ſtatute, and execution is ſued of the ſeigniory. *A.* dieth without heire, and the conuſee entereth, and is evicted by the diſſeiſee; he ſhall have the aide of this ſtatute; and yet it is out of the letter of the law, for the ſeigniory was delivered in execution and not the tenancy; but he was tenant by execution of thoſe lands, and therefore within the ſtatute. But the perquiſite of a villeine being evicted is out of the ſtatute, for he is tenant in fee ſimple thereof, and not tenant by execution.

Seventhly, Where the words be (delivered and taken in execution), yet if after the *liberate*, the conuſee entereth (as he may) ſo as the land is never delivered, yet is he within the remedy of this ſtatute, for he is tenant by execution.

Eighthly, Where the ſtatute ſaith, then every ſuch recoveror, obligee, and recognizee ſhall, &c. and ſaith not, their executors, adminiſtrators, or aſſignes, but they are omitted in this materiall place, yet by a benigne interpretation this ſtatute ſhall extend to them, becauſe they are mentioned in the next precedent clauſe of the eviction, and the remedy muſt by conſtruction be extended to all the perſons that appeare by the act to be grieved; a point worthy the obſervation.

(Ant. 268. b.)

Ninthly, Where the ſtatute giveth a *ſcire fac'* out of the ſame court, &c. if the record be removed by writ of error into another court, and there affirmed, the tenant by execution that is evicted ſhall have a *ſcire fac'* by the equity of this ſtatute out of that court, becauſe the *ſcire fac'* muſt be grounded upon the record. *Et ſic de ſimilibus.*

(F. N. B. 265. d.)

Tenthly, Where the ſtatute giveth the *ſcire fac'* againſt ſuch perſon or perſons, &c. that were parties to the firſt execution, their heires, executors or aſſignes, &c. this muſt not be taken ſo generally as the letter is; for if the firſt execution were had againſt a purchaſor, &c. ſo as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no *ſcire fac'* ſhall be awarded againſt him, his heires, executors, or aſſignes. But if he hath other lands ſubject to the execution, then a *ſcire fac'* lyeth againſt him or his aſſignes, but not againſt his executors; neither in that caſe can he have a *ſcire fac'* upon this ſtatute againſt the firſt debtor or recognizor, becauſe it giveth it onely againſt him, &c. that was party to the firſt execution, his heires, executors, or aſſignes. But if there be ſeverall aſſignes of ſeverall parcels of lands ſubject to the execution, one *ſcire fac'* upon this ſtatute ſhall lye againſt all the aſſignes. *Sed eſt modus in rebus.* This little taſte ſhall give a light to the diligent reader, not only to ſee into the ſecrets of this ſtatute, but to others alſo of like nature.

And by the ſtatute of 23. *H.* 8. *cap.* 6. it is provided, that the obligee, &c. ſhall have in every point againſt ſuch recogniſor, &c. like proces, execution, commodity and advantage in every behalfe, as hath been had or made upon the ſtatute ſtaple, and under ſuch maner and forme, as is for the ſame ſtatute ſtaple provided: by force of which branch, if the tenant by execution by force of the act of 23. *H.* 8. be evicted, he ſhall have the remedy provided for tenants by execution upon a ſtatute ſtaple by the act of 32. *H.* 8. In like manner by force of that clauſe of 23. *H.* 8. if the extendors upon a ſtatute ſtaple, &c. doe extend the lands, &c. at too high a rate, the obligee may pray that the extendors themſelves may take the lands, &c. at that rate, &c. by force of the ſaid ſtatutes of *Acton Burnel* and *De Mercatoribus*. Alſo no execution ſhall be ſued againſt the heire within age.

40. E. 3. 26. b. 44. E. 3. fol. 10. 2. H. 4. 17. 15. H. 7. 15.

But note, that upon a writ of *elegit* the plaintife cannot make any ſuch prayer, becauſe thoſe ancient ſtatutes doe extend to a ſtatute merchant, or a ſtatute ſtaple only, and neither to a recovery of debt or damages, nor to a recognizance in court; and ſo hath it been reſolved [*f*].

Nota, it appeareth by the preamble of the ſaid act of 32. *H.* 8. and by divers [*g*] bookes, that after a full and perfect execution had by extent returned and of record, there ſhall never be any re-extent upon any eviction; but if the extent be inſufficient in law, there may goe out a new extent.

[*h*] If a man have a judgement given againſt him for debt or damages, or be bound in a recognizance, and dieth his heire within age, or having two daughters, and the one within age; no execution ſhall be ſued of the lands by *elegit* during the minority, albeit the heire is not ſpecially bound, but charged as *terre tenant* [*i*]; and ſo againſt an heire within age no execution ſhall be ſued upon a ſtatute merchant or ſtaple, nor upon the obligation or recognizance upon the ſtatute of 23. *H.* 8. for it is excepted in the proces againſt the heire. Neither if the heire within age indow his mother ſhall execution be ſued againſt her during his minority. (1) [illegible]

Note, that by the ſtatute [*k*] of 27. *E.* 3. the execution of lands upon a ſtatute ſtaple is referred to the ſtatute merchant, and by the ſtatute *De Mercatoribus* no execution ſhall be had againſt the heire ſo long as he is within age.

Alſo ſince *Littleton* wrote, there is a right profitable ſtatute [*l*] made againſt fraudulent feoffments, gifts, grants, &c. judgements and executions, as well of lands and tenements,

[*f*] Mich. 4. & 5. Ph. and Mar. Bendloes, by all the Juſtices of the Common Pleas.
(Plowd. 82. b. 205. b.)
[*g*] 15. E. 3. Extent. 7. 22. E. 3. Recovery in value 22. 31. E. 3. Exten. 13. 17. E. 3. 76. 15. E. 3. ſcire fac. 115. 7. H. 4. 19. 22. Aſſ. 44. 22. E. 3. fol. ult. 44. E. 3. 10. 9. H. 7. 9. 15. H. 7. 15. 13. Eliz. Dier 299. 29. H. 8. Stat. Merchant Br. 40.
(2. Cro. 13.)
[*h*] 11. E. 3. age 4. 15. E. 3. age 95. 24. E. 3. 28. 29. Aſſ. 37. 29. E. 3. 50. 47. Aſſ. 4. 47. E. 3. 7. lib. 3. fol. 13. Sir William Herbert's caſe. Brooke, age 33.
(2. Cro. 838. 694. Siderf. 184.)
[*i*] Temps E. 1. Aſſ. 402. 417. 16. H. 7. 6. Livre d'entr. 545. Brooke, age 33.
(1. Cro. 295.)
[*k*] 27. E. 3. cap. 22.
[*l*] 13. Eliz. cap. 5. Li. 3. fo. 80. &c. Twyne's caſe. Li. 5. fo. 60. Gooche's caſe.

(1) *B. R. Grevill and Bracebridge's caſe.—Nota, p. 1656, the point of a ſpecial verdict was as follows: The conuſor leaſed for years, and died, his heir within age, whether the execution (which was admitted on all ſides to be void againſt the infant), was good to bind the term for years. Glyn, chief juſtice, and the court, and alſo Windham, at the bar, denied peremptorily the caſe of lord Coke to be law, unleſs it is underſtood that the marriage was held before the ſtatute; for then it is true that it ſhall not be extended,* ſed non quia eſt priviledge *for the infancy of the heir; but becauſe the wife is in by her huſband, and therefore has the better poſſeſſion, and thus comes in paramount to the ſtatute; but if the ſtatute was before the marriage, then clearly the dower of the wife is extendible; for the endowment breaks the deſcent, and ſhe is in by her huſband of a poſſeſſion charged, and there is no prejudice to the infant heir; ſo that the freehold is out of him, without any rent being incident to his reverſion. Nota, the poſſibility that the wife might die during the minority, and before the extent was ſatisfied, was not regarded. And nota, M. 6. 7. Eliz. C. B. in Egerton's Reports (cited by Noy in his lecture in Lincoln's-Inn), a like caſe was adjudged. Feme tenant in tail confeſſed a judgment, took huſband and died. The baron was tenant by the curteſy, and the ſtatute was extended, and then he ſurrendered to the heir, and was extended ſtill, and well,* per curiam, *for the reverſion was not prejudiced. And afterwards Trin. 1656. reſolved, that an extent lay well againſt the leſſee, becauſe the infancy of the heir is a perſonal priviledge. (Quere, if the rent is gone. It ſeems ſo; but the rent was not regarded.)* Lord Nott. MSS.

ments, as of goods and chattels, to delay, hinder, or defraud creditors and others of their just and lawfull actions, suites, debts, damages, penalties, forfeitures, heriots, mortuaries, and releases, for the exposition of which and other statutes, see the authorities quoted in the margent. (1)

Lib. 6. fo. 18. Pakeman's case. Lib. 10. fo. 56. the Chanc. of Oxford's case. See the Statutes of 3. H. 7. cap. 4. & 50. E. 3. cap. 6. Mich. 12. & 13. Eliz. Dier 295. 18. Eliz. 351. Dier. (8. Rep. 132.)

And it is to be observed, that the words of the said act of 13. *Eliz.* are, *Be it therefore declared, ordained, and enacted*; and therefore like cases in semblable mischiefe shall be taken within the remedy of this act, by reason of this word (*declared*); whereby it appeareth, what the law was before the making of this act. But let us now returne to *Littleton*.

W. 2. cap. 18.

Fieri facias. This is a writ mentioned in the said statute, but is a writ of execution at the common law. And it is called a *fieri facias*, because the words of the writ directed to the sherife be, *quòd fieri facias de bonis & catallis, &c.* and of those words the writ taketh its denomination.

But note, that a *capias ad satisfaciendum* is not mentioned in the said statute, because no *capias ad satisfac'* did lye at the common law upon a judgement for debt, &c. or damages, but only when the originall action was *quare vi & armis, &c.* But latter statutes have given a *capias ad satisfac'* where debt, &c. or damages are recovered; as it appeareth at large [*m*] in sir *William Herbert*'s case, whereunto I referre the reader.

[*m*] Lib. 3. fo. 11. sir William Herbert's case. (Hob. 283.) (F. N. B. 104)

And it is to be observed, that these three writs of execution ought to be sued out within the yeare and the day after judgement; but if the plaintife sueth out any of them within the yeare, he may continue the same after the yeare untill he hath execution. And to none of these writs of executions the defendant can pleade; but if he hath any matter since the judgement to discharge him of execution, he may have an *audita querela*, and relieve himselfe that way, but pleade he cannot. As if the plaintife after release unto the defendant all executions, yet in none of these three writs he shall pleade it, but is driven to his *audita querela*, as hath been said.

Sect. 505.

SCIRE facias. This is a judiciall writ, and properly lyeth after the yeare and day after judgement given; and is so called, because the words of the writ to the sherife bee, *quòd scire facias præfat' T.* (being the defendant) *quòd sit coram, &c. ostensurus si quid pro se habeat aut dicere sciat, quare, &c.* So as by the writ it appeareth, that the defendant is to be warned to plead any matter in barre of execution; and therefore albeit it be a judiciall writ, yet because the defendant may thereupon pleade, this *scire facias* is accounted in law to bee in nature of an action; and therefore [*n*] a release of all actions is a good barre of the same, and likewise a release of executions is a good barre in a *scire facias*. This writ was gi-

(Cro. Car. 240. 255. 328.)

[*n*] 19. H. 6. 3. 18. E. 4. 7. (8. Rep. 152.) (Doc. Plac. 330.) (Cro. Jac. 364.)

MES si apres l'an et jour le plaintife voit suer un scire facias, **a sacher si le defendant poit rien dire pur que le plaintife n'avera execution, donques il semble que tiel releas de touts actions serra bon plee en barre. / Mes ascuns ont semble contrary, entant que le briefe de* scire facias *est un briefe d'execution, et est d'aver execution, &c. Mes uncore entant que sur mesme le briefe le defendant poit pleader divers matters puis le judgement rendue de luy ouster d' execution, come utlagary, † &c. et divers au-*

BUT if after the yeare and day the plaintife will sue a *scire facias*, to know if the defendant can say any thing why the plaintife should not have execution, then it seemeth that such release of all actions shall be a good plea in barre. But to some seemes the contrary, in as much as the writ of *scire facias* is a writ of execution, and is to have execution, &c. But yet in as much as upon the same writ the defendant may plead divers matters after judgement given to oust him of execution, as outlawry, &c. and divers other matters, this

ters

* *a sacher si le defendant poit rien dire pur que le plaintife n'avera—d'aver*, L. and M. and Roh. † *&c.* not in L. and M. nor Roh.

(1) It was observed before, that one of the principal objects of the legislature, in passing the statute of uses, was to restore in some measure the notoriety of the old common law conveyances; but that their views in this respect were almost totally defeated, by the introduction of conveyances by lease and release, and by the preservation of uses, under the appellation of trusts. The legislature has, at different times, attempted to remedy *the mischief arising from the secret transfer of property to which conveyances by lease and release* has given rise. Among these attempts may be reckoned the statutes against fraudulent conveyances and devises, 13. Eliz. c. 5. 27. Eliz. c. 4. and 3. W. & M. c. 14. but particularly the statute of 29. Car. 2. c. 3. commonly called the Statute of Frauds and Perjuries, which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See ant. 48. a. not. 3. With the same views have been passed the acts for registering deeds respecting lands in the West, East, and North Ridings of the county of York, and in the county of Middlesex.—2. & 3. Ann. c. 4. 6. Ann. c. 35. 7. Ann. c. 20. and 8. G. 2. c. 6. Upon a similar principle was passed, the salutary and beneficial act of the 17th of his present Majesty, c. 26. for registering the grants of life annuities. With respect to the last statute, it is to be wished, that the legislature would enable persons redeeming or repurchasing annuities granted by them, to enter an account of such redemption or repurchase upon the register; for as it is an impeachment of a person's credit that annuities of this nature should be recorded against him, it is but reasonable, that when he has redeemed or repurchased them, that should be as publicly known and ascertained as his grant of them. But for want of some regulation of this kind, persons lie under the imputation of being subject to the payment of annuities, after they are liberated from them. On the statute of the 29. Car. 2. c. 3. the courts have decided, that as it was made with a design to prevent, either in marriage or in any other treaties, uncertainty, perjury, and contrariety of evidence, the cases not liable to *these inconveniencies are not* within it. See 1. Eq. Ca. Ab. 19. The courts seem to have favoured a like equitable construction of the statutes for the registration of deeds. Thus in the case of Le Neve v. Le Neve, 1. Ves. 64. lord Hardwicke decreed, that if a deed respecting lands in any of the register counties is not registered, and afterwards the same lands are sold or mortgaged, by a deed properly registered; if the person claiming under the second deed has notice of the first deed, the person claiming under the first deed, tho' it is not registered, shall be preferred to him. The general doctrine of these decisions is founded on principles both just and equitable, when applied to particular cases; yet it may be doubted whether a more rigid adherence to the letter of these statutes, particularly that of the 29. Car. 2. c. 3.

would

ters matters *, *ceo bien poit eſtre dit action, &c.* may bee well ſaid an action, &c.

ven in this caſe by the ſtatute of W. 2. for at the common law if the plaintife had ſurceaſed to ſue execution by *fieri facias*, or *levari facias*, a yeare and a day, hee had been driven to his new originall.

W. 2. ca. 45. 8. E. 3. 297, 298. 18. E. 3. 33. Lib. 3. fol. 12. Sir William Herbert's caſe. Fleta li. 2. cap. 12.

Ceo bien poet eſtre dit action. Here is to be obſerved, that every writ whereunto the defendant may plead, be it originall or judiciall, is in law an action.

Sect. 506.

ET jeo croy, que en un ſcire facias *hors d'un fine, un releas de touts manners d'actions eſt bon plee en barre.*

AND I take it that, in a *ſcire facias* upon a fine, a releaſe of all manner of actions is a good plea in barre.

This upon that which hath been ſaid, is evident of it ſelfe.

Sect. 507.

MES lou home recovera debt ou damages, et eſt accorde perenter eux que le plaintife † *ne ſuera execution, donques il covient que le plaintife fait un releas a luy de touts maners d'executions* ‡.

BUT where a man recovereth debt or damages, and it is agreed betweene them that the plaintife ſhall not ſue execution, then it behoveth that the plaintife make a releaſe to him of all manner of executions.

IL covient. Albeit *Littleton* here ſaith, hee ought or muſt, &c. yet there bee other words which will releaſe an execution without expreſſe words of a releaſe of execution.

As if a man releaſe all ſuites, the execution is gone; for no man can have execution without prayer and ſuit, but the king only; and therefore if the king releaſeth all ſuites, it is no barre of his execution, becauſe in the king's caſe the judges ought to award execution *ex officio* without any ſuite; but a releaſe of executions doth barre the king in that caſe. And ſo note a diverſity between a releaſe of all actions, and a releaſe of all ſuites.

19. H. 6. 4. 26. H. 6. Execution 7. Li. 8. fo. 153. Ed. Altham's caſe. Vid. Brooke, tit. Releaſes, 87.

So if the body of a man be taken in execution, and the plaintife releaſeth all actions, yet ſhall he remaine in execution; but if he releaſe all debts or duties, he is to be diſcharged of the execution, becauſe the debt or duty it ſelfe is diſcharged. 26. H. 6. tit. Executi n 7.

In the ſame manner if execution be ſued upon a recognizance by *elegit*, and the conuſee by deed make a defeaſance, that if the conuſor doth ſuch an act, that then the recognizance ſhall be voide; by this the execution is diſcharged. 20. Aſſ. p. 7. (6. Rep. 13. b.) (10. Rep. 47.)

So it is if judgement be given in an action of debt, and the body of the defendant is taken in execution by a *capias ad ſatisfaciendum*, and after the plaintife releaſeth the judgement, by this the body ſhall be diſcharged of the execution. 26 H. 6. ubi ſupra.

If the plaintife after judgement releaſe all demands, the execution is diſcharged, as ſhall appeare by that which next hereafter ſhall be ſaid.

If *A.* be accountable to *B.* and *B.* releaſeth him all his duties, this is no barre in an action of account, for duties extend to things certaine, and what ſhall fall out upon the account is incertaine; and albeit the Latine word is *debita*, yet duties doe extend to all things due that is certaine, and therefore diſchargeth judgements in perſonall actions, and executions alſo. 20. H. 6. 6. per Paſton.

Sect.

* *it par* added L. and M. and Roh.
‡ *&c.* added L. and M.

† *ne ſuera execution—ſerroit ouſte d'action*, L. and M. and Roh.

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would not have been more beneficial to the public. The French have ſhewn a much more rigid and pertinacious adherence to the letter of their laws reſpecting the regiſtration of deeds and wills. By laws of that kingdom as ancient as the 16th century, particularly an ordonnance of Henry II. of the year 1553, it was ordered, that all wills and deeds, containing ſubſtitutions of eſtates, ſhould be regiſtered within a particular period of time. If they were not regiſtered within that time, the courts ſeem to have doubted whether they were binding even on the parties, in whoſe favour the ſubſtitutions were made; but it was always ſettled, that the ſubſtitutions were of no force againſt creditors or purchaſors. Several points of the laws reſpecting ſubſtitutions being unſettled, and the laws reſpecting them being different in different parts of the kingdom, they were all reduced into one law, by the celebrated ordonnance of Auguſt 1747. That ordonnance was framed by the chancellor D'Agueſſeau, after taking the ſentiments of every parliament in the kingdom upon forty-five different queſtions propoſed to them upon the ſubject. The thirty-ninth queſtion is, "Whether a creditor or purchaſor, having notice of "the ſubſtitution, before his contract or purchaſe, is to be admitted to plead the want of regiſtration?" All the parliaments, except the parliament of Flandres, agreed, that he was; that to admit the contrary doctrine would make it always open to argument, whether he had or had not notice of the ſubſtitution; that this would lead to endleſs uncertainty, confuſion, and perjury; and that it was much better that the right of the ſubject ſhould depend upon certain and fixed principles of law, than upon rules and conſtructions of equity, which muſt be arbitrary, and conſequently uncertain. The ordonnance of Auguſt 1747 was framed accordingly. Thoſe who have commented upon that ordonnance lay it down as a fixed and undeniable principle, that nothing, not even the moſt actual and direct notice, countervails the want of regiſtration; ſo that if a perſon is a witneſs, or even a party, to the deed of ſubſtitution, ſtill, if it is not regiſtered, he may ſafely purchaſe the property ſubſtituted, or lend money upon a mortgage of it. See *Queſtions concernant les Subſtitutions, Toulouſe* 1770, and *Commentaire de l'Ordonnance de Louis XV. ſur les Subſtitutions, par Mr. Furgole, a Paris*, 1767.—*The preſervation of uſes, under the appellation of truſts*, is another circumſtance that has contributed to defeat the intended effect of the ſtatute of uſes. This is not the place for a diſcuſſion of every branch of the law of truſts. But ſome obſervations will be offered to ſhew in what manner the courts have remedied the miſchiefs ariſing from the ſecret nature of that ſpecies of property, both with reſpect to the *ceſtuy que truſt, and the public at large*.—1. As to the manner in which the courts have remedied the miſchief ariſing from the admiſſion of truſts, *with reſpect to the ceſtuy que truſt*. This has been effected in ſome degree by the courts of equity having held, that *perſons paying* money to truſtees, with notice of the truſt, are, generally ſpeaking, obliged to ſee it properly applied. Lord Manſfield, in his very diſtinguiſhed argument in the great caſe of Burgeſs v. Wheate, obſerves, "that the *ceſtuy que truſt* is "actually and abſolutely ſeiſed of the freehold, in the conſideration of a court of equity; that the truſt is the land, in that court; "and that the declaration of the truſt is the diſpoſition of the land." It is, perhaps, to be wiſhed, that the operation and conſequences of truſts had been confined to the truſtee and *ceſtuy que truſt*. There is no doubt but the doctrine in queſtion is in many inſtances of great ſervice to the *ceſtuy que truſt*, as it preſerves his property from the peculations and other diſaſters to which, if it were

Sect. 508.

(5. Rep. 56. a.)
(Cro. Jac. 623.)
(Sid. 141.)

TOUTS manners de demands.

ITEM, *ſi home releſſa a un auter touts manners* * *de demands, ceo eſt le plus mèlior releaſe* † *a luy a que le releaſe eſt fait* ‡, *que il poet aver, et plus urera a ſon avantage. Car per tiel releaſe de touts manners* § *de demands, touts maners d'actions reals, perſonals, et actions d'appeale, ſont ales et extincts, et touts manners d' executions ſont ales et extincts.*

ALSO, if a man releaſe to another all maner of demands, this is the beſt releaſe to him to whom the releaſe is made, that hee can have, and ſhall enure moſt to his advantage. For by ſuch releaſe of all manner of demands, all maner of actions reals, perſonals, and actions of appeale, are taken away and extinct, and all manner of executions are taken away and extinct.

Demande, Demandum, is a word of art, and in the underſtanding of the common law is of ſo large an extent, as no other one word in the law is, unleſſe it be *clameum*, whereof *Littleton* maketh mention *Sect.* 445. And here is to be obſerved, that there bee two kinde of demands or claimes, viz. a demand or claime in deed, and a demand or claime in law; or an expreſſe, and an implied demand or claime. *Littleton* here putteth examples of both: and firſt he ſpeaketh of reall actions, wherein hee that bringeth his action maketh his demand, and therefore hee is properly called a demandant; and hee that defendeth is called tenant, becauſe hee is tenant of the freehold of the land.

Lit. Sect. 445. Bract. li. 1. cap. 10. Pl. Com. Steill's caſe, 359, &c.

(8. Rep. Altham's caſe, fol. 151.)

(2. Cro. 487.)

38. H. 8. tit. Releaſ. Br. 9. 6. H. 7. 15. 19. H. 6. 3, 4. 20. Aſſ. Pl. 5. 40. E. 3. 22. 49. E. 3. 7. b. 50. Aſſ. Pl. 6. 14. H. 4. 8. 13. R. 2. tit. Avow. 89. Lib. 8. fo. 153. Ed. Altham's caſe. Lit. 170. Sect. 748. Dyer 5. El. 217. (Yelv. 214.) (Cro. Jac. 170, 171.) (10. Rep. 51. b.)

Of demands implied, or in law, *Littleton* putteth examples: Firſt, of all actions perſonals: ſecondly, of appeales: for in both thoſe caſes he that bringeth the ſuit is called plaintife, and not demandant, and he that defendeth is called defendant. Thirdly, of executions. Fourthly, of title or right of entry, eyther by force of a condition, or by any former right, which merely is a demand or claime in law; but otherwiſe it is in the king's caſe. Fifthly, of a rent ſervice, rent charge, common of paſture, &c. which alſo are meere demands or claimes in law. (1) All which *Littleton* here, and in the two next Sections following, putteth but for examples; for by the releaſe of all demands, other things alſo be releaſed, as rents ſeck, all mixt actions, a warranty which is a covenant reall, and all other covenants reall and perſonall, eſtovers, all manner of commons and profits apprender, conditions before they be broken or performed, or after, annuities, recognizances, ſtatutes merchant or of the ſtaple, obligations, contracts, &c. are releaſed and diſcharged. (2)

Sect. 509.

ET ſi home ad title de entry en aſcuns terres ou tenements, per tiel releaſe ſon title eſt ale.

AND if a man hath title of entry into any lands or tenements, by ſuch a releaſe his title is taken away.

(10. Rep. 47.)
(1. Lev. 99.)
(3. Lev. 274.)

‖ Sed quære de hoc; *car* Fitz-James *chiefe juſtice de Engleterre tient le contrary, pur ceo que entre ne poit properment eſtre dit demande*, P. 19. H. 8. *

Sed quære de hoc; for *Fitz-James* chiefe juſtice of England holdeth the contrary, becauſe an entrie cannot bee properly ſaid a demand.

Title

* *de* not in L. and M. nor Roh.
§ *de* not in L. and M. nor Roh.
† *a luy—que celuy*. L. and M. and Roh.
‖ This paragraph not in L. and M. nor Roh.
‡ *que il*, not in L. and M. nor Roh.

(1) Nota *the diverſity. If* A. *releaſes to* B. *all his demands generally, or all his demands out of the manor of* D. *there, rent and common is releaſed, whether preſent or future: but if he releaſes to* B. *all demands which he has upon him, there, no rent or common, preſent or future, is releaſed,* quia releaſe eſt tantùm perſonel. *Trin. 5. Ja. Hancock v. Field.—Adjudged* contra, *that a releaſe of all demands is not a bar to a covenant before breach;—but it is agreed, that it bars warranty, for that lies properly on demand, becauſe he may have* warrantia chartæ. *So alſo reſervation of rent, by indenture, is a covenant in law, viz. covenant real; for it runs with the land, and does not lie, after a duration, but againſt the tenant of the land: and it is agreed that by a releaſe of all demands a covenant real is releaſed; for the rent itſelf, upon which the covenant in law riſes, is releaſed.—So* 14. H. 8. 9. *But however the law may be of covenants real, it ſeems to be contrary of covenants perſonal;—and ſo there is good difference* Sed forſan, *theſe paſſages are not to be underſtood of covenants before the breach, though covenants before the breach are expreſſive.* Ld. Nott. MSS.

(2) But a releaſe of all demands does not diſcharge rent before it is due, if it be a rent incident to the reverſion; for the rent at the time was not only not due, but the conſideration, viz. the future enjoyment of the lands, for which the rent was to be given, was not executed. 1. Sid. 141. 1. Lev. 99. 3. Lev. 274. Note to the 12th edition.

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left ſolely to the diſcretion of the truſtee, it would neceſſarily be ſubject. Yet it may be queſtioned, whether the admiſſion of it is not in general productive of more inconvenience than real good; for if the *ceſtuy que truſt* is a married woman, an infant, or otherwiſe incapable of giving aſſent to the payment of the money to the truſtee, the perſons paying it cannot be indemnified againſt the truſtee's miſapplication of it, but by paying it under the ſanction of a court of equity. This retards, and often abſolutely impedes the progreſs of the buſineſs, involves the parties in an expenſive and intricate litigation, and puts them to a very great, and, in other reſpects, an uſeleſs expence. To avoid this, it is become uſual to inſert a clauſe in deeds or wills, that the receipts of the truſtees ſhall, of themſelves, diſcharge the perſons to whom they are given, from the obligation of ſeeing to the application of the money paid by them. In ſome inſtances, without any clauſe of this nature, a perſon paying money to a truſtee is not anſwerable for the miſapplication of it, tho' he has notice of the truſt. Perhaps the following diſtinctions and obſervations will be found of uſe towards obtaining an accurate knowledge of the rules of equity upon this complex ſubject.—*Iſtly, With regard to perſonal eſtate*, it is every where admitted, that if a teſtator, poſſeſſed of perſonal eſtate only, dies indebted, having by his will directed his eſtates to be ſold for the payment of his debts, whether he ſpecifies them or not, the mortgagee or purchaſor of any part of his perſonal aſſets, is not bound to ſee to the application of his mortgage, or purchaſe-money. See Elliott and Merryman, Barnardiſton Rep. in Cha. page 78.

But

TITLE. Here title is taken in the largeſt ſenſe, including right alſo.

34. H. 8. tit. Releaſ. 8. 9. Chauncey's caſe. Lib. 8. fo. 153. Ed. Altham's caſe.

* Sed quære, &c. This is an addition, and no part of *Littleton*, and the opinion here cited cleerely againſt law.

Sect. 510.

ET ſi home ad rent ſervice ou rent charge, ou common de paſture, &c. per tiel releaſe de touts manners de demaunds fait al tenaunts de la terre dont le ſervice ou le rent eſt iſſuant, ou en † que le common eſt, le ſervice, le rent, et le common, eſt ale et extinct, &c.

AND if a man hath a rent ſervice or rent charge, or common of paſture, &c. by ſuch a releaſe of all manner of demands made to the tenants of the land out of which the ſervice or the rent is iſſuing, or in which the common is, the ſervice, the rent, and the common, is taken away and extinct, &c.

This upon that which hath been ſaid, needeth no further explication.

Sect. 511.

ITEM, ſi home releſſa a un auter touts manners de quarrels, ou touts controverſies ou debates enter eux, &c. quære, *a quel matter et a quel effect tiels parols ſoy extendont, &c.*

ALSO, if a man releaſeth to another all manner of quarrels, or all controverſies or debates betweene them, &c. *quære*, to what matter and to what effect ſuch words ſhall extend themſelves, &c.

QUARRELS, Querela, à querendo. This properly concerneth perſonall actions, or mixt, at the higheſt; for the plaintife in them is called *querens*, and in moſt of the writs it is ſaid, *queritur*. And yet if a man releaſe all *quereles* (a man's deed being taken moſt ſtrongly againſt himſelf) it is as beneficiall as all actions; for by it all actions, reall and perſonall, are releaſed. And by the releaſe of all quarrels, all cauſes of actions are releaſed thereby, albeit no action be then depending for the ſame.

40. E. 3. 47. b. Ed. Altham's caſe, ubi ſupra. 35. H. 8. Dier. 57.

9. E. 4. 44.

(9. Rep. 52.)

39. H. 6. 9.

Quarrels. Controverſies and debates are *ſynonima*, and of one ſignification. *Litis nomen omnem actionem ſignificat, ſive in rem, ſive in perſonam ſit.* If a man releaſe *omnes loquelas*, it is as large as *omnes actiones*; for *omnis actio eſt loquela*, and it extendeth as well to actions in courts of record, as baſe courts; for the writ of error ſaith, *in recordo et proceſſu, &c. loquela quæ fuit inter, &c.* And ſo the writ of falſe judgement ſaith, *recordari facias loquelam*, where the judgement was given in the county court. *Omnes actiones* ſeeme to be large words; for *exactio derivatur ab exigendo*, and *exigere* ſignifieth to enquire or demand.

Lib. 8. fol. 153. Altham's caſe. 21. H. 6. 16. a. F. N. B. 23. 18.

50. Aſſ. 6. 40. E. 3. 22. 13. R. 2. Avowrie 89.

Sect. 512.

ITEM, ſi home per ſon fait ſoit oblige a un auter en

ALSO, if a man by his deede bee bound to another in a

RELESSA al obligor touts actions, &c. The reaſon of

(Dyer. 307. a. Cro. Car. 426.)

† *que—quelle terre*, L. and M. and Roh.

