# THE NATURE AND PRACTICE OF Real Actions

In their

## WRITS and PROCESS,

Both Original and Judicial;

Together

With ſome *RECORDS* in the Court before the Juſtice of the County Palatine of *Cheſter*; proving the Antiquity of the Juriſdiction of that Court, and of ſome Families.

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*LONON.*

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THE

# Introduction.

THough Real Actions are now much worn out of uſe for the Recovery of Lands, yet the Learning concerning them is of no ſmall advantage for the true underſtanding of the original Cauſe of many Points in Law that do and may occur in daily Practice at this Day. And without ſome competent knowledge of this nature, it is not poſſible for any to be well grounded in the true reaſon of the Common Law, ſo as to be able to give ſound Advice in all Caſes that may happen, eſpecially relating to Titles of Land and Hereditaments. In the learning of theſe Actions, eſpecially in the learning of pleading therein, *Conſiſt in the Theory and Practick. In the Practick is Comprehended the nature of the Writ to be ſued forth, the Proceſs and Proceedings in the ſeveral Actions to Judgment. The Theory contains the*

*learning of Pleading in the ſaid ſeveral Actions.* That is, how to Count, plead in Barr, to Reply, *&c. And in this* lies the marrow and reaſon of the Law, for in ſuch Caſes a Man muſt underſtand the nature of Titles to Land, by Conveyance, Deſcent, Diſſeiſin, Diſcontinuance, Abatement, Remitter, where Entry is lawful, where not lawful. *I have in this Treatiſe attempted ſomething both as to the Firſt and to the Latter.* He that knows well how to plead well in real Actions, will know the better how to plead in many perſonal Actions, as in Actions of *Treſpaſs* and *Replevin*, where the Freehold comes in queſtion. By the pleadings in a *Quod permittat, Secta ad molendinum, Curia claudenda, &c.* the knowledge of pleading or declaring in Actions upon the Caſe for Ways, Markets, Commons, *&c.* Suit to the Milne, for Non-incloſure, may be had, and to plead Preſcriptions in ſuch Caſes. The like may be ſaid of moſt or many other real Actions. The Learning of Aſſiſes holds out fully the nature of Titles of Entry, whereby a Man may be ſufficiently inſtructed how to manage an *Ejectione firme*, which is now the Com

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mon Action for recovery of Lands where the Entry is lawful.

They are called Real Actions to diſtinguiſh them from Perſonal Actions which are grounded upon Contracts, Torts, *&c.* of Men one amongſt another, for which Damages or ſomething Perſonal is to be recovered, and theſe follow the Perſon. Real Actions are ſuch as are for the recovery of the Freehold or Inheritance of Lands or Hereditaments, and theſe are either Purely Real or Mixt; Purely Real are ſuch as are for recovery of Land only without Damages (for no Damages were recoverable by the Common Law in any Real Action) Mixt are ſuch, as where both Lands and Damages are recoverable by the Common Law. As Aſſiſe of *Novel diſſeiſin*, Writs of Entry, Attaint, *&c.* *Bro. Coſts.* 29.

More particularly theſe Real Actions may be ſubdivided into divers Kinds. 1. Into Writs of Right. 2. Writs of Entry. 3. Writs of the Anceſtours Poſſeſſion, called *Poſſeſſory Anceſtrel*, and all thoſe called *Præcipe quod Reddat's.* 4. Writs which contain no expreſs demand in the Writ, *i. e.* no number of Acres or Meſſuages, and be-

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gin with theſe words, *Si A fecerit te ſecurum, &c.* And the *Aſſiſe* of *Novel diſſeiſin*: Theſe are for the Recovery of Lands in *Demeſne.*

6. Co. 11. Other Real Writs there are for recovery of Hereditaments, and for performing and doing other things concerning Lands and Hereditaments. Of the firſt ſort are 1. A Writ of Right Patent, *&c.* Right Cloſe, this is the pureſt and higheſt Writ of Right, 2. A Writ of Right of Dower, a Writ of Right *De Rationabili parte*, a Writ of Right *Sur Diſclaimer.* Writs of Right in their nature are, The Writ of *Eſcheat*, *Formedons*, *Quod ei deforceat*, and ſome others. Of the ſecond ſort are, 1. Writs of Entry in the *Per*, *Cui*, *Poſt*, as Writs of Entry in nature of an Aſſiſe, 2. Writs of Intruſion, 3. *Cui in Vita*, 4. *Cui ante divortium*, 5. *Sur Cui in Vita*, 6. *Dum non fuit Compos mentis*, 7. *Dum fuit infra ætatem*, 8. VVrits of Entry at Common Law, 9. *Ad terminum qui præteriit*, 10. *Cauſa matrimonii prælocuti*, 11. *Sine aſſenſu capituli*, Of the Third ſort are, where the Anncſtour (not being Father, Mother, Brother, Siſter, Uncle, Aunt, Nephew,

or

or Neece, for of them a *Mortdanceſter* lies) died ſeiz'd, *viz.* The VVrits of *Ayel*, 2. *Beſayel*, 3. *Cozinage*. Of the Fourth ſort are the *Nuper obiit* and *Mortdanceſter*.

Thoſe for Recovery of other Hereditaments, and for doing and performing other things concerning Lands and Hereditaments are, 1. A VVrit of Annuity, 2. *Quare Impedit*, 3. *Juris Utrum*, 4. *Attaint*.

*Errata*

# ERRATA.

P. 5. *l.* 14. *r.* at this day. *p.* 7. *l. ante penultima. r. in manum noſtram. p.* 9. *l.* 4. *r.* in Aſſiſe, *dele* (the) *p.* 12. *l.* 19. *r.* Amercement is of Courſe. *p.* 16. *l.* 16. *r.* ſourch by Eſſoins. *p.* 23. *l.* 10. *r. Cumbermere. p* 24. *l.* 2. *r.* in real *Præcipe quod. p.* 32. *l. ult. r.* 39 E. 3. 36. *p.* 38. *l.* 9. *r.* but to be allow'd in a Writ. *p.* 38. *l. ante penultima, r.* 2. Waſt. 3. Aſſiſe of *Nuſance. p.* 47. *l.* 7. from the bottom *r.* firſt Vouchee. *p.* 48. *l.* 8. from the bottom *r.* Voucheth them the Cauſe &c. *p.* 50. *l.* 12. *r.* Counteuanc'd by the Law. *p.* 51. *l.* 7. outed great delays. &c. *p.* 56. *l. ult. dele* theſe words, *viz.* (ſo that the *Common Pleas* cannot admit of a Voucher over) then *r.* and delay to be given, &c. *p.* 57. *l.* 6. from the bottom *r. Feſt. beat. Mariæ. p.* 58. *l.* 7. *dele* theſe words, *viz. Vid. Contra f.* 56. *p.* 60. *l.* 4. *r.* ſhew a Charter, &c. *p.* 64. *l. ult. r. Vid. antea, c.* diſtreſs. *p.* 76. *l.* 18. *r.* and the learning here of is, &c. *p.* 85. *l.* 8. *r.* Entry of the Demandant is, &c. *p.* 132. *l.* 25. *r. Juſticies. p.* 147. *l.* 13. *r. reliquit verifieationem.* 147. *l.* 21. *r.* and at the Return. *p.* 155. *l.* 2. *r. pd. L. obiit. p.* 155. *l.* 15. *dele* (*fil. & hæred. L.*) *p.* 158. *l.* 26. *r. pro prox' p.* 159. *l.* 6. *r. pro prox'. p.* 160. *l.* 8. *r. pro prox' p.* 160. *l.* 11. *dele* (Another Rule) *p. ibidem. l.* 18. *r. pro prox'. p.* 170. *l.* 12. For *avint r.* Flint. *p.* 178. *l. ult.* for only remedy *r.* ordinary remedy. *p.* 249. *l.* 16. *dele* theſe words, *viz.* Writ of Covenant to levy a Fine. p. 250. *l.* 9. *r.* the Grantee cannot, &c. (for Cognizee cannot) *p.* 261. *l.* 9. *r. idem A. capiatur.*

OF

# REAL ACTIONS

## In GENERAL.

### CAP. I. LIB. I.

Where to be sued forth.

When a Real Action is to be brought for the Recovery of Lands or Hereditaments, the Original Writ is in the first place to be sued out of the High Court of Chancery, which is called the Officina Justiciæ; and that kind of Original must be sued forth as is most agreeable to the Nature of the Cause duly considered according to the Rules of Law. Wherein observe some Cases may admit of several Remedies, and one Real Writ or another may be brought at the Election of the Demandant, as a Nuper obiit, or a Mortdancester, an Assize of Novel Disseisin, or a Writ of Entry in Nature of an Assize, a Mortdancester or a Formedon in Remainder, and many others, as the Case may be.

29 H. 8. 59. 11 H. 4. 55. Co. lib. 2. 61. a. Co. lib. 6. 7. b. Election of Actions.

What Actions first to chuse.

But this is to be observed as a Rule, that where there may be such Election, it is the most prudent Course to chuse that Writ which is of the lower, rather than that of an higher Nature; for a Recovery in that of a lower Nature will be no Bar to an Action of an higher Nature. Whereas on the contrary, a Recovery in the higher Action may be a Bar to that of a Lower Nature; and therefore not prudent to sue forth a Writ of Right, when you may have a Writ of Entry; or a Writ of Entry, when you may have a Mortdancester, Ayel, Besayel; or these where you may have an Assize or Novel Disseisin: and so of other Writs pari ratione.

Co. lib. 6. 7. b. 8. a. Dyer. 5. Co. lib. 4. 43. 9 H. 7. 23.

2. Every Writ generally must have 15 days at the least between the Teste and the Return.

In what County to be laid.

3. By the Law, every Real Writ, for the most part, must be brought in the County where the Land lies, Bract. 189. & 414. If the Lands lie in several Counties bordering one upon another, the Assize must be brought in Confinio Comitatus; and it's said, it ought so to be mentioned in the Writ, 35 H. 6. 30.

The Order of things in a *Præcipe.*

4. In every Præcipe quod reddat an Order is to be observed in placing the things demanded in the Writ; the more worthy Thing should always be placed before the less worthy, the General before the Special, and the Intire before its Parts. Therefore Land upon which a House is built, being for the Habitation of Man, is more worthy than Land without building; and therefore a Messuage shall be first demanded, and of Messuages a Castle before other Messuages, and before a Manor, though it be part of a Manor, 1 E. 3. 4. 7 H. 6. 39. So Land shall be demanded before Meadow, Pasture, Wood; for Land is the Genus to these; and so Boscus, Wood, shall be demanded before Alnetum, Salicetum, which are but Species of Wood. So the Intire shall be demanded before the Moiety, or other Part, F. N. B. 4. Regist. The Order of things to be demanded in a Præcipe, is comprehended in these Verses, viz.

*Messuagium, Toftum, Molendinum, Columbare, Gardinum,*
*Terra, Pratum, Pastura, Boscus, Bruera, Mora.*
*Juncaria, Mariscus, Alnetum, Piscaria, redditus sectare priora.*

What words to be in a *Præcipe.*

5. In every Writ of Entry of his Ancestors Possession, he who demands the Inheritance, must say in the Writ (Quod clamat esse Jus & hæreditatem suam) but not if he be Tenant in Tail, or for Life. But in declaring he must shew his particular Estate, F. N. B. 201. Nor he who claims of his own Possession, except it be in a Cui in Vita, or Cui ante divortium.

*Bis petitum.*

6. If one thing be twice demanded (called bis petitum) in one and the same Præcipe, the Writ shall abate; as to demand a Manor and Rent, if the Rent be parcel of the Manor, the Writ shall abate, 3 E. 3. 85. So of a Manor and an Advowson, if the Advowson be appendant to the Manor, 6 E. 3. 267. M. 33 E. 3. Br. 919. So in a Formedon of a Manor, and of a Messuage and Land, if the Messuage and Land

Land be Parcel of the Manor, the Writ ſhall abate, 46 E. 3. 26. 9 H. 6. 42.

4. In every Præcipe quod reddat muſt be alledged where the Land lies, and this muſt be in a Vill, or Lieu conus, and not in an Hamlet, 9 E. 4. 36. 8 E. 4. 6. 34 H. 6. 18. Otherwiſe in perſonal Actions it may be in an Hamlet; and ſo in Dower, where no Land in certain is demanded: And alſo in Aſſize it may be in an Hamlet, becauſe the Recovery ſhall be by View of the Jurors; and ſo in a Scire fac' out of a Fine, Nuper obiit, Writ of Meſne, Covenant, Waſte, Quare Impedit, theſe may be in an Hamlet, 17 E. 3. 56. 18 E. 3. 11. but otherwiſe it is of a Writ of Right of Advowſon, 9 E. 4. 36. The Writ muſt alledge the Vill where the Land lies.

Theſe Real Writs lie only againſt the Tenant of the Freehold; and therefore Non tenure of the whole, or of parcel, Joyntenancy with another not named in the Writ, Intire Tenancy of the whole, or Several Tenancy, of Parcel when the Writ is brought againſt two or more, are good Pleas in Abatement at Common Law; but now by the Statute of 25 E. 3. c. 16. Non tenure ſhall not abate the Writ but for the Quantity, Lit. 115. 19 H. 6. 32. 37 H. 6. 8. 27 H. 8. 30. Tenant to the *Præcipe*.

In theſe Real Actions he who brings the Writ, is called Demandant, and he againſt whom it is brought, Tenant. Demandant, Tenant.

For the more diſtinct and certain Knowledge of the Nature and Proceedings in theſe Actions, I purpoſe this Method following: Firſt, To ſet forth ſomething of the Nature of thoſe things that are Incidents to theſe Real Actions before Appearance of the Tenant: And under this Conſideration I ſhall take, 1. Summons. 2. Attachment. 3. Diſtreſs. 4. Default. 5. Grand Cape. 6. Saver Default. Incidents before Appearance.

2. Such as are Incidents after Appearance concerning the Writ, as, Summons and Severans, Non tenure, Sole Tenancy, Several Tenancy, Imparlance. After Appearance.

3. Such as are Incidents after Appearance before Pleading to the Action, as, View, Eſſoin, Voucher, Counterplea of Voucher, Counterplea of Warranty, Aid Prier. After Appearance before Pleading.

After Appearance and Pleading.

4. Such as are after Appearance and after Pleading, as, Eſſoin, Default, Petit Cape, Receit, Departure in deſpite of the Court, and Judgment.

Particular Actions.

Having gone through theſe which generally concern all Real Actions, I ſhall deſcend to particular Writs diſtinctly under a ſeveral Head: And in Proſecution of this Purpoſe, I ſhall firſt, for Order ſake, begin with Writs of Right, then proceed with Writs of Entry, and laſtly to ſome other particular Writs promiſcuouſly; and in the Tract of every particular Writ, ſhall endeavour firſt to ſhew the Nature of the Writ, and the ſeveral Kinds of it, if it be diviſible. 2. Then the incident Proceſs before and after Appearance. 3. Some Rules of Law, eſpecially of Pleading concerning that particular Writ or Action.

## CAP. II.

## Of Summons.

Summons the firſt Proceſs in all *Præcipe quod Reddats.*

THE Original Writ in Real Actions, commands the Sheriff to ſummon the Tenant to anſwer the Demandant at a certain Day. And this is the firſt Proceſs in all Præcipe quod Reddats, which run thus, viz. Præcipimus tibi quod ſumm' per bon' ſummonitor' *J. B.* qd' ſit, &c. and therefore the Entry upon Record, after Appearance, is in all thoſe Writs thus, viz. *J. S.* ſummonit' fuit ad reſpondend' T. B. de pl'ito qd' reddat, &c. according to the Nature of the Writ; this is as much as Vocatio ad Jus, or Citatio amongſt the Civilians.

By whom and how many to be made.

This Summons in Real Actions muſt be made by two Summoners at the leaſt, 8 H. 6. 5. 35 H. 6. 46. And they muſt be liberi & legales homines, that they may teſtifie the Truth of the Summons, if they come to be examined by the Juſtices, Fleta lib. 6. c. 6. Co. lib. 6. 158. b. Fleta lib. 4. c. 5.

This

This Summons is to be made by the Sheriff or his Bailiff, either to the perſon of the Tenant, or upon the Land demanded, and there with the Summons warn the Tenant to appear and anſwer; and then the Sheriff is to return the Writ and the Summons, 37 H. 6. 26. How the Sheriff is to demean himſelf in ſummoning the Tenant upon the Land, Vid. Dalton's Office of a Sheriff, 149. Fleta ibid. Vid. 43 E. 3. 1. The Formalities. How to be made.

When Real Actions were ordinarily uſed, antiently the Summoners were Perſons that were actually imployed by the Sheriff for that purpoſe, and their Names return'd; whereas generally now no actual Summons is really given, but Names of Summoners of Courſe return'd by the Sheriff upon the Writ; but if the Tenant at ~~that~~ day ſhould come to wage his Law of Non-Summons, ſuch Summons of Courſe would not ſupport the Writ. Vid. Modern Rep. 248. *Searl verſus Long.* Summons actually made formerly.

By the Statute of 31 Eliz. c. 3. In Real Actions Proclamation muſt be made fourteen days before the Return of the Writ Die Dominico after Divine Service and Sermon, &c. which Proclamation the Sheriff muſt return with the Names of the Summoners, or no Grand Cape ſhall iſſue, but un al' Summons or Plur'; and ſo far as to the Proclamation the Common Law is altered. Proclamation, *Stat.* 31 *Eliz. c.* 3.

None ſhall be ſummoned to appear to anſwer forthwith in Real Actions, ad ſtatim reſpondendum, as Fleta expreſſes it, Fleta lib. 6. c. 6. But there ſhall be Fifteen Days at leaſt between the Summons and the Day to appear and anſwer; and this is provided by the Statute of Articuli ſuper Chartas, c. 15. 25 E. 1. which is but in affirmance of the Common Law, Co. 2. Inſt. 567. And the reaſon of ſo many Days was, becauſe ſo many Days Journey (Twenty Miles being accounted a Days Journey called Dieta) the Common Law did account a reaſonable time for him that was ſummon'd or attach'd to appear in any part of England whereſoever the Court of Juſtice ſate, Bract. lib. A. f. 235. 19 H. 7. c. 1. Co. 2 Inſt. 567. Fifteen days between Summons and the Teſt of the Writ.

Default, then *Grand Cape.*

If the Tenant do not appear, being legally ſummon'd (this is called a Default) a Writ call'd a Grand Cape ſhall be awarded againſt him; at the Return of which, if he do not appear, and ſave his Default by Non-Summons, or other lawful Excuſe for his Non-appearance (if the Demandant will ſtand upon the Default) the Demandant ſhall have Judgment to have Seiſin of the Land. But of this more ſhall be ſaid in Default, Grand Cape, and Saver Default, Fleta lib. 6. c. 6. 379. 50 E. 3. 16. 38 H. 6. 33.

Summons in Judicial Writs:

There are Judicial Writs in the Proceedings in theſe Actions, which require the Party to be ſummon'd, as well as the Originals, as Summons ad warrantizand, Cape ad Valentiam, Grand Cape, Petit Cape, Petit Cape ad Valentiam, of which in their proper Places.

Summons in *terra petita.*

In a Præcipe quod reddat againſt Tenant for Life, if he in the Reverſion be pray'd in Aid, and the Sheriff return (Nihil) upon the Scire Fac', or Summons ad Auxiliand', but that he ſummoned him in the Land demanded (in terra petita) it's good, 12 H. 4. p. 5. 38 Aſſ. p. 18.

## The Entry of Summons upon Record before Appearance, is thus, *viz.*

Salop. ff. Record.

Præceptum eſt Vic' qd' ſum' per bon' Summonit' *B.* qd' eſſet hic ad hunc diem ſcilicet ad reſpondend' *A.* de placito qd' reddat ei unum Meſſuagium cum pertinen' in *C.* &c. Et modo ad hunc diem ven' prædict' *A.* in propr' perſona ſua. Et Vic' modo mand' qd' prædict' *A.* non invenit ſibi pleg' de proſequend' &c. Ideo ſicut prius præceptum eſt Vic' qd' ſum' per bon' ſummonit' prædict' *B.* qd' ſit hic tal' die ad reſpond' præfat' *A.* de prædict' pl'ito, *Raſt. Entr.* 362. *a.* Novel. Imprint.

This al' Summons is a Judicial Writ, and is made upon the Original by the Prothonotary when the Summons for ſome Special Cauſe is not return'd by the Sheriff upon the Original, as for not giving Pledges, as in this Preſident, or where the Sheriff returns Tarde, or the like, Regiſtr. Judicial. 56. b. & 2. b.

The

The Entry of an *al' Summons* upon a *Tarde* return'd, is thus:

Salop' ſſ. Præceptum eſt Vic', &c. qd', &c. Et modo ad hunc diem ven' pd' *A.* per *L.M.* Attorn' ſuu' (vel in propr' perſon' ſua) Et Vic' tunc mand' qd' bre' adeo tarde, &c. per qd' ſicut prius præcept' fuit Vic' qd' ſum' pd' *B.* quod eſſet hic, &c. Raſt. Entr. 417. a. Journey's Accounts 2.

Proceſs in *Præcipe qd' Reddats*, firſt is Summons; what in other Real Actions.

In all Præcipe quod Reddats, which are properly and ſtrictly Pleas of Land, Summons is the firſt Proceſs, and Grand Cape in Caſe of Non-appearance; in other Real Actions, or ſuch as favour of the Realty called Actions in the Realty, the Proceſs is in ſome of them Summons, Attachment and Diſtreſs infinite, as in a Writ of Annuity, Quare Impedit, Quo Jure, Qd' permittat, &c. And ſometimes the Diſtreſs is in lieu of a Grand Cape, as in a Quare Impedit, by the Stat. Dyer 241. and ſometimes for a Petit Cape. In others Summons and Reſummons, as in a Mortdanceſter. In others Attachment and Re-attachment, as in an Aſſize of Novel Diſſein, and Aſſize of Nuſans; but of theſe in their proper Places. 21 H. 6. 56. F. N. B. 489. Engliſh F. N. B. 38. Raſt. Entr. 76.

Summons may be by Lands, Goods or Perſon.

Where the Proceſs is Summons, Attachment and Diſtreſs, the Sheriff may ſummon the Party by his Lands, Goods or Perſon, 22 H. 6. 38. Br. Summons 1. 34 H. 6. 49.

After Summons is Attachment, where Summons and Attachment lie in Proceſs; and therefore of that next in Order.

But note, That in every Præcipe qd' Reddat, the Sheriff is commanded thus: Præcipe *T.B.* quod reddat *L.M.* un' Meſ. &c. So that the Sheriff by the Letter of the Writ is firſt to command the Tenant to render the Land before he ſummon him. This is not to be underſtood of a Render in Pais, for nothing can veſt in the Demandant by it, but it is to be underſtood of a Render in a Court of Record. Vid. Kelw. Rep. 116. b. So that they are but words of Form, as the words Cape in manum ~~meum~~ in a Petit Cape, or Grand Cape, or Diſtrigas per omnes terr', &c. in a Diſtringas, &c. ibid. Vid. Co. lib. 5. 49. a.

CHAP.

## CHAP. III.

# Of Attachment.

Quotuplex.

ATtachment in the Law is of divers acceptations. In the ordinary acceptation it is a Writ to take the Body to answer to some Contempt done to a Court; or to answer to some Action there commenced, and differs nothing from a Capias: But an Attachment in the General may as well be against the Goods as the Body, and so differs from a Capias, as a Man may be attach'd by an Ox or 100 Sheep, Kitchin fol. 263.

What in Real Actions.

An Attachment after a Summons in Actions Real, is a Process to take Surety of the Defendant by certain of his Goods, to appear and answer the Action in such a Court; where if he appear not, he shall forfeit his Goods. And this Attachment must be by méer Personal Things, and not Real Chattels, nor Parcel of his Freehold, and in this differs from a Distringas; and they are to be the Defendant's own proper Goods, and not borrowed, or Goods pawn'd; and the Property of these Goods is not out of the Party, till he make default, 7 H. 6. 10. 27 H. 6. 2. 9 H. 7. 9. Br. Attachment 20. Co. 2. Inst. 254. Stat. W. 1. c. 45.

The Form of this Process is——

Writ.

Rex Vic' *B.* salutem, &c. Pone per Vad' & salvos plegios *J. S.* quod sit coram Justic', &c. ad respondend' B. de plito', &c. Et habeas ibidem no'ia pleg', &c. & hoc bre' Test', &c. This is Judicial, and is made by the Prothonotary.

May issue after an Essoine.

This Process may issue upon Default after Summons return'd by the Sheriff, or after Summons and an Essoine cast, and at the Day of the adjournment of the Essoine, if the Tenant do not warrant his Essoine, Rast. Entr. 520. b.

Upon

Upon this Writ the Sheriff may take Surety by Pledges, or attach him by his Goods. Br. Attachment 1. 7, 9. Attachment by Goods or by Pledges.

This Attachment ought to be fifteen Days between the Teſte and the Return, ſave in [redacted] Aſſize, and except ſome particular Juriſdictions, where the Proceſs by Cuſtom, or Act of Parliament, are Returnable de die in diem, as in the County Palatine of Cheſter and elſewhere. Br. Attachment 1. 5, 6. Co. Lit. 134. b. 15 days between the *Teſte* and the Retorn.

Nient Attach' per fifteen Days, ſhall be tried by Examination of the Officer who made the Return, and if he be abſent, the Attachment ſhall be [redacted] intended to be good; and the Tenant ſhall be awarded to anſwer. Br. Attachment 6. 12, 17, 18. Co. lib. 9. 31. *Nient attach'* how to be tried.

If the Sheriff take Sureties by Pledges, then the Return of the Attachment is thus: Return of the Attachment.

Infranominatus *J. S.* attachiatus eſt.

Per Pleg' { *J. D.* / *J. M.*

Or the Sheriff may return the Tenant attach'd by his Goods, thus——

Infranominatus *J. S.* attachiat' eſt.

Per Patellam ad valentiam 10 *d.* vel
Per Vaccam pretii 30 *s.*

Note, No Pledges where attach'd by Goods; otherwiſe in Dower.

A Clerk ought to be attach'd by his Perſon or Lands (if he have any Lay-fee) and not by his Goods. Fitz. Retorn. 23. Clerk how to be attach'd.

The Certainty and Value of the Goods attach'd, ought to be returned. Dyer 199. Anderſon's Rep. f. 51. Caſe 127. The value of the goods attach'd.

Record. After the returning of the Summons upon the Original, to the awarding of the Attachment, the Entry is thus——

*Norf. ff.* Record. *J. S.* per *L.* Attorn' ſuum obtul' ſe quarto die verſus *J. D.* de pl'ito, &c. Et ipſe non ven', & ſum', &c. ipſ' attachar' quod ſit hic in Octab' St'i Hillar' ad reſpond' &c.

Entry in *Cheſter.* The Entry in the Common Pleas in the County Palatine of Cheſter, is the like, ſave the words (quarto die) and the time of the Return.

All intended where Attachment lies in Proceſs in Real Actions. All that is before ſaid, is intended of Attachment in ſuch Real Actions where the Proceſs before Appearance is Summons, Attachment and Diſtreſs; for in ſome Real Actions, as in Deceit, the firſt Proceſs or Original, is an Attachment, and begins, Si *A.* fecer' te ſecurum de clamore ſuo proſequendo tunc pon' per vad', &c. and after a Diſtreſs.

The meaning of returning Pledges. If the Tenant do not appear upon the Return of the Attachment, then the Pledges are amerced, Ideo ip'i in mia', &c. for the Pledges do undertake the Defendants ſhall appeare; but Pledges are now feign'd Perſons return'd of Courſe, and ſo the Commencement is of Courſe,

The Pledges to be amerc'd in caſe of default.

Enty *Io' ipi' in mia'*, &c. So note, That the Pledges are only to be amerc'd, if the Tenant do not appear. Vid. Raſt. Entr. Q Imp. 520. in Proceſ. Vid. Leon. 2 p. 185. Crompt. Juriſdict. of Courts 169.

How the Entry muſt be when return'd attach'd by Goods. This is to be underſtood where the Sheriff returns the Attachment by Pledges; for where he returns the Attachment by Goods, there the Entry is not qd' ipi' in mia', becauſe there are no Perſons to be amerc'd but the Tenant, qd' ipſe in mi'a, &c. and the Value of the Goods to be eſtreated. Quær' the Entry. Vid. Dyer 199. 34 H. 6. 29. The Goods are to be forfeited. The Entry is in Dyer 199.

CHAP.

# CAP. IV.

## Of Diſtreſs.

IN Real Actions where the Proceſs is Summons, Attachment and Diſtreſs, if the Tenant do not appear at the Return of the Attachment, then is awarded a Diſtreſs or Diſtringas; and this is made by the Prothonotary upon the Return of the Attachment, and runs thus—— Diſtreſs when to be awarded.

Rex Vic' *B.* ſal'tem, &c. Præcipimus tibi quod diſtring' *J. B.* nuper de, &c. per omnes terras & catalla ſua in Balliva tua ita qd' nec ipſe nec aliquis per ip'm ad ea manum appon' donec aliud a nobis inde habueris præceptum. Et qd' de Exitibus eorum nobis reſpond' ita qd' hab' corpus prædict' *J. B.* coram, &c. ad reſpondend' *T. B.* de placito, &c. The Writ. Brew de Diſtringas.

Diſtreſs is divided by Britton c. 71. into Perſonal and Real; Perſonal is the diſtraining all the moveable Goods of the Party, and the ſeiſing by the Sheriff all the Profits of the Land from the Teſte of the Writ; which being return'd by the Sheriff, are called Iſſues, and for not appearing, are forfeited to the King, and eſtreated into the Exchequer. This is the Diſtreſs here intended. Fitz. 59. b. Diſtreſs *quotè-plex.*

Real Diſtreſs is that which is made only upon the Land, and cannot be taken by any common Perſon out of the compaſs of his Fee, as diſtreſs for Rent. Ibid. Diſtreſs Real.

Diſtreſs is further divided into Finite and Infinite; Finite is for ſome certain times, as once or twice, &c. Infinite, without Limitation of time, till Appearance. 52 H. 3. c. 7. Diſtreſs *Finite & Infinite.*

And it is likewiſe divided into Grand Diſtreſs, and Ordinary Diſtreſs. This Grand Diſtreſs ſeems to be the ſame with Diſtreſs Infinite. Brit. c. 26. f. 52. 52 H. 3. c. 7. 9. & 12. Co. 2. Inſt. 254. But I rather think that it's called Grand Diſtreſs when it is awarded in lieu of a Grand Cape. Grand Diſtreſs and Ordinary. Why call'd Grand Diſtreſs.

Grand Diſtreſs in lieu of a *Petit Cape* at Com. Law.

**In ſome Real Actions for Default after Appearance, a Grand Diſtreſs iſſued in lieu of a** Petit Cape, **at the Common Law, as in a** Quar' non admiſit, Convenco'e, Quar' incumbravit, Warrantia Cartæ, contra form' Feoffamenti, Contributione faciend', Quar' ſe intruſit, Quo jure, Secta ad molendinum, 2 H. 4. 1. b. 30 H. 6. 8. 2 Inſt. 254.

Diſtreſs in lieu of a *Grand Cape*.

**And in ſome Real Actions for Default before Appearance and after Summons and Attachment, the** Diſtring' **ſhall iſſue in lieu of a** Grand Cape, **by the Statute of** W. 1. c. 45. **generally, by the Statute of** Marbl. c. 12. **in a** Quar' Impedit; **and this is called Diſtreſs Peremptory, as in** Admeaſurement de Dote, **by the Statute of** W. 2. c. 14. Admeaſurement de Paſtur', Quod permittat, Warrantia Cart', Bre' de Rect' Cuſtod', Vaſto & Medio, 30 H. 6. 8. 2 *H.* 4. 1. b. Dyer 241.

Difference between ordinary *Diſtring'* and *Grand' Diſtring'* in lieu of a *Grand Cape*, and from that in lieu of a *Petit Cape*.

**The Writ of** Diſtring' **in lieu of a** Grand Cape, **is of the ſame Form with the Ordinary** Diſtring', **ſave that it is not only to conſtrain the Tenant to anſwer to the principal Plea, but likewiſe** ad audiend' judic' ſuum de pluribus defaltis; **but that in lieu of a** Petit Cape **is only** ad audiend' Judic' ſu' de plur' defalt', **without anſwering to the Action.** Fitz. 94. b. 52 H. 3. c. 9.

Retorn of the Diſtreſs.

**The Return by the Sheriff of the** Diſtring', **is thus——**

Manucap' infranominatus *J. S.* { *J. M.* / *J. L.* }

Unde Exitus xx *s.*

*Vel aliter.* T. S. diſtrict' eſt per terr' & catall' ſecundum formam hujus bris' unde exit' 20 *s.*

Et manucapt' eſt per { *J. L.* / *J. G.* }

*T. B.* Vic'.

*Vel aliter.* J. S. nihil habet in balliva mea per quod diſtring' poteſt, nec eſt invent'.

Where

Where a Diſtreſs may iſſue in lieu of a Petit Cape or Grand Cape, if the Sheriff return Iſſues, or Nihil, and default be made, Judgment ſhall be given againſt the Tenant or Defendant, as in a Warrantia Cartæ, Secta ad molendinum. Co. 2 Inſt. 254. 389. 124. Judgment upon the Diſtreſs in lieu of a Gr Cape or Petit Cape

Note that now ſince the Statute of W. 2. c. 45. where a Diſtringas may iſſue in lieu of a Petit Cape at Common Law for default after appearance; a Diſtringas in lieu of a Grand Cape may iſſue for default before appearance. Stat. W. 1. c. 45. Diſtreſs given in lieu of a Grand Cape, where in lieu of a Petit Cape at Com. Law.

