(Post. 339. a.) 10. E. 2. confirmation 24. 8. E. 2. garr. 62. 11. H. 4. 33. 43. E. 3. 17. 42. E. 3. 24. per Finchden. 17. E. 3 67. Lib. 1. fol. 112, 113. in Albanie's case. (9. Rep. 75.) (1. Roll. Rep. 197.)

in fee, the grandfather dieth, the father against his owne feoffment shall not enter; but if he die, his sonne shall enter. And so note a diversity betweene a release, a feoffment, and a warrantie: a release in that case is void: a feoffment is good against the feoffor, but not against his heire; a warrantie is good both against himselfe and his heires. (1)

And here are three diversities worthy of observation, *viz.* First, betweene a power or an authority, and a right. Secondly, betweene powers and authorities themselves. Thirdly, betweene a right and a possibilitie.

15. H. 7. 11.

As to the first, if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors release all their right and title in the land to the heire, this is void, for that they have neither right nor title to the land, but only a bare authority, which is not within *Littleton*'s case of a release of a right. And so it is if *cesty que use* had devised that his feoffees should have sold the land. Albeit they had made a feoffment over, yet might they sell the use, for their authority in that case is not given away by the livery.

(1.Rep. 111. a. 173. Ant. 215. a. 218. b. 237. a.)

As to the second, there is a diversity betweene such powers or authorities as are only to the use of a stranger, and nothing for the benefit of him that made the release (as in the case before) and a power or authority which respecteth the benefit of the releasor; as in these usuall powers of revocation, when the feoffor, &c. hath a power to alter, change, determine, or revoke the uses (being intended for his benefit) he may release; and where the estates before were defeasible, he may by his release make them absolute, and seclude himselfe from any alteration or revocation, as it hath beene resolved; which diversity you may read in [m] *Albanie*'s case. (2)

[m] Lib. 1. Albanie's case, ubi supra. Lib. 5. Hoe's case 70, 71. 10. H. 6. 4.

As to the third, before judgement the plaintife in an action of debt releaseth to the baile in the king's bench all demands; and after judgement is given, this shall not barre the plaintife to have execution against the baile, because at the time of the release he had but a meere possibility, and neither *jus in re*, nor *jus ad rem*, but the duty is to commence after upon a contingent, and therefore could not be released presently. So if the conusee of a statute, &c. release to the conusor all his right in the land, yet afterwards he may sue execution; for he hath no right in the land till execution, but only a possibilitie; and so have I knowne it adjudged. (3)

25. Ass. p. 7. 27. E. 3 Execution 130. Pasch. 38. Eliz. Rot. 521. inter Borough et Gray. (2. Roll. Abr. 404. 408. Hob. 46. 2. Cro. 401. 449.)

Sect. 447.

*ITEM; en releases de tout le droit que home ad en certein terres, &c. il covient a celuy a que le releas est fait en * ascun cas, que il ad le franktenement en les terres † en fait, ou en ley, al temps de releas fait, &c.‡ Car en chescun cas lou celuy a que le releas est fait, ad franktenement en fait, ou franktenement en ley, al temps del releas, || &c. ¶ donque le releas est bone.*

ALSO, in releases of all the right which a man hath in certaine lands, &c. it behooveth him to whom the release is made in any case, that hee hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made, hath the freehold in deed, or in law, at the time of the release, &c. there the release is good. (4)

49. E. 3 28.

DE tout le droit. This must be intended of a bare right, and not of a release of right, whereby any estate passeth, as to a lessee for yeares, &c. as shall be said hereafter. Also it must be intended of a release of a right of freehold at the least, and not to a right for any terme for yeares or chattle reall; as if lessee for yeares bee ousted, and hee in the reversion disseised, and the disseisor maketh a lease for yeares, the first lessee may release unto him. All which is implyed in the first *&c.* Also in some case a release of a right made to one that hath neither freehold in deed, nor freehold in law, is good and available in law, [c] as the demandant may release to the vouchee, and yet the vouchee hath nothing in the land; but the reason of that is, for that when the vouchee entereth into the warrantie, he becommeth tenant to the demandant, and may render the land to him, in respect of the privitie; but an estranger cannot release to the vouchee, because, *in rei veritate*, he is not tenant of the land.

(Doct. and Stud. 18. a. 10. Rep. 48. b. Post. 276. a.)

[c] 7. E. 4. 13. 20. H. 6. 29. 5. H. 7. 41. 18. E. 3. 12. 8. H. . . . 5. E. 3. 36. 5. E. 3. 46. Vide Sect. 490. 491. (Post. 284. b. 1. Rep. 87. b. 3. Rep. 29. b.)

[d] And

* *ascun—tiel*, in L. and M. and Roh. † *&c.* added in L. and M. and Roh. ‡ *&c.* not in L. and M. nor Roh.
|| *fait* added in L. and M. and Roh. § *donque* not in L. and M. nor Roh.

(1) Ant. 186. it is laid down that a man may warrant more than passes from him. In Fitzg. 234. lord chief-justice Trevor observes, that the reason why the feoffment prevails against the father, is, that by the disseisin he had acquired possession, and might make a feoffment, and the operation of a feoffment is to bar future and contingent rights.

(2) See note 2. to page 113. The doctrine of the suspension and extinction of powers will be considered in a note to the chapter of Discontinuance.

(3) In the king's bench, where the proceeding is by bill, the bail is not bound in a certain sum to the plaintiff, but only undertakes that the defendant shall pay the condemnation money, or render his body to prison; so that they are but in the nature of jailors to the defendant: but in the common pleas, the bail are bound to the plaintiff in a certain sum. 5. Rep. 70. 10. Rep. 51.

(4) Ant. 1st note to this Section.

particular estate may determine before the remainder can take place: but that in every case where the person to whom the remainder is limited is *in esse*, and is actually capable, or entitled to take on the expiration, or sooner determination, of the particular estate, supposing that expiration, or determination, to take place at that moment, there the remainder is vested. That the doubt arose, by not adverting to the distinction between the different nature of the contingency, in those cases where the remainder is limited to a person *in esse*; but the title of the remainder man to take, depends on a collateral or extraneous contingency, which may or may not take place during the continuance of the preceding estate; and those cases where the preceding estate may endure beyond the continuance of the estate in remainder. Thus if an estate is limited to *A.* for life, and after the death of *A.* and *I. S.* to *B.* for life, or in tail; there, during the life of *I. S.* the title of *B.* depends on the contingency of *I. S.* dying in the lifetime of *A.* This being an event which either may or may not take place during the continuance of the preceding estate, *B.*'s estate is necessarily contingent. But then, supposing *I. S.* to die; still it remains an uncertainty whether *B.*'s estate will ever take place in possession; for if the remainder be limited to *B.* for life; there if *B.* dies in *A.*'s lifetime, *A.*'s estate would endure beyond the continuance of the estate limited in remainder. The same would be the case if the remainder over were limited to *B.* in tail, and *B.* was to die in *A*'s lifetime without issue.— Yet, in both cases, it was agreed that *B.* took, not a contingent but a vested remainder. Hence they inferred that it was not the possibility of the remainders over never taking effect in possession, but the remainder man's not having a capacity or title to take, supposing the preceding estate at that instant to expire, or determine, and its being uncertain whether he ever will obtain that capacity or title, during the continuance of the preceding estate, that makes the remainder contingent. Upon these grounds they determined that the trustees took a vested remainder, and that the recovery therefore was void. The doctrine established in the case of Dormer and Fortescue is laid down by sir Edward Coke, 10. Rep. 85.; where he, with great accuracy of expression, observes, that where it is dubious and uncertain whether the use or estate limited in future shall ever *vest in interest* or not, then the use or estate, is in contingency; because, upon a future contingent, it may either vest or never vest, as the contingent happens. And see 1. Rep. 137. b.

[d] And ſo it is if the tenant alien hanging the *præcipe*, the releaſe of the demandant to the tenant to the *præcipe* is good, and yet he hath nothing in the land. [d] 10. E. 4. 14. 12. Aſſ. p. 41.

In time of vacation an annuity, that the perſon ought to pay, may be releaſed to the patron in reſpect of the privity; but a releaſe to the ordinary only ſeemeth not good, becauſe the annuitie is temporall. 8. E. 3. 21. 46. E. 3. 6. b. 8. H. 6. 23. 21. H. 7. 41. (Poſt. 284. a. 8. Rep. 148. 5. Rep. 24. b. 2. Cro. 151.)

If a diſſeiſor make a leaſe for life, the diſſeiſee may releaſe to him; for to ſuch a releaſe of a bare right there needs no privity, as ſhall be ſaid hereafter. But if the diſſeiſor make a leaſe for yeares, the diſſeiſee cannot releaſe to him, becauſe he hath no eſtate of freehold. And yet in ſome caſe a right of freehold ſhall drowne in a chattell; as if a feme hath a right of dower ſhe may releaſe to the gardein in chivalry, and her right of freehold ſhall drowne in the chattle, becauſe the writ of dower doth lie againſt him, and the heire ſhall take advantage of it. And it is to be obſerved, that by the antient maxime of the common law, a right of entrie, or a choſe in action, cannot be granted or transferred to a ſtranger, and thereby is avoyded great oppreſſion, injurie and injuſtice. *Nul charter, nul vende, ne nul done vault perpetualment ſi le donor n'eſt ſeiſie al temps de contracts de 2. droits, s. del droit de poſſeſſion, et del droit del propertie.* And therefore well ſaith *Littleton*, that he to whom a releaſe of a right is made muſt have a freehold. (Dyer 30. b. 2. Cro. 105.) Mirror, cap. 2. §. 17. (2. Roll. Abr. 45. 46, 47, 48. Ant. 214. a. 232. b. Poſt. 280.)

For the better underſtanding of transferring of naked rights to lands or tenements, either by releaſe, feoffment, or otherwiſe, it is to be knowne, that there is *jus proprietatis*, a right of ownerſhip, *jus poſſeſſionis*, a right of ſeiſin or poſſeſſion, and *jus proprietatis & poſſeſſionis*, a right both of property and poſſeſſion: and this is antiently called *jus duplicatum*, or *droit droit*. For example, if a man be diſſeiſed of an acre of land, the diſſeiſee hath *jus proprietatis*, the diſſeiſor hath *jus poſſeſſionis*; and if the diſſeiſee releaſe to the diſſeiſor, hee hath *jus proprietatis et poſſeſſionis*. (1) And regularly it holdeth true, that when a naked right to land is releaſed to one that hath *jus poſſeſſionis*, and another by a meane title recover the land from him, the right of poſſeſſion ſhall draw the naked right with it, and ſhall not leave a right in him to whom the releaſe is made. For example, if the heire of the diſſeiſor being in by diſcent *A.* doth diſſeiſe him, the diſſeiſee releaſe to *A.* now hath *A.* the meere right to the land. But if the heire of the diſſeiſor enter into the land, and regaine the poſſeſſion, that ſhall draw with it the meere right to the land, and ſhall not regaine the poſſeſſion only, and leave the meere right in *A.* but by the recontinuance of the poſſeſſion, the meere right is therewith veſted in the heire of the diſſeiſor. Mirror ubi ſupra. Bracton, lib. 5. fol 32. Britton, fol. 89. 121. Bracton, lib. 5. fol. 372. (2. Rep. 56. Sect. 473. Poſt. 283. b. 286. a.)

But if the donee in taile diſcontinue in fee, now is the reverſion of the donor turned to a naked right. If the donor releaſe to the diſcontinuee and die, and the iſſue in taile doth recover the land againſt the diſcontinuee, he ſhall leave the reverſion in the diſcontinuee; for the iſſue in taile can recover but the eſtate taile onely, and by conſequence muſt leave the reverſion in the diſcontinuee, for the donor cannot have it againſt his releaſe: but if the diſſeiſee enter upon the heire of the diſſeiſor, and infeoffe *A.* in fee, and the heire of the diſſeiſor recover the whole eſtate, that ſhall draw with it the meere right, and leave nothing in the feoffee. *Nota* the diverſity. Another diverſity is obſervable when the naked right is precedent before the acquiſition of the defeaſible eſtate, for there the recontinuance of the defeaſible eſtate ſhall not draw with it the preceding right. [e] As if the diſſeiſee diſſeiſe the heire of the diſſeiſor, albeit the heire recover the land againſt the diſſeiſee, yet ſhall he leave the preceding right in the diſſeiſee. So if a woman that hath right of dower diſſeiſe the heire, and he recover the land againſt her, yet ſhall he leave the right of dower in her. (Poſt. 319. a.) [e] 5. Aſſ. 1. 10. Aſſ. 16. 50. E. 3. 7. 4. E. 3. Eſtopp. 133. 30. Aſſ. 5. 11. E. 3. Entrie 56. 12. Aſſ. 41. 27. E. 3. 84. 488. (6. Rep. 70. a.)

Another diverſity is to be noted, when the meere right is ſubſequent, and transferred by act in law; there, albeit the poſſeſſion be recontinued, yet that ſhall not draw the naked right with it, but ſhall leave it in him: as if the heire of the diſſeiſor be diſſeiſed, and the diſſeiſor infeoffe the heire apparent of the diſſeiſee being of full age, and then the diſſeiſee dieth, and the naked right deſcend to him, and the heire of the diſſeiſor recover the land againſt him, yet doth he leave the naked right in the heire of the diſſeiſee. So if the diſcontinuee of tenant in taile infeoffe the iſſue in taile of full age, and tenant in taile die, and then the diſcontinuee recover the land againſt him, yet he leaveth the naked right in the iſſue. [e] But if the heire of the diſſeiſor be diſſeiſed, and the diſſeiſee releaſe to the diſſeiſor upon condition, if the condition be broken, it ſhall reveſt the naked right. And ſo if the diſſeiſee hath entred upon the heire of the diſſeiſor, and made a feoffment in fee, upon condition, if he entred for the condition broken, and the heir of the diſſeiſor entred upon him, the naked right ſhould be left in the diſſeiſee. But if the heire of the diſſeiſor had entred before the condition broken, then the right of the diſſeiſee had beene gone for ever. But now let us heare what *Littleton* ſaith. 23. H. 8. tit. Reſtore al action. Br. 5. 50. E. 3. 7. Vid. Sect. 473. 475. 478. 487. [e] 38. E. 3. 16. 9. H. 7. 24. (Poſt. 279. a. 4. Rep. 9. b.)

Sect.

(1) Theſe may be ſubdivided, with reſpect to the diſſeiſor, into that bare, naked, poſſeſſion which he acquires by the diſſeiſin, and the eſtate by title which his heir acquires by the diſcent; and, with reſpect to the diſſeiſee, into that right of poſſeſſion which he can reſtore by entry, and the bare right which he can only recover by action.

Sect. 448.

(Doct. and Stud. 17. a.)

HERE *Littleton* deſcribeth what a freehold in law is, for he had ſpoke before in many places of freeholds in deed. This *Bracton* calleth [a] *civilem et naturalem poſſeſſionem ſeu ſeiſinam.* The naturall ſeiſin is the freehold in deed, and the civill the freehold in law. (1)

[a] Bract. li. 4. f. 206. 236. Britton, fol. 83. b. Fleta, lib. 3. cap. 15. Vid. Sect. 680.

*FRanktenement en ley eſt, ſicome un home diſſeiſiſt un auter, et * moruſt ſeiſie, per que les tenements diſcendont a ſon fits, coment que ſon fits ne entra pas en les tenements, uncore il ad un franktenement en ley, quel per force de diſcent eſt ject ſur luy, et pur ceo un releas fait a luy, iſſint eſteant ſeiſie de franktenement en ley, eſt aſſets bon; et s'il prent feme iſſint eſteant ſeiſie en ley, coment que il ne unque enter pas en fait, et moruſt, ſon feme ſerra endow.* †

FReehold in law is, as if a man diſſeiſeth another, and dieth ſeiſed, whereby the tenements deſcend to his ſonne, albeit that his ſonne doth not enter into the tenements, yet hee hath a freehold in law, which by force of the diſcent is caſt upon him, and therefore a releaſe made to him, ſo being ſeiſed of a freehold in law, is good enough; and if he taketh wife being ſo ſeiſed in law, although he never enter in deed, and dieth, his wife ſhal be endowed.

42. E. 3. 20. 10. H. 6. 14. 17. E. 3. 78. 2. E. 3. 33. (5. Rep. 123. b.)

(Mo. 141.)

11. H. 4. 61. 21. H. 7. 12.

[g] 32. E. 3. barre 262. 41. Aſſ. 2. 13. H. 4. ſurrender, 10.

[h] 38. E. 3. 12.

If a man levie a fine to a man *ſur conuſance de droit come ceo que il ad de ſon done*, or a fine *ſur conuſance de droit tantùm*; theſe be feoffments of record, and the conuſee hath a freehold in law in him before hee entreth.

Upon an exchange, the parties have neither freehold in deed, nor in law, before they enter; ſo upon a partition the freehold is not removed untill an entry.

[g] If tenant for life by the agreement of him in the reverſion ſurrender unto him; he in the reverſion hath a freehold in law in him before he enter. [h] Upon a livery within the view no freehold is veſted before an entrie.

If a man doth bargaine and ſell land by deed indented and inrolled, the freehold in law doth paſſe preſently. And ſo when uſes are raiſed by covenant upon good conſideration.

17. E. 3. 77. 18. E. 4. 25.

If a tenant in a *præcipe* being ſeiſed of lands in fee, confeſſe himſelfe to be a villeine to an eſtranger, and to hold the land in villenage of him, the eſtranger by this acknowledgement is actually ſeiſed of the freehold and inheritance without any entry. But let us returne to *Littleton*.

Sect. 449.

ITEM, en aſcuns caſes de releaſes de tout le droit, coment que celuy a que le releaſe eſt fait n'ad riens en le franktenement en fait ne en ley, uncore le releaſe eſt aſſets bone. Sicome le diſſeiſor leſſa la terre que il ad per diſſeiſin a un auter pur terme de ſa vie, ſavant le reverſion a luy, ſi le diſſeiſee ou ſon heire releaſa al diſſeiſor tout le droit, &c.

ALSO, in ſome caſes of releaſes of all the right, albeit (2) that he to whom the releaſe is made hath nothing in the freehold in deed nor in law, yet the releaſe is good enough. As if the diſſeiſor letteth the land which hee hath by diſſeiſin to another for terme of his life, ſaving the reverſion to him, if the diſſeiſee or his heire releaſe to the diſſeiſor all the right, &c. this

cel

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

(1) It may not, perhaps, be improper in this place, to attempt a ſhort explanation of ſome words familiar both in the ancient and modern law. *Seiſin* is a technical term, denoting the completion of that inveſtiture by which the tenant was admitted into the tenure, and without which no freehold could be conſtituted or paſs. It is a word common as well to the French as to the Engliſh law. It is either in deed, which is, when the perſon has the actual ſeiſin or poſſeſſion; or in law, when after a diſcent the perſon on whom the lands deſcend, has not actually entered, and the poſſeſſion continues vacant, not being uſurped by another. *Diſſeiſin* ſeems to imply the turning the tenant out of his fee, and uſurping his place and relation. It has been obſerved in a preceding note, that perſons, to avail themſelves of the remedy by aſſiſe, frequently ſuppoſed or admitted themſelves to be diſſeiſed, when they were not; and that this was called *diſſeiſin by election*, in oppoſition to an *actual diſſeiſin*. To conſtitute an actual diſſeiſin, it was neceſſary that the diſſeiſor had not a right of entry; (or, to uſe the old law expreſſion, that his entry was not congeable;) that the perſon diſſeiſed was, at the time of the diſſeiſin, in the actual poſſeſſion of the lands; that the diſſeiſor expelled him from them by ſome degree of conſtraint or force; and that he ſubſtituted himſelf to be tenant to the lord. But how this ſubſtitution was effected, it is difficult, perhaps impoſſible, now to diſcover. From what we know of the feudal law, it does not appear how a diſſeiſin could be effected without the conſent or connivance of the lord: yet we find, the relationſhip of lord and tenant remained after the diſſeiſin. Thus, after the diſſeiſin, the lord might releaſe the rent and ſervices to the diſſeiſee; might avow upon him; and if he died his heir within age, the lord was entitled to the wardſhip of the heir. See Litt. Sect. 454. and the commentary upon it. It ſhould be obſerved, that a diſſeiſin did not diſturb rent iſſuing out of land, the ſeiſin of the rent being conſidered as a ſeparate and diſtinct ſeiſin from that of the land. 1. Rep. 133. b. A *diſcontinuance* is the effect of a diſſeiſin, when, on certain events, the perſon diſſeiſed has loſt his right of entry upon the diſſeiſor, and can only recover by action. The word *freehold* is now generally uſed to denote an eſtate for life, in oppoſition to an eſtate of inheritance. Perhaps, in the old law it meant rather the latter than the former. It is known that fees were held originally at the will of the lord; then, for the life of the tenant; that afterwards they were deſcendible to particular heirs of the body of the tenant; then, to all the heirs of his body; and that in ſucceſſion of time the tenant had the complete dominion or power over the fee. The word freehold always imported the whole eſtate of feudatory, but varied as the eſtate varied. Hence we find the freeholder repreſented the whole fee, did the duty to the lord, and defended the poſſeſſion againſt ſtrangers. See Feud. L. 1. tit. 25. l. 2. t. 1. 2. Craig. lib. 2. tit. 2. 1. Inſt. 31. 153. Litt. Sect. 59. 279. 592. Britton, cha. 32. and ſir Ed. Coke's Commentary upon thoſe Sections; and the caſe of Taylor on the demiſe of Atkins v. Horde, 1. Burrows 60.

(2) But a common recovery veſts no freehold in deed or in law before execution ſerved. See Moor 141.

cel releaſe eſt bone, pur ceo que celuy a que le releaſe eſt fait, avoit en luy un reverſion al temps del releaſe fait.

releaſe is good, becauſe hee to whom the releaſe is made, had in law a reverſion at the time of the releaſe made (1). (Plo. 352.)

HERE *Littleton* addeth a limitation to the next precedent Section, *viz.* that a releaſe of all the right may be good to him in reverſion, albeit he hath nothing in the freehold, becauſe he hath an eſtate in him. 7. E. 4. 13. 14. H. 4. 32. b. 41. E. 3. 17. 49. E. 3. 28. caſe ult.

Tout le droit, &c. Or title, intereſt, demand, or the like; and ſo it is if he in the reverſion hath an eſtate for life or in taile in reverſion, as in the like caſe it appeareth in the next Section.

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*EN meſme le maner eſt, lou leas eſt fait a un home pur terme de vie, le remainder a un auter pur terme de * auter vie, le remainder a le tierce en le taile, le remainder a le quart en fee, ſi un eſtranger que droit ad a la terre releſſa tout ſon droit a aſcun de eux en le remainder, tiel releaſe eſt bone, pur ceo que cheſcun de eux ad un remainder en fait veſtue en luy.*

IN the ſame manner it is, where a leaſe is made to a man for terme of life, the remainder to another for terme of another man's life, the remainder to the third in taile, the remainder to the fourth in fee, if a ſtranger which hath right to the land releaſeth all his right to any of them in the remainder, ſuch releaſe is good, becauſe everie of them hath a remainder in deed veſted in him.

HERE is another limitation, that a releaſe is good to him in the remainder, albeit hee hath nothing in the freehold in poſſeſſion, becauſe he hath an eſtate in him, as hath beene ſaid. In both theſe limitations it is to be obſerved, that the ſtate which maketh a man tenant to the *præcipe*, is ſaid to be the freehold, as here the ſtate of tenant for life, and not the reverſion in fee. 7. E. 4. 13. 41. E. 3. 7. 17. E. 3. 54. 18. E. 2. Tit. Entrie 74. 3. E. 2. Tit. Entrie 7. F. N. B. 207. E.

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MES ſi le tenant a terme de vie ſoit diſſeiſie, et puis celuy que ad droit (eſteant le poſſeſſion en le diſſeiſor) releſſa a un de eux † a que le remainder fuit fait tout ſon droit, cel releaſe eſt void, pur ceo que il n'avoit ‡ un remainder en fait al temps de releaſe fait, forſque tantſolement un droit del remainder.

BUT if the tenant for terme of life be diſſeiſed, and afterwards he that hath right (the poſſeſſion being in the diſſeiſor) releaſeth to one of them to whom the remainder was made all his right, this releaſe is void, becauſe hee had not a remainder in deed at the time of the releaſe made, but only a right of a remainder.

FOrſque tantſolement un droit del remainder. For a releaſe of a right to one that hath but a bare right regularly is void; for, as *Littleton* hath before ſaid, hee to whom a releaſe is made of a bare right in lands and tenements, muſt have either a freehold in deed or in law in poſſeſſion, or a ſtate in remainder or reverſion in fee or fee taile, or for life. Vide Sect. 454.

Sect.

* *auter* not in L. and M. nor Roh. nor in Cambr. MSS. † *a—le*, L. and M. and Roh. ‡ *en luy* added L. and M. and Roh.

(1) Releaſes may enure four manner of ways. 1ſt, *Per mitter le droit*, where a perſon is diſſeiſed, and he releaſes to the diſſeiſor his heir or feoffee.—2d, *Per mitter l'eſtate*, viz. when two or more are ſeiſed by a joint title of the ſame eſtate, as by a contract, or by deſcent, as jointenants or coparceners, and one of them releaſes to the other, this enures *per mitter l'eſtate*.—3d, *Per l'eſtorger*, is where the poſſeſſion and inheritance are ſeparated for a particular time, and he who hath the reverſion or inheritance, releaſes to the tenant in poſſeſſion all his right and intereſt. Such releaſe is ſaid to enlarge his eſtate, and to be equal to an entry and feoffment, and to amount to a grant and attornment.—4th, *Per extinguiſhment*, where the releaſee cannot have the thing *per mitter le droit*, yet the releaſe ſhall enure by way of extinguiſhment againſt all manner of perſons; as when the lord grants the ſeigniory to his tenant, ſuch releaſes abſolutely extinguiſh the rent, &c. although the releaſee be only tenant for life. Ant. 193. b. and ſee poſt. 273. b.

Sect. 452.

BY this it appeareth, that as a releaſe made of a right to him in reverſion or remainder, ſhall aid and benefit him that hath the particular eſtate for yeares, life, or eſtate taile, ſo a releaſe of a right made to a particular tenant for life, or in taile, ſhall aid and benefit him or them in the remainder.

(2. Roll. Abr. 414. Poſt. 275. a. 279. b. 285. b. 297. a. Ant. 147. b. 197.)

If two tenants in common of land graunt a rent charge of 40s. out of the ſame to one in fee, and the grantee releaſe to one of them, this ſhall extinguiſh but twentie ſhillings, for that the graunt in judgement of law was ſeverall. (1) So it is if two men be ſeiſed of ſeverall acres, and grant a rent *ut ſupra*. But there is a diverſitie betweene ſeverall eſtates in ſeverall lands, and ſeverall eſtates in one land; for if one be tenant for life of lands, the reverſion in fee over to another, if they two joyne in a grant of a rent out of the lands, if the grantee releaſeth either to him in the reverſion, or to tenant for life, the whole rent is extinguiſhed, for it is but one rent, and iſſueth out of both eſtates, and ſo note the diverſitie. (2)

(1. Rep. Mayor's caſe.)

Si le tenant ad le fait enſon poigne a pleader. And ſo it is in both caſes: for albeit he in the reverſion or remainder is a ſtranger to the deed, when the releaſe is made to the tenant, and the tenant for life or in taile is a ſtranger to the deed, when the releaſe is made to him in reverſion or remainder, yet ſeeing they are privies in eſtate, none of them in pleading ſhall take benefit thereof, without ſhewing the ſame in court, which is worthy to be obſerved

35. H. 6. 8.

S'ils ceo poient monſtre. The one cannot plead the releaſe made to the other without ſhewing of it, for that they are privie in eſtate, as hath beene ſaid. The reſidue of theſe two Sections needs no explication.

(Ant. 232. a. Hob. 66. 2. Roll. Abr. 412.)

*ET nota, que cheſcun releaſe fait a celuy que ad un reverſion ou un remainder en fait, ſerra vera et aidera celuy que ad le franktenement, auxybien come a celuy a que le releaſe fuit fait, ſi le tenant avoit le releaſe en ſon poigne * de pleader.*

AND note, that every releaſe made to him which hath a reverſion or a remainder in deed, ſhall ſerve and aid him who hath the freehold, as well as him to whom the releaſe was made, if the tenant hath the releaſe in his hand to plead.

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ET en meſme le manner † eſt lou un releaſe ‡ eſt fait al tenant pur terme de vie, ou al tenant en le taile, ‖ ceo urera a eux en le reverſion, ou a eux en le remainder, auxybien come al tenant de franktenement, et averont auxy grand advantage de cel, s'ils ceo poyent monſtre §.

IN the ſame manner it is where a releaſe is made to the tenant for life, or to the tenant in taile, this ſhall enure to them in the reverſion, or to them in the remainder, as well as to the tenant of the freehold, and they ſhall have as great advantage of this, if they can ſhew it.

* *de pleader* not in L. and M. nor Roh. † *eſt lou* not in L. and M. nor Roh. ‡ *eſt* not in L. and M. nor Roh.
‖ *ceo* not in L. and M. nor Roh. § *&c.* added in L. and M. and Roh.

(1) *If they grant a rent-charge of* 20s. *which in law amounts to a rent-charge of* 40s. *as two grants, for otherwiſe* non eſt caſus. *When two tenants in common grant a rent, that is, ſeveral eſtates in one land, and yet they are ſeveral grants, therefore quære of this diverſity. Plo. Que. pl.* 315. *contra.* Lord Nott. MSS.

(2) *For Plowd. in his Quære* 315. *if tenant for life grants rent, and the grantee purchaſes the reverſion, the rent remains during the life of the tenant for life.* Lord Nott. MSS.

Sect.

Sect. 454.

ITEM, ſi ſoit ſeignior et tenant, et le tenant ſoit diſſeiſee, et le ſeignior releſſa al diſſeiſee tout le droit que il avoit en le ſeigniorie ou en le terre, cel releaſe eſt bone, et le ſeigniorie eſt extinct: et ceo eſt pur cauſe del privitie que eſt perenter le ſeignior et le diſſeiſee. Car ſi les avers le diſſeiſee ſoient pris, et de eux le diſſeiſee ſuiſt un replevin envers le ſeignior, il compellera le ſeignior d'avowrer ſur luy; car s'il avower ſur le diſſeiſor, donques ſur le matter monſtre l'avowrie abatera, car le diſſeiſee eſt tenant a luy en droit et en la ley.

ALSO, if there bee lord and tenant, and the tenant be diſſeiſed, and the lord releaſeth to the diſſeiſee all the right which he hath in the ſeigniorie or in the land, this releaſe is good, and the ſeigniorie is extinct: and this is by reaſon of the privitie which is betweene the lord and the diſſeiſee. For if the beaſts of the diſſeiſee be taken, and of them the diſſeiſee ſueth a replevin againſt the lord, hee ſhall compell the lord to avow upon him; for if hee avow upon the diſſeiſor, then upon the matter ſhewn the avowrie ſhall abate, for the diſſeiſee is tenant to him in right and in law. (1)

HEREUPON may bee collected and obſerved two diverſities: firſt, betweene a ſeigniorie or rent ſervice, and a rent charge: for a ſeigniorie or rent ſervice may bee releaſed and extinguiſhed to him that hath but a bare right in the land, And the reaſon hereof is, in reſpect of the privitie betweene the lord and the tenant in right; for he is not only as tenant to the avowrie, but if hee die his heire within age, hee ſhall bee in ward; and if of full age, hee ſhall pay releefe; and if he die without heire, the land ſhall eſcheat. But there is no ſuch privitie in caſe of a rent charge, for there the charge only lieth upon the land. (3. Rep. 35. b.)

The ſecond diverſitie is betweene a ſeigniorie and a bare right to land; for a releaſe of a bare right to land to one that hath but a bare right is void, as hath beene ſaid. But here in the caſe of our author, a releaſe of a ſeigniorie to him that hath but a right, is good to extinguiſh the ſeigniorie. Vid. Sect. 451.

Nota, a ſeigniorie, rent, or right, either *in præſenti*, or *in futuro*, may be releaſed five manner of wayes, and the firſt three without any privitie. Firſt, to the tenant of the freehold in deed or in law. Lib. 10. fol. 48. Lampet's caſe. (Poſt. 275. 2. Roll. Abr. 402.)

Secondly, to him in remainder. Thirdly, to him in the reverſion. The other two in reſpect of privitie: as, firſt, here the lord releaſeth his ſeigniorie to the tenant being diſſeiſed, having but a right, and no eſtate at all: ſecondly, in reſpect of the privitie, without any eſtate or right; as by the demandant to the vouchee, or donor to the donee, after the donee hath diſcontinued in fee, as appeareth hereafter in this chapter. Sect. 455.

Per cauſe de privitie, &c. See for this word (*privitie*), Sect. 461.

Il compellera le ſeignior d'avowrer ſur luy, &c. This is regularly true; but if the lord hath accepted ſervices of the diſſeiſor, then the diſſeiſee cannot enforce the lord to avow upon him, though his beaſts be taken, &c. (2) 20. H. 6. 9. b. 41. E. 3. 26. 48. E. 3. 9. 2. E. 4. 6. a.

If a man hath title to have a writ of eſcheat, if he accept homage or fealtie of the tenant, he is barred of his writ of eſcheat; but if he accept rent of the tenant, that is no bar to him, for it may be received by the hands of a baylife. [*d*] But ſome doe hold, that if there be lord and tenant, and the tenant be diſſeiſed, and the diſſeiſee die without heire, the lord accepts rent by the hands of the diſſeiſor, this is no barre to him. Contrarie it is, if he avow for the rent in court of record, or if he take a corporall ſervice, as homage or fealtie, for the diſſeiſor is in by wrong: but if the lord accept the rent by the hands of the heire of the diſſeiſor, or of his feoffee, becauſe they be in by title, this ſhall barre him of his eſcheat, which is to bee 31. E. 1. Diſcent 17. 26. E. 3. 72. 4. H. 6. 21. F. N. B. 144. o. [*d*] 7. E. 6. tit. Eſcheat. Br. 18. (9. Rep. 22. 1. Roll. Abr. 316. b.)

(1) Here the releaſe operates by way of extinguiſhment. See poſt. 279. b.

