

Lib. III. Cap. XI. Of Discontinuance. Sect. 598, 599, 600.

Statute of W. 2. ca. 1. De donis conditionalibus, Quod non habeant illi quibus reuementum sic fuerit datum potestatem alienandi, &c. Upon these Words the Sages of the Law have construed the said Act according to the Rule and Reason of the Common Law, and that in diuers and sundry variable Manners. For some Alienations of Tenant in Tail they have adjudged voidable by the Issue in Tail by Action only; some at the Election of the Issue in Tail to avoid it by Action, Entry or Claim; some are meerly void by the Death of the Tenant in Tail; which several Constructions were made upon the self same Words aforesaid.

18 E. 3. 12. 19 E. 3. Bre. 468. 24 E. 3. 28. 36 Aff. 8. 22 R. 2. Discon. 5 E. 4. 3. 4 H. 7. 17. 33 E. Formedon & 13. 7. Pl. Com. Smith and Stapleton's Case. 3 Co. 85.

Plowd. 437. a.

As for Example; If Tenant in Tail make a Feoffment in Fee, this drives the Issue in Tail to his Action, which is called in Law a Discontinuance; and this Construction was made, for that at the Common Law the Feoffment of an Abbot or Bishop, or of the Husband seised in the Right of his Wife, did work a Discontinuance, and did drive the Successor and the Wife to their Action, and foreclosed them of their Entry: And as the Entry of the Issue was taken away, so consequently of them in Reversion and Remainder. Also if an Abbot, Bishop, or Husband in the Right of his Wife, seised of a Rent, or of any other Inheritance that lieth in Grant, had aliened, it was in the Election of the Successor or Wife after the Death of her Husband to claim the Rent, &c. or to bring an Action; for that Alienation did not work a Discontinuance; and so it is by Construction in Case of Tenant in Tail. Lastly, If the Abbot, Bishop, or Husband, had granted a Rent newly created out of the Land, &c. to another in Fee, this had utterly ceased by their Death; and so it is also by Construction in Case of Tenant in Tail. So as these Words (Non habet potestatem alienandi) do work these Effects, viz. as to Lands, that a Feoffment barreth not the Issue, &c. of his Action, but worketh a Discontinuance to bar him of his Entry: As to Rents or any Thing in esse, that lie in Grant, that the said Words do take away his Power to make any Discontinuance; as to Rents, &c. newly created, that they take away his Power to make them to continue longer than during his Life.

But there is a Diversity between an Alienation working a Discontinuance of an Estate which taketh away an Entry, and an Alienation working, deuesting or displacing of Estates, which taketh away no Entry. As if there be Tenant for Life, the Remainder to A. in Tail, the Remainder to B. in Fee, if Tenant for Life doth alien in Fee, this doth deuest and displace the Remainders, but worketh no Discontinuance. And therein it is to be observed, That to every Discontinuance there is necessary a Deuesting, or Displacing of the Estate, and turning the same to a Right: For if it be not turned to a Right, they that have the Estate cannot be driven to an Action. And that is the Reason that such Inheritances, as lie in Grant, cannot by Grant be discontinued, because such a Grant deuesteth no Estate, but passeth only that which he may lawfully grant; and so the Estate it self doth descend, reuert, or remain, as shall be said hereafter in this Chapter.

A. maketh a Gift in Tail to B. who maketh a Gift in Tail to C. C. maketh a Feoffment in Fee, and dieth without Issue, B. hath Issue and dieth, the Issue of B. shall enter; for albeit the Feoffment of C. did discontinue the Reversion of the Fee-simple which B. had gained upon the Estate-tail made to C. yet could it not discontinue the Right of the Intail which B. had, which was discontinued before; and therefore when C. died without Issue, then did the Discontinuance of the Estate-tail of B. which passed by his Liberty, cease; and consequently the Entry of the Issue of B. lawful; which Case may open the Reason of many other Cases.

Ante 187. b. 188. a.

Also note, That a Discontinuance made by the Husband did take away the Entry only of the Wife and her Heirs by the Common Law, and not of any other which claimed by Title paramount above the Discontinuance. As if Lands had been given to the Husband and Wife, and to a third Person, and to their Heirs, and the Husband had made a Feoffment in Fee, this had been a Discontinuance of the one Moiety, and a Disseisin of the other Moiety: If the Husband had died, and then the Wife had died, the Survivor should have entred into the whole, for he claimed not under the Discontinuance, but by Title paramount from the first Feoffor; and seeing the Right by Law doth survive, the Law doth give him a Remedy to take Advantage thereof by Entry; for other Remedy for that Moiety he could not have.

¶ Fee, ou Fee taile. And so it is of an Estate for Life.

Sect. 598, 599, 600.

Item, si Tenant en Tasse soit disseise, & il releffa per **A**lso, if Tenant in Tail be disseised, and he release by his son