feme apres la mort sa baron, est congeable en ceste cas. Car quant sa baron feasoit tiel feoffment, &c. il puissoit bien enter, nient contristeant tiel feoffment, &c. durant la coverture; et il ne puissoit enter en son droit demesne, mes en le droit la feme: ergo, *tiel droit que il avoit d'entrer en droit sa feme, &c. ceste droit d'entrer demurt al feme apres son decease.*

entrie of the wife after the death of her husband, is congeable in this case. For when her husband made such feoffment, &c. he might well enter, notwithstanding such feoffment, &c. during the coverture; and he could not enter in his owne right, but in the right of his wife: *ergo,* such right as hee had to enter in the right of his wife, &c. this right of entrie remayneth to the wife after his decease.

If the husband within age take to wife feme tenant in taile generall, and the husband make a gift in taile and dieth within age, in this case the wife may enter, as *Littleton* here holdeth, or the heire of the husband in respect of the new reversion descended unto him may enter. But if the heire enter, presently thereupon his estate vanisheth. If tenant in taile being within the age of one and twenty yeeres make a feoffment in fee, and after is attainted of felony and dieth, the entry of the issue is not lawfull; for his entry is not lawfull in respect of his estate only, but of his blood also which is corrupted; and therefore in that case he is driven to his *formedon.* (8. Rep. 43.)

If husband and wife be both within age, and they by deed indented joyne in a feoffment reserving a rent, the husband dieth, the wife may enter, or have a *dum fuit infra ætatem.* But if she were of full age, she shall not have a *dum fuit infra ætatem,* for the nonage of her husband, albeit they be but one person in law. 14. E. 3. Bre. 281. 14. E. 3. Dum fuit infra ætatem 6. F. N. B. 192. (1. Roll. Abr. 634.)

Sect. 634.

ET il y ad este dit, que si deux joyntenants esteants deins age font un feoffment en fee, et l'un des enfants devy, et l'auter survesquist; entant que les ambideux enfants puissont enter joyntment en lour vies, cel droit accruist tout a luy que survesquist, et pur ceo celuy que survesquist poit enter en l'entiertie, &c Et auxy l'heire le baron que fist le feoffment deins age ne poit enter, &c. pur ceo que nul droit discendist a tiel heire en le cas avantdit, pur ceo que le baron n'avoit unques riens forsque en droit de sa feme, &c.

AND it hath beene said, that if two joyntenants being within age make a feoffement in fee, and one of the infants die, and the other surviveth; in as much as both the infants might enter joyntly in their lives, this right accrueth all to him which surviveth, and therefore hee that surviveth may enter into the whole, &c. And also the heire of the husband which made the feoffment within age cannot enter, &c. because no right descendeth to such heire in the case aforesaid, for that the husband had never any thing but in right of his wife, &c.

***POIT** enter en l'entiertie, &c.* And the reason hereof is implied in this (*&c.*) for that they may joyne in a writ of right, and therefore the right shall survive. But they cannot joyne in a *dum fuit infra ætatem,* because the nonage of the one is not the nonage 21. E. 3. 50. 18. E. 2. Bre. 831. 6. E. 3. 4. 9. H. 6. 6. 1. H. 6. 6. 29. H. 6. 42. 34. H. 6. 31. F. N. B. 192.

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which are such only at the election of the party. By a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised, may, if he pleases, consider as *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election, is no disseisin till the party in question, by his election, makes it such. It follows therefore, that every act which is said by the writers to produce an immediate disseisin, necessarily implies an actual disseisin. Now we find, that the disseisins produced by feoffments instantly gave the feoffee, against every person but the disseisee, an *immediate* estate of freehold, with all the rights and incidents annexed to it. To this effect Bracton writes, lib. 2. ch. 5. § 3. *Item valida poterit esse donatio* statim ab initio *inter quasdam personas, et invalida et suspensa quantum ad alias personas, ut si quis rem alienam dederit alicui, ut supra dictum est.* Hence we find every where, that the wife of the feoffee became *immediately* intitled to her dower; the husband of the feoffee became *immediately* intitled to his curtesy; and the descent upon the heir of the feoffee *immediately* took away the entry of the disseisee. This is the constant language of the books, when they speak generally of disseisins. Now the books make no difference, whether the feoffment is made by a person seised of an estate of freehold, or by a person having only the bare possession, as tenant for years, at will, or by sufferance. The description given by Bracton in the passages cited from him, answers every notion given by lord Mansfield of an actual disseisin. Bracton says, that immediately upon the feoffment the estate becomes the property of the feoffee, as between him and the feoffor, and every other person, except the rightful owner; that a long and uninterrupted possession of a certain duration, will make the title of the feoffee good even against the rightful owner; that, to prevent this, the donor must restore his own seisin.—Here then is what his lordship so justly considers as necessarily requisite to form an actual disseisin—a person who has expelled the tenant from his fee, and usurped his feudal place and relation; a tenant to the *præcipe* of every demandant, though the true owner's right of entry upon him is not taken away. If the feoffee in this case were only a disseisor at the election of the disseisee, it would follow, that he was not a disseisor till the right owner made him such by his election, and therefore, that the fee would not be in him, if the rightful owner did not elect to make him a disseisor. According to this doctrine, if the feoffee of tenant for years, or any other person making a feoffment without an estate of freehold in him, died in the life of the rightful owner of the estate, the estate would not be subject to dower or curtesy, nor would the entry of the rightful owner be taken away. But we find, that in all cases in which our law-writers treat of disseisins made by feoffments, they consider it as a matter of course, that the estate of the feoffee, immediately, became an estate of freehold, with all the qualities and rights of a freehold estate annexed to it. A similar argument lies from the relation in which such a feoffee stood with respect to strangers. Bracton observes, that he immediately acquired the seisin of the fee as against strangers; which could not be, if he were only a disseisor at the election of the party. It has been observed before, that the books make no difference between feoffments made by persons having estates of freehold, and feoffments made

nonage of the other. In this caſe, if one joyntenant had made a feoffment in fee and died, the right ſhould not have ſurvived, for the joynture was ſevered for a time. If two joyntenants be, and the one is of full age, and the other within age, and both they make a feoffment in fee, and he of full age dieth, the infant ſhall enter, or have a *dum fuit infra ætatem* but for the moitie.

See of this in the Chapter of Joyntenants. (8. Rep. Whittingham's caſe.)

Sect. 635.

(F. N. B. 192. a. 5. Rep. 27. 29. 6. Rep. 3. 9. Rep. 84. b. 8. Rep. 42.)

ET auxy quant un enfant fait un feoffment eſteant deins age, ceo ne luy greevera ne ledra, mes que il poit enter bien, &c. car ceo ſerroit encounter reaſon, que tiel feoffment fait per celuy que ne fuit able de faire tiel feoffment, greevera ou ledera auter, de toller eux de lour entre, &c. Et pur ceux cauſes il ſemble à aſcuns, que apres la mort de tiel baron iſſint eſteant deins age al temps de le feoffment, &c. que ſa feme bien poit enter, &c.

AND alſo when an infant make a feoffment being within age, this ſhall neither grieve nor hurt him, but that hee may well enter, &c. for it ſhould be againſt reaſon, that ſuch feoffment made by him that was not able to make ſuch a feoffment, ſhall grieve or hurt another, to take them from their entry, &c. And for theſe reaſons it ſeemeth to ſome, that after the death of ſuch huſband ſo being within age at the time of the feoffment, &c. that his wife may well enter, &c.

Bract. fol. 14. Britton fol. 88. a. Fleta lib. 3. cap. 3. (Poſt. 350. b. 380. b.)

MES que il poit enter bien, &c. Here is implied, that he might enter either within age, or at any time after full age, and likewiſe after his death his heire may enter. *Meliorem enim conditionem facere poteſt minor deteriorem nequaquam.*

Nota, A ſpeciall heire ſhall take advantage of the infancie of the anceſtor. As if tenant in taile of an acre of the cuſtome of borow Engliſh make a feoffment in fee within age, and dieth, the youngeſt ſonne ſhall avoid it; for he is privie in bloud, and claimeth by diſcent from the infant.

(8. Rep. 54. Ant. 12. a.)

And ſo if tenant in taile to him and the heires females of his bodie make a feoffment in fee and dieth within age, having iſſue a ſonne and a daughter, the daughter ſhall avoid the feoffment. And ſo note, that a cauſe to enter by reaſon of infancie is not like to conditions, warranties, and eſtoppels, which ever deſcend to the heire at the common law.

The reſidue of this Section upon that which hath beene ſaid is evident.

Sect. 636.

(Ante 218. b. Perk. 581. 2. Roll. Abr. 494.)

SUrrender, ſurſum redditio, properly is a yeelding up of an eſtate for life or yeares to him that hath an immediate† eſtate in reverſion or remainder, wherein the eſtate for life or yeares may drowne by mutuall agreement betweene them. (1)

† Rep. 2. 541. a. Perk. 618. 509. 1. Leon. 350. 300. Keilw. 42. 2 Roll. Abr. 494. 8. pl. 1. Winch. 263. Bro. Eſtat. Cas. 392. 409.

ITEM, ſi feme enheritrix prent baron, et ont iſſue fits, et le baron moruſt, et el prent auter baron, et le ſecond baron leſſa la terre que il ad en droit ſa feme a un au-

ALSO, if a woman inheritrix taketh huſband, and they have iſſue a ſonne, and the huſband dieth, and ſhe takes another huſband, and the ſecond huſband letteth the land which he

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(1) A *ſurrender* differs from a releaſe in this reſpect, that the releaſe operates by the greater eſtate's deſcending upon the leſs:—a ſurrender is the falling of a leſs eſtate into a greater. As there is neceſſarily a privity of eſtate between the ſurrenderor and the ſurrenderee, no livery of ſeiſin is neceſſary to a perfect ſurrender. See 2. Bla. Com. ch. 20.—In Thompſon v. Leach, 2. Salk. 618. the court held, that a ſurrender immediately diveſts the eſtate out of the ſurrenderor, and veſts it in the ſurrenderee; for this is a conveyance at common law, to the perfection of which no other act is requiſite but the bare grant; and that, tho' it be true, that every grant is a contract, and there muſt be an *actus contra actum*, or a mutual conſent, yet that conſent is implied; that a gift imports a benefit; that an aſſumpſit to take a benefit may well be preſumed; and that there is the ſame reaſon why a ſurrender ſhould veſt the eſtate before notice or agreement, as why a grant of goods ſhould veſt a property; or ſealing of a bond to another in his abſence, ſhould be the obligee's bond, immediately without notice.

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made by perſons having eſtates leſs than freehold. Bracton expreſsly mentions guardians, tenants for years, by ſufferance, at will, by diſſeiſin, or intruſion, as perſons whoſe feoffments are attended with the effect deſcribed above. So does ſir Edward Coke, in the paſſage cited from the 2d Inſtitute. So Perkins, ſect. 222. "If leſſee for years enfeoffs a ſtranger, the leſſor being upon "the land, yet the land ſhall paſs by the feoffment; but perhaps, if he continues upon the land, claiming the ſame after the "feoffment, this countervails an entry for a forfeiture: and the reaſon why it paſſed by ſuch a feoffment, is, becauſe the leſſor had "nothing to do, to meddle with the poſſeſſion of the land during the term." So Dyer, 362. b. A termor for 1000 years made a feoffment, by the words *dedi, conceſſi, et feoffavi*. It was made a doubt, whether the lands paſſed by the feoffment, ſo that the leſſor might enter for the forfeiture; or whether the term paſſed by the firſt words. The very doubt ſhews that it was taken for granted, that without thoſe words the freehold would veſt in the feoffee. In the margin of that caſe it is ſaid, that in the caſe of Read and Morpeth v. Errington (reported in Cro. Eliz. 322.) it was held, that the leſſee for years might make a feoffment, notwithſtanding the preſence of the leſſor; and that it was a forfeiture of the leaſe; for though the leſſee had the poſſeſſion and might diſpoſe of it, yet the leſſor might enter for the forfeiture. Thus, in the caſe of Blundell v. Baugh, ſir William Jones 315. the judges held, that when tenant at will makes a leaſe rendering rent, and he enters and pays rent, that is no diſſeiſin, but at the election of the firſt leſſor; for, ſay they, it never ſhall be a diſſeiſin, unleſs there be the claim of a ſtranger by entry to have the freehold, or unleſs the owner of the land waives the occupation of the land, or brings an action, or otherwiſe declares his intention, that he takes it by diſſeiſin. Here the two kinds of diſſeiſin are contraſted in the moſt direct and poſitive manner. The judges alſo, in the caſe of Blundell v. Baugh, cited Matthew Taylor's caſe, 34. Eliz. C. B. Tenant at will, or for years, makes a feoffment in fee, and dies, his wife brings dower againſt the feoffee, who pleaded *ne unque ſeiſie que dower*: but the whole court was againſt him; for in the inſtant the fee was gained. In 12. Edw. IV. 12. ant. 31. b. Cro. Jac. 615. that doctrine is controverted, on the ground that the ſeiſin of the feoffor was but momentary: but this proves the poſition attempted to be eſtabliſhed here; for if the feoffment

ter pur terme de ſa vie, et puis la feme moruſt, et puis le tenant a terme de vie ſurrendiſt ſon eſtate a le ſecond baron, &c. quære, *ſi le fits le feme poit enter en ceſt cas ſur le ſecond baron durant la vie le tenant a terme de vie, *&c. Mes il eſt cleere ley, que apres la mort le tenant a terme de vie, le fits la feme poit enter; pur ceo que le diſcontinuance, que fuit tantſolement pur terme de vie, eſt determine, &c. per la mort de meſme le tenant a terme de vie* †.

hath in right of his wife to another for terme of his life, and after the wife dieth, and after the tenant for life ſurrendereth his eſtate to the ſecond huſband, &c. *quære*, if the ſonne of the wife may enter in this caſe upon the ſecond huſband during the life of tenant for life, &c. But it is cleere law, that after the death of the tenant for life, the ſon of the wife may enter; becauſe the diſcontinuance, which was only for terme of life, is determined, &c. by the death of the ſame tenant for life.

Note, there be three kinde of ſurrenders, viz. a ſurrender properly taken at the common law, which is here before deſcribed, and whereof *Littleton* ſpeaketh. (1) Secondly, a ſurrender by cuſtome of lands holden by copy, or of cuſtomary eſtates, whereof you have read before, *Sect.* 74. and a ſurrender improperly taken (as appeare before, *Sect.* 550.) of a deed. And ſo of a ſurrender of a patent, and of a rent newly created, and of a fee ſimple to the king. (Ant. 218. b.) (9. Rep. 75.) 2. Eliz. Dier. 176. 14. H. 7. 3. 27. Aſſ. 37. 49. E. 3. 2. 11. H. 4. 2. 12. H. 4. 21. 13. H. 4. 13.

A ſurrender properly taken is of two ſorts, viz. a ſurrender in deed, or by expreſſe words, (whereof *Littleton* here putteth an example) and a ſurrender in law wrought by conſequent by operation of law. *Littleton* here putteth his caſe of a ſurrender of an eſtate in poſſeſſion, for a right cannot bee ſurrendered. And it is to be noted, that a ſurrender in law is in ſome caſes of greater force than a ſurrender in deed. As if a man make a leaſe for yeares to begin at *Michaelmaſſe* next, this future intereſt cannot be ſurrendred, wherein it may drowne, but by a ſurrender in law it may be drowned. As if the leſſee before *Michaelmaſſe* take a new leaſe for yeares either to begin preſently, or at *Michaelmaſſe*, this is a ſurrender in law of the former leaſe. *Fortior & æquior eſt diſpoſitio legis quàm hominis.* (2) 14. H. 8. 15. 37. H. 6. 17. 21. H. 7. 6. 40. E. 3. 24. 31. Aſſ. 26. 50. E. 3. 6. 44. Aſſ. 3. 35. H. 8. Dier 37. 8. Aſſ. 20. 4. Ma. Dier. 141. 11. Eliz. Dier. 280. 6. H. 7. 9. 37. H. 6. 17. 21. H. 7. 6. 14. H. 7. 4. Lib. 6. f. 69. Sir Moyle Finche's caſe. (5. Rep. 11. 1. Leo. 323. 4. Rep. 53.) (10. Rep. 67. 6. Rep. 69. Cro. Jac. 84. 2. Roll. Abr. 494. Ant. 47. b. Dyer 58.) 19. H. 6. 33. 27. Aſſ. 46. 14. H. 7. 4. 1. H. 6. 1. Pl. Com. 541.

But a right is releaſeable.

Alſo there is a ſurrender without deed, whereof *Littleton* putteth here an example of an eſtate for life of lands, which may be ſurrendred without deed, and without livery of ſeiſin; becauſe it is but a yeelding, or a reſtoring of the ſtate againe to him in the immediate reverſion or remainder, which are alwayes favoured in law. And there is alſo a ſurrender by deed; and that is of things that lie in grant, whereof a particular eſtate cannot commence without deed, and by conſequent the eſtate cannot be ſurrendred without deed. But in the example that *Littleton* here putteth, the eſtate might commence without deed, and therefore might bee ſurrendred without deed. And albeit a particular eſtate be made of lands by deed, yet may it be ſurrendred without deed, in reſpect of the nature and qualitie of the thing demiſed, becauſe the particular eſtate might have beene made without deed; and ſo on the other ſide. If a man be tenant by the courteſie, or tenant in dower of an advowſon, rent, or other thing that lies in grant; albeit there the eſtate begin without deed, yet in reſpect of the nature and qualitie of the thing that lies in grant, it cannot be ſurrendred without deed. And ſo if a leaſe for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet becauſe remainders and reverſions, though they be of lands, are things that lie in grant, they cannot be ſurrendred without deed. See in my Reports plentifull matter of ſurrenders. (Ant. 225. b. Cro. Car. 399. 2. Roll. Abr. 498.)

Quære, ſi le fits la feme poit enter, &c. Here *Littleton* maketh a *quære*. So as grave and learned men may doubt, without any imputation to them; for the moſt learned doubteth moſt, and the more ignorant for the moſt part are the more bold and peremptory. (10. Rep. 66, 67.)

It is holden of ſome, that after the ſurrender the iſſue in taile during the life of tenant for life may enter; for that having regard to the iſſue, the ſtate for life is drowned, and conſequently the inheritance gained by the leaſe is by the acceptance of the ſurrender vaniſhed and gone: as if tenant in taile make a leaſe for life, whereby he gaineth a new reverſion (as hath beene

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

(1) By the ſtat. 29. Cha. II. c. 3. ſect. 3. no leaſe, &c. either of freehold or term of years, or any uncertain intereſt, not being copyhold or cuſtomary intereſt, ſhall be *ſurrendered*, unleſs it be by deed or note in writing, ſigned by the party *ſurrendering* the ſame, or his agents thereunto lawfully authorized by writing, or by act and operation of law. Upon this ſtatute it was held, by lord chief-baron Gilbert, in Magennis v. Macculloh, Gilb. Ca. in Eq. 236. that a leaſe for years cannot be ſurrendered by cancelling of the indenture without writing; becauſe the intent of that ſtatute was to take away the manner they formerly had of transferring intereſts to lands, by ſigns, ſymbols, and words only; and therefore, as a livery and ſeiſin on a parol feoffment was a ſign of paſſing the freehold, before the ſtatute, but is now taken away by the ſtatute; ſo the cancelling of a leaſe was a ſign of a ſurrender, before the ſtatute, but is now taken away, unleſs there be a writing under the hand of the party. In Farmer v. Rogers, 2. Wilſ. p. 27. it was held, that the ſtatute does not make a deed abſolutely neceſſary to a ſurrender; for it directs it to be made either by deed or *note in writing*: and when it is made by a note in writing, there is no occaſion for any ſtamp-duty, it not being a deed. But ſee 23. Geo. III. c. 58. ſect. 1.

(2) For the firſt leaſe and the ſecond cannot ſubſiſt together, and the parties, by making a contract of as high a nature for the ſame thing, tacitly conſented to diſſolve the former; for without the diſſolution of that, the leſſor could not grant to the leſſee that intereſt which was already paſſed from the leſſor to the leſſee by the firſt leaſe. *Note to the 11th edition.*

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feoffment in this caſe only gave a freehold at the election of the reverſioner, the feoffor had no ſeiſin. The ſame doctrine ſeems to be laid down very expreſsly by lord Hardwicke. Having occaſion to mention a fine levied by tenant at will, he ſays, "If they meant a "wrong thereby, they muſt have taken another method; as this could not work a diſſeiſin on the truſtees; and turn their eſtate to a "right, while they were tenants at will to the truſtees. This way indeed they might do it, according to the diſtinction taken in "ſeveral caſes, particularly in Dormer and Parkhurſt, if they executed a feoffment on the land; becauſe it is a feoffment on livery "which is a notoriety to the truſtees, and puts it on them to make entry to avoid." In the ſame manner, 3. Atk. 339. his lordſhip ſays, "If a man enters as my tenant, he does not gain ſuch a poſſeſſion to levy a fine thereon, unleſs he continues in poſſeſſion; "for a wrong-doer to gain a poſſeſſion by diſſeiſin, muſt not ſtep on the land, and withdraw, and leave the rightful owner in "poſſeſſion, which would be ſufficient to give a ſeiſin on a feoffment, but not to levy a fine."—In every ſtage of our law, the moſt modern as well as the moſt antient, the peculiar operation of a feoffment, as to the diveſting of eſtates, deſtruction of contingent remainders, and extinction of powers, has been recogniſed. Citations and arguments to prove the point before us, might be eaſily multiplied; but they ſhall be concluded here, by ſome obſervations upon the allowed effect of a fine levied by a tenant for years, or even by a tenant at ſufferance, who has previouſly made a feoffment. No point of our law is more clearly ſettled, than that, unleſs

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beene faid) if tenant for life furrender to the tenant in taile, the eftate for life being drowned, the reverfion gained by wrong is vanifhed and gone, and he is tenant in taile againe againft the opinion *Obiter* of *Portington*, 21. *H*. 6. 53.

21. H. 6. 53.
(Ant. 185. 8. Rep. 145.)

But herein are two diverfities worthy of obfervation. The firft is, that having regard to the parties to the furrender, the eftate is abfolutely drowned, as in this cafe betweene the leffee and the fecond baron. But having regard to ftrangers, who were not parties or privies thereunto, left by a voluntary furrender they may receive prejudice touching any right or intereft they had before the furrender, the eftate furrendred hath in confideration of law a continuance. (1) As if a reverfion be granted with warrantie, and tenant for life furrender, the grantee fhall not have execution in value againft the grantor, who is a ftranger during the life of tenant for life; for this furrender fhall worke no prejudice to the grantor who is a ftranger.

45. E. 3. 13. 5. H. 5. 9.
9. E. 4. 18.

So if tenant for life furrender to him in reverfion being within age, he fhall not have his age; for that fhould be a prejudice to a ftranger, who is to become demandant in a reall action.

40. E. 3. 13. 9. E. 4. 18.
1. H. 6. 1. 24. E. 3. 77.

If tenant for life grant a rent charge, and after furrender, yet the rent remaineth, for to that purpofe he commeth in under the charge. *Caufâ quâ fupra.*

5. H. 5. 8. 26. Aff. 38.
7. H. 6. b.
(6. Rep. 79. 7. Rep. 38.
Ant. 184. b.)

If a bifhop be feifed of a rent charge in fee, the tenant of the land enfeoffe the bifhop and his fucceffors, the lord enter for the mortmaine, he fhall hold it difcharged of the rent; for the entrie for the mortmaine affirmeth the alienation in mortmaine, and the lord claimeth under his eftate; but if tenant for life grant a rent in fee, and after infeoffe the grantee, and the leffor enter for the forfeiture, the rent is revived, for the leffor doth claime above the feoffment. But if I grant the reverfion of my tenant for life to another for terme of his life, and tenant for life attorne, now is the wafte of tenant for life difpunifhable. (2) Afterwards I releafe to the grantee for life and his heires, or grant the reverfion to him and his heires; now albeit the tenant for life be a ftranger to it, yet becaufe he attorned to the grantee for life, the eftate for life which the grantee had fhall have no continuance in the eye of the law as to him, but he fhall be punifhed for wafte done afterward.

(Ant. 234)
48. E. 3. 16.
(Mo. 94.)

The fecond diverfitie is, that for the benefit of an eftranger the eftate for life is abfolutely determined. As if he in the reverfion make a leafe for yeares, or grant a rent charge, &c. and then the leffee for life furrender, the leafe or rent fhall commence *maintenant*. So in the cafe of *Littleton*, firft, betweene the leffee and the fecond hufband, the ftate for life is determined; and fecondly, for the benefit of the iffue it fhall be fo adjudged in law. Here note a diverfitie, when it is to the prejudice of a ftranger, and when it is for his benefit.

(Plo. Com. 198.)

If a man maketh a leafe to *A*. for life, referving a rent of 40 fhillings to him and his heires, the remainder to *B*. for life, the leffor grant the reverfion in fee to *B*. *A*. attorne, *B*. fhall not have the rent; for that although the fee fimple doe drowne the remainder for life betweene them, yet as to a ftranger it is *in effe*; and therefore *B*. fhall not have the rent, but his heire fhall have it.

(4. Leo. 37. Hob. 3.)
Adjudge Mich. 16. & 17. Eliz. int. Turner pl. & Gray def. in ejectione firmæ in communi banco Rot. 945. Sir Francis Fleming's cafe.
[a] 6. H. 4. 7. Pl. Com. 418.
[b] 32. H. 8. Br. furrender 52.
(2. Cro. 275. Mo. 54.)

A mafter of an hofpitall being a fole corporation, by the confent of his brethren makes a leafe for yeares of part of the poffeffions of the hofpitall; afterwards the leffee for yeares is made mafter, the terme is drowned; for a man cannot have a terme for yeares in his owne right and a freehold in *auter droit* to confift together (as if a man leffee for yeares take a feme leffor to wife). (3) [a] But a man may have a freehold in his owne right and a terme in *auter droit*; and therefore if a man leffor take the feme leffee to wife, the terme is not drowned, but he is poffeffed of the terme in her right during the coverture [b] So if the leffee make the leffor his executor, the terme is not drowned. *Caufâ quâ fupra.* (4)

But if it had beene a corporation aggregate of many, the making of the leffee mafter had not extinguifhed the terme, no more than if the leffee had beene made one of the brethren of the hofpitall.

* Sect. 637.

Vide Sect. 658.
(1. Roll. Abr. 634.)

UN foits. Here it is to bee obferved, that it is not neceffary that the tenant in taile bee ever feifed of an eftate taile at the time when the difcontinuance of the whole eftate is begun: as if tenant in taile make a leafe

[*NOTA, que un eftate taile ne poit efte difcontinue, mes la ou ceftuy que fait le difcontinuance fuit un foits feifie per force de le taile, finon que*

NOTE, that an eftate taile cannot bee difcontinued, but there where hee that makes the difcontinuance was once feifed by force of the taile, unles it be

* The part of this Section within crotchets is not either in L. and M. nor Roh. nor MSS. and the remainder of this Section in thofe copies immediately follows (with a fmall variation) that part of the work which is diftinguifhed by Sect. 632.

(1) On the furrender of terms of years by one termor for years to another termor for years, fee Hughes v. Robotham, 1ft Cro. 302.
(2) See note 2. ante 218. b.
(3) *Cont.* Lichden v. Winfmore, 1. Roll. Abr. 934.
(4) Mergers were never favoured in courts of law, and ftill lefs in courts of equity. Hence, even in a very early period of the equitable jurifdiction of the court of chancery, it was admitted, that a fine or feoffment to leffee for years to the ufe of a ftranger, did not extinguifh the term; becaufe the *ceftui que ufe* had no method to compel the execution of it, but thro' the medium of the court of chancery; and the court would not compel him to execute it, to his own prejudice, during the continuance of the term. The ftatute of ufes expreſly faves the rights of the feoffee to the ufe; this preferves him the benefit of any terms which may be vefted in him. Even where a termor for years was made a tenant to the *præcipe*, it was determined, that the momentary freehold vefted in him, for the purpofe of making him tenant, did not extinguifh the term. Cro. Jac. 643. It is however dangerous to make feoffees or releafees to ufes, truftees for terms of years, if they are alfo truftees for preferving contingent remainders; for if they fhould have occafion to enter for the forfeiture of the tenant for life, it may be made a queftion, whether, at leaft in law, that would not be a merger of their term.

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fome one of the parties to a fine has an eftate of freehold in the lands, of which it is levied, it is totally void, as to all ftrangers, and may be avoided at any time by the plea, *quod partes finis nihil habuerunt.* Now, fuppofing a tenant for years to make a feoffment, and the feoffee afterwards to levy a fine, it is clear, that the fine would be without effect, unlefs the feoffment gave him an eftate of freehold. In the cafe of Whaley v. Tancred, 1. Vent. 241. fir Thomas Raymond, 219. 1. Lev. p. 2. 52. it was fettled, that where a fine is levied in this manner, the fine will bar the leffor at the end of five years after the expiration of the term. This would never be the cafe unlefs the feoffment had previoufly created an eftate of freehold.—In the cafe of Doe v. Proffer, Cowp. 217. lord Mansfield expreffed himfelf as follows:—" It is very true that I told the jury, they were " warranted by the length of time in this cafe, to prefume an *adverfe* poffeffion and *oufter* by one of the tenants in common, of " his companion; and I continue ftill of the fame opinion. Some ambiguity feems to have arifen from the term " *actual oufter*," " as if it meant fome act accompanied by real force, and as if a turning out by the fhoulders were neceffary. But that is not fo. " A man may come in by a rightful poffeffion, and yet hold over *adverfely* without a title. If he does, fuch holding over under " circumftances will be equivalent to an *actual oufter*. For inftance, length of poffeffion during a particular eftate, as a term of " one

que ſoit per reaſon de garrantie, &c. Come] by reaſon of a warranty, &c. As if there be grandfather, father, and ſon, and the grandfather is tenant in taile, and is diſſeiſed by the father who is his ſon, and the father maketh a feoffment of this without warranty and die, and afterwards the grandfather dies, the ſon may wel enter upon the feoffee, becauſe this was no diſcontinuance, inaſmuch as the father was not ſeiſed by force of the entaile at the time of the feoffment, &c. but was ſeiſed in fee by the diſſeiſin of the grandfather.

** et l'ayel ſoit tenant en taile, et eſt diſſeiſie per le pier que eſt ſon fits, et' le pier fait un feoffment de ceo ſans garranty et devie, et puis l'aiel devie, le fits bien poit enter ſur le feoffee, pur ceo que ceo ne fuit pas diſcontinuance, entant que le pier ne fuit ſeiſie per force de le taile al temps del feoffment, &c. mes fuit ſeiſie en fee per le diſſeiſin fait al ayel.*

for life, whereby he gaineth, as hath beene ſaid, a fee ſimple by wrong; in this caſe if he grant the reverſion in fee, and the leſſee dieth, the whole eſtate is diſcontinued; and yet at the time of the grant (by which the diſcontinuance continueth) hee was not ſeiſed by force of the taile; and therefore *Littleton* materially added theſe words (*un foits*) that is, that hee was once ſeiſed by force of the eſtate taile: and ſeeing that (as hath beene ſaid) a diſcontinuance is a privation, the rule of law agreeth well with the rule of philoſophie, that *omnis privatio præſupponit habitum.* and therefore he cannot diſcontinue that eſtate which he never had.

Vide Sect. 592. 596, 597. 601. 640. 658.

Sinon que il ſoit per reaſon del garrantie, &c. For in many caſes a warrantie added to a conveyance is ſaid to make a diſcontinuance *ab effectu*, although he that made the conveyance was never ſeiſed by force of the eſtate taile, becauſe it taketh away the entrie of him that right hath, as a diſcontinuance doth. As if tenant in taile be diſſeiſed and dieth, and the iſſue in taile releaſe to the diſſeiſor with warrantie; in this caſe the iſſue was never ſeiſed by force of the taile; and yet this hath the effect of a diſcontinuance by reaſon of the warrantie, and the reaſon hereof appeareth before in this Chapter.

9. E. 4. 19. 12. E. 4. 11. 21. E. 4. 97.

Le fits poet enter. But if the father that made the feoffment had ſurvived the grandfather, he ſhould never have entred againſt his own feoffment; but albeit the father had ſurvived, yet after his deceaſe the ſonne ſhould have entred, for the reaſon here yeelded by *Littleton*. But if the feoffment had beene with warrantie, then it had wrought the effect of a diſcontinuance; and therefore *Littleton* ſaith *ſans garranty*, without warrantie.

15. E. 4. Diſcont. 30. & entr. Cong. 21. 21. E. 4. 97. 9. E. 4. 19. 39. H. 6. 45. 21. H. 6. 52. 12. E. 4. 11. 1. Mar. Dier. 98. (Ant. 265.)