(2) But the opinion of the 48. E. 3. 9. ſeems to the contrary; becauſe when the tenant pleads the diſſeiſin, to compel the lord to avow upon him, it is ſtrange that the lord, by his own act of acceptance, ſhould maintain his avowry, and deſtroy the feudal contract. Gilb. Ten. 64. 65.

bee underſtood of a diſcent or feoffment, after the title of eſcheat accrued: (*e*) for if the diſſeiſor make a feoffment in fee, or die ſeiſed, and after the diſſeiſee die without heire, then there is no eſcheat at all, becauſe the lord hath a tenant in by title. And when *Littleton* wrote, the diſſeiſee in the caſe here put, ſhould have compelled the lord to have avowed upon him, as *Littleton* holdeth. But now this is altered by a latter ſtatute of (*f*) 21 *H.* 8. For whereas by fines, recoveries, grants, and ſecret feoffments, &c. made by tenants to perſons unknowne, the lords were put from knowledge of their tenants, upon whom by order of law they ſhould make their avowrie, &c. it is by that ſtatute enacted, that if the lord ſhall diſtreine upon the lands and tenements holden, &c. that he may avow, &c. upon the ſame lands, &c. as in lands, &c. within his fee or ſeigniorie, &c. without naming of any perſon certaine, and without making avowrie upon a perſon certaine. Upon which ſtatute theſe foure points are to be obſerved. Firſt, that the lord hath ſtill election either to avow according to the common law, by force of the ſtatute, by reaſon of this word (*may*). Secondly, albeit the purview of the act be generall, yet all neceſſary incidents are to be ſupplyed, and the ſcope and end of the act to be taken: and therefore, though he need not to make his avowrie upon any perſon certaine, yet he muſt alleage ſeiſin by the hands of ſome tenant in certaine, within fortie yeares. Thirdly, that if the avowrie be made according to the ſtatute, everie plaintife in the replevin, or ſecond deliverance, be he termor or other, may have everie anſwer to the avowrie that is ſufficient; and alſo have aid, and everie other advantage in law (diſclaimer only except); for diſclaime he cannot, becauſe in that caſe the avowrie is made upon no certaine perſon. Fourthly, where the words of the ſtatute be, if the lord diſtreine upon the lands and tenements holden, yet if the lord come to diſtreine, and the tenant enchaſe his beaſts which were within the view out of the land holden, and there the lord diſtreine, albeit the diſtreſſe be taken out of his fee and ſeigniorie in that caſe, yet is it within the ſaid ſtatute; for in judgment of law the diſtreſſe is lawfull, and as taken within his fee and ſeigniorie; and this ſtatute being made to ſuppreſſe fraud, is to be taken by equitie (1).

(*e*) 7. H. 4. 17. 3. R. 2. entr. cong. 38. 2. H. 4. 8. 6. H. 7. 9. Vide Sect. 556.

(*f*) 21. H. 8. cap. 19. (Hob. 242.)

Lib. 9. fol. 136. Aſcough's caſe.

27. H. 8. fol. 4. 32. H. 8. cap. 2. Lib. 9. fol. 36. Bucknal's caſe.

34. H. 8. Avowrie Br. 113. 27. H. 8. 4. & 20. Bucknal's caſe ubi ſupra.

Lib. 9. fol. 22. in caſe d'avowrie. 44. E. 3. 20. 11. H. 7. 4. 21. H. 7. 40. 34. H. 6. 18. 16. E. 4. 10. 6. R. 2. Reſcou. 11. (Ant. 161.)

Sect. 455.

ITEM, ſi terre ſoit done a un home en taile, reſervant al donor et a ſes heires un certaine rent, ſi le donee ſoit diſſeiſie, et puis le donor releſſa al donee et a ſes heires tout le droit que il avoit en la terre, et puis le donee enter en la terre ſur le diſſeiſor; en ceſt caſe le rent eſt ale, pur ceo que le diſſeiſee al temps de releaſe fait, fuit tenant en droit et en la ley al donor, et avowrie a fine force covient de eſtre fait ſur luy per le donor pur le rent aderere, &c. Mes uncore rien de droit de terres, ſcilicet, *de le droit de le reverſion, * paſſera per tiel releaſe, pur ceo que le donee a que le releaſe eſt fait, adonque n'avoit riens en la terre forſque tantſolement un droit, et iſſint le droit del terre ne puiſſoit † adonques paſſer al donee per tiel releaſe.*

ALSO, if land be given to a man in taile, reſerving to the donor and to his heires a certaine rent, if the donee be diſſeiſed, and after the donor releaſe to the donee and his heires all the right which hee hath in the land, and after the donee enter into the land upon the diſſeiſor; in this caſe the rent is gone, for that the diſſeiſee at the time of the releaſe made, was tenant in right and in law to the donor, and the avowrie of fine (2) force ought to bee made upon him by the donor for the rent behinde, &c. But yet nothing of the right of the lands, *(ſcilicet)* of the reverſion, ſhall paſſe by ſuch releaſe, for that the donee to whom the releaſe is made, then had nothing in the land but onely a right, and ſo the right of the land could not then paſſe to the donee by ſuch releaſe.

Si

* *adonques ne* added L. and M. and Roh.

† *adonques* not in L and M.

(1) See the following page. Gilb. Diſtr. 189. Lord Raym. 257.
(2) That is, of neceſſity.

SI le donee ſoit diſſeiſie, &c. This is evident by that which hath beene ſaid. Eutadmit that the donee maketh a feoffment in fee, and the donor releaſe unto him and his heires all the right in the land, this ſhall extinguiſh the rent, becauſe the lord muſt avow upon him, and yet the tenant in taile after the feoffment hath no right in the land. But the reaſon is in reſpect of the privity, and that the [*m*] donor is by neceſſity compellable to avow upon him only; for if he ſhould avow upon the diſcontinuee, then it ſhould appeare of his owne ſhewing that the reverſion whereunto the rent is incident ſhould be out of him, and conſequently the avowrie ſhould abate; and ſo was it [*n*] reſolved *Trin.* 18. *Eliz.* in the court of common pleas in ſir *Thomas Wiat*'s caſe, which I heard and obſerved. And *Littleton* ſaith here, that in caſe of the diſſeiſin of fine force, the avowrie muſt be made upon the donee.

Uncore riens de droit, &c. de reverſion, &c. Here the diverſitie aforeſaid betweene the rent ſervice and a bare right to the land appeareth.

Vide Sect. 454. 1. H. 5. tit. grant. 43. 14. H. 4. 38. 11. 3. fol. 29. lib. 6. 58. Lampet's caſe ubi ſupra. (Ant. 46. Poſt. 348.)

[*m*] 10. E. 3. 26 48. E. 3. 8. b. 31. E. 3. gard. 116. 5. E. 4. 3. 7. E. 4. 27. 15. E. 4. 13.

[*n*] Trin. 18. Eliz. in Thoma, Wiat's *caſe in communi banco.*

Sect. 456.

*EN meſme le manner eſt, ſi leas ſoit * a un pur terme de vie, reſervant al leſſor et a ſes heires certaine rent, ſi le leſſee ſoit diſſeiſie, et puis leſſor releſſa al leſſee et a ſes heires tout le droit que il ad en la terre, et apres le leſſee enter, coment que en ceſt cas le rent eſt extinct, uncore rien del droit de la reverſion paſſera,* cauſâ quâ ſupra.

IN the ſame manner it is, if a leaſe be made to one for terme of life, reſerving to the leſſor and to his heires a certaine rent, if the leſſee be diſſeiſed, and after the leſſor releaſe to the leſſee and to his heires all the right which he hath in the land, and after the leſſee entreth, albeit in this caſe the rent is extinct, yet nothing of the right of the reverſion ſhall paſſe, *cauſâ qua ſuprâ.*

HEREBY the diverſity is made apparent betweene a releaſe of a rent ſervice out of land, and a releaſe of right to land, in this Section.

Sect. 457.

MES ſi ſoit veray ſeignior et veray tenant, et le tenant fait un feoffment en fee, lequel feoffee ne unque devient tenant al ſeignior, † ſi le ſeignior releſſa al feoffor tout ſon droit, &c. ceſt releas eſt en tout void, pur ceo que le feoffor ad nul droit en la terre, et il n'eſt tenant en droit al

BUT if there be very lord and very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the lord, if the lord releaſe to the feoffor all his right, &c. this releaſe is altogether void, becauſe the feoffor hath no right in the land, and he is not tenant in right to the

VERAY ſeignior et veray tenant.

This is to be underſtood of a lord in fee ſimple, and of a tenant of like eſtate.

There be foure manner of avowries for rents and ſervices, &c. *viz.* 1. *Super ſeiſitum tenentem*, as in the caſe here put. 2. *Super ſeiſitum tenentem in formâ prædictâ*, as where a leaſe for life, or a gift in taile bee made, the remainder in fee. 3. Upon one as upon his tenant by the manor omitting (*quære*); and this is when the lord hath a particular eſtate in the ſeignioric, and ſo ſhall the donor upon

Vide Aſcough's caſe, l. 9. fo. 135. 136. 20. H. 6. 9. 2. H. 4. 24. 12. E. 4. 2. 26. H. 6. avowrie 17. 9. Liz. Dier 257. 5. H. 7. 11. 7. E. 4. 24. 20. E. 3. avow. 131.

(9. Rep. 135. b. 21. H. 8. c. 19.)

* *ſoit* added in L. and M. and Roh.

† &c. added in L. and M. and Roh.

upon the donee, or leſſor upon the leſſee. 4. *Sur le matter en la terre*, as within his fee and ſeigniorie. As where the tenant by knights ſervice maketh a leaſe for life reſerving a rent, and die his heire within age, the gardeine ſhall avow upon the leſſee, *ſcilicet*, *ſuper materiam prædictam in terris et tenementis prædictis ut infra feodum et dominium ſuum*. Now by the ſtatute the very lord may avow, as in lands within his fee and ſeigniorie, without avowing upon any perſon in certaine. (1)

47. E. 3. fol. ultimo. 38. H. 6. 13.

(Doc. Pla. 53.)

21. H. 8. cap. 19. (Poſt. 345.)

ſeignior, mes tenant ſolement tenant quant al avowry faire, et il ne unques compellera le ſeignior d'avower ſur luy, car le ſeignior avowera ſur le feoffee s'il voile.

lord, but only tenant as to make the avowre, and hee ſhall never compell the lord to avow upon him, for the lord ſhall avow upon the ſeoffee if hee will.

Here appeareth the diverſity betweene a tenant in taile, and a tenant in fee ſimple; for albeit tenant in taile make a feoffment in fee, yet the right of the entaile remaine, and ſhall deſcend to the iſſue in taile. But when the tenant in fee ſimple make a feoffment in fee, no right at all remaine of his eſtate, but the whole is transferred to the feoffee.

Alſo the lord is not compellable in that caſe to avow upon the feoffor; but if he will, as *Littleton* here ſaith, he may avow on the feoffee; but ſo it is not, as hath beene ſaid, in caſe of tenant in taile.

Note a diverſity betweene actions and acts which concerne the right, and actions and acts which concerne the poſſeſſion only. For a writ of cuſtomes and ſervices lieth not againſt the feoffor, nor a releaſe to him ſhall extinguiſh the ſeigniorie. So if a reſcous be made, an aſſiſe ſhall not lie againſt the feoffor, and him that made the reſcous, becauſe the feoffee is tenant, and in aſſiſe; the ſurpluſage incroached ſhall be avoided. For theſe actions and acts concerne the right; but of a ſeiſin and an avowrie which concerne the poſſeſſion, it is otherwiſe. And if the lord releaſe to the feoffor, this is good betweene them, as to the poſſeſſion and diſcharge of the arrerages, but the feoffee ſhall not take benefit of it, for that, as hath beene ſaid, it extendeth not to the right. But the feoffor ſhall plead a releaſe to the feoffee, for thereby the ſeigniorie is extinct; as if leſſee for life doth waſte, and grant over his eſtate, and the leſſor releaſe to the grantee, in an action of waſte againſt the leſſee, he ſhall plead the releaſe, and yet he hath nothing in the land. And ſo in waſte ſhall tenant in dower or by the courteſie in the like caſe, and the vouchee, and the tenant in a *præcipe* after a feoffment made. And ſo in a *contra formam collationis*.

(Doc. Pla. 321.)

Le feoffee ne unques deveigne tenant. *Nota* here an excellent point of learning, *viz.* if there be lord and tenant, and the rent is behind by divers yeares, and the tenant make a feoffment in fee, if the lord accept the ſervice or rent of the feoffee due in his time, he ſhall loſe the arrerages due in the time of the feoffor; for after ſuch acceptance he ſhall not avow upon the feoffor, nor upon the feoffee for the arrerages incurred in the time of the feoffor. But in that caſe if the feoffor dieth, albeit the lord accept the rent or ſervice by the hand of the feoffee due in his time, he ſhall not loſe the arrerages, for now the law compelleth him to avow upon the feoffee, (2) and that which the law compelleth him unto, ſhall not prejudice him.

4. E. 3. 22. 7. F. 3. 8. 7. E. 4. 27. 29. H. 8. tit. avowrie. Br. 111. li. 3. fol. 63. c6. Pennant's caſe. 7. H. 4. 14. 2. E. 4. 6. 34. H. 6. 46. 37. H. 6. 29. H. 8. avowrie. (6. Rep. 58. b.)

So it is, and for the ſame reaſon, if there be lord, meſne, and tenant, and the rent due by the meſne is behinde, and after the tenant fore-judge the meſne, and the lord receive the ſervices of the meſne which iſſue out of the tenancie, he ſhall not be barred of the arrerages which iſſued out of the meſnalty; and ſo if the rent be behinde, and the tenant dieth, the acceptance of the ſervices by the hand of the heire ſhall not barre him of the arrerages; for in theſe caſes albeit the perſons be altered, yet the lord doth accept the ſervices of him which only ought to doe them. (3)

4. E. 3. 22. 47. E. 3. 4.

But as long as the feoffor liveth, the lord ſhall not be compelled to avow upon the feoffee, unleſſe he giveth the lord notice, and tender unto him all the arrerages.

21. H. 8. cap. 19.

But now by the ſtatute the lord may avow upon the lands ſo holden, as in lands within his fee or ſeigniory, without naming of any perſon certaine to bee tenant of the ſame, and without making of any avowrie upon any perſon certaine, as hath beene ſaid, which hath much altered the common law in the caſes aboveſaid, for the benefit and ſafety of the lord.

But yet theſe caſes are neceſſary to be knowne (for which purpoſe I have added them), for that the lord may avow ſtill at the common law if he will.

Sect.

(1) On the continuance of the right of the entail in the tenant in tail after a feoffment made by him, ſee the caſe of lord Sheffield v. Radcliffe, *Hob.* 334. and ſee Duncombe v. Wingfield, *ibid.* 252.

(2) For the lord could not introduce the heir into the feud contrary to the expreſs alienation of the anceſtor. Gilb. Ten. 67.

(3) By acceptance of rent from the aſſignee, the leſſor loſes his action of debt againſt the firſt leſſee, but he may ſtill maintain an action of covenant againſt him. 1. Saund. 240. 241. 2. Saund. 302.

Sect. 458.

AUTERMENT eſt lou le veray tenant eſt diſſeiſie, come en le cas avantdit; car ſi le veray tenant que eſt diſſeiſie, teigne del ſeignior per ſervice de chivaler et moruſt (ſon heire eſteant deins age), le ſeignior avera et ſeiſera le garde del heire, et iſſint n'avera il my le gard del feoffor que fiſt le feoffment en fee, &c. iſſint il eſt graund diverſity enter les deux caſes, &c.

OTHERWISE it is where the very tenant is diſſeiſed, as in the caſe aforeſaid; for if the very tenant who is diſſeiſed, hold of the lord by knights ſervice and dieth (his heire being within age), the lord ſhall have and ſeize the wardſhip of the heire, and ſo ſhall he not have the ward of the feoffor that made the feoffment in fee, &c. ſo there is a great diverſitie betweene theſe two caſes. (Ant. 76. b.)

Of this ſufficient hath beene ſaid before.

12. H. 4. 13. 36. E. 3. tit. gard; 10. 6. H. 7. 9. 37. H. 6. 1. 32. H. 6. 27. 7. E. 6. tit. gard. Br. (Poſt. 345. b.)

Sect. 459.

*ITEM, ſi un home leſſa a un auter ſon terre pur terme d'ans, ſi le leſſor releſſa al leſſee tout ſon droit, &c. devant que le leſſee avoit enter en meſme le terre per force de meſme le leas, tiel releas eſt void, pur ceo que le leſſee n'avoit poſſeſſion en la terre al temps del releas fait, mes tantſolement un droit d'aver meſme la terre per force de meſme le leas. Mes ſi le leſſee enter en meſme la terre, et ent eit poſſeſſion per force de meſme le leas, donque tiel releas fait a luy per le feoffor, ou per ſon heire, eſt * ſufficient a luy per cauſe del privitie que per force del leas eſt perenter eux, &c.*

ALSO, if a man letteth to another his land for terme of yeares, if the leſſor releaſe to the leſſee all his right, &c. before that the leſſee had entred into the ſame land by force of the ſame leaſe, ſuch releaſe is void, for that the leſſee had not poſſeſſion in the land at the time of the releaſe made, but only a right to have the ſame land by force of the leaſe. But if the leſſee enter into the land, and hath poſſeſſion of it by force of the ſaid leaſe, then ſuch releaſe made to him by the feoffor, or by his heire, is ſufficient to him by reaſon of the privitie which by force of the leaſe is between them, &c. (1)

DEVANT que le leſſee avoit enter, &c. For before entry the leſſee hath but *intereſſe termini*, an intereſt of a terme, and no poſſeſſion, and therefore a releaſe which enure by way of enlarging of an eſtate cannot worke without a poſſeſſion, (2) for before poſſeſſion there is no reverſion; and yet if a tenant for twenty yeares in poſſeſſion make a leaſe to *B.* for five yeares, and *B.* enter, a releaſe to the firſt leſſee is good, for he had an actuall poſſeſſion, and the poſſeſſion of his leſſee is his poſſeſſion. And ſo it is if a man make a leaſe for yeares, the remainder for yeares, and the firſt leſſee doth enter, a releaſe to him in the remainder for yeares is good to enlarge his eſtate. (3)

49. E. 3. 28. 32. H. 6. 8. 37. H. 6. 18. 22. E. 4. 37. 4. H. 7. 10. 15. H. 7. 14.

22. E. 4. Surrender. 6. (Poſt. 273. a.)

But if a man make a leaſe for yeares to beginne preſently, reſerving a rent, if before the leſſee doth enter the leſſor releaſeth all the right that hee hath in the land, albeit this releaſe cannot enlarge his eſtate, yet it ſhall in reſpect of the privity extinguiſh the rent. And ſo it is if a leaſe be made to beginne at *Michaelmas*, reſerving a rent, and before the day the leſſor releaſe all the right that hee hath in the land, this cannot enure to enlarge (Ant. 46. b.)

* *bon et* added L. and M. and Roh.

(1) Ou releaſes which operate by enlargement, ſee poſt. 273. a.

(2) But this muſt be underſtood of a leaſe at common law; for if it be ſo framed as to be a bargain and ſale under the ſtatute, the poſſeſſion is immediately executed in the leſſee, ſo that no entry is neceſſary. See the note page 71. b. and Cro. Car. 110. 2. Ventris 35.

(3) By this paſſage it appears, that what ſir Edward Coke obſerves a few lines before, that a releaſe which enures by enlargement cannot work without a poſſeſſion, muſt be underſtood to mean, not that an actual eſtate in poſſeſſion is neceſſary, but that a veſted intereſt ſuffices, for ſuch a releaſe to operate upon. By comparing this with what is ſaid in note 1. 271. b. of the operation of a leaſe and releaſe, it will be ſeen, that not only eſtates in poſſeſſion, but eſtates in remainder and reverſion, and all other incorporeal hereditaments, may be effectually granted and conveyed by leaſe and releaſe: but it is an inaccuracy to ſay, that the releaſee, in theſe caſes, is in the *actual poſſeſſion* of the hereditaments; the right expreſſion is, that they are *actually veſted* in him, by virtue of the leaſe of poſſeſſion, and the ſtatute.

enlarge the eſtate but to extinguiſh the rent in reſpect of the privity, as it was reſolved [b] in the exchequer, which I obſerved.

[b] Mich. 39. & 40. Eliz. in Scaccario, betweene ſir Henrie Woodhouſe and ſir William Pallon.

A man granteth the next avoidance of an advowſon to two, the one of them may before the church become void releaſe to the other; for although the grantor cannot releaſe to them to increaſe their eſtate, becauſe their intereſt is future, and not in poſſeſſion, yet one of them to extinguiſh his intereſt may releaſe to the other in reſpect of the privity. But after the church become void, then ſuch a releaſe is void, becauſe then it is (as it were) but a thing in action. And this was reſolved [c] by the whole court of common pleas, which I myſelfe heard and obſerved. And by conſequent in the caſe of *Littleton*, if a leaſe for yeares be made to two, albeit the leſſor before they enter cannot releaſe to them to enlarge their eſtate, yet one of them may before entry releaſe to the other.

[c] Paſch. 38. Eliz. in quare impedit per Bennet. verſ. Peveſque de Norwich in communi banco. Pl. Com. 423.

Mes tantſolement un droit, &c. Which is not ſo to be underſtood that he hath but a naked right, for then he could not grant it over; but ſeeing he hath *intereſſe termini*, before entrie, he may grant it over, albeit for want of an actuall poſſeſſion he is not capable of a releaſe to enlarge his eſtate.

Mes ſi le leſſee enter en meſme le terre, &c. This is evident. And herein note a diverſity betweene a leaſe for life, and for yeares, for before the leſſee for yeares enter, a releaſe cannot be made unto him: but if a man make a leaſe for life, the remainder for life, and the firſt leſſee dieth, a releaſe to him in the remainder and to his heires is good before hee doth enter to enlarge his eſtate, for that he hath an eſtate of a freehold in law in him, which may be enlarged by releaſe before entrie.

25. E. 3. 53. 31. E. 3. Confirmat. 14. 31. Aſſ. Pl. 13.

And where our author ſpeaketh only of a leſſee for yeares, the ſame law it is of a tenant by ſtatute merchant or ſtaple, or tenant by *elegit*, or the like.

Sect. 460.

21. H. 6. 37. 2. E. 4. 6. b. 7. E. 4. 27. 3. E. 4. 16. 29. H. 6. Releaſe 6. (5. Rep. 13. 2. Sid. 163. Ant. 47. Cro. Jac. 169.)

BY theſe two Sections is to be obſerved, a diverſity between a tenant at will, and a tenant at ſufferance; for a releaſe to a tenant at will is good, becauſe betweene them there is a poſſeſſion with a privity; but a releaſe to a tenant at ſufferance is void, becauſe he hath a poſſeſſion without privity. As if leſſee for yeares hold over his terme, &c. a releaſe to him is void, for that there is no privity betweene them; and ſo are the books that ſpeake of this matter to be underſtood. (1)

EN meſme le maner eſt, come il ſemble, ou leaſe eſt fait a un home a tener de le leſſor a ſa volunt, per force de quel leas le leſſee eit poſſeſſion: ſi le leſſor en ceſt caſe fait un releas al leſſee de tout ſon droit, &c. ceſt releas eſt aſſets bon pur le privity que eſt perenter eux; car en vain ſerra de faire eſtate per un liverie de ſeiſin a un auter, lou il ad poſſeſſion de meſmes les tenements per le leas de meſme celuy devant, &c.

IN the ſame manner it is, as it ſeemeth, where a leaſe is made to a man to hold of the leſſor at his will, by force of which leaſe the leſſee hath poſſeſſion: if the leſſor in this caſe make a releaſe to the leſſee of all his right, &c. this releaſe is good enough for the privity which is betweene them; for it ſhall bee in vaine to make an eſtate by a livery of ſeiſin to another, where he hath poſſeſſion of the ſame land by the leaſe of the ſame man before, &c.

Sed contrarium tenetur, &c. This is of a new addition, and the booke here cited ill underſtood, for it is to be underſtood of a tenant at ſufferance.

* Sed contrarium tenetur, P. 2. Ed. 4. *per touts les juſtices.*

But the contrarie is holden, *Paſch.* 2. *E.* 4. by all the juſtices. *

Sect.

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

(1) A tenant at will is he who enters and enjoys the land by the expreſs or implied conſent of the owner, without there being any obligation on the part either of the leſſor or leſſee to continue it for any certain or determinate term. A tenant by ſufferance is he who, having entered and obtained poſſeſſion by title, continues the poſſeſſion, after his title is ended, by the laches of the leſſor. The former is in by the conſent of the owner of the lands, this creates a privity between them. A tenant by ſufferance is in only by the laches of the owner, ſo that there is no privity between them. Both theſe eſtates differ from that of a tenant from year to year, the tenant of which may determine it at the end of any year, but after a new year is begun, the tenure cannot be determined either by the leſſor or leſſee till the end of the year. See 1. lord Raymond, 707. 708. 2. Salk. 413. 3. Salk. 222. If a perſon holds by leaſe, and the term expires, the leaſe itſelf is notice of the expiration of the term, and the leſſor may enter on the leſſee without further notice, unleſs for double rent, under the 4. Geo. 2. ſect. 1. in which caſe there muſt be a previous demand in writing. Where the tenant holds by will, the modern determinations are, that there muſt be a previous notice; but this notice varies according to the cuſtom of the place, and the nature of the hereditaments in leaſe.

Sect. 461.

*MES lou home de ſa teſte demeſne occupia terres ou tenements a la volunt celuy que ad * le franktenement, et tiel occupier ne claima riens forſque a volunt, &c. ſi celuy que ad le franktenement voile releaſer tout ſon droit al occupier, &c. tiel releaſe eſt void, pur ceo que nul privitie eſt perenter eux per leaſe fait al occupier, ne per auter manner, &c.*

BUT where a man of his owne head occupieth lands or tenements at the will of him which hath the freehold, and ſuch occupier claimeth nothing but at will, &c. if hee which hath the freehold will releaſe all his right to the occupier, &c. this releaſe is void, becauſe there is no privitie betweene them by the leaſe made to the occupier, nor by other manner, &c.

DE ſa teſte demeſne occupia. Hee doth not ſay, *de ſa teſte demeſne enter*, &c. ſo as this is to bee underſtood of a tenant at ſufferance, *viz.* where a man commeth to the poſſeſſion firſt lawfully, and holdeth over.

Vide Sect. 68. (1. Roll. Abr. 658. Ant. 57. Cro. Car. 303.)

(*m*) For if a man entreth into land of his owne wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but hee is a diſſeiſor, (1) and then the releaſe to him is good; or if the owner conſented thereunto, then hee is a tenant at will, and that way alſo the releaſe is good. But there is a diverſitie when one commeth to a particular eſtate in land by the act of the partie, and when by act in law; for if the gardein hold over, he is an abator, becauſe his intereſt came by act in law.

(*m*) Temps H. 8. tit. tenant a volunt. Br. 15. 2. E. 4. 38. 18. E. 4. 25. 39. E. 3. 28. 12. E. 3. Aſſ. 86. 11. E. 3. ibid. 87. 12. Aſſ. 21. 13. E. 3. Aſſ. 92. 28. Aſſ. 11. 34. Aſſ. 10. 10. E. 3. 41. 8. E. 3. 63. (1. Roll. Abr. 662. Poſt. 277.)

Vide 2. part of the Inſtitutes. Marlb. cap. 16. 10. E. 4. 9 &c. (1. Roll. Abr. 861. Ant. 56. a.)

Nul privitie. *Priveitie* is a word common aſwell to the Engliſh as to the French, and in the underſtanding of the common law is fourefold.

Old N.B. 117. 137. Lib. 3. fo. 23. Walker's caſe. Lib. 4. fol. 123. 124.

1. As privies in eſtate, whereof *Littleton* here ſpeaketh; as betweene the donor and donee, leſſor and leſſee, which privitie is ever immediate. Vide Sect. 454.

2. Privies in bloud; as the heire to the anceſtor, or betweene coparceners, &c. (8. Rep. 42. b.)

3. Privies in repreſentation; as executors, &c. to the teſtator. (Ant. 242. a.)

And fourthly, privities in tenure; as the lord and tenant, &c. which may be reduced to two generall heads, privies in deed, and privies in law.

Sect. 462, 463.

ITEM, ſi home enfeoffe auters homes de ſa terre ſur confidence, et al entent de performer ſa darreine volunt, et le feoffor occupiaſt meſme la terre a la volunt de ſes feoffees, et puis les feoffees releſſont per lour fait a lour feoffor tout lour droit, &c. ceo ad eſte un queſtion, ſi tiel releaſe ſoit bon ou non. Et aſcuns ont dit, que tiel releaſe

ALSO, if a man enfeoffe other men of his land upon confidence, and to the intent to performe his laſt will, and the feoffor occupieth the ſame land at the will of his feoffees, and after the feoffees releaſe by their deed to their feoffor all their right, &c. this hath beene a queſtion if ſuch releaſe be good or no. And ſome have ſaid, that

HERE is a queſtion moved, and the reaſons of both ſides ſhewed, and as it hath beene obſerved, the latter opinion is the better, being *Littleton*'s owne opinion.

12. E. 4. 12. b. 15. E. 4. 9. H. 7. 25. Vide Sect. 302. 176. 340.

Il ſerra entendue per la ley que le feoffor doit maintenant occupie la terre a la volunt de les feoffees. For intendments of law mentioned by our author, ſee the Section in the margent.

4. E. 4. 8. b. 9. H. 7. fol. ultimo. 15. H. 7. 2. b. 14. H. 8. 9. a. Sect. 99. 100. 110. 367. 377. 393. 406. 440.

Here is to bee obſerved the intendment of law, that when a feoffment is made to a future uſe, as to the performance of his laſt will, the feoffees

35. H. 6. Subpena 22. 15. H. 7. 12. b. 37. H. 6. 36. 11. H. 4. 52. 7. H. 4. 22. 1. Mar. 111. Dier. (6. Rep. 18. a) (Ant. 111. b 112. a.)

ent added L and M. and Roh.

(1) This is to be underſtood when there is no particular eſtate in the land; but if there be a term in *eſſe*, and one enters claiming the term, he ſhall not be a diſſeiſor, but an action of debt or waſte ſhall be againſt him, and one may be executor *de ſon tort* of a term. 3. Lev. 35.

(2) P. 9. Car. C. B. *on the argument of the caſe of Blundell or Baugh, commonly called the Earl of Nottingham's caſe, juſtice Barkley ſaid, that he whom lord Coke calls in this place an abator, muſt be taken for a diſſeiſor, as he had actual poſſeſſion by the poſſeſſion of the guardian.* Lord Nott. MSS.—See Cro. Ca. 302. Latt. Rep. 372. 1. Vent. 51. 53.

(2. Rep. 58.)

feoffees ſhall bee ſeiſed to the uſe of the feoffor and of his heires in the meane time.

Ipſæ etenim leges cupiunt ut jure regantur.

(1. Roll. Abr. 859, Sid. 458. Dyer. 186. a)

And reaſon would that ſeeing the feoffment is made without conſideration, and the feoffor hath not diſpoſed of the profits in the meane time, that by conſtruction and intendment of law the feoffor ought to occupie the ſame in the meane time. And ſo it is when the feoffor diſpoſeth the profits for a particular time *in præſenti*, the uſe of the inheritance ſhall be to the feoffor and his heires, as a thing not diſpoſed of; wherein it is to be obſerved, that lands and tenements conveyed upon confidences, uſes, and truſts, are to be ruled and decided, if queſtion groweth upon the confidences, uſes or truſts, by the judges of the law; for that it appeareth by this and the next Section, they are within the entendment and conſtruction of the lawes of the realme (1).

35. H. 6. Subpena. 22.
30. H. 6. tit. Deviſe.

(Ant. 111. b. 112. a.)

And it is to be obſerved (as hath beene ſaid) that there is a diverſitie betweene a feoffment of lands at this day upon confidence, or to the intent to performe his laſt will, and a feoffment to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates, as hee ſhall appoint by his laſt will: for, in the firſt caſe, the land paſſeth by the will, and not by the feoffment; for after the feoffment the feoffor was ſeiſed in fee ſimple, as he was before; but in the latter caſe, the will purſuing his power is but a direction of the uſes of the feoffment, and the eſtates paſſe by execution of the uſes, which were raiſed upon the feoffment; but in both caſes the feoffees are ſeiſed to the uſe of the feoffor and his heires in the meane time: and all this and much more concerning this matter hath beene adjudged.

Est voyd, pur ceo que nul privitie fuit perenter les feoffees et lour feoffor, entant que nul leaſe fuit fait apres ticl feoffment per les feoffees al feoffor, a tener a lour volunt. Et aſcuns ont dit le contrarie, et ceo per deux cauſes.

Sect. 463.

UN eſt, que quant tiel feoffment eſt fait ſur confidence a performer la volunt del feoffor, il ſerra intendue per la ley, que le feoffor doit maintenant occupier la terre a la volunt de ſes feoffees; et iſſint il eſt tiel manner de privitie enter eux, ſi come home fait un feoffment as auters, et ils incontinent ſur le feoffment voylent et granteront, que lour feoffor occupiera la terre a lour volunt, &c.

ONE is, that when ſuch feoffment is made upon confidence to performe the will of the feoffor, it ſhall bee intended by the law, that the feoffor ought preſently to occupie the land at the will of his feoffees; and ſo there is the like kinde of privitie betweene them, as if a man make a feoffment to others, and they immediately upon the feoffment will and grant, that their feoffor ſhall occupy the land at their will, &c.

Lib. 6. fol. 17. 18. Sir Edward Clere's caſe.
Dillon & Frayn's caſe, l. 1. &c. fol. 113.

(2. Roll. Abr. 797. 1. Rep. 129. b. 192. b. Stat. 27. H. 8. c. 10. Plow. 348. 1. Rep. 127. Sid. 26.)

Note, uſes are raiſed either by tranſmutation of the eſtate, as by fine, feoffment, common recoverie, &c. or out of the ſtate of the owner of the land, by bargaine and ſale by deed indented and inrolled, or by covenant upon lawfull conſideration, whereof you may read plentifully in my *Reports*.

