Brook tit. Mortmaine 6. 47. E. 3. 11. 21. E. 3. 17.

40. Aff. 13.

Alſo hee that hath a title to enter upon a mortmaine, ſhall not be barred by a diſcent, becauſe then he ſhould bee without all remedie. And ſo it is in caſe where a woman hath a title to enter *cauſâ matrimonii prælocuti*, no diſcent ſhall take away her entrie, becauſe ſhee hath but a title, and no remedie by action. (1)

Sect. 392.

*ITEM, ſi tiel tenant ſur condition ſoit diſſeiſie, et le diſſeiſor devie ent ſeiſie, et la terre deſcendiſt al heire le diſſeiſor, ore le entrie le tenant ſur condition, que fuiſt diſſeiſie, eſt toll. Mes uncore ſi le condition ſoit enfreint *, donque poit le feoffor ou le donor que fierent eſtate ſur condition, ou lour heirs, enter,* cauſâ quâ ſupra.

ALSO, if ſuch tenant upon condition be diſſeiſed, and the diſſeiſor die thereof ſeiſed, and the land diſcend to the heire of the diſſeiſor, now the entrie of the tenant upon condition, who was diſſeiſed, is taken away. Yet if the condition be broken, the feoffor or the donor which made the eſtate upon condition, or their heires, may enter, *cauſâ quâ ſupra.*

IF a man be ſeiſed of lands in fee, and by his laſt will in writing deviſeth the ſame to another in fee, and dieth, after whoſe deceaſe the freehold in law is caſt upon the deviſee, and the heire, before any entrie made by the deviſee, entreth, and dieth ſeiſed, this diſcent ſhall not take away the entrie of the deviſee; for if the diſcent, which is an act in law, ſhould take away his entrie, the law ſhould barre him of his right, and leave him utterly without remedie. (2) And ſo it is of him that entreth for conſent to a raviſhment; and ſo it was reſolved in the caſe of *Martin Tròtte* of London, [n] *Paſchæ* 32. *El. in Com. Banco*; and accordingly was the opinion of the court of common pleas, [o] *Paſch.* 1. *Jac. Reg.* To this may bee added as a like caſe, the king's patentee before he enter, &c. Another reaſon wherefore a diſcent ſhall not take away the entrie of him that hath a title to enter by force of a condition, &c. is, for that the condition remaines in the ſame eſſence that it was in at the time of the creation of it, and cannot be diveſted or put out of poſſeſſion, as lands and tenements may (3).

[n] Paſch. 32. Eliz. in Communi Banco. 7. R. 2. Scir. Fac. 3. 41. E. 3. 14. per Finchden.

[o] Paſch. 1. Jac. Regis in Communi Banco.

Sect. 393.

DEVIE ſeiſie, &c. viz. in fee ſimple or in fee tayle.

Et ſon heire enter, &c. So as he hath an actuall fee ſimple.

De la 3. part de les tenements, &c. id eſt, in ſeveraltie.

By this ſection it appeareth, that an entrie being taken away by the diſcent, is revived by the endowment, albeit the tenant in dower ſhall have it but for her life. And the cauſe is, for that although the heire entred, yet

ITEM, ſi un diſſeiſor devie ſeiſie, &c. et ſon heire enter, &c. lequel endowa la feme le diſſeiſor de la tierce part de les tenements, &c. en ceſt cas quant a ceſt tierce part que eſt aſſigne a la feme en dower, maintenant apres ceo que la feme enter, et ad le poſ-

ALSO, if a diſſeiſor die ſeiſed, &c. and his heire enter, &c. who endoweth the wife of the diſſeiſor of the third part of the land, &c. in this caſe as to this part which is aſſigned to the wife in dower, preſently after the wife entreth, and hath the poſſeſſion of the ſame third

* *&c.* added in L. and M. but not in Roh.

(1) The aſſertion, that a woman in this caſe has no remedy by action, may, perhaps, be diſputed, as the writ *cauſâ matrimonii prælocuti* extends to all the degrees. See the writ in the Regiſter. Booth's Real Actions 197. and Fitz. Nat. Br. 205.

(2) Acc. the caſe of Matthefon v. Trott, Owen 141. 1. Leo. 209. But the reaſon given in the Commentary, that the deviſee, in this caſe, has no remedy by action, is not well founded, if what Sir Edward Coke obſerves in page 111 a. be true, that the deviſee may either enter, or have his writ *ex gravi querela*. Upon this head, the judges Anderſon and Walmeſley ſeem to differ on the caſe above cited. Whatever may be the caſe with reſpect to a deſcent, a fine levied by the heir at law, is a bar to a deviſee after five years non-claim. Hulm v. Heylock, Cro. Car. 200. It is alſo a bar to a title of entry for a condition broken, or a right or title of entry upon any other account. Mayor of London v. Alsford, Cro. Car. 575. 1. Jones 452. See Mr. Cruiſe's Eſſay on Fines, 146. 147.

(3) Hamſworth v. Pretty, Cro. Eliz. 919. Thomas deviſed to Richard, his eldeſt ſon, in fee, upon condition that he ſhould pay to his other children the ſums appointed to them according to the intent of his will; and on refuſal, that his younger ſons and daughters ſhould have it to them and their heirs. Thomas refuſed payment, and died; and William, his ſon, entered, and the younger ſons and daughters entered upon him: it was contended, that the deſcent upon William took away the entry of the younger ſons and daughters; but the court held the contrary. For it was not as a deſcent by a ſtranger after a deviſe, before the entry of the deviſee, which, perhaps, might take away their entry, becauſe it was not then an immediate deviſe; but it was *quaſi* a deviſe upon a limitation, or upon a condition broken, which no deſcent ſhould take away or prejudice.

*possession de mesme la tierce part, le disseisee poit loyalment enter sur la possession le feme en mesme la tierce part. Et la cause est, pur ceo que quant la feme ad son dower, el serra adjudge eins immediate per son baron, et nemy per l'heire; et issint quant a le franktenement de mesme la tierce part, le discent est defeate *. Et issint poies veir, que devant le endowment le disseisee ne poit enter en ascun part, &c. et apres le dowment il poit enter † sur la feme, &c. mes uncore il ne poit enter sur les auters deux parts que l'heire le disseisor ad per le discent ‡.*

part, the disseisee may lawfully enter upon the possession of the wife into the same third part. And the reason is, for that when the wife hath her dower, she shall be adjudged in immediately by her husband, & not by the heire (1); and so as to the freehold of the same third part, the discent is defeated. And so you may see, that before the endowment the disseisee could not enter into any part, &c. and after the endowment he may enter upon the wife, &c. but yet hee cannot enter upon the other two parts which the heire of the disseisor hath by the discent (2).

when the wife is endowed she shall not be in by the heire, [a] but immediately by her husband being the disseisor, who is in for her life by a title paramount the dying seised and discent, and therefore in judgement of law, the discent as to the freehold, and the possession which the heire had is taken away by the endowment; for that the law adjudgeth no meane seisin betweene the husband and the wife.

[a] 8. E. 2. Entrie 75. 19. E. 2. Dower 171. 5. E. 2. Entrie 66. 24. E. 3. 32. 40. 38. Ass. Pl. 26.

43. E. 3. 32. 45. E. 3. 9. b. 11. H. 4. 11. 7. H. 5. 3. 10. E. 3. 27. 28. 36. H. 6. Dower 30.

If there bee lord, mesne and tenant, the mesne doth grant to the tenant to acquite him against the lord and his heires, the lord dies, his wife hath the seigniorie assigned to her for her dower, and distraines the tenant; albeit the grant was to acquite him against the lord and his heires only, yet because shee continued the estate of her husband, and the reversion remained in the heire, this grant of acquitall did extend to the wife, which is a notable case.

31. E. 1. Mesne 55. (F. N. B. 136.)

If after the dying seised of the disseisor, the disseisee abate, against whom the wife of the disseisor recover by confession in a writ of dower, in that case, though the discent bee avoided as *Littleton* here saith, yet the disseisee shall not enter upon the tenant in dower, because the recoverie was against himselfe; but if he had assigned dower to her *in pais*, some say hee should enter upon her (3).

A man makes a gift in taile reserving twentie shillings rent, and dies, the donee takes wife, and dieth without issue, the heire of the donor entreth and endoweth the wife, shee is so in of the estate of her husband, that albeit the estate taile be spent, and the rent reserved thereupon determined, yet after she be endowed, she shall be attendant to the heire in respect of the said rent. And so it is of lord and tenant, the wife that is endowed shall be attendant for the due services; but if any services be encroached, albeit that encroachment shall binde the heire, yet the wife shall be contributorie but for the services of right due (4).

10. E. 3. 26. (7. Rep. 9. a.)

Issint poies veir, que devant le dowment le disseisee ne poit enter, et apres l'endowment il poit enter, &c. The like hath beene said before in this chapter, *Sect.* 386. where the entrie of the disseisee may be taken away for a time, and by matter *ex post facto* revived againe.

Nota, albeit the disseisor after a discent taketh to him but an estate for life, yet when the disseisee doth enter upon him, he shall thereby devest the reversion, for the estate of freehold is that whereupon a *præcipe* doth lye, and therefore the entrie of the disseisee is as available in law, as if he had recovered it in a *præcipe*. And so it is if a disseisor make a lease for life, and grant the reversion to the king, the entrie of the disseisee upon the tenant for life shall devest the reversion out of the king in the same manner as if the disseisee had recovered the lands against the tenant for life in a *præcipe*.

Vide Sect. 382. 383. 25. E. 3. 48. Pl. Com. 553. (Post. 253. b. Dyer 21. b.) (1 Roll. Abr. 658. Ant. 55. b.)

Sect.

* &c. added in L. and M. and Roh. † *sur la feme*, not in L. and M. nor Roh. ‡ &c. added in L. and M. and Roh.

(1) The dowress holds of the heir; but by the institution of the law, she is in of the estate of her husband; so that after the heir's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is that dower defeats descent, because the lands cannot be said to descend as demesne which are in tenure; and the assignment of dower being in the nature of infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descended as demesne. Gilb. on Dower 395.—See ant. 31. b.

(2) The doctrine contained in this section seems to apply to the cases of a recovery suffered by the heir, either before or after the assignment of dower.

(3) *So note, though the disseisee, being an abator, did an act to which he was compellable, yet it is not as good as if he had been actually compelled. Supra*, 35. Lord Nott. MS.

(4) Sir Edward Coke, in this passage, and in a former part of his Commentary, puts several cases on the continuance of the wife's dower after the fee charged with it is determined. Perhaps the following distinctions and observations will assist in clearing up the complex and abstruse points of learning in which this question is involved. I. In those cases where the fee is evicted by title paramount, the dower and courtesy necessarily cease upon the eviction. Such is the case put by Littleton in the section before us. II. When the donor enters for breach of condition; as his entry absolutely defeats the estate of the tenant on condition, so it defeats his wife's right of dower, and the husband's right of courtesy, and all other charges brought upon the estate, either by the donee's own act, or by act of law. See Note 2, fo. 202. b. III. If a person seised in fee tail, or any other determinable fee, conveys in fee, the wife's right of dower, and the husband's courtesy, can only be commensurate with the estate of the grantor, and must necessarily cease whenever that estate ceases. See 10 Rep. 97. b. 98. a. IV. As to estates in fee simple conditional at the common law, and estates tail under the statute *de donis*;—the wife was entitled to her dower, and the husband to his courtesy, out of them, after the failure of the issues in tail. But it may be observed, that though it now is difficult to avoid considering estates in fee simple conditional in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversioner expectant on the failure of these heirs; yet this restriction to particular heirs, and exclusion of others, is understood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or being such, if they afterwards failed, and the donee did not alien the estate, it should be lawful for the donor and his heirs to enter. — This entry, therefore, was not an entry upon the *natural expiration of a previous estate*, but for a *condition broken*; in which case, as in all others where entry is made for breach of a condition, the right of the wife to her dower, and the husband to his courtesy, if the general rule were adhered to, would be defeated. But for reasons now rather to be recited than demonstrated, this case was made an exception from the general rule. So with respect to the right of the wife of tenant in tail to her dower, and the husband to his courtesy, after the failure of the issues in tail; the statute *de donis* introduced no new estate, but only preserved estates limited as conditional fees to the issues inheritable under them, by preventing the tenants of such conditional fees from alienating or disposing of them; and as they preserved the estates, so they preserved the incidents belonging to them, and, among others, the right of the wife to her dower, and the husband to his courtesy. V. If a person makes a gift in tail, reserving rent; after failure of the issues in tail, the rent will not be continued, either for the dower of the wife, or the courtesy of the husband. Plo. Com. 135. VI. As to limited fees;—by which, in this place, are to be understood those fees which are qualified, not because the estate of the grantor is limited—(such as

Sect. 394.

EN ceſt caſe jeo poy enter ſur le poſſeſſion l'iſſue, &c.

Vide 9. H. 7. 24. and 37. H. 6. 1.

See before the chapter of Homage.

(3. Rep. 34. a.)

For here was but a diſcent of a reverſion at the time of the dying ſeiſed, for the eſtate of the tenant by the courteſie had commencement by the having of iſſue, and is conſummate by the death of the wife, ſo as the fee & franktenement did not after the deceaſe of the wife deſcend to the heire, and albeit the tenant by the courteſie dieth afterwards, and that the franktenement is caſt upon the heire, ſo as now he hath the fee and franktenement by diſcent, yet becauſe the heire came not to the fee and franktenement at once, immediately after the deceaſe of the wife, ſuch a mediate diſcent ſhall not take away the entrie of the diſſeiſee. On the other ſide, an immediate diſcent may take away an entrie for a time, and mediately may be avoided by matter *ex poſt facto*, as hath beene ſaid. But if a dying ſeiſed taketh not away the entrie of him that right hath at the time of the diſcent, it ſhall not by any matter *ex poſt facto* take away his entrie.

*ITEM, ſi un feme ſoit ſeiſie de terre en fee, dont jeo aye droit et title d'entre, ſi la feme prent baron, et ont iſſue enter eux, et puis la feme devie ſeiſie, et apres le baron devie, et l'iſſue enter, &c. en ceſt caſe jeo * poy enter ſur le poſſeſſion l'iſſue, pur ceo que l'iſſue ne vient a les tenements immediate per diſcent apres la mort ſa mere, &c. † eins per le mort del pier.* (1)

Contrarium tenetur P. 9. Hen. 7. *per tout le court*, & M. 37. H. 6.

ALSO, if a woman be ſeiſed of land in fee, whereof I have right and title to enter, if the woman take huſband and have iſſue betweene them, and after the wife die ſeiſed, and after the huſband die, and the iſſue enter, &c. in this caſe I may enter upon the poſſeſſion of the iſſue, for that the iſſue comes not to the lands immediately by diſcent after the death of the mother, &c. but by the death of the father.

Contrarium tenetur P. 9. H. 7. per tout le court, & M. 37. H. 6.

If a diſſeiſor die without heire, his wife privement enſeint with an iſſue, and after the iſſue is borne, who entreth into the land, he hath the land by diſcent, and yet thereby the entrie of the diſſeiſee ſhall not be taken away, becauſe, as *Littleton* here ſaith, the iſſue commeth not to the lands immediately by diſcent, after the deceaſe of the father.

And ſo it is if a diſſeiſor make a gift in taile, the remainder in fee, and the donee dieth without iſſue, leaving his wife privement enſeint with a ſonne, and he in the remainder enters, and after the ſonne is borne, who entreth into the land, this diſcent ſhall not take away the entrie of the diſſeiſee, *cauſâ quâ ſupra.*

Contrarium tenetur, &c. This is an addition, and therefore to be paſſed over. And at this day, this caſe of *Littleton* is holden for cleere law.

Sect. 395.

ITEM, ſi un diſſeiſor enfeoffa ſon pier en fee, et le pier moruſt de tiel eſtate ſeiſie, per que les tenements diſcendont a le diſſeiſor, ‡ come fits et heire, &c. en ceſt caſe le diſſeiſee bien poit enter ſur le diſſeiſor, nient obſtant le diſcent,

ALSO, if a diſſeiſor enfeoffe his father in fee, and the father die ſeiſed of ſuch eſtate, by which the land deſcend to the diſſeiſor, as ſonne and heire, &c. in this caſe the diſſeiſee may well enter upon the diſſeiſor, notwithſtanding the diſcent,

* *poy* not in L. and M. and Roh. † *eins per le mort del pier*, and the note that follows, not in L. and M. nor Roh.
‡ *ent* added in L. and M.

(1) Conformably to this it was held by lord Holt in the caſe of Carter v. Taſh, 1. Salk. 241. that a diſcent which tolls entry ought to be an immediate diſcent; and therefore if a feme diſſeiſoreſs take huſband, and hath iſſue and dies, and after the huſband dies, the diſcent of the iſſue does not take away entry, becauſe the interpoſition of tenant by the courteſy does impede it, and that coverture to avoid a diſcent ought to be continual from the time of the diſſeiſin to the diſcent; for if a feme be ſole at the time of the diſſeiſin, or of the diſcent, or any time intermediate, her entry is not preſerved, becauſe ſhe had an opportunity to enter and prevent the diſcent: as if a feme covert is a diſſeiſee, and after her huſband dies ſhe takes a ſecond huſband, and then the diſcent happens, this diſcent ſhall take away the entry of the feme: and upon this laſt point the plaintiff in that caſe was nonſuited.

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as thoſe which are claſſed under the third diſtinction)—but thoſe which being created by a perſon ſeiſed in fee ſimple, are by the original grant by which they are created, only to continue till a certain event; as a grant to A. and his heirs, tenants of the manor of Dale, or to A. and his heirs, while there ſhall be heirs of the body of B.:—or thoſe fees which are originally deviſed or limited in words importing a fee ſimple or fee tail abſolute and unconditional, but which, by ſubſequent words, are made determinable upon ſome particular event (ſee Note 1. 203.):—as to fees of this deſcription, it ſhould ſeem by the caſe cited in the Note to F. N. B. 149. G. and the caſes of Flavell v. Ventrice, Roll. Abr. 676. and Sammes v. Payne, 1. Leo. 167. 1. And. 184. 8. Rep. 34. Gouldſ. 81. that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the huſband his courteſy, after the expiration of the period to which the fee charged with the dower or courteſy is to continue; but that where the fee is originally deviſed in words importing a fee ſimple, or fee tail abſolute and unconditional, but by ſubſequent words is made determinable upon ſome particular event; there, if that particular event happens, the wife's dower and the huſband's courteſy ceaſe with the eſtate to which it is annexed. Such appears to be the diſtinction eſtabliſhed by the foregoing caſes. But a different doctrine as to caſes of the latter deſcription, ſeems to have been laid down in the caſe of Buckworth v. Thirkell, determined in laſt Trinity term in the court of king's bench. There Joſeph Sutton the teſtator deviſed his eſtates to truſtees upon truſt to pay the rents and profits of them for the maintenance and education of Mary Barrs, till ſhe arrived at twenty-one, or was married: "And from and after the ſaid Mary Barrs ſhould have attained her age of twenty-one years, or ſhould "be married, he gave and deviſed all the ſaid lands and premiſes to the ſaid Mary Barrs, her heirs and aſſigns for ever; "but in caſe the ſaid Mary Barrs ſhould happen to die before ſhe arrived at the age of twenty-one years, and without having iſſue of her body lawfully begotten; then, from and after the deceaſe of the ſaid Mary Barrs without iſſue, as aforeſaid, he gave and deviſed all his ſaid eſtates unto his grandſon Walter for life," with ſeveral remainders over. Mary Barrs married Solomon Hanford, and had iſſue a ſon, who died in her life; and afterwards Mary Barrs died under twenty-one. In this caſe, the court were unanimouſly of opinion, that on the deceaſe of Mary Barrs, her huſband became intitled by the courteſy to the eſtates for his life, and that, ſubject thereto, the deviſees over became entitled to them by way of executory deviſe.—By a manuſcript report of this caſe, the ground upon which the court appears to have formed their opinion on it,

Hen. T. 25 G. 3.

is,

pur ceo que quant al diſſeiſin, le diſſeiſor ſerra adjudge eins forſque come diſſeiſor, nient obſtant le diſcent, * quia particeps criminis.

diſcent, for that as to the diſſeiſin, the diſſeiſor ſhall bee adjudged in but as a diſſeiſor, notwithſtanding the diſcent, *quia particeps criminis.* (1)

(Ant. 238. b.)

OF this ſufficient hath beene ſaid before in this chapter, Sect. 386. And regularly it is true, that albeit a diſcent be caſt, and the entrie of the diſſeiſee taken away, yet if the diſſeiſor commeth to the land againe, either by diſcent or purchaſe, of any eſtate or frechold, which is implyed in the (&c.) the diſſeiſee may enter upon him, or have his aſſiſe againſt him, as if no diſcent or meane conveyance had beene, *quia particeps criminis.*

15. E. 4. 23. a. 11. E. 4. 2. 18 E. 4. 25. a. 33. H. 6. 5. b. 34. H. 6. 11. 12. H. 8. 9. 24. H. 8. 3. 9. 18. H. 8. 5. 5. H. 7. 29. Aſſ. 54. 39. E. 3. 25. 26.
(Poſt. Sect. 409.)

Sect. 396.

ITEM, ſi home ſeiſie de certaine terre en fee ad iſſue deux fits, et moruſt ſeiſie, et le puiſne fits entra per abatement en la terre, quel ad iſſue, et de ceo moruſt ſeiſie, et les tenements diſcendont al iſſue, et l'iſſue entra en la terre: en ceſt caſe le fits eigne, ou ſon heire, poit enter per la ley ſur l'iſſue del fits puiſne, nient contriſteant le diſcent, pur ceo que quant le fits puiſne abatiſt en la terre apres le mort ſon pier devant aſcun entrie per le fits eigne † fait, la ley intendra que il entra en claymant come heyre a ſon pier. Et pur ceo que l'eigne fits clayma per meſme le title, ceſtaſcavoir, come heyre a ſon pier, il et ſes heires poient enter ſur l'iſſue de puiſne ‡ fits, nient obſtant le diſcent, &c. pur ceo que ils clay-

ALSO, if a man ſeiſed of certaine land in fee have iſſue two ſons, and die ſeiſed, and the younger ſonne enter by abatement into the land, and hath iſſue, and dieth ſeiſed thereof, and the land deſcend to his iſſue, and the iſſue enters into the land: in this caſe the eldeſt ſonne, or his heire, may enter by the law upon the iſſue of the younger ſon, notwithſtanding the diſcent, becauſe that when the younger ſon abated into the land after the death of his father before any entrie made by the eldeſt ſonne, the law intend that hee entred claiming as heire to his father. And for that the eldeſt ſonne claimes by the ſame title, that is to ſay, as heire to his father, hee and his heires may enter upon the iſſue of the younger ſon, notwithſtanding the diſ-

EN ceſt caſe le fits eigne, &c. poit entrer ſur l'iſſue del fits puiſne, &c.
And the reaſon hereof is, for that the law intendeth the youngeſt ſonne entred claiming the land as heire to his father, and becauſe the eldeſt ſonne claimeth alſo by the ſame title, *viz.* as heire to his father, therefore hee and his heires may enter upon the ſecond ſonne and his heires, in reſpect of the privitie of the bloud betweene them, and of the ſame claime by one title, albeit the youngeſt ſon gained a fee ſimple by his entrie: for *Littleton* here calleth it an abatement, which proveth the gaining of a fee ſimple.

(Plow. 306. a.)

And it is to be obſerved, that *aſſiſa mortis anteceſſoris non tenet inter conjunctas perſonas ſicut fratres & ſorores, &c.* for theſe are privie in bloud, but it lyeth againſt ſtrangers, and then damages are to be recovered againſt a ſtranger, but not againſt his brother.

Bract. lib. 4. fol. 261. 282. 283. Britton, fol. 180. 181. Fleta, lib. 5. cap. 1. 2, &c. 20. E. 3. Dan. preſent 13. 12. H. 3. Mord. pl. ultim. 13. E. 1. Mord. 47. 29. Aſſ. 11. F. N. B. 196. b. (8. Rep. 42.) (Poſt. 271. a.)

Lands were given to the huſband and wife, and to the heires of their two bodies, they had iſſue a daughter, the wife died, the huſband had iſſue by another wife foure ſons and died, the eldeſt ſonne abated

Paſch. 3. E. 3. Coram Rege Kanc. in Theſaur.

* *&c.* added: *quia particeps criminis*, not in L. and M. † *fait* not in L. and M. ‡ *fits—ſeiſie*, L. and M. and Roh.

(1) For when the diſſeiſor enfeoffs the father, it is preſumed to be done in order afterwards to come in by diſcent, and the act of law ſhall not give ſanction to the wrong of the party; nor ſhall any man by his own wrong, however cunningly contrived, give to himſelf a right; for when the heir by the diſcent gains a *jus poſſeſſionis*, he is ſuppoſed innocent of the wrong of his anceſtor, but here he is partner of his guilt. See Gilb. Ten. 27. 28.

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is, an analogy they ſuppoſed it to bear to the caſe of eſtates in fee ſimple conditional, and eſtates tail; in both of which dower and courteſy continue after failure of the iſſues, and in both of which the wife's being ſeiſed of a fee, to which the iſſue might by poſſibility inherit, entitles the huſband to courteſy. Some obſervations have been offered above to ſhew that the continuation of dower and courteſy in the caſes of eſtates in fee ſimple conditional, was an exception to a general rule (dower and courteſy, in all other caſes of conditions, being defeated by the entry for the condition broken); and that the ſame reaſoning may be applied to the continuation of dower and courteſy out of an eſtate tail, after the failure of iſſue. It may therefore ſeem ſingular that the court, on this occaſion, ſhould prefer reaſoning by way of analogy from the only admitted *exception* to the general rule, to reaſoning by analogy from the *general rule* itſelf:—it is the more ſo as that, as the general caſe of eſtates on condition approached nearer to the caſe then under conſideration of the court, than the particular caſe of eſtates in fee ſimple conditional, or eſtates tail; for the diſtinguiſhing feature of the deviſe which gave riſe to the caſe before the court (as of all deviſes of that deſcription) is, that after the whole fee is firſt deviſed, it is made defeaſible by a ſubſequent claute. Now neither an eſtate in fee ſimple conditional, nor an eſtate tail, has any ſuch defeaſible quality or incident annexed to it; but this quality forms the very eſſence of all other eſtates upon condition.—With reſpect to the application of the maxim, that where the iſſue may by poſſibility inherit, the huſband ſhall have his courteſy (and ſo *vice verſâ* of dower); in every place in the books where that is mentioned, it is to introduce an enquiry whether the wife, being in the actual ſeiſin of an eſtate, was in fact ſeiſed of an eſtate, the *quality* of which was ſuch, that the iſſue of the huſband might inherit it, but never with a view to ſhew that the *quantity* of the eſtate was ſuch, that it might endure ſo long as to be inheritable by the iſſue. On the contrary, when the wife's eſtate is evicted by title paramount, or by an entry for the breach of a condition, in both caſes the iſſue might have inherited; but the huſband would be entitled to his courteſy in neither, after the eviction or entry. Another difference between the caſe of an eſtate in fee ſimple made defeaſible by a ſubſequent executory limitation or deviſe, and that of an eſtate in fee ſimple conditional, or an eſtate tail, is, that an eſtate in fee ſimple, made defeaſible by an executory limitation or deviſe, cannot, by any means whatever, be diſcharged by the firſt taker, or deviſee, from the operation of the ſubſequent limitation or deviſe; but an eſtate in fee ſimple conditional may immediately after the birth of a child, and an eſtate tail immediately after marriage, be deſtroyed, and a fee-ſimple abſolute acquired, by the huſband and wife joining in a fine or common recovery.—The caſe is the ſame with reſpect to the wife's right of dower.---Beſides, the quality we are ſpeaking of is not ſufficient of itſelf to entitle the huſband to courteſy, or the wife to dower; it is only one of many incidents which the eſtate ought to have to give that title.

abated and died ſeiſed, this diſcent did take away the entrie of the daughters, becauſe they claimed not by one title. And in ancient bookes the eldeſt ſonne is called *hæres propinquus*, and the younger ſonne *hæres remotus*. And albeit the eldeſt ſonne hath iſſue and dieth, and that after his deceaſe the youngeſt ſon or his heire entreth, and many diſcents be caſt in his line, yet may the heires of the eldeſt ſonne enter in reſpect of the privitie of the bloud, and of the ſame claime by one title; but if the youngeſt ſonne make a feoffment in fee, and the feoffee die ſeiſed, that diſcent ſhall take away the entrie of the eldeſt, in reſpect that the privitie of the bloud faileth. And admit that the youngeſt ſonne be of the halfe bloud to his brother, yet he is of the whole bloud to his father; and therefore if he entreth by abatement, and dieth ſeiſed, it ſhall not barre his elder brother of his entrie. But if the eldeſt ſonne entreth, and gaineth an actuall poſſeſſion and ſeiſin, then the entrie of the youngeſt is a diſſeiſin. And then a dying ſeiſed ſhall take away the entrie of the eldeſt, for *poſſeſſio terræ* muſt be *vacua* when the youngeſt ſonne enters by abatement, as *Littleton* ſaith, becauſe he hath more colour in that caſe to claime, as heire to his father, who laſt was actually ſeiſed. Therefore if after the deceaſe of the father, an eſtranger doth firſt enter and abate, upon whom the youngeſt ſonne entreth and diſſeiſe him and die ſeiſed, this diſcent ſhall binde the eldeſt, for he entred by diſſeiſin, and not by abatement.

If a man bee ſeiſed of lands of the nature of

8. E. 2. Aſſ. 380.
40. E. 3. 24. b. 19. Aſſ. 24.

Vid. Brooke tit. Entrie 27.

(Roll. Abr. 628. 629.)

(4. Rep. 58.)

mont per un meſme title. Et en meſme le maner il ſerra, ſi fueront pluſors diſcents de un iſſue a un auter iſſue del puiſne fits.

cent, &c. becauſe they claime by the ſame title. And in the ſame manner it ſhall be, if there were more diſcents from one iſſue to another iſſue of the younger ſonne (1).

Sect. 397.

*MES en tiel caſe, ſi le pier fuit ſeiſie de certaine terres en fee, et ad iſſue deux fits, et devie, et l'eigne *fits enter, et eſt ſeiſie, &c. et puis le puiſne frere luy diſſeiſiſt, per quel diſſeiſin il eſt ſeiſie en fee, et ad iſſue, et de tiel eſtate moruſt ſeiſie, donques l'eigne frere ne poit enter, mes eſt mis a ſon briefe* d'entre ſur diſſeiſin, &c. † *de recoverer la terre. Et la cauſe eſt, pur ceo que le puiſne frere vient a les tenements per tortious diſſeiſin fait a ſon eigne frere, et per cel tort la ley ne poit entender que il claime come heire a ſon pier, nient pluis que une ſtrange perſon que uſt diſſeiſie l'eigne frere ‡ que n'avoit aſcun title, &c. Et iſſint poyes veier la diverſitie, lou le puiſne frere enter apres le mort le pier devant aſcun entrie fait per l'eigne frere en tiel cas,* ‖ *et ou l'eigne frere*

BUT in this caſe, if the father were ſeiſed of certaine lands in fee, and hath iſſue two ſons, and die, and the eldeſt ſonne enter, and is ſeiſed, &c. and after the yonger brother diſſeiſeth him, by which diſſeiſin he is ſeiſed in fee, and hath iſſue, and of this eſtate dieth ſeiſed, then the elder brother cannot enter, but is put to his writ of *entrie ſur diſſeiſin, &c.* to recover the land. And the cauſe is, for that the youngeſt brother commeth to the lands by wrongfull diſſeiſin done to his elder brother, and for this wrong the law cannot intend that he claimeth as heire to his father, no more than if a ſtranger had diſſeiſed the elder brother which had no title, &c. And ſo you may ſee the diverſitie, where the younger brother entreth after the death of the father before any entrie made by the elder brother in this

* *fits—frere*, L. and M. and Roh.
† *&c.* not in L. and M. nor Roh.
‡ *frere* not in L. and M. nor Roh.
‖ *&c.* added in L. and M. and Roh.

(1) When a younger brother enters in this caſe, he does not enter to get a poſſeſſion diſtinct from that of the elder brother, but to preſerve the poſſeſſion in the family, that nobody elſe abates. Gilb. Ten. 28.

frere enter apres la mort ſon pier, et puis eſt diſſeiſie per le puiſne frere, lou le puiſne frere puis moruſt ſeiſie *.

caſe, and where the elder brother enters after the death of his father, and after is diſſeiſed by the younger brother, where the younger after dieth ſeiſed.

burgh Engliſh, and hath iſſue two ſonnes and die, and the eldeſt ſonne before any entrie made by the youngeſt, entreth into the land by abatement, and dieth ſeiſed, this ſhall not take away the entrie of the youngeſt brother. *Et ſic de ſimilibus.* And theſe and the like caſes are all within the reaſon and rule of our author. And where our author ſpeaketh only of an abatement, ſo it is not an intruſion; for if the father make a leaſe for life, and hath iſſue two ſonnes and dieth, and the tenant for life dieth, and the youngeſt ſonne intrude, and die ſeiſed, this diſcent ſhall not take away the entrie of the eldeſt. But if the father had made a leaſe for yeares, it had beene otherwiſe, for that the poſſeſſion of the leſſee for yeares maketh an actuall freehold in the eldeſt ſonne. And it is to be obſerved, that the reaſon of *Littleton* in this caſe (for that both the brethren hold by one title) holdeth alſo in many other caſes. (1. Roll. Abr. 629. Ant. 15. a.)