But if he *charges a ſpecific part of his perſonalty* with the payment of a ſpecific debt or legacy, it is a matter of doubt how far the purchaſor of that ſpecific part is anſwerable. In the caſe of Bell v. Humble, 2 Vern. 444. the maſter of the rolls decreed, that a mortgagee of a term of years from an executor (which term of years was ſpecifically bequeathed) was not anſwerable for the miſapplication of his purchaſe-money.—This decree was reverſed in the houſe of lords in 1703-4. Two caſes in Peere Williams, Ewer v. Corbett, and Bunting v. Stonard, vol. 2. p. 148. & 150. coincide with the maſter of the rolls againſt the houſe of lords. And ſee Gilbert's Reports, 113. It ſhould, however, be obſerved, that the principle on which the courts have founded their opinion, that the purchaſor or mortgagee of any part of the teſtator's aſſets ſpecifically bequeathed is not anſwerable for the miſapplication of his purchaſe or mortgage money, is, that the whole of the perſonal eſtate being bound to pay the debts of the teſtator, that ſpecific part (though ſpecifically charged) is liable with the reſt: it has therefore been held, that the purchaſor muſt *not* have notice that there are no debts, or that the debts are paid. Yet it ſeems clear from Ewer v. Corbett, that though by ſuch notice of there being no debts, or of the debts being paid, he makes himſelf anſwerable for his purchaſe or mortgage money; yet he is not bound, previouſly, to enquire and ſatisfy himſelf, that there are debts unpaid, or that the parts of the aſſets not ſpecifically bequeathed are ſufficient to pay the debts and legacies. *2dly*, With reſpect to *the deviſe of a real eſtate for the payment of debts*: It muſt firſt be obſerved, on the authority of the caſes of Cutler and Coxeter, 2. Vern. 302. French and Chicheſter, 2. Vern. 568. and 2. Vez. 590. that if a perſon charges both his real and perſonal eſtates with the payment of his debts, the perſonal eſtate muſt be firſt applied; and that it is therefore immaterial, whether the teſtator charges the perſonal eſtate in the firſt inſtance, or not.—Now, if a perſon deviſes to truſtees to ſell for the payment of his debts, all the books agree (ſee particularly the caſe above cited of Elliot v. Merryman, Spalding and Shalmer, 1. Vern. 301. Culpepper v. Aſton, 2. Chan. Caſes 115. 221. 1. Vez. 173. and 215. Cottrell v. Hampſon, 2. Vern. 5. Smith v Guyon, Bro. Ca. in Cha. 186.) that if the debts are ſpecified or ſcheduled, the purchaſor or mortgagee *is* bound to ſee to the application of his money; but that if they are not ſpecified, or ſcheduled, he *is not* bound to ſee to ſuch application; it being conſidered, that his ſpecifying them is an evidence of his intention that the purchaſor ſhould be obliged to ſee to the application; and that his not ſpecifying them is an evidence of the contrary. For this diſtinction is not to be conſidered as taking its riſe from any fundamental principle of equity or juſtice, that when the teſtator deviſes in one manner, the purchaſors or mortgagees ſhould be anſwerable; and that if he deviſes in another manner, they ſhould not be anſwerable; but merely as a rule of conſtruction: for it is clearly in the teſtator's power to make the purchaſor or mortgagee either anſwerable or not anſwerable. Where there is not any poſitive clauſe, or expreſſion, to denote his intention one way or the other, recourſe muſt be had to implication; and when there is no contrary implication, the courts conſider the modes of the deviſe in this reſpect, to amount to an implication. *As to legacies*, they, from their nature, muſt be conſidered ſo far as ſpecified or ſcheduled debts, that the purchaſor or mortgagee from a deviſee of a real eſtate in truſt

(2. Roll. 410. 412.)
11. H. 4. 41. 43.
(9. Rep. 37, 38. 2. Inſt. 398.)

of this caſe is, for that the debt is a thing conſiſting meerely in action; and therefore albeit no action lyeth for the debt, becauſe it is *debitum in præſenti, quamvis ſit ſolvendum in futuro*, yet becauſe the right of action is in him, the releaſe of all actions is a diſcharge of the debt it ſelfe. [o] And ſo may an executor before probate releaſe an action; and yet before probate he can have no action, becauſe the right of the action is in him, and ſo it was adjudged. And ſome ſay, that an ordinary may releaſe an action, and yet he can have none. But if a man by deed doth covenant to build an houſe or make an eſtate, and before the covenant broken, the covenantee releaſeth to him all actions, ſuits, and quarrels, this doth not diſcharge the covenant it ſelfe, becauſe at the time of the releaſe, *nihil fuit debitum*, there was no debt or duty, or cauſe of action in being. But in that caſe a releaſe of all covenants is a good diſcharge of the covenant before it be broken.

[o] Trin. 2. Ja. in Com. Banco, inter Middleton & Rinnot. 18. H. 6. 23. b. Pl Com. 277, 278. in Greſbroke's caſe per Weſton.

5. Eliz. Dier. 217.

Altham's caſe ubi ſupra.

(10. Rep. 51. b. 1. Rep. 112. b. 2. Cro. 222. 571. Sid. 85. Hob. 216.)

*certaine ſumme de money, a payer al feaſt de S. Michael prochein enſuant, * ſi le obligee devant le dit feaſt releſſa al obligor touts actions, il ſerra barre del dutie a touts temps, et uncore il ne puiſſoit aver action al temps de releaſe fait.*

certaine ſumme of money, to pay at the feaſt of Saint *Michael* next enſuing, if the obligee before the ſaid feaſt releaſe to the obligor all actions, he ſhall be barred of the duety for ever, and yet hee could not have an action at the time of the releaſe made.

Sect. 513.

9. H. 7. 5. a.

(8. Rep. 153.)

45. E. 3. 8. 17. H. 6. 26.
13. H. 4. Avowrie 240.

(Ant. 47. b. Yelv. 67. F. N. B. 131. a. Cro. Jac. 505.)

37. E. 3. 13. b. 47. E. 3. 24.

10. H. 2. Execution 137.
16. E. 2. ib. 138. 16. E. 3. Scire fac. 4. F. N. B. 267.
9. E. 3. 7.

(5. Rep. 18.)
5. Mar. Action ſur le caſe. Br. 108. 3. Mar. Dier. 113.
Lib. 4. fol. 94. Slade's caſe.
Li. 5. fo. 81. b. Forde's caſe.
39. H. 6. 28. b. 5. E. 4. 45.
2. H. 4. 13. 12. R. 2. Releaſe 29.
(See Mo. 13. Bend. 57. Cro. Eliz. 807. Cro. Car. 241. Cro. El. 118. 2. Leo. 107. 2. Cro. 504. Cro. El. 776. 4. Rep. 94. Litt. Rep. 61. S. C.
2. Saund. 337. 3. Mod. 153. S. C. Salk. 65.)

RELEASE touts actions. This releaſe ſhall not barre the leſſor of his rent, becauſe it was neither *debitum* nor *ſolvendum* at the time of the releaſe made; for if the land be evicted from the leſſee before the rent become due, the rent is avoyded; for it is to be paid out of the profits of the land, and it is a thing not meerely in action, becauſe it may be granted over. But the leſſor before the day may acquite or releaſe the rent. But if a man be bound in a bond or by contract to another to pay a hundred pounds at five ſeverall daies, he ſhall not have an action of debt before the laſt day be paſt: and ſo note a diverſity betweene duties which touch the realty, and the meere perſonalty. But if a man be bound in a recognizance to pay a hundred pound at five ſeverall dayes, preſently after the firſt day of payment he ſhall have execution upon the recognizance for that ſumme, and ſhall not tarry till the laſt bee paſt, for that it is in the nature of ſeverall judgements. And ſo note a diverſity between a debt due by recognizance, and a debt due by bond or contract. And ſo it is of a covenant or promiſe, after the firſt default an action of covenant, or an action upon the caſe doth lie, for they are ſeverall in their nature. Laſtly, note a diverſity between debts and covenants, or promiſes.

MES ſi home leſſa terre a un auter pur termed'un an, rendant a luy al feaſt de S. Michael prochein enſuant 40 *s. et puis devant meſme le feaſt il releſſa al leſſee touts acts, uncore apres meſme le feaſt il avera act de debt pur non payment de les* 40 *s. nient obſtant le dit releas.* Stude cauſam diverſitatis *enter les deux caſes.*

BUT if a man letteth land to another for a yeare, to yeeld to him at the feaſt of S. *Mich.* next inſuing 40s. and afterwards before the ſame feaſt hee releaſeth to the leſſee all actions, yet after the ſame feaſt hee ſhall have an action of debt for the non payment of the 40 s. notwithſtanding the ſaid releaſe. *Stude cauſam diverſitatis* betweene theſe two caſes.

If a man hath an annuity for terme of yeares, or for life, or in fee, and he before it be behind doth releaſe all actions, this ſhall not releaſe the annuity, for it is not meerely in action, becauſe it may be granted over.

Sect.

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

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truſt to ſell it for the payment of debts and legacies, muſt ſee his money applied in the diſcharge of them, unleſs there is an expreſs clauſe, or ſufficient implication from other parts of the will, that the deviſor intended to free him from that obligation.—II. *As to the manner in which courts of equity have attempted to prevent the miſchiefs ariſing from the admiſſion of truſts, with reſpect to the public at large:*—This has been effected in ſome meaſure, by its having been laid down as a general rule, that in any competition of claims, where the equity of the parties is equal, he who has the law ſhall prevail. See Francis's Maxims of Equity, 61. If a perſon has the legal eſtate or intereſt of the ſubject matter in conteſt, he muſt neceſſarily prevail at law over him whoſe right is only equitable, and therefore not even noticed by the courts of law. This advantage he carries with him, ſo far, even into a court of equity, that if the equitable claims of the parties are of equal force, equity will leave him who has the legal right in full poſſeſſion of it, and not do any thing to reduce him to an equality with the other, who has the equitable right only.—Perhaps the following illuſtration of this very important rule of equity, by an enquiry into the doctrines of courts of equity reſpecting terms of years, attendant upon the inheritance, will not be unacceptable to the reader.——At common law, leaſes for years were not ſuppoſed to transfer any property to the leſſee, and were generally of very ſhort duration; for, as they tended to prevent the crown of its forfeitures, and the lord of the fruits of his tenures, they were conſidered with a very jealous eye. Beſides, the poſſeſſion of the leſſee was conſidered as the poſſeſſion of the freeholder; and if his leaſe was defeated or diſturbed, though he could recover for damages, he had no means to recover the poſſeſſion. Moreover, leaſes for years were ſubject to be abſolutely defeated, either by a real or fictitious recovery againſt the freeholder; but in the reign of Henry IV. or, at leaſt, in that of Henry VII. the courts reſolved, that the leſſee ſhould not only recover damages, as a recompence for the loſs of the poſſeſſion, but ſhould alſo recover the poſſeſſion itſelf. Afterwards the 21ſt Hen. 8. c. 15. protected the leſſee againſt the effect of fictitious recoveries. Theſe alterations of the common law gave the leſſee for years an intereſt and ſtability which he had not before. Still, in the eye of the law, particularly before the demolition of the feudal tenures, terms of years were in every reſpect but pecuniary emolument, far inferior to eſtates of freehold. This ſtability on the one hand, and ſubordinate ſtate of property on the other, made them very proper and convenient modifications of property, for ſecuring money or any other charges upon the fee, or for giving a partial or temporary right to the profits or beneficial property of the land, in thoſe caſes where the owner wiſhed to have, not only the remainder or reverſion,

II.

Sect. 514.

*ITEM, ou home voile ſuer briefe de droit, il covient que il counta del ſeiſin de luy, ou de ſes anceſtors, et auxy que le ſeiſin fuit en temps de meſme le roy, come il counta en ſon count. Car ceſt un ancient ley uſe, come appiert per le report d'un plee en le eire de Nottingham *, titulo* Droit en Fitzherbert, cap. 26. *en tiel forme que enſuiſt. John Barre port ſon brieſe de droit envers Reynold de Aſſington, et demaunda certaine tenements, &c. † ou le miſe eſt joyne en le bank, et originall et le proces fueront demandes devant juſtices errants, ou les parties viendront, et les ‡ 12 chivalers fieront lour ſerement ſans challenge des parties, d'eſtre allowes, pur ceò que election fuit fait per aſſent des parties, ove les quater chivalers, et le ſerement fuit tiel: Que jeo verity dirre, &c. lequel* R. *de* A. *ad plus mere droit a tener les tenements que John Barre demanda vers luy per ſon brieſe de droit, ou John de*

ALSO, where a man will ſue a writ of right, it behoveth that he counteth of the ſeiſin of himſelfe, or of his anceſtors, and alſo that the ſeiſin was in the ſame king's time, as he pleadeth in his plea. For this is an ancient law uſed, as appeareth by the report of a plea in the eire of *Nottingham, tit. Droit in Fitzherbert, cap.* 26 in this forme following. *John Barre* brought his writ of right againſt *Reynold* of *Aſſington*, and demanded certaine lands, &c. where the miſe is joyned in banke, and the originall and the proceſſe were ſent before the juſtices errants, where the parties came, and the twelve knights were ſworne without challenge of the parties, to be allowed, becauſe that choiſe was made by aſſent of the parties, with the foure knights, and the oath was this: That I ſhall ſay the truth, &c. whether *R.* of *A.* hath more meere right to hold the tenements which *John Barre* demandeth againſt him by his writ of right, or *John* to have

IL covient que il counta del ſeiſin de luy ou de ſes aunceſtors. For if neyther hee nor any of his anceſtors were ſeiſed of the land, &c. within the time of limitation, hee cannot maintaine a writ of right; for the ſeiſin of him of whom the demaundant himſelfe purchaſed the land, &c. availeth not. (Ant. 279. a.) Ac 281. a.

For the time of limitation, ſee the ſtatute of 32. H. 8. cap. 2. Vide Sect. 170.

And ſo it is in a writ of right of advowſon. (8. Rep. 65. Hob. 240.) F. N. B. 30. a. 2. E. 3. 27. Littl. 112. a.

Auxy que le ſeiſin fuit en temps de meſme le roy come il counta. Hereby it appeareth, that not onely a ſeiſin (as hath beene ſaid) is requiſite, but alſo that the ſeiſin be had in the time of the ſame king, according to his count.

Report commeth of the Latine word *Reportare, à re et porto, id eſt, referre, à re et fero.* And in the common law, it ſignifieth a publike relation, or a bringing againe to memory caſes judicially argued, debated, reſolved, or adjudged in any of the king's courts of juſtice, together with ſuch cauſes and reaſons as were delivered by the judges of the ſame; and in this ſenſe *Littleton* uſeth the word in this place.

En le eire de Nottingham. Eire, Iter. And it ſignifieth the court of the juſtices in *eire*, and thereupon they were called *juſtitiarii itinerantes*, in reſpect that the juſtices reſiding at Weſt- (4. Inſt. 184.)

* *titulo Droit en Fitzherbert, cap.* 26. not in L. and M. nor Roh. † *ou* not in L. and M. nor Roh. ‡ 12 not in L. and M. nor Roh.

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reverſion, but the actual freehold. Hence we find mortgages for long terms of years very frequent in the reign of queen Elizabeth. Now, according to our notions of mortgages, if the mortgage debt is not paid at the time appointed, the eſtate mortgaged is abſolutely forfeited to, and becomes the property of, the mortgagee, at law; but courts of equity permit the mortgagor to redeem, on payment to the mortgagee of his principal, intereſt and coſts. Still this is merely a right in equity, the legal eſtate continuing in the mortgagee. Thus if an eſtate be demiſed for a term of years, with a proviſo making the term void on payment of a ſum of money with intereſt, before or upon a certain day, the condition is not conſidered at law as complied with, unleſs the money is paid on or before that very day; if it is not paid then, the eſtate belongs at law to the mortgagee, for the remainder of the term. And though a court of equity allows the mortgagor to redeem it, by paying the principal, intereſt and coſts, after that time, this ſubſequent payment, though it gives the mortgagee the equitable right to the eſtate, does not affect the legal continuance of the term. In this reſpect our law differs from the civil law; in which a mortgage is conſidered only as an acceſſary of the debt; and payment at any time, by annulling the debt, extinguiſhes the mortgage. To apply this doctrine to terms of years. After payment of the mortgage debt, the term of years for which the mortgage is made, is in law in the mortgagee; but, in equity, the mortgagor is entitled to the benefit of it. By an analogy to the caſe of mortgages, when terms of years are created for ſecuring the payment of jointures, portions for children, or for any other purpoſe, they do not determine (unleſs there is a ſpecial proviſo) by the performance of the truſts for which they are raiſed. Thus in all theſe caſes, the legal intereſt during the continuance of the term, is in the truſtee; but the owner of the fee is entitled to the equitable intereſt, or rather to all the benefit or advantage which can be made of the term during its continuance. As the courts of common law had determined, that the poſſeſſion of the leſſee for years was the poſſeſſion of the owner of the freehold, courts of equity determined, that where the tenant for years was but a truſtee for the owner of the inheritance, he ſhould not ouſt his *ceſtuy que truſt*, or obſtruct him in doing any act of ownerſhip, or in making any aſſurances of his eſtate. In theſe reſpects, therefore, the term is conſolidated with the inheritance. It follows the deſcent to the heir, and all the alienations made of the inheritance, or of any partial eſtate or intereſt carved out of it by deed, by will, or by act of law. Whitchurch v. Whitchurch, 2. P. W. 236. 9. Mod. 124. Gilb. Rep. 168. Villiers and Villiers, 2. Atk. 7. Hoole v. Sales, 2 Wilſ. 329. Still, tho' the truſt or benefit of the term is annexed to the inheritance, yet the legal intereſt of the term remains diſtinct and ſeparate from it at law, and the whole benefit and advantage to be made of the term ariſes from this ſeparation. For if two perſons, or more, have claims upon the inheritance under different titles, a term of years attendant upon it is ſtill ſo diſtinct from it, that if any one of them obtains an aſſignment of it, then (unleſs he is affected by any of the circumſtances which equity conſiders as fraudulent) he will be entitled, both at law and in equity, to the eſtate for the whole continuance of the term, to the utter excluſion of all the other claimants. This, if the term is of long duration, abſolutely deprives all the other claimants of every kind of benefit in the land. Suppoſing, therefore, *A.* purchaſes an eſtate, which, previous to his purchaſe, had been ſold, mortgaged, leaſed, and charged with every kind of incumbrance to which

[p] Mirror cap. 2. ſect. 3. and ſect. 15. and ca. 4. le office des Juſtices in Eire. Glanv. li. 9. cap. 11. Li. 8. cap. primo. Britt. fol. 1. b. 7, 8. &c. Bract. lib. 3. fo. 115, &c. Flet. li. 1. ca. 15. &c. 4. E. 3. 32. 6. E. 3. 35. 23. E. 3. 21. 15. H. 7. 5. Vide Sect. 442. 233, 234.

Weſtminſter were called *juſtitiarii reſidentes*, and were much like in this reſpect to the juſtices of aſſiſe at this day, although for authority and manner of proceeding (whereof you ſhall reade [p] in the ancient authors of the law) farre different. And as the power of the juſtices of aſſiſes by many acts of parliament and other commiſſions increaſed, ſo theſe juſtices itinerant by little and little vaniſhed away. And it is certaine, that the authority of juſtices of aſſiſes itinerant through the whole realme, and the inſtitution of juſtices of peace in every county being duely performed, are the moſt excellent meanes for the preſervation of the king's peace, and quiet of the realme, of any other in the Chriſtian world.

De Nottingham. This ſhould bee *Northampton*, according to the originall.

This report whereof *Littleton* here maketh mention, you ſhall finde an abſtract of it in 3. *E.* 3. ſince *Littleton*'s time, put in print by *Fitzherbert* when he was ſerjant in 11. *H.* 8. and is not in the Reports or bookes at large. And yet here it appeareth, that they be of great authority, and vouched by *Littleton* himſelfe for the proofe of a maine point in law. And hereby it alſo appeareth how neceſſary it is to reade records and pleas reported or recorded, though they were never printed. For thoſe and the like records are *veritatis et vetuſtatis veſtigia.*

3. E. 3. tit. Droit. F. 26.

Tit. droit in Fitzherbert, 26. is

*aver eux, ſicome il demaund, et pur rien dirra que le verity * ne dirra, ſicome moy ayde Dieu, &c. ſans dire a lour eſcient. Et tiel ſerement ſerra fait en attaint, et en battaile, et † en ley gager, car eux mittont cheſcun choſe a fine. Mes John Barre counta del ſeiſin d'un Raſe ſon anceſter en temps le roy Henry, et Reynolde ſur le miſe joyne tendiſt demy mark pur le temps, &c. Et ſur ceo* Herle, *juſtice, dit al grand aſſiſe, apres ceo que ils fueront charges ſur le mere droit, Vous gentes, Reynold donaſt demy marke al roy pur le temps, ‡ al entent que ſi § vous troves que l'anceſter || John ne fuit pas ſeiſie en le temps que le demaundant ad count, ** vous n'enquires plus avant del droit; et pur ceo vous nous dires, lequel l'anceſter John, Raſe per noſme, fuit ſeiſie en temps le roy Henry, come il ad count, ou non. Et ſi vous troves que il ne fuit ſeiſie en cel temps, vous n'enquires nient pluis; et ſi vous troves que il fuit ſeiſie, donques enquires ouſter del †† briefe. Et puis le*

them, as hee demandeth, and for nothing to let to ſay the truth, ſo helpe mee God, &c. without ſaying to their knowledge. And the like oath ſhall bee made in an attaint, and in battaile, and in wager of law, for theſe doe bring every thing to an end. But *John Barre* counted of the ſeiſin of one *Ralfe* his anceſtor in the time of king *Henry*, and *Reynold* upon the miſe joyned tendred halfe a marke for the time, &c. And hereupon *Herle*, juſtice, ſaid to the grand aſſiſe after that they were charged upon the meere right, You good men, *Reynold* gave halfe a marke to the king for the time, to the intent that if you find that the anceſtor of *John* was not ſeiſed in the time that the demandant hath pleaded, you ſhall enquire no further upon the right; and for this, you ſhal tell us, whether the anceſtor of *John* (*Ralfe* by name) were ſeiſed in king *Henries* time, as he hath pleaded, or not. And if you find that he was not ſeiſed in this time, you ſhall enquire no more; and if you find that he was ſeiſed, then you ſhall enquire further of the writ. And after the grand aſſiſe came in with their

* *ne—jeo*, L. and M. and Roh. || *vous—home*, L. and M. and Roh. †† *briefe—droit*, L. and M. and Roh. † *en—le*, L. and M. and Roh. § *John* not in L. and M. nor Roh. ‡ *al entent—et ceo ſert*, L. and M. and Roh. and in MSS. ** *vous—home*, L. and M. and Roh. and MSS.

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real property is ſubject; in this caſe *A.* and the other purchaſors, and all the incumbrancers, have equal claims upon the eſtate. This is the meaning of the expreſſion, that their equity is equal. But if there is a term of years ſubſiſting in the eſtate, which was created prior to any of the purchaſes, mortgages, or other incumbrances, and *A.* procures an aſſignment of it in truſt for himſelf, this gives him the legal intereſt in the lands during the continuance of the term, abſolutely diſcharged from, and unaffected by, any of the purchaſes, mortgages, and other incumbrances, ſubſequent to the creation of the term, but prior to his purchaſe. This is the meaning of the expreſſion in aſſignments of terms, that they are to protect the purchaſor from all meſne incumbrances. But it is to be obſerved, that *A.* to be entitled in equity to the benefit of the term, muſt have all the following requiſites: he muſt be a purchaſor for a valuable conſideration; his purchaſe muſt in all reſpects be a fair purchaſe, and free from every kind of fraud; and at the time of his purchaſe he muſt have no notice of the prior conveyance, mortgage, charge, or other incumbrance. It is to be obſerved, that mortgagees, annuitants, judgment creditors, leſſees, and all other incumbrancers, are purchaſors in this ſenſe, to the amount of their ſeveral charges, intereſts, or rights. If any perſon of this deſcription, unaffected by notice or fraud, takes a defective conveyance or aſſignment of the fee, or of any eſtate carved out of it, defective either by reaſon of ſome prior conveyance, or of ſome prior charge or incumbrance; and if he alſo takes an aſſignment of a term to a truſtee for himſelf, or to himſelf, where he takes the conveyance of the inheritance to his truſtee; in each of theſe caſes, he is entitled to the full benefit of the term; that is, he may uſe the legal eſtate of the term to defend his poſſeſſion during the continuance of the term, or, if he has loſt the poſſeſſion, to recover it at common law, in preference to all claimants prior to his purchaſe, but ſubſequent to his term. All this was laid down and explained by lord Hardwicke, in the caſe of Willoughby and Willoughby in Chan. Trin. 30. Geo. 2. 1756. Upon the ſame principles was decided the caſe of Stanhope v. earl Verney, before lord Northington, in chancery, July 27, 1761. The caſe there was, that Henry Sayer, being ſeiſed in fee of certain eſtates ſubject to an outſtanding term of years, in Rigby and Eyre, by indenture of leaſe and releaſe, bearing date the 4th and 5th days of June 1732, conveyed them to lady Dyſart and her heirs, for ſecuring the payment of 1000l. and intereſt, and covenanted to produce the deeds reſpecting the terms of years. Afterwards Rigby and Eyre aſſigned the term to Cunningham and Clayton in truſt for Sayer, his heirs and aſſigns; and then Sayer, by indenture dated the 19th day of Dec. 1732, conveyed the ſame eſtates to mrs. Naſh (under whom lord Verney claimed) by way of mortgage, for ſecuring to her 3000l. and intereſt, with a declaration that Cunningham and Clayton ſhould ſtand poſſeſſed of the term in truſt for her, and the deeds reſpecting it were delivered to her, and neither ſhe nor the truſtees had notice of the mortgage to lady Dyſart. Lady Dyſart brought an ejectment; lord Verney defended, and ſet up the term, with a declaration of the truſt of it in favour of mrs. Naſh, under whom he claimed. Upon this lady Dyſart brought her bill in equity. The queſtion was, which ſhould be preferred: lady Dyſart, who had the firſt declaration of the truſt of the term, or lord Verney,

*graund aſſiſe reviendroit ove lour verdict, et diſont, que Raſe * ne fuit pas ſeiſie en temps le roy H. per que fuit agard que Reynold tiendroit les tenements vers luy demandes, a luy et ſes heires quites de John Barre et ſes heires a remnant. Et John en le mercie, &c. Et le cauſe pur que jeo aye monſtre icy a toy, mon fits, ceſt plee, eſt, pur prover le matter precedent que eſt dit en briefe de droit, &c. car il ſemble per ceſt plee, que ſi Reinold n'avoit pas tendue demy marke pur enquirer del temps, &c. donques le graund aſſiſe duiſſoit eſtre charge tantſolement del mere droit, et nemy del poſſeſſion, &c. † Et iſſint que touts foits en briefe de droit, ſi le poſſeſſion dont le demandant counta ſoit en temps le roy, come il avoit counte, donques le charge del grande aſſiſe ſerra tantſolement ſur le mere droit, coment que le poſſeſſion fuit encounter le ley, come il eſt dit adevant en ceſt chapter, &c.*

verdict, and ſaid, that *Ralſe* was not ſeiſed in the time of king *Henry*, whereby it was awarded that *Reynold* ſhould hold the tenements demanded againſt him, to him and his heires quite of *John Barre* and his heires to the remnant. And *John* in mercy, &c. And the reaſon why I have ſhewed to thee, my ſon, this plea, is, to prove the matter precedent which is ſaid in a writ of right; for it ſeemeth by this plea, that if *Reynold* had not tendred the halfe marke to enquire of the time, &c. then the grand aſſiſe ought to be charged onely to enquire of the meere right, and not of the poſſeſſion, &c. And ſo alwayes in a writ of right, if the poſſeſſion wherof the demandant counteth bee in the king's time, as hee hath pleaded, then the charge of the grand aſſiſe ſhall be only upon the meere right, although that the poſſeſſion were againſt the law, as it is ſaid before in this chapter, &c.

of a new addition, and therefore though it bee true, yet not to bee allowed.

Et le original et le proces ſuera demande devant juſtices itinerants. For it is to be underſtood, that all pleas either in the realty or perſonalty that were begunne and not determined before juſtices in eire, were adjourned by them into the court of common pleas.

4. E. 3. 41. Pevrel's caſe.
Mirror, Glanvil, Bracton, Britton, Fleta, } ubi ſupra.

Les 12 chivalers ſieront lour ſerement ſauns challenge, &c. pur ceo que le election fuit fait per aſſent des parties ove les 4 chivalers.

Here are foure things to be obſerved.

30. E. 1. tit. challenge 172. 21. E. 4. 77. 39. E. 3. 1. 44. E. 3. 6. 11 H. 6. 13. (Cro. El. 664.)

Firſt, that *omnis conſenſus tollit errorem*, and againſt his owne conſent he cannot challenge the twelve.

Secondly, that the foure knights electors of the grand aſſiſe are not to be challenged, for that in law they bee judges to that purpoſe, and judges or juſtices cannot bee challenged. And that is the reaſon that noblemen, that in caſe of high treaſon are to paſſe upon a peere of the realme, cannot be challenged, becauſe they are judges of the fact, and the *Magna Charta* ſaith, *per judicium parium ſuorum.*

4. E. 3. 13.

Formerly it seems to have been otherwise. See Plat. 156. 6. 37.

Plat. 156. 6.

Magna Charta cap. 29.

Thirdly, that the twelve before any aſſent may be challenged before the foure knights electors, but after aſſent or return of the pannell before the juſtices, there ſhall be no challenge to the pannell nor to the polles.

39. E. 3. 2. 7. H. 4. 20.

Fourthly, if there be not foure knights for electors in that county, the next to them in that county ſhall be taken; *ne curia regis deficeret in juſtitiâ exhibendâ.*

7. H. 4. 20.

Sauns dire a lour eſcient. And here it appeareth, that where the judgement is finall, there the oath of the grand aſſiſe or jury is abſolute, and not to their knowledge, as here

* *ne* not in L. and M. nor Roh. † *et* not in L. and M. nor Roh.

Verney, who had the ſubſequent declaration of the truſt, but had the cuſtody of the deed.--Lord Northington held, that a declaration of truſt in favour of an incumbrancer, was tantamount to an actual aſſignment, unleſs a ſubſequent incumbrancer, *bona fide*, and without notice, procured an aſſignment; and that the cuſtody of the deeds reſpecting the term, with a declaration of the truſt of it in favour of a ſecond incumbrancer, was *equivalent to an actual* aſſignment; and therefore gave him an advantage over the firſt incumbrancer, which equity would not take from him. Such being the advantages to be derived from terms of years, it is an object of great conſequence to aſcertain, when it is ſafe for the purchaſor to leave them in the truſtee in whom he finds them, and when it is neceſſary or prudential to require them to be aſſigned to a truſtee of his own.—But it is more eaſy to ſay where it is unſafe, than to ſay where it is ſafe, for him to be ſatisfied without ſuch an aſſignment of it.—*1ſt*, It may be laid down, as a general rule, that whenever a term has been raiſed for ſecuring the payment of money, as the aſſignment of it by the truſtee for the perſon intitled to receive, to a truſtee for the perſon obliged to pay, the money, is the beſt poſſible evidence of the payment of the money, it may be reaſonably required as ſuch.—*2dly*, In caſe a term of years has been aſſigned to attend the inheritance, if, upon a purchaſe (taking it in the above

here in the writ of right, in the attaint, and in wager of law, for the judgement in every of theſe three is finall.

Vide Sect. 193.

Le miſe eſt joyne. *Miſe* is a word of art appropriated only to a writ of right, ſo called becauſe both parties have put themſelves upon the meere right to be tryed by grand aſſiſe or by battaile: ſo as that which in all other actions is called an iſſue, in a writ of right in that caſe is called a miſe. And in this ſenſe *Littleton* taketh it here. But in a writ of right if a collaterall point is to be tryed, there it is called an iſſue; and is derived of this word (*miſſum*), becauſe the whole cauſe is put upon this point. It is alſo taken for expences, as *miſæ & cuſtagia*. And ſometime it ſignifieth a cuſtomary grant to the king, or lords marchers of Wales by their tenants at their firſt comming to their lands.

Regiſtrum.

33. H. 8. ca. 13. 3. E. 6. ca. 36.

10. E. 3. 20. 31. E. 3. droit 11. 22. E. 3. 17. 18. H. 3. droit 62. 33 E. 3. ib. 39. Lamb. explicat. verborum verbo Mancuſa.

Tender di marke al roy. Maſter *Lambard* ſaith, that *mancuſa & marca Saxonicè Mancup. 7. Mearc' Nummus 30 valens denarios.* And this *mearc*, now called a marke, being an old Saxon word, is the cauſe that England moſt commonly reckoned by markes. *Libra Saxonicè* is a *pund, à pondo*, which is called ſo untill this day. *Solidus, qui apud nos eſt pars libræ viceſima, denarios per id temporis continebat quinque. nunc duodecim*; and *ſcilling* is a Saxon word, and with us uſed to this day. Pennye, *Saxonicè pennig, Latinè denarius*; but the value of theſe have not been alwayes one.

F N. B. 31. c. 3. 1. E. 3. droit 15. 6. E. 3. ibid. 24.

In a writ of right of advowſon brought by the king, the tenant ſhall not tender the *dimarke*, becauſe *nullum tempus occurrit regi*; and therefore the king ſhall alledge, that hee or his progenitor was ſeiſed, without ſhewing any time.

Mirror, ca. 1. §. 17. ca. 3. de Artaint. ca. 5. §. 1. Bract. fo. 288, 289. &c. 292. Brit. fol. 241. 245, 246. &c. Flet. li. 5. ca. 21. & 34. Forteſcue ca. 26.