A feoffee to the uſe of *A.* and his heires, before the ſtatute of 27. *H.* 8. for money bargaineth and ſelleth the land to *C.* and his heires, who hath no notice of the former uſe; yet no uſe paſſeth by this bargaine and ſale, for there cannot be two uſes in *eſſe*, of one and the ſame land; and ſeeing there is no tranſmutation of poſſeſſion by the terre-tenant, the former uſe can neither be extinct nor altered. And if there could be two uſes of one and the ſame land, then could not

(1) Many references have been made, in the foregoing notes, to this part of the work, for ſome obſervations on conveyances at common law, and thoſe which derive their effect from the ſtature of uſes. It appeared adviſeable to collect them into one continued note, that the difference between the two modes of conveyance might appear in a ſtronger light; and to prevent a neceſſity of frequently repeating thoſe general principles and illuſtrations, which otherwiſe muſt have been introduced on every occaſion, where any point of this nature ſeemed to require an explanation. On the ſame ground it ſeemed adviſeable to anticipate ſome paſſages which otherwiſe would have had a place in a ſubſequent part of the notes.——*Feoffments* and *grants* were the two chief modes uſed in the common law for transferring property. The moſt comprehenſive definition which can be given of a feoffment ſeems to be, a conveyance of corporeal hereditaments, by delivery of the poſſeſſion upon or within view of the hereditaments conveyed. The delivery of the poſſeſſion was made on or within view of the land, that the other tenants of the lord might be witneſſes to it. No charter of feoffment was neceſſary: it only ſerved as an authentication of the tranſaction; and when it was uſed, the lands were ſuppoſed to be transferred, not by the charter, but by the livery, which it authenticated. Soon after the Conqueſt, or perhaps towards the end of the Saxon government, all eſtates were called fees. The original and proper import of the word feoffment is, the grant of a fee. It came afterwards to ſignify, a grant with livery of ſeiſin of a free inheritance to a man and his heirs; more reſpect being had to the perpetuity, than the feudal tenure of the eſtate granted. In early times, after the Conqueſt, charters of feoffment were various in point of form. In the time of Edward I. they began to be drawn up in a more uniform ſtyle. The more ancient of them generally run with the words *dedi, conceſſi*, or *domavi*. It was not till a later period that *feoffavi* came into uſe. The more ancient feoffments were alſo uſually made in conſideration of, or for, the homage and ſervice of the feoffee, and to hold of the feoffor and his heirs. But after the ſtatute *quia emptores*, feoffments were always made to hold of the chief lords of the fee, without the words *pro homagio et ſervitio*. Sir Edward Coke mentions in page 6. a. that there are eight neceſſary parts in a feoffment. The fifth, ſixth, and ſeventh of theſe are not to be found in many of the ancient charters. When the land compriſed in the feoffment deſcended from the anceſtor, or by uſage retained the property of the antient bock-land, of not being alienable from the kindred, the antient feoffments were often expreſſed to be made with the aſſent of the feoffor's wife, his heir or his heirs. In antient charters there was inſerted a general warranty: in that, the phraſe was much varied. The oath of the party was often added to it, and ſometimes a clauſe, that if the feoffor's title was evicted, he ſhould give other lands of equal value. Sometimes theſe clauſes extended to a ſecond eviction; and ſometimes the feoffor obliged himſelf, if he ſhould make default in warranting the lands granted, to make reſtitution to the feoffee. The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees (or of eſtate tail, as they are now called) and of life eſtates; to which may be added, feoffments of eſtates given in frankmarriage and frankalmoigne. To make the feoffment complete, the feoffor uſed to give the feoffee ſeiſin of the lands: this is what the feudiſts called inveſtiture. It was often made by ſymbolical tradition; but it was always made upon or within view of the lands. When the king made a feoffment, he iſſued his writ to the ſheriff, or ſome other perſon, to deliver ſeiſin: other great men did the ſame. This gave riſe to powers of attorney. (See the preface to Mr. Madox's Formulare.)

A grant

not the ſaid ſtatute execute either of them for the uncertaintie. But if *A.* diſſeiſe one to the uſe of *B.* and *A.* doth bargaine and ſell the land for money to *C.* *C.* hath an uſe; and here be two uſes of one land, but of ſeverall natures; the one, *viz.* upon the bargaine and ſale to be executed by the ſtatute, and the other not. (Ant. 22. b.)

But ſince *Littleton* wrote, all uſes are transferred by act of Parliament [c] into poſſeſſion, ſo as the caſe which *Littleton* here puts is thereby altogether altered. Yet it is neceſſarie to bee knowen, what the common law was before the making of the ſtatute, and may ſerve for the knowledge of the law in like caſe. [c] 27. H. 8. cap. 10. (Dr. and Stud. 98. a.)

Incontinent ſur le feoffment. *Quæ incontinenti fiunt in eſſe videntur.*

A lour volunt, &c. Here is implyed, everie tenancie at will is at the will of both parties, as before in his proper place hath beene ſhewed.

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*UN auter cauſe ils allegeont, que ſi tiel terre vault xl. s. per an, &c. donque tiel feoffor ſerra jure en aſſiſes et en auters enqueſts en plees realx, et auxy en plees perſonals, de quel graund ſum que les plaintiſes voilent counter, * &c. Et ceo eſt per le common ley de la terre.* Ergo, *ceo eſt pur un graund cauſe. Et la cauſe eſt, que la ley voet que tiels feoffors et lour heires doient occupier, &c. et prender et enjoyer touts maner de profits, iſſues, et revenues, &c. ſicome les tenements fueront lour meſmes, ſans interruption de les feoffees, nient obſtant tiel feoffment.* Ergo, *meſme la ley done privitie perenter tiels feoffors et*

ANOTHER cauſe they alleage, that if ſuch land bee worth fortie ſhillings a yeare, &c. then ſuch feoffor ſhall be ſworn in aſſiſe and other enqueſts in plees reals, and alſo in plees perſonals, of what great ſum ſoever the plaintiffe will declare, &c. And this is by the common law of the land. *Ergo,* this is for a great cauſe. And the cauſe is, for that the law will that ſuch feoffors and their heires ought to occupie, &c. and take and enjoy all manner of profits, iſſues, & revenues, &c. as if the lands were their own, without interruption of the feoffees, notwithſtanding ſuch feoffment. *Ergo,* the ſame law giveth a privitie between ſuch feoffors and the feoffees upon confidence,

BY the ſtatute of 2. *H.* 5. cap. 3. ſtatute 2. it is enacted, that, in three caſes, he that paſſeth in an enqueſt, ought to have lands and tenements to the value of fortie ſhillings, *viz.* Firſt, upon triall of the death of a man. Secondly, in plea reall betweene partie and partie. And thirdly, in plea perſonall, where the debt or the dammages in the declaration amount unto fortie markes. (1) And it is worth the noting, that the judges that were at the making of that ſtatute did conſtrue it by equitie: for where the ſtatute ſpeakes in the disjunctive debt or dammages, they adjudged that where the debt and damages amounted to fortie markes, that it was within the ſtatute. *Forteſcue* [f] ſaith, *Ubi damna vel debitum in perſonalibus actionibus non excedunt quadraginta marcas monetæ Anglicanæ, hinc non requiritur, quòd juratores in actionibus hujuſmodi tantum expendere poſſint: habebunt tamen terram vel reditum ad valorem competentem, juxta diſcretionem juſtitiariorum, &c.* And foraſmuch as at the time of the making of this ſtatute, the greater part of the lands in England in thoſe troubleſome and dangerous times (when that unhappie controverſie betweene the houſes of Yorke and Lancaſter was begun) were in uſe; and the ſtatute was made to remedie a miſchiefe, that the ſheriffe uſed to return

(Ant. 156. b.)
28. H. 8. Dy. fol. 9.
Vid. W. 2. cap. 38. L'eſtat. de 21. E. 1. de juratis ponendis in aſſiſis, &c.
(Forteſcue 62. a. 27. El. c. 6. Ant. 157. a.)

9. H. 5. fol. 5.
[f] Forteſc. cap. 25.

les

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

(1) By 32. H. 8. inhabitants of corporate towns worth 40 s. in goods, may try felonies in ſeſſions and gaol deliveries for ſuch towns, and this is not repealed by ſubſequent ſtatutes concerning jurors. 1. Ven. 366. The 4th and 5th W. and M. c. 24. requires that all trials in the courts at Weſtminſter, or before the judges of *niſi prius*, oyer and terminer, or gaol delivery, or general ſeſſions of the peace, muſt be by jurors, each worth 10 l. *per annum*, of freehold or copyhold in the ſame county, if the trial be in England; and by jurors worth 6 l. *per annum*, if in Wales; and taleſmen muſt have 5 l. *per annum* in England, and 3 l. *per annum* in Wales, excepting ſtrayers returned *propter medietatem linguæ.*—But by the 14th and 15th Ann. c. 16. no hundreders are required except in proſecutions criminal, and on penal ſtatutes, becauſe in other caſes the *venire* ſhall be *de corpore comitatûs.*

A *grant*, in the original ſignification of the word, is a conveyance or transfer of an incorporeal hereditament. As livery of ſeiſin could not be had of incorporeal hereditaments, the transfer of them was always made by writing, in order to produce that notoriety in the transfer of them, which was produced in the transfer of corporeal hereditaments, by delivery of the poſſeſſion. But, except that a feoffment was uſed for the transfer of corporeal hereditaments, and a grant for the transfer of incorporeal hereditaments, a feoffment and a grant did not materially differ. —— Such was the original diſtinction between a feoffment and a grant. But, from this real difference in their *ſubject matter*, a difference was ſuppoſed to exiſt in *their operation*. A feoffment viſibly operated on the *poſſeſſion*, a grant could only operate on the *right* of the party conveying. Now, as poſſeſſion and freehold were ſynonymous terms, no perſon being conſidered to have the poſſeſſion of the lands but he who had, at leaſt, an eſtate of freehold in them; a conveyance which was conſidered as transferring the poſſeſſion, muſt neceſſarily be conſidered as transferring an eſtate of freehold; or, to ſpeak more accurately, as transferring the whole fee. But this reaſoning could not apply to grants; their eſſential quality being that of transferring things which did not lie in poſſeſſion; they therefore could only transfer the right; that is, could only transfer that eſtate which the party had a right to convey. It is in this ſenſe we are to underſtand the expreſſions which frequently occur in our law-books, where they deſcribe a feoffment to be a *tortious*, and a grant to be a *rightful*, conveyance. Thus, from a difference in the *quality* of the hereditament conveyed by thoſe two modes of conveyance, a difference has been conſidered to exiſt in their *operation*. A great part of Mr. Knowler's celebrated argument in the caſe of Tayler on the demiſe of Atkins v. Horde, turns on this diſtinction. See 1. Burr. 92. This appears to have been the outline of conveyances at the common law. The introduction of *uſes* produced a great revolution in this reſpect. Without entering into a minute diſcuſſion of the difference between uſes at common law, and uſes ſince the ſtatute of 27. H. 8. it is ſufficient to ſtate the following circumſtances. Uſes at the common law were, in moſt reſpects, what truſts are now. When a feoffment was made to uſes, the legal eſtate was in the feoffee. He tilled the poſſeſſion, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The perſon to whoſe uſe he was ſeiſed, called by the law-writers the *ceſtuy*

15. H. 7. 18. b. 13. H. 7. 7. b. 5. E. 4. 7. a.

ſimple men of ſmall or no underſtanding; and therefore the ſtatute provided, that hee ſhould returne ſufficient men: and albeit in law the land was the feoffees, yet for that they had it but upon truſt, and *ceſty que uſe* tooke the whole profits, as our author here ſaith, and in equity and conſcience the land was his, therefore the judges, for advancement and expedition of juſtice, extended the ſtatute (againſt the letter) to *ceſty que uſe*, and not to the feoffees.(1)

[n] 3. H. 6. 29. Challeng. 19. 21. H. 6. 37. (Ant. 157. a.)

[n] But note, if a man hath a freehold *pur terme d'auter vie*, or is ſeiſed in his wife's right, and is returned on a jurie, yet if after he be returned, *ceſty que vie*, or his wife die, hee may be challenged; and ſo it is if after the returne the lands be evicted.

Et ceo eſt per le common ley. Here three things are to be obſerved. Firſt, that the ſureſt conſtruction of a ſtatute is by the rule and reaſon of the common law. Secondly, that uſes were at the common law. Thirdly, that now ſeeing the ſtatute [g] of *27. H. 8. cap.* 10. which hath beene enacted ſince *Littleton* wrote, hath transferred the poſſeſſion to the uſe, this caſe holdeth not at this day; but this latter opinion before that ſtatute was good law, as *Littleton* here taketh it.

[g] 27. H. 8. cap. 10.

(8. Rep. 42. b.)

Meſme la ley done privitie, &c. Hereof it followeth, that when the law gives to any man any eſtate or poſſeſſion, the law giveth alſo a privitie and other neceſſaries to the ſame: and *Littleton* concludeth it with an illative, *ergo*, *meſme la ley done privitie*, which is verie obſervable for a concluſion in other caſes.

(Ante 156. b.)

And the (*quære*) here made in the end of this Section is not in the originall, but added by ſome other, and therefore to be rejected.

27. El. cap. 6.

Alſo ſince *Littleton* wrote, the ſaid ſtatute of *2. H. 5.* is altered: for where that ſtatute limited fortie ſhillings, now a latter ſtatute hath raiſed it to foure pounds, and ſo it ought to be contained in the *venire facias*.

Pl. Com. 352. b. in Delamere's caſe, and 349. b. Lib. 1. fol. 121, 122. 127. 140. in Chudleye's caſe. Lib. 2. fol. 58. 78. Lib. 6. fol. 64. Lib. 7. fol. 13. & 34.

Nota, an uſe is a truſt or confidence repoſed in ſome other, which is not iſſuing out of the land, but as a thing collaterall, annexed in privitie to the eſtate of the land, and to the perſon touching the land, *ſcilicet*, that *ceſty que uſe* ſhall take the profit, and that the terre-tenant ſhall make an eſtate according to his direction. So as *ceſty que uſe* had neither *jus in re*, nor *jus ad rem*, but only a confidence and truſt, for which he had no remedie by the common law, but for breach of truſt his remedie was only by *ſubpœna* in chancerie: and yet the judges, for the cauſe aforeſaid, made the ſaid conſtruction upon the ſaid ſtatute.

Forteſc. cap. 25, 26, 27.

Now how jurors ſhall bee returned, both in common plees, and alſo in plees of the crowne, and in what manner evidence ſhall be given to them, and how they ſhall be kept, untill they give their verdict, you may read in *Forteſcue*, and therefore need not to be here inſerted.

Sect. 465.

Flet. lib. 5. cap. 34. 25. H. 7. 14. 22. E. 4. 4.

IT is a certaine rule, that when a releaſe doth enure by way of enlarging of an eſtate, that there muſt be privitie of eſtate, as betweene leſſor and leſſee, donor and donee. For if *A.* make a leaſe to *B.* for life, and the

ITEM, releaſes ſolonque le matter en fait, aſcun ſoits ont lour effect per force d'enlarger l'eſtate celuy a que

ALSO, releaſes according to the matter in fact, ſometimes have their effect by force to enlarge the ſtate of him to *le*

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

(1) See lord Bacon's reading on the ſtatute of uſes, p. 8. *accord.* edit. 1785.

ceſtuy que uſe, had the beneficial property of the lands; had a right to the profits; and a right to call upon the feoffee to convey the eſtate to him, and to defend it againſt ſtrangers. This right at firſt depended on the conſcience of the feoffee: if he withheld the profits from the *ceſtuy que uſe*, or refuſed to convey the eſtate as he directed, the feoffee was without remedy. To redreſs this grievance, the writ of ſubpœna was deviſed, or rather adopted from the common-law courts, by the court of chancery, to oblige the feoffee to attend in court, and diſcloſe his truſt, and then the court compelled him to execute it. Thus uſes were eſtabliſhed. — They were not conſidered as iſſuing out of, or annexed to the land, as a rent, a condition, or a right of common; but as a truſt repoſed in the feoffee, that he ſhould diſpoſe of the lands, at the diſcretion of the *ceſtuy que uſe*, permit him to receive the rents, and in all other reſpects have the beneficial property of the lands. Yet an uſe, though conſidered to be neither iſſuing out of nor annexed to the land, was conſidered to be collateral to it, or rather as collateral to the poſſeſſion of the feoffees in it, and of thoſe claiming *that* poſſeſſion under them. Hence the diſſeiſor, abator, or intruder of the feoffee, or the tenant in dower, or by the courteſy of a feoffee, or the lord entering upon the poſſeſſion by eſcheat, were not ſeiſed to an uſe, though the eſtates in their hands were ſubject to rents common, and condrions. They were conſidered as coming in by a paramount and extraneous title; or, as it is called in the law, *in the poſt*, in contradiſtinction from thoſe who, claiming under the feoffee, were ſaid to be *in the per*. Thus, between the feoffee and *ceſtuy que uſe*, there was a confidence in the perſon, and privity in eſtate. (See Chudleigh's caſe, 1. Rep. 120. and Burgeſs and Wheat, 1. Bla. 123.) But this was only between the feoffee and *ceſtuy que uſe*. To all other perſons the feoffee was as much the real owner of the fee, as if he did not hold it to the uſe of another. *He* performed the feudal duties; *his* wife was intitled to dower; *his* infant heir was in wardſhip to the lord; and, upon *his* attainder, the eſtate was forfeited. To remedy theſe inconveniencies, the ſtatute of 27. H. 8. was paſſed, by which the poſſeſſion was diveſted out of the perſons ſeiſed to the uſe, and transferred to the *ceſtuys que uſe*. For by that ſtatute it is enacted, that when any perſon ſhall be ſeized of any lands to the uſe, confidence, or truſt of any other perſon or perſons, by reaſon of any bargain, ſale, feoffment, fine, recovery, contract, agreement, will, or otherwiſe; then, and in every ſuch caſe, the perſons having the uſe, confidence, or truſt, ſhould from thencefoth be deemed and adjudged in lawful ſeiſin, eſtate, and poſſeſſion of and in the lands, in the ſame quality, manner, and form, as they had before in the uſe. There ſeems to be little doubt, but that the intention of the legiſlature, in paſſing this act, was utterly to annihilate the exiſtence of uſes, conſidered as diſtinct from the poſſeſſion. But they have been preſerved under the appellation of *truſts*. The courts heſitated much before they allowed them under this new name. On the one hand, it had clearly been the intent of the legiſlature to deſtroy them, while they continued uſes at the common law; on the other hand, motives of equity, or rather of compaſſion, and the general bent of the nation, pleaded ſtrongly in their favour. The latter prevailed. Thus (to uſe the expreſſion of lord Hardwicke, 1. Atk. 591.) a ſtatute made upon great conſideration, and introduced in a ſolemn and pompous manner, has had no other effect than to add, at moſt, three words to a conveyance. Beſides this;—one of the chief inconveniences produced by truſts, was, the ſecret method they afforded for the transfer of property. The ſtatute intended to reſtore the notoriety of the old common-law conveyances. So far from effecting it, the exiſtence and transfer of fiduciary, or truſt eſtates has continued. Secret modes of transferring the poſſeſſion itſelf have

*le releaſe eſt fait. Si-come jeo leſſa certain terre a un home pur terme des ans, per force de que il eſt en poſſeſſion, et puis jeo releſſa a luy tout le droit que jeo aye en le terre ſans pluis parolx mitter en le fait, et deliver a luy le fait, donques il ad eſtate forſque pur terme de ſa vie. Et la cauſe eſt, pur ceo que quant le reverſion ou le remainder eſt en un home lequel voile enlarger per ſon releas l'eſtate le tenant, &c. il n'avera pluis greinder eſtate, mes en * tiel manner et forme ſicome † tiel feoffor fuit ſeiſie en fee, et volloit per ſon fait faire eſtate a un en certaine forme, et deliver a luy ſeiſin per force de meſme le fait: ſi en tiel fait de feoffement ne ſoit aſcun parol de enheritance, ‡ donques il ad forſque eſtate pur terme de vie; et iſſint il eſt en tiels releaſes faits per || eux en la reverſion ou en le remainder. Car ſi jeo leſſa la terre a un home pur terme de ſa vie, et puis jeo releſſa a luy tout mon droit ſauns plus dire en le releas,*

whom the releaſe is made. (1) As if I let certaine land to one for terme of yeares, by force whereof hee is in poſſeſſion, and after I releaſe to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath hee an eſtate but for terme of his life. And the reaſon is, for that when the reverſion or remaynder is in a man who will by his releaſe inlarge the eſtate of the tenant, &c. hee ſhall have no greater eſtate, but in ſuch manner and forme as if ſuch leſſor were ſeiſed in fee, and by his deed will make an eſtate to one in a certain forme, and deliver to him ſeiſin by force of the ſame deed: if in ſuch deed of feoffement there be not any word of inheritance, then he hath but an eſtate for life; and ſo it is in ſuch releaſes made by thoſe in the reverſion or in the remainder. For if I let land to a man for terme of his life, and after I releaſe to him all my right without more ſaying in the releaſe, his eſtate is not

leſſee maketh a leaſe for yeares, and after *A.* releaſeth to the leſſee for yeares, and his heires, this releaſe is void to enlarge the eſtate, becauſe there is no privity betweene *A.* and the leſſee for yeares. (Poſt. 296. a.)

If a man make a leaſe for twenty yeares, and the leſſee make a leaſe for ten yeares, if the firſt leſſor doth releaſe to the ſecond leſſee, and his heires, this releaſe is void for the cauſe aforeſaid. (Ant. 270. a.)

For the ſame cauſe, if the donee in taile make a leaſe for his owne life, and the donor releaſe to the leſſee and his heires, this releaſe is void to enlarge the eſtate.

And as privity is neceſſarie in this caſe, ſo privity only is not ſufficient. As if an infant make a leaſe for life, and the leſſee granteth over his eſtate with warranty, the infant at full age bringeth a *dum fuit infra ætatem*, the tenant voucheth his grantor, who entereth into warranty, the demandant releaſeth to him and his heires; here is privitie in law, and a tenancie in ſuppoſition of law: and yet becauſe hee *in rei veritate* hath no eſtate, it cannot enure to him by way of inlargement; for how can his eſtate be inlarged, that hath not any. (Ant. 264. a. Poſt. 285. b. Sect. 490. 491.)

If a tenant by the courteſie grant over his eſtate, yet he is tenant as to an action of waſte, attornement, &c. and yet a releaſe to him and his heires cannot enure to enlarge his eſtate that hath no eſtate at all. (Ant. 53. a. 54. a.)

But if a man make a leaſe for yeares, the remainder for life, a releaſe by the leſſor to the leſſee for yeares, and to his heires, is good, for that he hath both a privity and an eſtate; and the releaſe alſo to him in the remainder for life and his heires, is good alſo. (2. Roll. Abr. 400.)

If I grant the reverſion of my tenant for life to another for life, now ſhall not I have an action of waſte: (2) but if I releaſe to the grantee for life, and his heires, now hee hath 48. E. 3. 16. a. per Perſay et Finchden. 41. E. 3. 17. a. 7. E. 4. 17. (Ant. 54. a.)

* *tiel—la*, L. and M. and Roh. † *ſi* added in L. and M. and Roh. ‡ *&c.* added L. and M. and Roh.
|| *eux en la* not in L. and M. nor Roh.

(1) Here Littleton treats of releaſes which operate by enlargement of the eſtate of the releaſee. To make releaſes operate in this manner, it is neceſſary that the releaſee, at the time the releaſe is made, ſhould be in actual poſſeſſion of, or ſhould have a veſted intereſt in, the lands intended to be releaſed; that there ſhould be a privity between him and the releaſor; and that the poſſeſſion of the releaſee ſhould be notorious. Hence a tenant by *elegit*, or ſtatute-merchant, is not capable of a releaſe that is to operate by enlargement. But a tenant in dower or by the courteſy are, as they have the notoriety of poſſeſſion, and privity of eſtate, with reſpect to the releaſor. See Roll. Abr. 400. 401. and Gilb. Ten.

(2) Becauſe no perſon is intitled to an action of waſte, but he who has an eſtate immediate in remainder or reverſion, expectant on the eſtate of the perſon committing waſte. See ant. note 2. to page 218. b.

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have been diſcovered, and have totally ſuperſeded that notorious and public mode of transferring property, which the common law required, and the ſtatute intended to reſtore; and many modifications or limitations of real property have been allowed, which the common law did not admit. An attempt will be made to give the reader a ſuccinct view of theſe points, by ſome obſervations First, on the nature of the eſtates of the feoffee and the *ceſtuy que uſe*, ſince the ſtatute of uſes. Secondly, on the limitations and modifications of landed property unknown to the common law, which have been introduced under the ſtatute of uſes. Thirdly, on the mode by which conveyances to uſes operate. Fourthly, on the doctrine of powers deriving their effect from the ſtatute of uſes. Fifthly, on uſes not executed by the ſtatute. It is to be premiſed, that what is here ſaid of a feoffee to uſes, is equally to be underſtood of a releaſee, conuſee, or recoveror, who ſtands ſeiſed to uſes.—1. *As to the eſtates of the feoffee and the ceſtuy que uſe*;—the ſtatute unites the poſſeſſion to the uſe, ſo that the very inſtant the uſe is raiſed, the poſſeſſion is joined to it; and the uſe and the poſſeſſion are thereupon immediately conſolidated, and become convertible terms. Thus, had all uſes been veſted either in poſſeſſion or in right, no eſtate or intereſt of any kind could have been left in the feoffee. But uſes are frequently limited in contingency; to ſerve which, as they come *in eſſe*, it is neceſſary that there ſhould be a ſeiſin ſomewhere. When this caſe was firſt conſidered by the lawyers, it was found difficult to diſcover any mode of reaſoning conſiſtent with the ſyſtem generally received on the doctrine of uſes, by which that ſeiſin could be ſuppoſed to exiſt any where; or what the preciſe nature of it was. This was the great difficulty in Chudleigh's caſe. There the following caſe was put: Suppoſe a feoffment is made to the uſe of *A.* during his life, remainder to the uſe of his ſons ſucceſſively in tail; and, for want of ſuch iſſue, to the uſe of *B.* in fee; is there any, and what ſeiſin, to ſerve the uſes limited to the ſons of *A.*?—in whom does that ſeiſin exiſt?—and how does it operate? Upon this point the judges ſeem, by the accounts which have come to us of that caſe, particularly ſir Edward Coke's and lord chief-juſtice Popham's, to have held very different opinions. All agreed, that to the execution of an uſe under the ſtatute, it was indiſpenſibly

hath the fee ſimple, and ſhall puniſh the waſte done after (1).

It is further to be obſerved, that to a releaſe that enureth by way of enlargement of the eſtate, there is not only required privity, as hath beene ſaid, and an eſtate alſo, but ſufficient words in law to raiſe or create a new eſtate. If a man make a leaſe to *A.* for terme of the life of *B.* and after releaſe to *A.* all his right in the land, by this, *A.* hath an eſtate for terme of his owne life; for a leaſe for terme of his owne life is higher in judgement of law, than an eſtate for terme of another man's life.

(Ant. 42. a.)

16. H. 6. releaſe 45. 22. E. 2. releaſe. Statham.

(a) 13. H. 4. 6. Stanf. prer. 7. b. 18. E. 4. 8. 22. Aſſ. 12. 11. H. 7. 19. 10. H. 6. 11. (Poſt. 299. a. Ant. 270. b.)

Son eſtate n'eſt my enlarge. Mes ſi jeo releſſa a luy et a ſes heires, donques il ad fee ſimple; et ſi jeo releſſa a luy et a ſes heires de ſon corps engendres, donques il ad fee taile, &c. Et iſſint il covient de ſpecifier en le fait quel eſtate celuy a que le releas eſt fait avera.

enlarged. But if I releaſe to him and to his heires, then he hath a fee ſimple; and if I releaſe to him and to his heires of his bodie begotten, then hee hath a fee taile, &c. And ſo it behoveth to ſpecifie in the deed what eſtate hee to whom the releaſe is made ſhall have.

If a feme covert be tenant for life, a releaſe to the huſband and his heires is good, for there is both privity and an eſtate in the huſband, whereupon the releaſe may ſufficiently enure by way of enlargement (*a*); for by the entermarriage he gaineth a freehold in his wife's right.

Tout le droit. *Vide* Sect. 650.

Pur terme des ans. So it is if a releaſe be made to tenant by ſtatute, ſtaple or merchant, or tenant by *elegit*, as hath beene ſaid; and ſo likewiſe to gardeine in chivalrie which holdeth in for the value, by him in the reverſion of all his right in the land, by this a freehold paſſeth for the life of him to whom the releaſe is made, for that is the greateſt eſtate that can paſſe without apt words of inheritance.

If a man make a leaſe for ten yeares, the remainder for twenty yeares, he in the remainder releaſeth all his right to the leſſee, he ſhall have an eſtate for thirty yeares; for one chattle cannot drowne another, and yeares cannot be conſumed in yeares.†

(1. Leo. 303. 323. Ant. 193. b.)

Mes ſi jeo releaſe a luy et a ſes heires, &c. Here it is to bee obſerved, that when a releaſe doth enure by way of enlargement of an eſtate, no inheritance either in fee ſimple or fee taile, can paſſe without apt words of inheritance.

9. Eliz. Dier. 263. 10. Eliz. Bendloes. Litt. lib. 3. fol. 68. 69. 70. b. 130. b.

But there is a diverſity betweene a releaſe that enureth by way of enlargement of the ſtate and by way of *mitter l'eſtate* (2); for when an eſtate paſſeth by way of *mitter l'eſtate*, there ſometime there need not any words of inheritance. As if a joynt eſtate be made to the huſband and to his wife, and to a third perſon and to their heires, the third perſon releaſeth all his right to the huſband, this ſhall enure by way of *mitter l'eſtate*, and not by way of enlargement of the eſtate, becauſe the huſband had a fee ſimple, and needeth not to have any words of inheritance. So it is if the releaſe had been made to the wife.

See before in the chapter of Fee Simple, 9.

(*b*) 40. E. 3. 41. 46. E. 3. 19. H. 6. 33. H. 6. 5. 10. E. 4. 3.

(*b*) If there be three joyntenants, and one releaſe to one of the other all his right, this enureth by way of *mitter l'eſtate*, and paſſeth the whole fee ſimple without theſe words (heires). But if there be two joyntenants, and the one of them releaſe all his right to the other, this doth not to all purpoſes enure by way of *mitter l'eſtate*, for it maketh no degree, and hee to whom the releaſe is made ſhall for many purpoſes be adjudged in from the firſt feoffor, and this releaſe ſhall veſt all in the other joyntenant without theſe words (heires).

10. E. 4. 3. b. 37. H. 8. tit. alienation. Br. 31. 31. H. 4. 8. 40. Aſſ. 5. 9. Eliz. Dier. 263.

But if there be two coparceners, and the one releaſe all his right to the other, this ſhall enure by way of *mitter l'eſtate*, and ſhall make a degree, and without theſe words (heires) ſhall paſſe the whole fee ſimple. And it is to be obſerved, that to releaſes that enure by way of *mitter l'eſtate*, there muſt be privity of eſtate at the time of the releaſe.

(2. Roll. Abr. 403. 16. E. 4. 3. b.)

If two coparceners be of a rent, and the one of them take the ter-tenant to huſband, the other may releaſe to her, notwithſtanding the rent be in ſuſpence, and it ſhall enure by way of *mitter l'eſtate*, and ſhe may releaſe alſo to the ter-tenant, and that ſhall enure by way of extinguiſhment: but if ſhe releaſe to her ſiſter and to her huſband, it is good to bee ſeene how it ſhall enure.

Vid. Litt. fol. 68. 69. (8. H. 4. 8) (Poſt. 230. a.)

Littleton having now ſpoken of releaſes that enure by way of enlargement of the eſtate, and of releaſes that enure by way of *mitter l'eſtate*, proceedeth to releaſes that enure by way of *mitter le droit*. So as of that which hath beene and ſhall bee ſaid by our author of releaſes, it appeareth that ſome doe enure by way of enlargement of eſtate, ſome by way of *mitter l'eſtate*, ſome by way of *mitter le droit*, by way of entrie and feoffment, and ſome by extinguiſhment.

Sect.

(1) By the releaſe the tenant for life in remainder obtains the immediate remainder in fee.

(2) Here the releaſe operates by *mitter l'eſtate*; which is, where two perſons come in by the ſame feudal contract, as joint-tenants or copareeners, and one of them releaſes to the other the benefit of it. In releaſes which operate by this laſt mode, the releaſee being ſuppoſed to be already ſeiſed of the inheritance by virtue of the former feudal contract, and the releaſe only operating as a diſcharge from the right or pretenſion of another ſeiſed under the ſame contract, words of inheritance in the releaſe are uſeleſs; but where the releaſe operates by enlargement, the releaſee having no ſuch previous inheritance, and fiefs being either for life or in fee, as they are originally granted, the releaſe gives the eſtate to the releaſee for his life only, unleſs it be expreſsly made to him and his heirs.