If two coperceners make partition to preſent by turne, and one of them uſurpe in the turne of the other, this uſurpation ſhall not put the other out of poſſeſſion, becauſe they claime by one title. 22. E. 4. 4. (F. N. B. 34. Ant. 186. b.)

If two coperceners be, and they ſeverally preſent to the ordinarie, yet the church is not litigious, becauſe they claime all by one title (1). Doctor & Stud. cap. 30. fol. 117.

If upon a writ of *diem clauſit extremum*, the youngeſt ſonne be found heire, the eldeſt ſon had no remedy by the common law, becauſe they claimed by one title; but otherwiſe it is, if they claime by ſeverall titles, as it appeareth in our bookes (2). But this is now holpen by a ſtatute * made ſince *Littleton* wrote. 12. E. 4. 18. * 2. E. 6. cap. 8.

If two parſons be in debate for tithes, which amount to above the fourth part, and one man is patron of both churches, no *indicavit* doth lye, for that both incumbents claime by one and the ſame patron. *Et ſic de ſimilibus.* 2. H. 7. 12. a. See the Section next following.

And where *Littleton* ſaith, ſeiſed of lands in fee, the ſame law it is if a man bee ſeiſed of lands in taile, and hath iſſue two ſonnes *mutatis mutandis*.

Et eſt ſeiſie, &c. That is to ſay, actually ſeiſed, either by entrie, as *Littleton* here putteth it, or by poſſeſſion of the leſſee for yeares, or the like. (Poſt. 245. a.)

N'avoit aſcun title, &c. That is to ſay, any pretence or ſemblance of title, as the younger brother here hath; and in many other caſes, there is a great diverſitie holden in our bookes [o] where one hath a colour or pretence of right, and when he hath none at all, whereof you may read plentifully in our bookes.

[o] 2. E. 2. baſtardie 19. 21. E. 3. 34. 22. Aſſ. 85. 39. E. 3. 26. 17. E. 3. 59. 11. E. 3. Aſſ. 88. 21. H. 6. 14. 11. E. 3. age 3. Vide Sect. 400. & cap. Garranty

Sect. 398.

EN meſme le maner eſt, ſi home ſeiſie de certaine terre en fee ad iſſue deux files et devie, l'eigne file entra en la terre claymant tout la terre a luy, et ent ſolement priſt les profits, et ad iſſue et moruſt ſeiſie, per que ſon iſſue enter, quel iſſue ad iſſue et devie ſeiſie, et le ſecond iſſue enter †, & ſic ultra, *uncore le puiſne file ou ſon iſſue, quant a le moitie poit enter ſur quecunque iſſue de l'eigne file, nient obſtant tiel*

IN the ſame manner it is, if a man ſeiſed of certaine land in fee, hath iſſue two daughters and dieth, the eldeſt daughter entreth into the land claiming all to her, and thereof onely taketh the profits, and hath iſſue and dieth ſeiſed, by which her iſſue enter, which iſſue hath iſſue and dieth ſeiſed, and the ſecond iſſue enter, *& ſic ultra*, yet the younger daughter or her iſſue as to the moitie may enter upon any iſſue whatſoever of the elder *diſcent*,

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

(1) Acc. Dig. p. 1. c. 3.—See 7th Ann. c. 18.

(2) At the common law, if the youngeſt ſon were found heir, the eldeſt might have an office; the doubt was, whether it ſhould be tried which of them was heir by immediate interpleader, or at the full age of him that was firſt found heir: but the 2d and 3d Ed. 6. ch. 8. hath remedied it, and given an interpleader immediately, on traverſing the firſt office, which cannot be, unleſs the party who traverſed had an office found for himſelf. 7. Co. 44. a. b. Kemi's caſe.

diſcent, pur ceo que ils claimont per un meſme title, &c. Mes en tiel caſe ſi ambideux ſoers avoyant enter apres la mort lour pier, et ent fueront ſeiſies, et puis l'eigne ſoer uſt diſſeiſie la puiſne ſoer de ceo que a luy affiert, et ent fuit ſeiſie en fee, et ad iſſue, et de tiel eſtate moruſt ſeiſie, per que les tenements diſcendont al iſſue del eigne ſoer, donque le puiſne ſoer ne ſes heires ne poient enter, &c. causâ quâ ſupra, &c.

daughter notwithſtanding ſuch diſcent, for that they claime by one ſame title, &c. But in ſuch caſe where both ſiſters have entred after the death of their father, and were thereof ſeiſed, and after the eldeſt ſiſter had diſſeiſed the younger of her part, and was thereof ſeiſed in fee, and hath iſſue, and of ſuch eſtate dieth ſeiſed, whereby the lands deſcend to the iſſue of the elder ſiſter, then the younger ſiſter nor her heirs cannot enter, &c. *cauſâ quâ ſupra, &c.*

(Hob. 120. Poſt. 373. b. Ant. 198.) 21. Aſſ. 19. 21. E. 3. 7. 27. 32. 26. Aſſ. 2. 27. Aſſ. 68. 36. Aſſ. p. 1. 43. E. 3. 19. 4. H. 7. 10. 16. H. 7. 4.
(Mo. 60.)
See more of this in the chapter of Warrantie. Sect. 710. 28. Aſſ. 30. Vide Sect. 710.
(4. Leo. 52. Ant. 174. a.)

CLaimont tout la terre. Here it appeareth, that when the one coparcener doth ſpecially enter, claiming the whole land, and taking the whole profits, that ſhe gaines the one moitie, *viz.* of her ſiſter by abatement, and yet her dying ſeiſed ſhall not take away the entrie of her ſiſter; whereas when one coparcener enters generally, and taketh the profits, this ſhall be accounted in law the entrie of them both, and no diveſting of the moitie of her ſiſter (1).

If one coparcener enter claiming the whole, and make a feoffment in fee, and take backe an eſtate to her and her heires, and hath iſſue and die ſeiſed, this diſcent ſhall take away the entrie of the other ſiſter, becauſe by the feoffment the privitie of the coparcenarie was deſtroyed.

Claimont per un meſme title, &c. Of this ſufficient hath beene ſaid in the next precedent Section.

Ne poient enter, &c. Of this there hath beene alſo ſpoken in the ſame Section.

Sect. 399.

Pl. Com 57. 39. E. 3. Le darreine caſe.

Lib. 8. fol. 101. 102. Sir Rich. Lechford's caſe.
(2. Roll. Abr. 584. 586. Doctor & Stud. 68. 69.)

Glanvil. lib. 7. cap. 2. Bract. lib. 5. cap. 19. Brit. cap. 70.

Vide Sect. 188.

SEiſie en fee. For this holds not in caſe of an eſtate taile.

Mulier, ſeu filius mulieratus. Mulier hath three ſignifications. Firſt, *Sub nomine mulieris continetur quælibet fœmina.* Secondly, *Proprie ſub nomine mulieris, continetur virgo.* Thirdly, *Appellatione mulieris, in legibus Angliæ, continetur uxor. Et ſic filius natus vel filia nata ex juſtâ uxore, appellatur in legibus Angliæ filius mulieratus, ſeu filia mulierata,* a ſonne *mulier*, or a daughter *mulier. Sicut baſtardus* (2) *dicitur à Græco verbo Baſſaris, i.e. meretrix, ſeu concubina, quia procreatur ex meretrice ſeu*

ITEM, ſi home eſt ſeiſie de certaine terre en fee, et ad iſſue deux fits, et l'eigne fits eſt baſtard, et le puiſne frere eſt mulier, et le pier devie, et le baſtard enter enclaimant come heire a ſon pier, et occupia la terre tout ſa vie, ſans aſcun entre fait ſur luy per le mulier, et le baſtard ad iſſue, et moruſt ſeiſie de tiel eſtate en fee,

ALSO, if a man be ſeiſed of certain lands in fee, and hath iſſue two ſonnes, and the elder is a baſtard, and the younger *mulier*, and the father die, and the baſtard entreth claiming as heire to his father, and occupieth the land all his life, without any entrie made upon him by the *mulier*, and the baſtard hath iſſue, and dieth ſeiſed

et

(1) *Hob. 120. Smale v. Dales. The contrary is held, that one coparcener cannot be diſſeiſed without actual ouſter, and claim ſhall not alter the poſſeſſion.* Lord Nott. MS. *See Lastingham's Case.*

(2) *Sir Henry Spelman verbo Baſtard rejects this derivation, and holds it to be a pure Saxon word Baſtart*, viz. impurè natus, ut apud nos, Upſtart dicitur homo novus. *Lord Nott. MS.* In Germany, and with us, (who derive many of our cuſtoms and political opinions from the Germans) baſtardy was always a circumſtance of ignominy. But in Spain, Italy, and France, baſtards were in many reſpects on an equal footing with legitimate children. During the firſt and ſecond races of the kings of France no difference appears to have been made between their legitimate and illegitimate offspring. The ſame ſeems to have been the caſe of the offspring of all the ſovereign princes and higher ranks of nobility in France. Their acknowledging a natural child to be their child, was conſidered as tantamount to any formal act of legitimation. But the natural children of all other perſons were conſidered as villeins. After the acceſſion of the Capetian line, the condition of baſtards was altered for the worſe in many reſpects. Thoſe of royal parentage were excluded from the throne, and were no longer held to be of blood royal. They were only permitted to bear the arms of France, with a bar. A ſimilar change took place with regard to the baſtards of the princes and nobility. By an ordinance of the year 1600, it was declared, that the children of nobility ſhould not be conſidered even as gentlemen, unleſs they obtained letters of nobility. On the other hand, the baſtards whoſe parents were of a lower order, inſtead of being conſidered villeins, as before, began about the commencement of the 16th century to be conſidered as free men, and except as to the right of receiving and tranſmitting ſucceſſion, they are now, in France, on an equal footing with their fellow-ſubjects.—See *Oeuvres du Chancelier D'Agueſſeau*, t. 7. p. 881. *Diſſertation dans laquelle on diſcute les principes du droit Romain et du droit François par rapport aux Bâtards.*

et la terre diſcendiſt a ſon iſſue, et ſon iſſue enter, &c. en ceſt caſe le mulier eſt ſans remedie, car il ne poit enter, ne aver aſcun action pur recoverer la terre, pur ceo que eſt un antient ley en tiel caſe uſe, &c *.

of ſuch eſtate in fee, and the land deſcend to his iſſue, and his iſſue entreth, &c. in this caſe the *mulier* is without remedie, for he may not enter, nor have any action to recover the land, becauſe there is an antient law in this caſe uſed, &c.

But we terme them all by the name of baſtards, that be borne out of lawfull marriage. By the common law, [r] if the huſband be within the foure ſeas, that is, within the juriſdiction of the king of England, if the wife hath iſſue, no proofe is to be admitted to prove the childe a baſtard, (for in that caſe *filiatio non poteſt probari*) unleſſe the huſband hath an apparent impoſſibilitie of procreation; as if the huſband be but eight yeares old, or under the age of procreation. ſuch iſſue is baſtard, albeit he be borne within mariage. (2) [ſ] But if the iſſue be borne within a moneth or a day after mariage, betweene parties of full lawfull age, the childe is legitimate. (3)

Diſcendiſt a ſon iſſue. For if the baſtard dieth ſeiſed without iſſue, and the lord by eſcheat entreth, this dying ſeiſed ſhall not barre the *mulier*, becauſe there is no diſcent. If the baſtard enter, and the *mulier* dieth, his wife privement enſeint with a ſonne, the baſtard hath iſſue and dieth ſeiſed, the ſonne is borne, his right is bound for ever. But if the baſtard dieth ſeiſed, his wife enſeint with a ſonne, the *mulier* enter, the ſonne is borne, the iſſue of the baſtard is barred: for *Littleton* putteth his caſe, that there muſt not only be a dying ſeiſed, but alſo a diſcent to his iſſue.

Et ſon iſſue enter, &c. And ſo it is to be underſtood, albeit the *mulier*, after the deceaſe of the baſtard, doth enter before the heire of the baſtard; for the diſcent bindeth, and not the entrie of the heire.

Le mulier eſt ſans remedie. Hereby it appeareth that this diſcent differeth from other diſcents, for this diſcent barreth the right of the *mulier*, whereas other diſcents doe take away the entrie only of him that right hath, and leaveth him to his action, but here by the dying ſeiſed of the baſtard, his iſſue is become lawfull heire [a] It is holden, that if the *mulier* bee within age at the time of the dying ſeiſed, that nevertheleſſe hee ſhall bee barred, becauſe the iſſue of the baſtard is in judgement of law become lawfull heire, and the law doth preferre legitimation, before the privilege of infancie.

And the reaſon of this caſe is, for that *Juſtum non eſt aliquem poſt mortem facere baſtardum, qui toto tempore vitæ ſuæ pro legitimo habebatur.* And ſo it ſeemeth to be, that if a man hath iſſue a ſonne being baſtard eigne, and a daughter, and the daughter is married, the father dieth, the ſonne entreth and dieth ſeiſed, this ſhall barre the feme covert. And the diſcent in this caſe of ſervices, rents, reverſions, expectant upon eſtates taile, or for life, whereupon rents are reſerved, &c. ſhall binde the right of the *mulier*, but a diſcent of theſe ſhall not drive them, that right have, to an action.

So if the baſtard dieth ſeiſed, and his iſſue endoweth the wife of the baſtard, yet is not the entrie of the *mulier* lawfull upon the tenant in dower, for his right was barred by the diſcent.

If the baſtard eigne entreth into the land, and hath iſſue, and entreth into religion, this diſcent ſhall barre the right of the *mulier*.

Ad iſſue deux fits. If a man hath iſſue ſuch a baſtard as is aforeſaid, and dieth, and the baſtard entreth and dieth ſeiſed, and the land deſcendeth to his iſſue, the collaterall heire of the father is bound as well as where there be two ſonnes.

And where our author ſpeaketh of ſonnes, ſo it is if a man hath iſſue two daughters, the eldeſt being a baſtard, and they enter and occupie peaceably as heires; now the law in favour of legitimation ſhall not adjudge the whole poſſeſſion in the *mulier*, (who then had the only right) but in both, ſo as if the baſtard hath iſſue and dieth, her iſſue ſhall inherit. [b] And

concubinâ. In Engliſh, hee is called baſe borne, and thereupon ſome ſay, that a baſtard is as much to ſay, as one that is a baſe naturall, for *aerd* ſignifieth nature. I read in *Fleta*. [p] that there bee three kindes of baſtards, *viz. manſer, nothus & ſpurius*, which are deſcribed in two old verſes:

Manſeribus ſcortum, notho mœchus dedit ortum.
Ut ſeges è ſpicâ, ſic ſpurius eſt ab amicâ. (1)

[p] Flet. lib. 1. cap. 5. Vide Sect. 380. (1. Roll. Abr. 356, 357. 358. 359. Cro. Jac. 541. Godb. 281. Palm. 9. 4. Init. 36.)

[r] Bract. lib. 4. fol. 278. 279. 7. H. 4. 9. 43. E. 3. 19. 41. E. 3. 7. 41. E. 3. 10. 29. Aſſ. 54. 98. Aſſ. 14. 1. H. 6. 7. 19. H. 6. 17. 39. E. 3. 13.
[ſ] 18. E. 4. 28. (1. Salk. 120.)

(Poſt. 260. 273 1. Roll. Abr. 624. 8. Rep. 101. b. Ant. 15. a. 7. Rep. 42.)

Lib. 8. 101. 102. Sir Rich. Lechford's caſe.

[a] 5. E. 2. Diſcent. Br. 49. 31. Aſſ. 18. 22. 33. E. 3. Verdict. 48. 36. Aſſ. 2. Pl. Com. Stowel's caſe. 10. E. 3. 2. 13. E. 1. tit. Baſtardie 28. (Poſt. 246. a. 5. Rep. 98.) 14. E. 2. Baſtardie 26.

Hil. 18. E. 3. cor. Reg. Rot. 144. Ebor. 17. E. 3. 59. Fitz. Baſtard. 32. Sir Rich. Lechford's caſe, ubi ſupra. See afterwards in the Chapter of Warranties. (Poſt. 368. a.)

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

(1) Filius naturalis à vulgo barbarorum opponitur legitimo. Sed revera opponitur filio adoptivo, in quo ſenſu Tiberius vocat Druſum filium ſuum naturalem. Cal. Lex. verb. nat. filius. Spurii Latini et Græci ſine patre. Ib.—*Lord Nott. MS.* Jure pontificio noſtro dicuntur qui ex adulterino concubitu, manſeres qui ex ſcorto, ſpurii exitus qui ſacris initiati ſunt, aut religionem profeſſi ſunt.—Ib.

(2) It is now held that the huſband's being within the four ſeas, is not concluſive evidence of the legitimacy of the child, and it is left to a jury to conſider whether the huſband had acceſs to his wife. See 3d P. W. 276, 276. Pendrell v. Pendrell, 2. Stra. 925. So evidence may be given, that the huſband's habit of body was ſuch, as to make his having children an impoſſibility. Lomax v. Holmden, 2. Stra. 940. See alſo 1. Roll. Abr. 358. 1. Salk. 123. But the rule laid down by lord Coke, was once generally received. In Jenk. c. 10. pl. 18. it is ſaid, "that if the huſband be in Ireland for a year, and the wife in England during that time has iſſue, it "is a baſtard; but it ſeems otherwiſe now for Scotland, both being under one king, and make but one continent of land."—See ant. note 2. to p 126.

(3) See note 1. to page 261. a.

[b] 2. E. 3. tit. baſtardie 15. 21. E. 3. 34. b. 30. Aſſ. p. 7. Sir Rich. Lechford's caſe, ubi ſup.
[c] Britt. cap. 73. 20. E. 3. Vouch. 129. 11. E. 3. Age 3. 5. H. 7. 2. Sir Rich. Lechford's caſe, ubi ſup.
(Ant. 170. b.)

[b] And in the ſame caſe, if both daughters enter and make partition, this partition ſhall binde the *mulier* for ever.

[c] And an aſſiſe of *mortd'anceſter* lieth not betweene the baſtard and the *mulier* in reſpect of the proximitie of bloud.

And the baſtard being impleaded or vouched ſhall have his age.

Et le baſtard enter come heire a ſon pier. If a man hath iſſue baſtard eigne and *mulier puiſne*, and the baſtard in the life of the father hath iſſue and dieth, and then the father dieth ſeiſed, and the ſonne of the baſtard entreth, as heire to his grandfather, and dieth ſeiſed, this diſcent ſhall binde the *mulier*.

Pur ceo que eſt antient ley en tiel caſe uſe, &c. As hereafter in our Commentarie upon the two next Sections ſhall appeare, by our antient bookes, and the antient ſtatutes of the realme. And here is implyed how neceſſarie it is, after the example of our author, to looke into the antiquities, than which nothing is more venerable, profitable, and pleaſant. (1)

Sect. 400.

MES il ad eſtre l'opinion d'aſcuns, que ceo ſerra intendue lou le pier ad un fits baſtard per un feme, et puis eſpouſa meſme la feme, et apres le eſpouſels il ad iſſue per meſme la feme un fits, ou un file mulier, et puis le pier moruſt, &c. ſi tiel baſtard enter, &c. et ad iſſue et devie ſeiſie, &c. donque avera l'iſſue de tiel baſtard le terre cleerement a luy, come avant eſt dit, &c. et nemy aſcun auter baſtard la mere que ne fuit unque eſpouſe a ſon pier. Et ceo ſemble bone et reaſonable opinion: car tiel baſtard née devant eſpouſels celebres perenter ſon pier et ſa mere, per la ley de ſaint eſgliſe eſt mulier, coment que per la ley del terre il eſt baſtard, et iſſint il ad un colour d'entrer come heire a ſon pier, pur ceo que il eſt per un ley mulier, &c. ſcilicet, *per la ley de ſaint eſgliſe. Mes autrement eſt de baſtard que n'ad aſcun * maner colour d'entre come heire, entant que il ne poit per nul ley eſtre dit mulier, car tiel baſtard eſt dit en la ley,* quaſi nullius filius, &c.

BUT it hath beene the opinion of ſome, that this ſhall be intended where the father hath a ſonne baſtard by a woman, and after marrieth the ſame woman, and after the eſpouſels he hath iſſue by the ſame woman a ſon or a daughter, and after the father dieth, &c. if ſuch baſtard entreth, &c. and hath iſſue and die ſeiſed, &c. then ſhall the iſſue of ſuch baſtard have the land cleerely to him, as it is ſaid before, &c. and not any other baſtard of the mother which was never married to his father. And this ſeemeth to be a good and reaſonable opinion: for ſuch a baſtard borne before marriage celebrated betweene his father and his mother, by the law of holy church is *mulier*, albeit by the law of the land he is a baſtard, and ſo he hath a colour to enter as heire to his father, for that he is by one law *mulier*, *ſcilicet*, by law of holy church. But otherwiſe it is of a baſtard which hath no manner of colour to enter as heire, in ſo much as hee can by no law bee ſaid to be *mulier*, for ſuch a baſtard is ſaid in the law to be *quaſi nullius filius, &c.* (2)

Mes

* *maner* not in L. and M. but in Roh.

(1) In the caſe of Pride v. the earls of Bath and Montague, it was held, that the rule that a perſon ſhall not be baſtardized after his death, is only good in the caſe of baſtard eigne and mulier puiſne. 1. Salk. 120.

(2) Nota. 2. Inſt. 96. 97. *On the ſtatute of Merton, Pope Alexander III. (anno 1160. 6. H. 2.) ordained, that children born before matrimony, where matrimony followes, ſhould be as legitimate as thoſe born after marriage*, quia eccleſia tales habet pro legitimis.—Conſtitutio pontificia, *or the canon law*, eſt intelligenda ſolummodo de filiis natis ex coitu, qui poterunt eſſe conjugales; qui verò ex damnato coitu naſcuntur, ſcilicet ex coitu inceſtuoſo vel adulterino, cujuſmodi coitus non poterat eſſe uxorius, tamen nunquam legitimari poſſunt per ſubſequens matrimonium. Ratio eſt quia matrimonium ſubſequens ex fictione legis retrahitur ad tempus ſuſceptionis liberorum, ut legitimati habeantur legitimè ſuſcepti (i. e.) poſt contractum matrimonium. Fictio autem juris nunquam admittitur contra naturam et bonos mores. Quapropter lex non poteſt fingere matrimonium fuiſſe cum eis, cum quibus nuptiæ non potuerunt eſſe per leges; quia in fictionibus tranſlationis requiritur habilitas extremorum à quo et ad quem. Ideòque leges civiles et decretales olim matrimonium inter adulteros prohibebant, contractumque dirimebant. Jam verò iſta prohibitio locum non habet, niſi in mortem prioris conjugis alteruter fuerit machinatus, vel prematurè, dum adhuc viveret, de contrahendo poſt mortem ejus connubio pacta fuerit fides. Secundò, notandum eſt quòd ſubſequens matrimonium legitimos facit quoad ſpiritualia, non quoad temporalia, quia Papa non poteſt legitimare, quoad temporalia, extra ſui ipſius dominica, ſcilicet extra terras quæ ſunt de patrimonio ſancti Petri, quod Papa Innocentius III. confitebatur (ergo Anglia non eſt ex patrimonio ſancti Petri quicquid fecerit Rex Johannes). Et Sanchez quem Clemens III. valdè laudavit, apertè dicit ſi proles habita ſit ex concubitu omnino formicano, cum non poſſe pontificem, quoad temporalia et ſecularia, legitimare. *All this was ſaid and proved out of ant ent authors by a learned advocate, whoſe diſcourſe is printed at large in the modern arrets collected by Monſ. de Maiſon, Arrêt 20. And there the principal caſe was, the uncle, in the life of his wife, had a child by his niece and god-daughter, on promiſe of marriage when time ſhould ſerve: the wife dies, and then the uncle had other children, and ten years after, by diſpenſation from the pope, containing a clauſe of legitimation of the children born before, marries her. Reſ. The pope's diſpenſation was void as to any legitimation, which, whether it were becauſe the marriage were within the Levitical degrees, or becauſe of ſpiritual kindred, or becauſe againſt the council of Trent, a general council being held by the Sorbonne to be above the pope, appears not; but may be for all theſe reaſons, or for none of them, but only becauſe the pope cannot legitimate in temporals. 2dly, That the children of this marriage ſhould have penſions to live on, which may ſeem to approve the diſpenſation as to the marriage. 3dly, That no ſuch be granted for the future. Ibid.* 360. Romani filios naturales tantùm non alio jure habuerunt quàm peregrinos. Theodoſii & Arcadii principatu temperata ſunt legum ſeveritas, ac deinde Zenonis lege obtinuit, ut naturales liberi conſequentibus cum matre nuptis juſti ac legitimi haberentur. Bodinus de Repub. lib. 1. cap. 4. p. 29. Sed nota, quòd ante Zenonis tempora, viz. per legem Divi Conſtantini, nati ante matrimonium, fiebant legitimi per matrimonium ſubſequens; quod tamen explicatur in eodem codice, viz. per matrimonium legitimantur liberi naturales modò procreati ſint muliere liberâ, & cujus matrimonium non eſt legibus interdictum. Vide Monſ. de Maiſons, Arrêt 20. page 359—*Lord Nott. MS.*

MES ad eſte l'opinion d'aſcuns, &c. And our author here ſaith, that this opinion is good and reaſonable, for that ſuch a baſtard, by the law of holy church (*) is a *mulier.*

Matrimonium ſubſequens legitimos facit quoad ſacerdotium non quoad ſucceſſionem, propter conſuetudinem regni quòd ſe habet in contrarium. Yet the canon law holdeth them legitimate *quoad ſucceſſionem.* At a parliament holden [q] *anno* 20. *H.* 3. for that to certifie upon the king's writ, that the ſonne borne before marriage as a baſtard, was *contra communem formam eccleſiæ, rogaverunt omnes epiſcopi magnates ut conſentirent, quòd nati ante matrimonium eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium quantùm ad ſucceſſionem hæreditariam, quia eccleſia tales habet pro legitimis: et omnes comites & barones unâ voce reſponderunt, quòd nolunt leges Angliæ mutare, quæ hucuſque uſitatæ ſunt & approbatæ.*

* Vid. Britton fol. 168. b. 166. 203. And the ſtatute of Merton 20. H. 3. cap. 19. confirmeth this opinion. Hil. 18. E. 3. coram rege in Theſaur. Eborum. Bracton lib. 2. fol. 63.

[q] Statut. de Merton. 20. H. 3. cap. 9. Vid. Bract. l. 5. f. 416. 417. 10. Aſſ. Pl. 20.

Iſſint que il ad un colour d'entre, &c. Here it is to be obſerved, that the law more reſpecteth him that hath a colourable title, though it be not perfect in law, than him that hath no title at all, as hath beene ſaid (r) before. (1)

[r] Vide Sect. 397. & cap. garr. Sect.

Sect. 401.

MES en le caſe avant dit, lou le baſtard enter apres la mort le pier, et le mulier luy ouſta, et puis le baſtard diſſeiſiſt le mulier, et ad iſſue, et devie ſeiſie, et l'iſſue enter, donque le mulier poit aver briefe d'entre ſur diſſeiſin *envers l'iſſue del baſtard, et recovera la terre, &c. Et iſſint poies veir le diverſitie lou tiel baſtard continue la poſſeſſion tout ſa vie ſans interruption, et lou le mulier enter et interrupt le poſſeſſion de tiel baſtard, &c.*

BUT in the caſe aforeſaid, where the baſtard enter after the death of the father, and the mulier ouſt him, and after the baſtard diſſeiſe the mulier, and hath iſſue and dieth ſeiſed, and the iſſue enter, then the mulier may have a writ of *entrie ſur diſſeiſin* againſt the iſſue of the baſtard, and ſhall recover the land, &c. And ſo you may ſee a diverſity where ſuch baſtard continues the poſſeſſion all his life without interruption, and where the mulier entreth and interrupts the poſſeſſion of ſuch baſtard, &c.

ET le mulier luy ouſta. An eſtranger in the name of the *mulier* without his commandement cannot enter upon the baſtard, for that the baſtard may gaine the eſtate and barre the *mulier.* And therefore regularly none ſhall enter but the *mulier*, or ſome other by his commandement. And therefore *Littleton* ſaith (and the *mulier* put him out) no more than in the caſe [a] of the lord *Azwdley:* for there an eſtranger of his owne head could not enter in the name of him that right had to enter within the five yeares to avoid the fine. But in both thoſe caſes, firſt, if the *mulier* agree thereunto before the diſcent of the baſtard; or ſecondly, if he that right hath before the five yeares be paſt do aſſent thereunto, the claime is good, and ſhall avoid the eſtate both of the baſtard and of the conuſee, as it was holden in the lord *Azudley's* caſe, *quia omnis ratihabitio retrotrahitur, & mandato æquiparatur*, and it ſtandeth well

[a] Mich. 38. & 39. Eliz. in the king's bench upon evidence by the whole court. Vide 31. H. 8. entr. conge. Br. 123.

4. H. 7. cap.

with the words of the ſtatute, ſo that they purſue their title, &c. by way of action or entry; and ſo is the booke in [b] 31. *H.* 8. to be intended.

Vide Sect. 334.
[b] 31. H. 8. entr. cong. Br. 123.

But in the caſe of the *baſtard eigne*, which is *Littleton's* caſe, gardein in ſocage, or gardein in chivalrie, may enter, for they are no ſtrangers, as in another place is plainly ſhewed. If an infant make a feoffment in fee, an eſtranger of his owne head cannot enter [c] to the uſe of the infant, for the eſtate is voidable. But where an infant or a man of full age is diſſeiſed, an entrie by a ſtranger of his owne head is good, and veſteth preſently the eſtate in the infant, or other diſſeiſee. So it is if tenant for life make a feoffment in fee, an eſtranger may enter for a forfeiture in the name of him in the reverſion, and thereby the eſtate ſhall be veſted in him, *et ſic de ſimilibus.*

[c] Paſc. 39. Eliz. in communi banco per curiam. 10. H. 7. 16. 7. E. 3. 69. 26. E. 3. 62. per Thorp. 45 E. 3. releaſe 28. 11. Aſſ. 11.

Lou

(1) Both by the civil and canon law, children born before marriage are made legitimate by the ſubſequent marriage of their parents. This was eſtabliſhed in the civil law by the emperor Conſtantine, and confirmed by the emperor Juſtinian. It was eſtabliſhed in the canon law by a conſtitution of pope Alexander the Third, in 1160. This legitimation is a privilege or incident inſeparably annexed to the marriage; ſo that tho' both the parents and the children ſhould waive or refuſe it, the children nevertheleſs would be legitimate. But it holds in theſe caſes only where, at the time of the birth of the children, it was lawful for both parents to intermarry; for if the father were married to another woman at the time of the birth of the children, and afterwards his wife died and he married the mother of the child, the child would not be legitimated by this ſubſequent marriage. Children thus legitimated are on an equal footing with the legitimate children; and if they die before the marriage of their parents, ſtill they are conſidered as legitimate, and tranſmit their legitimacy to their iſſue: but whether they are conſidered legitimate from the time of the marriage of their parents, or whether their legitimacy by their parents' marriage has a relation back only to the time of their birth, is a point warmly diſputed by the civilians and canoniſts. The prevailing opinion ſeems to be, that they are to be conſidered as legitimate from the time of their birth to all purpoſes but thoſe in which to conſider them as ſuch would operate to the detriment of a third perſon. Thus, if there be a natural-born child, and the father afterwards marries and has ſons; his wife dies, and he marries the woman by whom he had the natural child; it ſeems to be the better opinion, that the child legitimated by the ſubſequent marriage does not acquire the right of progeniture over the ſons of the firſt marriage. The doctrine of legitimacy by a ſubſequent marriage was never admitted into the Engliſh law; and the refuſal of the noblemen of our nation to admit it, on the occaſion mentioned in ſir Edward Coke's Commentaries, is ſpoken of by ſir William Blackſtone and other writers as a memorable inſtance of their jealouſy of the civil law, and their firmneſs in oppoſing foreign innovations. The doctrine of legitimation prevails, with different modifications, in France, Germany, and Holland. By an arret d'audience of the 21ſt of June, 1668, it was adjudged, that if a perſon marries in England a woman by whom he had children previous to the marriage, the children born in France are legitimated by it, and acquire all the rights of legitimacy under the French law. See c. 10. C. de Natur. lib. Nov. 89. c. 8. Vinn. in Inſt. l. 1. t. 10. f. 13. Hein. Elem. Jur. de Legitimatione. Traité des Succeſſions par le Brun, ed. 1776. lib. 1. c. 2. f. 1. D. 1. l. 2. c. 2. f. 1. n. 13. and ſir John Forteſcue, c. 39. Till the ſtatute of Merton, the queſtion whether born before or after marriage, was examined before the eccleſiaſtical judge, and his judgment was certified to the king or his juſtices, and the king's court either abided by it or rejected it at pleaſure. But after the ſolemn proteſt made by the barons at Merton againſt the introduction of the doctrine of the civil and canon law in this reſpect, *ſpecial baſtardy* has been always triable at common law; and *general baſtardy* alone has been left to the judgment of the eccleſiaſtical judge, who in this caſe agrees with the temporal. 2. Inſt. 99. Reeves's Hiſt. of the Engliſh Law, 85. 201. and ſee ant. note 2. to page 126. a.