En attaint. *Attincta* is a writ that lyeth where a falſe verdict in court of record upon an iſſue joyned by the parties is given. And of ancient writers it is called *breve de convictione*; and is derived of the participle *tinctus*, or *attinctus*, for that if the petty jury be attainted of a falſe oath, they are ſtained with perjury, and become infamous for ever; for the judgement at the common law in the attaint importeth eight great and grievous puniſhments. 1. *Quòd amittat liberam legem imperpetuum*, that is, he ſhall be ſo infamous as he ſhall never be received to be a witneſſe, or of any jury. 2. *Quòd foris faciant omnia bona & catalla ſua.* 3. *Quòd terræ et tenementa in manus domini regis capiantur.* 4. *Quòd uxores & liberi extra domus ſuas ejicerentur.* 5. *Quòd domus ſuæ proſtrentur.* 6. *Quòd arbores ſuæ extirpentur.* 7. *Quòd prata ſua arentur.* *Et* 8. *Quòd corpora ſua carceri mancipentur.* So odious is perjury in this caſe in the eye of the common law, and the ſeverity of this puniſhment is to this end, *ut pœna ad paucos, metus ad omnes perveniat*; for there is *miſericordia puniens*, and there is *crudelitas parcens.* And ſeeing all tryals of reall, perſonall, and mixt actions depend upon the oath of 12 men, prudent antiquity inflicted a ſtrange and ſevere puniſhment upon them, if they were attainted of perjury.

(3. Inſt. 163. 222.)

But ſince *Littleton* wrote, a ſtatute hath beene made in mitigation of the ſeverity of the common law, in caſe when the petite jury is attainted, and therefore it is taken by equity. For where the ſtatute ſaith, that the party grieved ſhall have an attaint againſt the party which ſhall have judgement upon the verdict, yet an attaint ſhall be maintained upon that ſtatute againſt the executors of the party. *Et ſic de ſimilibus.* [a] But ſee the ſtatute and authorities quoted in the margent. Only I thought good to obſerve three things.

[a] 23. H. 8. ca. 3. 3. Eliz. Dyer. 201. 7. E. 6. ibidem 81. 3. Mar. ibidem 129. 7. Eliz. ibidem 235. 24. H. 8. Br. Attaint. 96 4. Mar. ib. 127. 20. H. 7. 5. 42. E. 3. 26. F. N. B. 107. D. Mirror ca. 1. §. 3. ca. 3. §. ca. 5. §. 1. Bracton lib. 3. 141. b. & fo. 320. 331. Glanvil. lib. 2. cap. 3, 4, 5 Lib. 8. ca. 9. Lib. 4. ca. 1. Brit. fo. 40. 42, 43. 81. 175. 190. Fleta lib. 1. ca. 32. & lib. 2. cap. 48.

Firſt, that no attaint can be maintained upon this ſtatute but between party and party.

Secondly, that no conuſance can be granted upon any attaint, becauſe all attaints are to be taken either before the king in his bench, or before the juſtices of the common place, and in no other courts, &c.

Thirdly, conſider what pleas may bee pleaded in an attaint by force of this act, and what not.

En battaile, *Duellum, monomachia*, and it ſignifieth in the common law a tryall by ſingle fight, by battaile or combate, *monomachia* (1). [b] And in the writ of right neither the tenant or demandant ſhall fight for themſelves, but finde a champion to fight for them: becauſe if either the demandant or tenant ſhould be ſlaine, no judgement could be given for the lands or tenements in queſtion. But in an appeale the defendant ſhall fight for himſelfe, and ſo ſhall the plaintife alſo; for there if the defendant be ſlaine, the plaintife hath the effect of his ſuite, that is, the death of the defendant; the order and ſolemnity whereof you may reade in our ancient and latter bookes. And this the law did inſtitute when the tenant failed of his witneſſes, or evidences, or other proofes; and the preſumption of law is, that God will give victory to him that hath right.

[b] 4. E. 3. 41. 17. E. 3. 19. H. 6. 35. 1. H. 4. 3. 30. E. 3. 20. 29. E. 3. 12. 13. H. 4. 4. Stan. 174. 178. 17. Eli. Dyer. 9. E. 4. 35. 1. H. 6. 6. 3. H. 6. 55. Vid. li. 9. fo. 32. b. & 33. b. Mirror ca. 4. del office des juſtices, &c. Glanvil. li. 1. cap. 9. lib. 8. cap. 8.

Ley gager, *Vadiare legem*; and there is alſo *facere legem*, by making of his law. That is, to take an oath (for example) that hee oweth not the debt demanded of him upon a ſimple contract, nor any penny thereof. And it is called wager of law, becauſe of ancient time

* *ne* not in L. and M. nor Roh. † *Et*, not in L. and M. nor Roh.

(1) Upon this ſubject, ſee 3. Black. ch. 22. ſect. 5. and 6. and the notes to the 1ſt vol. of Dr. Robertſon's Hiſtory of Charles the Vth.—The reader will alſo find ſome curious and intereſting particulars upon this head, in *Pere le Brun, Traite de quelques pratiques ſuperſtitieuſes qui ont ſeduit le peuple, et embaraſſe les ſçavants.*

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above extenſive ſenſe) *all* the deeds (as well originals as counterparts) by which the term was created or aſſigned, are delivered to the purchaſor, and he is ſatisfied, that the truſtee in whom it is then ſaid to be veſted, has made no prior aſſignment of it; it is difficult to ſay what poſſible uſe can be made of the term againſt him, or what good end can be anſwered by requiring an aſſignment of it to a truſtee of his own, unleſs it be to ſatisfy the requiſitions of thoſe to whom he may afterwards have occaſion to mortgage or ſell the eſtate.—*3dly*, But if any of the deeds reſpecting the term are not delivered to the purchaſor, or if he is not ſatisfied of the truſtee's not having previouſly aſſigned it; it ſeems prudent to require an actual aſſignment of it to a truſtee for him.—Few general rules, beſides theſe, can be laid down upon this ſubject.—And theſe muſt from their nature be ſubject to an endleſs variety of modifications. In all caſes of this deſcription, it is infinitely better to err by an exceſs of care, than to truſt any thing to hazard. There is no doubt but the precautions uſed for the ſecurity of purchaſors appear ſometimes to be exceſſive, and ſatisfactory reaſons cannot always be given for requiring ſome of them: yet the more a perſon's experience increaſes, the more he finds the reaſon and real utility of them; and the more he will be convinced that very few of the precautions required by the general practice of the profeſſion are without their uſe, or can be ſafely diſpenſed with.

time he put in ſurety to make his law at ſuch a day; and it is called making of his law, becauſe the law doth give ſuch a ſpeciall benefit to the defendant to barre the plaintife for ever in that caſe. [r] But he ought to bring with him eleven perſons of his neighbours that will avow upon their oath, that in their conſciences he ſaith truth, ſo as he himſelfe muſt bee ſworne *de fidelitate*, and the eleven *de credulitate*.

Lib. 10. cap. 5. Bract. li. 3. tract. 2. ca. 37. & li. 5. fol. 410. Britton fol. 56. Fleta lib. 2. ca. 56. 63.

[r] Magna Carta ca. 28. Bracton lib. 5. fol. 410. Fleta lib. 2. ca. 63. Diverſities des Courts. 33. H. 6. 8. (4. Rep. Slade's caſe 93.)

And wager of law lieth not when there is a ſpecialty, or deed to charge the defendant, but when it groweth by word, ſo as he may pay or ſatisfie the party in ſecret, whereof the defendant having no teſtimony of witneſſes may wage his law, and thereby the plaintife is perpetually barred, as *Littleton* here ſaith; for the law preſumeth that no man will forſweare himſelfe for any worldly thing; but mens conſciences doe grow ſo large (ſpecially in this caſe paſſing with impunity) as they chooſe rather to bring an action upon the caſe upon his promiſe, wherein (becauſe it is *treſpaſſe ſur le caſe*) hee cannot wage his law, than an action of debt.

A man outlawed or attainted in an attaint, or upon an inditement of conſpiracy, or of perjury, or otherwiſe, whereby he become infamous, ſhall not wage his law. 33. H. 6. 32.

A man under the age of 21 yeares ſhall not wage his law; but a feme covert, together with her huſband, ſhall wage her law. 11. H. 6. 40. 15. E. 4. 2. (Cro. Eliz. 161.)

When the ſuite is for the king, or for his benefit, as in a *quo minus*, the defendant ſhall not wage his law. 32. H. 6. 24. 8. H. 5. Ley 66. 35. H. 8. Ley. Br. 102.

If an infant be plaintife, the defendant ſhall not wage his law. An alien ſhall wage his law in that language he can ſpeake. 26. E. 3. 63. b. 21. H. 6. 42.

In no caſe where a contempt, treſpaſſe, deceit, or injury is ſuppoſed in the defendant, he ſhall wage his law, becauſe the law will not truſt him with an oath to diſcharge himſelfe in thoſe caſes; only in ſome caſes in dett, detinue, accompt, the defendant is allowed by law to wage his law. 44. E. 3. 32. 18. E. 3. 4. 24 E. 3. 39. (4. Rep. 95. b.)

In an action of account againſt a receiver, upon a receipt of money by the hand of another perſon for account render (unleſſe it be by the hands of his wife, or of his commoigne) the defendant ſhall not wage his law, becauſe the receipt is the ground of the action, which lyeth not in privity betweene the plaintife and defendant, but in the notice of a third perſon, and ſuch a receipt is traverſable. [d] But in an action of debt upon an arbitrament, or in an action of detinue by the bailement of another's hand, the defendant ſhall wage his law, becauſe the *debet* and the *detinet* is the ground of thoſe actions, and the contract or bailement, though it be by another hand, is but the conveyance, and not traverſable. In an action of account againſt a bailife of a mannor, the defendant cannot wage his law, becauſe it foundeth in the realty. In an action of debt which concerns the realty, as for debt for a rent upon a leaſe for yeares, or an action of detinue for detaining an indenture of a leaſe for yeares, the defendant ſhall not wage his law, much leſſe for charters or deedes which concerne inheritance. 15. E. 4. 16. 10. E. 4. 5. (3. Cro. 790. 919.)

[d] 33. H. 6. 24. 13. H. 7. 3. a. 22. H. 6. 41. 1. H. 6. 1. b. 8. H. 6. 11. 18. H. 8. 3. 3. E. 3. 28. 11. H. 4. 54. 5 H. 5. 13. 21. H. 6. 30. 24. E. 3. Ley 63. 30. E. 3. 19. 9. E. 4. 1. 34. H. 8. Ley Gager. Br. 97.

In an action of debt for a fine or amerciament in a leete, the defendant ſhall not wage his law, becauſe the leete is a court of record; but in an action of debt for an amerciament in a court baron the defendant ſhall wage his law, for that it is no court of record. 10. H. 6. 7. 1. H. 7. 25. 6. Eliz. Bendloes.

In debt upon an account, before auditors, the defendant ſhall not wage his law, and this by conſtruction of the ſtatute of *W. 2. cap. 11.* which giveth them great authority, and ſaith, *coram auditoribus*, and therefore of an account before one auditor the law lyeth. So if the lord before auditors be found in ſurpluſage, in an action of debt brought by the accomptant, the lord ſhall not wage his law by conſtruction alſo upon this ſtatute, as an incident riſing upon the account. 9. H. 5. 3. 8. H. 6. 15. 22. H. 6. 35. 38. H. 6. 6. 14. H. 6. 62. 38. H. 6. 6.

In an action of debt by a gaoler againſt the priſoner for his victuals, the defendant ſhall not wage his law, for he cannot refuſe the priſoner, and ought not to ſuffer him to die for default of ſuſtenance; otherwiſe it is for tabling of a man at large. 28. H. 6. 4. 19. H. 6. 20. 22. H. 6. 13. 39. H. 6. 18.

In an action of debt brought by an attorney for his fees, the defendant ſhall not wage his law, becauſe he is compellable to be his attorney.(1) And ſo if a ſervant be retained according to the ſtatute of labourers in an action of debt for his ſalary, his maſter ſhall not wage his law, becauſe he was compellable to ſerve; otherwiſe it is, if he be not retained according to the ſtatute. (+) 21. H. 6. 4. 38. H. 6. 22. 39. H. 6. 18.

Whereſoever a man is charged as executor or adminiſtrator, he ſhall not wage his law, for no man ſhall wage his law of another man's deed, but in caſe of a ſucceſſor of an abbot, for that the houſe never dyeth. 5. H. 6. 38. 1. H. 7. 25. 13. H. 7.

In debt upon a penalty given by ſtatute, the defendant ſhall not wage his law. 10. H. 7. 18.

There is another kinde of wager of law in a reall action, of *non ſummons*, but thereof *Littleton* ſpeaketh not.

Et ſur ceo Herle *juſtice dit, &c.* Hereby it appeareth, that it is the office of

(1) *Otherwiſe of a counſellor at law, for he cannot bring any action; for he is not compellable to be counſellor, and his fee is* honorarium, *not a debt. Ammianus, lib.* 3.—Lord Nott. MSS.

(2) At Rome the functions of the bar were divided between, I. The Patrons, or Orators: II. The Advocates, who attended to inform or inſtruct the patrons upon the points of law, which aroſe in the cauſe: III. The Procurators: And, IV. the Cognitors. The two laſt nearly reſembled the Attornies of our courts. Beſides theſe, were the *Juris-conſulti*, who gave their opinions and advice upon matters of law. Till the time of Auguſtus every perſon had this liberty; but he confined it to ſome particular individuals ſelected by him, and made a regulation, that in future no one ſhould enjoy that privilege but under the authority of the prince. The opinions of the *Juris-conſulti*, called the *Reſponſa Prudentum*, were of great weight; and a conſiderable part of the Roman law is founded upon them. See Gravina *de Ortu et Progreſſu Juris Civilis*, lib. 1. ſect. 42, 43, 44. In the Summary of the Roman Law, taken from Dr. Taylor's Elements of the Civil Law, page 26, it is obſerved, that the *Reſponſa Prudentum* ſeem to amount to what we call Precedents, or Reports; that it is common to them both to be the determinations of lawyers to explain law: but that there is this difference between them, that our precedents owe their authority to their being the judgment of the court; but the *Reſponſa Prudentum*, though admitted as law, were nothing more than the private opinions of lawyers. See Cod. lib. 1. tit. 17. and the Cod. Theo. lib. 1. tit. 4. with the notes of Gothofred. It is ſuppoſed, that, in the early days of the Roman Empire, the practice of the law was merely honorary; but it ſoon became an object of gain. The Cincian law, which was paſſed about the time of the ſecond Punic war, was intended to revive the primitive cuſtom of honorary advocation. But it was ſo often evaded, that the emperor Claudius thought it more adviſable to moderate, than to attempt to deſtroy entirely, the ſalaries or emoluments of advocates. He accordingly inhibited them from taking a larger fee than ten ſeſterces, about 8ol. 14s. 7d. Engliſh. The advocates, however, thought it an indignity, that their fees ſhould be conſidered as wages, and therefore dignified them by the honourable title of preſents, or gratuities; but as they might demand, and even maintain an action for their fees, this diſtinction was merely nominal. See Gothofred *de Salario*, and Doctor Bever's Hiſtory of the Civil Law, page 444. In England the fees of counſel are honorary, in the ſtrict acceptation of the word. Thus in Moor v. Row, Cha. Rep. 38. a counſellor brought a bill for fees due to him from the defendant, a ſolicitor. The defendant demurred; the demurrer was allowed, and the bill diſmiſſed. Sir John Davies thus expreſſes himſelf upon this ſubject, in his preface to his Reports, pag. 22, 23. "*The fees to counſellors are not in nature of wages, or pay, or* that which we call *ſalary, or hire*, which are duties certain, and grow due by conteſt, for labour or ſervice, but *what is given him is honorarium, not merces*; being a gift which gives honour as well to the taker as the giver: nor is it certain or contracted; for no price, or rate, can be ſet upon counſel, which is invaluable and ineſtimable, ſo as it is more or leſs, according to the circumſtances, namely, the ability of the client, the worthineſs of the counſellor, the weight-

of the judges to inſtruct the grand aſſiſe or jury in points of law; for as the grand aſſiſe or other jurors are triers of the matters of fact, *ad queſtionem facti non reſpondent judices*, ſo *ad queſtionem juris non reſpondent juratores*. And accordingly the judge in this caſe directed the grand aſſiſe, viz. if they found that, &c.

Glanv. li. 12. cap. 1, &c. Bracton li. 5. fo. 328.

Per que fuit agard. Here are two things to be obſerved. Firſt, the form of a judgement finall. Secondly, that a judgement finall is to bee given in this particular caſe. For the forme of the finall judgement for the tenant is here expreſſed, that the tenant ſhall hold the tenements demanded againſt him, to him and his heirs quite of the demandant and his heires for ever, and the demandant in the mercy. *Quòd tenens teneat terram illam ſibi et hæredibus ſuis in pace verſus petentem, et hæredes ſuos in perpetuum.*

Lib. 5. fol. 85. Penrin's caſe.

For the ſecond point, ſeeing the miſe is joyned upon the meer right, albeit the verdict of the grand aſſiſe be given upon another point, yet judgement finall ſhall be given. And ſo it is if the tenant after the miſe joyned make default, or confeſſe the action, or if the demandant be non-ſuite; and yet in none of theſe caſes they of the grand aſſiſe gave their verdict upon the meere right.

31 E. 3. Judgm. 256. adjudge accord. 13. H. 4. Judgm. 245. 10. H. 6. 8. 20. H. 6. 38. b. 21. H. 6. 34. b. 26. H. 8. 8. b. 1. Mar. Dy. 98. Li. 5. fo. 85. Penrin's caſe. F. N. B. 5. 11. 31.

Come eſt avantdit. Vid. Sect. 478.

Chap. 9. Of Confirmation. Sect. 515.

Bract. li. 2. fol. 32. b. & 58, 59. Brit. 235.

HERE firſt our author ſhewes what a confirmation is:

* Lit. pag. ſequen.

Confirmation. *Confirmatio* commeth of the verbe * *confirmare, quod eſt firmum facere*; and therefore it is ſaid, that *confirmatio omnes ſupplet defectus, licèt id quod actum eſt ab initio, non valuit.* A confirmation is a conveyance of an eſtate or right *in eſſe*, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is encreaſed.

Bract. li. 2. 58.

A confirmation doth not ſtrengthen a voide eſtate. *Confirmatio eſt nulla ubi donum præcedens eſt invalidum, & ubi donatio nulla omnino nec valebit confirmatio:* for a confirmation may make a voidable or defeaſible eſtate good, but it cannot worke upon an eſtate that is voide in law. *Non valet confirmatio niſi ille qui confirmat ſit in poſſeſſione rei, vel juris unile fieri debet confirmatio, & eodem modo niſi ille cui confirmatio fit, ſit in poſſeſſione.* And another ſaith, [c] *Confirmare eſt id quod prius infirmum fuit firmare. Et donationum alia incepta, & defectiva, & poſt tempus confirmata, confirmatio enim omnem ſupplet defectum, poterit enim eſſe in pendenti donec per ratihabitionem hæredis cùm ad ætatem pervenerit roboretur.* (1)

Bract. li. 2. fol. 27. 58. 38. H. 6. 34. 37. Pl. Com. 390. Count de Leiceſter's caſe. (3. Rep. 64. b.) 10. E. 2. Confirm. 24. 32. E. 3. 9.

[c] Fleta lib. 3. cap. 14. & lib. 3. cap. 3.

Ratificâſſe. *Ratificare eſt ratum facere*, and is *æquipollent* to *confirmare*, which, as hath been ſaid, is *firmum facere.*

44. Aſſ. 3.

Approbâſſe cometh of *ad* and *probo*, which is to make perfect and good.

Confirmâſſe. Here it is to be obſerved, that there bee two kindes of confirmations, viz. confirmations expreſſe or in deed, whereof *Littleton* hath here put theſe three examples, and confirmations implied, or in law, whereof *Littleton* hereafter ſpeaketh in this chapter. *Quælibet confirmatio, aut eſt perficiens, creſcens, aut diminuens*; and of all theſe *Littleton* putteth examples in this chapter. And hereof *Fleta* ſaith, *carta autem de confirmatione eſt illa quæ alterius factum conſolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit.* (2)

Li. 9. fo. 142. Beamond's caſe. Flet. li. 3. cap. 14.

FAIT de confirmation eſt communement en tiel forme, ou a tiel effect: Noverint univerſi, &c. me A. de B. ratificâſſe, approbâſſe et confirmâſſe C. de D. ſtatum & poſſeſſionem, quos habeo, de, & in uno meſſuagio, &c. cum pertinentibus in F. &c.

A DEEDE of confirmation is commonly in this forme, or to this effect: *Know all men, &c. that I A. of B. have ratified, approved, and confirmed to C. of D. the eſtate and poſſeſſion which I have, of, and in one meſſuage, &c. with the appurtenances in F. &c.*

Sect.

(1) A *confirmation* is an approbation of, or aſſent to, an eſtate already created; by which the confirmor ſtrengthens and gives validity to it, as far as it is in his power. It has this operation only, with reſpect to eſtates *voidable* or defeaſible; but it has no operation upon eſtates which are abſolutely *void*. Such words may be uſed in a confirmation as may encreaſe or enlarge the eſtate; but that, as lord chief baron Gilbert obſerves, is by the force of thoſe words, and, ſtrictly ſpeaking, is foreign to the confirmation. Gilb. Ten. 75.

(2) See 9. Rep. 142. where ſir Edward Coke brings examples of theſe different operations of a confirmation.

" weightineſs of the cauſe, and the cuſtom of the country. It is a gift of ſuch a nature, that the able client may not neglect to give it " without ingratitude, for it is but a gratuity, or taking of thankfulneſs; yet the worthy *counſellor may not demand it without doing* " *wrong to his reputation*, according to that moral rule, *multa honeſta accipi poſſunt quæ tamen peti non poſſunt.*" In France the Roman law reſpecting the fees of advocates formerly prevailed. Many inſtances are found in their law books, of advocates bringing actions for their fees, and recovering upon them: but this has long fallen into diſuſe. In the conteſt, in 1775, between Mr. Linguet and the Order of Advocates, one of the charges againſt him was, that he had written to the duke d'Aiguillon, to demand his fees; and threatened him with an action for them; and that his demands upon the duke had been referred to arbitration. See *Journal Hiſtorique du Retabliſſement de la Magiſtrature*, tom 7. p. 190. Ordonnances have been made at different times enjoining the advocates to ſubſcribe, at the foot of their pleadings, a receipt for their fees; but the advocates never would obey them. The leading ordonnance upon this head is that of Blois. In 1602, the parliament of Paris gave an arret, enforcing the obſervance of that ordonnance. This gave the advocates ſo much offence, that three hundred of them renounced their profeſſion upon it, with the uſual formalities. This put an entire ſtop to the proceedings of the courts of juſtice. The matter was afterwards ſettled; and the ordonnance of Blois, in this reſpect, and the ſubſequent ordonnances enforcing it, are now conſidered as virtually repealed. See Loyſel, *Dialogue des Avocats*; and *Menagii Juris Civilis Amœnitates*, cap. 18.

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*ET en aſcun caſe un fait de confirmation eſt bone et available, lou en tiel caſe un fait de releaſe n'eſt paſſe bone ne available. Sicome jeo leſſa terre a un home pur terme de ſa vie, lequel leſſa meſme la terre a un auter pur terme de xl. ans, per force de quel il eſt en poſſeſſion; ſi jeo per mon fait confirme l'eſtate del tenant a terme d'ans, et puis le tenant a terme de vie moruſt durant le terme des * ans, jeo ne puis enter en la terre durant le dit terme.*

AND in ſome caſe a deede of confirmation is good and available, where in the ſame caſe a deede of releaſe is not good nor availeable. As if I let land to a man for terme of his life, who letteth the ſame to another for terme of forty yeares, by force of which he is in poſſeſſion; if I by my deed confirme the eſtate of the tenant for yeares, and after the tenant for life dieth during the terme of yeares, I cannot enter into the land during the ſaid terme.

LITTLETON in this chapter putteth eight diverſities betweene a confirmation and a releaſe; (1) and thereof for illuſtration here hee putteth two caſes in this and the next Section, which upon that which hath beene ſaid in the precedent chapters, is ſufficiently explained. Onely in both theſe caſes this is to bee obſerved, that where a confirmation ſhall enlarge an eſtate, there privity is required, as well as in the caſe of the releaſe, as by many examples which *Littleton* puts in this chapter appeareth. And note, here is the firſt caſe wherein a releaſe and a confirmation doe differ:

49. E. 3. 32.

(2. Roll. Abr. 482.)

9. H. 6. 22. tit. releaſe 44.

Leſſee for life made a leaſe for thirty yeares, and after the leſſor and leſſee for life made a leaſe for ſixty yeares to another, which leaſe for ſixty yeares the leſſor did firſt confirme, and after the leſſor confirmed the leaſe for thirty yeares, and after tenant for life dyed within the thirty yeares; and it was adjudged [*d*], that the leaſe for thirty yeares was determined by the death of leſſee for life, and that the leſſee for ſixty yeares might enter; for that albeit the leaſe for ſixty yeares was the latter in time, yet was it of greater force in law, for that the leſſor who had power to confirme which of them he would, did firſt confirme the ſecond leaſe.

(Cro. Car. 284. 1. Roll. Abr. 483. 500. Mo. 67. Dyer 218. b. Hob. 165. Poſt. 310. a.)

[*d*] Inter Unwel & Lodge, temp. Reg. Eliz. (Hob. 7.)

In this chapter is alſo to be obſerved eight caſes, wherein a releaſe and a confirmation have the like operation in law.

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UNCORE ſi jeo per mon fait de releaſe avoy releas al tenant a terme d'ans en la vie le tenant a terme de vie, cel releaſe ſerra voyd, pur ceo que adonques ne fuit aſcun privity perenter † moy et le tenant a terme d'ans: car releaſe n'eſt available al tenant a terme d'ans, mes lou eſt un privitie perenter luy et celuy que releaſaſt.

YET if I by my deed of releaſe had releaſed to the tenant for years in the lifetime of the tenant for life, this releaſe ſhall be voide, for that then there was not any privity between me and the tenant for years: for a releaſe is not available to the tenant for yeares, but where there is a privity betweene him and him that releaſeth. (2)

This belongeth to the firſt diverſity between a releaſe and a confirmation.

* *xl.* added L. M. and Roh.

† *moy et le tenant a terme d'ans,—luy et moy*, L. M. and Roh.

(1) He alſo mentions eight inſtances in which they agree.

(2) For in this caſe, if the leſſor releaſed to the leſſee for years, without uſing any further words, the operation of the releaſe would be to enlarge the eſtate of the leſſee by giving him an eſtate of freehold for his life. Now to make releaſes operate in this manner, it is neceſſary, not only that the releaſee, at the time the releaſe is made, ſhould be in the actual poſſeſſion of, or have a veſted intereſt in, the lands intended to be releaſed, but that there ſhould be a privity between him and the releaſor. In the caſe mentioned by Littleton, there is no privity between the donor and the leſſee of the donee for life. A releaſe therefore from the donor to the leſſee would be void. But a confirmation by the donor is good, and gives a ſtability and permanency to the eſtate of the leſſee during the whole term, which would otherwiſe determine by the deceaſe of the donee. Ante 272. a. 273. b.

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HERE is the ſecond diverſitie betweene a releaſe and a confirmation. But if the diſſeiſor make a leaſe for yeares to begin at Michaelmaſſe, and the diſſeiſee confirme his eſtate, this is voide, becauſe he hath but *intereſſe termini*, and no eſtate in him, whereupon a confirmation may enure.

4. H. 7. 10. by Read. 22. E. 4. 36.

*EN meſme le manner eſt, ſi jeo ſoy diſſeiſie, et le diſſeiſor fait un leaſe a un auter pur terme d'ans, ſi jeo releſſa al termor, ceo eſt voyde: mes ſi jeo confirma * l'eſtate le termor, ceo eſt bone et effectual.*

IN the ſame manner it is, if I be diſſeiſed, and the diſſeiſor make a leaſe to another for term of yeares, if I releaſe to the termor, this is void: but if I confirme the eſtate of the termor, this is good and effectuall.

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(5. Rep. 81.)

ITEM, ſi jeo ſoy diſſeiſie, et jeo confirma l'eſtate le diſſeiſor, il ad bone et droiturel eſtate en fee ſimple, coment que en le fait de confirmation nul mention eſt fait de ſes heires, pur ceo que il avoit fee ſimple al temps de confirmation. Car en tiel caſe ſi le diſſeiſee confirma l'eſtate le diſſeiſor, a aver et tener a luy et a ſes heires de ſon corps engendres, ou a aver et tener a luy pur le terme de ſa vie, uncore le diſſeiſor ad fee ſimple, et eſt ſeiſie en ſon demeſne come de fee, pur ceo que quant ſon eſtate fuit confirme, donque il avoit fee ſimple, et tiel fait ne poit changer ſon eſtate, ſans entry † fait ſur luy, &c.

ALSO, if I be diſſeiſed, and I confirme the eſtate of the diſſeiſor, hee hath a good and rightfull eſtate in fee ſimple, albeit in the deede of confirmation no mention be made of his heires, becauſe hee had fee ſimple at the time of the confirmation. For in ſuch caſe if the diſſeiſee confirme the ſtate of the diſſeiſor, to have and to hold to him and his heires of his body engendred, or to have and to hold to him for term of his life, yet the diſſeiſor hath a fee ſimple, and is ſeiſed in his demeſne as of fee, becauſe when his eſtate was confirmed, hee had then a fee ſimple, and ſuch deed cannot change his eſtate, without entry made upon him, &c.

19. H. 6. 22. 6. E. 3. Confirm. 4.

HERE is the firſt caſe wherein the releaſe and confirmation doth agree, viz. a confirmation to a diſſeiſor in taile, or for any particular eſtate, is of the like force as a releaſe to a diſſeiſor, during ſuch eſtate, which in both caſes is good for ever. In the ſame manner it is, if the diſſeiſor make a gift in taile, and the diſſeiſee confirme the eſtate of the donee for the life of the donee, this confirmation enures to the whole eſtate taile; for a confirmation can make no fraction of any eſtate, to extend but to part of the eſtate onely. *Et ſic de cæteris.* (1)

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* *l'eſtate de termor, — ſon eſtate,* L. and M. and Roh. † *fait* not in L. and M. nor Roh.

(1) It is to be obſerved, that a diſſeiſor acquires by the diſſeiſin a tortious fee ſimple, notwithſtanding at the time he makes the diſſeiſin he claims a leſs eſtate; it being a rule, that a diſſeiſor cannot qualify his own wrong.

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*EN meſme le manner eſt, ſi ſon eſtate ſoit confirme pur terme de un jour, ou pur terme d'un heure, il ad bon eſtate en fee ſimple, pur ceo que * ſon eſtate en fee ſimple fuits un foits confirme.* Quia confirmare idem eſt, quòd firmum facere, &c.

IN the ſame manner it is, if his eſtate bee confirmed for terme of a day, or for terme of an houre, hee hath a good eſtate in fee ſimple, for this, that his eſtate in fee ſimple was once confirmed. *Quia confirmare idem eſt, quòd firmum facere, &c.*

HERE is the ſecond caſe wherin the releaſe and confirmation doe agree. The reaſon of this is, for that the diſſeiſor hath a fee ſimple; and therefore if his eſtate be confirmed but for an houre, it is good for ever, becauſe (ſaith *Littleton*) *confirmare idem eſt, quòd firmum facere.*

Nota, a diverſity betweene a bare aſſent without any right or intereſt, and an aſſent coupled with a right or intereſt; and therefore an attornement cannot be made for a time nor upon condition; but if the perſon make a leaſe for a hundred yeares, the patron and the ordinary may confirme fifty of the yeares, for they have an intereſt, and may charge in time of vacation. And ſo if a diſſeiſor make a leaſe for an hundred yeares, the diſſeiſee may confirme parcel of thoſe yeares; but then it muſt be by apt words, for he muſt not confirme the leaſe, or demiſe, or the eſtate of the leſſee, for then the addition for parcell of the terme ſhould be repugnant when the whole was confirmed before, but the confirmation muſt be of the land for part of the terme. So may the confirmation be of part of the land; as if it be of forty acres, he may confirme twenty, &c. So if tenant for life make a leaſe for an hundred yeares, the leſſor may confirme eyther for part of the terme, or for part of the land. But an eſtate of free-hold cannot bee confirmed for part of the eſtate, for that the eſtate is intire, and not ſeverall, as yeares be (1).

Lib. 5. fol. 81. Forde's caſe. (Ant. 274. a.) (Poſt. 300. b.)

(1. Roll. Abr. 412.)

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ITEM, ſi mon diſſeiſor fait un leas a terme de vie, le remainder ouſter en fee, ſi jeo releas al tenant a terme de vie, ceo urera a celuy en le remainder. Mes ſi jeo confirme l'eſtate de le tenant a terme de vie, uncore apres ſon deceaſe jeo puis bien enter, pur ceo que † riens eſt confirme forſque l'eſtate le tenant a terme de vie, iſſint que apres ſon deceaſe, jeo puis enter. Mes quant jeo releſſa

ALSO, if my diſſeiſor maketh a leaſe for life, the remainder over in fee, if I releaſe to the tenant for life, this ſhall enure to him in the remainder. But if I confirme the eſtate of the tenant for tearme of life, yet after his deceaſe I may well enter, becauſe nothing is confirmed but the eſtate of the tenant for life, ſo that after his de-

HERE is the third caſe wherein the releaſe and confirmation differ, for the confirmation to the tenant for life doth not enure to him in the remainder.

And ſo it is when the ſeverall eſtates be in one perſon; as if the diſſeiſor make a gift in taile, the remaynder to the right heires of tenant in taile, if the diſſeiſee confirme the eſtate in taile, it ſhall not extend to the fee ſimple, no more than if the diſſeiſor had made a gift in taile, the remainder for life, the remainder to the right heires of tenant in taile; this extendeth onely to the eſtate taile, and not to

* *ſon* not in L. and M. nor Roh.