But where a Diſtringas is given by the Statute, in lieu of a Grand Cape, it does not therefore follow that a Diſtringas may be awarded in lieu of a Petit Cape, as may appear, Co. 2 Inſt. 390. 7 H. 4. 15. 12 H. 4. 3, 4. In waſt a Diſtringas is given by the Statute of W. 2. c. 14. in lieu of a Grand Cape, but it does not extend to give a Diſtringas after an appearance, in lieu of a Petit Cape. W. 2. c. 14. gives Diſtreſs in lieu of Gr. Cape, but not in lieu of a Petit Cape.

The Entry of awarding a Diſtringas is thus——

Præcept' eſt Vic' qd' Diſtringat J. B. per omnes Terr' &c. Ita qd' de exitibus &c. Ita qd' habeat Corpus ſum cora' Juſtic' noſtris apud Weſtmonaſter' in Octab' Hillar' ad reſpondend' E. M. de plito' quare cum (as in Waſte) ut dic' & ad audiend' judic' ſuum de plur' defalt', & qd' habeat, &c. Salop. ff. Record.

The Entry upon Record upon default before Appearance, upon Return of the Diſtringas in a Writ of waſte——

A. op' ſe quarto die verſus B. de plito' quare cum de Commun' Conſilio &c. & ipſe non ven' Et præcept' fuit Vic' qd' Diſtring' eum &c. & Vic' modo mand' qd' diſtrict' eſt per Catalla ad valent' 10s. & manucapt' eſt per I.M. & I.B. Ideo ipſe in mia' &c. And then the Plaintiff ought to declare before the Writ of Inquiry of Waſte be awarded thus--Et ſuper hoc pd' A. dicit qd' cum &c. Et inde produc' Sect' &c. Ideo præcept' eſt Vic' qd' in propr' perſon' ſu' acced' ad pred' ten'tum vaſtat' & cora' eo Venire fac' xii. &c. Raſt. Entr. 697. Salop. ff. Record. Judgment upon the grand Diſtreſs.

So in a Quar' Imp' and needs not to Declare before the Writ of Inquiry, as in Waſt. per Co. 2 Inſt. 125. yet in Raſt. Entr' Where the Pl. in Q. Imped' muſt declare before a Writ of Inquiry, as in Waſte.

Entr. 504. There the Plaintiff Declares before, which, is ſafeſt as I conceive, Vid. Raſt. Entr. 507. a So in a Writ of Meſne. Raſt. Entr. 434.

Entry of Judgment upon default, after Appearance upon the Return of the Diſtringas.

Norfolk ſſ. Et ipſe non Ven' & habuit inde diem hic, ad hunc diem ſcil' &c. Poſtquam als' Comperuit hic in Cur', Ideo Diſtring' quod ſit hic tal' die, &c. Ad quem diem Vic' mand' quod diſtrict' eſt, &c. Et ipſe *A.* non ven' &c. Io. Conſideratum eſt &c. Et pd' *I. M.* et *J. B.* in mia', &c. Raſt. Entr. 226.

Record.

## CAP. V.

## Eſſoine

Eſſoine, what. 1. ESſoine, *Eſſonium* from the French Eſſonier or Exonier, to excuſe, and is an allegation of an Excuſe from him that is Summon'd, or ought to Appear and Anſwer to an Action, and ſaves his Default for that time, for ſome juſt Cauſe of his abſence, as ſickneſs, &c. and this is as well for the Plaintiff as Defendant in perſonal Actions, and for the Demandant as Tenant, in Real Actions. Co. 2 Inſt. 125. Fleta lib. 6. c. 7. 8.

The kinds. 2. There are five kinds of Eſſoines. 1. De ſervitio Regis. 2. In terram ſanctam. 3. Ultra mare. 4. De malo lecti. 5. De malo veniend'; and this laſt is called the Common Eſſoine. ibidem.

The ground of Eſſoines. 3. And theſe Eſſoines or Excuſes of Appearance, were provided by the Law to the end no perſon might be ſurpriz'd and prejudic'd by his abſence; in caſe he had juſt cauſe to be excuſed by any thing that was not through his own default. Fleta, ibidem.

4. There

4. There are ſome other more ſpecial Cauſes of Excuſe to ſave default in real Actions, as Vis hoſtiu', ſi incidat in latrones, Impetus fluminu', fractur' pontiu', &c. But of theſe in their proper place in ſaver default. Fleta, lib. 6. c. 7. 382. Other ſorts of Eſſoines.

5. Theſe Eſſoines are allowed both before and after appearance, before and after iſſue joyn'd; ſome of theſe Eſſoines lie not in ſome Actions, and others are limited as to number, (i. e. how many Eſſoines ſhall be) and time, and perſons by ſeveral Acts of Parliament, and ſome perſons by the Common Law ought not to be Eſſoined in ſome particular Caſes, as after Summons in a Grand Cape, the Tenant ſhall not be Eſſoin'd by the Common Eſſoine, becauſe he ſhall anſwer to the firſt default. Fleta. lib. 6. f. 396. c. 14. and many others, of which, ſee Fleta lib. 6. c. 9. 10. Where Eſſoines are allowable.

6. No Eſſoine de Servitio Regis ſhall be caſt in 1. Dower. 2. Quare Impedit. 3. Aſſiſe of darrein preſentment. 4. Aſſiſe of Novell diſſeiſin. Co. 2 Inſt. 124. 39 H. 6. 40. Stat. of Eſſoines, 12. E. 2. 2 Rec. 303 Eſſoine de Servitio Regis, where not allowable.

7. But an Eſſoine de Servitio Regis may be allow'd after a Grand or Petit Cape, or diſtrels taken upon the Goods or Lands by the Stat. of Eſſoins, 12 E. 2. Raſt. Entr. 316. b. See the Stat. of Eſſoines; ſeveral Caſes wherein Eſſoines ſhall not be allow'd. 2 Rec. 303. 4 Where allowable.

8. By the Stat. of Weſt. 1. c. 42. The Common Eſſoine ſhall not be allow'd in Mortdanceſt', Juris Utrum, and Attaints after appearance, and this was for the Tenants Eſſoine. And by the Stat. of Weſt. 2. c. 28. the Demandant ſhall not Eſſoine in thoſe Writs, after an appearance. Vid. Co. 2 Inſt. 248 & 418. and the reaſon was becauſe of the great delay and charge of the Jurors which appeared the firſt day in thoſe Writs. 2 Reeves 122. Where the Common Eſſoine not allowable.

9. In the Eſſoine de ſervitio Regis, and the reſt of the Eſſoines (except the Common Eſſoine) he who caſts the Eſſoine, ſhall be Sworn of the truth of his Eſſoine, by the Common Law in all Eſſoines before the Stat. of Marl. c. 19. But yet at this day the Eſſoiner, ſhall warrant his Eſſoine by Oath in all the former Eſſoines, but the Common Eſſoine, becauſe of the great delay which was a year and a day. Co. 2 Inſt. 137. In what Eſſoins the Eſſoiner muſt be Sworne.

10. By

W. 1. c. 44. where an Eſſoine ſhall be turn'd to a default.

10. By the Stat. of Weſt. 1. c. 44. If an Eſſoine ultra mare be caſt, the Demandant may challenge the Eſſoine, and if it be found that the Tenant was within the four Seas the day of the Summons and three weeks after, the Eſſoine ſhall be turn'd to a default, ſo as the Tenant ſhall loſe his Land, by reaſon of the great delay given to the Demandant. Co. 2 Inſt. 253.

When the challenge ſhall be averr'd.

11. The Demandant ſhall be receiv'd to averr his Challenge, at the day the parties have by the Eſſoine. 3 E. 3. 29. 28 H. 6. 3.

Eſſoine de malo lecti, turn'd to a default.

12. And by the Stat. of Weſtm. 2. c. 17. the like Law is made for an averment by the Demandant and Plaintiff, againſt an Eſſoine de malo lecti, which will be turned to a default, if the Eſſoine be falſe. Co. 2 Inſt. 393.

Fourching by Eſſoine.

13. At the Common Law, where Parceners or Joint-tenants were ſued, to delay the Demandant, they might fourch Eſſoines, i. e. When they had every one, one Eſſoine, they uſed to Eſſoine again by ſucceſſive Eſſoines; as in a Præcipe quod reddat, againſt A. B. C. A. Eſſoines, B. and C. appear, and have idem dies given them, at which day A. and C. appear, and B. Eſſoines and have idem dies given them, at which day B. and A. appear, and C. Eſſoines; this is lawful at this day, but then at that day B. and C. appear, and A. Eſſoins again, this is Fourching by Eſſoine, and this is now remedied by the Stat. of W. 1. c. 43. Co. 2 Inſt. 250. 2 Rep. 122.

W. 1. c. 43. Fourching by Eſſoines remedied. Stat. Glouceſt. c. 10.

14. This Act of W. 1. c. 43. extended only to Parceners and Joynt-tenants, and not to Baron and Feme, and therefore the Statute of Glouceſter c. 10. was made to prevent fourching by Eſſoine, where Baron and Feme were Tenants. Both theſe Statutes extend only to Real Actions. Co. 2 Inſt. 321.

The

The Entry of an Eſſoine upon the Eſſoine Roll is thus:

I. S. verſus B. de pliro' ter' per A. M. in Octab. &c. Derb. ff. Record

W. verſus P. de plito' terr' per W. C. in Octab. &c. Salop. ff. Record

I. qui eſt in ſervitio Domini Regis verſus R. de plito' terr' per N. in Octab' &c. Salop. ff. Record

Eſſoine of a Praiee in Aide—

Exigitur R. at E. ſine quo pd' I. at M. et R. fil' T. frater W. G. ſine quo pd' W. G. reſpondere non poſſunt qui quidem R. non ven' habuer' diem per Eſſonium ſuum hic ad hunc diem poſtquam ſum' Ideo pd' W. Reſpond' ſine &c. vid. Raſt. Entr. 316. a. b. Salop. ff. Record Severans.

**The Entry of Eſſoines in the great Seſſions in Cheſter, are commonly upon the Writs or Pannels, and ſometimes upon a Roll.** Entry of Eſſoines in Cheſter.

The Entry upon an Eſſoine Roll in *Cheſter*, is thus——

Eſſon' adject' coram præfat' Juſtic' ad iſt' eand' Seſſion' i. e. xviii April' 1 E. 6. coram Robto' Townſend mil——Ro. 2.

Johannes Savage mil' verſus Humfrid' Swinnerton Ar' in plito' terr' per Johan' Cutt, uſque pr' diem prox' Seſſion' apud Ciſt' &c.——— } *Aſſ.* Ceſtr. ff. Record.

Laurentius Savage Ar' verſus Humfrid' Swinnerton Ar' per Johan' Doe in plito' vaſti, vel terr' uſque pr' diem prox' Seſſion' apud Ciſtr', coram Juſtic' Ceſtr' tenend——— } *Aff.* Ceſtr. ff. Record.

The Entry of an Eſſoine upon the Plea Roll, and other Proceedings thereupon is thus:

Ebor. ff. Record. Raſt. 520 b.

T. H. miles per I. M. Attornatum ſuum obtul' ſe quarto die verſus P. H. Cler' de placito quod ipſe ſimul cum M. permittat ipſum præſentare idoneam perſonam ad Eccleſiam de C. quæ vacua eſt et ad ſuam ſpectat donat' &c. Et ipſe non ven', Et ſum' &c. Id' attach' quod ſit hic in Octab' St. Hillarii, Et ſciendum quod pd' M. habet hic eundem diem per Eſſon' prout patet Rot. Eſſon' de Octab' St. Trinitatis iſtius ejuſdem Termin' prim. &c.

Record.

Aliter---Et ſciendum quod pd' Epiſcopus et Prior hic ad hunc diem fecer' ſe Eſſon' de malo Veniend' verſus præfat' R. de pd' plito' et habuer' inde diem per Eſſon' ſuum hic uſque ad præfat' terminum, &c. Raſt. ibidem.

**The like in other Actions**, mutat' mutand'

Entry of the Demandants Eſſoine.

Ebor. ff. Record.

Eſſonator H. op. ſe quarto die verſus W. de plito' &c. ſed quia pd' H. modo hic ad hunc diem fecit ſe Eſſon' de malo veniend' verſus pd' W. quam verſus pd' S. de pd' plito' et habet inde diem per Eſſon' ſuum hic uſque, &c. prout pat' Ro. Eſſon' ſecundo de Octab. iſt' eod' Termino, Ideo dict' eſt præfat' S. quod ſit hic ad præfat' Termin' ad jus ſuum pd' defendend' ſi &c. Raſt. 581. b.

When Eſſoine for Demandant ought to be caſt.

**An Eſſoine for the Demandant ought to be caſt the firſt day, becauſe he is demandable the firſt day,** 12 H. 4. 24, 25. **But by** Brian 18. E. 4. 14. **either Demandant or Tenant may be Eſſoined the fourth day. Note this is at** Weſtminſter; **but not ſo in Cheſter, but the Eſſoine days are either** Uſque prox' Seſſion'; **or if in the Seſſions time, then** de die in diem.

Eſſoine to be adjourn'd 15 days.

15. **Note at** Weſtminſter, **when the Tenant Eſſoins, in Real Actions, the Demandant ſhall Adjourn the Eſſoine for** 15 **days at leaſt,** Vid. Stat. 16 Car. c. 6. **for days in Banco for mean Proceſs.**

CAP.

## CAP. VI.

# Default before Appearance.

1. **DEfault before Appearance is a non Appearance in Court at the day of the Return of the Original Writ, for which the Tenant in a Præcipe ſhall loſe his Land, unleſs he can ſave, i. e. excuſe his default, and to that end upon ſuch default a Grand Cape ſhall be awarded to take the Land into the King's hands.** Vid. Fleta, lib. 6. c. 14. Co. Lit. 259. What.

**The Entry of a Default and Judgment upon a Grand Cape.** Entry of default.

En Brief d' entry. A. per Attornum ſuum op. ſe quarto die verſus B. de placito quatuor marcar' reddit' cum pertin' in C. quæ idem A. clam' verſus eum de quibus idem B. injuſte &c. diſſeiſivit præfat' A. infra &c. Et ipſe non ven' et al' fecit defalt' hic ſcilicet in Octab. Sanct' Hillar' poſtqam ſum', &c. Ita quod tunc præcept' fuit Vic' quod caperet reddit' pd' cum pertinen' in manus Domini Regis et idem, &c. Et quod ſum' per bon' ſummonitor' præfat' B. quod eſſet hic ad hunc diem ſcilicet in Octab' St. Trinitatis tunc prox' ſequen' ad reſpondend' præfat' A. tam de principal' placito quam de defalt' pd' Ideo conſideratum eſt quod prædict. A. recuperet ſeiſinam ſuam verſus præfat' B. de reddit' pd' cum pertinen' pro defalt' &c. Et idem B. in mia' &c. Et ſuper hoc pd' A. pet' bre' de inquirend' de dam' &c. Et ei conceditur retornabil' hic &c. Raſt. Entr. 281. a. Ebor. ſſ. Record.

**The Entry of a Default after an Eſſoine and Judgment given without a Grand Cape and an Eſſoine for the Demandant.** Entry of a default after an Eſſoine.

Ad quem diem ven' hic pd' L. per Attornatum ſuum pd', Et pd' B. modo ſe fecit Eſſon' verſus pd' L. de pd' placito et habuit inde diem per Eſſon' ſuum hic uſque in Octab' St. Trinitatis tunc prox' ſequen' &c. Et ad diem illum Attorn' pd' L. fecit ſe Eſſon' de malo Veniend' verſus pd' B. de placito pd' & habuit inde diem per Eſſon' hic uſque ad hunc diem ſcilicet in Octab' St. Michael' tunc prox' ſequen' Idem dies dat' fuit Salop. ſſ. Record.

præfat' B. hic &c. Et modo hic ad hunc diem ven' pd' L. per Attornatum ſuum pd' Et op. ſe quarto die verſus pd' B. de pd' plito' Et ipſe ſolemniter exact' non ven' Et habuit inde diem per Eſſon' ſuum Ideo conſideratum eſt quod pd' L. recuperet verſus pd' B. ſeiſinam ſuam de prædict' tenement' cum pertinen' pro defalt' &c. Et pd' B. in mia' &c. Raſt. 146. b.

Quer. whether this be legal that the Demandant ſhall Recover Seiſin upon default, after an Eſſoine, without a Grand Cape, for its contrary to Br. tit. Gr. Cape. 3. & M. 3 H. 4. 3. p. 17.

Default of the Wife, default of the Husband. Default of one of the Tenants.

2. In Præcipe quod reddat, the default of the Wife, is the default of the Husband, and the Demandant ſhall recover Seiſin of the Lands. 41 E. 3. 24. Præcipe againſt two, one makes default, the Demandant ſhall recover Seiſin of a Moiety. 41 E. 3. f. 2. p. 7.

*Un Demand' fait default & Tenant fait. default.* Summons *ad Sequend' ſimul.*

3. In a Præcipe by two, if one of the Demandants make default, and the Tenant makes default, a Summons ad Sequend' ſimul ſhall iſſue againſt the Demandant that made default, and a Grand Cape of the whole Land againſt the Tenant, and if at the Return thereof the Demandant that made default appear, Judgment ſhall be given for both the Demandants for the whole Land; but if he did not appear, then only for the moiety for one Demandant. 4 H. 6. 28. Br. default 46. et 28 H. 6. 3. The next in Order, after default before Appearance, is a Grand Cape, and therefore of that in the next Chapter.

## CHAP. VII.

## Of a *Grand Cape*

What.

1. GRand Cape or Cape magnum, is a judicial Writ in a Præcipe quod reddat, for Lands, Tenements and Hereditaments, which iſſues where the Tenant makes default at the day in the original Writ, and this Writ is to take the Land into the King's hand; and if the Tenant cometh not

not at the day of the Return, he loſeth his Land. Bract. lib. 3. tract. 3.

2. And by this Writ the Land is to be taken into the King's hands, by the view of lawful Men which are called Veyors, with a Summons of the Tenant to anſwer as well to his default, as to the Action of the Demandant; and in this it differs from the Petit Cape, which is only to anſwer to the default. 50 E. 3. 16. 38 H. 6. 33. Veiors.

3. At the Return of the Grand Capè, the Tenant may ſave his default, as to ſay he was not Summoned, &c. or was in Priſon, or diſturbed by the riſing of Waters, &c. but of this in Saver default. *Saver* default, how and when.

## The Grand Cape.

Rex, &c. Vic' C. ſalutem Cape in manum noſtr' per Viſu' legalium hominum de Com' tuo tertiam partem un' Meſs' cum pertinen' in N. ad quorumcunque manus devener' in balliva tua qu' I. qu' fuit ux. I. in Cur. noſtra, &c. apud *Weſtm.* clam' in dot' verſus prædict. T. pro defectu ipſius T. Et diem Capcon' ſcir. fac. Juſtic' noſtris apud *Weſtm.* per liter. tu' ſigillat' Et ſum' per bon. ſummonitor. prædict. T. quod ſit coram Juſtic. noſtris apud *Weſtm.* in Octab. St. Hillar. inde reſponſur. & oſtenſur. quare non fuit coram Juſtic. noſtris apud *Weſtm.* in Octab. St. Michael. Archangel. ſicut ſummonit. fuit. Et habeas ibidem noia. per quorum Viſum hoc fecer. ſum. Et hoc bre. Teſt. &c. Reg. jud. 2. b. The Writ.

The Demandant muſt make a Demand in nature of a Count after the default, before he can have a Grand Cape to aſcertain the particulars, as Acres, &c. where the Writ is general.

The

The Return of the Sheriff is thus :

Return of the Sherriffe.

Virtute iſtius Bris. decim' die N. Anno infra ſcript. per Viſum R. H. & T. H. probor. & legalium hominum de Com. meo Cepi in manus Dom' Regis terr. infra ſcript. prout interius mihi præcipitur.

Summon. I. *D.* *I. P.*

*T. M. Vic.*

Names of the Veiors to be return'd.

The names of the Veiors and Summonners muſt be Returned, Br. Return. 86.

To be executed 15 days before the Return.

4. The Land ought to be taken into the King's hands 15 days at leaſt before the Return of the Writ. Br. Grand Cape 29. & 36. But in Cheſhire, if it be one, two, or three days, it is ſufficient, if it be in time of Seſſions.

Return of *nul' habet terr'* where.

5. The Sheriff may Return quod null. habet terr. &c. and this is a good Return, Br. Return 7. But upon ſuch Return, the Tenant ſhall loſe his Land upon the default. Fitz. 113. Note that this Return may be made where the Grand Cape is againſt the Voucher, but not againſt the Tenant. 9 H. 6. 41.

The Sheriff to be anſwerable for the Profits.

6. When the Land is taken into the King's hand, the Sheriff ſhall be anſwerable for the Profits, from the time of the default till Judgment for the Demandant. Stamf. Prerog. 84. Yet by ſome theſe words (cape in manum noſtr') are but words of Form. Kiel. 117.

Judgment not to be given till Proceſs be determined againſt all.

7. Where the Præcipe is againſt ſeveral, and ſome appear, and others make default, and others Eſſoine; Judgment ſhall not be given preſently upon the Return of the Grand Cape or Petit Cape, till all have appeared, or Proceſs be determined againſt them, becauſe perhaps ſome of them may take the intire Tenancy upon them. For this vid. 11 H. 6. f. 42. & 3 H. 6. 52. Br. Gr. Cap. 1. 2 E. 4. 21. b. Br. Gr. Cap. 32. 12 H. 6. 6.

8. If

8. If the Grand Cape be not Returned, there muſt be an Alias before Judgment. Vid. Keilw. Rep. 54. b. 55. a. Al. Gr. Cape.

The Record following of an Entry of a Grand Cape in Cheſter, in a Ceſſavit, when the Courts of the Seſſions were held every month, or in the name of County Courts.—— Entry of a Gr. Cape in *Cheſter*

Placit. ad Com' *Ceſter'* apud *Ceſter'* Coram *Thom' Stanley* Mil' Juſtic. Domini Regis *Ceſtr.* die martis prox' poſt feſtum Epiph. Domini anno regni Regis *Henrici* ſexti, poſt Conqueſt. Angl. triceſimo ſecundo. XXXII *H.* 6.

*Rogerus Abbas* Domus & Eccleſiæ de Cumbmere in propria perſona obtulit ſe verſus *Ric. Wallis* de placito un' tofti cum pertin. in Wico malbano quod prædict *Rogerus* in Cur. dom' Regis hic' clam' ut jus ſuum verſus prædict' *Ricardum* per bre' Domini Regis de Ceſſavit per bienniu' pro defectu dci' Rici' &c. Et ipſe non Ven' Id' prædict' Toft' cum pertinen' Capiatur in manu' Domini Regis &c. Et diem &c. Et predict' *Ricardus* ſum' quod ſit hic ad prox' Com' ſcilicet diem martis in prim' Septiman' Quadrageſim' prox' futur' &c. ad reſpondendum præfat' Abbat' tuam de principal' placito prædict' quam de defalt' prædict' &c. Idem dies dat' eſt præfat' Abbat' hic &c. Ceſtr. *ff.* Record.

In the next place is proper to ſhew how a default may be ſav'd, and therefore the next Chapter is of that called Saver Default.

## CAP. VIII.

## Saver Default.

1. Saver Default, is to excuſe a default, which is properly when a man having made a default in Court, comes afterwards at the Return of the next Proceſs, and alledges a good Cauſe why he did not appear, as Impriſonment at the ſame time, or the like. What.

2. In

When to be sav'd. 2. In Real Actions, a default for non appearance must be saved at the Return of the Grand Cape in ~~null~~ Præcipe quod reddats, and at the Grand Distress in other Real Actions where the Process is Summons, Attachment and Distress peremptory.

Causes of saver of default. 3. There are divers Causes may be allowed by Law for saving a default. 1. By Imprisonment. 2. By Inundation of Waters. 3. By Tempest. 4. By breaking of a Bridge. 5. For want of due Summons. 6. The Demandant being essoined and some others, as in Co. Lit. 259. Its no Excuse to alledge that he was sick of great Infirmities. Benlowes Rep. 24. Pl. 96.

Most usual excuse is want of Summons. 4. The most usual is for want of Summons, and this shall be tried by the Tenants waging his Law of non Summons (called his gager de non Summons,) and not per pais, Except it be that the Tenants are a Corporation aggregate, as Mayor and Commonalty, Dean and Chapter, or the like, &c. 33 H. 6. 8. See this point there debated.

Wager of Law of non Summons. 5. If the Summons were not serv'd 15 days before the first day of the Return of the Writ, the Tenant may Wage his Law of non Summons, for 15 days before the 4th. day will not serve. 24 E. 3. 46. Br. Ley gager. 57.

6. The Wager of Law in non Summons shall be by the Tenant in person, and not by Attorney. 7 H. 4. 6.

Essoine upon making his Law. 7. Upon the day given to the Tenant to make his Law, he may be Essoined, but if he makes default afterwards, he shall lose his Land, 33 H. 6. f. 8. No Common Essoine lies for the Tenant upon a Grand or Petit Cape. 19 H. 6. 57.

Demandant essoine excuse le default of the Tenant. 8. If the Demandant be Essoined at the Return of the Grand Cape, the Tenant shall never be put to save his default, but a distringas ad respondendum shall issue. 37 H. 6. 29. a.

How the Demandant may release the default. 9. If the Demandant will stand upon the default, and hold himself to that, if the default be sav'd, the Writ shall abate.

abate, but the Demandant may if he pleaſe, releaſe the Default, and then the Tenant ſhall only anſwer to the Action, and if it be after Iſſue upon a Petit Cape, if the Demandant ſtand upon the Default, the Iſſue is wav'd, and if the Tenant ſave the Default; Quær', Whether the whole Action or Writ ſhall abate, or only the Tenant ſhall plead de Novo, 13 E. 4. 1. 11 H. 7. 1. 27 H. 8. 14. a. 10 H. 7. 21. 3 E. 4. 21. But at the Day given to the Tenant to make his Law, the Demandant cannot releaſe the Default without the Tenant's Conſent.

10. Before the Default ſav'd, after a Grand Cape, no Plea ſhall be admitted, which proves the Writ only abateable, but a Plea which proves the Writ abated in facto, as death of the Demandant puis le darrein Continuance ſhall be allow'd, 21 E. 4. 80. a. No Plea allowable before the Default ſav'd.

The Entry of a *Saver Default* by waging Law of Nonſummons, is thus———

*A.* alias pet' verſus *B.* duo Meſſuag', &c. ita quod tunc præcept' fuit quod ſum' prædict' *B.* per bon' ſum' quod eſſet hic in Octab. &c. ad reſpondend' præfat' *A.* de prædict' placito Ad quem diem prædict' *B.* fecit Defalt' ita qd' præcept' fuit Vic', qd' caperet Meſſuag'. &c. in manum Domini Regis, &c. Et qd' ſum' *B.* per bon' ſum' quod eſſet hic videlicet, &c. ad reſpondend' præfat' *A.* tam de principal' placit' quam de præd' Defalt' Ad quem diem, &c. Et præd' *A.* præciſe ſe capit ad prædict' Defalt' quam prædict' *B.* fecit hic ad præfat' Octab. &c. Et prædict. *B.* dixit quod ipſe nunquam ſum' fuit ſecundum legem terr' eſſend' hic ad præfat' Octab. ad reſpond' præfat' *A.* de prædict' placito Et hoc paratus fuit defendere contra ipſum & Sectam ſuam prout Cur' Regis hic cons' Per quod adtunc conſideratum fuit quod vad' ei inde legem ſuam de xii. manu, &c. Et inven' pleg' de lege ſua inde faciend' & habuit inde diem hic uſq; &c. Ad quem diem tam præd' *A.* quam præd' *B.* hic comparentibus idem *B.* inde præfecit inde legem ſuam prædict' prout eam ſuperius vadiavit per quod conſideratum eſt quod prædict' *A.* nihil caperet per breve ſuum præd' ſed ſit in mia' &c. pro falſo clamore ſuo & quod prædict' *B.* eat inde ſine die, &c. *Vid. Raſt. Entr.* 417. *Journey's* Accounts. Record. Saver Default.

*Duodecima manu.*

11. Note, In waging Law of Nonſummons, at the day of making his Law he muſt have Eleven Perſons with himſelf, to ſwear they believe the Tenant ſwears true, which is called Duodecima manu; and this is by force of the Stat. of Magna Charta c. 28. whereby it is Enacted, That none ſhall be admitted to wage his Law without credible Witneſſes. Vid. 37 *H.* 6. 8. Et Co. 2. Inſt. 45. In Practice there may be fewer than Eleven, as the Court thinks fit.

12. Having now done with ſuch things as are Incidents to Real Actions before Appearance, I proceed next to thoſe that are Incidents after Appearance concerning the Writ; and firſt of Summons and Severans.

## CAP. IX.

## Summons and Severans.

Where it is.

1. SUmmons and Severans is where there are ſeveral Demandants or Plaintiffs that are forc'd to joyn in one Action, and one or more of them refuſe to proſecute, and will not appear, then a Summons ſhall be awarded againſt them that do not appear, that they appear at a certain Day to proſecute together with the other Demandants or Plaintiffs. At the Return of which Summons, if they appear not, Judgment ſhall be given, that the other Demandants ſhall ſue alone, and they that appear not ſhall be ſevered. 10 Aſſ. pl. 12.

In what Actions.

2. And the Summons and Severans lies generally in moſt Real Actions, and Actions that favour of the Reality, as in Detinue of Charters, Warrantia Cartæ, &c. Co. 1 Inſt. 286. c. 139. 2 *H.* 4. 2. 11 *H.* 6. 23. but in few Perſonal Actions.

The end of Summons and Severans.

3. And the End and Intent of this Summons and Severans is, That the Nonſuit of one Demandant, ſhould not be the Non-

Nonſuite of the other in Real Actions, nor the Death of him that is ſevered, ſhould abate the Writ after Severans. Where death ſhall abate the Writ after Severans, and where not. Vid. Good Learning, Co. lib. 10. *Read* and *Redman*'s Caſe 134.

4. Severans of the Demandant is twofold: 1 By Summons ad ſequend' ſimul, where one of the Demandants never appear'd. 2. By award of the Court, without any Proceſs; and this after Appearance by nonſuiting him that does not appear, and entring Judgment that the other ſequatur ſolus. Co. 1. Inſt. 139. b. How many ſorts.

The Entry of *Summons* and *Severans* where the *Summons* was in *Terra petita.*

*P.* al's in Cur' Domini Regis hic petiit verſ. *J. L.* Caſtrum & Maner', &c. cum pertin' in *R.* ut jus ipſius *P.* & *B.* per breve Domini Regis de forma donationis in deſcendere Et præd' B. ſimul petens, &c. adtunc non ven' ita quod tunc præcept' fuit Vic' quod ſum' eum per bon' ſum' qd' eſſet hic a die, &c. ad ſequend' ſimul, &c. Ad quem diem Vic' modo mand' hic qd' præd' *B.* nihil habuit in Balliva ſua ubi potuit ſummonir' per qd' præcept' fuit Vic' qd' ſum' eum in præd' Caſtro & Maner' quod eſſet hic in hunc diem ſcilicet, &c. ad ſequend' ſimul, &c. ſi, &c. & modo hic ad hunc diem ven' præd' *P.* per Attorn' ſuum & præd' *B.* quarto die pl'iti ſolempniter exact' non ven' & fuit ſimul petens, &c. Et Vic' modo mand' quod ſum', &c. Ideo conſideratum eſt qd' præd' *P.* ſequatur ſolus ſine ipſo *B.* verſus præfat' *A.* quoad medietatem præd' Caſtr' & Maner', &c. cum pertinen' Et ſuper hoc ead' *P.* pet' verſus pd' *J.* medietatem eorundem Caſtr' & Maner', &c. cum pertin', &c. *Raſt. Entr.* 375. *Stafford* ff. Record. Summons and Severans.

Entry of *Summons* and *Severans* without Proceſs.

*Poſtea* continuat' proceſſu inter partes præd' de præd' placito per Jurat' poit' inde reſpect' inter eas hic uſq; &c. anno &c. & modo hic ad hunc diem ven' tam præd' *C.* quam pd' *A.* per Attorn' ſuum præd' Et pd' *G.* & *B.* quarto die pl'iti ſolempniter exact' non ven' Ideo ipſi per conſiderationem Cur' Regis hic ſeparentur & præd' *C.* ſolus admittatur ſine præfat' *G.* & *B.* ad ſequend' verſus præd' *A.* quoad medietatem meſſuag', &c cum pertin' & jurat' inde quoad medietatem pd' *Stafford* ff. Record.

inter præd' *C.* & præd' *A.* de placito ponitur in reſpect' hic uſq; &c. *Raſt. Entr.* 593.

Summons and Severans lies in theſe Actions:
1. *Libertate probanda*, F. N. B. 189.
2. *Quare Impedit*, Co. lib. 10. 134.
3. *Quo Jure*, F. N. B. 309.
4. *In rationalibus diviſis*, F. N. B. 311.
5. *Monſtraverunt*, F. N. B. 36.
6. *Warrantia Cartæ*, Co. 1. Inſt. 286.
7. *Formedons*, Vid. Raſt. Entr.
8. *Aſſiſe*, 44 E. 3. 16. 23. Aſſ. p. 9.
9. *Waſte*, 42 E. 3. 20.
10. *Bre' de Gard*, 38 E. 3. 9.
11. Attaint in Real Actions, See in Writs of Error, 29 *Aſſ.* 35.

Lies not in——
1. *Nativo habendo*, F. N. B. 189.
2. *Quid Juris clamat*, Co. lib. 10. 135. But this is a Judicial Writ.

## CAP. X.

## Non-tenure.

1. **After the Writ is brought, and Appearance given by the Tenant, there are ſeveral Pleas which may be offered by the Tenant in Abatement of the Writ, and amongſt others** Non-tenure.