Lou tiel baſtard continue tiel poſſeſſion ſans interruption. If the *mulier* entreth upon the baſtard, and the baſtard recovereth the land in an aſſiſe againſt the *mulier*, now is the interruption avoided; and if the baſtard dieth ſeiſed, this ſhall barre the *mulier*.

3. Aſſ. 9. If the baſtard eigne after the deceaſe of the father entreth, and the king ſeiſeth the land for ſome contempt ſuppoſed to be committed by the baſtard, for which no freehold or inheritance is loſt, but only the profits of the land by way of ſeiſure, and the baſtard die, and his iſſue is upon his petition reſtored to the poſſeſſion, for that the ſeiſure was without cauſe, the *mulier* is barred for ever; for the poſſeſſion of the king when he hath no cauſe of ſeiſure ſhall be adjudged the poſſeſſion of him for whoſe cauſe he ſeiſed. But if after the death of the father the *mulier* be found heire and within age, and the king ſeiſeth, in that caſe the poſſeſſion of the king is in right of the *mulier*, and veſteth the actual poſſeſſion in the *mulier*, and conſequently the baſtard eigne is fore-cloſed of any right for ever.

And ſo it is when the king ſeiſeth for a contempt, or other offence of the father, or of any other anceſtor; in that caſe, if the iſſue of the baſtard eigne upon a petition be reſtored, for that the ſeiſure was without cauſe, the *mulier* is not barred, for the baſtard could never enter, and conſequently could gain no eſtate in the land, but the poſſeſſion of the king in that caſe ſhall be adjudged in the right of the *mulier*. And it is to be obſerved, that the baſtard muſt enter *in vacuam poſſeſſionem*, and continue during his life, without interruption made by the *mulier*.

Pl. Com. Parſon de Honylane's caſe, 91. 35. H. 6. 24. 21. H. 6. 9. 1. E. 4. 3. 21. E. 4. 5. 5. E. 4. 6o.

Interrupt le poſſeſſion del baſtard, &c. If the baſtard invite the *mulier* to ſee his houſe, and to ſee pictures, &c. or to dine with him, or to hawk, hunt, or ſport with him, or ſuch like upon the land deſcended, and the *mulier* commeth upon the land accordingly, this is no interruption, becauſe he came in by the conſent of the baſtard, and therefore the comming upon the land can be no treſpaſſe; but if the *mulier* commeth upon the ground of his own head, and cutteth downe a tree, or diggeth the ſoile, or take any profit, theſe ſhall be interruptions; for rather than the baſtard ſhall puniſh him in an action of treſpaſſe, the act ſhall amount in law to an entry, becauſe he hath a right of entry. So it is if the *mulier* put any of his beaſts into the ground, or command a ſtranger to put on his beaſts, theſe doe amount to an entry; for albeit in theſe caſes the *mulier* doth not uſe any expreſs words of entry, yet theſe, and ſuch like acts, doe without any words amount in law to an entrie; for acts without words may make an entry, but words without an act (*viz.* entry into the land, &c.) cannot make an entry, (all which interruptions are implied in the ſaid *&c.*) More ſhall be ſaid hereafter of Interruptions, in the chapter of Continuall Claime.

Sect. 402.

Brooke tit. diſcent. 40.

SI un enfant deins age ad cauſe d'entrer. If a man ſeiſed of lands in fee die, his wife *privement enſeint* with a ſon, and a ſtranger abate and die ſeiſed, and after the ſonne is borne, hee ſhall bee bound by the diſcent, becauſe hee at the time of the diſcent had no right to enter, and this is to be gathered upon theſe words of *Littleton*, *ad cauſe d'entrer*, which at the time of the diſcent he hath not.

10. H. 6. 28. b. 2. E. 4. 25. 26. 15. E. 4. diſcent. 30.

Eſt eins per diſcent, &c. Here is implyed any other heire, collaterall or lineall.

An infant is accounted in law (as hath beene often ſaid,) [d] untill he paſſeth the

[d] Vide Sect. 259. 403.

ITEM, ſi un enfant deins age ad tiel cauſe de entry en aſcuns terres ou tenements ſur un auter, que eſt ſeiſie en fee, ou en fee taile de meſme les terres ou tenements, ſi tiel home que eſt tielment ſeiſie, moruſt de tiel eſtate ſeiſie, et les terres diſcendont a ſon iſſue durant le temps que l'enfant eſt deins age, tiel diſcent ne tollera

ALSO, if an infant within age hath ſuch cauſe to enter into any lands or tenements upon another, which is ſeiſed in fee, or in fee taile of the ſame lands or tenements, if ſuch man who is ſo ſeiſed, dieth of ſuch eſtate ſeiſed, and the lands deſcend to his iſſue during the time that the infant is within age, ſuch diſcent ſhall not take away the entry of the

l'entry

l'entry l'enfant, mes que il poit enter ſur le iſſue que eſt eins per diſcent, &c. pur ceo que nul laches ſerra adjudge en un enfant deins age en tiel caſe.

infant, but that hee may enter upon the iſſue which is in by diſcent, for that no laches ſhall be adjudged in an infant within age in ſuch a caſe.

age of 21 yeares, and certaine privileges hee hath in reſpect of his infancy.

Nul laches ſerra adjudge en le enfant deins age en tiel caſe.

And *Littleton* well added *(en tiel caſe)* that is, in caſe of diſcent, for in ſome other caſes, laches ſhall prejudice an infant. As laches ſhall be adjudged in an infant, if he preſent not to a church within ſix moneths, for the law reſpecteth more the privilege of the church (that the cure bee ſerved) than the privilege of infancy. And ſo the publike repoſe of the realme, concerning mens freeholds and inheritances, ſhall be preferred before the privilege of infancy, in caſe of a fine, where the time begins in the time of the anceſtor. So non-claime of a villaine of an infant by a yeare and a day, who hath fled into ancient demeſne, ſhall take away the ſeiſure of the infant. And if an infant bring not an appeale of the death of his anceſtor within a yeare and a day, he is barred of his appeale for ever, for the law reſpects more liberty and life than the privilege of infancy. And here it is to be obſerved, that *Littleton* putteth his caſe, that an infant ſhall enter upon a diſcent, when a ſtranger dieth ſeiſed, but hee put it not ſo before, in the caſe of the baſtard eigne. *B.* tenant in taile infeoffeth *A.* in fee, *A.* hath iſſue within age and dieth, *B.* abateth and dieth ſeiſed; the iſſue of *A.* being ſtill within age, this diſcent ſhall binde [*e*] the infant, for the iſſue in taile is remitted: and the law doth more reſpect an ancient right in this caſe, than the privilege of an infant that had but a defeaſible eſtate. And it is ſaid [*f*] if the king die ſeiſed of lands, and the land deſcend to his ſucceſſor, that this ſhall bind an infant, for that the privilege of an infant in this caſe holds not againſt the king (1).

33. E. 3. quar. imp. 46. (Ant. 171 a. Poſt. 337. b. 350. b. 380.)

Pl. Com. 37?. (F. N. B. 33 b. 6. Rep. 48. b. 3. Rep. 84.)

(Poſt. 348. a. 357. a.)

[*e*] 11. E. 4. 1. 2. F. N. B. 35. m.

[*f*] 35. H. 6. 60.

Sect. 403.

ITEM, ſi le baron et ſa feme, come en droit la feme, ont title et droit d'enter en tenements que un auter ad en fee, ou en fee taile, et tiel tenant moruſt ſeiſie, &c. en tiel caſe l'entrie le baron eſt tolle ſur l'heire que eſt eins per diſcent. Mes ſi le baron devie, donque la feme bien poit enter ſur le iſſue que eſt eins per diſcent, pur ceo que laches le baron ne turnera la feme ne ſes heires en prejudice ne en dammage

ALSO, if huſband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee tayle, and ſuch tenant dieth ſeiſed, &c. in ſuch caſe the entry of the huſband is taken away upon the heire which is in by diſcent. But if the huſband die, then the wife may well enter upon the iſſue which is in by diſcent, for that no laches of the huſband ſhall turn the wife or her heires to any prejudice nor loſſe

SI baron et feme, come en droit ſa feme, ont title et droit d'enter, &c. et tiel tenant moruſt ſeiſie, &c.

Theſe words are generall, but are particularly to bee underſtood, *viz.* when the wrong was done to the wife during the coverture; for if a feme ſole be ſeiſed of lands in fee, and is diſſeiſed, and then taketh huſband; in this caſe the huſband and wife, as in the right of the wife, have right to enter, and yet the dying ſeiſed of the diſſeiſor in that caſe ſhall take away the entry of the wife after the death of her huſband; and the reaſon is aſwell for that ſhee herſelfe when ſhee was ſole, might have entred and recontinued the poſſeſſion, as alſo it ſhall be accounted her folly that ſhee would take ſuch a huſband which would not enter before the diſcent.

9 H. 7. 24. a. 2. E. 4. 25. 7 E. 3. 47. b. 20. H. 6. 28. b. 42. E. 3. 12.

15. E. 4. diſcent. 30.

But

(1) This and many other paſſages in this work, reſpecting the operation and force of the acts of infants, were fully conſidered in the caſes of Zouch v. Parſons, 3. Burr. 1794; and May v. Hook, heard before lord chancellor Bathurſt, in 1773. — There being no printed account of the laſt caſe, it may not, perhaps, be unacceptable to the reader to find an account of it here.—Ann May and her two ſiſters were, under their father's will, ſeiſed of a conſiderable freehold eſtate; and poſſeſſed of a conſiderable leaſehold eſtate, as joint-tenants. Previous to the marriage of Ann May with John Hook the defendant, ſhe being then an infant, by articles of agreement dated the 28th of October 1761, and made between her of the firſt part, John Hook of the ſecond part, and truſtees of the third part, it was covenanted and agreed, that the leaſehold eſtates ſhould be aſſigned to John Hook for his own uſe and benefit; and that the freehold eſtates ſhould be ſettled on him for life; and then on her for her life; remainder to their firſt and other ſons ſucceſſively in tail male; — remainder to their daughters, as tenants in common in tail; remainder to John Hook in fee. And he covenanted to pay 100l. to the truſtees upon truſt to pay Ann Hook, if ſhe ſurvived him, the intereſt of it for her life, and after her deceaſe to divide it among the children.—Afterwards Ann May died under age. The queſtion was, Whether theſe articles were in equity a ſeverance of the joint-tenancy? Lord chancellor Bathurſt, when he made his decree in this cauſe, obſerved, that the firſt point attempted to be eſtabliſhed by the counſel was, that had Ann May been of full age when ſhe entered into the articles, they would have amounted to a ſeverance; but that no determination to that effect had ever been made:—That the co-joint-tenants were not, in this caſe, to be conſidered as volunteers, as they claimed by title paramount; and that their ſituation approached nearer to that of iſſue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his anceſtor:—That the utmoſt which the infant could do would be an avoidable act; and that, of courſe, it would be in the diſcretion of the court either to give or refuſe their aſſiſtance to it; and, by a parity of reaſon, it muſt always be in their power to model his contracts at their pleaſure:—That the contract, in the preſent caſe, was not ſuch as the court would uphold. Had the infant lived to come of age, and a bill been filed againſt her for a performance of the articles, the court would have ſet them aſide, and referred it to a maſter to draw new propoſals for a proper ſettlement:—That as the contract was not ſuch as would have bound the infant herſelf, *a fortiori* it ſhould not bind the co-joint-tenants:—That it would be a ſtrange doctrine, that any act of an infant, which is by its nature avoidable, ſhould ſever the joint-tenancy, as if that were allowed, it would always be in the power of the infant to ſay, whether the joint-tenancy ſhould be ſevered or not; then, if any of the co-joint-tenants ſhould die under age, the infant might avoid his own act, by pleading *infra ætatem*, and reſort to his title of ſurvivorſhip, which would be a great injuſtice and hardſhip on the co-joint-tenants. — On theſe grounds his lordſhip was of opinion, that the articles did not amount in equity to a ſeverance of the joint-tenancy.

9. H. 7. 24.

But there if the woman were within age at the time of her taking of huſband, then the dying ſeiſed ſhall not after the deceaſe of her huſband take away her entry; becauſe no folly can bee accounted in her, for that ſhee was within age when ſhee tooke huſband, and

en tiel cas, mes que la feme et ſes heirs bien poient enter, lou tiel diſcent eſt eſchue durant le coverture.

in ſuch caſe, but that the wife and her heires may well enter, where ſuch diſcent is eſchued during the coverture.

after coverture ſhe cannot enter without her huſband; all which is implyed in the ſaid (&c.)

Vid. Sect. 492. (Hob. 96. Ant. 233. b. 1. Lev. 266. 8. Rep. 100. 1. Roll. 421. Plo. 236.)

Laches le baron ne turnera la fem, &c. al prejudice, &c. *Laches* ſignifieth in the common law, retchleſneſſe, or negligence, *et negligentia ſemper habet infortunium comitem.* Here is a diverſity to be obſerved, that albeit regularly no laches ſhall be accounted in infants, or feme coverts, as is aforeſaid, for not entry or clayme to avoid diſcents, yet laches ſhall be accounted in them for no performance of a condition annexed to the ſtate of the land. For if a feme be infeoffed either before or after marriage, reſerving a rent, and for default of payment a re-entrie; in that caſe, the laches of the baron ſhall diſherit the wife for ever. And ſo it is [n] of an infant; his laches, for not performing of a condition annexed to a ſtate, either made to his anceſtor or to himſelfe, ſhall barre him of the right of the land for ever.

20. H. 6. 28. b.
[n] 31. Aſſ. p. 17. 42. E. 3. 1. Pl. Com. 55. 10. H. 7. 13. H. 7. 35. H. 6. 41. Pl. Com. 136. b. Fleta lib. 2. cap. 50.

If a man make a feoffment in fee to another reſerving a rent, and if he pay not the rent within a moneth, that he ſhall double the rent, and the feoffee dieth, his heire within age, the infant payeth not the rent, he ſhall not by this laches forfeit any thing. But otherwiſe it is of a feme covert; and the reaſon and cauſe of this diverſity is, for that the infant is provided for by the ſtatute, [o] *non current uſuræ contra aliquem infra ætatem exiſten' &c.* But that ſtatute doth not extend to a feme covert, neither doth that ſtatute extend to a condition of a re-entry; which an infant ought to performe, for the forfeiture thereof cannot bee called *uſura.*

[o] Le ſtatute de Merton ca. 5.

* Sect 404.

MES la court tient, lou tiel title eſt done al feme ſole, que puis prent baron que n'entra pas, eins ſuffer un diſcent, &c. la auter eſt, car ſerra dit la folly le feme de prendre tiel baron que n'entre en temps, &c.

BUT the court holdeth, where ſuch title is given to a fem ſole, who after taketh huſband which doth not enter, but ſuffer a diſcent, &c. there otherwiſe it is, for it ſhall be ſaid the folly of the wife to take ſuch a huſband which entered not in time, &c.

9. H. 7. 24.

THIS is added, and therefore, as formerly I have done, I meddle not withall; howbeit the opinion is holden for law, as it appeareth in the ſection next precedent.

Sect. 405.

Lord Erskine in Jur. 12. Ves. Jun. 456. in Cranmore case.

HERE *Littleton* explaineth a man of no found memorie to be *non compos mentis.* Many times (as here it appeareth) the Latin word explaineth the true ſenſe, and calleth him not *amens, demens, furioſus, lunaticus, fatuus, ſtultus,* or the like, for *non compos mentis* is moſt ſure and legall. (1)

Pl. Com. fo. 368. b. per Sanders. lib. 4. fo. 127. 182. Beverley's caſe. Mirror cap. 1. ſect. 9. ca. 5. ſect. 1. Bract. fo. 165. and 420. Britton fo. 167. b. 217. 66. Fleta li. 6. c. 39. Fitz. N. B. 222. b. Stanf. Prer. 33. 34. (Hob. 96. Sid. 112.)

Non compos mentis is

ITEM, ſi home que eſt de non ſane memorie, que eſt a dire en Latin, qui non eſt compos mentis, *ad cauſe d'entre en aſcuns tiels tenements, ſi tiel diſcent,* ut ſupra, *ſoit ewe en ſa vie durant le temps que il fuit de*

ALSO, if a man which is of non ſane memory, that is to ſay in Latine, *qui non eſt compos mentis,* hath cauſe to enter into any ſuch tenements, if ſuch diſcent, *ut ſupra,* bee had in his life during the time that hee was not of found

non

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

(1) *Scotch Pleading, anno 61. caſe 5. pages 69 and 70, and ſir Thomas Stewart's caſe.* Fatui ſive idiotæ ſunt illi tantùm, qui omni ratiocinatione et judicio carent, tardi, bardi, moriones, macærones, qui inopiâ caloris et ſpirituum laborant. Furor eſt dementia cum ferociâ, et horrendâ actionum vehementiâ. Fromanus de jure furioſorum, p. 6. Furor dividitur in continuum; ubi animus continuâ mentis agitatione ſemper accenditur; et interpolatum ſeu intervallatum; qui dilucida habent intervalla; quorum furor habet inducias, et quos morbus non ſine laxamento aggreditur; qui teſtamentum facere poſſunt; & quos furor ſtimulis ſuis variatis vicibus accendit. *In theſe fury and madneſs is but an ague or a diſeaſe; in the others, it is temperament and complexion. Again, among thoſe who have lucid intervals, it may be fit to diſtinguiſh between thoſe who have only* remiſſionem ſeu adumbratam quietem, *and thoſe who have* intermiſſionem ſeu reſipiſcentiam integram. *Two witneſſes depoſing* ſanæ menti, *are preferred and believed before an hundred touching fury and madneſs. Melancholy and hypochondriac vapours are like ſtorms at ſea, which, though they diſturb for a while, yet they do not hinder the returning to the former calm;* ſemel furibundus, ſemper furibundus præſumitur; *and therefore where the queſtion is of a fact done* lucido intervallo, *which may be either by remiſſion or intermiſſion, it is not enough to ſhew the act was* actus ſapienti conveniens, *for that may happen many ways; but it muſt be proved to be* actus ſapientis, *and to proceed from judgment and deliberation, elſe the preſumption continues.* Lord Nott. MS.

*non ſane memorie, et puis devia, ſon heire bien poit enter ſur luy que eſt eins per diſcent. Et en ceſt caſe poyes veier un cas, que l'heire poit enter, et uncore ſon anceſter que avoit meſme le title ne puiſſoit enter. Car celuy que ſuit hors de ſa memorie al temps de tiel diſcent, s'il voile enter apres tiel diſcent, ſi action ſur ceo ſoit ſue envers luy, il n'ad riens pur luy a pleder, ou de luy ayder, mes a dire, que il fuit de non ſane memorie al temps de tiel diſcent, &c. Et acco ne ſerra il reſceive a dire, pur ceo que nul home de pleine age ſerra reſceiveen aſcun plee per la ley a * diſabler le perſon demeſne, mes le heire bien poit diſabler le perſon ſon anneeſter pur ſon advantage † demeſne en tiel cas, pur ceo que nul laches poit eſtre adjudge per la ley en celuy que ad nul diſcretion en tiel caſe.*

memorie, and after dieth, his heire may well enter upon him, which is in by diſcent. And in this caſe you may ſee a caſe, where the heire may enter, and yet his anceſtor which had the ſame title could not enter. For hee which was out of his memorie at the time of ſuch diſcent, if hee will enter after ſuch a diſcent, if an action upon this be ſued againſt him, he hath nothing to plead for himſelfe, or to helpe him, but to ſay, that hee was not of ſane memorie at the time of ſuch diſcent, &c. And he ſhall not bee received to ſay this, for that no man of full age ſhall bee received in any plea by the law to diſable his owne perſon, but the heire may well diſable the perſon of his anceſtor for his owne advantage in ſuch caſe, for that no laches may bee adjudged by the law in him which hath no diſcretion in ſuch caſe.

of foure ſorts: 1. *Ideota*, which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*. (2. Inſt. 14.) 2. Hee that by ſickneſſe, griefe, or other accident, wholly loſeth his memorie and underſtanding. Lib. 4. 124. 125. Beverleye's caſe. 3. A lunatique that hath ſometime his underſtanding and ſometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, ſo long as he hath not underſtanding. Laſtly, hee that by his owne vitious act for a time depriveth himſelfe of his memorie and underſtanding, as he that is drunken. But that kinde of *non compos mentis* ſhall give no privilege or benefit to him or to his heires. And a diſcent ſhall (1) take away the entrie of an ideot, albeit the want of underſtanding was perpetuall; for *Littleton* ſpeaketh generally of a man of non ſane memorie. So likewiſe if a man that becomes *non compos mentis* by accident, as is aforeſaid, be diſſeiſed and ſuffer a diſcent, albeit he recover his memorie and underſtanding againe, yet hee ſhall never avoid the diſcent; and ſo it is *à fortiori* of one that hath *lucida intervalla*. As for a drunkard, who is *voluntarius dæmon*, he hath (as hath beene ſaid) no privilege thereby, but what hurt or ill ſoever he doth, his drunkenneſſe doth aggravate it: *Omne crimen ebrietas & incendit, & detegit.* (8. Rep. 170.) (Plo. Com. 19.)

If an ideot make a feoffment in fee, he ſhall in pleading never avoid it, by ſaying that hee was an ideot at the time of his feoffment, and ſo had beene from his nativitie. But upon an office found for the king, the king ſhall avoid the feoffment, for the benefit of the ideot, whoſe cuſtodie the law giveth to the king. (4. Rep. 123. b. F. N. B. 233.) 39. H. 6. 42. b. Abb. Aſſ. 89. b. F. N. B. 202. 5 E. 3. 70. Britton, cap. 28. fol. 66. 25. Aſſ. pl. 4. 35. Aſſ. pl. 10.

So it is of a *non compos mentis* by accident, and of him *qui gaudet lucidis intervallis*, if an eſtate be made during his lunacie: for albeit the parties themſelves cannot bee received to diſable themſelves, yet twelve men upon their oathes may finde the truth of the matter. But if any of them alien by fine or recoverie, this ſhall not onely binde himſelfe, but his heires alſo. (2) As amongſt other things requiſite to be knowen, theſe caſes you ſhall finde at large in my Commentaries, whereunto, for brevitie, I referre the reader; upon all which bookes there have beene foure ſeverall opinions concerning the alienation, or other act of a man 32. E. 3. tit. Scire fac. 160. Stanf. Pr. 34. F. N. B. 202. a. Beverleye's caſe, lib. 4. 126. 127. 128.

* *deſtultiſve ei*, added L. and M. and Roh.

† *demeſne— del heire*, L. and M. and Roh.

(1) In all the editions except the firſt, the word *not* is here erroneouſly inſerted.

(2) Lord Hobart obſerves in the caſe of Needler v. Biſhop of Wincheſter, that in theſe caſes "the law finds theſe perſons not ſo "diſabled, nor admits the averment of ſuch diſablement, becauſe it is certified by invincible and indiſputable credit of the judge, "that they were perfect and able perſons. And ſo here is a law of policy that doth not cancel the law of nature, but doth only bound "it in point of form and circumſtance; it being better to admit a miſchief in particular, even againſt the law of nature, than an in-"convenience in general: and it is not the law of nature to admit any improbable ſurmiſe againſt authentic record or evidence." Hob. 224.—Sir Ed. Coke obſerves, poſt. 350. b. that the only mode by which an infant can reverſe a fine levied by him, is by appearance in court during his infancy, and being inſpected by the judges; *non teſtium teſtimonio, aut juratorum ex vicinetu, ſed judicis inſpectione ſolummodo*: the judges may, however, inform themſelves in caſes of this kind by means of witneſſes, church books, or any other kind of evidence. It appears a great hardſhip that infants ſhould not be permitted to reverſe their fines after they attain their full age; and it ſeems unaccountable that the law, which will not permit them to do it after they attain their full age, ſhould permit them to do it before that age. The objection, that no averment can be made againſt any fact which is now upon record, applies as much to them before their attaining their full age as after. But the contrary has been too often eſtabliſhed to be now called in queſtion. See Ann Hungate's caſe, 12 Rep. 122. Warſcomb v. Carrell, ib. 124. Herbert Parrat's caſe, 2. Vent. 30. Hutchiſon's caſe, 3. Lev. 36. Requiſhe v. Requiſhe, Bulſtr. p. 2. 320. Sarah Gulſorth's caſe, 12. Mod. 444. With reſpect to the fines levied by ideots and lunatics, ſee 12. Rep. 124. Hugh Lewis's caſe. 10. Rep. 42. b. But infant truſtees within the ſtat. 7. Ann. c 19. may both levy fines, and ſuffer common recoveries. See 3. Atk. 479. 559. Com. Rep. 615. Barnes's Caſe of Pract. 217. See alſo Fitz. Nat. Bre. 202. where much argument is uſed to ſhew, that a *non compos* may plead his diſability to avoid his own acts as well as an infant; and 2. Blac. Com. ed. 5. p. 291. But in Stroud v. Marſhal, Cro. Eliz. 398, debt upon obligation, the defendant pleaded, that at the time of the obligation made, he was *de non ſane memory*: and it was thereupon demurred, and adjudged to be no plea; for he cannot ſave himſelf by ſuch a plea, and the opinion of Fitzherbert was held to be no law.

Vide Br. tit. Dum fuit infra ætatem 5.

man that is *non compos mentis, &c.* For, firſt, ſome are of opinion, that hee may avoid his owne act by entrie, or plea. Secondly, others are of opinion, that he may avoid it by writ, and not by plea. Thirdly, others, that he may avoid it either by plea, or by writ, and of this opinion is *Fitzherbert* in his *Natura Brevium, ubi ſupra.* And *Littleton* here is of opinion, that neither by plea, nor by writ, nor otherwiſe, he himſelfe ſhall avoid it, but his heire (in reſpect his anceſtor was *non compos mentis*) ſhall avoid it by entrie, plea, or writ. And herewith the greateſt authorities of our bookes agree; and ſo was it reſolved with *Littleton* in *Beverleye's* caſe; [r] where it is ſaid, that it is a maxim of the common law, that the partie ſhall not diſable himſelfe. But this holdeth only in civil cauſes; for in criminall cauſes, as felonie, &c. the act and wrong of a madman ſhall not bee imputed to him, for that in thoſe cauſes, *actus non facit reum, niſi mens ſit rea*, and he is *amens (id eſt) ſine mente*, without his minde or diſcretion; and *furioſus ſolo furore punitur*, a madman is only puniſhed by his madneſſe. And ſo it is of an infant, untill he be of the age of fourteene, which in law is accounted the age of diſcretion.

[r] Lib. 4. fol. 126, 127. (Plo. 19. a. F. N. B. 23.)

26. Aſſ. 27. 21. H. 7. 31. Stanford 16. b. 8. E. 2. Coron. 412. 414. 351. 22. E. 3. ibid. 224. Beverleye's caſe, ubi ſupra. F. N. B. 202. D. 3. H. 7. 2. Vide 3. E. 3. tit. Entrie Cong. Statham. 12. E. 4. 8. 39. H. 6. 4. Abbr. Aſſ. 89. 39. H. 6. 43. (Poſt. 265.)

Et en ceſt caſe poyes veir un caſe, &c. And though *Littleton* ſaith (one caſe), yet other caſes may be found to the ſame end. For if there be grandfather, father, and ſon, and the father diſſeiſe the grandfather, and make a feoffment in fee, without warrantie, the grandfather dieth, albeit the right deſcend to the father, he cannot by this right deſcended, enter againſt his owne feoffment; but if he die, the ſonne ſhall enter, and avoid the eſtate of the feoffee.

15. E. 4. tit. Diſcent 30.

So if the grandfather be tenant in taile, and the father diſſeiſe him, *ut ſupra, mutatis mutandis.*

(Ant. 53. b. 200. b.)

If lands be given to two and to the heires of one of them, he that hath the fee ſimple ſhall not have an action of waſte upon the ſtatute of *Glouceſter*, againſt the joyntenant for life, but his heire ſhall maintaine an action of waſte againſt him, upon the ſtatute of *Glouceſter*; ſo the heire ſhall maintaine that action, which the anceſtor could not.

Sect. 406.

*ET ſi tiel home de non ſane memorie fait feoffment, &c. il * meſme ne poit enter, ne aver briefe appell'* Dum non fuit compos mentis, &c. cauſâ quâ ſupra: *mes apres † la mort ſon heire bien poit enter, ou aver le dit briefe* Dum non fuit compos mentis *a ſon election.* ‡ *Meſme la ley eſt lou enfant deins age fait feoffement, et devie, ſon heire poit enter, ou aver un briefe de* Dum fuit infra ætatem, &c.

AND if ſuch a man of non ſane memorie make a feoffment, &c. hee himſelfe cannot enter, nor have a writ called *Dum non fuit compos mentis, &c. cauſâ quâ ſupra:* but after his death his heire may well enter, or have the ſaid writ of *Dum non fuit compos mentis* at his choice. The ſame law is where an infant within age maketh a feoffment, and dieth, his heire may enter, or have a writ of *Dum fuit infra ætatem, &c.*

FAIT feoffment, &c. Or any other like conveyance *in pais*; but fines and other aſſurances of record are not implyed in this (&c.)

Meſme la ley d'un enfant. This is true, as to the bringing of a *Dum fuit infra ætatem, &c.* but without queſtion the infant in that caſe might have entred, as it appeareth in the next Section.

Briefe Dum non fuit compos mentis. This writ (as it appeareth by our author) lieth for the heire of him that was *non compos mentis*, and not for himſelfe; but a *Dum fuit infra ætatem* lieth as well for the anceſtor himſelf after his full age, as for his heire.

Sect.

* *meſme* not in L. and M. nor Roh.
† *la——ſa* L. and M. and Roh.
‡ &c. added L. and M. and Roh. The reſt of this Section not in L. and M. nor Roh.

Sect. 407.

*ITEM, ſi jeo ſue * diſſeiſie per un enfant deins age, lequel aliena a un auter en fee, et l'alienee devie ſeiſie, et les tenements diſcendont a ſon heire, † eſteant l'enfant deins age, mon entry eſt tolle &c ‡.*

ALSO, if I be diſſeiſed by an infant within age, who alieneth to another in fee, and the alienee dieth ſeiſed, and the lands deſcend to his heire, being an infant within age, my entrie is taken away, &c.

Sect. 408.

MES ſi l'enfant deins age enter ſur l'heire que eſt § eins per diſcent, come il bien poit, pur ceo que || meſme le diſcent fuit durant ſon nonage, donque jeo bien puiſſe enter ſur le diſſeiſor, pur ceo que per ſon entrie il ad defeat et anient le diſcent.

BUT if the infant within age enter upon the heire which is in by diſcent, as he well may, for that the ſame diſcent was during his nonage, then I may well enter upon the diſſeiſor, becauſe by his entrie hee hath defeated and taken away the diſcent.

HERE it appeareth, that the entrie of the infant is lawfull, and giveth advantage to the diſſeiſee to enter alſo, becauſe the diſcent, which was the impediment, is avoided. And it is to be obſerved, that if the diſcent be caſt, the infant being within age, he may enter at any time, either within age, or after his full age.

And ſo it is if an infant make a feoffment &c. he may enter either within age, or at any time after his full age, and ſo in both caſes may his heire.

Vide the next Sect. following.

43. E. 3. tit. Entr. Cong. Vet. N. B. 126. b. F. N. B. 192. 45. E. 3. 21.

Sect. 409.

*EN meſme le manner eſt, lou jeo ſue diſſeiſie, et le diſſeiſor fait feoffment en fee ſur condition, et le feoffee moruſt de tiel eſtate ſeiſie, ¶ jeo ne purroy ** my enter ſur †† l'heire le feoffee: mes ſi le condition ſoit enfreint, iſſint que pur cel cauſe le feoffor enter ſur l'heire, ore jeo bien puiſſe enter, pur ceo que quant le feoffor ou ſes heires entront pur le condition enfreint, le diſcent eſt ouſterment defeat, &c. ‡‡*

IN the ſame manner it is, where I am diſſeiſed, and the diſſeiſor make a feoffment in fee upon condition, and the ſeoffee die of ſuch eſtate ſeiſed, I may not enter upon the heire of the feoffee: but if the condition bee broken, ſo as for this cauſe the feoffor enter upon the heire, now I may well enter, for that when the feoffor or his heires enter for the condition broken, the diſcent is utterly defeated, &c.

THE reaſon hereof is apparent, for *ceſſante cauſâ, ceſſat cauſatum*. Tenant *in capite* maketh a feoffment in fee to the uſe of the feoffee and his heires, untill the feoffor pay an hundred pounds to him or his heires, the feoffee dieth his heire within age, now hath the king the wardſhip of the bodie, and is intituled to the gard of the land. But if the feoffor pay the hundred pounds according to the limitation, the wardſhip is deveſted, both for the body and the land, and ſo it is in caſe of a condition: for, as *Littleton* here ſaith, the diſcent, which is the cauſe of wardſhip, is utterly defeated. And by theſe two laſt caſes which *Littleton* hath here put, it appeareth, that there is no difference, where the diſcent is diſaffirmed by a right paramount, as where the ſtate was never law-

Vide the Sect. next precedent. Dyer 13. El. fol. 298. 299. (Ant. 5. 395.)

