THE TOVCH-STONE OF Common Aſſurances.

OR,

A PLAIN AND FAMILIAR Treatiſe, opening the learning of the *Common Aſſurances* or *Conveyances* of the KINGDOME.

BY

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a caſtle may paſſe by his own proper name, as *de caſtello de S. cum pertin'*, ſo alſo may a hundred paſſe by his own name, as *de hundredo de S.*

A view of franke pledge and ſuch like things may alſo paſſe by their own names, as *De viſ. frank' pleg' bonorum et catallorum, waiviarum, felon' fugitivorum, utlagat. in exigen' poſitorum, felon' de ſe, deodand. theſaur' invent' ac extrahur' cum pertinen' in M.* West. ubi ſupra.

By the name of a meſſuage may paſſe a houſe, a curtilage, a garden, an orchard, a dove-houſe, a ſhop, a mill as parcell of the ſame. The like of a cottage, a toft, a chamber, a cellar, &c. Yet theſe may paſſe by their own ſingle names alſo, as *De uno meſſuagio, uno curtilagio, &c.* Plow. 169. 171.

A Chappell or an Hoſpitall muſt be demanded in a fine, and may paſſe by the name of a meſſuage. 13 Aſſ. pl. 2.

A Reverſion of land may paſſe by the name of a Reverſion, or by the name of the land it ſelfe. 43 E. 3. Br.

A Foldage may paſſe by the name of *De libertate unius Faldagii et curſu ovium cum pertinen' in F.* or *de libero Faldagio ovium cum pertinen' in F.* or *de libera Falda.* West. ubi ſupra.

Land, Meadow, or Paſture, Wood and the like, may paſſe by a certain number of acres, or by the certain meaſure of the ſuperficiall quantity thereof, as *De Hida, Carucata, bovata, Virgata, Acra, Roda, Furlingo terræ*, Houſe-boot, Hay-boot, and Plowboot may paſſe by the name of Eſtovers, as *De rationabili eſtoverio in boſcis, viz. in decem acris boſci ipſius A. in D.* And a fiſhing may paſſe by the name of *Separali piſcar' in aqua de S.* 16 Aſſ. 9. West. Symb. ubi ſupra.

And High-wood and Underwood may paſſe by the name of wood, as *de 20. acris boſci, &c.*

Parſonages, Rectories, Advowſons, Vicarages, or Tithes impropriate paſſe not by the names *de advocatione Eccleſiæ*, but *de Rectoria eccleſiæ de S. cum pertinen'*. But when the fine is but of a preſentation to a Church onely, it muſt be *de advocatione eccleſiæ de S.* and not *cum pertinen'*, and of all Vicarages endowed the writ muſt be *de advocatione vicariæ eccleſiæ de S.* and not *cum pertinen'*, and where no vicarage is indowed, it muſt paſſe under theſe words, *de advocatione eccleſiæ de S. &c.* West. Symb. ubi ſupra.

If part of an entire thing paſſe, it muſt paſſe by theſe words, *de medietate, tertia parte, quarta parte, &c.* as the Caſe is, as *de duabus partibus in tres partes dividend. 8. acr. terræ*, or *de medietate omnium decimarum, granorum et fœni de ter' vocat' le Blacklands cum pertinen. in H.* But if an entire thing as a Manor or Meſſuage be parted, as if the Manor of *S.* be divided into two parts, (if the diviſion be ſo made that the Manor of that part be not extinct) and a fine be to be levied of a part of it, it muſt paſſe by the name of the whole, as *de manerio de S.* So if a Meſſuage and 23. acres be parted, the part divided ſhall paſſe by the name of one Meſſuage and 10 acres of land

land, and not by the name *de medietate unius meſſuagii et viginti acr' ter'*. And if things be otherwiſe named then as before, ſometimes the fine will thereby loſe his force in all and ſometimes in part. But if a thing be twice named in a writ of covenant, as a Manor, and a Hundred parcell of the ſame, this will not hurt the fine.

Broo. Fines 44.91. 9 E.4.6. The things that do paſſe by the fine muſt be named to lye in the Shire, Town, Pariſh, or Hamlet, where it doth lie, for a fine is good, albeit it name the lands to lie in a Hamlet, or in a town decayed; but it is good to name the town wherein the Hamlet is, and that with addition for diſtinction if there be divers towns, of the ſame name in that county. And if a Manor extend into divers Towns as into *A. B.* and *C.* it is good to expreſſe all or none, as *de Manerio de S. in A. B.* and *C.* For if any of the towns be omitted, none of the Manor in that town will paſſe, but if the fine be of the Manor of *S. cum pertinen'* and ſay not where it lieth, this fine will cary the whole Manor. And if there be divers Manors of one name, as *South S.* & *North S.* or the like, it is ſafe to ſet down in the writ for the fine w^ch Manor is intended to be paſſed, howſoever the fine may be good of the Manor intended to be paſſed without the diſtinction.

7 H.6. 39. Plow. 163. Regiſt. 2. The order of placing things in fines is, Firſt, to ſet down the moſt worthy things before things leſſe worthy, as a Manor before a Meſſuage, a Caſtle before a Manor, a Houſe before land, arable land before meddow, meddow before paſture, &c. Secondly, to ſet down things generall before things ſpeciall, as land (being the *Genus* of meddow, Paſture, wood, &c.) before them, wood (being the *Genus* to wood grounds, as *alnetum, ſalicetum*) before them. Thirdly, to ſet down entire things before parts of things, as *de Manerio de S. & medietate Manerii de B.* Fourthly, to ſet down particular things after this manner.

ſuagium, tum, tendinum, umbare dinum, ra, tum, tura tus, ra
Meſ, Tof, Mol, Col, Gar, Ter, Pra, Pas, Boſ, Brue, Mora,
ria, cus, tum caria, ditus,
Iunta, Mariſ, alne, ruſ, red, Sectare priora.

And yet if this order be not obſerved, but the things be otherwiſe placed in the writ, if it be ſuffered to paſſe, the Fine will be good enough.

4. In reſpect of the eſtate of the parties thereunto.

Stat. 27 E.1. ch. 1. 41 E.3. 14. 44 E.3. 36. 39 E.3. 16. 17 E.3. 23. 24 E.3. 16. If either the Cogniſor or Cogniſee at the time of the Fine levied be ſeiſed of any eſtate of freehold in fee ſimple, fee taile, or for life, in poſſeſſion, reverſion, or remainder, whether the ſame be by right or wrong, the fine will bee a good fine in this reſpect. And therefore if one that is ſeiſed of land in fee ſimple, or fee taile, generall or ſpeciall, levy a fine of this land to a ſtranger, this is a good fine. So if a Strangere levy a fine to him of this land, this is a good fine. So alſo a fine levyed by, or to, a tenant for life of the land he doth ſo hold

TO THE RIGHT
VVORSHIPFULL
the *Benchers* of the *Middle Temple*,
and to the reſt of the *Gentlemen* of
that SOCIETY.

GENTLEMEN,

I May perhaps have been ſo long out of your ſight that I may be alſo by this time out of your minde. Nevertheleſſe it is not out of my mind, that I having received the ſeed and growth of that little knowledge in the lawes of this kingdome which God hath given me in the ſeed-plot of your ancient and honorable Society, doe no leſſe (by a naturall equity) owe the fruit thereof to you then the Rivers doe their tribute to the Ocean, and the trees their fruit to the planters and pruners. This therefore (ſuch as it is) although unworthy of ſo great a name, I am bold to dedicate to you, and put forth under the ſhelter of your favourable wings; beſeeching you to accept thereof, and my well meaning therein, and to honour it with your patronage and countenance. And it ſhall much oblige,

(*Gentlemen*,)

Your moſt humble

Servant

W. S.

To the *READER.*

COurteous Reader, I doe deſire in all plainneſſe to bee underſtood, that having in the time of my ſtudy of the Lawes of this Realme, collected ſome confuſed Notes and Obſervations out of the ſame: And being afterwards willing (for God knows, I had no further end or aim at firſt in them) for mine own private help and better readineſſe to digeſt them into ſome order and method, ſuch as my underſtanding could beſt contrive. The which things thus prepared and lying by me, came by chance to the view of ſome more learned then my ſelfe, who ſeemed to give ſome good approbation thereunto. Whereupon I firſt of all began to bethink my ſelf of making ſome part thereof publique. And having to that purpoſe adviſed with ſome of my more judicious friends, and being encouraged by ſome, and not diſcouraged by others, I did at laſt reſolve to attempt to publiſh and put in print the ſame. And calling to mind that the Common Aſſurances and Conveyances of the Kingdome (being that whereupon the whole eſtates, and conſequently the livelihoods of very many depend) are matters of great importance and that concern moſt men; and that therefore the legall learning thereof muſt needs be of great and daily uſe. And conſidering withall the miſchief ariſing every where by the raſh adventures of ſundry ignorant men that meddle ſo much in theſe weighty matters, there being now almoſt in every Pariſh an unlearned, and yet confident Pragmaticall Atturney (not that I thinke them all to be ſuch) or a lawleſſe Scrivener, that may perhaps have ſome Law Books in their houſes, but never read more Law then is on the backſide of *Littleton*, or an ignorant Vicar, or it may be a Blackſmith, Carpenter, or Weaver, that have no

more books of Law in their houſes, then they have Law in their heads, and yet as apt and able(if you will beleeve themſelves) either to judge of a Conveyance, and by the rules of Law (of all which they are utterly ignorant) to determine of the ſtrength and goodneſſe of a title or eſtate already made, or to make a Conveyance to transferre the property of things from man to man, as the moſt learned and beſt Counſellour of them all; and therefore undertake with great confidence, and diſpatch without any ſcruple any buſineſſe whatſoever offered to their hands: wherein they deale with men in their eſtates, as many that are called Phyſitians (but in truth Empericks) deal with men in their bodies (an evill fit for the conſideration of a Parliament). How they come to this their ſuppoſed dexterity and skill is a wonder, except that ſaying be falſe, *Nemo naſcitur artifex.* Either it muſt be born with them, or they muſt have it by education, or they muſt not have it at all. But if they will tell me they have good preſidents, I will tell them that a good Conveyancer muſt be as well able to judge of the validity of the title, and primitive eſtate of him that is to convey (which a man can never doe without knowledge of the rules of Law, no more then a blind man can judge of colours) as to make a derivative eſtate and conveyance by a good preſident; for *ſcire eſt per cauſas ſcire,* as the Philoſopher ſpeaks. And as well, for ought I know, may a man be an able Phyſitian by certain medicines onely that never read ſo much as the grounds of Phyſick, as ſuch men be able Conveyancers by their Preſidents only, that never read ſo much as the maximes of Law: *Nullum medicamentum idem eſt in omnibus.* For my part I muſt ingenuouſly profeſſe that I can ſcarce look into a Title or meddle with a conveyance of weight wherein I cannot make and move more doubts and queſtions, then I am able to reſolve and anſwer; and therefore theſe men have gotten the ſtart of mee much. And yet (much marvel it is to ſee) how theſe Empericks of the Law (if I may ſo call them) are ſought unto and made uſe of, and that not only in leſſer, but oft-times in greater and more weighty buſineſſes, and that without the aſſiſtance of any others more able and ſufficient; the which is not for lack of opportunity of finding more learned men in the Law, for there

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is a ſufficient ſtore of them in all places: nor doe thoſe that employ theſe Empericks of the Law always ſave (if they think it ſaved) mony hereby, for beſides the great miſchief which is oft-times done to themſelves by the unskilfulneſſe of theſe workmen, ſome of them by reaſon of their much cuſtome are grown more chargeable then an ordinary Counſellor, whoſe fee is certain and known. But of theſe Empericks of the Law and thoſe that make uſe of them, I might ſay as ſometimes our bleſſed Saviour ſaid, *Let them alone the blind leaders of the blind.* Howbeit being now called (as I conceive hereunto) I chuſe rather to admoniſh them and to tell the firſt ſort, That I conceive them to be uſurpers upon, and intruders into other mens callings, and that they thruſt their ſickles into other mens harveſt, & that they have not yet learned that rule of Divinity, *To abide in the calling wherin they are called*, but exerciſe themſelves in things too high for them; nor yet have they learned this, *Ne ſutor ultra crepidam*, Let not the Cobler goe beyond his laſt; nor have they learned that, *In quo quiſque norit in hoc ſe exerceat.* And let me tell the latter ſort, That they heed not enough this ſaying, *Caveat Emptor*; nor beleeve that ſaying, *Cuicunque in arte ſua credendum*, that every man is to be beleeved in his own art. But if you will ſay to me, That theſe men doe their work well, and their work doth ſucceed well: I will ſay to you, that the blinde man may happily hit the mark, and it may fall out that ſometimes they doe their work well, and it doth ſucceed well, but oft-times wofull experience ſheweth the contrary, and that many men have been much miſchieved every where by the ignorance of theſe men. Wherfore I wiſh both ſorts of them to doubt more and to be well adviſed in theſe affairs, as the Law doth preſume every one will be; for therefore is it indeed that a Will hath a more favourable interpretation then a Deed, becauſe mens Wils are oft-times made in haſt, and it is preſumed men take who they can to make them; but men for the making of their Deeds are not put upon thoſe ſtraits, but they take adviſe of learned men therein. And the more to move men herein and to redreſſe the evill before diſcovered, I have herein ſet forth under certain generall Titles or Common Places, the greateſt part of the Judgements, Statutes, Reſolutions, and Ca-

ſes that doe contain or concern the learning of the Common Aſſurances of the Kingdome, ſo as I think I may truly ſay, under reformation, that there are few materiall things as touching this ſubject to be found any where diſperſed in the Volumes of the Law, but they are to be found ſomewhere herein, and that there ſhall not happen one Caſe of a hundred but a hundred to one the diligent Reader may here finde the Caſe it ſelf, or ſome Caſe that by good inference may be applied to it. Not that I would have men now to reſt upon this help, and be leſſe carefull and more careleſſe to take advice of the Lawyer then heretofore (for this is the diſeaſe I labour to cure), for howbeit it may be that hereby theſe matters are made in ſome meaſure conſpicuous, yet to ſay the very truth, beſides that the ſubject matter of Law is ſomewhat tranſcendent, and too high for ordinary capacities, the manner of putting of Caſes is ſo conciſe, the diſtinctions and differences of Law are ſo many, that it is hard for any man not well read in the Laws in generall, to judge or make uſe of any part of them in particular, and rightly and fully to apprehend and apply the things herein ſet forth: and therefore I dare not adviſe men to reſt altogether hereupon, nor can I forbear to tell them it is very dangerous ſo to doe. But my aim and ends being alſo the uſes and commodities I expect and looke after from this work, is firſt of all, that ſuch men before ſpoken of, may ſee by the view of the infinite variety of Caſes, Points, and Queſtions, as touching theſe matters, diſcovering alſo ſo many by-ways wherein men converſant therein may walk, how much there goes to making up of an able Conveyancer, and that it is not ſo eaſie a matter to judge of a Title, give advice upon a Conveyance, and make theſe Common Aſſurances as men dream of, and that therefore men learn more to ſuſpect themſelves and others herein; and to theſe it may ſerve as a light in a dark place. Secondly, that by this the Lawyer and Student may in ſome meaſure readily finde together what he deſires touching theſe matters; and to him it may ſerve for a Table or Remembrancer. And laſtly, that every man may be the better able by the help hereof to underſtand, open, & put his own caſe to his Lawyer, and to move more pertinent queſtions to him: and other uſes I would have no man to make

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of it. In the uſe of this work therefore I muſt give thee two Advertiſements or Caveats. Firſt, that if thou deſire to find any thing in particular therein contained, that thou read the whole Chapter, or at leaſt the whole Queſtion and Diviſion of the Chapter wherein that thing is contained. And ſecondly, that thou doeſt not confidently build and rely upon any thing therein alone without advice from the learned Lawyer alſo, or at the leaſt without a ſerious and judicious peruſall of the Authorities & Books themſelves to which thou art therein referred: *Melius eſt petere fontes quam ſectari rivulos.* Some other things there are alſo herein inſerted as falling aptly under the Title, albeit it bee not altogether pertinent to the ſubject matter. And all theſe ſweet flowers of the Law growing *ſparſim* in the great fields of the Volumes of the Common and Statute Laws have I thus painfully gathered, bound up, & commended to thy charitable cenſure: no doubt but in my deſire to graſp and take up ſo much, I have taken and bound up ſome graſſe withall, which I hope ſhall not offend. If ſo be that I finde it have a fragrant ſmell with thee, I ſhall think I have recompence enough for my pains. But if any man think me too preſumptuous to attempt this enterpriſe; let him know firſt, that there is nothing mine in it, but the method, (and that not mine neither altogether) the matter thereof being nothing elſe but the Judgements, Reſolutions, and Opinions of the Judges of the Law in ſucceeding times: and then as I have not truſted my ſelfe, ſo they ſhall not truſt me altogether in theſe things. For I doe freely acknowledge mine own weakneſſe and want of judgement, and that I am the unmeeteſt and unworthieſt of all men to undertake ſuch a work, not one of a thouſand, but the meaneſt of ten thouſand. And this I have done is a poor ſomething ſufficient onely to give them that are more learned occaſion to doe ſomething more exactly in this kind. If any man diſlike the publiſhing of it in the Engliſh tongue, and think perhaps it may make the Law to be the more deſpiſed, and the Practitioner of the Law the leſſe regarded and uſed: I doe wonder at the diſlike of ſuch a man; for to me there appears no more reaſon why to keep the Lawes in an unknown languange that they may be kept from the knowledge of the people, then Papiſts

piſts have to keep the Scriptures and their prayers in a language unknown to the people; theſe being the Laws by which the people are to be governed, and the Law being the beſt inheritance of the Subject. The wiſdome of the Parliament hath thought to commend all the Statute Laws to the people in Engliſh, and to appoint that the pleadings ſhould be in Engliſh. And have we not many Books of Law in Engliſh already, as *Littletons Tenures*, *Doctor* and *Student*, *Finches* Law, Juſtice *Dodridge* Treatiſes, *Coke* upon *Littleton*, the *Womans Lawyer*, and many others? and are not theſe uſefull and profitable? And beſides the greateſt part of the proceedings in Chancery (the Court of greateſt employment within the Kingdome) are in Engliſh. And if it be meet any part of the Law be in the native tongue, it ſhould ſeeme it is meet this part ſhould be ſo, becauſe it concerneth ſo many men, and them alſo ſo much, that they may ſee and underſtand ſomewhat in their own Evidences. And therefore as we have turned their Deeds from Latine to Engliſh, ſo let us alſo turne ſome of the Law touching theſe Deeds out of French into Engliſh. *Bonum quo communius eo melius.* And I ſee no more reaſon why in Law more then in Phyſick the diſcovery of the Art ſhould make the Art or Artiſt the leſſe regarded. But (under correction) I ſhould rather think that it will rather make them both the more eſteemed: as a jewell whoſe properties are known, and that it will make them the more, and other men we have before ſpoken of the leſſe to be uſed and employed in their affairs, for the more men know, the leſſe they think they know, and the more they doubt, and nothing moves men to be ſo bold and confident in theſe matters as their ignorance, according to the Proverb, *Who ſo bold as blind Bayard?* And for further anſwer to this, I wiſh men to ſee the Preface to the Lord *Coke* upon *Littleton*. And if any man have any thing elſe to object and except (for ſome there are that will neither put forth their own ſtrength to doe good, nor bear with others that doe ſo) I wiſh them to undertake the ſame ſubject, and to perfect and ſupply my defects. And ſo committing thee to God, and this work to thy favourable cenſure, I am

Thy true friend
W. S.

THE

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THE TOVCH-STONE OF Common Aſſurances.

CHAP. I.
Of Common Aſſurances in generall.

THe Common or Generall Aſſurances or Conveyances of the Kingdome (being that by which commonly the property of things is made or changed) are of two ſorts, or are made two manner of waies, *viz.* either by matter of Record, or by matter of Deed. Thoſe that are made by matter of Record alſo are made either by matter of Record of a more high nature and extraordinary way, or by matter of Record of a more low nature and ordinary way. Thoſe Aſſurances that are made by matter of Record of a more high nature are ſuch as are made by Act of Parliament, of which we intend not to treat at all, neither doe we intend to meddle with thoſe Aſſurances that are made by the King unto his Subjects, as being matters more tranſcendent and intricate; but thoſe we intend to treat of are onely the common Aſſurances or Conveyances that are made between Subject and Subject, and are of ordinary and daily uſe for the transferring of the property of lands, tenements and hereditaments from one man to another. And of theſe there are obſerved to bee tenne kinds, two whereof are made by matter of Record, as a Fine, which is ſaid to be a feoffment of Record, and a common recovery, which is in the nature alſo of a feoffement of Record: and the reſt are by matter of Deed, as Firſt, by feoffement. Secondly, by Grant. Thirdly, by Bargain and Sale by deed indented and inrolled. Fourthly, by Leaſe. Fiftly, by Exchange. Sixthly, by Surrender. Seventhly, by

Releaſe or Confirmation, both which are in nature of Grants. Eighthly, by Deviſe, or by laſt Will and Teſtament. And ſome of theſe alſo ſerve to transferre the property of other things as well as of lands; and ſome of them alſo have other operations and uſes, as well as to change and alter property and paſſe things from one man to another, as will appear in their proper places. And the firſt thing we ſhall beginne upon ſhall be the learning of a Fine and Common Recovery, and firſt of a Fine.

CHAP. II.

Of a Fine.

Fine, *quid.*

THis word is ambiguouſly taken in our Law, for ſometimes it is taken for a ſumme of money or mulct impoſed or laid upon an offender for ſome offence done, and then alſo it is called a ranſome. And ſometimes it is taken for an Income or a ſumme of money paid at the entrance of a tenant into his land. And ſometimes it is taken for a finall agreement or conveyance upon Record for the ſetling and ſecuring of lands and tenements. And in this ſenſe it is taken here; and ſo it is defined by ſome to be, An acknowledgement in the Kings Court of the land or other thing to bee his right that doth complain. And by others, A Covenant made between parties & recorded by the Juſtices. And by others, A friendly, reall and finall agreement amongſt parties concerning any land or rent or other thing whereof any ſuit or writ is hanging between them in any Court. And by others more fully, An inſtrument of Record of an agreement concerning lands, tenements or hereditaments, duly made by the Kings licenſe and knowledged by the parties to the ſame, upon a writ of covenant, writ of right, or ſuch like, before the Juſtices of the Common Pleas or others thereunto authoriſed, and ingroſſed of Record in the ſame Court, to end all controverſies thereof both between themſelves which be parties and privies to the ſame, and al ſtrangers not ſuing or claiming in due time. And in every Fine there is a ſuit ſuppoſed, wherein the party that is to have the thing is called the Plaintiffe, & ſometimes alſo in another reſpect the conuſee or Recogniſee, & the other that doth depart with the thing is called the Deforceant, & ſometimes in another reſpect the Conuſor or Recogniſor. And it is therfore ſaid to be *Finalis cõcordia, quia finem ponit negotio adeò ut neutra pars litigantium ab eo de cætero poſſit recedere.* And it was anciently the end of a ſuit indeed, for after there had been ſome contention about the thing by ſuit, the parties became agreed who ſhould have it, and ſo a fine was levyed of it, and there was an end of the matter; and hence it is ſaid to be *fructus* or *effectus legis*, becauſe

Termes of the law, tit. Fine Co. upon Lit. 126, 127. 120 Plow. 357. Weſt. Symb. part 2. chap. 1.

Conuſee or Recogniſee. Conuſor or Recogniſor Deforceant.

becauſe it gives a man the fruit or effect of his ſuit. And to this day therefore a writ doth alwaies goe forth before a fine can be levyed, and this is now one of the common Aſſurances of the Kingdome.

Co. 5. 38. 43. Stat. 5 H. 4 ch. 14. There are five eſſentiall parts of a Fine. Firſt, the originall writ taken out againſt the conuſor, for without this a fine cannot be levyed. Secondly, the Kings licenſe for the levying of the fine, and for this the King is to have a fine or ſumme of money, which is called Kings ſilver, for this is properly that money which is due to the King, in the Court of Common Pleas, in reſpect of a licenſe there granted to any man for paſſing a fine. And this is part of the revenues of the Crown. Thirdly, the Conuſance or Concord it ſelfe which is the very agreement between the parties that intend the levying of the fine how and in what manner the thing ſhall paſſe, and doth begin thus; *Et eſt Concordia talis, &c.* And this is the foundation or ſubſtance of the fine, for if upon this the Kings ſilver be entred, albeit the Conuſor die afterwards, yet the fine is good, and the note or foot of the fine are but abſtracts out of this. Fourthly, the note of the fine, which is an abſtract of the originall Contract or Concord, and doth beginne thus. *Inter A. querentem et B. et C. deforcientes, &c.* Fifthly, the foot of the fine, which doth begin thus. *Hæc eſt finalis Concordia, &c.* and containeth all the matter, the day, yeere, and place, and before what Juſtices it was levied, which is therefore called the Foot of the fine becauſe it is the laſt part of it, and when this is done all is done. And of this there are indentures made by the Chirographer and delivered to the party to whom the Conuſance is made, which is called the Ingroſſing of a fine, for then a fine is ſaid to be ingroſſed when the Chirographer makes the indentures of the fine, and doth deliver them to the party to whom the Conuſance is made.

The parts of it.

Kings ſilver. *Quid.*

Concord *Quid.*

Note of the Fine. *Quid.*

Foot of the Fine. *Quid.*

F.N.B. 147. a. Co. 5. 39.

Ingroſſing of the Fine. *Quid.*

Weſt. Symb. part 2. Sect. 19. Dyer. 216. Plowd. 265. Stat. 4 H. 7. chap. 24. 1 R. 3. ch. 7. Co. 3. 86. Stat. 32 H. 8. chap. 36. A Fine is either without Proclamations, which is alſo called a fine at the common law, and this is ſuch a fine as is levyed after ſuch manner and forme as fines were uſually levyed before 4 *H.* 7. upon which no Proclamations were made, which fine doth ſtill remain of the ſame force as it was at the common law to diſcontinue the eſtate of the Cogniſor if it be executed. Or it is with Proclamations, which is alſo called a fine according to the Statute, and which is ſuch a fine as is levyed with Proclamations after the forme and manner ordained by the Statute of 4 *H.* 7. *chap.* 24. (and ſuch a fine ſhall every fine that is pleaded intended to bee if it bee not ſhewed what fine it is, and of this ſort were and are moſt fines ſince 4 *H.* 7. as being the beſt kind of fine of all; and it is in the election of him that ſueth out the fine as long as he liveth to have it with, or without Proclamations. A fine alſo whether with or without Proclamations, is either executed, which is ſuch a fine as of his owne force giveth a preſent poſſeſſion (or at the leaſt in law) unto the cogniſee, ſo

Quotuplex.

that he needeth no writ of *Habere facias ſeiſinam* or other means for the execution thereof; but he may enter: of which ſort is a fine *Sur cogniſance de droit come ceo que il ad de ſon done*, which is in very deed the beſt and ſureſt kind of fine of all, and is thus, *Et eſt concordia talis, ſcilicet quod prædict' A. recognoverit tenementa prædict' cum pertinen' eſſe jus ipſius B. ut ill' quæ idem B. habet de dono prædict' A. & ill' remiſit, &c.* And this kind of fine doth alwaies ſuppoſe a feoffement, or gift precedent of the ſame thing whereof the fine is had, which the fine is to corroborate and ſtrengthen. Or it is executory, which is ſuch a fine as of his own force doth not execute the poſſeſſion in the cogniſee, and of this ſort is a fine *Sur cogniſance de droit tantum*, when the party that doth levy the fine is ſeiſed of the thing, and hee to whom the fine is levyed hath no freehold therein but it paſſeth by the fine: and a fine *Sur Done, Grant, Releaſe, ou Confirmation*, which is after this manner. *Et eſt concordia talis ſc. quod prædict' A. conceſſit et reddidit tenementa prædicta cum pertin' præfat' B. et hæred' ſuis durante vita ipſius A. Et prædict' A. warrant' præd' cum pertin' præfat' B. & hæred' ſuis tota vita ipſius A.* Or thus, *Et eſt, &c. quod præd' A. conceſſit præd' B. tenementa, &c. Habend' eidem B. pro termino vitæ ſuæ.* Or thus, *Et eſt, &c. quod præd' A. recognoverit tenementa prædict' cum pertinen' eſſe jus ipſius B. & ille ei reddidit in eadem curia habend' &c.* Or a fine *Sur Done, ou Grant et Render.* Which is thus, *Et eſt concordia talis, ſc. quod prædict' A. recognoverit, &c. ut ill' quæ idem B. habet de dono prædict' A. et ill' remiſit, &c. Et pro hac prædict' B. conceſſit tenementa prædict' cum pertinen' præfat' A. Et ill' ei reddidit in eadem Curia habendum et tenend', &c.* And if theſe kinde of fines be not levied or ſuch Render made unto them that be in poſſeſſion at the time of the fines levyed, the Cogniſees muſt enter or have writs of *Habere facias ſeiſinam*, according to their ſeverall Caſes for the obtaining of their poſſeſſions. But if at the time of levying of ſuch an executory fine the party unto whom the eſtate is limited be in poſſeſſion of the lands paſſed, he ſhall not need any writ of execution to put him in poſſeſſion, for then the fine will enure by way of extinguiſhment of right, and doth not alter the eſtate or poſſeſſion of the Cogniſee, however perchance it doth better it. The fine *Sur conuſance de droit tantum*, alſo doth ſerve ſometimes to make a ſurrender, and then it is therein recited that the Conuſor hath an eſtate for life, and the conuſee the reverſion: and ſometimes it doth ſerve to grant a Reverſion, and then the particular eſtate is recited to be in another, and that the Conuſor willeth that the other ſhall have the reverſion, or that the land ſhall remain to the other after the particular eſtate ſpent: a fine alſo is either ſingle, which is ſuch a fine by which an eſtate is granted to the Cogniſee and nothing granted or rendred back again to the Cogniſor by the Cogniſee. Or it is double, which is ſuch a fine as doth contain a grant, and render back again either of the land

Co. 7. 32.

Vide infra.

it

it ſelfe, or of ſome rent, common, or other thing out of it to the Cogniſor for ſome eſtate, limiting thereby many times remainders to ſtrangers which be not named in the writ of covenant, which alſo is ſometimes with reſervation of rent, clauſe of diſtreſſe, and grant of the ſame over.

Experientia. Stat. de modo levandi Fines 18 E. 1 Weſt Simb. ut ſupra. 1 H. 7. 2. Broo. Fine 116.

4. The manner & order of levying of a Fine.

The manner and order of ſuing out or levying of a fine is thus. Firſt, there is an originall writ ſued out, and this may be a writ of *Meſne*, *Warrantia cartæ*, *de conſuetudinibus et ſervitiis*, or any writ of right (for upon theſe or any other writ whereby land is demanded or may be recovered, a fine may bee levyed) but the moſt uſuall writ whereupon a fine is levyed is a writ of covenant. And whiles this writ is depending, for howſoever it be the common practiſe to take out a *Dedimus poteſtatem*, and have the conuſance of a fine before any originall writ be ſued forth, yet the originall writ is alwaies ſuppoſed in law to precede the *Dedimus poteſtatem*, and therefore doth and muſt evermore beare *Teſte* before it, or elſe it is erroneous. After the originall writ ſued forth, there is a *Precipe*, which is the tituling of the writ whereupon the fine is levyed, and the concord and agreement of the parties, both which are fairly written (and that moſt commonly in parchment:) after this, the partie or parties that is or are to knowledge and levy the fine is or are to come in perſon before him or them that have power to take the ſame conuſance; who are to take notice of the perſons, that if there be any woman that hath a husband amongſt the conuſors in the fine, they doe examine her whether ſhe be willing and doe it freely without compulſion of her husband. After this, all the parties that are to levy the fine are to declare themſelves before the Judges or Commiſſioners (having power to take the ſame conuſance) to be willing to paſſe their right in the lands according to the agreement, and to ſubſcribe their names or markes to the concord: and if it be taken by a ſpeciall *Dedimus poteſtatem*, it is to be returned and certifyed under the hands and Seales of the Commiſſioners into the Court of Common Pleas, that it may be there recorded and finiſhed. And there the party Conuſee is firſt to compound with the King for his licenſe, for which he is to pay the Kings ſilver, and thereof he is to have an entry on the back of his writ of Covenant, and then he is to have it inrolled by the *Cuſtos brevium*, and upon this roll the Proclamations are to be indorſed: after this, it is to be brought to the Chirographers, who is firſt to make that Note thereof that is called the Note of the fine: and hereupon if it be a Remainder, Reverſion, Rent or Seigniorie whereof the fine is levyed the writ of *Quid juris clamat*, *Per quæ ſervitia*, *Quem redditum reddit*, as the caſe requireth, muſt be ſued forth. And after this, the Chirographer is to enter the fine of record to ingroſſe it, and to make and to deliver the Indentures thereof unto the Conuſee, and if it be a fine with Proclamations, it is

to be proclaimed openly in the Court of Common Pleas once every one of the four termes next after the ingroſſing of it, (and it was to be proclaimed within the County where the land did lye at every aſſiſes and ſeſſions the next yeere after the ingroſſing of it, but this it ſeemes is not neceſſary now) and the next terme after the ingroſſing of it the contents thereof are to be recorded in a Table (made for that purpoſe) to be ſet up in the court of Common Pleas at Weſtminſter in an open place all the terme time, and ſo alſo at every aſſiſes, the fine may alſo be inrolled and exemplifyed.

5. The nature, uſe, and fruit of a Fine.

A Fine is a Record as of great antiquity, ſo of a high nature, great force, and much credit and eſteem; and it is now become and ſerves for a formall conveyance of land, and one of the common aſſurances of the kingdome, for by this meanes a man may convey his land to another in fee ſimple, fee taile, for life or yeers, with reſervation of rent alſo. It is therefore called a Feoffement of record, for it doth countervaile a feoffement with livery of ſeſin in the country, and it includeth all that the feoffement doth; and worketh further of his own nature, and it is indeed for many purpoſes the beſt and moſt excellent aſſurance of all others, for by the ancient common law it was ſo high a barre, and of ſo great force, and of ſo ſtrong a nature in it ſelfe, that it did conclude and barre not onely ſuch as were parties and privies thereto and their heirs, but all others of full age, out of priſon, of good memory, and within the four Seas the day of the fine levyed, if they did not make their claim within a yeer and a day. And it is ſtill of that force, albeit it be ſomewhat enfeebled by ſome Statutes, that either it paſſeth all the right and intereſt of the Conuſor to the conuſee, or elſe it worketh by way of extinguiſhment and eſtoppell, and doth perpetually barre the Conuſor and his heires of all preſent and future right and poſſibility of right or other collaterall benefit to the thing whereof the fine is levyed. And if it be a fine with Proclamations it doth in time become a perpetuall barre to all others alſo, that have right, except they doe take care to prevent the barre by their claime, action, or entry, within five yeers after the proclamations ended. And it barreth Intailes peremptorily whether the heire do claim within five yeeres or not, if he make his claime by him that levyed the fine.

Statute of Fines 18 E. 1. Co. 1. 3. Plow. 358. 265.

6. What ſhall be ſaid a good Fine, or not: and how.
1. In reſpect of the perſons thereunto and their capacity. And by, or to, who a Fine may be levied, & who

Any perſon male or female, body ſole, or corporate, that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a conuſor therein, but there are certain perſons prohibited by law, which the Judges or Commiſſioners that take the conuſance of fines ought not to admit or receive, and yet if they doe admit them, and a fine be levyed by ſuch perſons, the fine is good and unavoidable, *Fieri non debet ſed factum valet*: and of this ſort are mad men, lunatikes, villaines, Ideots, men that have the Lethargy, doting old perſons that want diſcretion, drunken men, and men that are forced to

Weſt. Symb. in his Tract of Fines. 17 E. 3. 52. 17 Aſſ. pl. 17 Litt. Sect. 731. Perk. Sect. 24. Fitz. Fines 120. See in grant infra chap. 12. Numb. 4.

it.

it by threatning, imprisonment or the like, also such as are born blind, deafe and dumbe, but a man that becomes so accidentally may be received and ought not to be refused. Also persons attainted of felony or treason ought not to bee received to levy a fine, but such persons being admitted to levy a fine, the fine will be good against all persons but the King and the Lord of whom their lands whereof the fine is levyed, are held for their times: but persons waived or outlawed in personall actions onely ought not to be refused. [a] Also Infants ought not to be received to levy a fine, and yet if an Infant be admitted to levy a fine, and he doe not avoid it by writ of error during his minority (as he may if it be not a fine *Sur Grant & Render* in taile or for life, the fine will be good for ever against him and all others. [b] And if he die during his nonage, before he hath avoided it, it seemes his heire can never avoid it, and yet upon this point the Judges of the Common Pleas have been divided on a solemn argument, and of this Just. *Ded. in* 17 *Iac.* made a Quere. [c] Also women that have husbands ought not to be admitted alone without their husbands to levy fines, and yet if such a woman alone levy a fine of her own land she hath in fee simple, and her husband doe not avoid it (as he may if he will) by writ of Ertor, entry, or otherwise during her life, or after her death during his own life, if he be tenant by the Curtesie, this is now a good fine, and will bind her and her heires for ever, except she be an Infant at the time of the fine levyed, and her husband happen to die during her minority, for then in that Case, if it be not a fine *Sur Grant & Render* to her in taile or for life, she may avoid it during her minority, but if the coverture continue untill her full age, in that Case she cannot avoid it except her husband joyn with her in it, but the husband and wife ought to be received together to levy any fine of her land. If such persons as are civilly dead, as Fryars, Monkes, and the like, be admitted to levy a fine, the fine is void. But such civill bodies as have absolute estate in their possessions, as Maior and Commonalty, Dean and Chapter, Colleges, and other Societies corporate may levy fines of the lands they hold in common, even by the Common Law, and such fines are good, but Ecclesiasticall persons, as Bishops, Deanes, Masters of Hospitals, Parsons, Vicars, Prebends, and such like, are by divers Statutes restrained to levy fines of their spirituall inheritances.

Any person that hath capacity to take by grant, or may be a grantee by deed, may take by fine and be a conusee therein, as any person male or female, of full age or under age, whether it be a *Feme Covert*, madde person, lunatike, Ideot, any person in prison, or beyond the Sea, also any person attainted of felony or treason, or outlawed in any personall action, a Bastard, Clark convict, or Alien, may be conusee in a fine, and a fine levyed to such persons is good. [d] Also Corporations spirituall and temporall may be conusees in fines, and fines

may be conusors or conusees. And by what names.

Persons attaint.

Non sanæ memoriæ.

Infants.

Women covert.

Corporations.

a 17 E.3.52. Cromp. Jur. 37.10.E.4. 13.

b Perk. Sect. 19. Dyer 220. et per Just: Bridgmans opinion in private.

c 17 E.3. 52. 30 E.3. 5. 27 Ass. pl. 53. Perk. Sect. 19, 20. Co. 7. 8.

West. Symb. part 2. Sect. 9. Plow. 538. 575. Co. 11. 78. 1. in Magdalen Colledge case.

3 H.6.42. 41 E.3.7. 50 E.3.9. 24 E.3.62.

d 5 H.7.25. 19 H.6.25. Dyer 188.

levyed to them are good, but before the ingroſſing of ſuch fines there goeth alwaies a writ to the Juſtices of the Common Pleas, *Quod permittant finem illum levari.* But ſuch perſons as are civilly dead, as Fryers, Monkes and the like, cannot be conuſees in a fine, and therefore a fine levyed to ſuch perſons is void.

The names of Cogniſors, and Cogniſees in fines muſt bee certainly ſet downe, and they muſt for the moſt part bee deſcribed by their right names of Baptiſm and Surname, whether they be King, Princes, Dukes, Marqueſſes, Earles, Vicounts, Barons, Lords, or Knights, which be names of dignity, but ſome of theſe are ſometimes deſcribed without their Surname, as *Georg' Comes Salop. Iohannes Dux Lancaſtr.* or whether they be Eſquires or Gentlemen, which be names of worſhip and honour. But theſe additions of names of dignity and honour given to ſuch perſons or any others, as Biſhops and the like, are uſed in fines rather of curteſie then of neceſſity, for they are not needfull in fines. But in caſe where there bee two of one name it is ſafe to make ſome addition by way of diſtinction, as *Senior* and *Junior* and the like. Weſt. Simb. in his Tract of Fines.

If a woman living her firſt husband, take a ſecond husband and with him and by his name knowledge a fine, it ſeemes this is void becauſe of this miſtake, but if a woman with her right husband, by a wrong Chriſtian name, levy a fine ſhe is concluded by it, and cannot avoid it during her life. [e] And yet if a fine be levyed to a man and his wife by a wrong name, as to *A.* and *Sybill* his wife, when her name is *Iſabell*, this is holden to be void. [f] But if a fine be levyed by a woman by the name of *Margery* when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it ſeemes this fine is a good fine. 7 H. 4. 22. e 21 Aſſ. pl. 11. f F. N. B. 97. a Litt. Broo. Sect. 344.

2. In reſpect of the perſons before whom it is acknowledged, and the perſons & place before whom and where it is recorded. And what perſons may take conuſance of fines or record them. And where. And how, & the duty of ſuch perſons therein.

The Perſons or Judges before whom a fine is to be levyed are of two ſorts, for ſome are Judges onely at the time of the Cogniſance, and Certificate thereof, and others are Judges to whom the Cogniſance is to be certifyed, and before whom it is to be recorded. The firſt ſort are ſuch as have power to take ſuch cogniſance, either *ex officio*, and by virtue of their offices, or by ſome commiſſion generall or ſpeciall granted unto them by the King out of Chancery; [g] as all or any two of the Juſtices of the Common Pleas may in open Court take knowledge of fines and record them by virtue of their office. [h] Or the Chiefe Juſtice of that Court may by the Prerogative of his place take cogniſance of fines in any place out of the Court, and certify the ſame without any writ of *Dedimus Poteſtatem*: [i] and ſo alſo as it ſeemes may two of the Juſtices of that Court with the conſent of the reſt: or one of them with a Knight (but this is not uſual at this day.) [k] Alſo Juſtices of aſſiſe by the generall words of their Patents may take & certify cogniſances of fines without any ſpecial *Dedimus Poteſtatem*, but at this day they doe not uſe to certify them without Weſt. Simb. ubi ſupra. g Stat. 15. E 2. Stat. de Carlil. h Dyer 224. Cromp. Jur. i Stat. 15. E. 3. Broo. Fines 20. k Dyer 224. Broo. Fines 120.

a

a ſpeciall writ of *Dedimus poteſtatem.* And fines have been levyed before Juſtices Errants.

Cromp. Iur. 92. F. N. B. 147. a. b. 146. F. G.

Alſo cogniſances of fines are taken by a ſpeciall writ iſſuing out of the Chancery called a *Dedimus Poteſtatem*, whereby commiſſion is given in divers Caſes to a private man for the ſpeeding of ſome Act appertaining to a Judge upon a ſurmiſe that the parties that are to doe the ſame are not able to travaile, and by this writ upon ſuch a ſurmiſe, power may be given to any Serjant at law alone, or to any Knight and Gentleman together to take the conuſance of ſuch perſons, and they may by virtue thereof take the ſame [l] either of all or ſome of the parties; [m] and that (as it ſeems) in any place accordingly: [n] But a Juſtice or other perſon being cogniſee in a fine may not take the cogniſance thereof himſelf. And all theſe that have power to take the conuſances of fines are to take great heed of whom they doe take the ſame, and whom they doe admit to make ſuch conuſances before them. [o] And therefore they are to ſee that they know the parties that are to be Cogniſors, that they ſuffer not one man to make a conuſance in another mans name, and that they doe not take any conuſance from any perſon prohibited by law, for miſdemeanors by ſuch perſons herein are puniſhable in the Star-Chamber. [p] And if there be any woman that hath a husband that doth joyn with her husband in the conuſance, the Iudges or Commiſſioners muſt take care they doe examine her whether ſhe be willing, and doe part with her right in the land willingly or by compulſion of her husband, for albeit ſhe be made to doe it by compulſion of her husband yet hath ſhe no way to relieve her ſelfe when it is done. [q] And after the Commiſſioners have taken the ſame cogniſances by *Dedimus Poteſtatem* they are to certify the ſame truly, and the day and yeare when it was taken, [r] and not another time (for this may be a miſdemeanor puniſhable in Starre-Chamber) and to return the commiſſion into the Court of Common Pleas under their hands and ſeales within a yeere after the taking of the ſame conuſance, at the fartheſt. [s] And if they refuſe to return or certify it, the party grieved may by a writ called *Cognitionibus admittendis* or a *Certiorare* compell that Commiſſioner that hath it in his cuſtody, or his executor or adminiſtrator if he be dead, to certify it. [t] But if any of the cogniſors happen to die before it be certifyed, then it cannot be certifyed at all, for it cannot now be made a good fine. [u] And ſo alſo (as ſome hold) if the King die. [*] But if the Kings ſilver be entred in paper or upon the back of the writ of covenant (as the uſe is) and the party die after this, in this caſe the fine may goe on and will be a good fine notwithſtanding the death of the party.

Dedimus poteſtatem, quid.

Cognitionibus admittendis, quid.

And Judges for the recording of fines be the Juſtices of the comon Pleas onely, and therefore all cogniſances of fines muſt be certifyed thither, for in that Court onely and not in any other of the Courts of

l Curia 39. & 40 E. 1. 17.
m Dyer. 220. 28 H. 6. 21.
o 34 H. 6. 19 Broo. Fines 11. Cromp. Iur. 32. 92.
p 42 E. 3. 7. 3 H. 6. 42 Perk. Sect. 613. Doct. et St. 155. Cromp. Iur. 55.
q Stat. 23 El. chap. 3. Dyer 320.
r Dyer 220. Cromp. Iur. 92.
s Regiſt. or. 68. F. N. B. 147. b.
t Dyer 246.
u 1 H. 7. 9. Broo. Fines 124.
* Dyer. 220. Stat. 15. E. 2. 44. 44 E. 3. 38.

of Record at Weſtminſter, or in other inferiour Court, or ancient demeſne, are fines to be levyed. [x] But by ſpeciall grant a fine may be levied in a baſe Court. [y] And by certaine Acts of Parliament fines may be and are levyed in the county Palatine of Cheſter, county Palatine of Lancaſter, and county Palatine of Dureſme, of lands lying within thoſe places. And if any perſons doe take conuſance of fines other then ſuch as before that have power, or any other perſons or Judges ſhall record fines, or they ſhall be levyed in any other Court or place then as before, ſuch fines are void.

[x] 50 Aſſ. pl. 9.
[y] Stat. 2. R. 6. chap. 28. 37 H. 8. c. 19 5 Eliz. c. 27.

3. In reſpect of the thing whereof the Fine is levied, & of what things a Fine may be levyed or not, and by what names.

A Fine may be levyed of all things whereof a *Precipe quod reddat* lyeth, and of all things which are inheritable and in *eſſe* at the time of the fine levyed, whether the thing be Eccleſiaſticall and made temporall or temporall. As of an Honor, Manor, Iſland, Barony, Caſtle, Meſſuage, Cottage, Mill, Toft, Curtilage, Dove-houſe, Garden, Orchard, Land, Meadow, Paſture, Wood, Underwood, Chappell, River, Chauntry, Corrody, Office, Fiſhing, Warren, Fair, Rectory, Mines, a view of Franke pledge, Waife, Eſtray, Felons goods, Deodands, Hoſpitall, Furzes, Heath, Moore, Rent, Common, Advowſon, Hundred, Way, Ferry, Franchiſe, Seigniorie, Reverſion, Toll, Tallage, Pickage, Pontage, Aquitaile, Services, Portion of tithes, Oblations, or the like. And therefore fines *De honore de S.* or *De Manerio de S.* or *De Caſtro*, or *De Caſtello de S. cum pertinen'* are good. So fines *De uno meſuagio, uno cottagio, uno molendino*, without *Aquatico* or *Granatico* annexed are good. So fines *De uno Tofto, uno Curtilag. uno Columbario, uno gardino, uno pomario, decem acris terræ, decem acris prati, decem acris paſturæ, decem acris boſci, decem acris ſubboſci, de Balliva ſive officio Ballivat' de D. de Cuſtod. ſive officio cuſtod. de B. de cuſtod. parci & forreſtæ de D. de officio ſeneſcalciæ de S. cum pertinen', decem acris brueræ, decem acris moræ, decem acris uncariæ, decem acris mariſci, decem acris alneti, decem acris ruſcariæ*, are good. Alſo fines may be *De viſ. Fran' pleg. libertate & franchesiis in D. Wardis, Maritagiis, Eſchaet. catall. felonum, waviat. extrahur. de catall. fugitivorum, utlagat. attinct. de feriis, Mercat. Wrecco maris*, Or, *de rectoria Eccleſiæ parochialis de M.* or, *De decimis granorum, garbarum et fœni eidem Rectoriæ ſpectan' &c.* Or, *cum omnibus decimis granorum, garbarum, et fœni eidem rectoriæ ſpectan'*. Or, *de decimis garbarũ ad eccleſiã de M. qualitercunque ſpectan.* or *de omnibus & omnimod' oblationibus, decimis granorũ, garbarũ, fœni, lanæ, lini, canabis, porcellorum, aucarum, agell.* or, *&c. & aliis emolumentis quibuſcunq; ſpectan', creſcen', ſive exiſten' cum pertinen' in D.* Alſo fines may bee *De cilio Salium, plumbarum, aquæ ſalſæ puteo.* Or, *de theolonio, ſtallagio, picagio, pontagio, infra Burgum de D.* Or, *de quodam corrodio unius panis, unius lagenæ cerviſiæ pro omnibus hominibus in D.* Or, *de chiminio de piſcaria*, or *de libera warrenna*, or *de frankfold, de franchesia*, or *de nundinis de D. ſingulis annis ad feſta de M. ibidem tenend'.*

Stat. 32. H. 8. c. 7. Weſt. Symb. in his Tract of Fines Sect. 25, 50. ſee in expoſition of deeds infra, Numb.

Mercat

Mercat' de D. Quiet. ſive libero paſſagio ultra aquam de D. Or, *de communia*, or *de paſtura pro omnibus animalibus*, or *pro omnibus averiis*, or *de paſtura pro decem ovibus*, or *pro decem bovibus, equis, vaccis, porcis, ſpadonibus, &c.* or *de communia paſturæ quod prædict' M. B. habet & habere ſolebat pro omnibus averiis ſuis in centum acris terræ ipſius I. A. in D.* or *de advocatione eccleſiæ de D.* or *de advocatione tertiæ partis eccleſiæ, &c.* or *de rectoria de D.* or *de advocat. præſentat. donat. libera diſpoſitione, & Iure patronatus Eccleſiæ de D.* or *de Patronagio cum advocatione vicariæ Eccleſiæ de D. & capell. eidē rectoriæ annex'*, or *de tertia parte advocationis eccleſiæ, &c.* or *de medietat' advocat. Eccleſiæ*, or *de advocatione medietatis Eccleſiæ*, or *de medietate*, or *de tertia parte meſſuagii, decem acris terræ*, or the like, and theſe fines are good. Alſo a fine may be *de homagio*, or *de feod' militis*, or *de uno feod' milit' in D.* or *de ſervitio unius paris calcarium deauratorum*, or *de ſervitio inveniendi hominem equitem* or *peditem ad eundem vel ad equitandum* with the cogniſee *in exercitu Walliæ &c.* or *de minera plumbi & cujuſcunque generis metalli*, or *de profcuis officii*, or *de profcuo molendini*, or *de gurgite*, or *curſu aquæ currend. à loco vocat' H. infra & per terr' voc' K. ad molend. vocat' B.* or *de wera ſive veda in D.* And fines of all theſe and ſuch like things are good, but a fine that is levyed of a thing not certain, as *de tenemento* or *de hereditamento*, or the like, is void.

21 E. 3. 44. 18 E. 4. 22. West. Symb. ibid.

A Fine may be of a rent charge which had no being before, or of a chief rent or other rent which had a being before, but not of annuity, and a rent will paſſe by the number of the things to be rendred, as *De decem librat. decem marcat. ſex denar'* or *quinque ſolidor'*, or *uno obolario*. As *Precipe A. quod reddat B. con. &c. de 4 librat' reddit. & red' dimid' unius libræ piperis, ac reddit. unius paris chirothecarum, ſagittæ barbatæ, unius par' calceorū, unius vomeris, 1 lib. ceræ, 1 lib. piperis, 1 lib. cumini, 1 Clavi Gariophylli, 1 roſæ rubæ, 1 acus & Fili, 1 quarterii frumenti, unius quarterii hordei, 2 Bracei caponum, 40 Gallorum, 20 Gallinarum, mille ovorum et auc arum.* An Honor may paſſe by the name of a Manor, or by his own proper name, as *De honore de Tickhill*, or *de manerio de Tickhill*: ſo other things may moſt of them paſſe by their own proper names, as *de caſtro vicecomitatus de S. Inſula de D. Hundred. de D. Burgo de D.*

19 E. 4. 9.

A Manor may paſſe by his proper name without naming of the town or place, townes are places wherein it doth lie, as *de manerio de D. cum pertinen.*

Other things may paſſe in fines by the ſame names they are granted in deeds, as *de ſcit. ambit' et precinct' nuper Monaſterii de D. Scit. Manerii de D. Grangia de D. Parco de D. præbend' de D.*

26 Aſſ. p. 54. 2 E. 3. 36. 1 E. 3. 4. 27 H. 6. 4.

A Caſtle or Hundred may be parcell of a Manor and paſſe by the name of the Manor whereof they be parcell, and one Manor may be parcell of another Manor, and paſſe by the name of that Manor, or

Forfeiture.

hold is good in this reſpect: but hee muſt take heed of a forfeiture in this caſe, for if tenant for life levy a fine *Sur Cogniſanc' de droit come ceo, &c.* to a ſtranger, or levy a fine *ſur Grant & Releaſe* to a ſtranger, to hold to the cogniſee for a longer time then for the life of the tenant for life, howſoever in this caſe the fine be a good fine, yet this is a forfeiture of the eſtate of the tenant for life, whereof he in reverſion or remainder may take preſent advantage. And yet if ſuch a tenant for life levy a fine *ſur Grant et Releaſe*, to hold to the cogniſee for the life of the tenant for life, or grant his eſtate by ſuch a fine to him in reverſion or remainder; or by fine; grant a rent out of the land for longer time then for his own life, in theſe caſes the fine is good, & there is no forfeiture of the ſtate of the tenant for life. So likewiſe if a fine be levyed to a tenant for life by a ſtranger, who doth thereby acknowledg all his right to be in the tenant for life, & releaſe and quite claim to him & his heirs, & go no further, this is a good fine, & no forfeiture of the eſtate of the tenant for life, for his eſtate is not changed thereby, and it may enure to him in reverſion, but if the ſtranger ſay further in the fine *Come ceo que il ad de ſon done*, this is a forfeiture.

1 H.7.22. Co.2.56.9. 106.

Eſtoppell.

But if neither the coniſor nor cogniſee be ſeiſed of any eſtate of freehold in poſſeſſion or reverſion of the lands whereof the fine is levyed at the time of the levying of the ſame, but have only a leaſe for yeares, or not ſo much, the fine is void and of no force as to any ſtranger, howſoever it may be good between the parties by way of Eſtoppell. And therefore if a leſſee for yeers, or a diſſeiſee, or one that hath right onely to a remainder or reverſion levie a fine to a ſtranger that hath nothing in the land, this fine is void, or at leaſt voidable as to, and by any ſtranger thereunto, and he that hath cauſe may ſhew that the freehold eſtate and ſeiſin of the land was in another before and at the time of the fine levyed, and that *Partes finis nihil habuerunt tempore levationis finis.* And by this avoid it. And yet a vouchee after he hath entred into the warranty may levy a fine unto the demandant, but not to a ſtranger. And a diſſeiſor may levy a fine to a ſtranger that hath nothing in the land, and this is a good fine, for he hath the fee ſimple by wrong in him. Alſo the iſſue in taile may be barred by way of Eſtoppell, by a fine levyed by Anceſter being tenant in taile, albeit neither coniſor nor coniſee have any eſtate of freehold in the land. [a] A Joint-tenant, tenant in Common or Coparcenour, may levy a fine of his part to a ſtranger, and this will be a good fine. And ſo alſo as it ſeemes may one Coparcenour or tenant in common to another.

Co.5.123. 3.88.90. Super Lit.251. 3 H.7.9. 5 H.7.41. 3 H.6.21. 27 H.8.4.

a 26 H.8.9. Dyer 334. 69. Plow. 375. 338. E.4.13. 11 E.4.68.

One ſingle member of a corporation aggregate of many cannot levy a fine of the lands of the corporation, as the Maior or Maſter of a College cannot levy a fine without the communalty, or his fellows, &c. But ſuch perſons may levy fines of the lands they are ſolely ſeiſed in their own right as other men may doe.

Such

Co.11.78. Such as have eſtates of freehold in Eccleſiaſticall lands in the right of their Churches, houſes, &c. as Biſhops, Deanes, and Chapters, Prebends, Parſons and the like, may not levy a fine of ſuch lands, for if they doe it will not bind the ſucceſſor.

Stat.32 H. 8.chap.28. 12 E.4.12. Co. 6.55. Broo.Fines 121. Stat. 32 H.8. ch. 36. Co.5.3. 4. Stat.1 H. 7.chap.20. He that hath an eſtate of fee ſimple in lands in the right of his wife ought not to levy a fine thereof without her, and if he doe, ſhee and her heires may avoid it after his death. Alſo he that hath an eſtate of lands given in taile by the King, or by the proviſion of the King, ought not to levy a fine of this land, for it is void as againſt the iſſue in taile and the King. Alſo he that hath an eſtate of lands that are prohibited to be ſold by Act of Parliament ought not to levy a fine of ſuch land. Alſo ſhe that hath an eſtate of lands of her husband, or of any of his anceſtors aſſured to her for her Jointure, Dower, or in taile by the meanes of her husband or any of his anceſtors, may not levy a fine of this land, for if ſhe grant a greater eſtate then for her own life this worketh a preſent forfeiture.

West.Symb. ubi ſupra. Sect.30. Co.5.38. In the concords of Fines ſome things are to be regarded in the manner and forme, and ſome things in the matter and ſubſtance. Firſt, when a fine is levyed to divers Cogniſees the right ſhall be limited to one of them. As if a fine be levyed by *A.* to *B.* and *C.* it ſhall ſay, *Quod prædict' A. recognoverit tenementa prædict' eſſe jus ipſius B. ut ill' quæ iidem B. et C. habent, &c.* But the Kings tenant may acknowledge the right to be in divers. Secondly, the ſtate ſhall be limited to his heires onely to whom the right is limited, and not to the heires of all the cogniſees, as thus, *Quod prædict' A. cognoverit tent' præd' &c. eſſe jus ipſius B. ut ill' quæ iidem B. & C. habent de dono prædict' A. & ill' remiſit & quiete clam' de ſe & hæred' ſuis præfat' B. et C. et hæred' ipſius B. &c.* The releaſe and warrantie muſt be from the heirs of one of the Cogniſors, where there be more then one, for in a fine from divers the fee is ſuppoſed to be in one onely. And therefore it muſt be thus. *Quod prædict' A. & B. cogn' & ill' remiſit &c. de ſe et hæred' ipſius A. Et eidem A. et B. conceſſerunt pro ſe et hæred' ipſius A. quod ipſi warr' tenementa &c. ſi contra ſe et hæredes ipſius A. imperpetuum.* But if the fine be of lands in Gavel kind *contra.* Fourthly, the Concord need not to rehearſe all the ſpeciall names of the things contained in the writ, but it is ſufficient to ſay *Tenementa prædicta*, as *quod prædict' recognoverit tenementa prædicta, &c.* Fifthly, as a Concord cannot be without an originall writ, ſo it muſt purſue the originall writ and cannot be of any forain thing, *i.* ſuch a thing as is not contained in the writ, except it be conſequent thereunto, as when the writ is of land, there may be in the concord of a rent out of this land, but there may be more things in the *Precipe* then are named in the Concord. And a Concord may be with an exception of ſome part, but this exception muſt alwaies be of ſuch things whereof the writ will lie and are mentioned therein, muſt

5. In reſpect of the Concord and matters touching it. And what concord or agreement may bee made by Fine or not.

muſt be certainly named, & muſt ſucceed the things out of which they be excepted, as *Precipe A. B. quod teneat C. D. convenc' &c. de manerio de D. cum pertinen' in C. (except' uno meſſuagio, duabus acris terræ, et advocatione Eccleſiæ de C. &c. Et eſt concordia, &c. quod præd' A. cogn' tenementa prædict' cum pertinen' (except. præexcept.)* And in all theſe and ſuch like caſes, as before where the concord is not formall, the Judges ought not to receive the fine nor ſuffer it to paſſe, but if they doe and the fine be finiſhed, it cannot afterwards be avoided by writ or error or otherwiſe for theſe faults.

The Concord and agreement may be made of an eſtate in fee ſimple, fee taile, for life, or for yeeres, it may be alſo of divers remainders, and that to them that are no parties but ſtrangers to the fine. It may be alſo ſingle or double, with a render back again of ſome eſtate in the ſame land or ſome rent out of it, ſo as a Concord may have in it a reſervation of rent, a clauſe of diſtreſſe, or *Nomine pœnæ*, and a warrantie. [b] And therefore if *A.* levy a fine to *B. Sur cogniſance de droit come ceo, &c.* And *B.* by the ſame Concord doe grant and render the land back again to *A.* for life without impeachment of waſt, the remainder to *C.* the wife of *A.* for her life, the remainder to *A.* and his heires, this is a good Concord and by this deviſe a Jointure may be and is oftentimes made to a woman. And if a man would have a leaſe for life or yeers made of land by fine, the leſſee muſt by the concord acknowledge the lands to be the right of the leſſor (who is ſeiſed of the land) as that, &c. And then the leſſor muſt grant and render the ſame land back again to the leſſee (the conuſor in the fine) for life, or for a certain number of yeers as the agreement is, reſerving a rent with clauſe of diſtreſſe, and this is a good fine, and a common deviſe for this purpoſe. But if the leſſor be tenant in taile, it ſeems this fine will not bind the iſſue in taile. And yet if *A.* tenant in taile, and *N.* doe by fine acknowledge the land to be the right of a ſtranger, as that, &c. and then the ſtranger that is cogniſee doth grant and render the land again to *N.* for life, or yeers with clauſe of diſtreſſe, &c. and then grant and render the reverſion to the tenant in taile, this is a good fine, and will barre the iſſue in taile alſo, and will likewiſe paſſe the rent and the reverſion to the tenant in taile. So if a Stranger that hath nothing in the land levy a fine *Sur cogniſance de droit come ceo que il ad, &c.* To him in remainder in taile depending upon an eſtate for life, and the cogniſee by the ſame fine render to the cogniſor for tenne yeers to begin at Michaelmas following and dieth, and all the proclamations are made after his death, and the tenant for life dyeth after the time the leaſe is to begin, this is a good fine, and ſo a good leaſe to barre the iſſue in taile.

See in Weſt. Symb. divers examples, Perk. Sect. 629. Broo. Fines 108.

[b] Broo. Fines 106, 118. Co. 6. 33. Plow. 435. Dyer. 279. Co. 1. 76.

Iointure.

Leaſe.

If *A. B.* and *C.* levy a fine to *D.* and *D.* render the land back again to *A.* for life, the remainder to *B.* in taile, the remainder to *C.* Weſt. Sym. ubi ſupra. Co. 7. 38.

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in taile, and the remainder to a ſtranger in fee, this or any ſuch like concord as this is good. And if *A* and *B* joyne in a fine of a meſuage to *C* and *D* and to the heires of *C*, who do grant and render a charg of 30l. out of the land to *A* for his life, to begin after the death *B*, to be paid at the feaſts of, &c. *Proviſo ſemper quod pred' conceſſio pred' annualis reddit' 30l. non aliqualit' ſe extendat ad onerand' perſonas dict' C & D, ſed tantummodo ad oner and' dict' meſuag' tota vita ipſius A.* and then they grant and render the meſuage to *A* during the life of *H.* the remainder to be in taile, the remainder to the right heires of *B*, this is a good fine. But in ſuch a fine *ſur grant & render*, theſe things muſt be heeded. 1. None may take the firſt eſtate by the Concord, but the Cogniſors or one of them. And therefore if *A* knowledge a fine to *B*, and *B* render and grant the land to *A. Habendum ſibi &* E. *uxori ejus* and the heires of their bodies. So if the husband levie a fine of his wives land, and the Cogniſee grant and render the land to the husband and wife, this is not a good Concord. 2. The render of the Rent muſt be to one of the parties to the fine, and not to a ſtranger. 3. A man cannot reſerve a leſſe eſtate to himſelfe then fee; And therefore if *A* knowledge a fine to *B*, and *B* render to *A* in taile, the remainder to himſelf for life, this remainder is void. So if *A* by fine knowledge lands to *B*, and *B* grant and render the land to the Conuſor in taile, the remainde, to *B* in taile the remainder to *B* in fee, the limitation of this eſtate in taile to *B* is void, and he can never have execution of it. So if *A* knowledge the lands to *B*, and *B* doth grant and render to *A* for life. 4. The agreement muſt bee poſſible and ſenſible, for if there be three Conuſors in a fine, and the Conuſee render to one of them for life or yeares a rent, and grant the reverſion to another of them for life or yeares rendring a rent, and grant the reverſion in fee or in taile to the third, this is not a good Concord. 5. There can be no condition or clauſe of re-entrie for not payment of rent inſerted into the Concord, and yet ſome hold a fine levied to one in taile upon a condition with a remainder over is good. (*) And ſuch Concords as theſe of the laſt ſort before ought not to be received, and if they be received, the fine in moſt caſes may be avoyded for theſe faults, but if a fine bee received with a condition inſerted into the Concord, this is a good fine and not avoidable by writ of Error or otherwiſe.

1] 24. Ed. 3. 27. Bro. Fines 108.

2] Co. 2. in the Lord Cromwels caſe.

3] 24 Ed. 3. 26. 14 H. 4. 31. Dyer 69. 33, 34.

4] Co. 6. 33.

5] 44. Ed. 3. 22. 27 H. 8. 24.

*Co. 3. 5. ſuper Lit. 353. 5. 38.

No ſingle fine can be with a remainder over to any other perſon contained in it, but it muſt be to the Conuſee and his heirs only. 2. No rent can bee reſerved upon a fine that is *Sur Conuſance de droit come ceo, &c.* but upon a fine *ſur grant & render*, or *ſur conceſſit:* only, for if one levie a fine *ſur conuſance, &c.* rendring rent, this reſervation is void. 3. No ſingle or double fine ſhall be received with any covenants or other agreements then are before men-

Plow. 248.

2] 50. E. 3. 9

3] Co. 5. 38.

tioned, but in all theſe caſes alſo when the fine is received and levied it ſeemes it is good and unavoidable, and that only the remainder in the firſt caſe, the rent in the ſecond, and the Covenants in the laſt, are void; and the fine good for the reſidue.

A particular tenant, as for life, &c. cannot ſurrender his terme to him in reverſion or remainder by fine, but he may grant and releaſe it to him by fine. 44 Ed. 3. 36.

One may grant his tenements which *H* doth hold for life, and which after the death of *H.* ought to remaine to him, to *H.* for life, rendring rent with clauſe of diſtreſſe, ſaving the reverſion, and a fine of this forme is good. 44 Ed. 3. 45.

The manors and tenements contained in the writ may bee divided, as if a fine be levyed betweene *A* and *B* of two Manors, and *B* doth acknowledge all his right of the ſaid two Manors to be the right of the ſaid *A*, as that which, &c. for which *A* doth grant and render one Manor to *B* for life, with two parts of the other Manor which *N* holdeth in dower, to have the one Manor and two parts of the other Manor to *B* for life, the remainder after his death to *A* in taile, and that after the death of *N* the third part ſhall remaine to another. So if a fine be levied of the Manor of *G* with the appurtenances by *A* unto *C*, which *A* knowledgeth the right in *C*, as that &c. and *C* granteth and rendreth the ſame to *A* in taile, the remainder of the fourth part of the Manor towards the Weſt to the ſaid *A* and her heires, the remainder of another fourth part towards the Eaſt to *I.* in fee, and ſo of the other two fourth parts. Or incertainly by 3. third parts in remainder to *A*, *B* and *C* in remainder ſeverally, and theſe are good Concords. 44 Ed. 3. 11. 45 Ed. 3. 12. 44. Aſſ. Pla. 11. Bro. Fines 118.

If *T* and *E* his wife levie a fine to *R*, *D* and *T C* of divers Manors and lands in *A*, *B* and *C*, and in the fine there are divers grants and renders, and one grant and render is of the Manors of *A* and *B* and the lands therein to *T* and *E*, and the heirs of *T*, and in another render 100. acres parcell of one of the ſame Manors is granted to *E* in taile, the remainder to the right heires of a ſtranger, notwithſtanding this repugnancy, the Concord and conſequently the whole fine is good. Co. 5. 38.

6. In reſpect of the manner and order of levying it, and other matters.

The fine muſt bee levied and ſued forth in that manner and order as before is ſet forth, for if it be not ſo, but that there want an Originall writ, or if there be one, it doth beare *Teſte* after the *Dedimus Poteſtatem*, or the like, it will be a defective fine, and either *ipſo facto* void, or at leaſt voidable by writ of Error. See before.

If any one of the Conuſors die before the Conuſance be certified after it is acknowledged and taken, the fine cannot now bee made a good fine, and yet if the Commiſſioners ſhall certifie this Conuſance with an antedate, and ſo the fine be finiſhed, this may be a good fine at the common Law, but perhaps may bee avoided by ſentence in the Dyer 220. 254. Crom. Jur. 92. Dyer 246.

the Starre-Chamber. But if the Conuſance bee certified and the Kings ſilver paid to the King before the death of the Conuſor, the fine may be ingroſſed and finiſhed after his death well enough, and it will bee a good fine. And if a feme ſole make a Conuſance of a fine, and before it be certified and ingroſſed ſhee take a husband, this will not let but the fine may be finiſhed, and albeit it be recorded and ſued out in her name as ſole, whereas in truth ſhe is covert and of another name, yet is the fine a good fine, however in this caſe it is not amiſſe to get a releaſe of Errors from her husband.

Weſt. Sym. ubi ſupra. Lands that are bought of divers perſons may paſſe by one fine, and then the writ of covenant muſt be brought by all the vendees againſt all the vendors, and they muſt every one of them warrant for himſelfe and his heires, and ſuch a fine is good.

Dyer 227. 15 Ed. 4. 33. If lands lye in divers ſhires, it may be contained in one Concord and good enough, but there muſt be ſeverall writs of Covenant in every County, elſe the fine will not be good.

Co. 3. 78. 8. 9. 105. If a fine be levied of Covin by a leſſee for yeares, or life, or a Copiholder of purpoſe, and with an intent to barre him in reverſion or the Lord of his inheritance, this is of no force, and therefore *non-claime* within five years will not hurt in this caſe. So that it ſeems a fine or recovery may be covinous and avoidable for Covin as well as a deed, and therefore that a fine or recovery levied or ſuffered of fraud to deceive Purchaſors or Creditors will be void as to them as well as any other conveyance. So alſo a fine or recovery levied or ſuffered in execution or purſuit of an uſurious contract may bee void by the Statutes of uſury as well as a feoffment or other conveyance by deed. But a fine or recovery ſhall not be ſaid to be levied or ſuffered *per dureſſe*, and avoided for that cauſe.

Covin. Recovery.

Co. 3. 80. 16 H. 7. 5. See infra in Deed. Nu.

Uſury.

Dureſſe.

Co. 5. 38. See in expoſition of Deeds infra The Conuſance of a Fine, and a Grant and Render therein ſhall be expounded and taken as a Charter or other conveyance between party and party, becauſe it is a conveyance upon Record, and not as a writ or judgment upon Record. And therefore if *A* and *B* by fine knowledge the Manors of *S*, *T* and *W* to be the right of *C*, and *C* doth render the Manors of *S* and *T* to *A* by one render, and after by another render limit 100. Acres, parcell of the Manor of *S* to *B*, this ſhall be a good Concord, and be expounded according to the intent of the parties, *viz.* That *B* ſhall have the 100. acres, and *A* all the reſidue of the Manor.

7. How the concord of a Fine ſhall be expounded and taken.

37 H. 6. 5. If a fine bee levied to two men *& heredibus*, without the word [*Suis*] this is void for incertainty in a fine as it is in a deed.

Deed.

Co. ſuper Lit. 9. Frederick verſus Wakefields caſe. Trin. 36 Eliz. Co. B. If a fine believed, *come ceo que il ad de ſon done*, hereby a fee-ſimple will paſſe without any word of heires, And ſo alſo it is in caſe of a common recovery.

Recovery.

If the lands be limited in the Concord of a fine to *B* for life, and after to the children of *C* begotten, and *C* hath at the time of the

fine levied two daughters only; in this caſe the ſonnes and daughters that are borne after ſhall take nothing by this fine. And no averment of intent will help in theſe caſes. And yet an averment lieth upon a fine of the uſes thereof and of no other matters as upon a deed.

Averment.

3. What perſons ſhall be barred by a Fine, or a Fine and Non-claime. And in what time. Or not. And how.

A fine at the common Law, or a fine without Proclamations was once a perpetuall bar to all perſons that had right and no impediment at the time of the fine levied, and that did not claime within a yeare and a day after the execution of the fine by poſſeſſion; but now this Law is changed, and this kind of fine will barre none but ſuch as are parties and privies thereunto. But a fine by the Statute, or a fine with Proclamations is now much of the ſame virtue and force as a fine at the common law was, for by the Statute of 4 *H.* 7. it is provided, That every fine after the ingroſſing thereof ſhall be proclaimed in the Court the ſame Tearme, and the three next following Tearmes, foure ſeverall daies in every Tearme; which Proclamations ſo made, the fine ſhall conclude all parties privies and ſtrangers, except women covert, perſons within 21. yeares of age, in priſon, out of the Realme, or of *non ſane memorie*, (being no parties to the fine) ſo as they or their heires take their action or lawfull entrie within five yeares after theſe imperfections removed. Saving to all perſons and their heires (other then parties) the right claime and intereſt which they have at the time of the fine, ſo as they purſue it by action or entrie within five yeares after the Proclamations. And ſaving to all other perſons ſuch right, title, claime and intereſt as firſt ſhall grow or come to them after the Proclamations by force of any matter before the fine, ſo as they make their claime or entrie within five yeares after the ſame grow due, or if at that time there be any impediment as aforeſaid, within five yeares after the impediment removed. And by the Statute of 32 *H.* 8. (which is an expoſition of this Statute) it is provided, That all fines with Proclamations levied according to 4 *H.* 7. by any perſon of 21. yeares of age of any land, &c. before the fine levied entailed to him that doth levie the fine or any of his Anceſtors in poſſeſſion, reverſion, remainder, or uſe, immediately after Proclamations had ſhall be a barre againſt him and his heires, claiming only by force of any ſuch entaile, and againſt all others claiming only to the uſe of him or any heire of his body. By which Statute it doth appeare that all the parties, to the fine Conuſors and Conuſees, whether they be femes Covert, men *de non ſane memorie*, or others, (Infants only excepted, who during minority may avoyd it) and whether they have a naturall or civill capacity: & privies, *viz.* privies in bloud, as heires, whether they be lineall or collaterall, or privies in repreſentation, as executors and adminiſtrators: and all ſtrangers alſo, *viz.* all others beſides parties & privies that have or pretend any preſent right.

Stat. 18 Ed. 1. de finibus. Stat. 34 Ed. 3. 16. Plow. 373. Stat. 4. H. 7. ch. 24. 1 R. 3. ch. 7. 32 H. 8. ch. 36.

or

or title (except women covert, and the reſt that have impediment that doe make their entrie or claime, or bring their action within 5. years after Proclamations had, and thoſe perſons excepted alſo if they make not their claime, &c. within five yeares after the impediment removed) all theſe are concluded. *i.* ſo ſhut and cloſed up together, for their right is ſo extinct hereby, as they can never open their mouthes or lift up a finger againſt it. Saving to all others. *i.* ſuch as have no preſent right at the time of the fine levied, and were excepted before ſuch right, title, claim or intereſt as ſhal accrew to them after the Proclamations upon any truſt, gift in taile, or other cauſe, before the fine levyed, ſo as they make their claime, &c. within five years after their right firſt accrewed if they have then no impediment, or if they have, within five yeares after the impediment removed.

For a more full underſtanding of which Statutes and this matter, theſe things in generall muſt firſt be obſerved. 1. That the perſons to be barred by a fine are, 1 Parties. 2 Privies. 3 Eſtrangers. The parties if they be of the age of 21. years, are bound for ever by the fine, and ſhall have no time to claim to preſerve their right. The privies alſo, being heires and executors to the parties and voyd of impediment at the time of the fine levied, or not, if they claim by the ſame title that their Anceſtor had that levied the fine, are barred for ever by the fine, and ſhall have no time to claime to preſerve their right.

† Dyer 3. paſche, 7. Jac. B. R.

† And therefore if my father diſſeiſe my Grandfather of land, and then levie a fine of the land, and then my Grandfather die, and after my Father die, by this fine I am barred of the land for ever. And here note, (*) that he that is a privie within the intent of 4 *H.* 7. is an heire within the Statute of 32 *H.*8. *Et ſic è converſo.* And that privies or heires in eſtate and bloud, as he that is heire to whom the land doth or ſhould deſcend are within theſe Statutes, and ſhall be barred by the fine of their Anceſtor of that land. And ſo alſo ſhall privies in eſtate that are not privies in bloud, as where one hath land in burrow Engliſh, and levie a fine of it, hereby the youngeſt ſonne is barred. So if one bee tenant in taile to him and the heires females of his body, and he levie a fine, having a ſonne and daughter, hereby the iſſue female is barred, and yet ſhe is not the heire of his bloud. But he that is privie in bloud only, and not in eſtate alſo, is not within theſe Statutes, neither ſhall he be barred by the fine, and therefore if lands be given to a man, and the heires females of his body, and he hath a ſonne and a daughter, and the ſon levie a fine and die without iſſue, this is no barre to the daughter, for howſoever ſhe be heire of his bloud, yet ſhe is not heire to the eſtate, nor ſhall need to make her conveyance to it by him. The ſtrangers that are to be concluded by the fine, are either, 1. Such as have preſent right and no impediment, and theſe are barred within

(*) Trin. 21 Jac. Com. B. Curia in in Will. Godfreys caſe.

five yeares if they make not their claime within five yeares after the Proclamations. 2. Such as have preſent right, but have impediment of infancy, &c. and theſe are barred if they doe not make their claime within five yeares after the impediment removed. 3. Such as have no preſent but future right upon cauſe precedent, and they are either without impediment, and then they are barred if they claime not within five yeares after their right doth acrew; or they have impediments, and then they are barred if they claime not within five yeares after the impediment removed. 4. Such as have neither preſent nor future right at the time of the levying of the fine by reaſon of any matter before the fine, but whoſe right groweth either entirely after, or partly before, and partly after the fine, and theſe are not barred at all by the fine, but they may make their claime, &c. when they will. And parties, privies, and ſtrangers to fines that are barred thereby, are ſuch as have naturall capacities or civill, for both theſe are barred. Plow. 538. 337, 375, 378. And therefore it is held, if ſuch a Corporation as hath an abſolute eſtate and authority of his poſſeſſions ſo as he may maintaine a writ of right thereof, as Major and Communalty, Deane and Chapter, &c. levie a fine of their lands, they and their ſucceſſors are barred preſently, but if a Biſhop, Deane, or Prebend, without aſſent of the Deane and Chapter, or a Parſon and Vicar without aſſent of the Patron and Ordinary had levied a fine, this would not have barred the ſucceſſor; neither will it barre now with their aſſent, for they are reſtrained by divers Statutes. So alſo ſuch perſons are barred by the fines that are levied by others if they make not their claime in time, as if one diſſeiſe a Corporation aggregate of land belonging to their Corporation, and after levie a fine of it with Proclamations, and they doe not make their claime, &c, within five years, hereby they are barred. 2. Where the Anceſtor is barred by the fine, there for the moſt part the heire is barred alſo. Co. 9. 105. And therefore if tenant in taile be diſſeiſed, and the diſſeiſor levie a fine with Proclamations, and the tenant in taile ſuffer five yeares to paſſe without claime, &c. hereby he and his iſſues are barred for ever, ſo that the heire doth ſuffer for the laches of his Anceſtor, 3. The eſtates that ſhall be barred by the fine are eſtates by the common Law, or by Copihold, in fee-ſimple, fee-taile, or for life, or for yeares, the eſtates alſo of tenant by Statute, Elegit, and of Gardeins in Chivalrie, and of Executors that have land untill debts and Legacies be paid. Co. 9. 104. 5. 124. And therfore if one enter upon, and put out a Copiholder of land, and levie a fine thereof, and the Copiholder ſuffer five yeares to paſſe and make no claime, &c. the Copiholder and his Lord both are hereby barred for ever. And if a leaſe be made for yeares, and the leſſor or another before entrie of the leſſee levie a fine with Proclamations, and the leſſee doth not not make his claime, &c. within five

yeares

Plow. 378. Bro. Fines. 123. Co. 5. 124.

yeares, hereby the leſſee is barred of his intereſt for ever. 4. The things whereunto theſe Statutes doe extend, are lands and tenements, and not a Rent or other profit apprender out of the land, and therefore if I have a rent, common, or Eſtovers out of land, or a way over land, or power to ſell the land, and a fine is levied of the land it ſelfe, and I doe not make my claime of my rent, &c. within five yeares, yet I am not hereby barred of my rent, &c. And for this cauſe it is, that if a tenant in ancient demeſne levie a fine of his land, and five yeares paſſe, the Lord is not hereby barred to avoid it, for herein he claimeth not the land but his ancient Seigniorie. 5. The time in which they muſt make their claim, or bring their action that have preſent right and no impediment is within five yeares after Proclamation had, and the time for them which have impediments is within five yeares after the impediments removed. 6. The time within which they muſt make their claime or bring their action whoſe right doth happen afterwards, if they have no impediment, is within five yeares after the time that their right doth accrew, and if there be any impediment within five years after the impediment removed. 7. The perſons whoſe right is ſaved and preſerved are mentioned in the firſt and ſecond Saving of the Statute of 4 *H.* 7. and they are ſtrangers and not parties nor privies. 8. They that have benefit by the firſt Saving of the Statute ſhall have none by the ſecond Saving, for he that will be within the ſecond Saving to have benefit by it muſt be, 1 Another perſon, 2 The right muſt come and acrew to him firſt. 3 It muſt come to him after the fine and Proclamations. 4 His right muſt be upon ſome cauſe or matter before the fine. 9. No fine ſhall barre any eſtate in poſſeſſion, reverſion, or remainder which is not deveſted and put to a right at the time of the fine levied. And therefore if one levie a fine of my land whiles I am in poſſeſſion of it, this fine will not hurt me. So if the tenant of the land, out of which I have a Rent or Common, &c. levie a fine of the land, this ſhall not barre me of my Rent or Common, for I am ſtill in poſſeſſion of this in the judgment of the Law. So if there be tenant for life the remainder for life, or tenant in taile the remainder in taile, and the firſt tenant in taile or for life doe bargaine and ſell the land by deed indented and inrolled, and after levie a fine to the bargainee, in this caſe the remainders are not barred, albeit five yeares paſſe without claime, for the Law in theſe caſes doth adjudge them alwayes in poſſeſſion. So if I make a Leaſe for yeares of land, rendring a rent, and a ſtranger levie a fine of the land, and the leſſee for yeares payeth his rent to me duly, in this caſe I am ſaid to be alwayes in poſſeſſion, and therefore am not barred by this fine of my reverſion. So if there be a tenant by Copy or leaſe for life, the remainder for life, and the firſt tenant for life accept of a fine of the

Plow. Lord Zouches caſe, 370.

Dyer, 3. Co. 3. 86, 91. Plow. 373.

Co. 5. 124. 9. 106.

land with proclamations and 5 years paſſe without claime &c. hereby he that is in remainder is not barred. So if one have a leaſe for years of land to beginne in *futuro* and a fine is levyed of the land, and five years paſſe after the terme beginne, it ſeemes this is no barre, becauſe this eſtate is not put to a right. And for the further illuſtration of all theſe things ſee the examples following. [c] If tenant in taile levy a fine of the land intailed with proclamations according to the ſtatutes, this is a barre to the eſtate taile, wherein theſe things are to be known. 1. That whereſoever the iſſue doth claime by the ſame title, and muſt make his Conveyance to the lands by him that levied the fine, there the fine will barre him, and therefore if lands be given to the husband and wife in ſpeciall taile, *viz.* to them and to the heires of their two bodies iſſuing, or the like, or if the gift be to them and the heires males or females of their two bodies, or to them and the heires of their bodies with the remainder to the right heires of the husband in fee, and the husband alone levieth a fine with proclamations, by this the iſſue in taile is barred. And yet ſo as the right of the wife is ſaved ſo as ſhe makes her claime &c. within five years after her husbands death. [d] So if husband and wife tenants in ſpeciall taile have iſſue and the wife die, and the husband marry another wife and have iſſue and levy a fine *Sur cogniſance de droit come ceo &c.* and take backe by the ſame fine an eſtate in ſpeciall taile the remainder over &c. and die, the iſſue by the firſt wife is barred. [e] So if tenant in taile be diſſeiſed, or make a feoffment in fee, and after levie a fine with proclamations to the diſſeiſor or to a ſtranger, the iſſues in taile are hereby barred for ever, the continuance of the poſſeſſion in a nother notwithſtanding. [f] So if a gift be made to the eldeſt ſonne and the heires of his body, the remainder to the father & the heires of his body, and the father dyeth, and the eldeſt ſonne levy a fine with proclamations and dyeth without iſſue, this ſhall barre the ſecond ſonne for ever for the remainder deſcended to the eldeſt. [g] So if lands be given to an eldeſt ſonne and the heires of the body of his father (the father being then dead) and he levy a fine of this land, this will barre the younger brother. [h] But if the iſſue in taile doe not make his title by him that did levy the fine, there the fine will not barre, and therefore if my father be tenant in taile, and his brother diſſeiſe him and levy a fine, and he and my father dye, this fine ſhall not barre me as iſſue in taile, becauſe I doe not make my title to the land by him: but if I ſuffer five years to paſſe and doe not make my claime &c. by this meanes I may be barred by the fine. [i] And if the fine be levied of another thing then the thing it ſelfe entailed, As if the tenant in taile grant by fine a Rent, Common, or the like out of the land intailed, this fine will not barre the iſſue. So if a Rent be entailed and the tenant in

a. Iſſue in taile barred by the fine of his Anceſtor or ſome other.

c Stat. 4 H. 7. 32 H. 8. Co. ſuper lit. 372.

1] Co. 9. 138. 140. Dier, 3.

d Dier 354.

e Co. 3. 90.

f Co. ſuper Lit. 372.

g Curia trin. 21 Jac. Co. B

h Dier. 3.

i Plow. 435.

in taile of the Rent diſſeiſe the terre-tenant of the land out of which the rent doth iſſue, and then levy a fine of the land, this is no barre to the iſſue of the Rent. 2. Albeit the fine be a double fine with a grant and render, yet it is within theſe Statutes, and will barre the iſſue in taile as well as a ſingle fine, ſo as the grant and render be of the land it ſelfe and not of any profit apprender out of it. And therefore if husband and wife be tenants in ſpeciall taile, and they levy a fine with proclamations, and the Conuſee grant and render the land to them and their heires, this fine will barre the iſſue in taile. And if tenant in taile joyne with *I. S.* and levy a fine to a ſtranger, and the ſtranger doth grant and render the land againe to *I. S.* for years, and to the tenant in taile in fee afterwards; the iſſue in taile is barred by this fine. So if there be tenant for life, the Remainder in taile, and he in remainder in taile accept of a fine from a ſtranger, and grant and render to the ſtranger againe for years with a remainder over, hereby the iſſue in taile is bound. [k] If tenant in taile accept of a fine of the land entailed from a ſtranger, and then grant and render a Rent out of the land to the ſtranger by the ſame fine, this will not bind the iſſue in taile to pay the ſame Rent. [l] If tenant in taile make a feoffement on Condition, and die having two ſiſters inheritable to the taile, and one of them levy a fine with proclamations *ſur Releaſe* to the feoffee of the whole, in this caſe it is doubted whether the other ſiſter be barred of her halfe or not. 3. Albeit the tenant in taile die before all the proclamations be finiſhed, yet when they be finiſhed as they may be after his death, the iſſues in taile are bound by the fine, for howſoever by the death of the tenant in taile the right of the eſtate taile doth deſcend to the iſſue, yet when the proclamations are paſſed this right that doth deſcend is bound by the Statutes, and the iſſue cannot by any claime &c. ſave the right of the eſtate taile that doth deſcend unto him. 4. Albeit the iſſue in taile be within age, out of the Realme, under Coverture, *non compos mentis*, or in priſon at the time of the fine levied and the proclamations paſſed, yet the eſtate taile is barred by the fine. And therefore if *A.* be tenant for life of land the remainder to *B.* in taile, the reverſion to *B.* and his heires expectant, and *B.* levy a fine to *C.* and his heires, and hath iſſue and die before all the proclamations are paſſed, the iſſue in taile being then out of the Realme, the proclamations are made, and after the iſſue in taile cometh into the Realme and claimeth the remainder in taile upon the land, in this caſe the eſtate taile is barred for ever. 5. Theſe Statutes doe extend to fines levied by tenant in taile by Concluſion, and the iſſue ſhall be bound by the fine of their Anceſtor unto whom they are privy in eſtate and bloud, albeit *partes finis nihil habuerunt tempore finis*. And therefore if the iſſue in taile

2] Co. 76. 3. 85. ſuper Lit. 353. Bro. fines. 118. Dier. 279.

k] Plow. 435.

l] Dier 117.

3] Co. 3. 86. 87. 1 in Shelleys Caſe.

4] Co. 3. 84. 91.

5] Co. 3. 90. Dier. 279. Plow. 435.

in

in the life of his Anceſtor when he hath onely a poſſibility, As if there be grandfather, father, and ſonne, and the grandfather be tenant in taile, and the father levy a fine of the land before the grandfathers death, and then the grandfather dye before the father, and after the father dye, in this caſe the iſſue is barred by this fine: † ſo alſo if the grandfather ſurvive the father. But in caſe of a collaterall deſcent, if the collaterall Anceſtor die in the life time of his father without iſſue, this fine is no barre, but if he ſurvive his father, *contra.* So if lands be given to the grandfather and his wife in ſpeciall taile, and the grandfather dieth and the father doth diſſeiſe the grandmother, and doth levy a fine with proclamations, the grandmother dieth and then the father dieth, in this caſe the ſonne is barred. [m] So if lands be conveyed in taile to a woman for her Jointure within the Statute of 11 *H.* 7. *cap.* 20. and whiles ſhee liveth the iſſue in taile doth levy a fine of the land, by this the iſſues inheritable to the eſtate taile are barred for ever. [n] So if tenant in taile make a feoffement or be diſſeiſed, and after levy a fine with proclamations for a ſtranger, hereby his iſſues are barred for ever. [o] So if tenant in taile die and his iſſue before his entry (having a freehold in law only) doth levy a fine with proclamations, this ſhall be a barre to his iſſues and to his collaterall heires and brothers of the halfe bloud. [p] So if a tenant in taile have foure daughters and one of them levy a fine in the life of the father, this will be a barre to her iſſue for the fourth part of the land. [q] But in theſe caſes before and ſuch like where the iſſue in taile doth levy a fine in the life time of the tenant in taile, the tenant in taile himſelfe may after levy a fine of the land, and thereby barre his iſſue, and the Conuſee alſo to whom his iſſue hath levied a fine, and therefore in all theſe caſes it is ſuppoſed that the tenant in taile doth dye and ſuffer the right to deſcend to his iſſue. [r] If lands be given by will to one when he ſhall come to his age of twenty four years, to hold to him and the heires of his body, and he after his age of twenty one years levy a fine of this land with proclamations, this is a barre to the iſſue in taile. If a diſſeiſor make a gift in taile, & the donee make a feoffment to *A.* and after levy a fine with proclamations to *B.* that hath nothing in the land, this fine will barre the iſſues in taile and they ſhall not avoid it by pleading that *partes finis nihil habuerunt &c.* but it is no barre to the diſſeiſee, for he may avoid it by this plea when he will. [f] And *à fortiori* therefore, if a fine be levied by the tenant in taile that hath only an eſtate of freehold in remainder or reverſion is good: as if *A.* be tenant for life, the remainder to *B.* in taile, and *B.* levy a fine, albeit this be no diſcontinuance, yet it is a barre to the eſtate taile. [t] But if tenant in taile have iſſue a ſonne and a daughter, and the ſonne living the tenant in taile levy a fine and dye without iſſue,

† Curia. Trin 21. Jac. Com. B. Godfry & Wades caſe. Dier 48.

m Co. 3. 50, 51. 9. 140.

n Plow. 434, 435.

o Curia. 21. Iac. Co. B.

p Idem.

q Co. 3. 50, 51. 9. 140.

r Co. 10. 50. 9. 141. 3. 50, 51.

f Co. 3. 84.

Diſcontinuance.

t Trin. 21. Iac. Co B. Will. Godfrey verſus Wades caſe.

iſſue, and then the tenant in taile dieth, by this the daughter and the eſtate taile is not barred. So if the younger ſonne levy a fine in the life of the father, and then the tenant in taile dye, this is no barre to the elder ſonne. So if lands be given to a man and the heires females of his body, and he hath a ſonne and a daughter, and the ſonne doth levy a fine of the land, this is no barre to the daughter. So if tenant in taile have a daughter his wife being with childe of a ſonne, and the daughter levy a fine, and after the ſonne is borne, this fine ſhall not barre the ſonne, for theſe howbeit they be privies and heires to the bloud yet are not privies and heires to the eſtate. 6. Albeit the eſtate paſſed by the fine be afterwards before all the proclamations had avoided, yet the iſſue in taile is barred by it. And therefore if tenant in taile diſcontinue in fee, and after diſſeiſe the diſcontinuee and levy a fine with proclamations to a ſtranger, and take an eſtate backe by Render in the ſame fine, and the diſcontinuee before all the proclamations paſſe enter and claime and ſo avoid the fine, yet hereby the eſtate taile is barred. [u] And if tenant in taile infeoffe the iſſue in taile and after diſſeiſe him and levy a fine, the iſſue enter, and after the proclamations paſſe, and after the iſſue in taile doth infeoffe the tenant in taile which levied the fine and dyeth, it ſeemes this fine ſhall barre the iſſues in taile. 7. This is a barre to the eſtate taile and to the iſſues onely and is no barre to him in remainder or reverſion, and therefore when the eſtate taile is ſpent this barre is at an end. And therefore if an eſtate be limited to *A.* and *B.* his wife and the heires males of the body of *A.* the remainder to *C.* and *A.* and *B.* have iſſue and *A.* dye and *B.* and her iſſue, or her iſſue alone levy a fine, this will barre the iſſues of the iſſues whiles there be any, but they faile it will not barre *C.* in remainder, except he ſuffer five years to paſſe and ſo be barred by his *non claime*. So if tenant for life and he that is next in the remainder in taile joyne in a fine, this is a good barre to the iſſues in taile for ever as long as that eſtate taile ſhall continue, but not to him that is next in remainder, nor to any other that ſhall come in of any remainder in taile or in fee nor to him in reverſion. [x] If lands be given to *A.* and the heires males of his body, the remainder to *B.* and the heires males of his body, the remainder to the right heires of *A.* and *A.* doth bargain and ſell this land by deed indented and inrolled to *I. S.* and his heires, and after levy a fine of it *ſur Conuſance de droit come ceo &c.* to him and his heires, by this the remainder to *B.* is not diſcontinued, but it is a barre to the eſtate taile by the Statutes, and cauſeth the eſtate of the bargainee to laſt ſo long as the tenant in taile hath iſſues of his body, but if the fine had been before the bargaine and ſale it had been a diſcontinuance of the remainder, but in neither caſe a barre to him in remainder unleſſe he

6] Co. 3. 91.

u Per Popham et Fenner. Iuſt. M. 39. 40. Eliz. B. R.

7] Co. 1. 76. ſuper Lit. 372.

x Co. 10. 96. & 9 Iac. B. R.

Diſcontinuance.

he ſuffer himſelfe to be barred by his non-claime within five yeares after his remainder happen to come in poſſeſſion. 8. If there be tenant in taile the remainder to him in taile, and the tenant in taile levie a fine of this land, hereby both his eſtates are barred. *Et ſic de ſimilibus.* [y] But all this notwithſtanding, If lands be conveyed to a woman in taile for her joynture within the Statute of 11 *H.* 7. *chap.* 20. and ſhe levie a fine of this land, this will not barre the iſſues in taile. Or if lands be given in taile to any ſubject by the Kings own gift or proviſion, and the tenant in taile levie a fine, this fine ſhall not bind the iſſues in taile nor the King, but others it will barre, for theſe fines are not intended within, but excepted out of the Statute of 32 *H.* 8. but the King himſelfe being tenant in taile of the gift of ſome of his Anceſtors being ſubjects may levie a fine of it to barre his iſſues in taile. And in all caſes where a recovery will not barre the iſſues in taile, there a fine will not barre them.

8] Co. ſuper. Lit. 372

y] Bro. Fines 121. Co. 6. 55. Dyer. 4 Co. ſuper Lit. 372. Co. 8. 17. 78.

2 Wife barred by the fine of her husband or ſome other.

Albeit the fine of the husband and wife together of the wives land, or of the land of the husband and wife together, be a perpetuall barre to her and her heires for ever, yet if the husband alone levie a fine with Proclamations of ſuch land, and then he die, in this caſe ſhee is not barred of her right, but if ſhe doe not make her claime, &c. within five yeares after her husbands death ſhe is barred of her right for ever, notwithſtanding the Statute of 32 *H.* 8. [a] And if one ſeiſed of land in fee mary a wife, and after make a leaſe of this land to *A.* for life, the remainder to *B.* in fee, and *B* levie a fine with Proclamations, and the husband die, and the wife doe not make her claime, &c. within five years after the death of her husband; hereby ſhe is barred of her dower for ever notwithſtanding the eſtate for life in *A.* but if the remainder of *B.* had been put to a right at the time of the fine levied ſhe might have avoided the fine by Plea. *Quod partes finis nihil habuerunt, &c.* [b] And if the husband levy a fine of his owne land and die, and his widow having no impediment doth not make her claime within five yeares after his death; hereby ſhe is barred of her dower for ever. [c] If a jointure be made to a woman after the coverture, and her husband and ſhe levie a fine of it; hereby without queſtion ſhe is barred of her jointure in this land, but it is thought that this is no barre of her dower in the reſidue of the land of the husband, and eſpecially then when the fine is *Sur conuſance de droit come ceo, &c.* [d] If lands be given to a man and his wife in taile, the remainder to the right heires of the husband, and the husband alone levie a fine of this, this will not barre the wife except ſhe ſuffer five years to paſſe after his death without making claime, &c. and therefore if the fine be to the uſe of the husband and his heirs in fee he may diſpoſe it as a fee ſimple and his iſſue hath no remedy.

Dyer 72. Plow. 373.

a M. 18. Jac. Co. B. in Anne Twiſts caſe.

b Dyer 224. Co. 2. 93.

c Dyer. 358.

d Dyer 351.

If

Co. 9. 105. 3. 87. ſuper Lit. 298.

If a man diſſeiſe me of the land I have in fee ſimple, or fee taile, and after levie a fine of this land with Proclamations, and I doe not make my claime, &c. within five years after the Proclamations had, hereby I and my heires are barred for ever of this land. And if I being ſuch a tenant in fee make a leaſe for years, or be the Lord of any Copyhold eſtate, and my leſſee for yeares, or Copyholder in fee, or for life be ouſted, and I thereby diſſeiſed, and the diſſeiſor levie a fine, and neither I nor my leſſee for yeares, or Copyholder, doe make any claime, &c. within the five years after the fine levied, hereby we are all barred for ever. And if one diſſeiſe me of land, and after make a leaſe for life of it, and then levie a fine with Proclamations, and I ſuffer five yeares to paſſe, hereby I am barred both of the reverſion and of the eſtate for life alſo.

3. Diſſeiſee and the like barred by the fine of the diſſeiſor, &c.

Plow. in Stowels caſe.

If tenant for life make a feoffment in fee, and the feoffee levie a fine with Proclamations, and he in reverſion or remainder doe not make his claime, &c. within five years, hereby he is barred for ever.

Co. 3. 79.

If I pretend right or title to land, and enter upon it, and put him out that is in poſſeſſion, and then I levie a fine with Proclamations, with an intent to barre him, and he doth not make his claime, &c. within five years, hereby he is barred for ever, albeit he had the true right, and I no right at all.

Co. 3. 79. Doct. & St. 83. 155.

If I purchaſe land of *H.* and after perceiving my title defeaſible, and that a ſtranger hath the right of the land, I doe levie a fine to, or take a fine from another with Proclamations with intent and of purpoſe to barre him that hath right, and he ſuffer five yeares to paſſe, and doth not make his claime, &c. hereby hee is barred of his right for ever. And in theſe and ſuch like caſes, there is no reliefe to be had in equity. See more in Numb. 11. *infra.*

Equitie.

Co. 10. 95. 9. 106.

If there be tenant in taile, the remainder in taile, and the tenant in taile bargaine and ſell the land by deed indented and inrolled, and after levie a fine with Proclamations to the bargainee *Sur Conuſance de droit come ceo, &c.* in this caſe as to the tenant in taile and his iſſue this is a barre, but as to all others it is no barre, albeit they never make any claime, &c. So if tenant in taile levie a fine of his intailed land, this is a barre as to him and his iſſues, but as to all others it is no barre at all, and therefore he in remainder or reverſion in their times may enter notwithſtanding.

9. Where a Fine ſhall be a barre as to one perſon, and not to another, or as to one part of the land, and not to another.

[e] Co. 9. 140. 142.

[e] So if lands be entailed to the husband and wife, and the heires of their two bodies, and the husband alone levie a fine of this land, this as to the husband tenant in taile and his iſſues is a barre, but not as to the wife, for ſhe ſhall be tenant in taile ſtill, and yet it ſeems ſhe may not ſuffer a recovery of this land afterward. So if a man attainted of felony or treaſon levie a fine of his land, this as to the King and Lord of whom the land is held is void, and is no barre to their advantage and

Recoverie.

and title of forfeiture, but as to all others it is a good barre. [f] So if one levie a fine of Lands in Ancient demeſne and of other lands together, this as to the lands in Ancient demeſne is not good, nor any barre at all, but as to the other lands it is a good barre. f 7 H. 4. 44. F. N. B. 98. Plow.

10. The time of claime, and within what time he that hath right to land muſt make his claime, &c. to prevent the barre of the fine.

By the ancient common law, he that had right, was bound to make claime, &c. within a year and a day after the fine levied and execution thereupon, or elſe he was barred for ever, but this barre by *non-claime* is now gone, and if ſuch a fine without Proclamations bee levied at this day, hee that hath right may make his claime at any time to prevent the barre, and avoid the force of the fine. Co. ſuper Lit. 254. 262

Parties.

Parties to fines void of impediment at the time of the fine levied are barred of the land preſently, and ſhall have no time to avoid the ſame fine by entrie, claime, &c. Stat. 1 R. 3. ch. 7. 4. H. 7. ch. 24.

Privies.

And privies in bloud, and privies in repreſentation claiming by the ſame title which their Anceſtor that levied the ſame fine had, ſhall be barred by the ſame fine preſently, and that whether they have any impediment or not.

Eſtrangers.

1. That have preſent right and no impediment.

Eſtrangers to fines, (being all ſuch as are neither parties nor privies) who have right to the land whereof the fine is levied, and have no impediment naturall or legall, ſhall have time to make their claime, &c. within five years after the fine levied and Proclamations had, and no longer. And therefore if leſſee for years, tenant by Elegit, Statute, or a Copiholder in fee, or for life, be ouſted, and he in reverſion diſſeiſed, they ſhall have but one 5. years between them to make their claime, &c. and if they claime not within that time they are all barred for ever, for they have all preſent right and may bring their action preſently: but otherwiſe it is where the tenant for life, and he in reverſion be diſſeiſed, for in this caſe he in reverſion is not barred by the firſt five years after the fine levied, for in that time he can have no action, therefore he ſhall have time to make his claime 5. years after the death of the tenant for life. See the Sta. Plow. 374. Co. 7. 105.

[g] If a diſſeiſor levie a fine with Proclamations of the land whereof the diſſeiſin was, the diſſeiſee muſt make his claime within the firſt 5. years after the Proclamations had, and if he happen to die within the five yeares, his heire ſhall not have 5. years more, but ſo much time more as to make up the time incurred in his father or other Anceſtors time, 5. years, and albeit he be an Infant at the time of his Anceſtors death, yet he ſhall have no longer time. g Plow. 356. 375.

[h] If a tenant in taile be diſſeiſed, and the diſſeiſor levie a fine, the tenant in taile or his iſſues muſt make their claime within the next five years after the Proclamations paſſed, otherwiſe they be barred for ever. The like it is in the lacheſſe of him in remainder or reverſion. h 19 H. 8. 7. Plow. 374. Dyer 3.

[i] And if in theſe and ſuch like caſes, he that hath preſent right and is without impediment bring upon himſelfe any impediment, as if being within the Realme at the time when the fine is levied, he doe i Co. 100.

after-

afterwards goe beyond the Sea, or the like, in theſe caſes he ſhall have no longer time then the firſt five years after the proclamations had.

2. That have preſent right and impediment.

See the ſtatutes. Plow. 359. Dier 3. Plow. 367. 377.

Eſtrangers to fines peſtred with impediments of Infancy, Coverture, Madneſſe, Idiocy, Lunacy, Impriſonment, or abſence out of the Realme, at the time of the levying of the fine, and having then any preſent intereſt or right ſhall have five years time after the infirmity removed to make their claime &c. And therefore an Infant regularly ſhall have time for five years after he come to his full age to make his claime &c. although he be in his mothers wombe at the time of the fine levied. And yet if my fathers brother diſſeiſe him, and levy a fine with proclamations, and a year after the proclamations my father dyeth, and after and within five years my uncle dyeth, in this caſe I by reaſon of my infancy ſhall have only ſo much time to avoid the ſame as at the death of my father remained to come of the five years next after the proclamations, and not a new five years, becauſe I claime by the ſame title that my father had. So if my father, or other anceſtor be diſſeiſed and the diſſeiſor levy a fine with proclamations, and my father or anceſtor dye within five years after the proclamations, in this caſe I ſhall not have a new five years, but only ſo much as remaineth of the old five years to make my claime &c. Madmen and Lunatickes (being ſtrangers to the fine) ſhall have the like time to make their claime &c. as Infants have, and yet if this infirmity happen after the fine levied, and before the laſt proclamations be made, theſe perſons are not bound to the firſt years, but ſhall have five years time after they be cured of their maladies. Women Covert (eſtrangers to the fine) ſhall have five years time after they be diſcovert to purſue their right. But if a *feme ſole* (eſtranger to a fine) have preſent right, and after the fine levied ſhe take a husband, and ſo five years paſſe after the proclamations had, in this caſe ſhe is barred and ſhall have no further time to claime. Eſtrangers to fines impriſoned at the time of the fine levied ſhall have the ſame time and liberty Infants have, but if ſuch impriſonment happen after the time of the fine levied and before the laſt proclamation made, it ſeemeth they ſhall have five years after the inlargement. And eſtrangers to fines being out of the Realme at the time of the levying thereof ſhall have five years time after their returne to enter or claime &c. But if they be in *England* at the time of levying of the fine, and after goe beyond the Seas, and ſuffer the five years after the proclamations to paſſe, in this caſe they ſhall have no longer time, except they be ſent in the Kings ſervice and by his commandement, [k] And if the party be beyond the Sea at the time of the fine levyed, and never return but dye there, it ſeems in this caſe the fine will not barre his heire at all.

Infant.

Plow. 366. 375.

Non ſane memories.

Plow. 375. 376.

Women Covert.

Plow. 360. 366. 375.

Impriſonment.

Plow. 366.

Out of England.

[k] Sr. Tho. Cottons caſe 27 Eliz.

Eſtrangers

3. That have divers defects.

Estrangers to fines that have divers defects or infirmities, as Infancy, Coverture, non-sanity of minde, impriſonment, abſence out of the Realme, to avoid fines ſhall have time for five years after the laſt of the infirmities removed. But if they have divers impediments, and they be all once after the proclamations made wholly removed, and after they fall into the like againe and dye, in this caſe their heires ſhall not have a new five years, but the firſt five years begun in their Anceſtors time immediately after the firſt impediments ſo removed ſhall proceed, and *non-claime* of their heires during all the reſidue of the ſaid five years bindeth them as their ſaid Anceſtors ſhould have been bound thereby if they had remained void of ſuch impediments during all the ſaid five years. Plow.375. Dier 133.

4. That are without impediment having future right upon cauſe precedent.

Estrangers to fines that have no preſent but a future right, and that ſuch as groweth wholly before the proclamations, if they be void of impediment ſhall have five yeares time after their right, title, claime or intereſt firſt groweth, remaineth, deſcendeth or cometh to them after the proclamations. And therefore if a Mortgagee be diſſeiſed and the diſſeiſor doth levy a fine with proclamations, and the five years paſſe, and after the Mortgagor payeth or tendreth the money, in this caſe he ſhall have time for five years after the tender or payment of the money to make his claime &c. So if a man levy a fine of his land whereof his wife is dowable, ſhee ſhall have five years after her husbands death to make her claime &c. and not be bound by the five years after the fine. [l] So if tenant in taile levie a fine with proclamations, and after the five yeares dyeth without iſſue, the donor ſhall have five years after his death without iſſue to bring his *Formedon*. [m] So if leſſee for life levy a fine, or make a feoffement in fee and the feoffee doth levy a fine; in this caſe he in reverſion or remainder ſhall not be bound by the next five years after the fine levied, but he ſhall five years next after the death of the tenant for life, and if he dye within the five years, his heires ſhall have only ſo much time as to make up the time before his death five yeares. [n] So alſo is the law if leſſee for life be diſſeiſed, and the diſſeiſor or a ſtranger levy a fine, in this caſe he in reverſion or his heires ſhall have five years after the death of the tenant for life and ſhall not be bound to the next five years after the time of the fine levied. [o] So if tenant in taile in poſſeſſion levy a fine and dye without iſſue, in this caſe he in the remainder ſhall have time for five years after the death of the tenant in taile without iſſue, and if he make not his claime &c. in that time, he and his iſſues are barred for ever. The ſame law is for him in reverſion or the donor if there be no remainder. [p] And if tenant in taile diſcontinue in fee, and the diſcontinuee levieth a fine with proclamations, and five years doe paſſe and the tenant in taile dieth, in this

l Plow.374.

m Co.78. Plow.373, 374.

n Plow.374. Co.9.105.

o Plow.374. 19 H.8.7. Co.3.87.84. Dier 3.

p Co.3.87.

this caſe his iſſue ſhall have five years after the Deſcender to bring
1 30 El. his *Formedon.* q But if tenant in taile diſcontinue rendring rent and dye, and the iſſue accept the Rent (which doth barre him for his time) and then the diſcontinuee levieth a fine and dyeth, in this caſe the iſſue of the iſſue ſhall not be barred by the five yeares after the fine, but ſhall have five yeares after the death of the iſſue,
r Plow. 374. r And if one *de non ſane memorie*, make a feoffement, and the feoffee levie a fine, and then the feoffer die; in this caſe the heire ſhall have 5. yeares after the death of his Anceſtor, and not be bound by the 5. yeares next after the fine levied.

5. That have future right and impediment.

See the Statutes Plow. 366, 367. Dyer 3. Plow. 358. Eſtrangers to fines that have future right upon any cauſe precedent being affected with ſuch impediments when the right firſt accreweth, ſhall have 5. years after the impediment removed to make their claime &c. And therefore infants that are borne, or in their mothers wombe when ſuch right doth happen to them, women Covert, mad men, Lunaticks, priſoners beyond the Seas ſhall have this time. As if a man have iſſue a ſon and a daughter, and the ſon doth purchaſe lands and die, and the daughter entreth as his heire, and is diſſeiſed by *A* who levieth a fine, and 5. yeares claime without claime, and tenne yeares after the father hath another ſonne who is heire to his brother; he ſhall have in this caſe a new full 5. yeares after he come to his full age, for he is the firſt unto whom the right deſcended after the Proclamations. But if a ſtranger to a fine to whom a remainder or other title firſt accreweth after the fine dõe not purſue his right within 5. years, hereby he and his iſſues are barred for ever. And in like manner if the firſt iſſue in taile to whom the title of the taile firſt accreweth neglect to make his claime &c. within the firſt 5. years after his title accrewed, hereby he is bound for ever, and the whole eſtate taile alſo. And if one abate after the death of a tenant in fee-ſimple, and make a feoffement upon condition, and the feoffee levie a fine, and 5. yeares paſſe without any claime made by his heire, hereby the heire is barred for the preſent, but if afterwards the condition bee broken, and the Abator enter, then the heire may have an aſſiſe of Mortdanceſter againſt the Abator or enter when he will.

6. That have no right for any cauſe before the fine.

Plow. in Stowels caſe. Eſtrangers to fines that have neither preſent nor future right at the time of the levying of the ſame fines by reaſon of any matter before the fines levied, whoſe right groweth entirely before the Proclamations or partly before and partly after, may make their claime &c. when they pleaſe. As if a father die ſeiſed of land his elder ſonne being profeſſed, and the younger ſonne entreth and is diſſeiſed, and a fine with Proclamations is levied, and then the elder ſonne is dearaigned, in this caſe it ſeemes he is bound to no time. So if a tenant ceaſe one yeare, and then a fine with Proclamations is levied, and after the tenant ceaſeth another yeare, the Lord may

have his *Ceſſavit* 20. years after the Proclamations.

7. That have future rights by divers titles.

And ſtrangers to fines that have ſeverall future rights by divers titles growing at ſeverall times it ſeemeth ſhall have ſeverall five years to make their claims &c. commencing from the ſeverall times that their titles do firſt accrew unto them. As if tenant for life the remainder in fee make a feoffement in fee, and the feoffee levie a fine with Proclamations, and he in the remainder ſuffer the 5. yeares to paſſe, in this caſe he is barred of his entrie upon the alienation for the forfeiture, but it hath been held that if the tenant for life die, that he ſhall have another 5. years time to bring his *Formedon* in the remainder. So if the husband make a feoffement of his wives land to another upon condition which is broken, and he levieth a fine of this land, and the husband hath iſſue by his wife and dieth; and the firſt 5. yeares paſſe, and then his wife dieth; hereby he is barred of the title by the condition, but he ſhall have 5. yeares more to make his claime as heire to his mother. But if lands be given to *H* for the life of *A*, the remainder to *B* for life, the remainder to *H* in fee, and *H* is diſſeiſed, and after the diſſeiſor levie a fine, and 5. years paſſe; in this caſe *H* is barred both of his preſent and future eſtate and ſhall have no further time to make his claime &c. and yet if *Ceſtuy que vie* and he in the meane remainder die, *H* ſhall have another 5. years to make his claim to preſerve his remainder. In like manner it is if land be given to *H* for the life of *A*, the remainder to him for the life of *B*, the remainder to him for the life of *C*, and he is diſſeiſed, and the diſſeiſor levieth a fine with Proclamations; in this caſe, ſome ſay *H* for his preſent right ſhall have 5. years by the firſt ſaving of the Statute, and 5. years after the death of *A* by the ſecond ſaving of the Statute. If one diſſeiſe a feme ſole, and after mary her and have iſſue by her, and the husband is diſſeiſed before mariage or after, and then a fine is levied with Proclamations, and the husband dieth firſt, and afterwards the wife dieth within the 5. years, the iſſue being of full age, the 5. years paſſe, hereby he is bound as heire to his father, but he ſhall have 5. years more after the death of his mother to make his claime &c. *Quando duo jura in una perſona concurrunt æquum eſt ac ſi eſſent in diverſis.*

Plow. 537. 367. 372.

Plow. 357. 368. 372.

11. How a fine ſhall enure and work.

Where there is a precedent agreement amongſt the parties as a feoffement or the like there the fine ſhall not paſſe any thing, nor work by way of Eſtoppell, but only by way of corroboration, and ſhall be guided by the precedent agreement. And therefore if a feoffement be made to two and their heires, and after a fine is levied to them two and the heires of one of them, this ſhall enure as a releaſe, and ſhall not alter the eſtate, but if there be no precedent agreement it ſhall work as it may.

Co. 10. 96. 2. In the Lord Cromwels caſe.

If *A* enfeoffe *B* of certaine land in fee rendring rent with condition of re-entrie for not payment of rent, and by indenture at the ſame

Dyer 154. Fitz. Eſtoppell 211. Co. 2. in Cromwels caſe.

ſame time covenant to levie a fine of the ſame land to the feoffee to the uſes and conditions in the deed of feoffment, and after a fine is levied *ſur conuſance de droit come ceo &c.* accordingly, in this caſe this fine ſhall enure as a fine *ſur releaſe*, becauſe the Conuſee hath the fee before, and it ſhall not enure by way of Eſtoppell, albeit it bee a fine *ſur conuſance de droit come ceo &c.* And therefore the rent and condition ſhall remaine in this caſe, and not be extinct.

Eſtoppell. Extinguiſhment.

See before at Numb. 6. part. 2. F. N. B. 20. f. Stat. 23. El. ch. 3.

A fine may be avoided for many cauſes, as by the death of the parties after the conuſance before the recording of it, or by covin in the procuring of it; Alſo it may be avoided for other cauſes, as for ſome error in the proceeding in the ſuing out of the fine, and this is done by writ of error (but this error then that ſhall not make a fine voidable muſt be notorious, becauſe the thing is done by conſent, and it is a rule in Law *Conſenſus tollit errorem.*) And by this means if the huſband and wife levie a fine, and both of them be within age, whiles either of them be within age, they may avoid the fine as againſt them both. But if there be tenant for life and he in remainder in taile being an Infant, and they two levie a fine, and he in the remainder reverſe it for infancy, this ſhall not avoid the fine as to the tenant for life alſo. A fine alſo is and may be ſometimes avoided, or at leaſt loſe much of his force by the claim, entry, or action, of him that hath right to the land: for if the eſtate contained in a fine be once within 5. years after Proclamations lawfully defeated, the party hath thereby left his whole eſtate both againſt him which did reverſe the ſame and againſt all others which had right or title paramount and made no claime within the 5. years, albeit he which doth bring the action have no judgment and execution within 7. years after the Proclamations. In like manner if there be tenant for life, the remainder for life, the remainder in fee, and the firſt tenant for life alien, and the alienee levie a fine with Proclamations, and the ſecond tenant for life claim, or enter, &c. this doth make void the fine both againſt him, and againſt him in remainder alſo: for it is a rule, That any one that hath any eſtate in poſſeſſion or reverſion which will be barred by the fine when it is levied, may make a claime or entrie to prevent the bar of the fine. As tenant for his own, or for anothers life, tenant for years, he in reverſion or remainder after an eſtate for life or years, a Copyholder, or the Lord, a Gardian in nature, or nurture, may avoyd a fine. And this they may do for themſelves and others, & for others without authority precedent or aſſent ſubſequent, and the claim of one of them in this caſe ſhall availe the other. And by authority alſo any other man may make a claim, entry &c. in this caſe for him that hath right, and ſo he may doe alſo without any authority precedent, if the party for whom he doth it doe afterwards agree and aſſent unto it. But a

12. Where a fine may be avoided, or not. And how. 1. By a writ of error.

Co. 2. 77. 1. 76.

Plow. 358. 359. Co. 9. 106.

2. By a claime, entrie &c. And by whom a claim &c. may be made.

ſtranger of his owne head (unleſſe perhaps it bee for an Infant) cannot make ſuch a claime or entry to prevent the barre of a fine, except hee that hath the right doe give him authority before it be done ſo to doe, or doe agree to it after it is done. And therefore if a ſtranger of his owne head will make an entry or claime into land whereof a fine is levied whereunto I have right, and he doe it to my uſe, and I doe not agree to it within the 5. yeares, this entrie or claime will not avoid the fine. And yet it was held by Juſt. *Dodridge, M. 2. Car. B. R.* that if a ſtranger enter in my name and to my uſe that have the right, that this doth veſt the eſtate in me before agreement, and I ſhall be ſaid to agree untill I doe diſagree.

3. By a plea. A fine alſo is, and ſometimes may be avoided by plea, As by Averment of the continuance of ſeiſin of the Land in another at, and before the time of the fine levied, and that *partes finis nihil habuerunt tempore levationis finis*, and then he muſt ſhew in whom the eſtate was. As if leſſee for yeares, or a diſſeiſee, levie a fine to a ſtranger that hath nothing in the land, or *A* be diſſeiſed by *B*, and *B* bee diſſeiſed by *C* and *B* levy a fine to *D*, or one that hath a right of a remainder only, or a diſſeiſor make a gift in taile, and the donee make a feoffement to *A*, and after levie a fine to a ſtranger that hath nothing in the land. But this plea it ſeems neither parties nor privies, albeit they bee iſſues in taile, may have at this day, but ſtrangers only, and therefore in the laſt caſe the diſſeiſor and not the iſſue in taile may avoyd this fine by this plea. But if a Collaterall Anceſtor of whom the iſſue in taile doth not claim the land levie ſuch a fine, the iſſue may by this plea avoid it. It ſeems alſo the iſſue in taile may have this plea to a fine *Sur Releaſe* only. Stat. 4 H. 7. c. 24. Co. 3. 141. 88. Dyer 334.

Alſo there is a plea by which (as it ſeems) a fine hath been avoidable, which in effect is nothing elſe but an averment of ſeiſin ſtill in the demandant or plaintiffe or his heires before, at, and after the time of the fine levied. And this plea (as it ſeems) no man may have at this day but the iſſue in taile only to avoid a fine levied *Sur grant & Render*, by the Anceſtor in taile, and not to avoid a fine levied *Sur Conuſance de droit come ceo que il ad de ſon done &c.* And a feme Covert to avoid a fine levied by her husband alone. Co. 3. 84. Dyer 334. 290. Stat. 27 E. 1. c. 1.

If there be two of one name, and one of them levie a fine of the land of the other, or a ſtranger levie a fine in the name of him that is owner of the land; in both theſe caſes the fine may be avoyded by pleading the ſpeciall matter. And yet ſome hold that in this caſe the party hath no remedy but by action of diſceit. 34 H. 6. 19. 19 H. 6. 44.

4. By a Vacat. A fine alſo is and ſometimes may be avoided by the ſentence of a Court, when it appeareth to be gotten and obtained by ſome notorious fraud or practiſe.

And

And now it is high time we come to the ſecond kind of common aſſurances made by mater of record. *viz.* a Common Recovery.

CHAP. III.

Of a Common Recovery.

Co. ſuper Lit. 154. See the Preamble of the ſtat. of 23 H. 8. cap. 10. 23 Eliz. cap. 3. Doct. & Stud. 41. Weſt. Symb. tit. Recovery.

A Recoverie in generall is the obtaining of any thing unjuſtly taken or detained by judgment or triall of Law. And it is either a common recoverie which is ſuch a recovery as is uſed for a common aſſurance of land, or other recovery which is not uſed as an aſſurance of land. And the common recovery that is uſed for the aſſurance of land is nothing elſe but *fictio juris*, or a certaine forme or courſe ſet downe by Law to be obſerved for the better aſſuring of lands and tenements to men. And this is ſomewhat after the example of the recovery upon Title, which is without conſent and contrary to the will of him againſt whom the ſame is had: for there is in this a colourable ſuit, wherein there is a demandant which is called the Recoverer, and a tenant which is called the Recovere, and one that is called to warrant upon a ſuppoſed warranty which is called the Vouchee.

1. Common Recovery. *Quid.*

Recoveror. Recoveree. Vouchee.

The common recovery is ſomtimes with a ſingle voucher; which is when the writ is brought againſt him that is to paſſe the land immediately, and he doth vouch over the common vouchee. And ſometimes it is with a double voucher; which is when the writ is brought againſt another to whom he that is to paſſe the land hath aliened it, and he doth vouch him that is to make the aſſurance, and he doth vouch over the common vouchee: and this is the ſureſt way, and the ſafeſt kind of recovery. In this formality of a common recovery the courſe is, that by agreement of the parties a reall action is begun by a writ of entry brought by him that is to have the land aſſured againſt him that is to make the ſame aſſurance if it be with a ſingle voucher, or if it be with a double voucher againſt him to whom he that is to make the aſſurance hath aliened the land. And in this ſuit, the recoveror that doth bring the action doth ſurmiſe that the tenant againſt whom the writ is brought hath no right to the land, but that the recoveror hath right thereunto, and that the tenant came to it from ſuch a ſtranger whom the demandant doth name: And to this the tenant doth appeare in perſon or by Atturney, and then doth enter into defence of the land, but in pleading doth vouch to warrant; *i.* doth alleage that he bought the land of *I. S.* a ſtranger, who in the conveyance thereof bound himſelfe and his heirs to warrant, and make good the title to him or them to whom it is conveyed, and thereupon he prayeth that *I. S.* may be called in to defend the title, and then hee

2 *Quotuplex.*

See the places before Co. 1. 24. 10, 43. 45.

3 The manner and order of ſuffering a Common Recovery.

is allowed by the Court to call in *I. S.* to ſay what he can for the juſtifying of his right to the land before he ſo conveyed it: And hereupon *I. S.* doth appeare and make ſhew as if he would defend the title, but doth pray a further day may be aſſigned him to make his defence; which being granted him by the Court, at the the day appointed he by agreement, covin and aſſent of the parties doth not come in but make default: And thereupon the land is to be recovered by him that brought the writ againſt the tenant, and he is left for his remedy to *I. S.* upon his warranty, and accordingly judgment is given by the Court that the demandant or recoverer ſhall recover the land demanded againſt the tenant, and that the tenant ſhall recover ſo much land of *I. S.* of his own land in recompence for the land recovered from him which he ought to have warranted and defended but ſuffered to be loſt. And this recovery over is called a recovery in value or *pro Rata*. But if the recovery be with a double voucher, or a treble voucher, *I. S.* is upon his appearance to call or vouch to warrant *I. D.* and to alleage in the ſame manner as the tenant doth, and ſo pray that *I. D.* may come in, and thereupon *I. D.* doth appeare and make default: And ſo if there be more vouchers; and then there muſt be ſeverall recoveries over in value againſt every one of them; but he that is the laſt vouchee is alwaies the common voucher who is one of the cryers of the Court of Common Pleas, a man not worth any thing and one that hath no land to render in value upon the ſuppoſed warranty. And by his deviſei grounded upon the ſtrict Principles of law the firſt tenant doth willingly let goe the land for the aſſurance of the Purchaſor, and yet in truth hath no recompence over becauſe the vouchee hath no land to render in value. And by this meanes if one have an eſtate taile in lands which he is deſirous to ſell or to convert into an eſtate in fee ſimple, the ſame is commonly done, for the tenant in taile doth cauſe the purchaſor or ſome friend of his to bring a writ of entry againſt him for this land, and he appeareth to the writ, and in pleading ſaith that the land came to him or his Anceſtors from ſuch a man or his anceſtors who in the conveyance bound themſelves to warrant it. And thereupon that man is called in, who doth appeare and make default, and thereupon Judgement is had againſt him in manner as aforeſaid. Or if he would have the recovery with a double voucher, then doth he by fine, feoffement, or deed of bargaine and ſale inrolled diſcontinue the land, and then cauſe the recoveror that is to have the land to bring his writ of entry againſt the diſcontinuee, and he doth vouch the tenant in taile, who doth vouch over the common vouchee, and ſo it is done; and by this the eſtate taile that the tenant in taile hath or had is barred and bound, for that it appeareth now he had no power to entaile the land whereunto he had no juſt title, and

Recovery in value, or *pro Rata. Quid.*

F.N.B. 134. Co. 9. 6.

and beſides he ſhall recover a recompence over in value, and this is adjudged in law to goe in ſucceſſion of eſtate as the land ſhould have done, which is the reaſon why the recovery is a barre to all that are in remainder and reverſion aſwell as to the iſſues in taile.

Experientia. And in the ſuffering of theſe recoveries the tenants and vouchees doe appeare moſt commonly in perſon in Court, and ſo the recovery is finiſhed in the court preſently without more doing, but ſometimes they will not or cannot appeare in perſon, and then they doe uſe to appear and ſuffer the recovery by Atturney. And in that caſe there muſt be a Conuſance for a warrant of Atturney taken to authorize the Atturney or Atturneys in this manner if it be for a treble voucher. Warrant of Atturney.

Weſt Sym. ubi ſupra. Glouc'ſſ. *Prec'* A S *&* B *uxori ejus quod juſte &c. redd'* C D *Manerium de* N *cum pertinen' &c. que clam' eſſe jus et hered' ſuam & in que iidem* A *&* B *non habent ingreſſ. niſi poſt diſſeiſinam quam* H H *injuſte & ſine judicio fecit prefat'* C *infra* 30. *Annos jam ultim' elapſos &c. ut dic' &c.*

Glouc'ſſ. A S *&* B *po. lo. ſuo* W W *&* R R *Attornat. ſuos conjunctim & diviſim verſus* C D *de placito terre.*

Glouc'ſſ. M M *gen. quem* A S *&* B *vocant ad warrant. po. lo. ſuo* I I *&* L L *Attornat' ſuos conjunctim & diviſim verſus* C D *de placito terre.*

Glouc'ſſ. G W *gen. quem* M M *voc. inde ad warrant' po. lo. ſuo* R G *&* R S *Attornat' ſuos conjunctim & diviſim verſus* C D *de placito terre.*

Co. 10. 43. Co. 1. 94. And in theſe caſes to make two atturneys at the leaſt, and to give them an authority joyntly and ſeverally that if one of them dye before the recovery be ſuffered, the other may have power to doe and diſpatch it. And theſe warrants of Atturney for the ſuffering of recoveries are to be knowledged and certified in the ſame manner as the conuſances of fines knowledged in the Country are, ſave only that Recogniſances for warrants or atturney for recoveries may be taken by any Judge of the Court of Common Pleas or any Serjeant at law without a *Dedimus Poteſtatem*. But if any others take it they uſe to doe it by a ſpeciall *Dedimus Poteſtatem*, which is to command the Commiſſioners therein named to come to ſuch perſons and to take the names of their atturney or atturneys in the ſuit, and to certifie the ſame into the Chancery under their Seales ſuch a day. And if there be any woman covert that is to make the conuſance it ſeemes ſhee is to be examined as in the caſe of the conuſance of a fine. And when this is done the recoveries may be ſuffered by the atturneys without the perſonall appearance of the parties. And this is as good a recovery as the other which is ſuffered by the perſons themſelves appearing in Court, but that it will require longer time for the perfection of it, for in this *Dedimus Poteſtatem.* Examination.

caſe there muſt goe forth a *Summoneas ad warran'* which muſt have nine Returnes ere the recovery can be perfected, and by that time one of the parties may be dead. And when the recovery is thus ſuffered by the parties in perſon or by their atturneys, the ſame is to be entred by ſome one of the Clarks of the Court of Common Pleas upon the Rolles of the ſame Court there to remaine upon Record. And herein there muſt goe forth a writ of Execution called an *Habere facias ſeiſinam*, which is ſent to the Sheriffe of the County where the land doth lye to put the Recoveror in poſſeſſion of the land (except the recovery be of a reverſion of land after a leaſe for years of it, in which caſe the reverſion ſhall be in the recoverors by a claime without any writ.) And this writ the Sheriffe doth returne as executed according to the contents thereof, albeit in truth he never doe any thing upon it. And after this all the ſame proceeding is to be Exemplified by the Clarke of the ſame Court.

Habere facias. ſeiſinam.

4. The uſe, nature and operation of it.

A recovery being matter of Record is much of the nature of a fine, and ſuch a thing as whereof the law taketh notice; for it is now become a formall and orderly manner of Aſſurance of lands, and one of the Common Aſſurances of the Kingdome, or a common way and meanes to paſſe land from one to another. And therefore if a tenant for life ſuffer ſuch a recovery of his land it is a forfeiture of his eſtate, an uſe may be averred upon it as well as upon a fine, and it may be avoyded for covin as well as any other kind of conveyance. But it is of ſpeciall uſe and hath a ſpeciall virtue to barre and binde eſtates in taile and all the remainders and reverſions thereupon. And becauſe many of the Inheritances of the kingdome doe depend upon this Aſſurance, and it is oft times the greateſt ſecurity purchaſors have for their money, therefore it hath much favour from the law at this day. And therefore the law will not endure it ſhall be diſputed againſt, for *Communis error facit jus.* And hence it is that it ſhall not be avoyded for ſmall errors, for it is another rule of law *Conſenſus tollit errorem.* And if a recovery be ſuffered by a tenant in taile, hereby he hath not only diſcontinued, barred and deſtroyed the eſtate taile, and ſo defeated himſelfe and his iſſues the former owner of the land, and all the remainders and reverſions thereupon that ſhould take place after the eſtate taile whether they be in *eſſe* or contingent only, but alſo all former eſtates, leaſes and charges made by him in remainder or reverſion: for as when the eſtate taile in poſſeſſion is not barred by a recovery, the eſtates in reverſion or remainder are not barred, for *Quod non in magis propinquo non in magis remoto valebit*; So it is *è converſo*, where the eſtate taile in poſſeſſion is barred by the recovery, all the remainders and the reverſions, Conditions, charges, incumbrances and eſtates dependent upon it are barred alſo, except it be in

Forfeiture. Averment. Covin.

Co. 5. 41. 10. 37. 39. 3. 5. 6. 41, 42. Doct. et Stud. 41. 49, 50. ſtat. 13 Eliz. cap. 5. 23. cap. 3. 7 H. 8. cap. 4.

Co. 1. 62. 25. Doct & Stud. 49. 44 Ed. 3. 22.

in ſome ſpeciall caſes where the remainder or reverſion is in the King. And therefore if *A* be tenant in taile, the remainder to *B* in taile, the remainder to *C* in fee, and *B* or *C* doth make a leaſe for years of the land, or grant a rent charge out of the land, or enter into a Statute, or the like; or grant the remainder or reverſion upon condition, and after *A* doth ſuffer a common recovery of the land, and after dieth without iſſue, in this caſe the recoveror ſhall hold the land diſcharged of all theſe eſtates and charges in remainder. But otherwiſe it is if *A* himſelfe make a leaſe, or enter into a Statute, and then ſuffer a common recovery of the land, in this caſe this recovery doth not avoyd but affirme the leaſe or charge, for whereas it was before voydable by the iſſue in taile or him in remainder or reverſion, now it is good againſt them all, and the recoveror alſo ſhall hold it charged and ſubject to the leaſe and charge of the tenant in taile. This kind of Aſſurance therefore is in ſome reſpects better then a fine, for a fine will barre the heire in taile, but not him that is in the remainder or reverſion, but a recovery will barre them all.

5. What ſhall be ſaid a good Common Recovery. And who ſhall be barred and bound thereby, or not.

Weſt Sym. ubi ſupra. Co. ſuper Lit. 372.

In every good and binding common Recovery theſe things are requiſite. 1. That there be a demandant, a tenant, and a vouchee as the efficient cauſes thereof, for if either of theſe be wanting it is not a compleat recovery. And therefore if a common recovery be had againſt a tenant in taile without a voucher; this is voyd. And for this it is to be knowne that ſuch perſons and by ſuch names may be demandants, tenants, and vouchees in recoveries, as may be cogniſors and cogniſees in fines. [a] And therefore a recovery ſuffered by an Infant appearing by his Guardian is good, and will bind him and all others. [b] So alſo a recovery had againſt a woman that hath a husband being joyned with her husband will bind her and all others. 2. That there be land demanded as the matter, and that the thing be demandable. And for this it is to be known that of ſuch things and by ſuch names as a writ of Covenant for the levying of a fine may be had, a writ of entry for the ſuffering of a recovery may be had ſave, only it may not be *de foſſato, ſtagno, piſcaria, nn' Carucat' terre, eſtoveriis, homag', fidelitat', de ſervitiis faciendis, de bovata mariſci, de ſelion' terre, de gardino, cottagio, crofto, virgata terre, fodina mineræ, mercatu, nec de ſuperiori camera.* And yet of ſome of theſe alſo it may be by other names. Alſo a recovery may be had of a rent, common advouſon, franchiſes and the like, but not of an annuity. 3. That it be had and ſuffered in that order and forme as law requireth, *viz.* that there be a writ of entry brought, an appearance of the tenant *in fait*, a voucher, and an appearance of the tenant in Law the vouchee, Judgement and Execution in manner as aforeſaid, for if there be any ſubſtantiall defect in theſe things the recovery may be thereby avoided.

[a] Benets caſe Hobarts Rep. 275. Paſc. 9 Jac. Earle of Newports caſe adjudged.

[b] Co. 10. 43. Plow. 515. 27 Doct. & ſtud. 52. Co. 5. 40, 41. Weſt ubi ſupra.

Infant.

Woman covert.

Co. 3. 3. ſtat. 23 Eliz. cap. 3.

avoided by writ of error, but if it be only in forme it will not hurt. 4 That there be a lawfull tenant to the Precipe. *i.* that the writ of entry be brought againſt one that at the time of the writ brought is tenant of the freehold, either by right. *i.* that hath an eſtate for life at leaſt in the land, or by wrong. *i.* that is a diſſeiſor of the land demanded and whereof the recovery is had. And therefore in this caſe the courſe is where the land to be recovered is in poſſeſſion and a fine and a recovery is had of it together, the fine is ſued out firſt, for this doth make the Conuſee tenant of the freehold of the land, and then the recovery is had againſt him. And when the recovery is to be had of a reverſion, and that there is an eſtate for life in being of the land whereof the recovery is to be had (for an eſtate for years or any ſuch like eſtate will not hinder the ſuffering of a recovery) there the courſe is to get a Conditionall Surrender from the tenant for life of his eſtate to him in reverſion or remainder, to the end that he may be perfect tenant of the Inheritance, and then the writ of entry may be brought and the recovery had againſt him, for if a writ of entry be brought againſt a ſtranger, and he vouch the tenant in taile in poſſeſſion of the land, and ſo a recovery is had; or if there be tenant for life of land, the remainder or reverſion to another in taile, or in fee, and a ſtranger doth bring a writ of entry againſt him in the remainder or reverſion or againſt a ſtranger who doth vouch him, and ſo a recovery is had; theſe recoveries are not good. And yet if the writ be brought againſt the tenant of the land and a ſtranger that hath nothing in the land together, and ſo a recovery be had; this recovery is good enough. And if a diſſeiſor make a gift in taile of the land to another, and the writ is brought againſt him, and he vouch the diſſeiſee, and he vouch the common vouchee; this is a good recovery. 5. That it be in ſuch a caſe as is not prohibited by ſome Statute law, for if the King give any of his owne land whereof he is ſeiſed, or cauſe or procure another in conſideration of money or other land to give the lands whereof he is ſeiſed, in taile to any of his ſubjects or ſervants in recompence of their ſervice, or the like, the remainder to the King in fee ſimple, or fee taile; ſuch eſtates in taile cannot be barred by a common recovery: And therefore if ſuch a tenant in taile ſhall ſuffer a recovery of ſuch land it is voyd, and it will neither barre the iſſues in taile, nor any of them in remainder, nor the King. But if the King make ſuch a gift in taile keeping the reverſion to himſelfe, and after doth grant the reverſion to another; in this caſe the tenant in taile may ſuffer a recovery and bar the eſtate taile and the reverſion alſo. And where a ſubject by the Kings proviſion doth make ſuch a gift in taile and then doth grant the remainder to the King for life or years only; in this caſe the eſtate taile, remainders and

Dier 252. Co. ſuper Lit. 46. 3. 6.

Co. 3. 6. ſuper Lit. 46. Lit. Bro. Sect. 519. Plow. 514 Doct. & Stud. 49. See infra

Prerogative.

Stat. 34. H. 8. ca. 20. Co. ſuper Lit. 371. 2. 5. 16. Co. 8. 77, 78.

and reverſion alſo may be barred by a common recovery. So in other caſes where a ſubject doth make a gift in taile, the remainder to the King in fee; this eſtate taile may be barred by a common recovery. And therefore if there be tenant in taile, the remainder or reverſion in fee to another, and he in remainder or reverſion by deed indented and inrolled doth bargaine and ſell his remainder or reverſion in fee to the King; or if one covenant to ſtand ſeiſed to divers uſes in taile the remainder to the King in fee, in theſe caſes the eſtates and the reverſion and remainders depending thereupon may be barred by a recovery. So if a man make a gift in taile, the remainder in fee, and he in the remainder doth grant his remainder to another for life, the remainder to the King in fee on condition the eſtate ſhall be voyd upon the tender of 20 l. in this caſe the eſtate taile, and the reverſion alſo and condition thereupon may be barred. So if the Duke of *Lancaſter* had made a gift in taile, and the reverſion had deſcended to the King; this eſtate taile might have been barred by a recovery. So if Prince *H.* ſonne of *H.*7. had made a gift in tail, the remainder to *H.*7. in fee, which remainder by the death of *H.* 7. had deſcended to *H.*8. in this caſe the tenant in taile might have barred the eſtate taile by a recovery. And yet if the King make a gift in taile, the remainder in taile, or grant the reverſion in taile; in theſe caſes a common recovery may not be ſuffered to barre the entaile, remainder, or reverſion. And if the husband for the advancement of his wife in Jointure, and the preferment of the heires of their two bodies, make an eſtate in taile to him and his wife and the heires of their two bodies, and the wife after her husbands death alone by her ſelfe or with any other husband ſuffer a common recovery of the land whereof this eſtate is made; this recovery will not barre the eſtate taile. But if in this caſe the recovery be ſuffered by the heire in taile, or by the heire and his Mother together, it is a good recovery. And therefore if *A* be ſeiſed of land in fee and he make a feoffement in fee, to the intent that the feoffee ſhall reconvey it to him and his wife and the heires males of his body, and this is done accordingly, and they have iſſue a ſonne, and ſhe ſurrender, or make a forfeiture, and he enter and ſuffer a recovery; this is a good recovery and barre to the eſtate taile: or if the writ be brought againſt the mother, and ſhe vouch the heire in taile, and ſo a recovery is had, this recovery will barre the eſtate taile. And howſoever at the Common Law a recovery againſt a tenant for life with a voucher upon a lawfull warranty and a recovery in value was a barre to him in remainder or reverſion, and there was no remedy in this caſe, yet at this day it is otherwiſe. And therefore if tenant in taile after poſſibility of iſſue extinct, tenant by the courteſie, or any other tenant for life doe ſuffer their lands to be recovered from them by

Stat. 11 H. 7. cap. 20 Co. 3. 58. 61. 59.

Stat. 14 Eliz. cap. 8. Co. 1. 15. 62. 10. 43. 45. 3. 6.

covin

Forfeiture.

covin and agreement either as immediate tenants or as vouchees upon feigned titles, without the aſſent, and to the prejudice of him in remainder or reverſion; ſuch recoveries are voyd, and will not barre the remainders or reverſions, but are forfeitures of the eſtates of ſuch tenants for life. Inſomuch that if tenant for life be made tenant in fait to the writ, or tenant in law upon the voucher, and ſo a recovery be had, as if tenant for life make a leaſe for years, and the leſſee for years doth make a feoffement in fee, and the feoffee doth ſuffer a common recovery in which the tenant for life is vouched, and he vouch the common vouchee; theſe recoveries will not bind the reverſions or remainders. But there is no proviſion made at this day to preſerve the reverſion or remainder expectant upon an eſtate taile, nor to avoyd a recovery of the tenant for life, where he in the next remainder is agreeing and aſſenting to it. And therefore if there be tenant for life, the remainder to *A* in taile, the remainder to *B* in taile, &c. with divers remainders over, and the tenant for life doth ſuffer a common recovery, in which he doth vouch *A* who doth vouch the common vouchee; in this caſe this is a good recovery and doth barre the eſtate taile, the remainders, and reverſion alſo. And if one be ſeiſed of land in fee and have two ſonnes, *A* by his firſt wife and *B* and a daughter by his ſecond wife, and he deviſe the land to his wife for her life, the remainder to *B* his ſonne in taile, and the reverſion of the fee deſcend to *A*, and the writ of entry is brought againſt the tenant for life, and ſhee vouch *B*, and he doth vouch the common vouchee, and ſo a recovery is had without the aſſent of the heire in reverſion; this is a good recovery and a barre to all the eſtates in poſſeſſion, remainder and reverſion. And if a writ of entry be brought againſt the tenant for life, and he make default after default, and then the next in remainder in taile is received, or he pray in aid of him in reverſion or remainder, and then they vouch over, and ſo a recovery is had; this is a good recovery and a barre to all the eſtates in remainder and reverſion. But if the writ of entry be brought againſt the tenant for life & him in the remainder in tail together, and they vouch the common vouchee, and ſo a recovery is had; this will be no good recovery to barre the eſtate taile. † And if Spriritуall perſons as Biſhops, Deanes, Parſons, and ſuch like, ſuffer a recovery of their Eccleſiaſticall lands; ſuch a recovery is voyd and will not bind the ſucceſſor. * But if it be not in ſome ſuch prohibited caſe as before, and the recovery be had and ſuffered by and between ſuch perſons, and of ſuch things, and in ſuch a manner as aforeſaid, in ſuch caſes albeit there be in truth no warranty made upon which the voucher is had, and albeit there be nothing to be recovered in value, for that the vouchee hath no land to recover over in recompence, and albeit that no execution be done in the life

† See before in fines & Co. ſuper Lit. 44.

* Plow. Manxels caſe Co. 10. 373. 1. 94. Plow. 357.

life time of the party againſt whom the recovery is had, yet is the ſame regularly a perpetuall barre to the parties againſt whom the ſame is had and their heires of all the eſtates they have in fee ſimple, fee taile, or for life in them and againſt all them in remainder or reverſion and their remainders and reverſions that are depending upon the eſtates: with this difference; The recovery with the ſingle voucher doth not barre any eſtate but ſuch as the tenant in taile hath in poſſeſſion at the time of the recovery had, ſo that if the tenant in taile be in of any other eſtate, as by diſſeiſin, or the conveyance of the diſſeiſor, or the like, this eſtate is not barred. But the recovery with the double voucher doth bind and barre all intereſts, eſtates and titles that the vouchee hath at the time of the entry into the warranty. All which is further illuſtrated by the examples following. [c] If the writ of entry be brought againſt the tenant in taile, and he vouch the common vouchee, and ſo a recovery is had; this recovery with a ſingle voucher is a good recovery and a barre to the eſtate taile if it be then in poſſeſſion and not put to a right and to all the remainders and reverſions depending thereupon. [d] So if lands be given to *A* in taile the remainder to the right heires of *B* (*B* being then living) and the writ of entry is brought againſt the tenant in taile, and he doth vouch over the common vouchee; this is a good recovery and a barre to the eſtate taile and the remainder alſo. But if the tenant in taile be diſſeiſed, and then ſuffer a recovery with a ſingle voucher; or the diſſeiſor make a new eſtate in taile to the tenant in taile, and then the tenant in taile doth ſuffer a recovery with a ſingle voucher; or if the tenant in taile make a feoffement in fee of land, and then take back a new eſtate to himſelfe from the diſcontinuee in taile or in fee, and then doth ſuffer a common recovery with a ſingle voucher; by this recovery the entaile is not barred. But by a recovery with a double voucher in theſe caſes the eſtate taile is barred. And therefore as where the tenant in taile doth levy a fine, make a feoffement, or bargaine and ſell the land by deed indented and inrolled and the writ is brought againſt the Conuſee, feoffee, or bargainee, and he doth vouch the tenant in taile, and he doth vouch the common vouchee; this doth barre the eſtate taile and the remainders and reverſion depending thereupon: So if in theſe caſes the conuſee, feoffee, or bargainee doth make a new eſtate in taile to the conuſor, feoffor, or bargainor, or he diſſeiſe the conuſee, feoffee, or bargainee, and then levy a fine, make a feoffement, or bargaine and ſell to another againſt whom the writ of entry is brought, and he vouch the tenant in taile, and he doth vouch the common vouchee; by this recovery the firſt and ſecond eſtate taile and all the remainders and reverſion depending thereupon are barred. So if lands be given to *I. S.* and the heires males of the body of

Co. 3. 59. Lit. Bro. Sect. 38. Plow. Manxels caſe. 12 Ed. 4. 13. 13 Ed. 4. 1.

c Co. 3. 5. 10. 37.

d Co. 1. 135. 136. 3. 59. 12 E. 4. 19. 13 E. 4. Co. 10. 45.

Co. 3. 5. Plow. in Manxels caſe 1. 8.

of his wife engendred, and he hath iſſue a ſonne, and after his wife dyeth, and he diſcontinue and take an eſtate to him and the heires females of the body of his ſecond wife, and after diſcontinue againe and take an eſtate to him and the heires females of his owne body, and after diſcontinue againe, and the writ of entry is brought againſt the laſt diſcontinuee, and he doth vouch the tenant in taile, who doth enter into the warranty generally, and voucheth the common vouchee; this is a good recovery and a barre to all the eſtates in taile, and the remainders and reverſions alſo. And if *A* before the Statute of uſes had been tenant in taile, and had made a feoffement in fee to *B* and he and *B* had after made a feoffement to *C* to the uſe of *A* and his wife and the heires of their two bodies, and then ſhee had dyed, and after *A* had entred upon *C* the feoffee, and made a feoffement to *W* in fee, againſt whom *I S* had brought a writ of entry, and he had vouched *A* the tenant in taile; this had been a good recovery and a barre to all the eſtates. And if lands be given to husband and wife and the heires of the body of the husband with remainders over to ſtrangers, and the husband alone doth diſcontinue the whole land by fine, feoffement or bargaine and ſale by deed indented and inrolled, and the writ of entrie is brought againſt the diſcontinuee, and he doth vouch the husband alone without the wife, and the husband doth vouch the common vouchee, and ſo a recovery is had; this is a good recovery for the whole land and a barre to all the eſtates in tail and remainder and reverſion, but not to the eſtate of the wife for her life after the husbands death. But if lands be given to the husband and wife and the heires of their two bodies with remainders over to ſtrangers, and the husband alone diſcontinue, and the recovery is ſuffered as in the laſt caſe; it ſeemes this is no barre to the eſtates in taile or remainder or reverſion for any part of the land. And yet if lands be given to *I S* and *I D* in taile and *I S* diſcontinue the whole, and the writ of entry is brought againſt the diſcontinuee, and he vouch *I S* alone; this is a good recovery for the one halfe of the land and a barre to all the eſtates. And if lands be given as before to husband and wife and the heires of their two bodies, and the writ of entry is brought againſt them both, and they vouch the common vouchee, or the husband alone doth diſcontinue, and the writ is brought againſt the diſcontinuee, and he vouch the huſband and wife both, and they enter into the warranty and vouch the common vouchee, and ſo the recoverie is had; theſe are good recoveries for the whole, and a barre to all the eſtates in taile and to the eſtate of the woman and to all other eſtates. And where lands are given to a man and his wife and the heires of the body of the wife; or to the wife and the heires of her body, and the writ of entry is brought againſt the husband and wife, and they vouch the

Co. 3. 5. 6. 32.

Husband and wife.

Lit. Bro. 37.

the common vouchee; theſe are good recoveries and will barre the husbands and wives and the eſtates in taile, remainder and reverſion. Plow. 514. And where a man hath land in which his wife hath a Jointure, or to which ſhee will have title of dower after his death, if the writ of entry in this caſe be brought againſt them both, & they vouch the common vouchee, and ſo a recovery is had, this recovery will barre them both: But the husband alone without her cannot barre her of any ſuch eſtate by a recovery, for ſhe may falſifie and avoid it after his death. Co. 3. 5. 1. 12 Ed. 4. 14. And if lands be given to husband and wife and the heires of the body of the husband, and the writ of entry is brought againſt the husband alone, and he vouch the common vouchee, and ſo a recovery is had with a ſingle voucher; this is no good recovery for any part of the land, nor barre to any of the eſtates albeit the husband doe ſurvive the wife. Co. 3. 6. And yet if lands be given to two others and the heires of the body of one of them, the remainder over to a ſtranger, and the writ of entry is brought againſt one of them, and he vouch the common vouchee, and ſo a recovery is had; this is a good recovery and a barre to all the eſtates for the one halfe of the land. If lands be given to *A* in taile, the remainder to *B* in taile, the remainder to *C* in taile, the remainder to *D* in fee, and *A* doth make a feoffement in fee, and the writ of entry is brought againſt the feoffee, and he doth vouch *B* (being him in the ſecond remainder in taile) to warranty, and he doth vouch the common vouchee; this is a good recovery and a barre to the ſecond eſtate taile and all the remainders and reverſion depending thereupon; And yet it is no barre of the firſt eſtate taile which *A* hath. If the writ of entry be brought againſt a Mortgagee and he doth vouch the common vouchee, and ſo a recovery is had; this is no good recovery to barre or bind the Mortgagor, but that he may enter upon the condition broken. So if one give lands to *B* and his heires ſo long as *C* ſhall have heires of his body, and *B* doth ſuffer a common recovery, and vouch the common vouchee; this is no good recovery to barre the donor of the poſſibility, for in both theſe caſes he that is to be barred hath no remainder or reverſion but an intereſt or poſſibility which cannot receive a recompence in value. But if in theſe caſes the mortgagee vouch to warranty the mortgagor or *B* the donee vouch the donor, and ſo they vouch over the common vouchee, and ſo the recovery is had; theſe will be good recoveries to barre both them and their heirs for ever. And if one have an eſtate in fee ſimple determinable on a Limitation or a Condition, as if lands be given to *A* and his heires untill *B* pay to him 100 l. and then that it ſhall remaine to *B* and his heires, and *A* in this caſe doth ſuffer a common recovery and vouch the common vouchee; it ſeemes this is no barre to *B* and his heires, but that upon payment of the 100 l. he ſhall have the land. So if

Curia Mich. 18 Jac. B. R. So was it held by moſt of the Judges in the caſe betweene Pell & Browne.

one

one by his will deviſe his land thus, I give unto *A* my ſonne and his heires for ever my land in *W* paying 20 l. to *B* when *A* ſhall come to 21 years of age, and then that *A* and his heirs ſhall have it for ever, and if *A* ſhall dye without heires of his body *C* being then living that then *C* ſhall have it to him and his heires for ever, and *A* pay the 20 l. to *B* at his full age, and then ſuffer a recovery of the land; this is no barre to *C* of his eſtate. But here it muſt be noted that in the caſes before where it is ſaid that a recovery is void it is meant as to the heires and them in reverſion and remainder, for as to the parties themſelves that doe ſuffer the recovery the ſame is for the moſt part good and doth bind them by way of Eſtoppell and concluſion. And it muſt be noted alſo that a ſtranger that hath right to the land at the time of the recovery ſuffered is not barred at all by the recovery or by his lacheſs of *non-claime &c.* as in the caſe of a fine. Co. 3. 5.

6. The remedy of Recoverors againſt the Leſſees for Rents and ſervices and upon waſt done.

The recoverors in common recoveries their heirs and aſſignes ſhall have the like remedy againſt leſſees for lives and years of the land recovered, their Executors or Aſſignes by diſtreſſe, avowry, or action of debt for the rents and ſervices reſerved upon their leaſes that ſhall be due after the ſame recoveries had: And alſo like actions for waſt done after the recovery had: And like remedy upon a diſturbance in a Preſentation to an advowſon, and in like manner and forme as the leſſor ſhould or might have had if the ſame recoveries had never been had, albeit the ſame leſſees doe never Atturne to the ſame recoverors. And if a man make a leaſe for years to begin at Michaelmas reſerving rent, and before Michaelmas he ſuffer a recovery; in this caſe the recoveror ſhall diſtraine for this rent which the leſſor before the recovery could not diſtraine for. But if the recovery had not been had he might have diſtrained. Stat. 7 H. 8. cap. 4. Dier 31. Co. ſuper Lit. 104.

7. Where a Recovery may be avoided. Or not. And by whom. And how.

Fauxifier de Recovery.

A recovery may be defeated, fruſtrated and avoided (which is called the falſifying of a recovery) in part or in all for many cauſes, as for that there is ſome groſſe and ſubſtantiall Error in the manner of the proceeding. But a recovery is not avoidable for falſe or incongruous Latine, raſure, enterlining, miſentring of any warrant of Atturney, miſreturning or not returning of the Sheriffe, or other want of forme in words and not in matter of ſubſtance, becauſe it is done by the conſent of the parties. Or it may be avoided for that he againſt whom the writ of entrie is brought is not tenant of the freehold by right or wrong at the time of the writ brought, as when the writ is brought againſt a ſtranger that hath nothing in the land, and he doth vouch the tenant in taile in poſſeſſion of the land. Or a recovery may be avoided for that he that hath the eſtate and the right is neither party nor privy to the recovery, as when the writ of entry is brought againſt a diſſeiſor, and he vouch a ſtranger that hath nothing in the land; or a recovery is had againſt Stat. 23 El. cap. 3. Co. 5. 40. 21 H. 8. cap. 15. Co. ſuper Lit. 46. 104. Co. 3. 78. Dier 249. Co. 3. 4. 1621 5. 39. Plow. 515.

the

the husband alone of the land whereuntô his wife hath title of dower. Or a recovery may be avoided for that another hath ſome eſtate in the thing whereof the recovery is had at the time of the recovery ſuffered, as when there is a recovery had of land whereof there is a leaſe or eſtate for years by Statute, Elegit, or the like. Or it may be avoided for that the recovery is had by covin, as when it is ſuffered by tenant for life to diſinherite him in reverſion, or when it is gotten by ſome undue practiſe and ſiniſter dealing, for in this caſe it is ſometimes made void by a *Vacat* or ſentence of a Court. And where a recovery is avoidable or reverſable for any of theſe or ſuch other like cauſes it muſt be avoided by him whom it doth concern that is barred and bound by the ſame recovery that ſhould have had the land if the ſame recovery had not been and not by any other whom it doth not concerne. As if an erroneous recovery be ſuffered by tenant in taile; in this caſe his iſſues, or if they faile, the next in remainder or reverſion ſhall defeat it. So alſo if the land be recovered againſt a ſtranger; the tenant in taile ſhall avoid it; And if the land be recovered againſt a diſſeiſor, the diſſeiſee ſhall avoid it; And if the land be recovered againſt him in reverſion or remainder, the tenant for years by Statute or Elegit ſhall avoid it: but in theſe laſt caſes they ſhall falſifie and avoid it during their particular eſtates only. So alſo the wife ſhall falſifie the recovery ſuffered by her husband alone as to her title of dower only and no longer and further. And he in the reverſion or remainder ſhall falſifie and avoid the recovery ſuffered by the tenant for life either in the life time of the tenant or afterwards. But neither he in reverſion or remainder, or any one by or under him, or any other can falſifie a recovery ſuffered by the tenant in taile in poſſeſſion except it be for ſome ſuch cauſes as before. And the recoveror himſelfe cannot falſifie a recovery. So neither can a Gardian, or a tenant of a Manor, as if one hold land of a Manor, and a ſtranger recover the Manor by a feigned title; a tenant of the Manor cannot falſifie this recovery. And in all theſe caſes where a recovery is avoidable and a man hath power given him to falſifie; he muſt doe the ſame ſometimes by writ of Error, as in the caſe of an erroneous proceeding; and ſometimes by pleading and the ſetting forth of the ſpeciall matter, as in the caſe where the tenant is not tenant of the free hold, or when the recovery is had by covin againſt the tenant for life, or the like; and ſometimes by the ſhewing and ſetting forth of the practiſe to the Court, and a motion made that a *Vacat* may be made upon the Judgement for the cauſes alleaged.

And thus having done with the Cômon Aſſurances that are made

by matter of record we come to the Common Aſſurances that are made by matter of *Fait, viz.* by Deeds and Inſtruments of writing in the Country, wherein we muſt ſtay a while upon the learning of Deeds in generall, and from thence we ſhall deſcend to the particular kinds of Deeds.

CHAP. IIII.

Of a Deed.

1. A deed, *Quid.*

A Deed is a writing or Inſtrument written in paper or parchment ſealed and delivered to prove and teſtifie the agreement of the parties whoſe deed it is to the things contained in the deed. Termes of the Law. Co. ſuper Lit. 35.

2. *Quotuplex.* Indenture. Deed poll.

All deeds are either Indented, or Poll. The deed indented (which is that which is called an Indenture) is when the paper or parchment is cut and indented. And it is defined to be a writing containing a Conveyance, bargaine, contract, covenants or matter of Agreement between two or more, and is indented in the top or ſide anſwerable to another that likewiſe doth comprehend the ſelfe ſame matter. And this is ſo called becauſe it is ſo indented, for albeit it be called an indenture and begin in theſe words, *Hæc Indentura &c.* yet if it be not actually indented it is no Indenture: And of the other ſide if it be not ſo called or theſe words be omitted, yet if it be indented it is an Indenture. And this was anciently called *Charta cyrographata vel Communis*, becauſe each party had his part. The deed poll is that which is plaine without any indenting, when the parchment or paper is polled or cut even. And this was anciently called *charta de una parte.* And this is ſingle and but one, which the feoffee, grantee, or leſſee for the moſt part hath. The deed indented is alſo ſometimes Bipartite. *i.* of two parts, when there are two parties and two parts of the deed. And then commonly the feoffor, grantor or leſſor hath the one part, and the feoffee, grantee or leſſee the other part. And ſometimes it is Tripartite. *i.* when there are three parties and three parts, and then commonly each party hath a part of the Indenture. And ſometimes it is Quadripartite &c. And according to the parts they doe ſeale interchangeably one to another. And amongſt theſe parts the part ſealed by the feoffor, grantor or leſſor is ſaid to be the principall or originall, and the reſt are called but Acceſſary, Counterparts or Copies; and yet all of them in law doe make up but one entire deed. Theſe deeds alſo are ſometimes Termes of the Law. Co. ſuper Lit. 229. 143. 38 H. 6. 24.

Counterpart

Lit. Sect. 371. 372.

times in the firſt perſon, as *Noveritis &c. me* A B *&c. dedi & conceſſi &c.* And albeit it be an indenture ſo made yet is it good enough. And ſometimes they are made in the third perſon, as *Hæc Indentura teſtatur &c. quodidem* A B *&c. dedit & conceſſit &c.* * The deed Poll is uſually made in the firſt perſon, but if it be made in the third perſon it is good enough. There are divers other diſtinctions of deeds, for ſome are Publique that doe concerne Countries, ſome of the Prince: And ſome are Private between particular perſons, and thoſe private perſons or Subjects. And theſe only are intended here. And of theſe ſome are Abſolute, and ſome Conditionall: ſome are inrolled, and ſome not inrolled: ſome concern the realty, and ſome the perſonalty: And ſome are mixt. And ſome of theſe alſo containe matter of Grant, or Gift, amongſt which feoffements, gifts, bargaines and ſale, grants and leaſes are the chiefe. And ſome of them containe matter of diſcharge, as releaſes, acquitances, and defeaſances, and ſuch like. And ſome of them containe other matter, as confirmations and ſuch like. Or as other diſtinguiſh, ſome of them are Conſtitutive and making, and ſome are remiſſory or liberatory. And the firſt ſort are ſome of them creating. *i.* ſuch whereby any eſtate, property or obligation not having effence before, is newly raiſed and created, as the firſt grant of a rent, Common, way &c. eſtate taile, for life, years, &c. And ſome of them are conveying. *i.* ſuch by which eſtates, properties and the like being already created are conveyed to others, as feoffements, bargaines and ſales, grants over or aſſignements, ſurrenders, and the like. Thoſe that are of the laſt ſort are ſuch as doe deſcribe and teſtifie ſome precedent contract for a duty or fact to be paid, performed or done, releaſed or diſcharged, of which ſort are all acquitances, releaſes, and other ſuch like matters of diſcharge.

*Bro. Oblig. 51. Co. ſuper Lit. 35. 36. Weſt Symb. lib. 1. part 1. Sect. 46.

See Weſt Sym. 1. part.

But here by the way, two things are to be obſerved. 1. That there may be and are divers other kinde of deeds beſides thoſe which are named before, for every agreement put in writing ſealed and delivered becommeth a deed. And Atturnements, Exchanges, Surrenders, Partitioners, Authorities, Commiſſions, Licences, Revocations, and the like are uſually made, given, done and granted by deed. And there are divers other Inſtruments concerning Merchants and other affaires; if therefore any of theſe be done by deed ſuch a deed is for the moſt part ſubject to the rules of deeds herein laid downe. 2 Albeit that feoffements, gifts, bargaines, leaſes, Atturnements, Exchanges, Surrenders, and ſuch like things may in divers caſes be as well made and done without as with a deed, yet if a man will make his claime to any thing given or granted by ſuch feoffement, gift, &c. by deed, the deed muſt be ſuch a deed as is a good and perfect deed by the rules herein after laid down.

Note.

3. The parts of a deed.

In every deed or writing there are two parts conſiderable. 1. The externall or materiall part. *i.* The parchment or paper, waxe and writing. 2. The internall or intellectuall part. *i.* the ſenſe, force, virtue and operation of the words and matter therein contained. And in the writing, context or matter contained in divers deeds, as feoffements, grants, leaſes and the like there are certaine formall or orderly parts which make up the whole of which the law doth take ſpeciall notice: as, 1. The Premiſſes, the office whereof is rightly to ſet downe the name of the feoffor, grantor, leſſor, &c. feoffee, grantee, leſſee, &c. and to comprehend the certainty of the thing granted or leaſed. And herein in ſome deeds there is alſo a recitall of ſome things, and in ſome deeds an Exception of ſome part of the thing granted before by the deed. 2. The *Habendum*, the office whereof is to name againe the feoffee, leſſee, &c. and to ſet forth what eſtate he ſhall have and for what time he ſhall hold the thing given or granted. 3. There is ſet downe and expreſſed upon what termes and conditions the eſtate of the thing granted ſhall be held: and therefore there is ſometimes contained therein a *Tenendum*, to ſet forth by what Tenure the grantee ſhall hold the land granted. 2. A Reſervation or *Reddendum*, to ſet forth by what Rent he ſhall hold the land. 3. A Condition. 4. A Warranty. 5. Covenants. 6. The Concluſion after this manner *In cujus rei teſtimonium &c.* wherein is ſet forth the date of the deed, containing the day, moneth and yeare, and the ſtile of the King or yeare of our Lord. And all theſe are ſometimes contained under the Premiſſes and the *Habendum*. Co. ſuper Lit. 6. 229, 2. 3.

4. The nature of a deed indented and a deed poll with the difference that is between them.

All the parts of a deed indented in Judgement of Law doe make up but one deed, and every part is of as great force as all the parts together, and they are eſteemed the mutuall deeds of either party and either party may be bound by either part of the ſame. And the words of the Indenture are the words of either party. And albeit they be ſpoken as the words of the one party only, yet they are not his words alone but may be applyed to the other party if they doe more properly belong to him: for every word that is doubtfull ſhall be applied and expounded to be ſpoken by him to whom they will beſt agree according to the intent of the parties; and they ſhall not be taken more ſtrongly againſt one or beneficially for the other as the words of a deed Poll ſhall. * If therefore *A* by indenture enfeoffe *B* upon condition and then doth enter for the condition broken; in this caſe it hath been held that *A* in his pleading may ſhew forth the deed that he himſelfe ſealed, and that this is ſufficient. And therefore alſo it is thought that an Indenture made in the firſt Perſon is as good in Law as an Indenture made in the third Perſon when both parties have Plow. 134. 38 H. 6. 24. 25. Lit. Sect. 370. 9 H. 6. 35. 35 H. 6. 34. * 11 H. 7. 22. per Brian. Lit. Sect. 373.

have to this put to their Seales, for if in an Indenture made in the third Perſon or in the firſt perſon mention be made that the grantor only hath put to his Seale and not the grantee, then is the indenture only the deed of the grantor, but when mention is made that the grantee alſo hath put his Seale to the indenture, it ſhall be ſaid to be the deed of them both.

Finches Law 109.

And although both parts of the indenture are but as one part, yet the deed of the grantor is as the Principall and the other is not but a Counter-part. And therefore if the leſſor only ſeale and not the leſſee, yet it is as good as if both had ſealed, and if there be any difference between the Parts, the Counter-parts ſhall be made to agree with the principall, and it ſhall be deemed the miſpriſion of the Clarke.

Plow. 434. 421.

This deed is the ſtrongeſt kind of deed of the two, for this worketh an Eſtoppell. *i.* doth barre and conclude either party to ſay or except any thing againſt any thing contained in it, for if a leaſe be by indenture, both parties are concluded to ſay that the leſſor had nothing in the land at the time of the leaſe made, ſo that if the leſſor hap to have the land after by purchaſe or deſcent, the leſſee may enter upon him by way of concluſion, and the leſſee by Eſtopell ſhall be forced to pay his rent. But it is otherwiſe of a deed poll, for this is commonly but of one part which is ſealed by the feoffor, leſſor, &c. only. And this ſhall be expounded to be the ſole deed of the feoffor, leſſor &c. and the words therein contained ſhall be ſaid to be his words and ſhall bind him only and be expounded altogether in advantage of the feoffee, leſſee &c. and againſt the feoffor, leſſor &c. and this doth not worke any Eſtoppell againſt either party. But if a deed be indented or poll, and there be therein reciprocall Covenants between them from one to another albeit there be but one part, yet if eath of them ſeale it and deliver it the one to the other, this is good for both parties, and each of them that can get the deed into his hand to ſhew or plead may take advantage thereof againſt the other. And in this caſe the deed is uſually kept by one indifferent between them both.

Eſtoppell.

Trin. 38 El. Co. B. per Curiam. Co. ſuper Lit. 143.

See G. ant infra.

Note here firſt of all that ſome deeds are void from the beginning and doe never take effect; and amongſt theſe ſome are abſolutely void and void againſt all perſons, and ſome are void only to ſome purpoſes and againſt ſome perſons. Some alſo that are not void from the beginning are notwithſtanding voidable, and that ſometimes by the party himſelfe that made them or any others, and ſometimes by others and not by himſelfe. And ſome deeds are good in their firſt creation and well made at the firſt, but become void by ſome matter *ex poſt facto*. And this may be either by an extrajudiciall act, as raſure, or the like, or by a judiciall act.

5. When and where a deed ſhall be ſaid to be good and ſufficient. And when and where not, but void or voidable *ab initio*.

act. *i.* when by the ſentence of a Court a deed is damned and made void, which is called a Vacat of the deed.

A vacat of a deed.

To the making of every good Deed containing any agreement theſe things are requiſite. 1. Writing. *i.* That it be written in parchment or paper, and that the agreement be legally and formally ſet downe and be ſufficient in Law for the compoſition and frame of the words. And this is called the legall part, the Judgement whereof belongeth to the Judges of the Law. 2. That there be a perſon able to contract, and to be contracted with, and a thing to be contracted for, and that all theſe be ſet down by ſufficient names. 3. Reading. *i.* That if it be an illiterate man that is to ſeale the deed and he deſire to heare it read, that it be truly read or the contents thereof truly declared to him. 4. Sealing. *i.* That the deed ſo written be ſealed by the party or ſome other by his appointment for a further teſtimony of his conſent thereunto. 5. Delivery. *i.* That the deed ſo written and ſealed be delivered by the party or ſome other by his appointment as his deed. And theſe laſt things being matters of fact are to be tryed by Jurors. 6. That the ground, foundation, end, and purpoſe of making the deed be good and not againſt the Law. Otherwiſe in moſt of theſe caſes the deed is voyd *ab initio.* Alſo in ſome caſes to perfect the contract and make the conveyance of the thing intended to be paſſed thereby good, ſome other ceremonies or complements are requiſite, as Inrollment, Livery of Seiſin, Atturnement, otherwiſe the deed in part at leaſt becommeth fruitleſſe and vaine. For a deed may be void, either for that the writting is not in parchment or paper; or being ſo is not legally and formally drawn; or being ſo, there doth want a perſon able to give, or make, or capable to have, or take, or a thing to be contracted for; or if ſo, for that it is not duely ſealed and delivered; or if ſo, for that it is not truly read at the time of the ſealing and delivery; or if ſo, for that it is made void by ſome ſpeciall law, as being made upon an uſurious Contract, by dureſſe, or the like. Or it may at leaſt in part loſe his force afterwards by neglect of inrollment, Livery of Seiſin, or Atturnement in caſes where theſe things are requiſite.

Things requiſite to make a deed good,

Co. ſuper Lit. 225. 35. 36. Co. 2. 4. 5.

Perk. Sect. 149. 137.

See infra.

See infra.

Perk. Sect. 137. &c.

See infra.

Every deed well made muſt be written. *i.* The agreement muſt be all written before the ſealing and delivery of it: for if a man ſeale and deliver an empty peece of paper or parchment, albeit he doe therewithall give commandement that an obligation or other matter ſhall be written in it, and this be done accordingly, yet this is no good deed. 2. This writing muſt be in paper or parchment, for if an agreement be written on a peece of wood, linnen, the barke of a tree, a ſtone, or the like, and this be ſealed and delivered; this is no good deed. [b] But it may be written in any

1. In reſpect of the writing of it.

Perk. Sect. 118. Co. ſuper Lit. 171.

2] Co. ſuper Lit. 229. F. N. B. 122. Lit. 27 H. 6. 9. [b] Co. 2. 3.

any language, or in any hand. And therefore it is held that a deed written in French or Latine, and in Text, Court, or Roman hand, is as good as a deed written in Engliſh and in a Secretary hand. [c] And albeit the writing be beſides the lines, or the lines be written crooked, yet this will not hurt the deed. [d] And if there be any Alteration, raſure, or enterlining made in any part of the deed before the delivery of it; this will not hurt the deed. But in ſuch caſes it is policy to make a *Memorandum* of it upon the backe of the deed, and to give the witneſſes notice of it; for otherwiſe if it be in any place materiall, as in the name of the grantor, grantee, in the limiting of the eſtate, or the like, and eſpecially if it be in a deed poll, the deed is greatly ſuſpicious. 3. The matter written muſt be legall and orderly for manner and matter. *i.* There muſt be words ſufficient to ſet forth the agreement and bind the parties, for a deed may be void and loſe his virtue in all or part for repugnancy, incertainty, and divers other matters (whereof ſee in expoſition of Deeds *infra.*) But it is not materiall whether the deed be in the Firſt, or in the Third perſon ſo as the words be aptly applyed. For if a deed Poll be in the Third perſon *viz. Quod preſens ſcriptum teſtatur &c. quod idem* A *dedit & tradidit &c.* Or an obligation be in the Third perſon, *viz. M^d. quod I S debet I D* 20 l. *&c.* theſe are good deeds notwithſtanding the Statute of 38 *E.* 3. *cap.* 4. which is meant only of obligations made beyond the Seas. So if the words of a deed indented run in the Firſt perſon, it is as good as if it were in the Third perſon. Neither is it neceſſary that the Engliſh or Latine whereby it is made be true and congruous, for falſe and incongruous Latine or Engliſh ſeldome or never hurteth a deed, for the rules are *Falſa orthagraphia non vitiat chartam. Falſa grammatica non vitiat conceſſionem.* Neither is it neceſſary that every deed have all the parts of a deed before ſet downe, as Premiſſes, *Habendum, &c.* for a deed may be good without *Habendum*, warranty, Reſervation, or Covenant. And a deed is good albeit theſe words in the cloſe thereof *In cujus rei teſtimonium Sigillum meum appoſui* be omitted, and albeit there be no mention made in the ſame that the deed was ſealed and delivered ſo as in truth it be duly ſealed and delivered and the ſealing and delivery can be proved. Alſo a deed is good albeit it mention no time or place of date or making, or have a falſe date. *i.* be dated at one time and delivered at another, and albeit it have an impoſſible date, as the 30 of *February* or the like, for anciently untill the time of *E.* 2. and *E.* 3. the deeds had no date becauſe the Law was then held to be that if a deed were dated before the time of memory it was not pleadable except it were of Record but it might have been given in evidence. But he that doth plead ſuch a deed without any date, or with ſuch an impoſſible date muſt ſet forth the time when it was delivered.

[c] Perk. Sect. 123.

[d] Perk. Sect. 155. Co. ſuper Lit. 225.

37 Co. ſuper Lit. 225.

Fitz. Fait & feoffements. 5 Dier 6.

Co. 5. 121. 10. 133. See Oblig. Numb. 3.

Co. ſuper Lit. 6.

Co. 2. 5. Dier. 19. Kelw. 70.

Co. 2. 5. 5. 117 Dier 28. Perk. Sect. 120. Co. ſuper Lit. 6.

2. In reſpect of the perſons parties thereunto and matter therein.

The ſecond thing required in every well made deed is, That the perſon making it be able to give, grant, make, or doe the thing contained in it; that the perſon to whom it is made be capable of the thing to be given, granted, made or done thereby, for if it be made by, or to any ſuch perſons as are diſabled, as Infants, Aliens, women Covert, Perſons attainted of Treaſon or Felony, Idiots, and ſuch like, it will be void in all or part. But any perſon naturall male or female, or politique, as ſole Corporations, or Corporations aggregate of many, Eccleſiaſticall or Temporall, not diſabled by law may give or take by deed. Alſo there muſt be ſome matter whereabout the contract may be converſant. It is therefore ſaid that in every grant there muſt be grantor, grantee, and a thing to be granted and in every obligation an obligor, obligee, and thing to which the obligor is bound, and ſo of Feoffements and other deeds.

Co. 11. 73. Plow. 555. Perk. Sect. 1. 119. See Grant. infra. Numb. 4. Feoffements infra Numb. 12.

3. In reſpect of the reading of it.

The third thing required in every well made deed is, That if the party that is to ſeale it be a blind or an illiterate man, and deſire to heare it read that it be ſo, for if ſuch a man be to ſeale a deed, and he deſire to heare it, or to heare the contents of it read or declared to him firſt, and it be not done, and he afterwards ſeale and deliver it; this is no good deed. So if upon or without any ſuch requeſt made by him that is to ſeale and deliver it, the partie himſelfe to whom it is made, or a ſtranger ſhall read the deed, or declare the contents thereof falſly and otherwiſe then in truth it is; the deed will be voyd at leaſt for ſo much as is ſo miſread or miſdeclared. But if the party himſelfe that is to ſeale and deliver it before the ſealing and delivery thereof cauſe another that is a ſtranger covinouſly to read it, or to declare the contents thereof falſly to him, and otherwiſe then it is, of purpoſe to make the deed voyd; this will not hurt the deed. So if the party that is to ſeale the deed can read himſelfe and doth not, or being an illiterate or a blind man doth not require to heare the deed read, or the contents thereof declared; in theſe caſes albeit the deed be contrary to his mind, yet is it good and unavoydable.

Co. 2. 9. 3. 11. 27. 14 H. 8. 26.

4. In reſpect of the ſealing of it.

The fourth thing required in every well made deed is, that it be ſealed: But this ſealing of deeds in times paſt was not uſed, for the Saxons uſed only to ſubſcribe their names and to adde the ſigne of the Croſſe, and to ſet downe a great number of witneſſes. And afterwards the Normans brought in with them the ſealing of deeds but by degrees, for firſt the Kings and a few of the Nobility uſed it, and to ſeale with their Seales of Arms, afterwards all the Nobility uſed it, and then the Gentlemen, and about the time of *E.* 3. all men began to uſe ſealing of deeds, which hath been continued ever ſithence, ſo that now it is of neceſſity, in ſo much that if a deed be never ſo well written before and delivered afterwards, yet if it be not

Termes of the Law. Fait. Co. ſuper Lit. 225. Co. 2. 4. 5. Perk. Sect. 129.

not ſealed between the writing and delivery, it is not a good deed.

Perk. Sect. 130.131.134 But if a ſtranger ſeale it by the allowance or commandement precedent or agreement ſubſequent of him that is to ſeale it before the delivery of it, it is as well as if the party to the deed did ſeale it himſelfe. And therefore if another man ſeale a deed of mine, and I take it up after it is ſealed and deliver it as my deed; this is ſaid to be a good agreement to, and allowance of the ſealing, and ſo a

Perk. Sect. 130.131.132 good deed. And if the party ſeale the deed with any Seale beſides his own, or with a ſtick or any ſuch like thing which doth make a print, it is good. And although it be a Corporation that doth make the deed, yet they may ſeale with any other ſeale beſides their common Seale and the deed never the worſe. And if there

Perk. Sect. 134. be 20. to ſeale one deed, and they ſeale all upon one peece of wax and with one Seale, yet if they make diſtinct and ſeverall prints; this is a very ſufficient ſealing and the deed is good enough.

Co. 2.4.5. Perk. Sect. 137. 9 H. 6. 37. The fifth thing required in every well made deed is, That there be a delivery of it. And for this it muſt be known, that delivery is either actuall. *i.* by doing ſomething and ſaying nothing, or elſe Verball. *i.* by ſaying ſomething and doing nothing, or it may be by both, And either of theſe may make a good delivery & a perfect deed. But by one or both of theſe it muſt be made, for otherwiſe albeit it be never ſo well ſealed and written, yet is the deed of no force. And though the party to whom it is made take it to himſelfe, or hap to get it into his hands, yet will it do him no good nor him that made it any hurt untill it be delivered. And a deed may be delivered by the party himſelfe that doth make it, or by any other by his appointment or authority precedent or aſſent or agreement ſubſequent, for *omnis ratihibitio mandato æquiperatur.* And when it is delivered by another that hath a good authority and doth purſue it, it is as good a deed as if it were delivered by the party himſelfe: but if he doe not purſue his authority then it is otherwiſe. And therefore if a deed or the contents thereof be read or declared to a man that is to ſeale him; and he (being illiterate) doth deliver him to a ſtranger, and bid him examine him, and if it be ſo as it was read to him, then to deliver him as his deed, otherwiſe to redeliver him to him againe that made it; in this caſe if the deed be in truth, otherwiſe then it was read, and yet notwithſtanding he to whom it was delivered doth deliver him to him, to whom it is made, this delivery ſhall not not availe, neither is the deed by this delivery become a good deed.

5. In reſpect of the delivery of it. And what ſhall be ſaid a good delivery, or not.

1. In reſpect of the perſon that doth make it.

Perk. Sect. 137. 9 H. 6. 37. Co. 11. 28. 3. 35. 47 E. 3. 3.

Dyer 167. Perk. Sect. 137. 8 H. 26. Co. ſuper Lit. 36. 3. 26. 5. 119. 10 H. 6. 25. 13 H. 4. 8. And ſo alſo a deed may be delivered to the party himſelf to whom it is made or to any other by ſufficient authority from him: or it may be delivered to any ſtranger for and in the behalfe, & to the uſe of him to whom it is made without authority. But if it be delive-

2. In reſpect of him to whom it is made.

red

red to a ſtranger without any ſuch declaration, intention or intimation unleſſe it be in caſe where it is delivered as an eſcrow, it ſeems this is not a ſufficient delivery. And yet if an Obligation be made to the uſe of a third perſon expreſſed by the deed, and the obligor deliver it to him to whoſe uſe it is made; this is ſaid to be a good delivery. And albeit it be delivered before or after the day of the date of it, yet it is good enough: but if it be delivered before it be ſealed it is nothing worth. And where it is delivered before the date, yet in the pleading of it it muſt not be ſo ſet forth.

Dyer 192.

3 In reſpect of the time.
4 In reſpect of the manner and order of delivery.

Co. 2.4. Plow. 492.

If I have ſealed my deed, and after I deliver it to him to whom it is made, or to ſome other by his appointment and ſay nothing, this is a good delivery: So if I take the deed in my hand and uſe theſe or the like words; Here take him, or This will ſerve, or I deliver this as my deed, or I deliver him you; theſe are deliveries. So if I make a deed of land to another, and being upon the Land I deliver the deed to him in the name of Seiſin of the Land; this is a good delivery. So if the deed be ſealed and lying in a window, or on a Table, and I uſe theſe or the like words, There he is, take it as my deed; this is a good delivery and doth perfect the deed, for as a deed may be delivered by words without deeds, ſo may it alſo be delivered by deeds without words. But if a man ſeale and acknowledge before a Major or other Officer appointed for that purpoſe a writing provided for a Statute ora recogniſance, this acknowledgment before ſuch an Officer ſhall not amount to a delivery of the deed ſo as to make it a good obligation if it happen not to be a good Statute or Recogniſance.

Co. 9.137. Dyer 192. 167. Co. ſuper Lit. 36. 49. 35. Aſſ. pl. 6.

Adjudged Trin. 37. El. B. R.

As an Eſcrow. *Quid.*

The delivery of a deed as an Eſcrow is ſaid to be where one doth make and ſeale a deed and deliver it unto a ſtranger untill certaine conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed. And ſo a man may deliver a deed, and ſuch a delivery is good. But in this caſe two cautions muſt be heeded. 1. That the form of words uſed in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a ſtranger to it, and not to the party himſelfe to whom it is made. The words therefore that are uſed in the delivery muſt be after this manner. I deliver this to you as an eſcrow to deliver to the party as my deed upon condition that he doe deliver you 20l. for me, or upon condition that he deliver up the old bond he hath of mine for the ſame mony, or as the caſe is. Or elſe it muſt be thus. I deliver this as an Eſcrow to you to keep untill ſuch a day &c. upon condition that if before this day he to whom the Eſcrow is made ſhall pay to me 10l. or give to me a horſe, or infeoffe me of the Manor of Dale, (or perform any other condition) that then you ſhall deliver this Eſcrow to him as my deed. For if when I ſhall deliver the deed to the ſtranger, I ſhall uſe theſe

19 H. 8. Kelw. 88. 14 H. 8. 22. 14 H. 6. 42. Perk. Sect. 141. 140. 142. 138. 143. 144. Fits. Feoffments & Fait. 4. 13. 15. Co. 9. 137. ſuper Lit. 48. 36.

or

or the like words. I deliver this to you as my deed, and that you ſhall deliver it to the party upon certain conditions: Or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London, in theſe caſes the deed doth take effect preſently and the party is not bound to perform any of the conditions. So it muſt bee delivered to a ſtranger, for if I ſeale my deed and deliver it to the party himſelfe to whom it is made as an Eſcrow upon certaine conditions &c. in this caſe let the form of words be what it will, the delivery is abſolute, and the deed ſhall take effect as his deed preſently, and the party is not bound to perform the conditions; for, *Intraditionibus Chartarum non quod dictum ſed quod factum eſt inſpicitur.* [e] But in the firſt caſes before where the deed is delivered to a ſtranger and apt words are uſed in the delivery thereof, it is of no more force untill the conditions be performed then if I had made it and layd it by me and not delivered it at all, and therefore in that caſe albeit the party get it into his hands before the conditions be performed, yet he can make no uſe of it at all, neither will it do him any good. [f] But when the conditions are performed and the deed is delivered over, then the deed ſhall take as much effect as if it were delivered immediately to the party to whom it is made, [g] and no act of God or man can hinder or prevent this effect then if the party that doth make it be not at the time of making thereof diſabled to make it. He therefore that is truſted with the keeping and delivery of ſuch a writing ought not to deliver it before the conditions be performed, and when the conditions be performed he ought not to keep it but to deliver it to the party. For it may be made a queſtion whether the deed be perfect before he hath delivered it over to the party according to the authority given him. Howbeit it ſeems the delivery is good, for it is ſaid in this caſe that if either of the parties to the deed dye before the conditions be performed, and the conditions be after performed, that the deed is good, for there was *traditio inchoata* in the life time of the parties, *& poſtea conſummata exiſtens* by the performance of the conditions it taketh his effect by the firſt delivery without any new or ſecond delivery, and the ſecond delivery is but the execution and conſummation of the firſt delivery. And therefore if an Infant, or woman covert deliver a deed as an Eſcrow to a ſtranger, and before the conditions are performed the Infant is become of full age, or the woman is become ſole, yet the deed in theſe caſes is not become good. And yet if a diſſeiſee make a deed purporting a leaſe for years, and deliver it to a ſtranger out of the land as an Eſcrow, and bid him enter into the land, and deliver it as his deed, and he do ſo, this is a good deed, and a good leaſe, ſo that to ſome purpoſes it hath relation to the time of the firſt delivery and to ſome purpoſes not. Relation.

[e] Fitz. Faits & Feoffements 13.

[f] Idem.

[g] Co. 3. 35.

Co. 5. 84. 3. 36.

Co. 3. 35. 36.

See infra at Num. 8.

In

Double Delivery.

In caſe where a deed is meerly void and doth take no effect by his firſt delivery, as where a woman covert doth ſeale and deliver a deed, or the like, and ſhe after being ſole after her husbands death doth deliver the deed again, in this caſe the deed is become good. So where a deed originally good doth becom void by matter *ex poſt facto*, as by breaking the Seale or the like, if the party to the deed ſeale and deliver it again; by this means the deed is become good again. But regularly there may not be two deliveries of a deed, for where the firſt delivery doth take any effect at all, the ſecond delivery is void. Perk. Sect. 154. 11 H. 6. 27.

[h] And therefore it is held that if an Infant or a man by dureſſe of impriſonment do make ſeale and deliver a deed &c. (in which caſes the deed is not void but voidable) and after the Infant being of full age, or the man impriſoned being at large, doth deliver this deed again the ſecond time; this ſecond delivery is void: *Debile fundamentum fallit opus.* So if a man be diſſeiſed and make a leaſe for years in writing and deliver the deed, and after deliver it upon the ground, this ſecond delivery is void, for the firſt delivery made it his deed; but if he had delivered it as an Eſcrow to be delivered as his deed upon the ground, this had been a good ſecond delivery. And by all this that hath been ſaid it appeareth, that the putting to or ſubſcribing of the parties name or mark to the deed he is to ſeale is not eſſentiall, for a deed may be good albeit the party that doth ſeale it doth never ſet his name or his mark to it, ſo as it be duly ſealed and delivered. But it is the beſt and ſureſt way notwithſtanding to have the name or mark of the party ſubſcribed, for by this means the deed may be the better proved when the witneſſes are dead. [h] Perk. Sect. 14. 5 Co. 119. Co. ſuper Lit. 48. New Terms of the Law tit. Fait. 9. Jac. Scots caſe.

Subſcribing of the parties name or mark not neceſſarie.

Note.

Note here that albeit a writing or Eſcrow that is not ſealed and delivered in manner as aforeſaid may not be uſed nor pleaded as a deed, yet it may ſerve and be uſed as an evidence and proofe of the agreement contained therein. And whatſoever may be done by word without any writing may much more and better be done by writing unſealed or ſealed, though it be not delivered as aforeſaid.

6. In reſpect of the ground and end of it.

And the laſt thing required in every well made deed is, that it have a good foundation, and be to a good end, for albeit a deed have all the qualities of a good deed before required, *viz.* that it be well made, read, ſealed, and delivered, yet it may be void or at leaſt voidable for others cauſes, as when it is either unjuſtly gotten and obtained, or corruptly in purſuit and execution of ſome diſhoneſt agreement, or to a diſhoneſt end or purpoſe made. A deed therefore whether it be a feoffment, gift, grant, leaſe, releaſe, confirmation, or obligation that is made or obtained by *manaſſe*, or *dureſſe*, *i.* when one doth threaten another to kill or maime him, if he will not Co. 2. 9. Perk. Sect. 16. Dyer 143. 45 E. 3. 6.

Manaſſe or *Dureſſe. Quid.*

not make him ſuch a deed, or doth impriſon another untill he make him ſuch a deed, and thereupon he make the deed, a deed thus obtained by force and through feare to avoid danger is void and will not bind him that made it nor availe him to whom it is made. In which matter theſe things muſt be obſerved. 1. That there muſt be ſome threatning of life or member, or impriſonment, or ſome impriſonment or beating it ſelfe, for if it be only a threatning to take away goods, or to burn a houſe, or the taking and keeping of a mans goods, or the like, this will not make the deed made upon that occaſion to be *per dureſſe*. 2. It muſt be a threatning, beating or impriſonment of the party himſelfe that doth make the deed, or of his wife, for if it be a threatning, beating or impriſonment of any other beſides the party himſelf that doth make the deed or his wife, this will not make the deed to be by *dureſſe*. 3. The threatning beating or impriſonment muſt bee to this end, and hereupon the deed muſt be made, for otherwiſe the deed ſhall not be ſaid to be by *dureſſe*. As for examples. If foure do threaten one to impriſon him if he will not ſeale a deed to one of them 4. and he do ſo; this deed ſhall be ſaid to be gotten by *dureſſe* and therefore void. And if one threaten a man to kill him unleſſe he will ſeale a deed to him and three others, and he doe ſo; this is void as to all the foure. For if one threaten another to kill or maime him if he will not ſeale a deed to a ſtranger, and thereupon he do ſo; this is void as if it were to the party himſelfe. If one threaten to kill, wound, or impriſon me to make me ſwear or promiſe to ſeale him ſuch a deed, or impriſon me untill I do ſo, and afterwards at another time and in another place, and when I am at liberty I do it accordingly; this ſhall be ſaid to be made by *dureſſe* and void. If I be in priſon at one mans ſuit, and then another man doth cauſe me to be uſed more ſeverely in priſon to compell me to make him ſome deed which I do thereupon make to him; this deed ſhall be ſaid to be gotten by *dureſſe* and therefore void.

Bro. Dureſſe in toto, 9 H. 7. 24. 21 E. 4. 13.

But if I be impriſoned at one mans ſuit (be the cauſe juſt or not) and being in priſon I make an Obligation, or any other deed to a third man: this ſhall not be ſaid to be by *dureſſe* but is a good deed. So if one threaten me to take away my goods, burn or break my houſe, enter upon my land, kill or wound my father, or mother, brother, or ſiſter, or friend, or doe impriſon any of them, and thereupon I ſeale a deed; this is good and ſhall bind me. So if one diſtraine my beaſts to compell me to ſeale a deed and will not deliver them unleſſe I do ſo, and threaten me that if I take the beaſts again and not ſeale the deed he will kill me, and thereupon I ſeale the deed; this is a good deed and ſhall bind me. If I be arreſted upon good cauſe and being in priſon or under arreſt I make an Obligation, feoffment or any other deed to him at whoſe ſuit I

am

am arreſted for my enlargement and to make him ſatisfaction; this ſhall not be ſaid to be by dureſſe, but is good and ſhall bind me. And therefore if Auditors in an account do commit an accomptant to priſon, and then he make an obligation to his maſter for the Arrearages, this is good. And if one in priſon for felony grant a reverſion of land to another to help him out of his trouble, this is a good grant. If *A* and *B* enter into an obligation upon the threatning of *B* only, this is a good obligation by *A* that was not threatned.

Eſtoppell. And if one make an Obligation by dureſſe, and after being at large take a defeſance upon it, this makes the Obligation good again, and the obligee is concluded to ſay it was by dureſſe. A deed alſo made upon or in purſuite and execution of an uſurious contract. *i.* ſuch a contract as whereupon the lender is ſure to have in mony or monies worth for the loane of the thing above the principall more then after the rate of 8l. for the 100l. by the yeare alſo is void. In which matter theſe caſes are to be obſerved. If one 6. *Decembris* borrow 30l. untill the ſecond day of *June* next following to be paid then for it 33l. for the principall loane if the ſonne of the obligee be then alive, and if he die before that time, that then he ſhall pay but 27l. which is leſſe then the principall; in this caſe this contract is uſurious and corrupt, and therefore the deed that doth containe it is void.