What. 2. Non-tenure **is a Plea in Abatement of the Writ, whereby the Tenant alledges, that he is not Tenant of the Freehold of the Land or Rent demanded, or of ſome parcel of it at the time of the Writ brought, or at any time ſince,** 8 E. 3. 410. Thelw. Digeſt. of Writs, f. 238. Sect. 9. Raſt. Entr. 440.

The kinds. 3. **There is** Non-tenure **General, and** Non-tenure **Special:** Non-tenure **General is before defin'd;** Non-tenure **Special is where the Tenant ſhews what Intereſt and Eſtate he hath in**

in the Land demanded, as that he is Tenant for years, in Ward, by Statute-Merchant, Elegit, or the like. 1 E. 3. 1. 2 E. 3. 42. 7 H. 6. 17, 21. Thelwall Digeſt. of Writs, 240, 241. b. And therefore Cowel's Deſcription of General and Special Non-tenure (Collective) is a Miſtake; and the ſame Deſcription in Blunt's Nomo-Lexicon following him.

4. If the Tenant do not hold any part of the Land, i. e. be not Tenant of the Freehold, the Writ ſhall abate, becauſe as Bracton, *Amittere non poteſt quod non habet, & ita cadit breve*, Bract. lib. 5. c. 27. f. 431. Non-tenure abates the Writ.

5. So at Common Law by Non-tenure of parcel of an intire thing, as a Manor, the whole Writ ſhall abate. But now by the Statute of 25 E. 3. c. 16. by Non-tenure of Parcel, no Writ ſhall abate, but only for the quantity of the Non-tenure which is alledg'd and prov'd; yet it is held, 21 E. 4. 29. That in a Ceſſavit, Non-tenure of Parcel ſhall abate the whole Writ, though after the Statute, becauſe the Tenant cannot tender the Arrears for the whole demanded. Where Non-tenure of Parcel ſhall abate the whole at Common-Law. Alter'd by Stat. of 25 E. 3. c. 16.

6. Non-tenure General may be pleaded without ſhewing who is Tenant, 6 E. 3. 249. Thelw. Digeſt. of Writs 237. But Special Non-tenure muſt ſhew who is Tenant, Thelw. Digeſt. of Writs 240. Sect. 41. 8 H. 6. 35. Where it muſt be ſhewed who is Tenant.

7. In Non-tenure of Parcel, the Tenant ought to ſhew who is Tenant, or elſe to anſwer to the Reſidue of the Land demanded, or otherwiſe the Writ ſhould not abate at Common Law before the Statute, wherein the Equity of the Common Law is obſervable, that would not ſuffer a Writ good in part to be wholly deſtroyed, except the Tenant ſhew how the Demandant may have a better Writ, 36 H. 6. 7. 8 E. 4. 6. 10 E. 3. 497. Thelw. Digeſt. of Writs 242. Sect. 8, 10. Vid. 1 Modern Rep. 181. *Fowle* and *Doble*'s Caſe. Who is Tenant is to be ſhewed in Non-tenure of Parcel.

8. But in Br. 868. in a Præcipe quod reddat of three Manors, there was Non-tenure pleaded of one, and the Writ not abated for the other two, and this before the Statute of 25 E. 3.

Non-

Non-tenure is not pleadable in theſe Writs——

1. *Nuper obiit Non-tenure* of Parcel, no Plea, Reg. 226. F. N. B. 491. in meo. 7 H. 6. 8.
2. *Per quæ ſervitia*, Thel. Dig. Wr. 238. Sect. 12.
3. *VVaſte*, 46 E. 3. 25. 48 E. 3. 19.
4. *Deceit*, Thelw. 240. Sect. 33.
5. *Darrein Preſentment*, ibid.
6. *In Poſt Diſſeiſin*, F. N. B. 373.
7. *Recti de rationabile parte*, F.N.B. in meo. 22.
8. In *Scire fac. Non-tenure* of Parcel ſhall not abate the Writ, Thelw. Sect. 7.

Non-tenure of a Rent how.

9. In pleading of Non-tenure of a Rent, it muſt be ſaid, that he is not Pernor of the Profits, nor Tenant of the Land, out of which, &c. at the time of the Writ brought, &c. 5 E. 4. 22. Thelw. f. 241. Sect. 44. Raſt. Entr. 440.

Non-tenure of the Lands put in View, and where *de terris petitis.*

10. After View the pleading of Non-tenure is of the Lands put in View, and needs not ſay of the Lands demanded; but before View it ſhall be of the Lands in demand, de Tenementis petitis, 20 E. 3. 373. Contra 18 E. 3. Br. 357. Thelw. 239. Sect. 22, 23.

CHAP

## CAP. XI.

# Joyntenancy:

1. IN Real Actions may be pleaded likewiſe in Abatement of the Writ Joyntenancy, Sole-tenancy, or Several Tenancy.

2. Joyntenancy in the part of the Defendant or Tenant, is when the Tenant and ſome other Perſon do hold the Land joyntly, i. e. are Joyntenants of the Freehold, and the Writ is brought only againſt one, whereas it ought to be againſt all the Tenants of the Freehold; and if it be not, the Tenant may plead and demand Judgment of the Writ, becauſe another is Tenant of the Freehold with him who is alive, not named. Vid. Raſt. Entr. 66. Aſſiſe pl. 7 & 8. Raſt. Entr. Formedon 362. b. pl. 4. What.

3. At Common Law if the Tenant had pleaded Joyntenancy by Deed or Fine, the Writ muſt abate of Courſe; for the Demandant could not aver Soletenancy againſt the Deed produc'd, or the Fine, but he might confeſs and avoid the Joyntenancy as to plead a Releaſe or other Conveyance by one Joyntenant to the other, 14 H. 6. 8, & 25. Fitz. Tit. Jonynte-nancy. 18. Leon. 2 p. 161. Fitz. Tit. Joynt. 11, 14. 24 E. 3. 51. Br. Joynt. 22. 20 H. 7. f. 66. Where Joyntenancy by Deed or Fine ſhall abate the Writ without Anſwer.

4. But now by the Statute of Conjunctim Feoffatis, 34 E. 1. in caſe of a Deed the Law is altered, and the Demandant or Plaintiff ſhall not be delayed by abating of his Writ, but may aver Soletenancy. Vid. le Statute. But as to Fine, the Law remains as it was at Common Law, Dyer 291. Leon. 2 p. 161. 24 E. 3. 51. Br. Joynt 22. 20 H. 7. f. 66. *Stat. de Conjunctim Feoffatis*, 34 E. 1.

5. Note, Though Joyntenancy be pleaded ex Dono or Feoffamento of ſuch an one, yet if it be not by Deed, the Averment may be had againſt the Joyntenancy; and therefore when it is by Deed, there is a Profert hic in Cur' in the Plea, as in the firſt Plea beforemention'd in Raſt. Entr. 66. b. and where it is pleaded without Deed, there is no Profert, &c. as in the latter Pleading in Raſt. Entr. Formed. 362. b. pl. 4. Br. Joynt. 26. Where there muſt be a *Profert hic in Cur'*

6. In

Where it must be shew'd of whose Gift.

6. In pleading Joyntenancy on the part of the Tenant, it must be shew'd of whose Gift, and of what Estate, Fitz. Tit. Joyntenancy, 31. 3, & 29.

Difference in pleading Non-tenure and Joyntenancy.

7. Note, A difference between pleading Non-tenure and Joyntenancy: In Non-tenure he must plead, That he was not Tenant at the time of the Writ purchased, or at any time after; but in Joyntenancy he may plead Joyntenancy only at the time of the Writ purchased, 37 H. 6. 16. Fitz. Tit. Joynt. 24. Br. 24. The Reason of this Difference is worth Inquiry; for Billing says in the Case, that there is great Difference as to this Point between Non-tenure and Joyntenancy, but does not shew wherefore or upon what Ground.

Why Joyntenancy abates the Writ.

Voucher.

8. And the Reason why Joyntenancy shall abate the Writ, is, because the Tenant would lose the Benefit of his voucher, if the other Joyntenant be not joyn'd in the Writ; for one Joyntenant cannot vouch without the other, Br. Joynt. 6. 8. & 23.

Joyntenancy pleaded by one Tenant after another after a former Writ abated.

9. And therefore if the Tenant plead Joyntenancy with K. and the Demandant bring a new Writ by Journeys Accounts against the Tenant and K. the Tenant and K. may plead Joyntenancy with C. for the Benefit of K. who was not privy to the Writ at first, Br. ibid. 39 E. 3. 36.

CAP.

## CAP. XII.

# Of Sole-tenancy.

1. SOle-tenancy is where two or more are made Tenants to the Writ, and one of them only is Tenant of the free-hold of the whole. What.

2. But when Soletenancy is to be pleaded, and how and when it shall abate the Writ or not, is a matter well to be Considered, as to practical Proceedings in Real Actions in this Case. And first Rules of pleading Soletenancy.

1. In Pleading Intire or Soletenancy, the Tenant must plead over or Vouch, (if it be after the Demandant hath Counted) and not conclude to the Writ, otherwise the Writ shall not abate. And in such Case the Plea over in Bar, or Voucher are not to be answered, but the Demandant must maintain his Writ. Quere le reason de ceo. 10. E. 4. 8. 28. Ass. Pl. 25. 41 E. 3. 20. 44 E. 3. 33. 1. Rule. Vouch or pleader over.

2. If one of the Tenants only take the intire Tenancy upon him, and the other make default, say nothing, or plead non tenure, the Demandant may answer to the Bar without maintaining his Writ, but if the other take the intire Tenancy likewise, the Demandant must maintain his Writ. 10 E. 4. 8. 41 E. 3. 16. Where the Demandant shall not be forc'd to maintain his Writ.

3. Where one of the Tenants pleads non tenure, and the other takes the intire Tenancy upon him and pleads over, the Writ shall only abate against him that pleaded Non tenure, 22 E. 4. 4. Rast. Enter. 276. b.

4. If one of the Tenants disclaim, and the other take the intire Tenancy upon him, and plead over or Vouch as he ought, the Demandant may answer to the Plea in Bar, and not maintain his Writ. Rast. Entr. 276. Entr. bris' & 225. b. Disclaimer.

*Præcipe* against four, and makes default after appearance, how Proceſs is to go.

5. If a Præcipe be brought againſt four, and the one diſclaims, and two take the intire Tenancy upon them, and the fourth makes default after appearance, the Petit Cape ſhall be awarded againſt him and Return'd, and nothing ſhall be Entred of the Pleas of the other, but only their Appearance till the Petit Cape be Return'd, becauſe he who made default may perhaps ſave his default, and take the intire Tenancy upon him likewiſe; and there is no reaſon to forejudge him of his Tenancy, and though he do not ſave his default, yet the Demandant ſhall not recover Seiſin of a fourth part, till the iſſue of the Soletenancy be Tried between him and the other Tenants. 46 E. 3. 15. 2 E. 4. 29. 3 H. 6. 53.

When Sole tenancy is to be pleaded without pleading over in bar.

6. Note, that if before Appearance, one of the Tenants in a Præcipe make default, and a Grand Cape is awarded, and the other at the Return of the Grand Cape take the intire Tenancy upon him, he is to plead Soletenancy, without pleading over or concluding to the Writ, but pray that the Demandant may Count againſt him; Note the difference, when the Plea is after the Demandant hath Counted, and when it is before, for when it is after, the Tenant muſt plead over in barr, or Vouch as before. Raſt. Entr. 271. a. 364, 365.

For the Form of Pleading Sole, and ſeveral Tenancy. Vie. poſtea ſeveral Tenancy.

## CAP. XIII.

# Several Tenancy.

What, and when.

1. Several Tenancy is, when the Tenants hold ſeverally ſeveral parts of the Land demanded, and the Writ is brought jointly againſt them all, the Tenants may plead ſeverally, and ſhew how they hold Sole ſuch a part of the Tenements demanded, abſque hoc quod prædict' B. aliquid habuit

habuit in eodem die impetraco'nis bris' vel unquam poſtea &c. Raſt. Entr. 365. a. This is much of the nature of Soletenancy, and in pleading ſeveral Tenancy, the Tenant muſt plead over in Bar or Vouch, as in Soletenancy, and not conclude to the Writ, and the Demandant muſt maintain his Writ. 41 E. 3. 20. 42 E. 3. 8. 44 E. 3. 33. 19 H. 6. 14. though the other ſay nothing; and herein it differs from Soletenancy, where if one ſay nohing, the Demandant may anſwer to the barr, and not maintain his Writ, as is before ſaid.

Muſt plead over in barr or Vouch.

2. Several Tenancy ſhall abate the whole Writ. 27 H. 8. 30.

Several Tenancy abate the whole Writ.

3. Several Tenancy may be pleaded by the two Tenants after waging of Law of Non Summons, and though they joyn in waging their Law, they ſhall not be ſtop'd to plead ſeverally, ſeveral Tenancy; but if two or more take the intire Tenancy upon them, and wage their Law when there are other Tenants nam'd in the Writ, they ſhall be ſtop'd to plead ſeveral Tenancy afterwards. 42 E. 3. 16.

When ſeveral Tenancy is to be pleaded after waging of Law.

4. Several Tenancy is not pleadable in Nup. obiit. 7 H. 6. 8. or in Aſſiſe, or any other Action where no Land in certain is demanded. Br. Sev. Ten. 18. 2. Leon. p. 8. But this is to be underſtood that ſeveral Tenancy ſhall not be pleaded (in an Aſſiſe, or any other Action where no certain Land is demanded) to the Writ, for after a Plaint in an Aſſiſe, ſeveral Tenancy may be pleaded, as in Dyer 244. Aſſiſe againſt four, three plead ſeveral Tenancy, and the fourth pleads intire Tenancy of the whole, the Demandant ſhall chuſe his Tenant at his peril.

In what Actions it may be pleaded.

See Raſt. Entr. 364, 365. The pleading exactly Soletenancy and ſeveral Tenancy, according to the former Rules.

## CAP. XIV.

# Imparlance.

What. 1. After the Demandant hath Counted, the Tenant may pray a day to be given him by the Court to anſwer, which is called an Imparlance, in Latin, Interlocutio vel interloquela, and is Entred thus——Et prædict A. B. per T. L. Attornatum ſuum ven' et defend' jus ſu' quando &c. Et pet' licentiam inde interloquend' uſque, &c. Et het' &c. Kitchin f. 200.

The Kind. 2. Imparlance is two-fold, General and Special. General Imparlance is Entred as before, ſpecial Imparlance is when the party prays it with a ſaving of all Advantages, and then is added to the Entry Salvis omnibus advantagiis tam ad Juriſdic' Cur' quam bre' et narration'. Kitchin, ibidem.

No Plea to the Writ after imparlance. 3. Note that after a general Imparlance, no Plea to the Writ is to be received; but Non-tenure, Joint-tenancy, ſeveral Tenancy, may be pleaded in Abatement after imparlance. Vid. Keilw. Rep. 93. b. Palmers Rep. 308.

Demandant or Tenant may imparle, days of grace. 4. Either Demandant or Tenant may Imparle, and the Court may give what day they think fit, and are not bound to the Common days; for days of imparlance, are but days of grace, and ſo of days given for Demurrer or the like. Quia Cur' nondu' adviſatur, &c. 8 E. 4. 4. Br. jours. 52.

Imparlance in *Cheſhire* till the next Seſſions. 5. In the Court before the Juſtices of Cheſter, upon a ſpecial Imparlance in real Actions, day is commonly given, and in general Practice till the firſt day of the next Seſſions, if there has been no default before.

And thus much of ſuch Proceedings as concern ſuch dilatories, and pleadings as have reference to the Writ and Declaration, not going or referring to the matter of the

Action

Action. The next is of such Proceedings as are dilatories, (after the Writ is admitted to be good) as are incidents before pleading to the Action, as View, Essoine, Voucher, Counterplea of Voucher, Counterplea of Warranty and Aid prayer.

## CAP. XV.

## Of View.

1. IN most Real Actions, after the Demandant hath Counted, the Tenant may demand the View of the Land demanded, or if it be a Rent or other thing, View of the Land out of which it is, issues. Nomo-lexicon Tit. View. And the reason and ground of this Institution in the Law was, Quod certa res in judic' possit deduci. What.

2. But because the Tenant commonly demands the View merely to delay the Demandant, and not for want of any certain knowledge of the thing demanded, therefore the Stat. of W. 2. c. 48. 13 E. 1. was made to prevent View where it is not necessary, as in the particular Cases enumerated in the Statute expounded in Co. 2. Inst. In what Cases not grantable per Stat. W. 2. c. 48.

3. And therefore, where any demands the View in such Cases named in the Statute, the Demandant may Counterplead the View, i. e. alledge matter in Pleading, which ousts him of View, as where he that loseth Land by default brings a Quod ei deforceat for the Recovery of it, the Tenant shall not have View, because he is well enough ascertained of the Land by the former Record; so where View was had in a former Writ, and that Writ was abated after View for some mistake that appeared upon the View, as Nontenure, misnaming of the Town, so in Dower, when it is brought against the same Tenant that purchased the Land of the Husband; so if the Husband dy'd seis'd, it's a good Counterplea of View in Dower, 34 H. 6. 3. 21 E. 4. 22. and some other Cases mentioned in the Stat. Vid. Co. 2 Inst. 480. Counter-plea of View, where.

4. View

Where in Dower.

4. View in Dower, is not to be understood of a Writ of Dower unde nihil habet but other Writs of Dower, for no View lay at Common Law in Dower unde nihil habet. But Quær. whether not by the Stat. of 12 E. 2. de visu terræ, not Printed in Poulton. By that Statute, View is not to be granted in these several Writs, 1. Writ of Ward. 2. Of Customs and Services. 3. A Writ of Right of Advowson, except there be two Churches of one name in one Town. But to be allow'd a Writ de dote assignanda, and in Nuper obiit. Vid. Rast. abridg. Stat. View 519. where that Stat. de visu terr' is mentioned, but not set forth at large, nor in any other Printed Statute Book that I know of.

Where ousted at Common Law.

But in 45 E. 3. f. 17. its said that View was ousted in four Writs at the Common Law, 1. Dower unde nihil habet. 2. Intrusion. 3. Breve d' entry en le quibus. 4. Nuper obiit.

Where granted by some Statutes.

6. Whence I collect, that some Statute has granted View in these Writs now, for there are other Writs that the Common Law did not allow View in, as well as these, as in Writs where there was privity of Blood between the Tenant and Demandant, as in a Writ of Right de rationabili parte, where the Ancestor died seis'd, and for the same reason View did not lie in a Nuper obiit till the 12 E. 2. which Statute perhaps gave View in all the other Cases, as Intrusion, Brief d' Entry, &c. Vid. F. N. B. 22. & 493.

Not grantable in Intrusion.

7. But by 2 H 4. 5. View lies not in Intrusion, nor in the Writ of Entry in le Quibus, ibidem, 8 H. 6. 27. Contr' 2 E. 3. 44. b.

View in Dower *unde nihil habet.*

8. Note, that in the Writ of Dower unde nihil habet, View by Rastal's Entries lies, for there is the Writ of View in hæc verba. Though it seems questionable by some, whether View lies in a Writ of Dower unde nihil habet or not. Dyer 179. 14. H. 6.6.

Kinds of *View.*

9. There are two sorts of View in Real Actions 1. View by the Party 2. View by the Jurors, as in Assise of novel disseisin, 2. Wast. 3. 4. Assise of Nusance the Party shall not have View because the Jurors shall have View. 9 H. 6. 41. b. 8 H. 6. 27. 19 H. 6. 43. 50 E. 3. 11.

10 View,

10. View, shall not be granted after a day taken per prec' partium 46 E. 3. 4. nor after pleading to the Action, 3 H. 6. 55. because he takes Conizans of the Land. 29 E. 3 30. Not grantable after pleading.

11. View may be granted as well after general Imparlance as before, by the general Practice. Though many Books are against it. Dyer 210. 20 H. 6. 18. 35. H. 6. 31. 9 E. 4. 31. But its safest to demand the View before Imparlance. Grantable after Imparlance

12. Regularly, View shall not be granted, of a mans own wrong or tort; as in Writs of Entry sur disseisin against the Disseisor himself, an Assise of Nusance, Admeasurement of Pasture, Writs of Entry in le Quibus against the Tenant himself or the like, but yet this is to be explained, because it seems to contradict what is said before, as to Assise of Nusance, Writ of Entry in le Quibus, Intrusion. 1. As to the Assise of Nusance, the View shall be of the place to which the Nusance is done, because it is another thing than is in demand, Roll. Abridg. 727. 8 H. 6. 18. b. 41 E. 3. 23. so in a Writ of Entry sur disseisin of a Rent, View shall be of the Land out of which &c. because it is another thing than is demanded. 8 H. 6. 27. 7 H. 6. 44. so in the Quibus of a Rent. For the Writ of Entry in le Quibus and Intrusion, Quer. whether View be not granted by Statute as is beforesaid: But in the Case before of a Rent, if it appear to the Court that the Tenant to the Writ is Tenant to the Land out of which &c. View shall not be granted, 34 H. 6. 10. Not grantable in Actions of a man's own tort, View of another thing than is demanded.

13. After View, the Tenant may plead in abatement to the Writ such matter as appears by the View; but I conceive not such matter as is apparent in the Writ, for by that means a Plea in abatement may be obtain'd after an Imparlance, which is contrary to the former Rule, and so the Demandant delai'd, where there is no necessity, for the Tenant might have pleaded such matter before the View had, 40 E. 3. 35. Br. View 13. Quer. for by 42 E. 3. 23. b. & 7 H. 6. 34. it seems he shall have a Plea in abatement after View for false Latin, and 11 H. 4. 72. Br. View 41. its said by Hill that the Tenant may plead matter apparent in the Writ after View, but I conceive this is not Law, neither the one nor the other, Except the View was had before Imparlance, or after a special Imparlance. Plea in abatement after View.

14. When

Writ of View. 14. When View is demanded and granted, there ought to go out a Writ called a Writ of View, and this is to be proſecuted and ſued forth by the Demandant himſelf, for his own Expedition, becauſe he is to ſhew the Lands to the Sheriff, that he may ſhew them to the Party; and the Sheriff ought to give notice to the Tenant, and the Veiors or Viewers, i. e. to the four Knights in a Writ of Right, of the time of the View taken. 32 H. 6. 27. Fitz. View. 156.

15. The Form of demanding View, and of a Writ of View in Dower, which is in nature of a Writ of Right is thus——

Record. Et prædict' *R.* per *W.* Attornatum ſuum ven' & pet' Viſum de tenem' prædict' cum pertinen' unde &c. habeat &c. dies dat' eſt partibus prædict' hic uſque, &c. Et interim, &c.

## The Writ of View.

The Writ. Rex &c. Præcipimus tibi quod ſine dilacone' habere fac' W. viſu' de un' Meſs' &c. cum pertinen' in B. unde A. qu' fuit ux. S. in Cur. noſtr' coram Juſtic' noſtris &c. Clam' tertiam partem verſus præfat' W. ut dotem ſuam ex dotac'one prædict' S. quondam viri ſui unde nihil habet, Et dic' quatuor Militibus, ex ill' qui Viſui ill' interfuerint quod ſint coram &c. ad teſtificand' viſu' ill' Et heas' ibi noia' Militum Et hoc bre' Teſt' &c. &c. Raſt. Entr. 239. b.

### The like Writ in a Formedon, only ſaying thus——

Return of the Writ of View. Cum pertinen' in B. qu' prædict' S. in Cur' noſtr' coram &c. Clam' ut jus ipſius S. verſus præfat' A. per bre' noſtr' de forma donaconis in deſcendere. Raſt. Entr. 376.

16. The Sheriff may Return either that the Tenant nor any for him came to take the View; or that none came on the part of the Demandant to ſhew him the Land. In the firſt Caſe, the Tenant loſes the benefit of View, in the other there is to go out un al'.

Return

Return of the Writ of View is thus——

Virtute iſtius bris' Juſtic' infraſcript' Certifico quod habere feci W. in eod' bri' nominat' Viſu' de un' Mes', &c. Cum pertinen' in B. qu' prædict' A. in Cur' Domini Regis coram Juſtic' &c. clam' ut jus & hæreditat' ſuam verſus prædict' W. per bre' Domini Regis in forma donacois' in deſcendere. Et dixi quatuor Militibus qu' Viſui ill' interfuerint quod ſint coram &c. ad diem in iſt' bri' ſpecificat' ad teſtificand' Viſu' ill' prout in eod' bri' mihi præcipitur.

*R. B.* Vic.

Or thus——

Nullus ex parte prædict' A. ven' ad oſtendend' mihi Viſu' de Mes' &c. infraſcript' Ideo ad Execut' ſtius bris' per me nihil actum eſt ad præſens.

*R. B.* Vic.

17. Upon the Return of the Writ of View which is the next Seſſions or Quarterly after the awarding of it before the Juſtices of Cheſter, the Tenant may have a Common Eſſoine, which before the ſaid Juſtices, is but de die in diem, but in the Common Pleas at Weſtminſter, in all Real Actions, Except Writs of Dower, nine Common days are given upon every Eſſoine, but in a Writ of Dower there is given but five. The View may be returnable in the Seſſions week, any day: But then the Sheriff may delay it by his Return. Eſſoine upon the Return of the Writ of View.

18. The manner of Counterpleading the View in Dower, becauſe the Husband died ſeis'd. Vid. Raſt. Entr. 239. b. But the Preſident there for the Tenants Replication does not agree with the Book in 34 H. 6. f. 3. b. Per totam Cur' i. e. He ought to ſay that the Husband died not Seis'd of any Lands in the ſame Vill', and not (as it is in the Preſident) that the Husband died not Seis'd of the Lands demanded, for by ſuch Pleading, he takes upon him Conſſance of the Land, and then the View ought not to be granted. Manner of Counterpleading View in Dower.

19. When View is Return'd by the Sheriff, the Demandant muſt Count de novo.

## CAP. XVI.

## Eſſoine.

Eſſoines after appearance.

1. AS the Tenant may be Eſſoined upon the Return of Summons before Appearance, ſo he may be Eſſoined upon the Return of Judicial Proceſs after Appearance, as upon Return of the Writ of View, the Tenant may be Eſſoined. 12 H. 4. 14. And ſo upon Return of a Summons ad auxiliand', the Prajee in aid may be Eſſoined, and of a Summons adWarrantizand', the Vouchee may be Eſſoined, and idem dies given to the Tenant, Demandant, and Vouchee, and upon the Vouchee's appearing, the Tenant may be Eſſoined again: Againſt the Book of 3 H. 7. 23. Hob. Rep. 46. Earl of Clanrickards Caſe.

Tenant may Eſſoine when Vouchee appears.

2. And the Reaſon why the Tenant may be Eſſoined upon the appearance of the Vouchee, is becauſe he may have ſeveral Pleas to Plead againſt the Vouchee, as that he is not the ſame Perſon, &c. 5 E. 3. Eſſ. 54. Hob. Rep. 46. 29 E. 3. 48. 45 E. 3. 24. b. The Vouchee and Tenant may have either of them one Eſſoine, before they Enter into the Warranty.

Eſſoine upon *Venire* and other Proceſſes return'd.

3. So upon the Return of the firſt Jury Proceſs (as the Venire fac') the Tenant or Defendant may be Eſſoined both in Real, and Perſonal Actions. Co. 2. Inſt. 126.

But becauſe ſomething more largely hath been ſpoken before of the nature of Eſſoines in general, this ſhall ſuffice for Eſſoines after Appearance. The next thing in Method to Treat of is Voucher, after the Tenant hath appeared, and hath had the View and one Eſſoine after.

CAP.

## CAP. XVII.

# Voucher.

1. VOucher is a Term in the Law, and is when the Tenant calls another into Court to defend the Land, or otherwise to have Land of him, of the value of the Land loſt by reaſon of his Warranty; and he that Vouches, is called the Voucher, and he that is Vouched the Vouchee, (Vocatus) Co. Lit. 101. What.

2. And the manner of Vouching in the Entry and Pleading is thus—— Manner of Vouching.

Et prædict' S. in propria perſona ſua (vel per I. B. Attornatum ſuum) ven' & defend' jus ſuum quando, &c. Et voc'. inde ad Warrantizand' E. D. &c. Record.

And if the Vouchee be ready in Court, to Enter into the Warranty, then the Entry further is thus——Et Voc' inde ad Warrantizand' E. D. qui præſens hic in Cur' in propria perſona ſua Et gratis Tenement' prædict' cum pernen' ei Warrantizat, &c. But if the Vouchee be not ready in Court, then muſt go out Proceſs againſt the Vouchee, which is called a Summons ad Warrantizand' and then the Entry is thus——Et Voc' inde ad Warrantizand' E. D. ſum' in Com' prædict' habeat eum hic a die—Per auxiliu' Cur', &c. Idem dies dat' partibus eſt prædict' hic, &c.

3. If upon the Summons ad Warrantizand' the Sheriff Return the Vouchee Summon'd, and he makes default, a Cap' ad Valencia' ſhall iſſue forth for the Tenant, but if the Sheriff Return Nihil, upon the Summons, an al' and plur' ſhall iſſue, and then a Sequatur ſub ſuo pericul', and then if the Vouchee make default, Judgment ſhall be given for the Demandant, but no Judgment for the Tenant to Recover in value, becauſe it appears the Vouchee hath not Aſſets. Co. Lit. 393. a. & 101. b. Raſt. Entr. 687. & 240. a. So if Summons be Return'd, and default be Default of the Vouchee. *Cap' ad Valencia'.*

*Sequatur ſub ſuo periculo.*

made, and a Cap' ad Valentiam iſſue, and Nihil be Return'd, an al' & plur' Cap' ſhall iſſue, with a Sequatur ſub ſuo periculo upon the plur'. Raſt. Entr. 377.

*Bre' de Summons al* Cheſhire.

4. If one be Vouched in Lancaſhire or Cheſhire, and pray Summons thither, the Writ of Summons may iſſue thither from Weſtminſter. 26 E. 3. 59.

The Summons ad Warrantizand' runs thus——

The Writ of Summons *ad Warrantizandum.*

Rex Vic' C. Salutem Præcipimus tibi quod ſum' per bon' ſum' M. S. quod ſit Coram Juſtic' &c. ad Warrantizand' W. decem acr' terr' (according to the Lands demanded) cum pertinen' in L. qu' B. Clam' in Cur' noſtr' &c. verſus præfat' W. ut jus & hæreditatem ſuam, per bre' noſtr' de ingreſſu ſuper diſſeiſinam en le poſt (or other Writ as the Caſe may be) Et unde idem W. in ead' Cur' noſtr' voc' præfat' M. ſum' in Com' tuo ad Warrantizand' verſus eum. Et habeas ibi ſum', & hoc bre' Teſte, &c. Raſt. 240. 286. b. Entr. bris'.

5. If upon the Return of the Cap' ad Valentiam, the Vouchee makes default again, Judgment ſhall be given for the Demandant againſt the Tenant, and for the Tenant againſt the Vouchee. The Entry thereof, Vid. Raſt. 240. b.

The Grand Cape ad Valentiam is thus ——

The Writ of *Cape ad Valentiam.*

Rex, &c. Cape in man' noſtr' de terr' M. S. pro defectu ipſius M. ad valenciam un' Mii' &c. cum pertinen' in B. qu' A. in Cur' noſtr' &c. clam' ut jus & hæreditatem ſuam verſus W. per bre' noſtr' &c. Et unde idem W. in eadem Cur' noſtr' voc' prædict' M. S. Sum' in Com' tuo, ad Warrantizand' verſus eum. Et die' Capcois' Scire fac' Juſtic' noſtr' &c. Per liter' tu' ſigillat', Et ſum' per bon' Sum' ſuum prædict' M. S. quod ſit coram &c. inde reſponſur' quare non fuit Coram Juſtic' &c. Et auditur' inde judic' ſu'. Et habeas ibi ſum' Et hoc bre' Teſt' &c. Raſt. Entr. 240. b. This Writ is always before the Vouchee has appear'd.

*Petit Cape ad Valentiam.*

The Petit Cape ad Valentiam, is upon default after Appearance, and differs not from this, ſave that (inde reſponſur' quare

non fuit, &c. is left out, and he ſummon'd to hear Judgment. Upon the awarding of the Cape ad Valentiam, there goes out a Writ of Enquiry like wiſe, to enquire of the value of the Lands demanded, to the end the Sheriff may take the value into the King's hands, and the Action is continued in the mean time between the Demandant and Tenant, by dies dat. eſt, &c.

The Entry of the Cape ad Valentiam, and the Writ to Inquire of the Value, thus——

Ipſe (the Vouchee) non ven' & habuit inde diem per Eſſonium ſuum, ad hunc diem ſcilicet in Craſtinu', &c. Poſtquia' ſum' &c. Ideo Capiatur in man' Domini Regis de terr' prædict' I. ad Valenciam, &c. Et unde &c. Et die' &c. Idem dies dat' eſt præfat' W. in propr' perſon' ſu' &c. Et quia neſcitur quantum prædict' tria Meſſuagia, &c. valent per annum ſecund' verum Valor' eorund' Præceptu' eſt Vic' E. quod per ſacrament' proborum &c. Extendi et appretiari fac' prædict' tria' Mes' ſecund' verum Valor' eorund '& Extent' et appretiat' qu' inde fecerit ſcire fac' hic ſub ſigillo, &c. Et ſigillis eorum, &c. Et tunc Capiatur de terr' prædict' I. ad Valentiam, &c. in forma prædict', &c. Raſt. Entr. 687. a.

Entry of the *Cape ad Valentiam.*

Record.

*Ac inquirend de valore.*

5. If the Sheriff Return Nihil upon the Grand Cape ad Valentiam, then an al' & Plur' is awarded, and if the ſame Return be made, then a plus Plur' with a Sequatur ſub ſuo periculo, which is the laſt Proceſs the Tenant can have to bring in the Vouchee, and if he do not then appear, the Tenant loſes the Land, and cannot have Judgment to recover in Value, but fails in his Voucher, and therefore it is call'd a Sequatur ſub ſuo periculo. Co. 1 Inſt. 101. Br. Sequatur, &c. 4.