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neceſſary that there ſhould be a perſon ſeiſed to the uſe; an uſe in poſſeſſion, reverſion, or remainder; and a *ceſtuy que uſe in eſſe*. From theſe poſitions ſome of the judges in that caſe inferred, that the whole uſe was executed in *A.* and *B.* in a manner that left *nothing* of the antient ſeiſin in the feoffees; and that the contingent uſe, when it came *in eſſe*, was executed out of the firſt livery, and the original eſtate, of the feoffees. Others held, that an actual eſtate in remainder was veſted in the feoffees, to ſerve the contingent uſes as they aroſe. But both theſe ſyſtems were found to be open to unanſwerable objections. For, with reſpect to the firſt, one of the requiſites indiſpenſibly neceſſary to the execution of an uſe, under the ſtatute, is, that there muſt be a perſon ſeiſed to the uſe, *at the time* of the execution of it. Now, if the whole original ſeiſin was diveſted out of the feoffees, there would not, when the ſon of *A.* was born, be any perſon ſeiſed to his uſe;—or, in other words, there could be no ſeiſin to that uſe. This would make the eſtates limited to the ſons of *A.* and all other contingent remainders, void in their creation, for want of a ſeiſin to ſupport them, when they come *in eſſe*.—With reſpect to the latter ſyſtem,—it is to be obſerved, that under the limitations upon which the caſe aroſe, *A.* took an eſtate for life in poſſeſſion, and *B.* took an eſtate in remainder in fee;—and that, previous to the birth of *A.*'s children, there was no uſe veſted in any perſon which ſeparated thoſe two eſtates. Thoſe uſes, therefore, were commenſurate to the whole fee, and admitted no opening for any intermediate veſted uſe. Beſides, the feoffor neither limited, nor intended to limit, any ſuch intermediate uſe to the feoffees. Thus, on one hand, the objection to ſuppoſing that *nothing* of the old ſeiſin remained in the feoffees; on the other, the objection to ſuppoſing that *any uſe or legal eſtate* remained in them, made it difficult to conceive what eſtate or ſeiſin could be in them, to ſerve the contingent uſe. To clear up this difficulty it was obſerved, that the poſſeſſion was not executed by the ſtatute, but in the ſame manner, and to the ſame extent, in which the uſe was limited. Now, in the caſe we have mentioned, the uſe was limited, and conſequently the poſſeſſion executed, to the uſe of *A.* during his life, remainder to *B.* in fee, but ſubject to the poſſibility of *A.*'s having ſons, and their becoming intitled to the uſe, and conſequently to the poſſeſſion, for an eſtate or eſtates in tail. Thus, during the ſuſpence of the contingent uſe, the feoffees had a poſſibility of poſſeſſion, untouched and unaffected by the ſtatute, as there was

no

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ITEM, aſcuns foits releaſes urera de mitter, et veſter le droit celuy que fait le releaſe a celuy a que le releas eſt fait. Sicome un home eſt diſſeiſi, et il releſſa a ſon diſſeiſor tout le droit que il ad, en ceſt cas le diſſeiſor ad ſon droit, iſſint que lou ſon eſtate adevant fuit torcious, ore per tiel releas il eſt fait loyal et droiturel.

ALSO, ſometimes releaſes ſhall enure *de mitter*, and veſt the right of him which makes the releaſe to him to whom the releaſe is made. As if a man be diſſeiſed, and he releaſeth to his diſſeiſor all his right, in this caſe the diſſeiſor hath his right, ſo as where before his ſtate was wrongfull, now by this releaſe it is made lawfull and right. (1)

ET il releſſa a ſon diſſeiſor, &c. This releaſe ſo putteth the right of the diſſeiſee to the diſſeiſor, that it changeth the quality of the eſtate of the diſſeiſor; for where his eſtate was before wrongfull, it is by this releaſe made lawfull. But how farre, and to what reſpects his eſtate is changed, ſhall be ſaid hereafter in this chapter in his proper place.

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*MES hic nota, que quant home eſt ſeiſi en fee ſimple d'aſcun terres ou tenements, et un auter voile releaſer a luy tout le droit que il ad en meſmes les tenements, il ne beſoigne de parler de les heires celuy a que le releas eſt fait, pur ceo que il avoit fee ſimple al temps de releas fait. Car ſi releas fuit fait a luy * pur un jour, ou pur un heure, ceo ſerroit auxy fort a luy en ley, ſicome il uſt releas a luy et a ſes heires. Car quant ſon droit fuit ale de luy a un foits per ſon releas ſans aſcun condition,*

BUT here note, that when a man is ſeiſed in fee ſimple of any lands or tenements, and another will releaſe to him all the right which he hath in the ſame tenements, he needeth not to ſpeake of the heires of him to whom the releaſe is made, for that he hath a fee ſimple at the time of the releaſe made. For if the releaſe was made to him for a day, or an houre, this ſhall bee as ſtrong to him in law, as if he had releaſed to him and his heires. For when his right was once gone from him by his releaſe without any con-

IL ne beſoigne a parler de les heires, &c. And the reaſon of *Littleton* hereof is, for that the diſſeiſor hath a fee ſimple at the time of the releaſe made. And this appeareth by that which hath beene ſaid before, ſo as regularly hee that hath a fee ſimple at the time of the releaſe made of a right, &c. needeth not ſpeake of his heires. (Poſt. 280. a.)

Car ſi releaſe fuit fait a luy pur un jour, &c. For the diverſity is betweene a releaſe of part of the eſtate of a right, and between a releaſe of a right in part of the land. And therefore *Littleton* here ſaith, that a releaſe of a right for a day or an houre is of as good force, as if he had releaſed his right to him and his heires. But if a man be diſſeiſed of two acres, he may releaſe his right in one of them, and yet enter into the other. Vide 6. E. 3. 17. 12. E. 4. tit. Deſcent. F. 29. (Ant. 252. a.)

Sans aſcun condition,

* *et a ſes heires* added L. and M. and Roh.

(1) Here Littleton treats of releaſes which operate by *mitter le droit*. Releaſes of this kind muſt be made either to the diſſeiſor, his feoffee, or his heir. In all theſe caſes the poſſeſſion is in the releaſee; the right in the releaſor; and the uniting the right to the poſſeſſion completes the title of the releaſee: but the different degrees of title in the diſſeiſor, his feoffee, or his heir, give the releaſes made to them different operations. They all agree in this reſpect, that no privity is required, or indeed can, from the nature of the caſe, exiſt between them and the releaſor.

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no uſe *in eſſe* to which it could be executed. The moment the uſe came *in eſſe*, the feoffees would be entitled at common law to the poſſeſſion, to the uſe, or, as we ſhould now call it, in truſt for the *ceſtuy que uſe*; but by the operation of the ſtatute, the poſſeſſion is inſtantaneouſly diveſted from the feoffees, and executed in the *ceſtuy que uſe*. Thus, by ſuppoſing a poſſibility of ſeiſin, but no actual ſeiſin or uſe to remain in the feoffees during the ſuſpence of the contingent uſe, a ſufficient ſeiſin is provided to ſerve the contingent uſe when it comes *in eſſe*, without interfering with, or breaking in upon, the legal fee.—II. With reſpect to the *limitations and modifications of landed property, unknown to the common law, which have been introduced under the ſtatute of uſes*; the principal of theſe are known by the general appellation of ſpringing or ſecondary uſes. No eſtate could be limited upon or after a fee, though it were a baſe or a qualified fee; nor could a fee or eſtate of freehold be made to ceaſe as to one perſon, and to veſt in another, by any common-law conveyance. But there are inſtances where, even by the common law, theſe ſecondary eſtates ſeem to have been allowed when limited, or rather when declared, by way of uſe. See Jenk. Cent. 8. caſe 52. After the ſtatute of uſes, the judges ſeem to have long heſitated whether they ſhould receive them. In Chudleigh's caſe it was ſtrongly contended, that it would be wrong to make "any eſtate of freehold and inheritance lawfully veſted, to ceaſe as to one, and to veſt in others "againſt the rule of law, and that no eſtates ſhould be raiſed by way of uſe but thoſe which could be raiſed by livery of ſeiſin at the "common law." The courts, however, admitted them. After they were admitted, it was found neceſſary to circumſcribe them within certain bounds; becauſe when an eſtate in fee ſimple is firſt limited, there is no method by which the firſt taker can bar or deſtroy the ſecondary eſtate, as it is not affected either by a fine or common recovery. It is now ſettled, that when an eſtate in fee ſimple is limited, a ſubſequent eſtate may be limited upon it, if the event upon which it is to take place be ſuch, that if it does happen, it muſt neceſſarily happen within the compaſs of one or more life or lives in being, and 21 years and ſome months over. It was long before the courts agreed upon this period. In the late caſe of Buckworth v. Thirkill, lord Mansfield mentioned that it was not ſettled till his time. It is obſerved in note c. to p. 20. a. "that this period was not arbitrarily preſcribed by our courts of juſtice with reſpect to the limitation of perſonal eſtates, but wiſely and reaſonably adopted in analogy to the caſes of freehold and inheritance, which cannot

be

tion, &c. Herein is implyed two diverſities: firſt, betweene the quantity of the eſtate in a right, and the quality thereof; for albeit the diſſeiſee cannot releaſe part of the eſtate, as hath beene ſaid, yet may he releaſe his right upon condition, as here it appeareth by *Littleton*; [c] and it agreeth with our bookes.

&c. a celuy que ad fee ſimple, il eſt ale a touts jours.

dition, &c. to him that hath the fee ſimple, it is gone for ever.

[c] 4. E. 2. Releaſe 50. 43. Aſſ. 12. 17. Aſſ. 2. 31. Aſſ. 13. 21. H. 24.

Alſo here is another diverſity betweene a right, whereof *Littleton* putteth his caſe, which is favoured in law, and a condition created by the party which is odious in law, for that it defeateth eſtates. And therefore if a condition be releaſed upon condition, the releaſe is good, and the condition void.

(6. Rep. 62. a. Poſt. 297. a. 300. b.)

What things may be done upon condition, is too large a matter to handle in this place, our author having treated of Conditions before: only to give a touch of ſome things omitted there, ſhall ſuffice. An expreſſe manumiſſion of a villeine cannot be upon condition, for once free in that caſe, and ever free; alſo an attornment to a grantee upon condition, the condition is void becauſe the grant is once ſettled. But this is to be underſtood of a condition ſubſequent, and not of a condition precedent; for in both thoſe caſes, the condition precedent is good. But letters patents of denization made to an alien, may be either upon condition ſubſequent or precedent; and ſo may the king make a charter of pardon to a man of his life upon condition, as is aboveſaid.

Rot. Parliament 18. H. 6. num. 29. Ap. Gwilliam's caſe. 10. E. 3. cap. 2. 3. H. 7. f. 6.

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*MES lou * home ad un reverſion en fee ſimple, ou un remainder en fee ſimple, al temps de releas fait, la s'il voyle releaſer al tenant pur terme d'ans, ou pur terme de vie, ou al tenant en le taile, il covient a determiner l'eſtate que celuy a que le releas eſt fait avera per force de meſme le releas, pur ceo que tiel releas enurera pur enlarger l'eſtate de celuy a que le releas eſt fait.* †

(2. Roll. Abr. 400.)

BUT where a man hath a reverſion in fee ſimple, or a remainder in fee ſimple, at the time of the releaſe made, there if he will releaſe to the tenant for yeares, or for life, or to the tenant in taile, hee ought to determine the eſtate which he to whom the releaſe is made ſhal have by force of the ſame releaſe, for that ſuch releaſe ſhall enure to enlarge the eſtate of him to whom the releaſe is made. (1)

Of this ſufficient hath beene ſaid before.

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MES autrement eſt lou home ad forſque droit a la terre, et n'ad riens en le reverſion ne en le remainder en fait. Car ſi tiel home releſſa tout ſon droit a un que eſt tenant de le franktenement, tout ſon droit eſt ale, coment que nul mention ſoit fait de les heires celuy a que le releas eſt fait. Car ſi jeo leſſa terres ‡ a un home pur terme

BUT otherwiſe it is where a man hath but a right to the land, and hath nothing in the reverſion nor in the remainder in deed. For if ſuch a man releaſe all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heires of him to whom the releaſe is made. For if I let lands to one for terme of his life, if I after releaſe *de*

* *home—un*, L. and M. and Roh. † *&c.* added L. and M. and Roh. ‡ *ou tenements* added L. and M. and Roh.

(1) All releaſes *per mitter le droit* alſo agree in this, that words of inheritance are not neceſſary in releaſes which operate by *mitter le droit*; as the diſſeiſor, to whom, or to whoſe feoffee, or heir, that releaſe is made, acquires the fee by the diſſeiſin, and therefore cannot take it under the releaſe. In this reſpect they differ from releaſes by enlargement.

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be limited by way of remainder, ſo as to poſtpone a complete bar of the entail, by fine or recovery, for a larger ſpace. The ſame analogy has been obſerved with reſpect to theſe ſecondary fees, when limited upon an eſtate in fee ſimple. But the reaſon which induced the courts to adopt this analogy, with reſpect to theſe eſtates when limited upon an eſtate in fee ſimple, does not hold when they are limited upon or after an eſtate in tail; becauſe, when they are limited upon or after an eſtate in tail, the tenant in tail, by ſuffering a common recovery before the event takes place, bars or defeats the ſecondary eſtate, and acquires the fee ſimple abſolutely diſcharged from it. See Page v. Haywood, 2. Salk. 570. And ſee 1. Lev. 35. Goodman v. Cook, 2. Sid. 102. Hence if the ſecondary eſtates we are ſpeaking of, are limited upon or after an eſtate in tail, they may be limited generally, without reſtraining or confining the event or contingency upon which they are to take place, to any period. Thus, if an eſtate be limited to *A.* and his heirs; and if *B.* (a perſon *in eſſe*) dies, without leaving any iſſue of his body living at the time of his deceaſe; or having ſuch iſſue, if all of them die before any of them attain the age of 21 years, then to *C.* and his heirs; here the limitation to *C.* is limited after a previous limitation in fee ſimple; and it is a good limitation, becauſe the event upon which it is to take place, muſt, if it does take place, neceſſarily take place within the period of a life in being, and 21 years and a few months. But if the eſtate were limited to *A.* and his heirs; and after the deceaſe of *B.* and a total failure of heirs or heirs male of the body of *B.* to *C.* and his heirs; here, as the ſecondary uſe is limited after a previous limitation in fee ſimple, and the event on which the fee limited to *C.* is to take place is not ſuch as muſt neceſſarily happen within the period we are ſpeaking of (for *B.* may have iſſue, and that iſſue not fail till many years after the expiration of 21 years after *B.*'s deceaſe), the limitation to *C.* and his heirs is void. But ſuppoſe the eſtates were limited to *A.* for life, then to truſtees and their heirs during his life, for preſerving contingent remainders; then to *A.*'s firſt and other ſons ſucceſſively in tail male; with ſeveral remainders over; with a proviſo, that if *B.* dies, and there ſhould be a total failure of heirs or heirs male of his body, the uſes limited to *A.* and his ſons, and the remainders over, ſhall determine, and the lands remain and go over to *C.* and his heirs; here the limitation to *C.* and his heirs is limited upon or after previous limitations for life, or in tail; and the event upon which it is ſo to take effect, may poſſibly not happen till after a period of one or more life or lives in being, and 21 years. But ſo far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds we have mentioned; and ſo far as it is limited upon an event which may happen during the continuance of the eſtate of the tenants in tail, or after them, the firſt tenant in tail in poſſeſſion by ſuffering

de ſa vie, ſi jeo puis releaſe a luy pur enlarger ſon eſtate, il covient que jeo releſſa a luy et a ſes heires de ſon corps engender, * *ou a luy et a ſes heires, ou per tiels parols, Aaver et tener a luy et a ſes heires* † *de ſon corps engendres,* ‡ *ou a les heires males de ſon corps engendres, ou tiels ſemblables eſtates, ou autrement il n'ad pluis greinde eſtate que il avoit adevant.*

to him to enlarge his eſtate, it behoveth that I releaſe to him and to his heires of his body engendred, or to him and his heires, or by theſe words, To have and to hold to him and to his heires of his bodie engendred, or to the heires males of his bodie engendred, or ſuch like eſtates, or otherwiſe hee hath no greater eſtate than hee had before.

A Un que eſt tenant de franktenement. Here it appeareth, that to a releaſe of a right, made to any that hath an eſtate of freehold in deed or in law, no privitie at all is requiſite. As if a diſſeiſor make a leaſe for life, if the diſſeiſee releaſe to the leſſee, this is good, and directly within the rule of *Littleton*, becauſe the leſſee hath an eſtate of freehold, albeit there be no privitie. And ſo it is if a diſſeiſor make a leaſe to *A.* and his heires during the life of *B.* and *A.* dieth, a releaſe by the diſſeiſee to his heire, before hee doth actually enter, is good. (Ant. 266.)

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MES ſi mon tenant a terme de vie leſſa meſme la terre ouſter a un auter pur terme de vie de ſon leſſee, le remainder a un auter en fee, ore ſi jeo releſſa a celuy a que mon tenant leſſaſt pur terme de vie, § *ceo ſerra barre a touts jours, coment que nul mention ſoit fait de ſes heires, pur ceo que al temps de releaſe fait jeo avoy nul reverſion, mes tantſolement un droit d'aver la reverſion. Car per tiel leas, et le remainder ouſter, que mon tenant fiſt en ceo cas, mon reverſion fuit diſcontinue,* || *&c. et tiel releaſe urera a celuy en le remainder, d'aver advantage de ceo, auxibien come al tenant a terme de vie.*

BUT if my tenant for life letteth the ſame land over to another for terme of the life of his leſſee, the remainder to another in fee, now if I releaſe to him to whom my tenant made a leaſe for terme of life, I ſhall bee barred for ever, albeit that no mention be made of his heires, for that at the time of the releaſe made I had no reverſion, but only a right to have the reverſion. For by ſuch a releaſe, and the remainder over, which my tenant made in this caſe, my reverſion was diſcontinued, &c. and this releaſe ſhall enure to him in the remainder, to have advantage of it, aſwell as to the tenant for terme of life (1). (Poſt. 327.)

LITTLETON having before ſpoken of releaſes which enure by way of enlargement, by way of *mitter l'eſtate*, and by way of *mitter le droit*, here ſpeaketh of a releaſe of a right which in ſome reſpects enureth by way of extinguiſhment; as in this caſe which *Littleton* here putteth, the releaſe to the leſſee of the leſſee doth not enure by way of *mitter le droit*, for then ſhould he have the whole right, but as it were by way of extinguiſhment, in reſpect of him that made the releaſe, and that it ſhall enure to him in the remainder, which is a qualitie of an inheritance extinguiſhed. (Poſt. 279.)

* *ou* not in L. and M. nor Roh. † *males* added L. and M. and Roh. ‡ *ou a les heires males de ſon corps engendres* not in L. and M. nor Roh. § *ceo—jeo*, L. and M. and Roh. || *&c.* not in L. and M. and Roh.

(1) Here Littleton ſhews the operation of a releaſe *per mitter le droit*, when made to the feoffee of the diſſeiſor. The feoffee is in by title; his eſtate cannot be diveſted, or diſaffirmed, but by an act equal to that which created it. A releaſe does not affect his poſſeſſion or title, but diſcharges it from the right of the releaſor; ſo that whether the whole fee is in the feoffee, or carved out into particular eſtates, it remains unaltered by the releaſe, except as it is diſcharged by it from the right of the releaſor.

ſuffering a recovery, before the event happens, may bar the limitations over, and thereby acquire an eſtate in fee ſimple; and therefore the limitation over to C. and his heirs, is good.—III. With reſpect to the *mode by which conveyances to uſes operate.* It is to be obſerved, that to raiſe an uſe under the ſtatute, the poſſeſſion or ſeiſin to ſerve the uſe muſt be in ſome perſon diſtinct from the *ceſtuy que uſe*; the ſtatute requiring that the perſon ſeiſed to the uſe, and the perſon to whom the uſe is limited, ſhould be different perſons; ſo that if the poſſeſſion is conveyed, and the uſe limited to the ſame perſon, at leaſt if the uſe is limited in fee ſimple, that is not an uſe executed by the ſtatute, but the party is in by the common law. For the ſtatute of uſes mentions thoſe caſes only, where "any perſon or perſons ſtand ſeiſed to the uſe of any other perſon or perſons." Thus, in the caſe of Jenkins v. Young, Cro. Car. 231. 245. lands were given to two, *habendum* to the uſe of them and the heirs of their two bodies. It was argued, that the eſtate out of which the uſe ſhould riſe, was but for their lives, and that therefore, on the death of the *ceſtuys que vie*, the uſe limited upon their eſtate was determined: but the court held, that where an eſtate is limited to one, and the uſe to a ſtranger, the uſe ſhould not be more than the eſtate out of which it was derived; but that when the limitation is to two, *habendum* to the uſe of them and the heirs of their bodies, it was no limitation of the uſe, nor was the uſe to be executed by the ſtatute. So in Gilb. Rep. p. 17. it is expreſsly ſaid, that if a fine be levied to a man and his heirs, to the uſe of him and his heirs, he ſhall take by the common law, and not by way of uſe. And ſee Dyer 186. and ant. 22. b. and Bac. uſes, ed. 1785. p. 63. Com. 313. Skin. 209. Now the poſſeſſion or ſeiſin on which the uſe is declared, muſt either remain in the party, or be transferred to ſome third perſon. This is the meaning of thoſe paſſages in the books, where it is ſaid that uſes are either raiſed by tranſmutation of the poſſeſſion, or without ſuch tranſmutation. A bargain and ſale, and a covenant to ſtand ſeiſed, operate on the poſſeſſion of the bargainor or covenantor. A feoffment, fine, and common recovery, operate on the poſſeſſion of the feoffee, conuſee, or recoveror. A leaſe and releaſe has a mixt operation; the leaſe having the operation of, and being in fact, a bargain and ſale under the ſtatute, and the eſtate of the releaſee being extended or enlarged to an eſtate of inheritance by the operation of the releaſe at the common law. For with reſpect, firſt, to a bargain and ſale, and a covenant to ſtand ſeiſed; a bargain and ſale is conſidered as a real contract, whereby the bargainor for ſome pecuniary conſideration bargains and ſells, that is, contracts to convey the lands to the bargainee. A covenant to ſtand ſeiſed to uſes, is where a man covenants to ſtand ſeiſed of them to the uſe of his wife, his child, or kinſman. Here, in the firſt inſtance, the bargainor ſtands ſeiſed to the uſe of the bargainee; in the ſecond, the covenantor ſtands ſeiſed to the uſe of the parties intended to be benefited.

extinguiſhed. But yet the right is not extinct in deed, as ſhall be ſaid hereafter in this chapter.

(Poſt. 327. b.)

Mon reverſion fuit diſcontinue, &c. Here diſcontinue is in a large ſenſe taken for deveſted, though the entrie of the leſſor be not taken away, which is implyed in this (*&c.*)

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SONT come un tenant en ley. Which is certainly true in this caſe of remainder, and ſo it is alſo in caſe of a reverſion; as if a diſſeiſor make a leaſe for life, and the diſſeiſee doth releaſe all his right to the leſſee, this releaſe ſhall enure to him in the reverſion, albeit they have ſeverall eſtates, as hath beene ſaid, which is implyed in this (*&c.*)

CAR a cel intent le tenant a terme de vie et celuy en le remainder ſont ſicome un tenant en ley, et ſont ſicome un tenant fuit ſole ſeiſie en ſon demeſne come de fee al temps de tiel releaſe fait a luy, &c.

FOR to this intent the tenant for terme of life and he in the remainder are as one tenant in law, and are as if one tenant were ſole ſeiſed in his demeſne as of fee at the time of ſuch releaſe made unto him, &c.

But if a diſſeiſor make a leaſe for life, the remainder in fee, albeit they to ſome purpoſes (as here is ſaid) are as one tenant in law, yet if the diſſeiſee releaſe all actions to the tenant for life, after the death of the tenant for life, he in the remainder ſhall not take benefit of this releaſe, for it extended only to the tenant for life, as it is holden [a] in *Edward Altham's* caſe. And in like manner, if the diſſeiſor make a leaſe for life, and the diſſeiſee releaſe all actions to the leſſee, this inureth not to him in the reverſion; and ſo our author is to be underſtood of a releaſe of rights, and not of a releaſe of actions, to the tenant for life, as to or for the benefit of him in the remainder or reverſion.

[a] Lib. 8. fol. 148. Edw. Altham's caſe. (Poſt. Sect. 494.)

Sect. 472.

SI home ſoit diſſeiſie, &c. This is to bee underſtood where tenant in fee ſimple is diſſeiſed and releaſe; for if tenant for life be diſſeiſed by two, and he releaſeth to one of them, this ſhall inure to them both; for he to whom the releaſe is made, hath a longer eſtate than hee that releaſeth, and therefore cannot inure to him alone, to hold out his companion, for then ſhould the releaſe inure by way of entrie and grant of his eſtate; and conſequently the diſſeiſor, to whom the releaſe is made, ſhould become tenant for life, and the reverſion reveſted in the leſſor, [b] which ſtrange tranſmutation and change of eſtates in this caſe the law will not ſuffer. But if leſſee for yeares be ouſted, and he in the rever-

21. H. 6. 41. (Ant. 194. a. b.)

[b] 13. E. 4. tit. Diſcent. F. 29.

ITEM, ſi home ſoit diſſeiſie per deux, s'il releſſa a un d'eux, il tiendra ſon compaignion hors de terre, et per tiel releaſe il avera le ſole poſſeſſion et eſtate en la terre. Mes ſi un diſſeiſor enfeoffa deux en fee, et le diſſeiſee releſſa a l'un des feoffees, ceo urera a ambideux de les feoffees, et la cauſe de diverſity entre ceux deux caſes eſt aſſets preignant. * *Pur*

ALSO, if a man be diſſeiſed by two, if he releaſe to one of them(1), hee ſhall hold his companion out of the land, and by ſuch releaſe hee ſhall have the ſole poſſeſſion and eſtate in the land. But if a diſſeiſor infeoffe two in fee, and the diſſeiſee releaſe to one of the feoffees, this ſhal inure to both the feoffees, and the cauſe of the diverſity between theſe two caſes is pregnant e-

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* The remainder of this Section not in L. and M. nor Roh.

(1) Here the releaſe is to the diſſeiſors themſelves. They have only a bare poſſeſſion, preceded by no previous conveyance, and founded on no right or title, and therefore the releaſe of the diſſeiſee who has the right, paſſes the right to the diſſeiſor to whom it is made, and his holding out his companion is an act of notoriety equal to that by which the joint eſtate by diſſeiſin was originally acquired. Thus the poſſeſſion of each of the eſtates being founded on an equal degree of title, the diſſeiſor to whom the releaſe is made, having the right, muſt be preferred to him who has none: ſo that, in this caſe, the releaſe is tantamount to an actual entry and feoffment.

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benefited. In both, the poſſeſſion or ſeiſin remains in the party; and the ſtatute draws it from them, and executes it in the *ceſtuys que uſe*. Secondly, with reſpect to a feoffment, fine, and common recovery; the tranſfer or tranſmutation of the poſſeſſion from the feoffor, conuſor, and recoveree to the feoffee, conuſee, or recoveror, is effected ſolely by the operation of theſe conveyances or aſſurances at the common law; and if the uſe is declared to the feoffee, conuſee, or recoveror, in fee ſimple, the conveyance is completed at the common law, in the ſame manner as if the ſtatute of uſes had never paſſed. It is only when the uſe is declared to a third perſon, that the ſtatute has any operation; and then, by the operation of the ſtatute, the poſſeſſion previouſly transferred or tranſmuted to the feoffee, conuſee, or recoveror, by the operation of the feoffment, fine, and common recovery, at the common law, is diveſted from the feoffee, conuſee, or recoveror, and veſted in the *ceſtuys que uſe* by the ſtatute. Thirdly, as to the conveyance by leaſe and releaſe. The form of that conveyance is originally derived to us from the common law, and it is neceſſary to diſtinguiſh in what reſpect it operates as a common-law conveyance, and in what it operates under the ſtatute of uſes. At the common law, where the uſual mode of conveyance was by feoffment with livery of ſeiſin, if there was a tenant in poſſeſſion, ſo that livery could not be made, the reverſion was granted, and the tenant attorned to the reverſioner. As by this mode the reverſion or remainder of an eſtate might be conveyed without livery, when it depended on an eſtate previouſly exiſting, it was natural to proceed one ſtep further, and to create a particular eſtate for the expreſs and ſole purpoſe of conveying the reverſion; and then, by a ſurrender or releaſe, either of the particular eſtate to the reverſioner, or of the reverſion to the particular tenant, the whole fee veſted in the ſurrenderee or releaſee. It was afterwards obſerved, that there was no neceſſity to grant the reverſion to a ſtranger; and that a particular eſtate was made to the perſon to whom it was propoſed to convey the fee, the reverſion might be immediately releaſed to him; which releaſe, operating by way of enlargement, would give the releaſee the fee. In all theſe caſes, the particular eſtate was only an eſtate for years; for at the common law, the ceremony of livery of ſeiſin was neceſſary to create even an eſtate of freehold, as it is to create an eſtate of inheritance. Still an actual entry would be neceſſary on the part of the particular tenant; for, without actual poſſeſſion, the leſſee is not capable of a releaſe, operating by way of enlargement. But this neceſſity of entry for the purpoſe of obtaining the poſſeſſion, was ſuperſeded, or made unneceſſary, by the ſtatute of uſes: for by that ſtatute, the poſſeſſion was immediately transferred to the

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ceo que ils veignont eins per feoffment, et l'auters per tort, &c. nough. For that they come in by feoffment, and the others by wrong, &c.

diſſeiſor hath a freehold, whereupon the releaſe of tenant for life may enure; but the diſſeiſor hath no terme for yeares, whereupon the releaſe of the leſſee for yeares may enure.

And ſo it is if donee in taile be diſſeiſed by two, and releaſeth to one of them, it ſhall enure to them both. But if the king's tenant for life be diſſeiſed by two, and he releaſeth to one of them, he ſhall hold out his companion, for the diſſeiſor gained but the eſtate for life. So if two joyntenants make a leaſe for life, and after doe diſſeiſe the tenant for life, and he releaſe to one of them, he ſhall hold out his companion, for the diſſeiſin was but of an eſtate for life.

If tenant for life be diſſeiſed by two, and he in the reverſion and tenant for life joyne in a releaſe to one of the diſſeiſors, he ſhall hold his companion out, and yet it cannot enure by way of entrie and feoffment. But if they ſeverally releaſe their ſeverall rights, their ſeverall releaſes ſhall enure to both the diſſeiſors.

But here in *Littleton*'s caſe, where tenant in fee ſimple is diſſeiſed by two, and releaſeth to one of them, this for many purpoſes enureth by way of entrie and feoffment, and therefore he to whom the releaſe is made ſhall hold out his companion, and be made ſole tenant of the fee ſimple. And this holdeth not only in caſe of a diſſeiſin, but alſo in caſe of intruſion and abatement: but neceſſarily he to whom the releaſe is made muſt bee in by wrong, and not by title.

If two men doe gaine an advowſon by uſurpation, and the right patron releaſeth to one of them, he ſhall not hold out his companion, but it ſhall enure to them both; for ſeeing their clerke came in by admiſſion and inſtitution, which are judiciall acts, they are not merely in by wrong: for an uſurpation ſhall cauſe a remitter, as it appeareth in *F. N. B.* 31. *m.*

But if a leaſe for life be made, the remainder for life, the remainder in fee, and he in remainder for life diſſeiſeth the tenant for life, and then tenant for life dieth, the diſſeiſin is purged, and he in the remainder for life hath but an eſtate for life. And ſo note a diverſitie where the particular eſtate for life is precedent, and when ſubſequent.

19. H. 6. 27. 38 H. 6. 28. Caſe de occupant. (Ant. 42. b.)

Where our author putteth his caſe of one diſſeiſed, put the caſe that two joyntenants in fee be diſſeiſed by two, and one of the diſſeiſees releaſe to one of the diſſeiſors all his right, he ſhall not hold out his companion, becauſe the releaſe is but of the moytie, without any certaintie. If a man be diſſeiſed by two women, and one of them take huſband, and the diſſeiſee releaſe to the huſband, this ſhall enure to the advantage of both the diſſeiſors, becauſe the huſband was no wrong doer, but in a manner in by title.

(Poſt. 278. a.)

Il avera le ſole poſſeſſion et eſtate. If two diſſeiſors be, and they make a leaſe for life, and the diſſeiſee releaſe to one of them, this ſhall enure to them both, and to the benefit of the leſſee for life alſo: for he cannot by the releaſe have the ſole poſſeſſion and eſtate, for part of the eſtate is in another.

And ſo it is (as it ſeemeth) if the diſſeiſors make a leaſe for yeares, and the diſſeiſee releaſe to one of them, this ſhall enure to them both, for by the releaſe he cannot have the ſole poſſeſſion: and it appeareth by *Littleton*, that he muſt have the ſole poſſeſſion, and hold his companion out. But the morgagee upon condition, having broken the condition, is diſſeiſed by two, the morgagor having title of entrie for the condition broken, releaſe to the one diſſeiſor, albeit they be in by wrong, yet the releaſe ſhall enure to them both for two cauſes: firſt, for that they are not wrong doers to the morgagor, but to the morgagee; and by *Littleton*'s caſe it appeareth, that wrong is done to him that made the releaſe: ſecondly, that hee that makes the releaſe hath but a title by force of a condition, and *Littleton*'s caſe is of a right. Like law of an entrie for mortmaine, or a conſent to raviſhment, &c.

Mes ſi un diſſeiſor infeoffa deux, &c. And the reaſon of this diverſitie is, for that the feoffees are in by title, and are preſumed to have a warrantie, which is much favoured in law, and the diſſeiſors are meerely in by wrong. And the equitie of the law doth preſerve in this caſe the benefit of the eſtranger to the releaſe comming in by one joynt title.

21. H. 6. 41. (Ant. 194. b. 5. Rep. 70.)

Pur ceo que ils veignont eins per feoffment, et l'auters per tort. This is of a new addition, and not in the originall, and therefore I paſſe it over.

Sect.