Sect. 638.

ITEM, ſi tenant en taile fait un leaſe a un auter pur terme de vie, et le tenant en taile ad iſſue et devie, et le reverſion deſcendiſt a ſon iſſue, et puis l'iſſue granta le reverſion a luy diſcendue, a un auter en fee, et le tenant à terme de vie attourna † et devie, et le grantee del reverſion enter, &c. et eſt ſeiſie en fee en la vie del iſſue, et puis iſſue en le taile ad iſſue fits et devie, il ſemble

ALSO, if tenant in taile make a leaſe to another for terme of life, and the tenant in tayle hath iſſue and dieth, and the reverſion deſcendeth to his iſſue, and after the iſſue granteth the reverſion to him deſcended, to another in fee, and the tenant for life attorne and die, and the grantee of the reverſion enter, &c. and is ſeiſed in fee in the life of the iſſue, and after the iſſue in tayle hath

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* *et l'ayel ſoit tenant en taile, et eſt diſſeiſie per le pier que eſt ſon fits*, not in L. and M. † *et devie, et le grantor del reverſion enter, &c.—&c. et puis le tenant a terme de vie moruſt, et celuy en le reverſion entra, &c.* L. and M. and Roh.

" one thouſand years, or under a leaſe for lives, as long as the lives are in being, gives no title. But if tenant *pur autre vie* " hold over for twenty years after the death of *ceſtuy que vie*, ſuch holding over will in *ejectment be a complete bar* to the " remainder-man or reverſioner; becauſe it was *adverſe* to his title. So in the caſe of tenants in common: the poſſeſſion of one " tenant in common, *co nomine*, as tenant in common, can never bar his companion; becauſe ſuch poſſeſſion is not adverſe to the " right of his companion, but in ſupport of their common title; and by paying him his ſhare, he acknowledges him co tenant: " nor indeed is a *refuſal* to *pay* of *itſelf* ſufficient, *without denying* his *title*. But if upon demand by the co-tenant of his moiety, " the other *denies to pay*, and *denies his title*, ſaying he claims the whole and will not pay, and continues in poſſeſſion, ſuch " poſſeſſion is adverſe and *ouſter* enough." By the adverſe poſſeſſion mentioned in this caſe, his lordſhip never could mean, a diſſeiſin at the election of the party. What is there to diſtinguiſh it from an actual diſſeiſin?—Upon the whole, therefore, it is ſubmitted to the learned reader's conſideration, 1ſt, that, as feoffments have not been made from the reign of Henry the IId. to the preſent time, with any other ſolemnities than thoſe with which they are made at preſent, every operation and efficacy which has

2. III.

ble que ceo n'eſt pas diſcontinuance a le fits, mes que le fitz poit enter, &c. pur ceo que ſon pier, a que le reverſion de fee ſimple diſcendiſt, &c. n'avoit unques riens en la terre per force de le taile, &c.

iſſue a ſon and dieth, it ſeemes that this is no diſcontinuance to the ſon, but that the ſon may enter, &c. for that his father, to whom the reverſion of the fee ſimple deſcended, had never any thing in the land by force of the entaile, &c.

15. E. 4. Diſcont. 30. 43. Ed. 3. 6. 21. H. 6. 52. 4. H. 7. 17. (1. Roll. Abr. 634.) (4. Leo. 39. 160. 156.)

21. H. 6. 52, 53. (Ant. 333.)

OF this opinion is *Littleton* in our bookes.

Le grantee del reverſion enter, &c. Here it is to be underſtood and obſerved, that in this caſe of the grant of the reverſion *Littleton* doth not ſay *ſans garrantie*; becauſe if a warrantie had been added, it had wrought no diſcontinuance, for that (as hath beene ſaid) the diſcontinuance in judgement of law was but for life: but when the addition of a warrantie doth worke a diſcontinuance, then *Littleton* ſaith, *ſans garrantie*, as you may obſerve often in this Chapter.

Sect. 639.

*CAR ſi home ſeiſie en droit ſa feme, leſſa meſme la terre a un auter pur terme de vie, ore eſt le reverſion de fee ſimple a le baron, &c. Et ſi le baron moruſt, vivant ſa feme et le tenant a terme de vie, * et le reverſion diſcendiſt al heire le baron, ſi le heire le baron grant le reverſion a un auter en fee, et le tenant attorna, &c. et puis le tenaunt a terme de vie moruſt, et le grauntee del reverſion en cel caſe enter: † en ceſt caſe ceo n'eſt pas diſcontinuance a la feme, mes la feme bien poit enter ſur le grantee, &c. pur ceo que le grantor n'avoit riens al temps del graunt, en le droit la feme, quant il fiſt le graunt del reverſion.*

FOR if a man ſeiſed in the right of his wife, letteth the ſame land to another for terme of life, now is the reverſion of the fee ſimple to the huſband, &c. And if the huſband dieth, living his wife and the tenant for life, and the reverſion deſcend to the heire of the huſband, if the heire of the huſband grant the reverſion to another in fee, and the tenant attorne, &c. and afterwards the tenant for life dieth, and the grantee of the reverſion in this caſe enter: in this caſe this is no diſcontinuance to the wife, but ſhe may well enter upon the grantee, &c. becauſe the grantor had nothing at the time of the graunt, in the right of his wife, when hee made the graunt of the reverſion.

14. E. 3. Diſcont. 5. 18. Aſſ. p. 2. 18. E. 3. 54. 38. E. 3. 32, 22 H. 6. 24. 21. H. 6. 52, 53. 15 E. 4. Diſcont, 30.

CAR ſi home ſeiſie en droit ſa feme, leſſa, &c. Here *Littleton* putteth his caſe where the baron onely makes a leaſe for life; for if he and his wife joyne in a leaſe by deed, there the reverſion is not diſcontinued. See before, *Sect.* 620. More need not to be ſaid hereof, in reſpect the like caſe of tenant in taile hath been explained before.

Sect.

* *et* not in L. and M. nor Roll. † *en ceſt cas* not in L. and M. nor Roh.

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been conſtantly and uniformly allowed or aſcribed to them by the courts of judicature, or writers of authority contemporary with or ſubſequent to that monarch's reign, down to the preſent time, ought, notwithſtanding the objection that they are not now made with ſome of the ſolemnities with which they are ſaid to have been made in their very earlieſt inſtitution, to be allowed and aſcribed to them now: *2dly*, that by the paſſage cited from Bracton, and the other authorities cited or referred to in the courſe of this note, it appears, that the diſſeiſin produced by feoffments muſt be underſtood to be an actual diſſeiſin, and not a diſſeiſin merely at the election of the party: *3dly*, that in many of theſe authorities it is moſt expreſsly mentioned, and that in all of them it muſt be implied, that however ſlender, bare, or tortious, the poſſeſſion of the feoffee is, his feoffment neceſſarily and unavoidably veſts the freehold in the feoffee, till the diſſeiſee by entry or action reſtores his poſſeſſion: *4thly*, (to apply this abſtruſe and antiquated learning to the preſent ſubject-matter of buſineſs) that copyholders, tenants for years, by *elegit*, ſtatute-merchant, ſtatute-ſtaple, at will, or by ſufferance, are all conſidered to have the poſſeſſion of the eſtate, and that they may by feoffment veſt an actual eſtate of freehold in the feoffee: *5thly*, that a fine may be levied of, or a common recovery ſuffered upon, this eſtate of freehold: *6thly*, that the feoffment ſo executed, the fine ſo levied, and the recovery ſo ſuffered, are immediately good againſt every perſon except the rightful owner: and, *7thly*, that in proceſs of time they become good againſt the owner himſelf.—To aſcertain the exact period of time when fines levied by perſons of this deſcription will be a bar to the rightful owner, would be too great an extenſion of this note, the length of which already requires an apology.—*As to the ſecond objection*, that the feoffment of ſir Robert Atkyns was founded in fraud, and was therefore void; it is to be obſerved, that however that reaſoning applied to the particular caſe before the court, it does not apply to the general queſtion diſcuſſed in this note, which preſuppoſes

previous

Sect. 640.

ET iſſint il ſemble, coment que homes queux ſont inheritables per force de le taile, et ils ne fueront unques ſeiſies per force de meſme le taile, que tiel feoffements ou grants per eux fait ſans clauſe de warrantie, n'eſt pas diſcontinuance a lour iſſues apres lour deceaſe, mes que lour iſſues poyent bien enter, &c. coment que ceux queux fierent tielz grants en lour vies fueront forbarres d'entrer per lour fait demeſne, &c.

AND ſo it ſeemeth, that men which are inheritable by force of an entaile, and never were ſeiſed by force of the ſame entaile, that ſuch feoffements or grants by them made without clauſe of warrantie, is no diſcontinuance to their iſſues after their deceaſe, but that their iſſues may well enter, &c. albeit they which made ſuch graunts in their lives were forebarred to enter by their owne act, &c. (1. Roll. 634.)

Sect. 641.

*ET ſi le tenant en taile ad iſſue deux fits, et l'eigne diſſeiſiſt ſon pier, et ent fait feoffment en fee ſans clauſe de garrantie, et devia ſans iſſue, et puis le pier devie, le puiſne fits poit bien enter ſur le feoffee; pur ceo que le feoffment ſon eigne frere ne poit eſtre diſcontinuance, pur ceo que il ne fuit unques ſeiſie per force de meſme le taile. Car il ſemble encounter reaſon, que per matter en fait, &c. ſans clauſe de garrantie, home poit diſcontinuer un * fait, &c. que ne fuit unques ſeiſie per force de meſme le taile †.*

AND if tenant in taile hath iſſue two ſonnes, and the eldeſt diſſeiſeth his father, and thereof maketh a feoffement in fee without clauſe of warrantie, and die without iſſue, and after the father die, the youngeſt ſon may well enter upon the feoffee; for that the feoffement of his elder brother cannot be a diſcontinuance, becauſe he was never ſeiſed by force of the ſame tayle. For it ſeemeth to be againſt reaſon, that by matter in fact, &c. without clauſe of warrantie, a man ſhould diſcontinue a deed, &c. that was never ſeiſed by force of the ſame taile. (10. Rep. 95.)

NOTE, there alſo in theſe two Sections appeareth, that (as hath beene ſaid before) a warrantie, though he were never ſeiſed by force of the taile, may worke the effect of a diſcontinuance. Vide Sect. 592. 596, 597. 601. 658.

Home poet diſcontinuer un fait, &c. This is miſtaken, and ſhould be, *home poet diſcontinuer un taile*; and ſo is the originall.

Sect.

* *fait—tail*, L. and M. † *&c.* added in L. and M. and Roh.

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previous poſſeſſion in the feoffor, free from every circumſtance of fraud; either fair and innocent, or acquired by the open and notorious circumſtances of diſſeiſin, abatement, intruſion, or deforcement. Sir Robert Atkyns acquired his poſſeſſion by the entry made by him under the verdict obtained by him in 1710. He loſt it by the verdict given for dame Ann Atkyns in 1712. It may, therefore, be ſaid (and the fact really was), that he obtained the verdict given for him in 1710, and conſequently the poſſeſſion under it, by a *pretended* title. He had not a fair or innocent poſſeſſion. He did not acquire his poſſeſſion by diſſeiſin, intruſion, abatement, or deforcement; it did not deſcend upon him; it did not come to him by act of law; he was not in the ſeiſin of the fee by virtue of any gift or demiſe from the freeholder: he obtained his poſſeſſion by the judgment of a court of law, under the colour of a pretended title. Thus, in the language of the law, his original poſſeſſion was founded in fraud, practice, and ſtratagem. And to uſe an expreſſion of the judges, 3. Rep. 78. a. "the common law does ſo abhor fraud and covin, that all acts, as well "judicial as others, which of themſelves are juſt and lawful, yet being mixed with fraud and deceit, are in judgment of law "wrongful and unlawful."—In Burr. 117. great ſtreſs was laid on the reſolution of the judges in Fermor's caſe. The caſe there was, that Thomas Smith being ſeiſed in fee of ſeveral lands, and holding others by copy of court-roll, and others for a term of years, and others at will (all of them lying in the ſame vill), made a feoffment with livery of all thoſe held by copy, for years, and at will, to one Chappell for life, and afterwards levied a fine. The queſtion was, Whether the fine was a bar to the owners of the fee, at the expiration of the firſt five years. It appeared that Smith continued in poſſeſſion of the land, and paid the rents. See 3. Rep. 77. 1. And. 170. Cary, 20. Cro. Eliz. 86. The judges were of opinion, that the feoffment was fraudulent. Upon an examination of the different reports of the caſe, it will be found, that his *continuing in the poſſeſſion* of the land, *and paying rent after*

Sect. 642.

* *NOTA, ſi ſoit ſeignior et tenant, et le tenant dona les tenements a un auter en* † *taile, le remainder a un auter en fee, et puis le tenant en taile fait un leas a un home pur terme de vie, &c. ſavant le reverſion, &c. et puis granta le reverſion a un auter en fee, et le tenant a terme de vie atturna, &c. et puis le grantee del reverſion moruſt ſans heire, ore meſme le reverſion devient al ſeignior per voy d' eſcheate. Si en ceſt cas le tenant a terme de vie deviaſt, et le ſeignior per force de ſon eſcheate enter en la vie le tenant en le taile, et puis le tenant en le taile moruſt, il ſemble en ceo cas que ceo n'eſt pas diſcontinuance al iſſue en le taile, ne a celuy en le remainder, mes que il poit bien enter, pur ceo que le ſeignior eſt eins per voy d' eſcheat, et nemy per le tenant en le taile, &c. Mes* ſecus eſſet, *ſi le reverſion uſt eſte execute en le grantee en le vie de tenant en le taile, car adonque uſt le grantee eſte eins en les tenements per le tenant en le tayle,* ‡ *&c.*

NOTE, if there be lord and tenant, and the tenant giveth lands to another in taile, the remainder to another in fee, and after the tenant in taile makes a leaſe to a man for a terme of life, &c. ſaving the reverſion, &c. and after granteth the reverſion to another in fee, and the tenant for life attorne, &c. and after the grantee of the reverſion die without heire, now the ſame reverſion commeth to the lord by way of eſcheat. If in this caſe the tenant for life dieth, and the lord by force of his eſcheat enter in the life of tenant in taile, and after the tenant in taile dieth, it ſeemeth in this caſe that this is no diſcontinuance to the iſſue in taile, nor to him in the remainder, but that he may well enter, becauſe the lord is in by way of eſcheat, and not by the tenant in tayle. But otherwiſe it ſhould bee, if the reverſion had beene executed in the grantee, in the life of tenant in tayle, for then had the grantee been in the tenements by the tenant in taile, &c.

Vide Sect. 620.

THE reaſon of this caſe is here rendred (as before it was in this Chapter), that albeit the reverſion be executed in the lord by eſcheat in the life of tenant in taile, yet becauſe he is not in by the tenant in taile but by eſcheat, it worketh no diſcontinuance. But if it had beene executed in the life of tenant in taile in the grantee which was in by tenant in taile, then the lord by eſcheat ſhould have taken advantage of it. But of this ſufficient hath beene ſaid before in this Chapter.

Lib. 1. fol. 136.
Lib. 3. fol. 62, 63.

Sect. 643, 644, & 645.

PARCEL de ſon glebe, &c. In whom the fee ſimple of the

ITEM, ſi un parſon d'un eſgliſe ou un vicar d'un eſgliſe

ALSO, if a parſon of a church or vicar of a church alien

* *Nota,—Item,* L. and M. and Roh.

† *taile, le remainder a un auter en,* not in L. and M. nor Roh.

‡ *&c.* not in L. and M. nor Roh.

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after he made the feoffment, were the chief circumſtances which induced the court to conſider the feoffment to be fraudulent. The ſame may be obſerved of the caſe of White v. Bacon, Saville 126. The continuing in the poſſeſſion of the land after the conveyance, has always been conſidered in our law as a badge of fraud. Fermor's caſe therefore only proves, that if a tenant for years, after making a feoffment, continues in the poſſeſſion of the land, and pays rent for it, the poſſeſſion acquired by him under the feoffment is fraudulent; and therefore a fine, and every other act which derives its effect from that poſſeſſion, is void. But Fermor's caſe does not apply to the general queſtion, of the operation of a fine levied by tenant for years, who has previouſly executed a feoffment, when the caſe is not affected bycircumſtances of fraud. The caſe mentioned before in this note of Whaley v. Tancred is directly in point, that a fine ſo levied by leſſee for years is a bar to the leſſor after five years from the expiration of the leaſe. And with reſpect to the feoffor's remaining in the poſſeſſion, if by the deed declaring the uſes of the fine it is expreſſed that the fine ſhould enure to his uſe, the poſſeſſion will be veſted in him by the ſtatute of uſes.—The editor begs to conclude with an obſervation of lord Hardwicke (3. Atk. 631.) which ſeems to him to ſanction, in ſome meaſure, the general reaſoning contained in this note:—"If it is a mere legal title, and a man has purchaſed an eſtate which he ſees himſelf has a "defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice ſo as to make him a truſtee for the "perſon who had the right, becauſe this would be carrying it much too far; for the defect upon the face of the deeds is often "the occaſion of the fine's being levied."

eſgliſe, alien certaine terres ou tenements parcel de ſon glebe, &c. a un auter en fee, et moruſt, ou reſigne, &c. ſon ſucceſſor poit bien enter, nient contriſteant tiel alienation, come eſt dit en un Nota 2. H 4. *Terme Mich.* quod ſic incipit.

certaine lands or tenements parcell of his glebe, &c. to another in fee, and die or reſigne, &c. his ſucceſſor may well enter, notwithſtanding ſuch alienation, as is ſaid in a *Nota 2. H. 4. Termino Mich.* which beginneth thus.

Sect. 644.

NOTA quod dictum fuit pro lege, *en un briefe de accompt port per un maſter d'un college * vers un chapleine, que ſi un parſon, ou un vicar, graunt certaine terre quel eſt de droit ſon eſgliſe a un auter et devie, ou permute, le ſucceſſor poit enter, &c. Et jeo croy que la cauſe eſt, pur ceo que le parſon, ou vicar, que eſt ſeiſie, &c. come en droit de ſon eſgliſe, n'ad pas droit de fee ſimple en les tenements, † et le droit de fee ſimple de ceo demurt en aſcun auter perſon; et pur cel cauſe ſon ſucceſſor poit bien enter, nient contriſteant tiel alienation, &c.*

NOTA quod dictum fuit pro lege, in a writ of account brought by a maſter of a college againſt a chaplaine, that if a parſon, or vicar, grant certaine land which is of the right of his church to another and die, or changeth, the ſucceſſor may enter, &c. And I take the cauſe to bee, for that the parſon, or vicar, that is ſeiſed, &c. as in right of his church, hath no right of the fee ſimple in the tenements, but the right of the fee ſimple abideth in another perſon; and for this cauſe his ſucceſſour may well enter, notwithſtanding ſuch alienation, &c.

glebe is, is a queſtion in our bookes. [a] Some hold that it is in the patron; but that cannot be for two reaſons. Firſt, for that in the beginning the land was given to the parſon and his ſucceſſors, and the patron is no ſucceſſor. Secondly, the words of the writ of *juris utrùm* be, *ſi ſit libera eleemoſina eccleſiæ de D.* and not of the patron. Some others doe hold that the fee ſimple is in the patron and ordinary; but this cannot be, for the cauſes aboveſaid: and therefore, of neceſſitie, the fee ſimple is in abeyance, as *Littleton* ſaith. And this was provided by the providence and wiſdome of the law; for that the parſon and vicar have *curam animarum*, and were bound to celebrate divine ſervice, and adminiſter the ſacraments; and therefore no act of the predeceſſor ſhould make a diſcontinuance to take away the entry of the ſucceſſor, and to drive him to a reall action, wherby he ſhould be deſtitute of maintenance in the meane time. Upon conſideration of all our bookes I obſerve this diverſitie: that a parſon or vicar, for the benefit of the church and of his ſucceſſor, is in ſome caſes eſteemed in law to have a fee ſimple qualified; but to doe any thing to the prejudice of his ſucceſſor in many caſes, the law adjudgeth him to have in effect but an eſtate for life. *Cauſæ eccleſiæ publicis cauſis æquiparantur:* and *Summa ratio eſt quæ pro religione facit.* And *Eccleſia fungitur vice minoris, meliorem facere poteſt conditionem ſuam, deteriorem nequaquam.*

As a parſon, vicar, archdeacon, prebend, chantery prieſt, and the like, may have an action of waſte, and in the writ it ſhall be ſaid, *ad exhæredationem eccleſiæ, &c. ipſius B.* or *præbendæ ipſius A.*

And the parſon, &c. that maketh a leaſe for life, ſhall have a *conſimili caſu* during the

[a] 8. H. 6. 24. 12. H. 8. 8.

Vide Regiſtr. 307. a. 45. E. 3. tit. Eſchange. 12. H. 8. 9. (F. N. B. 48, 49. a.)

F. N. B. 19. L. (Dyer 71. a. 2. Roll. Abr 339.)

Bracton lib. 4. fol. 226.

Brit. fol. 143.

+ See Hobart's exposition of this in his reports p. [illegible]. See also Cro. Car. 582.

F. N. B. 55 D. & 57. E. F. 10. H. 7. 5.

* *vers un chapleine—d'un chapel,* L. and M. and Roh.

† *et—ne.* L. and M. and Roh.

F. N. B. 49. l. m. n. 20. E. 3. tit. Juris utrum. Temps E. 3. Juris utrum 14. 1. 14. E. 3. ibid. 4. F. N. B. 50. 30. E. 3. 26. 21. E. 3. 11. tit. Entrie 10. F. N. B. 206. F. Regiſtr. 237. 4. E. 4. 2. 8. E 3. tit. Entrie 3. 7. H. 3. 54, 55. (Ant. 67. a.)

the life of the leſſee, and a writ of entrie *ad communem legem* after his death, or a writ *ad terminum qui præteriit*, or a *quòd permittat* in the *debet*, and none can maintaine any of theſe writs, but a tenant in fee ſimple or fee tayle.

And a parſon, &c. may receive homage, which tenant for life cannot doe. *Temps E.* 1. *Incumbent* 19.

[c] F. N. B. 49. L. 50. a.

[c] Likewiſe a parſon, &c. ſhall have a writ of meſne, and a *contra formam feoffamenti*.

But a parſon cannot make a diſcontinuance, as *Littleton* here teacheth; for that ſhould be to the prejudice of his ſucceſſor to take away his entrie, and to drive him to a reall action.

(1 Roll. Abr. 476. 479. 488. Cro. Car. 38. 5. Rep. 81. 2. Roll. Abr. 63. 334.)

Alſo if a parſon, &c. make a leaſe for yeares, reſerving a rent, and dieth, the leaſe is determined by his death; as if tenant for life had made a leaſe, no acceptance of the rent by the ſucceſſor can make it good. Alſo in a reall action a parſon, vicar, archdeacon, prebend, &c. ſhall have aid of the patron and ordinarie, as tenant for life ſhall have. So as it is evident, that to many purpoſes a parſon hath but in effect an eſtate for life, and to many a qualified fee ſimple, but the entire fee and right is not in him; and that is the reaſon that hee cannot diſcontinue the fee ſimple that he hath not, nor ever had; for, as it hath beene ſaid, *Omnis privatio præſupponit habitum*. And for the ſame cauſe he cannot have a writ of right right, nor a writ of right in his nature; as a writ of right *ſur diſclaimer* of cuſtomes and ſervices, *ne injuſtè vexes*, *rationabilibus diviſis*, *quo jure*, and the like.

20. E. 3. tit. Aid. 30. 25. E. 3. 54. 8. E. 3. 45. 8. H. 6. 24. 11. H. 6. 9. 6. E. 2. Aid 167. 43. Aſſ. Pl. 13. F. N. B. 129. (Plo. 538.)

(2. Cro. 200. Ant. 325. b. Plo. 356. Doc. Pla. 27. 271.)

But here it appeareth by *Littleton*, that ſuch bodies politike or corporate as have a ſole ſeiſin, and may have a writ of right, for that the fee and right is in them (albeit they cannot abſolutely convey away their lands, &c. without aſſent of others), may make a diſcontinuance; as a biſhop, an abbot, a deane, a maſter of an hoſpitall, and the like. But this is to bee underſtood where a deane or a maſter of an hoſpitall, &c. are ſolely ſeiſed of diſtinct poſſeſſions; for if the bodie that is ſeiſed be aggregate of many, as the deane and chapiter, maſter and confreres, &c. then the feoffment of the deane or maſter is ſo farre from a diſcontinuance as it is a diſſeiſin.

14. E. 3. 11. 11. H. 4. 68. 9. E. 4. 16. 18. E. 3. 7. 6 E. 3. 11. 5. E. 2. Aid 167. 12. H. 4. 11. 32. E. 3. Aid 39. 38. E. 3. 19. 24. E. 3. Juris utrum 4.

And theſe that have the fee and right in them ſhall not have aid in reſpect of their high and large eſtate, albeit any of them be preſentable: but a deane that is collative ſhall have aid of the king.

And it is to be obſerved, that the remedie is ever agreeable to the right; and therefore the biſhop, deane, maſter of an hoſpitall, that hath college and common ſeale, or the like, ſhall have a writ of right right, which is the higheſt remedie, for that they have the higheſt eſtate.

Here

Sect. 645.

*CAR un eveſque poit aver breve de droit de * tenements de droit de ſon eſgliſe, pur ceo que le droit eſt en ſon chapiter, et le fee ſimple demurrant en luy et en ſon chapiter. Et un deane poit aver breve de droit, pur ceo que le droit demurt en luy. ‡ Et un abbe poit aver briefe de droit, pur ceo que le droit demurt en luy et en ſon covent. Et un maſter d'un hoſpitall poit aver briefe de droit, pur ceo que le droit demurt en luy et en ſes confreres, &c. Et ſic de aliis § caſibus conſimilibus. || Mes un parſon ou un vicar ne poit aver briefe de droit, &c.*

FOR a biſhop may have a writ of right of the tenements of the right of his church, for that the right is in his chapiter, and the fee ſimple abideth in him and in his chapiter. And a deane may have a writ of right, becauſe the right remaynes in him. And an abbot may have a writ of right, for that the right remaynes in him and in his covent. And a maſter of an hoſpitall may have a writ of right, becauſe the right remayneth in him and in his confreres, &c. And ſo of other like caſes. But a parſon or vicar cannot have a writ of right, &c.

* *tenements de droit de ſon eſgliſe, pur ceo que le droit eſt en ſon chapiter, et le*—not in L. and M. nor Roh. ‡ *Et un abbe poet aver briefe de droit, pur ceo que le droit demurt en luy*, not in L. and M. nor Roh. § *in* added L. and M. and Roh. || *&c.* added L. and M. and Roh.

Here *Littleton* citeth the booke caſe, *Mich. 2. H. 4.* as an authoritie whereupon he groundeth his opinion. And it is to be obſerved, that the yeares of *H. 4.* were publiſhed before *Littleton* did write.

But at this day, the biſhop, deane, maſter of an hoſpitall, or the like, that have the fee and right in them, as hath beene ſaid, cannot diſcontinue; neither can they or any parſon, vicar, archdeacon, prebend, or any other having any eccleſiaſticall living, with aſſent of deane and chapiter, patron and ordinary, or the conſent of any others, make any leaſe, gift, grant or conveyance, eſtate, charge or incumberance to binde his ſucceſſor other than for terme of one and twentie yeares, or three lives in poſſeſſion, whereupon the accuſtomed rent or more ſhall be reſerved. Theſe be excellent lawes, and have beene well expounded for the maintenance of religion and the good of God's church; for otherwiſe it is to bee feared that holy church would loſe more than it would gaine in theſe dayes.

Vide Sect. 527. 593, &c. 1. Eliz. c. 18. 13. Eliz. c. 10. 1. Jacobi cap. 3.

Lib. 2. fol. 46. Lib. 4. fol. 76. & 20. Lib. 5. fol. 9. & 14. Lib. 6. fol. 37. Lib. 7. fol. 8. Lib. 11. fol. 67. 37. H. 8. 31. H. 8. 32. H. 8. 37. H. 8. 1. E. 6, &c.

But where *Littleton*, in this and other Sections, makes mention of maſters of hoſpitals, the reader muſt know, that ſince *Littleton* wrote, there hath beene a great alteration made by divers acts of parliament concerning hoſpitals.

Maſter del hoſpitall. Theſe points concerning hoſpitals were reſolved [*e*] by the juſtices.

[*e*] Paſch. 24. Eliz. the Lord Cheneye's caſe. Lib. 2. fol. 48, 49. Eveſque de Canterburie's caſe.

Firſt, that no hoſpitall was given to the crowne by the ſtatute of 27. *H.* 8. nor any hoſpitall is within the ſtatute of 31. *H.* 8. of monaſteries, but only religious and eccleſiaſticall hoſpitals, and that no lay hoſpitall was within thoſe ſtatutes.

Secondly, if upon the foundation of any lay hoſpitall or after it was ordained, that one or divers prieſts ſhould be maintained within the hoſpitall to celebrate divine ſervice to the poore, and to pray for the ſoule of the founder, and all chriſtian ſoules, or the like; and that the poore of ſuch hoſpitall ſhould make the like oriſons, yet ſuch an hoſpitall is not within the ſaid ſtatutes; for the hoſpitall is lay, and not religious; and all or the moſt part of antient lay hoſpitals were founded or ordained after the like ſort; and the makers of thoſe ſtatutes never intended to overthrow workes of charitie, but to take away the abuſe.

(2. Sid. 48.)

Thirdly, that no hoſpitall was given to the king by the ſtatute of 37. *H.* 8. but in two caſes, where the donors, founders or patrons, &c. had entred and expulſed the prieſts, wardens, &c. betweene the fourth day of Februarie, *Anno* 27. *H.* 8. and the five and twentieth of December, *Anno* 37. *H.* 8. or where king *Henry* the eighth, by commiſſion according to that act, ſhould enter and ſeiſe the ſame; but that determined by the death of that king.

Lib. 1. f. 24. Porter's caſe.

Fourthly, that the ſtatute of 1. *E.* 6. extended not to any hoſpitall whatſoever, either lay or religious, as by the ſame appeareth.

Porter's caſe ubi ſupra; Lib. 4. 111. 113, 114. 116. in Lambert's caſe.

And I was of counſell with the lord *Cheney* in this caſe, which, ſeeing it may doe good for maintenance of charitable uſes, I thought good ſummarily to report it. To this I will adde, *Panis pauperum vita pauperum; qui defraudat eos vir ſanguinis eſt.*

Eccleſiaſticus c. 34. ver. 22. (8. Rep. 131. a.)

Nota, Of hoſpitals, ſome are corporations aggregate of many; as of maſter or warden, &c. and his confreres: ſome, where the maſter or warden hath only the eſtate of inheritance in him, and the brethren or ſiſters power to conſent, having college and common ſeale: ſome, where the maſter or warden hath the ſtate in him, but hath no college and common ſeale; and ſuch a maſter or warden ſhall have a *juris utrùm*: and of theſe hoſpitals ſome bee eligible, ſome donative; and ſome preſentable.

14. E. 3. juris utrum 4.

Sect. 646.

MES le pluis haut briefe que ils poient aver eſt le briefe de juris utrùm, *le quel eſt graund proofe que le droit de fee n'eſt en eux, ne en nul auters, &c. Mes le droit de fee ſimple eſt en abeiance, &c. ceo eſt a dire, que il eſt tantſolement en le remembrance, entendement et conſideration de la ley,* &c. Car moy ſemble que tiel*

BUT the higheſt writ that they can have is the writ of *juris utrùm*, which is a great proofe that the right of fee is not in them, nor in any others, &c. But the right of the fee ſimple is in abeiance, that is to ſay, that it is only in the remembrance, intendment and conſideration of the law, &c. for it ſeemeth to me,

(F. N. B. 48.)

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

choſe * *et tiel droit que eſt dit en divers livres eſtre en abeyance, eſt* † *a tant a dire en Latyne* (*ſcilicet*), Talis res, vel tale rectum, quæ vel quod non eſt in homine adtunc ſuperſtite, ſed tantummodo eſt, et conſiſtit in conſideratione et intelligentiâ legis, ‡ et quod alii dixerunt, talem rem aut tale rectum fore in nubibus. *Mes jeo ſuppoſe que ils intenderont per ceux parols*, in nubibus, &c. *come jeo aye dit adevant*. §

that ſuch a thing and ſuch a right which is ſayd in divers bookes to be in abeyance, is as much to ſay in Latine (ſcilicet), *Talis res, vel tale rectum, quæ vel quod non eſt in homine adtunc ſuperſtite, ſed tantummodo eſt, et conſiſtit in conſideratione et intelligentiâ legis, et quod alii dixerunt, talem rem aut tale rectum fore in nubibus*. But I ſuppoſe, that they meane by theſe words (*in nubibus, &c.*), as I have ſaid before.