† *nul* added L. and M. and Roh.

(1) The diſtinctions taken here by ſir Edw. Coke are, that a confirmation to a tenant of freehold or inheritance, cannot be ſo worded as to have a leſs operation than that of confirming his whole eſtate; conſequently, a confirmation to ſuch a tenant, either of the lands, or of his eſtate in them, for any term or period, is a confirmation of his whole fee. A diſſeiſor always acquires by the diſſeiſin a tortious fee ſimple; a confirmation therefore to him, however qualified, is a confirmation of his whole fee. It is otherwiſe in the caſe of a term of years. A confirmation may be made of part of the term only. The reaſon of this difference is, that an eſtate of freehold or of inheritance is conſidered as integral and indiviſible. But as years are ſeveral, the term which is compoſed of them is neceſſarily fractional and diviſible, and may conſequently be confirmed in part only, by uſing proper expreſſions for this purpoſe. If a perſon confirms *the eſtate* of the tenant for years for part of the term, as the word eſtate ſignifies all the intereſt or term of years which the tenant has, the ſubſequent words are not conſidered as qualifications of the former words, but as abſolutely repugnant to them; and as both cannot ſtand together, the law prefers the firſt, which are the principal, to the other, which are only ſecondary. 5 Co. 76. b.

(Ant. 52. a.)
(Poſt. 310. a. 315. a. 319. a.)
(1 Roll. Abr. 302.)

to the remainder for life, nor to the remainder in fee. But if the diſſeiſor make a leaſe for life to *A.* and *B.* and the diſſeiſee confirme the eſtate of *A.* *B.* ſhall take advantage thereof; for the eſtate of *A.* which was confirmed was joynt with *B.* and in that caſe the diſſeiſee ſhall not enter into the land, and deveſt the moity of *B.*

(Sid. 83.)

If the diſſeiſor infeoffs *A.* and *B.* and the heires of *B.* if the diſſeiſee confirme the eſtate of *B.* for his life, this ſhall not only extend to his companion, as hath beene ſaid, but to his whole fee ſimple, becauſe to many purpoſes hee had the whole fee ſimple in him, and the confirmation ſhall bee taken moſt ſtrong againſt him that made it.

(1 Cro. 321.)
(Ant. 182.)

Tenant in tayle diſcontinueth in fee and dyeth, the diſcontinuee make a leaſe for life, and granteth the reverſion to the iſſue, he ſhall not have a formedon againſt tenant for life; for by his formedon he

tout mon droit al tenant a terme de vie, ceo urera a celuy en le remainder ou en le reverſion, pur ceo que tout mon droit eſt ale per tiel releas. Mes en ceſt cas, ſi le diſſeiſee confirme l'eſtate et le title celuy en le remainder ſans aſcun confirmation fait a tenant a terme de vie, le diſſeiſee ne poit enter ſur le tenant a terme de vie, pur ceo que le remainder eſt dependant ſur l'eſtate le tenant a terme de vie; et ſi ſon eſtate ſerroit defeate, le remainder ſerroit defeate per l'entrie le diſſeiſee, et ceo ne ſerra reaſon que il per ſon entre defeateroit le remainder encounter ſon confirmation, &c.

ceaſe I may enter. But when I releaſe all my right to the tenant for life, this ſhall enure to him in the remainder or in the reverſion, becauſe all my right is gone by ſuch releaſe. But in this caſe, if the diſſeiſee confirme the eſtate and title of him in the remainder without any confirmation made to tenant for life, the diſſeiſee cannot enter upon the tenant for terme of life, for that the remainder is depending upon the ſtate for life; and if his eſtate ſhould be defeated, the remainder ſhould be defeated by the entry of the diſſeiſee, and it is no reaſon that he by his entry ſhould defeat the remainder againſt his confirmation, &c.

must recover eſtate of inheritance, and the leſſee for life hath not the inheritance, but the iſſue in taile himſelfe hath it.

(Ant. 202. a.)

If feoffee upon condition make a leaſe for life, or a gift in taile, and the feoffor releaſe the condition to the feoffee, he ſhall not enter upon the leſſee or donee, becauſe he cannot regaine his ancient eſtate.

If the feoffee upon condition make a leaſe for life, the remainder in fee, if the feoffor releaſe the condition to the leſſee for life, it ſhall enure to him in the remainder, as well as in the caſe of the right, or of a rent, &c.

If a feme diſſeiſoreſſe make a feoffment in fee to the uſe of *A.* for life, and after to the uſe of herſelfe in taile, and the remainder to the uſe of *B.* in fee, and then taketh huſband the diſſeiſee, and he releaſeth to *A.* all his right, this ſhall enure to *B.* and to his own wife alſo; for by the rule of *Littleton* it muſt enure to all in the remainder (1).

But if *A.* letteth to *B.* for life, and *B.* maketh a leaſe to *C.* for his life, the remainder to *A.* in fee, *A.* releaſeth to *C.* all his right, this is good to perfect the eſtate of *C.* for his life. But when *C.* dyeth, *A.* ſhall be in of his old eſtate, for his releaſe could not enure to himſelfe to perfect his defeaſible remainder, but his ancient right remaineth. And note, that in theſe two caſes the fee is deveſted and veſted all at one inſtant; in the ſame manner as if tenant in taile make a leaſe for life, at the ſame inſtant the eſtate taile is deveſted out of the donee, and the reverſion in fee out of the donor, and a new fee veſted in tenant in taile. And ſo if the huſband make a leaſe for life of his wife's land, he deveſteth his owne eſtate, that he hath in her right, and the inheritance of his wife, and at the ſame inſtant veſted a new reverſion in fee in himſelfe.

Vid. 29. Aſſ. 17. 30. H. 8. Recov. en value. Br. 30. 13. E. 3. entr. cong. Br. 127.

Mes en ceſt caſe ſi le diſſeiſee confirme l'eſtate et title celuy en le remaynder. Here is the third caſe wherein the releaſe and confirmation doe agree, for

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

(1) For though a man cannot contract with his wife, or transfer any intereſt to her, yet ſhe may, by conſtruction of law, take benefit of a releaſe made by him to a third perſon, and enuring by way of extinguiſhment. Hawk. Abr.

for the confirmation made to him in the remainder shall availe the tenant for life, as much as the release shall.

Pl. Com. Delamere's case. Vid. Sect. 574.

Pur ceo que le remainder est dependant, &c. By this some have gathered, that if a disseisor make a lease for life, reserving the reversion to himselfe, and the disseisee confirmeth the state of the disseisor, that he may enter upon the lessee, because the estate of him in the reversion dependeth not upon the state for life as the remainder: but all is one, for by the confirmation made to him in the reversion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder; and he cannot by his entry avoide the estate of the lessee for life, but hee must avoide the state of the lessor, which against his owne confirmation he cannot doe; and it hath been adjudged, that if a disseisor make a lease for life, and after levie a fine of the reversion with proclamations, and the five years passe, so as the disseisee is for the reversion barred, he shall not enter upon the lessee for life.

(Mo. 91.)
Reported by sir John Popham, chiefe justice.
(Post. 302. a.)
(6. Rep. 40.)
(Sid. 360.)

Le remainder serra defeat. It is regularly true, that when the particular estate is defeated, that the remainder thereby shall be also defeated, but it faileth in divers cases.

(1. Saun. 149, 150. Ant. 224. a.)

For where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a defeating of the remainder. But where the particular estate is defeasible, and the remainder by good title, there though the particular estate be defeated, the remainder is good. As if the lessor disseise *A.* lessee for life, and make a lease to *B.* for the life of *A.* the remainder to *C.* in fee, albeit *A.* re-enter, and defeate the estate for life, yet the remainder to *C.* being once vested by good title shall not be avoided; for it were against reason, that the lessor should have the remainder againe against his owne livery; and this is well warranted by the reason of *Littleton* in this case. So it is if a lease be made to an infant for life, the remainder in fee, the infant at his full age disagree to the estate for life, yet the remainder is good, for that it was once vested by good title; for in both these cases there was a particular estate at the time of the remainder created.

Vid. Pl. Com. Colthirst's case.
(Post. 333. a. b.)

If a lease be made to *A.* for the life of *B.* the remainder to *C.* in fee, *A.* dyeth before an occupant entreth, here is a remainder without a particular estate, and yet the remainder continueth good. (1)

17. E. 3. 48.

A rent is granted to the tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular estate continued not; for *eo instante* that he tooke the particular estate, *eo instante* the remainder vested, and the suspension in judgement of law grew after the taking of the particular estate. (2)

3. E. 3. Abb. Ass.
(Plo. 35. a. Vaugh. 200.
Moor 664. Yelv. 9.
2. Roll. Ab. 415. 7. H. 4. 6.
1. Rep. 66. Noy 47.)

If a man grant a rent to *B.* for the life of *Alice*, the remainder to the heires of the body of *Alice*, this is a good remainder, and yet it must vest upon an instant. (3)

7. H. 4. 6.

Sect. 522.

*ITEM, si sont deux disseisors, et le disseisee relessa a un de eux, il tiendra son compagnion hors de la terre. Mes si le disseisee confirma l'estate de l'un, sans pluis * dire en le fait, ascuns diont que il ne tiendra son compagnion dehors, mes tiendra joyntment oveluy, pur ceo que † riens fuit confirme forsque*

ALSO, if there bee two disseisors, and the disseisee releaseth to one of them, hee shall hold his companion out of the land. But if the disseisee confirme the estate of the one, without more saying in the deede, some say that hee shall not hold his companion out, but shall hold joyntly with him, for that nothing was con-

THIS is the fourth case wherein the release and the confirmation seeme to differ, being made unto one of the disseisors.

Confirme forsque son estate, &c. Hereby it appeareth, that if the disseisee confirme the estate of the one disseisor in the lands, to have and to hold the lands or tenements, or the right of the disseisee, to him and his heires, hee shall hold out the other disseisor; and that appeareth by *Littleton*, first, upon these words (*confirme the state of one*) without more saying in the deed,

* *dire — parlance,* L. and M. and Roh. † *nul* added L. and M. and Roh.

(1) But since the stat. 29. Car. 2. c. 3. 14. Geo. 2. c. 20. no such vacancy can happen.

(2) A rent is an incorporeal hereditament, and susceptible of the same limitations as other hereditaments. Hence it may be granted, or devised, for life, or in tail, with remainders or limitations over. But there is this difference between an intail of lands and an intail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the intail and the reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issues in tail; but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee simple. This was resolved in the cases of Smyth v. Farnaby, Carter 52. Sid. 285. and 2. Keb. 29. 55. 84. Weeks v. Peach, Lutw. 1224. and Chaplin v. Chaplin, 3 P. Wms 229. The reason of this difference is, that it would be unjust that the conveyance of a grantee of a rent, should give a longer duration or existence to the rent, than it had in its original creation. It is true, that the barring of an estate tail in land is equally contrary to the intention of the grantor. But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property which was considered to be against common right, with a very jealous eye. Now, a rent-charge was supposed to be against common right, the grantee of the rent-charge being subject to no feudal services, and being a burthen upon the tenant who was to perform them. Upon this principle the law, in every instance, avoided giving by implication a continuation to the rent, beyond the period expressly fixed for its continuance. Thus if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of rent is not entitled to her dower against the donor. So if a rent is granted to a man and his heirs generally, and he dies without an heir, the rent does not escheat, but sinks into the land. It is upon this principle, that when there is not a limitation over in fee, a tenant in tail of rent acquires, by his recovery, no more than a base fee. But if there is a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the rent in fee; and therefore, it is doing him no injustice that the recovery should give the donee, who suffers it, an estate in fee simple. The case of Chaplin v. Chaplin was, that lady Hanby, the grandmother of Porter Chaplin, being seised in fee, conveyed diverse lands, to the use and intent that the trustees named in the deed, should receive and enjoy a rent-charge of 30l. per ann. to them and their heirs, with power to distrain for it, and to enter and hold the land on non-payment for forty days; and then the rent was declared to be to the use of Porter Chaplin in tail; remainder to the use of the same person who had the land in fee. It is stated to have been afterwards disclosed to the court, that the legal estate of the rent in fee was in the trustees. But it is worthy of the attention of the reader, that it was not necessary that any new matter should be adduced to disclose this to the court, as it appears on the face of the deed: for a conveyance to *A.* and his heirs, to the use and intent that *B.* and his heirs may receive a rent out of the estate, gives *B.* the legal fee of the rent; so that if it is afterwards declared, that *B.* and his heirs are to stand seised of the rent to uses, the intended *cestuis que use* take only trust or equitable estates. If, therefore, it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute.

(3) Formerly the doctrine of the necessity that the remainder should rest at the very instant of the determination of the particular estate

deede, viz. to have and to hold the lands, &c. Secondly, the reaſon of *Littleton* in expreſſe words is, for that nothing was confirmed but his eſtate which was joynt. Thirdly, the next two Sections make it plaine where the *habendum* is added.

ſon eſtate que fuit joynt, &c.

firmed but his eſtate which was joynt, &c.

Hereby alſo it appeareth, that a releaſe is more forcible in law than a confirmation. If the diſſeiſee and a ſtranger diſſeiſe the heire of the diſſeiſor, and the diſſeiſee confirme the eſtate of his companion, this ſhall not extinguiſh his right that was ſuſpended: ſo as if the heire or the diſſeiſor re-enter, the right of the diſſeiſee is revived. And ſo it is if the grantee of a rent-charge and an eſtranger diſſeiſe the tenant of the land, and the grantee confirme the eſtate of his companion, the tenant of the land re-enter, the rent is revived; for the confirmation extended not to the rent ſuſpended, otherwiſe it is of a releaſe in both caſes.

Sect. 523.

*ET pur ceo aſcuns ont dit, que ſi deux joyntenants ſont, et l'un confirme l'eſtate l'auter, que il n'ad forſque joint eſtate, ſicome il avoit adevant. Mes s'il ad tiels parols en le fait de confirmation, a aver et tener a luy et a ſes heires touts les tenements dont mention eſt fait en le confirmation, donques il ad eſtate ſole en les tenements, * &c. Et pur ceo il eſt bone et ſure choſe en cheſcun confirmation d'aver ceux parolx; a aver et tener les tenements, &c. en fee, ou en fee taile, ou pur terme de vie, ou pur terme d'ans, ſolonque ceo que le cas † eſt, ou le matter giſt.*

AND for this ſome have ſaid, that if two joyntenants bee, and the one confirme the eſtate of the other, that he hath but a joynt eſtate, as he had before. But if hee hath ſuch words in the deede of confirmation, to have and to hold to him and to his heires all the tenements whereof mention is made in the confirmation, then he hath a ſole eſtate in the tenements, &c. And therefore it is a good and ſure thing in every confirmation to have theſe words; to have and to hold the tenements, &c. in fee, or in fee taile, or for terme of life, or for terme of yeares, according as the caſe is or the matter lyeth.

AND this confirmation leaveth the ſtate as it was, and doth not amount to any ſeverance of the joynture, as ſome have ſaid.

34. E. 3. tit. Confirm. pl. 15.

Mes s'il ad tiels parols en le fait, &c. This is plaine and evident enough.

Et pur ceo il eſt bone et ſure choſe, &c. This is good counſell, and worthy to be obſerved.

Sect. 524.

HERE the diverſity is apparent betweene a confirmation of the eſtate for life in the land to have and to hold the ſaid ſtate in the land to him and his heire, this cannot en-

CAR al entent d'aſcuns, ſi home leſſa terre a un auter pur terme de vie, et puis confirma ſon

FOR to the intent of ſome, if a man letteth land to another for life, and after confirme his eſtate which

eſtate

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

† *eſt* not in L. and M. nor Roh.

---

eſtate at fartheſt, was extended to the caſe of a poſthumous ſon. In the caſe of Reeve v. Long, 1. Salk. 227. an eſtate was limited to *A.* for life, remainder to his eldeſt ſon in tail; *A.* died leaving his wife *enceint*. She afterwards had a ſon. It was adjudged that the ſon, not being *in eſſe* at the time of the determination of the particular eſtate, could not take under the limitation. This judgment was afterwards affirmed in the court of king's bench; but it was reverſed in the houſe of lords, againſt the opinion of all the judges. To obviate all doubts reſpecting the law in this caſe, the ſtatute of 10. Wil. III. c. 16. was paſſed, by which it was enacted, that where any eſtate is, by marriage, or any other ſettlement, ſettled in remainder to children, with remainders over, any poſthumous child may take in the ſame manner as if born in the father's life-time. It is ſingular that this ſtatute does not expreſsly mention limitations or deviſes made by wills. There is a tradition, that, as the caſe of Reeve v. Long aroſe upon a will, the lords conſidered the law to be ſettled by their determination in that caſe; and were unwilling to make any expreſs mention of limitations or deviſes made in wills, leſt it ſhould appear to call in queſtion the authority or propriety of their determination. Beſides, in the above caſe of Reeve v. Long, the words of the act may be conſtrued, without much violence, to comprize ſettlements of eſtates made by will, as well as ſettlements of eſtates made by deed.

eſtate que il ad en meſme la terre, a aver et tener ſon eſtate a luy et a ſes heires, ceſt confirmation quant a ſes heires eſt void, car ſes heires ne poient aver ſon eſtate, que * *ne fuit forſque pur terme de ſon vie. Mes s'il confirma ſon eſtate per ceux parolx, a aver meſme le terre a luy et a ſes heires, ceſt confirmation fait fee ſimple en ceſt caſe a luy en la terre, pur ceo que* † *les parolx a aver et tener, &c. va a le terre, et nemy al eſtate que il ad, &c.*

hee hath in the ſame land, to have and to hold his eſtate to him and to his heires, this confirmation as to his heires is voide, for his heires cannot have his eſtate, which was not but for terme of his life. But if he confirme his eſtate by theſe words, to have the ſame land to him and to his heires, this confirmation maketh a fee ſimple in this caſe to him in the land, for that the words to have and to hold, &c. goeth to the land, and not to the eſtate which hee hath, &c.

large his eſtate, for his eſtate being but for life, that eſtate cannot bee extended to his heires. But in that caſe if he confirme the ſtate for life in the land in the premiſſes of the deed, and the *habendum* is in this ſort, to have and to hold the land to him and his heires, this ſhall enlarge his eſtate, and create in him a fee ſimple.

(1. Roll. Abr. 482.)

18. E. 3. 40. (Plo. 158. a.)

Wherein is to bee noted, [c] that the *habendum* and the premiſſes doe in ſubſtance well agree together, and that the *habendum* may enlarge the premiſſes, but not abridge the ſame. (1)

[c] Vid. Pl. Com. in Throgmorton's caſe, fol. 147. a. Wrottesleye's caſe, 197.

(2. Rep. 23.)

And ſeeing that in conveyances, limitations of remainders are uſuall and common aſſurances, it is dangerous by conceipts or nice diſtinctions to bring them in queſtion, as have in latter time beene attempted.

Son eſtate. Vid. Sect. 650.

Sect 525.

ITEM, ſi jeo leſſa certaine terre a un feme ſole pur terme de ſa vie, laquel prent baron, et puis jeo confirma l'eſtate le baron et ſa feme, a aver et tener ‡ *pur terme de lour deux vies; en ceſt caſe le baron ne tient jointment ove ſa feme, mes tient en droit de ſa feme pur terme de ſa vie. Mes ceſt confirmation urera a le baron per voy de remainder pur terme de ſa vie, s'il ſurvequiſt ſa feme.*

ALSO, if I let certain land to a feme ſole for terme of her life, who taketh huſband, and after I confirme the eſtate of the huſband and wife, to have and to hold for terme of their two lives; in this caſe the huſband doth not hold joyntly with his wife, but holdeth in right of his wife for term of her life. But this confirmation ſhall enure to the huſband by way of remainder for terme of his life, if hee ſurviveth his wife.

HERE is the fourth caſe wherein the releaſe and confirmation doe agree; and in this caſe it is to be obſerved, that the baron hath ſuch an eſtate in the land in the right of his wife as hee is capable of a confirmation to enlarge his eſtate; and therefore if the confirmation had been made of his eſtate to him alone, to have and to hold the land to him and to his heires, this had been good to have conveyed the fee ſimple to him after the deceaſe of his wife: for if in this caſe a releaſe be made to the huſband and his heires, this is ſufficient to convey the inheritance of the land to the huſband. (2)

Vid. Sect. 573. (Sid. 83. 361.) (2. Roll. Abr. 829.)

(Ant. 273. b.)

16. H. 6. tit. Releaſe 45. 22. E. 3. tit. Releaſe. Statham.

Ne tient jointment ove ſa feme. For two cauſes. Firſt, becauſe the

* *ne* not in L. and M. nor Roh. † *les parolx*——*le*, L. and M. and Roh. ‡ *la terre* added L. and M. and Roh.

(1) On the operation of an habendum in a deed, ſee ant. 21. a. Vin. Abr. Grant. J. K. L. and M.

(2) The nature of the eſtate which the huſband acquires by marriage in his wife's real property, will be explained in a note to fol. 325. b. With reſpect to his intereſt in her chattels real and choſes in action, an accurate, and, ſo far as it goes, a maſterly explanation of it is given in Bacon's Abridgement, vol. 1. fol. 268. It is much to be lamented, that the author did not go more fully into the ſubject. Mr. Viner has collected moſt of the caſes reſpecting it with his uſual induſtry. — But ſince the publication of that uſeful compilation, ſeveral caſes have been determined, by which the law upon it has been greatly illuſtrated and explained, and, in ſome inſtances, altered. An attempt will be made to give a ſuccinct view of it, in a note to fol. 351.

(4. Rep. 29.)

18. E. 3. 20.
(1. Roll. Rep. 230. 317. 438.
3. Leo. 4. a.
Ant. 184. a. 187. a.
Poll. 351. a.)

the wife hath the whole for her life. Secondly, joyntenants muſt (as hath been before ſaid in the chapter of Joyntenants) come in by one title. But in this caſe if the confirmation had been made to the huſband and wife, to have and to hold the land to them two and to their heires, they had been joyntenants of the fee ſimple, and the huſband ſeiſed in the right of his wife for her life; for the huſband and the wife cannot take by moities during the coverture.

If a man letteth land to the huſband and wife, to have and to hold the one moity to the huſband for terme of his life, and the other moity to the wife for her life, and the leſſor confirme the eſtate of them both in the land, to have and to hold to them and to their heires; by this confirmation as to the moity of the huſband, it entreth only to the huſband and his heirs, for the wife had nothing in that moity; but as to the moity of the wife, they are joyntenants, as hath bin ſaid; for the huſband hath ſuch an eſtate in his wife's moity, in her right, as is capable of a confirmation. But if ſuch a leaſe for life be made to two men by ſeverall moities, and the leſſor confirme their eſtates in the land, to have and to hold to them and to their heires, they are tenants in common of the inheritance; for regularly the confirmation ſhall enure according to the quality and nature of the eſtate which it doth enlarge and increaſe.

18. Aſſ. p. 3. 18. E. 3. Confir. 17. 17. E. 3. 68. 28 E. 3. 94. 40. E. 3. 8. Aſſ. 20.

If a leaſe for life be made to *A.* the remainder to *B.* for life, and the leſſor confirme their eſtates in the land, to have and to hold to them and their heires, *A.* taketh one moity to him and his heires, and therefore of the one moity he is ſeiſed for life, the remainder to *B.* for life, and then to him and his heires: of the other moity *A.* is ſeiſed for life, the immediate inheritance to *B.* and his heires; becauſe as to the moity which *B.* takes, the ſame is executed: as if the reverſion be granted to tenant for life, and to a ſtranger, it is executed for one moity, (as hath been ſaid before) and therefore in this caſe they are tenants in common.

30. H. 6. 9. (Ant. 182. b.)

If lands be given to two men, and to the heires of their two bodies begotten, and the donor confirmeth their two eſtates in the land, to have and to hold the land to them two and to their heires: in this caſe ſome are of opinion, that they ſhall be joyntenants of the fee ſimple, becauſe the donees were joyntenants for life, and (ſay they) the confirmation muſt enure according to the eſtate which they have in poſſeſſion, and that was joynt. But others hold the contrary. For, firſt, they ſay, that the donees have to ſome purpoſes ſeverall inheritances executed, though between the donees ſurvivor ſhall hold for their lives. Secondly, they ſay, that when the whole eſtate, which comprehendeth ſeverall inheritances, is confirmed, the confirmation muſt enure according to the ſeverall inheritances, which is the greater and moſt perdurable eſtate, and therefore that the donees ſhall be tenants in common of the inheritance in this caſe.

Vid. Sect. 573.

Per voy de remainder, &c. Here ſome queſtion hath been made of this terme remainder, without any cauſe at all, becauſe in law it is in nature of a remainder. For in caſe of a fine, when a reverſion expectant upon an eſtate for life in *A.* is granted to *B. et quæ ad ipſum reverti debet poſt mortem A. præfato B. & hæredibus ſuis remaneant, &c.* and a more colourable exception might be taken againſt this word *remaneant* there, than in the caſe of *Littleton*.

Pl. Com. Colthirſt's caſe. Doct. & Stud. ca. 21.

* 16. H. 6. tit. Releaſe 45. [o] 9. E. 4. 18. [p] 6. E. 3. 9. [q] 17. E. 3. 68. b.

It is true, that in * 16. *H.* 6. it is called a reverſion: in [o] 9. *E.* 4. it is called a remainder: in [p] 6. *E.* 3. it is ſaid, that by the confirmation an eſtate accrued to the huſband for terme of his life. In [q] 17. *E.* 3. the huſband, living the wife, ſhall have nothing but in abeyance after the death of his wife. But leſt there ſhould bee *pugna verborum*, which learned and wiſe men ever avoide, all do reſolve, that the eſtate of the huſband is good, and that it doth enure by way of increaſe and inlargement of his eſtate. And albeit in this caſe of *Littleton*, the huſband by the confirmation gaineth an eſtate for life in remainder, (as *Littleton* termeth it) yet if the huſband doth waſte, an action of waſte ſhall lie againſt him and his wife, notwithſtanding the meane remainder, becauſe the huſband himſelfe committeth the waſte, and doth the wrong; and therefore ſhall not excuſe himſelfe for his committing of waſte, in reſpect he himſelfe hath the remainder; no more than if a man leſſeth to *A.* during the life of *B.* the remainder to him during the life of *C.* if he commit waſte, an action of waſte ſhall lie againſt him. (1)

17. E. 3. 68. b. Vi. Paget's Caſe, lib. 5. fo. 76. b. (Ant. 54. a.)

Sect. 526.

5. E. 3. 17. b. Pl. Com. 418. b. 38. H. 6. 23. 14. H. 4. 12. 38. E. 3. 35. Pl. Com. Dame Hale's caſe. 50. Aſſ. p. 15. 4. H. 6. 5. 7. H. 6. 1. 9. H. 6. 52. 37. Li. Aſſ. 21. H. 7. 29. 21. E. 4. 40. 26. H. 8. 7.

THIS is the fifth caſe wherein the releaſe and confirmation doe agree: and it is to be obſerved, that chattels reals, as leaſes for yeares, ward-

MES ſi jeo leſſa al feme ſole terre pur terme d'ans, lequel prent

BUT if I let land to a feme ſole for terme of yeares, who taketh huſband, and af-

baron

(1) It is neceſſary to diſtinguiſh between the caſes mentioned by Littleton and ſir Edward Coke, in this and the preceding chapter, where an eſtate for life is enlarged to an eſtate in fee, by the *releaſe, or confirmation* of the reverſioner, or remainder-man, and thoſe caſes where a perſon, being ſeiſed of an eſtate for life, the inheritance is afterwards conveyed or deviſed to his right heirs, by a ſubſequent deed, or will. It appears by the caſe of Moore v. Parker, 1. Lord Raym. 37. 4. Mod. 316. Skin. 558. and Fonnereau v. Fonnereau, Doug. Rep. 1. vol. 470. that the eſtate of the anceſtor is not affected by the ſubſequent conveyance or deviſe to his right heirs. For though it is a rule that, where the anceſtor by any gift or conveyance takes an eſtate of freehold, and in the ſame gift, or conveyance, an eſtate is limited, either mediately or immediately, to his heirs in fee, or in tail, *the heirs*," in ſuch caſes, are words of limitation of the eſtate, and not words of purchaſe; yet this applies only to thoſe caſes where both the limitations are by the ſame inſtrument. In ſome caſes, the freehold of the anceſtor has reſulted to him by implication; but ſtill the deed from which that implication reſulted, was the deed in which the limitation to his heirs was expreſſed; ſo that the implied eſtate of freehold, and the expreſſed eſtate of inheritance, aroſe at the ſame time, and under the ſame deed, which brings it within the general rule. But ſuppoſe an eſtate is limited to *A.* for life; remainder to ſuch uſes as *B.* ſhall appoint, and afterwards *B.* in the life-time of *A.* appoints the eſtate to *A.*'s right heirs; it is difficult to ſay whether, in that caſe, the eſtates will unite or not. This caſe has ſometimes occurred in practice, but has not yet been the ſubject of any judicial determination. To prove the union of the two eſtates, it may be contended, that the deed by which the power is executed, muſt be conſidered as a part of the deed by which the power is given; that the uſe limited by the execution of the power derives its effect, and is fed, by the ſeiſin of the releaſees or feoffees of the deed containing the power; that the uſes limited in the original deed, to take effect in default of an execution of the power, are ſubject to that power; that the uſes limited under, or by virtue of the power, precede and take place of them, in the ſame manner as if in the original deed, not the power, but the uſe executed by virtue of the power, had been inſerted; and that though the uſes veſt at different times, yet they may be conſidered as virtually created at the ſame time. So that, in fact, it exactly reſembles the caſe put, poſt. 378, b. that if lands be given to two, during their joint lives, with the immediate remainder to the right heirs of him who ſhall die firſt, there both the eſtates are created at the ſame time, but the inheritance does not veſt till a ſubſequent period; yet Sir Edward Coke expreſsly ſays, that the heir, in that caſe, takes by deſcent. So that the caſe before us ſeems to unite all the qualities requiſite for the union of theſe eſtates; as both the limitations are made by the ſame grantor, are created at the ſame time, and are contained in the ſame deed. But theſe arguments are open to ſome objections, particularly with reſpect to the poſition, that both the limitations are made at the ſame time. See ant. 276. contin. note 1. p. 271, b.

baron, et puis jeo confirma l'eſtate le baron et ſa feme, a aver et tener la terre pur terme de lour deux vies: en ceſt caſe ils ont joynt eſtate en le franktenement de la terre, pur ceo que la feme n'avoit franktenement adevant, &c.

ter I confirm the eſtate of the huſband and his wife, to have and to hold the land for term of their two lives: in this caſe they have a joynt eſtate in the freehold of the land, for that the wife had no freehold before, &c.

ſhips, and the like, are not given to the huſband abſolutely (as all chattels perſonals are), by the intermarriage, but conditionally if the huſband happen to ſurvive her, and he hath power to alien them, at his pleaſure: but in the mean time the huſband is poſſeſſed of the chattels reall in her right (Ant. 46. b. Poſt. 351. a.)

Secondly, that the huſband hath ſuch a poſſeſſion in her right of the chattell, as is capable of a confirmation, or of a releaſe. (Ant. 273. b. Ant. 276. a. Ant. 299. a.)

Thirdly, that the confirmation in this caſe to the huſband and wife for their lives, maketh them joyntenants for life, becauſe a chattell of a feme covert may be drowned: and ſo note a diverſity betweene a leaſe for life and a leaſe for yeares made to a feme covert; for her eſtate of freehold cannot be altered by the confirmation made to her huſband and her, as the terme for yeares may, whereof her huſband may make diſpoſition at his pleaſure. (1)

Sect. 527.

ITEM, ſi mon diſſeiſor granta a un rent charge hors de la terre dont il moy diſſeiſiſt, et jeo reherſant le dit grant confirma meſme le grant, et tout ceo que eſt compriſe deins meſme le graunt, et puis jeo enter ſur le diſſeiſor; quære, *en ceſt caſe, ſi le terre ſoit diſcharge de le rent ou nemy* *.

ALSO, if my diſſeiſor granteth to one a rent charge out of the land whereof he diſſeiſed mee, and I rehearſing the ſayde grant confirme the ſame grant, and all that which is compriſed within the ſame grant, and after I enter upon the diſſeiſor; *quære*, in this caſe, if the land be diſcharged of the rent or no.

THIS is the fifth caſe wherein the releaſe and confirmation doe differ; for a releaſe to the grantee in this caſe [*a*] were voide. It is holden by ſome authority ſince *Littleton* wrote, that the diſſeiſee after his re-entry ſhall not avoide the rent charge againſt his own confirmation: and there a generall rule is taken, that ſuch a thing as I may defeate by my entry, I may make good by my confirmation. [*a*] 11. H. 7. 28. Lib. 1. fol. 147. Anne Mayow's caſe. 3. H. 4. 10.

If the feoffee upon condition grant a rent charge in fee, and the feoffor confirmeth it, and after the condition is broken, and the feoffor enter, he ſhall not avoide the rent charge. And ſo it is Li. 1. fo. 147, 148. Anne Mayow's caſe. (Poſt. Sect. 529.)

if the heire of the diſſeiſor grant a rent charge, and the diſſeiſee confirmeth it, and after recover the land, he ſhall not avoide the rent: and yet in neither of theſe caſes his entry was congeable at the time of the confirmation. (2)

Sect. 528.