*Al' plur', & ſequatur ſub ſuo periculo.*

The Entry of the Grand Cape ad Valentiam, al' plur' and Sequatur ſub ſuo periculo, Vid. Raſt. Entr. Titl. Formedon 377. b.

6. The Tenant is to Sue forth the plus plur' ſum' or plur' Cape ad Valentiam, and to ſee that the Sheriff Execute it which is the meaning of the awarding the ſequatur ſub ſuo periculo, which upon the plur' is always Entred thus—— Et dictum eſt præfat' W. (the Tenant) quod ſequatur ſub ſuo periculo

The Tenant to ſee the *plus plur'* Executed.

periculo, Idem dies dat' eſt partibus prædict' hic, &c. Vid. f. 170. Br' ſequatur ſub ſuo periculo. 4.

Upon default of the Vouchee at the Return of the ſequatur ſub ſuo periculo, its ſaid in Keilw. Rep. 41. That the Tenant muſt be call'd, and if he make default, a Petit Cape muſt be awarded, and not judgment till the Return.

The Tenants neglect upon the *Sequatur, &c.* ſhall loſe the Land.

7. And if the Sheriff Return not the Writ through the Tenants default, as if he do not ſue it forth, or deliver it in time, &c. or the like upon the Return, the Demandant may pray Seiſin of the Land, and alledge the Tenants neglect in not proſecuting the Writ through the Tenants default after the Sequatur ſub ſuo periculo. And all this may be obſerved in the Preſident before cited, Raſt. Entr. 377. b. 14 H. 6. 7. 42 E. 3. 13. If after the Sequatur, &c. the Writ be returned Tarde, the Tenant ſhall loſe the Land. Vid. Ceſtr. Record. f. 168.

*Tarde* upon the *Sequatur*, loſes the Land.

Returns upon Summons *ad Warr'* 9 at *Weſtminſter*; at *Cheſter, de die in diem.*

8. Upon every Summons ad Warrantizand' at Weſtminſter, there are nine Returns between the Teſte and the Return; but at Cheſter de die in diem, or more days within the week of the great Seſſions, but this is practiſed only in Common Recoveries, for in Actions that are adverſary, the Writ of Summons is returnable the next Seſſions. Vid. Co. 2 Inſt. 240.

Entring into Warranty. Record.

9. When the Vouchee appears, and offers to warrant the Land to the Tenant, its called an Entring into the Warranty, &c. and is Entred thus——Et prædict' A. ſum' &c. per T. Attornatum ſuum ven' & gratis Maner' &c. cum pertinen' ei Warrantiz' &c. And this is when a Summons ad Warrantizand' has iſſued forth before, and the Vouchee appears by Warrant of Attorny; but if the Vouchee be ready in Court to Enter into the Warranty at the time of the Voucher, then the Entry is thus ——Qui præſens eſt hic in Cur' in propria perſona ſua et gratis, &c.

Vouchee in *loco Tenentis.*

10. When the Vouchee has entred into the Warranty, he comes in loco Tenentis, and in judgment of Law, is Tenant to the Demandant, and then the Demandant Counts againſt him, as he did againſt the Tenant before. Co. 2 Inſt. 241. 8 E. 3. 61.

Whar

## What Pleas the Vouchee may have after entring into Warranty.

1. By the Voucher, all Pleas which are in Esse at the time of the Voucher, are put into the mouth of the Vouchee by the Tenant, and the Vouchee shall plead them, and not the Tenant; and likewise many Pleas which come in Esse ex post facto, and therefore the Tenant shall not plead a Release made to him after the Voucher, but the Vouchee shall plead it. 5 H. 7. 49, 50. 14 H. 6. 7.

May have all Pleas in *Esse* at time of Voucher.

2. The Vouchee may plead the death of the Tenant after the Voucher, or that the Demandant hath taken Husband, or is Outlaw'd, or Excommunicated puis le darrein Continuance, per Townsend. 5 H. 7. 50. a. 43 E. 3. 16. a.

What Pleas

3. The Vouchee may plead in abatement of the Writ, that one Recovered against the Tenant, pending the Writ by Action tried, and after the entring into warranty; for the Tenant by the warranty may have all manner of advantage that the Tenant of the Land might have; but if the Recovery were before the entring into the warranty, then it seems the Vouchee shall not have this Plea against the Demandant, because he might have Counterpleaded the warranty by such Plea against the Tenant, as in Case of two Writs pending for the same Land, by the same person, the Vouchee shall not have the Plea against the Demandant, because he may plead it against the Tenant in Counterpleading the warranty, if the Tenant does not take advantage of it; but by Finchden, the Vouchee may have all the Pleas aforesaid against the Demandant. 41 E. 3. 11. a.

Abatement of the Writ.

4. The Second Vouchee may plead the death of the First Vouchee 14 H. 6. 20.

Death of the first Vouchee by the second.

5. If any of the Vouchees be within Age, the Voucher may Vouch such a one within Age, and pray that the Parol may Demurr, which is another great delay to the Demandant, and in Case the Demandant do averr that he is of full Age, Then the Proces is first a Summons to be Viewd, then an al', a plur', and a Sequatur sub suo periculo, and

Infant, Parol Demurr.

Summons to be Viewd, *Alias plur' & Sequatur*,

and if he appear not at the Sequatur, the Land is loſt, but if he appear, and be awarded to be of full Age, then Proceſs ſhall be awarded againſt him as Vouchee, i. e. Summons ad Warrantizand', al', plur', and Sequatur, &c. 14 H. 6. 7. 20. Vid. Ceſtr. Record. f. 166.

Infant makes default at the *Sequatur, &c.*

Quære, if the Vouchee do not appear to be view'd at the Sequatur, what remedy the Tenant or he that vouched him hath, for he cannot Recover in value againſt him (as I conceive) becauſe no Proceſs went out againſt him as Vouchee, and he was never ſummoned; but if he be returned ſummoned to be Viewed, and he makes default, then Quære whether a Cape ad Valentiam may not iſſue againſt him, and I ſuppoſe it may.

Where the Vouchor muſt ſhew cauſe of his Voucher, or may Vouch generally.

Where Voucher is out of Com. Courſe.

Where the Voucher is out of Common Courſe, there he that Vouches is to ſhew ſome Cauſe of the Voucher, otherwiſe the Voucher may be over-rul'd; as when one Vouches himſelf for ſaving his Eſtate Tail, or himſelf as Heir, or his Brother as Tenant in Borough Engliſh, or two Brothers in Gavel-kind, and that the younger is within Age and the like, becauſe they are Vouchers out of Common Courſe. Co. 2 Inſt. 246. b. 40 E. 3. 14. 10 H. 7. 21, 22. 16 H. 7. 13. 43 E. 3. 19.

Counterplea of the Cauſe.

2. And the Demandant may Counterplead the Cauſe in ſuch Vouchers. Co. 2. Inſt. ibidem.

Voucher of the Tenant.

3. If one or two Vouchees vouch the Tenant or their Vouchor, they ought to ſhew Cauſe, becauſe the Voucher cannot ſtand with a Common intent. 11 H. 4. 42. So if Baron and Feme vouch, and the Vouchee voucheth, the Cauſe muſt be ſhew'd. 44. E. 3. 38. b.

The laſt Vouchee vouches the firſt.

4. If there be ſeveral Vouchers over, and the laſt Vouchee vouch the firſt, Cauſe muſt be ſhewn, becauſe the Demandant cannot Counterplead the Voucher by the Statute, having admitted him as Vouchee before, and therefor Cauſe muſt be ſhewn, that the Demandant may Traverſe it. 20 H. 6.2. b.

5. If

5. If the Cauſe be not ſufficient, the Demandant may Demurr to it. 11 H. 4. 20. b. 14 H. 6. 4. b. As if one vouch, and ſhew a Deed hic in Cur' prolat' for Cauſe, and it appear by the Deed that he ought not to vouch by that Deed, the Voucher ſhall be over-rul'd, for he cannot bind the Vouchee by any other Deed. Contr. 30 E. 3. 17. b. Or if it appear by the Cauſe ſhewn, that the Vouchee has nothing but a Poſſeſſion, which is defeated by Recovery or Lawful Entry, the Voucher lies not. 9 H. 6. 49. b. 41 E. 3. 13. 15. 44 E. 3. 27. ſo if one be vouched, and by the Cauſe ſhewn it appear that he ought to have vouch'd another with him, the Voucher is to be over-rul'd. Rolls Voucher. 755. Demurrer to the Cauſe ſhew'd.

6. A man may vouch as Aſſignee without ſhewing the Deed of Aſſignment, if the thing may be granted without Deed; as if A. Infeoff B. and warrant to him and his Aſſigns, and B. Infeoff C. C. may vouch A. without ſhewing any Deed of Aſſignment, only alledging a Que eſtate of B. Co 3. p. 63. Lincolne Colledge Caſe. 26 E. 3. 75. 3 H. 7. 14. 21 E. 4. 36. Where Aſſignee muſt ſhew a Deed.

Where a Revoucher may be.

1. If a man be vouched, & the Vouchee is Return'd dead by the Sheriff, upon the Return of the Summons ad Warr' the Tenant may vouch again, but yet with this Caution, that he cannot vouch a ſtranger out of the Blood of the firſt Vouchee without ſhewing Cauſe. 41 E. 3. 28, 29. 30 E. 3. 24. Quære. 38 E. 3. 27. b. 17 E. 3. 41. 22 E. 3. 3. b. Contr. So if the Vouchee die after Entring into Warr', no voucher at large. 4 H. 4. 1. vid. Raſt. Entr. Formedon tit. Voucher 14. vid. Dier. 7. a. 13 H. 7. 25. Revoucher where the Vouchee is return'd dead by the Sheriff.

If the Vouchee after iſſue joined make default, and a Petit Cape be awarded, and the Vouchee die, no Judgment for the Demandant, but a Revoucher of one of the Blood of the firſt Vouchee. Keilw. Rep. 69. b.

2. But in a new Original, the Tenant may Revouch at large, though he vouched another before. 30 E. 3. 24. b. Revoucher upon a new Original.

Where the Tenant may revouchpresently.

3. If one vouch, shewing Cause where he ought, when the Demandant Traverseth Cause the Tenant may wave the Voucher, and re-vouch presently. 17 E. 3. 47. But Quære whether he may revouch in such Case more than once, for if he should, upon the same Reason he may vouch ad infinitum.

Revoucher upon Return of *Cape ad Valentiam*, if the Vouchee be dead.

4. If the Vouchee make default upon the Return of the Cape ad Valentiam serv'd, the Tenant may say that the Vouchee is dead, and revouch, because otherwise the Demandant would Recover the Land, and the Tenant could not Recover in value against a dead Person. 22 E. 3. 18.

Vouchers great delays.

5. But because vouchers are great delays to the Demandant, and therefore not to be Counterpleaded by the Law, when they are used only for delay, provision by Acts of Parliament is made for preventing of unnecessary and dilatory vouchers, by giving the Demandant power to Counterplead the voucher.

Where a stranger may be vouched, not Heir.

6. If the voucher be Counterpleaded, and the vouchee be Returned dead by the Sheriff, the Tenant may vouch a stranger, but if the voucher be admitted, and the vouchee be Return'd dead, he cannot vouch a stranger, but the Heir of him that was vouched before. 12 H. 7. 9. Br. vo. 141. 14 H. 6. 7. p. 60. Br. 18.

## Counter-plea of Voucher.

What.

1. Counterplea of voucher is a matter shew'd by the Demandant in his Replication, why the Tenant or he that vouches ought not to be allowed such a voucher.

Kind.

2. There are Counterpleas at Common Law, and Counterpleas by Statute, Counterpleas to the Person of the Voucher and to the Person of the Vouchee, Counterpleas by the Demandant and the Vouchee. 21 E. 4. 54. 40 E. 3. 37.

What Counterpleas at Common Law.

3. The Counterpleas at Common Law were several, as that there is no such Person as the Vouchee, 7 E. 3. 27. That the Vouchee is a villain, that the Vouchee is dead and

and ſeveral other, vid. Co. 2 Inſt. 245, 246. Stat. 14 E. 3. c. 18. affirm the Common Law.

4. At Common Law the Demandant could not plead any Plea which was a Counterplea of the Warranty, and therefore the Statute of Weſtminſter 1. c. 40. gave the Counterpleas there provided for, which Statute was made 3 E. 1. and has cauſed great delays in Voucher. What not.

5. Two ſorts of Counterpleas are given now by that Statute. 1. That applicable only to Writs of Poſſeſſion, as Mordanceſter, Coſinage, Ayel, Nuper obiit, Intruſion, Beſail, &c. ſo called becauſe the Anceſtor was ſeis'd the day of his death, or the Demandant was ſeis'd. Co. Lib. 6. f. 3. Markalls Caſe. 2. The other applicable both to Writs of Poſſeſſion and Writs of Right, as Writ of Right Patent, Formedons, Eſcheat, Ceſſavit, &c. and other Writs of Right in their nature. Markalls Caſe, ibidem. Two kinds of Counterpleas by Statute.

6. The Counterplea in Writs of Poſſeſſion is thus—— That the Tenant or his Anceſtors whoſe Heir he is, was the firſt that Entred after the death of him of whoſe Seiſin he demands the Land. 1. Counterplea by Statute.

The other, and the moſt Common Counterplea is thus—— That neither he who is vouch'd to Warranty nor any of his Anceſtors ever had any Seiſin of the Land or Tenement demanded, neither in Fee nor Service by the hand of the Tenant or any of his Anceſtors ſince his time, of whoſe Seiſin the Demandant Counts to the time that the Writ was purchaſed, and the Plea mov'd, ſo that he might Infeoff the Tenant or his Anceſtors. The Entry of the ſecond Counterplea, vid. Raſt. Entr. 687. b. Voucher 7, and 378. b. Formedon A. Voucher. 2 Counterplea by Statute.

7. By this Statute of Weſtminſter 1. Vouchers are limited in Writs of Entry, which make mention of the degrees. None ſhall vouch any Perſon out of the Lien, i. e. out of the degrees. But in Writs of Entry in le poſt, the Voucher may be at large. What the degrees are, vid. Co. 2 Inſt. 153. The Expoſition of this Statute of Weſt. vid. Co. 2 Inſt. 239, 240, 241, 242. &c. Vid. Co. 2 Inſt. 153. Stat. Marlebrige c. 30. 52 H. 3. The nature of Writs of Entry, and by that Statute, the Writ of Entry in the Poſt, is given in Caſe of more Deſcents than two, Vouchers in Writs of Entry limited, within the Degrees, *per Stat. W.* 1.

or Alienations than two, which Deſcents or Alienations above two, are Called out of the Degrees, and ſuch Writ of Entry out of the Degrees is called a Writ of Entry in the Poſt, and before this Statute in ſuch Caſe the Demandant was put to his Writ of Right.

Joynt-tenancy no good Counterplea.

8. It's no good Counter-Plea to ſay that the vouchee is joint-tenant with others not named, or that he never had any thing but as joynt-tenant. Br. Counterplea de Vouch. 44. 8 H. 7. 5. 14 H. 6. 9. pl. 40. Dyer 341. The which Caſe of Dyer is at large with the pleadings in Co. Entr. Tit. Formedon. from 328. b. to 338. b.

Iſſue upon the Counterplea not abated by the death of the Vouchee.

9. If the voucher be Counterpleaded, and the Parties be at iſſue, the iſſue ſhall proceed, and is not abated though the vouchee die, becauſe he is no Party as yet to the Record. 50 E. 3. 2. Br. Counterplea. Vo. 20. 10 H. 7. f. 21. Br. ibidem 43.

Voucher of a ſtranger.

10. If the voucher be Counterpleaded, and the Vouchee be Returned dead by the Sheriff, the Tenant may vouch a ſtranger without Cauſe ſhew'd, but not if the Voucher be admitted, and the Vouchee be Returned dead, he cannot vouch a ſtranger, but the Heir of him that was vouched before. 12 H. 7. 9. Br. Vo. 141. 14 H. 6. 7. Br. 18.

Vouchee may be praied to be ſummoned in the ſame County, becauſe of Lands there.

11. If the Vouchee have Lands in the County where the Action is brought, the Demandant may prove it, and pray that he may be ſummon'd there, and this prevents the Record from being removed in Caſe of a Foreign Voucher upon a Deed of Vouchers or otherwiſe. 13 Aſſ. pl. 3. Br. Vo. 96. Contr. Br. Vo. 65.

Vouchee cannot Confeſs at *Weſtminſter*.

12. Note that a Vouchee cannot Confeſs upon a Foreign Voucher in Banco, becauſe they cannot take the Confeſſion. Br. Vo. 1.

Joynt-tenant or Tenant in Common with the Vouchor, not good Counterplea.

13. It's no Counterplea at Common Law or by Statute, that he who is vouch'd, is Tenant in Common with the Vouchor, 17 E. 3. 47. b. And if he were joynt-tenant, I Conceive the Law is the ſame, for it amounts to a Counterplea of the Warranty which the Demandant cannot have, and comes in a great meaſure into the 8th Rule before.

14. He

14. He that voucheth with Cauſe ſhew'd, if the Cauſe be Travers'd, the Voucher may revouch preſently. 17. E. 3. 47. b. vid. antea Voucher. Rule 3. Revouch preſently.

Theſe may ſerve for Rules and Directions in managing a Foreign Voucher upon a Deed of Vouchers or otherwiſe.

15. If upon a Counterplea or otherwiſe, the Voucher be allow'd, the Entry is thus——Io. Conſiderat' eſt quod vocare illud, ſtet, &c. Raſt. Entr. 687. b. Vo. 10. If the Voucher be diſallow'd, thus——Io. Conſiderat' eſt quod prædict' B. de vocar' ill' hend' præcludatur, &c. Entry *Quod vocare ſtet', & quod non.*

Counterplea of Warranty.

1. As the Demandant may Counterplead the Voucher, ſo the Vouchee may Counterplead the Warranty, i. e. alledge Cauſe why he ought not to warrant the Land. And this Counterplea of Warranty, the Demandant cannot have otherwiſe than as aforeſaid by the Statute. 40 E. 3. 14. 44 E. 3. 2. 9 H. 6. 50. What.

2. It is a good Counterplea of the Warranty that the Voucher is in of another Eſtate than the Eſtate to which the Warranty is annexed. 14. H. 6. 26. Raſt. Entr. Dower 240. a. Voucher 2. Where.

3. A good Counterplea, that the Feoffment was made by him to the Voucher and a ſtranger, and to the Heirs of the ſtranger who is living, and not joyn'd in the voucher. 17 E. 3. 74. So that he who is vouched, neither had any thing but by Diſſeiſin, upon which the Tenant re-entred. 9 H. 6. 49. b. So the Vouchee may Plead that he is to warrant but a part of the Land. 18 E. 3. 40. b. 41. So after entring into the Warranty, generally he may ſhew he is to warrant but a Fee-tail, or an Eſtate for Life. There are ſeveral others, vid. Raſt. Entr. 380. b. Formedon Voucher 24.

4. Upon Counterplea of Warranty, if the Warranty be diſallow'd upon Trial or Demurrer, Judgment ſhall be forth- Where Judgm. ſhall be given for the Demandant.

forthwith given for the Demandant against the Tenant, but if it be allowed, Judgment shall be against the Tenant, and over in value against the Vouchee by the Statute of Westm. 2. c. 6. before which Statute the Tenant could have no other Judgment against the Vouchee, but that the Vouchee should warrant the Land which was a great delay to the Demandant. Co. 2 Inst. 366.

Demurrer adjudged the same Term.

Note, if Counterplea of Voucher be adjudged against the Tenant, the same Term upon Demurrer, it is not peremptory; but he cannot vouch again, but may plead in barr. 22 H. 6. 40. 42 E. 3. 16. But if it be Adjourn'd to another Term, it is peremptory, and Judgment shall be for the Demandant.

## Proceedings how to manage a Deed of Vouchers in a Real Action.

IN the Statute of 13 Eliz. cap. 5. against fraudulent Deeds, &c. made to delay or hinder just and lawful Actions, &c. there is a Proviso, That that Act shall not extend to make void any Conveyance, by Reason whereof any Person shall use any Voucher in any Writ of Formedon; so that taking it for granted, That Deeds of Vouchers may be justly and lawfully used in these Actions; at leastwise I shall proceed to shew what a Deed of Voucher is, and how it is to be made, and how to be used in such Actions. It is a Conveyance made by him who hath a Title to Lands and Tenements defeasible by a Recovery in a Formedon to several Persons, the more the better, as will appear hereafter, to the intent to delay the Demandant in his Action.

2. It may be made by way of Feoffment, but the readiest and easiest way, and which is as good for this purpose, is to make a Lease and Release to one or two Persons, and his or their Heirs, to the use of such Persons, and their Heirs, as are intended to be Vouchées, with a Proviso contained in the Release, That if the Cestuy que uses, or some of them do not pay to the Releasor, naming him at any short day after the Date of the Release, a certain Sum of Money, the double or treble value of the Lands to be purchased, then the Conveyance to be void, &c.

3. This

3. This Conveyance muſt of neceſſity be made before the Teſte of the Original Writ of Formedon, otherwiſe it will be of no effect, Co. 2. Inſt. 245. and it muſt be made to thoſe Perſons that the Tenant is ſure will be his Friends, for otherwiſe they may loſe his Lands by making Default when ſummoned, confeſſing the Action, or the like. After the Demandant has counted, the Tenant may demand the View; and upon the Return of the Writ of View, the Tenant may be Eſſoined; and if more than one Tenant, they may forth by Eſſoine: And at the day given by the Eſſoine, the Tenant may have a general or ſpecial Imparlance; and at the day of the Imparlance the Tenant muſt either plead or vouch, and then comes in the uſe of the Deed of Vouchers.

4. And then it will be beſt to vouch only one of the Perſons in the Deed of Vouchers, becauſe the Deed of Vouchers will laſt the longer, and the Demandant cannot counterplead the Voucher, by reaſon that that Vouchée had a joynt-Eſtate with the others. For by the Statute of Weſtminſter the firſt, cap. 40. the Demandant, as this Caſe is, has no other Counterplea to the Voucher; but to ſay that the Vouchée or his Anceſtor never had any thing in the Land by which he might have enfeoffed the Tenant or his Anceſtors, but that will do the Demandant no good; for though one Joyntenant cannot enfeoff another, yet being ſeized per my & per tout, he may enfeoff a Stranger of the whole, though it be a Diſſeiſin of his Companion, as to a Moiety, 8 H. 7.

5 & 6. Beſides, as the Lord Coke ſaies, 2 Inſt. 244. the words in the Statute, Dont il poit Feoffment faire, is ſpoken but for Example; but a Fine, Releaſe or other Conveyance which giveth an Eſtate, is within that Law. And though the Eſtate of the Vouchees be determined by force of the Proviſo in the Deed of Vouchers, yet neither will that avail the Demandant; for if the Vouchée or any of his Anceſtors ever had any Seiſin, though it be voided or determined, yet it is ſufficient, Co. ib.

7. If the Vouchée be returned ſummoned, then he may Eſſoine, and at the day given by the Eſſoine, he may vouch another of his Companions, and ſo on; and every Vouchée may have the like Eſſoine. But to be juſt to the Demandant

as

as well as to the Tenant. If the Tenant vouches A. who appears and enters into the Warranty, and vouches B. who likewiſe Appears and Pleads to iſſue, which Iſſue is found for the Demandant, and before Iudgment Entred, either of the Vouchees dies, and after the Demandant enters his Iudgment to Recover againſt the Tenant, and for the Tenant to Recover againſt the firſt Vouchee, and for that Vouchee to Recover againſt the ſecond, that Iudgment will be intirely erroneous, Keil. 69. b. & 80. b. and ſo it will be as I conceive, if the ſecond Vouchee makes default, and the firſt Vouche dies before Iudgment, and therefore in ſuch Caſe the Demandant muſt be ſure to ſuggeſt to the Court, that the Vouchee is dead, and pray a Reſummons. vid. Br. Reſummons 7. 39. & 47.

Proceedings in *Cheſhire.*

8. The Proceedings in Cheſhire are thus.—1. The Tenant vouches I. S. in the ſame County, againſt whom, if he appears not gratis forthwith, there goes forth a ſummons ad Warrantizand' Returnable the firſt day of the next Seſſions, (unleſs by Conſent ſooner, as in Common Recoveries.) 2. If the Sheriff Return him ſummoned, he is to appear in Perſon, or by Attorney or Eſſoine; for he needs not a Dedimus poteſtatem as in a Writ of Entry en le poſt, in ſuffering a Common Recovery, the Reaſon ſee in F. N. B. 26. b. French. 3. At the Return of Summons, the Vouchee may Eſſoine, but that is but for one day, and every Vouchee may have one Eſſoine, at the day by the Eſſoine, the Vouchee is to appear, and then the Demandant is to Count againſt the Vouchee, and the Vouchee may imparle till firſt day of next Seſſions, and then Eſſoine for one day, and at the Eſſoine day come he may vouch over ſome other Perſon in the Deed of Vouchers; and it may be one who has no Lands in Cheſhire, but in another County, and this greatly delays the Demandant, for in ſuch Caſe the Action is continued Uſque prox' Seſſion' de Seſſion' in Seſſion' till it be Remov'd by Writ out of Chancery, Returnable into the Common-Pleas at Weſtminſter, Where, when the Record is ſent, the C. B. makes out a Summons ad Warrantizand' againſt the Vouchee, who at the Return of the Summons, may be Eſſoin'd, and at the day by the Eſſoine is to appear as before if he be return'd Summon'd; when the Vouchee has appeared, the Record is to be remanded to Cheſter, ſo that the Common-Pleas cannot admit of a Vou-

Eſſoine *per* Vouchee.

Remanded to *Cheſter.*

Cher

day to be given to the Parties to the next Seſſions at Cheſter, and then the Vouchee is to appear, and the Demandant to Count as before, and the Vouchee may have the Dilatories as before, and then call to Warranty another of the Vouchees, who if he have no Lands in Cheſhire, then the Record is to be remov'd to Weſtminſter as before, Vid. Dyer 69. Pl. 35. ſee Regiſter. The Writ there which removes the Record from Cheſter upon a Voucher, fol. 6. Br. Voucher 152. 156. ſee Co. Entr. f. 342. tit. Formedon, where theſe proceedings upon a Record from Cheſter are Entred. Inter Egerton Petent' & Deane Tenen' for Lands in Smallwood, in a Formedon en diſcender. The Roll in Cheſter is 43 Eliz.

So that the C. *Pleas* cannot admit of a Voucher over before they remand the Record. *Vid Kelw.* 109. *b.* there argued.

9. By this Deed of Vouchers, much further delay may be uſed, if the Vouchee be an Infant Heir of one of the Feoffees, if he be vouch'd as Heir, then the Tenant may pray that the Parol may Demurr till the full Age of the Infant, and it ought ſo to do. Co. Entr. 321.

Paroll to Demurr.

10. And there may be a further delay ſtill, if the Sheriff return upon the Summons ad Warrantizand' that the Vouchee has nothing whereby he may be ſummon'd, then the Tenant may take forth an Al' and after a Plur' without any prejudice to him, and then a Plus Plur' (called a Plur' ordinarily) with a Sequatur ſub ſuo periculo, : But then at the Return of the Sequatur, &c. if the Tenant do not procure the Vouchee to appear, he loſes his Land, but if he appear, (which he muſt do in ſuch Caſe in Perſon) F. N. B. 27. c. 13 E. 3. Fitz. Attorney 74. he may vouch over as before. Vid. Fitz. tit. vo. 18. 13 E. 3. Proceſs in Cheſter upon a Cape ad Valentiam. And there it's ſaid, that no Sequatur ſub ſuo periculo ſhall be Entred, till after the Return of the Plur' i. e. upon the awarding of the plus Plur' (Except it be in Dower) for in Dower it's ſaid, it muſt be at the taking out of the Al'. There's a notable Record for this, 8 H. 4. inter Record' Caſtr' Ceſtr'. ad Com' die martis prox' ante Feſt' beat' Mar' Vir'.

*Alias, Plur' Sequatur ſub ſuo periculo.*

*Vi. Fitz. Voucher*, 135. & 136.

*Vid. f.* 169.

11. If the Sheriff return Tarde upon the Writ of Summons ad Warrantizand', the Tenant may delay the Demandant to the Al', Plur'. and Sequatur ſub ſuo periculo, if the Tarde be return'd upon the Al' and Plur'. So that in Effect, by this Deed of Vouchers, the Land can never be re-

*Tarde.*

recovered, for what by Foreign Vouchers, Infants under Age, and other Dilatories, the Vouchers are never likely to be spent in the life times of the Demandant and Tenant, and if either of them die, all falls to the ground, and the Demandant or his Heir is to begin de novo, and the Tenant or his Heir may revouch all again. 30 E. 3. 24. b. ~~Vid. contra fo. 56.~~

Vouchee hath Lands in *Lancashire*, vouch'd in *Chester*; how to proceed.

12. If a Voucher in Chester be made of one that has Lands only in the County of Lancaster, Quære, whether the Record must be remov'd into the Chancery by Certiorari from thence, and then sent by another Writ into the County of Lancaster, in order to summon the Vouchee there, or that the Record is to be remov'd (as before in Case of other Counties that are not County Palatines) into the Common Pleas, for if the Common Pleas can Summon the Vouchee in a County Palatine to appear at Westminster to warrant, then the Question is out of doors, for then the Record must be remov'd to the Common Pleas; but if they cannot make such Summons than by Certiorari as before, In 26 E. 3. 59. b. Fitz. tit. Vo. 306. it's adjudg'd, That the Tenant pray that the Vouchee may be Summon'd in the County of Lancaster or Chester; the Writ shall issue thither, although that generally the King's Writ does not run there. Quære, of this Case.

26 *E.* 3. 59. *b.*

Ceſter. *ff.* 33 *E.* 3. Record.

In a Record inter Rot' in Castr' Cestr' inter Plita' Com' Cestr' tent' apud Cestr', coram Bartho' de Burgherſſe Justic' Domini Comit' Cestr' die martis prox' post claus' Pasch', Anno Regni Regis E. 3. 33. A Writ of Right is brought by William de Penreth & Margarita Uxor ejus, Et Elena qu' fuit Uxor Ade de Praiers versus Robert' de Wylaston et Margaria' Uxor' ejus, de duabus partibus tertiæ partis Maner' de Wystanston. Margery the Tenant, being received in default of her Husband, called to Warranty one Robert de Wermyncham Vicar' of the Church of Frodsha', and he appeared, and vouch'd over, and afterwards Warmyncham made default, and a Cape ad Valenciam was awarded against him; at the Return of the Cape, he appear'd, and to Excuse his default, he pleaded that both he and his Attorney were Imprison'd in Warrington in the Dutchy of Lancaster, and issue was taken upon it, and because the said issue could not be Tried in Cheshire, day was given to the next County. Et interim

interim Sequatur bre' Domini Regis, &c. And afterwards the Record was remov'd by Certiorari into the Chancery, and from thence to the Dutchy of Lancaſter, where both parties Appear'd, and at the Return of the Venire, Warmyncham made default again, and then the Record was remov'd from Lancaſter by another Writ out of Chancery into the Chancery again, and from thence ſent by Writ to Cheſter, in order to have Judgment, and there Judgment is given againſt the Tenants to the Writ, and for the Tenants againſt Warmyncham the Vouchee. This Record is pleaded tempore H. 5. in an Aſſiſe of Novel diſſeiſin, and Entred at large, with all the ſeveral Writs at large, Int' Plita' Com' Ceſtr' tent' apud Ceſtr' coram Gilberto Domino de Talbot, Juſtic' Ceſtr' die martis prox' poſt feſt' Sanct' Trinitat' 4 H. 5. Ceſtr. ff. 4 H. 5.

There ſeems to be ſome difference between this and a foreign Voucher, becauſe matter of Fact which is local, ought to be Tried in the proper County, and that can be done no other way, but by Certiorari. But Quære, whether this was ſuch a Foreign Plea as was needful to be Tried in Lancaſter, for I conceive the place of the Impriſonment was not material, and therefore the matter not local.

9. Note, if the Tenant Vouch an Infant as Heir, the Demandant may ſay that he is of full Age, and ſo go to iſſue, and then the Proceſs is a Venire to ſummon the Infant to appear, and to be view'd by the Court; and if he be return'd (Nihil) then goes forth an Al' and a Plur', and another Writ with a Sequatur ſub ſuo periculo, &c. and then if he appear not, whether the Sheriff return the Writ or not, the Tenant loſes the Land. Therefore it highly concerns the Tenant to procure the Infant to appear at the Return of the laſt Proceſs; and if by Inſpection of the Court the Infant is judg'd of full Age, then goes forth a Summons ad warr', as before. Vid. Keilw. Rep. 85. b. Summons *ad habend. viſu' Infan'* *Venire.*

So note, the Tenant may greatly delay the Demandant by alledging the vouchee within Age when he is not, Co. Entr. 320. inter Rotul' Ceſtr' ad Com' Ceſtr' tent' die Martis prox' poſt feſtum St. Luciæ Virgin', 3 H. 5. int' Willielm' Brereton Mil' & Nichol' fil' Roger' de Moldeſworth in a Formedon in deſcender'. Vid. Raſt. Entr. 379. b. Vid. poſtea for this Record more at large, f. 166. Ceſtr. ff. 3 H. 5.

Foreign Voucher of a Deed muſt be ſhew'd.