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ceſtuy que uſe; ſo that a bargainee under that ſtatute is as much in poſſeſſion, and as capable of a releaſe before or without entry, as a leſſee is at the common law after entry. All, therefore, that remained to be done to avoid, on the one hand, the neceſſity of livery of ſeiſin from the grantor; and to avoid, on the other, the neceſſity of an actual entry on the part of the grantee; was, that the particular eſtate (which, for the reaſons abovementioned, ſhould be an eſtate for years) ſhould be ſo framed, as to be a bargain and ſale within the ſtatute. Originally it was made in ſuch a manner as to be both a leaſe at the common law, and a bargain and ſale under the ſtatute. But as it is held, that where conveyances may operate both by the common law and ſtatute, they ſhall be conſidered to operate by the common law, unleſs the intention of the parties appears to the contrary; it became the practice to inſert, among the operative words, the words *bargain and ſale* (in fact, it is more accurate to inſert no other operative words), and to expreſs that the bargain and ſale or leaſe is made to the intent and purpoſe, that thereby, and by the ſtatute of uſes, the leſſee may be capable of a releaſe. The bargain and ſale, therefore, or the leaſe for a year, as it is generally called, operates, and the bargainee is in the poſſeſſion, by the ſtatute. The releaſe operates by enlarging the eſtate or poſſeſſion of the bargainee to a fee: this is at the common law, and if the uſe be declared to the releaſee in fee ſimple, it continues an eſtate at the common law; but if the uſe is declared to a third perſon, the ſtatute again intervenes, and annexes or transfers the poſſeſſion of the releaſee to the uſe of the perſon to whom the uſe is declared. It has been ſaid, that the poſſeſſion of the bargainee, under the leaſe, is not ſo properly merged in, as enlarged by the releaſe: but, at all events, it does not, after the releaſe, exiſt diſtinct from the eſtate paſſed by the releaſe. As the operation of a leaſe and releaſe depends upon the leaſe, or bargain and ſale, if the grantor *is a body corporate*, the leaſe will not operate under the ſtatute of uſes; for a body corporate cannot be ſeiſed to an uſe, and therefore the leaſe or poſſeſſion, conſidered as a bargain and ſale under the ſtatute, is void; and the releaſe, then, muſt be of no effect, for want of a previous poſſeſſion in the releaſee. In caſes of this nature, therefore, it is proper to make the conveyance by feoffment, or by a leaſe and releaſe, with an actual entry by the leſſee, previous to the releaſe; after which the releaſe will paſs the reverſion. It may alſo be obſerved, that in *exchanges*, if one of the parties die before the exchange is executed by entry, the exchange is void. Ant. 176. But if the exchange be made by leaſe and releaſe, this inconvenience is prevented, as the ſtatute executes the poſſeſſion without entry, and all incidents annexed to an exchange, at common law, will be preſerved.——IV. The next conſideration is, upon the doctrine of *powers deriving their effect from the ſtatute of uſes*; but the nature of theſe notes requires, that what is ſaid on this head ſhould be confined to ſome general obſervations upon the mode by which powers operate; and the relation which the deeds by which they are executed, bear to the deeds by which they are created. As to the firſt all powers of this kind are, in fact, powers of revocation and appointment: indeed, every declaration of an uſe may, in ſome reſpect, be conſidered as an appointment of the uſe or uſes to which the feoffee is to ſtand ſeiſed: but the word appointment is generally applied to thoſe caſes, where either the power of appointment is firſt reſerved, or given, with a ſubſequent limitation of uſes, to take place until, and in default of the appointment; or where the uſes are firſt limited, and a power is afterwards given to ſome perſon to limit other uſes. As the uſes limited under this power cannot operate but by the poſtponing, abridging, or defeating the prior uſes, it is uſual in ſome caſes, to precede the power of appointment by a power of revocation. But this is immaterial. The powers of leaſing, jointuring, charging, ſelling, and exchanging, uſually inſerted in marriage ſettlements, are powers of revocation and appointment. All of them poſtpone, abridge, or defeat, in a greater or leſs degree, the previous

IV.

Sect. 473.

*ITEM, ſi jeo ſue diſſeiſie, et mon diſſeiſor eſt diſſeiſie, ſi jeo releaſe a le diſſeiſor de mon diſſeiſor, jeo n'avera a unque aſſiſe ne entra ſur * le diſſeiſor, pur ceo que ſon diſſeiſor ad mon droit per mon releaſe, &c. † Et iſſint il ſemble en tiel cas, ſi ſoyent xx. diſſeiſors, cheſcun apres auter, et jeo releſſa a le darreine diſſeiſor, ‡ celuy diſſeiſor barrera touts les auters de lour actions et lour titles. Et la cauſe eſt, § come il ſemble, pur ceo que en mults caſes, quant un home ad loyal title d'entre, ‖ coment que il n'entra pas, il defeatera touts meane titles per ſon releaſe, &c. Mes ceo n'eſt ¶ my en cheſcun caſe, come ſerra dit apres.*

ALSO, if I bee diſſeiſed, and my diſſeiſor is diſſeiſed, if I releaſe to the diſſeiſor of my diſſeiſor, I ſhall not have an aſſiſe nor enter upon the diſſeiſor, becauſe his diſſeiſor hath my right by my releaſe, &c, And ſo it ſeemeth in this caſe, if there be xx. diſſeiſed one after another, and I releaſe to the laſt diſſeiſor, this diſſeiſor ſhall barre all the others of their actions and their titles. And the cauſe is, as it ſeemeth, for that in many caſes, when a man hath lawfull title of entrie, although he doth not enter, hee ſhall defeat all meane titles by his releaſe, &c. But this holds not in everie caſe, as ſhall be ſaid hereafter (1).

HERE it is to be obſerved, that a releaſe by one whoſe entry is lawfull to him that is in by wrong, ſhall purge and take away all meane eſtates and titles. And where our author firſt putteth his caſe of two eſtates by wrong, and after of twentie diſſeiſins, all eſtates be wrong.

(Poſt. 277. b. 278. a.) 21. H. 6. 41. 11. H. 4. 33. 9. H. 7. 25. 2. E. 4. 16. 21. E. 4. 78. 12. Aſſ. 22. Vide 3. H. 6. 38.

If *A.* diſſeiſe *B.* who enfeoffeth *C.* with warrantie, who enfeoffeth *D.* with warrantie, and *E.* diſſeiſeth *D.* to whom *B.* the firſt diſſeiſee releaſeth, this doth defeat all the meane eſtates and warranties, becauſe the releaſe of *B.* is made to a diſſeiſor, and his entrie is lawfull.

Sect. 474.

ITEM, ſi mon diſſeiſor leſſa, &c. If the diſſeiſor make a leaſe for life, and the leſſee maketh a feoffment in fee, and the diſſeiſee releaſeth to the feoffee, the diſſeiſor ſhall not enter upon the feoffee; for albeit the releaſe to one joynt feoffee of a diſſeiſor, as hath beene ſaid, ſhall not exclude the other, yet a releaſe to the feoffee of a tenant for life in this caſe ſhall take away the entrie of the diſſeiſor for the alienation which was made to his

*ITEM, ſi mon diſſeiſor leſſa les tenements dont il moy diſſeiſiſt a un ** auter home pur terme de vie, et puis le tenant a terme de vie aliena en fee, et jeo releſſa al alienee, &c. donque mon diſſeiſor ne poit enter, cauſâ quâ ſupra, coment que a un foits*

ALSO, if my diſſeiſor letteth the tenements wherof he diſſeiſed mee to another for terme of life, and after the tenant for terme of life alieneth in fee, and I releaſe to the alienee, &c. then my diſſeiſor cannot enter, *cauſâ quâ ſupra*, albeit that at one

* *le—ſon*, L. and M. and Roh. † *et* not in L. and M. nor Roh. ‡ *celuy diſſeiſor—il*, L. and M. and Roh. § *come il ſemble* not in L. and M. nor Roh. ‖ *coment que il n'entra pas—et entre*, L. and M. and Roh. ¶ *my—pas*, L. and M. and Roh. ** *auter* not in L. and M. nor Roh.

(1) This is upon the ſame principle, that where the title to the poſſeſſion is equal, the party who obtains the right ſhall be preferred.—So, by the modern law, where the equity of the parties is equal, he who has the law, is to be preferred.

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vious uſes and eſtates, and appoint new uſes in their ſtead. As ſoon as the uſes created by them ſpring up, they draw to them the eſtate of the feoffee; and the ſtatute executes the poſſeſſion. But it muſt be obſerved, that theſe powers do not operate as a conveyance of the poſſeſſion or eſtate, but as a limitation of the uſe. Hence, if a perſon, having a power of appointment, appoints the eſtate to *A.* and his heirs, to the uſe of *B.* and his heirs, the uſe is executed in *A.* and his heirs, and *B.* takes only an equitable fee. Thus, ſuppoſe a marriage ſettlement framed in the uſual manner, and with the uſual power of ſelling and exchanging reſerved to the feoffees; in theſe caſes, it is ſometimes expreſſed, that it ſhall be lawful for the feoffees to grant, bargain, ſell, and convey. But whatever are the words made uſe of, they can only operate as a limitation of the uſe; and the vendee will take the legal eſtate. If the feoffees make a conveyance by leaſe and releaſe, there is no doubt but it will be effectual; it will operate, however, as an appointment; the releaſee will take the legal eſtate, and if the releaſe is made to uſes, the intended *ceſtuys que uſe* will have only equitable eſtates.—— Secondly, as to the relation which the deed by which the power of appointment is executed, has to the deed by which the power is created. It is frequently ſaid in the books, that when a power is executed, from that time the feoffee, conuſee, recoveror, or releaſee, is ſeiſed to the uſe created by the power, in the ſame manner as if in the original deed in which the power is contained, not the power, but the uſe raiſed under the power had been inſerted. And this is true, ſo far as the uſe thus appointed derives its effect from, and is ſerved by or out of the original ſeiſin of the conuſee, recoveror, feoffee, or releaſee; and as it precedes and takes place of all the uſes limited ſubſequent or ſubject to the power. In this ſenſe, it clearly has a relation to the deed by which it is raiſed. But it has no other relation in point of time. In the caſe of the duke of Marlborough v. lord Godolphin, 2. Vez. 61. lord Sunderland left the intereſt of 30,000l. to his wife for her life, and the principal, after her deceaſe, to ſuch of her children as ſhe ſhould by deed or will appoint. By her will ſhe appointed 2000l. to Mr. Spencer and 1500l. to lady Morpeth, who both died in her life-time. It was contended, that the appointment related back to the time of lord Sunderland's will, which relation would overreach the death of the two parties, who were alive at the time of the death of the teſtator, lord Sunderland; and then it would be conſidered as veſting in them in their lives. But lord Hardwicke denied this. He admitted that an uſe taking effect by virtue of an execution of a power, was taken under the authority of that power, but *not from the time* of its creation; and he exemplifies this diſtinction by appointments of uſes; in which caſe, ſays his lordſhip, if a feoffment is executed to ſuch uſes as the feoffor

ſhall

ſoits l'alienation fuit a ſon diſenheritance, &c.

time the alienation was to his diſinheritance, &c.

diſinheritance, hee having the inheritance by diſſeiſin, ſo as hee could have no warranty annexed to it, and tenant for life hath forfeited his eſtate. But if the entry of the diſſeiſee were not lawfull, it is otherwiſe. As if a man make a leaſe for life, and the leſſee for life is diſſeiſed, and that diſſeiſor is diſſeiſed, and he in the reverſion releaſeth to the ſecond diſſeiſor, the firſt diſſeiſor ſhall enter upon the ſecond diſſeiſor, and his entry is lawfull; and if the leſſee for life re-enter, he ſhall leave the reverſion in the firſt diſſeiſor; and the cauſe is, for that the entry of the diſſeiſor at the time of the releaſe made was not lawfull. And the booke of [*m*] 9. *H.* 7. 25. is to be intended of an eſtate taile *mutatis mutandis*.

(8. Rep. 148. Sect. 447. 6. Rep. 70. Hob. 279.)

[*m*] 9. H. 7. 25.

If, in the caſe aforeſaid, the diſſeiſor make a leaſe for life, and the leſſee infeoffeth two, and the diſſeiſee releaſe to one of the feoffees, this ſhall barre the diſſeiſor, as hath beene ſaid; but yet he ſhall not hold out his companion for the cauſe aforeſaid.

Sect. 475.

ITEM, ſi home ſoit diſſeiſie, lequel ad fits deins age, et moruſt, et eſteant le fits deins age le diſſeiſor moruit ſeiſi, et la terre diſcendiſt a ſon heire, et un eſtrange abate, et puis le fits le diſſeiſee, quant il vient a ſon plein age, releſſa tout ſon droit a l'abator; en ceſt caſe l'heire le diſſeiſor n'avera aſſiſe de mord'anceſter envers l'abator, mes ſerra bar, pur ceo que l'abator ad le droit del fits le diſſeiſee per ſon releas, et l'entry le fits fuit congeable,† pur ceo que il fuit deins age al temps del diſcent, &c.*

ALSO, if a man be diſſeiſed, who hath a ſonne within age and dieth, and the ſonne being within age the diſſeiſor dieth ſeiſed, and the land deſcend to his heire, (1) and a ſtranger abate, and after the ſonne of the diſſeiſee, when hee commeth to his full age, releaſeth all his right to the abator; in this caſe the heire of the diſſeiſor ſhall not have an aſſiſe of mord'anceſter againſt the abator; but ſhall bee barred, becauſe the abator hath the right of the ſonne of the diſſeiſee by his releaſe, and the entry of the ſonne was congeable, for that hee was within age at the time of the diſcent, &c.

THE reaſon of this caſe is, for that the entry of the heire is congeable, and the abator is in the land by wrong.

Abate is both an Engliſh and French word, and ſignifieth in his proper ſenſe to diminiſh, or take away, as here by his entrie he diminiſheth and taketh away the freehold in law deſcended to the heire; and ſo it is ſaid to abate an account, ſignifying ſubtraction or withdrawing, &c. and to abate the courage of a man. In another ſenſe it ſignifieth to proſtrate, beat downe, or overthrow, as to abate caſtles, houſes, and the like, and to abate a writ; and hereof commeth a word of art, *abatamentum*, which is an entrie by interpoſition. Now the difference *inter diſſeiſinam, abatamentum, intruſionem, deforciamentum, et uſurpationem, et purpreſturam*, is this.

Vet. N. B. 115. Britton cap. 51. Bracton lib. 4. cap. 2. F. N. B. 203. f. W. 1. ca. 17.

A diſſeiſin is a wrongfull putting out of him that is actually ſeiſed of a freehold. And abatement is when a man died ſeiſed of an eſtate of inheritance, and betweene the death and the entry of the heire, an eſtranger doth interpoſe himſelfe, and abate.

Intruſion firſt properly [*n*] is, when the anceſtor died ſeiſed of any eſtate of inheritance expectant upon an eſtate for life, and then tenant for life dieth, and betweene the death and the entry of the heire an eſtranger doth interpoſe himſelfe and intrude.

[*n*] F. N. B. 203. Fleta li. 4. cap. 30.

Secondly, [*o*] he that entreth upon any of the king's demeſnes, and taketh the profits, is ſaid to intrude upon the king's poſſeſſion.

[*o*] Pl. Com. caſe de mynes.

Thirdly,

* *d'eſſe* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

(1) Littleton having treated of releaſes *per mitter le droit*, when made to the diſſeiſors themſelves and their feoffees, now treats of their operation when made to the heir of the diſſeiſor. In note 1. to page 239. it was obſerved, that a diſſeiſor has a mere naked poſſeſſion, unſupported by any right, and that the diſſeiſee may reſtore his poſſeſſion, and put a total end to the poſſeſſion of the diſſeiſor, by entry. But though the feoffee of the diſſeiſor comes in by title, ſtill the right of poſſeſſion remains in the diſſeiſee, and he may equally enter on the feoffee as on the diſſeiſor; ſo that a releaſe *per mitter le droit* gives both to the diſſeiſor and his feoffee the right of poſſeſſion and the right of property: but if the diſſeiſor dies, the entry of the diſſeiſee is taken away, and a preſumptive right of poſſeſſion is in the heir; ſo that the releaſe of the diſſeiſee only paſſes the right of property.

ſhall appoint by will; when the will is made, it is clear the appointee is in by the feoffment, but has nothing *from the time of the execution of the feoffment*, ſo as to veſt the eſtate in him; and he thereupon decreed theſe legacies to have lapſed by the death of the legatees in the life-time of the teſtator. This ſhews how much it is neceſſary to qualify the general expreſſions above alluded to. It alſo reconciles them with a known circumſtance attending powers of this nature, with which it is otherwiſe difficult to reconcile them, viz. that by an execution of a power, a perſon may limit eſtates which he could not limit by the deed in which the power is contained; for by an execution of a power of appointment, a life-eſtate may be limited to a perſon not *in eſſe* at the time when the deed giving the power was executed, with remainders over. Now, if we conſider theſe limitations as inſerted in the original deed, the remainders over would be void; for though a perſon may limit an eſtate for life to a perſon not *in eſſe*, he cannot limit a remainder upon it. But theſe limitations under powers of appointment are in every day's practice; and eſtates for life, with remainders over, are limited under them to perſons not *in eſſe* at the time of the execution of the original deed, in the ſame manner, and to the ſame extent, as if inſtead of being derived out of the ſeiſin of the feoffees of the original deed, and in that point of view, as making a part of that deed, the uſes and eſtates ſo limited were created by an original, ſubſtantive, independent, and integral conveyance.—V. The remaining ſubject for obſervation is, *what uſes are not executed by the ſtatute*. Firſt, as to uſes created by *wills*, it is to be obſerved, that lands were not deviſeable at common law, except through the medium of a previous feoffment to uſes. The *ceſtui que uſe* might diſpoſe of the uſe by will: the court of chancery conſidered the will as a declaration of the uſe, and compelled the feoffees to convey the lands accordingly. But when by the ſtatute of the 27th Henry VIII. the poſſeſſion was annexed to the uſe, as the uſe thereby became merged in the land, this indirect power of deviſing lands was abſolutely loſt. The 32. and 34. Hen. VIII. gave a power to deviſe the whole of lands held in ſocage, and two-thirds of lands held by knights ſervice. The 12. Car. II. converted knights ſervice into ſocage; ſo that now all landed property, except that which is of the tenure of copyhold, is deviſeable. But as the ſtatute of uſes preceded the ſtatutes of wills, it does not neceſſarily extend to them. It is true, that the ſtatute of uſes ſpeaks of perſons ſeiſed to uſes by virtue of wills; but this muſt

apply

[p] F. N. B. 141. f. g. h.

Thirdly, [p] when the heire in ward entreth at his full age without ſatisfaction for his mariage, the writ ſaith, *quòd intruſit.*

Deforciamentum comprehendeth not only theſe aforenamed, but any man that holdeth land whereunto another man hath right, be it by diſcent or purchaſe, is ſaid to be a deforceor.

Uſurpation hath two ſignifications in the common law: one, when an eſtranger that no right hath preſenteth to a church, and his clerke is admitted and inſtituted, hee is ſaid to bee an uſurper, and the wrongfull act that he hath done is called an uſurpation.

[q] Glanvil. lib. 9. cap. 11. Britton fol. 28. 29. (Cro. Car. 17. 2. Inſt. 278.)

Secondly, when any ſubject doth uſe, without lawfull warrant, royal franchiſes, he is ſaid to uſurpe upon the king thoſe franchiſes.

Purpreſtura, or *pourpreſtura*, a purpreſture. [q] *Purpreſtura eſt, &c. generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regiæ viæ (vel aliquarum publicarum) vel civitatis, &c.* And becauſe it is properly when there is a houſe builded, or an encloſure made of any part of the king's demeſnes, or of an high way, or a common ſtreet or publike water, or ſuch like publike things, it is derived of the French word *pourpris*, which ſignifieth an incloſure, but ſpecially applied, as is aforeſaid, by the common law.

Sect. 476.

9. H. 7. 25.

HERE the entry of the diſſeiſee is congeable, and yet the releaſe doth not avoid the condition, becauſe the feoffee is in by title, as hath beene ſaid, and may have a warranty. (2) And herein our author expreſſeth a diverſitie betweene a condition in law, and a condition in deed; for in the caſe before when the diſſeiſee releaſeth to the feoffee of the tenant for life, the condition in law is taken away, but otherwiſe it is in this caſe of a condition in deed.

(Sect. 415.) Lib. 1. f. 147. Mayowe's caſe.

But if the feoffee upon condition make a feoffment in fee over without any condition, and the diſſeiſee releaſe to the ſecond feoffee, the condition is deſtroyed by the releaſe before the condition broken or after. For the ſtate of the ſecond feoffee was not upon any expreſſe condition, as *Littleton* here putteth his caſe, and he may have advantage of the releaſe, becauſe it is not againſt his owne proper acceptance, as *Littleton* ſpeaketh in the next Section.

*MES ſi * home ſoit diſſeiſie, et le diſſeiſor fait feoffment ſur condition, ceſtaſcavoir, de rendre a luy certaine rent, et pur default de payment un re-entre, &c. ſi le diſſeiſee releſſa al feoffee ſur condition, uncore ceo † n'amendra l'eſtate le feoffee ſur condition; car nient obſtant tiel releas, uncore ſon eſtate eſt ſur condition, ſicome il fuit devant.*

‡ Et cum hoc concordat opinio omnium juſticiariorum, P. 9. H. 7.

BUT if a man be diſſeiſed, and the diſſeiſor maketh a feoffement upon condition, *viz.* to render to him a certaine rent, and for default of payment a re-entry, &c. if the diſſeiſee releaſe to the feoffee upon condition, yet this ſhall not amend the eſtate of the feoffee upon condition; for notwithſtanding ſuch releaſe, yet his eſtate is upon condition, as it was before (1).

And with this agreeeth the opinion of all the juſtices, *Paſch.* 9. *H.* 7.

14. H. 8. 18. per Port. (Ant. 271. a. 276. b.)

But if it be a wrongfull title, ſuch a title is taken away by a releaſe; as if *A.* diſſeiſed *B.* to the uſe of *C.* *B.* releaſe to *A.* this ſhall take away the agreement of *C.* to the diſſeiſin, becauſe it ſhould make him a wrong doer: as if the diſſeiſor be diſſeiſed, the diſſeiſee releaſeth to the ſecond diſſeiſee, this taketh away the right the firſt diſſeiſor had againſt the ſecond, and a relation of an eſtate gained by wrong ſhall never defeat an eſtate ſubſequent gained by right, againſt a ſingle opinion, not affirmed by any other in one of our bookes.

Sect. 477.

ET le diſſeiſor grant un rent-charge, &c. Here is inplyed commons or any other

ET meſme le maner eſt lou home ſoit diſſeiſie de certeine terre, et le diſſei-

IN the ſame manner it is where a man is diſſeiſed of certaine lands, and the diſſeiſor *for*

* *aſſun* added in L. and M. and Roh. † *n'amen bra---ne abatera*, L. and M. and Roh. *ne aberaſt*, Pap. M.S. *n'avoidera*, Vell. M.S. ‡ This paragraph not in L. and M. nor Roh.

(1) The obſervations made on note 1. to page 275. a. note 1. to page 276. b. and the note to the preceding page, apply to the caſes put by Littleton in this and the following Section, and by ſir Edward Coke in his commentary. The whole of the chapter contained in this chapter is particularly well explained by lord chief-baron Gilbert in his treatiſe on tenures.

(2) *The reaſon of this caſe in the book here cited is, that the condition is like a covenant between them; and he is eſtopped from claiming it otherwiſe; and the diverſity following ſeems to warrant this. Poſt.* 278. *b.*—Lord Nott. MS.

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apply either to thoſe lands which were deviſeable by cuſtom;—as when a perſon ſeiſed of lands deviſeable by cuſtom, deviſed them to *A.* and his heires, to the uſe of *B.* and his heirs:—or to uſes at common law;—as where a feoffment was made to *A.* and his heirs, to the uſe of *B.* and his heirs, and *B.* deviſed the uſe. To uſes of this deſcription the ſtatute extended; but it is difficult to conceive how uſes created under the teſtamentary power given by the ſtatutes of wills can be within the ſtatute of uſes. It is ſaid, that tho' the law will not force the operation of the ſtatute of uſes upon deviſes to which it is the teſtator's intention it ſhould not extend; yet it will apply it to thoſe caſes to which it is his intention it ſhould extend. This opinion makes it depend entirely on the will of the teſtator, whether the ſtatute of uſes ſhall or ſhall not operate upon the deviſes of his will. Thus, if a deviſe is made to the uſe of *A.* for life, with remainders over, if it were to be conſidered as a limitation under the ſtatute of uſes, it would be void, for want of a ſeiſin to ſerve the uſes. It cannot therefore be the teſtator's intention that it ſhould operate under that ſtatute; conſequently the law will not force it under that ſtatute, but leave it ſolely to its effect under the ſtatutes of wills. But ſuppoſe a deviſe to *A.* and his heirs, to the uſe of *B.* and his heirs, that would be good to give the legal fee to *B.* as a limitation under the ſtatute of uſes. The teſtator therefore might intend, and the form of the deviſe ſhews he did intend, to raiſe an uſe under that ſtatute, and the law, in conformity to his intentions, extends its operation to the deviſe. But againſt this it may be argued, that a ſtatute can never be conſidered as relating to any thing which did not exiſt at the time of its paſſing; and therefore, as lands were not deviſeable till ſome years after the ſtatute of uſes, the ſtatute of uſes cannot extend to uſes created by deviſe: that in wills the teſtator's intention is chiefly conſidered; and as by a deviſe to *A.* and his heirs, to the uſe of *B.* and his heirs, the teſtator ſhews it to be his intention that *B.* ſhould have the legal fee, the law will

ſor grant un rent-charge hors de meſme la terre, &c. coment que apres le diſſeiſee releſſa al diſſeiſor, &c. uncore le rent-charge demurt en ſa force. Et la cauſe en ceux deux caſes eſt ceo, que homen' avera advantage per tiel releas que ſerra encounter ſon proper acceptance, et encounter ſon grant demeſne. Et coment que aſcuns ont dit, que lou l'entre de home eſt congeable ſur un tenant, s'il releaſiſt a meſme le tenant, que ceo availeroit a le tenant, ſicome il uſt enter ſur le tenant, et puis luy enfeoffa, &c. ceo n'eſt pas voier en chaſcun cas. Car en le primer cas de ceux deux avantdits caſes, ſi le diſſeiſee uſt enter ſur le feoffee ſur condition, et puis luy enfeoffa, donques eſt le condition tout defeat et avoid. Et iſſint en le ſecond caſe, ſi le diſſeiſee entraſt et enfeoffa celuy que granta le rent-charge, donques eſt le rent-charge anient et avoid, mes il n'eſt pas void per aſcun tiel releas ſans entry fait, &c.

grant a rent-charge out of the ſame land, &c. albeit the diſſeiſee doth afterwards releaſe to the diſſeiſor, &c. yet the rent-charge remaynes in force. And the reaſon in theſe two caſes is this, that a man ſhall not have advantage by ſuch releaſe which ſhall bee againſt his proper acceptance, and againſt his own grant. And albeit ſome have ſaid, that where the entry of a man is congeable upon a tenant, if hee releaſes to the ſame tenant, that this ſhall availe the tenant, as if he had entred upon the tenant, and after enfeoffed him, &c. this is not true in every caſe. For in the firſt caſe of theſe two caſes aforeſaid, if the diſſeiſee had entered upon the feoffee upon condition, and after enfeoffed him, then is the condition wholly defeated and avoided. And ſo in the ſecond caſe, if the diſſeiſee entereth and enfeoffeth him who granted the rent-charge, then is the rent-charge taken away and avoided, but it is not void by any ſuch releaſe without entrie made, &c.

profit out of the lands. And the reaſon is, becauſe he ſhall not avoid his owne grant by a releaſe hee himſelfe hath acquired ſince the grant: but if the diſſeiſor in that caſe be diſſeiſed, and the diſſeiſee releaſe to the ſecond diſſeiſor, he ſhall avoid it, as by that which hath beene ſaid, *Sect.* 473. appeareth. So likewiſe if *A.* and *B.* bee joint diſſeiſors, and *B.* grant a rent-charge, and the diſſeiſee releaſe to *A.* all his right, *A.* ſhall avoid the rent-charge, becauſe it was not granted by him, and ſo not within the reaſon of our author. (6. Rep. 78. b.) (7. Rep. 38.) (Poſt. 349. a.) (Mo. 95.)

If there bee two femes joint diſſeiſors, and the one taketh huſband, and the diſſeiſee releaſe to the other, ſhee is ſole ſeiſed, and ſhal hold out the huſband and wife. (Ant. 276. a.)

If two diſſeiſors bee, and they infeoffe another, and take backe an eſtate for life or in fee, albeit they remaine diſſeiſors to the diſſeiſee as to have an aſſiſe againſt them, yet if he releaſe to one of them, he ſhall not hold out his companion, becauſe their ſtate in the land is by feoffment.

If there be two diſſeiſors, and they be diſſeiſed, and they releaſe to their diſſeiſor, and after diſſeiſe him, and then the diſſeiſee releaſe to one or both of them, yet the ſecond diſſeiſor ſhall re-enter, for they ſhall not hold the land againſt their owne releaſe; for *Littleton* here ſaith, that they ſhall not avoid their owne grant, and by like reaſon they ſhall not avoid their owne releaſe, *et ſic de ſimilibus.*

Come s'il uſt enter ſur le tenant et luy enfeoffe. Here is another kinde of releaſe, *viz.* a releaſe which enureth by way of entry and feoffment; for if a diſſeiſee releaſe to one of the diſſeiſors to ſome purpoſe, this ſhall enure by way of entry and feoffment, *viz.* as to hold out his companion. But as to a rent-charge granted (Ant. 194.)

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will put that conſtruction on the deviſe, and give it that operation. At the end of Mr. Hillyard's edition of Shepherd's Touchſtone, there is a very learned opinion of the late Mr. Booth on the doctrine of uſes. In two copies which the Editor has ſeen of this opinion, made immediately under the eye of Mr. Booth, and delivered by him to the perſons in whoſe cuſtody they now are, and alſo in a copy of it bequeathed by Mr. Booth, with his other valuable law manuſcripts, to Mr. Holliday, the following note is added to it.—"P. S. Powers under wills are not like powers under conveyances, operating by way of uſe. The "execution of a power under a deviſe, is not the limitation of a uſe; no, not where the deviſe is to uſes: as where there is a deviſe "to *I. S.* and his heirs, to the uſe of *A.* for life, remainder to *B.* in tail, with power for *A.* to limit a jointure, or leaſe, or charge; "here, there will be no ſeiſin in *I. S.* conſequently no ſuch uſe in *A.* or *B.* as is executed by the ſtatute of uſes; conſequently, the "execution of the power is no uſe; it operates as a deviſe under the ſtatute of wills."--- See alſo Popham v. Bamfield, 1. Vin. 79. Burchett v. Durdant, 2. Vent. 312. Broughton v. Langley, Salk. 679. Gilb. Uſes, 281. --- But whether a deviſe to uſes operates ſolely by the ſtatute of wills, or by that ſtatute jointly with the ſtatute of uſes, is a matter rather of ſpeculation than of uſe; as it is now ſettled, that an immediate deviſe to uſes, without a ſeiſin to ſerve thoſe uſes, is good; and that where the eſtate is deviſed to one for the benefit of another, the courts execute the uſe in the firſt or ſecond deviſee, as appears to ſuit beſt with the intention of the teſtator. 2dly, *With reſpect to copyhold eſtates*, the ſtatute of uſes does not extend to them, as it is againſt the nature of the copyhold tenure, that any perſon ſhould be introduced into the eſtate without the conſent of the lord. Gilbert's Tenures, 170. 3dly, With reſpect to *leaſes for years*; --- theſe eſtates are not executed by the ſtatute. But this muſt be underſtood of leaſes actually in exiſtence, at the time of their being aſſigned to the uſe. Therefore, if *A.* poſſeſſed of a leaſe for years, grants it over, or aſſigns it, to *B.* and *C.* to the uſe of *D.*; all the eſtate is in *B.* and *C.* and *D.* only takes a truſt, or equitable eſtate. But if *A.* being ſeiſed of lands in fee, makes a feoffment to the uſe of *B.* and *C.* for a term of years, this term is ſerved out of the ſeiſin of the feoffee, and is executed by the ſtatute.—It is the ſame if he bargains and ſells the eſtate, of which he is ſeiſed in fee, for a term of years. Gilb. Uſes, 198. Dyer 369. 2. Inſt. 671.—Such are the general outlines of the doctrine of uſes; one of the moſt important parts of the law, as all the landed property of the kingdom is, either directly or indirectly, regulated by it. It is to be obſerved, that one of the chief objects, both of the legiſlature and the judicature of this kingdom, in their regulations upon the ſubject, has been, on the one hand, to guard againſt thoſe reſtraints upon alienation, which are incompatible with the welfare of a free and commercial people; and on the other, to admit of reaſonable ſettlements and proviſions being made for wives and children, and the general wants of families. Experience ſeems to ſhew that they have accompliſhed their object. This fully anſwers the objections which foreigners make to the nature of our family-ſettlements, that we exclude the anceſtor, whoſe character is known to us, from the diſpoſal of the property; and intruſt it to the children, with whom we cannot but be perfectly unacquainted. — So detrimental has an unqualified and unlimited power of ſettlement been found even in France, that it has been made a queſtion there, whether it would not be for the advantage of the nation at large, that all ſettlements and truſts ſhould be abrogated. This queſtion, ſo far as it related to moveables, was by the order of Louis XV. propoſed in the year

ed by him, it ſhall not enure by way of entrie and feoffment; for if the diſſeiſee had entred and enfeoffed him, the rent-charge had beene avoided. But it is a certaine rule, that when the entry of a man is congeable, and he releaſeth to one that is in by title, (as hereto the feoffee upon condition is) it ſhall never enure by way of entry and feoffment, either to avoid a condition with which he accepted the land charged, or his owne grant, or to hold out his companion.

(Dr. and Student, 50. a.)

And where it appeareth by our author, that acts done by the diſſeiſor ſhall not be avoided by the releaſe of the diſſeiſee, it is to be noted, that acts made to the diſſeiſor himſelfe ſhall not be avoyded by the alteration of his eſtate by the releaſe of the diſſeiſee; as if the lord before the releaſe had confirmed the eſtate of the diſſeiſor to hold by leſſer ſervices, the diſſeiſor ſhall take advantage of it, and ſo of eſtovers to be burnt in the houſe, and the like law of a warrantie made unto him.

If the heire of the diſſeiſor indow his wife *ex aſſenſu patris*, and the diſſeiſee releaſe to the diſſeiſor, he ſhall not avoide the indowment, for that is like the caſe put by *Littleton* of the rent-charge.

If an alien be a diſſeiſor, and obtaine letters of denization, and then the diſſeiſee releaſe unto him, the king ſhall not have the land, for the releaſe hath altered the eſtate, and it is as it were a new purchaſe; otherwiſe it is if the alien had beene the feoffee of a diſſeiſor.

If the lord diſſeiſe the tenant, and is diſſeiſed, the diſſeiſee releaſe to the ſecond diſſeiſor, yet the ſeigniorie is not revived, for betweene the parties the releaſe enures by way of entrie and feoffment as to the land; but not having regard to the ſeigniorie, and for that the poſſeſſion was never actually removed or reveſted from the diſſeiſor, who claimeth under the lord, the ſeigniorie is not revived. But if the lord and a ſtranger diſſeiſe the tenant, and the diſſeiſee releaſe to the ſtranger, there the ſeigniorie by operation of law is revived, for the whole is veſted in the ſtranger which never claimed under the lord: and in that caſe, if the lord had died, and the land had ſurvived, the ſeigniorie had beene revived. But if the lord had diſſeiſed the tenant, and beene diſſeiſed by two, and the diſſeiſee releaſed to one of them, the ſeigniorie is not revived, becauſe he claimed (as hath beene ſaid) under the lord.