ITEM, ſi un parſon d'un eſgliſe charge † *le glebe de ſon eſgliſe perſon fait, et puis le patron et l'ordinarie*

ALSO, if a parſon of a church charge the glebe land of his church by his deed, and after the patron and ordinary con-

PARSON, Perſona. In the legall ſignification it is taken for the rector of a church parochiall, and is called *perſona eccleſiæ*, becauſe he aſſumeth and taketh upon him the perſon of the church, and is ſaid Glanv. li. 13. ca. 23, 24, 25. Bract. li. 4. ca. 85, &c. Brit. fo. 234. b. &c. Fleta li. 5. ca. 19, 20. & lib. 6. ca. 18. Reg. F. N. B. 48, 49.

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

† *le—un*, L. and M. and Roh.

(1) If a man ſeiſed of a rent-charge in fee grants it over to a feme ſole for a term of years, and the tenant attorns, and ſhe marries during the term, and the grantor confirms the rent to the huſband and wife for their lives, or in fee, they become joint tenants for life or in fee of the rent, and need no new attornment. Vaugh. 46.

(2) Tenant in tail makes a leaſe for life, now he hath gained a new fee by wrong, and afterwards he grants a rent-charge, or makes a leaſe for years, and afterwards tenant for life dies, he ſhall not avoid his charge or leaſe, altho' he be in of another eſtate, becauſe he had a defeaſible poſſeſſion and ancient right, the which, if they be in ſeveral hands, ſhould be good; as the leaſe of one, and the confirmation of the other, and being in one hand, ſhall be as much in judgment of law. 7. Rep. 14. a.

Brit. ubi supra.

8. E. 3. 26. 43. 38. E. 3. 4. 3. Mar. Dyer. 123.

7. H. 4. 15. (Mo. 67.)

(1. Roll. Abr. 479. 481.)
[b] 19. El. Dy. 356, 357. 11. H. 6. 9. 33. H. 8. tit. Charge. Br. 58. (Post. 329. a.)

See more of these kinds of confirmations in my Reports. Li. 2. 39. & 24. Li. 1. 153. lib. 4 23. 24. lib. 5. fol. 31. 81. Lib. 10. 6. Lib. 11. 19. Lib. 6. 34. (Ant. 274. b. 297. a. Sid. 75.)

31. E. 3. Grant. 61. 26. Ass. 38. 8. Eliz. Dy. 252. Vid. lib. 3. fol. 73. Le case de deane & chapter de Norwich. (1. Lev. 112. 1. Roll. Abr. 482. 2. Roll. Abr. 339.)

12. H. 4. 11. 19. E. 3. 7. 7. Eliz. Dyer. 238. 11. H. 6. 9. 10. Eliz. Dy. 6. E. 3. 10. 2. E. 3. 29. 9. E. 4. 6. 2. H. 4. 11. 38. E. 3. 19 25. E. 3. 54.

said to be seised *in jure ecclesiæ*, and the law had an excellent end therein, viz. that in his person the church might sue for and defend her right; and also be sued by any that had an elder and better right; and when the church is full, it is said to be *plena & consulta* of such a one parson thereof, that is, full and provided of a parson, that may *vicem seu personam ejus gerere.*

Persona impersonata, parson, impersonee is the rector, that is in possession of the church parochiall, be it presentative, or impropriate, and of whom the church is full.

Here are divers things to bee noted. First, that the confirmation is of the grant, which in deed is but a meere assent by deed to the grant; and therefore it is holden, that if there be a parson, patron, and ordinary, and the patron and ordinary give licence by deede to the parson to grant a rent charge out of the glebe, and the parson granteth the rent charge accordingly, this is good, and shall binde the successor; and yet here is no confirmation subsequent, but a licence precedent.

*confirmont meſme le grant, * et tout ceo que eſt compriſe deins meſme le grant, donques le grant eſtoyera en ſa force, ſolonque le purport de meſme le graunt. Mes en tiel caſe covient que le patron eit fee ſimple en le vowſon; car s'il † n'ad eſtate en la vowſon forſque pur terme de vie, ou en le taile, donque le grant ‡ ne eſtoyera forſque durant ſa vie, et la vie le parſon que granta, &c.*

firme the same grant, and all that is comprised in the same grant, then the grant shall stand in his force, according to the purport of the same graunt. But in this case it behoveth that the patron hath a fee simple in the advowson; for if he hath but an estate for life, or in taile, in the advowson, then the graunt shall not stand, but during his life, and the life of the parson which granted, &c.

Secondly, The ordinary alone, without the deane and chapter, may agree thereunto, either by licence precedent, or confirmation subsequent; for that the deane and chapter hath nothing to doe with that which the bishop doth as ordinary, in the life-time of the bishop.

Thirdly, [b] but if the bishop be patron, there the bishop cannot confirme alone, but the deane and chapter must confirme also; for the advowson or patronage is parcell of the possession of the bishopricke; and therefore the bishop, without the deane and chapter, cannot make the grant good, but only during his owne life, after the decease of the incumbent, either by licence precedent, or confirmation subsequent.

A. parson of *D.* is patron of the church of *S.* as belonging to his church, and presents *B.* who by consent of *A.* and of the ordinary, grants a rent charge out of the glebe; this is not good to make the rent charge perpetuall, without the assent of the patron of *A.* no more than the assent of the bishop who is patron, without the deane and chapter, or no more than the assent of the patron, being tenant in taile or for life, as *Littleton* saith. And *Littleton* here saith,, that the patron that confirmes must have a fee simple, meaning to make the charge perpetuall. (1) And *Littleton* after saith, that in the case of the parson the fee is in abeyance, and seeing the consent of the patron is in respect of his interest as heire, it appeareth by *Littleton*, he may consent upon condition; otherwise it is of an attornement, because that is a bare assent. Also if the estate of the patron be conditionall, and he confirmeth, and after the condition is broken, his confirmation is voide.

Fourthly, he that is patron must be patron in fee simple; for if hee be tenant in taile, or tenant for life, his confirmation or agreement is not good to bind any successor, but such as come into the church during his life. But if the patron be tenant in taile, and discontinue the estate in taile, the lease shall stand good during the discontinuance; or if the estate taile be barred, it shall stand good for ever.

But here is to be observed a diversity betweene a sole corporation, as parson, prebend, vicar, and the like, that have not the absolute fee in them, for to their grants the patron must give his consent. But if there be a corporation aggregate of many, as dean and chapter, master, fellowes, and schollars of a colledge, abbot or prior, and covent, and the like, or any sole corporation that hath the absolute fee, as a bishop with consent of the dean and chapter, they may by the common law make any grant of or out of their possessions, without their founder or patron, albeit the abbot or prior, &c. were presentable: and so it is of a bishop, because the whole estate and right of the land was in them, and they may respectively maintaine a writ of right.

* *et touts ce que eſt compriſe deins meſme le grant*, not in L. and M. nor Roh. † *n'ad—ads*, L. and M. and Roh. ‡ *ne* not in L. and M. nor Roh.

(1) A prebendary after admission and institution, and before induction, or instalment, granted an annuity for him and his successors, and the bishop confirmed it; it was resolved, that a writ of annuity lay not in that case, because the confirmation being made before the induction, was void. Plow. 528. a.

If a biſhop hath two chapters, and he maketh a grant, both chapters muſt confirme it, or elſe the ſucceſſor ſhall avoide it. But if one of the chapters be diſſolved, then the confirmation of the other ſufficeth; but it needeth not the confirmation of the king, who is founder and patron of all biſhoprickes.

Temps R. 2. tit. grant. 104. 50. E. 3. tit. Aſſiſe Statham. 11. Eliz. Dyer 282.

And note a diverſity between a confirmation of an eſtate, and a confirmation of a deed; for if the diſſeiſor make a charter of feoffment to *A.* with a letter of attorney, and before livery the diſſeiſee confirme the eſtate of *A.* or the deed made to *A.* this is cleerely voide, though livery be made after. But if a biſhop had made a charter of feoffment with a letter of attorney, and the deane and chapter before livery confirme the deed, this is a good confirmation, and livery made afterwards is good. And ſo it hath been adjudged.

The like law is of a confirmation of a deed of grant of a reverſion before attornment.

In the ſame manner it is if a biſhop at the common law had granted lands to the king in fee by deed, and the deane and chapter by their deed confirme the deed of the biſhop, and after the deed of the biſhop is inrolled, this is good, albeit the confirmation of the deane and chapter be not inrolled; for the aſſent upon the matter is made to the biſhop.

33. E. 3. Confirm. 22. 31. E. 3. Abb. 10. 21. H. 7. 1. Vid. Sect. 393. & 643.

But this confirmation that *Littleton* here ſpeaketh of muſt be made in the life, and during the incumbency of the perſon; and ſo in the life of the biſhop, or of any other ſole corporation. But it is to be knowne that grants made by parſons, prebends, vicars, biſhops, maſter and fellowes of any colledge, deane and chapter, maſter or gardeine of any hoſpitall, or any having any ſpirituall or eccleſiaſticall living are reſtrained by [c] divers acts of parliament, ſo as they cannot grant any rent charge, or to make any alienation, or to make any leaſes other than ſuch as are mentioned in thoſe acts, which you may reade at large, and the expoſitions upon the ſame, in my [*] Commentaries.

[c] 13. Eliz. cap. 10. 1. Eliz. cap. 19. 18. Eli. ca. 11. 1 Jac. cap. 3. Vid. Sect. 593. & 648.

[*] Li. 2. fo. 46. lib. 4. 76. & 120. li. 5. 9. 6. 14. li. 6. 37. lib. 7, 8. lib. 11. 67.

Sect. 529.

ITEM, ſi home leſſa terre pur terme de vie, le quel tenant a terme de vie charge la terre ove un rent en fee, et celuy en le reverſion confirma meſme le grant, le charge eſt aſſets bone et effectuall.

ALSO, if a man letteth land for term of life, the which tenant for life charge the land with a rent in fee, and hee in the reverſion confirme the ſame grant, the charge is good enough and effectuall.

HERE is a diverſity to bee obſerved, where the determination of the rent is expreſſed in the deed, and when it is implyed in law. For when tenant for life granteth a rent in fee, this by law is determined by his death; and yet a confirmation of the grant by him in the reverſion makes that grant good for ever, without words of inlargement, or clauſe of diſtreſſe, which would amount to a new grant. And yet if the tenant for life had granted a rent to another and his heires by expreſſe words, during the life of the grantor, and the leſſor had confirmed that grant, that grant ſhould determine by the death of tenant for life.

26. Aſſ. pl. 38. 45. Aſſ. pl. 13. Lib. 1. fol. 147. Anne Mayowe's caſe.

(1. Roll. Abr. 483.)

14. Aſſ. pl. 14.

Tenant for life upon a condition grant a rent in fee, the leſſor confirme the grant, and after the condition is broken, the leſſor re-enter, he ſhall not avoide the grant.

Sect. 530.

ITEM, ſi ſoit un perpetual chantarie, dont l'ordinarie n'ad rien a medler ne a faire; quære, *ſi le patron del chaunte-*

ALSO, if there bee a perpetuall chanterie, wherewith the ordinary hath nothing to doe or meddle; *quære*, if the patron of

THIS is meant of a chauntery donative wherewith the ordinary hath not to deale, and by this grant, when *Littleton* wrote, the chauntery ſhould have been charged for ever, becauſe no other had any intereſt in this chantery ſave

Vid. Sect. 648. (Cro. Jac. 63.) (10. Rep. Lampet's caſe.)

(1) For the confirmation of leaſes made by eccleſiaſtical perſons, ſee Bacon's Abr. tit. Leaſes.

(Post. 344.)

[a] 37. H. 8. ca. 4. 1. E. 6. c. 14.

ſave only the patron and chauntry prieſt, and the grant is made *concurrentibus hiis quæ in jure requiruntur.* But ſince *Littleton* wrote, all, and all manner of free chappels and chaunteries perpetuall, whereof *Littleton* here ſpeakes, are by [a] acts of parliament given to the crowne, and the bodies politike thereof diſſolved. See hereafter, *Section* 648. more at large of all this preſent *Section.*

ry, et le chapleine de meſme le chauntery poient charge le chauntery ove un rent charge en perpetuitie.

the chantery, and the chapleine of the ſame chantery may charge the chantery with a rent charge in perpetuitie.

Sect. 531.

Bra. li. 2. fo. 59. b. 21. H. 6. feoffments & faits 103. 22. H. 6. 42. 14. H. 4. 36. 19. H. 6. 44. 7. H. 7. 16. 32. E. 3. briefe 291. Brooke tit. Confirm. 20. 14. H. 7. 2. 37. H. 6. 17. Dyer 8. Eliz. 4. H. 7. 10. 22. E. 4. 36. 40. E. 3. 41. (Sid. 452. Plo. 196. 5. Rep. 17. a. 1. Roll. Abr. 482. Noy 66.)

HERE *Littleton* proceedeth, according to the former diviſion, to ſhew words that in law do amount to a confirmation. And here is to bee obſerved, that ſome words are large, and have a generall extent, and ſome have a proper and particular application. The former ſort may contain the latter; as *dedi*, or *conceſſi*, may amount to a grant, a feoffment, a gift, a leaſe, a releaſe, a confirmation, a ſurrender, &c. and it is in the election of the party to uſe to which of theſe purpoſes he will.

ITEM, en aſcun cas ceſt verbe dedi, * *ou ceſt verbe* conceſſi, *ad meſme l'effect en ſubſtance, et urera a meſme l'entent, come ceſt verbe* confirmavi. *Sicome jeo ſiue diſſeiſie d'un carue de terre, et† jeo face tiel fait*; Sciant præſentes, &c. quòd dedi *a le diſſeiſor,‡ &c.* vel quòd conceſſi *a le dit diſſeiſor, le dit carue, &c. et jeo deliver tantſolement le fait a luy ſauns aſcun livery de ſeiſin del terre, c'eſt un bone confirmation, et auxy fort en ley, ſicome il avoit en le fait ceſt verbe* confirmavi, &c.

ALSO, in ſome caſe this verbe *dedi*, or this verbe *conceſſi*, hath the ſame effect in ſubſtance, and ſhall enure to the ſame intent, as this verbe *confirmavi*. As if I bee diſſeiſed of a carue of land, and I make ſuch a deed; *Sciant præſentes, &c. quòd dedi* to the diſſeiſor, &c. or *quòd conceſſi* to the ſaid diſſeiſor, the ſaid carue, &c. and I deliver onely the deed to him without any liverie of ſeiſin of the land, this is a good confirmation, and as ſtrong in law, as if there had beene in the deed this verbe *confirmavi, &c.*

Bracton lib. 2. fol. 59. b.

Eſt autem confirmatio quaſi quædam ratihabitio, ſufficit tamen quandoque per ſe, ſi etiam in ſe contineat donationem, ut ſi dicat quis, dedi et confirmavi, licèt juvari poſſit ex aliquâ donatione præcedente.

(4. Rep. 80. b. 2. Cro. 169. Mo. 34. Plo. 397, 398.)

But a releaſe, confirmation, or ſurrender, &c. cannot amount to a grant, &c. nor a ſurrender to a confirmation, or to a releaſe, &c. becauſe theſe bee proper and peculiar manner of conveyances, and are deſtined to a ſpeciall end. (1)

[c] 32. E. 3. briefe 291. Brooke tit. Confirm. 20. Vid. 1c ſtat. de Gloc. ca. 4.

[f] 7. E. 3. 9.

Bracton. (Plo. 159)

14. H. 4. 36. Lib. 5. fol. 15. in Newcomen's caſe.

Dedi et conceſſi, &c. Here is implyed that there be more words than *dedi* and *conceſſi*, that will amount to a confirmation, as *dimiſi*. [c] In ancient ſtatutes and in originall writs, as in the writ of entry *in caſu proviſo, in conſimili caſu ad communem legem*, and many others, this word *dimiſi* is not applyed only to a leaſe for life, but to a gift in taile, and to a ſtate in fee. [f] Alſo, if a man make a leaſe to *A.* for yeares, and after by his deed the leſſor *voluit quòd haberet et teneret terram pro termino vitæ ſuæ*; this is adjudged by this verbe (*volo*) to bee a good confirmation for terme of his life. *Benignè enim faciendæ ſunt interpretationes cartarum propter ſimplicitatem laicorum ut res magis valeat quàm pereat.*

And he to whom ſuch a deed comprehending *dedi, &c.* is made, may plead it as a grant, as a releaſe, or as a confirmation, at his election. (2)

If a parſon and ordinary make a leaſe for yeares of the glebe to the patron, and the pa-

* *ou—et*, L. and M. and Roh. not in L. and M. nor Roh.

† *puis* added L. and M. and Roh.

‡ &c. VEL QUOD CONCESSI *a le diſſeiſor, &c.*

(1) The effect of the word grant, in implying a warranty, will be conſidered in a note on the chapter of Warranty.

(2) But a leaſe and releaſe cannot be pleaded as a grant of the reverſion. Noy 66.

patron by his deede granteth it over, or if the diſſeiſor granteth a rent to the diſſeiſee, and he by his deed granteth it over, and after re-enter; in both theſe caſes one and the ſame words doe amount both to a grant, and to a confirmation in judgement of law of one and the ſame thing, *ne res pereat.* And ſo it is if a diſſeiſor make a leaſe for life, or a gift in taile, the remainder to the diſſeiſee in fee, the diſſeiſee by his deed granteth over the remainder, the particular tenant attorneth, the diſſeiſee ſhall not enter upon the tenant for life, or in taile, for then he ſhould avoide his owne grant, which amounted to a grant of the eſtate, and a confirmation alſo. (Ant. 280. 298. 5. Rep 15, 16.)

Sect. 532.

*ITEM, ſi jeo leſſa terre a un home pur terme d'ans, per force de quel il eſt * en poſſeſſion, &c. et puis jeo face un fait a luy, &c.* quòd dedi & conceſſi, &c. *le dit terre, a aver pur terme de ſa vie, et delivera a luy le fait, &c. donques maintenant il ad eſtate en le terre pur terme de † ſa vie.*

ALSO, if I let land to a man for terme of yeares, by force whereof he is in poſſeſſion, &c. and after I make a deede to him, &c. *quòd dedi & conceſſi, &c.* the ſaid land, to have for terme of his life, and I deliver to him the deed, &c. then preſently hee hath an eſtate in the land for terme of his life. (Sid. 453.)

HERE is the ſixth caſe wherein the confirmation and the releaſe doe agree, and is evident, and needeth no explication.

Sect. 533.

ET ſi jeo die en le fait, a aver et tener a luy et a ſes heires de ſon corps engendres, il ad eſtate en fee taile. Et ſi jeo die en le fait, a aver et tener a luy et a ſes heires, il ad eſtate en fee ſimple. Car ceo urera a luy per force de ‡ confirmation d'enlarger ſon eſtate.

AND if I ſay in the deede, to have and to hold to him and to his heires of his body ingendred, hee hath an eſtate in fee taile. And if I ſay in the deed, to have and to hold to him and to his heires, he hath an eſtate in fee ſimple. For this ſhall enure to him by force of the confirmation to inlarge his eſtate.

THIS alſo is evident, and needeth no explication, ſaving that whenſoever a confirmation doth inlarge and give an eſtate of inheritance, there ought to be apt words (as *Littleton* here expreſſeth them) uſed for the ſame.

Sect. 534.

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor devie ſeiſie, et ſon heire eſt eins per

ALSO, if a man be diſſeiſed, and the diſſeiſor die ſeiſed, and his heire is in by diſcent,

QUANT al heire del diſſeiſor, &c. les tenements paſſont per voy de feoffment. For the

* *en poſſeſſion, &c.—poſſeſſione*, L. and M. and Roll. † *ſa* not in L. and M. nor Roh. ‡ *confirmation—confirmament*, L. and M. and Roh.

the land ſhall ever paſſe from him that hath the ſtate of the land in him. As if *ceſty que uſe* and his feoffees after the ſtatute of 1. *R.* 3. and before the ſtatute of 27. *H.* 8. *cap.* 10. had joyned in a feoffment, it ſhall be the feoffment of the feoffees, becauſe the ſtate of the land was in him.

21. H. 7. 34. b. Pl. Com. 59. a. in Wimbiſhe's caſe. (6. Rep. 15. a)

So it is if the tenant for life, and hee in the remainder or reverſion in fee, joyne in a feoffment by deede. The livery of the freehold ſhall move from the leſſee, and the inheritance from him in the reverſion or remainder, from each of them according to his eſtate. For it cannot bee adjudged by law, that the feoffment of tenant for life doth draw the reverſion or remainder out of the leſſor or him in remainder, or doth worke a wrong becauſe they joyned together.

Pl. Com. 59. a. Pl. Com. 140. in Browning's caſe. 2. H. 5. 7. 13. H. 7. 14. 13. E. 4. 4. a. 27. H. 8. 13. M. 16. & 17. Eliz. 339. (Sid. 83.) (1. Roll. Abr. 633.) (Ant. 45. a.) (1. Rep. 76, 77.)

If there bee tenant for life, the remainder in tayle, &c. and tenant for life and he in the remainder in tayle levie a fine, this is no diſcontinuance or deveſting of any eſtate in remainder, but each of them paſſe that which they have power and authority to paſſe.

Lib. 1. fo. 76. Bredon's caſe. (Ant. 251. b.)

A. tenant for life, the remainder to *B.* for life, the remainder in tayle, the remainder to the right heires of *B.* *A.* and *B.* joyne in a feoffment by deede, albeit it may be ſaid that this is the feoffment of *A.* and the confirmation of *B.* and conſequently hee in the remainder in tayle cannot enter for the forfeiture during the life of *B.* but becauſe *B* joyned in the feoffment, which was toreious to him in the remainder in taile, and is *particeps criminis*, therefore they forfeited both their eſtates, and he in the remainder in tayle might enter for the forfeiture. But if he in the reverſion in fee and tenant for life joyne in a feoffment by paroll, this ſhall be (as ſome hold) firſt, a ſurrender of the eſtate of tenant for life, and then the feoffment of him in the reverſion; for, otherwiſe, if the whole ſhould paſſe from the leſſee, then he in the reverſion might enter for the forfeiture, and every man's act (*ut res magis valeat*) ſhall be conſtrued moſt ſtrongly againſt himſelfe.

17. Eliz. Dyer 339. (1. Leo. 31.)

(1. Leo. 37. 26a.)

And it is to be obſerved that *Littleton* here putteth a diſcent, ſo as the entry of the diſſeiſee is not lawfull; for if the diſſeiſor and diſſeiſee joyne in a charter of feoffment, and enter into the land, and make livery, it ſhall be accounted the feoffment of the diſſeiſee, and the confirmation of the diſſeiſor.

Quære

*diſcent, et puis le diſſeiſee et l'heire * le diſſeiſor font jointment un fait a un auter en fee, et livery de ſeiſin ſur ceo eſt fait (quant al heire le diſſeiſor que enſealaſt le fait) les tenements paſſont † et uront per meſme le fait per voy de feoffment; et quant al diſſeiſee que enſealaſt meſme le fait, ceo ne urera ‡ ſinon per voy de confirmation. Mes ſi le diſſeiſee en ceſt cas port briefe d'entre en le* per *et* cui *envers l'alienee* ‖ *del heire le diſſeiſor*; quære, *coment il pledra cel fait envers le demandant per voy de confirmation, § &c. Et ſaches, mon fits, que eſt un des pluis honorables, laudables, et profitables choſes en noſtre ley, de aver le ſcience de bien pleder en actions reals et perſonals; et pur ceo jeo toy counſaile eſpecialment de mitter ¶ ton courage et cure de ceo apprender.* **

and after the diſſeiſee and the heire of the diſſeiſor make joyntly a deede to another in fee, and livery of ſeiſin is made upon this, (as to the heire of the diſſeiſor that ſealed the deed) the tenements doe paſſe and enure by the ſame deed by way of feoffment; and as to the diſſeiſee who ſealed the ſame deed, this ſhall enure but by way of confirmation. But if the diſſeiſee in this caſe brings a writ of entrie in the *per* and *cui* againſt the alienee of the heire of the diſſeiſor; *quære*, how he ſhall plead this deede againſt the demandant by way of confirmation, &c. And know, my ſon, that it is one of the moſt honorable, laudable, and profitable things in our law, to have the ſcience of well pleading in actions reals and perſonals; and therefore I counſaile thee eſpecially to imploy thy courage and care to learne this.

* *le diſſeiſor* not in L. and M. nor Roh.
‖ *del—le*, L. and M. and Roh.
** *&c.* added L. and M. and Roh.
† *et uront* not in L. and M. nor Roh.
§ *&c.* not in L. and M. nor Roh.
‡ *ſinon—mes*, L. and M. and Roh.
¶ *tout* added L. and M. and Roh.

(1) Tenant for life, and he in the remainder in fee, make a leaſe for years by deed indented; the leſſee, being ejected, declared upon the demiſe made by the tenant for life, and the remainder-man; and adjudged againſt the plaintiff; for, living the tenant for life, it is only the leaſe of the tenant for life, and the confirmation of the remainder-man; and he ought to have to declared, 1. Inſt. 45. b. So if two joint tenants, two tenants in common, or tenant for life, and he in the remainder, join in the grant of a copyhold, one fine only is due, and it ſhall enure as one grant only; ſo if a ſurrender be made, and after a common recovery is had by plaint, on the nature of a writ of entry, for better aſſurance — one fine only ſhall be paid. Co. Copyholder, 162, 163.

Quære coment il pledera ceſt fait, &c. Hee may pleade the feoffment of the heire of the diſſeiſor, and the confirmation of the diſſeiſee as it hath been pleaded and allowed.

Lib. 1. fo. 146, 147. Mayowe's caſe.

Et ſaches, mon fits, que eſt un de pluis honorable, &c. Here is to bee obſerved the excellency of good pleading, and *Littleton*'s grave advice, that the ſtudent ſhould imploy his courage and care for the attaining thereof; which hee ſhall attaine unto by three meanes: firſt, by reading; ſecondly, by obſervation; and thirdly, by uſe and exerciſe. For in ancient time the ſerjeants and apprentices of law did draw their owne pleadings, which made them good pleaders. And in this ſenſe *placitum* may be derived *à placendo, quia omnibus placet.*

See my Preface to the 9. Booke of my Reports. (Ante 17. a. 126. b. 181. a. 283. a. Sid. 339.)

Now ſeeing good pleading is ſo honourable and excellent, and that many a good cauſe is daily loſt for want of good and orderly pleading, it is neceſſary to ſet downe ſome few rules (amongſt many) of the ſame, to facilitate this learning, that is ſo highly commended to the ſtudious reader. For when I diligently conſider the courſe of our bookes of years and termes from the beginning of the raigne of *Edw.* 3. I obſerve, that more jangling and queſtions grow upon the manner of pleading, and exceptions to forme, than upon the matter it ſelfe, and infinite cauſes loſt or delayed for want of good pleading. Therefore it is a neceſſary part of a good common lawyer to be a good prothonotary. And now wee will performe our promiſe.

The order of good pleading is to be obſerved, which being inverted great prejudice may grow to the party, tending to the ſubverſion of law. *Ordine placitandi ſervato, ſervatur & jus, &c.*

Firſt, in good order of pleading a man muſt pleade to the juriſdiction of the court. Secondly, to the perſon; and therein firſt to the perſon of the plaintife, and then to the perſon of the defendant. Thirdly, to the count. Fourthly, to the writ. Fifthly, to the action, &c. [a] which order and forme of pleading you ſhall reade in the ancient authors agreeable to the law at this day; and if the defendant miſorder any of theſe, he loſeth the benefit of the former.

The count muſt be agreeable and conforme to the writ, the barre to the count, &c. and the judgement to the count; for none of them muſt be narrower or broader than the other.

A count or declaration, which anciently and yet is called *narratio*, ought to containe two things [b], viz. certainty and verity, for that it is the foundation of the ſuite, whereunto the adverſe party muſt anſwer, and whereupon the court is to give his judgement: [c] *Certa debet eſſe intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium.* But it muſt be underſtood that there be three kinde of certainties: firſt, to a common intent, and that is ſufficient in a barre which is to defend the party and to excuſe him. [d] Secondly, a certaine intent in generall, as in counts, replications, and other pleadings of the plaintife, that is to convince the defendant, and ſo in inditements, &c. Thirdly, a certaine intent in every particular, as in eſtoppels.

[e] He pleadeth a plea in abatement of the writ (which of ancient times was, and yet is called *breve*) or a plea after the latter continuance, ought to plead it certainly.

[f] The ancient formes of courts are to be duly obſerved, as *cùm dimiſit*, or *cùm dedit*, and not to ſay, that he was ſeiſed and demiſed, &c. (And yet if he ſay ſo, it maketh not the count vicious) [g] but in a barre replication or other kinde of pleading, the party muſt alledge a ſeiſin in the leſſor or donor, and ancient formes of pleading are alſo to be obſerved.

[b] Counts, or ſuch as be in nature of counts, (as an avowry, wherein the defendant is an actor) need not to be averred, but all other pleas in the affirmative ought to be averred, *et hoc paratus eſt verificare, &c.* but pleas meerly in the negative ought not to be averred, becauſe a negative cannot be proved.

[i] Where there is but one tenant or one defendant, he cannot have two ſuch pleas, as each of them doe goe to the whole; but where there are divers, each of them may pleade ſeverall pleas which extend to the whole (1).

[k] That which is alledged by way of conveyance or inducement to the ſubſtance of the matter need not to be ſo certainly alledged, as that which is the ſubſtance it ſelfe.

[l] Every plea muſt be direct, and not by way of argument, or rehearſall.

[m] Where a matter of record is the foundation or ground of the ſuite of the plaintife, or of the ſubſtance of the plea, there it ought to be certainly and truly alledged; otherwiſe it is, where it is but conveyance. But the proceedings and ſentences in the eccleſiaſticall courts may be alledged ſummarily; as that a divorce was had between ſuch parties, for ſuch a cauſe, and before ſuch a judge, and *concurrentibus iis quæ in jure requiruntur*; for the judge muſt be alledged, to the intent the court may write to him if it be denied.

Good matter muſt be pleaded in good forme, in apt time, and in due order, or otherwiſe great advantages may be loſt.

[a] Bracton li. 5. fo. 400. Britton, fo. 41. a. & 122. Fleta li. 6. ca. 35, 36. &c. 40. E. 3. 9. b. 17. E. 3. 74. 8. E. 3. 5. & 9. 35. H. 6. 12.

[b] Pl. Com. fo. 121, 122. 3. E. 4. 21. Vid. lib. 5. fo. 120. 121.

[c] Bracton lib. 2. fo. 140.

[d] Lib. 5. 120, 121. Long's caſe. Pl. Com. 56. Wimbiſhe's caſe.

[e] 7. H. 6. 17. 32. H. 6. 12. 15. Pl. Com. 33. b.

[f] 34. H. 6. 48. 8. H. 5. 4. b. 21. E. 4. 52. 5. E. 3. 15. 39. H. 6. 3. 10. H. 6. 2. 21. H. 7. 26.

[g] 48. E. 3. 8. 2. H. 4. 13. 6. H. 4. 2. b. 10. E. 4. 2. F. N. B. 156. c. 11. E. 3. Aide 32. 9. H. 6. 59. 10. E. 4. 4.

[h] Pl. Com. Bret's caſe. 342. 27. H. 8. 27. 27. H. 6. 9. H. 7.

[i] 40 E. 3. 31, 32, 33. 41. E. 3. 11. 9. H. 6. 46. 27. E. 3. 81. 44. E. 3. 23. 45. E. 3. Double plea 39. 43. E. 3. 21. 36. H. 6. 29. 37. H. 6. 23. 33. H. 6. 51. 15. E. 4. 25. 7. H. 4. 12. 41. E. 3. Double plea 78.

[k] Pl. Com. 81. 11. H. 4. 89. 34. H. 6. 48. 19. R. 2. Action ſur le caſe. 52. 22. E. 3. 19. 30. E. 3. 9.

[l] 5. H. 7. 8. 6. E. 4. 2. 21. E. 4. 44. 27. H. 8. 4. 22. H. 6. 17. E. 4. 7. 22. E. 4. 8.

[m] Pl. Com. 65. a. b. & 100. 376. & 410. 22. H. 6. 38. 19. H. 6. 49. 37. H. 6. 14. 36. H. 6. 5. 21. E. 4. 54. 11. H. 6. 15. 38. H. 6. 23. 42. Aſſ. 3. 48. E. 3. 11. 4. E. 4. 12. 9. E. 3. 46. 21. E. 4. 52. 35. H. 6. 35. 10. H. 7. 9. 15. 11. H. 7. 8. 22. E. 3. 2. 34. H. 6. 27. 12. H. 8. 5, 6. 7. E. 4. 32. 9. E. 4. 24. 8. E. 4. 31. 8. Aſſ. 29. 5. E. 4. 70. 3. E. 4. 1.