(Ant. 76. b.

* *diſſeiſie* not in Roh. but in L. and M.
§ *eins—heire*, L. and M. and Roh.
** *my* not in L. and M. nor Roh.
† *et* added L. and M. and Roh.
|| *meſme* not in L. and M. but in Roh.
†† *l'heire—la terre*, L. and M. and Roh.
‡ &c. not in L. and M. nor Roh.
¶ &c. added L. and M. and Roh.
‡‡ &c. not in L. and M. nor Roh.

lawfull, (as in the case of an infant,) and where the discent is affirmed for a time, the estate being lawfull, and being after defeated by matter *ex post facto*, by a title of re-entry.

Sect. 410.

Vid. Sect. 200. (Ant. 132)

ENtre en religion, &c. Here is implied profession. This discent shall not barre the entry of the disseisee, for that the discent commeth by the deed of the father, because he entred into religion, wherein there is an excellent point worthy of observation: for albeit the entry into religion make not the discent, but the profession, whereof you have read before, *Sect.* 200. yet here you may learne by *Littleton*, that the law respects the originall act, and that is, his entry into religion, which is his owne act, whereupon the profession followed: whereby the discent hapned; for, *Cujusque rei potissima pars, principium est.* And againe, *Origo rei inspici debet*, whereof you shall make great use in reading of our bookes. * Here *Littleton* attributeth the cause of the discent to his entry into religion, which was his owne act, whereas a discent doth not take away an entry unlesse it commeth by death, which, as *Littleton* saith, is the act of God, and no glorious pretext of an act (no, though it bee of religion) shall work a wrong to a stranger, that hath right, to barre him of his entrie. But it is said, that in the case of the bastard eigne, and *mulier puisne*, such a discent shall bind the *mulier*, as before hath beene said, and such an heire that commeth in by such a discent, shall have his age.

(Ant. 126. b. 238. b. 3. Rep. 61.)

* Vid. Pl. Com. Dame Hale's Case. 6. E. 3. 41. &c.

10. E. 3. 55. (Ant. 344)

ITEM, si jeo soy disseisie, et le disseisor ad issue et enter en religion, per force de quel les tenements discendent a son issue, en ceste case jeo bien puisse enter sur l'issue, et uncore la fuit un discent. Mes pur ceo que tiel discent vient al issue per fait le pier, scilicet, *pur ceo que il enter en religion, &c. et le discent ne vient a luy per fait de Dieu*, scilicet, *per mort, &c. mon entree est congeable. Car si jeo arraigne un assise de* novel disseisin *envers mon disseisor, coment que il puit enter en religion, ceo ne abatera my mon briefe, mes mon briefe (ceo non obstant) esloyera en sa force, et* * *mon recovere vers luy serra bonne.* † *Et per mesme le reason le discent que aveigne a son issue per son fait demesne, ne tollera moy de mon entrie, &c.*

ALSO, if I be disseised, and the disseisor hath issue and entreth into religion, by force whereof the lands descend to his issue, in this case I may well enter upon the issue, and yet there was a discent. But for that such discent commeth to the issue by the act of the father, *scilicet*, for that he entred into religion, &c. and the discent came not unto him by the act of God, (*scilicet*) by death, &c. my entry is congeable. For if I arraigne an assise of *novel disseisin* against my disseisor, albeit he after enter into religion, this shall not abate my writ, but my writ (notwithstanding this) shall stand in his force, and my recovery against him shall bee good. And by the same reason the discent which commeth to his issue by his own act, shal not take from me my entry, &c.

3. H. 6. 41. 10. H. 6. 10. b. 18. E. 4. 19. 9. E. 4. 25. 62. 7. E. 4. 15. 18. E. 3. 24. 25. E. 3. 39. 46. E. 3. 25. 30. E. 1. Briefe 885. Bracton lib. 4. fo. 180. & lib. 5. fo. 414. 22. R. 2. Briefe 936. 15. Ass. pl. 8.

Car si jeo arraigne un assise, &c. *Nota*, if a man be tenant or defendant in a reall or personall action, and hanging the suit the tenant or defendant entreth into religion, by this the writ is not abated, because it is by his owne act. And so it is of a resignation; but otherwise it is of a deposition, or deprivation, because he is expelled by judgment, and yet his offence, &c. was the cause thereof, *sed in præsumptione legis, judicium redditur in invitum.*

Moy de mon entry, &c. Here is implyed, or any of my heires.

Sect.

* *mon recovere* not in L. and M. nor Roh.

† *et* not in L. and M. nor Roh.

Sect. 411.

ITEM, ſi jeo leſſe a un home certaine terres pur terme de 20 *ans, et un auter moy diſſeiſiſt, et ouſta le termor, et devie ſeiſie, et les tenements diſcendont a ſon heire, jeo ne purroy enter; et uncore le leſſee pur terme d'ans bien puit enter, pur ceo que il per ſon entry ne ouſta l'heire que eſt eins per diſcent de le franktenement que eſt a luy diſcendus, mes ſolement * claime d'aver les tenements pur terme d'ans, lequel n'eſt † pas expulſement de le franktenement del heire que eſt eins per diſcent. Mes auterment eſt ou mon tenant a terme de vie eſt ‡ diſſeiſie,* cauſa patet, &c. ||

ALSO, if I let unto a man certain lands for the terme of twenty yeares, and another diſſeiſeth me, and ouſt the termor, and die ſeiſed, and the lands deſcend to his heire, I may not enter; and yet the leſſee for yeares may well enter, becauſe that by his entry hee doth not ouſte the heire who is in by diſcent of the freehold which is deſcended unto him, but only claymeth to have the lands for terme of yeares, which is no expulſion from the freehold of the heire who is in by diſcent. But otherwiſe it is where my tenant for terme of life is diſſeiſed, *cauſa patet, &c.* (1)

PUR terme de 20 *ans.* It is cleere that a diſcent ſhall not take away the entrie of a leſſee for yeares, as our author here ſaith, nor of a tenant by *elegit*, or tenant by ſtatute merchant, or ſuch like, as have but a chattle and no freehold; and the reaſon is, for that by their entry upon the heire by diſcent, they take no freehold (which, as often hath bin obſerved, is ſo much reſpected in law) from him; but otherwiſe it is of an eſtate for life, or any higher eſtate. And as a diſcent of a freehold and inheritance ſhall take away the entry of him that right hath to a freehold, or inheritance, ſo a diſcent of a freehold and inheritance cannot take away the entry of him that hath but a chattle, for that no diſcent or dying ſeiſed can be of the ſame.

(2) A man ſeiſed of an advowſon in fee, grants three avoydances one after another, and after the church becommeth void, and the grantor preſents, and his clarke is admitted and inſtituted, and after the church becomes void againe, the grantee may preſent to the ſecond avoidance, for that he was not put out of the poſſeſſion thereof; for as the leſſor having the freehold and inheritance cannot diſſeiſe his leſſee for years, having but a chattle, that any diſcent may be caſt, to take away his entry (as *Littleton* here ſaith); ſo in the ſaid caſe, the grantor hath the franktenement and fee of the advowſon rightfully, ſo as he cannot make any uſurpation, to gaine any eſtate, or to put the grantee ſo out of poſſeſſion as that he ſhould not preſent, no more than the leſſee for yeares in this caſe, to enter. Alſo in reſpect of the privitie that is betweene them, the uſurpation of the grantor ſhall not put the grantee out of poſſeſſion for the two latter avoydances. And this was reſolved [a] by all the judges of the court of common pleas, which I myſelfe heard and obſerved.

(See 2. Roll. Abr. 371. Hob. 322. 323. 5. Rep. 57. 102.)

[a] Hill. 18. Eliz. in communi banco.

Sect. 412.

ITEM, il eſt dit, que ſi home eſt ſeiſie de tenements en fee per occupation en temps de guerre, et ent moruſt ſeiſie en

ALSO, it is ſaid, that if a man be ſeiſed of lands in fee by occupation in time of warre, and thereof dieth ſeiſed in the

PER occupation en temps de guerre.

Firſt, it is neceſſarie to be knowne, what ſhall bee ſaid time of peace, *tempus pacis*; and what ſhall be ſaid *tempus belli, ſive guerræ*, time of warre. *Tempus pacis eſt quando*

(4. Inſt. 125.)

* *claime* not in L. and M. nor Roh. † *pas* not in L. and M. nor Roh. ‡ *diſſeiſie—ſeiſie, &c.* L. and M. and Roh. || *&c.* not in L. and M. nor Roh.

(1) A leaſe is conſidered as a covenant real, that binds the poſſeſſion of lands into whoſe hands ſoever it comes, if the lands be not evicted by a ſuperior title; yet the termor has not the freehold in him, but holds the poſſeſſion as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. Now then, if the termor enters before the deſcent, he reveſts the freehold in the diſſeiſee, who has the right of poſſeſſion; but if he enters after the deſcent, then he can only hold in the name of the freeholder, who has the preſent right of poſſeſſion, which is the heir of the diſſeiſor. Gilb. Ten. 35.

(2) *Hob.* 322. 323. *ſir William Elvis's caſe. This very caſe was the principal point; and there, by Hobart, Warberton, and Winch, it was adjudged* contra, *that uſurpation by the grantor puts the grantee out of poſſeſſion, and gets all that was granted out, Hutton* diſſentiente *But it appears that this place is good law, and that Hobart erravit. Hil.* 12. *Car. C. B. Legge v. Archer. A man leaſed an advowſon for years, and then preſented; this was ruled to be no uſurpation, but plenarily* pro hâc vice: *this place is cited l.* 8. *uſurpation* 5. idque ratione *privity*, ut inter *coparceners, and reaſon it is againſt his own act.* 8. *Rep. Dampart's caſe.* Lord Nott. MS.

Inter brevia de anno 1. E. 3. parte 1. & paſch. 28. E. 3. inter adjudicata coram rege. lib. 2. fol. 37. in theſaur. Paſch. 39. E. 3. inter adjudicata coram rege in theſaur. lib. 2. fol. 92. (Cro. Car. 71.)

14. E. 3. tit. ſcire facias 122. but more fully in the record at large.

do cancellaria, & aliæ curiæ regis ſunt apertæ, quibus lex ſiebat cuicunque prout fieri conſuevit. And ſo it was adjudged in the caſe of *Roger Mortimer*, and of *Thomas* earle of *Lancaſter*. *Utrùm terra ſit guerrina necne, naturaliter debet judicari per recorda regis, & eorum, qui curias regis per legem terræ cuſtodiunt, & gubernant, ſed non alio modo.*

temps de guerre, et les tenements diſcendont a ſon heire, tiel diſcent ne ouſtera aſcun home de ſon entry; et de ceo home poit vier en un plee ſur un briefe de aiel, an. 7. E. 2.

time of warre, and the tenements deſcend to his heire, ſuch diſcent ſhall not ouſt any man of his entry; and of this a man may ſee in a plea upon a writ of aiel, 7. E. 2.

And therefore when the courts of juſtice be open, and the judges and miniſters of the ſame may by law protect men from wrong and violence, and diſtribute juſtice to all, it is ſaid to be time of peace. So, when by invaſion, inſurrection, rebellions, or ſuch like, the peaceable courſe of juſtice is diſturbed and ſtopped, ſo as the courts of juſtice be as it were ſhut up, *et ſilent leges inter arma*, then it is ſaid to be time of warre. And the triall hereof is by the records, and judges of the court of juſtice; for by them it will appeare, whether juſtice had her equall courſe of proceeding at that time or no, and this ſhall not be tried by jury.

If a man be diſſeiſed in time of peace, and the diſcent is caſt in time of warre, this ſhall not take away the entry of the diſſeiſee.

Bracton lib. 4. fol. 240.

Item tempore pacis, quod dicitur ad differentiam eorum quæ fuerunt tempore belli, quod idem eſt, quod tempore guerrino, quod nihil differt à tempore juris. & injuriæ; eſt enim tempus injuriæ, cùm fuerunt oppreſſiones violentæ, quibus reſiſti non poteſt. & diſſeiſinæ injuſtæ.

So as hereby it alſo appeareth, that time of peace is the time of law and right, and time of warre is the time of violent oppreſſion, which cannot be reſiſted by the equall courſe of law. And therefore in all reall actions, the expleas, or taking of the profits, are layed *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law. (1)

Ingham cap. de novel diſſeiſin.

Per occupation. *Occupation* is a word of art, and ſignifieth a putting out of a man's freehold in time of warre; and it is all one with a diſſeiſin in time of peace, ſaving that it is not ſo dangerous as it appeareth here by *Littleton*; and therefore the law gave a writ in that caſe of *occupavit*, ſo called, by reaſon of that word in the writ, in ſtead of *diſſeiſivit*, in the aſſiſe of *novel diſſeiſin*, if the diſſeiſin had beene done in time of peace; whereby it appeareth, how aptly both in this, and in all other places, *Littleton* thorow his whole booke ſpeaketh. But albeit *occupatio*, whereof *Littleton* here ſpeaketh, is uſed only in the ſaid writ, and in none other, (that I can finde or remember) yet hath it beene uſed commonly in conveyances and leaſes, to limit, or make certaine precedent words, as *ad tunc in tenuitâ & occupatione.* But *occupatio* is applyed to the poſſeſſion, be it lawfull or unlawfull; it hath alſo crept into ſome acts of parliament, as 4. *H.* 7. *cap.* 19. 39. *Eliz.* *cap.* 1. and others; and *occupare* is ſometimes taken to conquer.

Lib. 4. fol. 49. 50. Ognel's caſe.

Et de ceo home poit vier en un plea ſur briefe de aiel, anno 7. *E.* 2. Hereby it appeares, that ancient termes or yeares, after the example of *Littleton*, are to bee cited and vouched, for confirmation of the law, albeit they were never printed; and that of thoſe yeares, thoſe eſpecially of *E.* 1. *H.* 3. *&c.* are worthy of the reading and obſervation; a great number of which I have ſeene and obſerved, which in mine opinion doe give a great light, not onely to the underſtanding and reaſon of the common law, (which *Fitzherbert* either ſaw not, or were by him omitted) but alſo to the true expoſition of the ancient ſtatutes made in thoſe times. Yet mine advice is, that they be read in their time. For after our ſtudient is enabled and armed to ſet on our yeare bookes, or reports of the law, let him reade firſt the latter reports, for two cauſes. Firſt, for that for the moſt part the latter judgements and reſolutions are the ſureſt, and therefore it is beſt to ſeaſon him with them in the beginning, both for the ſetling of his judgment, and for the retaining of them in memorie. Secondly, for that the latter are more facile and eaſier to be underſtood, than the more ancient: but after the reading of them, then to reade theſe others before mentioned, and all the ancient authors that have written of our law; for I would wiſh our ſtudient to be a compleat lawyer. But now to returne. As it is in caſe of diſcent, ſo it is in caſe of preſentation, for no uſurpation in time of warre putteth the right patron out of poſſeſſion, albeit the incumbent come in by inſtitution and induction: and time of warre doth not onely give privilege to them that be in warre, but to all others within the kingdome; and although the admiſſion and inſtitution be in time of peace, yet if the preſentment were in time of warre, it putteth not the right patron out of poſſeſſion.

6. E. 3. 41. 7. E. 3. darr. pref. 2. 28. E. 2. quar. imp. 175. F. N. B. 31.

Sect.

(1) *If tenant by elegit is interrupted in taking the profits of the land, by reaſon of war, he ſhall not hold over, but it ſhall be in diſadvantage of the tenant by elegit.* 19. *E.* 1. *Execution* 246. 4. *Rep.* 82. *b.*—*In Lib. Rub. Scacc. fol.* 241. tempus guerræ duravit à quarto die Apl. 48. H. 3. uſque ad 17. Sep. an. 49. apud Winter poſt bellum de Evetham pax proclamata fuit. Nota H. 3. 19. die Oct. anno ejuſdem 16. fuit apud Wall. An. 40. fuit apud Oxon. 48. apud Dudl. 14 Maij, an. 49. fuit apud Evethani. Et tamen ſunt placita de Rich. 16. H. 3. de banco. Tr. 16. H. 3. Et aſſiſa magna 40. H. 3. 48. H. 3. M. 40. H. 3. P. 48. H. 3. P. 49. H. 3. Et placita coram rege à 32. uſque 40. H. 3. Tr. 4. H. 3. 26. et 27. E. 1. Ent. R. T. Rot. 5. *Goods were ſeiſed for debt to the king; the ſheriff returned, that the Scots entered* hoſtiliter, *by reaſon of which they could not be taken: Rule*, Fiat inde inquiſitio, & interim pacem habeat de demandâ. *Noy MS.* 384.——3. *Inſt.* 52. *See the caſe of the earl of Lancaſter put at large. Nota, that in* 14. *E.* 3. F. ſcire facias 122. *there is no intimation at all of the matter; but on the record of this caſe, as is to be ſeen in the manuſcript Rep.* of Coke* 428. *the caſe was thus: Henry Lancaſter granted to the abbot of Rumſey and his ſucceſſors*, quòd ſi ex tunc aliquo tempore vel aliquâ occaſione guerræ in regno Angliæ feriam ſuam amitterent, ita quòd nihil inde percipere poſſunt, quieti eſſent ejuſdem anno et tempore de ſummâ ſuâ prædictâ ſol. *And upon* ſcire facias *for the arrears of that rent, which was in court for three years, viz.* 11. 12. *and* 13. *E.* 3. *the abbot pleaded theſe charters, and ſaid, that* guerra fuit tàm ſuper mare quàm ſuper terram inter dominum regem et illos de Franciâ, ita quòd mercatores ad dictas nundinas nec venerunt ut ſolebant, nec ipſe abbas aliquod profectum de iiſdem nundinis per idem tempus percepit nec percipere poſſit, quod paratus fuit verificare juxta tenorem chartæ prædictæ; *and it was reſolved*, quòd utrùm terra ſit guerrina, &c. prout hic notatur. *Then it follows in the ſaid manuſcript:* Nota, quòd guerra dicitur in hoc regno eſſe, quando exercitium juſtitiæ in curiis et placeis regis impeditur. *And Coke adds a ſhort note:* Ceo tryal de guerre in ceſt realm; et ex hoc ſemble que ne fuit guerre inter E. 4. et H. 6. car exercitium juſtitiæ non impeditum fuit, come appiert per les reports de 10. E. 3. et 42. H. 6. nec tamen H. 3. hic ſupra, nec temps Car. 1. *Lord Nott. MS.*

* The Editor has not been able to diſcover what is the manuſcript to which lord Nottingham alludes in this place.

Sect. 413.

ITEM, * *que nul morant ſeiſie (ou les tenements vienſdront a un auter per ſucceſſion)* † *tollera l'entre d'aſcun perſon, &c.* ‡ *Come de prelates, abbots, priors, deans, ou parſon d'eſgliſe,* || *ou d'auters corps politicke, &c. coment que ils fueront xx. morants ſeiſie, et xx. ſucceſſors, ceo ne tolle jammes aſcun home de ſon entrie* §.

Plus ſerra dit de diſcents en le prochein ¶ *chapter.*

ALSO, that no dying ſeiſed (where the tenements come to another by ſucceſſion) ſhall take away the entrie of any perſon, &c. As of prelates, abbots, priors, deanes, or of the parſon of a church, or of other bodies politike, &c. albeit there were xx. dyings ſeiſed, and xx. ſucceſſors, this ſhall not put any man from his entrie (1).

More ſhall be ſaid of diſcents in the next chapter.

PER ſucceſſion.

This in the common law is applied only to bodies politike, or corporate, which have ſucceſſion perpetuall, and not to naturall men; as to a biſhop and his ſucceſſors, or to an abbot, deane, archdeacon, prebend, parſon, &c. and their ſucceſſors, and not to *I. S.* or any other naturall body and his ſucceſſors, but to him and his heires. And the ſucceſſor of any of theſe is in the *poſt*, and the heire of the naturall man is in the *per*; and *ſuccedere* is derived of *ſub* and *cedere*. Vid. Sect. 1. 7. E. 3. 25. a. 5. E. 3. 13. & 31.

Corps politique, &c.

This is a body to take in ſucceſſion, framed (as to that capacity) by policie, and thereupon it is called here by *Littleton* a body politike; and it is alſo called a corporation, or a body incorporate, becauſe the perſons are made into a body, and are of capacity to take and grant, &c. And this body politike, or incorporate, may commence, and be eſtabliſhed three manner of ways, *viz.* by preſcription, by letters patents, or by act of parliament. Every body politike, or corporate, is either eccleſiaſticall or lay: eccleſiaſtical, either regular, as abbots, priors, &c. or ſecular, as biſhops, deanes, archdeacons, parſons, vicars, *&c.* lay, as maior and communaltie, baylifes and burgeſſes, *&c.* Alſo every body politike, or corporate, is either elective, preſentative, collative, or donative. And againe it is either ſole, or aggregate of many; as you may reade in the Third Part of my Commentaries. And this body politike, or corporate, aggregate of many, is by the civilians called *collegium*, or *univerſitas*. Lib. 3. fo. 73. in the caſe of the Deane and Chapter of Norwich. (1. Sid. 162. 11. Rep. 77. a.)

Chap. 7. Continuall Claime. Sect. 414.

CONTINUAL claime eſt † *la lou home ad droit et title d'entrer en aſcuns terres ou tenements dont* ** *auter eſt ſeiſie en fee, ou en fee taile, ſi ceſty que ad title d'entrer fait con-*

CONTINUAL claim is where a man hath right and title to enter into any lands or tenements whereof another is ſeiſed in fee, or in fee tail, if hee which hath title to enter makes continuall claime to the lands

HERE our Author firſt deſcribeth what a continuall claime is. It is called *continuum clameum*, becauſe at the common law it muſt have beene made within every yeare and day, as *Littleton* here teacheth. And yet if hee that right hath, maketh claime, and the ter-tenant dieth within the yeare and the day, this claime though it bee but *timuall* Mirror cap. 1. §. 15. & §. 18. Bracton li. 5. fo. 435. 436. Britton 107. b. 126. 4. Fleta lib. 6. cap. 52. 58. Vid. Sect. 424. Vid. Sect. 385. 32. H. 8. c. 33.

* *que* not in L. and M. nor Roh. † *ne* added in L. and M. and Roh. ‡ *come—quor.* L. and M. and Roh.
|| *ou d'auters corps politike*, not in L. and M. nor Roh. § *&c.* added L. and M. and Roh.
¶ *prochein chapitre—chapitre de continuelle clayme*, L. and M. and Roh. †† *per* added L. and M. ‡‡ *un* added L. and M.

(1) By the ſtatute of limitations, 21. Jac. 1. c. 16. it is enacted, that no entry ſhall be made by any man upon lands, unleſs within twenty years after his right ſhall accrue. —— By the 4th and 5th Ann. c. 16. it is enacted, that no entry ſhall be of force to ſatisfy the ſtatute of limitations, or to avoid a fine levied of lands, unleſs an action be thereupon commenced within one year after, and proſecuted with effect.

* Vid. Sect. 424.

once * made (as hath beene said) shall preserve the entry of him that maketh the claime (1).

Ad droit et title d'enter. And yet in some cases, a continuall claime may be made by him that hath right, and cannot enter.

If tenant for years, tenant by statute staple, merchant, or *elegit*, be ousted, and he in the reversion disseised, the lessor, or he in reversion, may enter to the intent to make his claime, and yet his entry as to take any profits, is not lawfull during the terme. And in the same manner, the lessor or he in the reversion in that case may enter to avoid a collaterall warranty, or the lessor in that case may recover in an assise. And so (as some have holden) may the lessor enter in case of a lease for life, to this intent, to avoid a discent, or a warranty.

Dyer 19. El. Pl. Com. 374. 15. H. 7. 3. 4. Jacobin's case. 28. H. 6. 28.

Vid. Sect. 442. 45. E. 3. 21.

If the disseisee make continuall claime, and the disseisor die seised within the yeare, his heire within age, and by office the king is intitled to the wardship, albeit the entry of the disseisee bee not lawfull, yet may he make continuall claime to avoid a discent, and so in the like.

7. H. 6. 40. Contin. Claime 1. Downcler's case. 5. E. 4. 4. (Plo. 191. a.) (9. Rep. 106.) (1. Rep. 67. a)

tinuall claime a les terres ou tenements devant le morant seisie de celuy que tient les tenements, donques coment que tiel tenant morust ent seisi, et les terres ou tenements discendront a son heire, uncore poit celuy que avoit fait tiel claime, ou son heire, enter en les terres ou tenements issint discendus, per cause de le continual claime fait, nient contristiant le discent. Sicome en case que home soit disseisie, et le disseisee fait continual claime a les tenements en la vie le disseisor, coment que le disseisor devie seisie en fee, et la terre discendist a son heire, uncore poit le disseisee enter sur la possession le heire, nient obstant le discent *.

or tenements before the dying seised of him which holdeth the tenements, then albeit that such tenant dieth thereof seised, and the lands or tenements descend to his heire, yet may he who hath made such continual claime, or his heire, enter into the lands or tenements so descended, by reason of the continuall claime made, notwithstanding the discent. As in case that a man bee disseised, and the disseisee makes continuall claime to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to his heire, yet may the disseisee enter upon the possession of the heire, notwithstanding the discent.

Uncore poit celuy que fait tiel clayme ou son heire enter. This is to be understood in this manner: that if the father make claime, and the disseisor dieth, and then the father dieth, that his heire may enter, because the discent was cast in the father's time, and the right of entry which the father gained by his claime, shall descend to his heire. But if the father make continuall claime, and dieth, and the sonne make no continuall claime, and within the yeare and day after the claime made by the father, the disseisor dieth, this shall take away the entry of the sonne, for that the discent was cast in his time, and the claime made by the father shall not availe him, that might have claimed himselfe. And of this opinion was *Littleton* himselfe in our bookes, where he holdeth, that no continuall claime can avoid a discent, unlesse it be made by him that hath title to enter, and in whose life the dying seised was. See more of this matter hereafter, in this chapter, Sect. 416.

(1. Roll. Abr. 630.)

Bracton lib. 5. fo. 436. Fleta lib. 5. cap. 52. 53. 22. H. 6. 37. 9. H. 4. 5. a. 15. E. 4. 22. a.

And as here *Littleton* putteth his case of the ancestor and heire, so it holdeth in all respects, of the predecessor and successor.

23. H. 6. 37.

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

(1) It has been observed in the notes to the chapter of Discents, that the reasons for which the law protected the possession of the heir of the disseisor from the entry of the disseisee, were, the notoriety and presumptive right of possession which the disseisor acquired by his being permitted to live and die in the peaceable possession of the lands; the necessity that there should be a tenant to do the feudal duties; and by way of a punishment on the tenant for his neglect in not asserting his right. But none of these reasons could exist, where the tenant entered upon the lands, and made his claim for them; as by doing so he prevented the presumption in favour of the title of the disseisor; made a tender to the lord of his feudal services; and did all that was in his power to restore his possession. But to entitle the disseisee to enter on the heir of the disseisor, notwithstanding the discent upon him, this claim must have been made within a year and a day next preceding the descent Lord chief baron Gilbert, in his commentary upon this chapter, observes, that the notion of laches, in not claiming for a year and a day, is taken out of the feudal law, it being the period of time within which the feudal services must be required. It is a space of time which is prescribed for the performance of different acts in our law, and in all laws derived from the feudal institutions. It seems only to import the space of a complete year. --- In Plo. Com. 359. a. lord chief justice Dyer is said to have defined claim to be a challenge of the ownership, or propriety, that he hath not in possession, but is detained from him by wrong.

Sect. 415.

*EN meſme le maner eſt, ſi tenant a terme de vie alien en fee, celuy en le reverſion ou celuy en le remainder poit enter ſur l'alienee. Et ſi tiel alienee devie ſeiſie de tiel eſtate ſans continual claime fait a les tenements, devant le morant ſeiſi del alienee, et les tenements per cauſe del morant ſeiſi del alienee diſcendont * a ſon heire, donques ne poit celuy en le reverſion ne celuy en le remainder enter. Mes † ſi celuy en le reverſion ou celuy en le remainder, que ad cauſe d'entre ſur l'alienee, fait continual claime a les tenements devant le morant ſeiſi del alienee, donques tiel home poit enter apres la mort l'alienee, auxy bien come il puiſſoit ‡ en ſa vie §.*

IN the ſame manner it is, if tenant for life alien in fee, hee in the reverſion or he in the remainder may enter upon the alienee. And if ſuch alienee dieth ſeiſed of ſuch eſtate without continuall claime made to the tenements, before the dying ſeiſed of the alienee, and the lands by reaſon of the dying ſeiſed of the alienee deſcend to his heire, then cannot he in the reverſion nor hee in the remainder enter. But if hee in the reverſion or in the remainder, who hath cauſe to enter upon the alienee, make continuall claime to the land before the dying ſeiſed of the alienee, then ſuch a man may enter after the death of the alienee, as well as he might in his life-time. (1. Rep. 14. a.)

BY this it appeareth, that a continuall claime may be made as well where the lands are in the hands of a feoffee, &c. by title, as in the hands of a diſſeiſor, abator, or intrudor, by wrong, as before hath beene noted.

Sect. 416.

ITEM, ſi terre ſoit leſſe a un home pur terme de ſa vie, le remainder a un auter a terme de vie, le remainder a la tierce en fee, ſi le tenant a terme de vie aliena a un auter en fee, et celuy en le remainder pur terme de vie fait continual claime a la terre devant le morant ſeiſie d'alienee,

ALSO, if land be let to a man for terme of his life, the remainder to another for terme of life, the remainder to the third in fee, if tenant for life alien to another in fee, and he in the remainder for life maketh continuall claime to the land before the dying ſeiſed of the alienee, and after the

ALIEN a un auter en fee. It is to be obſerved, that a forfeiture may be made by the alienation of a particular tenant, two manner of wayes; either *in pais*, or by matter of record. (1. Roll. Abr. 630.)

In pais, of lands and tenements which lie in livery (whereof *Littleton* intendeth his caſe) where a greater eſtate paſſeth by livery, than the particular tenant may lawfully make, whereby the reverſion or remainder is deveſted, as here in the example that *Littleton* putteth when tenant for life alieneth in Vid. Sect. 581. 609. 610 611.

* *a ſon heire,—al heire del alienee*, L. and M. and Roh. † *ſi* not in L, and M. nor Roh. ‡ *puiſſoit en poet a*, L. and M. and Roh. § &c. L. and M.

in fee, which muſt bee underſtood of a feoffment, fine, or recoverie by conſent.

(1. Rep. 14.)

If tenant for life, and hee in the remainder for life in *Littleton*'s caſe, hath joyned in a feoffment in fee, this had beene a forfeiture of both their eſtates, becauſe hee in the remainder is *particeps injuriæ*. And ſo it is if hee in the remainder for life had entred, and diſſeiſed tenant for life, and made a feoffment in fee, this had beene a forfeiture of the right of his remainder. (1)

17. El. Dy. 339. 16. El. Dy. 324.

A particular eſtate of any thing that lies in grant, cannot be forfeited by any grant in fee by deed. As if tenant for life or yeares of an advowſon, rent, common, or of a reverſion or remainder of land, by deed grant the ſame in fee, this is no forfeiture of their eſtates, for that nothing paſſes thereby, but that which lawfully may paſſe; and of that opinion is *Littleton* in our bookes.

32. E. 3. Deviſe 21. 15. E. 4. 9. Vide Sect. 608. 609. 610. (1. Roll. Abr. 854.)

But if tenant for life or yeares of land, the reverſion or remainder being in the king, make a feoffment in fee, this is a forfeiture, and yet no reverſion or remainder is diveſted out of the king; and the reaſon is, in reſpect of the ſolemnitie of the feoffment by liverie, tending to the king's diſheriſon. (2)

(1. Rep. 76. b.) 35. H. 6. 62. Tr. 32. El. in Informat. de intrunion vers Rolliston pur le Manor de Drayton Baſſet, ſo reſolved by the court of exchequer.

By matter of record, and that by three manner of wayes. Firſt, by alienation. Secondly, by claiming a greater eſtate than he ought. Thirdly, by affirming the reverſion or remainder to be in a ſtranger.

(Poſt. 332. b. 1. Leo. 40. 1. Roll. Abr. 855.)

First, by alienation; and that of two ſorts, *viz.* by alienation diveſting, or not diveſting, the reverſion or remainder. Diveſting, as by levying of a fine, or ſuffering a common recoverie of lands, whereby the reverſion or remainder is diveſted: not diveſting, as by levying of a fine in fee, of an advowſon, rent, common, or any other thing that lieth in grant: and of this opinion is *Littleton* in our bookes. * And ſo note two diverſities: firſt, between a grant by fine (which is of record) and a grant by deed *in pais*; and yet in this they both agree, that the reverſion or remainder in neither caſe is diveſted: ſecondly, betweene a matter of record, as a fine, &c. and a deed recorded, as a deed inrolled, for that worketh no forfeiture, becauſe the deed is the originall.