24. E. 3. 63. Vi. Sect. 648, 649, 650. 651. Vide Sect. 1. (Hob. 338. Ant. 263. b. 2. Roll. 339. Poſt. 345. a. 1. Rep. 66.)

EN abeiance. (1) That is, in expectation, of the French word *bayer*, to expect. For when a parſon dieth, wee ſay that the freehold is in abeyance, becauſe a ſucceſſor is in expectation to take it; and here note the neceſſitie of the true interpretation of words.

If tenant *pur terme d'auter vie* dieth, the freehold is ſaid to be in abeyance untill the occupant entreth. If a man make a leaſe for life, the remainder to the right heires of *I. S.* the fee ſimple is in abeyance untill *I. S.* dieth. And ſo in the caſe of the parſon, the fee and right is in abeiance, that is, in expectation, in remembrance, entendment, or conſideration of law, 1. *In conſideratione ſive intelligentiâ legis*, becauſe it is not in any man then living; and the right that is in abeiance is ſaid to be *in nubibus*, in the clouds, and therein hath a qualitie of fame whereof the poet ſpeaketh:

Virg. 4. Æneid. *Ingrediturque ſolo, et caput inter nubila condit.*

Sect. 647.

ITEM, ſi un parſon d'un eſgliſe devie, ore le franktenement del glebe del parſonage eſt en nulluy durant le temps que le parſonage eſt voide, mes in abeiance; c'eſtaſcavoir, in conſideration. et en le intelligence de le ley, tanque un auter ſoit fait parſon de meſme l'eſgliſe; et immediat quant un auter eſt ‖ *fait parſon, le franktenement en fait eſt en luy come ſucceſſor*. ¶

ALSO, if a parſon of a church dieth, now the freehold of the glebe of the parſonage is in none during the time that the parſonage is voide, but in abeiance, viz. in conſideration and in the underſtanding of the law, untill another be made parſon of the ſame church; and immediatly when another is made parſon, the freehold in deed is in him as ſucceſſor.

Brad. li. 1. c. 2. Brit. f. 249.

SI un parſon d'un eſgliſe devie, &c. So it is of a biſhop, abbot, deane, archdeacon, prebend, vicar, and of every other ſole corporation or body politike, preſentative, elective, or donative, which inheritances put in abeiance are by ſome called *hæreditates jacentes*; and ſome ſay, *que le fee eſt en balaunce*.

Sect.

* *et—en*, L. and M. and Roh. † *&c.* added L. and M. and Roh. ‡ *Mes jeo ſuppoſe que ils intenderont per ceux parols, in nubibus, &c.* not in L. and M. nor Roh. § *&c.* added L. and M. and Roh. ‖ *fait* not in L. and M. nor Roh. ¶ *&c.* added L. and M. and Roh.

(1) In the courſe of theſe notes, frequent mention has been made of the neceſſity which there was at the old law, that there ſhould always be an immediate tenant of the *freehold*, and of the reaſons upon which this neceſſity was grounded; but theſe reaſons did not apply, in the ſame degree, againſt the ſuſpenſion of the *inheritance*. Hence, tho' for the reaſons I have mentioned, it was an eſtabliſhed maxim, that the freehold never could be in ſuſpenſion, or, as it is generally called, in abeyance, it was admitted that the inheritance might. But this ſuſpenſion or abeyance of the inheritance could not but be conſidered with a very jealous eye; for tho' fiefs, in their original conſtitution, were not hereditary; ſtill, when they had once become hereditary, the conſequences of their becoming ſuch were ſo numerous, and affected materially ſo many other parts of the feudal ſyſtem, that, tho' it was always admitted that the inheritance might be ſuſpended, it was agreed, that the ſuſpenſion of it ſhould be diſcountenanced and diſcouraged as much as poſſible, and allowed upon none but the moſt preſſing and urgent occaſions. The chief reaſons of the averſion of the old law from the ſuſpenſion of the inheritance are ſet forth in two late maſterly and profound publications, ſir William Blackſtone's Argument on the Caſe of Perryn and Blake, and Mr. Hargrave's Obſervations on the Rule in Shelley's caſe.—To theſe reaſons the modern law has added her marked and unremitted odium of every reſtraint upon alienation; it being clear, that no reſtraint upon the alienation of property would be more effectual than the admiſſion of a ſuſpenſion of the inheritance.—The ſame principles have, in ſome degree, given riſe to the well-known rule of law, that a preceding eſtate of freehold is indiſpenſably neceſſary for the *ſupport* of a contingent remainder; and they influence, in ſome degree, the doctrines reſpecting the *deſtruction* of *contingent* remainders. Mr. Fearne's excellent Eſſay upon theſe ſubjects makes any farther inveſtigation of them here quite unneceſſary: but perhaps the reader will not be diſpleaſed with the following ſhort diſcuſſion of a ſubject intimately connected with them;—*the ſuſpenſion and extinction of powers*, deriving their effect from the ſtatute of uſes, or the ſtatute of wills; thoſe powers which are given to mere ſtrangers, that is, to perſons who have neither a preſent nor a future eſtate or intereſt in the land, are ſaid to be collateral to the land; thoſe which are reſerved to a perſon who has either a preſent or future eſtate or intereſt in the land, are ſaid to be *relating* to the land: and theſe again are ſubdivided into two claſſes, powers *annexed* to the eſtate in the land, and powers *in groſs*. The former are, where a perſon has an eſtate in the land, and the eſtate to be created by the power is to take effect in poſſeſſion during the continuance of the eſtate to which the power is annexed: ſuch is the power uſually given in ſettlements to tenants for life, when reſpectively in poſſeſſion, to make leaſes.—Powers in groſs are, where the perſon to whom they are given has an eſtate in the land; but the eſtate to be created under, or by virtue of the power, is not to take its effect till after the determination of the eſtate to which it relates: ſuch are the powers uſually inſerted in ſettlements to jointure an after-taken wife.—1. *As to the powers collateral to the land*,—it is ſaid, that a releaſe, fine, feoffment, or common recovery, will not extinguiſh or deſtroy them. See ante

Sect. 648.

ITEM, ascuns peradventure voilent arguer et dire, que entant que un parson ove l'assent del patron et ordinarie, poit granter un rent charge hors del glebe del parsonage en fee, et issint charger le glebe del parsonage perpetualment, ergo *ils ont fee simple, ou deux ou un de eux avoit fee simple* * *al meins* †. *A ceo poit estre respondue, que il est principle en le ley, que de chescuns terres il y ad fee simple, &c. en ascun home, ou* ‡ *auterment le fee simple est en abeyance* ‖. *Et un auter principle est, que chescun terre de fee simple poit estre charge de un rent-charge en fee per un voy ou per auter. Et quant tiel rent est graunt per le fait le parson, et le patron, et l'ordinarie, &c. en fee, nul avera prejudice ou parde per force de tiel grant, forsque les* § *grantors en lour vies, et les heires le patron, et les successors del ordinary apres lour decease. Et apres tiel charge, si le*

ALSO, some peradventure wil argue and say, that inasmuch as a parson with the assent of the patron and ordinary, may grant a rent charge out of the glebe of the parsonage in fee, and so charge the glebe of the parsonage perpetually, *ergo* they have a fee simple, or two or one of them have a fee simple at the least. To this may bee answered, that it is a principle in law, that of everie land there is a fee simple, &c. in some bodie, or otherwise the fee simple is in abeyance. And there is another principle, that every land of fee simple may bee charged with a rent charge in fee by one way or other. And when such rent is granted by the deed of the parson, and the patron, and ordinarie, &c. in fee, none shall have prejudice or losse by force of such grant, but the grantors in their lives, and the heires of the patron, and the successours of the ordinarie after their decease. And after such charge

IL est un principle en la ley, &c. *Principium, quod est quasi primum caput*, from which many cases have their originall or beginning, which is so strong, as it suffereth no contradiction; and therefore it is said in our books, that ancient principles of the law [a] ought not to be disputed, *Contra negantem principia non est disputandum*. That which our author here calleth a principle, *Sect.* 3. & 90. he calleth a maxime. (Ant. 10. b.) [a] 11. H. 4. 9. Sect. 3. & 90

Here *Littleton* in answer to an objection alleageth two principles. First,

Que de chescun terre il y ad fee simple, &c. This is *perspicuè verum*, and needeth no explanation. Secondly,

Chescun terre de fee simple poet estre charge en fee per un voy ou auter. Hereby it appeareth, that albeit the right of the fee simple be in abeyance, yet it may be charged by one way or another. And so it may be aliened in fee, albeit the right of the fee be in abeyance, or in consideration of law. And herein is a diversitie worthy the observation to be made; that when the right of fee simple is perpetually by judgement of law in abeyance, without any expectation to come *in esse*, there he that hath the qualified fee, *concurrentibus iis quæ in jure requiruntur*, may charge or alien it, as in the case of parson, vicar, prebend, &c. But where the fee simple is in abeyance, and by possibilitie may every houre come *in esse*, there the fee simple cannot be charged untill it commeth *in esse*. (1) As if a leasse for life be made, the remainder to the right he res of *J. S.* the fee simple cannot be charged (Lampet's case 10. Rep. 46. b.) (2. Roll. 418, 419.)

* *al—an*, L. and M. and Roh. † &c. added L. and M. and Roh. ‡ *auterment* not in L. and M. nor Roh. ‖ &c. added L. and M. and Roh. § *grantors—grantees*, L. and M. and Roh.

(1) On the question, whether the fee simple, during the suspence of a contingent remainder, remains in the grantor, or is in abeyance, see Mr. Fearne's Essay on Contingent Remainders, 3d ed. 275.

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ante 265. b. Albanie's case, 1. Rep. 110. b. Digges's case, 1. Rep. 173. a. Moore 605. The reason why a release does not extinguish them, is said to be (ante 265. b.), that collateral powers are not in the nature of rights or titles, and cannot therefore, from their nature, be released. 2dly, That where powers are given or reserved to any person having any estate or interest, either present or future, in the land, the exercise of these powers is considered as advantageous to him; and there is no reason why he should not be allowed to depart with, or exclude himself from the benefit of them: but that, when they are given to strangers, they are intended for the benefit of some third person; and therefore the extinction of them is supposed to be injurious to some person intended to be benefited by them. With respect to their not being destroyed by feoffment, fine, or recovery; every man, it is said, is stopped from claiming any estate contrary to his own feoffment; but if a stranger, with a power of revocation, makes a feoffment, levies a fine, or suffers a recovery, and afterwards revokes, the person claiming the estate under the revocation is in immediately by, and makes his title immediately from the original settlor or devisor, and not by or from the feoffor, conusor, or recoveree: he is not therefore bound or stopped by any act of the feoffor, conusor, or recoveree. Thus, by the old law, if *cestui que use* devised that his feoffees should sell his land, and died, and his feoffees made a feoffment over; yet it was held, that the feoffees might sell against their own feoffment, because the power to sell was merely collateral to the right to the land, and the vendee took nothing by the feoffment. II. *As to powers relating to the land.*—Such of those powers as are in the nature of powers *appendant to the estate*, may, it is agreed, be extinguished by release, feoffment, fine, or common recovery. These powers also are liable to be extinguished or suspended by any of the conveyances which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seised; for whoever has any estate in the land, may convey that estate to another; and it would be unjust that he should afterwards be admitted to avoid, or to do any thing in derogation from his own grant.—Any assurance of this nature, therefore, which carries with it the whole of the grantor's estate, is a total destruction of the powers appendant to that estate; and by parity of reason, any such assurance as carries with it only a part of the estate (as a term for years or an estate for life), suspends, during the continuance of that estate, the exercise of the power, or, at least, the estate to be raised by it; and any such assurance, which induces only a charge upon the estate (as a grant of a rent), necessarily subjects the estate created by the power to that charge. With respect to such of the powers relating to land as are said to be powers in gross:—As the estates raised by them do not fall within the compass of the estate to which they are said to relate, there does

charged till *I. S.* be dead. And ſo is *Littleton* to be underſtood, viz. that either it may be charged *in præſenti*, or *in futuro*.

44. E. 3. 21, 22.

(Plo. Com. 436.)

Cheſcun terre de fee ſimple. And ſo it is of lands entailed, for they may be charged in fee alſo; for the eſtate taile may be cut off by fine or recovery. Alſo the eſtate taile may continue, and yet tenant in taile may lawfully charge the land and binde the iſſue in taile. As if a diſſeiſor make a gift in taile, and the donee in conſideration of a releaſe by the diſſeiſee of all his right to the donee, granteth a rent charge to the diſſeiſee and his heires, proportionable to the value of his right, this ſhall binde the iſſue in taile. *Vide Sect.* 1. *Bridgewater*'s caſe; which lands, by the rule of *Littleton*, may be charged: and therefore if the owner of thoſe thirteene acres grant a rent-charge out of thoſe thirteene acres generally, lying in the meadow of eightie, without mentioning where they lie particularly; there, as the ſtate in the land removes, the charge ſhall remove alſo. But ſince our author wrote, all eccleſiaſticall perſons are diſabled to charge in fee any of their eccleſiaſticall poſſeſſions, as before hath beene ſpoken of at large.

Vide Sect. 1. Bridgewater's caſe, & 59.

Vide Sect. 593.
(Doct. and Stud. 50. a.)
31. E. 1. tit. Grant. 90.
8. R 2. Annuit. 53.
(2. Cro. 197.)

Et quant tiel rent eſt grant, &c. This is an excellent interpretation and limitation of the ſaid principle, viz. that none ſhall have prejudice or loſſe by any ſuch grant, but ſuch as are partie or privie thereunto; as the patron and his heires, the ordinary and his ſucceſſors, and the parſon and his ſucceſſors; which ſucceſſors of the parſon are to be preſented by the patron or his heires, and admitted and inſtituted by the ordinary or his ſucceſſors. The like is to be ſaid of an archdeacon, prebend, vicar, chauntrie prieſt, and the like.

(5. Rep. 81.)
16. E. 3. Annuit. 24. 40. E. 3. 30.
3. E. 3. 17. Reg. 38.
(Doct. & Stud. 66. b.)

Per le fait le parſon, et patron, et l'ordinarie, &c. Yet if the parſon die, and in time of vacation the patron, of the aſſent of the ordinary, or the patron and ordinary grant an annuitie or rent-charge out of the glebe, this ſhall (as hath beene ſaid) binde the ſucceeding parſons for ever.

If there be parſon, patron, and ordinary, and the parſon by the ordinance and aſſent of

* *parſon* not in L. and M. nor Roh. † *&c.* added L. and M. nd Ron. ‡ *&c.* added L. and M. and Roh. ‖ *&c.* not in L. and M. nor Roh.

**parſon devie, ſon ſucceſſour ne poit vener a le dit eſgliſe de eſtre parſon de meſme le eſgliſe per la ley, forſque per preſentment del patron, et admiſſion et inſtitution del ordinarie.* † *Et pur cel cauſe il covient que le ſucceſſor ſoy teigne content, et agree de ceo que ſon patron et l'ordinarie loyalment feſoyent adevant, &c. Mes ceo n'eſt proofe que le fee ſimple, &c. eſt en le patron et l'ordinarie, ou en aſcun de eux, &c. Mes la cauſe que tiel grant de rent-charge* ‡ *eſt bone, eſt, pur ceo que ceux queux averont intereſt, &c. en la dit eſgliſe, ſcilicet, le patron ſolonque la ley temporal, et l'ordinarie ſolonque la ley ſpiritual, fueront aſſentus, ou parties a tiel charge, &c. Et ceo ſemble eſtre la verie cauſe que tiel glebe poit eſtre charge en perpetuitie,* ‖ *&c.*

if the parſon die, his ſucceſſor cannot come to the ſayd church to be parſon of the ſame by the law, but by the preſentment of the patron, and admiſſion and inſtitution of the ordinarie. And for this cauſe the ſucceſſour ought to hold himſelfe content, and agree to that which his patron and the ordinarie have lawfully done before, &c. But this is no proofe that the fee ſimple, &c. is in the patron and the ordinarie, or in either of them, &c. But the cauſe that ſuch graunt of rent-charge is good, is, for that they who have the intereſt, &c. in the ſayd church, viz. the patron according to the law temporall, and the ordinarie according to the law ſpiritual, were aſſenting, or parties to ſuch charge, &c. And this ſeemeth to be the true cauſe why ſuch glebe may be charged in perpetuitie, &c.

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not ſeem to be any reaſon why any alteration in that eſtate ſhould affect them. Hence, if tenant for life, with a power to jointure an after-taken wife, conveys a life eſtate by bargain and ſale, leaſe and releaſe, or covenant to ſtand ſeiſed, this conveyance will not affect the power of making a jointure. If he even makes a conveyance in fee by any of theſe aſſurances, as it is not their operation to paſs a greater eſtate than the grantor has a right to convey, the power in groſs is not affected by it; but if he conveys by fine, feoffment, or recovery, as theſe aſſurances not only paſs the eſtate of the grantor, but convey a tortious fee, they neceſſarily diſturb the whole inheritance, and conſequently diveſt the ſeiſin, out of which the uſes to be created by the power are to be ſed. They therefore operate in extinction of the power. A power in groſs may alſo be releaſed to any of thoſe in remainder.—And if the whole fee is in the terre-tenant, ſubject to the power; as where an eſtate is limited to *A.* for life, remainder to ſuch uſes as he ſhall by deed or will appoint, remainder to *A.* in fee; there if *A.* conveys the whole fee by leaſe and releaſe, his power of appointment, notwithſtanding it is in the nature of a power in groſs, is totally extinguiſhed. See Ca. Temp. Talbot 41.—It ſhould be obſerved, that in mentioning above the effect of a feoffment, fine, or common recovery, the expreſſion is, that powers *may* be extinguiſhed by thoſe conveyances. But it is not intended to imply, either with reſpect to powers collateral or powers relating to the lands, that thoſe conveyances neceſſarily and unavoidably extinguiſh the powers in all caſes. In ſome caſes they do not. Thus, in the earl of Leiceſter's caſe, 1 Vent. 278, *A.* being tenant for life, with power to revoke by deed or will, executed a deed, whereby he covenanted to levy a fine to ſeveral uſes, and afterwards levied a fine accordingly; it was held, that the deed and fine (taken together) were a good execution of the power, and not an extinction of it. Afterwards, in Herring v. Brown, Carth. 22. 1 Vent. 368. 371. Skin. 35. 184. where *A.* being tenant for life, with power of revocation, levied a fine, and afterwards declared the uſes, it was contended, that the fine was an extinction of the power; and to diſtinguiſh that caſe from the earl of Leiceſter's caſe, it was ſaid, that in the former caſe the deed preceded, in the latter it was ſubſequent to the fine. In the former caſe it was ſaid, the power was executed, and an eſtate created by the deed, ſo that no eſtate remained forfeitable by the fine; but that, in the latter caſe, the fine being firſt levied, was *ipſo facto* a forfeiture of the eſtate, and the ſubſequent deed could not, by any intendment of law, revive the power. Three judges againſt one, in the king's-bench, were of this opinion. But error was afterwards brought in the exchequer-chamber to reverſe their judgment; and it was accordingly reverſed, by five judges againſt two, on the ground, that the fine and the ſubſequent deed, declaring the uſes thereof, were but one and the ſame conveyance.—Theſe caſes ſhew, that where a perſon is tenant for life, with a general power of revocation, a fine and a deed, declaring the uſes of it, will be conſtrued as a good exerciſe of the power. The principles of theſe caſes may be extended much further in argument; but it is by no means adviſeable to do it in practice. In Carthew 23. it is expreſsly ſaid, that if an eſtate is granted to one for life, who afterwards levies a fine *ſur conuzance de droit*, and declares the uſes to himſelf for life, remainder in fee to the grantor or leſſor, this is a forfeiture, notwithſtanding the declaration of the uſe.

of the ordinarie grant an annuitie to another, having *quid pro quo* in conſideration thereof, this ſhall binde the ſucceſſor of the parſon, without the conſent of the patron.

6. E. 3. 4. 55. 7. E. 3. 49, 41. F. N. B. 152. 17 E. 3. 32.

A church parochiall may be donative and exempt from all ordinarie juriſdiction, and the incumbent may reſigne to the patron, and not to the ordinarie; neither can the ordinarie viſit, but the patron by commiſſioners to be appointed by him. And by *Littleton*'s rule, the patron and incumbent may charge the glebe; and albeit it be donative by a layman, yet *mere laicus* is not capable of it, but an able clerke *infra ſacros ordines* is; for albeit hee come in by lay donation, and not by admiſſion or inſtitution, yet his function is ſpirituall; and if ſuch a clerke donative be diſturbed, the patron ſhall have a *quare impedit* of this church donative, and the writ ſhall ſay, *quòd permittat ipſum præſentare ad eccleſiam, &c.* and declare the ſpeciall matter in his declaration. And ſo it is of a prebend, chantery, chappell, donative, and the like; and no laps ſhall incurre to the ordinary, except it be ſo ſpecially provided in the foundation. But if the patron of ſuch a church, chantery, chappell, &c. donative, doth once preſent to the ordinarie, and his clerke is admitted and inſtituted, it is now become preſentable, and never ſhall be donative after, and then laps ſhall incurre to the ordinary, as it ſhall of other benefices preſentable. But a preſentation to ſuch a donative by a ſtranger, and admiſſion and inſtitution thereupon, is meerely void. And all this was reſolved by the whole court of king's bench, for the rectorie parochiall donative of Saint *Burian* in the countie of Cornewall,

39. E. 3. 17. b. 11 H. 4. 68. 8. H. 3. 23. Vi. Sect. 133. 530. 11 E. 3. Jur. vtr. 3. 8. Aſſ. 29. 31. 13. Aſſ. 2.

It appeareth by our bookes, and by divers acts of parliament, that at the firſt all the biſhopricks in England were of the king's foundation, and donative *per traditionem baculi, (id eſt)* the croſier, which was the paſtorall ſtaffe, & *annuli*, the ring whereby hee was married to the church. And king *Henry* the firſt being requeſted by the biſhop of Rome to make them elective, refuſed it: but king *John* by his charter bearing date *quinto Junii, anno decimo ſeptimo*, granted that the biſhopricks ſhould be eligible. If the king doth found a church, hoſpitall, or free chappell donative, he may exempt the ſame from ordinarie juriſdiction, and then his chancellor ſhall viſit the ſame. Nay, if the king doe found the ſame without any ſpeciall exemption, the ordinarie is not, but the king's chancellor, to viſit the ſame. Now as the king may create donatives exempt from the viſitation of the ordinarie, ſo he may by his charter licence any ſubject to found ſuch a church or chappell, and to ordaine that it ſhall be donative, and not preſentable, and to be viſited by the founder, and not by the ordinarie. And thus beganne donatives in England, whereof common perſons were patrons.

14. H. 3. Quar. Imp. 183. 17. E. 3. 12. 64. 14 H. 4. 11. F. N. B. 33. c. 16. c. 3. Brc. 660.

13 E. 4. 3. 6. H. 7. 14.

Vid. Sect. 530.

22 H. 6. 26. F. N. B. 35. c.

Hil. 1. Jac. coram Reg. rot. 601. inter Wil. Fairchild, pl. & Wil. Gayer def. in Treſpas.

17. E. 3. 40. 6. E. 3. 10. 25 E. 3 ca. Unico de Proviſor. Math. Par. pa. 10. & 62.

F. N. B. 35. E. 42. A. B. 27. E. 3. 8. & 85. 8. Aſſ. 29. 8. E. 3. Aſſ. 150. 18. E. 3. Scire Fac. 11. 6. H. 7. 14. 16. E. 3. Briefe 660. 21. E. 3. 60. Regiſtr. 40. Dyer. 10 Eli. f. 273. 14. El. ca. 5. 2 H. 5. c. 1.

Ordinarie. *Ordinarius* is hee that hath ordinarie juriſdiction in cauſes eccleſiaſticall, immediate to the king and his courts of common law, for the better execution of juſtice, as the biſhop or any other that hath exempt and immediate juriſdiction in cauſes eccleſiaſticall.

(9 Rep. 39. 4 Inſt. 338. Ant. 96. a.)

Ley temporel. Which conſiſteth of three parts, viz. Firſt, on the common law, expreſſed in our bookes of law, and judiciall records. Secondly, on ſtatutes contained in acts and records of parliament. And thirdly, on cuſtomes grounded upon reaſon, and uſed time out of minde; and the conſtruction and determination of theſe doe belong to the judges of the realme.

(Ant. 110. 115. b.)

Ley ſpiritual, &c. That is, the eccleſiaſticall lawes allowed by the lawes of this realme, viz. which are not againſt the common law (whereof the king's prerogative is a principall part) nor againſt the ſtatutes and cuſtomes of the realme; and regularly according to ſuch eccleſiaſticall lawes, the ordinarie and other eccleſiaſticall judges doe proceed in cauſes within their conuſance. And this juriſdiction was ſo bounded by the antient common lawes of the realme, and ſo declared by act of parliament.

(12. Rep. 72.) The Statute of 25 H. 8. c. 19. 33 H. 6. 34. 38. H. 6. 28.

Admiſſion & inſtitution. In proprietie of ſpeech, admiſſion is, when the biſhop upon examination adinitteth him to be able, and ſaith, *Admitto te habilem.* [d] Inſtitution is, when the biſhop ſaith, *Inſtituo te rectorem talis eccleſiæ cum curâ animarum, & accipe curam tuam & meam.* [e] But ſometimes in a more large ſenſe, *admiſſus* doth include *inſtitutus* alſo; *cujus præſentatus ſit admiſſus, (i. e.) inſtitutus.* And it is to be obſerved, that inſtitution is a good plenartie againſt a common perſon (but not againſt the king, unleſſe he be inducted); and that is the cauſe that regularly plenartie ſhall be tried by the biſhop, becauſe the church is full by inſtitution, which is a ſpirituall act; but void or not void ſhall be tried by the common law.

[d] Lib. 4. f. 75 & 79. Lib. 6. f. 49. Lib. 7. fo. 26. [e] W. 2. cap. 5. 13. E. 1.

22. H. 6. 27. 38. E. 3. 4.

At the common law, if an eſtranger had preſented his clerke, and he had beene admitted and inſtituted to a church, whereof any ſubject had beene lawfull patron, the patron had no other remedy to recover his advowſon, but a writ of right of advowſon, wherein the incumbent

Glanvill lib. 13. c. 18, 19 20. Mirror cap. 5. § 5. Bract. in lib. 4. fo. 238. 240. 241. &c. 291. Flet. lib. 5. c. 11. 16. 17. Brit. f. 222, 223, 224.

6. E. 3. 28. 39. 52. 39. E. 3. 24. 43. E. 3. 25. 45. E. 3. Quar. imp. 139. 10. E. 2. Com. 22. 31. E. 1. Quar. imp. 186.

(5. Rep. 57. 97. Lib. 6. 49, 50. b. 6. Rep. Green's Case. 2. Cro. 385. F. N. B. 33. h.)

F. N. B. 36. k. 143. a. 35. E. 3. ca. 3. 13. R. 2. ca. 1. 4. H. 4. ca. 21. 1. H. fol. 19.

[*] Li. 6. fol. 51. Li. 7. fo. 19. 3. H. 6. Dam. 17. 34. H. 6. 28. 12. E. 3. Champerty 9. 18. E. 3. 2. Temps E. 1. Quar. imp. 181.

[a] W. 2. ca. 5. 13. E. 1.

[g] 45. E. 3. 35. 38. E. 3. 4. 25. E. 3. 47. 13. El. Dy. 292. Reg. 302, &c. 18. El. Dy. 348. 14. E. 4. 2. 7. H. 4. 32. 31. E. 1. Quar. imp. 185. W. 2. ub. sup.

[h] 17. E. 3. 64.

(2. Inst. 356. 6. Rep. 29. a. 50. a.)

(3. Rep. 30. a. 50. a.)

9. H. 6. 32. & 56. 19 H. 6 68.

(7. Rep. 27. Cro. Car. 74. Doct. & Stud. 11. b. Lib. 6. 51. Ant. 17. b.)

(10. Rep. 53. 5. Rep. 102. 6. Rep. 51. Hob. 201. 2. Cro. 93.) 18. E. 2. Presentment. 20. 50. E. 3. Encumbent 10. 21. H. 7. 8. a. & b. 9. Eliz. Dyer. 260. F. N. B. 32. 14. H. 8. 31. 19. E. 2. Dar. Pres. 21. 10. E. 3 17. 9. H. 6. 31. 30. E. 3. tit. Quar. imp. Stath. 46. E. 3. 15. 9. H. 6. 38. 56. 19. H. 6. 68. L. 5. E. 4. 115. 9. E. 4. 30.

41. H. 4. 80. (Hob. 154.)

incumbent was not to be removed: and so it was at the common law, if an usurpation had beene had upon an infant or feme covert, having an advowson by discent, or upon tenant for life, &c. the infant, feme covert, and he in the reversion were driven to their writ of right of advowson; for at the common law, if the church were once full, the incumbent could not be removed, and plenartie generally was a good plea in a *quare impedit*, or assise of *darreine presentment*; and the reason of this was, to the intent that the incumbent might quietly intend and applie himselfe to his spirituall charge. And secondly, the law intended, that the bishop that had cure of soules within his diocesse, would admit and institute an able man for the discharge of his dutie and his owne; and that the bishop would doe right to every patron within his diocesse. But at the common law, if any had usurped upon the king, and his presentee had beene admitted, instituted, and inducted, (for without induction the church had not beene full against the king) the king might have removed him by *quare impedit*, and beene restored to his presentation; for therein he hath a prerogative, *quòd nullum tempus occurrit regi*; but he could not present, for the plenartie barred him of that; neither could he remove him any way but by action, to the end the church might be the more quiet in the meane time. [*] Neither did the king recover dammages in his *quare impedit* at the common law. But the said statute [a] hath altered the common law in the cases aforesaid; as namely, *Quoad hoc, quòd si pars rea accipiat de plenitudine ecclesiæ per suam propriam præsentationem, non propter illam plenitudinem remaneat loquela, dummodo breve infra tempus semestre impetretur, &c.* and also hath provided remedy in the other cases, as by the said act appeareth.

[g] And if the king doe present to a church, and his clerke is admitted and instituted, yet before induction the king may repeale and revoke his presentation. But regularly no man can be put out of possession of his advowson, but by admission and institution upon an usurpation by a presentation to the church, *cùm aliquis jus præsentandi non habens præsentaverit, &c.* and not by collation of the bishop: [h] and therefore if the bishop collate without title, and his clerke is inducted, this shall not put the rightfull patron out of possession; for it shall be taken to be only provisionally made for celebration of divine service untill the patron doe present; and therefore he is not driven to his *quare impedit*, or assise of *darreine presentment*, in that case; but an usurpation by collation shall take away the right of collation that is in another. (1)

It is to be observed, that an usurpation upon a presentation shall not only put out of possession him that hath right of presentation, but right of collation also. Therefore at this day the incumbent shall be removed in a *quare impedit*, or assise of *darreine presentment*, if there be not a plenartie by six moneths before the *teste* of the writ; but then the incumbent must be named in the writ, or else he shall never be removed: yet at the common law, if the ordinary refused to admit and institute the clerke of the patron, or when any disturbed him to present, so as he could not preferre his clerke, he might have his *quare impedit*, or assise *de darreine presentment*; and if the church were not full, have a writ to the bishop to admit his clerke: but so odious was symonie in the eye of the common law, that before the statute of W. 2. he recovered no dammages. At the common law, if hanging the *quare impedit* against the ordinary for refusing of his clerke, and before the church were full, the patron brought a *quare impedit* against the bishop, and hanging the suit, the bishop admit and institute a clerke at the presentation of another, in this case if judgement be given for the patron against the bishop, the patron shall have a writ to the bishop, and remove the incumbent that came in *pendente lite* by usurpation, for *pendente lite nihil innovetur*, and therefore at the common law it was good policie to bring the *quare impedit* against the bishop as speedily as might be. And it is to be observed, that albeit the clerke that comes in *pendente lite*, by usurpation, shall be removed; yet if the rightfull patron, being a stranger to the writ, present *pendente lite*, and his clerke is admitted and instituted, he shall not be removed; for else by the bringing of such *quare impedit* against the ordinary, the rightfull patron might be defeated of his presentation: and therefore ever after the statute of *Westm.* 2. amongst other things it was enquired *ex officio*, if the church were full, and of whose presentation, &c. and if the plaintife should have a writ to the bishop, and his clerke admitted, (as in most cases hee ought) yet may the rightfull incumbent have his remedie by law.