[n] Generall

(1) This is altered by 4. Ann, cap. 16. ſect. 4. & c. by which it is enacted, that it ſhall be lawful for any defendant or tenant, in any action or ſuit, or for any plaintiff in replevin, in any court of record, with the leave of the ſame court, to plead as many ſeveral matters thereto as he ſhall think neceſſary for his defence; but it is thereby alſo provided, that if any ſuch matter, upon a demurrer joined, be judged inſufficient, coſts ſhall be given at the diſcretion of the court; or if a verdict ſhall be found upon any iſſue in the ſaid cauſe for plaintiff, or the defendant, coſts ſhall be alſo given in like manner, unleſs the judge, who tried the ſaid iſſue, ſhall certify that the defendant, tenant, or plaintiff in replevin, had a probable cauſe to plead ſuch matter, which upon the ſaid iſſue ſhall be found againſt him. Note to the 11th edition.

[n] 35. H. 6. 35. 21. E. 4. 51. 9. H. 4. 5. 19. H. 6. 73. 5. E. 4. 12. 10. E. 4. 18. 13. H. 7. 18. 36. H. 8. *Pleading Br. 160.*

[o] V. Sect. 193. 3. H. 6. 47. 41. E. 3. 22. 9. Ass. 9. 22. Ass. 45. 2. E. 3. 42. 13. E. 3. Anc. Demesne 15. 20. E. 3. ib. 45. 7. H. 7. 8. Lib. 10. fo. 91. Li. 11. fo. 10.

[p] 3. H. 7. 3. 26. Ass. 10. 14. H. 4. 4. b. 27. H. 6. 8. b. 21. H. 6. Debt. 43. 7. H. 6. 24. 31. 35. H. 6. 48. 47. E. 3. 14. Pl. Com. 46. a. Li. 3. fo. 59. Linc. Col. case.

[q] 22. E. 4. 40. 2. 3. 20. E. 4. 10. 21. E. 4. 36. 22. H. 6. 50.

[r] 40. E. 3. 40. 43. 46. 41. E. 3. 2. 18. E. 3. 16. 26. E. 3. 68. 42. E. 3. 3. 10. 46. 6. E. 3. 37. 8. E. 3. 20. 10. E. 3. 60. 14. H. 4. 15. 12. E. 4. 1. 38. E. 3. 28. 7. H. 7. 3.

[s] 10. E. 4. 3. 27. H. 6. 8. 8. H. 7. 13. 9. H. 7. 26. 37. H. 6. 1. 27. H. 8. 13. 21. H. 7. 25. 11. H. 4. 33. Pl. Com. 79. 16. E. 4. 10. 1. H. 7. 33. 20. H. 7. 1. 6. E. 4. 4, 5. 21. E. 4. 54. 22. H. 6. 47. 11. H. 6. 8. 25. E. 3. 50. b. 23. Ass. 7. 2. Eliz. Dyer 184.

[t] Pl. Com. 149. b. & 105. a. 37. H. 6. 38.

[u] 18. E. 4. 16. b. 22. E. 4. 2. 76. 5. H. 7. 13. 38. H. 6. 17, 18, 19. 18. E. 3. 34. Pl. Com. 229. b. Lib. 8. 133. Turner's case.

[w] 5. H. 7. 34. 5. E. 3. 26. 22. H. 6. 28.

[x] 19. H. 6. 30. 32. Pl. Com. 232. b. & fo. 502. per Dyer & 503.

[y] 13. H. 4. 17. 10. E. 4. 18. 33 H. 6. 54. 35. H. 6. 30. 21. H. 7. 32. Bract. li. 3. fo. 154. Pl. Com. 87. b. 26. H. 6. Gard. 58.

[a] 2. H. 7. 15. 4. H. 7. 12. 10. H. 7. 12. 13. H. 7. 19. 26. H. 8. 5. b.

[b] Li. 8. fo. 133. Turner's case, & fo. 120. Bonham's case Li. 9. 25. 61. Li. 10. 100.

[c] 12. H. 8 6, 7. 2. R. 3. 17. 14. E. 4. 7. 9. E. 4. 19.

[d] 44. E. 3. 2. 34. H. 6. 5. 10. H. 6. 6. & 17. 12. E. 4. 11, 14. 14. H. 8. 24. 7. E. 3. 12. 17. E. 3. 44.

[e] 18. H. 6. 33. 22. H. 6. 53. 36. H. 6. 17. 38. H. 6. 18. 25. 5. E. 3. 15, 16. 22. Ass. 33. 2. Eliz. Dyer 184.

[f] Pl. Com. 14, 15. 2. E. 4. 18. 39. E. 3. 14. 32, 33. 8. E. 3. 57. Qu. Imp 25. 18. H. 6. 30. 7. 4. 18. 38. Ass. 14. 24. E. 3. 48. 22. E. 3. 13. 38. H. 6. 25. 32. H. 6. 14. 19. H. 8. 7. 27. H. 8. 12. b.

[g] 7. E. 4. 26. 11. H. 7. 4. 12. H. 7. 6. 33. H. 6. 9. 37. 43.

[h] V. Sect. 485.

[i] Bract. li. 5. fo. 400. Flet. li. 6. ca. 37.

[u] Generall estates in fee simple may be generally alledged, but the commencement of estates tayle, and other particular estates regularly must be shewed, unlesse in some cases where they are alledged by way of inducement, and the life of tenant in taile, or for life, ought to be averred.

[o] When any speciall and substantiall matter is alledged by either party, that ought to bee especially answered, and not to be passed over by a generall pleading.

[p] The plea of every man shall be construed strongly against him that pleadeth it, for everie man is presumed to make the best of his owne case: *ambiguum placitum interpretari debet contra proferentem.*

[q] Every plea that a man pleadeth ought to be triable, for without triall the cause can receive no end: *et expedit reipublicæ ut sit finis litium.*

[r] The tenant before his default saved, may plead all pleas which prove the writ abated, as death, &c. or matters apparent in the writ; but no plea, which prove it abateable, as taking of husband, &c.

[s] When a man is authorised to doe any thing by the common law, by grant, commission, act of parliament, or by custome, he ought to pursue the substance and effect of the same accordingly.

[t] All necessary circumstances implied by law in the plea need not to be expressed, as in the plea of a feoffment of a mannor, livery and attornement are implied.

[u] When a count, barre, replication, &c. is defective in respect of omission of some circumstance, as time, place, &c. there it may be made good by the plea of the adverse party; but if it be insufficient in matter, it cannot be salved.

[w] Every man shall plead such pleas as are pertinent for him, according to the quality of his case, estate, or interest, as disseisors, tenants, incumbents, ordinaries, and the like.

[x] Surplusage shall never make the plea vicious, but where it is contrarient to the matter before. (1)

[y] That which is apparent to the court by necessary collection out of the record need not to be averred.

[a] A man is bound to performe all the covenants in an indenture: if all the covenants be in the affirmative, he may generally plead performance of all; but if any be in the negative, to so many he must plead specially (for a negative cannot be performed), and to the rest generally. [b] So if any be in the disjunctive, he must shew which of them he hath performed. So if any are to be done of record, he must shew that specially, and cannot involve that in generall pleading.

[c] In many cases the law doth allow generall pleading, for avoyding of prolixity and tediousnesse, and that the particular shall come on the other side.

[d] Pleadings which amount to the generall issue are not to be allowed; but the generall issue is to be entred. *Vi. Sect.* 10. 485. 499.

[e] Every plea ought to have his proper conclusion, as a plea to the writ to conclude to the writ, a plea in barre to conclude to the action, an estoppell to relie upon the estoppels; *et sic de similibus.*

[f] When the conclusion of a plea, *et issint, et sic*, is in the affirmative, it shall not wave the speciall matter, for there the speciall matter is the substance and foundation of the conclusion, and affirmed by the same. But where the conclusion is in the negative, there the speciall matter regularly is waved.

[g] Whensoever speciall matter is pleaded, and the conclusion (*et sic*) is to the point of the writ or action, the speciall matter is waved.

The names of legall records are, a writ, a count, a barre, a replication, a rejoynder, a rebutter, a surrebutter, &c.

[b] New and subtill devices and inventions of pleading ought not to alter any principle of law, whereof you have heard plentifully before.

The count or declaration is an exposition of the writ, and addeth time, place, and other necessary circumstances, that the same may be triable; and any imperfection in the count doth abate the writ.

Pleadings are divided into barres, replications, rejoynders, surrejoynders, rebutters, and surrebutters, &c. They are words of art, and are called barres, *barræ*, so called, because it barreth the plaintife of this action. *Replicationes, à replicando; rejunctiones, à rejungendo; rebutter*, of the French word *rebouter, i. e. à repellendo*, to put backe or avoide, and so of surrebutter.

But each party must take heed of the ordering of the matter of his pleading, lest his replication depart from his count, or his rejoynder from his barre; *et sic de cæteris.*

[i] In ancient writers a barre is called *exceptio peremptoria*: a replication was then called *replicatio*, as now it is; a rejoinder, *triplicatio*; a surrejoinder, *quadruplicatio*; *et sic ulterius in infinitum.*

A de-

(1) And then it does, because the plaintiff cannot discern what to answer to in his replication. Note to the 11th edition.

A departure in pleading is ſaid to be when the ſecond plea containeth matter not purſuant to his former, and which fortifieth not the ſame, and thereupon it is called *deceſſus*, becauſe he departeth from his former plea; and therefore whenſoever the rejoynder (taking one example for all) containeth matter ſubſequent to the matter of the barre, and not fortifying the ſame, this is regularly a departure, becauſe it leaveth the former, and goeth to another matter. As if in an aſſiſe the tenant plead a diſcent from his father, and giveth a colour, the demandant intituleth himſelfe by a feoffement from the tenant himſelfe, the plaintife cannot ſay, that that feoffement was upon condition, and to ſhew the condition broken; for that ſhould be a cleere departure from his barre, becauſe it containeth matter ſubſequent. But in an aſſiſe, if the tenant pleadeth in barre, that *I. S.* was ſeiſed and infeoffed him, &c. and the plaintife ſheweth, that he himſelfe was ſeiſed in fee, untill by *I. S.* diſſeiſed, who infeoffed the tenant, and he re-entred, the defendant may plead a releaſe of the plaintife to *I. S.* for this doth fortifie the barre. (Sid. 10. 77. 176. 277. Finch 391. 2. Cro. 264.) 39. E. 3. 13. b. 39. H. 6. 15. 6. H. 7. 8. 21. H. 6. 32. Pl. Com. 105. 1. Mar. Dyer. 95. 28. H. 8. ib. 31. (Doc. Pla. 119. 1. Cro. 228, 229. 257.) 6. H. 7. 8. 3. H. 6. Departure 2.

If a man plead performance of covenants, and the plaintife reply, that he did not ſuch an act according to his covenant, the defendant ſaith, that he offered to do it, and the plaintife refuſed it; this is a departure, becauſe the matter is not purſuant; for it is one thing to doe a thing, and another to offer to doe it, and the other refuſed to doe it: therefore that ſhould have been pleaded in the former plea. *Vide & cave* in a *quare impedit*, what plea ſhall be ſafely pleaded *in primo placito*. (Sid. 10. 77. 180. 404.) 8. El. Dy. 253. 23. El. Dy. 271. 6. E. 3. 3. 40. E. 3. 32. 43. E. 3. 32. 43. E. 3. 11. 1. E. 4. 4. 18. E. 4. 24. 5. H. 7. 27. 8. H. 6. 11. 33. H. 6. 14. (Cro. Car. 257. 1. Saund. 83. 189.)

When a man in his former plea pleadeth an eſtate made by the common law, in the ſecond plea regularly he ſhall not make it good by an act of parliament. So when in his former plea he intituleth himſelfe generally by the common law, in his ſecond plea he ſhall not enable himſelfe by a cuſtome, but ſhould have pleaded it firſt. Pl. Com. 105. b. Fulmerſton's caſe. 21. H. 7. 25. 27. H. 8. 3. 21. H. 7. 17. 37. H. 6. 5. 38. H. 6. 25.

If a man plead an eſtate generally, (as for example a feoffement in fee) he in his ſecond plea ſhall not maintain it by other matter *tantamount* in law, as by a diſſeiſin and releaſe, or by a leaſe and releaſe, or a gift in tayle in barre, and in the ſecond plea a recovery in value; for this is a departure: but he in that caſe ſhall count of a gift, and maintaine it in his replication by a recovery in value, becauſe he could have no other count. (Saund. 142. S. C. 1. Leo. 81. S. C. Raym. 60. Sid. 142.) 21. H. 7. 25. 1. E. 4. 4. 3. H. 7. 5. 7. H. 7. 2.

See more of this matter, where the plaintife varying from time or place alledged in the count of actions tranſitory, ſhall commit no departure. Vid. Sect. 485.

The plea that containes duplicity or multiplicity of diſtinct matter to one and the ſame thing, whereunto ſeverall anſwers (admitting each of them to be good) are required, is not allowable in law. And this rule you ſee extendeth to pleas perpetuall or peremptory, and not to pleas dilatory; for in their time and place a man may uſe divers of them; and hereof ancient writers * ſpeake notably: *Sicut actor unâ actione debet experiri ſaltem iliâ durante, ſic oportet tenentem unâ exceptione, dum tamen peremptoria (quod de dilatoriis non eſt tenendum); quia ſi liceret pluribus uti exceptionibus peremptoriis ſimul & ſemel, ſicut fieri poterit in dilatoriis, ſic ſequeretur, quòd ſi in probatione unius defecerit, ad aliam probandam poſſit habere recurſum, quod non eſt permiſſibile, non magis quàm aliquem ſe defendere duobus baculis in duello, cùm unus tantùm ſufficiat.* Pl. Com. 139. 142. * Fleta li. 6. ca. 35. Bracton li. 5. fol. 400.

But where the tenant or defendant may pleade a generall iſſue, thereupon the generall iſſue pleaded, he may give in evidence as many diſtinct matters to barre the action or right of the demandant or plaintife, as he can. (1)

A ſpeciall verdict may containe double or treble matter; and therefore in thoſe caſes the tenant or defendant may eyther make choice of one matter, and to plead it to barre the demandant or plaintife, or to plead the generall iſſue, and to take advantage of all; or he may plead to part one of the pleas in barre, and to another part another plea; and his concluſion of his plea ſhall avoide doubleneſſe, and hereby neither the court nor the jury is ſo much inveigled, as if one plea ſhould containe divers diſtinct matters. And if the tenant make choice of one plea in barre, and that be found againſt him, yet he may reſort to an action of an higher nature, and take advantage of any other matter. And the law in this point is by them that underſtand not the reaſon thereof milliked, ſaying, *Nemo prohibetur pluribus defenſionibus uti.* 17. E. 3. 73. (Doc. Plac. 135.) 39. H. 6. 27. (Ante 139. a.)

And it is worthy of obſervation, that in the raignes of *Edward* the ſecond, *Edward* the firſt, and upwards, the pleadings were plain and ſenſible, but nothing curious, evermore having chiefe reſpect to matter, and not to formes of words, and were often holpen with a *quæſitum eſt*, and then the queſtions moved by the court, and the anſwers by the parties were alſo entred into the rolle. But even in thoſe dayes the formes of the regiſter of originall writs were then punctually obſerved, and matters in law excellently debated and reſolved; and where any great difficulty was, then it was reſolved by all the judges and ſages of the law (who were for matters in law called *concilium regis*) and their aſſembly and reſolution was entred into the rolle. As for example, in the great caſe in a *quare impedit*, betweene the king and the prior of Worceſter, concerning an appropriation, whether it were a mortmaine, the record ſaith, *ad quem diem venit prædictus prior per attornatum ſuum, &c. Et examina-* Hil. 32. E. 1. cor. Reg. in fine rotul.

(1) *It is natural to plead firſt to the juriſdiction, and afterwards to the writ of the count.* Nota, *The briefe ranked before the count*, 17. *Edw.* 3. 74. Nota, *Upon default in the count, the judgment ſhall be that the brief ſhall avoid.* 3. *Hen.* 6. 41. 9. *Hen.* 6. 10. *Brooke Count* 78. *Vide* 303. *b. Therefore, as it ſeems, it is more proper to reſerve the exception to the writ for the laſt place, if the firſt fails. In ſpecial caſes the order of pleading is not obſerved; as for example, a defendant in debt, in the cuſtody of the ſheriff, was permitted to plead a plea in abatement of the writ before any count was made, and before any of the other defendants came in.* 3. *Hen.* 6. *Fitz. Debt.* 20. *Lord Willoughby and other defendants in aſſiſe againſt them, pleaded in abatement of the writ before any count was made. Plowd. Com.* 73.—Lord Nott. MSS.

examinatis et intellectis recordo et processu coram toto concilio tam thesaurario et baronibus de scaccario, quàm cancellario, ac etiam justiciariis de utroque banco inspectâ causâ, pro quâ, pro domino rege dicunt, quòd ad ipsum regem pertinet præsentare, &c. consideratum est, &c. For in those dayes though the chancellor and treasurer were for the most part men of the church, yet were they expert and learned in the lawes of the realme.

As for example, in the time of the Conqueror, *Egelricus episcopus Ciceſtrensis vir antiquissimus, et in legibus sapientissimus,* as elsewhere I have said.

[a] Ockam, fo. 17.

[a] *Nigellus episcopus Eliensis Hen.* 1. *thesaurarius in temporibus suis incomparabilem habuit scaccarii scientiam, et de eâdem scripsit optimè.*

[b] Pasch. 5. R. 1. cor. Rege.

[b] *Henricus Cant. episcopus, H. Dunelm' episcopus, Willielmus Eliensis episcopus, G. Roffens. episcopus.*

[c] 1. H. 3. Rot. pat. Bract. sæpe.

[c] *Martinus de Patesbul clericus decanus Divi Pauli Loudon' constitutus fuit capitalis justic' de banco, quia in legibus hujus regni peritissimus.*

[d] Bract. sæpe.

[d] *Will'us de Raleigh clericus justiciarius domini regis.*

[e] 8. E. 3. 31.

[e] *Johannes episcopus Carliensis tempore H.* 3.
Robertus Passeleeve episcopus Ciceſtrensis tempore H. 3.

[f] Rot. pat. 24. H. 3.

[f] *Robertus de Lexintonio clericus constitutus capitalis justic' de banco.*

[g] Liber ejus de legibus extat script. temp. E. 1.

[g] *Johannes Britton episcopus Hereford.*

[h] Rot. pat. 17. E. 2.

[h] *Henricus de Stanton clericus constitutus fuit capitalis justiciarius ad placita*; with many others. And so were divers and many of the nobility, who when matters of great difficultie were brought into the upper house of parliament by writ of error, adjournement, or other parliamentary course, did by the assistance of the reverend judges, who ever attended in that court, judge and determine the same as by former and ancient records, and specially by the said record of 5. *R.* 1. doe manifestly appeare; and therefore the lords of parliament were called for those purposes, *concilium regis*; and like to the aforementioned record there be very many.

12. H. 4. 3.

In the raigne of *Edward* the third, pleadings grew to perfection both without lameneſse and curiosity; for then the judges and professors of the law were excellently learned, and then knowledge of the law flourished, the serjeants of the law, &c. drew their owne pleadings; and therefore truly said that reverend justice *Thirning*, in the raigne of *H.* 4. that in the time of *Edw.* 3. the law was in a higher degree than it had been any time before; for (saith he) before that time the manner of pleading was but feeble in comparison of that it was afterward in the raigne of the same king.

(Hob. 332. Ante 72. a.
* 36. E. 3. ca. 15. 46. E. 3. 21.
Dy. 299. Li. 8. fo. 161.
Lib. 10. fo. 131.
(Doc. Pla. 116.)
Li. 10. fo. 88. Pl. Com. 421.

In the time of *Henrie* the Sixth the judges gave a quicker eare to exceptions to pleadings, than either their predecessors did, or the judges in the raigne of *Edw.* the fourth, when our author flourished, or since that time have done, giving no way to nice exceptions, so long as the substance of the matter were sufficiently shewed. And as in the raigne of king *Edward* the third, by an act of parliament * it is provided, that counts or declarations should not abate so long as the matter of the action be fully shewed in the declaration and writ; so since our author wrote, in the raigne of queene *Elizabeth*, provision is made, that after demurrer the judges shall give judgement according to the right of the cause and matter in law, without regarding any imperfection, defect, or want of forme in any writ, returne, plaint, declaration, or other pleading or course of proceeding whatsoever, except such as the party demurring shall specially shew. In which acts appeales and indictments of felony, murder, or treason concerning man's life, and the forfeiture of his lands and goods, are excepted. An excellent and a profitable law, concurring with the wisedome and judgement of ancient and latter times, that have disallowed curious and nice exceptions tending to the overthrow or delay of justice; *apices juris non sunt jura*: yet it is good for a learned professor to make all things plain and perfect, and not to trust to the after aide or amendment by force of any statute, lest his client's cause matcheth not therewith; and as it is in physicke for the health of a man's body, so it is in remedies for the safety of a man's cause. In law, *præstat cautela quàm medela.*

But now let us returne to our author.

Sect. 535, 536, 537.

(Sid. 175. 176.)
(Doc. Pla. 70. 118. 136. 138. 254.)
(11. Rep. 52. a.)

*ITEM, si soyent seignior et tenant, * mesque le seignior confirma l'estate que le tenant ad en les tenements, uncore le seigniorie entierment demurt a le*

ALSO, if there be lord and tenant, albeit the lord confirme the estate which the tenaunt hath in the tenements, yet the seigniorie remaineth entire to the

* *mesme—et*, L. and M. and Roh.

a le ſeignior come il fuit adevant. lord as it was before.

Sect. 536.

EN meſme le manner eſt, ſi home ad un rent charge hors de certeine terre, et il confirma l'eſtate que le tenant ad en la terre, uncore demurt a le confirmor le rent charge.

IN the ſame manner is it, if a man hath a rent charge out of certaine land, and hee confirme the eſtate which the tenant hath in the land, yet the rent charge remayneth to the confirmor.

Sect. 537.

*EN meſme le manner eſt, ſi un home ad common de paſture * en auter terre, s'il confirma eſtate de le tenant de la terre, rien departera de luy de ſon common; mes ceo nient obſtant le common demurt a luy come fuit adevant.*

IN the ſame manner it is, if a man hath common of paſture in other land, if he confirme the eſtate of the tenant of the land, nothing ſhall paſſe from him of his common; but notwithſtanding this, the common ſhall remayne to him as it was before.

HERE is the ſixth caſe wherein the releaſe and confirmation doe differ; for by the releaſe of the ſeigniory, rent charge or common are extinct. And ſo theſe three Sections be evident, and need no explication, ſaving that ſome doe gather upon theſe two laſt Sections and the next enſuing, that a man cannot abridge a rent charge or common paſture by a confirmation, as he may doe a rent ſervice in reſpect of the privitie betweene the lord and tenant, ſo as (ſay they) a tenure may be abridged by a confirmation, but not a rent charge or common: and therefore *Littleton* beginneth the next Section with an adverbe adverſative, viz. (*mes* but) &c. But a man may releaſe part of his rent charge. or common, &c.

Sect. 538.

MES ſi ſoient ſeignior et tenant, lequel tenant tient de ſon ſeignior per le ſervice de fealtie et 20 s. de rent, ſi le ſeignior per ſon fait confirma l'eſtate le tenant, a tener per 12 d. ou per un denier, ou per un maile: en ceſt caſe le tenant eſt diſcharge

BUT if there be lord and tenant, which tenant holdeth of his lord by the ſervice of fealtie and 20 ſhillings rent, if the lord by his deed confirme the eſtate of the tenant, to hold by 12 pence or by a penny, or by a halfe peny: in this caſe the tenant is diſcharged of all the

AND the reaſon wherefore no ſervice of another cannot be reſerved upon the confirmation is, becauſe as long as the ſtate of the land continueth, it cannot by the confirmation of the lord be charged with any new ſervice. So as it is evident that the lord by his confirmation may diminiſh and abridge the ſervices, but to reſerve upon the confirmation new ſervices he cannot, ſo long as the former eſtate in the tenancie continueth. And as where a confirmation doth inlarge

28. E. 3. 92, 93. 26. Aſſ. 37. 6. Eliz. Dier. 230. b. 7. E. 4. 25. a. 21. E. 4. 62. per Brian. 10. E. 3. tit. avowrie 100. (9. Rep. 33.)

* *en—ou*, L. and M. and Roh.

inlarge an eſtate in land, there ought to be privitie, as hath beene ſaid; ſo regularly where a confirmation doth abridge ſervices, there ought to be privitie alſo.

de touts les auters ſervices, et ne rendra rien a le ſeignior, forſque ceo que eſt compriſe deins meſme le confirmation.

other ſervices, and ſhall render nothing to the lord, but that which is compriſed in the ſame confirmation.

And therefore here *Littleton* putteth his caſe of lord and tenant betweene whom there is privitie. And therefore if there be lord, meſne and tenant, the lord cannot confirme the eſtate of the tenant to hold of him by leſſer ſervices, but this is void, for that there is no privitie betweene them, and a confirmation cannot make ſuch an alteration of tenures.

7. E. 8. 19. 22. E. 3. 18. b.

And the caſe in 4. *E.* 3. maketh nothing againſt this opinion; for there the caſe in ſubſtance is this: *John de Bonvile* held certaine lands of *Ralfe Vernon*, and before the ſtatute of *quia emptores terrarum*, levied a fine of the ſame lands to the abbot of *Cogſall* and his ſucceſſors to hold of the chiefe lord (which was *Ralfe Vernon*) by the ſervices due and accuſtomed. *Ralfe Vernon* made a charter to the ſaid abbot in theſe words: *Conceſſi etiam eidem abbati et ſucceſſoribus ſuis relaxavi et quietum clamavi totum jus, &c. quod habeo, vel potero habere in omnibus tenementis quæ idem abbas habet de dono Johannis de Bonvile, tenendum de me et hæredibus meis in puram et perpetuam eleemoſinam*; and adjudged, that it was a good tenure in frankalmoigne: which caſe proveth nothing that the lord paramount may by his confirmation to the tenant peravaile extinct the meſnaltie (as it is abridged by maſter *Fitzherbert* in the title of Confirmation, pl. 21.) for the immediate lord did there make the ſaid charter, and not any lord paramount. (And therefore it is ever good to relie upon the booke at large, for many times *compendia ſunt diſpendia*, and *melius eſt petere fontes, quàm ſectari rivulos).* And of this opinion was maſter *Plowden* upon good adviſement and conſideration.

4. E. 3. 19.

And here is the ſeventh caſe wherein the releaſe and confirmation doth agree; for if there be lord and tenant by fealty and twenty ſhillings rent, the lord may releaſe all his right in the ſeigniorie or in the tenancie, ſaving fealtie and ten ſhillings rent; but he cannot ſave a new kinde of ſervice, for he may aſwell abridge his ſervices upon a releaſe as upon a confirmation. And as there is required privitie when the lord abridgeth the ſervices of his tenant by his confirmation; ſo muſt there be alſo, when the lord by his releaſe abridgeth the ſervices of his tenant. And therefore the lord paramount cannot releaſe to the tenant peravaile ſaving to him part of his ſervices, but the ſaving in that caſe is void (1).

4. E. 3. 19. 9. E. 3. 1. 12. E. 4. 11. 16. E. 3. fines 4. 6. Eliz. Dier 230.

(Ant. 47. a.) (Plo. 563. b.) Britton f. 57. 177. 40. E. 3. 21. 47, 48. 18. E. 3. 26. 50. Aſſ. 6. 14. H. 4. 8.

Et rendra rien a ſon ſeignior forſque ceo que eſt compriſe, &c. Which words are thus to be underſtood; that the tenant ſhall not render any more rent or annuall ſervice to the lord than is contained in the deed; but other things notwithſtanding the ſaid confirmation the tenant ſhall yeeld to the lord, as releefe, ayde *pur file marier*, and ayde *pur faire fitz chivaler*, becauſe theſe are incidents to the tenure that remaine, and ſhall not be diſcharged without ſpeciall words, by the generall words of all other actions, ſervices and demands. And ſo if a man hold of me by knight's ſervice, rent, ſuit, &c. and I releaſe to him all my right in the ſeigniorie, excepting the tenure by knight's ſervice, or confirme his eſtate to hold of me by knight's ſervice only for all manner of ſervices, exactions, and demands; yet ſhall the lord have ward, marriage, releefe, ayde *pur file marier*, *et pur faire fitz chivaler*, for theſe be incidents to the tenure that remaine. But it is holden, that if a man make a gift in taile by deed reſerving two ſhillings rent *a luy et ſes heires pro omnibus et omnimodis ſervitiis, exactionibus ſeculariibus et cunctis demandis*, if the donee die his heire of full age, the donor ſhall have no releefe, becauſe in the originall deed of the gift in taile it is expreſly limited, that by the ſervice of two ſhillings rent he ſhall be quite of all demands (and releefe lieth in demand); and by reaſon of thoſe words, ſay they, there cannot any releefe become due; but ſome doe hold the contrary in that caſe.

(Ant. 76. a.)

13. R. 2. tit. avowrie 89. Nota dictum. Fitzh.

(Ant. 93. a.)

Sect. 539.

MES ſi le ſeignior voile per fait de confirmation, que le tenant en ceſt cas doit

BUT if the lord will by his deed of confirmation, that the tenant in this caſe ſhall yeeld *render*

(1) 3. Inſt. 47. A ſaving will ſerve for any thing that is implied in the judgment, as in caſe of felony to ſave the wife's dower; but a ſaving will not ſerve againſt the expreſs judgment, for that ſhould be repugnant, as ſaving the life of the offender ſhould be void.

*render a luy un eſperver ou un roſe annualment a tiel feaſt, &c. ceſt * confirmation eſt voide, pur ceo que il reſerva a luy un novel choſe que ne fuit parcel de ſes ſervices devant la confirmation: et iſſint le ſeignior poit bien per tiel confirmation abridger les ſervices † per queux le tenant tient de luy, mes il ne poit reſerver a luy novel ſervices.*

to him a hawke or a roſe yearly at ſuch a feaſt, &c. this confirmation is void, becauſe hee reſerveth to him a new thing which was not parcell of his ſervices before the confirmation: and ſo the lord may well by ſuch confirmation abridge the ſervices by which the tenant holdeth of him, but hee cannot reſerve to him new ſervices.

THIS upon that which hath beene ſaid before in the next preceding Section is evident, and needeth no further explication.

Sect. 540.

*ITEM, ſi ſoit ſeignior ‡, meſne, et tenant, et le tenant eſt un abbe, que tient de meſne per certaine ſervice annualment, le quel n'ad aſcun cauſe § d'aver acquitance envers ſon meſne, pur porter briefe de meſne, || &c. en ceſt cas, ſi le meſne confirma l'eſtate que l'abbe ad en la terre, a aver et tener la terre a luy et a ſes ſucceſſors en frankalmoigne, &c. en ceſt cas le confirmation eſt bone, et adonques l'abbe tiendra de le meſne en frankalmoigne. Et la cauſe eſt, pur ceo que, nul novel ſervice eſt reſerve, car touts les ſervices eſpecialment ſpecifies ſont extincts, et nul rent eſt reſerve ¶ al meſne, forſque** que l'abbe tient de luy la terre, et ceo fiſt †† il devant la confirmation; car celuy que tient en frankalmoigne ne doit faire aſcun corporall ſervice; iſſint ‡‡ que per tiel confirmation il appiert, que le meſne ne reſerva a luy aſcun novel ſervice, mes que les tenements ſerront tenus de luy come ceo fuit devant. Et en ceſt*

ALSO, if there be lord, meſne, and tenant, and the tenant is an abbot, that holdeth of the meſne by certaine ſervices yearly, the which hath no cauſe to have acquitance againſt his meſne, for to bring a writ of meſne, &c. in this caſe, if the meſne confirme the eſtate that the abbot hath in the land, to have and to hold the land unto him & his ſucceſſors in frankalmoigne, or free almes, &c. in this caſe this confirmation is good, and then the abbot holdeth of the meſne in frankalmoigne. And the cauſe is, for that no new ſervice is reſerved, for all the ſervices ſpecially ſpecified bee extinct, and no rent is reſerved to the meſne, but the abbot ſhall hold the land of him as it was before the confirmation; for he that holdeth in frankalmoigne ought to doe no bodily ſervice; ſo that by ſuch confirmation it appeareth, the meſne ſhall not reſerve unto him no new ſervice, but that the lands ſhall bee holden of him as it was before. And in this caſe

* *confirmation—reſevacion*, L. and M. and Roh.
‡ *meſne—meſme*, L. and M. but not in Roh.
¶ *al meſne* not in L. and M. nor Roh.
‡‡ *que* not in L. and M. nor Roh.
† *per queux le tenant tient de luy*, not in L. and M. nor Roh.
§ *per cau* added L. and M. and Roh.
|| &c. not in L. and M. nor Roh.
** *que* not in L. and M.
†† *il—a lui*, L. and M. and Roh.

*caſe l'abbe averaun brieſe de meſne, s'il ſoit diſtreine en ſon default, per force de le dit confirmation, lou per caſe il ne puiſſoit aver * un brieſe adevant, &c.*

caſe the abbot ſhall have a writ of meſne, if hee bee diſtrained in his default, by force of the ſaid confirmation, where per caſe hee might not have ſuch a writ before.

4. E. 3. 19. 22. E. 3. 15. b. the lord Wake's caſe. 10. E. 3. 5. 15. E. 3. confirmat. 8. 4. E. 3. 19, 20. F. N. B. 136. h. & q. 4. E. 4. 35. 31. E. 1. Meſne 55. 11. E. 3. Avowrie 100. 22. E. 3. 18. b. 30. E. 3. 13. 16. H. 3. Avowrie 243. (9. Rep. 130.)