* 15. E. 4. 9. 31. F. 3. Gr. 62. 14. E. 3. 3. Avow. 117.

15. E. 2. Judg. 237. 6. E. 3. 29. 9. E. 3. 4. 18. E. 2. Fines 120. 15. E. 4. 29. 36. H. 6. 29. 2. H. 6. 9. 4. El. Dy. 9. H. 5. 14. 22. Aſſ. 31. 18. E. 3. 28. 16. Aſſ. 16. (Mo. 77. 212. 1. Rep. 16.)

Secondly, by claime; and that may be in two ſorts, either expreſſe or implyed. Expreſſe, as if tenant for life will in court of record claime fee, or if leſſee for yeares be ouſted, and he will bring an aſſiſe *ut de libero tenemento*. Implyed, as if in a writ of right brought againſt him, he will take upon him to joyne the miſe upon the meere right, which none but tenant in fee ſimple ought to doe. So if leſſee for yeares doe loſe in a *præcipe*, and will bring a writ of error, for error in proceſſe, this is a forfeiture. (3)

Thirdly,

* *&c.* added L. and M. and Roh. † *&c.* added L. and M. and Roh. ‡ *ne* in L. and M. and Roh. § *que* added in L. and M. and Roh. ‖ *ſa* not in L. and M. nor Roh. ** *que* not in L. and M. nor Roh. †† *(Car nul poit faire continual claim)* not in L. and M. nor Roh.

(1) See the obſervations on feoffments introduced in the notes to the next chapter.

(2) See ant. 233. b. note.

(3) So in the caſe of a leaſe for life, the tenant may plead it in bar; but in the caſe of a leaſe for years, or an eſtate by tenant by ſtatute or *elegit*, the defendant ſhall not plead in bar, as to ſay, *eſſoin non*, but juſtify by force of the leaſe; and conclude, *ſi non ſans tort*; and if the tenant of the freehold be not named, he ſhall plead, *nul tenant de franctenement noſme en le bref*: and in the caſe of a feoffment with a warranty, he muſt rely on the warranty. See ant. 238. b. 239. a.

Thirdly, By affirming the reverſion or remainder to be in a ſtranger, and that either actively or paſſively. Actively, by five manner of waves. As firſt, if tenant for life pray in aid of a ſtranger, whereby he affirmes the reverſion to be in him. Secondly, if he atturne to the grant of a ſtranger; and there note alſo a diverſitie betweene an atturnement of record to a ſtranger, and an atturnement *in pais*, for an atturnement *in pais* worketh no forfeiture. Thirdly, if a ſtranger bring a writ of entrie *in caſu proviſo*, and ſuppoſe the reverſion to be in him, if the tenant for life confeſſe the action, this is a forfeiture. Fourthly, if tenant for life plead covinouſly, to the diſheriſon of him in the reverſion, this is a forfeiture. Fifthly, if a ſtranger bring an action of waſte againſt leſſee for life, and he plead *nul waſt fait*, this is a forfeiture; or the like.

21. E. 3. 14. 2. 5. E. 4. 2. 21. H. 8. Fort. Br. 87. li 2. fol. 55. 56. Buckler's caſe. 27. E. 3. 77. 17. E. 3. 7. 2. 39. E. 3. 16. 29. E. 3. 24. 5. Aſſ. 5. 5. E. 3 entr. cong. 42. 14. E. 3. recett 135. 3. E. 3 32. 24. E. 3. 68. 1. H. 7. (1. Roll. Abr. 852. 3. Rep. 4. b. 1. Leo. 264. 9. Rep. 106.)

Paſſively, as if tenant for life accept a fine of a ſtranger, *ſur conuſans de droit come ceo, &c.* for hereby he affirmes of record, the reverſion to be in a ſtranger. 3 Mar. Dy. 148.

Littleton here ſpeaketh of the forfeiture of an eſtate; and here it is to be knowen, that the right of a particular eſtate may be forfeited alſo, and that he that hath but a right of a remainder or reverſion, ſhall take benefit of the forfeiture. As if tenant for life be diſſeiſed, and hee levie a fine to the diſſeiſor, he in the reverſion or remainder ſhall preſently enter upon the diſſeiſor for the forfeiture. And ſo it is if the leſſee after the diſſeiſin had levied a fine to a ſtranger, though to ſome reſpects, *partes finis nihil habuerunt*, yet it is a forfeiture of his right. Lib. 2. fol. 55. Buckler's caſe.

Littleton here ſpeaketh of an alienation in fee abſolutely, but ſo it is if the leſſee for life make a leaſe for any other man's life, or a gift in taile. If *A.* be tenant for life, and make a leaſe to *B.* for his life, and *B.* dieth, and the leſſee re-entreth, yet the forfeiture remaineth. 13. E. 4. 4.

If tenant for life make a leaſe for life, or a gift in taile, or a feoffment in fee, upon condition, and entreth for the condition broken, yet the forfeiture remaineth. *Littleton* ſpeaketh of an eſtate for life; ſo it is of tenant in taile *apres poſſibilitie*, tenant by the courteſie, tenant in dower, or of him that hath an eſtate to him and his heires, during the life of *I. S.* &c. and ſo of tenant for yeares, tenant by ſtatute merchant, ſtatute ſtaple, or *elegit*. (Ant. 202. b.) 39 Aſſ. 15. 43. F. 3. ent. cong 30. 2. H. 5. 7. 39. E. 3. 16. 45. b. 3. 25. (Ant. 28. a. 42. a.)

Littleton ſaith, that where the alienation in fee is made to another, which muſt be intended a ſtranger, for if it be made to him in reverſion or remainder, it amounts to a ſurrender of his eſtate, as at large hath beene ſpoken in the chapter of tenant for life.

By *Littleton* it appeareth, that tenant for life in remainder may enter for the forfeiture of the firſt tenant for life, and that if the tenant for life in remainder make continuall claime, and the alience die ſeiſed, then may he in the remainder for life enter; and if he die before he do enter, then he in the remainder in fee ſhall enter, becauſe he in the remainder in fee could not make any claime; and therefore the right of entrie, which tenant for life in remainder gained by his entrie, ſhall goe to him in the remainder in fee, in reſpect of the privitie of eſtate: and ſo it is of him in the reverſion in fee in like caſe, for he is alſo privie in eſtate. (1. Roll. Abr. 630.)

If two joyntenants be diſſeiſed, and the one of them make continuall claime and dieth, the ſurvivor ſhall take benefit of his continuall claime in reſpect of the privitie of their eſtate.

But if tenant for life make continuall claime, this ſhall not give any benefit to him in the remainder, unleſſe the diſſeiſor died in the life of tenant for life, for the cauſe abovesaid, *Sectione* 414.

If tenant in taile, the remainder in fee with garrantie, have judgement to recover in value, and dieth before execution without iſſue, he in the remainder ſhall ſue execution, for he hath right thereunto, and is privie in eſtate.

In the ſame manner, if a ſeigniorie be granted by fine to one for life, the remainder in fee, the grantee for life dieth, he in the remainder ſhall have a *per quæ ſervitia*, for he hath right to the remainder, and is privie in eſtate. Here alſo it appeareth, that none can make continuall claime, but he that hath right to enter.

Sect. 417.

MES eſt a veier a toy (mon fits) coment et en quel manner tiel continual claime ſerra fait: et ceo bien apprender, trois choſes ſont a intender. La 1. *choſe*

BUT it is to be ſeene of thee (my ſon) how and in what manner ſuch continuall claime ſhall be made: and to learne this wel, three things are to be underſtood. The firſt

SI home ad cauſe d'entrer en aſcuns terres ou tenements, &c. (Plo. 355. b. 359. a. 2. Inſt. 518. 3. Rep. 91. a.)

It is not ſufficient to tell one generally what he ſhould doe, but to direct him how, and in what manner he ſhall doe it, as *Littleton* doth in this place. And here, the generall rules of our author are to bee underſtood,

(Poſt. 263. b.)

This hath beene adjudged, Mich. 14. & 15. Eliz. Rot. 1458. in the Earl of Arundell's caſe.

ſtood, that the entrie of a man, to recontinue his inheritance or freehold, muſt enſue his action for recoverie of the ſame. As if three men diſſeiſe me ſeverally, of three ſeverall acres of land, being all in one countie, and I enter in one acre, in the name of all the three acres, this is good for no more but for that acre which I entered into, becauſe each diſſeiſor is a ſeverall tenant of the freehold, and as I muſt have ſeverall actions againſt them, for the recoverie of the land, ſo mine entrie muſt be ſeverall.

*eſt, ſi home ad cauſe d'entre en aſcuns terres ou tenements que ſont en divers villes deins un meſme countie, s'il enter en un parcel de les terres ou tenements que ſont en un ville, en noſme de touts ſes terres ou tenements as queux il ad droit d'enter deins touts les villes de meſme le countie; * per tiel entrie il avera auxy bone poſſeſſion et ſeiſin de † touts terres ou tenements dont il ad title d'entrie, ſicome il avoit enter ‡ en fait en cheſcun parcel: et ceo ſemble grand reaſon.*

thing is, if a man hath cauſe to enter into any lands or tenements in divers townes in one ſame countie, if he enter into one parcell of the lands or tenements which are in one towne, in the name of all the lands or tenements into the which he hath right to enter within all the townes of the ſame countie; by ſuch entrie he ſhall have as good a poſſeſſion and ſeiſin of all the lands and tenements whereof he hath title of entrie, as if hee had entred in deed into every parcell: and this ſeemeth great reaſon.

(4. Leo. 8.) (1. Leo. 36.)

(1. Roll. Abr. 738.) (1. Leo. 51.)

And ſo it is if one man diſſeiſe mee of three acres of ground, and letteth the ſame ſeverally to three perſons for their lives, &c. there the entrie upon one leſſee, in the name of the whole, is good for no more than that acre that he hath in his poſſeſſion. But if the diſſeiſor had letten ſeverally the ſaid three acres to three perſons for yeares, there the entrie upon one of the leſſees, in the name of all the three acres, ſhall recontinue and reveſt all the three acres in the diſſeiſee, for that the diſſeiſee might have had one aſſiſe againſt the diſſeiſor, becauſe he remained tenant of the freehold for all the three acres, and therefore one entrie ſhall ſerve for the whole.

7. Aſſ. 18. 12. E. 4. 10. 36. H. 6. 27. 32. Aſſ. pl. 1.

If one diſſeiſe me of one acre at one time, and after diſſeiſe me of another acre in the ſame countie at another time, in this caſe mine entrie into one of them in the name of both is good; for that one aſſiſe might be brought againſt him for both diſſeiſins.

11. H. 7. 25. Dyer. 16. El. 337.

But if I infeoffe one of one acre of ground upon condition, and at another time I infeoffe the ſame man of another acre in the ſame countie upon condition alſo, and both the conditions are broken, an entrie into one acre in the name of both is not ſufficient, for that I have no right to the land, nor action to recover the ſame, but a bare title, and therefore ſeverall entries muſt be made into the ſame, in reſpect of the ſeverall conditions. But an entrie in one part of the land, in the name of all the land ſubject to one condition, is good, although the parcels be ſeverall, and in ſeverall townes. And ſo note a diverſitie betweene ſeverall rights of entrie, and ſeverall titles of entrie, by force of a condition (1).

Deins meſme la countie. For if the lands lye in ſeverall counties, there muſt be ſeverall actions, and conſequently ſeverall entries, as hath beene ſaid.

5. H. 7. 7. 4. E. 4. 19. 22. E. 4. 11. a. (Ant. 52. 180. b.) (10. Rep. Lampet's caſe.) (Plo. Com. 91.)

En noſme de tout, &c. If one diſſeiſe me of two ſeverall acres in one countie, and I enter into one of them generally, without ſaying, In the name of both; this ſhall reveſt only that acre wherein entrie is made, as hath beene ſaid; and that is proved by our bookes, which ſay, that if I bring an aſſiſe of two acres, if I enter into one hanging the writ, albeit it ſhall reveſt that only acre, yet the writ ſhall abate.

Dont il ad title d'entrie. Here in a large ſenſe, title of entrie is taken for a right of entrie.

Sect.

* *et* added in L. and M. and Roh. † *touts* ---- *tiels*, L. and M. and Roh. ‡ *en fait* not in L. and M. nor Roh.

(1) The entry for a condition broken has been diſcuſſed in the preceding chapter, and the commentary and notes upon it. In the notes to the chapter of Diſcontinuances, ſome obſervations will be made on entries of feoffees, or releaſees, for the purpoſe of reveſting uſes.--- With reſpect to entries for avoiding fines, there were four modes of avoiding a fine at the common law; two by matter of record, and two by acts *in pais*. Thoſe by matter of record were, a real action commenced within a year and a day after the fine was levied, and an entry of a claim on the record at the foot of the fine itſelf, in this manner, *talis venit et apponit clamum ſuum*. Thoſe by acts *in pais* were a lawful entry upon the land by the perſon who had a right; and if that could not be done, a continual claim. But by the ſtatute of 4. H. 7. all thoſe who are affected by a fine muſt purſue their title by way of action, or lawful entry: ſo that a claim entered on the record of a fine would now be ineffectual. The actual entry muſt be made by the perſon who has a right to the lands, or ſome one appointed by him, either by preceding command or ſubſequent aſſent, within five years. See Plowd. 355. 359. 2. Inſt. 518. 3. Rep. 91. 2. Inſt. 518. 2. Bla. Rep. 994. —— By the ſtatute of 4. Ann. c. 16. ſect. 16. it is enacted, "That no claim or entry to be made of or upon any lands, tenements, or hereditaments, ſhall be of any force or effect to avoid any fine levied, or to be levied, with proclamations, according to the form of the ſtatute in that caſe made and provided, in the court of common pleas; or in the courts of ſeſſions in any of the counties palatine, or in the courts of grand ſeſſions in Wales, ſhall be a ſufficient entry or claim within the ſtatute of limitations, unleſs upon ſuch entry or claim an action ſhall be commenced within one year next after the making of ſuch entry or claim, and proſecuted with effect."

Sect. 418.

*CAR ſi home voile enfeoffer un auter ſans fait de certaine terres ou tenements que il ad deins pluſours villes en un countie, et il voile liverer ſeiſin al feoffee de parcel de tenements deins un ville en noſme de touts les terres ou tenements que il ad en meſme le ville, et en les auters villes, &c. touts les dits tenements, &c. paſſont per force de le dit livery de ſeiſin a celuy a que tiel feoffement en tiel maner eſt fait, et uncore celuy a que tiel livery de ſeiſin fuit fait, n'avoit droit * en touts les terres ou tenements en touts les villes, mes per cauſe de livery de ſeiſin fait de parcel de les terres ou tenements en un ville:* à multò fortiori, *il ſemble bone reaſon que quant home ad title d'enter en les terres ou tenements en divers villes deins un meſme county, devant aſcun entry per luy fait, que per l'entry fait per luy en parcel de les terres en un ville, en le noſme de touts les terres et tenements as queux il ad title d'enter deins meſme le countie, ceo † veſt un ſeiſin de touts en luy, et per tiel entry il ad poſſeſſion et ſeiſin en fait, ſicome il avoit enter en cheſcun parcel, &c.*

FOR if a man will enfeoffe another without deed of certaine lands or tenements which he hath in many townes in one countie, and he will deliver ſeiſin to the feoffee of parcell of the tenements within one towne in the name of all the lands or tenements which he hath in the ſame towne, and in other townes, &c. all the ſaid tenements, &c. paſſe by force of the ſaid livery of ſeiſin to him to whom ſuch feoffment in ſuch manner is made, and yet hee to whom ſuch livery of ſeiſin was made, hath no right in all the lands or tenements in all the townes, but by reaſon of the livery of ſeiſin made of parcell of the lands or tenements in one towne: *à multò fortiori,* it ſeemeth good reaſon that when a man hath title to enter into the lands or tenements in divers townes in one ſame county, before entry by him made, that by the entry made by him into parcell of the lands in one towne, in the name of all the lands and tenements to which he hath title to enter within the ſame county, this ſhall veſt a ſeiſin of all in him, and by ſuch entry hee hath poſſeſſion and ſeiſin in deed, as if he had entred into every parcell.

(9. Rep. 136. b.)

(Ant. 48. 49 50. Poſt. 259. a.)

(2. Rep. 31.)

THIS is evident, but here is a diverſity betweene a feoffment and an entry; for a man may make a feoffment of lands in another county, and make livery of ſeiſin within the view, albeit he might peaceably enter and make actuall livery; and ſo may he ſhew the recognitors in an aſſiſe, the view of lands in another county; but a man cannot make an entry into lands within the view where he may enter without any feare (for it is (*) one thing to inveſt, and another to deveſt), as hereafter ſhall be ſaid in the Section next following.

38. E. 3. 11. 38. Aſſ. 23.

(*) Vid. Sect. next following.

A multò fortiori. Or *à minore ad majus*, is an argument frequent in our author, and in our bookes, the force of argument in this place ſtanding thus: if it be ſo in a feoffment paſſing a new right, much more it is for the reſtitution of an antient right, as the worthier and more reſpected in law, which holdeth affirmatively, as our author here teacheth us.

Vid. Sect. 438.

The three (&c.) in this Section need no explication.

Sect.

* *en—a*, L. and M. and Roh.

† *veſt—eſt*, L. and M. and Roh.

Sect. 419.

Vide the Sect. preceding. (2. Roll. Abr. 124. 2. Inst. 483.)

HERE is to be observed, that every doubt or feare is not sufficient, for it must concerne the safety of the person of a man, and not his houses or goods; for if hee feare the burning of his houses, or the taking away or spoiling of his goods, this is not sufficient, because hee may recover the same, or dammages to the value without any corporall hurt.

7. E. 4. 21. 39. H. 6. 5.

Again, if the feare doe concern the person, yet it must not bee a vaine feare, but such as may befall a constant man; as if the adverse partie lie in wait in the way with weapons, or by words menace to beat, mayhem, or kill him; that would enter; and so in pleading must bee shew some just cause of feare, for feare of it selfe is internall and secret. But in a speciall verdict, if the jurors doe finde that the disseisee did not enter for feare of corporall hurt, this is sufficient, and shall be intended that they had evidence to prove the same. *Talis enim debet esse metus qui cadere potest in virum constantem, et qui in se continet mortis periculum, et corporis cruciatum. Et nemo tenetur se infortuniis et periculis exponere.*

(9. Rep. 13.)
39. E. 3. 28 11. R. 2. tit. dures 2.
12. H. 4. 19. 20.

Bract. lib. 2. fol. 16. b. Britton fol. 19. 66. Fleta lib. 3. cap. 7. and lib. 2. cap. 54. 49. E. 3. 14. 14. H. 4. 13. 39. Ass. 11. 11. H. 6. 51. 38. H. 6. 27. 39. H. 6. 36. 5. 20. H. 6. 28. 4. E. 4. 17. 12. E. 4. 7. 28. H 6. 8. 41. E. 3. 9. 11. H. 4. 6. 8. Ass. 25. Vid. Sect. 434. W. 2. cap. 49. 13. H. 4. dures 20.

And it seemeth that feare of imprisonment is also sufficient, for such a feare sufficeth to avoid a bond or a deed; for the law hath a speciall regard to the safety and liberty of a man. And imprisonment is a corporall dammage, a restraint of liberty, and a kind of captivity. But see in the Second Part of the Institutes, *W. 2. cap.* 49. a notable diversity betweene a claime or an entry into land, and the avoidance of an act or deed for feare of battery.

*LE second chose est a entender, que si home ad title d'enter en ascuns terres ou tenements, s'il ne osast enter en mesmes les terres ou tenements, ne en ascun parcel de ceo per doubt de battery, ou per doubt de mayhem, ou per doubt de mort, s'il alast et approch auxy pres les tenements come il osast pur tiel doubt, et claime per parol les tenements estre les soens, maintenant per tiel claime il ad un possession et seisin en les tenements, auxy bien come * s'il ust enter en fait, coment que il n'avoit unque possession ou seisin de mesme les † terres ou tenements devant le dit claime.*

THE second thing to be understood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the same lands or tenements, nor into any parcell thereof for doubt of beating, or for doubt of maiming, or for doubt of death, if he goeth and approach as neere to the tenements as hee dare for such doubt, and by word claime the lands to bee his, presently by such claime he hath a possession and seisin in the lands, as well as if hee had entred in deed, although hee never had possession or seisin of the same lands or tenements before the said claime.

Per tiel claime il ad un possession et seisin, &c. Here is to be observed, that there be two manner of entries, *viz.* an entry in deed, and an entry in law. An entry in deed is sufficiently knowne. An entry in law is when such a claime is made as is here expressed, which entry in law is as strong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong. And therefore upon such an entry in law an assise doth lie, as well as upon an entry in deed, and such an entry in law shall avoid a warranty, &c.

Vid. Sect. 378.

11. H. 6. 51. (Post. 250. b.)

Vid. Sect. 412. Pl. Com. 93. in Ass. de-le-thlorer. The parson of Honylane's case.

But here is a diversity to be observed betweene an entry in law and an entry in deed, for that a continuall claime of the disseisee being an entry in law, shall vest the possession and seisin in him for his advantage, but not for his disadvantage. And therefore if the disseisee bring an assise, and hanging the assise he make continuall claime, this shall not abate the assise, but he shall recover dammages from the beginning; but otherwise it is of an entry in deed. See more of this matter after in this chapter, Sect. 422.

Sect.

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

† *terres ou* not in L. and M. nor Roh.

Sect. 420.

ET que la ley eſt tiel, il eſt bien prove per un plee d'un aſſiſe en le liver d'aſſiſe, an. 38. E. 3. p. * 32. *le tenor de quel enſuiſt en tiel forme. En le county de* Dorſet, *devant les juſtices, trove fuit per verdict d'aſſiſe, que le plaintife que avoit droit per diſcent de heritage d'aver les tenements mis en plaint, al temps del morant ſon anceſter fuit demurrant en le ville ou les tenements fueront,* † *et per parolx claime les tenements enter ſes vicines, mes pur doubt de mort il n'oſa approcher les tenements, mes port l'aſſiſe, et ſur ceſt matter trove, agard fuit que il recovera, &c.*

AND that the law is ſo, it is well proved by a plea of an aſſiſe in the booke of aſſiſes, *an.* 38. *E.* 3 *p.* 32. the tenor whereof followeth in this manner. In the county of Dorſet, before the juſtices, it was found by verdict of aſſiſe, that the plaintiff which had right by diſcent of inheritance to have the tenements put in plaint, at the deceaſe of his anceſtor was abiding in the towne where the tenements were, and by paroll claimed the tenements amongſt his neighbours, but for feare of death hee durſt not approach the tenements, but bringeth his aſſiſe, and upon this matter found, it was awarded that he ſhould recover, &c.

HERE it appeareth that our booke caſes are the beſt proofes what the law is, *Argumentum ab authoritate eſt fortiſſimum in lege.* And for proofe of the law in this particular caſe, *Littleton* here citeth a caſe in 38. E. 3. but it is miſprinted, for the originall, according to the truth, is in the Booke of *Aſſiſes*, 38. E. 3. p. 23. and not *placito* 32. for there be not ſo many pleas in that yeare. And after the example of *Littleton*, booke caſes are principally to be cited for deciding of caſes in queſtion, and not any private opinion, *teſte meipſo.* More ſhall be ſaid of the matter implyed in this Section in the next following. 38. Aſſ. p. 23.

Sect. 421.

LA tierce choſe eſt a entender deins quel temps ‡ *et per quel temps le claime que eſt dit continual claime ſervera et aidera celuy que fiſt le claime, et ſes heires. Et quant a ceo eſt aſcavoir, que celuy que ad title d'enter, quant il voiet faire ſon claime, ſi il oſaſt approacher la COvient a luy d'aller et approcher auxipres, &c.*

THE third thing is to know within what time and by what time the claim which is ſaid continuall claime ſhall ſerve and aid him that maketh the claime, and his heires. And as to this it is to be underſtood, that hee which hath title to enter, when he will make his claime, if hee dare approach the land, then

By this it ſhould ſeeme, that by the authority of our author, if the diſſeiſee commeth as neere to the land as he dare, &c. and maketh his claime, this ſhould be ſufficient, albeit he be not within the view.

And the great authorities of the booke * in 9. H. 4. (being by the whole court) is not againſt this; for that caſe is put where there is no ſuch feare, as here our author mentioneth, in him that makes the continuall claime, and * 9. H. 4. 5.

* p. 32. not in L. and M. nor Roh. † &c. added L. and M. and Roh. ‡ *et per quel temps* not in L. and M. nor Roh.

and then he that makes the continuall claime ought to bee within the view of the land; and therefore the authoritie of this booke, as it is commonly conceived, is not against the opinion of our author in the point aforesaid. But then it is further objected, that the said booke is against another opinion of our author in this Section, *viz.* that where there is no feare, &c. hee that maketh a continuall claime * ought to go to the land or to parcell thereof to make his claime, and therefore in that case he cannot make a claime within the view of the land.

* 11. H. 6. 51. agreeth with our author in this point.

(3. Rep. 25. Ant. 15. Ant. 245.)

*terre, donques il covient aler a la terre, ou a parcel de ceo, * et faire son claime; et s'il n'osast approcher la terre pur doubt ou pavor de batterie, ou mayhem, ou mort, donques covient a luy d'aler et approcher auxypres come il osast vers la terre, ou † parcel de ceo, ‡ a faire son claime.*

he ought to goe to the land, or to parcell of it, and make his claime; and if hee dare not approach the land for doubt or feare of beating, or maiming, or death, then ought hee to goe and approch as neere as hee dare towards the land, or parcell of it, to make his claime.

To this it is answered, that where a continuall claime shall devest any estate in any other person in any lands or tenements, there, as it hath beene said, he that maketh the claime ought to enter into the land, or some part thereof, according to the opinion of our author: but where the claime is not to devest any estate, but to bring him that maketh it into actuall possession, there a claime within the view sufficeth; as upon a discent, the heire having the freehold in law may claime land within the view to bring himselfe into actuall possession, and in that sense is the opinion of *Hull* and the court to be intended. *Et sic in similibus.* But yet the entry into some parcell in the name of the residue is the surest way. (1)

Vid. Sect. 277.

Sect. 422.

Vid. Sect. 385. 426. 9. H. 4. 5. 14. H. 4. 36. 7. E. 3. 37. Pl. Com. 356. 357. 367. Mirror, cap. 2. s. 18. Britton, fol. 45. b. & 126.

DEINS l'an et le jour. It is to bee observed, that the law in many cases hath limited a yeare and a day to be a legall and convenient time for many purposes. As at the common law, upon a fine or finall judgement given in a writ of right, the party grieved had a yeare and a day to make his claime. So the wife or heire hath a yeare and a day to bring an appeale of death. If a villeine remained in antient demesne a yeare and a day, he is privileged. If a man be wounded or poysoned, &c. and dieth thereof within the yeare and the day, it is felony. By the antient law if the feoffee of a disseisor had continued a yeare and a day, the entry of the disseisee for his negligence had beene taken away. After judgement given in a reall action, the plaintife within the yeare and the day may have a *habere facias seisinam*, and in an action of debt, &c. a *capias*, *fieri facias*, or a *levari facias*. A protection shall be allowed but for a yeare and a day, and no longer, and in many other cases.

(Post. 262. a.)

(Ant. 130. b.)

Vi. Sect. 385.

But this time of a yeare and a day in case of continuall claime is, since our author wrote, altered by the said statute of 32. *H.* 8. *ca.* 33. as before it appeareth.

ET si son adversarie que occupia le terre, morust seisie en fee, ou en fee taile, deins l'an et le jour apres tiel claim, per que les tenements discendont a son fits come heire a luy, uncore poit celuy que fist le claime entrer sur le possession le heire, ‡ &c.

AND if his adversary who occupieth the land, dieth seised in fee, or in fee taile, within the yeare and a day after such claime, whereby the lands descend to his sonne as heire to him, yet may hee which make the claime enter upon the possession of the heire, &c.

Sect.

* *a* added in L. and M. and Roh. † *a—et*, L. and M. and Roh. ‡ *&c.* not in L. and M. nor Roh.

(1) Even where a declaration in ejectment is delivered, though the defendant appears to it, and confesses lease, entry, and ouster, yet, to avoid a fine, there must be an actual entry. This was very solemnly determined in the king's bench, in the case of Berrington v. Packhurst; and by the lords on appeal in 1738. See 2. Stra. 1086. 4. Bro. Par. Cas. 353. This doctrine has been twice very expressly recognized;—first, in the case of Wigfall v. Brydon, 3. Burr. 1895; and since in the case of Goodright v. Cator, Doug. 460. In that case, lord Mansfield states the distinction to be, that where entry is necessary to *complete the landlord's title*, there the confession of lease, entry, and ouster, is sufficient; but that where it is requisite in order to *rebut the defendant's title*, actual entry must be made. The latter is the case where a fine is to be avoided.

Sect. 423.

*MES en ceſt cas apres l'an et le jour que tiel claime fuit fait, * ſi le pere donques moruſt ſeiſi ademaine procheine apres l'an et le jour, ou † un auter jour apres, &c. donques ne poit celuy que fiſt le claime entrer: et pur ceo ſi celuy que fiſt le claime voit eſtre ſure a touts temps que ſon entre ne ſerra toll per tiel diſcent, &c. il covient a luy que deins l'an et le jour apres le primer claime ‡ fait, de faire un auter claime en le forme avantdit, et deins l'an et le jour apres le ſecond claime || fait, de faire le tierce claime en meſme le maner, et deins l'an et le jour de le tierce claime de faire un auter claime, et iſſint ouſter, ceſt aſcavoir, de faire un claime deins cheſcun an et jour procheine apres cheſcun claime fait durant la vie ſon adverſarie, et donques a quecunques temps que ſon adverſarie moruſt ſeiſi, ſon entrie ne ſerra tolle per nul tiel diſcent. Et tiel claime en tiel maner § fait, eſt pluis communement priſe et noſme Continual Claime de luy que fiſt le claime.*

BUT in this caſe after the yeare and the day that ſuch claime was made, if the father then died ſeiſed the morrow next after the yeare and the day, or any other day after, &c. then cannot hee which made the claime enter: and therefore if hee which made the claime will be ſure at all times that his entrie ſhall not be taken away by ſuch diſcent, &c. it behoveth him that within the yeare and the day after the firſt claime made, to make another claime in forme aforeſaid, and within the yeare and the day after the ſecond claime made, to make the third claime in the ſame manner, and within the yeare and the day after the third claime to make another claime, and ſo over, that is to ſay, to make a claime within everie yeare and day next after everie claime made during the life of his adverſarie, and then at what time ſoever his adverſarie dieth ſeiſed, his entrie ſhall not be taken away by any diſcent. And ſuch claime in ſuch maner made, is moſt commonly taken and named Continuall Claime of him which maketh the claime, &c.

IT is to be obſerved, that the yeare and the day ſhall be ſo accounted, as the day whereon the claime was made ſhall be accounted one: as for example, if the claime were made 2. *die Martii*, that day ſhall be accounted for one; for *Littleton* ſaith in the Section next before (after the claime made) and then the yeare muſt end the firſt day of *March*, and the day after is the ſecond day of *March*. Vid. Sect. 385. (Ant. 46. b.)

See for the computation of the yeare, *de anno biſextili*, and of the day naturall and artificiall, and other parts of the yeare, [a] *Bracton*, [b] *Britton*, and [c] *Fleta* excellent matter. [a] Bract. fol. 264. 344. 359. (2. Roll Abr. 1521.) [b] Britton, fol. 209. [c] Fleta, lib. 6. cap. 11. Statute de anno Biſextili. 21. H. 3. Dier 17. Eliz. 345.

Sect. 424.

MES uncore en le cas avantdit, lou ſon adverſarie

BUT yet in the caſe aforeſaid, where his adverſarie dieth

ſarie

* *ſi nul auter clayme fuiſt fait*, added in L. and M. and Roh.
† *a* added in L. and M. and Roh.
‡ *fait* not in L. and M. nor Roh.
|| *fait* not in L. and M. nor Roh.
§ *d'eſtre* added in L. and M. and Roh.

*ſarie moruſt deins l'an et la jour procheine apres le * claime, ceo eſt en ley un continual claime, entant que l'adverſarie deins l'an et le jour procheine apres meſme la claime moruſt. Car il ne beſoigne a celuy que fiſt ſon claime de faire aſcun auter claime, mes a quel temps que il † voit deins meſme l'an et jour, &c.*

within the yeare and the day next after the claime, this is in law a continuall claime, inſomuch as his adverſarie within the yeare and the day next after the ſame claime dieth. For hee which made his claime needeth not to make any other claime, but at what time hee will within the ſame yeare and day, &c.

Vid. Sect. 414.

This is evident.

Sect. 425.

Vid. Stat. 32. H. 8. c. 33.)

ITEM, ſi l'adverſarie ſoit diſſeiſie deins l'an et le jour apres tiel claime, et le diſſeiſor ent moruſt ſeiſie deins l'an et le jour, &c. tiel morant ſeiſie ne grievera my celuy que fiſt le claime, mes que il poit enter, &c. Car quecunque ſoit que moruſt ſeiſie deins l'an et le jour procheine apres tiel claime fait, ceo ne grievera my celuy que fiſt le claime, mes que il poit enter, &c. coment que fueront pluſors morant ſeiſie, et pluſors diſcents deins meſme l'an et le jour, &c.