Bro. Defeſance 17.

Uſury. *Quid.*

Terms of the Law. Co. 5. 70. 37 H. 8. ch. 9. 39 El. c. 18. 21 Jac. ch. 17. 13 El. ch. 8.

If one borrow 100l. and for this mortgage land above the value of 8l. by the yeare, on condition that if the Mortgagor pay the mony at the years end, that the eſtate ſhall ceaſe; this is an uſurious contract, and therefore the deed whether it be a deed of feoffment, grant, or leaſe containing it is void. So if I lend another man 10l. for a yeare and take ſecurity by Statute or Obligation that the borrower pay me the lender 20l. for it; this contract is uſurious, and therefore the Statute and Obligation void. But if the agreement and Statute or Obligation be, that if the borrower pay not the 10l. within the yeare that then he ſhall pay 20l. for it; this is no uſury, and therefore in this caſe the deed is good. If one come to me to borrow 500l. of me and tell me he is unable to pay it together, and therefore hee deſires hee may pay it in twelve or thirteene years, and doth offer therefore to give me for my kindneſſe 200l. over and above beſides the uſe to let him have it ſo, and then the 500l. the intereſt, and the 200l. is caſt together, and ſo we agree upon an Annuity of 80l. *per annum* for fourteene years, which is aſſured by Conveyances unto me; in this caſe the contract is uſurious, and all the aſſurances made to perfect it are void. And yet regularly where the principall mony is loſt the contract is not uſurious. If a man deſire to borrow of me 100l. for a yeare and I am content to let him have it for the uſe of 8l.

Corſlets caſe. Paſch. 7. Jac. B. R.

Curia Hil. 14. Ja. B. R. Sanders caſe.

but

but withall I compell him to take a leaſe of me of a houſe at 60l. rent which in truth is worth but 30l. this contract is uſurious and therefore the aſſurances thereupon made void. *Et ſic de ſimilibus.*

Co. 5. 69. But if a man the 17th of *July* 1579. grant me a rent of 20l. *per annum* for the loane of 100l. to be paid every halfe yeare, and the firſt payment at Chriſtmaſſe 1580. and it is agreed between us that if he pay the 100l. the 17th of *July* 1580. that then the rent ſhall ceaſe; this contract is not uſurious, and therefore the aſſurances thereupon made are not void but good. But if in this caſe there be a private or collaterall agreement between us that he ſhall not pay the 100l. and redeem the rent, and that clauſe be put in only to evade the Statute, then is the contract uſurious notwithſtanding and the deeds and aſſurances thereof void. *Et ſic de ſimilibus.*

Hill. 7. Jac. B. R. Curia. If one borrow 100l. after the rate of 8l. *per centum*, and the borrower do afterwards pay part of the principall and all the uſe within the yeare, and the lender doth receive it, or the lender doth ſue for his mony within the yeare; theſe ſubſequent acts do not make the contract or deeds or aſſurances thereof void, for it is a rule, that if the originall contract be not uſurious, no matter *ex poſt facto* can make it ſo.

Bro. Obligation 79. If one borrow of me 10l. and bind himſelfe to pay me by a day, and moreover bind himſelfe that if he pay it not by the day, that he ſhall pay me 20l. for it; this contract and the deed for perfection of it are good, for this is not uſurious, for all Obligations with conditions for payment of mony lent are of this nature. And yet if one borrow 100l. of me and for this mortgage land to me of a greater value then 8l. *per annum* on condition that if he pay the mony at any time before the years end then the aſſurance to be void; this ſhould ſeem to be an uſurious contract, for in this caſe I am ſure to have by the agreement more then after the rate of 8l. *per centum*, and ſo it is not in the laſt caſe before.

Pet. Inſt. Brigman Hil. 7. Car. If one borrow 100l. for a yeare and give the Broker 20l. to procure it; this will not make the contract uſurious nor the aſſurances void: but for this the Broker may be puniſhed.

Obligations made to a Sheriffe contrary to the ſtatute.

Alſo all Obligations made to a Sheriffe contrary to the Statute of 23 *H.* 6. ch. 10. are void or at leaſt voidable by pleading. But of this ſee in Obligations *infra*.

Colluſion in fraudulent conveyances.

Stat. 27 El. ch. 4. Co. ſuper Lit. 3. ſtat. 39 El. ch. 18. A deed alſo made containing the Grant of any thing with intent and of purpoſe to deceive and defraud one that ſhall afterwards buy the ſame thing is void. For it is to this purpoſe provided by a Statute Law,

1. To deceive purchaſors. That all fraudulent conveyances of land or any rent or profit out of land made by whomſoever with intent to deceive or defeate any that ſhall purchaſe the land or any rent or profit out of it for mony or other good conſideration of the fruit and effect of their purchaſe ſhal be void againſt ſuch purchaſors for ſo much as they buy and againſt all others that come in by or under them. But all ſuch conveyances as are made

made *bonâ fide* and upon good conſideration are not to be accounted fraudulent. For the better underſtanding of which Statute and the Law in theſe caſes obſerve, That conveyances *bonâ fide* are oppoſed to ſuch as are upon and with any truſt expreſſe or implied: And good conſiderations are ſet down in the Statute to diſtinguiſh from ſuch as are not valuable, as nature, bloud, and the like. If one convey land with a preſent or future power of revocation or alteration at his will that doth convey it; this ſhall be ſaid a fraudulent conveyance as againſt him that ſhall afterwards purchaſe this land: So that if one convey his land to the uſe of himſelfe for life, and after to the uſe of divers of his bloud with a future power, as after the death of *H*, or after ſuch a day to revoke it, and before the day he ſell this land to a ſtranger for a valuable conſideration; in this caſe the firſt deed ſhall be ſaid to be fraudulent and void as to him that ſhall purchaſe the land to doe him any hurt. And if one convey land with ſuch a power of revocation, and after with an intent to defraud a purchaſor make a feoffment to a ſtranger to extinct the power, and after ſell the land for valuable conſiderations to a ſtranger; in this caſe both the firſt and the ſecond deed as to the purchaſor ſhall be ſaid to be fraudulent and therefore void. And if there be grandfather father and ſon, and the grandfather makes a leaſe for 100. years to the father, and the father to prevent the drowning of the leaſe by the deſcent of the reverſion to him doth aſſigne over the leaſe to certaine friends of his to the uſe of his ſon an infant under pretence to pay debts, the grandfather dieth, the father doth continue the occupation of the land and maketh eſtates and doth all acts as owner of the land, the ſonne payeth no debts, and the aſſignement (albeit divers perſons of quality were named aſſignes) was delivered to one of the aſſignes of meane eſtate in private, and after the father doth ſell the land for valuable conſideration, in this caſe this aſſignment ſhall be taken to be fraudulent and void as to the purchaſor. And if the father make a fraudulent conveyance and after continue the occupation of the land and it deſcend to the ſonne after the fathers death, and he ſell it for valuable conſideration; in this caſe the purchaſor may avoid the conveyance made by the father as well as if it had been made by the ſonne himſelfe, and that whether the ſonne be privie to the conveyance made by his father or not. And if the fraudulent conveyance bee made to the King, yet it is void as to a purchaſor as if it were made to a common perſon. And therefore if there bee tenant in taile the remainder in taile or in fee, and he in the remainder perceiving the tenant in taile doth intend to ſell the land and barre him by a common recovery doth ſell his remainder by deed inrolled to the King, and after the tenant in taile doth ſell the land by common recovery for good conſideration, in this caſe the purchaſor

Co. 3. 31.

Co. 3. 82. 83.

Co. 6. 72.

chaſor ſhall avoid this deed to the King, whereby alſo appeareth that a fraudulent conveyance within this ſtatute may be by way of bargaine and ſale. And ſo was it ruled by the Lord Chiefe Juſtice *Hide* in evidence to a Jury at Guildhall 3. *Car.* And if there be a leaſe for years and the leſſor make a fraudulent conveyance in fee, and then for good conſideration maketh another leaſe to begin at the end of the former leaſe; this conveyance ſhall be void as to the ſecond leſſee. And if *A* make a leaſe to *B* for years upon good conſiderations, and after he makes another leaſe to *C* of the ſame thing for the ſame term to begin at the ſame time upon good & valuable conſideration, and *B* doth not diſcover this but drives this bargaine with *C*, and is witneſſe to this ſecond leaſe, and the firſt leaſe is not excepted in the ſecond leaſe; it ſeems in this caſe the firſt leaſe ſhall be void as to *C*. And in all theſe and ſuch like caſes, albeit the purchaſor before he make his bargaine have notice of the fraudulent conveyance, yet ſhall he avoid it as if he were ignorant of it. But ſuch conveyances and deeds made as before ſhall never be ſaid to be fraudulent and void as againſt him that ſhall have the thing afterwards if he do not give a valuable conſideration for it. And therefore if one make a leaſe that would be fraudulent & void as to ſuch a purchaſor to *A*, and after make another leaſe *bonâ fide* to *B*, but without any rent or fine given for it; in this caſe the firſt leaſe ſhall not be ſaid to be fraudulent as againſt the ſecond leſſee, and therfore not void. So if one covenant for the advancement of his heirs males &c. to levie a fine of land by a day to the uſe of himſelf for life, and after of his iſſue male; and before the day he make a leaſe that is fraudulent for many years of purpoſe, and after he doth levie a fine accordingly; in this caſe this leaſe is good and ſhall not be ſaid to be fraudulent and void by this Statute as againſt the iſſue in taile. So if a man that is ſomwhat fooliſh and given to waſt be perſwaded to ſettle his lands upon ſome of his friends of purpoſe to maintaine himſelf with it; and after ſome of his lewd companions inveigle him and get him for a ſmall ſum of mony to conveigh it to them; in this caſe the conveyance firſt made ſhall not be ſaid to be fraudulent as againſt theſe purchaſors, and therefore it is good againſt them. And if one that hath a terme for 60. years if he live ſo long make it away, and then hee doth forge a leaſe for 90. yeares abſolutely; and after by indenture reciting this forged leaſe for valuable and good conſideration doth bargaine and ſell this forged leaſe and all his intereſt in the land to *I S.* in this caſe it ſeems that the firſt leaſe is not void, and that the purchaſor ſhall have nothing but the forged leaſe.

M. 4. Jac. Cowell & Bart. caſe.

Per. 2 Iuſt. Hil. 18 Jac. B. R.

Co. 5. 60. Co. 3. 83.

Co. ſuper Lit. 3.

A deed alſo made of any thing with intent and purpoſe to deceive and defeate Creditors of their juſt debts and duties is void alſo as againſt ſuch perſons. For it is provided to this purpoſe

Stat. 3 H. 7. 4. 2 R. 2. ch. 3. 13 El. ch. 5. Co. 3. 82.

2 To deceive creditors and others of debts and ſuch like duties.

by other Statutes. That all feoffments, gifts, grants, alienations, bargaines and conveyances of lands, tenements, hereditaments, goods, and chattells, or any rent, profit, or commodity out of land made by fraud or colluſion of truſt to him that made the ſame, or otherwiſe with intent to hinder and delay, or put off, or put by Creditors, or others of their juſt and lawfull actions, ſuites, debts, accompts, damages, penalties, forfeitures, hariots, mortuaries, or reliefes ſhall be void as againſt them to whom ſuch thing ſhall belong and hee may recover the thing notwithſtanding, but all ſuch as are made *bonâ fide*, and upon good conſideration, are not to be accounted fraudulent by this Statute. For the better underſtanding whereof theſe caſes following are to be heeded. If a man a little before his death make a conveyance of his land to his children or friends of his bloud with a proviſo to make it void at his pleaſure, and he take the profits of it as his own, or make a conveyance of it to friends to the intent they ſhall not be ſubject to the payment of his debts, having bound himſelfe and his heires by any eſpecialty, or to the intent that a warranty and aſſets ſhall not bind his ſonne for other land or the like, in this caſe this conveyance ſhall be void as to them that ſhould have reliefe upon this land by the diſſent; and eſpecially when the conveyance is made after ſuites begun; and more eſpecially when any judgment is had upon the ſuits againſt him that doth make the deed. And ſo alſo is the law for goods. And therefore if one be indebted to *A* 20l. and to *B* 40l. and be poſſeſſed of goods to the value of 20l. and *A* doth ſue the debtor for his 20l. and hanging this ſuite, the debtor ſecretly makes a generall deed of gift of all his chattels reall and perſonall to *B* in ſatisfaction of his debt, and yet doth afterwards continue the occupation and uſe the goods as his own, and after *A* getteth judgment and execution; in this caſe the deed of gift to *B* ſhall be ſaid to be fraudulent and therefore void as againſt *A*. So if in this caſe he give all his goods to *B* in ſatisfaction of his debt, and before any ſuite begun by *A*, with any expreſſe or implicite truſt, as to the intent that *B* ſhall be favourable to the debtor, or that if the debtor provide the mony that he ſhall have the goods again, or that he ſhall ſuffer the debtor to enjoy and uſe the goods and pay him as hee can; in theſe and the like caſes the deeds ſhall bee ſaid to bee fraudulent and void, for howſoever it bee made upon good conſideration, yet it is not made *bonâ fide*. So if one in conſideration of naturall affection, or for no conſideration give all his goods to his child, or couſin *bonâ fide*, this ſhall be a void deed as to the Creditors. *Et ſic de ſimilibus.* So if one give all his goods and chattels to his executor in his life time by deed of gift, this ſhall be ſaid to be fraudulent and ſhall be void as to Creditors. And albeit thoſe to whom the deed of fraud is made know nothing of the fraud, yet is the

Co. 5. 60. 3. 82. Dyer 295.

Co. 3. 80. 83. Bro. Done. 20. Plow. 54.

the deed fraudulent in that caſe alſo as well as where they are privie to it. If after a Commiſſion of Bankrupts be ſued out the debtor make a deed of gift of all his goods to one of his Creditors in ſatisfaction of his debt; in this caſe this deed ſhall be void as againſt the reſt of the Creditors and as to the Commiſſioners, and they may order it with the reſt of the eſtate notwithſtanding. But if *A bonâ fide* and for valuable conſideration mortgage his land whereof he hath a term of years to *B*, upon condition that if he repay the mony to *B* a yeare after that he ſhall reenter, and *B* doth covenant with *A*, that he ſhall take the profits of it untill that time &c. *A* doth not pay the money, and *B* hoping that he will pay it in time doth ſuffer him to continue in poſſeſſion and take the profits of it two or three years after, and in the interim judgment is had againſt *A*, upon a bond and execution awarded; in this caſe execution ſhall not be made of this leaſe, for this deed of mortgage ſhal not be ſaid to be fraudulent as to the Creditor, for when a conveyance is not fraudulent at the time of the making of it it ſhall never be ſaid to be fraudulent for any matter *ex poſt facto*.

Co. 2. 25.

By the two Judges of Aſſiſe Aug. 5. Car. in Com. South. Lady Lamberts caſe.

If *A* be ſeiſed of the fifth part of the Manor of *B*, and *B* of the 6th part, and *M* cometh to *A* to buy his part, and after *M* ſaith to *A*, my Counſell tells me I cannot ſafely buy of you unleſſe *B* joyn, and after *B* doth grant a rent charge of 15l. *per annum* out of this Manor to *C* her ſonne and the heires of his body in conſideration of naturall affection (and this was about 1°. *Jac.* *C* being then but about three years old) with proviſo that if *D* (whom *B* did then intend to mary) grant to the ſaid *C* the like rent of 15l. and for the like eſtate out of 20l. land by the yeare of the land of *B*, then the ſaid grant to be void, and after the ſaid *A* bought the 6th part of the ſaid Manor of *B*, and *D* her husband being intermaried, and after *A*, *B*, and *D* her husband joyne in the grant to *M*, and in this caſe it was ruled that this grant to *C* was not fraudulent and void. If one doth hold his land to pay a hariot at the death of every one that dyeth tenant in fee ſimple, and he infeoffe his ſonne and heire in conſideration of naturall affection and mariage to be had between the ſonne and *I*, and the ſon (to prevent the Dower of his intended wife during his fathers life) makes a leaſe for forty yeares unto his father if his father live ſo long, and afterwards the mariage is had, the father payeth the rent, the ſonne doth ſuit of Court for the land and after the father dieth; in this caſe this leaſe ſhall not be ſaid to be fraudulent as to the Lord to deceive him of his hariot becauſe it was made to another end.

Mich. 19 Jac. Co. B. Miller & Pots caſe.

Co. 10. 56, 57.

Stat. 52 H. 3. c. 9. 34 H. 8. ch. 5. Co. 6. 76. Lit. Bro. Sect. 59. Plow. 49. Co. 8. 164. 9. 129.

A deed alſo made to defeate the King or other Lord of his wardſhip ſhall be void, as to a third part of the thing conveyed. And therefore if any tenant that holdeth of the King or any o-

3 To deceive Lords of their wardſhips &c.

ther Lord make a feoffment or other conveyance of his land to deſeate and defraud the King or Lord of his wardſhip, primer ſeiſin or any other benefit appointed and preſerved for the Lord by the Statutes of 32 and 34 *H.* 8. ſhall be void as to a third part thereof againſt the King or other Lord who ſhall notwithſtanding have their wardſhip and other benefits, as if none ſuch were made. As if ſuch a tenant by deed enfeoffe his lineall or collaterall heire within age, or make a leaſe for life the remainder to his heire, or make a gift in taile the remainder in fee to his heire, or make a feoffment on condition that he ſhall reinfeoffe his heire at his full age, or make a feoffment for the paiment of his debts, prefermẽt of his wife and children, or infeoffe another to the intent that he ſhall take the profits till he have an heire male and then to reinfeoffe him; all theſe are fraudulent, and void as to a third part of the land, and as againſt the King or other Lord in reſpect of the benefit they are to have of and by the land. But no conveyance in theſe caſes ſhall be ſaid to be fraudulent and ſo void for two parts of the land. And if one make a feoffment of land to two (whereof his heire is one) and their heires for mony or other valuable conſideration; this ſhall not be ſaid to be a fraudulent conveyance of any part. So if ſuch a joyntenant make a feoffment of his moity to a ſtranger. * And in caſes where the feoffment is fraudulent for a third part as before, if the feoffee dye or make a feoffment over *bonâ fide* before the death of the Anceſtor; in theſe caſes the deed is become good again, and the colluſion gone. If a man for feare of debts convey his lands to friends with condition that upon payment of 10l, they ſhall convey it to thoſe whom he ſhall appoint; in this caſe the conveyance ſhall not be ſaid to be fraudulent as to the King or other Lord for it was done to another end, and therefore it is a good conveyance againſt all men but the Creditors. Where deeds ſhall be void in part or in all for want of inrollment, atturnement, livery of ſeiſin or the like; ſee afterwards.

* Dyer 9. Co. 2. 94.

Dyer 268. Co. 10. 57.

6 Where a deed good in his creation may become void by matter *ex poſt facto*. And what will make ſuch a deed void or not.

1. By Raſure.

If a deed that is well and ſufficiently made in his Creation ſhall be afterwards altered by raſure, interlining, addition, drawing a line through the words (though they be ſtill legible) or by writing new letters upon the old in any materiall place or part of it, as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted or in the limitation of the eſtate, or if it be in an Obligation, when the word [Heires] ſhall be inſerted, or the ſumme increaſed, or in the date of either, or the like; be the ſame either by the party himſelfe that hath the property of the deed or any other whomſoever except it be by him that is bound by the deed; and be the ſame with or without the conſent of him to whom it is made or doth belong; in this caſe and by either of theſe meanes the deed hath loſt his force and is become void.

Co. 11. 27. 5. 119. Dyer 59. 261. Perk. Sect. 123. 135. Kelw. 162. Fitz. Releaſe 27. 14 H. 8. 25. Bro. Fait 9.

And

And if the alteration be made by the party himſelfe that oweth the deed, albeit it be in a place not materiall, and that it tend to the advantage of the other party and his owne diſadvantage, yet the deed is hereby become void. But if the alteration be made by the party himſelfe that is bound by the deed in any materiall or immateriall part thereof, or a ſtranger without the privity or conſent of the owner of the deed ſhall make any ſuch alteration in any part of a deed not materiall, (as if it be a deed of a grant containing a leaſe for years, and there be inſerted between [To have and to hold] and [for 30 years] theſe words [from henceforth:] Or if it be an obligation and there be inſerted between [*Obligo me*] and [*per preſentes*] theſe words [*Executores meos*] in both which caſes thoſe words are needleſſe and without any fruit at all; hereby the deed is not hurt, but it remaineah good notwithſtanding. But if the Alteration be before the delivery of the deed, be it whatſoever or by whom ſoever, it will not hurt the deed. And herein it muſt be obſerved that then a raſure, &c. is moſt dangerous, and the deed thereby moſt ſuſpitious when it is in a deed Poll and there is but one part of the deed; and when the raſure or other alteration is in any materiall part of the deed; and when the alteration makes to the advantage of him that doth owe the deed and to the diſadvantage of the other that made it; and when there doth appeare ſome other thing to be written before; and when there is no other part of the deed, recitall, defeaſance, or other matter to which this may be compared, and that may make it appeare to be before the delivery; and when there be other parts of the deed or other matters whereunto this being compared doth not agree in that part wherein the alteration is; and when the deed hath been in the ſmoke, or any ſuch like meanes hath been uſed to cover the alteration. And in theſe caſes the matter was anciently uſed to be tried by the Judges upon the view of the deed; but it is now uſed to be tried by Jurors, whether the raſure, or other alteration were before the delivery of the deed or not.

Perk. Sect. 123, 124. Bro. Fait 6. Perk. 129, 127. 128.

Co. ſuper Lit. 225.

2. By breaking or defacing of the Seale.

And if after the ſealing, delivery and perfection of a deed, the ſeale thereof happen to be broken off, or to be utterly defaced, ſo that no ſigne or print thereof can be ſeen, or it appeareth to have been broken off and it is glued, or the wax new heat and ſet on again; or the label of the deed hath been broken off from the deed & is ſewed on again; or the deed is new ſealed with other wax, be the ſame by whatſoever means, or whomſoever unleſſe it be by him and his means that is bound by the deed; in theſe caſes and by either of theſe meanes the deed is become void. But if any peece of the ſeale remain fixed to the deed, and there be any print left upon that peece, the deed doth continue good. And if after the ſeale of a deed bee broken off the party that ſealed it doe ſeale and deli-

Dier 59. Co. 11, 28. 5, 23. Dier 112. Perk. Sect. 135, 136. Bro. Obligig. 83.

3 By redelivery or cancelling of it.

ver it *de novo*; by this meanes it seems the deed is become good again. Trin. 38 El. Co. B. Dier 112.

And if a deed be delivered up to the party that is bound by it to be cancelled and it be so; or if he that hath the deed doth by agreement between him and the other cancell the deed; by either of these meanes the deed is become void. But if an Obligee deliver up an Obligation to be cancelled, and the obligor doe not afterwards cancell him, but the obligee happen to get him again into his hands and sue the obligor upon him, the obligor hath not any plea to avoid him, for the deed remains still in force.

4. By disagreement. Co. 3. 26. 5. 119. Dier 167.

And if an Obligation be delivered as an Escrow to a stranger to be delivered to the obligee on certaine conditions, or to a stranger to the use of the obligee, and when this is after tendred to the obligee he doth refuse it and disagree to it; or if an Obligation be made to a feme covert, and her husband disagree to it, in all these cases the deed is become void. And like Law is of other deeds in

Agreement.

divers such like cases. But the party bound by the deed may not in these cases plead *non est factum* to the deed. And in these cases when the party hath once by his agreement made the deed good he cannot afterwards by his disagreement make it void: and when once by refusall and disagreement he hath made the deed void he cannot by agreement or acceptance afterwards make it good.

5. By Judgement of a Court. Crom. Jur. 29. 40. Bro. Fait. 38.

A deed also good in his originall creation may be afterwards damned or avoided by sentence and order of a Court, and this is usually done in the Starre-Chamber and in the Chancery, and it is when it appeareth that the deed was obtained by some fraud, force, circumvention or such like practise, or when it doth appeare to be forged, or the like.

Vacat of a deed.

7. When and where a deed may be good in part and void in part. Or good against one person and void against another. Or not. Co. 11. 27. 14 H. 8. 27. 28, 29.

For the answer of this question these differences must be observed. 1. When a deed is void *ab initio*, and when it doth become void by matter *ex post facto*. 2. When the deed which is void in part from the beginning is entire, and when it doth consist of severall clauses: and when it doth consist of severall clauses when the severall clauses are absolute and distinct, and when they are severall and yet the one hath dependency upon the other. For if any of the Covenants of an Indenture, or the conditions of an Obligation be against Law, and the rest of the covenants or conditions be good and lawfull; in this case those that are against Law and the deed as to that part are void *ab initio*, and the rest and the deed as for that part are good *ab initio*. So if three distinct Obligations are written upon a peece of parchment, and the one of them only is read to the obligor, and he being an illiterate man seale and deliver the deed; in this case this is a good deed for that which was read and void for the rest *ab initio*. But if an obligation be for 20 l. and it be read to the obligor an Obligation of 20 s. this is void for the whole *ab initio*.

Co. 11. 27. Kelw. 70. 3 E. 30. 31.

If

If a deed be read as containing the grant or gift of an eſtate taile and a letter of Atturney to give Livery of Seiſin, and in that ſenſe the party doth ſeale it, and in truth it is a feoffement and conveyance of an eſtate in fee ſimple; in this caſe albeit the letter of atturney were truly read yet becauſe it hath dependence on the eſtate, it is void for all.

Co. 11. 28. Fitz. feoffements & Faits. 57. 47 E. 3. 3.

If a man be indebted to me 20 l. on a Contract and 100 l. on an Obligation, and he pay me this 20 l. and I am to make a releaſe for it, and the intendment of the releaſe is no more, and it is ſo read to me being an illiterate man, but in truth it is a generall releaſe, in this caſe it ſeemes it is good for ſo much as it is intended and was declared and void for the reſt.

Dier 27.

If the condition of an obligation be altered by raſure &c. the obligation alſo is hereby become void becauſe the condition and obligation are one deed, but if the raſure &c. be in the defeaſance of an obligation, this will not make the obligation void.

14 H. 8. 25. 26.

If a deed containe divers diſtinct and abſolute Covenants, and any of theſe Covenants be altered by addition, interlineation, raſure, or the like, by this meanes the whole deed and not that part only is become void.

Co. 11. 28.

Co. 5. 23. 11. 28. 3 H. 7. 5.

If there be divers grantors, obligors, &c. named in a deed and one of them only doe ſeale the deed, this is a good deed as againſt him that doth ſeale and void as to all the reſt that doe not ſeale. And if divers enter into covenants by a deed ſeverally, and the ſeale of one of them is broken from the deed; in this caſe the deed is good ſtill as to all the reſt but void as to him. But if an obligation, or the covenants of a deed be joint and not ſeverall or joint and ſeverall, and the ſeale of one of the obligors, or covenantors is broken, or the obligation or covenants be altered by raſure or the like; hereby the whole deed is become void.

14 H. 8. 29. Perk. fo. 2.

If I be bound in an obligation to a Monke and *I S*, this deed is void as to the Monke but good as to *I S*: So if a Monke and I be bound to another; this is good as againſt me, but void as againſt the Monke. And ſo it is in caſe of a Grant.

Co. 1. 173. Dier 127. See in Leaks. Numb. 13.

By a power of revocation or a condition a deed may be made void in part and continue in his force for another part. And therefore it ſeemes in the uſuall caſe where a deed is made upon condition that if ſuch a thing be, or be not done that the deed ſhall be void, or that theſe preſents ſhall be void; that in theſe caſes the whole deed and all the covenants therein contained are void; But if the frame of the condition be, That upon ſuch a thing to be, or not to be done it ſhall be lawfull for the feoffor, leſſor &c. to reenter, or that the demiſe ſhall be void, without more words; in theſe caſes the eſtate only and thoſe covenants that are incident thereunto, as for quiet enjoying and the like and the deed as to

that part only is void: and for other covenants that are collaterall and have no dependence upon the eſtate that the deed doth remain in force and is good ſtill, for a man may grant two acres upon condition to reenter into one of them. If it be intended that the whol deed ſhal be void, the beſt way is to uſe theſe words [thentheſe preſents & every thing therein contained ſhall be utterly void.]

3 How and to what time a deed ſhall have relation, and when it ſhall begin to take effect.

All deeds doe take effect from, and therefore have relation to the time not of their date but of their delivery: and this is alwaies preſumed to be the time of their date unleſſe the contrary doe appeare. And hence it is, That if a Statute be acknowledged the 26. day of *May*, and the conuſee make a releaſe of all demands dated the 25. day and deliver it the 27. day; that by this releaſe the Statute is diſcharged. And if the defeaſance of a Statute doe beare date before, and the delivery of it be after the Statute; that the conuſor may ſhew this and take advantage of it in avoidance of the Statute. And that if a writing be dated in the minority of an Infant, and be ſealed and delivered by him when he is of full age, that this is a good deed and will bind him. And that if a releaſe be ſuppoſed to be made by a husband to barre a duty due to the wife, and it be dated during the coverture but in truth it is ſealed and delivered by the husband before the coverture; that this ſhall not barre the wife: the time therefore of delivery of a deed is materiall in all theſe and the like caſes, and this is alwayes to be tried by a Jury. And hence it is alſo, That if the next preſentation to a Church be granted to two ſeverall perſons by ſeverall deeds of ſeverall dates, and the deed that beareth the laſt date be firſt delivered; in this caſe he to whom this deed is made ſhall have the Preſentation, and not the other whoſe deed albeit it be dated firſt yet is delivered laſt. Aud hence it is alſo that if a leaſe be made for years, to begin from henceforth, or *à confectione preſentium*, or *à die confectionis*; that this leaſe ſhall be ſaid to begin from the time of the firſt delivery and not from the time of the date.

Co. 2. 4. 5. 5 H. 7. 26. Plow. 491. Dier 307. 315. Fitz. Feoffments & faits 87. 63. 95.

Fitz. feoff. & Faits. Barre 147.

Co. 5. 1.

Relation.

And where deeds have a kind of double delivery, as in caſe of a delivery as an Eſcrow, there they ſhall take effect from, and have relation to the time of the firſt delivery or not *ut res valeat*, for if relation may hurt and for ſome cauſe make void the deed (as in ſome caſes it may) there it ſhall not relate. But if relation may helpe it, as in caſe where a feme ſole deliver an Eſcrow and before the ſecond delivery ſhe is married or dieth, in this caſe if there were not a relation the deed would be void, and therefore in this caſe it ſhall relate. So if one diſſeiſe me of two acres of land in *D* and I releaſe to him all my right in my lands in *D* and deliver it to an eſtranger as an Eſcrow &c. untill a time and before that time he diſſeiſe me of another acre there; in this caſe this releaſe ſhall not by relation extend to this other acre to barre me

Co. 3. 35, 36. 18 H. 6. 9. 27 H. 6. 7. Plow. 344.

of

of that alſo. But as to collaterall acts there ſhall be no relation at all in this caſe. And therefore if the obligee releaſe before the ſecond delivery the releaſe is void and will not barre the party obligee of the fruit of his obligation.

Co. 10. 92. ſuper Lit. 267. 317. 225. 231. 5. 74 Lit. Sect. 375.

If a man that is party or privy in eſtate or intereſt or one that doth juſtifie in the right of one that is ſuch a party or privy ſhall plead a deed in any Court, although he claime but parcell of the originall eſtate, yet in this caſe he muſt ſhew the originall deed to the Court: and the reaſon of this is, to the end that the legall part of the deed (the triall whereof belongeth to the Judges) may approve it ſelfe. *i.* that it may be ſeen whether the compoſition of words be ſufficient in Law or not, and then that it may appeare whether the eſtate be with Condition, Limitation, or with power of revocation &c. to the end that if there be any ſuch thing in it and there be no other part of it, the other party may take advantage of it, and then that it may appeare to be without raſure or interlining and the like, and alſo that it may appeare to be well ſcaled and delivered (the triall whereof doth now belong to the Country.) But ſtrangers to eſtates that are neither parties nor privies ſhall not be compelled to ſhew the deed though they make uſe of him. And when a deed is thus ſhewed in Court it muſt remaine in that Court all the Terme wherein it is ſhewed in the cuſtody of the *Cuſtos brevium*, and at the end of the Terme if the deed be not denied the Law doth adjudge the poſſeſſion of the deed in him to whom it doth belong. But if the deed be denied then it is to be kept there untill it be determined. Alſo when a deed is ſhewed in Court the adverſe party may take any advantage by it that it will afford him, as if a feoffement be made by deed poll on condition, and the feoffee doth breake the condition and the feoffor doth enter and the feoffee doth ſue him and makes his title by that deed, the feoffee may take advantage of the Condition.

9. When and where a deed muſt be ſhewed in Court. And how long it ſhall abide there. And who may take advantage of it.

Dier 315. 12 H. 6. 1. Co. 2. 4. 5.

Any man that hath occaſion to uſe or plead a deed may ſet forth the delivery thereof to be at any time after the date of the deed, and in ſome caſes he muſt doe ſo if he will have any advantage by it. As if he plead a releaſe to an obligation and it beareth date before the obligation; in this caſe he muſt averre that it was delivered after or it will not availe him. But a man may not in pleading ſet forth the delivery of a deed to be before the date of the deed. And yet if it be ſo that a deed be dated after the time of the delivery of it, the deed is good, and therefore if he that doth uſe ſuch a deed doe plead and ſet it forth as a deed made before the time of the delivery and the party that made it plead *non eſt factum* to the deed, a Jury upon the triall may finde the truth of the caſe: but if he by his pleading ſet forth the deed to be delivered before the time of the date, then the Jury is concluded aſwell

10. Where one may ſay his deed was delivered at another time or in another place.

Eſtoppell.

as

as the party himſelfe, for a Jury is eſtopped to finde any thing contrary to that which is apparently admitted in the record. In debt brought by an executor the defendant pleaded the releaſe of the Teſtator which did beare date after the death of the teſtator, but he did averre the delivery of it in the life time of the teſtator, and the Court did not allow of this plea. 12 H.6.1.

Sometimes Antiquity added a place where the deeds were made, as *Datum apud B*, and this was in diſadvantage of him to whom the deed was made, for if the deed be in generall and without this addition he may alleage the deed to be made where he will. An obligation made beyond the Seas may be ſued here in *England* in what place the obligee will, and if it beare date at the Burdeux in *France*, it may be alleaged to be made in *quodam loco vocat. Burdeux* 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 not it is not traverſable in that caſe. Co.ſuper. Lit.6. Co.ſuper. Lit.261.

11. *Non eſt factum; Quid.* And where this may be pleaded to a deed, or not.

Non eſt factum is an anſwer to a declaration whereby a man denieth that to be his deed whereupon he is impleaded.

If any deed or writing be uſed againſt a man in any Court and it want writing, ſealing, or delivery, or it be not ſealed, written, and delivered as before is ſet forth, the party that is ſued upon it or againſt whom it is pleaded may plead this plea to it. So alſo if a deed by any Alteration of raſure &c. become void; in this caſe the party may plead this plea to avoid it. So alſo where a deed doth become void or loſe his virtue by the not reading, or not true reading of it to an illiterate man, orby refuſall or diſagreement as in the caſes before, the party may plead this plea to avoid it. But in all caſes where the deed is voidable and ſo remaineth at the time of the pleading, as if an Infant, or man of full age by dureſſe ſeale and deliver a deed; or if an obligation be well ſealed and delivered by two and the deed be joynt and the obligee ſue one of them; in theſe and ſuch like caſes the party bound by the deed may not plead *Non eſt factum*, for in the firſt and ſuch like caſes he muſt avoid it by ſpeciall pleading with concluſion of Judgment *ſi Action &c.* and in the laſt he muſt plead in abatement of the writ &c. And if an obligation or any other deed be by any ſpeciall act of Parliament made void the party that is bound by it cannot plead this plea of *Non eſt factum* to it but he muſt avoid it by ſpeciall pleading of the matter and taking advantage of the Statute and ſo with concluſion of Judgement *ſi Action &c.*

And now we come to the Expoſition of deeds.

CHAP.

CHAP. V.

Expoſition of Deeds.

IT is further to be obſerved that Deeds for the moſt part conſiſt of theſe things. *viz.* the Premiſſes, *Habendum*, *Tenendum*, *Reddendum* or reſervation, Condition, Warranty, and Covenant. And in the Premiſſes there is ſometimes a Recitall, and ſomtimes an Exception contained: but all theſe are not eſſentiall parts of a deed, for a deed may be good albeit it have not all theſe parts or it be not ſo formall and orderly drawn and made.

Co. ſuper Lit. 6. 7. Co. 11. 51. 2. 55. Plow. 196.

1. Premiſſes, *Quid.*

The Premiſſes of a deed is all the forepart of the deed before the *Habendum*. And yet this word is ſometimes taken for the thing demiſed or granted by the deed. And the office of this part of the deed is rightly to name the grantor and grantee and to comprehend the certainty of the thing granted, either by expreſſe words, or by that which by reference may be reduced to a certainty, and the exception or thing to be excepted if there be any. And in this part of the deed is the Recitall (if there be any in the deed) for the moſt part contained. And herein alſo is ſometimes (though improperly) ſet downe the eſtate.

Co. ſuper Lit. 6. 7. 10. 107.

2. *Habendum*, *Quid.*

The *Habendum* of a deed is that part of the deed which doth begin with To have and to hold. And this doth properly ſucceed the Premiſſes. And the office hereof is to ſet downe againe the name of the grantee, the eſtate that is to be made and limited, or the time that the grantee ſhal have in the thing granted or demiſed, and to what uſe. And herein alſo is ſometimes though needleſly ſet downe againe the thing granted. But the deed that doth uſually conſiſt of all theſe parts may be good notwithſtanding ſome of them be omitted and it be not ſo formally made. For an eſtate may be made by a deed without any *Habendum* at all. As if one give or grant land to another and his heires, without any more words in the deed; or if one give or grant land to another, and limit no eſtate without any *Habendum* in the deed; and ſeale and deliver this deed and make Livery accordingly; in both theſe caſes the deed is good, and in the firſt caſe an eſtate in fee ſimple is made, and in the laſt caſe an eſtate for life is made. And if the name of the grantee be not contained in the Premiſſes, yet if it be in the *Habendum*, it may be good enough. As if one give or grant land *Habendum* to *B* and his heires, and he is not named in the Premiſſes, yet this is a good deed to make an eſtate in fee ſimple. And yet if the thing granted be only in the *Habendum* and not in the Premiſſes of the

3. Where a deed is good notwithſtanding ſome ſeeming fault in the Premiſſes or *Habendum*.

the deed, the deed will not paſſe it. And therefore if a man grant blacke acre only in the Premiſſes of a deed *Habendum* blacke acre and white acre; white acre will not paſſe by this deed. But if the thing newly added be implied in the thing granted by the Premiſſes of the deed, as being an incident thereunto or otherwiſe, or it be the ſame thing, and expreſſed in other words only, in theſe caſes the Premiſſes and the *Habendum* may ſtand together. As if one grant a manor, *Habendum* the manor with the Advowſon appendant to the manor; or if one grant a Reverſion of land by the name of a reverſion in the premiſſes, *Habendum* the land it ſelfe, in both theſe caſes the deed is good and the advowſon and reverſion will paſſe. So alſo if livery of Seiſin be made of the thing newly added, in this caſe perhaps it may paſſe by the Livery. And if the thing granted be left out in all, or in part in the *Habendum*, yet the grant is good. And thereof if one grant land to *A Habendum* to *A* his heires &c. or if one grant white acre and blacke acre to *A Habendum* white acre to *A* and omit black acre; yet theſe deeds are good, and all that is contained in the premiſſes of the deed doth paſſe in both caſes. And if a feoffement be made to one, *Habendum* to him and his heires, without the word Aſſignes; this is a good feoffement and the eſtate thereby made is aſſignable: as where a leaſe is made to one his executors and adminiſtrators, without the word Aſſignes, this is a good Leaſe and aſſignable. So if one grant land to *A Habendum* to him for 100. years; or *Habendum* to him and his aſſignes for 100. years; theſe are as good leaſes as the leaſe that is made by theſe words *Habendum* to *A* his executors, adminiſtrators and aſſignes for 100. years. So if a leaſe of land be made to *A Habendum* the land to him and his heires for 100. years, this is a good *Habendum* and the word [heirs] is void, and it ſhall goe to his executors &c. As alſo where land is granted to *A Habendum* to him and his Succeſſors for 100. years; this is a good leaſe, and the word [Succeſſors] void, for it ſhall goe to executors &c. And if a leaſe be made *Habendum* for years, and ſay not how many years; this is a good *Habendum* and a leaſe for two years.

Plow. 152. Dier 96. Perk. Sect. 251.

Lit. 1 Co. ſuper Lit. 46. Co. 6. 35. New Terms of the Law, tit. Aſſignes.

3. Recitall. *Quid.*

A Recitall is the ſetting down or report of ſomthing done before.

4. Where it is needfull; or not.

When a man is to take any new eſtate from the King of a thing whereof there is any eſtate in being, there the former eſtate if it be good and of record muſt be rehearſed and recited in the deed, or elſe the ſecond grant will not be good: but in caſe of a common Perſon there needs no ſuch recitall; neither when a man is to derive an eſtate out of a former, or aſſigne over a terme of years is it needfull there ſhould be any recitall of the former eſtate in being.

Co. 1. 45. Dier 77.

5. Where miſrecitall will hurt a deed; or not.

If one recite or rehearſe an eſtate made for terme of years, and then

Co. 1. 74.

then after grant over that terme to another, and miſtake in the recitall; this miſtake may make all void. As if a *Fieri facias* come to a Sheriffe to levy a debt, and he by writing recite that the defendant hath a terme of years, and doth ſuppoſe it to begin 1°. *Maii*, 2 *Jac.* when in truth it doth begin the 20th. of *Auguſt*, and then ſell the ſame terme; in this caſe this ſale is void. But if he adde withall theſe words in the deed [And all the intereſt that the defendant had in the land] or if he make ſale of it for a certain number of years only; this grant may be good notwithſtanding the miſrecitall.

Dier 93. 160. If one recite a former leaſe to be made ſuch a day to *I S* and then make a new leaſe to begin after the end of the former leaſe, and miſtake the date of the old leaſe; in this caſe the deed is good notwithſtanding this miſtake.

8 H. 7. 3. Fitz. Grant. If one grant a reverſion, and in reciting the leaſe in poſſeſſion miſtake the date of it only and recite all the reſt truly; this will not hurt the grant. No more then where a man doth recite that ſuch land came to him by forfeiture, and then doth grant it by name; for in this caſe albeit it did not come to him by forfeiture but by ſurrender, yet this miſtake will not hurt. And yet in caſe of the King ſuch a miſrecitall may make the grant void.

Dier 56. 87. 376. If I grant to *I S* all the lands in Dale which I purchaſed from *I D* or which came unto me by deſcent from *I D*, or I give all my goods to *I S* which I have as executor to *I D*, and in truth I have no ſuch lands or goods, but I had them by ſome other meanes or of ſome other; in theſe caſes and by this miſtake the deed is void. But if I grant to *I S* all my lands in Dale by name, as white acre, which I purchaſed of *I D* and in truth I did purchaſe them of another; in this caſe this miſtake will not hurt the deed. So if I grant 20. load of wood in Dale in the great wood which I had of the grant of my father, and in truth I had not of the grant of my father but of the grant of another; in this caſe the grant is good. But of this matter ſee more in Grant *Numb.* 4. *part* 5.

6. Exception, *Quid.*

Plow. 361. 195. Dier 59. Perk. Sect. 625. Co. ſuper Lit. 47. 3 H. 6. 45. An Exception is a clauſe of a deed whereby the feoffor, donor, grantor, leſſor, &c. doth except ſomewhat out of that which he had granted before by the deed. And this doth moſt commonly and properly ſucceed the ſetting downe of the things granted, and is made by one of theſe words *Except'*, *Preter*, *Salvo*, *Si non*, or ſuch like. And hereby the thing excepted is exempted and doth not paſſe by the grant, neither is it parcell of the thing granted: as if a manor be granted excepting one acre thereof, hereby in Judgement of Law that acre is ſevered from the manor. But this may be in any part of the deed, and ſo hath it been reſolved. *Hil.* 17 *Car.*

7. What ſhall be ſaid a good exception; or not.

B. R. Fregunnels caſe. Perk. Sect. 62 &c. In every good Exception theſe things muſt alwaies concurre, 1. This Exception muſt be by apt words. 2. It muſt be of part of

of the thing granted and not of ſome other thing. 3. It muſt be of part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It muſt be of ſuch a thing as is ſeverable from the thing which is granted, and not of an inſeparable incident. 5. It muſt be of ſuch a thing as he that doth except may have and doth properly belong to him. 6. It muſt be of a particular thing out of a generall, and not of a particular thing out of a particular thing or of a part of a certainty. 7. It muſt be certainly deſcribed and ſet downe. As for examples. [a] If a man grant all his lands in *Eſſex* ſaving, beſides, or except his lands in dale, or all his lands in Dale excepting one houſe, or one acre in certain; or one houſe excepting one chamber in certain; theſe and ſuch like Exceptions are good. [b] And if one grant a manor excepting one Tenement (parcell of the manor) or excepting the Services of *I S* (who doth hold of the manor) or excepting one Cloſe, or excepting one acre, or excepting the Advowſon appendant, or excepting the woods, or excepting twenty acres of wood, or excepting all the groſſe trees; theſe are good exceptions.

Plow. 19. Co. ſuper. Lit. 47.

a Plow. 195. Perk. Sect. 641.

b Dier 103. Plow. 104. 361. 67. Co. 8. 63. 11. 47. 5. 11. Perk. Sect. 642. 3 H. 6. 35.

[c] And if one grant a meſuage and houſes thereunto belonging excepting the barne or excepting the dovehouſe; it ſeemes this is a good exception, for they may paſſe by the grant of a meſuage &c. [d] And if one grant land excepting the Timber trees thereupon, or excepting the trees thereupon; or if a man ſell a wood excepting 20. of the beſt oakes, and ſhew which in certain; theſe are good exceptions. [e] So if one have a manor wherein is a wood called the great wood, and he grant his manor excepting all the woods and underwoods that grow in the great wood and all the trees that grow elſewhere, this is a good exception. [f] And if one grant a meſuage and all the lands and tenements thereunto belonging excepting one cottage; this is a good exception. [g] And if one grant a reverſion excepting the rent; this is a good exception of the rent and doth keep it from paſſing by the grant. So if a man have a a rent charge out of land and he releaſe his right in the land except the rent; So if the Lord releaſe to his Tenant *Salvo dominio ſuo, &c.* theſe are good exceptions. [h] And if one grant all his horſes except his white horſe; this is a good exception of the white horſe. [i] And if a man be ſeiſed of a manor, and leaſe it by deed indented for life *exceptis & reſervatis quod bene liceat* to the leſſor *ſuccidere dare & vendere omnes groſſas arbores in dicto manerio creſcentes &c.* it ſeemes this is a good exception of the trees. But if the exception be of another thing then the thing granted: [k] As if one grant a manor or land excepting 12 d. or excepting the Tithes, or excepting one acre of ground which is no parcell of the manor or of the land before granted; or if one grant the land deſcended to him of the part of his father excepting the land deſcended to him of the part of

c 14 H. 8. 1.

d Co. 8. 63. 5. 23.

e In the caſe of Haward & Fulcher. Hil. 3. Car. B. R.

f Co. 11. 64.

g Perk Sect. 113. 644. Dier 157.

h Plow. 361.

i 3 H. 6. 45. Perk. Sect. 643.

k Perk. Sect. 639. Dier 59. Plow. 361. 67. 370.

of his mother; theſe exceptions are void. [l] Or if the exception be ſuch as it is repugnant to the grant and doth utterly ſubvert it and take away the fruit of it, as if one grant a manor or land to another excepting the profits thereof; or make a feoffement of a cloſe of meadow or paſture, reſerving or excepting the graſſe of it; or grant a manor excepting the ſervices; theſe are void exceptions. [m] So if one grant his houſe, chambers, cellars, and ſhops, excepting his ſhops; it is ſaid this is no good exception. And by the like reaſon if one grant his meadow and paſture grounds except his meadow grounds, this exception is not good no more then if one grant two manors or two acres excepting one of them. And of this opinion was the Chiefe Juſtice in *B.R. Hil. 3 Car.* in the caſe of *Haward* and *Fulcher*. [n] And yet if a man make a leaſe for yeares of a Mill excepting the profits thereof during the life of the leſſor; it is ſaid, this hath been adjudged a good exception. But I doubt of this caſe, for the exception of the profits of a thing is the exception of the thing it ſelfe. And a man cannot grant an eſtate and reſerve a part of the eſtate, as make a feoffement in fee and reſerve a leaſe for life, or grant an Advowſon and reſerve the Preſentation for his life. [o] Or if the exception be of an inſeparable incident and a thing that cannot be granted by it ſelfe and from another, as if a manor be granted excepting the Court Baron, or land be granted excepting the common appendant thereunto belonging; theſe exceptions are void. But exceptions of ſeverable incidents are good. [p] Or if the exception be of ſuch a thing as the grantor cannot have nor doth belong to him by law; as if a leſſee for years aſſigne over all his terme in the land excepting the Timber trees, earth or clay; this exception is not good. But if leſſee for life make a leaſe for years, or leſſee for 21. years make a leaſe for 20. years; or tenant by the courteſie or in dower grant over their eſtate excepting the Timber trees; theſe are good exceptions. And if a leſſee for life or years open a Cole-mine and then aſſigne over his eſtate excepting the mines or the profits thereof; theſe are void exceptions. [q] Or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre excepting white acre, or grant 20. acres of land by particular names excepting one acre of them; theſe exceptions are void. [r] Or if the exception be ſet downe incertainly, as if one grant a houſe excepting one chamber; or grant a manor excepting one acre, but doth not ſet forth which chamber or which acre it ſhall be; theſe exceptions are void.

A *Tenendum* is a clauſe of the deed whereby the tenure was heretofore created. And this doth moſt commonly and properly ſucceed the *Habendum*, and was made by this word *Tenendum per ſervicium &c.* But ſithence the Statute of *Quia emptores terrarum* when. 8. *Tenendum. Quid.*

l Dier 97. 264. Co. ſuper Lit. 47. Plow. 153. 103, 104. 14 H.8.1. Doct. & Stud. 98.

m Dier 59. 263.

n Plow. 524. Dier 264. Br. grant. 60 38 H.6, 38.

o Co. ſuper Lit. 150.

p Co. 5. 12. Hil. 9 Jac. B.R. per Curiam.

This difference hath been agreed.

q Co. ſuper Lit. 47. Plow. 53.

r Perk. Sect. 643. 641.

Co. ſuper Lit. 6. & Co. 9. 130.

when the fee ſimple doth paſſe the tenure is alwaies of the chiefe Lord and is thus ſet forth, *Tenendum de capitalibus dominis &c.* And this clauſe at this day is for the moſt part omitted altogether.

9. Reſervation or *Reddendum. Quid.*

A Reſervation is a clauſe of a deed whereby the feoffor, donor, leſſor, grantor &c. doth reſerve ſome new thing to himſelfe out of that which he granted before. And this doth moſt commonly and properly ſucceed the *Tenendum*, and is made by one or more of theſe words *Reddend'*, *reſervand'*, *ſolvend'*, *faciend'*, *inveniend'*, or ſuch like. This doth differ from an exception which is ever of part of the thing granted and of a thing in *eſſe* at the time, but this is of a thing newly created or reſerved out of a thing demiſed that was not in *eſſe* before; ſo that this doth alwaies reſerve that which was not before or abridge the tenure of that which was before. Co.10.107. Plow.132. Co.ſuper Lit.47. Perk.Sect. 625.

10. What ſhall be ſaid a good reſervation. And what not.

In every good reſervation theſe things muſt alwaies concurre. 1. [a] It muſt be by apt words. 2. It muſt be of ſome other thing iſſuing or comming out of the thing granted and not a part of the thing it ſelfe nor of ſome thing iſſuing out of another thing. 3. It muſt be of ſuch a thing whereunto the grantor may have reſort to diſtraine. 4. It muſt be made to one of the grantors and not to a ſtranger to the deed. As for examples. [b] If a man grant land yeelding and paying money or ſome ſuch like thing yearly, this is a good reſervation. But if the grantee covenant to pay ſuch a ſumme of money, or to doe ſuch a thing yearly; this is no good reſervation, but a covenant to pay a ſumme of money in groſſe and not as a rent. [c] If a leaſe be made for years rendering a rent to the leſſor or his heires, in the diſjunctive; or rendering a rent to the leſſor, without ſaying [and his heirs &c.] or rendering a rent during the ſaid terme; and doth not ſay to whom; or rendering 10 l. to the leſſor and 5 l. to his heires; all theſe reſervations are good. But if a leaſe be made rendering rent to the heires of the leſſor; this reſervation is void becauſe the rent is not reſerved to himſelfe firſt. [d] If one grant land, yeelding for rent money, corne, a horſe, ſpurres, a roſe, or any ſuch like thing; this is a good reſervation: but if the reſervation be of the graſſe, or of the veſture of the land, or of a Common or other profit to be taken out of the land; theſe reſervations are void. [e] If one grant a manor, meſuage, land, meadow, or paſture, or the veſture or herbage of land, meadow or paſture, rendring a rent; this is a good reſervation. But if one grant Tithes, rents, commons, advowſons, offices, a corody, mulcture of a Mill, a Faire, market, priviledge, or liberty, reſerving a rent; this reſervation is void. And yet ſuch a reſervation alſo in caſe of the King is good. And in caſe of a Subject alſo, if a leaſe be made by deed in writing of any ſuch thing for a terme of years reſerving a rent; this may be good by way of contract to produce

[a] Plow.132. Perk.Sect. 626. Co.8. 71.

[b] Plow.132.

Covenant.

[c] Co.5.111. 8.71.ſuper Lit.2.14. 213.99.

[d] Co.ſuper Lit.142.

[e] Co.ſuper Lit.47. Co.5.3. Perk.Sect. 626.

Prerogative.

produce an action of debt, though not as a rent to be diſtrained for. And thus by apt words an apt rent out of manors and ſuch like memorable things, or divers rents may be reſerved upon one grant. As if one grant the Manors of *A*, *B* and *C* rendring for *A* 20 s. for *B* 20 s. and for *C* 20 s. theſe are good Rents and ſeverall. So if one grant the manors of *A*, *B* and *C* rendering 3 l. *viz.* for *A* 20 s. for *B* 20 s. and for *C* 20 s. this is a good reſervation, but in this caſe the rent is intire. Alſo one may reſerve one rent one yeare and another rent another yeare; as 10 s. one yeare and 20 s. another yeare, or one may reſerve a rent to be paid every ſecond or third yeare, and no rent the other yeares, or one may reſerve one kinde of rent one yeare and another kinde of rent another year; and theſe reſervations are good. And theſe reſervations may be by fine aſwell as by deed, or it may be in caſe where the leſſor hath a reverſion of the land, or upon a partition to make an equality without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed.[f] If two Joint tenants joine in the grant of their land by deed indented and the rent is reſerved to one of them; this is a good reſervation and ſhall goe to him alone. But if it be by word or by deed Poll that the leaſe is made the rent ſhall goe to them both.[g] And if a man poſſeſſed of a Terme joine his wife with him and they both aſſigne over this Terme by indenture rendering a rent to them two and the ſurvivor of them, and ſhee doth not ſeale the deed; in this caſe the reſervation as to the wife is void. And if the reſervation be of the rent to a ſtranger that is no party to the deed and to him only, this reſervation is void. And therefore if the father and his ſonne and heire apparant by indenture leaſe his land for years to beginne after the fathers death rendering rent to the ſonne, it is void.

Debt.

Co. 5. 55. Dier 308. Co. ſuper Lit. 47. 164. 213.

Co. ſuper Lit. 225. 8 H. 7. 9. Bro. Fine 36. Reſervation. 4.

f Co. ſuper Lit. 214. 143. 47. Dier. 222.

g Adjudge Mich. 8. Car. in Blands caſe.

Hobarts Rep. 274. Oates & Fith Co. 3.

A Condition is a clauſe of reſtraint in a deed or a bridle annexed and joined to an eſtate ſtaying and ſuſpending the ſame and making it incertaine whether it ſhall take effect or no.

10. Condition. *Quid.*

A Warranty is a clauſe or covenant made in a deed by the one party unto the other whereby the feoffor, donor or leſſor doth for him and his heires grant to warrant and ſecure land granted to the feoffee, donee or leſſee and his heires during the eſtate.

11. Warranty. *Quid.*

A Covenant is a Clauſe of agreement contained in a deed whereby either party is bound to doe, performe or give ſomething to the other. And of all theſe ſee at large afterwards.

12. Covenant. *Quid.*

Co. ſuper Lit 302. Perk. Sect. 66.

In the Conſtruction of deeds it muſt be conſidered, 1. How a deed in the groſſe ſhal be taken and enure, 2. How it ſhall be taken and expounded in the ſeverall parts and peeces of it. And for the firſt theſe Rules are to be known. 1. If divers joine in a deed and ſome are able to make ſuch a deed and ſome are not, this ſhall be

13. How and to what purpoſe a deed of grant in groſſe ſhall enure and be conſtrued and taken.

ſaid to be his deed alone that is able, as if divers joine in the grant of a thing by deed & one alone hath all the eſtate and the reſt have nothing in the thing granted; it ſhal be ſaid to be his grant alone that hath the eſtate. And ſo *è converſo*. If a deed be made to one that is uncapable and to others that are capable, in this caſe it ſhall enure only to him that is capable. 2. A deed that is intended and made to one purpoſe may enure to another, for if it will not take effect that way it is intended it may take effect another way. And therefore a deed made and intended for a releaſe may amount to a grant of a Reverſion, an Atturnement, or a Surrender, or *è converſo*. Dier 251. Co. 2. 35. & ſuper Lit. 49.

And if a man have two waies to paſſe lands by the common law and he intendeth to paſſe them one way, and they will not paſſe that way; in this caſe *ut res valeat* it may paſſe the other way. As if a man beſeiſed of two acres of land in fee, and letteth one of them for years, and after intending to paſſe them both by feoffement maketh a Charter of feoffement and maketh livery in the acre in poſſeſſion in the name of both the acres; in this caſe the acre in poſſeſſion only doth paſſe: but if the leſſee of the other acre Atturne then the reverſion of that acre will paſſe alſo. But where a man may paſſe lands by the Common law or by raiſing of a uſe and ſetling it by the Statute there in many caſes it is otherwiſe. As if the father make a Charter of feoffment to his ſonne and a letter of Atturney to make livery, and no livery is made; in this caſe no uſe ſhall ariſe to the ſonne. So if a man in conſideration of marriage make a feoffement with a letter of Atturney to give livery, and no livery is made; in this caſe no uſe will ariſe. And ſo was it held by Ch. Juſtice *Popham B. R.* for the intẽtion of the parties doth work much in the raiſing and direction of uſes. And therefore it is ſaid that when a man doth intend to paſſe land one way it ſhall never paſſe another way contrary to his intent, as if one covenant for good conſiderations to levy a fine of land to the uſe of *I S* and his heires, if no fine be levied no uſe ſhall ariſe upon the covenant. Dier 96.

If one by words of Bargain ſell, give and grant, make a feoffement of his houſe for money, and intending to paſſe it by way of bargaine and ſale and Inrolment the deed being made there being a Maſter of the Chancery in the houſe whereof the feoffement is made, he doth acknowledge and deliver the deed before him, in this caſe if the deed be not inrolled the conveyance is void and that delivery ſhall not amount to a livery of ſeiſin. 19 Eliz. Thorold & Gordens caſe.

And yet when the intent is apparent to paſſe it one way or another there it may be good either way, as where one doth make a feoffement in fee with a letter of Atturney to make livery, and in the ſame deed doth covenant in caſe livery of ſeiſin be not had to perfect the deed to ſtand ſeiſed to the uſes of the feoffement, in this caſe albeit no livery of ſeiſin be made or atturnement had to perfect the feoffement or grant, yet if it be in ſuch a caſe where there is a Experientia.

con-

conſideration ſufficient to raiſe the uſes by the covenant, the uſes will ariſe by the covenant. 3. When a deed may enure to divers purpoſes he to whom the deed is made ſhall have election which way to take it and he may take it that way as ſhall be moſt for his advantage. As if a deed of grant be made by the words *Dedi & conceſſi*; this in law may amount to a grant, feoffement, gift, leaſe, releaſe, confirmation or ſurrender, and it is in the choiſe of the grantee to plead or uſe it the one way or the other. So if a leaſe for years be made to me of land for mony by the words demiſe, grant, bargain and ſell; I may take and uſe this by way of bargain and ſale, or by way of demiſe at my pleaſure. So if one have a rent out of land whereof I and my wife are jointly ſeiſed, and he doth by his deed releaſe, give and grant this rent to me, in this caſe I may uſe this as a releaſe to extinguiſh the rent, or as a grant of the rent as it may make moſt for my advantage. *Et ſic de ſimilibus.* But where any inconvenience may grow by ſuch an election there the grantee ſhall not have an election but it ſhal enure as it may, as where a man may paſſe land by the common law or by raiſing of uſe and ſetling it by the Statute there ſometimes it is ſo. And therefore if in the ſame caſe before, a father make a Charter of feoffement to his ſonne and a letter of atturney to make livery and no livery is made; hereby no uſe will ariſe to the ſonne as it will in caſe of a covenant. And if a leaſe for years be made of a Manor by the words bargaine, ſell, demiſe and grant, and this is to begin at a day to come; in this caſe it muſt paſſe entirely as a demiſe at the common law or entirely as a bargaine and ſale, and the leſſee hath not election to take or uſe it otherwiſe or to uſe it for part one way and for part another way. 4. It ſhall enure as much as may be according to the apparent intent of the parties. And therefore it is that if a feoffement be made of a Manor with an advowſon appendant; or a bargaine and ſale of land in poſſeſſion and land in reverſion together be made and the feoffement is not well executed for want of livery of Seiſin or Atturnement, or the deed of bargaine and ſale is not inrolled; in theſe caſes albeit the advowſon may paſſe without livery or atturnement and the reverſion without inrolment, yet becauſe the intent doth appeare to be that all ſhall paſſe together therefore neither the advowſon nor the reverſion will paſſe by this deed. 5. When a deed is made it ſhall enure as it may, and ſo as it may have and take the moſt and beſt effect that may be according to reaſon, as if tenant for life or years and he in remainder or reverſion in fee joine in a feoffement by deed; this ſhall enure in the firſt caſe as the leaſe of the tenant for life and the confirmation of him in the remainder or reverſion, and in the laſt caſe as the feoffement of him in the reverſion &c. and the ſurrender of the leſſee for yeais to the feoffee and and no forfeiture of the eſtate in the leſſee for life. But if in this

Co. ſuper Lit. 301. Dier 251.

Co. 2. 36. Dier 30. 302.

Dier 109. 319.

Co. 2. 35, 36.

Finches law. 58.

Plow. 140. 59. Co. ſuper Lit. 302.

caſe the feoffement be by word it ſeemes it ſhall enure firſt as a ſurrender of the eſtate of the tenant for life and then the feoffement of him in reverſion *ut res valeat.* And if *A* be tenant for life the remainder to *B* for life the remainder to *D* in taile the remainder to the right heirs of *B* and *A* and *B* joine in a feoffement by deed, in this caſe this is the feoffement of *A* and confirmation of *B* but a forfeiture of both their eſtates whereof the tenant in taile may take preſent advantage. If tenant for life grant a rent charge to him in reverſion in fee, and he by his deed doth grant this rent over to another and his heires; this is a good grant and confirmation alſo to make the rent paſſe to the ſecond grantee in fee ſimple. So if a diſſeiſor make a leaſe for life the remainder to the diſſeiſee and the diſſee doth grant the remainder over; this is a good grant and confirmation alſo. If *A* doe bargaine and ſell his land to *B* by indenture, and before inrolment they doe both grant a rent charge to *C* by deed and after the indenture is inrolled: in this caſe after the inrolment this ſhall be ſaid to be the grant of *B* and the confirmation of *A*, and if the deed be not inrolled it ſhall be ſaid to be the grant of *A* and confirmation of *B*. If one make a Charter of feoffement of one acre of land to *A* and his heires, and another deed of the ſame acre to *A* and the heires of his body and deliver ſeiſin according to the forme and effect of both deeds; it ſeemes this ſhall enure by moities, *viz.* he ſhall have an eſtate taile in the one moity with the fee ſimple expectant and a fee ſimple in the other moity. If two ſeverall tenants of ſeverall lands joine in a leaſe for years by deed indented; theſe be ſeverall leaſes and ſeverall confirmations from each of them from whom no intereſt paſſeth and doth not worke by way of Eſtoppell. If *B* tenant for life of *C* and he in remainder or reverſion in fee of the ſame land joine in a leaſe for life or years by deed indented; this ſhall enure during the life of *C* as the leaſe of *B* and the confirmation of him in reverſion or remainder and after the death of *C* as the leaſe of him in reverſion or remainder and the confirmation of *B* without any Eſtoppell. If tenant in taile and he in reverſion grant a rent charge in fee, it ſhall bee taken the grant of the tenant in taile and the confirmation of him in reverſion, but when the tenant in taile dieth without iſſue, it ſhall be taken the ſole grant of him in reverſion. If two Jointenants bee in fee of an acre of land and they leaſe it to a ſtranger for life, and the leſſee grant his eſtate to one of the leſſors; in this caſe it ſeemes it ſhall enure for a moity by way of grant and for the other moity by way of Surrender.

Forfeiture. Co. 5, 15. Co. ſuper Lit. 147. Co. ſuper Lit. 21. Co. ſuper Lit. 45. Eſtoppell. Perk. Sect. 80.

If there bee Lord and tenant, and the Lord grant his Seigniory to his tenant and to a ſtranger; this ſhall enure for a Moitie to the tenant by way of Extinguiſhment and

Perk. Sect. 81 Dier 140.

Perk.Sect. 82,83. and for the other moitie to the ſtranger by way of grant. If tenant for life of the grant of a woman ſole grant his eſtate to the husband of the wife, this ſhall enure for the whole by way of grant.

If a leaſe be made for life the remainder for life to a ſtranger and the leſſee grant his eſtate to his leſſor; this ſhall enure by way of grant. If there be Lord and two Joint tenants in fee, and the Lord grant his Seigniory to one of his tenants in fee; it ſeemes this ſhall take effect for the whole by way of extinguiſhment. If there be leſſee for life and the reverſion deſcend to two coparceners, and one of them take a husband and the leſſee grant his eſtate to the husband and wife; this ſhall enure by way of grant for the whole. If the diſſeiſee and the heire of the diſſeiſor (being in by deſcent) make a feoffement by one deed and livery of ſeiſin thereupon; this is the feoffement of the heire only and the confirmation of the diſſeiſee. 6. If one have divers eſtates in land and he make any charge or grant upon or out of it; this ſhall iſſue out of all his eſtates. And if one have a poſſeſſion and an ancient right, and grant a rent charge out of the land, or make a leaſe of the land; this ſhall iſſue out of both the eſtates and it ſhall enure from him having ſeverall eſtates as it ſhall enure from ſeverall perſons having the ſame eſtates. *Quando duo jura concurrant in una perſona æquum eſt ac ſi eſſent in diverſis.* 7. If one that hath a rent charge out of a manor by grant reciting his grant grant the ſame rent to a leſſee for life of the manor out of which the rent doth iſſue, to have and perceive to him and his heires, and ſurrender to him the deed; this ſhall not enure to extinguiſh the rent but by way of grant, of which the heire of the leſſee for life may take advantage if he doe not by granting away the rent, purchaſing the reverſion of the manor or making a feoffement of the manor and thereby committing a forfeiture, or by ſome ſuch like meanes prejudice himſelfe, for by theſe meanes the rent will be extinct and determined. If a diſſeiſor grant a rent to the diſſeiſee, and he by his deed doth grant it over to another; or the diſſeiſor make a leaſe for life or gift in taile the remainder to the diſſeiſee, and the diſſeiſee doth grant over this remainder, and the tenant atturne; theſe grants of the diſſeiſee ſhall be taken for a grant and a confirmation alſo *ne res pereat.* If there be Lord and tenant of white acre and two other acres, and the Lord grant by deed to his tenant that he will not diſtraine his tenant in white acre for his ſervice; this grant ſhall not enure to determine the Seigniory in any part, but as a covenant, ſo that if he doe diſtraine in white acre, the tenant may have an action of covenant. If a man have a wood of 200. acres, and he grant it to another for life or years, and that he ſhall cut therein 4. or 5. acres every yeare; in this caſe albeit the wood be granted and the grant ſhall enure to paſſe it yet the grantee can

Co.ſuper Lit.372. Co.7.14.1. 147,148. 5.E.4.2.

Perk.Sect. 592.

Co.ſuper Lit. 302.

Perk.Sect. 69.

Mich.37 & 38 Eliz. B.R.Curia.

cut no mor é but 4. or 5, acres by the yeare. And yet the grantor as this caſe is can not himſelfe cut any of the wood during the time, as in caſe where a man doth grant to another that he ſhall cut every year 4. or 5, acres in ſuch a wood; for in this caſe the grantor may notwithſtanding cut as much as he will. And here note that in all the caſes before according to the conſtruction that the law makes of the deed ſo muſt the party that is to uſe it ſet it forth and plead it, as when it ſhall enure as a leaſe then it muſt be pleaded as a leaſe &c. See more in *Releaſe Numb.* 9. *Surrender Numb.* 7. *Confirmation Numb.* 7.

14. How a deed of grant ſhall be conſtrued and taken in all the parts and branches thereof. Generall Rules.

In the conſtruction of deeds it muſt be obſerved that there are ſome generall rules that are appliable to all the parts of all kinds of deeds, and ſome that are appliable only to ſome kind of deeds and to ſome part of the deed only. In the conſtruction therefore of all parts of all kinds of deeds theſe rules are univerſally obſerved. Co. ſuper Lit. 313. Lit. Sect. 563. Plow. 160. 154.

1. That the conſtruction be favourable and as neere to the mindes and apparent intents of the parties as poſſibly it may be and law will permit. for *Benigne ſunt faciendæ interpretationes cartarum propter ſimplicitatem laicorum. Et verba intentioni non è contra debent inſervire*, as if there be Lord and tenant and the tenant grant the tenements to one man for terme of his life the remainder to another in fee, and the Lord grant the Services to the tenant for life in fee; in this caſe howbeit a grant may enure by way of releaſe, and a releaſe to the tenant for life ſhall enure to him in remainder and is an extinguiſhment, yet becauſe this is contrary to the intent, it ſhall be taken for a ſuſpenſion only of the ſervices during the life of the tenant for life and the ſervices ſhall goe afterwards to his heire. But if the intent of the parties be apparently againſt law then the conſtruction ſhall not apply the deed to their intent, as if one give land to another and his heires for 20. years; in this caſe the executor and not the heire ſhall have this land after the death of him to whom it is given. So if one by deed intending to give land to another and his heires give the land to him To have and to hold to him, or to him and his aſſignes for ever, without theſe words, [and his heires] this is but an eſtate for life at the moſt. Doct. & Stud. 39. Lit. cap. 1. Plow. 161. 16 H. 8. 10. Dier 15. Fitz. Barre. 237.

2. That the conſtruction be reaſonable and according to an indifferent and equall underſtanding, and therefore if I grant to another Common in all my Manor, this ſhall be expounded to extend to commonable places only, and not in my gardens, orchards &c. And if I grant to one Eſtovers out of my Manor; he may not by this cut downe my fruit trees. And if one grant me (a Barriſter) a fee *pro conſilio*; this ſhall be taken for counſell in Law only. And ſo in caſe of a Phyſitian. And if one grant to me to digge in all his Bro. Don. 14. 17 E. 3. 7. 46 E. 3. 17.

lands

lands for Tinne; I may not by this grant digge under his houſe. And if one grant me Common for all my beaſts; this ſhall be taken for all my commonable beaſts and not for goats and the like. And if one grant me all his trees in his manor; by this I ſhall not have his apple trees. And if one leaſe to me his houſe and land to the end that I may make profit thereof in the beſt manner: by this grant I may not proſtrate the houſe or make waſt.

Plow.154. 170.134. Dier 46. Co. ſuper Lit.223. 146.217. Co.9.48.10. 143.

3. That too much regard be not had to the native and proper definition, ſignifications and acceptance of words and ſentences to pervert the ſimple intentions of the parties, for a manor may paſſe by the name of a meſuage, or a Knights fee, if it be uſed ſo to be called. *& ſic è converſo*, a meſuage by the name of a manor: a Remainder may be granted by the name of a Reverter, a Reverſion by the name of a Remainder: for the law is not nice in grants, and therefore it doth oftentimes tranſpoſe words contrary to their order to bring them to the intention of the parties, and it is a rule of law, *Mala grammatica non vitiat cartam*, neither falſe Latine nor falſe Engliſh will make a deed void when the intent of the parties doth plainely appeare. It is therefore held that two negatives doe not make an affirmative when the apparent intent is contrary. And it is another rule of Law, *Falſa ortographia non vitiat Conceſſionem.*

Plow.160. 161.

4. That the conſtruction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts doe agree together and there be no diſcordance therein. *Ex antecedentibus & conſequentibus eſt optima interpretatio*, for *Turpis eſt pars quæ cum ſuo toto non convenit. Maledicta expoſitio quæ corrumpit textum.* If a man make a feoffement of all his land in *D* with Common *in omnibus terris ſuis*; this Common ſhall be intended in the lands granted in *D* only, and not elſewhere, for it muſt be underſtood *ſecundum ſubjectam materiam.*

Lit. Sect. 283. Finches Ley 60. Plow.160. 154.

5. That the conſtruction be ſuch as the whole deed and every part of it may take effect and as much effect as may be to that purpoſe for which it is made, ſo as when the deed cannot take effect according to the letter it be conſtrued ſo as it may take ſome effect or other, *Verba debent intelligi cum effectu. Et benigne faciendæ ſunt interpretationes ut res magis valeat quam pereat.* And therefore if an Annuity be granted *pro conſilio impendendo*, or a feoffement made *ad erudiendum filium*, or *ad ſolvendum* 10 *s.* theſe ſhall be conſtrued conditionall grants without any words of condition, for otherwiſe the party will be without remedy.

Co. ſuper Lit. 183. Finche of the Law 6.

6. That all the words of the deed in conſtruction be taken moſt ſtrongly againſt him that doth ſpeake them and moſt in advantage of the other party, *Verba Cartarum fortius accipiuntur contra proferentem, & quelibet conceſſio fortiſſime contra donatorem interpre-*

tanda eſt. And therefore if one ſeiſed of land in fee grant it to another, and ſay not for what time, this ſhall be taken an eſtate for life. But this is to be underſtood with this limitation, that no wrong be thereby done, for it is a Maxime in Law. *Quod legis conſtructio non facit injuriam.* And therefore if tenant for life grant the land he doth hold for life to another, and doth not ſay for what time; this ſhall be taken an eſtate for his owne life, and not the life of the grantee, for then it would be a forfeiture. So if one be ſeiſed of ſome lands in fee, and poſſeſſed of other lands for years, all in one pariſh, and he grant all his lands in that pariſh (without naming them) in fee ſimple or for life; by this grant ſhall paſſe no more but the lands he hath in fee ſimple. So if a man have a houſe wherewith there hath been Copy hold land and other land uſually occupied; and he let this houſe and all his land thereunto belonging: in this caſe and by this demiſe the Copy hold land doth not paſſe; for in both theſe caſes then there would be a forfeiture. But otherwiſe by theſe words all the lands in both caſes would paſſe.

Forfeiture.

Co. ſuper Lit. 112.

7. That if there be two clauſes or parts of the deed repugnant the one to the other the firſt part ſhall be received and the latter rejected except there be ſome ſpeciall reaſon to the contrary, and therefore herein a Deed doth differ from a Will; for if there be two repugnant clauſes in a Will the firſt ſhall be rejected and the latter received.

4 El. the Biſhop of Ely's caſe.

8. That that which is generally ſpoken be generally underſtood unleſſe it be qualified by ſome ſpeciall ſubſequent words, as it may be; for if one be ſeiſed of a manor wherein there is a Parke, and he grant the manor with the cuſtody of the Parke; by this the Parke will not paſſe.

Co. ſuper lil. 42.

9. That if the words may have a double intendment and the one ſtandeth with law and the other is againſt law, that it be taken in that ſenſe which is agreeable to law: and therefore if tenant in taile make a leaſe of land to *B* for term of life, and doe not mention for whoſe life it ſhall be; this ſhall be taken for the life of the leſſor and not for the life of the leſſee, as it ſhall be if ſuch a leaſe be made by tenant in fee ſimple.

9 Ed. 4.4.

10. That things doubtfully ſet down be applied to him to whom they doe properly belong. As if *I S* make a feoffment to one of his own name, and there is a covenant in the deed that *I S* ſhall deliver the deeds, this ſhal be taken of *I S* the feoffer and not *I S* the feoffee.

Co. 9. 48. 10. 143.

11. That ſuch a conſtruction be made of abbreviations as the deed may not loſe his force, as if one grant *tot' ill' Maner' de D. & C,* if it be but one manor, the words ſhall be taken for *totum illud Manerium,* if two manors, then it ſhall be taken for *tota illa maneria.*

Fit. Grant 41. Plo. 317. Co. 5. 12. 22. aſſ. Pl. 61. Perk. Sect. 110.

Note. And here note that moſt of all theſe rules run through all the caſes of expoſition hereafter following.

Touching

* Touching things granted theſe rules are firſt to be known.

* The expoſition of the ſeverall parts of the deeds of grant. And how the words and ſentences therein ſhall be taken.

1. In the premiſſes, and what doth paſſe by the grant of a thing.

1. When any thing is granted all the means to attaine it and all the fruits and effects of it are granted alſo and ſhall paſſe *incluſive* together with the thing by the grant of the thing it ſelfe without the words *cum pertinentiis* or any ſuch like words. *Cuicunque aliquid conceditur conceditur etiam & id ſine quo res ipſa non eſſe potuit.* As by the grant of Conuſance of pleas is granted the Ordinary proceſſe to bring cauſes to judgment. By the grant of a ground is granted a way to it. By the grant of Trees is granted with all power to cut them down and take them away, by the grant of Mines is granted power to digge them; and by the grant of fiſh in a mans pond is granted power to come upon the banks and fiſh for them.

Co. ſuper Lit. 152. Lit. Sect. 572. 229. Co. 4. 86, 87. 8 H. 7. 4. Bro. Grant. 86. 144. 43 Ed. 3. 22. Co. 10. 64. ſuper Co. Lit. 307.

2. The incident, acceſſary, appendant, and regardant ſhall in moſt caſes paſſe by the grant of the principall without the words *cum pertinentiis*, but not *è converſo*, for the principall doth not paſſe by the grant of the incident &c. *Acceſſorium non ducit ſed ſequitur ſuum principale.* And therefore by the grant of a reverſion without naming the rent the reverſion after an eſtate taile, for life, or years and the rent reſerved upon the eſtate will paſſe, ſo as the tenant atturne to the grant: but by the grant of the rent the reverſion will not paſſe. So by the grant of a manor, the Court Baron therunto belonging wil paſſe; by the grant of a houſe or ground, the wayes thereunto belonging doe paſſe; by the grant of errable land, the common appendant thereunto will paſſe; by the grant of Mills, the waters, flood gates, and the like that are of neceſſary uſe to the Mills do paſſe; by the grant of a houſe, the eſtovers appendant thereunto will paſſe; by the grant of a manor, the advowſons appendant and villaines regardant thereunto paſſe; by the grant of a Faire, the Court of Pipowders will paſſe; by the grant of homage or rent, the fealty will paſſe; and by the grant of Eſcuage, homage and fealty will paſſe. But divers things that by continuall enjoyment with other things are only appendant to others, as warrens, leetes, waifes, eſtraies, and the like, theſe will not paſſe by the grant of thoſe other things, and therefore if one have a Warren in his land, and grant the land, by this the warren doth not paſſe. And yet if in theſe caſes he grant the land *cum pertinentiis*, or with all the profits, priviledges &c. thereunto belonging; by this grant perhaps theſe things may paſſe. And here know that a reverſion may be parcell or appendant to a thing in poſſeſſion, and paſſe by the grant of it, but a poſſeſſion cannot be parcell or appendant to a thing in reverſion. And therefore if one make a leaſe for life of a manor excepting 20. acres of it, and after grant the reverſion of the manor; by this grant the 20. acres will not paſſe. So if one be diſſeiſed of an acre parcell of a manor, or of common appendant to the manor, and before an entry or recontinuance of the

38 H. 6. 38. Co. 11. 47. 50. Plow. 103. Bro. Grant. 60. 129. Co. 1. 7. 28.

the acre or common he grant the manor to a ſtranger; by this the acre of land or common will not paſſe. But otherwiſe it is in caſe where a leaſe for years only is made of parcell of a manor. And if a leaſe be made for life of 20. acres parcell of a manor, and after the manor it ſelfe is granted; by this the reverſion of the 20. acres is granted and will paſſe alſo.

And if a man make a feoffment in fee of an acre of land parcell of a manor, and after repurchaſe it, and then grant the manor; this acre will not paſſe by this grant, for it is not united by the new purchaſe. But it is otherwiſe of trees, for if a man make a leaſe for life of a manor or other land excepting the trees, and after grant the reverſion of the manor or land to another; hereby the trees doe paſſe. And if a man make a feoffment in fee of a manor excepting the trees, and after the feoffee buy the trees, in this caſe the trees are united againe, ſo that if the feoffee ſell the manor the trees ſhall paſſe with it. If I leaſe an acre of land to which an advowſon is appendant for terme of life reſerving the advowſon, and after doe grant the reverſion of that acre with the appurtenances; hereby the advowſon doth not paſſe. But if I grant the advowſon for terme of life reſerving the acre, and after grant the acre with the advowſon *cum pertinentiis*; by this the advowſon doth paſſe. If land be appendant to an office, there by grant of the office with the appurtenances the land will paſſe without livery of ſeiſin. And if an office be appendant to land, there by the grant of the one the other will paſſe. 14 H. 8. 25 Co. 11. 50. 3. That which is parcell or of the eſſence of a thing albeit at the time of the grant it be actually ſevered from it doth paſſe by the grant of the thing it ſelfe. And therefore by the grant of a Mill, the milſtone doth paſſe albeit at the time of the grant it be actually ſevered from the Mill. So by the grant of a houſe, the dores, windows, locks, and keyes, do paſſe as parcell of it, albeit at the time of the grant they be actually ſevered from the houſe. 14 H. 8. 1. Co. ſuper Lit. 4. 4. By the grant of the land, or ground it ſelfe, all that is *ſupra*, as houſes, trees, and the like is granted, for *Cujus eſt ſolum ejus eſt uſque ad cœlum*, alſo all that is *infra*, as Mines, earth, clay, quarres, and the like. And by the grant of a houſe, the ground whereon it doth ſtand doth paſſe. 12 H. 7. 25. 5. When any matter of intereſt or profit is granted, the grant ſhall be taken largely. But when any matter of eaſe or pleaſure only is granted, as a walk, or the like, the grant ſhall be taken ſtrictly. Plow. 289. 19 H. 6. 4. 6. When a man doth grant all his lands, or all his goods; by this grant doth paſſe not only what he is ſole ſeiſed or poſſeſſed of but alſo what he is joyntly ſeiſed or poſſeſſed of with another. And ſo *è converſo*. If two men joyn together and grant all their lands, or all their goods; hereby doe paſſe not only all they have joyntly and together, but all thoſe they have ſole and a part. Co. ſuper Lit. 301. Lit. Sect. 543, 544. 7. Some words in deeds

deeds are large and have a generall extent, and ſome have a proper and particular application; the former ſort may containe the latter, as *Dedi*, or *Conceſsi*, may amount to a grant, a feoffment, a gift, a leaſe, a releaſe, a confirmation, a ſurrender: and it is in the election of the party to whom the deed is made to uſe it to which of theſe purpoſes he will. And hence it is that if a Lord by the words of *dedi & conceſſi* grant to his tenant that doth hold of him his rent; or one that hath a rent charge out of land doth grant it to the tenant of the land; that in theſe caſes the rent is extinguiſhed albeit it be by way of grant. But a releaſe, ſurrender, confirmation &c. cannot amount to a grant &c. nor a ſurrender to a confirmation or a releaſe &c. becauſe theſe be proper and peculiar manner of conveyances and are deſtinated to a ſpeciall end.

Co. ſuper Lit. 5.6. Co. 4. 88.

Amongſt words whereby things doe paſſe ſome are collective, compound, or generall comprehending many things, as hereditaments, lands, tenements, honors, Iſles, villages and the like including lands of ſeverall ſorts and qualities. And ſome words are ſimple or particular, as Meadow, Paſture, Wood, Moore, and the like.

The terms whereby things are granted, expounded.

Co. ſuper Lit. 6.16. Perk. Sect. 114, 115. 11 H. 6. 22.

The word [Hereditament] is of as large extent as any word, for whatſoever may be inherited, be it corporeall or incorporeall, reall, perſonall, or mixt, is an hereditament. By the grant therefore of all hereditaments doe paſſe Honors, Iſles, Caſtles, Seigniories, Manors, Meſuages, Lands, Meadowes, Paſtures, Woods, Moores, Mariſhes, Furſes, Heaths, Reverſions, Commons, Rents, Vicarages, Advowſons in groſſe, and the like things which the grantor hath in feeſimple at the time of the grant, whether he hath it by purchaſe or deſcent.

Hereditament.

Bro. Grant. 143 Co. ſuper Lit. 6. Perk. Sect. 114.

And the word [Tenement] is of large extent alſo, and it ſeemes doth comprehend as much as the former. And therefore by the grant of all Tenements will paſſe as much as by the grant of all Hereditaments.

Tenement.

Co. ſuper Lit. 4. Co. 4. 891. Perk. Sect. 114.

The word [Land] ſtrictly doth ſignifie nothing but errable land, but in a larger ſenſe it doth comprehend any ground, ſoile, or earth whatſoever. And therefore by the grant of all Lands, doth paſſe errable lands, meadowes, paſtures, woods, moores, waters, mariſhes, furſes, heath, and ſuch like, and the caſtles, houſes, and buildings thereupon, but not rents, advowſons, and ſuch like things.

Land.

Co. 11. 47. 50. 10. 107.

Alſo by grant of any land in poſſeſſion the reverſion thereof will paſſe. And yet by the grant of a reverſion of land the land in poſſeſſion will not paſſe.

Edw. caſe Mich. 9. Jac. curia 9 H. 7. 25. Bro. Grant. 87. 11 H. 6. 22.

But here it muſt be obſerved that in caſes of grants and gifts of all hereditaments, tenements, or lands, conſideration is had of the eſtate of the grantor, for if a man be ſeiſed of ſome lands in fee, and have other lands for life, or years only, and all theſe are lying within one pariſh, and he grant all his lands, tenements, or hereditaments in this pariſh to another in fee ſimple, fee taile, or for life, and

Note.

Forfeiture.

and give livery of ſeiſin in the lands whereof he is ſeiſed in fee, in the name of all the reſt; by this doth paſſe no more but his lands whereof he is ſeiſed in fee, for otherwiſe it would be a forfeiture for thoſe lands. But if the livery of ſeiſin be made in any part of the lands he hath for life or yeares, then that part wherein the livery is made will paſſe and no more. And if the conveyance be by bargain and ſale and deed inrolled, then the lands whereof he is ſeiſed in fee ſimple and for life ſhall paſſe, and not the land he hath for a terme of years. And yet if in this caſe the grant be for years, then all the lands will paſſe, for then there will be no forfeiture in the caſe.

Forfeiture. Howbeit it is ſaid in *Bro. Done* 41. *pro lege.* That if a man give or grant all his lands and tenements in *B*, that by this leaſes for years doe not paſſe, and that theſe words doe intend franktenements at the leaſt.

Honor. Iſle. Commote. Caſtle. Theſe words [*Honor*, *Iſle*, and *Commote*] are compound words and of large extent. And therefore by the grant of them may paſſe one or more ſeigniories, manors, and divers other lands. Alſo a Caſtle may containe one or more manors. And therefore by the grant of a Caſtle may paſſe one or more manors. And ſo ſometimes *èconverſo* a Caſtle may paſſe by the grant of a manor. But by a Caſtle moſt commonly is ſignified no more but the houſe or building and the parcell of ground incloſed wherein it doth ſtand. Co. ſuper Lit. 5. Plow. 169.

Town or Village. This word [Village or Towne] is of large extent alſo. And by the grant of it a manor, land, meadow, and paſture, and divers ſuch like things may paſſe. Co. ſuper Lit. 5. Plo. 168.

Manor. This word [Manor] is a word of large extent and may comprehend many things. And therefore by the grant of a manor without the words of *Cum pertinentiis* doe paſſe demeſneſſe, rents, and ſervices, lands, meadowes, paſtures, woods, commons, advowſons appendant, villaines regardant, Courts Baron and perquiſites thereof that are in truth at the time of the grant parcell of the manor. [a] But nothing that in truth is not parcell of the manor albeit it bee ſo reputed will paſſe by the grant of the manor, and therefore if one have a manor, and after purchaſe the lawday or a warren to it, and then he grant away the manor, hereby the lawday or warren will not paſſe. And yet if by union time out of mind they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* theſe things may paſſe. [b] By the grant of a manor alſo divers Towns may paſſe. An Honour alſo may paſſe by this name. And ſo alſo may a Caſtle or a hundred. And one manor alſo that is parcell of another manor may paſſe by the grant of that manor whereof it is parcell. Co. ſuper Lit. 5. 58. Perk. Sect. 116. Co. 5. 11. Plow. 168. Dyer 233. 14 H. 8. 1. 9. Iac. B. R. Dyer 30. 8 H. 7. 4. *a* Baintons caſe. M. 9. *b* Co. ſuper Lit. 5. 26. Aſſ. Plo. 54. 2 E. 3. 36.

The word [Knights-fee] is a compound word alſo and may comprehend many things. And therefore by the grant of this may paſſe land, meadow, and paſture as parcell of it. And ſometimes Co. ſuper Lit. 5. Plo. 168. 17 E. 3.

by

by this doth paſſe ſo much land as to make a Knights fee. And ſome ſay it doth containe eight hides of land. And it ſeems alſo that a manor may paſſe by this name if it be uſually called ſo.

Co. ſuper Lit. 5. Plow. 167. The word [Grange] is a compound word alſo, and by the grant of a Grange will paſſe a houſe or edifice, not only where corne is ſtored up like as in barns but neceſſary places for husbandry alſo, as ſtables for hay, and horſes, and ſtables and ſties for other cattle and a curtilage and the Cloſe wherein it ſtandeth at the leaſt. And where land, meadow and paſture &c. belonging to ſuch houſes are called all together by the name of a Grange there perhaps by this word the whole may paſſe. Grange.

Co. ſuper Li. 5. Plow. 195. Bro. Grants. 155. The word [Farme or Ferme] called in Latine *firma* is alſo a compound word and doth comprehend many things. And therefore by the grant of a Ferme will paſſe a meſſuage and much land, meadow, paſture, wood &c. thereunto belonging or therewith uſed, for this word doth properly ſignifie a capitall or principall meſuage and a great quantity of demeſnes thereunto appertaining. Alſo by the grant of all Farmes, or all Fermes; it ſeems leaſes for years doe paſſe. Farme.

Co. ſuper Lit. 5. This word is a collective word alſo, for by the grant of *unam bovatam terre*, or of one, or of an oxgange of Land may paſſe land, meadow and paſture, and it doth properly intend as much as an Oxe can till. And *Iugum terre* or halfe a Plow land is as much as two Oxen can till, and by the grant of halfe a plow land may paſſe and meadow, and paſture. Oxgange of land. Halfe a Plow land.

Co. ſuper Lit. 5. Plo. 167. The words [Plow land, and a Hide of Land] are *Synomyna* and are collective words alſo. And therefore by the grant of *Carucatam* or *Hidam terre*, or of a Plow land, or of a hide of land may paſſe 100. acres of land, meadow and paſture, and the houſes thereupon, but it doth properly intend as much land as one plow can till in a yeare. A Plow land, or a Hide of land.

Co. ſuper Lit. 5. This word [A yard-land] is alſo collective and doth comprehend many things, but it is not certaine, for in ſome Countries it doth containe 20. acres, and in ſome Countries 24. acres, and in ſome Countries 30. acres, by the grant therefore of *virgatam terre*, or a yard land will paſſe that quantity of land, meadow and paſture that is called by this name. And ſo by the grant of halfe a yard, or a quarter of a yard land. A yard of land. Halfe a yard land.

Co. ſuper Lit. 6. Plow. 167. The word [Fold courſe] is alſo compound, for by the grant of a fold courſe lands and tenements my paſſe. *Et ſic de ſimilibus.* And finally by the grant of any ſuch compound thing as before for the moſt part there doth paſſe thereby ſo much as in common reputation is accounted part of that thing and is uſually called by that name. Fold courſe.

8 H. 7. 1. Bro. Grant. 86. By the grant of a Rectory or Parſonage will paſſe the houſe, the glebe, the tithes, and offerings belonging to it. And by the grant of Parſonage, Rectorie, Vicarage.

of a Vicarage will paſſe as much as doth belong unto it, as the Vicarage houſe &c.

Meſuage.] By the grant of a meſuage, or a meſuage with the appurtenances doth paſſe no more but the dwelling houſe, barne, dove-houſe, and buildings adjoining, orchard, garden, and curtilage. *i.* a little garden, yard, field, or peece of void ground lying neer and belonging to the meſuage, and houſes adjoyning to the dwelling houſe, and the cloſe upon which the dwelling houſe is built at the moſt. And ſo much alſo may paſſe by the grant of a houſe. So that the quantity of an acre of ground or thereabouts in Orchard, Garden, and out-let may paſſe by either of theſe names, but more then this will not paſſe by the grant that is made in either of theſe words, albeit more have been occupied with it, and albeit more be intended to be paſſed by the grant. And therefore if there be a meſuage or dwelling houſe and divers acres of land thereunto belonging called all together by the name of Hedges. And a grant is made by theſe words, of all that meſuage with the appurtenances commonly called by the name of Hedges; by this grant nothing ſhall paſſe but the meſuage, garden, and curtilage. [a] And yet if a manor or farme be commonly called by the name of a meſuage, there by the grant of a meſuage the whole manor or ferme may paſſe. [b] And by the grant of a meſuage or houſe and all the lands thereunto appertaining will paſſe all the land uſually occupied therewith. Alſo by the name of a meſuage a Chappell or a Hoſpitall may be granted.

Curtilage. Houſe.

Plow. 85. 15. 171. 178. 569. Lit. Bro. Sect. 31. 185. Co. ſuper Lit. 5. Co. 10. 65. Kelw. 57. 27 H. 6. 2.

[a] See before.

[b] Lit. Bro. Sect. 185. 160. Bro. Leaſes 55. Plow. 170. c13 Aſſ. Pl. 2. Co. ſuper Lit. 4.

Cottage. By the grant of a Cottage doth paſſe a little dwelling houſe that hath no land belonging to it.

Errable land, Meadow, Paſture. By the grant of all a mans errable land there doth paſſe no more but that kinde of land: And by the grant of all a mans meadow ground, or all a mans meadows, doth paſſe no more but that kind of ground: And by the grant of all a mans paſtures doth paſſe no more but the land or ground it ſelfe imployed to the feeding of beaſts, & alſo ſuch paſtures and feedings as he hath in another mans ſoile.

Wood. Trees, If a man have divers acres or peeces of Wood, and grant to another *omnes boſcos ſuos*, or all his woods, or all his woods growing in ſuch a place; by this grant doth paſſe all the highwood and underwood, and not only the wood growing upon the land or ſoile but the land or ſoile it ſelfe wherein it doth grow. But in this caſe if the grantor have in the ſame place divers peeces of wood and divers cloſes wherein there are divers trees growing in the hedges; it ſeems in this caſe theſe trees in the hedges ſhall not paſſe by this grant in theſe words, eſpecially if the caſe be ſo that the cutting of them will be a waſt. And yet if the grantor have no peeces or groves of wood in the place, nor trees but what are growing in the hedges and grounds, in this caſe it ſeemes all the trees except the apple trees doe paſſe, but not his hedges and hedgrowes. And in caſe

14 H. 8. 1. Perk. Sect. 116. Co. 5. 11. Br. Done 14.

Co. 5. 11, 11. 50. caſe where the trees only doe paſſe, as where the grant is of all a mans trees there ſhall paſſe no more of the ſoile but ſo much as ſhall ſerve for the nutriment of the trees, and the owner of the ſoile ſhall have the graſſe growing thereupon alſo. If a man grant to another all his ſalable underwoods within his manor which have been uſually ſold by the owners of the manor with free entrie, egreſſe and regreſſe for felling, making and carying the ſame away at all times convenient; in this caſe it ſeems the ſoile doth not paſſe but the wood only. And yet if thoſe words with free entrie &c. be omitted *contra.*

Curia. Hill. 16 Jac. B. R. Pinchcombs caſe.

Dyer 374. Co. 11. 48. If one deviſe, grant and to terme let a farme with all manner of timber, wood, underwood and hedgrowes except the great oakes in ſuch a cloſe, to have and to hold the Farme for 21. years, in this caſe albeit there be the word Grant, and that the trees be not named againe in the *Habendum*, yet the other trees doe not paſſe by this grant otherwiſe then in other leaſes, and if the leſſee cut any Timber to ſell it is waſt in him.

A Tofte is a place where a meſuage hath ſtood, and by this name in a grant ſuch a thing will paſſe. Toft.

Co. ſuper Lit. 4. 5. *Bruera* is a heath or heathy ground. *Fraſſetum* is a wood or peece of ground that is woody. *Alnetum* is a word of Elders, or place where Elders grow. *Salicetum*, a wood of willows or place where willows grow. *Selda*, a wood of ſallowes, willowes or withies, or place where ſuch things grow. *Filicetum* is a brakie ground or place where ſuch things grow. *Fraxinetum*, a wood of aſhes, or place where Aſhes grow. *Lupulicetum*, a hopyard or place where hops doe grow. *Arundinetum*, a place where reeds grow. *Roncaria* or *Runcaria*, a place full of bryars or brambles. *Iuncaria* or *Ioncaria* or *Iampna* (which are all one) a place where ruſhes doe grow. *Ruſcaria*, a place where kneeholme or butchers pricks or broom doth grow. *Mariſcus*, a fenne or mariſh ground. *Mora*, a more barren and unprofitable ground then a marſh. And by grant of theſe and ſuch like things, or of 20. acres of ſuch ground, theſe particular kinds only or ſo many acres thereof doe paſſe. *Vacaria*, is a Dairie houſe. *Porcaria*, a Swineſtie. *Bercaria* a Tannehouſe: and by theſe names theſe things will paſſe. By the name of *Stagnum* or Poole, or *Gurges* a gulfe the water, land, and fiſh in the water will paſſe.

Bruera. Fraſſetum. Alnetum. Salicetum. Selda. Filicetum. Fraxinetum. Lupulicetum. Arundinetum. Roncaria. Iuncaria. Ruſcaria. Mariſcus. Mora.

Vacaria. Porcaria. Stagnum. Gurges.

Co. ſuper Lit. 5.

Co. idem. By the grant of *Stadium*, *Ferlingus*, or *Quarentena terre* doth paſſe a furlong or furrow long, which anciently was the 8th part of a mile. By the name of *Selio* or *porca terre* doth paſſe a ridge of land which is ſometimes longer and ſometimes ſhorter. By the grant of an acre of land doth paſſe ſo much as in an acre by meaſure in that Country by the Ordinary account and meaſure of the Country. By the grant of a Rood of land doth paſſe 10. pearches

Stadium. Ferlingus. Quarentena terre. Selio terre. Acre of land. Rood of land.

ches the 4th part of an acre. And by the grant of 6. foot in length and two foot in breadth, ſo much only doth paſſe. And by theſe and ſuch like names land may be granted.

Mines. By the grant of *Mineras* or *Fodinas plumbi &c.* or Mines of Lead &c. the land it ſelfe will paſſe if livery of ſeiſin be made thereof, but otherwiſe it ſeemes not, and then the grantee hath by the grant a power to digge only granted unto him. Co. ſuper Lit. 6. Co. 5. 12.

Trench. If one grant to me to digge a Trench in his ground from ſuch a place to ſuch a place to convey water by a lead pipe, or otherwiſe; hereby alſo *incluſive* is granted a liberty at any time after to digge to amend it as occaſion ſhall be. Perk. Sect. 111.

Turfes. If one grant to me to dig turfes in his land or ſoile and to carry them away at my will and pleaſure; by this is not granted the land it ſelfe, the houſes or trees thereupon or mines therein. Co. ſuper Lit. 4.

Common. If one grant to another Common for all his beaſts in his land; hereby is not granted Common for Goates, Pigges, and ſuch like beaſts and cattell that are not commonable. But if the grant be of common for all manner of beaſts *contra*. And if one grant to another Common without number in his land, the grantor is not hereby excluded to common there with the grantee. Co. ſuper Lit. 4. Perk. Sect. 108, 109.

And if one grant to me common of paſture for 10. Kine in his Lands in Dale; by this grant I ſhall have common in his commonable grounds and lands only and not in any other lands. And if a man grant common of paſture to me for my beaſts *ubicunque averia ſua ierint*, and he occupie 100. acres of land with his beaſts, and after he keep no beaſts; yet by this grant I may keep my beaſts in thoſe 100. acres. But if hee grant to mee common of paſture for my beaſts whereſoever his cattell ſhall goe &c. by this grant I ſhall have no common but when the grantor doth uſe his common with his Cattell &c.

Eſtovers By the grant of Eſtovers will paſſe houſeboote, hayboote, and plowboote. But if a man grant to me Eſtovers out of his manor, I may not by this grant cut downe any of the fruit trees within his manor. Perk. Sect. 116.

Way. If land be granted to me; hereby alſo implicitly is a way thereunto granted to me alſo. [a] So that if one have 20. acres of land and grant me one acre in the middeſt of it, hereby *incluſive* there is granted me a way to it. [b] And yet if a man have two Cloſes and he uſe to goe over one of them for his eaſe to the other Cloſe by a new way; and after he grant the further Cloſe *cum pertinentiis*; by this grant the new way doth not paſſe. 14 H. 8. 1. *a* Clar. caſe Trin. 5 Jac. B. R. *b* Per. Williams & Yelverton Juſtices. Mic. 3 Jac.

Foreſt, Park, Chaſe, Warren. If a man have a Foreſt, Park, Chaſe, Vivarie, and Warren in his owne ground, and he grant this Foreſt, Park, Chaſe, Vivarie or Warren; hereby not only the priviledge but the land it ſelfe doth paſſe. But if the ground be anothers; or if it be his owne and the grant be Co. ſuper Lit. 5. Rice & Wiſemans caſe. Mic. 9 Jac.

be onely of the game, &c. in theſe caſes the land or ſoil it ſelfe will not paſſe.

Co. ſuper Litt.4. Fiſhing.

If a man be ſeiſed of a river, and by his deed doth grant *ſeperalem piſcariam*, or *aquam ſuam* in the ſame, and maketh Livery *ſecundum formam cartæ*; by this grant doth paſſe onely a liberty to fiſh within the water, and not the ſoile nor the water it ſelfe: and therefore the grantor may take water ſtill, and if it be drie he may take the ſoile alſo. And if one grant all his fiſh in his pond; by this is granted a power to come and fiſh for them, but the grantee may not hereby dig a trench, and let out the water to take the fiſh, albeit they may not be otherwiſe taken.

Fitz. Barre. 237.

Co. ſuper Litt.4. Dier 285. Trin. 5. Jac. B.R. accord'. Veſture or Herbage of land.

If one bee ſeiſed of 20 acres of land, and hee grant to another and his heires the veſture, or the herbage of it, and maketh livery of feiſin in it *ſecundum formam cartæ*; by this grant doth paſſe the corn, graſſe, underwood, ſweepage, and the like; and for theſe things the grantee may have an action of treſpaſſe for any wrong done to him in them. But hereby the land it ſelf, the houſes, and great trees thereupon, and mines therein doe not paſſe. And if one grant the herbage or veſture of a wood; hereby is granted the graſſe and underwood onely, and not the timber or great trees. But if a man ſo ſeiſed of 20 acres of land, grant to another the profits of this land To have and to hold to him and his heirs, and maketh livery *ſecundum formam cartæ*; hereby the veſture, herbage, trees, mines, and all whatſoever parcell of that land doth paſſe.

Profits of lands.

35 H.6.37. Deeds.

If one grant to another all his deeds, or all his muniments; hereby will paſſe all his charters, feoffments, leaſes, releaſes, confirmations, letters of Atturney, and the like.

Co. ſuper Litt.118. 39 H.6.35. Dier 59. Perk. ſect. 115. 12 H.8.4. Bro. Grant 96.51. Done 39.47. Dier 5. Co.8.33. Goods.

If one give or grant to another *Omnia bona*, or all his goods; by this doth paſſe all his moveable and immoveable, perſonall and reall goods, as horſes, and other beaſts, plate, jewels, and houſhold ſtuffe, bowes, weapons, and ſuch like; and his money, and his corn growing on the ground, alſo all the obligations and bils that are made to him, and in his own name doe paſſe by this, but not the debts due by ſuch obligations and bils. And ſome ſay that leaſes and tearms of years of houſes, lands, rents, commons, &c. rents charge for years, wardſhips of tenants in Capite, and by Knights ſervice, and the intereſts that a man hath by Statute Staple, Statute Merchant, or Elegit, doe paſſe by this grant, but of this others doubt. And if a man give or grant to another *omnia catalla ſua*, or all his chattels; hereby doth paſſe as much as by the grant of all his goods, and by this without queſtion leaſes for years &c. doe paſſe. But by neither of the grants doe paſſe thoſe goods or chattels which the grantor hath by delivery in keeping for another, or the like. Neither doth any eſtate of inheritance or freehold, or the charters concerning any freehold paſſe under

Chattels.

theſe words, [a] Neither doth any thing in action, as debts, or the like, nor hawkes, hounds, poppinjays, or the like paſſe by this grant. [b] And yet if an Executor grant *omnia bona & catalla ſua*; hereby the goods and chattels he hath as Executor as well as his other goods and chattels will paſſe. And if one grant all his leaſes for years which he hath by any conveyances; hereby the leaſes for years which he hath as Executor as well as other leaſes for years will paſſe.

[a] Per ch. Juſt. B.R. 21 Jac. [b] Adjudged 3 Jac. Kelw. 64. 10. Co. 4. 1. Per Flemming Juſt. 7 Jac. B.R.

Utenſils. If one grant to another all his Utenſils; hereby will paſſe all his houſhold ſtuffe, but not his plate, jewels, or any ſuch like thing. Dier 59.

Grant of all a mans eſtate, right &c. If a man be ſeiſed of land in feeſimple or for life, and have an eſtate in it for years, by Statute Merchant, Staple, Elegit, or the like: and he grant all his eſtate, or all his right, or all his title, or all his intereſt of and in the land; by this grant all his eſtate, and as much as he is able to grant doth paſſe. And if tenant for life of land, the remainder to the ſtranger in taile, the remainder to the right heires of the tenant for life doe grant by theſe words; hereby both his eſtates do paſſe. And if a tenant in tail grant all his eſtate in the land; hereby there doth paſſe as much as he can grant. And all theſe words alſo doe cary and paſſe reverſions as well as poſſeſſions. And if a man have a tearm of years of land, and he grant his tearm; hereby doth paſſe the tearm of yeares, and all his eſtate and intereſt of the land. Co. ſuper Litt. 345. Litt. Sect. 613. Plow. 161. Co. 1. 153.

Note. And note that by all theſe names theſe things may be granted, and that for ſuch things as are grantable without deed, when they paſſe by a verball grant in any of theſe words, the words ſhall have the ſame expoſition as they have in deeds. Fitz. Brief 581.

If one grant all his goods in ſuch a place *ſi quæ fuerint*; by this grant nothing doth paſſe but the goods that are in ſuch a place at the time of the grant, and not any other goods that ſhall bee there afterwards. H. 6.

If two men have goods in common, and have other goods ſeverally, and they give me all their goods, by this grant is given all their goods they have in common, and likewiſe all the goods they have in ſeveralty. Bro. Done 12.

If two tenants in common, or others ſeverally ſeiſed of land, join in the grant of a rent of twenty ſhillings, or a horſe, out of the land whereof they are ſo ſeiſed; by this grant the grantee ſhall have two twenty ſhillings or two horſes. Plow. 171. 140. Co. 10. 106.

If a man grant a rent of ten pound to me, To have and to hold during my life and my wives life, and after the death of my wife a rent of three pound to me for my life; in this caſe if my wife die I ſhall have both the rents. But if there bee any words of reſtraint or determination of the firſt rent, it may be otherwiſe. Bro. Grant 64.

If

Adjudg. M. 20 Jac. B.R. Burton verſus Brown.

If one be ſeiſed of a garden plot in the pariſh of Sale, and grant it to *B* for ten years, which being expired he doth grant his garden plot to *C* for twenty one years, and *C* doth build a houſe upon part of it, and leaveth the other part in a garden plot ſtill, and after the twenty one years ended, the leſſor doth grant to D, *totam illam peciam fundi ſive gardin' plott' nuper in tenura de* B *& nunc de* C, lying in the pariſh of Sale, by this grant the houſe newly built, and the plot of garden doth paſſe.

Bro. Grant 53. 88. Done 26.

If one grant his Manor of Dale in Dale, which in truth doth extend into Dale and Sale; in this caſe no part of the Manor that doth lye in Sale ſhall paſſe. So if one grant all his tenements in Dale; hereby none of the tenements in Sale will paſſe. So if the Manor lie within the pariſhes of *A*, *B* and *C*, and the grant is of the Manor of Dale, lying within the pariſhes of *A* and *B*; by this grant no part of the Manor lying in *C*, will paſſe. But

Co. 1, 46.

if one ſeiſed of the Manors of *A* and *B*, in the County of *C*, grant thus, *totum illud Manerium de* A *&* B, *cum pertin' in Com'* C, or *totum illud Manerium de* A *cum* B, *in Com'* C, by theſe grants in caſe of a common perſon both the Manors will paſſe.

Bro. Grant Plow.

If one grant all his lands in Dale which hee had of the gift of *I S*; by this grant nothing will paſſe but that which hee had of the gift of *I S*. But if one grant all his lands in Dale called Hodges which he had of the gift of *I S*; by this grant all that which is called Hodges ſhall paſſe, albeit the grantor had it not of the gift of *I S*.

Dockraies caſe Paſch. 12 Jac.

If one grant all his lands in the occupation of *I S*; by this grant doth paſſe not onely ſuch lands as *I S* doth occupy by right, but alſo ſuch lands as hee doth occupy by wrong, and not onely the lands whereof he hath ſome eſtate, but alſo ſuch lands as whereof he hath the paſturage onely.

2 Jac. Br.

If one grant all his lands in *B*, and elſewhere in the County of *S*, in the tenure of *I S*; by this grant nothing doth paſſe but that which is the tenure of *I S*.

Adjudge Seignior Wentworths caſe. Co. 1. 46.

If one grant his Manor of *S*, *nec non omnes mariſcos ſuos de S, ac omnia terra, tenementa &c. in S. & alibi dict' Manerio ſpectan'*; by this grant the marſh doth paſſe though it be no part of the Manor.

If one grant all his demeſne lands of his Manor of Dale &c. it ſeems by this the cuſtomary land parcell of the Manor held by copy doe paſſe.

Adjudge Hil. 2 Jac. B.R. Bakers caſe.

If one be ſeiſed of tithes which did belong to an Abby, part of which were gathered by the Almoner, and part not, and he grant *omnes & omnimodas decimas granorum &c. infra dominium prædict' & precinct' ejuſdem, in dict' Comit'. Ac omnes alias decimas, proficua & commoditates &c. infra dominium prædict' & dict' Monaſter' &c. ſpectan' et quæ nuper per Eliemozinar' ejuſdem Monaſterii collect' fuer'*; by this grant ſhall paſſe all the tithes as well thoſe that were

collected by the Almoner, as thoſe which were not, and thoſe words *quæ per Eliemozinar'* &c. ſhall refer onely to the laſt, and not to both ſentences.

If one grant all his lands in *D*, containing 10 acres, whereas in truth his lands there doe contain 20 acres; by this grant the whole 20 acres will paſſe. Dier 80.

If one grant the Scite of an Abbie *& omnia terras prat' paſturas & ſubſcript' cum pertinen' dict' Monaſter' pertinen' &c. viz.* ſuch a thing and ſuch a thing, &c. by this grant the grantee ſhall have all the lands belonging to the Monaſtery, and *viz.* ſhall relate to *Subſcript'* onely, and not to *omnia*. See more in Grant *infra* at *Num.* 4. and in Teſtament, at *Numb.* 8. and in Fine, at *Numb.* Dier 77.

In the Exception. And how that ſhall be taken:

1. In the thing excepted.

The Exception is always taken moſt in favour of the feoffee, leſſee &c. and againſt the feoffor, leſſor. And yet it is a rule, That what will paſſe by words in a grant, will be excepted by the ſame words in an exception. And it is another true rule, That when any thing is excepted, all things that are depending on it, and neceſſary for the obtaining of it, are excepted alſo: as if a leſſor except the trees, he may bring his chapman to view them if hee deſire to ſell them, and he or the Vendee may cut them and take them away. And by ſuch an exception the Leſſor will have the boughs, fruit, hierons, and hawks, that breed in them &c. Co. 10. 106. 14 H. 8. 1. 11 5^a.

If a man be ſeiſed of a fiſhing from ſuch a place to ſuch a place, and hath a mill upon the water, and hee grant *totam partem ſuam piſcariæ de* D, *quam diu terræ ſuæ ſe extendunt, ſalvo tamen ſtagno molendini*; this exception doth not take away the fiſhing of the grantee in the mill pond, but it ſhall have relation only to the pool to repair the mill. Perk. ſect. 646. Fitz. Aſſiſi 316.

If a man ſeiſed of a Manor make a leaſe of it excepting all the ſaleable underwoods now growing, or which hereafter ſhall grow on the premiſſes, which have been uſually ſold by the owners of the Manor, with free entrie, egreſſe and regreſſe, for the felling, making, and carying away of the ſame at times convenient; in this caſe the ſoil is not excepted by reaſon of the ſubſequent words. Hil. 16 Jac. B. R. per 2. Judges.

If one be ſeiſed of a Manor and make a leaſe of it *cum pertin' una cum columbar' ac reddit' tenentium, decimis garbarum, finibus, heriot' perquiſit' Cur' & aliis omnibus proficuis, Advocac' Eccleſiæ & Wrecc. except'*, in this the exception doth begin at *Advocac' Eccleſiæ*, and doth except that which followeth and no more. Dier 58.

2. In the time.

If one grant in fee excepting the trees, or any other thing to the grantor without ſaying [and to his heires;] by this exception the thing excepted is ſevered only for the life of the grantor, and then it ſhall paſſe with the reſt of the things granted. But if the thing be excepted indefinitely without ſaying [for the life of the grantor &c.] nor how long; this ſhall be taken to be an exception during the eſtate. Dier 264.

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The *Habendum* as all other parts of a deed for the moſt part ſhall be taken moſt ſtrongly againſt the grantor and moſt in advantage of the grantee, yet ſo as withall it ſhall be conſtrued as neer the intent of the parties as may be, as in al thecaſes following doth appear.

In the *Habendum* or limitation of the eſtate and how that ſhall be taken.

If land be given or granted to one *habendum*, or to have and to hold to him and his heirs ſo long as he pay 20 yearly to *I S* and his heires, or ſo long as ſuch a tree doth ſtand, or the like; this is a kind of feeſimple, but it is limited and qualified and determinable upon this contingent. And yet this may become a pure feeſimple, for if land be granted to one and his heirs untill *I S* pay 100l. and *I S* die before he pay it, in this caſe the eſtate is become a pure feeſimple.

Plow. 557.

Feeſimple.

If lands be given or granted to a man, to have and to hold to him and his heires, this is a feeſimple, pure, abſolute and perpetuall; and this is made by theſe words [his heires] for it is a generall rule that theſe words [his heires] only make an eſtate in feeſimple in all feoffments and grants. But this rule hath many exceptions, for if feoffment of land be made to *I S & heredibus*, without the word [*Suis*] this is a feeſimple. And yet if the grant be to *I S* and *I D & heredibus*, without this word [*Suis*] *contrà*, for this is only an eſtate for their lives. And if lands be given to a Biſhop, Parſon or the like To have and to hold to him and his ſucceſſors; this is a feeſimple. And lands be given to a Maior and Communalty or other Corporation aggregate generally without the word Succeſſors, or any other word, or if lands be given to ſuch a Corporation for their lives, this is a feeſimple. But if land be given to a Parſon, or the like To have and to hold to him, without ſaying how long; or to have and to hold to him for life; by this he hath no more but an eſtate for life. [a] And if lands be given to the King generally without any other words; this is a feeſimple. [b] So if one grant *deo & eccleſiæ de D*; it is ſaid this is a feeſimple in the Parſon of *D*. So alſo of a grant *Eccleſiæ de D. per Thirne Iuſt*. So if a grant had beene to the Monkes of ſuch a houſe, it had beene a feeſimple in the houſe. And in like manner it is in other caſes; [c] As if one recite that *B* hath enfeoffed him of white acre To have and to hold to him and his heires, and then he ſaith further, that as fully as *B* hath given white acre to him and his heirs he doth grant the ſame to *C*, by this *C* the grantee hath the feeſimple of this acre. And if one grant 2. acres to *A* and *B* To have and to hold the one to *A* & his heires, & the other to *B in forma predicta*; by this *B* hath a feeſimple in this other acre, for an eſtate in fee ſimple, fee taile, or for life may be made by ſuch words of reference. Alſo if a rent be granted betweene Parceners for to make an equalitie of partition, and it bee granted generally and without any words of heires, yet this is a feeſimple. So where lands are given in *Frankalmoigne*. And ſo

Co. ſuper Lit. 8, 9. Lit. 1, 27 H. 8. 5. Perk. Sect. 239. 240, 241. 39 H. 6. 38. Plow. 28. Bro. Eſtates 4. 11 H. 7. 12. Co. ſuper Lit. 15.

a Co. 6. 27. ſuper Lit. 9.
b 15 Ed. 4. 13. 9 H. 7. 11, 12 H. 8, 9. H. 4. 84. 33 H. 6. 20.
Co. ſuper Lit. 9. Aſſ. Pl. 12. Plow. 130. 14 H. 4. 13.

alſo it is in the caſes of a releaſe of right, a fine, and a recovery. 27 H. 8. 27. Lit. Sect. 31. Co. 11. 46.

If one give or grant land to another To have and to hold to him and his heires males, or to him and his heires females, in both theſe caſes there is a feeſimple made, but otherwiſe it is when theſe words are in a Will, for then it is but an eſtate in taile only.

If one grant land to one, To have and to hold to him & his right heires; by this he hath a feeſimple. And ſo it ſhall be taken if it be by fine. So if one grant land to *I S* for life, the remainder to the heires, or to the right heires of *I S*, this is a feeſimple: ſo if one make a feoffment in fee to the uſe of himſelfe for life, and after his death to the uſe of his heires; this is a feeſimple. 33 H. 6. 5. Co. ſuper Lit. 22. Co. 1. 95. 66.

If one grant land to *I S*. To have and to hold to him and the heires of *I S*; this is a feeſimple, and all one with a grant to *I S* and his heires.

If one grant land to another to have and to hold to him for 20. yeares, and that after the 20. years the grantee ſhall have it to him and his heires by 10l. rent, and give livery of ſeiſin; by this the grantee ſhall have the feeſimple. 20 H. 6. 35. Co. ſuper Lit. 217.

If one grant land to the Wife of *I S* to have and to hold to her for life, and after to *I S* in taile, and after to the right heires of *I S*; by this *I S* hath a feeſimple. And if one grant land to *A* for life, the remainder to *B* for life, the remainder to the right heirs of *A*; by this *A* hath a feeſimple. Co. 2. 91. Dyer 156. Co. ſuper Lit. 22.

If land be granted to a man and his wife, to have and to hold to them and the heires iſſuing of them, it ſeemes this is a feeſimple and not a feetaile. Bro. Eſtates 86.

If land bee granted to one and his heires by the premiſſes of a deed to have and to hold to him for life; by this he hath a feeſimple. So if by the premiſſes of a deed land bee granted to one and the heires of his body to have and to hold to him and his heires; by this he hath an eſtate taile and a fee ſimple expectant. And ſo *via verſa*. If by the premiſſes of the deed the grant be to him and his heires to have and to hold to him and the heires of his body; by this alſo he hath an eſtate taile and a feeſimple expectant. Co. 2. 21. 24. ſuper Lit. 21. 21 H. 6. 7.

Fee taile. If lands be given or granted to a man to have and to hold to him and to the [or his] heires of his body, or the [or his] heires males of his body, or the [or his] heires females of his body; by this the grantee hath an eſtate taile. So if ands be given to a man, to have and to hold to him and the heires males, or to him and the heires females of his body begotten; in both theſe caſes it is an eſtate tail. Termes of Law, tit. tail. Lit. tit. Fee toto, in & Co. ſuper Lit. 26.

If lands be given to a man & his wife, to have and to hold to them and the heires males, or to them and the heires females of their two bodies begotten; by this they both have an eſtate taile. And if lands be given to them & the heires males, or heires females of the body of the husband begotten on the wife; by this he hath an eſtate taile & Lit. idem Co. 1. 140. Co. ſuper Lit. 20. Co. 7. 41.

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his wife an eſtate for life only. And if lands be given to *A* to have and to hold to him and his heires on the body of *B* begotten; by this *A* hath an eſtate taile and *B* hath nothing. So if lands be given to a man and his wife, to have and to hold unto them and the heires he ſhall beget on her body; by this they have an eſtate taile in them both. If lands be given to a man and his wife and the heirs of the body of the husband; by this the husband hath an eſtate in generall taile, and the wife but an eſtate for life. If lands be given to him to have and to hold to him and his heires he ſhall beget on the body of his wife; by this he hath an eſtate taile and ſhe no eſtate at all.

Lit. Sect. 17. If one give his land to his daughter or Couſin in Frankmariage; by this they have each of them an eſtate taile without any word of [heires, or heires of body] &c.

Co. ſuper Lit. 21. Co. 7. 41. 5 H. 5, 6. If one give lands to *B* and his heires, to have and to hold to *B* and his heires, if *B* have heires of his body and if he die without heires of his body that it ſhall revert to the donor; by this *B* hath an eſtate taile. So if one give lands to *B* and his heires if he have iſſue of his body; by this he hath an eſtate taile. So if lands be given to *B* to have and to hold to him and his heires, provided that if he die without heire of his body that the land ſhall revert. So if lands be given to *A & B uxori ejus & hered' eorum & aliis hered' ipſius A, ſi dict' hered' de dict' A & B exeunt' obierunt ſine herede de ſe &c.* by this they have an eſtate taile. And ſo in all ſuch like caſes where after a limitation of a feeſimple theſe or ſuch like words are added, *viz.* that if he die without heires of his body the land ſhall revert, for in all theſe caſes the *habendum* is conſtrued to be a limitation or declaration what heires are meant before.

Co. ſuper Lit. 26. Plow. 135. If lands be given to *A* and *B*, (a young man and maid unmaried) to have and to hold to them and the heires of their two bodies; by this each of them hath an eſtate taile, and if they mary their heires may inherite it.

Co. ſuper Lit. 7. Co. 8. 87. Aſſ. Pl. 47. 5 Aſſ. 14. If lands bee given to the ſonne to have and to hold to him and his heires of the body of his Father; by this the ſonne hath a feeſimple. But if the words bee to have and to hold to him and the heires of the body of the Father engendred; by this it is an eſtate taile in a deed as it is in a Will. And if the Father be dead the Law is ſo alſo, but it ſeems the ſonne ſhall have by this only an eſtate for life except he be iſſue in taile to his father *per formam doni*. So if there bee grandfather, father and ſonne, and the father dieth, and lands be given to the ſon to have and to hold to him and the heires of the body of the grandfather; this is an eſtate taile in the ſonne: but neither the father nor the grandfather have either of them any eſtate in theſe caſes. If lands be given to *I S* and the heires of the body of his wife (being dead) begotten; by this *I S* hath an eſtate taile. Will.

12 H. 4. 1.

If one grant lands to *I S*, to have and to hold to him and the heires of his body iſſuing, the remainder to *I D* and his heires *in forma predicta*; by this *I S* and *I D*, after him have each of them an eſtate taile. Co. ſuper Lit. 385.

If one grant lands to *A* to have and to hold to him for life the remainder to the firſt ſonne of *A*, and the heires males of the body of that firſt ſonne; by this the firſt ſonne hath an eſtate in taile, and *A* his father but an eſtate for life only. But if lands be granted to *A* for life the remainder to the heires of the body of *A*; by this *A* hath an eſtate taile in him. And if lands be given to a man and his wife to have and to hold to them and one heire of their bodies lawfully begotten and to one heire of the body of that heire; by this there is an eſtate taile made, yet ſo as it ſhall laſt only during the lives of thoſe two heires. Co. 2. 91. ſuper Lit. 22. 39. Aſſ. Plow. 20.

If one grant lands to another to have and to hold to him and to his heires of the body of ſuch a woman lawfully begotten; by this he ſhall have an eſtate taile, for begotten ſhall be intended by the donee on that woman. Co. ſuper Lit. 26.

If there be husband and wife and they have iſſue a ſonne and daughter, and lands are given to the wife to have and to hold to her and the heires of her late husband on her body begotten; by this the wife hath an eſtate for life and the ſon an eſtate in taile, and if he die without iſſue it ſhall goe to his daughter *per formam doni*. Co. ſuper Lit. 26.

If lands be granted to the husband of *A* and wife of *B*, to have and to hold to them and the heires of their two bodies; by this they have each of them an eſtate in taile in them, for there is a poſſibility that one husband and wife may dye, and then the other husband and wife may intermary. Co. ſuper Lit. 20.

If there be father and ſonne, and lands are given to the father to have and to hold to him and the heires of the body of his ſon; by this the ſonne hath an eſtate taile but the father as it ſeemes but an eſtate for life. 12 H. 4. 3. Dyer 247.

If lands be given to the mother for life the remainder to her ſon and the heires of the body of his father on her begotten (the father being dead) by this the ſon hath an eſtate taile. Lit. Sect. 352.

If lands be granted to *I S*, to have and to hold to him and the heires he ſhall happen to have of his wife; by this he hath but an eſtate taile and no feeſimple, and his wife hath no eſtate at all. 12 H. 4.

If lands be granted to *I S* and the heires that the ſaid *I S* ſhall lawfully beget of his firſt wife, and he hath no wife at the time of the grant; by this he hath an eſtate taile. Co. ſuper Lit. 20.

If *A* have iſſue by *B* his wife *C* a ſonne & *D* a daughter, and *A* die, and lands are granted to *B* to have and to hold to her and to the heires of *A* her late husband on her body begotten; in this caſe and by this deed *C* hath an eſtate taile & the woman hath only Co. ſuper Lit. 26.

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an eſtate for life, and if *C* die without iſſue, *D* his Siſter ſhall have the land *per formam doni*. But if one grant lands to *A* late wife of *I S*, to have and to hold to the ſaid *A* and the heires of *I S* on the body of the ſaid *A* begotten; in this caſe the ſon and heire ſhall take no eſtate by the grant. And the ſame conſtruction ſhall be upon the ſame words in his Will. Will.

Co. ſuper Lit. 26. If lands be granted to the husband and wife, to have and to hold to them and the heires of the body of the ſurviver of them; by this the ſurvivor ſhall have an eſtate taile after the death of the other.

Co. ſuper Lit. 20. If lands be granted to *I S* to have and to hold to him *& heredibus de carne ſua*, or *heredibus de ſe*, or *heredibus quos ſibi contigerit*, in all theſe caſes *I S* hath an eſtate taile and no more.

Co. ſuper Lit. 28. If lands be granted to husband and wife, to have and to hold to him and the heires of the body of the husband, the remainder to the husband and wife and the heires of their two bodies begotten, this remainder is void, and therefore by this the husband hath an eſtate in taile and the wife a joint eſtate for life with her husband and no more.

Co. 1. 140. If lands bee granted to *I S* and his heires of the body of *Jane* a *Noke* begotten; by this *I S* hath an eſtate taile and no more.

Co. ſuper Lit. 20. If lands be granted to *I S & heredibus de corpore procreatis*; by this the heires that ſhall be begotten afterwards ſhall take. And if lands begranted to *I S & heredibus de corpore procreandis*; by this the heires of his body before begotten ſhall take *per formam doni* as well as thoſe that ſhall be begotten afterwards.

Co. ſuper Lit. 146. If one grant to *I S* that if he and the heires of his body bee not yearely paid 40*s*. that hee or they ſhall diſtraine in the lands of the grantor; by this the grantee hath an eſtate in taile in the rent, as if he grant to *I S* that if he and his heires be not paid &c. that he or they ſhall &c. he hath a feeſimple in the rent. For life.

Lit. Sect. 283. 285. Co. 8. 85. 96. 2. 24. Finches Law 60. Co. ſuper Lit. 9. Dyer 307. Co. 7. 23. If one give or grant land to another to have and to hold to him, or to him and his aſſignes, and ſay not how long nor for what time, and the grantor make livery of ſeiſin according to the deed; by this the grantee hath an eſtate for his owne life. But no livery of ſeiſin be made no eſtate at all but an eſtate at will doth paſſe by this deed. And if he that doth grant the land be but a leſſee for years of the land and he make no livery of ſeiſin upon the grant; by this his terme of years and that eſtate which he hath is granted. But if he make livery of ſeiſin upon the grant then an eſtate for the life of the

17 Aſſ. Pl. 17. grantee will paſſe, and it is a forfeiture of the eſtate of the leſſee for years of which he in reverſion may take preſent advantage. And if one grant to another Common in his land when he doth put in his owne beaſts, or Eſtovers in his Manor when he commeth there, and ſay no more, by this it ſeemes the grantee hath an eſtate for life. Forfeiture.

If.

If one grant land to *I S* to have and to hold to him or his heirs, in the diſjunctive; this is but an eſtate for life and no more. So if one grant lands to *I S* to have and to hold to him and his heire, in the ſingular number; by this *I S* hath only an eſtate for life and no feeſimple. Co.5.112. ſuper Lit.8.

If one bargaine and ſell land to another for money, and limit no time and expreſſe no eſtate; by this the bargaine ſhall have only an eſtate for life. But otherwiſe it was before the Statute of Uſes, for then it had been a fee ſimple. Co.1.87.130. Plow.539.

If lands be granted to *I S* for life, and after to the next heire male of *I S* and the heires males of the body of ſuch next heire male; by this *I S* hath but an eſtate for life. But if it be to the next heires males of *I S* it is an intaile. Co.1.66.

If one grant land to *I S* to have and to hold to him in fee ſimple, or in fee taile, without ſaying [to him and his heirs, or to him and his heires males, or the like] this is but an eſtate for life and no more. So if one grant land to *I S* to have and to hold to him and his feed, or to him and his iſſues, generally without more words; by this is made only an eſtate for life. But in the conſtruction of a Will the law is otherwiſe in moſt of theſe caſes. 20 H. 6.33. Co. ſuper Lit.8.20.

Will.

If lands be granted to two *& heredibus* without this word [*Suis*] by this they have an eſtate for their lives and no longer, 20 H.6. 35

If one grant lands to *I S* to have and to hold to him and his heires for his owne life, or for the life of *I D*; by this *I S* hath an eſtate for life and no more. Co.5.112. 1.140.

If one grant lands to *A* and *B* *Habendum ſibi & ſuis* omitting all other words, or to have and to hold to them and their aſſignes; by this they have an eſtate for life only. So if lands be granted to any naturall perſon to have and to hold to him and his Succeſſors; by this he hath only an eſtate for his life. Co.4.29. ſuper Lit.1.8.

If one grant his lands to *I S* to pay his debts to have and to hold to him generally without limiting any eſtate; in this caſe *I S* hath an eſtate for life only. Co.8.96.

If lands be granted to *A* and *B* to have and to hold to them for their lives to the uſe of *C* for his life; by this *C* hath an eſtate for his life if *A* and *B* live ſo long. Dier 186.

If a tenant in taile grant *totum ſtatum ſuum*; by this the grantee hath an eſtate for the life of the grantor and no longer. And if a leſſee for life grant all his eſtate; hereby his eſtate for life doth paſſe, for this is as much as he can lawfully grant. Lit.Sect. 613. Co.1.53. ſuper Lit. 345. Plow.562.

If a man have a ſonne and a daughter and die, and lands be granted to the daughter and the heires females of the body of the father; it ſeemes by this ſhe hath only an eſtate for life. 162. Co.ſuper Lit.24.

If one grant land to another to have and to hold to her whiles ſhe ſhall live ſole, or during her widowhood, or ſo long as ſhe ſhall be- Co.ſuper Lit.42. 234,235.

behave her ſelfe well, or ſo long as he ſhall dwell in ſuch a houſe, or ſo long as ſhe pay 10 l. yearly, or ſo long as the coverture between her and her husband ſhall continue; or one grant lands to a man to have and to hold unto him untill he ſhall be promoted to a Benefice, or the like; in all theſe caſes if livery of ſeiſin be made according to the deed, or if the grant be of ſuch a thing whereof no livery is requiſite, the grantee hath an eſtate for his life and no more, and that determinable alſo.

Co. ſuper Lit. 183. 42. Plow. 161. F.N.B. 168. If one grant lands to *I S.* to have and to hold to him for life, and doth not ſay for whoſe life; this regularly ſhall be taken for the life of *I S* the leſſee, and not for the life of the leſſor. But if the leſſor himſelfe have but an eſtate for life in the lands granted, then the leaſe ſhall be conſtrued to be and endure during that life only by which the leſſor did hold to prevent a forfeiture. And if he that doth make the leaſe be tenant in taile of the land, this ſhall be taken to be a leaſe for the life of the leſſor. And if a tenant for life of land make a leaſe for years of it and then grant his reverſion by the name of a reverſion to another To have and to hold to him and his heires; by this he hath only an eſtate for the life of the grantor and no more. So if tenant in taile of land grant it to one for years, and after grant his reverſion to another To have and to hold to him and his heires; this ſhall be conſtrued to be an eſtate for the life of the tenant in taile and no longer, and the atturnement of the tenants in theſe caſes will not alter the caſes. And ſo it is in caſe of a Releaſe alſo, as if tenant in taile doth releaſe to *B* (being leſſee for years of the land) all his right to the land, this ſhall be taken to enure but for the life of the tenant in taile and no longer, as if a man retaine a ſervant, and ſay not how long; this ſhall be taken for a year. *Conſtructio legis non facit injuriam.*

Co. ſuper Lit. 147. Co. 8, 85. If one grant to *I S* that if he be not paid yearly for his life 40 s. that he ſhall diſtraine in the land of the grantor for it; by this *I S* hath an eſtate for life in the rent. And if a man by his deed grant a rent of 10 l. iſſuing out of all his land quarterly at the uſuall feaſts, this is an eſtate for life of the grantee.

Co. 5. 9. 11. 3. If one grant lands to *I S* and *I D.* To have and to hold to them during their lives, omitting theſe words [and the longeſt liver of them] by this notwithſtanding they ſhall hold it during the life of the longeſt liver of them. And if lands be granted to *A* To have and to hold to him during the lives of *B, C* and *D* without any more words; by this *A* hath an eſtate during all their lives and during the life of the longeſt liver of them. * And if lands be granted to *A* To have and to hold to him during his life, and during the lives of *B* and *C*, by this he hath a leaſe for his owne life and the lives of *B* and *C* and the longeſt liver of them. But if a leaſe be made to *I S* of land to have and to hold to him during the time

* 38 Eliz. B.R. in the caſe of Ros & Adwick.

that

that *A* and *B* ſhall be Juſtices of Peace, or during the time that *A* and *B* ſhall be of the Inner Temple, or the like; in theſe caſes the failer of one doth determine the eſtate. † And if a leaſe be made to *B* only To have and to hold to him and *C* for their lives; by this *B* hath an eſtate for his owne life only and no more and *C* hath nothing at all. And here by the way let it be obſerved in theſe and ſuch like caſes where lands are granted to one man to have and to hold to him, [or to him and his aſſignes, or to him, his executors, adminiſtrators and aſſignes] during the life, or during the lives of others; and in moſt caſes where a man is tenant *pur auter vie*, *i.* for the life or lives of another or others, if the tenant *pur auter vie* in poſſeſſion die his eſtate ſhall not goe to his heires, executors or adminiſtrators unleſſe they can firſt get into poſſeſſion after his death, but he that can firſt get into the poſſeſſion of the land after the death of the tenant *pur auter vie* ſhall have it for his life, and after his death then he that can firſt get into the poſſeſſion againe &c. And therefore if the land were let by the tenant *pur auter vie* at the time of his death to any under tenant for years, or for one year, or at will, and this undertenant be in poſſeſſion at the time of the death of the tenant *pur auter vie*, this undertenant ſhall have it for his life, if the life or lives by which it is held ſo long live, for the rule in this caſe is *occupanti conceditur. Et capiat qui capere poteſt.* And this eſtate is called an occupancy, and he that hath it an occupant. To prevent which miſchiefe the leſſee muſt take care when he takes his leaſe to have it made to him and his heires during the life or lives of him or them by whom it is held, for in this caſe after his death his heire and none other ſhall have it; or if this be neglected, then he muſt take care to grant over his eſtate by act executed (for by his laſt will he may not deviſe it) to ſome friend and his heires in truſt for him; or he may grant it over to another, and take a regrant of it to himſelfe and his heires; or he may make a leaſe for years of the lands to ſome friends in truſt, and by this meanes he may have the fruit of it during the terme.

† Adjudged B.R. 8 Eliz. Hobart & Wiſemores caſe.

Occupant.

Co. ſuper Lit. 41. 239. 388. Plow. 556. 28 Dier 328. 321. 264. Co. 10. 98.

When no time is ſet downe for the beginning of an eſtate then it ſhall begin preſently, otherwiſe it ſhall begin at the time expreſſed if it may ſtand with law. If a leaſe for years be made bearing date the 26th. day of *May*, To have and to hold for 21. years from the date, or from the day of the date; in theſe caſes the leaſe ſhall begin on the 27th. day of *May*. But if the words be To have and to hold from henceforth, or from the making hereof, in theſe caſes the leaſe ſhall begin on the day in which it is delivered. And if it be to begin *à die confectionis*, then it ſhall begin the next day after the delivery. And if it be To have and to hold for 21. years; without mentioning when it ſhall begin, it ſhall begin from the delivery

For years. When ſuch a leaſe ſhall begin and how long it ſhall continue.

Co. ſuper Lit. 46. Co. 5. 1. 2. 5. Dier 286. 307.

very if there be no former leaſe in being, and if there be, then it ſhall begin from the time of the ending of that leaſe. If the deed have a date which is void or impoſſible, as the 30 of *February*, or 40. of *March*, and the terme be limited to begin from the date, then it ſhall begin from the delivery. So if a man by his deed recite a leaſe which is not, or which is void, or miſrecite a leaſe that is in *eſſe* in point materiall, and then ſay To have and to hold from the end of the former leaſe; this leaſe ſhall begin in courſe of time at the time of the delivery of the deed.

Co.l.154. Plow.198. If one make a leaſe of land to *A* for 20. years, and then grant it to *B* To have and to hold to him from the end of the firſt terme &c. in this caſe this ſecond leaſe ſhall begin aſſoone as the firſt leaſe by what meanes ſoever ſhall end. But if the words of the ſecond leaſe be To have and to hold to him from the end of the 20. years, in this caſe the ſecond leaſe ſhall not begin untill the 20. years be expired. And if one make a leaſe of white acre to *A* for 10. years, and of blacke acre to *B* for 20. years, and then reciting both the leaſes doth make a leaſe to *C* to begin after the former leaſes; this ſhall be taken reſpective, and ſhall begin for white acre after the end of the 10. years, and for black acre after the end of 20. years. And if one make a leaſe to two for 60. years provided that if the leſſees ſhall die within the term, that then preſently after the deceaſe of the laſt of them longeſt living the leſſor ſhall reenter, and one of them die; and after the leſſor doth make a leaſe to another *Habendum &c. cum poſt ſive per mortem ſurſum redd' vel forisfacturam* of the firſt ſurviving leſſees *acciderit vacare* for 40. years; in this caſe this ſecond leaſe ſhall begin after the death of the leſſee ſurviving, reentry of the leſſor, or the effluxion of time of the firſt leaſe which of them ſhall firſt happen, and the leſſee cannot at his election make it to begin at any other time.

Co.6.36.

Dier 261. If a man make a leaſe for 30. years, and 4. years after make another leaſe to another man in theſe words. *Noveritis &c. me* A *de* B *predictis* 30. *Annis finitis dediſſe & conceſſiſſe* B. *de* C. *&c. Habendum à die confectionis preſentium termino predicto finito uſque finem* 31. *Annorum:* by this the ſecond terme ſhall begin at the end of the 30. years. And if one make a leaſe to *A.* for 20. years and after make a leaſe to *B* to have and to hold to him from the end of the firſt terme for 20. years to be accompted from the date of the laſt deed; in this caſe the ſecond leaſe ſhall begin at the end of the firſt leaſe, & theſe words [to be accompted &c.] ſhal be rejected.

Craddocks caſe. paſc. 7. Jac. Co. B.

Dier 112. If one make a leaſe of land to *A* for 10. years, and after by indenture grant it to *B* to have and to hold to him from Michaelmas next for 10. years, and after the firſt leſſee doth purchaſe the reverſion by which his terme is drowned; in this caſe the ſecond leaſe ſhall begin preſently when Michaelmas is come.

If

If two Jointenants be, and one of them grant the land to *I S* to have and to hold to him for 20. years if the leſſor and his companion ſo long live; by this the leaſe ſhall continue no longer then they both live together, and when either of them is dead the leaſe is determined. * And if one grant his land to *I S* to have and to hold to him, his executors &c. for the terme of 100. years if *A*, *B*, and *C* live ſo long; and leave out theſe words [or either of them] in this caſe if either of them die the leaſe is determined. But if the words be To have and to hold for 100. years if *A*, *B* or *C* [omitting or either of them] ſhall live ſo long, *contra*. † If a leaſe be made of land to the husband and wife to have and to hold to them for 21. years if the husband and wife or any child between them ſhall ſo long live; this is a good leaſe and ſhall continue for all their lives and for the life of the longeſt liver of them albeit the firſt words be in the copulative.

Mich 13 Jac.B.R.

*Co.5.9.

† Paſch. 30. Eliz.Co.B.

If one poſſeſſed of land for a terme of years grant the ſame to another, To have and to hold to him, his executors and adminiſtrators, or to him and his aſſignes, or to him, without any more words: or if a man that is poſſeſſed of a terme grant his leaſe to another, and doth not ſay for what time; it ſeemes in theſe caſes the whole terme is granted albeit no livery of ſeiſin be made. And in the firſt caſe if livery of ſeiſin be made then it ſeemes there doth paſſe an eſtate for the life of the grantee, and therefore that this is a forfeiture of the eſtate of the leſſee for years whereof he in the reverſion may take advantage preſently. And if a leſſee for years of land grant a rent out of the land generally without any limitation; this ſhall be conſtrued to enure for a grant of the rent ſo long as the eſtate of the grantor doth continue. But if he grant a rent by expreſſe words for the life of the grantee: by this the grantee ſhall have it for all the terme if he live ſo long.

Dier 307.69. Plow.520. 524,525. 423,424. Co.7.23.

If one grant lands to *I S* To have and to hold to him for life reſerving the firſt ſeven years a roſe, and if he will hold the land over that he ſhall pay a rent in money, and no livery of ſeiſin is made; by this it ſeemes in certaine is made a leaſe for ſeven years untill the Condition be performed; and then alſo it ſeemes it is a leaſe for no longer time. And ſo perhaps it will be if livery of ſeiſin be made.

Co.ſuper Lit.218.

If one grant a rent of 5 l. *per annum* unto *I S*, To have and to hold to him &c. untill he ſhall receive 20 l. in this caſe he ſhall have a leaſe for foure years of this rent. But if lands be granted to *I S* To have and to hold &c. untill he ſhall receive 20 l. out of the profits of it, in this caſe if livery of ſeiſin be made the grantee hath an eſtate determinable upon the levying of the money, and if no livery be made he hath no eſtate at all but at will.

Co.ſuper Lit.42. Plow.273.

If one make a leaſe for life and ſay, that if the leſſee within one yeare

Co.ſuper Lit.218.

yeare pay not 20 s. that he ſhall have but a term for 2. years; by this if he doth not pay the money he hath only a leaſe for 2. years albeit livery of ſeiſin be made upon it.

Co.9.63.60. If one make a leaſe to *I S* To have and to hold to him, his executors &c. for 10. years if *I D* ſhall live ſo long, and *I D* is dead at the time when the leaſe is made; in this caſe *I S* hath an abſolute leaſe for 10. years.

Plow.273. Co.ſuper Lit.45. Dier 24. If one grant lands to *I S* To have and to hold to him, his executors &c. for 3. years and ſo from 3. years to 3. years during the life of *I S*, or from 3. years to 3. years during the life of the leſſee; by this it ſeemes *I S* hath a leaſe for 6. years and no more. And if one grant lands to *I S* To hold for 3. years and after the end of thoſe 3. years for 3. other years, and after the end of thoſe 3. years for 3. other years during the life of the leſſor; by this it ſeemes *I S* hath a leaſe for 9. years and no more. And yet if in theſe and ſuch like caſes where a leaſe is made from ſo many years to ſo many for the life of any perſon livery of ſeiſin be made upon this deed *ſecundum formam chartæ*; this perhaps may be an eſtate for life.

14 H.8.10. Co.6.35. 10.106. If lands be granted To have and to hold from our Lady day *pro termino unius Anni & ſic de uno Anno in unum Annum quamdiu ambabus partibus placuerit*; by this the grantee hath a leaſe for 3. years only in certain and afterwards a leaſe at will. And if lands be granted to have and to hold from the Nativity of Chriſt next *pro termino unius Anni, et ſi in fine dict' unius Anni ambæ partes placerent quod eadem preſens dimiſſio foret renovata tunc habend' premiſſa* to the leſſee &c. *ab & poſt dictum feſtum Nativitatis Domini uſque terminum trium Annorum extunc prox' ſequen'*; by this the grantee hath a leaſe in certaine but for one year only, and if the parties agree againe a leaſe for 3. years.

Co.6.35. 21 H.7.38. If one make a leaſe to *I S* To have and to hold to him for years, and ſay not how many years: by this the leſſee hath a leaſe for 2. years and no more.

Co.3.19. If one grant his land to *I S* To have and to hold to him untill *I D* ſhall come to 21. years of age; in this caſe if *I D* die before that time the leaſe is ended.

Co.1.44. 7 H.4.42. If a man poſſeſſed of a terme of years of land doth grant the land to another and his heirs, this by conſtruction will amount to a good grant of his intereſt.

Dier 263. If lands be granted to husband and wife and to *I S* To have and to hold to them and to the heires of the husband and *I S*; by this the wife hath only an eſtate for life in a moity w^th^ her husband and the husband and *I S* have the feeſimple in Jointenancy to them and their heires. Limitation of eſtates to divers perſons.

Co.8.87.10. 50.ſuper Lit.25. Dier 145. If lands be granted to two brothers, or two Siſters, or to a brother

brother or ſiſter, or to a father and ſonne or any others, To have and to hold to them and the heires of their bodies begotten: by this they have joint eſtates for their lives, ſo that the ſurvivor of them will have the whole for his life, and ſeverall inheritances. *i.* eſtates in generall taile by moities in common one with another. And if lands be granted to two men and their wives and the heires of their bodies begotten: in this caſe they have joint eſtates for life, and afterwards the one husband and wife ſhall have the one moity and the other the other moity in common. And and if lands be granted to a man and two women To have and to hold to them and the heires of their bodies: by this they have each of them an eſtate taile in common with the other.

If lands be granted to husband and wife To have and to hold to them and their heirs of their bodies iſſuing, or in any ſuch like manner; by this the wife hath an eſtate taile as farre forth as the husband. But if it be granted to them To have and to hold to them and the heires of the body of the husband, or to the husband and wife and the heires of the husband which he ſhall have by his wife, or in any ſuch like manner: by this the wife hath only an eſtate for life and the whole eſtate taile is in the husband. So *via verſa* if lands be granted to husband and wife and the heires of the wife upon her body begotten by the husband: by this he hath an eſtate for his life only and his wife the whole eſtate taile. And if lands be granted to the husband To have and to hold to him and the heires of his body on the body of his wife begotten, or To have and to hold to him and the heires of his body begotten on the wife he ſhall firſt mary, or To have and to hold to him and his wife he ſhall firſt mary, and the heirs of their bodies begotten: in theſe caſes the husbands have the whole eſtate and the wives nothing at all. But otherwiſe it is it ſeemes when the eſtate is limited by way of uſe to a man and his wife that he ſhall afterwards mary, for by this it ſeemes the wife ſhall take alſo.

Lit. Sect. 27,28,29. Co. ſuper Lit. 26. Dier 340. Co. 1, 100.

Uſe.

If lands be granted to *A* a maried man, and to *S* a maried wife and to the heirs of their bodies engendred: by this they have each of them an eſtate taile preſently executed, and whiles the wife of the husband and the husband of the wife live they ſhall hold it for their lives, and if they happen to die and theſe to intermary and have iſſues their iſſues ſhall have it according to the intaile.

15 H. 7. 10.

When the *Habendum* ſhall be ſaid to be repugnant and void. And when not, but ſhall controll, divide or expound the premiſſes.

If lands be granted to *A* and *B* To have and to hold to *A* for life the remainder to *B* in fee: by this *A* ſhall have the whole for his life and *B* the feeſimple afterwards.

Dier 126. 56.

As touching this matter theſe differences are to be taken. Between things that are granted and between the eſtates. When the things that are granted are ſuch as lye in grant and take effect by the delivery of the deed only without any ceremony, or take effect

Co. 2, 23. 8. 56. Perk. Sect. 181. 14 H. 8. 14. Co. ſuper Lit. 183.

effect by the ſame ceremonie, and when not but another ceremony is required to the perfection of the grant and eſtate. And when there is an expreſſe eſtate made by the deed in the Premiſſes thereof, and when but an implied eſtate only, as for examples. If one grant land, rent common, or any ſuch like thing to one and his heires by the Premiſſes of the deed To have and to hold to him for life, or To have and to hold to him and to his aſſignes, without more words; in this caſe the *Habendum* is repugnant and void, and by this the grantee ſhall have an eſtate in feeſimple if livery of ſeiſin and atturnment as the caſe doth require be duly made, for otherwiſe no eſtate at all but at will will paſſe. So if a man grant a rent, or any ſuch like thing that lieth in grant to one and his heires To have and to hold to him for years; this is a void *Habendum*, and the grantee ſhall have the feeſimple. But if a man grant land to another and his heires To have and to hold to him for a certaine number of years; in this caſe whether he make livery of ſeiſin or not it is a good *Habendum*; and by this the grantee ſhall have an eſtate for ſo many years and no more. So if one grant land, rent, common, or any ſuch like thing to one in the Premiſſes of the deed without limitation of eſtate (which in judgement of law is an implied eſtate for life) To have and to hold to him for a certain number of years, or at will; this *Habendum* is good and ſhall ſtand with the Premiſſes and qualifie it; and by this the grantee ſhall have but a leaſe for years, or at will, as the *Habendum* is. And if one grant land by the Premiſſes of a deed to one and his heires of his body To have and to hold to him and his heires; this *Habendum* ſhall ſtand and this ſhall be taken an eſtate taile and a feeſimple expectant. So *vice verſa*, If land be granted to one and his heires To have and to hold to him and his heirs of his body; this ſhall be conſtrued an eſtate taile and a feeſimple expectant and ſo both ſhall ſtand together.

Co.8.154. 21 H.6.7. Co.ſuper Lit.20. Dier 126. & per curiam in Thurmans caſe. Paſc.16 Jac. B.R. 21 H.6.7.

If lands be given to *B* and his heirs To have and to hold to *B* and his heires, and if he die without heires of his body that it ſhall revert to the donor, it ſeemes this is a feetaile only and no feeſimple expectant. *Voluntas donatoris in carta doni ſui manifeſte expreſſa obſervanda eſt.*

Co.ſuper Lit.21.

If a leaſe for years be made of land, and then the leſſor by the premiſſes of the deed granteth the land to another To have and to hold the reverſion of the land to him &c. for life; this *Habendum* ſhall ſtand. So if by the Premiſſes of the deed the reverſion be granted To have and to hold the land it ſelfe, this is good and both ſhall ſtand together, but nothing is granted in either caſe but the reverſion.

Co. 10. 107. 108.

If the next Advowſon of a Church be granted to three To have & to hold to them and either of them jointly and ſeverally; this is joint and the *Habendum* is void. * And yet if one grant land to two by

Dier 304. Co.5.19.

* Co.2.55.

the Premiſſes of the deed To have and to hold to one of them for life, the remainder to the other for life; this is not repugnant but ſhall ſtand together and make the eſtates ſeverall and in remainder one after another. So if a leaſe be made to two To have and to hold the one moity to the one and the other moity to the other; by this they have ſeverall eſtates. *Expreſſum facit ſemper ceſſare tacitum.* Super Lit. 183. Dier 106.

If a man have a leaſe for years of land, and he reciting this, by the Premiſſes of the deed doth grant all his eſtate in the land, To have and to hold the land or the terme after his death, or for part of the time only; in this caſe the *Habendum* is void and the whole eſtate doth paſſe immediatly by the premiſſes. Dier 272. Plow. 520.

If a tenant for life ſurrender a moity of his land, and the leſſor grant it all to a ſtranger To have and to hold the one moity for life and the other moity for 40. years after the death of the tenant for life; this *Habendum* ſhall ſtand and enure according to the grant. Dier 256.

If a man ſeiſed of land in fee make a leaſe for life of it to one, and after grant the reverſion of it to another To have and to hold the reverſion and the tenements aforeſaid *cum poſt mortem forisfact' &c. vacare acciderit*; in this caſe the *Habendum* and premiſſes may ſtand together. It is uſuall in the *Habendum* of a deed to ſet down to what uſe the party to whom the deed ismade ſhal have the thing granted, But touching this and the matters that doe concern uſes ſee *Vſe infra* at large. And ſee alſo more for the *Expoſition* of *Deeds* in *Teſtaments Numb.* 8. *Grant Numb.* 4. *Leaſes cap.* 14. *Numb.* 4. And here note that parol-agreements and conveyances have the ſame conſtruction for the moſt part made upon them as are made before upon deeds. And therefore if a man by word of mouth without any writing grant all his lands in Dale to *I S* To have and to hold to him for life, but doth not ſay for whoſe life; this ſhall have the ſame conſtruction as ſuch a grant made in writing hath. Curia paſ. 7 Jac. Co. B. Note.

In the reſervation of rent. And how that ſhall be taken.

This is alwaies taken moſt in advantage of the feoffee, grantee, leſſee, &c. and againſt the feoffor, grantor, leſſor, &c. and yet ſo as the rent be paid during the time. And therefore if the reſervation be only to the feoffor, grantor, &c. and the deed doe not ſay alſo [to his heires, executors &c.] this reſervation ſhall continue only for the life time of the grantor and ſhall determine with his death. And ſo alſo it is where the reſervation is to the feoffor or his heires, in the disjunctive, for in this caſe the rent ſhall continue only during the life of the grantor. And yet if one make a leaſe for years rendring yearly during the ſaid terme to the leſſor or his heirs or executors; this is a good reſervation during all the terme, by reaſon of theſe words [during the terme.] So if the feoffor, or leſſor be Co. 5. 111. 10. 106. 8. 71 Co. ſuper Lit. 47. 213, 214.

ſeiſed

Plow. 176. 21 H. 7. 25. 27 H. 8. 19. Dier 45.

feiſed in fee, and make a feoffement in fee, or leaſe for life or years, rendring rent to the feoffor or leſſor or his executors or aſſignes; in this caſe the rent ſhall continue only for the life of the leſſor. But if the reſervation be to the feoffor, or leſſor, his heires and aſſignes, in the copulative, or in the disjunctive to him or his heires, or to him and his ſucceſſors (if it be the leaſe of a Corporation) during the terme; then all the aſſignees of the reverſion ſhall enjoy it. And if the reſervation be thus, yeelding and paying ſo much rent (without any more words,) this ſhall be taken for all the time of the eſtate and ſhall goe to him in reverſion accordingly. And if the reſervation be, rendring ſo much rent during the ſaid terme, and doth not ſay to whom; in this caſe it ſhall be conſtrued to be to him that hath the reverſion and accordingly it ſhall be paid and ſhall continue during the term. * But if *A* be ſeiſed of land in fee, and make a leaſe for years of it rendring rent to *A* [without ſaying To his heires &c.] during the ſaid terme; this rent ſhall continue only during the life of *A* and no longer. And yet if *A* be poſſeſſed of a terme only, and make an under-leaſe or aſſignement with ſuch a reſervation; *Quere.*

* So held in the caſe of Bland M. 8 Car. B.R.

27 H. 8. 19.

If the reſervation be thus, Yeelding and paying 20 s. during the ſaid terme, omiting the word [yearly] this ſhall be taken, to be not once only but yearly during the terme and accordingly it muſt be paid.† And if a leaſe be made for years, rendring in every middle of the yeare, *quolibet medio Anni* 20 l. this ſhall be paid during the term.

† Paſ. 21 Jac. Hudſon & Brent B.R.

Co. 10. 107.

If one by deed indented grant lands to *A* To have and to hold to him for life, the remainder to *B* and the heires of his body, and for default of ſuch iſſue to remaine to *D* in taile, or for life, yeelding therefore yearly &c. in this caſe the reſervation ſhall extend to all the eſtates.

Dier 136. Co. 5. 111. ſuper Lit. 217.

If a leaſe be made the 10th. day of *Auguſt*, rendring rent at our Lady day and Michaelmas; in this caſe albeit our Lady day be firſt named, yet the firſt payment ſhall be at Michaelmas next after the making of the deed.

Per Williams & Yelverton Iuſt. Ch. Iuſt. contra 9 Jac. B.R.

If the reſervation be at Michaelmas or within 20 daies after: in this caſe the 20th day ſhall be taken excluſive. But if the rent be to paid at Michaelmas or by the ſpace of 20. daies after, in this caſe the 20th day ſhall be taken incluſive.

Co. 10. 106.

If a leaſe be made in *December*, from the Nativity of Chriſt next for one yeare with this addition, *Et ſi in fine dicti Anni ambæ partes agrearent quod eadem dimiſſio foret renovata tunc habend' & tenend' premiſſa dicto I S* (the leſſee) *ab & poſt dictum feſtum tunc proxim. ſequend. uſque finem trium Annorum. Reddendo inde Annuatim durante dicto termino dict. W S. &c.* in this caſe the reſervation ſhall relate to both the terms, and the rent ſhall be paid the firſt yeare although they doe not agree to renew the leaſe.

If two Jointenants by deed poll, or by word make a leaſe for life reſerving a rent to one of them; this ſhall goe to them both. So if one of them be tenant for life and the other in fee, and they joine in a leaſe for life, or gift in taile reſerving a rent; the rent ſhall enure to them both. But if tenant for life and he in reverſion joine in a leaſe for life, or gift in taile by deed reſerving a rent, the rent ſhall enure to the tenant for life only during his life and after to him in reverſion. Co. ſuper Lit. 214.

If two tenants in common make a leaſe of their land rendring 20 s. rent; this ſhall be but one 20 s. and not two 20 s. So if the leaſe be rendring a Hawke or a Horſe; by this they ſhall have but one Hawke, and one Horſe, and not two Hawkes or two Horſes, as it ſhall be in caſes where they doe joine in the grant of ſuch things out of their land. Plow. 171. 289. Co. 10. 106.

If one make a gift in taile of two acres of land, the one at the cõmon law & the other in Burrow Engliſh rendring an oxe to him and his heires, and the donee having two ſonnes die, and the eldeſt ſonne doth inherite the one acre and the youngeſt ſonne doth inherite the other; in this caſe the donor and his heires ſhall have but one oxe &c. Co. 10. 106.

If one make a leaſe of land for years if the leſſee live ſo long, and after the leſſor by his deed indented doth grant the land to another To have and to hold the reverſion to the grantee for his life *cum poſt mortem &c. aut aliter acciderit vacare reddend' inde Annuatim* to the grantor and his heires *cum reverſio predicta acciderit 9 s. 4 d. per Annum*; in this caſe this reſervation of rent ſhall not begin before the reverſion happen in poſſeſſion. Co. 10. 107 108.

If rent be reſerved to be paid at two termes, and it is not ſaid by equall portions; yet it ſhall be ſo taken and it muſt be ſo paid. 13 H. 4. Avowry 240.

In other reſpects. If one be poſſeſſed of a terme of years of land, and grant it by deed to *I S* for his life, and after his death to *I D*; in this caſe the whole terme is granted to *I S*, and his executors, adminiſtrators and aſſignes ſhall have it and not *I D*. But if a terme were ſo deviſed by Will, *contra*. And if one give or grant to another his horſe, or his bookes for his life, and that after his death they ſhall remaine to another, the remainder is void, and the firſt ſhall have it for ever, for the gift or grant of ſuch a thing for an houre is a gift of it for ever. Co. 8. 95. 10. 47. Bro. Done 57. Fitz. Done 2.

Deviſe.

Remainder.

See more in *Vſe Numb.* 7.

And it is now time that we come to the other parts of a Deed and firſt to a *Condition*.

CHAP.

CHAP. VI.

Of a Condition.

Termes of the Law. Co. ſuper Lit. 201.

A Condition is a kind of Law or bridle annexed to ones act ſtaying or ſuſpending the ſame and making it uncertaine whether it ſhall take effect or no, Or as others define it, It is *modus* an Equality annexed by him that eſtate intereſt or right to the land &c. whereby an eſtate &c. may either be created, defeated or enlarged upon an incertaine event. And this doth differ from a Limitation, which is the bounds or compaſſe of an eſtate, or the time how long an eſtate ſhall continue. And this ſometimes is contained in a Teſtament or Will, and ſometimes in a deed. And when it is in a deed it hath no proper place aſſigned it, but it may be in any part of the deed; howbeit for the moſt part it is placed next after the *Habendum*, or next after the Reſervation of the rent. It is alſo ſometimes annexed to and depending upon eſtates; and ſometimes annexed to, and depending upon Recognizances, Statutes, Obligations, contracts, and other things: Conditions are alſo contained in Acts of Parliament and Records. But of theſe we ſpeake not here in the enſuing matters, which are eſpecially to be applied to ſuch Conditions as are uſually contained in deeds and annexed to the realty. *i.* to eſtates in feeſimple, feetaile, for life, or years.

1. Condition. *Quid.*

Limitation. *Quid.*

27 H.8.16. Co.2.70.

Co.ſuper Lit. 201. Plow. Colthirſts caſe. Co. 8,43.

And of theſe Conditions there are divers kinds. For ſome are in deed or Expreſſe. *i.* when the condition is expreſſed by the party in legall terms and by expreſſe words in writing or without writing knit to the eſtate, as if I enfeoffe a man of land rendring rent at a day on condition that if it be not paid it ſhall be lawfull for me to reenter. And ſome are in law or Implied. *i.* when the condition is *tacitè* created by the law without any words uſed by the party. The firſt ſort of conditions alſo are ſome of them precedent or executed. *i.* when the condition muſt be fulfilled ere the eſtate can take effect, as where an agreement is between me and *I S* that if he pay me 10 l. at Michaelmas he ſhall have ſuch a ground of mine for 10. years; or I make a leaſe of land to *I S* for 10. years, provided that if he pay me 10 l. at Michaelmas he ſhall have the land to him and his heires; and in theſe caſes by the performance of the condition the eſtate is acquired. And ſome of them are Subſequent and Executory. *i.* when the eſtate is executed but the continuance thereof dependeth upon the breach or per-

2. Quotuplex.

formance of the condition, as where a leaſe is made for years, on condition that the leſſee ſhall pay 10 l. to the leſſor at Michaelmas or elſe his leaſe ſhall be void, and in this caſe by the performance of the condition the eſtate is held and kept. Theſe conditions alſo are ſome of them in the affirmative. *i.* that doe conſiſt of doing, as providing that the leſſee ſhall pay the rent, or pay 10 l. to the leſſor &c. And ſome in the Negative. *i.* that conſiſt of not doing, as provided that the leſſee ſhall not alien &c. And ſome of them are in the Affirmative which imply a Negative, as provided that if the rent be unpaid that the leſſor ſhall reenter which implieth a Negative, *viz.* not paid. Conditions alſo are ſome of them collaterall. *i.* when the act to be done is a collaterall act, as that the party ſhall pay 10 l. goe to Rome, or the like. And ſome are inherent. *i.* ſuch as are annexed to the rent reſerved out of the land whereof the eſtate is made. And ſome of them alſo are Reſtrictive & contain a reſtraint, as that the leſſee ſhall not alien, or do waſt, or the like. And ſome are compulſory, as that the leſſee ſhall pay to the leſſor 10 l. ſuch a day or his leaſe ſhall be void. And ſome of them be ſingle. *i.* to doe one thing only. And ſome copulative *i.* to doe divers things. And ſome diſjunctive. *i.* when one thing of divers is required to be done. And ſome conditions make the eſtate whereunto they are annexed voidable only by entry or claime. And ſome of them make the eſtate void *ipſo facto* without entry or claime. And ſometimes they tend to deſtroy eſtates, ſometimes to make, or to enlarge eſtates, and ſometimes neither to make nor deſtroy, but only to clogge eſtates, as where a leaſe is made rendring rent on a day, on condition if it be not paid that the leſſor ſhall enter on the land and keep it till the rent be paid. And all theſe waies conditions may be lawfully made. *Ineſſe poteſt donationi modus, conditio ſive Cauſa.*

Co. ſuper Lit. 201.

Lit. Sect. 327.

The conditions in law or implied are either by Common law, or by Statute law. The firſt ſort are ſome of them founded on ſkill, as where an office is granted, there is a condition *tacite* implied, that if the grantee doth not execute it faithfully according to the truſt the grantor may put him out. And ſome are without ſkill, as where an eſtate is made for life or years of land, there is this condition implied, that if the leſſee doe waſt he ſhall forfeit the place waſted, or if the leſſee make a feoffement of the land he ſhall forfeit his eſtate and the leſſor ſhall enter. And where an eſtate is made in fee of land; this condition is implied, that the feoffee ſhall not alien it in Mortmaine. And theſe conditions doe ſomtimes give a recovery, and no entry, as in the caſe of waſt. And ſometimes they give an entry and no recovery, as in the caſe of Alienation in Mortmaine. In the caſe of exchange alſo there is a condition in law, for which ſee *Exchange*.

Co. 8. 44. 3. 65. Lit. 325, 378. F.N.B. 205.

Co. 4. 121.

It

3. What things may be made and done upon Condition. And to what things a Condition may be annexed. Or not. And how it may be made and annexed thereunto.

21 H.7.24. Perk.Sect. 707,708. &c. It is a generall rule, That when a man hath a thing he may condition with it as he will. Conditions in deed therefore may be annexed to things inheritable, to frank tenements, or to chattells reall and perſonall: as for example, If a feoffement in fee, gift in taile, or leaſe for life be made of lands or tenements, or a grant be of a rent, Common, or the like thing in feeſimple, feetaile, or for life, theſe things may be done upon condition. So a leaſe for years of land, or a grant of a rent &c. for years may be made upon condition. And a leaſe may be made for five years on condition that if the leſſee pay to the leſſor within the firſt two years 10. markes that then he ſhall have the fee, otherwiſe but for five years. Alſo a Gardian in Chivalry may grant the wardſhip of the body and land or either of them on condition. A tenant by ſtatute Marchant, Staple, or Elegit may grant their eſtates upon condition. The Lord may grant his Seigniory to his tenant on condition. The tenant for life may grant his eſtate to his leſſor, or him in reverſion upon condition. The King may make letters Patents of denization to an alien, or a Charter of pardon to a man for his life upon condition. Alſo releaſes and confirmations may be made upon condition. And a ſubmiſſion to an award may be upon a condition. But an Inſtitution to a Benefice, or an induction may not be on a condition. An atturnement, or an expreſſe Manumiſſion of a villaine cannot be upon a condition ſubſequent, as it may be upon a condition precedent. And a condition cannot be releaſed upon a condition, as ſome hold. But the contrary is held by others cleerly and that there is no difference between this and a releaſe of a right *Ideo quere*. An award cannot be made on a condition as was held in *Sherers* caſe 35 *Eliz.* A contract or ſale of a Chattell perſonall, as an oxe or the like, may be upon condition, as if *A* ſell his horſe to *B* that if *A* doe ſuch an act, then that *B* ſhall pay 5 l. at the day agreed upon, otherwiſe but 4 li. So if I agree with a Phyſitian that if he cure ſuch a diſeaſe he ſhall have ſo much; and in this caſe he cannot have the money untill he have done the cure. As where I promiſe a man 10 l. when he hath built ſuch a houſe, in this caſe he cannot have the money untill the houſe be built. Alſo retaining of ſervants, delivery of Charters, and divers other things may be done upon condition. And if an Executor aſſent to a legacy upon a condition; the aſſent is good but the condition is void.

Perk.Sect. 281. Co.ſuper. Lit.274. Perk.Sect. 724. Co.8.98. Dier 242. Co.2.74. Co.ſuper Lit.274. Perk.Sect. 712,713. Co.4.28.

Lit.Sect. 365. Co.ſuper Lit. 161,216. Doct.& Stu.16. Perk.Sect. 715. And conditions annexed to eſtates in all the caſes before howſoever they are moſt frequently and ſafely made by deed in writing, yet it ſeemes ſuch conditions may be made and annexed to any eſtate of a thing grantable without deed without any writing at all; howſoever in ſome caſes it cannot be well pleaded nor uſed without a deed, for it is a rule, That if a condition be pleaded

in any action to defeat a freehold, the deed wherein the condition is contained muſt bee ſhewed. But of chattels reall, as leaſes for years and the like, or grants of chattels perſonall, a man may plead that ſuch leaſes and grants were made upon condition, without ſhewing the deed. And in the firſt caſe alſo of a condition to avoid a freehold, it may be given in evidence to a Jury, and they may finde the matter at large as it is, and ſo the party may have advantage of the condition without ſhewing any deed of it. Alſo the pleading of a feoffment in fee on condition without deed and reentry, is good if the party confeſſe the condition. A condition may be annexed to a limitation of uſes, and thereby the ſame may be made void. See *Vſe*. Co.5.40. Co.8.90.

4. The nature of a condition in deed, and of a limitation.

The nature of an expreſſe condition annexed to an eſtate in generall is this: That it cannot be made by, nor reſerved to a ſtranger, but it muſt be made by, and reſerved to him that doth make the eſtate. And it cannot bee granted over to another except it be to and with the land or thing unto which it is annexed and incident. And ſo it is not grantable in all caſes; for the eſtates of both the parties are ſo ſuſpended by the condition, that neither of them alone can well make any eſtate, or charge, of or upon the land; for the party that doth depart with the eſtate, and hath nothing but a poſſibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the eſtate, grant or charge it, it will be ſubject to the condition ſtill, for the condition doth always attend and waite upon the eſtate or thing whereunto it is annexed: ſo that although the ſame doe paſſe through the hands of an hundred men, yet is it ſubject to the condition ſtill; And albeit ſome of them be perſons priviledged in divers caſes, as the King, infants, and women covert, yet they alſo are bound by the condition. And a man that comes to the thing by wrong, as a diſſeiſor of land whereof there is an eſtate upon condition in beeing, ſhall hold the ſame ſubject to the condition alſo. And when the condition is broken or performed &c. the whole eſtate ſhall be defeated: So that if there be a leaſe for life made by deed and not by will, the remainder over in fee, on condition that the leſſee for life ſhall pay ten pound to the leſſor; if the leſſee pay not this ten pound, the eſtate in remainder is avoided alſo. *Et ſic è converſo*, unleſſe by ſpeciall limitation it be otherwiſe provided, as if *A* grant by Indenture land to *B* for life, the remainder to *C* in fee, rendring rent to *A* and his heires, with condition that if the rent be behind, to reenter and retain the land during the life of *B* and no more, and *A* doth enter in the life time of *B* for non payment; this doth not deſtroy the remainder. And if tenant for life and he in remainder join in a feoffment on condition that if &c, that then the tenant for life ſhall reenter; this

Co. ſuper Litt. 186. Perk. Sect. 818. Litt. Sect. 358. Dier 6.

Dier 298. Co. 8. 44. Perk. Sect. 818, 819.

Dier 117. Co. 10. in Mary Portingtons caſe. Super Litt. 230. Litt. Sect. 374. Perk. Sect. 564. fo. 108. Litt. fo. 224. Dier 127. Co. ſuper Litt. 224

is

is good without defeating the entire eſtate: for regularly a condition cannot avoid a part of an eſtate onely, and leave another part entire; neither can the eſtate be void as to one perſon, and good as to another, (except it be in caſe of a condition annexed to an eſtate limited by way of uſe, as in *Frances* caſe *Co.*8.90.) And yet if *A* make a gift in tail to *B*, the remainder to *B* in fee upon condition not to alien, and *B* doth alien; this doth defeat the eſtate taile one-
Co.4.121. Dier 127. ly, and not the remainder. Alſo the whole eſtate of the whole and not of ſome part only, ſhall be avoided, except by agreement the condition be ſpecially reſtrained to ſome part, and the reentry given in that part only, as where a feoffment is made of two acres, on condition that if ſuch a thing happen, the feoffor ſhall enter in-
Perk.Sect. 840. to one of them. And further when he that hath right doth reenter by force of ſuch condition, hee ſhall avoid all charges and incumbrances put upon the land after the condition made, for hee that doth enter into land by force of ſuch a condition, muſt have
See infra. it again in the ſame plight as it was when he parted with it. And finally, a condition for the moſt part will not determine the eſtate without entrie or claim. So that howſoever a limitation hath much
[a] Litt.Sect. 380. affinity and agreement with a condition, [a] and therefore it is ſome-
[b] Co.9.128. 8.17.6.41. Plow.413. times called a condition in law[b], both of them doe determine an eſtate in being before, and a limitation cannot make an eſtate to be void as to one perſon, and good as to another, as if a gift bee
Co.10.40. Dier 300. Litt.Sect.90 made in taile to one and his heires males, untill he doe ſuch a thing, and then his eſtate to ceaſe and goe to another: yet herein they differ: 1. A ſtranger may take advantage of an eſtate determined by limitation, and ſo he cannot upon a condition. 2. A limitation doth always determine the eſtate without entrie or claime, and ſo doth not a condition.

Co.2.Lord Cromwels caſe.10 Mary Portingtons caſe. Co. ſuper Litt.204. 27 H.8.16. Litt.Sect. 328, 329, 330, 331. Conditions annexed to eſtates are ſometimes ſo placed and confounded amongſt covenants, ſometimes ſo ambiguouſly drawn, and at all times have in their drawing ſo much affinity with limitations, that it is hard to diſcern and diſtinguiſh them. Know therefore that for the moſt part conditions have conditionall words in their frontiſpice, and doe begin therewith, and that amongſt theſe words there are three words that are moſt proper, which in and of their own nature and efficacy without any addition of other words of reentry in the concluſion of the condition that doe make the eſtate conditionall, as *Proviſo*, *Ita quod*, and *Sub conditione*. And therefore if *A* grant lands to *B*, To have and to hold to him and his heires, Provided that, or ſo as, or under this condition, that *B* doe pay to *A* ten pound at Eaſter next; this is a good condition, and the eſtate is conditionall without any more words. But there are other words; as *Si*, *ſi contingat*, and the like, that will make an eſtate conditionall alſo, but then they muſt have other words join-

5. When an eſtate ſhall be conditionall. And what words will make a condition. And what not. And how a condition may bee knowne from a covenant, or limitation.

Proviſo. Ita quod. Sub conditione.

Si. Si contingat.

ed

ed with them, and added to them in the cloſe of the condition, as that then the grantor ſhall reenter, or that then the eſtate ſhall be void, or the like. And therefore if *A* grant lands to *B*, To have and to hold to him and his heirs, and if, or but if it happen the ſaid *B* doe not pay to *A* ten pound at Eaſter, without more words, this is no good condition, but if theſe or ſuch like words be added, that then it ſhall be lawfull for *A* to reenter, then it will be a good condition.

But here note that theſe words *Proviſo*, *Ita quod*, and *ſub conditione*, albeit they bee the moſt proper words to make conditions, yet doe they not always make the eſtate by the deed to bee conditionall, but ſometimes doe ſerve for other purpoſes; for the word *Proviſo* hath divers operations beſides; for ſometimes it doth ſerve for, and work a qualification or limitation, and ſometimes it doth ſerve to make and work a covenant onely. And then only (being inſerted amongſt the covenants of the deed) it doth make the eſtate conditionall when there are theſe things in the caſe. 1. When the clauſe wherein it is hath no dependence upon any other ſentence in the deed, nor doth participate with it, but ſtands originally by and of it ſelfe. 2. When it is compulſory to the feoffee, donee, &c. 3. When it comes on the part, and by the words of the feoffor, donor, leſſor, &c. 4. When it is applied to the eſtate, and not to ſome other matter, as if one grant a Manor with an Advowſon appendant, and after the *Habendum* and reſervation of rent amongſt the covenants, there is this clauſe inſerted [Provided that the grantee ſhall regrant the Advowſon for the life of the grantor] this is a good condition. And thus it may be alſo a condition and a covenant: as if the words run thus, Provided always, and the feoffee &c. doth covenant &c. that neither he nor his heires ſhall doe ſuch an act, this is both a condition and a covenant. But if the clauſe have dependence on another clauſe of the deed, or bee the words of the feoffee &c. to compell the feoffor to doe ſomething, then is it not a condition but a covenant onely, as if there be in the deed a covenant that the leſſee ſhall skowre the ditches, and then theſe words follow [Provided that the leſſor ſhall cary away the earth.] Or there is a covenant that the leſſee ſhall repaire the houſes, and then theſe words follow [Provided that the leſſor doe provide timber.] So if this clauſe bee applied to ſome other thing, and not to the thing granted, then is it no condition, as if a leaſe of land be made rendring rent at *B*, provided that if ſuch a thing happen, it ſhall be paid at *C*; this doth not make the eſtate conditionall. Or a leaſe is made for yeares without impeachment of waſte, *proviſo quod non proſternet domus voluntarie*; in this caſe howſoever this doth make the priviledge, yet doth it not make the eſtate conditionall. Or a leaſe is made for years rendring rent, provided

Co. ſuper Litt. 146. Co.2.70. Dier 152. 311. Litt. Bro.256. Dier 6.222. Plow.136. 5 H.7.7. Perk. Sect. 732.

Covenant.

vided that the leſſor ſhall not diſtrain for the rent; in this caſe this is a good condition, but not annexed to the eſtate. So if in a deed of bargaine and ſale of land after the *Habendum*, there are theſe words, *viz.* upon theſe conditions following, *viz.* that if the vendor pay the vendee twenty pound at Eaſter, and enfeoffe him of a meadow called *S* before Whitſontide, that the bargain ſhall bee void. Provided nevertheleſſe that the bargainer ſhall hold the land for twenty years without the let of the bargainee; it ſeemes this Provided in this caſe doth not make a condition. So if a leaſe be made of a houſe, & amongſt the covenants theſe words are inſerted, [Provided alſo that if the leſſor will dwell upon it, or keep it in his hands, then the leſſee, his executors and aſſigns doth covenant upon one yeares warning to remove and give place to the leſſor this leaſe notwithſtanding;] it ſeemes this is no condition but a covenant onely. [a] If a leaſe be made, provided that if the rent bee behinde, without any more words; this is no good condition.

Dier 318.

27 H.8.15. Bro. Condition 7.

a Curia paſche 14 Jac. Br. in the caſe of *Muddy*.

The word *ſi* alſo doth not always make a condition, for ſometimes it makes a limitation, as when a leaſe is made for years if *I S* ſhall live ſo long.

Co. ſuper Litt.

There are other words alſo that in the Kings grant, in laſt Wils and Teſtaments, and other ſpeciall caſes doe make conditions, as *ea intentione, ad effectum, propoſitum, intentionem*, paying, and the like. So that if one deviſe his land to *I S*, *ea intentione &c.* that he ſhall pay to *W S* tenne pound, or paying, or ſo as he pay to *W S* tenne pound, or to ſell &c. theſe are good conditions. But theſe words regularly doe not make a condition when they are uſed in deeds. And therefore if one make a feoffment in fee *ea intentione*, *ad effectum &c.* that the feoffee ſhall doe, or not doe ſuch an act; theſe words doe not make the eſtate conditionall, but it is abſolute notwithſtanding. And yet perhaps theſe words being conjoined with ſome others may make a condition, as if lands be granted *ea intentione quod ſi defecerit &c. tunc quod reintrabit*, or the like.

Co. ſuper Litt. 236, 237. Doct. & Stud. 122. Dier 138. Plow. 142. 7 H. 4. 22. Co. ſuper Litt. 204. Co. 10. 42. Dier 318. Doct. & Stu. 34.

Alſo conditions are ſometimes made eſpecially in eſtates and leaſes for years, without any of theſe formall words when the apparent intent of the leſſor is to make the eſtate conditionall, albeit the words be not uſed as the words of the leſſor, but as the words of the leſſee, or indefinitely of neither. And therefore it hath been ſaid, That if an Indenture bee made between *A* and *B* thus: It is agreed and covenanted between the parties aforeſaid, that *B* ſhall have the land for yeares, and that hee ſhall not alien it; that this eſtate is conditionall. But it ſeems this is not law. But if this clauſe be inſerted amongſt other covenants, *viz.* If the leſſee hinder the leſſor to fell, cut, and cary away the trees upon the lands deviſed, that the leſſor may reenter and the leaſe ſhall be void; this is a good condition, and ſo it hath been adjudged in the caſe of *Haward*

Doct. & Stu. 94. Dier 6. 91. 63. 92.

Haward and *Fulcher*, *Hil.* 3. *Car' B. R.* And if a leſſee for yeares doe covenant in his leaſe, that if hee, his executors, or aſſignes, ſhall alien, that it ſhall be lawfull for the leſſor to reenter; it ſeems this is a good condition, and not a covenant onely. And if a leaſe for years be made, and this clauſe is inſerted in the deed, It is agreed between the parties that if the leſſee do not pay 10 pound to the leſſor at Eaſter, that from thenceforth the leaſe ſhall bee void; this is a good condition. And if a leaſe bee made with this clauſe inſerted in the deed, it is agreed that whoſoever ſhall have the eſtate or intereſt, that he or they ſhall find ſureties within the year for the rent, otherwiſe the eſtate ſhall ceaſe; it ſeems this is a good condition. And if a leaſe for years be made with this clauſe inſerted, And that it ſhall not be lawfull for the leſſee to alien without licence of the leſſor, under pain of forfeiture; this is a good condition. And if a leaſe for years be made of a houſe, with this clauſe inſerted in the deed, And the leſſee ſhall continually dwell upon the ſame houſe upon pain of forfeiture of the ſaid terme; this is a good condition. And if in a leaſe for years the leſſee covenant to pay ſo much rent, and then theſe words are inſerted, And if it ſhall happen the ſaid yearly rent &c. then the leſſee doth covenant and grant &c. that the leaſe ſhall be void; it ſeems this is a good condition, and ſo hath it been ever taken as was ſaid by *Juſt. Dodridge*, *Hil.* 3. *Car'*. And in all theſe caſes the eſtate is conditionall. But in caſes of feoffments in fee, gifts in taile, and leaſes for life, it ſeemes words penned in this manner will not make conditions, but that in theſe caſes the preciſe and formall words of a condition are requiſite. And therefore that if a feoffment be made by deed, and therein is inſerted this clauſe, That it is agreed, or that the feoffee doth covenant that if the feoffor doe ſuch an act, that the feoffor ſhall reenter; this is no condition, nor the eſtate hereby made conditionall. And yet ſee *Perk. Sect.* 744.

Dier 66.65. Curia Mich. 37, 38. Eliz. B. R.

Dier 79.27. Co. ſuper Litt. 204.

Plow. 132.

Co. ſuper Litt. 204. Doct. & St. 94. Dier 65. 138.

If one make a leaſe for yeares on condition to pay rent at foure feaſts, and after there is a clauſe in the deed. And if the rent ſhall be behinde, &c. that he ſhall diſtrain; this clauſe doth not take away the condition, but the ſame doth continue and the eſtate is conditionall ſtill. See more in the next queſtion.

Dier 348.

In the making of eſtates the cauſe is regarded. And in caſe of the grant of lands or tenements, *cauſa* doth ſometimes make a condition, as if a woman give lands to a man and his heirs, *cauſa matrimonii prælocuti*; in this caſe if ſhe either mary the man, or the man refuſe to mary her, ſhee ſhall have the land again to her and her heirs. But of the other ſide, if a man give land to a woman and to her heirs *cauſa matrimonii prælocuti*, though he mary her, or the woman refuſe, he ſhall not have the lands again to him and his heirs. And in the caſe of a grant executorie the word [*pro*] may make a con-

Co. ſuper Litt. 204.

Co. ſuper Litt. 204. Co. 10. 42. Plow. 141. 9 Ed. 4. 19. 15 Ed. 4. 2. Dier 6.

condition. And therefore if a man grant me an Annuity *pro una acra terre*, or *pro decimis &c.* or if hee grant mee an Annuity for a way, or a gutter through my ground, this is conditionall, and if he be diſturbed in the way, acre of land, tithes, or gutter, he may refuſe to pay the Annuity. So if an Annuity be granted to an Officer for the executing of his office, or *pro conſilio impendendo*, if the grantee doe not execute the office, or give counſell, &c. the Annuity ſhall ceaſe. But if one grant me Tithes or an Annuity, and I grant an Annuity for theſe Tithes, or grant to give counſell for the Annuity; it ſeems the grants that are in this manner are not conditionall, but abſolute. So if I *pro conſilio &c.* or *pro una acra terre &c.* make a feoffment in fee, or leaſe for life of another acre, theſe eſtates are not conditionall. And if one deviſe land to be ſold by his executors, and to be diſtributed for his ſoul; by this it ſeems the eſtate or power of the executors is conditionall. So if one deviſe his land to finde a Preacher or a Chaplain. But otherwiſe it ſeems it is of land ſo conveyed by deed in a mans life time. And if a feoffement be made of land *ad erudiendum filium*; ſome have ſaid this eſtate is conditionall.

Dier 7. 127. See Teſtament.

Teſtament.

Plow. 141. 142.

Co. ſuper Litt. 234, 235. Co. 10. 42. Plow. 413. Litt. Sect. 90. Dier 290.

The moſt apt and proper words to make a limitation of an eſtate are *Quamdiu*, *Dummodo*, *Dum*, *Quouſque*, *Si*, and ſuch like. And therefore if *A* grant lands to *B*, To have and to hold to him and his heirs, untill *B* goe to Rome, or untill he be promoted to a Benefice, or untill *B* pay to *A*, or *A* pay to *B* twenty pound, or ſo long as *I S* ſhall live, or if *A* grant lands to *B*, To have and to hold to him, his executors, &c. if *I S* and *I D* ſhall live ſo long. Or if *A* grant lands to *B*, To have and to hold to him for the life of *B*, So that *B* pay 20 pound to *A* at Eaſter following; theſe are not conditionall, but limited to eſtates. So if *A* grant lands to *B* To have and to hold to him for ſo long as he ſhall keep himſelf a widower, or *dum ſola fuit*, or *durante viduitate*, if the grantee be a widow, theſe are good limited eſtates, but theſe words doe not make the eſtates to be conditionall.

Limitation.

Dier 125. Plow. 159. Perk. Sect. 740.

If the words in the cloſe or concluſion of a condition bee thus, That the land ſhall return to the feoffor, &c. or that hee ſhall take it again and turn it to his own profit, or that the land ſhall revert, or that the feoffor ſhall *recipere* the land; theſe are either of them good words in a condition to give a reentry, as good as the word [*reenter*] and by theſe words the eſtate will bee made conditionall.

Co. ſuper Lit. 233, 234. Co. 8. 44.

The tenant by the curteſie, the tenant in taile after the poſſibility of iſſue extinct, the tenant in dower, the tenant for life, the tenant for yeares, by Statute, or Elegit, Gardian, &c. doe hold their eſtates ſubject to a condition in law, ſo that if either of them alien his land in fee, or claim a greater eſtate in a court of record then his own, he doth forfeit his eſtate, and he in remainder or reverſion

6. What ſhall bee ſaid a condition in law. And when an eſtate ſhall be ſubject to ſuch a condition.

on may enter, and if ſuch a tenant doe waſte, hee in reverſion ſhall recover the place waſted. The tenant in feeſimple doth hold his eſtate ſubject to a condition in law, ſo that if hee alien his land in Mortmain, he doth forfeit it, and the Lord may enter upon him. So alſo he that doth take land in exchange doth hold it under a condition in law, *viz.* that if the land he give in exchange for that land be recovered from him that hath it, that he ſhall enter upon his own land again. Alſo every officer that hath to doe in the adminiſtration of Juſtice, all Keepers of Parks, Stewards, Beadles, Bailiffes, and ſuch like, hold their offices under a condition in law; ſo that if they doe not duly execute it, and doe all that thereunto doth appertain, they may forfeit them, and the grantor may put them out. *In quo quis delinquit in eo eſt de jure puniendus.*

7. What ſhall bee ſaid a good condition in deed or limitation in his originall creation. And what not.

To every good condition is required an externall form. *i.* words to declare an intent in the party to have the eſtate conditionall, as in the caſes before. And an internall form. *i.* ſuch matter as whereof a condition may be made.

1. For the manner, and frame, and order of making of it.

As to things executed, the condition muſt be made and annexed to the eſtate at the time of the making of it; but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the ſame deed wherein the eſtate is made, if it bee delivered at the ſame time it is as good as if it were contained in the ſame deed. And therefore if a man make a feoffment, leaſe, or the like, by one deed abſolute, and at the ſame time make another deed of defeaſance or condition, and deliver both together, this is a good condition, and will make the eſtate conditionall. But if the defeaſance be ſealed and delivered before, or after the deed, *contra.* And therefore if one make an abſolute feoffement in fee, and before or after the ſealing or delivery of that deed the feoffor declare himſelf by deed: or the feoffor and feoffee agree by deed that the eſtate made before, or to be made after, ſhall be conditionall, yet this is not conditionall. And yet if an Annuity be granted abſolutely by one deed, and after the grantee grant to the grantor, that if the grantor doe ſuch a thing, the Annuity ſhall ceaſe: in this caſe the Annuity is conditionall.

Perk. Sect. 717. Co.1. 113. Plow. 133. Co. ſuper Litt. 146 217. Co.2.71

A condition may be annexed to an eſtate by way of uſe, as if a feoffment be made to *A*, to the uſe of *B*, and his heires, on condition that *B* ſhall pay to the feoffor twenty pound ſuch a day; this is a good condition. So if one covenant to ſtand ſeiſed of lands to the uſe of *B* and his heirs, on condition that if he pay him tenne pound, the uſe ſhall be void, or the like. Alſo a condition may be annexed to an eſtate created by Will, as if one deviſe land to *I S* for his life, Provided that he pay ten pound yearly to *I D*; this is a good condition. Whereof ſee in *Teſtament.*

Co.146. Hil. 40. Jac. B.R. Warners caſe. Co.1. 112. Albanies caſe.

Dier 126. 348.

A rent, or any ſuch like thing may be granted on condition, that if

Co.8.17. 24 Ed. 3.29.

if ſuch a thing bee or bee not done, the rent ſhall ceaſe for a time, and then revive again, and this condition is good. But in caſe of land it is otherwiſe, for that cannot bee granted after this manner.

Co.1.86. Perk.Sect. 718. Co.4. 121.Dier 6. Alſo a condition to make an eſtate void for a part of the time is not good. And therefore if a feoffment bee on condition, that upon ſuch a contingent the feoffor ſhall enter and have the land for a time, or the eſtate ſhall be void for a part of the time; or make a leaſe for ten years, provided that upon ſuch a contingent it ſhall be void for five years; theſe conditions are not good. And yet if a feoffment bee made of two acres, provided that upon ſuch a contingent the eſtate ſhall bee void as to one acre onely; this is a good condition.

Co. ſuper Litt.214. Doct. & Stud. 94. 159. 100. Co. ſuper Litt.379. Co. 1. 84. Dier 33. 21 H.7. 11. Dier 4.Co. 8.95. A condition that a ſtranger, or the heir of the feoffor ſhall doe an act is good, as if a feoffment be made to *I S* on condition that *I D* ſhall pay to the feoffor ten pound at Eaſter next; or if a feoffment be made on condition that if the heir of the feoffor pay twenty ſhillings to the feoffee, that the feoffor and his heirs ſhall reenter. But a condition to give a ſtranger a reentry is void ſo farre forth. And therefore if an eſtate bee made upon condition, that upon ſuch a contingent a ſtranger ſhall enter, or the eſtate ſhall ceaſe, and another ſhall have it; howſoever this may be ſo drawne, as it may be a good condition to give him his heirs &c. that doth make the eſtate an entry, yet it cannot be good to give the eſtate or the entry to the ſtranger. So if a feoffment be made on condition that upon ſuch a contingent the feoffor and a ſtranger ſhall enter; this is not good to give an entry to the ſtranger, but it is good to give the feoffor a reentry. And yet by will a man may deviſe a terme after this manner.

Co. ſuper Litt. 213. If a man enfeoffe another, upon condition that he and his heires ſhall render to a ſtranger and his heires a yearely rent of twenty ſhillings, &c. and if hee faile of payment thereof, that the feoffor ſhall reenter; albeit this as a reſervation of rent is meerely void, and the condition that doth call it a rent, is meerly miſtaken, yet the condition is good, and *ut res valeat* the words ſhall be taken contrary to their proper ſenſe.

Perk. Sect. 798. If I enfeoffe *I S* of land on condition that if *I D* give to him ten pound, or goe to Rome before ſuch a day &c. that then the feoffee ſhall pay to me ten pound &c. this is a good condition.

Co. ſuper Litt.207. If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor ten pound, hee ſhall have the fee of land; this is not a good condition. But if he ſay further, And if he fail to pay that, the feoffor ſhall reenter, this is good.

Co. ſuper Litt.224. If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs ſhall reenter; this is a void condition, for when the iſſues fail, the eſtate is at an end.

Con-

Conditions that are ſo penned, as they are inſenſible and altogether incertain are void: as if one make a leaſe on condition that if the rent be behinde to reſtrain, and if there bee not ſufficient, the ground to enter into the premiſſes; this condition is void for inſenſibility, and the eſtate is abſolute. *Et ſic de ſimilibus.*

Muddy & Gardners caſe. Adjudge paſche 14. Jac. B. R. Co. 6. 41.

To enlarge an eſtate.