HERE our author having ſeene the former bookes putteth his caſe, that the meſne maketh the confirmation to hold in frankalmoigne, and not the lord paramount.

Et en ceſt caſe l'abbe avera brieſe de meſne. Here is to bee noted, that upon a confirmation to hold in frecalmoigne there lyeth a writ of meſne, albeit the cauſe of acquitall beginne after the ſeignior. And ſo upon ſuch a confirmation the tenant ſhall have, *contra formam feoffamenti.*

Sect. 541.

45. E. 3. 10. 30. H. 6. tit. barre 59. Regiſtrum 102. 1. H. 6. cap. 5.

(Poſt. 323. a.) Brooke tit. propertie 28.

(Sect. 589, 590, 591.)

[a] Bracton lib. 2. 59. b. 24. E. 3. tit. diſcont. 16. 42. E. 3. 18. 40. E. 3. 17. 43. E. 3. 4. 9. E. 4. 38. Dier. 10. Eliz. Growche's caſe.

HERE is to be obſerved a diverſity betweene the cuſtodie of the body of a ward within age, and a right of inheritance in the body of a villeine in groſſe; for a man may bee put out of poſſeſſion of the cuſtodie of his ward, but not of his villeine in groſſe, no more than a man can bee of his priſoner which he hath taken in warre.

Alſo of things that are in grant, as rents, commons, and the like, it is at the election of the party whether hee will be diſſeiſed of them or no, as ſhall bee ſaid after in his proper place. (1) But of a villeine in groſſe he cannot at all be diſſeiſed. [a] *Non valet confirmatio niſi ille qui confirmat ſit in poſſeſſione rei vel juris unde fieri debet confirmatio, & eodem modo niſi ille cui confirmatio fit, ſit in poſſeſſione.*

And materially doth *Littleton* put his caſe of a villeine in groſſe; for of a villeine regardant to a mannor, the lord may be put out of poſſeſſion; for by putting him out of poſſeſſion of the mannor, which is the principall, hee may likewiſe bee put out of poſſeſſion of the villeine regardant, which is but acceſſory. And by the recovery of the mannor the villeine is recovered. But if another doth take away my villeine in groſſe or regardant, he gaineth no poſſeſſion of him. And this doth well appeare by the writ of *nativo habendo*, for that writ is not brought againſt any perſon in certaine (becauſe no man ca-

ITEM, ſi jeo ſue ſeiſie d'un villein come de villein en gros, et un auter luy prent hors de ma poſſeſſion, enclaimant luy d'eſtre ſon villeine † la ou il n'avoit aſcun droit d'aver luy come ſon villeine, et puis jeo confirma a luy l'eſtate que il ad en mon villeine, ceſt confirmation ſemble void, pur ceo que nul poit aver poſſeſſion de un home come de villeine en groſſe, ſi non celuy que ad droit de luy aver come ſon villein en groſſe. Et iſſint entant que celuy a que le confirmation fuit fait, ne fuit ſeiſie de luy come de ſon villeine a le temps de confirmation fait, tiel confirmation eſt void.

ALSO, if I be ſeiſed of a villeine as of a villeine in groſſe, and another taketh him out of my poſſeſſion, clayming him to bee his villein there where hee hath no right to have him as his villeine, and after I confirme to him the eſtate which hee hath in my villeine, this confirmation ſeemeth to be voide, for that none may have poſſeſſion of a man as of a villeine in groſſe, but he which hath right to have him as his villeine in groſſe. And ſo inaſmuch as hee to whom the confirmation was made, was not ſeiſed of him as of his villeine at the time of the confirmation made, ſuch confirmation is void.

* *un—tiel*, L. and M. and Roh. † *la ou il n'avoit aſcun droit d'aver luy come ſon villeine*, not in L. and M. nor Roh.

(1) See ant. 239. note 1.

can gaine the poſſeſſion of him. But the writ is to this effect: *Rex vic' ſalutem. Præcipimus tibi, quòd juſtè et ſine dilatione habere facias A. B. nativum et fugitivum ſuum, &c. ubicunque inventus fuerit, &c. et prohibemus ſuper foriſtacturam noſtram ne quis eum injuſtè detineat*; ſo as detaine him one may, but to poſſeſſe himſelfe of him, and to diſpoſſeſſe the lord, he cannot. (Ant. 303. a.)

And if a man might have beene diſpoſſeſſed of a villeine in groſſe, or of a villeine regardant (unleſſe he be diſpoſſeſſed of the mannor alſo, as hath beene ſaid), the law would have given a remedie againſt the wrong doer, as the law doth in the caſe of a ward.

Now, ſeeing it doth appeare by our bookes [*a*] (and by *Littleton* himſelfe by implication ſpeaking only of a villeine in groſſe) that if a man be diſſeiſed of the mannor whereunto the villeine is regardant, he is out of poſſeſſion of his villeine, and ſo an advowſon appendant, and the like. Hereby (*Littleton* putting his caſe of a villeine in groſſe) and by divers authorities a point controverted in our bookes [*] is reſolved, viz. that by the grant of the mannor without ſaying *cum pertinentiis*, the villeine regardant, advowſon appendant, and the like, doe paſſe; for if the diſſeiſor ſhall gaine them as incidents to the mannor, whoſe eſtate is wrongfull, *à multò fortiori* the feoffee, who commeth to his eſtate by lawfull conveyance, ſhall have them as incidents. But where the entrie of the diſſeiſee is lawfull, he may ſeiſe the villeine regardant, or preſent to the advowſon, &c. before he enter into the mannor: otherwiſe it is where his entrie is not lawfull; and ſo are the ancient authors [*b*] to be intended (1).

[*a*] Bracton, fol. 243. Britton, fol. 126. (5. Rep. 11. b. Ant. 77. a. 121. b.)

[*] 9. E. 4. 38. 3. H. 4. 15. 18. E. 3. 44. 16. E. 3. Quar. Imp. 146. 19. R. 2. Treſp. 255. 19. H. 6. 33. 21. H. 6. 9. 33. H. 6. 33. 5. H. 7. 36. 38. 10. H. 7. 9. F. N. B. 33. 9. 22. H. 6. 33. per Moyle. 30. E. 3. 31. 39. E. 3. 21. 43. E. 3. 12. (Plowd. 258. a. Ant. 122. b. Poſt. 349. b. 363. b.)

[*b*] Bracton, fol. 242, 243. Britton, fol. 126. Fleta, acc. 2. H. 6. F. N. B. 77. a. b.

Sect. 542.

*MES en ceſt cas, ſi tiels parols fueront en le fait, * &c.* Sciatis me dediſſe et conceſſiſſe † tali, &c. talem villanum meum, *c'eſt bone; mes ceo urera per force et voy de grant, et nemy per voy de confirmation, &c.*

BUT in this caſe, if theſe words were in the deed, &c. *Sciatis me dediſſe et conceſſiſſe tali, &c. talem villanum meum*, this is good; but this ſhall enure by force and way of grant, and not by way of confirmation, &c.

HERE it is to be obſerved, that a man hath an inheritance in a villeine, whereof the wife of the lord ſhall be endowed, as hath beene ſaid; for in him a man may have an eſtate in fee or fee taile for life or yeeres. And therefore *Littleton* is here to be underſtood, that in the grant there were theſe words (*his heires*) or elſe nothing paſſed but for life, as of other things that lie in grant. 24. E. 3. Diſcont. 16.

Sect. 543.

ET ‡ aſcun foits ceux verbs dedi et conceſſi ureront per voy d'extinguiſhment del choſe done ou grant; ſicome un tenant tient de ſon ſeignior per certeine rent, et le ſeignior granta per ſon fait a le tenant et a ſes heires le rent, &c. ceo urera a le tenant per voy d'extinguiſhment, car per cel grant le rent eſt extinct, &c.

AND ſometimes theſe verbes *dedi et conceſſi* ſhall enure by way of extinguiſhment of the thing given or granted; as if a tenant hold of his lord by certaine rent, and the lord grant by his deed to the tenant and his heires the rent, &c. this ſhall enure to the tenant by way of extinguiſhment, for by this grant the rent is extinct, &c.

And this grant of the rent ſhall enure by way of releaſe. 3. E. 3. 12. & 3. Aſſ. 7.

Sect.

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

† *tali* not in L. and M. nor Roh.

‡ *et—item*, L. and M. and Roh.

(1) See the Chapter on Villenage.

Sect. 544.

(2. Roll. 405.)

*EN meſme le manner eſt lou *un ad un rent charge hors de certaine terre, et il graunta al tenant de la terre le rent charge, &c. Et la cauſe eſt, pur ceo que appiert, per les parols del grant, que le volunt le donor eſt, que le tenant avera le rent, &c. Et entant que il ne puit aver ne perceiver aſcun rent hors de ſon terre demeſne, pur ceo le fait ſerra intendue et pris pur le pluis advantage et availe pur le tenaunt que puit eſte pris, et ceo eſt per voy d'extinguiſhment.*

IN the ſame manner it is where one hath a rent charge out of certaine land, and hee grant to the tenant of the land the rent charge, &c. And the reaſon is, for that it appeareth, by the words of the grant, that the will of the donor is, that the tenant ſhall have the rent, &c. And inaſmuch as hee cannot have or perceive any rent out of his owne land, therefore the deed ſhall be intended and taken for the moſt advantage and availe for the tenant that it may be taken, and this is by way of extinguiſhment.

34. H. 6. fol. 41. (Ante 285. a.)

BUT if the grantee of the rent-charge granteth it to the tenant of the land and a ſtranger, it ſhall be extinguiſhed but for the moitie: and ſo it is of a ſeigniorie.

Sect. 545.

ITEM, ſi jéo leſſa terre a un home pur terme d'ans, et puis jéo confirma ſon eſtate ſans pluis parolx mitter en le fait, per cel il n'ad pluis greinder eſtate que pur terme d'ans, ſicome il avoit adevant.

ALSO, if I let land to a man for terme of yeares, and after I confirme his eſtate without putting more words in the deed, by this he hath no greater eſtate than for terme of yeares, as hee had before.

Sect. 546.

MES ſi jeo releſſa a luy mon droit que jeo aye en le terre ſans plus † parols mitter en le fait, il ad eſtate de frankteneement. ‡ Iſſint poyes entend, mon fits, divers grands diverſities perenter releaſes et confirmations.

BUT if I releaſe to him all my right which I have in the land without putting more words in the deed, hee hath an eſtate of freehold (1). So thou maiſt underſtand (my ſonne) divers great diverſities betweene releaſes and confirmations.

IN theſe two Sections is the ſeventh caſe wherein a releaſe and confirmation doe differ.

Sect.

* *un—home*, L. and M. and Roh. † *parols* not in L. and M. nor Roh. ‡ *et* added in L. and M. and Roh.

(1) To give a confirmation this effect, in the caſe of a leaſe at common law, the leaſe muſt have previouſly made an actual entry. But no entry is neceſſary for the purpoſe, if the leaſe be a bargain and ſale, under the ſtatute.

Sect. 547.

ITEM, ſi jeo eſteant deins age leſſa terre a un auter pur terme de xx. ans, et puis il graunte le terre a un auter pur terme de x. ans, iſſint il granta forſque parcel de ſon terme: en ceſt caſe quant jeo ſue de pleine age, ſi jeo releſſa al grauntee de mon leſſee, &c. ceſt releaſe eſt voyd, pur ceo que il n'y ad aſcun privitie perenter luy et moy, &c. Mes ſi jeo confirme ſon eſtate, donque ceſt confirmation eſt bone. Mes ſi mon leſſee graunta tout ſon eſtate a un auter, donques mon releaſe fait a le grantee eſt bone et effectual.

ALSO, if I being within age let land to another for terme of xx. yeares, and after he granteth the land to another for term of x. years, ſo hee granteth but parcell of his terme: in this caſe when I am of full age, if I releaſe to the grantee of my leſſee, &c. this releaſe is void, becauſe there is no privitie betweene him and me, &c. But if I confirme his eſtate, then this confirmation is good. But if my leſſee grant all his eſtate to another, then my releaſe made to the grantee is good and effectuall. (1) (Ant. 296.)

HERE are two things to be obſerved: Firſt, that the leaſe of an enfant in this caſe is not void but voidable. Secondly, this is the eighth caſe put by *Littleton*, wherein the releaſe and confirmation doe differ.

7. E. 4. 6. b. 18. E. 4. 2. 9. H. 7. 24. (Cro. Jac. 320. Sid. 42. 1. Roll. 729, 730.)

Sect. 548.

ITEM, ſi home granta un rent charge iſſuant hors de ſon terre a un auter pur terme de ſon vie, et puis il confirma ſon eſtate en le dit rent, a aver et tener a luy en fee taile ou en fee ſimple; ceſt confirmation eſt void quant a enlarger ſon eſtate, pur ceo que celuy que confirme n'avoit aſcun reverſion en le rent.

ALSO, if a man grant a rent-charge iſſuing out of his land to another for terme of his life, and after hee confirmeth his eſtate in the ſaid rent, to have and to hold to him in fee taile or in fee ſimple; this confirmation is void as to inlarge his eſtate, becauſe hee that confirmeth hath not any reverſion in the rent. (Sid. 285.) (Mo. 30.)

HERE the diverſitie is apparant, betweene a rent newly created and a rent *in eſſe*: which needeth no explication. Only this is to be obſerved, that *Littleton* intendeth his deed of confirmation not to containe any clauſe of diſtreſſe; for otherwiſe, as to the confirmation the deed is void, but the clauſe of diſtreſſe doth amount to a new grant, as in the Chapter of Rents hath beene ſaid. (2. Roll. 415.) 21. E. 3. 47. 15. E. 4. 8. b. Pl. Com. 35. 8. H. 4. 19. (Ant. 148. a. Poſt. 317. a.)

Sect. 549.

MES ſi home ſoit ſeiſie en fee de rent ſervice ou de

BUT if a man be ſeiſed in fee of rent ſervice or rent charge, (Poſt. 366. a. Finch 234.)

rent

(1) So 3d Wilſon 234. Henry Blencowe and Mary his wife, ſeiſed in fee, demiſed to William Alder for 21 years, with a proviſo for re-entry on default of payment of the rent, or breach of any of the covenants. Among other covenants, there was one from William Alder, — "that he ſhould not aſſign, transfer, or ſet over, or otherwiſe do or put away the indenture of demiſe, "or the premiſes thereby demiſed, or any part thereof, to any perſon or perſons whomſoever, without the conſent of the ſaid Henry "Blencowe and Mary his wife, then heirs and aſſigns, in writing, under his, her, or their hands and ſeals, firſt had and obtained "for doing thereof." — William Alder, without any licence, demiſed to John Buſby for 14 years. — It was held, that there was no *privity* of *contract* between the original lettor and Rugby, the under-lettee. So that it was an under leaſe, and not an aſſignment; and therefore no breach of the covenant. And ſee Strange, 405.

*rent charge, et il grant le rent a un auter pur terme de vie, et le tenant atturna, et puis il confirma l'eſtate de le grantee en fee taile, ou en fee ſimple, ceſt confirmation eſt bone, quant a enlarger ſon eſtate ſolonques les parols le confirmation, pur ceo que celuy que confirmaſt * al temps de confirmation avoit un reverſion del rent.*

and he grant the rent to another for life, and the tenant attorneth, and after hee confirmeth the eſtate of the grantee in fee taile, or in fee ſimple, this confirmation is good, as to enlarge his eſtate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reverſion of the rent.

HERE is the eighth eaſe wherein the releaſe and confirmation doth agree: and it is here to be obſerved, that to the grant of the eſtate for life, *Littleton* doth put an attornement, becauſe it is requiſite; but to the confirmation to the grantee of the rent to enlarge his eſtate, there is none neceſſary, and therefore he putteth none: but of this more ſhall be ſaid in the Chapter of Attornement, *Sect.* 556, 557.

Sect. 550.

MES en cas avantdit lou home graunt un rent charge a un auter pur terme de vie, s'il voile que le grantee averoit eſtate en le taile, ou en fee, il covient que le fait de grant del rent charge pur terme de vie, ſoit ſurrender ou cancell, et donques de faire un novel fait d'autiel rent charge, a aver et perceiver a le grantee en le taile ou en fee, &c. Ex paucis † plurima concipit ingenium.

BUT in the caſe aforeſaid where a man grants a rent charge to another for terme of life, if he will that the grantee ſhould have an eſtate in taile, or in fee, it behoveth that the deed of grant of the rent charge for terme of life be ſurrendred or cancelled, and then to make a new deed of the like rent charge, to have and perceive to the grantee in tayle or in fee, &c. *Ex paucis plurima concipit ingenium.*

Vid. Sect. 636. (Cro. Car. 399. Ant. 148. a. 225. b. 10. Rep. 66. Plowd. 237. a. Poſt. 338. 1. Ven. 297.)

SURRENDER ou cancel. (1) Note by cancellation of the deed the rent which lieth only in grant ceaſeth (as here it appeareth) as well as by the ſurrender. And the reaſon wherefore (if the grantor make a new grant of the rent, and not enlarge it by way of confirmation, as *Littleton* muſt be intended) the deed ſhould be ſurrendred or cancelled, is leſt the grantor ſhould be doubly charged, viz. with the old grant for life, and with the new grant in fee; or, as hath beene ſaid, the grantor may grant to the grantee for life and his heires, that he and his heires ſhall diſtreine for the rent, &c. and this ſhall amount to a new grant, and yet amount to no double charge, whereof you may ſee before in the Chapter of Rents.

* *l'eſtate* added L. and M.

† *plurima concipit ingenium — dictis*, &c. L. and M.

(1) See ante 226. note 2.

CHAP. 10. Of Attornement. Sect. 551.

*ATTORNEMENT eſt, come ſi ſoit ſeignior et tenant, et le ſeignior voile granter per ſon fait les ſervices de ſon tenant a un auter pur terme d'ans, ou pur terme de vie, ou en taile, ou en fee, il covient que le tenant atturna al grauntee en le vie le grantor, per force et vertue del grant, ou auterment le grant eſt void. Et atturnement eſt nul auter en effect, forſque quant le tenant ad oye del grant fait per ſon ſeignior, que meſme le tenant agrea per parol a le dit grant, ſicome adire a le grauntee, Jeo moy agree a le grant fait a vous, * &c. ou, Jeo ſue † bien content de le graunt fait a vous; mais le pluis common atturnement eſt, adire, ‡ Sir, jeo atturna a vous per force del dit graunt, ou jeo deveigne voſtre tenant, &c. ou || liverer al grantee un denier, ou un maile, ou un farthing, per voy d'attornement §.*

ATTORNEMENT is, as if there bee lord and tenant, and the lord will grant by his deed the ſervices of his tenant to another for terme of yeares, or for terme of life, or in taile, or in fee, the tenant muſt attorne to the grantee in the life of the grantor, by force and vertue of the grant, or otherwiſe the grant is void. And attornement is no other in effect, but when the tenant hath heard of the grant made by his lord, that the ſame tenant do agree by word to the ſaid grant, as to ſay to the grantee, I agree to the grant made to you, &c. or I am well content with the grant made to you; but the moſt common attornment is, to ſay, Sir, I attorne to you by force of the ſaid grant, or I become your tenant, &c. or to deliver to the grantee a pennie, or a halfepennie, or a farthing, by way of attornement.

ATTORNMENT is an agreement of the tenant to the grant of the ſeigniorie, or of a rent, or of the donee in tayle, or tenant for life or yeeres, to a grant of a reverſion or remainder made to another. It is an ancient word of art, and in the common law ſignifieth a torning or attorning from one to another. Wee uſe alſo *attornamentum* as a Latine word, and *attornare* to attorne. And ſo *Bracton* [a] uſeth it: *Item videndum, eſt ſi dominus attornare poſſit alicui homagium et ſervitium tenentis ſui contra voluntatem ipſius tenentis, et videtur quòd non.*

Bracton, lib. 2. fol. 81. Britton, f. 105. b. 176, et 177. Fleta, lib. 3. cap. 6.

(1. Roll. Abr. 293.)

(1. Rep. 68.)

[a] Bracton, lib. 2. fo. 81. b. Fleta. Britton, ubi ſupra.

And the reaſon why an attornment is requiſite, is yeelded in old bookes to be, *Si dominus attornare poſſit ſervitium tenentis contra voluntatem tenentis, tale ſequeretur inconveniens, quòd poſſit eum ſubjugare capitali inimico ſuo, et per quod teneretur ſacramentum fidelitatis facere ei qui eum damnificare intenderet.* (1)

Bracton, lib. 2. fol. 81. b. Britton, ubi ſupra.

Il covient que le tenant attorna al grantee en la vie del grantor, &c. And ſo muſt he alſo in the life of the grantee; and this is underſtood of a grant by deed. And the reaſon hereof is, for that every grant muſt take effect as to the ſubſtance thereof in the life both of the grantor and the grantee. And in this caſe if the grantor dieth before attornement, the ſeigniorie, rent, reverſion, or remainder deſcend to his heire; and therefore after his deceaſe the attornement commeth too late: ſo likewiſe if the grantee dieth before attornement, an attornement to the heire is

Vide Litt. fol. 128. 11. H. 7. 19.

Lib. 1. fol. 104, 105. Shelley's caſe.

40. Aſſ. 19. 34. H. 6. 7. 20. H. 6. 7.

(Doct. and Stud. 86. a.)

* &c. not in L. and M. nor Roh. *liverer*—*deliverer*, L. and M. and Roh.

† *bien* not in L. and M. nor Roh.

‡ &c. added in L. and M. and Roh.

(1) Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the conſent of the lord; nor the lord alien or transfer his ſeigniory without the conſent of his feudatory: for the obligations of the lord and his feudatory being reciprocal, the feudatory was as much intereſted in the conduct and ability of the lord, as the lord in the conduct and ability of his feudatory; and that as the lord could not alien, ſo neither could he exchange, mortgage, or otherwiſe diſpoſe of his ſeigniory, without the conſent of his vaſſal. See Sir Martin Wright's Introduction to the Law of Tenures, 30, 31. — It is certain that this doctrine formerly prevailed in England. But, in general, it does not appear to have prevailed (at leaſt in an equal extent) in other countries. It ſeems there to have been admitted, that the lord might transfer the *whole fee*, without the conſent of the vaſſal, and that the vaſſal immediately, by ſuch a transfer, became the tenant of the new lord.— It ſeems alſo to have been admitted, that the lord might transfer to another the beneficial fruits of the tenure, without the conſent of the vaſſal. But it was a great queſtion whether the lord could transfer his vaſſal to another, without the vaſſal's conſent, unleſs by transferring the *whole fee*. — See Baſnage *Commentaire de la Coutume de Normandie, des Fiefs et Droits feodaux*, art. 204.—This neceſſity, which ſubſiſted in our old law, that the tenant ſhould conſent to the alienation of the lord, gave riſe to the doctrine of attornment. — At the common law, attornment ſignified only the conſent of the tenant to the grant of the ſeigniory; or, in other words, his conſent to become the tenant of the new lord. But after the ſtatute *quia emptores terrarum* was paſſed, by which ſubinfeudation was prohibited, it became neceſſary that when the reverſion or remainder-man after an eſtate for years, for life, or in tail, granted his reverſion or remainder, the particular tenant ſhould attorn to the grantee; as the particular tenant muſt, otherwiſe, have held of the remainder-man, and he of the chief lord; by which a new tenure would be created. — The neceſſity of attornment was, in ſome meaſure, avoided by the ſtatute of uſes; as by that ſtatute, the poſſeſſion was immediately executed to the uſe; — and by the ſtatute of wills, by which the legal eſtate is immediately veſted in the deviſee. — Yet attornment continued after this to be neceſſary, in many caſes. But both the neceſſity and efficacy of attornments have been almoſt totally taken away by the ſtatutes of 4. and 5. Ann. c. 16. and 11. Geo. 2. c. 19. By the former of thoſe ſtatutes it was enacted, "That all grants and conveyances of any manors or rents, or of the reverſion or remainder of any meſſuages or lands, ſhould be good without attornment of the tenants;

is void, for nothing deſcended to him; and if he ſhould take, he ſhould take it as a purchaſor, where the heires were added but as words of limitation of the eſtate, and not to take as purchaſors.

(9. Rep. 84. Sect. 564.)

But if the grant were by fine, then albeit the conuſor or conuſee dieth, yet the grant is good. For by fine levied the ſtate doth paſſe to the conuſee and his heires; and the attornment to the conuſee or his heires at any time to make privitie to diſtraine is ſufficient. But all this is to be taken as *Littleton* underſtood it, viz. of ſuch grants as have their operation by the common law. For ſince *Littleton* wrote, if a fine be levied of a ſeigniorie, &c. to another to the uſe of a third perſon and his heires, he and his heires ſhall diſtraine without any attornment, becauſe he is in by the ſtatute of 27. *H.* 8. *cap.* 10. by transferring of the ſtate to the uſe, and ſo he is in by act in law.

34. H. 6. 7. 20. H. 6. 7.

Bracton, lib. 2. fol. 81, 82. acc.

Lib. 6. fol. 68. Sir Moyle Finche's caſe.

And ſo it is, and for the ſame cauſe, if a man at this day by deed indented and inrolled according to the ſtatute, bargaineth and ſelleth a ſeigniorie, &c. to another, the ſeigniorie ſhall paſſe to him without any attornement; and ſo it is of a rent, a reverſion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and leſſees much altered concerning attornement ſince *Littleton* wrote.

(2. Cro. 193. Poſt. 321. 6 Rep. 68.)
27. H. 8. cap. 16.
Vide Sect. 584.

But if the conuſee of a fine before any attornement by deed indented and inrolled, bargaineth and ſelleth the ſeigniorie to another, the bargainee ſhall not diſtraine, becauſe the bargainor could not diſtraine. *Et ſic de ſimilibus*; for *nemo poteſt plus juris ad alium transferre quàm ipſe habet. Vide Sect.* 149. where upon a recovery, the recoveror ſhall diſtraine and avow without attornement.

(Ant. 104. b. Poſt. 321. b. 5. Rep. 113.) Lib. 6. ubi ſupra. Vide Sect. 149.

A grant to the king, or by the king to another, is good without attornement, by his prerogative.

49. E. 3. 4. 34. H. 6. 8. 6. E. 4. 13. (Poſt. 324. b. 1. Roll. Abr. 294. Sect. 574. 1. Rep. Alton Wood's caſe. 8. Rep. 89. 1. Roll. Rep. 301. 1. Cro. 141. Jones 356.)

Attornement eſt nul auter en effect, &c. It is to be underſtood that there be two kinde of attornements, viz. an attornement in deed or expreſſe, and an attornement in law or implicite. Of attornement expreſſe or in deed *Littleton* ſpeaketh here, and of attornement in law heſpeaketh after in this chapter. And to both theſe kinds of attornements there is an incident inſeparable, that is, that the tenant hath notice of the grant; for (an attornement being an agreement or conſent to the grant, &c.) he cannot agree or conſent to that which he knoweth not. And the uſuall pleading is, to which grant the tenant attorned. And therefore if a bayly of a mannor who uſed to receive the rents of the tenants, purchaſe the mannor, and the tenants having no notice of the purchaſe, continue the payment of the rents to him, this is no attornement. So if the lord levie a fine of the ſeigniorie, and by fine take backe an eſtate in fee, the tenant continueth the payment of the rent to the firſt conuſor without notice of the fines, this is no attornement. But it is to be knowne, that there be two kinde of notices, viz. a notice in deed or expreſſe, whereof *Littleton* here ſpeaketh, when he ſaith, that the tenant agreeth to the grant, and a notice in law or implied, whereof *Littleton* hereafter ſpeaketh in this chapter.

Lib. 2. fol. 67. b. Tooker's caſe. 1. El. Dyer 302. Tooker's caſe ubi ſupra.

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If there be lord, meſne and tenant, and the meſne grant over his meſnaltie by deed, the lord releaſeth to the tenant, whereby the meſnaltie is extinct, and there is a rent by ſurpluſage, an attornement to the grant of this rent ſecke is good, although the qualitie of that part of the rent is altered, becauſe it is altered by act in law.

If a reverſion of two acres be granted by deed, and the leſſor before attornement levie a fine of one of them, and the tenant attorne to the grantee by deed, this is good for the other acre.

[a] 18. E. 3. tit. Variance, 63. 22. E. 3. 18. Tooker's caſe ubi ſupra. (Poſt. 314.)

[a] If the reverſion be granted of three acres, and the leſſee agree to the ſaid grant for one acre, this is good for all three; and ſo it is of an attornement in law, if the reverſion of three acres be granted, and the leſſee ſurrender one of the acres to the grantee, this attornement ſhall be good for the whole reverſion of the three acres according to the grant.

Et le tenant agrea. Hereafter in this chapter *Littleton* doth teach what manner of tenant ſhall attorne.

Agrea per parol, &c. And ſo hee may, and more ſafely by his deed in writing.

39. H. 6. 3. Tooker's caſe ubi ſupra.

Sicome adire a le grantee, &c. Here is to be ſeene to what manner of grantees the attornement is good. Regularly the attornement muſt be according to the grant, either expreſsly or impliedly. Of the firſt *Littleton* hath here ſpoken.

Im-

ments; provided that no ſuch tenant ſhould be damaged by payment of rent to any ſuch grantor or conuſor, or by breach of any condition for non-payment of rent before notice given him of ſuch grant by the conuſee or grantor. By the latter ſtatute it was enacted that the attornments of tenants to ſtrangers claiming title to the eſtate of their landlords, ſhould be abſolutely null and void to all intents and purpoſes whatſoever, and that the poſſeſſion of their reſpective landlord or landlords, leſſor or leſſors, ſhould not be deemed or conſtrued to be any wiſe changed, altered, or affected, by any ſuch attornment or attornments; provided that nothing therein contained ſhould extend to vacate or affect any attornment made purſuant to, and in conſequence of, ſome judgment or decree, or order of a court of equity, or made with the privity and conſent of the landlord or landlords, leſſor or leſſors, or to any mortgagee, after the mortgage is become forfeited.—Till the paſſing of theſe ſtatutes, the doctrine of attornment was one of the moſt copious and abſtruſe points of the law. But theſe ſtatutes having made attornment both unneceſſary and inoperative, the learning upon it is ſo uſeleſs, that Mr. Viner has inſerted nothing reſpecting it in his voluminous compilation but an extract from lord chief baron Gilbert. — Mr. Bacon has not the article Attornment in his work; and the learning and induſtry of lord chief baron Comyn have furniſhed him with little material upon it, that is not to be found either in Littleton or ſir Edward Coke.

No Attornment in Bacon Abr. 329. 3 Vol. 31.

Impliedly, as if a reverſion be granted to two by deed, and the leſſee attorne to one of them according to the grant, this attornement is good, but not to veſt the reverſion only in him to whom attornement is made; but it ſhall enure to both the grantees, for that is according to the grant, and for that it cannot veſt the reverſion only in him to whom the attornement is made. And ſo it is if one grantee dieth, the attornement to the ſurvivor is good. (Poſt. 313. a. Ant. 52. a. 297. b. 296. a)

If the lord grant by deed his ſeigniorie to *A.* for life, the remainder to *B.* in fee, *A.* dieth, and then the tenant attorne to *B.* this attornement is void, becauſe it is not according to the grant; for then *B.* ſhould have a remainder without any particular eſtate. Tooker's caſe ubi ſupra. 11. H. 7. 12. 20. H. 6. 7. (Ant. 298. a.)

If a reverſion be granted to a man and a woman, they are to have moities in law; but if they entermarrie and then attornement is had, they ſhall have no moities (and yet by the purport of the grant they are to have moities), becauſe it is by act in law. Tooker's caſe ubi ſupra. Pl. Com. 187. 483. (Ant. 187. b.)

If a feme grant a reverſion to a man in fee, and marry with the grantee, the leſſee attorne to the huſband, this is a good attornement in law to the huſband 2. R. 2. tit. Attornement 8. Lib. 4 f. 61. Heming's caſe. (Mo. 91. con. 1. Leo. 58.)

If a reverſion be granted by deed to the uſe of *I. S.* and the leſſee hearing the deed read, or having notice of the contents thereof attorne to *ceſtuy que uſe*, this is an implied attornement to the grantee.

If a reverſion be granted for life, the remainder in taile, the remainder in fee, the attornement to the grantee for life ſhall enure to them in the remainder, to veſt the remainder in them. Temps E. 1. Attorn. 22. 18. E. 4. 7. (Ant. 212. b. 312. b. 6. Rep. 63. 5. Rep. Ford's caſe. 1. Roll. Abr. 412. 3. Leo. 17. 4. Leo. 23.)

And in thoſe caſes if the tenant ſhould ſay, that I doe attorne to the grantee for life, but that it ſhall not benefit any of them in remainder after his death, yet the attornement is good to them all; for having attorned to the tenant for life, the law (which he cannot controll) doth veſt all the remainder. And of this more ſhall be ſaid hereafter in this chapter.