And as it was good policie (as hath beene said) to bring a *quare impedit* as speedily as might be against the bishop, so it is good policie at this day to name the bishop in the *quare impedit*, for then he shall not present by laps. But seeing the bishop shall not present by laps because he is named in the writ, what then, after that the time be devolved to the metropolitan, shall not he present by laps, because he is not named? To this it is answered, that he shal not in that case present by laps; for the metropolitan shal never present or collate by laps after six moneths, but when the immediate ordinary might have collated by laps within the six moneths, and had surceased his time. And so it is if the time be devolved to the king

for

(1) V. stat. 7. Ann. c. 18.

for the firſt ſtep or beginning faileth; and in humane things, *Quod non habet principium, non habet finem.* And all theſe points were reſolved [*] in a writ of error brought by *Richard* biſhop of London and *John Lancaſter* againſt *Anthony Lowe* upon a judgement given againſt them in a *quare impedit* in the common-place for the church of Winbiſhe. But now let us heare what our author will ſay unto us.

[*] Mich. 3. Jacobi. (6. Rep. 48. b. 2. Cro. 92.)

Sect. 649.

ITEM, ſi tenant en taile ad iſſue et ſoit diſſeiſie, et puis il releſſa per ſon fait tout ſon droit a le diſſeiſor: en ceſt caſe nul droit de taile poit eſtre en le tenant en taile, pur ceo que il avoit releas tout ſon droit. Et nul droit poit eſtre en l'iſſue en le taile durant le vie ſon pere. Et tiel droit del enheritance en le taile n'eſt pas tout euſterment expire per force de tiel releas, &c. Ergo, *il covient que tiel droit demurt en abeiance* *, ut ſupra, *durant la vie le tenant en taile que releſſa, &c. et apres ſon deceaſe donque eſt tiel droit maintenant en ſon iſſue en fait, &c.*

ALSO, if tenant in tayle hath iſſue and is diſſeiſed, and after he releaſeth by his deed all his right to the diſſeiſor: in this caſe no right of taile can be in the tenant in taile, becauſe hee hath releaſed all his right. And no right can bee in the iſſue in taile during the life of his father. And ſuch right of the inheritance in the taile is not altogether expired by force of ſuch releaſe, &c. *Ergo*, it muſt needs be that ſuch right remaine in abeiance, *ut ſupra*, during the life of tenant in taile that releaſeth, &c. and after his deceaſe ſuch right preſently is in his iſſue in deed, &c.

LITTLETON having declared where a fee is in abeyance, and where a freehold and fee is in abeyance by act in law, and where a fee that is in abeyance may be charged; here he putteth two caſes where a right of an eſtate taile may be in abeyance by the act of the partie, which are ſo cleere and evident, as there needs no further proofe or argument, than *Littleton* hath juſtly and artificially made, albeit ſome objections of no weight have beene made againſt it. If tenant in taile of lands holden of the king be attainted of felonie, and the king after office ſeiſeth the ſame, the eſtate taile is in abeyance, there ſaid to be in ſuſpence.

(Hob. 338.) Pl. Com. fol. 562, 563. in Walſingham's caſe. 14. E. 3. Diſcont. 5.

(Cro. Car. 427, 8, 9. Ant. 217. a. Dyer 71. a.)

19. H. 6. 60. 29. Aſſ. p. Walſingham's caſe, ubi ſupra. (Ant. 263. b. 299. b. 331. a. 342. b.)

Grant ſon eſtate, concedit ſtatum ſuum. State or eſtate ſignifieth ſuch inheritance, freehold terme for yeares, tenancie by ſtatute merchant, ſtaple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his eſtate, &c. as much as he can grant ſhall paſſe, as here by *Littleton*'s caſe appeareth. Tenant for life, the remainder in taile, the remainder to the right heires of tenant for life, tenant for life grant *totum ſtatum ſuum* to a man and his heires, both eſtates doe paſſe.

Vide Sect. 65. 524, 525, 526. 44. E. 3. 10. 14. Aſſ. 28. 43. Aſſ. 8. 5. H. 7. 30.

44. Aſſ. 28. 44. E. 3, 10.

Sect. 650.

EN meſme le maner eſt, lou tenant en taile granta tout ſon eſtate a un auter; en ceſt cas le grauntee n'ad eſtate forſque pur terme de

IN the ſame manner it is, where tenant in taile grant all his eſtate to another; in this caſe the grantee hath no eſtate but for terme of life of the tenant

Right, Jus, ſive rectum, (which *Littleton* often uſeth) ſignifieth properly, and ſpecially in writs and pleadings, when an eſtate is turned to a right, as by diſcontinuance, diſſeiſin, &c. where it ſhall bee ſaid, *quòd jus deſcendit et non terra.* But (Right) doth alſo include the eſtate

(Plo. 484.)

20. H. 6. 9.

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

Vide Sect. 465. Pl. Com. 484. Lib. 8. fol. 153. Altham's caſe. 39. H. 6. 38.

eſtate *in eſſe* in conveyances; and therefore if tenant in fee ſimple make a leaſe for yeares, and releaſe all his right in the land to the leſſee and his heires, the whole eſtate in fee ſimple paſſeth.

(1. Cro. 429.)

And ſo commonly in fines, the right of the land includeth and paſſeth the ſtate of the land; as *A. cognovit tenementa prædicta eſſe jus ipſius B. &c.*

[a] W. 2. cap. 3. Pl. Com. 484. & 487. b.] And the ſtatute [a] ſaith, *jus ſuum defendere* (which is) *ſtatum ſuum*. And note that there is *jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus poſſidendi.*

Vid. Sect. 429. 659, &c. (Poſt. 347. b.)

Title, properly, (as ſome ſay) is, when a man hath a lawfull cauſe of entry into lands whereof another is ſeiſed, for the which hee can have no action, as title of condition, title of mortmaine, &c. But legally this word (Title) includeth a right alſo, as you ſhall perceive in many places in *Littleton:* and title is the more generall word; for every right is a title, but every title is not ſuch a right for which an action lieth; and therefore *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt*, and ſignifieth the meanes whereby a man commeth to land, as his title is by fine or by feoffment, &c. And when the plaintife in aſſiſe maketh himſelfe a title, the tenant may ſay, *Veniat aſſiſa ſuper titulum*; which is as much to ſay, as upon the title which the plaintife hath made by that particular conveyance. *Et dicitur titulus à tuendo*, becauſe by it he holdeth and defendeth his land; and as by a releaſe of a right a title is releaſed, ſo by releaſe of a title a right is releaſed alſo. See more hereof in *Fitzherbert* and *Brookes'* Abridgements in the title of *Title.*

6. H. 7. 8. a. Altham's caſe ubi ſupra.

Pl. Com. fol. 374. in ſeignior Zouche's caſe; & fol. 487. & 448. in Nichol's caſe.

Intereſt. *Intereſſe* is vulgarly taken for a terme or chattle reall, and more particularly for a future tearme; in which caſe it is ſaid in pleading, that he is poſſeſſed *de intereſſe termini.* But *ex vi termini*, in legall underſtanding, it extendeth to eſtates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly ſaid to have an intereſt in them: and by the grant of *totum intereſſe ſuum* in ſuch lands, as well reverſions as poſſeſſions in fee ſimple ſhall paſſe. And all theſe words ſingularly ſpoken are *nomina collectiva*; for by the grant of *totum ſtatum ſuum* in lands, all his eſtates therein paſſe. *Et ſic de cæteris.*

23. H. 8. taile Br. 32. 35. H. 8. Grant. Br. 150. Vide 16. Eliz. Dier 325. b. Titulum.

Ne unques avera briefe de waſte, &c. So it is if tenant for life be, the remainder in taile, and he in the remainder releaſe to the tenant for life, all his right and ſtate in the land. Hereby it is ſaid in our bookes, that the eſtate of the leſſee is not inlarged, but the releaſe ſerveth to this purpoſe, to put the eſtate taile into abeyance, ſo as after that he in the remainder cannot have an action of waſte; yet in that caſe (ſaving reformation) the leſſee for life hath an eſtate for the life of tenant in taile expectant upon his owne life. But if tenant in fee releaſe to his tenant for life all his right, yet he ſhall have an action of waſte. And if tenant in taile make a leaſe for his owne life, he ſhall have an action of waſte.

43. Aſſ. p. 13. 41. E. 3 tit. Waſte 83. 11. H. 4. 67. 13. H. 7. 10. Pl. Com. 482. per Dier. 27. H. 8. 20.

42. E. 3. 23.

F. N. B. 60. H. 41. E. 3. Waſte 83. 42. E. 3. 18.

vie del tenant en le taile, et le reverſion de le taile n'eſt pas en le tenant en taile, pur ceo que il avoit graunt tout ſon eſtate et ſon droit, &c. Et ſi le tenant a que le graunt fuit fait fiſt waſt, le tenant en le taile ne unque avera briefe de waſt, pur ceo que nul reverſion eſt en luy. Mes le reverſion et le enheritance de le taile, durant le vie le tenant en le taile, eſt en abeiance, ceſtaſcavoir, tantſolement en le remembrance, conſideration, et intelligence de la ley *.

in taile, and the reverſion of the taile is not in the tenant in taile, becauſe he hath granted all his eſtate and his right, &c. And if the tenant to whom the grant was made make waſte, the tenant in taile ſhall not have a writ of waſte, for that no reverſion is in him. But the reverſion and inheritance of the taile, during the life of the tenant in taile, is in abeiance, that is to ſay, only in the remembrance, conſideration, and intelligence of the law.

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

Sect. 651.

ITEM, ſi un eveſque alien terres que ſont parcel de ſon eveſquery et devie, ceo eſt un diſcontinuance a ſon ſucceſſor, pur ceo que il ne poit enter, mes eſt mis a ſon briefe de ingreſſu ſine aſſenſu capituli.

ALSO, if a biſhop alien lands which are parcell of his biſhopricke and die, this is a diſcontinuance to his ſucceſſor, becauſe he cannot enter, but is put to his writ of *de ingreſſu ſine aſſenſu capituli.* (Ant. 342. a. F. N. B. 194.)

Of this ſufficient hath beene ſaid (how the law ſtandeth at this day) before in this Chapter.

Sect. 652.

ITEM, ſi un dean alien terres * *queux il ad en droit de luy et ſon chapiter, et moruſt, ſon ſucceſſor* † *poit enter.* ‡ *Mes ſi le deane eſt ſole ſeiſie come en droit ſon deanry, donque ſon alienation eſt diſcontinuance a ſon ſucceſſor, come eſt dit adevant.*

ALSO, if a deane alien lands which he hath in right of him and his chapter, and dieth, his ſucceſſor may enter. But if the deane bee ſole ſeiſed as in right of his deanry, then his alienation is a diſcontinuance to his ſucceſſor, as is ſaid before. (Ant. 342. a.)

HEREOF alſo that which was neceſſary is before ſaid in this Chapter, and *Littleton*'s owne words are plaine and evident. 22. E. 4. tit. Feoffment, & Faits, 29. 21. E. 4. 85, 86.

Sect. 653.

ITEM, peradventure eſcuns voilont arguer et dire, que ſi un abbe et ſon covent ſont ſeiſies en lour demeſne come de fee de certaine terres a eux et a lour ſucceſſors, &c. et l'abbe ſans aſſent de ſon covent alien meſmes les terres a un auter et devie, ceo eſt un diſcontinuance a ſon ſucceſſor, &c.

ALSO, peradventure ſome will argue and ſay, that if an abbot and his covent bee ſeiſed in their demeſne as of fee of certaine lands to them and to their ſucceſſors, &c. and the abbot without the aſſent of his covent alien the ſame lands to another and die, this is a diſcontinuance to his ſucceſſor, &c.

Sect. 654.

PER meſme reaſon ils voilent dire, que lou un dean ‖ *en chapter ſont ſeiſies de certain terre a eux et a lour ſucceſſors, ſi le deane alien meſme la terre, &c.*

BY the ſame reaſon they will ſay, that where a deane and chapter are ſeiſed of certaine lands to them and their ſucceſſors, if the deane alien the ſame lands;

ceo

* *queux il ad en droit de luy et ſon chapter,* —— *parcel de ſon deanrie,* L. and M. and Roh. † *ne* added L. and M. and Roh. ‡ *Mes poit aver briefe de ingreſſu ſine aſſenſu epiſcopi et capituli, &c.* added L. and M. and Roh. and MSS. ‖ *en*—*et le,* L. and M. and Roh.

*ceo ſerroit un diſcontinuance a ſon ſucceſſor, iſſint que ſon ſucceſſor ne poit enter, &c. A ceo poit eſtre reſpondue, que il y ad grand diverſitie perenter les * deux caſes.*

&c. this ſhall be a diſcontinuance to his ſucceſſor, ſo as his ſucceſſor cannot enter, &c. To this it may be anſwered, that there is a great diverſitie betweene theſe two caſes.

Sect. 655.

(Ant. 341. a.)

CAR quant un abbe et le covent ſont ſeiſies †, uncore s'ils ſont diſſeiſie, l'abbe avera aſſiſe en ſon noſme demeſne, ſans noſmer le covent, ‡ &c. Et ſi aſcun voile ſuer præcipe quòd reddat, &c. *de meſmes les terres quant ils fueront en le maine l'abbe et covent, il covient que tiel action real ſoit ſue envers l'abbe ſolement ſans noſme la covent ‖, pur ceo que touts ſont morts perſons en la ley, forſque l'abbe que eſt le ſoveraigne, &c. Et ceo eſt per cauſe del ſoveraigntie §; car auterment il ſerroit forſque come ¶ un de les auters moignes de le covent, &c.*

FOR when an abbot and the covent are ſeiſed, yet if they bee diſſeiſed, the abbot ſhall have an aſſiſe in his owne name, without naming the covent, &c. And if any will ſue a *præcipe quòd reddat, &c.* of the ſame lands when they were in the hands of the abbot and covent, it behoveth that ſuch action reall be ſued againſt the abbot only without naming the covent, becauſe they are all dead perſons in law, but the abbot who is the ſoveraigne, &c. And this is by reaſon of the ſoveraignty; for otherwiſe he ſhould bee but as one of the other monkes of the covent, &c.

Sect. 656.

*MES un dean et le chapter ne ſont morts perſons en la ley, &c. car cheſcun de eux poit aver action per ſoy en divers caſes. Et de tiels terres ou tenements que le deane et chapter ont en common, &c. s'ils ſoient diſſeiſies, le deane et chapter averont un aſſiſe, et nemy le deane ſole, ** &c. Et ſi auter voile aver action real de tiels terres ou tenements envers le deane, &c. il covient de ſuer envers le deane et chapter, et nemy envers le deane ſole, &c. et iſſint il ap-*

BUT deane and chapter are not dead perſons in law, &c. for every of them may have an action by himſelfe in divers caſes. And of ſuch lands or tenements as the deane and chapter have in common, &c. if they bee diſſeiſed, the deane and chapter ſhall have an aſſiſe, and not the deane alone, &c. And if another will have an action reall for ſuch lands or tenements againſt the deane, &c. he muſt ſue againſt the deane and chapter, and not againſt the deane alone, &c. and ſo there appeareth a

piert

* *dites* added L. and M. and Roh.
‖ &c. added L. and M. and Roh.
** &c. not in L. and M. nor Roh.
† &c. added L. and M. and Roh.
§ &c. added L. and M. and Roh.
‡ &c. not in L. and M. nor Roh.
¶ *un* not in L. and M. nor Roh.

appiert grand diverſitie perenter les deux caſes, &c.

great diverſitie betweene the two caſes, &c.

THESE are apparent, and need no explanation. Saving in the 655. Section mention is made of the *præcipe quòd reddat*, which in this place is intended of a reall action whereby land is demanded, and is ſo called of the words in every ſuch writ. (10. Rep. 132. F. N. B. 2. c. 131. c. 192. b.)

And the reaſon of this diverſitie betweene the caſe of the abbot and covent, and deane and chapter is, for that (as hath beene ſaid) the monkes are regular, and civilly dead, and the chapter are ſecular, and perſons able and capable in law. But by the policie of law the abbot himſelfe (here termed the ſoveraigne) albeit he be a monke and regular, yet hath he capacitie and abilitie to ſue and be ſued, to enfeoffe, give, demiſe, and leaſe to others, and to purchaſe and take from others; for otherwiſe they which right have ſhould not have their lawfull remedie, nor the houſe remedie againſt any other that did them wrong; neither could the houſe without ſuch capacitie and abilitie ſtand. And the covent have no other abilitie or capacitie, but only to aſſent to eſtates made to the abbot, and to eſtates made by him, which for neceſſitie's ſake, though they be civilly dead, they may doe. Vid. Sect. 200. 8. E. 3. 27. 11. H. 4. 84. 21. E. 4. 86. 11. H. 7. 12.

Sect. 657.

ITEM, ſi le maſter d'un hoſpitall diſcontinue certaine terre de ſon hoſpitall, ſon ſucceſſor ne poit enter, mes eſt mis a ſon briefe de ingreſſu ſine aſſenſu confratrum et * conſororum, &c. *Et touts tiels brieſes pleinment appearont en le Regiſter, &c.*

ALSO, if the maſter of an hoſpitall diſcontinue certaine land of his hoſpitall, his ſucceſſor cannot enter, but is put to his writ of *de ingreſſu ſine aſſenſu confratrum et conſororum, &c.* And all ſuch writs fully appeare in the Regiſter, &c. (Ante 342. a.) (Plo. 22. b.)

THIS muſt alſo be underſtood where the maſter of the hoſpitall hath ſole and diſtinct poſſeſſions, and not where he and his brethren are ſeiſed as a body politike aggregate of many. And here *Littleton* (as divers times before) doth cite the Regiſter.

Sect. 658.

ITEM, ſi terre ſoit leſſe a un home pur terme de ſa vie, le remainder a un auter en le taile, ſavant le reverſion al leſſor, et puis celuy en le remainder diſſeiſiſt le tenant à terme de vie, et fait un feoffment à un auter en fee, et puis moruſt ſans iſſue, et le tenant a terme de vie moruſt; il ſemble en ceſt cas, que celuy en la reverſion bien puit enter ſur le feoffee, pur ceo que celuy en le remainder que fiſt le feoffment, ne fuit unque ſeiſie en le taile per force de meſme le remainder, &c.

ALSO, if land be lett to a man for terme of his life, the remainder to another in taile, ſaving the reverſion to the leſſor, and after he in the remainder diſſeiſeth the tenant for terme of life, and maketh a feoffment to another in fee, and after dyeth without iſſue, and the tenant for life dyeth; it ſeemeth in this caſe, that hee in the reverſion may well enter upon the feoffee, becauſe he in the remainder which made the feoffment, was never ſeiſed in taile by force of the ſame remainder, &c. (1. Roll. Abr. 634.)

HERE

* *conſororum—ſororum*, L. and M. and Roh.

Vid. Sect. 637. 592. 596, 597. 601. 640, 641. Vide Sect. 637. (10. Rep. 35. 1. Roll. Abr. 634.)

HERE it appeareth, that albeit the feoffor hath an eſtate taile in him expectant upon an eſtate for life, yet his feoffement worketh no diſcontinuance. Wherein *Littleton* doth adde a limitation to that which in this Chapter he had generally ſaid, viz. That an eſtate taile cannot be diſcontinued, but where he that maketh the diſcontinuance was once ſeiſed by force of the taile; which is to be underſtood, when he is ſeiſed of the freehold and inheritance of the eſtate in taile, and not where he is ſeiſed of a remainder or a reverſion expectant upon a freehold; which freehold (as often hath beene ſaid) is ever much reſpected in law.

CHAP. 12. Of Remitter. Sect. 659.

HERE our author having next before treated of a Diſcontinuance, very aptly beginneth this Chapter with a deſcription of a Remitter.

(2. Roll. Abr. 422.)

Remitter eſt un antient terme en la ley, and is derived of the Latine verbe *remittere*, which hath two ſignifications; either, to reſtore and ſet up againe, or to ceaſe. Therefore a remitter is an operation in law upon the meeting of an ancient right remediable, and a latter ſtate in one perſon where there is no follie in him, whereby the ancient right is reſtored and ſet up againe, and the new defeaſible eſtate ceaſed and vaniſhed away. And the reaſon hereof is, for that the law preferreth a ſure and conſtant right, though it be little, before a great eſtate by wrong and defeaſible; and therefore the firſt and more ancient is the moſt ſure and more worthy title; *Quod prius eſt, verius eſt, & quod prius eſt tempore, potius eſt jure:* [a] therefore many bookes in ſtead of remitter ſay, that he is *en ſon primer eſtate*, or *en ſon melior droit*, or *en ſon melior eſtate*, or the like. (1)

[a] 25. Aſſ. pl. 4. 35. Aſſ. pl. 11. 26. E. 3. 69. 11. H. 4. 50. a. 41. E. 3. 17. b. Et tit. Remit. 11. 6. E. 3. 17.

(8. Rep. 153.)

Lou home ad deux titles. Here this word (Titles) is taken in the largeſt ſenſe, including rights: for being properly taken, [b] as in caſe of a condition, mortmaine,

[b] Vide Sect. 429. & 659, &c. 34. H. 8. tit. Remitter Br. 50. 44. E. 3. Attaint. 22. 38. Aſſ. pl. 7. (Plo. 484. Ant. 345.)

*REMITTER eſt un antient terme en la ley, et eſt lou home ad deux titles a terres ou tenements, ſcilicet, un pluis antient title, et un auter title pluis darrein; et s'il vient a la terre per le pluis darreine title, uncore la ley luy adjudgera eins per force del pluis eigne title, pur ceo que le pluis eigne title eſt le pluis ſure title, et pluis digne title. Et donque quant home eſt adjudge eins per force de ſon eigne title, ceo eſt a luy dit un remitter, pur ceo que la ley luy mitter d'eſtre eins en la terre per le pluis eigne * et ſure title. Sicome tenant en le taile diſcontinua la taile, et puis il diſſeiſiſt ſon diſcontinuee, et iſſint moruſt ſeiſie, per que les tenements diſcendont a ſon iſſue ou coſine inheritable*

REMITTER is an antient terme in the law, and is where a man hath two titles to lands or tenements, viz. one a more antient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, becauſe the elder title is the more ſure and more worthie title. And then when a man is adjudged in by force of his elder title, this is ſayd a remitter in him, for that the law doth admit him to be in the land by the elder and ſurer title. As if tenaunt in taile diſcontinue the taile, and after hee diſſeiſeth his diſcontinuee, and ſo dieth ſeiſed, whereby the tenements deſcend to his iſſue or coſine inheritable by *per*

* *et ſure* not in L. and M. nor Roh.

(1) I. *As to the general doctrine of remitter:*—In note 1, p. 239. a. notice was taken of the different degrees of title, which a perſon diſſeiſing another of his lands acquires in them in the eye of the law, independently of any anterior right: That if *A.* is diſſeiſed by *B.* while the poſſeſſion is in *B.* it is a mere naked poſſeſſion, unſupported by any right; and that *A.* may reſtore his poſſeſſion, and put a total end to the poſſeſſion of *B.* by an entry on the land, without any previous action: but that if *B.* dies, the poſſeſſion deſcends on his heir by act of law. That, in this caſe, the heir comes to the poſſeſſion of the land by a lawful title, and acquires in the eye of the law an apparent right of poſſeſſion, which is ſo far good againſt the perſon diſſeiſed, that he has loſt his right to recover the poſſeſſion by entry, and can only recover it by an action at law. That the actions uſed in theſe caſes are called poſſeſſory actions; but that if *A.* permits the poſſeſſion to be with-held from him beyond a certain period of time, without claiming it, or ſuffers judgment in a poſſeſſory action to be given againſt him by default; or, if being tenant in tail, he makes a diſcontinuance; in all theſe caſes, *B.*'s title is ſtrengthened, and *A.* can no longer recover by a poſſeſſory action, and his only remedy there is, by an action on the right. That theſe laſt actions are called droiturel actions, and that they are the ultimate reſource of the perſon diſſeiſed.——Now, if in any of theſe three different ſtages of the adverſe title, the diſſeiſee, without any default in him, comes to the poſſeſſion of the eſtate by a defeaſible title, he is conſidered to be in not as of his new right, but as of his ancient and better right; and conſequently, the right of the perſon, who, ſuppoſing the diſſeiſee ſtill to be in as of his defeaſible eſtate, would be entitled to the lands, upon the ceaſer or determination of that eſtate, is gone for ever. In theſe circumſtances, the diſſeiſee is ſaid to be *remitted* to his ancient eſtate. The principal reaſon for his being remitted is, that the perſon ſo remitted cannot ſue or enter upon himſelf; ſo that in theſe caſes where the poſſeſſion is recoverable by entry, the remitter has the effect of an entry; and in thoſe caſes where it is recoverable by action, it has the effect of a judgment at law. But there is no remitter where he who comes to the defeaſible eſtate, comes to it by his own act, or his own aſſent. Hence, the defeaſible eſtate, to intitle the party to be remitted, muſt be made to him during infancy or coverture, or muſt come to him by deſcent, or act of law: neither is there any remitter where the ancient eſtate is recoverable, neither by action, nor by entry. So that in thoſe caſes where the diſſeiſee is beyond the three ſtages mentioned in the beginning of the note, if he afterwards comes to the eſtate by a defeaſible title, he remains ſeiſed as of that eſtate, and is not remitted to his more ancient title. Theſe are the

2. part.

per force de le taile; en ceſt caſe, ceo eſt a luy a que les tenements diſcendont, que ad droit per force de le taile un remitter a le taile, pur ceo que le ley luy mitte et adjudge d'eſtre eins per force de le taile, que eſt ſon eigne title: car s'il ſerroit eins per force de le diſcent, donques le diſcontinuee puiſſoit aver briefe de entre ſur diſſeiſin *en le* per *envers luy, et recoveroit les tenements et ſes dammages,* &c. Mes entant que il eſt eins en ſon remitter per force de le taile, le title et le intereſt le diſcontinuee eſt tout ouſterment anient et defeat, &c.*

force of the taile; in this caſe, this is to him to whom the tenements deſcend, who hath right by force of the tayle a remitter to the tayle, becauſe the law ſhall put and adjudge him to bee in by force of the tayle, which is his elder title: for if hee ſhould bee in by force of the diſcent, then the diſcontinuee might have a writ of entrie *ſur diſſeiſin* in the *per* againſt him, and ſhould recover the tenements and his dammages, &c. But inaſmuch as he is in his remitter by force of the taile, the title and intereſt of the diſcontinuee is quite taken away and defeated, &c. (1)

affent to a raviſher, and the like, there is no remitter wrought unto them, becauſe theſe are but bare titles of entrie, for the which no action is given; but a remitter muſt be to a precedent right: and *Littleton* in this Chapter putteth all his caſes onely of remitters, to rights remediable. (2. Roll. Abr. 421.)

Et un auter title pluis darreine, &c. Here is to be obſerved, that an eſtate muſt worke a remitter to an ancient right; for albeit two rights doe deſcend, there can be no remitter, becauſe one right cannot worke a remitter to another: for regularly to every remitter there be two incidents, viz. an ancient right and a defeaſible eſtate of freehold comming together. 19. H. 6. 59. 78. 45. tit. Entre Cong. 3. Pl. Com. 246. a. (3. Rep. 1.)

Le pluis eigne title eſt le pluis ſure title, et pluis digne title. So as the eldeſt title is worthily (as hath beene ſaid) preferred, becauſe it is the more ſure and more worthy.

Sicome tenant en taile diſcontinue le taile, &c. Here our author, according to his accuſtomed manner, 19. H. 6. 61, 62.

to illuſtrate his deſcription putteth an example of a remitter, where the law preferreth the ancient eſtate by right, before a new eſtate defeaſible. And this remitter is wrought by an eſtate caſt upon the iſſue in taile by diſcent, which is an act in law, and the diſcent of the land in poſſeſſion, and the right of eſtate taile deſcend together.

Eſt tout ouſterment anient et defeat, &c. Here be two things implied and to be underſtood: Firſt, that this remitter is wrought in this caſe by operation of law upon the freehold in law deſcended without any entrie. Secondly, that the law ſo favoureth a remitter (being a reſtoring to right), that if the diſcontinuee be an infant or a feme covert, and tenant in taile after a diſcontinuance diſſeiſe them and die ſeiſed, the iſſue ſhall be remitted without any reſpect of the privilege of infancie or coverture; and therefore our author ſaid, *le title et intereſt le diſcontinuee eſt tout ouſterment anient et defeat.* (Poſt. 390. a. Ant. 246. a. Poſt. 357. a.) 11. E. 4. 1.

Donques le diſcontiuuee, &c. Here is a reaſon added in this particular caſe, that fitteth not other caſes of remitter; for in this caſe and many other, the law that abhorreth ſuits of vexation, doth avoid circuitie of action; for the rule is, *Circuitus eſt evitandus.* 11. E. 3. 3. tit. Aſſ. 85. 4. E. 4. 35. 11. R. 2. Bar. 242. 30. E. 3. 8. 6. E. 3. 7. 19. H. 6. 63. 24. E. 3. 70. 14. H. 4. 27. 10. H. 7. 11. F. N. B. Meſne & Waſt.

Sect. 660.

ITEM, ſi le tenant en tayle enfeoffa ſon fits en

ALSO, if tenant in tayle infeoffe his ſonne in fee,

OUR author having put one example where both the rights deſcend together, now puts another example, where Temps E. 1. Remit. 13. 11. E. 3. Age 5. 38. E. 3. 24. 40. E. 3. 43. 21. E. 4. 19.

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

(1) 1. Here the ancient right and the defeaſible eſtate *come together*. It is immaterial whether they come by diſcent or by act of law. See the inſtances brought by Littleton afterwards, Sect. 665, 666. and 678.

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the doctrines of the common law reſpecting remitter. But they are greatly altered by the ſtatute of the 27 Hen. VIII. That ſtatute executes the poſſeſſion to the party in the ſame plight, manner, and form, as the uſe was limited to him: It operates only with reſpect to the firſt taker, and therefore the iſſue of the iſſue is remitted. By the ſtatute of 32 Hen. VIII. it is enacted, that no fine, feoffment, or other act by the huſband, of the wife's lands, ſhall be any diſcontinuance; but that the wife and her heirs, and ſuch others to whom the right ſhall appertain after her deceaſe, ſhall, notwithſtanding ſuch fine, or other act, lawfully enter into her lands, according to their rights and titles therein. This takes from the wife, and thoſe claiming under her, the effect of the ſtatute of the 27 Hen VIII. ſo that ſhe has her election to take by the 27 Hen. VIII. or to enter by the 32 Hen. VIII. upon which ſhe ſhall be remitted. See Duncombie v. Wingfield, Hobart 264.—Sir W. Blackſtone, 3. Com. Cha. 10, obſerves, that the doctrine of remitter might ſeem ſuperfluous to an haſty obſerver, who perhaps would imagine, that ſince the tenant hath now both the right, and alſo the poſſeſſion, it little ſignifies by what means ſuch poſſeſſion ſhall be ſaid to be gained. But the wiſdom of our ancient law determined nothing in vain. As the tenant's poſſeſſion was gained by a defective title, it was liable to be overturned, by ſhewing that defect in a writ of entry; and then he muſt have been driven to his writ of right to recover his juſt inheritance; which would have been doubly hard, becauſe, during the time he was himſelf tenant, he could not eſtabliſh his prior title by any poſſeſſory action: the law, therefore, remits him to his prior title, and puts him in the ſame condition as if he had recovered the land by writ of entry. Without the remitter, he would have had *jus et ſeiſina* ſeparate, a good right, but a bad poſſeſſion; now, by the remitter, he hath the moſt perfect of all titles, *juris et ſeiſinæ conjunctionem.*

where the iſſue in taile claimeth by purchaſe in the life of tenant in taile, and the ancient right deſcendeth after to the ſame iſſue.

Car coment que tiel heire fuit de pleine age al temps del mort, &c. The reaſon is, becauſe no follie can be adjudged in the infant at the time of the acceptance of the feoffement. Therefore the law reſpecteth the time of the feoffement, and not the time of the death: and albeit he might have waived the eſtate which he had by the feoffement at his full age, yet here it appeareth, that the right of the eſtate taile deſcending to him either within age, or of full age, ſhall worke a remitter in him; for that the waiver of the ſtate ſhould have beene to his loſſe and prejudice.

27. H. 8. c. 10. of Uſes. 35. H. 8. Dy. 54. b. 6. E. 6. ib. 77. 1. & 2. P. & M. 116. 2. & 2. P. & M. 129. 191. 28. H. 8. 23. b. Pl. Com. Amy Townſhend's caſe, fol. 111. 34. H. 8. tit. Remit. Br. 49. (Dyer 106. Sid. 63. 1. Leo. 91. Hob. 255. 298.)