A condition to enlarge or encreaſe an eſtate may be good, as if a gift be made in tail, or a leaſe be made for life or years, on condition that if ſuch an act be done or not done, the leſſee ſhall have the land to him and his heirs, as if one make a leaſe for life to one, and if the leſſor die without heir of his body, then he doth grant the land to the leſſee and his heirs for ever. Or if land be granted to a man for 5 years, on condition that if the grantee pay to the grantor within the two firſt years ten pound, then that he ſhall have the feeſimple, otherwiſe that he ſhall have the land but for five years, and livery of ſeiſin be made according to the deed; this is a good condition, and by this upon the performance of the condition the feeſimple will paſſe. So if one grant land for five years rendring rent, and that if the leſſee will hold it over to him and his heirs, that he ſhall pay twenty pound rent; this is a good condition, and if he pay the rent, he ſhall have the feeſimple. So if a man make a leaſe for years, and at the ſame time for the ſurety of the terme to the leſſee makes a feoffment to him upon condition that if he be diſturbed in his term, he ſhall have the feeſimple of the land, and deliver both theſe deeds at one time, and give livery of ſeiſin accordingly; this is a good condition. So if a leaſe for life be made upon condition, that if the leſſor or his heirs pay to *B* or his heirs, ten pound at a certain day, that then the leſſor may reenter, and if he doe not pay it at that time, and the leſſee pay to the leſſor or his heirs ten pound at a certain day, after the former day, that then the leſſee ſhall have the land to him and his heirs for ever; this is a good condition. But in all caſes where theſe kind of conditions are good to make the increaſed eſtate good, there muſt be theſe things in the caſe. 1. There muſt be a precedent particular eſtate as an eſtate in tail for life, or years, for a foundation to erect the ſubſequent eſtate upon, and that firſt eſtate alſo muſt be certain and irrevocable, not upon contingency, or with power of revocation. 2. The privity muſt remain untill the time of the performance of the condition, for if the donee or leſſee doe grant away the firſt eſtate, the condition cannot afterwards be performed to effect and produce the encreaſing eſtate. 3. The ſubſequent eſtate muſt veſt *eo inſtanti*, when the contingency upon which the condition dependeth, ſhall happen or never. 4. The firſt and ſecond eſtate muſt take effect by one and the ſame deed, or elſe by two deeds delivered at the ſame time, for *quæ incontinenti fiunt ineſſe videntur.* 5. The condition upon which the increaſe is, muſt

Co. 8. 75. Plow. 477. 481. Litt. Sect. 350. Perk. Sect. 710. Plow. 135. 10 Aſſ. pl. 15. Perk. Sect. 745. 707. Plow. 25. Litt. Sect. 707. 350. Plow. 272. 482, 483. 4 H. 7. 4. See more in the Lord Staffords caſe, Co. 8, 73.

be

be poſſible and lawfull, for upon an impoſſible condition it cannot, and upon an unlawfull condition it ſhall not increaſe.

Co.1.155. Dier 150. If one make a leaſe for life, provided that if the leſſee die within ſixty years, that his executors ſhall have the land for ſo many of the ſixty years as ſhall be to come at the time of his death; this is no good condition to make the eſtate to increaſe, but it may be

Co.1.84. a Covenant. And if a leaſe for years be made, on condition that if the leſſor ſell the reverſion of the ſame land, the leſſee ſhall have the fee of it; this is no good condition to increaſe the eſtate. And

Co.8.75. a poſſibility cannot decreaſe upon a poſſibility, as a leaſe for years to a leaſe for life by one contingent, & the leaſe for life to a feeſimple by another.

Co. ſuper Litt. 218. And if a leaſe be made to a man and a woman for their lives, on condition that which of them two ſhall firſt marry that one ſhall have the fee and they intermary; in this caſe neither of them ſhall have the fee for incertainty.

Co. ſuper Litt. 218. 50 Ed. 3. 27. If a man make a leaſe for life, and adde this condition, that if the leſſee within one year doe not pay twenty ſhillings; that he ſhall have but a term of two years, and he doe not pay the 20 s. by this his leaſe for life is gone, and he hath now but a leaſe for two years.

To abridge an eſtate.

1 H.8.13. If a leaſe be made, on condition that if a ſtranger diſlike it, or be diſcontented with it, that the leaſe ſhall be void; this is a good condition.

2. For the matter & ſubſtance of it.

Hil. 6 Jac. B.R. Curia. If a leaſe be made, on condition that if the leſſee be outlawed, the leaſe ſhall be void; it ſeems this is a good condition.

Trin. 3 E. 6. per Curiam. If a feoffment be made, on condition that if the feoffee commit treaſon, that the feoffor ſhall reenter; in this caſe the condition is vain, for if the feoffor enter, his entry is not lawfull, for the King is intitled, and his title ſhall be preferred.

Prerogative.

Co.1.83. 6.43. Co.9. 128. No condition or limitation, be it by act executed, limitation of a uſe, or by deviſe, or laſt Will, that doth contain in it matter repugnant, and tending to the utter ſubverſion of the eſtate, or matter that is againſt law, or matter that is impoſſible to be done is good. And therefore in all ſuch caſes if the condition be ſubſequent, the eſtate is abſolute, and the condition void: And if the condition bee to goe before the eſtate, the eſtate and the condition both are void.

Teſtament.

Uſe.

Co. ſuper Litt. 223. If a feoffment or other conveyance be made of land, or a grant of rent &c. in feeſimple by deed or will, upon condition that the feoffee or grantee ſhall not alien to certain perſons, as to *I S*, or to *I S* and *W S*; this is a good condition. So if one make a feoffment in fee of land, on condition that the feoffee ſhall not alien it in Mortmain; this is a good condition. So if *A* be ſeiſed in fee of black acre, and *B* doth infeoffe *A* of white acre in fee, on condition that he ſhall not alien black acre; this is a good condition. But if the condition be that the feoffee or grantee ſhall not alien the thing granted to any perſon whatſoever, or that if he doe alien to any perſon, that he ſhall pay a fine to the feoffor; theſe conditions are void in

Repugnant conditions. To reſtrain Alienation.

Prerogative.

the caſe of a common perſon as repugnant to the eſtate. But in caſe of the King, ſuch conditions are good. And in the caſes of a common perſon alſo the alienation is good until it be avoided by the feoffor. And in *Paſc.* 19 *Jac. B.R.* it was held by Juſt. *Dodridge* and *Chamberlain*, that if a feoffment be on condition that if the feoffee alien, he ſhall pay 10 l. to the feoffor; that this is a good condition: but Ch. Juſt. and Juſt. *Haughton* held the contrary, for then this ſhal be a circumvention of the law. If a gift had been made to an Abbot, & his ſucceſſors, on conditiõ not to alien, this had been a good condition.

Bragge and Tanners caſe.

Doct. & St. 124.

If one make a feoffment of land to an infant, on condition hee ſhall not alien to any perſon; this is a good condition during the minority of the infant, but not afterwards. In like manner as if one make a feoffment to a husband and wife, on condition they ſhall not alien; this condition to ſome intent is good, *i.* to reſtrain alienation by feoffment or deed, and to ſome intent repugnant and void, *i.* to reſtrain alienation by fine, for that is lawfull. So if a gift be made in tail, on condition that the tenant in tail may alien for the profit of his iſſues; this is a good condition. And ſo if land be given in tail, upon condition that the tenant in tail or his heirs ſhall not alien in feeſimple, feetail, nor for the term of any others life, but for their own lives; this condition is good. But if lands be given in tail on condition, that the tenant in tail, or his heirs in tail ſhall not ſuffer a common recovery, levy a fine with Proclamations according to the Statutes of 4 *H.*7. and 32 *H.*8. to bar the iſſues, or on condition that he ſhall not make copyhold eſtates of copyhold land, according to the cuſtome of the place, or make leaſes according to the Statute of 32 *H.*8. *ca.* 28. theſe conditions are held to be repugnant, and for that cauſe void. And yet ſee, for the laſt of theſe caſes the opinion in *Co. ſuper Litt.* 223. to be contrary, and that a condition to reſtrain the making of ſuch leaſes is good; for this power is not incident to the eſtate, but given to him collaterally by the Statute, and *Quilibet poteſt renunciare juri pro ſe introducto*. But *tota curia* in *Mary Portingtons* caſe is againſt him. If a man make a gift in tail to *A*, the remainder to him and his heirs, on condition that he ſhall not alien; this condition as to the eſtate tail is good, and void as to the other. And therefore if an alienation be, he ſhall defeat it onely as to the eſtate tail. And if a man make a gift in tail, on condition that the donee or his heirs ſhall not alien; this is a good condition to ſome intents, and void to other, and therefore if he make a feoffment in fee, or any other eſtate by which the reverſion is diſcontinued tortiouſly, the donor ſhall enter, otherwiſe if he ſuffer a common recovery. And a gift in tail, on condition that the tenant in tail ſhall not make a leaſe for his own life, is not a good condition, by *Co.* 6. 43. againſt *Co. ſuper Litt.* 223. If one ſeiſed in fee of land, and make a leaſe of it for years or life, on condition that the leſſee ſhall not alien the land leaſed, or any part thereof during the term, or on con-

Co. ſuper Litt. 224. 10 H.7. 11. 13 H.7. 23. Co. 10. 30. Perk. Sect. 739. 21 H.6. 33.

Dier 48. Co. 6. 43.

Co. ſuper Litt. idem Dier 227.

Co. 6. 43.

Co. 6. 43. 4. 84. ſuper Litt. 223.

condition that he ſhall not alien it, or any part of it, during the term without licence of the leſſor; theſe are good conditions. So if one be ſeiſed in fee of a Manor, and he make a leaſe of years of it to *I S*, on condition that he ſhall not make voluntary eſtates by copy; this is a good condition. But in a feoffment in fee ſuch a condition is repugnant and void. And if one be poſſeſſed of a leaſe for years, or of a houſe, or of any other chattel reall or perſonall, and he give or ſell all his intereſt therein, upon condition that the donee or vendee ſhall not alien the ſame; this condition is void for repugnancy, and the gift or ſale is abſolute.

Co. 2. 72. Dier 318. If one make a feoffment of land in fee, on condition that the feoffor ſhall retain the land for twenty years without interruption; it ſeems this is a good condition and not repugnant.

Dier 94. If I grant land to another for life, if it ſhall pleaſe me ſo long to ſuffer him; it ſeems this condition is repugnant and void.

Co. 10. 39. ſuper Litt. 206. Plow. 77. 133. 21 H. 7. 8. 8 H. 7. 10. Perk. Sect. 731. If a feoffment be made of land in fee, on condition that the feoffee ſhall not enjoy the land, or ſhall not take the profits of the land, or on condition that the heire of the feoffee ſhall not inherit the land, or condition that the feoffee ſhall not doe waſt, or condition that his wife ſhall not be endowed; in all theſe and the like caſes the condition is void as repugnant to the eſtate.

Co. 6. 41. 1. 84. ſuper Litt. 224. If a gift in tail be made, on condition that the donee or his iſſues ſhall not take the profits of the land, or on condition that if the donee die, his eſtate ſhall go unto another, or on condition that their wives ſhall not be endowed, or on condition that they ſhall not do waſt, or on condition that warranty and aſſets or a collaterall warranty ſhall not bar the iſſues in tail; all theſe conditions are repugnant and void.

Co. 1. 84. If lands be given or granted to two and their heirs, on condition that the ſurvivor ſhal have the whole notwithſtanding partition, or on condition that the ſurvivor ſhall not have the whole albeit there be no ſeverance; theſe conditions are repugnant and void.

Perk. fol. 141. If one make a leaſe for life, on condition that the leſſee ſhall not doe fealty; this condition is not good.

Co. ſuper Litt. 204. If lands be given to one and the heirs males of his body, provided that if he die without heirs females of his body, that the donor ſhall reenter; this condition is repugnant and void.

Co. ſuper Litt. 146. 10 H. 7. 8. Co. 6. 41. 5 H. 7. 7. 7 H. 6. 44. Perk. Sect. 732. If one have land in poſſeſſion, or reverſion, and he grant a rent out of it, on condition that the grant ſhall not charge the perſon of the grantor; this is a good condition, and not repugnant. But if a man grant a bare annuity, or grant a rent charge out of another mans land with ſuch a condition, or if one grant a rent charge, on condition that the grantee ſhall not diſtrain, nor charge the perſon of the grantor, or if one grant a rent out of land, on condition that the land ſhall not be charged with it; all theſe conditions are repugnant and void. So if two grant a rent charge out of land, provided

that it ſhall not extend to one of them; this condition is repugnant and void.

If a man ſeiſed in fee of land make a leaſe for years rendring rent, and after the leſſee makes a leaſe to the leſſor of other land, on condition that he ſhall not diſtrain for his rent in the former leaſe made to this leſſee; this is a good condition, and not repugnant. Perk. Sect. 733.

If one make a feoffment in fee, or leaſe for life, with warranty, on condition that the feoffee or leſſee ſhall not vouch to warrant, nor recover in value, or if the leaſe be made without impeachment of waſt, on condition that if the leſſee doe waſt the leſſor ſhall reenter; theſe are good conditions, and not repugnant. Perk. Sect. 734. Dier 47.

Conditions againſt Law.

All conditions annexed to eſtates being compulſory, to compell a man to doe any thing that is in its nature good, or indifferent, or being reſtrictive, to reſtrain or forbid the doing of any thing which in its nature is *malum in ſe*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any Statute, or the like; all ſuch conditions are good, and may ſtand with the eſtates. But if the matter of the condition tend to provoke or further the doing of ſome unlawful act, or to reſtrain or forbid a man the doing of his duty; the condition for the moſt part is void. And therefore if lands be given or granted to a man, upon condition that he ſhal kil a man, or upon condition that he ſhal burn his neighbours houſe, or upon condition that he ſhall forſwear himſelf, or upon condition that he ſhall ſave and keep harmleſſe the grantor whatſoever he ſhall doe, or that if hee doe not theſe things, the grant ſhall bee void; this condition is void. Or if lands be given or granted to an officer, upon condition that he ſhall not duly execute his office; this condition is againſt law, and void: *Et ſic de ſimilibus.* So if a gift be made in tail, upon condition that the donee ſhall diſcontinue, or one give or grant land, on condition that the grantee ſhall be a foreſtaller againſt the Statutes; theſe and ſuch like conditions are void. And hereupon it is, that conditions annexed to land, that the profits thereof ſhall be employed to ſuperſtitious uſes are void. And hence alſo it is that ſuch conditions as are againſt the liberty of law, as that a man ſhall not mary, or the like, are void. And hence alſo ſuch as are againſt the publique good. And therefore it ſeems if one grant his land to *I S*, on condition that he (being a husbandman) ſhall not ſow his errable land; this condition is void. And in all theſe caſes if the condition be ſubſequent to the eſtate, the condition only is void, and the eſtate good and abſolute; if the condition be precedent, the condition and eſtate both are void, for an eſtate can neither commence nor encreaſe upon an unlawfull condition. Perk. Sect. 727. Co. 1. 24. 6. 43. Dier 343. Co. ſuper Litt. 206. Co. 1 L. 53. 7 Ed. 3. 65. Perk. Sect. 722. 725. *Co. 6. 41. ſuper Litt. 207. 219. 206. Dier 252. 262. Plow. 152. Perk. Sect. 935. Plow. 272. 286. Co. 1. 84. ſuper Litt. 207.

Conditions impoſſible.

* All conditions annexed to eſtates that contain in them matter at the time of making of them impoſſible to be done are void. And therefore if one give or grant land on condition, that a man ſhall go to Rome in three days, or condition that a man ſhal infeoffe

a corporation, when there is none ſuch, or if one give lands in taile, on condition that the eſtate ſhall ceaſe, as if the tenant in tail bee dead, or if one grant lands, on condition that a man ſhall infeoffe his wife; all theſe and ſuch like conditions are void. And in theſe caſes alſo if the condition be ſubſequent, the condition is void only, and the eſtate is abſolute, and if the condition bee precedent, the condition and the eſtate both are void, for an eſtate can neither commence nor increaſe upon an impoſſible condition. And if the thing to be done by the condition be poſſible at the time of the making of the condition, and doe afterwards by the act of God become impoſſible; the condition is become void, and the eſtate abſolute, as if a feoffment be made, on condition that the feoffee ſhall before Eaſter following enfeoffe the feoffor, and the feoffee die before the day, or on condition that the feoffee ſhal appear in ſuch a Court before or at Eaſter, and he die before the time; in theſe caſes the condition is gone, and the eſtate is abſolute.

Co. 6. 41. 1. 84. And the ſame Law is for the moſt part of Limitations, if they bee repugnant, impoſſible, or againſt Law, as is before ſhewed to be of Conditions. See more in the next diviſion following. Limitation.

Co. 8. 90. ſuper Litt. 219. 27 H. 8. 14. It is a generall rule, That ſuch conditions annexed to eſtates as goe in defeaſance, and tend to the deſtruction of the eſtate being odious to the Law, are taken ſtrictly, and ſhall not bee extended beyond their words, unleſſe it be in ſome ſpeciall caſes. And therefore if a leaſe be made, on condition that if ſuch a thing bee not done, the leſſor [without any words of heirs, executors &c.] ſhall reenter and avoid it; in this caſe regularly the heir, executor &c. ſhall not take advantage of this condition. So if one make a leaſe for years of a houſe, on condition that if the leſſor ſhall be minded to dwell in the houſe, and ſhall give notice to the leſſee, that hee ſhall depart; in this caſe if the leſſor die, his heire, executor, &c. ſhall not have the like advantage and power as the leſſor himſelf, for the condition ſhall not be extended to them. And hence it is, that if a leaſe for years be made, on condition that the leſſee ſhall not alien without the licence of the leſſor; in this caſe the reſtraint ſhall continue only during the lives of the leſſor and leſſee and no longer. And yet this rule hath an exception, for if a man mortgage his land to *W*, upon condition that if the mortgagor and *I S* pay 20 s. ſuch a day to the mortgagee, that then he ſhal reenter, and the mortgagor die before the day; in this caſe *I S* may pay the money and perform the condition. But otherwiſe it is whiles the mortgagor doth live, for in that time *I S* alone without him may not tender it, and if he do, this tender is no performance of the condition. And in caſe where a condition doth tend to create an eſtate there it ſhall have the moſt favourable expoſition that may be, and therefore in that caſe albeit the words be not ſatisfied, yet

8. How a condition in deed or a limitation ſhall be taken & expounded. And how it muſt and ought to be performed.
1. In reſpect of perſons.

Dier 66. Not to alien.

Co. ſuper Litt. 219.

To pay mony.

Litt. Sect. 352. Co. ſuper Litt. 219 Co. 8. 60.

To make an eſtate.

if the intent be ſatisfied, it ſufficeth. And therefore if one make a feoffment in fee, on condition that the feoffee ſhall make an eſtate back again in tail to the feoffor and his wife before ſuch a day, and before that day the feoffor die; in this caſe the condition ſhall be performed as neer to the intent as may be; and therefore if the condition be, that he ſhall make the eſtate to them two *Habendum* to them and the heirs of their two bodies engendred, the remainder to the right heirs of the feoffor, the eſtate ſhall be made to the wife for life without impeachment of waſt, the remainder to the heirs of the body of the husband begotten on the wife. And if *A* enfeoffe *B* on condition that *B* ſhall make an eſtate in frankmariage to *C* with ſuch a one the daughter of the feoffor; in this caſe albeit an eſtate in frankmariage may not be made, yet an eſtate ſhall be made to them for their lives. *Et ſic de ſimilibus. Conditio beneficialis quæ ſtatim conſtruit benigne ſecundum verborum intentionem eſt interpretanda, odioſa autem quæ ſtatum deſtruit ſtricte ſecundum verborum proprietatem eſt accipienda.*

2. In reſpect of time.

In all caſes where a time is ſet for the doing, or performance of the matter contained in the condition, be it to pay money, make an eſtate, or the like, it muſt be done at the time agreed upon, and ſet down in the condition. And in caſes where it is to be done before a time certain, it muſt be done before that time, or elſe the condition is broken. But in all caſes where no time is ſet for the doing of the thing contained in the condition, be it to pay money, make an eſtate, or the like, if the act to be done, bee to be done to the party that doth make the eſtate, or be to be done to him and a ſtranger, and be ſuch a thing as is for the benefit of him that doth make the eſtate, and for his benefit only, there regularly the party that is to doe the thing ſhall have time to doe it during his life, unleſſe the party, feoffor, &c. that doth make the firſt eſtate, whereunto the condition is annexed, doth haſten the doing thereof by requeſt: for if he requeſt the doing thereof and ſet no time, it muſt be done within a convenient time after that requeſt; and if he requeſt and prefixe a time convenient when he doth deſire to have it done, it muſt be done at that time; and in theſe caſes the condition cannot be broken without a requeſt, ſo long as he to whom the eſtate upon condition is made be living. And therefore in this caſe it is not like to a condition made by a Wil, for if one deviſe his land to *I S*, ſo as he pay the twenty pound to *I D*, the Teſtator doth owe him, and no time is ſet for the payment thereof; in this caſe he muſt pay it as ſoon as it is demanded, or he doth forfeit the land, and the heir may enter. But if the thing to be done, be to be done to a ſtranger, and be for the profit and benefit of a ſtranger only: as if a feoffment be made, on condition that the feoffee ſhall mary the daughter of the feoffor, or on condition that the feoffee ſhall

Co. ſuper Litt. 209. 208. 219. Co. 2. 79. 6. 31. Litt. 353. Plow. 30. Perk. Sect. 155. 779. 794 787. 793. 789. 788. 38 Ed. 3. 11. Dier 311.

To pay mony.

Teſtament.

To mary *I S*.

ſhall infeoffe a ſtranger, and no time is ſet for the doing hereof; in theſe caſes the feoffee ſhall not have time during his life to doe it, but he muſt do it in a reaſonable time, and that without any requeſt at all, or elſe he doth break the condition. And in ſome ſpeciall caſes when the act to be done is to be done to the party himſelf, the party ſhall not have time to doe it during his life, as if one grant land to *I S*, on condition that he ſhall grant an Advowſon to the grantor for his life, or on condition that he ſhall grant a rent charge to the grantor during his life, to be paid at Michaelmas and our Lady day; in theſe caſes the grant of the Advowſon muſt be before the Advowſon fall, and the grant of the rent muſt be before either of the days of payment come, and that without requeſt, elſe the condition is broken. And if the condition be that if *I S* do ſuch an act, that then the feoffee ſhall pay ten pound to the feoffor, elſe that the feoffor ſhall reenter, and no time is ſet when the feoffee muſt pay this ten pound; in this caſe it ſeems the payment muſt be as ſoon as the ſame act is done, and that without any requeſt at all. And in caſe where the feoffee &c. or a ſtranger be to doe an act, and he alone is to doe it, and it doth nothing concern the feoffor &c. as to goe to Rome, or the like, there the feoffee &c. or ſtranger ſhall have time during his life to doe the thing, and it cannot be haſtned by requeſt.

To infeoffe.

To grant an Advowſon or a rent.

Perk. Sect. 9. 798.

To pay mony.

Co. ſuper Litt. 209.

If lands be granted, on condition that the grantee ſhall make a leaſe for life of other lands to the grantor, the remainder to a ſtranger; in this caſe the feoffee ſhall have all the time of his life to doe it, if hee be not haſtned by requeſt. But if the condition be to make a gift in taile to a ſtranger, the remainder to the feoffor; in this caſe it muſt be done in time convenient without requeſt.

Co. ſuper Litt. 220, 222.

To make a leaſe.

If the King licence his tenant to infeoffe *A* and *B*, ſo as they give the land again to the feoffor, and the heirs males of his body, and he make a feoffment accordingly; in this caſe it muſt bee reconveyed before the death of the feoffor, or elſe the condition is broken.

If *A* infeoffe *B* of black acre, on condition that if *C* infeoffe *B* of white acre *A* ſhall reenter; in this caſe *C* ſhall have time to do this during his life, if *B* doe not haſten it by requeſt.

Co. ſuper Litt. 208.

To infeoffe.

If a leſſee grant his eſtate to a ſtranger, on condition that the grantee doe get the good will of the leſſor, and no time is ſet when he ſhall get his good will; it ſeems in this caſe he ſhall have time to get his good will during the terme, and that although he deny it at the firſt, yet if he grant it afterwards that this is ſufficient.

Perk. Sect. 795.

To get the good will of *I S*.

When a time is ſet in certain for the payment of mony, or the doing of any other thing generally, neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certaine, but no houre of the day is ſet down wherein the

Litt. Sect. 342. Co. ſuper Litt. 213.

ſame ſhall be done; in this caſe they muſt attend ſuch a diſtance of time before the Sun ſet, as may be convenient to doe that worke in. And if the condition be to pay money at a place certain, at any time during life; in this caſe the money may not be tendred at any time in the place, in the abſence of him that ſhould receive it, but he that is to pay it muſt give notice to the other party before hand what time he will tender it, that the other may be ready to receive it. Or if at any time the parties hap to meet at the place, a payment or tender then at that place is ſufficient. And the ſame law is for the moſt part in conditions of obligations.

To pay money.

Obligation.

3. In reſpect of place.

In caſes where a place is ſet down for the doing of the thing contained in the condition, there it muſt always be done at that place, unleſſe by ſome agreement made between the parties afterwards another place be appointed, otherwiſe the condition is not performed, and the parties are not bound to attend in any other place. But in caſes where there is no place ſet down for the doing of the thing contained in the condition, if the thing to be done be a corporall ſervice, as to pay money, or any ſuch like thing, the party that is to doe it muſt at his perill ſeek out the perſon to whom it is to be done, if he be *infra regnum Angliæ*: but if he be not within the kingdome, he is not bound to ſeek him, and yet the condition is not broken. And if the thing to be done be either locall, *i.* ſuch a thing as muſt be done in or at a place certain, as the making of a feoffment of land, payment of rent, or the like; in this caſe the thing muſt be done at that very place, and a tender of doing it in that place is a ſufficient performance of the condition; as for examples, If a feoffment be made, on condition that the feoffee ſhall pay to the feoffor twenty pound on Eaſter day at Dale, and the feoffee tender the twenty pound the ſame day at Sale: And albeit the feoffor be at Sale, and he tender the twenty pound to his perſon there the ſame day, yet this is no performance of the condition. And if a feoffment be made in mortgage, on condition for the payment of money at a day, and no place is ſet for the payment thereof; in this caſe the mortgagor muſt ſeek the mortgagee and tender it to his perſon at his perill: and tender of the money upon the land mortgaged, is not a ſufficient performance of the condition. And if a feoffment be made, on condition that the feoffee ſhall infeoffe the feoffor of white acre in Dale; in this caſe the feoffment, or the tender of it muſt be in Dale, and cannot be elſewhere, and a tender of it there is ſufficient to perform the condition. So if the condition be, that the feoffee ſhall in Eaſter Terme next acknowledge ſatisfaction upon a Judgement in the Kings Bench; this muſt be done there, and cannot be done elſewhere. So if a feoffment in fee bee made of white acre, rendring rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and

Co. ſuper Litt. 210, 211, 213. Litt. Sect. 343. 345. Bro. Condition 60.

To pay mony.

To infeoffe.

To acknowledge ſatisfaction.

no

no place is ſet for the payment of it ; in this caſe the feoffee is not bound to tender his rent any where for the ſaving of the condition, but upon the land, and a tender there is ſufficient. And if a man make a feoffment in fee, without any reſervation of rent precedent in the deed, on condition that the feoffee and his heirs ſhall render a yearly rent of twenty ſhillings a year to the feoffor and his heirs, and if they fail, that the feoffor ſhall reenter ; in this caſe alſo it ſeems the payment or tender muſt be upon the land. But if the condition be, that he ſhall render twenty ſhillings a year to a ſtranger, and his heirs ; this is no rent, nor in the nature of a rent, and therefore in this caſe the feoffee muſt tender it to the perſon of the ſtranger where he can find him at the day, or elſe hee doth break the condition, and tender upon the ground is not ſufficient. But in theſe caſes if the nature of the thing to be done be ſuch as will not admit of ſuch a cariage from place to place to ſeek out the perſon of the feoffor &c. there albeit the thing to be done be corporall or tranſient, and not a locall thing, yet that is to doe it ſhall not be bound to ſeek out the perſon of the other; as for example, If an eſtate be made, on condition that the grantee ſhall deliver twenty quarters of wheat, or twenty load of wood to the grantor at ſuch a time, and no place is ſet for the doing thereof; in this caſe the grantee is not bound to cary the ſame about to ſeek the feoffor or grantor, as he is bound to cary money, but before the day, the grantee is to know of the grantor where he will appoint to receive it, and there it muſt be tendred. And the like law is for the moſt part in conditions of obligations.

To pay rent.

To deliver wood or corn.

Obligation. A Caveat.

It is beſt therefore in all theſe caſes, and herein he that is to be the agent is to take care to have certainty of time and place ſet down in the condition for the doing of the thing that is to bee done, and the more certain it is, the better it is for him.

Per Juſt. Bridgeman. If a leaſe be made, on condition that the leſſee ſhall pay to the leſſor all ſuch ſums of money as the leſſor ſhall lay out in ſuch a buſineſſe; in this caſe the leſſor muſt firſt tender to the leſſee a note of the charges before the leſſee is bound to pay, and untill this be done the condition cannot bee broken. And after a note is given alſo, he ſhall have ſome reaſonable time to provide the money. And if he tender him a note of more then in truth he doth lay out, the leſſee if he know it, may pay ſo much as is laid out, and he may refuſe to pay any more.

4. In reſpect of other matters. To pay mony.

Co.5.22. If lands be granted, upon condition that *A* ſhall make an eſtate of lands at the charges of *B* ; in this caſe *A* muſt doe the firſt act, *viz.* notifie to *B* what aſſurance he will make before *B* is bound to tender the charges.

To make an eſtate.

Paſche 17. Jac. B.R. If a feoffment be made, on condition that the feoffee ſhall give ſo much houſhold ſtuffe to the feoffor, or ſo much mony for it as it ſhal be

To deliver houſhold ſtuffe, or pay money.

be rated at by two indifferent perſons to this end to be choſen; it ſeems in this caſe the election of the two men muſt be by the feoffee: but if the words be by two perſons to be indifferently choſen then the election ſhall be by both parties, for in the firſt caſe the word Indifferent doth goe to the praiſing not to the perſons.

To clenſe ditches.

If a feoffement be made of a ground, on condition that the feoffee ſhall rake the ditches, in this caſe if the feoffee doe it once it is a ſufficient performance of the condition. And yet if a man grant a houſe for life, on condition that the leſſee ſhall dwell and be reſident in the houſe during the ſaid terme; in this caſe it is not ſufficient that he dwell in it once during the terme, but muſt doe ſo all the terme or elſe the condition is broken. 27 H.8.1. Plow. Colthirſts caſe. 21.

To dwell in the houſe.

If an annuity be granted of tenne markes *per Annum* to a man, on condition, or till he be promoted to a benefice by the grantor, and it is not ſaid of what value the benefice ſhall be, in this caſe it ſhall be taken for a benefice of as great value, and of as good an eſtate as the Annuity is, otherwiſe the grantee may refuſe it, and yet his Annuity ſhall continue. Perk. Sect. 804.

To give goods.

If a feoffment be made on condition that the feoffee ſhall give all his goods *ſi quæ fuerint*, or give al his Pikes in his pond *ſi quæ fuerint*; in this caſe the words ſhall be taken in the preſent tenſe, for the goods and Pikes that are at the time of the grant. But if a feoffement be on condition that the feoffee ſhall give all his goods in London *ſi quæ fuerint*, that did belong to *I S*, in this caſe the words ſhall be taken in the preterperfect tenſe. Perk. Sect. 742.

Not to diſturb the leſſor in taking the wood.

If one make a leaſe of the Manor of Dale (wherein is a wood called Dale wood) excepting all the woods and underwoods growing in Dale wood and all the great trees growing elſewhere, and this is upon condition that if the leſſee ſhall diſturbe the leſſor to cut and ſell the wood and underwood excepted the leaſe to be void; in this caſe it ſeemes the condition ſhall extend only to the wood and underwood in Dale wood and not to the trees elſewhere: but if the words of the condition be [ſhall diſturbe &c. to cut &c. the wood and underwood on the premiſſes] *contra*. Haward & Fulchers caſe. Hil. 3. Car. B. R.

To pay rent.

If one grant land rendring rent at the Feaſts of *S.* Michaell and our Lady day or within a moneth after, on condition that if it be behind after the Feaſts and daies limited by the ſpace of eight weekes that the leaſe ſhall be void; in this caſe the eight weekes ſhall be accounted from the moneth which is the twenty eight day after the Feaſt. Dier 142.

If the condition be made in the copulative and conſiſt of divers parts, every part muſt be obſerved or the condition will not be performed. But when it is made in the disjunctive, if any part of it be obſerved it is a ſufficient performance of the condition. And therefore if a feoffement be made, on condition to reinfeoffe and pay twenty 12 H.7.10. Co. ſuper Lit. 225. Perk. Sect. 746. Dier 337. 372.

twenty pound and the feoffee do reinfeoffe but not pay the twenty pound; in this caſe the condition is broken. But if the condition be to reinfeoffe or pay twenty pound and the feoffee doe one of them; it is a good performance of the condition. And when it is made in the copulative and disjunctive both, it ſhall be taken in the disjunctive only, as if a leaſe be made to *A* and *B* his wife, on condition that the ſaid *A* and *B* or any child between them ſhall ſo long live; this ſhall be taken in this ſenſe if the husband, wife or child ſhall ſo long live, ſo that the leaſe ſhall not be determined by the death of the husband or wife alone. If there be two proviſoes in two ſeverall indentures of conveyance of ſeverall Manors to *A* and *B* that if the feoffor pay or tender twenty ſhillings to *A* and *B* or the heires of *A* that the Conveyance ſhall be void, and *A* die; in this caſe tender to *B* is not ſufficient, and it muſt be made to the heire of *A* and it muſt be twenty ſhillings for every proviſo: but otherwiſe it is of a collaterall act.

Co.3.64. ſuper Lit. 203,204. Dier 6. 127. 11 H.7.21.

If the words of a condition be thus, that upon ſuch a contingent the party ſhall enter and retaine the land untill the thing be done &c. in this caſe and by theſe words the eſtate is not determined as it is by theſe words, [that the eſtate ſhall be void, or that the grantor ſhal reenter, or the like.] And in theſe words there is a difference alſo to be obſerved, for if the words be, that upon ſuch a contingent the eſtate ſhall ceaſe and be void, and it be a leaſe for years to which the condition is annexed, the eſtate is *ipſo facto* void without entry or claime and can never be affirmed afterwards; but if the words of the cloſe of the condition be, that the feoffor, leſſor, &c. ſhall reenter, without any other words, albeit it be in a leaſe for years yet the leaſe is not void untill he hath made an actuall reentry. But in both caſes if the eſtate to be avoided be an eſtate in fee, or for life, it is only voidable by the breach of the condition, and muſt be made void by entry or claime, and untill this be done the grantor can make no new eſtate of the land. But in the firſt caſe before the party ſhall retaine the land and take the profits of it in the nature of a pledge untill the thing be done agreed upon in the condition and then the other party ſhall have the land againe. See more in the next queſtions. And in *Obligation Numb.* 7. *Covenant Numb.* 6.

9. When and how a Condition or Limitation ſhall be ſaid to be performed. Or not.

1. When the act is to be done between the parties themſelves. To make an eſtate.

Co.8.90. Lit. Sect. 352. Co.3.64.282 2 H.4.11.

The words of a condition may be performed and not the intent, and the intent may be performed and not the words; and then for the moſt part a condition is performed when the intent and meaning of it is obſerved. And therefore if a feoffement be made, on condition that the feoffee or his heires ſhall make an eſtate to the feoffor and his wife in taile before ſuch a day, and before the day the huſband die, and then he make an eſtate as neere it as he may *viz.* to the wife for life without impeachment of waſt and after to the heires of the body of the husband; this is a good performance

mance of the condition. And if the condition be that the grantee shall make a feoffement of land; and he make a leaſe of the land firſt, and then a releaſe to the leſſee and his heirs; this is *tantamount* and a good performance of the condition. Co. ſuper Lit. 207.

To pay money.

If a feoffement be made, on condition that if the feoffor or his heires pay tenne pound by a day the feoffement to be void, and the feoffor before the day doth commit treaſon and is executed and ſo dieth without heire, and after before the day the heire is reſtored, and he at the day doth pay the money; in this caſe this is a good performance notwithſtanding there was once a diſability. So as if heretofore one had made a feoffement, on condition to reinfeoffe by a day, and before the day the feoffee had entred into Religion, and then had been dearaigned, and at the day had made the feoffement; this had been a good performance of the condition. Co. ſuper Lit. 222. Perk. Sect. 802, 803.

By and to whom money ſhall be paid upon a condition.

If a feoffement be made, upon condition that if the feoffee ſhall pay to the feoffor tenne pound ſuch a day, that then he ſhall have the land to him and his heirs, otherwiſe that the feoffor ſhall reenter, or if it be made on condition that the feoffee ſhall pay tenne pound to the feoffor ſuch a day; and before the day the feoffee ſell the land; in this caſe the ſeller or the buyer either of them may tender the money at the day, and this will be a good performance of the condition, for he that hath intereſt in the land on the one ſide, or in the condition as party or privy on the other ſide may tender and performe the condition to ſave the eſtate. Co. 5. 96. & ſuper Lit. 208. 207.

If lands be mortgaged, (or which is all one) if a feoffement be made of lands on condition that if the mortgagor or feoffor pay tenne pound to the feoffee ſuch a day that then the eſtate ſhall be void, & before the day the mortgagor or feoffor die; in this caſe the heire or executor of the feoffor, the Ordinary, the Gardian in Chivalry or Socage of the heire of the feoffor, or any other by either of their commandement precedent or aſſent ſubſequent may pay this money at the day, and payment or tender of it by either of them at the day is a good performance of the condition. * And ſo alſo it ſeemes is the law upon a deviſe of land to *I S* paying to *I D* twenty pound; if *I S* die his heire or executor may pay the twenty pound, and this is a good performance of the condition. But in theſe caſes if a ſtranger of his owne head without any ſuch commandement or agreement pay the tenne pound; this will be no good performance of the condition. And yet perhaps if the party that is to pay it be an Ideot; the payment or tender by any one in his behalfe ſhall be a good performance of the condition. And if a feoffement be made, on condition that if the feoffor pay tenne pound to the feoffee that the eſtate ſhal be void, & no time is ſet for the payment of this mony, & the feoffor die before any payment or tender made; in this caſe his heire cannot tender it and ſo perform the condition. Lit. Sect. 534. 537. 15 H. 7. 2. Co. ſuper Lit. 206.

Teſtament.

* Lit. Bro. Sect. 125.

Lit. Sect. 337

If

Co.ſuper Lit.207. Bro Condition 109.

If a feoffement be made, on condition that if the feoffor and *I S* pay tenne pound ſuch a day the feoffement to be void, and the feoffor die before the day and *I S* alone pay it; this is a good performance of the condition.

Co.ſuper Lit.210.5. 96 Dier 181. 101. Co.6.69. Lit.Sect. 339.

If a feoffement be made, on condition that if the feoffor pay to the feoffee or his heires tenne pound ſuch a day, and before the day the feoffee doth grant the land away to another; in this caſe the money may be paid to the feoffee himſelfe, or if he be dead to his heires, and this payment is a good performance of the condition. And if the words of the condition be [That if he pay to the feoffee, his heires or aſſignes &c.] in this caſe payment to either of them is a good performance of the condition; ſo as if in this caſe the feoffee make a feoffement over, it is in the election of the firſt feoffor to pay the money to the firſt or ſecond feoffee, and if the firſt feoffee die, to pay it to his heire or the ſecond feoffee: But payment to an executor or adminiſtrator in this caſe is not a good performance. And yet if the words of the condition be, that if he pay to the feoffee [without words, heires, executors &c.] tenne pound ſuch a day, in this caſe the payment may be made to the executor or adminſtrator of the feoffee after his death, and ſuch a payment is a ſufficient performance of the condition: And if the words of the condition be [that if the feoffor pay to the feoffee, his heires, executors or adminiſtrators &c.] in this caſe payment to either of them is a good performance of the condition. But payment to an aſſignee in this caſe is not good. And if the words be, that if he pay to the feoffee and his heires &c. in this caſe payment to his executors or to his aſſignes is not a good performance of the condition. So that in all theſe caſes it ſeemes for the perſon to whom payment is to be made the words of the condition are preciſely to be purſued.

Paſ.9 Jac.5. Sir Richard Lees caſe.

If a feoffement be made, on condition that if the feoffor ſhall tender twelve pence to the feoffee ſuch a day the feoffement to be void, and afterwards the feoffee is diſſeiſed of the land, and after the feoffor doth tender the twelve pence to the feoffee at the day; this is a good performance of the condition. To tender money.

Dier 69. 41 E.3.25.

If a feoffement be made to two men, on condition that they ſhall reinfeoffe the feoffor, or make a leaſe to him by a day, and before the day one of them die, and the ſurvivor doth reinfeoffe, or make the leaſe; this is a good performance of the condition. And ſo alſo it ſeemes the law is if both the feoffees be living, for by his owne acceptance it ſeemes he hath diſpenſed with the condition and ſo cannot enter for the breach of it. To reinfeoffe.

Plow.23. 3 H.7.4. 21 H.6.10.

If a feoffement be made on condition that the feoffee ſhall infeoffe the feoffor of the Manor of Dale by ſuch a time, and before the time appointed the feoffee doth grant a rent charge out of the Manor to a ſtranger, and then at the time appointed makes a feoffment

ment of the Manor according to the condition; in this caſe this is a good performance of the condition. But if in this caſe the feoffee before the time appointed grant away to a ſtranger twenty acres parcell of the Manor, and then doth make a feoffement of the Manor according to the condition; this is no good performance of the condition. And if a feoffement be made on condition that the feoffees or leſſees in truſt of ſuch land ſhall grant an Annuity out of it, and ſome of them only doe grant this Annuity; this is no good performance of the condition.

To make a leaſe. If there be a feoffement made, upon condition that the feoffee ſhall make a leaſe of land to the feoffor for life, the remainder to *I S* in fee, and the feoffee make a leaſe to the feoffor for life, and after by another deed doth grant the reverſion to *I S*, this is a good performance of the condition. 44 E.3.22.

To purchaſe lands. If a feoffment be made upon condition that the feoffee ſhall purchaſe lands or tenements to the value of twenty pound *per Annum*, and he purchaſe a rent common, or any ſuch like thing to that value; this is a good performance of the condition. But if in this caſe the feoffee and another purchaſe ſo much land together jointly; this is no good performance of the condition. So if the feoffee alone purchaſe lands to the value of twenty pound *per Annum*, and there is a rent iſſuing of it which muſt be deducted; this is no good performance. And yet in theſe caſes, if the ſtranger Jointenant releaſe to the feoffee all his right in the land, or the grantee of the rent releaſe to him the rent before the time of the performing of the condition the condition is well performed in both caſes. *Tantum valet terra quantum vendi poteſt.* And if one make a feoffement in fee, on condition that if the feoffee purchaſe land to the value of twenty ſhillings, the feoffement ſhall be void, and after the feoffee diſſeiſe another man of land to that value: it is ſaid that by this the condition is performed, *Sed quere.* And that if he recover ſo much land in value in an action: that this is no performance of the condition. *Sed quere.* For this ſeemes to me a better performance of the condition then the former. Perk. Sect. 807, 808. 21 H.6.28. Dier. 15. Perk. Sect. 812.

Payment.

To pay mony. Tender. If lands be granted, on condition to pay money, and the money is tendred according to the condition, but either no body is ready to receive it, or it is refuſed: this is a good performance of the condition. And after a man hath once refuſed the money ſo tendred to him according to the condition, he hath no remedy in law to recover it except it be money lent upon a mortgage. [a] And if the payment be made part of it with counterfeit Coine, and the party accept it and put it up, this is a good payment and conſequently a good performance of the condition. [b] And if at the day of payment the parties doe account together, and he to whom the money is to be paid being indebted to the other, that debt by agreement Dier 181. Lit. Sect. 334, 335. 338. Co. ſuper Lit. 209. [a] Termes of the law. tit. coine. [b] Co. ſuper Lit. 212. Fitz. Barre 343.

Acceptance.

greement is allowed, and the reſidue is paid and accepted: this is a good performance of the condition. [c] So if the party that is to receive it accept and take new ſecurity by bond or ſtatute for the money: this is a good performance of the condition. [d] And ſo in moſt caſes, when by a condition a thing is to be done one way, and to be done to the party to the condition himſelfe and not to a ſtranger, and he doth accept it another way: this is a good performance of the condition. *Volēti non fit injuria.* But if the thing to be done be to be to a ſtranger, & one that is no party to the condition, and it be done in any other manner, and he accept thereof: this is no performance of the condition. And ſo alſo if the time of doing the thing be paſt, as if one make a feoffement to me, on condition that if he pay me tenne pound ſuch a day the feoffement ſhall be void, and he doth not pay me at the day, but doth die, and after by agreement between his heire and me he doth pay me the tenne pound, and I receive and accept it, and thereupon I ſuffer him to enter and hold the land: in this caſe the condition is not performed but I may enter upon him and out him notwithſtanding.

c Co. ſuper Lit. 212.

d Dier 45. Co. 5. 96.

Perk. Sect. 392.

If the mortgagor pay the money according to the condition, and after the mortgagee deliver it to the mortgagor as his own money, the condition is performed and the mortgage diſcharged notwithſtanding.

Adjudge Mich. 40. & 41 Eliz. B. R Powel. verſus Bartholomew.

If a feoffement be made to I S, on condition that if the feoffor pay to the executors or adminiſtrators of I S tenne pound the feoffement ſhall be void, and I S die, and the tenne pound is paid to the executors of I S according to the condition, but it is covinouſly done. i. there is a private agreement that the feoffor ſhall have all, or part of his money againe: this payment in this caſe is no good performance of the condition, but that payment that muſt be a performance of a condition in this caſe to fetch lands out of the hands of an heire muſt be reall, full and effectuall.

Co. 5. 96. ſuper Lit. 209.

If a leaſe be made, on condition that the leſſee ſhall get the good will of *I S* and the leſſor doth come to *I S* firſt and aske his good will, and he denie it him, and after when the leſſee doth aske it he doth grant it him; in this caſe the condition is performed. So if the condition be, that he ſhall get his good will by ſuch a day, and at the firſt being deſired he denieth it, but afterwards and before the day he doth grant it. And yet if no day be ſet, and he deſire his good will and *I S* denieth it and afterwards he doth get his good will; it ſeemes this is no performance of the condition.

14 H. 8. 17.

To get the good will of *I S.*

If there be two things in the copulative to be done by the condition, both muſt be done, otherwiſe the condition will not be performed.

Perk. Sect. 746. See before.

If a feoffement be made, on condition that if the feoffor and *I S* pay

Co. ſuper Lit. 219.

2. When the act is to be done by a ſtranger, to pay money.

pay tenne pound at Michaelmas the feoffement ſhall be void, and before the day the feoffor die, and *I S* pay the money; this is a good performance of the condition. But if the feoffor be living *contra.*

3. When the act is to be done to a ſtranger. To make an eſtate.

If a feoffement be made on condition to make an eſtate to a ſtranger by a day, and before the day he die; in this caſe if an eſtate be made as neere the condition as may be it is ſufficient. Plow. 133. Co. 3. 64.

* Tender.

* If a feoffement be made to *I S* on condition that he ſhall infeoffe *I D* and his heires; and *I S* doth tender the feoffement to *I D* and he doth refuſe to take it; this is no performance of the condition in this caſe. But if it be to be done to the feoffor himſelfe *contra.* And ſo alſo it is, if the condition be to make an eſtate taile, or any leſſer eſtate to a ſtranger, and he tender it and the ſtranger refuſe it; this is no good performance of the condition. And if a feoffement be made, on condition to reinfeoffe the feoffor and his wife in taile the remainder to *W* in fee, and he tender it to the wife only and not to him in remainder; this is no good performance of the condition. Co. ſuper Lit. 209. 19 H. 6. 67. Perk. Sect. 815, 816. 2 E. 4. 2. 19 H. 6. 67.

And the ſame law for the moſt part is in conditions of obligations. See more in *Obligations* at *Numb.* 9.

10. What act ſhall be a breach of a Condition in deed. And when a condition in deed ſhall be ſaid to be broken. Or not.

If a feoffement be made, on condition that the feoffee ſhall not infeoffe *I S* of the land, and the feoffee doth make a feoffment to *I S* and *I D*; this is a breach of the condition. And ſo alſo it is if the feoffee make a feoffement to *I D* to the intent that he ſhall alien to *I S*. *Quando aliquid prohibetur fieri directo prohibetur & per obliquum.* And yet if the feoffee in the caſe before alien to *I D* and after he doth alien to *I S*, this is no breach of the condition. And if the condition be, that the feoffee ſhall not infeoffe *I S* and he die, and his heire enfeoffe *I S*, this is no breach of the condition. Co. ſuper Lit. 222. Dier 45, 46.

Not to alien.

If a leaſe for years be made, on condition that the leſſee ſhall not aſſigne, or alien, the term, or the land during his life without the licence of the leſſor, and the leſſee doth give it by his will without licence; this is a breach of the condition and forfeiture of the eſtate. But if he make an executor of his will only, this is no breach. And if the condition be that the leſſee ſhall not alien, and he die, and his executor alien, this is no breach of the condition. And if the condition be that the leſſee ſhall not alien but to his children, and the leſſee by will deviſe it to his executors; it ſeemes this is a breach of the condition. So if he deviſe that *A* his ſonne ſhall have his term after his wife, and doth make *A* his ſonne his executor; it ſeemes this is a breach of the condition. But if he doe not make *A* his executor *contra.* And in caſes of deviſe albeit the executors doe not aſſent yet the condition is broken, as in caſe where a reverſion is granted on condition that the grantee ſhall not alien it, and he doth alien it, but no atturnement is to this grant; yet it ſeemes this Dier 45. 65. Per 3. Juſtices B. R. 3 Jac.

is

Dier 6. is a breach of the condition. And if a leaſe for years be made, on condition that the leſſee or his aſſignes ſhall not alien, and the leſſee doth make his wife his Executrix, and ſhee doth take another husband, and he doth alien it; it ſeemes this is a breach of the condition and a forfeiture of the eſtate. But if a leaſe be made on condition that the leſſee ſhall not alien without the licence of the leſſor, and after the leſſor die, and the leſſee aſſigne, or the leſſee die and his executors or adminiſtrators aſſigne; this is no breach of the condition in either of theſe caſes. So if a leaſe be made, on condition that the leſſee ſhall not alien the terme during his life, and he makes an executor, but doth not deviſe it to him; this is no breach of the condition. And if a leaſe be made, on condition that the leſſee his executors or aſſignes ſhall not alien the terme to any perſons without the licence of the leſſor but to the wife or one of the children of the leſſee, and the leſſee die, and his executors alien to one of the children of the leſſee and he alien to a ſtranger without licence; this is no breach of the condition. And if one make a leaſe of a houſe and land, on condition that the leſſee ſhall not parcell out the land or any part of it from the houſe, and the leſſee doth grant all his terme in the houſe and part of the land, and doth keepe the reſt, and after doth leaſe that part alſo; this is a breach of the condition.

Dier 152. Co. 4. 120.

Hil. 38. El. Marſh verſus Curtis.

Co. 8. 92. If a leaſe be made of a houſe, on condition that the leſſee ſhall not ſuffer any woman great with child to harbour or lodge in the houſe ſix daies after notice given by the leſſor, and the leſſee doe ſuffer any ſuch perſon after notice given, albeit the leſſor conſent to it; yet the condition is broken. But if the leſſor doe *nolens volens* keep ſuch a woman there againſt the mind of the leſſee; this is no breach of the condition.

Not to ſuffer a woman with child in the houſe.

12 H. 4, 5. Bro. Condition. 40. If a leaſe be made, on condition that if any waſt be done the leſſor ſhall reenter; in this caſe if the houſe fall by a tempeſt, this is no breach of the condition, for this is not waſt: but if it be uncovered by tempeſt, and the tenant hath a convenient time to repaire it, and doth not, but doth ſuffer the timber to periſh for want of covering; this is a breach of the condition and the leſſor may enter and put out the leſſee. * And if a leaſe be made, on condition that the leſſee ſhall not doe waſt, and he ſuffer waſt to be made in decay of the houſes &c. it ſeemes the condition is broken. *Sed quere.*

Not to doe waſt.

* Per. Dier and Walſh Juſtices. Dier 281.

Dier 13. If a leaſe be made, on condition that if the leſſee be minded to ſell his eſtate the leſſor ſhall have the firſt offer thereof, giving as much as another will give; in this caſe if the leſſee doth not give notice when he is minded to ſell it he doth breake the condition: but if when he is minded to ſell he doth tell the leſſor

Not to ſell till the leſſor refuſe it to any other.

of his purpoſe and what he is offered for it, and the leſſor doth either ſay he will not have it, or that he will not give ſo much for it, or doth not accept it, but doth delay &c. and then the leſſee doth ſell it to another: this is no breach of the condition, neither is he bound to waite upon him in this caſe.

To make an eſtate.

If a feoffement be made, on condition that the feoffee ſhall make a feoffement in fee, gift in taile, leaſe for life, or years of the land, to the feoffor, or to a ſtranger by a day; and before the day the feoffee doth diſable himſelfe to doe it, either by making ſome eſtate of the ſame thing to ſome other perſon in taile, for life, years, in preſent or future, or for one yeare, or by taking a wife whereby ſhee may be intitled to dower, or by ſuffering a recovery of the land, or by granting of any rent, Common, or the like, or by entring into any Statute &c. or by ſuffering any Judgement to be had againſt him, or by doing any other ſuch like act, whereby he cannot convey the land according to the condition in the ſame plight, quality and freedome it was at the time of the conveyance made: in either of theſe caſes the condition is *ipſo facto* broken. And albeit the land be afterward diſcharged and the party againe enabled before the day to performe the condition, yet this will not ſalve the breach. And ſo alſo it is of a limitation. But when the condition is to be performed of the part of the feoffor or grantor, there diſability before the time will not hurt ſo as he be againe enabled at the time. And ſo alſo it is when the condition is to be performed of the part of the feoffee, and there is no certaine day ſet for the performance of the thing, for in this caſe albeit he be once diſabled, yet if he be afterwards againe enabled, and doe it within the time that the law doth give him to do it; in this caſe the condition is not broken. And ſo alſo it is, if the feoffee be diſſeiſed, and during the diſſeiſin, he doe any ſuch act as before; in this caſe before his entry this is no breach of the condition, for till then the charge doth not binde the land. And ſo likewiſe it is when the diſability doth proceed from another cauſe, as where one doth make a feoffement on condition that the feoffee, ſhall reinfeoffe before ſuch a day, and before the day the feoffor diſſeiſe the feoffee and keepe him out till the day be paſt; or one doth make a feoffement, on condition the feoffee ſhall marry *B* before ſuch a day, and before the day the feoffor himſelfe doth marry her ſo that the feoffee cannot performe the condition; in theſe caſes the condition is not broken.

Co. ſuper Lit. 221, 222. Co. 2. 58. Perk. Sect. 803. Lit. Sect. 355. Co. ſuper Lit. 206.

To imploy the profits to charitable uſes.

If one make an eſtate of lands (held in Capite) on condition that he to whom it is made ſhall imploy the profits thereof to divers charitable uſes, and he die his heire within age, by reaſon whereof the King hath the land during the minority of the heire,

Trin. 13 Jac. Slade verſus Tompſon. B. R.

heire, ſo that the profits cannot be employed; this is no breach of the condition.

Co. 1. in Porters caſe. If one make a feoffement of land, on condition to reinfeoffe in convenient time, and the feoffee doth not ſo but doth make a leaſe to another; this is a double breach of the condition. And the ſame Law is of a Deviſe by will in this manner. To reinfeoffe.

Perk. Sect. 796. Co. 8. 90. See the parable Mat. 21, 28. If a feoffement be made, upon condition that the feoffee ſhall make ſome eſtate to the feoffor, or ſome other by a day, and the feoffee before the day ſay to him to whom the eſtate is to be made, that he will never make the eſtate, notwithſtanding he doth make the eſtate before the day according to the condition; in this caſe it is ſaid the condition is broken. *Sed quere* of this, for it ſeemes if he really deny it before, and actually performe it at the day; that this is a good performance of the condition. As if a leaſe be made of a houſe, on condition that the leſſee ſhall not diſturbe the leſſor in the taking a way of his goods out of the houſe, and when the party doth come or ſend to fetch them the leſſee doth only forbid them; this in this caſe is no breach of the condition, and it was agreed in this caſe that words without ſome deeds, as ſhutting the dore againſt them, forcible reſiſtance, or laying of hands upon them, or the like are no breach of ſuch a condition. And if a leaſe be made, on condition that the leſſor ſhall be foure times a yeare in the houſe demiſed without being ouſted by the leſſee and the leſſee ſeeing him comming doth ſhut the dores or windowes againſt him; this hath been thought to be no breach of this condition. To make an eſtate. To ſuffer one to take his goods. To ſuffer one to come into a houſe.

3 H. 4. 8.

Dier 33. If a leaſe be made, on condition that the leſſee ſhall pay yearly to the leſſor during the terme tenne pound; in this caſe if he faile of payment once, the condition is broken and eſtate forfeit. So if one make a feoffement in fee of land, on condition to pay tenne pound yearly to *I S*; if he faile once the condition is broken. To pay a yearly rent or ſum.

Penner verſus Glover 37 & 38 El. Mich. B. R. per curiam. If a leaſe be made of a Manor in which are divers Copyholders, on condition that the leſſee ſhall not moleſt, vex, or put out any Copiholder paying his duties and ſervices; in this caſe if the leſſee enter upon, and put out any one Copiholder, this is a breach of the condition. But if he enter *vi & armis* upon a Copiholders tenements, and there beate him only, or the like: this is no breach of the condition. Not to moleſt Copiholders.

Crompt. Jur. 64, 65. If there be a condition to pay rent, and the leſſee let part of the land to other undertenants, or let all the land to another for part of the time, and he undertake the rent ſtill, and faile of payment: in this caſe the condition is broken and eſtate forfeit. But if there be any covin and practiſe in the caſe between the firſt leſſor and the leſſee, the undertenants may perhaps have relief in equity. To pay rent. Equity.

Co. 8. 90. If one make a leaſe for years of land, and then alſo make a feoffement in fee of the lands on condition that if the leſſee be diſturbed Not to diſturb.

bed in his terme that he ſhall have the fee ſimple, and he is diſturbed by the feoffor or by his meanes; in this caſe the condition is broken and the leſſee ſhall have the fee ſimple. But if the diſturbance be by a ſtranger and not by the feoffor or by his meanes or conſent; this is no breach of the condition.

Not to be outlawed.

If a leaſe be made, on condition that the leſſee ſhall not be outlawed, and he is outlawed without proclamation; it ſeemes this is no breach of the condition, becauſe the outlawry is not good. Per 2. Justices. H. 7 Jac. B.R.

If a condition poſſible at the time of creation become after impoſſible in part by the act of God, and the party doe not performe that which is poſſible, the condition is broken. Lit. Sect. 352. Co. 2. 59.

If a man make a leaſe for years on condition, and the leſſee doth not know of it, and after the leſſor doth by will give the land to the leſſee without condition, and the leſſee doth ſuch an act as is a breach of the condition; in this caſe the condition is not broken, for the leſſee muſt have notice of the condition ere he can breake him. Co. 8. 92.

To pay rent.

If a leaſe be made rendering rent, on condition, that if the rent be not paid within twenty daies the leſſor ſhall reenter, and the rent is not paid; in this caſe the condition is broken, but the leſſor cannot enter untill he hath made a legall demand, and if he die before he doe it, his heire ſhall never take advantage of that breach, but it is diſcharged for ever. Doct. & Stud. 35. 13 H. 4. 17.

When an act is to be done in time convenient, or otherwiſe, and the party doe it not by the time appointed by law; the condition is broken. Li. Sect. 353. Plow. 30.

To give adviſe.

If one grant an annuity *pro conſilio impenſo & impendendo*, and the grantor require adviſe, and the grantee refuſe or neglect to give it: this is a breach of the condition and a forfeiture of the eſtate. And if the deed be, that he ſhall goe to ſuch a place to give counſell, and he require him to goe thither and he refuſe it, this is a forfeiture of the eſtate. But if he refuſe to goe with him to another place, or give counſell to his adverſary being not required to give counſel to him, this is no breach of the condition nor forfeiture of his annuity. And if one had heretofore deviſed his land to be ſold by his executors, & to have been diſtributed for his ſoule, & the executors had not ſold it in time convenient, or had taken the profits to their own uſe: this had been a breach of the condition. See more in the laſt foregoing diviſion, and in *Obligation Numb.* 10. *Covenant Numb.* 7. The ſame law is for the moſt part of conditions of obligations. See *Obligation Numb.* 10. 21 E. 3. 7. 8 H. 6. 24. Dier 369. Lit. Sect. 383.

11. When a condition in law ſhall be ſaid to be broken. Or not.

Every particular eſtate hath a condition in law annexed to it, and therefore if tenant for life in dower, by the courteſie, or after poſſibility of iſſue extinct, leſſee for years, tenant by ſtatute merchant, elegit or the like make any abſolute or conditional eſtate of the lands they hold in fee ſimple, fee tail, or for life & give livery of ſeiſin thereupon or levy a fine *Sur conuſance de droit*, or ſuffer a recovery of the land, Co. 2. 15. 8. 44. ſuper Lit. 233.

Forfeiture.

or

or the like; this is a breach of the condition in law and a forfeiture of their eſtate. Alſo if any ſuch tenant (except tenant in taile after poſſibility of iſſue extinct) doe waſt in the lands they doe ſo hold; this is a breach of the condition in law and a forfeiture of their eſtate in ſo much as the waſt is committed. But if an Infant or feme covert that hath ſuch an eſtate ſhall make any ſuch eſtate &c. this is no breach of the condition in law. And yet if ſuch a perſon doe waſt, this is a breach of the condition in law. And ſo alſo if any ſuch perſon be an officer and doe any thing which is a cauſe of forfeiture in another; this will be a forfeiture in him or her alſo.

Infant. Womencovert.

Co. ſuper Lit. 223. If any keeper of a Parke without warrant kill any Deere, fell or cut any wood and convert it to his owne uſe, pull downe the lodge or any houſe within the Parke uſed for hay for the Deere, or the like; this is a breach of the condition in law. So alſo if a keeper ſhall not looke to the game, but the Deere be killed by his default, and damage come to the Lord; by this alſo the condition is broken. But the not attending upon ſuch an office for two or three dayes if the Lord have no ſpeciall loſſe thereby is no cauſe of forfeiture.

Co. ſuper Lit. 234. Offices that are for the Adminiſtration of Juſtice, or of clark ſhip in any Court of Record, or concerning the Kings treaſure, revenue, account, alnage, auditorſhip &c. have alſo conditions in law annexed to them, and therefore if ſuch officers ſhall ſell their offices or miſdemeane themſelves in their offices: by this the condition in law may be broken and they may forfeit them.

Lit. Sect. 347. Plow. 175. Co. 3. 62. 347. 5. 56. Dier 131. Co. ſuper Lit. 214, 215. Doct. & Stud. 93. Perk. Sect. 830, 831. 833, 835. Plow. 488, 489. As no man may create or annex a condition to an eſtate but he that doth create the eſtate it ſelfe, ſo neither can a man give or reſerve the power, title or benefit of reentry and avoidance of an eſtate upon the breach of a condition to any other but to him, or them, or at leaſt to one of them that doth make the eſtate, his or their heirs, executors and adminiſtrators &c. for it is a rule of the common law, That none may take advantage of a condition but parties and privies in right and repreſentation, as heires, executors, &c. of naturall perſons, and the ſucceſſors of politique perſons: and that neither Privies nor Aſſignees in law, as Lords by Eſcheate, nor in deed, as grantees of reverſions, nor Privies in eſtate, as he to whom a remainder is limited, ſhall take benefit of entry or reentry by force of a condition. And therefore if a man had made a leaſe for life reſerving rent, on condition that if the rent be behind the leſſor, his heires and aſſignes ſhall reenter, and after had granted the reverſion to a ſtranger; this grantee ſhould not by the common law have had benefit by this condition. But if the leſſor had died, his heire or the Gardian in Chivalry or Socage of ſuch an heire if he had been an Infant

12. Who may enter for a condition broken. And what perſons ſhall take advantage of a condition or a limitation. And what not.

and inward might have taken advantage by the condition. And if one had been poſſeſſed of a leaſe for years, and had granted his terme upon condition and had died; his executors or adminiſtrators might have had advantage of this condition.

And at this day the law is ſtill the ſame as touching Privies in blood, for an heire ſhall take advantage of a condition, though no eſtate deſcend to him from the Anceſtor. And therefore if one be ſeiſed of land of the part of his mother, and he make a feoffement in fee of it, on condition, and die, and the condition is broken; in this caſe the heire of the part of the father ſhall enter, but as ſoone as he hath entred the heire of the part of the mother ſhall enter upon him and enjoy the land. And if a man be ſeiſed of land in the right of his wife, and he make a feoffement in fee of it, upon condition, and die; the heire of the husband ſhall enter for the condition broken, but the wife ſhall have the land. And ſo alſo is the law as touching Privies in right and repreſentation, for Executors and Adminiſtrators ſhall take advantage of a condition now as heretofore. And ſo alſo ſhall the Succeſſors of a Deane and Chapter, Biſhop, Arch-deacon, Parſon, Prebend, or any body Politique or corporate, Eccleſiaſticall or Temporall; theſe ſhall take advantage of conditions as heretofore they did. So alſo the law is the ſame as touching Privies in law, for they ſhall no more take advantage of a condition now then heretofore. But as touching grantees of reverſions and Privies in eſtate, there is ſome alteration made of the Law, for by a new law it is provided, That all perſons which ſhall have any grant of the King of any reverſion &c. of any lands &c. which pertained to Monaſteries &c. as alſo all other perſons being grantees or aſſignees &c. to or by any other perſon or perſons, and their heires, executors, ſucceſſors and aſſignes, ſhall have like advantage againſt the feoffees &c. by entry for not payment of rent, or for doing waſt, or for other forfeiture &c. as the ſaid leſſors or grantors themſelves ought or might have had.

Co. ſuper Lit. 202. 12.

Sat. 32 H. 8. cap. 34.

And for the true underſtanding of the ſenſe of this Statute and the ancient Common law further touching this point, 1, Theſe diverſities muſt be obſerved to be taken before the Statute which take place ſtill.

Co. ſuper Lit. 214. Plow. 27.

1. Between a condition that doth require a reentry, and a limitation that doth *ipſo facto* determine the eſtate without entry, for albeit a ſtranger might not take advantage of the firſt yet he might take advantage of the laſt by the Common law. And therefore if a man at this day make a leaſe to another *quouſque*, or untill *I S* come from *Rome*, or if a man make a leaſe to a woman *quamdiu caſta vixerit*, or if a man make a leaſe to a widow

Co. 10. 36. F. N. B. 201.

widow *ſi tamdiu in pura viduitate viveret*, or if a man make a leaſe to another for one hundred years if he live ſo long, and then the leſſor doth grant the reverſion to a ſtranger; in all theſe and ſuch like caſes the grantee of the reverſion may take advantage of the limitation, for after the eſtate is ended by the limitation he may enter.

Co. 3. 64, 65. Co. ſuper Lit. 214. 11 H. 7. 17. Plow. 136.

2. Between a condition annexed to a freehold and a condition annexed to a leaſe for years, for if before the Statute a man had made a gift in taile, or leaſe for life, on condition that if the donee or leſſee did not pay tenne pound by ſuch a day the gift or leaſe ſhould be void or ceaſe; in this caſe the grantee of the reverſion could not by the common law have taken advantage of the condition, for it could not be void or ceaſe but by entry which could not be transferred to another. But if a leaſe for years had been made on ſuch a condition; a grantee of the reverſion might by the common law have taken advantage of this condition, for the eſtate in this caſe was by the breach of the condition *ipſo facto* void without entrie. But now the grantee of the reverſion ſhall have advantage of the condition in both theſe caſes.

Co. ſuper Lit. 214.

3. Between a condition in deed and a condition in law, for by the very common law not only the grantee of the reverſion but alſo the Lord by Eſcheat, may either of them have advantage of a condition in law for any breach in his owne time.

2. TheſeReſolutions and Judgements upon the Statute muſt be marked. 1. That the Statute is generall, and the grantee of the reveſion of every cómon perſon as well as the King may take advantage of conditions. 2. That the Statute doth extend to grants made to the ſucceſſor of the King aſwell as to the King albeit he only be named in the Statute. 3. That he that comes to the reverſion by fine, feoffement, grant, limitation of uſe, common recovery, or bargaine and ſale, is ſuch a grantee as is within the intendment of the Statute. 4. That where the Statute doth ſpeake of feoffees &c. that it doth not extend to gifts in taile, and therefore if a gift in taile be upon condition, and after the donor doth grant the reverſion; this grantee ſhall never have any benefit of this condition. 5. That where the Statute doth ſpeake of grantees and aſſignees of the reverſion; that hereby an aſſignee of part of the ſtate of the reverſion may take advantage of the condition, as if leſſee for life be, and the reverſion is granted for life &c. or if leſſee for years be &c. and the reverſion is granted for years &c. in theſe caſes the grantees of the reverſion ſhall have advantage of the conditions.

Co. ſuper Lit. 214. Co. 5. 13.

* Davy and Mathews caſe per. & 2 Juſtices Trin. 14. Jac. B. R.

* So if a leſſee for one hundred years make a leaſe for tenne years, rendring rent, with condition of reentry, and the firſt leſſee doth afterward grant his terme and eſtate to *I S*; in this caſe *I S*

is ſuch a grantee and aſſignee of the reverſion as ſhall take advantage of the condition. 6. That as well mediate as immediate grantees. *i.* the grantees of grantees *in infinitum* are intended within this Statute. 7. That a grantee of part of the reverſion cannot take advantage of a condition by this Statute. And therefore if a leaſe be made of three acres reſerving rent upon condition, and the reverſion is granted of two of the three acres; in this caſe the rent ſhall be apportioned, but the condition is deſtroyed except it be in the Kings caſe. And yet a condition may be apportioned by the act of law, or by the wrong of the leſſee. As if a leaſe be made of two acres (the one of the nature of Burrough Engliſh, and the other at the Common law) upon condition, and the leſſor having iſſue two ſonnes dieth; in this caſe each of them ſhall enter for the condition broken. And if the leſſee upon condition make a feoffment of part of the land; this doth not deſtroy the condition. There is therefore herein a difference between a condition that is compulſory, and a power of revocation that is voluntary: for he that hath ſuch a power may by his own act extinguiſh it in part, by levying a fine of part of the land or otherwiſe, and yet his power may remain for the reſidue as in the caſe of a limitation; but in the caſe of a condition he cannot doe ſo. 8. Such grantees as ſhall have advantage by this Statute, muſt be compleat grantees; And therefore grantees of reverſions by fine, or deed, muſt have atturnment ere they can take advantage of the condition. And yet if a reverſion be granted by fine to one that hath no atturnment, and he grant it to another that hath an atturnment; in this caſe the ſecond grantee ſhall take advantage of the condition, albeit the firſt grantee ſhall not. And the leſſee muſt have notice of the grant of the reverſion, ere he in reverſion can take any advantage of a condition. And therefore it is, that if the leſſor bargain and ſell the land by deed indented and inrolled (in which caſe there needs no atturnment); or if the leſſor make a feoffment of the land, and ſo out the leſſee, and the leſſee reenter (which is an atturnment in law); the grantee or feoffee in theſe caſes cannot take advantage of any condition before he hath given notice to the leſſee of this grant of the reverſion. 9. Such as come in meerly by act of law, or paramount, as the Lord of a Villain, the Lord by eſcheat, the Lord that doth enter for Mortmain, or the like, cannot take advantage of a condition within this Statute. And hence it ſeems it is that if leſſee for forty yeares make a leaſe for thirty ſeven years on condition, and after ſurrender his eſtate to his leſſor; that the ſurrendree ſhall not have advantage of this condition. 10. * Albeit the words of the Statute be generall, yet grantees and aſſignees ſhall not take benefit of every forfeiture by force of a condition, nor yet of all conditions, but onely of ſuch as are inherent.

Prerogative.

Apportionmẽt.

Power of revocation.

Co. 5. 112, 113. Co. ſuper Litt. 214.

Co. 5. 113, 114. Co. 8. 92.

Co. ſuper Litt. 214. Paſche 7 Jac. Co. B. per 2 Juſtices.

* Co. ſuper Litt. 215. Dier 309. Curia in Leeks caſe. Paſche 7 Jac. Co. B.

i. ſuch

i. ſuch as are either incident to the reverſion, as for payment of rent, or for the benefit of the State, as for reſtraining of waſt, for cauſing of reparations, making of fences, skowring of ditches, preſerving of woods, and the like. And of conditions that are collaterall, ſuch grantees ſhall not take benefit. And therefore if the condition be for payment of a ſum of mony in groſſe, to reſtraine alienation, for the delivery of corn, wood, or the like, the grantee of the reverſion of the land ſhall not have advantage of it by this Statute, for theſe remain as they were before the Statute at the Common law. 11. Such conditions as are on the part of the leſſor, it ſeems are not within this Statute; And therefore if one make a leaſe for years, on condition that if the leſſor, his heirs or aſſigns, pay ten pound to the leſſee at our Lady day, the leaſe to bee void, & the leſſor doth grant the reverſion to a ſtranger before the day; it ſeems the grantee ſhall not take advantage of this; but the condition is gone.

Per Juſtice Bridgman.

Doct. & St. 35. 13 H.4. 17.

If one make a leaſe for years rendring rent to him and his heirs, on condition that if it be not paid within fourteen days, that hee and his heirs ſhall reenter, and the rent is behinde, and the leſſor doth demand it, and then die; in this caſe the heir may enter. But if he die before demand, the heire cannot make a demand, and ſo take advantage of that breach of the condition, which was in the time of his Anceſtor.

Perk. Sect. 834.

If a man be poſſeſſed of land for twenty years in the right of his wife, and he make a leaſe of it for ten years rendring rent, with condition of reentry for default of payment, and after the husband die; in this caſe the wife ſhall have the rent, but it ſeems ſhe ſhall not take advantage of the condition.

Co. 1. 85. ſuper Litt. 379. Dier 127. 117.

If a leaſe be made to *I S*, on condition that if ſuch a thing be, or be not done, that the land ſhall remain to *I D*, or that *I D* ſhall enter; in this caſe *I D* ſhall never take advantage of this condition, either by the Common law or by this Statute.

Co. ſuper Litt. 218. 237.

Regularly where a man will take advantage of a condition, if he may enter, he muſt enter, and when he cannot enter, he muſt make a claim; for an eſtate of freehold or inheritance will not ceaſe without entry or claim. And he that is to have advantage by the condition, may wave his advantage if he will. And untill ſuch entrie or claim made, the party that ſhould enter can make no good eſtate of the thing to any other. But herein a difference is to be obſerved in the penning of a condition, and between a leaſe for yeares and a leaſe for life or a greater eſtate: for if a leaſe for years be made, on condition that upon ſuch a contingent the eſtate ſhall ceaſe, or the leaſe ſhall be void; in this caſe when the thing doth happen, the leaſe is *ipſo facto* void without entry or claim. But otherwiſe it is of a leaſe for life, albeit there be the

13. Where entry or claim is needfull, to avoid an eſtate on condition. And where a man may take advantage of a condition without entry or claim. And where not.

the ſame words in the condition. And if one make a leaſe for years, on condition that if ſuch a thing be done, the leſſor ſhall reenter; in this caſe an entry is needfull to avoid the eſtate.

If one make a feoffment in fee, gift in taile, or leaſe for life, on condition that upon ſuch a contingent the eſtate ſhall be void; in this caſe there muſt be an entry made, after the condition is broken to avoid the eſtate. So if one bargain and ſell his land by deed indented and inrolled, with proviſo that if the bargainor pay &c. then the eſtate ſhall ceaſe and be void, & he doth pay the mony; in this caſe the eſtate is not reveſted in the bargainor before an actuall reentry is made. And ſo it is alſo if lands be deviſed to a man and his heirs, on condition that if the deviſee doe not pay twenty pound at a day, his eſtate ſhall ceaſe and be void; in this caſe the eſtate is not void untill an actuall reentry be made. And ſo alſo it is if a reverſion, remainder, advowſon, rent, common, or the like, be deviſed on ſuch a condition; in theſe caſes there muſt be a claime before the eſtate will be determined. And therefore if a man grant ſuch a thing to another and his heirs, on condition that if the grantor pay twenty pound on ſuch a day, the ſtate of the grantee ſhall ceaſe or be void, and the grantor doth pay the mony according to the condition; in this caſe the ſtate is not reveſted in the grantor before a claim made at the Church in caſe of an Advowſon, and in the other caſes upon the land. But in caſe where a man cannot make an entry or claim, there the law will not compell him to it. And therefore if one grant land to another for five years, on condition that if he pay to the grantor within the two firſt years forty marks, that then he ſhall have the fee, otherwiſe but for tearm of five years, and livery of ſeiſin is made accordingly, and the grantee doth not pay this mony; in this caſe after the two years are paſt, the freehold ſhall be in the grantor without entry or claim, for as this caſe is, he cannot enter, but he muſt out the leſſee of his term. So if I grant a rent charge out of my land upon condition; when the condition is broken, the rent is extinct, and here needs no claim. So if a man make a feoffment of land to me in fee, on condition that I ſhall pay him twenty pound ſuch a day &c. and before the day I let the land to him for yeares, † rendring rent, and after the condition is broken; in this caſe he may retain the land without entry or claime, and the rent is extinct. So if one covenant to ſtand ſeiſed to the uſe of himſelf for life or otherwiſe, and then after to the uſe of others, with a proviſo of revocation &c. and after he doth revoke it; in this caſe all the eſtates are reveſted in him without entry or claim.

† Rent.

*14. When a condition broken ſhal make the eſtate &c. void *ab initio*. And when not. And to what intents the leſſor, feoffor, &c. ſhall be adjudged by his reentry to be in of his firſt eſtate. And to what intents not.

* It is generally true that he that doth enter for a condition broken, doth make the eſtate void *ab initio*, & that hee ſhall be in of his firſt eſtate in the ſame courſe and manner as it was when he departed

Co. 4.120. Perk. Sect. 840. Plow. 186.482. 14 H.8.17.

ted with the poſſeſſion, and at the time of the making of the condition. And hence it is, that if there be any charge or incumbrance on the land, as if leſſee of land upon condition grant a rent charge out of the land, or enter into a Statute or Recogniſance, and the conuſee have the land in execution, and this charge is after the condition is made; in this caſe when the condition is broken, and the party doth reenter, hee ſhall by relation avoid the rent, ſtatute, and recogniſances, and hold the land freed from them all. And if an eſtate be to paſſe by way of increaſe, upon condition, or a leaſe is to be made upon a condition precedent; when the condition is performed, the party ſhall hold his eſtate free from all after charges and clogs. And if a man enter for breach of a condition in law, hee ſhall avoid all charges and acts done after that thing is done which doth produce the forfeiture, but he ſhall not avoid any thing done before that time; for he muſt take the thing as hee findes it: as if a houſe or land belong to an officer in reſpect of his office, and he grant a rent out of it for his life, and then he doth forfeit it; in this caſe the rent ſhall continue. And if leſſee for life of land grant a rent out of it, and then make a feoffment in fee of the land; in this caſe the rent ſhall continue, and the leſſor cannot avoid. But if leſſee for life of land make a feoffment in fee of it, and then grant a rent out of the land; in this caſe the leſſor ſhall avoid it. And if a leſſee grant a rent out of his land, and then doe waſt, and the leſſor recover the land, he cannot avoid this rent, but ſhall hold the land charged with it. But if the leſſee doe waſt firſt, and then he grant a rent charge to a ſtranger out of the land, and after the leſſor recover the place waſted; in this caſe he ſhal hold the land diſcharged. And if leſſee for life make a leaſe for years, and after enter upon the leſſee for years, and make a feoffment in fee; this ſhall not avoid the leaſe for years. And if a man make a leaſe for yeares, rendring rent with clauſe of entry for non payment, and the leſſee doth make underleaſes of part of this land, and after the rent is unpaid, and the leſſor doth enter; in this caſe he ſhall have all the land, and avoid all the under leaſes. But if there be any covinous practiſe in the caſe, the undertenants may have remedy in Equity. And if a leaſe be made for life, the remainder in taile on condition; in this caſe if the condition be broken, both the eſtates be avoided. *Et ſic de ſimilibus.* But this generall rule doth faile in divers particulars: as if a man bee ſeiſed of land in the right of his wife, and he maketh a feoffment in fee by deed indented, upon condition that the feoffee ſhall deviſe the land to the feoffor for life &c. and the husband dieth, and then the condition is broken; in this caſe the heir of the husband ſhall enter, and yet he ſhall not have the eſtate of the feoffor, for this doth preſently after his entry vaniſh away. So if a tenant in ſpeciall tail hath iſſue,

Co. ſuper Litt. 234. Perk. Sect. 843, 844. Co. ſuper Litt. 233.

Crompt. Jur. 64, 65.

Co. 10. 41.

Equity.

Co. ſuper Litt. 202. Perk. Sect. 842, 843.

ſue, and his wife dieth, and tenant in taile maketh a feoffment in fee upon condition, the iſſue dieth, the condition is broken, and then the feoffor doth reenter; in this caſe he ſhall have but an eſtate for life as tenant in tail after poſſibility of iſſue extinct. So if a leſſee for life or years make a feoffment in fee on condition, and after doth enter for the condition broken; in this caſe he ſhall not be in in the ſame courſe, for now his eſtate is ſubject to entry for forfeiture, though he be tenant for life ſtill. So if a diſſeiſor be of certain land, and he die ſeiſed thereof, and his heir is in by deſcent, and the diſſeiſee enter upon the heir, and infeoffe a ſtranger upon condition, and the heir of the diſſeiſor doth enter upon the feoffee, and the diſſeiſee doth ſue a writ of entry *ſur diſſeiſin*, againſt the heir of the diſſeiſor, and doth recover and hath execution, and the feoffee on condition doth reenter, and after the condition is broken; in this caſe the feoffor is not in in the ſame caſe, for now the diſſeiſor cannot enter upon him as he might before. And in ſome caſes the feoffor by his reentry ſhall be in in his former eſtate, but not in reſpect of ſome collaterall qualities: as if tenant by homage Anceſtrell, make a feoffment of the land he doth ſo hold in fee, on condition, and entreth for the condition broken; in this caſe it ſhall never be held in homage Anceſtrel again. And ſo if a copyhold eſcheat be, and the Lord make a feoffment in fee upon condition, and entreth for the condition broken; in this caſe the cuſtome annexed to that land is gone. So if there be Lord and tenant by fealty and rent, and the Lord is in ſeiſin of the rent, and granteth his Seigniory to another and his heirs on condition, and the tenant doth atturn and payeth his rent to the grantee, the condition is broken; the Lord diſtraineth for his rent, and reſcous is made, in this caſe the former ſeiſin ſhall not enable him to have an aſſiſe without new ſeiſin. If there be Lord and tenant, and the Lord diſſeiſe the tenant of the tenancy, and thereof doth enfeoffe a ſtranger on condition, and after the condition is broken, and the Lord enter, and the tenant doth enter upon him; in this caſe the Seigniory is not revived.

If tenant in tail make a feoffment in fee on condition, and dieth, and the iſſue in tail within age doth enter for the condition broken; in this caſe he ſhall be in firſt as tenant in feeſimple, and heir to his father, and then ſhall be preſently remitted: but if he be of full age he ſhall not be remitted.

If one make a feoffment of white acre and black acre, on condition &c. and that he ſhall enter into black acre onely; in this caſe upon breach of the condition, he ſhall enter into that part onely. Co. ſuper Litt. 202, 203.

If the words of a condition be, That if ſuch a thing be not done, the feoffor or leſſor ſhall enter into the land, and take the profits thereof untill the thing be done, or to the like effect; in this caſe

if

if the feoffor or leſſor enter upon the breach of the condition, hee doth not avoid the eſtate, or get any thing by his entry, but the poſſeſſion onely in the nature of a pledge, or a diſtreſſe untill the thing be done; And if the condition be for the payment of the rent, he ſhall hold the land untill he be paid the rent. And if the words be [That the feoffor &c. ſhall enter and take the profits, untill thereof he be ſatisfied, or untill he be ſatisfied or paid the rent] in the firſt caſe as ſoon as he is paid, either by the receiving of the profits, or payment of the rent behind, or both together; and in the laſt caſe as ſoon as he is paid the rent by the feoffee or leſſee, the feoffee or leſſee may enter again into the land.

15. When and by what meanes a condition ſhall be diſcharged and extinguiſhed for ever, or ſuſpended for a time. Or not.

1. By the act of God. Conditions impoſſible.

Co. ſuper Lit. 207. 219. 15 H. 7. 13. Dier 262.

If a condition be poſſible in his creation, and after become impoſſible by the act of God, the condition is diſcharged and gone for ever, and the eſtate is abſolute. As if a feoffment be made to me, on condition that I ſhall reinfeoffe the feoffor before a day, or on condition that I ſhall appear at *Weſtminſter* in the Kings Bench ſuch a day, or on condition that I ſhall goe to *Paris* about the affairs of the feoffor before ſuch a day, and before the day appointed it doth happen that I die; in all theſe caſes the condition is diſcharged. So if the condition of a feoffment be that if the feoffor or his heirs pay ten pound to the feoffee ſuch a day, and before the day the feoffor dieth without heire; in this caſe the condition is gone. And if the condition become impoſſible in part onely, then it is diſcharged for ſo much onely.

Perk. Sect. 819.

If there be Lord and tenant, and the tenant doth enfeoffe a ſtranger on condition, and the feoffee die without heir, ſo that the tenancy eſcheat; in this caſe the condition doth continue, and the Lord muſt hold it ſubject to the condition.

2. By the Act of Law.

Co. ſuper Litt. 215. Co. 4. 120.

Albeit a condition cannot be divided by the act of the parties, but it will be deſtroyed, yet it may be divided by the act of law; and therefore if a leaſe for years be made of two acres of land (the one of the nature of Burrough Engliſh, and the other at the Common Law) on condition, and the leſſor having iſſue two ſons dieth; in this caſe albeit the condition be divided, yet it is not gone, but doth continue ſtill, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reverſion, grant part of his reverſion to a ſtranger; the condition is deſtroyed in all, for it cannot be apportioned by the act of the parties, as it may by the act of the law, or the wrong of the leſſee.

3. By the Act of the parties.

Co. 2. 59. the Lord Cromwels caſe. Dier 309. Co. ſuper Litt. 265. 379. Co. 10. 41.

A condition may be deſtroyed in the very creation of it; as if one deviſe lands for life with expreſſe words of a condition, and not words of limitation, or words that may be ſo taken, the remainder over to a ſtranger; in this caſe the ſtranger cannot enter, neither is the remainder good, nor the condition effectuall. Or it may be diſcharged by matter *expoſt facto*: as in the examples following.

lowing. If one make a feoffment in fee of land upon condition, and after and before the condition broken, he doth make an abſolute feoffment, or levy a fine of all or part of the land to the feoffee, or any other; by this the condition is gone and diſcharged for ever. And yet if one grant a rent out of his land, upon condition, and after make a feoffment of this land, this doth not extinguiſh the condition. And if a fine in this caſe be levied in purſuance of a former agreement; as if one by Indenture bargain and ſell his land to another, and in the Indenture there is a covenant that all other aſſurances ſhall be to the uſe of the bargainee, according to the firſt agreement, and the bargaine and ſale hath a condition annexed that the bargainee ſhall make a feoffment of part of the land to the bargainor, & after the bargainor doth levy a fine to the bargainee in corroboration of the firſt bargain; in this caſe the condition is not extinct, but ſaved by the original agreement. And if one make a feoffment in fee of land upon condition, & after & before the condition broken, he doth make a leaſe for years onely of the land, or part of it to the feoffee or any other; by this the condition is ſuſpended for that time. And if the feoffor after a feoffment made of land upon condition, enter upon all or part of the land and be impleaded, and loſe it; by this the condition is gone for ever. And if he enter and hold the poſſeſſion onely; by this the condition is ſuſpended during his poſſeſſion, and if he hold the poſſeſſion ſo long that the feoffee cannot perform the condition; the condition is diſcharged for ever. And if one make a feoffment of land upon condition, and after and before the condition broken, the feoffee doth make a feoffment of all or part of the land to the feoffor; by this the condition is gone for ever. And if the feoffee make a leaſe for life or yeares onely of part of the land; by this the condition is ſuſpended for that time. But if the feoffee make a feoffment in fee, leaſe for life, or years to a ſtranger; this is no extinguiſhment nor ſuſpenſion of the condition. And if the condition be to pay mony, or doe any ſuch collaterall thing; if in this caſe the feoffee make a leaſe to the feoffor, this doth not ſuſpend the condition.

Co.2.59. Perk.Sect. 819,820. 163. Litt. Bro. Sect. 212. Co. ſuper Litt. 219.

Co.7.14.4. 52. Litt. Bro. Sect. 212. 85. Co. ſuper Litt. 218.

Releaſe. If the feoffor or leſſor releaſe to the feoffee or leſſee all conditions, or all demands in the land, or confirm the eſtate of the feoffee without condition &c. by either of theſe means the condition is deſtroyed and gone for ever.

Perk. Sect. 823. Co.1. 147. See Releaſe and confirmatiõ

If one make a leaſe for life or years of land on condition, and after grant the reverſion of part of this land; hereby the condition is deſtroyed for ever. And if he make a leaſe of part of it onely; by this the condition is ſuſpended.

Co.2.59. Perk.Sect. 163. Co.4. 119.

A condition may be extinct or ſuſpended by the intermariage of the parties to the condition; as if a feoffment bee made by a woman, on condition to pay ten pound, or on condition to infeoffe her

Perk.Sect. 763.765. 764.

her by a day certain, and before the day they two do intermary, and the mariage doth continue untill after the day; in this case the condition is gone. And if the condition be to reenter for not payment of rent; the condition shall be suspended and no rent be paid during the coverture.

Co.4.119.5. 34.2.59.714. Dier 309. If a lease be made for years, on condition that the lessee or his assignes shall not alien without the licence of the lessor, and the lessor licence the lessee alone to alien, or licence him to alien a part of the land, or licence him to alien all the land for a time, or if the lease be to three on such a condition, and the lessor licence one of them to alien; in al these cases the condition is gone for ever.

Perk. Sect. 766. If one had enfeoffed me, on condition that I should pay him tenne pound at Easter, and before the time he had entred into Religion, and made me his executor, and had not been deraigned; in this case the condition had been gone for ever.

Perk. Sect. 822. If I be seised of land in fee, and take a wife, and during the mariage enfeoffe a stranger on condition and die, and the feoffee endow my wife of her third part; in this case the condition is not destroied, and yet the third part is freed from the condition, but the reversion of that third part is not freed from the condition. And if shee grant her estate againe to the feoffee, the condition is revived. So if there be Lord and tenant, and the tenant make a feoffement in fee upon condition and the feoffee is attainted of felony &c. so that the tenancy doth escheate; in this case the condition is not gone, but the tenancy is charged with it.

Co.3.64. super Lit. 211. If a feoffement, or lease be made rendring rent, on condition for not payment a reentry, and the feoffor, or lessor after the breach of the condition doth distraine or bring an assise for the Rent, or doth accept the rent at another day; hereby the condition is not destroied but it is discharged for that time so that the feoffor or lessor cannot take any advantage of that breach: and if the act to be done by the condition be a collaterall act, as not to alien, or the like, and the condition is broken and the feoffor not having notice thereof doth accept the rent; in this case also and by this meanes the condition is not discharged.

Lit. Sect. 476,477. Co. super Lit. 277. If one disseise the feoffee, or the heir of the disseisor, or any other that hath lands by a just title, and thereof enfeoffee a stranger on condition, and the land is lawfully recovered from him by him that hath the title; hereby the condition is destroied for ever. And if a disseisor make a feoffement in fee on condition, and after the disseisee doth enter upon the feoffee on condition; this doth extinguish the condition. But if the disseisee release to the feoffee on condition; this release doth not discharge the condition. But if a disseisor make a lease for life, & the lessee for life make a feoffment in fee on condition, & the disseisee release to the feoffee of the tenant for life, by this the

4. by the Act of a stranger.

Release.

the condition in law is deſtroied. And if the feoffee upon condition make a feoffement over without condition,& the diſſeiſee releaſe to the ſecond feoffee; by this the condition is deſtroied, be the releaſe before the condition broken or after. And if feoffee on condition make a leaſe for life, and the feoffor releaſe to the feoffee on condition or leſſee for life all conditions, or all demands to the land; by this the condition is diſcharged. And if the feoffee on condition make a feoffement to another on condition, and after the firſt feoffor doth enter for breach of the condition; hereby the ſecond feoffement and the condition alſo is gone for ever. Perk. Sect. 823.821.

If a man ſeiſed of land in fee let it to a ſtranger for years, and one that hath no right doth out the leſſee, and thereof die ſeiſed, and his heire is in by deſcent, and he doth make a feoffement to a ſtranger upon condition, upon whom the leſſee for years doth enter within the terme claiming his terme; in this caſe the leſſee ſhall hold the land diſcharged of the condition. Perk. Sect. 820.

And now we paſſe to a *Covenant* being another part of a Deed.

Chap. VII.

Of a Covenant.

1. Covenant. *Quid.*

A Covenant is the agreement or conſent of two or more by Deed in writing ſealed and delivered whereby either or one of the parties doth promiſe to other that ſomething is done already or ſhall be done afterwards. And he that makes the covenant is called the covenantor, and he to whom it is made the covenantee. Termes of the law. Plow. 308.

Covenantor. Covenantee.

2. *Quotuplex.*

And this is either expreſſe, or in deed. *i.* when the covenant is expreſſed in the deed: As when *A* by deed doth covenant with *B* to ſerve him for a year, and *B* doth covenant with *A* to pay him tenne pound for this ſervice. Or it is implied or in law, *i.* when the deed doth not expreſſe it but the law doth make and ſupply it. As when one doth make a leaſe for years by the words [demiſe or grant] without any expreſſe covenant for quiet enjoying; in this caſe the law doth intend and make ſuch a covenant on the part of the leſſor, which is, that the leſſee ſhall quietly hold and enjoy the thing demiſed againſt all perſons at leaſt having title under the leſſor and at leaſt during the leſſors life, and (as ſome thinke) during the whole terme; And hereupon an action of covenant may be brought againſt him in the reverſion, ſo that if the heire that is in by deſcent put out the termor of his father the termor may have this Termes of the law. tit. Covenant. Co. 4. 80. 5. 17. F.N.B. 145. 146. Dier 338. 257.

this action againſt him. A covenant is alſo either reall, *i.* that whereby a man doth bind himſelf to paſſe a reall thing, as lands or tenements: as a covenant to levy a fine of land, in which caſe the land it ſelf is to be recovered, or when it doth run in the realty ſo with the land that he that hath the one hath, or is ſubject to the other, and ſo a warranty is called a reall covenant. Or it is perſonall, *i.* when it doth runne in the perſonalty and not with the land, but ſome perſon in particular ſhall have benefit by it, or be charged with it: as when a man doth covenant to doe any perſonall thing, as build, or repair a houſe, ſerve him, or the like. And theſe alſo are ſome of them ſaid to be inherent, *i.* ſuch as are converſant about the land, as that the thing demiſed ſhall be quietly enjoyed, ſhall be kept in reparations, ſhall not be aliened, or if it be to be ſold that the leſſor ſhall have the firſt refuſall, to pay rent, not to cut downe timber trees, or doe waſt, to fence the copices when they be new cut, to make further aſſurance, or the like. And ſome of them are ſaid to be collaterall, *i.* that are converſant about ſome collateral thing that doth nothing at all, or not ſo immediatly concern the thing granted, as to pay a ſumme of money in groſſe, to build a houſe in another mans ground, to make a feoffment or leaſe of other land, to give other ſecurity to perform the covenants, or to pay the rent, or that the leſſor ſhall diſtrain for the rent in ſome other land then that which is demiſed, or the like; theſe are collaterall covenants. There is alſo a covenant to ſtand ſeiſed of land to uſes, which is now become a kind of conveyance of land; for which read *Vſes* at large.

Co. 1. 154. Litt. Bro. Sect. 309. 27 H. 8. 16. Plow. 308. F.N.B. 145.

3. The uſe and operation of it.

The moſt frequent uſe of a covenant is to binde a man to doe ſomething *in futuro*, and therefore it is for the moſt part executory; and if the covenantor doe not perform it, the covenantee may have thereupon for his relief an action or writ of covenant againſt the covenantor ſo often as there is any breach of the covenant. And this writ of covenant is therefore defined to bee a writ lying where a man is bound by a covenant in a deed and hath broken it. And in this caſe commonly the party damnified ſhall recover damages only for the breach: and if hee have a Judgement in an action brought for one breach, and after the covenantor doth breake the covenant again; in this caſe hee may bring a new action, and ſo for every breach. But a covenant doth ſomtimes alſo make a tranſmutation of a property and poſſeſſion of things, as in caſe of a covenant to ſtand ſeiſed of land to uſes, for which ſee *Vſe*. And in caſe where one doth covenant that another ſhall have a peece of land for five years; this is a good leaſe for five years, for which ſee *Leaſe*. And in caſe where one doth covenant with another, that if he pay him ten pound ſuch a day, he ſhall have all his cattle in Dale, or his leaſe for years hee hath of the Manor of

A writ or action of covenant. *Quid.*

Uſe.

Leaſe.

Contract.

Dale; in this caſe it ſeems if he pay the mony at the time hee ſhall have the property of the goods, and of the leaſe for years. It is ſaid therefore that in ſome caſes upon the writ of covenant the party ſhall recover the land it ſelf out of which he hath been ejected.

4. What ſhall bee ſaid a good covenant in deed upon which an Action of covenant may be had. And what not.

1. In reſpect of the manner of making it.

A covenant may be in the affirmative, or in the negative. And it may be executed, *i.* that a thing is done already, or executory, *i.* that a thing ſhall be done hereafter, and theſe are all good. But if it be of a thing preſent, as if I covenant that my horſe is yours; this is void. [a] And theſe covenants being made by a deed poll are as good and effectuall, as when they are made by a deed indented, ſo as the party have the deed to ſhew, for otherwiſe a common perſon cannot have an action of covenant, for it doth not lie upon a verball agreement, neither can it be grounded without a writing, except it be by a ſpeciall cuſtome as in *London*. [b] And there needs not in this caſe formall and orderly words, as Covenant, Promiſe, and the like, to make a covenant on which to ground an action of covenant: for a covenant may be had by any other words, & upon any part of an agreement in writing, in what words ſoever it be ſet down for any thing to be, or not to be done, the party to or with whom the prowiſe or agreement is made may have this action upon the breach of the agreement. And therefore if theſe words be inſerted in a deed amongſt other covenants [That the leſſee ſhall repair, provided always that the leſſor ſhall allow timber: Or that the leſſor ſhall skowre ditches, provided always that the leſſor doe cary away the earth;] theſe are good covenants on both ſides. [c] And if a leaſe be made of houſes by Patent to *I S*, for twenty one years, and therein is inſerted this clauſe [And that the ſaid *I S* and his aſſignes ſhall repaire the houſes when they ſhall bee decayed;] this is a good covenant. And ſo alſo it is where theſe or the like words be inſerted amongſt other covenants [And that the leſſee ſhall pay ten ſhillings a year rent, or that the leſſee ſhall not alien;] theſe ſhall bee ſaid to bee covenants, unleſſe it bee in ſuch caſes where there is ſome other meanes to inforce the doing of the thing. As if in caſe of the rent there bee a clauſe of diſtreſſe, reentry, or *nomine penæ*. And in all caſes regularly where words that doe beginne the ſentence be conditionall, and have the effect of a condition, and doe give another remedy, there they ſhall not be conſtrued to make a covenant, as in the caſes of condition before. And yet if words of condition, and words of covenant be coupled together in the ſame ſentence, [as Provided alwayes; and it is covenanted, or the like;] in ſuch caſes the words may be conſtrued to make a covenant and a condition both.

Plow. 330. 27 H. 8. 16.

a F. N. B. 145 G. Co. 3. 63. Ewers caſe. 8 Jac.

b Litt. Bro. Sect. 450. Co. 2. Lord Cromwels caſe. Dier 57. 150. 21 H. 7. 37. 40 E. 3. 5.

c Adjudge paſch. 14 Jac. B. R. Sir Thomas Bret verſus Cumberlands caſe.

Bro. Covenant 21, 26. & Co. & Dier ubi ſupra.

Leaſe.

If a man make a leaſe for life by Indenture, and therein are inſerted theſe words [It is provided that if the leſſee die within ſixty years,

Dier 150. Co. 1. 155.

years, that then his executors and assignes, shall have the land untill the sixty years be ended, to bee accounted from the date of the Indēture; this albeit it be not a good lease, yet it is a good covenant.

Bro. covenant 38. decent 50. 21 H.7.32.

If a man make a lease for years, and warrant it to the lessee, his heirs, and assignes, during the term, or he that hath right to the land, confirme the estate of the lessee for years with warranty; in these cases howbeit this be not a warranty; nor in the nature of a warranty, yet it shall be construed a good covenant in law for the quiet enjoying of the thing.

Perk. Sect. 69.

If the Lord grant to his tenant, that he will not distrain him in such a part of his land for his rent; this shall be taken to be a good covenant, by this word [grant].

See West, Symb. in his first part toto. & infra Plow. 308. 302. 27 H.8.16. Dier 13.324 253. 251. Fitz. Covenant 1.

A covenant to do any thing that for the substance & matter of it is lawfull; or not to doe any thing that for the matter of it is unlawfull, is good: as if the grantor covenant that he is seised or possessed of a good estate of and in the thing he doth grant, and hath power to grant it. That the grantee shall quietly enjoy it. That it is and shall be free from incumbrances. That he will make further assurance if need be. That if the grantee be evicted, he shall pay no rent. That the grantee shall pay rent. That he shall discharge all dues, and save and keep harmlesse the grantor. That he shall not alien the thing granted; or if he doe, that the grantor shall have the first refusall thereof. That he shall not doe wast. That he shall have houseboot, hayboot. That the grantor or grantee shall repaire the old housing, or build new. That he shall pay and discharge all rents and payments issuing out of the land. That he shall not fell trees, or if he doe, that he shall pay to the grantor so much in money for every tree. That if he fell any underwood, he shall fence it. That he shall make an estate of land. That hee shall be quit of any suit, service, or payment. That he shall give sufficient security to *I S* for an hundred pound he doth owe him; and all these and the like covenants are good. And generally where a condition for the matter of it is good, a covenant comprehending the same matter is good also. But if the matter required to be, or not to be done by the covenant be for the substance thereof unlawfull, then is the covenant void and doth not bind: and therefore if one covenant to kil, or rob a man, or the like; this covenant is void. So if one covenant that he will maintain another in his suits, or that he will not appear in Inquests, or that he will break the peace, or that hee will forestall corn, or the like; these covenants are void. So if one be tenant in fee simple of land, and he covenant that he will not alien it; this covenant is void. So if a man be a tradesman, and he covenant that he will not use or exercise his trade; this restraint if it be absolute and continuall, it is void; but if it be *sub modo* only, as that he shall not use his trade at one time, or in one City or Town onely,

2. In respect of the matter or substance of it.

See Condition Num. 7

See Conditions against Law, Numb. 7. Dier 6.

Against Law.

18 Jac. B.R. Jolliffe versus Broad. Pasc. 19 Jac. B.R. Tanner versus Brag.

this covenant may be good. So if a man be by covenant reſtrained to ſow the land which hath been uſed to be ſowed, and this be either abſolutely, or *ſub modo, i.* that if hee ſow it hee ſhall pay thus much an acre for it; theſe covenants have been held to be void. *Sed quære* how the law is now, for it ſeems the Statute of 39 *Eliz. ch.*2. is diſcontinued. If *A* owe mony to *B*, and *B* owe mony to *C*, and *B* doth make a letter of Atturney to *C*, to ſue *A* at his own charge, & *B* doth covenant with *C*, that he wil not releaſe the debt to *A*; in this caſe albeit this be maintenance in *C* to ſue at his own charge, yet this is a good covenant and not againſt law. So alſo if a Deane and Chapter, or the like, covenant to renue a leaſe contrary to the meaning of the Statute of 18 *Eliz. ch.* 11. it ſeems this is a good covenant. And if the thing to be done by a covenant be in the nature of it impoſſible, the covenant is void. And therefore it is, that if a man covenant to goe to Rome in three dayes, or the like; the covenant is void. So if a man covenant to make a feoffment to his wife; this covenant is void. But if a man covenant to make a good eſtate of land to her in feeſimple, or otherwiſe, or to find her maintenance, or to give her ſo much by the year; theſe are good covenants. And generally there where the matter being in a condition will make the condition void becauſe it is againſt Law, there it being in a covenant will make the covenant void.

Hil. 20 Jac. Co. B. Maire verſus Stapleton.

Trin. 14 Jac. Co. B. Tailors caſe.

Impoſſible.

27 H. 8. 27. 4 H. 7. 4.

See Condition Num. 7.

If a leſſor covenant with his leſſee, that he ſhall and may have houſeboot, hayboot, plowboot, &c. by the aſſignment of the Bailiffe of the leſſor; this is a good covenant: and yet it ſeems it doth not reſtrain the power that the leſſee hath by the law to take theſe things without aſſignement. But if the leſſee doe covenant that he will not cut any timber, or fuell, without the leave, or without the aſſignement of the leſſor; this is a good covenant and doth reſtrain him, for in this and ſuch like caſes the rule is, *Modus & conventio vincunt legem.*

Dier 19. 115.

Releaſe.

If an obligee covenant with the obligor, that he will not ſue him upon the obligation untill Eaſter following; this is a good covenant, but no releaſe or ſuſpenſion of the debt.

Mich. 36, 37 Eliz. Co. B. Adjudge Deaux verſus Jefferies.

* If there be Lord and tenant of three acres of land, white acre, and two others, and the Lord grant to the tenant by deed that he will not diſtrain in white acre for his rent or ſervices; this is a good covenant, but doth not determine the Seigniory.

21 H. 7. 23. *Perk. Sect. 69.

If one man grant a mill within his Manor, & covenant for him & his heirs that there ſhall be no other mill ſet up within the Manor; it ſeems this is a good covenant.

Pitz. Covenant 5.

If one make a leaſe wherein are divers covenants to bee performed on the part of the leſſee, and after the leſſee doth covenant, that if any of the covenants be broken, that the leſſor ſhall enter upon the land demiſed, and hold it untill the leſſee make him amends

Fitz. Covenant 3.

amends for the damage done by the breach of the covenant; it ſeems this is a good covenant, and that the leſſor may take advantage thereof accordingly.

Plow. 307, 308. 21 H. 7. 18. 27 H. 8. 16. Fincheſley 49.

If a man ſeiſed of land in fee, covenant to ſtand ſeiſed of it to uſes, and no eſtate doth riſe by the covenant; yet this may bee good by way of covenant, and give remedy to the covenantee in an action of covenant. But with this difference. If the covenant be future, as where one doth covenant with another, that in conſideration of a mariage, his lands ſhall deſcend, remain, or revert to his ſonne and heire apparent, and to the heires of his body, on the body of his wife; in this caſe the covenantee may have a writ of Covenant upon the covenant. For if a covenant be preſent, as that a man and his heirs ſhall from henceforth ſtand and bee ſeiſed to ſuch and ſuch uſes, and the uſes will not ariſe by the Law in the caſe; in this caſe no action of covenant will lie upon this covenant, for this action will never lie upon any covenant, but upon ſuch a covenant, as is either to doe a thing hereafter, or that a thing is or hath heretofore beene done, and not when it is for a thing preſent, as when *A* doth covenant with *B*, that his blacke horſe ſhall be for ever after the horſe of *B*; this is no good covenant to give the horſe to *B*, or to give him an action of covenant for him, but *A* may keep him ſtill notwithſtanding.

Agree 8. Car.

If one mortgage upon condition to reenter upon payment of an hundred pound at a day, and the mortgagee doth covenant that he will not take the profits of the land untill default of payment; this is a good covenant, and the mortgagee therefore may not meddle with the profits untill the day of payment come.

Co. 4. 80. 5. 17. Trin. 3 Jac. B. R. Stiles caſe. Paſ. 7 Jac. B. R. Winſe-combes caſe.

5. What ſhall be ſaid a good covenant in Law, upon which an action of covenant may be had. And what not.

If one make a leaſe for years of land by the words [Demiſe or Grant], and there is not contained in the leaſe any expreſſe covenant for the quiet enjoying of the land; in this caſe the Law doth ſupply a covenant for the quiet enjoying of it againſt the leſſor and all that come in under him by title during the Term, and upon this the leſſee, his executors, adminiſtrators, or aſſignes, may have an action of covenant if he be diſturbed. But where there is an expreſſe covenant in the deed for the quiet enjoying of the land, there the Law will not make this implied covenant. *Expreſſum facit ceſſare tacitum.* And therefore herein this is not like to the caſe, where a man doth make a leaſe for life by the words of *Dedi & conceſſi*, or make a leaſe for life by other words reſerving rent, (in which caſes the law doth create a warranty againſt all men during the life of the leſſor) for if in theſe caſes there be an expreſſe warranty in the deed, yet this doth not take away nor qualifie the implied warranty, but the Leſſee may make uſe of which of them hee will, if he bee ouſted or evicted by one that hath an elder title.

Warranty.

6. How a covenant in deed or law ſhall be taken and expounded. And how it ſhall be performed.

A covenant in particular (being one part of a deed) is ſubject to the generall rules of expoſition of all parts of deeds in generall, as to bee alwayes taken moſt ſtrongly againſt the covenantor and moſt in advantage of the covenantee. 2. To be taken according to the intent of the parties. 3. *Vt res magis valeat &c.* 4. When no time is limited for the doing of the thing, it ſhall bee done in reaſonable time, and the like. Plow. 287. See in Expoſition of Deeds before in toto.

Ioint and ſeverall.

In caſes where the covenantees have, or are to have ſeveral intereſts or eſtates, there when the covenant is made to and with the covenantees, *& cum quolibet eorum, aut altero eorum*; in this caſe theſe words make the covenant ſeverall: as if one by Indenture demiſe black acre to *A*, and white acre to *B*, and green acre to *C*, and covenant with them and either of them, or covenant with them and every of them, that he is lawfull owner of all theſe acres; in this caſe the covenant is ſeverall: but if he demiſe to them the three acres together, and covenant in this manner; the covenant is joint and not ſeverall. And if *A* and *B* doe covenant jointly, and ſeverally: in this caſe the covenant may bee joint, or ſeverall, and the covenantors may be ſued either the one way or the other, at the election of the covenantee. Co. 5. 19. Dier 338. Bro. Covenant 49.

For quiet enjoying.

If one make a leaſe of land to another, and covenant that hee ſhall quietly enjoy it without the let of any perſon whatſoever, or without the let of any perſon whatſoever claiming by or under the leſſor; in both theſe caſes the covenant ſhall be taken to extend to ſuch perſons as have title, or claime ſome eſtate under the leſſor: for if in the firſt caſe any perſon that hath no title, and in the ſecond caſe any perſon that ſhall claim under another and hath title, or that ſhall claim under the leſſor, claim, or enter, or otherwiſe diſturbe the leſſee; this is held to bee no breach of the covenant. *Sed quere* of the firſt caſe: for herein ſome conceive a difference betweene a covenant in deed, and a covenant in law: and that howſoever the covenant in law is extended only to evictions by title, yet that the covenant in deed ſhall be extended further. And therefore that if *A* make a leaſe for years to *B*, and doth covenant that *B* ſhall quietly enjoy it during the term without the interruption of any perſon or perſons; that if a ſtranger in this caſe that hath no right doth interrupt *B*, that he may have an action of covenant: as when ſuch a promiſe is by word, an action of the caſe will lie upon it. F.N.B. 145. I. Dier 328. 26 H. 8. 3. Mich. 7 Jac. B.R. accord in Gambles caſe. Co. 4. 80. Dier 328. Per Furner at Lent Aſſiſe Glouc. 23 Car.

Action of the caſe.

And if the leſſor covenant with his leſſee, that he hath not done any act to prejudice the leaſe, but that the leſſee ſhall enjoy it againſt all perſons; in this caſe theſe words [againſt all perſons] ſhall refer to the firſt, and be limited and reſtrained to any acts done by him, and no breach ſhall be allowed but in ſuch an act. Curia Jervis verſus Peade. Mich. 40. 41 El. B.R.

The covenant in law upon the words Demiſe or Grant alſo for the Co. 5. 17. 22 H. 6. 52. Co. 4. 80. Dier 257.

the quiet enjoying of the thing demiſed, is generall againſt all perſons that have title during the Terme, and extendeth to the heir after the death of the leſſor, as againſt himſelf onely, and ſhall charge the Executors or Adminiſtrators for any diſturbance in the life of the covenantor, but not for any diſturbance afterwards; he that doth ſue therefore upon this covenant, muſt ſhew that he was moleſted or evicted by one that had an elder title. Executors.

Co 5.78. If one doth covenant to enter into bond for the quiet enjoying of land, and doth not ſay what bond; in this caſe it ſhall be taken to be a bond of ſo much as the land to be enjoyed is worth.

Fitz. Covenant 21. ſee before. A warranty in a leaſe for years ſhall be taken for a covenant for quiet enjoying.

7 E.4.6. Bro. Grant. 164. If one covenant with another to acquit him of all charges iſſuing out of the land, and after by Parliament the tenth part of the value, not of the iſſues of all lands are given to the King; in this caſe it ſeems the covenant ſhall not extend to this. But if the Parliament had given the tenth part *exituũ terre*; the covenant would have extended to this as well as to rents, commons, and ſuch like things, wherewith the land is charged. To free from incumbrances and charges.

Co. 5.19. If *A* covenant with *B* to make ſuch aſſurance, or ſuch further aſſurance of land as the Counſel learned in the law of *B* ſhall adviſe; in this caſe albeit *B* be learned in the law himſelf, yet he may not deviſe this aſſurance, but ſome other learned in the law muſt adviſe, otherwiſe *A* is not bound to make it. To make aſſurances of land.

Co. 5.19,20. Dier 361. & per Juſt. Bridgeman. And if *A* covenant with *B* to make ſuch aſſurance of land by a day, as *B* or his heirs ſhall deviſe; in this caſe *B* or his heires muſt firſt deviſe the aſſurance before *A* is bound to doe any thing. And therefore if one ſell land for money, and the vendee doth covenant to make back to the vendor and his heirs ſuch aſſurance of the land as the Counſell of the vendor ſhall deviſe within one yeare, provided that if the vendee make default in the aſſurance, then if he doe not pay twenty pound to the vendor, that then the vendee ſhall ſtand ſeiſed to the uſe of him and his heires, and the vendor tender no aſſurance, the twenty pound is not paid: in this caſe the land is in the vendee freed from the covenant. And therefore in theſe and ſuch like caſes, where a man is to make ſuch aſſurance, as *A* or his heirs, or their Counſel ſhall deviſe; *A* or his heirs muſt take care that in time they have an aſſurance reaſonably drawn and ready to be ſealed, and to tender it to him that is to ſeale it, for untill then there can be no breach of covenant. But if *A* bee bound to make a feoffement, leaſe, or other aſſurance of land to *B* by a day; in this caſe *B* need not to demand it or tender the aſſurance, for *A* at his perill muſt doe it, otherwiſe he doth breake his covenant. [a] And yet if in this caſe *B* doe get the aſſurance drawn, and tender it to *A*, it ſeemes *A* is bound to ſeale it, or

a. Trin. 20 Jac. B. R. Steed verſus Spike.

otherwiſe hee doth breake his covenant. * And if the caſe bee ſo that *A* is bound to make ſuch aſſurance to *B*, by a day, at the coſts of *B*; in this caſe *A* muſt doe the firſt act, *viz.* notifie to *B* what manner of aſsurance he will make that he may know what money to tender, and when the money is tendred, *A* muſt ſee that hee doe make the aſſurance accordingly at his perill, and if he fail in either of theſe the covenant is broken. * Co.5.20. 22.

If *A* be bound to make ſuch aſſurance to *B*, as by the Counſell learned of *B*, upon requeſt made ſhall be deviſed: in this caſe it is ſufficient if the adviſe be given to *B*, and that he do make it known to *A*, and it is not needfull it be given to *A* immediately. And if *A* covenant with *B* to make ſuch aſsurance to *B* as *I S* ſhall deviſe, and *I S* doth deviſe a reaſonable deed of bargain and ſale, and hee tender it to *A* to ſeal; in this caſe *A* is bound to ſeal it preſently, and he ſhall not have time to adviſe with his Counſell upon the deed, but if he be illiterate and cannot read the deed, he may refuſe and delay to ſeal it untill he can get ſome body to reade it, which he muſt doe as ſoon as he can. And if one bee bound by covenant to make an aſſurance upon requeſt: the covenantee muſt requeſt and tender an aſsurance alſo, and he muſt tender ſuch a one alſo as is reaſonable, otherwiſe the covenant will not bee broken by the refuſull or neglect to doe it: as if one be bound to make a feoffment to *A* upon requeſt; in this caſe *A* muſt get a naked deed of feoffment drawn without warranty or covenants, and tender it. And if the covenant be to make ſuch a leaſe as the former; in this caſe the ſecond leaſe muſt not differ from the former, and if it doe the party is not bound to ſeal it. Co.5.20. Dier 338. Co.2.3. Experientia.

If one covenant to levy a fine at the next Aſſiſes for thirteene years *extunc*; this ſhall be taken from the time of the fine levied, and not from the time of the covenant. Curia Hil. 7 Iac. Co.8.

If one bargain and ſell land to me by deed indented, and before the inrolment of the deed I do covenant with *I S* to convey all the land whereof I am ſeiſed, and to doe this before ſuch a day, and before the day the deed is inrolled; in this caſe my covenant ſhall not extend to this land conveyed to me by this bargain and ſale. Adjudge in Sir Jo. Brets caſe.

If *A* covenant with *B*, that in conſideration of a mariage between the ſon of *A* and ſiſter of *B*, that hee at the coſts of his ſon, and by his ſufficient deed will before Eaſter day aſſure land to his ſonne, and *B* doth covenant that if *A* doe performe this, then hee will make him a generall releaſe; in this caſe albeit *A* be ready, and the ſon doe not tender the aſſurance, and the conveyance is not made, *B* is not bound to make any releaſe. Dier 371.

To repaire the houſes. If one covenant to keep and leave a houſe in the ſame or as good plight as it was at the time of the making of the leaſe; in this caſe the ordinary and naturall decay of it is no breach of Fitz. Covenant 4.

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the covenant; but the covenantor is here by bound to doe his beſt to keepe it in the ſame plight, and therefore to keepe it covered &c.

Dier 19. If the words of a covenant be [that the leſſee ſhall have thornes by the aſſignment of the leſſor and neceſſary fuell alſo;] it ſeemes by this that there muſt be an aſſignment of the fuell as well as of the thornes. For the having of houſeboot &c.

Dier 19, 20. If the leſſor covenant with his leſſee that he ſhall have ſufficient hedgeboote by aſſignment of the bailif of the leſſor; in this caſe and by this the leſſee is not reſtrained from that liberty that the law doth give him, and therefore that he may take without aſſignment: But if the words be negative, that he ſhall not take without aſſignment, or that he ſhall take by aſſiignment, and not otherwiſe, *contra.*

Trin. 21 Jac. B.R. George verſus Lane. If *A* doth covenant with *B* that where as a mariage is intended to be ſolemnized between *A* and *C* the daughter of *B* at or before the fourteeneth day of *Auguſt* next, and where the ſaid *B* hath paid to the ſaid *A* a thouſand pound for portion &c. the ſaid *A* in conſideration thereof doth covenant with *B* that he within one yeare of the day of the mariage will aſſure lands of the value of foure hundred pound *per Annum*; in this caſe albeit the mariage be not before that day yet the covenant muſt be performed. To convey lands of the value of &c.

Per Juſtice Bridgman. If one make a leaſe for years of a Manor, and covenant that the leſſee ſhall make eſtates for life or years, and that they ſhall be good; in this caſe it ſeemes this covenant ſhall not be taken to enable the leſſee to make eſtates for a longer time then his eſtate will beare. That the leſſee ſhall make eſtates.

Dier 13. If the leſſee covenant with the leſſor that if the leſſee be minded to ſell his eſtate the leſſor ſhall have the firſt refuſall; in this caſe when the leſſee is minded to ſell he need doe no more but acquaint the leſſor with his purpoſe, and know his mind, and if he doe not anſwer him preſently he may ſell it to whom he will: And if the covenant be further that the leſſor ſhall give as much as another will, the leſſee muſt tell him what another doth offer him, and aske him whether he will give ſo much, and if he refuſe or doe not accept it preſently the leſſee may ſell to whom he will. That if the leſſee ſell the leſſor ſhall have the firſt refuſall.

Co. ſuper Lit. 204. Dier 371. Mich. 7 Jac. Co. B. If one covenant to ſerve me a year, and I covenant to pay him tenne pound for it; in this caſe albeit he doe not ſerve me yet I muſt pay him the tenne pound. But if I covenant with him to pay him tenne pound if he ſerve me a yeare *contra*, for in this caſe I am not bound to pay him the money unleſſe he ſerve me a yeare. So if one covenant to make new pales ſo as he may have the old, in this caſe it ſeemes he is not bound to make the new pales unleſſe he may have the old pales. So if one covenant to pay money for ſervice, counſell, or the like, or covenant to mary ones daughter, or make an eſtate, and the covenant is penned conditionally, and To doe one thing for another.

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ſo as one thing is the cauſe of another, and it is not ſet downe by mutuall and reciprocall covenants; in all theſe caſes if the cauſe or condition be not obſerved the covenant ſhall not be performed.

That the leſſee ſhal have the fee.

If one make a leaſe for tenne years, and covenant that if the leſſee pay him tenne pound within the tenne years that he ſhall have the fee ſimple, and the leſſee ſurrender his eſtate within the time; in this caſe if the leſſee pay the money the leſſor is bound to make the fee ſimple to him. But if the words of the covenant be, that if he pay him tenne pound within the terme he ſhall have fee, and the leſſee ſurrender his terme, and then pay the tenne pound; in this caſe the leſſor is not bound to make the fee ſimple, for it was not paid within the terme. Co.1.144.

Aſſignes.

If one covenant to doe a thing to *I S*, or his aſſignes, or to *I S* and his aſſignes by a day, and before the day *I S* die; in this caſe it muſt be done to his aſſignes if he before the day name any aſſignee, and if he doe not, it muſt be done to his executor or adminiſtrator which is an aſſignee in law. See more in *Condition Num.* 8. *Obligation*, 7. 27 H.8.2.

7. When a Covenant in Deed or Law ſhall be ſaid to be broken. And when not. And how.

If one be ſeiſed of land in fee, or poſſeſsed of a terme of years, and he doth alien it, and ſuppoſing he hath a good eſtate, he doth covenant that he is lawfully ſeiſed or poſſeſsed, or that he hath a good eſtate, or that he is able to make ſuch an alienation &c. and in truth he hath not, but ſome other hath an eſtate in it before; in this caſe the covenant is broken as ſoone as it is made. * And if I bargaine and ſell land by deed indented to *B*, and before the deed is inrolled I grant the ſame land to *C*, and covenant that I am ſeiſed of a good eſtate of it in fee, and after the deed is inrolled; in this caſe the covenant is broken. Dier 303. Co.9.60.

That the covenantor is ſeiſed of a good eſtate &c.

* Adjudge Sir Perall Brocas caſe. 32. 2.

For quiet enjoying.

If *A* let land to *B*, and covenant that he ſhall quietly enjoy it without the let of any perſon whatſoever, and *A* himſelfe, or any other perſon that hath any title to the land by or under him, as if he make a leaſe of it, or grant a rent out of it to another, or any other perſon that hath any title to the land albeit it be not by or under *A* as if *A* were a diſſeiſor, and the diſſeiſee, doe enter or diſturbe *B*; in all theſe caſes the covenant is broken. And ſo alſo is the law deemed to be by ſome in caſe of covenant in deed for quiet enjoying, where a ſtranger or one that hath no title to the land doth enter or diſturbe *B*. But otherwiſe it is in caſe of covenant in law for quiet enjoying; for in this caſe if a ſtranger that hath no title to the land doth enter or diſturbe the leſſee, this is no breach of the covenant in law. And in all caſes where any perſon hath title, the covenant is not broken untill ſome entry or other actuall diſturbance be made by him upon his title. Mich.8 Jac. Lams caſe. Dier 328. F.N.B. 145. 26 H.8.3. Hil. 39 Eliz. B.R. Cornes caſe. Pitz. Covenant 36. Bro. Covenant 40.

If a man make a leaſe of land, and after make a feoffement of the 20 Jac. Bro. Covenant 7.

the ſame land, and the feoffee doth diſturbe the leſsee; in this caſe it hath been ſaid this is a breach of the covenant for quiet enjoying. *Sed quere.*

Hil. 20 Jac. adjudg B.R. Butler verſus Lady Swinerton.

If a man purchaſe land to him and his wife and his heires in fee, and then make a leaſe for years of it to *I S*, and covenant for him, his executors and aſſignes that the leſsee, his executors and aſſignes ſhall quietly hold and enjoy the premiſses without the let of the leſsor, his heires or aſſignes or any other perſon by or through his or their meanes, title or procurement, and after the leſsor doth die, and his wife doth enter and diſturbe; in this caſe and by this meanes the covenant is broken. And ſo it is alſo, if *A* purchaſe land of *B*. To have and to hold to *A* for life, the remainder to *C* the ſonne of *A* in taile, and after *A* doth make a leaſe of this land to *D* for years and doth covenant for the quiet enjoying as in the laſt caſe, and then he dieth, and then *C* doth out the leſsee; in this caſe this was held to be no breach of the covenant. So likewiſe if *A* be ſeiſed of white acre in fee, and take to wife *B*, and then make a leaſe of it to *C* with ſuch a covenant as before for the quiet enjoying, and then *A* doth die, and after *B* doth recover dower; by this the covenant is broken, and yet if the mother of *A* recover dower and out the leſſee *contra*. So alſo if a tenant in taile doth make a leaſe with ſuch a covenant, and his iſſue doth diſturbe the leſſee; this is no breach of the covenant. And yet if the leſſor be the cauſe of the gift in taile, or procure the diſturbance, this may be a breach of the covenant. And ſo alſo it is where a man is ſeiſed of land in fee, and he doth make a leaſe with ſuch a covenant, and afterwards he doth die, and then his heire is in ward by reaſon of a tenure, and hereby the leſſee is diſturbed; it ſeemes this is no breach of this covenant.

Swans caſe. M. 7 & 8 El.

Dier 42. 26 H. 8. 3. Fitz. Covenant 6. 26.

Curia. B.R. paſc. 6 Car. Crowles caſe.

If one covenant that the wife he is about to mary ſhall quietly enjoy all her goods, and that the covenantee ſhall take it into his poſſeſſion, and the husband doth only take the goods and keepe them in his poſſeſſion; this is no breach of the covenant.

Adjudge Hil. 38 El. Woodroffe verſus Greenwood.

If a covenant be for the quiet enjoying againſt all perſons but the King and his ſucceſſors; and the Patentee of the King doe diſturbe; this is a breach of this covenant.

Adjudge Mich. 2 Car. B.R. Säders caſe.

If two make a leaſe, and covenant that the leſſee ſhall enjoy the land without the let of them or any other, and one of them alone doth diſturbe the leſſee; this is a breach of the covenant.

Dier 240.

If a leſsee grant and aſſigne all the land contained in his leaſe to *A*, and doth covenant with him that he hath not done any act or thing by which the grant or aſſignment might be impaired, but that the aſſignee his executors &c. may enjoy it againſt all perſons, and before this time the wife of the leſsor had recovered and had execution of a third part of this land for her dower; in this caſe this

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is no breach of the covenant, for the words [but that &c.] doe referre to the former and are not abſolute.

If *A* grant the Bailiwicke of *W* to *B* for life, and *B* aſſigne it to *C* for three years, and after to *D*, and *C* doth covenant with *D* that he will not doe or ſuffer to be done any act during the ſaid three years by which the grant made by *A* may be forfeit, but that after the three years ended he may enjoy it in as ample manner as *C* did or might have done without any act by *C*, and after the three years ended *C* doth execute a Proces there, and thereby incroch upon the office; this is no breach of the covenant. Adjudge Rich. verſus Row. paſch. 13 Jac. Co. B.

To free from charges and incumbrances.

If *A* grant land to *B* and his heires rendring tenne pound rent, and *B* doth ſell the land to *C* and his heires and doth covenant with *C* that from ſuch a day he ſhall enjoy it diſcharged of all incumbrances, and before that day a Common Recovery is had againſt *C* in which *A* is vouched, and this is to the uſe of *C* and his heires, ſuppoſing hereby the rent had been gone which is not ſo; in this caſe the covenant is broken, for this rent is an incumbrance. Curia Hil. 20 Jac. Co. B. Greenway & Tuckfalds caſe.

If a leaſe be made of land for years, & the leſſee deviſe it to his wife *durante viduitate*, and after to his ſonne, and he in reverſion doth ſell the fee to the woman during the widowhood, and doth covenant that the land is diſcharged of all former ſales, rights, titles, charges: in this caſe the covenant is broken at the firſt by reaſon of the poſſibility of the ſonne. Co. 10. 52.

If *A* grant white acre to *B*, and covenant that *B* ſhall enjoy it againſt all incumbrances, and *C* doth diſturbe him in the taking of common there, and this is a common which is againſt common right and which he hath by preſcription: in this caſe it ſeemes this is a breach of the covenant. But if it be of a common that is of common right *contra*. 9 Eliz. Co. B.

To make eſtates and aſſurances.

If *A* covenant with *B* before Eaſter to make him a good ſure eſtate of land diſcharged of all former bargaines, leaſes and incumbrances whatſoever, (leaſes or grants for life or years reſerving the ancient rent during the terme only excepted) and *A* after this and before the eſtate made doth make a grant of all or part of the land reſerving the old rent, it ſeemes this is no breach of the covenant. Dier 139.

If one make a leaſe to *I S* for years, and covenant with him that upon the Surrender of that leaſe he will make him a new leaſe, and the leſſor before *I S* can make any Surrender doth ſell away the reverſion, or make a leaſe to another of the land, and ſo diſable himſelfe, this is *ipſo facto* a breach of the covenant, without any Surrender made by the leſſee which in this caſe is not needfull. For *Lex neminem cogit ad vana & in utilia peragenda*. So if one be ſeiſed of land in fee, and covenant to make a feoffement of it to *I S* by Co. 5. 21.

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a day upon requeſt, and the Covenantor before the day doth make a feoffement of it to another, and then doth die before any requeſt made to him; in this caſe the covenant is broken.

Dier 338. Co.2.3. If *A* covenant with *B* to make ſuch aſſurance as *B*, or as the Counſell learned of *B* ſhall deviſe, and *B* tender ſuch an aſſurance to *A* to ſeale, and *A* doth refuſe or delay to ſeale it; this is a breach of the covenant.

Bro.Covenant 3. If *A* doth covenant with *B*, *C*, *D* and *E* to make them a feoffement ſuch a day, and they come to the land at the time to take it, and *A* doth not make the feoffement; by this the covenant is broken. And ſo alſo if *B* and *C* only or one of them doth come to the land, for it may be made to any of them in the name of the reſt. But if none of them come to the land albeit the feoffor never come there it ſeemes the covenant is not broken.

Curia B.R. If *A* covenant with *B* before Eaſter next to aſſure his houſe to him and *K* his wife during the life of *I S*, and *A* ſurrender his houſe to the uſe of *B* and ſuch as *K* ſhall name at the requeſt of *B*; in this caſe the covenant is broken, for this is no performance of it.

Dier 324. If one covenant to repaire, ſuſtaine and amend a houſe, and the houſe is burnt by the negligence of the covenantor and not repaired againe; this is a breach of this covenant. And if the leſſee covenant for him and his executors to repaire at his owne coſts (the principall timber not hurt or in decay for lacke of reparations or otherwiſe in default of the leſſee or his executors only except) and he die, and afterwards the houſe is burnt in default of the executors; in this caſe the covenant is broken and the executors may be charged. To repaire.

Fitz. Covenant 29. Co.5.15. F.N.B.145. Co.1.98. Perk.Sect. 738. Dier 33. Plow.29. 40 E.3.5. If one covenant to leave a wood in the ſame plight he findes it, and he cut downe trees; in this caſe the covenant is broken preſently, for it is now become impoſſible to be performed by his owne act: But if in this caſe ſome of the trees be blowed downe with the wind, or the like, by this the covenant is not broken, for it is now become impoſſible to be done by the act of God, and in this caſe the covenantor is not bound to ſupply it. And ſo likewiſe of a covenant to repaire houſes, or if one covenant to ſuſtaine houſes or Sea banks, or covenant to leave them in as good caſe as one doth find them, and the houſes be burnt, or throwne down by tempeſt, or the like, or the banks be overthrown by a ſuddaine flood, or the like accident; in this caſe the covenant is not broken by this accident only; but if the covenantor doe not repaire and make up theſe things again in time convenient the covenant will be broken. And if houſes be let to me for years, and I covenant to leave them in as good plight as I finde them, and I throw down the houſes, this is no breach of the covenant for I may reedifie them,

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and therefore no action will lie upon this covenant untill the end of the terme.

If one covenant to repaire a houſe before a day, and it happen the plague is in the houſe before and untill the day; and thereby it is not done; in this caſe the covenant is not broken, for this will excuſe, but then it muſt be done in convenient time afterwards, for otherwiſe the covenant will be broken. Hil.8 Jac. Curia.

If a leſſee covenant to doe all the reparations of a houſe demiſed at his own coſts and charges,& he cut trees upon ſome ofthe ground demiſed to amend the houſe; it ſeemes this is a breach of his covenant. Dier 198.

To paymoney. If one covenant to pay money at five ſeverall daies, and he faile of payment the firſt day; by this the covenant is broken. Co.ſuper Lit. 292.

To leave a ſtock &c. If one take land ſowed or a ſtocke of cattell in leaſe for years, and the leſſee covenant to leave it in as good plight as he doth take it; in this caſe he muſt leave it ſowed againe, and if any of the cattell die, he muſt make up the number, otherwiſe he doth breake his covenant. 40 E.3.5.

Not to take toll. If a Corporation doe covenant not to take Toll,and their Common officer appointed for that purpoſe doth take it; this is a breach of the covenant. 43 E.3.17.

To build a houſe. If *A* covenant with *B* to build a houſe by a day, and *B* doth forbid him, and thereupon he doth forbeare to doe it, and doth it not; in this caſe the covenant is broken, for this will not excuſe him: But if he doe by any actuall impediment hinder him, or be the cauſe why the thing is not done, then the not doing of it is no breach of the covenant. And therefore if a leſſee covenant to cleanſe one of the ditches in the land demiſed, and the leſſor enter upon the land it ſelfe and keepe out the leſſee, and he doth not cleanſe the ditch by the time; by this the covenant is broken: but if in this caſe the leſſor doe by force keepe the leſſee out of the ditch or place it ſelfe, *contra.* 18 E.4.8. Kelw.34. Trin. 36 El. B.R. Carrell verſus Reade.

To cleanſe a ditch.

To have liberty to goe in and out of a ſhop. If *A* and *B* be Jointenants of a ſhop, and *A* covenant with *B* that he and his aſſignes ſhall have free ingreſſe and egreſſe in and out of the ſhop, and *A* doth appoint *C* his ſervant to enter as ſervant to him and to occupy in common with *A* and this ſervant doth expell the ſervant of *B*; in this caſe this is a breach of the covenant. Hil.16 Jac. B.R. Siliard verſus Loe.

To come into a houſe. If *A* covenant with *B* that *B* ſhall come foure times a year into the houſe of *A* without being ouſted by *A* and *A* when he doth ſee *B* comming doth ſhut the doores and windowes and doth not ſuffer *B* to come in; by this the covenant is not broken. 3 H.4.8.

* To mary another Make a feoffment &c. Tender and refuſall. * If *A* covenant with *B* to mary the daughter of *B*, make a feoffement, or doe any other act to *C* (who is a ſtranger to the covenant) and *A* doth tender it and offer to doe as much as doth lie 33 H.6.16. Bro.Covenant 3. Fitz. Barre62.

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in his power, but the ſtranger doth refuſe it, and thereby it is not done; yet this doth not excuſe but the covenant is broken. But if the covenant be to doe any ſuch act to the covenantee himſelfe, and the covenantor tender it and the covenantee refuſe it; by this the covenant is performed.

Mich. 7 Jac. Co. B. See more in the laſt queſtion, and in *Obligation Numb.* 7, 8, 9, and in *Condition Numb.* 9, 10.

8. Who ſhall or may have advantage of a covenant in deed or law, and bring a writ of covenant upon the breach of it. Or not.

Any one that is party to the deed to whom the covenant is made may take advantage of the covenant, but not a ſtranger; for if *A* covenant with *B* to doe an act to *C* who is no party to the deed, and he doth it not, *B* and not *C* muſt ſue him upon this breach.

Co. 5. 17. Dier 257. 47 E. 3. 12. If a leaſe be made of land to a husband and wife for years, and the leſſor doth enter upon the land and put them both out, or the one of them after the death of the other, in this caſe both of them whiles they both live, and the ſurvivor after the death of one of them may have this action of covenant upon the covenant in law. So if a wardſhip be granted to a woman by deed, and ſhee take a husband and die; the husband ſhall have advantage of this covenant in law made by the word [grant] if he be diſturbed. So if one by the words [demiſe or grant] leaſe land to a woman ſole for years, who taketh a husband and dieth; in this caſe if the husband be diſturbed he ſhall take advantage of this covenant in law.

Dier 338. If a feoffement be made in fee, and the feoffor doth covenant to warrant the land, or otherwiſe to the feoffee and his heires; in this caſe the heire of the feoffee ſhall take advantage of this. As if *A* covenant with *B* and his heires to infeoffe *B* and his heires of land, and *B* die before it be done, in this caſe his heires ſhall take advantage thereof. And if *A*, *B* and *C* have lands in coparcenery, and they purchaſe other lands in fee, and they covenant each to other his heires and aſſignes to make ſuch conveyance to the heire of him that ſhall die firſt of a third part as he ſhall deviſe, in this caſe the heire not the executor ſhall take advanntage of the covenant. Heire.

Co 5. 17. F. N. B. 145. H. Dier 112. 271. Executors and Adminiſtrators ſhall take advantage of inherent covenants, albeit they be not named. And therefore if *A* covenant to doe a thing to *B* and doe not name his executors or adminiſtrators, and it be not done, it ſeemes the executors or adminiſtrators of *B* may have an action of covenant for the not doing of it. As if one covenant with *I S* to pay him money at Michaelmas and doe not ſay to his executors &c. and he die before the time; in this caſe his executor or adminiſtrator ſhall take advantage of this covenant and may recover the money. Executors & adminiſtrators.

* See Condition Numb. 12. Co. 5. 18. 9 Jac. B. R. Wilborne & Beſtwichs caſe accord. * Grantees of reverſions ſhall have the like advantage againſt Fermors (by action only) for any covenant or agreement contained Aſſignees or Grantees.

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in their leaſe as the leſſors, their heires or ſucceſſors might. And ſo alſo ſhall leſſees againſt grantees of reverſions (recoveries in value except) by the ſtatute of 32 *H.* 8. *cap.* 34. And herein (as in the caſes of a condition before) a difference is taken between covenants that are inherent, and covenants that are collaterall. For the covenants whereof grantees by this ſtatute ſhall take advantage are inherent covenants. *i.* ſuch covenants as doe concerne the thing granted and tend to the ſupportation of it: As where a leſſee for life or years doth covenant with his leſſor and his heires to keep the houſes demiſed in good reparations, or the like, and after the leſſor doth grant away the reverſion of all * or part of the houſes to *I S*; in this caſe *I S* ſhall take advantage for any breach of the covenant in his time, but not for any breach before the time the reverſion was granted. But if the leſſee doth covenant with his leſſor and his heires to pay him a ſumme of money, or make him a feoffement or the like, and then the leſſor doth grant the reverſion to *I S*, in this caſe *I S* ſhall not take advantage of this covenant: And yet the executors or adminiſtrators of the leſſor ſhall take advantage of this covenant.

* Mich. 8 Jac. Pimes caſe.

Regularly every aſſignee of the land or thing demiſed ſhall take advantage of inherent covenants, as if a covenant be, to have Eſtovers to burne in the houſe demiſed, or to have timber to repaire, or if the covenant be that the leſſor or leſſee ſhall repaire, or the like. And therefore of theſe aſſignees in deed and in law aſſignees of aſſignees *in infinitum* ſhall take advantage, and aſſignees of executors or adminiſtrators, Tenants by Statute, or Elegit, or after a ſale upon a *Fieri facias*, a husband in the right of his wife; any one of theſe and any other that ſhall come lawfully to a terme unto which ſuch a conveant is incident, albeit he be not named yet may he take advantage of it.

Co. 5. 17.

If a leaſe for years be made to *I S* by the words [Demiſe or Grant] and the leſſee aſſigne this over to *I D*; in this caſe *I D* may take advantage of the covenant in law, and bring an action againſt the leſſor if he be diſturbed.

Co. 4. 80. Dier 257. Fitz. covenant 30.

If a leaſe for years be made of land, & the leſſor doth covenant with the leſſee and his aſſignes to doe, or not to doe ſomething; in this caſe an aſſignee by word or an aſſignee by deed may take advantage of this covenant.

Co. 3. 63. F.N.B. 145.

If two coparcenours make Partition of land, and the one of them doth covenant with the other to acquite her and her heires of a ſuit that iſſued out of the land, and the covenantee doth alien her part to a ſtranger; in this caſe the alienee ſhall have the ſame advantage for acquitall of the land as the covenantee had. So if *A* be ſeiſed of the Manor of *B* whereof a chappell is parcell, and a Prior with the conſent of his covent had covenanted with *A* and his heires

Co. ſuper Lit. 385. Co. 5. 23. 18.

Lords

Lords of the Manor to celebrate divine ſervice in the chappell, and after *A* had ſold the Manor; in this caſe the vendee or aſſignee of the Manor ſhould have had the ſame advantage of the covenant the vendor had. But if the Lord had ſold the chappell the aſſignee of the chappell ſhould not taken advantage of the covenant. And if a covenant be to ſay divine ſervice in the chappell of a ſtranger; in this caſe the aſſignee of the Manor in which the chappell is ſhall not take advantage of the covenant.

Co. 5. 16. 17, 18.

Regularly all thoſe that doe ſeale and deliver the deed and are named and bound by the expreſſe words of the covenant, whether the covenant be collaterall or inherent, are bound by the covenant contained in the deed; And therefore if heires, executors, adminiſtrators or aſſignes be named in the covenant, for the moſt part they are bound by the covenant. And in all caſes of inherent covenants alſo, where a man doth covenant for himſelfe only, and doth not name his executors and adminiſtrators or either of them; they are bound and may be charged by the covenant notwithſtanding. And in ſome caſes the law is ſo alſo for collaterall covenants. And in moſt caſes of inherent covenants that tend to the ſupport of the thing granted; (in reſpect of which it is preſumed the leſſor tooke the leſſe for the land) ſuch as have the land, albeit they be neither executors nor adminiſtrators or either of them but aſſignees &c. ſhall be charged by the covenant though they be not named, for theſe covenants are ſaid to run with the land.

9. Who ſhall be bound and charged by a covenant. And againſt whom a writ of covenant doth lie. And where. Or not.

Executors, Adminiſtrators.

Co. ſuper Lit. 231. Dier 13. Bro. covenant 6. Det. 80.

If a feoffement, or leaſe be made to two, or to a man and his wife, and there are divers covenants in the deed to be performed on the part of the feoffees, or leſſees, and one of them doth not ſeale, or the wife doth, or doth not ſeale during the coverture, and he, or ſhe that doth not ſeale doth notwithſtanding accept of the eſtate and occupy the lands conveyed or demiſed; in theſe caſes as touching all inherent covenants, as for payment of rent, and the acceſſaries thereof, as clauſes of diſtreſſe, of reentry, of *nomine pœnæ*, reparations, and the like, they are bound by theſe covenants as much as if they doe ſeale the deed. So if a leaſe be made to *A* for years or life the remainder to *I S* in fee, and there is a rent reſerved, or there be divers covenants on the part of the grantees, and *I S* doth never ſeale the deed or counterpart; yet if in this caſe he accept the eſtate after the death of *A* he muſt pay the rent and performe all the covenants that are inherent. So alſo if there be covenants in the Kings Patent to be performed on the part of the Patentee. As if there be this clauſe in the Patent [and that *I S* (the Patentee) ſhall repaire the houſe when it is decayed;] in this caſe the Patentee is bound by this covenant, and all ſuch like covenants. But *Quere* of collaterall covenants in the firſt caſes, for therein it ſeemes the feoffee or leſſee is not bound. And yet it is ſaid, that if an indenture

Experientia. Paſc. 14. Jac. B. R. Bret & Cumberlands caſe.

Co. ſuper Lit. 231.

be made between *A* of the one part and *B* and *C* of the other part, and therein there is a leaſe made by *A* to *B* and *C* on certain conditions, and *B* and *C* are bound to *A* by the indenture in twenty pound to performe the conditions and *B* only doth ſeale the deed and not *C*; yet in this caſe if *C* accept of the eſtate he is bound by the covenants, and one of them cannot be ſued without the other whiles they are both living. *Qui ſentit commodum ſentire debet et onus. Et tranſit terra cum onere.*

Heire. If a man covenant for him and his heires to doe any thing whatſoever; hereby his heires are bound. But otherwiſe except the heires be bound by the deed by expreſſe name, an heir ſhall ſcarcely be bound or charged in any caſe by a deed. And therefore it is that if the leſſee for years be ouſted by any other but the heire himſelfe, no action of covenant will lie againſt the heire unleſſe there be an expreſſe covenant wherein and whereby the leſſor and his heirs are bound. But if he be ouſted by the heire himſelfe it ſeemes an action of covenant will lie againſt him. And yet if he be ouſted by an elder title from the leſſor *cõtra*, for in this caſe the heir ſhal not be charged. Co. 5. 17. Bro. covenant 38. 32 H. 6. 32. Dier 257. Fitz. covenant, 31.

Executors. Adminiſtrators If a man doe covenant for himſelfe only, to pay money, build a houſe, for quiet enjoying, or the like, and he doth not ſay in the covenant [his executors Deſcent adminiſtrators &c.] yet hereby his executors & adminiſtrators are bound & ſhal be charged. And yet if a leſſee for years covenant for himſelfe to repair the houſes demiſed, omitting other words; it ſeemes in this caſe he is bound to repaire only during his life, and the executors or adminiſtrators are not bound. So if a leſſor covenant for himſelfe only to diſcharge the leſſee of all quit rents out of the land; it ſeemes this covenant is only perſonall, and ſhall bind the covenantor only during his life. But if in theſe caſes theſe words [during the terme] be added in the covenant, as if a leſſee covenant for himſelfe to repaire the houſes during the terme, or the leſſor covenant for himſelfe to diſcharge the leſſee of all quit rents during the terme; in theſe caſes it ſeemes the executors and adminiſtrators alſo will be charged after his death. 10 H. 7. 10. Dier 19. 14. Bro. covenant 50 Dier 114.

If a leſſee be ouſted by one that hath title; it ſeemes an action of covenant will lie for this ouſter againſt the executor or adminiſtrator upon the covenant in law, if he were put out in the life time of the leſſor and not otherwiſe, for if there be tenant for life the remainder in fee to another, and the tenant for life by the words [demiſe or grant] doth make a leaſe for years and dye, and after he in the remainder doth enter and put out the leſſee for years; in this caſe he cannot upon this covenant in law charge the executors or adminiſtrators of the leſſor. But upon an expreſſe covenant for quiet enjoying he may. Dier 257.

Aſſignees or Grantees. In ſome caſes an aſſignee ſhall be charged though he be not named, Co. 5. 16.

med, and in ſome caſes ſhall not be charged though he be named, and in ſome caſes he ſhall be charged when he is named, as when the covenant doth extend to a thing in *eſſe*, parcell of the demiſe, there the thing to be done is appurtenant and *quodammodo* annexed to the thing, and ſhall bind the aſſignee though he be not expreſly named, as a covenant to repaire &c. But if the covenant be annexed to a thing not in *eſſe* before but *de novo* to be erected on the thing, as to ſet up a new houſe, or the like; in this caſe it will not bind the aſſignees unleſſe they be named in the covenant. And if the covenant be to doe a thing meerly collaterall; in that caſe it will not bind the aſſignees albeit they be named expreſly. Alſo when a contract is perſonall only, and a man doth bind himſelfe and his aſſignes; his aſſignes ſhall not be bound hereby: as if one demiſe ſheep or other ſtock of cattell, or any other perſonall goods for any time, and the leſſee doth covenant for him and his aſſignes at the end of the terme to deliver them in as good plight as they were at the time of the demiſe or ſuch a price for them, and the leſſee aſſigne them; in this caſe this covenant will not bind the aſſignee: but the executors and adminiſtrators of the firſt leſſee are bound hereby. So if one demiſe a houſe and land with a ſtocke or ſumme of money for years, rendring rent, and the leſſee doth covenant for him and his aſſignees to deliver the money at the end of the terme; in this caſe an aſſignee ſhall not be bound by this covenant as the executors and adminiſtrators of the leſſee ſhall. Executors.

Co. 5. 17. Dier 27. Bro. deſcent 50. If a leſſee covenant to repaire the houſes demiſed or to diſcharge the leſſor *de omnibus oneribus circa terram*, or the like; in theſe caſes and ſuch like albeit aſſignees be not named in the covenant, yet aſſignees and aſſignees of aſſignees *in infinitum*, & al others that ſhal come to the land by the act of law, or by the act of the parties ſhall be bound and charged by this covenant.

Co. 5. 17. If a leſſee covenant for him and his aſſignes to build a new houſe upon the land demiſed within ſeven years, and the leſſee aſſigne it over; in this caſe the aſſignee is chargeable. But if a man covenant for him and his aſſignes to make a feoffment, obligation, or the like, in this caſe the aſſignee ſhall not be charged albeit he be named. And if the leſſee covenant for himſelfe, or for himſelfe, his executors and adminiſtrators only to build a new houſe upon the land demiſed, and the leſſee aſſigne over the land; in this caſe the aſſignee is not bound by this covenant.

This caſe. verſ. Cholmsley. Trin. 36 Eliz. C. B. If a leaſe be made rendring rent, and if it be arere that the leſſee his executors and aſſignes ſhall forfeit three ſhillings four pence *nomine pœnæ*, and the leſſee aſſigne the terme; in this caſe it ſeemes the aſſignee ſhall be charged with the *nomine pœnæ*.

Note. And in all the caſes before where a covenant is broken, an action of covenant may be brought. But herein note that howſoever in divers of the caſes before aſſignees are chargeable upon a covenant, yet the leſſee himſelfe is not hereby diſcharged, but the leſſor or grantee of the reverſion hath election to charge which of them he will. And therefore if a leſſee covenant for him and his aſſignes to repaire, and the leſſee aſſigne; in this caſe the leſſor may have his action of covenant againſt either of them. And if a leſſee covenant for him, his executors, adminiſtrators and aſſignes to repaire the houſes demiſed, and he in reverſion doth grant away his reverſion, and the leſſee aſſigne his eſtate; in this caſe albeit the grantee of the reverſion have accepted the rent of the aſſignee of the terme, yet he may ſtill have an action of covenant againſt the executor of the leſſee upon this covenant. So if a Patentee covenant for him and his aſſignes to repaire, and he aſſigne; the King may have his action againſt either of them.

Election.

Bro. covenant 32.

Hil. 16 Jac. B.R. Curia Bret verſus Cumberlād.

If *A* and *B* doe covenant for themſelves jointly without more words; the covenant is joint and one of them cannot be charged without the other. But if they covenant for themſelves ſeverally the covenant is ſeverall and they may be ſued apart. And if they covenant jointly and ſeverally; then the covenant is joint and ſeverall, and they may be ſued either way at the election of the covenantee.

Co. 5. 23.

10. When a covenant ſhall be ſaid to be gone and diſcharged. And when not. And how.

Where the deed it ſelfe wherein the covenants are contained, or the eſtate on which the covenants as acceſſary to the principall doth depend, is gone and determined there regularly the covenants are gone alſo. And therefore if a leaſe for life or years be ſurrendred, whereby the eſtate is gone, or a deed become void by raſure or the like, and there be covenants contained in the deed; by theſe meanes the covenants are gone alſo. But this ſurrender doth not diſcharge the breach of covenant which was before the ſurrender. For if a Parſon leaſe his glebe for years, and after reſigne, whereby the leaſe for years doth become void; in this caſe the covenants of the leaſe as to the time before the reſignation ſhall be ſaid to be in force ſtill.

Dier 20. Co. 5. 23.

40 E. 3. 27. Bro. Surrender 47. Covenant 42. Hil. 4 Jac. B.R. Moile. verſ. Auſtin.

Where a covenant is become impoſſible to be done by the act of God, as where one doth covenant to ſerve another ſeven years, and he die before the ſeven yeares be expired; by this the covenant is diſcharged.

Co. 1. 98. Plow. 286.

Where there is an expreſſe covenant in a deed for quiet enjoying, the implyed covenant is gone. *Expreſſum facit ceſſare tacitum.*

Co. 4. 80.

Releaſe. By a releaſe of all covenants from the covenantee the covenant is diſcharged, ſo as the releaſe be by deed, for a covenant by deed cannot

18 E. 4. 8.

not be discharged by word. And therefore if *A* by deed covenant with *B* to build a house by a day, and *B* doth wish him to let it alone; this is no discharge of the covenant.

Pasc. 6. Car. B. R. Adjudg Bachelors case. If the lessor accept the rent of the lessee or his assignee after a covenant broken; this doth not discharge the breach of the covenant, but the lessor may sue for it notwithstanding.

And so we come to a *Warranty* being a speciall kind of covenant, and therefore next in order to be spoken to.

CHAP. VIII.

Of a Warranty.

Finch. ley 39. Co. super Lit. 365. A Warranty is a covenant reall annexed to lands or tenements whereby a man and his heires are bound to warrant the same. Or it is where a man is bound to warrant the land or hereditament that another hath. And he that doth make this warranty is called the warrantor, and he to whom it is made the warrantee.

1. Warranty. *Quid.*

Warrantor. Warrantee.

Co. 1. 2. super Lit. 365. 4. 81. There are two kind of warranties. 1. A warranty in deed, or an expresse warranty, which is when the same is expressed. *i.* when a fine, or feoffement by deed is levied or made in fee, or a lease for life is made by deed, comprehending warranty, or which hath an expresse clause of warranty contained in it, as when a consor, feoffor, or lessor doth covenant to warrant the land to the consee, feoffee, or lessee; which is in these words. *Ego* I S *& heredes mei warrantizabimus & imperpetuum defendemus* W S *& heredibus suis tenementa predicta contra omnes homines imperpetuum.* And by the Statute of *Bigamis Dedi* is made an expresse warranty during the life of feoffor. 2. A warranty in law, or an implied warranty, which is when it is not expressed by the party but *tacite* made and implied by the law, whereof see divers Examples *infra*. The warranty in deed also is either lineall, which is thus described. A covenant reall annexed to the land by him which either was owner or might have inherited the land and from whom his heire lineall or collaterall might by possibility have claimed the land as heire from him that made the warranty. Or else it is collaterall, which is thus described. A warranty made by him that had no right or possibility of right to the land and is collaterall to the title of the land. Also there is a warranty which doth commence by disseisin or wrong, of all which

2. *Quotuplex.*

Co. super 383, 384. 370. 365.

ſee divers examples afterwards. And note that all theſe things here are to be applied to warranties of lands and concerning freeholds and inheritances, for there is a warranty of goods and cattells in contracts of which we treat not here.

3. The fruit and effect of it, and what uſe may be made of it.

The fruit and effect of this warranty in deed is, that it doth alwaies conclude and barre the warrantor himſelfe of the land ſo warranted for ever, ſo that all his preſent and future rights that he hath or may have therein are hereby extinct. And therefore if the father be diſſeiſed, and the ſonne in his life time releaſe all his right to the land to the diſſeiſor, and make a warranty of the land in the deed, and then the father dieth, and the right of the land deſcendeth to the ſonne; in this caſe albeit the releaſe doth not barre the ſonne yet the warranty doth barre him. And for the moſt part alſo it doth conclude and barre the heires of him that made the warranty to whom the ſame warranty doth deſcend to demand the ſame land againſt the warranty, for if it be a lineall warranty, it is a barre of an eſtate in fee ſimple without any Aſſets. *i.* without any other land deſcended to him in fee ſimple from the ſame Anceſtor that made the warranty: And with aſſets it is a barre of an eſtate in taile. And if it be a collaterall warranty, it is with or without aſſets a barre of an eſtate in fee ſimple or fee taile, and all poſſibility of right thereunto; and yet ſo as it doth not paſſe any eſtate or right but only bind the right ſo long as the warranty is in force, for if the warranty be avoided the right may be revived. But neither the lineall or collaterall warranty can enlarge an eſtate. And therefore if a leſſor by deed releaſe to his leſſee for life, and warrant the land to him and his heires; this doth not make his eſtate greater, neither will it barre titles of entry or action in caſes of Mortmaine, conſent to a Raviſhor, mortgage, or dower. And therefore if an Anceſtor of the Lord hath title to enter upon an Alienation in Mortmaine, and he releaſe, or make a feoffement with warranty; this warranty will neither barre him nor his heire. So if a collaterall Anceſtor will make a warranty which doth after deſcend upon one that hath title of entry upon a condition broken; this will not barre his entry &c. neither will it barre any right that ſhall commence after the warranty made. And the warranty that doth commence by diſſeiſin doth not bind or barre any eſtate with or without Aſſets.

Co. ſuper Lit. 265. 372. 365. 384. Co. 4. 121. 10. 97.

Co. ſuper Lit. 389. &c.

And in caſes where the lineall or collaterall warranty is a barre, there if the party be impleaded by him or his heires that made the warranty, the party impleaded that is tenant of the land may plead and ſhew forth this warranty againſt him, and demand Judgement whether he contrary to his owne warranty ſhall be ſuffered or received to demand the thing warranted; and this in pleading is called a Rebutter. And if he be impleaded or ſued by another for

Co. ſuper Lit. 265. Co. 10. 98, 99. Dier 42. Co. ſuper Lit. 101.

Rebutter. *Quid.*

he

the land, then he to whom the warranty is made or his heires may vouch. *i.* call in the warrantor or his heires to warrant the land. And this is an interpleader in the nature of an action brought by the warrantor againſt the warrantee, wherein he that doth vouch, (called the vouchor) is demandant, and he that is vouched (called the vouchee) is made tenant or defendant to the action, and the vouchor is as it were out of the ſuite. And this ſecond tenant the vouchee is called the tenant by the warranty. And hereupon ſhall iſſue forth to the Sheriffe a writ to ſummon the vouchee to appeare called a *Summons ad warrantizandum.* And if the vouchee appeare he muſt plead to the vouchor, and if he ſhew cauſe why he ſhould not warrant, that muſt be tried, and this ſhewing of cauſe is called a Counterplea to the voucher: but if he plead in a voidance of the warranty, it is called a Counterplea to the warranty. And if he cannot gaineſay the warranty the ſtranger ſhall recover the land demanded againſt the vouchor, and he ſhall recover as much other land againſt the vouchee of the lands he hath or had at the time of the voucher. And this recovery of other land is called a recovery in value. And if the vouchee hath at the time of the voucher and recovery no lands deſcended to him to anſwer the warranty but hath afterwards land happening to him by deſcent from that Anceſtor, then he may have a reſummons and recover the land that doth after happen. But if the Sheriffe returne upon the ſummons, that the vouchee is ſummoned & he doth make default, then he ſhall have a *Magnum cape ad valentiam,* when if he make default againe the Judgement ſhall be given againſt the vouchor, and he ſhall recover over in value againſt the vouchee, and if the vouchee appeare and then make default the vouchor ſhall have a *parvum cape ad valentiam,* and then if he make default Judgement ſhall be given as before. But if the Sheriffe returne upon the ſummons, he hath nothing whereby he may be ſummoned, then may the vouchor have a writ called *Sequatur ſub ſuo periculo,* whereupon ſhall goe an *Alias* and *Pluries,* and if the like returne be made the demandant ſhall have Judgement againſt the firſt tenant, but he cannot recover in value againſt the vouchee. And if the caſe be ſo the vouchee had a warranty from ſome other for the land, he may dearaigne. *i.* maintaine the warranty over and ſhall recover in value over alſo againſt his vouchor in the ſame manner as before.

Voucher. *Quid.*

Vouchor. Vouchee.

Tenant by the warranty. *Quid.*

Summons ad warrantizandum. Quid.

Counterplea to the voucher. *Quid.*

Conntterplea to the warranty. *Quid.*

Recovery in value. *Quid.*

Sequatur ſub ſuo periculo. Quid.

Dearaignment *del Garranty. Quid.*

F.N.B. 134. Co ſuper Lit. 102.

Or the warrantee to whom the warranty is made or his heires may at any time before they be impleaded for the land if they will bring a *Warrantia Chartæ* upon the warranty in the deed againſt the warrantor or his heires, and hereby all the land the heire of the warrantor hath by deſcent from the Anceſtor that made the warranty at the time of this writ brought ſhall

warrantia chartæ. Quid.

be bound and charged with the warranty into whoſe hands ſoever it goe afterwards, ſo that if the land warranted be after recovered from the warrantee he ſhall recover ſo much land over againe of the other land of the heire of the warrantor or of the warrantor himſelfe if he be living. And albeit the warrantee or his heires doe recover in this writ yet he may after upon occaſion vouch the warrantor or his heires notwithſtanding. And herein obſerve it is good policy if a man ſuſpect any thing to bring this writ of *Warrantia Chartæ* betimes, becauſe it binds all the land of the warrantor from the time of the writ brought and not any of his other lands he had before that time that are now aliened.

4. What words and clauſes in a deed will make a warranty. Or not.

The words *Dedi & conceſſi*, or *Dedi* only in a feoffement doe make a warranty when an eſtate of franketenement or inheritance doth paſſe by the deed. But the word *Conceſſi* only, or *Demiſi & conceſſi*, doe not make ſuch a warranty. And by force of the Statute of *Bigamis chap. 6. Dedi* is made an expreſſe warranty during the life of the feoffor. Co ſuper Lit. 383, 384. Co. 4. 81.

The word, *Warrantizo*, or warrant is the only apt and effectuall word to make an expreſſe warranty or a warranty in deed, and therefore this word only is uſed in fines. And the words *Defendo*, or *Acquieto*, albeit they be commonly uſed in deeds, yet of themſelves without the other will not make a warranty. Lit. Sect. 733. Co. 5. 17, 18.

If a man by deed doth grant to warrant land to *I S* and his heires, and the warrantor doth not bind his heires to the warranty; or doth not warrant to *I S* and his heires but to *I S* only; or doth warrant to *I S* and his aſſignes and not to *I S* and his heires; or doth bind himſelfe and his heires to warrant the land, but doth not ſay how long, nor againſt whom; theſe are good warranties, but how they ſhall be taken ſee afterwards. Dier 42. Co. ſuper Lit. 383.

5. To what things a warranty may be annexed and extended. And to what not. And how.

A warranty in deed may be annexed to eſtates of inheritance or freehold, and that not only of corporeall things which paſſe by livery, as houſes, lands, and the like, but alſo of incorporeall things which lie in grant, as Advowſons, Rents, Commons, Eſtovers, and the like which iſſue out of lands or tenements, and that not only to inheritances in *eſſe* but alſo to ſuch as are newly created, as a man (ſome ſay) may grant a rent &c. *de novo* out of land for life, in taile, or in fee, with warranty. So a warranty in law may extend to a rent newly created, and therefore if ſuch a rent be granted in exchange for an acre of land; this Exchange and warranty thereunto annexed is good. But a warranty may not be annexed to an eſtate or leaſe for years, albeit it be a leaſe of one thouſand years, nor to any other chattell, and therefore in all actions the which leſſee for years may have as treſpaſſe &c. a warranty cannot be pleaded in barre. Co. ſuper Lit. 366. 389.

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Co. ſuper Litt.371. 385. Litt. Sect. 738. 745.706.

A warranty may be made upon any kind of conveyance, as upon fines, feoffments, gifts, &c. alſo a warranty may be made by and upon releaſes and confirmations made to the tenant of the land, albeit he that makes the releaſe or confirmation hath no right to the land, &c. And yet ſome ſay, that by a releaſe or confirmation where there is no eſtate created, or tranſmutation of the poſſeſſion, a warranty cannot be made to the aſſignee. But if *A* be ſeiſed of land in fee, and *B* doth releaſe to him, or doth confirm his eſtate in fee with warranty to him, his heirs, and aſſignes; in this caſe all men agree this warranty to be good; and ſo alſo it ſeems it is in the caſe laſt before, and that both the party himſelf, and the aſſignee may vouch.

Co. ſuper Litt. 384. 386.

A warranty in Law may be good in his creation, albeit it be made without deed, for if a man by his laſt Will and Teſtament deviſe lands to another man for life, or in tail rendring rent; to this eſtate there is a warranty in Law annexed. 6. What ſhall be a good warranty in Law. And how it ſhall barre and bind.

Co. ſuper Litt. 384. F.N.B. 134. Co. 4. 80.

The words *Dedi & conceſſi*, or *Dedi* onely in a feoffment, make a good warranty in Law. But the word *Conceſſi* onely in fine or feoffment, doth not make a warranty in law. And albeit there be an expreſſe warranty in the deed, yet this doth not take away the implied warranty of the Law. And this warranty in Law by *Dedi & Conceſſi*, or by *Dedi* onely, is a generall warranty during the life of the feoffor.

Co. ſuper Litt. 102. 384.

Every partition and exchange implieth in it, and hath annexed to it a ſpeciall warranty in Law, and how it ſhall bar and be extended ſee in *Exchange*. Partition. Exchange.

Co. 4. 80.

Every tenure by homage Aunceſtrel, *i.* where a tenant and his Aunceſtors have held land of a Lord, and his Aunceſtors time out of mind by homage, hath a warranty in Law annexed to it, by which the Lord is bound to warrant it to the tenant and his heirs.

Co. ſuper Litt. 334.

If one make a gift in tail or leaſe for life of land by deed or without deed reſerving a rent, or of a rent-ſervice by deed; in theſe caſes there is annexed an implied warranty againſt the donor or leſſor, his heirs and aſſignes.

Co. ſuper Litt. 384.

When dower is aſſigned to a woman, there is a warranty in Law included, which is that the tenant in dower being impleaded, ſhall vouch and recover in value a third part of the two parts whereof ſhe is dowable.

Co. ſuper Litt. 384.

And this warranty in Law is of the nature of a lineall warranty, and ſhall bind as a lineall warranty onely, for it doth never barre any collaterall title. And hence it is, that this warranty and aſſets in ſome caſes is a good bar, as if tenant in tail exchange for other lands which are deſcended to the iſſue, and he hath accepted of them, or if not, that other lands are deſcended to him. But if tenant in tail of lands make a gift in tail or leaſe for life rendring rent and die;

die; in this caſe this is no bar. And yet if other aſſets in fee ſimple deſcend, this warranty in Law and aſſets is a good bar.

7. What ſhall bee ſaid a good warranty in deed. Or not. And how it ſhall bar and bind. Infant.

To every good warranty in deed that muſt barre and binde theſe things are requiſite, 1. That the perſon that doth warrant, bee a perſon able, for if an infant make a feoffment in fee of land, and thereby doth binde him and his heirs to warrant the land; in this caſe albeit the feoffement bee onely voidable, yet the warranty is void. 2. That the warranty be made by deed in writing, for if a man make a feoffement by word, and by word binde him and his heirs to warrant the land; this is not a good warranty. So if a man give lands to another by his laſt Will, and thereby binde him and his heires to warrant it; this warranty albeit the Will bee in writing is void. 3. That there be ſome eſtate to which the warranty is annexed, that may ſupport it, for if one covenant to warrant land to another and make him no eſtate, or make him an eſtate that is not good, and covenant to warrant the thing granted; in theſe caſes the warranty is void. 4. That the eſtate to which the warranty is annexed, bee ſuch an eſtate as is able to ſupport it, and therefore that it be a leaſe for life at the leaſt, for if one make a leaſe for years of land, and bind himſelfe and his heires to warrant the land; this is no good warranty, neither will it have the effect of a warranty: but this may amount to a covenant on which an action of covenant may be brought. 5. That the warranty deſcend upon him that is heir of the whole bloud by the common Law to him that made the warranty, and not upon another: for if tenant in tail in Burrough Engliſh (where by cuſtome the youngeſt ſon is to inherit) diſcontinue the tail, and have iſſue two ſons, and the Vncle releaſe to the diſcontinuee with warranty and dieth; this is no good warranty to binde the ſonne. So if in this caſe tenant in taile diſcontinue the taile with warranty &c. having two ſonnes, and die ſeiſed of other lands in the ſame Burrough in fee ſimple, to the value of the lands in taile; the younger ſonne is not barred by this warranty. So if one give his land to the eldeſt ſonne, and the heires males of his body, the remainder to the ſecond ſonne, &c. and the eldeſt ſonne doth alien with warranty having iſſue a daughter and die; this is no good warranty to barre the ſecond ſonne. So if tenant in taile have iſſue two daughters by divers venters and die, and they enter and a ſtranger doth diſſeiſe them, and one of them doth releaſe all her right, and binde her and her heires to warrant it; in this caſe the warranty is not good to barre the ſiſter: but if they had beene by one venter *contra*. So if two brothers be by demy venters, and the eldeſt doth releaſe with warranty to the diſſeiſor of the uncle, and dieth without iſſue, and the younger dieth; this is no good warranty to barre the younger brother, for a warranty muſt evermore

Co. ſuper Litt. 367.

Litt. Sect. 703. Co. ſuper Litt. 386.

Co. 10. 56. & Super Litt. 384.

Co. ſuper Litt. 378. 26 H. 8. 9.

Co. ſuper Litt. 12. Litt. fol. 161 Sect. 735.

Litt. fo. 161.

Litt. Sect. 737.

Co. ſuper Litt. 387. Litt. Sect. 718.

more deſcend upon him that is heire at the Common Law to him
Litt. Sect. 745.746. that made it. 6. That he that is heir doe continue to be ſo, and that neither the deſcent of the title nor the warranty be interrupted, for if one binde him and his heires to warrant, and after is attainted of treaſon or felony, and die; this warranty doth not binde his heire. So if tenant in taile be diſſeiſed, and after releaſe to the diſſeiſor with warranty, and after the tenant in taile is attainted of felony, and hath iſſue and die; this warranty will
Co.10.96. 97. ſuper Litt. 388. 21 H.7. not bind the iſſue. 7. That the eſtate of freehold that is to bee barred be put to a right before or at the time of the warranty made, and that he to whom the warranty doth deſcend, have then but a right to the land, for a warranty will not barre any eſtate of freehold or inheritance in *eſſe* in poſſeſſion, reverſion, or remainder, that is not diſplaced and put to a right before or at the time of the warranty made, though after at the time of the deſcent of the warranty, the eſtate of freehold or inheritance be diſplaced and deveſted. And therefore if there be father and ſon, and the ſonne hath a rent-ſervice, ſuit to a mill, rent-charge, rent-ſeck, common of paſture, or other profit apprender out of land of the father, and the father maketh a feoffment in fee with warranty and dieth; this ſhall not barre the ſonne of the rent, common, &c. And albeit the ſonne after the feoffement with warranty and before the death of the father had been diſſeiſed, and ſo being out of poſſeſſion the warranty had deſcended upon him, yet this warranty ſhould not binde him. So if my collaterall Aunceſtor releaſe to my tenant for life with warranty and die, and this warranty deſcend upon me; this ſhall not binde my reverſion or remainder. But if in the caſe before the ſonne be diſſeiſed of the rent &c. and affirme himſelfe to be diſſeiſed by the bringing of an Aſſiſe (for otherwiſe he ſhall not be ſaid to be out of poſſeſſion of a rent, or the like) and after the father doth releaſe with warranty and die; in this caſe the collaterall warranty ſhall binde and barre the ſon of his rent &c. And if in the laſt caſe my tenant for life be diſſeiſed, and my Aunceſtor doth releaſe to the diſſeiſor with warran-
Litt. Sect. 734. ty and die; this is a good warranty to barre and bind me. 8. That the warranty doe take effect in the life time of the Aunceſtor, and that he be bound by it, for the heire ſhall never be bound by an expreſſe warranty, but where the Aunceſtor was bound by the ſame warranty, and therefore a warranty made by Will is void.
Co. ſuper Litt. 370. 9. That the heire claim in the ſame right that the Aunceſtor doth, for if one bee a ſucceſſor onely in caſe of a corporation, hee ſhall
Litt. Sect. 726. Co.1. 67. 140. ſuper Litt. 380. not be bound by the warranty of a naturall Aunceſtor. 10. That the heire that is to be barred by the warranty be of full age at the time of the fall of the warranty, for if my Aunceſtor make a feoffment, or a releaſe with warranty, and at this time I am within

age,

age, and after he die, and the warranty descend upon mee within age; this warranty shall not bind me: but if I become of age after the warranty of my Auncestor, and before his death; in this case the warranty may barre mee. And in the first case it will barre me also, whiles it is in force; but I may by my entry avoid it. And the same Law is of a woman covert. And yet if the entry of an infant or a woman covert be not lawful when the warrantie doth descend; in this case the warrantie shall binde them as well as any other, for such a warrantie cannot be avoided but by entrie and avoiding the estate. And where the husband is within age at the time of the descent of a warranty to his wife, and the entrie of the wife is taken away, there the warranty shall bind the wife.

If lands be given to *A* for life, and after to the next heir male of *A*, and the heires males of the body of that heire male, and *A* having issue *B*, makes a feoffment of the land with warrantie to *I S*; this is a good warrantie and a barre to the issue, for a man may be barred of his right by a warrantie which hee could never avoid: as where lessee for life is disseised, and a collaterall Auncestor of the lessor doth release to the disseisor with warrantie and die, and this doth descend upon the lessor; by this he is barred. Co.1.66. 44 Ed.3.30. 44 Ass.pl.35

A warrantie made for life or in taile is good, and shall binde for so long onely, as if tenant in taile of land let it for life the remainder to another in fee, and a collaterall Auncestor doth confirme the estate of the tenant for life and die, and the tenant in taile hath issue; this is a barre to the issue during the life of the tenant for life. And in this case upon a voucher the recovery in value shall be put for life onely. Litt.Sect. 738 Co.super Litt. 387.

If one make a gift in taile and grant to warrant the land given according to the gift; this warrantie is good no longer then the estate doth last. And no warrantie that a donor can make in this case can bar him of the land if the donee die without issue, and the estate determine. Co.10.96.

And where a warranty doth bar it is entire and doth extend to all the land, and to all persons, upon whom it doth descend, and is a barre of all the right that every one of them hath in the land, so that if they have all right jointly or severally, or one onely hath all the right and the rest none, he that hath the right is barred. And therefore if lands be given to *A*, and the heirs of his body and for want of such issue to *E* his sister and the heirs of her body, and *A* doth make a feoffment with warrantie, and die without issue having two sisters *E* and *S*; this is a bar to *E* for the whole albeit the warranty descend on her and another. Co.8.52. super Litt. 373.

If there be tenant for life, the remainder to his sonne and heire apparant in taile, and the father doth a feoffement in fee with Co.5.79.

warrantie

warrantie and dieth; in this caſe this is a good warrantie, and will bar the ſon albeit it be made of purpoſe to bar him. But if by agreement and covin between him and *A* and *B*, he make a leaſe to *A* who makes a feoffment in fee to *B*, to whom the father doth releaſe with warrantie, thinking by a collaterall warrantie to bar his ſon; this is no bar, for this warrantie began by diſſeiſin: And if in the firſt caſe the ſon doth enter in the life time of the father upon the land he doth avoid the warrantie.

Co. 1.66. If the father bee tenant for life, the remainder to the next heire male of the father, and to the heires males of the body of ſuch next heire male, and the father makes a feoffment to *I S* with warrantie and dieth; it ſeems this warrantie is a good bar to the heir; and in this caſe the heir cannot enter in the life time of his father, for he cannot be heire male unto his father untill his fathers death.

Co. ſuper Litt. 366. 365. Co. 1. 67. Stat. Glouc. ch. 1 6. Litt. Sect. 724, 725. If tenant for life make a feoffement with warrantie, or be diſſeiſed, and releaſe with warrantie, and he in reverſion being heir to the tenant for life doth not enter, but ſuffer the leſſee for life to die, and thereby the warrantie to fall and deſcend upon him; in this caſe this warrantie generally is a bar without any aſſets. But if hee that doth ſo alien, &c. bee tenant by the courteſie, this is no barre to the heire without aſſets in fee ſimple from the tenant by the curteſie, and then it is a barre for ſo much. And if the heire for want of this aſſets at the time doth recover the land from his mother, and after aſsets doth deſcend from the father; in this caſe the tenant ſhall recover the ſame land of the mother againe. And if ſhe that doth ſo alien, &c. to be tenant for life of the inheritance or purchaſe of her deceaſed husband, or given unto her by any of the Aunceſtors of her husband, or by any other perſon ſeiſed to the uſe of her husband, or of any of his Aunceſtors; in this caſe her alienation, releaſe, or confirmation with warrantie ſhall not binde the heire whether hee have aſſets or not. But if a man convey lands to the uſe of himſelfe *B* his wife, and the heirs of his body, and they have iſſue *C*, and the father dieth, and *C* diſſeiſeth his mother, or getteth a feoffement from a diſſeiſor, and then ſuffereth a recovery with a ſingle voucher, and after the wife doth releaſe to the recoverer with warrantie; in this caſe the warrantie is a barre to the iſſue, and not void by the Statute of 11 *H.7.*

Stat. 11 H.7. chap. 20. Litt. Sect. 727. Co. ſuper Litt. 365.

Co. 3. 58.

If the husband that is ſeiſed of lands in the right of his wife levy a fine or maketh a feoffment in fee with warranty, and the wife dieth, and then the husband dieth; this warranty ſhall not binde the heire of the wife without aſſets of other land in fee ſimple from the father, albeit he be not tenant by the courteſie, but it is before her death that he doth make the eſtate and the warranty. But a Fine levied by the husband and wife, in this caſe is a good bar to the heir.

Co. ſuper Litt. 366. 381. Stat. Glouc. ch. 6. Litt. Sect. 332.

If

Fine.

If tenant in taile that is in of another eſtate, *i.* either by diſſeiſin, or by the feoffment of a diſſeiſor, doth ſuffer a common recovery, and a collaterall Aunceſtor of the tenant in taile doth releaſe with warrantie to the recoverer, and after the recoverer doth make a feoffment to uſes executed by the Statute of 27 *H.* 8. and after the collaterall Aunceſtor dieth; in this caſe albeit the eſtate of the land be transferred in the poſt before the deſcent of the warrantie, yet it ſhall binde. So if hee to whom the warrantie is made ſuffer a common recovery, and after the Aunceſtor dieth. But if tenant in dower enfeoffe a villain with warranty, and the Lord of the villain enter into the land before the deſcent of the warrantie, and after the woman dieth; this warrantie ſhall not binde the right of the heir. So if a collaterall warrantie be made to a baſtard and his heirs, and living, the Aunceſtor the Baſtard dieth without iſſue, and the Lord by eſcheat doth enter, and after the Aunceſtor dieth; this warrantie ſhall not binde. Co.3.62. 22 Aſſ.pl. 37. 29 Aſſ. pl.34.

A collaterall warrantie may deſcend upon an iſſue in taile before the right deſcend, and yet be good with this difference, that the right be in *eſſe* in ſome of the Aunceſtors of the heir at the time of the deſcent of the warranty, as if tenant in taile diſcontinue the taile in fee, and the diſcontinuee is diſſeiſed, and the brother of the tenant in taile releaſeth all his right &c. to the diſſeiſor with warrantie, and dieth without iſſue, and the tenant in taile hath iſſue and dieth; in this caſe the iſſue is barred. But otherwiſe it is where the right is not in *eſſe* in the heir or any of his Aunceſtors at the time of the fall of the warrantie, as if Lord and tenant be, and the tenant make a feoffment in fee with warrantie, and after the feoffee doth purchaſe the Seigniory, and after the tenant doth ceaſe; in this caſe the Lord ſhall have a Ceſſavit, for a warrantie doth never bar any right that doth commence after the warrantie. Litt. Sect. 7 H. Co. ſuper Litt.388

8. What ſhall be ſaid a lineall warranty. And how ſuch a warranty ſhall barre.

If the caſe be ſo that if no ſuch warranty had beene made by the father or other Aunceſtor, the right of the lands or tenements ſo warranted, had or might have deſcended or come from the ſame Aunceſtor, and that from and by him that made the ſame warranty, ſuch a warrantie is a lineall warrantie. As if a man bee ſeiſed in fee of land, and make a feoffment of it to another, and binde him and his heires to warrant the land, and hath iſſue and die, and the warrantie doth deſcend upon the iſſue; this is a lineall warrantie, for that if none ſuch had been, the right of the land had deſcended to him as heire to his father, and he muſt have made his deſcent by him. And if there be grandfather, father and ſon, and the grandfather be diſſeiſed, and the father releaſe to the diſſeiſor being in poſſeſſion with warranty &c. and dieth, and after the grandfather dieth; this is a lineall warrantie to the ſon, and albeit in this caſe the warrantie deſcend Litt. Sect. 703.711. Co. ſuper Litt.371.

before

Litt.Sect. 707. before the right, yet it is a good bar. And if there be two brothers, and the father is diſſeiſed, and the eldeſt brother doth releaſe with warranty, and die without iſſue, and after the father dieth, and the warrantie doth deſcend to the younger ſonne; this
Co.1.66,67. is a lineall warrantie to him. And if lands be given to *A* for life, the remainder to his right heires, and hee doth make a feoffment with warrantie and die; this is but a lineall warrantie. And if two parcenours be, and the eldeſt enter into all the land to her owne uſe, and then doth make a feoffment with warrantie and dieth without iſſue; this as to her owne part is a lineall warrantie,
Co.8.52. New Terms of the Law, tit. Warrantie. but as to her ſiſters part is a collaterall warrantie. And in every caſe where one doth demand an eſtate taile, if any Anceſtor of the iſſue in taile, whether he had poſſeſſion of the land or not, hath made a warrantie, and if the iſſue, that were to bring a writ of Formedon, may or might have by poſſibility by ſome matter that might have been done conveyed to himſelf a title by force of the gift by him that made the warrantie; this is a lineall warrantie. As if a man be ſeiſed of land of an eſtate taile to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath iſſue and dieth; this war-
Litt.Sect. 719. rantie deſcending upon the iſſue is a lineall warrantie. And if lands be given to one and the heirs males of his body, and for want of ſuch iſſue to the heires females of his body, and the donee doth make a feoffment with warrantie, and hath iſſue a ſonne and a daughter and dieth; this warrantie is lineall to the ſonne, and if the ſonne die without iſſue male, it is a lineall warrantie from the father to the daughter. But if the brother in his life time releaſe to the diſcontinuee &c. with warrantie &c. and after dieth without iſſue; this is a collaterall warranty to the daughter.
Litt.Sect. 714. If lands bee given to the husband and wife, and the heires of their two bodies engendred, and they have iſſue, and the husband diſcontinue and die, and after the wife doth releaſe with warrantie
Co. ſuper Litt. 375. and die; this is a lineall warrantie. And if lands be given to a man and a woman unmaried, and the heirs of their two bodies, and they intermary, and are diſſeiſed, and the husband doth releaſe with warrantie and dieth, and after the wife dieth; this is a
Litt. Sect. 718. lineall warrantie to the iſſue for all the land. And if tenant in taile have iſſue three ſons and diſcontinue, and the middle brother doth releaſe with warrantie, and die without iſſue, and after the father dieth, and after the elder brother dieth without iſſue, ſo that the warrantie doth deſcend to the younger brother; this is a lineall warrantie to him. And if a father give land to his eldeſt ſon and the heirs males of his body, &c. the remainder to the ſecond ſonne, &c. if the eldeſt ſon alien in fee with warrantie, &c. and hath iſſue female, and dieth without iſſue male; this is a lineall warrantie

to

to the ſecond ſonne. And in all theſe caſes of a lineall warrantie if the right of the eſtate to be barred bee the right of an eſtate in fee ſimple, it is a barre without any aſſets; for the rule is, That as to him that demandeth fee ſimple by any of his Aunceſtors, he ſhall bee barred and bound by a lineall warrantie that doth deſcend upon him, unleſſe hee bee reſtrained by ſome Statute. But it doth not binde the right of an eſtate in fee taile without aſſets, for in that caſe the rule is, That as to him that demandeth fee taile by writ of Formedon in the Deſcendor, he ſhal not bee barred by a lineall warrantie, unleſſe he hath aſſets by deſcent in fee ſimple of other land from the ſame Aunceſtor that made the warrantie; and then it is a barre for ſo much onely as doth deſcend to him no more. And yet if the iſſue in taile doe alien the aſſets deſcended and die; in this caſe the iſſue of that iſſue is not barred by this warrantie and aſſets. But if the iſſue to whom the warrantie doth deſcend, bring his writ of Formedon, and is barred by judgement by reaſon of the warrantie and aſſets; in this caſe albeit he alien the aſſets afterwards, yet the eſtate taile is barred for ever.

Litt. Sect. 711, 712. Doct. & St. 152, 153. Co. 8. 52.

Co. ſuper Litt. 393.

9. What ſhall bee ſaid a collaterall warranty. And how ſuch a warranty ſhall bar.

If tenant for life do alien in fee with warrantie, or be diſſeiſed & releaſe to the diſſeiſor with warrantie and die, and the warrantie deſcend on him in reverſion or remainder; this is a collaterall warrantie. So if the leſſee for life be diſſeiſed, and a collaterall Aunceſtor of him in reverſion releaſe with warrantie and die, and the warrantie deſcend on him in reverſion; this is a collaterall warrantie, for that is collaterall which is collaterall to the title of the land. And if a man ſeiſed of lands in fee have iſſue two ſonnes, and the father dieth, and the younger ſonne doth enter, and doth alien the land with warrantie, and die without iſſue; this is now a collaterall warrantie that is deſcended on the elder brother. And if a ſonne bee diſſeiſed of his own land, and bring an Aſſiſe, and after the father doth releaſe to the diſſeiſor with warranty and dieth; this warrantie that doth deſcend to the ſonne is a collaterall warrantie. And if a father diſſeiſe his ſon of the land he hath of his own purchaſe without any intent to alien afterwards and to barre his ſonne, and after he doth make a feoffment with warrantie and die before the entrie of his ſonne, ſo that the warrantie doth deſcend; this is a collaterall warrantie. If there bee father and two ſonnes, and the father is diſſeiſed, and the younger ſonne doth releaſe with warrantie to the diſſeiſor and die without iſſue, and then the father dieth; in this caſe the warrantie now deſcended is a collaterall warrantie. If a leaſe be made for life to the father, the remainder to his next heir, and the father is diſſeiſed and doth releaſe with warrantie and dieth; this is a collaterall warrantie to the heire. And if the husband diſcontinue

Co. 1. 69. 21 H. 7. 10. Litt. Sect. 725.

Litt. Sect. 707. Doct. & St. 152.

21 H. 7. 10.

Litt. Sect. 704.

Litt. Sect. 707.

Co. ſuper Litt. 388.

tinue the right of his wife, and an Auncestor collaterall to the wife to whom she is heir doth release with warranty and die, and after the husband dieth; this is a collaterall warranty and a bar to her.

Co.10.96. Litt.Sect. 709. Plow. 234. Kelw. 78. And in every case where a man doth demand an estate taile by a writ of Formedon, if any Auncestor of the issue in tail which hath or hath not possession maketh a warranty, and the issue that is demandant cannot by any possibility that may be done convey to him a title by force of the gift from and by him that made the warranty; this is a collaterall warranty, as if tenant in taile discontinue the taile and die, having issue, and the uncle of the issue doth release with warranty to the discontinuee, and die without issue, so that the warranty doth descend on the issue in taile; this is a collaterall warranty. So if such a discontinuee make a feoffment in fee, or be disseised, and the uncle release with warranty to the disseisor, or feoffee, and die without issue, and the warranty doth descend on

Litt. Sect. 708. the issue; this is a collaterall warranty. If a tenant in taile have three sons, and discontinue the tail in fee, and the middle brother doth release to the discontinuee with warranty, and after the tenant in taile dieth; this is a collaterall warranty to the elder bro-

Litt. Sect. 716. ther. If one have issue three sonnes, and giveth land to the eldest, and the heirs of his body, and for want of such issue to the middle, and the heirs of his body, the remainder to the third, and the heires of his body, and the eldest doth discontinue the taile in fee with warranty, and die without issue; this is collaterall to the middle sonne. In the same manner it is in case where the middle sonne hath the same land by force of the same remainder, because his elder brother made no discontuance but died without issue of his body, and after the middle brother doth make a discontinuance with warranty, &c. and dieth without issue; this is a collaterall warranty to the youngest sonne. And in this case if any of the sonnes be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warranty; this is a collaterall warranty to that son upon whom the warranty doth

Co. 8.52. Litt. Sect. 713. descend. If lands be given to *A*, and the heirs of his body, and for want of such issue to *E*, his sister and the heires of her body, and *A* doth make a feoffement with warranty, and die without issue, having two sisters *E* and *S*; this is a collaterall warranty to

Litt. Sect. 741. *E*. If lands be given to a man and the heires of his body begotten, who taketh a wife and hath issue a son by her, and the husband doth discontinue the taile in fee and dieth, and after the wife doth release to the discontinuee with warranty and dieth, and the warranty doth descend to the sonne; this is collaterall to him. If tenant in taile discontinue the taile in fee, and the discontinuee is disseised, and the brother of the tenant in taile doth release to the disseisor with warranty in fee, and dieth without is-

ſue, and the tenant in taile hath iſſue and dieth; this is collaterall as to the iſſue. If tenant in tail have iſſue two daughters, and die, and the elder enter into all to her own uſe, & thereof make a feoffment in fee with warranty, and die without iſſue, this warranty as to the other ſiſters part is collaterall, but not as to her own. If the husband and wife, tenants in ſpeciall tail, have iſſue a daughter, and the wife die, and the husband by a ſecond wife have iſſue another daughter, and diſcontinueth in fee and dieth, and a collaterall Aunceſtor of the daughters releaſe to the diſcontinuee with warranty and dieth, and the warranty deſcend upon both the daughters; this is a collaterall warranty to them. If lands be given to one and the heirs males of his body, and for want of ſuch iſſue to the heires females of his body, and the father die, and the brother releaſe with warranty, and die without iſſue; this is collaterall to the daughter. If tenant in taile make a leaſe for life, the remainder to another in fee, and a collaterall Aunceſtor doth confirm the eſtate of tenant for life with warranty and die, and after the tenant in taile die having iſſue; this is a good binding collaterall warranty during the eſtate for life. And in all theſe and ſuch like caſes of a collaterall warranty, whether the right bee the right of an eſtate taile, or the right of an eſtate in fee ſimple that is to be barred, it is a bar without any aſſets, for in this caſe the rule is, That a collaterall warranty is a barre to him that demandeth fee ſimple, and alſo to him that demandeth fee taile without any other deſcent of lands in fee ſimple, ſo that the heir on whom the ſame warranty is deſcended, can never have the land ſo warranted whiles the warranty doth continue in force, but is bound thereby, except it be in ſome ſpeciall caſes reſtrained by Act of Parliament, as where the husband alone during his wives life, or after her death, being tenant by the curteſie make a feoffement by fine or deed of his wives land, which ſhee hath by deſcent or purchaſe, with warranty; this will not barre her heire without aſſets of other lands in fee ſimple deſcended from the ſame Aunceſtor that made the warranty. Or where a wife after her husbands death ſhall alone or with her ſucceeding husband alien, releaſe, confirm or diſcontinue with warranty, the land ſhe holdeth in dower or in taile of the gift of her former husband or any of his Aunceſtors; this warranty is voidable and will not binde with aſſets.

Co. ſuper Litt. 373.

Litt. Sect. 738.

Litt. Sect. 712. Co. ſuper Lit. 374. Co. 10. 96. Stat. of Glouc. ch. 3. Co. ſuper Litt. 365. Stat. 11 H. 7 chap. 20.

10. What ſhall be ſaid a warranty that doth begin by Diſſeiſin. And what ſuch a warranty doth work.

If the ſon purchaſe land &c. and after let it to his father or any other Aunceſtor for years, or at will, and he by his deed doth infeoffe a ſtranger, and that with warranty, and after dieth, whereby the warranty doth deſcend upon the heire; this warranty doth commence by diſſeiſin. So if tenant by Elegit, Statute Merchant, Guardian in Chivalry, or Soccage, or becauſe of Nurture,

Litt. Sect. 699, 700, 701 702. Finch 82. Co. ſuper Litt. 367.

ture, make a feoffement with warranty, and this warranty doth deſcend on his heir; this warranty doth commence by diſſeiſin. So if one that hath no right at all enter into my land, and make a feoffement to another with warranty. So if one Coparcenor enter into the whole land, and make a feoffement in fee with warranty; this warranty as to the one moity doth begin by diſſeiſin. So if father and ſonne purchaſe lands to them jointly &c. and the father alien the whole to another with warranty &c. and after the father dieth; this warranty as to the one moity doth beginne by diſſeiſin. But if the purchaſe bee to them two and the heires of the ſonne it is otherwiſe, for if the ſonne enter in the life time of the father, the warranty is avoided for all, but if hee doe not enter, then as to the fathers moity it is a collaterall warranty. And if the purchaſe be to the father and ſon and the heirs of the father, and the father alien with warranty &c. in this caſe the warranty is good for the whole.

Co. 5. 80. ſuper Litt. 366. 367.

If the father be tenant for life, the remainder to his ſon and heir in fee, and the father by covin and conſent of purpoſe to bar the heir by a collaterall warranty maketh a leaſe for years, to the end that the leſſee ſhould make a feoffement in fee that the father may releaſe to the feoffee with warranty, and all this is done accordingly, and the father dieth, and the warranty doth deſcend to the ſonne; in this caſe the warranty ſhall be ſaid to beginne by diſſeiſin. But if the father in this caſe make a feoffement in fee with warranty and die; this is a good warranty to binde the ſonne, albeit it be done of purpoſe to bar him. So if one brother make a gift in taile to another, and the uncle doth diſſeiſe the donee, and infeoffeth another with warranty, the uncle dieth and the warranty deſcendeth on the donor, and then the donee dieth without iſſue; this warranty doth begin by diſſeiſin. So if the father and ſon, and a third perſon be jointenants in fee, and the father maketh a feoffment in fee of the whole, with warranty, and dieth, and then the ſonne dieth; in this caſe as to the part of the third perſon, and to the part of the ſonne, the warranty ſhall be ſaid to beginne by diſſeiſin. But releaſes at this day by a tenant for life to a diſſeiſor or any other without covin, albeit it bee to the intent to barre him in reverſion ſhall barre him, for intent without covin and diſſeiſin ſhall not avoid a warranty. And examples of warranties that doe begin by diſſeiſin, have theſe qualities: 1. That for the moſt part the diſſeiſin is done immediately to the heire that is bound by the warranty. 2. The warranty and diſſeiſin are *ſimul* and *ſemel*. And yet if a man diſſeiſe another with intent to make a feoffment with warranty, albeit the feoffement be made twenty years after the diſſeiſin, yet it ſhall be ſaid to bee a warranty that doth beginne by diſſeiſin. But in all theſe caſes of warranties that doe beginne by diſſeiſin, this is the rule, That

they are altogether void and without force as to all others but to the parties themſelves that doe make them, and therefore they do not barre or binde any others at all of their right that have any. And the ſame Law is of a warranty that doth begin by abatement or intruſion; that is, when an abatement or intruſion is made of purpoſe to make a feoffement in fee with warranty. And ſo alſo it is where the tenant dieth without heir, and an Auncеſtor of the Lord doth enter before the entry of the Lord, and make a feoffement in fee with warranty; in this caſe this ſhall not binde the Lord, becauſe it doth begin by wrong.