13. The Lord Coke in his Expoſition of the 12th Chapter of the Statute of Gloceſter, Co. 2 Inſt. 325. ſays that leaſt foreign Vouchers ſhould be uſed for Delay, they muſt ſhew a Charter, &c. comprehending warranty to the Court: But many Preſidents are otherwiſe; but admitting that a Deed muſt be ſhewed, I conceive that muſt be underſtood of private Jurisdictions, as of Cities or other Corporations. And the Lord Coke in his firſt Inſt. 102. a. ſeems to be of that Opinion.

## CAP. XVIII.

## Aid Praier.

What?

1. WHen Real Actions are brought againſt any particular Tenant, as Tenant for Life, by the Curteſie, or the like, becauſe they had not the whole Eſtate in themſelves to defend, they might pray in Aid of him or them in Reverſion or Remainder to plead for them, to defend the Inheritance of the Land, and this is called (Aid prayer.)

Kinds.

2. This Aid is twofold, 1. Of the King. 2. Of a Common perſon for Aid of the King, Vid. Co. 2 Inſt. 268, 269, 270.

Aid in perſonal Actions.

3. There's Aid likewiſe in perſonal Actions, as in Treſpaſs after iſſue join'd, and in Replevin; but theſe are not to the preſent purpoſe. Vid. 22 H. 6.33.

Where to be allow'd or not.

4. In Aſſiſe, Aid ſhall not be allow'd of one who is a ſtranger to the ſuppoſal of the Writ, 14 H. 6. 22. Otherwiſe in a Writ of Entry in nature of an Aſſiſe, 14 H. 6. 22. 21 E. 4. 15. b.

Tenant in tail.

5. Tenant in Tail ſhall not have Aid of him in Remainder in Fee, becauſe he hath an Inheritance, 2 E. 3: 46. nor Tenant in Tail after poſſibility, &c. becauſe he once had an Inheritance in him. 2 H. 4. 17. b. 11 H. 4. 15. 39 E. 3. 16.

6. Leſſee

6. Leſſee for Life, Remainder in Tail, Remainder in Fee, the Leſſee ſhall have Aid of him in Remainder in Tail, 41 E. 3. 16. b. Leſſee for life.

7. In Real Actions Aid ought to be demanded at the firſt day the Tenant hath to plead, i. e. before Imparlance, 3 H. 6. 5. and ſhall have Aid before Plea pleaded and Iſſue taken, 4 H. 6. 30. b. For after Plea pleaded no Aid ſhall be granted, 4 H. 6. 30. b. 8 H. 4. 16. When to be demanded.

The Entry of Aid praier is thus——

Et prædict. *A.* per *T.* Attorn' ſuum ven' & dic' quod, &c. (here's the Cauſe of Aid pleaded) Et ſic idem *A.* dicit qd' ipſe tenet & die impetrationis Brevis Original' prædict. *R.* tenuit Tenement' pd' cum pertinen' pro termino vitæ ſuæ remaner' inde præfat' *B.* & hæred' maſcul' de corpore ſuo exeun' ſine quo ead' *A.* non poteſt Tenement' præd' cum pertin' in placitum deducere neq; præfat' *R.* inde reſpondere Et pet' auxilium de ipſo *B.* &c. Et ei conceditur, &c. Io' præcept' eſt Vic' quod ſum' per bon' ſummon' prædict' *B.* quod ſit hic a die Paſch. in quindecem dies ad jungend' cum præfat' *A.* ſimul, &c. in reſpond' præfat' *R.* de præd' placito ſi, &c. idem dies dat' eſt partibus præd' hic, &c. *Co. Entr.* 327, & 341. 49. a. Entry. Record.

8. Upon demand of Aid, and granted, a Judicial Writ is to be ſued out by the Tenant (call'd a Summons ad auxiliand') at the Return of which if the Praiee do not appear or Eſſoine, and after make default, Judgment is entred qd' defend' ou tenens ſol' reſpondeat, 27 H. 8. 4. 4 H. 6, 30. Summons *ad Auxiliandum.*

The Summons *ad auxiliand'* is thus——

Rex Cum *J.* in Cur', &c. pet' verſus *W.* unum Meſſuag', &c. in *E.* de quibus idem *W.* injuſte & ſine judicio diſſeiſivit præfat' *J.* poſt prim'. &c. (but now infra triginț an', &c.) ut dic' idemq; *W.* poſtea ven' in ead' Cur' noſtra & dixit quod quidam *W. W.* nuper fuit ſeiſit' (as in the Plea when Aid was demanded) &c. Et petiit auxilium de ipſo *W. VV.* qd' ei conceſſum fuit Et ideo tibi præcipimus qd' ſum' per bon' ſum' prædict. *VV. VV.* quod ſit coram, &c. in Oct. Sti. Hil-

lariſ The Writ of Summons *ad Auxiliandum.*

larii ad reſpondend' præfat' *J.* ſimul cum præfat' *W.* de præd' pl'ito ſi voluerit Et habeas ibi ſum' & hoc Bre', *Raſt. Entr.* 271. b.

This is a Writ of Summons ad auxiliand' in a Writ of Entry ſur Diſſeiſin; the like in other Actions mutat' mutand'; but the Writ may be made ſhorter than ſetting forth at large the Eſtate of the Praiee in Aid, only alledging that the Praiee is ſeiſed in Fee, and that the Tenant has only an Eſtate for Life, &c.

The Entry of Judgment upon the Default of the *Praiee in Aid* upon the Summons return'd.

Entry Record.

Ad quem diem coram Domina Regina apud *W.* ven' tam pd' *J.* quam præfat' *S.* per Attorn' ſuum pd' Et præd' *A.* (the Praiée) licet ſum' non ven' Ideo conſideratum eſt quod pd' *S.* (the Tenant) ad narrationem prædict' ſine pd' *B.* præfat' *J.* reſpondeat, &c. *Co. lib. Entr.* 49. a.

And upon Default after an Eſſoine by the Praiee. Vid. Raſt Entr. 27. a.

Where Aid ſhall be granted a ſecond time.

9. In ſome Caſes Aid ſhall be granted of another after Aid was granted before. As if one Coparcener who is praied in Aid by another, make Default, the Coparcener Tenant may pray in Aid of another, from whom the Land originally was deriv'd; as if the Brother make Default, Aid may be prayed of the Uncle upon a Partition made between the Father of the Tenant and the Uncle, 17 E. 3. 12. b. So the Leſſee for Life, after Aid of him in Reverſion, who dies, ſhall have Aid of his Heir, 31 H. 6. 10. And ſo if the Heir after dies, he ſhall have Aid of his Heir, 21 H. 6. 38. b.

After Judgment to anſwer Sole.

10. After Judgment to anſwer ſole, yet in ſome Caſe Aid may be prayed and had after, as if he in Reverſion make default, who was prayed in Aid by Baron and Feme, if after the Husband make default and the Wife is receiv'd, ſhe ſhall have Aid againſt him in Reverſion, 12 R. 2. Aid. 123. Fitz. Abr.

11. But

11. But becauſe Aid praier as well as Vouchers are great Delays to the Demandant, and may be falſe as well as Vouchers, therefore the Law has provided Counterpleas of Aid as well as of Vouchers; of which obſerve what follows——

Counterplea of Aid.

Counterpleas of Aid.

It is a good Counterplea of Aid, That the Praiee hath nothing in the Reverſion, 12 H. 6. 1. or Remainder; Or that the Praiee did not demiſe the Land to the Tenant, Raſt. Entr. 27. The Entry of a Counterplea. Vid. Raſt. Entr. ibid.

What is a good Counterplee.

And now having gone through thoſe Incidents that wait upon Real Actions after Appearance, and before Pleading to the Action, I come to thoſe that are Incidents after Appearance and after Pleading, as Eſſoine, Default, Petit Cape, Departure in deſpite of the Court, Receit, Judgment, of which ſome have been ſpoken of before, as Eſſoin and Default, and therefore of them leſs ſhall be ſaid here; the time when they are, i.e. (after Pleading) only makes the difference.

## CAP. XIX.

## Eſſoine after pleading.

1. AS the Tenant may be Eſſoin'd before Appearance and after Appearance before Pleading, ſo he may be Eſſoin'd after Pleading. As upon the Return of a Venire fac', Hab. Corpor', and other Judicial Proceſs, 7 H. 6. 14. Dyer 324. b. 21 E. 3. 33. b. 7 H. 6. 14. But in Perſonal Actions no Eſſoine is allowable upon the Hab. Corpor' or Diſtringas, by the Statute of Weſtminſter 2. c. 27. Co. 2. Inſt. 417. Neither can the Demandant or Bailiff be Eſſoin'd in a Real Action upon the Hab. Corpor', Raſt. Entr' 316. a.

Eſſoine after Judicial Proceſs as *Venire, Hab. Corp.*

2. If

Every Tenant one Eſſoine.

2. If there be ſeveral Tenants, they may have every one one Eſſoine after Appearance and Pleading as well as before, Co. 2. Inſt. 126. and 250. Weſtm. 1. c. 43. 2 E. 4. 10. And therefore I conceive the Caſe of Eſſoins in Hob. Rep. f. 8. is miſtaken, which reſtrains Eſſoining ſeverally to a Writ of Partition.

Weſtm. 1. c. 43. Marlebr. c. 13. Weſtm. 2. c. 27.

3. The Statute of Weſtminſter 1. c. 43. was made to prevent fourching by Eſſoine; the Statute of Marlebrige, c. 13. to prevent any more than one Eſſoine after iſſue join'd in Perſonal Actions, and the Statute of Weſtminſter 2. c. 27. limited that one Eſſoine to the next Proceſs. But Real Actions ſtand as to Eſſoines as they were at Common Law. The next thing in Rule is Default after Appearance.

## CAP. XX.

# Default after Appearance.

What.

1. Default after Appearance, differs nothing in the nature of the thing from default before Appearance, ſave only in the Circumſtance of time, that the one is the not Appearing nor Eſſoining upon the Return of the Original, and the other is not Appearing, or Eſſoining upon the Return of ſome mean Proceſs, or ſome other day given when he has appear'd before to the Original.

*Petit Cape* to be awarded.

2. In the firſt place, the Tenant ſhall loſe his Land upon the Return of the Grand Cape, in all Præcipe quod Reddats if he cannot ſave his default as is ſhew'd before; in the other Caſe, a Petit Cape ſhall be awarded, and upon the Return of that, if the Tenant cannot ſave his default, he ſhall loſe his Land in all Præcipe quod Reddats.

*Grand Diſtreſs*, in lieu of a *Petit Cape*.

3. In Caſe of default after Appearance in ſome Actions, a Grand Diſtreſs ſhall iſſue in lieu of a Petit Cape, Vid. con- c. Diſtreſs.

4. In

4. In Real Actions, Default after Apperance is several ways, 1. At the Return of the Writ of View, Old N. B. 162. 2. At the Return of the Venire fa' Rast. Entr. 30. 279. 3. At the day given to wage Battle in a Writ of Right, Rast. Entr. 103. b. 4. After an Imparlance the same day, which is called a Departure in despite of the Court, Rast. Entr. 149. 5. 5. At the day given by an Essoine, Rast. Entr. 30. a. 6. At a day given in a Superior Court, the Record being remov'd from the Inferior by Certiorar' or the like, as in Dower, Ne unques accouple, &c. and in other Cases. Rast. Entr. 229. a. b. Default several ways.

5. Note, that in some Cases judgment shall be given without a Petit Cape first awarded; in other Cases a Petit Cape must first issue. Without a Petit Cape, as in the Case of default at the day given to wage Battle in a Writ of Right; in the Case of Departure in despite of the Court, and in several other Cases in our Books; as in Case an issue be found for the Demandant, and after the Tenant make default, judgment shall be given without a Petit Cape, for after Issue and Verdict, nothing remains but judgment. 4 H. 6. 28. So if it the Tenant claim fee in a Quid Juris clam', and after make default. 30 E. 3. 29. Where Judgment without a *Petit Cape*.

Upon default, at the Return of the Venire fac' in all Præcipe quod Reddats, a Petit Cape shall be awarded, and a Distringas in lieu of a Petit Cape in Actions that are in the Reality, as in Writs of Customs and Services, Writ of Measne, and other Writs where Attachment and Distress lie in the mean Process, for the inquest shall not be taken by default in any Real Action. 30 E. 3. 29. *Petit Cape* upon Return of *Venire fac'*. No inquest to be taken by default in real Actions.

6. In a Quare Impedit, the Defendant appears, and after makes default, at the Return of the Venire a Writ to the Bishop shall be awarded, and the Inquest not to be taken by default, nor a Distringas first in lieu of a Petit Cape. Pasch', 12 E. 2. Q. Imp. 168. The Reports lately Printed. In *Q. Imped.* Writ to the Bishop, and no *Distringas* upon default.

7. Upon the default, the Petit Cape is made by the Prothonotary Teste the Chief Justice, and ought to have fifteen days at least before the Return, as well as the Grand Cape, but in Cheshire, two or three days is sufficient, if Return of the *Petit Cape* 15 days. How in *Cheshire*.

it be in the time of Seſſions. Br. Grand Cape. 36.

The Petit Cape Runs thus——

Writ of *Petit Cape.*

Rex, &c. Vic' B. ſalutem. Cape in manu' noſtr' un' Meſs. &c. in C. qu' S. in Cur' noſtr' coram Juſtic' noſtris Ceſtr' apud Ceſtr', vel apud Weſtminſt' clam' ut jus ſuum verſus M. pro defectu ipſius M. Et ſum' per bon' ſum' prædict' M. quod ſit coram Juſtic' noſtris Ceſtr' apud Ceſtr' primo die prox' Seſſion' Comitat' Ceſtr' apud Ceſtr' tenend' vel die Sabat' prox' futur' iſt' eadem Seſſion' vel apud Weſtmin' in Octab' St. Hillarii auditur' inde judic' ſuum Et habeas ibi ſum', &c. Et hoc bre' Teſt' I. S. &c. Juſtic', &c.

The Return of the Sheriff upon the Writ is thus. ——

Return.

Virtute iſtius bris' mihi direct' tal' die & anno cepi in manus Domini Regis Tenementa prædict' infraſcript' cum pertinen' prout interius mihi præcipitur.

*A. B.* Vic'

Vid. fol. 26. Grand Cape, and comparing the Grand Cape and Petit Cape together, the words in the ſeveral Writs do ſhew wherein they differ.

But becauſe (Departure in deſpite of the Court) is a ſpecial default upon which judgment ſhall be given without a Petit Cape firſt awarded, and is an ordinary Default, upon which Judgments are given in Common Recoveries, ſomething ſhall be ſaid of that in the next Chapter.

CAP.

## CAP. XXI.

# Departure in deſpite of the Court.

1. A Departure in deſpite of the Court, is when the Tenant when he hath appear'd, and hath a day given him by Imparlance, or the like, the ſame Term, or if he do not appear when he is call'd, this is a Departure in deſpite of the Court, and Judgment ſhall be given for the Demandant without a Petit Cape; becauſe the Tenant in ſuch Caſe is always intended in Law, to be preſent in Court, and for his Contempt he ſhall loſe his Land. Vid. Nomo-Lexicon Tit. Departure in deſpite, &c. and 9 H. 6. 58. Vid. poſtea. What

2. But if he Imparle to another Term, and at the day make default, this is no Departure, but a Petit Cape ſhall be firſt awarded, Br. Departure in, &c. 2 Contr', 7 H. 6. 39. Yelvert. Rep. 211. Lilburn verſ. Heron. Imparlance to another Term, no Departure then.

3. But by Co. lib. 8. Beecher's Caſe, f. 62. it's there ſaid, That if a certain day be given to the Tenant by Imparlance, if he do not appear, it's no Departure, ſpeaking indefinitely as to the ſame or another Term, which I much queſtion for Law, as to the ſame Term; for in 7 H. 6. 39. it's agreed, that if in the ſame a day certain be given upon an Imparlance, or that no day certain be given, but a Licentia interloquend' generally, if the Tenant or Vouchée do not appear when he is call'd, it is a Departure in deſpite of the Court, and Seiſin of the Land ſhall be awarded, as the Practice is in all common Recoveries. And the Recoveries in the Court of Great Seſſions of Cheſter are entred upon the Default of the common Vouchee, i. e. after the common Vouchee hath appear'd and pleaded, then the Demandant imparles generally the ſame Seſſions without any certain day (petit licentiam inde interloquend' & habet, &c.) and then comes into Court again; and the Vouchée being call'd, makes Default, which is a Departure in deſpite of the Court, being in the ſame Seſſions, and the Vouchée having no day given him by the Court, nor imparling to any day certain, but being always intended to be preſent, therefore Judgment is entred without Where no Departure if a day certain be given. Common Recoveries in *Cheſter*. Judgment given upon Default of the Vouchee.

Entry of a Departure.

& Petit Cape thus—— Et prædict' *B.* (the Vouchée) licet ſolemniter exact' non reven' ſed in contemptum Curiæ receſſit & defalt' fecit Io' conſideratum eſt quod prædict' *A.* recuperet Seiſinam ſu', &c. Vid. 3 *H.* 6. 14. 38 *E.* 3. 13. 18 *E.* 4. 41. 14 *H.* 8. 2. See all this confirm'd, Yelv. 211. Lilburn verſ. Heron; and Cr. 2. p. 292. the ſame Caſe.

No Departure upon *Dies dat.* to another Term or Seſſions.

4. If a day be given by the Court upon Continuance of Proceſs by Dies dat' eſt to another Seſſions or another Term, and then the Tenant make default, this is no Departure; for he departed with the Licence of the Court; but in ſuch Caſe a Petit Cape ſhall be awarded, 7 H. 6. 39. 41.

Difference between *Retraxit* and Nonſuit.

5. Note, That the Demandant may withdraw (called a Retraxit) in Deſpite of the Court, as well as the Tenant, Vouchée, or Praiee in Aid, may depart in deſpite of the Court; in which Caſe Judgment ſhall be given for the Tenant, and the Demandant ſhall not be Nonſuited, though he would. As if the Defendant or Tenant appear and imparle the ſame day, and after come into Court, and the Demandant makes Default, this is a (Retraxit) in Contempt of the Court, and a Bar to the Demandant. But if the Tenant imparles to another day certain, though it be in the ſame Term or in another Term, and the Demandant then makes Default, this ſhall be conſtrued a Nonſuit of the Demandant, and not a Bar. For in the firſt Caſe the Demandant is not demandable, being one and the ſame day, and therefore always intended to be preſent in Court; and if he withdraw himſelf, he ſhall be barred, as is aforeſaid. But in the other Caſe the Demandant is demandable, in Judgment of Law, being not preſent in Court; and therefore if he appear not, being called, may be Nonſuited, 3 H. 6. 14. Br. Departure in deſpite, &c. 1. And there it is ſaid the ſame Law is of the Vouchée or Tenant, which ſeems to confirm Coke's Opinion in Beecher's Caſe, That if the Tenant do imparle to a day certain, though it be in the ſame Term, and then make default, this is no Departure in deſpite of the Court, but a Petit Cape ſhall be awarded, 20 E. 2. Excom. 28. Vid. Beecher's Caſe. Co. lib. 8. 62. The Entry of this Retraxit,

Where Demandant may be Nonſuited, where not.

6. In

6. In Case of default of a Tenant for life, against whom a Præcipe is brought, he in Reversion may pray to be Receiv'd, to be made a Party to the Suit to defend his Right, and to prevent the losing of the Land, and this leads to the last Incident in my method, viz. Receit. Receit upon default of a Tenant for Life.

## CAP. XXII.

## Receit.

1. Receit or Receptio, is the Admission of a Person, Party to a Writ, or a Stranger thereunto, to whom a Reversion or Remainder appertaineth, in default of another Person to defend his or her Freehold or Inheritance; The Law saith, Admittatur. vid. Co. 1. Inst. 192. b. What.

2. And in this Case, two Actions Concurr, One betwéen the Demandant and Tenant, and the other betwéen the Tenant by Receit and the Demandant. Co. ibidem. Two Actions Concurr.

3. This Receit is given by the Statute of Westminster. 2. c. 3. 1. In Case where a Præcipe is brought against Husband and Wife, for the Land of the Wife; if the Husband make default or Render the Land, or upon Nihil dicit, the Wife may be receiv'd to defend her Right before Judgment given. 2. To him in Reversion or Remainder, where an Action is brought against Tenant in Dower, by the Curtesie, after possibility of issue extinct, or any other Tenant for Life, and they make default or render. Co. 2 Inst. 345. Receit by Stat. of *W.* 2. c. 3.

4. A Termor, though he be Party to the Writ, may be receiv'd by virtue of the Statute of Gloucester, 6 E. 1. for he may be made a Party by Covin. 3. Leon. p. 168. Williams v. Drewry. But this Statute extends only to give Receit to a Termor in Case of the default or Rendition, but says nothing of Faint pleading; but now the Stat. of 21 H. 8. c. 11. Gives Termor may be receiv'd though party to the Writ, Stat. Glo. 6 E. 1.

Q. whether Tenant *per elegit*, or Stat *March.* be not Termors within this Stat. *Vid. Keilw.* 109 *Hern Pl.* 353.

Gives Receit to the Termor both upon Default, Reddition, and Faint pleading, vid. the Statute of Gloceſter Expounded per Cook Lit. 46. In Caſe of a Termor, Execution is ſuſpended, but no judgment ſtai'd.

In what Caſes the Stat. of *W.* 2. *c.* 3. Extends.

5. The Statute of Weſtminſter 2. c. 3. Extends only to Default, Nient dedire, or Render, and not to Faint pleadder which is remedied by the Statute of 13 R. 2. c. 17. as to them in Reverſion or Remainder: But Quære, whether the Wife ſhall be receiv'd upon a Faint pleader of the Husband, and it ſeems not, unleſs ſhe be within the Equity of the Statute of Weſtminſter 2. c. 3.

Time of Receit.

6. The time of praying to be receiv'd, is when judgment is to be given for the Demandant, without further Proceſs, as if the Tenant appear, and after he depart in Deſpite of the Court, then he in Reverſion is to be receiv'd. Co. 2 Inſt. 346. 7 H. 4. 15. 3. Cr. p. 826. 13 H. 7. 35. ſo no receit of the Wife for default of the Husband till Return of the Grand Cape or Petit Cape, as the Caſe may be. Keilw. Rep. 35. b.

Count *de novo.*

7. When he in Reverſion is receiv'd, then the Demandant ſhall Count againſt him de novo, ſo that if the former Count were not good, no advantage ſhall be taken of that, for by the Receit, the former Count is wav'd. 33 H. 6. 53. 3. Cr. p. 826. Co. 2 Inſt. 345.

What Pleas he may plead.

8. He that is Receiv'd, may plead almoſt all Pleas, and take all Advantages as the principal Tenant might have done, as Age, Voucher, Aid Prater, and the like. Br. Receit 62. 21 H. 6. 28. Co. 2 Inſt. 346. He that is receiv'd, may be Eſſoined.

Cannot Imparle

9. He that is receiv'd cannot Imparle, and if he make default, it is peremptory, and judgment ſhall be Entred againſt the principal Tenant, without taking notice of the Tenant by Receit; becauſe the Tenant by Receit ought always to be ready in Court, parat' petenti reſpondere. 21 H. 6. 48. 1. Cr. p. 262.

Entry

Entry of Receit of the Feme upon Default of the Husband upon the *Petit Cape*, is thus——

*Salop' ff.* Et Vic' modo mand' quod cepit, &c. Et qd' ſum', &c. Et ſuper hoc prædict' *A.* (the Demandant) pet' Seiſinam Tenement' prædict' cum pertin' per defalt' prædict' *J.* (the Tenant) ſibi adjudicari, &c. Et ſuper hoc prædict' *B.* (the Tenant by Receit being a Feme, in default of her Huſband) in propria perſona ſua ven' & dic' quod Tenement' prædict' ſunt jus ſuum unde ex quo ipſa ven' ante judicium redditu' parata præfat' *A.* (the Demandant) reſpondere & jus ſuum defendere pet' quod ipſa per defalt' *J.* (the Tenant her Huſband) viri ſui non amittat inde jus ſuum ſed quod admittatur inde ad defenſionem juris ſui, &c. Et admittitur, &c. Et ſuper hoc, &c. (the Tenant by Receit pleads in Abatement of the Writ) Raſt. Entr. 30. a. in Ayle. Record.

Note, That the Wife being party to the Writ, needs not ſhew any Cauſe to be receiv'd, but a Stranger muſt ſhew how he has the Reverſion in him, 33 H. 6. 39. Co. 2. Inſt. 345. as in the Entry before and hereafter may be obſerv'd. Where cauſe of Receit muſt be ſhew'd.

The Entry of Receit of him in Reverſion, where the Tenant makes Default upon the Return of the *Grand Cape.* Entry.

*Norfolk. ff.* Et Vic' modo teſtatur die cap'onis, &c. Et qd' ſum', &c. Et ſuper quo prædict' *J.* (the Demandant) pet' Seiſinam Tenementor' prædict' cum pertinen' per defalt' prædict' *N.* ſibi adjudicari, &c. Et ſuper hoc ven' *A. B.* hic in Cur' in propria perſona ſua & dic' quod quidam, &c. (And then pleads how ſuch an one was ſeis'd and leas'd, and ſhews how the Reverſion came to him)——— Unde ex quo ipſe ven' ante judic' reddit', &c. as before—— Raſt. Entr' 140. a. b. Cui in vita.

Vid. The Entry of a Receit of a Feme in Reverſion upon a (Feint Pleder) where a Leaſe and Reverſion is pleaded by Fine ſur Grant & Render', *Raſt. Entr.* 29. a. Ayle. and 581. a. where the Leaſe and Reverſion is pleaded.

Note,

Feint Pleder what.

Note, That a Feint Pleder is where the Plea is false and covenous, or where the Tenant does not that which by Law he ought in order to defend the Land of Covin between him and the Demandant; as when the Tenant for Life neither prays in Aid of him in Reversion, nor vouches him to Warranty.

Counterplea of Receit.

10. Receit may be counterpleaded as well as Voucher and Aid praier to prevent delay. And the common Counterplea of Receit is, That he who prays to be receiv'd, had nothing in the Land, i. e. the Reversion at the time of the Writ brought.

Keil. Rep. 71.

But there are other Counterpleas likewise: As, 1. Where a Reversion is created hanging the Writ, 4 E. 4. 14. 18 E. 4. 25. Rast. Entr. 582. a. But if the Reversion descend pendente Brevi, I conceive he may be receiv'd. Rast. Entr. 374. b. Formedon seems to warrant so much. 2ly. Where he who prays to be receiv'd, was pray'd in Aid by the Tenant for Life, and refus'd to joyn, 4 E. 2. 160. 18 E. 3. 13. Co. 2. Inst. 345.

Entry.

The Entry of the Counterplea, is thus——

*Suffolk. ff.*

Et prædict' *A.* non cogn' aliqu' per prædict' *S.* superius allegat' dic' quod idem *S.* ad aliquod jus de Mess. &c. prædict' modo petit admitti non debet quia dic' quod die impetrationis bris' sui prædict' scilicet tali die, &c. anno, &c. pd' *S.* nihil habuit in Reversione eorund' Tenementor' cum pertinen' Et hoc parat' est verificare unde pet' judicium & Seisinam tenement' ill' sibi adjudicari, &c. *Rast. Entr.* 581. b.

Judgment now comes next in order, which is the end of all Real Actions, and the Consummation of all Judicial Process and Procedings.

CAP.

## CAP. XXIII.

# Judgment.

1. Judgment, quaſi Juris dictu' the very Voice of Law and Right, and therefore Semper pro veritate accipitur. Co. Lit. 39. What.

2. In Real Actions ſome Judgments are Final, ſome not Final, ſome Interlocutory, ſome Definitive or the laſt Judgment. Final, ſuch as do ſo barr all Right and Claim, that he, againſt whom ſuch Judgment is given, can never have any more Actions for the Land whilſt that Judgment ſtands in Force unreverſt. As Judgment in a Writ of Right after the [Miſe] joined, or Nonſuit by the Demandant. And judgment in Attaint is Final. Interlocutory, are ſuch, as after which, there is another judgment to be given in the ſame Action, as in a Partitione facienda, The firſt is, Quod partitio fiat, and when Partition is made, and Return'd by the Sheriff, there the Definitive judgment is Quod Partitio prædict' firma & ſtabil' imperpetuum teneatur, &c. Co. 1 Inſt. 294. Dyer. 301. Co. 1 Inſt. 167. Co. lib. 11. f. 40. Sorts. Final. Interlocutory.

3. Regularly, every Judgment ought to be given according to the Original Writ, both in Real and Perſonal Actions, 12 E. 4. 6. Co. 2 Inſt. 236. And therefore if two be Demandants, Judgment cannot be Entred for one, Except in two Caſes in Aſſiſe, 1. By a Man and his Wife, for Lands in right of his Wife. 2. By two Joint-tenants, in which Caſes they may both Recover Seiſin of the Land, and one only Damages for his Goods taken upon the Land. Co. 2 Inſt. 236. Judgment muſt be according to the Original.

4. Judgment is to be Entred when the Right is known, and that may be either by Implication and judgment of Law, as, 1. When a Tenant makes default either before or after Appearance, and due Proceſs return'd as before, 2. By direct acknowledgment of the Party, as by Confeſſion, or 3. By Verdict of 12 Men. Raſt. Entr. 367, 368. a. See When to be Entred.

the Entry upon Confeſſion and Default, and nient dedire, Co. Entr. 327. b.

Sometimes not upon default till the jury inquire upon the Points in the Writ.

5. Note, that in ſome Caſes Judgment ſhall not be Entred upon default, till the Jury have inquir'd of the Points in the Writ, and if theſe be not found true for the Demandant, Judgment ſhall be Entred for the Tenant, not withſtanding the Default. As in an Aſſiſe of Mord'anceſter, the Jury ſhall inquire of the three Points in the Writ, 1. Whether the Anceſtor was ſeis'd in Fee the day of his death. 2. Whether the Anceſtor died within 50 Years next before the Teſt' of the Writ, 3. Whether the Demandant be next Heir to him that ſo died. Co. 2 Inſt. 399. 4 E. 2. Mordanc' 38, 31. Mordanc' 58.

How Entred.

6. In Præcipe quod Reddats, The Judgment for the Demandant is always that he ſhall recover Seiſin of the Land. Ideo Conſideratum eſt quod prædict' S. recuperet Seiſina' ſuam de Mes' prædict' cum pertinen' per defalt' (if it be by Default) Et prædict' I. in mia' &c. If it be by Confeſſion, Then it is,——Quod recuperet Seſina' ſuam de Mes' prædict' cum pertinen', Et nihil de mia' ipſius A. quia ven' primo die per ſum' &c. if the Confeſſion be upon the Original.

Damages and Coſts, none at Common Law.

7. And Note, That in no Real Actions the Demandant did recover Coſts or Damages at Common Law, i. e. in purely Real, for in ſome mixt Actions he did, as in Aſſiſe, Writs of Entry in nature of an Aſſiſe, in Attaint, vid. Co. 2 Inſt. 286. Co. lib. 10. Pilford's Caſe, 116. 3 H. 4. 16.

Stat. *Gloc. c.* 1. firſt Stat. which gave damages. Except Stat. *Merton. c.* 1.

8. The Statute of Gloceſter, c. 1. in the 6 E. 1. was the firſt Statute (Except the Statute of Merton c. 1. which gave Damages in Dower under nihil habet) that gave Damages and Coſts in Real Actions. viz. in theſe particularly—— 1. In a Writ of Coſinage, 2. Ayel, 3. Beſayel. 4. A Writ of Entry ſur diſſeiſin. 5. Aſſiſe d' Mordanceſter. 6. In all Real Actions grounded upon the Intruſion, or ſon tort demeſne of the Tenant.

Counts not to Damages.

9. In Real Actions, the Demandant never Counts ad dam', but he ſhall recover Damages pending the Writ in ſuch Actions where Damages are given. But a Warrantia Chartæ

Chartæ is Excepted out of this Rule, for there the Plaintiff did declare ad dam' 21 E. 3. 57. b. Raſt. Entr. 396.

10. And becauſe Damages in ſome Caſes are recoverable pendente bri' A Writ of inquiry of Damages ſhall be awarded: As in a Writ of Entry ſur diſſeiſin, the Demandant ſhall recover Damages from the Diſſeiſin to the time of the Inquiſition awarded, and not after, as per 33 H. 6. 47. a. In other Præcipe quod reddat, Damages ſhall be recovered from the diſſeiſin or wrong done, &c. to the time of the judgment given, but if it be upon a Verdict, but to the time of the Verdict, if the Court do ſtay judgment upon a Cur. adviſar' vult, ibidem, Quære ration'. Where a Writ of inquiry ſhall be awarded.

11. In a Præcipe of a Rent of the Demandants own Poſſeſſion, he ſhall recover the Arrears pending the Writ Uſque diem judicii reddit', becauſe it is his Inheritance. 33 H. 6. 47. 7 E. 4. 5. 40 E. 3 24. 16 H. 7. 5. a. b. Co. lib. 10. Pilfords Caſe. Co. 2 Inſt. 286. But 33 H. 6. 37. b. ſemble contra, ſo in Aſſiſe of Rent, ibidem. From what time damages are recoverable.

12. In Real Actions Anceſtrell droiturell, as in Writs of Right, and Writs of Right in their nature, viz. Formedons, Partitione faciend', and all others (Except Dower unde nihil habet) no Damages are recoverable at this day. Co. 2 Inſt. 287, 289. 7 H. 6. 35, 36. 3 H. 4. 16. No damages recoverable in ſome Actions at this day.

13. Note, that the Reaſon my Lord Coke gives in 2 Inſt. 286. why the Demandant in Real Actions ſhould not recover damages at Common Law, is becauſe the Demandant never Counted to damages, which (I conceive) cannot be the Reaſon, for in ſome mixt Actions at Common Law, the Demandant never Counted to damages, as in Aſſiſe, Writs of Entry, in nature of Aſſiſe, and in Attaint, and yet damages were recoverable in thoſe Actions, at Common Law; and in a Warrantia Chartæ the Demandant Counts to damages, and yet ſhall recover no damages where the judgment is only pro loco & tempore i. e. where no Land is loſt. 40 E. 3. 7 Hob. Rep. Osbornes Caſe. The Reaſon why damages were not recoverable at C. Law. In *Warrantia Chartæ*, Counts to damages, yet recovers none.