Since *Littleton* wrote, and after the ſtatute of 27 *H.* 8. *cap.* 10. if tenant in taile make a feoffement in fee to the uſe of his iſſue being within age, and his heires, and dieth, and the right of the eſtate taile deſcend to the iſſue being within age; yet he is not remitted, becauſe the ſtatute executeth the poſſeſſion in ſuch plite, manner and forme, as the uſe was limited: *Et ſic de ſimilibus*, ſo as there is a great change of remitters ſince *Littleton* wrote. (1)

Pl. Com. ub. ſup.

But if the iſſue in taile in that caſe waive the poſſeſſion, and bring a formedon in the diſcender, and recover againſt the feoffees, he ſhall thereby bee remitted to the eſtate taile; otherwiſe the lands may be ſo incumbred, as the iſſue in taile ſhould be at a great inconvenience: but if no formedon be brought, if that iſſue dieth, his iſſue ſhall be remitted; becauſe a ſtate in fee ſimple at the common law deſcendeth unto him.

(2. Roll. Abri. 419. 421. 1. Roll. Rep. 260.)

Eſteant de pleine age, il charge per ſon fait, fee, ou ſon coſine inheritable per force de le taile, le quel fits ou coſin al temps de feoffment eſt deins age, et puis le tenant en le taile devia, et celuy a que le feoffment fuit fait eſt ſon heyre per force de le taile; ceo eſt un remitter al heire en le taile a que le feoffment fuit fait. Car coinent que durant la vie le tenant en le taile que fiſt le feoffment, tiel heire ſerra adjudge eins per force de le feoffment, uncore apres la mort le tenant en le tayle, l'heire ſerra adjudge eins per force de le taile, et nemy per force de le feoffment. * *Car coment que tiel heire fuit de pleine age al temps de le mort de le tenaunt en le taile que fiſt le feoffment, ceo ne fait aſcun matter, ſi l'heire fuit deins age al temps del feoffment fait a luy. Et ſi tiel heire eſteant deins age al temps de tiel feoffement, vient al pleine age, vivant le tenant en le taile que fiſt le feoffment, et iſſint eſteant de pleine age, il charge per ſon fait meſme la terre ove*

Eſteant de pleine age, il charge per ſon fait, or his coſine inheritable by force of the taile, which ſonne or coſine at the time of the feoffment is within age, and after the tenant in taile dieth, and hee to whom the feoffement was made is his heire by force of the taile; this is a remitter to the heire in taile to whom the feoffement was made. For albeit that during the life of the tenant in tayle who made the feoffement, ſuch heire ſhall bee adjudged in by force of the feoffement, yet after the death of tenant in taile, the heire ſhal be adjudged in by force of the taile, and not by force of the feoffment. For altho' ſuch heire were of full age at the time of the death of the tenant in taile who made the feoffment, this makes no matter, if the heire were within age at the time of the feoffement made unto him. And if ſuch heire beeing within age at the time of ſuch feoffment, commeth to full age, living the tenant in tayle that made the feoffement, and ſo being of full age he charges by his deed *un*

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

(1) The effect of this ſtatute on the doctrine of Remitter is very fully explained in Duncombe v. Wingfield, Hob. 254. See 2. Leo. 222. Sid. 63. Dyer, 351.

*un common de paſture, ou ove un rent charge, et puis le tenant en le taile moruſt; ore il ſemble que le terre eſt diſcharge del common, et de le rent, pur ceo que le heire eſt eins de auter eſtate en la terre que il fuit al temps de le charge fait, entant que il eſt en ſon remitter per force de le tayle, et iſſint l'eſtate que il avoit al temps de le charge, eſt ouſterment defeat, * &c.*

the ſame land with a common of paſture, or with a rent charge, and after the tenant in tayle dieth; now it ſeemeth that the land is diſcharged of the common, and of the rent, for that the heire is in of another eſtate in the land than he was at the time of the charge made, in as much as hee is in his remitter by force of the tayle, and ſo the eſtate which hee had at the time of the charge, is utterly defeated, &c. (1)

&c. The reaſon is, becauſe the grantor had not any right of the eſtate in taile in him at the time of the grant, but only the eſtate in fee ſimple gained by the feoffment, which (as *Littleton* here ſaith) is wholly defeated. And the ſtate of the land out of which the rent iſſued, being defeated, the rent is defeated alſo. (2. Roll. Abr. 419. 421. 3. Rep. 5. b. Hob. 45.)

But if tenant in taile make a leaſe for life whereby he gaineth a new reverſion in fee, ſo long as tenant for life liveth, and he granteth a rent-charge out of the reverſion, and after tenant for life dieth, whereby the grantor becommeth tenant in taile againe, and the reverſion in fee defeated; yet becauſe the grantor had a right of the entaile in him, cloathed with a defeaſible fee ſimple, the rent-charge remaineth good againſt him, but not againſt his iſſue; which diverſitie is worthy of obſervation, for it openeth the reaſon of many caſes. 11. H. 7. 21. Edriche's caſe. (Mo. 319. 1. Rep. 148. Ant. 278. a.)

If the heire apparent of the diſſeiſee diſſeiſe the diſſeiſor, and grant a rent-charge, and then the diſſeiſee dieth, the grantor ſhall hold it diſcharged; for there a new writ of entrie doth deſcend unto him, and therefore he is remitted. (2. Roll. Abr. 422.)

So if the father diſſeiſe the grandfather, and granteth a rent-charge, and dieth, now is the entry of the grandfather taken away, if after the grandfather dieth, the ſonne is remitted, and he ſhall avoid the charge. So as where our author putteth his example of a fee taile, it holdeth alſo in caſe of a fee ſimple.

Un common de paſture, oũ un rent charge, &c. Here *Littleton* putteth his caſe of things granted out of the land. But what if the iſſue at full age by deed indented or deed poll make a leaſe for yeares of the land, and after by the death of tenant in taile he is remitted, whether ſhall he avoid the leaſe or no? And it is holden he ſhall not, becauſe it is made of the land it ſelfe, and the land is become by the leaſe in another plight than it is in the caſe of a grant of a rent-charge, which I gather out of our author's owne words in another place. 33. H. 8. Dier 51. b. Vide Sect. 289.

La terre eſt diſcharge del rent, &c. *Littleton* doth adde theſe words materially, becauſe the whole grant is not thereby avoided, but the land diſcharged of the rent-charge; for the grantee ſhall have notwithſtanding a writ of annuitie, and charge the perſon of the grantor. Li. 2. f. 36. b. Ward's caſe.

Sect. 661.

ITEM, un principall cauſe pur que tiel heire en les caſes avantdits, et auters caſes ſemblables, ſerra dit en ſon remitter, eſt pur ceo que il n'y ad aſcun perſon envers que il poet ſuer ſon briefe de

ALSO, a principall cauſe why ſuch heire in the caſes aforeſaid, and other like caſes, ſhall bee ſaid in his remitter, is for that there is not any perſon againſt whom he may ſue his writ of *formedon*. For againſt

UN principall cauſe pur que, &c. And of this opinion is [d] *Littleton* in our bookes. [d] 12. E. 4 20. 41. E. 3. 18. 11. H. 4. 50.

Il n'ad aſcun perſon envers que, &c. ſicome il avoit loialment recover meſme la terre vers un auter, &c. Here it is to be underſtood, that regularly a man ſhall not be remitted to a right (6. Rep. 58. b. 1. Sid. 63. 2. Roll. Abr. 419.)

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

(1) II. Here the ancient right *comes after* the defeaſible eſtate.

Lib. 3. f. 3. the Marqueſſe of Winchester's caſe.

right remedileſſe, for the which he can have no action; for *Littleton* here ſaith, that there is no perſon againſt whom the iſſue when he commeth to the land without folly may bring his action; and ſaith alſo, that this is the principall cauſe of the remitter; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in taile ſuffer a common recovery in which there is error, and after tenant in taile diſſeiſeth the recoveror and dieth, here the iſſue in talle hath an action, viz. a writ of error; but as long as the recoverie remaineth in force, he hath no right, and therefore in that caſe there is no remitter. (1)

formedon. Car envers luy meſme il ne poit ſuer, et il ne poit ſuer envers nul auter, car nul auter eſt tenant del frankte-nement; et pur cel cauſe la ley luy adjudge eins en ſon remitter, ſcilicet, en tiel plite, ſicome il avoit loialment recover meſme la terre envers un auter, &c.

himſelfe he cannot ſue, and hee cannot ſue againſt any other, for none other is tenant of the freehold; and for this cauſe the law doth adjudge him in his remitter, *ſcilicet*, in ſuch plite, as if hee had lawfully recovered the ſame land againſt another, &c.

(3. Rep. 3.)

If *B.* purchaſe an advowſon, and ſuffereth an uſurpation and ſix moneths to paſſe, and after the uſurper granteth the advowſon to *B.* and his heires, *B.* dieth, his heire is not remitted, becauſe his right to the advowſon was remedileſſe, viz. a right without an action. (2).

(Ant. 122. b.) 5. H. 7. 35.

Tenant in taile of a mannor whereunto an advowſon is appendant maketh a diſcontinuance, the diſcontinuee granteth the advowſon to tenant in taile and his heires, tenant in taile dieth, the iſſue is not remitted to the advowſon, becauſe the iſſue had no action to recover the advowſon before he recovered the mannor whereunto the advowſon was appendant. And ſo it is of all other inheritances regardant, appendant, or appurtenant; a man ſhall never be remitted to any of them before he recontinueth the mannor, &c. whereunto they are regardant, appendant, or belonging.

Britton fol. 126.

Car nul ne poet claimer droit en les appurtenances ne en les acceſſories que nul droit ad en le principall.

[e] Bract. li. 4. f. 243. b.

[e] *Item, excipi poteſt, &c. quamvis jus habeat in tenemento et pertinentiis, primò recuperare debet tenementum ad quod pertinet advocatio, et tunc poſtea præſentet et non ante, et de hâc materiâ in Rotulo de termino Sancti Michaelis, anno regis Henrici tertio in comitatu Norff. de Thomâ Bardolfe.*

8. R. 2. Quare Imp. 199. 2. H. 4. 18. 14. H. 6. 15, 16. 8. H. 6. 17. 33. H. 6. 15. F. N. B. 35. B. & 36 F. 24. E. 3. Diſcont. 16. 33 H. 8. Dier 48. b. (Ant. 324. b. 333. b. Poſt. 363. b.)

But, on the other ſide, if a man be remitted to the principall, he ſhall alſo be remitted to the appendant or acceſſory, albeit it were ſevered by the diſcontinuee, or other wrong doer. And therefore if tenant in taile be of a mannor whereunto an advowſon is appendant, and infeoffeth *A* of the mannor with the appurtenances, *A.* re-infeoffeth the tenant in ta le, ſaving to himſelfe the advowſon, tenant in taile dieth; his iſſue being remitted to the mannor, is conſequently remitted to the advowſon, although at that time it was ſevered from the mannor. So it is in the ſame caſe if tenant in taile had beene diſſeiſed, and the diſſeiſor ſuffer an uſurpation, if the diſſeiſee enter into the mannor, he is alſo remitted to the advowſon.

Sect. 662.

ITEM, ſi terre ſoit taile a un home et a ſa feme, et a les heires de lour deux corps engendres, les queux ont iſſue file, et le feme devy, et le baron prent auter feme, et ad iſſue un auter file, et diſcontinua le taile, et puis diſſeiſie le diſcontinuee et iſſint moruſt ſeiſie, ore le terre diſcen-

ALSO, if land be entailed to a man and to his wife, and to the heires of their two bodies begotten, who have iſſue a daughter, and the wife dieth, and the huſband taketh another wife, and hath iſſue another daughter, and diſcontinue the taile, and after he diſſeiſeth the diſcontinuee and *dera*

(1) III. By what ſir Edward Coke ſays here, and in other parts of this Chapter, it appears, that there is *no remitter to a bare title, to an immediate right, or to a bare right of action, nor in thoſe caſes where the freehold does not accrue to the right.* It is upon the laſt ground, that where tenant in tail makes a diſcontinuance, the iſſue in tail is not remitted; neither is there a remitter to a term for years. Hence, if leſſee for years to commence at a future day enters before that day (which is a diſſeiſin), and continues in poſſeſſion till the term commences, he ſhall not be remitted, for the diſſeiſor acquires by the diſſeiſin an eſtate of freehold; which, tho' it be tortious, the law will not diveſt from him for a term which is of no account. See 2. Roll. Abr. 420. l. 25. Com. Dig. vol. 5. 417, 418, 419, 420.

(2) This ſeems to be altered by the afore-mentioned ſtatute of 7. Ann. c. 18. *Note to the 11th edition.*

dera a les deux files. * *Et en ceſt cas quant al eigne file, que eſt inheritable per force de le tayle, ceo* † *n'eſt un remitter forſque de le moity. Et quant al auter moity, el eſt mis a ſuer ſon action de* formedon *envers ſa ſoer. Car en ceſt cas les deux ſoers ne ſont pas tenants en parcenary, mes ſont tenants en common, pur ceo que ils ſont eins per divers titles. Car l'un ſoer eſt eins en ſon remitter per force de le taile, quant a ceo que a luy affiert; et l'auter ſoer eſt eins quant a ceo que a luy affiert en fee ſimple per le diſcent ſon pier,* ‡ *&c.*

ſo die ſeiſed, now the land ſhal deſcend to the two daughters. And in this caſe as to the eldeſt daughter, who is inheritable by force of the tayle, this is no remitter but of the moitie. And as to the other moitie, ſhe is put to ſue her action of *formedon* againſt her ſiſter. For in this caſe the two ſiſters are not tenants in parcenarie, but they are tenants in common, for that they are in by divers titles. For the one ſiſter is in in her remitter by force of the entaile, as to that which to her belongeth; and the other ſiſter is in as to that to her belongeth in fee ſimple by the diſcent of her father, &c.

CEO n'eſt remitter forſque pur le moitie, &c. Here *Littleton* putteth a caſe where the iſſue in taile ſhall be remitted to a moitie, becauſe but a moity of the land deſcended unto her, and there cannot be any remitter, but for ſo much as commeth to the iſſue by diſcent, or by any other meanes without his folly; and in this caſe by act in law the coparcenary is defeated, for the daughters are in by ſeverall titles, viz. the eldeſt daughter is tenant in taile *per formam doni*, by the remitter of the one moitie; and the youngeſt ſeiſed in fee ſimple by diſcent of the other moitie, againſt whom the other ſiſter in taile may have her *formedon*. (1) 44. E. 3. 26. 19. H. 6. 59. (Plo. 246. a.)

Sect. 663.

EN meſme le manner eſt, ſi tenant en tayle enfeoffa ſon heire apparant en le taile (eſteant l'heire deins age), et un auter jointenant en fee, et le tenant en tayle moruſt; ore l'heire en tayle eſt en ſon remitter quant a l'un moity, et quant a l'auter moitie il eſt mis a ſon briefe de formedon, || *&c.*

IN the ſame manner it is, if tenant in taile enfeoffe his heire apparant in tayle (the heire being within age) and another jointenant in fee, and the tenant in tayle dieth; now the heire entayle is in his remitter as to the one moitie, and as to the other moitie hee is put to his writ of *formedon*, &c.

LE heire, &c. eſt en ſon remitter quant a l'un moitie, &c. (2. Roll. Abr. 41.)

Hereby it appeareth, that albeit joyntenants be ſeiſed *pro indiviſo per my et per tout*, yet each of them hath in judgement of law but a right to a moitie; and therefore the iſſue in taile in this caſe is remitted but to a molty, and is tenant in common but with the other feoffee. And ſo it is if the diſcontinuee, after the death of tenant in tayle, make a charter of feoffment to the iſſue in tayle, being within age, who hath right, and to a ſtranger in fee, and make livery to the infant in name of both; the iſſue is not remitted to the whole, but to the halfe: for firſt he taketh the fee ſimple, and after the remitter is wrought by operation of law, and therefore can remit him but to a moitie. But of this ſufficient hath beene ſaid in the Chapter of Joyntenants. Vide Sect. 288.

Sect.

* *Et* not in L. and M. nor Roh. † *n'eſt—eſt*, L. and M. and Roh. ‡ *&c.* not in L. and M. nor Roh. || *&c.* not in L. and M. nor Roh.

(1) IV. By this and the following Section it appears, that if *part of the eſtate* comes to the right, it is remitted for that part.

Sect. 664.

*ITEM, ſi tenant en taile enfeoffa ſon heire apparant, l'heire eſteant de pleine age al temps de feoffment, et puis le tenant en taile moruſt; ceo n'eſt remitter al heire, pur ceo que il fuit ſa folly, que il eſteant de pleine age voile prendre tiel feoffment, &c. Mes tiel folly ne poit eſtre adjudge en l'heire eſteant deins age * al temps del feoffment, &c.*

ALSO, if tenant in tail enfeoffe his heire apparant, the heire being of full age at the time of the feoffment, and after tenant in taile dieth; this is no remitter to the heire, becauſe it was his folly, that being of full age hee would take ſuch feoffment, &c. But ſuch folly cannot be adjudged in the heire being within age at the time of the feoffment, &c.

(Ant. 171. b. 187. a. 246. a. 337. b. 308. b.) 40. E. 3. 44. 18. E. 4. 25.

BY this feoffment albeit the heire apparent hath ſome benefit in the life of his anceſtor, yet is he thereby (beſides his owne) ſubject during his life to all charges and incumbrances made or ſuffered by his anceſtor. And therefore our author ſaith well, *que il fuit ſon folly que il eſteant de pleine age voile prender tiel feoffment*, but folly ſhall not be judged in one within age in reſpect of his tender yeares, and want of experience.

Sect. 665.

(Ant. 202. b.)

HERE *Littleton* putteth a caſe where the huſband within age by the intermarriage may be remitted, albeit he gaineth but a freehold during the coverture *en auter droit*.

Alſo here is to bee obſerved, that the eſtate which doth in this caſe worke the remitter, could not have continuance after the deceaſe of the wife. And ſo on the other ſide, if the huſband make a diſcontinuance, and take backe an eſtate to him and his wife, during the life of the huſband, this is a remitter to the wife preſently, albeit the eſtate is not by the limitation to have continuance after the deceaſe of the huſband; which caſe is proved by the reaſon of the caſe which our author here putteth. And here our author obſerveth the diverſity when the huſband is within age, and when hee is of full age; for when he is within age, no folly can be adjudged in him, as in this Chapter hath beene often ſaid.

ITEM, ſi tenant en taile enfeoffa un feme en fee, et moruſt, et ſon iſſue deins age prent meſme la feme † a feme; ceo eſt un remitter al enfant ‡ deins age, et la feme donque n'ad rien, pur ceo que le baron et la feme ſont forſque come un perſon en ley. Et en ceſt cas le baron ne poit ſuer briefe de formedon, *ſinon que il voiloit ſuer envers luy meſme, le quel ſerroit enconvenient; et pur cel cauſe la ley adjudgera l'heire en ſon remitter, pur ceo que nul folly poit eſtre || adjudge en luy eſteant deins*

ALSO, if tenant in taile enfeoffe a woman in fee, and dyeth, and his iſſue within age taketh the ſame woman to wife; this is a remitter to the infant within age, and the wife then hath nothing, for that the huſband and his wife are but as one perſon in law. And in this caſe the huſband cannot ſue a writ of *formedon*, unleſſe he will ſue againſt himſelfe, which ſhould bee inconvenient; and for this cauſe the law adjudgeth the heire in his remitter, for that no folly can bee adjudged in him being *deins*

* *&c.* added L. and M. and Roh. † *a feme* not in L. and M. nor Roh. ‡ *deins age* not in L. and M. nor Roh.
|| *adjudge——auelle*, L. and M. and Roh.

*deins age al temps d'eſpouſels, &c. Et ſi l'heire ſoit en ſon remitter per force de le taile, il enſuiſt per reaſon, que la feme n'ad riens, &c. Car entant que le baron et ſa feme ſont come un perſon, la terre ne poit eſtre ſevere per moities; et pur cel cauſe le baron eſt en ſon remitter de l'entiertie. Mes autrement eſt ſi tiel heire fuit de pleine age al temps de les eſpouſels, car donques le heire n'ad riens forſque en droit ſa feme, * &c.*

within age at the time of the eſpouſels, &c. And if the heire bee in his remitter by force of the entaile, it followeth by reaſon, that the wife hath nothing, &c. For inaſmuch as the huſband and wife be as one perſon, the land cannot be parted by moities; and for this cauſe the huſband is in his remitter of the whole. But otherwiſe it is if ſuch heire were of full age at the time of eſpouſels, for then the heire hath nothing but in right of his wife, &c.

Here is alſo to bee noted, that preſently by the marriage within age, the huſband is remitted, and the freehold and inheritance of the wife baniſhed cleane away.

Priſt meſme la feme al feme. Here it is good to be ſeene what things are given to the huſband by marriage. (1) Firſt, it appeareth here by *Littleton*, that if a man taketh to wife a woman ſeiſed in fee [*f*], he gaineth by the intermarriage an eſtate of freehold in her right, which eſtate is ſufficient to worke a remitter, and yet the eſtate which the huſband gaineth dependeth upon uncertaintie, and conſiſteth in privitie [*g*]; for if the wife be attainted of felony, the lord by eſcheat ſhall enter and put out the huſband: otherwiſe it is if the felonie be committed after iſſue had. Alſo, if the huſband be attainted of felonie, the king gaineth no freehold, but a pernancie of the profits during the coverture, and the freehold remaineth in the wife. [*b*] Secondly, if ſhe were poſſeſſed of a terme for yeares, yet he is poſſeſſed in her right; but he hath power to diſpoſe thereof by grant or demiſe; and if he be outlawed or attainted, they are gifts in law.

(4. Rep. 29.)

[*f*] 13. H. 4. 6. Stanf. l. 7. b. 18. E. 4. 5. 11. H. 7. 19. 10. H. 6. 11. 7. H. 6. 9. b.

Vide Sect. 58.

[*g*] 4. Aſſ. p. 4. 4. E. 3. Aſſ. 166.

(1. Rep. 50 a. 1. Roll. Abr. 343, 344. 5. Rep. 17. Hob. 285.)

[*b*] Pl. Com. fol. 260. b. Dame Hale's caſe. 50. Aſſ. 5. 38. H. 6. 23. 21. E. 4. 35. 7. E. 4. 6. 7. H. 7. 2. 10. H. 6. 11.

[***] Upon an execution againſt the huſband for his debt, the ſheriffe may ſell the terme during her life; but the huſband can make no diſpoſition thereof by his laſt will. Alſo, if he make no diſpoſition or forfeiture of it in his life, yet it is a gift in law unto him if he doe ſurvive his wife; but if he make no diſpoſition, and die before his wife, ſhe ſhall have it againe. And the ſame law is of eſtates by ſtatute merchant, ſtatute ſtaple, *elegit*, wardſhips, and other chattels realls in poſſeſſion.

[***] Mich. 26. & 27. Eliz. inter Annor & Lodington in briefe de error adjudge in both Courts. Lib. 8. fol. 96. Mat. Manning's caſe.

But if the huſband charge the chattell reall of his wife, it ſhall not binde the wife if ſhee ſurvive him. If a feme ſole be poſſeſſed of a chattell reall, and be thereof diſpoſſeſſed, and then taketh huſband, and the wife dieth, and the huſband ſurviveth, this right is not given to the huſband by the intermarriage, but the executors or adminiſtrators of the wife ſhall have it; ſo it is if the wife hath but a poſſibilitie.

7. H. 6. fol. 2. (1. Roll. Abr. 346.) Vid. Sect. 58.

In the ſame manner it is if the wife be poſſeſſed of chattels reals *en auter droit*, as executrix or adminiſtratrix, or as gardeine in ſocage, &c. and ſhe intermarrieth, the law maketh no gift of them to the huſband, although he ſurviveth her. In the ſame manner if a woman grant a terme to her owne uſe, taketh huſband, and dieth, the huſband ſurviving ſhall not have this truſt, but the executors or adminiſtrators of the wife [*i*]; for it conſiſteth in privitie: and ſo hath it beene reſolved by the juſtices. Chattels reals conſiſting meerely in action the huſband ſhall not have by the intermarriage, unleſſe he recovereth them in the life of the wife, albeit he ſurvive the wife; as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage, and the like, whereunto the wife was intitled before the marriage.

Pl. Com. fol. 294. Oſborne's caſe, and there fol. 192. b. Wrotesley's caſe.

[*i*] Paſch. 32. Eliz. in Cancellar. in Witham's caſe Hill. 38. Eliz. in Cancell. in Waterhouſe's caſe. Wrotesley's caſe, ubi ſup.

But chattels reals being of a mixt nature, viz. partly in poſſeſſion, and partly in action, which happen during the coverture, the huſband ſhall have by the intermarriage, if hee ſurvive his wife, albeit he reduceth them not into poſſeſſion in her life-time; but if the wife ſurviveth him, ſhe ſhall have them. As if the huſband be ſeiſed of a rent ſervice, charge, or ſeek, in the right of his wife, the rent become due during the coverture, the wife dieth, the huſband ſhall have the arrerages; but if the wife ſurvive the huſband, ſhe ſhall have them, and not the executors of the huſband. So it is of an advowſon, if the church become voyd during the coverture [*k*], he may have a *quare impedit* in his owne name, as ſome hold: but the wife ſhall have it if ſhe ſurvive him; and the huſband, if he ſurvive her: *et ſic de ſimilibus.*

13. E. 3. Quar. Imp. 57. 14. H. 4. 12. 38. E. 3. 35. b. 50. E. 3. 13. 10. H. 6. 11. F. N. B. 121. 22. H. 6. 25. 29. E. 3. 40. 11. R. 2. Account 49. 12. R. 2. Briefe 639 5. E. 3. Execut. 99.

[*k*] 50. E. 3. 13. 28. H. 6. 9. 7. H. 7. 2.

But

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

(1) *On the intereſt which the huſband takes in the chattells real and things in action of his wife.*—Some obſervations have been offered to the reader, in a former part of this work, upon the nature of the eſtate which the huſband takes in his wife's lands of freehold or inheritance. See ante 325. b. note 2. The following obſervations are now ſubmitted to his conſideration, upon the nature of the intereſt which the huſband takes in his wife's chattels real and things in action.—1. *Where the huſband ſurvives the wife:*—At the common law no perſon had a right to adminiſter. It was in the breaſt of the ordinary to grant adminiſtration to whom he pleaſed, till the ſtatute of the 21ſt of Hen. VIII. which gave it to the next of kin; and if there were perſons of equal kin, whichever took out adminiſtration firſt was entitled to the ſurplus. The ſtatute of diſtribution was made to prevent this injuſtice, and to oblige the adminiſtrator to diſtribute. In thoſe caſes where the wife was entitled only to the truſt of a chattel real, or to any choſe in action, or contingent intereſt in any kind of perſonalty, it ſeems to have been doubted, whether, if the huſband ſurvived her, he was entitled to the benefit of it or not. See the commentary above, and 4. Inſt. 87. Roll. Abr. 346. All. 15. Wytham v. Waterhouſe, Cro. Eliz. 466. 8. Rep. in Cha. 37. and Gilb. Ca. in Eq. 234.—By the 22 and 23 Car. II. c. 10. adminiſtrators are liable to make diſtributions; but as the act makes no expreſs mention of the huſband's adminiſtering to his wife, and as no perſon can be in equal degree to the wife with the huſband, he was not held to be within the act. To obviate all doubts upon this queſtion, by the 29 Car. II. c. 3. § 25. it is declared, that the huſband may demand adminiſtration of his deceaſed wife's perſonal eſtate, and recover and enjoy the ſame, as he might have done before the ſtatute of the 22d and 23d of that reign.—Upon the conſtruction of theſe ſtatutes it has been held, that the huſband may adminiſter to his deceaſed wife, and that he is entitled, for his own benefit, to all her chattels real, things in action, truſts, and every other ſpecies of perſonal property, whether actually veſted in her and reduced into poſſeſſion, or contingent, or recoverable only by action or ſuit.—It was, however, made a queſtion after the ſtatute of 29 Car. II. c. 3. § 25. whether, if the huſband, having ſurvived his wife, afterwards died during the ſuſpence of the contingency upon which any part of his wife's property depended, or without having reduced into poſſeſſion ſuch of her property as lay in action or ſuit, his repreſentative, or his wife's next of kin, were entitled to the benefit of it.—But by a ſeries of caſes it is now ſettled, that the repreſentative of the huſband is entitled as much to this ſpecies of his wife's property, as to any other; that the right of adminiſtration follows the right of the eſtate, and ought, in caſe of the huſband's death, after the wife, to be granted to the next of kin of the huſband. See Mr. Hargrave's Law Tracts, 475. And that if adminiſtration *de bonis non* of the wife is obtained by any third perſon, he is a truſtee for the repreſentative of the huſband. See

26. E. 3. 64. 10. H. 6. 11. F. N. B. 121. 22. H. 6. 25. [l] Lib. 4. fol. 51. in Ongel's caſe. Hil. 17. El. Rot. 457. in Com. Banco, Sharp's caſe. 21. E. 4. 4. 21. H. 7. 29. 11. H. 7. 4. 26. H. 8. 7. 43. E. 3. 10. 3. H. 6. 23. 37. 4. H. 6. 5. 14. E. 2. Det. 73. 5. E. 2. Ibid. 169. 30. E. 3. 48. E. 3. 12. 12. R. 3. Bre. 638, 639. 16. E. 4. 8. 16. H. 6. Bre. 939. [m] 43. E. 3. 8. V. 10. H. 6. 11. 39. E. 3. 17.

But if the arrerages had become due, or the church had fallen voyd before the marriage, there they were meerely in action before the marriage; and therefore the husband should not have them by the common law, although he survived her. And so it is of releefes, *mutatis mutandis*. [l] But now by the statute of 32. *H.* 8. *cap.* 37. if the husband survive the wife, he shall have the arrerages as well incurred before the marriage, as after.

But the marriage is an absolute gift of all chattels personals in possession in her owne right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unlesse he and his wife recover them. And of personall goods *en auter droit*, as executrix or administratrix, &c. the marriage is no gift of them to the husband, although he survive his wife. (1)

[m] If an estray happen within the mannor of the wife, if the husband die before seisure, the wife shall have it, for that the propertie was not in the wife before seisure.

But as to personall goods, there is a diversitie worthy of observation betweene a propertie in personall goods (as is aforesaid) and a bare possession; for if personall goods be bailed to a feme, or if she finde goods, or if goods come to her hands as executrix to a bailiffe, and taketh a husband, this bare possession is not given to the husband, but the action of detinue must be brought against the husband and wife.

But now let us heare *Littleton*.

Vide Sect. 87, &c.

Le quel ſerra inconvenient. This argument *ab inconvenienti*, our author hath used in many places.

Sect. 666.

*ITEM, ſi feme ſeiſie de certaine terre en fee prent baron, le quel aliena meſme la terre a un auter en fee, * l'alienee leſſa meſme la terre al baron et ſa feme pur terme de lour deux vies, ſavant le reverſion al leſſor et a ſes heires; en ceſt cas la feme eſt eins en ſon remitter, et el eſt ſeiſie en fait en ſon demeſne come de fee, ſicome el fuit adevant, pur ceo que le repriſel del eſtate ſerra adjudge en ley le fait le baron, et nemy le fait la feme; iſſint nul folly poit eſtre adjudge en la feme, que eſt covert en tiel caſe. Et en ceſt caſe le leſſor n'ad † rien en le reverſion, pur ceo que la feme eſt ſeiſie en fee, ‡ &c.*

(Ant. 350. b.)

ALSO, if a woman seised of certaine land in fee taketh husband, who alieneth the same land to another in fee, the alienee letteth the same land to the husband and wife for terme of their two lives, saving the reversion to the lessor and to his heires; in this case the wife is in her remitter, and she is seised in deed in her demesne as of fee, as shee was before, because the taking backe of the estate shall be adjudged in law the fact of the husband, and not the fact of the wife; so no folly can be adjudged in the wife, which is covert in such case. And in this case the lessor hath nothing in the reversion, for that the wife is seised in fee, &c.

21. E. 3. 26. 29. E. 3. 43. 41. E. 3. Remit. 11. 19. E. 3. Remit. 14. 35. Ass. 12. 38. E. 3. 24. 39. E. 3. 29, 30. 41. E. 3. 17. 46. E. 3. 20. b. 26. E. 3. 69. Vi. Sect. 676. 11. R. 2. Remit. 12. 44. E. 3. 17.

LA feme eſt en ſon remitter. By this it appeareth, that albeit there be no moities betweene husband and wife, yet this is a remitter presently, and standeth not upon the survivor of the wife, as some have thought: for if the estate gained by intermarriage be a sufficient estate to worke a remitter; *à fortiori*, an estate made to the husband and wife shall worke a remitter in the wife. And so it is if tenant in taile infeoffe his issue being within age, and his wife in fee, and dieth; this is a remitter to the issue presently, by the death of tenant in taile; though some have thought the contrarie.