Sect. 478.

(Ant. 45. a.)
Vid. Sect. 514.

28. E. 3. 98. 9. E. 4. 46.
21. E. 4. 55. 41. E. 3. 10.
2. H. 4. 12.

QUEL briefe de eux il eſſiera, &c. Note, many times in one caſe the law doth give a man ſeverall remedies, and of ſeverall kindes, as in this caſe by action and by entry; by action, either a writ of right, or *dum fuit infra ætatem.*

Et puis le diſſeiſor porta briefe de droit, &c. Here it appeareth, that there is a great art and knowledge for a man that hath divers remedies to chuſe his apteſt remedie; as in this caſe, if he bring his writ of right, the diſſeiſor ſhall be barred, but if he had entred upon the heire of the alienee, he ſhould have enjoyed the land for ever. For in that caſe the heire of the alienee after ſuch an entrie ſhall never have a writ of right, no more then if the diſſeiſee entreth upon the heire of the diſſeiſor, and make a feoffment in fee, if the heire of the diſſeiſee

*ITEM, ſi home ſoit diſſeiſie per un enfant * lequel aliena en fee, et alienee devie ſeiſie, et ſon heire enter, eſteant † le diſſeiſor deins age, ore eſt en election ‡ le diſſeiſour d'aver un briefe || de* dum fuit infra ætatem, *ou briefe de droit envers le heire del alienee, et quel briefe de eux que il eſſiera, il doit recover per la ley, § &c. Et auxi il poit enter en la terre ſans aſcun recoverie, et en ceſt caſe l'entre le diſſeiſee eſt tolle, &c. Mes en ceſt cas ſi le diſſeiſie releſſa ſon droit al heire*

ALSO, if a man bee diſſeiſed by an infant who alien in fee, and the alienee dieth ſeiſed, and his heire entreth, the diſſeiſor being within age, now is it in the election of the diſſeiſor to have a writ of *dum fuit infra ætatem*, or a writ of right againſt the heire of the alienee, and which writ of them hee ſhall chuſe, hee ought to recover by the law, &c. And alſo he may enter into the land without any recovery, and in this caſe the entrie of the diſſeiſee is taken away. *heire*

* *deins age* added in L. and M. and Roh.
† *le diſſeiſor—d'alienour*, L. and M. and Roh.
† *le diſſeiſor—Palienour*, in L. and M. and Roh.
‡ *de* not in L. and M. nor Roh.
|| &c. not in L. and M. nor Roh.

1744 by the Chancellor D'Agueſſeau to all the parliaments and ſuperior councils of France. See *Queſtions concernant les Subſtitutions, avec les Reſponſes de tous les Parlemens et Cours Souveraines du Royaume, et les Obſervations de M. le Chancelier d'Agueſſeau ſur les dits Reſponſes.* Toulouſe, 1770. And ſee alſo *Commentaire de l'Ordonnance de Louis XV. ſur les Subſtitutions, par M. Furgole. Paris*, 1767.

It is hoped, that the importance of the ſubject, and the want of a comprehenſive and ſyſtematic treatiſe upon it, will be thought a ſufficient apology for the great length of the foregoing note. Lord chief-baron Gilbert's eſſay upon Uſes and Truſts, conſidered in the only light in which it can be conſidered with juſtice to its author, as an unfiniſhed ſketch, is intitled to great commendation. It certainly contains ſeveral moſt profound and learned obſervations, but in many inſtances is very defective and erroneous.

In a future part of this work an attempt will be made to explain the leading points of the doctrine of truſts. --- The ſuſpenſion and extinction of powers; --- the deſtruction of contingent remainders; --- and the difference between the operations of feoffments, fines, common recoveries, bargains and ſales, releaſes, and wills, will be conſidered in a note on the chapter of Diſcontinuance.

*heire del alienee, et puis le diſſeiſor porta briefe de droit envers l'heire d'alienee, et il joyne le miſe ſur le mere droit, &c. le graunde aſſiſe doit trouver per la ley, que le tenant ad pluis mere droit * que ad le diſſeiſor, †&c. pur ceo que le tenant ad le droit le diſſeiſie per ſon releaſe, lequel eſt pluis ancient et pluis mere droit: car per tiel leas tout le droit le diſſeiſee paſſa a le tenant, et eſt en le tenant. Et a ceo que aſcuns ont dit, que en tiel caſe lou home que ad droit al terres ou tenements (mes ſon entrie n'eſt pas congeable) s'il releſſa al tenant ‡ tout ſon droit, &c. que tiel releaſe urera per voy d'extinguiſhment. Quant a ceo il puit eſtre dit, que ceo eſt § voyer quant a celuy que releſſa; car per ſon releaſe il ad luy demiſe ‖ quietment de ¶ ſon droit, quant a ſon perſon, mes uncore ** le droit que il avoit bien poit paſſer a le tenant per ſon releaſe. Car enconvenient ſerroit que tiel ancient droit ſerroit extinct tout ouſterment, &c. car il eſt communement dit, que*

&c. But in this caſe if the diſſeiſee releaſe his right to the heire of the alienee, and after the diſſeiſor bringeth a writ of right againſt the heire of the alienee, and hee joyne the miſe upon the meere right, &c. the great aſſiſe ought to finde by the law, that the tenant hath more meere right than the diſſeiſor, &c. for that the tenant hath the right of the diſſeiſee by his releaſe, the which is the moſt ancient and moſt meere right: for by ſuch releaſe all the right of the diſſeiſee paſſeth to the tenant, and is in the tenant. And to this ſome have ſaid, that in this caſe where a man which hath right to lands or tenements (but his entrie is not congeable) if he releaſe to the tenant all his right, &c. that ſuch releaſe ſhal enure by way of extinguiſhment. As to this it may bee ſaid, that this is true as to him which releaſeth; for by his releaſe hee hath diſmiſſed himſelfe quite of his right as to his perſon, but yet the right which hee hath may well paſſe to the tenant by his releaſe. For it ſhould bee inconvenient that ſuch an ancient right ſhould bee extinct altogether,

re-enter he ſhall detaine the land for ever, and the feoffee ſhall not maintaine any writ of right; for a bare right ſhall never be left in the feoffee, but ſhall ever follow the poſſeſſion, as hath beene ſaid: but if the diſſeiſee entreth upon the heire of the diſſeiſor, and make a feoffment in fee upon condition, and entreth for the condition broken before the heire of the diſſeiſor enter, hee is reſtored to his right againe.

(Ant. 266 a.) 38. E. 3. 16. 24. H. 8. Reſtore ai prim. acc. n. 5. Vide Sect. 447.

A man maketh a gift in taile, the remainder in fee, tenant in taile dieth without iſſue, an eſtranger intrude, and he in the remainder brings a formedon, and recovereth by default, and maketh a feoffment in fee, the intrudor reverſe the recoverie in a writ of diſceit and entreth, he ſhall detaine the land for ever, and the feoffee ſhall not have a writ of right. 9. H. 7. 24.

And ſo likewiſe if a diſſeiſor die ſeiſed and a ſtranger abate, and the diſſeiſee releaſe to him, the heire of the diſſeiſor ſhall enter and detaine the land for ever. For the right to the poſſeſſion ſhall draw the right of the land to it, and ſhall not leave a right in him to whom the releaſe is made, as hath been ſaid before in the 447. Section. 9. H. 7. 24.

Le droit del diſſeiſee paſſa al tenant, et eſt en le tenant. For ſeeing the tenant hath the whole fee ſimple, he is capable of the whole right of the diſſeiſee, and, as *Littleton* here ſaith, the right is in the tenant.

Inconvenient ſerroit. Here againe, as hath beene often obſerved, an argument *ab inconvenienti* is forcible in law; and that judges by the authoritie of our author are to judge of inconveniences as of things unlawfull, as hereby and by

Vide Sect. 87. 138. 139. &c. 269. 419. 720.

* &c. added L. and M. and Roh. † &c. not in L. and M. nor Roh. ‡ &c. added L. and M. and Roh.
§ *voyer—ceſſa*, L. and M. and Roh. ‖ *quietment* not in L. and M. nor Roh.—*nettement*, MSS. ¶ *tout* added L. and M. and Roh. ** *le droit que il avoit bien poit paſſer a le tenant per ſon releaſe*, not in the Vell. MS. but omitted moſt probably through miſtake.

by many other places it appeareth.

Un droit ne poit pas morier. Dormit aliquando jus, moritur nunquam. For of ſuch an high eſtimation is right in the eye of the law, as the law preſerveth it from death and deſtruction: trodden downe it may bee, but never trodden out. For where it hath beene ſaid, that a releaſe of right doth in ſome caſes enure by way of extinguiſhment; it is ſo to be underſtood, either (as *Littleton* doth here) in reſpect of him that makes the releaſe, or in reſpect that by conſtruction of law it enureth not alone to him to whom it is made, but to others alſo who be eſtrangers to the releaſe, which, as hath beene ſaid, is a qualitie of an inheritance extinguiſhed.

84. H. 8 6 b. As if there be lord and tenant, and the tenant maketh a leaſe for life, the remainder in fee, if the lord releaſe to the tenant for life, the rent is wholly extinguiſhed, and he in the remainder ſhall take benefit thereof; even ſo when the heire of a diſſeiſor is diſſeiſed, and the diſſeiſor make a leaſe for life, the remainder in fee, if the firſt diſſeiſee releaſe to the tenant for life, this is ſaid to enure by way of extinguiſhment, for that it ſhall enure to him in the remainder, who is a ſtranger to the releaſe; and yet in truth the right is not extinct, but doth follow the poſſeſſion, *viz.* the tenant for life hath it during his time, and he in the remainder to him and to his heires, and the right of the inheritance is in him in the remainder; for a right to land cannot die or be extinct in deed; and therefore if, after the death of tenant for life, the heire of the diſſeiſor bring a writ of right againſt him in the remainder, and he joyne the miſe upon the meere right, it ſhall be found for him, becauſe in judgment of law he hath by the ſaid releaſe the right of the firſt diſſeiſee.

Sect. 479.

14. H. 8. fol. 5. 6. 11. H. 7. 25. 30. H. 6. tit. barre. 39. 38. E. 3. 20.

HERE *Littleton* putteth a diverſity betweene releaſes which enure by way of extinguiſhment againſt all perſons, and whereof all perſons may take advantage, and releaſes which in reſpect of ſome perſons enure by way of extinguiſhment, and of other perſons by way of *mitter le droit*: or betweene releaſes which in deed enure by extinguiſhment, for that hee to whom the releaſe is made cannot have the thing releaſed, and releaſes which, having ſome quality of ſuch releaſes, are ſaid to enure by way of extinguiſhment, but in troth doe not, for that he to whom the releaſe is made may receive and take the thing releaſed. And here *Littleton* putteth caſes where releaſes do abſolutely enure by extinguiſhment without exception, having reſpect to all perſons. And firſt of the lord and tenant: ſecondly, of the rent-charge: thirdly, of the common of paſture.

*MES releaſes que enurera per voy d'extinguiſhment envers touts perſons, ſont lou celuy a que le releas eſt fait, ne poit aver cco que a luy eſt releas. Sicome ſi ſoyent ſeignior et tenant, et le ſeignior releſſa al tenant tout le droit que il ad en la ſeigniory, ou tout le droit que il ad en le terre, &c. tiel releas va per voy de extinguiſhment envers touts perſons, pur ceo que le tenant ne poit aver * ſervice pur prender de luy meſme.*

BUT releaſes which enure by way of extinguiſhment (1) againſt all perſons, are where hee to whom the releaſe is made, cannot have that which to him is releaſed. As if there bee lord and tenant, and the lord releaſe to the tenant all the right which hee hath in the ſeigniory, or all the right which he hath in the land, &c. this releaſe goeth by way of extinguiſhment againſt all perſons, becauſe that the tenant cannot have ſervice to receive of himſelfe.

Sect. 480.

EN meſme le maner eſt de re-

FIRST, of the lord and tenant, and the lord releaſe to the tenant his ſeigniorie,

IN the ſame manner is it of a releaſe *leas*

* *ſervice pour prender—ceo*, L. and M. and Roh.

(1) Here Littleton returns to releaſes by extinguiſhment. See ant. 268.

*leas fait al tenant del terre de un rent-charge ou common de paſture, &c. pur ceo que le tenant ne poit aver ceo que a luy eſt releſſe, &c. iſſint tiels releaſes urera * per extinguiſhment en touts voyes.*

made to the tenant of the land of a rent-charge or common of paſture, &c. becauſe the tenant cannot have that which to him is releaſed, &c. ſo ſuch releaſes ſhall enure by way of extinguiſhment in all wayes.

cannot have and enjoy the thing that is releaſed. But in the caſe of the right of the land, the tenant of the land may take and enjoy it for ſtrengthening his eſtate therein.

this muſt of neceſſity enure by way of extinguiſhment to all men; for the tenant cannot have ſervice to be taken of himſelfe, nor one man can be both lord and tenant. The ſecond is of a rent-charge; a man cannot have land and a rent iſſuing out of the ſame land. Thirdly, a man cannot have land and a common of paſture iſſuing out of the ſame land, *et ſic de cæteris*. For in all theſe caſes and the like he to whom the releaſe is made

(a. Roll. Abr. 405.)

The meſne being a feme entermarrie with the tenant peravaile, if the lord releaſe to the feme, the ſeigniorie only is extinct; but if hee releaſe to the huſband, both ſeigniorie and meſnaltie are extinct. And in this caſe, if the lord releaſe to the huſband and wife, it is a queſtion how the releaſe ſhall enure; but it is no queſtion but that a releaſe may be made to a meſnaltie or a ſeigniory ſuſpended in part of the eſtate.

(Ant. 273. b.)

But here obſerve a diverſity where a releaſe enureth by way of extinguiſhment of an inheritance, which is in poſſeſſion and may be granted over, and a releaſe of a right, or an action to lands which cannot be granted over. [r] For the lord may releaſe his ſeigniorie to the tenant of the land for life or in taile, *et ſic de cæteris*. But ſo cannot one releaſe a right or an action; for if it be releaſed but for an houre, it is extinct for ever, as hath beene ſaid.

(274. a. 1. Roll. Abr. 414.)
(Ant. 214. a. 232. b. 266. a.)
[r] 13. E. 3. tit. Extinguiſhment. Brook 45. et tit. Voucher. F. 120.
30. E. 3. 13.
19. H. 6. 19. 21. E. 3. 33.
38. Aſſ. 17.
11. H. 4. tit. Releaſe. 21.
18. E. 2. ibid. 5. 26. H. 8. 5.
41. Aſſ. 6.

And two things are to be obſerved here. Firſt, that by the releaſe of all the right in the land the ſeigniorie is extinct, as well as by the releaſe of all the right in the ſeigniorie, for the ſeigniorie iſſueth out of the land. Secondly, that by the releaſe of all his right in the ſeigniorie or the land, the whole ſeigniorie is extinct without any words of inheritance. If the tenancie be given to a lord and to a ſtranger, and to the heires of the ſtranger, the lord releaſe to his companion all the right in the land, this releaſe doth not onely paſſe his eſtate in the tenancie, but extinguiſheth alſo his right in the ſeigniorie, and ſo one releaſe enures to extinguiſh ſeverall rights in one and the ſame land.

If there be lord and tenant by fealty and rent, the lord granteth the ſeigniorie for yeares, and the tenant atturneth, the lord releaſeth his ſeigniorie to the tenant for years, and to the tenant of the land generally, the whole ſeigniorie is extinct, and the eſtate of the leſſee alſo. But if the releaſe had beene to them and their heires, then the leſſee had had the inheritance of the one moitie, and the other moitie had beene extinct. And the reaſon of this diverſity is, becauſe when the releaſe is made generally, it can enure to the leſſee but for life, becauſe it enureth by way of enlargement of eſtate, and being made to the tenant of the land, it enureth by way of extinguiſhment, as *Littleton* here ſaith, and then there cannot remaine a particular eſtate in the ſeigniorie for life. But when the releaſe is made to them and their heires, each one takes a moitie, the one by way of encreaſing of the ſtate, and the other by extinguiſhment.

(Ant. 152. b.)
(Mo. 59.)

Sect. 481.

ITEM, de prover que le graund aſſiſe doit paſſer pur le demandant, en le caſe avantdit, jeo aye oye ſovent † la lecture de l'eſtatute

ALSO, to prove that the graund aſſiſe ought to paſſe for the demandant, in the caſe aforeſaid, I have often heard the reading of the ſtatute of Weſt. 2.

JEO aye oye ſovent la lecture de Weſt. 2. Here it is to be obſerved, of what authoritie antient lectures or readings upon ſtatutes were, for that they had five excellent qualities. Firſt, they declared what the common law

(2. Inſt. 345.)

* *per extinguiſſement en touts voyes, — touts foitz per voie d'eatientiſement envers touts perſons*, L. and M. and Roh.
† *en* added L. and M. and Roh.

law was before the making of the ſtatute, as here it appeareth. Secondly, they opened the true ſenſe and meaning of the ſtatute. Thirdly, their caſes were briefe, having at the moſt one poynt at the common law, and another upon the ſtatute. Fourthly, plaine and perſpicuous, for then the honour of the reader was to excell others in authorities, arguments, and reaſons for proofe of his opinion, and for confutation of the objections againſt it. Fifthly, they read, to ſuppreſſe ſubtill inventions to creepe out of the ſtatute. But now readings having loſt the ſaid former qualities, have loſt alſo their former authorities: for now the caſes are long, obſcure, and intricate, full of new conceits, liker rather to riddles than lectures, which when they are opened they vaniſh away like ſmoke, and the readers are like to lapwings, who ſeeme to bee neereſt their neſts when they are fartheſt from them, and all their ſtudie is to find nice evaſions out of the ſtatute. By the authority of *Littleton*, antient readings may be cited for proofe of the law; but new readings have not that honour, for that they are ſo obſcure and darke.

de Weſtminſter ſecond, que commence, In caſu quo vir amiſerit per defaltam tenementum quod fuit jus uxoris ſuæ, &c. *que a le common ley devant * meſme l' eſtatute, ſi leaſe ſoit fait † a un home pur terme de vie, le remainder ouſter en fee, et un eſtrange per feint action uſt recover envers le tenant a terme de vie per default, et puis † le tenant moruſt, celuy en le remainder n'avoit aſcuns remedie devant le ſtatute, pur ceo que il n'avoit aſcun poſſeſſion del terre.*

which begunne thus: *In caſu quo vir amiſerit per defaltam tenementum quod fuit jus uxoris ſuæ, &c.* that at the common law before the ſayd ſtatute, if a leaſe were made to a man for terme of life, the remainder over in fee, and a ſtranger by feigned action recovered againſt the tenant for life by default, and after the tenant dieth, he in the remainder had no remedie before the ſtatute, becauſe hee had not any poſſeſſion of the land.

L'eſtatute de W. 2. Which is the third chapter.

Le remainder ouſter en fee. Here is to be obſerved, that although the ſtatute ſpeaketh of a reverſion [*a*], yet by the authority of *Littleton* a remainder is within the ſtatute.

See the ſtatute of 14. *Eliz. cap.* 8. which provideth fully for him in the remainder.

Feint action. *Feint* is a participle of the French word *feindre*, which is to feigne or falſly pretend, ſo as a feint action is a falſe action.

N'avoit aſcun remedie devant l'eſtatute. [*b*] Here it appeareth by *Littleton*, that if a man maketh a leaſe for life, the remainder in fee, and tenant for life ſuffereth a recovery by default, that he in the remainder ſhould not have a formedon by the common law: for *Littleton* ſaith, that he hath not any remedy before the ſtatute. Neither is there any ſuch writ in that caſe in the Regiſter, albeit in ſome bookes mention is made of ſuch a writ.

[*a*] 24. E. 3. 85. 28. E. 3. 96. 18. E. 2. Entrie 74. 3. E. 2. Entrie 7. 6. E. 3. 24. 7. E. 3. Ent. 62. 7. E. 3. 54, 55. 15. E. 4. 15. F. N. B. 217. d. Regiſter 241.

[*b*] W. 2. cap. 5. Vide 34. E. 3. Formdon 31. 11. E. 3. ibid. 31. 8. E. 3. 59. F. N. B. 217. d. 7. H. 7. 13.

Sect. 482.

28. E. 3. 3. Tit. Juris Utrum 1. HERE a diſſeiſin gotten by wrong, and defeated by the entrie of him that right hath, is ſufficient to maintaine a writ of right againſt the recoveror in this caſe, for albeit

MES ſi celuy en le remainder uſt enter ſur le tenant a terme de vie, et luy diſſeiſiſt, et apres

BUT if he in the remainder had entered upon the tenant for life, and diſſeiſed him, and after the te-

le

* *meſme* not in L. and M. nor Roh. † *a une home— al tenant*, L. and M. and Roh. ‡ *le tenant* not in L. and M. nor Roh.

le tenaunt entra ſur luy, et apres le tenant a terme de vie per tiel recovery perde per default et moruſt, ore celuy en le remainder bien poit aver briefe de droit envers celuy que recovera, pur ceo que le miſe ſerra joine ſolement ſur le mere droit, &c. Uncore en ceſt caſe, le ſeiſin de celuy en le remainder fuit deſeat per entrie del tenant a terme de vie. Mes peradventure aſcuns voilent argue et dire, que il n'avera briefe de droit en ceſt caſe, pur ceo que quant le miſe eſt joine, il eſt joine en tiel maner, (ſcilicet) *ſi le tenant ad plus mere droit en le terre en le manner come il tyent, que le demandant ad en le maner come il demanda, et pur ceo que le ſeiſin del demandant fuit defeat per l'entry de le tenant a terme de vie, &c. donque il ad nul droit en le manner come il demaund.*

nant enter upon him, and after the tenaunt for life by ſuch recoverie loſe by default and die, now he in the remainder may well have a writ of right againſt him which recovers, becauſe the miſe ſhal be joined only upon the mere right, &c. Yet in this caſe the ſeiſin of him in the remainder was defeated by the entry of the tenant for life. But peradventure ſome will argue and ſay, that hee ſhall not have a writ of right in this caſe, for that when the miſe is joyned, it is joyned in this manner, *(ſcilicet)* if the tenaunt hath more mere right in the land in the manner as he holdeth, than the demandant hath in the manner as hee demandeth, and for that the ſeiſin of the demandant was defeated by the entry of the tenant for term of life, &c. then he hath no right in the maner as he demandeth.

the ſeiſin is defeated betweene the leſſee for life and him in the remainder, yet having regard to the recoveror, who is a meere ſtranger, and hath no title, it is ſufficient againſt him. But otherwiſe it is againſt the party himſelfe that defeated the ſeiſin, and the law is propenſe to give remedie to him that right hath. And where ſome have thought, that there is no authority in law to warrant *Littleton*'s opinion herein, they are greatly miſtaken, for *Littleton* hath good warrant for all that he hath written.

7. E. 3. 62. 38. E. 3. 37. tit. Jur. Utr. 1.

(Poſt. 315. a.)

Lands are letten to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A.* *A.* dieth, *B.* entreth and dieth, a ſtranger intrudeth, the heire of *A.* ſhall have a writ of right of the ſeiſin which *A.* had as tenant for life.

Lands are letten to *A.* and *B.* and to the heires of *A.* *A.* dyeth, a recovery is had againſt *B.* the heire of *A.* ſhall have a writ of right of the whole, for every joyntenant is ſeiſed *per my et per tout.*

(Ant. 184. a. b.)

If lands be given in tayle, the remainder to *A.* in fee, the donee dyeth without iſſue, his wife *privement enſeint*, *A.* entreth, the iſſue is borne and entreth upon him and dyeth without iſſue, *A.* ſhall have a writ of right, of the ſeiſin which he had.

If lands be given in tayle to *A.* the remainder to his right heires, *A.* dieth without iſſue, the collaterall heire of *A.* ſhall have a writ of right of the ſeiſin of *A.*

4. E. 3. 16. 17.

And ſo note a diverſity betweene a ſeiſin to cauſe *poſſeſſio fratris*, &c. for there is required a more actuall ſeiſin, and a ſeiſin to maintaine a writ of right. And hereby alſo are the (&c.) in this Section explained.

(Ant. 14. b. 15. a.) 40. E. 3. 8. 42. E. 3. 20. 37. Aſ. 4. 24. E. 4. 24. 7. H. 5. 4. 11. H. 4. 11.

See my opinion on the Exchequer case dated 7 Jan. 1603.

Sect. 483.

A CEO poit eſtre dit, que ceux parols (modo et formâ prout, &c.) *in mults des caſes ſont*

TO this it may bee ſaid, that theſe words *(modo et formâ prout, &c.)* in many caſes are words *parols*

parols de forme de pleder, et ne-my parols de ſubſtance. Car ſi home port briefe d'entre in caſu proviſo, *del alienation fait per le tenant en dower a ſon diſinheritance, et counta del alienation fait en fee, et le tenant dit, que il ne aliena pas en le manner come le demaundant ad declare, et ſur ceo ſount a iſſue, et trove eſt per verdict, que le tenant alyenaſt en le taile, ou pur terme d'auter vie, le demaundant recovera: uncore l'alyenation ne fuit en le manner come le demaundant avoit declare, &c.*

of forme of pleading, and not words of ſubſtance. For if a man bring a writ of entrie *in caſu proviſo*, of the alienation made by the tenant in dower to his diſinheritance, and counteth of the alienation made in fee, and the tenant ſaith, that he did not alien in maner as the demandant hath declared, and upon this they are at iſſue, and it is found by verdict, that the tenant aliened in taile, or for tearme of another man's life, the demandant ſhall recover: yet the alienation was not in manner as the demandant hath declared, &c.

(Yelv. 148. Hob. 73. 105.)
(6. Rep. 24.)

WHERE *modo et formâ* are of the ſubſtance of the iſſue, and where but words of forme, this diverſity is to be obſerved. [c] Where the iſſue taken goeth to the point of the writ or action, there *modo et formâ* are but words of forme, as here in the caſe of the writ of entrie *in caſu proviſo*, and ſo is the (&c.) well explained in this Section. But otherwiſe it is when a collaterall point in pleading is traverſed; as if a feoffment be alleadged by two, and this is traverſed *modo et formâ*, and it is found the feoffment of one, there *modo et formâ* is materiall. So if a feoffment be pleaded by deede, and it is traverſed *abſque hoc quòd feoffavit modo et formâ* upon this collaterall iſſue, *modo et formâ* are ſo eſſentiall, as the jury cannot find a feoffment without deed.

[c] 9. H. 6. 1. 40. E. 3. 35. 21. E. 4. 22. F. N. B. 206. g. 40. E. 3. 5. 32. H. 8. iſſue. Br. 80. Vid. Sect. ſequent.

12. E. 4. 4.
(Doc. Pla. 175. 199. 344. 345.)

Sect. 484.

Vid. Sect. preced.
(8. Co. 89. Sid. 15.)

TROVE eſt per verdict, que il tient per fealtie tantùm. Here is another diverſitie to be obſerved: That albeit the iſſue bee upon a collaterall point, yet if by the finding of part of the iſſue, it ſhall appeare to the court that no ſuch action lieth for the plaintife no more than if the whole had been found, there *modo et formâ* are but words of forme, as here in the caſe which *Littleton* putteth of the lord and tenant appeareth.

10. E. 4. 7. 8. E. 4. 15. 20. E. 4. 3. 21. E. 4. 3. Merlebr. cap. 3.

(Doc. Pla. 191. 344.)

Car le matter del iſſue eſt lequel il tient de luy ou nemy, &c.

(9. Rep. 32.)

Here it appeareth, that

*AUXY, ſi ſoient ſeignior et tenant, et le tenant tient del ſeignior per fealtie ſolement, * et le ſeignior diſtreine le tenant pur rent, et le tenant porta brieſe de treſpas envers ſon ſeignior de ſes avers iſſint priſes, et le ſeignior plede que le tenant tient de luy per fealtie et certain rent, et pur le rent arere il vient a diſtreiner, &c. et demaunde judgement de brieſe port vers luy,* quare vi et armis, &c. *et l'auter dit, que il ne tient de luy en le maner come il ſuppoſe, et ſur*

ALSO, if there bee lord and tenant, and the tenant hold of the lord by fealty only, and the lord diſtreine the tenant for rent, and the tenant bringeth a writ of treſpaſſe againſt his lord for his cattell ſo taken, and the lord plead that the tenant holds of him by fealtie and certaine rent, and for the rent behinde he came to diſtreine, &c. and demand judgement of the writ brought againſt him, *quare vi et armis*, &c. and the other ſaith, that hee doth not

ceo

* *et—ſi*, L. and M. and Roh.

ceo ſont a iſſue, et trove eſt per verdict que il tient de luy per fealtie tantùm; en ceſt caſe le briefe abatera, et uncore il ne tient de luy en le maner come le ſeignior avoit dit. Car le matter de l'iſſue eſt, lequel le tenant tient de luy ou nemy; car s'il tient de luy, coment que le ſeignior diſtreina le tenant pur auter ſervices que ne doit aver, uncore tiel briefe de treſpaſſe, quare vi et armis, &c. *ne giſt envers le ſeignior, mes ſerra abate.*

hold of him in the manner as he ſuppoſe, and upon this they are at iſſue, and it is found by verdict that he holdeth of him by fealty onely; in this caſe the writ ſhall abate, and yet hee doth not hold of him in the manner as the lord hath ſaid. For the matter of the iſſue is, whether the tenant holdeth of him or no; for if hee holdeth of him, although that the lord diſtreine the tenant for other ſervices which he ought not to have, yet ſuch writ of treſpaſſe *quare vi et armis, &c.* doth not lie againſt the lord, but ſhall abate.

if the matter of the iſſue be found, it is ſufficient. And this rule holds in criminall cauſes. For if *A.* be appealed, or indicted of murder, *viz.* that hee of malice prepenſed killed *I. A.* pleadeth that he is not guilty *modo et formâ*, yet the jury may find the defendant guiltie of manſlaughter without malice prepenſed, becauſe the killing of *I.* is the matter, and malice prepenſed is but a circumſtance.

(Doc. Pls. 191. Ant. 227. 2. Roll. Abr. 704. 708. Sid. 5. Hob. 18. 73. 81. Doc. Pla. 355. 344. 345.) Pl. Com. 101.

(9. Rep. 348. 1. Cro. 14. 16. Haw. P. C. 266.)

In aſſiſe of *darreine preſentment*, if the plaintife alleage the avoydance of the church by privation, and the jury find the voydance by death, the plaintife ſhall have judgment; for the manner of voydance is not the title of the plaintife, but the voydance is the matter.

6. E. 3. 41. b. 25. E. 3. 50. 9. H. 7. 3 13. H. 7. 14. 29 E. 3. 38. (Sid. 21. 22.)

(Doc. Pla. 348.)

[*d*] If a gardeine of an hoſpitall bring an aſſiſe againſt the ordinary,

[*d*] 8. E. 3. 70. 8. Aſſ. 29. & 39. 9. E. 3. 338. 24. E. 3. 34. 5. H. 4. 2. 7. H. 4. 11. Pl. Com. 92. 3. Mar. Dier 116. 40. E. 3. 35. Dier 2. & 3. Ph. & Mar. 115. b. Trin. 22. Eliz. Rot. 920. Wolman's caſe 41. E. 3. 28. 34. Aſſ. 3. 30. Aſſ. 5. 33. E. 3. verdict 97. 22. E. 3. 1. b. 18. E. 3. 48. 31. E. 3. account 58. 28. Aſſ. 48. (2. Roll. Abr. 704. 719.)

ne pleadeth that in his viſitation he deprived him as ordinary, whereupon iſſue is taken, and it is found that he deprived him as patron, the ordinary ſhall have judgement, for the deprivation is the ſubſtance of the matter.

The leſſee covenant with the leſſor not to cut downe any trees, &c. and bind himſelf in a bond of forty pounds for performance of covenants, the leſſee cut downe ten trees, the leſſor bringeth an action of debt upon the bond, and aſſigneth a breach that the leſſee cutteth down twenty trees, whereupon iſſue is joined, and the jury finde that the leſſee cut downe ten, judgement ſhall be given for the plaintife; for ſufficient matter of the iſſue is found for the plaintife.

Sect. 485.

*AUXY, * en briefe de treſpaſſe de batterie, ou des biens emports, ſi le defendant plede de rien culpable, en le manner come le plaintife ſuppoſe, et trove eſt que le defendant eſt culpable en auter ville, ou a auter jour que le plaintife ſuppoſe, uncore il recovera.*

ALSO, in a writ of treſpaſſe for batterie, or for goods carried away, if the defendant plead not guiltie, in manner as the plaintife ſuppoſe, and it is found that the defendant is guiltie in another towne, or at another day than the plaintife ſuppoſes, yet hee ſhall recover.

EN briefe de treſpaſſe de battery, et des biens emports, &c.

Here *Littleton* ſpeaketh of actions brought for things tranſitory. In which caſes the wrong being done in one towne, the plaintife may not only alledge it in another towne, as *Littleton* here ſaith, but alſo in another county, and the jurors upon not guilty pleaded are bound to find for the plaintife.

(11. Rep. 5.)

(7. Rep. 2. b. 2. Roll. Abr. 688. Doc. Pla. 93. 369. 386.)

Neither can the aſſault, battery, or taking of goods, &c. alledged in another county, be traverſed without ſpeciall cauſe

(1. Roll. Abr. 335. Hob. 103. 104. Doc. Pla. 367. 5. Rep. 77.)

* *cy—un*, L. and M. and Roh.

(1. Rep. 1. 396. 6. Rep. 65. b.)

cauſe of juſtification which extendeth to ſome certaine place; as if a conſtable of a towne in another county arreſt the body of a man that breaketh the peace, there he may traverſe the county (but he muſt not reſt there) but all other places ſaving in the towne whereof hee is conſtable. And ſo it is of taking of goods, if the defendant juſtifie for damage feaſant in another county, he muſt traverſe as before. But where the cauſe of the juſtification is not reſtrained to a certaine place, that is ſo locall as it cannot be alledged in any other towne, as in the caſes before alledged, and the like, then albeit the action bee brought in a forraine countie, yet he muſt alledge his juſtification in the county where the action is brought.