The Writ of Inquiry of Damages is thus—

The Writ of Inquiry of Damages.

Rex, &c. Vic' ſalutem Præcipimus tibi quod per ſacram' probor' & legal' hominu' de Com' tu' diligentr' inquir' quantum unum Meſs' &c. cum pertinen' in C. de quibus T. injuſte & ſine judico diſſeiſivit W. infra &c. Et qu' idem W. in Cur' noſtra coram Juſtic' noſtr' apud *Weſtminſter'* recuperavit verſus eum per defalt' valent per an' in omnibus Exitibus, juxta verum Valor' eorund' & quantum tempus elabitur a tempore diſſeiſin' prædict', Et ulter' quæ damn' idem W. ſuſtinuit occaſione diſſeiſin' ill' & inquiſic' quam inde fecer' Scire fac' Juſtic' noſtr' apud *Weſtminſt'* a die, &c. ſub ſigill' tuo & ſigill' eorum per quorum ſacrament' inquiſic' ill' fecer', Et habeas ibi nomina eorum per quorum ſacrament' inquiſ' ill' fecer', Et hoc Bre' Teſt', &c. *Raſt. Entr.* 278. *b.*

I conceive it not impertinent to ſay ſomething in relation to the Falſifying of a Recovery, to ſhew how a Judgment obtained in a Real Action may be avoided by Plea, without a Writ of Error, or Attaint, and the ~~having~~ hereof, is not only uſeful in Real Actions, but Contains much in it of the Reaſon of the Law in other Caſes, and with that I ſhall Conclude this Firſt Book.

## CAP. XXIV.

# Of Falſifying a Recovery.

Recoveries may be Falſified.

1. THough Judgments once had, are in Law as ſacred whilſt they are in Force, and bind the Right not only of Parties and Privies, but alſo of all Strangers whoſe Titles are mean to the Title of the Demandant and the judgment, yet if they are obtain'd by Fraud or Covin or other illegal way, and not warranted by the Rules of Law, in many Caſes they may be Avoided and Falſified by Plea, if they be pleaded againſt him that has Right.

2. They

2. They may be Falſified ſeveral ways, 1. By Entry and Plea, 2. By Action, 3. By Action and Plea, 4. By Plea only. 1. By Entry and Plea, when the Parties Entry is not taken away by the Recovery, and he brings an Aſſiſe, and the Recovery is pleaded againſt him, then he pleads matter to avoid the Recovery, as if one be Duſted by Covin between the Demandant and him that Duſts the Tenant, and then the Demandant brings an Action againſt him who Duſted the Tenant; the Tenant may have an Aſſiſe, and if this Recovery be pleaded againſt him, he may avoid it for the reaſon aforeſaid. 41. Aſſ. Pl. 28. Br. Fauxif. Recovery. 40. So if a Woman that has Title of Dower, procure another to Enter, and recover againſt him, this may be Falſified in an Aſſiſe. 44 Aſſ. 29. Br. ibidem 43. ſo Tenant per Stat. Merchant, Staple, Elegit may falſifie for Covin in an Aſſiſe, 21 E. 3. 1. Br. Fauxf. Recovery 48. How many ways they may be Falſified. 1. by Entry & Plea.

2. By Action and Plea; and that is, when the Entry of the Party that has Right is taken away by the Recovery, and upon a real Action brought, this Recovery is pleaded in barr of his Right; this may be Falſified by Plea, as at Common Law, if a Recovery were had againſt Tenant for Life, he in Reverſion could not, (nor yet can ſave in Common Recoveries) Falſifie by Entry as to have a Common Aſſiſe, but muſt Falſifie by Plea in an Ad terminum qui præteriit or Writ of Right 24 H. 8. Br. 44. So if before the Statute of Uſes the Ceſtuy qu' uſe in Tail had ſuffered a Recovery againſt him by feint Title, the Feoffees ſhould Falſifie by way of Action, and not in an Aſſiſe by way of Entry 31 H. 8. Br. Faux Recovery 49. So the iſſue in Tail may falſifie in a Formedon 7 H. 4. 17. Br. Faux Recovery. 10. 2. By Action and Plea.

3. By Action, as in a Quod ei deforceat, by particular Tenants, and deceit for want of Summons, &c. But theſe are not intended in this place, being particular Actions of themſelves Treated of hereafter. 3. By Action.

4. By Plea only, as when the Action is brought againſt the Tenant upon a Recovery, or a Recovery is pleaded in the Demandants Replication againſt him, then may the Tenant Falſifie it, if he have Cauſe. As in a Scire fac' againſt the 4. By Plea only.

the Ter-tenant upon a Recovery against B. the Ter-tenant may Falsifie the Recovery for good Cause, 12 E. 4. 2. Br. Faux Recovery 31. So in Trespas, the Defendant pleads in bar, and the Plaintiff in his Replication pleads a Recovery, the Defendant by rejoynder may Falsifie. Vid. 12 E. 4. 14. & 19. 13 E. 4. 1. Br. Faux Recovery 30.

Several causes of Falsifying. 1. By Covin.

3. There are several Causes and grounds for the Falsifying a Recovery. 1. For Covin, Br. Faux Recovery 1. 3. 6. 27. 46. 2. An elder Title of Entry than the Tenant had against whom the Recovery was obtain'd, and upon whom the Entry was made. Br. Faux Recovery 2. 3. Want of jurisdiction in the Court where judgment is given, Br. 9. 38. 4. Warranty and Assets, Br. 18. 5. By reason of a Release, Br. 21. 6. Faint pleader in the Action wherein the Recovery is had, Br. 22. 49. 7. No Tenant of Freehold at the time of the Recovery Br. Faux Recovery 30. 32. 37. 8. Want of an Estate in the Tenant, as being but Tenant for Life. Br. 44.

1. For Covin.

1. For the first as to Covin, as when he who has an Advowson, and grants the next avoidance, and afterwards of Covin to destroy the Grantees interest, he suffers a Recovery by Writ of Right of Advowson against him, 26 H. 8. 2. So if one pleads a Recovery against himself by Assise, puis le darreine Continuance, the Demandant may say, that this Recovery was of Covin, and must shew how, i. e. That the Tenant did not disseise the Tenant in the Assise 9 H. 6. 41. So if the Entry of one that has right to Land be taken away, and he of Covin gets another to Enter, and Recovers against him, this may be falsified for Covin, though the Party that recover'd had a good Title, and he who was ousted may either Enter, or bring an Assise: And where a Woman has Title of Dower, and gets another to Enter, and then Recovers against him that Entred, this may be Falsified for the Covin, 9 H. 6. 41. and other Cases there are of the like nature, 7 H. 4. 19. 5 H. 7. 40.

2. An elder Title of Entry.

2. As to the Second ground of Falsifying. If A. bring a Præcipe quod reddat against C. and Recover against him, and hanging the Præcipe quod reddat L. Enters, and A. brings a Scire fac' against him, and in Plea to the Scire fac', he makes a Title, and says that he was seis'd till C. disseised

diſſeiſed him againſt whom the Recovery was had, this is good to falſifie the Recovery, becauſe L. had elder and better Title to the Poſſeſſion than C. had, againſt whom the Recovery was obtained after his Title was avoided by Entry 3 H. 6. 34.

3. As to the third, for Want of Jurisdiction: As if one plead a Recovery in a Baſe Court in Ancient Demeſne, the other party may falſifie this, by ſhewing how the Land is (Frankfee) by virtue of a Fine levied in the King's Courts, &c. 7 H. 4. 3. The like fee 39 Aſſiſe. pl. 6. 3. Want of Jurisdiction.

4. The Fourth ground as to Warranty and Aſſets: If a Tenant in tail diſcontinue with Warranty, and Aſſets is deſcended, and the iſſue in tail procures another to Enter and Recovers againſt him, the Alienee may falſifie this Recovery by the Warranty and Aſſets; and in this Caſe there is Covin, as well as the Warranty and Aſſets to avoid this Recovery 27 Aſſiſe. pl. 74. 4. Warranty & Aſſetr.

5. A Releaſe may be a Fifth Cauſe, as when in an Aſſiſe, a Recovery is Pleaded againſt B. in a Scire fac' to Execute a Fine, and that the Plaintiffs Title is mean between the Fine and the Execution; the Plaintiff may Reply and Falſifiy the Judgment for Execution, becauſe he againſt whom the Recovery was had, was but Tenant for Life, and that the Anceſtor of him who recover'd, releaſed his Right to the Ter-tenant before Execution, and ſo the Execution falls in Law, 29 Aſſiſe. pl. 1. Br. Fauxif. de Recovery. 21. 5. A Releaſe.

6. The Sixth ground in Caſe of Faint pleader, as if Ceſtuy qu' uſe before the Statute, ſuffer a Recovery againſt him upon a Faint Title, the Feoffees ſhall Falſifie. Br. Faux. Recovery 49. So if a Man has a Warranty and does not plead it againſt the Party himſelf who Recovers. 30 Aſſiſe. pl. 10. 6. Faint pleader

7. The

7. No Tenant to the *Præcipe.*

7ly. The seventh Ground, That there was no Tenant of the Freehold. As if a Recovery by Writ of Right be pleaded against the Issue in Tail and a Voucher, &c. it may be falsified so as to plead, that at the time of the Writ brought, the Tenant was not Tenant of the Freehold, nor at any time after, 12 E. 4. 14, 19. 13 E. 4. 1. Vid 14 E. 4. 2. He needs not shew who was Tenant, if the Recovery was by Default, but only to plead Non-tenure generally. The like 19 Ass. pl. 4. So if the Tenant was not seis'd of the Estate Tail at the time of the Recovery, Kelw. Rep. 136. b Pl. Com. *Manxill's* Case 8.

8. Want of Estate in the Tenant.

8ly. As to the last Ground where the Tenant has but a particular Estate, he in Reversion may falsifie it in another Action: As if a Recovery be against Tenant for Life, he in Reversion may falsifie in ad terminum qu' præteriit; but if Tenant for Life pray Aid of a Stranger, he in Reversion may enter before Judgment, but after Judgment he cannot enter, but must falsifie, as before, Br. Faux. Rec. 44. The Statute of 14 Eliz. c. 8. which makes Recoveries void by or against Tenant for Life extends only to Recoveries by Covin or Consent, i. e. to all common Recoveries.

Termors for years may falsifie, & Tenant *per* Stat. Merch *per Stat.* 21 *H.* 8. c. 15.

4. Vid. Stat. of 21 H. 8. c. 15. How Termors for years, Tenants by Stat. Merchant, Staple, Elegit, shall falsifie feigned Recoveries by them in Reversion, &c. Co. Lit. 104. b. Co. Lit. 46.

Rules of falsifying Recoveries.
1. Not to falsifie in point tried by Privies.

5. Observe these six Rules as to falsifying Recoveries. 1. No Party nor Privy to a Recovery, shall falsifie in the Point tried, by Verdict; as if an Issue be tried against a a Tenant in Tail upon the Title, i. e. (non dedit) he, nor his Issue shall falsifie in this Point, but must have an Attaint, otherwise if the Recovery were by Default, or Issue upon a Collateral Point, and not upon the Title, 34 H. 6. 2. 19 H. 6. 39.

2 Where may falsifie in the point tried.

2ly. Where a Man cannot have an Attaint, he may in some Cases falsifie in the Point tried; as if a Man seis'd in Burrough English, lose by false Oath, the Attaint belongs to the Eldest Son; and therefore the younger may falsifie in the Point tried, per Forteſcue. 22 H. 6. 28. and 26 H. 6. 18.

3ly. A

3ly. A Stranger may falſifie a Recovery in the Point tried, or by any other matter which proves the Recovery void, or the Title of the Demandant to be void; as in Aſſiſe, if a Recovery be pleaded againſt N. and Plaintiff's Poſſeſſion mean between the Title and the Writ brought, this Recovery may be falſified by alledging a Releaſe, which the Tenant to the Recovery might have pleaded, or he may plead, that the Tenant died hanging the Writ, or that the Tenant had nothing in the Land hanging the Writ, &c. 36 H. 6. 32. 9 H. 6. 41. Br. Faux. Rec. 3. 15. But it's ſaid, A Stranger cannot falſifie in Dilatories; as to ſay, a Feme Demandant took Husband pending the Writ, Br. 15. 36 H. 6. 32. Nor that the Action was diſcontinued, nor to alledge any Error in the Record, 21 E. 4. 23. Br. 34. 3. Stranger may falſifie in the point tried.

4ly. None can falſifie (though he be a Stranger) without making a title, 36 H. 6. 32. 4. None can falſifie without Title.

5ly. Where a Man loſes his advantage of time to falſifie, he ſhall not falſifie afterwards: As if an Aſſiſe be brought againſt B. and he pleads a Recovery, and the Plaintiff hath Cauſe to falſifie it, and does not, but pleads another matter which goes againſt him, and Judgment againſt him, he cannot falſifie after in another Action, 40 Aſſ. pl. 4. Br. Faux. Rec. 39. 5. Cannot falſifie out of time.

6ly. He who claims under him who ſuffers the Recovery, or againſt whom the Recovery is had, cannot falſifie, though he be a Stranger; as if one purchaſe of the Tenant, hanging the Writ, and after the Demandant recovers, the Purchaſer is bound by the Recovery, and cannot falſifie, 36 H. 6. 32. Br. 25. 14 Aſſ. pl. 26. Br. 42. 6. He who claims under him who loſt, cannot falſifie.

# OF PARTICULAR REAL ACTIONS In General.

## LIB. II. CAP. I.

In what Cases to be brought.

1. WHERE a Man had Right or Title to any Lands or Tenements, and the Poſſeſſion thereof was unjuſtly taken or withheld from him that had Right, the Common Law and Statute Law did provide ſeveral Remedies for the Recovery of the Poſſeſſion according to the ſeveral Circumſtances of the Difference of the Caſe; and the ſeveral Remedies had their ſeveral Names and Denominations commonly from the moſt important Point of the Writ, or matter therein mentioned to be redreſſed or complain'd of, as the Writ of Ayel from the Seiſin of the Grandfather; the Mortdanceſter from the death of the Anceſter, though he died not ſeis'd, if he were ſeiſed the day of his death, F. N. B. 486. The Writ of Right, ſo call'd, becauſe the words in the Writ are, Quod ſine dilatione plenum rectum teneas, &c. Co. 1. Inſt. 115. a. and ſo of others.

Denominations from the point of the Writ.

The Kinds.

2. Theſe real Writs do admit of Diviſions and Subdiviſions; ſometimes they are divided in reſpect of the words of the Writs; and ſo they are divided into Præcipe qd' reddats. 2. Præcipe quod faciats for things not in Render, as the Writ de Conſuetudinibus & Servitiis, Secta ad molendinum, Quod permittat. 3. Or, Si fecerit te ſecur', Finch. Law 257.

2ly. They

2ly. They are divided in respect of the Person that was last seis'd, into Actions Possessory and Actions Ancestrel.

Possessory are those that are brought when the Demandant himself was seised; as in Assises, Writs of Entry, in nature of an Assise, Writ of Right of a Deforcement to the Demandant, Escheat, Cessavit, Writ of Right sur disclamer, &c. Possessory Actions.

Ancestrel are those that are brought upon the Seisin of the Ancestor, as Mordantcester, Ayel, Besayel, Cosinage; And these Actions Ancestrel are again subdivided into Actions Ancestrel possessory, as where the immediate Ancestor was seised, and the Possession descended to the next Heir; and into Ancestrel Droiturel, where nothing but a bare Right descended from the Ancestor; and are likewise sometimes for the meer right, as the Writ of Right, and sometimes grounded upon the Right, as Writs of Right in their nature, some Writs of Entry, as Dum fuit infra ætatem, Non compos mentis, Co. lib. 6. f. 3, 4. Markal's Case. Actions Ancestrel.

3. Regularly, all Præcipe quod Reddats real, are either, 1. Writs of Right, as a Præcipe in capite. 2ly. Writs of Right in their nature. 3ly. Writs of Entry. 4ly. Writs of Seisin of the Grandfather and Great Grandfather, as Ayel and Besayel, or of the Great Grandfather's Father, or of the Brother of the Great Grandfather's Father, call'd a Writ of Cosinage. Another Division.

4. The Real writs of Si fecer' te securum, &c. are such as are either of the Demandant's own Seisin; as an Assise de Novel Disseisin: Or, 2ly. of the Seisin of his Ancestor, being his Father, Mother, Brother, Sister, Uncle, Aunt, Nephew or Neece, as an Assise of Mordantcester, or any other Ancestor where the Writ is brought by Privies in Blood, as the Nuper obiit. 3ly. A Quo jure, which is a Writ of Right in it's nature. 4ly. Partitione faciend'. 5ly. Juris utrum, Attaint. Division of Writs, *Si fecer' te securum*, &c.

5. The real Præcipe Quod faciats whether they be for things in Fesans or Sufferance, are either to recover Hereditaments not being Land, or some real thing concerning them; Of the first sort are the Writ de Consuetudinibus & Servitiis, Sect. ad Molendinum, Q. Imp'. Quod permittat; Of the second sort are the Curia Claudenda, A Writ of Division of *Præcipe quod fac'*

Covenant Real to Levy a Fine, a Writ of Meſne, Warrantia cartæ. Under theſe Diviſions lie all, or moſt of the Conſiderable Real Writs, ſome of which likewiſe are diviſible again, under their proper heads, as the Writs of Right, and Writs of Entry, which ſhall be taken notice of, when we come to thoſe particular Actions.

Real Actions may be brought though the Entry be not taken away.

6. Note for a Rule, That anciently (and at this day) a Man might bring a Real Action, yea, a Writ of Right (if he pleas'd) though his Entry was not taken away. And generally where the Entry is not taken away, the Aſſiſe of Novel diſſeiſin was the Common Remedy to recover the Poſſeſſion, as the Ejection' firm' is at this day. Co. 1 Inſt. 278. 6. * Lit. Sect. 478.

Where a man may have election to have ſeveral ſorts of Actions.

7. In moſt Caſes where a Man may have a Real Præcipe, he may have a Writ of Right, which is the higheſt real Action; but in ſome Caſe, if he do bring a Writ of Right when he may Enter, he loſes the Land for ever. As if a Diſſeiſor within age alien, and the alienee die ſeiſ'd, and his Heir Enter, and the diſſeiſee releaſe his Right to the Heir of the alienee, in this Caſe the diſſeiſor has a right to the Poſſeſſion, becauſe he alienèd under age, and therefor may Enter, but if he bring a Writ of Right againſt the Heir of the alienee, he loſes the Land, becauſe the Heir of the alienee has the more ancient right in him by the Releaſe, but if he had Entred, the Heir of the alienee ſhould not have recovered in a Writ of Right, againſt him, becauſe a bare right in ſuch Caſe ſhall not be left in the Heir of the alienee, but ſhall ever follow the Poſſeſſion. Co. 2 Inſt. 279. e. f. 266. a. *

CAP.

## CAP. II.

# Of a Writ of Right in general.

1. A Writ of Right, (properly so called) is a Writ brought by him who has the full and meer right of property to the Land in him, to recover the Right of Possession, which he cannot be restor'd unto without a judgment first had for him in the King's Court, or some Court Baron. Bract. lib. 5. tract. 1. c. 1. Writ of Right what.

2. And though this Definition may be applied to many other Actions where the Entry of the Defendant is taken away, yet this Writ differs from all others. 1. In the Frame of it. 2. In the use of it. 3. In the Process and Proceedings. 4. In the End of it. Wherein different from others.

1. First for the Frame of it, it is always directed to the Lord of whom the Land is holden, to do right to the Demandant in his Court, and remains with the Demandant, Except where the Lord remits his Court to the King, or has no Court, there the Writ is directed to the Sheriff, or in the Case of the King, where the Land is holden of him, as of some Honour, Castle, Mannor, or in Capite, as of his Crown; in the first Case, the Writ is directed to his Bailiffs, and in the other to the Sheriff, which is called a Præcipe in Capite, F. N. B. 9. Register original 1. 2, 3. 4. Where it is directed to the Lord or King's Bayliffs, there are these words always in the Writ, Præcipimus tibi quod sine dilacoe' rectum teneas *W. B.* de un' Mess. &c. —— In the Frame of it.

2. For the use of it in some Cases, no other Writ can be had but a Writ of Right for recovering of the Possession; as in all or most Cases where a Man loses Land by default in a Præcipe quod reddat: But in 11. Ass. 17. Br. Droit de Recto. 23. after a Recovery against an Heir by default, where his Ancestor died Seis'd, the Heir brought a Mord'ancestr' and good. Quære, whether there be any other Case. In the Use of it

2. Where

2. Where the Tenant loſes in a Præcipe quod reddat, by Action tried. 3. Where the Demandant is barr'd in any other Real Action (though it be but by action tried) he ſhall have a Writ of Right, as his ultimum refugiu'. 4. If a Man loſe by default in a Writ of Right before the Miſe joined, he may have a Writ of Right againſt him that recover'd. F. N. B. ibidem. 5. I conceive its then proper for this Action, when the ſeiſin of the Anceſtor is not within the time of limitation preſcribed to other Actions.

In Proceſs and Proceedings. 3. It differs from other Original real Writs in the Proceſs and Proceedings, of which more hereafter.

In the End. 4. In the End of it, for it is Ordained to be the utmoſt Remedy that any Man may have in Civil Actions for the Recovery of Poſſeſſions, that there may be an end of Suits; for the Judgment is commonly final, and as Fleta ſays, Lib. 6. c. 1. Actio quidem ſuper Recto ultimum locu' ſibi vendicat in ordine placitoru' a ſummo Remedio ad inferiorem Actionem, non habetur ingreſſus neq' auxilium.

Kinds of Writs of Right. 3. Writs of Right are of ſeveral ſorts——As the Writ of Right Patent, Writs of Right Cloſe, and Writ of Right of London, which are the Proper Writs of Right, and Writs which are Writs of Right in their own nature.

Writs of Right proper and in their nature are.

1. Writ of Right Patent.
2. *De Recto quando Dominus remiſit Cur'*, is Cloſe.
3. *Præcipe in Capite*, is a Writ of Right Cloſe.
4. The little Writ of Right Cloſe in Antient Demeſne.
5. A Writ of Right of Dower is Patent.
6. A Writ of Right of *London.*
7. Wtit of Right *de Rationabili parte.*
8. *Ne injuſte vexes*, is a Writ of Right Patent in it's nature.
9. A Writ of Right of Advowſon.
10. A *Nativo Habendo* in its nature, a Writ of Right.
11. *Quo jure*, in its nature a Writ of Right.

12. *De*

Writs of Right proper, and in their nature are.

12. *De Rationabilibus diviſis*, in its nature is a Writ of Right. 5 E. 4. 2. b.
13. A Writ of Right *de Cuſtodia Terr' & hæred'*.
14. *De Conſuetudinibus & ſervitiis*, a Writ of Right in its nature.
15. A Writ of Right *ſur Diſclaimer*.
16. All *Formedons* are Writs of Right in their nature. *Co. lib.* 6. 7. c. 8.
17. *Ceſſavit*, a Writ of Right in its nature.
18. A Writ of Dower *unde nihil habet*, in its nature, a Writ of Right.

## CAP. III.

# A Writ of Right Patent.

1. There are ſeveral ſorts of Writs of Right Patent, as firſt, the general Writ of Right Patent directed to the Bayliffs of the King when the Land is holden of him as of ſome Manor, &c. or to the Lord of whom the Land is holden, and this is the higheſt Writ of Right Patent. F. N. B. 1. 2. 2. The Writ of Right in London. 3. The Writ of Right of Dower. 4. The Writ of Right de Rationabili parte. 5. The ne injuſte vexes. Reg. 1, 2, 3, 4. What.

2. The general Writ of Right, chiefly intended to be Treated of in this Chapter is called in Books (Droit droit) becauſe it hath the greateſt reſpect, and the moſt aſſured judgment. And this is not to be underſtood ſtrictly of a Writ of Right Patent only, but likewiſe of ſuch Writs of Right as are of the ſame nature, and do as it were flow from it, as the Writ of Right Quia Dominus remiſit Curiam, which is Cloſe, and is nothing but the Writ of Right Patent brought in the King's Court, and then it is always Cloſe, and directed to the Sheriff; and the Writ called the Præcipe in Capite, which is as high a Writ of Right as any, and is where the Land is holden of the King as *Droit droit.*

as of his Crown, and not as of any Manor or Honours, &c. and this is always Close and directed to the Sheriff. Regiſter Brev. 4. b. F. N. B. 11.

Writs of Right in their nature, why ſo called.

3. All other Writs of Right, are Writs of Right in their nature only; and I conceive they are called Writs of Right in their nature, partly for diſtinction ſake ~~to~~, to difference them from the proper Writ of Right for Lands in Fee-ſimple, and partly becauſe in moſt of their Proceſs and Proceedings they agree with the Writ of Right, but not in all, and that the Eſtate thereby Demanded, and to be Recovered, is not always the mere Right, i. e. the Fæſimple; as the Writ of Right of Dower, Formedon in Deſcender, Remainder; and ſome of them are not for Lands, but ſome particular Hereditaments, as the Writ of Right of Advowſon, Writ of Right of Ward, De conſuetudinibus & ſervitiis, and the like.

To whom the Writ is to be directed.

4. Where the Lands are holden of a Common Perſon, the Original Writ of Righ Patent is always directed to the Lord of the Manor, if he be in England, otherwiſe to his Bayliff; but the Writ is always to remain with the Demandant himſelf, ſo doth no other Original.

The Original is thus——

The Writ.

*Carolus*, &c. *T. M.* ſalutem. Præcipimus tibi quod ſine dilatione plenum rectum teneas *T. B.* de un' Meſſ. decem acr' terr', &c. cum pertin' in *B.* quod clamat tenere de te per ſervitium unius denar' per annum pro omni ſervitio qu' *J. S.* ei deforceat Et niſi fecerit Vic' *C.* faciat ne amplius clamorem inde audiamus pro defectu recti. *T.* meipſo apud Weſtmonaſter. Regiſtr. f. 1. a.

How the Writ is to be delivered.

5. The Original thus ſued forth, it ought to be brought to the Steward of the Court of the Manor, of which the Land is holden, and there delivered in Court to him; upon which after he hath given Pledges to proſecute, and the Steward hath made an Entry of the Demand by the Writ, he ought to deliver the Writ again to the Demandant.

The

The Entry of the Writ at the Court Baron is thus——

Cur' *D.* Mil' Maner' ſu' de *S.* tent' ibid. coram *J. S.* Seneſchal' vel *J. B. J. T.* Ballivis ipſius *D.* ac *J. N.* & *L. T.* &c. Sectator' Cur' ill' die anno Regni Dom', &c.

Record en Court Baron.

Ad hanc Cur' ven' *J. M.* in propria perſona ſua deferendo ſecum Breve Domini Regis de recto patens qu' ſequitur in hæc verba, Rex, &c. Et pet' quod plenum rectum eid' *J. M.* ſecundum exigentiam prædict' brevis verſus prædict. *J. L.* de Maner' & Tenement' prædict' teneatur Et inven' pleg' de proſequend' breve prædict' verſus ipſum *J. L.* videlt' *A.* & *B.* &c. & præcept' eſt *J. S.* Ball' quod prædict' *J. L.* ſum' eſſend' ad prox' Cur', &c. ibidem tenend' ad reſpond' eid' *J. M.* de placito quod reddat ei Maner' & Tenement' prædict. cum pertin' qu' idem *J. M.* clam' eſſe jus ſuum verſus eund' *J. L.* per breve prædict. Raſt. Entr. 244. b.

Tolt.

**6. If the Bailiff or Steward delay the Demandant, and will not ſend out Proceſs, then the Demandant may remove the Plea into the County Court by a Precept called a** Tolt, **and then the Entry in the Court Baron is further thus——**

Record of the Tolt.

Et quia prædict' Ballivi favent prædict' *J. L.* verſus eundem *J. M.* Ideo ſum' prædict' præfat' *J. M.* nondum conceditur faciend' ſed dies dat' eſt eid' *J. M.* ad prox' Cur', &c. hic ſcilicet die Martis prox', &c. tenend', &c. Ad quem diem coram præfat' Ball' & Sectator' Cur' prædict' ven' hic prædict. *J. M.* in propria perſona ſua Et Vic' Com. *C.* per Ballivum Domini Regis & ſuum virtute cujuſdam præcept' ipſius Vic' ad querimoniam præd. *J. M.* aſſerentis ill. in loquela præd. plenum rectum in hac Cur' non tenetur eid' Ballivo facti in Cur' hic oſtens' tul' ſibi loquel' præd' in Com' ſu' *N.* deducend', &c.

**The Tolt is thus——**

The Writ called the Tolt.

*R. W.* Vic' *N. Edvardo C.* Ballivo Domini Regis & ſuo in Com' præd' itineranti ſalutem quia ex querela *J. M.* ad Com' meum ſcilicet die, &c. anno, &c. apud *B.* ibm. tent' perſonaliter accedente accepi quod licet ipſe breve Domini Regis de Recto patens Ballivo dict' Domini Regis Ducatus ſu' *L.* de *F.* in dicto Com' meo direct' de eo quod ipſi plenum rectum tenerent

dicto *J. W.* de Maner' de *F.* cum pertin' & de xl. acris terr' cum pertin' in *F.* qu' *J. S.* ei deforc' detuliſſet *J. B.* & *J. C.* Ballivis ſu' Ducatus præd' de *F.* præd' tamen pro eo quod dict' Ballivi favent dictum I. S. in ea parte & plenum rectum ſecund' Exigentiam ejuſdem bris' hucuſque diſtuler' facer', tibi ex parte Domini Regis præcipio firmiter injungens quod in propria perſona tua acced' ad Cur' Domini Regis Ducatus ſui prædict' de F. Et loquela qu' eſt ibidem inter præfat' I. W. & I. S. per dictum bre' de Recto in Com' meum prox' tenend' tollas. Et ſum' per bon' ſum' prædict' I. S. quod ſit ad Com' meum N. ſcilicet die, &c. apud N. in le Shirehouſe tenend' præfat' I. W. inde reſponſur' Et habeas ibi loquelam prædict' ſum' & hoc præcept', dat' in Com' meo apud N. in le Shirehouſe die, &c. Anno ſupradicto' *Raſt.* 244.

Return of the Tolt. **Then the Return of the Tolt is made upon the back of the Tolt** Virtute iſtius præcept' die Anno acceſſi in propria perſona mea ad Cur' infraſcript' apud *B.* tent', &c. Vid. Raſt. Entr. 244. b.

*Pone.* 7. **Upon the Return of the Plea into the County Court, the Demandant may remove the ſame out of the County, into the** Common Pleas, **by a Writ called a** Pone, **without any Cauſe ſhew'd in the Writ, but if the Tenant remove it, he muſt ſhew ſome Cauſe in the** Pone. F. N. B. 9 Raſt. Entr. 245. a. **But there are other Cauſes for which the Tenant may remove the Plea out of the Lord's Court, or the County Court into the** Common Pleas. Vid. F. N. B. 10. b.

**The** Pone **is as followeth——**

Writ of *Pone.* Rex, &ce. Pone ad petitionem I. M. coram Juſticiar' noſtris apud Weſtm' loquelam quæ eſt in Com' tuo per bre' noſtrum de Recto, inter I. M. petentem, & I. L. Tenentem de Maner' de F. cum pertinen' in D, & ſum' per bon' ſum' prædict' I. L. quod tunc ſit ibidem præfat' I. M. inde reſponſur', Et habeas ibi ſum', & hoc bre', &c. Raſt. Entr. 245. a.

8. We

8. We have brought the Writ of Right out of the Lord's Court into the County, and from thence into the Common Pleas, by the Demandant by a Pone; which, (as is ſaid) is the only proper way for the Demandant, but the Tenant he may remove it by a Recordar' into the Common Pleas immediately with Cauſe ſhew'd. Vid. F. N. B. The Form of the Recordar'. *Recordari.*

9. But without all this Circuity the Demandant may if he pleaſe, have his Writ of Right immediately, returnable into the Common Pleas, which is moſt ſafe and uſual. And in this Caſe after the Teſte, there muſt be theſe words in the Writ, viz. Quia I. T. Dominus feodi ill' nobis inde remiſit Cur' ſuam, and if theſe words be in, its not material whether the Lord gives Licence or not, but if they be not in, it is ſufficient if the Lord ſend his Licence to the King in the Chancery afterwards. F. N. B. 5. a. And this Writ of Right is called, Quia Dominus remiſit Cur', and is Cloſe directed to the Sheriff. *Quia Dominus remiſit Cur'* Letter of Licence.

The Form of the Letter of Licence from the Lord, vid. Raſtall, 246. a.

The Original Writ of Right, Quia Dominus, &c. is thus—

Elizabetha Dei gratia Angliæ Franciæ & Hiberniæ Regina, Fidei defens', &c. Vic' Ceſtr' ſalutem, Præcipe Thom' Grimſditch, quod juſte & ſine dilacoe' reddat Rado' Johnſon, unam Salinam octo plumbor' cum pertinen' in Northwico, qu' clam' eſſe jus & hæreditatem ſuam, Et unde quer' qd' prædict' Thomas ei injuſte deforceat. Et niſi fecerit & præd' Radus' facer' te ſecur' de clamore ſuo, pros' tunc ſum' prædict' Thomam quod ſit coram Juſticiar' noſtris Ceſtr', apud Ceſtriam pr' die prox' Seſſionis Com' Ceſtr' apud Ceſtr', tenend' oſtenſur' quare non fecerit, & habeas ibi ſum' & hoc bre' Teſte meipſa apud Ceſtr' ſecundo die Auguſti Anno Regni noſtri octavo. Quia Edrus Comes Derby capital' Dominus feodi ill' nobis inde remiſit Cur' ſuam. Inter bria' Ceſtr' 8. Eliz. The Writ of *Quia Dominus remiſit, &c.*

Returned thus.——

Pleg' de pros. { *Heric' Doe.* / *Petrus Poe.* } Sum' { *Ricus Roe.* / *David Doe.*

*Hugo Cholmondeley, Mil'*
Vic' Ceſtr'.