Here

* *et* added L. and M. and Roh. † *aſcun* added L. and M. and Roh. ‡ &c. not in L. and M. nor Roh.

(1) But they shall go to the administrator *de bonis non*; for should they go to the husband, the creditors, legatees, &c. of the deceased would be thereby wronged. *Note to 11th edition.*

Squibb v. Wynne, 1. P. W. 378. Cart v. Reeve, ib. 382.—II. *If the wife survives the husband*:—As to this point, there is a material difference with respect to chattels real, and goods, cattle, money, and other chattels personal. All chattels personal become the property of the husband immediately upon the marriage; he may dispose of them without the consent or concurrence of his wife; and at his death, whether he dies in her life-time or survives her, they belong to his personal representative.—*With respect to her chattels real*, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held, that a disposition of a term of years to a man for his life was such a total disposition of the term, that no disposition could be made of the possible residue of the term, or at least, that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported by Dyer 74. to have been determined by all the judges in a case in the 6th of Edw. VI.—The court of chancery first broke through this rule, and supported such future dispositions when made by way of trust. Their example was followed by the courts of law in Matt. Manning's case, 8. Rep. 94. b. and Lampet's case, 10. Rep. 46. b.—This disposition of the residue of a term, after a previous disposition of the term to a person for his life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years differs from a contingent interest, created by way of remainder.—If a person limits a real estate to *A.* for life, and after the decease of *A.* and if *B.* dies in *A.*'s life-time, to *C.* for a term of years, this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest. Now, if a person marries a woman possessed of, or entitled to, the trust of a present actual and vested interest in a term of years, or any other chattel real, it so far becomes his property, that he may dispose of it during her life; and if he survives her, it vests in him absolutely; but if he makes no disposition of it, and she survives him, it belongs to her, and not to his representatives: nor is he, in this case, entitled to dispose of it from her by will. See Prec. in Chan. 418. Factor v. Samyne, 2. Vern. 270. If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is, such an interest as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may assign it, unless, perhaps, in those cases where the possibility or contingency is of such a nature, that it cannot happen during the husband's life-time. Ante 46. b. 10. Rep. 51. a. Hutt. 17. 1. Salk. 326. But it is an exception to this rule, at least in equity, that if a future or executory interest in a term or other chattel is provided for the wife, by or with the consent of the husband, there the husband cannot dispose of it from the wife; as it would be absurd and unfair in the highest degree that he should be allowed to defeat [his]

Here alſo it appeareth, that no follie in this caſe can be adjudged in a feme covert, for the taking backe of the eſtate ſhall be adjudged in law the act of the huſband.

Note in the caſe of the feme covert, ſhe may be remitted in the life of the diſcontinuor, becauſe ſhe hath a preſent right: but in the caſe of tenant in taile, the iſſue cannot be remitted in the life of the diſcontinuor, becauſe the iſſue hath no right untill his deceaſe.

The Marques of Winch. caſe, ub. ſup. (Hob. 71.)

Sect. 667.

*MES en ceſt caſe ſi le leſſour voile ſuer action de waſt vers le baron et ſa feme, pur ceo que le baron avoit fait waſt, le baron ne poit barrer le leſſor pur monſtre ceo, que le repriſel del eſtate fait a luy et a ſon feme fuit un remitter a ſa feme, pur ceo que le baron eſt eſtoppe a dire ceo * que eſt encounter ſon feoffment, et ſon repriſel demeſne del eſtate pur terme de vie a luy et a ſa feme. Et uncore le leſſor n'ad † un reverſion, pur ceo que le fee ſimple eſt en la feme. Et iſſint home poit veier un matter en ceo caſe, que home ſerra eſtoppe per un matter en fait, coment que nul eſcripture ſoit fait per fait indent ou autrement.*

BUT in this caſe if the leſſor wil ſue an action of waſt againſt the huſband and his wife, for that the huſband hath committed waſt, the huſband cannot barre the leſſor by ſhewing this, that the taking backe of the eſtate to him and to his wife was a remitter to his wife, becauſe the huſband is ſtopped to ſay that which is againſt his owne feoffement, and taking backe of the eſtate for terme of life to him and to his wife. And yet the leſſor hath no reverſion, for that the fee ſimple is in the wife. And ſo a man may ſee one thing in this caſe, that a man ſhall bee ſtopped by matter in fact, though there bee no writing by deed indented, or otherwiſe.

PUR ceo que baron eſt eſtoppe a dire, &c.

Eſtoppe commeth of the French word *eſtoupe*, from whence the Engliſh word ſtopped: and it is called an eſtoppel or concluſion, becauſe a man's owne act or acceptance ſtoppeth or cloſeth up his mouth to alleage or plead the truth: and *Littleton*'s caſe here proveth this deſcription. Li. 2. f. 4. b. Goddard's caſe. V. Sect. 41. & 693. 695. 679. (Poſt. 363. b.)

Touching eſtoppels, which is an excellent and curious kinde of learning, it is to be obſerved, that there be three kinde of eſtoppels, viz. by matter of record, by matter in writing, and by matter *in paiis*. (Cro. Car. 388. 1. Roll. Ab. 865.

[a] By matter of record, viz. by letters patents, fine, recoverie, pleading, taking of continuance, confeſſion, imparlance, warrant of atturney, admittance. [a] 43. Aſſ. 29. 8. H. 4. 7, 8. 22. Aſſ. 54. 15. E. 3. Eſtop. 239. 4. E. 3. ib. 133. (1. Roll. Abr. 862.)

[b] By matter in writing, as by deed indented, by making of an acquittance by deed indented or deed poll, [c] by defeaſance by deed indented or deed poll. [b] 4. H. 4. 1. 8. H. 7. 6. 13. H. 7. 24. 15. E. 4. 28. 41. E. 3. Eſtop. 12. 12. R. 2. ib. 212. [c] 8. R. 2. Eſtop. 283. 35. H. 6. 18. 3. H. 6. 16.

By matter *in paiis*, as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an eſtate, as here in the caſe that *Littleton* putteth; whereof *Littleton* maketh a ſpeciall obſervation, that a man ſhall be eſtopped by matter in the countrey, without any writing. (1) 16. H. 7. 5. 34. H. 6. 19. 14. H. 4. 29. (1. Leo. 82. 158. 4. Rep. 53. 8. Rep. 53, 54.)

To make the reader more capable of the learning of eſtoppels, theſe few rules, amongſt others, are to be knowne.

[d] First, that every eſtoppel ought to be reciprocall, that is, to binde both parties; and this is the reaſon, that regularly a ſtranger ſhall neither take advantage, nor be bound by the eſtoppell: [e] privies in bloud, as the heire; privies in eſtate, as the feoffee, leſſee, &c. privies in law, as the lords by eſcheat; tenant by the curteſie, tenant in dower, the incumbent [d] 33. H. 6. 19. 50. 30. H. 6. 9. 31. E. 3. Eſtop. 240. 33. Aſſ. 18. 30. Aſſ. 51. 14. Aſſ. 9. 18. E. 4. 1. (3. Mod. 141.) [e] 8. Aſſ. 53. Br. Fines, 73. 8. H. 6. 17. 21. E. 3. 35. 38. E. 3. 31. 20. E. 3. Eſtop. 187.

* *que eſt* not in L. and M. nor Roh. † *un——null*, L. and M. and Roh.

(1) The reaſons why eſtoppels are allowed, ſeem to be theſe: No man ought to alledge any thing but the truth for his defence, and what he has alledged once, is to be preſumed true, and therefore he ought not to contradict it; for as 'tis ſaid in the 4. Inſt. 272. *allegans contraria non eſt audiendus*. Secondly, as the law cannot be known till the facts are aſcertained, ſo neither can the truth of them be found out but by evidence; and therefore 'tis reaſonable that ſome evidence ſhould be allowed to be of ſo high and concluſive a nature, as to admit of no contradictory proof. *Note to the 11th edition.*

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his own agreement. But this ſuppoſes the proviſion to be made before the marriage; for if it be made ſubſequent to the marriage, it is a mere voluntary act, and void againſt an aſſignee for a valuable conſideration. 1. Chn. Ca. 225. Lanc. 54. Sir Edward Turner's Caſe, 1. Vern. 7. Pitt v. Hunt, 1. Vern. 18. Walker v. Saunders, 1. Eq. Ca. Abr. 58.——*With reſpect to things in action*, they do not veſt in the huſband, until he reduces them into poſſeſſion. It has been held, that the huſband may ſue alone for a debt due to the wife upon bond, but that if he joined her in the action, and recovered judgment and died, the judgment would ſurvive to her. Oglander v. Baſton, 1. Vern. 396. See Alleyn 36. 2. Lev. 107. & 2. Vez. 677. The principle of this diſtinction appears to be, that his bringing the action in his own name alone, is a diſagreement to his wife's intereſt, and implies it to be his intention that it ſhould not ſurvive to her; but if he brings the action in the joint names of himſelf and his wife, the judgment is, that they both ſhould recover: ſo that the ſurviving wife, not the repreſentative of the huſband, is to bring the *ſcire facias* on the judgment. His bringing the action, therefore, in the joint names of himſelf and his wife, does not, in effect, alter the property, or ſhew it to be his intention that it ſhould be altered. In 3. Atk. 21. Lord Hardwicke is reported to ſay, that, at law, if the huſband has recovered a judgment for a debt of the wife, and dies before execution, the ſurviving wife, not the huſband's executors, is entitled. This appears to be the general principles of the courts of law, reſpecting the intereſt which the huſband takes in, and the power given him over, the things in action of his wife: but the courts of equity have admitted many very nice diſtinctions reſpecting them. 1ſt, a ſettlement made before marriage, if made in conſideration of the wife's fortune, entitles the repreſentative of the huſband dying in his wife's life-time, to the whole of her things in action; but it has been ſaid, that if it is not made in conſideration of her fortune, the ſurviving wife will be entitled to the things in action, the property of which has not been reduced by the huſband in his life-time: ſo, if it is in conſideration of a particular part of her fortune, ſuch of the things in action as are not compriſed in that part, it has been ſaid, ſurvive to the wife. See Cleland v. Cleland, Chn. Prec. 63. 2. Vern. 502. Adams v. Cole, Caſ. Temp. Talbot 168. In the caſe of Blois and the Counteſs of Hereford, 2. Vern. 501. a ſettlement was made for the benefit of the wife, but no mention was made of her perſonal eſtate. Lord-Keeper decreed that it ſhould belong to the repreſentative of the huſband; and ſaid, that in all caſes where there

cumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound and take advantage of estoppels; and that a rebutter is a kinde of estoppell.

[f] 21. E. 4. 4. 23. Ass. 14. 17. H. 6. Estop. 273. 18. E. 3. 30. 7. H. 7. 6. & 16.
[g] 46. E. 3. 33. 29. Ass. 38. Pl. Com. 398.
[h] 35. H. 6. 33. 46. E. 3. 12. 49. E. 3. 14. 8. Ass. 3. 45. Ass. 5. 3. El. Dy. 196. 11 El. ib. 280. 9. H. 6. 60.
[i] 5. E. 4. 7. 8. E. 4. 19. 10. E. 4. 12. 22. E. 4. 38. 32. Ass. 9. 35. H. 6. 20.
[k] 33. H. 6. 16. 4. E. 3. 22. 6. H. 4. 7. 31. E. 1. Gard. 155. F. N. B. 142. E.
[l] 12. H. 7. 4. 20. H. 6. 29. 3. H. 4. 9. 41. E. 3. 4. 11. H. 4. 30.
[m] 2. R. 3. 14. 2. R. 2. Estoppell. 20. 40. E. 3. 21. 12. E. 4. 13. 18. E. 3. 31. 35. 44. E. 3. 45. 17. Ass. 27. 45. E. 3. 2. 21. H. 7. 24. 5. E. 4. 7. 7. E. 4. 19. 3. E. 4. 11. 4. E. 3. 54. 7. E. 6. Br. Estop. 162. 11. H. 4 30. 3 . E. 3. 21. 31. Ass. 14.
[n] 37. Ass. 17. 38. H. 6. 12. 5. El. Dy. 222.
[o] 7. El. Dy. 244.

[f] Secondly, that every estoppell, because it concludeth a man to alleage the truth, must be certaine to every intent, and not to be taken by argument or inference.

[g] Thirdly, every estoppell ought to be a precise affirmation of that which maketh the estoppell, and not be spoken impersonally; as if it be said, *Ut dicitur, quia impersonalitas non concludit, nec ligat: impersonalis dicitur, quia sine personâ.* [h] Neither doth a recitall conclude, because it is no direct affirmation.

[i] Fourthly, a matter alleaged that is neither traversable nor materiall, shall not estoppe.

[k] Fifthly, regularly a man shall not be concluded by acceptance or the like, before the title accrued.

[l] Sixthly, estoppell against estoppell doth put the matter at large.

[m] Seventhly, matters alleaged by way of supposall in counts, shall not conclude after non-suit: otherwise it is after judgement given; and after non-suit, albeit the supposall in the count shall not conclude, yet the barre, title, replication, or other pleading of either partie, which is precisely alleaged, shall conclude after non-suit; and hereby are the bookes reconciled.

Eighthly, where the veritie is apparant in the same record, there the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to alleage the truth, when the truth appeareth of record. [n] If a fine be levied without any originall, it is voydable, but not void; but if an originall be brought, and a *retraxit* entred, and after that a concord is made, or a fine levied, this is void, in respect the veritie appeareth of record. [o] An impropriation is made after the death of an incumbent, to a bishop and his successors; the bishop by indenture demiseth the parsonage for fortie yeares, to begin after the death of the incumbent; the deane and chapiter confirmeth it, the incumbent dieth; this demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent.

[p] Bract. fo. 420. 26. Ass. 64. 39 Ass. 10. 11. H. 4. 84. 7. H. 6. 7. 33. Ass. 5. 11. E. 3. Estop. 259. 21. E. 3. 39. 19. R. 2. Estop. 282. 3. E. 3. ib. 23 33. E. 3. Estop. Stath. Le stat. de 9. H. 6. ca. 11. 30. H. 6. 2. Doct. & Stud. 69. 34. H. 6. 39. 18. E. 4. 1. b. 10. E. 4. 10.

[p] Ninthly, where the record of the estoppell doth run to the disabilitie or legitimation of the person, there all strangers shall take benefit of that record; as outlawrie, excommengement, profession, attainder of *præmunire*, of felonie, &c bastardie, mulieitie, and shall conclude the partie, though they be strangers to the record. *Vide in Littleton cap. Villenage, Sect.* 196, 197, &c. But of a record concerning the name of the person, qualitie, or addition, no estranger shall take advantage, because he shall not be bound by it. But *nota*, reader, that in case of the muliertie *primâ facie*, an estranger shall take benefit of it, &c. But yet because he may be a *mulier* by the ecclesiasticall law, and a bastard by the common law, therefore against such a certificate pleaded, the adverse partie may alleage the speciall matter, and confesse the certificate of the bishop according to the ecclesiasticall law, and alleage further the speciall matter according to the common law, whereunto the adverse partie must answer; and so are the books that treat of this matter to be reconciled. (1) But now let us returne to *Littleton.*

Sect. 668.

MES si en action de wast le baron fait default a le graund distresse, et la feme pria d'estre receive et soit receive, el monstra bien tout le matter, et coment el est en son remitter, et el barrera le lessor de son action, * *&c.*

BUT if in the action of wast the husband make default to the grand distresse, and the wife pray to be received, and is received, shee may well shew the whole matter, and how shee is in her remitter, and shee shall barre the lessor of his action, &c.

(Ant. 192. b.)

LA feme pria d'estre resceive et soit resceive. Receipt, *receptio*, commeth of the Latine verbe *recipere*, so called because the wife, upon the default of her husband, is received as a feme sole alone, without her husband, to defend her right; and it is also called *defensio juris*; and in this case the wife may bee received by the [a] statute: and yet [b] ancient authors who wrote before the statute, doe speake of a kind of receit at the common law. The civilians call resceit, *admissionem tertii pro suo interesse*, which more properly is resembled to the receit of him in the reversion or remainder, that is no part to the writ.

20. E. 1. Defensio juris.

[a] W. 2. ca. 3.
[b] Bract. fo. 393. Mir. lib. 3. cap. Exceptions.

Sect.

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

(1) See note 1. to page 245. a.

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there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there is no agreement for that purpose. See Eq. Ca. Abr. p. 69. 2d, If the husband cannot recover the things in action of his wife but by the assistance of a court of equity, the court, upon the principle that he who seeks equity must do equity, will not give him their assistance to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for; or unless the wife appears in court, and consents to the property being made over to him. 2. P. W. 641. 3. P. W. 12. Tanfield v. Davenport, Tothill 179, 2. Vez. 669. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid the husband, in all cases where she appears in court personally, and consents to it. 2. Vez. 579. It appears to be agreed that the interest is always payable to the husband, if he maintains his wife, 2. Vez. 561. 2.; yet, where the husband receives a great part of the wife's fortune, and will not settle the rest, the court will not only stop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit. 3. Atk. 21. 3d, Volunteers and assignees on a commission of bankruptcy, are, in cases of this nature, subject to the same equity as the husband; and are therefore required by the court, if they apply for its assistance in recovering the wife's fortune, to make a proper provision for her out of it. 2. Atk. 420. Jacobson v. Williams, 1. P. W. 382. But if the husband assigns either the trust term of his wife, or a thing in action for a valuable consideration, the court does not compel the assignee to make a provision for the wife. See sir Edward Turner's Case, 1. Vern. 7. In the case of Pitt v. Hunt, 1. Vern. 18. Lord Chancellor Nottingham expressed great surprize at the determination in sir Edward Turner's case, but he thought himself bound by it. Lord Thurlow, by the manner in which he is reported to have expressed himself in the cause of Worral v. Marlar, and Bushnan v. Pell, (see Mr. Cox's very valuable edition of Peere Williams's Reports, note to page 459, vol. I.) seems to be of the same way of thinking. His lordship there said, " he had considered " the several cases upon this subject, and did not find it any where decided, that if the husband makes an actual assignment by con- " tract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned; " but that a court of equity has much greater consideration for an assignment actually made by contract, than for an assignment by " mere operation of law; for as to the latter, his lordship declared it to be his opinion, that when the equitable interest of the wife

was

Sect. 669.

CAR en chescun cas lou feme est receive pur default son baron, el pledera et avera mesme l'advantage en plee pledant, come el fuissoit feme sole, * *&c. Et coment que l'alienee fist le leas al baron et a sa feme per fait endent, uncore ceo est remitter a la feme. Et auxy, coment que l'alienee rendist mesme la terre al baron et a sa feme per fine pur terme de lour vies, uncore ceo est un remitter al feme, pur ceo que feme covert que prent estate per fine, ne serra my examine per les justices,* † *&c.*

FOR in every case where the wife is received for default of her husband, she shall plead and have the same advantage in pleading, as shee were a woman sole, &c. And albeit that the alienee made the lease to the husband and wife by deed indented, yet this is a remitter to the wife. And also, albeit the alienee rendereth the same land to the husband and his wife by fine for terme of their lives, yet this is a remitter to the wife, because a feme covert which takes an estate by fine, shall not be examined by the justices, &c.

COME el fuissoit feme sole, &c. In this Section foure things are to be understood.

First, when a feme covert is received, that she shall plead as if she were sole. And this is regularly true, yet holdeth not in all cases; [c] for if a feme covert be received in an assise, and plead a record and faile, therefore she shall not be adjudged a disseisor, as shee should be if shee were sole, &c. So if a feme covert onely levie a fine executorie, and a *scire facias* is brought against her and her husband, if shee be received upon the default of her husband, shee shall barre the conusee, which if she had been sole, shee could not doe, and in some other cases.

[c] 37. Ass. 1.

17. Ass. 17. 39. E. 3. 43. 5. E. 3. Voucher 178.

Secondly, that though the estate taken backe be by deed indented, yet that shall not hinder the remitter in case of a feme covert, or an infant.

Thirdly, that though it be by fine *sur render*, yet that shall not hinder the remitter; because a feme covert is not to be examined upon any fine, but when shee and her husband passe some estate or interest, or release her right by a fine of the lands or tenements.

(10. Rep. 43.)

Fourthly, if the husband levie a fine of his wife's lands, and the conusee grant and render the land to the husband and wife, although the wife be not partie to the originall, nor to the conusans, and therefore she ought not by the law to take any present estate but by way of remainder only; yet here it is proved by *Littleton*, that the grant and render *de facto* to the wife *in præsenti* is not void; for then it could not worke a remitter, but voidable by writ of error; and that avoidable estate doth worke a remitter. (1)

Trin. 27. Eliz. inter Owen & Morgan. Rot. 276. in banco communi. Li. 3. fol. 5. the marquesse of Winchester's case. 7. E. 3. 64. 13. E. 3. Voucher 119.

Ne serra my examine per les justices, &c. The examination of a feme covert ought to be secret; and the effect is to examine her, whether shee be content to levie a fine of such lands (naming them particularly and distinctly, and the state that passeth by the fine) of her owne voluntary free will, and not by threats, menaces, or any other compulsorie meanes.

(3. Rep. 5. a.)

Sect. 670.

ET hic nota, que quant ascun chose passera de la feme que est covert de baron per force

AND here note, that when any thing shall passe from the wife which is covert of a husband by *il'un*

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

† *&c.* not in L. and M. nor Roh.

(1) V. From this passage, and others mentioned both by Littleton and Coke, it appears to be a general rule, that *the remitter shall take effect, though the estate which made the remitter is voidable*; as if it be taken from an infant, a feme covert, or upon condition. See Com. Dig. vol. 5. 415.

" was transferred to the creditor of the husband by mere operation of the law, he should exactly be in the place of the husband, and " was subject precisely to the same equity in respect of the wife." 4th, But notwithstanding the uniform and earnest solicitude of the courts of equity to make some provision for the wife out of her fortune, in those cases where the husband, or those claiming under him by act of law, cannot come at it, without the assistance of the courts, still it does not appear that they have ever interfered to prevent its being paid the husband, or to inhibit him from recovering it at law. 2. Atk. 420. In Cha. Prec. 414. it is observed, that if the trustees pay the wife's fortune, it is without remedy. 5th, Money due upon a mortgage is considered as a thing in action. It seems to have been formerly understood, that as the husband could not dispose of lands mortgaged in fee without the wife, the estate remaining in the wife carried the money along with it to her and her representatives; but that as the husband had the absolute power of a term of years, there was nothing to keep a mortgage debt, secured by a term, from going to the husband's representatives; but this distinction no longer prevails; and it is now held, that though, in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt. See Boswell v. Brander, 1st Peere Williams 458. Bates v. Dandy, 2. Atk. 207. 6th, If baron and feme have a decree for money in the right of the feme, and then the baron dies, the benefit of the decree belongs to the feme, and not to the executor of the husband. This was certified by Hyde chief-justice, and his certificate confirmed by lord chancellor, Michaelmas, 15. Car. II. Manners v. Martin, 1. Cha. Ca. 27. If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration: so if a judgment be given in trust for a feme sole, who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent. 3. Peere Williams 200.

d'un fine : ficome le baron et la feme fefont un conufance de droit a un auter, &c. ou fefoyent un grant et render a un auter, ou releffent per fine a auter, et fic de fimilibus, *lou le droit del feme pafferoit del feme per force de mefme le fine ; en touts tielx cafes la feme ferra examine devaunt que la fine foit accept, pur ceo que tiels fines concluderont tiels femes coverts a touts jours,* * *&c. Mes lou riens eft move en le fine forfque tantfolement que le baron et la feme preignont eftate per force de mefme le fine, ceo ne concluder la feme ; pur ceo que en tiel cas el jammes ne ferra my examine,* † *&c.*

force of a fine : as if the hufband and wife make conufance of right to another, &c. or make a grant and render to another, or releafe by fine unto another, *et fic de fimilibus,* where the right of the wife fhall paffe from the wife by force of the fame fine ; in all fuch cafes the wife fhall be examined before that the fine be taken, becaufe that fuch fines fhall conclude fuch femes coverts for ever. But where nothing is moved in the fine but onely that the hufband and wife doe take an eftate by force of the faid fine, this fhall not conclude the wife ; for that in fuch cafe fhe fhall not be at all examined, &c.

QUANT afcun chofe paffera de la feme covert, &c. per force d'un fine, &c. And of this opinion is [*d*] *Littleton* in our bookes.

[*d*] 15. E. 4. 28. 24. E. 3. 31. 42. E. 3. 6. 3. H. 6. 42. 20. E. 3. tit. Cui in vita 10.

[*] 29. E. 3. 43. 46. E. 3. 5.

* Therefore if the hufband and wife be tenants in fpeciall tayle, and they levie a fine at the common law, and after the hufband and wife take backe an eftate to them and their heires ; in this cafe the eftate tayle is not barred ; and yet againft a fine levied by her felfe fhe cannot be remitted, becaufe thereupon fhe was examined : but in that cafe if the land defcend to her iffue, he fhall be remitted. (1)

X But according to Sir Geo. Beaumont's case, 9. Co. 138. b. if husb. & wife levies a fine with proclamations according to the stat. of 4. Hen. 7. & 32. Hen. 8. it will bar the issue though the wife survives.

Sect. 671.

ITEM, fi tenant en taile difcontinua le taile, et ad ‡ *iffue file, et moruft, et la file efteant de pleine age prent baron, et le difcontinuee fait un releas de ceo al baron et a fa feme pur terme de lour vies, ceo eft un remitter al feme, et la feme eft eins per force de le taile,* caufâ quâ fupra.

ALSO, if tenant in taile difcontinue the taile, and hath iffue a daughter, and dieth, and the daughter being of full age taketh hufband, and the difcontinuee make a releafe of this to the hufband and wife for terme of their lives, this is a remitter to the wife, and the wife is in by force of the taile, *caufâ quâ fupra, &c.*

ET la feme efteant de plein age prent baron, &c. Here it appeareth, that her full age when fhe tooke baron is not materiall; but her coverture at the taking backe of the eftate. And fo note a diverfitie betweene a remitter and a difcent : for if a woman be diffeifed, and being of ful age taketh hufband, and then the diffeifor dieth feifed, this difcent fhall binde the wife, albeit fhe was covert when the difcent was caft, becaufe fhe was of full age when fhe tooke hufband, as appeareth before in the Chapter of Difcents. But albeit the wife that hath an ancient right, and being of full age, taketh a hufband, and the difcontinuee letteth the land to the hufband and wife for their lives, this is a remitter to the wife ; for remitters to ancient rights are favoured in law.

(Ante 246.)

Sect.

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

(1) Since Littleton wrote, feveral ftatutes have been paffed, which have given rife to a great extenfion of the doctrine refpecting alienations by hufbands of their wives eftates. Thefe are chiefly the ftatutes of the 4. H. 7. refpecting the force and effect of fines, the 27. H. 8. for transferring ufes into poffeffion, and the 32. H. 8. for preferving the eftates of wives againft the alienations of their hufbands. The reader will find the effect of thefe ftatutes upon the doctrine of remitter, inveftigated in a very copious and mafterly manner in lord chief-juftice Hobart's account of his argument on giving judgment in the cafe of Duncomb v. Wingfield. See Ho. Rep. page 254.

Sect. 672.

*ITEM, ſi terre ſoit done a le baron et a ſa feme, aver et tener a eux et a les heirs de lour deux corps engendres, et puis le baron aliena la terre en fee, et reprent eſtate a luy et a ſa feme pur terme de lour deux vies; en ceſt cas il eſt remitter en fait a le baron et a ſa feme, maugre le baron. Car il ne poit eſtre un remitter en ceſt cas a la feme, ſinon que ſoit un remitter a le baron, pur ceo que le baron et ſa feme ſont tout un meſme perſon en ley, coment que le baron eſt eſtoppe de claymer. * Et pur ceo, ceo eſt un remitter en luy enconter ſon alienation et ſon repriſel demeſne, come eſt dit adevant †.*

ALSO, if land be given to the husband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten, and after the husband alien the land in fee, and take backe an estate to him and to his wife for terme of their two lives; in this case this is a remitter in deed to the husband and to his wife, mauger the husband. For it cannot be a remitter in this case to the wife, unlesse it be a remitter to the husband, because the husband and wife are all one same person in law, though the husband be stopped to claime it. And therefore this is a remitter against his owne alienation and repriſel, as is said before.

(Hob. 260.)

HERE it appeareth, that the husband against his owne alienation, if he had taken the estate to him alone, could not have beene remitted. But when the estate is made to the husband and wife, albeit they be but one person in law, and no moities betweene them; yet for that the wife cannot be remitted in this case, unlesse the husband be remitted also, and for that remitters, as hath beene often said, are favoured in law, because thereby the more antient and better rights are restored againe; therefore in this case, in judgement of law, both husband and wife are remitted; which is worthy of great observation.

(Hob. 255.)

Sect. 673.

ITEM, ſi terre ſoit done a un feme en taile, le remainder a un auter en tayle, le remainder a le tierce en tayle, le remainder al quart en fee, et la feme prent baron, et le baron diſcontinua la terre en fee; per cel diſcontinuance touts les remainders ſont diſcontinues. Car ſi la feme deviaſt ſans iſſue, ceux en le remainder n'averont aſcun remedie forſque de ſuer lour briefes de forinedon *en le remainder,*

ALSO, if land be given to a woman in taile, the remainder to another in taile, the remainder to the third in taile, the remainder to the fourth in fee, and the woman taketh husband, and the husband discontinue the land in fee; by this discontinuance all the remainders are discontinued. For if the wife die without issue, they in the remainder shall not have any remedie but to sue their writs of *formedon* in the remainder, when *quant*

* *Et pur ceo* not in L. and M. nor Roh.

† *&c.* added L. and M. and Roh.

quant il avient a lour temps. Mes ſi apres tiel diſcontinuance, eſtate ſoit fait a le baron et ſa feme pur terme de lour deux vies, ou pur terme d'auter vie, ou auter eſtate, &c. pur ceo que ceo eſt un remitter al feme, ceo eſt † auxy un remitter a touts ceux en le remainder: Car apres ceo que la feme que eſt en ſon remitter moruſt ſans iſſue, ceux en le remainder poyent enter, &c. ſans aſcun action ſuer, &c. En meſme le maner eſt de ceux que oiunt la reverſion apres tiel tailes ‡.*

it comes to their times. But if after ſuch diſcontinuance, an eſtate be made to the huſband and wife for terme of their two lives, or for terme of another man's life, or other eſtate, &c. for that this is a remitter to the wife, this is alſo a remitter to all them in the remainder. For after that that the wife which is in her remitter be dead without iſſue, they in the remainder may enter, &c. without any action ſuing, &c. In the ſame manner is it of thoſe which have the reverſion after ſuch entailes.

41. E. 3. 17. 41. Aſſ. 1. 36. Aſſ. p. 4.

LITTLETON having ſpoken of remitters to the iſſue in taile, who is privie in bloud, and to the wife, who is privie in perſon, now he ſpeaketh of remitters to them in reverſion or remainder expectant, upon an eſtate taile, who are privie in eſtate. And this caſe proveth that the wife is remitted preſently; for the equitie of the law requireth, that as the diſcontinuance of the eſtate in taile is a diſcontinuance of the reverſion or remainder; ſo, that the remitter to the eſtate in taile, ſhould be a remitter to them in the reverſion or remainder.

44. Aſſ. p. 15. 44. E. 3. 30. (2. Roll. Ab. 421. 3. Cro. 145. W. Jones, 199.) 20. E. 3. Aid. 29.

Tenant for life the remainder to *A.* in taile, the remainder to *B.* in fee, tenant for life is diſſeiſed, a collaterall anceſtor of *A.* releaſeth with warrantie and dieth, whereby the eſtate taile is barred; the tenant for life re-entreth, the diſſeiſor hath an eſtate in fee ſimple determinable upon the ſtate taile, and the remainder of *B.* is reveſted in him; and ſo note in this caſe the eſtate for life and the remainder in fee are reveſted and remitted, and an eſtate of inheritance left in the diſſeiſor. If a fine be levied *ſur grant et render* to one for life or in taile, the remainder in fee, if tenant for life, or in taile, execute the eſtate for life or in taile, this is an execution of the remainder.

Vid. Pl. Com. 489. Nichol's caſe, & fol. 553. in Walſingham's caſe. 17. Eliz. Dier, 344. 25. E. 3. 48. tit. Reſceit. 28. 49. E. 3. 16.