Littleton here putteth five examples of an expreſſe attornement, but of them the laſt is the beſt, becauſe the eare is not only a witneſſe of the words, but the eye of the delivery of the penny, &c. and ſo there is *dictum et factum*. And any other words which import an agreement or aſſent to the grant, doe amount to an attornement. And albeit theſe five expreſſe attornements be all ſet downe by *Littleton*, to be made to the perſon of the grantee [*b*], yet an attornement in the abſence of the grantee is ſufficient; for if he doth agree to the grant either in his preſence or in his abſence, it is ſufficient. [*b*] Lib. 2. fol. 68, 69. Tooker's caſe. 28. H. 8. tit. Attornement Br. 40. (10. Rep. 52. Cro. Car. 440. 1. Roll. Abr. 300. Dyer 298. a.)

Sect. 552.

*ITEM, ſi le ſeignior graunt le ſervice de ſon tenant a un home, et puis per un fait portant un darreme date il granta meſmes les ſervices a un auter, et le tenant attorne a le ſecond grantee, ore le dit * grauntee ad les ſervices; et coment que apres le tenant voile attorner a le primer grauntee, c'eſt clerement void, &c.*

ALSO, if the lord grant the ſervice of his tenant to one man, and after by his deed bearing a later date hee grant the ſame ſervices to another, and the tenant attorne to the ſecond grantee, now the ſaid grantee hath the ſervices; and albeit afterwards the tenant will attorne to the firſt grantee, this is clearely void, &c.

HERE it is to be obſerved, that *Littleton* expreſſeth not what eſtate is granted, and very materially; for if the former grant were in fee, and the latter grant were for life, and the tenant doth firſt attorne to the ſecond grantee, he cannot after attorne to the firſt grantee to make the fee ſimple paſſe, for that ſhould not be according to the grant; but in that caſe the attornement to the firſt is countermanded. And ſo it is if a reverſion expectant upon an eſtate for life be granted to another in fee, and after the (Cro. Car. 284. 1. Roll. Abr. 500. Ant. 296. a.)

grantor before attornement confirme the eſtate of the leſſee in taile, the attornement to the grantee for the fee ſimple is void.

In the ſame manner, if a reverſion upon an eſtate for yeeres be granted in fee, and the leſſor confirme the eſtate of the leſſee for life, he cannot afterwards attorne.

If

* *dit—ſecond*, L. and M. and Roh.

(9. Rep. 84. Sect. 564.)

is void, for nothing deſcended to him; and if he ſhould take, he ſhould take it as a purchaſor, where the heires were added but as words of limitation of the eſtate, and not to take as purchaſors.

34. H. 6. 7. 20. H. 6. 7.

But if the grant were by fine, then albeit the conuſor or conuſee dieth, yet the grant is good. For by fine levied the ſtate doth paſſe to the conuſee and his heires; and the attornment to the conuſee or his heires at any time to make privitie to diſtraine is ſufficient. But all this

Bracton, lib. 2. fol. 81, 82. &c.

is to be taken as *Littleton* underſtood it, viz. of ſuch grants as have their operation by the common law. For ſince *Littleton* wrote, if a fine be levied of a ſeigniorie, &c. to another to the

Lib. 6. fol. 68. Sir Moyle Finche's caſe.

uſe of a third perſon and his heires, he and his heires ſhall diſtraine without any attornment, becauſe he is in by the ſtatute of 27. *H.* 8. *cap.* 10. by transferring of the ſtate to the uſe, and ſo he is in by act in law.

(2. Cro. 193. Poſt. 321. 6 Rep. 68.)
27. H 8. cap. 16.
Vide Sect. 584.

And ſo it is, and for the ſame cauſe, if a man at this day by deed indented and inrolled according to the ſtatute, bargaineth and ſelleth a ſeigniorie, &c. to another, the ſeigniorie ſhall paſſe to him without any attornement; and ſo it is of a rent, a reverſion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and leſſees much altered concerning attornement ſince *Littleton* wrote.

(Ant. 104. b.
Poſt. 321. b.
5. R p. 113.)
Lib. 6 ubi ſupra.
Vide Sect. 149.

But if the conuſee of a fine before any attornement by deed indented and inrolled, bargaineth and ſelleth the ſeigniorie to another, the bargainee ſhall not diſtraine, becauſe the bargainor could not diſtraine. *Et ſic de ſimilibus*; for *nemo poteſt plus juris ad alium transferre quàm ipſe habet*. *Vide Sect.* 149. where upon a recovery, the recoveror ſhall diſtraine and avow without attornement.

49. E. 3. 4. 34. H. 6. 8.
6. E. 4 13.
(Poſt. 314. b.
1. Roll. Ab. 294.
Sect. 574.
1. R. 1. Alton Wood's caſe.
8. Rep. 89.
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11 Eliz. Dier 282.
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[a] If the reverſion be granted of three acres, and the leſſee agree to the ſaid grant for one acre, this is good for all three; and ſo it is of an attornement in law, if the reverſion of three acres be granted, and the leſſee ſurrender one of the acres to the grantee, this attornement ſhall be good for the whole reverſion of the three acres according to the grant.

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tenants; provided that no ſuch tenant ſhould be damaged by payment of rent to any ſuch grantor or conuſor, or by breach of any condition for non-payment of rent before notice given him of ſuch grant by the conuſee or grantor. By the latter ſtatute it was enacted, that the attornments of tenants to ſtrangers claiming title to the eſtate of their landlords, ſhould be abſolutely null and void to all intents and purpoſes whatſoever, and that the poſſeſſion of their reſpective landlord or landlords, leſſor or leſſors, ſhould not be deemed or conſtrued to be any wiſe changed, altered, or affected, by any ſuch attornment or attornments; provided that nothing therein contained ſhould extend to vacate or affect any attornment made purſuant to, and in conſequence of, ſome judgment at law, or decree, or order of a court of equity, or made with the privity and conſent of the landlord or landlords, leſſor or leſſors, or to any mortgagee, after the mortgage is become forfeited.—Till the paſſing of theſe ſtatutes, the doctrine of attornment was one of the moſt copious and abſtruſe points of the law. But theſe ſtatutes having made attornment both unneceſſary and inoperative, the learning upon it is ſo uſeleſs, that Mr. Viner has inſerted nothing reſpecting it in his voluminous compilation but an extract from lord chief baron Gilbert. — Mr. Bacon has not the article Attornment in his work; and the learning and induſtry of lord chief baron Comyn have furniſhed him with little material upon it, that is not to be found either in Littleton or ſir Edward Coke.

No learned Attornm. Work 329. 31. & 31.

Impliedly, as if a reverſion be granted to two by deed, and the leſſee attorne to one of them according to the grant, this attornement is good, but not to veſt the reverſion only in him to whom attornement is made; but it ſhall enure to both the grantees, for that is according to the grant, and for that it cannot veſt the reverſion only in him to whom the attornement is made. And ſo it is if one grantee dieth, the attornement to the ſurvivor is good. (Poſt. 313. a. Ant. 52. a. 297. b. 296. a)

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ALSO, if the lord grant the ſervice of his tenant to one man, and after by his deed bearing a later date hee grant the ſame ſervices to another, and the tenant attorne to the ſecond grantee, now the ſaid grantee hath the ſervices; and albeit afterwards the tenant will attorne to the firſt grantee, this is clearely void, &c.

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In the ſame manner, if a reverſion upon an eſtate for yeeres be granted in fee, and the leſſor confirme the eſtate of the leſſee for life, he cannot afterwards attorne.

If

* *dit—ſecond*, L. and M. and Roh.

11. H. 7. 19. 2. R. 2. ubi ſupra.

P. 3. Eliz. Bendloes. Hemling's caſe ubi ſupra. (1. Roll. Abr. 299.)

11. H. 7. 12.

If a feme ſole maketh a leaſe for life or yeares, reſerving a rent, and granteth the reverſion in fee, and taketh huſband, this is a countermand of the attornement.

Where our author putteth his caſe of the whole reverſion, if two coparceners bee of a reverſion, and one of them granteth her moity by fine, the conuſee ſhall have a *quid juris clamat* for the moitie.

If in the caſe that our author here putteth of ſeverall grantees, if the tenant attorne to both of them, the attornement is void, becauſe it is not according to the grant. If a reverſion be granted for life, and after it is granted to the ſame grantee for yeares, and the leſſee attorneth to both grants, it is void for the incertaintie: *à multò fortiori*, if the lord by one deed grant his ſeigniorie to *I.* biſhop of *London* and to his heires, and by another deed to *I.* biſhop of *London* and to his ſucceſſors, and the tenant attorne to both grants, the attornement is void; for albeit the grantee be but one, yet he hath ſeverall capacities, and the grants are ſeverall, and the attornement is not according to either of the grants.

(Ant. 190. a. Mo. 84.)

But if *A.* grant the reverſion of *Black-Acre* or *White-Acre*, and the leſſee attorne to the grant, and after the grantee maketh his election, this attornement is good; for albeit the ſtate was incertaine, yet he attorned to the grant in ſuch ſort as it was made: and ſo note a diverſity betweene one grant and ſeverall grants, and obſerve in this caſe an attornement good in expectation, and yet nothing paſſed at the time of the attornement, but by the election ſubſequent.

Sect. 553.

Temps E. 2. Attornement. 48. E. 3. 15. (Sid. 310. 312. 373. Ant. 263. a. Poſt. 341. a. 3. Rep. 29. 1. Lco. 208.)

HERE it is to bee obſerved, that when a man maketh a feoffment of a mannor, the ſervices doe not paſſe, but remaine in the feoffor untill the freeholders doe attorne; and when they doe attorne, the attornement ſhall have relation to ſome purpoſe, and not to other. For albeit the attornement bee made many yeares after the feoffment, yet it ſhall have relation to make it paſſe out of the feoffor *ab initio* even by the liverie upon the feoffment, but not to charge the tenants with any meane arrerages, or for waſte in the meane time, or the like.

(2. Roll. Abr. 394, 395. Plo. 482. b. 483. a. Ant. 270. b. 279. b.)

If a reverſion of land bee granted to an alien by deed, and before attornement the alien is made denizen, and then the attornement is made, the king, upon office found, ſhall have the land: for as to the eſtate betweene the parties, it paſſeth by the deed *ab initio*. (1)

Paſch. 5. E. 3. coram rege. Suſſ. x in Theſaur. 21. E. 3. 47. 34. E. 3. Double plea. 24. 42. Aſſ. p. 6. 43. Aſſ. p. 20. 30. E. 3. 29. E. 3. 26. E. 3. per quæ ſervicia 21. 8. H. 4. 1. b. 12. H. 4. 20. H. 6. 7. 35. H. 6. 9. E. 4. 33. 13. H. 7. 14. a. 1. H. 7. 31. 4. E. 6. Attornement, Br. 30.

ITEM, ſi home ſoit ſeiſie de un mannor, quel mannor eſt parcel en demeſne, et parcel en ſervice, s'il voile aliener cel mannor a un auter, il covient que per force del alienation, que touts les tenants que teignont del alienor come de ſon mannor attornerent al alienee, ou auterment les ſervices demurront continualment en l'alienor, forpriſe tenants a volunt †; car il ne beſoigne que tenants a volunt atturnent ſur tiel alienation, &c. ‡*

ALSO, if a man bee ſeiſed of a mannor, which mannor is parcell in demeſne, and parcell in ſervice, if hee will alien this mannor to another, it behooveth that by force of the alienation, all the tenants which hold of the alienor as of his mannor doe attorne to the alienee, or otherwiſe the ſervices remaine continually in the alienor, ſaving the tenants at will; for it needeth not that tenants at will doe attorne upon ſuch alienation, &c.

Also, if a man plead a feoffment of a mannor, hee need not plead an attornement of the tenants; but (if it be materiall) it muſt be denied or pleaded of the other ſide.

And upon conſideration had of all the bookes touching this point, whether the ſervices of the freeholders doe paſſe, wherein there have beene three ſeverall opinions, viz. ſome have holden that the ſervices doe paſſe in the right by the livery as parcell of the mannor, but not to avow without attornement, as in the caſe of the fine. And others have holden, that they both paſſe in right and in poſſeſſion to diſtreine without attornement. And the third opinion is, that in this caſe the ſaid ſervices paſſe neither in poſſeſſion nor in right, but untill attornement remaine

* *&c.* added L. and M. and Roh. † *&c.* added in L. and M. and Roh. ‡ *par ceo que meſmes les terres et tenements que ils teignont a volunte paſſont al aliene per force de tiel alienation*, added in L. and M. and Roh. and in MSS.

(1) Here the fee is ſuppoſed to veſt immediately in the grantee: but when an eſtate is granted upon a condition precedent, the eſtate does not veſt, even by way of relation, till the performance of the condition. Plo. 482. b.

remaine continually in the alienor, as *Littleton* here holdeth. And so it was resolved *Pasch.* 15. *Eliz.* betweene *Brasbitch* and *Barwell*, according to the opinion of our author. And I never yet knew any of *Littleton*'s cases (albeit I have knowne many of them) to be brought in question, but in the end the judges concurred with our author. Vid. Hill. 14. Eliz. Rot. 508. in Communi Banco.

And where our author speaketh of the attornement of the freeholders, if the lord make a lease for yeares or for life of a mannor, and the freeholders attorne to the lessee, if after the reversion of the mannor be granted, the attornement of the lessee for yeares or life shall binde the freeholders: for by their former attornement, they have put the attornement into the mouth of the lessee. 9. E. 2. tit. Attornement 18. b. 19. E. 2. ibid. 19. 21. E. 3. 47. 5. H. 5. 12. b. Vid. Lit. Sect. 549. & 556.

Forsprise tenant a volunt, &c. Here is implied tenant at will or by copie of court roll according to the custome of the mannor, so as the freehold and inheritance both of lands in the hands of tenant at will by the common law or by custome shall passe both in right and in possession without any attornement.

Sect. 554.

ITEM, si soient seignior et tenant, et le tenant lessa la terre a un auter pur terme de vie, ou dona la terre en le taile savant le reversion a luy, &c. si le seignior en tiel cas granta son seigniory a un auter, il covient que celuy en le reversion atturna al grauntee, et nemy le tenant a terme de vie, ou le tenant en le taile, pur ceo que en cest cas celuy en le reversion est tenant al seignior, et nemy le tenant a terme de vie, ne le tenant en le taile.

ALSO, if there bee lord and tenant, and the tenant letteth the land to another for term of life, or giveth the land in taile saving the reversion to himselfe, &c. if the lord in such case grant his seigniory to another, it behoveth that hee in the reversion attorne to the grantee, and not the tenant for terme of life, or the tenant in taile, because that in this case he in the reversion is tenant to the lord, and not the tenant for terme of life, nor the tenant in taile.

FOR it is a maxime in law, that no man shall attorne to any grant of any seigniorie, rent service, reversion or remainder, but he that is immediately privie to the grantor; and because in this case there is no privitie betweene the lord and the tenant for life, or donee in taile, but only betweene the lord and him in the reversion; for in this case the attornement of him in the reversion only is good. (8. Rep. 42.)

Savant le reversion a luy, &c. That is to say, without limitation of any remainder over; and this is but to make his opinion plaine as to the point that he putteth it.

Sect. 555.

*EN mesme le manner est lou sont seignior, mesne et tenant, * si le seignior voile granter les services del mesne, coment que il ne fait ascun mention en son grant del mesne, uncore il covient que le mesne atturna, † &c. et nemy le tenant*

IN the same manner is it where there are lord, mesne and tenant, if the lord will grant the services of the mesne, albeit hee maketh no mention in his grant of the mesne, yet the mesne ought to attorne, &c. and not the tenant peravaile, &c. *per-*

* *si—et*, L. and M. and Roh.

† &c. not in L. and M. nor Roh.

(1) For the difference between seisin and attornement, see Bredeman's case, 6. Rep. 66. b.

peravaile, &c. pur ceo que le meſne eſt tenant a luy, &c.

for that the meſne is tenant unto him, &c.

This ſtandeth upon the ſame reaſon that the next precedent caſe did.

Sect. 556.

(6. Rep. 59. a.)

HERE is to be obſerved a diverſitie betweene a rent ſervice and a rent charge, or a rent ſecke; for as to the rent ſervice, no man (as hath beene ſaid) can attorne, but he that is privie; ſo in caſe of a rent charge, it behooveth that the tenant of the freehold doth attorne to the grantee, without reſpect of any privitie. And therefore the diſſeiſor onely, in the caſe of a grant of a rent charge, ſhall attorne, becauſe he is (as *Littleton* ſaith) tenant of the freehold; but in caſe of a grant of a rent ſervice, the attornement of a diſſeiſee ſufficeth.

MES auterment eſt lou certaine terre eſt charge d'un rent charge ou rent ſeck; car en tiel caſe ſi celuy que ad le rent charge ceo grant a un auter, il covient que le tenant del franktenement atturna al grantee, pur ceo que le franktenement eſt charge ove le rent, &c. Et en rent charge nul avowrie doit eſtre fait ſur aſcun perſon pur le diſtreſſe priſe, &c. mes il avowera le priſe bone et droiturel, come en terres ou tenements iſſint charges a ſon diſtreſſe, &c.

BUT otherwiſe it is where certaine land is charged with a rent-charge or rent ſecke; for in ſuch caſe if he which hath the rent-charge grant this to another, it behooveth that the tenant of the freehold attorn to the grantee, for that the freehold is charged with the rent, &c. And in a rent-charge no avowrie ought to be made upon any perſon for the diſtreſſe taken, &c. but hee ſhall avow the priſel to bee good and right-full, as in lands or tenements ſo charged with his diſtreſſe, &c.

21. H. 6. 9. b.

(2. Rep. 67.)

(6. Rep. 39. a.)

If there be lord and tenant by homage, fealtie, and rent, the tenant is diſſeiſed, the lord granteth the rent to another, the diſſeiſee attorneth, this is void: but if he had granted over his whole ſeigniorie, the attornement had beene good; and the reaſon of this diverſitie is here given by our author, for that when the rent was granted onely, it paſſed as a rent ſecke, and conſequently the diſſeiſor being terre-tenant, muſt attorne. But when the ſeigniorie is granted, then the diſſeiſee in reſpect of the privitie may attorne.

Covient que le tenant del franketenement, &c. And therefore if the tenant of the land charged with a rent charge or a rent ſecke make a leaſe for life, and he that hath the rent charge or rent ſecke granteth it over, the tenant for life ſhall attorne, for he is tenant of the freehold, according to the expreſſe ſaying of our author, and (as hath beene ſaid) there needeth no privitie.

(1. Leon. 265. a.)

And it was holden by *Dyer* chiefe juſtice of the court of common pleas, and *Mounſon* juſtice, in the argument of *Bracebridge*'s caſe aboveſaid, and not denied, that if he that hath a rent charge granteth it over for life, and the tenant of the land attorne thereunto, and after he granteth the reverſion of the rent charge, that the grantee for life may attorne alone; and that theſe words of *Littleton* are to be underſtood when a rent charge or rent ſecke is granted in poſſeſſion: and therewith agreeth 46. *E.* 3. where it appeareth, that the *quid juris clamat*, in that caſe, did lie againſt the grantee for life.

46. E. 3. 27. a. H. 6. 9. Vi. Lit. Sect. 549. & 553.

A man maketh a leaſe for life, and after grants to *A.* a rent charge out of the reverſion, *A.* granteth the rent over, he in the reverſion muſt attorne, and not the tenant of the freehold, for that the freehold is not charged with the rent; for a releaſe made to him by the grantee doth not extinguiſh the rent. And *Littleton* is to be underſtood, that the tenant of the freehold muſt atturne when the freehold is charged.

Et

Et en rent charge nul avowrie doit eſtre fait ſur aſcun perſon, &c. This is the reaſon that *Littleton* giveth of the difference betweene the rent ſervice and the rent charge. Now it may bee ſaid, that this reaſon is taken away by the ſtatute of 21. *H.* 8. for by that ſtatute the lord needs not avow for any rent or ſervice upon any perſon in certaine; and then by *Littleton*'s reaſon there needeth no privitie to the attornement of a ſeigniorie; for (ſay they) *ceſſante cauſâ vel ratione legis, ceſſat lex*, as at the common law no aid was grantable of a ſtranger to an avowrie; becauſe the avowrie was made of a certaine perſon: but now the avowrie being made by the ſaid act of 21. *H.* 8. upon no perſon, therefore the reaſon of the law being changed, the law itſelfe is alſo changed; and conſequently in an avowrie according to that act, aid ſhall be granted of any man, and the like in many other caſes; which caſe is granted to be good law: but albeit the lord (as hath beene ſaid) may take benefit of the ſtatute, yet may he avow ſtill at his election upon the perſon of his tenant. And albeit the manner of the avowrie be altered, yet the privitie (which is the true cauſe of the ſaid difference) remaineth ſtill as to an attornement.

21. H. 8. cap. 19. Vide Sect. 454. 27. H. 8. 4. b. (Doc. Plac. 25, 26.)

Rent charge, &c. It is to be obſerved, to what kinde of inheritances being granted, an attornement is requiſite. And in this chapter *Littleton* ſpeaketh of five. Firſt, of a ſeigniorie, rent ſervice, &c. Secondly, of a rent charge. Thirdly, of a rent ſecke. And hereafter in this chapter of two more, viz. of a reverſion and remainder of lands; for the tenant ſhall never need to attorne but where there is tenure, attendance, remainder, or payment of a rent out of land. And therefore if an annuitie, common of paſture, common of eſtovers, or the like, be granted for life or yeeres, &c. the reverſion may be granted without any attornement; and albeit ſometimes in ſome of theſe caſes, or the like, an attornement be pleaded, yet it is ſurpluſage, and more than needeth, becauſe in none of them there is any tenure, attendance, remainder, or payment out of land.

21. H. 7. 1. (1. Roll. Abr. 292, 293.) 1. H. 5. 1. 37. Aſſ. 14. 36. Aſſ. pl. 3. 31. H. 8. tit. Attornement Br. 59. (Ant. 303. b.)

Sect. 557.

*ITEM, ſi ſoit ſeignior et tenant, et le tenant leſſa ſon tenement a un auter pur terme de vie, le remainder a un auter en fee, et puis le ſeignior granta les ſervices a un auter, &c. et le tenant a terme de vie attorna, ceo eſt aſſets bone, pur ceo que le tenant a terme de vie eſt tenaunt en ceſt caſe al ſeignior, &c. et celuy en le remainder ne poit eſtre dit tenant al ſeignior, quant a cel entent, forſque apres la mort le tenant a terme de vie: uncore en ceſt caſe ſi celuy en le remainder moruſt ſans heire, le ſeignior avera le remainder per voy d'eſcheate, pur ceo que coment que le ſeignior en tiel cas * covient d'avower ſur le tenant a terme de vie, &c. uncore tout l'entier tenement, quant a touts les eſtates de franktenement ou de fee ſimple, ou auterment, &c. en tiel cas ſont enſemble tenus de le ſeignior, &c.*

ALSO, if there be lord and tenant, and the tenant letteth his tenement to another for terme of life, the remainder to another in fee, and after the lord grant the ſervices to another, &c. and the tenant for life attorne, this is good enough, for that the tenant for life is tenant in this caſe to the lord, &c. and he in the remainder cannot be ſaid to be tenant to the lord, as to this intent, untill after the death of the tenant for life: yet in this caſe if hee in the remainder dieth without heire, the lord ſhall have the remainder by way of eſcheat, becauſe that albeit the lord in ſuch caſe ought to avow upon the tenant for life, &c. yet the whole entire tenement, as to all the eſtates of the freehold or of fee ſimple, or otherwiſe, &c. in ſuch caſe are together holden of the lord, &c.

* *covient d'avower—d'avowera*, L. and M. and Roh.

* *Mes nemy de faire avowrie ſur eux touts enſemble.* M. 3. H. 6.

But not to make avowrie upon them all together. *M.* 3. *H.* 6.

15. E. 3. Attorn. 10. 12. E. 4. 4. 18. H. 6. 2. 9. E. 2. tit. Attorn. 18. 18 E. 4. 7. Temps E. 1. Attorn. 22. Vide Sect. 580.

ET le tenant a terme de vie attorna, &c. For he that is (as hath beene ſaid) privie and immediately tenant to the lord muſt attorne; and that is in this caſe: the tenant for life, and ſo of the other ſide if a ſeigniorie be granted to one for life, the remainder to another in fee, the attornement to the tenant for life is an attornement to the remainder alſo; unleſſe it be that they in the remainder ought to have acquitall, or other privilege (whereof they ſhould be prejudiced); and then albeit an attornement be had to the tenant for life, and he acknowledge the acquitall, &c. yet after his deceaſe, he in remainder ſhall not diſtreyne untill he acknowledge the acquitall, notwithſtanding the attornement of the tenant for life.

(3. Rep. 66. Ant. 310. a. Poſt. 320. b.)

(9. Rep. 134. b. Ant. 280. a.)

Avera le remainder per voy d'eſcheat. For the remainder is holden of the lord, but not immediately holden; and in this caſe, by the eſcheat of the remainder the ſeigniorie is extinct; for the fee ſimple of the ſeigniorie being extinct, there cannot remaine a particular eſtate for life thereof, in reſpect of the tenure and attendance over; and of this opinion is *Littleton* [a] himſelfe in our bookes. But otherwiſe it is of a rent charge in fee; for if that be granted for life and after he in the reverſion purchaſe the land, ſo as the reverſion of the rent charge is extinct, yet the grantee for life ſhall enjoy the rent during his life, for there is no tenure or attendance in this caſe.

3. H. 6. 1. Old Tenures 107. [a] 15. E. 4. 13. a. (1. Leon. 225.)

M. 3. H. 6. 1.

**Mes nemy de faire avowrie, &c.* This is added to *Littleton*, but it is conſonant to law, and the authoritie truly cited.

Sect. 558.

ITEM, ſi ſoit ſeignior et tenant, et le tenant leſſa les tenements a un feme pur terme de vie, le remainder ouſter en fee, et la feme prent baron, et puis le ſeignior granta les ſervices, &c. a le baron et ſes heires; en ceſt caſe le ſervice eſt mis en ſuſpence durant le coverture. Mes ſi la feme devie vivant le baron, le baron et ſes heires averont le rent de ceux en le remainder, &c. Et en ceo caſe il ne beſoigne aſcun attornement per parol, &c. pur ceo que le baron que doit attorne, accepta le fait del graunt de les ſervices, &c. le quel acceptance eſt un attornment en la ley.

ALSO, if there be lord and tenant, and the tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh huſband, and after the lord grant the ſervices, &c. to the huſband and his heires; in this caſe the ſervice is put in ſuſpence during the coverture. But if the wife die living the huſband, the huſband and his heires ſhall have the rent of them in the remainder, &c. And in this caſe there needeth no attornement by parol, &c. for that the huſband which ought to attorne, accepted the deed of grant of the ſervices, &c. the which acceptance is an attornment in the law.

3. E. 3. 42. 15. E. 3. Attornement, 11. (6. Rep. 63. 9. Rep. 85. 2. Roll. Abr. 424.)

LE quel acceptance eſt un attornement en la ley, &c. *Littleton* having ſpoken (as hath beene ſaid) of attornements in deed, or expreſſe, now commeth to ſpeake of attornements in law, or implied; and having before ſet downe five expreſſe attornements in deed, doth in this chapter enumerate ſeven attornments in law. Here it is to be underſtood, that the expreſſe attornement of the huſband will binde the wife after the coverture,

* This paragraph not in L. and M. nor Roh.

coverture, and in as much as this acceptance of the grant is an attornement in law, without a word of attornement the ſeigniorie ſhall paſſe. And this is the firſt example that *Littleton* putteth of an attornement in law, which amounteth to an expreſſe attornement, for that it is an agreement to the grant. (44. E. 3. tit. Fines 37. 11. E. 4. 4. (1. Roll. Abr. 303) (Ant. 280. a. 301. 310.)

If the lord grant his ſeigniorie to the tenant of the land, and to a ſtranger, and the tenant accept the deed, this acceptance is a good attornement to extinguiſh the one moitie, and to veſt the other moitie in the grantee, as hath beene ſaid.

Sect. 559.

*EN meſme le manner eſt, ſi ſoyent ſeignior et tenant, et le tenant prent feme, et puis le ſeignior granta les ſervices a la feme et ſes heires, et le baron accepta le fait; en ceſt cas apres la mort le baron, la feme et ſes heires averont les ſervices, &c. car per le acceptance * del fait per le baron, ceo eſt bone attornement, &c. coment que durant le coverture les ſervices ſont mis en ſuſpence, &c.*

IN the ſame manner is it, if there be lord and tenant, and the tenant taketh wife, and after the lord grant his ſervices to the wife and his heires, and the huſband accepteth the deed; in this caſe after the death of the huſband the wife and her heires ſhall have the ſervices, &c. for by the acceptance of the deed by the huſband, this is a good attornement, &c. albeit during the coverture the ſervices ſhall be put in ſuſpence, &c.

HERE is the ſecond example that *Littleton* putteth of an attornement in law, and ſtandeth upon the former reaſon. (1. Roll. Abr. 938, 939, 940.)

Sont miſe en ſuſpence. Suſpence commeth of *ſuſpendeo*, and in legall underſtanding is taken when a ſeigniorie, rent, profit apprender, &c. by reaſon of unitie of poſſeſſion of the ſeigniorie, rent, &c. and of the land out of which they iſſue, are not *in eſſe* for a time, *et tunc dormiunt*, but may be revived or awaked. And they are ſaid to be extinguiſhed when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and perdurable an eſtate in the one as in the other. (Ant. 148. b.) (4. Rep. 52.) (Cro. Car. 101.)

Sect. 560.

ITEM, ſi ſoyent ſeignior et tenant, et le tenant granta les tenements a un home pur terme de ſa vie, le remainder a un auter en fee, ſi le ſeignior granta les ſervices a le tenant a terme de vie† en fee, en ceſt cas le tenant a

ALSO, if there be lord and tenant, and the tenant grant the tenements to a man for terme of his life, the remainder to another in fee, if the lord grant the ſervices to the tenant for life in fee, in this caſe the tenant for terme of life

HERE is the third caſe that *Littleton* putteth of an attornement in law. And it is to bee obſerved, that albeit a grant, as hath beene ſaid, may enure by way of releaſe, and a releaſe to the tenant for life doth worke an abſolute extinguiſhment, whereof he in the remainder ſhall take benefit, yet the law ſhall never make any conſtruction againſt the purport of the grant to the prejudice of any, or againſt the meaning of the parties as here (Sider. 25.)

* *del fait per* not in L. and M. nor Roh.

† *en fee* not in L. and M. nor Roh.

here it ſhould; for if by conſtruction it ſhould enure to a releaſe, the heires of the tenant for life ſhould be diſherited of the rent; and therefore *Littleton* here ſaith, that the heires of the grantee ſhall have the ſeigniorie after his death. And here is an attornement in law to a grant ſuſpended that cannot take effect in the grantee ſo long as he liveth, but ſhall take effect in his heires by deſcent; for the inheritance of the ſeigniorie was in the tenant for life, and the ſuſpenſion onely during his life.

*terme de vie ad fee en les ſervices; mes les ſervices ſont mis en ſuſpence durant ſa vie. Mes les heires * le tenant a terme de vie averont les ſervices apres † ſon deceaſe, &c. ‡ Et en ceſt cas il ne beſoigne§ attornement; car per l'acceptance del fait de celuy que doit attourner, &c. eſt ceo attournement de luy meſme ||.*

hath a fee in the ſervices; but the ſervices are put in ſuſpence during his life. But the heires of the tenant for life ſhall have the ſervices after his deceaſe, &c. And in this caſe there needeth no attornement; for by the acceptance of the deed by him which ought to attorne, &c. this is an attornement of it ſelfe.

Sect. 561.

MES lou le tenant ad cy grand et haut eſtate en les tenements ſicome le ſeignior ad en le ſeigniory; en tiel caſe, ſi le ſeignior graunta les ſervices al tenant en fee, ceo urera per voy d'extinguiſhment. Cauſa patet.

(Ant. 279.)

BUT where the tenant hath as great and as high eſtate in the tenements as the lord hath in the ſeigniory; in ſuch caſe, if the lord grant the ſervices to the tenant in fee, this ſhall enure by way of extinguiſhment. *Cauſa patet.*

HERE *Littleton* intendeth not onely as great and high an eſtate, but as perdurable alſo, as hath beene ſaid; for a diſſeiſor or tenant in fee upon condition hath as high and great an eſtate, but not ſo perdurable an eſtate, as ſhall make an extinguiſhment.

Sect. 562.

HERE in this caſe he in the reverſion of the tenancy muſt attorne, becauſe he is the tenant to the lord; and yet the ſeigniorie ſhall be ſuſpended during the life of the grantee, becauſe hee hath an eſtate for life in the tenancie, but his heires ſhall enjoy the ſeigniorie by diſcent.

Uncore il ne

ITEM, ſi ſoyent ſeignior et tenant, et le tenant fait un leas a un home pur terme de ſa vie, ſavant le reverſion a luy, ſi le ſeignior granta le ſeigniorie a le tenant a terme de vie en fee; en ceſt caſe il covi-

ALSO, if there bee lord and tenant, and the tenant maketh a leaſe to a man for terme of his life, ſaving the reverſion to himſelfe, if the lord grant the ſeigniory to tenant for life in fee; in this caſe it behoveth that he in the rever-

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* *le tenant a terme de vie*, not in L. and M. nor Roh.
§ *aſcun* added L. and M. and Roh.
† *ſun* not in L. and M. nor Roh.
‡ *&c.* not in L. and M. nor Roh.
|| *&c.* added L. and M. and Roh.