ALSO, if the adverſarie be diſſeiſed within the yeare and the day after ſuch claime, and the diſſeiſor thereof dieth ſeiſed within the yeare and the day, &c. ſuch dying ſeiſed ſhall not grieve him which made the claime, but that he may enter, &c. For whoſoever hee be that dieth ſeiſed within the yeare and the day after ſuch claim made, this ſhall not hurt him that made the claime, but that hee may enter, &c. albeit there were many dyings ſeiſed, and many diſcents within the ſame yeare and day, &c.

HERE it appeareth, that the continuall claime doth not only extend to the firſt diſſeiſor, in whoſe poſſeſſion it was made, but to any other diſſeiſor, that dieth ſeiſed within the yeare and day after the continuall claime made. And whereas our author ſpeaketh of a ſecond diſſeiſor, &c. herein is likewiſe implyed not only abators and intruders, but the feoffees or donees of the diſſeiſors, abators, or intruders, and any other feoffee or donee immediate or mediate, dying ſeiſed within the yeare and day, of ſuch continuall claime made.

Sect. 426.

ITEM, ſi home ſoit diſſeiſie, et le diſſeiſor moruſt ſeiſie deins l'an et le jour procheine apres le diſſeiſin fait, per que les tenements diſcendont a ſon

ALSO, if a man be diſſeiſed, and the diſſeiſor dieth ſeiſed within the yeare and day next after the diſſeiſin made, whereby the tenements deſcend to his heire, in this *heire,*

* *primer* added L. and M. and Roh.

† *voit* not in L. and M. nor Roh.

*heire, en ceſt caſe l'entrie le diſſeiſee eſt toll, car l'an et le jour que aidroit le diſſeiſee en tiel caſe *, ne ſerra pris de temps de title d'entre a luy accrue, mes tantſolement de temps del claime per luy fait en le manner avantdit. Et pur cel cauſe il ſerroit bone pur tiel diſſeiſee pur faire ſon claime † en auxy breve temps que il puiſſoit apres le diſſeiſin, &c.*

caſe the entrie of the diſſeiſee is taken away, for the yeare and day which ſhould aid the diſſeiſee in ſuch caſe, ſhall not bee taken from the time of title of entrie accrued unto him, but only from the time of the claime made by him in manner aforeſaid. And for this cauſe it ſhall be good for ſuch diſſeiſee to make his claime in as ſhort time as he can after the diſſeiſin, &c.

THIS in caſe of a diſſeiſor is now holpen by the ſtatute made ſince *Littleton* wrote, as hath beene ſaid; for if the diſſeiſor die ſeiſed within five yeares after the diſſeiſin, though there be no continuall claime made, it ſhall not take away the entrie of the diſſeiſee, but after the five yeares there muſt be ſuch continuall claime as was at the common law: but that ſtatute extendeth not to any feoffee or donee of the diſſeiſor immediate or mediate, but they remaine ſtill at the common law, as hath beene ſaid.

32. H. 8. cap. 33. Vide ſect. 385. 422. (Ant. 238. a.)

Sect. 427.

ITEM, ſi tiel diſſeiſor occupia la terre per xl. ans, ou per ‡ pluſors ans, ſans aſcun claime fait per le diſſeiſee, &c. § et le diſſeiſee per petit ſpace devaunt le mort del diſſeiſor fait un claime en le forme avantdit, ſi iſſint fortunaſt que deins l'an et le jour apres tiel claime le diſſeiſor moruſt, &c. l'entrie le diſſeiſee eſt congeable, &c. Et pur ceo il ſerroit bone pur tiel home que ne fiſt claime, que ad bone title d'entrie ||, quant il oyet que ſon adverſarie giſt languiſhment, de faire ſon claime, &c.

ALSO, if ſuch diſſeiſor occupieth the lands fortie yeares, or more yeares, without any claime made by the diſſeiſee, &c. and the diſſeiſee a little before the death of the diſſeiſor makes a claime in the forme aforeſaid, if ſo it fortuneth that within the yeare and the day after ſuch claime the diſſeiſor die, &c. the entrie of the diſſeiſee is congeable, &c. And therefore it ſhall bee good for ſuch a man which hath not made claime, and which hath good title of entrie, when hee heareth that his adverſarie lieth languiſhing, to make his claime, &c.

THIS is evident enough, and in reſpect of that which hath beene ſaid, needeth not to be explained.

Sect. 428.

ITEM, ſicome eſt dit en les caſes miſes, lou home

ALSO, as it is ſaid in the caſes put, where a man hath

HERE title is taken in his large ſenſe to include a right.

Aſcun auter title, &c.

* *&c.* added L. and M. † *&c.* added L. and M. ‡ *plus* added L. and M. § *et* not in L. and M. || *&c.* added L. and M.

&c. Here is implyed abators or intruders, and not only their diſſeiſors, but the feoffees or donees of diſſeiſors, abators, or intruders, or any other ſo long as the entrie is congeable.

Sect. 429.

*ITEM, de les dits * preſidents poies ſcaver (mon fits) deux choſes. Un eſt, lou home ad title d'entre ſur un tenant en le taile, s'il fiſt un tiel claime a la terre, donques eſt l'eſtate taile defeat, car cel claime eſt come entre fait per luy, et eſt de meſme l'effect en ley, ſicome il fuiſſoit ſur meſmes tenements, et uſt entrer en meſmes les tenements, come devant eſt dit.* † *Et donques quant le tenant en le taile immediate puis tiel claime continua ſon occupation en les tenements, ceo eſt un diſſeiſin fait de meſmes les tenements a celuy que fiſt tiel claime,* et ſic per conſequens, *le tenant adonques ad fee ſimple.*

ALSO, of the ſaid foreſaying thou mayſt know (my ſonne) two things. One is, where a man hath title to enter upon a tenant in taile, if he maketh ſuch a claime to the land, then is the eſtate taile defeated, for this claime is as an entrie made by him, and is of the ſame effect in law, as if he had bin upon the ſame tenements, and had entred into the ſame, as before is ſaid. And then when the tenant in taile immediately after ſuch claime continue his occupation in the lands, this is a diſſeiſin made of the ſame tenements to him which made ſuch claime, and ſo by conſequent, the tenant then hath a fee ſimple.

Preſidents. This ſhould be *precedents*, and ſo is the originall, and this agreeth with the right ſenſe of *Littleton*.

(Ant. 233.)

And here it appeareth, that a continuall claime, which is an entrie in law, is as ſtrong as an entrie in deed.

Vide Sect. 650. and 659, &c.

Title de entrie. Here *title de entrie* is taken in the large ſenſe for right of entrie.

Sect. 430.

LE ſecond choſe eſt, que auxy ſovent que il que ad droit d'entre fait tiel claime, ‡ *et ceo nient contriſteant ſon adverſary continua ſon occupation,* § *auxy ſovent l'adverſary fait tort et diſſeiſin a celuy que fiſt le claime. Et*

THE ſecond thing is, that as often as hee which hath right of entrie maketh ſuch claime, and this notwithſtanding his adverſary continue his occupation, ſo often the adverſary doth wrong and diſſeiſin to him which made the claime.

pur

* *dites precedents* L. and M.

† *Et* not in L. and M. nor Roh.

§ *&c.* added L. and M. and Roh.

‡ *et ceo—&c.* L. and M. and Roh.

*pur cel cauſe auxy ſovent poit celuy que fiſt * meſme le claime pur cheſcun tiel tort et diſſeiſin fait a luy, aver un briefe de treſpaſſe,* † Quare clauſum fregit, &c. *et recovera ſes damages, &c.*

And for this cauſe ſo often may hee which makes the ſame claime for every ſuch wrong and diſſeiſin done unto him, have a writ of treſpaſſe, *Quare clauſum fregit, &c.* and recover his dammages, &c.

HEREBY alſo it appeareth, that an entry in law is equivalent to an entry in deed. *Avera breve de treſpaſſe,* quare clauſum fregit, *et recovera ſes damages.* The diſſeiſee ſhall have an action of treſpaſſe againſt the diſſeiſor, and recover his dammages for the firſt entry without any regreſſe, but after regreſſe he may have an action of treſpaſſe with a *continuando*, and recover as well for all the meane occupation as for the firſt entry. And here note, that *Littleton* doth here include coſts within dammages.

(2. Roll. Abr. 550. 1. Rep. 98. 1. Leo. 302. 20. H. 6. 15. 38. H. 6. 27.)

Sect. 431.

OU il poit aver un briefe ſur le ſtatute le roy Richard *le ſecond, fait l'an de ſon raigne* 5. *ſuppoſant per ſon briefe que ſon adverſary avoit entrer en les terres* ‡ *ou tenements celuy que fiſt le claime, ou ſon entry ne fuit pas done per la lev, &c. et per tiel action il recovera ſes dammages, &c. Et ſi le caſe fuit tiel, que l'adverſary occupiaſt les tenements ove force et armes, ou ove multitude de gents a temps de tiel claime, &c.* || *immediate apres meſme le claime poit celuy que fiſt le claime pur cheſcun tiel fait aver un briefe de forcible entry, et recovera ſes treble dammages, &c.*

OR he may have a writ upon the ſtatute of *R.* 2. made in the fifth yeare of his reigne, ſuppoſing by his writ that his adverſarie had entred into the lands or tenements of him that made the claime, where his entry was not given by the law, &c. and by this action he ſhall recover his dammages, &c. And if the caſe were ſuch, that the adverſarie occupied the tenements with force and armes, or with a multitude of people at the time of ſuch claime, &c. immediately after the ſame claime may hee which made the claim for every ſuch act have a writ of forcible entry, and ſhall recover his treble dammages, &c. (1)

THIS is the ſtatute of 5. *R.* 2. *cap.* 7.

(Doc. Pla. 381.)

Per tiel action il recovera ſes dammages. This is to be underſtood, that he ſhall recover dammages for the firſt torcious entry, but not for the meane profits in this action, though he made a regreſſe. And here note, that alſo he ſhall recover his coſts of ſuit, *expenſæ litis*, which *Littleton* doth include within theſe words (dammages, &c.)

37. H. 6. 35. 34. H. 6. 30. 13. H. 7. 15. 10. H. 6. 14. 2. E. 4. 18. 21. E. 4. 5. 74. 13. E. 2. 3. 27. Aſſ. 64. 38. Aſſ. 9. 44. E. 3. 20. 10. H. 7. 27. Keylwey 1. b. 5. R. 2. cap. 7. (F. N. B. 248. 249.)

Dammages. *Damna* in the common law hath a ſpeciall ſignification for the recompence that is given by the jury to the plaintife or defendant, for the wrong the defendant hath done unto him. (2)

(2. Inſt. 28). Poſt. 355. b. 10. Rep. 115. 116. 11 Rep. 56.)

Multitude. One or more may commit a force, three or more may commit an unlawfull aſſembly, a riot or a rout. A multitude here ſpoken of (as ſome have ſaid) muſt be ten or more. *Multitudinem decem faciunt.* And ſo (ſay they) it is ſaid *de grege hominum.* But I could never read it reſtrained by the common law to any certaine number, but left to the diſcretion of the judges. (3)

(3. Inſt. 176 Hale's Pl. C. 137. (See ſtat. 1. Geo. 1. c. 4.)

Un briefe de forcible entrie, et recovera ſes treble dammages. This writ is

* *meſme* not in L. and M nor Roh. † Quare clauſum fregit, *&c. et recovera ſes damages, &c. ou il poit aver un briefe*, (the beginning of the next Section) not in L. and M. nor Roh. nor in MSS. before mentioned. It may be here obſerved, that the older copies of Littleton are not divided into Sections, which ſeem to have been firſt injudiciouſly marked by Weſt in the edition 1583, though his diviſions have been ſince retained for the convenience of citation. ‡ *ou—et*, L. and M. and Roh. || *immediate apres meſme le claime—donques*, L. and M. and Roh.

(1) Perhaps this paſſage is now quite accurate. Till the reign of Richard II. the party diſſeiſed, if his attempt were made ſoon after the diſſeiſin, might recover his poſſeſſion by *force*; but by a ſtatute paſſed in the fifth year of that reign, it was enacted, that none from thenceforth ſhould make any entry into lands and tenements, but in caſes where entry was given by the law; and in that caſe, not with a ſtrong hand, nor with a multitude of people, but only in a peaceable and eaſy manner; and that perſons convicted of doing the contrary ſhould be puniſhed by impriſonment, to be ranſomed at the king's pleaſure. By a ſtatute paſſed in the fifteenth year of the ſame reign, it was enacted, that upon complaint of any ſuch forcible entries to the juſtices of peace, they ſhould take ſufficient power of the county, and go to the place where ſuch force was made; and if they found any that held ſuch place forcibly, after ſuch entry made, they ſhould be taken and put into the next gaol, there to abide convict by the record of the ſame juſtices, until they had made fine and ranſom to the king. By this it appears, that Littleton is equally wrong in his account of the puniſhment inflicted by that ſtatute, and the offence it intended to correct. Theſe ſtatutes of the reign of Richard II. have been confirmed, explained, and in ſome reſpects extended by the ſtat. 4. H. 4. ch. 8. 8. H. 6. ch. 9. 23. H. 8. ch. 14. 31. Eliz. ch. 11. and 21. Jac. 1. ch. 15. See Burn. Juſt. vol. II. 151. It ſhould be obſerved, that in caſe an action is brought on theſe ſtatutes, if the defendant make himſelf a tale, which is found for him, he ſhall be diſmiſſed without any enquiry concerning the force; for however he may be puniſhable at the king's ſuit, for doing what is prohibited by ſtatute, as a contemner of the laws and diſturber of the peace, yet he ſhall not be liable to pay any damages for it to the plaintiff, whoſe injuſtice gave him the provocation in that manner to right himſelf. See 1. Haw. 141. 3. Burr. 1698. 17, 18.

(2) Some obſervations on the practice of our law, with reſpect to damages, coſts, and meſne profits, will be offered in a ſubſequent part of this work.

(3) By the common law there muſt be *three* perſons at leaſt to conſtitute a riot. By the 1. Geo. 1. c. 5. *two* perſons at leaſt muſt be unlawfully aſſembled, to be within that act. By the 13. Car. 2. ſt. 1. c. 1. not more than *twenty* perſons are to be ſworn to a petition to the king, or either houſe of parliament, for any alteration of matters eſtabliſhed by law in church or ſtate; and no petition is to be delivered by a company of more than *ten* perſons. By the bill of rights, or declaration delivered by the lords and commons to the prince and princeſs of Orange, Feb. 13, 1688, and afterwards enacted in parliament, when they became king and queen, the fifth article is, "That it is the right of the ſubjects to petition the king, and that all commitments and proſecutions for ſuch petitioning are "illegal." Sir William Blackſtone expreſsly ſays, that the right of the ſubject to petition, as declared by this ſtatute, is under the regulations of the 13. Car. 2. But a queſtion may be made, whether the declaration contained in the bill of rights was not, in this particular, a repeal of the 13. Car. 2.

8. H. 6. cap. 9. 3. E. 4. 19. 24. F. N. B. 248. 11. E. 4. 11. b. 6. H. 7. 12. b. 22. H. 6. 37. 19. H. 6. Regiſter 97. 22. H. 6. 57. F. N. B. 249. a. (2. Cro. 17. 19. 31. 148. 151. 199. 214. 633. 639. 1 Roll. Rep. 406. Sid. 97. 149. Noy 136. 1. Cro. 561. 2. Inſt. 289. 4. Inſt. 176. c. 15. 1. Leo. 317.) (15. R. 2 c. 2. 8. H. 6. c. 9. 23. H. 8. c. 15. 31. El. c. 11. 21. Jac. c. 15.)

is grounded upon the ſtatute of 8. *H.* 6. and lieth either where one entreth with force, or where he entreth peaceably and detaineth it with force, or where he entreth by force, and detaineth it by force. And in this action without any regreſſe the plaintife ſhall recover treble dammages, as well for the meane occupation as for the firſt entry by force of the ſtatute. And albeit he ſhall recover treble dammages, yet ſhall he recover coſts which ſhall be trebled alſo.

One may commit a forcible entry, as hath beene ſaid, in reſpect of the armour or weapons which he hath that are not uſually borne, or if he doe uſe violence, and threats to the terrour of another. And if three or foure goe to make a forcible entry, albeit one alone uſe the violence, all are guilty of force. If the maſter commeth with a greater number of ſervants than uſually attend on him, it is a forcible entrie.

It is to be underſtood, that there is a force implied in law, as every treſpaſſe and reſcous and diſſeiſin implieth a force, and is *vi et armis*; and there is an actuall force, as with weapons, number of perſons, &c. and when an entry is made with ſuch actuall force, an action doth lie upon the ſaid ſtatute. See before more of force and armes, *Sect.* 240.

Sect. 432.

*ITEM, * il eſt a veier, ſi le ſervant d'un home que ad title d'enter, poit per le commandement ſon maſter faire continual claime pur ſon maſter ou non.*

ALSO, it is to bee ſeene, if the ſervant of a man who hath title to enter, may by the commandement of his maſter make continuall claime for his maſter or not.

This needeth no explication.

Sect. 433.

10. H. 7. 12. 33. H. 6. 20.

ET il ſemble que en aſcuns caſes il poit ceo faire; car s'il per ſon commandement vient a aſcun parcel de la terre, et la fait claime, &c. en le noſme ſon maſter, ceſt claime eſt aſſets bone pur ſon maſter, pur ceo que il fait tout ceo que ſon maſter covient faire † ou devoit faire en tiel cas, &c. ‡ Auxy ſi le maſter dit a ſon ſervant, que il ne oſaſt vener a la terre, ne aſcun parcel de la terre, pur faire ſon claime, &c. et que il ne oſaſt approcher pluis prochein a la terre forſque a tiel lieu appell Dale, et commanda ſon ſervant d'aler a meſme le lieu de Dale, et la faire un claime pur luy, &c. ſi le ſervant iſſint fait, &c. ceo ſemble auxy bone claime pur ſon maſter, ſicome

AND it ſeemeth that in ſome caſes he may doe this: for if he by his commandement commeth to any parcell of the land, and there maketh claime, &c. in the name of his maſter, this claime is good enough for his maſter, for that he doth all that which his maſter ſhould or ought to doe in ſuch caſe, &c. Alſo if the maſter ſaith to his ſervant, that hee dares not come to the land, nor to any parcell of it, to make his claime, &c. and that he dare approch no neerer to the land then to ſuch a place called Dale, and command his ſervant to goe to the ſame place of Dale, and there make a claime for him, &c. if the ſervant doth this, &c. this alſo ſeemeth a good claime for his maſter, as if his maſter were there

* *il—icy*, L. and M. and Roh. † *ou devoit faire* not in L. and M. nor Roh. ‡ *Auxy* not in L. and M. nor Roh.

ſon maſter la fuit en proper perſon, pur ceo que le ſervant fiſt tout ceo que ſon maſter oſaſt et devoit faire per la ley en tiel caſe, &c.*

there in his proper perſon, for that the ſervant did all that which his maſter durſt and ought to doe by the law in ſuch a caſe, &c.

HERE it appeareth that where the ſervant doth all that which he is commanded, and which his maſter ought to doe, there it is as ſufficient as if his maſter did it himſelfe; for the rule is, *Qui per alium facit, per ſeipſum facere videtur.*

7. E. 3. 69. a. b.
45. E. 3. Releaſe. 28.
45. E. 3. tit. Brieſe 589.
20. E. 3. 62. per Thorp.
11. Aſſ. p. 11. 39. Aſſ. p. 18.
10. H. 7. 12. a.
31. H. 8. tit. entr. Cong. et tit. Fauxifier recovery 29.
(*) Lib. 9. fo. 106. a. the Lord Awdleye's caſe.

Per commandement. If an infant or any man of full age have any right of entrie into any lands, any ſtranger in the name and to the uſe of the infant or man of full age may enter into the lands, and this regularly ſhall veſt the lands in them without any commandement, precedent, or agreement ſubſequent. (*) But if a diſſeiſor levy a fine, with proclamation according to the ſtatute, an eſtranger without a commandement precedent, or an agreement ſubſequent within the five yeares cannot enter in the name of the diſſeiſee to avoid the fine. And that reſolution was grounded upon the conſtruction of the ſtatute of 4. *H.* 7. *cap.* 24. But an aſſent ſubſequent within the five yeares ſhould be ſufficient. *Omnis enim ratihabitio retrotrahitur, et mandato æquiparatur*, as hath beene ſaid.

Auxi ſi le maſter dit a ſon ſervant que il ne oſaſt, &c. Here it appeareth, that where the ſervant purſueth the commandement of his maſter, and doth all that which his maſter durſt and ought to doe by the law, this is ſufficient. And although the maſter feareth more than the ſervant, or admit that the ſervant hath no feare at all, yet if he goeth as farre as his maſter durſt, and as he commanded, it is ſufficient. And this is implyed in this Section.

Sect. 434.

AUXY, ſi home ſoit cy languiſhant, ou cy decrepyte, que il ne poit per nul maner vener a le terre, ne a aſcun † parcel d'ycel, ou ſi un recluſe ſoit, que ne poit per cauſe de ſon order aler hors de ſa meaſon, ‡ ſi tiel maner || de perſon commaunda ſon ſervant d'aler et faire claime pur luy, et tiel ſervant ne oſaſt aler a le terre, § ne a aſcun parcel de ceo, pur doubt de batery, maybem, ou mort, ¶ &c. et pur cel cauſe tiel ſervant vient auxy pres a la terre come il oſaſt pur tiel

ALSO, if a man be ſo languiſhing, or ſo decrepite, that he cannot by any meanes come to the land, nor to any parcell of it, or if there bee a recluſe, which may not by reaſon of his order goe out of his houſe, if ſuch manner of perſon command his ſervant to goe and make claime for him, and ſuch ſervant dare not goe to the land, nor to any parcell of it, for doubt of beating, mayhem, or death, &c. and for this cauſe the ſervant commeth as nere to the land as he dareth for ſuch doubt

REGULARLY it is true, that where a man doth leſſe than the commandement or authority committed unto him, there (the commandement or authority being not purſued) the act is void. And where a man doth that which he is authoriſed to doe and more, there it is good for that which is warranted, and void for the reſt; yet both theſe rules have divers exceptions and limitations. (1)

(Ant. 52. a.)
(Hob. 154.)
(1. Leo. 289.)

For the firſt, *Littleton* here putteth a caſe where the ſervant doth leſſe than he is commanded, and yet it ſufficeth, for that *Impotentia excuſat legem*; for ſeeing the maſter cannot, and the ſervant dare not, enter into the land, it ſufficeth that he come as neere to the land as he dare.

If a man makes a letter of attorney to deliver ſeiſin to *I. S.* upon condition, and the attorney delivereth it abſolute, this is void: and ſo ſome hold if the warrant bee abſolute, and hee delivereth ſeiſin

11. H. 4. 3.
12. Aſſ. 24. 26. Aſſ. 39.
(Perk. 38. b. Mo. 280.)

* *ſon* added in L. and M. and Roh. † *parcel* not in L. and M. nor Roh. ‡ *&c.* added in L. and M. and Roh.
|| *de* not in L. and M. § *ne — ou*, L. and M. and Roh. ¶ *&c.* not in L. and M. nor Roh.

(1) Where there is a complete execution of a power, and ſomething, *ex abundanti*, added, which is improper, there the execution ſhall be good, and only the exceſs void; but where there is not a complete execution of a power, or where the boundaries between the exceſs and execution are not diſtinguiſhable, it will be bad. See Alexander v. Alexander, 2. Ves. 644.

See before Sect. 419.

(2. Inst. 483.)
(Ant. 243. b.)

seisin upon condition, the liverie is void.

Pur battery, mayhem, ou mort. See the Second Part of the Institutes, *W.* 2. *cap.* 49. a diversity betweene the making of an entry or claime, and the avoidance of an act or deed.

Auterment le master serroit en tresgrand mischiefe. *Argumentum ab inconvenienti est validum in lege, quia lex non permittit aliquod inconveniens.* And as hath beene often observed before, *Nihil quod est inconveniens est licitum.*

46. E. 3. Petition 18.
33. H. 6. 8.
43. E. 3. 8. b. 30. a.

Recluse, Reclusus, Heremita, seu Anchorita, so called by the order of his religion; he is so mured or shut up, *quòd solus semper sit, et in clausurâ suâ sedet*; and can never come out of his place. *Seorsim enim et extra conversationem civilem hoc professionis genus semper habitat.* Note here, albeit the recluse or anchorite be shut up himselfe, so as he by his order is not to come out in person, yet to avoid a discent, he must command one to make claime, and such a recluse shall always appeare by attorney in such cases where others must appeare in proper person, *Impotentia enim excusat legem.*

MES si le master de tiel servant soit de bone sane, et poit et osast bien aler a les tenements, ou a parcel de ceo, de faire son claime, &c. si tiel master commanda son servant d'aler a ascun parcel de la terre a faire claime pur luy, ‖ *et quant le servant est en alant de faire le commandement de son master, il oye per le voy tielx choses que il ne osast vener a ascun parcel de la terre pur faire le claime pur son master, et pur cel cause il vient auxy pres la terre come il osast pur doubt de mort, et la fait claime pur son master, et en le nosme de son master, &c. il semble que le doubt en le ley en tiel case serroit, si tiel claime availera son master ou nemy,* * *doubt, et fait* † *le claime, &c. pur son master, il semble que tiel claime pur son master est assets fort, et bon en ley. Car auterment son master serroit en tresgrand mischiefe; car il bien poit estre que tiel person que est languishant, decrepite, ou recluse, ne poit trover ascun servant que osast aler a la terre, ne* ‡ *ascun parcel de cel, pur faire le claime pur luy, &c.* and maketh the claime, &c. for his master, it seemeth that such claime for his master is strong enough, and good in law. For otherwise his master should bee in a very great mischiefe; for it may well be that such person which is sicke, decrepit, or recluse, cannot finde any servant which dare go to the land, or to any parcell of it, to make the claime for him, &c.

Sect. 435.

BUT if the master of such servant bee in good health, and can and dare well goe to the lands, or to parcell of it, to make his claime, &c. if such master command his servant to goe to any parcell of the land to make claime for him, and when the servant is in going to doe the commandement of his master, he heareth by the way such things as he dare not come to any parcell of the land to make the claime for his master, and therefore he commeth as neere to the land as he dare for doubt of death, and there maketh claime for his master, and in the name of his master, &c. it seemeth that the doubt in law in such case shall be, whether such claime shall availe his master *pur*

* *doubt* --- *pavour*, in L. and M. and Roh.
‖ *&c.* added in L. and M. and Roh.
† *le*---*tiel*, in L. and M. and Roh.
‡ *a* added in L. and M. and Roh.

pur ceo que le ſervant ne fiſt tout ceo que ſon maſter al temps de ſon commandement oſaſt faire, &c. Quære.

or not, for that the ſervant did not all that which his maſter at the time of his commandement durſt have done, &c. *Quære.*

THIS continuall claime is void, for that the ſervant doth leſſe than that which is expreſſely commanded, and there is no impotencie or feare in the maſter. (9. Rep. 79.)

Sect. 436.

ITEM, aſcuns ont dit, que lou home eſt en priſon et eſt diſſeiſie, et le diſſeiſor moruſt ſeiſie durant le temps que le diſſeiſee eſt en priſon, per que les tenements diſcendont al heire del diſſeiſor, ils ont dit, que ceo ne noiera my le diſſeiſee que eſt en priſon, mes que il bien poit enter, nient obſtant tiel diſcent, pur ceo que il ne puiſſoit faire continual claime quant il fuit en priſon.

ALSO, ſome have ſaid, that where a man is in priſon and is diſſeiſed, and the diſſeiſor dieth ſeiſed during the time that the diſſeiſee is in priſon, whereby the tenements deſcend to the heire of the diſſeiſor, they have ſaid, that this ſhall not hurt the diſſeiſee which is in priſon, but that he well may enter, notwithſtanding ſuch a diſcent, becauſe hee could not make continuall claim when he was in priſon.

QUANT home eſt en priſon et eſt diſſeiſie. For if hee bee diſſeiſed when he is at large, and the diſcent is caſt during the time of his impriſonment, this diſcent ſhall binde him. *Excuſatur autem quis quòd clameum ſuum non appoſuerit, ſi tempore litigii in priſonâ detentus fuerit, ita quòd venire non poſſit, nec mittere, quia nulli vertitur in dubium, et ubi eadem ratio et idem jus erit, ideò videtur quòd excuſari debet quis ſi per vim majorem, vel per fraudem, extra priſonam detentus fuerit, ita quòd venire non poſſit nec mittere, dum tamen hoc per certa judicia probari poterit.*

(1. Roll. Abr. 687.)

9. H. 7. 24. Pl. Com. 360.

Bracton, lib. 5. fol. 436. Britton, fol. 116. b. Fleta, lib. 6. cap. 52. 53. & lib. 6. cap. 7. & 14.

Pur ceo que il ne poit faire continual claime quant il fuit en priſon. Here it is to bee obſerved by the authoritie of *Littleton*, that he is not enforced in this caſe by law to doe it by his ſervant or any other by his warrant or commandement, for things done by deputie are ſeldome well done, but everie man will ſee his owne buſineſſe moſt effectually ſpeeded and performed: and that it may be once ſpoken for all, the reaſon that a man impriſoned ſhall not be bound in this and the like caſes is, for that by the intendment of law he is kept (as it is preſumed in law) without intelligence of things abroad, and alſo that he hath not libertie to goe at large to make entrie or claime, or ſeeke counſell. And ſo note a diverſitie betweene a recluſe who might have intelligence, and a man in priſon.

Pl. Com. 360. in Stowel's caſe.

* Sect. 437.

MES l'opinion de touts les juſtices, p. 11. H. 7. *fuit, que ſi le diſſeiſin ſoit avant l'enpriſonment, coment que le morant ſeiſie ſoit il eſteant en le priſon, ſon entrie eſt tolle.*

BUT the opinion of all the juſtices, p. 11. H. 7. was, that if the diſſeiſin bee before the impriſonment, although the dying ſeiſed be he being in the priſon, his entrie is taken away.

THIS is of a new addition, and miſtaken, for there is no ſuch opinion, p. 11. H. 7. but it is, 9. H. 7. fol. 24. b.

Il

* This Section is not in L. and M. nor Roh. nor in the edit. 1577. which is eſteemed more correct than the common copies.

(Poſt. 260. a. Ant. 128. b.)
(F. N. B. 236. 11. Rep. 8.)
(2. Roll. Abr. 803. 804. 2. Inſt. 665. 1. Leo. 22. 186.)
Mirror cap. 3. Britton, fol. 21. Fleta, lib. 1. cap. 28. & lib. 2. cap. 59. Bracton, lib. 2.
2. E. 4. 1. 4. E. 4. 10. 21. E. 4. 73. 11. H. 7. 5. 21. H. 6. 50. 9. H. 4. 3. 21. H. 6. Utlary 36. 7. H. 6. 27. 21. E. 4. 88. 22. E. 4. 37. 18. E. 3. Villenage 47. 21. E. 4. 37. 33. H. 6. 45. 46. 44. E. 3. Villeine 41. 4. H. 4. 19. 11. H. 4. 34. 3. Eliz. Dyer 192. 2. Eliz. 176. 5. Eliz. ibid. 223. 19. H. 6. 2. 8. H. 6. 37. 37. H. 6. 19.
(Doct. Pla. 230. 398.)
(Ant. 248. b.)
8. H. 4. 7. 21. H. 7. 13. 10. H. 6. 58. 20. H. 6. 20. 21. H. 6. 55. 22. H. 6. 18. 39. H. 6. 1. 33. H. 6. 51. 45. 38. H. 6. 33. 21. E. 4. 94. 21. H. 7. 33. 5. H. 7. 1. 12. H. 6. 8. 11. H. 6. 67. 19. 1. E. 4. 2. 27. H. 8. 2. 38. Aſſ. pl. 17. Vide Sect. 439. 5. E. 3. 50. b. 7. H. 6. 38.

Fleta, lib. 6. cap. 67. & 24. Vide W. 2. cap. 48. and the expoſition thereof, 2. part Inſtit. 4. E. 2. Diſcent 51.

Bracton, lib. 5. tract. 3. Fleta, lib. 6. cap. 7. 14. 3. H. 6. 46. 38. E. 3. 5. 31. H. 6. Barre. 66. 12. H. 4. 13. 50. E. 3. 9. 3. H. 6. 48. 2. H. 4. 8. 5. H. 7. 3. F. N. B. 17. Bract. lib. 4. fol. 367. 369. Glan. lib. 1. cap. 8. 28. H. 6. 11. 4. H. 5. Challenge 153. Br. Saver. Def. 45.

(Cro. Eliz. 506.)

IL reverſera tiel utlagarie. *Nota*, the originall is, *reverſera tiel utlagarie per briefe de error* (1), and ſo it would bee amended: for outlawries may bee reverſed two manner of wayes, *viz.* by plea, or by writ of error. By plea, when the defendant commeth in upon the *capias utlagatum*, *&c.* hee may by plea reverſe the ſame for matters apparent, as in reſpect of a *ſuperſedeas*, omiſſion of proceſſe, variance, or other matter apparent in the record; and yet in theſe caſes ſome hold, that in another terme the defendant is driven to his writ of error.