A gift in taile is made to *B.* the remainder to *C.* in fee, *B.* diſcontinueth and taketh backe an eſtate in taile, the remainder in fee to the king by deed inrolled; tenant in taile dieth, his iſſue is remitted, and conſequently the remainder, as *Littleton* here ſaith; and the diverſity is [*a*] betweene an act in law, for that may deveſt an eſtate out of the king, and a tortious act, or entry, or a falſe and a feined recovery againſt tenant for life or in taile, which ſhall never deveſt any eſtate, remainder, or reverſion out of the king. [*b*] But a recovery by good title againſt tenant for life, or in taile, where the remainder is to the king by defeaſible title, ſhall deveſt the remainder out of the king, and reſtore and remit the right owners. (1)

[*a*] Seignior Stafford's caſe, lib. 8. fol. 76. b.
[*b*] Cholmley's caſe, lib. 2. 53. 7. R. 2. Aide le Roy, 61. 22. E. 3. 7.

Sect. 674, 675.

(5. Rep. 85. 2. Inſt. 350. 11. Rep. 62.)

FEINT et faux action, 1. *Actio ficta et falſa*, but hereof *Littleton* ſpeaketh himſelfe in this Chapter.

[*c*] W. 2. cap. 4.

(Ant. 331. b.)

Quod ei deforceat, is a writ that is given by [*c*] ſtatute to any tenant for life or in tayle upon a recovery by default againſt them in a *præcipe*, and lyeth againſt the

ITEM, ſi home leſſa un meaſe a un feme pur terme de ſa vie, ſavant le reverſion al leſſour, et puis un ſuiſt un feint et faux action envers la feme, et recoveraſt le meaſe envers luy per default, iſſint que

ALSO, if a man let a houſe to a woman for terme of her life, ſaving the reverſion to the leſſor, and after one ſue a feyned and falſe action againſt the woman, and recovereth the houſe againſt her by default, ſo as the *la*

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

(1) VI. Thus it may be laid down as another general rule, that a remitter *to the particular eſtate, is a remitter to him in the reverſion or remainder.* See Com. Dig. vol. 5. 417.

la feme puit aver envers luy un quod ei deforceat, *ſolonque le ſtatute de Weſtm.* 2. *ore le reverſion le leſſor eſt diſcontinue, iſſint que il ne poit aver aſcun action de waſt. Mes en ceſt caſe ſi la feme prent baron, et celuy que recoveraſt leſſa le meaſe al baron et a ſa feme pur terme de lour deux vies, la feme eſt eins en ſon remitter per force del primer leaſe.*

woman may have against him a *quod ei deforceat*, according to the ſtatute of Weſtm. 2. now the reverſion of the leſſor is diſcontinued, ſo that he cannot have any action of waſte. But in this caſe if the woman take huſband, and he which recovereth let the houſe to the huſband and his wife for terme of their two lives, the wife is in her remitter by force of the firſt leaſe.

Sect. 675.

*ET ſi le baron et la feme font waſt, le primer leſſor avera envers eux breve de waſt, pur ceo que entant que la feme eſt en ſon remitter, il eſt remiſe a ſon reverſion. Mes ſemble en ceſt cas, ſi celuy que recoveraſt per le faux action, voile porter auter briefe de waſt envers le baron et ſa feme, le baron n'ad auter remedy envers luy, mes de faire default a la graund diſtres, &c. et cauſer la feme d'eſtre receive, et de pleder cel matter envers le ſecond leſſor, et monſtrer coment l'action per que il recoveraſt fuit faux et feint en ley, &c. iſſint le feme poit * luy barrer, &c.*

AND if the huſband and wife make waſte, the firſt leſſor ſhall have a writ of waſt againſt them, for that inaſmuch as the wife is in her remitter, he is remitted to his reverſion. But it ſeemeth in this caſe, if hee that recovereth by the falſe action, will bring another writ of waſte againſt the huſband and his wife, the huſband hath no other remedie againſt him, but to make default to the grand diſtreſſe, &c. and cauſe the wife to be received, and to plead this matter againſt the ſecond leſſor, and ſhew how the action wherby hee recovered was falſe and fained in law, &c. ſo the wife may bar him.

recoveror and his heires, in which caſe the particular tenant was without remedie at the common law, becauſe hee could not have a writ of right. And it is called a *quod ei deforceat*, for that they are part of the words of that writ, viz. *Præcipe A. quod, &c. reddat B. unum meſuagium, &c. quod clamat eſſe jus et maritagium ſuum, et quod idem* A. *ei injuſtè deforceat.*

Bracton lib. 4. 367. Fleta lib. 5. cap. 28. & li. 6. cap. 14. 7. E. 3. 62. F. N. B. 155. (6. Rep. 8. b.)

(Cro. Jac. 292. Cro. Car. 278. 414.)

Recoveraſt, &c. per default. There hath beene a queſtion in our bookes upon theſe words (by default): as for example, whether a recoverie had by default in an action of waſte againſt tenant in dower, or by the courteſie, a *quod ei deforceat* lyeth by the ſaid ſtatute. And divers hold opinion, that in that caſe no *quod ei deforceat* lieth, for that judgement is not given by default; for notwithſtanding the default, there goeth out a writ to enquire *de vaſto facto, et quod vaſtum prædictum* A. (*le defendant*) *fecit*; ſo as the defendant may give evidence, and the jurors may finde for the defendant, that no waſte was done: as in the aſſiſe albeit it bee awarded by default, yet may the tenant give evidence, and the recognitors of the aſſiſe may finde for the tenant; and therefore in thoſe caſes, the defendant or tenant *non amittit per defaltam*, as the ſtatute and *Littleton* ſpeaketh, and they cite *F. N. B.* in the point. (1)

(F. N. B. 155. b.)

W. 2. cap. 4.

F. N. B. fol. 155. E.

Secondly, they hold that a *quod ei deforceat* lieth where the tenant can have no remedie by attaint; but in this caſe (ſay they) an attaint doth lie.

2. H. 4. 2. 21. H. 6. 56. 41. E. 3. 8. 3. H. 6. 29. 22. E. 3. 19.

Thirdly, they hold, that in an action of waſte, although it be brought againſt a tenant in dower, or tenant by the courteſie that have a freehold, yet the dammages are the principall; for they were recoverable againſt tenant in dower and by the courteſie by the common law; and the ſtatute of *Gloceſter* gave the

(8. Rep. 85.)

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

(1) *Co. MSS. 215. p. 33. Eliz. Elmer v. Thackers. The caſe was this. Elmer and his wife, tenant in dower, brought* quod ei deforcent verſus *W. Thacker, who pleaded, that* 30. *Eliz. he brought waſte againſt the demandants who appeared, and upon* nihil dicit *W. Thacker recovered damages and had judgment. The demandants replied,* null wall fait. *The tenant demurred in law; and theſe points were moved, 1ſt, Whether* quod ei deforceat *lies upon recovery by default againſt tenant in dower in waſte. 2d, Admitting that it does, whether* quod ei deforcent *lies upon the recovery by* nihil dicit, *as this caſe is. As to the ſecond point, the whole court reſolved clearly, that* quod ei deforceat *does not lie; for in as much as the judgment upon* nihil dicit *is after appearance, there the default is not the cauſe of the judgment; and the ſtatute ſays,* per defaltam: *and for this reaſon judgment was given againſt the demandant, as appears afterwards in page* 356. *But as to the 1ſt point it was objected, that* quod ei deforceat *does not lie upon default of tenant in dower in waſte, as is the caſe here; for if it ſhould lie in this caſe, he ſhall avoid the verdict of twelve men, which was not the intention of the ſtatute, but only to relieve the tenant where he makes default; therefore, in as much as the tenant, notwithſtanding the default, might give evidence to the jury, then every perſon in policy might make default, if afterwards he might prevail upon evidence to have* quod ei deforcent: *and the reaſon of F. N. B. is, that the verdict has found waſte. 2. Hen. 2. If in waſte the jury find falſely, attaint lies, and 21 Hen. 6. 56. 34 Hen. 6. 12.; ſo where the aſſiſe is awarded for default, yet the tenant may have attaint, if it be found againſt him by falſe oath. 17 Ed. 2. Attaint* 89. *34 Hen. 6. 7. Prior recovers in waſte, and has a writ of enquiry in waſte, and the ſheriff returns the waſte* 20 *marks, and awards that he ſhall recover the place waſted, and treble damages, and that he ſhall have execution for the damages immediately,* licet ceſſet *execution for the thing waſted till the colluſion ſhould be enquired into, therefore the damages are the principal; for it is no where found that execution ſhould be awarded of the acceſſory before the principal: and for this reaſon, 12 Rich. 2. Eſtrepement 6. judgment ſhall not be given in the eſtrepement, becauſe it is only the acceſſory, until judgment ſhall be given in the principal plea. And in Elmer's caſe, ante* 355. *it was reſolved, that this writ lies upon recovery by default in waſte againſt tenant in dower, or any other tenant for life.*—Lord Nott. MSS.

(7. Rep. 68. b.)
[d] 34. H. 6. 7. 40. E. 3. 37. & 38. E. 3.
[e] 9. H. 5. 15.
30. H. 6. tit. Bar. 59.

the place waſted but for a penaltie, ſo as the nature of the action (ſay they) remaineth ſtill to bee perſonall, for that the dammages are the principall; [d] and in proofe hereof they cite divers authorities in law. And if two bring an action of waſte, the releaſe of one of them is a good barre againſt the other, [e] and ſo reſolved by the whole court; which proveth (ſay they) that the dammages are the principall: for if the land were the principall, the releaſe of one of them ſhould not barre the other, no more than in an aſſiſe, a writ of ward, an *ejectione firmæ*, &c.

Laſtly, they ſay, that in actions where dammages are to be recovered, and the land is the principall, the demandant never counteth to dammages, and yet ſhall recover them: but in an action of waſte the plaintiffe counteth to his dammage; and if the dammages be the principall, then cleerely no *quod ei deforceat* lieth.

[*] 17. E. 3. 58. 29. E. 3. 42. F. N. B. 98. b. 12. H. 4. 4. 19. E. 2. Diſceit 56. W. 2. cap. 3. 3. H. 4. fol. 1.
W. 2. ca. 3. 9. E. 4. 16.

Others doe hold the contrarie: and as to the firſt they ſay, that albeit that in the writ of waſte, judgement is not only given upon the default, yet the default is the principall, and the cauſe of awarding of the writ to enquire of the waſte as an incident thereunto: and the law alwayes hath reſpect to the firſt and principall cauſe; and therefore upon ſuch a recoverie [*] a writ of deceit lieth; and that writ lieth not but where the recoverie is by default. So in an action of waſte againſt the huſband and wife, upon the default of the huſband, the wife ſhal be received; and yet the ſtatute there ſpeaketh alſo, *per defaltam*. So upon ſuch a recoverie in waſte againſt the baron and feme by default, the wife ſhall have a *cui in vitâ* by the ſtatute; and it ſpeaketh where the recoverie is *per defaltam*. And albeit the defendant may give in evidence, if he knoweth it; yet when he makes default, the law preſumeth he knoweth not of it, and it may be that he in truth knew not of it; and therefore it is reaſon, that ſeeing the ſtatute, that is a beneficiall ſtatute, hath given it him, that he be admitted to his *quod ei deforceat*, in which writ the truth and right ſhall be tried. And ſo it is of a recoverie by default in an aſſiſe; albeit the recognitors of the aſſiſe give a verdict, a *quod ei deforceat* lieth. And all this as to this point was reſolved by the whole court of common pleas; and ſo the doubt in 41. *E.* 3. 8. well reſolved. *Nota*, if tenant for life make default after default, and he in the reverſion is received and plead to iſſue, and it is found by verdict for the demandant, the default and the verdict are cauſes of the judgement; and yet the tenant ſhall have a *quod ei deforceat*.

41. E. 3. 8. b. 2. H. 4. 2. 21. H. 6. 56. 44. E. 3. 42. Br. tit. quod ei deforc. 4. Paſch. 33. El. Rot. 1125. inter Ed. Elmer & El. ſa ſeme, ten. en dower demandants, & Wil. Thacker ten. in quod ei deforceat. (Cro. Eliz. 263.)

As to the ſecond objection, that the defendant may have an attaint. Firſt it was utterly denied of the other part, [f] that an attaint did lie in this caſe; for though it be taken by the oath of twelve men, yet it is but an enqueſt of office, whereupon no attaint did lye on either partie, as upon an enquirie of colluſion, although it be by one jurie, nor upon a verdict of *quale jus*. Secondly, admitting that an attaint did lie in that caſe, yet it followeth not *ex conſequenti*, that a *quod ei deforceat* did not lie; [g] for if an aſſiſe bee taken by default, a *quod ei deforceat* doth lie; and yet the partie may have an attaint; for this is no enqueſt of office, but a recognition by the recognitors of an aſſiſe, who were returned the firſt day, and not returned upon the awarding of the aſſiſe by default. And as to the ſecond objection, of this opinion was the whole court in *Edward Elmer*'s caſe above mentioned. As to the third objection, that the dammages ſhould bee the principall, becauſe they were at the common law; that is an argument (ſay the other ſide) that they are more antient, but not that they are more principall; and treble dammages were not at the common law (for the common law never giveth more dammage than the loſſe amounteth unto), but are given by the ſtatute of *Gloceſter*; but the place waſted is worthier being in the realtie, than dammages that be in the perſonaltie: *Et omne majus dignum trahit ad ſe minus dignum, quamvis minus dignum ſit antiquius et à digniori debet fieri denominatio.* And it is confeſſed, that in an action of waſte againſt tenant for life, or for yeares, the place waſted is the principall, becauſe the ſtatute of *Gloceſter* doth give the place waſted and treble dammages at one time; for no prohibition or action of waſte lay againſt them at the common law; and in an action of waſte, if the defendant confeſſe the action, the plaintiffe may have judgement for the place waſted, and releaſe the dammages; which proveth (and ſo *Fitzherbert* collecteth) that the dammages are not the principall; for a man ſhall never releaſe the principall, and have judgement of the acceſſorie: and an action of waſte againſt tenant for life, is as reall as an action againſt tenant in dower. And as to the caſe of 9. *H.* 5. cited on the other ſide, it was anſwered, that it was an action in the *tenuit*, which is only in the perſonaltie, and then the releaſe of the one doth bar both; neither could ſummons and ſeverance lie in that caſe; [b] but in an action of waſte (in the *tenet*), either againſt tenant for life or for yeares, the releaſe of the one doth not barre the other; and in both thoſe caſes ſummons and ſeverance doth lie: and this point was alſo reſolved accordingly in *Edward Elmer*'s caſe. But when theſe three points were reſolved by the court for the demandant, then the councell of the tenant moved in arreſt of judgement another point, viz. that the judgement was given upon a *nihil dicit*, which is alwayes after appearance, and not *per defaltam*; and thereupon judgement was ſtayed. (1)

[f] 33. E. 3. quod ei deforc. Pl. ult. F. N. B. 156. V. Flet. l. 5. c. 21 48. E. 3. 19. 40. Aſſ. 23. 33. H 6. 25. 39. H. 6. 1. F. N. B. 107.
[g] 17. E. 2. Attaint 69. 21. H. 6. 56. 34. H. 6. 12.

(1. Cro. 414. Mo. 184. F. N. B. 107. c. 6. Rep. 8. b. 11. Rep. 5.)

[b] 6. E. 3. 47. 48. E. 3. 19.

(2. Rep. 68. b. Ant. 139. a. 286. a.)

34. H. 6. 7. Waſt 50.

10. Rep. 115. 1. Leo. 297. 6. Rep. 44.)

But

(1) Sir Edward Coke, in his commentary on the ſtatute of Glouceſter, 2. Inſt. 286. obſerves, that regularly in perſonal and mixed actions damages were to be recovered at the common law; but that in real actions no damages were to be recovered at the common law, becauſe the court could not give the demandant that which he demanded not; and the demandant in real actions demands no damages either by writ or count. The aſſiſe was a mixed action; and therefore if upon the trial the demandant made out his title, his ſeiſin, and his diſſeiſin by the tenant, he had judgment to recover his ſeiſin and his damages for the injury ſuſtained. But the damages in theſe caſes were awarded againſt the diſſeiſors only, and not againſt their alienees or tenants. The ſtatute of Marlbridge, 52. Hen. III. c. 16. gave damages in a writ of mortauncеſtor againſt the chief lord. The ſtatute of Glouceſter, 6. Ed. I. was a conſiderable extenſion of the law of damages. It ordained, that if the diſſeiſor ſhould alien the lands, and ſhould not have whereof damages might be levied, the perſon into whoſe hands the tenements came ſhould be charged with the damages, ſo that each ſhould anſwer for the time he held them; that the diſſeiſee ſhould recover damages on a writ of entry *ſur diſſeiſin* againſt him who was found tenant againſt the diſſeiſor; that damages ſhould for the future be recovered in a writ of mortauncеſtor, as in one of novel diſſeiſin; and alſo in writs of coſinage, aiel, and beſaiel; and generally, that damages ſhould in all caſes be rendered where the land was recovered againſt a man upon his own intruſion, or his own act. The ſtatute then mentions, that till that time damages had been taxed only to the value of the iſſues of the land: it was therefore provided, that a demandant in future ſhould recover the coſts of the writ purchaſed, together with the damages, not only in the above inſtances, but generally in caſes where he was entitled to recover damages. Tho' this ſtatute only mentions the coſts of the writ, the conſtruction of it has been extended to the whole expence of carrying on the ſuit. Before this ſtatute the juſtices in eyre uſed, where the plaintiff obtained a verdict, to compute the expences of the ſuit, and in aſſeſſing damages, aſſeſſed a ſum ſufficient to ſatisfy that expence, as well as the damages. The ſtatute of Marlbridge gave coſts in particular caſes to the defendant; ſo that it is a miſtake to ſay, that the ſtatute of Glouceſter was the firſt ſtatute by which coſts were given. See Sayer's Law of Coſts, p. 3. The general law of coſts ſtill reſts on the ſtatute of Glouceſter; ſo that where coſts were not recoverable before that ſtatute, they are not recoverable now, unleſs in thoſe caſes where they have been given by ſome ſubſequent ſtatute.

But to returne to *Littleton*. Here he openeth a ſecret of law; for the cauſe of this remitter is, for that the tenant for life in this caſe might have a *quod ei deforceat*, for ſo *Littleton* ſaith: *iſſint que il poit aver quod ei deforceat*: Now it appeareth by our bookes, that the tenant for life at the common law was remedileſſe, becauſe he could not have (as hath beene ſayd) a writ of right; and conſequently the feme covert in this caſe could not bee remitted by the taking of an eſtate to her huſband and her, becauſe her right was remedileſſe, and could have no action. But when an act of parliament or a cuſtome doth alter the reaſon and cauſe thereof, thereby the common law it ſelfe is altered, if the act of parliament and cuſtome be purſued; for *Alteratâ cauſâ et ratione legis, alteratur et lex, et ceſſante cauſâ ſeu ratione legis ceſſat et lex*: as in this caſe the ſtatute of *W.* 2. giving remedie to this feme tenant for life, in this it giveth her abilitie to bee remitted, becauſe her right is not now remedileſſe, but ſhee hath an action to recover it. (8. Rep. 62. 356. F. N. B. 155. b. 2. Inſt. 350.)

Vide for the caſes upon this ground; 14. H. 7. 11. per Fineux: 27. H. 8. 4. b. Aid. 35. H. 6. Gard. 72. 29. E. 3. 5. per Wilbie Cuſtome. Lib. 3. fol. 86. Juſtice Windham's caſe, a. & b.

And *Littleton* warily putteth his caſe, that the recoverie was had againſt the feme while ſhe was ſole; for there was a time when it was a queſtion, whether a recoverie beeing had by default againſt the huſband and wife, (the wife being tenant for life) the ſaid ſtatute gave a *quod ei deforceat* to the huſband and wife, for that the ſtatute gave it againſt tenant in dower and tenant for life, &c. and here the huſband is not tenant for life, but ſeiſed in the right of his wife, and therefore out of the ſtatute: and of this opinion is one [*g*] booke; but (*Apices juris non ſunt jura, et parùm differunt quæ re concordant*) the contrarie hath beene adjudged, and ſo that point is now in peace: and the like in caſe of receit for him in reverſion. But if the huſband and wife loſe by default, and the huſband die, the wife ſhall not have a *quod ei deforceat*; for a *cui in vitâ* is given to her in that caſe by a former ſtatute, viz. *W.* 2. *cap.* 3. Theſe things are worthy of due obſervation, and points of excellent learning; and *Littleton* in our bookes ſpeakes of another kinde of *quod ei deforceat* at the common law, upon a diſſeiſin, which you may read. But now let us heare him in his booke.

[*g*] 4. E. 3. 38. 33. E. 3. Avowrie 255. 5. E. 3. 4. F. N. B. 156. a. 5. E. 3. 5. 2. E. 4. 13. F. N. B. 156. C. 33. H. 6. 46. 2. E. 4. 11. 19. E. 4. 2.

Le reverſion eſt diſcontinue, iſſint que il ne poit aver action de waſte. Here it appeareth, that when the reverſion is deveſted, the leſſor cannot have an action of waſte, becauſe the writ is, that the leſſee did waſte *ad exhæredationem* of the leſſor, and that inheritance muſt continue at the time of the action brought. And it is to bee obſerved, that in an action of waſte brought by the leſſor againſt the leſſee, the leſſee in reſpect of the privitie cannot plead generally, *riens en le reverſion*, viz. [*h*] that the leſſor hath nothing in the reverſion, but he muſt ſhew how and by what meanes the reverſion is deveſted out of him; and this holdeth (as hath been ſaid) betweene the leſſor and the leſſee: but if the grantee of a reverſion bringeth an action of waſte, the leſſee may plead generally, that he hath nothing in the reverſion. And yet in ſome ſpeciall caſes an action of waſte ſhall lie, albeit the leſſor had nothing in the reverſion at the time of the waſte done. As if tenant for life make a feoffment in fee upon condition, and waſte is done, and after the leſſee re-enter for the condition broken; in this caſe the leſſor ſhall have an action of waſte. And ſo if a biſhop make a leaſe for life or yeares, and the biſhop die, the leſſee, the ſee being void, doth waſte, the ſucceſſor ſhall have an action of waſte. So if leſſee for life be diſſeiſed, and waſte is done, the leſſee re-enter, an action of waſte ſhall be maintained againſt the leſſee; and ſo in like caſes: and yet in none of theſe caſes the plaintiffe in the action of waſte had any thing in the reverſion at the time of the waſte made; but theſe eſpeciall caſes have their ſeverall and eſpeciall reaſons, as the learned reader will eaſily finde out.

45. E. 3. 21. 44. E. 3. 34, 35. F. N. B. 60. 23. H. 8. tit. Waſt. Br. 138. (Cro. Car. 405. Ant. 327. a. 334. b.)

[*h*] 46. E. 3. 20. 8. H. 6. 17. 30. H. 6. 7.

(Ant. 54. a. Mo. 52.)

(F. N. B. 112. h.)

Here note, that albeit the action be falſe and feigned, yet is the recoverie ſo much reſpected in law, as it worketh a diſcontinuance. [*i*] But if tenant for life ſuffer a common recoverie, or any other recoverie by covine and conſent betweene the tenant for life and the recoveror, this is a forfeiture of his eſtate, and he in the reverſion may preſently enter for the forfeiture. Since our author wrote, the ſtatute of 14 *El. cap.* 8. hath beene made concerning this matter, which is to be conſidered, [*k*] and hath beene well conſtrued and expounded, and needs not here to be repeated.

(Poſt. 362. a.)

[*i*] 5. Aſſ. pl. 3. 5. E. 3. Ent. Cong. 42. 15. E. 3. Age 95. 41. E. 3. 18. per Finchden. 32. E. 3. 2. b. Lib. 1. fol. 15. Sir Will. Pelham's caſe. 14. El. cap. 8

[*k*] Lib. 3. fol. 60. Lib. 1. fol. 15.

And it is to be obſerved, that although the diſcontinuance groweth by matter of record, yet the remitter may be wrought by matter *in paiis*: and of the reſidue of theſe two Sections ſufficient hath beene ſaid before.

Sect.

Sect. 676.

(2. Inſt. 343. F. N. B. 193. a.)

*ITEM, ſi le baron diſcontinua le terre de ſa feme, et puis repriſt eſtate a luy et a ſa feme, et al tierce perſon pur terme de lour vies, ou en fee, ceo * n'eſt un remitter a la feme, forſque quant a la moity; et pur l'auter moity el covient apres la mort ſon baron de ſuer un briefe de* cui in vitâ †.

ALSO, if the huſband diſcontinue the land of his wife, and after taketh backe an eſtate to him and to his wife, and to a third perſon for terme of their lives, or in fee, this is no remitter to the wife, but as to the moitie; and for the other moitie ſhee muſt after the death of her huſband ſue a writ of *cui in vitâ*.

44. E. 3. 17. 44. Aſſ. 2. 43. Aſſ. 3. Vid. Sect. 666.

CEO n'eſt remitter forſque quant al moitie, &c. Albeit there is authoritie in our bookes to the contrarie, yet the law is taken as *Littleton* here holdeth it, and as before it appeareth in the like caſe in this Chapter, and for the reaſon therein expreſſed.

Sect. 677.

15. E. 4. 1. b. 7. H. 4. 17. 1. H. 7. 16. b. 39. E. 3. 30. 27. H. 8. 24.

ET puis le baron revient, et agreea, &c. In this caſe the eſtate is in the feme covert preſently by the liverie before any agreement by the huſband; and of this opinion is *Littleton* in our bookes.

(4. Inſt. 146.)

Ala ouſter le mere. If hee had beene within the realme, it doth not alter the caſe.

Quære en ceſt caſe ſi le baron, &c. Here is a queſtion moved by *Littleton*, whether the diſagreement of the huſband ſhall ouſte the wife of her remitter. And it ſeemeth that the diſagreement ſhall not deveſt the remitter.

Firſt, becauſe the ſtate made to the wife which wrought the remitter is baniſhed and wholly defeated, and therefore no diſagreement of the huſband can deveſt the ſtate gained by the leaſe, which by the remitter was deveſted before.

Secondly, for that the law having once reſtored her antient and better right, will not ſuffer the diſagreement of the huſband to deveſt it out of her, and to revive the diſ-

ITEM, ſi le baron diſcontinue la terme ſa feme, et ala ouſter le mere, et le diſcontinuee leſſa meſme la terre al feme pur terme de ſa vie, et liver a luy ſeiſin; et puis le baron revyent, et agreea a cel liverie de ſeiſin, ceo eſt un remitter a la feme: et uncore ſi la feme fuiſſoit ſole al temps de le leas fait a luy, ceo ne ſerroit a luy un remitter. Mes entant que el fuit covert de baron al temps de la leas, et de le liverie de ſeiſin fait a luy, coment que el priſt ſolement le liverie de ſeiſin, ceo fuit un remitter a luy, pur ceo que feme covert ſerra adjudge

ALSO, if the huſband diſcontinue terre the land of his wife, and goeth beyond ſea, and the diſcontinuee let the ſame land to the wife for terme of her life, and deliver to her ſeiſin; and after the huſband commeth backe, and agreeth to this liverie of ſeiſin, this is a remitter to the wife: and yet if the wife had beene ſole at the time of the leaſe made to her, this ſhould not be to her a remitter. But inaſmuch as ſhe was covert baron at the time of the leaſe, and liverie of ſeiſin made unto her, albeit ſhee taketh only the liverie of ſeiſin, this was a remitter *ſicome*

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

ſicome enfant deins age en tiel cas, &c. Quære *en ceſt cas ſi le baron quant il revient, voil diſagree a le leas et livery de ſeiſin fait a ſon feme en ſon abſence, ſi *.ceo ouſtera ſon feme de ſon remitter †, ou nemy, &c.* to her becauſe a feme covert ſhall be adjudged as an infant within age in ſuch a caſe, &c. *Quære* in this caſe if the huſband when hee comes backe, will diſagree to the leaſe and livery of ſeiſin made to his wife in his abſence, if this ſhall ouſte his wife of her remitter, or not, &c.

ſhe will. As if lands be given to the huſband and wife, and their heires the huſband make a feoffment in fee, the feoffee giveth the land to the huſband and wife and the heires of their two bodies, the huſband dieth; in this caſe the wife may elect which of the eſtates ſhee will; for both eſtates are waiveable, and her time of election and power of wayver accrewed to her firſt after the deceaſe of her huſband. If lands be given to a man and the heires females of his body, and he maketh a feoffment in fee, and take backe an eſtate to him and his heires, and dieth, having iſſue a daughter, leaving his wife *groſſement enſeint* with a ſonne and dieth, the daughter is remitted; and albeit the ſonne be afterward borne, he ſhall not devеſt the remitter. (1)

continuance, and reveſt the wrongfull eſtate in the diſcontinuee.

Thirdly, for that remitters tending to the advancement of ancient rights are favoured in law.

And ſo it is for the ſame cauſes, if the wife ſurvive her huſband, ſhe cannot claime in by the purchaſe made during the coverture; but the law adjudgeth her in her better right. But if both eſtates be waiveable, there albeit the wife *primâ facie* is remitted; yet after the deceaſe of her huſband, ſhe may elect which of the eſtates ſhe will. (2. Rep. 37. 3. Rep. 26. b. 32, a. 2. Roll. Abr. 421, 422, 423. 9. Rep. 140. b. 2. Cro. 489. Ante 246. a. 348. 3. Leon. 2.)

41. E. 3. 18. (Plo. 114. b.)

18. Eliz. Dier 351.

Sect. 678.

ITEM, ſi le baron diſcontinua les tenements ſon feme, et le diſcontinuee eſt diſſeiſie, et puis le diſſeiſour leſſa meſmes les tenements a le baron et a ſon feme pur terme de vie, ceo eſt un remitter a la feme. Mes ſi le baron et ſon feme fueront de covin ‡ et conſent que le diſſeiſin doit eſte fait, donques il n'eſt remitter a ſon feme, pur ceo que el eſt diſſeiſereſſe. Mes ſi le baron fuit de covin et conſent a le diſſeiſin, et nemy la feme, donque

ALSO, if the huſband diſcontinue the lands of his wife, and the diſcontinuee is diſſeiſed, and after the diſſeiſor letteth the ſame lands to the huſband and wife for terme of life, this is a remitter to the wife. But if the huſband and his wife were of covine and conſent that the diſſeiſin ſhould be made; then it is no remitter to his wife, becauſe ſhe is a diſſeiſereſſe. But if the huſband were of covin and conſent to the diſſeiſin, and not the wife

ET puis le diſſeiſor leſſa meſme les tenements, &c. Note, ſo much are remitters favoured in law, that the ſtate made by the diſſeiſor (which commeth to the land by wrong, and upon whom the entry of the diſcontinuee is lawfull) doth remit the wife, and deveſteth all out of the diſcontinuee, albeit he hath a warrantie of the land.

18. E. 4. c. b. (F. N. B. 98. c.)

Mes ſi le baron et feme fueront de covin et conſent, &c. Here it appeareth that covin and conſent of the huſband and wife doth hinder the remitter of the wife; for covine and conſent in many caſes to do a wrong, doth choak a meere right, and the ill manner doth make a good matter unlawfull.

18. E. 4. ubi ſupra.

(3. Rep. 71.)

Covin, Covina, cometh of the French word *Convine*, and is a ſecret aſſent deter-

Pl Com. 546. in Wimbiſhe's caſe.

* *ceo—jeo*, L. and M. and Roh. † *ou nemy, &c.* not in L. and M. nor Roh. nor MSS. ‡ *et—ou*, L. and M. and Roh.

(1) VII. *The remitter defeats the wrongful eſtate immediately without entry*; yet where both eſtates are waiveable by a wife, without prejudice to a third perſon, ſhe may waive which ſhe pleaſes. But if a third perſon is intereſted, ſhe muſt take her ancient eſtate. Thus, if there be a feoffment to the huſband and wife in tail, remainder to *A.* the huſband diſcontinues, and takes back an eſtate to him and his wife in tail, remainder to *B.* though the wife in reſpect to herſelf may take either the original eſtate tail, or the eſtate tail created by the feoffment, both the eſtates being after marriage; yet ſhe ought to take the firſt, being for the benefit of *A.* the rightful remainder-man. Hob. 71. 255.

(Ant. 35. a. 4. Rep. 82 b. F. N. B. 98. d.)

determined in the hearts of two or more to the defrauding and prejudice of another.

44. E. 3. 46. 11. H. 4. 60. 44. Aſſ. 29. 19. H. 8. 12. 18. H. 8. 5. 11. E. 4. 2. 7. H. 7. 11.

A woman is lawfully intitled to have dower, and ſhe is of covine and conſent; that one ſhall diſſeiſe the tenant of the land; againſt whom ſhe may recover her lawfull dower; all which is done accordingly; the tenant may lawfully enter upon her; and avoid the recovery in reſpect of the covine. But if a diſſeiſor, intrudor, or abator, doe endow a woman that hath lawfull title of dower, this is good; and ſhall binde him that right hath; if there were no ſuch covine or conſent before the diſſeiſin; abatement, or intruſion.