11. How a warranty ſhall be taken.

All warranties in generall are favourably taken in Law, becauſe they are part of mens aſſurances. Every warranty in Law is taken for, and hath the effect of a lineall warranty.

The warranty that is made by *Dedi & Conceſſi*, or *Dedi* only in a feoffement, is and ſhall be taken for a generall warranty againſt all perſons to the feoffee and his heires, during the life of the feoffor onely, albeit there be no ſervice reſerved by the deed nor heir named: but it ſhall not extend to the aſſignee of the feoffee. And if there be any ſervice reſerved on the deed, then it ſhall extend againſt the heir alſo. Co.4.81. 5.17.

The warranty in Law that is made upon a gift in tail, or leaſe for life, rendring rent, is a ſpeciall warranty againſt the donor and leſſor, and his heirs and aſſignes, ſo that the donee or leſſee may vouch the grantor after the grant of the reverſion, or the grantee of the reverſion after the atturnment of the tenant at his election. Co.4.81. ſuper Litt. 384.

The warranty in Law that is made upon an Exchange, is ſpecial in divers reſpects, for it extendeth reciprocally to, and againſt the heires of both parties, and it doth extend only to the ſame land that is given in exchange and none other; and no uſe can be made of it but by voucher, for no *Warrantia Cartæ* doth lie upon it. So alſo the warranty that is made in dower is taken to extend only to the other two parts of the land. Co.4.121. ſuper Litt. 384.

The warranty in Law that is made upon the tenure of Homage Auncеſtrel, extendeth reciprocally to the heires, and againſt the heires of both parties. Co. ſuper Litt. 384.

If a feoffement be made of land to three jointly, and the feoffors doe warrant the land to the feoffees, and every of them; this warranty ſhall be joint and not ſeverall. But if the eſtate be ſeverall, as if one grant white acre to *A*, and blacke acre to *B*, and grant to warrant the land to them, and either of them; in this caſe the warranty ſhall be ſeverall. Co. 5. 59.

If a man of full age, and an infant join in a feoffement with warranty; this ſhall be taken for a good warranty as to the whole for him that is of full age and void for the infant, and not void in part and good in part. Co. ſuper Litt. 367.

If a man make a feoffment in fee, & bind his heirs but not himſelf to Co. ſuper Litt. 386.

war-

warranty; in this caſe and by this his heirs ſhall not be bound, and it ſeems alſo that it will not binde the warrantor himſelfe. But if a man binde himſelfe to warrant, and not his heirs by the feoffement; in this caſe the feoffor himſelfe is bound to the warranty but not his heirs, for it is a maxime of Law, That the heir ſhall never be bound to any expreſſe warranty, but where the Aunceſtour was bound by the ſame warranty. If one make a feoffment to *B* and his heirs, and thereby doth grant to warrant the land, and doth not ſay to *B* and his heirs; yet this warranty ſhall be taken to extend to them. But if the feoffor doth grant to warrant the land to *B*, and doth not ſay to his heires, this ſhall not extend to his heirs. And if in this caſe the warranty be to *B* and his aſſignes, it ſhall not extend to his heirs, neither ſhall the aſſignees take advantage of it after the death of *B*. And if the warranty be to *B* and his heirs, and not to his aſſignes alſo; this ſhall not extend to his aſſignes. If one make a feoffment to *A*, *habendum* to him and his heirs, and binde himſelfe and his heirs to warrant the land *in forma prædicta*; in this caſe the warranty ſhall extend to the feoffee & his heirs.

Co. ſuper Litt. 47. 385. Dier 42. Kelw. 108. Co. 6. 69.

Co. 1. 1. If one grant to warrant land to another and his heirs, and doth not ſay againſt what perſons, this ſhall be taken for a generall warranty againſt all men.

If one make an eſtate and grant to warrant the land, but doth not ſay how long; this ſhall bee taken for as long as the eſtate to which the warranty is knit doth laſt.

Dier 328. If a warranty be made againſt any ſpeciall perſons, it ſhall extend to them and no further, and it ſhall extend in all caſes for and to all titles, and entries upon title; and it ſhall not in any ſuch caſes extend to tortious and unlawfull entries.

Co. ſuper Litt. 366. If a man bee ſeiſed of a rent-ſeck, iſſuing out of the Manor of Dale, and hee take a wife, and the husband doth releaſe to the terre-tenant, and warranteth *tenementa prædicta* and dieth; this warranty ſhall extend to the rent as well as to the land; and therefore if the wife ſue for her thirds of the rent, the terre-tenant may vouch the heire. And regularly the warranty doth extend to all things iſſuing out of the land, *viz.* to warrant it in the ſame manner and plight as it was in the hands of the feoffor, and hee ſhall vouch as of lands diſcharged. And therefore if grantee of a rent grant it to the tenant of the land on condition, and the tenant doth make a feoffment of the land with warranty; in this caſe the warranty ſhall not extend to the rent, albeit the feoffment be made of the land diſcharged of the rent. And if a woman have a rent-charge in fee, and ſhe doth intermary with the tenant of the land, and a ſtranger doth releaſe to the tenant of the land with warranty; this warranty ſhall not extend to barre any action to be brought after the death of the wife for the rent. But if in this caſe the te-

Co. ſuper Litt. 388, 389.

nant make a feoffment in fee with warranty and dieth, the feoffee in a *cui in vita* brought by the wife ſhall vouch as of lands diſcharged at the time of the warranty made. So if tenant in taile of a rent-charge purchaſe the land and make a feoffment with warranty and the iſſue bring a Formedon of the rent, the tenant ſhall not vouch,&c.

12. Who may take advantage of a warranty. And how. And againſt whom it may bee taken.

Aſſignes.

All thoſe that are parties to the warranty, *i.* ſuch as are named in the deed regularly, ſhall take advantage of the warranty; as if one doth warrant land to another, his heires and aſſignes; in this caſe both the heirs & the aſſigns may take advantage of it, and they both may vouch, or rebut, or have a *warrantia cartæ*, ſo as they come in in privity of eſtate, for otherwiſe the heire or aſſignes cannot vouch, or have a *Warrantia Cartæ*, and yet he may rebut notwithſtanding in divers caſes. But thoſe that are not named for the moſt part ſhall not take advantage of the warranty, and therefore if land be warranted to *I S*, and not to him and his heirs, or to him and his aſſigns, or to him, his heires and aſſigns; in theſe caſes neither the heire nor the aſſignee may vouch or have a *Warrantia Cartæ*; and yet in ſome caſes where it is ſo, the aſſignee or tenant of the land may rebut. Co. ſuper Litt. 365. 5.17.

The warranty annexed to an Exchange, a Partition, by *Dedi*, and by homage Aunceſtrell, doth alwayes goe in Privity, and therefore an aſſignee in theſe caſes can take no advantage of it. And yet in the caſes of Exchange, and *Dedi*, an aſſignee may rebut. But the aſſignee of a leſſee for life may take advantage of the warranty in Law annexed to his eſtate. Co. ſuper Litt. 384.

If one grant to warrant land to another, his heirs and aſſigns; in this caſe the heirs, or aſſignes, heire of the aſſignee, or aſſignee of the heirs of the feoffee, or aſſignees of aſſignees *in infinitum*, ſhall take advantage of the warranty. And therefore if one infeoffe *I S* to have and to hold to him, his heires and aſſignes, and warrant the land to him, his heires and aſſignes, and *A* doth infeoffe *B* and his heires, and *B* dieth; in this caſe the heire of *B* ſhall vouch as aſſignee to *A*. And if one infeoffe *A* and *B*, *Habendum* to them and their heires, and warrant the land to them, their heirs and aſſignes, and *A* die, and *B* doth ſurvive and die, and his heire infeoffe *C*; in this caſe *C* ſhall take advantage of this warranty as aſſignee. If one infeoffe *A* with warranty to him, his heirs and aſſignes, and *A* doth infeoffe *B*, and *B* doth reinfeoffe *A*; in this caſe neither *A* or his aſſignes ſhall ever take any advantage of this warranty. And yet if *B* infeoffe the heire of *A*, he may take advantage of the warranty. Co. 5.17. ſuper Litt. 384,385.

If one make a feoffment by deed with warranty to the feoffee, his heirs and aſſignes, and the feoffee doth make a feoffment over to another by word without deed; in this caſe the ſecond feoffee ſhall have

have all the advantage of this warranty, for an aſſignee by word ſhall have the ſame advantage that an aſſignee by deed ſhall have.

If a feoffment be made with warranty to a man and his heirs and aſſignes, and he make a gift in tail the remainder in fee, and the donee make a feoffement in fee; this feoffee ſhall not vouch as aſſignee, but he muſt vouch his donor upon the warranty in Law; and yet he may rebut.

If lands be given to two brethren in fee ſimple, with warranty to the eldeſt and his heirs, and the eldeſt die without iſſue; in this caſe albeit the other brother be his heire, yet he ſhall have no advantage at all by the warranty, becauſe he comes in above the warranty. But generally all that claime under the warranty ſhall take advantage thereof by way of rebutter, albeit they can take no other advantage by it.

If one make a feoffment to two their heirs and aſſigns, and one of them doth make a feoffment in fee, this feoffee in this caſe ſhall not take advantage as aſſignee.

Co. ſuper Litt. 385. An aſſignee of part of the land ſhall take advantage of a warranty, as if a man make a feoffment of two acres with warranty to him, his heirs and aſſigns, and the feoffee doth make a feoffment of one acre of it to another; in this caſe the ſecond feoffee ſhall take advantage of the warranty as aſſignee. And therefore herein there is a difference between the whole eſtate in part, and part of the eſtate in the whole or in any part, for if a man have a warranty to him, his heirs and aſſigns, and he make a leaſe for life, or gift in tail; in theſe caſes the leſſee or donee ſhall not take advantage of the warranty as aſſignes: but they may vouch the leſſor or donor upon the warranty in Law. But if a leaſe for life bee made the remainder in fee; ſuch a leſſee may vouch as aſſignee upon the firſt warranty. If the father have a feoffment made to him and his heirs with warranty, and he make a feoffment to his ſon and heire with warranty; in this caſe the ſon may take advantage of the firſt warranty after his fathers death. If a man infeoffe a woman with warranty, and they intermary and are impleaded, and upon the default of the husband the wife is received; in this caſe ſhe may vouch her husband. *Et ſic è converſo.* If a woman infeoffe a man with warranty, and they intermary and are impleaded; the husband in this caſe ſhall vouch himſelf and the wife.

Co. ſuper Litt. 384.

Co. ſuper Litt. 390.

26 H. 8. 3. 21 Aſſ. pl. 37. 29 Aſſ. 34. Co. 3. 62, 63. He that comes into the land meerly by act of Law in the poſt, as the Lord by Eſcheat, or the like, ſhall never take advantage of a warranty, and therefore if tenant in dower infeoffe a villain with warranty, and the Lord of the villaine enter; or a feoffment bee to a baſtard with warranty, and hee die without iſſue, and the Lord enter by Eſcheat; in theſe caſes the Lord ſhall never take advantage of theſe warranties. But otherwiſe it is where a

man comes to the land by limitation of uſe or a common recovery, which is by the act of the party, for if tenant in taile being in of another eſtate, *i.* by diſſeiſin, or feoffement of a diſſeiſor ſuffer a common recovery, and a collaterall Aunceſtor of the tenant in taile doth realeaſe with warranty to the recoveror, and after the recoveror doth make a feoffment to uſes which are executed by the Statute of 27 *H.* 8. and after the collaterall Aunceſtor dieth; in this caſe the terre-tenants may take advantage of the warranty by way of rebutter, albeit the eſtate be transferred in the poſt. So if hee to whom the warranty is made, ſuffer a common recovery, and after the Aunceſtor dieth; the recoveror may take advantage of this warranty by way of rebutter, for any man that hath the poſſeſſion of land, albeit he have no deed to ſhew how he came by the poſſeſſion of it, or how he is aſſignee, may rebut the demandant, and ſo barre him and defend his owne poſſeſſion; And therefore the tenant by the curteſie, donee in taile that is in of another eſtate, an aſſignee by force of a warranty made to a man and his heirs, feoffee of a donee in taile may rebut and bar the demandant by the warranty.

If one infeoffe another of an acre of ground with warranty, and hath iſſue two ſons, and dieth ſeiſed of another acre of land of the nature of Burrough Engliſh; in this caſe albeit the warranty deſcend upon the eldeſt ſonne onely, yet both the ſonnes may be vouched. And ſo alſo it is of heires in Gavelkind; the eldeſt ſhall be vouched as heire to the warranty, and the reſt in reſpect of the inheritance. And in like ſort the heire at the Common law, and the heire of the part of the mother ſhall bee vouched, or the heire at the Common law may bee vouched alone at the election of the tenant. And in like ſort the heire at the Common law ſhall be vouched with the heire in Burrough Engliſh. And ſo alſo a baſtard ſhall be vouched with a *mulier*. And if a man die ſeiſed of certain lands in fee, having iſſue a ſonne and a daughter by one venter, and a ſonne by another, and the eldeſt ſonne entreth and dieth, and the land doth deſcend to the ſiſter; in this caſe the warranty doth deſcend on the ſon, and he may be vouched as heir, and the ſiſter alſo may be vouched as heir to the land. Co. ſuper Litt. 376. 1 Ed.3.13. 5 H.7.2.

If two make a feoffment with warranty, and the one die; the ſurvivor ſhall not be charged alone with the warranty, but the heir of him that is dead ſhall be charged alſo. And if two be bound to warrant land, and both of them die; the heires of both of them ought to be vouched, and ſhall be equally charged. And if the heir be vouched in the ward of three ſeverall perſons, the one of them onely ſhall not be charged, but they ſhall be charged equally. Co.3.14. ſuper Lit.386. 16 H.7.13. 48 Ed.3.5.

If a woman an heir of the diſſeiſor, infeoff me with warranty, & after ſhe is maried to the diſſeiſee; in this caſe I may take advantage of Co. ſuper Litt.365.

this

this warranty againſt the diſſeiſee, and rebut him upon it if he ſue me for the land. So if the husband and wife ſue me for the land of his wife, and I have a warranty of a collaterall Aunceſtor of the husbands deſcended to him; in this caſe I may make uſe of this to barre the husband and wife.

Co. ſuper Lit. 392. 393.

A warranty lineall or collaterall may be defeated, determined or avoided in all or in part. And this is ſometimes by matter in law, and ſometimes by matter in deed.

13. When a warranty ſhall be ſaid to be defeated, determined or avoided. And how. Or not.

Co. 10. 96. 1, 2, 3. 62 Lit. Sect. 741. Co. ſuper Lit. 392.

If the eſtate to which the warranty is annexed be gone the warranty annexed thereunto is gone alſo. And therefore if an eſtate tail to which a waranty is annexed be ſpent, the warranty is determined. And if a man make a gift in taile with warranty, and after the donee doth make a feoffment and die without iſſue; the warranty is gone. So if tenant in taile diſcontinue the taile and the diſcontinuee be diſſeiſed, or make a feoffment on condition, and a collateral aunceſtor of the iſſue releaſe to the diſſeiſor or feoffee on condition, with warranty, and after the diſcontinuee doth enter upon the diſſeiſor, or on the feoffee for the condition broken; in theſe caſes the warranty made by the collaterall aunceſtor is gone. So if a Seigniory be granted with warranty, and the tenancy eſcheat ſo that the Seigniory is extinct; hereby alſo the warranty is defeated. So if a collaterall Aunceſtor heretofore had releaſed with warranty, and then had entred into Religion; this warranty had bound, but if after he had been dearaigned the warranty had been defeated.

Co. ſuper Lit. 384. Bro. Garranty 27.

If the father make a feoffment to his ſonne and heire apparant with warranty and die, ſo that the warranty doth deſcend upon the ſonne; hereby the warranty is gone. And yet if a feoffment be made to a man and his heires, and he dieth leaving iſſue daughters; in this caſe the warranty ſhall be divided and is not determined.

Lit. Sect. 743. Co. ſuper Lit. 390. Lit. Sect. 744.

If tenant in taile doth make a feoffment to his Uncle, and after the Uncle doth make a feoffment in fee with warranty &c. to another, and after the feoffee of the Uncle doth reinfeoffe againe the Uncle, and after the Uncle doth infeoffe a ſtranger in fee without warranty and dieth without iſſue, and the tenant in taile dieth; hereby the warranty made to the firſt feoffee is defeated. So if the Uncle make the warranty to the feoffee, his heires and aſſignes, and take backe an eſtate in fee and after doth infeoffe another. But if one make a feoffment with warranty to the feoffee, his heires and aſſignes, and the feoffee doth reinfeoffe the feoffor and his wife, or the feoffor and a ſtranger; in theſe caſes the warranty is not defeated but doth continue ſtill. So if two doe make a feoffment with warranty to one, his heires and aſſignes, and the feoffee doth reinfeoffe one of the feoffors; in this caſe the warranty is not gone. And if in the firſt caſe the feoffee make an eſtate to his Uncle in tail or for life

life ſaving the reverſion, or a leaſe for life the remainder over &c. in this caſe the warranty is only ſuſpended.

If one make a feoffment or releaſe with warranty, and after is attainted of treaſon or felony; hereby the warranty is gone; and albeit he doe afterwards obtaine his Pardon yet the warranty is not revived. Co. ſuper Lit. 391.

If a feoffment with warranty be made to two or more, and they being Jointenants doe after by deed make Partition; by this the warranty is determined. So if two Jointenants be, and one of them diſſeiſe the other, and he that is diſſeiſed doth recover in an aſſiſe and hath Judgement to hold in ſeverally; hereby the warranty is determined, * So if *A* and *B* be Jointenants of white acre for life, and *A* by fine doth grant to *B totum & quicquid habet in tenemeutis*; hereby the warranty is gone. But if a Partition be made by Judgement upon a writ by force of the Statute of 13 *H.* 8. this doth not defeat the warranty fallen to them, but it ſhall be divided between them, and they ſhall all of them take advantage of it. Co. 6. 12. * Adjudge Hil. 22 Jac. B.R. Euſtace & Sholes caſe.

If one enfeoffe three with warranty to them and their heires, and one of them releaſe to one of the other two; hereby the warranty is gone for that part. But if one of them releaſe to the other two; in this caſe the warranty is not gone but doth continue, and they may vouch upon it. Co. ſuper Lit. 385.

If one enfeoffe two men and their heires, and one of them doth make a feoffment in fee; hereby the warranty is not determined, but the other may take advantage of it notwithſtanding. Co. ſuper Lit. 385.

Releaſe. If the party that hath the warranty or the eſtate to which the warranty is annexed releaſe to him that is bound to warrant all warranties, or all covenants reall, or all demands; by either of theſe releaſes the warranty is gone. So alſo if by a defeaſance made between the parties it be agreed the warranty ſhall be void, by this defeaſance the warranty may be avoided alſo. Or if it be ſo agreed that the warrantee or his heires &c. ſhall not vouch, or have a *Warrantia cartæ*; by this the warranty is avoided in part. Co. ſuper Lit. 393. 392. Lit. Sect. 748.

Defeaſance.

If tenant in taile doth enfeoffe his Uncle which doth enfeoffe another in fee with warranty, if in this caſe the feoffee releaſe the warranty to his Uncle; hereby the warranty is extinct. But if a gift in taile be made with warranty, in this caſe a releaſe made by the tenant in taile of this warranty will not extinguiſh it. Co. ſuper Lit. 391.

If the parties between whom the warranty is intermary, hereby the warranty is ſuſpended during the coverture in ſome caſes. Co. ſuper. Lit. 390.

If tenant in taile doth make a feoffment in fee with warranty, and diſſeiſeth the diſcontinuee, and dieth ſeiſed, this doth ſuſpend the warranty. Co. ſuper Lit. 330.

If two make a feoffment in fee and warrant the land to the feoffee Co. ſuper Lit. 393.

feoffee and his heires, and the feoffee doth releaſe the warranty to one of the feoffors; this doth not determine the warranty of the other as to the moity. So if one doth infeoffe two with warranty, and the one of them doth releaſe the warranty; this doth not extinguiſh the warranty for the other moity, but it doth continue ſtill.

A warranty alſo may loſe his force by taking benefit or making uſe thereof; for after a man hath once taken advantage thereof in ſome caſes he can make no further uſe of it: of which read *Co. ſuper Lit.* 393.

And now having done with Deeds in generall and ſome of the parts thereof in ſpeciall, we are in order to come to ſome ſpeciall kinds of deeds, wherein we will firſt begin with a deed of *Feoffment.*

CHAP. IX.

Of a Feoffment.

New termes of the law. Co. ſuper Lit. 9. Lit. Sect. 57.

Feoffamentum. i. *Donatio feodi*, ſtrictly and properly is the gift or grant of any honors, caſtles, manors, meſſuages, lands, houſes, or other corporall immovable things of like nature which be hereditable to another in fee ſimple. *i.* to him and his heirs for ever by the delivery of ſeiſin and poſſeſſion of the things given. And from hence comes the word *Infeoffe*, for by this word and the words Give, and Grant, (as the moſt apt words for that purpoſe) is this kind of conveyance moſt commonly made, Hence alſo it is, that he that makes this feoffment is called the feoffor, and he to whom it is made the feoffee. Alſo it is ſometimes but improperly called a feoffment when an eſtate of freehold only doth paſſe.

1. Feoffment. *Quid.*

Infeoffe.

Feoffor: Feoffee.

See Weſt Sym. 1. part. Sect. 235. Co. ſuper Lit. 6.

This kind of conveyance albeit it may be made in moſt caſes by word without any writing, yet it is moſt commonly done by writing, and this writing is then called a Deed or Charter of feoffment, but hence is the diviſion of a feoffment by word, or a feoffment by writing. The ancient formes and examples of theſe deeds are very briefe; and and yet they had theſe parts contained in them. 1. The Premiſſes. 2. The *Habendum.* 3. The *Tenendum.* 4. The *Reddendum.* 5. The Clauſe of warranty. 6 The *In cujus rei teſtimonium.* 7. The Date. 8. The clauſe of *Hiis teſtibus. Hæc fuit candida illius ætatis fides & ſimplicitas quæ pauculis lineis omnia fidei firmamenta poſuerunt.*

2. *Quotuplex.*

* Co. ſuper Lit. 49. 9. Co. 1. 111, 112. Plow. 554. 9 H. 7. 24. 39 H. 6. 43. Co ſuper Lit. 237. Perk. Sect. 210. 24 E. 3. 70. Co. 1. 121. Co. 6. 70. Bro. ſcire facias. 88. Plow. 423, 424.

* And this manner of conveyance, as it is the moſt ancient kind of conveyance, ſo is it the beſt and moſt excellent of all others, and in ſome reſpects doth excell the conveyance by fine or recovery: for it is of that nature and efficacy by reaſon alſo of the livery of Seiſin

3. The nature and operation of it.

Seiſin evermore inſeparably incident to it, that it cleereth all diſſeiſins, abatements, intruſions, and other wrongfull and defeaſible titles, and reduceth the eſtate cleerly to the feoffee when the entry of the feoffor is lawfull, which neither fine, recovery, nor bargaine and ſale by deed indented and inrolled will doe when the feoffor is out of poſſeſſion. And it paſſeth the preſent eſtate of the feoffor, and not only ſo but barreth and excludeth him of all preſent and future right and poſſibility of right to the thing which is ſo conveyed, inſomuch that if one have divers eſtates all of them paſſe by his feoffment, and if he have any intereſt, rent, common, or the like into or out of the land, it is extinguiſhed and gone by the feoffment. And further it barreth the feoffor of all collaterall benefits touching the land, as condition, power of revocation, writs of error, attaint and the like, inſomuch that if a man make an eſtate of his land upon condition, or with power to revoke it, and after he make a feoffment of the land; by this he is barred for ever of taking advantage of the condition or power of revocation. It deſtroyeth contingent uſes, gives away a future uſe incluſively, gives away a Seigniory incluſively, and gives away a right of action: for both the feoffment and livery of ſeiſin incident thereunto are much favoured in law, and ſhall be conſtrued moſt ſtrongly againſt the feoffor and in advantage of the feoffee. And beſides all this becauſe it is ſo ſolemnly and publiquely made it is of all other conveyances moſt obſerved and therefore beſt remembred and proved.

4. Who may make or take a feoffment. And what ſhall be ſaid a good feoffment. Or not. And what things are requiſite thereunto.

If the feoffment be made by deed then muſt the deed be ſo made, written, read, ſealed, and delivered as all other deeds that are well made muſt be. For which ſee *Deed ſupra cap.* 4. *Numb.* 5.

1. In reſpect of the perſons thereunto and the quality of their eſtate.

Men *de non ſane memorie.*

Feme covert.

Infant.

Attaint perſons.

And in every good feoffement that is made there muſt be a feoffor. *i.* a perſon able to grant the thing paſſed by the feoffment; a feoffee. *i.* a perſon capable of it and able to take it, and a thing grantable, and it muſt be granted in that manner as law requireth. And for this therefore obſerve that whoſoever is diſabled by the common law to take is diſabled alſo to make a feoffment, gift, grant, or leaſe, and many alſo that have capacity to take by ſuch conveyances have no ability to grant by them, as men attainted of treaſon, felony, or in a Premunire, aliens borne, the Kings villaines, Ideots, mad men, a man deafe, blind and dumbe from his nativity, a feme covert, an infant, and a man by dureſſe, for the feoffments, gifts, &c. of ſuch perſons may be avoided. But ſuch perſons as have committed treaſon or felony if attainder doe not follow, ſuch as are attaint of hereſie, a leper removed by the Kings writ from the ſociety of men, baſtards, ſuch as are deafe, dumbe or blind, that have underſtanding and ſound memory, albeit they cannot expreſſe their intentions otherwiſe then by ſignes, thoſe that are drunken, the villaines of a common perſon before entry &c. alſo excommuni-

See Grant Numb. 4. Co. ſuper. Lit. 2. 42, 43. Perk. Sect. 182, 183, 185 Bro. Feoffments 2. 7. 8, 9. 17. 39 H. 6. 43. 21 H. 7. 7.

cate

cate perſons, and outlawed perſons, albeit the King take the profits of their lands, all theſe may make feoffments, gifts, &c. and all theſe have capacity to take by ſuch conveyances. Outlawed perſons.

Perk. ſect. 185, 186. A woman that hath a husband alone and by her ſelfe without her husband cannot make a feoffment of her owne land, and if ſhe doe ſo it is void albeit her husband agree to it. Feme covert.

Fitz. faits & feoffments 29. Perk. Sect. 205. 224, 225. Neither the head alone, nor any one or more of the members of a Corporation aggregate of many alone may make a feoffment of any of the land belonging to their corporation. But all of them together may make a feoffment: and if any of them be ſeiſed of land in his owne right and in his naturall capacity, he may make a feoffment of this land as another man may doe; yea he may make a feoffment of this land to the ſame corporation whereof he is a head or member, and ſo give and take alſo in a divers capacity. Corporation.

Co. ſuper Lit. 43. Eccleſiaſticall perſons cannot make feoffments, gifts, &c. of their eccleſiaſticall lands for longer time then three lives, or twenty one years, for all feoffments, gifts, grants and leaſes by Biſhops albeit they be confirmed by Deane and Chapter, or by any of the Colledges or halls in either of the Univerſities or elſewhere, or by Deane or chapters, maſters or gardians of any hoſpitalls, Parſons, vicars, or any other having ſpirituall or eccleſiaſticall living, are avoidable. Eccleſiaſticall perſons.

Perk. Sect. 194. A man cannot make a feoffment to his owne wife after the mariage is conſummate. But after a contract made, and carnall knowledge had he may make a feoffment to her, and ſuch a feoffment will be good. Husband and wife.

Perk. Sect. 197. Fitz. faits & feoffments 26. One Jointenant cannot make a feoffment of his part of the land to his companion, for a man cannot give a poſſeſſion to him that hath it before. And hence it is alſo that the leſſor cannot make a feoffment to his leſſee for life, years, or at will. And yet perhaps a feoffment in this caſe if it be in writing may worke as a confirmation. But one tenant in common, or one coparcenor may make a feoffment of his part of the land to his companion. Jointenants. Tenants in common.

Bro. feoffment 4. Perk. Sect. 222. If a man make a feoffment of anothers land, it is a diſſeiſin, but a good feoffment againſt all men but the diſſeiſee himſelfe. And if foure joine in a feoffment of land, and three of them have nothing in the land, and the fourth hath all the eſtate; this is a good feoffment. Diſſeiſor and Diſſeiſee.

Perk. Sect. 197. Co. ſuper Lit. 48, 49. A diſſeiſor cannot make a feoffment of the land to the diſſeiſee, but it will be void, for the diſſeiſee will be remitted. But a diſſeiſee may make a deed of feoffment and a letter of atturney to enter and give livery; and if the atturny doe ſo, this will be a good feoffment.

Fitz. faits & feoffments 21. No feoffment, or livery of ſeiſin can be made to the King, for he doth alwaies give and take by matter of record.

A feoffement may be made at this day of any thing which doth lie Prerogative.

2. In reſpect of the matter whereof it is made.

lie in livery, by whatſoever tenure it be held, notwithſtanding the Statute of *Magna Carta cap.* 32. But in ſome caſes where a man doth alien his land held of the King, he muſt have the Kings licence before hand to doe it, or elſe he muſt pay a fine to the King afterwards for not having a licence. But of ſuch things whereof no livery of ſeiſin can be made no feoffment can be made. Co. ſuper Lit. 49. 21 H. 7. 7. See infra at Numb. 9. Grant 5.

One may make a feoffment of a moity, third, fourth, or fifth part of his Manor or other land, and that by the name of a moity, third, or fourth part. Co. ſuper Lit. 190.

A feoffment may be made of an upper chamber over another mans houſe beneath. Co. ſuper Lit. 48.

If there be a meadow of one hundred acres which time out of minde hath been divided amongſt divers perſons, and each perſon hath a certaine number of acres, but in no certaine place, the cuſtome being to allot each perſon his number one yeare in one place and another in another *alternis vicibus*; in this caſe either of theſe perſons may make a feoffment of his part by the name of ſo many acres lying in ſuch a meadow without any bounding or deſcribing of it. Co. ſuper Lit. 4. 48.

If parceners have made partition of their land, that the one ſhall have it from Eaſter to Lammas to her and her heires, and the other ſhall have it from Lammas to Eaſter to her and her heires, or that the one ſhall have it one yeare and the other the other yeare *alternis vicibus*: Or if they have two Manors deſcended, and they agree that the one ſhall have the one Manor one yeare, and the other the other Manor the ſame year, and the next year that he that had the one ſhall have the other *alternis vicibus* for ever; in theſe caſes the parceners may either of them make a feoffment of this land or Manor. Co. ſuper Lit. 4. 48.

3. In reſpect of the preſence or poſſeſſion of other perſons on the land at the time of the feoffment made.

If there be any leaſe for life or years in being of that land or thing whereof the feoffment is made, and he that hath this leaſe for life or years, or in his abſence his bailife or ſervant keeping in the houſe or land whereof the feoffment is to be made doth give leave and agree that livery of ſeiſin ſhall be given upon the houſe or land by the leſſor himſelfe or by his atturny, and for this cauſe doth leave the poſſeſſion of the houſe or land, and thereupon livery of ſeiſin is made; this is a good feoffment and a good livery of ſeiſin and yet it doth not prejudice the eſtate of the leſſee. And if the leſſor make a feoffment of the land to a ſtranger by aſſent or licence of the leſſee the leſſee then being on the lād; this is a good feoffment. In like manner as it is, where the leſſor doth enfeoffe a ſtranger to which the termor doth agree ſaving his terme. And if the leſſor make ſuch an entry upon the leſſee for life or years as to put him out of poſſeſſion of the houſe or land, and then he doth make a feoffment and livery of ſeiſin of it, or if the leſſor in the abſence of the leſſee his wife, ſervants and children enter upon the thing in leaſe and make Co 2. 32. Dier 340. 18 Perk. Sect. 221. 21 H. 7. 7. Perk. Sect. 220. 46 E. 3. 25. Bro. Feoffments de terre 68. Co. ſuper Lit. 48. 49. 52.

a feoffment and livery of ſeiſin thereof; in theſe caſes there is a good feoffment to paſſe the reverſion, for in theſe caſes when the leſſee for life or years doth reenter, the law doth adjudge this to be an atturnement in law. But if a leſſor will enter upon his leſſee, and againſt his will (the leſſee being ſtill in poſſeſſion of the land) make a feoffment of the land and give livery; this is void and can never take effect as a feoffment. And therefore if there be a conveyance made of a houſe and land thereunto belonging in leaſe, and the feoffor come into part of the land without the leave of the leſſee, and there make livery of ſeiſin of that part in the name of all the reſt of the land, (the leſſee himſelfe, his wife, child, or ſervant being then upon any other part of the land, and eſpecially if they be in the houſe) this is no good feoffment for any part of the land but void for the whole. * And yet if the leſſee for years make an under-leaſe of part of the land to another, and the feoffor doth make a feoffment of this part, and give livery of ſeiſin upon this part, in this caſe the poſſeſſion of the firſt leſſee in the reſidue will not hurt the feoffment or livery for this part, but it is a good feoffment. Alſo if the leſſee give the leſſor leave to make livery and depart and leave a ſervant of the leſſee upon the land; in this caſe it ſeemes his preſence upon the land whiles the livery is made will not hurt. And ſo if the leſſee leave the poſſeſſion and leave nothing upon the land but his cattell; they will not keep his poſſeſſion nor prejudice the livery of ſeiſin.

Atturnement.

* Veynors caſe Trin. 7 Jac.B.R.

Co.ſuper Lit.48.

21 H.7.7. Dier 18. If a leaſe be made of one acre to one, and another acre to another, and the leſſor make a feoffment of both theſe acres, and make livery in one of them in the name of both acres; this is no good feoffment for the other acre, for by this livery he is not put out of poſſeſſion of that acre. So if one make a feoffment of two Manors the one in poſſeſſion and the other in leaſe, and give livery of ſeiſin of the Manor in poſſeſſion in the name of both the Manors; this is no good feoffment for the other Manor, neither will it paſſe by this feoffment. So if one make a leaſe for years of a houſe, and after make a feoffment in fee of the houſe and of a cloſe adjoining, and give livery of ſeiſin of the houſe the termors wife and children being then in the houſe; in this caſe this is no good livery neither to paſſe the houſe nor the cloſe.

Perk.Sect. 222. Dier 362. If leſſee for life, or years make a feoffment of the land, the leſſor being then upon the land and not contradicting it; it ſeemes this is a good feoffment, and that the preſence of the leſſor upon the land eſpecially if he doe not contradict it will not hinder the virtue of the feoffment as againſt the feoffor and all others: but the leſſor may enter afterwards for the forfeiture notwithſtanding if hee pleaſe.

Forfeiture.

Perk.Sect. 223. If the husband alone make a feoffment of the land, he hath in the right

Husband and wife.

right of his wife, or that he hath jointly with his wife, his wife being then upon the land and diſagreeing to it; in this caſe the feoffment is good againſt the feoffor and all others but the wife notwithſtanding her preſence and diſagreement, but the wife may after his death avoid it.

Iointenant. If one jointenant make a feoffement of the whole land, his companion being then upon the land; by this there doth paſſe no more but a moity, and the feoffement is void as to the moity of his companion, for the feoffment doth not give his moity. Perk. Sect. 220.

If a man enter into my land by wrong, and make a feoffement of it to a ſtranger, I being then upon the land; this feoffement is void, for in this caſe the Law doth adjudge me to be alwayes in, and never out of the poſſeſſion. Perk. Sect. 219.

Prerogative. If the King have any poſſeſſion of the land by wardſhip or otherwiſe, the owner of the land can make no feoffement of it. And therefore if the King be entituled to land by wardſhip, or primer ſeiſin after office found after the death of an Auncеſtor of one of his tenants; in this caſe it is ſaid the feoffement of the heire is void and paſſeth nothing, for the King is ſtill in poſſeſſion. And if it be before office found it will be all one, for the office ſhall relate to the death of the Auncеſtor. And yet in theſe caſes the feoffment is good againſt the heire himſelf, and all others beſides the King. If the heir before office found, enter and make a feoffment, and then the King doth pardon the feoffee; in this caſe the feoffement is good. And yet ſuch a feoffement after office with a pardon is void. And the like law is if the entry bee before office, and the pardon after the office; for this is void alſo. But Perk. Sect. 219. Bro. Feoffment. 3. 17. 21 H. 7. 7. 2 H. 6. 5. 1 H. 7. 5. Stamf. prer. Regis 40.

Outlawed perſons. if a man bee outlawed for debt or treſpaſſe, and thereupon the King hath the profits of the lands; in this caſe the owner may make a feoffment of this land notwithſtanding.

4. In reſpect of the manner of making of it. Divers perſons cannot make a feoffement but it muſt be by deed, as corporations, and ſuch like: Alſo divers things cannot be granted by a feoffement, but the feoffement muſt be made by deed, for Fitz Faits & Feoffements 32. See Grant Numb. 4.

Reverſion. a feoffement cannot be made of a reverſion of land but it muſt be by deed. But a leaſe may be made of land to one for life, the remainder to another in fee, and this may be done without any writing by word only. Alſo a feoffment may be made of the moity, third, or 4th part of a manor, or of a peece of land without deed. And yet if one be ſeiſed of a manor, whereunto an Advowſon is appendant, and he make a feoffment of three acres parcell of the manor, together with the Advowſon to two men, *Habendum* the one moity with the Advowſon to one of them, and the other moity to the other; in this caſe the feoffment cannot be well made unleſſe it by deed. Litt. Sect. 60. ſuper Litt. 190.

If a leaſe be made for five years, on condition that if the leſſee pay to the leſſor within the two firſt years ten pound, then that he ſhall Litt. Sect. 250.

have

have the land to him and his heires, or otherwiſe but for five years; in this caſe if livery of ſeiſin be made to the leſſee before his entry this is a good feoffment. *Et ſic de ſimilibus.*

Lit.Sect. 59.66. Co.ſuper Lit.52. Doct.& Stud.13.

Every feoffment alſo whether it be made by deed or without deed muſt be made with livery of ſeiſin, and this livery of ſeiſin muſt be made according to the rules of livery and ſeiſin herein after laid downe, for this is of the eſſence of a feoffment, and a feoffment is not accounted perfect untill livery of ſeiſin be made, for untill then the feoffee hath only an eſtate at will in the land, and the feoffor may put him out when he will. And if either of the parties die before the livery of ſeiſin be made the feoffment is void, and no warrant of atturny to make livery can be executed after the death of the feoffor or feoffee, neither is there any remedy in this caſe to get the aſſurance to be made perfect but in a Court of Equity. But in caſe where there are many feoffees there the death of one or ſome of them will not hinder the livery but it may be made to him or them that doe ſurvive, we muſt ſee therefore in the next place what this livery of ſeiſin is.

Livery of ſeiſin.

Equity.

New terms of the law.

Weſt 2. part Symb. Sect. 251. Co.ſuper Lit.48.

Livery of ſeiſin, or giving of poſſeſſion is a ſolemnity or overt ceremony required by law and uſed for the paſſing of lands or tenements corporall as an evidence or teſtimoniall of the willing departing by him that makes the livery from the thing whereof livery is made and the willing acceptance thereof by the other party. And this is as ancient as a feoffment, for no feoffment is made without livery of ſeiſin, albeit livery of ſeiſin be ſometimes made upon other conveyances. And it was firſt invented as an open and notorious act to this end, and that by this meanes the country might take notice how lands doe paſſe from man to man and who is owner thereof, that ſuch as have title thereunto may know againſt whom to bring their actions, and that others may know that have cauſe of whom to take leaſes, and of whom to require wardſhips &c. And by this means if the title come in queſtion the Jury can the better tell in whom the right is. And of this livery of ſeiſin there are two kinds. 1. A livery in deed. 2. A livery in law called a livery within view. The livery in deed is when the feoffor, donor &c. by himſelfe or another taketh the ring of the doore of the houſe, or a turfe, or twig of the land, and delivereth the ſame upon the land unto the feoffee, donee, &c. in the name of ſeiſin of the houſe, or ſeiſin of the land. And this is done ſometimes by the parties themſelves if they be preſent, & ſometimes in their abſence by their atturnyes or procurators. The livery in law is where the feoffor ſaith to the feoffee being in view of the land, I give you yonder houſe to you and your heires, goe enter into the ſame and take poſſeſſion thereof accordingly, or the like.

5. Livery of ſeiſin. *Quid.*

Co.ſuper Lit.48.

6. *Quotuplex.*

Bro.eſtates 4.Plow.28. 29.

Becauſe this manner of conveyance by feoffment is ſo ancient there it.

7. The nature and operation of

therefore this ceremony (being inſeparably incident to a feoffment) is much favoured in law: And therefore it is expounded and taken ſtrongly againſt him that doth make it and beneficially for him to whom it is made. And for this cauſe it worketh not only to tranſmit the preſent eſtate but alſo to barre all preſent and future rights and poſſibilities. If therefore one make a leaſe for life to *I S* the remainder to the right heires of *I D* (which *I D* is then living) and give livery of ſeiſin according to the deed; in this caſe albeit he in remainder be not capable of this remainder, yet by the livery it ſhall paſſe out of the feoffor, and ſhall be in Abeyance during the life of *I S*. So if a feoffment be made to one *& heredibus*, without the word [*Suis*,] and livery of ſeiſin be made of the deed; this livery perhaps may make the eſtate good.

2. Where and in what caſes it is requiſite. Or not.

Livery of ſeiſin is needfull and muſt be had and made in all caſes where any eſtate of fee ſimple, fee taile, or for a mans owne or another mans life is made or granted by writing, or word in the country of any lands or tenements corporall. And ſo alſo where one doth make a leaſe of land to another for years the remainder to a ſtranger in fee ſimple, fee tail, or for life; in theſe caſes livery of ſeiſin muſt be had and made to the leſſee for years or elſe nothing will paſſe to him in remainder; and yet the leaſe for years will be good. And ſo alſo where a leaſe for yeares is made upon condition that if ſuch a thing happen the leſſee ſhall have the fee ſimple; in this caſe the leſſee muſt have livery of ſeiſin before his entry, otherwiſe the eſtate will not increaſe. And ſo alſo if the King make a feoffment of the land he hath in the right of the Duchy of Lancaſter that is not within the county Palatine; in this caſe livery of ſeiſin muſt be made as in the caſe of a Subject. And in all theſe caſes where livery of ſeiſin is requiſite and it is not made, there doth paſſe no eſtate by the conveyance but an eſtate at will at the moſt.

Co. 5. 92. Lit. Sect. 70. Co. 6. 26. Doct. & Stud. 13. Co. ſuper Lit. 49.

Co. ſuper Lit. 216.

Plow. 214. 2. 9.

But livery of ſeiſin is not needfull or requiſite to bee had and made in caſes where any eſtate of fee ſimple, fee taile, or for life is made or granted of any lands by matter of record, as by the Kings Letters Patents, Fine, Recovery, Deed indented and inrolled, and the like; nor is it needfull where any ſuch eſtate is created by way of covenant and raiſing of uſe, by way of Exchange, Indowment *ad oſtium Eccleſiæ*, or *ex Aſſenſu patris*; nor is it needfull where any ſuch eſtate is paſſed or granted by way of Surrender, deviſe, releaſe, or confirmation, or by way of increaſe or executory grant, as when the fee ſimple is granted to the leſſee for life or yeares in poſſeſſion; neither is it requiſite or can be made where any incorporeall hereditaments, as reverſions, rents, commons, or the like are granted in fee ſimple, fee taile, or for life: for in ſome of theſe caſes there is an atturnement to be made that doth ſupply.

Co. 2. 23. Lit. Sect. 59. Co. ſuper Lit. 49.

ſupply a livery. Neither is it requiſite in ſome caſes where an eſtate of freehold is made of a corporall thing, as if a houſe or land belong to an office, and the office be granted by deed; in this caſe the houſe or land doth paſſe as incident thereunto. So if a houſe or chamber belong to a corody; in this caſe by the grant of the corody the houſe or chamber paſſeth without any livery of ſeiſin. Neither is it requiſite upon a leaſe for yeares, for if a man make a leaſe for one thouſand yeares; this leaſe is perfect by the delivery of the deed without any livery of ſeiſin. Neither is it needfull where one doth grant to me and my heires all the trees growing on his ground; for theſe will paſſe without any livery of ſeiſin at all.

Co. 8. 137 11. 49.

Perk. Sect. 184. Co. ſuper Lit. 48, 49. 52.

Livery of ſeiſin may and muſt be made either by the party himſelfe that maketh the eſtate, or if it be a livery in deed, it may in his abſence be made by his atturney ſufficiently authorized by writing. And he that may make an eſtate, to the perfection whereof livery is requiſite, may himſelfe and in his owne right make livery thereupon: and in the right of another, and as atturney to another ſo divers that cannot make any eſtate may notwithſtanding make livery of ſeiſin. And therefore the husband albeit he may not make a feoffment in fee, or leaſe for life, &c. of land to his wife, yet he may as an atturney make livery of ſeiſin to her upon a conveyance made by another. And ſo alſo may the wife upon a conveyance made to the husband or her. And ſo alſo Monks, Infants, Aliens, and ſuch like perſons diſabled to make feoffments &c. may notwithſtanding make livery of ſeiſin as atturneys upon conveyances made to others. And ſo likewiſe may he in remainder in fee make livery to the leſſee for years. *Et ſic de ſimilibus.* And this livery of ſeiſin may and muſt be made to the party himſelfe that taketh the eſtate, or in his abſence to his atturney or procurator ſufficiently authorized: and in this caſe any one may be an atturney to take that may be an atturney to give livery. If a feoffment be made to divers by deed and livery of ſeiſin is made to one or ſome of them; this is a good livery to execute the eſtate to them all. But if a feoffment be made to divers without deed, and livery of ſeiſin is made to one or ſome of them in the name of all the reſt; in this caſe the feoffment is good to execute the eſtate in him or them to whom the livery is made and void as to the reſt. If a leaſe for years be made to *A* and *B* without deed, the remainder to *D* in fee, and livery of ſeiſin is made to *A* or *B*; in this caſe this is a good livery to make the remainder to paſſe to *D*. But if a leaſe be made for years to *A*, the remainder to the right heires of *I S* in fee *I S* being then living, and livery of ſeiſin is given to *A*, this remainder is void, for *nemo eſt heres vivẽtis*. One Jointenant cãnot make livery of ſeiſin to his companion as a tenant in common may. And a leſſor cannot

9. How it may & muſt be made. And what ſhall be ſaid a good livery of ſeiſin. Or not.

1. In reſpect of the perſons that make it, & to whom it is made, and the quality of their eſtate. Woman covert Infant.

Co. ſuper Lit. 48, 49.

Dier 35. Co. ſuper Lit. 49. 359. Co. 5. 95.

Co. ſuper Lit. 217.

Perk. 40. 10 E. 4. 3.

make livery of seisin to his lessee for life or years. See before *Num.* 4.

2. In respect of the time when it is made.

In all cases where this ceremony is requisite, whether it be done by the parties themselves in person or their deputies it must be done and made, 1. in the life time of the feoffor, donor, or lessor, and in the life time of the feoffee, donee, or lessee; for if either of them die it cannot be done afterwards, neither can a warrant of atturney be be made to deliver seisin after the death of the feoffor &c. But if there be more feoffees, donees, or lessees, then one; in such cases albeit all of them die but one the livery of seisin may be made to that one that doth survive, and it will be good to him to execute the estate in all the land. And so it is if there be a warrant of atturney made by a Corporation aggregate, as a Mayor and Communalty, Deane and Chapter, or the like, to give livery of seisin, in this case the death of the Mayor, &c. will not determine the authority, and therefore in that case the livery of seisin may be made after his death. Co. super Lit. 52.

2. If it be a lease for years with a remainder over in fee, the livery must be made to the lessee for yeares before his entry or at the time when he doth enter for that purpose, for afterwards it cannot be made. *Quod semel meum est amplius meum esse non potest. Quere* also whether the law be not so in all other cases, and let men take heed they doe not (as commonly they doe) enter into the land before they have livery of seisin made thereof unto them. And yet it seemes the livery of seisin is good when it is made afterwards, by *Co.* 2. 55. Co super Lit. 49. 216. Perk. Sect. 205.

A caveat.

3. It must not be made before the estate begin, for if a lease be made for years to begin at Michaelmas with a remainder over, and the livery of seisin is made before Michaelmas; this livery of seisin is void, for if a livery worke at all it must worke presently, and so it cannot in this case because it is before the estate doth begin. Co. super. Lit. 217.

3. In respect of the place or thing wherein it is made.

If an estate be made of divers peeces of land in divers villages in the same county; in this case the making of livery of seisin of and in any part thereof in the name of all the rest, or of one parcell according to the deed, albeit he doth not say in the name of &c. sufficeth for all, if all the peeces be in the grantors possession and out of lease. But if the peeces of land lie in divers counties, or in the same county, and they be in lease, or out of the possession of the feoffor *contra*, for in that case the making of livery in one part in the name of all the rest is not sufficient for the rest, for in this case it is requisite that livery of seisin be made upon and in some of the lands in both counties, and upon every parcell of land that is out of possession, or at least in some parcell of the land in the occupation of every severall tenant. And yet if one part of a Manor be in one county, and the other part in another county in view of that part; in this case it seemes livery of seisin in the one part in the one county in view of the other part in the other county is good & sufficeth for all. Co. super Lit. 48. Perk. Sect. 227. 228. Doct. & Stud. 3. Lit. Sect. 61. 418. Perk. Sect. 226. Fitz. feoffments & Faits, 111.

So

So if the ſcite of a Manor lie in one county, and the reſt of the Manor in another county; in this caſe the making of livery in the ſcite of the Manor is ſufficient for the whole Manor. If a feoffment be made of the Manor of Dale in Sale, the which Manor doth extend in Dale and Sale, and livery of ſeiſin is made accordingly in Dale only and not in Sale alſo; by this feoffment there doth paſſe no more of the Manor but that which is in Dale only. If I be ſeiſed of one acre in fee, and of another acre for life, and I make a feoffment of both acres, and make livery of ſeiſin in that acre whereof I am ſeiſed in fee in the name of both acres; in this caſe it ſeemes this ſufficeth to paſſe both the acres. But if I be ſeiſed of one acre in fee, and poſſeſſed of another acre for years, and I make a feoffment of both acres and livery of ſeiſin in that acre only whereof I am ſeiſed in fee in the name of both the acres *contra*, for this is as if I make a feoffment of land whereof I am ſeiſed and of other land whereof I am not ſeiſed &c. If I be ſeiſed of two acres of land, and let one of them for years, and then make an eſtate of both of them to another, and make livery of ſeiſin in that I have in poſſeſſion in the name of both the acres; this will not ſerve to paſſe the other acre, but livery muſt be made in that acre alſo. And accordingly it was agreed in a caſe in the Kings Bench *Hil.* 38 *Eliz.* which was, that a man was ſeiſed in fee of a Manor and other lands called Groves, and he made a feoffment of it (Groves being then in leaſe for years) and a letter of atturny to give livery and the atturny made livery of the Manor in the name of the reſt, the leſſee being ſtill in poſſeſſion of Groves; in this caſe it was agreed that this was no good feoffment for Groves.

Perk. Sect. 228.

9 H. 7. 25. per Frowick.

Fitz. Faits & Feoffments. 2.

Mountague verſus Jefferies.

See infra.

When a feoffment is made of a houſe and land, the livery of ſeiſin is moſt aptly to be made of and in the houſe in the name of the reſt, and at the doore of the houſe &c. And when a feoffment is made of a Rectory or Parſonage; the livery of ſeiſin may be made in the Parſonage houſe, or if there be no houſe, it may be made upon the Glebe, or if there be neither, it may be made at the ring of the Church doore.

See before Numb. 4.

4. In reſpect of the preſence or poſſeſſion of others.

In the making of every livery of ſeiſin it is requiſite that all perſons that have any lawfull eſtate and poſſeſſion in the thing whereof livery is to be made, as leſſees for life, years, and ſuch like joine in the making thereof or be removed thence, for every livery ought to bring an immediate poſſeſſion to the feoffee, donee, &c.

Dier 362.

If leſſee for years make a feoffment and a warrant of atturny to give livery of ſeiſin, and the atturny make livery of ſeiſin the leſſor being preſent upon the land and not contradicting it; it ſeemes this is a good livery of ſeiſin.

Bro feoffments 24.

The preſence of the feoffor, donor, &c. upon the land after he hath delivered ſeiſin to the feoffee, donee, &c. albeit he ſtay upon the

land a while and doe not depart and leave the feoffee &c. in poſſeſſion will not hurt the livery. See more *ſupra Numb.* 4.

5. In reſpect of the matter whereof it is to be made.

Livery of ſeiſin may be made of any corporall thing, as Manors, houſes, lands, meadowes, paſtures, woods, chambers, or the like. And theſe things therefore are ſaid to lie in livery. But of incorporall things, as rents, advowſons, commons, eſtovers, and ſuch like things livery cannot be made. And theſe things therefore are ſaid to lie in grant and not in livery. And therefore when a livery is made of theſe *nil operatur*. See more above *Numb.* 4. Co. ſuper Lit. 49.

6. In reſpect of the manner & order of making it. And how livery of ſeiſin is to be made.

To every good livery of ſeiſin is requiſite either ſuch an act as the law doth adjudge to be a livery, or apt words that doe amount unto it, for a livery may be good by words without any act or deed at all. But it cannot be good by an act or deed without any words at all: howbeit that livery that hath an act or ceremony in it is the beſt becauſe it taketh the deepeſt impreſſion in the witneſſes. Co. 9. 137. ſuper Lit. 49.

The moſt uſuall formall and orderly manner of making of livery of ſeiſin is thus, that the feoffor, donor, &c. and the feoffee, donee, &c. if they be preſent, or in their abſence their atturneys or ſervants that have authority doe come to the doore, backſide or garden if it be a houſe, if not, then to ſome part of the land where ſeiſin is to be delivered, and there in the preſence of many good witneſſes doe ſhow the cauſe of their meeting, openly and plainly, doe read the deed or declare the contents thereof and of the letter of atturny if there be any. And then the feoffor, &c. or his atturny (if it be a houſe) doe take the ring, latch or haſpe of the doore (all the people, men, women and children being out of the houſe,) or (if it be of a peece of ground) doe take a clod of the ground or a bough or twig of a tree or buſh growing thereupon; and (all the people being out of the ground) the ſame ring &c. clod, bough &c. with the deed doe deliver to the feoffee, donee, &c. or to his atturny: and in the delivery hereof doe uſe theſe or ſome ſuch like words, *viz.* I deliver theſe to you in the name of ſeiſin of all the lands and tenements contained in this deed To have and to hold according to the forme and effect of the ſame deed. Or, I deliver you ſeiſin and poſſeſſion of this houſe or ground in the name of all the lands contained in the deed according to the forme and effect of the deed. And then if it be a houſe the feoffee, &c. doth enter in firſt alone and ſhut to the doore, and then he doth open it and let in others. And if the feoffment, gift, or leaſe be made without deed, then they doe and muſt withall expreſſe the very eſtate it ſelfe which the feoffee, donee, or leſſee is to have: as for example, the feoffor, donor, or leſſor muſt come to the houſe or land which is to be granted and where livery of ſeiſin is to be made and there muſt by apt words grant the houſe or land to him that is to have it in fee ſimple, or in taile, or for life, (as the agreement is) and in ſeiſin thereof muſt deliver. Weſt. Symb. 1. part. Sect. 251. Perk. Sect. 209. 210. Co. ſuper Lit. 48.

deliver him the ring of the doore, or a turfe or twig of the land. And if the feoffment &c. be made by writing then it is wiſdome to indorſe and ſet downe on the back of the ſame how, when, and where the ſame is made, and the names of the witneſſes thereunto. But a livery of ſeiſin that is not ſo exactly made may be good notwithſtanding. And therefore if the feoffor, donor, &c. or his atturny take any thing elſe that comes from off the land, as a ſtone, or the like, and therewithall doth make the livery of ſeiſin; or if he take a turfe, or twig from off another mans ground and not from the ſame whereof poſſeſſion is to be given, and deliver that upon the ground in the name of ſeiſin; Or if he take a peece of ſilver or gold, or a rod, ſtick or the like, and deliver this upon the land in the name of ſeiſin; all theſe are good deliveries of ſeiſin and poſſeſſion. So if the feoffor &c. be at the doore of the houſe, or by the land, or in the houſe, or upon the land, and after he hath delivered the deed he ſay to the feoffee, donee, &c. [Here I deliver you ſeiſin and poſſeſſion of this houſe or land in the name of ſeiſin and poſſeſſion of all the lands and tenements contained in the deed.] Or [have and enjoy this houſe or land according to the deed.] Or [enter into this land or houſe and God give you joy of it.] Or [I am content you ſhall enjoy this land;] in all theſe caſes there is a good livery of ſeiſin. *Et ſic de ſimilibus.*

Co. 9. 137. Fitz. feoffments & faits. 111.

Co. 6. 26. 41 E. 3. 17.

Bro. feoffment 28. If I being ſeiſed of a houſe in fee make a feoffment of it and of divers lands to a man then preſent with me in the ſame houſe, and there deliver him the deed in the name of ſeiſin of all the lands contained in the deed; in this caſe this is a good delivery of the deed, and a good livery of ſeiſin alſo, albeit I continue in poſſeſſion of the houſe ſtill and goe not out of it. And if I be Lord of a Manor, and lying ſicke within ſome part of the Mannor I make a feoffment of the Manor, and deliver the deed to the feoffee ſaying to him, I will that you take ſeiſin preſently; and thereupon command all my tenants of the manner to atturne to him, and they doe ſo; this is a good livery of ſeiſin. So if I make a deed, and after I have read it, being upon the land I deliver it to the feoffee, donee, &c. and ſay, Here I deliver you this charter as my deed in the name of ſeiſin of all the lands therein contained, or the like; this is a good delivery of the deed and of ſeiſin. But if I doe only ſeale and deliver the deed upon or in view of the land without ſaying or doing any more; this will not amount to a livery of ſeiſin. * And therefore if a man make a feoffment with a letter of atturny to give livery of ſeiſin, and then he deliver the deed upon the land; this is no good making of livery of ſeiſin. And ſo alſo if there be no letter of atturny.

Perk. Sect. 211, 212.

Perk. Sect. 215. Co. 6. 26.

* Cromwals caſe Adjudged in the exchequer 15 Eliz.

Co. 6. 26. If I be ſeiſed of a houſe in fee, and being in the houſe ſay to *I S*, Here *I S*, I demiſe you this houſe for terme of my life; this

will not amount to a livery of ſeiſin; and therefore it is no good leaſe untill livery of ſeiſin be made, but it is a good beginning of a leaſe.

If the father infeoffe his ſonne of land, and the ſonne ſuffer his father to enjoy it, and after the ſonne doth come to the Pariſh Church where the land doth lie, and there in the audience of the pariſhioners uſeth theſe words to his father, [Father you have given me ſuch and ſuch lands (and doth name them) as freely as you gave them to me I give them to you againe;] this is no good livery of ſeiſin neither doth any eſtate paſſe hereby. So if one being upon his land ſay to *I S*, [*I S* ſtand forth, I doe here reſerving an eſtate to me for mine owne life give this land to thee and thy heires for ever;] this is no good livery of ſeiſin, neither doth any eſtate paſſe thereby. So if one make a charter of feoffment to me and make no livery of ſeiſin thereupon, and after I make a feoffment of the land to *I S* and the feoffor hearing and having notice of it ſaith [I doe willingly agree to it and am contented that *I S* ſhall have it,] or I doe agree to the feoffment, or the like; in this caſe this doth not make the feoffment that was made to me good.

Perk. Sect. 216.

Hil. 37 Eliz. B.R. Callards caſe.

Fitz. Fait. & feoffments.

If divers parcells of land be conveyed and livery of ſeiſin is made in one; or there be divers feoffees, and livery of ſeiſin is made to one of them according to the deed, without uſing any more words; this is good. But the beſt forme and order of making of livery in this caſe is to adde theſe words, [in the name of all the reſt &c.]

Co. ſuper Lit. 48. Fitz. Eſtoppell. 177.

Livery in law, or within the view.

If the feoffor, donor, &c. deliver the deed in ſight or view of the land, and uſe theſe or any ſuch like words, [I will that you ſhall enter into the land and have it according to the deed;] Or, [take and enjoy the land according to the deed;] Or, [I deliver you this deed in the name of ſeiſin;] Or, [enter you into the land and take ſeiſin of it;] Or [take the land and God give you joy of it;] Or, (if the eſtate be made without deed) [I give you yonder land to you and your heires and goe & enter into the ſame and take poſſeſſion thereof accordingly;] Or [enter into the land and enjoy it in fee ſimple to you and your heires, or for your life &c.] in all theſe caſes the eſtate and the livery is good albeit the feoffor &c. ſtand in one county and the land in view be in another county. But in all theſe caſes of livery within the view, 1. It muſt be made by the perſon himſelfe that doth make the eſtate, for it cannot be made by his atturny. 2. There muſt be a relation to to the land, for if the feoffor doe deliver the deed only to the feoffee in ſight of the land; this is not a good livery within the view. 3. The parties muſt ſtand within view of the land, for if the feoffor &c. being out of the ſight of the land ſay to the feoffee &c. Goe and enter and take ſeiſin of the land and God ſend you joy of it; this is no good livery of ſeiſin. 4. There muſt be ſome body

Co. 9. 137. 6. 26. ſuper Lit. 48. 253.

1] New terms of the Law.

Co. ſuper Lit. 48. Dier 18. 2] 18 H. 6. 16.

3] Co. ſuper Lit. 48.

body capable of a freehold to take by the livery, for if it be made to a leſſee for years the remainder to the right heires of *I S* and *I S* is then living, it is void. 5. The feoffee &c. muſt enter preſently, for if either the feoffor, donor &c. or feoffee, donee &c. die before entry; the livery cannot be made good. And yet if the party dare not enter for feare, in this caſe if he claime it only, and doe not enter it is ſufficient.

5] Co.1.156. Perk. Sect. 214. Fitz. faits & feoffments. 47.

Livery of ſeiſin in deed may be made or taken by the deputies or atturnyes of the parties, and this livery by them is as good as that livery of ſeiſin which is made by the parties themſelves; and that alſo as it ſeemes albeit the parties themſelves be upon the land at the time of the making thereof if they doe not contradict it. But in the making of this livery care muſt be had, 1. That there be a deed of feoffment, for otherwiſe a letter of atturny to deliver poſſeſſion availeth nothing. 2. That there be a good authority in writing, which may be either in the deed of feoffment it ſelfe, * whether it be Poll, or Indented, and that albeit the atturny be not party to it, or elſe by a ſingle deed beſides the feoffment &c. 3. That the atturny doe purſue his authority at leaſt in the ſubſtance and effect of it. 4. That the atturny doe it in the name of the feoffor, donor, &c. who doth give the authority. 5. That it be done in the life time of the parties. But a livery in law may not be made by an atturny. And therefore if a letter of atturny be to deliver ſeiſin generally and the atturny by virtue thereof deliver ſeiſin in view; this livery of ſeiſin is void.

Co. ſuper Lit. 52. Celw. 51. Co. 9. 76. terms of the law. tit. Livery.

10. Where livery of ſeiſin made or taken by an atturny ſhall be good. And where not. And what warrant is ſufficient.

* The opinion therefore in Co. ſuper Lit. 52. 6. as to this point is held not to be law.

Bro. Feoffments. 25. Aſſ. pl. 4. Perk. Sect. 23.

If an Infant, or woman covert make a feoffment and letter of atturny to make livery, and the atturny doe ſo; this is void, for they are not able to give ſuch an authority. And if a man whiles he is of ſound memory make a feoffment with a letter of atturny to give livery and after he become paralytique and ſo dumbe, but by ſignes he doth declare himſelfe to be willing to have livery of ſeiſin made, and it is made; this is a good livery of ſeiſin. But if a letter of atturny be made to deliver ſeiſin of certain land by one that is *de non ſane memorie*, and the deed of feoffment was made whiles he was of ſound memory, and afterwards he doth come to his memory again, and then the livery is made upon the firſt warrant without any new aſſent &c. in this caſe the livery is not good.

Infant. Woman covert.

De non ſane memorie.

Dier 283.

That for the moſt part which for the manner and order of making it is a good livery of ſeiſin if it be made & taken by the parties themſelves is good being made and taken by their atturnies or deputies that have a good authority and do well purſue it. And therefore if the conveyance be made of divers lands, and they lie in one county, and a warrant of atturny is made to give livery generally, and the atturny doth make it in one part of the land in the name of all the reſt; this is a good livery. *Et ſic de ſimilibus.*

If

If a man be ſeiſed of black acre, and white acre, and he make a deed of feoffment of both theſe acres, and a letter of Atturney to enter into both theſe acres, and to deliver ſeiſin of both of them according to the form and effect of the deed, and he doth enter into black acre and deliver ſeiſin *ſecundum formam cartæ*; in this caſe the livery of ſeiſin is good, albeit he doe not enter into both the acres, nor into one acre in the name of both. And if the feoffment bee made to two or more, and the warrant of Atturney is to make livery to them both, and the Atturney doth make livery of ſeiſin to one of the feoffees *ſecundum formam & effectum cartæ*; in this caſe the livery is good to both, and yet he that is abſent may wave the livery. Co. ſuper Litt. 52.

And yet if a man be diſſeiſed of black acre and white, and a warrant of Atturney is made to one to enter into both theſe acres, and to make livery, and the Atturney doth enter into one acre onely, and make livery of ſeiſin there *ſecundum formam cartæ*; in this caſe the livery of ſeiſin is void for all, for in this caſe he doth leſſe then his authority. So if a man make a letter of Atturney to deliver ſeiſin to *I S* upon condition, and the Atturney doth deliver ſeiſin abſolutely; this livery of ſeiſin is void. And ſo in all ſuch like caſes where the Atturney doth leſſe then the authority and commandement, all that he doth is void. But for the moſt part where the Atturney doth that which he is authoriſed to doe, and more alſo, it is good for ſo much as is warranted, and void for the reſt. And therefore if the letter of Atturney be to give livery of ſeiſin to *I S*, and the Atturney give it to *I S* and *W S*; this livery is good to *I S* and void to *W S*. So if the letter of Atturney be to give livery of ſeiſin of white acre only, and he make livery of white acre and black acre alſo; this livery is good for white acre, and void for black acre. So if the letter of Atturney be abſolute, and the Atturney give livery upon condition; ſome hold this to be good, and the condition to be void. Co. ſuper Litt. 52. 258 Perk. Sect. 187, 188, 189. Perk. Sect. 109. Co. ſuper Lit. 258.

If a letter of Atturney be made to two jointly to make or take livery of ſeiſin, and one of them alone doth it without the other; this is a void livery. But otherwiſe it is when it is made to two jointly or ſeverally, for there one of them alone may doe it. Co. ſuper Litt. 49.

If a letter of Atturney be to make livery of ſeiſin after the death of another man, and the Atturney doth make livery of ſeiſin during that mans life; this livery is void. Perk. Sect. 39.

11. How it ſhall enure, and be taken, and conſtrued.

Livery of ſeiſin is ſometimes made ſingle, and without any relation to the deed whereby the eſtate upon which the livery is made is created at all: and ſometimes and moſt commonly it is made with reference to the deed in theſe or ſuch like words [*ſecundum formam cartæ*]. In the firſt caſe the eſtate is oftentimes made upon the livery; and then there may bee one eſtate contained in the deed, Litt. Sect. 359. Co. ſuper Litt. 48. 122. Fitz. Eſtoppel 177. 7 Ed. 4. 25. Co. ſuper Litt. 49. Fitz. feoffments & faits 23.

deed, and another made by the livery, alſo there may paſſe more land by the livery then is in the deed, and by this means when there is a fault in the deed, ſo that the land will not paſſe by the deed, it may perhaps paſſe by the livery: but in this caſe then there muſt be apt words uſed in the making of the livery to create the eſtate alſo, as well as to give the poſſeſſion. But where the livery of ſeiſin is made with relation to the deed, there it muſt take effect according to the deed or not at all, for theſe words *ſecundum formam cartæ*, are to bee underſtood according to the quantity and quality of the effectuall eſtate contained in the deed. And therefore if one make a deed of feoffment to another, and in the deed there is contained no condition at all, and when the feoffor doth make livery he doth make livery upon condition; or if the deed contain an eſtate to him and his heirs, and he maketh livery of an eſtate in taile or for life; in theſe caſes there doth paſſe nothing by the deed. And yet if there be apt words uſed to create ſuch an eſtate at the time of the livery made; ſuch an eſtate may be made by the livery without the deed, and then the deed ſhall be void. But if in theſe caſes the feoffor ſay when he doth make livery on condition in taile, or for life, *ſecundum formam cartæ*; in this caſe there is a good feoffment made according to the deed, and the additionall words are void. So if a man make a leaſe for years, and make livery *ſecundum formam cartæ*; this is but a leaſe for years ſtill. And if *A* give land to *B* To have and to hold after the death of *A* to *B*, and his heires; this is a void deed, and therefore if the livery of ſeiſin be made *ſecundum formam cartæ*, the livery of ſeiſin is void alſo. But if when he doth give livery of ſeiſin, he give it to him and his heires without theſe words *ſecundum formam &c.* or if in the making of livery he ſay, Here I deliver you ſeiſin of this land, To have and to hold to you and your heirs for ever, or the like; this may make a fee ſimple. And ſo if one make a deed of feoffment of two acres, and after make livery of ſeiſin of four acres; in this caſe if there bee words in the livery of ſeiſin ſufficient to make a new eſtate, the other two acres may paſſe alſo.

Co. 2455. 5. 94. & Greene-wood's caſe, B. R. Mich. 17 Jac.

If *A* by deed give land to *B*, to have and to hold after the death of *A* to *B* and his heirs; this is a void deed, and therefore if upon this deed livery of ſeiſin be made before the day by the party himſelf, or at, or after the day by his Atturney *ſecundum formam & effectum cartæ*; the livery is void alſo, for it cannot enter ſo. And yet if a leaſe be made for life to begin *in futuro*, and at, or after the day come the leſſor himſelf in perſon doth make livery of ſeiſin *ſecundum formam cartæ*; in this caſe the leaſe perhaps may become good by this livery of ſeiſin.

Co. ſuper Litt. 222.

If an agreement be between two that the one ſhall enfeoff the other

ther upon condition for ſurety of money, and afterwards livery of ſeiſin is made generally without any ſuch condition; in this caſe it is ſaid by ſome the eſtate ſhall be on condition ſtill.

If there be a fault in the deed, as by the miſ-naming of the feoffor &c. feoffee &c. or the like, and afterwards the feoffor &c. doth himſelfe in perſon make livery of ſeiſin upon this deed to the feoffee &c. by this the fault of the deed may be holpen and cured. Perk. Sect. 42.

If one make a feoffment to himſelf and another, and give livery of ſeiſin to the other; this is a good feoffment and ſhall enure to the other wholly, and hee ſhall take the whole by the feoffment and the livery. And ſo if the livery be made to one that is capable, and to another that is not capable; hee that is capable ſhall take the whole, and the other ſhall have nothing. So if a feoffment be made to two, and one of them die before the livery is made, and after the livery is made to the ſurvivor; in this caſe the livery ſhall enure to the ſurvivor only, & he ſhall have all the eſtate thereby. So if a feoffment be made without deed to a Corporation and to *I S*, and livery is made to *I S* alone; in this caſe *I S* ſhall have the whole and the Corporation nothing at all. Perk. Sect. 204. 203. 7 H. 7. 9.

If a feoffment be made to four, and livery of ſeiſin is made to one, two or three of them; this ſhall enure to them all. But if the feoffment be without deed, it ſhall enure to him wholly to whom the livery is made. And if one of them give warrant to the reſt to take livery for him, and they doe ſo; this ſhall enure to them wholly, and not to him at all for any part. Dier 35. 10 E. 4. 1. Co. 5. 95.

If the tenant make a feoffment to his Lord and another, and give livery of ſeiſin to the other; this ſhall enure wholly to the other untill the Lord agree to it, and then to them both. 10 E. 4. 12.

If one make a deed of feoffment of one acre of land to *A* and his heirs, and another deed of the ſame land to *A* and his heirs of his body, and deliver ſeiſin according to the form and effect of both deeds; in this caſe it ſhall enure by moities, *i.* he ſhall have an eſtate taile, and the fee ſimple expectant in the moity, and a fee ſimple in the other moity. Co. ſuper Litt. 21.

If two ſeverall deeds of feoffment be made to two ſeverall perſons of one and the ſame thing; he that can get the ſeiſin firſt ſhall have it. *Rem domino vel non domino, vendente duobus, In jure eſt potior traditione prior.*

If leſſee for life make a feoffment, and a letter of Atturney to the leſſor to make livery, & he doth make livery accordingly; in this caſe this ſhall not enure to bar him of his entry upon the feoffee for the forfeiture of his leſſee. But if leſſee for years make a feoffment in fee, and ſuch a letter of Atturney to the leſſor, and he doe deliver ſeiſin accordingly; this livery ſhall bind him, for it ſhall be ſaid as in his own right, becauſe the leſſee had no freehold whereof to make livery. Co. ſuper Litt. 52.

If

Co. ſuper Litt. 52.

If a leſſor make a deed of feoffment, and a letter of Atturney to the leſſee for years to give livery, and he doth it accordingly; this ſhall not be conſtrued to extinguiſh or hurt his term. See more in *Expoſition of Deeds, ſupra ch.* 5.

And ſo we come to another kinde of Deed of Common Aſſurance called a *Bargain and Sale.*

CHAP. X.
Of a Bargain and Sale.

Terms of the Law, Plow. 301. Co. 2. 35.

THis word doth ſignifie the transferring of the property of a thing from one to another upon valuable conſideration. And herein only it doth differ from a Gift; that this may bee without any conſideration or cauſe at all, and that hath always ſome meritorious cauſe moving it, and cannot be without it. This word alſo is ſometimes applied to the aſſurance or conveyance whereby this is done and made, which is called a deed of Bargaine and Sale, for this may be done by writing or without writing. 1. Bargain and Sale. *Quid.*

Terms of the Law, Plow. 301. Co. 2. 35.

And ſometimes this is and may be of lands, tenements, and hereditaments, and to this the terme is moſt properly applied. And then it is ſaid to be, where a recompence is given by both parties to the bargain. As where one doth bargain and ſell his land to another for mony; in this caſe the land is a recompence to the one for the money, and the money to the other for the land. And this now alſo is become one of the common aſſurances of the kingdome, * ſo that ſuch an aſſurance may now bee averred to bee fraudulent within the Statute of 27 *Eliz.* as well as any other aſſurance, a rent may be reſerved upon it, or a condition made by it, as well as by any other kind of aſſurance. And ſometimes this is and may be of moveable things, as trees, corn, graſſe, oxen, kine, houſhold-ſtuffe, and the like: the property whereof is and may be altered by this kind of conveyance, as well as by gift, or grant. 2. *Quotuplex.*

* Per Ch. Juſt. Hide. 3 Car. Co. 2. 54.

Terms of the Law. Agreement.

And this kind of bargain and ſale is that which is commonly called a Contract: which largely taken, is an agreement between two or more concerning ſomething to be done, whereby both parties are bound each to other, or one is bound to the other. But ſtrictly it is the buying and ſelling of ſome perſonall goods whereby the property is altered. And in both theſe caſes he that doth ſell is called the bargainor, and hee to whom the ſale is made is called the bargainee. Bargainor. Bargainee.

Co. 8. 94. 5. 113. 3. 62.

The effect of this is to transfer the property, and this it will as effectually doe as any other kind of conveyance whatſoever. And therefore the bargainee of a reverſion howſoever he may not have bene- 3. The effect of it.

benefit of a condition upon the demand of a rent without giving notice of the bargain and ſale to the leſſee. And howſoever if *A* conuſee by a fine of a reverſion before atturnment of the tenant bargain and ſell the reverſion to *B*, that *B* cannot diſtraine for this rent untill he can get an atturnment of the tenant; yet the bargainee ſhal have benefit of a condition as an aſſignee within the Statute of 32 *H.*8. And it ſeems he may vouch by force of a warranty annexed to the eſtate of the land, becauſe he is in partly in the *per*, and partly in the *poſt*.

4. Of what things a bargain and ſale may be. Or not.

All things for the moſt part that are grantable by any other way from one man to another are grantable, and may be transferred by way of bargain and ſale from one to another. And therefore lands, rents, advowſons, commons, tithes, profits of Courts, and the like, may be granted by way of bargain and ſale in fee ſimple, fee tail, for life, or years. And all manner of goods and chattels, as leaſes for years, wardſhips, cattell, corn, houſholdſtuffe, wood, trees, merchandiſes, and the like, are grantable by way of bargain and ſale. But it ſeems Eſtovers, and ſuch like things *de novo*, and that have not eſſence before are not grantable by way of bargain and ſale, as they are by way of grant or leaſe, and therefore that a bargain and ſale of ſuch things is void.

See Weſt Symb. tit. Bargain and Sale.

6 Jac. B.R. Adjudged. 21 H. 6. 43. per Yelverton.

5. What ſhall bee ſaid a good bargain & ſale. And what things are requiſite to make ſuch a bargain and ſale. Or not. Of lands.

If any eſtate of freehold or inheritance be made of land by way of bargain and ſale, the ſame muſt be made by a writing or deed indented, and cannot be made by word of mouth onely, as a leaſe for years, whether it be created *de novo*, or be in *eſſe* before, may be. But lands in *London* by a ſpeciall Proviſo within the Statute may be bargained and ſold by word of mouth without any writing. 2. The very words Bargain and Sell, are not neceſſary to a good bargain & ſale, for words equivalent will ſuffice to make land paſſe by way of bargain & ſale. And therefore if a man ſeiſed of land in fee do by deed indented, and by the words alien, or grant, ſell them to another; or if ſuch a man covenant to ſtand ſeiſed of his land to the uſe of another, and theſe deeds are made in conſideration of money, and the deeds be after inrolled; theſe will amount to good bargains and ſales. And if a man by a deed indented and inrolled in conſideration of ten pound paid to him by the words, demiſe and grant, paſſe his lands to another for twenty years; this is a good bargain and ſale. 3. There muſt be ſome good conſideration given, or at leaſt ſaid to be given for the land. And therefore if *A* (for divers good conſiderations) [a] or (in conſideration that the bargainee is bound for the bargainor, and for divers other good cauſes) [b] or (for divers great and valuable conſiderations) bargaine and ſell his land by deed indented and inrolled to *B* and his heirs; *nihil operatur*. But if in theſe caſes in truth there be money or other good conſideration given, albeit it be not expreſſed upon the deed, the

Stat. 27 H. 8. ch. 16.

Co. 8. 94. 7. 40. 2. 36.

Co. 1. 176.

a Ward verſus Lambert Paſche 37 Eliz.

b 41 El. Adjudged.

Dier 169.

the bargainee may aver it, and being proved the bargain will bee good. And if the deed make mention of money paid, as in conſideration of an hundred pound or the like, and in truth no money is paid, yet the bargain and ſale is good. And no averment will lie againſt this which is expreſly affirmed by the deed. And if the deed mention and ſay (for a certain ſum of money) or (for a certaine competent ſum of money), theſe are good conſiderations. 4. There needs no livery of ſeiſin or atturnment in this caſe. And therefore if one bargain and ſell a reverſion by deed indented and inrolled for good conſideration; the reverſion will paſſe without any atturnment of the tenant. And if it be onely a leaſe for years of a reverſion that is granted, there needs no atturnment nor inrolment. And in caſe of a bargaine and ſale the bargainee is in actuall poſſeſſion before any entry, ſo that the leſſee may atturn to the grant of the reverſion, as hath been ruled in *Mittons* caſe, *Mich.* 18 *Jac. in Cur' Ward.* by the two Chief Juſtices and the whole Court. And yet I think he hath not ſuch a poſſeſſion as to bring any poſſeſſory action for treſpaſſe, or the like, untill an actuall entry: for where the Statute of 27 *H.*8. of uſes provides, that the actuall poſſeſſion ſhall be adjudged according to the uſe, yet it ought to have a circumſtance which is requiſite by the common law, *viz.* an actuall entry in deed. But there muſt be an inrolment of the deed in caſe where any freehold doth paſſe, for it is provided, That no lands (except in ſome Corporations only) ſhall paſſe from one to another by any deed whereby any eſtate of inheritance or freehold ſhall be made or take effect in any perſon or perſons to be made by reaſon only of any bargain and ſale thereof, except the ſame be made and done by writing indented, ſealed and inrolled in one of the four Courts [the Chancery, Kings Bench, Common Pleas, or Exchequer], or elſe within the ſame County or Counties where the lands ſo bargained and ſold, doe lie before the *Cuſtos Rotulorum*, and two Juſtices of the Peace, and the Clerk of the Peace of the ſame County or Counties, or two of them at the leaſt, whereof the Clerk of the Peace to be one. And the ſame inrolment to be within ſix moneths next after the ſame writing or deed is dated. And this Statute was made in the ſame Parliament wherein the law of transferring of uſes into poſſeſſion was made, to the end that mens lands might not ſuddenly and privately paſſe upon payment of a little money in an alehouſe, or the like. And herein theſe things muſt be obſerved; 1. The inrolment upon ſuch a deed as to make this eſtate to paſſe, muſt be in parchment, for an inrolment in paper is not good. 2. The deed inrolled muſt be indented, for if it be but poll, the eſtate will not paſſe. 3. It muſt be inrolled within ſix moneths of the purchaſe or ſale. *And this account muſt be, 1. From the date, and not from the time of the delive-

Averment.

Dier 90.

Co. 7. 40. 8. 94.

Co. 5. 112.

Stat. 27 H. 8. ch. 16. Pl. 307.

Inrolment. Where neceſſary. And how it muſt be done.

*Co. 5. 1.

delivery of the deed. 2. After twenty eight days to the moneth and no more. 3. The day of the date to be taken excluſive, and for none of the days of the ſix moneths. And yet if a deed be inrolled the ſame day it bears date, it is good. 4. If it be inrolled any part of the laſt day of the ſix moneths, it is ſufficient. And thus the deed may be inrolled within the ſixe moneths, albeit either of the parties die within the time. And if the deed be not thus inrolled, it is of no force at all. So that if one bargain and ſell his land to mee, and the trees upon it; in this caſe albeit the trees might have been ſold alone by deed without inrolment, yet now being not inrolled, becauſe the ſale is not good for the land, it ſhall not be good for the trees alſo. And no ſubſequent act will help in this caſe, for if one by words of bargain and ſell, onely without any other words in the deed grant a reverſion, and the deed be not inrolled, and after the tenant doth atturn; hereby nothing doth paſſe, neither ſhall it enure as a confirmation. But yet this muſt be noted that in ſome caſes where a deed will not enure by way of bargain and ſale for ſome of the cauſes aforeſaid it may enure to ſome other purpoſes. A bargain and ſale may be made of goods, and cattels, without any ſuch ſolemnity as before, for it may bee by word as well as by writing, with or without any words of bargain and ſell as well as by thoſe words, by a deed poll, as well as by a deed indented, and that without any inrolment at all, and without any delivery of any part of the things ſold, or of any peece of money (as the manner is) in the name of ſeiſin. But in this caſe alſo ſome reſpect is to be had unto the cauſe and conſideration of the bargain, as well as in the caſe of the bargain and ſale of lands. For howſoever perhaps in the caſe of a grant or bargain, and ſale of goods or cattels by deed in writing, the conſideration is not materiall. And that if a man doe by his deed under his hand and ſeal bargain and ſell timber, trees, or any other thing without any conſideration at all, the ſame may paſſe well enough; yet if the contract be by word, or by writing ſealed and not delivered, if there be no conſideration, or no good conſideration of it, it is of no effect at al. And therefore if a man by word of mouth ſel to me his horſe, or any other thing, and I give him or promiſe him nothing for it; this is void and will not alter the property of the thing ſold. But if one ſell me a horſe, or any other thing for money, or any other valuable conſideration, and the ſame thing is to be delivered to me at a day certain, and by our agreement a day is ſet for the payment of the money, or all, or part of the money is paid in hand, or I give earneſt money (albeit it be but a penny) to the ſeller, or I take the thing bought by agreement into my poſſeſſion where no money is paid, earneſt given, or day ſet for the payment; in all theſe caſes there is a good bargain and ſale of the thing to alter the pro-

2] Dier 218. Adjudge Franklin & Garters caſe Mich. 37 & 38 Eliz.

4] Dier 218.

Ruled in the Court of Wards. Co. 11. 48.

Of goods and cattels.

Experientia.

Plow. 308.

Dier 29, 30. 14 H. 8. 19. 9 H. 7. 21. 21 H. 7. 6. 10 H. 7. 6. Plow. 432.

propertie thereof; and in the firſt caſe I may have an action for the thing, and the ſeller for his money; in the ſecond caſe I may ſue for and recover the thing bought; in the third I may ſue for the thing bought, and the ſeller for the reſidue of the money; in the fourth caſe where earneſt is given we may have reciprocall remedies one againſt another; & in the laſt caſe the ſeller may ſue for his money. If *A* ſell cloth to *B* for ten ſhillings, and *B* takes away the cloth againſt the will of *A*; in this caſe *A* ſhall have an action of treſpaſſe againſt *B*. And if *A* ſell cloth to *B* for ten ſhillings in his election to make it a bargain or not, and if he will he may keep his cloth untill the other pay him, and if *A* ſay nothing, but doth ſuffer *B* to take it away; he may make it a bargain if he will, and bring an action of debt for his money. If I offer money for a thing in a Market or Faire, and the ſeller agree to take my offer, and whiles I am telling the money as faſt as I can hee doth ſell the thing to another: Or when I have bought it we agree that he ſhall keep it untill I can goe home to my houſe to fetch the money; in both theſe caſes, eſpecially in the firſt the bargains are good, ſo as the ſeller may not ſell them afterwards to another, and upon the payment and tender and refuſall of the money agreed upon, I may take or recover the things.

Co. 1. 87. ſuper Litt. 10. Dier 169. If one doe bargain and ſell his land to me for money, To have and to hold to me generally, and doth not ſay to me and my heirs; by this I have but an eſtate for life and no more. 6. How a bargain and ſale ſhall be taken.

Dier 155. If one in conſideration of ten pound paid by me doth bargaine and ſell his land to me and my heirs To have and to hold to me to the uſe of the bargainor for life, the remainder in tail to me, the remainder to the right heirs of the bargainor; this *Habendum* in this caſe is void, and I and my heirs ſhall have the land for ever. Of lands.

Co. 6. 33. If one in conſideration of ten pound ſell me land for the term of twenty years, and doth not ſay when this term ſhall begin; in this caſe it ſhall begin preſently. See more in *Expoſition of Deeds, chap. 5. in toto.*

Kelw. 87. Plow. 140. 41. If one ſell me any thing by the tod, pound, buſhel, yard, or ell; it ſhall be accounted me aſſured, and reckoned according to the cuſtome of the country and place, and not according to the ſtatutes or the meaſures of other countries. Of goods.

Plow. 86. 27 H. 8. 27. Brod. Contract. 4. If one ſell me twenty barrels of ale, or ten pottles, or cups of wine; by theſe bargains I ſhall not have the barrels, pottles, or cups, with the ale or the wine. But if one ſell me a hogſhead, or a firkin of wine, it ſeems by this bargain I ſhall have the hogſhead and firkin with the wine.

27 Aſſ. 29. If one ſell me all his trees in ſuch a wood, and that I ſhall not cut them untill *Michaelmas*, and in the interim hawks doe breed in the trees; it ſeems in this caſe that the vendor ſhall have them,

and that I may not meddle with them. And yet ſee *Co.* 11. 58. which ſeems to be to the contrary.

7. How and to what purpoſes a deed of bargain and ſale of lands and the inrolment thereupon ſhall relate. And how and to what purpoſes not.

The inrolment of a deed of bargain and ſale, when it is done within the ſixe moneths ſhall to moſt purpoſes relate to the time of the delivery or of the date of the deed. And it is given as a rule, That it ſhall have relation to the time of the delivery of the deed, *viz.* to avoid all meane eſtates and charges made to a ſtranger by the bargainor after the delivery of the deed before the inrolment, but not to deveſt any eſtate lawfully ſettled in the interim in the bargainee himſelf. And therefore if one bargain and ſell his land by deed indented to one, and after before the deed is inrolled, he enter into a ſtatute, or grant a rent-charge out of this land, or make a leaſe of the land to another, and then the deed is inrolled within the time; in this caſe the relation ſhall avoid all the mean charges and eſtates. And if *A* bargain and ſell his land by deed indented to *B*, and afterwards doth ſell the ſame land by deed indented to *C*, and the deed made to *C* is firſt inrolled, and then the deed made to *B* is inrolled alſo within the ſix months; in this caſe *B* ſhall have the land, and the relation of his inrolment ſhall make the inrolment of the other deed void. So if *A* levy a fine of the land to *C*, yet *B* ſhall have the land. But if the firſt deed made to *B*, be not inrolled within the ſix moneths, and the deed to *C* be inrolled within the ſix moneths *contra*.

Co. 4. 71. Bro. fait Inrol. 9.

Dier 218.

Curia M. 3 Jac. B. R.

If *A* bargain and ſell land to *B*, and after levy a fine to *B* of the ſame land, and after within the ſixe moneths the deed is inrolled; in this caſe *B* ſhall take by the fine and not by the bargain and ſale.

Co. 4. 71.

If one jointenant alien all his lands in Dale to *A*, and before the inrolment the other jointenant die, and after the deed is inrolled; in this caſe but a moity and not the whole land doth paſſe.

Bro. fait Inroll. 9.

Bankrupt.

If *A* bargaine and ſell his land to *B*; and after this *A* doth become Bankrupt, and the Commiſſioners ſell the land to *C*, and after the deed is inrolled within ſix months; in this caſe *B* and not *C* the purchaſor ſhall have the land.

So held 4. Car. B. R.

Ward.

If *A* bargain and ſel his land held in capite to *B* in fee, & *B* dieth before inrolment, and then the deed is inrolled; in this caſe the heir of *B* ſhall be in ward. And ſo was it held by all the Juſtices in Sir *Walter Earls* caſe, *Paſch.* 15 *Iac. Curia Ward.* And yet in this caſe the wife of the bargainee ſhall not have dower, as was held by *Anderſon* Chief Juſtice, and Juſtice *Walmſley* 3 *Iac. Co. B.* and again in Sir *Robert Barkers* caſe, 6 *Iac.* And if one bargain and ſell his land to *I S*, and after this the rent incur; and then the deed is inrolled; the bargainee and not the bargainor ſhall have the rent. *Per Curiam B. R. Hil.* 11 *Car.*

Paſche 15. Jac.

Dower.

Contrarium tent. per Iuſt. Berkley, Hil. 11 Car.

Rent.

If *A* bargain and ſell his land to *B* in fee, and then mary *C* and die, and *C* is endowed, and after the deed is inrolled; in this caſe

22 Eliz.

the

the dower of the woman ſhall be taken away by relation, as was held in Baron *Frevils* caſe, 22 *Eliz. Co. B.*

3 Jac. Co. B. If *A* bargain and ſell land to *B* and *C* in fee, and *B* releaſe to *C* before the inrolment; this releaſe is void. Releaſe.

So held in Mockets caſe 10 El. If *A* diſſeiſor bargain and ſell the land diſſeiſed to *B* in fee, and the diſſeiſee doth releaſe to the bargainor, and after the deed is inrolled; in this caſe this releaſe ſhall avail *B.*

If *A* bargain and ſell his land to *B*, and *B* before inrolment doth bargain and ſell the land to *C*; the firſt deed is inrolled, and then the ſecond deed is inrolled; in this caſe the laſt bargain and ſale is void,

6 Jac. and ſhall not be made good by relation, as was held by the Court in Sir *Robert Barkers* caſe.

So was it held in Sir Chriſtopher Hattons caſe. If a leaſe be made rendring rent on condition to reenter for not payment, and the leſſor bargain and ſell the reverſion by deed indented, and after the deed made the rent is arere, and then the deed is inrolled; in this caſe it ſhall not relate to give a reentry for the condition broken.

So hath it been adjudged. If *A* bargain and ſell land to *B* in tail, and *B* before inrolment of the deed doth make a leaſe according to the Statute of 32 *H.* 8. and after the deed is inrolled; this is a good leaſe.

And now we come to a Gift.

Chap. XI.

Of a Gift.

Gift. *Quid.* THis word importing no more, then the transferring of the property of a thing from one to another, is of larger extent then a feoffement, which is always applied to an immoveable thing; for this is often applied to moveable things alſo, as trees, cattell, houſhold-ſtuffe &c. the property whereof is, and may be altered as well by gift, as by ſale or grant. And in this ſenſe a gift is ſometimes by the act of the party, as when one man doth give a thing to another. And this is, or may be either by word or by writing. And ſometimes it is by act of Law, as when a woman is maried to a husband, or one is made Executor to another; in theſe caſes by the mariage onely, and taking of the Executorſhip the Law gives all the goods of the woman to the husband, and of the Teſtator to his Executor. So where one doth take my goods as a treſpaſſer, and I recover damages for them upon a ſuit in Law; in this caſe the Law doth give him the property of the goods, becauſe hee hath paid for them. But this word Gift is ſometimes taken more ſtrict-

ly; and applied to a conveyance or paſſing of an eſtate of lands or tenements to another in tail, wherein this word *Dedi* is moſt commonly uſed. And then hee which doth ſo give the land is called the donor, and hee to whom it is given the donee. And this for the moſt part is by deed though it may be otherwiſe. And for theſe deeds of gift of immoveable or moveable things, ſee *Deed* and *Grant in toto*, wherein all the learning touching this matter is involved. And ſo we paſſe to a *Grant*.

Donor. Donee.

CHAP. XII.

Of a Grant.

Grant. *Quid.*

THis word taken largely is, where any thing is granted or paſſed from one to another. And in this ſenſe it doth comprehend feoffements, bargaines and ſales, gifts, leaſes, charges, and the like, for he that doth give, or ſell, doth grant alſo. And thus it is ſometimes in writing or by deed, and ſometimes it is by word without writing. But the word being taken more ſtrictly and properly, it is the grant, conveyance, or gift by writing of ſuch an incorporeall thing as lieth in grant, and not in livery, and cannot be given or granted by word onely without deed. Or it is the grant of ſuch perſons as cannot paſſe any thing from them but by deed, as the King, bodies corporate &c. And this albeit it may be made by other words, yet it is moſt commonly made by this word [grant] as being moſt proper to this purpoſe. Know therefore that amongſt hereditaments, ſome are ſuch as are ſaid to lie in livery, *i.* ſuch as whereof livery of ſeiſin may be made, as Manors, houſes, lands &c. And ſome are ſuch as doe not lie in livery, *i.* whereof no livery of ſeiſin can, nor need to be made, but they paſſe by the delivery of the deed without any more, and of this ſort are rents, reverſions, ſervices, advowſons in groſſe, and the like, which things cannot paſſe from man to man without deed or matter of record, which is of a higher nature then a deed. And hee that makes this grant is called the grantor, and hee to whom it is made is called the grantee.

Co. ſuper Litt. 172. 9. Finchesley 29.

Co. ſuper Litt. 49.

Grantor. Grantee.

2. *Quotuplex.*

It is taken here in the largeſt ſenſe as that which doth comprehend both. And ſo ſome grants are of the land or ſoile it ſelfe: and ſome are of ſome profit to be taken out of or from the ſoile, as rent, common &c. And ſome are of goods and chattels, and ſome are of other things, as authorities, elections &c. And they are made ſometimes by matter of record, & ſometimes by deed.

deed or writing in the country, and ſometimes by word without either. Some grants alſo tend to charge the grantor with ſomething he was not charged with before, and ſome to paſſe ſomething out of him to the grantee, and ſome tend to diſcharge the grantee of ſomething wherewith he was charged or chargeable before, and whereof he is now hereby diſcharged.

Co. 11. 73. Plow. 555. Perk. Sect. 1.

Regularly theſe things are requiſite in every good grant or gift. 1. That there be a grantor, donor &c. and that he be a perſon able to grant, and not diſabled by any legall or naturall impediment. 2. That there be a grantee, donee &c. and that he bee a perſon capable of the thing granted, and not diſabled to receive it. 3. That there be a thing granted, and that the thing be ſuch a thing as is grantable. 4. That it be granted in that order and manner that Law requireth: as where the thing is not grantable without deed, that it be done by deed. And if it be by deed, that the deed have apt words to deſcribe and ſet forth the perſon of the grantor, and grantee, and thing granted &c. and that all neceſſary circumſtances, as ſealing, and delivery, and livery of ſeiſin, and attornment where it is needfull bee obſerved. 5. That there bee an agreement to, and acceptance of the grant or thing granted by him to whom it is made, and for default in either of theſe particulars a grant may be void. *In acquirendo rerum dominio ſcilicet quod donationes non valent licet ſint inceptæ niſi ſint perfectæ.* But if grants be very ancient and the things granted have been enjoyed according to the grant ever ſince the making of it; in this caſe the grant may be good notwithſtanding ſome legall defect in ſome of theſe particulars.

3. Things neceſſarily requiſite to every good grant.

Bro. Grant 89.

Perk. Sect. 64. 4 H. 7. 17. Plow. 150. 16 H. 7. 3. Litt. Sect. 60.

Corporations as Dean and Chapter, Maior and Communalty, and ſuch like regularly can neither grant lands, goods, or chattels, but it muſt be by deed. But the grantees of ſuch perſons, and all other common perſons may grant or give any thing which doth lie in livery, as manors, houſes, lands, and ſuch like things in fee ſimple, fee tail, for life, for years, or at will, by word without deed. And if a leaſe be made of any ſuch thing for life or years, with a remainder over in fee ſimple, fee taile, or for life; it is good, albeit the ſame be done by word without any deed in writing.

4. What ſhall bee ſaid a good and ſufficient grant, gift, or ſale. Or not.

1. For the manner of it. And what may bee granted without deed. Or not. And how.

Co. ſuper Litt. 49. Dier 139. Perk. Sect. 61. 60. 63. Bro. Grant 59.

Such things as are ſaid to lie in grant and not in livery, generally cannot be granted or given, had or taken without deed unleſſe it be in ſome ſpeciall caſes. And therefore rents and ſervices, and ſuch like things which are in groſſe, and not incident to ſome other thing may not be granted without a deed. And therefore if a rent-charge be granted unto me for years, I may not grant this rent over without deed. And if there be Lord and tenant of errable land by fealty, and the ſervice of yeelding the tenth ſheaf of corn before it be ſowed; the Lord cannot grant this ſervice for

Rents, Services &c.

years without deed. But if a rent, or any ſervice be parcell of, or incident to a manor or any other thing which is grantable without deed; in this caſe by the grant of the principall by word this thing may paſſe as belonging thereunto without any deed. Alſo rents or ſervices may be granted upon a partition by one coparcenor to another without deed.

Reverſion or Remainder.

A reverſion cannot be granted in fee ſimple, fee tail, for life, or years without deed unleſſe it be in caſewhere it is parcell of a manor. But a reverſion may be granted upon a partition by one coparcenor to another without any deed. And the ſame law is of a remainder. And therefore if one make a leaſe for life or years to one, the remainder in fee ſimple, fee taile, or for life, to another without deed, howſoever this be a good remainder in the firſt creation without deed, yet this remainder cannot be granted over without deed.

Perk. Sect. 61. Dier 174. Plow. 433. Bro. Grant 104.

Advowſon, Tithes &c.

A Parſonage or Rectory, albeit it conſiſt of nothing but Tithes, and the like, beſides the Church and Church-yard, and it hath no houſe nor glebe belonging to it, yet may be granted without deed in fee ſimple, for life, or years: and then the tithes and offerings will paſſe as incident. But the tithes alone, or a portion of tithes, oblations, mortuaries, or obventions are not grantable by themſelves without deed. And therefore a leaſe paroll of tithes, albeit it be but for years is not good. And if the Parſon agree with one of his Pariſhioners, that he ſhall have his own tithes; this is not a good grant of the tithes, neither may it be pleaded or uſed ſo; but perhaps by way of agreement a Pariſhioner may retain his tithes. And if a leſſee for years of tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron *Denham*, 2 *Car.* at *Sarum* Aſſiſes. And yet it is held that a Parſon may grant his tithes from year to year to him that is to pay them without any deed, but this is by way of retainer. But this grant or agreement muſt be made to and with the party himſelf that is to pay the tithe, and not with another: neither can this intereſt bee aſſigned or a ſtranger take advantage of it, as hath been agreed in the caſe of *Hawkes* and *Brafield*, *Paſch.* 3 *Jac. B.R.*

15 H.7.8. 16 H.7.3. 19 H.8.12. 21 H.6.43.

All this was agreed 36 El. B.R.

Mich. 8 Jac. Dr. Longworths caſe.

An Advowſon in groſſe cannot be granted without deed; yea the grantee of the grantee of an Advowſon is to ſhew both the deeds. But an Advowſon is grantable upon a partition between coparcenors without deed. And an Advowſon incident to a manor, or peece of land is grantable with the manor or land without any deed. The next avoidance to a Church is not grantable without deed.

21 Ed. 3. 38. 11 H. 4. 3. Dier 29. 10. Co. 1. 1.

Plow. 150. 9 Ed. 4. 47.

Common of paſture &c.

Common of Paſture, of eſtovers, turbary, fiſhing, &c. cannot be granted in fee ſimple, fee tail, for life, or years, unleſſe it be in caſe of partition, or of appendancy as incident to ſome corporall thing with-

Perk. Sect. 61.

without deed. And therefore if a man grant by word of mouth to me Common for twenty beasts in his manor; this is not good. Neither if it be granted to me by deed may I grant this over to another without deed. But if a man have Common of pasture appendant or appurtenant to his land; in this case he may grant his land with the Common appendant by word only without any deed. Franchises, as Fairs, Markets, Courts, Warrens, and the like, or the profits thereof are not grantable without deed. But it seems a Hundred is grantable without deed, for that is *liberum tenementum*. The profits of a Mill, County, Ferry, Corody, or the like, are not grantable without deed.

15 H.7.8. Franchises, and such like things.

6 H.7.9. Dier 91. 126. Doct. & St. 16. Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entrie to any reall or personall thing are not grantable at all, but by way of release to the tenant of the land &c. by which means it may be extinguished: but this may not be neither without deed. And therefore if a man take my goods as a trespassor, or I deliver him my goods to keep, and after I will give these goods to him; I cannot doe this without deed.

Things in action, and such like things.

Dier 281. An election, condition, covenant, assent, licence, or liberty, cannot be created and annexed to an estate of inheritance or freehold without deed.

Co. 9.9. A priviledge to hold land for life without impeachment of wast, is not grantable without deed. Offices for the most part are not grantable without deed. And yet some inferiour offices, as Stewardships, Bailiwicks, and the like are, for such officers a Lord of a Manor may retain by word without deed.

Offices.

Perk. Sect. 57. 60. Bro. Done i. Dier 370. 5 H. 7. 35, 36. Plow. 150. Most chattels reall and personall, may be given and granted without deed. And therefore if a man by word of mouth grant, give, or sell me his lease for years, the wardship of body and land, or the wardship of land that he hath by reason of a tenure by Knights service, or by grant from the King, or grant or sell mee the trees standing upon his ground, the corn growing upon his land, his horse, sword, plate, or other houshold stuffe; this is a good grant or gift. But the wardship of the body of an heir only, cannot be granted without deed. So a next presentation cannot be granted without deed.

Chattels.

Plow. 540. If one grant his reversion of land to one, and by the same deed granteth a rent out of the same land to another, and delivereth the deed to both of them at one time; this is good, and shall enure first as a grant of the rent to one, and then as a grant of the reversion to the other.

What by the same deed.

Dier 6. If one convey land to another, and the grantee by the same deed doth grant a rent or common to the grantor out of the same land conveyed; this is as good as if it were by another deed.

By what words of grant.

Dedi & Conceſſi be the moſt apt words for all kind of grants, yet it may be by other words, and the grant as good as by thoſe words. Co. ſuper Litt.

The beſt way in grants is to grant by words of preſent time in the preſent tenſe as well as in the preterperfect tenſe. But a grant by words of the preterperfect tenſe only, as by *Dedi & conceſſi* only without words of the preſent tenſe is good. 35 H.6,11.

2. In reſpect of the perſon of the grantor &c. and the naming of him. And who may be a grantor. And how.

Touching this part two things are requiſite: 1. That the grantor be a perſon able. 2. That if the grant be by deed, that he be ſufficiently deſcribed and ſet forth either by his proper names or elſe by ſome other matter of diſtinction. Note therefore that whoſoever may be a feoffor, may be a grantor. And any natural, politique, or corporate body (not prohibited by law, as Monke, Frier, woman covert, infant, and ſuch like) may be a grantor, donor &c. And the grants of ſuch perſons will be good. See Feoffement ca.9. Numb.4. Perk. Sect. 3.

Alien.

An alien may, and is able to grant or give any thing that he is capable of to have or take by grant or gift.

Perſon attaint or outlawed.

A perſon attainted of treaſon or felony may give or grant his land, and this is good againſt all others beſides the King, and the Lord of whom his land is held. And he may grant or give his goods to relieve himſelf in priſon, and this will be good againſt all others, and the King and Lord alſo. A perſon outlawed in a perſonall action may give or grant his goods or chattels, and the gift or grant will be good againſt all others but the King. Perk. Sect. 26. See ch. 2. Numb.6.

Woman covert.

The Queen may without the agreement of the King make grants, gifts &c. of her lands or goods, but another woman that hath a huſband cannot give, or grant her lands or goods without her huſbands conſent, unleſſe it be in ſome ſpeciall caſes. And albeit ſhee doe recite by the deed that ſhe is ſole and not covert, yet this will not help. And if the caſe be ſo that by agreement between her and her husband there be a certain portion of her husbands lands or goods allotted unto her to diſpoſe of, and manage at her pleaſure, yet ſhe alone without her husband can make no good grant or gift of any part of theſe lands or goods. But if ſhe grant any thing by fine, and the husband doe not avoid it during the coverture; this grant will binde her after his death. And if ſhe make a gift or grant of her husbands goods, it is thought this is not good untill her husband agree to it. Co. ſuper Litt. 3. Per. Sect. 8.20. 41. See ch. 2. Numb.6.

An infant cannot make any gift or grant &c. that is good but in ſpeciall caſes, for if he maketh any grant or gift that taketh effect by the delivery of the deed onely, as if he grant a rent-charge out of his land, or make a feoffement with a letter of Atturney to give livery of ſeiſin, or give or ſell his horſe, and the buyer or donee take him himſelfe; theſe are void *ab initio*. And if the grant, or gift take effect by the delivery of his own hand, as if hee make 9 H.7.24. 26 H.8.2. Perk. Sect. 12,13,14.19. 7 H.4.5. See cha.2.Num. 6.

make a feoffment and give livery of ſeiſin himſelfe, or ſell a horſe and deliver him with his owne hands; this is voidable by the Infant himſelfe, or others that ſhall have his right &c. But if an Infant grant any thing by fine; this muſt be avoided during his minority or elſe it cannot be avoided at all.

Perk. Sect. 16. All grants that are made by Dureſſe, are voidable by the parties themſelves that make it or others that have their eſtates &c. But if it be done by fine, it is good and unavoidable. Dureſſe.

Co. 123. 124. See cap. 2. Numb. 6. All gifts, grants, &c. made by deed in the country by thoſe that are *de non ſane memorie* are good againſt themſelves but voidable by thoſe that are their heires, executors, or have their eſtate. But if it be by fine it is good and unavoidable. *Non ſane memorie.*

Perk. Sect. 25. A man that is borne dumbe, or dumbe and deafe if he have underſtanding may by delivery of the deed and making of ſignes make a good grant, gift, &c. But a man that is borne deafe, dumbe and blind cannot.

Perk. Sect. 26. A Baſtard may give or grant as well as any other man after he hath gotten a name by reputation. Baſtard.

See Leaſe. A Parſon may grant any thing belonging to his Parſonage for no longer time then for his owne life, and therein likewiſe but during his reſidency, albeit he have the conſent of the Patron and ordinary. Parſon.

Perk. Sect. 31, 32, 33. Neither the head without the members of a Corporation, nor the members without the head, as Dean without the Chapter, or Chapter without the Deane, may give or grant any of the lands belonging to their Corporation. Corporation.

See Executors. One executor or Adminiſtrator may give or ſell any of the goods of the deceaſed, and this is good to bind all the reſt. Executors.

What Grants Eccleſiaſtaicall perſons may make of their Eccleſiaſticall lands, husbands of the lands of their wives and tenants in taile of their lands intailed. See in *Leaſe*.

Co. 6. 63. ſuper Lit. 3. The name of the perſons in Grants is ſet downe only to diſtinguiſh perſons and to make the perſon intended certaine: and therefore howſoever it be beſt and moſt ſafe to deſcribe the perſon by his true and proper name of Baptiſme, and alſo by his Sirname, and if it be a Corporation by the true name whereby the Corporation is made, yet miſtakes in this caſe unleſſe they be very groſſe will not make void the grant. *Nihil facit error nominis cum de corpore conſtat.* And therefore if one that is a Baſtard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common eſteeme then his owne right name, or is uſually called by another name then his true name in the place where he lives, in theſe caſes they may grant by this name and the grant is good. And if a man be baptized by one name and after be confirmed by another; ſome have ſaid he may grant by either Miſnaming.

Perk. Sect. 41. Co. ſuper Lit. 3.

of

of theſe names. *Sed Quere.* And if *John* at *Stile* grant by the name of *William* at *Stile*; this grant is good. *Et ſic de ſimilibus.* * And theſe grants are good eſpecially when there is ſome other addition to make it more certain, as when a Duke, Marqueſſe, Earle, or Biſhop grant by their names of honour or dignity, and grant without any name or with a falſe name of baptiſme, as when the Duke of *Suffolke* by the name of the Duke of *Suffolke*, without any more words, or by the name of *William* Duke of *Suffolke*, when his name is *John*, or the Biſhop of *Norwich* grant ſo; theſe are good grants, becauſe there is but one ſuch Duke and one ſuch Biſhop within the kingdome. So if a Deane and Chapter, Mayor and Communalty grant by the name of their Corporation without any addition of Chriſtian or Sirname; it is good. And eſpecially then alſo are theſe grants good when the true name doth appeare in ſome other part of the deed. As when *John* at *Stile* reciteth by his deed that his name is *John* at *Stile*, and by the ſame deed doth grant by the name of *Thomas* at *Stile*. Or *Alice* at *Stile* reciting by her deed that ſhe is a feme covert when in truth ſhe is ſole. But if an ordinary man grant by his Sirname only without any name of baptiſme, or by his name of baptiſme without any ſirname at all; in theſe and ſuch like caſes for the moſt part the grant will be void for incertainty unleſſe there be ſome other matter in the deed to helpe it, or ſome matter done *ex poſt facto* to ſupply it; for in ſome caſes where the thing granted doth lie in livery ſuch a miſtake or incertainty in the grant may be holpen by the livery of ſeiſin upon the deed afterwards. And ſo alſo it is in the names of Corporations, for if the variance and miſtake by omiſſion or alteration be only in ſome ſmall matter ſo as it is literall and verball only the grant will not be hurt by it. But if the miſtake or omiſſion be in the ſubſtance of the name; the grant may be void by it. And therefore if *Decanus & Capitulum eccleſiæ cathed' ſanctæ & individ. Trin. Caerlil.* grant by the name of *Decanus eccleſiæ cathed. ſanctæ Trin. in Caerlil. & totum capitulum eccleſiæ predict*: this is good: *Et ſic de ſimilibus*: for if the ſenſe doth ſtill remaine either expreſly or by neceſſary implication, and the deſcription be ſuch as doth import a ſufficient and certaine demonſtration of the true name of the Corporation according to the foundation thereof, it ſufficeth. But if any of the ſubſtance or eſſence of the name be omitted *contra*. And therefore if a Corporation incorporate by the name of *Prepoſiti & collegii regalis coll. beate Mariæ de Eaton juxta Windſor* grant by the name of *Prep, & ſociorum Colleg. regalis de Eaton &c.* leaving out *Collegium et beatæ Mariæ*; this grant is void.

Perk. Sect. 59. Co. ſuper Lit. 3. * Fitz. grant 67. Perk. Sect. 42.

Perk. Sect. 40.

3 H. 6 26. Perk. Sect. 38. 42.

Co. 6. 65. 10. 122. 11. 59. Dier 150. Co. 10. 124.

* 3 In reſpect of the grantee and the naming of him. And who may de a grantee &c. And how.

* Touching this part three things are requiſite. 1. That the grantee be a perſon capable. *i.* that he be a perſon in being at the time of the grant made and not diſabled by any legall impediment

Co. ſuper. Lit. 2. 3. Perk. Sect. 43. See in feoffment. cap. 9. Numb. 4.

ment to take by the grant. 2. That if the grant be by deed the grantee be ſufficiently named or at the leaſt ſet forth and diſtinguiſhed by ſome circumſtantiall matter, and that he be ſo named or deſcribed as that he may be capable by that name whereby he is ſet forth. 3. That he himſelfe and not a ſtranger doe take by the ſame grant. Note therefore that all naturall and politique or corporate bodies that are not diſabled by law may be grantees. And all perſons that may be grantors may be grantees: And ſome others that cannot grant or give yet may take or receive. And a grant made to one, two, three, or twenty ſuch perſons is good.

Co. 1. 101. Perk. Sect. 52. 54. Co. 2. 31. A grant of land or rent in poſſeſſion to the right heires of *I S*, *I S* being then living is void, for there is nor can be any ſuch perſon *in rerum natura*, for no man can be an heire to another that is living. But ſuch a grant to one in remainder is good if ſo be that *I S* die before the the particular eſtáte end and before the remainder happen. So if a grant be to him or her that ſhall be the firſt child of *I S*, and he have no child at the time of the grant, this is void. So if a grant be made to the wife or child of *I S* when there is none ſuch, it is void. As if a grant be to *I S*, and to his firſt borne ſonne, or to *I S* and her that ſhall be his wife, and he hath at the time of the grant neither wife nor ſonne; in theſe caſes the grant is void as to the wife and ſonne, and *I S* ſhall have all by the grant.

Co. ſuper Lit. 2. An alien may be a grantee; but if any thing be granted unto him whereof he is uncapable, as any eſtate of lands in fee ſimple, for life, or years, he cannot hold it, but the King will have it from him. — Alien. Prerogative.

Co. ſuper Lit. 2. Perk. Sect. 48. A perſon attainted of treaſon or felony before or after attainder may be a grantee, but he cannot hold the thing granted, for if the King or Lord will he may have it from him. So alſo perſons outlawed in perſonall actions may be grantees of lands, or goods but the King will have the profits of the lands & property of the goods. — Perſons attaint.

Perk. Sect. 43. Co. ſuper Lit. 2. A woman covert may be a grantee; but her husband may by his diſagreement a void the grant. And yet if he doe not avoid it in his life time the grant will be good: and he that will have the grant to be void muſt ſhew that the husband did diſagree to it. — Woman covert.

Perk. Sect. 4 Co. ſuper Lit. 2. An Infant may be a grantee, for this is preſumed to be for his advantage. And yet at his full age he may agree to it and perfect it or diſagree to it and avoid it without any cauſe ſhewed. — Infant.

Co. Idem. A man *de non ſane memorie* may be a grantee as well as any other man, and it ſeemes theſe grants cannot be afterwards avoided. But ſuch men may not be grantees of offices of truſt and ſuch like things. — Men *de non ſane memori.*

Co. Idem. A Baſtard, perſons deformed having humane ſhape, leapers, and ſuch like may be grantees of lands or goods &c. as other men may be. — Baſtard.

Co. Idem. An Hermaphrodite may be a grantee according to the moſt prevailing Sex. — Herrmaphrodite.

Clerk convict. Villaine.

A clerke convict, and a man impriſoned may be a grantee as well as any other. And ſo alſo may a villaine of the King or of a common perſon, but he cannot retaine the thing granted, for the King or Lord may have it from him if he will. But Monkes, Friers, and ſuch like perſons cannot be grantees, for they are utterly diſabled. Co. ſuper Lit. 3. Perk. Sect. 48. 51.

Miſnaming or not naming.

Regularly it is requiſite that the grantee be named by his names of Baptiſme and Sirname, and ſo it is moſt ſafe, and ſpeciall heed muſt be taken to the name of Baptiſme, for that a man cannot have two or more names of Baptiſme as he may of Sirnames. And yet in ſome caſes though the name be miſtaken the grant is good. [a] As if a grant be to *I S*, and *Em* his wife and her name is *Emelin*, [b] or a grant is made to *Afred Fitzjames* by the name of *Etheldred Fitzjames*; [c] or a grant be to *Robert* Earle of *Penbrooke* where his name is *Henry*; or to *George* Biſhop of *Norwich* where his name is *John*; [d] or a grant be to a Mayor and Communalty, or a Deane and Chapter, and Mayor or Deane is not named by his proper name; [e] or a grant be to *I S* wife of *W S* where ſhee is ſole; all theſe and ſuch like grants are good, for in this caſe the rule doth hold *utile per inutile non vitiatur*. [f] And if one be baptized by one name and after confirmed by another; yet a grant to him by his firſt is good. And ſo alſo ſome thinke of a grant to him by his ſecond name. *Sed Quere* of this. Alſo when a Baſtard hath gotten a name by reputation, a grant may be made to him by that name and it is good.

[a] Bro. Noſme. 9. [b] Bro. Confirmation. 30. [c] Co. 6. 65. 27 E. 3. 85. [d] Co. ſupu Lit. 3. [e] Dier 119 [f] Co. ſuper Lit. 3.

If a grant be made to *W.* at Stile by the name of *W.* at Gappe; this is a good grant notwithſtanding this miſtake. 9 E. 4. 43. Fitz. Grant. 23.

But where a grant doth intend to deſcribe the perſon of the grantee by his proper name and doth omit or miſtake his chriſtian name or ſirname; in this caſe for the moſt part the grant is void unleſſe there be ſome ſpeciall matter to help it as in the caſes before. Co. ſuper Lit. 3. Perk. Sect. 54. Bro. Grant. 65. Done 17. Dier 337. Perk. Sect. 55, 56. Bro. Don. 31 Grant. 172. Done 50. Fitz. Donei. Perk. Sect. 55. 52.

Incertainty.

And yet if the grant doe not intend to deſcribe the grantee by his known name, but by ſome other matter, there it may be good by a certaine deſcription of the perſon without either ſirname or name of Baptiſme. And therefore a grant to the wife of *I S*, or *primogenito filio*, or to the ſecond ſonne, or to the youngeſt ſonne, or *Seniori puero*, or *omnibus filiis*, or *filiabus* I S, or *omnibus liberis* I S, or *omnibus exitibus I S*, or to the right heires of *I S*, or to the next of bloud of *I S*; in theſe caſes grants made to theſe perſons in theſe words are good, for the perſon is certainly enough deſcribed. And if a leaſe be made to *I S* for life, the remainder to him that ſhall come firſt to Pauls ſuch a day, or to him that *I S* ſhall name in three daies; if in theſe caſes any one doe come to Pauls that day, or be named by *I S* within three daies and the particular eſtate doth ſo long continue; this is a good grant of the remainder. *Id certum eſt quod certum reddi poteſt.* But if a grant be made

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in theſe words, *viz.* To foure of the pariſhoners of Dale; or *Deo & eccleſiæ de D*; or to two of the ſonnes of *I S* and he hath many ſonnes; or to *I S*, or *W S* in the diſjunctive; theſe and ſuch like Grants as theſe are utterly void for incertainty. And if a gift or grant of goods be to the pariſhioners of Dale in theſe words; it ſeemes this is good; but if a grant or gift of land be made to them by theſe words, it ſeemes this is void. And ſo alſo it is of a grant of goods to the Churchwardens of a pariſh, this is held to be good, but otherwiſe it is of a grant of land to them. A baſtard is capable by that name whereby he is uſually called, and therefore a grant to him by that name is good. And a right heire, or one that ſhall be the firſt iſſue of *I S* that hath no child, is capable of a remainder by that name, but of land in poſſeſſion he is not capable by that name. And a baſtard as the reputed ſonne of *I S* may take by a grant to *I S* and his iſſue. A Biſhop may take by the name of a Biſhop without any other name. But if a grant be made to the pariſhioners or inhabitants of Dale, or *probis hominibus de* Dale, or to the commoners of ſuch a waſt, or to the Lord and his tenants bond and free; theſe are not good grants; for albeit theſe perſons are capable yet are they not capable by theſe names.

Doct. & Stud. 94. Co. l. 15. ſuper Lit. 231. New terms of the law. 251, 252. 5 E. 3. 17. Co. ſuper Lit. 21.

If there be two grantees and one of them doe take by the deed it is ſufficient, but if the grant be to one that is no party to the deed and not to the grantee himſelfe; in this caſe albeit the grantee and he to whom the grant is made be capable and never ſo well deſcribed by their names yet is the grant void, for no grant can be made but to him that is party to the deed except it be by way of remainder. And therefore if a man make a leaſe for terme of life, and after the leſſor grant to a ſtranger that the tenant for life ſhall have the land to him and his heires; this Grant is void. *Et ſic de ſimilibus.* And yet it ſeemes in ſome caſes if one of the grantees be party to the deed that another Grantee that is no party to the deed may take with him. And therefore the caſe was. *Robert* gave the reverſion of lands which *Agnes* his wife did hold for her life to *Stephan de la Moore, Habendum poſt mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejuſdem Roberti*; in this caſe it was adjudged that albeit *Joane* were not named before the *Habendum* yet that ſhe ſhould take in taile with her husband.

Touching this point theſe things are requiſite. 1. That the thing whereof the grant is made be grantable, and that both in reſpect of the nature of the thing it ſelfe, and alſo of his eſtate that doth grant it, for in ſome caſes albeit the thing for the quality of it be grantable yet in reſpect of the eſtate and property that the owner hath in it, it is not grantable. 2. That if it be by deed it be ſufficiently diſtinguiſhed and named.

4. In reſpect of matter touching the thing granted, charged &c.

Amongſt things that are grantable ſome are grantable *de novo* and

1. In reſpect of the nature of the thing granted. And what things are grantable over or chargeable. Or not.

and in their firſt creation, but not tranſmiſſible nor aſſignable afterwards. And ſome are grantable at firſt in their originall creation and aſſignable over afterwards from man to man *in infinitum.*

See Fine Numb. 6. part. 3.

All things that may be granted by fine and whereof a fine may be levied may be granted over from man to man.

1. In reſpect of the nature of the thing it ſelfe.

See in expoſition of the termes of Grants ſupra cap. 5. Numb. 15. Bro. Done 10.

All the things that are before obſerved to be grantable by or without deed are grantable over from man to man. And therefore all corporall and immovable things that lie in livery, as Manors, meſuages, cottages, lands, meadowes, paſtures, woods and the like are grantable in fee ſimple, for life, or years at firſt and aſſignable over againe at the pleaſure of the grantee. Alſo trees, and emblements are grantable. And a man may grant the veſture or herbage. *i.* the graſſe of his ground and not the ground it ſelfe. And a man that is ſeiſed in fee of a houſe may give or ſell the timber, ſtone &c. of the houſe, and the donee or grantee may take it after the death of the donor. Alſo all incorporeall things that lie in grant, as rents, ſervices and the like are grantable over in fee ſimple, for life, or years, and therefore rents or ſervices reſerved upon any eſtate and rents granted out of lands are grantable over *in infinitum.* And if a man have a rent reſerved on a particular eſtate he may grant over parcell of it. But a rent or Service ſuſpended cannot be granted. Neither can a man grant a rent iſſuing out of a rent. If a rent be granted to me I may grant it over to a ſtranger before I be ſeiſed of it; and this grant is void. But an Annuity it ſeemes is not grantable over after the firſt creation of it. And yet if an Annuity be granted to *I S* and his aſſignes *pro conſilio*; it ſeemes this Annuity is grantable over. Advowſons are grantable in fee ſimple, for life, or years, from man to man *in infinitum.* Alſo the preſentation to a Church before the Church is void is grantable; but when the Church is void that Turne is not grantable, for it is then in the nature of a thing in action. Alſo Rectories, and tithes, and portions of tithes, and penſions are grantable from man to man *in infinitum.*

Rents, Services.

Perk. Sect. 103. Bro. grant 3. 3 H. 6. 20. 9 H. 6. 12. Perk. Sect. 91. 87. 101. Fitz. grant 145. Co. ſuper Lit. 144.

Advowſons &c.

Stat. 32. H. 8 cap. 7. Perk. Sect. 90.

Reverſions and Remainders.

Reverſions and Remainders are grantable from man to man in fee ſimple, fee tail, for life or years. And if I have a tenant for life of three houſes; I may grant the reverſion of two of them. And if I have the reverſion of three houſes & four acres of land; I may grant the reverſion of two houſes & of two acres of land. And if tenant in taile be of an acre of land the remainder to his right heires, he may grant over this remainder by it ſelfe; and yet it is ſuch a thing as the tenant in taile himſelfe may barre by a common recovery. But if a grant be of land to *I S* for years the remainder to the right heires *I D*, & *I D* is living; this remainder is not grantable ſo long as *I D* doth live.

Perk. Sect. 73. 88. 87.

Common.

Commons, of paſture, of turbary, of fiſhing, of eſtovers, are grantable in fee, for life or years, from man to man *in infinitum.* * And yet if a common in groſſe and without number be granted to a man and his

Perk. Sect. 103. * Per 2. Judges againſt one Hil. 16 Jac. B. R.

his heires; it seemes this is not grantable over to another man. But if common for a certaine number of beasts be so granted, it seemes the law is otherwise, and that this is grantable over in case where the first grant is to the grantee only, and not the grantee and his assignes.

Perk. Sect. 101. Offices are grantable at first; but the great Judiciall offices of the kingdome, as the offices of the Lord Keeper, Chiefe Justices, or Chiefe Baron, or of other of the Justices or Barons, and such like are not grantable over to others, neither may they be executed by deputies. But the Sheriffes office albeit it be not grantable over yet may it be executed by deputy. * The reversion of an office is not grantable by a Subject as it is by the King, yet a Subject may grant an office *Habendum* after the death of the present officer; and this is good. † The inferior offices also that are offices of trust, especially if they concern the person of the grantor, howsoever they are grantable at first yet are they not grantable over by the officer to any other unlesse they be granted to them and their assignes, and of this sort are the offices of Steward, Bailife, Receiver, Sewer, Chamberlaine, Carver, and the like, neither may these be executed by deputy but where the grant is so.

Offices.

Prerogative.

* Per Lord Keeper & 2. Chiefe Just. M. 5 Car. in cancellaria.

† Co. super Lit. 233. Perk. Sect. 101.

22 E. 7. 25. 13 H. 7. 13. Licences, and authorities are grantable at first for the lives of the parties or for years. But the grantees of them cannot assigne them over. And therefore if power be given to me to make an award or livery of seisin; I may not grant over this power to another. And if licence be granted me to walke in another mans garden, or to goe through another mans ground; I may not give or grant this to another.

Licences, Authorities, &c.

Co. 4. 66. 5. 24. Dier 244. Co 10. 51. A bare possibility of an interest which is incertaine is not grantable. And therefore if one have a terme of years in land, and by his will devise it to *I S* for his life, and afterwards to me for the residue of the yeares; or devise it to *I S* if he live so long as the terme shall last, and if he die before the terme end the remainder to me; in these cases so long as *I S* doth live I cannot grant over this possibility. So if a lease be made to me and my wife for life, the remainder to the survivour of us; I may not grant this remainder over to another man. But such a possibility being coupled with some present interest is grantable over. And therefore if *A* have foure houses in execution upon a Statute, and by course of time it will endure thirteene years, and after two of the houses are evicted by Elegit for fifteen years; in this case he that hath this execution upon the Statute may assigne over his interest in these two houses, for after the execution by the Elegit is satisfied *A* shall have the two houses againe untill he be satisfied. The Lord cannot grant the wardship of the heire of his tenant whiles the tenant is living.

Possibilities.

Perk. Sect. 90.

1 E. 4. 10. Those things that are inseparably incident to others are not grantable

Incidents. grantable without the thing to which they are ſo incident and belonging. And therefore a Court Baron which is evermore incident to a Manor is not grantable without the Manor it ſelfe: common appendant to land is not grantable without the land it ſelf to which it doth belong: and common of eſtovers appendant to a houſe is not grantable without the houſe it ſelfe to which it doth belong. Perk. Sect. 104. 5 H. 7. 7.

Suſpended things. A rent, ſervice, or other thing whiles it is wholly in ſuſpenſe is not grantable. And therefore if the Lord diſſeiſe the tenant, or the tenant enfeoffe the Lord upon condition; the Lord cannot grant over the Seigniory during this ſuſpenſion. But if one have a rent in fee out of my land, and he purchaſe the ſame land for life or years; in this caſe it ſeemes the rent is grantable even whiles the eſtate of the land doth continue. So if the tenant make a leaſe for yeares or life of the tenancy to the Lord; in this caſe the Lord may grant the Seigniory notwithſtanding. And yet if the tenant make a leaſe to another man for life, and the Lord grant the Seigniory to this tenant for life in fee; in this caſe it ſeemes the grantee of the ſeigniory cannot grant it over becauſe it was never in *eſſe*. 16 H. 7. 4. Co. ſuper Lit. 314. Bro. Grant 173. Perk. Sect. 88, 89.

Franchiſes. Franchiſes, as views of Frank pledge, Perquiſites of Courts, Leets, Conuſance of Pleas, Faires, Markets, goods of felons, waifes, eſtrayes, Hundreds, Ferries, or Paſſages, Warrens, and the like are grantable over from man to man in fee, for life or years, *in infinitum*.

Things in action. Things in action, and things of that nature, as cauſes of ſuit, rights and titles of entry are not grantable over to ſtrangers but in ſpeciall caſes. And therefore if a man have diſſeiſed me of my land or taken away my goods; I may not grant over this land or theſe goods untill I have ſeiſin of them againe. Neither can I grant the Suit which the law doth give to me for my reliefe in the caſes to another man. So if I make a feoffment to another man on condition that if I doe ſuch a thing I ſhall have the land againe; in this caſe I may not before or after the time of performance of the condition grant over the condition to another. But all theſe things I may releaſe to the parties themſelves, for it is a maxime in law, that every right title, or intereſt in *preſenti* or in *futuro* by the joint act of all them that may claime any ſuch right, title or intereſt may be barred or extinguiſhed. And in ſome caſes a grantee of a reverſion may take advantage of a condition annexed to an eſtate for life or years. If a man owe me money on an obligation, or the like; I cannot grant this debt to another: but I may grant a letter of atturney to another man to ſue for it and receive it, or I may grant the writing it ſelfe to another, and he may cancell it or give it to the obligor. * A preſentation to a Church after the Church is become void is not grantable, for it is in the nature of a thing in action. † And if a man take my goods from me, or from another man in whoſe hands they are, or I buy goods of another man and ſuffer Co. 5. 24. 10. 48. Co. ſuper Lit. 214. Dier 244. Perk. Sect. 86, 87, 85. Bro. Done. 27, 24, 48. Co. 6, 50. See condition. Co. ſuper 232. Perk. Sect. 86. * Dier 283. † Perk. Sect. 92. Fitz. Done 3. 7.

ſuffer them in his poſſeſſion and a ſtranger taketh them from him; it ſeemes in theſe caſes I may give the goods to the treſpaſſor, becauſe the property of them is ſtill in me.

Perk. Sect. 99. Plow. 379. Truſts and confidences which are perſonall things for the moſt part are not grantable over to others. And hence it is alſo that offices of truſt & confidence are not grantable over but in ſome ſpeciall caſes where they are granted to a man and his aſſignes; or where they are granted to a man and his heires. And hence it is alſo that a Wardſhip by reaſon of a terme in ſocage, which by the law is given to the next of kin is not grantable over to any other perſon by the Gardian in Socage. Perſonall things.

Fitz. Grant 19. 76. Some things are ſo entire that they cannot be ſevered by grant. And therefore if a man hold three acres of land of me by twelve pence rent, and I grant the ſervices of the third acre; this is void, and he ſhall have all or none, for I cannot ſever the tenure. But if a man hold land of me by homage, fealty, eſcuage, and a certain rent; in this caſe I may grant the rent and keep the Seigniory. Entire things.

Perk. Sect. 94. A villaine is grantable for life, or years; and if the villaine during the eſtate of the grantee purchaſe land in fee, the grantee ſhall have it for ever as a Perquiſite albeit he have but an eſtate for life in the villaine it ſelfe. Villaines.

Dier 58. Plow. 142. 147. Perk. Sect. 91. Dier 305. Perk. Sect. 90. All chattells reall and perſonall regularly are grantable from man to man *in infinitum*, as leaſes for years be they preſent or future, wardſhips of tenants in Capite, or by Knights ſervice, trees, oxen, horſes, plate, houſhold ſtuffe, and the like. Alſo trees, graſſe and corne growing and ſtanding upon the ground, fruit upon the trees, wooll upon the ſheeps backe is grantable. Chattells reall and perſonall.

Co. 5. 24. Fitz. Barre 280. If a man ſell me ten load of wood in his wood to be taken by his aſſignment; or ſell me three acres of wood towards the north ſide of the wood; by this grant in theſe words I have ſuch an intereſt as is grantable over. If I make a leaſe by deed of a houſe to another, and therein it is agreed between us, that if the rent be not paid me by ſuch a time I ſhall enter into the houſe and take and ſell the goods there as mine own to pay the rent; it ſeems this is a good grant of the goods and that I may doe according to the agreement. And if one that doth hold land of me grant to me by deed indented that I ſhal diſtraine for my ſervice in all his land, this is a good grant. Diſtreſſe.

Fitz. Grant 6. Fitz. Done 11. A man may give or grant mony, as if *I* deliver one mony on condition that if he aſſure me of ſuch land he ſhall have it, otherwiſe that he ſhall redeliver it to me again, in this caſe if he make the aſſurance he ſhall have the mony, if not I may have an accompt for it. Money.

Bro. Done 34. Such things as are *feræ naturæ* as Conies, Hares, Deere, and ſuch like are not grantable at all. *Feræ naturæ.*

Perk. Sect. 90. A Parſon of a Church may grant his tithes for years, and yet they are not in him. Tithes.

A man may give or grant his deeds, *i.* the parchment, paper & wax Deeds.

to another at his pleaſure, and the grantee may keep or cancell them. And therefore if a man have an obligation he may give or grant it away and ſo ſever the debt and it. So tenant in fee ſimple may give or grant away the deeds of his land, and the executor in the firſt caſe, and the heire in the laſt caſe hath no remedy. But a tenant in tail of land cannot give or grant any of the deeds belonging to the land intailed no more then the land it ſelfe. One may give or grant apparell, and it is ſaid if one make apparell for another, and put it upon him to uſe & weare; this is a gift or grant of the apparel it ſelf.

Co. ſuper Lit. 232, Trin. 38 El. B.R. 25 H. 8. 5. 1 H. 7. Doves caſe.

Apparell.

1 H. 4. 31. Fitz. Barre 179.

Wooll. If one grant to another all the wooll of his ſheep for ſeven years; this is a good grant.

Perk. Sect. 90.

If one being a Parſon give to another all the wooll he ſhall have for tithe the next year; this is a good grant.

Fitz. Grant. 40.

Incertainty. If one grant to another his horſe or his cow in the disjunctive; this is a good grant not withſtanding this incertainty, and the donee ſhall have election and by that make the grant good.

Bro. Done 19.

2. In reſpect of the eſtate, property & poſſeſſion of the grantor. Any eſtate that a man hath in fee ſimple, fee taile, for life, or years in any lands &c. or any rent, or profit apprender out of the ſame is grantable from man to man *in infinitum*. And he that hath any ſuch eſtate of any lands may charge it with any rent or profit to be taken out of it as long as the eſtate of the land doth laſt. But an eſtate at will is not grantable over. And if an eſtate be made to a man and his heires without the word Aſſignes, yet he may aſſigne it at his pleaſure, for Aſſignes is included within Heires.

An *Intereſſe termini*. i. a leaſe for years to commence in *futuro* is grantable before the terme doth begin, whether it be a leaſe of the land it ſelfe or any rent or other profit out of it.

22 E. 4. 37. Perk. Sect. 91.

The intereſt or eſtate that a man hath by extent is aſſignable from man to man at pleaſure.

Co. 4. 64.

The reverſion upon an eſtate taile is grantable. And yet the tenant in taile in poſſeſſion by the ſuffering of a common recovery may barre him in reverſion of any fruit of it.

Co. 6. S. Geo. Curſons caſe Co. 1. Alton-woods caſe.

If an eſtate be made of land upon condition, as if *A* make a feoffment to *B* on condition that if *A* pay twenty pound he ſhall have the land againe: in this caſe *A* and *B* together may at any time before the performance of the condition joine together and grant this land, or charge it with any rent, &c. and this will be good, for it is a maxime in law, Fee ſimple land may be charged one way or other. And in this caſe *B* may grant over his eſtate alone, but it will be ſubject to the condition. And if *B* grant a rent out of the land to a ſtranger, and after the condition is performed and the feoffor enter; in this caſe he ſhall avoid the rent. But in this caſe *A* cannot grant, for he hath nothing but a poſſibility. If one enfeoffe divers to the uſe of his ſonne and heire upon condition and before the time of performance of the condition the father and ſonne joine to grant or charge the land, this is a good grant or charge.

Co. 1. 147. 10. 48, 49. Lit. chap. Confirmation.

Co. 1. 147.

If

Co.ſuper Lit.45. Co.10.48,49

If the tenant in taile and he that is next in remainder in fee joine in the grant of a rent charge in fee, and after the tenant in taile doth die without iſſue; in this caſe this is a good grant and charge againſt him in remainder. And if *A* doth bargaine and ſell land to *B* by indenture and before inrolment they doe joine to grant a rent charge to *C* by deed; in this caſe this is a good charge and grant whether there be any inrolment or not. And ſo if donor and donee in taile grant a rent charge out of the land, & then the donee die without iſſue; in this caſe the grant is good to bind the donor.

Conſuper Lit.182.

If land be granted to two men and to the heires of their two bodies begotten; in this caſe albeit they have ſeverall inheritances after their death, yet neither of them can grant away his eſtate after his life, for they are divided only in ſuppoſition of law.

Perk.Sect. 73.

One coparcener of a ſeigniory may grant his part to a ſtranger.

Perk.Sect. 103.

If two Jointenants be of a plow land, and one of them doth grant to a ſtranger common of paſture for beaſts without number to be taken in the ſame land; this is void.

Perk.Sect. 80. Perk.Sect. 65. Dier 12.33.

If two Jointenants be of a reverſion, & one of them grant the whol, this is void for a moity. If a man grant, or charge that which is none of his, and that wherein he hath no property it being in the grantee or a ſtranger; the grant is void. And therefore if a man grant a rent charge out of the Manor of Dale, or grant a reverſion of land, and in truth the grantor hath nothing in the Manor of Dale, or in the land; in this caſe the grant is void. And albeit the grantor doe afterward purchaſe the Manor, or the land, yet this will not make the grant good. But if the grant be by fine, or by indenture, there in ſome caſes it ſhall be good by way of eſtoppell. And in this caſe albeit the party recite that it is his owne yet this will not mend the caſes. And therefore if a man recite that he hath a rent of tenne pound a yeare, and then grant five pound a year parcell of it; in this caſe if he have no ſuch rent the grant is void.

Iointenants.

Eſtoppell.

Bro.Done 56.4.

A Shepherd, Bailif, or Parker cannot give or grant away the goods of his maſter without authority. And yet it ſeemes the ſervant of a Taverner or Mercer may give or grant his maſters Wine or Wares. And if a wife give or grant the goods of her husband; this is a good gift or grant untill the husband diſagree to it, and by his agreement it is made good for ever.

Servant.

Husband and Wife.

Plow.524. 525.

If a man have a leaſe for yeares of land, and make a leaſe for life of it, or charge it for longer time then the leaſe for yeares doth laſt; in this the grant is good for ſo long as the leaſe for yeares doth laſt and no longer. But if he make a leaſe for life and give livery of ſeiſin he doth forfeit his eſtate.

Co.ſuper Lit.214. Perk.Sect. 65.86.

Regularly a man cannot grant, or charge that which is not in his owne poſſeſſion albe it he have a right to it: And therefore if a man be diſſeiſed of his land, and before he hath entred into or recovered

covered the land he doth grant or give the land or his right to the land to a ſtranger, or grant a rent charge out of the land to a ſtranger; in theſe caſes the grants are not good. And yet ſuch grants by fine may be good by way of eſtopell. And by a releaſe alſo the right may be extinct. But if one that hath a reverſion upon an eſtate for life, and he grant a rent iſſuing out of this land; in this caſe the grant is good, and the charge ſhall faſten upon the land after the eſtate of the tenant for life is ended. And if a man grant common, or rent, notwithſtanding that a ſtranger take the rent or uſe the common at the time of the grant, yet this grant is good, for a man cannot be out of poſſeſſion of theſe things but at his pleaſure. † And if a leaſe for years be made to me, I may grant away my eſtate before my entry. And if the leaſe be to begin at a day to come; I may aſſigne over my intereſt before the day come, for in this caſe the intereſt is in me from the time of making of the leaſe. * Alſo I may give or ſell my goods that I have not in poſſeſſion, and therefore if a man take my goods out of mine or another mans poſſeſſion; I may afterward give or grant theſe goods to him or another man, and this grant or gift is good.

Eſtoppell.

Perk. Sect. 92. 98. Co. ſuper Lit. 46.

† Hil. 18 Jac. B. R. per. 2 Juſtices.

* Perk. Sect. 92, 93. Fitz. Done 3. Bro. Done 13. Dier 90. 30. Co. 4. 62, 63. Dier 305. 20 H. 6. 22. Perk. Sect. 59. Co. 11. 50.

Tenant for life. Trees.

A leſſor cannot give or grant the trees growing on the ground of his leſſee for life, or yeares without the licence of the leſſee, except they be firſt cut downe by the leſſee or ſome other, for then he may. And if there be leſſee for life, and the leſſor give the trees growing on the ground, and after the leſſee for life dieth; in this caſe the donee cannot take them, for that at the time of the gift a property of them was in the leſſee. But if a tenant in fee ſimple give or grant the houſes ſtanding, or trees growing on the ground he hath in his poſſeſſion; in this caſe the grantee or donee may take them after the death of the grantor, and that albeit they be not cut or taken downe before his death. And yet if the tenant in taile give or grant the trees growing upon his intailed land, and the donor die before the trees be cut; in this caſe the donee or grantee cannot cut them afterwards. Howbeit if ſuch a tenant in taile give or grant his emblements of corne growing on the ground; the donee may cut and take them after the death of the tenant in taile. And if the tenant in taile give or grant his trees, and die before they be cut, and afterwards before the iſſue in taile enter into the land the donee or grantee cut them and take them away, in this caſe the iſſue in taile can bring no action of treſpaſſe againſt the donee or grantee for the trees. But perhaps if the trees be not removed off the ground he may take them.

Tenant in taile.

Emblements.

Preſentation.

If two coparceners be of an advowſon, and the one doth preſent, and then he doth grant the next preſentation; this is a good grant, but by this grant doth paſſe the next he hath to grant, for his companion muſt have the next. So if one be ſeiſed in fee of an advowſon

Dier 35. 15 H. 7.

advowſon, and he hath a wife, and he grant the third preſentation; this is a good grant, but it ſhall be taken for the third he may grant, which is the fourth, for the wife is to have the third for her dower.

Perk. Sect. Dier 35. 350. Lit. Bro. Sect. 298. Perk. Sect. 102.

3. In reſpect of a former grant of the ſame thing.

If a man have granted a thing once he cannot afterwards grant it again. And therfore if a man give or grant me a horſe firſt by word of mouth, and after grant him to me by deed; this ſecond grant is void, and therefore if there be any fault in this grant in writing it is not materiall. And if a man grant to me common of paſture without number in his ground, and after make the like grant to another; this ſecond grant is void as to me, albeit it be good againſt the grantor. And if one grant the next preſentation to a Church after the death of the preſent Incumbent, and after grant the ſame to another; or make a leaſe of land to one for tenne years, and after make a leaſe of the ſame land to another for the ſame tenne years; or give a horſe to one and after give the ſame horſe to another; in all theſe caſes the ſecond grant is void. But if the firſt grant or gift be only of part of the thing granted afterwards, or of part of the time only, the ſecond grant will be good for the overplus. And therefore if one be ſeiſed of a Manor and demiſe ten acres of the demeſne to tenne years, and after demiſe the whole Manor to another for twenty years; this is a good grant for the overplus of the Manor beſides the tenne acres, preſently, and for the whole Manor for the laſt tenne years. So if the ſecond grant be to beginne after the firſt is determined; it is good. And if the ſecond be ſuch as may be ſatisfied and not impeach the former, both ſhall ſtand good. And therefore if one that hath an Advowſon grant the next Preſentation to one, and after he doth grant the next Preſentation to another, and doth not ſay [after the death of the Incumbent;] in this caſe the ſecond grant is good, and the grantee thereby ſhall have the ſecond avoidance after the death of the preſent Incumbent.

Co. 4. 122. Perk. Sect. 114. 116. Co. 10. 106, 107. 11. 47. *a*] Plo. 190. *b*] Co. ſuper Lit. 46. See alſo Co. 2. in Lanes caſe which doth ſeeme to warrant this opinion alſo. Dier the grant is good in a common perſons caſe Bro. Grant.

4. In reſpect of naming or deſcription of the thing granted. Miſnaming or Miſrecitall.

By the grant of an acre of land or of any other thing by the name whereby it is called the reverſion of that thing if the grantor have no more but a reverſion will paſſe and this miſtake will not hurt. But it is not ſo *è converſo*. [a] And yet ſome have ſaid, if one grant a thing in poſſeſſion by the name of the reverſion of the thing this is good to paſſe the poſſeſſion. *Quod non eſt lex*. [b] For if one make a leaſe for years and before the leſſee enter the leſſor grant the land by the name of the reverſion or the land; this grant is void. If one make a leaſe for life of the demeſnes of a Manor rendring rent, and after he doth grant the Manor by the name of the Manor; this is a good grant for the reverſion of the demeſnes as well as for the reſidue of the Manor. But if one grant common by the name of the reverſion of the common, it ſeemes this is not good. And yet if one have common and grant it for life, and during that

eſtate he doth grant the common by the name of *totam illam Communiam ſuam &c.* ſome doe hold this grant to be good.

Any thing may be granted by the name whereby it is and hath been uſually called of latter times within nine or tenne years or thereabouts albeit it be an improper name, and not the ancient name of the thing but a name newly gotten. And ſo a Manor may paſſe by the name of a meſuage or farme, or a farme or Manor by the name of a meſuage if it be ſo uſually called and reputed. So the great houſes in *London* called *Exceter* and *Dorſet* houſes may be granted by thoſe names. And if a man grant that which in deed is a paſture ground by the name of a wood; Or grant that which in deed is a wood by the name of a paſture ground, and the things are called by thoſe names; theſe are good grants of thoſe things. And if one grant by the name of a great field that which in deed is but a little cloſe but it is uſually called by the name of a great field: this is a good grant of this thing. So if one grant by the name of a plow land that which in truth is but an acre of land, or grant by the name of a Manor that which is but a plow land; theſe grants are good. And ſo as it ſeemes it is *è converſo.* But if a man grant a houſe, or a meſuage; by this grant an acre of land will not paſſe.

Co.6.65. 45 E.3.6. Bro.grant.7. Perk.Sect. 116. 14 H.8.1. 27 H.6.2.

By the grant of ſervices, a rent reſerved upon an eſtate taile will paſſe.

Co.ſuper Lit.150. Mic.7 Jac. Curia.B.R.

If a man make a leaſe of one houſe to another for years, and the leſſee divide it and make two houſes of it, and after the leſſor doth grant the reverſion of it by the name of one houſe; this is a good grant to paſſe it. And if one leaſe three houſes to three ſeverall men at ſeverall times, and they divide them into twenty nine tenements and houſholds in them all; and the firſt leſſor doth grant them by the name of three meſuages: this is a good grant to paſſe them all. But if he grant by the name of fifteene meſuages or tenements only: it ſeemes this is good for no more but for fifteene of the ſubdivided tenements.

If one recite that he hath a rent charge iſſuing out of blacke acre and white acre, and then grant the ſame rent, and in truth it doth iſſue out of blacke acre only: or if he doe recite that it doth iſſue out of one acre when in truth it doth iſſue out of both: in both theſe caſes the grant is good notwithſtanding theſe miſtakes.

Perk.Sect. 72.

If one be Patron of the Church of *S. Peter* and *Paul* in *D*, and he grant the next Preſentation of the Church of *S. Peter*, or of the Church of *S. Paul*: theſe are void grants to paſſe the Preſentation.

Bro.Grant. 12. * Perk.Sect. 79.

* If one grant a rent out of white acre by the name of a rent out of blacke acre, this grant is void as to charge white acre.

Per Ch. Juſtice Hurton & Yelverton Co. B. Mic.3. Car.in the caſe of Edward Crew.

If one have a Manor called *Steeple Lavington*, and he grant it by the name of weſt *Lavington* alias *Steeple Lavington* by the [*alias*] eſpecially

especially if the grant say [lying in *Lavington*] and the Manor of *Steeple Lavington* doth lie in that parish, and the grantor hath no other land there.

Mic. 2 Jac. in Brownes case agreed. If one grant all his lands which he hath in *D* in this manner, [All my lands in *D* which I had of the grant of *I S*;] this is a good grant of all his lands in *D* albeit he had them not of the grant of *I S* but of the grant of another. But if the words be [all my lands which I had by the grant of *I S* in *D*;] in this case the grant is not good to cary any other lands in *D* but such as he had of the grant of *I S*. So if one grant in this manner [all my Manor of Sale in Dale which I had by descent] and in truth he had it not by descent but by purchase; this is a good grant of the Manor. So if one grant all his lands in Dale, and say no more; this is a good grant to passe all his lands there. But if one grant in this manner [all my lands in Dale which I had by descent from my father,] and in truth I had them not by descent but by purchase, this grant is void and will not passe those lands. So if I grant in this manner [all my lands that I had by the attainder of *I S*] and in truth I had no land by that meanes: this grant is void. And if I grant after this manner [all my lands in *B* in the tenure of *D* which I had of the gift of *I S*] and in truth it doth lie in *B* and is in the tenure of *D* but it was not purchased of *I S*; this is a good grant to passe the land.

Plow. 169. 395. And so was the opinion of Ch. Justice Popham 2 Jac. B. R.

Dier 87.

Mic. 2 Jac. Adjudge Brownes case.

Dier 299. Co. 3. 10. If a parish lie in two Counties, *viz.* *Berk.* and *Wilts*, and one grant in this manner [all his close called Callis in the parish of Hurst in the county of *Berk.*] and in truth the close doth lie in the county of *Wilts*; this is a good grant to passe the close. But if one grant in this manner [All his houses in the parish of *S. Buttolphes extra Algate* late in the tenure of *R*] where in truth he hath no houses there, but he hath some houses in *S. Buttolphes extra Alderſgate*; this is a void grant. And yet if the grant be in this manner, [All that my house in the occupation of *I S* in *S. Andrews* parish] whereas in truth it is in the parish of *K.* but in the occupation of *I S*; it seemes this grant is good to passe the house. But if it be thus [All that my house in *S. Andrews* parish in *Holborne* in the occupation of *I S*] and in truth it is in another parish but in his occupation: this grant is not good to passe the house.

Hil. 2 Jac. B. R. per Tanfield. If one grant in this manner [my Manor of Dale which appeareth by office found to be of the value of tenne pound *per Annum*] and in truth in the office it is found at twenty pound *per Annum*; this grant is good notwithstanding this misprision.

Pasc. 7 Jac. B. R. Co. 2. 32. If one grant in this manner [all my Manor of *W* late parcell of the possession of the Abbot of *S* and late in the possession of *K*] and in truth it was never in the possession of *K*, this grant is good notwithstanding. But if the grant be thus [*omnia illa terras &c.*

in tenura I S *jacen. in* W *nuper prioratui de* S *ſpectan.*] and in truth the land doth lie in *S* and not in *W*; this is no good grant to paſſe the lands in *S*. And if the lands doe lie in *W* but are in the tenure of *I D* and not in the tenure of *I S*; the grant is void to paſſe the lands in the occupation of *I S*.

If one purchaſe land of *I S* in *T* and have no other land there, and he grant his land in *T* late the land of *R S*, or late the land of *S* and miſtake or omit the chriſtian name; this grant is good notwithſtanding this miſtake. And ſo alſo it is where there is a blanke left for the chriſtian name. And if in this caſe he grant all his land in *T* and ſay no more, this is a good grant to paſſe the land. And if one grant [all his lands in *D* called *N* which were the lands of *I S*,] this is a good grant to paſſe the lands called *N* though they were never the lands of *I S*. But if the grant be [of all his lands in *D* which were the lands of *I S*] by this none but thoſe lands that were the lands of *I S* will paſſe. Dier 376. Bro. Grant 92.

If one grant in this manner [all my meadow in *D* containing tenne acres] whereas in truth his meadow there doth containe twenty acres, it ſeemes this is a good grant for the whole twenty acres. So if one grant thus [All thoſe forty ſeven acres of land by the Sleight whereof fifteen lie in *D*, twenty in *E* and twenty five in *F*] and in truth all of them doe lie in *F* and none of them in *D* or *E*: this is a good grant to cary the whole forty ſeven acres. Dier 80.

If one grant twenty load of wood and ſay in his grant [of which twenty load of wood he had ſixteene load by the grant of his father *I S*] and in truth *I S* did not grant any wood to him at all, or did not grant unto him ſixteene load only: this is a good grant of the twenty load of wood notwithſtanding this falſe recitall. Bro. Grant 69.

If one grant his Manor of *D* and doth not ſay in what towne or townes it doth lie, this is a good grant. But it is beſt to ſay in what townes the Manor doth lie, for if it lie in divers places (as it may) and any of the places into which it goeth be omitted and the reſt are ſet downe; no part of the Manor lying in the towne that is not expreſſed will paſſe. Bro. Grant 53. 7 H. 4. 41.

If one grant a Manor and that which in truth is but one Manor by the name of the Manor of *A* and *B*; this is a good grant of the Manor. And ſo alſo it is if it be two Manors, as if a man be ſeiſed of the Manors of *Ryton* and *Condor* in the county of *Salop*, and he grant in this manner [*totum illud Manerium de Ryton & Condor cum pertinen. in Com. Salopiæ*;] this is a good grant of both the Manors. Otherwiſe it is in caſe of the King. Co. 1. 46. Prerogative.

If one have a farme of land, meadow, &c. by leaſe called *Hodges* lying within the pariſhes of *S. Stephen* and *S. Peter* in *S. Albons*, and he reciting the ſaid leaſe grant to *C* his terme and intereſt in the houſe, lands, &c. called *Hodges* in the pariſh of *S. Peter* and Curia. Co. B. Paſc. 9 Jac. Inter Plat. & Sleepe. Bro. Grant 53.

and *S. Albons*; this grant is good only for ſo much as doth lie in the pariſh of *S. Peter* and not for that which doth lie in *S. Stephens*. But if he grant the farme and doth not ſay in what pariſh it doth lie; this is a good grant of the whole farme. As in the caſe before of a Manor that doth lie in divers pariſhes. And if in the caſe here the farme lie within the pariſh of *S. Peter* only; the grant is good for the whole farme. If one recite that whereas he hath ſuch lands by forfeiture, or whereas ſuch a one hath an eſtate of his land, or whereas the grantee hath paid him tenne pound or done him ſuch ſervice, or the like, and theſe things are not true, and afterwards he doth grant the land by apt words; this miſtake in theſe caſes will not hurt the grant. But otherwiſe it is in caſe of the King in ſome of theſe caſes. Prerogative.

Co. 11. 50. If one have a Manor in which he hath Parkes and Fiſhponds, and he grant the Manor for life except the game and fiſh, and after grant the reverſion of the Manor; this is a good grant of the game and fiſh alſo.

Co. ſuper Lit. 5. If a grant be of [*Centum libratas terræ*, or 50 *libratas terræ*, or of *Centum ſolidat' terre*] it ſeemes theſe are good grants, and that hereby doth paſſe land of that value, and ſo of more or leſſe.

Co. ſuper Lit. 4. If a grant be of an acre of land covered with water, this is a good grant.

Dier 84. 34 E. 3. If a grant be of a certaine portion of land or tithes, or of the fourth part of land or tithes, and there be a ſufficient certainty in the deſcription of it, this grant is good. And therefore if the grant be of the fourth part of the tithes, and of the offerings of the Church of *S. Peter*, this is a good grant.

Bro. Grant. 101, 121. If one ſeiſed of an Advowſon in fee grant to *I S* that as oft as the Church is void he ſhall name the Clarke to the grantor, and he ſhall preſent him to the Ordinary; this is a good grant of the Advowſon.

Dier 46. Plow. in Hil. & Granges caſe. A reverſion may be granted by the name of a remainder, or a remainder by the name of a reverſion, and ſuch a grant is good. As if one grant land to *I S*, the reverſion to *I D*: this is a good grant of the remainder.

Fitz. Grant. 63. If one make a leaſe of land to husband and wife for their lives, and after grant the reverſion of this by the name of the reverſion of the land which the wife doth hold for life: this grant is void. So if one grant to two for life, and after grant the reverſion of one of them; this is void.

21 Aſſ. pl. 23 A Fulling or griſt mill may be granted by the name of a mill only.

27 H. 6. 2. Plow. 164. Bro. Leaſe 55. If one grant in this manner [All that his meſuage &c. And all the lands, meadowes and paſtures thereunto belonging:) this is a good grant and certaine enough to paſſe all the lands, meadowes and paſtures uſually occupied therewith. Incertainty.

If

If the Lord grant his Manor by the name of [his Manor with the reverſion of all his tenants :] or by the name of [the reverſion of all his tenants bond and free which hold for life or years] and doe not name them by their particular names; theſe grants are good in theſe caſes and certaine enough. Fitz. Grant 68. Perk. Sect. 68.

If one grant land, and ſay not in what pariſh or county or village it doth lie; yet if there be any other matter to deſcribe it; it ſeems the grant is good enough, and it may be averred where it lieth. But if there be no circumſtantiall matter in the grant to denote and decipher out where it doth lie; it ſeemes the grant is void for incertainty. And therefore if one grant his Manor of Dale; or his lands in the occupation of *I S*; or his lands that deſcended to *I S*; or his lands that did belong to the priory of *S*, or the like; theſe are good grants and certaine enough. *Id certum eſt quod certum reddi poteſt.* Bro. Grant 53. Co. 9. 47.

If there be tenant for life of three houſes and foure acres of land, and he in reverſion grant the reverſion of two houſes and of two acres of this land; this is a good grant and hath ſufficient certainty in it. Perk. Sect. 73.

If a grant be incertain altogether and have not ſufficient certainty in it, & cannot be made certain by ſome mater *ex poſt facto*, it is void. And therefore if there be Lord and tenant of three acres of land by fealty and twelve pence rent, and the Lord grant [the ſervices of the third acre] to a ſtranger; this grant is meerly void. So if husband and wife hold an acre of land jointly of *I S* for their lives and *I S* grant the reverſion of the acre of land which the husband alone doth hold for his life; this grant is void. So if there be Lord and three Jointenants, and the Lord grant the ſervices of one of them to a ſtranger; this grant is void. So if one have twenty tenants that doe pay him twelve pence a peece rent, and he grant five ſhillings yearly out of theſe rents, and doth not ſay of which tenants, this grant is void for incertainty. So if conuſance of pleas be granted and it is not ſaid before whom; this is utterly void. So if one have two tenants, and doth grant the reverſion of one of them, and doth not ſay which; this is void for incertainty. So if one grant eſtovers to another, and ſay not what nor how; this is void. So if one grant me ſo many of his trees, or of his horſes as may be reaſonably ſpared; this grant is void. And yet if one grant me ſo many of his trees as *I S* ſhall thinke fit; it ſeemes this grant is good. And if one grant me one hundred load of wood to be taken by the aſſignement of the grantor, or to be taken by the aſſignment of *I S*; theſe are good grants. So if one grant me three acres of wood toward the North ſide of the wood; this is a good grant and certaine enough. Perk. Sect. 68, 69. 9 H. 6. 12. 44 E. 3. 17. Bro. Grant 52. Dier 91. Co. 5. 24.

If one grant to one of the children of *I S* and *I S* hath more then Bro. Done 31.

then one, and he doth not deſcribe which he doth intend; this grant is void for incertainty.

9 E.4.36. Perk.Sect. 74. If one grant to me a rent or a robe; twenty ſhillings or forty ſhillings; or common of paſture or rent; in the disjunctive which is at firſt very incertaine; yet this grant may become good, for if I make my election, or he pay the rent, or performe the grant in either part; the grant is now become good. So if one be ſeiſed of two acres of land, and he doth leaſe them for life, the remainder of one of them, and doth not ſay of which to *I S*; in this caſe if *I S* make his election which acre he will have, the grant of the remainder to him will be good. So it is when a man hath ſix horſes in his ſtable, and he doth grant me one of his horſes but doth not ſay which of them; in this caſe I may chooſe which I will have, and in theſe caſes when I have made my election and not before the grant is good. And if in theſe caſes the grantee doe not make his election during his life it ſeemes the grant will never be good. If one be ſeiſed of land and leaſe it for yeares rendring tenne ſhillings rent, and after he doth grant a rent of tenne ſhillings out of this land to a ſtranger; in this caſe albeit there be ſome incertainty in the grant yet this is a good grant of a rent of tenne ſhillings, but it ſhall be taken a grant of a new and not of the old rent, and therefore ſhall not take effect untill the particular eſtate be ended.

Perk.Sect. 76.

Bro.Grant. 77.

See more to this point in *Deeds* and their *Expoſition chap.* 5. *Numb.* 15. and *Fine chap.* 2. *Numb.* 7.

5. In reſpect of matter in ſome other parts of the Grant.

In ſome caſes albeit there be in a Grant a good grantor, and a good grantee, and a thing granted, and all theſe are duly and certainly deſcribed, yet the grant may be void for ſome fault in ſome other thing touching the grant: as, 1. In the commencement of the eſtate, For if a man be poſſeſſed of a terme of yeares, albeit it be one hundred yeares or upwards, and grant to another all the reſidue of this terme of years that ſhall be to come at the time of his death; this grant is void for incertainty. And yet if a man poſſeſſed of ſuch a terme in land, grant the land to another To have and to hold to him after the death of the grantor for fifty yeares, or for two hundred years; theſe are good grants, and in the firſt caſe the grantee ſhall have fifty yeares if there be ſo many to come of the terme of one hundred years at the death of the grantor, and in the laſt caſe the grantee ſhall have the land for the whole one hundred years or ſo many of them as are to come at the death of the grantor. So if one grant any thing that doth lie in livery or in grant, and that is in *eſſe* at the time of the grant in fee ſimple, fee taile, or for life, and the eſtate is to begin at a day to come: this for the moſt is void: howbeit in ſome caſes the livery of ſeiſin will helpe it. But a leaſe for years to begin in *futuro* is good enough. And if a leaſe be made to one for yeares, or for yeares determinable upon lives, and

1. In the commencement of the eſtate:

Bro.Grant. 154. Co.1.155. Plow.520.

Dier 58. Co.5.1.

Paſc.7 Jac. Dennis caſe.

Incertainty.

and after a leaſe is made to another of the ſame thing To have & to holdfrom the end of the former leaſe,this is a good leaſe & the commencement certaine enough. So if a leaſe be made of land to one for life, and after the reverſion thereof is granted to another for life *cum poſt mortem vel alio modo vacare contigerit*; this is good. So if a leaſe be made to one for twenty years if he live ſo long, and after a leaſe is made to another *Habendum* after the end of the term granted to the leſſee, for twenty yeares to be accompted from the date of the deed laſt made,this is a good grant for 20.years after the firſt leaſe ended, and the words [to be accompted &c.] ſhall be rejected. And if one grant a rent to me, *Habendum* from the time of my full age for my life, and I am of full age at the time of the grant, this grant is good for my life. If a woman ſole have a leaſe for years and take a husband, and then he in reverſion grant the land to another *Habendum* after the terme granted to the husband &c. where in truth it was never granted to the husband but by an act of law,*viz.* the mariage, yet this is a good leaſe. 2. In the limitation of the eſtate. For if a grant be to two *& heredibus*, without *Suis*, this is void for incertainty. And yet a grant to one *& heredibus*, is good. And if a man grant two acres To have and to hold the one in fee ſimple & the other in fee taile, or the one in fee ſimple and the other for life, and doth not ſet downe which in fee ſimple &c. in certaine, yet this grant is good, and the grantee hath the election. And yet if one grant two acres to two men *Habendum* the one to the one and the other to the other, and ſay not which either of them ſhall have, this is void for incertainty. And if one have a reverſion of land after a leaſe for yeares, and grant the land *Habendum* the reverſion, or grant the reverſion *Habendum* the land, this is good.

Craddocks caſe. Paſc. 7 Jac. Co.B.

Co.9.

Plow.192. Co.6.36.

22 H.6.15. Plow.28.

Perk.Sect. 75.77. Plow.152.

Co.10, 107. Plow.147.

2. In the limitation of the eſtate. Or in the *Habendum* of the Grant.

Incertainty.

In ſome caſes a grant or gift may be void at leaſt to ſome perſons and purpoſes when there are none of the defects aforeſaid in it, as when it is made upon a corrupt contract, or to the end to defraud creditors of their debts, or purchaſors of their lands bought, or the like,whereof ſee before in *Deed chap.* 4. *Numb.* 5.

6. In reſpect of the end or ground of the Grant.

And in ſome caſes albeit there be no other fault in the grant, yet it may become void for want of ſome other matter that ought to be done,as inrolment, livery of ſeiſin, atturnement, &c. for where theſe things are requiſite the grant is not good untill it be had, neither for that thing which will not paſſe without that ceremony nor yet for that which otherwiſe would paſſe by the deed. And therefore if a feoffment be made of a Manor to which an Advowſon is appendant, and no livery is made ſo that the Manor doth not paſſe; the Advowſon will not paſſe neither. Where a grant may be void by the refuſall or waiver of the grantee, See before in *Deed Num.6. chap.* 4.

21 H.7.5. Co.ſuper Lit.

7. In reſpect of omiſſion of ſome ceremony &c.

If

7H.6.43. 21 H.7.23. Perk. Sect. 69. Bro. Grant 175. Kelw. 88.

If one make a feoffement with warranty, and after the feoffee doth grant to the feoffor that neither he nor his heires ſhall vouch the warrantor or his heirs upon the warranty; this is a good diſcharge of the benefit of voucher, and doth bar the feoffee of it. And yet he may bring a *Warrantia Cartæ* ſtill. So if one grant to mee a rent-charge, and afterwards I grant to him that he ſhall not be ſued for this rent; this is a good grant to bar me of bringing an annuity for the rent. And yet I may diſtrain for the rent ſtill. And ſo *è converſo* if I grant to the grantor he ſhall not be diſtrained for the rent, by this I am barred of a diſtreſſe, but not of bringing an annuity for the rent. So if the Lord doth grant to his tenant holding by knights ſervice, that his heirs ſhall not be in ward &c. or a man doth grant to his debtor that he will not ſue him for the debt at all, or until ſuch a time; or one grant to his leſſee for life or years that he ſhall not be impeached for waſt; all theſe are good diſcharges, and may be pleaded by way of bar to avoid circuity of action.

5. What ſhall bee ſaid a good grant in the nature of a releaſe or diſcharge. Or not.

And now becauſe Atturnment as hath been ſhewed is neceſſary in ſome caſes to the perfection of ſome conveyances & grants of things lie in grant and not in livery, we muſt therefore here ere wee can goe further, as a neceſſary appendix to Grant, adde the learning of Atturnment which followeth next in order.

CHAP. XIII.

An Atturnment.

Co. ſuper Litt. 309. Terms of the Law. Plow. 25. Litt. Sect. 551.

AN Atturnment is the agreement of the tenant to the grant of the Seigniory, or of a rent, or the agreement of the donee in tail, or tenant for life, or years, to a grant of a reverſion or of a remainder made to another. As where the Lord, or one that hath a rent out of land doth grant over his Seigniory, or his rent to another, or one that hath a reverſion or a remainder after an eſtate for life or years doth ſell or give the ſame away to another; in theſe caſes the tenant of the land muſt have notice of this ſale or gift, and of the alteration of the party to whom he muſt attend in his ſervices, and he muſt give his conſent to the ſame gift or grant, or elſe generally the ſame is not good. And this yeelding of conſent is called an Atturnment. And it is either actuall, or verball, or actuall and verball both.

1. *Quid.*

2. *Quotuplex.*

That which is actuall, is either implied and in Law, or expreſſed and in Fait. Of all which there are divers examples hereafter following.

The

3. The effect of it.

The end, effect or fruit of this agreement is to perfect a grant and to make a good conveyance of an eſtate, for where this is needfull no rent nor reverſion will paſſe without it, neither can the grantee of the Seigniory, rent or reverſion bring any action of waſt for waſt done in the land, nor diſtraine for any rent or ſervice upon the land before this is done. But this is but a bare aſſent and therefore it ſhall not nor will enure or worke to paſſe any intereſt, to make a bad grant good, to enfranchiſe a villaine, nor to give a man a tenancy by diſſeiſin, intruſion, or abatement, neither ſhall it worke by way of eſtoppell. And therefore if a man gaine a rent iſſuing out of land by coherſion of diſtreſſe or otherwiſe, and the tenant of the land atturne to him; this will not amend his eſtate. But otherwiſe a grant and the atturnement of the tenant doe as effectually paſſe the freehold and inheritance of the reverſion of land as a feoffment and livery of ſeiſin of land doth paſſe the poſſeſſion of land.

Lit. Sect. 551. Co. ſuper Lit. 302. Lit. Bro. Sect. 267. 129. 379. 39 H. 6. 24. Co. ſuper Lit. 323. 315. Lit. Sect. 608.

4. Where and in what caſes the atturnment of the tenant is neceſſary. Or not. And how. And to what intents.

In moſt caſes where the grantee hath meanes to compell the tenant to atturne there the atturnement of the tenant is at leaſt to ſome purpoſes needfull, for howſoever it be true that if a ſeigniory, rent, ſervices, reverſion, or remainder be granted by fine, in this caſe the rent, ſeigniory, &c. doth paſſe, ſo as the grantee may enter for a forfeiture upon the alienation of the tenant being tenant for life, years, by ſtatute, or elegit, or upon an eſcheate of the tenant, or ſeiſe a ward or heriot if it happen before any atturnment be made: And if the reverſion of a leaſe for years be granted by fine, and the leſſee be ouſted and the leſſor diſſeiſed, the conuſee may have an aſſiſe: and therefore as to all theſe purpoſes the atturnment of the tenant is not needfull. But the grantee, his heire, or aſſignee, cannot diſtraine the tenant for rent, or bring any action that doth lie in privity between him and the tenant, as waſt upon a waſt done by the tenant, writ of entry *ad communem legem*, or *in caſu proviſo*, or *in conſimili caſu* upon the alienation of the tenant, eſcheate upon the dying of the tenant without heirs, or ward upon the death of the tenant his heire within age, or writ of cuſtomes and ſervices, untill he have the atturnement of the tenant: and therfore as to all theſe purpoſes the atturnement of the tenant is neceſſary. And hence it is that the conuſee of a fine hath meanes appointed him by the law to compell the tenant to atturne, for in caſe where the Lord doth grant his ſeigniory to another and the tenant will not atturn, the conuſee before the fine be ingroſſed may have a writ called a *Per que ſervitia* and thereby compell him to atturne. And in caſe where a man doth grant a rent to another and the tenant of the land out of which the rent doth iſſue will not atturne, the conuſee of the rent may have a writ called a *Quem redditum reddit* and thereby compell him to atturne. And in caſe where a man doth grant a reverſion or a remainder of his tenant for life to another and

Lit. Sect. 579, 580, 581. Co. 6. 68. Co. ſuper Lit. 309. 314. 320.

Per que ſervitia.

Old. N. B. 170. Co. ſuper Lit. 252.

Quem redditum reddit.

I dem.

and the tenant will not attorne, the conuſee of the reverſion or remainder may have a writ called a *Quid Juris clamat* and thereby compell the tenant for life to atturne. * And if the conuſee of the fine die in theſe caſes before he have the atturnment of the tenant, his heire albeit he come to the thing deſcended by act of law, yet ſhall be in no better caſe then his aunceſtor was. And if the conuſee of a fine by which he hath a reverſion granted to him before he hath gotten the atturnment of the tenant bargaine and ſell the reverſion by deed indented and inrolled; the bargainee ſhall be in no better caſe then the bargainor was. And if a reverſion be granted by fine, and the conuſee before atturnement enter and make a feoffment, and the leſſee reenter; in this caſe the feoffee cannot diſtraine for the rent. And yet if there be Lord, meſne and tenant, and the meſne grant the ſervices of his tenant by fine to another in fee, and after the grantee die without heire, and by this meanes the ſervices of the meſne eſcheate; in this caſe the Lord may diſtraine for them without any atturnement of the tenant.

Idem. Co. ſuper Lit. 310. * Co. ſuper Lit. 321.

Quid Iuris clamat.

Co. 6. 68. Lit. Sect. 584. 583.

In theſe following caſes atturnement in law or in deed is abſolutely and to all intents neceſſary, *viz.* [a] Where one doth make a leaſe for life, or years to one, and after doth grant the reverſion or remainder after the ſame leaſe ended to another by deed in fee ſimple, fee taile, for life, or years; in this caſe the leſſee for life, or yeares muſt atturne. [b] So where the Lord doth grant his ſeigniory or the ſervices of his tenant by deed in fee ſimple, or otherwiſe in fee taile, for life, or years to a ſtranger; in this caſe the tenant muſt atturne. [c] So where the Lord of a Manor doth make a feoffment of his Manor; in this caſe the ſervices of the tenants will not paſſe without their atturnement. [d] So if another man have a rent ſervice, rent charge, or rent ſeck, iſſuing out of my land, and he doth grant this rent to a ſtranger; in this caſe I muſt atturn to this grant to the ſtranger. And if in theſe caſes the tenant doe not atturn the grant of the reverſion &c. is meerly void.

[a] Co. 2. 66. Lit. Sect. 551. 567. 571. Co. ſuper Lit. 316.
[b] Lit. Sect. 551. Co. ſuper Lit. 315. Perk. Sect. 636.
[c] Co. 6 68. Doct. & Stud. 35. Lit. Sect. 553.
[d] Co. ſuper Lit. 312. Lit. Sect. 572.

Co. ſuper Lit. 315.

If a reverſion bee granted after an eſtate of a tenant by Statute Merchant, Staple, or Elegit, or after an eſtate that any one hath untill debts be paid, or the like; in theſe caſes theſe tenants muſt atturn, or this grant will not be good.

Co. 2. 35. Lit. Bro. Sect. 298. Dier. 307. Co. ſuper Lit. 312. Lit. Bro. Sect. 151. 379. Bro. Attur. 59. Dier 26. Lit. Bro. 349.

If one make a leaſe for years of land rendring rent, and after hee doth grant the reverſion to another for years, to begin after the death of the grantor; in this caſe it is needfull that the leſſee for years in poſſeſſion doe atturn to make this grant good. But if one make a leaſe of his land to one for tenne years, and after make a leaſe of it to another, To have and to hold from the end of the ſaid terme of tenne years for the terme of twenty years, in this caſe it ſeemes it is not needfull that the firſt leſſee doe atturne but that the grant is good enough without it. If one make a leaſe to another

for

for twenty years, and he make a leaſe over to a third for ten years rendring a rent, and then doth grant the reverſion to a ſtranger; in this caſe it is needfull that the leſſee for tenne years doe atturne: but if the leaſe for tenne years be made without any reſervation of rent *contra*. For it is a rule, That where there is no tenure, attendancy, remainder, rent, or ſervice to be paid or done there atturnment is not neceſſary. And hence it is, that where one doth grant common of paſture appendant or appurtenant, or eſtovers out of land, that there needes no atturnment of the tenant to make this grant good. And if a rent or common be granted to one for life, and after the reverſion of it be granted to another; that in this caſe there need no atturnment to make this ſecond grant good. * And if one make a leaſe to one for tenne years, and then make a leaſe to another for twenty years; in this caſe the ſecond leaſe is good for the ten years to come after the firſt ten years ended, without any atturnment of the firſt leſſee.

* And ſo it was agreed in M. 37. 38 Eliz. B.R.

If a Lord exchange the ſervices of his tenant with another for land; in this caſe the atturnment of the tenant by whom the ſervice is to be done is neceſſary to perfect this Exchange. Perk. Sect. 249. 259.

If there be Lord and tenant in fee ſimple, and the tenant doth make a leaſe to another man of the tenancy for life, and the Lord doth grant the Seigniory to the tenant for life in fee; in this caſe the tenant in reverſion muſt atturne to the tenant for life upon this grant of the reverſion, or the grant is not good. Lit. Sect. 562.

If I be ſeiſed of a reverſion after an eſtate for years, and I grant it to the uſe of my ſelfe for life, and after to the uſe of another and his heirs in fee, and after I grant my reverſion for life to another; in this caſe it is needfull that the tenant for yeares atturn to this grant. Hil. 8 Jac.

If a leaſe be made to *I S* for his life, and afterwards another leaſe is made of the ſame land to *I D* for his life; in this caſe it ſeems that *I S* muſt atturn to this ſecond grant, or that the grant will not be good. Dier 118.

An eſtate of a Seigniory cannot be gained by a diſſeiſin, abatement, or intruſion without an atturnment. And therefore if one diſſeiſe another of a Manor which is part in demeſne and part in ſervices, the ſervices are not gained untill the tenants atturn. Lit. Sect. 587.

In all caſes for the moſt part where there is no means provided by law to compell the tenant to atturn, there their atturnment in law or in deed is not neceſſary unleſſe there be ſome ſpeciall default in the grantee. *Quod remedio deſtituitur ipſa re valet ſi culpa abſit.* And therefore an atturnment is not neceſſary in theſe caſes following. *viz.* [e] Where one doth grant a rent, reverſion, remainder, ſervice, or ſeigniory to another by way of deviſe by a laſt will and teſtament, or by Letters Patents from the King, or where ſuch things Co. 6. 68. Lit. Sect. 580. 583. 586. Co. ſuper Lit. 321. 314. e] F. N. B. 121. M.

things are granted by matter of record from a ſubject to the King.[f] So when the thing granted doth paſſe by way of uſe and doth veſt by force of the ſtatute of uſes. As if one that is ſeiſed of land in fee doth make a leaſe of it for life or yeares to *I S* and after levieth a fine, or doth covenant to ſtand ſeiſed of the reverſion of this land (or of the land it ſelfe which is all one) to the uſe of another, or doth bargaine and ſell the reverſion in fee, or for yeares; in theſe caſes the tenant need not to atturne :† But if *A* grant a reverſion to *B* to the uſe of *C* and the deed is not inrolled or the uſe ariſe not upon conſideration of bloud &c. in this caſe if the tenant doe not atturne the reverſion will not paſſe. [g] If one by a common recovery ſuffered grant a reverſion to the uſe of himſelfe, his wife, or children; in this caſe there needs no atturnment of the tenant by the Statute of 7 *H.*8. *chap.* 4. [h] So where one doth come to any ſuch thing by title or ſeigniory paramount, as by eſcheate, ſurrender, or forfeiture; or by deſcent, in all theſe caſes and the reſt before the atturnment of the tenant is to no purpoſe, neither to paſſe the thing as to the eſtate, nor to make a privity to diſtraine or bring action of debt. And therefore if there be Lord, meſne, and tenant, and the meſne grant the ſervices of his tenant by fine to another in fee, and after the grantee dieth without heire; in this caſe the ſervices of the meſnalty ſhall come to the Lord paramount and he may diſtraine for them or bring any action that lieth in privity for them without any atturnment. So if leſſee for life of a Manor ſurrender his eſtate to the leſſor; there needes no atturnment of the tenants of the Manor to make this eſtate to paſſe. So if the reverſion of a tenant for life be granted to another in fee, and the grantee die without heire ſo that the reverſion eſcheate; in this caſe the Lord may diſtraine or bring any action of waſt &c. without any atturnment. So if a reverſion deſcend to an heire from his auncеſtor; in this caſe it will veſt in the heire without atturnment, and atturnment in this caſe is not neceſſary. So if the conuſee of a Statute Merchant extend a ſeigniory or rent for debt, the ſeigniory or rent ſhall be veſted in him without any atturnment of the tenant.

If a Copiholder in fee make a leaſe for yeares by licence of the Lord rendring rent, and after ſurrender the reverſion to the uſe of *I S*; in this caſe it ſeemes an atturnment of the tenant is not needfull, but *I S* ſhall have the rent without any atturnment.

If one grant the reverſion of Copihold lands for life, or yeares, or grant the ſeigniory of Copihold lands of inheritance; in theſe caſes there needs no atturnment of the tenants to make the grants good. And ſo alſo is the law for an eſtate at will by the common law.

[f] Co. 6. 68. ſuper Lit. 321. 2. 35.

† Agreed in the Court of Wards Hil. 18 Jac.

[g] Calvins caſe. Paſch. 7 Jac. B. R.

[h] Lit. Sect. 583. 5 H. 7. 18, 19 Co. ſuper Lit. 321.

Co. ſuper Lit. 321.

Per 3 Juſti. Trin. 4 Jac. B. R.

Curia M. 37 & 38 Eliz. B. R. Co. 2. 35. ſuper Lit. 311.

If a leaſe be made to one for life, the remainder to another in taile, the remainder over to the right heires of the tenant for life, and the tenant for life doth grant his remainder in fee; in this caſe there needs no atturnment of the tenant in taile, but the remainder will paſſe by the deed preſently without any atturnment at all. Lit. Sect. 578.

If one leaſe for life the remainder for life, and after the leſſor releaſe all his right in the land to him in remainder for life; in this caſe there needs no atturnment of the leſſee for life to perfect this releaſe. Lit. Sect. 575.

If two Jointenants or more make a leaſe for life rendring rent, and one of them doth releaſe the rent to the other; in this caſe there needs no atturnment to make the rent to paſſe. Lit. Sect. 574.

In all caſes where the grant is in the perſonalty there needs no atturnment. And therefore in grants of annuities which doe charge the perſon of the grantor only and not his land, there needs no atturnmeut. And in all caſes where there is an atturnment in law there needs no atturnment in deed. Agreed in Curnocks caſe. M. 3 Jac. Co. B.

§. By whom an atturnment may & muſt be made. Or not.

If there be Lord, meſne, and tenant, and the Lord grant the fee of the Seigniory; in this caſe the meſne and not the tenant muſt atturne. Lit. Sect. 555.

If one make a leaſe for life, and then grant the reverſion for life, and the leſſee atturne, and after the Lord grant the ſeigniory; in this caſe it ſeemes the grantee and not the firſt leſſee for life muſt atturne. Co. ſuper Lit. 319.

If there be Lord and tenant and the tenant make a gift in taile, or leaſe for life of the land, and after the Lord grant the ſervices to a ſtranger; in this caſe the tenant for himſelfe and not the tenant in taile, or for life muſt atturn: For it is a maxime in law That no man ſhall atturne to any grant of any ſeigniory, rent ſervice, reverſion, or remainder but he that is immediately privy to the grantor. But to the grant of a rent ſeck or rent charge iſſuing out of ſuch land as before, the under-tenant in taile, or for life and not immediate tenant himſelfe muſt atturne. Lit. Sect. 554. 556. Co. ſuper Lit. 311.

If there be tenant for life the remainder in fee, and the Lord grant the ſervices to a ſtranger; in this caſe the tenant for life and not him in remainder muſt atturne. Lit. Sect. 556.

If there be tenant for life the remainder in taile, and he in the reverſion after their eſtates doth grand his reverſion to a ſtranger; in this caſe if either of them need to atturne it muſt bee the tenant for life. Idem.

Husband and wife.

If a woman that hath a husband be to atturne, the husband may and muſt doe it for her, and the atturnment of the husband for the wife, whether it be expreſſed or implied, will binde the wife. Co. ſuper Lit. 312. Lit. Sect. 558.

If

Lit. Sect. 571. Co. ſuper Lit. 316. 317.

If one make a leaſe for yeares of land the remainder for life, and after the leſſor doth grant the reverſion; in this caſe the tenant for life or yeares either of them may atturne.

Co. ſuper Lit. 312.

If a rent charge be iſſuing out of land, and the tenant be diſſeiſed of the land; in this caſe the diſſeiſor muſt atturne. But in caſe of the grant of a rent ſervice the diſſeiſee may atturne if he will, for the privity is betweene the Lord and the diſſeiſee only.

Co. ſuper Lit. 312.

If a man make a leaſe for life to *I S* of land, and after grant a rent charge out of it to *I D*, and after he grant over this rent to another; in this caſe the leſſor and not *I S* muſt atturne.

Co. ſuper Lit. 316. 8 E. 4. 10.

The tenant in dower after ſhee hath aſſigned over her eſtate and not the aſſignee muſt atturne to the grant of the reverſion. And yet ſome hold that the aſſignee alſo may atturne. The ſame law is alſo of the tenant by the courteſie: but it is not ſo in other caſes, for if the reverſion of leſſee for life be granted, and leſſee for life aſſigne over his eſtate, the aſſignee and not the leſſee muſt atturne.

Co. ſuper Lit. 316.

If leſſee for life aſſigne over his eſtate upon condition, and then the reverſion is granted; in this caſe the aſſignee and not the leſſee for life muſt atturne.

Co. ſuper Lit. 315. Perk. Sect. 231.

If a tenant in fee ſimple that ought to atturne to a grant of a Seigniory or rent die before he make an atturnment, his heire muſt atturne, and an atturnment made by him is good. So if he grant away his land before he make his atturnment, his grantee may atturne, and an atturnment made by him will be good enough.

Co. ſuper Lit. 311.

If a Lord of a Manor make a leaſe of his Manor for life or years, and the freeholders and others doe atturne to the leſſee, and after he grant away the reverſion of the Manor to a ſtranger; in this caſe the leſſee for life or yeares muſt atturne, and this will bind all the freeholders.

Co. ſuper. Lit. 311.

If there be Lord and tenant by homage, fealty and rent, and the tenant is diſſeiſed, and then the Lord granteth the rent to another; in this caſe the diſſeiſor and not the diſſeiſee muſt atturn, but if he grant the whole Seigniory the diſſeiſee may atturne.

Co. ſuper Lit. 315.

A voluntary Atturnment where it is needfull may be made by an infant, or one that is deafe and dumbe (who may doe it by ſignes). But one that is *non compos mentis* cannot make an Atturnment.

Infant.

Non compos mentis.

Co. ſuper Lit. 310. 312. 20 H. 6. 7.

The Atturnment muſt always be made to the grantee of the reverſion, rent &c. according to the grant whether the Atturnment be expreſſe or implied. But if divers doe take by the grant, the atturnment may be made to one of them, and this ſhall avail the reſt, as if a reverſion or a rent be granted to two or more, and the tenant atturn to one of them, this is good to veſt and ſettle the thing

6. To whom an atturnment may & muſt be made. Or not.

granted in them all according to the grant. And if a leaſe bee made by deed of a reverſion to *A* for life, the remainder in fee to *B*, and the tenant atturn to *A*; this is a good atturnment to ſettle the remainder in *B*. But if the tenant atturn to *B*, during the life of *A*, this is not good for *A*; howbeit if the tenant for life die before the atturnment be made, in this caſe the atturnment may bee made, and this ſhall be ſufficient to perfect the grant of the remainder to *B*.

If I grant a reverſion to one man, and before the atturnment of the tenant had to perfect the grant, he doth ſell this reverſion to a third man; in this caſe the tenant may atturn to the ſecond grantee, and this will make the grant good to him. But if the atturnment be made to both the grantees, it is void for incertainty. Co. 6. 68. 11 H. 7. 12.

An atturnment may as well be made to *ceſtuy que uſe* of a reverſion, as to the grantee of the reverſion himſelf. And it ſeemes it muſt be made to him, and not to the grantee of the reverſion. For it was agreed in the Court of Wards, *Hil.* 18 *Iac.* That if a reverſion be granted to *B* to the uſe of *C*, that the atturnment muſt bee made to *C*, and not to *B* who is but an inſtrument. Co. ſuper Lit. 310. Hardings caſe.

7. When and at what time the atturnment muſt be made.

In all caſes regularly where atturnment is neceſſary, it muſt be made in the life time of the parties Grantor and Grantee, or Exchangor or Exchangee, for if either of them die before the atturnment be made the grant or exchange is void. And therefore if a Manor be granted and livery of ſeiſin be given upon the demeſnes thereof, and one of the tenants die before atturnment be made by him, his tenement will not paſſe and the grant as to that part will be void, for in this caſe all the tenants but tenants at will muſt atturne. And albeit the grant of the reverſion be to begin at a day to come and after the death of either of the parties, yet muſt the atturnment be made in the life time of the parties or otherwiſe the grant will not be good. And yet an atturnment may be made after the death of the tenant by his heire, and after the Conveyance of the tenant by his aſſignee. Co. 1. 151. ſuper Lit. 310. Lit. Sect. 551. Perk. Sect. 263. 231. Co. ſuper Lit. 315. 2. 35.

If a leaſe be made of a reverſion to beginne at a day to come; in this caſe the atturnment may be made before or after the day ſo it be made in the life time of the parties. Co. 2. 35.

If one grant his reverſion of white acre or blacke acre, and the tenant atturne to the grant before the grantee have made his election which acre he will have, this is a good atturnment. Co. ſuper Lit. 310.

If a man grant his reverſion by deed to one, and after and before the tenant doe atturne he levy a fine or make a feoffment of the land to another; in this caſe it ſeemes the atturnment after comes too late; but if the fine or feoffement be Co. ſuper Lit. 309. 310. 8. 82. 4. 61. Kelw. 163.

but

but of part of the land granted before in reverſion; in this caſe the firſt grant after atturnment ſhall bee good for the reſidue. And if a woman ſole grant a reverſion, and after and before atturnment ſhee mary with a ſtranger, and after the tenant atturne; in this caſe the atturnment comes too late, for the mariage is a countermand of it. And if a reverſion of an eſtate for life or yeares be granted, and the grantor before atturnment doth confirme the eſtate of the tenant for life or yeares and ſo change the eſtate, and after the tenant atturne, in this caſe the atturnment comes too late.

Co. ſuper Lit. 309, 310. 315. Lit. Sect. 551. Plow. 344.

To the making of a good atturnment where it is needfull divers things are required. 1. It muſt be made by the perſon that ought to make it. 2. It muſt be made to the perſon that ought to take it. 3. It muſt be made in time convenient. 4. If it be an expreſſe atturnment the tenant muſt firſt have notice of the grant of the reverſion, rent, &c. to which he muſt atturne; but otherwiſe it is of an atturnment in law, for there notice in all caſes is not neceſſary. 5. And it muſt be done in that manner the law doth preſcribe. And for this it is to be knowne that it may be made by words or by deeds and without any writing, or by deed or writing (and this is the ſafeſt way to doe it.) And any words written or ſpoken by the tenant that doe import an aſſent and agreement to the grant of the reverſion, rent, &c. in ſuch manner as the ſame is made after notice given to him of the grant whether it be in the preſence or the abſence of the grantee of the reverſion, rent, &c. will make a good atturnment in deed. And therefore if the tenant after knowledge of the grant uſe theſe words following or any others to the like effect to the grantee, *viz.* I doe atturne, or turne tenant to you according to the grant; or, I become your tenant; or, I agree to the grant; or, I am well content with the grant; or, God ſend you joy of it; theſe are good expreſſe atturnments. And if the tenant after knowledge of the grant pay, doe, or deliver all, or any part of the rent, or ſervice, before, or at the time when the ſame is due, to the grantee, or give a penny, or farthing, an oxe, or a knife or any ſuch like thing, or any other valuable thing, in the name of atturnment, or in the name of ſeiſin of the rent; this is a good expreſſe atturnment, and that atturnment which is made by words and deed or ſigne both is the beſt, for that doth leave a more deep impreſſion in the minde of the witneſſes. But if one have a rent charge iſſuing out of my land, and he grant it to a ſtranger; and I give him an oxe to put him in poſſeſſion of the rent; it ſeemes this is no good atturnment.

8. The manner of making an atturnment. And what ſhall be ſaid a good atturnment. Or not.

Notice.

Lit. Sect. 563. 551. 513. Co. ſuper Lit. 315. 49 E. 3. 15.

M. 2 Car. in the Court of Wards. Co. ſuper Lit. 310.

If a man grant his reverſion of my living to *I S.* and his Baylife that doth uſe to gather his rents ſaith to me that *I S* hath bought it and I muſt hereafter pay my rent to him, and I tell him I am glad of it; this is a good atturnment. And that albeit it be in the abſence

ſence of *I S.* * And it is not materiall whether the ſtranger know of the grant or not, ſo the tenant know of it. And an atturnment made to the Lords Steward in the Court in the abſence of the Lord is a good atturnment. For it is ſufficient if the tenant have notice, that he atturne to the grant in the preſence of any whomſoever. Tenant for life was, the remainder in tail, he in the remainder granted his remainder, the tenant for life having notice of the grant ſaith to a ſtranger in his abſence, That is the party, I am well pleaſed that the grant is made to him; it was adjudged to be good. *Curia B.R. Hil. 11 Car. B.R. Hiltons caſe.

If a reverſion be granted to one for life, and after the ſame reverſion be granted to him for yeares, and the tenant atturne to both the grants at once; this atturnement is void for incertainty. So if one grant his ſeigniory to *I S* Biſhop of *London* and his heires by one deed, and grant the ſame to *I S* Biſhop of *London* and his ſucceſſors by another deed & the tenant atturn to both grants at once; this atturnment is void for incertainty. So if a reverſion be granted to two ſeverall perſons by ſeverall deeds, and the tenant atturne to both the grants at one time; this atturnment is void for incertainty, and neither of the grants are perfected by the atturnment in theſe caſes. The implied atturnment which alſo doth amount to an expreſſe atturnment is made divers manner of wayes. For if the tenant after notice of the grant of the reverſion pay his rent to the grantee, or ſurrender his eſtate to the grantee, or pray in aid of the grantee, or accept a grant of the reverſion or remainder from him that hath it, this is a good atturnment in law. But if the tenant after the grant of the reverſion, not having notice of the grant pay his rent to the grantee as a receiver, Bailife, &c. this is no good atturnment. † And therefore if the Bailife of a Manor ſhall purchaſe the Manor or the reverſion of one of the tenements and the tenant not knowing of this purchaſe pay his rent to him as he was wont to doe, this is no good atturnment in law. So if a man ſeiſed of a ſeigniory levie a fine of it, and then taketh backe an eſtate in fee, and the tenant having no notice of all this doth pay his rent to the conuſor as he was wont to doe; this is no good atturnment in law to perfect either of theſe grants. Co. ſuper Lit. 310. 11 H. 7. 12. 14 H. 8. 15. 34 H. 6. 41. Co. ſuper Lit. 312. † Calvins caſe. Adjudged Paſc. 7 Jac. B.R. Co. ſuper Lit. 309. Co. 2. 67. Dier 302.