ET auxy, ſi tiel que eſt en priſon ſoit utlage in action de debt ou treſpaſſe, ou en appeale de robberie, &c. il reverſera tiel utlagarie * *envers luy pronounce, &c.*

AND alſo, if hee which is in priſon be outlawed in an action of debt or treſpaſſe, or in an appeale of robberie, &c. hee ſhall reverſe this outlawry pronounced againſt him, &c.

But for any matters in fact, as death, impriſonment, ſervice of the king, &c. he is driven to his writ of error, unleſſe it be in caſe of felonie, and there *in favorem vitæ* he may plead it.

But albeit impriſonment be a good cauſe to reverſe an outlawrie, yet it muſt be by proceſſe of law *in invitum*, and not by conſent or covin, for ſuch impriſonment ſhall not avoid the outlawrie, becauſe upon the matter it is his owne act.

Sect. 438.

THIS is evident enough.

Per brieſe d'error. For hee ſhall have no writ of diſceit, becauſe the ſummons was according to the law of the land, by ſummoners and veiors, and the land taken into the king's hand by the pernor.

AUXY, ſi un recoverie ſoit † per default vers tiel que eſt en priſon, il avoidera le judgement per brieſe de error, pur ceo que il fuit en priſon al temps de le default fait, &c. Et pur ceo que tiels matters de record ne noyeront celuy que eſt en priſon, mes que ils ſerront reverſes, &c. à multò fortiori, *il ſemble que un matter en fait*, ſcilicet, *tiel diſcent ewe quant il fuit en priſon ne luy noyera, &c. ſpecialment pur ceo que il ne puiſſoit aler hors de priſon pur faire continuall claime, &c.*

ALSO, if a recovery bee by default againſt ſuch a one as is in priſon, he ſhal avoid the judgement by a writ of error, becauſe he was in priſon at the time of the default made, &c. And for that ſuch matters of record ſhal not hurt him which is in priſon, but that they ſhall bee reverſed, &c. *à multò fortiori*, it ſeemeth that a matter in fact, *ſcilicet*, ſuch diſcent had when hee was in priſon ſhall not hurt him, &c. eſpecially ſeeing he could not goe out of priſon to make continuall claime, &c.

Per default. *Default* is a French word, and *defalta* is legally taken for non-appearance in court. There bee divers cauſes allowed by law for ſaving a man's default; as, firſt, by impriſonment, whereof *Littleton* here ſpeaketh. 2. *Per inundationem aquarum.* 3. *Per tempeſtatem.* 4. *Per pontem fractum.* 5. *Per navigium ſubſtractum per fraudem petentis, non enim debet quis ſe periculis et infortuniis gratis exponere, vel ſubjacere.* 6. *Per minorem ætatem.* 7. *Per defenſionem ſummonitionis per legem.* 8. *Per mortem attornati ſi tenens in tempore non novit.* 9. *Si petens eſſoniatus ſit.* 10. *Si placitum mittatur ſine die.* 11. *Per breve de warrantiâ diei.* But ſickneſſe (as one holds) is no cauſe of ſaving a default, becauſe it may be ſo artificially counterfeited, that it cannot be knowne.

Record,

* *per brief d'errour, &c. pur ceo qu'il fuiſt en priſon al temps d'utlagarie*, added L. and M. and Roh. and in MSS.
† *ewe* added L. and M. and Roh.

(1) A writ of error properly lies, where falſe judgment is given in any court which is a court of record. It was formerly held, that, by the common law, no amendment could be permitted, unleſs within the very term in which the judicial act ſo recorded was done. But the courts now allow of amendments at any time while the ſuit is depending.—After the termination of the ſuit the judgment can only be reverſed by writ of error. From the inferior courts it lies to the king's bench and common pleas;—from the common pleas to the king's bench;—from the king's bench to the houſe of lords. To amend errors in a baſe court, not of record, a writ of falſe judgment lies.—A writ of error only lies upon *matter of law*. There is no method of reverſing an error on the determination of facts but by an attaint or a new trial. See Bla. Com. 3. vol. c. 25. ſ. 3. F. N. B. 20. 4. Inſt. 21.

Record, (1) *Recordum,* is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a court of juſtice which hath power to hold plea according to the courſe of the common law, of reall or mixt actions, or of actions *quare vi et armis,* or of perſonall actions, whereof the debt or dammage amounts to fortie ſhillings or above, which wee call Courts of Record, and are created by parliament, letters patents, or preſcription.

Glanvil. lib. 8. cap. 8. Bracton lib. 3. fol. 156. Britton in proemio & cap. 27.

It is aptly derived of *recordari,* which is to keepe in memorie or record, as it is ſaid, *quòd dicere nihil aliud eſt quàm recordari* ; and in the ſame ſenſe the poet uſeth it, *ſi ritè audita recordor.* But legally records are reſtrained to the rolles of ſuch only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *ſecundum legem et conſuetudinem Angliæ.* And the rolles being the records or memorialls of the judges of the courts of record, import in them ſuch incontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie. And if ſuch a record be alleaged, and it be pleaded that there is no ſuch record, it ſhall be tried only by it ſelfe : and the reaſon hereof is apparent, for otherwiſe (as our old authors ſay, and that truly) there ſhould never be any end of controverſies, which ſhould be inconvenient. Of courts of record you may read in my Reports ; but yet during the terme wherein any judiciall act is done, the record remaineth in the breſt of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges ſhall direct ; but when that terme is paſt, then the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie.

Cicero. Virgil. Pl. Com. 79. b. Mich. 7. & 8. Eliz. Dier 242. 17. E. 3. 49. 37. H. 6. 21. b. 11. H. 4. 26. b. 21. H. 6. 34. Error. Br. 73. 7. H. 7. 4. 19 Aſſ. 7. lib. 4. fol. 52. in Rawlin's caſe. Glanvil. lib. 8. cap. 8. Bracton lib. 3. fol. 156. Britton cap. 27. lib. 6. fol 11. Ientleman's caſe. and 30. 45. lib. 7. fol. 30. lib 8. fol. 60. b. and 67. a. 7. H. 6. 28. 19. H. 6. 9.

If a grant by letters patents under the great ſeale be pleaded and ſhewed forth, the adverſe partie cannot plead *nul tiel record,* for that it appeares to the court that there is ſuch a record ; but inaſmuch as it is in nature of a conveyance, the partie may denie the operation thereof, therefore he may plead *non conceſſit,* and prove in evidence that the king had nothing in the thing granted, or the like, and ſo it was adjudged. But to returne to *Littleton :* What then ? ſhall a man that is in priſon be privileged from ſuits or outlawries ? Nothing leſſe ; for if the tenant or defendant be in priſon, he ſhall upon motion, by order of the court, be brought to the barre, and either anſwer according to law, or elſe the ſame being recorded, the law ſhall proceed againſt him, and he ſhall take no advantage of his impriſonment.

(Doc. Pla. 307. 308. 1. Leo. 65.) 18. Eliz. Dier 343. 3. Mar. Dy. 129. Pl. Com. 232. Seignior Berkeley's caſe. 16. H. 7. 11. b. 22. H. 8. Record. Br. 65. 39. H. 6. 4. 3. Eliz. Dier 187. lib. 6. fol. 15. Eden's caſe. Mich. 31. & 32. El. Rot. 365. In Banke le Roy, inter Eden, & Franklyn, & Browne. (4. Rep. Hind's caſe.) 7. H. 6. 38. 8. H. 6. 16. Vide Sect. 418.

A multò fortiori. Here is an argument, *à minori ad majus,* and the force of our author's argument is this : If a man in priſon ſhall not be bound by a recoverie by default for want of anſwer in court of record in a reall action, which is matter of record (the height and ſtrength whereof hath beene ſomewhat touched) *à multò fortiori,* a diſcent in the countrey, which is matter of deed, ſhall not for want of claime binde him that is in priſon. And as the argument *à minori ad majus* doth ever hold (as our author hath alreadie told us) affirmatively, ſo the argument *à majori ad minus* doth ever hold negatively, as our author here teacheth us : and the reaſon hereof is this, *quod in minori valet, valebit in majori ; et quod in majori non valet, nec valebit in minori.*

Sect. 418.

Pur ceo que il ne poit aler hors de priſon, &c. By this it appeareth, that a man in priſon by proceſſe of law ought to be kept *in ſalvâ et arctâ cuſtodiâ,* and by the law ought not to goe out, though it be with a keeper, and with the leave and ſufferance of the gaoler : but yet impriſonment muſt be, *cuſtodia, et non pœna ;* for *carcer ad homines cuſtodiendos, non ad puniendos dari debet.*

Sect. 439.

*EN meſme le manner il ſemble, lou home eſt hors du royalme en ſervice le roy, pur beſoigne del royalme, ſi tiel * home ſeit diſſeiſie quant il eſt en ſervice le roy, † et le diſſeiſor moruſt ſeiſie, le diſſeiſee*

IN the ſame maner it ſeemeth, where a man is out of the realme in the king's ſervice, for the buſineſſe of the realme, if ſuch a one be diſſeiſed when hee is in ſervice of the king, and the diſſeiſor dieth

6. R. 2. Protect. 46. Vide Sect. 198. 440. 441. (Cro. Car. 365. 5. Rep. Conſtable's caſe. 1. Roll. Abr. 528.)

HORS du royalme, (id eſt) extra regnum ; as much to ſay, as out of the power of the king of England, as of his crowne of England : for if a man be upon the ſea of England, he is within the kingdom or realme of England, and within the ligeance of the king of England, as of his crowne of England. And yet *altum mare* is out of the juriſdiction of the common law, and within the juriſdiction

* *home* not in L. and M. † *et le diſſeiſor moruſt ſeiſie, le diſſeiſee eſteant en le ſervice le roy,* not in L. and M.

(1) The public records of the kingdom are conſidered to relate to the proceedings of the houſes of parliament, the court of chancery the courts of common law, or the revenue. A general table of them, diſtinguiſhed under theſe different heads, is to be found in the appendix to the report from the committee appointed to view the Cottonian library. See the report and appendix, page 183. The rolls or records of parliament have been publiſhed in the courſe of his preſent majeſty's reign, in ſix volumes folio, under the immediate auſpices of the houſe of peers. This extenſive and laborious undertaking is executed with the greateſt accuracy : it pre-ſuppoſes no common ſhare of antiquarian and diplomatic learning in the gentlemen concerned in it. A part of it was the work of the late Mr. Morant ; all the reſt was completed by Mr. Aſtle, the keeper of the records in the Tower, and Mr. Topham, of Lincoln's-Inn. It ſhould be obſerved, that the proceedings of the legiſlature till the reign of Edward I. were exceedingly irregular, and greatly defective in point of form. They are ſometimes penned ſo as to appear to come from the king alone ; ſometimes as iſſued jointly by the king and lords ; ſometimes the aſſent of the commons is, and ſometimes it is not, expreſſed ; ſometimes the authority for paſſing

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Rot. Pat. { 8. H. 3. 9. H. 3. 15. H. 3.
Temps E. 1. Avowrie 192. Rot. Valcon. 22. E. 1. m. 8. Pat. 23. E. 1. 1. pars Pat. 10. E. 2. 8. E. 2. Coron. 399. Stanf. Pl. Coron. 51.

tion of the lord admirall, whoſe juriſdiction is verie antient, and long before the reigne of *Edward* the third, as ſome have ſuppoſed, as may appeare by the lawes of *Oleron*, (ſo called, for that they were made by king *Richard* the firſt when he was there) that there had beene then an admirall time out of minde, and by many other antient records in the reignes of *Henrie* the third, *Edward* the firſt, and *Edward* the ſecond, is moſt manifeſt.

Vide Sect. 677.

See hereafter in another caſe, which *Littleton* put in his chapter of Remitter; there he ſaith, *ouſter le mere*, beyond the ſea. This great officer in the Saxon language is called *Aen mereal*, (*i.e.*) over all the ſea, *præfectus maris, ſive claſſis, archithalaſſus*: and in antient time the office of the admiraltie was called *cuſtodia marinæ Angliæ*, or *maritimæ Angliæ*.

(Hob. 212.)

3. R. 3. Cont. Claime 13.
1. E. 3. 46.

And note *Littleton* ſaith not, beyond the ſea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of England. But *intra quatuor maria*, or *extra*, is taken by conſtruction to be within the realme of England, or the dominions of the ſame.

But here a queſtion may be demanded, What if a man be out of the realme, and a recoverie is had againſt him in a *præcipe* by default, whether ſhall he avoid it in a writ of error, as well as he ſhould doe the outlawrie, or if he had beene impriſoned at the time of ſuch recoverie by default? And it ſeemeth that he ſhall not avoid the recoverie, for by that meanes a man might be infinitely delayed of his freehold and inheritance, whereof the law hath ſo great a regard. And few or none goe over, but it is either of their owne free will, or by ſuit, for what cauſe ſoever; and he is not in that caſe without his ordinarie remedie, either by his writ of higher nature, or by a *quòd ei deforceat*. But outlawrie in a perſonall action ſhall be avoided in that caſe, *quia de minimis non curat lex*, and otherwiſe he ſhould be without remedie. See Section 437. and note the diverſitie betweene that caſe of the impriſonment, and this of being beyond ſea. And *Littleton* putteth the caſe of impriſonment, and omitteth the being beyond ſea here: neither have I ſeene any booke to warrant, that he that is beyond ſea ſhall in this caſe avoid the recoverie by default.

Bract. lib. 5. fol. 436.

En ſervice le roy. *Bracton* ſheweth, that the exception of being beyond ſea is, *quia fuit in ſervitio domini regis ultra mare, viz. apud talem locum*, and that caſe is cleere: but you ſhall heare the opinion of *Bracton* in the next Section, where hee is not in the ſervice of the king.

Sect. 440.

Bract. lib. 5. fol. 436. b. & 163. Brit. fol. 21. 216. 217. Flet. lib. 6. cap. 52. 53. 13. H. 4. Triall 6. 9. H. 4. 3. 21. H. 6. Error 27. 33. H. 6. 1. 21. H. 6. 31. 26. H. 8. cap. 18. 5. & 6. E. 6. cap. 11.

AND herewith the antient law of England is agreeable with *Littleton*, and the law at this day. So as it is *vetus & conſtans opinio. Excuſatur etiam quis quòd clameum*

*ITEM, auters ont dit, que ſi aſcun ſoit hors du royalme, coment que il ne ſoit en ſervice le roy, ſi eſteant en le ſervice le roy, que tiel diſcent ne grieveroit le diſſeiſee; mes pur ceo que il ne puiſſoit faire continual claime, * il ſemble a cux, que quant il † vient en Engleterre, il poit enter ſur l'heire le diſſeiſor, &c. Car ticl home reverſera un utlagarie ‡ pronounce envers luy durant le temps que il fuit en le ſervice le roy, &c.* ergo, à multò fortiori, *avera aid et indempnitie per la ley en l'auter caſe, &c.*

ALSO, others have ſaid, that if a man bee out of the realme, though hee bee not in the king's *tiel*

* *&c.* added in L. and M. and Roh. † *revient*, L. and M. ‡ *que eſt* added L. and M.

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the acts is mentioned; and ſometimes the acts are in the form of charters.—The firſt ſummons of the knights of ſhires to parliament, extant on record, is in the 49th year of Henry III.—The firſt regular ſummons directed to the ſheriff for the election of citizens and burgeſſes, is in the 23d of Edward I.—In that reign the proceedings of the legiſlature aſſumed a more regular form; but far removed from that in which they appear at preſent. The conſent of the commons to the levying of taxes for the king gave them great weight. They took advantage of this circumſtance to obtain a remedy for the grievances they had to complain of.—In the reign of Edward III. the mode of preſenting their petitions, and of receiving their anſwers, was regularly practiſed. If the petition and the anſwer to it were of ſuch a nature as to require an expreſs and new proviſion to be made for it, the king, with the aſſiſtance of his council and of the judges, framed, from ſuch petition and anſwer, an act, which was uſually entered on the ſtatute roll; but if an expreſs and new proviſion were not required, the petition itſelf and the king's anſwer to it were entered on the parliament roll, and then uſually ſtiled an ordinance.—Alterations and improvements gradually took place; but it was not till the reign of Henry VI. that theſe petitions of the commons were reduced, in the firſt inſtance, into the body of the bill.

*tiel home eſteant hors de le royalme eſt diſſeiſee en terres ou tenements deins le royalme, et le diſſeiſor devy ſeiſie, &c. le diſſeiſee eſteant hors du royalme, il ſemble a eux, que quant le diſſeiſee vient deins le royalme, que il poit * enter ſur l'heire le diſſeiſor, et ceo ſemble a eux per deux cauſes. Un eſt, que celuy que eſt hors du royalme ne poit aver conuſans del diſſeiſin fait a luy per entendement de ley, nient pluis que choſe fait hors du royalme poit eſtre try deins le royalme per le ſerement de 12. † et de compeller tiel home per la ley de faire continuall claime, lequel per l'entendement de le ley ne puit aver aſcun notice ou conuſance de tiel diſſeiſin, ceo ſerra inconvenient, et noſmement quant tiel diſſeiſin eſt fait a luy quant il eſt hors du royalme, et auxy le morant ſeiſie fuit quant il fuit hors du royalme: car en tiel caſe il ne poit per nul poſſibility ſolonque common prejumption faire continual claime; mes auter-*

ſervice, if ſuch a man being out of the realme be diſſeiſed of lands or tenements within the realme, and the diſſeiſor die ſeiſed, &c. the diſſeiſee being out of the realme, it ſeemeth unto them, that when the diſſeiſee commeth into the realme, that he may well enter upon the heire of the diſſeiſor, &c. and this ſeemeth unto them for two cauſes. One is, that hee that is out of the realme cannot have knowledge of the diſſeiſin made unto him by underſtanding of the law, no more than that a thing done out of the realme may bee tried within this realme by the oath of 12. men; and to compell ſuch a man to make continuall claime, which by the underſtanding of the law can have no knowledge or coniſance of ſuch diſſeiſin made or done, this ſhall be inconvenient, namely, when ſuch a diſſeiſin is done unto him when he was out of the realme, and alſo the dying ſeiſed was done when he was out of the realme: for in ſuch caſe he may not by

non appoſuerit, ut ſi toto tempore litigii fuit ultra mare quácunque occaſione. And this is alſo agreeable with our yeare bookes. (1)

Nient pluis que choſe fait hors del royalm poet eſte trie deins le royalm per le ſerement de 12. And in this rule of law there is warily and truly put by *Littleton*, theſe words *(by the oath of twelve men)* meaning by a jury. For by certificate a thing done beyond ſea may be tried, as *Littleton* himſelfe, *Sect.* 102. hath ſet downe. And all matters done out of the realme of England concerning war, combate, or deeds of armes, ſhall bee tried and termined before the conſtable and marſhall of England, before whom the triall is by witneſſes, or by combate, and their proceeding is according to the civill law, and not by the oath of twelve men, as *Littleton* here ſpeaketh.

4. E. 3. 2. & 3. Vide Sect. 100.

(Ant. 74. a.)

(4. Inſt. 123.)

1. H. 4. cap. 14. 13. H. 4. f. 4. 48. E. 3. 2. & 3.

This rule here rehearſed by *Littleton*, is worthy of explication. If an alien (for example borne in France) bring a reall action, and the tenant plead that the demandant is an alien borne under the obedience of the French king, and out of the leigeance of the king of England; ſhall this caſe want triall, becauſe the matter alleaged is out of the realme? then by the fiction of this plea, no demandant ſhall recover; therefore in this caſe, the demandant ſhall reply, that hee was borne at ſuch a place in England, within the king's leigeance, and hereupon a jury of 12. ſhall bee charged, and if they have ſufficient evidence that hee was borne in France, or in any other place out of the realme, then ſhall they finde, that hee was borne out of the king's alleageance, and if they have ſufficient evidence that he was borne in *England*, or *Ireland*, or *Jernſey*, or *Jerſey*, or elſewhere within the king's obedience,

(Doc. pla. 209.)

20. E. 3. averment. 34. 27. Aſſ. 24. 32. H. 6. 25. 15. E. 4. 13. 7. H. 6. 15. 1. R. 3. 4. 6. H. 7. 6. 7. H. 7. 8. F. N. B. 196. 29. Aſſ. 11. 13. E. 1. m. rot. 47. 12. H. 3. ibid. 55. Lib. 7. fol. 26. 27. Calvin's caſe. Li. 6. f. 47. Dowdale's caſe.

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

† *&c.* added in L. and M. and Roh.

(1) A reference was made in a former part of this work to this place for ſome obſervations on the different points of law ariſing on the doctrine of the *Four Seas*. So far as it leads to an enquiry into our *dominion of the ſea*, circumſtances of a public nature *now* exiſt which make it a matter of too much importance and delicacy to be treated of here. In the note referring to this paſſage, ſir Philip Medows's treatiſe on the dominion and ſovereignty of the ſeas is mentioned with great commendation. A copy of this work, which formerly belonged to lord chief baron Parker, has this note in his lordſhip's own hand-writing. "This is a moſt curious and excellent "treatiſe; and though Mr. Selden's *Mare Clauſum* is a learned and ingenious work, and will be ever popular with Engliſhmen, yet "ſir Philip Medows's rules for aſcertaining the limits of the ſea ſeem to me to be founded on more ſolid and prudential reaſons than "Mr. Selden has offered in his book. T. Parker, 14th Sept. 1744." It has been a complaint among the learned, that in the treatiſes which have been written on the laws of war and peace, no regard is had to the *intermediate time between the commencement of hoſtilities* and *actual war*. Thoſe whoſe ſtudies may lead them to conſider that ſubject, will hear with pleaſure that the late ſir Hans Stanley, whoſe erudition and claſſic taſte are well known, left behind him in manuſcript, an elegant and accurate treatiſe upon it, entitled, *De Jure Imperfecti Belli.*

dience, they ſhall finde that he was born within the king's leigeance. And this hath ever beene the pleading and manner of triall in that caſe. And ſo it is in the caſe that *Littleton* here putteth, if a man, in avoydance of a fine or a diſcent, alleage that hee was out of this realme in Spaine, at the time of levying of the fine and at the time of the diſſeiſin and diſcent, the adverſe party may alleage that he was at ſuch a place in England, &c. whereupon iſſue ſhall be taken, and then in evidence he may prove that he was out of the realme, &c. which, upon ſufficient evidence, the jurie ought to finde. And in both theſe caſes and the like, in a ſpecial verdict the jury may finde that he was borne beyond ſea, or was beyond ſea at that time, &c.

(7. Rep. 26. 27. Calv. caſe.)

The ſtatute of 25. *E.* 3. *de proditionibus* doth declare, that it is treaſon by the common law to adhere to the enemies of the king within the realme, or without, if hee bee thereof proveablement attaint of overt fact, and that he ſhall forfeit all his lands, &c. A man muſt not imagine that ſeeing by the common law declared by authority of parliament, that adhering to the king's enemies without the realme, is high treaſon, and that the delinquent may be attainted thereof, &c. that this ſhould want triall, for then the judgement of the common law, and declaration of the parliament, ſhould be illuſory, which no well adviſed man will thinke in a matter of ſo great conſequence. But certaine it is, that for neceſſitie ſake, the adherencie without the realme muſt be alleaged in ſome place within England. And if upon evidence they ſhall finde any adherencie out of the realme, they ſhall finde the delinquent guilty. But moſt commonly they indited him (if he had lands) in ſome county where his lands did lie, that were to be forfeited; and this, as appeareth in our bookes, was the common uſe. And ſo it is declared by the ſtatute (*) of 35. *H.* 8. and that it ſhall be tried by twelve men of the countie, where the king's bench ſhall ſit, and be determined before the juſtices of that bench, or elſe before ſuch commiſſioners, and in ſuch ſhire of the realme, as ſhall be aſſigned by the king's majeſtie's commiſſion, and this ſtatute for this point remaines in force at this day, and ſo it was reſolved [*a*] by all the judges in my time, *viz.* in 33. *Eliz.* in the caſe of *Orurcke*. And *anno* [*b*] 34. *Eliz.* in ſir *John Perot*'s caſe done in Ireland, for that is out of the realme of England, and the caſe [*c*] in *Mich.* 19. & 20. *Eliz.* was utterly denied, and ſir *Chriſtopher Wray* himſelfe (who is ſuppoſed to give his opinion in that caſe) proteſted that he never gave any ſuch opinion, but did hold the contrary. When part of the act, eſpecially the originall, is done in England, and part out of the realme, that part that is to be performed out of the realme, if iſſue be taken thereupon, ſhall be tried here by 12. men; and thoſe twelve men ſhall come out of the place where the writ is brought. For example, (which ever doth illuſtrate) it was covenanted by indenture, by charter party, that a ſhip ſhould ſayle from *Blackney* haven in Norfolke, to *Muttrel* in Spaine, and there remaine by certaine dayes.

5. R. 2. triall. 54.

(*) 35. H. 8 cap. 2. Stamford. pl. cor. 90. (Cro. Car. 332.)

[*a*] 33. Eliz. caſe Orurke.
[*b*] 34. Eliz. caſe de Sir John Perots.
[*c*] Mich. 19. & 20. Eliz. Dier 360.
(20. H. 6. 8.)
48. E. 3. 3. 11. H. 7. 16.
2. R. 3. 4.

In an action of covenant brought upon this charter party, the indenture was alleaged to be made at *Thetford* in the county of Norfolke, and upon pleading, the iſſue was joyned, whether the ſaid ſhip remained at *Muttrel* in Spaine by the ſaid certaine dayes. And it was adjudged that this iſſue ſhould be tried at *Thetford*, where the action was brought, becauſe there the contract tooke his originall by making of the charter partie, and ſo hath it beene often adjudged in ſuch like caſe.

(1. Roll. 532. Hob. 11. 4. Inſ. 138. 140. 141. 7. Rep. 2. a. Sid. 367. Lut. 700. 710. 950.) Paſch. 28. Eliz. in action de covenant inter Evangeliſt Conſtantine pl. & Hughgyn defendant in the king's bench. Li. 6. f 47. Dowdale's caſe. Vid. 32. H. 6. 25. 48. E. 3 3. 11. H. 7. 16. 2. E. 2. obligation 15. (2. Cro. 76. Sid. 228. Hob. 11.)

An obligation made beyond the ſeas may be ſued here in England, in what place the plaintife will. What then if it beare date at *Bourdeaux* in *France*, where ſhall it be ſued? And anſwer is made, that it may be alleaged to be made *in quodam loco vocat' Burdeaux* in *France*, in *Iſlington* in the county of *Middleſex*, and there it ſhall be tried, for whether there be ſuch a place in *Iſlington* or no, is not traverſable in that caſe. Theſe points are neceſſary to be knowne in reſpect of the variety of opinions in our bookes. And of theſe thus much ſhall ſuffice, and now is *Littleton* worthy to be heard.

Entendement de le ley.

Per entendement de le ley. *Vide*, for intendement of law, *Sect.* 99, 100. 110. 293. 377. 393. 406. 367. 462. 463, &c. 439.

Vide Sect. 269.

Ceo ſerra inconvenient. Here alſo, as hath beene often ſaid, appeareth, that *argumentum ab inconvenienti*, is ſtrong in law.

Autrement eſt ſi le diſſeiſee fuit deins le royalme al temps del diſſeiſin, &c. So as if a man be diſſeiſed before he goeth over ſea, or commeth into the realme againe before the diſcent, the diſcent ſhall take away his entrie.

Per entendement de le ley. Ceo ſerra inconvenient. Autrement eſt ſi le diſſeiſee fuit deins le royalme al temps del diſſeiſin, &c. poſſibilitie after the common preſumption make continuall claime; but otherwiſe it ſhould be if the diſſeiſee were within the realme at the time of the diſſeiſin, or at the time of the dying ſeiſed of the diſſeiſor.

Sect 441.

UN auter matter ils allegeont pur prover que devant le ſtatute fait en le temps de roy E. 3. an. * 34. cap. 16. *de ſon raigne, per quel eſtatute non-claime eſt ouſte, &c. le ley fuit tiel, que ſi un fine ſoit levy de certaine terres ou tenements, ſi aſcun que fuit eſtrange al fine avoit droit d'aver et recover meſmes les terres ou tenements, s'il ne venuſt et fiſt ſon claime a ceo deins l'an et le jour procheine apres le fine levie, il ſerra barre a touts jours,* quia dicebatur, finis finem litibus imponebat. *Et que la ley fuit tiel, il eſt prove per l'eſtatute de Weſtminſter* 2. De donis conditionalibus, *lou il eſt parle que ſi fine ſoit levie de les tenements en taile,* &c. quòd finis ipſo jure ſit nullus, nec habeant hæredes, aut illi ad quos ſpectat reverſio licet fuerint plenæ ætatis in Angliâ, et extra priſonam) neceſſitat' apponere clameum ſuum, † &c. *Iſſint ceo*

ANOTHER matter they alleage for a proofe that before the ſtatute of king *Edward* the Third, made the 34th yeare of his reigne, by which ſtatute non-claim is ouſted, &c. the law was ſuch, that if a fine were levied of certaine lands or tenements, if any that was a ſtranger to the fine had right to have and to recover the ſame lands or tenements, if he came not and made his claime thereof within a yeare and a day next after the fine levied, he ſhall be barred for ever, *quia dicebatur quòd finis finem litibus imponebat.* And that law was ſuch, it is proved by the ſtatute of Weſt. the 2. *De donis conditionalibus,* where it is ſpoken if the fine bee levied of tenements given in the taile, &c. *quòd finis ipſo jure ſit nullus, nec habeant hæredes, aut illi ad quos ſpectat reverſio (licet plenæ ætatis fuerint in Angliâ, et extra priſonam) neceſſitat' apponere clameum ſuum.* Soe it is proved

HERE it appeareth, what the common law was before the ſaid ſtatute, for non-clayme upon a fine levied. But now ſince *Littleton* wrote, by the ſtatute of 4. *H.* 7. five yeares after proclamations made upon the fine are given to him that right hath to make his claime, or purſue his action, where the common law gave him but a yeare and a day. But this ſtatute of 4. *H.* 7. extends only to fines, and not to non-claime upon a judgement in a writ of right, and therefore the ſaid ſtatute of 34. *E.* 3. here cited by *Littleton*, which ouſteth non-claime only to fines levied, extendeth not to a judgement in a writ of right at this day, and therefore the common law in that caſe remaineth to this day, *viz.* that claime muſt bee made within a yeare and a day after judgement. Alſo if a fine be levied without proclamations, or without ſo many as the law requireth, then the ſtatute of non-claime doth extend to ſuch a fine.

84. E. 3. cap. 16.

(Ant. 254. b.)
4. H. 7. cap. 24.
See as well this ſtatute as the ſtatute of 32. H. 8. cap. 36. well expounded in my Reports. Lib. 3. fol. 84, 85, &c. caſe del fines per totum. lib. 1. fol. 96, 97. in Shelleye's caſe. lib. 2. fol. 93. Bingham's caſe. lib. 8. fol. 100. Lechford's caſe. lib. 9. fol. 139, 140, 141. Beaumond's caſe. lib. 10. fol. 49. b. Lampet's caſe, and 89 a. lib. 9. fol. 105. 106. *Margaret Podger's caſe.* lib. 5. fol. 124. Saffyn's caſe. lib. 10. 96. 97. Seymour's caſe. lib. 8. fol. 72. Groſſeye's caſe. lib. 11. fol. 69. 71. 78. Pl. Com. in Smith and Stapl. caſe, and in Stowe's caſe, and Howel's caſe, and Glanvil. li. 13. cap. 11. Bract. 435. Fleta, lib. 6. cap. 53. Brit. 216.

(4 H. 7. c. 24. 32. H. 8. c. 36. 2. Cro. 101. 226.)

Dicebatur finis, quia finem litibus imponebat. (1) Here you may obſerve the etymologie of a fine. And herewith agreeth [a] antiquity: *Finis ideò dicitur finalis concordia, quia imponit finem litibus.* And after the example [b] of *Littleton*, it is good to ſearch out the etymologie or right derivation of words; for *ignoratis terminis ignoratur et ars*, as hath beene often obſerved in other places. And the civilians call this judiciall concord, *tranſactionem judicialem de re immobili.*

[a] Glanvil. lib. 8. cap. 3. Bract. lib. 5. fol. 435. Fleta, lib. 6. cap. 52. 53

[b] Etymologies, &c. Vid. Sect. 74. 174. 194. 415. 520. 593.

* 34. *cap.* 16. not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

(1) Every part of the law relating to fines and common recoveries has been ſtated and explained by Mr. Cruiſe, in his Eſſays upon thoſe ſubjects, in a manner that equally recommends them to the ſtudent, and the moſt learned and experienced practitioners. Beſides the obligations which the Editor has to him upon this account in common with the reſt of the profeſſion, he acknowledges with equal pleaſure and gratitude the particular obligations he has to him for the aſſiſtance he has derived from them in the courſe of this work.

Stat. de anno. 13. E. 1.