15 Days Writ of Summons.

10. After the ſuing out of the Original, the next thing to be done is to get the Tenant ſummon'd, and there ought to be 15 days at the leaſt between the Teſte and the Return of the Original.

Manner of Summons.

11. The manner of the Summons is as in other real Actions upon the Land, for which vid. Summons antea. f. 3.

When is the day of appearance at *Weſtm.* when at *Cheſter.* *Grand Cape.*

12. Upon Summons return'd, if the Tenant do not appear at the day of appearance, which at Weſtminſter is the 4th day after the Return of the Writ, but in Cheſter, the very Return of the Writ, the Demandant may have a Grand Cape, upon the Return of which, if the Tenant do not appear and plead ſomething to Excuſe his default, the Land is loſt. Vid. Saver default, fol. 29. Vid. Grand Cape. f. 26.

Eſſoine.

13. The Fourth day after the Return, the Tenant may Eſſoine, and this at Weſtminſter delays the Demandant ſeveral weeks, as if the Eſſoine be caſt Tres Michael' it ſhall be adjourn'd by the Demandant 15 days, at leaſt to Craſtin' Anim' which is from the 20th of October, to the 3d of November, and ſo of other days according as the Eſſoine is Caſt. Note, that the Demandant muſt adjourn the Eſſoine, otherwiſe he may be Nonſuited, if the Tenant Enter a ne Recipiatur with the Clerk of the Eſſoines. But the Eſſoine in Cheſter is but de die in diem.

Eſſoine to be adjourn'd.

Where Judgmt. ſhall be given without a *Gr. Cape.*

14. At the day given by the Eſſoine, if the Tenant do not appear, judgment ſhall be given without a Grand Cape. Vid. ante p. 24 Raſt. Entr. 146. b.

15. If the Tenant appear after the Count, he may demand the View, and that delays the Demandant Nine returns

turns more, i. e. if he appear Craſtin' Anim' the 3d of November, then the Writ of View is returnable Quindena Paſche, in Eaſter Term, which is ſome times Six months and upwards. Vid. Stat. 17 Car. c. 6. Co. 2 Inſt. 567. Dyer 252. 9 E. 4. 18. View when to be demanded.

16. And View may be demanded either before or after an Imparlance. Raſt. Entr. 376. a. Vid. antea f. 44.

The Writ of View in a Writ of Right.——

Rex, &c. Vic' C. ſalutem, Præcipimus tibi quod ſine dilacon' haber' fac' viſu' de un' Meſs', &c. in B. qu' W. in Cur' noſtra coram Juſtic' noſtris apud Weſtm'. clam' ut jus ſuum verſus eum per bre' noſtr' de Rect' rect' Et dic' &c. ut antea f. 44. Writ of View.

For the Return, Vid. f. 46.

17. Upon Return of the Writ of View, the Tenant may be eſſoin'd again, and that delays the Demandant 15 days more at leaſt. But Q. whether the Eſſoine ſhall not be adjourn'd nine Returns, as if the Writ of View be returnable Quindena Paſche in Eaſter Term, and an Eſſoine then Caſt whether they ought not to be given to Tres Trinitatis, which is ſome Eight or Nine weeks by the Statute of 16 Car. c. 6. Tenant may be eſſoin'd upon return of the Writ of View.

18. At the day given by the Eſſoine after View, the Tenant ought to appear, and then he may Imparle, and day may be given to any Common Return day, or any other day in Term as the Court ſhall think fit, for thoſe days are but days Ex gra' Cur' Vid. jour in Court. 52. 8 E. 4. 4. Imparlance after Eſſoine.

19. And now we have brought the Tenant to an Appearance when the Demandant has regularly proſecuted his Action, but if the Demandant have in any thing miſtaken his proceedings, or hath not done in his Proceſs what by Law he ought, he thereby gives the Tenant an Advantage to delay him much more, and it may be during his life, though he may proſecute his Action ſeveral years. And in ſuch Caſe, the other learning of Saver default, non Tenure, Several Tenancy, Joynt-tenancy, &c. comes to be of uſe, which ſee before. p. 29. 34. 37. 41. Demandant may be delay'd by his own miſmanagement.

20. After

Count. 20. After the Tenant hath appear'd, the Demandant Counts againſt him, which is commonly delivered to the Tenants Attorney between the time of demanding the View, and the return of the Writ of View.

## Count in a Writ of Right.

*Salop. ff.* Record. R. C. per I. B. Attornatum ſuum pet' verſus I. S. Maner' de T. cum pertinen' ac Advoc' Eccleſiæ de C. cum pertinen' ac' du' Meſs', &c. in M. P. D. & E. ut jus & hæreditat' ſu' per bre' Domini Regis de Recto quia Capital' Dominus feod' ill' remiſit inde Cur' ſu' Regi, &c. Et unde dic' quod ipſimet fuer' ſeiſit' de Maner' Advoc' tenement', & reddit' prædict' cum pertinen' in dominico ſuo ut de feodo & jure & de Advoc' prædict' cum pertinen', ut de feodo & jure tempore pacis, tempore Domini Regis, nunc Capiendo inde Expleſ. ad Valenc', &c. Et quod tal' ſit jus ſu' offerunt, &c. Raſt. Entr. 246. a. b.

This is a Count where the Demandant himſelf was ſeis'd, if it be of the ſeiſin of his Anceſter, the Count muſt be ſet forth, who, and in what King's time, Vid. Raſt. Entr. 104. b.

21. After the Count (as is before ſaid) the Tenant may demand the View, and after View Imparle.

Voucher, Aid. 22. After the View and Imparlance, the Tenant may Plead or Vouch, or pray in Aid if he be Tenant for life. For Voucher, Vid. antea. Aid Praier, antea. Vid. Co. Entr. 1824. b.

The Entry of the defence in a Writ of Right. 23. The defence in this Action is different from all others; for whereas in other Præcipe quod reddat's, the Tenant defends his own Right by ſaying, Ven' & defend' jus ſuum quando, &c. in this he defends the right and ſeiſin of the Demandant, ſaying, Et prædict' T. ven' & defend' jus præd' S. & ſeiſinam ejus, &c. & totum, &c. ut de feodo & jure, & maxime de Tenement' prædict' cum pertinen',——Co. Entr. 182. a. b. Quær. the reaſon of this,* and the Form of the Replication ſeems as ſtrange, the Demandant ſaying that the Tenant unjuſtly defends the right of the Demandant thus,

But upon a Confeſſion, the Tenant defends his own Right. *Raſt. Entr.*

* See 3 B. C. [illegible]

thus, ——Et præd' S. dic' quod præd' T. injuſte defend' jus ipſius S. & ſeſinam ejus, &c. Et totum, &c. ut de feodo & jure & maxime de Tenement' præd' cum pertinen', &c. Quia dic', and then recites the Count again according to 21 H. 6. 26. a. Co. Entr. 182. a.

23. There are three ſorts of Trial in this Action. 1. By the Grand Aſſiſe. 2ly. By Battle. 3ly. By a Common Jury of 12 upon a Collateral point. 3. Kinds of Trial in a Writ of Right.

1. The Grand Aſſiſe is a Jury of 12, joined to Four Knights, and choſen by them to Trie the mere right between the Demandant and the Tenant, upon whom the Tenant hath put himſelf by pleading: And this is called joining the (Miſe) upon the mere Right, which in other Actions is called (joining iſſue.) Lit. Sect. 514. Co. Lit. 294. b. 1. Gr. Aſſiſe.

Note, that the Tenant in Law, i. e. the Vouchée or Praiée in Aid may put themſelves upon the Grand Aſſiſe. Co. Entr. 181. b. 182. a. b.

It's called the (mere Right) merum jus, becauſe the Right of Property to the Land is only Tried and put to iſſue, without reſpect to the right of Poſſeſſion, for it is poſſible that the Demandant or Tenant may come unlawfully to the Poſſeſſion, and yet have good right to the Land, and the Grand Aſſiſe ſhall find for them accordingly, as you may ſee Lit. Sect. 478. In the Caſe where an Infant diſſeiſor alieneth in Fæ, and the Alienée dieth ſeis'd, and his Heir Enter, the diſſeiſor being within Age, if the Diſſiſee Releaſe his Right to the Heir of the Alienée, and then the Diſſeiſor bring a Writ of Right, and the (Miſe) be joined upon the mere Right, the Grand Aſſiſe ought to find for the Tenant, for that the Tenant hath the right of the Diſſeiſee, which is the antient Right, though the Poſſeſſion of the Tenant was not lawful, neither before nor after the Releaſe; but the Diſſeiſor might have Entred upon the Heir of the Alienée, becauſe he was under Age at the time of the diſcent, and Conſequently might have had an Eject' Firm'. Vid. Co. 1 Inſt. 279. a. Mere Right, why ſo called.

23. The manner of the Tenant's putting himſelf upon the Grand Aſſiſe is thus.——Et præd' E. ven' & defend' jus The pleading to the Grand Aſſiſe.

The pleading to the Grand Aſſiſe.

jus ipſius W. (the Demandant) Et ſeiſina' ſu' quando, &c. Et totum &c. Et quicquod, &c. Et maxime de Tenement' præd' cum pertinen', ut de feodo & jure, &c. Et pon' ſe in magnam Aſſiſam Domini Regis, Et pet' Recognic' fieri utrum ipſe majus jus habeat tenend' Tenement' præd' cum pertinen' ſibi, & hæred' ſuis ut Tenen' inde ſicut ill' ten' an præd' W. habend' eadem Tenement' cum pertinen', ut ill' ſuperius pet', &c.

*Miſe* join'd in a Writ of Right without any Replication.

**Note, that upon the Tenants thus putting himſelf upon the Grand Aſſiſe, the (Miſe) is joined without any Replication by the Demandant, and Proceſs is awarded as hereafter is ſhew'd.** Co. Entr. 181. **But yet the Demandant may if he will Imparle before the Proceſs be awarded, and if the Tenant do not appear at the day given by the Imparlance in the ſame Term, this is a Departure in Deſpite of the Court, and judgment ſhall be given againſt the Tenant without a** Petit Cape, Raſt. Entr. 247. Vid. antea Departure in Deſpite, &c. f. 74. Vid. Dyer 98. Pl. 51.

*Sum' ad eligend' 4 Milites.*

24. **When the (Miſe) is join'd and Proceſs awarded, Firſt the Demandant is to ſue out a Writ of Summons to warn Four Knights to appear, to chuſe the Grand Aſſiſe, and this is a judicial Writ in the** Regiſter. f. 51. **And is thus.**———Vid. Dyer 103.

Writ of Summons *ad elegend' 4 Milites.*

Rex, &c. Vic' C. ſalutem Præcipimus tibi quod ſum' quatuor legales Milites de Com' tuo quod ſint, &c. ad Eligend' ſuper Sacrament' ſuum duodecim de ſen' & aliis legalibus militibus de Vicin' de S. qui meſſus ſciant & velint dicere veritatem ad faciend' Recognic' magn' Aſſiſe noſtre inter A. peten' & B. tenent' de un' Meſs. &c. qu' idem A. in Cur' noſtra, &c. clam', &c. verſus eum, Et unde idem B. in eadem Cur' noſtra poſuit ſe in magnam Aſſiſam noſtram, Et petiit Recognic' fier' utrum ipſe majus jus habeat tenend' Meſs', &c. præd' ſicut ill' tenet an præd' A. habend' ill' ſicut ill' petit, &c. Et habeas ibi noia' quatuor Milit', Et hoc bre' Teſte, &c. Vid. Lit. Sect. 514.

*Raſt. Entr. 103. a.*

**If there be not Four Knights in the County, the Sheriff may return others.**

25. **At the Return of Twelve Knights by the Four, if they**

they do not appear, a Venire fac' inſtead of a habeas Corpora ſhall be awarded to the Sheriff, to cauſe them to appear by ſuch a day. Dyer 270. b. Vid. Co. Entr. 181. Leon 1. p. 303.

*Venire fac.* to cauſe the Jury return'd by the 4 Mil' to appear.

26. There muſt be 16 Jurors of neceſſity to make the Grand Aſſiſe, i. e. 12. together with the Four Knights, Dyer 98. Leon 1. p. 303. though the Writ directed to the Four Knights is ad eligend' de ſeipſis & aliis duodecim, &c. Dyer ibidem.

16 Jurors to make the Grand Aſſiſe.

27. If Four Knights do not appear, but ſome of them, an Habeas Corpora ſhall iſſue to the Sheriff, Dyer 79. b. and no al' Summons.

*Hab' Corpor'* to bring in the 4 Mil'.

28. If Four Knights be Return'd and Appear, and one is Challeng'd and found true before the Juſtices of the Bench, an al' Summons may be awarded to Return another in lieu of him challeng'd, and an Habeas Corpora againſt the other, This was done 2 P. & M Michael' Term. Dyer 103. Pl. 8. which is contrary to other Opinions, that the Four Knights ſhould be challeng'd, or at leaſt not to be challeng'd before the Juſtices; for which ſee afterwards,

Challenge of the Knights. *Al' Sum'* in Caſe one challeng'd, be withdrawn, *Hab' Corpora* againſt the reſt.

29. When the four Knights appear, they ſhall be ſworn lawfully and truly to chuſe Twelve Knights, gladiis cinctis, of themſelves and others, which beſt know, and will declare or ſay the truth between the Parties; and the Demandant and Tenant may be ordered to go along with the four Knights to make their Challenges to thoſe that ſhall be choſen by them; for after the Pannel made by the four Knights, no Challenge can be made either to the Array, or to the Polls before the Juſtices, Raſt. Entr. 241. b. 242. Leon. 1. p. 303. 7 H. 4. 20. 39 E. 3. f. 2. Br. Droit. 6. Littleton Sect. 514. Co. Lit. 294. a. ¶.

Oath of the four Knights.

30. It's ſaid, 15 E. 4. 1. Br. Droit. 12. againſt the Opinion of Co. Lit. 294. That the Four Knights may be likewiſe challeng'd, but not before Juſtices (as the Caſe of Dyer is 103. before-mention'd) but where they and the Parties are together when they are chuſing the other Knights; and if one be challeng'd, it ſhall be tried by the other Three; and if two be challen'd, by the other two; and if Three be challeng'd, a

Challenge of the four Knights how to be tried.

new Writ shall issue to chuse other Four Knights, for no Challenge shall be made by less than two.

Oath of the Jury.

31. The manner and Form of the Oath to the Jury that are to try the Cause upon the meer Right. Vid. Lit. Sect. 514. Leon. 3. p. 162. Anderf. Rep. 1. p. Heidon and Ibgreave's Case. 148.

Tenant shall first begin his Evidence.

32. The Tenant shall first begin his Evidence in a Writ of Right, Leon. 3. p. 162. Heidon and Ingreave's Case. Moor Rep. 762. Dyer 247. pl. 75.

What may be given in Evidence.

33. Any thing but a collateral Warranty may be given in Evidence. Br. Droit. 48.

Demy-mark.

34. If the (Seisin) of the Demandant or his Ancestor be not in the time of the King, in whose Reign he has alledg'd in his Count, the Tenant may tender a Demy Mark to the King to have the Seisin inquir'd by the Grand Assise; and then if the Grand Assise find not the Seisin, as it is alledg'd, they ought not to enquire any further of the Right, Lit. Sect. 514. Co. Inst. 294. b. 10 E. 3. 20. 10 E. 4. 9. See the Case quoted by Littleton Sect. 514. abridg'd by Fitz. Grand Abridg. Tit. Droit 26. 3 E. 3. Iter Northamp. not elsewhere in any printed Report.

Reason of the Demy-mark.

Quær' the true reason of this Tender of the Demy-Mark, I find no Entry of it in any Book of Entries; but I have a Manuscript Copy of a Record in Q. Elizabeth's time, wherein the Tender of the Demy-Mark is entred, but the Parties and the Number-roll I know not. The Copy of the Record, at large follows here afterwards.

Time of Tender of the Demy-mark.

35. There's a great Question in the Law, What is the most proper time for the Tender of the Demy-Mark, Whether at or before the joyning of the (Mise) as it is in Lit. Sect. 514. at the joyning of the (Mise) or at the time of swearing of the Jury, as Br. Droit. 41. But the Law is now taken, that it ought to be at the swearing of the Jury. Moor Rep. 762.

Whether the Demy-mark needs to be entred this day. *Per Stat.* 32 H. 8. c. 2. Seisin to be within 60 years.

Quær' whether at this day there needs any Tender of the Demy-mark at all, because at Common Law the Seisin could not be trabers'd, but now Issue may be tendred upon the Seisin by the Statute of 32 H. 8. c. 2. Br. Droit. 32. By which Statute the Seisin ought to be within sixty years. If the Seisin be within sixty years, and it be alledg'd in the Count infra sex-

agint'

agint' annos jam ultim' elaps' tempore Domini Regis C.—— if it were not within that King's Reign, if the Tenant would have any advantage of it, I conceive he ought to make a Tender of the Demy Mark at this day. But Q. whether he may not ſay in his Count that he was ſeis'd within 60 years, and not mention any King's Reign. And I conceive he may, becauſe now the King's Reign is not material, in regard the time of Limitation is altered, which before was from the time of H. 2. and therefore it muſt appear to the Court that the ſeiſin was after his time, and ſo of neceſſity to alledge in what King's Reign the ſeiſin was. Vid. Co. 1 Inſt. 114. b. ¶. 115. a. † 2 Inſt. 94. 1. Inſt. 293. a. †.

Thus much of the Grand Aſſiſe.

36. The next kind of Trial in a Writ of Right is by Battle, and in ſuch Caſe the Tenant offers Battle thus, (which is called wageing of Battle.—— 2. *Battle.*

Et præd' L. per A. B. Attornatum ſuum ven' & defend' jus ipſius D. (the Demandant) & ſeiſinam ſuam, &c. Et totum, &c. ut de feodo & jure, &c. & maxime de Tenementis præd' cum pertinentiis, &c. Et hoc paratus eſt defendere per Corpus liberi hominis ſui G. B. nomine qui preſens eſt hic in Cur' illud defendere per Corpus ſuum, & qualitercunque Cur' Domini Regis Cons', Et ſi male contingat de eodem G. B. quod abſit, paratus eſt illud defendere per alium qui, &c. Co. Entr. 182. a. Entry of wageing *Battle.* Record.

The Demandant joyns thus——Et præd' D. dicit qd' præd' L. injuſte defend' jus ipſius D. & ſeiſinam ſuam, &c. & totum &e. ut de feodo & jure & maxime de tenementis præd. cum pertinentiis, &c. quia dic' quod ipſemet fuit ſeiſit' de tenement' præd' cum pertinen' in Dominico ſuo ut de feodo & jure tempore pacis, tempore Domini Regis, nunc capiend' exples' ad Valenc', &c. Et quod tale ſit jus ſu' paratus eſt illud diſrationare per Corpus liberi hominis ſui H. T. nomine qui præſens eſt hic in Cur' parat' illud diſrationare per Corpus ſuum, & qualitercunque Cur' Domini Regis cons', Et ſi mal' contingat, &c. Co. ibidem. Vill. 1 H. 6. 7.

Waging Battle, Proceedings therein *tempore. H. 6.* 1 *H. 6. f. 6 b.*

The Caſe of 1 H. 6. f. 6. b. for the Curioſity of it is worthy obſervation; In a Writ of Right for the Manor of Capenhaw in the County of Northumberland, Battle was joyned upon the meere Right, and the Champions appear'd; and it was Commanded by the Court that the Champions of the Tenant ſhould put Five pence into his Gantlet, in every Finger-ſtall a Peny, and deliver it into Court, and ſo the Demandant ſhould do the ſame, and the Judges receiv'd the Gantlets, &c. The Champions were ordered to appear the next day after the Feaſts of St. Peter and St. Paul, in their Array, and at the day Babington Commanded the Champion of the Tenant to come over the Barr and come to the Seat bare upon the Eaſt-ſide, and ſo the Champion of the Demandant on the Weſt-ſide, and the Champions being on their Knees, the Counſel of the Parties were askt by the Chief Juſtice, why they ſhould not allow the Champions, and why they ſhould not wage the Battle, who anſwered, they knew no Cauſe. The further ordering of the Champions and the Battle, and their Array, you may ſee further in that Caſe which is Abridg'd by Brooke Tit. Droit 20. And in the Caſe of Paramour, Dyer 301. which is the laſt Caſe of Battle reported in our Law Books in the 13 Eliz. The Entry of all the Proceedings in this Caſe of Paramour is in Co. Entr. 182. a.

*Champions.*

37. The Battle cannot be performed by the Demandant and Tenant in their own Perſons, but muſt find Champions, becauſe if either ſhould be ſlain, no Judgment could be given. But in an Appeal, the Parties ſhall Fight for themſelves, becauſe if one be ſlain, the end of the Combate is obtain'd. Co. Inſt. 294. b. Co. Lib. 9. f. 31, 32. b. The Caſe of the Abbot of Strata Marcella. Mirror. c. 3.

Eſſoine of the *Champion* and his Maſter.

38. After Battle waged, the Champion and his Maſter may be both ſeverally one after another Eſſoined. Fleta, Lib. 6. c. 9. in fine.

Oath of the *Champions.*

39. The Champions muſt take an Oath, the Form whereof you may ſee in Co. 2 Inſt. 247. At the Common Law, the Champion for the Demandant was to Swear that he or his Father ſaw the Demandant in ſeiſin of the Lands, and that his Father Commanded him to prove it. But becauſe Champions commonly took the Oath, though neither they nor

nor their Fathers ever saw the Demandant in Possession, therefore to avoid Perjury, that part of the Oath was taken away by Parliament. West. 1. c. 41.

40. The Champions shall Combate but once, and therefore if they Fight till the Stars appear, the Tenant shall prevail, for it is sufficient for the Tenant to defend being in Possession. Co. 2 Inst. 247. a. Shall Combate but once.

41. The Judges of the Common Pleas, are Judges. ibidem. If the Champion be vanquished, the Victory shall be Proclaim'd that he is vanquish'd, and he shall acknowledge his fault in the Audience of the People, and pronounce the horrible word (Cravent) and Judgment shall be forthwith given, and the Recreant shall amittere liberam legem i. e. become infamous, and never be of any Jury or a Witness. Co. 2 Inst. 247, 248. Justices of the *Common Pleas*, Judges of the Combate.

So far of Trial by Battle.

41. Trial by a Common Jury shall be where issue is taken upon any Collateral Point, and not upon the mær Right, as upon a Collateral Warranty or the like. 9 E. 4. 40. Br. Droit. 48. 3. By a Common Jury.

42. The Judgment in this Action is in this Form, viz. Quod Tenens ten' Terr' ill' sibi, & hæred' suis in pace versus peten' & hæred' suis in perpetuu'. Judgment final shall be given against the Demandant, if the seisin be not found as he hath Counted, or if after the (Mise) joyn'd the Demandant be Nonsuited, or Verdict be found against him. Against the Tenant if he make default after the Mise joyned, or Confess the Action, but yet not without a Petit Cape, Co. Lib. 5. 86. & 2 Cr. 292. Lilburne vers. Heron. Lit. Sect. 514. Co. 1 Inst. 295. b. Co. Lib. 5. 85. Penrins Case. Judgment in a Writ of Right.

Judgment after the *Mise* joyned binds all strangers that make not their claim within a year and a day: But this is to be after Execution. *Fitz. Abridg. tit. Fauxif. Recovery.* 1. *tit. Cont. claime.* 7. *Pl. Co.* 357. *b.* Now no barr by Equity of the Statute of Non-claime. 34 *E.* 3. *c.* 16. *Pl. Com.* 360.

For the further Illustration and practical understanding of what is before said, I shall proceed next to some Entries of Records, and Presidents in this Action, whereby what is before in Theory, may be here seen in Practice. Most of them are Records in the Castle of Chester, before the Justices of Chester; and observable for their Antiquity and Jurisdiction Entries upon Record.

risdiction of that Court. But I shall begin with that Record before mentioned, f. 110. before the Judges of the Common Pleas at Westminster, where the Demy-mark is tendred, which Entry of the Demy-mark is not (as I think) in any Book of Entry extant in Print.

## The Record.

Record, *tempore Eliz. Reginæ.* Et prædict' Q. B. per T. B. Attornatum suum ven' & defend' jus prædict' R. jam peten' & seisinam prædict' R. N. Mil' de qua &c. quando &c. Et totum &c. Et quicquid &c. Et maxime Tenement' prædict' cum pertinen' ut de feodo & jure, &c. Et pon' se inde in magnam Assisam Domine Regine, &c. Et pet' Recognic' inde fier' utru' ipse majus jus habeat tenend' Tenement' prædict' sibi & hæred' mascul' de Corpore suo exeun', ut ill' tenet an præd. R. habend. eadem Tenement. cum pertinentis, ut ill. superius petit, &c.

*Miſe* joyne.

Tender *del Demy-mark.* Et profert hic in Cur. sex solid. & octo denarios ad usum Domine Regine nunc, &c. pro eo scilicet quod inquiratur de tempore, &c. Et ideo pet. quod inquiratur per Assisam utrum præd. R. N. Miles fuit seisit' de Tenement. præd. cum pertinen. in Dominico suo ut de feodo tempore dict. Dom' Regis Henrici Octavi prout præd. R. jam pet. superius allegavit. Et præd. R. N. similiter. &c. Ideo præceptum est Vic. quod sum. per bon. sum. quatuor legales Milites gladiis cinctos de Balliva sua, quod sint coram, &c. ad Eligend. de seipsis, &c. ad faciend. Recognition. magne Assise præd. &c. Idem dies dat. est tam præfat' R. quam præfat' Q. hic, &c. Ad quem diem hic ven' tam, &c. Et Vic' videlicet A. B. modo mand' quod ipse summon' fecit A. B. C. D. quatuor legales Milit' de Com' suo gladiis cinctos per Johannem Doe & Ricard. Roe, Ballivos suos Essend. hic ad præfat. Octab. St. Hillar. ad faciend. prout bre. inde in se exigit & requirit, Et quod sum. prædict. & eorum uterque manucapt. est per M. & N. Et prædict. A. B. C. D. quatuor Mil. solemnitr, exact. non ven. sed defalt. fecer. Ideo Præceptum est Vic. quod habeat hic in Crastin. Trinitatis Corpora præd. A. B. C. & D. quatuor Mil. & gladiis cinct. ad faciend. Election. magn. Assise Domini Regis præd. inter partes præd. de Tenement. præd. cum pertinen. in forma præd. &c. Idem dies dat. est tam præfat. R. quam præd. Olivero & Agnete, hic ad audiend. Election. magne Assise præd. Ad quem diem hic ven. tam præd. R. quam præd. Oliverus & Agnes per Attornatum suum præd. Et præd. A. B. C. D. quatuor Mil.

*Bre' ad eligen' quatuor Mil.*

*Hab. Corpora 4 Militum.*

Mil', &c. exact. quidam eorum videlicet A. B. & C. ven. & præd. D. non ven. Et præceptum fuit Vic. quod habeat hic ad hunc diem Corpora eorundem A. B. C. & D. Et Vic. modo mand. quod quilibet eorum attachiat. eſt per Johan. Man, Hugon. Den. Ideo Præceptum eſt Vic. quod Diſtring. eoſdem A. B. C. & D. quatuor Mil. &c. per omnes terras, &c. Et quod de exitibus, &c. ita quod habeat Corpora eorum hic in Craſtin. Anim. ad faciend. Electionem magn. Aſſiſe Domine Regine, inter partes præd. in forma præd. &c. Idem dies dat. eſt tam præfat. R. quam præfat. O. & A. hic &c. Ad quem diem hic ven. tam. præd O. & A. per Attornatum ſuum præd. Et Vic. modo mand. quod quilibet præd. A. B. C. D. ſeperatim per ſe diſtrict. eſt per Catalla ad Valenc. xl. *s.* & manucapt. eſt per I. & D. ſuperer. quo præd. A. B. C. & D. quatuor legales Mil. &c. exact. in propria perſona ſua, ven. & Jurat. ſuper ſacrament. ſua in preſentia partium præd. elegerunt de ſeipſis & aliis ſexdecem, &c. videlicet E. F. I B. &c. probos & legales homines &c. ad faciend. electionem Recogn. magn. Aſſiſe præd. Ideo Præceptum eſt Vic. quod venire fac. hic tal. die ad faciend. Recogn. præd. Idem dies dat' eſt partibus præd. hic, &c. Ad quem diem hic ven. præd. W. per Attornatum ſuum præd. Et præd. O. & A. ſolemniter exact. non ven. ſed defalt. fecer. Ideo Tenement. præd. cum pertinen. capientur in manus Domini Regis, Et præd. O. & A. ſum. quod ſint hic in Octab. St. Michael. auditur. inde judic. ſu. &c. Ad quem diem hic ven. præd. W. per Attornatum ſuum præd. Et præd. O. quarto die pliti. ſolemniter exact. non ven. Et ſuper hoc ven. præd. Agnes ux. præd. O. hic in Cur. in propria perſona ſua, Et dic. quod præd. Tenementa cum pertinen. qu. præd. W. ſuperius verſus eam & præfat. Virum ſuum pet. ſunt jus ipſius Agnet. unde ex quo eadem A. ven. ante judic. inde redditum paratum jus ſuum defendere & præfat. Willmo. reſpondere pet. quod ipſa per defalt. præd. O. Viri ſui non amittat inde jus ſuum ſed quod admittatur ad defenſionem juris ſu. Et admittitur, &c. Et ſuper hoc præd. W. pet. verſus ipſum A. Tenta. præd. cum pertinen. in Forma præd. &c. Et unde dic. quod, &c. Et præd. A. voc. ad Warr. &c.

*Diſtring' 4. Militum.*

*4. Mil. eompuer' & jurat' & eleger' &c.*

*Venire fac' verdis jurat' elect.*

*Tenens fecit defaltam.*

*Petit Cape.*

*Uxor Tenentis Recieve.*

Placita

Placita Com' Ceſtr' tent' apud Ceſtr', coram *Bartholimo* de Burgherſh' Juſtic' Domini Comit' Ceſtr'. die martis proxime poſt Feſtum St. Michaelis, Anno Regni Regis E. Tertii a Conqueſtu xxxvii.

*Johannes de Delves* Chivalier, & *Iſabella* Uxor ejus, per Attornatum ſuum pet' verſus Magiſtrum *Johannem de Brunham* medietatem quarte partis Maner' de *Malpas*, cum pertinen', exceptis un' molendin' ventritico
Ceſtr. ff. carucat' Terr' & ſex Acr' boſci in eadem quarta parte, ut jus & hæreditatem ipſius *Iſabellæ* per bre' Domini Comitis Ceſtr' Præcipe in Capite, &c. Et ſciend' quod al' medietas quarte partis Maner' præd. exceptis fil' Willimi' Brereton Mil', ſimul peten', &c. Sum' fuit eſſend' hic ad hunc diem, &c. ad ſequend' Et modo non ven', Ideo
*Summons & Severance.* Conſideratum eſt quod præd. Johannes de Delves & Iſabella ſequantur ſine, &c.

Et unde idem Johannes de Delves & Iſabella dic', quod quidam Willielmus fil' David le Clerk fuit ſeiſit' de præd'
*Count.* quarta parte Exceptis, &c. in Domino ſuo, ut feodo & jure tempore pacis tempore H. quondam Regis Domini Domini Regis nunc capiend' inde Exples' ad Valenc', &c. Et de ipſo Willielmo quia obiit ſine hæred' deſcend' jus, &c. cuid' Philippo ut fratri & hæred', &c. Et de ipſo Philippo deſcend' jus, &c. cuid' David. de Malpas hæred' &c. Et de ipſo David' deſcend' jus, &c. cuid' Phil. ut fil' & hæred', &c. Et de ipſo Phil. deſcend' jus, &c. cuid' David. ut fil' & hæred', &c. Et de ipſo David deſcend jus. &c. cuid. Phil. ut fil. & hæred,&c. Et de ipſo Phil. deſcend' jus,&c. iſt' Iſabellæ qu' nunc petit ſimul, &c. Et cuid' Ellene Sorori ejuſdem Iſabellæ, ut filiabus & hæred, &c. Et de ipſa Ellena deſcend' jus &c. propartis ſu' ipſar' inde contingentis, &c. præfat' Willielmo fil' Willielmi, ut fil' & hæred' qui modo non ſequitur, Et quod tal' ſit jus ipſius Iſabellæ, iidem Johannes & Iſabella offerunt, &c.