If there be Lord and tenant, and the tenant let the land to a woman for life the remainder in fee, and the woman doth take a husband, after the Lord doth grant the ſervices to the husband in fee, in this caſe this acceptance of the deed by him that ought to aturn is a good atturnment in law. So if in this caſe the tenant leaſe to a man for life the remainder over and the Lord grant the ſervices to the tenant for life, and he accept thereof; this is a good atturnment in law. Lit. Sect. 558, 560, &c.

If the Lord by deed grant his ſeigniory to the tenant of the land and to a ſtranger, and the tenant doth accept of this deed; this is Co. ſuper Lit. 313.

a good atturnment in law to extinguiſh a moity and to veſt the other moity in the other grantee. So if one make a leaſe to *I S* for life, and after confirme his eſtate, the remainder over to *I D* and the leſſee for life doth accept of the deed of this confirmation and grant; this is a good atturnment in law and doth veſt the remainder in *I D*.

Co. ſuper Lit. 313. Lit. Sect. 573.

If there be Lord and tenant and the tenant take a wife, and after the Lord doth grant the ſervices to the wife and her heires, and the husband doth accept of the deed of this grant; this is a good atturnment in law.

Lit. Sect. 559.

If the conuſee of a fine of ſervices ſue a *Scire facias* to have execution of the ſervices, and hath Judgment to recover; this is a good atturnment in law.

Lit. Sect. 564.

If a woman grant a reverſion to a man in fee, and after mary with the grantee, this is a good atturnment in law to perfect this grant made to the husband.

Co. ſuper Lit. 310.

If a Lord grant his ſeigniory, & there be twenty manner of ſervices, and the tenant with what intent ſoever it be, pay or performe in deed any parcell of the ſervices to the grantee; this is a good atturnment in law for all the ſervices.

Lit. Sect. 563.

If I be ſeiſed of land in fee, and make a leaſe for life or yeares of it, or it be extended by a Statute or Elegit, and then I make a feoffment of this land and give livery of ſeiſin upon it, and ſo put out the tenant, and after the tenant (or one of the tenants, if there be many) reenter; this is a good atturnment in law. And ſo alſo it ſeemes is the law if the leſſee for life recover in an aſſiſe. But if a man make a leaſe for life, and then the leſſor grant the reverſion for life, and the leſſee atturne, and after the leſſor enter and make a feoffment in fee, and ſo diſſeiſe the leſſee for life, and then the leſſee reenter; this is no good atturnment in law by the grantee for life. And if the conuſee of a reverſion by fine diſſeiſe the leſſee for life and make a feoffment in fee, and the leſſee reenter; this is no good atturnment in law to the feoffee to enable him to diſtraine &c.

Lit. Sect. 576, 577. Co. ſuper Lit. 319. Dier 212. Co. 6. 68. 5. 113.

If one grant the reverſion of a leaſe of a terme of yeares, and before any atturnment made, the leſſee for years doth grant his terme to the grantee of the reverſion; in this caſe this is no good atturnment in law to make the reverſion to paſſe.

Hil. 8 Jac.

If one have land and a rent iſſuing out of other land both in one county, and he grant both by deed, and give livery of ſeiſin of the land in the name both of the land and of the rent; this is no good atturnment in law to make the grant of the rent good.

Perk. Sect. 231.

If leſſee for life or yeares, ſubſcribe his name as a witneſſe to the ſealing and delivery of the grant of the reverſion made by the leſſor to a ſtranger; this is no good atturnment in law, for he may doe this and not have notice: But if he have notice of the grant and

So was it held in Brokenbury & Martials caſe. 5 Eliz.

then put his hand to it; this is an atturnment, *Curia B. R. H.* 11. *Car.*

Atturnement to part of the grant good for the whole.

If a reverſion be granted of two acres, or for forty years, or if ſervices be granted, and the tenant doth atturn for one acre, or for part of the forty yeares, or for part of the ſervices, this ſhall extend to all, and is a good atturnment for both the acres, all the forty yeares, and all the ſervices. And that albeit the tenant ſay expreſly it ſhall be good but for a part and not for the whole. And ſo alſo it is of an atturnment in law. And therefore if the grantee by fine of ſervices ſue a *Scire facias* to have execution of any part of the ſervices, and have judgement to recover any part, or a leſſee of three acres ſurrender one of them to the grantee of the reverſion of all the three acres; this is a good atturnment for the whole. But if one atturn for part of the land, or for part of the ſervices in caſe of the grant of a reverſion of land, or the grant of ſervices, and have no notice of the grant of any more, this atturnment is not good for any part, but void for all. Co. 2. 68. ſuper Litt. 297. 314. 309. Lit. ſect. 564.

Atturnment to one good to others.

If a ſeigniory, reverſion, or the like, be granted to two or more, and the tenant after notice thereof doth atturn to one of them; this is a good atturnment to perfect the grant to both or all of them. But if one die before atturnment, and the tenant atturne to the ſurvivor or ſurvivors; this ſhall not availe the heire of him that is dead, but it is good to perfect the grant to the ſurvivor or ſurvivors, to whom it is made. Co. ſuper Lit. 297. 2. 68. 67.

If a reverſion be granted to husband and wife, and the tenant atturne to the wife in the abſence of the husband; this is a good atturnment to perfect the grant to them both. But if a reverſion bee granted to two men, and the tenant have notice onely of a grant made to one of them, and he atturn to him onely; this atturnment is void, and not good to perfect the grant to either of them. Calvins caſe Paſc. 7 Jac. B. R. Co. 2. 68.

Atturnment by one good for others.

If two jointenants be for life, or years, and the reverſion of their eſtate is granted to a ſtranger, and one of them atturn to the grant of the reverſion; this is a good atturnment for both of them. The like law is for tenants in common. But if *A*, *B*, *C* and *D*, be leſſees for years, and *C* and *D* be outlawed, ſo as they forfeit their parts to the King, and the King become tenant in common with *A* and *B*, and after the reverſion is granted to a ſtranger, and *A*, *B*, *C* and *D* atturn; this is no good atturnment to perfect the grant of the reverſion, for *C* and *D* cannot atturn, and the atturnment of *A* and *B* for the King and themſelves is not good. Co. 2. 66, 67. Litt. Sect. 566. 6 Car. in the Lord Brooks caſe in the Court of Wards.

9. Who ſhall bee compelled to atturn. Or not. And where.

Atturnment made by the husband is good for the wife: whereof ſee before at *Numb.* 5.

In all caſes for the moſt part where atturnment is needfull, the tenant whether he be tenant in fee ſimple, for life, yeares, by Statute, Co. 6. 68. 9. 84. ſuper Litt. 315.

tute, Elegit, or as executor untill debts be paid, ſhall be compelled to atturn. And albeit the tenant be an infant, and come to the land by purchaſe or deſcent, yet may he be compelled to atturn, but then in this caſe his atturnment ſhall not prejudice him, for when he is of full age he may diſclaim or ſay he doth hold by leſſe ſervices.

Co. ſuper Litt. 316. 318. If there be tenant in tail of a reverſion, and he grant this over to a ſtranger; in this caſe the tenant in poſſeſſion may be compelled to atturne. But if the reverſion upon the eſtate of the tenant in tail, or upon the eſtate of the tenant in tail after poſſibility of iſſue extinct be granted, ſuch a tenant may not be compelled to atturn; and yet ſuch a tenant may atturn *gratis* if he will. And the aſſignee of the eſtate of ſuch a tenant in taile after poſſibility &c. is compellable to atturn. And if one make a gift in tail, the remainder in fee, and the Seigniory, or a rent charge iſſuing out of the land, is granted in fee by fine; in this caſe the tenant in tail may bee compelled to atturn.

Co. 6. 68. ſuper Litt. 318. In al caſes for the moſt part where atturnment is not needful, there is no means to compell the tenant to atturn. And therefore the tenant cannot be compelled to atturn to him that comes to a reverſion or remainder by eſcheat, forfeiture &c.

Co. ſuper Litt. 318. 3. 86. If one grant his reverſion of land in Mortmain without a licence, the tenant may not be compelled to atturn untill there bee a licence had from the King.

Co. ſuper Lit. 318. 3. 86. Alſo it is a generall rule, that when the grant by fine is defeaſible, there the tenant ſhall not be compelled to atturne. As if an infant levy a fine, this is defeaſible by writ of Error during his minority, and therefore the tenant ſhall not be compelled to atturn. So if the land be holden in ancient demeſne, and he in the reverſion levieth a fine of the reverſion at the Common Law; the tenant ſhall not be compelled to atturn, becauſe the eſtate that paſſeth is reverſable by a writ of deceit.

10. How an atturnment ſhall enure and be taken.

Co. ſuper Litt. 309. 310. 297. See before. If the grant be abſolute, and the atturnment be on condition; yet this ſhall enure according to the grant. So if the atturnment be but to part of the things, or part of the time granted; this ſhall enure to perfect the grant for all. So if the atturnment be made but to one of the grantees, it ſhall enure to the reſt. So if the atturnment be made to the particular tenant, it ſhall enure to him in the remainder to perfect his eſtate alſo.

Co. ſuper Lit. 320. If the eſtate of the tenant be with a priviledge annexed, as without impeachment of waſt, or the like, and the tenant atturn generally without any ſaving of his priviledge, if the atturnment bee *gratis* and voluntary, whether it bee an atturnement in law or in deed; this ſhall not enure to extinguiſh his priviledge: but if the atturnment be made by the compulſion of a writ in this manner,

ner, and without this ſaving, he hath loſt his priviledge for ever.

If a reverſion &c. be granted to two ſeverall men one after another, and he that hath the latter grant get the atturnment of the tenant to his grant before the other; in this caſe this ſhall enure to perfect the latter, and the firſt grant now cannot be made good. Co. ſuper Lit. 310.

If a reverſion be granted to a man and woman unmaried, and before atturnment made they entermary, and then the tenant atturn; in this caſe they ſhall have the eſtate by moities. Co. ſuper Lit. 310.

§ 11. How an atturnment ſhall relate.

An atturnment as to the party grantor ſhall have relation to the time of the grant to make the thing to paſſe out of the grantor *ab initio*, albeit it be made many years after the grant, and therefore all acts done by him after the time of the grant, and before the atturnment to the prejudice of his own grant, as granting of rents, entring into Statutes, or the like, are void, as to the land to charge it: and hence it is that if a reverſion be granted to an alien, and before the atturnment of the tenant he is made denizen; in this caſe the King upon office found ſhall have the land, and yet it ſhall not ſo relate as to make the tenants chargeable to the grantee for any mean arrearages, or for any waſt in the lands from the time of the grant to the time of the atturnment. But in reſpect of a ſtranger it ſhall not relate at all. And therefore if two deeds be of a reverſion at ſeverall times, and hee whoſe deed was made laſt gets atturnment firſt, the reverſion doth paſſe to him, and though the other get atturnment afterwards, yet this will not help him by relation, and albeit the former grant of the reverſion be in fee, and the latter for life onely, yet the law will be allone in both caſe. Co. ſuper Lit. 310.

And now having done with this we come to a *Leaſe*.

Chap. XIV.

Of a Leaſe.

1. *Quid.*

A Leaſe doth properly ſignifie a demiſe or letting of lands, rent-common, or any hereditament unto another for a leſſer time then he that doth let it hath in it. (For when a leſſee for life or years doth grant over all his eſtate or time unto another, this is more properly called an Aſſignment then a Leaſe.) And this albeit it may be made and done by other words, yet it is moſt commonly and aptly made by the words Demiſe, Grant, and Let. And in this caſe he that letteth is called the Leſſor, and he to whom it is let the Leſſee. This word alſo is ſometimes although improperly applied to the eſtate, *i.* the title, time or intereſt the leſſee hath to the thing

Aſſignement.

Leſſor, Leſſee.

Terms of the Law. Co. ſuper Lit. 43. 45. Juſtice Dodridge Treatiſe called The uſe of the Law. Bro. Leaſes 60. 437. Plow. 421. 432. Dier 125.

thing demiſed, and then it is rather referred to the thing taken or had, and the intereſt of the taker therein: but in this place it is applied rather to the manner or means of attaining or coming to the thing letten. And in this ſenſe it is ſometimes made and done by record, as fine, recovery &c. and ſometimes and moſt frequently by writing called a Leaſe by Indenture, albeit it may be made alſo by deed poll. And ſometimes alſo it is (as it may bee of land, or any ſuch like thing grantable without deed for life or never ſo many years) by word of mouth without any writing, and then it is called a Leaſe-paroll. And hence comes the diviſion of a Leaſe-paroll, and a Leaſe in writing. And all theſe ways it may be made either for life, *i.* for the life of the leſſee, or another, or both: or for years, *i.* for a certain number of years, as ten, an hundred, a thouſand, or ten thouſand years, moneths, weeks, or days, as the leſſor and leſſee doe agree. And then the eſtate is properly called a Term of years: for this word Terme doth not onely ſignifie the limits and limitation of time, but alſo the eſtate and intereſt that doth paſſe for that time: Theſe Leaſes alſo for years doe ſome of them commence *in preſenti*, and ſome *in futuro*, at a day to come: and the Leaſe that is to begin *in futuro*, is called an *intereſſe termini*, or future intereſt. Or at will, *i.* when a Leaſe is made of land to be held at the will and pleaſure of the leſſor, or at the will and pleaſure of the leſſor and leſſee together: and ſuch a leaſe may be made by word of mouth as well as the former.

2. *Quotuplex.*

Term of years.

Intereſſe termini, or Future intereſt.

See Grant Numb. 4. Co. 6. 36. 34, 35. 1. 154, 155. Co. ſuper Litt. 45, 46. Plow. 273. 523.

Regularly theſe things muſt concurre to the making of every good leaſe. 1. As in other grants, ſo in this there muſt be a leſſor, and he muſt be a perſon able, and not reſtrained to make that leaſe. 2. There muſt be a leſſee, and he muſt be capable of the thing demiſed, and not diſabled to receive it. 3. There muſt be a thing demiſed, and ſuch a thing as is demiſable. 4. If the thing demiſed be not grantable without a deed, or the party demiſing not able to grant without deed, the leaſe muſt be made by deed. And if ſo, then there muſt be a ſufficient deſcription and ſetting forth of the perſon of the leſſor, leſſee, and the thing leaſed, and all neceſſary circumſtances, as ſealing, delivery &c. required in other grants muſt be obſerved. 5. If it be a leaſe for years it muſt have a certaine commencement, at leaſt then when it comes to take effect in intereſt or poſſeſſion, and a certain determination either by an expreſſe enumeration of yeares, or by reference to a certainty that is expreſt, or by reducing it to a certainty upon ſome contingent precedent by matter *ex poſt facto*, and then the contingent muſt happen before the death of the leſſor or leſſee. 6. There muſt bee all needfull ceremonies, as livery of ſeiſin, atturnment, and the like, in caſes where they are requiſite. 7. There muſt be an acceptance of the thing demiſed, and the eſtate by the leſſee. But whether any

3. Things neceſſarily required in every good leaſe.

rent

rent be reſerved upon a leaſe for life, years, or at will, or not, is not materiall, except only in the caſes of leaſes made by tenant in tail, husband and wife, and Eccleſiaſticall perſons. Of which ſee *infra.*

4. What ſhall bee ſaid a good and a ſufficient leaſe for life or years. Or not.

For the ability and capacity of the leſſors and leſſees, and what ſhall bee ſaid a good leaſe or not, in reſpect of the ability of the leſſor, and the capacity of the leſſee, and the deſcription of their perſons, the nature and deſcription of the thing demiſed, and what miſ-recitall, or miſnoſmer will hurt, or not. See *Grant Num.* 4. and *infra Numb.* 5, 6, 7.

1. In reſpect of the perſons of the leſſor, and the leſſee, the thing leaſed, & the eſtate, property, or poſſeſſion of the leſſor therein.

Leaſes for life, or years, or at will may be made of any thing corporall or incorporall, that lieth in livery or grant. Alſo leaſes for years may bee made of any goods or chattels. See for this *Grant Numb.* 4. Bro. Leaſes 23.

A man ſeiſed of an eſtate in fee ſimple in his own right of any lands or tenements, may by deed or writing in the country, or without writing by word of mouth make a leaſe of it for what lives or years he will. And hee that is ſeiſed of an eſtate in tail of any lands or tenements, may make any leaſe out of it for his owne life, but not longer unleſſe it be by fine or recovery, or it be ſuch a leaſe as is warranted by the Statute of 32 *H.*8. (whereof ſee more *infra*). And he that is ſeiſed of lands or tenements of any eſtate for his own or anothers life may make what leaſe for years he will of it, and it will be good as long as the leaſe for life doth laſt. And hee that is poſſeſſed of lands or tenements for years may make a leaſe of it for all or part of the years, and theſe are good leaſes. The tenant for life or years may alſo aſſigne over all their eſtates if they pleaſe. And if ſuch tenants make leaſes for longer time, as if leſſee for years make a leaſe for life; it ſeemes by this the land will paſſe for life, if the term of years laſt ſo long. But if he give livery of ſeiſin upon it (as he muſt to make the leaſe for life good) this is a forfeiture of the eſtate for years. Co. 7. 11. 1. 44. Plow. 524.

Forfeiture. Infant.

If an infant be ſeiſed of land in fee ſimple, and he make a leaſe for years of it rendring no rent; this leaſe is void. But if there be a rent reſerved upon the leaſe, then the leaſe is but voidable, and may by the acceptante of the rent by the infant after his full age bee made good. 9 H. 7. 24. 18 Ed. 4. 2. Plow. 545.

Acceptance.

Iointenants. Tenants in common.

Jointenants, tenants in common, and parcenours may make leaſes for life or years of their own parts, and purparties at their pleaſures, and theſe leaſes will binde their companions. And one coparcenour, or tenant in common may make a leaſe of his part to his companion if he will. Litt. cap. tenant in common, F.N.B. 62. G.

If a feoffment be made upon condition, and before the time of performance of the condition, the feoffor and feoffee doe joyne to make a leaſe for life or years of the land; this is a good leaſe.

Bro. Leaſes 58. A man that hath an eſtate in land to him and his wife and his heirs, may make what leaſe he will of the land, and this will be good againſt all men but his wife onely, and that for her time.

Co. 10. 49. If there be leſſor in fee, and leſſee for ten years; in this caſe they two may joyn together and make a leaſe for lives, or for any terme of years; and this is good.

Plow. 133. A diſſeiſee cannot make a leaſe of that land whereof he is diſſeiſed untill he make his entry or recover the poſſeſſion of the land again. So neither can a woman that hath recovered the third part of her husbands land in a writ of dower, make any leaſe of it before ſhe be in poſſeſſion by execution. And yet if a leaſe be made to me for years, I may make a leaſe of part, or an aſſignement of all the term before I have made my entry into the land demiſed. So if the father die, and the ſon make a leaſe to a ſtranger of the land deſcended to him before his entry; this is a good leaſe: but if a ſtranger had entred and abated into the land, and then the ſonne had made the leaſe *contra*.

Bro. Scire facias 36.

Co. ſuper Lit. 46.

Plow. 137. 142.

Co. 5. 5. Dier 357. Co. 6. 2. 8. 70. 1. 175. See in Leaſes made by tenant in tail *infra*.

In ſome caſes alſo ſuch perſons as are not ſeiſed in fee ſimple &c. nor able to derive ſuch eſtates for life or years out of their owne eſtates, may lawfully notwithſtanding make ſuch leaſes for life &c. And this is ſometimes by ſome ſpeciall Act of Parliament enabling them ſo to doe. And hence it is alſo that a tenant in tail may make leaſes for three lives or twenty one years. And ſometimes it is by ſome ſpeciall power or authority that is given or reſerved by and to the party himſelf that had the fee ſimple in him, or given to ſome other to doe it in his name, and leaſes thus made may bee good. And therefore if any Act of Parliament enable a tenant in tail, or a tenant for life to make leaſes for three lives, or twenty one years, leaſes that are ſo made in purſuit of that authority, are good. And if a man be ſeiſed of land in fee, and convey it to the uſe of himſelf for life, or in tail with divers remainders over with a proviſo that it ſhall be lawfull for him or any ſuch tenant in tail to make leaſes for twenty one years; in this caſe he or they may make ſuch leaſes and they will be good. But in both theſe caſes care muſt be had to purſue the authority ſtrictly, *i.* that the leaſes made be according to the power and direction given by the ſtatute or proviſo, for if it differ and vary ever ſo little from the ſenſe and meaning of the ſame; the leaſe will not be good. And therefore in the caſe before of a power to make leaſes for twenty one years, if the party make more leaſes for twenty one yeares at one time then one, they are all void but the firſt, becauſe it is againſt the intent of the parties, though it be not againſt the words. And ſo if the power be to make leaſes for three lives; he cannot by this make a leaſe for ninety nine yeares if three lives ſo long live. But if the power be thus, Provided &c. that he may make any leaſe in poſſeſſion.

By ſpeciall power or proviſo to make leaſes.

ſion or reverſion, ſo ãs it doe not exceed the number of three lives or twenty one years; in this caſe a leaſe may be made for ninety nine years if three lives live ſo long. But where uſes are raiſed by way of covenant, and in the deed there is a proviſo that the covenantor for divers good conſiderations may make leaſes for years; in this caſe this power is void, and therefore no leaſe can bee made hereupon:

Averment. neither will any averment help in this caſe. And if a man have a letter of Atturney, or other authority to make leaſes for another, and doe make them accordingly; ſuch leaſes are good. But herein alſo caution muſt be had of three things: 1. That the authority be good. 2. That he that is the Deputy or Atturney doe purſue the authority ſtrictly. 3. That he doe it in the name of his maſter, and not in his own name. Co. 9. 76.

2. In reſpect of the manner of the agreement, and the words whereby the ſame is ſet down. And what words will make an eſtate for life or years.

A leaſe made for a thouſand days, moneths, or weeks, is as good for ſo long as it endureth as a leaſe for an hundred or a thouſand years. So a leaſe for half a year, or a whole year is good. So if a leaſe be made from day to day, or from weeke to weeke for four years; this is a good leaſe for four years, *Et ſic de ſimilibus.* So if one make a leaſe for ten years, & ſo from ten years to ten years, during an hundred years, or untill an hundred years are incurred; this is a good leaſe for an hundred yeares. So if one make a leaſe from three years to three years, during the life of *I S*; in this caſe if livery of ſeiſin be not given, this is a good leaſe for ſixe years, but if livery be given, it is a good leaſe for the life of *I S*. And if a leaſe be made from my death untill *Anno Domini* 1650; this is a good leaſe. Co. 6. 72. 14 H. 8. 13. Plow. 422. Plow. 272. Bro. Leaſes 49. Dier 24.

Livery of ſeiſin.

Livery of ſeiſin. If I ſay to *I S* being in my houſe [Here *I S*, I demiſe to you my houſe and land ſo long as I live;] this is a good leaſe for life to him if livery of ſeiſin be made. *Et ſic de ſimilibus.* Co. 6. 26.

Livery of ſeiſin. If one make me a leaſe of land until an hundred pound be paid me, & make livery of ſeiſin upon it; this is a good leaſe for life determinable upon the payment of the hundred pound. But if no livery be made it is no good leaſe. 21 Aſſ. pl.

Executors. If one make a leaſe to me for my life, and for four, ten, or twenty yeares after; this is a good leaſe for life firſt if livery of ſeiſin bee made, and then a good leaſe for years for ſo many years as are agreed upon afterwards, which my executors ſhall have. And if no livery of ſeiſin be made; yet it ſeems it is a good leaſe for ſo many years after my death. Bro Leaſes 27. 51.

If an Indenture of leaſe be made between *A* of the one part, and *B*, *C*, and *D* of the other part, and therein *A* doth demiſe land to *B*, To have and to hold to him for eighty years, if *B* ſhall live ſo long, and if he die, or alien the premiſſes within the term, then that his eſtate ſhall ceaſe, and then the leſſor doth grant the land to *C* for ſo many years of the ſaid term as ſhall be then to come after the Co. 1. 153. Dier 253.

the death or alienation of *B*, if he live ſo long; in this caſe this is a good leaſe to *B* for ſo many years as he ſhall live of the eighty years, but the leaſe to *C* after is not good, for the terme is ended by the death of *B*, but if the words of the ſecond demiſe be To have and to hold during the reſidue of the eighty years, and not during the reſidue of the term; in this caſe the ſecond demiſe is good to *C* alſo.

Co. l. 155. Dier 150. 2 53. If one make me a leaſe for ſixty years if I live ſo long, provided that if I die within the term, that my executors ſhall have it during the reſidue of the ſixty years; in this caſe this is a good leaſe for the ſixty years determinable upon my death, but not a good leaſe for the reſidue of the ſixty years after my death. And yet it may amount to a good covenant for that time.

Evans caſe, Trin. 5 Jac. B.R. If *A* covenant to levy a fine to *B* and his heirs, provided that if he pay *B* and his heirs ten pound at the end of thirteen years, that then the fine ſhall be to the uſe of *A* and his heirs, and *A* doth covenant with *B* by the ſame deed, that *B* his heirs, executors, and aſſignes, ſhall quietly hold the premiſſes from *Michaelmas* next for thirteen years and yearly from thenceforth for ever if the ten pound bee not paid according to the intent; in this caſe this covenant doth not make a good leaſe for the thirteen years, and it is but a covenant. Covenant. Covenant.

Plow. 272. Lit. Sect. If one make a leaſe for a certain number of years, and it is further agreed that upon ſome contingent the leſſee ſhall have the fee ſimple, and livery of ſeiſin is given hereupon; in this caſe the leaſe for years doth continue good for the time agreed upon.

Co. 2. 24. 10. 87. A leaſe for years cannot by the agreement of the parties be made to the heirs of the leſſee, nor intailed to the heirs of his body. And therefore if a leaſe be made to *I S* and his heires, or to *I S* and the heirs male of his body, yet the executors of *I S*, and not his heirs ſhall have it, and the executors may ſell the term. Executors.

Per Juſtice Jones at the Aſſiſes at Glouc. If two agree by word that one of them ſhall have ſuch a peece of land for twenty years; this is a good and perfect leaſe that is made by this agreement, albeit they doe agree to have a writing made of it afterwards, for in this caſe the writing is but the confirmation of it. But if the agreement be that ſuch a writing ſhall be made, or that a leaſe ſhall be made of ſuch a thing between them and put in writing, ſo that the agreement hath reference to the writing, and implieth an intent not to perfect the agreement till the writing be made; in this caſe the leaſe is not a perfect leaſe untill the writing be made.

Co. ſuper Lit. 9. F.N.B. 270. e. Br. Leaſes 71. Albeit the moſt uſuall and proper making of a Leaſe is by the words, Demiſe, grant, and to ferme let, and with an *Habendum* for life or yeares, yet a Leaſe may be made by other words, for whatſoever word will amount to a Grant will amount to a Leaſe. And

there-

therefore a Leaſe may be made by the word, Give, Betake, or the like. The word *Locavit* alſo is a good word. And the uſe in the Exchequer is to make Leaſes by the word *Committimus*, which is a good word to make a leaſe. [d] And if *A* doe but grant and covenant with *B* that *B* ſhall enjoy ſuch a peece of land for 20. yeares; this is a good leaſe for twenty yeares. [e] So if *A* promiſe to *B* to ſuffer him to enjoy ſuch a peece of land for twenty years; this is a good leaſe for twenty yeares. [f] So if *A* licenſe *B* to enjoy ſuch a peece of land for twenty yeares; this is a good leaſe for twenty yeares. And therefore it is the common courſe, if a man make a feoffment in fee, or other eſtate upon condition that if ſuch a thing be, or be not done at ſuch a time, that the feoffor, &c. ſhall reenter, to the end that in this caſe the feoffor, &c. may have the land and continue in poſſeſſion untill that time, to make a Covenant that he ſhall hold and take the profits of the land untill that time; and this Covenant in this caſe will make a good leaſe for that time, if the incertainty of the time (whereunto care muſt be had) doe not make it void. And therefore if *A* bargaine and ſell his land to *B* on condition to reenter if he pay him an hundred pound, and *B* doth covenant with *A* that he will not take the profits untill default of payment, or that *A* ſhall take the profits untill default of payment; in this caſe howbeit this may be a good Covenant yet it is no good Leaſe. And if the Mortgagee covenant with the Mortgagor that he will not take the profits of the land untill the day of payment of the money; in this caſe albeit the time be certaine, yet this is no good Leaſe but a Covenant onely. If one give a Bond for the quiet holding of a Cloſe for three yeares; it ſeemes this is no leaſe in Law. See the opinion of the Parliament for *Bonds* and *Covenants* both *Stat.* 14 *Eliz. cap.* 11.

d] Bro. Leaſes 60.
e] Mic. 9 Ja. B. R. Curia.
f] 5 H. 7. 1.
Agreed by all the Judges Mic. 20 Jac. et per Juſt. Bridgman. And 8 Car. B. R.
Covenant.

3. In reſpect of the Commencement, & continuance & end of the term or eſtate.

Incertaintie.

A Leaſe for yeares may begin at a day to come, as at Michaelmas next, or three or ten yeares after, or after the death of the leſſor or of *I S*, and it is as good as where it doth begin preſently. But a leaſe for life of any thing whatſoever whether it lye in Livery, or in Grant if it be *in eſſe* before, cannot begin at a day to come. And therefore if a leaſe be made *Habendum*, from Michaelmas next, or from the day of the making of it, or after the death of the leſſor, or after the death of *I S* to the leſſee for life; this leaſe is not good: but in caſe of a leaſe of land made thus, it is ſometimes holpen by the Livery of ſeiſin. For which ſee *Livery of Seiſin chap.* 9. *Num.* 11. But all leaſes for yeares whether they begin *in preſenti*, or *in futuro*, muſt be certaine, that is, they muſt have a certain beginning, and certain ending, and ſo the continuance of the term muſt be certain, otherwiſe they are not good. And yet if the years be certain when the leaſe is to take effect in intereſt or poſſeſſion it is ſufficient, for untill that time it may depend upon an incertainty, *viz.* upon

Co. 5. 1. ſup. Lit. 48. Plow. 156. 197.
Co. ſup. Lit. 45. Co. 1. 155

a poſſible contingent precedent before it begin in poſſeſſion or intereſt, or upon a limitation or condition ſubſequent: but in caſe when it is to be reduced to a certainty upon a contingent precedent, the contingent muſt happen in the lives of the parties. And albeit there appear no certainty of years in the leaſe, yet if by reference to a certainty it may bee made certaine it is ſufficient: *Id certum eſt quod certum reddi poteſt.* As for examples, if *A* ſeiſed of lands in fee grant to *B*, that when *B* ſhall pay to *A* twenty ſhillings, that from thenceforth he ſhall hold the land for twenty one years, and after *B* doth pay the twenty ſhillings; in this caſe *B* ſhall have a good leaſe for twenty one years from thenceforth. And if *A* grant to *B*, that if his tenant for life ſhall die, that *B* ſhall have the land for ten years; this is a good leaſe. And if one make a leaſe for years after the death of *C*, if *C* die within ten years; this is a good leaſe if *C* die within the ten years, otherwiſe not. But if *A* be ſeiſed of land in fee, and leaſe it to *B* for ten years, and it is agreed between them that *B* ſhall pay to *A* an hundred pound at the end of the ſaid ten years, and that if he doe ſo and ſhall pay the ſaid hundred pound, and an hundred pound at the end of every ten years, that then the ſaid *B* ſhall have a perpetuall demiſe and grant of the premiſſes from ten years to ten years continually following *extra memoriam hominum &c.* in this caſe this albeit it be a good leaſe for the firſt ten years, yet it is void for all the reſt for incertainty. And if a leaſe be made to begin from the Nativity of Chriſt, and he doth not ſay which Nativity, as next &c. it is void for incertainty. And yet if a leaſe for years be made of land in leaſe for life To have and to hold from the death of the tenant for life; this is a good leaſe: So if it be To have and to hold from *Michaelmas* next after the death of the tenant for life, or from *Michaelmas* next after the determination of the eſtate of the tenant for life; theſe are good leaſes. So if there be a former leaſe in being for life or years, and another leaſe for years is made of the land To have and to hold from the end of the former eſtate by ſurrender, forfeiture, or otherwiſe for twenty years; or to have and to hold from the ſurrender, forfeiture, or other determination of the former leaſe if there be any, and if there be none for twenty years; theſe and ſuch like leaſes are good, and this commencement is certain enough. And if one make a leaſe to begin after the death of *I S*, and to continue untill *Michaelmas*, which ſhall be in *Anno Domini* 1650. this is a good leaſe.

Co. ſuper Lit. 45. Plow. 83. 524. Co. 6. 35. 1. 155.

Plow. 270.

Hil. 16 Jac. in the Ex. chequer.

Plow. 192. 523.

Co. 6. 36.

Plow. 523. & 17 Jac. B. R. Agree.

If a man have a leaſe of land for an hundred years, and he make a leaſe of this land to another To have & to hold to him for 40 years to begin after his death; this is a good leaſe for the whole forty years, if there ſhall be ſo many of the hundred years to come at the time of the death of the leſſor. But if the leſſor grant the land to

Lit. Bro. Sect. 437. Bro. Grant 154. Co. 1. 2 155. Plow. 520, 521. See Expoſition of Deeds.

another To have and to hold to him for & during all the reſidue of the term of an hundred years that ſhall be to come at the time of the death of the grantor; this is void for incertainty. And yet if in this caſe he grant withall all his eſtate, or all his term, or all his intereſt in the premiſſes of the deed, and then ſay To have and to hold the land &c. to the grantee for all the reſidue of the terme of an hundred years that ſhall be to come at the time of his death; by this the whole eſtate and intereſt of the grantor into the land doth paſſe preſently by theſe words in the premiſſes of the deed. And if in this caſe the leſſee for an hundred years make a leaſe of the land to have and to hold after his death for an hundred years; this will bee a good leaſe for as many of the firſt hundred years as ſhal be to come at the time of his death.

If *A* make a leaſe to *B* for ninety years to begin after the death of *A*, on condition to be avoided upon the doing of divers acts by others, and afterwards makes another leaſe of the land *Habendum* after the determination or redemption of the former leaſe; it ſeems this is a good leaſe and certain enough. But if a leaſe be made to *A* for eighty years if he live ſo long, and if he die within the ſaid term or alien the premiſſes, that then his eſtate ſhall ceaſe, and then he doth further by the ſame deed grant and let the premiſſes for ſo many years as ſhall then remain unexpired after the death of *A*, or alienation to *B* for the reſidue of the ſaid term of eighty years if he ſhall live ſo long; in this caſe the leaſe to *B* is void, for after the death of *A* the term is at end, but if he ſay for the reſidue of the eighty years, it is otherwiſe.

Per Juſtice Bridgeman.

Co. 4. 153. Dier 253.

If *A* doth make a leaſe of land to *B*, for ſo many years as *B* hath in the Manor of Dale, and *B* hath then a leaſe for ten years of the Manor of Dale; in this caſe this is a good leaſe for ten years. But if *A* make a leaſe of land to *B* for ſo many years as the land *B* hath in execution ſhal be in execution; this leaſe is void for incertainty. And if a leaſe be made during the minority of *I S*, or untill *I S* ſhal come to the age of twenty one years, theſe are good leaſes; and if *I S* die before he come to his full age, the leaſe is ended. But if a leaſe be made to another until a child that is now in its mothers belly ſhal come to the age of twenty one years; this leaſe is not good. And if a leaſe be made for ſo many years as *I S* ſhall name; in this caſe if *I S* do name a certain number of years in the life time of the party leſſor, this is a good leaſe. But if a leaſe be made for ſo many years, as the executor of the leſſor, or of the leſſee ſhall name; this leaſe is void.

Plow. 273. 523. 522. F. N. B. 6. N. 14 H. 8. 11. Co. 6. 35.

If a man make a leaſe for twenty one years, if *I S* live ſo long, or if the coverture between *I S* and *D S* ſhall ſo long continue, or if *I S* ſhall continue to be Parſon of Dale ſo long; theſe and ſuch like leaſes are good. But if *A* make a leaſe to *B* for ſomany yeares as *A*

Co. ſuper Litt. 45. Plow. 27.

and

and *B*, or either of them ſhall live, not naming any certain number of years; this cannot be a good leaſe for years. So if the Parſon of Dale make a leaſe of his glebe for ſo many years as he ſhall be Parſon there; this is not certain, neither can it be made ſo by any means. And yet if a Parſon ſhall make a leaſe from three years to three years ſo long as he ſhall be Parſon; this is a good leaſe for ſix years if he continue Parſon ſo long, and for the reſidue void for incertainty. So if I make another a leaſe of land untill he be promoted to a Benefice; this is no good leaſe for years, but void for incertainty.

Co. 6. 35. 14 H. 8. 10. Plow. 274. If I have a rent-charge of twenty pound *per annum*, and let it to another untill he have levied an hundred pound; this is a good leaſe for five years. But if I have a peece of land of the value of twenty pound *per annum*, and I make a leaſe of it to another untill he ſhall levy out of the profits thereof an hundred pound; this is no good leaſe for years but void for incertainty.

Plow. 27. Co. 6. 35. But here note in all theſe caſes of incertain leaſes made with ſuch limitations as aforeſaid, as untill ſuch a thing be done, or ſo long as ſuch a thing continue &c. that if livery of ſeiſin be made upon them, they may be good leaſes for life determinable on theſe contingents, albeit they be no good leaſes for years. Note.

Co. ſuper Lit. 46. 10 Ed. 3. 26. And in ſome ſpeciall caſes a leaſe may be good notwithſtanding ſome incertainty in the continuance of it, for a leaſe may ceaſe for a time and revive again, as if tenant in tail make a leaſe for years reſerving twenty ſhillings, and after take a wife and die without iſſue; in this caſe as to him in reverſion the leaſe is meerly void, but if he indow the wife of the tenant in tail of the land as to the wife it is revived again. So if tenant in taile make a leaſe for yeares rendring rent, and die without iſſue, his wife enceint with a ſonne, and he in reverſion enter, in this caſe as againſt him the leaſe is void, but after the ſonne is born the leaſe is good again if it be within the Statute. So if tenant in fee ſimple take a wife, and then make a leaſe for years and dieth, the wife is indowed; in this caſe ſhe ſhall avoid the leaſe, but after her deceaſe the leaſe ſhall be in force again.

Plow. 433. 421. 273. Co. 1. 155. Bro. Leaſes 73. 10. Plow. 521. Co. 4. 58. If a leaſe be made for life or years to *A*, and after the leſſor doth make a leaſe for years by word or in writing to *B*; regularly this concurrent leaſe to *B* is a good leaſe at leaſt for ſo many yeares of the ſecond leaſe as ſhall be to come after the firſt leaſe is determined according to the agreement, as if the firſt leaſe to *A* be for twenty years, and the ſecond leaſe to *B* be for thirty yeares, and both begin at one time; in this caſe the ſecond leaſe is good for the laſt ten years. And yet the reverſion will not paſſe without the atturnment of the tenant, and therefore if any rent be reſerved on the firſt leaſe, the ſecond leſſee ſhall not have it untill the firſt leſſee doth atturn. But if the ſecond leaſe be for the ſame or for a leſſe 4 In reſpect of another leaſe then in being of the ſame thing.

time, as if the firſt leaſe be for twenty years, and the ſecond leaſe be for twenty or for ten years to begin at the ſame time; theſe ſecond leaſes are for the moſt part void. And yet herein a difference is taken between leaſes made by matter of record and by writing, and leaſes that are made by word of mouth: for if the ſecond leaſe be made by fine, deed indented, or poll, albeit it be but for the ſame or for a leſſer time, and albeit it be a leaſe of the land it ſelf, and not of the reverſion, yet it will paſſe the rent reſerved upon the firſt leaſe if the firſt leſſee atturn, and ſo alſo it will do without atturnment where atturnment is not needfull. But if the ſecond leaſe be made by word of mouth it is otherwiſe, for a reverſion and a rent in this caſe will not paſſe without deed, and therefore a grant by word doth not paſſe them. And if the ſecond leaſe be by fine or deed indented, then alſo it will work by way of Eſtoppel both againſt the leſſor and againſt the leſſee, ſo that if the firſt leaſe happen by any means, as by ſurrender or otherwiſe, to determine before it be run out, then the ſecond leſſee ſhall have it; and if there bee any rent reſerved upon the ſecond leaſe, the leſſee muſt pay it from the time of the making of the leaſe. And therefore if one make a leaſe of land to *A* for ten years, and after make a leaſe to *B* of the ſame land from *Michaelmas* next for ten years, and before *Michaelmas* the firſt leſſee doth purchaſe the fee ſimple, ſo that now by this means his term is drowned; in this caſe the ſecond leaſe ſhall begin at *Michaelmas*. So if one make a leaſe to *A* for twenty years, and *A* make a leaſe of the land to *B* for two years rendring rent, and after *A* makes a leaſe for the reſt of his time to *C* by deed; this leaſe if the leſſee for two years doe atturn, is a good leaſe of the rent and reverſion; and ſo it is alſo without Atturnment, if there be any conſideration given for it, for then it is alſo a good leaſe for all the reſt of the term after the two years. So if one make a leaſe to *A* for twenty years, if he live ſo long rendring rent, and after he doth make a leaſe to *B* by Indenture for eighty years to begin preſently, or grant the reverſion to beginne at a day paſt, or the like; in all theſe caſes if the firſt leſſee atturne the rent will paſſe, but if not it will be a good leaſe for the land for ſo many of the yeares as ſhall bee to come after the firſt leaſe ended. But if the ſecond leaſe bee by paroll without a deed, the reverſion as a reverſion will not paſſe, and the grant will bee void if there bee nothing elſe to help it. And in caſes where the ſecond leaſe is void, albeit the firſt leſſee ſurrender his eſtate, or his eſtate end by a condition; yet the ſecond leaſe is not hereby made good. But if the ſecond leaſe for yeares after another leaſe for life or years be made for mony, ſo as it may be ſaid to paſſe by

Eſtoppel

Dier 58. 356 Plow. 421. 422. Co. 1. 155.

Dier 112. Plow. 432.

Co. 4. 53.

Co. 1. 155. Plow. 432. 434.

Hil. 6 Jac. Adjudge Finch verſus Vaughan.

Dier 112.

Co. 2. 35. 36.

by way of bargain and ſale; this may help the matter, for in this caſe albeit it be by word onely, it may paſſe the reverſion and the rent alſo: but in moſt caſes it is good for the remainder of the term after the firſt leaſe ended. And if the ſecond leaſe be to begin after the end of the former leaſe; in this caſe the former leaſe is no impediment at all to the validity of the latter leaſe, but the latter leaſe is good notwithſtanding.

Stat. 32 H. 8. cap. 28. Co. ſuper Lit. 44.

Any perſon whatſoever of full age that hath any eſtate of inheritance in fee taile in his owne right of any lands, tenements, or hereditaments, may at this day without fine or recovery make leaſes of ſuch lands for lives or years, and ſuch leaſes ſhall be good ſo as theſe conditions and incidents following be therein obſerved and kept.

5. What Leaſes or other acts may be made or done by a tenant in tail. And what leaſes made by ſuch a tenant ſhall be good to binde the iſſue, or him in remainder, or others after the death of the tenant in tail. And how they ſhall bind.

1. Such leaſes muſt be by deed indented, and not by deed poll or by paroll.

Co. 5, 6. Dier 246.

2. They muſt be made to begin from the day of the making thereof, or from the making therof. And therfore a leaſe made to begin from *Michaelmas* which ſhall be three years after for twenty one years, or a leaſe made to begin after the death of the tenant in tail for twenty one years is not good. But if a leaſe be made for twenty years to begin at *Michaelmas* next; it ſeems this is a good leaſe.

Co. 5. 2.

3. If there be an old leaſe in beeing of the land, the ſame muſt be ſurrendred, or expired and ended within a year of the time of the making of the new leaſe; and this ſurrender muſt be abſolute and not conditionall, alſo it muſt be reall, and not illuſory, or in ſhew onely. For *factum non dicitur quod non perſeverat.*

Co. 5. 2.

4. There muſt not be a double or concurrent leaſe in being at one time, as if a leaſe for years bee made according to the ſtatute; he in the reverſion cannot afterwards expulſe the leſſee and make a leaſe for life or lives, or another leaſe for years according to the Statute, nor *è converſo.* But if a leaſe for years be made to one, and afterwards a leaſe for life is made to another, and a letter of Atturney is made to give livery of ſeiſin upon the leaſe for life, and before the livery made the firſt leaſe is ſurrendred; in this caſe the ſecond leaſe is good.

Sparks caſe Trin. 4 Jac. B. R.

Co. 5, 6. Dier 246.

5. Theſe leaſes muſt not exceed three lives, or twenty one years from the time of the making of them. And therefore if tenant in tail make a leaſe for twenty two or for forty years, or for four lives; this leaſe is void, and that not only for the overplus of time more then three lives or twenty one yeares, but for that time of three lives or twenty one years alſo. And it hath been reſolved, that if tenant in tail make a leaſe for ninety nine years determinable upon three lives; that this is not a good leaſe. But if a leaſe be made by a tenant in tail for a leſſer time, as for two lives, or for twenty years, this is a good leaſe. And if a leaſe be made for four lives, and

Co. 1.

it happen that one of the lives die before the tenant in tail die; yet this accident will not make the leaſe good, but it remains voidable notwithſtanding.

6. Theſe leaſes muſt be of lands, tenements, or hereditaments manurable or corporall, which are neceſſary to be letten, and whereout a rent by law may be iſſuing and reſerved. And therefore if a tenant in tail make a leaſe of ſuch a thing as doth lie in grant, as an Advowſon, Fair, Market, Franchiſe, or the like, out of which a rent cannot bee reſerved, eſpecially if it be a leaſe for life; this leaſe is void, and that albeit the thing have been anciently and accuſtomably letten. And a grant of a rent-charge therefore out of ſuch lands is void. * And if tenant in tail make a leaſe for three lives of a portion of tithes rendring rent; this leaſe is unqueſtionably void. And ſo alſo it ſeems it is if it be a leaſe for twenty one years. Co. 5. 2. Tallentines caſe, Paſch. 3 Jac. B. R. Co. 11. 60. *Trin. 2 Ja. B. R. Adjudg. Doddingtons caſe.

7. They muſt be of ſuch lands, or tenements, which have been moſt commonly letten to farm, or occupied by the Farmors therof by the ſpace of twenty years next before the leaſe made, ſo as if it have been letten for eleven years at one or ſeverall times within twenty years before the new leaſe made it is ſufficient. And albeit the letting have been by copy of Court roll only, yet ſuch a letting in fee, for life, or years, is a ſufficient letting, and ſo alſo is a letting at will by the Common Law. But theſe lettings to farm muſt be made by ſuch as are ſeiſed of an eſtate of inheritance, for if it have been only by Guardian in Chivalry, tenant by the curteſie, in dower, or the like; this will not ſerve to be a letting within the intent of the ſtatute. Co. 6. 37. Dier 271.

8. There muſt be reſerved upon ſuch leaſes yearely during the ſame leaſes due and payable to the leſſor and his heirs to whom the reverſion ſhall appertain ſo much yearly farm or rent, or more as hath beene moſt accuſtomably yeelded or paid for the lands &c. within twenty years next before ſuch leaſe made. And therefore if the rent be reſerved but for part of the time of the new leaſe, this leaſe is void. And if the tenant in taile have twenty acres of land that have been accuſtomably letten, and hee make a leaſe of theſe twenty acres, and of one acre more which hath not been accuſtomably letten, reſerving the uſuall yearly rent, and ſo much more as to exceed the value of the other acre; this is not a good leaſe by the Statute. So if the tenant in tail of two farms, the one at twenty pound rent, the other at ten pound rent, and he make a leaſe of both theſe farms together, at thirty pound rent; this is not a good leaſe within the Statute. But if beſides the annuall rent there have beene formerly reſerved things not annuall, as hariots, fines, or other profit upon the death of the Farmors, or profit out of anothers ſoil, as paſturage for a colt &c. if upon the new leaſe the yearly rent be reſerved, albeit theſe collate- Co. 5. 8. 6. 6. 37. Co. 6. 37, 38. Trin. 3 Jac. B. R. Adjudg. Adjudg Tr. 18 Jac. B. R.

Co.5.6. laterall reſervations be omitted, yet theſe leaſes are good. And ſo alſo if there be more rent reſerved upon the new leaſe then the rent that hath been anciently paid, the leaſe is good notwithſtanding. And yet if tenant in tail of land let a part of it that hath been accuſtomably letten, and reſerve the rent *pro rata*, or more then after the rate; this is not a good leaſe. And yet if two coparcenours have twenty acres of land of equall value between them in tail, and theſe have been uſually letten, and they make partition of theſe lands, ſo as each of them hath ten acres; in this caſe they may make leaſes of their ſeverall parts reſerving the half of the accuſtomable rent. And if upon the old leaſe the rent were payable at foure days in the year, and by the new leaſe it is reſerved to be paid at one day; this is not a good leaſe. But if the rent upon the old leaſe be payable in gold, and the new rent be payable in ſilver; it ſeems the leaſe is not good. And if a tenant in tail be of a Manor that hath been uſually demiſed for ten pound rent, and after a tenancy eſcheat, and then he doth make a leaſe of the Manor rendring ten pound rent by the year; in this caſe this is a good leaſe, but if the leſſor purchaſe a tenancy, then it ſeems otherwiſe.

Co.5.5. And yet Co. ſuper Lit. 44. b. is *contra*.

Trin. 3 Jac. B.R. Cornwals caſe. Co.5.5.

Co.5.6.

9. Such leaſes muſt not be without impeachment of waſt. And therefore if tenant in tail make a leaſe of his land intailed without impeachment of waſt; this leaſe is void. And if a leaſe be made for life, the remainder for life &c: this is not a good leaſe, for in this caſe during the remainders, the tenant for life cannot be puniſhed for waſt done. But if ſuch a tenant of land make a leaſe of it to *I S* for the lives of three others; this is a good leaſe, albeit it may afterwards become an occupancy.

Co.6.37. & Meers caſe Adjudge.

Waſt.

Stat. 11 H. 7.20. Co.3.51.

10. Such leaſes muſt not be againſt any ſpeciall Act of Parliament. And therefore if a woman that is tenant in tail of the gift of her deceaſed husband, or any of his Aunceſtors whiles ſhe is ſole, or after with another husband make any ſuch leaſe warranted by this Statute; yet this leaſe is not good.

Co.7.7. 8.34. Dier 7.8. The womans Lawyer 173. Plow.435.

11. They muſt have all due ceremonies and circumſtances for the perfection of them, as other ſuch like leaſes have, as livery of ſeiſin, and the like, where they are needfull. And then only when leaſes have theſe conditions, and are made according to theſe proviſions, are they ſaid to be within this ſtatute of 32 *H.8.* and ſuch only as doe binde the tenant in tail himſelf, and the iſſue in tail, for otherwiſe if it be not warranted by this ſtatute, albeit it will bind the tenant in tail himſelfe that made it, yet it will not binde his iſſue, but as to him it will be void, or voidable at the leaſt: for if tenant in tail of land make a leaſe of it for an hundred yeares without any rent reſerved thereupon; this leaſe as to the iſſue in tail is void: but if he make a leaſe of his land for an hundred years

Plow.436.

Acceptance. rendring rent, and have iſſue and die; in this caſe the leaſe is onely voidable by the iſſue at his pleaſure, and therefore if the iſſue accept the rent after the death of the tenant in tail; by this means the leaſe is affirmed and become good. But howſoever the leaſe bee made it will not binde him that comes in of a remainder over, nor him that is the donor. And therefore if a tenant in tail make a leaſe warranted by the ſtatute, and after die without iſſue, ſo that the land doth remain over to another, or revert to the donor; in theſe caſes neither he in the remainder, nor the donor ſhall be bound by this leaſe, for as to them the leaſe is void. And yet by a common recovery the tenant in tail may make leaſes of, or lay charges upon the land to binde the donor and him in remainder alſo. But otherwiſe it is of a fine, for if tenant in tail make a leaſe for years by fine, this will not barre the donor, nor the remainder in any caſe where it is in a ſtranger. And yet if the remainder be in the tenant in tail himſelf, and he make a leaſe for years by deed according to the Statute or by fine; this leaſe is good and ſhall bind his own remainder.

6. What leaſes or other acts may be made or done by the husband with the lands he hath in fee ſimple, or fee tail in the right of his wife, or joyntly with her. And what leaſes made by him of ſuch lands are good. Or not. And how.

The husband may at this day without fine or recovery make leaſes of the lands, tenements, or hereditaments, whereof he hath any eſtate of inheritance in fee ſimple, or fee tail in the right of his wife, or jointly with his wife made before or after the coverture, ſo as there be in ſuch leaſes obſerved the eleven conditions or limitations before required in the leaſes made by tenant in tail, and ſo that the wife doe joyn in the ſame deed, and be made party thereunto, and doe ſeal and deliver the ſame deed her ſelf in perſon. Stat. 32 H. 8. cap. 28. Co. ſuper Litt. 44.

For if a man and his wife make a letter of Atturney to another to deliver the leaſe upon the land; this leaſe is not a good leaſe from the wife warranted by the ſtatute. And yet then as in other like caſes of leaſes not warranted by this ſtatute it is a good leaſe againſt the husband. And when the leaſe is ſuch a leaſe as is warranted by the ſtatute, it doth bind the husband and wife both, and the heirs of the wife; but if it be an eſtate tail, it doth not bind the donor nor him in remainder. Paſch. 7 Jac. B.R.

If the husband and wife at the Common Law had joyned in a leaſe of her land without rendring of rent; this leaſe had been void as againſt the wife, and ſo is the law ſtill. 26 H. 8. 2.

If the husband at the Common Law had been ſeiſed of land in the right of his wife, and hee had made a leaſe for yeares rendring rent and died; this leaſe had been void, and ſo is the law ſtill. 26 H. 8. 2. Co. 2. 77.

If the husband and wife at the Common law had made a leaſe by word rendring rent; this leaſe had been void as againſt the wife; and ſo is the law ſtill. Dier 98.

The

Stat. 32 H. 8. ch. 28. See the womans lawyer 163.

The husband and wife together may by fine, or recovery, make what leaſes they will of her land, or charge it for what time they will; and ſuch leaſes and charges will be good againſt the husband and wife both and their heires alſo. But if the husband alone doe levie any fine of his wives land, and thereby make any eſtate whatſoever; this will not bind the wife after her husbands death but ſhe may avoid it. And if the husband and wife make a leaſe of her land rendring rent to them and the heires of the wife (as in ſuch leaſes it ought to be;) in this caſe the husband cannot by fine or otherwiſe grant or diſcharge this rent longer then during coverture unleſſe the wife join in the fine, but the rent ſhall deſcend, remaine or revert in ſuch ſort and manner as the land ſhould have done.

Co. ſuper Lit. 44. Co. 5. 14. 11, 66.

Biſhops with the confirmation of the Deane and Chapter, Parſons or Vicars with the conſent of their Patrons and Ordinaries, Archdeacons, Prebends, and ſuch as are in the nature of Prebends, as Precentors, Chaunters, Treaſurers, Chancellors, and ſuch like, alſo Maſters and governours and Fellowes of any Colledges or houſes, (by what name ſoever called) Deanes and Chapters, Maſters or Gardians of any Hoſpitall and their brethren, or any other body politique, ſpirituall and eccleſiaſticall (*Concurrentibus hiis quæ in jure requiruntur*) might by the ancient common law have made leaſes for lives or yeares, or any other eſtates of their ſpirituall or eccleſiaſticall living for any time without ſtint or limitation. And at this day the Biſhops, and the reſt of the ſaid Spirituall perſons, except Parſons and Vicars, may make leaſes of their ſpirituall livings for three lives, or twenty one years, and ſuch leaſes will be good both againſt themſelves and their ſucceſſors. But ſuch perſons may not make leaſes or eſtates for any longer time then for three lives or twenty one years, and if they doe albeit it be by fine or recovery, or it be confirmed by the Dean and Chapter &c. yet it is void as againſt the ſucceſſor. Neither will the leaſes made by ſuch perſons for three lives or twenty one years be good, unleſſe they have certain conditions and properties required in them. Theſe things therefore are neceſſarily required to be obſerved in the making of ſuch leaſes: 1. That they have the effect of all the qualities or properties before mentioned and required by the Statute of 32 *H.* 8. in the leaſe made by the tenant in tail, and be made after that pattern, *viz.* That they be by deed indented. 2. That they do begin from the time of the making of them. 3. & 4. That the old leaſe be ſurrendred, and there be not a concurrent leaſe (ſave in caſe of a Biſhop). And therfore if any ſuch perſon make a leaſe for 21 years to one, & then make a leaſe for three lives to another; this ſecond leaſe is void. And yet if a Biſhop make a leaſe for 21 years to one man, & then within a year after make another leaſe to another for

Stat. 32 H. 8. ch. 28. 13 El. ch. 10 1 Jac. chap. 3. 1 El. ch. 19. 14 El. ch. 11. 18 El. ch. 10. 20.

Co. ſuper Litt. 44. Co. 11. 66. 5. 3. 15.

7. What leaſes or other acts Biſhops or other ſpirituall or eccleſiaſticall perſons may make or doe with the lands they have in the right of their churches or houſes. And what leaſes made by ſuch perſons will bind their ſucceſſours and others. Or not.

21 years to beginfrom the making of it,this ſo as it be confirmed by Dean & Chapter is reſolved to be a good leaſe. 5. That they doe not exceed three lives or twenty one yeares, but they may be for a leſſe time. 6. That they be of lands or tenements manurable or corporall. 7. That they be made of lands that have been commonly let to farm by the ſpace of 20 years before. 8. That there be reſerved upon them the ancient and accuſtomed rent payable to the leſſor and his ſucceſſors during the time. 9. That they be not made without impeachment of waſt. 10. That there be livery of ſeiſin upon them &c. where it is requiſite. 11. If the leaſe be made according to the exception of the Statute of 1 *Eliz.* and 18 *Eliz.* and not warrated by the Statute of 32 *H.* 8. as in the caſe of a concurrent leaſe, and it be made by a Biſhop or any ſole Corporation,it muſt be confirmed by the Deanes and Chapters or others that have intereſt. And if a Parſon or Vicar make a leaſe, it is not good but during the Parſon or Vicars reſidence according to the Statute of 13 *Eliz. chap.* 20. and in this caſe there needs no confirmation at all. 12. Some of the leaſes that are made by the Colledges and houſes of the Univerſity &c. muſt have ſome rent corne reſerved upon them. * But Biſhops, Deanes, Parſons and ſuch like ſpirituall perſons cannot grant the next advowſons of Churches,neither can they grant rents out of their ſpirituall livings but the ſame charges will be void after their death. And if a Biſhop ſuffer an annuity to be recovered againſt him by a pretence of title of preſcription on a Judgment after a verdict or confeſſion, or a Parſon in ſuch a caſe pray in aide of the Patron and ſo ſuffer an annuity to be recovered; this will not bind the ſucceſſor. And yet a Biſhop,or any ſuch ſpirituall perſon may grant ancient offices of truſt of neceſſity or conveniency, as the offices of Chancellor, Regiſter, Steward, Bailife, or the like, with the ancient fees incident thereunto for the life or lives of the grantees, and ſuch grants are good, albeit they be made by the Biſhops of the new erected Biſhopricks,and that there be not in them the conditions and properties required in the leaſes before mentioned,ſo as they be confirmed by the Deane and Chapter. But they may not grant any new office nor yet adde any new fee to the old offices. And therefore if a Biſhop grant an annuity *pro conſilio impenſo & impendendo* where none was before; this will not bind the ſucceſſor. And yet if there be an old fee, and there is a new fee added to it;in this caſe it ſeems it is good for the old fee albeit it be void for the new fee. Neither may they grant their offices otherwiſe then they have been granted. And therefore where the ancient grants of the office have been to one; it cannot be now granted to two. And where the ancient grants have been to two jointly, they may not be now granted in remainder one after another. Neither may the grants of theſe offices be longer then for the

Co. 11. 66. 5. 3.

Stat. 18 El. cap. 20. * Co. 5. 15. 11. 66. 10. 58. Dier 370. And moſt of theſe points were agreed by Juſtice Jones and Juſt. Whitlock at Lent Aſſiſes at Gloc. 6 Car.

the life or lives of the grantees. And in caſe where the grant is void, the confirmation of the Deane and Chapter will not make it good.

Co. ſuper Lit. 45. 329. 3.59.10. 59. 11.73.78. 5.5.

But here note that albeit in all theſe caſes of leaſes and grants not warranted by the Statutes aforeſaid the Statutes ſay the leaſes ſhall be void, yet this is to be underſtood as againſt the ſucceſſors and not againſt the leſſors themſelves, for the leaſes are good ſo long as the leſſors live, or at leaſt ſo long as they continue in the place. And therefore if ſuch a leaſe be made by a Deane and Chapter or other Corporation aggregate; it is good as againſt the Deane or other head of the Corporation, ſo long as he doth continue in his place. And if a Biſhop make any leaſe or other grant not warranted by the Statute of 1 *Eliz.* or a Deane and Chapter, Maſter and Fellowes of a Colledge or the like make leaſes not warranted by the Statute of 13 *Eliz. cap.* 10. theſe leaſes are good againſt themſelves albeit they are void againſt their ſucceſſors. So as if a private Act of Parliament doth entaile land upon a man, and appoint him what eſtates he ſhall make, and that if he make any other eſtates they ſhall be void; in this caſe they ſhall not be void as to the tenant in taile himſelfe that doth make them. Note.

Stat. 13 El. cap. 20.

Leaſes of Benefices with cure are no longer good then the Parſon is reſident.

Leaſes made by Colledges muſt have reſerved upon them the third part of the rent in Corn. See the Statute of 18 *Eliz. cap.* 20.

Co. ſuper Lit. 55. 56. 270. 14 H. 8. 12.

If one make a leaſe to another during the will and pleaſure of him that letteth, or him that taketh, or both (for ſo in effect is every leaſe at will;) this is a good leaſe at will. So if one make a feoffment in fee, or leaſe for life, &c. and doe not make livery of ſeiſin and ſo perfect the eſtate; the feoffee or leſſee hath only an eſtate at will. But if a bargaine and ſale be made of land, and the ſame is void, or a Corporation grant land, and the grant is void; by this there is no leaſe at will made. 8. What ſhall be ſaid a good leaſe at will. Or not.

Co. ſuper Lit. 45. 3. 59. 65. 7. 8.

Leaſes for lives or yeares are of three natures, ſome be good in law, ſome be voidable by entry, and ſome void without entry. And of ſuch as be good in law, ſome be good at the common law, as leaſes made by tenant in fee ſimple notwithſtanding they be for longer time then three lives or twenty one yeares; ſome by act of Parliament, as leaſes made by tenant in taile, leaſes made by a Biſhop ſeiſed in fee in the right of his Church alone without the Chapter, leaſes made by a man ſeiſed in fee ſimple or fee taile of land, in the right of his wife together with his wife, for twenty one yeares, or three lives according to the Statutes. And of ſuch leaſes as be void alſo, ſome are void at the common law, and that ſometimes *in preſenti*, as in the caſes before of leaſes for yeares that have no certainty in them, or leaſes for lives made without livery of ſeiſin, 9. Where a leaſe for life or years ſhall be void *ipſo facto* by the death of the leſſor or by other meanes. Or not, but voidable by entry &c. And how.

ſeiſin, and the like. And ſome are void in *futuro*, as if a tenant in taile make a leaſe for yeares warranted or not warranted by the Statute, and after die without iſſue; this leaſe is void as to him in reverſion or remainder: *Ceſſante ſtatu primitivo ceſſat derivativus.* So if a Prebend, Parſon, or Vicar make a leaſe for yeares not warranted by the Statutes; this is void by the death of the leſſor, and the ſucceſſor need not make any entry or claime to avoid it. So if a tenant for life make a leaſe for yeares and after die; in this caſe the leaſe for yeares is void. And therefore in all theſe and ſuch like caſes no acceptance of rent after will affirme ſuch leaſes. But otherwiſe it is in caſes of leaſes for yeares made by Biſhops albeit they be confirmed by Deane and Chapter; and of leaſes made by Deanes and Chapters, or tenants in taile as to their ſucceſſors and iſſues when the leaſes are not warranted by the Statutes: And otherwiſe it is alſo in the caſe of leaſes for life made by theſe or any of the former leſſors, for in all caſes of leaſes for life it muſt be avoided by entry &c. and therefore ſuch leaſes are not void but voidable. *viz.* The leaſes of Biſhops and Deanes after their death by their ſucceſſors and that by the Statute law, and the leaſes of tenants in taile by their iſſues after their death, and that by the common law. And in theſe and ſuch like caſes the acceptance of the rent by the iſſue or ſucceſſor will make good the leaſe at leaſt for their time.

Acceptance.

Acceptance.

If a leaſe be made for yeares on condition that upon ſuch a contingent it ſhall be void; in this caſe ſo ſoone as the thing doth happen the leaſe is void *ipſo facto* without any reentry &c. But if a leaſe for life be made on ſuch a condition; in this caſe the leſſor muſt enter &c. before the leaſe will be void. Co. 3. 65.

Chap. XV.

Of a Feoffment, Gift, Grant, and Leaſe.

1. Where and by what meanes a feoffment, gift, grant or leaſe and the eſtate thereby made being good at firſt becometh void by matter *ex poſt facto*, and may be avoided. Or not. And how.

A Feoffment, Grant or Leaſe in writing may become void by raſure, interlining, and the like, as hath been ſhewed before in Deed, *ſupra*. And a feoffment, grant, or leaſe and the eſtate thereby made may become void by forfeiture, or upon a breach of a condition, or by a limitation. For which See *Condition* and *Vſes*. Alſo they may become void by diſagreement or refuſall: And this may be either by the diſagreement of the party himſelfe to whom it is made, or by the diſagreement of another: Of the party himſelfe, for no eſtate can be made to a man of any thing in fee ſimple, for life,

Co. 3. 26, 27. 5. 119. Doct. & Stud. 119. Perk. Sect. 44. 45. Fitz. Done 4, 5. Bro. Done 29. 30. 59.

life, or otherwiſe againſt his will: And therefore by his diſagreement or refuſall of it the eſtate it ſelfe and the deed whereby it is conveyed may become void. By the diſagreement of another, as the husband in caſe of a feoffment &c. made to his wife may by diſagreement avoid it. And for the firſt of theſe the law is thus, That all ſuch acts that give eſtates directly or by way of uſe are good at firſt, and the thing granted when the deed of grant is delivered to his uſe ſhall veſt in the grantee before he hath notice of the grant or agree to accept of the thing granted, ſo that if lands be limited to a man by way of uſe, or granted immediately by feoffment, gift, grant, or leaſe, or goods or chattels be given or granted to a man; in theſe caſes the things granted ſhall be ſaid to be in the grantee and the grant good before notice and agreement untill diſagreement. And before agreement the grantee may waive it, and ſo avoid the eſtate and the deed alſo whereby the eſtate is made. And if it be but a leaſe for yeares that is made; he may waive and avoid that by word of mouth in the conntry as well as a gift of goods, or an obligation delivered to his uſe. But if it be an eſtate of free hold that is made by feoffment &c; it ſeemes he cannot waive and avoid that but in a Court of Record.

Co. ſuper Lit. 204. Plow. 134. 15 E. 4. 4. Dier 76. 9 E. 4. 20.

When the cauſe of a grant faileth and the thing granted is executory, the grant is become void. As if one grant an annuity for an acre of land, for tithes, or for counſell; in this caſe *pro* is conditionall, and therefore if the land be evicted by an elder title, or the grantee diſturbed in the tithes, or he refuſe to give counſell, the annuity is determined. But if a feoffment, or leaſe for life or yeares be made of an acre of land *pro una acra &c.* as in the caſe before; albeit the acre be evicted &c, yet the grant in this caſe of the acre of land is good. And if one grant an annuity for counſell, if the grantee will not give counſell, the grant is not of force. So if one grant to make new pales in a place for the old pales; if in this caſe he cannot have the old pales it ſeemes the grant ſhall not bind him to make new pales. So if one grant a rent for a way; ſtop the way and the rent ſhall be ſtopped.

Co. 8. 144, 145.

If one that hath a leaſe for life or yeares of a Manor to which an advowſon is appendant grant the next avoidance that ſhall happen during the leaſe, or grant a rent out of the Manor, and then ſurrender the Manor ſo that his eſtate is gone, in this caſe notwithſtanding the grant of the next avoidance, and of the rent doth continue good, and the grantee ſhall enjoy it according to the grant as long as the eſtate that is ſurrendred ſhould have had continuance.

If the heire of the Kings tenant enter and make a leaſe before livery ſued, and after an intruſion is found againſt him; by this it ſeems the leaſe is avoided. So if tenant in taile make a leaſe warranted by the Statute, and after dieth without iſſue; by this the leaſe is determined.

H. 7.

If

If a tenant in taile make a feoffment to his heire within age, and he after he is of full age make a leaſe for yeares of the land, and after the tenant in taile dieth and the heire is remitted; the leaſe in this caſe is not avoided. Co. ſuper Lit. 349.

If an annuity be granted to one untill he be advaneed to a benefice by the grantor, and the grantor die, and the heire or executor of the grantor tender a benefice; it ſeemes this will not determine the grant. Plow. 272. 15 H. 7. 11.

If *A* be leſſee for yeares of an advowſon, and grant the next avoidance to *B* if it ſhall happen to become void during the terme, and *A* doth ſurrender the terme to *C* who hath the inheritance, and the Church become void before the end of the terme; in this caſe the grant is good to *B* and he ſhall have the next avoidance, for a man cannot derogate from his owne grant. So if *A* be leſſee for years, and he grant a rent charge to a ſtranger, and after ſurrender his terme to the leſſor; in this caſe albeit the terme be extinct yet the rent doth continue and the ſtranger ſhall have it during the terme. So if *A* have a rent charge out of the land of *B* and acknowledge a Statute to *C* and then releaſe the rent to *B*; in this caſe albeit the rent be gone as to *A* and *B*, yet it is in *eſſe* as to the conuſee and he may extend it. Co. 8. 145. 7. 39.

If a man be ſeiſed of a great wood and grant to *I S* ſix hundred coards of wood out of the ſame wood to be taken by the aſſignement of *A*; in this caſe if *A* will not upon requeſt aſſigne where the wood ſhall be taken, yet the deed will not loſe his effect, but *I S* may take it without aſſignment. Co. 5. 24.

If *A* be leſſee for life on condition to have fee, and he make a leaſe to *B* for yeares and after he performe the condition and ſo his eſtate for life is turned into a fee ſimple; in this caſe the leaſe for years is good ſtill notwithſtanding: but otherwiſe it is in caſe of the King. Co. 7. 14.

If *A* tenant in taile enfeoffe *B* on condition to the uſe of *A* in fee, and *A* had granted a rent charge or acknowledged a Statute, which by the Statute of 1 *R.* 3. *cap.* 5. was extended, and after *A* had performed the condition; in this caſe albeit the eſtate had been changed yet the intereſt of the grantee or conuſee had continued. Co. 1. 147. 148. 11 H. 7. 21.

If *A* be tenant for life, the remainder to *B* in taile, the remainder to *A* in fee, and *A* doth grant a rent charge or acknowledge a Statute and die; in this caſe and hereby the grant is not become void, but if *B* die without iſſue the heire of *A* ſhall be charged. 5 E. 4. 2. Pethouſe & Cranes caſe. Mic. 36. 37 El. Co. B.

If a corody be granted for a ſervice to be done, the omiſſion of the ſervice doth determine the corody. Davis Rep. 16

If one grant lands with his daughter in frank mariage, or goods with his daughter in mariage, and after the mariage is diſſolved and 20 E. 4. ult. Dier 13. 126.

they

they are divorced; in this caſe the grant is now become of no force: *Ceſſante cauſa ceſſat effectus.*

Bro. Grant 103. If one man grant to another an office of charge only to which there is no benefit or fee incident; in this caſe he may avoid and determine his owne grant at his pleaſure without any cauſe given. But if there be any fee or profit incident to the office then he may not avoid the grant of it or put out the officer without ſome cauſe of forfeiture: and if he doe the grantee may have an aſſiſe. And yet in this caſe alſo he may put him out of the office albeit he may not deprive him of the fee or profit incident thereunto.

2. Where a man may avoid his own grant. Or not. And when.

Bro. Grant. If one grant a Ward to another to mary, or for his ſervice; it ſeemes he may not afterwards avoid this grant. But if one grant him to another for inſtruction or education, *contra.*

Bro. Grant 128. If one make a leaſe for years of his land rendring rent, and after grant the rent to *I S* and the termor atturne, and after the leſſor accept of a ſurrender of the eſtate of the termor; yet this doth not avoid the grant of the rent but the ſame ſhall continue ſtill.

Lit. Sect. 477. If a diſſeiſor grant a rent, common, or other profit apprender out of the land, and after the diſſeiſee doth enter and enfeoffe him of the land; in this caſe the rent is avoided and the common is gone. But if the diſſeiſee releaſe to the diſſeiſor; in this caſe he ſhall not avoid his owne grant.

An Infant, and other diſabled may impeach and avoid their own grants in divers caſes, which ſee before in *Grant.*

A deed of feoffment &c. in ſome caſes is holpen, and a fault therein cured by the making of livery of ſeiſin. For which ſee *Feoffment* and *Leaſe.* But an atturnment will not help the grant of a reverſion &c. for it is a maxime in law, That atturnment cannot make a void grant good.

3. Where and by what meanes a feoffment, gift, grant, or leaſe or the eſtate thereby made being void or voidable at the firſt may become good by matter *ex poſt facto.* Or not.

Co. 1. Capels caſe. Dier 373. Co. 1. 48. 76. If a tenant in taile make a leaſe for life or years of land and this leaſe is voidable, and after the tenant in taile doth ſuffer a common recovery of the land to whomſoever it be; by this the leaſe is affirmed & made good during the terme as wel againſt the iſſues & heirs by the entaile as againſt him in reverſion or remainder: And ſo it is of a charge of a rent upon the land. And if tenant in taile make a leaſe of the land or charge it, and after levy a fine of the land to a ſtranger, by this the leaſe or charge is become good againſt the iſſue in taile alſo.

So held in the Exchequer Hil. 16 Jac. If a tenant in taile make a leaſe for forty yeares rendring rent and die, and his iſſue doth leaſe to another by indenture for twenty one yeares rendring rent to begin after the expiration, forfeiture or ſurrender of the firſt leaſe; it is ſaid this doth affirme the firſt leaſe. *Sed quere.*

Acceptance of rent reſerved on a leaſe for life or yeares which is voidable only and not void, may make the leaſe good.

A feoffment, gift, &c. that is made by dureſſe or manaſſe, and therefore voidable may by another deed of defeaſance afterwards made between the ſame parties become good. Bro. Defeaſance. 17.

Alſo grants, leaſes, and the eſtates thereby made that are not good may be made good and perfected by releaſe or confirmation. For which ſee *Releaſe* and *Confirmation*.

4. Where & when a feoffment, gift, grant or leaſe may be good for one time and void for another, and good againſt one perſon but void againſt another, and good in part and void in part. Or not.

A feoffment may be good againſt ſome perſons and void againſt others, but cannot ceaſe and revive and be good and void at ſeverall times, as a leaſe for years, or a grant of rent &c. may in many caſes, for a grant may be ſuſpended, and a leaſe for yeares may ceaſe and revive againe, as if tenant in taile make a leaſe for yeares rendring twenty ſhillings rent, and after taketh a wife and dieth without iſſue, and he in reverſion or remainder endoweth his wife (as he may;) in this caſe the leaſe as againſt the woman is revived albeit it be void as to him in reverſion or remainder. So if tenant in taile make a leaſe for yeares and die without iſſue his wife enceint with a ſonne, and he in reverſion enter, and after the ſonne (being heire to the entaile) is borne; in this caſe the leaſe which was before avoided by him in reverſion if it be ſuch a leaſe as is warranted by the Statute is good againſt the iſſue in taile, and therefore is revived againe. So if the King make a gift in taile to *W* to hold by Knights ſervice, and *W* doth make a leaſe to *A* for thirty yeares reſerving rent, and then *W* dieth his ſonne and heire of full age; in this caſe as to the King this leaſe is void, but after livery ſued out the leſſee may enter againe, and if the iſſue accept the rent the leaſe is affirmed. So if tenant in taile make a leaſe not warranted by the Statute and die, and his heire is in ward; in this caſe the Gardian in the behalfe of the heire may avoid the leaſe during the wardſhip, but afterwards the heire may affirme it againe if he accept of the rent. So if tenant in fee ſimple take a wife, and then make a leaſe for years and dieth, and the wife is endowed, ſhe ſhall avoid the leaſe for her eſtate, but after her death the leaſe will be in force againe. But if the Patron grant the next avoidance, and after the Parſon, Patron and Ordinary before the Statutes had made a leaſe of the Glebe for years, and after the Parſon had died, and the grantee of the next avoidance had preſented a Clerke to the Church who had been admitted, inſtituted and inducted, and had died within the terme, and the Patron had preſented a new Clerke to the Church who had been admitted, inſtituted and inducted; in this caſe the leaſe had not revived againe. No more then if a feme covert levy a fine alone, and the husband doth enter and avoid the fine, the eſtate ſhall revive againſt the wife after his death, for it is avoided as to her alſo as well as to the husband by his entry. See more in *Deed ſupra cap.* 4. *Numb.* 7. Co. ſuper Lit. 46. 7. 8

Where a feoffment, gift, grant, or leaſe is voidable, in ſome caſes

Co. ſuper Lit. 43. Co. 7. 8. Dier 337. 239.

caſes it may be avoided by the party himſelfe that made it and not by others albeit they be privies as heires, executors, or adminiſtrators, and in ſome caſes it is voidable by others and not by the party himſelfe, and in ſome caſes it is voidable by the party himſelfe and by others. And in ſome caſes it is avoidable only at ſome times, and in ſome caſes it is avoidable at all times: as for examples, an Infant if he grant by fine muſt avoid it during his minority if he live to be of full age, otherwiſe he himſelfe or any other ſhall never avoid it. But if he grant by deed, this may be avoided at any time by himſelfe, his heires, executors, or adminiſtrators, or his Gardian in his right as the caſe is. But a Lord by eſcheate cannot avoid a voidable eſtate made by his tenant being an Infant, And if a woman covert doe any ſuch act by deed; it may be avoided by her husband during the coverture, or her ſelfe after the coverture, or her heires &c. that are privies after her death. And if a man *de non ſane memorie* doe any ſuch act it may not be avoided by himſelfe that is the party denying it, but it may be avoided by his heires &c. that are privies. And if tenant in taile make a voidable leaſe not warranted by the Statute; he may not avoid it himſelfe, but his iſſue may. And if he be in ward by reaſon of a tenure in Capite or Knight ſervice, the gardian of the iſſue during his time may avoid it. And if a Corporation ſpirituall ſole or aggregate make leaſes not warranted by the Statutes, they may not avoid it themſelves, but their ſucceſſors after their death, tranſlation, or other remotion may avoid it; or if a Biſhop make ſuch a voidable leaſe, the King when the Biſhoprick doth come into his hands may avoid it.

5. Who may avoid a feoffment, gift, grant or leaſe, that is voidable. Or not. And how.

Infant.

Woman covert.

Co. ſuper Lit. 7. 8.

De non ſane memorie.

Tenant in tail.

Corporations.

And now we paſſe to another ſort of Aſſurances that are for ſome ſpeciall purpoſes and in ſome ſpeciall caſes only wherein we ſhall firſt begin with an *Exchange*.

CHAP. XVI.

Of an Exchange.

Terms of the law tit. Exchange Finches ley 27.

AN Exchange is the mutuall grant of equall intereſts the one in exchange for the other. Or it is, where a man is ſeiſed or poſſeſſed of land in fee ſimple, fee taile, for life, or yeares, or is poſſeſſed of goods, and another is ſeiſed or poſſeſſed of other lands or poſſeſſed of other goods in the like manner, and they doe exchange their lands or goods the one for the other. And in this there is a doble grant, for each of them doth grant that which is his to the other.

1. Exchange or Eſchange. *Quid.*

* Co. ſuper Lit. 50. Perk. Sect. 253.

This manner of conveyance (which heretofore was very frequent) is ſometimes made by word without any writing: and ſometimes it is made by deed or in writing: and which way ſoever it be made it muſt be made by this word Exchange, which is a word ſo appro-

priated to this thing as the word Frankmariage is to a gift in Frankmariage, neither of which can be made or deſcribed by any circumlocution.

2. The effect and fruit of it.

The fruit and effect of an exchange is, that it doth give the intereſt and after the property of the things exchanged to either party according to the agreement. And if the exchange be of lands or tenements of any eſtate of Inheritance or freehold whether it be by word or deed, it hath a condition and a warranty in law incident and annexed to it as a thing made by the word Exchange and *tacite* implied in every grant of exchange: A condition, to give a reentry upon all the land given in exchange if he be put out of all or part of the land taken in exchange, and a warranty, to enable him to vouch and to recover over in value ſo much of his own land againe given in exchange as ſhall be recovered from him of the land taken in exchange if he be ſued for it: So that upon every exchange either party if he be put out of or loſe by action the land he taketh in exchange hath a double remedy againſt the other, and yet this remedy doth goe only in the privity and ſhall not goe to an aſſignee: As if *A* exchange land with *B* and *B* be put out of all or part of the land upon a title paramount by a recovery in a reall action or otherwiſe, in this caſe *B* may either enter upon his owne land againe which he gave in exchange, or elſe if it be in an action brought he may vouch *A* upon the warranty in law, and ſhall recover as much in value againſt him of the land he gave as he hath loſt of the land he tooke in exchange. But if *B* alien his land taken in exchange to *C* and *C* be put out of all or part of the land upon a title paramount, *C* in this caſe can neither enter upon the land given to *A* in exchange upon the condition in law, nor vouch *A* to warranty and recover over in value upon the warranty in law. And yet *A* in this caſe ſhall have the like remedy againſt *C* the alienee upon the condition and warranty both as he had againſt *B*. But if *A* himſelfe implead *C* for the land he gave to *B* in exchange, *C* may make uſe of this warranty in law by way of Rebutter againſt *A*. And in all theſe caſes where one of the parties is put out of all or part of the land or out of part of the eſtate by entry, and the other party enter upon the others land upon the condition in law, he may enter upon the whole land and avoid the whole exchange: but if he be impleaded for a part only, or for the whole, and a part only be recovered from him; in this caſe he ſhall recover ſo much in value of the other land only as he hath loſt and no more: As if an exchange be of three acres for three acres, and after one of the parties is put out of one of the acres by the entry of a ſtranger; in this caſe he may enter upon the whole three acres he had given in exchange and ſo avoid the whole exchange if he will. And if *A* and *B* be Jointenants for life and the fee ſimple to the heires of *A* and *A* exchange this land with *C* in fee, and then die, and *B* enter and avoid

Co. 4. 121. 15 E. 4. 3. 9 E. 4. 21. Bro. Eſchange in toto. Fitz. Eſchange in toto.

Condition.

Warranty.

Aſſignee.

Rebutter.

avoid the exchange for his life (as he may) in this caſe *C* may avoid the whole exchange and enter upon his owne three acres againe. So if he in reverſion diſſeiſe his tenant for life, and then exchange the land, and after the tenant for life enter; in this caſe the other party may defeate the whole exchange. But in this caſe of an exchange of three acres for three acres, if one of the acres were gained by diſſeiſin, and the diſſeiſee bring an action and doth recover it againſt the diſſeiſor, in this caſe if he vouch over the other party to the exchange, he ſhall recover ſo much in value only of the three acres he gave in exchange as the acre he hath loſt and no more.

See Grant Numb. 4.

To the perfection of an exchange and to make things to paſſe by this kind of conveyance theſe things are requiſite. 1. That the perſons or parties thereunto be able to give and take, and not diſabled by any ſpeciall impediment. And for this it muſt be known that ſuch perſons as may be grantors and grantees may make exchanges, and ſuch perſons as are diſabled to grant are diſabled to make exchanges.

3. How an exchange muſt be made. And what ſhall be ſaid a good exchange. Or not.

1. In reſpect of the parties thereunto and their eſtates.

Co. ſuper Lit. 51.

An exchange made between the King and a ſubject is good albeit the King hold his land in one capacity and the ſubject in another.

Idem.

An exchange made between an Infant and another is not void but voidable only, for the Infant at his full age may affirme or avoid it at his election.

Infant.

Bro. Eſchange 9. Perk. Sect. 279.

An exchange made between a tenant in taile and another is not void but voidable, for it is good againſt himſelfe during his life, and his iſſue at his full age may affirme or avoid it at his election.

Tenant in tail.

Bro. Eſchange 9.

An exchange made between a man *de non ſane memorie* and another is not void but voidable, for it is good againſt him, but his heir may avoid or affirme it at his election.

De non ſane memorie.

Bro. idem. Perk. Sect. 279.

A man that doth hold land in fee ſimple, fee taile, or for life in the right of his wife, may exchange this land, and the exchange will be good as long as he and his wife doth live. And he with his wife may exchange it for longer time and the exchange is good againſt him, but his wife after his death may affirme or avoid it if ſhe will.

Husband in right of his wife.

Perk. Sect. 288.

One Parſon or Vicar may exchange his Church or Benefice with another, and this exchange is good.

Parſon.

Perk. Sect. 280, 273.

The diſſeiſor and diſſeiſee may joine together and exchange the land whereof the diſſeiſin was made with a ſtranger for other land: but if it be made out of the land and before the entry of the diſſeiſee it ſhall not bind the diſſeiſee, for he may avoid it. And a diſſeiſor cannot exchange the land he hath gotten by diſſeiſin with the diſſeiſee for other land, for this exchange is void, unleſſe it be by Indenture, or fine, that it may work by way of eſtoppell.

Perk. Sect. 279.

The leſſor and leſſee may joine together and exchange the land leaſed for other land, and this is good; for it ſhall be ſaid to be the ſurrender of the leſſee to the leſſor, and the exchange of the leſſor; and therefore the leſſee (as it ſeemes) ſhall have nothing to doe

Surrender.

with the land taken in exchange, *Sed quere* of that.

Iointenants. Tenants in common.

Jointenants for life the fee to one of them may exchange their land with a ſtranger for other land to hold in the ſame nature, and the exchange is good. But Jointenants, tenants in common, and coparceners cannot exchange the lands they doe ſo hold one with another before they have made partition. Perk. Sect. 277. 281.

If *A* and *B* be Jointenants for life the fee to *A* and *A* exchange the whole land with another for other land, this is good only for his moity as ſome have ſaid: But it ſeems notwithſtanding it is good for the whole untill it be avoided by the other Jointenant. Perk. Sect. 277.

2. In reſpect of the matter whereof it is made or the nature of the thing exchanged. And of what things and eſtates an exchange may be made.

The ſecond thing required in a good exchange is, that the things exchanged be ſuch as whereof an exchange may be made. And for this it muſt be known that an exchange may be made of things of the ſame nature, as of a temporall thing for a temporall thing, a ſpirituall thing for a ſpirituall, as a houſe for a houſe, land for land, a Manor for a Manor, a Church for a Church, rent for rent, common for common, a horſe for a horſe, one peece of plate for another or the like: or it may be made of things of a divers nature, as of a temporall thing for a ſpirituall, as of a houſe for land or rent, a chamber in a houſe for common, or for a reverſion, ſeigniory, or advowſon, of land or rent for a right of land or releaſe of right, of an advowſon for land, of a rent for a way, of a horſe for a peece of plate, of a gowne for a horſe, or the like. And exchanges made of theſe things albeit the things exchanged doe lie in divers counties are good. Perk. Sect. 263, 261; 262, 266. 258. Lit. Sect. 62. Co. ſuper Lit. 51, 52.

Alſo a ſeigniory by homage and fealty or the like which is not valuable may be exchanged for land, rent, or any other ſuch like thing. So may a ſeigniory by divine ſervice. But a ſeigniory in frankalmoigne cannot be exchanged with any but the tenant of the land that doth hold by the tenure. And houſes, manors, lands, rents, commons, ſeigniories, reverſions, and the like may be exchanged in fee ſimple, fee tail, for life, or years. So that an exchange may be of an Inheritance for an Inheritance, of a franktenement for a franktenemant, and of chattells reall for chattells reall. Perk. Sect. 259, 260. 258.

If one grant white acre in exchange for black acre lying within the ſame or in two counties, this is a good exchange. So if I grant a rent charge iſſuing out of my land in exchange to *I S* for an acre of his land &c. this is a good exchange. So if I have a rent iſſuing out of the land of *I S* and I grant this to *I K* in exchange for land or other rent; this exchange is good when the tenant hath atturned to the grant of the rent. So if one have a rent out of my land in fee, & I have the land in fee & I grant the land in exchange for the rent, it ſeems this is a good exchange. But if one grant me a Manor or land, & I in exchange for the ſame Manor or land grant unto him a rent *de novo* iſſuing out the ſame land or Mannor, this cannot take effect as an Exchange. So if one releaſe his Eſtovers that hee hath in ſuch a Wood, and deliver the Releaſe in Exchange for land given Perk. Sect. 244. Idem. 263. 3 E. 4. 10. 9 E. 4. 21. 9 E. 4. 21. Perk. Sect. 262. Perk. Sect. 266. Fitz. Eſchange 16.

to him in exchange for the ſame releaſe; this is a good exchange.
[d] Perk. Sect. 271. [d] If there be a diſſeiſor and diſſeiſee, and the diſſeiſee releaſe his right to the diſſeiſor in exchange for other land; this is a good exchange.
[e] Idem. 282. [e] So if the diſſeiſor of an acre of land enfeoffe a ſtranger of the ſame acre of land, and the feoffee give to the diſſeiſee an acre of land in fee in exchange for a releaſe of all his right in the acre of land of
[f] Idem Sect. 271. which he was diſſeiſed; this is a good exchange. [f] But if the diſſeiſee grant his right to a ſtranger that hath nothing in the land in exchange for an acre of land; this exchange is not good, neither ſhall
[g] Perk. Sect. 260. the ſtranger take any thing by this grant. [g] If there be Lord and tenant by fealty and 12 d. rent, and the Lord exchange the ſeigniory with the tenant for the tenancy, or *è converſo*, by deed indented; this
[h] Perk. Sect. 267. is held by ſome to be a good exchange. [h] If I have a rent iſſuing out of the land of *I S* & I grant or releaſe the ſame rent to *I S* in exchange for other land; this is a good exchange. So if I releaſe the ſame rent unto him in exchange for a way over his ground; this is a good ex-
[i] Perk. Sect. 268, 269. change. [i] If I be ſeiſed of lands to which *I S* hath a right of action, and I give to him other land for a releaſe of his right; this is a good exchange. And the ſame law is of an exchange of land and an advowſon by deed indented for a releaſe of right in another advowſon to an uſurper when his Incumbent hath been in poſſeſſion of the
[k] Perk. Sect. 257. Church ſix moneths. [k] If two Parſons of a Church make an exchange of their benefices by words of exchange, and each of them reſigne his benefice into the hands of the Biſhop to the ſame intent, and the Patrons preſent accordingly, and the Preſentations are *per viam*
[l] Perk. Sect. 264, 265. *permutationis*; this is a good exchange. [l] If three acres of land with an advowſon appendant be given in exchange by *T K* to *I S* for a chamber to be aſſigned by the ſaid *I S* at the election of *T K* and he aſſigne two chambers, and *T K* chooſe and enter upon one, and *I S* enter upon the land; this exchange is good notwithſtanding the incertainty. So if *I S* give his Manor of *A* to *T K* in exchange for his Manor of *B* or for his Manor of *C* & he enter upon one of theſe Manors, and *T K* enter upon the Manor of *A*; this exchange is good. Out of all which theſe things by the way may be obſerved.
Co. ſuper Lit. 50. Perk. Sect. 265. 1. That the things exchanged need not to be in *eſſe* at the time of exchange made, for a man may grant a rent *de novo* out of his land in exchange for a Manor. And yet if I grant to another the Manor of *A* for the Manor of *B* which he is to have after his fathers death by deſcent, it ſeems this exchange is void. 2. There needs no tranſmutation of poſſeſſion, for a releaſe of rent, eſtovers, or right of land for land is good. 3. The things exchanged need not to be of one nature ſo as they concerne lands or tenements, for land may be exchanged for rent, common, or any other inheritance which doth concerne lands or tenements, or ſpirituall for temporall things, as

tithes; a tenure by divine ſervice for land or a temporall ſeigniory. But annuities and ſuch like things which charge the perſon only and doe not concerne lands or tenements, or goods and chattels, cannot be exchanged for land.

3. In reſpect of the manner of the making of the exchange. And where it ſhall be good without deed or not.

The third thing required in a good exchange is, that it be made in that manner and order that law doth require: wherein theſe things are to be known. 1. That if all or part of the things whereof the exchange is made doe lie in ſeverall counties: or if all or part of the things whereof the exchange is be ſuch as lie in grant and not in livery, albeit it be in the ſame county: in theſe caſes the exchange muſt be made by deed indented in writing. But where the exchange is of lands, and of lands lying in the ſame county, albeit it be of any eſtate of inheritance or free hold, yet it may be by word of mouth without writing. And ſo alſo may it be when the things exchanged doe lie in divers counties, when the exchange is made only for a terme of years. And therefore if an exchange be made between *I S* and *T K* of lands lying in one and the ſame county in fee, or for life, it may be by word of mouth: but if all or part of the lands of *I S* lie in one county, and all or part of the lands of *T K* doe lie in another county, the exchange muſt be made by deed indented. If an exchange be made of rent for land, and the land out of which the rent is iſſuing and the land given in exchange for it doe both lie in one county; this exchange cannot be good without deed. So if an exchange be made of the reverſion of an acre of land for three ſhillings of rent iſſuing out of another acre of land, and both acres are in one county; this exchange muſt be made by deed indented or it will not be good. So if an exchange be made of an acre of land and a rent out of another acre for another acre of land and common for three beaſts, and all is in one and the ſame county, this exchange muſt be by deed indented, or it will not be good. But if I be ſeiſed of a Manor to which I have common appendant or appurtenant, and *T K* is ſeiſed of another Manor to which he hath a villaine regardant, and both the Manors are in one county, an exchange may be made of theſe Manors by word of mouth without writing, and the common and villaine will paſſe as incidents well enough. And yet if *I S* hath an office whereunto land doth belong and *T K* hath rent iſſuing out of the land of a ſtranger and all the land is in one county and the office is to be uſed and occupied in the ſame county; if theſe things be exchanged it muſt be by deed indented. 2. The word [Eſchange] or [Exchange] muſt be had and uſed between the partres in the making of the exchange. As I grant to you white acre To have and to hold to you and your heires in exchange for blacke acre. And in conſideration thereof you grant to me and my heires blacke acre in exchange for white

Perk. Sect. 244. Co. ſuper Lit. 51, 52. Lit. Sect. 62. Co. 9. 14. Perk Sect. 247, 248, 249, 250. 246.

Co. ſuper Lit. 50, 51. Perk. Sect. 252, 253. 9 E. 4. 21. Fitz. Exchange, 12.

white acre, for this word is ſo individually requiſite as it cannot be ſupplied by any other word, neither will any averment that it was in exchange helpe in this caſe. And therefore if *A* by deed indented give to *B* an acre of land in fee ſimple, or for life, and by the ſame deed *B* doth give to *A* another acre of land in the ſame manner, this cannot enure as an exchange; And therefore if no livery of ſeiſin ſo as it may take effect by way of Grant, it is utterly void. But by this meanes lands may be granted from one to another, for there needs no livery of ſeiſin. So if an exchange be made by words betweene two of lands in one county, and before their entry Indentures are made betweene them of the ſame lands without words of exchange, and no livery of ſeiſin is made; this ſhall not paſſe by way of exchange. And yet it hath been held by ſome that *Permutatio*, or ſome other word of like effect may ſupply this word exchange. 3. That if any rent, reverſion, ſeigniory, or the like be granted by either party, that then the tenant doe atturne to the grant, for that atturnment is requiſite in this caſe. And yet in the caſe of the grant of land in poſſeſſion in exchange no livery of ſeiſin is needfull. Neither is it needfull that either party to the exchange come to the thing given to him in exchange by the ſame meane and manner of aſſurance: for if leſſee for life of one acre give another acre to his leſſor in taile in exchange for a releaſe from him of that acre, To have and to hold in taile in like manner, this is a good exchange.

Livery of ſeiſin.

Perk. Sect. 259. 263. 289. 276.

Atturnment.

Livery of ſeiſin.

Perk. Sect. 265.

An exchange may be made to take effect in *futuro* as well as in *preſenti*, for if an exchange be made betweene me and *T K* That after the Feaſt of Eaſter *T K* ſhall have my Manor of Dale in exchange for his Manor of Sale, this is a good exchange.

19 H. 6. 27. Perk. Sect. 275.

If an exchange be made in writing of land, and it doth limit and expreſſe no eſtate that either party ſhall have in the thing exchanged, yet this is a good exchange. But if an eſtate for life be limited expreſſely to one, and no expreſſe eſtate is limited to the other; this is not a good exchange, as ſhall be ſhewed in the next place.

Fitz. Exchange 15. Lit. Sect. 64, 65. Co. ſuper Lit. 50, 51. Perk. Sect. 276.

4. In reſpect of the quality or equality of the eſtates or intereſts exchanged.

The fourth thing required in a good exchange is equality of eſtate, *viz.* that either party have the like kind of eſtate of the thing exchanged, ſo that if one have an eſtate in fee ſimple the other have ſo likewiſe, and ſo for other eſtates. For if the one grant that the other ſhall have his land in fee ſimple for the land which he hath of the other in fee taile: or that the one ſhall have in the one land fee taile, and the other in the other land but for terme of life: or that the one ſhall have in the one land fee taile generall, and the other in the other land fee taile ſpeciall: or that the one ſhall have in the one land for life, and the other in the other

land but for yeares; theſe exchanges are void and cannot take effect as exchanges. [m] And therefore if the Lord releaſe to his tenant his ſervices in taile in exchange for other lands given to the Lord in exchange in taile alſo; this exchange is void, for by this releaſe made by the Lord the ſervices are gone for ever. [n] So if tenant for his owne life exchange with him that is tenant for life of another; this is not a good exchange. (And by the ſame reaſon it ſhould ſeeme if leſſee for twenty yeares of his land exchange with another for other land for forty yeares, that this ſhould not be a good exchange.) [o] But if leſſee for life be of an acre of land and he give another acre of land to his leſſor in fee taile in exchange for a releaſe of all his right in the acre that he holdeth for terme of his life, To hold to him and the heires of his body engendred; this is a good exchange. [p] Or if tenant for his owne life exchange with him that is tenant in taile after poſſibility of iſſue extinct; this exchange is good. [q] And yet if an eſtate for life be expreſſed to the one party upon the exchange, and no eſtate is expreſſed to the other party; it is ſaid that this exchange is not good, and yet where no eſtate is expreſſed the party ſhall have an eſtate for his owne life.

[m] Perk. Sect. 283.

[n] Perk. Sect. 275. Finches ley 27.

[o] Perk. Sect. 276.

[p] Co. 11. 80.

[q] Perk. Sect. 275. 19 H. 6. 27.

Husband and wife. Tenant in tail.

But in theſe caſes it is not neceſſary that the parties to the exchange be ſeiſed of an equall eſtate at the time of the exchange made, for if tenant in taile or husband in right of his wife exchange their land in fee ſimple with another for lands he hath in fee ſimple; this is a good exchange untill it be avoided by the iſſue or the wife. [r] Neither is it neceſſary that both eſtates be in poſſeſſion, for one may grant an acre in poſſeſſion in exchange for an acre in reverſion, and this exchange is good. [ſ] Neither is it neceſſary that there be an equality in the value or quantity of the lands exchanged, for if the land of one of the parties be worth one hundred pound and the land of the other but tenne pound, or the land of one of the parties be one hundred acres and the land of the other but tenne acres, if the eſtates given be equall, the exchange is good. [t] Neither is equality in the quality or manner of the eſtates requiſite. For if two Jointenants be in fee of an acre of land and they grant that acre to another in exchange for other lands To have and to hold a moity to one of them and his heires, and a moity to the other and his heires, which is an eſtate in common: or two men give lands in exchange to *A* and his heires for lands from *A* to them two and their heires, albeit the one party hath a joynt eſtate and the other a ſole eſtate, yet the exchange is good. The like law is if the land of one of the parties be of a defeaſible title and the land of the other of an undefeaſible title, this exchange is good till it be avoided.

Co. ſuper Lit. 51. Perk. Sect. 289. Lit. Sect. 65. Perk. Sect. 280, 281.

[r] Idem.

[ſ] Idem.

[t] Idem.

The

Co. ſuper Lit. 50,51. Co. 1. 98. 105. Perk. Sect. 284. 286. 292. 289.

The fifth and laſt thing required in a good exchange is, that there be an execution and perfection of the exchange by entry or claime in the life time of the parties, *viz.* That both the parties to the ſame exchange do enter into the things taken in exchange, if they be ſuch things as they may enter into, for untill the exchange be executed by entry, or the like, the parties thereunto have no freehold in deed or in law in the things exchanged, albeit the ſame things do lie in one County: And if either of the parties die before he enter into the lands by him taken in exchange; hereby the whole exchange is become void, if his heir will; but if one of the parties enter, he ſhall not firſt begin to avoid the exchange. But if the parties enter at any time during their lives it is ſufficient, unleſſe the poſſeſſion be before deveſted by an elder title, as by entry for a condition broken, entry by a diſſeiſee or his heir, or the like, and not reveſted again before the entry. As if an exchange be had betweene two of land, and before their entry by force of the exchange they are, or one of them is diſſeiſed of the land exchanged, and the diſſeiſor die ſeiſed thereof, and then they enter according to the exchange, and put out the heir of the diſſeiſor, this ſhall not be ſaid to be an execution of the exchange, but if the diſſeiſee have recovered the ſame land againſt the heir of the diſſeiſor by writ of entry, and have execution, then he may execute the exchange by entry. And in caſe where a reverſion, rent, or ſeigniory is granted in exchange, it muſt be perfected and executed by the atturnment of the tenant in the life time of the parties, otherwiſe the exchange is not good; but in this caſe after atturnment is made, it ſeems the exchange is perfect without any entry or claim.

5. In reſpect of the execution of it.

Perk. Sect. 257.

If two Parſons exchange their Churches, and reſigne them into the Biſhops hands, this is not a perfect exchange untill they be inducted; and therefore if either of them die before they be both inducted, the exchange is void.

Perk. Sect. 255, 256. Pitz. Exchange 14. Perk. Sect. 272.

Where a deed ſhall take effect as an exchange, there muſt be all the conditions before mentioned in the caſe. And yet note that where one thing is granted for another in the nature of an exchange, and for ſome of the cauſes aforeſaid, the things cannot paſſe by way of exchange, there they may paſſe notwithſtanding by way of grant, and the deed may take effect to other purpoſes, albeit it may not enure and take effect as an exchange. And therefore if two be ſeiſed of ſeverall acres of land, and the one of them by deed doth give his acre to the other, and the other his acre to him without any word of exchange, and each of them doth make livery of ſeiſin to the other; in this caſe albeit the acres will not paſſe by way of exchange, yet will they paſſe by way of grant. And in this caſe if no livery of ſeiſin be made, either of them ſhall hold the lands granted at will only. And in like manner it is if two

4. When a deed ſhall take effect as an exchange. Or not.

agree

agree to exchange land, and after each of them levy a fine or make a feoffment of the land to other; by this the land will paſſe each to other, but not by way of exchange. So if *A* and *B* his wife, and *C* and *D* his wife agree to exchange lands, and *A* and *B* enter into the land they are to have in exchange, and then they doe make a feoffment of their own land unto *C* and his father, and not to *C* and *D* his wife; this ſhall not enure as an exchange, and therefore *C* and *D* may enter upon their own land again, but the feoffment is good. And if one aſſign a woman her dower in exchange for land; this ſhall not take effect as an exchange, but it ſhall enure to be a good aſſignment of dower.

5. How an Exchange ſhall be conſtrued and taken.

If two doe exchange land by deed, and limit no eſtates, this ſhall be taken for eſtates for life, and the exchange is good; but if an expreſſe eſtate be limited to one, and no expreſſe eſtate to the other, it is ſaid this is not good, and that conſtruction of law wil not help it. 19 H.6.27. Perk. Sect. 275.

If an exchange be made between two men of two acres of land by deed, and in the *Habendum*, it is ſet down that each of them ſhal have the acres given in exchange with divers other acres not expreſſed in the premiſſes, this addition ſhall be taken as ſurpluſage, and the exchange ſhall be good for the two acres. See more in *Expoſition of Deeds*. Perk. Sect. 251.

6. Where an Exchange ſhall be determined, or the nature of it changed by matter *ex poſt facto*. And how. And where not.

If after an exchange is made before or after the parties enter, all, or part of the land given to either party be recovered from him upon an elder title, as by an entry upon a condition broken, alienation in Mortmain, or upon a diſſeiſin, in theſe caſes if that party enter again upon his own land which he gave in exchange (as hee may) hereby the whole exchange is determined. But if after the exchange is perfect, one of the parties doe enter upon the land he doth give in exchange, this doth not make void the exchange, neither may the other party hereupon enter upon the land he doth give in exchange, but he may have an aſſiſe, or an action of Treſpaſſe againſt the other. And yet if an exchange of a common for a way, or a rent, or the like, if the one party deny the common, it hath been ſaid the other party may deny the way or the rent. *Sed quære.* Perk. Sect. 286. Co. 4. 122. Perk. Sect. 299. Bro. Exchange 12. Perk. Sect. 299.

If an exchange be made of fee between two of a Manor, whereof the one half is in tail, and the other half is in fee ſimple, and the tenant in tail that made the exchange die, and his iſſue diſagree to it, ſo that the exchange of the tailed land is become void; this doth determine the whole exchange, for when an exchange becometh void in part, it becometh void in all, and untill it be avoided it is good for all. As if one be ſeiſed of white acre, and he exchange white acre and black acre (which is none of his) with another for two other acres, this ſhall continue for a good exchange, and not be avoided untill he that hath right to black acre doth evict him that hath it in exchange. Bro. Exchange 8. Perk. Sect. 297.

If

Co.4.122. Perk. Sect. 296.294. 290.298.

If an exchange be made by tenant in tail, and his iſſue after his death waive the poſſeſſion of all or part of the land taken in exchange, and diſagree to the exchange, hereby the whole exchange is determined. So if the wife after the husbands death, the infant at his full age, or the heir of him that is *de non ſane memorie* diſagree to the exchange of the husband, the infant, or him that is *de non ſane memorie*; hereby the whole exchange is determined, and no ſubſequent agreement can make it good again.

15 E.4.3.

If two doe make an exchange by word of mouth, and after before either of them enter, they make Indentures of the lands exchanged, and grant the ſame from one to another; it ſeems hereby the nature of the exchange is changed, and the exchange determined.

Perk. Sect. 285. Co.1. 105. Dier 285. Perk. Sect. 290. 294.298. Co.1.98.

7. Who may take advantage of a void or voidable Exchange. Or not. And when.

The parties themſelves, and all privies and ſtrangers for the moſt part may take advantage of ſuch exchanges as are void for the defects before named: But when the exchange is only voidable, *contrà*. And therefore when an exchange is made by an infant; the infant himſelf at his full age, or his heir, and none other may avoid it. And when an exchange is made by a tenant in tail, the iſſue in tail after the death of his aunceſtor, and none other may avoid it. And when an exchange is made by the husband, or husband and wife of the wives land, the wife after the husbands death, or heir of the wife after her death, and none other may avoid it. And when an exchange is made by a man of *non ſane memorie*, his heir after his death and none other may avoid it. But in all theſe caſes of infant, tenant in tail, woman covert, and a man *de non ſane memorie*, and where lands are recovered by an elder title, the other party may not enter and avoid the exchange untill the infant, iſſue in tail, woman, or heir of him that is *de non ſane memorie*, or him that doth loſe the land by an elder title, doth firſt enter.

Infant.

Tenant in tail.

Husband and wife.

Home de non ſane memorie.

Co. ſuper Lit. 51. 12 H. 4. 11. Perk. Sect. 290. 294. Fitz. Eſchange 13. Perk. Sect. 291. 279. 293. 298.

8. Where an Exchange voidable at firſt doth become good by matter *ex poſt facto*. Or not.

If an infant exchange lands, and after at his full age occupy the lands taken in exchange for his own lands; hereby the exchange is made good. So if tenant in tail exchange his intailed lands with another, and after his death the iſſue occupy the lands taken in exchange by his aunceſtor; hereby the exchange is made good for the life of the iſſue in tail. So if the husband and wife exchange the lands of the wife for other land, and ſhe after her husbands death agree to it, and enter into and agree to the lands taken in exchange; hereby the exchange is made good: but if the husband alone make an exchange of his wives land, and ſhe after his death agree to this, and enter into the land; it ſeems this will not make the exchange good. And if a man ſeiſed of land in right of his wife in fee thereof infeoff a ſtranger, and take an eſtate back again to him and his wife, and a third perſon in fee, and they three join in exchange of the ſame land in fee for other lands to a ſtranger in fee, and the exchange is executed, and the husband dieth, and ſhe doth occupy

Tenant in tail. Husband and wife.

the

the land taken in exchange with the other third perſon; hereby the exchange is made good. If a man *de non ſane memorie* make an exchange, and his heir after his death enter into the land taken by his aunceſtor in exchange, and agree to the exchange; hereby the exchange is made good. And in all theſe caſes when the exchange is once by agreement made good, it can never by any ſubſequent diſagreement be afterwards made void.

And now from hence we come to a *Surrender*, a ſpeciall way or means for the giving or transferring of ſomething to another, that hath already ſome intereſt into the ſame thing.

CHAP. XVII.

Of a Surrender.

1. Surrender, *Quid.* A Surrender properly taken is the yeelding or delivering up of lands or tenements and the eſtate a man hath therein unto another that hath a higher and greater eſtate in the ſame lands or tenements. But it is ſometimes improperly applied to other things. Co. ſuper Lit. 337.

Surrendror. Surrendree. He that doth ſurrender is called the ſurrendror, and he to whom it is made is called the ſurrendree.

2. *Quotuplex.* And there be three kinds of ſurrender, *viz.* A ſurrender properly taken at the Common law. 2. A ſurrender by cuſtome of lands holden by cuſtome or of cuſtomary eſtates, whereof we ſpeak not here. 3. A ſurrender improperly taken, as of a deed, or grant of a rent-charge, of a patent, and of lands in fee ſimple to the King. The ſurrender properly taken is of two ſorts: 1. Expreſſe or in deed, which is when it is done by apt words, and the expreſſe agreement of the parties. 2. In law or implied, which is when it is wrought by conſequent and operation of law, or when the law doth interpret or enure ſomething done to another intent to make a ſurrender of it. And in the firſt caſe it is ſometimes by word only, and ſometimes by writing. And when it is by writing, it is ſaid to be an inſtrument teſtifying by apt words that the particular tenant of the lands or tenements for life or years doth conſent and agree that he which hath the next and immediate remainder or reverſion thereof ſhall alſo have the particular eſtate of the ſame in poſſeſſion, and that he yeeldeth the ſame unto him. Co. ſuper Lit. 337, 338 Co. 6. 69. Plow. 106, 107. Weſt Symb. 1. part. lib. 2. chap. 460.

3. The effect of it. The fruit and effect of a ſurrender is, that it doth paſſe the eſtate of the ſurrendror to the ſurrendree, and that hereupon the eſtate of the ſurrendror is drowned and extinct in the eſtate of the ſurrendree; And yet not ſo but that to ſome purpoſes it ſhall bee ſaid Co. ſuper Lit. 338. Co. 1. 96. Bro. ſurrender 47. Perk Sect. 591.

ſaid to have continuance ſtill. And therefore if tenant for life grant a rent-charge, and after doth ſurrender his land; in this caſe the rent-charge ſhall continue notwithſtanding the ſurrender. So if leſſee for life make a leaſe for years rendring rent, and the leſſee for life ſurrender his eſtate; in this caſe albeit the primitive eſtate for life be yeelded up, yet the derivative eſtate for years ſhall continue notwithſtanding, but the ſurrendree ſhall not have the rent reſerved upon the leaſe for years. So if leſſee for life or years break a covenant with his leſſor, and after ſurrender his eſtate to him, his breach of covenant is not hereby ſalved, for the leſſor may have an action of covenant ſtill notwithſtanding the ſurrender. And if one ſeiſed of land grant a rent out of it in fee, and this rent is extended on a ſtatute or granted for leſſe time to another, and then the grantee doth ſurrender the deed of the grant of the rent to the tenant of the land; in this caſe the rent ſhall continue as to him that hath execution and the grantee. And if one make a leaſe for years rendring rent, and the leſſee ſurrender his eſtate to the leſſor; hereby the rent is extinct: but if the leſſor grant the rent to a ſtranger before the ſurrender *contrà*. And if one leaſe for years, and the leſſee let parcel of his term to his leſſor rendring rent, and after the leſſee ſurrender his whole eſtate; in this caſe it ſeems the rent is determined.

Extinguiſhment.

Co venant.

Co. 8. 145. 7. 39. Bro. Sur. 42.

If leſſee for life or years take a new leaſe of him in reverſion of the ſame thing in particular contained in the former leaſe for life or years; this is a ſurrender in law of the firſt leaſe. As if leſſee for his own or anothers life in poſſeſſion or reverſion take a new leaſe for years; Or a leſſee for forty years take a new leaſe for fifty years; the firſt leaſe in both theſe caſes is ſurrendred. And this rule holdeth, albeit the ſecond leaſe be for a leſſe time thē the firſt, as if leſſee for life accept a leaſe for years, or leſſee for twenty years accept a leaſe for two years. And albeit the ſecond leaſe be voidable, as being made upon condition, as if leſſee for twenty years take a new leaſe for twenty years upon condition that if ſuch a thing happen the ſecond leaſe ſhall be void, and the thing doe after happen; in this caſe both theſe leaſes are become void: As where the leſſor doth grant the reverſion to the leſſee upon condition, and after the condition is broken. Or if the ſecond leaſe be made by tenant in tail, or the like: as if a man make a leaſe for years of land, and then make a feoffment to another of the land, and then take back an eſtate to him and his wife of the land, and then make a new leaſe to the leſſee for ten years; this is a ſurrender in law of the firſt leaſe: But if the ſecond leaſe be meerly void, then it is otherwiſe. And therefore if the leſſor doe by words of covenant only promiſe to his leſſee that he ſhall have a new leaſe, and doe never actually make him; this is no ſurrender in law. [a] And this rule as it ſeems holdeth

4. What ſhall be ſaid a ſurrender in law of lands. And by what means an eſtate ſhall be ſurrendred in law. Or not.

By acceptance and taking of a new eſtate.

14 H. 8. 15. Plow. 194. Dier 28. Co. 10. 67.

Perk. Sect. 617. Co. 5. 11. Fitz. Surrender 3. Co. ſuper Lit. 218. 37 H. 6. 17.

Dier 140, 141.

Dier 272. a Dier 178. 177. Co 5. 54. 55. Kelw. 70.

holdeth alſo, albeit the ſecond leaſe be to the leſſee and a ſtranger, or to the leſſee and his wife: and albeit the ſecond leaſe be by word only, and the firſt leaſe be by deed, if ſo be that the thing granted by the leaſe be ſuch a thing as may paſſe by word without writing; and albeit the ſecond leaſe be in another right, as if the husband have a leaſe for yeares in the right of his wife, and then take a new leaſe to himſelf in his own name: and albeit the firſt leaſe be to begin preſently, and the ſecond be to begin at a day to come, or *è converſo*: *and albeit there be a mean eſtate between, as if land be let to *A* for years, and after let to *B* for years, to begin after the firſt term, and the aſſignee of *A* doth take a new leaſe: So if one demiſe land for ten years to one, and after demiſe it for ten years to another, to begin at *Michaelmas*, and after the firſt leſſee accept a new leaſe. For in all theſe caſes there is a ſurrender in law of the firſt leaſes. And if there be two leſſees for life, or years, and one of them take a new leaſe for years, this is a ſurrender of his moity; whereby it doth appear that a ſurrender in law may be made of ſome eſtates wch cannot be ſurrendred by a ſurrender in fait; for *fortior eſt diſpoſitio legis quam hominis*. And hence it is that a corporation aggregate may make a ſurrender in law without deed, although it cannot make an expreſſe ſurrender without deed. But if the leſſee doe only licence the leſſor to make a feoffment, and to give livery of ſeiſin: or doe give livery of ſeiſin for him as his Atturney: or doe licence him to enter into the land and no more, neither of theſe things ſhall be ſaid to be a ſurrender in law. So if the ſecond leaſe be made of another, and not of the ſame thing whereof the firſt leaſe is made, as where the firſt leaſe is of the land, and the ſecond is made of a rent or other profit to be taken out of the land, or the firſt is of a Manor, and the ſecond of the Bayliwick or Stewardſhip of the Manor, or the firſt is of a Park, and the ſecond is of the Keeperſhip of the Park; in theſe caſes there is no ſurrender of the firſt leaſe. Alſo if the ſecond leaſe be not a good leaſe, perhaps it ſhall not be conſtrued a ſurrender. See *Co.* 2. *Lanes* caſe 17.

Dier 140. 141. 1.

Dier 178.

Paſc. 40 El. Co. ſuper Lit. 338. Co. 6. 69. 10. 53. 67. 5. 11. Dier 280. *Dier 93. 112.

Dier 46. Co. 2. 60.

Co. 6. 69. 10. 67.

Perk. Sect. 608. Bro. Surrender 48. Trin. 5 Jac.

Co. 6. 69.

Adjudged.

But if the firſt leaſe be of the land it ſelf, and the ſecond leaſe is of the veſture of the ſame land, this is held to be a ſurrender of the firſt leaſe. * So if the ſecond leaſe be not to begin untill the firſt leaſe end, the taking of this ſecond leaſe is no ſurrender of the firſt leaſe. So it hath been ſaid if one make a leaſe of black acre in Dale, and the leſſee accept a ſecond leaſe of all the lands of the leſſor in Dale in generall words, and the leſſor that doth make the leaſe have divers other lands there beſides this acre, that this is no ſurrender of the firſt leaſe. *Sed quere* of this, for others do much doubt it. So if one enter into land, & make a leaſe for the triall of the title only, and after the leſſor (he and the leſſee being both out of poſſeſſion)

Trin. 5 Jac. Sir Jo. Chamberlain. caſe. See Dier 200. *Co. 5. 11.

Per Curiam B. R. 9 Jac.

seſſion) make another leaſe of the ſame thing to the leſſee; it ſeems this is no ſurrender of the firſt leaſe: but if the leſſor enter before he make the leaſe *contra*. To make a good ſurrender in deed of lands, and to make them to paſſe by ſuch a ſurrender, theſe things are firſt of all required: 1. That the ſurrendror be a perſon able to grant and make, and the ſurrendree a perſon capable and able to take and receive a ſurrender, and that they both have ſuch eſtates as are capable of a ſurrender. And for this purpoſe, 1. That the ſurrendror have an eſtate in poſſeſſion of the thing ſurrendred at the time of the ſurrender made, and not a bare right thereunto only. 2. That the ſurrender be to him that hath the next immediate eſtate in remainder or reverſion, and that there be no intervenient eſtate coming between. 3. That there be a privity of eſtate between the ſurrendror and the ſurrendree. 4. That the ſurrendree have a higher and greater eſtate in the thing ſurrendred, then the ſurrendror hath, ſo that the eſtate of the ſurrendror may be drowned therein. 5. That he have the eſtate in his own right, and not in the right of his wife &c. 6. And that he be ſole ſeiſed of this eſtate in remainder or reverſion, and not in jointenancy. As for examples, infants, women covert, mad and lunatick men, and all ſuch like perſons, as are diſabled to grant, are diſabled to make a ſurrender, and none but ſuch as may grant their land may ſurrender their land. A Corporation aggregate of many cannot make an expreſſe ſurrender without a deed, but it may make ſuch a ſurrender by deed. And ſuch perſons as are diſabled to take by a grant are diſabled to take by a ſurrender, and ſuch as may bee grantees, may be ſurrendrees; and therefore a ſurrender made to an infant is good. If the husband have a leaſe or eſtate for years in the right of his wife, he alone, or he and his wife together may ſurrender this; but if the husband have an eſtate for life in the right of his wife, being tenant in dower or otherwiſe, and he alone, or hee and ſhee together ſurrender this; this ſurrender is good onely during the life of the husband, except it bee made by fine. One executor may ſurrender an eſtate or leaſe for years which the executors have in the right of their teſtator. If there be two tenants in common, and one of them have the particular eſtate, and the other the fee ſimple; as where an eſtate is limited to two and the heirs of one of them, and he that hath the eſtate for life doth alien his part to a ſtranger; in this caſe the alienee may ſurrender to the other jointenant: So if there be three jointenants for life, and the fee ſimple is limited to the heirs of one of them; and one of the jointenants for life doth releaſe to the other, and he to whom this releaſe is made doth ſurrender to him that hath the fee ſimple; this is a good ſurrender of a third part. But otherwiſe one jointenant cannot ſurrender to another jointenant, albeit he be tenant for life which

See Perk. in his chap. of Surrender *in toto*. Bro. Surrender *in toto*. Fitz. Surrender *in toto*. Co. ſuper Lit. 338.

Co. 10, 67.

Perk. Sect. 613, 612. Bro. ſurrender 44.

21 H. 7. 25.

Perk. ſect. 586, 587. Fitz. ſur. 2.

1. What ſhall be ſaid a ſurrender in deed of lands. And when they ſhall be ſaid to paſſe by ſuch a ſurrender. Or not.

1. In reſpect of the perſon between whom it is made, and their eſtate and poſſeſſion.

Husband and wife.

Executors. Tenant in common.

Jointenants.

which doth make, and he tenant in fee ſimple, that doth take the ſurrender. A leſſee for life or years, may ſurrender to him that is next in remainder in fee ſimple, or fee tail, or to him in reverſion in fee, and this is a good ſurrender, and a ſurrender as it ſeems may be made to the grantee of the reverſion before atturnment, ſo as atturnment be afterwards made. And in caſe of the ſurrender of an eſtate for life there needs no livery of ſeiſin as in caſe of the grant of an eſtate for life. A leſſee for years of a term to begin at a day to come cannot ſurrender it by an actuall ſurrender before the day the term begin, as he may by a ſurrender in law. [a] If leſſee for life be diſſeiſed, or leſſee for years be ouſted, and before his entry or the getting of the poſſeſſion again, he ſurrender his eſtate to him in reverſion; this ſurrender is void. So if a woman that hath title of dower ſurrender it to him in reverſion before ſhe hath recovered it; this ſurrender is void. And yet if leſſee for years after his term is begun & before his entry, when no body doth keep from him the profits, doe ſurrender his eſtate; it ſeems this is a good ſurrender; but if another enter before him, and keep him out, it ſeems otherwiſe. If there be leſſee for years, the remainder for life, the remainder or reverſion in fee, & the leſſee for years be ouſted, & he that ouſted him die ſeiſed, & then the leſſee for years enter, and then the tenant for life ſurrender to him in remainder or reverſion in fee; this is not a good ſurrender, for there is in this caſe but a bare right of remainder for life and in fee; but if the leſſee for years had not been ouſted, it had been a good ſurrender. If there be leſſee for years, the remainder for life, the remainder in fee; the leſſee for years may ſurrender to the leſſee for life, and ſo may the tenant for life to him in remainder or reverſion in fee, but if there be tenant for life, the remainder for life, the remainder in fee; in this caſe the ſecond tenant for life cannot ſurrender to him in remainder in fee. If a leaſe bee made for life or years to *A*, the remainder for life to *B*, the remainder in fee tail to *C*, and the firſt tenant for life or years doth ſurrender to *C*, or to the leſſor, *B* being the next in remainder for life being then living; this is not a good ſurrender, neither can it take effect as a ſurrender in reſpect of the intervenient eſtate. And ſo ſome ſay the law is if the middle remainder be but for years only: as if a leaſe be made for years, the remainder for years, and the firſt termor ſurrender his intereſt to the leſſor; this is no good ſurrender. *Sed quere.* For it ſhould ſeem that a future iutereſt will no more hinder an actuall ſurrender of the firſt leſſee, then a ſurrender in law. And ſo alſo it ſeems the law is for a concurrent leaſe, which for the latter part of it is in the nature of a future intereſt. But if in this caſe it fall out the middle remainder be void; as where a leaſe is made to *A* for life, or years, the remainder to a monk (who is a perſon uncapable) for life or years, the remainder to *IS* in fee;

Livery of ſeiſin.

Perk. Sect. 584. Co. ſuper Lit. 338 Per. ſect. 600 Bro. ſur. 4.

Dier 251. 358. 280.

Perk. Sect. 601, 602. 4 H. 7. 10. Co. 6. 69.

[a] Perk. Sect. 600, 601, 602, 603.

Perk. Sect. 605. Dier 251.

Perk. Sect. 588.

Dier 112. Plow. 190. Dier 93. Plow. 432, 433.

fee; in this caſe *A* the firſt tenant may ſurrender to him in remainder in fee, and the ſurrender is good. If leſſee for 20 years make a leaſe for 5 years, and the leſſee for 5 years enter, and after the leſſee for 20 years ſurrender to him in reverſion or remainder; this is a good ſurrender. So alſo if the two leſſees join in the ſurrender. So alſo if the firſt leſſee ſurrender firſt, and the leſſee for 5 years ſurrender after. But if the leſſee for five years ſurrender to him in the reverſion or the remainder before the ſurrender of the leſſee for 20 years; this cannot take effect as a ſurrender for two cauſes: 1. Becauſe there is a remnant of the term as an intervenient eſtate to hinder the drowning of the terme. 2. Becauſe there wants a privity between the leſſee for five years, and him in reverſion. If tenant in fee ſimple ſurrender to the Lord Paramount of whom the land is held; this can never take effect as a ſurrender, unleſſe it be in a ſpeciall caſe where the Lord hath cauſe to have a *Ceſſavit*. So if tenant in tail ſurrender to him in remainder or reverſion in fee ſimple; this cannot take effect as a ſurrender. So if leſſee for life ſurrender to him in remainder for years: or tenant for the life of *B* ſurrender to him that hath an eſtate for the life of *C*, theſe are void ſurrenders, for the eſtates of them to whom they are made, are not capable of ſuch ſurrenders, for they are not greater then the eſtates of the ſurrendrors, and therefore not able to drown the eſtates ſurrendred. And yet if leſſee for the life of another, or for his own life ſurrender his eſtate to him in remainder that is tenant for his own life; this is a good ſurrender, for an eſtate for a mans own life is greater in judgement of law, then an eſtate for another mans life. And hence it is that if a leaſe bee made to two for their lives, the remainder to a third perſon for his own life, and one of the firſt tenants for life ſurrender his eſtate unto him in remainder for life; this is a good ſurrender for a moity. If leſſee for life or yeares ſurrender to him in remainder or reverſion that hath no good eſtate in the remainder or reverſion, as where the remainder or reverſion is granted by word only, or being granted by deed there is no atturnment of the tenant to the grant, or the like; this ſurrender is not good. And yet if tenant in taile make a leaſe for life whereby he gaineth a new reverſion (but defeaſible) and the tenant for life doth ſurrender to the tenant in tail; this ſhall be a good ſurrender. So if a woman inheritrix have a husband, and they have iſſue a ſonne, and the husband dieth, and ſhe take another husband, and he letteth the land for life, and the wife dieth, and the tenant for life doth ſurrender his eſtate to the ſecond husband; this is a good ſurrender to moſt purpoſes.

Perk. Sect. 604. 14 H. 7. 3. Plow. 541. Bro. Sur. 16.

Bro. ſur. 9. Fitz. ſur. 10.

Perk. Sect. 590.

Perk. Sect. 589. Co. ſuper Lit. 42. 3. 61.

Perk. Sect. 590.

Co. 2. 66.

Co. ſuper Lit. 338.

Perk. Sect. 622. If a feme ſole be ſeiſed of land in fee, and ſhe make a leaſe thereof to a ſtranger for life, and then take a husband, and the leſſee ſur-

render to the husband; this is no good ſurrender, neither can it enure ſo, becauſe he to whom it is made hath not the reverſion in his own but in his wives right.

2. In reſpect of the place where it is made. And where the ſurrender of lands in one County may be good for the lands that doe lie in another County. Or not.

It is further alſo required in every good ſurrender, that if it be made by word and without deed, that then it be made in the ſame County where the land to be ſurrendred doth lie, but by writing a man may make a ſurrender of lands that doe lie in any other County, and in what place ſoever it doth lie. And a ſurrender may be by word or writing of lands lying within the ſame County in any place out of the land. And therefore if tenant for life ſurrender to him in reverſion in any place out of the land within the ſame County, and the ſurrendree agree to it, the freehold is in him preſently. Bro. ſur. 2. 8. Fitz. Partition 5. Perk. ſect. 583.

3. In reſpect of the matter or thing. And of what things a ſurrender may be made. Or not.

3. That it be made of ſuch things, of which a ſurrender may be made. For ſurrenders may not be made of eſtates in fee ſimple, or fee taile, nor yet of rights or titles onely of eſtates for life or years, nor yet of part of an eſtate for life or years, as if a man have a leaſe for ten years, he cannot ſurrender the laſt ſeven years, and keep to himſelf the three years. But otherwiſe one may ſurrender any kinde of eſtate for life, as by dower, by the curteſie, or as tenant in tail after poſſibility of iſſue extinct, or for years, or years determinable upon lives, and that of any meſuages, houſes, lands, commons, rents, or the like, that are grantable from one to another, and ſuch ſurrenders are good. Bro. ſurrend. *in toto*. Per. chap. Sur. *in toto*. Co. 5. 11. ſuper Lit. 338.

4. In reſpect of the manner. And how and by what words a ſurrender may be made. And where it may be made without deed, and upon condition. Or not.

4. That there be words, or words and deeds ſufficient to make the mind of the ſurrendror to appear that he is willing and deſirous to part with and yeeld up the thing ſurrendred into the hands of the ſurrendree. And herein it is to be known that albeit the words Surrender, Give, or Yeeld up, be the moſt ſignificant & proper words whereby to make a ſurrender, yet any other words, eſpecially if it be in the ſurrender of a leaſe for years, that do teſtifie and declare the will and aſſent of him that is the particular tenant that he in the remainder or reverſion ſhall have the eſtate of the tenant, be ſufficient to paſſe the eſtate by way of ſurrender. And therefore if leſſee for life or years doe by word or writing ſay, That he will hold the land no longer, and wiſh him in reverſion or remainder therefore to enter: Or that it is his deſire that he ſhall enter into the land, and have it and his eſtate therein: Or that he is content that he ſhall have his eſtate, or have his leaſe; ſuch, or any ſuch like declaration as this made to him in reverſion or remainder, will be a good ſurrender. So if leſſee for years deliver his Indenture to a ſtranger, to deliver it and all his eſtate up to him in reverſion, and doe appoint the ſtranger to deliver and ſurrender it to him in reverſion, and he doe ſo, and he in reverſion accept thereof; this is a good ſurrender; but otherwiſe it is of an eſtate for life. So if the particular tenant doe by the words Give, Grant, or Confirm, paſſe his eſtate Perk. Sect. 607, 608, 609. Dier 251. Bro. ſur. 1. 35. 37. 17. 21 H. 7. 7. Hil. 37 El. B. R. Sleigh & Batemans caſe.

ſtate to him in reverſion, and he doe enter and agree to it; this is a good ſurrender: And by all theſe ſurrenders the eſtates wil paſſe by way of ſurrender, except it be in ſome ſpeciall caſes where the intent of the parties doth plainly appear to bee that the eſtate ſhall not paſſe by way of ſurrender. But if a leſſee for life or years doe onely goe from the houſe or land, and carry away his goods and cattell, and ſo waive the poſſeſſion for a time, either becauſe the leſſor ſhall not diſtrain them for rent behind, or the like, and thereupon the leſſor doth enter and enjoy it; this is no ſurrender, neither is this a good yeelding up of his eſtate. And in ſuch a manner and by ſuch words as before, any thing that may be granted by word without writing, may bee ſurrendred by word without writing, ſo as it be made within the ſame County where the thing ſurrendred doth lie. And this holdeth true albeit the eſtate to bee ſurrendred were created by deed: But ſuch things, as commons, rents, advowſons, reverſions, remainders, and the like, that cannot bee granted without deed cannot bee ſurrendred without deed. And therefore if a leaſe be made for life, the remainder for life by word of mouth without any writing; he in the remainder for life cannot ſurrender his remainder for life without deed. So where one hath a rent, advowſon, or the like, as tenant in dower, or by the courteſie; this cannot bee ſurrendred without deed. And in caſe where there is any ſpeciall matter to be contained in the ſurrender, as reſervation of rent, condition, or the like, there for the moſt part it muſt be by deed; or it will not be good. And therefore if tenant for life declare himſelf by word of mouth to be contented and agreed that he in the reverſion ſhall have the land and his eſtate therein, rendring ten ſhillings a years rent; or paying ſuch a ſumme of money, or upon condition that if he ſurvive the leſſor he ſhall have it again &c. this is no good ſurrender. And a ſurrender may be made alſo upon a condition precedent or ſubſequent, as if it be with reſervation of rent that if it be not paid it ſhall be void; but if it be an eſtate for life that is ſo ſurrendred, it ſeems it muſt be made by writing indented, and ſo likewiſe it ſhould ſeem the law is of the ſurrender of a leaſe for years upon a condition, or however it is moſt ſafe ſo to doe. 5. That the ſurrendree doe agree to, and accept of it, for untill then the ſurrender is not perfect, but if the ſurrendree doe once agree to it, he cannot after diſagree, for his firſt agreement doth perfect the ſurrender. But the actuall entry of the ſurrendree into the land is not neceſſary. And therefore if tenant for life or years ſurrender to him in reverſion out of the land, and he agree to it, he hath the land in him preſently. And yet he may not bring any action of Treſpaſſe againſt any man for

Perk. Sect. 581, 582, 583. Fitz. ſur. 1. Co. ſuper Lit. 338.

Dier 251. Bro. Sur. 16.

Perk. Sect. 624. 623. Co. ſuper 218.

Perk. Sect. 608. Lit. Bro. 163.

5. In reſpect of the agreement of him to whom the ſurrender is made. And what agreement is neceſſary. Agreement. Treſpaſſe.

for any Treſpaſſe done upon the land untill he have made his entry.

But here note, that in the caſes before where things may not paſſe by way of ſurrender, either becauſe of an intervenient eſtate, or the like; if there be ſufficient words in the deed, it may avail to other purpoſes, and may enure and paſſe the thing by way of grant; but then if it be an eſtate for life that is intended to bee ſurrendred, there muſt be livery of ſeiſin made upon the deed. And wherefore if there bee leſſee for yeares, the remainder for life or years, the remainder in fee, and the leſſee for years in poſſeſſion doth ſurrender and grant all his eſtate to him in remainder in fee; howſoever this deed cannot enure as a ſurrender, yet it ſhall enure as a good grant of the eſtate of the leſſee for years unto him in remainder in fee. Perk. Sect. 588, 589.

6. How a ſurrender ſhall be conſtrued and taken.

A ſurrender in generall ſhall be taken moſt ſtrongly againſt the ſurrendror, and moſt beneficially for the ſurrendree. And therefore if I hold of the leaſe of *A* one acre for life, and another acre for years, and I ſurrender to *A* all my lands, or all my lands I hold of his leaſe; by this ſurrender both the acres are ſurrendred. But if the ſurrender be of all the lands I have or hold for life, or of all the lands I have or hold for years of the leaſe of *A*, *contra*. And if I hold one acre for life of the leaſe of the father of *I S*, and I hold another acre for life or years of the leaſe of *I S* himſelf, and I ſurrender to *I S* all the land I hold of his leaſe; by this the land that I had by the leaſe of his father doth not paſſe. A ſurrender to one jointenant ſhall be conſtrued to enure to them all. But if tenant for life or years grant his eſtate to one of the jointenants in reverſion, it ſeems this ſhall not enure as a ſurrender to them all, but as a grant to him alone. Perk. Sect. 610, 611. Perk. Sect. 615. Bro. Sur. 54. Co. ſuper Lit. 192.

If the leſſor make, and the leſſee take a new leaſe upon condition, this ſurrender in law is abſolute, and albeit the condition be broken, yet the firſt leaſe is gone. But if the leſſee ſurrender or grant his eſtate to the leſſor upon condition; this condition if it be broken may reveſt the eſtate. Co. ſuper Lit. 218.

See more in the next queſtion, and in *Expoſition of Deeds*.

7. Where a feoffment, leaſe, grant, or other act made, or doe by the tenat for life or years, ſhall be a ſurrender or not. And how it ſhall enure or be conſtrued and taken.

1. When it is made to him in reverſion or remainder.

If any kind of tenant for life of land infeoff him in remainder or reverſion of the land, or grant his eſtate to him in remainder or reverſion; this ſhall enure as a ſurrender. And if leſſee for years before his term doe begin, make a feoffment to him in reverſion or remainder, or grant his eſtate to him; this ſhall enure as a ſurrender. And if leſſee for life grant his eſtate to him in reverſion, the remainder in fee to another; this ſhall enure as a ſurrender, and this remainder is void. But if ſuch a tenant for life make a leaſe to him in remainder or reverſion for the terme of the life of him in remainder or reverſion; this ſhall not enure as a ſurrender be- Bro. ſur. 3. 5. Perk. ſect. 616. 620. 623. Co. ſuper Lit. 42. Bro. Sur. 49.

becauſe it doth not give the whole eſtate, but it ſhall enure by way of grant. So if leſſee for life make a leaſe to him in remainder in tail for term of the life of him in remainder; this ſhall not enure as a ſurrender, but as a grant, and ſhall end with the life of the grantee. If leſſee for forty years make a leaſe for thirty ſeven years on condition, and after grant his eſtate to him in reverſion, and the ſecond leſſee atturn; this ſhall enure as a ſurrender. If there be tenant for life, the remainder in tail to a ſtranger, and the remainder in tail to another ſtranger, the remainder in fee to the tenant for life, and the tenant for life doth make a feoffment to the firſt tenant in tail; this ſhall enure as a ſurrender of the eſtate for life, and as a grant of the reverſion in fee alſo. If tenant for life being a woman take a husband, and then her husband and ſhe by deed indented make a leaſe to him in reverſion for the life of the husband; this ſhall not enure as a ſurrender, but as a grant. If there be tenant for his own life, the remainder to *I S* for his life, and the firſt tenant for life ſurrender to him in remainder for the life of him in remainder; it ſeems this ſhall enure as a ſurrender, and is no forfeiture; but if he grant it to him for the life of a ſtranger, and make livery of ſeiſin, this is a forfeiture. If leſſee for life, the reverſion being in jointenants, grant the land to one or all of the jointenants for twenty years; this ſhall not enure as a ſurrender, but as a grant, for there remains an intereſt in the leſſee ſtill as a mean eſtate. If leſſee for years make him in reverſion or remainder his executor; this ſhall not enure as a ſurrender, albeit it doe give him the whole eſtate. If lands be given to the husband and wife, the remainder to *I S*, and the husband diſcontinue in fee, and take back an eſtate to him and his wife, the remainder to *W N*, and die, and the wife claim in by the ſecond eſtate, and ſurrender to *W N*; this ſhall not enure as a ſurrender, but as a grant. If leſſee for life or years grant his eſtate to him in remainder or reverſion and a ſtranger; this ſhall enure as a ſurrender of the one half to him in reverſion, and as a grant of the other moity to the ſtranger. And yet it is ſaid, that if leſſee for life of land grant his eſtate to him in the reverſion and two others, that hereby they have a joint eſtate, and the ſurvivor ſhall have the whole. If leſſee for life make a leaſe for his own life to the leſſor, the remainder to the leſſor and a ſtranger in fee; this ſhall enure as a ſurrender of the one moity, and a forfeiture of the other moity. If tenant for life ſurrender to the husband of a woman tenant in tail or in fee; this ſhall enure as a grant, not as a ſurrender. And ſo alſo it ſeems is the law when the ſurrender is to the husband and wife. And if *B* be tenant for life, the remainder to *C* in tail, the remainder to *D* in tail, and *B* infeoff *C* and *S* his wife in fee; this ſhall not enure as a ſurrender, but it is a forfeiture: ſo that if *C* die without iſſue,

Paſch. 7 Jac. B. R.

Perk. ſect. 621.

Co. ſuper Lit. 42.

Bro ſurrender 17.

Perk. ſect. 615.

Forfeiture.

Bro. ſurrender 52.

Bro. ſurr. 36

Bro. ſurr. 11. Co. 2. 61. 3. 61.

2. When it is done or made to him and a ſtranger.

Perk. ſect. 619.

Co. ſuper Lit. 335.

Perk. ſect. 622. Bro. Sur. 20. 34. 23.

Forfeiture.

Bro. ſur. 46.

D may enter. If there be leſſee for life, the reverſion to two coparcenours, and one of them take a husband, and the leſſee doth grant his eſtate to her and her husband; this ſhall not enure as a ſurrender, but as a grant. And yet if tenant for life doe grant his eſtate to the husband and wife, ſhe having the reverſion if ſhe be an infant and within age at this time; it ſeems this ſhall enure as a ſurrender, not as a grant. If tenant for life, or years, and he in reverſion or remainder by word without deed join in a feoffment; it ſhall be ſaid the ſurrender of the eſtate for life or years to him in the reverſion, and the feoffment of him in reverſion. But if he in reverſion infeoff the tenant for life without any deed; this ſhall enure firſt as a ſurrender of the leaſe for life, and then as a feoffment. See more in *Deed: Numb.*

Perk. Sect. 623. 21 H. 7. 40.

Bro. ſur. 34.

3. When it is done with him in reverſion or remainder.

Plow. 140. Dier 358.

8. Where a deed or rent may be ſurrendred. And how ſuch a ſurrender ſhall enure or be taken.

If I have a rent in fee, for life, or years, iſſuing out of another mans Manor, or other lands, I may ſurrender it, for if I deliver the deed of the grant of the rent to be cancelled unto any one that hath any eſtate of the Manor or land in fee ſimple, for life, or yeares, in poſſeſſion or remainder, either ſolely by himſelf, or jointly with others, this is a good ſurrender, and hereby the rent is extinct and gone. But one that is tenant in tail of a rent cannot ſurrender it, neither wil the delivering up of the deed in this caſe determine the rent. And if one be ſeiſed of land out of which a rent is iſſuing in fee, and is diſſeiſed, and during the diſſeiſin the grantee of the rent ſurrender his rent, and give up his deed; it ſeems this doth not extinguiſh the rent, yet hath the grantee no remedy for his rent when he hath delivered up his deed. And yet if one be ſeiſed of land in fee out of which a rent is iſſuing in fee, and he die without heir, ſo that the land eſcheat, and before the Lord enter upon his eſcheat, he that hath the rent doth ſurrender the deed of the rent to the Lord; it ſeems this is a good ſurrender to extinguiſh the rent. And if the grantee of a rent-charge in fee grant the ſame to him in fee that is ſeiſed of the land in fee; this ſhall enure to extinguiſh the rent; but if he grant it to one that hath only an eſtate for life *contrà*.

14 H. 7. 2. Perk. Sect. 591. 585. 606. 590. 596. 598.

Perk. Sect. 594.

Perk. Sect. 595.

Perk. Sect. 597.

And now by this time it is high time we come to *Confirmations* and *Releaſes*, which ſerve to enlarge and amend the eſtate and intereſt that a man hath in a thing already.

CHAP.

CHAP. XVIII.
Of a Confirmation.

Terms of the law. Co. ſuper Lit. 295.

A Confirmation is the conveyance of an eſtate or right that one hath into lands or tenements to another that hath the poſſeſſion thereof, or ſome eſtate therein whereby avoidable eſtate is made ſure, and unavoidable, or whereby a particular eſtate is increaſed and enlarged. And this albeit it may be made by other words, as by *Dedi* or *Conceſſi*, which are generall words, and ſerve to make a grant, feoffment, leaſe, releaſe &c. yet it is moſt commonly and properly made by theſe words *Confirmaſſe, Ratificaſſe & approbaſſe*, which doe ſignifie *ratum & firmum facere & ſupplere omnem defectum*. And he that makes the confirmation is ſometimes called the confirmor, and he to whom it is made the confirmee.

1. Confirmation. *Quid.*

Confirmor. Confirmee.

Co. ſuper Lit. 295. Plow. 140. Lit. Sect. 515. Co. 9. 142.

There are two kinds of confirmations, *viz.* a confirmation implied or in law, which is when the law by conſtruction makes a confirmation of a deed made to another purpoſe, and a confirmation expreſſe or in deed, which is when the act done or deed made is intended for a confirmation. And both theſe are always in writing. The latter is properly called a deed or inſtrument of confirmation, and is made after this manner, *Noveritis univerſi &c. me* A *de* B *ratificaſſe, approbaſſe & confirmaſſe* C *de* D *ſtatum & poſſeſſionem quos habeo de & in uno Meſuagio &c. cum pertinen. in* F *&c.* A confirmation is alſo diſtinguiſhed by his effects, for ſometimes it doth tend and ſerve to confirm and make good a wrongfull and defeaſible eſtate, or to make a conditionall eſtate abſolute. And then it is ſaid to be *confirmatio perficiens*. And ſometimes it doth tend and ſerve to increaſe and enlarge a rightfull eſtate, and ſo to paſſe an intereſt. And then it is called *confirmatio creſcens*. And ſometimes it doth tend and ſerve to diminiſh and abridge the ſervices whereby the tenant doth hold. And then it is called *confirmatio diminuens*.

2. *Quotuplex.*

Co. 146, 147 Dier 109. 7 H. 6. 7. Lit. Sect. 539. Co. 9. 142.

The nature and work of this where it doth find a foundation to work upon is, either to increaſe and enlarge the eſtate of him to whom it is made from a leſſer to a greater, and to give him ſome new intereſt he had not before, or to corroborate and perfect the eſtate that was imperfect before, or to change the quality of it from an eſtate upon condition to an abſolute eſtate or otherwiſe, for this a confirmation will doe. In ſome caſes alſo it will extinguiſh rights and titles of entry. But it will not make an eſtate good that is meerly void; nor add, nor take from an eſtate a deſcendible quality, and make a man capable of it that is uncapable in himſelf,

3. The nature and operation of it in generall.

or *è contra*. In ſome caſes alſo it wil leſſen and diminiſh rents or ſervices. But it cannot ne will change the nature of the ſervice into ſome other kind of ſervice, nor increaſe it into a greater ſervice.

4. Where the confirmation of ſome perſons is needfull to perfect the grant of others. Or not. And how it may be done.

If a Biſhop, Dean, Archdeacon, Prebend, or the like, make any leaſe of the land they have in the right of their Biſhoprick, Deanery, Archdeanery, or Prebendſhip not warranted by the Statute of 32 *H.*8. and within the other Statutes; it ſeems this leaſe muſt be confirmed by the Dean and Chapter by their common ſeal, and if there be two Chapters it muſt be confirmed by them both, or otherwiſe it is not good. But if the leaſe bee ſuch a leaſe as is warranted by the Statutes, the Biſhop may make it without the confirmation of the King, the Patron, and Founder of Biſhopricks, or the Dean and Chapter. And ſo alſo it ſeems of the reſt. And a Corporation aggregate as Dean and Chapter, Maſter and Fellows, and the like, may grant without any confirmation of the Founder, and this grant will be good. If a Biſhop &c. grant an ancient office belonging to his Biſhoprick, albeit it be but for the life of the grantee, yet it muſt be confirmed by the Dean and Chapter, otherwiſe it is not good. If a Parſon or Vicar had made any leaſe for longer time then his own life, it muſt have been confirmed by the Patron & Ordinary. But at this day albeit it be confirmed by the Patron and Ordinary, yet the leaſe is good for no longer then during the Parſons ordinary reſidencie, except it be impropried.

Co. ſuper Lit. 300, 301. Co.10. 62.5.3.Dier 145.273. 349.338. 339.61.

Co.10.62.

Dier 52.ſtat. 13 El.ch.20.

If tenant for life grant a rent-charge to *I S* and his heirs; in this caſe he in reverſion muſt confirm it, otherwiſe the grant of the rent will be good for no longer then the life of the tenant for life.

Co. 1.147.

Where a man hath an intereſt in any lands, tenements, rents, commons, felons goods, or the like, by grant of any of the Kings of the Realm, he need not have the confirmation of any or of every ſucceeding King. Alſo it ſeems grants of Fairs, Markets, Warrens, and the like, made by one King, will be good in law againſt his ſucceſſors without any confirmation. But all ſuch as have any judiciall or miniſteriall offices, commiſſions and authorities derived from the King, muſt have the confirmation of every ſucceeding King, otherwiſe they may loſe them.

Co.8.167. Dier 277.

Dier 327. Lit. Bro. 203. Kelw. 145.188.

*5. What confirmations may be made. And what ſhall be ſaid a good expreſſe or implied confirmation. Or not. And by what words it may be made.

1. To confirm or alter the quality of the eſtate of him to whom it is made.

*In every good confirmation tending to confirm an eſtate or alter the quality of it, theſe things muſt concur: 1. There muſt be a good confirmor, and a good confirmee, and a thing to be confirmed as in other grants, and the deed muſt bee well ſealed &c. 2. There muſt be a precedent rightfull or wrongfull eſtate in him to whom the confirmation is made in his own or in anothers right, or at leaſt he muſt have the poſſeſſion of the thing whereof the confirmation is to be made that may be as a foundation for the confirmation to work upon. As if feoffee on condition make a feoffment over, and the feoffor confirm his eſtate to him to whom the ſecond feoff-

Co.1.146. 9.142. 7 H. 6.7.

feoffment is made and his heirs; this is a good confirmation to make his eſtate abſolute. And if leſſee for life make a feoffment in fee, or leaſe for years, and the firſt leſſor confirm this ſecond eſtate; it ſeems this is a good confirmation. And if one diſſeiſe me of land, I may after confirm the eſtate of the diſſeiſor, or of his heir if he be dead, or of his feoffee if he have aliened it, and this will make his eſtate good for ever: And if the diſſeiſor make a leaſe for life, or years of it; I may confirm the eſtate of the leſſee, and this will make it good for the time. * And if one make a leaſe for life abſolute, or a feoffment in fee, or leaſe for life on condition, or be diſſeiſed of land, and the leſſee for life, feoffee, or diſſeiſor doth grant a rent out of the land in fee, and the leſſor, feoffor, or diſſeiſee doth confirm the eſtate of the grantee; this doth make good the grant for ever. And ſo alſo if the heire of a diſſeiſor that is in by deſcent grant a rent-charge, and the diſſeiſee confirmeth it; this is a good confirmation. And if an Infant make a leaſe for 20 years, and the leſſee doth make a leaſe to another for all or part of the time, and the infant at his full age doth confirm this ſecond leaſe; this is a good confirmation, and doth perfect the leaſe, for it is a rule, That which I may defeat by my entry, I may confirm by my deed. But if there be no precedent eſtate on which the confirmation may work, or the eſtate be ſuch an eſtate as is meerly void; then is the confirmation void, and cannot take effect as a confirmation: as for example, If a man aſſign dower to a woman that hath nothing to do with it, or a Court that hath not power doth make leaſes by commiſſion, or an eſtate that was upon condition is avoided by entry, or a leſſee ſurrender, or a diſſeiſee enter upon a diſſeiſor, and afterwards he that hath the rightfull eſtate confirm their eſtates ſo defeated and gone; theſe confirmations are void: *Debile fundamentum fallit opus.* And a confirmation to him that hath nothing in the land is void. And hence it is that if one confirm all his eſtate that he hath granted to another, when in truth he hath granted none at all; this is void. And ſo alſo it is if there be an eſtate and no poſſeſſion: as if a diſſeiſor make a leaſe for years to begin at *Michaelmas*, and before the day the diſſeiſee doth confirme the eſtate of the leſſee for years; it is ſaid this is not a good confirmation, *ſed quære.* 3. The confirmor muſt have ſuch an eſtate and property in the thing whereof the confirmation is made as he may be thereby enabled to confirm the eſtate of the confirmee, as the leſſors, feoffors, and diſſeiſees in the caſes before have, otherwiſe the confirmation is void. And therefore if the heir of the diſſeiſee during the life of the diſſeiſee confirm to the diſſeiſor; this is no good confirmation to perfect his eſtate, albeit the diſſeiſee die & the right of the land deſcend to his heir afterwards. So if lands be given to *A* & *B* his wife & the heirs of their bodies iſſuing, the remainder in fee to *A*, & *A* levy a fine with

Lit. ſect. 516.
Co. 9. 142. 6. 15. Perk. ſect. 86. Lit. ſect. 518. 521. 11 H. 7. 29. 28.
* Co. 1. 144. Lit. ſect. 527. 529. 11 H. 7. 28.
Co. ſuper Lit. 300. Lit. ſect. 547. 11 H. 7. 28.
Infant.
Co. ſuper Lit. 295. 301 Dier 263.
4 H. 7. 10.
Dier 109.
19 H. 6. 62.
Co. 9. 138.

with Proclamations and die, and ſhe within five yeares doth enter and claime, and after the conuſee doth confirme the eſtate made by the firſt gift to the wife To have and to hold according to the ſame; this confirmation is to no purpoſe. So if leſſee for life make a leaſe for thirty yeares, and after he in reverſion and the leſſee for life leaſe for ſixty yeares; in this caſe he cannot confirme the leaſe for thirty yeares becauſe he hath granted it before for ſixty yeares. And hence it is alſo that the confirmation by one Jointenant of the eſtate of his companion worketh nothing, for their eſtates are equall, and each hath intereſt in the whole land. And yet if one Jointenant confirme the whole land to his companion To have and to hold the land to him and his heires; this ſhall amount to a Grant, and ſo will be good to paſſe his moity. And hence it is alſo, that if a man grant a rent charge out of his land to another for life, and then confirme his eſtate without any clauſe of diſtreſſe (for by a clauſe of diſtreſſe a grant of a new rent may be made) To have and to hold to him in fee ſimple, or fee taile; that this is void, for the confirmor hath no reverſion of the rent in him. 4. The precedent eſtate muſt continue untill the confirmation come, as in all the caſes of voidable eſtates made the confirmation muſt be before the eſtates be made void by entry &c. or otherwiſe the confirmation will be void. And therefore if leſſee for life or yeares ſurrender, or the diſſeiſee enter upon the diſſeiſor, and after the leſſor or the diſſeiſee confirme the eſtate of the leſſee or diſſeiſor; this confirmation comes too late. 5. The eſtate precedent and that which is to be confirmed muſt be lawfull and not prohibited by any act of Parliament. And therefore if a ſpirituall perſon, as Prebend, or the like make a leaſe not warranted by the Statutes; the confirmation of the Deane and Chapter will not help nor amend it. And if tenant in taile make avoidable leaſe, and after confirme it himſelfe; this is voidable ſtill. 6. There muſt be apt words of confirmation in the deed or Inſtrument. And herein note that albeit the words *Confirmavi, ratificaſſe & approbaſſe* be the moſt ſignificant and proper words to make this conveyance, yet ſuch as are made by other generall words may make a good confirmation. And therefore it is agreed, that a deed made by the words *Dedi, Conceſſi*, or *Demiſi*, may make a good confirmation. And therefore that if the diſſeiſee, coparcener, or leſſor make a deed of the land by the word *Dedi*, or *Conceſſi* to the diſſeiſor, other coparcener, or leſſee for life, and deliver the deed; this is a good confirmation without livery of ſeiſin. Alſo if a feoffment be made to *A* to the uſe of *B* and his heires upon condition, and before the condition broken the feoffor and *B* doe joine in the grant of a rent charge, and after the condition is broken; in this caſe the law doth interpret this a good grant from *B* and a good confirmation of the

Jointenants.

Livery of ſeiſin.

Co. ſuper Lit. 296.

Firz Confirmation 15. Lit. Sect. 523. Dier 263.

Lit. Sect. 543. Co. ſuper Lit. 308.

Co. 5. 15. Lit Sect. 607.

Lit. Sect. 531. 532. 10 E. 4. 3. Co. ſuper Lit. 295. Dier 116. Co. 1. 147. 5. 15.

the ſeoffor without any words of confirmation. So if tenant for life doe grant a rent to him in reverſion, and he by deed doth grant it to another and his heires in fee; in this caſe the law doth conſtrue this a good grant and a confirmation alſo. And in theſe caſes of confirmations of eſtates, if it be by the diſſeiſee to the diſſeiſor, it is good without any words of heires, as if the diſſeiſee confirme the eſtate of the diſſeiſor, or confirme the land unto him, and ſay not To him and his heires; this is an effectuall confirmation to him and his heires for ever. And if a leſſee for life or a diſſeiſor make a leaſe for life, or yeares, &c. and he in the reverſion, or the diſſeiſee confirme their eſtates, and not the land, and without any *Habendum* or limitation of eſtate; this is good for ſo long as the eſtates do continue. But it is moſt ſafe alwayes to expreſſe the eſtate. *i.* to ſay To have and to hold the land to him and his heires, or for life &c. as the agreement is. If leſſee for life grant a rent to one and his heires out of the land, and the leſſor doth confirme the eſtate, or this rent charge, this doth make the eſtate of the rent ſure. And ſo alſo if he doe confirme the rent, and ſay To have and to hold to him and his heires; this is a good confirmation. But if he confirm the rent, To have and to hold to him in fee, without naming his heires, hereby his eſtate is not bettered.

Lit. Sect. 519. Co. ſuper Lit. 296. Co. 1. 147.

If the leſſor confirme the eſtate of his leſſee for life with this clauſe, To hold without impeachment of waſt; this is a good confirmation to change the quality of the eſtate ſo farre as to make it diſpuniſhable of waſt. So if the Lord paramount confirm the eſtate of the meſne with clauſe of acquitall. And ſo if leſſee for yeares, or for anothers life be without impeachment of waſt, and the leſſor confirme to him for his own life, and omit that clauſe; hereby this priviledge is gone and the eſtate is become puniſhable for the waſt.

Co. 9. 139. F. N. B. 136. Co. 8. 76. Dier 10.

2. To enlarge the eſtate of him to whom it is made.

This kind of confirmation *Creſcens* muſt have all the qualities of the former: and there muſt be alſo in this caſe a privity between the confirmor and the confirmee. And then it may enlarge the eſtate of him to whom it is made, as from an eſtate at will to an eſtate for yeares, or to a greater eſtate; from an eſtate for yeares to an eſtate for life, or to a greater eſtate; from an eſtate for life to an eſtate in taile, or in fee; and from an eſtate taile to an eſtate in fee; and theſe confirmations are good. But in all theſe kind of confirmations care muſt be had of the manner of penning them, and that in every ſuch deed there be a limitation of the eſtate. *i.* That theſe words be inſerted To have and to hold the tenements &c. to him and his heires, or to him and the heires of his body, or to him for terme of life, or yeares, as the agreement is; for if leſſee for life make a leaſe for yeares, and then leſſee for life and he in reverſion confirme the land To have and to hold to him for life, or to him and his heires; theſe words will make the eſtate to increaſe. But

Co 9. 142. ſuper Lit. 305. Dier 145. 296. Co. 6. 15. Lit. Sect. 533. 532. 523. Dier 263.

if

if the confirmation be made to the leſſee for life or for yeares of his terme or eſtate and not of the land. As when he doth confirme his eſtate To have and to hold his eſtate to him and his heires, this doth not increaſe the eſtate. And yet if he confirme the land To have and to hold the land to him and his heires; this will increaſe the eſtate. *Et ſic de ſimilibus.* Lit. Sect. 524. 545. Plow. 540.

If the husband have an eſtate of land for life or yeares in the right of his wife, or to them both for life, and a confirmation to him alone, of his eſtate, or of the land To have and to hold the land to him and his heires; this is a good conveyance of the fee ſimple to him after the death of his wife. And if I let land to a woman ſole for the terme of her life, who taketh a husband, and after I doe confirme the eſtate of the husband and wife To have and to hold for terme of their two lives; this is good, but it ſhall enure only to enlarge his eſtate for terme of his life if he ſurvive his wife. But if one leaſe to another for life, and after confirme the eſtate of the leſſee to him and his wife for terme of their two lives; this is void as to the wife. Co. ſuper Lit. 299. Plow. 160. Lit. Sect. 525. Fitz. Confirmation 7. 17.

If one grant a rent-charge out of his land for life, and after the grantor confirme the eſtate of the grantee in the rent without any clauſe of diſtreſſe To have and to hold to him in fee ſimple or fee taile; this confirmation is not effectuall to enlarge the eſtate. But if a man be ſeiſed of an old rent-charge or rent-ſervice, and grant the ſame firſt for life, and after confirme the eſtate of the grantee in fee ſimple, or fee taile; this is good and will enlarge the eſtate accordingly. Lit. Sect. 548, 549.

If tenant for life grant a rent out of the land to one and his heirs during the life of the leſſee for life, and after the leſſor confirme the rent to the grantee and his heires; it ſeems the eſtate is not hereby enlarged, but when the tenant for life doth die the rent ſhall ceaſe. Co. 1. 147.

This kind of confirmation may be made by the ſame words as the former, *viz.* by the words, Give, Grant, or Demiſe. But neither of theſe may be made by the words, Surrender, Releaſe, Exchange, or the like, for theſe are peculiar words deſtined to a ſpeciall end being proper and peculiar manner of conveyances. And yet if I that am a leſſor do ſay to my leſſee for yeares by my deed, I will that you ſhall hold the land for your life; this is a good confirmation to increaſe the eſtate by this word *volo* only. So if I grant to my leſſee for yeares, that he ſhall hold the land for terme of his life; this without any other words is a good confirmation. Co. ſuper Lit. 301. Fitz. Confirmation 23.

3. To diminiſh or abridge the ſervices, &c.

By a confirmation the Lord may confirme the eſtate of his tenant which holdeth by Knights ſervice to hold in Socage, or to hold for a leſſe rent, or to hold at common law where before he did hold in ancient demeſne, and ſuch a confirmation is good. But ſuch a confirmation Co. 9. 142. Lit. Sect. 538.

firmation as is to hold by new ſervices, as a roſe for money, or the like, is not good for that purpoſe. And in this caſe there muſt be alſo a privity. And therefore if there be Lord meſne and tenant, and the Lord confirme the eſtate of the tenant to hold by leſſe ſervices; this is void. And if the Lord confirme to his tenant after he is diſſeiſed before his entry, to hold by leſſe ſervices; this is void.

Co. 5. 81, 82. Lit. Sect. 519. Co. ſuper Lit. 297. Lit. Sect. 520.

A confirmation may be by apt words in caſe of a leaſe for yeares for part of the time, but in caſe of a free hold it cannot be ſo. And ſo alſo it may extend to part of the thing before in eſtate. And therefore if a diſſeiſor, tenant in taile, husband of the land he hath in the right of his wife, or leſſee for life make a leaſe for yeares, and the diſſeiſee, iſſue in taile, wife, or leſſor make a confirmation of all the land for part of the time, or of part of the land for all the time; this confirmation is good. But if any ſuch perſon make a leaſe for life, gift in taile, &c. the diſſeiſee cannot confirme part of the eſtate but he muſt confirme all. And therefore if he confirme his eſtate for one houre, it is a confirmation of the whole eſtate. And ſo alſo if he confirme the land to the diſſeiſor himſelfe but one houre, one week, one yeare, or for his life, &c. this is a good confirmation of the eſtate for ever. And if it be a leaſe for yeares that is confirmed care muſt be had to the manner of the confirmation, for if the confirmation be of the eſtate or the terme for one houre; this is a good confirmation for the whole time: and therefore the confirmation muſt be had of the land To have and to hold for part of the terme; and being ſo made it may be good for that time only and no longer.

6. Where a confirmation may be good for part of the eſtate or for part of the thing. Or not.

11 H. 7. 29. Co. 1. 146. 9. 142.

If I make a feoffment on condition and before the condition broken I confirme the eſtate of the feoffee abſolutely; this will not extinguiſh the condition. And yet if the condition be broken firſt ſo as my entry is lawfull; in this caſe the confirmation will extinguiſh the condition. And if the feoffee make a feoffment over abſolutely to another, and I confirme the eſtate of the ſecond feoffee whether it be before or after the condition broken; by this the condition is diſcharged.

7. The force and virtue of it. And how it ſhall enure and be conſtrued and taken.

Lit. Sect. 535. 536. 537.

If the Lord confirme the eſtate of his tenant in the tenements, or one that harh a rent, common, or profit out of land confirme to the terretenant his eſtate; in theſe caſes notwithſtanding this confirmation the ſigniory, rent, common, &c. doe continue, and this ſhall not enure to extinguiſh it.

Co. ſuper Lit. 298.

If the diſſeiſee and a ſtranger diſſeiſe the heire of the diſſeiſor, and the diſſeiſee confirme the eſtate of his companion; this ſhall not enure to extinguiſh the ſuſpended right of the diſſeiſee, but when the heire of the diſſeiſor ſhall reenter it ſhall be revived. And if the grantee of a rent charge and a ſtranger diſſeiſe the tenant of the land, and the grantee confirme the eſtate of his companion;

this

this ſhall not enure to the rent ſuſpended to extinguiſh it, but after the reentry of the tenant the rent ſhall be revived.

If a man hold his land of me by Knights ſervice, rent, ſuit of court &c. and I confirme his eſtate to hold of me by Knights ſervice only for all manner of ſervices and demands; in this caſe albeit this doe abridge the ſervice yet it ſhall not be conſtrued to take away wardſhip, reliefe, aid to mary my daughter and make my ſonne Knight and the like. Co. ſuper Lit. 305.

If I have an eſtate in land for my life, and he in the reverſion doth confirme the eſtate to me and my wife for the terme of our lives; this ſhall enure only as a confirmation of my eſtate and not ſo as to give any eſtate to my wife. But if I have a leaſe for life or yeares in right of my wife, and he in the reverſion doe confirme the eſtate to me and my wife To have and to hold to us for our lives; this ſhall enure not only to confirme the eſtate but alſo to create an eſtate to me after my wives death: And in the caſe of a leaſe for yeares it maketh our eſtate joint, but in the caſe of a leaſe for life I ſhall take by way of enlargement of eſtate for my life after my wives death. And if in this caſe the confirmation be to me and my wife To have and to hold the land to us two and our heires; this ſhall enure to us in fee ſimple as Jointenants. If land be let to husband and wife To have and to hold the one moity to the husband for his life and the other moity to the wife for her life, and the leſſor confirme to them both their eſtate in the land To have and to hold to them and their heires; in this caſe as to the one moity it doth enure only to the husband and his heires, but as to the other moity they ſhall be Jointenants. And yet if ſuch a leaſe for life be made to two men by ſeverall moities, and the leſſor confirme their eſtates in the land To have and to hold to them and their heires; by this they are tenants in common of the inheritance. See before. Co. ſuper Lit. 299.

If the diſſeiſee confirme the eſtate of the diſſeiſor To have and to hold to him and his heires of his body engendred, or To have and to hold to him for terme of his life; this ſhall enure to him as a fee ſimple and ſhall confirme his eſtate for ever. Lit. Sect. 419.

If my diſſeiſor make a leaſe for life the remainder over in fee, and I confirme the eſtate of the tenant for life; this ſhall not enure to, nor availe him in remainder. And if the diſſeiſor make a gift in tail the remainder to the right heires of the tenant in taile, and the diſſeiſee confirme the eſtate of the tenant in taile; this ſhall not extend to the fee ſimple, no more then if the diſſeiſor make a gift in taile the remainder for life the remainder to the right heires of the tenant in taile, and the diſſeiſee confirme the eſtate of the tenant in taile; for this ſhall extend only to the eſtate taile, and not to the remainder for life or in fee. But if the diſſeiſee in the firſt caſe confirme the eſtate of him in the remainder; this ſhall enure Co. ſuper Lit. 298. 297.

to

to and availe the tenant for life. And ſo if a diſſeiſor make a leaſe for life and keepe the reverſion, and after the diſſeiſee doth confirme to the diſſeiſor; this ſhall enure to the tenant for life. And ſo if a diſſeiſor make a leaſe for life to *A* and *B* and the diſſeiſee confirme the eſtate of *A*; this ſhall enure to *B* and make his eſtate good alſo in the other moity. And ſo if there be two diſſeiſors and the diſſeiſee confirme the eſtate of one of them without ſaying more; this ſhall enure to them both. But if the confirmation be of the land To have and to hold the land to one; in this caſe it may enure to him alone. So if a diſſeiſor enfeoffe *A* and *B* and the heires of *B* and the diſſeiſee confirme the eſtate of *B*, albeit it be but for his life; yet this ſhall enure to both and to the whole fee ſimple.

Co. ſuper Lit. 299. If a leaſe be made for life to *A* the remainder to *B* for life, and the leſſor confirme their eſtates in the land To have and to hold to them and their heires; this ſhall enure as to the one moity to *A* in fee after the death of *B*, and as to the other moity in fee to *B* after the death of *A*.

Co. Idem. If lands be given to two men and the heires of their two bodies begotten and the donor doth confirme their eſtates in the land To have and to hold the land to them two and their heires; it ſeems this ſhall enure to them as a joint eſtate for their lives and after for ſeverall Inheritances.

Lit. Sect. 516, 521, 519, 520, 541. Co. 5. 79. If the leſſee for life, or the diſſeiſor doth make an abſolute leaſe for yeares, and he in the reverſion or the diſſeiſee doth confirme the eſtate of the leſſee for yeares; this makes the leaſe good for all the time. So if the diſſeiſor makes a leaſe for life, and the diſſeiſee doth confirme the eſtate of the leſſee for life; this makes the eſtate good for the life. And if he in reverſion confirme the eſtate of the termor but one houre; this doth make it good for all the terme. And if an eſtate for life or in fee be confirmed but for one houre; it is a good confirmation for all the eſtate. And if the diſſeiſee confirme the eſtate of the diſſeiſor To have and to hold for one houre, yeare, or for life, or in taile; this is a good confirmation for ever and makes his eſtate unavoidable. And yet if the diſſeiſee confirme the land *Habendum* the land for life, or in taile, &c. *contra*.

Dier 52. 339 Co. 5. 81. If a voidable leaſe be made for forty yeares, and the leſſor confirme the terme for twenty yeares; this is a good confirmation of the whole terme. But if he confirme the land for twenty yeares, it may be good for that time only and no longer; wherein as in divers other caſes before obſerve that the very words whereby the confirmation is made are much to be heeded, for *Parols font plea*. Note.

Lit. Sect. 606, 607, 610. If tenant in taile or for life of land letteth it for yeares, and after confirme the land to the leſſee for yeares To have and to hold to the leſſee and his heires for ever; by this the leſſee hath only an eſtate

eſtate for terme of the life of the tenant in taile or for life, and therein his leaſe for yeares is extinct.

If tenant for life doth grant a rent to another and his heires during the life of the tenant for life, and the leſſor confirme to the grantee and his heires; this ſhall be conſtrued to be an eſtate for life only and no enlargement of the eſtate. But if tenant for life grant a rent-charge in fee, and the leſſor confirme it; this ſhall be conſtrued to be a confirmation of the fee ſimple. Co. 1. 147. ſuper Li. 301.

See more in *Expoſition* of *Deeds cap.* 5. *in toto.* And more alſo in the chapter of *Releaſe*, whereunto we are now come in the next place.

CHAP. XIX.

Of a Releaſe.

1. Releaſe. *Quid.*

A Releaſe is the giving or diſcharging of the right or action which a man hath or may have or claime againſt another man or that which is his. Or it is the conveyance of a mans intereſt or right which he hath unto a thing to another that hath the poſſeſſion thereof or ſome eſtate therein. And this albeit it may be made by other words, as *Dedi*, *Conceſſi*, or *Renunciaſſe*, or ſuch like, yet it is moſt commonly and properly made by theſe words *Remiſiſſe*, *Relaxaſſe*, *& quietum clamaſſe*, all which are much to one purpoſe. He that makes the releaſe is ſometimes called the releſſor, and hee to whom it is made the releſſee. Terms of the law. Weſt Symb. lib. 2. Sect. 466.

Releſſor, Releſſee.

2. *Quotuplex.*

There are two kindes of releaſes like unto thoſe of confirmation, *viz.* a releaſe expreſſe or in deed, and that is a purpoſed releaſe, when the act done or deed made is intended a releaſe. And this is alwaies done by writing. And then it is defined by ſome to be an Inſtrument whereby eſtates, rights, titles, actions, and other things be ſometimes extinguiſhed, ſometimes transferred, ſometimes abridged, and ſometimes enlarged, which is after this manner. *Noverint &c. me* A *de* B *remiſiſſe, relaxaſſe & omnino de me* [*vel pro me*] *& hered. meis quietum clamaſſe* C *de* D *totum jus, titulum & clameum que habui, habeo vel quoviſmodo in futuro habere potero de & in uno meſuagio cum pertin. in* F *&c.* And a releaſe implied or in law, and that is when the law by intendment and conſtruction and by way of conſequent doth make a releaſe of an act done to another purpoſe. And this is ſometimes by writing, and ſometimes without writing. Theſe releaſes alſo are ſometimes of a bare and naked right, and ſometimes of a right accompanied with ſome eſtate or intereſt. And ſometimes they are of actions reall or in lands or tenements, and ſometimes of actions perſonall of or in goods or chattells, and ſometimes of actions mixt partly in the realty and partly in the perſonalty. Co. ſuper Lit. 264. 265.

Co. ſuper Lit. 193.273. 277. Co. 1.147. Lit. Sect. 606.459. 465,466. 446.

A releaſe is much of the nature of a confirmation, for in moſt things they agree and produce the like effects. This therefore is ſaid ſometimes to enure by way of *mitter le eſtate. i.* by way of giving or transferring or enlargement of an eſtate or intereſt, and ſo doth give ſome new intereſt or eſtate to him to whom it is made. And ſometimes it is ſaid to enure by way of *mitter le droit* only, *i.* by way of giving, transferring and diſcharging of a right title or entry unto him to whom it is made. And ſo it doth ſometimes perfect an eſtate that was imperfect and defeaſible before, and enure by way of entry and feoffement. And ſometimes alſo it doth enure to make a conditionall eſtate abſolute. And ſometimes alſo it doth worke and enure by way of extinguiſhment or diſcharge: And then alſo ſometimes it doth enure by way of diſcharge or extinguiſhment as againſt all perſons, and ſo as that whereof all perſons may take advantage. And ſometimes it doth enure only as a diſcharge againſt ſome perſons only, and as to or againſt other perſons by way of *Mitter le droit.* And ſome of theſe in deed enure by way of extinguiſhment, for that he to whom the releaſe is made cannot have the thing releaſed. And ſome of them have ſome quality of ſuch releaſes and are ſaid to enure by way of extinguiſhment, but in truth doe not, for that he to whom the releaſe is made may receive and take the thing releaſed. And in ſome caſes alſo a releaſe like a confirmation doth enure by way of abridgement. But a man cannot barre himſelfe hereby of a right that ſhall come to him hereafter. And therefore it is held that theſe words uſed in releaſes [*quæ quoviſmodo in futuro habere potero*] are to no purpoſe.

3. The nature and operation of it in generall.

Co. 10.48. ſuper Lit. 268.269. 266.

Lands, tenements and hereditaments themſelves may be given and transferred by way of releaſe, and all rights and titles to lands may be given, barred and diſcharged by releaſe, and ſo alſo may rights and titles to goods and chattells. Alſo all actions, reall, perſonall and mixt, may be given, diſcharged or extinct by releaſe; for howſoever rights and titles of entry cannot be granted by act of the party, nor any action may be granted from one man to another by act of the law or the party, yet all theſe may be releaſed to the terretenant. And a right to a free hold or Inheritance, ſeigniory or rent *in preſenti* or *futuro* may be releaſed five manner of waies, and the firſt three waies without any privity at all. 1. To the tenant of the free hold in deed or in law. 2. To him in the remainder. 3. To him in reverſion. The other two waies in reſpect of privity without any eſtate or right, as by demandant to vouchee, donor

4. What things may be releaſed. Or not. And how.

to donee after the donee hath diſcontinued.

Alſo conditions annexed to eſtates, powers of revocation of uſes, warranties, covenants, tenures, ſervices, rents, commons, and other profits to be taken out of lands may be diſcharged, extinguiſhed & determined by releaſe to the tenant of the land &c. Bro. Releaſe in toto.

Alſo poſſibilities of land &c. if they be neere and common poſſibilities albeit they be not grantable over to another perſon, yet may they be releaſed to him that hath the preſent eſtate of the land. And therefore if a man poſſeſſed of a terme deviſe it to *A* for life, the remainder to *B* and his heires males during the terme; in this caſe albeit *B* may not grant his intereſt over yet he may releaſe it to *A*. And if *A* deviſe to *B* twenty pound when he comes to the age of twenty foure years, and die; in this caſe *B* after he is of the age of twenty one years may releaſe this legacy. So a covenant to doe a future act may be releaſed before it be broken. And it ſeems alſo the conuſee of a Statute or recogniſance may releaſe to a feoffee of part of the land and ſo barre himſelfe of execution of that land. And if I grant to *I S* that if he doe ſuch a thing he ſhall have an annuity of twenty pound for his life; in this caſe it ſeems *I S* may releaſe this before the condition be performed. And if I make a feoffment to *I S* to divers uſes with power to revoke it; I may releaſe this power to one that hath an eſtate of free hold in poſſeſſion, reverſion or remainder in the land. And yet if I make a feoffment to *I S* with proviſo that if *B* revoke that the uſes ſhall ceaſe; in this caſe *B* cannot releaſe this power. And a remote poſſibility that is altogether incertaine cannot be releaſed. And therefore if the ſonne of the diſſeiſee releaſe to the diſſeiſor in the life time of his father; this releaſe is void. And ſo if the conuſee of a Statute releaſe his right to the land of the conuſor before execution; this releaſe is void. And ſo if a plaintife releaſe to a Baile in the Kings Bench before Judgement given, this releaſe is void. Co. 10. 47. 51, 52. 5. 70. 71. ſuper Lit. 265. Lit. Sect. 446. Co. 1. 111. 111. Dier 57. Co. 1. 113. 174.

So if one promiſe to pay me tenne pound upon the ſurrender of my land to him, and that if he ſhall ſell it for above fifty pound that then he ſhall pay me tenne pound more, and I releaſe this to him before he doe ſell it and before I do ſurrender; im this caſe this doth not releaſe the ſecond promiſe becauſe it is not releaſable. Adjudge Tr. 14. Jac. B. R.

Alſo debts, legacies, and other duties may be releaſed and diſcharged thereby before or after they become due. And therefore a rent or annuity may be releaſed before the day of paiment. And ſo alſo may a debt due by obligation: Judgements, Executions, Recogniſances, and the like, by apt words be diſcharged by releaſe. See infra.

If

If the charge or duty grow by record the diſcharge and releaſe thereof muſt be by record alſo. And if it grow by writing the diſcharge and releaſe muſt be by writing alſo. *Nihil eſt magis rationi conſentaneum quam eodem modo quodque diſſolvere quo conflatum eſt.* And therefore a duty growing by a verball agreement may in ſome caſes be releaſed by word without writing. But regularly lands and tenements cannot be given, nor rights and titles to lands, and actions be diſcharged by releaſe without a deed in writing.

5. How and after what manner theſe things may be releaſed.

Co. ſuper Lit. 274. Perk. Sect. 718. Lit. 467. Co. 1. 111. 21 H. 7. 24.

A releaſe that doth enure by way of *mitter le eſtate, mitter le droit*, or extinguiſhment, may be made upon condition or with a defeaſance, ſo as the condition or defeaſance be contained in the releaſe or delivered at the ſame time with it, for no defeaſance made after can avoid the force of a releaſe made before. And yet a releaſe may be delivered as an eſcrow, and ſo the force of it may be ſuſpended for a time. But a releaſe of a condition may not be made upon a condition, Nor may a releaſe of a chattell be upon a condition ſubſequent, but it may be upon a condition precedent. * And therefore if a man releaſe a debt to another upon condition that the releſſor may have ſuch a debt owing from a third perſon to the releſſee; this is a good cõdition.

Condition. Defeaſance.

* Curia. B. R. Hil. 9 Car. Barkley & Perkes caſe.

Dier 307. 21 H. 7. 24. Co. ſuper Lit. 274. Lit. Sect. 467.

A releaſe of all actions may be made untill a time paſt, as untill the firſt of *May* laſt, or untill the day of the date of the releaſe; and this will diſcharge all actions till then and none after. But a releaſe cannot be made of a right or action for a part of an eſtate or for a time only, as for one year, or untill *Michaelmas* next, or the like, for a releaſe of ſuch a thing for one day or for one hour is a releaſe of it for ever. And yet a man may releaſe his right in a part of the land. And therefore if a man be diſſeiſed of two acres, he may releaſe his right in one of them and enter into the other acre. Alſo a releaſe in the nature of an acquitance may be of part of a debt. And therefore if one be bound in an obligation of foure hundred pound to pay two hundred pound at *Michaelmas*, and at *Chriſtmas* after the obligee by his deed releaſeth three hundred ninty pound parcell of the ſaid foure hundred pound; this is a good releaſe for ſo much and no more.

Adjudged Barkley & Perkes caſe. Hil. 9 Car. B. R.

* 6. What releaſes may be made of lands or tenements. And what ſhal be ſaid a good releaſe in deed. Or not. And by what words it may be made.

* In every good releaſe in deed howſoever it enure theſe things are requiſite. 1. That there be a good releſſor, and a good releſſee, and a thing to be releaſed. 2. That the deed be well ſealed, delivered &c. And if it tend and enure by way of enlargement of eſtate, then theſe things are further required to make the releaſe good. 1. He that doth make the releaſe muſt have ſuch an eſtate in himſelfe as out of which ſuch an eſtate may be derived and granted to the releſſee as is intended by the releaſe.

Dier 251.

1. When it doth enure by way of enlargement or paſſing of an eſtate.

1. In reſpect of the eſtate of the releſſor.

as if he have the reverſion in fee of lands, he may releaſe to a tenant for years and thereby encreaſe his eſtate to an eſtate for life or in taile, or he may paſſe his whole fee ſimple by the releaſe. But if there be leſſee for years rendring rent, and the reverſion is granted for life the remainder over in fee, and the grantee of the reverſion releaſe all his right to him in remainder, and then he in the remainder grant the reverſion, and the tenant for life releaſe to the grantee alſo; in this caſe it ſeems both theſe releaſes are void and cannot enure as releaſes, howbeit it may be if they have words of ſurrender in them they may enure as ſurrenders. So if there be leſſee for years, the remainder in taile, the remainder in fee, and the leſſee for years being a woman doth mary with him in the remainder in fee, and he in remainder in taile releaſe to him in remainder in fee; this is a void releaſe. So if tenant for life releaſe to him in remainder in fee or in taile; it ſeems this is void and cannot enure as a releaſe. So if there be tenant for life, the remainder in taile, the remainder in fee, and he in remainder in fee releaſe to the tenant for life; this will not increaſe his eſtate. And if the tenant in taile in this caſe releaſe to the tenant for life, his eſtate ſhall be no longer increaſed hereby then for the life of the tenant in taile. 2. He to whom the releaſe is made muſt have ſome eſtate in poſſeſſion in deed or in law, or in reverſion in deed, in his own or anothers right of the lands whereof the releaſe is made to be as a foundation for the releaſe to ſtand upon; for a releaſe which muſt enure to enlarge an eſtate cannot work without a poſſeſſion joined with an eſtate. And therefore the releſſee muſt be leſſee for life, years, or tenant by Statute merchant, ſtaple, elegit, or as gardian in chivalry that doth hold the land over for the value, or at leaſt he muſt be tenant at will. And therefore if a man let his land to another for term of years to begin preſently, and after the leſſor or his heir doth releaſe to the leſſee (after his entry and being in poſſeſſion) all his right in the land; this is good to enlarge the eſtate according to the time ſet down in the releaſe, but if the releaſe be before the term begin, or after the term begin and before the leſſee have entred; (howſoever if any rent be reſerved on the leaſe it may enure and be good to extinguiſh that rent) yet it is not good to enlarge the eſtate. And yet if a tenant for 20. years in poſſeſſion make a leaſe to *B* for 10. years, and *B* enter and he in the reverſion releaſe to the firſt leſſee for years; this is a good releaſe to enlarge the eſtate. So if a man make a leaſe for years the remainder for life or years and the firſt leſſee doth enter; in this caſe a releaſe to him in remainder is good to enlarge the eſtate. So if I grant the reverſion of my tenant for life to another for life, and after releaſe to him and his heires; this is a good releaſe to enlarge the eſtate.

Per Juſtice Jones. 5 Car. Dier idem.

Surrender.

Adjudge Trin. 5 Jac. B.R. Butlers caſe.

Lit. Sect. 598. Plow. 556. Co. ſuper Lit. 345.

2. In reſpect of the eſtate of him to whom the releaſe is made.

Co. ſuper Lit. 270. 273. 265.

Lit. Sect. 459. Plow. 423. Dier 4. 15 H. 7. 14.

So

Co. ſuper Lit. 273. So if a man make a leaſe for life or yeares to a feme ſole, and ſhee take a husband, and he in the reverſion releaſe to the husband and his heires; this is a good releaſe to enlarge the eſtate according to the words of the releaſe. But if the caſe be ſo that a man had an eſtate in poſſeſſion of land, and he be now out of the poſſeſſion of it, and have but a right only to it; or if he have a poſſeſſion only and no eſtate; or if he have neither eſtate nor poſſeſſion; in theſe caſes a releaſe made to ſuch a one will not availe to enlarge his eſtate.

Co ſuper Lit. 270. And therefore if a man make a leaſe for life the remainder for life, and the firſt leſſee dieth, and the leſſor releaſe to him in remainder for life, before his entry; this is a good releaſe to enlarge his eſtate, for he hath an eſtate of free hold in law capable of enlargement by releaſe before entry. But if there be leſſee for life, the remainder for life, the remainder in tail, the remainder in fee, and the leſſee for life is diſſeiſed, & during the poſſeſſion of the diſſeiſor he that hath right doth releaſe to one of them in the remainder; this is void. So if lands be given in taile or leaſed for life, and the donee or leſſee is diſſeiſed, and during the poſſeſſion of the diſſeiſor the donor or leſſor doth releaſe all his right to the donee or leſſee; this is void and will not enlarge his eſtate, howbeit if there be any rent reſerved on the eſtate it will extinguiſh the rent. So if the tenant by the curteſie grant over his eſtate, and after he in reverſion doth releaſe to the tenant by the curteſie; in this caſe his releaſe is void and will not enlarge his eſtate. So if an Infant make a leaſe for life, and the leſſee granteth the eſtate over with warranty, and the Infant at full age doth bring a *Dum fuit infra ætatem*, and the tenant doth vouch the grantor, who doth enter into the warranty, and the demandant being the Infant doth releaſe to him and his heires; this will not enlarge his eſtate, for in truth he had no eſtate before, and that which is not cannot be enlarged. And if leſſee for life or yeares, releaſe to him in remainder or reverſion; this cannot be good as a releaſe, howbeit if there be apt words it may amount to a Surrender. * And if a man have only an occupation of land as tenant at ſufferance, as when a leſſee for yeares doth hold over his terme, or the like; no releaſe to him can work any enlargement of eſtate, for albeit he have a poſſeſſion yet hath hee no eſtate, and beſides in this caſe there is no privity: which is the third thing required in theſe releaſes. For as in all theſe releaſes that enure by way of increaſe or paſſing an eſtate, there muſt be ſome eſtate in the releſſor and the releſſee, ſo there muſt be ſome privity in eſtate between them at the time of the releaſe made, for an eſtate without privity is not ſufficient. And therefore it muſt be, between donor and donee, leſſor and leſſee,

Lit. Sect. 451.

Lit. Sect. 455, 456.

Co. ſuper Lit. 273.

Dier 251.

* Co. ſuper Lit. 271. Lit. Sect. 461.

Co. ſuper Lit. 296. Lit. Sect. 461.

3. In reſpect of privity.

and the like as in the caſes before, between him in reverſion and the leſſee for life or yeares, tenant by Statute Merchant or Staple or by Elegit or Gardian in Chivalry that keepeth the land for the value. And if tenant for life leaſe for yeares, and he in the reverſion and the tenant for life doe joine together and releaſe to the leſſee for yeares; this is a good releaſe to enlarge the eſtate. So if he in reverſion releaſe to the husband that hath an eſtate in the right of his wife only for life or yeares; this is a good releaſe. † So if leſſee for yeares make a leaſe of the land but for part of the terme, the privity continueth ſtill, and therefore a releaſe to him is good to enlarge the eſtate. But if he aſſigne over all the terme then the privity is gone, and therefore a releaſe made to him afterwards is void: And then a releaſe made to the aſſignee of the terme is good to enlarge the eſtate. And if a diſſeiſor make a leaſe for life or yeares, and after he and the diſſeiſee joine together to make a releaſe to the leſſee for life or yeares; this is a good releaſe to enlarge the eſtate. But if the diſſeiſor in this caſe make a leaſe for life or yeares, and the diſſeiſee or he that hath right releaſe to the tenant for life or yeares; in this caſe the releaſe is void for want of privity. And if there be leſſee for yeares the remainder for life, and he in reverſion releaſe to the leſſee for yeares or him in remainder for life and his heires all his right; this is a good releaſe to work an enlargement of eſtate. So if one make a leaſe for life, and grant the reverſion for life, and then the leſſor doth releaſe to the grantee of the reverſion and his heires; this is a good releaſe to enlarge the eſtate of the grantee, and here is privity enough. If *A* be tenant for life, the remainder to *B* in taile, the remainder to *C* for life, the remainder to *A* in fee, and *A* die, and his heire doth releaſe all his right to *B* being in poſſeſſion; this is a good releaſe and gives the fee ſimple.

Plow. 541.

Co. ſuper Lit. 273.

† Dier 4. Co. 3. 22.

Plow. 540. 14 H. 7. 4. Lit. Sect. 518.

Co. ſuper Lit. 273.

Bro. Releaſe 71.

But if *A* make a leaſe to *B* for life, and the leſſee maketh a leaſe for yeares, and after *A* in the life time of the tenant for life maketh a releaſe to the leſſee for yeares; this releaſe is void and will not enlarge his eſtate for want of privity. So if a man make a leaſe for twenty yeares, and the leſſee make a leaſe for tenne yeares, and the firſt leſſor doth releaſe to the ſecond leſſee and his heires; this releaſe is void. So alſo if the donee in taile make a leaſe for his own life, and the donor releaſe to the leſſee and his heires; this releaſe is void. So alſo if the donee in taile make a leaſe for his owne life, and after the donor releaſe to the donee and his heires; it ſeems this is not a good releaſe. Alſo one Jointenant or coparcener may releaſe to another and thereby transferre all his eſtate and give the whole intereſt unto his companion; and this is a good releaſe to paſſe all his or her part of the land. And if there be three Jointe-

Co. ſuper Lit. 273. Bit. Sect. 516.

Bro. Releaſe 77. Perk. Sect. 84.

nants

nants in fee and they make a leaſe for life, and after two of them releaſe all their right in the land to the third; this is a good releaſe. So if one make a leaſe for life to another, and after the grant the reverſion to ſeven and the tenant for life doth atturn, and after four of the ſeven releaſe all their right to the other three and after one of the three releaſe to the other two; theſe are good releaſes. So if a leaſe for yeares be made to two, to begin at a day to come, a releaſe by one of them to the other is good to give all the terme and all the land to the releſsee. But it ſeems one tenant in common cannot releaſe to another tenant in common.

10 E.4.3.

4] Co. ſuper Lit.273. 264.301.

The fourth thing that is required in ſuch a releaſe is ſufficient words in law not only to make a releaſe, (which is required in all releaſes) but alſo to raiſe and create a new eſtate. For this therefore know that all releaſes (of what kind ſoever) are commonly made by theſe words, *Remiſiſſe, Relaxaſſe, & quietum clamaſſe*, as being the moſt ancient and ſignificant words for this purpoſe. And amongſt theſe the word Releaſe is the moſt effectuall word, as that which doth include the other two, and as that which is the proper and peculiar word for this kind of conveyance. But there are other words alſo by which a releaſe may be made, as *Renunciare, Acquietare, &c.* And therefore it is held that if one have common in anothers land, and he by deed releaſe it to him thus: *Renuntio Communiam meam &c.* this is a good releaſe. And if the leſſor doe but grant to his leſſee for life that he ſhall be diſcharged of the rent; this is a good releaſe of the rent. And it is a rule, That by what words a debt or duty may be created, by words of a contrary ſignification it may be releaſed. And therefore if one doe knowledge himſelfe to be ſatisfied and diſcharged a debt, this is a good releaſe of the debt. And for words to raiſe the eſtate it is uſuall and moſt ſafe to ſpecifie in the deed what eſtate he to whom the releaſe is made ſhall have; and in moſt caſes this is needfull: for it is generally true, That when a releaſe doth enure by way of enlargment of eſtate no inheritance in fee ſimple or fee taile can paſſe without apt words of inheritance. And therefore if I make a leaſe of land to another for his life, and after I releaſe to him all my right without more ſaying in the releaſe; hereby his eſtate is not enlarged. But if I releaſe to him and his heires; by this he hath a fee ſimple. And if I releaſe to him and the heires of his body; by this he hath an eſtate taile. But where a releaſe worketh by way of *mitter le eſtate* there in ſome caſes there needs not any words of inheritance, as in caſes where releaſes are made between Jointenants or coparceners, as where a joint eſtate is made to the husband and wife and a third perſon and their heires, and the third perſon doth

4. In reſpect of the words whereby it is made.

9 H.6.35. Dier 116. Lit.Sect. 544. Co.ſuper Lit.264. Dier 307. Co.9.52.

Co.ſuper Lit.273. Lit.Sect. 465.468, 469.

releaſe all his right to the husband alone, or to the wife alone. So if there be three Jointenants, and one of them doth releaſe to one of the other two; in all theſe and ſuch like caſes there needs not any limitation of the eſtate, for the releaſe is good without it.

2. When it doth enure by way of paſſing and extinguiſhment of a right or title only.

In every good releaſe in deed that doth tend and enure to give diſcharge or extinguiſh any right or title of lands it is alſo further requiſite, Lit. Sect. 466. Co. ſuper Lit. 265. Co. 5. 70, 71. 1. 112. 8. 151.