(Doc. Pla. 367. 2. Cro. 45. 372. Noy 57. 3. Cro. 353. Doc. Pla. 361.)

(1. Leo. 39. Sid. 234. 294. 3. Rep. 52. b. Ant. 145. b. Doc. Pla. 43. 2. Sid. 118. Cro. El. 99.)

Et * *iſſint en* † *pluſors auters caſes ceux parols*, ſcilicet, *en le maner come le demaundant ou le plaintiſe ad ſuppoſe, ne font aſcun* ‡ *matter de ſubſtance del iſſue: car en brieſe de droit, lou le miſe eſt joyne ſur le mere droit, il eſt a tant a dire, et a tiel effect*, ſcilicet, *lequel ad pluis mere droit, le tenant ou le demandant al choſe en demand.*

And ſo in many other caſes theſe words, *viz.* in manner as the demandant or the plaintife hath ſuppoſed, do not make any matter of ſubſtance of the iſſue: for in a writ of right, where the miſe is joyned upon the meere right, that is as much as to ſay, and to ſuch effect, *viz.* whether the tenant or demaundant hath more meere right to the thing in demand.

Trin. 30. Eliz. in the king's bench, betweene Inglebert and Jones. And herewith agreeth a judgement in the court of com. pleas, Paſch. 38. Eliz. Rot. 1656.

As if a man be beaten in the county of *Middleſex*, and hee bringeth his action in the county of *Buck.* the defendant cannot pleade that the plaintife aſſaulted him in the county of *Midd. &c.* and traverſe the county, but he muſt pleade his juſtification in the county of *Buck.* for that the cauſe of his juſtification is good in any place. And ſo it is in caſe of bailement of goods, and other caſes for tranſitory things; as for example.

In an action upon the caſe the plaintife declared for ſpeaking of ſlanderous words, which is tranſitory, and laid the words to be ſpoken in *London*, the defendant pleaded a concord for ſpeaking of words in all the counties of England, ſaving in *London*, and traverſed the ſpeaking of the words in *London:* the plaintife in his replication denied the concord, whereupon the defendant demurred, and judgment was given for the plaintife. For the court ſaid, that if the concord in that caſe ſhould not be traverſed, it would follow, that by a new and ſubtile invention of pleading, an ancient principle in law (that for tranſitorie cauſes of action the plaintife might alledge the ſame in what place or county he would) ſhould be ſubverted, which ought not to be ſuffered; and therefore the judges of both courts allowed a traverſe upon a traverſe in that caſe: and the wiſedome of the judges and ſages of the law have always ſuppreſſed new and ſubtile inventions in derogation of the common law. And therefore the judges ſay in one booke [*e*], We will not change the law which always hath been uſed. And another ſaith [*f*], It is better that it be turned to a default, than the law ſhould be changed, or any innovation made.

[*e*] 38. E. 3. 1.
(1. Cro. 105. Ant. 72. Mo. 350. 2. Cro. 372.)
[*f*] 2. H. 4. 18. 31. E. 3. Gager. deliver. 5.

A man did grant a rent, with a new invented clauſe of diſtreſſe, *viz.* that the grantee ſhould hold the diſtreſſe againſt gages and pledges; and yet by the whole court he ſhall gage deliverance, for otherwiſe by this new invention all replevyes ſhall be taken away.

[*] See many other new inventions in derogation of the common law diſallowed by the judges, and by the court of parliament.

[*g*] 42. Aſſ. 12. 4. E. 3. ca. 5. 18. E. 3. ca. 1. & ca. 6. 4. H. 4. ca. 2.

[*h*] Li. 6. fo. 46. 47. Dowdale's caſe. 3. E. 3. Aſſ. 446. 27. E. 3. 86. 1. Aſſ. 16. 3. Aſſ. 4. 6. Aſſ. 4. 5. Aſſ. 7. 18. E. 3. 38. 21. Aſſ. 8. 29. Aſſ. 5. 44. E. 3. 6. b. 14. H. 4. 35. 5. H. 5. 2. 10. H. 6. 13. 21. H. 6. 51. 37. H. 6. 2. 7. E. 4. 45. 18. E. 4. 1. 22. E. 4. 19. 13. H. 7. 17. 2. Mar. Br. attaint. 104. 10. Eliz. Dier 171.

[*g*] By this which hath beene ſaid you ſhall know the law as it is now in uſe in theſe caſes, and the better underſtand our [*i*] books, when you ſhall reade them concerning as well locall as tranſitory things, wherein you ſhall finde great variety of opinion in our bookes.

[*i*] 19. H. 6. 48. 11. H. 6. 16. 43. E. 3. 23. b. 46. E. 3. 3. a. 9. H. 6. 62. 21. H. 6. 27. 14. H. 8. 24. 18. E. 4. 1. 20. H. 6. 2. 34. H. 6. 4^a. 14. H. 6. 21. 22. 4. H. 6. 13. 33. H. 6. 25. 12. E. 4. 12. 28. H. 8. Dier. 29. 21. E. 4. 19. 80. 27. H. 8. 19. 12. H. 8. 1. 11. H. 4. 65. 19. H. 8. 6.
(Hob. 134. 1. Leo. 201. Cro. Car. 514. Cro Ja. 366.)

Si le defendant plead de rien culpable. This is a good iſſue, if the defendant committed no battery at all; but regularly by the common law if the defendant hath cauſe of juſtification or excuſe, then can he not pleade not guilty, for then upon the evidence it ſhall be found againſt him, for that he confeſſeth the battery, and upon that iſſue cannot juſtifie it, but he muſt pleade the ſpeciall matter, and confeſſe and juſtifie the battery.

The like law is in other caſes, and therefore this is a learning neceſſary to be knowne, for that the loſſe of moſt cauſes dependeth thereupon. As if in battery the defendant may juſtifie the ſame to be done of the plaintife's owne aſſault, he muſt pleade it ſpecially, and muſt not pleade the generall iſſue, and ſo of the like. In treſpaſſe of breaking his cloſe, upon not guilty he

* *iſſint* not in L. and M. nor Roh. † *melles* added in L. and M. and Roh. ‡ *matter—maner*, L. and M. and Roh.

he cannot give in evidence, that the beaſts came thorow the plaintife's hedge, which he ought to keep, nor upon the generall iſſue juſtifie by reaſon of a rent-charge, common, or the like.

In detinue the defendant pleadeth *non detinet*, he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but muſt pleade it; but he may give in evidence a gift from the plaintife, for that proveth he detaineth not the plaintife's goods.

[*d*] So in an action of waſte, upon the plea *nul waſt fait*, he may give in evidence any thing that proveth it no waſte, as by tempeſt, by lightening, by enemies, and the like; but he cannot give in evidence juſtifiable waſte, as to repaire the houſe, or the like. [*e*] If one doth waſte, and before the action brought the leſſee repaireth it, and after the leſſor bringeth an action of waſte, and the leſſee pleade *quòd non fecit waſtum*, he cannot give in evidence the eſpeciall matter.

If two men be bound in a bond jointly, and the one is ſued alone, he may plead this matter in abatement of the writ; but he cannot plead *non eſt factum*, for it is his deed, though it be not his ſole deed. [*f*] See in *Whelpdale*'s caſe, where a man may ſafely plead *non eſt factum*, and where not, and the former books that treat of that matter well reconciled.

[*g*] Upon *plenè adminiſtravit* pleaded by an executour, *et iſſint riens inter maines*, if it be proved that he hath goods in his hands which were the teſtatour's, he may give in evidence that he hath paid to that value of his owne mony, and need not plead it ſpecially. (1)

In an aſſiſe, if the tenant plead *nul tort nul diſſeiſin*, he cannot give in evidence a releaſe after the diſſeiſin; but a releaſe before the diſſeiſin he may, for then there is no diſſeiſin upon the matter.

In a writ of right, if the tenant joyne the miſe upon the meere right, he cannot give in evidence a collaterall warranty; for he hath not any right by it, and therefore it ought to have been pleaded.

Of this learning you ſhall reade plentifully in our bookes, and in my Reports. This little taſte ſhall here ſuffice to make the reader capable of the reſt. Regularly whenſoever a man doth any thing by force of a warrant or authority, he muſt plead it.

But all that hath been ſaid muſt be under two cautions: firſt, that whenſoever a man cannot have advantage of the ſpeciall matter by way of pleading, there he ſhall take advantage of it in the evidence. For example, the rule of law is, that a man cannot juſtifie in the killing or death of a man; and therefore in that caſe, he ſhall be received to give the eſpeciall matter in evidence, as that it was *ſe defendendo*, or in defence of his houſe in the night againſt theeves and robbers, or the like.

Secondly, that in any action upon the caſe, treſpaſſe, battery, or of falſe impriſonment againſt any juſtice of peace, maior, or bailife of city or towne corporate, headborough, port-reve, conſtable, tithingman, collector of ſubſidy or fifteen, in any his majeſty's courts in *Weſtminſter*, or elſewhere, concerning any thing by any of them done by reaſon of any of their offices aforeſaid, and all other in their aide or aſſiſtance, or by their commandement, &c they may plead the generall iſſue, and give the ſpeciall matter for their excuſe or juſtification in evidence.

In an action of treſpaſſe or other ſuit againſt any perſon for taking of any diſtreſſe or other act doing by force of the commiſſion of ſewers, the defendant in any ſuch action ſhall and may make avowry, conuſance, or juſtification generally, that it was done by authority of the commiſſion of ſewers for lotte or taxe aſſeſſed by that commiſſion, &c. and the plaintife ſhall reply he did it of his owne wrong without ſuch cauſe. And both theſe acts were made for avoiding of prolixity and captiouſneſſe of pleading, tending to the great charge and danger of officers and miniſters of juſtice, &c. Evidence, *evidentia*. This word in legall underſtanding doth not only containe matters of record, as letters patents, fines, recoveries, inrolments, and the like, and writings under ſeale, as charters and deeds, and other writings without ſeale, as court rolles, accounts, and the like, which are called evidences *inſtrumenta*, but in a larger ſenſe it containeth alſo *teſtimonia*, the teſtimony of witneſſes, and other proofes to be produced and given to a jury, for the finding of any iſſue joined betweene the parties. And it is called evidence, becauſe thereby the point in iſſue is to be made evident to the jury. *Probationes debent eſſe evidentes (id eſt) perſpicuæ et faciles intelligi.* But let us now returne to *Littleton*.

Ou a auter jour que le plaintife ſuppoſe. [*h*] As if the treſpaſſe were done the fourth of May, and the plaintife alledgeth the ſame to be done the fifth of May, or the firſt of May, when no treſpaſſe was done; yet if upon the evidence it falleth out that the treſpaſſe was done before the action brought, it ſufficeth: and this is warranted by *Littleton*, who ſpeaketh indefinitely, that the jury may find the defendant guilty at another day than the plaintife ſuppoſeth.

Et a tiel effect. Here is to be obſerved, that the law of England reſpecteth the effect

25. H. 8. Br. (Doc. Pla. 197.)

22. H. 6. 33. (4. Rep. 33. 2. Roll. Rep. 491. Poſt. 303. 1. Leo. 228.)

[*d*] 12. H. 8. 1. 19. E. 3. Waſt. 30. 20. E. 3. Waſt. 32.
[*e*] 10. Eliz. Dier 276. 2. Mar. Dier 212.

(1. Sid. 450. Doc. Pla. 198.)

[*f*] Lib. 5. fo. 119. Whelpdale's caſe. 7. E. 4. 5. 7. E. 6. Br. non eſt fact. 14. 1. H. 7 15. 14. H. 8. 28. Pl. Com. Dive and Man caſe. 36. H. 8. Dier 59. 2. Mar. Dier 112. 1. Eliz. Di. 167.
[*g*] Hill. 10. H. 8. Rot. 323. in com. banc. et Mich. 6. E. 6. in com. banco. Bendloes. 7. H. 5. 9. 6. H. 7. 10. 34. E. 3. Droit 29. 9. E. 3. 32. 8. E. 3. 24. 33. E. 3. Verd. 18. H. 6. 94. 39. H. 6. 38. 18. E. 3. 19. Pl. Com. 81. 173. 21. H. 7. 76. 16. Kelw. 21. E. 4. 11. 22. E. 4. 45. 13. H. 7. 13. Stanf. Pl. Cor. 15. 22. Aſſ. 55. 37. H. 6. 21. (Doc. Pla. 198. Ant. 227. a. Hob. 174. Poſt. 303. b.)

7. Ja. ca. 5.

23. H. 8. ca. 5.

[*h*] 19. H. 6. 47. 3. E. 4. 5. 21. E. 4. 66. (Cro. Jac. 366. 1. Cro. 501. 514. 515. 228. 229. 2. Cro. 202. Sid. 308.)

(1) *Yet if the matter be pleaded ſpecially, that is not cauſe of demurrer, though it amounts to the general iſſue, becauſe it has no colour of matter in law, as was adjudged by juſtice Walmeſley. Hob.* 127. Lord Nott. MSS.

effect and ſubſtance of the matter, and not every nicety of forme or circumſtance: *Qui hæret in literâ, hæret in cortice, et apices juris non ſunt jura.*

Sect. 486.

*ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor devie ſeiſie, &c. et ſon fits et heire eſt eins per diſcent, et le diſſeiſée enter ſur l'heire diſſeiſor, lequel entrie eſt un diſſeiſin, &c. ſi l' heire port aſſiſe, ou briefe * de entre en nature de aſſiſe, il recovera.*

ALSO, if a man be diſſeiſed, and the diſſeiſor dyeth ſeiſed, &c. and his ſonne and heire is in by diſcent, and the diſſeiſee enter upon the heire of the diſſeiſor, which entrie is a diſſeiſin, &c. if the heire bring an aſſiſe, or a writ of entrie in nature of an aſſiſe, hee ſhall recover.

AND the reaſon hereof is, for that in the writ of right mentioned in the next Section, the charge of the grand aſſiſe upon their oath is upon the meere right, and not upon the poſſeſſion.

Sect. 487.

(Ant. 266. a.)

CAR ſi le heire le diſſeiſor, &c.

Here is a diverſity to be obſerved concerning that which hath been ſaid, when the poſſeſſion ſhall draw the right of the land to it, and when not. And therefore when the poſſeſſion is firſt, and then a right commeth thereunto, the entry of him that hath right to the poſſeſſion ſhall gaine alſo the right which, as before it appeareth in thoſe caſes there put, followeth the poſſeſſion, and the right of poſſeſſion draweth the right unto it; but when the right is firſt, and then the poſſeſſion commeth to the right, albeit the poſſeſſion be defeated, (as here in *Littleton*'s caſe it is by the heire of the diſſeiſor) yet the right of the diſſeiſee remaineth.

6. E. 3. 7.

Vid. Sect. 447.

Brieſe d'entrie en le per. *A.* dyeth ſeiſed, and the land deſcendeth to *B.* his ſonne; before he entreth, an eſtranger abateth and dyeth ſeiſed, *B.* entreth, againſt whom the heire of the abator recovereth in an aſſiſe, *B.* may have a writ of *mort d'an-*

5. Aſſ. 1. 10. Aſſ. 16.

MES ſi l' heire port brieſe de droit envers le diſſeiſée, il ſerra barre, pur ceo que quant le graund aſſiſe eſt jure, lour ſerement eſt ſur le mere droit, et nemy ſur le poſſeſſion. Car ſi l' heire le diſſeiſor † ſuiſt un aſſiſe de novel diſſeiſin, *ou brieſe* d'entre *en nature d'aſſiſe, et recoveraſt vers le diſſeiſee, et ſuiſt execution, uncore poit le diſſeiſee aver brieſe* d'entre en le per *envers luy de le diſſeiſin fait a luy per ſon pere, ou il poit aver envers l' heire brieſe de droit.*

BUT if the heyre bring a writ of right againſt the diſſeiſee, he ſhall bee barred, for that when the graund aſſiſe is ſworne, their oath is upon the meere right, and not upon the poſſeſſion. For if the heyre of the diſſeiſor ſue an aſſiſe of *novel diſſeiſin*, or a writ of *entrie* in nature of an aſſiſe, and recovers againſt the diſſeiſee, and ſueth execution, yet may the diſſeiſee have a writ of *entrie* in the *per* againſt him, for the diſſeiſin made to him by his father, or he may have againſt the heire a writ of right.

ceſter

* *de entre en nature de aſſiſe il recovera. Mes ſi l'heire port* (the beginning of next Section) not in L. and M. nor Roh. but in both MSS. † *ſuiſt—porta*, L. and M. and Roh.

ceſter, and recover the land againſt him. And if the diſſeiſin had beene done to *A.* &c. then after the recovery in the aſſiſe, *B.* ſhould have had a writ of *entrie* in the *per*, becauſe the heyre that is in by diſcent is in the *per*.

Sect. 488.

MES ſi le heyre doit recover envers le diſſeiſee en le caſe avantdit per briefe de droit, donque tout ſon droit ſerroit clerement ale, pur ceo que judgement final ſerroit done envers luy, que ſerroit encounter reaſon lou le diſſeiſee ad le pluis meere droit, &c.

BUT if the heire ought to recover againſt the diſſeiſee in the caſe aforeſaid by a writ of right, then all his right ſhould be cleerely taken away, for that judgement finall ſhall bee given againſt him, which ſhould bee againſt reaſon where the diſſeiſee hath the more meere right.

Judgement final. The forme whereof you ſhall ſee in the laſt Section of this chapter.

Que ſerra encounter reaſon. *Argumentum ab inconvenienti.* Vid. Sect. 87. &c. (Poſt. 295. b.)

Sect. 489.

ET ſaches, mon fits, que en briefe de droit, apres ceo que les quater chivalers ont eſlie le grand aſſiſe, donques il n'ad pluis greinder delay que en un brief de formedon, *apres ceo que les parties ſont a iſſue, &c. Et ſi le miſe ſoit joyne ſur le battaile, donques il ad meindre delay.*

AND know (my ſonne) that in a writ of right, after the foure knights have choſen the grand aſſiſe, then he hath no greater delay than in a writ of *formedon*, after the parties be at iſſue, &c. And if the miſe bee joyned upon battaile, then hee hath leſſer delay.

BATTAILE. See for this word in the laſt Section of this chapter. (Poſt. 294. b.)

Iſſue, &c. Or demurrer, which is an iſſue in law. (5. Rep. 104.)

Sect. 490.

ITEM, releaſe de tout le droit, &c. en aſcun caſe eſt bone, ſait a celuy que eſt ſuppoſe tenant en ley, coment que il n'ad riens en les tenements. Sicome en præcipe quòd reddat, *ſi le tenant aliena la terre pendant le briefe, et puis le demaundant releſſa a*

ALSO, a releaſe of all the right, &c. in ſome caſe is good, made to him which is ſuppoſed tenant in law, albeit he hath nothing in the tenements. As in a *præcipe quòd reddat*, if the tenant alien the land hanging the writ, and after the demandant releaſeth *luy* (2. Inſt. 244.) (Ant. 266. 267.)

luy tout ſon droit, &c. cel releaſe eſt bone, pur ceo que il eſt ſuppoſe d'eſtre tenant per le ſuit del demandant, et uncore il n'ad riens en la terre al temps de releaſe fait.

to him all his right, &c. this releaſe is good, for that he is ſuppoſed to be tenant by the ſuit of the demandant, and yet hee hath nothing in the land at the time of the releaſe made.'

Sect. 491.

EN meſme le manner eſt ſi en præcipe quòd reddat *le tenant vouche, et le vouchee entre en le garrantie, ſi apres le demandant releſſa al vouchee tout ſon droit *, ceo eſt aſſets bone, pur ceo que le vouchee apres ceo que il avoit enter en le garrantie, eſt tenant en ley al demandant,† &c.*

IN the ſame manner it is in a *præcipe quòd reddat* the tenant vouch, and the vouchee enters into warranty, if afterward the demandant releaſe to the vouchee all his right, this is good enough, for that the vouchee after he hath entred into warranty, is tenant in law to the demandant, &c.

[h] 10. E. 4. 13. 12. Aſ. 41. 22. Aſ. 13. 23. E. 3. 21. 25. E. 3. 40. 38. E. 3. 10. 11. 7. E. 3. 6. 19. E. 3. tit. Reſceit. 34. E. 3. tit. Reſceit. 9. E. 4. 16. 39. H. 6. 40. 17. Aſ. 24. 8. H. 7. 5. 20. Aſſ. 2. 14. E. 3. Procedendo 4. 9. E. 3. 17. 32. E. 3. Quare Imp. 2. Dyer. 17. Eliz. 341. Sect. 447.

* Vi. devant Sect. 447. (Ante 265. b. 273. a.

HERE it doth appeare, that there is a tenant in deed and a tenant in law, and *Littleton* in this and the next Section putteth two examples of tenants in law, *viz.* (*h*) the tenant to a *præcipe* after alienation, and of the vouchee, whereof ſomewhat hath been ſaid before.

And it is obſervable, that *Littleton* ſaith, that in both caſes hee is tenant in law to the demandant, and yet he hath nothing in the land. And therefore if after the vouchee hath entered into warranty, and become tenant in law, an anceſtor collaterall of the demandant releaſeth to the vouchee with warranty, he ſhall not plead this againſt the demandant, for that the releaſe by the eſtranger is voide, which, beſides the authorities before vouched, appeareth by *Littleton* himſelfe; * for he ſaith, that he is tenant in law to the demandant, whereby he excludeth that he is tenant in reſpect of any eſtranger.

Sect. 492.

Glan. li. 1. ca. 1. Bract. li. 3. fo. 101. Brit. fo. 71. Flet. li. 1. ca. 15. & 16.

NOTA, there be two kind of actions, *viz.* one that concern the pleas of the crowne, *placita coronæ*, or *placita criminalia*; another that concerne common pleas, *placita communia, ſeu civilia*. Of that which concerneth pleas of the crowne, *Littleton* ſpeaketh hereafter in this chapter. Of actions concerning common pleas, *Littleton* ſpeaketh in this place. And theſe are threefold (that is to ſay), reall, perſonall, and mixt. *Placitorum aliud perſonale, aliud reale, aliud mixtum.* Or, *Actionum quædam ſunt in*

Mir. ca. 2. §. 1. Bract. ub. ſup. Flet. li. 1. ca. 1.

ITEM, quant al releaſes d'actions, reals et perſonals, il eſt iſſint, que aſcuns actions ſont mixt en le realty et en le perſonaltie: ſi come un action de waſte ſue envers tenant a terme de vie; ceſt action eſt ‡ en le realtie, pur ceo que le lieu waſte ſerra recover; et auxy en le

ALSO, as to releaſes of actions, realls and perſonals, it is thus. Some actions are mixt in the realty and in the perſonalty: as an action of waſt ſued againſt tenant for life; this action is in the realtie, becauſe the place waſted ſhall bee recovered; and alſo in the perſonaltie, becauſe

per-

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

*perſonaltie, pur ceo que treble damages ſerront recovers pur le * tortious waſt fait per le tenant; et pur ceo en ceſt action un releas d'actions reals eſt bon plee en barre, et iſſint eſt un releas d' actions perſonals.*

treble damages ſhall bee recovered for the wrongfull waſte done by the tenant; and therefore in this action a releaſe of actions reals is a good plea in barre, and ſo is a releaſe of actions perſonals.

rem, quædam in perſonam, et quædam mixtæ. And generally, *actio* is defined, [i] *Actio nihil aliud eſt quàm jus proſequendi in judicio quod ſibi debetur.* Or, *Action n'eſt autre choſe que loyall demande de ſon droit.* (Plo. 484.)

[i] Vide Sect. 444. Bract. lib. 3. fol. 98. Fleta lib. 1. cap. 15. Mirror cap. 2. § 1.

[k] And by the releaſe of all actions, cauſes of action be releaſed; but within a ſubmiſſion of all actions to arbitrement, cauſes of action are not contained.

[k] Lib. 8. 153. Altham's caſe. 35. H. 8. Dier 57. 5. Mar. 217. Vide 36. H. 6. 8. Vid. 42. E. 3. 22. 23. (5. Rep. 8. a. 103. 77. b.)

Tenant pur vie. And ſo it is if it be brought againſt tenant for yeares, becauſe it agreeth with the reaſon of *Littleton* here rendred, *viz.* that the place waſted ſhall be recovered, and therefore foundeth in the realty.

Auxy en le perſonaltie, pur ceo que treble damages ſerra recovers, which doe found in the perſonaltie. Wherefore *Littleton* concludeth, that in an action mixt a releaſe of all actions reals is a good barre, and ſo is a releaſe of all actions perſonals. (Cro. Car. 171.)

And here is to be obſerved a diverſity betweene the act of the party, and an act in law; for a man by his owne act cannot alter the nature of his action; and therefore if the leſſee for life or leſſee for yeares doe waſte, now is an action of waſte given to the leſſor, wherein he ſhall recover two things, *viz.* the place waſted, and treble damages: in this caſe if the leſſor releaſe all actions realls, he ſhall not have an action of waſte in the perſonalty only; and if he releaſe all actions perſonals, he ſhall not have an action of waſte in the realty only.

[l] And ſo it is if the leſſee doth waſte, and after ſurrendreth to the leſſor his eſtate, and the leſſor accept thereof, the leſſor ſhall not have an action of waſte.

[l] 19. H. 6. 66. 14. H. 6. 14. 11. R. 2. Waſt. 99. 14. H. 8. 14. 23. H. 8. Br. Waſte. (5. Rep. 75.) (Noy 118.)

But by act in law the nature of the action may be changed; as if a man make a leaſe *pur terme d'auter vie*, and the leſſee doth waſte, and then *ceſty que vie* dyeth, an action of waſte ſhall lye for damages only, becauſe the other is determined by act in law.

And againe, hereupon is another diverſity to be obſerved, that in caſe when an action is well begun, and part of the action determineth by act in law, and yet the like action for the reſidue is given, there the writ ſhall not abate, but proceed. But where by the determination of part the like action remaineth not for the reſidue, there the action well commenced ſhall abate. As if an action of waſte be brought againſt tenant *pur terme d'auter vie*, and hanging the writ *ceſty que vie* dyeth, the writ ſhall not abate, but the plaintife ſhall recover damages only, becauſe if *ceſty que vie* had died before any action brought, the leſſor might have an action of waſte for the damages. So if an *ejectione firmæ* be brought, and the terme incurreth hanging the action, yet the action ſhall proceed for damages only, becauſe an *ejectione* doth lye after the terme for damages only. But if tenant *pur auter vie* bring an aſſiſe, and *ceſty que vie* dyeth hanging the writ, albeit the writ were well commenced, yet the writ ſhall abate, becauſe no aſſiſe can be maintainable for damages only.

11. H. 6. 43. 9. E. 4. 50. 24. E. 3. 72. 18. E. 8. 28. 9. H. 6. 30. (7. Rep. 77. 80 a.) (Sid. 61. Hob. 328.)

So if an action of waſte be brought by baron and feme in remainder, in eſpeciall tayle, and hanging the writ the wife dieth without iſſue, the writ ſhall abate, becauſe every kind of action of waſte muſt be *ad exhæredationem*.

2. H. 4. 22. 6. E. 2. briefe 807. (Ant. 53. b. Plo. 18. b.)

If a writ of annuity be brought, and the annuity determineth hanging the writ, the writ faileth for ever, becauſe no like action can be maintained for the arrerages only, but for the annuity and arrerages.

34. H. 6. 10. 9. E. 4. 39. 14. H. 7. 31. 18. E. 3. Scire facias 10. (Wm. Jones 215. Cro. Car. 171. 5. Rep. 48. b.)

But where damages only are to be recovered, there albeit by act in law the like action lyeth not afterwards, yet the action well commenced ſhall proceed; [m] as if a conſpiracy be brought againſt two, and one of them dyeth hanging the writ, it ſhall proceed.

[m] 22. R. 2. briefe 888. 18. E. 4. 1. (Doc. Pla. 47.) (Ray. 185. and 176. S. C.)

And in an aſſiſe of *novel diſſeiſin*, a writ of annuity, *quare impedit*, and other mixt actions (1), a releaſe of actions reals is a good plea, and ſo it is of a releaſe of actions perſonals.

(1. Saun. 228. S. C. 1. Vent. 16. & 18. 2. H. 4. 13. 9. H. 6. 57. Mo. 133. contra)

But if three joyntenants be diſſeiſed, and they arraigne an aſſiſe, and one of them releaſe to the diſſeiſor all actions perſonals, this ſhall barre him, but it ſhall not barre the other plaintife; for having regard to them the realty ſhall bee preferred, *et omne majus trahit ad ſe minus dignum.* [n] And in a writ of ward brought by two, the releaſe of the one ſhall not grieve the other, but ſhall enure to his benefit, for he ſhall recover the whole ward, and hold his companion out.

30. H. 4. Baile 59. (2. Roll. Abr. 411. 1. Co. 68 a. Ant. 197. b.) [n] 30. H. 6. ubi ſupra. 45. E. 3. fol. 6. 18. E. 3. fol. 56.

But here a diverſity is to be obſerved betweene realll actions, wherein damages are to bee recovered

21. H. 6. 18 a. (Doc. Pla. 47. 321.) (W. Jones. 215. contra.)

* *tortious waſt—tort et waſt*, L. and M. and Roh.

(1) 5. *Car. B. R. Sir John Bodvill's caſe. Reſolved contra*; ſcilicet, *that it was a mere perſonal action, and not mixt*; et ideo, *annuity in Wales by bill lies well*; *where, if it had been mixt, the action ought to have been brought by original, per* 34. *H.* 8. *ca.* 6. *upon argument by the court on error brought.* Cro. 170. L. Nott. MSS.

recovered at the common law, as in an aſſiſe, &c. and reall actions where damages are not to be recovered by the common law, but are given by the [o] ſtatute, for there a releaſe of all actions perſonals is no barre, as in the writ of dower, *entrie ſur diſſeiſin in le per, &c. mord'anc'., aiel, &c.*

[o] Merton cap. 1. in dower. Gloc. cap. 1.

* Sect. 493.

(5. Rep. 97.)

ET en quare impedit, *un releas d'actions perſonals eſt bone plee, et iſſint eſt un releaſe d'actions reals*, per Martin, quod fuit conceſſum. Hill. 9. H. 6. 57.

AND in a *quare impedit*, a releaſe of actions perſonals is a good plea, and ſo is a releaſe of actions reals, *per Martin, quod fuit conceſſum. Hill.* 9. *H.* 6. *fol.* 57.

9. H. f. 57.
22. H. 6. 27. b.

THIS is an addition to *Littleton*, which although it be law, and the booke truly cited, yet I paſſe it over. But yet note by the way, that a releaſe of actions perſonals is alſo a good barre in a *quare impedit*, becauſe it is an action mixt.

Sect. 494.

(Poſt. 303. b.)
(1. Roll. Rep. 36. 37.)
(Ant. 180. b.)
(Hob. 103.)

LE diſſeiſor bien poet pleder, &c.

Nota, every man ſhall plead ſuch pleas as are proper for him, and apt for his defence to be pleaded. [q] As a diſſeiſor that hath nothing in the land may pleade a releaſe of actions perſonals, becauſe damages are to be recovered againſt him, and therefore for his defence hee may plead it; but a releaſe of actions reals he cannot plead (1), becauſe he hath no eſtate in the land, and none ſhall plead a releaſe of actions reals in an aſſiſe, but the tenant of the land. *Et ſic de cæteris.* But the tenant in an aſſiſe ſhall plead a releaſe of actions perſonals to the diſſeiſor, for that plea proveth that the plaintife hath no cauſe of action againſt him.

[q] 11. Aſſ. 9. 18. E. 3. 2. 23. 24. 31. E. 3. quare imp. 161. 7. E. 3. 5. 9. E. 3. 6. 39. E. 3. 30. 22. E. 3. 2. 13. H. 4. 7. 3. E. 2. quare imp. 44. 38. E. 3. 30. 31. 5. F. 3. 26. 21. E. 3. 16. 17. 5. H. 7. 34. 8. H. 5. 14. 22. H. 6. 28. 29. 1. H. 7. 34. 27. E. 3. 81. 32. H. 6. 15. b. 17. Aſſ. 25. 2. H. 7. 14. 13. H. 8. 13. 14 44. E. 3. 12. 46. E. 3. 13. 16. E. 4. 11. 24. E. 3. 34. 4. E. 4. 18. 7. H. 4. 34. 2. R. 2. encumbent. 4. 33. E. 3. quare imp. 194.
(8. Rep. 151. b.)
(Sect. 278)

If the diſſeiſee releaſe to the diſſeiſor all actions reals, and the diſſeiſor maketh a feoffement in fee, and an aſſiſe is brought againſt them, the feoffee ſhall not plead the releaſe to the diſſeiſor, for that he is not privie to the releaſe, for a releaſe of actions ſhall only extend to privies.

13. H. 4. 9. a.
(7. Rep. 26. a.)

(Sect. 471.)

If a diſſeiſor make a leaſe for life, the remainder in fee, and the diſſeiſee releaſe all actions to the tenant for life, after the death of tenant for life, he in the remainder ſhall not plead the ſaid releaſe.

(10. Rep. 51. b.)

If the diſſeiſee releaſe all actions to the diſſeiſor, and die, this doth barre him but for his life, for after his deceaſe his heire ſhall have an action [r], as ſome have ſaid. And hereby may appeare a manifeſt diverſity between a releaſe of a right, and a releaſe of actions.

[r] 19. H. 6. 23. a.
(8. Rep. 152.)

ET meſme le maner eſt en aſſiſe de novel diſſeiſin, *pur ceo que il eſt mixt en le realtie et en le perſonalty. Mes ſi un tiel aſſiſe ſoit arraigne enter le diſſeiſor et le tenant, le diſſeiſor bien poit plede un releas d'actions perſonals pur barrer l'aſſiſe, mes nemy un releas d'actions reals, car nul pledera releas d'actions reals en aſſiſe forſque le tenant.*

IN the ſame manner it is in an aſſiſe of *novel diſſeiſin*, for that it is mixt in the realtie and in the perſonaltie. But if ſuch an aſſiſe bee arraigned againſt the diſſeiſor and the tenant, the diſſeiſor may well plead a releaſe of actions perſonals to barre the aſſiſe, but not a releaſe of actions reals, for none ſhall plead a releaſe of actions reals in an aſſiſe but the tenant.