(3. Rep. 78. Plo. 51. a. 54. Ant. 35. a.)

tiel leas fait al feme eſt un remitter, pur ceo que nul default fuit en la feme.

then ſuch leaſe made to the wife is a remitter, for that no default was in the wife.

41. Aſſ. p. 28. 25. Aſſ. p. 1. 27. Aſſ. 74. 15. E. 4. 4. a. 12. Aſſ. p. 10.

And ſo it is in all caſes where a man hath a rightfull and juſt cauſe of action; yet if he of covine and conſent doe raiſe up a tenant by wrong againſt whom he may recover, the covine doth ſuffocate the right; ſo as the recovery, though it be upon a good title, ſhall not binde or reſtore the demandant to his right.

11. E. 4. 2. 15. E. 4. 23. 14. H. 8. 13. 33. H. 6. 5. 12. E. 4. 21. b.

If tenant in taile and his iſſue diſſeiſe the diſcontinuee to the uſe of the father; and the father dieth; and the land deſcendeth to the iſſue; he is not remitted againſt the diſcontinuee in reſpect he was privie and partie to the wrong; but in reſpect of all others he is remitted; and ſhall deraigne the firſt warrantie. And ſo note a man may be remitted againſt one, and not againſt another.

A. and *B.* joyntenants be intitled to a reall action againſt the heire of the diſſeiſor, *A.* cauſe the heire to be diſſeiſed; againſt whom *A.* and *B* recover and ſue execution: *B.* is remitted; for that he was not partie to the covine, and ſhall hold in common with *A.*; but *A.* is not remitted; for the reaſon that *Littleton* here ſheweth.

F. N. B. 179. g. 12. E. 4. 9. 35. Aſſ. 5. 44. E. 3. 9. 23. 13. Aſſ. 1. Temps E. 1. Waſte 128. 16. Aſſ. p. 7. 21. E. 4. 53. 21. H. 7. 35. 3. H. 4. 17. (1. Rol. Abr. 278. 660. F. N. B. 117. g.)

Pur ceo que el eſt diſſeiſoreſſe. *Nota*, it is regularly true, that a feme covert cannot be a diſſeiſoreſſe by her commandement or procurement precedent, nor by her aſſent or agreement ſubſequent; but by her actuall entry, or proper act, ſhe may be a diſſeiſoreſſe. And therefore ſome doe hold that *Littleton* muſt be intended; that the huſband and wife were preſent when the diſſeiſin was done; and others doe hold that *Littleton* is good law, albeit ſhe were abſent; for that if her procurement or agreement be to doe a wrong, to cauſe a remitter unto her in this ſpeciall caſe, ſhe ſhall faile of her end; and remitted ſhe ſhall not be; but in this ſpeciall caſe ſhe ſhall be holden as a diſſeiſoreſſe by her covine and conſent *quatenus* to hinder the remitter. And here it appeareth, that albeit the huſband be of covine and conſent, &c.; yet if the wife were not of covine and conſent alſo, ſhe ſhall be remitted, becauſe, as *Littleton* ſaith; there was no default in the wife.

Sect. 679.

ITEM, ſi tiel diſcontinuee feſoit eſtate de franktenement al baron et a ſon feme per fait endent ſur condition, ſcilicet, reſervant al diſcontinuee un certaine rent, et pur default de payment un re-entry, et pur ceo que le rent eſt aderere le diſcontinuee enter; donques de cel entrie le feme avera un aſſiſe de novel diſſeiſin, *apres la mort ſon baron envers le diſcontinuee, pur ceo que le condition fuit tout ouſterment aniente, entant que la feme fuit en ſon remitter; uncore le baron oveſque ſa feme*

ALSO, if ſuch diſcontinuee make an eſtate of freehold to the huſband and wife by deed indented upon condition, *ſcilicet*, reſerving to the diſcontinuee a certain rent, and for default of payment a re-entrie, and for that the rent is behind the diſcontinuee enter; then for this entrie the wife ſhall have an aſſiſe of *novel diſſeiſin*, after the death of her huſband againſt the diſcontinuee, becauſe the condition was altogether taken away, inaſmuch as the wife was in her remitter; yet the huſband with his wife can-

feme

feme ne poient aver aſſiſe, pur ceo que le baron eſt eſtoppe, &c.

not have an aſſiſe, becauſe the huſband is eſtopped, &c. (4. Rep. 5a.)

IT is hereby to be obſerved, that the wife is preſently remitted, and that the conditions, and rents, and all other things annexed to, or reſerved upon the ſtate (that is vaniſhed and defeated by the remitter) are defeated alſo. (1)

Pl. Com. in Amy Townſhend's Caſe. 12. R. 2. tit. Remitter. 1a.

Sect. 680, 681.

ITEM, ſi le baron diſcontinua les tenements ſa feme, et repriſt eſtate a luy pur terme de ſa vie, le remainder apres ſon deceaſe a ſa feme pur terme de ſa vie; en ceſt cas ceo n'eſt un remitter a la feme durant la vie le baron, pur ceo que durant la vie le baron, la feme n'ad riens en le franktenement. Mes ſi en ceo cas la feme ſurveſquiſt le baron, ceo eſt un remitter a la feme, pur ceo que un franktenement en ley eſt ject ſur luy maugre le ſoen. † Et entant que el ne poit aver action envers nul auter perſon, et envers luy meſme el ne poit aver action, pur ceo el eſt en ſon remitter. Car en ceſt cas coment que la feme ne entra pas en les tenements, uncore un eſtrange que ad cauſe de aver action, poit ſuer ſon action envers la feme de meſmes les tenements, pur ceo que el eſt tenant en ley, coment que el ne ſoit tenant en fait.

ALSO, if the huſband diſcontinue the tenements of his wife, and take backe an eſtate to him for life, the remainder after his deceaſe to his wife for terme of her life; in this caſe this is no remitter to the wife during the life of the huſband, for that during the life of the huſband, the wife hath nothing in the freehold. But if in this caſe the wife ſurviveth the huſband, this is a remitter to the wife, becauſe a freehold in law is caſt upon her againſt her will. And inaſmuch as ſhe cannot have an action againſt any other perſon, and againſt her ſelfe ſhee cannot have any action, therefore ſhe is in her remitter. For in this caſe although the wife doth not enter into the tenements, yet a ſtranger which hath cauſe to have an action, may ſue his action againſt the wife for the ſame tenements, becauſe ſhee is tenant in law, albeit that ſhe be not tenant in deed.

(Sid. 69.)

(Hob. 260.)

Sect. 681.

*CAR tenant de franktenement en fait eſt celuy, que, s'il ſoit diſſeiſie de * franktenement, il poit aver aſſiſe: mes tenant de franktenement en ley devant ſon entre † en fait, n'avera my aſſiſe. Et ſi home ‡ ſoit ſeiſie || de certeine terre, § et ad iſſue fits quel prent*

FOR tenant of freehold in deed is he, who, if hee be diſſeiſed of the freehold, may have an aſſiſe: but tenant of freehold in law before his entrie in deed, ſhall not have an aſſiſe. And if a man bee ſeiſed of certaine land, and hath iſſue a ſonne who taketh wife, and

ſeme

† *ſoen—ſeme*, Paper M. S. * *ſon* added L. and M. and Roh. † *en fait* not in L. and M. nor Roh. ‡ *ſoit* not in L. and M. nor Roh. || *en fee* added L. and M. and Roh. § *et* not in L. and M. nor Roh.

(1) VIII. The remitter defeats entirely the wrongful eſtate, and conſequently every thing annexed to or iſſuing out of it. See ant. Sect. 659. 665, 666. and poſt. Sect. 686, 687. But an eſtate made of the land itſelf by him who is remitted, as a leaſe for years, is not defeated by the remitter.—See Com. Dig. vol. 5. 416.

(4. Rep. 8.)

feme, et le pier devie ſeiſie, et puis le fits devie devant aſcun entrie fait per luy en la terre, le feme le fits ſerra endowe en le terre, et uncore il n'avoit nul franktenement en fait, mes il avoit un fee et franktenement en ley. Et iſſint nota, que præcipe quòd reddat *poit auxybien eſtre maintenus envers celuy que ad franktenement en ley, ſicome envers celuy que ad le franktenement en fait.*

the father dieth ſeiſed, and after the ſonne dies before any entrie made by him into the land, the wife of the ſonne ſhall be endowed in the land, and yet he had no freehold in deed, but hee had a fee and freehold in law. And ſo note, that a *præcipe quòd reddat* may as well bee maintained againſt him that hath the freehold in law, as againſt him that hath the freehold in deed.

(Plo. 416. b.)

HERE five things are to be obſerved. Firſt, that a remainder expectant upon an eſtate for life worketh no remitter, but when it fall in poſſeſſion: for before his time he can have no action, and no freehold is in him. Secondly, though the woman might waive the remainder, yet becauſe ſhe is preſently by the death of the huſband tenant to the *præcipe*, it is within the rule of remitter, and her power of waiver is not materiall. Thirdly, that a freehold in law being caſt upon the woman by act of law, without any thing done or aſſented to by her, doth remit her, albeit ſhe be then ſole and of full age. Fourthly, that a *præcipe* lyeth againſt one that hath but a freehold in law. Fifthly, that a woman ſhall be endowed where the huſband hath the inheritance, and but a freehold in law, as hath beene ſaid in the Chapter of Dower.

18. H. 8. 3.
(3. Rep. 26. a.)

Vide Sect. 447.
Bracton, lib. 4. fol. 206. 237.
Britton, 83. b.
Fleta, lib. 3. cap. 15.
(Plo. 229. b. 230. a.
Cro. Car. 338. Hob. 256.)

Sect. 682.

*ITEM, ſi tenant en taile ad iſſue deux fits de pleine age, et il leſſa la terre taile al eigne fits pur terme de ſa vie, le remainder al fits puiſne pur terme de ſa vie, et puis le tenant en taile moruſt; en ceſt cas l'eigne fits n'eſt pas en ſon remitter, pur ceo que il prent eſtate de ſon pier. Mes ſi l'eigne fits moruſt ſauns iſſue de ſon corps, donque ceo eſt un remitter al puiſne frere, pur ceo que il eſt heire en le tayle, et un franktenement en le ley eſt eſcheate, et jecte ſur luy per force de le remainder, et il y ad nul envers que il poit ſuer ſon action *.*

ALSO, if tenant in taile hath iſſue two ſons of full age, and he letteth the land tailed to the eldeſt ſon for terme of his life, the remainder to the younger ſon for terme of his life, and after the tenant in taile dieth; in this caſe the eldeſt ſonne is not in his remitter, becauſe hee tooke an eſtate of his father. But if the eldeſt die without iſſue of his bodie, then this is a remitter to the younger brother, becauſe he is heire in taile, and a freehold in law is eſcheated, and caſt upon him by force of the remainder, and there is none againſt whom he may ſue his action.

[a] 12. E. 4. 20.
[b] Sect. 684, 685.

OF this opinion is [a] *Littleton* in our bookes; and of this ſufficient hath beene ſaid in the next Section before. See hereafter [b] ſome explanation hereof.

Sect.

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

Sect. 683.

*EN meſme le maner eſt, lou home ſoit diſſeiſie, et le diſſeiſor moruſt ſeiſie, et les tenements diſcendont a ſon heire, et l'heire le diſſeiſor fait un leas a un home de meſmes les tenements pur terme de * vie, le remainder a le diſſeiſee pur terme de vie, ou en taile, ou en fee, † le tenant a terme de vie moruſt, ore ceo eſt un remitter al diſſeiſee, &c.* cauſâ quâ ſupra, ‡ *&c.*

IN the ſame manner it is, where a man is diſſeiſed, and the diſſeiſor dieth ſeiſed, and the tenements deſcend to his heire, and the heire of the diſſeiſor make a leaſe to a man of the ſame tenements for terme of life, the remainder to the diſſeiſee for terme of life, or in taile, or in fee, the tenant for life dieth, now this is a remitter to the diſſeiſee, &c. *cauſâ quâ ſupra, &c.* (2. Roll. Abr. 420.)

AND this ſtandeth upon the ſame reaſon that the caſes in the two Sections precedent doe. See the next Section following.

Sect. 684.

§* *NOTA, ſi tenant en taile enfeoffa ſon fits et un auter per ſon fait de la terre taile, en fee, et livery de ſeiſin eſt fait a l'auter accordant al fait, ‖ et le fits rien conuſant de ceo ¶ agreea a le feoffment, et puis celuy que priſt le livery de ſeiſin devy, et le fits ne occupia la terre, ne prent aſcun profit del terre durant la vie le pier, et puis le pier moruſt, ore ceo eſt un remitter al fits, pur ceo que le franktenement eſt ject ſur luy per le ſurvivor; et nul default fuit en luy, pur ceo que il ne unque*

NOTE, if tenant in taile infeoffe his ſonne and another by his deed of the land intailed, in fee, and livery of ſeiſin is made to the other according to the deed, and the ſon not knowing of this agreeth not to the feoffement, and after hee which tooke the livery of ſeiſin dieth, and the ſon doth not occupie the land, nor taketh any profit of the land during the life of the father, and after the father dieth, now this is a remitter to the ſonne, becauſe the frechold is caſt upon him by the ſurvivor; and no default was in

* IT ſhould ſeeme by this marke, that this was an addition to *Littleton*; but it is of *Littleton*'s owne worke, and agreeth with the originall, ſaving the originall begun this Section thus: *Item ſi tenant en taile, &c.*

Per ſon fait, &c. Here *Littleton* materially addeth by his deed; for if a man intendeth to [*b*] make a feoffement by *parol* to *A.* and *B.* and he and *B.* come upon the land, *A.* being abſent, and make livery to *B.* in the name both of *B.* and *A.* and to their heires, this ſhall enure onely to *B.*; for neither can a man abſent take livery, nor make livery without deed. (Ant. 49. b. 52. a. 297. b.)

[*b*] Temps H. 8. Feoffements, Br. 72. 40. E. 3. 41. 10. E. 4. 1 a. 15. E. 4. 18. 18. E. 4. 12. 22. H. 6. 12.

Et liverie de ſeiſin eſt fait a l'auter accordant al fait, &c. Note, livery being made to one according to the deede, enureth to both, becauſe the deede whereunto the livery referreth is made to both; for the rule is, that *Verba relata hoc maximè operantur per referentiam ut in eis ineſſe videntur.* (9. Rep. 136.) (Ant. 49. b. 52. a.)

Et

* *ſe* added L. and M. and Roh. † *et* added in L. and M. and Roh. ‡ *&c.* not in L. and M. nor Roh. § *Nota—item,* L. and M. and Roh. ‖ *et* not in L. and M. nor Roh. ¶ *ne* added L. and M. and Roh.

Et le fits nient conuſant de ceo, ne agreea a le feoffement. Here it appeareth, that if the ſonne be conuſant, and agreeth to the feoffement, &c. this is no remitter to him. And therefore if the feoffement were made by deed indented, and the ſonne with the other ſcaleth the counterpart, and then the feoffor maketh livery to the other according to the deed, and the other dieth, the ſon is not remitted, becauſe he was conuſant of the feoffement, and agreed to the ſame; and *Littleton* ſaith in the caſe that he putteth, that there was no default in the ſon, becauſe he agreed not to the feoffement in the life of the father: and ſo it ſeemeth, that if *A.* be ſeiſed in taile, and have iſſue two ſons, and by deed indented betweene him of the one part, and the ſons of the other part, maketh a leaſe to the eldeſt for life, the remainder to the ſecond in fee, and dieth, and the eldeſt ſon dieth without iſſue, the ſecond ſon is not remitted, becauſe he agreed to the remainder in the life of the father; or if the like eſtate had been made by parol, if in the life of the father the tenant for life had beene impleaded, and made default, and he in the remainder had beene received, and thereby agreed to the remainder, after the death of the father and the eldeſt ſon without iſſue, the ſecond ſon ſhould not be remitted, becauſe he agreed to the remainder in the life of the father; all which is well warranted by the reaſon yeelded by our author in this Section.

agreea, &c. en la vie ſon pier, et il ad nul envers que il poit ſuer briefe de formedon, *&c.*

him, becauſe he did never agree, &c. in the life of his father, and hee hath none againſt whom hee may ſue a writ of *formedon*, &c.

Vide Sect. 682.

Sect. 685.

CAR ſi home ſoit diſſeiſie de certaine terre, et le diſſeiſor fait un fait de feoffment per que il infeoffa B. C. *et* D. *et le liverie de ſeiſin eſt fait a* B. *et* C. *mes* D. *ne fuit al liverie de ſeiſin, ne unque agreea a le feoffment, ne unque voile prender les profits, &c. et puis* B. *et* C. *devieront, et* D. *eux ſurveſquiſt, et le diſſeiſee port ſon briefe* ſur diſſeiſin en le per *envers* D. * *il monſtra tout le matter,* † *coment il ne unques agreea a le feoffment, et iſſint il diſchargera luy de damages, iſſint que le demandant ne recovera aſcuns dammages envers luy, coment que il ſoit tenant del franktenement del terre. Et uncore le ſtatute de* Glouceſter, ‡ cap. 1. *voit, que le diſſeiſee recovera damages en briefe de* entre, *foundue ſur* § *diſſeiſin vers celuy que eſt trouve tenant. Et ceo eſt un proofe en l'auter caſe, que entant*

FOR if a man be diſſeiſed of certaine land, and the diſſeiſour make a deed of feoffement whereby he infeoffeth *B. C.* and *D.* and liverie of ſeiſin is made to *B.* and *C.* but *D.* was not at the liverie of ſeiſin, nor ever agreed to the feoffment, nor ever would take the profits, &c. and after *B.* and *C.* die, and *D.* ſurvive them, and the diſſeiſee bringeth his writ upon diſſeiſin in the *per* againſt *D.* hee ſhall ſhew all the matter, how he never agreed to the feoffement, and hee ſhall diſcharge himſelfe of dammages, ſo as the demaundant ſhall recover no dammages againſt him, although he be tenant of the freehold of the land. And yet the ſtatute of *Glouceſter cap.* 1. will, that the diſſeiſee ſhall recover dammages in a writ of entrie founded upon a diſſeiſin againſt him which is found tenant. And this is a proofe in the other caſe,

que

* *il—meſme celuy* D. L. and M. and Roh. † *et* added L. and M and Roh. ‡ *cap.* 1. not in L. and M. nor Roh.
§ *le novel* added L. and M. and Roh.

*que l'iſſue en le taile avient a le franktenement, et * nemy per ſon fait, ne per ſon agreement, † mes apres la mort ſon pier, ceo eſt un remitter a luy, entant que il ne poit ſuer action de* formedon *envers nul auter perſon, &c.*

that foraſmuch as the iſſue in taile came to the freehold, and not by his act, nor by his agreement, but after the death of his father, therefore this is a remitter to him, inaſmuch as he cannot ſue an action of *formedon* againſt any other perſon, &c.

THIS caſe ſtandeth upon the ſame reaſon that the next precedent caſe doth.

Mes celuy que eſt trove tenant, &c. Here it appeareth, that acts of parliament are to be ſo conſtrued, as no man that is innocent, or free from injurie or wrong, be by a literall conſtruction puniſhed or endamaged: and therefore in this caſe, albeit the letter of the ſtatute is generally to give dammages againſt him that is found tenant, and the caſe that *Littleton* here putteth, *D.* being ſurviver, is conſequently found tenant of the land; yet becauſe he waived the eſtate, and never agreed to the feoffment, nor tooke any profits, he ſhall not be charged with the dammages.

(8. Rep. 1. Poſt. 365. b. 366. a. 369. 381. Ant. 11. b. 115. a. Plo. 365.)

Sect. 686, 687.

ITEM, ſi un abbe aliena la terre de ſon meaſon a un auter en fee, et l'alienee per ſon fait charge la terre ove un rent charge en fee, et puis l'alienee infeoffe l'abbe ove licence, a aver et tener al abbe et a ſes ſucceſſors a touts jours, et puis l'abbe moruſt, et un auter eſt eſlieu, et fait abbe: en ceſt caſe l'abbe que eſt le ſucceſſor, et ſon covent, ſont en lour remitter, et tiendront la terre diſcharge, pur ceo que meſme l'abbe ne poit aver aſcun action, ‡ne briefe d'entre ſine aſſenſu capituli, *de meſme la terre envers nul auter perſon.* (1)

ALSO, if an abbot alien the land of his houſe to another in fee, and the alienee by his deed charge the land with a rent-charge in fee, and after the alienee infeoffe the abbot with licence, to have and to hold to the abbot and to his ſucceſſors for ever, and after the abbot die, and another is choſen, and made abbot: in this caſe the abbot that is the ſucceſſor, and his covent, are in their remitter, and ſhall hold the land diſcharged, becauſe the ſame abbot cannot have an action, nor a writ of *entre ſine aſſenſu capituli*, of the ſame land againſt any other perſon.

(2. Roll. Abr 522.)

Sect. 687.

EN meſme le maner eſt, lou un eveſque, ou un deane, ou auters tiels perſons aliena, &c. ſans aſſent, &c. et l'alienee charge la terre, &c. et puis l'eveſque repriſt eſtate de meſme la terre per licence, a luy et a ſes ſuc-

IN the ſame manner it is, where a biſhop or a deane, or other ſuch perſons alien, &c. without aſſent, &c. and the alienee charge the land, &c. and after the biſhop takes backe an eſtate of the ſame land by licence, to him and his ſucceſ-

ſuc-

* *ren* added L. and M. and Roh. † *mes——que*, L. and M. and R.h. ‡ *ne——de*, L. and. M. and Roh.

(1.) VIII. Here *Littleton* begins to treat of *remitter to bodies politic.*

ſucceſſors, et puis l'eveſque devie; ſon ſucceſſor eſt en ſon remitter, come en droit de ſon eſgliſe, et defeatera le charge, &c. cauſâ quâ ſupra, &c.

ſours, and after the biſhop dieth; his ſucceſſor is in his remitter, as in right of his church, and ſhall defeat the charge, &c. *cauſâ quâ ſupra.*

OUR author having ſpoken of remitters to ſingular or naturall perſons, as iſſues in taile, and to feme coverts, and to their heires, and to them in reverſion or remainder, and their heires; now he ſpeaketh of remitters to bodies politike and incorporate, as to abbots, biſhops, deanes, &c. And as diſcents doe remit the heire which comes in the *per*, ſo ſucceſſion doth remit the ſucceſſor, albeit he commeth in the *poſt*. And ſo in other caſes where the iſſue in taile of full age ſhall be remitted; there in the like caſe ſhall the ſucceſſor be remitted alſo, and defeat all meane charges and incumbrances.

Ove licence, &c. That is, of the king and the lords immediate and mediate, to diſpenſe with the ſtatutes of mortmaine; whereof ſee more before, *Sect.* 140.

Sect. 688.

ITEM, ſi home ſuiſt faux action envers le tenant en taile, ſicome home voile ſuer envers luy un briefe d'entre en le poſt, *ſuppoſant per ſon briefe que le tenant en taile n'ad pas entre ſinon per* A. *de* B. *que diſſeiſiſt l'ayel le demandant, et ceo eſt faux, et il recover envers le tenant en le taile per default, et ſuiſt execution, et puis le tenant en taile moruſt, ſon iſſue poit aver briefe de* formedon *envers luy que recovera; et s'il voile pleader le recoverie envers le tenant en taile, l'iſſue poit dire, que le dit* A. *de* B. *ne diſſeiſiſt poynt l'ayel celuy que recoveraſt, en le maner come ſon briefe ſuppoſa, et iſſint il fauxera * le recoverie. Auxy* polito *que ceo fuit voyer, que le dit* A. *de* B. *diſſeiſiſt l'ayel le demandant que recoveraſt, et que apres le diſſeiſin le demandant, ou ſon pier, ou ſon ayel per un fait avoyent releſſe al tenant en taile tout le droit que il avoit en la terre, &c. et ceo nient contriſte-*

ALSO, if a man ſue a falſe action againſt tenant in taile, as if one will ſue againſt him a writ of entrie in the *poſt*, ſuppoſing by his writ that the tenant in taile had not his entrie but by *A.* of *B.* who diſſeiſed the grandfather of the demandant, and this is falſe, and he recovereth againſt the tenant in taile by default, and ſueth execution, and after the tenant in taile dieth, his iſſue may have a writ of *formedon* againſt him which recovereth; and if hee will plead the recoverie againſt the tenant in taile, the iſſue may ſay, that the ſaid *A.* of *B.* did not diſſeiſe the grandfather of him which recovered, in manner as his writ ſuppoſe, and ſo he ſhall falſifie his recovery. And admit this were true, that the ſaid *A.* of *B.* did diſſeiſe the grandfather of the demandant which recovered, and that after the diſſeiſin, the demandant, or his father, or his grandfather by a deed had releaſed to the tenant in taile all the right which hee had in the

ant

* *le——ſon*, L. and M. and Roh.

ant il ſuiſt un briefe d'entre en le poſt *envers le tenant en taile, en le manner come eſt avauntdit, et le tenaunt en taile pleda a celuy, que le dit* A. *de* B. *ne diſſeiſiſt pas ſon ayel, en le manner come ſon briefe ſuppoſa; et ſur ceo ſont a iſſue, et l'iſſue eſt trove pur le demandant, per que il ad judgement de recover, et ſuiſt execution; et puis le tenant en le taile moruſt, ſon iſſue poit avoir un briefe de* formedon *envers celuy que recovera; et s'il voile plead le recoverie per l'action trie envers ſon pier * que fuit tenant en taile, donque il poit monſtrer et pleader le releaſe fait al ſon pier, et iſſint l'action que fuit ſue, feint en ley* †.

land, &c. and notwithſtanding this hee ſueth a writ of entrie in the *poſt* againſt the tenant in taile, in manner as is aforeſaid, and the tenant in taile plead to him, that the ſaid *A.* of *B.* did not diſſeiſe his grandfather, in ſuch manner as his writ ſuppoſe; and upon this they are at iſſue, and the iſſue is found for the demandant, wherby he hath judgment to recover, and ſueth execution; and after the tenant in taile dieth, his iſſue may have a writ of *formedon* againſt him that recovered; and if he will plead the recovery by the action tried againſt his father who was tenant in taile, then he may ſhew and plead the releaſe made to his father, and ſo the action which was ſued, feint in law.

IL recovera envers le tenant en taile per default. *Littleton* addeth (by default) becauſe if the [c] recovery paſſed upon an iſſue tried by verdict, he ſhall never falſifie in the point tried, becauſe an attaint might have beene had againſt the jurors; and albeit all the jurors be dead, ſo as the attaint doe faile, yet the iſſue in taile ſhall not falſifie in the point tried, which, untill it be lawfully avoided, *pro veritate accipitur*. As if the tenant in taile be impleaded in a *formedon*, and he traverſeth the gift, and it is tried againſt him, and thereupon the demandant recover; in this caſe the iſſue in taile ſhall not falſifie in the point tried; but he may falſifie the recovery by any other matter: as that the tenant in taile might have pleaded a collaterall warrantie, or a releaſe, as *Littleton* here putteth the caſe, or to confeſſe and avoid the point tried. And *Littleton*'s caſe holdeth not only in a recovery by default, whereof he ſpeaketh, but alſo upon a *nihil dicit*, or confeſſion or demurrer.

[c] 12. E. 4. 19. 13. E. 4. 3. 11. H. 4. 89. 7. H. 4. 17. 14. H. 7. 10, 11. 28. Aſſ. 32. 52. 34. Aſſ. 7. 10. H. 6. 5. 19. H. 6. 39. Brooke tit. Fauxifier de Recoverie 55. 22. H. 6. 28. 34. H. 6. 2. 26. H. 6. 32. 36. H. 6. Fauxer. de Recoverie 27. (6. Rep. 7. 1. Roll. Rep. 443.)

Sect. 689.

ET il ſemble, que feint action eſt autant a dire en Engliſh, a fained action, *c'eſtaſcavoir, tiel action que coment que les parolx de le briefe ſont voyers, uncore per certaine cauſes il n'ad cauſe ne title per la ley de recover per meſme l'action. Et faux action eſt, lou les parolx de briefe ſont faux. Et en les deux caſes avantdits, ſi le cas fuit tiel, que apres tiel recovery, et execution*

AND it ſeemeth, that a faint action is as much to ſay in Engliſh, *a fained action*, that is to ſay, ſuch an action as albeit the words of the writ be true, yet for certaine cauſes hee hath no cauſe nor title by the law to recover by the ſame action. And a falſe action is, where the words of the writ bee falſe. And in theſe two caſes aforeſaid, if the caſe were ſuch, that after ſuch recovery, and execution

ent

* *que fuit* not in L. and M. nor Roh. † *&c* added L. and M. and Roh.

*ent fait, le tenant en taile uſt diſſeiſie celuy que recovera, et ent moruſt ſeiſie, per que la terre diſcendiſt a ſon iſſue, ceo eſt un remitter al iſſue, et l'iſſue eſt eins per force de le taile; et pur cel cauſe jeo dye mis les deux caſes precedents, pur enformer toy, mon fits, que l'iſſue en taile per force d'un diſcent fait a luy apres un recovery et execution * fait envers ſon aunceſter, poit eſtre auxy bien en ſon remitter, ſicome il ſerroit per le diſcent fait a luy apres un diſcontinuance fait per ſon aunceſter de les terres tayles per feoffement en pais, ou auterment, &c.*

thereupon done, the tenant in tayle had diſſeiſed him that recovered, and thereof died ſeiſed, whereby the land deſcended to his iſſue, this is a remitter to the iſſue, and the iſſue is in by force of the taile; and for this cauſe I have put theſe two caſes precedent, to enforme thee (my ſonne) that the iſſue in taile by force of a diſcent made unto him after a recovery and execution made againſt his anceſtour, may be as well in his remitter, as he ſhould be by the diſcent made to him after a diſcontinuance made by his anceſtour of the entayled lands by feoffement in the countrie, or otherwiſe, &c.

HERE *Littleton* explaineth what a faint action is, and what a falſe action is, which is plaine and perſpicuous. And here it is to be obſerved, that a remitter may be had after a recovery upon a faint action by a diſſeiſin and a diſcent, aſwell as by a diſcent after a diſcontinuance by a feoffement, &c.

Sect. 690.

28. Aſſ. 32. 34. Aſſ. pl. 7.
15. E. 3. Age 95. 11. H. 4. 89.
7. H. 4. 17. 33. E. 3. Entrie Cong. 31. 21. H. 6. 13.
10. H. 6. 6. 12. E. 4. 20.
14. H. 7. 11. 23. Eliz. Dier 376.
Lib. 1. fol. 106. Shelley's caſe.
Pl. Com. 55.
(Cro. Car. 388. Plo. 14.)

HERE it appeareth, that if a judgement be given againſt a tenant in taile upon a faint or falſe action, and tenant in taile die before execution, no execution can be ſued againſt the iſſue in tayle. But if in a common recoverie judgement bee had againſt tenant in tayle where he voucheth, and hath judgement to recover over in value, albeit the tenant in tayle dyeth before execution, yet the recoveror ſhall execute the judgement againſt the iſſue in tayle in reſpect of the intended recompence; and for that it is the common aſſurance of the realme, and is well warranted [*d*] by our bookes, and was not invented by juſtice *Choke*, who was a grave and learned judge in the time of *E.* 4. (as ſome hold by tradition); but it may bee

ITEM, en les caſes avantdits, ſi le cas fuit tiel, que apres ceo que le demandant avoit judgement de recover envers le tenant en taile, et meſme le tenant en taile moruſt devaunt aſcun execution ewe envers luy, per que les tenements diſcendont a ſon iſſue, et celuy que recovera ſuiſt un ſcire facias *hors de le judgement d'aver execution de le judgement envers l'iſſue en taile, l'iſſue plederà le*

ALSO, in the caſes aforeſaid, if the caſe were ſuch, that after that the demandant have judgement to recover againſt the tenant in tayle, and the ſame tenant in tayle dieth before any execution had againſt him, whereby the tenements deſcend to his iſſue, and he who recovereth ſueth a *ſcire facias* out of the judgement to have execution of the judgement againſt the iſſue in taile, the iſſue ſhal plead the matter

See hereafter Sect. 709.
15. E. 3. Briefe 324. 42. E. 3. 53.
44. E. 3. 21. 48. E. 3. 11.
1. E. 4. 6. 5. E. 4. 2.

[*d*] 12. E. 4. 20. Dier 23. Eliz. 376. Lib. 10. fol. 37, 38. in Mary Portington's caſe.

* *ent* added L. and M. and Roh.