1. In reſpect of the eſtate of the releſſor.

1. That he that doth make it hath at the time of the releaſe made ſome right or title to releaſe. As where one doth diſſeiſe me of land, and I releaſe to him all my right in the land; this is a good releaſe. So if one diſſeiſe my tenant for life, and I (being the next in remainder or reverſion in fee) do releaſe to him that did make the diſſeiſin; this is a good releaſe. So if the husband make a leaſe for life, and then take a wife and dieth, and the wife releaſe her dower to him in reverſion; this is a good releaſe. And ſo alſo if after the mariage a man make a leaſe for life the remainder in fee, and ſhee releaſe all her right to him in remainder in fee or to him in reverſion; this is a good releaſe and will barre her for ever,

And therefore if the Releſſor have only a poſſibility of a right, or a right happen to come to him after the releaſe; this is not ſufficient to make the releaſe good. And therefore if the father be diſſeiſed, and the ſon before his fathers death releaſe all his right to the diſſeiſor, and after the father dieth, ſo that the right doth deſcend; this is no good releaſe to bar the Releſſor of his right. So if there be grandfather, father and ſon, and the father diſſeiſe the grandfather, and make a feoffement, and the ſon releaſe in the life time of his father, and after the father and grandfather die; this releaſe in this caſe will not bar him. So if a leaſe be made for life, the remainder to the right heirs of *I S*; and the leſſee is diſſeiſed, and the eldeſt ſon of *I S* living, his father doth releaſe to the diſſeiſor; this releaſe is void. So if the conuſee of a ſtatute &c. doe releaſe to the conuſor all his right in the land; this is void and he may ſue execution after notwithſtanding. Or if the Releſſor have only a power, this is not ſufficient to make the releaſe good. And therefore if a man by his will deviſe that his executors ſhall ſell his land, and dieth, and the executors releaſe all their right and title in the land to the heir; this releaſe is void. Lit. Sect. 446. Co. 10. 47. 42. ſuper Lit. 265. Co. 10. 57. Co. 5. 70. Co. ſuper Lit. 265.

2. In reſpect of the eſtate of him to whom the releaſe is made.

2. In all caſes of a releaſe of a bare right of a freehold in lands or tenements, he to whom the releaſe is made muſt at the time of the making thereof in any caſe have the freehold in deed or in law in poſſeſſion or ſome ſtate in remainder or reverſion in deed (and not in right only) in fee ſimple, fee tail, or for life of the lands Co. ſuper Lit. 267.

where-

whereof the releaſe is made; for rights of entry, and actions, and the like, are not to be transferred to ſtrangers, but are thus to be releaſed, and ſuch releaſes are good. As if the diſſeiſee releaſe to the diſſeiſor himſelf who hath the freehold in deed, or to the heir of the diſſeiſor before his entry, who hath the freehold in law, or to the leſſee for life of the diſſeiſor; theſe releaſes are good. So if a diſſeiſor make a leaſe to *A* and his heirs during the life of *B*, and *A* die, and the diſſeiſee releaſe to his heir before his entry; this is a good releaſe. So if a fine *ſur conuſance de droit come ceo &c.* or *ſur conuſance de droit* only (which is a feoffment on record) be levied, or if tenant for life by agreement of him in the reverſion ſurrender to him in the reverſion, or if a man doe bargain and ſell his land by deed indented and inrolled, or uſes are raiſed by covenant on good conſiderations; in all theſe caſes the conuſee, him in reverſion, bargainee, and *ceſtuy que uſe*, have a freehold in law in them before entry. And therefore a releaſe to them of the right of the land by him that hath it is good, and will bar the Releſor. But otherwiſe it is in caſes of Exchange, Partition, or upon Livery within the view, for in theſe caſes no releaſe is good untill an actuall entry made, for till then they have neither freehold in right nor law. So if a diſſeiſor make a gift in tail, or leaſe for life or years of the land, and keep the reverſion, and then the diſſeiſee or his heir releaſe to the diſſeiſor all his right; this is a good releaſe to bar his right for ever. So if the heir of the diſſeiſor be diſſeiſed, and the firſt diſſeiſee doe after releaſe to him all his right; this is a good releaſe to bar him. So if a donee in tail diſcontinue in fee, and the donor releaſe to the diſcontinuee and die; this is a good releaſe againſt the donor. So if the donee in tail be diſſeiſed, and after the donor releaſe to the donee all his right: this is good, but in this caſe nothing of the reverſion will paſſe by the releaſe, for the donee had then nothing but a right. But if any rent be reſerved on the eſtate tail, the rent is gone by the releaſe. So if a leaſe be made to one for life rendring rent, and the leſſee is diſſeiſed, and the leſſor releaſe to the leſſee and his heirs all his right; in this caſe albeit the rent be extinct, yet nothing of the right of the reverſion doth paſſe. And yet if a woman that hath right of dower releaſe to the guardian in Chivalry: this is a good releaſe, and her right or title of dower is gone. But if a diſſeiſor make a leaſe for years, and the diſſeiſee releaſe to the leſſee for years; this releaſe is void becauſe he hath no freehold. But if he make a leaſe for life, and the diſſeiſee releaſe to the leſſee for life; this is a good releaſe. So alſo a releaſe to the diſſeiſor after the leaſe for years made is good. And if leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the

Co. ſuper Lit. 266. 275. Lit. ſect. 448. 1 H. 6. 4. Dier 302.

Lit. Sect. 449

Co. ſuper Lit. 266. Lit. Sect. 455, 456.

Extinguiſhment.

Co. ſuper Lit. 265.

the diſſeiſor make a leaſe for years, and the firſt leſſee releaſe to him; this is a good releaſe. Alſo in ſome caſes a releaſe made to one that hath neither freehold in deed, nor freehold in law, is good when he hath an eſtate in reverſion or remainder, as in the caſe before, where a releaſe is made by the diſſeiſee to the diſſeiſor after he hath made an eſtate for life. So if the demandant in a reall action releaſe to the tenant that comes in by receipt upon a prayer of aid or voucher upon a warranty; this is good. And yet if it be before the receipt, or entry into the warranty, or it be by any other beſides the demandant, it is void: So if the tenant in a reall action alien hanging the *precipe quod reddat* againſt him, and after alienation the plaintiff releaſe all his right in the land to him, this is a good releaſe. So if a diſſeiſor make a leaſe for life, the remainder to another for life, the remainder to a third in taile, the remainder to a fourth in fee, and the diſſeiſee releaſe to either of them in remainder; this is a good releaſe. But if in this caſe tenant for life be diſſeiſed, and after he that hath right (the poſſeſſion being in the diſſeiſor) doth releaſe to either of them in remainder; this is a void releaſe. But in all the caſes of a releaſe of a bare right to him that hath an eſtate of a freehold in deed or in law, generally there needs no privity to make the releaſe good: as in the caſes before of a releaſe made to the tenant for life of the diſſeiſor, and them that follow. For if tenant for life make a leaſe to another for life of the leſſee, the remainder over in fee, and the firſt leſſor releaſe al his right to him to whom the tenant made the leaſe for life; this is a good releaſe and a perpetuall bar, albeit the releaſe be not to him and his heirs. And ſo it is in caſe of a reverſion.

Lit. Sect. 448, 449, 450, 451. Co. 8. 151.

3. In reſpect of privity.

Co. ſuper Lit. 275. Lit. Sect. 470, 471. Co. 10. 48.

If leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the diſſeiſor make a leaſe for years, and the leſſee that is ouſted doth releaſe to the leſſee of the diſſeiſor; this is a good releaſe. And yet if the diſſeiſee doe releaſe to the leſſee for years of the diſſeiſor; this is void.

If leſſee for a thouſand years be ouſted by the leſſor, and he make a leaſe for two years, and the leſſee for a thouſand years releaſe unto him; this is a good releaſe. But if a leſſor diſſeiſe his leſſee for life, and make a leaſe for a thouſand years, and the leſſee for life releaſe to this leſſee of a thouſand years; this releaſe is void.

If one be diſſeiſed, and after another doth diſſeiſe him, and the diſſeiſee releaſe to the laſt diſſeiſor; this is a good releaſe. So if *A* diſſeiſe *B* who infeoffeth *C* with warranty, who infeoffeth *D* with warranty, and *E* diſſeiſeth *D* to whom *B* the firſt diſſeiſee releaſeth; this is a good releaſe, and doth defeat all the mean eſtates and warranties. So if my diſſeiſor leaſe for life, and the leſſee for life alien in fee, and I releaſe to the alienee all my right &c. this is

Co. ſuper Lit. 277. Lit. Sect. 473. 470, 471. 478.

a good releaſe and will bar me of my entry: but if my entry be gone, as if I leaſe for life, and my leſſee be diſſeiſed, and that diſſeiſor is diſſeiſed, and I releaſe to the ſecond diſſeiſor; in this caſe the firſt diſſeiſor may enter upon the ſecond. So if my diſſeiſor in the caſe aforeſaid make a leaſe for life, and the leſſee for life maketh a feoffment to two, and I releaſe to one of the feoffees; this is a good releaſe and will bar me and my diſſeiſor alſo. So if tenant for life let the land to another for the life of the leſſee, the remainder to another in fee, and the leſſor releaſe to his tenant for life; this is a good releaſe.

If one that hath a ſon within age be diſſeiſed and die, and the diſſeiſor die ſeiſed, and the land deſcend to his heir, and a ſtranger abate, to whom the ſon when he comes of age doth releaſe; this is a good releaſe. So if one be diſſeiſed by an infant which doth alien in fee; and the alienee die ſeiſed, and his heir entreth, the diſſeiſor being within age, and the diſſeiſee releaſe to the heir of
9 H. 6. 43. the alienee; this is a good releaſe. But where an inheritance or an eſtate for life is releaſed to one that is but tenant for years, the
Co. 10. 48. releaſe is not good without privity. And therefore if tenant for life or in fee releaſe to the leſſee for years of his diſſeiſor; this is not good. But the releaſe of a term of years to the leſſee for years of him that doth eject him is good enough without privity, as in the caſe before.

Co. ſuper Lit. 265. But here note that in caſes of a void releaſe of a right to an inheritance or freehold, where there is a warranty contained in the deed, the warranty may be good, and be uſed by way of rebutter, albeit the releaſe be void. As if the ſon of the diſſeiſee releaſe with warranty in the life time of his father, or there be grandfather, father and ſon, and the father diſſeiſe the grandfather, and make a leaſe with warranty and die; in both theſe caſes albeit the ſon be not barred by the releaſe, yet he is barred by the warranty. Warranty.

Co. ſuper Lit. ſect. 467. 4. Such words as will make a good releaſe in the caſes of releaſes that enure by way of enlargement of eſtate will make a good releaſe in theſe caſes. And note that this kinde of releaſe is good without any limitation or ſpecifying of the eſtate, for by a releaſe of all a mans right without ſaying To have and to hold to him and his heirs &c. in all the caſes before, he that makes the releaſe is barred of his right for ever, for if I be ſeiſed of an eſtate in fee by wrong, and he that hath right releaſe to me all his right, albeit it be but for one houre, yet this is a good releaſe for ever. 4. In reſpect of the words whereby it is made.

* 7. What Releaſes may be made of other things. And what ſhall be ſaid a good Releaſe in Deed of ſuch things. Or not. And by what words.

Lit. ſect. 480. Co. ſuper Lit. 280. 305. Perk. ſect. 70. * If there be Lord and tenant, and the Lord releaſe to the tenant all his right that he hath in the ſeigniory, or all his right that he hath in the land &c. this is a good releaſe to extinguiſh the ſeigniory. Of a ſeigniory, rent-ſervice, common, or the like.

ory. And in this caſe there needs no words of inheritance or limitation, for by releaſe of all the right in the ſeigniory; the ſame is extinct for ever, without ſaying [to him and his heirs]. And yet in this caſe the Lord may by apt words releaſe his ſeigniory to the tenant only in tail, or for life, and it ſhall be good ſo long. But if a Lord grant to his tenant that he ſhall doe his ſuit to another Manor of the Lords, or that the tenant ſhall give him yearly twelve pence for his ſuit; this grant will not extinguiſh and determine the ſervices or tenure.

If there be Lord and tenant, and the tenant be diſſeiſed, and after the Lord releaſe all his right &c. to the tenant; by this releaſe the ſervice or ſeigniory is extinct, for albeit a right regularly cannot be releaſed to him that hath but a bare right, yet a ſeigniory may be releaſed and extinct to him that hath but a bare right in the land. But if the tenant make a feoffment in fee, and then the Lord releaſe all his right &c. to the tenant; this is not good to extinguiſh the ſeigniory or ſervices, but it will diſcharge all the arrearages. Lit. ſect. 457. Co. 10. 48. ſuper Lit. 268.

If a rent-charge, common of paſture, or any other profit apprender be iſſuing out of my land, and he that hath it doth releaſe it to me; this is a good releaſe and will extinguiſh it. But if I be diſſeiſed of the land, and have but a right at the time of the releaſe made: the releaſe is not good, as it is in the caſe of a rent-ſervice and a ſeigniory. But if lands be given to me in tail, or for life rendring rent, and I be diſſeiſed, and after the donor releaſe to me all his right in the land; this is a good releaſe and ſhall extinguiſh the rent. So if in this caſe where I am tenant in tail and I make a feoffment in fee rendring rent, and after I releaſe to the feoffee; this is a good releaſe and hereby the rent is extinct. And if two coparceners be of a rent, and one of them take the terretenant to husband, and after either of them releaſe; theſe releaſes will be good. Lit. ſect. 480. 536, 537. Co. ſuper Lit. 305. Lit. ſect. 455, 456. Co. ſuper Lit. 273.

If one diſſeiſe me of land, and then grant a rent-charge out of the land, and I reciting the ſame grant releaſe to the grantee; this releaſe it ſeems is good, and will bar me ſo as after my reentry I ſhall not be able to avoid it. Lit. ſect. 527. Co. ſuper Lit. 300.

Of an Advowſon &c. If two have the grant of the next advowſon or avoidance of a Church; before it be void one of them may releaſe to the other, but afterwards they cannot. Co. ſuper Lit. 270.

Of a Condition. If *A* make a feoffment in fee, gift in tail, leaſe for life or years to *B* on condition that upon ſuch a contingent it ſhall be void; in this caſe *A* may before the condition broken releaſe all his right in the land, or releaſe the condition to *B*; and this will be good to make the eſtate abſolute and to diſcharge the condition. So if a feoffee Co. 1. 112. Perk. ſect. 823. 764.

on

on condition make a gift in tail or leaſe for life, and after the feoffor releaſe to the donee or leſſee; this is a good releaſe to diſcharge the condition. So if a copyholder ſurrender to the uſe of anothrr on condition, and this is preſented to be without condition, and after the ſurrendror doth releaſe to him to whoſe uſe the ſurrender was made all his right &c. this is a good releaſe and doth extinguiſh the condition. But if a diſſeiſor make a feoffment on condition, and the diſſeiſee releaſe to the feoffee on condition; howſoever this doth bar the right of the diſſeiſee, yet it doth not diſcharge the condition.

Co. 1. 112, 113 173, 174. Where a power or authority is ſuch that doth reſpect the benefit of the releſſor, as in the uſuall caſes of power of revocation of uſes, when the feoffor &c. hath power to alter, change, determine or revoke the uſes being intended for his benefit, and he releaſe to any one that hath a freehold in poſſeſſion, reverſion, or remainder, by the former limitation: this is a good releaſe and doth extinguiſh the power and make the eſtates that were before defeaſible abſolute, and it doth ſeclude him from any power of alteration or revocation. But if the power be collaterall, or to the uſe of a ſtranger, and nothing to the benefit of him that makes the releaſe: as if *A* make a feoffment to *B* to divers uſes, provided that *B* ſhall revoke the uſes, and *B* releaſe to any one of them that hath a uſe, this doth not extinguiſh the power, as in caſe where the power is given to *A*, and *A* doth releaſe it. Of a power of revocation.

If a feoffment be made with warranty, and the feoffee releaſe the warranty; this doth extinct it. And ſo it is of other warranties. But if tenant in tail releaſe the warranty annexed to his eſtate tail, this doth not extinguiſh this warranty. Of a warranty.

Bro. Releaſe 88. 21 H. 7. 29. Co. 5. 27. Any man may releaſe any debt or duty due to himſelf. Alſo a man may diſcharge or releaſe any thing due, or any wrong done to his wife before or after the mariage. And therefore if a treſpaſſe were done, or a promiſe were made to my wife before the mariage; I may at any time during the mariage releaſe this. So if any wrong be done, or obligation, ſtatute, or promiſe made to her alone, or to her and me together at any time during the mariage; I alone may releaſe and diſcharge this. And if my wife be an executrix to any other man, I may releaſe any debt or duty due to the teſtator. Of debts and other duties perſonall.

1. In reſpect of the perſons.

Husband and wife.

Per ch. Juſtice B.R. Mich. 17 Ja. And if a legacy be given to a woman ſole to be paid at *Michaelmas* next, and I mary with her, and I releaſe the legacy before the day: it ſeems by this the legacy is gone.

Co. 5. 27. An infant executor may releaſe a debt duly paid unto him of the teſtators debt. But if he releaſe that which he doth not receive, Infant.

ceive, it is a void releaſe. And regularly the releaſe of an infant is void.

2. In reſpect of the time.

An executor before probate of the Will may releaſe a debt or duty due to the teſtator; and this releaſe is good to bar him. Co. 5. 27. 9. 39.

A future or contingent promiſe may be releaſed and diſcharged before the contingent happen. A debt on an obligation, or rent may alſo be releaſed before the day of payment as well as after, but not by the ſame words. And therefore if one promiſe to *I S* that upon the ſurrender of *I S* he will pay him an hundred & ten pound, and after the promiſe and before the ſurrender he releaſe this debt; this doth diſcharge the debt. But if the promiſe be that if the ſurrendree ſhall ſell the land, and ſhall have five hundred pound, that then he ſhall pay to the ſurrendror an hundred pound more, and the ſurrendror before ſale releaſe this ſum; this is no diſcharge of it. And yet a releaſe of the promiſe is a diſcharge of it. And if *A* promiſe to me that if *I S* doe not pay to me an hundred pound 1 *Octobris*, that hee doth owe me, that *A* will pay me the hundred pound 1° *Novembris*, and I 10° *Septembris* releaſe to him this debt, or all actions & demands; in this caſe this releaſe is not good to diſcharge this promiſe. But by a releaſe of the promiſe, the ſame is diſcharged. Trin. 14 Ja. in Eltons caſe. Hil. 16 Jac. B. R. Briſcoe verſus Heires.

Of actions.

If a man releaſe to another all actions, and doe not ſay further which he hath againſt him; this is as good a releaſe as if theſe words were inſerted. *Quod neceſſario ſubintelligitur non deeſt.* Bro. Releaſe 29.

And all theſe releaſes muſt be made by apt words, and ſuch as law ſhall judge ſufficient for that purpoſe. Co. 9. 53.

And in all theſe caſes care muſt be had there be no miſtake, for miſtakes will make releaſes and confirmations void as well as other grants. And therefore if *A* make a releaſe to *B* in this manner: *Noveritis &c. me* A *de* B *remiſiſſe &c.* B *omnes actiones quas idem* B *habet verſus* A, whereas it ſhould be *quas idem* A *habet verſus* B; this releaſe is void. Bro. Releaſe 56. 58.

8. What ſhall be ſaid a Releaſe in law. Or not. And how.

If there be Lord and tenant, and the Lord purchaſe the tenancy; by this means the ſervices are releaſed and extinct in law. And if the Lord diſſeiſe his tenant, and make a feoffment in fee by deed or without deed; this is a releaſe in law of the ſeigniory. Co. ſuper Lit. 264.

Of a ſeigniory. Of a right to land.

If a diſſeiſee diſſeiſe the heir of the diſſeiſor, and make a feoffment with or without a deed; this is a releaſe in fee in law of the right. And if he make a leaſe for life, this is a releaſe in law of the right ſo long as the leaſe doth laſt. Co. idem.

If

Co. ſuper Lit. 264. 8 E. 4. 3. 21 E. 4. 2.

If a creditor, as an obligee, or the like, make a debtor, as the obligor &c. his executor; by this means the action is releaſed by act of law, and yet the duty remains ſtill, for the executor may retain ſo much of the goods of the teſtator. And if the creditor be a woman, and ſhe mary with the debtor; by this the debt is releaſed in law. And if there be two obligees or debtees, and one of them being a woman, is maried to the obligor; this is a releaſe in law of the debt, albeit the creditor be an infant.

Of a right of action.

Executor.

M. 30 & 31 El. B. R. Adjudge. Co. 8. 136.

But if there be a woman executrix to the debtee, and ſhe take the debtor to husband; this is no releaſe in law.

And if an obligor be made adminiſtrator of the goods and chattels of the obligee; this is no releaſe in law.

Co. 6. 25. 5. 22. Bro. Releaſe 84. 94. ſtat. 23 H. 8. ch. 3.

Where divers join in any ſuit or action to recover any perſonall thing of which they are to have the joint benefit or intereſt when the law doth not compell them to join, there the releaſe of one of them ſhall bar all the reſt. And therefore if two men join in an action of debt, treſpaſſe, or the like, and one of them alone doth releaſe to the defendant; this is a barre to the other plaintiffs alſo. So if a ſtatute or an obligation be made to two or more, and one of them releaſe it to the conuſor or obligor; this is a diſcharge of the whole duty, and a bar to the reſt, ſo that they can make no uſe of the ſtatute or obligation. But if divers be charged in any action, and they for the diſcharge of themſelves only join in a ſuit or action, where alſo they can doe no otherwiſe being compelled by law to join; in this caſe the releaſe of one of them ſhall not hurt the others. And therefore if divers join in a writ of Error, Attaint, or *Audita querela*, and one of them releaſe to the defendant in the writ; this will not bar the reſt of their remedy, but they may goe on in their ſuit notwithſtanding.

9. The force and virtue of it. And how it ſhall enure and be conſtrued and taken.

1. In reſpect of the perſons. And where a releaſe made by one ſhall binde another. And where not. And where a releaſe made to one ſhall enure to others. Or not.

16 H. 7. 4.

If there be two or more executors, and one of them alone releaſe a debt or duty to the teſtator before judgement had in a ſuit had by all the executors againſt the debtor, this will bar all the reſt. But otherwiſe it ſeems it is after judgement had.

Executors.

Co. ſuper Lit. 205.

If a writ of ward be brought by two, and one of them releaſe; this ſhall not bar his companion, but ſhall enure to his benefit, for hereby he ſhall have the whole ward.

Lit. Sect. 452. 470. Co. ſuper Lit. 275. 290. 267, 268. Co. 8. 151.

A releaſe made to the tenant in tail, or for life of the right to the land, ſhall avail and enure to him that hath a reverſion or remainder in deed. And ſo *è converſo*: A releaſe made to him that hath a remainder or reverſion will avail and enure to the benefit of him that hath the eſtate tail for life, or years precedent. As if a diſſeiſor make a leaſe for life, and the diſſeiſee re-

releaſe to the tenant for life; this ſhall enure to the diſſeiſor. So if he or a tenant for life make a leaſe for life, the remainder for life, the remainder in tail, the remainder in fee, and the diſſeiſee or firſt leſſor doth releaſe all his right to any one of them in remainder; this ſhall enure unto, and benefit all the reſt. And if the husband make a leaſe of his wives land to one for life, the remainder to another in fee, and the wife after his death doth releaſe all her right in the land to him in remainder; this ſhall enure to the leſſee for life.

If a diſſeiſor make a leaſe for life, and the diſſeiſee releaſe all his right to the tenant for life; this ſhall enure to the benefit of the diſſeiſor. But if the diſſeiſee releaſe no more to the tenant for life but all actions; this releaſe will not benefit him in remainder or reverſion after the death of the tenant for life. Co. ſuper Lit. 275.

If a diſſeiſor make a feoffment to two in fee, and the diſſeiſee releaſe to one of the feoffees; this ſhall enure to both. Lit. Sect. 472.

If tenant in tail be diſſeiſed by two, and he releaſe to one of them; this ſhall enure to both. But if the Kings tenant bee diſſeiſed by two, and he releaſe to one of them; this ſhall not enure to the other. So if two jointenants make a leaſe for life, and then diſſeiſe the tenant for life, and he releaſe to one of them; in this caſe his companion ſhall have no benefit by it. Co. ſuper Lit. 276.

If tenant in fee ſimple be diſſeiſed by two, or two doe abate or intrude, and he doth releaſe to one of them; the other ſhall have no benefit by this. But if tenant for life doe after a diſſeiſin done to him releaſe to one of the diſſeiſors; this ſhall enure to both. Lit. Sect. 472. 522.

And if two diſſeiſors be, and they make a leaſe for life or years, and after the diſſeiſee doth releaſe to one of the diſſeiſors, this ſhall enure to them both, and to the benefit of the leſſee for life alſo. Co. ſuper Lit. 276.

And if leſſee for years be ouſted, and he in reverſion diſſeiſed, and the leſsee releaſe to the diſseiſor; the term of years is hereby extinct, and the diſseiſee may take advantage of it and enter preſently.

But if two jointenants in fee be diſſeiſed by two diſſeiſors, & one of the diſſeiſees releaſe to one of the diſſeiſors all his right; this ſhall enure to the other, for this extendeth but to a moity.

If a releaſe be made by a woman of her dower to the guardian in Chivalry; this ſhall enure to the heir, and he may take advantage of it. Co. ſuper Lit. 266.

If tenant for life be diſſeiſed by two, and he in the reverſion and the tenant for life join in a releaſe to one of the diſſeiſors; this ſhall not enure to the other. But if they doe ſeverally releaſe Co. ſuper Lit. 276.

leaſe their ſeverall rights, their ſeverall releaſes ſhall enure to both the diſſeiſors.

Co. idem. If mortgagee upon condition after the condition broken be diſſeiſed by two, and the mortgagor that hath the title of entry doth releaſe to the one diſſeiſor; this ſhall enure to both. And like law is for an entry for mortmain, or a conſent to raviſhment &c.

Co. ſuper Lit. 269. If there be Lord and two jointenants, and the Lord releaſe to one of them; this ſhall avail his companion.

If tenant in fee ſimple make a feoffment in fee, and after the Lord releaſe to the feoffor, this ſhall not enure to the feoffee to extinguiſh the ſeigniory. But if he releaſe to the feoffee, this ſhall enure to the feoffor to extinguiſh the ſeigniory.

Co. ſuper Lit. 279. If there be Lord and tenant, and the tenant make a leaſe for life, the remainder in fee, and the Lord releaſe to the tenant for life; the rent is hereby wholly extinguiſhed, and he in remainder ſhall take advantage of it; as when the heir of a diſſeiſor is diſſeiſed, and the diſſeiſor makes a leaſe for life, the remainder in fee, and the firſt diſſeiſee doth releaſe to the tenant for life; this ſhall enure by way of extinguiſhment to him in remainder, *viz.* to the leſſee for life firſt, and after to him in remainder.

Co. ſuper Lit. 267. If two tenants in common of land grant a rent of forty ſhillings out of it, and the grantee releaſe to one of them; this ſhall not enure to the other. But if one bee tenant for life of lands the reverſion in fee to another, and they join in the grant of a rent out of the lands, and the grantee releaſe either to the tenant for life, or to him in reverſion; this ſhall enure to the other and extinct the whole rent.

Co. ſuper Lit. 276. If two men gain an advowſon by uſurpation, and the right Patron releaſe to one of them; this releaſe ſhall enure to them both.

Co. 5. 59. ſuper Lit. 232. Lit. Sect. 376. If two be bound jointly and ſeverally in any obligation, or other eſpecialty, and the obligee &c. releaſe to one of them; this ſhall enure to diſcharge the other alſo, if it be a good releaſe as to him that makes it. But otherwiſe it is in caſe of a releaſe made by the King.

And if two do a treſpaſſe to another together, and he to whom it is made doth releaſe it to one of them; this ſhall enure to diſcharge the other. Prerogative.

Dier 319. Co. ſuper Lit. 273. 276. 14 H. 8. 6. If husband and wife, and *I S* purchaſe to them and the heirs of the husband, and after *I S* releaſe all his right in the land to the husband; the wife ſhall have no benefit by this, but it ſhall enure to the husband alone. To husband and wife.

And if there be two women joint diſſeiſereſſes, & the one take

a husband, and the diſſeiſee releaſe to the other; in this caſe the husband & wife ſhall take no benefit by this. And if the diſſeiſee releaſe to the husband; this ſhall enure to him and his wife and the other woman.

And if one that hath a rent out of my wives land releaſe it to me and my heirs; this ſhall enure by way of extinguiſhment, and my wife will have advantage of it. And yet if the words be [grant and releaſe] the rent to the husband and his heirs; in this caſe the husband may take as a grant if he will.

Note. But here note in all theſe caſes of releaſes, when one man will take advantage of a releaſe made to another, he muſt have the releaſe to ſhew and plead. *Co. ſuper Lit. 232.

If I bee diſſeiſed, and I releaſe to the diſſeiſor all actions I have or may have againſt him; this is but perſonall, and ſhall not be expounded to bar my heir after my death of his remedy, neither will it bar me of my remedy againſt his heir after his death. Co. 10. 51. 22 H. 6. 1.

So if I deliver goods to another, and afterwards I releaſe to him all actions, and then he die; by this I am not barred ſo, but I may ſue his executors.

See more in *Confirmation, chap.* 18. *Numb.* 7.

2. In reſpect of the thing releaſed. Of all actions. A releaſe of all actions without any more words, is better then a releaſe of all actions reall onely, or a releaſe of all actions perſonall onely, for by a releaſe of actions, or a releaſe of all manner of actions, without more words, are releaſed and diſcharged, all reall, perſonall and mixt actions then depending, and all cauſes of ſuit for any reall or perſonall thing: as Appeals for the death of an anceſtor, conſpiracies, ſuits by *Scire facias* to have execution of a Judgement, detinue for charters. Co. 8. 153. 5. 28. 70. Kelw. 113. Co. ſuper Lit. 286. 290. 292. 289. Lit. ſect. 492. 505, 506. 512, 513. Bro. ſtat. 39.

And if two conſpire to indite me, and I releaſe to them all actions, and after they goe on with their conſpiracy; by this releaſe I am barred to doe any thing againſt them. By this releaſe alſo of all actions, a debt due to be paid upon a ſtatute or an obligation at a day to come, albeit the releaſe be before the day is diſcharged, and by this alſo the ſtatute it ſelf if it be at any time before execution is diſcharged.

And if one be to pay forty pound at four days, and ſome of the days are paſt, and ſome to come, and the debtee make ſuch a releaſe; by this the whole debt is diſcharged.

Alſo in a *Scire facias* upon a Fine or a Judgement, this releaſe is a good plea in bar.

But this releaſe of all actions will not diſcharge Executions, or bar a man of taking out of Executions, except it be where it muſt bee done by *Scire facias*. Neither will it diſcharge or bar a man of ſuits by *Audita Querela*, or writ of Error to reverſe

verſe an erroneous judgement, neither will it diſcharge covenants before they be broken, nor will it diſcharge any thing for which the releſſor had no cauſe of action at the time of the releaſe made, as if a woman have title of dower, and doe releaſe all actions to him that hath the reverſion of the land after an eſtate for life; or a man is by an award to pay me ten pound at a day to come, and before the time I make ſuch a releaſe; or I make a leaſe rendring rent, or an annuity is granted to me, and before the rent-day, I make the leſſee or the grantor ſuch a releaſe; in theſe caſes, and by a releaſe in theſe words without more, the dower, debt, rent, or annuity, is not diſcharged.

Lit. ſect. 496, 497. And if a man have two remedies or means to come by land, as action and entry, or by goods, as action and ſeiſure, or the like; in this caſe by a releaſe of all actions he doth not barre himſelf of the other remedy. *Et ſic è converſo.*

And if a man doth covenant to build an houſe, or make an eſtate, and before the covenant broken the covenantee doth releaſe unto him all actions; by this the covenant it ſelf is not diſcharged. And yet after the covenant is broken, this releaſe will diſcharge the action of covenant given upon that breach.

Co. ſuper Lit. 292.

Co. 8. 151. Plow. 484. 6 H. 7. 8. Co. 3. 29. 6. 1. ſuper Lit. 345. By a releaſe of all a mans right into any lands or tenements without more words is releaſed and diſcharged all manner of rights of action and entry the releſſor hath to, in or againſt the land, for there is *jus recuperandi, proſequendi, intrandi, habendi, retinendi, percipiendi, poſſidendi,* and all theſe rights, whether they accrue by fine, feoffment, deſcent, or otherwiſe, are extinct and diſcharged, ſo that if the releſſee have gotten into the land of the releſſor by wrong, by this releaſe the wrong is diſcharged, and the releſſee is in the land by good title. Of all right.

Alſo by this releaſe are diſcharged and releaſed all titles of dower, and titles of entry upon a condition or alienation in mortmain.

And if a woman have title of dower after an eſtate for life, and make ſuch a releaſe to him in reverſion, this doth barre her. By ſuch a releaſe alſo from the Lord to the tenant the ſervices are extinct.

Co. 10. 47. ſuper Lit. 289. But this releaſe will not bar a man of a poſſibility of a right that he hath at the time of the releaſe, or of a right that ſhall deſcend to him afterwards. And therefore if the conuſee of a ſtatute before Execution releaſe all his right into the land to the terretenant; or the heir of the diſſeiſee in the life-time of his father doe releaſe to to the diſſeiſor all his right; theſe releaſes doe not bar them. Nor will this releaſe bar a man of an *Audita Querela,* and ſuch like things. And yet if the tenant in a reall

action after the demandant hath recovered the land, releaſe to him all his right in the land; this doth bar him of a writ of Errour for any errour in the proceeding in that ſuit.

And if there be Lord and tenant by fealty and rent, and the Lord by his deed reciting the tenure doth releaſe all his right in the land ſaving his ſaid rent; by this releaſe the right of the ſeigniory, ſave only of the ſeigniory of the rent and fealty, is extinct. And if the Lord releaſe to his tenant all his right to the land and ſeigniory, *ſalvo ſibi dominio ſuo &c.* hereby the ſervices only, not the tenure is extinct. Co. ſuper Lit. 150. Dier 157.

And if one have a rent-charge out of my land, and make ſuch a releaſe of all his right to the land to me that am the terretenant without exception of the rent; hereby the rent is extinct and gone for ever. Perk. Sect. 644.

Of all title. By a releaſe of all a mans title into lands or tenements without more words is releaſed and diſcharged as much as is releaſed by the releaſe of all a mans right, and both theſe releaſes have the like operation: for howſoever title ſtrictly and properly is where a man hath lawfull cauſe of entry into lands whereof another is ſeiſed, for which he can have no action, yet it is commonly taken more largely, and doth include a right alſo. And *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt.* Kelw. 484. 6, 7, 8. Co. ſuper Lit. 265. 345.

Of entry or right of entry. By a releaſe of all entries or rights of entry a man hath into lands, without more words a man is barred of all right or power of entry into thoſe lands upon any right whatſoever. And if a man have no other means to come by the land but by an entry, and he hath releaſed that by theſe words; he is barred for ever. But if one have a double remedy, *viz.* a right of entry, and an action to recover his right by, and then releaſe all entries; by this he is not barred of his action. Co. 8. 151.

Of actions reall. * By a releaſe of all actions reall without more words, are diſcharged all reall and mixt actions then depending, and all cauſes of reall and mixt actions not depending. And therefore all cauſes of ſuing of aſſiſes, writs of Entry, *Quare Impedit*, actions of waſt, and the like, which the party hath at the time of the releaſe made, are hereby diſcharged. But this releaſe will not bar him that doth make it of any cauſes of action that ſhall ariſe and accrue afterwards. Neither will it bar him of an appeal of death or robbery, writ of Error, or any ſuch like thing. Nor of any thing which a releaſe of all actions will not bar. And yet when land is to be reſtored or recovered by judgement in a writ of Error; this releaſe is a bar to the writ of Error. So if a judgment be given upon a falſe verdict in a reall action, a releaſe of all actions reall is a bar in an attaint. Lit. ſect. 492, 493. 495. Co. 8. 151. Lit. ſect. 115, 500. Co. ſuper Lit. 288, 289.

By

Bro. Releaſe 47. Co. ſuper Lit. 285. 9 H. 6. 57. Lit. Sect. 502.

By a releaſe of all actions perſonall, without more words are diſcharged all perſonall actions then depending, and all cauſes of perſonall actions wherein a perſonall thing only is to be recovered, and therefore hereby are diſcharged all cauſes of ſuing out of actions of debt, treſpaſſe, detinue, or the like. Alſo all mixt actions, as actions of waſt, *Quare Impedit*, an aſſiſe of novel diſſeiſin, writ of annuity, appeal of maihme, and the like. Of actions perſonall.

Co. ſuper Lit. 289.

And if debt &c. or damages be recovered in a perſonall action by falſe verdict, and the defendant bringeth a writ of attaint; or if a writ of *Audita Querela* be brought by the defendant in the former action to diſcharge him of execution; by this releaſe the defendant in both caſes is barred of his ſuit.

Co. ſuper Lit. 288. Lit. Sect. 503.

Alſo when by a writ of Error the plaintiffe ſhall recover or be reſtored to any perſonall thing only, as debt, damage, or the like: as if the plaintiffe in a perſonall action recover any debt &c. or damages, and be outlawed after judgement; in this caſe in a writ of Error brought by the defendant upon the principall judgement, this releaſe will bar him. But where by a writ of Error the plaintiffe ſhall not be reſtored to any perſonall or reall thing, this releaſe is no bar: as if a man be outlawed in an action perſonall by proceſſe upon the originall, and bring a writ of Error, and then releaſe; this is no barre to him.

Lit. Sect. 497, 498. 500.

If a man by wrong take or find my goods, or they be delivered to him, and I releaſe to him all actions perſonall; notwithſtanding this releaſe, I may in this caſe take my goods again, albeit I be barred of my action by this releaſe. Neither is this releaſe a bar in an appeal of robbery or death. Neither will it bar in any caſe where a releaſe of all actions will not bar. Neither is it any bar to an action of debt brought for an annuity granted for a term of years for any arrearages that ſhall grow due after the releaſe. Nor for any rent or ſum of *nomine pene*, when the releaſe is before the ſame day, or *nomine pene* happen. Neither is it a bar in ſuch reall actions wherein damages are recoverable only by the ſtatute, and not by the common law, as in a writ of dower, entry, *ſur diſſeiſin in le per Mordanceſter, Aile &c.*

Co. ſuper Lit. 291, 285

Co. ſuper Lit. 76. 291. Fitz. Audita Querela. 3.

By a releaſe of all debts without more words, are diſcharged and releaſed all debts then owing from the releſſee to the releſſor upon eſpecialties, or otherwiſe, all debts due alſo upon ſtatutes. And therefore if the conuſor himſelf, or his land, be in execution for the debt, and he hath ſuch a releaſe, he muſt be diſcharged: and ſo he cannot be upon a releaſe of all actions. Of debts.

Co. 8. 153. & ſuper Lit. 291.

By a releaſe of all duties without more words is a releſſor barred, and the releſſee diſcharged of all actions, judgements, Of duties.

and executions, alſo of all obligations. And if the body of a man be in execution, and the plaintiffe make him ſuch a releaſe; hereby he ſhall be diſcharged of execution, becauſe the duty it ſelfe is diſcharged. And if there be rent or ſervices behind to the Lord from his tenant, and the Lord make ſuch a releaſe to his tenant; by this it ſeems the arrearages are releaſed.

Of Suits. This word is of ſomewhat a more large extent then actions, for by a releaſe of all ſuits without more words is releaſed and diſcharged as much as by a releaſe of all actions. And hereby alſo are diſcharged al executions in the caſe of a ſubject. But in the caſe of the King it doth not releaſe executions. And this doth not releaſe a covenant before it be broken. Co. 8. 154. 157. 5. 70. ſuper Lit. 291.

Prerogative.

Of Debates, quarrells, controverſies. By a releaſe of all quarrels without more words, all actions reall and perſonall, and all cauſes of ſuch actions are releaſed and diſcharged. So likewiſe by the releaſe of all controverſies, or by the releaſe of all debates. But this will not bar the releſſor of any cauſes of ſuit that ſhall ariſe after, and was not at the time of the releaſe: as the breach of a covenant which ſhal be after, albeit the covenant be before, is not diſcharged hereby. Co. ſuper Lit. 292. 8. 157. 5. 70.

Of Covenants. By a releaſe of all covenants without more words all covenants then broken and all that ſhall be after broken that were then made and in being are diſcharged. *Qui deſtruit medium deſtruit finem.* Co. 1. 112. 10. 51. ſuper Lit. 292.

And therefore if a leſſee doe covenant to leave a houſe leaſed to him at the end of the terme as it was at the beginning of the terme, and the leſſor before the end of the terme releaſe to the leſſee all covenants; this doth diſcharge the covenant. But this releaſe doth diſcharge nothing elſe but covenants. Adjudge Hil 4 Jac. B. R. Hancocks caſe.

Of Statutes. By a releaſe of all Statutes from the conuſee to the terre-tenant without more words the Statute is diſcharged. And yet if he releaſe all his right in the land of the conuſor; this will not diſcharge the land of execution. Co. 10. 47.

Of Errors. By a releaſe of all errors and writs of error, all errors and writs of error and that before they be brought are extinct and diſcharged. And if a man be outlawed in a perſonall action by proceſſe upon originall, and make ſuch a releaſe; this will barre him. Co. 2. 16. Lit. Sect. 503.

Of Warranties. By a releaſe of all warranties or covenants reall, all warranties then made and being are for ever diſcharged. Lit. Sect. 148.

Of Legacies. By a releaſe of all legacies without more words, a man doth barre himſelfe of all the legacies given him *in preſenti* or *futuro*, ſo that if he be to have a legacy at 24. yeares old and at 21. yeares of age he releaſe to the executor al legacies or this legacy in particular; this is a barre to him of this legacy for ever. Co. 10. 51. Dier 56. Co. ſuper Lit. 76.

And

And yet a releaſe of all demands in this caſe is no diſcharge of this legacy.

Co. ſuper Lit. 292. By a releaſe of rent the rent is extinct and diſcharged whether the day of paiment be come or not. But a releaſe of all actions will not diſcharge a rent before the day of paiment come. Of Rent.

Adjud. Hil. 16 Jac. B. R. Briſcoe verſ. Heires. Co. 10. 51. By a releaſe of all promiſes or *Aſſumpſits* without more words, a man may barre himſelfe of a contingent or future thing that by other words could not be releaſed, as if a man promiſe to me that if *I S* doe not pay me one hundred pound the tenth of *March* next that he will pay it me the twentieth of that moneth and before the time I releaſe to him all actions and demands; this will not diſcharge the promiſe. But if I releaſe to him all promiſes, this will barre mee. *Et ſic de ſimilibus.* Of promiſes.

Lit. Sect. 507. Co. 8. 151. ſuper Lit. 290. By a releaſe of all Judgements without more words is he that maketh it barred of the effect, of any Judgement he hath againſt the releſſee, for if execution be not taken out he is now barred of it. And if the releſſee, or his land &c. be in execution he and it ſhall be diſcharged thereof by *Audita Querela.* And by a releaſe of all executions without more words, a man is barred of taking or having out of any execution upon any Judgement either before *Scire facias* or after. But if after execution be made by *Capias ad Stat. Elegit*, or *fieri facias* the plaintife releaſe to the defendant all executions, he cannot plead ſuch a releaſe but he muſt have an *Audita Querela*, and that he may have to diſcharge him of execution. Of Judgements Of Executions *Audita Querela*

Co. ſuper Lit. 287, 288. By a releaſe of all appeales, are diſcharged all appeales of felony, of death, of robbery, of rape, of burning, of larceny depending, and all cauſes not yet moved alſo. Of Appeales.

Co. 8. 150. By this releaſe of all advantages, it ſeems actions of debt upon account are diſcharged. Of Advantages

Kelw, 113. By a releaſe of all conſpiracies, all conſpiracies paſt are diſcharged, and ſuch alſo as are only begun and ſhall be proſecuted and perfected after the releaſe are likewiſe hereby diſcharged. Of Conſpiracies.

Co. 10, 48. By a releaſe of all forgeries before publication the forgery is diſcharged but not the publication, and therefore the releſſor may take his remedy for that notwithſtanding. Of Forgeries.

Co. ſuper Lit. 291. Co. 8. 154. Lit. Sect. 501, 509, 510. A releaſe of all demands is the beſt releaſe of all, and this word is the moſt effectuall word of all, and doth in deed include and comprehend within it moſt of all the releaſes before. By a releaſe therefore of all demands without more words are releaſed all rights and titles to land, warranties, conditions annexed to eſtates before they be broken or performed and Of Demands or Claimes.

after they be broken. Alſo by this releaſe are releaſed and diſcharged all Statutes, Obligations, Contracts, Recogniſances, Covenants, Rents, Commons, and the like. Alſo all manner of actions reall and perſonall, Appeales, Debts, duties. Alſo all manner of Judgements, Executions. Alſo all Annuities, and Arrearages of Annuities and Rents. And therefore if a man have a title of entry by force of a condition &c. or a right of entry into any lands; by ſuch a releaſe the right and title is gone. And if a man have a rent-ſervice, rent-charge, eſtovers, or other profit to be taken out of the land; by ſuch a releaſe to the tenant of the land it is diſcharged and extinct.

And therefore if a termor for yeares grant the land by indenture to *A* rendring rent, and at the end of the firſt yeare he releaſe to the grantee all demands; the rent is hereby extinct during all the time. And a releaſe of all claimes it ſeems is much of the ſame nature. Adjudg. B.R. paſc. 17 Jac. Wottons caſe.

But by a releaſe of all demands or of all claimes is not releaſed any ſuch thing as whereof a releaſe cannot be made, as a meere poſſibility, or the like. Co. 5. 70.

Neither will this releaſe diſcharge a covenant or promiſe that is future and contingent before it be in being. Nor a covenant before it is broken: and therefore if the leſſee of a houſe covenant to leave it as well in the end of his terme as it was in the beginning of his terme, and before the end of the terme the leſſor releaſe to the leſſee all demands; this is no barre to an action brought for a breach of the covenant afterwards. Hil. 4 Jac. B.R. Hancocks caſe adjudge.

And if a man in conſideration of a ſumme of money given to him by a woman ſole aſſume to her that if ſhee mary one *M* that he will pay to her after the death of *M* one hundred pound by the yeare if ſhee ſurvive him, and ſhee mary him, and the husband releaſe all demands and then die; this is no barre to the duty. So if one promiſe a woman that if ſhee will mary him that he will leave her worth one hundred pound if ſhee doe ſurvive him, and before the mariage ſhee releaſe to him all actions and demands; this doth not diſcharge the promiſe. Hil. 6 Jac. B.R. Belcher & Hudſons caſe.

Note. And note that all theſe words are of the ſame force when they are joined with other words as when they are alone.

If two tenants in common of land grant a rent-charge of forty ſhillings out of it to one in fee, and the grantee releaſe to one of them; this ſhall extinguiſh but twenty ſhillings, for that the grant in judgement of law is ſeverall. Co. ſuper Lit. 267.

If one have ſeverall cauſes of action againſt two, and make a joint releaſe to them; this ſhall be taken to be a releaſe of all joint and ſeverall cauſes of action. 19 H. 6. 4.

So

Bro. Releaſe 31.29. So if an executor have ſome cauſe of action for himſelfe, and ſome for his teſtator, and he releaſe all Actions, indefinitly; this releaſe doth diſcharge both ſorts of actions.

Co. ſuper Lit. 280. If the tenancy be given to the Lord and a ſtranger, and to the heires of the ſtranger, and the Lord releaſe to his companion all his right in the land; this ſhall enure not only to paſſe his eſtate in the tenancy but alſo to extinguiſh his right in the Seigniory.

Perk. Sect. 71. Bro. Releaſe 85. 9 E. 3. If there be Lord and tenant of two acres, and the Lord releaſe all his right in one of them to the tenant; hereby the ſervices are extinct for both. So if one have a rent-charge out of twenty acres, and releaſe all his right in one acre; hereby all the rent is extinct. And yet if *A* leaſe white acre to *B* for life rendring rent, and afterwards doth releaſe part of the rent; this is good only for ſuch part.

Bro. Releaſe 65. If I be ſeiſed of land in fee and I make a leaſe of it to one for life, and after I releaſe all my right in the land for the life of the tenant for life, ſo as neither I nor my heires ſhal have claim or challenge any thing or right in that land for the life of the tenant for life; by this releaſe nothing is extinct or diſcharged but

Dier. 307. the cauſes of action of waſt that were then, and not any cauſe that ſhall happen afterwards.

If a Statute be entred into the twentyeth of *Aprill*, and the conuſee by a releaſe dated the ninteeneth of *Aprill* (meaning to except this Statute) doth releaſe all debts and demands till the making of the releaſe; by this releaſe the Statute is diſ-

Per Juſtice Dodridge Trin. 14 Jac. charged. But if the words had been to the day of the date of the releaſe, *contra*.

Co. 9. 53. If a promiſe be of two parts, and he to whom it is made doth releaſe one part; it ſeems this is a releaſe of both.

If *A* 1°. *Jan.* enter into an obligation of forty pound to *B* and *B* 13°. *July* make a deed thus, It is agreed between *B* on the one part and *A* on the other part that upon good conſiderations *B* doth acknowledge himſelfe fully ſatisfied and diſcharged of all bonds, debts or demands whatſoever from the beginning of the world to this day by the ſaid *A*, and that he the ſaid *B* is to deliver all ſuch bonds as he hath yet undelivered to *A* except one bond of forty pound yet unforfeit which is for the paiment of &c. which was the obligation before; in

Lit. Sect. 467. 470. Co. ſuper. Lit. 273. 264. 280. Kelw. 88. Co. ſuper. Lit. 9. this caſe it was adjudged a good releaſe and diſcharge of all the bonds excepting that one, and that this exception ſhall goe to all the premiſſes.

A releaſe of a right, or an action cannot be for a time but it will be for ever. And therefore if a releaſe be made to any one

3. In reſpect of the time or eſtate.

one that hath a fee ſimple by wrong by him that hath the right for one houre, one yeare, for life, or yeares; this is a good releaſe for ever.

And if the diſſeiſee releaſe all his right in the land to the diſſeiſor without naming his heires or ſetting down any time how long the releſſee ſhall have the land or the right of the diſſeiſee therein; this is a good releaſe for ever and doth make the eſtate of the diſſeiſor good for ever, and ſo doth make a good eſtate in fee ſimple without theſe words [his heires &c.] And if the diſſeiſor or his heire make a gift in taile, or a leaſe for life, and the diſſeiſee releaſe all his right to the donee or leſſee for life To have and to hold for life only; this is a good releaſe of his right for ever.

But if the diſſeiſee doe diſſeiſe the heire of the diſſeiſor, and make a leaſe for life (which is a releaſe in law;) by this the right is releaſed during that time only. So if one Jointenant or parcener releaſe to the other all his right in the land, without the words [heires] or any more word; this releaſe doth give to his companion his whole intereſt for ever. And when the Lord, or grantee of a rent releaſe to the tenant, or terretenant generally; by theſe releaſes a fee ſimple is transferred without any words of heires &c. And yet the Lord may releaſe his Seigniory to his tenant, to hold to him in taile or for life, and this ſhall be taken and enjoyed accordingly. But if the Lord doth releaſe the Seigniory to his tenant without any words of heires put in the deed, the ſame is extinct. Lit. Sect. 545, 546. 465.

And if I let land to a man for terme of yeares, and after I releaſe to him all my right which I have in the land, without uſing any other words in the deed; or releaſe to him To have and to hold for his life; in both theſe caſes he hath an eſtate for his life only. Plow. 556. Dier 263.

And if I leaſe land to a man for his owne life, and after releaſe to him To have and to hold for his owne life; hereby he hath but an eſtate for his owne life.

But if I make a leaſe to him for anothers life, and after releaſe to him *Habendum* to him for his owne life; by this he hath an eſtate for his owne life.

But if I be ſeiſed of land in fee ſimple and let it to another for life or yeares, and then releaſe all my right to him To have and to hold to him and his heires, hereby he hath the fee ſimple. And if I releaſe all my right to him To have and to hold to him and the heires of his body, hereby he hath an eſtate taile.

And if one be ſeiſed in fee of a rent ſervice or charge and grant it firſt for life, and then releaſe it to the grantee To hold Lit. Sect. 549.

hold to him and his heires, or to him and the heires of his body; this ſhall enure to an enlargement according to the agreement.

But if one grant a rent-charge out of his land *de novo*, and after releaſe to the grantee all his right in the rent To have and to hold to him in fee ſimple or fee taile; this doth not enlarge the eſtate.

Lit.Sect. 606.610. 24 E.3.28. And if tenant in taile, or for life make a leaſe for years, and after by deed doth releaſe all his right to the leſſee for yeares in poſſeſſion, to hold to him and his heires for ever; this will not make the eſtate of the leſſee good for longer time then the life of the releſſor.

Co.ſuper Lit.273. If one make a leaſe for tenne yeares the remainder for twenty yeares to another, and he in remainder releaſe all his right to the leſſee for tenne yeares; in this caſe the releſſee hath an eſtate for thirty yeares and no leſſe, for one leaſe for yeares cannot drowne in another.

Lit.Sect. 526. Co.ſuper Lit.299. 300. If I let land to a woman ſole for her life, or for yeares, and ſhee take a husband, and after I releaſe to them two to hold for their lives; this ſhall enure no further then the intent, and in the firſt caſe he ſhall hold jointly with his wife, but in her right whiles ſhee doth live, and after for his owne life if he ſurvive, and in the laſt caſe they ſhall have the freehold jointly.

Co.ſuper Lit.280. If there be Lord and tenant by fealty and rent, and the Lord granteth the Seigniory for yeares, and the tenant atturneth, and the Lord releaſeth his Seigniory to the tenant for yeares and to the tenant of the land generally; by this the Seigniory is extinct for ever, and the eſtate of the leſſee alſo. But if the releaſe be to them and their heires; then the leſſee ſhall have the inheritance of the one moity, and the other is extinct.

Termes of the law. It is a diſcharge in writing of a ſumme of money or other duty which ought to be paid or done, As if one be bound to pay money on an obligation, or rent reſerved upon a leaſe, or the like, and the party to whom the money or duty ſhould be paid or done upon the receipt thereof or upon ſome other agreement betweene them maketh a writing under his hand witneſſing that he is paid or otherwiſe contented and therefore doth acquite and diſcharge him of the ſame, The which is ſuch a diſcharge and barre in the law that he cannot demand and recover the ſame againe contrary thereunto if the acquitance be ſhewed.

10. Acquitance. *Quid.*

The

11. Where a man is not bound to pay money without he hath an acquitance.

The obligor is not bound to pay money upon a ſingle bond unleſſe the obligee will make to him an acquitance or releaſe. Nor is he bound to pay it before he hath the acquitance. And in this caſe the obligor may compell the obligee to make him an acquitance. And ſo alſo it is in caſe of a Statute Merchant, one is not bound to pay the money thereupon before he hath the acquitance or releaſe of the plaintife. But otherwiſe it is in caſe of an obligation with a condition, for there a man may averre paiment.

22 E.4.8. 41 E.3.25. 1 H.7.15. 22 E.4.6. Brō debt 43. Oblig.10.

And becauſe Statutes, Recogniſances and Obligations are often uſed and tend to the ſtrengthening of the Common Aſſurances of the kingdome, we may not in any wiſe paſſe them over, but muſt take ſome ſurveigh of them. And firſt of a *Statute*.

CHAP.

CAP. XX.

Of a Statute.

Terms of the Law, Stat. de Mercatoribus. Acton Burnell. 11 Ed. 1.

A Statute is a Bond or Obligation of Record : But this word is ſometimes uſed in another ſenſe, *viz.* for a Decree made in Parliament called an Act of Parlaiment. 1 Statute. *Quid.*

And of theſe Obligations, there are three kinds : 1. A Statute Merchant : 2. A Statute Staple : 3. A Recogniſance. The Statute Merchant, is a Bond acknowledged before one of the Clerks of the Statute Merchant and Mayor, and chief Warden of the City of *London*, or two Merchants of the ſaid City for that purpoſe aſſigned, or before the Mayor, chief Warden or Maſter of other Cities, as *York*, *Briſtow*, or the like; or the Bailiffe of any Burrough, or Village, or other ſufficient men for that purpoſe appointed and Authoriſed, Sealed with the ſeal of the Debtor or Recogniſor, and of the King, which is of two pieces; the greater whereof is kept by the Mayor or chief Warden, and the leſſor by the ſaid Clerk: And the form of it is thus; *Novertis &c. me* A B *teneri* C D *in Centum libris ſolvend. eidem ad Feſtum S. Mich. proxim. Et niſi fecero, concedo quod currat ſuper me & haeredes meos diſtrictio & pena in Statuto domini Regis edito apud Weſtm. Dat. &c.* And this albeit at firſt it was ordained and uſed for Merchants only, yet at this day, it is and may be uſed and given by any others, and is become one of the common Aſſurances of the Kingdome. 2 *Quotuplex.* Statute Merchant. *Quid.*

27 Ed. 3. Stat. 2. cap. 1 2. 3 &c. 27 Ed. 3. Stat. cap. 9. 22 H. 8. c. 6. Coo. ſuper Lit. 289. 15 H. 7. 16.

The Staple doth ſignifie this or that Town or City, whither the Merchants by common order and commandement doe carry their commodities, as Wooll, and the like to utter by the great. And the Statute Staple is either properly or improperly ſo called : That which is properly ſo called, is defined to be a Bond of Record acknowledged before the Mayor of the Staple in the preſence of one or two Conſtables of the ſame Staple, and is ſealed with the Seale of the Staple, and ſometimes alſo with the Seale of the party, the which it ſeemes is not neceſſary. And this is founded upon the Statute of 27 *Ed.* 3. *cap.* 9. and was invented, and is uſed only for Merchants and Merchandizes of the ſame Staple: This is of the ſame nature the Statute Merchant is. That which is improperly ſo called, is alſo called a Recogniſance, which is alſo a Bond of Record teſtifying that the Recogniſor doth owe to the Recogniſee a ſumme of money. And of theſe there are divers kinds; for there is one Recogniſance founded upon the Statute of 23 *H.* 8. *cap.* 6. The forme whereof is this, *Noveritis &c. me* A B *teneri* C D *in Centum libris ſolvend. eidem ad Feſtum S. Mich.* Statute Staple. *Quid.* Recogniſance. *Quid.*

proxim. Et si defecero in solutione debi. predict. volo & concedo quod tunc currat super me haeredes & executores meos poena in Statuto Stapulae debit. pro Marchandisis in eadem emptis recuperand. ordinat. & provis. Dat. &c. And this is alwayes to be acknowledged before the chiefe Justice of the Kings Bench, or of the Common Pleas in the Terme time, or in their absence out of Term before the Mayor of the Staple at *Westminster*, and the Recorder of the City of *London* for the time being. And it is to be sealed with the Seale of the Conusor, and with the Seale of the King appointed for that purpose, and with the Seale of the chiefe Justice, Mayor, and Recorder before whom it is acknowledged; and they before whom it is taken doe subscribe their names to it: And this was ordained, and may be, and is used by Merchants, or any other whomsoever for paiment of debts, or assurance of other things: And this also is of the same nature the Statute Merchant is: And both this, and the two former, are much of the nature of judgements had upon Suits in the Courts of Kings Bench and Common Pleas, and therefore they are called Pocket judgements.

Pocket Iudgements.

Coo. 8. 153.

There are also divers other kinds of Recognisances that are taken by and acknowledged before the Lord Keeper, Master of the Wards, Master of the Rolls, Master of the Chancery, Justices of the one Bench or of the other, (some of which are called Bailes) Barons of the Excheker, Judges in their Circuits, Justices of the Peace, Sheriffs, and others; some whereof are by the Common Law, and some by certaine Statutes. And amongst these, some are without Seale, and recorded only, and some are sealed and recorded also: And some of them are in a sum certaine, as the Recognisances taken in the Common-Pleas for Baile are, and some of them are incertaine, as those Recognisances, that are taken for Baile in the Kings Bench, which are after this manner, *Si Judicium redditum &c. tunc volo & concedo*, That the debt recovered against the defendant shall be levied of my goods and chattels &c. And these also are much of the nature of the former kinde of Recognisances. And all Obligations made to the King are of the nature, and have the force of a Recognisance.

Baile.

Prerogative.

See Statutes 33 H. 8. c. 22 39. 3 H. 7. c. 1 10 H. 6. c. 1 Dyer 315. 307. F N B. 251. f. 132 c. 133. a. 68. a.

Statutes and Recognisances are sometimes single, without any Defeasance; and sometimes they are double: *i.e.* With a Defeasance or Condition, upon the performance whereof the same are to be avoided.

Conusor. Conusee.

The Debtor, or he that doth enter into the Statute or Recognisance, is called the Recognisor, or Conusor, and the Debtee, or hee to whom it is made, is called the Recognisee or Conusee.

To

Dyer 35. Litt. Broo. Sect. 484, 511 F. N. B. 267 a.

To make a good Statute or Obligation of Record, the forme preſcribed muſt bee purſued: 1. In reſpect of the perſons before whom: And therefore, the Statute Merchant or Staple, or the Recogniſance founded upon the Statute of 23 *H.* 8. may not bee acknowledged before any others beſides the perſons appointed by the Statutes. Neither may any other Recogniſance bee acknowledged before any, but ſuch as either have power *ex Officio*, and by their Offices to take them, or have ſpeciall Commiſſion ſo to doe: And therefore a Recogniſance taken by a Conſtable is void. If a Recogniſance bee made to the Lord Keeper and two others, and it bee acknowledged before himſelfe, this is void as to him: 2. In reſpect of the manner of making and acknowledging of it: And therefore, if the ſubſtantiall forme appointed by the Statutes be not obſerved, it will be void. If therefore, a Statute Merchant be not ſealed with the Seale of the Debtor, and there bee not a Seale of two peeces annexed to it, this is no good Statute, neither can it take effect as a Statute; howbeit in this caſe, if it be delivered by the party, it may take effect as an Obligation: But if the variance from the Statutes bee only in ſome circumſtance, this will not hurt a Statute or a Recogniſance. And therefore it is held, That albeit there bee no time ſet for the payment of the money in the Statute, yet the Statute is good, for then it is due preſently. And albeit, the Statute be written with anothers hand, and not with the hand of the Clerk of the Statutes or the like, yet is the Statute good enough. And if a Statute Staple bee not ſealed with the Seale of the party that doth acknowledge it; yet it ſeemes it is good enough, for the Statute doth not require it; but a Recogniſance within the Statute of 23 *H.* 8. cannot bee good, except the Seale of the party bee to it, for ſo are the words of the Statute.

3. What ſhall be ſaid a good Statute or Recogniſance, and what not. Firſt, in reſpect of the perſons before whom it is acknowledged.

Dyer 210

Secondly, in reſpect of the manner of making it.

Hollingworth verſus Aſcughe Paſche. 35 El. Co. B. Adiudge.

Obligation.

Perk. 3. Iuſtices Co. B. Trin. 22 Iac.

If a Recogniſance or a Statute bee to pay money at ſeverall dayes, it is good enough, and if the Conuſor faile one day, Execution may bee ſued of the whole STATUTE.

Coo. 8. 153.

Every Statute Staple or Merchant, not brought to the Clerk of the Recogniſances within foure Moneths next after the acknowledging, to enter a true Copy thereof, ſhall bee void, againſt all perſons, their Heires, Succeſſors, Executors, Adminiſtrators and Aſſignes onely, which for good conſideration ſhall after the acknowledging of the ſame Statute, purchaſe the Land or any part lyable thereunto, or any Rent, Leaſe, or profit out of it.

Stat. 27 Eliz. cap. 4.

4. All the proceedings upon a Statute or Recognisance; and the manner and order of Execution thereupon.

The proceedings upon a Statute or Recognisance, to have the fruit and effect thereof, is not like to the proceedings in other cases of Suits upon Obligations and the like, to reduce them to judgement, but as they are in their own nature much like to the nature of a judgement, so is the proceeding and execution thereupon, much like to the proceeding and execution upon a Iudgement: And therefore the Conusee may if hee please, bring an Action of debt upon a Statute and wave all other proceeding, or otherwise, if he like not this course, he [or if he be dead, his Executor or Administrator, and if his Executor be dead, the Executor of his Executor] may assoone as the same is forfeit, have present Execution of it after this manner: Hee must bring his Statute to the Mayor and Clerk or other Officer, before whom it was acknowledged, and there if they finde the Record of it, and the day to be past for the payment of the money, they are to apprehend and imprison the body of the Conusor if he be a lay-person and can be found within their jurisdiction; and if he cannot be found there, they are to certifie the Record into the Chancery, which also if they refuse to doe, they may be compelled unto by a Certiorare: And if that Certificate be faulty, or execution be not done upon it by reason of the death of the Conusee or otherwise, the Conusee or his Executor, or Administrator, may have another Certificate: And thereupon, in case of the Statute Merchant, he shall have a Writ of *Capias* out of the Chancery, directed to the Sheriffe of the County where the Conusor lives, to apprehend and imprison him (if he be not a Clergy man) and this is to be returned in the Common-Pleas, or Kings Bench. And when the Conusor is taken, he shall have time for a quarter of a year to make his agreement with the Conusee, and to sell his lands or goods to satisfie the Conusee: And for that purpose, he may sell his lands or goods, albeit he be in prison, and his saile is good and lawfull: And if in that time, he doe not satisfie the Conusee, or if upon the *Capias*, the Sheriffe returne a *non est inventus*, then by another Writ [or by divers Writs, if the lands or goods lie in divers Counties] called an *Extendi Facias*. And in the case of a Statute Staple, presently after the Certificate into the Chancery, the Conusee shall have a Writ to take his body and extend his lands and goods returnable in Chancery: And this Writ is a Commission directed to the Sheriff of the County, where the lands and goods lie for the valuing of the same, whereby all the lands, goods, and chattels of the Conusor shall be appriſed and valued at a reasonable rate by a Iury of sworn men, charged by the Sheriff for that purpose; which Inquisition so taken is to be returned by the Sheriff, and thereupon the lands, goods, and chattels are to be taken into the Sheriffs hands, and by him to be delivered to the Conusee

Certiorare.

Capias.

Extendi Facias.

Quid.

Fitz. Accompt. 97. Execution in toto. Broo. Statute in toto Stat. Acton Burnel de Mercatoribus. 27 Ed. 3. c. 9. F. N. Br. 130, 131, 132. Dyer 180. 15 H. 7. 15. Coo. 4. 67. 7 H. 7. 12 Plow. 61, 62, 82. Coo. super Lit. 290. Stat. 23 H. 8. c. 6. 5 H. 4. c. 12. 2 R. 3. 7. 14 Ed. 3. 11. Lit. Broo. Sect. 294. 123, 226. Dyer 299. Coo. 5. 87. 4, 82, 57, 66. Stat. 11 H. 6. c. 10. Kitch. 116.

Conuſee (which the Sheriff may doe if he will without any Writ) to hold unto the Conuſee untill he be ſatisfied his debt and damages. And if the Sheriff refuſe ſo to doe, the Conuſee ſhall have a Writ out of the Chancery called a *Liberate*, to compell him to deliver to the Conuſee the lands, goods, and chattels, ſo found by Inquiſition, and taken into his hands upon the Extent, which the Sheriff need not to return: * Or the Conuſee may enter upon the land himſelfe, and take the goods out of the Sheriffs hand; and this act of the Sheriff and Iurie upon this Writ is called an Extent: And if the Iurors or Appraiſors upon the *Extendi facias*, overvalve the lands or goods in favour to the Debtor, the Conuſee hath no remedy but by motion in that Court where the Writ is returnable at the return day, or at leaſt the ſame Terme wherein the Writ is returnable, to deſire that the Appraiſors may take the lands or goods at the rate they have valued them, in the ſame manner as the Conuſee is to have them. But if the Conuſee accept of the lands and goods from the Sheriff, or ſuffer the Term to paſſe wherein the Writ is returnable, he is too late, and hath no remedy at all. And if the Appraiſors do undervalue the lands or goods in favour to the Debtee, it ſeemes the Conuſor hath no remedy at all, for he may at any time pay all or the reſidue of the debt and damages unlevied, and have his land againe if he pleaſe. And in caſe where the Inquiſition or Extent taken and made, is inſufficient, as if part of the land only be extended in the name of all the lands, or it is found the Conuſor dyed ſeiſed of land, and it is not ſaid of what eſtate, or the like, the Conuſee ſhall have a new Extent, and this is called a Re-extent; and this he may have, albeit the lands or goods be delivered to the Conuſee by a *Liberate*, if the Conuſee have not entred upon and accepted it, but if he once accept it, he can never after have a Re-extent: And when the Conuſee is in poſſeſſion of lands by ſuch an Extent as before, then is he Tenant by Statute; and after the Conuſee is once ſetled in peace in the lands extended, he ſhall hold it untill he be ſatisfied his debt, and his reaſonable coſts and damages for travell, ſuit, delay, and expence. But it ſeemes the time ſhall not run out nor bee ſaid to begin untill the entrie of the Conuſee into the land; for if the land be extended and remaine ſeven yeares without a *Liberate* made, yet he may have a *Liberate* at the end of the ſeven yeeres; And aſſoon as the Conuſee ſhall be ſatisfied his debt and dammage by the goods and chattels of the Conuſor, and by the ordinary and certaine or extraordinary and caſuall profits of the land, the Conuſor ſhall have his land againe: And for that purpoſe, if the Conuſee refuſe to give him an account, and to yeild up his land to him the Conuſor, howbeit he may not enter, yet may compell the Coruſee thereunto by a Writ called a *venire facias ad computandum*, in the nature of a *Scire facias*, by which the Conuſor ſhall call the Conuſee his

* Adiuge Butler verſus Wallis, paſ. 38 Eliz. B.R.

Liberate. Quid.

Extend. *Quid.*

Re-extend.

Tenant by Statute.

Venire facias ad Computan. dum. Quid.

Executors or Adminſtrators to account, and if upon the accompt, it ſhall appear he is ſatisfied, the Conuſor ſhall have his land againe; and if it appear he is overſatisfied, he ſhall anſwer the over-plus to the Conuſor. But the Conuſor may not enter upon the Conuſee untill he hath brought this Writ, and made it therupon to appeare that the Conuſee is ſatisfied. And if in caſe the Conuſee be dead, his Executor. ecutor or Adminiſtrator may have execution of the Statute without any *Scire Facias* upon the ſhewing of the Statute and the Teſtament in Chancery. And if the Sheriff return that the Conuſor is dead, the execution ſhall be made of his lands only in the hands of his Heir or Age. the Purchaſor; but if the Heir be under age, the Execution cannot be done untill he be of full age: And if the Conuſor die in priſon, the Eſcape. Execution ſhall be of his lands, goods, and chattels: And if the Gaoler that hath him in priſon ſuffer him to eſcape, he muſt anſwer the debt; And if it fall out that the Conuſee, his Executor, or Adminiſtrator be ouſted, or diſturbed of his Execution by the Conuſor himſelfe, or any other during the time of the Extent, he may relieve himſelfe againſt the diſturber by Aſſiſe, or other Action, as another in the like caſe may doe: And if he be rightfully ouſted or diſturbed by one that hath better right, as by one that hath a former Statute or the like, or by the act of God, as by fire, water, or the like, in theſe caſes the Conuſee ſhall hold the land over after the time of his extent untill he be ſatisfied. But when it is through his own neglect only that he is unſatisfied, as where the lands are delivered to him by the *Liberate*, and he after his entrie into them make a conditionall ſurrender of them; as if lands of the value of 10 l. by the year, be delivered to him in execution for 40 l. and he within foure yeares make a conditionall Surrender of them to the Conuſor, and after he enter for the condition broken, in this caſe he ſhall not hold the land over the foure years, for he muſt take the profits upon his Extent preſently; The proceeding in Execution of the Statute Staple, and the Recogniſance founded upon the Statute of 23 *H.* 8. is after the ſame manner throughout as the proceeding in Execution of the Statute Marchant is, with theſe differences only. That upon the Execution of the Statute Merchant, there doth iſſue forth a *Capias* againſt the body before any Execution be to be made of the lands, or goods, and chattels, and the lands and goods cannot bee extended untill a quarter of a yeare be paſt after the body is taken, or the Sheriffe have returned a *non eſt inventus*; but upon the Execution of the Statute Staple and the Recogniſance, the body, goods, and lands may bee taken together at the firſt; this therefore is a more ſpeedy remedy then the former. Alſo upon a Statute Merchant, one may have an Action of debt; but otherwiſe upon a Statute Staple; and the *Capias* upon the Statute Merchant may be returnable in the Kings Bench, or Common-Place, but 15 H. 7. 16. F N.B. 130. 131.

the

the writ of Execution upon the other is to bee returned in the Chancery.

Dyer 360. 315. Kelw. 100. Weſt. 2 chap. 18. Broo. execution 129. Coo. 3. 11. 15. H. 7. 16. Kitch. 117.

The proceeding upon the other ſort of Recogniſances are after another manner; for upon Recognisances at the common Law, if the money be not paid at the day, the Conuſee his Executor or Adminiſtrator is to bring a *Scire facias* againſt the Conuſor, or if hee be dead againſt his heires when they be of full age; or if the lands the Conuſor had at the time of entring into the Recogniſance, be ſold againſt the purchaſers of theſe lands which the Conuſor had at any time after the Recogniſance entred into, to warne them to come into that Court whence the *Scire facias* cometh, and to ſhew cauſe why execution ſhould not bee done upon the ſaid Recogniſance; and if the party or parties cannot be found to be warned, or being warned do not appear at the time, or appearing ſhew no cauſe why the debt ſhould not be levied, then the Conuſee ſhall have execution of a Moity of his lands by *Elegit*, or if the Conuſor be living, of all his goods by *Levari* or *Fieri facias* at his election, but he cannot have execution of his body unleſſe he bring an Action of debt upon the Recogniſance, or it be by courſe of the Court, as it is in the Kings Bench upon a Baile, in which caſe a *Capias* doth lie.

Elegit.

Levari facias.

Fieri facias.

Capias.

Stat de Mercatoribus.

The proceeding againſt the Sureties in Statutes ſhall be as the proceeding againſt the Principall; but in caſe where there are moveables of the Principall to ſatisfie the debt, the Suretie (as it ſeems) ſhall not be charged.

Sureties.

Plow. 72. Coo. 10. 50. 51. Bro. St. Marchant.

When a man doth enter into a Statute or Recogniſance, the land of the Conuſor is not the debtor, but the body; and the land is lyable only in reſpect that it was in the hands of the Conuſor at the time of acknowledging of the Statute, or after; and the land is not charged with the debt, but chargeably only at the election of the Conuſee; but the perſon is charged, and the land is chargable in reſpect of the perſon, and not the perſon in reſpect of the land. And therefore albeit the Conuſor alien his land to another, yet he remaines debtor ſtill, and his body and his goods ſhall be taken in execution: and yet when execution is ſued upon the land, the land is charged and become debtor alſo.

5. What things are ſubject and liable to execution upon a Statute or Recogniſance. And when, and how; And what not.

First, in reſpect of the nature and quality of the things themſelves.

Stat de Mercatoribus. Coo. 3. 12. Plow. 72. Coo. 2. 59. Littl. Sect. 358. Dyer 205. Broo. Stat. Marchant 44. Dyer 7. Co. ſuper Littl. 374.

The body of the Conuſor himſelf, but not the body of his heire, executor, or adminiſtrator is lyable to execution and may be taken, albeit there be lands, goods, and chattels to ſatisfie the debt; and all the demeſne and copyhold lands, tenements, and hereditaments corporeall and incorporeall of the Conuſor that are grantable over, as his Mannors, Meſuages, Lands, Meadowes, Paſtures, Woods, Rents, Commons, Tithes, Advowſons, and the like: alſo all his goods and chattels, as leaſes for yeares, wardſhips, emblements, cattell, houſhold-ſtuffe, and the like, are liable to execution upon

a Statute. * And therefore if a man make a leaſe for life, or yeares, and after enter into a Statute, or Recogniſance; this reverſion *cum acciderit* ſhall be ſubject to execution, and the Conuſor cannot (as it ſeemes) by any ſale thereof prevent it. And yet the contrary hath been held for law. *Litt. Broo. Sect.* 227. ‡ And if one make a feoffment in fee, or leaſe for life, reſerving a rent, this rent is extendable and the Conuſee may diſtraine for it. ‖ So if the leſſee for life make a leaſe for yeares rendring a rent, and then the leſſee for life enter into a Statute; this rent is ſubject to execution, and it ſeemes the Conuſee may bring an Action of debt againſt the leſſee for yeares for it. a And albeit the rent become extinct by the purchaſe of the Conuſor or otherwiſe, yet as to the Conuſee it ſhall be ſaid to be in *eſſe* and ſubject to execution ſtill. And therefore if a rent be granted unto me for my life after the death of my wife, and after I do acknowledge a Statute, and then my wife die, and then I releaſe the rent to the terre-tenant; this rent ſhall be lyable to execution. But Annuities, Offices in truſt, Seigniories in Franckalmoigne, Homage, Fealty, Rights, Things in action, and ſuch like things are not liable to execution upon Statutes or Recogniſances. Alſo a remainder in taile, or in fee after an eſtate taile in poſſeſſion, is not liable to execution in theſe caſes, except it happen to come into the poſſeſſion of the Conuſor.

* Dyer 373.

‡ Doct. & St. 53. Broo. St. Marcha. 44. Dyer 205.

‖ Harrington's caſe paſche 9. Iac. B. R.

a Coo. 7. 38.

Dyer 7. Co. ſuper Littl. 374. Doct. & St. 53. Coo. 2. 59. 1. 62.

Second, in reſpect of the eſtate, property and poſſeſſion of the conuſor in the things.

The lands, tenements and hereditaments that are Copihold, albeit the Conuſor have the fee ſimple of them, yet are ſubject to execution, only for the life of the Conuſor; but his demeſne lands wherein he hath an eſtate in fee-ſimple, are liable to execution for ever if need require.

Stat. de Mercatoribus Dyer 299. Plow. 82. Coo. 7. 39. 3 12. Broo. Recogniſance 7. Co. 1. 62. 13 H. 7. 22. Broo. Stat. Marchant 36.

The lands the Conuſor hath in jointenancy with another, are ſubject to execution during the life of the Conuſor and no longer; for after his death the ſurviving jointenant ſhall have all; but if the Conuſor ſurvive his companion, then all the land ſhall bee ſubject to execution: and the lands the Conuſor hath as tenant in taile, are liable to execution only during the life of him being the tenant in taile; for afterwards they ſhall go to his iſſue in taile. And yet if the tenant in taile after he hath entred into a Statute, ſuffer a recovery of the land intailed, in this caſe the land ſhall be ſubject to execution as if it were fee-ſimple land. And the lands the Conuſor hath in the right of his wife, ſhall be charged and ſubject to execution only during the lives of the husband and wife together, and no longer.

If a feoffment be made in condition to make an eſtate to another by a day of the ſame land, and before the day the feoffee enter into a Statute or a recogniſance; this land ſhall be ſubject unto execution untill the feoffor reenter, for the breach of the condition.

Litt. Sect. 338.

If

Coo. 2. 59. If one be diſſeiſed of land, and then enter into a Statute; this land ſhall not be ſubject to execution: and yet if the Conuſor do after recover the land by entry or action, it ſhall be lyable to execution.

Stat. de Mercatoribus Co. 3. 11. 12. Plow. 524. Coo. 8. 171 5. 90. Dyer 67. The goods and chattels whereof the Conuſor is ſolely poſſeſſed, and poſſeſſed in his own right; and the goods and chattels of which he is joyntly poſſeſſed with another; and the goods and chattels he hath in the right of his wife, are liable to execution. But the goods or chattels that he or his wife hath as Executor or Executrix to another, or as pledged only, it ſeems are not ſubject to execution. And if the Conuſor deliver goods to another to deliver over to *I S*; theſe goods before they be delivered over are liable to execution. And if hee have leaſes for yeares in the right of his wife, and die before execution be done, it ſeemes theſe leaſes are liable to execution. *Sed quære.* But if the Conuſor have goods in his cuſtody of another mans, or have goods he hath diſtrained in the nature of a diſtreſſe, theſe are not liable to execution.

Coo. 3. 12. Stat. de Mercatoribus. All the lands, tenements and hereditaments which the Conuſor had at the time of the Statute or Recogniſance entred into or at any time after, into whoſe hands by what means ſoever the ſame are betide and come at the time of execution, are ſubject and liable to the execution. But the lands the Conuſor had and did put away before the time of the Statute or Recogniſance entred into, are not liable to execution. And all the goods and chattels the Conuſor hath and are found in his hands at the time when the execution is to be made by the *Extendi facias*, are liable to the execution. But the goods and chattels he had and did *Bonâ fide* do away before the time of execution done, are not liable to the execution. 3. In reſpect of the time.

Broo. Stat. 19. 48. 25. Plow. 72. See infra. And of all theſe things before ſubject to execution, the Conuſee may take all or part at his pleaſure. And therefore if the Conuſor have ſold his lands to divers perſons, or have ſold ſome of his lands to divers perſons, or to one man, and keep the reſt in his hands, or it deſcend to his heire; the Conuſee may ſue execution upon the lands in either of their hands at his election; ſo that if the Cogniſee after the Statute entred into and before execution purchaſe part of the land of the cogniſor, he may notwithſtanding have execution upon the reſidue in the hands of the Conuſor, or in the hands of his heire; and yet ſo that in ſome of theſe caſes his execution may be afterwards avoided, and he compelled to ſue execution againe. 4. In reſpect of the quantity.

Weſtm. 2. chap. 18. Plow. 72. Coo. 3. 12. Dyer 305. Kelw. 100. The Cogniſee upon other Recogniſances ſhall have the ſame things in execution as a man ſhall have after a judgement in a Suite in the Kings Bench or Common-Pleas by *Fieri facias*, or *Levari facias*, all his goods and chattels, and by *Elegit* the Moity of

of his lands, and all his chattels, beſides the Cattell of his plow and implements of husbandry. But in theſe caſes he cannot take the body of the Conuſor in execution, unleſſe it be upon a new Suite, or in caſe of baile in the Kings-Bench.

Where a man ſhall have a Reextent or new execution, And where not.

Howſoever by the Common-law after a full and perfect execution had by extent returned and of record, there ſhall never be any reextent, yet by a ſpeciall Act of Parliament it is provided, That if after lands &c. be had in execution upon a juſt or lawfull title wherewith all the ſaid lands &c. were liable tied or bound at ſuch time as they were delivered or taken in execution, they ſhall be taken or recovered away from him before he hath received his full debt and damages; in this caſe after a *Scire facias* had againſt the Conuſor his heirs, executors, adminiſtrators, or purchaſors, he (or his executors or adminiſtrators if he be dead) ſhall have a new execution to levie the reſidue of the debt and dammages then unſatisfied. Wherein theſe things are to be obſerved, 1. In caſe where the Conuſee is unlawfully and wrongfully diſturbed either by the Conuſor or by a ſtranger in the taking of the profits of the land delivered to him in execution; there hee may and muſt bring his action and recover damages, and theſe damages ſhall goe toward his ſatisfaction; for in this caſe and for this diſturbance hee ſhall not hold the land a day the longer. And where he is hindred by his own neglect or act in the taking of the profits of the land, as where his debt is 40l. and he hath 10l. a yeare delivered to him by which he may ſatisfie himſelf in four yeares, and within the time hee make a conditionall ſurrender to the Conuſor, and enter for the condition broken; in this caſe hee ſhall not hold the land over, neither ſhall he have any Reextent. And where the let or diſturbance is ſuch as wherein the Conuſee hath remedy given him by the Common-law to hold the land over after the diſturbance removed; in this caſe he ſhall have no new execution nor reextent within this Statute; for where the Conuſee hath remedy in *præſenti* for part, or in *futuro* for all or part, this Statute extendeth not to it. And therefore where the Conuſee is hindred in the taking of the profits of land by the act of God, as by fire, overflowing of water or the like; or the act of the party Conuſor, or any by or under him, as when one is bound to *A* in a Statute of 100l. and after to *B* in a Statute of 200l. and *B* extendeth the land firſt, and then *A* extendeth the land and taketh it away from *B*, or when the Gardian in Chivalry doth put out the Conuſee by reaſon of the Wardſhip of the Heire of the Conuſor, or the wife of the Conuſor doth claime her dower and put out the Conuſee, or one diſſeiſe his leſſee for life, or out his leſſee for years, and then acknowledge a Statute, and after execution is ſued againſt him and then the land is delivered to the Conuſee and af-

Stat. 32. H. 8. chap. 5.

Coo. 4. 66. 82. Plow. 61 15. H. 7. 15 Coo. ſuper Litt. 292. Kitch. 116.

ter

ter the leſſee for life or yeares doth enter; in all theſe caſes becauſe by the Common-law the Conuſee may hold over the land after the time given him by the extent and after the impediments removed, untill he be ſatisfied his debt and damages therefore, he ſhall have no ayd of this Statute by Reextent; for he is then only to be relieved by this Statute when as he is evicted and diſturbed and is wholly and clearely without any remedy at the Common-law. 2. Where the Statute ſaith [untill he &c. or his aſſignes ſhall fully and wholy have levied the whole debt and damages] if he hath aſſigned ſeverall parcels to ſeverall aſſignes, yet all they ſhall have the land but untill the whole debt be paid. 3. Where the words be [for the which the ſaid lands &c. were delivered in execution] If *A* diſſeiſor convey the lands to the King who granteth the ſame over to *A* and his heires to hold by Fealty and 20l. rent, and after granteth the Seigniory to *B*, *B* acknowledgeth a Statute, and execution is ſued of the Seigniory, *A* dieth without heire, and the Conuſee entreth and is evicted by the diſſeiſee; in this caſe he ſhall have the ayd of this Statute; but the Perquiſite of a Villain being evicted is out of the Statute. 4. Where the words be [delivered and taken in execution] yet if after the *Liberate* the Conuſee enter (as he may) ſo as the land is never delivered, yet it is within the remedy of this Statute. 5. Albeit the Statute ſpeake only of the recoveror, obligee, &c. and not of their executors, adminiſtrators, or aſſignes, yet the Statute ſhall extend to them. 6. Where the Statute ſpeakes of a *Scire facias* out of the ſame Court &c. if the record be removed into another Court and there affirmed, he may have a *Scire facias* out of that Court. 7. Where the Statute gives a *Scire facias* againſt ſuch perſon and perſons &c. that were parties to the firſt execution, their heires executors or aſſigns &c. this muſt not be taken ſo generally as the letter is; for if the firſt execution were had againſt a purchaſor &c. ſo as nothing in his hands were liable but the land recovered, if this land bee evicted from the tenant by execution, no *Scire facias* ſhall goe againſt him, his executors &c. but if he hath other lands ſubject to execution, then a *Scire facias* lieth againſt him or his aſſignes, but not againſt his Executor; neither in that caſe can he have a *Scire facias* upon this Statute againſt the firſt debtor or recogniſor, but if there be ſeverall aſſignes of ſeverall parcels of lands ſubject to the execution, one *Scire facias* will lie againſt all the aſſignes.

7. Where and by what means a Statute or Recogniſance, and the execution thereof ſhall be diſcharged, ſuſpended, or avoided in all or in part, and where not.

Dyer 297. 315. Co. 6. 13 20. Aſſ. Pl. 7. See Defeaſance.

A Statute or recogniſance and the execution thereupon may be discharged divers wayes as by defeaſance, releaſe, paiment of the mony, debt, and damages, or the reſidue thereof unlevied, delivery up of the Statute, purchaſe of part of the land by the cogniſee, or the like. And therefore if there be a defeaſance to the Statute or recogniſance,

ſance, and it be to pay money at a day, or to performe ſome other thing, and the money be paid, or the thing done accordingly, this is is a diſcharge of the Statute. And therefore if ſuch a Statute or recogniſance be afterwards ſued againſt the Conuſor, hee may bee relieved by an *Audita Querela*. And if *A* bind himſelfe to *B* by a Statute of 20l. and *B* ſue execution, and the lands of *A* are delivered to him in execution untill he levy the money, and after *B* doth make a defeaſance to *A* by Indenture, that if *A* pay 10l. by a day certaine, that then the Statute or Recogniſance ſhall bee voyd; if this be done accordingly, the Statute and the execution thereupon is defeated and diſcharged. And if the Cogniſee before execution or after, releaſe to the Cogniſor the Statute or Recogniſance, or the debt; this is a perpetuall diſcharge of the Statute and the execution thereupon. But if the Conuſee before execution releaſe to the Conuſor all his right in or to the land; this will not diſchage the whole execution; for if he may not ſue execution of the land afterwards (as it ſeemes he may this notwithſtanding) yet he may ſue execution of his body and goods. Bnt ſuch a releaſe after execution made of the land, will no doubt diſcharge the land. And yet if a Conuſee releaſe all his right in the land to the Feoffee of the cogniſor of a parcell of the land, it ſeemes this will diſcharge the land of execution, albeit it be before the execution ſued that this releaſe is made. And ſo it is ſaid it was reſolved *Mich.* 26. 27. *Eliz.* If the cogniſee aſſigne the Statute or Recogniſance to the Cogniſor or to the terre-tenant by way of diſcharge of the debt or land; it ſeemes this is a good releaſe and diſcharge of it in law. And if the Cogniſee purchaſe any part of the land of the Cogniſor after the Statute or Recogniſance entred into; this is no diſcharge of the Statute or the Recogniſance, but the Cogniſee may have execution notwithſtanding of the lands that are left in the hands of the Cogniſor or of his body, or goods, or all. But if the Cogniſee purchaſe parcell of the lands, and a ſtranger another parcell; in this caſe the lands that are purchaſed by the ſtranger ſhall be diſcharged of execution. And if the Cogniſee after execution ſued purchaſe any part of the land, or the Fee-ſimple of all or part of it doth deſcend to him; by this the whole execution is diſcharged. And if the Cogniſee purchaſe all the lands of the Cogniſor; by this the execution as to the land is ſuſpended, but this is no diſcharge as to the body and goods of the conuſor, for they are ſubject to execution ſtill. And if the conuſee reinfeoffe the conuſor againe, the execution may be revived again againſt the lands of the conuſor, ſo that they will be ſubject to execution againe whether they do continue in his hands or bee ſold away to others. So alſo if the conuſee

By defeaſance.

By Releaſe.

Coo. ſuper Litt. 76. 10. 47. 50. 51. ſuper Littl. 265. Broo. St. Marchant 25. See Releaſe

Barrow. & Graies caſe 38. Eliz.

By purchaſe or ſurrender of the land.

Plow. 92. F. N. 104. Lit. Broo. Sect. 293. 11. H. 7 4. Br. audita Querela 49. Stat Marchant 42. Coo. ſuper Litt. 150. 25. Aſſ. Pl. 7. Broo. Stat. Marchant 25. Littl. Broo. Sect. 441. 5. H. 7. 25.

Conuſee enfeoffe a ſtranger after hee doth purchaſe the land, and the ſtranger doth enfeoffe the Conuſor; in this caſe alſo the Execution is revived, and the lands ſhall now be ſubject thereunto as they were before.

Harringtons caſe. Paſche 19. Iac. B.R.

If a Leaſſee for life make a Leaſe for yeares rendring a rent, and after enter into a Statute to *I S*, and then enter into another Statute to *I D*, and after hee doth grant his eſtate to *I S*; by this the Execution of the Statute made to *I S* is ſuſpended, and therefore during the ſuſpention, it ſeemes *I D* albeit he be after in time, may ſue and have the Rent in execution.

Plow. 72. Coo. 3. 12, 6, 13.

If the Conuſor after he hath entred into a Statute or Recogniſance, doth convey away his land to divers perſons, and then the Conuſee ſue Execution of the Statute upon the lands of one or ſome of them and not of all; in this caſe he or they whoſe lands is, or are taken in Execution may by an *Audita Querela* or *Scire Facias*, have contribution from the reſt, wherein theſe differences muſt bee obſerved: That one Purchaſor ſhall have Contribution from another: And therefore if the Conuſor ſell ſome lands to *I S*, and other lands to *I D*, and the Conuſee ſue Execution only of the lands of *I S*: *I S* ſhall have contribution againſt *I D*. And the Feoffee of the Purchaſor, the Feoffee of the Heir of the Conuſor, the Feoffee of the Feoffee, and another Feoffee ſhall have contribution of the Heir of the Conuſor: But the Conuſor himſelfe ſhall not have contribution from a Purchaſor; and therefore, if hee ſell part of his lands, and keep part in his hands, and the Conuſee ſue Execution only of the lands in the hands of the Conuſor or his Heires; in this caſe, neither he nor his Heirs ſhall have any contribution from the Purchaſors; and one Heire ſhall have contribution from another. And therefore, if one be ſeiſed of two Acres, the one in Burrow Engliſh, the other of other Land, and he enter into a Statute and die, and he hath but two daughters, and the Execution is ſued upon the land of one them; ſhe ſhall have contribution from the other. So where ſome land doth diſcend to the Heire of the part of the Father, and ſome to the Heire of the part of the Mother.

8. Where the Conuſor, or his heir, or an alienee, or purchaſor ſhall have contribution upon a Statute or Recogniſance, or not.

If one be ſeiſed of lands in Fee in the County of *A*, and *B*, and enter into a Statute or Recogniſance, and the Conuſor die, and then the Conuſee die alſo, and his Executor doth ſue Execution of the lands in *B* only, and hath Execution, and after the Heir doth ſell theſe lands; in this caſe the Vendee ſhall have no contribution. So alſo it ſeems the Law is, if the Heire ſell the land to divers, and one of the Purchaſors appear to the *Scire Facias*, and the Iudgement is given againſt him, and he afterwards ſell the land, his Vendee ſhall have no contribution: And in all theſe caſes where it is ſaid the one Purchaſor ſhall have contribution,

it is not intended that the reſt ſhall give or allow him any thing by way of contribution, but that the party whoſe lands are extended, may by *Audita Querela* or *Seire Facias*, as the caſe requireth, defeat the Execution, and thereby ſhall be reſtored to all the meane profits, and force the Conuſee to ſue his Execution upon all the land, that the land of every one of the Terre-tenants may be equally extended.

And ſo wee fall from an Obligation by matter of Record, to an Obligation by matter of Fait which is no Record.

CAP.

Cap. XXI.

Of an Obligation.

Finches ley. 49.

AN Obligation is a Deed in writing whereby one man doth bind himſelfe to another to pay a ſumme of money or doe ſome other thing. And hee that makes this Deed is called the Obligor, and he to whom it is made is called the Obligee. 1. Obligation. *Quid.* Obligor. Obligee.

Coo. ſuper Litt. 172.

And it is ſometimes Simple, or Single, which is when it is to pay a ſumme of money or doe ſome other thing, and when it is without any Defeſance or Condition in or annexed to it, which alſo is ſometimes with a penalty called a penall Bill, and ſometimes without a penalty. And this is that which is moſt properly called an Obligation, and ſometimes alſo it is called a ſingle Bill, or ſingle Bond. And ſometimes it is double or Conditionall, which is when it is attended upon and accompanied with a Condition. And then it is ſaid to be a Bond containing a penalty with condition to pay money, or doe or ſuffer ſome act or thing, &c. And this Condition is ſometimes called a Defeaſance, and then eſpecially when it is (as ſometimes it is) in another Deed or Inſtrument; for moſt commonly it is inſerted into the ſame Deed wherein the Obligation being the other part of it is contained. And then alſo it is either ſubſcribed under the Obligation, or included within the body of it, or indorſed upon the back of it. And *quacunque viâ* if the condition be performed the penalty is ſaved; if not, the penalty is forfeit. 2. *Quotuplex.*

a Broo. Obligat. 67. 30. b Trin. 49. Eliz. B.R.

[a] An Obligation may be made upon parchment or paper, and in looſe parchment or paper, [b] or in a peece of paper or parchment ſowed in a book, and either way it is good. But if it be made on a Tally, peece of wood, or any other thing but paper or parchment, albeit it be ſealed and delivered, yet it is voyd. [c] And it may be made in the firſt or in the third perſon (notwithſtanding the Statute of 38. *Ed.* 3. *c.* 4. which doth intend only Obligations made beyond the Sea.) And therefore an Obligation ſo made, as *Memorandum quod* A *de* B *debet* C *de* D 10l. *In cujus &c.* is good. 3. What ſhall be ſaid a good Obligation in his originall creation, or not. First, for the manner and form of it; and what words are ſufficient to make an Obligation.

c Coo. ſuper Lit. 229. Fitz Obligat. 9.

Dyer 21. 22. 23. Coo. 9. 53. 37 H. 6. 9. 21 Ed. 4. 22. Kelw. 34. 21 Ed. 4. 39. 21 H. 7. 6.

Albeit the beſt manner and form of an Obligation, is that which is moſt uſuall, as, *Noveritis me* A *de* B *teneri & firmiter obligari* C *de* D *in* 20l. *legalis &c. Solvend. eidem* C *aut ſuo cert. Attornat. executoribus aut adminiſtratoribus ſuis. Ad quam quidem ſolutionem bene & fideliter faciendum obligo me haredes executores & adminiſtratores meos firmiter per præſentes &c.* yet any words in a writing ſealed and deliverd whereby a man doth prove and declare himſelfe to have another mans money or to be indebted to him, will make a good Obligation;

and

And therefore if a man by Deed ſay but this, *Memorandum* that *I A* of *B* doe owe to *C* of *D* 20l. to be paid at Eaſter next. Or *memorandum*, that *I A* of *B* have had of *C* of *D* 20l. of which there is 10l. behind, [or of which I owe him 10l.] Or *memorandum*, that *I A* of *B* have received of *C* of *D* 20l. to be repaid him again. Or *memorandum*, that *I A* of *B* doe grant to owe [or to pay] *C* of *D* 20l. Or *memorandum*, that *I A* of *B* doe promiſe to pay *C* of *D* 20l. Or *memorandum*, that *I A* of *B* will pay to *C* of *D* 20l. Or *memorandum*, that *I A* of *B* have had 20l. of the money of *C* of *D*. Or *memorandum*, that *I A* of *B* have borrowed of *C* of *D* 20l. Or *memorandum*, that *I A* of *B* doe bind my ſelfe to *C* of *D* that he ſhall receive of me 20l. all theſe and ſuch like are good Obligations. So if one ſay [d] *memorandum*, that *I A* of *B* bind my ſelfe to *C* of *D* that he ſhall receive 20l. by the hands of *I S* when *K* doth come to his houſe, and at Michaelmas then next following 5l. this is a good Obligation, and the words [by the hands of *I D*] are voyd. [e] So if one bind himſelfe thus. *Memorandum*, that *I A* of *B* owe to *C* of *D* 20l. for payment of which I bind my ſelfe and my goods; this is a good Obligation and will bind the perſon but not his goods. [f] So if one by Deed, covenant or promiſe to doe a thing and then uſeth theſe words, *Ad quam quidem premiſſionem perimplendam obligo me in* 20l. this is a good Obligation for 20l. [g] So if one binde himſelfe thus: [h] *Memorandum*, that *I A* of *B* am bound to *C* of *D* to deliver him 20 quarters of corn by a day, *Ad quod performandum obligo me*, without more words; this is a good Obligation. So if one binde himſelfe thus: *Memorandum*, that *I A* of *B* bind my ſelfe to pay *C* of *D* 10l. at Eaſter, and if I faile to pay it then, I do grant to pay him 20l. this is a good Obligation for the 20l. if he faile to pay the 10l. [i] And ſome ſay he may recover both the 20l. and the 10l. So if one bind himſelfe thus: [k] *Memorandum*, that in conſideration of a Bill of 50l. wherein *I S* is bound for me to *I D* for payment of 20l. I doe bind my ſelfe in 20l. to the ſaid *I S* to ſave him harmleſſe from all Actions of the ſame; this is a good Obligation; and if *I D* ſue *I S*, the Bill is forfeit. Or if one bind himſelf thus: Be it known &c. that *I A* of *B* doe owe unto *C* of *D* the ſumme of 14l. to be paid at the Feaſt of &c. together with ſix pounds which I owe him upon Bils and Recogniſances ſubſcribed with my hand; this is a good Bill, but it is good for no more but the 14l. and not for the 6l. for the words doe only import the time of payment of the 6l.

If one make a Writing in the form of a Statute which the party doth ſeale and afterwards legally deliver, but it is not ſealed by the Kings and the Majors Seale according to the Statute, albeit this be not a good Statute, yet it may be a good Obligation.

If one bind himſelfe to pay money or doe any other thing, and afterward doth adde this clauſe in the Deed, *Et ad majorem hujus rei*

[d] Broo. Obligation 56.

[e] Broo. Obligation 16.

[f] Broo. Obl. 52. Dyer 6.

[g] Broo. Obl. 40.

[h] Broo. Obl. 79.

[i] Foxalls caſe 9. Iac. B.R.

[k] Foxe verſus Wright. trin. 40. Eliz. B.R.

Adiudged Parret & Woolwards caſe, M. 38. 39 El. in the Exchequer Chamber.

Trin. 37 El. B.R. Fitz. Accompt. 79

Perk. Sect. 158. Fitz. Oblig. 1.

rei ſecuritatem inveni A *de* B *&* C *de* D *fidejuſſores; quorum unuſquiſque Obligat ſe in toto & in ſolid.* and theſe two doe alſo ſeale and deliver the Deed; it ſeems this is a good Obligation to bind them, albeit there be no other words in the Deed.

Broo. Obl. 72. Cromp. Iur. 63.

If an Obligation be made to *I D* to the uſe of *I S*, this is a good Obligation for *I S* in equity, and ſome have ſaid he may releaſe it; but this is much to be doubted; for it is certaine *I S* cannot ſue the Obligor in his own name, but when he hath cauſe of Suit he may compell *I D* in Chancery to ſue the Obligor.

Brook. Obl. 47. 14. H. 8. 29. 21. Ed. 3. 46. 4. Ed. 4. 29.

If *A* of *B* bind himſelf to *C* of *D* to pay 20 l. and ſay not when; yet the Obligation is good, and the mony is due preſently. So if the Obligation be *Solvendum nunquam*, or *ſolvendum* at Doomſday, the Obligations are good, and the *ſolvendum* void, and the mony is due preſently. So if *A* of *B* bind himſelf to *C* of *D* in 20 l. *Solvendum* A *de* B [where it ſhould be *ſolvendum* C *de* D,] the Obligation is good, and and the *ſolvendum* voyd.

Dyer 13. Broo. Oblig. 15. 68.

If the Obligation be made thus, [*Obligo me &c.*] leaving out theſe words following [*hæredes executores & adminiſtratores*;] this is a good Obligation, and the Executors and Adminiſtrators, but not the Heir, are bound by it. And if it be made thus, [*ſolvendum* to the *Obligee & ſucceſſoribus ſuis*] and not [*executoribus &c.*] this is a good Obligation, and the Executors and Adminiſtrators; and not the Succeſſors, except it be in caſe of a Corporation, ſhall take advantage of it.

Coo. 10. 133 Fitz. Obl. 12 2 H. 4. 14.

An Obligation may be good, albeit it containe falſe or incongruous Latin or Engliſh, or Latin be put for Engliſh, or *è contra*, if the intent of the parties may ſufficiently appear: And therefore if one be bound by the name of *Iohannes* for *Iohannem*; or one bind himſelfe in *octogenta*, for *octoginta libris*; or in *ſeptungentis* for *ſeptuagintis libris*; in *wiginti* for *viginti libri*; in ſewteene for ſeaventeene pounds; in *quinquegentis* for *quingentis libris*; [l] in *ſeptuageſſimo* for *ſeptuaginta libris*; [m] *ſexingentis* for *ſexcentris libris*; in *quinquageſſimis*, or *quinque decies*, for *quinquaginta libris*; in *octogenta* for *octoginta libris*; or in *viginti livers*, for *viginti libris*; in *viginti nobilibus* for 20 nobles; [n] or in *octigenta libris*, for *octoginta libris*; or *quinginta libris* for *quinquaginta libris*, or the like; theſe miſpriſions will not hurt the Obligations, for they are good notwithſtanding. But if one by the Obligation bind himſelfe in in [o] *quinqueagentis libris*, or in *quinqeagentis libris*, or in *quinagentis libris*, or in *ſegintis libris*; theſe Obligations are voyd; for in theſe caſes the meaning is ſo uncertaine, that it cannot be diſcerned, and no Averment will ſerve to ſupply it in this caſe. [p] So if an Obligation be dated 23 *die Aprilie*, in ſtead of *Aprilis*; this is a good Obligation; and this miſtake will not hurt.

l Adiudged Vernons caſe M. 13. Iac. Co. B.
m Graies caſe 5. Iac. B. R.
Mich. 10. Car. B. R.
Adiudged
n Fitz hugh. treſ. Bridges 3. & 4. Eli.
Co. B.
o Paris caſe M. 4. Iac. B. R.
p Trin. 21. Iac. Nowels caſe.

And if an Obligation have not date, or a falſe and impoſſible

date, or have but halfe the date as the year of our Lord only; or if it want theſe words *In cujus rei &c.* or the like, if it be ſealed and delivered, it is a good Obligation. Coo. 2. 5. See at Fait. Numb. 5.

Secondly, for the matter and ſubſtance of it.

A ſingle Obligation may be to pay money, or to doe any other thing that is lawfull and poſſible, and ſuch Obligations are good. But if the Obligation be to bind a man to doe a thing unlawfull or impoſſible, it is voyd: And therefore if one bind himſelfe in an Obligation to kill a man, burn a houſe, maintaine a Suit; or the like, it is voyd. So if the Obligation be made for maintenance or to that end, or if it be made purſuant to, and in execution of an uſurious contract, or the like, it is voyd. So if an Obligation be made againſt the Statute of 23. *H.* 6. it is void. So if one bind himſelfe in an Obligation, and the matter thereof is altogether uncertaine, or inſenſible, it is voyd; but if there be any reaſonable certainty in it, it is good enough. So if one bind himſelfe to goe to *Rome* in three dayes under paine of 20 l. this is void. Coo. 10. 11a See fait or Deed, Num. 51. See more infra.

4. What ſhall be ſaid a good condition of an Obligation, or not.

First, for the manner and frame of it.

The condition of an Obligation may be either in the ſame, or in another Deed, and it may be indorſed of the back of the Obligation, ſubſcribed under it, or contained within it; but the beſt way to make it, is the uſuall way, *viz.* The condition of this Obligation is ſuch &c. and yet if it be otherwiſe, it may be good; for if an Obligation be made from *A* to *B* and on the back of the ſame theſe words are indorſed [That whereas the within bounden *A* is bound to *B* in 20 l. yet *B.* willeth and granteth that if *A* pay to *B* 10 l. at Eaſter, that then the Obligation ſhall bee voyd;] it ſeemes this is a good condition. So if in the cloſe of an Obligation of 20 l. theſe words be added: [That if *A* (the Obligor) pay 10 l. to *B* (the Obligee) at Eaſter, that the Obligation ſhall be voyd;] this is a good condition. So if an Obligation be made from *A* to *B* of 20 l. and theſe words are ſubſcribed: [Now therefore if the Obligor pay 5 l. quarterly for foure years, then it is agreed that the Obligation ſhall be voyd;] this is a good condition. So if a ſingle Obligation be made from *A* to *B* of 20 l. and after the Obligation is made, *B* doth by another Deed grant that if *A* pay him 10 l. at Eaſter, the Obligation ſhall be voyd; this is a good condition or Defeaſance. But if *A* do bind himſelfe in an Obligation to *B* of 20 l. and after *B* doth bind himſelf in another Obligation to *A* to performe the Covenants of an Indenture, and in this ſecond Obligation, there is a Proviſo that *B* ſhall not ſue upon the firſt Obligation till ſuch a time; this is not a good condition. Plow. 141. 2 H. 6. 51. Fitz Barre 157. Broo. Obli. 89. Fitz. Barre 265. Paſche 8. Iac. B. Simpſons caſe 21 H. 6. 51. 26 H. 8. 9.

If *A* be bound to *B* in 20 l. with condition that if *B* doe not bring *A* a horſe before Eaſter, that the Obligation ſhall be voyd; this a good condition; and if the Obligee will have advantage of it, hee muſt perform the thing; *Et ſic de ſimilibus.* So if *A* be bound in an Obligation to *B* in 20 l. with condition that if *B* ſhall bring 2 o load 26 H. 8. 8. Bro. Coun. 69.

of

of wood to the houſe of *A*, that *A* ſhall pay him the 20 l. or that *A* ſhall pay him 20 l. when *B* ſhall bring him 20 load of wood to his houſe; theſe are good conditions, and the thing muſt be done before the money is to be paid.

Broo. Oblig. 42. If the condition of an Obligation be, That if *A* (the Obligor) doe not pay to *B* (the Obligee) 10 l. that the Obligation ſhall bee voyd; this is a good condition; but it ſhall bee taken according to the words, and therefore the Obligor is not to pay it; And if he be ſued, he may plead performance of the condition in the not paying of it.

Curia B.R. Paſche 90. Ia. Trueman & Parrams caſe. If theſe words be omitted in the cloſe of the condition [That then the Obligation to be void;] the condition is voyd, but it doth not hurt the Obligation, for that remaines ſingle: But if the next words, *viz.* [Or elſe ſhall ſtand in force] be omitted, the condition is never the worſe; for as the addition of them doth nothing adde to, ſo the omiſſion of them doth nothing derract from the ſtrength of the Obligation.

See in Weſt. Symb. The condition of an Obligation, may be to doe any lawfull or poſſible thing, as to pay money, deliver goods or Cattell, acknowledge a Statute, enter into an Obligation, make a Releaſe, make an eſtate, ſurrender an eſtate, make reparations, for quiet enjoying, to ſave harmleſſe, to defend a title, to performe Covenants, to abide an Award, to performe a Will, to give ſo much land or money in legacy, to purchaſe lands, to appeare in a Court, to marry another, not to ſue, not to meddle with an Executorſhip, not to revoke a Letter of Atturney, not to be Surety, not to play at cards or dice, or any ſuch like thing; and ſuch a condion is good. So alſo it ſeemes a condition, that a man ſhall not ſell his goods, is good: But when the matter or thing to be done by the condition is unlawfull or impoſſible, or the condition it ſelfe is repugnant, inſenſible, or incertaine, the condition is voyd. and in ſome caſes the Obligation alſo. And herein theſe differences are to be obſerved. Secondly for matter and ſubſtance of it.

Paſche 8. Ia. Co. B.

Coo. 10. 101 11. 53. ſuper Litt. 206. Dyer. 304. Plow. 64. Fitz. Obligation, 13 See before in Condition and in Covenant. 1. When the thing enjoyned, or reſtrained to be, or not to be done by the condition, is ſuch a thing in his own nature, as the comiſſion or omiſſion thereof, is *malum in ſe*, there not only the Condition, but the whole Obligation alſo is voyd *ab initio*: And therefore if one be bound in an Obligation with condition that he ſhall kill a man, burn a houſe, doe any other Felony, commit any Treſpaſſe, maintain any Suit unlawfully; or (being an Officer) that he ſhall take Fees by extortion, or that hee (being a Sheriffe &c.) ſhall let a Priſoner eſcape, or that he ſhall ſave the Obligee harmleſſe againſt an unlawfull Deed, or that hee ſhall not ſave his land, or that he (being a Tradeſman) ſhall not uſe his Trade, (and yet it ſeemes a condition, that a man ſhall not uſe his Trade in one place, or at one time, or if he doe that, he ſhall pay ſo much by the year unto another, is not Againſt Law.

a condition againſt Law,) or that a man (being an Officer & an Officer *pro bono publico*) ſhall not exerciſe his Office, or the like; this condition is voyd, and makes the Obligation and ſo the whole Deed voyd. But when the thing to be, or not to be done by the condition, is ſuch a thing as the omiſſion or commiſſion thereof in its nature is not *malum in ſe*; but only againſt ſome maxim of Law, as that a man ſhall make a Feoffment to his own wife, or is but *malum prohibitum* only, as that a man ſhall erect a Cottage contrary to the Statute of 31 *Eliz.* or is repugnant to the ſtate, as that a Feoffee of Land ſhall not alien it, or take the profits of it, or that a Tenant in Taile ſhall not ſuffer a Recovery of his Land, or the like; in theſe caſes the conditions only are voyd, and the Obligations remaine ſingle and without a condition. And yet perhaps if the Obligors be ſued upon theſe Obligations, they may have reliefe in equity.

Equity.

Impoſſible.

2. When the matter or thing to be done by the Condition, is ſuch a thing as in its nature is impoſſible to be done at the time of the making of the Obligation, there the Obligation is good, and the Condition only is voyd. And therefore if I be bound in an Obligation with Condition, that I ſhall ſtand to the Award of certain perſons &c. provided that the Award be made before the tenth day of *May* next, and provided that I have warning 15 dayes before the 10th of *May*, and this Obligation is made the 9th day of *May*; this is a voyd Condition: And ſo if I be bound in an Obligation with condition, that I will goe to *Rome* within three dayes, or that I will make an eſtate of white acre in Dale worth 10l. *per annum*, when *reverâ* it is worth but 5l. *per annum*, or that I will bee non-ſuit in ſuch an Action, or aſſure ſuch a piece of ground, when in truth there is no ſuch Action, or piece of ground; this condition is voyd, and the Obligation remaines ſingle and good. So if the condition be, That whereas *A* had a judgement againſt *B* the Obligor for 20l. and the Obligee hath acknowledged ſatisfaction, if therefore the Obligor ſhall before ſuch a day get a Warrant from *A*, whereby the Obligee may be ſaved harmleſſe for the ſame acknowledgement, That then &c. this condition is voyd, and as it ſeemes, the Obligation alſo, for that it is not only impoſſible, but againſt Law alſo. But when the thing to be done by the condition, is a thing poſſible at the time of the making of the Obligation, and after by matter *ex poſt facto* by the Act of God, the Act of the Law, or the Act of the Obligee, it is become impoſſible; in this caſe the Obligation and the Condition both are become voyd: And therefore if a man be bound with a condition, that he ſhall appear the next Tearm in ſuch a Court, and before the day the Obligor dieth; hereby the Obligation is ſaved. So if *A* be bound to *B*, that *I S* ſhall marry *Jane G* by ſuch a day, and before the day, *B* himſelfe marry with *Jane G*, hereby the Obligation is diſcharged, and *B* ſhall never take advantage of it.

Perk. Sect. 735. Coo. ſuper Litt. 207. Fitz. Oblig. 17. 27 H. 8. 29. 21. Ed. 4. 54. 42. Ed. 3. 6.

Hill. 17. Iac. B. R.

21 Ed. 4. 53.

3. When

3. When the Condition of an Obligation is ſo inſenſible and incertaine, that the meaning cannot be known, there the Condition only is void, and the Obligation good: As if an Obligation bee made by *A* to *B* with condition, that *A* ſhall keep *B* without dammage againſt *I S* for 10l. in which the Obligee is bound to the Obligor; this Condition is void, and the Obligation ſingle. * So if the Condition be, That *A* ſhall pay his part of the ſummes of money, that ſhall be levied for the trying of the Cuſtomes of *M*; unleſſe the word [levied] be uſed for taxed in that Countrey, the Condition is inſenſible and void. So if *A* be bound to *B* with Condition to ſave him harmleſſe, and ſay not for what, or againſt whom; this Condition is void and the Obligation ſingle: But if any ſenſe or certainty may be made of it, the Obligation and Condition ſhall be both good.

Inſenſible. Incertaine.

* Paſche 9. Iac. B.R.

7 H. 6. 44. 21. H. 7. 24. 30.

4. When the Condition of an Obligation in the matter of it is repugnant to the Obligation it ſelfe, there the condition is void, and the obligation good: And therefore if the condition of an obligation be, that the Obligee ſhall not have benefit by the obligation, or that he ſhall not ſue for the money in the obligation, or the like; this condition is void, and the obligation ſingle: And yet this by a Defeaſance made after the obligation may bee done.

Repugnant.

See Defeaſance.

10 H. 6. 14. 21. Ed. 4. 10. * Trin. 7. Ia. B.R.

5. When the thing to be done, by the condition is to be done beyond the Sea, it hath been held that the condition is void, and the obligation ſingle, becauſe the thing was not triable here. * But it ſeemes the Law is otherwiſe now, and that the matter is triable here and the condition good. And in all other caſes where a Deed in generall is void for Miſnoſmer, diſability, or otherwiſe, there an obligaition is void.

Not triable.

Fitz. Oblig. 2. 11.

All Bonds with conditions for the enjoying of ſpirituall livings contrary to the Statute of 13 *Eliz. Chap.* 20. are void by the Statute of 14 *Eliz. chap.* 11.

If any Ladyes or Gentlewomen be drawen by flattery, of threatning to enter into any Obligation ſimple or conditionall, to pay any money not truly due, they may be relieved by a courſe in the Chancery, for which, ſee the Statute of 31 *H. 6. chap.* 39.

Stat. 23 H. 6. chap. 10.

No Sheriffe or his Officers ſhall take any Obligation, by colour of their offices of any perſon in their ward, but only to themſelves, and in the name of their office, with condition with ſureties ſufficient, that the Priſoner ſhall appear at the day in the Writ. And all others taken in any other forme ſhall be voyd. And perſons that are in his ward, by Execution, Condemnation, *Capias utlagatum*, Excommunication, Suretie of the Peace, or ſome other ſpeciall caſe, being ſent for by a Iuſtice for Felony or the like, may not be bailed: and others that are arreſted on a *Capias* for Debt, or an

5. When an Obligation ſhall be void, for that it is made to another, & not to the Sheriff, or to the Sheriff in another manner then is appointed by the Stat. of 23. H. 6. ch. 10.

Indictment, or otherwiſe by Writ, Bill, or Warrant that are mainpernable, muſt be bailed. For the bettter underſtanding of which Statute, theſe things muſt be obſerved; That ſuch Obligations as differ and vary from the forme of this Statute in words and circumſtances only are good, notwithſtanding this Statute. a And therefore if a Priſoner make an Obligation with a condition to appear and anſwer in a plea of debt, and ſay no more, nor do ſet down the cauſe of the debt, this is a good Obligation. And if the Sheriffe take an Obligatiou with one ſurtie only, or with two ſureties that are inſufficient, or with two ſureties of another County; this is a good Obligation. So if the debt for which the party is arreſted be 300l. and the Sheriffe take an Obligation of 100l. for his appearance; this is a good Obligation, for in theſe caſes it is left to his diſcretion, and it doth concern him only. So if the condition of the Obligation be for appearance *Menſe paſche*, omitting *proximè futurum*, yet is is a good Obligation. So if the party be arreſted by an Attachment out of the Starre-Chamber upon a contempt, and the condition of the Obligation is, that if the Obligee ſhall appeare, and then, and there ſhall anſwer a contempt by him committed againſt the King and his councell, this is a good Obligation. And if the party that doth make the Obligation be not in the Sheriffes cuſtody, albeit the Obligation be made in any other manner eſſentially differing from the forme preſcribed in the Statute, if it be not againſt the common Law, it is a good Obligation. And therefore if when a *Capias utlagatum* be delivered to the Sheriffe againſt a man, the Sheriffe take Bond of him for his fees, and his travaile; this Bond if it be not within this Statute, yet it is againſt the common Law, and therefore voyd, becauſe it is by colour of Extortion. But where the Obligation, whether it be ſingle, or double, made by a priſoner, doth eſſentially differ by addition, alteration, or diminution from the form preſcribed in the Statute, there the Condition and Obligation both are voyd. And therefore if ſuch a Priſoner make an Obligation to any other beſides the Sheriffe, albeit he to whom it be made be called Sheriffe, or if he make an Obligation to the Sheriffe himſelf, and not by the name of his office; or if he make an Obligation to him by the name of his office, and doth not rightly name him, * as if he make it to *I S vicecomiti in Comitatu prædicto*, whereas it ſhould be *de Comitatu prædicto*; all theſe Obligations are voyd by this Statute. And if the Sheriffe take an Obligation of a priſoner for his appearance, in caſe where he is not bailable by the Statute, and ſo let him goe free; or if he take an obligation of a priſoner that is bailable for his appearance, and doth inſert other things into the condition, as to pay money for meat, drink, or fees, or the like; or if he deliver a man in execution, and take bond of him to ſave him harmeleſſe, or to be

a Villars caſe M. 9. Iac. B. R.

Coo. 10. 101

Villars caſe.

Dyer 364.

Antleys caſe Hill. 7. Iac. Co. E.

Coo. 10. 101.

* Nowels caſe Trin. 21. Iac. Curia.

be a true priſoner; all theſe and ſuch like obligations as theſe are voyd by this Statute. If a man be a priſoner in Ludgate upon a
Dyer 118. 119. *Capias utlagatum*, and the Gaoler take an obligation of him with two ſureties, with condition to ſave him harmeleſſe, and to diſcharge his fees, and to yeild his body at all times upon Summons &c. this is a voyd obligation, aſwell againſt the ſureties, as againſt the principall. If the under-Marſhall of the Kings Bench take an obligation of one in execution and a ſtranger with condition to ſave him harmleſſe of all eſcapes, and ſo ſuffer the priſoner to goe at large, this is a voyd obligation. If the Sheriffe of Bedford having a priſoner by
Dyer 324. Plow. 61. 62 force of an execution, let him goe at large, and take an obligation of him, with condition that he ſhall keep the Sheriffe without damage againſt the King and the Plantiffe, and be at all times at the commandement of the Sheriffe as a true Priſoner, and appear before the Iuſtices of the King at *Weſtminſter* &c. this is a voyd obligation.

Pit. Oblig. 4. If a man be a priſoner to the Sheriffe for ſuſpition of Felony, and after a writ comes to him to have all his priſoners at a certain day before the Iuſtices of Goale delivery of the ſame County, and thereupon the Priſoner doth make a ſingle obligation to the Sheriffe to appear before the Iuſtices the day of the writ; this is a voyd obligation, becauſe it is ſingle and not with condition. And if the Sheriffe baile not one bailable by a ſingle obligation, it ſeemes this is a voyd obligation.

6 How a ſingle Obligation ſhall be taken. A ſingle obligation is alwayes taken moſt in advantage of the obligee and againſt the obligor, but it is otherwiſe of the condition of an obligation, for this is alwayes taken moſt in advantage of the obligor, and againſt the obligee.
10. H. 7. 1. 16.

Ioint and ſeverall. If two, three, or more bind themſelvs in an obligation thus, *Obligamus nos* and ſay no more, the obligation is and ſhall be taken to be joint only, and not ſeverall; but if it be thus, *Obligamus nos & utrumque noſtrum*; or *obligamus nos & unumquemque noſtrum*; or *obligamus nos & quemlibet noſtrum*; or *obligamus nos & alterum noſtrum*; in all theſe caſes the obligation is both joint, and ſeverall, ſo as in theſe caſes the obligee may ſue all the obligors together, or all of them apart at his pleaſure, but it ſeemes he may not ſue ſome of them and ſpare the reſt, but he muſt ſue them altogether, or all apart by ſeverall *Precipes*, and in this caſe he may have ſeverall judgements and ſeverall executions againſt the obligors, and take all their bodies in execution, but he ſhall have ſatisfaction but once, or from one of them only, for after he hath been ſatisfied by one, the reſt ſhall be diſcharged. But in the firſt caſe where the obligation is joynt and not ſeveral, the obligee muſt ſue all the obligors together, for he cannot ſue one alone with effect without the reſt, unleſſe it be in ſome ſpeciall caſes, as where one of the obligors alone doth ſeale the Deed, or where all of them do ſeale, but one of them is an Infant, a woman covert, a monk, or the like,
Dyer 19. 310 Coo. 5. 119. 9 53. old N. B. 62. Broo. Iointennancy 4. 16. Dec. 69.

or where one of them is dead, for in theſe caſes one or ſome of them may be charged without the reſt. But otherwiſe the Plantiffe cannot proceed in his ſuit againſt one, or ſome of them without the reſt, except the defendant give him advantage, for howſoever the Suit be well begun, for when one or ſome of them alone is, or are ſued, * it ſhall not be intended that the reſt are living, untill it be ſhewed by the other party, yet the defendant is not bound to anſwer, unleſſe the reſt be ſued alſo; and therefore in this caſe he or they that is or are ſued alone, are thus to take advantage of it. *Viz.* to ſhew the matter to the Court, and to plead in abatement of the writ; for if hee appear and ſhew it not, but plead *non eſt factum*, or the like to the obligation, the Iury muſt find againſt him, and he will be charged with the whole debt. And ſo alſo if one appear, and the other make default and is outlawed, it ſeemes he that doth appear muſt anſwer all.

* Hill. 39. Eli. B. R. adiudged.

Executors. Executors and Adminiſtrators ſhall be bound by the obligation of the obligor, albeit they bee not named: but the heir of the obligor ſhall not be bound by the obligation, unleſſe he be named in the obligation, *viz. obligo me, hæredes &c.*

Dyer 14. 27.

Heire;

If an obligation be made to one and his heires, or to one and his ſucceſſors; the Executors and Adminiſtrators, not the heire, or ſucceſſor, ſhall take advantage of it.

See before.

If one binde himſelf in an obligation of 200l. to *A* and *B*, *ſolvend.* 100l. to *A* and 100 to *B*. and *A* die, it ſeemes the executors of *A* ſhall not have 100l. but that *B* ſhall have the whole 200l. *ſed quære.*

Dyer 350.

For the time of paiment. If one binde himſelf by obligation to *I S* to pay him an 100l. when *K* doth come to his houſe, and at Michaelmas then next following 100l. more; Michaelmas then next following ſhall be taken for next following the making of the obligation, and not next following the comming of *K* to his houſe.

Broo, Obli. 59.

If one binde himſelf to pay money upon a ſingle obligation, and doth not ſay when; in this caſe it muſt be paid preſently.

Dyer 128. pec. 3. Iuſtices Trin. 22. Iac. Co. B.

If one bind himſelf by obligation to pay mony at Michaelmas, and doth not ſay which Michaelmas; this ſhall be taken for Michaelmas next after the date of the obligation; And ſo alſo it ſhall be taken in the condition of an obligation.

Curia in the Marches of Wales Trin. 8. Car.

7 How an Obligation with a Condition, or the Condition of an Obligation ſhall bee taken. And how it muſt and ought to be performed.

If one bind himſelf to pay 20l. in the yeare of our Lord which ſhall be 1599. in and upon the thirteenth of October next enſuing the date of the obligation; this ſhall be taken to be due the 13 of October 1599. and not next after the obligation. See more *infra.*

Agree M. 9. Ia. B. R.

Hill 37. Eli. B. R. Sharplus verſus Hauckington.

The condition of an obligation when it is doubtfull, is alwaies taken moſt favourably for the obligor, in whoſe advantage it is made, and moſt againſt the obligee, yet ſo as an equall and reaſonable conſtruction be made according to the minds of the parties, albeit the words ſound to a contrary underſtanding.

Dyer 14. 51.

If ſomethi ng be by a condition to be done, and it is ſet down indefinitly, and not ſet down who ſhall do it, if the obligee hath more skill to do the thing then the obligor, it ſhall be done by him; otherwiſe it ſhall be done by the obligor: as if a Tailor be bound to me in an obligation with condition, that if I bring him three yards of cloth which ſhall be meaſured and ſhaped, and if he make me a Cloak of it &c. and it is not ſaid by whom it ſhall be ſhaped, this muſt bee done by the Tailor.

Perk. Sect. 785.

First in reſpect of the perſons that are to doe the thing.

If the condition of an obligation be to pay money, or do any other tranſitory act to the obligee himſelf, and no time is ſet for the doing thereof, but a place only; this regularly muſt be done in convenient time, and that without requeſt. So alſo in caſe where the thing to be done is in its nature locall, but yet ſuch a thing as may be done in the abſence of the obligee, and without his concurrence, as to acknowledge ſatisfaction on a Iudgement, make a leaſe for yeares or the like, it muſt be done in convenient time and that without requeſt. So alſo in caſe where the thing to be done is locall, and the concurrence of both parties neceſſary thereunto, yet when it is to be done to a ſtranger and not to the obligee, as if the condition be that the obligor ſhall make a Feoffement to *I S*, it muſt be done in convenient time without requeſt. But where the thing to be done is locall, and the concurrence of both parties neceſſary thereunto, and the act is to be done by the obligor himſelf, or by a ſtranger to the obligee himſelf, as where the condition is that the obligor, or a ſtranger, ſhall infeoffe the obligee; in this caſe the obligor, or the ſtranger ſhall have time to do it during his life, unleſſe the obligee do haſten it by requeſt, and if he requeſt it ſooner, then it muſt be done in convenient time after requeſt made. And yet if the thing to be done, be to be done wholy by the obligor, or a ſtranger, and doth nothing concern the obligee, as where the condition is that the obligor ſhall goe to *Rome*, or that *I S* ſhall preach at *Pauls* croſſe, or the like; in the firſt caſe it may be done at any time during the life of the obligor, and in the laſt caſe it may bee done at any time during the life of *I S*; and requeſt in this caſe ſhall not haſten it.

Coo. ſuper Litt. 208. a. 79. 80. 9. Ed. 4. 22. 9. H. 7. 16.

Secondly in reſpect of the time when the thing is to be done.

If an obligation be with condition to grant a rent, or an annuity to the obligee during his life, to be paid at Eaſter, and no time is ſet for the doing of it; this rent muſt be granted before Eaſter next after the obligation, or elſe the obligation will be forfeit. And if the condition be to grant an Advowſon, and no time is ſet for the doing thereof; it muſt be done before the Church become voyd, or otherwiſe the obligation ſhall be forfeit.

Coo. 2. 80. ſuper Lit. 80.

If the condition be to do a thing upon a day in the yeare, and there be two daies of that name in the yeare; in this caſe it ſeemes it muſt be done that day that is furtheſt of from the time of the making of

Dyer 77.

the

the obligation, especially if that day be the more notorious of the two dayes.

If the condition be to pay 10l. the eleventh of *May* next following, and the obligation is dated the 5th of *May*; in this case the money must be paid the 11th day of the same Moneth of *May*, and not of the next Moneth of *May*. Adiudg. M. 20. Iac. B. R. Prescots case.

If the condition be to stand to the award of *I S*, and *I S* award money to be paid, but set no time for the payment of it; this must be paid in convenient time, else the obligation shall be forfeit. 22 Ed. 4. 15.

If one be bound to me in an obligation with condition, that if I enfeoffe him of White acre, he will pay me 10l. but doth not say when; this must be done assoon as I make him the feoffement. So if one be bound to me that if the goods I have delivered to *B* shall be lost, that *C* shall satisfie me for them, and doth not say when; this shall be presen tly after the looſing. Perk. Sect. 797, 799.

If the condition be to pay *I S* money when he shall come to the age of 21 yeares; in this case it must be paid the very day *I S* doth come to his full age, and paiment after is not a sufficient performance of the condition. M. 2. Iac. B. R. Crausdenet Morses case.

If the condition be to come at a day to such a place to do a thing, and the thing cannot be done without the concurrence of the other partie; in this case the obligor must stay for the very last instant of the day for his comming; and it seemes also he must stay at the place all the day long. 39 Eli. B. R. Fitz. Barre 92.

If the condition be to pay a rent at Mich. or within 20 dayes after, the obligation is not forfeit before the 20 dayes be past. Adiudg. pas. 39 Eli.

If one be to doe a thing on a day certaine, he may doe it any part of the day whiles the light doth last: And if the condition be to doe a thing by, or before a day, it may be done the last instant of the day before, and it is sufficient. Broo. Condition 145. Dyer 17. 7. Ed. 4. 3.

3. In respect of the place where the thing is to be done.

If the condition of an obligation be to pay money, or doe any like transitory act to the Obligee on a day certaine, but no place is set down where it shall be done; in this case it must be done to the person of the Obligee whereſoever he be; and for this purpose, the Obligor must at his perill seek out the Obligee, if he be *intra quatuor maria*, otherwise the obligation is forfeit; but if the Obligee be not within the Kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing. So if one grant an Annuity to another, and doth not set down where it shall be paid, and gives a Bond with condition for the payment thereof; in this case it must be done to the person of the Obligee where ever he be: And the like Law is as it seemes, where the thing to be done by the condition, is to be done by or to a stranger: But when the thing the party is bound by the condition to doe is locall, he is not bound to goe any further Perk. Sect. 780, 781. 7 Ed. 4. 4. 22 Ed. 4. 25. Lit. Sect. 340, 341.

ther, or to any other place, but to the place it ſelfe: And therefore if the condition be to make a Feoffment of a piece of Land, the party that is bound to doe it, is not bound to goe to any other place, but to the piece of land to doe it: And if a man make a Feoffment in Fee, or Leaſe for life or years of land, rendring rent generally, and gives an obligation with condition for the payment of the rent, the Feoffee, or Leaſſee, is not bound to goe to any place from the land to ſeek the Feoffor or Leaſſor to pay him this rent.

Perk. Sect. 785. If the condition be, to deliver 20 quarters of corn ſuch a day to the Obligee, and no place is ſet down where it ſhall be delivered; in this caſe it is ſufficient, if the Obligor when the corn is ready, doe give notice thereof to the Obligee, and to wiſh him to appoint a place whereunto the Obligor may bring it, and if he refuſe to appoint a place, it is at his own perill; or the Obligor may bring the corn to the houſe of the Obligee (and this is the ſafeſt way) and if the Obligee refuſe it, the condition is performed, and the obligation is diſcharged.

Coo. 4. 80. Dyer 257. If the condition be, to performe all the Covenants in an Indenture; this ſhall bee taken as well for the Covenants in Law as for the Covenants in Deed.

4. In reſpect of the thing it ſelf to be done.

Plow. 67. If a Leaſe be made of a Mannor excepting a Cloſe, and the Leaſſee make an obligation to the Leaſſor with condition, that the Leaſſee ſhall perform *omnia & ſingula in ſcripto prædicto contenta*; by this the Cloſe ſhall be taken to be within the condition, ſo that if the Leaſſee diſturb the Leaſſor in the Cloſe excepted, this ſhall be a of breach the condition.

To perform Covenants.

See Covenant. Num. 6. If the condition be, to make a Feoffment to the Obligee of Land; in this caſe the Feoffment may be made with, or without writing, and if it be made by writing, it may be made without any warranty or Covenants, and this will be a ſufficient performance of the condition.

To make a Feoffment, Leaſe &c.

Coo. 6. 33. If the condition be, That the Obligor ſhall make a Leaſe to the Obligee for 20 years, and it is not ſet down when the Leaſe ſhall begin, it ſhall begin preſently.

Dyer 218. If the condition be, That the Obligor ſhall doe any act upon requeſt that the counſell of the Obligee ſhall think reaſonable, as for example, ſhall doe any act &c. for the releaſing of an obligation, wherein the Obligee is bound to the Obligor, and the Obligee by adviſe of Counſell deviſeth and requeſteth a releaſe of all demands to the Obligee, and to *I S*; in this caſe the Obligor may refuſe to ſeale it, albeit it be deviſed by the counſell of the Obligee, becauſe it is unreaſonable, for it muſt be a reaſonable act that the Obligor by this condition is bound to doe.

To make a Releaſe, or other aſſurance.

Adiudg. Hil. 39 Eli. Co. 8. If the condition be to pay 10l. at Michaelmas next, and 10l. yearly after, untill *I S* be made Knight; in this caſe albeit *I S* bee made

To pay money or rent.

made Knight before Michaelmas, yet the firſt 10l. at Michaelmas muſt be paid.

If the condition bee thus, That if the Obligor ſhall for ever pay yearly to the Obligee &c. 10l. at the two uſuall Feaſts by equall portions, or if his heires ſhall at any time hereafter pay 100l. at one payment to the Obligee, that then the Obligation to be void; in this caſe albeit the Obligor hath election, which of theſe two things to doe; yet becauſe the intent is apparant that one of theſe things ſhould be done, if therefore the 100l. be not paid before the firſt Feaſt, the 10l. muſt be paid yearly. Adiudge M. 18. Iac. B. R. Harbert verſus Rockſey.

To warrant land and for quiet enjoying.

If the condition of an obligation from *A* to *B* be thus; That whereas *A* hath ſold to *B* certaine Meadow in Dale, that the ſaid *A* ſhall warrant the ſame againſt Lord and King and all others, if the ſaid *B* ſhall peaceably enjoy it to him, and his heires of the Lord of the Manner of *M*, by the ſervices due after the cuſtome &c. in this caſe the ſubſtance of this being for quiet enjoying, it ſhall be extended that way, and albeit it be not ſaid what he ſhall warrant, yet it ſhall be taken the Land in queſtion, and the warranty ſhall be conſtrued to laſt only for the life of *B*, and not to extend to any new titles after the Covenant, eſpecially ſuch as are by the act and default of the Obligee himſelfe, as if he commit a forfeiture and the Lord enter, or the like. Dyer 42. 43.

To prove a thing.

If the condition be, That the Obligor ſhall ſufficiently prove ſuch a thing; this ſhall be taken for proofe by enqueſt and accordingly it muſt be done: But if the condition be that it ſhall be done by ſuch a time, or before ſuch perſons as when or where ſuch proofe cannot be had, then it is otherwiſe. Where the word [proofe] is put generally, it ſhall be underſtood of proofe by Iuſtice; but when the parties agree upon another form of proofe, that ſhall prevaile againſt that which is but inſtruction of Law. Perk. Sect. 791. 10. Ed. 4 11. Golds caſe in Harberts Rep. 127.

To ſuffer his wife to make a Will.

If one be bound in an obligation with condition to ſuffer his wife to give to her kinſfolks, children, or others portions of his goods to the value of 100l. and that he will perform it, and ſhe give part to one and part to another; in this caſe the husband muſt performe it accordingly: But if the condition be to ſuffer her to give to *A* and *B* 100l. and that he will perform it, and ſhe give 100l. to *A*, he is not bound to perform this. Curia Trin. 7. Iac. Co. B.

If the condition be, That hee ſhall perform his wives Will, ſo it doe not exceed 20l. and ſhee make a Will and deviſe 100l. in this caſe hee is not bound to perform the Will for the 20l. Adiudg. Hil. 7. Iac. B. R.

5. In reſpect of the manner and order of doing the thing and other matters.

If the condition of an Obligation be, That the Obligor ſhall infeoffe the Obligee, and ſuch others as he ſhall name by a day; in this caſe the Obligee muſt doe the firſt act, *viz.* name the others; otherwiſe the Obligor doth not forfeit his obligation by the not doing of it: But if the condition be to infeoffe me, or ſuch others as I ſhall Kelw.

name

name before ſuch a day; in this caſe if I doe not name others, it ſeemes he muſt enfeoffe me before the day at his perill.

Coo.5.25.7. Ed. 4. 13 Perk. Sect. 775. If the condition be, that the Obligor ſhall make ſuch an eſtate of Land as *I S* ſhall adviſe, *I S* muſt firſt adviſe, and this muſt be made known unto the Obligor ere he is bound to doe any thing, and if he never adviſe, he is never bound to doe any thing; for it is in this caſe, as if one bee bound to ſtand to the award of *I S*, and *I S* never make any, or make a void award which is all one.

Coo. 5. 23 If the condition be, to make ſuch a diſcharge in ſuch a Court as the Obligee or his counſell ſhall adviſe; in this caſe the Obligee muſt doe the firſt act, *viz.* adviſe and give notice of the adviſe to the Obligor before he is bound to doe the thing. But if the condition be to make ſuch a diſcharge in ſuch a Court ſuch a day, as the Judge of that Court ſhall adviſe, in this caſe the Obligor muſt at his perill procure the Iudge to adviſe a diſcharge, and it muſt be done that very day or the obligation will be forfeit.

Per. Iuſt. Nichols, M. 13 Ia. Co. B. If the condition be, to pay 20 l. to the Obligee when he doth come to *London*; in this caſe, the Obligee muſt doe the firſt act, *viz.* make known to the Obligor when he doth firſt come to *London*, for otherwiſe, it ſeemes the Obligor is not bound to pay the money.

Coo.5.127 Dyer 371. If the condition be, that the Obligor ſhall levie a fine to the Obligee before ſuch a day, the Obligee muſt doe the firſt act, *viz.* ſue out the Writ of Covenant.

21 Ed.4,52 If the condition be, that the Obligor ſhall deliver 20 Clothes to the Obligee ſuch a day, the Obligee paying for every cloth immediately after the delivery 20 l. in this caſe the clothes muſt bee delivered, albeit the Obligee refuſe to pay the money; but if [immediately after] be left out, it ſeems the Obligor is not bound to deliver the cloth unleſſe the Obligee firſt pay the money.

Coo.2, 3, 4 Dyer 337. If the condition be, that the Obligor and his heires ſhall at any time upon requeſt made, doe any act &c. that the Obligee ſhall require &c. and the Obligee tender a Releaſe or other Deed to ſeale; in this caſe, if the Obligor, or his heir that is to ſeale the Deed, be an illiterate man, he may refuſe to ſeale it, untill he can get ſome body to read it unto him, but he may not refuſe or delay to ſeale it untill he can have a Lawyers adviſe upon it, but he will forfeit his Obligation.

Perk. Sect. 773. Coo. 5. 21. If the condition be, to doe any thing upon requeſt, the Obligor untill requeſt made is not bound to doe any thing towards it, neither can he forfeit his obligation till then. And yet if in this caſe, the Obligor diſable himſelfe to doe the thing he hath undertaken to doe upon requeſt before the requeſt made the obligation may bee forfeit without any requeſt made.

If the condition be, that the Obligor ſhall within a certaine time ſurrender ſuch land of his for an Annuity, of ſo much as they ſhall agree upon, and they agree upon 10 l. *per annum*; in this caſe the Obligor is not bound to make the ſurrender untill the Annuity be made and tendred unto him. 14 H. 8.

If the condition bee, to deliver to the Obligee an obligation wherein the Obligee is bound &c. or to ſeale and deliver to the Obligee ſuch a Releaſe of it as ſhall be deviſed by the counſell of the Obligee before Michaelmas, and the counſell doe not adviſe any Releaſe before Michaelmas; in this caſe the Obligor is diſcharged of the obligation, for the Obligee is to doe the firſt act. Hil. 37. Eliz. Co. B. Greeninghams caſe adiudg.

If *A* be bound to *B*, in an obligation with condition that *A* and his wife ſhall levie a fine of land to *C* and *D* and their heires, and at their coſts and charges; this ſhall be conſtrued to be at the coſts of the Obligor, and not at the coſts of the Conuſees, but if the word [and] be omitted, perhaps it may be otherwiſe. Trin. 4. Iac. B. R.

If the condition be thus, That if the wife die before Michaelmas without iſſue of her body then living, that the obligation ſhall bee void; in this caſe [then living] ſhall relate *ad proximum antecedens*, and not to the death of the wife, and therefore if ſhe hath iſſue and die, and after before Michaelmas the iſſue dyeth alſo, the obligation is void. Dyer. 17.

If the condition be, that if the Obligor ſhall waſte the goods of the Obligee (his maſter) and this waſte within three Moneths after due proofe of it, either by confeſſion or otherwiſe bee notified to the Obligor, that the Obligor ſhall ſatisfie the Obligee for it, and the Obligor doe confeſſe the waſte under his hand and ſeale; in this caſe, it ſeemes this proofe though it be *extrajudiciall* is ſufficient. Golds caſe, M. 13. Ia.

Conditions Impoſſible.

When the condition of an obligation is to doe two things by a day, and at the time of making of the obligation both of them are poſſible, but after and before the time when the ſame is to be done, one of the things is become impoſſible by the act of God, or by the ſole act and laches of the Obligee himſelfe; in this caſe the Obligor is not bound to doe the other thing that is poſſible, but is diſcharged of the whole obligation. But if at the time of the making of the obligation one of the things is, and the other of the things is not poſſible to be done, he muſt perform that which is poſſible. And if in the firſt caſe one of the things become impoſſible afterwards by the act of the Obligor, or a ſtranger, the Obligor muſt ſee that he doe the other thing at his perill. And when the condition of an obligation is to doe one ſingle thing which afterwards before the time when it is to bee done doth become impoſſible to be done in all or in part, the obligation is wholy diſcharged; and yet if it bee poſſible to be done in any part, it ſhall be performed as neare to the condition as may be. Coo. 5. 22. ſuper Lit. 207. Dyer 262. 15 H. 7. 2. 4 H. 7. 4.

If

21 Ed. 3. 29

If the condition be, to doe one of two things, as to make a feoffment to me, or pay me 20 l. in this caſe, if the obligor doe either of them, it is ſufficient. But if the condition be in the copulative, as to enfeoffe me and pay me 20 l. in this caſe, the doing of one of them will not ſuffice, but he muſt doe both.

Per. Iuſtice. Dodridge M. 2. Car. B. R.

If the condition be, to pay to *A B* and *C* 30 l. a peece within a week after they come to 18 years of age, or within 40 dayes after their dayes of marriage after notice given thereof, which ſhall firſt happen; in this caſe, this notice muſt goe to both the parties, ſo that notice muſt be given when they are 18 years of age; otherwiſe, and untill notice given, it ſeemes the obligor is not bound to pay the money. See more in *Condition Numb.* 8. and *Covenant Numb.* 6.

8. When the Condition of an Obligation ſhall be ſaid to be performed and the Obligation ſaved, or not.

The matter of a condition of an obligation is ſometimes affirmative and compulſory, and doth conſiſt of ſomething to be done, and ſometimes it is negative and reſtrictive, and doth conſiſt of ſomething not to be done; the not doing in the firſt caſe, and doing in the latter caſe cauſeth the obligation to bee forfeit; and the doing in the firſt caſe, and not doing in the latter, ſaveth the obligation.

Coo. ſuper Lit. 207. plow. 67. 27 Ed. 4. 3.

To make a feoffment.

If one be bound in an obligation to me, with condition to enfeoffe me of land, and the obligor doe firſt make a Leaſe to me of it, and afterwards he doth make a Releaſe of it to me and my heires; this is a good performance of the condition.

Perk. Sect. 784. Fitz. Barre 82. Perk. Sect. 758. 15 Ed. 4. 5.

Tender and Refuſall.

If a condition be to make me a feoffment of land, and he tender me a feoffment, and I refuſe it; by this the condition is performed. So if the condition be, to make a feoffment to my uſe, and when it is is made I refuſe it; this is a good performance of the condition. But if a man bind himſelfe in an obligation to me, with condition to make feoffment to a ſtranger, and hee tender the feoffment to the ſtranger, and he doth refuſe it; this is no good performance of the condition, but the obligation is forfeit. If the condition be, to enfeoffe me and my wife, and he tender it to me, and I refuſe it; it ſeemes this is a good performance.

3 H. 7. 4. 4 H. 7. 4. Perk. Sect. 757.

If one bind himſelfe in an obligation to me, with condition to make me a feoffment of the Mannor of Dale by a day, and he before the day, grant a rent-charge out of the ſame Mannor to a ſtranger, and afterwards and before the day alſo, he doth make me a feoffment of the land; this is a good performance of the condition, and the grant of the rent no breach thereof. But if the obligor ſell away part of the Mannor before, or make a feoffment to me but of a moity, or a third part of the Mannor; this is no good performance of the condition. And if in this caſe, the obligor before the day take a wife, and before the day make his feoffment according to the condition, but the marriage doth continue untill after the day; in this caſe, it ſeemes the condition is broken.

If

Acceptance.

If the condition be, that the obligor ſhall enfeoffe me of the Mannor of Dale, and hee make a feoffment of the Mannor of Sale, and I accept thereof; it ſeemes this is no performance of the condition, and that my acceptance in this caſe will not help. So if the condition be to make me a feoffment of land, and he give me mony, a horſe, or the like in recompence of this, and I accept thereof; this is no good performance of the condition: And the like Law is in all caſes where the condition is to doe any collaterall thing, as to account, build a houſe, enter into a Recogniſance, or the like, and the obligor doth give, and the obligee accept ſome other thing in liew thereof: And ſo alſo it is where the condition is to make a feoffment to a ſtranger, and the obligor give, and the ſtranger take another thing in liew thereof: But if the condition be to enfeoffe me of land ſuch a day, and he make, and I take the feoffment before the day; this is a good performance of the condition. Perk. Sect. 749, 759. Dyer 1. Perk. Sect. 751, 9. H. 7. 1. 3 H. 7. 4, 27. H. 8. 1. 14. H. 8. 15. 10. H. 7. 14.

If the condition be to enfeoffe me or my heirs in the diſjunctive, and the obligor enfeoffe me and my heires; this is a good performance of the condition; for it is impoſſible to enfeoffe my heirs whiles I live, and when two things are to be done by a condition, whereof the one is poſſible at the time of making the obligation, and the other is not; in this caſe it is ſufficient if he doe the thing which is poſſible. 14 H. 8. 15. Coo. 5. 112.

If the condition be, to make me a feoffment, or pay me 20 l. if the obligor doe either of them, it is ſufficient. But if the condition be to infeoffe me, and pay me 20 l. in this caſe the obligor muſt do both, or the condition will not be performed, *Et ſic de ſimilibus.* 21 Ed. 3. 9.

To make an Eſtate.

If the condition be, that the obligor ſhall make me a ſufficient eſtate of land by the adviſe of *W* and *S*, and they adviſe an inſufficient eſtate, and the obligor doe make the eſtate according to that adviſe; this is a good performance of the condition: But if the condition be that the obligor ſhall make a good and ſure eſtate, and he by adviſe of counſell make an eſtate that is not good and ſure; this is no good performance of the condition. Perk. Sect. 776. Kelw. 95.

If the condition be, that the obligor ſhall make me an eſtate of land, and make the eſtate to another by my appointment; it ſeemes this is no performance of the condition. Fitz. Barre. 55.

If the condition be, that the obligor or his feoffees in truſt ſhall make an eſtate to the obligee ſuch a day, and the feoffees doe it without the conſent of the obligor; this is no performance of the condition. Trin. 17. Ia. B. R.

To make further aſſurance.

If the condition be, to make further aſſurance, and the obligor make further aſſurance upon condition, without the agreement of the other party; this is no good performance of the condition. Paſche 8. Ia. Co. B.

To ſave harmleſſe.

If the condition be, to ſave me harmleſſe from an Annuity wherewith my land is charged, and the obligor doth pay the ſame yearly, and 37 H. 6. 18. Perk. Sect. 792.

and get me an Acquittance for the ſame from the party; this is a good performance of the condition. But if the condition bee to diſcharge me of ſuch an Annuity; in this caſe, payment and procuring mee a Releaſe, is no good performance of the condition.

Perk. Sect. 790. Fitz-Barre 72. — To grant a rent, or to procure a rent to be granted.

If the condition be, that the Feoffees or Leaſſees of the Obligor of ſuch land which they have in truſt ſhall grant me a rent-charge, or releaſe their right to mee before ſuch a day, and there be three Feoffees, or Leaſſees, and two of them only doe grant this rent, or make this Releaſe; this is no good performance of the condition.

Dyer 15.

If the condition be, that the Obligor ſhall purchaſe and procure to me and my heires a rent of 5 l. *per annum*, and a ſtranger hath ſuch a rent out of my land, and he doth get him to releaſe this to me; this is a good performance of the condition: And if one be bound with condition to grant me the rent and farm of ſuch a Mill before Michaelmaſſe, to be had and perceived untill I be paid 10 l. and before that time he leaſe the Mill to me at a rent, and then ſuffer me to detaine ſo much of the rent; it ſeemes this is a good performance of the condition.

Fitz. Barre, 77.

Coo. ſuper Lit. 207. — To deliver a horſe. — Tender and Refuſall.

If the condition be to deliver me a horſe, and the Obligor tender the horſe unto me, and I refuſe him; hereby the condition is performed; and ſo in all ſuch like caſes where the Obligor is to doe any collaterall thing, as ſtand to an award, or the like; if the Obligor offer to doe it, and the Obligee refuſe, the condition is performed, and the Obligation diſcharged for ever.

Dyer 17. ſuper Lit. 202. Broo. Condition 145. — To pay money.

If the condition be, to pay money at a day certaine, and the Obligor pay a little before night, time enough for the receiver to ſee to number his money by day-light; this is a good performance of the condition. And if the condition be to pay money by, or before a day; paiment the laſt inſtant of the day before is a ſufficient performance of the condition.

Perk. Sect. 748. 34 H. 6. 17. 21 Ed. 3. 13 Coo. 5. 117. 9. 79. Broo. Oblig 64. — Acceptance.

If the condition be, to pay me a ſumme of money at a day certaine, and the Obligor pay me leſſe money before the day, or all the money before or at the day, or give me ſomething elſe before, or at the day of paiment in liew thereof, or pay me all the money or a leſſer ſumme at the day appointed, but in another place, and not the place mentioned in the condition, and I accept thereof; in all theſe caſes the condition is well performed. But if a ſtranger to the condition doe ſo, and I accept thereof; this is no good performance of the conditon as hath been * adjudged. And if the Obligor pay leſſe then the whole money at the day of paiment, and the Obligee accept thereof; this is no good performance of the condition: * And if the thing to be done be a collaterall thing, as to account, or the like, and the Obligor give unto the Obligee money, or a horſe in liew thereof, and the Obligee accept it; this is no good perfor-

* Trin. 36 Eliz.

* Adiudge. 27 Eli.

mance of the condition. And if the Obligor pay the money to the Obligee after the day of paiment; this is no performance of the condition, but the Obligation is forfeit, and the money paid ſhall goe in part towards the forfeiture: And yet in this caſe the Defendant at this day being ſued upon this obligation, doth uſually adventure to plead conditions performed, and give this ſpeciall matter in evidence to the Iury, who for the moſt part doth find againſt the Obligee. And yet if the condition be, to pay me money at a day certaine, or to pay another money at a day certaine, and the Obligor pay me or the ſtranger at ſeverall times before the day, and I, or the ſtranger accept thereof; this is a good performance of the condition. Dyer 18.

Tender and Refuſall.

But if the Obligee doe only promiſe to accept of a horſe for his money at the time of paiment, and when the time of paiment comes, and a tender of the horſe is made to him, he doth refuſe him; this tender is not a ſufficient performance of the condition. 18 Ed. 4.

If the condition be, to pay money at a day and place certaine, and the Obligor tender it at the time and place, and the Obligee is not ready to receive it; or being ready, doth refuſe to receive it; this is a good performance of the condition to ſave the forfeiture of the obligation: And yet if the Obligor be afterwards ſued for this money, he muſt ſay in his pleading, that he is ſtill ready to pay it, and he muſt tender it in Court. But if one be bound by a ſingle obligation to pay money, and after at the ſame or ſome other time, he hath a Defeaſance from the Obligee, that upon paiment of a leſſer ſumme the obligation ſhall be void; and the Obligee refuſe the money when the ſame is tendred at the time when by the Defeaſance it is to be paid; in this caſe the Obligor is not bound to tender the money in Court, neither hath the Obligee any remedy for it. Coo. ſuper Lit. 208. 209. 27 H. 8. 10. Perk. Sect. 784.

If the condition be, to pay me money at a day and place certaine, and the Obligor doth tender it to me the ſame day in another place, this is no performance of the condition, and therefore in that caſe I may refuſe it. 41 Ed. 3. 25.

If the condition be, to pay money between two dayes; paiment of the money upon either of thoſe dayes is not a good performance of the conditon, but the paiment muſt bee betweene the two dayes. Dyer 17.

If the condition bee, to pay me money at a day certaine, and I bid the Obligor pay the money to one that I doe owe ſo much more unto, or I bid him lay out the money for mee, or I bid him keep it for ſuch a debt I owe unto him, and hee doe ſo, and I accept hereo; it ſeemes this is a good performance of the condition. Perk. Sect. 748, 27 H. 6. 6. Fitz. Barre. 43.

If the condition be to pay me money, and I appoint another

to

to receive it, and the Obligor pay it unto him; this is a good performance of the condition.

Coo. ſuper Lit. 208. 209. Dyer 56.

If the condition be, that a ſtranger ſhall pay to the Obligee 10 l. and the Obligee accept a horſe for it, this is a good performane of the condition. But if the condition be that one ſtranger ſhall pay to another ſtranger 10 l. and the one doth give, and the other take a horſe in liew of this; this is no good performance of the condition. Acceptance.

New Terms of the Law, tit. Coine. *a* Per Inſt. Bridgman & Curia in the Marches of Wales 8. *b* Termes of the Law, Idem.

If the condition be, to pay me 20 l. of lawfull Engliſh money, and the Obligor pay me in Spaniſh or in any other money currant in this Realm; this is a good performance of the condition. [a] But paiment in farthings is no good paiment. [b] If the condition be, to pay me 20 l. and the Obligor pay me ſome of the 20 l. in counterfeit pieces, which I not perceiving at the time, doe put up and accept, but after upon a review I doe perceive ſome of them to bee naught, and thereupon I doe ſend it back to him again, in this caſe it ſeemes the condition is well performed, and therefore the ſending back of the money againe will not cauſe a breach afterwards.

22 Ed. 4. 2.

If the condition be, that I ſhall ſtand to the award of *I S*, and he doth award mee to pay 20 l. to *W S* by a day, and at the day I doe tender him the 20 l. but he doth refuſe it; in this caſe I have ſufficiently performed the condition, and the obligation is ſaved. To ſtand to an Award.

22 Ed. 4. 25.

If the condition be, that I ſhall ſtand to the award of *I S*, and he award that I ſhall enter a Retraxit in a Suit depending between me and the other party, and I do not ſo, but am Nonſuite, or do diſcontinue my Suit; this is no good performance of the condition.

22 Ed. 4. 40.

If the condition be, that the Obligor ſhall come ſuch a day to ſuch a place and ſhew me a Releaſe, and he doth come to the place the latterpart of the day, and doth ſtay there untill the light of the day be gone, ready to ſhew his Releaſe, but I come not thither; this is a good performance of the condition. To ſhew a Releaſe.

Dyer 255. 17 Ed. 4. 3.

If one make a Leaſe of land to mee, and bind himſelfe in an obligation with condition to ſuffer me quietly to enjoy the land without the let of him or any other; in this caſe if he himſelfe, nor any other by his incitement doe diſturbe me, the condition is performed; and if a ſtranger that hath title, doe enter without his procurement or occaſion, this is no breach of the condition. For quiet enjoying.

Perk. Sect. 760. 758. 2 Ed. 4. 3.

If the condition be, to appear in the Kings Bench ſuch a day, to anſwer *I S*, and at the day the Obligor doth appeare, but the Plaintiffe is eſſoined ſo that the defendant cannot anſwer him, or the Suit is diſcontinued by the Demiſe of the King before the day of appearance; in theſe caſes the condition is performed and the obligation ſaved. But if the Obligor in this caſe when he doth To appeare.

appeare, doth not cauſe his appearance to be entred of Record, the obligation is forfeit.

If the condition bee to appeare *coram domino Rege*, and the Obligor appeare before the Kings Perſon; this is no performance of the condition. And if the condition be, to appear *coram Juſticiariis Domini Regis*, and the Obligor appeare before them out of Court; this is no performance of the condition. 8 H. 4. 6.

To make a Bond.

If the condition be, that a ſtranger ſhall make an obligation to the Obligee, and the ſtranger tender it, and the Obligee refuſe it; this is a good performance of the condition: But if the condition be, that the Obligor ſhall make an obligation to a ſtranger, and the Obligor tender it, and the ſtranger refuſe it; this is no performance of the condition. Coo. ſuper Litt. 208, 209. 10 H. 6. 16. 27 H. 8. 1.

To marry a woman.

If the condition be, that the Obligor ſhall marry the daughter of the Obligee by a day, and he doth tender himſelfe, and ſhe doth refuſe; in this caſe the obligation is forfeit, notwithſtanding this tender and refuſall. Perk. Sect. 756. 4 H. 7. 3.

To leave a Poſſeſſion.

If the condition be, to deliver the key of a houſe, and the quiet poſſeſſion to *I S*, to the uſe of the Obligee, and the Obligor (the houſe being rid, and every one out of the houſe, and the door locked) doth deliver the key to *I S*; it ſeemes this is no good performance of the condition, but that *I S*, or the Obligee, or his deputy ought to come and receive the poſſeſſion. See more in *Condition* at *Numb.* 9. and *Covenant* 6. Dyer 219.

9. When a ſingle Obligation ſhall be ſaid to be broken and forfeit, or not.

If an Obligation that is ſingle, be not performed, as when it is to pay money at a day, and the money is not paid, the obligation is broken. But if a man be bound by an obligation to pay money at ſeverall dayes, the obligation is not forfeit, nor can be ſued untill all the dayes be paſt. And yet if the condition of an obligation be to pay money at ſeverall dayes, and the Obligor doe fail to pay the money the firſt day; in this caſe the Obligee may ſue for the money due by the obligation preſently. Coo. 8. 153. ſuper Litt. 292. FN B. 267.

If one be bound to pay money at a day certaine by a ſingle obligation or Bill, and the Obligor tender the money at the day to the Obligee, ſo as he will give him his Bill or a Releaſe for the money, and the Obligee refuſe ſo to doe, and thereupon he doth refuſe to pay the money; in this caſe the obligation is not forfeit; for in this caſe the Obligor is not bound to pay the money, unleſſe the Obligee will give up his Bill or give him a Releaſe. But otherwiſe it is in caſe where one is bound to pay money by the condition of an obligation; for there the Obligor muſt pay the mony at his perill, albeit the Obligee refuſe to deliver up the obligation or to give a Releaſe. Broo. Oblig. 62. Fait. 105. Fitz. verdict. 13.

If one be bound to pay money on a ſingle Bill at a day, and the Obligor tender the money at the day to the Obligee, and he refuſe

it; ſ

it; in this caſe, it ſeemes hee hath now remedy for his money; *Sed Quære.*

Broo. Oblig. 17. In all cauſes when the condition is not performed or broken, the obligation is forfeit, and till then it cannot be forfeit: And therefore, if one be bound in an obligation, with condition to pay me 10 l. at Eaſter, before the day come, the obligation cannot bee forfeit; but if it bee not paid at the day, the obligation is forfeit: 4 H. 7. 4. And yet if the Obligee himſelfe be the cauſe of the breach of the condition, or the thing to be done by the condition, is now become impoſſible by the act of God, the obligation is now become without penalty: As if in the old dayes I had been bound in an obligation to an Abbot, that *A* ſhould infeoffe him before Chriſtmaſſe, if *A* enter into Religion, my Bond had been preſently forfeited: But otherwiſe it had been if *A* had been profeſſed under the obedience of the Obligee himſelfe.

10. When the condition of an Obligation ſhall be ſaid to be broken and the Obligation forfeit, or not.

To make a Feoffment.

Perk. Sect. 768. 769. If the condition be to make a Feoffment of land to me ſuch a day, and he be not upon the land ready to make the Feoffment, albeit I come not there to receive it, yet the condition is broken.

21 Ed. 3. 29. Cook. 5. 112. If the condition be that when the Obligor ſhall come to his Aunt, he will enfeoffe the Obligee, or the heirs of his body, in this caſe he muſt doe it aſſoon as he doth come to her, and the Obligee ſhall requeſt the Feoffment, or the obligation is forfeit.

21 Ed. 4. 55. If the condition be to enfeoffe me of a Mannor by a day, and before the day the Obligor doth make a Feoffment of it to another, hereby the condition is broken, and the Obligation forfeit, and though the Obligor repurchaſe it againe before the day, and then make the Feoffment, yet this will not cure the breach.

4 H. 7. 4. If the condition be, to enfeoffe *B* and *C*, and one of them die before the time bee paſt wherein it ſhould bee done; in this caſe hee muſt enfeoffe the ſurvivor of them, or the condition is broken.

To make a Leaſe.

Dyer 347. If the condition bee, that if the Obligor before Michaelmaſſe make a Leaſe to the Obligee for thirty one yeares, if *A* will aſſent, and if hee will not aſſent then for twenty one yeares, That then &c. if *A* do not aſſent, and the Leaſe for twenty one years be not made before Michaelmaſſe, the obligation is forfeit.

To make an Eſtate.

7 H. 6. 24. If the condition be that the Obligor ſhall make me an eſtate upon requeſt, and he tender me an eſtate before I requeſt it, and afterwards I doe requeſt it, and he doth refuſe it; in this caſe the condition is broken, and the obligation forfeit.

Paſche 8. Co. B. 5a. If the condition be that the Obligor ſhall make me a good eſtate of land (being Copi-hold land) and he doth ſurrender it abſolutely, and the Homage when they preſent it, doe preſent it conditionally; this is no breach of the condition.

If the condition be, to make a good eſtate of land in Fee-ſimple to *A* (a woman) before ſuch a time, and before ſuch time the Obligor taketh *A* to wife, and the day paſſe, and no eſtate is made; in this caſe the condition is broken, and the obligation forfeit. But if the obligation be made to the woman her ſelfe, then it is diſpenſed with by the inter-marriage. 4 H. 7. 4. Kel.

To make further aſſurance.

If the condition be, that the Obligor and his ſonne ſhall doe all ſuch acts for the better aſſuring of land, as the Obligee or his Counſell ſhall deviſe, and the Obligee deviſe and tender a Releaſe to the Obligor and his ſonne to ſeale, and they delay and refuſe to ſeale it untill they can ſhew it to their Counſell to bee adviſed upon it; this is a breach of the condition; but if they be illitterate and refuſe to ſeale it untill they can get it read; this is no breach of the condition. Coo. 2. 3. Dyer 337.

To ſave harmleſſe.

If the condition bee, that the Obligor ſhall ſave the Obligee harmleſſe from ſuch a debt, for which the Obligee is ſurety for the Obligor, and the Obligee commeth at the time, and to the place when and where the money, for which he is engaged, is to bee paid, and finding no body ready to pay the money, he doth pay it himſelfe to ſave the forfeiture of the obligation; hereby the condition to ſave harmleſſe is broken, and the obligation forfeit. And therefore much more if the Obligee be ſued, arreſted, outlawed, or taken in Execution for the debt of the principall: So alſo if the Obligee bee put in feare of arreſt for the debt of the Principall, and therefore dare not goe about his buſineſſe; by this the condition is broken. But if the Obligee be ſued unjuſtly, either becauſe he is ſued before the money is due, or otherwiſe, or if the Bond in which he is bound, be againſt Law and void, and he ſuffer himſelfe to bee unjuſtly vexed thereupon, and doth not take advantage of it, it ſeemes this is no breach of the condition of the Bond to ſave harmleſſe. Dyer 186. 187. 18 Ed. 4. 27. 28. Coo. 5. 24. Old book of Entry 12.

If a Bailiffe diſtrain beaſts on a withernam, and afterwards redeliver them to the party of whom he had them, and a take Bond from him with condition to ſave him harmeleſſe from him for whom the beaſts were taken, and after he doth bring a detinue againſt the Bailiffe for the beaſts; in this caſe the condition is not broken; for this action will not lie in this caſe. 2 H. 4. 9.

To pay mony.

If the condition be to pay money to me at a day and place certaine, and the money is not tendred at the time and place, albeit there be no body ready to receive it, if it be tendred, yet the condition is broken. Kelw. 60.

If the condition be to pay money to me at a day and place, and the obligor in his going to the place is robbed of the money ſo as he cannot pay him; in this caſe notwithſtanding the condition is broken, and the obligation forfeit, and this will not excuſe it. Broo. Oblig. 9.

If

Kelw. 60. If the condition be to pay money to me at a day and place, and I seeing him going to the place to pay the money, do wish him to forbeare, and thereupon he doth so, and doth not pay it; in this case the obligation is forfeit, and this will not excuse. But if I doe violently and actually detaine and hinder him, so that hee cannot pay it, this will excuse him.

Hill 4. Iac. Molneux case. If the condition be to pay me the rent reserved on such a lease, at the times limited by the lease, and it be not accordingly; hereby the condition is broken, albeit I do never demand the rent. To pay Rent.

Broo. Oblig. If the condition be to pay me the rent reserved on such a lease, and I enter upon all or part of the land demised, so as the rent is suspended so long as I keep the possession, in this case the non-payment of the rent during the time of the suspension of the rent, is no breach of the condition.

Dyer 30. If the condition be that I shall enjoy land without the interruption of any person whatsoever, and afterwards I doe forfeit it my selfe by non-paiment of rent, or the like; this is no breach of the condition. For quiet enjoying.

Dyer 255. 17. Ed. 4. 3. If the condition be, that the obligor shall suffer the obligee to enjoy lands &c. and that without the let of him &c. or any other person or persons &c. and one that hath an elder title doth enter; this is no breach of the condition. But if he procure this entry and disturbance, this is a breach of the condition.

Kelw. 60. If the condition be that *B* and others shall quietly enjoy land, and *A* the obligor and *B* the obligee doth disturbe the others; it seemes by this disturbance the condition is broken.

Coo. 9. 51. If the conditinn be that the obligor shall not disturbe me in the keeping of my Courts, and he keep the Courts and take the Fees himself; this is a breach of the condition.

Coo. super Litt. 384. If one make a feoffment of land, and make me an obligation with condition to defend the land for 12 yeares &c. and I am entred by a stranger, but never impleaded; in this case the condition is broken.

Coo. 4. 61. 8. 83. If the condition be to stand to the award of *I S*, and the obligor doth afterward counter-maund the submission made to *I S*; this is a breach of the condition. *Factum non dicitur quod non perseverat.* To stand to an Award.

Coo. 8. 82. 83. 18. Ed. 4. 20. If the condition be that I shall have licence to carry wood seven yeares, and the obligor doth give me a licence for seven yeares, and then doth revoke it againe; this is a breach of the condition, To give a licence.

18 Ed. 4. 23. If the condition be, that *I S* shall give me licence to go over his ground, and *I S* doth so, but another doth interrupt me; this is no breach of the condition. And yet if the condition be that I shall have licence to go over that ground, there perhaps such an inter-

ruption may be a breach of the condition.

To appeare. If an obligation bee made to me with condition to appeare in such a Court such a day, and at the day hee is kept in prison at my suite so as he cannot appeare; in this case his not appearance is no breach of the condition, for his imprisonment shall excuse him. But if his imprisonment be for Felony, or any other such like cause of his own, *contra*. Fitz. Barre. 60.

If the condition be, to appeare in such a Court such a day, and before the day a *Supersedeas* doth come to the Sheriffe; yet if the obligor do not appear, the obligation is forfeit. Dyer 25.

To ride to Dover. If the condition be, that the obligor shall ride with *I S* to Dover such a day, and *I S* doth not go thither that day, in this case it seemes the condition is broken, and that he must procure *I S* to go thither and ride with him at his perill. Perk. Sect.

Not to alien. If I make a lease for yeares, and the lessee doth enter into an obligation with condition that hee shall not alien the land demised without my licence, and I die, and then hee doth alien it; it seemes this is a breach of the condition. Per Iust. Nichols M. 13. Ia.

To serve. If the condition be that *I S* shall serve me in all my honest and lawfull commands, or that *I S* shall be a good and honest servant to me one yeare; in the first case if I command him nothing, the condition is not broken, albeit he never tender his service: but in the last case it seemes he is to tender his service to me, or otherwise the condition will be broken. But if I refuse his service when it is tendred, or hee die within the time, the obligation is discharged. And yet if hee depart away within the time, the condition is broken. Perk. Sect. 772. 6 Ed. 4. 2.

To marry a woman. If the condition be that *A* shall marry *B* by a day, and before the day the obligor himselfe doth marry her: in this case the condition is broken. But if the obligee marry her before the day, the obligation is discharged. 4 H. 7. 4. Perk. 792.

To performe covenants. If the condition be, to performe the covenants and paiments of a Deed, and the deed doth containe a feoffment, and this is on condition that if the feoffor pay such a summe of money he shall reenter, and he doth not pay it; in this case this non-paiment is no breach of the condition. But if *A* let land by Indenture to *B* for yeares rendring rent, and *B* doth bind himselfe in an obligation with condition to performe all the covenants contained in the Indenture, and the rent is unpaid; this is a breach of the condition, and cause of forfeiture of the obligation. Briscoes case Tain. 5. Ia. c. B. R. Adiudged Griffin & Scots case 5. Iac. B. R.

To keep Prisoners. If the condition be for the safe keeping of prisoners, and one doth escape that is in execution, and in prison under colour of an execution, or the like, but in truth and in judgement of law is no prisoner; this escape is no breach of the condition. See more in *Condition* at *Numb.* 10. Curia Trin. 37. Eliz.

If

11. By what meanes and when an Obligation good in his original creation, doth or may become void, bee discharged or gone by matter *ex post facto*, Or not.

Coo. super Litt. 207. If the condition of an obligation consist of two parts in the disjunctive, or be to do one of two things before, or at a day certain, and both the things are possible at the time of the making of the obligation, and before the time of performance one of the things is become impossible to be done by the act of God, or by the act of the obligee himself; in this case the obligation is discharged for ever. Coo. 5. 22. 15 H. 7. 2. And therefore if the condition be, That if the obligor shall sell away his wives land, if then he shall either in his life time purchase to his wife and her heires and assignes land of as good right and value as the money by him received, or had by or upon the said sale shall amount unto, or else do and shall leave unto her the said *I* as Executrix by legacy or otherwise as much money as shall bee by him received upon such sale, That then &c. and the obligor doth sell his wives land, and then his wife doth die before him so that he cannot leave her the money; in this case the obligation is discharged, and the husband is not bound to purchase land to her and her heires. So if the condition be, that if *I S* do not prove the suggestion of a Bill depending in the Court of requests before the utas of Hillary, that then he shall pay 20l, &c. and *I S* die before the utas; hereby the obligation is discharged for ever, and he is not bound to pay the 20l. So if the condition be that if the obligor appeare in the Kings Bench in Eastern Terme, or pay 20l. to the obligee at Michaelmas, and the obligor die before Easter Terme; hereby the obligation is discharged; but if he do not appeare in Easter Terme and out-live the Term, and die after, then it seems the 20l. must be paid at Michaelmas, or the obligation is forfeit. So if the condition be that the obligor shall marry *A* before Easter, or pay 20l. to the obligee at Michaelmas, and *A* die, or become madd before Easter, or the obligee marry *A* himselfe, and the marriage doth continue between them untill Easter be past; in all these cases the obligation is discharged for ever. But when the thing is become impossible by the act or laches of the obligor, the law is otherwise. And therefore if the condition be, that *A* shall marry with *B* before Easter, or that the obligor shall pay unto the obligee 20l. at Michaelmas, and the obligor himselfe marry with *B*, and the marriage doth continue untill after Easter; hereby the obligation is not discharged. So if the condition be to deliver up an obligation before Easter, or give a release at Michaelmas, and the obligor doth loose the obligation, or the obligation is burnt; hereby the obligation is not discharged, for if he doth not make the release at Michaelmas, hee doth forfeit the obligation.

Dyer 262. 15 H. 7. 4. 4 H. 7. 4. Agree 9. Iac. in Bathurst case.

8 Ed. 4. 21. Coo. 5. 22. Perk. Sect. 759. 767. 4. H. 7. 12. Ed. 4. 27.

If the condition of an obligation consist of one part only, or be to do one thing at a time certain, and that thing at the time of the obligation made is possible to be done, but afterwards and before the time

time when it is to be performed it doth become impoſſible by the act of God, or the act of the obligee; in this caſe alſo the obligation is gone and diſcharged for ever. And therefore if the condition be to appear in perſon ſuch a day in ſuch a Court, and before the day the obligor die, or at the day the water doth ariſe ſo high that he cannot travaile to the place without perill of life; in theſe caſes the obligation is diſcharged. So if the condition be, that *A* ſhall marry *B* before Eaſter, and before the time *A* or *B* die, or become madd, or the obligee marry *B*, and the marriage doth continue untill after the day; in all theſe caſes the obligation is diſcharged. But if the thing become impoſſible by the act of the obligor, *contra*. And therefore if the condition be, that the obligor ſhall appeare ſuch a day, and before, and at the day hee is impriſoned through ſome default of his own ſo that he cannot appeare, this will not excuſe him, * no more then in caſe where hee is ſo ſick that he cannot appeare without perill of his life. So if the condition be that *B* ſhall marry *C* before Eaſter, and the obligor himſelfe marry her, and the marriage doth continue untill after the time; in this caſe the obligation is forfeit. * So if the condition give the obligor time all his life time to do the thing, the obligation is not diſcharged by his death, but in this caſe he muſt do it during his life time at his perill.

* So held in the Exchequer 3. Cur.

* Curiæ Co. B Hill 37. Eliz.

If the condition be that the obligor ſhall deliver to the obligee an obligation or ſuch a releaſe as the counſell of the obligee ſhall deviſe before Michaelmas, and the counſell of the obligee deviſe no releaſe before Michaelmas; hereby the obligation is gone for ever.

Adiudge 37. Eliz. Co. B. Greeningham verſus Ewre.

If the obligation depend upon, or be neceſſary to ſome other deed, and that deed become void, in this caſe the obligation is become void alſo; as if the condition of the obligation be to perform the Covenants of an Indenture, and afterwards the covenants be diſcharged or become void; by this meanes the obligation is diſcharged and gone for ever. And if one make a leaſe for yeares rendring rent, and the leſſee enter into an obligation with condition to pay the rent to the leſſor, and after it fall out ſo that the leſſee is evicted out of the land by an elder title, whereby the rent in law is gone; in this caſe and by this meanes the obligation is diſcharged and gone alſo. But if the eviction be but of a part of the land, *contra*.

Broo. Oblig. 6. 88. 29. 4. H. 7. 6.

If an obligation bee made to me, and delivered to *I S* to my uſe, and when it is tendred to me, I do refuſe it and diſagree to it; hereby it is become void, and cannot afterwards be made good againe. So if an obligation bee made to my wife, and I diſagree to it; hereby it is become void.

Coo. 5. 119.

By a Releaſe made from the Obligee to the Obligor, or to one of

Fit. Barr. 37

of the Obligors if there be more then one, the obligation may be discharged. And therefore, if an Obligation be made to me with condition to pay money, and I by my Deed release it, or acknowledge my selfe satisfied the debt, albeit I receive none of it, or that I receive but part of it in full satisfaction of the debt, by this the obligation is discharged for ever.

Broo. Oblig. 61. Coo. 8. 136. 8 Ed. 4. 3, 21 Ed. 4. 2, 11 H. 7. 4.

If the Obligee make the Obligor, or one of the Obligors, or all the Obligors, his Executor, or his Executors; hereby the obligation is discharged for ever. But the granting of Letters of Administration to one, or more of the Obligors, is no discharge of the obligation. And if the Obligor make the Obligee his Executor, this is no discharge of the obligation.

Broo. Oblig. 61.

If the Obligee be a woman, and take the Obligor to husband, hereby the obligation is discharged.

Fitz. Barre. 133.

If the condition be to enfeoffe *K S* (a woman) before such a time, and before the day the Obligor, doth marry the woman; this doth not discharge the obligation.

Dyer 329.

If the condition be to serve me seven years, and within the time I licence him to depart, it seemes that hereby the obligation is discharged: And yet if the condition be to stand to an Award, and it is awarded that one of the parties shall pay 5 l. a yeare for seven years towards the education of *I S*, and *I S* die within the seven years, the obligation is not discharged by his death, but the money must be paid during the time notwithstanding.

Dyer 371.

If the condition bee to doe two things, or stand upon divers points; and the Obligee supposing the breach of one of them doth sue the Obligor, and the issue being joyned upon that point, it is found against the Plaintiffe, and he is barred; hereby the whole obligation is discharged; and so long as that Iudgement is in force, he can never sue the obligation upon any other point within the condition.

Fitz. Barre. 64.

If the condition be to satisfie me for goods I have delivered to *I S* if they be lost, and afterwards they be lost, and I sue *I S*, and have him in Execution for them; by this the obligation is not discharged; but perhaps when I have satisfaction of *I S* being in Execution for the goods, the obligation may be gone.

And in all other Cases by which a Deed in generall may become void by matter *ex post facto*, as by Rasure or the like, an obligation may become void.

Cap. XXII.
Of a Defeaſance.

Defeaſance, *Quid.*

THis in a large ſence doth ſometimes ſignifie a condition annexed to an eſtate, and ſometimes the condition of an obligation made with, and annexed to the Obligation at the time of making thereof: But it is more peculiarly and properly applyed to ſuch conditionall inſtruments as are made in Defeaſance and avoidance of Statutes and Reconiſances at the time of entring into the ſame Statutes or Recogniſances, and to ſuch conditionall Inſtruments as are made in Defeaſance of Statutes, Obligations, and the like, after the time of the ſame Statutes entred into, and Obligations &c. made: And it is therefore thus defined.

A Defeaſance is a condition relating to a Deed, as to an Obligation, Recogniſance, Statute, or the like, which being performed by the Obligor or Recogniſor, the Act is diſabled and made void, as if it had never been done; which differeth from a condition only in this, that this is alwayes made at the ſame time, and annexed to, or inſerted in the ſame Deed, but that is alwayes made in a Deed by it ſelf, and for the moſt part made after the Deed whereunto it hath relation.

2. Where and in what caſes a Defeaſance may be; and what things may be defeated and avoided thereby; and where, and what not.

There is no Inheritance Executory, as Rents, Annuities, Conditions, Warranties, Covenants, and ſuch like, but may by a Defeaſance made with the mutuall conſent of all thoſe which were parties to the creation thereof at the ſame, or at any time after, be annulled, diſcharged and defeated. And ſo is the Law of Statutes, Recogniſances, Obligations, and the like; yet ſo, as in all theſe caſes regularly, the Defeaſance muſt be made *eodem modo* as the thing to be defeated was and is created, *viz.* if the one be by Deed, the other muſt be ſo alſo; for it is a rule, that in all caſes when any Executory thing is created by a Deed, that the ſame thing by the conſent of all perſons which were parties to the creation of it, may be by their Deed defeated and annulled, and therefore that Warranties, Recogniſances, Rents, Charges, Annuities, Covenants, Leaſes for years, Uſes at Common-Law, and ſuch like, may by a Defeaſance made with the mutuall conſent of all thoſe that were parties to the creation of it by Deed, be diſcharged and avoided. *Nihil eſt tam conveniens naturali æquitati quàm quod unumquodque diſſolvi eo ligamine quo ligatur.* And therefore by ſuch a Defeaſance, not only the Covenant which doth create a power of Revocation, but the power it ſelfe created, may be utterly defeated and avoided: But eſtates of Inheritance, and other eſtates in Taile or for life, executed by Livery &c. cannot be avoided by Defeaſance made after the time of their creation and firſt making. And yet by anoother

Coo. ſuper Litt. 236, 237. 1. 111, 113. Plow. 137. 193. 21 H. 7. 23. Broo. Defeaſance in toto.

other Deed of Defeasance made at the same time, a Feoffment, Release, Lease for life, or other executed thing, may be avoided as well as if it were by condition within the same Deed; as if a Disseisee release to the Disseisor; this Release cannot be defeated by an Indenture of Defeasance made afterwards, but it may be defeated by an Indenture of Defeasance made at the same time. *Quæ in continenti fiunt in esse videntur.*

Coo. 1. 113. To make a good Defeasance, these things are requisite: 1. That the Defeasance bee made *eodem modo*, as the thing to be defeated is created; for if the Obligee by word only discharge the Obligor, or grant not to sue him; this will not defeat the obligation; it

[a] Broo. Defeas. 12. Fitz. Barre. 95. must be by Deed therefore as the former was. [a] But whether the Deed of Defeasance be indented or poll is not materiall: 2. [b] That

[b] Plow. 393. if it doe recite the Statute or the obligation (as for the most part it doth) that it bee done truly; for if a Defeasance be made of a Statute or an obligation which is recited to be made the 10th day of *May*, whereas in truth it beareth date the first day of *May*; this

[c] 14 H. 8. 10. Bro. Estrang al fait. 10. Defeasance is void. 3. [c] That it be made between the same persons that were parties to the first Deed &c. And therefore, if *A* be bound in an obligation to *B* in 20 l. and *B* make a Defeasance to *C*, that if *C* pay him 20 l. the obligation made by *A* shall be void; this is no good Defeasance, because it is not made between the same parties.

[d] Broo. tit. Defeasance 3. [d] And yet if a Statute be made to the husband and wife, and the husband alone joyn in the making of a Defeasance, this is a good De-

[e] Broo. Defeasance 5. feasance. 4. [e] That it be made after the making of the Recognisance, Obligation &c. and not before; for if *A* grant to *B*, that if *B* will be bound to him in 20 l. by obligation, that the obligation shall bee void, and after *B* doth bind himselfe to *A* in an obligation of 20 l.

[f] Dyer 315. this Defeasance is not good, because it is before the obligation. [f] And yet if the date of the Defeasance be before the date of the Recognisance &c. and it be delivered after, it is good enough. 5. That it be

[g] Plow. 137. Broo. Defeasance, 11. made of a thing defeasible; [g] for if a Disseisee release his right to the Terre-tenant, and after there is a Defeasance made between them, that if the Releasor shall pay 20 l. to the Releasee, the Release shall

[h] Broo. Defeasance, 6. 9 Coo. super Litt. 236. be void; this is a void Defeasance. [h] And yet a Release may be avoided by a condition or Defeasance made at the time of making of a Release as well as a Feoffment.

See West. Symb. Broo. Defeasance in toto. If the Defensance of a Recognisance, Obligation, &c. be, that if the Cognisor, or Obligor &c. pay a summe of money, or doe not disturb the execution of the Will of *I S*, or do make a Lease for years to *I S*, or the like; these are good Defeasances. As if the Grantee of a Rent-charge grant to his Grantor, that if he shall pay him 20 l. such a day, the grant of the rent shall be void. Albeit the condition

20 H. 7. 24. 21 H. 7. 32. Fitz Barre, 71. of an obligation, that is repugnant to the obligation it selfe, is void, and the obligation single, yet it is otherwise in case of a Defeasance

made

3. What shall be said a good Defeasance, and what not.

For the manner of it.

For the matter of it.

made after the obligation, for this is good, notwithſtanding it be repugnant. And therefore if the Obligee after the obligation made, grant by Deed to the Obligor, that the obligation ſhall be void, or that hee will not ſue the obligation at all, or that he will not ſue the obligation untill ſuch a time, or that the obligation ſhall bee diſcharged; theſe Defeaſances are good to avoid the obligation.

If the Feoffee with warranty, grant that neither he nor his heirs ſhall take benefit of the warranty of the Feoffor or his heires; this is a good Defeaſance of the warrantie: And if he grant not to vouch, this will diſcharge the voucher: And if he grant not to bring a *warrantia Cartæ*, this will barre him of that remedy. In like manner it is, if the Grantee of a rent-charge grant to the Grantor, that he will not take any benefit by the Grant, this is a totall diſcharge; and if he grant he will not bring an Annuity, this is a diſcharge of the perſon; and if he grant that he will not diſtraine the land for the rent, this is a diſcharge of the land. Broo. Defea. 47 H. 6. 43. 21 H. 7. 23. Perk. Sect. 69.

If one make a Leaſe for life by Deed, and after by another Deed doth grant to his Leaſſee, that he ſhall not be impeached for waſte; this is a good diſcharge: And if the Leaſſee afterwards grant by Deed to the Leaſſor, that if he ſhall bring an Action of waſte againſt the Leaſſee, that he will not make uſe, nor take advantage of the Deed of diſcharge; this is a good diſcharge of the diſcharge. So that hereby it ſeemes a Defeaſance may bee of a Defeaſance, and one Defeaſance after another, and* regularly the laſt ſhall ſtand. And therefore, if a Leaſe for years be made on condition to pay 20 l. at Eaſter, and the Leaſe to be void, and before Eaſter the Leaſſor and Leaſſee agree, that if the Leaſſor pay it at Eaſter following, the Leaſe ſhall be void, and before that time they make the like agreement for another yeare; it ſeemes theſe be good Defeaſances, and that the laſt ſhall ſtand. Broo. Defea. 11. Condition, 120. * Agree. Paſche. 8. & Ia. Co. B. Per Inſt. Bridgman.

If the Defeaſance after Execution made upon a Statute be thus, that if the Conuſor pay ſo much money, the Statute ſhall be void; it ſeemes by this the Statute and Execution thereupon is void; howbeit, it is beſt to adde theſe words in the Defeaſance [and the Execution thereupon.] Broo. Defeaſ. 7.

And now being comming towards an end, we come to the laſt Aſſurance of a mans life, or that Aſſurance kind of that men doe commonly make when they are neer and towards the end of their life, *viz.* a Teſtament.

CAP. XXIII.

Of a Teſtament.

Termes of the Law, Lit. Broo. Sect. 300. Coo. ſuper Lit. 111. Swinb. of Wills 24.

A Teſtament is the full and compleat declaration of a mans minde or laſt Will of that he would have to be done after his death: It is in Latin *Teſtamentum*, i. *Teſtatio mentis*, the witneſſe of a mans minde; and to deviſe by Teſtament, is to ſpeak by a mans Will what his minde is to have done after his death: And this is ſometimes called a Will, or laſt Will; for theſe words are *Synonima*, and are as it ſeemes promiſcuouſly uſed in our Law: Howſoever by the Civill Law, it is then only ſaid to be a Teſtament when there is an Executor made and named in it; and when there is none, but a Codicill only; for a Codicill is the ſame that a Teſtament is, but that it is without an Executor; and a man can make but one Teſtament that ſhall take effect, but he may make as many Codicills as he Will. And by the Common-Law where Lands or Tenements are deviſed in writing, albeit there be no Executor named, yet there it is properly called a laſt Will, and where it doth concerne Chattels only, a Teſtament. He that doth make the Teſtament is called the Teſtator: And when a man dyeth without Will, he is ſaid to die inteſtate.

1. Teſtament. *Quid.*

Codicil. *Quid.*

Teſtator. Inteſtate.

Perk. Sect. 476. Coo. ſuper Lit. 111.

Of Teſtaments there be two ſorts, namely a Teſtament in writing or a written Teſtament, which is, where the minde of the Teſtator in his life time, by himſelf or ſome other, by his appointment, is put in writing. And a Teſtament by word or without writing, which is, where a man is ſick, and for feare leaſt death or want of memory, or ſpeech, ſhould ſurprize him, that he ſhould be prevented if he ſtayed the writing of his Teſtament, deſireth his neighbours and friends to beare witneſſe of his laſt Will, and then declareth the ſame preſently by words before them: And this is called a *Nuncupative*, or *Nuncupatorie* Teſtament: And this being after his death proved by Witneſſes, and put in writing by the Ordinary, is of as great force for any other thing but land, as when at the firſt in the life of the Teſtator it is put in writing. A Codicill alſo is in writing, or by word as a Teſtament is: The Civilians have other diviſions of Wills and Teſtaments, as ſolemn and unſolemn, priviledged and unpriviledged, whereof the Common Law maketh no mention.

Quotuplex.

Nuncupative.

Termes of the Law, tit. Deviſe. Coo. ſuper Litt. 111. Swinb. lib. 1. c. 7.

The parts of every compleat Teſtament whereof it doth conſiſt, are two: 1. The making of Deviſes, or giving of Legacies: 2. The making and Ordination of an Executor; for a Teſtament can bee no more without, then a Codocill can be with an Executor.

2. The Parts of it.

A.

Deviſe or Legacy *Quid.*

A Deviſe or Legacy is where a man in his Teſtament doth give any thing to another; the firſt of theſe termes is properly applied to the gift of lands, and the laſt to the gift of goods or chattels: and therefore a Deviſe ſtrictly is ſaid to be where a man in his Teſtament doth give his lands to another after his deceaſe; and a Legacy is ſaid to be where a man in his Teſtament doth give any chattell to another to have after the death of the Teſtator; but the word is promiſcuouſly applied to the one and to the other. And hee that gives by ſuch a Will is called the Deviſor, and he to whom the thing is given, the Deviſee or Legatee.

Deviſor, Deviſee, or Legatee.

Quotuplex.

And a deviſe is ſometimes ſimple and without condition, as where I give my land to another and his heires, or I give 20l. to another, without more words. And ſometimes it is with a condition, which is when there is a quality added to the deviſe or legacy, whereby the effect of it is ſuſpended or hindred, and it is thereby made to depend on ſome future event. And this condition in this caſe may be made almoſt by any words; as if I give to one my land if he pay 20l. to my daughter, or ſo as he pay 20l. to my daughter, or paying 20l. to my daughter, or I give one 20l. if he marry my daughter, or when he ſhall marry my daughter, or I give my wife 20l. a yeare whiles ſhe ſhall live unmarried, or I give to him, or to whomſoever ſhall marry my daughter 20l. or the like; in all theſe caſes the deviſe is conditionall. The firſt kind of deviſe is called by the *Civilians* a ſimple aſſignation, and the latter a conditionall aſſignation.

Dyer 317. 74. Coo. ſuper Littl. 217. Swinb. 132. 134. 136

Conditionall Deviſe.

Executor *Quid.*

An Executor in a large ſenſe is taken for any one that is appointed to have the diſpoſition and ordering of the goods and chattels of a man that is dead. And ſo there are three kinds of Executors: the firſt is *à lege conſtitutus*, who is therefore called *legitimus*, and ſuch a one is the Ordinary of the Dioceſſe who hath ordinary Iurisdiction in matters Eccleſiaſticall: the ſecond is *à Teſtatore conſtitutus*, who is therefore called *Teſtamentarius*, and hee is ſtrictly and properly called an Executor, and is defined to be one appointed by a mans laſt Will and Teſtament to have the diſpoſing and adminiſtration of all or part of a mans goods and chattels, and to perform a mans laſt Will and Teſtament according to the contents thereof: the third is *ab Epiſcopo conſtitutus*, who is therefore ſaid to be *Dativus*. And ſuch a one is an Adminiſtrator, who is defined to be one that hath the goods and chattels of a man dying inteſtate committed to his charge by the Ordinary for want of an Executor. And his power, benefit, and charge is in all things equall to the power, benefit, and charge of an Executor.

New Terms of the law. Coo. 8. 135. Plow. 288. Coo ſuper Littl. 209. Coo. 9. 40.

Ordinary.

Adminiſtrator.

Quotuplex.

The Executor and Adminiſtrator alſo is ſometimes univerſall or totall, *i.* one that hath the power and diſpoſition of the whole perſonall eſtate committed to him. And ſometimes he is particu-

Dyer 4. Bro. Executor 155. Coo. 6. 19.

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lar or partiall, *i.* one that hath the power and diſpoſition of ſome part of the eſtate, or of all the eſtate for a time only committed to him. And ſometimes he is abſolute *i.* ſuch a one that hath an abſolute power of the eſtate, as Executor or Adminiſtrator, and ſometimes he is conditionall *i.* one that hath a limited and conditionall power of the eſtate only. And in both caſes he ſhall be charged and chargable for ſo much as is committed to him as the teſtator or inteſtate himſelfe: for this cauſe the Executor is ſaid to repreſent the perſon of the Teſtator; for as to the eſtate committed to his truſt he may charge others, and be charged himſelf, ſue and be ſued, as the Teſtator himſelfe might. And the eſtate he hath by his Executorſhip is ſaid to be in him to the uſe of the Teſtator and in his right: and that he doth in the diſpoſition of his eſtate is ſaid to be in the right and to the uſe of the Teſtator alſo; And the Adminiſtrator hath the ſame power and property over and in the goods and chattels, the ſame remedy by Suit, and ſo farr forth ſhall be charged as the Executor; for they differ not in nature, but in name only. And yet the Adminiſtrator is but the Ordinaries deputy, and he may revoke the Adminiſtration, or call the Adminiſtrator to an account.

Coo. ſuper Litt. 209. St. 31. Ed. 3. c. 11. Coo. 9. 40. 8. 135.

Repreſent the perſon of the Teſtator.

Swinb. 12. Eyer 143. Coo. ſuper Littl. 112. Litt. Sect. 168. Coo. 4. 61.