Sect.

* This Section is not in L. and M. nor Roh.

(1) *Hob.* 163. *accord. whether the action be brought againſt the diſſeiſor only, or againſt him and the tenant; but if the ſame perſon be diſſeiſor and tenant, then he may plead a releaſe of actions real.* L. Nott. MSS.

Sect. 495.

ITEM, en tiels actions reals que covient d'eſtre ſue envers le tenant del franktenement, ſi le tenant ad un releas d'actions reals del demandant fait a luy devant le briefe purchaſe, et il plede ceo, il eſt bon plee pur le demandant a dire, que celuy que pleda le plee n'avoit rien en le franktenement al temps del releas fait, car adonque il n'avoit cauſe d'aver aſcun action real envers luy.

ALSO, in ſuch actions reals which ought to bee ſued againſt the tenant of the freehold, if the tenant hath a releaſe of actions reals from the demandant made unto him before the writ purchaſed, and he plead this, it is a good plea for the demandant to ſay, that hee which plead the plea had nothing in the freehold at the time of the releaſe made, for then he had no cauſe to have an action reall againſt him. (8. Rep. 140.)

THIS is evident enough by that which hath beene ſaid, that a releaſe of all actions reals muſt bee made to him that is tenant of the land, becauſe a reall action muſt be brought againſt ſuch a tenant. (8. Rep. 151. b.)

Sect. 496.

*ITEM, en tiel cas ou home poet enter en terres ou tenements, et auxy poit aver un action real de ceo, que eſt done per la ley envers le tenant *; ſi en ceſt caſe le demandant releſſa al tenant touts maners de actions reals, uncore ceo ne tolle le demandant de ſon entrie, mes le demandant bien poit enter nient contriſteant tiel releas, pur ceo que nul choſe eſt releſſe forſque l'action, &c.*

ALSO, in ſuch caſe where a man may enter into lands or tenements, and alſo may have an action reall for this, which is given by the law againſt the tenant; if in this caſe the demandant releaſeth to the tenant all maner of actions reals, yet this ſhall not take the demandant from his entrie, but the demaundant may well enter notwithſtanding ſuch releaſe, for that nothing is releaſed but the action, &c.

POET enter. Here it appeareth, that where a man may enter, a releaſe of all actions doth not barre him of his right, becauſe he hath another remedy, *viz.* to enter. And this is agreeable with the authoritie of our [*ſ*] bookes. But where his entry is not lawful, there a releaſe of all actions is by conſequence a barre of his right, becauſe he hath releaſed the mean whereby he might recover his right. As if the diſſeiſee releaſe all actions to the heire of the diſſeiſor, which is in by diſcent, he hath no remedy to recover the land; but yet the diſſeiſee hath a right, for that hee hath releaſed his action, and not his right, as ſhall be ſaid hereafter in the chapter of *Remitter* in his proper place. If the heire of the diſſeiſor make a feoffment in fee to two, and the diſſeiſee releaſeth to one of the feoffees all actions, and he dieth, the ſurvivour ſhall not plead this releaſe for the cauſes abovеſaid. And hereby alſo again appeareth another diverſity between a releaſe of a right, and a releaſe of actions. (8. Rep. 152.) [*ſ*] 18. E. 3. 34. 19. E. 3. title 35.

It

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

(8. Rep. 150.)
19. Aſſ. 3. 30. E. 3. 19. 6.
19. H. 6. 4. 6. 21. H. 7. 23. b.
7. H. 6. 6.

It is to be obſerved, when a man hath ſeverall remedies for one and the ſelfe ſame thing, be it reall, perſonall, or mixt, albeit he releaſeth one of his remedies, he may uſe the other.

Sect. 497.

(9. Rep. 52.)

EN meſme le maner eſt de choſes perſonals; ſicome home a tort prent mes biens, ſi jeo releſſa a luy touts actions perſonals, uncore jeo puiſſe per le ley prender mes biens hors de ſon poſſeſſion.

IN the ſame manner is it of things perſonall; as if a man by wrong take away my goods, if I releaſe to him all actions perſonals, yet I may by the law take my goods out of his poſſeſſion.

This of it ſelfe is evident.

Sect. 498.

(Coke's Ent. 170. b.)
(10. Rep. 119. b. 2. Cro. 681.)
Glanvil. lib. 10. cap. 13.
(F. N. B. 138. a.)
(1. Roll. Abr. 606.)
(2. Roll. Abr. 505.)
(Doc. Pla. 124. 125.)

BRIEFE de detinue. *Breve de detentione dicitur à detinendo*, becauſe *detinet* is the principall word in the writ. And it lyeth where any man comes to goods eyther by delivery, or by finding. In this writ the plaintife ſhall recover the thing detained, and therefore it muſt bee ſo certaine as it may be knowne, and for that cauſe it lyeth not for mony out of a bagge, or cheſt; and ſo of corn out of a ſacke, and the like, theſe cannot be knowne from other. [*t*] A man ſhall have an action of detinue of charters which concern the inheritance of his land if hee know the certainty of them, and what land they concerne, or if they be in bagge ſealed, or cheſt locked, though he knoweth not the certainty of them: and it is good policie (if poſſibly he can) in that caſe to declare of one charter in eſpeciall, [*u*] and then the defendant ſhall not wage his law. [*x*] An action of detinue for charters doth ſound in the realty, for therein ſummons and ſeverance lyeth; and in detinue of goods a *capias* doth lye; but for charters in ſpeciall a *capias* lyeth not, and yet a releaſe of actions perſonals in a writ of detinue of charters is a good barre.

AUXY, ſi jeo ay * *aſcun cauſe d'auter briefe de detinue de mes biens vers un auter, coment que jeo releſſa a luy touts actions perſonals, uncore jeo puiſſe* † *per le ley prendre mes biens hors de ſon poſſeſſion, pur ceo que nul droit de les biens eſt releſſe a luy, mes ſolement l'action, &c.*

ALSO, if I have any cauſe to have a writ of detinue of my goods againſt another, albeit that I releaſe to him all actions perſonals, yet I may by the law take my goods out of his poſſeſſion, becauſe no right of the goods is releaſed to him, but only the action, &c.

41. E. 3. 2.
(1. Roll. Ab. 5. Noy

[*t*] 41. E. 3. 2. 8. H. 6. 18. 28. 29. 21. E. 3. 28. 3. H. 6. 19. 30. H. 6. 4. 9. H. 6. 18.

(9. Rep. 18. 78. b. F. N. B. 138.)
(10. Rep. 51. b.)

[*u*] 10. H. 6. 20. 21. H. 6. 1. 14. H. 6. 4. 14. H. 4. 23. 24. 27. (Poſt. 295.)

[*x*] 20. H. 6. 45. 19 E. 3. Severance 14. 31. E. 3. ib. 32. 42. E. 3. 13. 40. E. 3. 25. (10. Rep. 135.)
(Doc. Pla. 125.)

Sect. 499.

PER cauſe del ſtatute. That is to ſay, the ſtatute of 4. *H.* 4. *ca.* 7. and 11. *H.* 6. *ca.* 4.

Car s'il voet pleder le releaſe generalment. Here it appeareth, that when the ſtatute had given the action reall a-

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor fait feoffment a divers perſons a ſon uſe ‡, *et le diſſeiſor continualment priſt les profits, &c. et le diſſeiſee releſſa a luy*

ALSO, if a man be diſſeiſed, and the diſſeiſor maketh a feoffment to divers perſons to his uſe, and the diſſeiſor continually taketh the profits, &c. and the diſſeiſee releaſe *touts*

* *aſcun* not in L. and M. nor Roh. † *per le ley* not in L. and M. nor Roh. ‡ *&c.* added L. and M. and Roh.

touts actions reals, et puis il ſuiſt vers luy breve d'entre en nature d'aſſiſe per cauſe de le ſtatute, pur ceo que il prent les profits, &c. Quære, *coment le diſſeiſor ſerra aide per le dit releas; car s'il voile pleder le releas generalment, donques le demandant poit dire, que il n'avoit riens en le franktenement al temps del releas fait; et s'il pleda releas ſpecialment, donques il covient * conuſtre un diſſeiſin, et donques puit le demandant enter en le terre, &c. per ſon conuſans de le diſſeiſin, &c. mes peradventure per eſpecial pleader il luy poit barrer de l'action † que il ſuiſt, &c. coment le demandant poit enter.*

to him all actions reals, and after hee ſueth againſt him a writ of entrie in nature of an aſſiſe by reaſon of the ſtatute, becauſe hee taketh the profits, &c. *Quære*, how the diſſeiſor ſhall bee ayded by the ſaid releaſe; for if hee will plead the releaſe generally, then the demandant may ſay, that hee had nothing in the freehold at the time of the releaſe made; and if hee plead the releaſe ſpecially, then he muſt acknowledge a diſſeiſin, and then may the demandant enter into the land, &c. by his acknowledgment of the diſſeiſin, &c. but peradventure by ſpeciall pleading he may barre him of the action which he ſueth, &c. though the demandant may enter.

gainſt the pernor of the profits, it enableth him to take and pleade a releaſe of all actions reals, and yet he hath neither *jus in re*, nor *jus ad rem*, which point is worthy of obſervation for manifeſtation of the equity of the law. (5. Rep. 77.) 3. H. 7. 2.

Donques il covient conuſtre un diſſeiſin, &c. In a writ of dower the tenant pleaded that before the writ purchaſed *A.* was ſeiſed of the land, &c. untill by the tenant himſelfe hee was diſſeiſed, and that hanging the writ *A.* recovered againſt him, &c. judgment of the writ, and adjudged a good plea, in which plea the tenant confeſſed a diſſeiſin in himſelfe. (8. Rep. 150.) 15. E. 4. 4. b. (Doc. Pla. 343.)

Donques poit le demandant enter. So might hee have done in this caſe that *Littleton* putteth, albeit the tenant confeſſed no diſſeiſin. And therefore it is no prejudice to the tenant to confeſſe a diſſeiſin in himſelfe, &c. and then, as *Littleton* here holdeth, the action ſhall be barred.

But the reader is to obſerve, that now by the ſtatute of 27. *H.* 8. *cap.* 10. which executes the poſſeſſion to the uſe, all the ſtatutes againſt *ceſty que uſe*, or pernor of the profits, have loſt their force. 28. H. 8. Dier 32. 27. H. 8. c. 10.

Sect. 500.

ITEM, ſi home ſuiſt appeale de felony del mort ſon anceſter envers un auter, coment que l'appellant releſſa al defendant touts maners d'actions reals et perſonals, ceo ne aidera my le defendant, pur ceo que ceſt appeal n'eſt pas

ALSO, if a man ſue an appeale of felony of the death of his anceſter againſt another, though the appellant releaſe to the defendant all manner of actions reall and perſonall, this ſhall not aide the defendant, for that this appeale is not

OUR author having ſpoken of common pleas, now treateth of certaine pleas criminall, or pleas of the crowne, whereof it is ſaid, [*a*] *Item, criminalium alia majora, alia minora, alia maxima, ſecundum criminum quantitatem; ſunt enim crimina majora et dicuntur capitalia eò quòd ultimum inducunt ſupplicium, &c. Minora verò, quæ fuſtigationem inducunt, vel pœnam pilloralem, vel tumboralem, vel carceris* (a) Bract. lib. 3. fo. 101. b.

* *de* added in L and M. and Roh. † *que il ſuiſt, &c.* not in L. and M. nor Roh.

carceris incluſionem, &c.

[b] Flet. lib. 1. cap. 15.

[b] *Criminalium quædam ſententialiter mortem inducunt, quædam verò minimè.* [c] *De peche eſt briefe diviſion, car eſt mortal ou venial ſolonque ceo que appiert es paines.* And that crime is called mortall or corporall: mortall, becauſe it deſerveth death; and ſuch crimes are called veniall, as may be redeemed or ſatisfied by ſome other puniſhment than by death.

[c] Mir. ca. 1. §. 4. & ca. 4. des paines en divers manners.

Appeale de felonie. [x] *Appellum* ſignifieth *accuſatio*, an accuſation, and therefore to appeale a man is as much as to accuſe him; and in [y] ancient bookes he that doth appeale is called *accuſator*, and is peculiarly in legall ſignification applyed to appeales of three ſorts. Firſt, of wrong to his anceſtor, whoſe heire male he is, and that is onely of death, whereof our author here ſpeaketh. The ſecond is of wrong to the huſband, and is by the wife only of the death of her huſband to be proſecuted. The third is of wrongs done to the appellants themſelves, as robbery, rape, and mayhem. The word *appellum* is derived of *appeller*, to call, becauſe *appellans vocat reum in judicium*, he calleth the defendant to judgement, and the plaintife is called the appellant.

[x] Mir. ca. 1. §. 7. Braſt. lib. 3. fo. 137. Brit. ca. 22. 23. Flet. li. 1. ca. 31, 32, 33. 4. Rep. 39.) (3. Inſt. 131.)

[y] Glanvil. lib. 7. cap. 9. et lib. 14. ca. 1. et 3.

Appeale, *Appellatio*, is a removing of a cauſe in any eccleſiaſtical court to a ſuperior; but of this there needeth no ſpeech in this place.

24. H. 8. ca. 12. 1. Ei. ca. 1.

De mort. Appeale of death is of two ſorts, of murder and of homicide. Murder is when one is ſlaine with a man's will, and with malice prepenſed or forethought. Homicide, as it is legally taken, is when one is ſlaine with a man's will, but not with malice prepenſed. Chance-medly, or *per infortunium*, is when one is ſlaine caſually, and by miſadventure, without the will of him that doth the act, whereupon death inſueth; but of this no appeale doth lye. Murder commeth of the Saxon word *mordren*.

(4. Rep. 40. 43. 3. Inſt. 47.)

Were is an old Saxon word ſometime written *weera*, and ſignifieth the price of the life of a man, *eſtimatio capitis*, that is, ſo much as one paid for the killing of a man; by which it appeareth, that ſuch government was in thoſe dayes, as ſlaughters of men were moſt rarely committed, as maiſter *Lambard* collecteth. And you ſhall not reade of any inſurrection or rebellion before the Conqueſt, when the view of frankpledge and other ancient lawes of this realme were in their right uſe.

Lamb. Expoſ. verb. Eſtimatio. Flet. lib. 1. ca. 42. Hoved. o. 344.

Mes s'il releaſe al defendant touts manners d'actions, &c. And the reaſon is, for that then all actions, as well criminall as reall, perſonall and mixt, be releaſed. But a releaſe of all actions reall and perſonall cannot barre an appeale of death, becauſe that releaſe extendeth to common or civill actions, and not to actions criminall; but releaſes of all actions criminall or mortall, or concerning pleas of the crowne, are good barres in an appeale of death, and ſo the (&c.) in the end of the Section is well explained.

(4. Rep. 45. 47.) (Doc. Pla. 97.) 21. H. 6. 16.

action real, entant que l'appellant ne recovera aſcun realtie en tiel appeale: ne tiel appeale n'eſt pas action perſonal, en tant que le tort ſuit fait a ſon aunceſtor, et nemy a luy. Mes s'il releſſa a le defendant touts manners actions, donque il ſerra bone barre en appeale. Et iſſint home poit veyer que releaſe de touts maners d' actions eſt melior que releas de actions reals et perſonals, &c.

an action reall, in as much as the appellant ſhall not recover any realtie in ſuch appeale: neither is ſuch appeale an action perſonall, in as much as the wrong was done to his anceſtor, and not to him. But if hee releaſe to the defendant all manner of actions, then it ſhal be a good barre in an appeale. And ſo a man may ſee that a releaſe of all manner of actions is better than a releaſe of actions reals and perſonals, &c.

Sect. 501.

*ITEM, en appeale de robberie, ſi le defendant voile pleader un releaſe de l'appellant de touts actions perſonals, ceo ſemble nul plee; car action de l'appeale, lou l'appellee aura judgement de mort, &c. eſt pluis hault que action perſonal eſt, et n'eſt pas properment dit action perſonal: et pur ceo ſi le defendant voiloit plead un releaſe del appellant de barrer luy d'appeale, en ceſt caſe il covient d'aver un releaſe de touts manners * d'appeals, ou touts manners d'actions, come il ſemble, &c.*

ALSO, in an appeale of robberie, if the defendant will plead a releaſe of the appellant of all actions perſonals, this ſeemeth no plea; for an action of appeal where the appellee ſhall have judgment of death, &c. is higher than an action perſonall is, and is not properly called an action perſonall: and there if the defendant will plead a releaſe of the appellant to barre him of the appeale, in this caſe hee muſt have a releaſe of all manner of appeales, or all manner of actions, as it ſeemeth, &c.

Robberie, *Roboria*, properly is when there is a felonious taking away of a man's goods from his perſon: and it is called robbery, becauſe the goods are taken as it were *de la robe*, from the robe, that is, from the perſon; but ſometimes it is taken in a larger ſenſe. 22. Aſſ. 39. W. 1. cap. 20.

Judgement de mort, &c. By this (*&c.*) is implyed appeales of rape, of arſon or burning, of felony or larceny, for therein alſo is judgment of death, and are within our author's reaſon. (3. Inſt 68, Dy. 39. a. Cro. Car. 531.)

Come il ſemble, &c. It is to be underſtood, that, firſt, a releaſe of all actions criminall, mortall, or concerning pleas of the crowne; ſecondly, a releaſe of all actions generally; thirdly, a releaſe of all appeales; and laſtly, a releaſe of all demands, are good barres in all theſe kinds of appeales. V. Sect. 508. (Poſt. 291. b.)

Sect. 502.

MES en appeale de maihem un releaſe de touts manners d'actions perſonals eſt bone plee en barre, pur ceo que en tiel action il ne recovera forſque damages, &c.

BUT in appeale of mayhem a releaſe of all manner of actions perſonals is a good plea in barre, for that in ſuch an action hee ſhall recover nothing but damages.

MAYHEM, mahemium, membri mutilatio, or *obtruncatio,* commeth of the French word *mehaigne*, and ſignifieth a corporall hurt, whereby hee loſeth a member, by reaſon whereof hee is leſſe able to fight; as by putting out his eye, beating out his fore-teeth, breaking his ſkull, ſtriking off his arme, hand, or finger, cutting off his legge or foot, or whereby he loſeth the uſe of any of his ſaid members. Mir. ca. 1. §. 9. Glan. li. 14. ca. 7. Bract. lib. 3. Tract. 2. ca. 24. Brit. fo. 48. ca. 25. Flet. lib. 1. ca. 38. Stanf. Pl. Cor. fo. 38. b. (3. Inſt. 118. 4. Rep. 43. 45. Ant. 126.) 28. E. 3. 94. 8. H. 4. 21.

Damages, &c. Vide Sect. 194.

Releaſe de touts manners actions perſonals eſt bone plea, &c. And the reaſon is, for that every action wherein damages only are recovered by the plaintife, is in law taken for an action perſonall. 21. H. 6. 16. (Ant. 127. a. 9 Rep. 52.)

Sect.

* *d'actions* added L. and M.

Sect. 503.

V. li. 11. fo. 39. 41. in Metcalfe's case upon what judgements and awards a writ of error doth lie.

(Cro. Car. 66.)

*(3 Rep. 1. Cro. Jac. 5.)

Li. 5. fo. 111. Foxley's case. Li. 7. fo. 11, 12. Tenleman's case.

(Cro. Car. 63. Noy 68. 1. Roll. 750. 11. Rep. 38. F. N. B. 17. Ant. 117. b. 8. Rep. 141.)

15 Eliz. Dyer. 317. (Ant. 128. b.)

Lib. 9. fol. 119. 8. Zanchar's case. (5. Rep. 111.) (Ant. 114.)

28. Ass. 49. 12. E. 3. Utlag 3. 38. E. 3. 13. Mich. 4. & 5. El. Dyer fo. 222. Vid. Sect. 197. (6. Rep. 25. F.N.B. 20. b. 22. b.)

1. H. 4. 6.

(1. H. 4. 6. 8. Rep. 150. 156. 8. H. 6. c. 12. 32. H. 8. 30. 18. Eliz. 14. Cro. Car. 272. 878. 5. Rep. 41. 42.)

BRIEFE de error. This writ lyeth when a man is grieved by any error in the foundation, proceeding, judgment, or execution, and thereupon it is called *breve de errore corrigendo.* But without a judgment, or an award in nature of a judgment, no writ of error doth lie; for the words of the writ be, *si judicium redditum sit:* and that judgement must regularly be given by judges of record, and in a court of record, and not by any other inferiour judges in base courts, for thereupon a writ of false judgement doth lye. In this case of utlawry upon processe, the judgement is given (in the county court, which is no court of record) by the coroners (saving in London judgement is given by the recorder, and not by the maior, who is coroner by the custome of the city): for after the defendant is *quinto exactus*, and maketh default, the judgement is, *ideo utlagetur per judicium coronatorum*; and in London, *per judicium recordatoris:* so as by the outlawry, the plaintife recovers nothing, but the king taketh the whole benefit thereof; for the law did intend, that the defendant would rather appeare and answer the plaintife, &c. than to forfeit all his goods and chattels, debts and duties to the king, by his default and contumacie. But *Littleton* is to be intended, that the sherife doe returne the *exigent* whereby the outlawry appeares of record, or that the outlawry be removed by *certiorari*, for before that time that the outlawry appeare of record, the defendant doth not forfeit his goods, nor the plaintife can be disabled, nor any writ of error doth lye in that case. And this is the cause that the goods of outlawes cannot be claimed by prescription, because they are not forfeited untill the outlawry appeare of record. *Vide Sect.* 197. where it appeareth by *Littleton*, that the plaintife cannot be disabled by outlawry, unlesse it appeareth of record.

ITEM, si home soit utlage en action personal per proces sur le originai, et port breve d'error, si celuy a que suit il fuit utlage, voile pleader envers luy un releas de touts manners d'actions personals, ceo semble nul plee; car per le dit action il ne recovera rien en personaltie forsque tantsolement de reverser le utlagarie: mes un release de briefe d'error est bone plea.

ALSO, if a man bee outlawed in an action personall by processe upon the originall, and bringeth a writ of errour, if he at whose suit he was outlawed, will pleade against him a release of all manner of actions personals, this seemeth no plea; for by the said action, hee shall recover nothing in the personaltie, but only to reverse the outlawrie: but a release of the writ of errour is a good plea.

Car per le dit action il recovera rien en le personaltie. Hereupon is to be observed a diversity, when by the writ of error the plaintife shall recover, or be restored to any personall thing, as debt, damage, or the like; for then by the reason that *Littleton*, here yeeldeth, the release of all actions personals is a good plea, for that the plaintife is to recover, or to be restored to something in the personalty. And so likewise when land is to be recovered, or to be restored in a writ of error, a release of all actions reals is a good barre. But where by a writ of error the plaintife shall not bee restored to any personall or reall thing, then a release of all actions reall or personall is no barre; and therefore *Littleton* here putteth his case with great caution. If a man (saith he) by processe upon the originall be outlawed, there in deed he shal be restored to nothing in the personalty against the plaintife. But where by the outlawry he forfeited all his goods and chattels to the king, he shall be restored to them; also thereby he shall be restored to the law, and to be of ability to sue, &c. But if the plaintife, in a personall action, recover any debt, &c. or damages, and bee outlawed after judgement, there in a writ of error brought by the defendant upon the principall judgement, a release of all actions personals is a good plea. And so it is where a judgement is given in a reall action, a release of all actions reals is a good barre in a writ of error brought thereupon.

It

THE latter pages of the Chapter on Releaſes relate almoſt entirely to the uſeful, but abſtruſe and complicated, learning of *Special Pleading*. The Editor's profeſſional ſtudies having been directed to thoſe branches of the law which relate to conveyancing, he finds himſelf unable to write any annotations either on the text or the commentary contained in thoſe pages. He might fill them with notes; but he thinks it more honourable to confeſs his total ignorance of the ſubject, than, knowingly, to preſent the public with obſervations which muſt be unintereſting, and which might be of a nature to deceive and miſlead the Student.

Lincoln's-Inn, Nov. 9, 1785.

Erratum, page 241, note 4, line 8, inſtead of *grantor* read *grantee*.

To be placed before fol. 209. a.

If the tenant in a reall action release to the demandant after recovery his right in the land, he shall not have a writ of error, for that he cannot be restored to the land. 9. H. 6. 47.

And so it is if debt, &c. or damages be recovered in a personall action by false verdict, and the defendant bringeth a writ of attaint, a [a] release of all actions personal is a good barre of the attaint; for thereby the plaintife is to be restored to the debt, &c. or damages which he lost: the like law is if a judgement be given upon a false verdict in a reall action, a release of all actions real is a good barre in an attaint. For both the writ of error and the writ of attaint doe insue the nature of the former action, &c. [a] 26. H. 8. 3. b. 13. E. 4. 1. 2. 34. H. 6. 31. 35. H. 6. 19. 29. Ass. 35. 47. E. 3. 6.

And so it is if a writ of *audita querela* be brought by the defendant in the former action to discharge himselfe of an execution, a release of all actions personal is a good barre, because he is to discharge himselfe of a personall execution. 24. E. 3. 37. (5. Rep. 86.)

Mes un release de briefe de error est bone plea, &c. So as in this speciall case here put by *Littleton*, wherein the plaintife is to recover or be restored to nothing against the party; yet for that the plaintife in the former action is privy to the record, a release of a writ of error to him is sufficient to barre the plaintife in the writ of error of the suit, and vexation by the writ of error. And so note that an action reall or personall doth imply a recovery of something in the realty or personalty, or a restitution to the same, but a writ (1) implyeth neither of them, which is worthy of observation. (6. Rep. 25.)

Sect. 504.

ITEM, si home recovera debt ou damages, et il relessa al defendant touts maners d'actions, uncore il puit loialment suer execution per capias ad satisfaciendum, *ou per* elegit, *ou* fieri facias: *car execution per tiel briefe ne poit estre dit action.*

ALSO, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet hee may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *fieri facias*: for execution upon such a writ cannot bee said an action.

HERE appeareth a diversity betweene an action and an execution. For regularly an action is said in its proper sense to continue until judgement bee given, and after judgement then doth processe of execution begin; and therefore a release of all actions regularly is [b] no barre of execution, for the execution doth beginne when the action doth end. And therefore the foundation of the first is an originall writ, and doth determine by the judgement; and writs of execution are called judiciall, because they are grounded upon the judgement. Vide Sect. 233. (5. Rep. 88, 89. 8. Rep. 153. a) 8. E. 3. 9. 4. E. 3. Attorney 18. 33. H. 6. 49. 34. H. 6. 51. [b] 13. H. 4. Release 59. 19. H. 6. 3. 26. H. 6. Execution 7.

Per cap. ad satisfaciendum. This is a judiciall writ for the taking of the body in execution untill hee hath made satisfaction: where a *capias ad satisfaciendum* lyeth at the common law; and where it is given by statute, you may reade at large in my Reports. Sir William Herbert's case, lib. 3. fol. 11, 12.

I have read two ancient records touching the taking of the body in execution, whereof, to my remembrance, I never read any touch in our bookes, yet will I recite them, and leave them to the judicious reader. *William de Walton* brought an action of trespasse of breaking his close against *John Martin*, and upon not guilty pleaded, hee was found guilty and damages assessed; whereupon judgement was given that the plaintife should recover his damages, *et quòd prædictus Johannes capiatur.* And the record saith, *Quòd prædictus Johannes venit coram domino rege et reddidit se prisonæ, et quia constat curiæ per inspectionem corporis ipsius Johannis, quòd idem Johannes est talis ætatis quòd pœnam imprisonamenti subire non potest, ideo dictum est ei, quòd eat inde sine die.* Pasch. 14. E. 3. Rot. 106. coram Rege in Thesaur. Surrey. (Cro. Jac. 356.)

The other record is, That *Ellen Allot* brought an appeale of robbery against *John Boskiseleke* clerke, *Richard Charta*, and others, who pleaded not guilty, and were not found guilty: whereupon judgement was given that they should goe quite, *et prædicta Elena pro falso appello suo committatur prisonæ, &c.* (for [b] by the statute she ought to be imprisoned in that case for a yeare.) But the record saith, *Quia eadem Elena pregnans fuit, et in periculo mortis, ipsa dimittitur per manucaptionem, &c. ad habendum corpus usque quind. Michaelis, &c.* (2) Mich. 41. E. 3. Rot. 27. coram Rege Cornub. in Thesaur. [b] W. 2. cap. 12. (Siderf. 236. Hutton 118.)

(1) That is, a writ of error.
(2) The record at large is stated in 12 Rep. fol. 126.

There be certaine maximes in the law concerning executions, as taking ſome inſtead of many. *Ea quæ in curiâ noſtrâ ritè acta ſunt, debitæ executioni demandari debent. Parum eſt latam eſſe ſententiam niſi mandetur executioni. Executio juris non habet injuriam. Executio eſt fructus et finis legis. Juris effectus in executione conſiſtit. Proſecutio legis eſt gravis vexatio, executio legis coronat opus. Boni judicis eſt judicium ſine dilatione mandare executioni. Favorabiliores ſunt executiones aliis proceſſibus quibuſcunque.* But now let us heare what *Littleton* ſaith.

(5. Rep. 88. a.)

Per elegit. This is alſo a judiciall writ, and is given by the ſtatute eyther upon a recovery for debt or damages, or upon a recognizance in any court. And it is called a writ of *elegit*, for that according to the ſtatute that ſaith, [c] *Sit de cæterò in electione illius, &c. ſequi breve quòd vicecomes fieri faciat, &c. vel quòd liberet ei, &c.* The words of the writ bee, *Elegit ſibi liberari, &c.* And thereupon it is called an *elegit*. By this writ the ſherife ſhall deliver to the plaintife *omnia catalla debitoris, (exceptis bobus & aſris carucæ) et medietatem terræ.* And this muſt be done by an inqueſt to be taken by the ſherife.

[c] W. 2. cap. 18. (Plowd. 178. b.)

When *Littleton* wrote, by force of certaine acts [d] of parliament, execution might bee had of lands (beſides by force of the *elegit*) upon ſtatutes merchant, ſtatutes ſtaple, and recognizances taken in ſome court of record; and ſince he wrote, upon a recognizance or bond taken by force of the ſtatute [*] of 23. *H.* 8. before one of the chief juſtices, or the maior of the ſtaple, and recorder of London out of terme, which hath the effect of a ſtatute ſtaple. The manner of the executions upon body, lands, and goods, appeareth in the ſtatutes quoted in the margent.

[d] 11. E. 1. Stat. de Acton Burnell. 13. E. 1. de mercatoribus. 27. E. 3. cap. 22. Vide Fleta, li. 2. cap. 57. 25. E. 3. 53. (6. Rep. 44.)
[*] 23. H. 8. cap. 6.

Since *Littleton* wrote, a profitable ſtatute hath been made [e] concerning executions of lands, tenements, and hereditaments, whereby it is provided, that if after ſuch lands, &c. be had and delivered in execution upon a juſt or lawfull title, wherewithall the ſaid lands, &c. were liable, tied, or bound at ſuch time, as they were delivered or taken into execution, ſhall be recovered, deveſted, taken, or evicted out of, or from the poſſeſſion of any ſuch perſon, &c. before ſuch times, as the ſaid tenants by execution, their executors or aſſignees, ſhall have fully levied their debt and damages, for the which the ſaid lands, &c. were taken in execution; then every ſuch recoveror, obligee, and recognizee, ſhall have a *ſcire facias* out of the ſame court from whence the former execution did proceed, againſt ſuch perſon or perſons as the former execution was purſued, their heires, executors or aſſignes, to have execution of other lands, &c. liable and to be taken in execution for the reſidue of the debt or damages. *Sed opus eſt interprete.*

[e] 32. H. 8. cap. 5. (5. Rep. 86. b. 2. Inſt. 677. b.)

Lib. 4. fol. 66. Fulwood's caſe. (4. Rep. 81. a. Inſt. 678.)

Therefore, firſt, it is to be knowne, that where the tenant by execution hath remedy given to him by law after eviction, there the ſtatute extendeth not to it; for the act ſaith, by reaſon whereof the ſaid recoverors, obligees, and recognizees, have been cleerly ſet without remedy, &c. and the body referreth to the preamble, and the party ought not to have double ſatisfaction, one by the former lawes, and another by this ſtatute.

(Cro. 338.)

And therefore if part of the land, &c. be evicted from the tenant by execution, this ſtatute extendeth not to it; becauſe he ſhould hold the reſidue, till he be fully ſatisfied; and he muſt be contented if all be evicted ſaving one acre to hold that, though it be but a poore remedy: for no new execution in that caſe hee can have upon this ſtatute. Therefore if the conuſee hath remedy *in præſenti* for part, or *in futuro* for all, or part, this ſtatute extendeth not to it.

Secondly, if a man be bound to *A.* in a ſtatute of a thouſand pounds, and by a latter ſtatute to *B.* in a hundred pounds, and *B.* firſt extendeth, and then *A.* extendeth and taketh the land from *B.* yet *B.* ſhall have no aide of the ſtatute, becauſe after the extent of *A.* *B.* ſhall re-enjoy the land, by force of his former execution.

Thirdly, If the wife of the conuſor recover dower againſt the tenant by execution, he ſhall hold over, and ſhall have no aide of this ſtatute.

Fourthly, If a man put out his leſſee for yeares, or diſſeiſe his leſſee for life, and after knowledge a ſtatute and execution is ſued againſt him, and the leſſees re-enter, the tenant by execution after the leaſes ended, ſhall hold over, and have no aide of this ſtatute.

Fifthly, This ſtatute muſt not be taken literally, but according to the meaning; therefore where the letter is untill he, &c. or his aſſignes ſhall fully and wholly have levied the whole debt or damages; if he hath aſſigned ſeverall parcels to ſeverall aſſignes, yet all they ſhall have the land but till the whole debt be paid.

Sixthly, where the words be, for the which the ſaid lands, &c. were delivered in execution. A diſſeiſor conveys lands to the king, who granteth the ſame over to *A.* and his heires to hold by fealty, and twenty pound rent, and after granteth the ſeigniory to *B.* *B.* knowledgeth a ſtatute,