Licet fuerit plenæ ætatis in Angliâ, et extra prisonam. In this act of 13. E. 1. *De donis conditionalibus* is one omitted, who is added in the statute *De modo levandi fines, viz. et sanæ memoriæ.* [c] But a fem-covert had no privilege of non-claime at the common law, as some have said, because she had a husband that might make claime for her. But yet *Bracton* saith, *Item excusatur uxor quæ sub potestate viri supposita, quòd clamcum non apposuerit licet mittere possit,* and citeth a judgement in the point, *Trin.* 4. *H.* 3. in *Cusin*'s case. But *Fleta* saith, *Excusatur si fuerit uxor alicujus, si fuerit per virum impedita, quòd non potuit apponere clamcum.* Also they in reversion or remainder expectant upon any estate of freehold were barred by the common law; and yet they could make no claime, because, as hath beene said, it belonged to the particular tenant, and not to them because their entry was not lawfull; which was one of the principall causes of making of the said statute of 34. *E.* 3. which ousted non-claime. But these cases of coverture, and of them in reversion and remainder, are now without question holpen, and just provision made for the saving of their rights and titles, by the said statute of 4. *H.* 7. as by the said act appeareth.

[c] Pl. Com. Stowel's case, 359.

Bracton, lib. 5. fo. 436.
Britton, fo. 216. b.
Fleta, lib. 6. ca. 58.

prove, que si un estrange home que avoit droit a les tenements, s'il fuit hors de royalme al temps del fine levie, &c. n'avera dammage, coment que il ne fist son claime, &c. coment que tiel fine fuit matter de record: per greinder reason il semble a eux, que un disseisin et discent que est matter en fait, ne issint trope greevera celuy que fuit disseisie quant il fuit hors du royalme al temps de disseisin, et auxy al temps que le disseisor morust seisie, &c. mes que il bien poit enter, nient contristeant tiel discent. *

that if a stranger that hath right unto the tenements, if he were out of the realme at the time of the fine levied, &c. shall have no dammage, though that hee made not his claim, &c. though that such fine was matter of record: by greater reason it seemeth unto them, that a disseisin and discent that is matter in deed, shall not so grieve him that was disseised when he was out of the realme at the time of that disseisin, and also at the time that the disseisor died seised, &c. but that he may well enter, notwithstanding such discent.

(4. H. 7. c. 24. 32. H. 8. c. 36. 2. Inst. 516.)

Sect. 442.

ARRAIGNE un assise. To arraigne the assise is to cause the tenant to be called to make the plaint, and to set the cause in such order as the tenant may bee enforced to answer thereunto; and is derived of the French word *arraigner*, which signifieth to order or set in right place. An arraignment is sometime called an affitution, of the verbe *affituo*, compounded of *ad* and *statuo*, that is, to place or set in order one by another. In the same sense that *Littleton* here useth it, it is used when an appeale is

ITEM, quære *si home soit disseisie, et il arraigne un assise envers le disseisor, et les recognitors de le assise † chaunta pur le plaintife, et les justices d'assise voyle estre advises de lour judgment, tanques al prochein assise, &c. et en ‡ le dementiers le disseisor morust seisie, &c. si le dit suit*

ALSO, inquire if a man be disseised, and he arraigne an assise against the disseisor, and the recognitors of the assise chante for the plaintife, and the justices of assise will bee advised of their judgements untill the next assise, &c. and in the meane season the disseisor dieth seised, &c. yet the

dell

* *&c.* added in L. and M. and Roh. † *chaunta—chaunteront*, in L. and M. and *chanteront* in Roh. ‡ *le* not in L. and M.

del assise ſerra * *pris en ley pur le dit diſſeiſee un continuall claime, entant que nul default fuit en luy* †, *&c.*

ſaid ſuit of the aſſiſe ſhall bee taken in law for the diſſeiſee a continuall claime, inſomuch that no default was in him, &c.

arraigned, both which are arraigned in French, but entred in Latin. And it is to bee obſerved, that *Littleton* ſaith here *arraigne un aſſise*, and ſaith not that the tenant is arraigned; and ſo of the appeale; for theſe are the ſuits of the ſubject, and no man is ſaid to be arraigned, but merely at the ſuit of the king, upon an enditement found againſt him, or other record wherewith he is charged. And there the arraignment of the priſoner is to take order that he appeare, and for the certainty of the perſon to hold up his hand, and to plead a ſufficient plea to the enditement or other record, whereupon they which follow for the king may orderly proceed. (10. Rep. 130.) 2. & 3. E. 6. c. 24. towards the end. Stanf. pl. cor. 105. C. 3. H. 7. ca. 1.

Juſtices d'aſſiſe. Juſtices of aſſiſe are aſſigned and conſtituted by the king of the judges and ſages of the law, and are called juſtices of aſſiſe, for that the writs of aſſiſe of *novel diſſeiſin*, (which in former times were accounted *feſtina remedia*, and very frequent and common) were returnable before them to be taken in their proper counties twice every yeare at the leaſt, whereupon they had authority to give judgment and award ſeiſin and execution: and therefore both for the number of them in times paſt, and for the greater authority they had then as juſtices of *niſi prius* (which was to trie iſſues only, except in *quare impedit*, and aſſiſes *de darreine preſentment*, in which caſes the juſtices of *niſi prius* might give judgment) they were denominated juſtices of aſſiſes: and divers acts of parliament have given to them great authority both in criminall cauſes and common pleas. Theſe juſtices of aſſiſe have alſo commiſſions of *oier* and *terminer*, of gaole delivery and of the peace, of aſſociation, and *ſi non omnes* throughout their whole circuits, ſo as they are armed with ample, provident, but yet ordinary juriſdiction; for all their commiſſions are bounded with this expreſſe limitation, *facturi quod ad juſtitiam pertinet ſecundum legem et conſuetudinem Angliæ*. And in former time, according to the originall inſtitution and their commiſſion, both the juſtices joined both in common pleas and pleas of the crowne. *Vid.* Sect. 514. 233. 234. Magna Charta, 30. W. 2. ca. 3. 30. 39. Stat. de Ebor. ca. 4. Artic. Sup. Cart. ca. 10. 4. E. 3. ca. 11. 7. R. 2. ca. 4. 27. E. 1. de finibus ca. 4. 28. E. 1. de appellatis. 4. E. 3. ca. 2. 2. H. 5. ca. 8. 3. H. 5. ca. 7. 13. H. 4. ca. 7. North. 2. E. 3. ca. 3. 2. E. 3. ca. 5. 14. H. 6. ca. 1. 21. H. 6. ca. 10. 3. H. 7. c. 1. 33. H. 8. c. 9. 34 & 35. H. 8. ca. 14. 2. & 3. E. 6. ca. 24. 1. E. 6. ca. 7. 2. Mar. Dier 99. 3. & 4. Eliz. Dier 205. (F. N. B. 240. c. 4. Inſ. 161.)

Si le dit ſuit del aſſiſe ſerra priſe en ley, &c. un continual claime. And it is holden at this day that it ſhall amount to a claime, for that there was no default in him, as *Littleton* ſaith. (*d*) Some have objected, that if the bringing of an aſſiſe ſhould amount to continuall claime, and every continuall claime made by the diſſeiſee veſt the poſſeſſion and freehold in him, therefore if bringing the aſſiſe, &c. ſhould amount to a continuall claime, that then the writ ſhould abate. But hereunto it hath beene anſwered in this chapter, that a continuall claime is an entry by conſtruction of law for the advantage of the diſſeiſee, but not for his diſadvantage. (*d*) See before in this chapter, Sect. 419. Vide Sect. 416. (2. Ed. 3. 8. 14. Ed. 3. 14.) (Ant. 253. b.)

In a writ of entry *ſur diſſeiſin* againſt one, ſuppoſing that he had not entred but by *S.* who diſſeiſed him, the tenant ſaid that *S.* died ſeiſed, and the land deſcended to him, and prayed his age; the plaintife counterpleaded his age, for that he arraigned an aſſiſe againſt *S.* who died hanging the aſſiſe, and he was ouſted of his age, for that the bringing of the aſſiſe amounted to a claime. 24. E. 3. 25. 9. E. 2. age. 141. 15. E. 3. Counterplea de gar. 5.

If tenant in dower alien in fee with warranty, and the heire in the reverſion bring a writ of entry *in caſu proviſo*, *&c.* and hanging the plea the tenant dieth, the heire ſhall not be rebutted or barred by this warranty, for that the *præcipe* did amount to a continuall claime. And herewith agreeth (*) antiquity: *Et ſi clameum non appoſuerit, ſufficit tamen ſi ille vel anteceſſor ſuus faciat quod tantundem valeat, ut ſi placitum moverit tenentem vel fecerit rem litigioſam; quia ſicut plus eſt facto appellare quàm verbo, ita plus eſt clameum apponere facto quàm verbo: et ad hoc facit de termino Sanctæ Trinitatis, anno regni regis H. 3. 15. in com. Hunt. de quâdam Guldeburgâ, cui objectum fuit, quòd clameum non appoſuit, et ipſa reſpondit, quòd fecit quod tantundem valet, quia tempore finis facti implacitavit tenentem per aliud breve, &c.* 3. E. 3. tit. garrantie 62. * Fleta, lib. 6. ca. 52. Bract. lib. 5. fo. 436.

If the goods of a villeine (before any ſeiſure made by the lord) be diſtreined, the lord may have a replevyn; and notwithſtanding before the bringing of the writ he had no property, yet the very bringing of the writ doth amount to a claime of the goods, and veſteth the property in the lord. 33. E. 3. Replevin. 43. 42. E. 3. 18. b. 9. H. 6. 25.

Entant que nul default fuit en luy, &c. Hereby it is implyed, that our author inclined to this opinion, that it ſhould amount to a claime, for that no default was in him; *et nemo debet rem ſuam ſine facto aut defectu ſuo amittere*, as the rule is.

Sect.

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

Sect. 443.

(Poſt. 331. a. 342. b. 345. a.)
(Dyer 71. a.)
(2. Roll. Abr. 339.)

HERE, firſt, it is to be obſerved, that albeit the freehold and inheritance is in this caſe in no perſon, but in abeyance or in conſideration of law, yet an entrie and claime by one that hath no right ſhall gaine the inheritance by wrong. For here *Littleton* ſaith, and of ſuch eſtate died ſeiſed, &c. And ſo it is in caſe of a biſhop, parſon, vicar, prebend, or any other ſole corporation. And in the ſtatute of *Merlebridge* it is called an intruſion.

Merleb. cap. 28.

Secondly, that ſeeing by the death of the abbot (which is the act of God) no perſon is able to make continuall claime, therefore a diſcent during that time ſhall not prejudice the ſucceſſor; for, as hath beene ſaid, *Impotentia excuſat legem.* If an uſurpation bee had to a church in time of vacation, this ſhall not prejudice the ſucceſſor, to put him out of poſſeſſion, but that at the next avoidance hee ſhall preſent.

(5. Rep. 21.)

(F. N. B. 34. m. W. 2. cap. 5.)

Nient pluis que ils ſont able de ſuer action, &c. Here that which hath in this chapter beene ſaid is confirmed, *viz.* That the entrie or continuall claime muſt purſue the action.

(8. Rep. 88. Ant. 252. b.)

Car le covent n'eſt forſque un mort perſon, &c. This is *ratio una*, but not *unica*: for though the reſt of the corporation be no mort perſons, as the chapter in caſe of deane and chapter, or the commonaltie in caſe of mayor and commonaltie; yet cannot they when there is no deane or maior make claime, becauſe they have neither abilitie nor capacitie to take or to ſue any action, as our author here ſaith.

Car en temps de

ITEM, quære *ſi un abbe de un monaſterie moruſt, et durant le temps de vacation un home torciouſement enter en certaine parcel de terre del monaſtery, claymant la terre a luy et a ſes heires, et de tiel eſtate moruſt ſeiſie, et la terre diſcendiſt a ſon heire, et puis apres un * eſt elect, et fait abbe de meſme la monaſterie, ſi †meſme l'abbe poit enter ſur le heire ou nemy. Et il ſemble a aſcuns, que l'abbe bien poit enter en ceo cas, pur ceo que le covent en temps de vacance ne fuit aſcun perſon able de faire continual claime; car nient pluis que ils ſont perſonable de ‡ſuer action, nient pluis ils ſont able de faire continual claime, car le covent § n'eſt forſque || un mort corps ſans teſte; car en temps de vacation un graunt fait a eux, ou per eux, eſt void; et en ceſt caſe l'abbe ne poit aver briefe* d'entre ſur diſſeiſin *envers*

ALSO, inquire if an abbot of a monaſterie die, and during the time of vacation a man wrongfully entreth in certaine parcels of land of the monaſterie, claiming the land unto him and his heires, and of that eſtate dieth ſeiſed, and the land deſcendeth unto his heires, and after that an abbot is choſen, and made abbot of the monaſterie, a queſtion is, if the abbot may enter upon the heire or not. And it ſeemeth to ſome, that the abbot may well enter in this caſe, for this, that the covent in time of vacation was no perſon able to make continuall claime; for no more than they be perſonable to ſue an action, no more be they able to make continuall claime, for the covent is but a dead bodie without head; for in time of vacation a grant made unto them is void; and in this caſe an abbot may not have a writ of *entrie upon diſſeiſin* againſt the heire, for

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* *abbe* added L. and M. and Roh.
§ *n'eſt—eſt*, L. and M. and Roh.
† *meſme* not in L. and M. nor Roh.
|| *come* added L. and M. and Roh.
‡ *ſuer—faire*, L. and M. and Roh.

*le heire, pur ceo que il ne fuit unques diſſeiſee. Et ſi l'abbe ne puiſſoit enter en ceo caſe, donques il ſerra mis a ſon briefe de droit, * &c. lequel ſerra trope dure pur le meaſon: per que ſemble a eux, que l'abbe bien poit enter, &c.*

Quæras de dubiis, legem bene diſcere ſi vis:
Quærere dat ſapere, quæ ſunt legitima verè †.

this, that hee was never diſſeiſed. And if the abbot may not enter in this caſe, then hee ſhall bee put into his writ of right, &c. which ſhall bee hard for the houſe: by which it ſeemeth to them, that the abbot may well enter, &c.

Quæras de dubijs, legem bene diſcere ſi vis:
Quærere dat ſapere, quæ ſunt legitima verè.

vacation un graunt fait a eux ou per eux, eſt void, &c. And the reaſon is, becauſe the body politique which is capable, is not complete, but wanteth the head. But this is to be underſtood of an immediate grant; for if during the vacation of the abathie of Dale, a leaſe for life, or a gift in taile be made, the remainder to the abbot of Dale and his ſucceſſors, this remainder is good, if there be an abbot made during the particular eſtate.

2. H. 7. 13. 40. Aſſ. 26. 34. E. 3. Garrantie 69.

(Poſt. 378.)

(Ant. 239. a.)

If there be maior and commonaltie of *D.* and the maior dieth, a graunt made to the maior and commonaltie of *D.* is void for the cauſe aforeſaid; but in that caſe, if a leaſe for life be made, the remainder to the maior and commonaltie of *D.* the remainder is good, if there bee a maior elected during the particular eſtate.

(10. Rep. 1. Ant. 85. 250. a. 3. a. lib. 10. Lampett's caſe. lib. 6. Biſhop of Wells's caſe. lib. 1. Rector of Cheddington's caſe.)

Poit enter, &c. Here by this (*&c.*) is implyed, or make his continuall claime in ſuch ſort as hath beene before expreſſed.

Quæras de dubiis, legem bene diſcere ſi vis:
Quærere dat ſapere, quæ ſunt legitima verè.

Here *Littleton* expreſſeth an excellent meanes to attaine to the reaſon of the law, by enquiring of, and conference had with, learned men, of doubtfull caſes:

Inter cuncta leges, & per cunctabere doctos. Horace.

For as *collatio peperit artes*, ſo *collatio perficit artes*: and this muſt bee continuall; for as knowledge increaſeth, ſo doubts therewith increaſe alſo; *Creſcante ſcientiâ, creſcunt ſimul et dubitationes.*

And here *Littleton* citeth verie aptly two verſes; for it is truly ſaid, that *Authoritates philoſophorum medicorum et poetarum ſunt in cauſis allegandæ et tenendæ:* and our author doth cite a verſe for memorie, but it is worthy of memorie.

Chap. 8. Of Releaſes. (1) Sect. 444.

RELEASES ſont en divers manners, ceſtaſcavoir, releaſes de tout le droit que home ad en terres ou tenements, ‡ et releaſes de actions perſonals et reals, et auters choſes. Re-

RELEASES are in divers manners, *viz.* releaſes of all the right which a man hath in lands or tenements, and releaſes of actions perſonalls and realls, and other things.

Vide Mir. cap. 2. ſect. 17. Vide Brit. 101. Bract. li. 5. Tract. de Except. & lib. 4. fol. 318. b. Fleta, lib. cap. 14.

HERE our author beginneth with a diviſion of releaſes.

Theſe words muſt be referred thus: releaſes are of two ſorts, *viz.* a releaſe of all the right which a man hath either in lands and tenements, or in goods and chattels: or there is a releaſe of actions reall, of or in lands or tenements: or perſonall, of or in goods or chattels: or mixt, partly

* *&c.* not in L. and M. † *verè* not in L. and M. nor is any part of theſe two verſes in the Camb. MSS. ‡ *&c.* added in L. and M.

(1) At common law, lands could not be transferred by one perſon to another but by feoffment, with livery of the ſeiſin. This produced a notoriety of the tranſmutation of the poſſeſſion. This notoriety was in ſome meaſure effected by a diſſeiſin; but that was only a tortious poſſeſſion, liable to be defeated by the diſſeiſee. Thus the diſſeiſor had the poſſeſſion; the diſſeiſee the right. To complete the title of the diſſeiſor, it was neceſſary he ſhould acquire the right. This could not be done by a feoffment, as that was a transfer of the poſſeſſion; but it was effected by a releaſe, which in ſome reſpects operates as an actual tranſfer of the right; in others, as an acquittal or diſcharge from it. The different degrees of title in the diſſeiſor, his heir, or feoffee, and the different natures of the rights of the diſſeiſee, make it neceſſary that releaſes ſhould be adapted to the different ſituation of the parties, and give them, as the circumſtances of the parties vary, a different effect and operation.

•492•

partly in the realty, and partly in the perſonaltie.

Releaſe, *Relaxatio*. Of the etymologie of this word you have heard before. *Fleta* [a] calleth it *charta de quietâ clamantiâ*.

[a] Fleta, ubi ſupra.

leaſes de tout le droit que homes ont en terres ou tenements, &c. ſont communement fait en tiel form ou de tiel effect :

releaſes of all the right which men have in lands and tenements, &c. are commonly made in this forme, or of this effect :

Sect. 445.

NOverint univerſi per præſentes, &c. Here *Littleton* ſheweth preſidents of releaſes of right : and preſidents doe both teach and illuſtrate, and therefore our ſtudient is to be well ſtored with preſidents of all kindes.

Bract. lib. 4. fol. 238. Fleta, ubi ſup. 9. H. 6. 35. 24. E. 3. 27. 13. H. 4. entr. congeab. 57.

Remiſiſſe, relaxâſſe, et quietum clamâſſe. Here *Littleton* ſheweth, that there be three proper words of releaſe, and bee much of one effect : beſides, there is *renunciare*, *acquietare*, and there bee many other words of releaſe ; as if the leſſer grants to the leſſee for life, that he ſhall be diſcharged of the rent, this is a good releaſe. *Vide* Sect. 532.

(2. Roll. Abr. 400. 403. 9. Rep. 52.)

And it is to bee underſtood, that there bee releaſes in deed, or expreſſe releaſes, whereof *Littleton* heere hath ſhewed an example. Theſe expreſſe releaſes muſt of neceſſitie be by deed. There be alſo releaſes in law, and they are ſometime by deed, and ſometime without deed. As if the lord diſſeiſe the tenant, and maketh a feoffment in fee by deed or without deed, this is a releaſe of the ſeigniorie. And ſo it is if the diſſeiſee diſſeiſe the heire of the diſſeiſor, and make a feoffment in fee by deed or without deed, this is a releaſe in law of the right. And the ſame law it is of a right in action. (1)

27. H. 8. 29. of an uſe.
24. H. 6. 44. of an attaint.
3. E. 3. 38. 21. E. 4. 81.
Pl. Com. Delamere's caſe.
(8. Rep. 136 Plo. 185. 186. Hob. 10. 1. Sid. 79. 1. Roll. Abr. 934. Plo. 36. 5. Rep. 29.)

8. E. 4. 3. 21. E. 4. 2.

If the obligor make the obligee his executor, this is a releaſe in law of the action, but the dutie remaines, for the which the executor may retaine ſo much goods of the teſtator.

11. H. 7. 4. 20. H. 7. 29. 8. E. 4. 3.

If the feme obligee take the obligor to huſband, this is a releaſe in law. The like law is, if there be two femes obligees, and the one take the debtor to huſband. (2)

If an infant of the age of ſeventeene yeares releaſe a debt, this is void ; but if an infant make the debtor his executor, this is a good releaſe in law of the action. (3)

But if a feme executrix take the debtor to huſband, this is no releaſe in law, for that ſhould be a wrong to the dead, and in law worke a *devaſtavit*, which an act in law ſhall never worke. And ſo it was adjudged in the king's bench, *Mich.* 30. & 31. *Eliz.* in which caſe I was of counſell.

30. E. 3. 24. 32. E. 3. tit. ſcire fac. 102.
(Mo. 36. 1. Leo. 320. 8. Rep. 152. Plo. 184. a. Finch. 294.)

But it is to be obſerved, that there is a diverſitie betweene a releaſe in deed, and a releaſe in law ; for if the heire of the diſſeiſor make a leaſe for life, and the diſſeiſee releaſe his right to the leſſee for his life, his right is gone for ever. But if the diſſeiſee doth diſſeiſe the heire of the diſſeiſor, and make a leaſe for life, by this releaſe in law the right is releaſed but during the life of the leſſee ; for a releaſe in law ſhall be expounded more favourable, according to the intent and meaning of the parties, than a releaſe in deed, which is the act of the partie, and ſhall

NOverint univerſi per præſentes, me A. de B. remiſiſſe, relaxâſſe, et omninò de me et hæredibus meis quietum clamâſſe : *vel ſic*, pro me et hæredibus meis quietum clamâſſe C de D. totum jus, titulum, et clameum quæ habui, habeo, vel quoviſmodo in futur. habere potero, de et in uno meſſuagio cum pertinentiis in F. &c. *Et eſt aſcavoire, que ceux verbs* remiſiſſe, et quietum clamâſſe, *ſont de un tiel effect ſicome tiels verbs*, relaxâſſe.

KNow all men by theſe preſents, that I A. of B. have remiſed, releaſed, and altogether from me and my heires quiet claimed: or thus, *for mee and my heires quiet claimed to C. of D. all the right, title, and claim which I have, or by any meanes may have, of and in one meſſuage with the appurtenances in F. &c.* And it is to bee underſtood, that theſe words, *remiſiſſe, et quietum clamâſſe*, are of the ſame effect as theſe words, *relaxâſſe*.

(1) What ſir Edward Coke obſerves reſpecting obligors and obligees holds equally between all other creditors and debtors; but it muſt be attended with the following obſervations. A debt is only a right to recover the amount of the debt by way of action; and as an executor cannot maintain an action againſt himſelf, or againſt a co-executor, the teſtator, by appointing the debtor an executor of his will, diſcharges the action, and conſequently diſcharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be conſidered but as a ſpecific bequeſt or legacy, deviſed to the debtor to pay the debt, and therefore, like other legacies, it is not to be paid or retained till the debts are ſatisfied ; and if there are not aſſets for the payment of the debts, the executor is anſwerable for it to the creditors. In this caſe, it is the ſame whether the executor accepts or refuſes the executorſhip. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorſhip, if there are aſſets, he may retain his debt out of the aſſets, againſt the creditors in equal degree with himſelf ; but if there are not aſſets, he may ſue the heir, where the heir is bound. See Wankford v. Wankford, 1. Salk. 299. Selwin v. Brown, 4 Bro. Cas. in Par. 179. Forr. 243. Vin. vol. 8. p. 198. 2. Eq. Cas. Abr. 46. 1. note at (Q).

(2) In the caſe of Smith v. Stafford, Hob. 216. the huſband promiſed the wife before marriage that he would leave her worth 100l. The marriage took effect, and the queſtion was, whether the marriage was a releaſe of the promiſe. All the judges but Hobart were of opinion, that as the action could not riſe during the marriage, the marriage could not be a releaſe of it. The doctrine of this caſe ſeems to be admitted in the caſe of Gage v. Acton, 1. Salk. 325. 12. Mod. 290. The caſe there aroſe upon a bond executed by the huſband to the wife before the marriage, with a condition making it void if the ſurvived him, and he left her 1000l. Two of the judges were of opinion, that the debt was only ſuſpended, as it was on a contingency which could not by any poſſibility happen during the marriage. But lord chief juſtice Holt differed from them : he admitted that a covenant or promiſe by the huſband to the wife to leave her ſo much in caſe ſhe ſurvives him is good, becauſe it is only a future debt on a contingency which cannot happen during the marriage, and that is precedent to the debt ; but that a bond debt was a preſent debt, and the condition was not precedent, but ſubſequent, that made it a preſent duty, and the marriage was conſequently a releaſe of it. The caſe afterwards went into chancery. The bond was taken there to be the agreement of the parties, and relief accordingly decreed. 2. Vern. 481. A like decree was made in the caſe of Carnel v. Buckle, 2. P. W. 243.

(3) *If the obligor make the obligee his executor, the obligee may retain ; but that is not applicable to the caſe put here. Therefore he may make an executor at* 17 ; tamen ſupra 89. *b. it is ſaid that it is at* 18. *It ſhould ſeem that the caſe here is underſtood of* 17 *complete*, et ſupra 89. *of* 18 *beginning ; and thus the paſſages agree.* D'Avila Hiſt. *King of France is major at* 14 *beginning. Thus it ſeems that puberty, which by the civil law holds from* 14 *to* 18, *is underſtood of* 18 *beginning ; and thus our law agrees with the civil law*, impubes non licet teſtari *before* 17 *complete, and* 18 *beginning*. Lord Nott. MSS.

ſhall be taken moſt ſtrongly againſt himſelfe, and ſo in the caſe aforeſaid, where the debtor is made executor.

Totum jus, titulum, et clameum. But note, that *jus.* or right, in generall ſignification includeth not onely a right for the which a writ of right doth lie, but alſo any title or claime, either by force of a condition, mortmaine, or the like, for the which no action is given by law, but only an entry. (10. Rep. 47.)

Sect. 446.

ITEM, ceux parolx que ſont communement mis en tielx faits de releaſes, * ſcilicet (quæ quoviſmodo in futurum habere potero) *ſont ſicome voides en le ley; car nul droit paſſa per un releaſe, forſque le droit que le releſſor ad al temps de le releas fait. Car ſi ſoit pier et fits, et le pier ſoit diſſeiſe, et le fits (vivant ſon pier) releſſa per ſon fait a le diſſeiſor tout le droit que il ad ou aver puiſſoit en meſmes les tenements ſans clauſe de garrantie, &c. et puis le pier moruſt, &c. le fits poit loyalment enter ſur la poſſeſſion le diſſeiſor, pur ceo que il n'avoit † droit en la terre ‡ en la vie ſon pier, mes le droit diſcendiſt a luy per diſcent apres le releas fait per le mort ſon pere, &c.*

ALSO, theſe words which are commonly put in ſuch releaſes, *ſcilicet (quæ quoviſmodo in futurum habere potero)* areas voide in law; for no right paſſeth by a releaſe, but the right which the releaſor hath at the time of the releaſe made. (1) For if there be father and ſonne, and the father bee diſſeiſed, and the ſonne (living his father) releaſeth by his deed to the diſſeiſor all the right which he hath or may have in the ſame tenements without clauſe of warrantie, &c. and after the father dieth, &c. the ſonne may lawfully enter upon the poſſeſſion of the diſſeiſor, for that hee had no right in the land in his father's life, but the right deſcended to him after the releaſe made by the death of his father, &c.

NOTE, a man may have a preſent right, though it cannot take effect in poſſeſſion, but *in futuro.* (2)

As hee that hath a right to a reverſion or remainder, and ſuch a right he that hath it, may preſently releaſe. But here in the caſe which *Littleton* puts, where the ſonne releaſe in the life of his father, this releaſe is void, [a] becauſe he hath no right at all at the time of the releaſe made, but all the right was at that time in the father; but after the deceaſe of the father, the ſonne ſhall enter into the land againſt his owne releaſe. (2. Roll. Abr. 400. 8. Rep. Edw. Altham's caſe.) [a] Britton, fol. 101. 17. E. 3. 67. 42. E. 3. 21. 10. H. 6. 4. 25. Aſſ. 7. 27. E. 3. Execution 130. 1. Rep. 112. b.

The baron make a leaſe for life and dieth, the releaſe made by the wife of her dower to him in reverſion is good, albeit ſhee hath no cauſe of action againſt him *in præſenti.* 16. E. 3. Barre 245. Hoe's caſe, 5. part. f. 70, 71.

Sans clauſe de garrantie. For if there bee a warrantie annexed to the releaſe, then the ſonne ſhall be barred. For albeit the releaſe cannot barre the right for the cauſe aforeſaid, yet the warranty may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reaſon (which in all caſes is to be fought out) wherefore a warrantie being a covenant reall ſhould barre a future right, is for avoiding of circuitie of action (which is not favoured in law); as he that made the warrantie ſhould recover the land againſt the ter-tenant, and he by force of the warrantie to have as much in value againſt the ſame perſon: yet is there a diverſity betweene a warrantie and a feoffment; [b] for if there be grandfather, father, and ſonne, and the father diſſeiſeth the grandfather, and make a feoffment in (Sect. 706.) 20. II. 6. 29. [b] 39. II. 6. 43. 21. E. 4. 81. 15. E. 4. 10. Entr. Cong. 21. 9. II. 7. 1. b. 2. E. 3. 38.

* *ſcil.* --- &c. in L. and M. and Roh. † *nul* added in L. and M. and Roh. ‡ *quant il releſſaſſes*, added in L. and M. and Roh.

(1) To prevent maintenance, and the multiplying of contentions and ſuits, it was an eſtabliſhed maxim of the common law, that no poſſibility, right, title, or any other thing that was not in poſſeſſion, could be granted or aſſigned to ſtrangers. —— A right in action could not be transferred even by act of law; nor was it conſidered as transferred to the king by the general transferring words of an act of attainder. (See the marquis of Wincheſter's caſe, 3. Rep. 2. b.) — But a right or title to the freehold or inheritance of lands might be releaſed in five manners. —— 1. To the tenant of the freehold in fact, or in law, without any privity. — 2. To him in remainder. — 3. To him in reverſion. --- 4. To him who had right only in reſpect of privity; as if the tenant were diſſeiſed, the lord, notwithſtanding the diſſeiſin, might releaſe his ſervices to him. --- 5. To him who had privity only, though he had not the right; as if tenant in tail made a feoffment in fee, after this feoffment no right remained in him; yet in reſpect of the privity only, the donor might releaſe to him the rent and ſervices. --- 6. So if the terre-tenants and the perſon entitled to the right or poſſibility joined in a grant of the lands, it would paſs them to the grantee diſcharged from the right or poſſibility. See 10. Rep. 49. b. --- But the common law is altered in the above inſtances in many reſpects. — On the aſſignment of things in action, ſee ante note 1. to p. 232. b. A contingent remainder in real eſtates can only be transferred by a fine or a common recovery, in which the remainder man comes in upon the voucher. — Contingent intereſts in terms of years, and other perſonal eſtates, have been held to be aſſignable by deed for a valuable conſideration. See Mr. Fearne's Eſſay on Contingent Remainders. The paſſage in the text was cited by lord chief-juſtice Trevor, in delivering his opinion on the caſe of Arthur v. Bokenham, (Fitzgib. 234.) with an obſervation, that the doctrine laid down there by Littleton had never been contradicted.

(2) This doctrine was fully inveſtigated in the caſe of Dormer v. Forteſcue, Vin. vol. 18. fol. 413. 3. Atk. 135. Bro. Par. Caſ. v. 4. 353. 405. The caſe there was, that an eſtate was limited to the uſe of *A.* for 99 years, if he ſhould ſo long live; and after his deceaſe, or the ſooner determination of the eſtate limited to him for 99 years, to the uſe of truſtees and their heirs, during his life, upon truſt to preſerve the contingent remainders; and after the end or determination of that term, to the uſe of *A.*'s firſt and other ſons ſucceſſively in tail male, with ſeveral remainders over. *A.* having a ſon, they joined in levying a fine and ſuffering a common recovery, in which the ſon was vouched. If the truſtees took a veſted eſtate of freehold during the life of *A.* the recovery was void, there not being a good tenant to the præcipe; but if they took only a contingent eſtate, the freehold was in the ſon, and of courſe there was a good tenant to the præcipe. Upon this point the caſe was argued in the court of king's bench, and afterwards on appeal before the houſe of lords, where all the judges were ordered to attend. Lord chief-juſtice Lee, when the cauſe was heard in the king's bench, and lord chief-juſtice Willes, in delivering the opinion of the judges in the houſe of lords, entered very fully into the diſtinction between contingent and veſted remainders.—They ſeem to have laid down the following points. That a remainder is contingent, either where the perſon to whom it is limited is not *in eſſe*; or where the particular