3. The nature and effect of a Teſtament, and of a Codicill.

A Teſtament is of that nature that it doth much differ from other acts and deeds that men doe and execute in their life times: for albeit it be made, ſealed and publiſhed in never ſo ſolemn a manner, yet it hath no life nor vertue in it untill the teſtators death; for it is a Maxime in law, *Omne Teſtamentum morte conſummatum eſt, Et voluntas ambulatoria uſque ad extremum vitæ exitum*; itis therefore reſembled untill death to the interlocutory ſentence, and after death to the definitive ſentence of a Iudge. And hence it is ſaid, *Sed legum ſervanda fides, ſuprema voluntas Quod mandat fieri que jubet parere neceſſe eſt.* a And for this cauſe a man may alter, or make void his will at his pleaſure, and he may make as many new Wills and Teſtaments as he will, and there is no meanes under the Sun to barre a man of this liberty. b And the latter Teſtament doth alwaies revoke and overthrow the former; but otherwiſe it is of a codicill; c for a man may make as many of theſe as he will, and make no Teſtament at all; d or if he make a Teſtament he may afterwards make as many codicils as he will, and one of them will not overthrow the other; for in the firſt caſe they muſt be all annexed to the letters of adminiſtration, and the Adminiſtrator muſt perform them, and in the latter caſe they muſt be all annexed to the Teſtament, and the Executor muſt take care to performe them. e A Teſtament therefore is ſaid to have three degrees. 1. An Inception, which is the making of it. 2. A Progreſſion, which is the publication of it. 3. A Conſummation, which is the death of the teſtator. f In Grants therefore, the firſt is of greateſt force, but

a Litt. Ero. ſect. 300.

b Litt. Sect. 168. Perk. Sect. 478.

c Swinb. 13. 14.

d Broo. Teſtament 20.

e Plow. 343 344.

f Coo. ſuper Litt. 112.

in Teſtaments the laſt is of greateſt force. But when a Teſtament is perfect by the death of the party, it doth as effectually give and transferre eſtates and alter the property of lands and goods, as acts executed by deed in the life time of the parties; g for hereby diſcents of lands are prevented, and a man may make eſtates in Fee-ſimple, Fee-taile, for life, or yeares, of lands, tenements, rents, reverſions or ſervices as effectually as by deed; and theſe eſtates alſo will be good without any Livery of Seiſin, or Attournement. And hereby alſo rents, and power to diſtraine for them may be reſerved: conditions created and annexed to eſtates, or things deviſed, h And therefore they that take by deviſes of lands, are ſaid to take in the nature purchaſors. i And if therefore a tenant in taile make a Feoffment to the uſe of himſelfe in Fee, and after deviſe the ſame land to his wife in fee, and die; the ſonne is not remitted, though the Father die ſeiſed: for the deviſe doth prevent the diſcent.

g Litt. Sect. 167. 168.

h Perk. Sect. 505.

i Dyer 221.

4. What ſhall be ſaid a good and a ſufficient Teſtament Or not.

To the making of every good Teſtament, theſe things are requiſite. Coo. 6. 23.

Firſt, in reſpect of the perſon that doth make it, and the thing whereof it is made. And what Perſons may make a Teſtament, And of what things, or not, And how.

1. That the Teſtator be a perſon able to make a Teſtament, and not diſabled for any ſpeciall cauſe, either in reſpect of his perſon, mind or condition, or in reſpect of the thing whereof the Teſtament is to be made. And for this it muſt be knowne: k That a woman that hath a husband, cannnot make a Teſtament of her land or goods, except it be in ſome ſpeciall caſes; for of her lands ſhee can make no Teſtament with, or without her husbands conſent: l of the goods and chattels ſhe hath as Executrix, to any other ſhe may make an Executor without her husbands conſent; for if ſhe do not ſo, the Adminiſtration of them muſt be granted to the next of kin to the deceaſed Teſtator, and ſhall not goe to the husband, m but of them ſhe can make no deviſe with or without her husbands leave, for they are not deviſable; and if ſhee doe deviſe them, the deviſe is void. And of the things due to the wife whereof ſhe was not poſſeſſed during the marriage, as things in action, and the like, it ſeemes ſhe may make her Teſtament, at leaſt ſhe may make her husband Executor, n of her Paraphonalia, *viz.* her neceſſary wearing apparell, being that which is fit for one of her rank: ſome ſay ſhee may make a Teſtament without her husbands leave, others doubt of this, howbeit all agree that ſhee and not his Executor ſhall have this after her husbands death, and that the husband cannot give it away from her. And of the goods and chattels her husband hath, either by her or otherwiſe, ſhee may not make a Teſtament without the licence and conſent of her husband firſt had ſo to do. But with his leave and conſent ſhe may make a Teſtament of his goods, and make him her Executor if ſhee will. And it is ſaid alſo, that if ſhee do make a Teſtament of his goods (in truth without his leave and conſent) and he after her death ſuffer

A Feme Covert.

k Stat. 32. & 34 H. 8. c. 5. Coo. 4. 51. Broo. Teſtament 13.

l 12 H. 7. 14. Perk. Sect. 502. Fitz. Executor 40.

m Plow. 526. Fitz. Executor 109.

n 12 H. 7. 24. 18 Ed. 4. 11. Perk. ſect. 501. Fit. Executor 5. 28. 109. Broo Teſtament 11.

ſuffer the Will to bee proved, and deliver the goods accordingly; in this caſe the Teſtament is good. And yet if the husband give his wife leave to make a Teſtament of his goods, and ſhe do ſo, he may revoke the ſame at any time in her life time, or after her death before the Will be proved. But a woman after contract with any man, may before the marriage make a Teſtament aſwell as any other, and is not at all diſabled hereby.

An Infant.

Stat. 32. Ed. 34. H. 8. cap. 5. Perk. Sect. 503. 504. Br. Cuſtome 50. Swin. 37, 38.

An Infant untill he be of the age of 21 yeares can make no Teſtament of his lands by the Statutes of 32. & 34 *H.* 8 But by ſpeciall cuſtome in ſome places where land is deviſable by cuſtome, he may deviſe it ſooner. And of his goods and chattels, if he bee a boy, he may make a Teſtament at fourteene yeares of age and not before: and if a maid, at twelve yeares of age and not before; and then they may do it without, and againſt the conſent of their Tutor, Father, or Guardian. o And yet ſome ſay an Infant cannot make a Teſtament of his goods and chattels untill he he be eighteene yeares of age. p A madd or lunatick perſon during the time of his inſanity of mind cannot make a Teſtament of lands or goods; but ſuch a one as hath his *lucida intervalla*, cleere or calme intermiſſions, may during the time of ſuch quietneſſe and freedom of mind make his Teſtament, and it will bee good. So alſo an Idiote, *i.* ſuch a one as cannot number twenty, or tell what age he is, or the like, cannot make a Teſtament, or diſpoſe of his lands or goods; and albeit he doe make a wiſe, reaſonable, and ſenſible Teſtament, yet is the Teſtament void. But ſuch a one as is of a meane underſtanding only, that hath *groſſum caput*, and is of the middle ſort between a wiſe man and a foole, is not prohibited to make a Teſtament. So alſo an old man that by reaſon of his great age is childiſh againe, or ſo forgetfull that he doth forget his own name, cannot make a Teſtament; for a Teſtament made by ſuch a one is void. So alſo it ſeemes a drunken man, that is ſo exceſſively drunk, that he is deprived of the uſe of reaſon and underſtanding, during that time may not make a Teſtament; for it is requiſite when the Teſtator doth make his will, that he be of found and perfect memory, q *i.e.* that he have a reaſonable memory and underſtanding to diſpoſe of his eſtate with reaſon. r A man that is both deafe and dumb, and that is ſo by nature, cannot make a Teſtament. But a man that is ſo by accident, may by writing or ſignes make a Teſtament. And ſo may a man that is deafe or dumb by nature or accident. And ſo alſo may a man that is blind. s An alien borne cannot make a Teſtament of lands or goods. A man that is entred into Religion, cannot make a Teſtament. t A Traitor attainted from the time of the Treaſon committed can make no Teſtament of his lands or goods; for they are all forfeit to the King; but after the time he hath a pardon from the King for his offence,

o Coo. ſu. per Litt. 89, p Perk. Sect. 503. 504. 24. Swinb. 37. 40.

A Lunaticke perſon.

An Idiot.

Swinb. 39. 40.

Swinb. 42.

An old man.

q Coo. 6. 23. Hill 3. Car. per the Lord keeper in the Chancery.

A deafe and dumb man.

r Swinb. 53.

s Curia B. R. 7. Iac.

An alien.

t Star. 5. & 6 Ed. 6. c. 11. & Swinb. 54.

A Traitor.

fence, he may make a Teſtament of his lands or goods as another man. A man that is attainted or convict of Felony cannot make a Teſtament of his lands or goods, for they are forfeit; but if a man be only indicted, and die before Attainder, his Teſtament is good for his lands and goods both. And if hee be indicted and will not anſwer upon his arraignment, but ſtandeth mute &c. in this caſe his lands are not forfeit, and therefore it ſeemes hee may make a Teſtament of them. And if a man kill himſelfe, his Teſtament as to his goods and chattels is void, but as to his lands is good.

A Felon. Prerogativa Regis. Plow. 258, 259.

A Felo *de ſe*. Plow. 261.

A man that is outlawed in a perſonall action cannot make a Teſtament of his goods and chattels ſo long as the outlawry doth continne in force; but of his lands he may make a Teſtament. The head, or any of the members of a corporation may not make a Teſtament of the lands or goods they have in Common, for they ſhall goe in ſucceſſion. A Villaine cannot make a Teſtament of his lands or goods after the Lord hath ſeiſed them. But here note, that howſoever the Teſtaments of Traitors, Aliens, Felons, Out-lawed perſons, and Villaines, be void as to the King, or Lord that hath right to the lands or goods by forfeiture or otherwiſe, yet it ſeemes the Teſtament is good againſt the Teſtator himſelf, and all others but ſuch perſons only. And here note further alſo, By the civill law alſo the Teſtaments of divers others, as Excommunicate perſons, Hereticks, Uſurers, Inceſtuous perſons, Sodomites, Libellers, and the like, are void. But by our law, the Teſtaments of ſuch perſons, at leaſt as to their lands, are good by the Statutes that do enable men to deviſe their lands. But all other perſons whatſoever, male or female, old or young, lay or ſpirituall, rich or poore, at any time before their death whiles they are able to ſpeak ſo diſtinctly, or write ſo plainly as another may underſtand them, and underſtand that they underſtand themſelves, may make Teſtaments of their lands, goods, and chattels, and that albeit they have ſworne to the contrary: and none are reſtrained of this liberty, but ſuch as are before named. * See more *infra* to this matter.

An outlawed perſon. Fitz. Dec. 16.

A Corporation. Fitz. Teſtament. 1.

A Villaine. Swinb. 155. &c. See the Stat. 32. & 34 H. 8. Perk. Sect. 496.

Secondly, in reſpect of the mind of him that doth make it.

The ſecond thing required to the making of a good Teſtament, is, that he that doth make it have at the time of the making of it, *Animum teſtandi*, i.a mind to diſpoſe, a firme reſolution and adviſed determination to make a Teſtament; otherwiſe the Teſtament will be void; for it is the mind not the words of the Teſtator that doth give life to the Teſtament, for if a man raſhly, unadviſedly, incidently, jeſtingly, or boaſtingly, and not ſeriouſly write or ſay that ſuch a one ſhall be his Executor, or have all his goods, or that he will give to ſuch a one ſuch a thing; this is no Teſtament, nor to bee regarded. And the mind of the Teſtator herein is to bee diſcovered by circumſtances; for if at the time hee bee ſick, or ſet himſelfe ſeriouſly to make his Teſtament, or require witneſſes to beare

* See more infra at Numb. 7. Swin. 9. 131. 324. 325.

beare witneſſe of it, it ſhall be deemed in earneſt; but if it bee by way of diſcourſe only, or of ſomewhat he would do hereafter, or the like, it ſhall be taken for nothing.

Swinb. 283. 284. 285. 286.

The third thing required in a good Teſtament, is, that the minde of the Teſtator in the making of it bee free, and not moved by feare, fraud, or flattery, for when a Teſtator is moved to make his Teſtament by feare, or circumvented by fraud, or overcome by ſome immoderate flattery; the ſame is void, or at leaſt voidable by exception. And therefore if a man by occaſion of ſome preſent fear, or violence, or threatning of future evils do at the ſame time, or afterwards by the ſame motive make a Teſtament: this Teſtament is void, not only as to him that put him ſo in feare, but as to all others, albeit the teſtator confirm it with an arch. But if the cauſe of feare be ſome vaine matter, or being weighty is removed, and the teſtator doth afterwards when the feare is paſt, confirm the Teſtament; in this caſe perhaps the Teſtament may bee good. And if a man by occaſion of ſome fraud or deceit bee moved to make a Teſtament, if the deceit be ſuch as may move a prudent man or woman, and if it be evill alſo; the Teſtament is void, or voidable at the leaſt; but if the deceit be light and ſmall, or if it be to a good end, as where a man is about to give all his eſtate to ſome lewd perſon from his wife and children, and they perſwade the Teſtator that the lewd fellow is dead, or the like, and thereby procure him to give his eſtate to them; this is a good Teſtament. And one may by honeſt interceſſions, and modeſt perſwaſions procure another to make himſelfe or a ſtranger Executor to him, or the like, and this will not hurt the Teſtament. Alſo a man may uſe fair and flattering ſpeeches to move the Teſtator to make his Teſtament, and to give his eſtate unto himſelf, or ſome friend of his, except it be in caſe where the flatterer doth firſt beate or threaten him, or put him in fear, or to his flattery joineth fraud and deceit, or the Teſtator is a perſon of weak judgement, or under the danger or government of the flatterer, as when the Phyſician ſhall perſwade his Patient under his hands to make his Teſtament, and give his eſtate to himſelf; or the wife attending on her husband in his ſickneſſe ſhall neglect him, and continually provoke him to give her all, or where the perſwader is importunate and will have no denial, or when there is another Teſtament made before; for in all theſe caſes the Teſtament wil be in danger to be avoided. And if I be much privie to another mans minde, and he tell me often in his health how hee doth intend to ſettle his eſtate, and he being ſick, I doe of mine own head draw a Will according to his minde before declared to me, and bring it to him, and ask him whether this ſhall be his Will or no, and he doth conſider of it, and then deliver it back to me, and ſay yea; this is a good Teſtament: But if otherwiſe, ſome friends of a ſick man of their own heads, ſhall make a

Thirdly, in reſpect of the occaſion or motive of it,

Will and bring it to a man in extremity of ſickneſſe, and read it to him, and ask him whether this ſhall be his Will, and he ſay yea, yea: Or if a man be in great extremity, and his friends preſſe him much, and ſo wreſt words from him, eſpecially if it be in advantage of them, or ſome friends of theirs; in theſe caſes the Teſtaments are very ſuſpitious.

But as touching theſe two laſt things, *Quere* how they ſhall avail in the Wills of land which are not regulated ſo much by the Civill Law.

Fourthly, in reſpect of the manner and form of the diſpoſition.

The fourth thing required in the making of a good Teſtament, is, that that form and order that the Law preſcribeth be obſerved in the the diſpoſition. And therefore 1. that there be an Executor named in all Teſtaments of goods and chattels, and that that Executor named be capable of the Executorſhip; for this is ſaid to be the head and foundation of the Teſtament; for if there be never ſo many Legacies given, and no Executor made, this diſpoſition is but a a Codicill, and cannot properly bee called a Teſtament; for in this caſe the party dead, is ſaid to die inteſtate, and the Adminiſtration of his goods muſt be granted to the Widdow, or next of kinne; whereas on the other ſide, if an Executor be appointed, albeit there be no Legacy given, yet this diſpoſition is, and is properly ſaid, to be a Teſtament: 2. If the Teſtament be of lands or Tenements, it muſt be in writing, and it muſt be committed to writing at the time of the making thereof: And it is not ſufficient, that it bee put in writing after the death of the Teſtator, being firſt made by word of mouth only, for then it is but *Nuncupative* ſtill. But if the Teſtament bee firſt made by word of mouth, and be afterwards written, and then brought to the Teſtator, and he approve it for his Teſtament: Or if the Teſtator, when he doth declare his minde, doth appoint that the ſame ſhall be written, and thereupon the ſame is written accordingly in the life time of the Teſtator; theſe are good Teſtaments of land, and as good as if they be written at the firſt. If therefore one be very ſick, and another come to him, and ask him whether his wife ſhall have his land, and he ſay yea, and a Clerk being preſent doth put this in writing without any precedent commandement or ſubſequent allowance of the ſick man; this is no good Teſtament of the land. So if one declare his whole minde before Witneſſes, and ſend for a Notary to write it, and die before he come, and he write it after his death; this is no good Teſtament for his lands, but a good *Nuncupative* Will for his goods and chattels, except he declare his minde to be that it ſhall not be his Will unleſſe it bee put in writing, for then perhaps it may not be a good Will, for his goods and chattels. So if he that doth write the Will cannot hear the party ſpeak, and another that ſtands by the ſick man doth tell him what he doth ſay; in this caſe if there be none others preſent

Swinb. 112. Broo. Teſt. 20.

Firſt, naming of an Executor.

Secondly, if it be of lands, it muſt be in writing.

Stat. 32. & 34 H. 8. Perk. Sect. 476, 477. Dyer 72. Plow. 345. Coo. 4. 60. Dyer 53.

Adiudged. Trin. 10. Ia.

to prove that he reported the very words of the ſick man; this will be no good Teſtament of the Land. But if a Notary take direction from the ſick man for his Will, and after goe away and write it, and then doth bring it againe and reade it to the Teſtator and he approve it: Or if it be written from his mouth by the Notary according to his minde, and his mind were to have it written, albeit it be not ſhewed or read to him afterwards; theſe are good Teſtaments. So if the Notary doe only take certaine rude notes or directions from the ſick man which he doth agree unto, and they bee afterwards written faire in his life time, and not ſhewed to him againe, or not written faire untill after his death; theſe are good Teſtaments of lands. If a ſick man bid the Notary make a Teſtamant of his lands, but doth not tell him how, and the Notary make a deviſe of it after his own minde; this is no good Teſtament; and yet if it be after read unto, and approved by the Teſtator, it may be good. And ſo if a Teſtament bee found written in the Teſtators houſe, and not known by whom, and it be read unto, and approved by the Teſtator; this is now a good Teſtament in writing for lands and goods: 3. Uſes of lands before the Statute of uſes, might, and lands and tenements deviſable by Cuſtome, and goods and chattels may be diſpoſed by word without writing, and ſuch Teſtaments of ſuch things ſo made are good: 4. It is not materiall in what matter or ſtuffe, whether in paper or parchment, nor in what language, whether in Latin, French, or any other tongue, nor in what hand, or letters, whether in Secretary hand, Roman hand, or Court hand, or in any other hand a Teſtament be written, ſo it be faire and legible that it may be read and underſtood: Neither is it materiall whether the ſame be written at large, or by notes, or characters uſuall or unuſuall, as xx^{s} for twenty ſhillings, or when the figure (2) is uſed in ſtead of the letter *A*, if it be uſuall in the Teſtators writing, or the like; for the Teſtament is good notwithſtanding. So alſo if ſome words be omitted, or ſentences improper uſed, when the intent and meaning is apparant, as where a man ſaith [I make my Wife of my this my laſt Will and Teſtament] leaving out the word [Executrix,] yet the Teſtament is good, and this ſhall be underſtood: But if it be ſo done as it cannot be read, or by reading the minde of the Teſtator cannot be known, then is the Teſtament void and of no force. In like manner as a *Nuncupative* Will is, when the words ſpoken, are ſo ambiguous, obſcure, and uncertaine, that thereby the meaning of the Teſtator cannot be known nor underſtood. 5. Where writing is needfull (as in the caſe of diſpoſition of land it is) there ſealing of the Teſtament, or ſubſcribing of the Teſtators name is not neceſſary. And therefore if a man by himſelfe or another, doe make a Teſtament of his land, and doe not put his Seale or name to it, if hee agree to it, this is a ſufficient Teſtament:

Swinb. part. 4. Sect. 25. 26.

Perk. 476, 477.

Thirdly, uſes and lands by cuſtome, and chattels deviſable without writing.

Fourthly, the matter or hand wherein and whereby it is written.

Fifthly, ſealing and ſubſcribing the Teſtators name not needfull.

Sixthly, interruption in the making of the Will.

6. If whiles the Teſtator is making his Will, and whiles he intendeth to proceed further at that time either by adding, diminiſhing, or altering, he bee ſuddenly ſtricken with ſickneſſe or inſanity of minde whereby he cannot proceed, but gives it over in the middeſt and ſo he die; it ſeemes in this caſe the whole Will is void. And yet if a man begin his Will, and make perfect Deviſes to one, and then of himſelfe give over untill another time: or if a man make a perfect Deviſe to one, and then die before he can make any Deviſe to any others; it ſeemes theſe are good Teſtaments for as much as is done. And therefore it is ſaid if one command another to make his Will and by it to deviſe White Acre to *I S* and his heirs, and Black Acre to *I N* and his heirs, and he write the Deviſe to *I S* and his heirs, and the Teſtator die before he can write the Deviſe to *I N* and his heires; this is a good Deviſe to *I S*, but a void Deviſe to *I N* and his heires. But if a man bid the Notary write a Deviſe of his land to *I S* upon condition, and the Notary write the Deviſe to *I S*, but the Teſtator dyeth before he can write the condition; in this caſe the whole Deviſe is void. But a man may if he pleaſe, make a Teſtament of part of his goods, and die inteſtate for the reſt, and that diſpoſition he doth make is good for ſo much. Swinb. 6. Lit. Broo. Sect. 300. Swinb. part. 7. Sect. 10. Coo. 3. 31. Swinb. 188.

Seventhly, in reſpect of the proofe of it; and what ſhall be ſaid a ſufficient proofe of a Teſtament, or not.

7. The laſt thing required to the perfection of a Teſtament, is, that it bee proved; for if it be never ſo well made, and be in truth the Teſtament of the Teſtator, yet if it cannot be by proofe made to appear ſo, it is but a void Teſtament and of no force at all. And therefore herein theſe things are to be known: 1. That a *Nuncupative* Teſtament muſt be proved by two Witneſſes at the leaſt, and thoſe muſt be ſuch as are without exception: 2. A written Teſtament when it is written with the Teſtators own hand, doth prove and approve it ſelfe, and therefore need not the help of Witneſſes to prove it. And for this cauſe if a mans Teſtament be found written faire and perfect with his own hand after his death, albeit it be not ſubſcribed with his name, ſealed with his Seale, or have any Witneſſes to it, if it be known or can be proved to be his hand, it is held to be a good Teſtament and a ſufficient proof of it ſelfe; but if it be ſealed with the Seale, and ſubſcribed with the name of the Teſtator, and can be proved by Witneſſes, it is the more authentick. And when it is found amongſt the choiſe evidences of the Teſtator, or faſt locked up in a ſafe place, it is the more eſteemed; for if it be written in another hand, and the Teſtators hand and Seale or one of them not to it, albeit it be found in ſuch a place as before, yet ſome proof will be expected of it further by Witneſſes in that caſe. And if a writing be found under the Teſtators own hand, yet if it be but a ſcribled writing written Copie-wiſe, with a great diſtance between every line without any date, in ſtrange characters, with many interlinings, and lying amongſt his void papers or the like; this will not bee Swinb. part. 7. Sect. 13. part. 4. Sect. 25.

eſteemed

eſteemed a ſufficient teſtament nor a good proofe of it; but it ſhall be accounted rather a draught or image of the Teſtators Will for a direction to him after to make his Will by: And yet if it can bee proved that the Teſtator did declare himſelfe that this ſhould be his Will; this will be a good Teſtament and a good proofe of it. 3. If it bee proved the Teſtator ſaid his Teſtament was in ſuch a Schedule in the hands of *I S*, and *I S* produce a writing deposing it to be the ſame; it ſeemes this is a ſufficient proofe; but if he ſay withall it is written with his own hand, then it ſeemes ſome other proofe, as by comparing hands, or the like, that it is his hand, wherein it is written, will be expected. 4. If the Witneſſes will prove, the writing produced to be the laſt Will of the Teſtator, or that hee ſaid, it was, or it ſhould be his laſt Will, or that it is the ſame writing that was ſhewed unto them, and whereunto they are Witneſſes, albeit they never heard it read, or ſet their hands to it, it is a ſufficient proofe. 5. All perſons male and female, rich and poore, are eſteemed competent Witneſſes to prove a Will, ſave only ſuch as are infamous, as perjured perſons, and the like; and ſuch as want underſtanding and judgement, as children, infants, and the like; and ſuch as are preſumed to beare affection, as kindred, tenants, ſervants, and the like. A Legatee is reputed a competent Witneſſe to prove any other part of the Will but his own Legacy, or to prove any thing againſt himſelfe touching his own Legacy, but not otherwiſe. And therefore, where there be but two Witneſſes of a Will, wherein either of them hath ſomewhat bequeathed unto himſelfe; this Will cannot be ſufficiently proved for thoſe Legacies; but for the reſt of the Will it may be ſufficiently proved. 6. Where there is no queſtion nor oppoſition moved or had about, or againſt a Teſtament, there the Oath of the Executor alone is eſteemed a ſufficient proofe of it; and in that caſe regularly no other proof is required. And where more proofe is neceſſary, as in the caſes before, it is in the diſcretion of the Ordinary, what proofe to admit and allow: And thoſe Witneſſes for number, nature, and quality; or that other proofe that he doth deeme and accept for ſufficient, is ſufficient; and the Teſtament ſo proved by ſuch Witneſſes, or other proofe is ſufficiently proved. And of this queſtion, ſee more *infra* at *Numb.* 7.

Swinb. part. 4. Sect. 21.

Witneſſe competent to prove a Teſtament.

A Teſtament ſufficient and good in his creation and beginning, may afterwards become void by divers meanes, as 1. By Countermaund or Revocation, and this is ſometimes by the party himſelfe that made it, and ſometimes it is by another: And ſometimes it is expreſſe, and ſometimes it is implyed; for it is a rule, That any Act or thing done, or words ſpoken by the Teſtator after the Teſtament made, that doth alter or croſſe all or part of his Teſtament made before, is a Revocation of it, or of that part thereof that is ſo croſſed and altered. And therefore if a Feme Covert make a Teſtament

Coo 4. 61. Litt. Sect. 168. Plow. 344, 341. Swinb. part. 7. Sect. 14. 15. Perk. Sect. 478. Coo. 3. 36, & 82, 83.

5. Where, and how a Teſtament good in his beginning, may become void by matter *ex poſt facto*, or not.

By Countermaund or Revocation.

ſtament, and after take a husband; by this the Teſtament is revoked. And if a man make a Teſtament of land, and after make a Feoffment of the ſame land, which Feoffment is not good for ſome defect in the Livery of Seiſin or otherwiſe, ſo that the Feoffor dyeth ſeiſed of the land notwithſtanding; hereby the Teſtament as to this land is revoked. So if a man make a latter Teſtament, and therein by expreſſe words doth revoke the former Teſtament; or if a man by any writing, or by word of mouth (* for one may by word of mouth revoke a Will in writing, albeit it be of land) doe expreſly revoke a former Teſtament that he hath made, and make no new Teſtament (for ſo a man may do and die inteſtate if he will;) or if a man make a latter Teſtament, & make no mention of the former Teſtament; all theſe are Countermaunds of the former Teſtament. And the latter Teſtament doth alwayes revoke the former, and that albeit the Executor of the latter doe refuſe the Executorſhip, or die during the life of the Teſtator, or after his death; and albeit the King be made Executor of the former; and albeit the former be a written, and the latter but a *Nuncupative* Teſtament; and this holdeth true in a Teſtament of lands, as well as in a Teſtament of goods and chattels; but otherwiſe it is *è converſo*; for however a man may by word avoid a Will made in writing that is good; yet a man cannnot by word make good, and affirm a Will made in writing that is void: And therefore, if a man deviſe his land in writing to *I S* and his heirs, and *I S* die before the Deviſor, and after the Deviſor ſay by word, That the heires of *I S* ſhall have the land, as *I S* ſhould have had it if he had lived; this verball declaration will not affirm the diſpoſition. Alſo the latter Teſtament doth infringe the former, albeit there be no mention made in the latter of revoking of the former; and albeit there bee twenty Witneſſes of the former and but two or none of the latter; and albeit in the former, the Executor be appointed ſimply and without condition, and in the latter, he be appointed conditionally, and the ſame condition be alſo broken, ſo that the condition be of ſomething then to come at the time when the condition was made: but if the Executor of the latter Teſtament bee made upon ſome condition then preſent or paſt, the condition not exiſting, the former Teſtament is not revoked; and albeit the former Teſtament be made irrevocable, *i.e.* That the Teſtator ſay, I make this my laſt Will and Teſtament irrevocable; and albeit the Teſtator hath ſworn not to revoke the former, the Oath being alſo revoked together with the Teſtament; and albeit the Teſtator enter into an Obligation with condition not to revoke it, but then in this caſe he doth forfeit his Obligation. But the latter Teſtament doth not revoke the former in theſe caſes following; *i.e.* when the latter is imperfect in reſpect of Will; *i.e.* when the Teſtator dyeth whiles he is making of it,

*Dyer 310. 34. Eliz. B. R. Burton, caſe.

Condition.

it, and before he can finiſh it, or when it is vehemently ſuſpected that the Teſtator was compelled to make the latter by feare or violence, or induced to make it by fraud and deceit, or when the former was made by the Teſtator whiles he was in his good and perfect minde and memory, and the latter is made by him when he is *inops mentis*, or when the latter is made by the perſwaſion and for the benefit of certaine perſons, when the Teſtator is in extremity of ſickneſſe, unleſſe it appeare plainly to be the expreſſe Will of the Teſtator to revoke the former, or unleſſe the Teſtator himſelfe did dictate the latter, or in caſe the latter be in favour of the children of the Teſtator or others who are to have the Adminiſtration of his goods if he die inteſtate. 2. When the Teſtator doth make two Teſtaments, a former and a latter, both being written, and afterwards lying ſick upon his death bed, they are both preſented unto him, and he is deſired to deliver to one of the ſtanders by, which of them he will have to ſtand for his laſt Will, and he deliver the former. 3. When the latter doth agree in all points with the former, for then both of them are as one in divers writings. 4. When in the latter Teſtament there is no Executor named, for then it is but a Codicill or addition to the former. 5. When the latter is made upon ſome ſudden diſcontent againſt the Executor of the former Teſtament, and afterwards he and the Executor are reconciled againe; in theſe and ſuch like caſes, the latter Teſtament is no Revocation of the former. * If the husband licence his wife to make a Teſtament, and after her death, he forbid the Probate, this is a Countermaund of of the Teſtament. But note here, that Revocations in generall are not favoured in Law, and therefore he that will a void a former Will by Revocation, muſt ſee he prove it well. 2. * A good Teſtament may become void by cancelling or other deſtruction of it, as, where the Teſtator himſelf, or ſome other by his commandement doth cut, or teare it in peeces, deface it, or caſt it into the fire; by this meanes the Teſtament is made void, except it be in caſe where the Teſtator doth it unadviſedly, or it be done by ſome other without his conſent, or by ſome caſualty, or when he doth willingly pull away the Seales, and then he doth afterwards ſeale it againe, or where the whole Teſtament is not cancelled or defaced, but ſome or the chiefe part thereof, as the naming of the Executor, or the like; for it is good ſtill for the reſidue, or where there be ſeverall papers, or writings, of one, ten, or each of them, containing the whole Teſtament, the cancelling or defacing of ſome of them doth not hurt the Teſtament, unleſſe it can be proved that the Teſtators mind were to avoid it all, or where the Teſtament is loſt in the life time of the Teſtator, or after; for in this caſe ſo much as can be proved by Witneſſes is ſtill in force. 3. A good Teſtament may become void by alteration of the eſtate of the Teſtator; as when a man after the time of making

* Lit. Broo. 55.

* Swinb. lib. 7. part. ſect. 16.

Secondly, by cancelling of it.

Swinb. part. 7. Sect. 17.

Thirdly, by alteration of the eſtate of the Teſtator, &c.

making the Teſtament, and before his death is convicted or condemned of ſome great crime for the which the Law depriveth him of the making of a Teſtament, as Treaſon, Felony, or the like. And yet if the crime be pardoned and purged before his death, the Teſtament may be good enough. And if a man of ſane and perfect memory make his Teſtament, and after become *inops mentis*, as every man for the moſt part is before his death; this doth not hurt the Teſtament. 4. A good Teſtament may become void by an intention only to alter it when the Teſtator is hindered in his intention that it cannot take effect: And therefore, if when the Teſtator intendeth to alter his Teſtament, or to make a new one, he be by feare or fraud forbidden or letten, that he dare not or cannot alter it, or the Notary or Witneſſes dare not, or may not be ſuffered to come to him, as when a wife or ſome other that is to have benefit by the former Will, under pretence that ſhe hath a charge from the Phyſitian that none ſhall come at him, or under pretence that he is aſleep or the like, will not ſuffer any body to come at him; or when the Notary and Witneſſes are all preſent, and they make ſuch a noiſe or quarrelling, that they hinder the effect of his intent; or when the Teſtator is kept from doing it by importunate requeſts and flattering perſwaſions; in all theſe caſes, and by theſe meanes the former Teſtament may become void. But if it appear the Teſtator hath no purpoſe to alter the Teſtament when hee is let as aforeſaid; the feare is a vaine feare, the Teſtator is prohibited at another time, and not the time when he doth intend to alter the Teſtament, but he hath ſundry opportunities after that time to doe it, and doth it not, or he is drawn only by the faire ſpeeches of a wife or friend, or by the weeping, or other trouble ariſing from the griefe of the Legatary or Executor for the Teſtators ſickneſſe only he is diſturbed; in theſe caſes perhaps it may not be void. And where it is void by the prohibition of a Legatary only, it is void for ſo much as doth concern him only, and not for the reſt of the Teſtament. 5. A good Teſtament may become void by making another of the ſame date; for if two Teſtaments be found after the death of the Teſtator, and it cannot be diſcerned or proved which was made former or latter; the one of them doth overthrow the other, and both of them are become void, except they be both to the ſame purpoſe, or one of them be made in favour to wife and children &c. and the other to ſtrangers. And yet in the firſt caſe alſo the Teſtator by declaration of his minde, which of them he will have to take effect, may make either of them good. 6. A good Teſtament may be made void by the declaration of the Teſtators minde, as if a man have two Teſtaments lying by him, the one made after the other, and they are both ſhewed or delivered to the Teſtator when he lyeth ſick, and hee by word or ſigne declare that

Coo. 4. 62.

Fourthly, by intention to alter it.

Swinb. part. 7. ſect. 18.

Fifthly, by making another of the ſame date.

Swinb. part. 7. ſect. 11. Perk. Sect. 479.

Sixthly, by the declaration of the Teſtator.

that he will have the former to ſtand; this declaration doth revoke the latter, and affirme the former. And where a man would revoke a Will for any of theſe cauſes, he muſt preſently after the death of the Teſtator put in a *Caveat* or exception in that Court where the Will is tobe proved, and thereupon proceed to queſtion it, or by a prohibition in ſome caſes he may ſtay the Probate in the Spirituall Court. See more *infra* at *Numb.* 12.

Perk. Sect. 501. Coo. 1. 99. 2.55.

If a woman covert without the leave of her husband make a Teſtament of her husbands goods, and the husband doth after her death conniveat the Probate, and deliver the goods accordingly, hereby the Teſtament of the wife is become good; but if an Infant or mad man make a Teſtament in the time of his Infancy, or madneſſe, and after the Infant or mad man become of full age, or ſober, before his death; it ſeemes theſe Teſtaments are void. And yet if the Infant at his full age, or the mad man when he is ſober make a publication of this Teſtament, it may perhaps bee good.

6. Where a Teſtament void or voidable in his Inception. may become good by ſome matter or accident *ex poſt facto.* And where not.

Perk Sect. 479. Coo. 4.61. Plow. 344.

If a man make a former and a latter Will, and by this latter the former is revoked, and after the Teſtator declare himſelf that the former ſhall ſtand; by this the former that was void before, is now become good againe. And yet if a man make a Will that is void, and it be proved after his death; this Probate will not make it good, but it doth remaine void as it was before.

If a Feme ſole make a Will, and then take a husband whereby the Will is countermanded, and ſo become void; if her husband die, ſo that ſhe become ſole againe: this accident will not make the Will good againe, but it doth remaine void ſtill; but perhaps by a new publication after ſhee doth become ſole, it may become good againe. See more *infra* at *Numb.* 11.

See before at Numb. 4.

To the making of a good and ſufficient Deviſe, theſe things are requiſite. 1. That there be a deviſor, and that he be a perſon able to deviſe, and that both in reſpect of the condition of his owne perſon and of the thing whereof the Deviſe is made. 2. That there be a Deviſee, and that hee bee a Perſon capable and able to receive the thing deviſed, either at the time when the Deviſe is made, or at leaſt when the Deviſe is to take effect. 3. That the Deviſor have at the time of the deviſe made *animum teſtandi*, *i.* a mind to make a deviſe. 4. That the Will of the Deviſor be free, and not drawn or coacted by fraud, flattery, feare, or the like. 5. That the Deviſe be made in due manner and forme. 6. That the thing deviſed be a thing deviſable. 7. That it be deviſed upon lawfull termes and conditions. 8. That there be words ſufficient to make his mind known. 9. That it bee proved after the death of the Deviſor. 10. And if it be a Deviſe of land, it is further required that the Deviſor be ſolely ſeiſed of the land, and not jointly

7. What ſhall be ſaid a good and ſufficient Deviſe or Legacy, or not.

Perk. Sect. 406. See before at Numb. 4. and after at Numb. 17.

Firſt, in reſpect of matter touching the Deviſor, and who may be a Deviſor.

ly ſeiſed with another; and that he be ſeiſed of an eſtate in Fee-ſimple: and that the Deviſe be in writing. And for the firſt of theſe it is to be known, that whoſoever may make a Teſtament, may make a deviſe of the ſame thing of which he may make a Teſtament. *Et ſic è converſo.* And whoſoever is diſabled to make a Teſtament, is diſabled to deviſe by ſuch a Teſtament. And therefore Infants may not deviſe their lands untill they be 21 yeares of age, nor their goods and chattels untill they be 14 yeares of age (or as ſome ſay untill they be 18 yeares of age.) [a] Women that have husbands, cannot deviſe their lands to their own husbands, or others, either by or without their husbands conſent, albeit there be a cuſtom to enable them thereunto; but all ſuch deviſes are void. [b] And Spirituall perſons as Archbiſhops, Biſhops, Deanes, Archdeacons, Prebends, Perſons, Vicars, or any member of a Corporation may not deviſe the lands or goods they have in the right of their churches and Corporations. And for the ſecond thing, this is to bee known 1. that regularly whoſoever may be a Grantee, may be a Deviſee or Legatee. And therefore a Deviſe made to any perſon or perſons, male or female, children or ſtrangers, bondmen or freemen, Lay men or clerks, debtors or creditors, Infants or men of full age, women ſole or covert, Colledges, Univerſities, Corporations, or the like, are good. But it is ſaid, that if any Legacy be given to an Heretick, Apoſtate, Traitor, Felon, Excommunicate perſon, Out-lawed perſon, Baſtard, unlawfull Colledge, Libeller, Sodomite, Uſurer, Recuſant convict, it is void by the Civill Law, except it be in ſome ſpeciall caſes. And yet it ſeemes a Deviſe of lands to any ſuch perſon is good within the Statute of Wills. [c] A Deviſe to an Infant in the womb of its mother, at the time of the death of the Teſtator is void. [d] And yet if a man deviſe to ſuch an Infant, and hee happen to bee borne before the death of the Teſtator, it ſeemes in this caſe the Deviſe is good; for it is a rule, [e] That the Deviſee muſt be capable of the thing deviſed at the time of the death of the Deviſor; if it be then to take effect in poſſeſſion, or if it be a remainder, he muſt be capable of it at the time when the remainder ſhall happen, or otherwiſe the Deviſe is void. [f] And a man may deviſe his lands, goods, or chattels, to his own wife, as well as to any other. 2. But he that may be thus a Deviſee, and is capable of a thing deviſed, muſt be certainly named and deſcribed; for if a Deviſe be to a perſon altogether incertaine, the Deviſe is altogether void. [g] And therefore if I give my land to my beſt friend, or to my beſt friends, theſe are void Deviſes. So if I give my land to a Vicar, and ſay not to what Vicar; this Deviſe is void, and no averment will help in this caſe. [h] If one have two ſonnes of one name called *I S*, and he deviſe to his ſonne *I S* without any diſtinction; it ſeems this Deviſe is void for uncertainty; but in

Secondly, in reſpect of the matter touching the Deviſee. And who may be a Deviſee. And by what name.

Incertainty.

Averment.

[a] Coo. ſuper Litt. 112. 4. 61. Broo. Deviſe 32.

[b] Perk. Sect. 496.

Perk. Sect. 505. 510. Swinb. 212. ſee infra at Numb. 18.

[c] Dyer 303. 304. B. R. Curia. Mic. 13. Ia.

[d] New Termes of the Law tit. Deviſe. See infra Numb. 11.

[e] 9. Ia. B. R. Litt. ſect. 168. Litt. Broo. ſect. 55.

[g] M. 19. Ia. Curia. B. R. Crumpe verſus Bodie.

[h] Coo. 6. 68. Swinb. 293. 294. 295. 295.

in this caſe perhaps an averment which ſon is meant, may help. So if one give to *I S* 20l. and there be two or more of that name; this Deviſe is void, except it may be proved by ſome thing which of them he meant. So if one ſay in his Teſtament, I give to one of the world 10l. this Deviſe is void for incertainty. So if one give him 10l, whoſe name is written in a Schedule in the cuſtody of ſuch a man; and in truth there is no ſuch Schedule in the cuſtody of ſuch a man to be found; or if there be no name written therein; it ſeemes theſe Legacies are void for incertainty. So if a man give a Legacy to a man incertaine, and no ſuch man is to be found, and the meaning of the Teſtator cannot be known; this Deviſe is void. And yet if a man by his Will ſay thus, I deviſe to him that ſhall marry my daughter; this is a good Deviſe; and he that doth marry my daughter in my life time, or after my death ſhall have it. And if a man deviſe any thing *ad pias cauſas*, as to the Church, or to the Poore, not expreſſing what Church or Poore; this perhaps may be a a good Deviſe. So if a man give 20l. to his kindred; it is ſaid this is a good Deviſe, and that a reaſonable expoſition ſhall be made of it as neer the intent of the Teſtator as may be: *viz.* that thoſe in the next degree ſhall have it firſt, and then thoſe in the next degree to that ſhall have it afterwards; and if it be a Deviſe to the kindred of another man, that they ſhall have it equally. (*Sed quære* of this Deviſe, for it ſeemes altogether uncertaine.) So if a man give to *I S*, or *I D* 20l. this is held to be a good Deviſe, albeit it be ſomewhat incertaine, and the diſjunctiue ſhall be taken for a copulative, and ſo *I S* and *I D* ſhall take both by this Deviſe; but if in this caſe one of them be nearer of kin then the other, then it is ſaid he ſhall have it for his life, and the other afterwards. And if one deviſe 20l. to *A* or *B*, which of them *I S* will appoint; this is a good Deviſe, and hee that *I S* ſhall appoint ſhall have it. And if one deviſe to *I S* and his children; this is a good Deviſe and certaine enough, and hereby he and his children ſhall take the thing deviſed together. 3. And as the perſon to whom the Deviſe is made, muſt be capable, and certainly deſcribed and named, ſo muſt he be capable by that name by which the Deviſe is made to him, or otherwiſe the Deviſe is void. And therefore if a Deviſe be to the heires of *I S*, *I S* being living; this Deviſe is void. And yet if lands or goods be deviſed to the Executors of *I S*, and *I S* die before the Teſtator and make Executors; this is a good Deviſe to the Executors. And if a man deviſe his land to *I S* for life, the remainder to the next of kin, [or next of blood] of *I S*; this is a good Deviſe of the remainder. And if a man deviſe goods to the Pariſhioners of the Pariſh of *S*, to the uſe of the Church; this is a good Deviſe, and the Churchwardens may recover it. And if a man deviſe *Eccleſiæ ſanctæ Andreæ*

Swinb. part 7. ſect. 9.

Plow. 345. Coo. 1. 105. 155. Perk. ſect. 508.

Fitz. Deviſe 27. Plo. 523. Perk. ſect. 509. 510. Broo. Corporation. 55.

dec

drex de Holborne; it ſeems this is a good Deviſe to the Perſon of that Church. And if a man deviſe to the City of *London*, Univerſity of *Oxford*, or to Queens Colledge in *Oxford*, theſe are good Deviſes. But if one deviſe to the Cominalty of a Guyld that is not incorporate, as to two of the middle men of the Guyld of the fraternity of whiteacres in *London*, or the like; this deviſe is void.

Miſnaming. 4. And if the perſon be capable, wel-named, and capable by that name, if his name be truly ſet downe, yet if his name be not ſo, but miſtaken, the Deviſe is void. Dyer. 4. Perk. ſect. 505. Swinb. 289. 290. And therefore if one intending to give 20l. to *I S*, deviſe to *I N* 20l. this deviſe is void both to *I S* and *I N*, except the perſon be certainly denoted and deſcribed by ſome other circumſtance, as to *I N* the ſonne of *I S* my Lanlord, or the like. So if one deviſe to the Abbot of S. *Peter*, when the foundation is the Abbot of S. *Paul*; this Deviſe is void. And if one deviſe to a Corporation, and there be none of that name at the time of the Deviſe, nor during the life of the Teſtator, this Deviſe is void, and ſo alſo it ſeemes the Law is, if there be a Colledge made after of that name. But if one deviſe a thing to the wife of *I S*, and before the Deviſor die, *I S* dye, and ſhe take another husband, and is called by another name; yet this Deviſe is good. Plow. 344. So if one give a Legacy to *I S* Deane of *Pauls*, and the Chapter there and their Succeſſors, and after before the death of the Deviſor *I S* dye, and another is made Deane; yet this Deviſe is good notwithſtanding this miſtake. For the third and fourth thing required in a good Deviſe, ſee before at *Numb.* 4. *Part.* 2. 3. And for the fifth thing, it is to be knowne,

Fifthly, in reſpect of matter touching the manner and forme of the Deviſe. And how a Deviſe may be made. 1. That lands and tenements deviſable by cuſtome, may be deviſed by a Nuncupative Will without any writing for any time whatſoever, as Uſes at the Common-Law that are now within the Statute might have been. Coo. ſuper Litt. 111. Plow. 345. Swinb. part 1. ſect. 12. Alſo thoſe Uſes that remaine at the Common-Law, and are not within the Statute, may be deviſed by word without any writing. But no eſtate can be made of lands by Deviſe upon the Statute, except the Deviſe be in writing; and ſo a man may deviſe his land, albeit he make no Executor; for an Executor hath nothing to do with the Free-hold of land. Alſo goods and chattels, leaſes for yeares of Lands, Wards, Villaines, and the like may be deviſed by word without any writing at all. Plow. 345. Swinb. part. 1. Sect. 12. Dyer 140. And yet it ſeemes queſtionable whether a Leaſe for yeares of a Rent, Common, or ſuch like thing, be deviſable by word without writing. Swinb. part. 4. ſect. 4. Plow. 23. Littl. Broo. ſect. 316. Dyer 23. 2. The forme of words in a Deviſe is not at all regarded; and therefore if one ſay, I give, inſtitute, deſire, appoint, or will, that *I S* ſhall have my land, or that *I S* ſhall have 20l. or let *I S* have my land or 20l. all theſe Deviſes are as good as if he ſay, I deviſe to *I S* my land or 20l. And therefore if one at this day ſince the Statute of Uſes deviſe that his Feoffees of the land ſhall bee

ſeiſed

ſeiſed of the land to the uſe of *I S* and his heires, or to the uſe of *I S* and the heires of his body; or if ſuch a man deviſe that his Feoffees ſhall make an eſtate of the land to *I S* and his heires, or to him and the heires of his body; this is a good Deviſe of the land in Fee-ſimple, or Fee-taile. * And if a man make a Feoffment of his land to the uſe of his laſt Will, and then deviſe that his Feoffees ſhall be ſeiſed to the uſe of *I S*; this is a good Deviſe of the land *per intentionem*. * And if I deviſe that *I S* ſhall have, hold, and occupy my land for his life; this is a good Deviſe of the land for his life. * If a man have a Leaſe for yeares of land, and he deviſe his Leaſe, or his Terme, or his Ferme, or the profits or occupation of the land; by either of theſe Deviſes his whole leaſe and all his intereſt in the land is given as well as by any other forme of words. 3. A man may deviſe lands, tenements, or hereditaments in poſſeſſion in Fee, for life or yeares; or he may deviſe it in reverſion, *viz.* to one for life, the remainder to another in Fee, or in taile, or in any other ſort, as a man may grant it by his Deed, and ſuch Deviſes are good. But if the Fee-ſimple of land be deviſed to one, the remainder cannot be deviſed to another, albeit the firſt Deviſe be but conditionall. And therefore if land be deviſed to *I S* and his heires, and if he dye without heires, that it ſhall remaine to *I N* and his heires; this is a void remainder to *I N*. So if a man deviſe his land to *I S* in Fee, *ita quod ſolvat I* N 20l. and if he faile, that it ſhall remaine to *I N* and his heires, this remainder to *I N* is void; for if *I S* faile of payment, *I N* ſhall not enter and have the land, but the heire of the Deviſor. And yet perhaps a rent may be deviſed after this manner. Howbeit if another man have a Rent-charge of 20l. a yeare iſſuing out of my land for 20. yeares; and he deviſe this unto me untill I have levied 100l. by way of retainer, the remainder to *I S*; this remainder is not good. 4. A Deviſe may be of lands, goods, or chattels ſimply and abſolutely or conditionally; the ſimple Deviſe alſo may be *in præſenti*, or *in futuro*. And therefore as a Deviſe to one and his heires in *præſenti*, is good, ſo a Deviſe to one and his heires after the death of *I S* is good. If I deviſe land to *I S* and his heires on condition, as ſo as, or *ita quod*, he pay 10l. to *W S*, or paying to *W S* 10l. or *ad ſolvendum* 10l. to *I S*; the Deviſe in all theſe caſes is a good conditionall Deviſe; and if the condition be not performed or broken, the eſtate is ended, and the heire may take advantage of it. And therefore if lands be ſo given to the heire, the condition is idle, becauſe none can enter but him. And if I deviſe that if *I S* pay my Executors 20l. that hee ſhall have White acre to him and his heires for ever, or for life &c. this is a good Deviſe, and after the contingent ſhall take effect accordingly, and in this caſe and ſuch like the heire of the Deviſor muſt keep the land untill

Condition.

* Paſche. 9. Iac. Newmans caſe.

* Plow. 545. Coo. 4. 66. 8. 95.

* Dyer 122. 33. 128. Coo. 1. 83. 6. 42. Dyer 4. 33.

Dyer 139. 140.

Plow. 521. Perk. Sect. 163. See Condition Coo. 8. 95

till the contingent doe happen. In like manner as if it bee a chattell, the Executor ſhall keep the thing untill the condition bee performed, and after a condition broken he ſhall take advantage of it.

Limitation. 5. A Deviſe may be alſo with a limitation, as in the caſes before; and as, where one give land to another, and his heires ſo long as *I S* ſhall have heires of his body; or where one doth deviſe his land to *A* his ſonne and his heirs for ever, paying to *B* his brother 20 l. when he ſhall come of age, and then that he ſhall enter and have it to him and his heirs, and if he die without heirs of his body, the ſaid *B* then living, then that *B* and his heirs ſhall have it in the ſame manner: And theſe and ſuch like Deviſes are good.

Coo. ſuper Lit. 112. 113 236. 6. A man that is ſeiſed of land in Fee, may deviſe that his Executors ſhall ſell it; or may deviſe it to his Executors to ſell, or Deviſe it to his Executors, and that they ſhall ſell it; and theſe Deviſes are good.

Clauſe of Diſtreſſe. Dyer 348. 100. 8. 84. 85. 7. A Deviſe may be of a rent, or of land reſerving a rent, with clauſe of Diſtreſſe, As if a man Deviſe land to *I S*, paying 10 l. by the yeare to his wife, and if it be unpaid, that ſhe ſhall diſtraine for it; this is a good Deviſe: But a Warranty cannot be made by a Will. And yet if a man deviſe land to another for life, or in Taile, reſerving a rent; in this caſe the heires of the Deviſor ſhall be bound to the Warranty in Law, and the Deviſee ſhall take advantage of it.

Warrantia. Coo. ſuper Litt. 386.

Plow. 523. 540. Dyer. 357. Coo. 8. 94. 83 8. A man may deviſe his land to one, and deviſe a rent out of the ſame land to another, and theſe Deviſes are good. So a man may deviſe his land to one in Fee, and after deviſe the ſame land to another for life or years; and theſe are good Deviſes, and may ſtand together. So alſo if a man in the fore-part of his Will by generall words, deviſe all his lands to one in Fee, and in the latter part of his Will, deviſe ſome ſpeciall part of it to another in Fee; theſe Deviſes are good and ſhall ſtand together, as for example, if one have a Farm, and in the firſt part of his Will, give this Farm to one, and in the latter part of his Will give one Cloſe (a part of this Farm to another) or a man deviſe all his land in *B* (which is in the County of *Glouc.*) to *A* his daughter, and the latter part of his Will deviſeth all his land in the County of *Glouc.* in the poſſeſſion of *I S* to his ſonne, and part of the land in *B.* is in the poſſeſſion of *I S*, and in *Glouceſterſhire*; theſe are good Deviſes and ſhall ſtand together. * But otherwiſe, it is when the generall clauſe doth come laſt, as where one doth give his land to *A* his daughter, and in the latter part of his Will, doth give all his land in *Hartfordſhire* in the poſſeſſion of *I S* to *W*, and the land given to *A*, is in *Hartfordſhier*, and in the poſſeſſion of *I S*; in this caſe the Deviſes will not ſtand together, for the firſt Deviſe is void; and ſo alſo it is, where both the Deviſes are particular, as, where firſt in a mans Will, he doth give White Acre to *A* and his heirs, and after in his Will he doth give White Acre to *B* and his heires;

* 38 Eliz. Co. B. Agreed divers times.

heirs; in this caſe the firſt Deviſe to *A* is void. * And yet in this laſt caſe, ſome have held the Deviſes ſhall be good, and that *A* and *B* ſhall be Joint-tenants *Idea Quere.* * If one deviſe all his land to *I S* and his heirs excepting 20 l. for ſeven years, which he willeth ſhall be imployed for his children; this is a good Deviſe of this ſumme of 20 l. a yeare. 9. And a man may deviſe his land for ſo many yeares as *I S* ſhall name, and after appoint that his ſonne ſhall have it during the minority of his ſonne, and both theſe Deviſes may ſtand together: And therefore, if *A* be poſſeſſed of the Mannor of *D* for yeares, and he deviſeth all his Term to his eldeſt ſonne if he live ſo long, and if he die before he have any iſſue of his body, then to his younger ſonne in the ſame maner, but withall, he doth appoint that his wife ſhall have the occupation of the land untill his eldeſt ſonne be 21 years of age; theſe Deviſes ſhall ſtand together, and the wife ſhall enjoy the Mannor, for that time by this Deviſe. 10. A man may deviſe a term of years by way of remainder; as for example, a man that is poſſeſſed of a term of years, of land, may deviſe it to *I S* for life, the remainder to *I D*; or to *I S* for life, and that it ſhall after remaine to *I D*, or to *I S*; for ſo many years as he ſhall live, and after to *I D*, or in any ſuch like manner, theſe are good Deviſes both to the firſt, and to him in remainder alſo by way of Executory Deviſe, though not by way of remainder, and in this caſe the firſt Deviſee cannot hinder the ſecond Deviſee of the remnant of the terme. But a man cannot by Deed in his life time grant his term in this manner: * Nor if a man be poſſeſſed of a term can he entaile it by his Will: And therefore, if a man poſſeſſed of his terme of years of land Deviſe his term or his land to *I S* and his heires, or to *I S* and the heirs of his body, or to *I S*, and his iſſues, the remainder to *I D*; this remainder is void, and it is a good Deviſe of the whole terme to *I S*, and his Executors. * Alſo a chattell perſonall may (as it ſeemes) be deviſed to one for life, and afterwards to another, but yet ſo as the one muſt have the property only, and the firſt but the occupation only, as if one deviſe that *I D* ſhall have the occupation of his plate for his life, and after that it ſhall remaine to *I S*; this is a good Deviſe of the plate to *I S*. But if the thing it ſelfe be deviſed to the firſt of them; then the Deviſe to the ſecond is void, for the gift of a chattell perſonall for one houre is the gift of it for ever. And ſo it did ſeeme in the Lady *Daves* caſe. *Hill. 9. Car. B. R.* 11. A Legacy of goods or chattels may be given to, or untill a certaine time, or from, or after a time certaine or incertaine; as for five years, or from, or untill the marriage of *A* or the like; and theſe Diſpoſitions are good. 12. A man may deviſe his land for ſo many yeares as *I S* ſhall name, and if *I S* doe name a certaine number of yeares in the life time of the Deviſor

Dyer in his Lecture, 1. & per Inſt. Dodr.

* Trin. 9. Ia. B R.

Plow. 523. 546.

Coo. 8. 95. Plow. 519. 546. 516. 539. Dyer 277.

Grant

* Coo. 10. 87. 47. paſche. 17. Iac. B. R. child. verſus Baily.

* 37 H. 6. 30. Litt. Broo. Sect. 388. 3. 4. 209.

Swinb. part. 4. Sect. 17.

Plow. 524.

viſor, this will bee a good Deviſe. But if one deviſe his land for ſo many yeares as his Executor ſhall name, it ſeemes this Deviſe is not good. 6. As touching the ſixth thing required in a good Deviſe, theſe things are to be known. 1. That Lands, Tenements, and Heriditaments for the nature and quality of them are deviſable as well as other things. And therefore by the cuſtome of ſome places, lands in poſſeſſion, reverſion, or remainder, are deviſable in Fee for life, or yeares; and a man that hath a Leaſe for yeares of land, may deviſe the land at his pleaſure during his term. But by the ancient Common-Law in favour to heires, the lands that a man had in Fee-ſimple were not deviſable by Teſtament, except only in ſome ſpeciall places by the cuſtome of the place, as Gavelkind-lands in *Kent*, and lands within certaine Borrow-Townes, as *London*, *Oxford* &c. and by the cuſtome of thoſe places ſuch lands are deviſable: And in ſome places the cuſtome is, that they may deviſe their purchaſed lands only; and in other places, that they may deviſe their lands diſcended alſo: And in ſome places the cuſtome is that they may deviſe for life only, and in other places, that they may deviſe in Fee-ſimple and Fee-taile alſo. And in all theſe places where ſuch cuſtomes are, they may deviſe their lands now as they might have done before the Statute; for the Statute hath not deſtroyed their cuſtome. And therefore at this day they that have ſuch lands in ſuch places, have their election either to deviſe according to the power the cuſtome doth give them, or according to the power the Statute doth give them, and in the firſt caſe the Deviſe is good againſt the heire for the whole; and in the laſt caſe, it is good againſt him for two parts in three only. Alſo by the Common-Law, the Uſes of lands were deviſable, as goods, and chattels were at the pleaſure of him that had them. But otherwiſe, and in other caſes, lands and tenements, might not be deviſed and diſpoſed by Will, untill 32 *H.*8. at which time the owners of lands, tenements, rents, &c. were by Act of Parliament enabled to deviſe and diſpoſe their lands as followeth: He that hath any land in poſſeſſion, reverſion, or remainder by Socage Tenure, and hath no land held *in Capite* or by Knights Service, may deviſe all his land, or any rent, Common, or other profit apprender out of it to any perſon in Fee-ſimple, Fee-taile, for life or years, at his pleaſure. Hee that hath any ſuch land held of the King *in Capite* by Knights Service, or by Knights Service and not in Chiefe, or held of any common perſon by Knights Service, may deviſe two parts thereof in three, to be devided, or any rent, &c. out of thoſe two parts at his pleaſure, and no more; for the third part muſt diſcend to the heir and come to ſatisfie the Lord his duties; and therefore the Deviſe of the whole land in this caſe is void for the third part. He that hath any ſuch land held by Knights Service *in Capite*, and other lands held by Socage

Sixthly, in reſpect of matter touching the thing deviſed, and what may be deviſed, and by what name.

Deviſe of lands and tenements.

Dyer 371. Coo. 8. 83. 6. 16. ſuper Litt. 111. Perk. Sect. 496. 500. 497. 538. Litt. Sect. 167. Dyer 155. old N. B.

Perk. Sect. 496. 528. 538.

Stat. 32. H. 8. c. 1. 34 H. 8. c. 5.

Socage Tenure may deviſe two parts of the whole, and no more, or any rent &c. out of it at his pleaſure. He that doth hold land of the King by Knights Service only, and not *in Capite*; or if a meane Lord by Knights Service, and hath alſo other lands held by Socage Tenure, may deviſe two parts in three of all the land held by Knights Service or any rent &c. out of it, and all his Socage land at his pleaſure. So that now by theſe Statutes, a man that hath lands in Fee-ſimple, may deviſe them in Fee-ſimple, Fee-taile, for life, or yeares abſolutely, or conditionall at his pleaſure. And therefore if one deviſe his land to one for life, the remainder in Fee, or Fee-taile to another; or deviſe his land to *B*, the remainder to the next heir male of *B*, and the heires males of the body of ſuch heire male or the like; theſe are good Deviſes. But for the more full underſtanding of theſe things, it is to be known in the next place.

See the Statute, Coo. ſuper Litt. 111. Perk. Sect. 544. Litt. Sect. 287. Dver, 210. old, N B 89. Perk. Sect. 500, 539, 540. 496, 497, 498.

2. That this Statute doth not enable men to deviſe land that are diſabled by Law in reſpect of their perſons or minds, as Infants, women Covert, men *de non ſane* memory, or the like; nor ſuch as are diſabled in reſpect either of the nature of their land, as Copi-holders (for Copi-hold-land is not deviſable) or of the eſtate they have in the land, as Tenants in Taile, or *pur auter vie*, or Ioynt-tenants; for theſe can no more deviſe the land they doe ſo hold, then they could before the Statute. But ſuch as are ſeiſed of land in Common, or Coparcenery, may deviſe their land as well as thoſe that are ſole ſeiſed. And if two be Ioint-tenants for life, the Fee-ſimple to one of them; he that hath the Fee-ſimple, may deviſe his Fee-ſimple after the death of his companion. Neither doth this Statute enable thoſe that are ſeiſed of lands in Fee, in the right of their houſes and Churches to deviſe the ſame lands: And therefore, Biſhops, Deanes, Parſons, Vicars, Maſters, of Hoſpitals, or the like; can no more deviſe the lands belonging to their Biſhopricks &c. then they could before the Statute, but the lands they are ſeiſed of in their own right, they may deviſe like other men.

Coo. 10. 87. 3. 32. ſuper Litt. 111.

3. Heridiments that are not of any yearly value, are ſome of them deviſable, and ſome not; for if the King grant to one and his heirs *bona & catalla felonum & fugitivorum vel ut lagatorum*, Fines, and Amercements within ſuch a Manner or Village; in this caſe, the owner can neither deviſe theſe things to another, as part of the two parts, nor leave them to diſcend for a third part. And yet if one have a Mannor unto which a Leet, Waiſe, Eſtrays, or the like; is appendant or appurtenant; there by the Deviſe of the Mannor with the appurtenances, theſe things may paſſe as incident to the Mannor: But if a man have a Hundred, with the goods of Felons, Out-lawes, Fines, Amercements, *Retorna brevium*, and other ſuch caſuall Heriditaments within the ſame Hundred, and theſe have been uſually let to Farm for a rent; in this caſe, theſe things may be de-

viſed or left to diſcend for a third part. 4. Such incertaine Franchiſes as before that are Heriditaments of no yearly value, albeit they are not deviſable, yet may reſtraine the deviſe of a mans lands and tenements, and make it void for a third part, if they be held *in Capite*, for if it is not requiſite, that the thing held by the Tenure *in Capite* be deviſeable; and ſuch things as may not bee left to diſcend to the Lord for a third part, and to ſatisfie him, his duties, may notwithſtanding be deviſable, or reſtraine the Deviſe of other lands and tenements, and make it void for a third part. And therefore, a Reverſion upon an eſtate taile, which is dry and fruitleſſe, if it be holden of the King by Knights Service *in Capite* will hinder the Deviſe of the third part of a mans lands and tenements: Alſo an eſtate taile of lands held *in Capite* may reſtraine the Deviſe of a third part of other lands. And therefore, if ſuch lands be conveyed to one and the heirs of his body, the remainder to another, and he have other lands in Socage; if he have any iſſue, he can deviſe but two parts of his Socage land. And where the Statute ſpeaks of a remainder, it is to be intended of ſuch a remainder only, as may draw Ward and marriage by the Common-Law, and this is that remainder only, that doth hinder a Deviſe. And therefore if *A* be ſeiſed of lands in Socage Tenure; and *B* be ſeiſed of lands in Fee, held *in Capite* by Knights Service, and *B* make a Leaſe for life or gift in Taile to *C*, the remainder to *A* in Taile or in Fee; in this caſe, *A* during the eſtate for life or in Taile, may deviſe all his Socage land, notwithſtanding this remainder. But if a man make a Leaſe for life or yeares, and after grant the reverſion for life, or in Taile, the remainder in Fee, and after the Grantee for life dyeth, or Donee in Taile dyeth without iſſue, in this caſe, this remainder which now is in point of reverſion, will reſtraine the Deviſe of other lands, and make it void for a third part. 5. In all caſes where a man is reſtrained to deviſe any part of his lands held in Socage, he muſt have lands held *in Capite* at the ſame time, and therefore the time of having of lands to deviſe, and holding of other lands *in Capite*, and diſpoſing of the lands to be deviſed, muſt concurre. And therefore, if a man be ſeiſed of an Acre of land in Fee, held of the King in Chiefe by Knights Service, and of other two Acres in Fee held in Socage, and enfeoffee his younger ſonne of the Acre held *in Capite*, and of one of the other Acres, or convey it to the uſe of his wife, or for the paiment of his debts &c. and after purchaſe land held in Socage; in this caſe, he may deviſe all the new purchaſed land held in Socage without reſtraint. So if a man bee ſeiſed of lands held by Knights Service *in Capite* in poſſeſſion, reverſion, or remainder, and of lands held in Socage, and by his Will in writing, doth deviſe all the ſaid lands, and after the land held *in Capite* is recovered from him, or aliened by him *bonâ fide*; in theſe caſes

Coo. 10. 81. 82. ſuper Litt. 111. Coo. 3. 35. 30. 34.

Coo. 10. 81. 11, 24. 3. 10. 34. 35. ſuper Litt. 111. Dyer 158.

caſes the Deviſe is good for all the land held in Socage: And hence it is, That if the King grant land to one in Fee Farm to hold in Socage at a rent, and after grant this rent to another and his heires, to hold *in Capite*, and the Grantee of the rent doth grant it to him that hath the land; in this caſe, becauſe the rent is extinct, and he cannot be ſaid to hold lands *in Capite*, this ſhall not reſtraine the Deviſe of any of his lands. And yet if a man hold ſome lands by Knights Service *in Capite*, and other lands in Socage, and bee diſſeiſed of the lands held *in Capite*; he cannot deviſe all his Socage land, but the Deviſe will be void for a third part, for he is ſaid to have that land ſtill, whereof hee hath the right. And albeit the Statute ſay [that he that hath lands held of the King *in Capite*, and other lands in Socage, may give two parts for the advancement of his wife, paiment of his debts, preferment of his children] whereby he is reſtrained to deviſe any more. And therefore, if by act, executed in his life time, he convey two parts to any ſuch uſes or intents, he cannot deviſe any more by his Will, but the reſidue muſt diſcend, yet this alſo is to be intended of the land he hath at the ſame time. For if a man be ſeiſed of land held in Socage of the yearly value of 20 l. *per annum*, and he hath not any land held *in Capite* by Knights Service, and he make his Will in writing, and by it, deviſe his Socage land to one in Fee, and then purchaſe land of the value of 20 s. *per annum* held *in Capite*, and die; this will make the Deviſe void for a part of the land that is held in Socage: But if a man ſeiſed of land in Fee of Socage Tenure, aſſure it to the uſe of his wife for her Iointure, and after purchaſe lands held *in Capite* by Knights Service; he may deviſe two parts in three of all this *Capite* land, and the King ſhall not have any thing out of, or for the Socage land: If a man ſeiſed of lands, part of which are held *in Capite*, and part in Socage make a Feoffment of the lands held *in Capite*, (being two parts in three of the whole) to the uſe of him and his wife for life, with divers remainders over; in this caſe, he may not deviſe any of the Socage land. And if a man have no Socage land but *Capite* land, and convey it away in Fee-ſimple, keeping no Reverſion to any ſuch uſe, and after purchaſe Socage land; he may deviſe all the Socage land newly purchaſed. 6. As the Teſtator enabled to deviſe by this Statute without reſtraint, is, and muſt be one that hath the land he doth deviſe at the time of the Deviſe made, and no other land then to be an impediment to his Deviſe, ſo he muſt have a ſole eſtate as well in the land he doth leave to diſcend to the heir, as in the land he doth Deviſe: And therefore, if lands held *in Capite* be conveyed to a man and his wife, and the heirs of their two bodies; and this man hath other lands whereof he is ſole ſeiſed held of the King *in Capite* by Knights Service; in this caſe he may not deviſe two parts of the whole, ſuppo-

Coo. 3. 4. 11. 24.

Coo. 3. 32.

ſing this may ſuffice for the Kings third part, for he may deviſe but two parts of the reſidue; *i.e.* of that whereof he is ſole ſeiſed either at the time of making of the Will, or at the leaſt at the time of the death of the Teſtator. 7. The eſtate of the land that is held, muſt continue after the death of the Tenant, otherwiſe it will be no reſtraint. And therefore, if Tenant in Taile be to him and the heirs males of his body, the remainder in Fee to another of Lands held by Knights Service *in Capite*; and he is ſeiſed of other lands in Socage in Fee, and by his Will in writing deviſe all the Socage land and die without iſſue male; in this caſe, the Deviſe is good for all the Socage land. And ſo alſo it is where the eſtate the Anceſtor had of the land held is defeated by condition. Coo. 10. 84.

8. That which a man cannot diſpoſe by any act in his life time, ſhall not be taken for any ſuch Mannors &c. whereof a man may deviſe two parts by authority of this Statute at his death: And therefore in the caſe of an indevided eſtate of lands between husband and wife, where the husband can make no diſpoſition for longer time then during the Coverture; theſe lands are not to bee eſteemed, ſuch as are to be accounted amongſt the lands; whereof two parts in three are deviſable. Coo. 3. 32.

9. The Tenure by Knights Service muſt continue after the death of the Deviſor, otherwiſe the land ſo held, will be no reſtraint. And therefore, if the King grant land to one and his heires, to hold during his life by Knights Service *in Capite*, and after in Socage, or to hold during his life in Socage, and after by Knights Service; in theſe caſes, the Grantee may deviſe all his land, notwithſtanding the Tenure of this land. Coo. 10, 84. 3. 34.

10. The King or other Lord muſt have a full and clear yearly value of the third part left to diſcend to him, and the value is to be eſteemed as it is, and doth happen to be at the time of the death of the Teſtator, for the King, or other Lord muſt have the like and equall benefit for his third part, as the Deviſee hath for the two parts without diminution or ſubſtraction; when therefore a man will have his Deviſe good for the reſidue, he muſt take care that the third part be ſo left, for if the third parr be not valuable, or be charged with any rent &c. or be upon any incertainty, as if it be upon a poſſibillity only, as where a man and his wife be ſeiſed of a joint eſtate Taile made during the Coverture, and he Deviſe other lands to her on condition, that ſhe ſhall wave her eſtate made during the Coverture, and ſo intend that that part of his land ſhall be left for the Kings part; this Deviſe will not be good for the reſidue, and albeit the wife doe wave the eſtate after the husbands death, yet this will not help the matter or make the Deviſe good for that part for which it was void before: But it is not materiall by what Tenure the third part diſcending be held: For it is holden by the better opinion, That if a man be ſeiſed of 20 l. land held of the King *in Capite*, and 10 l. land held of a Subject by Socage, and he deviſe all the *Capite* land. Coo. 3. 32. 31. ſuper Litt. 111. 10. 84.

land to a ſtranger; that this is a good Deviſe for the whole, and that the King ſhall be ſatisfied by the Socage land. And if it be of the value of the third part, albeit it be but of an eſtate Taile where-of the Anceſtor was ſeiſed, or it be new purchaſed land, yet it is ſufficient: And therefore, if ſome lands be given to a man, and the heirs of his body of the value of 10 l. *per annum*, and he be ſeiſed of other lands in Fee-ſimple to the value of 20 l. *per annum* and all, or part of theſe are held *in Capite* by Knights Service; in this caſe he may deviſe the lands in Fee-ſimple, and leave the entailed land to diſcend for a third part: And if a man be ſeiſed of ſuch land, and convey it to the uſes within the Statute or any of them, and after purchaſe new land and leave that to diſcend, this is ſufficient.

Coo. 3. 34. 11. The third part that is left to diſcend to ſatisfie the King or other Lord muſt diſcend immediately, and he muſt not ſtay for it. And therefore, if a man be ſeiſed of three Acres of land held by Knights Service *in Capite*, and make a Leaſe of one Acre for life, and after deviſe the other two Acres; this Deviſe is not good for the whole two Acres, but for two parts in three thereof only; and albeit the Tenant for life die afterwards, yet this will not help the matter. But if the Deviſor leave a full third part immediately to diſcend in Fee-ſimple or in Fee taile, he may deviſe the other two parts at his pleaſure. And if he doe not leave a third part to the full, it muſt be made up and ſupplyed out of the other two parts, which in caſe of the King is done by Commiſſion out of the Court of Wards, and in caſe of a Subject by Commiſſion out of the Chancery.

Coo. ſuper Litt. 111. 9. 133. 3. 32. 30. 12. As the third part left to diſcend, muſt bee of as good value as either of the other two parts is at the time of the death of the Teſtator, or otherwiſe the Deviſe of all the reſidue will not be good, ſo muſt it bee taken out of the lands of the Teſtator indifferently: And therefore, if a man be ſeiſed in Fee of land held in Chiefe by Knights Service, and make a Feoffment of the one halfe of it to the uſe of himſelfe for life, and after to the uſe of one he doth intend to marry, and after to the uſe of another in remainder, or to any other ſuch like uſes within the Statute, and after he doth marry the ſame woman, and after he deviſeth the other moity to his wife, children, or any other; in this caſe, albeit the wives eſtate have precedency, yet the King ſhall have his third part out of both the moities equally. So if one be ſeiſed of Gavelkind land held *in Capite*, and his ſonne being dead, deviſe part of it to one of his grand-children, and part of it to another, and part to a third Taile; in this caſe, the Kings third part ſhall come out of all the three parts equally, and accordingly the Deviſe will be void for ſo much to every one of them. So if one hold three ſeverall Mannors of three ſeverall Lords; he cannot deviſe two of theſe Mannors leaving a three to diſcend, but he may deviſe two parts of every of the third Mannors, and a third part of each Mannor muſt

diſcend.

diſcend to each Lord, for there muſt be an equallity in theſe things. For further illuſtration of which things, the examples following are to be heeded. *W B*, being ſeiſed of the Mannor of *Thoby in Capite*, and of lands in *Fobbing* held in Socage in Fee, and he and his wife being ſeiſed of the Mannor of *Hinton* held *in Capite* to them and the heires of their two bodies begotten by an eſtate made to them during the Coverture for the joynture of the wife, the reverſion to *W* in Fee, and *Thoby* doth amount to the value of two parts, and *Hinton* and *Fobbing* to a third part, and *W B* by his Will in writing, doth deviſe *Thoby* to his wife for life, upon condition that ſhe ſhall not take her former Joynture, with divers remainders over and die, and ſhee refuſed her former Jointure in *Hinton*; in this caſe it was adjudged that the Deviſe was not good for the whole Mannor of *Thoby*, and that the Mannor of *Hinton* was not a ſufficient third part to diſcend. Coo. 3. Butler & Bakers caſe.

L L being ſeiſed of the Mannor of *Affaland*, *Heanton*, *Rillaton*, *Pengelley*, *Willeſworthy*, and *Triveſquite* (the laſt only held *in Capite*) in Fee, and having iſſue *Thomas* his eldeſt ſonne, *William*, *Humfry*, and *Richard*, younger ſonnes, which *Richard* had iſſue *Leonard*, makes a Feoffment of theſe Mannors to divers uſes, *viz.* of the Mannors of *R*, *P*, *W*, and *A*, to the uſe of the Feoffor for life, and after to the uſe of ſuch perſon as he ſhould appoint by his laſt Will, and after to the uſe of *W* his ſecond ſonne in Taile, and after to his other ſonnes in Taile, and after to the uſe of the Feoffor and his wife in Taile, and after to the uſe of the Feoffor and his heirs for ever. And of the Mannor of *H* to ſuch like uſes, and of the Mannor of *T* alſo to ſuch like uſes, and the ſame uſes were with power of Revocation: And after the Feoffor purchaſed eight Acres of other land held in Socage, and after did revoke the uſes of the Mannors of *R*, *P*, *W*, and *A*, and after deviſed ſome of the ſaid Mannors (excepting ſome peeces) and the ſaid eight Acres of land to his eldeſt ſonne and the heirs males of his body for 500 yeares on certain conditions, and if he die without iſſue, that it ſhall goe to *William* &c. and afterwards he dyed ſeiſed of the ſaid eight Acres of land, and the lands deviſed by the Will at the time of the death of the Teſtator were of the yearly value of 24 l. 14 s. 10 d. *per annum*, *& non ultra*, and the lands whereof the Feoffment was made, and not revoked were at the time of the death of the Teſtator of the value of 55 l. 6 s. 8 d. in this caſe, it was adjudged that the Deviſe of the eight Acres newly purchaſed was void at leaſt for a third part, and reſtrained by the reverſion in Fee expectant upon the eſtate Taile made to the younger ſonne of the Mannor held *in Capite*. And it was reſolved, That if a man be ſeiſed of three Acres of equall yearly value, one of them held of the King by Knights Service *in Capite*, and have iſſue two ſonnes, and give the Acre ſo held; and another of the Acres to his younger ſonne, whereby hee hath ſo executed Coo. 10. 78. Leonard Leoveis caſe, Coo. 11. 24.

his

his power by the Statute, that hee cannot deviſe by his Will any part of the third Acre; and after he purchaſe three Acres of equall value held in Socage; that in this caſe becauſe he hath the reverſion in Fee upon the eſtate Taile made to the younger ſonne, he can deviſe no more but two parts of the ſaid land ſo newly purchaſed. But if the reverſion be gone before the purchaſe, he may deviſe the whole; but if a man be ſeiſed of lands in Fee, part of which are held of the King *in Capite* by Knights Service, and he convey two parts of it unto any of his ſonnes, or to the uſe of his wife for life, or in Taile; in this caſe, albeit he may not deviſe any part of the reſidue, yet he may by his Will deviſe the reverſion of the two parts. And in caſe, where he hath not conveyed the full two parts, he may deviſe ſo much as to make up that hee hath conveyed full two parts: And it was further reſolved in the ſame *Leonard Lovets* caſe. That whereas the Statute ſaith, All perſons &c. having &c. of any Mannors &c. in poſſeſſion, reverſion, or remainder &c. and the Feoffor *L L* in the caſe before had a remainder in Taile expectant upon the eſtates in Taile limited to the ſonnes; that this remainder was not within the Statute, nor would have reſtrained the Deviſe, but for the reverſion in Fee afterwards. *A B*, being ſeiſed in Fee of the Mannor of *Gracedin* held *in Capite*, and of the value 30*l. per annum*, and of the Mannor of *Normanton* held *in Capite* of the value of 18*l. per annum*, in conſideration of a marriage with *M*, did covenant to ſtand ſeiſed of the Mannor of *G*, to the uſe of himſelfe and the heirs males of his body, on the body of the ſaid *M*, and after to the uſe of *W B* his brother, and the heires males of his body, and after to the uſe of another brother in Taile, and after to the uſe of his own right heires, and of the Mannor of *N* to the uſe of himſelfe and *M* he is to marry, and the heires of his body, and after the remainders as before of the other Mannor, and after the marriage is had, and *A B* doth purchaſe other lands held in Socage of the value of 3*l. per annum*, and then deviſed the ſame new purchaſed lands; in this caſe, it was adjudged that the Deviſe was void for a third part of the Socage land, in reſpect of the reverſion dependant upon the eſtate taile, and yet that it was a good Deviſe for two parts of the new-purchaſed land, albeit he had executed his power and given more then two parts to the uſe of his wife. And in theſe caſes where a man hath land held *in Capite*, and other land, and he convey the land held *in Capite* to any of the Uſes within the Statute, as to his yonnger children or the like, or convey it with power of revocation only, ſo that he hath power of the land ſtill, and after he purchaſe land held in Socage; in this caſe it ſeemes hee may deviſe all the land newly purchaſed, as if the land were conveyed without any ſuch power of revocation. *A* being ſeiſed of land in fee held,

Coo. 6. 16. ſuper Litt. 112.

Coo. 11. 23. Henry Harpurs caſe.

Coo. 10. 83.

Coo. 6. 17. Sir Edwards caſe.

held of the King *in Capite*, made a Feoffment of two parts of it to the uſe of his wife, for her life, for her Jointure, and after made a Feoffment of the third part to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates as he ſhall limit and appoint by his laſt Will and Teſtament in writing, and afterwards he did by his laſt Will in writing deviſe this third part to one in Fee; in this caſe it was reſolved that the Deviſe was good for the whole third part. And yet if a man make a Feoffment in Fee of land held *in Capite* to the uſe of his laſt will, albeit the deviſe of the land be with reſerence to the Feoffment, yet it is void for a third part, *E B* being ſeiſed of 6 Mannors, the one in Fee, and the reſt in Taile with the reverſion expectant to him and his heires and hath iſſue *T B*, divers of which Mannors are held of the King *in Capite* by Knights ſervice, and every of them of equall yearely value, by his laſt Will in writing did deviſe all the ſaid Mannors to divers perſons and their heires for payment of his debts and advancement of his children, and then died, and the eſtate in taile that diſcended to his iſſue was more then a third part of all; in this caſe it was reſolved that the Deviſe was good for two parts of the reverſions, and for the entire Mannor in Poſſeſſion, and not void for a third part of the Mannor in Poſſeſſion, and for all the reverſions in Fee. A man being ſeiſed in Fee of Gavelkind land in *Kent*, part whereof is held of the King *in Capite*, and part of Common perſons in Socage hath iſſue *A*, who hath iſſue *B C* and *D*, and *A* deviſeth ſome of theſe lands to *B*, and ſome to *C*, and ſome to *D* his Grand-children in taile; in this caſe the Deviſe is void for a third part of the whole, aſwell for the land held in Socage as the land held *in Capite*. And yet if in this caſe no Will be made, the King ſhall have but a third part of that which doth diſcend to the eldeſt ſonne the heire at the Common-law, and not the third part of that which doth diſcend to the younger ſonnes by cuſtome. And if lands deviſable by cuſtome come into the Kings hands, and he grant them to hold of him *in Capite*, and the Patentee deviſe them to the uſe of his wife, children, or for paiment of his debts &c. in this caſe the Deviſe is void for a third part: And here note, that in all the caſes before where a man is reſtrained to deviſe a third part of his land if he deviſe the whole, the Deviſe is good notwithſtanding for ſo much as he hath power to deviſe. And as touching the thing deviſed is further to be known. 13. That a man muſt have right to, and poſſeſſion of the land he deviſeth, or elſe the Deviſe is not good. And therefore if a Diſſeiſor deviſe the land he hath gotten by Diſſeiſin; this Deviſe as to the Diſſeiſee is void. And if a man be diſſeiſed of his land, ſo that he hath nothing but a right thereof left, and then he deviſe this right, or deviſe the land, this Deviſe is void. And if one contract for land, and pay his money for it, but hath

Coo. 10. 81. Tr. 34. Eliz. Bedinfields caſe.

Coo. Rep. Stamf. Per. 8.

Deviſe of a right to Land, or of Land that is another mans.

Plow. 485.

Nevils caſe.

hath no aſſurance of the land, and he deviſe this land to another; this cannot be a good Deviſe of the land, but perhaps the Deviſee may in a Court of equity compell him that hath received the money to aſſure and ſettle the land according to the Deviſe. And if one deviſe another mans land, this Deviſe is void; but if he after the Deviſe made purchaſe this land, now is the Deviſe good. If a man bargaine and ſell land to me on condition to reenter, if he pay me 10l. and I covenant that I will not take the profits untill default of paiment, and he make a Leaſe of 6 yeares of it to another, and after breake the condition; in this caſe I may deviſe this land, and the deviſe will be good. 14. A Seigniory, Rent, or the like thing is deviſable as land is, and will paſſe without the Attornement of the Tenant. The like Law is of a reverſion alſo. And a man may deviſe a Rent *de novo* iſſuing out of land, or a Rent iſſuing out of land that is in *eſſe* before. And therefore if a man make a Leaſe for life or yeares rendring Rent, the Leſſor may deviſe this Rent. So if if a Rent be granted to one and his heires, the Grantee may deviſe this rent. So a man that is ſeiſed of land in Fee may deviſe any rent out of it at his pleaſure. And therefore if a man that holdeth his land by Knights ſervice in Cheiſe by his Will deviſe any Rent Common, or other profit out of it; this deviſe is good, and that albeit the Rent or Profit doth amount to the value of the whole land; as if one have 3 Acres of land worth 3s. by the yeare, and he deviſe 3s. Rent out of it; this is a good deviſe of the whole Rent; but in this caſe the Rent ſhall iſſue out of two parts of the land, and a third part ſhall be free and not charged with it, but he may charge 2 parts in 3 parts of ſuch land at his pleaſure. And ſo alſo it is if a man have lands holden by Knights ſervice, and not *in Capite*, and other lands in Socage, he may charge two parts of the Knights ſervice land, and all his Socage land at his pleaſure. And if a man have lands held in Socage, and no lands held *in Capite*, or by Knights ſervice, he may deviſe what rent he will out of it. But a man cannot deviſe a Rent, Common, or any ſuch like thing out of another mans land that is none of his owne, nor out of that he hath not. And therefore if one deviſe 10l. out of his Mannor of Dale, when in truth he hath no ſuch Mannor, this Deviſe is void. If a rent be granted to me for the life of *I S*; it ſeemes I may not deviſe this rent, but that the Terre-tenant ſhall hold it as an Occupant. 15. Where a man is ſeiſed of a houſe in Fee, and may deviſe the houſe it ſelfe, there it ſeemes he may deviſe the doores, windowes, wainſcot, or the like Incidents of the houſe. And where a man may deviſe the land it ſelfe, it ſeemes hee may deviſe the trees or graſſe growing upon the land. *Quando licet id quod majus, videtur & licere id quod minus.* But where the land it ſelfe is not deviſable, there ſuch things incident or annexed to,

Plow. 344. Fitz. Deviſe 7.

Adiudged Powſly & Blakemans caſe.

Perk. Sect. 538. Litt. Sect. 585. 586. Dyer 253. 140. 5. 52. F. N. B. 121. Coo. ſuper Litt. 111. 8. 83, 3. 33.

Deviſe of Rent, Common, Seigniory or the like.

Dyer 253.

Occupant.

Coo. 4. 63. Perk. Sect. 512. 518. Coo. 11. Rich. Liſords caſe. Kelw. 88.

Deviſe of houſes, doores, glaſſe, wainſcot &c.

or

or growing, or being upon it, are not deviſable. And therefore the tenant in taile, for life, or yeares of land may not deviſe the houſes, or windowes, doores, or wainſcot of houſes, or trees, or graſſe being or growing thereupon, but this deviſe is void. 16. Where a man hath a Uſe that is not executed by the Statute of Uſes, but remains at the Common-law, he may deviſe it as he may any other thing, And therefore if one be poſſeſſed of a Terme of yeares, and grant it over to another to the uſe of the Grantor, he may diſpoſe this uſe by his Will, for it is in the nature of a Chattell. But if a man have ſuch a Uſe in jointenancy he cannot deviſe it. 17. All manner of goods and chattels reall and perſonall may be deviſed by Teſtament. And therefore Leaſes for years of lands, Grants for yeares of Rent, Common, or the like, Wardſhips of the bodies and lands of heirs of Tenants by tenure *in Capite* and by Knights Service, Cattell, as oxen ſheepe, horſes &c. gold, ſilver, money, plate, houſhold-ſtuffe, as beds, pots, panns, platters, &c. corne, wooll, and implements of husbandry may be deviſed by Will; and not only thoſe a man hath at the time of the Deviſe, but thoſe a man is to have or may have afterwards. And therefore it is held a man may give his corne that ſhall grow in ſuch a ground the next yeare after his death, or the wooll or lambs his flock of ſheep ſhall yeild the next yeare after his death; and that theſe Deviſes are good; but if in this caſe there ſhall be no ſuch corn growing in that ground, or any lambs or wooll ariſing out of his flock that yeare the Legacy is fruitleſſe. And yet if the Teſtator deviſe to *I S* 20 quarters of corne, or 20 lambs, and both will that the ſame ſhall be paid out of his corne that ſhall grow, or out of his flock the next yeare, and there be not ſo much corne, or not ſo many lambs, or not any at all growing or ariſing, yet this is a good Deviſe, and the things muſt be paid. In like manner if a man give to *I S* a horſe, or a yoke of oxen, in this caſe albeit the Teſtator have neither horſe nor yoke of oxen, yet the Deviſe is good and muſt be performed. 18. Things in action, as debts, and the like, albeit they be not grantable by deed in the life time of the party, yet are they deviſable by Will. And therefore if the Teſtator doth by his Will give any debt due to him on an obligation, or on a contract, or the like; this Deviſe is good. And the thing deviſed may bee had thus, the Teſtator may if he will make the Legatury Executor as to that debt, or if he do not, the Legatury may ſue the Executor in the *Spirituall* Court, or in ſome Court of equity, and thereby compell the Executor either to recover it himſelf, and ſo to pay it to the Legutary, or to give the Legutary power to ſue for and recover it himſelfe in the Executors name. But if it be ſuch a cauſe of action, as is altogether uncertain, as where a man may have an action againſt another, for taking away his goods, or to compell him to make an account, or the like; this is ſuch a cauſe of action as is not deviſeable.

Deviſe of a Uſe. — Perk. Sect. — See Uſes.

Deviſe of goods and chattels. — Swinb. part. 3. Sect. 5. Perk. Sect. 511, 525.

Deviſe of debts, and things in action, poſſibilities, and incertainties.

And

Perk. Sect. 527. Litt. Broo. Sect. 437. Dyer 272. Plow. 520.

Childs caſe 17. Ia. B.R.

And yet poſſibilities and incertainties are in divers caſes deviſable. And therefore if one have money to be paid him on a Mortgage, he may deviſe this money when it comes; as if I enfeoffe a ſtranger of land, upon condition that if he do not pay me 20l. ſuch a day, that I may reenter, in this caſe I may deviſe this 20l. if it be paid, and the Deviſe is good, albeit it be made before the day of paiment come. And if a man be poſſeſſed of a Terme of yeares, and deviſe all the reſidue of that Terme of yeares that ſhall be to come at the time of his death; this Deviſe is good, and yet ſuch a Grant by deed is void.

Grant.

*Perk. Sect. 520. 521. &c. See in grant.

*But a meer poſſibility, and a thing altogether incertain is no more deviſable by will, then it is grantable by deed. 19. Emblements, *i.e.* the corne that is ſowen and growing upon a mans ground at the time of his death, and which himſelfe ſhould have reaped if he had lived to the harveſt (as in moſt caſes he ſhall where he doth ſowe it) are deviſable. And therefore if a man have land in Fee ſimple, Fee taile, for life, or yeares and ſowe it with corne; he may deviſe the corne at his death to whom he pleaſe. And yet if Leſſee for yeares ſowe his land ſo little while before his Terme expire that it cannot be ripe before the end of the Terme, and he die, it ſeemes he cannot deviſe this corne, for if he had lived he could not have reaped it after the end of the Terme.

Deviſe of Emblements.

Perk. Sect. 527.

20. Obligations, Counterpanes of Leaſes, and ſuch like things alſo are deviſable; but in this caſe the Deviſee cannot ſue upon the Obligation in his own name, nor enter for the condition broken upon the Leaſe if there he cauſe, but he may cancell, give, ſell, or deliver up the Obligation, or Counterpane to the Obligor, or Leſſee.

Deviſe of Obligations, Counterpanes of Leaſes, &c.

See infra in Numb.

And finally whatſoever ſhall come to the Executor after the death of the Teſtator in the right of his Executorſhip, may be deviſed by the laſt Will and Teſtament of the Teſtator.

Perk. Sect. 521. Litt. Sect. 287. Doct. & St. 167.

21. The goods and chattels that a man hath joyntly with another are not deviſable. And therefore if there be two Iointenants of goods or chattels, as where ſuch things are given to two, or two do buy ſuch things together, and one of them deviſe his part of the things to a ſtranger; this Deviſe is void. Inſomuch that if in this caſe the Teſtator make the other Ioyntenant his Executor, the Will as to this is void, and he ſhall not be charged as Executor for thoſe goods, but he ſhall have them altogether by right of ſurvivorſhip.

Deviſe of the things a man hath in Iointure with another.

Plow. 525. Broo. Adminiſtrator 7. Fitz. Adm. 3.

22. The goods and chattels that a man hath in anothers right are not deviſable; and therefore an Executor or Adminiſtrator cannot deviſe the goods and chattels he hath as Executor or Adminiſtrator, for ſuch a Deviſe is void. Howbeit the Executor may appoint an Executor of the goods of the firſt Teſtator, which the Adminiſtrator cannot do, And of the profits that do ariſe by the goods and chattels the Executor or adminiſtrator hath during the time of his Adminiſtration, he may make diſpoſition. The goods and chattels belonging to Colledges, and Hoſpitals may not be deviſed by the Teſtaments of the

Deviſe of the things a man hath in anothers right.

Maſters

Maſters or governours thereof, nor the goods and chattels belonging to other Corporations by the Mayors, Bayliffes, or Heads thereof. * And the goods and chattels that Churchwardens have in the right of the Church are not deviſable. * All the chattels reall that a man hath in the right of his wife by her means, and all the Obligations that are made to her alone before, or during the time of the Coverture, and the chattels reall or perſonall that his wife hath as Executrix to any other, are not deviſable by the Teſtament of the husband. But all the chattels perſonall that a man hath by his wife which ſhe hath in her own right, and the debts due upon Obligations made to the husband and wife both during the Coverture, are deviſable by the Teſtament of the husband. 23. Such things as are annexed, and incident to a Freehold or inheritance, ſo that it cannot be ſevered from it by him that hath the propertie of them, as wainſcot, and glaſſe to houſes, and the like, are not deviſable; but in ſuch caſes where the thing it ſelfe to which it is annexed is deviſable. 24. The goods and chattels that are another mans, are not deviſable, and therefore if a man give another mans horſe, it is is a void Deviſe. So if one deviſe the things that by ſpeciall cuſtome of ſome places, as the heire loomes do belong to the heire, this Deviſe is void, for it is not deviſable from him.. 25. If a Biſhop have a Ward belonging to his Biſhoprick fallen, he may deviſe it; but if a Church of his become void in his life time, he cannot deviſe the Preſentation. If a Parſon of a Church have the Advowſon in Fee, and he deviſe that his Executors two or three of them ſhall preſent at the next avoydance; this is a good Deviſe. 26. All theſe things before that are deviſable, when they are deviſed muſt be named, and deviſed either by their proper name, or otherwiſe deſcribed by ſome other matter whereby the mind of the Teſtator may be known and diſcerned; for if he erre and miſtake in the name or ſubſtance of the thing deviſed, or it be ſo incertainly deviſed and deſcribed that it cannot be perceived what he intendeth, the Deviſe is void. And therefore if one deviſe a piece of ground by the name of a Meſuage, except it be ſo called, the Deviſe is void. And yet by the Deviſe of the uſe, profit, or occupation of land, the land it ſelfe is well deviſed; and by the Deviſe of land it ſelfe, the reverſion thereof may be deviſed. But if one intending to deviſe a horſe, doth deviſe an oxe: or meaning to give gold, doth give apparell; theſe Legacies are void, unleſſe his meaning may appeare by ſome circumſtance to be otherwiſe; as if a man have but one horſe, and he be called *Arundell*, and he deviſe his horſe *Bucephall*; this Legacy is good enough. And if a man give all his mony in ſuch a Cheſt, when in truth there is no mony in that Cheſt, or give to another the 10l. which *I S* doth owe him, when in truth *I S* doth not owe any ſuch money; this Deviſe is void. And yet if the Deviſe bee thus, *viz.* I give to *A B* 10l. and

Doct. & St. lib. 2. c. 39. Perk. Sect. 476. 498. 497

Husband and wife.

* Perk. Sect. 560. Doct. & St. c. 7.

Deviſe of things that are incident and annexed to ſome other thing.

Perk. Sect. 526. Relw. 88. See before.

Deviſe of things that are not the Deviſors, or belong not unto his Executor.

Plow. Granthams caſe Coo. ſuper Litt. 185. Coo. ſuper Litt. 308.

Deviſe of a Preſentation to a Church.

Trin. 13. Ia. Curia. B. R.

Miſtake or error in the thing deviſed.

Swinb. part. 7. c. 5. Plow. 525. Perk. Sect. 500.

I will that the ſame bee paid of the money I have in ſuch a Cheſt, or of the money which ſuch a man doth owe me; in this caſe the Deviſe is good, albeit there be not any money in the Cheſt or owing: And if one give 10 l. remaining in ſuch a Cheſt, whereas in truth there is but 5 l. in the Cheſt; in this caſe the Legacy is good for the 5 l. But error and miſtake in the quantity and quality of the thing deviſed, when the ſame for the ſubſtance of it is certaine, doth not hurt: And therefore, if the Teſtator meaning to give the fourth part of his goods, give the one halfe; or meaning to give but 50 l. give 100 l. or *è converſo*, meaning to give a greater, doth give a leſſe quantity or ſum; in theſe caſes, the Legacy is good, and the Legatary ſhall have as much as the Teſtator did meane. If a man give his white horſe, when in truth he hath but one horſe and that is black; this is a good Deviſe of this horſe: And if the thing deviſed be under ſuch generall words that the minde of the Teſtator cannot bee knowne by it, the Deviſe is void: And therefore, if the Teſtator ſay, I doe bequeath ſomething, or I bequeath a ſubſtance, or I bequeath a body, or I bequeath, or the like; theſe Deviſes are void for incertainty: So if he ſay, I doe give lands, or I doe give goods; theſe Deviſes are void: And yet if the Teſtator give a horſe, an oxe, a gold chaine, or the like indefinitely; in theſe caſes, the Deviſe is good, albeit he have no ſuch thing. But if one deviſe thus, I give lead, money, wheat, oyle, or the like; and ſay, not how much or what quantity; this Legacy is void for incertainty, or at leaſt the Executor may deliver what quantity thereof he will, and this ſhall ſatisfie the Leagcy. 7. As touching the terms of a Deviſe, it muſt be known, That if one deviſe any thing to wicked ends or upon wicked conditions, as to the end, that the Deviſee ſhall kill a man, or becauſe he hath killed a man, or the like; theſe Deviſes are void in like manner as it is when the cauſe or motive is falſe, as becauſe one is my Couſin, or hath lent me money, I deviſe to him 20 l. and hee is not my Couſin, or did not lend me money; theſe Deviſes are void. And as touching the reſt of the properties of a good Deviſe, ſee them before in the properties of a good Teſtament: And here by the way, be adviſed if thou haſt land to ſettle, rather to doe it by act executed by advice of learned Counſell in thy life and health-time, and therein adde ſuch conditions and proviſoes of revocation and otherwiſe as thou wilt; or if thou wilt doe it by Will, then doe it in thy perfect memory and by learned advice: Let the Will bee indented and of two parts, and leave one part with a friend that it be not ſuppreſſed after thy death; Let there be credible Witneſſes to the publication thereof, and let their names be ſubſcribed to it: Let the whole Will be written with one hand, and in one peece of paper or parchment for feare of alteration, addition, or diminution: Let

Swinb. part. 7 cap. 10.

Incertainty in the thing Deviſed.

Swinb. 289.

Seventhly, in reſpect of the Tenures and conditions, cauſes and ends of the Deviſe.

Coo. 3. 36.

A Caveat for making of Teſtaments.

the hand and ſeale of the Deviſor be ſet to it: And if it be in ſeverall parts, let his hand and Seale and the hands of the Witneſſes be to every part: If there be any raſing or enter-lining, let there be a *Memorandum* of it. And if thou make any revocation of thy Will, doe it by good adviſe and by writing; *Vox audita perit, Litera ſcripta manet.*

8. The Expoſition of Teſtaments and Deviſes, and how they ſhall bee conſtrued and taken. Deviſes of Land. Firſt, in reſpect of the perſon that is to take by the Deviſe; and what, when, and how he ſhall ſo take by the Deviſe.

The generall rules for the Expoſition of Wills are theſe, That they muſt have a favourable and benign interpretation; and as neare to the minde and intent of the Teſtator as may be: and yet ſo withall, as his intent may ſtand with the rules of Law, and bee not repugnant thereunto. It is ſaid to be therefore a maxime of Law, *Quod ultima voluntas teſtatoris perimplenda eſt ſecundum veram intentionem ſuam*, according to theſe Verſes: Plow. 540. Coo. ſuper Litt. 322.

Sed legum ſervanda fides, ſuprema voluntas
Quod mandat fierique jubet parere neceſſe eſt.

If a Deviſe be made of land to *I S*, and the heirs males of his body; by this Deviſe the ſonnes and not the daughters of *Y S* ſhall have the land. And if a Deviſe be made of land to *I S*, and the heirs Females of his body; by this Deviſe the daughters and not the ſonnes of *I S* ſhall have the land. And yet it hath been ſaid in theſe caſes, that if in the firſt caſe, the Deviſee have iſſue a daughter, who hath iſſue a ſonne; or in the laſt caſe, hath iſſue a ſonne who hath iſſue a daughter, that this ſonne and daughter ſhall take by this Deviſe in theſe caſes; but it ſeemes the Law is otherwiſe. Termes of the Law. tit. Deviſe. Coo. ſuper. Litt. 25. Plow. 414.

* Grant. If a Deviſe be made of land to *I S* and his heires males, by this Deviſe *I S* hath an eſtate Taile; but otherwiſe it is of ſuch a limitation by Deed; for if one by Deed give land to another and his heirs males; by this the Donee hath a Fee-ſimple, and his heirs generall ſhall have it. 27 H. 8. 17.

If a Deviſe be of land to *I S*, and to the eldeſt heirs females of his body; by this Deviſe all his daughters and not one of them only ſhall take it: So if one deviſe Gavelkind-land to a man and his eldeſt heirs; this doth not alter the cuſtome, but by this all the ſonnes ſhall take. Coo. ſuper Litt. 27.

If a man deviſe his land to his wife for life, the remainder to his ſonne and the heirs males of his body engendred, and for default of ſuch iſſue the remainder to his next heir male, and the heires males of the body of that heire male, and after his ſonne die without iſſue (living his wife) and the Deviſor hath iſſue a daughter who hath iſſue a ſonne; in this caſe and by this Deviſe it ſeemes the daughter and not her ſonne ſhall have the land and that in Fee-ſimple. Fitz. Deviſe 2.

If a man deviſe his land to his wife for life, and after to his own right heirs males, and he hath iſſue three daughters, and after his death one of them hath a ſonne; in this caſe, and by this Deviſe Trin. 9. Iac. Adiudged Curteis caſe.

the

the next collaterall heire male of the Deviſor, and not the ſonne of the daughter ſhall have the land.

Dyer 122. If a man have iſſue two ſonnes and a daughter, and deviſe his land to his wife for tenne yeares, the remainder to his younger ſonne and his heirs, and if either of the ſaid two ſonnes die without iſſue of their bodies, the remainder to the daughter and her heirs, and the younger ſonne die in the life time of the father, and after the father die; in this caſe and by this Deviſe the daughter hath a good remainder, but it ſeemes the elder ſonne hath firſt an eſtate Taile by the intent of the Deviſor.

Dyer 330. If a man deviſe ſome land to *A* his eldeſt daughter and her heires, and if ſhe die without iſſue, to *T* his youngeſt daughter and her heirs, and if ſhe die within 16 years, that *A* ſhall have her part to her and her heirs, and if *A* marry ſuch a one, that *T* ſhall have her part to her and her heirs; and if *T* die having no iſſue, that all her part ſhall goe to *M* and *E* his Neeces; and if *A* die without iſſue, that *T* ſhall have her part to her and her heires, and *T* after the 16 years, doth die without iſſue; in this caſe the Neeces *M* and *E*, and not *A* ſhall have her part that is dead.

Perk. Sect. 566.567. If land be deviſed to *A* for life, the remainder to a Monke for life, the remainder to *I S* in Fee; by this Deviſe he in the remainder in Fee, ſhall take preſently after the firſt eſtate for life ended; and if the Deviſe be to a Monke for life, the remainder to *I S* in Fee; by this *I S* ſhall take preſently.

Dyer 326. If a man deviſe his land to a woman and her brother, and the heirs of either of their two bodies, and for default of iſſue of the ſaid woman and her brother, the remainder to the right heires of the Deviſor, and after the death of the Deviſor, the brother dyeth without iſſue, and the ſiſter hath iſſue and dyeth; in this caſe and by this Deviſe, her iſſue ſhall have a moity and no more of the land.

Dyer 304. If one deviſe two parts of his Land to his four younger ſonnes in Taile, and that if the Infant in the wombe of his wife be a ſonne, that he ſhall have the fifth part as co-heire with the four, and if his five ſonnes die without iſſue, that the two parts ſhall revert, and then the Deviſor dyeth, and after a ſonne is born, and after he and three of the other ſonnes die; in this caſe and by this Deviſe, the Infant ſhall not take any thing, becauſe he is uncapable, and the two parts ſhall not revert to the heire untill the five ſons be dead without iſſue.

Adiudged. Co. B. M. 36. 37 Eliz. Brownes caſe. If one deviſe the Mannor of Dale to the eldeſt ſonne of *I S* in Fee, and the Mannor of *Sale* to *I D* for life, the remainder to ſuch of the children of *I S*, as ſhall be then living, and ſhall have the Mannor of *Dale*, and the eldeſt ſonne of *I S*, after the teſtators death doth ſell the Mannor of *Dale*, and after *I D* dyeth; in

this caſe and by this Deviſe none of the children of *I S* ſhall have the Mannor of *Dale*, but it ſhall goe to the heires of the Deviſor.

If one deviſe his land to the children of *I S*, by this deviſe the children that *I S* hath at the time of the Deviſe, or at the moſt the children that *I S* hath at the time of the death of the Teſtator, and not any of them that ſhall bee borne after his death, ſhall take.

If one have two daughters by divers women, and deviſe a moity of his land to his wife for ſeven yeares, and that the elder daughter ſhall enter into the other moity at her day of marriage, and if his wife be with child of a daughter, that then ſhe ſhall have an equall portion with the other ſiſter, and the Deviſor dyeth, and the wife doth enter and hath not a daughter, and then the elder daughter doth take a husband, and enters upon a moity, the younger daughter dies without iſſue, and the ſeven years expire; in this caſe and by this deviſe, the collaterall heir of the younger daughter ſhall have the moity of the whole, and not the moity of a moity only and that by diſcent. Dyer 342.

Next of blood. If a man have iſſue *B C* and *D* ſonnes, and he deviſe his land to *D* his ſonne, the remainder *proximo de ſanguine*, or to the next of blood of the Teſtator; in this caſe and by this Deviſe *B* ſhall take after the death of *D*, as the next of blood. In like manner, if the Teſtator have four daughters, and he deviſe his land to the youngeſt in Taile, the remainder to the next of blood; by this Deviſe the eldeſt daughter and not all the reſt ſhall have the land: And if the Teſtator have iſſue *B* his elder ſonne and *C* his younger ſon, and *B* have iſſue *D* his ſonne, and *B* is attainted and dyeth, and the Teſtator deviſeth his land to *I S* for life, the remainder to the next of blood of the Teſtator; by this Deviſe *D* and not *C* ſhall have the land. Curia B. R. Mich. 20. Iac.

If a man have iſſue *B* and *C* ſonnes, and *D* a daughter, and deviſe his land to *C* for life, and after that it ſhall remaine to the next of blood to his children, to the next heirs of the blood of his children, and *C* dyeth, and *B* dyeth without iſſue, and *D* hath iſſue a daughter; in this caſe and by this Deviſe, the heires of *A* ſhall not take, but the next of blood to the children of *A*, which is the daughter of *D*, and his children themſelves are excluded, and if the ſonnes have any iſſues living, they ſhall take with her by this Deviſe. Broo. Diſcent. Pl. 19. 8. Aſſ. Pl. 6.

If the Teſtator have iſſue by *A* his firſt wife, three daughters, *Joane*, *Elizabeth* and *Anne*; and by *B* his ſecond wife, *Alice* and *Elizabeth*; and by *C* his third wife, *William* a ſonne, and three daughters, *Mary*, *Katharine* and *Johan*; and he deviſe his land to *Johan* his youngeſt daughter for life, paying 13 s. 4 d. to the ſonne, and after her death to the ſonne and the heirs of his body, and after his death with- Adiudged M. 20. Iac. perin. verſus Pearſe, B. R.

without iſſue to *Elizabeth* the daughter of the ſecond wife, and *Mary* the daughter of the third wife for their lives; the remainder (in Latin) to the next of the blood of the Deviſor for ever, and the elder *Joan* hath iſſue *I P*, and dyeth, the ſonne dyeth without iſſue; the younger *Joan* hath iſſue and dyeth, *Elizabeth* of the firſt wife hath iſſue and dyeth; *Anne* dyeth having iſſue, *Alice* dyeth without iſſue, *Mary* and *Elizabeth* born of the ſecond wife die without iſſue, *Katherine* dyeth without iſſue; in this caſe and by this Deviſe the ſonne and heir of the elder daughter after the death of the ſonne without iſſue, and of *Elizabeth* and *Mary*, and not all or any of the children or their children ſhall have the land, becauſe *proximo* in Latin doth devote a perſon certain; and there be expreſſe Deviſes to others: But if in this caſe the remainder bee limited in generall to the next of blood without any other matter, all the daughters perhaps may have it as Joint-tenants.

Fitz. Deviſe 9. Perk. Sect. 508. If a man have two ſonnes and a daughter which hath two daughters, and he deviſe his land to a ſtranger for life, the remainder to his ſecond ſonne for life, the remainder in Fee to the next of blood to his ſonne; in this caſe, if the eldeſt ſonne die without iſſue, the daughter and her daughters ſhall have the land.

See in the Expoſion of Deeds ſupra. Coo. 8. 94. Plow. 525. Whatſoever will paſſe by any words in a Deed, will paſſe by the ſame words in a Will, and more alſo; for a Will is alwayes more favourably interpreted then a Deed; And therefore if a man deviſe the profits, uſe, or occupation of land; by this Deviſe the land it ſelfe is deviſed. Secondly, in reſpect of the thing deviſed.

Mevils caſe. Fitz. Deviſe 4. Broo. Done. 41. If a man deviſe thus, I give all my lands to *I S*, or I give all my tenements to *I S*, or I give all my lands and tenements to *I S*; by this Deviſe is given, and *I S* ſhall have not only all the lands whereof the Deviſor is ſole ſeiſed, but alſo all the lands whereof he is ſeiſed in common or co-parcinery with another, and not only the lands hee hath in poſſeſſion, but alſo the lands hee hath in reverſion of any eſtate in Fee-ſimple; but by this Deviſe regularly, Leaſes for years of lands will paſſe.

Plow. 66. If a man deviſe thus, I give all my land in poſſeſſion only; by this Deviſe there is given the lands he hath in poſſeſſion only, and none of the lands he hath in reverſion.

Plow. 343. 344. old N. B. 89. Fitz. Deviſe 17. If a man be ſeiſed of land in Fee-ſimple in *Dale*, and deviſe thus, I give all my lands in *Dale* to *I S*, and after the Will made and publiſhed, he doth purchaſe other lands in *Dale* and dyeth; in this caſe and by this deviſe *I S* ſhall not have the new purchaſed lands: and in this caſe it hath beene held further, That if the Teſtator doe by word of mouth after the purchaſe of the ſame lands declare himſelfe to be minded that *I S* ſhall have the ſame new purchaſed lands alſo by this Deviſe, that notwithſtanding *I S* ſhall not have them by this Deviſe; * And yet it hath been adjudged, That if in this

* Trin. 37 Eliz. B. R. Breckford verſus Parincote.

caſe one come to the Deviſor to buy his new purchaſed land, and he ſay nay but I S ſhall have it as the reſt, that this is a new publication of the Will, and that I S by this deviſe ſhall have theſe new purchaſed lands; for a new publication of the Will in theſe caſes will make the land to paſſe. But if a man deviſe the Mannor of *Dale*, and at the time of the deviſe he hath it not, or deviſe his lands in *Dale*, and at the time of the deviſe he hath no lands there, and afterwards he doth purchaſe the Mannor of *Dale*, or lands in *Dale*; by this deviſe, and in this caſe, the Mannor and the new purchaſed lands will paſſe; for in this caſe it ſhall be intended he meant to purchaſe it. And yet the Statute enabling a man to deviſe lands ſaith, *Any perſon having, &c. Coo.* 3.30. See before.

If one have an ancient Tenement, and lands belonging to it, and then purchaſe more lands, and occupy them altogether with the Tenement many years, and being all thus in his occupation, he doth make a deviſe after this manner, I give my Tenement in *Dale*, and all my lands belonging to it now in my occupation, to I S. by this deviſe I S ſhall have the ancient land onely, and none of the new purchaſed land; but if there be no ancient land belonging to the Tenement, but new purchaſed land onely, there perhaps it may be otherwiſe; for in this caſe the words cannot elſe be ſatisfied. As in caſe where a man hath ſome lands in Fee-ſimple, and other lands for yeares onely in *Dale*, and he deviſe all his lands and Tenements in *Dale*; by this deviſe the lands he hath for years doth not paſſe; but if he have no other lands in *Dale* but theſe lands, in this caſe perhaps this land will paſſe. Loftis verſus Baker. Hill. 20. Ia. B.R.

If one have a moity of lands in *Eſſex*, and a moity of lands in *Kent*, and he deviſe thus, I give my moities, and all my other lands in *Kent* to *I S*, it ſeems by this deviſe the moities in both Counties do paſſe, and that *I S* ſhall have both the moities. In Mevils caſe.

If a man be ſeiſed in Fee, in poſſeſſion of the moity of a Farm called the Farm of *C.* and of the reverſion in Fee of the other moity, expectant on a leaſe made to *A* and *B* for their lives, and he make his Will thus, I will that my wife ſhall have all my living which I now occupy, untill my ſon come to 21. years of age, and then I will have her have the thirds of all my living, and that my ſonne ſhall have all my Farm of *C* to him and his heirs; by this deviſe if *A* and *B* dye before the heire be 21. yeares of age, the wife ſhall have the thirds of the whole Farm, and not of the moity in poſſeſſion onely. Plich. 20. Ia. Adiudged Scatergoods caſe.

If a man be ſeiſed of land in a Village, and in two Hamlets of the ſame Village, and he deviſe all his lands in that Village, and in one of the Hamlets; by this deviſe none of his land in the other Hamlet doth paſſe. Dyer 261.

If a man make his Will the firſt day of May, and thereby give the Mannor Plow. 343.

Mannor of *Dale* to one in Fee, and the tenth of May one of the Tenancies eſcheat, and the 20. of May the Deviſor dyeth; in this caſe and by this deviſe, it ſeems the Deviſee ſhall have the Tenancie that doth eſcheat.

Litt. Broo. Sect. 43. Perk. Sect. 16. Litt. Sect. 586. Kelw. 43. Coo. ſuper Litt. 19. 20 H. 6. 35. Litt. Broo. Sect. 432. 10. H. 8. 10. * Fitz Deviſe 111.

If one deviſe his land thus, I give my land in *Dale* to *I S* and his heires, or to *I S* in Fee, or to *I S* in Fee-ſimple, or to *I S* for ever, or to *I S Habendum ſibi & ſuis*, or to *I S* and his Aſſignes for ever; or thus, I give my land to *I S*, to give, ſell, or do therewith at his pleaſure; by all theſe, and ſuch like deviſes, a Fee-ſimple eſtate is made of the thing deviſed, and *I S* ſhall have the ſame to him and his heirs for ever. But if land be granted by Deed after this manner, *I S* by this grant in all theſe caſes, except onely in the firſt caſe, hath onely an eſtate for life. * And if a man deviſe his land to *I S*, and ſay not how long, nor for what time, by this deviſe *I S* hath an eſtate for life only in the land.

3. In reſpect of the eſtate and time that is deviſed. Fee-ſimple.

Deed.

Coo. ſuper Litt. 9. Perk. Sect. 57. 2. 9 New Terms of the law tit. Deviſe. * Fr. in 2. C. B. R. reply & Daniels caſe. Coo. 6. 16. Dyer 126.

If a man deviſe his land to *I S* and his Aſſignes, without ſaying [for ever] it is ſaid by ſome, that by this deviſe *I S* hath onely an eſtate for life. * But the contrary is affirmed elſewhere, and that it is a Fee-ſimple.

If one deviſe his land to his wife, to diſpoſe thereof at her will and pleaſure, and to give it to one of her ſonn's; in this caſe, and by this deviſe, ſhe hath a Fee-ſimple; but it is qualified, for ſhe muſt convey it to one of her children, and cannot convey it to another.

* Adiudge Hill 36. Eliz Co. B.

If one deviſe his land to *I S*, paying 10. l. and uſe no other words, by this deviſe the Deviſee hath the Fee-ſimple of the land, albeit the 10. l. be not the hundredth part of the worth of the land. * And yet if one deviſe his land to *I S* for his life, paying 10. l. by this deviſe *I S* ſhall have an eſtate for life only.

If one deviſe land of the value of 50. l. *per annum* to *J S* for life, the remainder to *I D* paying 40. l. to *W.* by this deviſe *J D* ſhall have the Fee ſimple of the remainder upon condition.

Hill. 17. Iac. B. R. adiudged Spicers caſe.

If one have two ſonnes, and he deviſe his land firſt to his wife, and then he ſaith thus: In like manner, I will that my ſonne *A.* ſhall have it after my wives death; and if my wife dye before my ſonne *B*, then that my ſonne *A* ſhall pay to *B* 3. l. by the year during the life of *B*, and alſo 20. l. to *W S.* by this deviſe *A* ſhall have the Fee-ſimple of this land.

Curia M. 18. Iac. B. R. Green verſus Dewell.

If one deviſe his land thus, I will my land to my ſonne *W*, for his life, and after his death to my ſonne *T*, and if my ſonne *W* purchaſe land as good as that land for my ſonne *T*, then that my ſonne *W* ſhall ſell the land deviſed to my ſonne *T* as his own, and I will that my ſonne *W* ſhall pay to his Siſters 10. l. by 20. s. a year; in this caſe, and by this deviſe *W* hath a Fee-ſimple; for power to ſell giveth by implication an eſtate in Fee-ſimple, and it is paying alſo, &c.

If one deviſe land to his wife and her heires, and if the heire put her

out that ſhe ſhall have other land; by this deviſe ſhe hath the Fee-ſimple of the firſt land, and is not abridged by the latter words. Paſch. 14. Iac. B. R. Curia.

If one deviſe his land thus, I give White Acre to my eldeſt ſonne and his heires for his part: *Item*, Black Acre to my youngeſt ſonne for his part; by this deviſe the younger ſonne ſhall have the Fee-ſimple of Black Acre: So, if I give White Acre to *I S*, *Item*, Black Acre to *I S* and his heires; by this deviſe *I S* ſhall have the Fee-ſimple of White Acre alſo. Trin. 30. Eliz.

If one give land to his wife for life, the remainder to his ſonne and the heires males of his body, and for want of ſuch iſſue the remainder to the next heire male of the Donor and the heires males of his body; it ſeems by this deviſe, that the next heire male of the ſonne hath a Fee-ſimple. Perk. Sect. 565.

Fee-taile. If one deviſe his land thus, I give my land in *Dale* to *I S*, and to his, or [to the] heires males, or heires females of his body, [or of his body begotten] or to *I S* and his iſſues male, or his iſſues female; or to *I S* and the heires males of his body begotten on *M*; or to *I S* and *E* his wife, and the heires males, or heires females of their two bodies begotten; or to *I S* and his heires, if he ſhall have any heires of his body, elſe that the land ſhall revert; or to *I S* and his heires if he have any iſſue of his body; or to *I S* and the right heires males of his body; or to *I S* and his heires, provided that if he dye without heires of his body, that the land ſhall revert; by all theſe and ſuch like deviſes an eſtate taile is made of the thing deviſed, and I S the Deviſee ſhall have the ſame accordingly. Coo. ſuper Lit. 21. 26.

Deed. If one deviſe his land thus, I give my land in *Dale* to *I S et ſemini ſuo*; by this deviſe I S hath an eſtate taile: But if he ſay, I give my land in *Dale* to I S *et ſanguini ſuo*; it is ſaid by this deviſe I S hath the Fee-ſimple of the land. If one deviſe his land to I S *et exitibus, vel prolibus de corpore ſuo*; by this deviſe if I S have no children at the time, it ſeems he hath an eſtate taile; but by ſuch a limitation by deed is made onely an eſtate for life. If one deviſe his land thus, I give my land in *Dale* to I S for life, the remainder to *I D* and *E* his wife and their children; or to *I D* and *E* his wife and their men children; or to *I D* and *E* his wife and their iſſues; by theſe deviſes if the huſband and wife have no children at the time of the deviſe, is created an eſtate taile; and if they have any children at the time of the deviſe, then hereby is created an eſtate for all their lives onely in joyntenancie. And if land be deviſed to *A* for life, the remainder to *B*, and the heires of his body, the remainder to I S and his wife, and after to their children; by this deviſe I S and his wife have eſtates for their lives onely, and their children after them eſtates for their lives joyntly: And albeit they have no children at the time, yet every child they ſhall have after, may take by way of remainder. And ſo alſo it ſeems is the law upon ſuch a limitation by Deed. Coo. ſuper Litt. 9. Broo. tit. taile 21. Coo. ſuper Lit. 20. 6, 16.

Deed.

Litt. Sect. 31. 9. H. 6. 25. 27. H. 8. 27.

If lands be deviſed to *I S*, and his heires males, or his heires females, without ſaying [of his body;] by this deviſe *I S* hath an eſtate taile. But if ſuch a limitation be by deed, it is a Fee-ſimple. Deed;

Hill 22. Iac. B.R. Daniels caſe

If one have two ſonnes, and deviſe White Acre to his eldeſt ſonne and his heires, and Black acre to his youngeſt ſonne and his heires, and if either of them dye without iſſue, then that the other ſhall be his heire; by this deviſe either of them hath an eſtate taile, and no Fee-ſimple.

Adiudge. M. 9. Iac. Wallops caſe.

If one have land in *Kent* in *W S* and *T*, and have one male child and a daughter, and his brother hath three children, *B*, *C*, and *D*, and he deviſe his land thus; *Item*, I give my land in *Kent* to my male childe and his heires, and if he dye without heires of his body, that that the land in *W* ſhall go to *B* and his heires. *Item*, I will my land in *S*, to *C* and his heires, and my land in *T*, to *D* and his heires; in this caſe, and by this deviſe, the male child of the Deviſor hath an eſtate taile in all the lands, and after his death without heires it ſhall remaine according to the Will; So that if one deviſe his land to his eldeſt ſonne and his heires, and if he dye without heires of his body, that it ſhall remain to his youngeſt ſonne and his heires; by this deviſe, the eldeſt ſonne hath an eſtate taile, and the youngeſt ſonne the Fee-ſimple.

Co. 9. 127

If one deviſe his land to his ſonne *W*, and if he marry and have any iſſue male begotten of the body of his wife, then that iſſue to have it; and if he have no iſſue male, then to others in remainder; by this deviſe, it ſeems *W* hath an eſtate taile to him and the iſſues male begotten on the body of his wife.

Perk. Sect. 561. 20. H. 6. 36.

If one deviſe White Acre to *I S* and the heirs of his body, and then after ſaith thus, and I will that *I D* ſhall have Black Acre in the ſame manner that *I S* hath White Acre; by this deviſe *I D* hath an eſtate tail in Black Acre as I *S* hath in White Acre. *Et ſic de ſimilibus* * And if one deviſe White Acre to I S, and then ſay; *Item*, Black Acre to I S and the heires of his body; by this deviſe he hath an eſtate taile in both Acres.

* Tr. 30. Eli.

Dyer, 132.

If one deviſe his land to his wife for yeares, the remainder to his younger ſonne and his heires, and if either of his two ſonnes dye without iſſue, &c. that it ſhall remaine to his daughter and her heires, and the younger ſonne dye in the life time of the Father, and after the Father dyeth; it ſeemeth by this deviſe the elder ſon ſhall have the land in taile.

Adiudg. Tri. 7. Iac. Co. B. Robinſons caſe.

If one deviſe his land to his wife for life, and after to his ſonne, and if his ſonne dye without iſſue, having no ſonne [or having no male] then that it ſhall goe to another; by this deviſe the ſonne hath an Eſtate taile to him and the heires males of his body.

If

If lands be given to a man and woman unmarried and the heires of their two bodies, or to the husband of *A*, and wife of *B*, and the heires of their two bodies; by theſe Deviſes are made eſtates in Taile. Coo. ſuper Litt. 20. 26. Plow. 35.

If a man deviſe White acre to his three brothers, and Black acre to *C* his brother, ſo as he pay 10*l.* to *I S*, and otherwiſe that it ſhall remain to the houſe, provided that the ſame lands be not ſold, but go unto the next of name and blood that are males, if it may be; it ſeemes that by this deviſe *C* hath an eſtate tail in black acre, and that if he die without iſſue, it ſhall go to the three other brothers and their heires males in taile one after another: and that white acre alſo is ſo entailed in every of their parts. For the words [ſhall remaine to the houſe] ſhall be conſtrued to the moſt worthy of the Family, and the words [that are males] ſhall be conſtrued in the future tenſe. Dyer 333.

If land be deviſed to *I S* and the heires of his body, and that if he die, that it ſhall remain to *I D*, by this Deviſe *I S* hath an eſtate Taile, and the latter words do not qualify the former, but *I D* muſt attend his death without heires of his body before he ſhall have the land. Adiudg. 14. Eliz. Coo. B. & Trin. 9. Iac. B. R.

If land be deviſed to *I S* and the heirs males of his body, and if it happen that he dye without heire of his body, that it ſhall go to *H* and his heires; by this Deviſe *I S* hath an eſtate to him and the heires males of his body, and the ſubſequent words do not alter nor enlarge the eſtate. Dyer 171.

If land be deviſed to *I S* and *E* his wife and to the heires of the body of the Survivor of them; by this Deviſe the Survivor ſhall have a generall eſtate Taile. Coo. ſuper Litt. 26.

Deed. If land be deviſed to *I S* and the heires he ſhall have by *A* his wife; by this Deviſe *I S* hath a Fee Taile, and not a Fee ſimple as he hath in caſe of ſuch a limitation by deed. Coo. ſuper Litt. 26.

If land be deviſed to *I S* and to the heires of the body of ſuch a woman; by this Deviſe *I S* hath an eſtate Taile, and begotten ſhall be intended begotten by him. Coo. ſuper Litt. 26.

If one deviſe land to his ſonne and his heires, and that if his ſonne die within the age of 21 yeares or without iſſue, that the land ſhall remain over: and the ſon dieth within age having iſſue; in this caſe and by this Deviſe the ſonne hath an eſtate Taile, and [or] in this place ſhall be taken for [and] Adiudg. M. 37. 38 Eliz. Sale verſus Gerrard.

Deed. If land bee deviſed to a man and his wife, and to one heire of their body, and the heire of the body of that heire; by this Deviſe an eſtate Taile is made in a Will as well as in a Deed. Coo. ſuper Litt. 22.

If a man deviſe his land thus, I give White acre to *A* my ſonne and his heires, Black acre to *B* my ſonne and his heires, and Green acre to *C* my ſonne and his heires, provided that if all my ſaid ſons die without iſſue of their bodies, that then all my ſaid lands ſhall M. 18. Iac. B. R. Gilberts caſe.

goe

goe to *M* my wife and her heires; by this Deviſe they have all of them eſtates in Taile of their land, and as it ſeems croſſe remainders to either of them of the land of each other.

Coo. 9. 128. If one deviſe his land thus, I give my land in Dale to *I S*, and if he die without iſſue male of his body, then that it ſhall remain over to *I D*; by this Deviſe *I S* hath an eſtate Taile.

Litt. Broo. Sect. 43. Broo. Deviſe 38. Done 44. If a man hath iſſue three ſonnes, and deviſe his land thus, *viz.* one part to two of his ſonnes in Taile, and another part to his third ſonne in Taile, and that neither of them ſhall ſell his part, but that either of them ſhall be heire to other; in this caſe and by this Deviſe either of them hath an eſtate Taile, and if one of them dye without iſſue, his part ſhall not revert to the eldeſt, but ſhall remain to the other ſonne, for it is an implied remainder.

Coo. ſuper Litt. 26. If there be husband and wife, and they have iſſue a ſonne and a daughter, and the husband die, and land is deviſed to the wife and the heires of her late husband on her body begotten; in this caſe, and by this Deviſe the wife hath only an eſtate for life, the ſonne an eſtate in Taile, and ſo alſo the daughter in caſe he die without iſſue.

Coo. ſupra Litt. 147. 8. 85. If one deviſe to *I S*, that if he and his heires of his body be not paid 20l. rent yearely, he and they ſhall diſtraine &c. by this Deviſe *I S* hath an eſtate taile of this rent. But if the Deviſe be that if *I S* be not paid 20l. yearly, he ſhall diſtrain &c. by this Deviſe *I S* hath only an eſtate for life. So if one deviſe a rent of 10l. out of his land to be paid quarterly, and ſay not how long the rent ſhall continue: this is but an eſtate for life. For life.

Fitz. Deviſe. 16. Coo. 6. 16. Perk. Sect. 577. If one deviſe his land thus, I give my land in Dale to *I S* for his life, or to *I S* [without any more words] or to *I S* and his heire, in the ſingular number; or *I S* and his children, and *I S* hath children at the time of the Deviſe; or to *I S* and his ſucceſſors, (*I S* being a naturall perſon;) by all theſe and ſuch like Deviſes *I S* hath only an eſtate for life in the thing deviſed. * But if the Teſtator have only a Terme of yeares in the land whereof the Deviſe is made, and deviſe this land to *I S*, and doth not ſay for what time; it ſeemes that by this Deviſe the whole Terme is deviſed, unleſſe the intent doth appeare to be otherwiſe. And if one deviſe land (whereof a man is ſeiſed in Fee) to *I S*, paying 10l. to *I D*; by this Deviſe albeit there be no eſtate expreſſed, yet *I S* hath the Fee-ſimple of the land, in reſpect of the paiment of the money. But if the intent of the Teſtator appeare to be that *I S* ſhall have the land but for his life, *contra*; for there the conſideration will not alter the eſtate expreſſed upon the gift.

* Mich. 13. Ia. B. R. Dyer ſect. 307.

See before Litt. Broo. Sect. 406. 125.

Coo. ſuper Litt. 9. 4. 29. If land be deviſed thus, I give my land in Dale to *I S* and his aſſignes, [without more words] by this Deviſe is held to be given no more but an eſtate for life by conſtruction upon a Will, as it is upon Deed.

upon a Deed. And yet in the *New Termes of the Law tit. Deviſe*, the contraray is affirmed, *Ideo quære.*

If one deviſe thus, I will that *I S* ſhall have and occupy my land in Dale, and ſay not how long; by this Deviſe *I S* ſhall have the land for his life. *But if I deviſe that *I S* ſhall enter into my land, and ſay no more; by this Deviſe *I S* hath no eſtate at all, but power to enter into the land only. Paſche 9. Iac. Newmans caſe. *Dyer 342.

If a man have a ſonne and a daughter and dieth, and lands are deviſed to the daughter, and the heires females of the body of the Father; by this Deviſe the daughter hath only an eſtate for her life; for there is no ſuch perſon, for ſhe is not heire. Coo. ſuper Litt. 24.

If one deviſe his land thus, I give my land in *Dale* to *I S* for his life, and after to the next right heire of *I S* in the ſingular number, and to his right heires for ever; by this deviſe I S hath only an eſtate for life. So if one deviſe land to I S for life, and after to the next heire male of I S, and to the heires males of the body of ſuch next heire male; by this deviſe I S hath an eſtate for life only; but if it be thus, I give my land in *Dale* to I S for his life, and after to the heires, or to the right heires of I S; by theſe deviſes I S hath the Fee-ſimple of the land; And if it be to I S for life, and after to the heires males of I S; by this I S hath an eſtate Taile. Coo. 1. 66.

If one deviſe land to I S and *E* his wife, and after their deceaſe, [or the remainder] to their children; by this deviſe whether they have, or have not children at the time, I S and *E* his wife have eſtates for their lives only. Coo. 6. 16b

If one deviſe a Moity of his land to his wife for life, and the other Moity to his ſecond ſonne, and after by another clauſe doth deviſe it all to his ſonne after the death of his wife: by this Deviſe the ſonne hath only an eſtate for life after the wives death, and no more. Curia 7. Ia. Co. B.

By Implication. If one deviſe his land to *I S* in Fee after the death of *I B* (being his ſonne and heire apparant;) by this Deviſe *I B* hath an eſtate for life by implication, and untill the Deviſe take effect, the law gives it to him by diſcent. And ſo alſo it ſeemes the law is where one doth deviſe his land to *I S* after the death of his wife: that by this Deviſe the wife hath an eſtate for life by implication. And therefore if a man deviſe thus, I give my goods to my wife, and that after her deceaſe, my ſonne and heire ſhall have the houſe where the goods are; it is held by this Deviſe that the wife hath an eſtate for life in the houſe by implication; for a man is bound to provide for his own wife. But if a man deviſe his land to *I S* after the death of *I W*, (a ſtranger to the Deviſor;) it ſeemes that by this Deviſe *I W* hath no eſtate at all by implication, and that this doth but ſet forth when the eſtate of *I S* ſhall begin, and that the intent of the Teſtator is that his heire ſhall have it untill that time. Broo. Deviſe 48. 52. Litt. Broo. 107. 13 H. 7. 13. New termes of the Law tit. Deviſe Plow. 158. 414. 521.

If one deviſe land thus, I give my land in *Dale* to *I S*, to the intent Coo. 6. 16. 3. 20. Broo. Eſtates 78.

tent that with the profits thereof, he ſhall bring up a child; or to the intent that with the profits thereof, he ſhall pay to *A* 10 l. or to the intent that he ſhall out of the profits thereof pay yearly 10 l. by theſe Deviſes *I S* hath only an eſtate for life, albeit the payments to be made be greater then the rent of the land: And therefore, it is not like to the caſe before, where a ſumme of money is to be paid preſently.

Dyer 357. If one deviſe his land thus, I give my land to *Alice* my Coſin in Fee-ſimple, after her deceaſe to *W* her ſonne (who is her heir apparant;) by this Deviſe ſhe hath an eſtate for life firſt, the remainder to her ſonne for his life, the remainder to the heirs of *A* in Fee-ſimple: And ſo alſo is the Law when the Deviſe is to any other after that manner.

Dyer 371. If my father be tenant for life of land, the remainder to me in Fee, and I deviſe this land to my wife, rendring for her naturall life 40 s. to the right heir of my father; by this Deviſe my wife hath an eſtate for life after the death of my father.

Coo. 3. 20. If one deviſe his land unto his Executors, untill his ſonne ſhall come unto 21 yeares of age, the profits to be imployed towards the performance of his Will, and when he ſhall come to that age, then that his ſonne and his heires ſhall have it; by this Deviſe the Executors ſhall have it untill he be 21 yeares of age, and if he die before that time, untill the time he ſhould have been 21 yeares of age if he had lived ſo long; and [ſhall] in this caſe ſhall be taken for [ſhould.] For yeares.

Coo. ſuper Litt. 42. If one deviſe his land to his Executors for the paiment of his debts, and untill his debts be paid; by this Deviſe the Executors have but a chattell and an incertaine intereſt, and they and their Executors ſhall hold it untill the debts be paid and no longer.

Coo. 10. in Leonard Loveis caſe, 87. 46. If one deviſe his land to *I S*, and the heires males of his body for the term of fifty yeares; it ſeemes that by this Deviſe, I S hath but a Leaſe for ſo many yeares, if the heires males of his body ſhall ſo long continue, and that for want of iſſue male, the terme of yeares ſhall end: And in this caſe, the Executor or Adminiſtrator, not the heirs males of I S ſhall have it after his death. Executors.

Adiudged Lowen verſus Coxe. Mich. 37. 38. Eliz. Co. B. Dyer 25. Lit. Bro. Sect. 133. Litt. 283. Perk. Sect. 170. Dyer 350. If one deviſe his land thus, I give to I S and I D, and their heirs, my land in *Dale* equally; or my land in *Dale* to be equally divided; by theſe Deviſes I S and I D ſhall have and hold the land, not as Iointenants, but as Tenants in common, ſo that the heire and not the ſervivor ſhall have his part that firſt dyeth: And yet in caſe of ſuch a limitation by Deed, it is otherwiſe: And if one deviſe his land to I S and I D, and their heires [without more words;] it ſeemes that by this Deviſe they ſhall take and hold as Joint-tenants. * And yet if one deviſe land to I S and I D, and the heires of either of their bodies lawfully engendred; it ſeemes that Fourthly, in reſpect of other matters.

* Dyer 326.

that by this Deviſe I S, and I D ſhall take and hold as Tenants in common and not as Ioint-tenants. * And if one deviſe his land to I S and I D thus, I will that I S and I D ſhall have my lands in *Dale*, and occupy them indifferently to them and their heires. * Paſche 9. Ia. Newmans caſe.

Deviſe of goods and chattels.

If one be poſſeſſed of a terme of yeares of land, and deviſe the ſame to his wife during all the years, and if ſhe die within the years, then to *A* and *B* his two ſonnes, if they have no iſſue male; but if they or either of them have iſſue male, then that it ſhall goe to the uſe of thoſe iſſues male; and ſhe die, and the two ſonnes die without iſſue born, one of their wives being privily with child of a ſonne, which after his death is borne; in this caſe and by this deviſe this iſſue male ſhall have it aſſoone as he is borne. Hill. 13. Ia. B. R. Adiudged. Blandfords caſe.

First, in reſpect of the perſon that ſhall take by the Deviſe.

Executors.

Heire.

If one be poſſeſſed of a terme of yeares, and he deviſe it to another and his heires, or his heirs males; by this Deviſe the Executors or Adminiſtrators, not the heirs of the Legatee ſhall have it. And therefore, if Leſſee for years of land deviſe all his intereſt therein to his wife if ſhe live ſo long, and after her death, if any part of the term be to come, deviſe the ſame to I S his ſonne and the heirs of his body; in this caſe and by this Deviſe, the Executors and Adminiſtrators of I S, not his heires ſhall have it, at leaſt, ſo long as he hath any heires of his body: And yet if one poſſeſſed of a term of years, deviſe it to I S, and after his death, that the heir of I S ſhall have it; in this caſe I S ſhall have ſo many years of the term as he ſhall live, and the heir of I S and the Executor of that heir ſhall have the reſidue of the term. Coo. 10. 46. Lampets caſe Perk. Sect. 558. 559.

If one give 10 l. to the children of I S, and at the time of the Deviſe I S hath foure children, and after before the death of the Teſtator he happen to have two more; in this caſe and by this Deviſe, the two children he hath afterwards ſhall have no part of the 10 l. but thoſe foure he had before ſhall have it all. Swinb. 316.

If one give 10 l. to his Pariſh Church, and at the time of the Will made, hee live in one Pariſh, and after he doth remove into another Pariſh, and die there; by this Deviſe the Pariſh where he lived before, and not where hee dyed, ſhall have this 10 l. Swinb. 316.

Secondly, in reſpect of the thing.

If one deviſe a third part of all his goods and chattels; by this Deviſe, ſome ſay, doth paſſe and is given no more but a cleare third part after debts and Legacies paid: but it ſeemes a third part of the whole, is hereby deviſed out of which the debts muſt firſt be paid by Law. Dyer. 59. 164.

If one deviſe to another all his goods and chattels, or all his plate, or all of any other thing in generall; by this Deviſe doth paſſe and is given not only all the Teſtator hath of that thing at the time of the making of the Will, but alſo all he hath at the time of his death; and not only what he hath in poſſeſſion, but alſo what he hath not in poſſeſſion: Plow. 343. Swinb. 318.

poſſeſſion: But if one deviſe all his goods, or all *his* plate &c. in ſuch a place, or in the occupation of I S; by this Deviſe none other will paſſe but what are in that place, and in the occupation of *I S.*

By the opinion of divers Lawyers. If one have a term of years of a portion of Tithes in *Dale*, and have a term of years of land in *Dale*; and he deviſe all his lands and tenements in *Dale*, and all his eſtate therein to *I S*; by this Deviſe the the portion of Tithes doth not paſſe, for it is neither land, nor tenement: but by Deviſe of all his heriditaments, perhaps it may paſſe. *Sed Quære.*

Portman verſus Willis. Paſche, 36 Eliz. Co. B, Coo. ſuper Litt. 118. Swinb. part. 7. c. 10. If one deviſe to I S all his goods and chattels; by this deviſe doth paſſe and is given all his eſtate active and paſſive, (except land of inheritance and free-hold eſtates, and ſuch things as depend thereupon,) as Leaſes for years, Wardſhips by Tenure *in Capite*, or by Knights Service, gold, ſilver, plate, houſhold-ſtuffe, cattell, corn, debts, and the like; and if one deviſe to I S all his goods, or all his chattels, by either of theſe is deviſed as much as by both of them.

Swinb. 305. 306. 307. If one deviſe to I S all his moveables; by this Deviſe doth paſſe all his perſonall goods, both quick and dead, which either move themſelves, as horſes, ſheep, and the like; or may be moved by another, as plate, houſhold-ſtuffe, corn in the garners and barnes, or in the ſheafe &c. * alſo all Bonds and Eſpecialties; and by a Deviſe of Immovables doth paſſe Leaſes, Rents, graſſe and the like; but not any of thoſe things that doe paſſe by the Deviſe of moveables; but debts will not paſſe by either of theſe Deviſes.

* Agree Hill. 9. Car. Co. B.

Swinb. 313. part. 7. c. 10. If one deviſe to another all his houſhold-ſtuffe; hereby doth paſſe his plate, coaches, tables, ſtooles, formes, beds, veſſels of wood, braſſe, pewter, earth, and the like; but not his apparrell, books, weapons, tooles for Artificers, cattell, victuals, corn, plow-geere and the like; by a Deviſe of all utenſils, it is agreed that plate and jewels doe not paſſe.

Dyer 59.

Swinb. 302. If a man deviſe to I S one of his horſes, or a horſe; by this Deviſe I S ſhall have the election, if there be more then one, which horſe he will have: but if the deviſe be thus, I will that my Executor ſhall deliver to I S one of my horſes; in this caſe, the Executor hath the election, and he may deliver which of them he will. Election.

Swinb. 94. If one deviſe thus, I give to I S my corn growing in ſuch a ground this next year; or the lambs of my flock this next year; by theſe Deviſes the Legatee ſhall have no more but what doth grow that year: But if he deviſe ſo many quarters of corn, or ſo many lambs; in theſe caſes ſo much muſt be paid howſoever.

Coo. 4. 66. Plow. 520. Coo. 7. 23. If one have a Leaſe for yeares of land, and deviſe it to I S for life; by this Deviſe the whole terme is deviſed, and I S the Deviſee ſhall have the whole terme if he live ſo long, and yet I S ſhall not have an Thirdly, in reſpect of the time.

Deed.

an eſtate for life by this Deviſe; and ſo alſo it ſeemes the Law is upon a Grant by Deed after this manner: And if a man poſſeſſed of a terme of years of land deviſe his term, or his Leaſe, or the land it ſelfe by a Deviſe, in either of theſe termes the whole terme doth paſſe. Dyer 307.

If a man be poſſeſſed of two houſes for yeares, and deviſe them to his wife for her life, if ſhe live ſole; the remainder to I S; and if ſhee marry, then that ſhe ſhal have one of them during the reſt of the term, [and then addeth theſe words,] and alſo, I will that ſhe ſhall have 20 l. a year out of my other lands; in this caſe and by this Deviſe, it ſeems the Annuity ſhall continue during the term. *Sed Quære*, for the Judges were divided in this point. Paſche 14. Iac. B. R. Gough & Haywards caſe.

If a Legacie be given, and no time is ſet for the paiment or doing of it, if it be ſimple, it muſt be paid and done preſently; if it be conditionall, and upon a condition precedent, it muſt be paid or done the time the condition is firſt extant: and if there be a time ſet for the paiment or doing of it, it muſt be paid or done at the time appointed. See more in Expoſition of Deeds, Numb. 15. Plow. 540. Swinb. 354.

9. Deviſe of lands to Executors or others to ſell; or that Executors or others ſhall ſell or otherwiſe diſpoſe them: how this ſhall bee taken, and what ſale and diſpoſition ſhall be good, or not.

Deviſe of Lands to Executors to ſell, to pay debts, Legacies &c. are ſome of them after one manner, and ſome after another; for ſometimes the Deviſe is thus, I will that my Executors, or that *A B* and *C* my Executors ſhall ſell my land; and ſometimes the Deviſe is thus, I give my land to my Executors to be ſold, or to the end that they ſhall ſell it; in the firſt caſe, the Executors have only an authority and no intereſt, and therfore in that caſe the land doth diſcend in the interim to the heir of the Deviſor, and he ſhall have the profits of the land untill it be ſold; and if it be never ſold, he ſhall ever have the profits of it; and in this caſe, they may ſell it when they will, if they be not haſtned therunto by order of Court, and when they doe ſell, they muſt all joyne in the ſale by the Common-Law, or otherwiſe the ſale had not been good; and therefore if one or more of them had dyed before the ſale, they that had ſurvived or their Executos could never have ſold it by this authority; ſo likewiſe if any of the Executors had refuſed the charge of the Will, the land could not have been ſold by the reſt, unleſſe the words of the Will had been, that his Executors or ſome of them ſhould ſell it; for in that caſe, ſome of them even by the Common-Law it ſelfe might have ſold, and now alſo by the Statute of 21 *H.* 8. *cap.* 4. ſome of them may ſell it without the reſt; as if one give his land to *A* for life, and that after his deceaſe it ſhall be ſold by his Executors, and make foure Executors, and one of them die during the life of *A*, and then *A* dyeth; in this caſe, the other three Executors may ſell: So if one give his land in Taile, and that if the Donee die without iſſue, that the lands ſhall be ſold by his ſonnes-in-law; and he have then five ſonnes-in-law, and one of them die in the life time of Coo. ſuper Litt. 236. 112, 113. 15 H. 7. 12. Dyer 177. 219. Kelw. 107, 108. Perk. Sect. 543. 542. Litt. Broo. Sect. 371. Kelw. 40. 45.

of the Donee, and after the Donee die without iſſue; in this caſe, the other foure may ſell the land, and the ſale made thereof is good: And yet if the words of the Will be, That it ſhall be ſold by *A B* and *C* his Executors, or his ſonnes-in-law; in this caſe, if one of them die, it cannot be ſold by the reſt: but in the laſt caſe before, where the Deviſe is, I give my land to my Executors to be ſold &c. the Executors have an intereſt in the land, and an authority about the land alſo, and therefore in this caſe, the diſcent is prevented, and the Executors ſhall keep it till the ſale, neither will any diſſeiſin, fine, recovery, or Feoffment by the heir prejudice their intereſt, but that they may ſell it when they will, but they muſt ſell in time convenient, or otherwiſe the heir may enter and put them out by a condition in Law, that is annexed to the intereſt, or perhaps the heir may tender to them the worth of the land, and if they refuſe to accept it, he may enter upon them and out them: and it ſeemes in this caſe, the meane profits untill the ſale is no Aſſets, but the money made upon the ſale ſhall be Aſſets in their hand: and in this caſe, albeit one or more of the Executors die or refuſe, yet the reſt may ſell it, even by the Common-Law it ſelfe, and ſo alſo by conſtruction upon the ſame Statute, for the eſtate ſurviveth. But it ſeemes they not may ſell to him that doth refuſe; neither may they in either caſe transferre their power to ſell to any other, nor keep the land themſelves and pay ſo much of their own money as the land is worth. Aſſets.

Perk. Sect. 547. Dyer 371. 26. If one deviſeth by his Will, that his land ſhall be ſold to pay his debts, and ſay not by whom; in this caſe it ſhall be ſold by his Executors: and if one deviſe all his land except one Acre which he doth appoint to pay his debts; by this Deviſe his Executors or the ſurvivor of them may ſell it: but if one ſay by his Will that *I S* ſhall have *tam gubernationem puerorum meorum quam* the diſpoſing letting and ſetting of my lands; by this Deviſe *I S* hath not power given to him to ſell the land.

Dyer. 219. If one deviſe that his land ſhall be ſold after the death of his wife by his Executors with the aſſent of *I S*, and make his wife and a ſtranger his Executors and die, and after *I S* die; in this caſe, the land cannot be ſold, for the authority is determined.

Dyer 151. 152. If one deviſe that his Executors ſhall ſell the land, and with the money comming or made of it, ſhall pay ſuch and ſuch Legacies or ſums of money, in particular to ſuch and ſuch perſons by name; this is not a Legacie for which a Suit lyeth in a Court Chriſtian, but for this, every one that is to have portion may have accompt againſt the Executors after the ſale.

Trin. 2. Car. B.R. If one give lands to another, to give them againe to the children of the Teſtator, or to diſpoſe them at the Will of the Deviſees to ſome of the children of the Deviſor; in theſe caſes, the Deviſees

muſt diſpoſe it accordingly, and cannot give it to any other: And if one give lands to others, to the intent that with the profits thereof they ſhall educate children, or pay ſuch ſums of money, or the &c. in this caſe, the Deviſees muſt doe accordingly, or they may bee compelled thereunto. Coo. 6. 16.

And in all caſes of Deviſes of lands to Executors to ſell, it is wiſdome to make it certaine: *i.e.* that the Executors or the ſurvivor of them, or ſuch or ſo many of them as take upon them the probate of the Will (if his meaning be ſo) ſhall ſell it: And it is better to give an Authority, then an eſtate, unleſſe his meaning be that they ſhall take the profits of the land untill the ſale; and if he doe ſo, then it is neceſſary that he appoint that the meane profits untill the ſale ſhall be Affets in their hands; for otherwiſe it ſhall not be ſo. Coo. ſuper Litt. 112. 113.

10. Deviſe upon condition, and what words in a Will ſhall be conſtrued in the ſenſe of a condition, and what not.

The ſame words that in a Deed will make a condition, and the thing granted thereby to be conditionall, will make a condition in a Will, and the thing given thereby to be conditionall: And therefore theſe words, *Provided on condition, So that, If,* and the like will make a condition in a Will: So that if one deviſe land to *I S* on condition, or *So that*, or *If*, or provided that he doe bring up his eldeſt ſonne, or pay his wife 20 l. a yeare for her life, or the like; by theſe Deviſes, the eſtate is made conditionall: Alſo other words that being uſed in a Deed will not make a condition, yet being uſed in a Will make a condition, and the eſtate made by the Deviſe to be conditionall: And therefore, if a man deviſe his land to his Executors to be ſold; or deviſe his land to them, or others to pay 20 l. to *I S*, or paying 20 l. to *I S*; in theſe caſes and by theſe Deviſes, the eſtates are made conditionall: and of theſe conditions regularly the heire, and not a ſtranger ſhall take advantage. So as if one deviſe land to another, and his heirs, provided that he pay 10 l. to *I S*, otherwiſe that the land ſhall remaine to *I D*, and his heires; in this caſe, if the Deviſee doe not pay the money, *I D* ſhall not take advantage of it, nor have the land according to the Deviſe, but the heir of the Deviſor ſhall enter and have the land and put out the Deviſee. And if one deviſe his land to *I S* for life, on condition to pay 20 l. to *I D*, and after to *I D* in Taile; in this caſe, if *I S* doe not pay the 20 l. it ſeemes the heire ſhall enter and hold the land during the life of *I S*, and that *I D* ſhall not have it till then. Dyer 33. 348 126. Coo. ſuper Litt. 236. See condition. Dyer 33. 348 126, 128.

And in caſes of Deviſes of goods or chattels, other words will make a Deviſe conditionall in divers caſes, as [when] as, I give to to *I S* 10 l. when he ſhall be married; and [whiles] as, I give to *I S* 20 l. whiles he ſhall abide with my children, which is as much as if he abide with my children; and [which] as, I give him 20 l. which ſhall marry my daughter; and the ablative Caſe abſolute, Swinb. 136.

ſolute, as, my ſonne being dead, I give to *I S* 20 l. And of all theſe conditions regularly, the Executor and no other ſhall take advantage. But if the condition bee ſuch, for the matter and ſubſtance of it, as is impoſſible, unlawfull, or the like; there perhaps theſe words may not make a condition, nor the thing deviſed conditionall, but rather make the whole ſentence void. Whereof read *Swinb. part.* 4. *Sect.* 5. at large.

Fitz. tit. Aſſiſe 27. If one deviſe his land to his daughter and heir apparant in Fee-ſimple, this Deviſe is void; yet if in this caſe, the wife of the Deviſor be privily with child of a ſonne which is born after his death, now is the Deviſe become good, for now ſhee is not heir to her father.

11. Where a Deviſe void or voidable in his exception, may become good by matter *ex poſt facto*, or not.

Plow. 344. If a woman that hath a husband, deviſe her land by Will during the Coverture, and after her husbands death when ſhe is ſole, ſhe do publiſh and approve it; in this caſe and by this meanes the Deviſe is become good: but if ſhe make and publiſh it during the Coverture, and after her husband die and ſhe become ſole, this accident without any more will not make the deviſe good; the ſame Law is of the Deviſe of good and chattels.

Plow. 344. If an Infant within age deviſe his lands or goods and publiſh his Will, and after he comes to bee of full age, he doth publiſh and approve it againe; in this caſe and by this meanes, the Deviſe is become good: but if the Infant live to be of full age, and doe not publiſh and approve it, *contrâ*.

Swinb. 340. If a Legacy of goods or chattels be given on condition to a man uncapable, and before the condition is extant, he doth become capable; in this caſe and by this meanes, the Deviſe is become good. See before, at Numb. 6. more of this matter.

Litt. 168. Coo. ſuper Litt. 112. Plow. 540. 541. Coo. 8. 94. 6. 33. A Deviſe that hath a good beginning, is ſometimes avoided and overthrown by ſubſequent matter in the ſame Will, and ſometimes by ſubſequent matter in another Will, and ſometimes by ſome other accident *ex poſt facto*: For if a man make a ſubſequent or latter Deviſe, either in the ſame or in another Will, ſo contrary and repugnant to the former, that both cannot ſtand together, this doth overthrow the former: And therefore, if a man doe give White Acre to *I S* in Fee, or his white horſe to *I S*, and after by the ſame or another Will, doth give White Acre to *I D* in Fee, or his white horſe to *I D*; theſe latter Deviſes doe overthrow the former, *cum duo inter ſe pugnantia reperiuntur in teſtamento, ultimum ratum eſt*: And as a latter Will doth overthrow the former, ſo the latter part of a Will doth overthrow the former part of the ſame Will: But if the Deviſees be ſuch as they may ſtand both together, and are not directly repugnant, nor doe fight one againſt another, there the latter ſhall not overthrow the former, but both ſhall be received: And therefore, if one deviſe his land to *I S*, and his heires, and

12. Where a Deviſe good in his inception, ſhall, or may become void by matter *ex poſt facto*, or not.

By a ſubſequent repugnant Will.

See before.

after by the ſame Will deviſe a Rent out of the ſame land to *I D* and his heires, or *è contra*. So if one deviſe White acre to *A* for life, and afterwards give the ſame acre to *B* in Fee; in this caſe the one may have it for his life, and the other may have the Fee-ſimple afterwards.

By a waiving of the eſtate deviſed.

If one deviſe his land to his ſonne and heire in Fee-ſimple: or deviſe it to a ſtranger for yeares, the remainder to his ſonne and heire in Fee-ſimple, and the heire after the death of the Deviſor doth (as he may) waive the eſtate given him by the Deviſe, and claime the the land by diſcent; in this caſe and by this meanes the Deviſe is become void. But if the Deviſe be to the ſonne and heire in Taile, the remainder to a ſtranger, there he cannot waive the Deviſe and take it in any other manner. And ſo if a man have only two daughters, (who are his heire) and he deviſe his land to them; or have Gavelkind land, and deviſe it to all his ſonnes: they may not waive theſe Deviſes and take by diſcent, for by Deviſe they ſhall take as jointenants, who otherwiſe by diſcent ſhall take as Parceners. Plow. 545. Perk. Sect. 569. Litt. Broo. 453. Kitchin 127. Dyer 317. 350.

If one deviſe his land to another in Fee ſimple, Fee taile, for life, or yeares, and the Deviſee after the death of the Teſtator doth refuſe and waive the eſtate deviſed to him; in this caſe and by this meanes the Deviſe is become void. And it ſeemes a verball waiver is ſufficient in this caſe. So if one give goods or chattels to another, and the Deviſee refuſe it; by this meanes the Deviſe is become void, and any waiver or refuſall will ſuffice in this caſe; for a man ſhall not bee compelled *Nolens volens* to take a thing deviſed to him Litt. Book. Sect. 482. Perk. Sect. 569. Dyer 61. Coo. 9. 140. Plow. 543. 544.

If a woman ſole deviſe her lands or goods by Will, and after take a husband and die during the Coverture; by this meanes the Deviſe is become void. And yet if ſhe ſurvive her husband, and die unmarried, now is the Deviſe become good againe. Plow. 348.

If one deviſe his land to *I S* and his heires, and afterwards *I S* die living the Teſtator; by this meanes the Deviſe is become voyd. And in this caſe no verball declaration of the Teſtator that the heires of *I S* ſhall have it will help; for albeit a Deviſe of land in writing may be revoked by a verball ſubſequent declaration, or by any act croſſing or controlling that Deviſe, yet a Deviſe becomming vold by that meanes cannot be made good by any ſuch verball declaration ſubſequent to the ſame Countermaund. So if one give any goods or chattels to *I S*, and he die before the Teſtator; in this caſe and by this meanes the Deviſe is become void, and the Executor of *I S* ſhall not have it. And yet if a Deviſe be of land to *A* for life, the remainder to *B* in Taile, and *A* die before the Teſtator; it ſeems the Deviſe of the remainder doth continue good notwithſtanding. Plow. 60. 346. 344. 347. See infra at Numb. 14. Perk. Sect. 567. 568.

And if one deviſe land or goods to the wife of *I S*, and afterwards her husband dieth, and ſhe marry with another man, and then Plow. 344.

the

the Deviſor dieth; this is a good deviſe notwithſtanding, and not avoided by either of theſe Accidents,

Per Iuſtice Iones M. 9. Iac, Co. E. If one deviſe a Terme that he hath to *A* for life, the remainder to ſuch perſons as ſhall be occupiers of White Acre at the death of *A*; this Deviſe albeit in his beginning it be good, yet if the Deviſor die before *A*, it ſeemes now to become void; for he that will take by way of Executory deviſe, muſt take as an immediate purchaſor, and be capable and knowne at the time of the death of the Teſtator.

Swinb. 356. If I give to *I S* 20l if he marry my daughter, and ſhe dye before he marry her; in this caſe and by this meanes the Legacy is become void.

Perk. Sect. If I give a debt owing to me to *I S*, and afterwards I receive or releaſe the debt; hereby the deviſe is become void.

Litt. Broo. Sect. 300. If a man make a Will and give Legacies, and appoint one or more his Executor or Executors, and he, or they after his death all refuſe to take upon them the Adminiſtration: yet in this caſe the Legacies remaine good, and are not become void: And in this caſe the courſe is to grant the Adminiſtration of the goods to him to whom it doth belong, and to annex the Will to the Adminiſtration, and then the Adminiſtrator is to performe the Will as the Executor ought to do.

It is held alſo that a Legacy of goods or chattels may become void by the injurious dealing of the Legatee againſt the Teſtator after the Legacy given: whereof read *Swinb. part. 7. Sect. 22.*

Swinb. 357. And when the thing deviſed is dead, or ſpoiled: howſoever by this meanes the Deviſe is not become void, yet it looſeth his effect. and is as if it were void. See more *ſupra* at *Numb.* 5.

Swinb. 350. 355. 356. In all theſe caſes when the diſpoſition of the Legacy is pure, and no time is ſet for the performing of it; or there is a ſet time for the doing of it, and the Legatee die before the time: and where the diſpoſition of the Legacy is conditionall, and a time ſet for the doing of it, if the Legatee live till that time, or the condition be performed; in all theſe caſes the Executor or Adminiſtrator of the Legatee ſhall have the Legacy, and the ſame remedy to recover it that the Legatee himſelfe had. But if the Legatee die before the condition be performed, *contra*; And yet if in that caſe the Teſtators mind ſhall appeare to be that the Executor or Adminiſtrator of the Legatee ſhall have it: or the condition be to be performed by another, and there be no default in the Legatee: or if the diſpoſition be modall: or the Legacy that was at firſt upon condition, be afterwards repeated without condition, or it be referred to a condition to be afterwards ſet downe, and none is ſet downe; in theſe caſes the Legacy is not loſt by the death of the Legatee, but ſhall go to his Executor or Adminiſtrator: as for Example; If one deviſe 20l. to

13. Where a Legacy ſhall goe to the Executor when the Legatee doth die, before he doth receive it; And where not.

W S to be paid within 4 yeares after the death of the Teſtator, and the Legatee die before the 4 yeares expired; in this caſe the Executor or Adminiſtrator after the 4 yeares expired ſhall recover the Legacy. If one give to *W S* 20l. when he cometh to 21 yeares of age, and he die before he come to the age of 21 yeares; in this caſe his Executor ſhall not have the Legacy. But if the Deviſe be thus, I give to *W S* 20l. and I will that it ſhall be paid him at his age of 21 yeares, and he die before he come to the age of 21 yeares; in this caſe his Executor ſhall recover the Legacy. So if one give to *I S* 20l. when he ſhall be married, and he die before marriage; in this caſe his Executor ſhall not have it. But if one deviſe thus, I give to *W S* 20l. towards his marriage, and he dye unmarried, in this caſe the Executor ſhall have and recover the Legacy. So if one do give to *W S* 20l. when the Executor of the Teſtator ſhall dye; in this caſe if *W S* die before the Executor, the Executor or Adminiſtrator of *W S* ſhall not have the Legacy. If one deviſe goods or chattels to *I S*, and *I S* die before the Teſtator, the Executor or Adminiſtrator of *I S* ſhall not have this Legacy.

Broo. Deviſe 27. 45. Swinb. 350. 355. Dyer 59. Swinb. 358. 356. Plow. 345.

14. Where an Executor upon a Deviſe to him hath an Election to have the thing deviſed as Executor, or as Legatee. And when he ſhall have it in the one right, or in the other, and what act ſhall make a declaration of his Election.

When any chattell reall or perſonall is given to an Executor by a Will, the Executor hath an election given him by the Law to have and take it in the one right or in the other *viz.* as Executor, or as Legatee: and by his ſpeciall entry, or ſeiſing of the thing or ſome ſpeciall declaration his election is to be made. And if the Executor doe enter generally (as moſt doe) and never make any declaration which way, or by which right he will have it, (as moſt Executors uſe to do) he ſhall be ſaid to have it, and the Law ſhall Adjudge it in him as Executor and not as Legatee. But if by any ſubſequent words or deeds he ſhall declare his mind to be otherwiſe, he ſhall be in as a Legatee *ab initio*; And yet if once he doe any ſuch act as is proper to an Executor, this is a diſagreement to the Legacy *ab initio*; and after that it ſeems he cannot take as Legatee, but muſt take as Executor. And if one Executor of many to whom a terme of yeares of land is deviſed, occupy the ſame alone, and the reſt intermeddle not with the profits thereof, albeit he make no declaration, it is ſaid this is a good declaration of his election to have it as Legatee. But if a terme of yeares be given to the wife of *I S*, and *I S* be made Executor, and he enter generally, and after makes his Teſtament and never ſpeakes of this terme; this is no declaration of his Election to have it as Legatee, neither ſhall the terme be ſo deemed in him but as Executor. But in theſe caſes this muſt be heeded, that howſoever the Executor hath power to take as Executor or as Legatee, yet he cannot take as Legatee to prejudice Creditors in their debts; but the ſame things they ſo take as a Legacy, if there be not enough beſides, ſhall be ſaid to be Aſſets in their hands as to the Creditor for the ſatisfaction and paiment of their debts.

Plow. 519. 520. 543. 100. 10. 47. 2. 37. 8. 96. Dyer 277. 367. Perk. Sect. 574. 573. 575.

Aſſets,

If

Dyer 331. If a man deviſe that after his Debts and Legacies paid, his wife ſhall have all the reſidue of his goods and chattels to diſtribute for his Sarle &c. and make his wife his Executor; in this caſe it is ſaid ſhe hath no election, but ſhe muſt take as Executor, and cannot take as Legatee.

15. Aſſent *Quid.* When a Deviſe of goods or chattels is well made, the aſſent of the Executor is neceſſary to the perfection thereof, for untill then the Legatee may not have or meddle with the thing deviſed. And

Coo. 10. 17. 52. this Aſſent is defined to be the agrement of an Executor or Adminiſtrator, that a Legatee ſhall have the thing bequeathed unto him. And it is either expreſſe, *i. e.* when the Executor or Adminiſtrator doth by expreſſe words agree to the Deviſe. Or implied, *i. e.* when the Executor doth not by words, but by ſome overt act declare his aſſent that the Legatee ſhall have the thing deviſed unto him.

16. Where an Aſſent is neceſſary, or not. And where a man may enter into the lands, or take the goods or chattels deviſed unto him without the aſſent or delivery of the Executor. And what ſhall be ſaid a ſufficient Aſſent to execute a Legacy, or not.

Coo. ſuper Litt. 111. Perk. Sect. 576. 578. 579. Swinb. 134. 135. This agreement of the Executor or Adminiſtrator is not needfull in the caſe of Deviſe of land; for if a man be ſeiſed of land in Fee-ſimple, and deviſeth to another in Fee-ſimple, Fee-taile, for terme of life, or yeares; in theſe caſes the Deviſee may enter into the land deviſed without any leave of the Executor or Adminiſtrator: and in truth in theſe caſes the Freehold or eſtate is ſaid to be in the Deviſee before his entry: and therefore if the heire enter firſt, the Deviſee may enter upon him, and put him out. And in caſe where land is deviſed by the cuſtome of a place, if the heire enter firſt and keep the Deviſee out, the Deviſee may have a writ of *Ex gravi querela* againſt him for his relief: and this writ is incident to that cuſtome. But if a Deviſee enter firſt into the land deviſed unto him, and then the heire of the Deviſor enter upon him, then the Deviſee may take his remedy at the Common law as in other caſes. And with theſe things the Ordinary, Executor, or Adminiſtrator is not to intermeddle. But regularly a

Perk. Sect. 570. Coo. ſuper Litt. 211. Plow. 525. 20. Ed. 4. 9. deviſee cannot nor may not have or take any chattel real or perſonall deviſed to him without the agreement or delivery of the Executor or Adminiſtrator. And by this aſſent if the Deviſe be good (for otherwiſe an aſſent will not make it good) the Deviſe is perfected, and the Legacy executed. And yet if the Legatee have the thing

Swinb. 353. Broo. tit. deviſe 6. 30. deviſed in his own hands; or if there be a ſpeciall clauſe in the Will giving him authority to take it himſelfe; or it be a Legacy to good and godly uſes; or the thing given be like to periſh on the ground, being corne or the like, and there be aſſets beſides to pay all the debts; in theſe caſes perhaps the Aſſent of the Executor or Adminiſtrator may not be neceſſary, but the Legatee may take the thing deviſed without his agreement. And if a Legacy be given to one of

Perk. Sect. 572. the Executors themſelves, he may take it without any aſſent of his Co-executors, and that before Adminiſtration alſo if he will.

If there be many Executors, the aſſent of any one of them is ſuffici-

ent; and if there be but one and he be dead, the aſſent of his executor is ſufficient; or if he die inteſtate, the aſſent of the Adminiſtrator *de bonis non adminiſtratis* of the firſt Teſtator is ſufficient; or the Legatee himſelfe in this caſe where the Executor dieth inteſtate, or where he doth refuſe to take upon him the Adminiſtration, may take Adminiſtration himſelfe, and by publique declaration aſſent to his own Legacy. And if a man be Executor and Legatee both, he may aſſent to, and take the Legacy, and yet waive the Executorſhip, and this aſſent is good. And therefore if the Legatee of a term of years be made Executor, and he enter and claim and occupy the land by force of the Deviſe, and dye before Probate of the Will: the Executor of the Legatee, and not the Ordinary ſhall have this term; and yet it ſeems the Executor may not do this in prejudice of a Creditor to hinder him of his debt. Dyer 372. 367.

A Caveat for Executors.

Any agreement in word or deed will ſuffice to make an aſſent and execute a Deviſe. Let Executors take heed therefore; for if an Executor do but agree that the Legatee of a term of years of land ſhall take the profits thereof, and that but for a time only; or ſay to the Legatee, God ſend you joy of it: or I intend you ſhall have it according to the Deviſe, or the like; this is a good aſſent to execute the Legacy. And if the Executor agree that the Legatee and a ſtranger together ſhall take the profits of the land, or the thing deviſed; this is a good aſſent. And it ſeemes that whatſoever verball agreement will amount to an Atturnment, may make an aſſent to a Legacy. If therefore the Executor agree to the Legacy upon certain Termes and conditions; this is agreed to be a good and abſolute aſſent to the Legacy. Coo. 4. 28. See Atturnment. Per 2 Iuſtices M. 37. 38. Eliz. B. R. Coo. 4. 28

If a terme of years be given to the wife of the Teſtator, during the minority of his eldeſt ſonne, to the intent that ſhe with the profits thereof ſhall breed up his children, the remainder of the ſame term to the ſame eldeſt ſonne, and ſhe is made Executrix, and ſhe enter generally, but doth alwaies breed the children of the Teſtator; in this caſe it ſeems that this education of the children ſhall be taken for an aſſent againſt her to veſt the eſtate in the eldeſt ſonne. Plow. 540.

And if a man poſſeſſed of a term of years give it to his wife, if ſhe live ſo long, and after her deceaſe the remainder of years to *I S*, and make his wife Executrix, and ſhe enter, claiming to have it only for her life, the remainder to *I S* according to the Deviſe; in this caſe this is a good aſſent for the execution of the remnant of the term in *I S*. Plow 516. Perk. Sect. 574.

And if a term be deviſed to *A* for life, the remainder to *B*, and the Executor aſſent to the Deviſe of *A*; in this caſe this is a good aſſent to the deviſe of *B*, and ſhall execute the ſame alſo whether the Executor have aſſets or not. So if a man poſſeſſed of a term of 20 yeares, deviſe it one for 10 yeares, and after to another for the remnant of the term; or if the Deviſe be to one for ſo many Coo. 8. 95. 4 66. 10. 47 Perk. Sect. 574.

many years of the term as he ſhall live, and after to another for the reſt of the time: in all theſe caſes an aſſent to the firſt Deviſee is an aſſent to the ſecond alſo. And ſo alſo it ſeems is the Law of a chattell perſonall when the occupation thereof is firſt deviſed to one, and then the thing to another. And if one that hath a term of years give it to his wife for her life, the remainder to his ſonne, and make her Executrix: and ſhe enter claiming by force of the Deviſe, and not as Executrix; in this caſe this is a good aſſent to execute the Deviſe to him in remainder.

37 H. 6. 30. Plow. 519. 543. Coo. 3. 96. 10. 47.

If one be poſſeſſed of a term of years of land, and he deviſe it to one of his Executors alone for part of the time, and the remainder of the time after to a ſtranger: and that Executor alone albeit he enter generally doth occupy the land himſelf, and the other Executors do not intermeddle therewith; in this caſe it ſeemes this is a good aſſent to execute the Legacy to him in remainder for the reſt of the terme. And yet if one give goods to one of his Executors for life, and after to a ſtranger for life, and this Executor alone get the goods into his own hands, and occupy them alone all his life time; it ſeems this occupation without ſome aſſent, will not execute the gift in the ſecond Legatee.

Perk. Sect. 574. 575. Fitz. Deviſe 6.

If one poſſeſſed of a Leaſe for yeares, deviſe it to his Executors, and deviſe a rent out of it to *I S*, and the Executors pay the rent; this is a good aſſent to the whole Legacy. But if he deviſe a rent, or Common out of it for certaine years to *I S*, and after deviſe the term to *I D*: and the Executor doth agree that *I S* ſhall put in his cattell, or doth pay the rent to *I S* (which is a good aſſent to the Legacy of *I S*;) this is no aſſent nor execution of the Legacy of *I D*; And yet perhaps if he deviſe a rent at firſt to *I D* for part of the term, and another rent to *I S* for the reſidue of the terme afterwards; in this caſe it ſeems that an aſſent to the firſt is not ſufficient to perfect the Deviſe of the ſecond Legatee. And yet if a Termor deviſe the occupation or profits of his land to *I S* for 10 yeares of his Terme, and after deviſe the land it ſelf to *I D* for the reſt of the term; in this caſe if the Executor aſſent to the Legacy of *I S*, this will be a good aſſent to, and execution of the Legacy of *I D*.

Plow. 540. 544. Coo. 8. 96. Plow. 541. 542. 522.

If one poſſeſſed of a term deviſe it to *I S* for life, the remainder to *I W*, and make *I S* his Executor, and *I S* take a releaſe from *I W* of all his right to the land; this is an implicite aſſent to the Legacy of *I W*.

Coo. 10. 52

If a man deviſe the occupation of a book or any other chattell perſonall to *I S*, or that *I S* ſhall have the occupation of any ſuch like thing during his life, and that after his deceaſe it ſhall goe to *I D* for ever, and the Executor deliver the thing to *I S*; it ſeemes this is a good execution of the Legacy to the ſecond Deviſee *I D*; and there-

Old N. B. 80. 37 H. 6. 30.

therefore after the death of *I S* he may ſeiſe the goods and hold them according to the Deviſe.

17. How a Deviſee may attaine the thing deviſed. And what remedy he ſhall have to recoverit, or damages for it.

If lands, or any rent, or other profit to be taken out of lands, be deviſed to a man in Fee-ſimple, Fee-tail, for life, or years; in theſe caſes the Deviſee may enter into, and have and take the thing deviſed without the leave or agreement of the Executor or Adminiſtrator: and ſo he may whether there be any Executor made or not, and whether the Will be proved or not, for the Ordinary and the Executor have nothing to doe with theſe things. And if the Deviſee in any ſuch caſe be diſturbed in the having or taking of ſuch things, he may have the ſame remedy as men have in other caſes. And where the land is deviſed by cuſtome, if the heire enter before the Deviſee, the Deviſee may be relieved by a Writ called *Ex gravi Querela*; but if the Deviſee enter firſt, and then the heire enter upon him, the Deviſee may have his remedy at the Common-law. Perk. Sect. 576. 577. 578. 579. Coo. ſuper Litt. 111.

If lands are given thus, I will that my executors ſhall ſell my land, and with the mony made thereof ſhall pay 10l. to my daughter *A*, and 10l. to my daughter *B*; in this caſe and for this gift *A* and *B* may either ſue the executors in a Court of equity, or have an action of Accompt againſt them in a Court of Common law. Trin. 9. Iac. Lovets caſe Dyer 151. 152.

If Leſſee for years deviſe his term to executors for life, the remainder over to *I S* for the reſt of the term: and the executor entreth and doth aſſent to the Legacy and dye, and the executor of the executor doth take the profits of the land, and keep out the ſecond Legatee; in this caſe it ſeemes he may have an Accompt againſt the executor of the executor for the profits of the land. But if one deviſe his land to his ſonne and his heires (except 20l. a yeare for ſeven yeares to be imployed as followeth) and doth appoint his ſonne (being his executor alſo) to pay that money to his daughters for portions; in this caſe the daughters may not have an Accompt at the Common-law, but they may ſue the executors in the Spirituall Court or in a Court of equity, and if the executor be dead, they may ſue his executor. Dyer 277. Trin. 9 Ia. Lovets caſe.

If one deviſe a rent out of his land, and do charge the land with a diſtreſſe: the Deviſee may make uſe of that remedy and diſtrain or the rent: but unleſſe power be given him by the Will to diſtrain, he may not diſtrain for it. Dyer 348.

If one be poſſeſſed of a term of years of land, and deviſe it to his wife to the end that ſhe with the profits thereof ſhal breed up his children; in this caſe this is no Legacy to them, and therefore it ſeemes they have no remedy but in Chancery or ſome other Court of equity againſt her if ſhe refuſe to do it. Plow. 545. Fitz. Deviſe 6. Plow. 540. Perk. Sect. 574. 483. 20. Ed. 4. 9. Swinb. 135.

And in caſes of Deviſes of goods and chattels, as Leaſes for years, rents out of ſuch Leaſes, and the like, the Legatee cannot take the thing

thing deviſed before he have the Aſſent of the Executor or Adminiſtrator thereunto: And therefore, if in theſe caſes the Executor or Adminiſtrator refuſe to agree to, performe, and deliver the Legacy, the Legatee may ſue him in the Spirituall Court, or in ſome Court of Equity to compell him thereunto: But a Legatee may not ſue for a Legacy in any of the Courts of Common-Law, neither may hee ſue the Executor or Adminiſtrator in the Spirituall Court for the Legacy untill the Will be proved: but he may by Suit there compell him to prove the Will or to refuſe the Adminiſtration: And in theſe Courts and by theſe meanes, the Deviſee may recover his Legacy againſt an Executor or Adminiſtrator, if he have Aſſets to pay the debts of the Teſtator; for otherwiſe a Legacy is not recoverable at all; but in caſe where the Executor or Adminiſtrator hath once agreed to the Legacy, ſo as it is executed, it is then ſo veſted in the Legatee, and he hath ſuch a property therein, that he may enter into, or ſeiſe and take the thing deviſed as his own, and if any man keep or take it from him, he may have reliefe as in other caſes.

37 H. 6. 9. If another doth claime by Deed of gift the goods a Legatee doth ſue for; this may bee tryed in the Eccleſiaſticall Court.

Perk. Sect. 527. Swinb. If a debt, obligation, or any ſuch like thing in action be deviſed to another, the Deviſee hath no meanes to recover it, but by a Suit in the Spirituall Court, or in ſome Court of Equity, to compell the Executor to ſue for it himſelfe, or to make the Legatee a Letter of Atturney, to ſue for it in the Executors name; for the Legatee cannot ſue for it in his own name, unleſſe he be made Executor as to that debt &c. (which is the beſt courſe in theſe caſes:) and yet if the Legatee have the Bond or Eſpecialty in his hands, he may deliver it up or cancell it.

Plow. 543. 515. And of this opinion were Sir *John Wilder*, and Sr *John Bridgeman*, upon deliberate adviſe. If a man deviſe a term of years of land to *I S*, and make another his Executor, and the Executor having enough beſides to pay the debts doth ſell this term; in this caſe, albeit the ſale be good, and *I S* have no remedy nor meanes to recover the term, yet he may ſue the Executor for it, and recover the worth of it in damages in a Court of Equity.

And now having done with the firſt part of a Teſtament, *viz.* a Deviſe; we come to that which doth concern the ſecond part, *viz.* an Executor.

See before at Num. 4. part. 1.

18. what perſon may make or appoint an Executor, and what not, and how.

Any perſon that may make a Teſtament, and deviſe his goods and chattels, may make an Executor. [a] And a woman that hath a husband, as to the goods and chattels ſhee hath as Executrix to another, and as to her own goods and things in action, *viz.* debts due unto her upon Obligations, and Eſpecialties made to her alone before, or after her marriage, may make an Executor. [b] And he that may make an Executor, may make either one, two, three, or more his Executors at his pleaſure. And he may if he will make one man his

[a] Fitz. Executor, 28. [b] Swinb. 187. Dver 4. Broo. Executors 155. 19 H. 8. 8. Litt. Broo. Sect. 180. 3 H. 6. 7. Swinb. 200. 193.

his Executor for one yeare, another man his Executor for another yeare; or one man his Executor untill ſuch a time, and then another his Executor; As one may make *A* and *B* his Executors, and that *B* ſhall not meddle during the life of *A*. And a man may make one man Executor for one part of his eſtate, and another man his Executor for the other part of his eſtate; or one may make one man Executor as to part of his eſtate, and die inteſtate, as to the reſidue of his eſtate: Alſo a man may appoint one to be his Executor, if he will accept it, and if he refuſe that, another ſhall be his Executor. And laſtly, a man may make another his Executor upon condition, *viz.* ſo as he give Bond to ſuch and ſuch men to performe his Will, or the like: And all theſe nominations and appointments of Executor are good.

19. What perſon may bee made or appointed an Executor, and what not, and by what name.

Any perſon that may be a Legatee, and take by the Deviſe of goods and chattels, may be an Executor: And therefore it is ſaid, That any perſon or perſons, male or female, of the Clergy, or Laity, children or ſtrangers, friends or enemies, married or unmarryed, creditor or debtor, bond or free, may be an Executor. [c] And that a Baſtard, an Excommunicate, or an Out-lawed perſon, may be as able and as abſolute an Executor as any other. [d] And an Infant or child *in utero matris* may be an Executor; but he cannot meddle with the Adminiſtration of the goods untill he bee of the age of 17 years, and therefore the Ordinary muſt grant the Adminiſtration unto ſome other untill that time in truſt, and for the benefit of the Infant. [e] And a woman that hath a husband, may be an Executrix to any other perſon. [f] Alſo a woman may bee Executrix to her own husband, and the husband may be Executor to his own wife, and by this meanes hee may recover all the debts due to her upon Obligations, Recogniſances, and the like, made to her before or after the marriage, and the goods that were taken away from her before the marriage; all which the husband ſhall not have but by Executorſhip or an Adminiſtration of her goods and chattels. And all theſe perſons that may be Executors, may be Executors by that name as they may be Deviſees: And yet if there be two of one name, and the Teſtator make one of that name his Executor, and doth not ſay, neither can it be diſcerned which of them he doth intend, in this caſe, neither of them ſhall bee Executor.

See at Num. 4. part. 2. Numb. 7. Swinb. 222. Fitz. Executors 47. 87. Deviſe 3.

[c] Fitz. Executor, 11, 88. Non-ability, 18. Broo. Non-ability, 38.

[d] Coo. 6. 67.

Husband and wife.

[e] Fitz. Executor 24.

[f] Fitz. Executor 24. Broo. Conſultation, 5.

See before at Numb. 7. Swinb. 292.

But it is ſaid, that an Heretick, Apoſtate, Traitor, Felon, Recuſant convict, Sodomite, Libeller, Baſtard begotten in Inceſt, or a notorious Uſurer cannot be an Executor: And that if a man be for any of theſe cauſes uncapable at the time of the death of the Teſtator, when the Executor is to take upon him the Executorſhip, that hee is for ever uncapable; but it hath beene held by the Common-Law, that a perſon attaint, may bee an Executor.

Swinb. 222. 223. Coo. 9. 39.

Broo. Non-ability 18. Fitz. Excomengment. 13.

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Swinb. part. 4. Sect. 17. 18, 19. Dyer 4. 19 H. 8. 8. 21 H. 6. 6. Fitz. Executor 43. Broo. Executors, 98. 73. Fitz. Executors, 113. 121. Briefe 999.

The moſt apt and proper words whereby to conſtitute an Executor, are, I make *I S* my Executor, or, I make *I S* the Executor of my Will &c. But an Executor may be conſtituted by other words equivalent or by implication: And therefore, if a man ſay in his Will, I will that *I S* ſhall be my generall Adminiſtrator, or I will that *I S* ſhall adminiſter all my goods, or I will that *I S* ſhall diſpoſe all my goods and chattels, or I commit all my goods to *I S*, or I commit all my goods to the diſpoſition of *I S*, or I make *I S* Lord of all my goods, or I make *I S* Legatary of all my goods, or I leave all my goods to *I S*, or I give all my goods to *I S*, and make no other Executor; in all theſe caſes, *I S* by intendment of Law is made Executor of all the goods and chattels of the deceaſed: So if a man ſay, Of all my goods I make *I S*, and ſay no more, but omit the word [Executor,] by theſe words *I S* is made Executor: So if one ſay, I will that *I S* ſhall diſpoſe all the goods that are in his hands, by theſe words *I S* as to thoſe goods is made Executor: So if I deliver goods to *I S* to keep untill my death, and then to diſtribute *ad pios uſus*, or for my ſoule, hereby *I S* is made Executor of thoſe goods. So if one ſay, I will that *I S* ſhall be my Executor if *I D* will not; by this *I D* is made Executor in the firſt place by implication, and if he refuſe, then *I S* ſhall be Executor. But if a man make *A* and *B* his Executors, and ſay, I will that *I S* ſhall be a Coadjutor, or helper to *A* and *B ad diſtribuendum* or *ad adminiſtrandum bona mea*; or I will that *I S* ſhall be Surveyor, or Supraviſor of my Will; in theſe caſes and by theſe words, *I S* is not made Executor with *A* and *B*. And yet if he ſay, I will that *I S* ſhall have Adminiſtration of my goods, or bee Executor with *A* and *B*, or be Adminiſtrator with *A* and *B*; in theſe caſes and by theſe words, *I S* is made joynt Executor with *A* and *B*. And if one ſuppoſing *I S* to be dead, ſay, I will that *I D* ſhall be my Executor becauſe *I S* is dead, in this caſe and by theſe words, *I S* if he be living is made Executor firſt; and if he refuſe, *I D* ſhall be Executor: If one make *A B* and *C* his Executors, and then ſaith afterwards: And I will that *B* ſhall adminiſter my goods alone, or that *B* only ſhall adminiſter my goods; it ſeemes in theſe caſes, *B* only is made Executor, and that *A* and *C* are not made joint Executors with him.

3 H. 6. 6, 7.

20. By what words a man may be made an Executor, and what words in a Teſtament ſhall make a man full Executor, or not, but a Coadjutor or Supraviſor; and who ſhall be an Executor by ſuch words.

Coo. 9. 39. a Plow. 276. Dod. & Stud 78. 132. Dyer 236. 4 H. 7. 13.

In all Caſes where a man hath any goods or chattels to adminiſter, and he doth die a naturall or civill death, and dyeth inteſtate, either in deed *i. e.* doth make no Will at all, nor appoint any Executor, or in Law; *i. e.* that doth make one or more his Executor or Executors, and he or they ſo appointed, is, or are ſuch perſons, as are not in being; or if they be in being, is, or are ſo incertainly named, that it cannot be diſcerned whom the Teſtator doth intend; or if he is, or they be well named, he is, or they are all incapable by reaſon

21. Where and in what caſe an Adminiſtration is grantable, or not: And to whom it doth belong to grant it, and to whom it muſt be granted.

reaſon of ſome legall impediment; or if otherewiſe, they bee capaple, they doe all die before the Will be proved; or if they live, if being cited to come in before the Ordinary to prove the Will, they either refuſe to appear, or if they doe appeare, they refuſe to prove the Will, and to take upon them the Adminiſtration of the goods and chattels of the deceaſed; in all theſe caſes, the Ordinary may and ought to grant the Adminiſtration of all the goods and chattels of the deceaſed to him that of right it doth belong unto according to his diſcretion: And if a man make a Will and after the death of the Teſtator, the Executor prove it, and then die inteſtate, the Ordinary muſt grant the Adminiſtration of the goods of the firſt Teſtator, not adminiſtred in the hands of the Executor to ſome competent perſon or perſons according to his diſcretion: but where a man hath no goods and chattels to adminiſter, *i. e.* either he hath none, or if hee have, they are none of his, or if they are, there is an Executor named, *in rerum natura*, capable, and well named, and he doth accept, or at leaſt hath not refuſed the Executorſhip; in theſe caſes, the Adminiſtration ought not to be granted; or if it be granted, it will be void or voidable at the leaſt: And where an Adminiſtration is grantable, it is to be granted by, and had from the Ordinary of the Dioceſſe, where the party whoſe goods are to be adminiſtred, lived at the time of his death; for regularly he that ſhall have the Probate of a Will, in caſe where a man doth make a Will, ſhall have the granting of the Adminiſtration of his good and chattels, in caſe he die inteſtate: And therefore, if all the goods and chattels of the party deceaſed, be within the ſame Dioceſſe wherein the inteſtate lived and dyed; the Ordinary of that Dioceſſe, or his lawfull Deputy, or Commiſſary, or the Arch-deacon of the Dioceſſe, or his Deputy or Officiall (as the Cuſtome of the Country is) or the Dean and Chapter in time of vacation of the Biſhop ſhall grant the Adminiſtration, and the Adminiſtation ſhall be had from him: but if there be *bona notabilia* in the caſe, *viz.* if the party deceaſed have goods or chattels of the value of five pounds or upwards, lying and being at the time of his deceaſe in divers Dioceſſes; in this caſe, the Archbiſhop or Metropolitan of the Dioceſſe wherein the party dyed, or *Sede vacante*, the Dean and Chapter being Guardian of the Spiritualties, and not the Ordinary of the particular Dioceſſe ſhall grant the Adminiſtration; and it muſt be had from him; for if the Ordinary of the particular Dioceſſe grant it when it ought to be granted by the Metropolitan, the Adminiſtration is void not only as to the goods that lie within the other Dioceſſe, but alſo as to the goods lying within the ſame Dioceſſe: And ſo is it alſo, if it be granted by the Ordinary of another particular Dioceſſe, as if *A* die within the Dioceſſe of *Lincoln*, the King being indebted to him at the time of his death, and the Adminiſtration of his goods and chattels

Stat. 31 Ed. 3. chap. 11. 21 H. 8. c. 5. Fitz. Adminiſtration 7. Litt. Broo. Sect. 276. See infra Numb.

Bona notabilia.

Coo. 5. 29. 36. Dyer 305. F. N. B. 120. Plow. 277. 281. Coo. 6. 18. 19. Dyer 339. See infra at Numb.

chattels is granted by the Biſhop of *London*; this Adminiſtration is void: And if the Metropolitan doe grant an Adminiſtration, when it ought to be granted by the Ordinary of the particular Dioceſſe, the Adminiſtration is voidable by ſentence of the ſame Court out of which it is granted: If one die in *Ireland*, and have nothing but an Eſpecialty for money, and that Eſpecialty doth lie in *England*, the Ordinary of the Dioceſſe within which that place is where the Eſpecialty doth lie, ſhall commit the Adminiſtration; and if the Ordinary of another Dioceſſe grant it, the Adminiſtration is void: And therefore the caſe was, A Merchant in *Ireland* was bound in an Obligation of 40 l. to one *I S* in *London*, and the Obligation was made in *Ireland*, but remained alwayes in *London*, and the Merchant dyed inteſtate in the County of *Bedford* in *England*, and a Biſhop of *Ireland* did commit the Adminiſtration to one, and the Archbiſhop of *Canterbury* did commit it to the wife of the Inteſtate who had the Obligation; in this caſe the laſt Adminiſtration was adjudged good: And it was there held, that the Adminiſtration ſhall bee granted by the Ordinary of the place, where the Eſpecialty doth lie at the time of the death of the Inteſtate, and not by the Ordinary of the place where the debt began. And in caſes, where the Adminiſtration is grantable by the Ordinary and others as before, ſuch perſons having power to grant it, may not grant it to whom they pleaſe, but as they are bound to grant it, and cannot refuſe ſo to doe, ſo are they directed and appointed to whom they ſhall grant it: For it is appointed by a ſpeciall Law, That the Ordinary ſhall depute the next friends of the Inteſtate to adminiſter his goods if they deſire it: and the Adminiſtration is to be committed to the widdow, or next of blood, or both to the Inteſtate, and where there be divers in equall degree, and they all ſue for it, the Ordinary may accept them all or refuſe ſome of them and commit the Adminiſtration to the reſt only; and if ſome of them only ſue for it, he may grant it to them alone: So that now the Law and courſe is to grant the Adminiſtration to the neareſt of kinne to the deceaſed: As 1. to the husband or wife; and if there bee none ſuch, 2. to the children ſonnes or daughters; and if there be none ſuch, 3. to the Parents, Father or Mother; and if there be none ſuch, 4. to the brothers or ſiſters of the whole blood; and if there bee none ſuch, 5. to the brothers or ſiſters of the hale blood; and if there be none ſuch, 6. to the next of kinne, Uncles &c. And if theſe come in time and deſire the Adminiſtration, the Ordinary may and muſt grant it to them, and cannot grant it to any other if they be capable of it as moſt men are: and if divers of theſe in equall degree deſire it, the Ordinary may grant to which of them hee pleaſeth; howſoever in this caſe, it ſeemes moſt juſt and equall to grant it to them all, unleſſe he have ſome

Dyer 305.

Stat. 31. Ed. 3. c. 11. 21. H. 8. c. 5. Litt. Broo. Sect. 233. 415. Fitz. Excomengment. 13. Coo. 9. 39. 40, 3, 40. Dyer 339. 4 H. 7. 14.

ſpeciall

ſpeciall reaſon to admit ſome and to exclude the reſt: and if none of theſe that are next of kinne ſhall deſire it, but ſuffer the time to ſlip; in this caſe, the Ordinary may grant it to whatſoever ſtranger he pleaſe: And yet then perhaps the next of kinne may by Suit get the ſame Adminiſtration revoked, and a new Adminiſtration granted to him. See *infra* at Numb. 41.

22. How an Adminiſtration may be granted, and what ſhall be ſaid a good Adminiſtration, or not.

An Adminiſtration may and muſt be granted in writing under Seale, for by word of mouth it may not be granted; and it may be granted as well upon condition as abſolute: and it may be granted as well for a part of the eſtate as for the whole: And therefore, if a man have goods in two Provinces, and he make a Will of his goods in one of the Provinces, and die Inteſtate for the goods in the other Province, an Adminiſtration may be granted for the goods in this Province: Alſo an Adminiſtration may be granted during, or untill a certaine time, or continually. And therefore, if a man make a Will and appoint an Executor for ſeven yeares, after the ſeven years ended, the Ordinary may and muſt grant an Adminiſtration of the goods. So if one doe appoint another to be his Executor to be his Executor a year after his death, the Ordinary may and muſt grant the Adminiſtration for that yeare, untill the power of the Executor doth take place: And all theſe Adminiſtrations are good.

Dyer 294. Fitz. Admin. 5. 34 H. 6. 14 Plow. 279.

23. Who ſhall adminiſter after the death of an Executor or Adminiſtrator, and who not, and how an Executor of an Executor ſhal charge and be charged.

If an Executor die after he hath proved the Will, and he hath made a Teſtament, and appointed an Executor therein; in this caſe, this Executor alſo ſhall be Executor to the firſt Teſtator, as he is to the ſecond, and he ſhall have all the benefit and be ſubject to all the charge that the firſt Executor had and was ſubject unto; and yet the goods of one Teſtator ſhall not be ſubject to the debts of the other; but each of the Teſtators goods ſhall be ſubject to the payment of his own debts only. [a] And if in this caſe, the Executor of the Executor take upon him the Adminiſtration of the goods of the firſt Teſtator, he cannot refuſe the Adminiſtration of the goods of the latter: but he may take upon him the latter and refuſe the former. But if the Executor refuſe to adminiſter to the firſt Teſtator before the Ordinary, or die before the Probate of the Will, and hee hath made a Teſtament and appointed an Executor therein; in theſe caſes, it ſeemes the Executor of the Executor ſhad not adminiſter the goods of the firſt Teſtator, but the Ordinary muſt grant the Adminiſtration thereof: And yet if all the reſidue of the goods of the firſt Teſtator be given by the Teſtament to the firſt Executor after the debts be paid; in this caſe, albeit he die before Probate of the Will, yet his Executor ſhall be Executor alſo to the firſt Teſtator, or elſe he ſhall have the Adminiſtration of his goods and chattels granted unto him: And therefore, if *A* make his Will, and give Legacies to *B* and *D*, and give all the reſt of his goods and chattels

Stat. 25. Ed. 3 c. 4. Coo. 5. 9. Plow. 286. 34 H. 6. 14.

[a] Trin. 17. Iac. Co. B. Wolfe & Heidens caſe.

Dyer 372.

Adiudged in Hill. 9. Car. in Dean caſe.

chattels after debts and Legacies paid to *C* his wife, and make her his ſole Executrix, and ſhee die before Probate of the Will, or any election made, not knowing of the Will; and *E* ſue out an Adminiſtration of the goods of *A*, and pay the Legacies to *B* and *D*, and *F* ſue out an Adminiſtration of the goods of *C*; in this caſe, the Adminiſtrator of *C*, and not of *A* ſhall have the goods; for the Law doth judge them in *C* after the debts and Legacies paid without any election.

Broo. Executor 117. 26. H. 8. 7. Coo. 1 96. Dyer 372. Termes of the Law. tit. Adminiſtration.

If an Executor after hee hath proved the Teſtators Will, die Inteſtate; in this caſe, the Adminiſtration of the goods of the firſt Teſtator not adminiſtred in the hands of the Executor muſt be granted to whom the Ordinary ſhall think fit: And if the Ordinary pleaſe, hee may grant the Adminiſtration, *de bonis non adminiſtratis* of the firſt deceaſed, and of the goods of the ſecond deceaſed to one and the ſame perſon: And herein the Adminiſtrator muſt take care that his Adminiſtration have ſpeciall words for the granting of an Adminiſtration of the goods of the firſt Teſtator, not adminiſtred; * for howſoever ſome hold that by the generall Adminiſtration, the Adminiſtrator ſhall have not only the goods of the Executor, but the goods of his Teſtator alſo, yet it ſeemes this is not taken to be Law at this day.

* Fiz. Adminiſtrator. 9

Dyer 160.

If there be two Executors made, and one of them doth refuſe before the Ordinary, and the other doth prove the Will, and make a Will himſelfe and appoint an Executor and then die; in this caſe, it ſeemes the Executor of the Executor that did prove the Will alone ſhall have the diſpoſition of all the eſtate, and be Executor to the firſt Teſtator, and that the ſurviving Executor ſhall not meddle therewith, for that his Election by the death of his companion is gone. And if one make two Executors, and one of them doth make an Executor and die, and the other that doth ſurvive hath accepted the Executorſhip; in this caſe, the ſurviving Executor ſhall have the ſole diſpoſing of the eſtate, and the Executor of the deceaſed Executor ſhall not intermeddle therewith: And if therefore the ſurviving Executor die Inteſtate, an Adminiſtration *de bonis non Adminiſtratis* of the firſt Teſtator ſhall be granted: And if the Executor of the deceaſed Executor have any of the eſtate in his hands, the ſurviving Executor may take or recover it from him: And if two bee made Executors, and one of them is uncapable; in this caſe, he that is capable ſhall adminiſter alone.

Litt. Broo. Sect. 172. Broo. Executor 149. 99. Fitz. Executor 12. 113. Dyer 187.

Dyer 372. 112. Coo. 5. 9

If one that is Adminiſtrator of another mans goods doe make his Will and make an Executor and die; or doe die Inteſtate, and the Adminiſtration of his goods is granted to ſome body; in the firſt of theſe caſes the Executor, and in the laſt the Adminiſtrator, unleſſe he be made Adminiſtrator of theſe goods alſo ſhall not

meddle with theſe goods of the firſt deceaſed: but the adminiſtration of the goods of the firſt deceaſed in the hands of the Adminiſtrator not adminiſtred muſt be granted againe. And hence it is that if the Adminiſtrator of my goods have a judgement for a debt due to me, and he dye before execution, and make an Executor, or die inteſtate, that in this caſe his Executor or Adminiſtrator ſhall never have execution of this judgement. And the ſame law is of the Adminiſtrator of my Executor in this caſe.

24. Where an Executor or Adminiſtrator may accept or refuſe the Executorſhip or Adminiſtration, and how. And where he may be Executor after he hath refuſed or not. And what act or intermedling with the goods of the dead ſhall bee ſaid an Adminiſtration, and what not.

An Executor or Adminiſtrator may accept or refuſe the executorſhip or the adminiſtration at his pleaſure; and therefore he may at any time before he hath intermedled with the eſtate as Executor or Adminiſtrator refuſe it; and if he be ſued by any as Executor or Adminiſtrator, he may plead, *ne unques Executor*, *i. e.* he was never Executor or Adminiſtrator, and did never adminiſter: and if it be true, he ſhall by this meanes avoid the ſuite; for a man ſhall not be compelled to take ſuch a charge upon him whether he will or no. If therefore there bee many Executors, or an adminiſtration bee granted unto many: and one of the Executors prove the Will in the name of the reſt, or one accept the adminiſtration in the name of all the reſt, yet the reſt may refuſe to accept it, and plead in any Suite againſt them that they are not Executors or Adminiſtrators. But as an Executor or an Adminiſtrator after he hath once legally refuſed the executorſhip or adminiſtration, can never after intermeddle therewith: ſo after he hath once legally accepted thereof, (that is) hath done any thing as Executor or adminiſtrator, and which is proper only for an executor or adminiſtrator to doe, he can never after refuſe it. And his acceptance of part, in this caſe, will make him chargable with all, except it bee in the caſe before of an Executor who may accept of the laſt Executorſhip, and refuſe the firſt.

Coo. 9. 37. 37 H⁸ 6. 27. 28. 20. H. 6. 1.

If the Executors being cited to come in and prove their Will, appeare before the Ordinary, and refuſe to adminiſter and to prove the Will, they cannot afterwards accept it or intermeddle with it. But herein this difference muſt be obſerved; That where there bee many Executors named and made, and they being cited, ſome of them only do appear and refuſe to accept it: (the reſt of the Executors being then living) and after ſome or one of the reſt of the Executors prove the Will, or take upon him the Executorſhip; in this caſe and notwithſtanning this refuſall, they that doe refuſe may afterwards at any time, at leaſt during the life time of their Co-executors that did accept it, accept thereof and intermeddle therewith as far forth as either of the reſt. And therefore in this caſe howſoever the Executors refuſing ſhall not be charged in any ſuite againſt all the Executors for any thing due from the Teſtator, but they may by their plea avoid it: yet the Executors accepting cannot ſue for any thing

Coo. 9. 37. Fitz. adminiſtration 6, 11. Broo. Adminiſtration 32. Executors. 117. Coo. 5. 28. Peik. Sect. 485. Dyer 160. 21. Ed. 23.

thing due to the Teſtator, nor be ſued for any thing due from the Teſtator, but they muſt ſue and be ſued in the names of themſelves and their Co executors that do refuſe alſo. And if there be 3 Executors, and two of them prove the Will, and the third refuſe; yet this third Executor alone may releaſe any debt due to the Teſtator. But if there be but one Executor made, and he alone, or if there be many made, and they do all together refuſe before the Ordinary to take upon him or them the adminiſtration; in this caſe the Teſtator is ſo farre forth ſaid to be dead inteſtate, and thereupon therefore the Ordinary may grant the adminiſtration of the goods of the deceaſed, and then the Executor or Executors can never after accept thereof, or intermeddle therewith. And if one or more of the Executors refuſe, and the reſt accept, if he or they which accept die before he or they that refuſed accept; it ſeemes in this caſe they can never afterwards accept it, but the Adminiſtration muſt bee granted.

See the caſes before.

If one be ſued as Executor or Adminiſtrator, and he plead to the Suit *ne unques Executor*, *i.e.* he was never Executor or Adminiſtrator, if he have not in truth intermedled before; this Plea is a refuſall of the Executorſhip or adminiſtration, and therefore he can never afterwards accept or intermeddle with the Executorſhip or Adminiſtration.

Coo. 9. 37. 5. 34. Dyer 105. Kelw. 63. Broo.

Every intermedling with the goods of the deceaſed, or with the office and work of an executor, ſhall not be ſaid to be ſuch an adminiſtration as to amount unto an acceptance of the executorſhip or adminiſtration, and ſo to make a man chargable as executor or adminiſtrator. And therefore if a man that is an executor or adminiſtrator do only lay up and preſerve the goods of the deceaſed; or command another to take away the goods of the deceaſed from one that hath them in his keeping; or ſee the deceaſed buried in a decent manner, and for that purpoſe uſe, and if need be ſell ſome of his goods to do it; or make an Inventary of the goods and chattels of the deceaſed; or prove the Teſtators Will with his owne money; or take his own goods lying amongſt the goods of the deceaſed: or take and uſe ſome of the goods of the deceaſed only by miſtake, or as a treſpaſſer, or by the delivery of another; or take and diſpoſe any of the goods of the deceaſed when the executor or adminiſtrator doth challenge them as his owne and in his own right: or if he redeeme any of the goods of the deceaſed with his own money when they are pledged to the full value, and the day of redemption is paſt, as neither of theſe acts will make a ſtranger an executor of his own wrong: ſo neither will they amount to an acceptance of the executorſhip, and make the executor or adminiſtrator chargable as executor or adminiſtrator. But if a man that is an executor or adminiſtrator ſhall ſue by that name for any debt due to the deceaſed; or being ſued

Adminiſtrator 35. 36. Fitz. Adminiſtrator 7. Broo. Executor 165. 32 H. 6. 6. Dyer 135.

Executor of his own wrong.

ed by that name for any debt or duty due from the deceaſed, ſhall imparle to the Suite, or plead any other plea beſides *ne unques Executor*; or ſhall take into his hands the goods of the deceaſed, and convert them to his owne uſe, and alter the property by ſale, gift, or otherwiſe, and all this as the goods of the deceaſed; (and ſo it ſhall be intended againſt him if he do not declare the contrary, that he doth take and uſe them as his own &c.) or if he deliver the goods of the deceaſed to Creditors or Legataries in ſatisfaction of their debts or Legacies; or receive any debt due to the deceaſed, and give a releaſe for the ſame; or releaſe any debt due to him before it be paid; or pay any debt due from the deceaſed, except it be with his own money: any or either of theſe acts will amount unto an acceptance of the Executorſhip; and therefore after an Executor or Adminiſtrator hath done any ſuch act, he can never after refuſe the Executorſhip or Adminiſtration.

If a woman ſole be made an Executrix to another, and ſhe marry a husband before ſhe intermeddle with the eſtate, and then her husband doth adminiſter; this is ſuch an acceptance as will bind her, and ſhe can never afterwards refuſe it. Broo. Executor. 147.

25. What things an Executor or Adminiſtrator ſhall have by vertue of his Executorſhip or Adminiſtration. And what not. First in reſpect of the nature of the thing.

The Executor or Adminiſtrator ſhall have by vertue of his Executorſhip or Adminiſtration all the chattels reall and perſonall of the Teſtator, as well thoſe that are in poſſeſſion, as Leaſes for years of Land, Rent, Common, or the like, Grants of next Advowſons, and Preſentations, Wardſhips of heirs by reaſon of tenures *in Capite*, or Knights Service, corn growing and cut, trees, and graſſe cut and ſevered, cattell, money, plate, houſhold ſtuffe, and the like, as alſo thoſe that are in action, as right and intereſt of executions upon Judgements, Statutes, Obligations, Cauſes of action, and the like; He ſhall have alſo all other things that are of the nature of chattels. Coo. ſuper Litt. 209. 388 Perk. Sect. 69. Plow. 293. Doct. & St. 39. 76. Perk. Sect. 833. Coo. 4. 65. 63. 7. 17. Kelw. 118.

b And therefore the executor or adminiſtrator ſhall have the two years of the heir female that is in Ward; a relief or an advowſon that is fallen; and yet if a Biſhop have title to preſent by the vacation of a Church, and then he dye; in this caſe the King and not the executor or adminiſtrator of the Biſhop ſhall preſent. And if the Lord have a greater eſtate in the Seigniory then for life or years, it is ſaid the executor or adminiſtrator ſhall not have the relief. And the executor or adminiſtrator of the Lord ſhall have Fines aſſeſſed upon the Tenants upon their admittances in the Lords time. b Coo. ſuper Litt. 79. Dyer 140. 283. Dyer 24. Broo. Executor 143.

c And if I make a Feoffment in Fee, gift in tail, or leaſe for life, rendring Rent, and the rent is behind, and then I dye; in this caſe the arrerages of Rent due to me in my life time ſhall go to my executor or adminiſtrator in the nature of a chattell. So if a Rent be granted out of land to me in Fee-ſimple, Fee-tail, for life, or years, and it be not paid to me in my life time; theſe arrerages ſhall go to my executor or adminiſtrator, and not to any other. c Stat. 32. H. 8. cap. 37. Coo. 4. 48. Dyer 375.

other. [d] And ſo alſo if a Parſon have an annuity in Fee in the right of his Church, and it be behind, and the Parſon dye; in this caſe the executor or adminiſtrator, not the ſucceſſor of the Parſon ſhall have the arrerages, [e] And if I be ſeiſed of land and poſſeſſed of a ſtock of cattell, and let it to another for years, and he covenant by the Leaſe to pay me and my wife our heirs and aſſignes 100l. by the year, during the term; in this caſe after my death, and my wives ſurviving me, her executor or adminiſtrator and not my heir ſhall have this payment. [f] And if one ſeiſed of land in Fee make a Feoffment of it to me excepting the trees, and after grant me the trees for years; or if he make me a Leaſe of the land firſt for years, and after doth grant me the trees for a number of years, to begin after the end of the term of the land; in both theſe caſes I have the trees in the nature of a chattell, and if I dye my executor or adminiſtrator ſhall have them. [g] And if a man grant to me the next Preſentation to the Church of *D*; in this caſe if I dye, my executor or adminiſtrator ſhall have it as a chattell. [h] And my wife ſhall have ſo much of her wearing apparell as is neceſſary and convenient for one in her eſtate and condition: and therefore that ſhall not go to my executor. But ſo much of her wearing apparell as ſhe hath ſuperfluous and more then neceſſary for her, ſhall go to my executor or adminiſtrator after my death. [i] And the charters and evidences that do concern any of my chattels which my executor or adminiſtrator is to have, ſhall go with the ſame chattels. So alſo any Charters whatſoever if they be pledged to me for money, ſhall go to my executor or adminiſtrator untill the money be paid. But otherwiſe thoſe deeds and evidences that do belong to the heir as incident to the Inheritance, ſhall not go to my executor or adminiſtrator after my death. But matters of truſt, and ſuch things as are perſonall, as offices of truſt, wardſhips by reaſon of a Tenure in Socage, or *Jure naturæ*, or the like, ſhall not go to the executor or adminiſtrator after the death of him that hath them. So an executor or adminiſtrator ſhall not have the graſſe and trees growing on the ground no more then the ſoile or ground it ſelfe whereon they grow. So an executor or adminiſtrator ſhall not have the Incidents of a houſe, as glaſſe, doores, wainſcot, and the like, no more then the houſe it ſelfe, nor pales, wals, ſtauks, fiſh in Ponds, Deere, or Conies in Parkes, Pigeons in Pigeon houſes, or the like.

[d] F.N.B. 120. L.
[e] Dyer 275.
[f] Coo. 4. 63.
[g] Dyer 283. 34 H. 6. 27.
[h] See ſupra at Numb. 7.
[i] Broo. chattels 12.
Plow 293. Coo. 3. 39. 9. 99.
Kelw. 118. See before at Numb. 7.

If a Leaſe for yeares of land be granted to me and my heires, or to me and my ſucceſſors, and I dye; my executor or adminiſtrator and not my heire ſhall have this terme. The ſame law is if a wardſhip, or the next advowſon of a Church be granted unto me and my heires, or if a Covenant or an Obligation be made to me and my heires: for in all theſe caſes this is ſtill a chattell in

Secondly in reſpect of the caſe.

Coo. 10. 97. Litt. Sect. 740. Fitz. Accompt. 56 F. N. B. 120.

me that ſhall go to my executor or adminiſtrator, and hee onely ſhall take advantage by it. And if my heire or ſucceſſor happen to get the Deed, the executor or adminiſtrator may recover it from him. And if a Leaſe be made to me for 20. years without naming my executors or adminiſtrators or aſſignes in the Leaſe; in this caſe if I dye, my executor or adminiſtrator notwithſtanding ſhall have it during the terme. h And if a Leaſe for years be made to a Biſhop and his ſucceſſors, and he dye; his executor or adminiſtrator, not his ſucceſſor ſhall have it. And if a man be poſſeſſed of a terme of yeares of land, and grant it by deed, or give it by Will, to me and my heires, or to me and my heires males: or deviſe it by Will to *A* for life, the remainder to me and my heires; in theſe caſes I ſhall have theſe terms of years as chattels, and after my death my executor or adminiſtrator ſhall have them. h And if a man grant a rent out of his land to me and my heires for 20 yeares, and I dye; my executor or adminiſtrator not my heire ſhall have this rent. i And if a rent bee granted to me my heires and executors during the life of *I S*, and for one halfe yeare after, and I dye; in this caſe the half yeares rent ſhall goe to my executor or adminiſtrator, and not to my heire. Aud if I be ſeiſed of land in Fee, and make a Leaſe for years of it reudring rent, and then deviſe this rent to a ſtranger, and the deviſee dye; in this caſe his executor or adminiſtrator ſhall have it. And if Leſſee for life make a Leaſe for yeares abſolutely; this in Law is a Leaſe for ſo many yeares if the life ſo long live, and ſhall go to the executor or adminiſtrator after his death.

New termes of the Law tit. aſſignes
h Coo. ſuper Litt. 46.
Coo. 8. 95. 10. 87. Plow. 524.
h Litt. Sect. 740.
i M. 7. Ia. Co. B. Wats caſe Litt. Sect. 739.
Dyer. 5.
Coo. 7. 12.

If I have a box, cheſt, or trunk wherein my writings that doe concern my inheritance do lie, and the ſame is open, and not ſealed or locked: in this caſe my Executor ſhall have it; but if it be locked or ſealed, *contra*: for then it ſhall góe to him that is to have the writings as incident thereunto. And yet if there be any money, plate, or any other ſuch like thing in the cheſt alſo; my Executor ſhall have that thing.

Broo. Executors 145. 97. Fitz. Executors 111.

The Incidents of a houſe, as glaſſe-windowes annexed with nailes or otherwiſe to the windowes, the wainſcot fixed by nailes, ſkrewes, or irons put through the poſts or walls, tables dormant, furnaces of lead and braſſe, and fats in a brew and die houſe ſtanding and faſtned to the walls, or ſtanding in, or faſtned to the ground in the middle of the houſe, (though faſtned to no wall,) a copper, or lead fixed to the houſe, the doores within and without that are hanging and ſerving to any part of the houſe, ſhall not goe to the Executor or Adminiſtrator to be divided and ſold from the houſe, albeit the Executor or Adminiſtrator have a Leaſe for yeeres of the houſe, and by that meanes hath the houſe alſo. But if the glaſſe be from the windowes, or there be wainſcot looſe, or doores more

Coo 4. 63. 21 H. 7. 26.

then

then are uſed that are not hanging, or the like: theſe things ſhall go to the Executor or Adminiſtrator.

Co. 5. 96. Fitz. Executor 8. If I make a Feoffment to *I S* of land, on condition that if he pay me, my heires or aſſignes, or my heires executors or adminiſtrators a 100l. ſuch a day, that the Feoffment ſhall be void, and I dye before the time of paiment; in this caſe if this money be paid at the day, my Executor or Adminiſtrator and not my heire ſhall have it.

Coo. 4. 63. 11. 48. If one be ſeiſed in Fee of lands whereon there are trees growing, and he make a Feoffment of the land to me, excepting the trees, and afterwards he doth ſell me the trees for ever, and after I dye; in this caſe my Executor or Adminiſtrator ſhall not have theſe trees, as they ſhall in caſe where the Feoffor doth grant them to me for yeares. And if I be ſeiſed of land in Fee, and I make a Leaſe for life, or yeares of it excepting the trees, and afterwards I dye; in this caſe my Executor or Adminiſtrator ſhall not have theſe trees, but they ſhall goe in both caſes with the land.

Coo. 4. 63. 11. 81. 84. If a Leaſe be made for life, or yeares of land whereon a houſe is ſtanding, or timber is growing, and the houſe is proſtrate, or the timber is cut or fallen down (by whomſoever or what means ſoever it be;) the materials of this houſe, and this timber is now become a chattell; and therefore if the Leaſe be without impeachment of waſte, it ſhall goe to the Leſſee, and after his death to his Executor or Adminiſtrator, but if the Leaſe be otherwiſe, it ſhall goe to the Leſſor, and after his death to his Executor or Adminiſtrator. But if the timber be cut for reparations only, or the Leſſee will imploy the materials of the houſe to build it againe, and the Leaſe do continue, it may be ſo imployed, and then the Executor or Adminiſtrator of the Leſſor may not take it.

Coo. 11. 50. Perk. Sect. 58. If one be ſeiſed in Fee-ſimple of ground whereon trees do grow, and he ſell me theſe trees for money, and afterwards I dye before they be cut; in this caſe my Executor or Adminiſtrator ſhall have and may cut them.

Coo. ſuper Litt. 388. If the Kings tenant by Knights ſervice *in Capite* be ſeiſed of a Mannor whereunto an Advowſon is appendant, and the Church become void, and the tenant dyeth, his heire within age: in this caſe the King and not the Executor or Adminiſtrator of the tenant ſhall have the Preſentation. And yet if in this caſe the land be held of a common perſon, the executor or adminiſtrator and not the Gardian ſhall have it.

Dyer 316. Doct. & St. 35. Perk. Sect. 59. In all caſes regularly where a man doth ſowe land, whereof and wherein he hath ſuch an eſtate as may perhaps continue untill the corne be ripe, if he that doth ſowe it die before it be cut and ſevered, his executor or adminiſtrator ſhall have it; as if the husband ſowe the land whereof he hath an eſtate in Fee-ſimple, Fee-taile, for life,

or for a certain number of years in the right of his wife, and dye ere it be ripe; in this caſe the Executor or Adminiſtrator of the husband and not the wife ſhall have it. And if one that holdeth land for the life of *I S*, ſowe the land, and *I S* die ere it be ripe and cut; the Executor or Adminiſtrator of the tenant ſhall have this corn. And if tenant in Tail, or in Dower ſowe the land they do ſo hold, and dye ere it be cut; the Executor or Adminiſtrator not the iſſue in tail, nor the heir, or him in reverſion ſhall have it. So if the husband make a Feoffment in Fee to the uſe of himſelf for life, and after of his wife &c. and he ſowe the land, and after die; his Executor or Adminiſtrator not his wife ſhall have the corn. But if a Feoffment be made to the uſe of the husband and wife together in Fee, or for life, and the husband ſowe the land; in this caſe the wife not the Executor or Adminiſtrator of the husband ſhall have the corn. So if Leſſee for years certain ſow the land a little before the end of his term, and the term end before it be cut; in this caſe he that is to have the land, not the Executor or Adminiſtrator of the Leſſee for years ſhall have the corn

Coo. 2. 93.

If there be Tenant for life, the remainder in Fee of a Tenancy, and the Lord grant his Seigniory for life, and after he in remainder in Fee of the Tenancy, dye, his heir within age, and after the Lord die, and after the Tenant for life die; in this caſe the heir and not the Executor or Adminiſtrator of the Lord ſhall have the Ward-ſhip.

Hill 7. Iac. B. R. per Curiam.

If one be ſeiſed of land in Fee, and make a Leaſe for years rendring Rent at Michaelmas, or within 10 daies after, and the Leſſor happen to die during the term after Michaelmas, and before the 10 daies expired; in this caſe the heire of the Leſſor and not his Executor or Adminiſtrator ſhall have the laſt half years Rent due at Michaelmas.

F. N. B. 120. Fitz. Covenant 17. Dyer 24.

If one grant a Rent in Fee, and grant withall that if the Rent be behind, the Grantor ſhall forfeit 20*s*. *nomine pœnæ* to the Grantee and his heirs, and the Rent is behind, and the Grantee die; in this caſe his Executor or Adminiſtrator not his heir ſhall have this money that is forfeit already. So if one make a Feoffment in Fee of land, and the Feoffee doth covenant to do divers things to the Feoffor, *Et quoties defectus fuerit* &c. that he ſhall forfeit to him and his heirs 5*l*. and the Feoffee doth fail and breake his covenant divers wayes, and the Feoffor dieth; in this caſe his Executor or Adminiſtrator not his heir ſhall have and recover all the forfeitures that are paſt.

Coo. 4. 65. Perk. Sect. 58. Coo. ſuper Litt. 46.

If a Biſhop, Parſon, Vicar, Maſter of Hoſpitall, or any body politique be poſſeſſed of any goods or chattels in their owne right and dye; theſe ſhall go to the Executor or Adminiſtrator, not the ſucceſſor of ſuch a perſon. And albeit ſuch things be granted to them

them and their ſucceſſors, yet their executors and adminiſtrators and not their ſucceſſors ſhall have it. But if a Corporation aggregate as Dean and Chapter, Mayor or Cominalty and the like, have any goods or chattels in right of their Corporation, and any of the Heads or Members thereof dye; the Executors or Adminiſtrators of ſuch perſon ſhall not have them: but they ſhall continue in ſucceſſion with the Corporation.

Co. 6. 80. Dyer 201. An Executor or Adminiſtrator ſhall have the benefit of a pardon granted to the deceaſed, and ſhall have advantage of any error in any outlawry againſt the deceaſed, and have reſtitution of the goods forfeir thereupon.

Coo. ſuper Litt. 351. Plow. 294. 192. The Executor or Adminiſtrator of a woman that hath a husband ſhall have by right of his Executorſhip or adminiſtration all Actions, Rights, and Titles to any chattels, and poſſibilities, and things of that nature which the wife had before the marriage, and which fell to her during the marriage; for theſe things the husband ſhall not have by the intermarriage after his wives death, as he ſhall have all the reſt of her goods and chattels: exeecpt he have them as executor or adminiſtrator to her as he may be. And if ſuch a woman have any goods or chattels as Executrix to another, her executor or adminiſtrator not her husband ſhall have theſe alſo; for ſhe hath theſe goods in anothers, and not in her own right. Husband and Wife.

Litt. Sect. 281. Perk. Sect. 525. 526. Litt. Sect. 320. 321. If I have any goods or chattels in Iointenancy with another, as if a leaſe be made of lands to me and another for years, or a horſe or other chattell perſonall be given or granted to me and another; in theſe caſes if I die, my executor or adminiſtrator ſhall not have any part of theſe goods or chattels: but the other ſurviving Iointenant ſhall have them all. But otherwiſe it is of the goods and chattels that I and another have in Common. And therefore if I and another have goods and chattels in that nature as before: and he, or I grant that which doth belong unto us thereof unto a ſtranger; in this caſe the ſtranger, and him of us two that hath kept his part are tenants in Common of the things; and therefore if either of us die, the part of him that dieth in the goods and chattels ſhall goe to his executor or adminiſtrator and not to the other Tenant in Common.

Fizt Executor 53. 84. 317. If I have a Judgement for land in a reall or mixt action, and for damages recovered in the ſame Suit, and I dye; in this caſe my executor or adminiſtrator not my heire ſhall ſue execution for, and recover the damages, but not for the land. So if I recover damages againſt another for the detaining of my Charters, and dye; my executor or adminiſtrator ſhall recover the damages, but the heire ſhall have the Charters, and the heire muſt ſue his *Scire facias* for the Charters ere the executor can ſue for the damages. Alſo if I recover any debt or damage in any perſonall action; my executor

or

or adminiſtrator ſhall recover and have this. See more *infra* at *Numb.* 39.

26. What an Executor may doe by vertue of his Executorſhip. And the power of an Executor, Adminiſtrator, or Ordinary.

The power and intereſt which the Executor hath is wholly by the Will. And hence it is that an Executor whether he be abſolute or conditionall whiles he is Executor, may do any thing as Executor, (except only ſue for debts and duties due to the Teſtator) aſwell before the Probate of the Will as he may do after; for before the Probate he may enter into and ſeize the goods and chattels whatſoever they be, or give power to another ſo to do: and if any of them be taken or kept from him, he may have an action of treſpaſſe, or a replevin to recover them; he may give or ſell any of the goods or chattels; he may pay any of the debts due from, and receive or releaſe any debts due to the deceaſed. But it is otherwiſe in the caſe of an Adminiſtration; for in as much as his power and intereſt is given to him wholly by the Adminiſtration, therefore he can do nothing untill the Adminiſtration be granted. And yet in this caſe as to the goods taken away before the Adminiſtration, the Adminiſtration ſhall have ſuch a relation as to give the Adminiſtrator an action for them. But otherwiſe after the Adminiſtration is granted, the intereſt and power of the Adminiſtrator is equall to and with the power and intereſt of the Executor. And yet it is otherwiſe of the power and intereſt of the Ordinary; For howſoever it ſeemes by the ancient Common Law he might ſeize, preſerve, give, grant, and diſpoſe the goods of the inteſtate to pious uſes, yet might he not ſue for the goods or debts due to the inteſtate, no more then he might be ſued for any debt due from the inteſtate; and at this day he may only keep and preſerve the goods of the deceaſed until adminiſtration be granted and ſue him in the Court of the Ordinary that doth detaine the goods from him, and perhaps may ſue him that ſhall take the goods out of his poſſeſſion; for he may not ſell or give the goods of the deceaſed, nor receive or releaſe any debts; for in caſe where there is an Executor made that is capable &c. he is not to meddle at all with the eſtate untill the Executor refuſe: and where there is no Executor that the party is dead inteſtate, the Ordinary is preſently to commit the Adminiſtration to the neareſt of the kinred; which when he hath done, his power is at a end, for it is doubted of ſome whether he may repeale an Adminiſtration without cauſe or not; but it hath been clearly held by all that he may not diſpoſe of the eſtate afterwards, and that he hath not power to enforce the Adminiſtrator to give portions to children out of the eſtate, and that if he do goe about it either before or after the granting of the Letters of Adminiſtration, the Adminiſtrator may have a Prohibition. * And accordingly divers have been granted; And yet notwithſtanding it ſeemes this courſe is uſuall: and Prohibitions not often granted at this day.

Coo. 6. 18. 9. 38. 5. 27. 1 Iow. 280. 9. Ed. 4. 47. 36 H. 6. 7. Fitz. Adminiſtrator 2. 6.

Coo. 8. 135. 9, 39. Dyer 256. Weſtm. 2. cap. 20. 31 Ed. 3. c. 11.

*Hill 13. Ia. Co. B. Henslowes caſe Trin. 3. tac. Co. B. Davis caſe. Hill 2. Car. Co. 9. Fotherlies caſe.

*An

* Litt. Sect. 69. Plow. 281. Broo. Executor 129.

* An Executor or Adminiſtrator may after the death of the deceaſed enter into the houſe where the deceaſed lived, and where he dyed, and where the goods are, and take them away and juſtify it; but he muſt do it within convenient and reaſonable time, as within 30 daies after his death or thereabouts, and in a quiet and faire manner when the doore is open &c.

m Dyer 2.

m He may keep any of the goods of the deceaſed, ſo as he pay or lay out as much of his own money in and about the Adminiſtration of the ſame eſtate.

n Plow. 543. 544.

n He may if he want money to diſcharge Funerals, or pay debts, ſell any of the chattels reall or perſonall whereof the deceaſed dyed poſſeſſed; and that albeit the thing in particular be deviſed: as if a man be poſſeſſed of a term of years *int ralia*, and deviſe the ſame term to *I S*; the executor or adminiſtrator notwithſtanding this deviſe may at any time before aſſent given to the Legacy, if he have not aſſets to pay the debts, ſell this term, and the Legatee is remedileſſe. And ſo he may do alſo albeit there be enough beſides to pay the debts, and he have no need; but then in this caſe the Legatee ſhall have ſome reliefe in a Court of Equity againſt the executor or adminiſtrator for damages, but the ſale is unavoidable.

Plow. 184. 543. Coo. 5. 28.

An executor or adminiſtrator may retain ſo much of the eſtate as to ſatisfie his own debt firſt if any be due unto him. And if he hath enough to pay all the debts and Legacies, he may pay them in what order he will without danger to himſelf or wrong to Creditors or Legataries. And if he hath not enough, he may pay them in what order he will, but not without danger to himſelf. But if any thing be due to himſelfe, hee may pay that firſt of all; and for others that are in equall degree, he may pay which of them he will firſt. And for the Legataries he may preferr which of them he will, or pay one of them his whole Legacy, and pay another a part of his, or not pay him any part of his Legacy if there be no aſſets to do it.

The Addition to Iuſtice Dodridge treatiſe 93. Kelw. 62 27 H 8. 22. Plow. 525.

But an executor or an adminiſtrator may not ſell any thing that is given in ſpeciall to a Legatee to pay another Legacy given to another Legatee, nor compell a Creditor or Legatee to take ſome of the goods of the deceaſed for his debt or Legacy whether he will or no, nor deviſe the goods he hath as executor or as adminiſtrator, neither can executors or adminiſtrators make diviſion of the goods amongſt them.

Coo. 5. 28.

Infant.

An Infant that is an executor, after the time he is capable, hath as much power as another Executor of full age; for hee may ſell the goods, receive debts, and make Releaſes for the moneyes hee doth receive, aſſent to a Legacy when debts are paid, ſue, and be ſued, as another executor. And hee is only diſabled to do any thing to hurt himſelf; And therefore if he releaſe a debt before he receive it, the Releaſe is void; and if he aſſent to a Legacy before the debts are paid, the aſſent is void; and if he do any other act.

act which will be a waſting of the goods in an executor that is of full age, it ſhall not bind him. And it ſeemes that howſoever an Infant Executor after 17 yeares of age may ſell any of the chattels perſonall hee hath as Executor, yet that after his age of 17 yeares, and before he is 21 yeares of age, that he cannot ſell a Leaſe for yeares he hath in the right of his Executorſhip, but that ſuch ſale is void.

And ſo was it held by Iuſtice Hutton at Sarum Aſſiſes. 21. Iac.

Woman Covert.

A woman covert that hath a husband, and is an Executrix may do any lawfull act as another Executor may do, but ſhe may not do any thing to prejudice her husband, as releaſe a debt before it bee paid, aſſent to or deliver a Legacy before the debts be paid, or the like: and yet the husband himſelfe may do ſo.

Broo. Executor 178. 152. Fitz. Executor 55. Co. 5. 28.

27. The office, duty, charge of an Executor or Adminiſtrator and of the Ordinary.

Coo. 8. 133.

The office and duty in generall of an Executor or Adminiſtrator is to diſpoſe all the eſtate of the deceaſed wherewith he hath to do. 1. Truly, not to convert any of it to his own uſe, but to the uſe and beſt advantage of the deceaſed, nor to labour by any undue practiſe or meanes to hinder any Creditor of his debt. 2. Lawfully, to pay debts and Legacies in that order the Law preſcribeth. 3. diligently, *quia egligentia ſemper habet comitem infortunium*; but more particularly, The firſt duty and care of an Executor or Adminiſtrator after he hath taken upon him the charge of the Adminiſtration of the goods and chattels of the deceaſed after the goods are laid up, is to ſee the body of the deceaſed laudably interred according to his rank and quality; wherein let the Executor or Adminiſtrator take this caution by the way, not to exceede in Funerall pomp, eſpecially if it be ſo that the eſtate will ſcarcely reach to pay the debts; for let his expences be what they will, the Iudges (who in this are to determine what ſhall be allowed) will allow what they pleaſe, and they are pleaſed in ſuch caſes to allow but a ſmall matter; And whatſoever the Executor or Adminiſtrator doth lay out more, he muſt beare out of his own eſtate, if hee have not enough beſides to pay the debts. The ſecond duty and care muſt be to make an Inventary, *i.e.* a Schedule containing a true and perfect deſcription of all the goods and chattels of the deceaſed at the time of his death, as of his Wares, Merchandizes, Emblements, and the like with their appriſement and value, and of none elſe, and of all debts due to him and from him. And this muſt be made by and before two of the Creditors or Legataries of the deceaſed (if there be any ſuch and they will do it) and two others, or in caſe they refuſe, by and before two other men of the honeſt neighbours. And herein let the Executor or Adminiſtrator take this caution by the way not to intermeddle with the goods before he hath done this; for howſoever he may do any act as Executor before the Inventary bee made, yet the Ordinary may puniſh this upon him except it be done with the Ordinaries licence, who in this caſe may give what time he

First in the Funerals.

Doct. & St. 75. Plow. 543. Kelw. 64.

Secondly, in making an Inventary.

Doct. & St. 35. Stat. 21. H 8. c. 5. Dyer 166. Swinb. part. 6. Sect. 6. 7. 8. 9. 10.

he will for the doing of it; and untill the Inventary be made and put in, it ſhall be preſumed againſt the Executor or Adminiſtrator that he hath aſſets in his hands to pay all men; and beſides untill this be done, he cannot deduct to ſatisfie his own debt firſt, and barr other men by Plea. But of the other ſide when he hath made and exhibited a true and perfect Inventary of all the goods and chattels, it ſhall be preſumed againſt him that he hath ſo much as is contained in the Inventary and no more, unleſſe more can be proved by Witneſſes. 3. The third thing whereof the Executor or Adminiſtrator is to take care, is to prove the will if there be any: And this the Ordinary will compell him to do, but otherwiſe he may do any thing as Executor ſave only ſue actions as well before Probate as after. 4. The fourth thing whereof the Executor or Adminiſtrator muſt take care, is to ſell and make money of the goods and chattels, and to receive the debts due to the deceaſed, and then to pay the Debts and Legacies due to the Creditors and Legataries, wherein the Executor or Adminiſtrator muſt be very cautious and wary. And for this purpoſe let him obſerve, That all the debts muſt be paid before any Legacies be paid or delivered; and if there be not enough beſides to pay the debts, any thing given by way of Legacy may be ſold to make money to pay the debts, and the Legataries muſt looſe their Legacies, for *Legatarii contendunt de lucro captando, Creditores autem de damno vitando.* And in payment of debts this decorum muſt be obſerved. 1. Amongſt perſons that are Creditors, the executor or adminiſtrator himſelfe ſhall be preferred, ſo that if any debt be due to him, he may deduct to ſatisfie himſelfe firſt, albeit others looſe their whole debt thereby, and eſpecially then when his debt is in equall degree with others debts. 2. After the executor or adminiſtrator is ſerved and ſatisfied his debt, then the King is to be preferred, ſo that if there be any debt due to him, and he begin his Suit for it before any other man can get a Judgement for his debt againſt the executor or adminiſtrator, his debt ſhall be paid before any others. 3. After the King is ſerved and ſatisfied his debt, then the debts of common perſons muſt be paid. And theſe alſo muſt be paid in this order or manner. 1. The debts due by Record by any judgement had againſt the deceaſed in any judiciall proceeding in any Court of Record. 2. The debts due by Statutes or Recogniſances ented into by the deceaſed; for the debts due upon judgements muſt be ſatisfied before theſe; *ſit judicium prius velpoſterius.* 3. The debts due by Obligations and penall and ſingle Bils, for theſe are in eqnall degree, and theſe are to bee paid after Statutes and Recogniſances. And yet if the Statute or Recogniſance be only for performance of Covenants, and no Covenant is broken, an Obligation for the payment of preſent money ſhall be diſcharged before it. 4. The debts due for

Rent:

See Probate infra at Numb.

Thirdly in Probate of the Will.

Coo. 9.88. Plow. 184. 545. Dyer 80. Doct. & St 75.76.77. 78.132. Stat. 33.H.8. cap.39. Coo. 5.28.4.54. 59.60.8.132. Dyer 232,32 21 Ed.4.,21. Broo. Executors 88. 172. Coo.8, 132. Dyer 32. Plow. 279.280. Broo. Executors 103. Kelw. 74.

Fourthly, in payment of Debts and Legacies; and the order of payment of Debts and Legacies.

rent upon Leaſes of Land, or grants of rents; but ſome ſay that debts due for rent in the Teſtators life time (be the rent reſerved upon Leaſes made by, or without deed for years, or at will) are in equality of degree with debts due upon Eſpecialties. 5. The debts due for ſervants wages and workmen. 6. The debts due upon ſhop-books and verball Contracts; and yet it is ſaid by ſome, That Legacies are to be paid before debts due by ſhop-books, bills unſealed, or contracts by word, *Quod non credo.* And amongſt debts alſo that are in equality of degree, thoſe that are due are to be paid before thoſe that are not due; and thoſe whoſe day of payment is already come before thoſe whoſe day of payment is not yet come: And yet if the Creditor whoſe day of payment is already come, doe not ſue for his debt untill his debt whoſe day of payment is at a day to come, become due, the Executor or Adminiſtrator may ſatisfie which of them he will firſt. And amongſt debts that are due and already to be paid, thoſe that are firſt ſued for, are to be firſt paid: Or if the Creditors begin their Suites together, the Executor or Adminiſtrator may pay which he will of them firſt, and to pay debts in any other order is dangerous: And therefore for the purpoſe, if the deceaſed are two ſeverall debts of 10 l. a piece to two ſeverall Creditors by ſeverall Obligations, and the Executor or Adminiſtrator hath enough only to pay one of them, he that can firſt get Iudgment and Execution ſhall firſt be ſatisfied, and if the Executor or Adminiſtrator doe afterwards pay the other his debt, he muſt ſatisfie the firſt out of his own eſtate. If one that hath a debt due to him from the deceaſed upon a ſimple Contract or the like, ſue the Executor or Adminiſtrator for it, and there bee debts due to others upon bonds and bills unſatisfied; in this caſe, the Executor or Adminiſtrator may not pay this debt, nor may hee ſuffer the Plaintiffe to recover in his Action; for if he doe, and he have not Aſſets beſides to ſatisfie the debts due upon Bills and Bonds, he muſt ſatisfie ſo much out of his own eſtate as hee hath ſo paid, or ſuffered to bee recovered from him; for in the caſe of an Action brought, he is to plead and to ſet forth theſe debts upon Eſpecialties, and to ſay that he hath no more but what is ſufficient to ſatisfie them &c. and thereby he ſhall barre the Plaintiffe in his Action. In like manner it is, if one that hath a debt due to him from the deceaſed upon an Obligation, ſue the Executor or Adminiſtrator thereupon, and there be debts due to others upon Iudgements, Statutes or Recogniſances, and the Executor or Adminiſtrator ſuffer the Plaintiffe to recover the debt due upon the Obligation for want of pleading the Iudgements &c. or doth voluntarily pay that debt, and he hath not Aſſets beſides to pay the debts due upon Iudgements &c. in this caſe, he muſt pay ſo much out of his own eſtate towards the ſatisfaction of

Addition to Iuſt. Doddridge 92.

the

the ſaid debts due upon Iudgements &c. as he hath paid of the debt due upon the Obligation. But here it muſt be noted that no Iudgement or Statute that is diſcharged, or is left and ſuffered to lie by agrement to barre others of their debts, ſhall be any barre to others that ſue for their due debts upon Obligations &c. and Covin. therefore if any Executor or Adminiſtrator ſhall plead any ſuch Iudgement &c. in barre of any other debt ſued for by any other Creditor, the Creditor may by ſpeciall pleading ſet forth this matter of Covin and avoid the plea and barre of the Executor or Adminiſtrator. If one Creditor whoſe debt is in equall degree and preſently due and to be paid, begin a Suit againſt the Executor or Adminiſtrator for his debt, and hee hath notice that the Suit is begun againſt him, or the Action is laid in the County where the Executor or Adminiſtrator doth dwell, or (as ſome have ſaid) in *London*, (in both which caſes, it ſeemes he is bound to take notice thereof at his perill) and after this Suit begun hee doth make voluntary payment of another debt in equall degree in all reſpects for which no Suit is begun; this is a devaſtavit in the Executor or Adminiſtrator, and if he have not Aſſets to ſatisfie him who began his Suit firſt, he ſhall be compelled to ſatisfie ſo much thereof as he doth voluntarily pay to the other, and that out of his own eſtate: And yet an Executor or Adminiſtrator may make voluntary payment of any debt due by Record, as by Iudgement, Statute &c. after ſuch a Suit begun and juſtifie it. If two Creditors in equall degree to all purpoſes begin to ſue for their debts at one time; in this caſe, the Executor or Adminiſtrator cannot ſafely make voluntary payment to either of them, unleſſe he have enough to pay them both; but his ſafeſt way is to pay him firſt, that in a due and legall proceeding (for he may not covinouſly help one of them to a Iudgement ſooner) can firſt recover it by Iudgment and Execution: And yet if in this caſe no Suit be begun, the Executor or Adminiſtrator may make voluntary payment to either of them in equall degree of his whole debt, albeit he have no Aſſets left to pay unto the other any part of his debt. If *A* and *B* be two Creditors in equall degree, and *A* begin his Suit firſt, and after *B* doth begin his Suit, and it happeneth that *B* *bonâ fide* without any Covin or agreement between him and the Executor or Adminiſtrator doth get Iudgement and Execution firſt; in this caſe, the Executor or Adminiſtrator may make payment to *B* firſt of all. But if the Executor or Adminiſtrator doth by any Covin and agreement help *B* to his Iudgement and Execu- Covin. tion firſt, and by this meanes he is firſt ſatisfied, if there be not enough left to ſatisfie *A*, he muſt ſatisfie him out of his own eſtate. If two Suits begin at or about one time upon two ſeverall Obligations, and the Executor is forced to plead to them both before

fore either of them hath a Iudgement, ſo that he cannot plead the Iudgement that the other hath againſt him, and he hath not Aſſets to ſatisfie both the debts ſued for, and after the Plaintiffs in both the Suits get Iudgement and Execution. *Quere* what the Executor or adminiſtrator may doe in this caſe: And here note by the way, that it is policy for a Creditor that hath cauſe to ſue an executor or adminiſtrator, to bee doing betimes, and to get judgement and execution aſſoone as he may; for it falleth out in this caſe, That he that doth firſt come ſhall bee firſt ſerved: After all the debts are paid in ſuch order and manner as before, then is the executor or adminiſtrator to pay and to deliver the Legacies: and herein the executor may preferre himſelfe ſo, that if any Legacy be given to him, he may detaine and deduct it, albeit there be nothing left to diſcharge the Legacies given to others: and after he hath ſatisfied himſelfe, he may ſatisfie and deliver what Legacies he will, albeit there bee not enough to ſatisfie all the Legatees; or he may pay to each of the Legatees a part of their Legacy, and deduct a part out of every Legacy where there is not enough to ſatisfie all the Legacies: But if any particular thing, as a Leaſe, or a horſe, or the like be given; this muſt be delivered accordingly, and may not be ſold by the executor or adminiſtrator to pay others all, or any part of their Legacies: and if there be enough to pay all the Legacies they muſt be paid all according to the Will; and it is ſaid by ſome, that if an executor or adminiſtrator make no Inventary of the goods, that he muſt pay all the Legacies whether he have Aſſets or not. The laſt thing an executor or adminiſtrator is to take care of, is to make an account, (for it is held that an executor or adminiſtrator is not bound in Law or Conſcience to make reſtitution for perſonall wrongs) wherein this is to be known, That the Ordinary may if he will call the executor or adminiſtrator to account concerning the goods and chattels of the deceaſed, either generally or particularly as the caſe requireth; and that with or without the Creditors or Legataries inſtigation, within a year or what time he will; unto which account he may call all the Creditors and Legataries; and therein the executor or adminiſtrator muſt ſhew what he hath received, and what he hath laid out and prove it in ſuch ſort as the Ordinary ſhall like: And then if it be found he hath faithfully and fully adminiſtred, the Ordinary may acquit him of the burthen, and then hee is diſcharged of all Suits in the Spirituall Court; but this account and diſcharge will not help nor availe him at all to diſcharge him of Suits at the Common-Law.

Doct. & St. 34. Plow. 545. Swinb. 110. 114.

Swinb. Part. 6. Sect. 17.

Fifthly, in making an Account.

The Office and duty of the Ordinary after the death of any perſon within his Dioceſſe, is, if he hear of any Will made, and any Executor appointed, to cite the Executor, and to compell him to come in and prove the Will, and to accept and take upon him the

Coo. 5. 83. 9. 39. Litt. Broo. Sect. 233. F. N. B. 120. Dyer 232. Doct. & St. 132.

Broo. Executor. 90. Teſtament. 27. Stat. 31. Ed. 3. c. 11. 13 Ed. 1. c. 19. 21 H. 8. c. 5.

the adminiſtration of the goods, or to refuſe it: and if the Executor refuſe, or if there be a Will made and no Executor appointed, the Ordinary muſt commit the adminiſtration *cum teſtamento annexo* to whom he ſhall think fit, and take Bond of the admiſtrator to performe the Will. And if there be no will made, he is to grant the adminiſtration of the goods to the next of kinne, if he or they require it; and if not, to whomſoever beſides ſhall deſire it; or if no body ſeek it, he may grant letters to whom he will *ad colligendum bona defuncti*, and thereby take the goods of the deceaſed into his own hands: and then it ſeemes hee is to pay therewith the debts and Legacies of the deceaſed, ſo farre as the ſame will reach in ſuch order as the Executor or adminiſtrator is to pay them. See more of this queſtion in Numb. 29. *infra*.

28. Where and how an Executor or Adminiſtrator ſhall charge others in reſpect of the eſtate of the deceaſed, and what actions & remedy he may have againſt others, and what not, and how.

An Executor or Adminiſtrator regularly ſhall charge others for any debt or duty due to the deceaſed, as the deceaſed himſelf might have done; and the ſame actions the deceaſed might have had, the ſame actions for the moſt part the Executor or adminiſtrator may have alſo: And therefore he may have an [a] action of account, [b] an action of Treſpaſſe *de bonis aſportatis in vita teſtatoris*, [c] an action of debt againſt a Gaoler upon the eſcape of a priſoner, [d] a Writ of error upon the Statute of 27 *Eliz.* [e] an attaint upon the Stature of 23 *H.* 8. a Writ of reſtitution upon the Statute of 21 *H.* 8. [f] an action upon the caſe upon the aſſumpſit of the Teſtator, [g] an *Indempnitate nominis* when the deceaſeds goods are taken upon an Out-lawry againſt another man of his name, [h] an action of Covenant for breach of a Covenant made to the deceaſed, [i] an action upon the Caſe upon the Trover and Converſion of the goods of the Teſtator, [k] an *Ejectione firmæ* for an ejectment of the Teſtator out of a Terme, [l] an action of debt for the rent behind in the life time of the deceaſed, [m] an action of debt for the arrearages of an annuity due to the Teſtator in his life time, [n] and a Raviſhment or Ejectment of guard for a wrong due to the deceaſed. [o] But an Executor or adminiſtrator ſhall not charge another, or have any action againſt him for a perſonall wrong done to the Teſtator, when the wrong done to his perſon or that which is his, is of that nature as for which dammages only are to bee recovered: And therefore an Executor or Adminiſtrator cannot ſue another for the beating or wounding of the deceaſed, or for a Treſpaſſe done to him in his cattle, graſſe or corn, or for a waſte done by his Tenant in his lands; for theſe are ſaid to be perſonall actions which die with the perſon, according to the rule, *Actio perſonalis moritur cum perſona*.

[a] Weſt. 2. c. 22.
[b] F N B. 117.
[c] Dyer 322.
[d] Coo. 11. 41.
[e] Coo. 6. 80.
[f] Coo. 9. 86.
[g] Stat 9. H. 6 c. 4.
[h] Broo. Executor. 161.
[i] Coo. 5. 27.
[k] 7 H. 4. 6.
[l] Coo. 4. 50.
[m] Broo. Executor 169.
[n] Broo. Executor 122.
[o] Coo 9. 89.

36 H. 6. 7. Coo. 8. 135.

If the Teſtament be kept from the Executor, he may have remedy to recover it in the Spirituall Court: So if the goods of the deceaſed be kept from him, he may ſue there for them if he will, or

he may ſue in any Court of Common-Law. And if there bee a Will, and an Executor made, or two Adminiſtrations granted together, hee that is rightfull Executor or adminiſtrator may ſue the wrongfull adminiſtrator for the goods in his cuſtody.

If one grant a rent out of his land for life, provided that it ſhall not charge his perſon, and the rent is behind, and the Grantee dyeth; in this caſe, the executor or adminiſtrator of the Grantee may have an action of debt for theſe Arrearages. Coo. ſuper Litt. 146.

If any rent or arrerages of rent be due to me upon a grant of rent out of any land to me, or reſervation of rent upon any eſtate made by me of land; in theſe caſes, my executor or adminiſtrator may have an action of debt for this rent, or hee may diſtraine for it, ſo long as the land chargeable with the rent, and out of which it doth iſſue, is in his poſſeſſion that ought to pay it, or in the poſſeſſion of any one that doth claime by or under him. Coo. 4. 50. Stat. 32 H. 8. cap. 37.

If any of my houſhold ſervants doe convey away and eloine or deſtroy any of my goods; any executor or adminiſtrator may have a ſpeciall Commiſſion out of the Chancery to enquire of, and to puniſh it. And in caſe where a man doth ſue as executor or adminiſtrator he muſt in his action name himſelfe as he is, *i. e.* if he bee an Executor, he muſt name himſelfe ſo; and if an adminiſtrator, he moſt name himſelfe ſo: And if there bee many Executors, and ſome accept and ſome refuſe, if they bring any action, they muſt be all named in the Writ: And yet if one executor have goods in his poſſeſſion and hee alone ſell them, perhaps for this contract he may bring an action for the money in his own name; ſo alſo if the goods be taken out of his poſſeſſion alone, it is ſaid he alone may ſue for them; but the ſafeſt way in theſe caſes, is to ſue in the names of all the Executors; for the poſſeſſion of one of them is ſaid to be the poſſeſſion of all of them. See Stat. 31. H 6. c. 2. Coo. 5. 33. Broo. Treſpaſſe 346. Fitz. Executor 14.

29. Where and how an Executor or Adminiſtrator, ſhall be charged by others, and what Actions and remedy may be had againſt him, or not.

An executor or adminiſtrator regularly ſhall be charged by others, for any debt or duty due from the deceaſed, as the deceaſed himſelfe might have beene charged in his life time, ſo farre forth as he hath any of the eſtate of the deceaſed to diſcharge the ſame. And therefore if a man bind himſelfe by Obligation or Covenant to pay money or doe any ſuch like thing, and doe not bind his executors or adminiſtrators by name; in this caſe, the excutor or adminiſtrator may be ſued and may be charged as farre forth as if they were named. And yet where the Covenant is but perſonall, as where one doth make a Leaſe for yeares, and the Leaſſor doth Covenant to pay the quit rents, but he doth not ſay during the terme; by this it ſeemes the executor or adminiſtrator of the Leaſſor ſhall not be charged. ° An action of the caſe lyeth againſt him upon an aſſumpſit or the ſimple contract of the Teſtator, eſpeciall Coo. ſuper Litt. 209. 5. 17. Dyer 14. 23. 112. Doct. & St. Broo. Diſcent. 53. ° Coo. 9. Plow. 182.

where

p FNB.121 q 3 H.6.35. 11 H.4. 45. where the ground of the Aſſumpſit is a true debt, p a *rationabili parte bonorum* lyeth againſt him; q a *Detinue* lyeth againſt him for the goods delivered to the deceaſed, if the executor or adminiſtrator doe ſtill continue the poſſeſſion of them: Alſo an action of debt lyeth againſt him for Arrearages of account found upon the deceaſed before Auditors.

Stat. 25. Ed. 1. c. 11. The executor or adminiſtrator of the father that hath levied Aid of his Tenant for the marriage of his daughter, ſhall bee charged with it, and the daughter may ſue for it.

FNB. 56. The executor or adminiſtrator of a Gardian in Chivalry that doth commit waſte in the Wards lands, ſhall be charged and may be ſued for the heire for it.

Coo. 5. 12. Coo. 8. 94. If a man poſſeſſed of a term of years, deviſe it to another, and the executor or adminiſtrator of the Deviſor before the aſſent to the Legacy, doth commit Waſte in the land in Leaſe; in this caſe, he ſhall be charged with, and may be ſued for this Waſte by him in reverſion: But if the executor die, his executor ſhall not bee charged with it; for it is a perſonall wrong that dyeth with the perſon.

Dyer 370. If a Biſhop grant an annuity out of his lands to *I S* for life and die; in this caſe, it ſeemes the executor or adminiſtrator of the Biſhop ſhall bee charged with the Arrerages due in the Biſhops time.

Broo. Executor 127. Coo. 3. 24. 22. If a Leaſe for yeares be made rendring rent, and the rent is behind and the Leſſee die; in this caſe, the executor or adminiſtrator of the Leaſſee ſhall be charged for this rent. So alſo if Leaſſee for yeares aſſigne over his Intereſt and die, his executor or adminiſtrator ſhall be charged with the Arrerages before the aſſignment, but not with any of the Arrerages due after the aſſignment.

Broo. Executor. 157. The executor or adminiſtrator of a Cuſtomer or Controller ſhall be charged upon a Taile of the Exchequer ſhewed to the Teſtator.

Weſtm. 2. c. 35. The executor or adminiſtrator ſhall bee charged for a Raviſhment or ejectment of Ward by the deceaſed.

Trin. 7. Ia. B. R. FNB. 51. The Executor or Adminiſtrator may be charged in the Spirituall Court for Tythes due from the deceaſed: but he may not (as it ſeemes) be ſued in any Temporall Court for them.

Curia 21. Ia. B. R. The executor or adminiſtrator of a man that recovereth a debt upon a judgement had by the deceaſed, ſhall be chargable with reſtitution, if the judgement be reverſed for error.

Coo. 9. 87. FNB. 117. Dyer 322. 11 H. 4. 46. Doct. & St. 76. Coo. 8. 94. 133. An executor or adminiſtrator ſhall not be charged for any perſonall wrong done by the deceaſed, and therefore no action may be brought againſt him for any ſuch cauſe, as becauſe the deceaſed did burne the Deed of the Plantiffe, ſuffer a Priſoner at his ſuite to eſcape, cut down his trees, eat up his graſſe, beate or wound the

body of the Plantiffe, defame him in his name or the like; for all theſe are ſaid to be perſonall actions that dye with the perſon, neither is there any remedy to be had againſt the executor or adminiſtrator in equity in theſe caſes, neither ſhall he be charged in any action of accompt for any receit or occupation by the deceaſed. And yet perhaps an action of the caſe may lie in this caſe; neither will an action of debt lie againſt him upon the ſimple contract of the deceaſed, but an action of the caſe only. r Neither will an action lie againſt an executor or adminiſtrator upon an arbitrement made in the life time of the deceaſed, albeit it be made in writing. s Neither will any action lie againſt any Executor or adminiſtrator for coſts given in the Star chamber or Chancery againſt the deceaſed in a Suite there, but when the party dieth, the ſame is loſt; and where a man doth ſue an executor or adminiſtrator in a Suite, hee muſt charge him as he is, *viz.* if he be an Executor, he muſt ſue him by that name; if an adminiſtrator, then by that name. And where there be many Executors, and have all accepted, they muſt be all ſued; but if ſome of them have refuſed, perhaps the Suite may bee good enough againſt the reſt. But otherwiſe one Executor cannot be charged without his companions, except it be in the caſe of Summons and Severance, and in ſome ſpeciall caſe where one alone doth the wrong and the like, as where one Executor alone doth detain the deeds from the heir; for in this caſe he alone may be charged. See more *infra* at *Numb.* 39.

r Adiudge Hill 40. Eliz. B. R. Bowyers caſe.

s Hill. 7. Ia. BR. per 3 Iuſtices.

Coo. 9. 39. 40 Broo. Executor 98. 136. 156. Fitz. Briefe 341.

30. What act one Executor or Adminiſtrator alone may do; And where the act or laches of one may prejudice or barr his companion, and where not.

All the Executors where there be more then one, be they never ſo many, in the eye of the Law are but as one man; in which reſpect the Law doth eſteeme moſt acts done by or to any one of them, as acts done by or to all of them. And therefore the poſſeſſion of one of them of the goods and chattels of the deceaſed is eſteemed the poſſeſſion of them all; paiment of debts by or to one of them is eſteemed a payment by or to them all; the ſale or gift of one of them of the goods and chattels of the deceaſed, the ſale and gift of them all; a Releaſe made by or to one of them is a Releaſe made by or to them all; and the aſſent of one of them to a Legacy the aſſent of them all. * And therefore if there be two Executors, and one of them deliver up the Obligation to the Debtor whereby he is bound, the other Executor ſhall not recover him in a Detinue. So if two Executors have lands or goods in execution, and one of them releaſe all his intereſt, this is a totall diſcharge of the execution. * And yet if in this caſe there be any practiſe between the executor and the Creditor in this matter, and there be not Aſſets beſides to pay all the Debts and Legacies, here perhaps the other Executor may have remedy in equity againſt his Co-executor and the Creditor. But how the Law is of Adminiſtrators, *quære*; for ſome think that one of

21 Ed. 4. 25. 4 H. 7. 4. 16. H. 7. 4. Broo. Executors 66. 30. 65. 9. Ed. 4. 12. Fitz. Executors 10.

* Adiudge M. 39. 40. Eliz. B. R.

* Crompt. Iac. 45. 4 H. 7. 4.

of them alſo may ſell goods releaſe debts, plead to actions or the like without the other.

Dyer 210. Coo. 4. 31. Addition to Iuſt. Dodridge 47. If one Executor atturn to the Grant of a reverſion, or a rent; this is as good as if they did all atturn and bind all the reſt, as in caſe of aſſent to a Legacy; for in this caſe the aſſent will bind all the reſt, albeit there be not enough to pay the debts beſides the Legacy given away by aſſent, but his aſſent ſhall not hurr his Co-executors in a Devaſtavit.

Coo. 9. 38. Dyer 210. If one Executor appear to an action ſued againſt them all, or plead a Plea to it; this for the moſt part ſhall be ſaid to be the appearance and plea of them all, and ſhall bind the reſt.

Dyer 319. 210. 16 H. 7. 4. If two Executors ſue together, and one of them is ſummoned and ſevered; in this caſe he that is ſummoned may before Iudgement releaſe the duty; but if the other proſecute to Iudgement firſt, and then he that is ſevered acknowledg ſatisfaction, this will not benefit the Defendant, nor barr the reſt that are Plaintiffes in the Iudgement. And if 3 Executors ſue, and 2 are ſummoned and ſevered, and the 3 recover and dye; in this caſe the other two ſhall have execution. See more at *Numb.* 27. *ſupra.*]

27 H. 8. 21. 6 H. 7. 5. Plow. 343. Fitz. Executors 6. One Executor or Adminiſtrator cannot give or ſel any of the goods or chattels of the deceaſed to another Executor or Adminiſtrator; and therefore they may not make diviſion of the goods amongſt themſelves; and regularly one of them cannot ſue another of them. And therefore if one keep, give, or ſell all the goods, releaſe debts, or the like in the diſturbance of the execution of the Will or due Adminiſtration of the eſtate; it ſeemes the other hath no remedy againſt him, except it be in the caſe of Covin before; But if all the reſidue of the goods and chattels after debts and legacies paid be given to one of the Executors alone, and after the debts and legacies paid the reſt do detaine it or any part of it from him; in this caſe perhaps hee may have ſome remedy againſt them.

31. What act one Executor may do to another, And what remedy or action one Executor or Adminiſtrator may have againſt another or not.

11 H. 483. If the Debtor make his Creditor and another his Executors, and the Creditor doth refuſe the executorſhip, and the other doth accept it; in this caſe the Creditor may ſue the executor for this debt: But if both prove the Will, and the Debtor dye, the ſurviving Co-executor cannot ſue the executor of the debtor for this debt. And if one make a woman and two others his executors, and a Creditor before ſhee doth accept of the executorſhip doth marry her; in this caſe hee may ſue the other executors for this debt; but if ſhee have accepted of the executorſhip firſt; *contra.*

Plow. 543. Coo. 532. Doct. & St. 75. Perk ſe. 488. 570. Kelw. 59. A Devaſtavit or waſte in an executor or adminiſtrator is when he doth miſimploy the eſtate of the deceaſed, and misdemean himſelfe in the managing thereof againſt the truſt repoſed in him.

32. Devaſtavits *Quid.* What ſhall be ſaid a Devaſtavit and waſteing of the

goods of the deceaſed by an Executor or Adminiſtrator, And how he ſhall be charged thereupon.

And this may be done divers wayes, as 1. When the Executor or Adminiſtrator doth beſtow more upon the Funerals of the deceaſed then is meet, having reſpect to his degree and eſtate. 2. When he doth pay Legacies in money, or aſſent to Legacies given in other things before the debts are paid, and hath not enough beſides to pay the debts. 3. When he doth not pay the debts in that order and manner as is before ſet down, but doth pay them firſt he ſhould pay laſt, and he hath not enough to pay them all. 4. When he doth releaſe a debt or duty due to the deceaſed before he doth receive it, or when the goods of the deceaſed being taken from him, he doth releaſe to him that doth take them the action whereby he may recover them. 5. When he doth ſell the goods of the deceaſed much under value, eſpecially if it be with covin, as to his near friends, to his own uſe, to have money under hand, or the like: but otherwiſe to ſell them under value, eſpecially where he cannot conveniently make more of them, is no waſte. All theſe and ſuch like acts as theſe are ſaid to be a waſte in an Executor or Adminiſtrator; and being diſcovered againſt him by the returne of the Sheriffe, (or as ſome think by enqueſt of office) it will produce this effect, to make the Executor or Adminiſtrator chargable for ſo much as he hath miſimployed and waſted *de bonis propriis*, ſo that any Creditor may charge him for the debt due to him from the Teſtator as for his own proper debt, and for ſo much the execution ſhall be made againſt him upon own body lands and goods; And yet ſo as one Executor or Adminiſtrator ſhall not be charged for the waſte of another; for if there be many Executors, and one of them only doth commit the waſte, he only ſhall be puniſhed for this waſte. And the Executor or Adminiſtrator if he do commit a waſte in the gift or ſale of goods, ſhall anſwer it alone; for he to whom the goods are given or ſold ſhall not be puniſhed for it, neither ſhall the executor or adminiſtrator of the executor or adminiſtrator be puniſhed for it after his death. And howſoever the husband ſhall be charged in a Devaſtavit for the waſte of himſelfe or his wife where ſhe is an executrix whiles they both live togeather; yet if a woman executrix take a husband, and during the marriage he or ſhe doth commit a waſte, and after ſhe die; in this caſe it ſeemes the husband ſhall not be charged for the waſte himſelf or his wife did, *Sed quere* of this. For if a void Adminiſtration be committed, and the Adminiſtrator do waſte the goods, and after the Adminſtiration is committed to another; in this caſe the firſt Adminiſtrator mae be charged by the Creditors for the waſte done in his time. But an executor or adminiſtrator may lawfully ſell or convert the goods of the deceaſed to his own uſe, ſo as he convert the money to the uſe of the deceaſed, in payment of debts, or the like, and pay ſo much of his own money as the goods

Dyer 185. Coo. 5. 32. Old B. of Entries 11.

Dyer 210. Doct. & St. 78.

2 H. 7. 15. Coo. 5. 27. M. 3. Ia. B.R.

Coo. 6. 18.

Dyer 2, 187. Plow. 543.

goods ſo converted to his uſe are worth; and theſe acts are not eſteemed a waſte in him. Alſo he may ſell any ſpeciall Legacy that is given, and this is no waſte in him; howbeit it is a wrong to the Legatee if there be aſſets to pay debts beſides. And when he hath enough to pay all the debts and Legacies, then he may diſpoſe of the whole eſtate how he will without any prejudice to himſelf at all.

Termes of the Law Kelw. 59. 93. Dyer 105. 157. 255. Coo. 5. 32. Etoo. Executor 162.

An executor of his own wrong is one that is neither lawfull executor nor adminiſtrator, and yet doth take upon to do and act ſuch things as are only fit for, and proper to an executor or adminiſtrator, as to take the goods of the deceaſed into his own poſſeſſion, give and ſell them, pay the debts of the deceaſed therewith, releaſe the debts due to the deceaſed, and the like. And a man may make himſelfe ſuch an executor by any ſuch intermedling with the office and work of an executor as followeth; 1. By proving the Will with the money of the dead; but to prove another mans Will at my own charge, will no more make me chargable as executor of mine own wrong, then to bury the deceaſed in a decent manner out of his own eſtate. 2. By a ſeiſing, gaining, keeping and uſing of the goods of the deceaſed as a mans own, eſpecially if he convert them to his own uſe, ſell, or otherwiſe diſpoſe them; and every colour of title will not help in this caſe; for if a man make a Deed of gift of all his goods and chattels to another, and dyeth inteſtate, and this in truth is fraudulent and in truſt, and the Donee after the death of the Donor doth diſpoſe of theſe goods and chattels as his own; in this caſe and by this meanes he ſhall be eſteemed as executor of his own wrong. And yet if the Deed of gift be *bona fide* in ſatisfaction of a juſt debt, and the goods be no more then the debt, it may be otherwiſe: but if the goods be much more then the debt, there it ſeemes he ſhall be charged ſo for the overplus, and that whether he have them in poſſeſſion or not; and ſo was the opinion of Iuſtice *Jones* at *Glouceſt.* Aſſiſes 9. *Car.* If the Ordinary grant Letters *ad colligendum & vendendum* the goods of the deceaſed that are like to periſh, and *I S* to whom the Letters are made, under colour thereof doth take and ſell the goods; hereby he may make himſelfe chargable as executor of his own wrong: for the Ordinary hath no ſuch power himſelfe, and therefore he may not give that power to another. If a man that is next of kin procure a Beggar, or a ſtranger to take out an adminiſtration, and then to make him a Deed of gift of all the goods for a ſmall matter; he may bee thus charged for the overplus of the worth of the goods more then he gave. So if a Debtor procure ſuch an adminiſtration to bee taken out, and then get a Releaſe of his debt from the adminiſtrator; this may make him chargable as executor of his own wrong for ſo much as his debt doth come unto. And yet a

33. Executor of his owne wrong. Who ſhall be ſaid to be ſo. And what act ſhall make him ſo to be accounted. And what act ſuch an Executor may do, And how hee ſhall be charged, or not.

Stat. 43. Eliz. cap. 8.

Plich. 7. Ia. Co. B. per. ch. Iuſtice.

man may take away his own goods that were in the hands of the deceaſed without danger. And every having and poſſeſſion of the goods of the deceaſed will not make a man executor of his own wrong: * For if a man dye in my houſe and have goods there, and I keep them untill I can be well diſcharged of them; this will not make me chargable as Executor of mine own wrong. * So if I do only lay up the goods of the deceaſed to preſerve them in ſafety for him that ſhall have right to them, this will make me no more chargable then if I take an Inventary of all the goods of the deceaſed. So if another man take the goods of the deceaſed and ſell them to me, or give them to me; howſoever this will make him chargable as Executor of his own wrong, yet this will not make me chargable ſo. Neither will every diſpoſition of the goods of the deceaſed make a man Executor of his own wrong; for if a man ſel ſome of the goods of the deceaſed (where there is need) to help forward a decent Funerall of the body of the deceaſed: this is no ſuch diſpoſition as to make a man chargable thus. So if I deliver the wife of the deceaſed her neceſſary wearing apparell, or if I be wife to the deceaſed and take it my ſelfe. So where I take any of the deceaſeds goods into my hands, by miſtake, ſuppoſing them to be mine own, or under colour of title, as when I have a good Deed of gift or ſale of them without any fraud or covin: or under a good authority, as when I take them upon a warrant from the Sheriffe that hath proceſſe out of the Exchequer to take them, or as a Treſpaſſor only, as when I kill, or otherwiſe abuſe the cattell; ſuch an intermedling with the goods of the deceaſed will not make a man chargable as Executor of his owne wrong, neither may I ſo bee charged in theſe caſes. The third way by which a man may make himſelf chargable as Executor of his own wrong, is by delivering of the goods of the deceaſed to Creditors in ſatisfaction of their debts, or by ſelling any of the goods of the deceaſed to pay the debts of the deceaſed, and paying the ſame with the money made thereof; but to pay the deceaſeds debt with a mans own money will not make him chargable ſo. The fourth way by which a man may make himſelfe ſo chargable, is by receiving any of the debts due to the deceaſed. The fifth way by which a man may make himſelf chargable ſo, is by releaſing any debts or duties due to the deceaſed. The ſixth way, by delivering any Legacies given by the deceaſed in kind, or by paying any Legacies except it be with a mans own money. The ſeventh way, by taking a mans Legacy given to him before the Executor have accepted of the Executorſhip and aſſented to the Legacy. The eighth way, by ſueing as Executor to the deceaſed for any debt due to the deceaſed. And the ninth way by taking upon him to ſell the lands of the deceaſed as his Executor. In all theſe caſes

*Trin. 17. Iac. per chieſe Iuſt.

* Coo. 5. 34 Kelw. 63.

Kelw. 63. 52. 33 H. 6. 31. 32 H. 6. 5 Dyer 167. Coo. 5. 34. 20 Ed. 4. 17. Fitz. Executors 122.

See the Caſes before.

Dyer 166.

Dyer 166.

caſes, and by all theſe and ſuch like meanes, a man may make himſelfe an Executor of his own wrong: So that if an Executor after he hath legally waived the Executorſhip, or an Adminiſtrator after his Adminiſtration is repealed and revoked, intermeddle with the eſtate in any ſuch manner, he may bee charged as *Executor* of his own wrong: And if a woman take more of her wearing apparrell then is neceſſary and convenient for one of her ranke and condition without Legacy of the husband and licence of the Executor, ſhee may bee charged thus.

Dyer 105.

Dyer 166. 33 H.6.31.

Dyer 255. 166. Coo. 5.34.9.39.

And if a man under colour of an Adminiſtration that is not good, or of a Commiſſion *ad colligendum bona defuncti* that is not good, or of a Will when in truth there is none at all, or no good Will, doe take upon him to intermeddle with the goods and to diſpoſe of the eſtate in manner as aforeſaid, by this meanes he may make himſelfe chargeable thus. And in theſe caſes and by theſe meanes, ſuch perſons that doe ſo intermeddle, do make themſelves to be accounted in Law, Executors; but Executors by wrong only and not Executors by right. * And therefore, ſuch perſons have not the favour nor power of lawfull Executors, as to bring any Action for debt due to the deceaſed, to deduct and pay themſelves any debt due to themſelves firſt of all and to barre other Creditors, and the like. * And for ſo much as they have ſo diſpoſed and miſ-imployed, and no more, they make themſelves chargeable to any Creditor or Legatee of the deceaſed that ſhall ſue them as farre forth as a lawfull Executor is chargeable. And albeit, he that doth thus be a Creditor, yet this will not help him; for a Creditor may not enter upon the goods of the deceaſed and pay himſelfe firſt, and if he doe ſo, if there be a lawfull Executor or Adminiſtrator made, he may ſue the Creditor; and if there be no Executor or Adminiſtrator made, the Creditor may by this meanes make himſelfe chargeable to other Creditors, as Executor of his own wrong for ſo much as he hath taken into his own hands: And then a man ſhall be charged the rather in theſe caſes, and by this meanes when there is no Executor made; or if there be an Executor made, when he doth refuſe to take upon him the Executorſhip, nor any Adminiſtration granted; for when a man dyeth Inteſtate, and a ſtranger taketh and uſeth the goods of the deceaſed as his own, albeit he pay no debt, or Legacy, nor doe any other act as Executor, yet when no other man taketh upon him the adminiſtration, this intermeddling ſhall make him chargeable as Executor of his own wrong; for in that caſe the Creditor hath no other remedy: But in caſe where there is an Executor made, and he doth prove the Teſtament, and doth take upon him the Adminiſtration of the goods, and then a ſtranger taketh out of the hands of this Executor, or getteth into his own hands all or ſome of the goods of the deceaſed, and uſeth them as his own;

* Coo. 5.34. Plow. 148. 145. 33 H.6. 31.

* Dyer 210. Plow. 184. Coo. 5.33.

Coo. 5.33. Kelw. 59.

this,

this will not make this ſtranger Executor of his own wrong; for now there is a lawfull Executor againſt whom the Creditor may have his remedy, and the Executor ſhall have his remedy for theſe goods againſt the ſtranger; for they are and ſhall be accounted Aſſets in the hands of the Executor ſtill, notwithſtanding the ſtranger hath the poſſeſſion of them: And yet in this caſe alſo where there is a rightfull Executor, if a ſtranger ſhall take the goods into his hands, claime to be Executor, pay debts and Legacies, and receive debts, and intermeddle as an Executor; in this caſe, perhaps, and by this expreſſe Adminiſtration as Executor, he may bee charged as Executor of his own wrong, albeit there be a lawfull Executor: And if a man die Inteſtate, and a ſtranger intermeddle with the eſtate as before, and then the Adminiſtration is granted to another; in this caſe, the ſtranger may be charged by any Creditor or Legatee as Executor of his own wrong for his intermeddling before the Adminiſtration granted; for the rightfull Executor or Adminiſtrator ſhall be charged with no more then what doth come into his hands. And if an adminiſtration bee granted afterwards to any one that hath ſo intermeddled with the goods before; this will not purge the wrong done before; and therefore in this caſe, a Creditor may charge him as Executor of his own wrong, or as a lawfull Adminiſtrator at his election.

Paſche. 39 Eliz. Co. B. Bradbury verſus Reynolds.

34. Adminiſtrator *durante minori ætate*; what he is, and his power, and when it ſhall end.

The Adminiſtrator *durante minori ætate* is a ſpeciall kinde of Adminiſtrator, and is in caſe where an Infant under the age of 17 years (for at that age an Infant is capable of an Executorſhip) is made an executor, and the Adminiſtration of the goods (as the manner is in that caſe) is committed to one or more of the next friend or friends of the Infant during his minority, which is untill he be of the age of ſeventeen yeares; he that hath ſuch an adminiſtration granted unto him is ſuch an Adminiſtrator. And he is ſometimes generall, *i.e.* when his adminiſtration is granted unto him without any words of limitation: and ſometimes he is ſpeciall; *i.e.* when his adminiſtration is granted to him *ad opus & uſum* of the Infant only. In the firſt caſe, he hath as large a power as another adminiſtrator hath, and therefore he may aſſent to a Legacy, albeit there be not Aſſets to pay debts; he may ſell any of the goods or chattels of the deceaſed, or give them away or the like, as another adminiſtrator may doe. But in the laſt caſe, it is otherwiſe; for ſuch a ſpeciall adminiſtrator can doe little more then the Ordinary himſelfe, and therefore he may not ſell any of the goods or chattels of the deceaſed, except it be in caſe where they are like to periſh, for funerall expences, or for payment of debts, nor may he aſſent to a Legacy where there is not Aſſets to pay debts &c. And this adminiſtration is *ipſo facto* determined when the executor doth come to the age of ſeventeen years: And therfore if it be granted during the minority of four Executors, and

Coo. 5. 29, 6, 27. 9. 27.

and one of them die, or come to the age of ſeventeen yeares; now is the adminiſtration determined: And if the executor be a woman and ſhe take a husband that is ſeventeen years of age or upwards; in this caſe, it ſeemes the adminiſtration is determined: And therefore alſo it is that if ſuch an adminiſtration *durante minori ætate* bee granted after the executor is ſeventeen yeares of age, the adminiſtration is void.

4 H.7.14. Litt. Broo. Sect. 330. 34. H.6. 14. Dyer 339. Broo. Adminiſtrator 7.

It hath been held that the Ordinary after he hath granted the adminiſtration of the goods of a man Inteſtate to another may afterwards without cauſe revoke the ſame and grant it to another, at his pleaſure: and that if the Ordinary grant letters of adminiſtration to one, and after grant letters of adminiſtration to another, of the goods of the ſame man, that hereby the ſecond letters of adminiſtration are *ipſo facto* countermanded, albeit there be no words of Revocation in them. * But it ſeemes the Law is otherwiſe, and that after the Ordinary hath granted the adminiſtration according to the charge and direction given him by the Statutes, that he cannot afterwards revoke it, and grant it to another without cauſe; *i.e.* unleſſe the firſt adminiſtration be illegally granted, as when it is granted to a ſtranger, and not to the next of kinne or the like, or unleſſe the firſt adminiſtrator cannot or will not adminiſter; for in theſe caſes he may without doubt grant the adminiſtration to another. And yet in theſe caſes, where there is a former adminiſtration granted regularly, all acts that the firſt adminiſtrator doth lawfully execute and doe as adminiſtrator, as ſale of goods, payment, or receit of debts, making Releaſes, and the like, are good and ſhall bind the next and ſucceeding adminiſtrator. And therefore, if the Ordinary after the death of a man Inteſtate, doth grant the adminiſtration of his goods to a ſtranger, and then the next of kinne doth ſue by Citation to have it repealed, and the firſt adminiſtrator hanging that Suit in the Spirituall Court, doth ſell the goods of purpoſe to defeat the ſecond adminiſtration, and after the firſt letters of adminiſtration are revoked by ſentence, and the firſt ſentence annulled, and the adminiſtration is committed to another; in this caſe, the ſecond adminiſtrator cannot recover theſe goods or have any remedy for them. And yet perhaps if there be any fraud in the caſe, an executor may have reliefe upon the Statute of 13 *Eliz.* But if the firſt Suit and ſentence be by Appeale avoided, then all that the firſt adminiſtrator doth is void, and the ſecond adminiſtrator may recover the goods notwithſtanding the ſale: And if the firſt adminiſtration be upon condition, all the acts the adminiſtrator doth before the condition is broken, are good; and therefore if if he give or ſell the goods, the ſubſequent adminiſtrator cannot avoid it.

* See the Stat. 21 H.8. c.5. Coo.6. 18. New book of Entries 38.

Plow. 281. Coo.6. 18, 19 Dyer 339.

Coo.6. 19.

35. Where an Adminiſtration once committed by the Ordinary may be afterwards revoked; and what ſhall be ſaid a Revocation of ſuch an Adminiſtration, or not; and what acts done before ſhall ſtand in force, or not.

Coo.8. 135.

If a man die Inteſtate and have not *bona notabilia*, and the Biſhop

ſhop of the Dioceſſe grant Letters of Adminiſtration to one, and after the Archbiſhop doth grant Letters of Adminiſtration to another; in this caſe, the effect of the firſt adminiſtration is ſuſpended untill the other be repealed and declared by ſentence to bee void.

If there be a Will, and it is concealed, and thereupon an adminiſtration is granted, and after the Will is produced and proved; in this caſe, the adminiſtration is *ipſo facto* determined, and all the acts the adminiſtrator hath done *ab initio*, are become void. See more in the next Queſtion. Plow. 281. 9 H. 5. 5.

36. what Acts done by one Executor or Adminiſtrator, may be avoided by the ſubſequent Executor or Adminiſtrator, and what not.

If a Will bee made by an Ideot, and an Executor appointed therein, and the Executor take upon him the adminiſtration, and after the Will is avoided for the weakneſſe of the Teſtator; in this caſe, it ſeemes that all the Acts the Executor doth before the avoidance of the Will are good and not to bee avoided by the Adminiſtrator. Dyer.

If there bee a Will made, and an Executor appointed, and the Ordinary cite the Executor to come in, and prove the Will, and he doth not come, and thereupon the Ordinary doth grant the adminiſtration to another; in this caſe, all acts done by the Adminiſtrator are good, and ſhall binde the Executor, if hee may and ſhall afterwards take upon him the Executorſhip. But otherwiſe it is where the Ordinary doth grant the Adminiſtration before the Executor be cited to appeare, or before the time given him to take upon him the adminiſtration; for in this caſe, nothing that he doth ſhall binde the Executor. 3 H. 7. 14.

When there is an Adminiſtration granted, and it is afterwards upon a Suit by condition only repealed; in this caſe all acts done by the firſt Adminiſtrator are good and ſhall binde the ſubſequent Adminiſtrator. But in caſe where the firſt adminiſtration is upon a Suit by appeale by ſentence annihilated and declared void, there, all acts done by the firſt Adminiſtrator are void, and ſhall not bind the ſubſequent Adminiſtrator: And therefore, if the Ordinary of the Dioceſſe grant an Adminiſtration that doth belong to the Metropolitan to grant (in which caſe, the Adminiſtration is void;) all Acts done by the Adminiſtrator are void, and may be avoided by the ſucceeding Adminiſtrator. But when the adminiſtration doth belong to the Ordinary of the Dioceſſe to grant, and the Metropolitan doth grant it (in which caſe, it is only voidable) in that caſe, all acts upon and by vertue of the firſt adminiſtration before the ſecond adminiſtration is granted, are good. Coo. 6. 18, 19 Plow. 282. Coo. 8. 143, 135.

If an adminiſtration be granted to a ſtranger, and afterwards it is revoked and granted to the next of kinne; in this caſe, all lawfull acts done by the firſt Adminiſtrator before, and hanging the Suit, are good and unavoidable by the ſubſequent Adminiſtrator; and yet perhaps if the firſt Adminiſtrator waſte the goods, it may bee hee may Wilſon verſus Packman. M. 37. 38 Eliz. B. R.

may be charged for this by the ſubſequent Adminiſtrator, or by a Creditor.

Plow. 281. 282. Coo. 6. 19. 34. H. 6. 14.

Where the Executor by the Will is not to adminiſter untill a certain time; in this caſe, the adminiſtration of the goods is to be granted untill that time, and all acts done by ſuch an adminiſtrator before that time are good and ſhall binde the Executor. So where an Executor is made, or an adminſtration is granted upon condition, which is after broken, ſo that the Executorſhip or Adminiſtration is determined; yet in this caſe, all acts done by him before this time are good.

4 H. 7. 13. Plow. 282.

If there be a falſe and a true Will, and the Executor of the falſe Will prove this Will firſt, and afterwards the Executor of the true Will doth diſprove and avoid the firſt Will; in this caſe, hee may alſo avoid all acts the firſt Executor doth.

Coo. 5. 33. Dyer 30. 80. Coo 8. 132. 134. 21 H. 6 19 Dyer 2. 27 H. 8. 6. Coo. 9. 108. 2 H 4. 21.

The ſame Barres and Pleas regularly, that a man may have to Actions brought by the deceaſed himſelf in his life, a man may have to barre the Action and Suit of his Executor or Adminiſtrator after his death. But an Executor or Adminiſtrator may have beſides the ſame Pleas and Barres to Actions the deceaſed might have had as *Non eſt factum*, *Per Dureſſe*, *Non Aſſumpſit* and the like, divers other Pleas and Barres to Actions in reſpect of his eſtate and condition as Executor or Adminiſtrator: For if he never meddle with the goods and chattels of the deceaſed, and yet be ſued as Executor or Adminiſtrator, he may plead *Ne unque*, *i. e.* he did never intermeddle as Executor or Adminiſtrator; and if this be found for him, this will barre the Plaintiffe: And if he doe intermeddle and take upon him the adminiſtration, he may plead, if the caſe be ſo, that he cannot recover the goods of the deceaſed; for he ſhall bee charged for no more then what he can get in his poſſeſſion. Or he may plead that he hath fully adminiſtred all the goods and chattels of the deceaſed, and hath nothing left to adminiſter; or he may plead, that he hath paid ſo much of his own money as the goods in his hands do amount unto. Or if he be ſued for debts due by obligations or ſuch like Eſpecialties entred into by the deceaſed, hee may plead that there are debts due, and yet to pay on Iudgements had againſt the deceaſed, or that there are debts due and yet to pay on Recogniſances or Statutes entred into by the deceaſed, and that he hath no more then enough to ſatisfie them: Or, he may plead that there are Iudgements had againſt him for other debts of the deceaſed in equall degree with the debt ſued for, and that he has no more then enough to diſcharge them: ſo as theſe former debts, on, and for which theſe Iudgements were had and Statutes given, bee *bonâ fide* due, and the Iudgements, Recogniſances and Statutes in truth continued for the ſame; for if there be any fraud in the caſe, *viz.* that either the Iudgements, Recogniſances, or Statutes, were

37. What ſhall be ſaid a good barre in debt, or other Action brought by, or againſt an Executor or Adminiſtrator, and what not.

at firſt entred into, or are afterwards continued of purpoſe to deceive or delay others of their due debts, when either the debt is ſatisfied, or compounded for leſſe, or the like; in theſe caſes, this plea will not ſerve; but this matter being diſcloſed, by the Plaintiffs pleading, he will avoid it: And if he be ſued for a debt due upon a ſimple Contract or promiſe of the Teſtator, he may plead there are debts to pay due by Obligations and other eſpecialties entred into by the deceaſed, and that he hath no more then enough to ſatisfie thoſe debts, and this will barre the Plaintiff in his Action: And therefore if an executor or adminiſtrator plead a Iudgement in barre of an Action of debt upon an Obligation, hee muſt ſhew alſo that the Suit whereupon the Iudgement was had, was upon an Obligation; for if it were on a ſimple Contract, it is no barre. And if the Executor be ſued for debt on an Obligation, he may plead he made voluntary payment of other debts due upon Obligations, or gave new ſecurity for them in his own name before the Suit began, and that he hath no more then enough to ſatisfie them. But to plead ſuch a voluntary payment or giving of new ſecurity after Suits begun upon this Obligation now in Suit is no good plea. If an Action bee brought againſt an Executor or Adminiſtrator on an Eſpecialty for money, it is no good plea in barre of this Action to plead a Statute or Recogniſance with Defeaſance to performe Covenants when there is no Covenant broken. If a Suit be againſt an Executor or Adminiſtrator for a Legacy, it ſeemes it is no good plea to plead a Bond with Condition for performance of Covenants, or for the doing of any other collaterall thing that is contingent only, and not yet broken. Is is no good plea in an Action for an executor or adminiſtrator to ſay that the deceaſed was Outlawed.

Curia Trin. 37 Eliz.

Trin. 39. Eliz. B.R.

38. Where and in what caſe, an Executor or Adminiſtrator ſhall be charged by his own act or pleading upon his own goods; and where Execution ſhal bee *de bonis propriis*; and where not.

An Executor or Adminiſtrator may make himſelf chargable of his own goods, either by omiſſion, as when he being ſued upon an Obligation, or the like, and there is a Iudgement againſt him or the deceaſed in force, and he hath but enough to ſatisfy that Iudgement, and he doth not plead this in barre of the preſent action, but doth ſuffer the Plaintiffe to recover againſt him; in this caſe he muſt ſatisfy this ſecond debt out of his own eſtate; or by Commiſſion, and that either by doing, as when he doth any act that is a waſte in him, and thereupon a Devaſtavit is returned againſt him, for in this caſe he muſt anſwer ſo much as he hath waſted out of his own eſtate: or by ſaying, as when a Suite is againſt, and he doth plead ſuch a falſe plea therein as doth tend to the perpetuall barr of the Plaintiffe in the action, and yet it is of a thing that doth lie within his perfect knowledge, as when hee doth plead he is not Executor, nor did ever adminiſter as Executor, and upon tryall of this iſſue againſt him it be found hee is a rightfull

2 H. 6. 12. Dyer 185. 80 Coo. 9. 90, 94. 9 H. 6. 57. 34 H. 6. 45. Broo. Executor 141. 105. Litt. Broo. Sect. 29. Kelw. 61. Broo. Executors 164.

rightfull or wrongfull Executor; in this caſe he muſt ſatisfy this debt out of his own eſtate whether he have Aſſets or not, and the execution had upon the Iudgement had in this Suite ſhall be *de bonis propriis*. And if an executor or adminiſtrator be ſued, and he plead to the action *plenè adminiſtravit*, and upon tryall it is found againſt him; in this caſe if he have any of the goods of the deceaſed left in his hand, the execution ſhall be of them; but if he have none of the goods of the deceaſed left, the execution ſhall be, and he ſhall be charged for ſo much as is found to be in his hands *de bonis propriis*. But where he is ſued upon a promiſe made by the Teſtator, and he plead *non aſſumpſit* to it; and where he is ſued upon a Deed made by the Teſtator, and he plead *non eſt factum* to it, or the like; and theſe iſſues upon tryall are found againſt him; or when he ſhall confeſſe the action, or ſuffer a Iudgement to go by default againſt him: or plead any vain plea; in all theſe caſes he ſhall not be chargable of his own eſtate, neither ſhall the judgement and execution in theſe caſes be *de bonis propriis*, but *de bonis Teſtatoris* only for the debt, and *de bonis propriis* for the coſts; And yet if an executor or adminiſtrator ſhall entreate a Creditor to forbeare his debt untill a day, and then promiſe to pay him; by this promiſe he hath made himſelfe chargable as for his own debt, howbeit it ſhall be allowed him upon his Account. But in all theſe caſes, and ſuch like where a man ſhall be charged of his own eſtate, and the execution ſhall be *de bonis propriis*, it ſeemes the Iudgement is alwayes *de bonis Teſtatoris*, and the courſe is this, the firſt execution is againſt the executor *de bonis Teſtatoris*, and not *de bonis propriis*; And after a Devaſtavit returned by the Sheriffe againſt the executor or adminiſtrator, and not before, a new execution is directed to the Sheriffe to levie the debt *de bonis Teſtatoris*; and if there be none of them to be found in his hands, then to levie them *de bonis propriis*. And therefore if an Executor or Adminiſtrator be ſued by a Creditor, and the Executor or Adminiſtrator plead a *plenè adminiſtravit* generally, or plead ſpecially that he hath no more but to ſatisfie a Iudgement or the like; and upon tryall this iſſue is found againſt him, and it is found he hath in all or part enough to ſatisfie the debt; in theſe caſes the Judgement is *de bonis Teſtatoris*, and thereupon an Execution is (as in other caſes) to levie the debt *de bonis Teſtatoris* in the hands of the Executor or Adminiſtrator, and for the coſts *de bonis propriis*. And upon the returne of the Sheriffe a ſpeciall execution doth iſſue forth to levie the money *de bonis Teſtatoris*: *Et ſi conſtare poterit* that he hath waſted the goods, then that he ſhall make the execution *de bonis propriis*. And hereupon alſo the Plaintiffe may if he will have a *Capias* againſt the body, or an *Elegit* againſt the lands of the Executor or Adminiſtrator,

Atworths caſe Mich. 38. 39. Eliz.

34 H. 6. 45. 46 Ed. 3. 9. Fitz. Executor 9. Coo. 5. 32. 8. 134. Dyer 185. 32.

ſtrator, and no other courſe of proceeding can or may be had a-gainſt the Executor or Adminiſtrator in this caſe.

An action of debt was brought againſt two Executors, and one of them did appeare and confeſſe the action, and the other made default, and thereupon Judgement was given to recover againſt them both *de bonis Teſtatoris* in their hands, and execution accordingly: and upon this execution the Sheriffe did returne a Devaſtavit againſt the Executor that made default only, and hereupon a *Scire facias* went out againſt him alone, and afterward an execution againſt him alone *de bonis propriis.* Dyer 210.

Aſſets, *Quid.*

Aſſets in this caſe is ſaid to be where one dieth indebted and maketh his Executor, or dyeth inteſtate, and the Executor or Adminiſtrator hath ſufficient in goods or chattels or other profits to pay the debts or ſome part thereof; this is ſaid aſſets in his hands, and for ſo much he ſhall charged. Termes of the Law Coo. ſuper Litt. 374.

33. What ſhall be ſaid to be Aſſets in the hands of an Executor or Adminiſtrator to charge him, Or not.

All thoſe goods and chattels, actions and commodities which were the deceaſeds in right of action or poſſeſſion as his own, and ſo continued to the time of his death, and which after his death the Executor or Adminiſtrator doth get into his hands as duly belonging to him in the right of his Executorſhip and Adminiſtration, and all ſuch things as do come to the Executor and Adminiſtrator in liew or by reaſon of that, and nothing elſe ſhall be ſaid to be aſſets in the hands of the executor or adminiſtrator to make him chargable to a Creditor or Legatee. And herein theſe things are to be known; 1. That Aſſets in the hands of one of the executors ſhall be ſaid to be Aſſets in the hands of all the executors. Kelw. 51.

2. That Aſſets in any part of the world ſhall be ſaid to be Aſſets in every part of the world: and therefore if that point be in iſſue, and it appeare that there is Aſſets in the hands of any one of the executors, or in any County or place whatſoever, the Iury muſt find that there is Aſſets. Coo. 6. 47.

3. All goods and chattels of what nature or kind whatſoever that are valuable, as oxen, kine, corne, &c. ſhall be eſteemed Aſſets. But ſuch things as are not valuable, as a Preſentation to a Church and the like, ſhall not be accounted aſſets. Coo. ſuper Litt. 388.

4. All the goods and chattels that come to the executor or adminiſtrator in the right of their executorſhip or adminiſtration, and that are by Law given to them by vertue thereof in the right of the deceaſed (for which, See before at *Numb.* 25.) and which are in poſſeſſion ſhall be eſteemed Aſſets in his hands. [a] And therefore if a Feoffment be made to the uſe of the Feoffor for life, and after to the uſe of his executors and aſſignes for 20 yeares; in this caſe it ſeemes this 20 yeares ſhall be ſaid to be aſſets in the hands of the executor of the Feoffor. [b] And goods pledged to the deceaſed and not redeemed, or the money wherewith it is redeemed, when it is redeemed, ſhall be ſaid to be aſſets in the hands of the executor Coo. ſuper Litt. 388. 5. 34. Dyer 362. Kelw. 63. [a] Coo. ſuper Litt. 54. Dyer 362. [b] 20 H. 7. 4. Broo. aſſets 12.

executor or adminiſtrator. c And if the deceaſed doth appoint that the executors ſhall ſell his land to pay his debts, the money that is made of the land when it is ſold, ſhall be ſaid to be aſſets in his hands. 5. All the goods and chattels in action or in poſſibility at the time of the death of the deceaſed that are afterwards recovered, and are gotten in poſſeſſion into the hands of the executor or adminiſtrator when they are ſo recovered, are eſteemed aſſets in his hands. But they are never accounted aſſets untill they are recovered and come in poſſeſſion; and therefore if there be debts owing to the deceaſed upon Statutes or Obligations, or otherwiſe, theſe are never eſteemed aſſets in the hands of the executor or adminiſtrator untill he hath recovered them. So likewiſe if there be debt or damages recovered by a Iudgement had by the deceaſed, but no execution is done untill execution be made, this ſhall not be eſteemed aſſets in the hands of the executor or adminiſtrator. So if the executor bring an action of treſpaſſe againſt another *de bonis aſportatis in vita Teſtatoris*, and he have a Iudgement for damages; in this caſe untill he hath recovered it by execution, it ſhall not be eſteemed aſſets in his hands. And if the Indgement be erroneous, and the execution avoidable; in this caſe albeit it bee recovered and gotten in poſſeſſion, yet it ſhall not be eſteemed aſſets. And therefore if one ſue another and recover againſt him as Adminiſtrator of *I S*; and after a Teſtament made by *I S* is produced and proved, and thereby an Executor is made; in this caſe the money recovered by the Adminiſtrator ſhall not be ſaid to be aſſets in his hands as to any of the Creditors becauſe the Executor may recover it from him, or the debtor will have it againe. And if the Executor or Adminiſtrator do never recover and get the thing into his poſſeſſion, he ſhall never bee charged, eſpecially there where he hath done his beſt to get it and cannot. If one covenant to make a Leaſe for yeares to the deceaſed his executors or adminiſtrators, and after his death the Leaſe is made to the executor or adminiſtrator accordingly; in this caſe this Leaſe ſhall be ſaid to be aſſets in his hands, and he ſhall be chargable for ſo much to any Creditor. And whatſoever the executor or adminiſtrator, muſt be forced to ſue for by the name of executor or adminiſtrator being recovered, ſhall be eſteemed aſſets in his hands. 6. Albeit the thing be extinct and gone as to the executor and adminiſtrator himſelfe, yet it may have his being and be accounted aſſets as to the Creditors and Legatees. And therefore if an executor or adminiſtrator have a Leaſe for yeares of land in the right of the deceaſed, and afterwards he doth purchaſe the Fee-ſimple of the land (whereby the Leaſe is drowned) yet in this caſe this Leaſe ſhall continue to be aſſets as to the Creditors and Legatees ſtill. * And if the Debtee make the

c See before Numb.

Coo. ſuper Litt. 124.5. 31. Broo. Aſſets 24. Dyer 264. 121.2 H. 4. 21. Coo. 6. 58. Kelw-63. Dyer 362.

Curia Mich. 13. E.R.

Coo. 1.98. Plow. 84. 292.

Coo. 5.34.

Coo. 1.87. Broo. Leaſes 63.

* Trin. 7. Ia. B.R. Simons caſe. Coo. 8. 136.

Debtor his Executor, or the Debtee dye inteſtate, and the adminiſtration is committed to the Debtor; in theſe caſes this debt ſhall be ſaid to continue and ſhall be eſteemed aſſets for ſo much as to other Creditors. And if a woman Executrix have goods worth 20l. and ſhe marry with one of the Creditors to whom 20l. is owing; in this caſe it ſeems the husband may not retain the goods to pay himſelfe, but they ſhall be aſſets to other Creditors. And yet if the Debtor make the Debtee his executor, he may retaine ſo much as to ſatisfie his own debt, and that he doth ſo retain ſhall not be ſaid to be aſſets in his hands as to any other Creditor. And if *I S* have goods to the value of 20l. and he is bound to *B* and *C* in 20l. a piece, and he dyeth inteſtate, and after *D* doth adminiſter, and then *B* dyeth and maketh *D* his executor; in this caſe *D* may retain this to ſatisfie his own debt, and it ſhall not be ſaid to be aſſets in his hands as to any other. 7. The goods and chattels of other men in the hands of the executor or adminiſtrator that were in the poſſeſſion of the deceaſed, if he had no right to them, or if he had and they do not belong to the executor, will not make the executor or adminiſtrator chargable; for theſe ſhall not bee eſteemed aſſets in his hands. And therefore if the goods of another man be amongſt the goods of the deceaſed, and theſe come all together into the hands of the executor or adminiſtrator; theſe goods that are the goods of another ſhall not be ſaid to bee aſſets in the hands of the executor or adminiſtrator. And if the executor doth receive a rent that doth belong to the heir; this rent ſhall not be ſaid to be aſſets in his hands: and hence it is that if the deceaſed were outlawed at the time of his death, that his goods and chattels are not no be accounted aſſets, for they are none of his. 8. * If an executor of his own wrong to whom 20l. is owing, doth enter upon ſo much of the goods of the deceaſed as is worth 20l. intending to pay himſelf; this ſhall be eſteemed aſſets in his hands to make him chargable for ſo much to any Creditor or Legatee. 9. * If the deceaſed have goods worth 20l. and owe 20l. to *A*, and 10l. to *B*, and he compound with *A* for 10l. in this caſe he ſhall be ſaid to have aſſets, and be charged to pay the debt of *B* alſo. 10. If a man have a Leaſe for years worth 20l. *per annum* at the rent of 5l. and he die; in this caſe not the whole value of the land, but ſo much as is above the rent ſhall bee ſaid to bee aſſets in the hands of the executor or adminiſtrator.

Burnets caſe Hill 8. Iac. Plow. 184.

Kelw. 63, Coo. 6. 58. Dyer 362.

Doct. & St. lib. 2, cap. 3.

*Coo. 5. 30. Dyer 2.

*27 H. 8. 6.

Coo 5. 31. 10 H. 7. 5.

40. Probate *Quid. Quotuplex.*

The Probate of a Teſtament is the producting and inſinuating of it before the Eccleſiaſticall Iudge, Ordinary of the place where the party dyeth, or other that hath power to take the ſame. And this is done in two ſorts, either in common Form, *i. e.* upon the oath of the executor or party exhibiting it upon his credulity that

Swinb. 261. 264.

that the Will exhibited is the laſt Will and Teſtament of the party deceaſed, which is the ordinary courſe; and this the Ordinary may accept if he will. Or *per teſtes, i. e.* which is when over and beſides his oath he doth alſo produce witneſſes or maketh other proof to confirm the ſame, and that in the preſence of ſuch as may pretend any intereſt in the goods of the deceaſed, or at the leaſt in their abſence after they have been lawfully ſummoned to ſee ſuch Will proved if they think good. And this courſe is uſed only where there is a ſuſpition of the Will, and the Caveat is entred, or where there is a feare of contention and ſtrife between the kinred and friends of the party deceaſed about his goods; for a Will proved in common form may be called into queſtion at any time thirty yeares after; and when the Will is thus exhibited into the Biſhops Court, the ſame is to be kept by his officers, and the Copy thereof in parchment under the Biſhops Seale of his office to be certified and delivered, which parchment ſo ſealed is called the Will proved.

41. Where the Probate of a Will is neceſſary, and where not; And by and before whom, And in what time it muſt be proved.

Coo. ſuper Litt. 292. Perk. Sect. 482.

The Probate of the Will (as having reſpect to the goods and chattels) is in ſome reſpect neceſſary; for howſoever as touching any Free-hold of lands deviſed it is not all materiall, and howſoever the Executor before Probate may receive and releaſe debts, and do moſt other acts as Executor, yet he cannot ſue for any debt due to the Teſtator. And if the Executor delay the Probate, the Ordinary may by Proceſſe compell him to come in and accept or refuſe of the Executorſhip. And when it is proved it muſt be proved by the Executors or one of them at leaſt; and if all the goods of the deceaſed be within the ſame Dioceſſe wherein he lived and dyed, the Executor muſt prove it before the Ordinary of the Dioceſſe, or before his lawfull Commiſſary or Deputy, or before the Archdeacon or his Deputy or Commiſſary (as their compoſition is) or if the goods be in a Peculiar, then before him that is Judge of that Peculiar; or if the goods be within two Peculiars, then before the Ordinary of the Dioceſſe wherein theſe two Peculiars lye. But if there be *bona notabilia* in the caſe, *viz.* That the Teſtator have goods or chattels at the time of his death of the value of 5l. or more lying in two or more Counties, or have good debts upon Eſpecialties (as ſome ſay) for otherwiſe they follow the perſon; or have any (Eſpecialties as other ſay) lying in other Counties for debt, ſo that there be of goods and chattels or good debts to the value of 5l. in any other Dioceſſe then that wherein the Teſtator led his life and dyed, then the Probate doth belong to the Archbiſhop of that Dioceſſe wherein it is, unleſſe the Ordinary of the ſame Dioceſſe have the Probate by compoſition between him and the Metropolitan; for otherwiſe there muſt be ſeverall

Perk. Sect. 491. 492. 486. Coo. 9. 36. Teſtament 4. 3. 5. Plow. 280. Stat. 23 H. 8. cap. 9. 21 H. 8. c. 5. See before at num. 21.

Swinb. part. 6. Sect. 11.

Probates for the goods in every Dioceſſe (as anciently was uſed in theſe caſes.) But if a man die in his journey in another Dioceſſe, and have more then 5 l. goods about him, this ſhall not be ſaid to be *bona notabila*, but the Will may be proved before the Ordinary of the place where the deceaſed lived and his eſtate doth lie. And except it be in caſes where men have *bona notabilia*, the Officers of the Courts of the Metropolitans are not to cite men out of their own Dioceſſe ; and to diſcover this matter, it is the duty of the Ordinary of the Dioceſſe, when any man comes to prove a Will, to give him an Oath, and examine him whether he know of, or doe believe, there are any goods to the value of 5 l. lying in any other Dioceſſe at the time of the Teſtators death, and if he hear of any to diſmiſſe them to the Prerogative Court, and to give them notice of it : Alſo in ſome places, the Lords of Mannors have the Probate of all the Wills within their Mannor by cuſtome of the place ; and in thoſe places it muſt be proved there, and not elſewhere. And when an Executor is bound to prove the Will before the Ordinary as before, the Ordinary may give him what time to doe it hee doth think fit, and when he doth prove it, the Ordinary doth take an Oath of him to adminiſter the goods faithfully, and to take bond of him alſo if he pleaſe; but this ſome doe omit.

Stat. 23 H. 8. cap. 9.

Fitz. Teſtament. 4. 5.

And now becauſe lands are oftentimes conveyed by the ſeverall kinds of aſſurance aforeſaid unto one man, but to the uſe of another, and to the intent that another ſhall take the profits of it, we muſt of neceſſity hear ſomewhat of the learning of Uſes, and then wee ſhall have done.

CHAP.

CHAP. XXIIII.

Of a Vſe.

Coo. 1. 121. 122. See the Addition to Iuſt. Dodr. Treatiſe. Coo. ſuper Litt. 271, 272.

A Vſe is the profit or benefit of Lands or Tenements, or as others define it, The equity and honeſty to hold the land in *conſcientia boni viri*: Or, as others define it more fully, It is a truſt or confidence repoſed in ſome other which is not iſſuing out of the land, but as a thing collaterall annexed in privity to the eſtate of the land, and to the perſon touching the land, ſo that he for whom he is truſted ſhall take the profit of the land, and the Terre-Tenant ſhall diſpoſe of it according to his direction: As for an example, If a Feoffment be made to *I S* and his heires, to the uſe, profit or behooſe of *W S* and his heires; in this caſe heretofore *I S* had the eſtate and property of the land, but *W S* had and was to have the profits in honeſty and equity. So if one agree with *W S* for a piece of land for 20 l. and pay him the money, but hath no aſſurance of the land, yet the equity and honeſty to have this land is in him, that hath contracted and paid his money for it: and this truſt was called the uſe of the land; and hence came the courſe in conveyances to ſet down in the *Habendum* to whoſe uſe, as *Habendum* to *A* and his heires to the uſe of *A* and his heires: And he for whom this truſt is, and that ought to have the profit of the land by conveyance as aforeſaid, is called *ceſtuy que uſe*. There is a uſe alſo of goods and chattels, which is properly called a Truſt or confidence, for one may have ſuch things to the uſe of another.

1. Vſe. *Quid.*

Ceſtuy que uſe. Truſt or confidence. *Quid.*

Doct. & St. 95 Pe. k. Sect. 533. Coo. 2. 58. 9. 11. Dyer 18, 146.

A Vſe is either expreſſe; *i.e.* when the uſe or intent is openly declared and expreſſed between the parties upon the making of the eſtate of land, whereunto the uſe is annexed, as, when a Feoffment is made of land to *I S* and his heires, to the uſe of *W S*, and the heirs of, or heires males of the body of the ſaid *W S*, or to the end and intent that *W S* and his heires, or *W S* and the heires of his body ſhall take the profits of it, or the like; or when I covenant to ſtand ſeaſed of the land to the uſe of my wife for life, and after of my eldeſt ſonne, and the heires of his body, or the like. Or, it is implyed; *i.e.* when the uſe is not declared upon the agreement between the parties, but is left to the conſtruction and made by the operation of Law, as when a man ſeiſed of land makes a Feoffment in Fee, or doth levie a fine, or ſuffer a common Recovery of it to another without any conſideration, and it is not agreed nor declared to what uſe or intent it ſhall be; this by conſtruction of Law ſhall be to the uſe of the Feoffer, Conuſor, or Recoveree: But if there be any conſideration of money or other thing paid or given, or any rent

2. *Quotuplex.*

or Tenure reſerved, then by conſtruction of Law, it ſhall be to the uſe of the Feoffee, Conuſee, or Recoveror, for otherwiſe the Law preſumeth that the intent of him that did part with the land was ſo (*viz.*) that the other ſhould have the property of the land to his uſe, and that he himſelfe ſhould take the profits of it. So when one doth bargaine and ſell his land for money to another, and no uſe is expreſſed; in this caſe the Law doth ſay, it ſhall be to the uſe of the Bargainee and his heires. A uſe alſo is either in *eſſe* and that in poſſeſſion, reverſion, or remainder, as when a Feoffment is made to *I S*, to the uſe of *I W* and his heirs, or to the uſe of *I W*, and after to the uſe of *I D*, and the heires males of his body, and after to the uſe of *S T*, and his heires for ever: Or, it is in *poſſe*, or in contingency, as when by poſſibillity, it may happen to be in poſſeſſion, reverſion, or remainder, as where a uſe is limitted to me for life, and after to him that ſhall be my firſt ſonne in Taile, this is only the poſſibility of a uſe, for it may or may not be. Coo. 1. 121.

3. The nature, incidents, and originall of it.

A Uſe at the Common-Law, before the Statute hereafter ſpoken of was made, was, and where that Statute doth not take place, is nothing but a meare confidence and truſt colatterall to, and diſtinct from the land annexed in privity of eſtate, and to the perſon touching the land to this purpoſe, that *ceſtuy que uſe* ſhould take the profit of the land, and the Feoffee or Terre-Tenant that was truſted ſhould make eſtates, and otherwiſe diſpoſe of the land as the *ceſty que uſe* in his life, or at his death by his laſt Will and Teſtament ſhould direct and appoint; and if he made no diſpoſition, then that it ſhould goe to his heir, ſo that the Feoffee had the Free-hold or ſole property of the thing in him, and *ceſtuy que uſe*, had neither *jus in re* nor *jus ad rem* (for if he againſt the Will of the Feoffee had entred into the land, he had been a Treſpaſſor) but a bare confidence or truſt for which the *ceſtuy que uſe* had no remedy, but in Chancery upon breach of the truſt, and there to have the Feoffee impriſoned untill he perform the truſt according to the order of the Court. And theſe uſes to ſome purpoſes, were reputed in Law as chattels, and therefore were deviſable by Will, and to ſome purpoſe as hereditaments, and a kind of Inheritance of which there was a *poſſeſſio fratris &c.* and to ſome purpoſes, neither chattels nor hereditaments, for they were not eſteemed Affets in the heire or Executor, neither were they reputed as Commons, Rents, Conditions, and ſuch like Inheritances which are diſcontinued or taken away by the Alienation of the Terre-tenant, Eſcheat, Diſſeiſin &c. but a uſe is not ſo. Coo. in Chudleighs caſe, in toto & Shelleys caſe. Kelw. 160. Dyer. 12. Broo. Feoffm. al uſes, in toto, conſcience, 25.

Incidents of it.

And to every of theſe uſes, there were two inſeperable Incidents, confidence in the perſon, and privity in the eſtate, expreſſed by the parties or implyed by the Law, and when either of theſe failed, the uſe was either gone for ever or ſuſpended for a time at the leaſt:

leaſt: And therefore if the Feoffee to uſe, upon good conſideration had enfeoffed another of the land that had not notice of the uſe, the uſe had been gone for ever, becauſe howſoever here was a privity of eſtate; yet here was no conſidence in the perſon, but if the Feoffment had been without conſideration to ſuch a one, in this caſe, the uſe had remained ſtill becauſe the Law did imply a notice: So alſo it ſeemes the Law was when it was made in conſideration of marriage only. And if a Diſſeiſor, Abator, or Intrudor, had come to the poſſion of the land whereof the uſe was, albeit he had notice of the uſe, yet the uſe was ſuſpended during their poſſeſſion, and they ſhould not have been ſeiſed to uſe as the Feoffee was, for they come not to the land in the *per* but in the *poſt*. And if a Lord by Eſcheat, Lord of a Villaine, or one that had entred for Mortmaine, or that had recovered in a *Ceſſavit &c.* had come to ſuch land and had notice of the uſe, the uſe had been gone for ever, for theſe came to the land in the *poſt* and above the uſe: And Tenant in Dower and by the curteſy ſhould not be ſeiſed to uſes in being, for all theſe wanted privity of eſtate: And if there had been Tenant for life, the remainder in Fee to the uſe of another, and the Tenant for life had made a Feoffment in Fee to one that had notice of the uſes, this ſecond Feoffee ſhould not have ſtood ſeiſed to the firſt uſes: So if the husband had made a Feoffment in Fee of the land of his wife, upon conſideration and without any uſe expreſſed, the wife ſhould not have had a *Subpœna* becauſe the Feoffee was not in privity of eſtate of the wife: And if *ceſtuy que uſe* for life or in Taile, the remainder in Taile with divers remainders over in uſe, had made a Feoffment to one that had notice; he ſhould not have been ſeiſed to the firſt uſes *cauſâ qua ſupra*. But otherwiſe it is of Commons, Advowſons, and ſuch like appendants or appurtenants, for if Tenant in Taile, or husband in right of his wife make a Feoffment of a Mannor, or of part of it with an Advowſon appendant; the Advowſon at leaſt after Preſentment ſhall paſſe as appendant to the Mannor or to part of the Mannor, and not to the eſtate of the land which is diſcontinued by the Feoffment. So if a Diſſeiſor, Abator, Intrudor, or the Lord by Eſcheat, or the like, ſhall have theſe things as annexed to the land or the poſſeſſion of the land; ſo that there is a difference between a uſe, a warrantie and ſuch like things that are annexed to the eſtate of the land in drivity, and Commons, Advowſons, and other hereditaments that are annexed to the poſſeſſion of the land.

Trin. 17. Ia. Cancellaria.

And theſe Uſes began firſt when the cuſtome of property began and was brought in, that one man knew his own from another mans, and then was to enjoy his own, and not to be deprived of it without conſent or order of Law; for then he that had land, had two things in him, a poſſeſſion of the land, and power to take the profits of it, and thoſe being to be diſtinguiſhed, he might give the

Doct. & Stud. 96. Coo. 1. 123. 124. Stat. 27. H. 8. c. 10. in the preamble.

The Originall of it, and why ſo much lands were put in uſe.

Free-hold or Poſſeſſion to another, and take the profits himſelfe; and they were the rather allowed by the Law for a time as reaſonable, becauſe they gave a man power to diſpoſe of his land by Will, which otherwiſe hee could not have done but in ſome ſpeciall caſes by cuſtome of the place: But in time this uſe was turned into an abuſe, and the greateſt part of all the lands in the Kingdome, eſpecially in the time of the broyl between the houſes of *York* and *Lancaſter*, were put in uſe, partly of fraud and partly of feare, which produced not a few inconveniences, for thereby many were deceived of their juſt and reaſonable rights, as namely, a man that had cauſe to ſue for his land, knew not againſt whom to bring his Action, or who was owner of it; the wife was defrauded of her thirds, the husband of being Tenant by the Curteſy, the Lord of his Wardſhip, Reliefe, Harriot, and Eſcheat, the Creditor of his Extent for debt, the poore Tenant of his Leaſe, and other Purchaſors of their purchaſe, for theſe rights and duties were given by the Law from him that was owner of the land and none other, which at this time was the Feoffee of truſt, and ſo the Feoffor the old owner of the land, ſhould take the profits, and leave the power to diſpoſe of the land at his diſcretion to the Feoffee, and yet the Feoffee was not ſuch a Tenant of the land as his wife might have Dower, or the land bee extended for his debt, or that he might forfeit it for Felony or Treaſon, or that his heire ſhould be in Ward for it, or any duty of Tenure fall to the Lord by his death, or that he could make any eſtates of it; alſo lands were many times conveyed by laſt Wills, by words only, and ſometimes by tokens only in time of great extremity of weakneſſe, and many perjuries for tryall of ſecret uſes were daily committed.

The miſchief of uſes.

All which having been eſpied, have been laboured to be cured and holpen by divers particular Acts of Parliament in all ſucceeding ages: but the makers of theſe Lawes finding the continuances of theſe uſes ſo miſchievous, that they did over-reach the policy of all Lawes, for a generall remedy, and a perfect cure of all the ſaid miſchiefes and abuſes, have at laſt provided; That where any are, or ſhall be ſeiſed of any lands to the uſe or truſt of any other, by reaſon of any bargain, ſale, feoffment, fine, recovery, contract, agreement, or otherwiſe, by any meanes whatſoever, *ceſty que uſe* or truſt, that hath any ſuch uſe in Fee-ſimple for terme of life or yeares, or otherwiſe, or any uſe in reverſion or remainder &c. ſhall have the poſſeſſion of the land in ſuch quality, manner and condition as hee had the uſe or truſt: And where any one is ſeiſed of lands to the uſe or intent that another ſhall have a yearly rent out of the ſame lands, *ceſty que uſe* of the rent, ſhall bee deemed in poſſeſſion thereof of like eſtate as he had the uſe: By which Statute the uſe and poſſeſſion of land is now at this day coupled, conjoyned and marryed with an indiſſoluble knot, ſo as they cannot now ſtand apart and divided, but he that hath the

Vſes and poſſeſſions uniſed.

Stat. 1. R. 2. c. 9. 4 H. 4. c. 7. 11 H. 6. c. 3. 1 R. 3. c. 1. 4 H. 7. c. 17. 1 H. 7. c. 1. 19 H. 7. c. 15. 27 H. 8. c. 10.

the one muſt have the other, and the one doth enſue the other as the ſhaddow doth the body; and therefore now upon Fines, Recoveries, and Feoffments, the eſtate doth ſettle as the uſe and intent of the parties is declared by word or writing before the act done; as for example, If a writing bee made between two or more, that one of them ſhall levie a fine, make a Feoffment, or ſuffer a Recovery to the other to the uſe and intent that one of them, or another man ſhall have it for life, and after another in Taile, and after a third in Fee-ſimple, in this caſe, the Law ſetleth the eſtate according to the uſe and intent declared, ſo that now what eſtate a man hath in the uſe, the ſame he hath in the poſſeſſion. But herein for the more full underſtanding of this Statute, and the Law at this day, it muſt bee obſerved, That this Statute doth not extend to all manner of uſes, neither are all uſes executed and united to the poſſeſſion hereby; for to every execution of a uſe within this Statute, foure things are requiſite: 1. That there be a perſon ſeiſed: 2. That there be a *ceſty que uſe in eſſe*. 3. That there be a uſe in *eſſe* in poſſeſſion, reverſion, or remainder. 4. That the eſtate out of which the uſes doe ariſe be veſted *in ceſtuy que uſe*, ſo that when theſe foure, *viz.* Seiſin in the Feoffees, *ceſtuy que uſe in rerum natura*, uſe in *eſſe*, and that the eſtate of the Feoffees doth veſt *in ceſtuy que uſe*, then there is an execution of the uſe within this Statute; but if any of theſe faile, there is no execution of the uſe within this Statute: And therefore, it is agreed that this Statute doth not execute any uſe but only uſes in *eſſe*, ſo that the right of a preſent and a future or contingent uſe are excluded untill they come in *eſſe*, and then the Statute doth execute them; alſo if no alteration be of the eſtate of the land before. And if *ceſtuy que uſe* in Taile with divers uſes in remainder had made a Feoffment and dyed before the Statute, no execution ſhould have been of this right of a uſe untill entry by the Feoffees. So if *ceſtuy que uſe* in poſſeſſion had made a Feoffment before the Statute; no right of the uſe in poſſeſſion or remainder ſhall be executed by the Statute untill the regreſſe by the Feoffees: So if a Feoffment had been made before the Statute to the uſe of the Feoffee for life, and after to the uſes of others in remainder, and the Feoffee had made a Feoffment in Fee to another; this uſe ſhall not be recontinued, or the repoſſeſſion of the land executed unto it by this Statute, ſo that the right of uſes in *eſſe* and uſes in contingency untill they happen to be in *eſſe* remaine at the Common-Law, as they were before the Statute; and therefore if the eſtate of the Feoffees be in ſuch caſes deveſted by diſſeiſin; or the King, or a Corporation, or an Alien, or a perſon attaint &c. be enfeoffed of the land before the uſe come in *eſſe*, or if the land be aliened *bonâ fide* upon conſideration to one that hath not notice of the uſe; this uſe can never be executed untill theſe poſſeſſions be removed by lawfull entrie or a fine

To what uſes the Statute of 27 *H.*8. doth extend, and to what not.

Coo. 1. 126. 136. Plow. 3, 1.

Coo. 1. 126. Dyer 58. 88. 330.

action of the Feoffees; and if their entrie and action be barred, the uſe is gone for ever, and the party grieved thereby hath no remedy but in Chancery: And therefore if *cesty que uſe* in Taile the remainder in Taile reſtrained with a clauſe of perpetuity be diſſeiſed; no uſe in contingency can bee executed by this Statute: And if before the Statute, a feoffment had been made in Fee to the uſe of *I S* for life, and after to the uſe of the right heires of *I N*, and the Feoffees had been diſſeiſed, and then the Statute had been made, and after *I N* die, and after his death *I S* die; this uſe ſhall never be executed in the right heire of *I N*. And ſo alſo if a diſſeiſin be after the Statute and before the death of *I N*, no poſſeſſion ſhall bee executed in the right heir of *I N*: Alſo uſes that need no Execution by the Statute, as when a man doth convey land to *I S* and his heires to the uſe of *I S* and his heires; this doth not need help of this Statute: Alſo uſes that are againſt the rules of the Common-Law, ſhall not be executed by this Statute: And therefore if a Feoffment be made to the uſe of *A* for life, and after to the uſe of every perſon that ſhall be his heir one after another for term of his life: So if one make a Feoffment to the uſe of another in Taile with divers remainders over with a previſo, that neither of them ſhall diſcontinue or alien &c. theſe uſes ſhall not be executed becauſe theſe limitations are wholy void; and in theſe caſes it ſeemes there is no remedy to be had in Chancery againſt the Feoffees: So that out of all this appeareth that ſome uſes are executed preſently, as uſes in *eſſe*, and ſome are executed by matter *ex poſt facto*, if they be according to Law, and come in *eſſe* in due time; but if they be uſes invented and limitted in a new manner, and not according to the ancient Common-Law, they are altogether void, and extinguiſhed and aboliſhed by this Statute: And where lands are conveyed to others in truſt after this or the like manner, *viz.* that the Feoffees ſhall take the profits, and deliver them to the Feoffor and his heirs &c. or that the Feoffees ſhall convey it to the heire of the Feoffor at his age of twenty one years: And where lands are conveyed to certaine uſes expreſſed and declared, and there be other ſecret uſes and intents agreed upon between the parties; theſe uſes or truſts are not within this Statute, neither will the Statute execute them, but they remaine as they were before the Statute, determinable in Chancery: Alſo Leaſes for years of lands in uſe that have their being before, and are granted over in uſe are not executed by this Statute: And therefore if a Leaſſee for yeares of land, grant or aſſign over his eſtate to *A* and *B* and their aſſignes to the uſe of the Grantor and his wife for the term of their lives; this uſe or truſt is out of this Statute, and not executed thereby; and therefore in this caſe all the eſtate is in *A* and *B*, and the Grantor hath nothing but a uſe, for which he hath his remedy in Chancery: So if one

Coo. 1. 138.

Dyer 369. 356. Crompt. Iur. 65.

one be ſeiſed of land in Fee, and he bargaine and ſell it, or make a Leaſe of it to another in truſt, and for the benefit of a third perſon; this is but a Chancery truſt &c. in this third perſon, as was held clearly, *M.* 8. *Car. B. R.* And yet if a Feoffment bee made to the uſe of *I S*, and his aſſignes for the terme of twenty years; this term of yeares ſhall be executed by the Statute: And ſo in all ſuch like caſes and queſtions of Truſts and uſes that are not within the Statute of uſes, the Law is now as it was before the ſame Statute was made, and all thoſe matters are determinable in Chancery; for as the queſtions of uſes and truſts that are within the Statue are to bee decided and ruled by the Iudges of the Common-Law, ſo are all other queſtions of uſes and truſts that are out of the Statute to be ruled and decided by the Iudges of the Chancery.

4. What ſhall be ſaid a good uſe of land, or not; and when and where ſuch a uſe ſhall be raiſed, altered or created, or not.

Coo. ſuper Litt. 271. Plow. 301.

To make a good uſe, or to make a uſe to riſe, eſpecially ſuch a uſe as may bee within the Statute, reſpect muſt be had to divers things. 1. To the wayes or meanes of creating and raiſing of uſes, wherein it is to be obſerved, that albeit the quallity of the uſes be changed in moſt caſes by the Statute of uſes, yet uſes, and uſes within this Statute are, and may be raiſed as they might before the Statute, either by tranſmutation of the eſtate, as by fine, feoffment, common recovery &c. or out of the eſtate of the owner of the land, as by bargain and ſale, by Deed indented and inrolled, or by Covenant to ſtand ſeiſed to uſes upon good conſideration: And therefore a Fine, Feoffment, or Recovery may be had of land to the uſe and intent, that either of the parties thereunto or others ſhall have it for any time or eſtate; and by this meanes what uſes and conſequently what eſtates a man will may be raiſed and created: And in theſe caſes the Conuſor, Feoffor, or Recoveree may appoint the uſe of the ſame Fine, Feoffment, or Recovery to whom he will, without any reſpect of marriage, money, kindred, or the like; for in this caſe his will guideth the equity of the eſtate. Or if a man make a Leaſe to *A* for life to the uſe of *B* for life; this is a good uſe and eſtate in *B* during the life of *A*. Or if a man by bargain and ſale for good conſideration ſell his land to another; hereby the uſe will riſe according the eſtate bargained and ſold unto the Bargainee: but in this caſe if it be an eſtate of Free-hold, as of Fee-ſimple, Fee-taile, or for life, that is ſold; the bargain and ſale muſt be made by Deed indented and inrolled within ſix moneths after in ſome of the Courts at *Weſtminſter*, or in the Ceſſions Rolls of the Shire where the land lyeth, (except it be in Cities and corporate Townes where they uſe to inroll Deeds) otherwiſe no uſe will riſe by it: but if it be an eſtate or term for years only that is ſold, there the uſe will riſe well enough without any ſuch matter. Or if a man ſeiſed of land in Fee, covenant to ſtand ſeiſed of it to the uſe of his wife, children, brethren, or other kinsfolke for life,

First in reſpect of the manner of raiſing it, and the ſeverall wayes whereby uſes may be raiſed.

Dyer 186.

Coo. 6. 68.

Dyer 155. Coo. 2. 36. 7. 40. 8. 93. 4. 70. See Bargaine and Sale.

Coo. 2. 35. 8. 94.

life, in Fee-ſimple, Fee-taile; or if one ſeiſed of land in Fee-ſimple covenant to ſtand ſeiſed of it to the uſe of a woman he is to marry, or to the uſe of a woman his ſonne or other kinſman is to marry, or the like; hereby the uſes and conſequently the eſtates will riſe accordingly. And in theſe caſes there is no need it ſhould be by Deed indented &c. or that the Deed be inrolled, for uſes may be raiſed by Deed poll as well as by Deed indented. Alſo uſes may be created (as ſome hold) by word or parol-agreement as well as by Deed or writing: for it is ſaid it hath been adjudged, That if a man ſay to his ſonne and a wife that his ſonne is to marry, that in conſideration of the ſame marriage they ſhall have the land to them two in taile; that hereby a good eſtate tail will ariſe after the marriage; And that where one doth by word without Deed grant to his ſonne and to his wife in tail land in conſideration of their marriage, that it was agreed by all the Iudges that the uſe did riſe upon this agreement. Howſoever it is moſt ſafe in theſe caſes to do it by Deed and in writing; for *Dyer* 296. *Plow.* 22, ſeems to oppugne this. And if a man make a Feoffment, levy a Fine, or ſuffer a Recovery to the uſe of his laſt Will, or to the intent to perform his laſt Will, or to the uſe of ſuch perſon and perſons and of ſuch eſtate and eſtates as he ſhall limit by his laſt Will, and then afterwards by his laſt Will declare the uſes, theſe are good uſes, and this is a good way of raiſing of uſes. So if a man deviſe his land by Will to *I S* and his heirs to the uſe of *I D* and his heirs; it ſeems that the uſe will riſe to *I D* and his heirs by this means. And if a man by a verball agreement in conſideration of money or the like, ſell his land to another, or agree and promiſe that the Bargainee ſhall have it for any time, howſoever that hereby no uſe nor eſtate will ariſe (if it be a Free-hold that is ſold) within the Statute, becauſe it is not by Deed indented &c. yet it ſeems a good uſe will ariſe at the Common Law, and that the Bargainee ſhall have relief in equity for his purchaſe. The ſecond thing whereunto reſpect muſt be had, is to the perſons truſted, or to him to whom the conveyance is made; for to every good uſe there muſt be a perſon ſeiſed to uſe, and he muſt be a perſon capable of ſuch a Seiſin. And for this it muſt be known that any ſole perſon that may make an eſtate to himſelf, may make an eſtate to other uſes. Alſo a man may be ſeiſed of his own land to other uſes, as in the caſe of a covenant to ſtand ſeiſed to uſes. But the King, or any body corporate, alien born, or perſon attaint, cannot be ſeiſed to other uſes no more by an originall Feoffment to uſe, then when they come by the land in uſe at the ſecond hand; in which caſe (as hath beene ſhewed) neither ſuch Perſons, nor diſſeiſors, abators, or intrudors, or Lords of villains, or by Eſcheates, ſhall be ſeiſed to other uſes;

Crompt. Iur. 61. 60. Plow. 301. 308. and the better opinion of the Iudges in Corbins caſe 38 Eliz.

Litt. Sect. 462. 463. Coo. 6. 17.

See the Stat. 27 H. 8. of Vſes Fitz. Deviſe 22.

Dyer 229.

Conſcience.

Secondly in reſpect of the perſons truſted and what perſons may not be ſeiſed to the uſe of another, but to their own uſe.

Coo. 1. 122. 127. 135. Plow. 2. 8. Dyer 8. 283.

Reſolved in Doctor Atkins caſe 44 Q. Co. B.

uſes; but in all theſe caſes the uſes are void, and the parties ſhal hold the land to their own uſes, or to the uſes of the ſeoffors &c. & not to the uſe of *Ceſtuy que uſe*. And a bargainee of land for valuable conſideration cannot be ſeiſed of the land to any other uſe but his own. Dyer 155. Litt. Broo. Sect. 60.

*The third thing to be reſpected is the *Ceſtuy que uſ*; for to every good uſe, as there muſt be a perſon ſeiſed to uſe, ſo there muſt be a perſon to whoſe uſe he is ſeiſed, and he muſt be capable alſo. And for this it muſt be obſerved that any man that is capable of an eſtate directly and immediately to himſelfe, is capable of the ſame eſtate by way of uſe: but if the uſe be limited to a Corporation, there muſt be a licence had; otherwiſe it will be an alienation in Mortmaine. And if future uſes upon Contingences be limited to ſuch perſons as are not in being, theſe uſes howſoever they are good at the Common-Law, yet they are not good within the Statute, neither doth the Statute execute them at all untill they come in poſſeſſion. And if a Feoffment be made to *I S* and his heires to the uſe of the Pariſhioners of *Dale*; this uſe is voyd, for they are incapable by this name; and it ſhall be to the uſe of the Feoffor. The fourth thing to be regarded, is the eſtate of him that doth raiſe the uſe in the land whereof the uſe is raiſed; for howſoever the Tenant in Fee-ſimple of land may create what uſes he will in Fee, for life, or yeares upon it, and ſuch uſes are good; and the Tenant in taile, or for life may perhaps grant their land for their own lives to the uſe of a third perſon; [a] Yet if a Tenant in taile for good conſiderations covenant to ſtand ſeiſed to the uſe of himſelf for life, and after of his eldeſt ſonne in taile; no uſe will riſe by this Covenant. So if Tenant in taile of an Advowſon in groſſe grant it by Deed to one and his heires to the uſe of himſelf for life, and after to the uſe of another in Fee; this grant is void by the death of the Tenant in taile. [b] And if ſuch a Tenant in tail bargain and ſell his land by Deed indented and inrolled; hereby the bargainee hath an eſtate diſcendible to his heirs, but determinable upon the death of the Tenant in taile. [c] And if one covenant by Indenture to ſtand ſeiſed to the uſe of *B* of White Acre which he hath not then, but he doth afterwards purchaſe it; by this no uſe will riſe. And if one that hath but a term of yeares grant it to *I S* to the uſe of himſelf for life &c this is no good uſe within the Statute, but a Chancery truſt only. The fifth thing to be reſpected, is the eſtate of him that doth take by the conveyance out of which the uſes are derived: for howſoever where a man doth grant in Fee-ſimple to another and his heires, he may limit what uſes he will upon this eſtate; and if a man make an eſtate for life to another, he may limit an uſe thereupon; yet if a man make a gift in tail to another, he can limit no uſe thereupon. And therefore if one grant his land to *I S* and

*Coo. 1. 136 Broo. Mortmaine 37. See before.

Thirdly in reſpect of the perſons for whom the truſt is, or the *Ceſtuy que uſe*.

12 H. 7. 27. 49 Ed. 3. 4.

Fourthly in reſpect of the eſtate and poſſeſſion of him that doth create the uſe.

[a] Hill. 38. Eliz. Co. B. Curia. Coo. 2. 52. Paſche 13. Ia Co. B. Seignior Sayerſus Smith.

[b] Coo. 10. 96

[c] Yelvertons caſe 37. Q. B. R.

Dyer 369. Coo. 2. 78. Coo. ſuper Litt. 19.

Fifthly, in reſpect of the eſtate and poſſeſſion of him that doth take by the conveyance.

and the heirs of his body to the uſe of *I S* and his heirs in Fee, this limitation of uſe is void, and *I S* hath hereby an eſtate in Taile. [c] And if a Feoffment be made to *I S* to have and to hold unto him and the heirs of his body to the uſe of him his heirs and aſſignes for ever; this uſe is voyd. [d] And where one doth bargain and ſell land for money (in which caſe the law doth make an expreſſe uſe) no other uſe can be appointed. And therefore if *A* for money bargain and ſell land to *B* and his heirs to the uſe of *A* for life, and after of *B* in Tail, and after of *A* in Fee; all theſe uſes are void, for a uſe cannot riſe out of a uſe. So if *A* make a Leaſe to *B* for years rendring Rent, To have and to hold to the uſe of the Leſſor; this uſe is void as being againſt reaſon alſo. And if a Feoffee to uſe before the Statute of uſes, had bargained and ſold the land to one who had notice of the former uſe: no uſe had been made hereby; for there might not be two uſes in being of the ſame land at one time. And if *A* enfeoffe *B* to the uſe of *C* and his heirs, with proviſo that if *D* pay to *C* 100l. that *C* and his heirs ſhall ſtand ſeiſed to the uſe of *D* and his heirs, this laſt uſe is void; for the uſe muſt ariſe out of the eſtate of the Feoffee, and not out of the eſtate of the *Ceſtuy que uſe*.

c Trin. 14. Ia. B.R. Adiudged Couper & Franklins caſe.

d Dyer 169. Cromp. Iur. 53. Litt. Broo. Sect. 284.

Dyer 255. Coo. 1. 136. 137.

Sixthly in reſpect of the cauſe or conſideration of it, and what ſhal be a ſufficient conſideration to raiſe or alter a uſe, Or not.

The ſixth thing whereunto reſpect muſt be had, is the cauſe or conſideration: For howſoever in caſes where uſes paſſe by way of tranſmutation of poſſeſſion, as by Fine, Feoffment, or Recovery, there the conſideration is not at all materiall; for he that doth make the eſtate, may appoint the uſe to whom he will without any reſpect to marriage, kindred, money, or other thing; for in this caſe his own will and conſideration guideth the uſe and equity of the eſtate: yet in Bargains and Sales, and Covenants to ſtand ſeiſed to uſes, it is otherwiſe: for there conſideration is ſo neceſſary that nothing will paſſe, neither will any uſe riſe without a Conſideration, *i. e.* ſome matter that may be a cauſe or occaſion meritorious which amounteth to a mutuall recompence in Deed or in Law, which muſt be expreſſed or implied in the Deed whereby the uſe is created, or elſe ſupplied by averment and proof: For howſoever in this caſe an averment ſhall not be allowed and taken againſt a Deed, that there was no conſideration given when there is an expreſſe conſideration upon the Deed; yet when the Deed expreſſeth no conſideration, or ſaith [for divers good conſiderations] or the like, there an averment of a good conſideration given ſhall be received, for this is an averment that may ſtand with the Deed; and without conſideration Inrolment will not help. And therefore if one bargain and ſell his land to another by Deed indented and inrolled without any conſideration; it ſeems no uſe will riſe by this to the Bargainee. [e] So if one [for divers good cauſes and conſiderations or for divers great and valuable conſiderations] bargain and ſell his land to another, or covenant to ſtand ſeiſed of his land to the uſe of another that is not of his

Coo. 1. 176

Averment.

Dyer 169. Comp. Iur. 62.

Dyer 146. Coo. 1. 176. 11. 25. Dyer 312.

e 41 Q. Adiudged.

his kindred; no uſe will riſe by this, unleſſe it be proved that mony or ſomething elſe was given for it. But if a man by Deed in conſideration of money, as [in conſideration of the ſumme of 100l. to him paid, or in conſideration of a competent ſum of money to him paid or otherwiſe promiſed to be paid, or in conſideration of other land, or of giving of counſell, or the like] bargain and ſell or by ſuch like words grant his land to another in Fee-ſimple, Fee-tail, for life, or years; in theſe caſes the uſe will ariſe to the bargain well enough. And therefore if I covenant with *B* that when he doth infeoffe me of White Acre, I will ſtand ſeiſed of Black Acre to the uſe of him and his heirs, and he doth infeoffe me accordingly; in this caſe the uſe of Black Acre will riſe to *B*, and he and his heires ſhall have it according to the agreement. f So if I agree with my Leſſee for years, that if he pay me 100l. within his term, that I will ſtand ſeiſed of the land to the uſe of him and his heirs, and he do pay me the 100l. accordingly; in this caſe the uſe will riſe, and he and his heirs ſhall have it according to the agreement. So if I covenant that my ſonne ſhall marry the daughter of *A*, and *A* promiſe to give me a 100l. for the marriage portion, and I covenant that if the ſame marriage do not take effect, I and my heirs will ſtand ſeiſed of the land to the uſe of *A* and his heirs untill the 100l. be paid; in this caſe a good uſe will riſe of the land accordingly if the marriage do not take effect; But in all theſe and ſuch like caſes, the covenant muſt be by Deed indented, and it muſt be inrolled; otherwiſe no uſes will ariſe. And when the Deed is inrolled it ſhall take effect as from the beginning by relation to avoid all intervenient eſtates and charges whatſoever; And in like manner it is if one for no cauſe, or for no conſideration, as [becauſe he is of his ancient acquaintance, or becauſe there hath been entire love or great familiarity between them, or becauſe he hath been his chamber-fellow, ſchool-fellow, or fellow-ſervant, or becauſe he hath done him good ſervice, or becauſe he was his Maſter and taught him, or to the end that he may pay his Debts and Legacies and diſcharge his Funerals, or for divers good cauſes and conſiderations] if one for any of theſe or any ſuch like cauſe and conſideration, covenant with another that he will ſtand ſeiſed of his land to the uſe of that other and his heirs, or that he and his heirs ſhall have the land &c. by this covenant whether it be inrolled or not, no uſe at all will riſe. So if one covenant to ſtand ſeiſed to the uſe of *I S* (who is his Baſtard ſonne) and his heirs; no uſe will ariſe hereby: And yet perhaps upon ſuch a Covenant as this, whereupon no uſe nor eſtate doth ariſe, an Action of Covenant may lie. But if one [in conſideration of nature, kindred, blood, or marriage with ones ſelfe, or any of his blood, paiment of debts, or for the like cauſe] or without any ſuch expreſſe conſideration at all, Covenant

Plow. 301. Brao. Fait. Inroll. 9. Doct. & St. 99. Cromp. Iur. 60. 61. Dyer 50.

Cromp. Iur 61.

f Broo. Expoſition of words 44.

Plow. 302. 21 H. 7. 20.

Relation.

Dyer 374.

Coven.

Coo. 7. 11. 10. 143. 1. 83. Plow. 301. Litt. Broo. Sect. 284. Coo. 1. 154.

Covenant

nant to ſtand ſeiſed to the uſe of himſelfe, his wife, children, brothers, ſiſters, or couſins, or their wives; theſe are good conſiderations, and the uſes and eſtates thereupon thus raiſed and made, are good: And therefore if one covenant by his Deed without expreſſion of any conſideration to ſtand ſeiſed of his land to the uſe of himſelfe for life, and after of his wife for life, and after of his child in Taile, or for life, and after of his brother in Taile, or for life, or in Fee, or in any ſuch like manner; theſe uſes will riſe and the eſtates will bee well made hereby accordingly. So if I agree with another, that if he marry my daughter, that from the time of the marriage, they ſhall have my land to them and their heires; in this caſe, and by this agreement, if he doe marry my daughter, they will have my land according to the agreement: So if I being about to marry with a woman, covenant with *I S*, to ſtand ſeiſed of my land to the uſe of my ſelfe for life, and after to the uſe of the woman I am to marry for her life, and after to the uſe of the heires of my body begotten on her; theſe are good uſes and eſtates that are made by this covenant: But here by the way, this difference muſt bee obſerved where a man doth Covenant in conſideration of a marriage to be had, to ſtand ſeiſed to uſe, and the marriage doth not take effect, there no uſe ſhall ariſe: So alſo if the parties diſagree at their age of conſent: and ſo was it held in the Lord *Harberts* caſe: But where one doth covenant to make a Feoffment, or levie a fine to ſuch uſes, and the Feoffment is made, or fine levied accordingly, there notwithſtanding the marriage doth not take effect, yet the uſe ſhall ariſe; for there hee is in by the fine or Feoffment, in which caſe there needs no conſideration. And therefore if *A* covenant with *B*, that in conſideration *C* is his kinſman, and in conſideration of a marriage to bee had between *C* and *E* hee will make a Feoffment and other aſſurances to the uſe of himſelfe for life, the remainder to *C* and *E*, and the heires of their two bodies, and after aſſurances are made accordingly by Fine or Feoffment, but they do not intermarry, but marry others; in this caſe notwithſtanding *E* ſhall have a Moity of the land. So if I covenant (in conſideration of the love I beare to my wife) to ſtand ſeiſed to the uſe of her and her heirs of my body upon her begotten, and after to the uſe of my brother; hereby the uſe will riſe to my brother alſo, albeit he be not within the expreſſe conſideration. So if one covenant with his two ſonnes for the love he doth beare to them, to ſtand ſeiſed of his land to the uſe of himſelfe for life, and after of his wife for life, and after of his two ſonnes in taile one after another; in this caſe the conſideration is ſufficient to raiſe the uſe to the husband and wife alſo. So if one (in conſideration of the love he doth beare to his brother) doth covenant to ſtand ſeiſed

Plow. 301. Pr. 10. Feoffment al. uſes, 54.

Curia Trin. 10. Car. B. R. Hoskins caſe.

Coo. 7. 40. 11. 24. Dyer. 374.

Plow. 307.

ſeiſed to the uſe of his brother, and the wife of his brother for life, or in taile; in this caſe the conſideration is ſufficient to raiſe the uſes to them both. So if I covenant (in conſideration of the marriage of my ſonne with the daughter of another) to ſtand ſeiſed to the uſe of my ſelfe for life, and after of my ſonne and his wife in Taile; theſe are good uſes and will riſe accordingly.

Plow. 307. Dyer 174. If I covenant with *I S* to ſtand ſeiſed to the uſe of him, his Executors &c. (he being none of my kindred) for twenty years, and after to the uſe of my ſonne in Taile; in this caſe, the uſe will not riſe to *I S*, but it will riſe to my ſonne well enough. For albeit the conſideration of money given by one, may be a conſideration to all the eſtates; yet the conſideration of blood &c. is ſingular and will raiſe the uſe of that only to which it goeth: But if I covenant with *B* in conſideration of the marriage of my ſonne with the daughter of *B* to ſtand ſeiſed to the uſe of *R* (a ſtranger) for life, and after to the uſe of my ſonne and his wife in Taile; in this caſe, the uſe ſhall riſe to *R*, albeit he be a ſtranger, and that for the ſupportance of the remainder, which cannot be without a particular eſtate: and in all theſe and ſuch like caſes, no inrolement of the Deed is neceſſary. Inrolment.

Coo. 11. 24. 25. 7. 40. If I (in conſideration of 10 l. given to me by my ſonne,) covenant with him to ſtand ſeiſed of land to the uſe of him and his heires; in this caſe, no uſe will riſe without inrolment by the implyed conſideration, becauſe there is an expreſſe conſideration, *Et expreſſum facit ceſſare tacitum.* And yet if I covenant, that in conſideration that *I S* is my ſonne, and hath paid mee 10 l. that I will ſtand ſeiſed of land to the uſe of him and his heires; in this caſe, the uſe will ariſe without inrolment. And if I covenant in conſideration of 100 l. and of a marriage, to ſtand ſeiſed to the uſe of my ſelfe for life, and after of my ſonne in Taile; hereby the uſe is raiſed, and the poſſeſſion charged without inrolment. So alſo where a Feoffment is made, fine levied, or recovery ſuffered, and no uſe declared thereupon; and the ſame is without any conſideration of fine or rent; by this the uſe is not changed, for it doth reſult to the Feoffor, Conuſor, and Recoveree, and he hath the eſtate as he had it before; but if in theſe and ſuch like caſes, there be but a penny or a penny worth of conſideration given, or any rent reſerved upon the Feoffment; the uſe will riſe well enough to the Feoffee &c. And if any Tenure be created, as where a gift in Taile, Leaſe for life or years is made; in theſe caſes, albeit there be no conſideration given, yet the uſe will riſe well enough to the Donee or Leaſſee, and eſpecially, if any rent be reſerved, for that is a kinde of conſideration: But if a Leaſſee for years grant over his term to another without any conſideration at all, it ſeemes by this no uſe at will riſe to the Grantee, and therefore that the Grantee ſhall hold all it to

Manrels caſe Trin. 3. Iac. B R. Broo. Feoffment al uſe 15. Plow. Manrels caſe. 4.

Coo. 1. 24. Doct. & St. 97. 99. 101.

the uſe of the Grantor; *ſed Quære.* The ſeventh thing whereunto reſpect is to bee had, is the manner and forme of words uſed in the making and raiſing of uſes, wherein there is much regard to the minde and intention of parties: For if one covenant in conſideration of 20 l. paid him by *I S*, to ſtand ſeiſed of land to the uſe of *I S* and his heires: or if one covenant that *I S* and his heires ſhall have his land; if this Deed be inrolled, this is a good bargain and ſale to raiſe the uſe, and will doe it as well as when it is made by the words [*bargaine and ſell.*] So if one for good conſideration by words of Demiſe and Grant, make a Leaſe of his land for a term of years; hereby the uſe will riſe to the Leaſſee as well as if the Leaſe were made by the words, *bargaine and ſell, Et ſic de ſimilibus.* And yet if one by words of *bargaine and ſell*, convey his land to his ſon, no uſe will ariſe by this, except there be money paid, and the Deed be inrolled. And if one in conſideration of money grant his land to his ſonne, or any other by the word [*enfeoffe*;] no uſe will riſe by this, unleſſe Livery of Seiſin be made thereupon, becauſe the intent of the parties in theſe caſes doth appeare to be to paſſe it in another manner: And if in the laſt caſe Livery of Seiſin bee made, then the uſe ſhall be guyded by Law, that is, if nothing be given, it ſhall be to the uſe of the Feoffor, and not amount to a limitation of uſe to the ſonne. * If one covenant with his ſonne, that his land ſhall remaine, or that his land ſhall diſcend to him; this is a good covenant to raiſe the uſe according to the limitation. And yet if one covenant with his ſonne upon his marriage, that his land ſhall remaine, revert, or diſcend to his ſonne in Fee, or in Fee-Taile; by this no uſe will be raiſed, becauſe it is ſo incertaine; but perhaps this may amount to a covenant, whereupon the ſonne may have an Action of Covenant. If I covenant for me and my heires, that I and my heires and all others that are ſeiſed, ſhall bee thereof ſeiſed to the uſe of &c. this is a good covenant to raiſe the uſe, albeit it be in words of the future tenſe. If I covenant with my eldeſt ſonne and ſtrangers to convey my land to the ſame ſtrangers to the uſe of my ſelfe for life, and after of my ſonne in Taile &c. and I grant by the Deed, that the ſaid perſons ſeiſed of the ſaid land, ſhall be from thence ſeiſed to the ſaid uſes, and none other uſe, and no other conveyance is made; it ſeemes this is ſufficient to raiſe the uſe: And yet if I be ſeiſed of land in Fee, and Covenant with *I S*, that *A B* and *C D* and their heires, ſhall ſtand and be ſeiſed of this land to the uſe of &c. it ſeemes, this is not a good covenant to raiſe the uſes. If a Feoffment or other conveyance be made to the uſe of the Feoffor and the heires of his body, on the body of *M* the wife of *S T*, and for default of ſuch iſſue, to the uſe of him and the heirs of his body of *S* the now wife of *W K*, and for default of ſuch iſſue, then to the uſe and performance of his

Seventhly, in reſpect of the manner and frame of the words uſed in the raiſing of uſes, and what manner of uſes may be made, or not.

Coo. 8. 94.

Coo. 2. in Sir Rowland Haywards caſe. Wards verſus Lambert. Co. B. Paſche 37 Eliz.

Inrolment.

Reſolved in Stiles caſe 3° Eliz. * 21 H. 7. 18. Plow. 308, 301. Broo. Feoffments al uſe, 16.

Covenant.

Dyer 374.

Coo. 1. 120.

his laſt Will for 10 yeares immediatly after his death, and after the term ended, to the uſe of the Feoffees and their heirs during the life of *W* (eldeſt ſonne of the Feoffor) and after his death to the uſe of the firſt iſſue male of the body of the Feoffor lawfully begotten, and the heires of the body of ſuch firſt iſſue male, and for default of ſuch firſt iſſue male to the ſecond iſſue male &c. [in the ſame manner;] theſe are good limitations of uſes. So if a uſe be limited to *I S* for life without impeachment of waſte, and after to the uſe of *B* and *C*, their Executors and Adminiſtrators for the term of twenty years, and after to the uſe of *C* and the heires males of his body &c. theſe are good uſes. So if a uſe be limited after this manner, *viz.* to the uſe of a mans laſt Will and Teſtament, or to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates as he ſhall limit, and appoint by his laſt Will and Teſtament; or to the uſe of ſuch perſon and perſons, or to ſuch uſes and purpoſes as he ſhall by any writing under his hand and ſeale declare and appoint; theſe are good limitations. If I covenant with another in conſideration of blood &c. that I will ſtand ſeiſed of my land to the uſe of ſuch of my ſonnes, or ſuch of my couſins as the Covenantee ſhall name; in this caſe, after a nomination made, the uſe will riſe well enough. But if I (for and in conſideration of 10l. or the like good conſideration) covenant to ſtand ſeiſed of land to the uſe of ſuch perſons as the Covenantee ſhall name; in this caſe, albeit the Covenantee doe nominate ſome of my couſins, or blood, yet no uſe will riſe by this for the incertainty of it. If a Feoffment or other conveyance be to the uſe of *I S* and his heires, provided that if the Feoffer pay 10l. at ſuch a day, that then it ſhall be to the uſe of the Feoffer and his heirs; this is a good limitation, and the uſe will riſe accordingly. A uſe may be limitted to a woman *durante viduitate ſua*, and this is good.

Incertainty.

If a man bee ſeiſed of two Manners, and covenant to ſtand ſeiſed of the ſame to the uſes following, *viz.* of the one to the uſe of the Covenantor for his life, and after to the uſe of his wife for life, and after to the uſe of his eldeſt ſonne in Taile &c. And for the other Mannor, to the uſe of his ſecond ſon in Taile &c. theſe are good limitations, and the uſes will riſe accordingly.

If a man ſeiſed of land in Fee agree with another, that a Fine ſhall be levied of it, and that the ſame ſhall be to the uſes following, *viz.* that *I S* (the Conuſor) ſhall have one yearly rent of 50l. during his life to be iſſuing out of the ſame land, and as touching the land charged with the rent &c. to the uſe of *I D* (the Conuſee) untill default of payment of the ſaid yearly rent, and then to the uſe of *I S* and his heirs for ever; this is a good limitation and the uſe will riſe accordingly, *Et ſic de ſimilibus.*

If a Feoffment be made by *I S* to the uſes in certaine Indentures

Coo. 1. 90.

Coo. 6. 18. Lit. Sect. 462, 463.

Coo. 1. 176.

Coo. 4. 3.

Coo. 11. 23.

Coo. 2. 69, 70.

Coo. 10. 78.

Tripartite of the ſame date, and therein is declared that it ſhall bee to the uſe of *A* for life without impeachment of Waſte, and after to the uſe of ſuch Farmors, or Tenants to whom he ſhall demiſe any part of the premiſes for life, or lives, or for any terme of yeares, as in any ſuch demiſe ſhall be limited and appointed, and after to the uſe of the performance of the laſt Will of the ſaid *L*, and to the uſe of ſuch perſon or perſons ſeverally to whom the ſaid *L* by his laſt Will and Teſtament ſhall appoint any eſtate, and after to the uſe of &c. theſe are good uſes, and the eſtates ſhall riſe accordingly.

A uſe may be limited upon condition, and the condition may be annexed to one of the uſes, and not unto another. Coo. 4. 14.

If lands be conveyed to *I S* and the heires of his body, to the uſe of *I S* and his heirs, or to the uſe of a ſtranger and his heires; this uſe will not riſe in this manner. And yet if lands be conveyed to *I S*, and his heirs, to the uſe of him and the heirs males of his body, and after to the uſe of a ſtranger and his heires; it ſeemes this is a good limitation. Coo. ſuper Litt. 19.

If one grant lands by Deed to husband and wife, To have and to hold to the uſe of the husband and wife and of the heires of their two bodies; this is a good eſtate Taile by this limitation, albeit he doe not ſay *Habendum* to them and their heirs &c. but *Habendum* to their uſes; but otherwiſe it were if the uſe were limited to a ſtranger in this manner. Hill. 6. Car. B R. Adiudge.

If lands be conveyed by *I S* to *I D*, to the uſe of *I S*, or to the uſe of his wife for life, or to the uſe of any other for life, the remainder to another in Taile or for life, the remainder to a third, his Executors &c. for ſix months, and after the ſix months ended, to the uſe of a fourth and his heires; theſe are good limitations, and the eſtates will riſe accordingly. Dyer 314.

If a uſe be limited to the Conuſee of a Fine, or a Recoveror in a Recoverie untill he make a Leaſe for fourty yeares, and after to the uſe of the Recoverees or Conuſors and their heirs; this is a good limitation and the uſe will riſe accordingly. Dyer 290.

Contingent uſes, or uſes in *poſſe* may be created as well as uſes in *eſſe*; and therefore if lands be conveyed to the uſe of a man and the wife he ſhall afterwards marry, or to the uſe of his firſt, ſecond, or third wife; or to the uſe of *I S* for life, and after to the uſe of the right heires of *I D*, and *I D* is then living; or to the uſe of *I S* for life, and after to the uſe of him that ſhall bee his firſt heire male, and the heires of the body of ſuch heire male &c. all theſe and ſuch like, are good uſes; but they are uſes at the Common-Law ſtill, and are not executed by the Statute untill they come in *eſſe*. Coo. 1. in Chudleighs caſe. 135.

Eighthly, in reſpect of the nature and quality of the uſe.

The laſt thing whereunto reſpect is to be had, is the nature and quality of the uſe: And herein it is to be known, that a man may

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at this day by act executed in his life time, or by his laſt Will and Teſtament at his death, give his Lands, Tenements or Hereditaments to any perſon or perſons not corporate, and their heires, for any religious, charitable, or civill uſe as well as for any private uſe: And therefore a man may ſo diſpoſe of his lands for the finding of a Preacher, erecting or maintenance of a Schoole, reliefe and comfort of maimed ſouldiers, ſuſtenance of poore people, reparations of Churches, High-wayes, Bridges, diſcharging of the poore Inhabitants of a Village of the common charges, to make a ſtock for poore Labourers in Husbandry, and poore Apprentices, and for the marriage of poore Virgins, or other ſuch like uſes, and theſe uſes are not prohibited by any Statute: And it is good policy upon every ſuch Feoffment or eſtate to reſerve to the Feoffor and his heires ſome ſmall rent, or to ſet down ſome ſmall conſideration: But theſe uſes are not ſuch uſes as are executed by the Statute of uſes, neither are they to bee reſembled to the uſes aforeſaid; for in this caſe, if there be any miſ-imployment of the lands, or breach of the truſt by the parties truſted, redreſſe is to be had by the Lord Chancellor or Lord Keeper by a ſpeciall courſe of proceeding. For which, ſee the Statutes of *39 Eliz. chap. 6. 43. Eliz. chap. 9. 7 Jac. chap. 3.* But if any man have heretofore given, or heretofore ſhall give any Lands, Tenements or Hereditaments by act executed in his life, or by his laſt Will at his death to any perſon ſingular, or corporate, in Fee-ſimple, Fee-Taile for life, or yeares, to the intent or upon condition to maintaine any ſuperſtitious uſe, as to finde a Chaplaine, and have the ſervice of a Prieſt to ſay Maſſe, or to have a Prieſt or other man to pray for the Soule of any dead man in ſuch a Church or other place, or to have or maintaine perpetuall obites, lamps, or torches &c. to bee uſed at certaine times to help to ſave the ſouls or men out of the ſuppoſed Purgatory; all theſe and ſuch like uſes are void; and the lands that are ſo given to ſuch ſuperſtitious uſes, are to be forfeited, and given to the King, and he ſhall have them, and yet ſo that if there bee any charitable uſe intermixed with the ſuperſtitious uſe, and they may bee diſtinguiſhed, the King ſhall have only ſo much as is given to the ſuperſtitious uſe, and not that which is given to the charitable uſe alſo: For which, See *Adams* and *Lamberts* caſe at large, *Coo. 4. 104.*

As touching the Declaration of Uſes, *i. e.* the manifeſtation or agreement of the parties, to what uſes and intents the Aſſurance made ſhall be, theſe things are to be known: 1. That uſes may be declared or averred on a Fine, Feoffment, or recovery of land; but on a bargaine and ſale of land, no uſe may be declared or averred, but what the Law doth make. And upon a covenant of uſes, no other uſe may be declared or averred, but what is contained

Coo. 1. 26. 3. 131. 4. 113. — Charitable uſes.

Stat. 15. R. 2. ch. 5. 37. H. 8 ch. 4. 1. Ed. 6. ch. 14. — Superſtitious Vſes.

Coo. 1. 175. 176. Dyer 169. — 5. Declaration of Vſes: And where a uſe of land may bee declared upon any Aſſurance, and what ſhall be ſaid a ſufficient declaration of ſuch a uſe, or not.

within the Deed. 2. Every one may declare and diſpoſe the uſe of land according to the eſtate that he hath in the land; for the declaration and diſpoſition of the uſe doth enſue the ownerſhip of the land *ſicut umbra ſequitur corpus*. And at this day the uſe doth draw the land to it, as the body or principall the ſhaddow or acceſſary: And therefore the owner of the land, or he from whom the land doth move, ought to limit and declare the uſe of the land; as if the husband and wife levie a fine of the land, whereof he is ſeiſed in the right of his wife; the husband alone may declare the uſe of this fine, and this declaration ſhall bind the wife, albeit her aſſent to the limitation of the uſes doe not appeare, if her diſaſſent doth not appeare; but in this caſe, it is moſt proper to have a declaration of the uſes by the husband and wife both; for ſhee alone, becauſe ſhe is *ſub poteſtate viri*, cannot alone declare or limit any uſe; neither can the husband alone limit any uſe againſt her good will, becauſe he hath not the eſtate of the land: And therefore, if *A* and *B* his wife be ſeiſed of land in the right of his wife, and ſhee without the conſent of her husband, covenant by Indenture with *C* and *D*, 14 *Martii* 14 *Eliz.* that a fine ſhall be levied of this land, and that it ſhall be to the uſe of her ſelf for life without impeachment of waſte, and after to the Conuſees for their lives, to the intent that they ſhall ſuffer *I S* to take the profits for his life with divers remainders over; and afterwards, and before the fine levied, the husband alone by another Indentnre 31 *Febr.* 22 *Eliz.* (wherein the wife is named a party) without the conſent o his wife, doth agree that a fine ſhall be levied to the uſe of him and his wife, and after to the uſes limited by the wives Indenture, and after the fine is levied accordingly; in this caſe, albeit the variance be in one particular only, and the limitations in all the reſt of the uſes aud eſtates doe agree, yet all the ſame limitations by both Indentures are void, and the uſe upon the conveyance is left to conſtruction of Law, and therefore ſhall be to the wife and her heirs for ever: And yet if the husband and wife agree in the limitation of the uſes for part of the land, and differ in the reſt, the limitations for ſo much as they agree in are good, and void for the reſidue: And in theſe caſes where the declaration is good, the wife and her heires ſhall be bound by it. So if two Joynt-tenants are, and they, or two others having ſeverall eſtates joyne in a Fine, and one of them declare the uſe in one manner, and the other doth declare the uſe in another manner; this declaration is good for either of their parts; for the declaration ſhall be governed according to their eſtates. And if an Infant, or a man *de non ſane memorie* doth declare the uſe of a fine levied by him, this declaration is good and ſhall bind him ſo long as the fine ſhall continue in his force. 3. This declaration of Uſes may bee made either

Cos. 2. 57. Dyer 290.

Husband and wife.

Joint-tenants.

Infant.

De non ſane memorie.

Coo. 2. 73. 5. 2. 9

either by Deed indented (which is the moſt uſuall and ſafe way,) or by Deed Poll; As where the parties doe by ſuch a writing agree that an Aſſurance paſſed, or to be paſſed, ſhall be to ſuch and ſuch uſes; As that a fine ſhall be levied by ſuch a time, and that it ſhall be to the uſe of one for life, another in Taile, and another in Fee. Or it may be made by a verball agreement without any writing at all; as where an agreement is ſo had, and made between two or more, that a fine, or Recovery ſhall be had, and it ſhall be to ſuch and ſuch uſes, and the ſame is had accordingly; in this caſe, this is a ſufficient declaration being proved; but it is not ſafe in

Coo. 2. 69. 70. 6. 27. 36 Dyer 290. Coo. 7. 40. Coo. 9. 8. Dyer 136.

theſe caſes to depend upon ſlipper memory. 4. This declaration by word or writing, may bee made before, at, or after the time of making the Aſſurance: and therefore one may covenant or agree that *I S* ſhall recover againſt him, or that he will levie a fine, or make a Feoffment to *I S* of ſuch land, and that the ſame ſhall bee to the uſe of &c. And if one make a Feoffment, he may declare the uſes of it at the ſame time, and that within the ſame, or in another Deed at his pleaſure: And if the Aſſurance be paſt, and no declaration of uſes had before, or at the time of paſſing it, a declaration may be ſubſequent. *viz.* That the ſame Aſſurance was and ſhall be, and the Recoverors &c. ſhall ſtand and be ſeiſed to ſuch and ſuch uſes; for an Indenture ſubſequent may direct and declare the uſes of a Fine or Recovery precedent. But herein theſe diverſities are to be obſerved; when precedent Indentures are made to direct the uſes of a ſubſequent Aſſurance, and after the Aſſurance is made accordingly; there no Averment ſhall bee taken by word, that the ſame Aſſurance was to other uſes then are declared by the Indenture: But againſt an Indenture ſubſequent, declaring the uſes of an Aſſurance precedent, an Averment may be taken, that there were other uſes expreſſed and limited, before or at the time of the Aſſurance, then are contained in the Indenture. If a precedent Indenture bee made to direct the uſes of a ſubſequent Aſſurance, when the Aſſurance comes, the land is bound, and the Conuſor or Recoveree cannot by any act of his, after the Recoverie had, charge or avoid it; but if the declaration bee ſubſequent, if in the interim, between the Aſſurance had, and the declaration of the uſes, the Conuſor or Recoveree ſell, give, or charge the land to others; this ſubſequent declaration will not ſubvert the meane eſtates, charges or intereſts, unleſſe it can bee otherwiſe proved, that by a certaine and compleat agreement of the parties, the Aſſurance was had and made to theſe uſes. 5. When the agreement for the limitation of uſes is precedent, whether it bee by writing or word, it is but directory and doth not bind the eſtate untill the ſame Aſſurance be afterwards had, and therefore by a new agreement or declaration made in the ſame manner as the former

Averment

former, *viz.* in writing, if the former be ſo, and between the ſame parties either before, or at the time of the ſame Aſſurance paſſed, new uſes may be made & the former uſes changed; but when the ſame Aſſurance is purſued accordingly, & no intervenient alteration is made, it ſhall be expounded to be to the ſame uſes, and ſhal binde the parties, & no naked Averment ſhal be received of any latter or other agreement contrary to the Indentures. 6. The declaration of the uſes muſt be certaine, and that eſpecially in three things; in the perſons to whom, in the lands &c. of which, and in the eſtates by which the uſes are declared; and if there want certainty in either of theſe, the declaration is not good; and it muſt be compleat of it ſelf without any reference to Indentures, or other writings to be made afterward; for then it is but an imperfect communication, and no compleat declaration. 7. Where an Indenture precedent is to limit the uſes of a ſubſequent Fine or Recovery, and it is not purſued in ſome circumſtance of time, perſon, quantity, or the like; yet if no other new meane agreement may be proved, the Aſſurance ſhall be in judgement of Law to the uſes contained in the ſame Indenture; but if the variance be in theſe particulars, & the form of the Indenture be not purſued, there an Averment without writing may be taken, that the fine or other Aſſurance was to other uſes then are contained in the Indenture; & if none ſuch can be made, then it is left to conſtruction of Law. And therefore if *A* be ſeiſed of divers Mannors in Fee, and by his Indenture dated 10 *Martii.* 21 *Eliz.* doth covenant with *B* & *C*, that he before the end of Trinity Term next Will by Fine or other Conveyance aſſure one of theſe Mannors to them, & that the ſame Aſſurance ſhall be to the uſe of *A* and *E* his wife, & of the heirs of *A*, and the 28th day the Deed is inrolled; and the 29th day of the ſame moneth, he doth by another Indenture Covenant with the ſame *C* and *D* to convey all the ſame Mannors to the ſame *C* and *D* before the Annuntiation next, & that the ſame Aſſurance ſhall be to the uſe of *A*, and the heirs males of his body, & for default of ſuch iſſue, to the uſe of divers others in remainder, & by this Indenture doth covenant, that if he ſhall not ſufficiently convey this land by the day, that he wil ſtand ſeiſed to the ſame uſes &c. and no Fine is levied by the end of Trinity Terme, but the 17th of *September* following, a note of a Fine is acknowledged to *B* and *C*, and the heirs of *B*, of the land within the firſt Indenture; and the 18th of the ſame moneth, another note of a Fine is acknowledged to *C* and *D* of the ſame, and other land in the laſt Indenture, and both theſe Fines are entred in *Octabis Mich.* following; in this caſe, theſe Fines cannot bee directed and declared by both Indentures, and therefore it ſeemes the declarations are void.

6. Averment of Vſes; and where a uſe of land may be

As touching Averment of Uſes; *i.e.* the proofe of uſes by witneſſes, theſe things are to be known, that where any uſe is expreſſed upon a Charter of Feoffment, no other uſe *contra* or *preter* the uſe which

Coo 3. 8. 5. 20. 25. Doct. & St. 95. Coo. 2. 57.

which is expreſſed ſhall be admitted. But in caſes of Fines and Recoveries wherein no uſes are expreſſed, other uſes then what Law conſtruction will make may be ſhewed and proved to be agreed upon, and the ſame aſſurances ſhall be to ſuch uſes as by proof ſhall be made to appear to be the intent of the parties: As if a man and his wife ſell her land for money, and after levy a Fine to the vendee and his heirs; in this caſe it may be averred it was for money, and this ſhall carry the uſe to the Vendee without any declaration of uſe, which otherwiſe would reſult to the woman and her heirs: and yet if a Fine be with a Grant and Render, no averment to prove it to be to other uſes then what are contained in the Fine ſhall be received. And where the uſes of a Conveyance be declared by Indenture before, or at the time of the ſame Conveyance, no averment ſhall be received of any other uſes then what are contained in the Indenture: But if the Indenture of declaration be ſubſequent, there an averment lieth and ſhal be received that there were other uſes agreed upon at, or before the time of the conveyance made. And where an agreement is made to levy a Fine, or ſuffer a Recovery, before, or at a time certain, and that it ſhall be of ſuch and ſuch lands, and to ſuch and ſuch perſons; and after it falleth out the Fine, or Recovery is not had by that time, or not of the ſame land, or not between the ſame perſons; in theſe caſes an averment may be had of other uſes and of another agreement.

averred upon any aſſurance; And what ſhal be ſaid a ſufficient averment, or not.

Coo. 9. 8.

Coo. 5. 26.

Where the uſes of an aſſurance are certainly agreed upon and declared between the parties thereunto, there regularly it ſhall be to ſuch uſes as are declared and agreed upon and to none others. But if a conveyance be made of land by Fine, Feoffment, or recovery, and no uſes thereof declared and agreed upon, the Law will limit and appoint the uſe according to equity and conſcience. And therefore if a man levy a Fine, make a Feoffment, or ſuffer a recovery of land without any conſideration; the Law will adjudge the uſe to be in the Feoffor, Conuſor, and Recoveree who doth part with the land: And ſo if a man make a Feoffment to the intent to perform his laſt Will, or to the uſe of his laſt Will, or to ſuch perſons as he ſhall limit by his laſt Will; in all theſe caſes the uſe ſhall be in the Feoffor and his heires whiles he doth live to diſpoſe at his pleaſure. And ſo if one make a Feoffment of land to *I S* and his heirs, to the uſe of *W S* for 20 years, and limit the uſe no further; in this caſe the reſidue of the uſe after the 20 years, ſhall be to the Feoffor and his heirs: But if in theſe caſes there be any conſideration of money or the like, though never ſo little given, or any rent reſerved upon the Feoffment, the Law will adjudge the uſe in the Feoffee, Conuſee, or Recoveror: And yet in that caſe alſo if other uſes be expreſſed upon the Deed, it ſeems it ſhall go to the uſes expreſſed; as if *A* for 20l. paid by

Doct. & St. 95. Perk. Sect. 533. Coo. 1. 24. Dyer 18. Cromp. Iur. 62. Coo. ſuper Litt. 271.

7. To what uſe an aſſurance of land ſhall be by conſtruction of Law, And how the Limitation of the Vſes of land by a Deed ſhall be conſtrued.

Bakers caſe Co. B. Hill 37 Eliz.

Doct. & St. 95.

B, enfeoffe *B* and his heirs to the uſe of *C* and his heirs. If the husband and wife levy a Fine of the wives land without conſideration, and without any declaration of uſe, the Law will adjudge this to be to the uſe of the wife and her heirs; but if they ſell her land for money, and after levy a Fine thereof to the Vendee; this ſhall be to the uſe of the Vendee and his heirs. And if a man be ſeiſed of land of the part of his Mother, and without any conſideration make a Feoffment in Fee of it; this ſhall be ſaid to be to his uſe in the ſame nature he had it before. So if two Jointenants be of land, the one in Fee-ſimple, and the other but for life, and they without any conſideration levy a Fine of it, and make no declaration of uſe; the uſe ſhall be to them of the ſame eſtate as they had before in the land. So if *A* tenant for life of land; and *B* in reverſion or remainder, levy a Fine of this land, generally, this ſhall be to the uſe of *A* for life, and to the uſe of *B* in Fee afterwards as it was before. So if *A* be ſeiſed in Fee of an Acre of ground, and he and *B* joyne together and levie a Fine of it to another without any conſideration; this ſhall be to the uſe of *A* and his heirs only. Coo. 2. 57. 58.

If one make a gift in taile, or Leaſe for life, or yeares, albeit it be without any conſideration of Fine, or Rent, yet the Law will adjudge the uſe in the Donee, or Leſſee and not in the Donor or Leſſor. Perk. Sect. 533.

If one at this day by Deed indented bargain and ſell his land to another for money, and doth limit no eſtate, but the Deed is *Habendum* to him only, and not *Habendum* to him and his heirs, or to him and the heires of his body, or to him for life; howſoever in this caſe before the Statute of uſes was made, it was otherwiſe, yet now the common received opinion is that by this there doth paſſe onely an eſtate for life, and not a Fee-ſimple. Plow. 539. Coo. 1. 87. yet ſee Litt. Broo. 538. Crompt. Iur. 47. 27H. 8. 6. Coo. 1. 110.

If a Feoffment be made to *I S* and his heires to the uſe of *I D* without any more words; by this limitation *I D* hath only an eſtate for life: So if a Feoffment be made to *I S* and his heires to the uſe of *I D* for ever, without ſaying [and his heirs;] hereby *I D* hath only an eſtate for life: And ſo of other uſes the conſtruction ſhall be according to the rules of Law. Coo. ſuper Litt. 42. Dyer 169.

If a uſe be limited to *I S* and his heires untill *A* ſhall come from beyond the Sea, and attaine his full age or dye, in this caſe if he come from beyond Sea, attaine his full age, or dye, the uſe ſhall ceaſe, Paſche 31 Eliz. B. R. the Lord Mordants caſe.

If one covenant to ſtand ſeiſed to the uſe of *A* his eldeſt ſonne and the heires males of his body, and after to the uſe of *B* his ſecond ſonne in tail in the ſame manner, or according to the limitation to *A*; by this *B* hath an eſtate tail to him and the heires males of his body. Hill 17. Iac. B. R. Rigwayes caſe.

If

Co. ſuper Litt. 28. If a Feoffment in Fee be made to the uſe of a man and his wife for their lives, and after to the uſe of their next iſſue male to bee begotten in Tail, and after to the uſe of the husband and wife and of the heires of their two bodies begotten (they having no iſſue male then;) by this the husband and wife are tenants in ſpeciall Tail executed; and after they have iſſue male, they are tenants for life, the remainder to the ſonne in Tail, the remainder to them in ſpeciall Tail.

Dyer 300. If one make a Feoffment to the uſe of himſelf for life, and after his deceaſe to the uſe of *Alice* whom he doth intend to marry, untill the iſſue he ſhall beget of her ſhall be of the age of 21 years, and after the iſſue cometh to that age, then to the uſe of the wife during her widdowhood, and the husband dye without iſſue; by this the wife ſhall have an eſtate at leaſt during her widdowhood.

Coo. 1. If I covenant with *B* that in conſideration he will marry my daughter, that from the time of the marriage I will ſtand ſeiſed to the uſe of my ſelf for life, and after to the uſe of *C* a ſtranger and the heirs males of his body, and after to the uſe of *B* and my daughter and the heirs of their two bodies; in this caſe albeit the uſe limited to *C* the ſtranger be void, yet it ſeems *B* and my daughter ſhall not have the land till the death of *C* without iſſue, but that my heirs ſhall have it till that time.

Coo. 1. 155. If I covenant with *B* to ſtand ſeiſed to the uſe of my ſelfe for life, and after my death to the uſe of *C* a ſtranger for the term of 20 years, and after the end of the term to the uſe of my ſonne in tail; in this caſe the uſe limited to *C* is voyd, and my ſonne after my death ſhall have the land: But if the words of the covenant be [and after the end of 20 yeares] inſteed of [and after the end of the term] my ſonne ſhall not have the land untill the 20 yeares be expired. See more in expoſition of Deeds. Chap. 5.

Co. 1. Chudleighs caſe. All ſuch uſes as are not within, nor executed by the Statute of 27 *H.* 8. but remain at the Common-Law, may be deſtroyed, diſcontinued, or ſuſpended as uſes before the Statute might have been. And therefore contingent uſes may be extinguiſhed or ſuſpended at this day. As if a man ſeiſed of land in Fee have three ſonnes *A B* and *C*, and he make a Feoffment of his land to divers Feoffees to the uſe of them and their heires during the life of *A*, and after to the uſe of the firſt ſonne that *A* ſhall beget and the heirs males of the body of ſuch firſt ſonne; or if a Feoffment be made to the uſe of a man and the wife that he ſhall marry, or the like; if in theſe caſes the Feoffees make a Feoffment over before the contingent uſes happen to be in *eſſe*, as before *A* have any ſonne, or the man take a wife &c. albeit it be to one that have notice of theſe uſes, yet the uſes are deſtroyed for ever, and the Feoffees cannot enter and revive them.

8. Where and how Vſes of Land may be extinguiſhed and deſtroyed or ſuſpended, or not; And where the ancient Vſes ſhall be revived by the entry of the Feoffees, or not.

them contrary to their own Feoffment: And if in theſe caſes the Feoffees before the contingent remainder veſt be diſſeiſed, hereby the uſes are ſuſpended; but then by the Reentry of the Feoffees the ancient uſes will be revived again: And therefore if the Feoffees releaſe to the Diſſeiſor and ſo barr themſelves of their entry, the uſes are extinguiſhed and ſhall not be revived, and the party grieved hath no remedy but in Chancery againſt the Feoffees for breach of truſt. And if the Feoffees in the firſt caſe before dye, before *A* have any ſonne born, the contingent remainder is gone: As where a Feoffment is made to the uſe of the Feoffor for life, and after to the uſe of the right heirs of *I S* in Fee, and the Feoffor dye before *I S*; in this caſe the remainder is gone, for a remainder cannot be without a particular eſtate no more of a uſe then of an eſtate made in poſſeſſion: and ſuch a remainder muſt veſt during the particular eſtate, or at leaſt *eo inſtanti* when the particular eſtate doth end.

Coo. 1.136

If a Feoffment be made to the uſe of *I S* and the wife he ſhall afterwards marry, and of the heirs males of their bodies; and *I S* make a Feoffment of this land to another before he take a wife; hereby the contingent remainder is deſtroyed.

If *A* enfeoffe *B* and his heirs to the uſe of *C* and *D* his wife and the heirs of the ſurvivor of them, and *C* makes a Feoffment to *E* and dyeth; this Feoffment doth deſtroy the contingent remainder.

Hill 2. Car. Scaccar Adjudged.

When the eſtate out of which the uſes do ariſe is gone, the uſes are gone alſo; As if a Leaſe be made to *A* for his life to the uſe of *B* for his life, and *A* dye; hereby the eſtate of *B* is gone.

Dyer 186.

Alſo uſes of lands may be gone by Revocation, whereof See in the next part.

9. Where a power to revoke Vſes of Land ſhall be good, And how they ſhal be taken; And what Revocation by reaſon of ſuch power ſhall be good, And what not.

Proviſoes and Powers of revocation of uſes of lands are very frequent in voluntary conveyances (whether by Feoffment or otherwiſe) that paſſe land by way of raiſing of uſes, and are executed by the Statute of 27 *H.* 8. and the Inheritances of many depend thereupon. As if a man ſeiſed of land in Fee have divers ſonnes, and he covenant to ſtand ſeiſed of that land to the uſe of himſelfe for life, and after of his eldeſt ſonne in Tail, and for want of ſuch iſſue, to the uſe of his ſecond ſonne in Tail &c. with a Proviſo that it ſhall be lawfull for him at any time during his life to revoke any of the ſaid uſes, and to limit and appoint other uſes &c. Or if *A* by Indenture between him and *B* his heire apparant an Infant, covenant with *B* for the advancement of his blood &c. to ſtand ſeiſed to the uſe of himſelfe for life, and after to the uſe of his ſaid heir apparant and the heirs males of his body, and after to the uſe of his right heires, provided that if *A* by himſelfe or any other during his life ſhall deliver or offer to *B* a Ring of gold to the intent to make

Coo. ſuper Litt. 237. 7. 11. 12. 10. 143. 1. 1 Ro. 173. 1 Ro. 107. Dyer 372.

make void all the ſaid uſes, that then the ſame uſes ſhall be voyd, and he may limit new uſes: Or if *A* by Indenture covenant with *B* to ſtand ſeiſed to the uſe of himſelf and his wife and his daughter for their lives, and after &c. provided that if the ſaid *A* during his life and after the debts mentioned in the Schedule annexed to the Indenture ſhall be paid, ſhall be diſpoſed to determine, diſannull, change, alter, enlarge, diminiſh or make void the uſes or eſtates, or any of them, of the Premiſſes or any part thereof, and by writing indented under his Hand and Seale ſubſcribed in the preſence of three Witneſſes ſhall declare his mind to be ſo; that then the ſame uſes ſhall be void; all theſe and ſuch like Proviſoes being coupled with a uſe are allowed to be good and not repugnant to the former eſtates. But in caſe of ſuch a Feoffment or other Conveyance whereby the Feoffee or Grantee is in by the Common-Law, as where *A* doth enfeoffe *B* and his heirs to the uſe of *B* and his heirs, it is ſaid ſuch a Proviſo is meerly repugnant and voyd. And as touching theſe Proviſoes or Revocations, theſe things are to be known; 1. Theſe Revocations are favourably interpreted, becauſe many mens Inheritances depend upon it; And therefore he that hath this power, may revoke part of the uſes at one time, and part at another time; and the revocation of the old, may be made by the making of new uſes without any expreſſe revocation; And by the ſame conveyance whereby the old uſes be revoked, the new uſes may be created and limited, and then the former uſes do ceaſe *ipſo facto* by this revocation without any entry or claim: As if one covenant to ſtand ſeiſed to the uſe of himſelf and his wife for their lives, and after to the uſe of *A* his daughter for life, and after to the uſe of *B* his daughter in Tail &c. provided that if he ſhall be minded &c. he may by writing &c. make voyd the ſame uſes, and declare the uſes to others, and he doth make voyd the uſe to his wife at one time and no more, and after by a Deed doth limit and appoint new uſes of the whole by a new covenant to ſtand ſeiſed to other uſes; theſe are good revocations; for there needs no reall and expreſſe revocation of former uſes, but the creating of new uſes is in Law an actuall revocation of the old uſes, as the making of a latter is *ipſo facto* a revocation of a former Will. 2. The Proviſo muſt for the ſubſtance of it be purſued in the revocation, and all incident circumſtances thereof muſt be obſerved, as ſealing, ſubſcription of names, witneſſes, and the like; otherwiſe the revocation will not be good. And therefore if the Proviſo be, that if the Covenantor ſhall be minded to revoke, and ſhall declare his mind by writing indented under his Hand and Seale, delivered before three Witneſſes, the uſes ſhall be void; in this caſe a revocation by word without writing, or by a writing and not indented, or by writing indented

and

and not under Hand and Seale, or under Hand and Seale, and before two Witneſſes only, is not good. And yet if a Proviſo be that if the Covenantor ſhall at any time during his life by writing under his Hand and Seale delivered before two witneſſes revoke the ſame &c. the old uſes ſhall be void, and the Covenantor by his laſt Will and Teſtament in writing under his hand and Seale before two Witneſſes doth give the land to another, and make no expreſſe revocation of the former uſes; this is a good revocation in Law. If the Proviſo be that if the Covenantor be minded at any time during his life to revoke the ſame uſes &c. and ſhall pay or tender to *A B* 20s. in ſuch a place; in this caſe tender of this 20s. in that place at any time is not good, unleſſe he happen to meet with *A B* at the place, for then tender at any time is good; but otherwiſe the Covenantor muſt give notice to *A B* what time he will tender the 20s. in that place, otherwiſe the revocation is not good. If one be to marry his daughter to the ſonne of another man, and they do mutually covenant to ſtand ſeiſed of their lands to the uſe of their ſonne and daughter with Proviſo to revoke the uſes with the conſent of the mothers, if they or either of them be then living, and one of them dye; in this caſe a revocation by the conſent of the ſurviving mother is ſufficient. 3. When the covenantor doth make void ſuch uſes by vertue of ſuch a revocation, he is ſeiſed again of the land in Fee-ſimple, as he was at firſt without any entry or claim. 4. This power of revocation, whether it be preſent, as thoſe before and moſt are, or future, as when they are upon contingent, as if the Covenantor over-live *I S* or the like, when it is reſerved to the party himſelf that made the uſes, may by his Fine, or Feoffment be utterly extinguiſhed; As if he make a Feoffment, or levy a Fine of the land whereunto the uſes and proviſo are annexed; by this the Proviſo is extinct; And yet ſo as if he make a Feoffment, or levy a Fine of part of the land only: this ſhall extinguiſh his power but to that part only: But if the power be reſerved to a ſtranger, it ſeems the Fine or Feoffment of him that made it, will not extinguiſh it. This power alſo when it is preſent may be extinguiſhed by a Releaſe made by him that hath the power, to any one that hath any eſtate of Franktenement in the land in poſſeſſion, reverſion, or remainder; or it may be avoided by Defeaſance whether it be preſent or future.

Trin. 18. Ia. Co. B. Tibbet & Leas caſe.

Co. 8. 92.

Trin. 18. Ia. B. R. Savill & ſterlings caſe.

Co. 1. 111. 112. 113. ſuper Litt. 237.

Releaſe.

Defeaſance.

10. Other Truſts and Confidences of lands and of chattels reall and perſo-

If one convey his lands to certain friends in truſt, to the intent that they ſhall convey it to ſuch perſons as he ſhall ſet down in his laſt Will and Teſtament; or if a man deliver money to a friend in truſt to purchaſe land for him and his heirs, to the end that he may have the profits thereof for his life, and to the end

Cromp. Iur. 48. 59. 58. 54. Dyer 160. Fitz. Accompt. 122

it

it may be conveyed to them afterwards: or if a man deliver money to his friend to buy land for him that doth deliver the money in his own name; or if a man enfeoffe his friend and his heirs of land, to the intent that he ſhall alien the land to whom *I S* ſhall appoint; or if land be conveyed to me in Mortgage and I pay all the money, but I to prevent the joynture of my wife, or for ſome ſuch like cauſe name a friend joynt purchaſor with me, and ſo the conveyance is made to us both; if in any of theſe caſes, or in any other ſuch like caſe the friend truſted prove falſe, and do not perform the truſt, but turn the profits of the land to their own uſe, or refuſe to ſettle it according to the truſt, or the like, the party grieved muſt have his remedy in Chancery, for theſe are not Truſts or Uſes within the Statute, nor ſuch for which there is any remedy at the Common-Law; And in that caſe where the land is ſetled to the intent, that the friends truſted ſhall ſettle it where *I S* ſhall appoint, if *I S* do not appoint how it ſhall be ſetled, it ſeems the Feoffees ſhall have it to their own uſe.

nall, The nature of ſuch Truſts, the duty of them that are truſted, and the remedy to bee had againſt them for breach of their truſt

Cromp. Iur. 65. Dyer 369. Broo. Feofment al uſe 60. Cromp. Iur. 62. 45. 11 Ed. 4. 2. 7 Ed. 4. 29.

And if a man give or grant his goods or chattels, as Leaſes for yeares or the like to friends in truſt to the uſe of himſelf for life, and after to perform his Will, or the like; theſe are ſuch uſes and truſts as are not within the Statute of uſes, and for the breach of which there is no remedy at the Common-Law but in Chancery only. So if an Obligation or Statute be made to *A B* to the uſe of *C D*; this is a truſt of the ſame nature; and if *A B* releaſe the Obligation without the conſent of *C D*, or get the money into his own hands, *C D* ſhall have relieſe in Chancery; And in all theſe caſes and ſuch like caſes, the generall rules by which uſes were governed at the Common-Law are ſtill in force and to take place as thoſe by which uſes and truſts are now for the moſt part governed. As 1. If there be any cauſe to ſue for or about the lands or goods wherewith the parties are truſted, as if they deny or delay to perform the truſt, they muſt be compelled thereunto by ſuite in Chancery. 2. The *Ceſtui que uſe*, or party for whom the truſt is, cannot of himſelfe diſpoſe of the lands or goods, for the property and intereſt in Law is in the Truſtees; and if it be an Obligation or Statute that is made to the uſe of another, *Ceſtuy que uſe* cannot releaſe it, but the Truſtee muſt releaſe it. 3. If the party truſted ſo with lands, goods, or chattels give, grant, or ſell the ſame lands, goods, or chattels to one that hath knowledge of the ſame uſes or truſts (as it is alwayes preſumed he hath where the truſts are expreſſed upon the ſame Deed, by which the lands, goods, or chattels are given or granted) or if the things ſo given or granted, be granted upon the ſame truſts, or to the ſame uſes, or without any conſideration at all; in theſe caſes

7 Ed. 4. 29.

Cromp. Iur. 62. 63. 65. 11 Ed. 4. 24. Ed. 4. 37.

caſes he to whom the thing whereabout the truſt is, ſhall have the ſame thing upon the ſame truſt and to the ſame uſe as he that did give or grant the ſame had it. But in caſe where no truſt or uſe is expreſſed upon the Deed, the purchaſor or buyer hath no notice or knowledge of the uſe or truſt, and hee gives a valuable conſideration for the thing, there for the moſt part the ſale is good, and the party grieved thereby hath no remedy but againſt the party firſt truſted in Chancery; and the purchaſor ſhall have and enjoy the thing ſo bought to his owne uſe for ever; but he that is the party truſted, will bee forced in Chancery to make the party grieved an amends in damages for this breach of truſt; And if there be any practiſe, packing, or combination betweene the buyer and the ſeller in the matter, there perhaps the Suit may hold againſt them both, and the buyer may be forced to reſtore the thing it ſelfe. * And yet if *A* enter into a Statute to *B* and *C* to the uſe of *B*, and *A* having notice of this uſe doth get a releaſe from *C*: in this caſe it ſeemes *B* muſt have his whole remedy againſt *C*, and ſhall have no remedy againſt *A*. 4. If the Truſtor or *Ceſtuy que uſe* in theſe caſes commit Felony &c. ſo that the things if he had the property of them were forfeit; in this caſe it ſeemes that neither they nor their Heires, Executors &c. nor yet the Lord &c. ſhall have them, but the Truſtees ſhall keep them for ever. 5. If the *Ceſtuy que uſe* or Truſtors dye and appoint how the ſame things ſhall be diſpoſed of, the Truſtees are bound to ſee it done; as if the Truſtor appoint it ſhall pay his debts, or provide Legacyes, the parties truſted muſt take care it be ſo imployed; and in this caſe the Debtees and Legatees alſo may compell the Truſtees in Chancery. 6. In all theſe caſes regularly the thing whereof the truſt is, is in equity at the diſpoſing of him that is the *Ceſtuy que uſe*, unleſſe he do otherwiſe appoint it, and if at his death he make no diſpoſition thereof it ſhall goe to his Heire, Executor &c. 7. In all theſe caſes the Truſtees ſhall have their reaſonable allowance in Chancery for whatſoever they have laid out about the land &c. in Suites or otherwiſe for the profit of the Truſtor. Out of all which may appeare how dangerous it is for a man to meddle with any lands, goods, or chattels ſo conveyed or ſetled in truſt, for the *Ceſtuy que uſe* or Truſtors have no property in the thing, and therefore they cannot ſell or give it, and the Truſtee hath it but to anothers uſe; And it is not ſafe therefore to deale with either of them alone, nor yet indeed ſafe to deale at all in theſe caſes, unleſſe the buyer may have the conſent, ſale, and aſſurance, or the Releaſe &c. of the Truſtors and Truſtees

* 11 Ed. 4. 8.

Broo. Feoffment al uſe 34.

15 H. 7. 12. Cromp. Iur. 54.

Dyer 49.

8 H. 7. 11.

ſtees altogether; And if there bee any woman Covert, or Infant within the Truſt, it is moſt of all dangerous. And if goods or chattels be given to, or to the uſe of a Feme Covert, or Infant, and certaine friends are truſted therewith, if they doe ſell or give away theſe goods or chattels contrary to the Truſt, they muſt be ſure to anſwer it, if therefore they ſell them, let them ſee that the money made thereof be as beneficiall, and be beſtowed for the wife or children; for it ſeemes it is not ſufficient in this caſe, that the money made thereof bee paid to them.

7 Ed. 4. 14. Fitz. Subpena. 5.

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