*Releaſe plede.* Et Magiſter Johannes de Brunham, in propria perſona ſua ven' & defend' jus ipſius Iſabellæ quando, &c. Et ſeiſinam præd' Willielmi fil' David. ut de facto & jure de cujus ſeiſin', &c. maxime de prædict' medietate cum pertinen' Exceptis, &c. Et totum, &c. Et dic' quod quidam Johannes de Sayntpere Mil' nuper de prædict' Tenement' cum pertinen' fuit ſeiſit' in dominico ſuo ut de feodo et jure, &

inde

inde feoffavit Magiſtrum Johannem de Brunham & Richard' de Stafford Mil', Johannem de Wingefield Milit' & Johannem de Hale hend' ſibi & hæred' ſuis imperpetuum Virtute cujus feoffamenti iidem Richardus, Johannes de Wingfield, Johannes de Hale & Magiſtr' Johannes fuer' ſeiſit' in Forma præd' qui quidem Johannes de Wingfield & Johannes de Hale, obierunt per quod Tenementor' prædict' accrevit ipſis Richardo & Magiſtro Johanni, &c. Qui quidem Richardus per nomen Richard' de Stafford Domini xxiii. die Maii, Anno Regni Domini Regis nunc xxxvii. remiſit, relaxavit & omnino pro ſe quiet' clam' ipſo Magiſtro Johanni de Brunham totum jus & clam' qu' habuit, ſeu quoviſmodo habere' potuer' in Ten' cum pertinen' per nomen omnium Terrar' & Tenementor' qu' nuper fuer' Domini Johannis de Seyntpere Milit' in Com' Ceſtr' Et pon' ſe in magnam Aſſiſam Domini Comitis Ceſtr', Et pet' Recognic' fier' utrum ipſe majus habeat in Tenement' præd' cum pertinen', ut jus ſuum ſicut illa tenet an præd' Johannes de Delves & Iſabella ſicut *Miſe joyns.*

Dat' eſt partibus præd' hic ad prox' Com' ſcilicet die Martis in Vigil' St. Luce Virginis prox' futur' Aſſiſe, Et tunc ven' hic quatuor Mil' ad faciend' Election' ill' &c. Ad quem diem ven' partes præd', & Hugo de Venables Chivaler, Thomas de Dutton Chevaler, Adam de Houghton Chevaler & Henricus de Norris Chivaler, ſimiliter ven' qui per ſacrament' ſua in preſentia partium præd' de ſeipſis & aliis elegerunt ſexdecem Hugon' de Venables Chivaler, Thom. de Dutton Mil' Ada' de Houghton Che. Henric' de Norris Chivaler, Richard Fyton de Bolyn, Ranulph' de Weever, Johan' de Thom. de Davenport, Johan' de Hockenhull, Will' de Horton, Will' de Stanley, Richard' Donne de Robertum de Legh ſenior' Thom' de Stathum & Edmund' de Cotton, ad faciend' Recognic' Aſſiſe præd', Ideo Præceptum eſt Vic' *Summons & Milites.* *Electio magn' Aſſiſe.* *Noia' jurator'.*

Venire fac' eos hic ad prox' Com' ſcilicet die Martis prox' poſt Feſtum St. Hillarii tunc prox' ſequen' ad faciend' Recognic' præd', &c. Idem dies dat' eſt partibus præd' hic' &c. Ad quem diem Martis partes præd', &c. Et Jurat' inde inter partes præd' poſita fuit in reſpectu hic inter partes præd' uſque ad hunc diem ſcilicet die Martis prox. poſt Feſtum St. Scolaſtic' Virginis tunc prox. ſequen. pro defectu jurator. &c. Et modo ven. partes præd. & ſimilitr. Jurat' ven. qu' de conſenſu partium præd. elect. triat. & jurat. dicunt ſuper ſacrament. ſuum quod præd. Johannes de Delves & Iſabella majus *Venire fac'.* *Verdict magne Aſſiſe.*

majus jus hent. habend. præd. medietatem quarte partis Maner. præd. cum pertinen. Exceptis. &c. ſibi & hæred' ipſius Iſabellæ, ut de jure ejuſdem Iſabellæ ſicut illam petunt quam præd. Magiſtr. Johannes teneat illam ſicut illam tenet prout iidem Johannes Delves & Iſabella ſuperius per bre. ſuum præd. ſuppon. Ideo Conſideratum eſt quod præd. Johannes de Delves & Iſabella recuperent ſeiſinam ſuam verſus præd. Magiſtrum Johannem de præd. medietate cum pertinen' tenend. ſibi & hæred. Iſabellæ quietam de præd. Magiſt. Johanne & hæred' ſuis imperpetuum, Et Magiſtr. Johannes in miſericordia. &c.

*Iudic'.*

Judicium.

Releaſe pleaded

Quær. what neceſſity there was of Pleading of this Releaſe by one Joynt-tenant to another; whether the ſame might not have been given in Evidence, and the Tenant have put himſelf upon the Grand Aſſiſe generally? I conceive he might for the reaſon before mentioned.

Seiſin.

Note, here by this Record, the Tenant muſt defend the right of the Demandant, and the ſeiſin of him in whom the ſeiſin is alledg'd in the Count. And to Confirm this, ſee Co. Entr. 182. b.

Count.

View.

Novel Count.

Voucher.

Imparlance.

*Cenced' vocar'.*

Summons *ad Warrantizand.*

Entr' in War.

Novel Count.

Voucher over.

Entr' in War.

Novel Count.

Confeſſion.

Judgment.

In the 2 Eliz. amongſt the Records in the Caſtle of Cheſter, Ro. 12. b. There a Writ of Right is brought, and the Tenant appears, and after the Count demands the View, which was granted Returnable die Veneris the ſame Seſſions; then at the day and View return'd, the Demandant Counts again, then the Tenant imparls till the next Seſſions: At which next Seſſions the Parties appear, and the Tenant Vouches, and the Demandant Imparls till the nert Seſſions; At which time the Demandant (Concedit vocare) and then a Summons ad Warrantizand' iſſues, Returnable the firſt day of nert Seſſions, at which Seſſions the Vouchée enters into Warranty gratis; And the Demandant Counts again, and the Vouchée vouches over, and the Writ of Summons ad Warrantizand' returnable mercur. the ſame Seſſions, at which time the Second Vouchée apears and Enters into Warranty, and the Demandant Counts again againſt him, and the Second Vouchée Confeſſes the Action, and judgment given for the Demandant againſt the Tenant, and he over againſt the Firſt Vouchée, and the Firſt Vouchée againſt the Second Vouchée. The Record in part is as followeth.——

Placita

Placita apud Ceſtr' coram Johanne Throcm'ton ar'o Juſtic' Dominæ Reginæ apud Ceſtr' ad Seſſionem tent' ibid. die Lunæ videlicet xxvii. die Maij Anno Regni Dominæ Eliz. Dei gratia, &c. Reginæ fidei Defenſor', &c. Secundo.

*Johannes Manley* Gen. per *Edv. Holland* Attorn. ſuum pet *Ceſtr.* ſſ. verſus *Robertum Sound* unum Meſſuagium quadragint. acr. terr. Bre. & vigint. acr. Paſtur. cum pertinentiis in Shocklach qu. clam. ut jus & hæreditat. ſuam.

Et unde idem *Johannes* per Attorn. ſuum pd. dic' quod quidam Count. *Nicholaus Manley* avus pd. *Johannis Manley* cujus hæres ipſe eſt fuit ſeiſit. de Tenementis pd. cum pertinentiis in Dominico ſuo ut de feodo & jure tempore pacis tempore Domini H. Septimi nuper Regis Angl. videlt. infra ſexagint. annos ultim. elapſ. capiend. inde exples' ad valenc. &c. Et de ipſo *Nicholao* deſcend. jus Tenementor. pd. cum pertin. cuidam *Henrico Manley* ut fil. & hæred. pd. *Nicholai*, & de præfat. *Henrico* deſcend. jus Tenementor. pd. cum pertin. iſti *Johanni* qu. nunc pet. ut fil. & hæred. pd. *Henrici* Et quod tal' ſit jus ſuum offert, &c.

Et pd. *Robertus Sound* per *Robertum Brooke* Attorn. ſuum ven' Defence. & defend. jus ſuum quando, &c. Et pet. viſum de Tenement. pd. View. cum pertinentiis & hab. &c. dies dat. eſt partibus pd. hic uſq; diem Vener. prox. futur. iſt. ead. Seſſion. &c. Et interim &c. Et modo, &c.

Note, **This Count differs from the other by reaſon of the Statute of 32 H. 8. c. 2. which has appointed the time of Limitation for Seiſin in a Writ of Right to be ſixty years,** Co. Entr. 182. b. Seiſin 60 years.

**The Defence here entred, is not right; for it ſhould have been** Ven. & defend. jus ipſius *Johannis Manley* & ſeiſinam ipſius *Nicholai* quando, &c. Et totum, &c. Et quicquid, &c. **as in the Preſident before; and** Co. Entr. 182. b. **And in a Record in the Caſtle of Cheſter in the Court of Common Pleas there before the Juſtices of Cheſter, where View is demanded,** Ad Com. tent. die Martis prox. poſt Feſtum Sti. Hillarij, 37 *E.* 3. b. Defence.

Only I find this ſort of Defence (as in this Record of Q. Eliz.) in Co. Entr. 181. a. in a Writ of Right of Advowſon upon a general Imparlance, but upon a ſpecial Imparlance in the very next Action, there the Entry is, as I have ſaid before (i. e.) to defend the Right of the Demandant, &c.

*Ceſtr. ff.* Ad Com' die Martis prox' ante Feſtum Sanctæ Lucæ Virginis, 38 *E.* 3. Ro. Ceſtr. Lxxxiv.

A Writ of Right wherein many Deſcents are mentioned in the Count, to Coheirs, the Tenant pleads a Feoffment with Warranty by the Anceſtor, who was ſeiſed, and puts himſelf upon the Grand Aſſiſe. And after the awarding of the Summons to the four Knights, &c. the Tenant makes Default, and Judgment finally is given, which ought not to have been (as I conceive) without a Petit Cape, Co. lib. 5. 86. and Cr. 2. p. 292. *Lilburn* verſus *Heron.* The Action is between John Collie and Agnes his Wife, and John Whitmore Senior and Chriſtiana his Wife againſt Willielm. Dandy, Johan. de Shagh, Johan' Gamel Capellan', and Robert. Picks Capellan' for Lands in Middlewich and Newton. This Writ is a Writ of Right, Quia Dominus Hugo de Venables Mil' & Willielmus del Holt Capital' Domini Feod' ill' ipſo Comit' remiſer' Cur' ſu.

*Com.* Recoveries by Writ of Right in *Cheſter.* In the 22 E. 4. Rolls in the Caſtle of Cheſter, there are ſeveral Recoveries in a Writ of Right for Security of Lands, as common Recoveries are now upon a Writ of Entry ſur diſſeiſin en le poſt, The Tenant calls to Warranty *A. B.* the Vouchée appears gratis, and the Demandant Counts againſt him; then the Vouchée joyns the Miſe upon the mère Right; and the Demandant imparles, and the ſame Counte appears again, and the Vouchée makes default in Contempt of the Court, and Judgment final is given. One of the ſaid Records at large here follows, viz.

Placita

Placita Com' Ceſtr' apud Ceſtr' coram *Thomâ* Domino *Stanley* Mil' Juſtic' Domini Principis ibd. die Martis proxime poſt Feſtum St. *Annæ* Anno Regni Regis *Edwardi* quarti poſt Conqueſtum Angl' viceſimo ſecundo.

Willielmus Botiller & Willielmus Tatton in propria perſona ſua pet. verſus Willielm' Wiche & Margeriam uxor. ejus octavam partem Manerii de Pickmeire duo. Meſſuag' cent' acr' terr' decem acr' prati viginti acr' paſtur' & ſex acr. boſci in Pickmeire & Wymyncham ut jus & hæreditat' ſu' per Breve Domini Regis de Recto Præcipe in capite, &c. Et unde dic' quod ipſimet fuer' ſeiſit' de prædict' octavâ parte Maner' meſſuag' terr' prat' paſtur' & boſci præd. cum pertinen' in Dominico ſuo ut de feodo & jure tempore pacis tempore Domini Regis nunc capiend' inde Expleſ. ad valenc', &c. Et quod tal' ſit jus ſuum offerunt, &c. *Ceſtr.* ſſ. Count.

Et prædict. Willielmus Wiche & Margeria uxor ejus in propria perſona ſua ven' & defend' jus prædict. Willielmi Botiller & Willielmi Tatton quando, &c. Et ſeiſin. de qua Seiſina, &c. ut de feodo & jure, &c. Et maxime de prædict' octava parte Maner' meſſuag' terr' prat' paſtur' & boſci pd' cum pertinen' & totum, &c. Et Vic' inde ad warr' quendam Adam Brikhened qui præſens eſt hic in Cur' in propria perſona ſua & gratis octavam partem Maner' Meſſuag' terr' prat' paſtur' & boſci pd' cum pertin' eis warr', &c. Et ſuper hoc prædict. Willielmus Bottiler & Willielmus Tatton pet' verſus prædict. Adam tenen' per Warr' ſu' octavam partem Maner' meſſuag' ter' prat' paſtur' & boſci prædict' cum pertin' in forma prædict. &c. Et unde dic' quod ipſimet fuer' ſeiſit' de prædict. octava parte Maner' meſſuag' terr' prat' paſtur' & boſci prædict. cum pertinen' in Dominico ſuo ut de feodo & jure tempore pacis tempore Domini Regis nunc capiend' inde Expleſ. ad valenc', &c. Et quod tal' ſit jus ſuum offerunt, &c. Defence. Voucher.

Et prædict. Adam tenens inde per Warr' ſu' defend' jus præd. Willielmi Botiller & Willielmi Tatton quando, &c. Et ſeiſin' eor' de qua ſeiſina, &c. jut de feodo & jure, &c. Et maxime de prædict. octava parte Maner' meſſuag' terr' prat' paſtur' & boſci prædict. cum pertin' & totum, &c. Et pon' ſe inde in magnam Aſſiſam Domini Principis, &c. Et pet' Recognitionem fier' utrum ipſe majus jus het' tenend. per octavam partem Maner' meſſuag' terr' prat' paſtur' boſc. pd. cum pertin' ſicut ill' tenet ut tenens inde per Warr' ſu' prædict. An prædict. Willielmus Botiller Grand Aſſiſe.

Botiller & Willielmus Tatton hend' prædict' octavam partem Maner. meſſuag. ter. prat. paſtur. & boſci pd. cum pertinentiis ſicut illa ſuperius petunt, &c.

Imparlance per Demandant. Et prædict. Willielmus Botiller & Willielmus Tatton pet' licentiam inde interloquend' & hent', &c. Et poſtea iſt. eod. Com. &c. iidem Willielmus Botiller & Willielmus Tatton reven. hic in Curia in propria perſona ſua, &c. Et prædict. Adam licet ſolemniter exact. non reven. ſed in contempt. Cur' defalt' fecit Ideo conſideratum eſt per Cur' quod iidem Willielmus Botiller & Willielmus Tatton recuperent Seiſinam ſuam verſus prædict. Willielmum Wyche & Margeriam Uxorem ejus de prædict. octava parte Maner' meſſuag. terr. prat. paſtur. & boſci præd. cum pertinen' tenend' eiſdem Willielmo Botiller & Willielmo Tatton & hæred. ſu' quiet. de præd. Willielmo Wyche & Margeria Uxore ejus & hæred. ſu' Et de præfat. Adamo tenend' per Warr. ſu. & hæred. ſu. imperpetuum Et quod iidem Willielmus Wyche & Margeria hent. de terr. pd. Ade ad valenc', &c. Et idem Ad' in mia', &c.

Default per Tenant.

Judgment.

**In the time of E. 4. there are ſeveral Actions of the ſame nature, both with ſingle and double Vouchers.**

Ad Com' Ceſtr' coram Gilberto Domino de Talbott Juſtic' die Martis prox' ante Feſtum Sti. Dionyſii martyris. 3 H. 5.

*Ceſtr. ſſ.* Richardus del Vykers & Emma ux' ejus & Richardus de Mottra & Iſabel' ux' ejus in propr. perſona ſua pet' verſus Katherinam quæ fuit uxor Thom. del Hogh de Thornton duas partes trium partium Maner' de Leghton juxta Neſton cum pertinen' quæ ſimul cum altera tertia parte earund. trium partium Thom. de Fytch & Margeria ux' ejus hic in Cur' Clam' ut jus ſuum per Breve Domini Regis de Recto, &c. Summons & Severans & judicium quod ſequantur ſine, &c.

Summons & Severans.

Et unde dic' quod quædam Amicia filia Willielmi de Leghton conſanguin' ipſarum Emme & Iſabelle cujus hær' ipſæ ſunt fuit ſeiſit' de prædict. tertia parte, &c.

Miſe joyn.

**The Tenant joyns the** Miſe **upon the meere Right,** Ideo fiat inde magn. Aſſiſa, &c. **Then the Summons awarded to return the four Knights** ad eligend' xii., &c. ad prox' Com', **which is continued by** Vic. nihil inde fecit. **And then at a further**

4 Knights ſum.

further County the Sheriff returns 4. Knights summon'd, viz. George of Carrington Mil. Willielmus de Stanley Mil. Johannes de Pull Mil. & Radu. de Boſtock Mil. qui modo in Cur. præſtiter. ſacrament. &c. Et Eleger. xii. &c. Videlicet Johan' de Letherland, Johan' Lancelyn, &c. Ideo ipſi ſum. quod ſint hic ad prox. Com. &c. which is continued to ſeveral Counties by Habeas Corpor. and Diſtring. Et quod ſum. prædict. 4. Mil. quod ſint hic ad eundem diem, &c. ad eligend. & ponend. per eorum ſacrament. xii. &c. tal. And then continued by al. Diſtringas, Et quod præd. 4. Mil. pon. xii. &c. tal. &c. at length the Jury appeared, Et per Conſenſum partium elect. triat. & jurat. found for the Tenant, and Judgment final given.

Election of the Jury by the 4. Knights.

*Diſtringas.*

Verdict.

Judgment. *pro Ten'.*

Note, in this Record is nothing ſaid of the Four Knights being joyned with the Jury, and therefore I conceive its ſaid that the Trial was per Conſenſum partium.

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## Pleadings.

### Pleas proper in this Action.——

There are Pleas in Abatement of the Writ in this Action, Common to other Real Actions, as Variance betwéen the Writ and Count, Falſe Latin, Not purſuing the Form in the Regiſter, Death of one of the Demandants, &c. and the like, of which I purpoſe not to ſay any thing Conſiderable, but only as to what is proper to this Action.

In Abatement, it may be pleaded that the Demandant had nothing in the Land at the time of the Writ brought, but to him and the Heirs of his Body, or for Life, &c. becauſe none but Tenant in Fée-ſimple can bring this Writ. 5 E. 4. 2. b.

Abatement.

1. Becauſe Poſſeſſion is an Evidence of Right and Property; therefore in this and all other Real Actions in the Right, (Except ſuch as are grounded upon the Seignory, and

Count.

and not upon the Seiſin of the Land, as a Writ of Eſcheat, Right ſur diſclam. &c.) for Recovery of Lands and Tenements, the Demandant in his Count muſt alledge a (Seiſin) and taking of the Profits which is called the Expleas, ſo that it muſt be an actual Seiſin. Viz. Quod ſeiſit. fuit de Meſs. &c. in dominico ſuo ut de feodo tempore pacis tempore Domini Regis Capiendo inde *Expleſ'* ad Valenc. &c. 26 H. 8. 3. Dyer 114. 21 H. 6. 22.

Deſcent in the Count.

2ly. If he Counts of the Seiſin of his Anceſtour, he muſt ſet forth the Deſcent of the Right, as de præd. B. diſcend. jus cuid. C. & de præd. C. iſt. M. ut fil. & hæred. &c. Et quod tal. ſit jus ſuum offert, &c.

Seiſin within 60 years.

3ly. Where he Declares upon the Seiſin of his Anceſtour, he muſt alledge it within 60 years by the Statute of 32 H. 8. c. 2. Co. 1 Inſt. 114.

Barr.

Firſt, the Tenant muſt make Defence both before Plea to the Writ, as before the Barr, and again before the Rejoynder to the Replication. Br. droit. 11. 21 H. 6. 26. And the Defence in a Writ of Right Patent or Cloſe for Lands, differs from all others, for whereas in other Real Actions the Tenant defends his own Right, Viz. defend. jus ſuum quando, &c. in this the Tenant defends the Right and Seiſin of the Demandant, Viz. ven. & defend. jus ipſius W. (the Demandant) & ſeiſinam ſuam quando, &c. Co. Entr. 182. a. b. The true reaſon of this I could never yet find. Vid. antea 106. *& 3 B. C. 297.*

Defence.

*Miſe* joyn.

In a Writ of Right where the Miſe may be joyn'd upon the meer Right, there needs little of ſpecial Pleading, for all or moſt of ſuch matter (Except a Collateral warranty) may be given in Evidence upon the Miſe joyned upon the meer Right. Br. droit. 48. Vid. Lit. Sect. 478.

Special pleading & over to the Aſſiſe.

But if a Man will plead ſpecially in barr of the Aſſiſe, he muſt take care that his Plea be a Barr, or elſe he muſt with his ſpecial matter conclude to the Right, and put himſelf upon the Grand Aſſiſe, and therefore as to this, there is a Rule taken by Shard. P. 34 E. 3. tit. droit. That where the Plea pleaded, does not deſtroy the Right of the Demandant, but appears by the Plea that he may have a Right, he

he muſt conclude his Plea, by putting himſelf upon the Grand Aſſiſe; but when by the Plea it appears the Demandant has no Right, As a Fine levied by the Demandant himſelf, or a Releaſe by him, or a Collateral warranty, &c. he may conclude his Plea to the Action, Judic' ſi Actio, &c. P. 20 E. 3. tit. droit. & 34 E. 3. tit. droit. 29. And if the Demandant Reply and iſſue be taken, the Trial ſhall be by a Common Jury, becauſe it is out of the Point of the Grand Aſſiſe, i. e. the mære Right is not Tried, but a Collateral matter. Br. droit. 42, 43. & 30.

Trial by Common Jury.

The Tenant may plead that the Anceſtour of the Demandant was never ſeiſed, i. e. ſi ſoit trove pon. ſe ſuper, &c. q. ad pluis mel. droit. P. 35 E. 3. 3.

*Queux ſont bons* Pleas in Barr.

But he cannot Traverſe the Seiſin in ſuch a King's Reign, but muſt tender a Demy-mark to the King, to have it inquired by the Grand Aſſiſe. 10 E. 3. 20. tit. droit. ſo note the difference; but now by the Statute of 32 H. 8 c. 2. he may Traverſe ſuch Seiſin (as I conceive) as is before ſaid.

Seiſin *lou* traverſable. *Demy-mark.*

A Man may plead Special matter, (as Recovery in an Aſſiſe,) and conclude to the Right. Et ſic melius droit & pon. ſe ſuper Aſſiſam utrum, &c. for a Recovery in an Aſſiſe, cannot be in barr of a Writ of Right, becauſe it only fortifies and evidences the right of Poſſeſſion, but not the mær Right. M. 27 E. 3. 85. droit. 20. 8 E. 2. droit. 36.

Special matter, *& Conclude au droit.*

3. Recovery in a Ceſſavit by default is a good barr in a Writ of Right, becauſe the judgment is final by the Statute of Gloceſter, c. 4. 6 E. 1. But if the Recovery be by Verdict, it is no barr, but he muſt conclude to the Right. M. 31 E. 3. droit. 53. Quær.

Recovery in *Ceſſavit.*

4. An Eſtate tail from the Demandant and his Anceſtours may be pleaded in barr without joyning the Miſe, becauſe the Trial cannot be by Battle or the Grand Aſſiſe, being but an Eſtate tail; ſo Baſtardy or a Leaſe for Life or years, &c. may be pleaded in barr. Tempore E. 1. & droit. 41.

Eſtate tail, or for life, &c. pleadable.

Recovery in *brev' de droit.*

5. A Recovery by default in a Writ of Right, is no Plea in a Writ of Right, but Recovery by Battle, or the Grand Assise, or Inquest is a good Plea, because the judgment is final. Tempore E. 1. droit. 50.

Estate mean Recovery by *touts* Estates.

6. A Recovery in a Præcipe quod reddat, and the Demandants Title mean, betwæn the Teste of the Writ and the Judgment, is a good barr to a Writ of Right. For a Recovery in Real Actions binds all Rights and Titles betwæn the Teste of the Writ and Judgment, and therefore in a Præcipe quod reddat, if the Tenant alien, hanging the Writ, the Alienee shall not have a Writ of Right or any other remedy till the Judgment be Revers'd. Br. droit. 24. 12 Ass. 41. 7 E. 4. 19.

Tenant, *lou serr' Compel monstr'* Title.

Grand Assise.

7. Note, that M. 18 E. 3. droit. 63. It appears the Demandant may force the Tenant to shew a Title (and not suffer him to plead to the Assise generally,) by pleading in barr to the Assise, as to say, That his Grandfather's Father had Two Sons, and he claims from the Elder, &c. Et pet. judic. si Assisa, &c. The Tenant rejoyns that the Grandfather's Father had Three Sons, and infeoffed the Third, from whom he claims by Descent, and sets forth the Descent, and then prays the Assise. Note, there the Demy-mark tendred by the Demandant to inquire of the Seisin of his Grandfather. Tempore Henrici R.

*Demy-mark* tender *per* Demandant.

*Defens' de novo*

8. If the Demandant Reply to the Barr, the Tenant must make a Defence de novo in his Rejoynder, 21 H. 6. 26.

Voucher, Aid, Grand Assise.

9. Note, the Tenant may Vouch, Pray in Aid, Plead in barr, or put himself upon the Assise, and the Vouchée or Pratée in Aid may have like Pleas. 21 H. 6. 26.

Collateral Warranty.

10. A Collateral warranty is to be pleaded in barr, and not to be given in Evidence upon the Mise joyned, and the reason I conceive to be, because the warranty does not prove any Right, i. e. mitter le droit out of the Feoffor, and put it into the Feoffée, but only barrs him of his Right by force of the Covenant Real, so that if the Mise should be joyned upon the mær Right, the warranty would not help, because the Grand Assise must give their Verdict upon the mær

meer Right, which remains still in the Party, notwithstanding the warranty, but if he plead the warranty in barr, then the Demandant is estop'd by his Warranty. Lit. Sect. 478.

11. In regard all special matters may be given in Evidence in a Writ of Right upon the (Mise) joyned, therefore that is the safest way so to plead. Evidente *sur le Mise.*

12. But if the matter in barr to the Assise be cléer, then it is sometimes most for the advantage of the Tenant to plead it, and not put himself upon the Grand Assise, which is very dilatory, and may become vexatious to the Tenant by the Practice of the Demandant, by not prosecuting and suing out Proces as he ought, and many other delays for want of Knights, their not appearing or the like: And this mischief and vexation to a Tenant in a Writ of Right lately brought before the Justices of Chester about the 34 or 35 Car. 2. Between Wibunbury and others Demandants, and one Bolton Tenant, wherein the Demandant had a design meerly to vex and weary out the Tenant, who had an undoubted Title and Interest. The Tenant there, put himself upon the Grand Assise, (where he might have pleaded in barr) and by that means he suffered much by attendance from Assises to Assises, and could not bring it on to Trial, (though he much endeavoured it) through slowness in suing out Proces by the Demandant, want of appearance of the Knights, &c. and the Demandant would not consent to any thing for Expedition, but afterwards one of the Demandants died, and so the Writ abated, which might have been prevented by pleading in barr, for then it must have been tried by a Common Jury. Sometimes better to plead in barr to the Assise. *Inter Wibunbury Pet', & Bolton Tenen' in Bri' de Recto. 34 Car. 2.*

## CAP. IV.

# Writ of Right Close.

What.

1. THis Writ is peculiar to Lands in Ancient Demesne, and is always Close, and is directed to the Lord of the Manor, or sometimes to the Bailiff of the Manor thus.——

The Writ.

Rex, Præcipimus tibi vel vobis quod sine dilacon' secund' consuetudinem Manerii de A. plenum rectum teneatis L. de un' Mess. &c. in B. qu. S. ei deforceat ne amplius inde clamorem audiamus pro defectu recti, Test. &c. F. N. B. 25. Rast. Entr. 241. b.

Protestation to Sue, in what nature of a Writ.

He that brings the Writ, may make protestation to pursue it in nature of what Writ he pleases, either in nature of a Writ of Right, and then the Process is as in a Writ of Right before, and the Count and all other Proceedings, or in nature of an Assise of Novel disseisin, Cui in vita, or any other Real Writ, and therefore may be brought by Tenant for life, in Tail or in Dower, and then the procedings are in nature of the Writ first upon by the Protestation. F. N. B. 26, 27. Rast. Entr. 242. a.

By Tenant for Life.

Not removeable out of the Lord's Court.

This Writ cannot be removed out of the Lords Court, but where the Land is free Land, or where the Demandant is Steward. 34 H. 6. 35. 1 H. 7. 30. 9 H. 7. 11. Rast. Entr. 242. b. 243. a. b.

Foreign Voucher, *Supersedeas.*

In Case of a Foreign Voucher, the Tenant must pursue a Supersedeas to the Lord's Court, to cease till the Voucher be decided by a Warrantia Chartæ in the Common Pleas, F. N. B. 31.

Where *Mise* is joyned, whether removable?

If the Mise be joyned upon the meer Right, it is a Question whether the Record shall not be removed into the Common Pleas, in the 1 H. 7. 30. Per Townsend it shall be removed, but adjudged contra, Dyer 111. 12 Ph. & M. and a Pro-

a Procedendo awarded. And in Raſt. Entr. 141. b. Proceſs is awarded to Four ordinary Men to chuſe the Grand Aſſiſe in the Court of the Mannor. The Record is removed by an Accedas ad Cur. Raſt. Entr. 242. b. 243. a. b.

## CAP. V.

## Writ of Right in *London*.

This Writ of Right is of the ſame nature with the Writ of Right Patent, only different as to the place where the Lands lie, i. e. Concerning Lands in London; the Writ is directed to the Mayor and Sheriffs of London, thus.—— F. N. B. 13. What.

Rex, &c. Majori & Vicecomitibus *London* ſalutem, Præcipimus vobis quod ſine dilacon' plenum Rectum teneatis N. S. de uno Meſſuagio, &c. cum pertinen' in *London* quod M. ei deforceat, ne amplius inde clamorem audiamus pro defectu recti, Teſt' &c. The Writ.

Vid. a Recovery and Entry of Proceedings in this Writ, Co. Lib. 1. 7, 8. where the Vouchee joyns the (Miſe) upon the meer Right.

The Plea upon this Writ is not removeable out of London by Tolt, Pone or Recordare; but in Caſe of a foreign Plea, or foreign Voucher, there the Record ſhall be remov'd into the Common Pleas by Writ out of the Chancery, and ſhall be remanded, when the Warranty is Tried by the Statute of Gloceſter c. 12. Vid. F. N. B. 14. how it ſhall be removed, Co. Entr. 176, 177. a. b. But the Statute of Gloceſter is Corrected by the Statute de forenſ' vocat' ad Warr' 9 E. 2. as to the manner of the Removeal. Co. 2 Inſt. 324, 325. Not removeable by *Tolt*, &c

CAP.

## CAP. VI.

# Writ of Right of Dower.

What. THIS Writ is of little uſe or practice becauſe of the ordinary Writ of Dower (unde nihil habet) for ordinarily now the Wife has no part of her Dower aſſign'd to her when ſhe ſues for Dower, and unleſs ſhe have ſome part of her Dower in the ſame Town, and of the ſame Perſon, and ſues for the Reſidue, ſhe needs not bring a Writ of Right of Dower, but the other, unde nihil habet, Regiſtr. 3. Weſtm. 1. c. 48.

Is Patent. To whom directed. 2. This Writ is Patent, and is directed to the Heir of the Husband to do right to the Wife in his Court, or to the Guardian, and is removable as the other Writ of Right Patent, and in the Common Pleas the Proceſs is the ſame. The Form of the Writ is thus———

The Writ. Rex, &c. Præcipimus tibi quod ſine dilacon' plenum rectum ten' *B.* quæ fuit Ux' *C.* de tertia parte & x. acr. terr. &c. in *L.* quam clam. tenere de te in dotem per liberum ſervitium, &c. qu' *S.* ei deforc. &c. Teſte, &c. Reg. 3.

This is in Caſe where the Heir hath a Court, but if he have none, then the Writ of Right is directed to the Sheriff returnable into the C. Pl.

Demand in lieu of a Count. 3. In this Writ as well as the Writ Unde nihil habet, there's no Count, but a Demand, thus, viz.———A. quæ fuit Ux' T. per J. S. Attorn. ſuum pet. verſus M. tertiam partem un. Meſſ. &c. cum pertinen. in W. ut dotem ipſius A. ex dotatione prædict. T. quondam Viri ſui, &c. Raſt. Entr. 234. b.

Defens nul. 4. Note, In Dower and Aſſiſe the Defendant makes no (Defence) but always ſaith (Ven. & dic.) and not Ven. & defend. &c. Raſt. Entr. 232. b. More ſhall be ſaid when we come to a Writ of Dower Unde nihil het', and the Pleadings I ſhall refer to that Chapter.

CAP.

## CAP. VII.

# Writ of Right *de Rationabili parte.*

1. THIS is a Writ of Right between Privies in Blood only, as between Brothers in Gavelkind, and Sisters and other Coparceners, where one deforceth another, and lies only for Lands in Fee-simple. As if the Ancestor make a Lease for Life, and die, and after the Lessee die, and one of the Brothers or Coparceners enter and keep out the rest, he or she so kept out, may have this Writ, F. N. B. 20. This Writ is Patent. What.

2. But if the Ancestor die seis'd, the Nuper obiit is the proper Remedy, and against a Stranger a Mortdancester, and in case of an Estate-tail, a Formedon must be brought by one Coparcener against the other, F. N. B. 22, 23. The Form of the Writ is thus—— *Nuper obiit* where the Ancestor dies seised.

Rex &c. Vic' *S.* salutem. Præcipimus tibi quod sine dilatione plenum rectum ten. *S.* de decem acr. terr. &c. in *B.* qu. clam. esse rationabilem partem suam qu' ei contingit de libero tenemento quod fuit *J.* patris ( vel matris, fratris vel sororis avunculi vel amit' consanguinei vel consanguineæ ) sui vel suæ in ead. villa & tenere de te per liberum servitium un. denar. per annum pro omni servitio qu' *A.* ei deforceat, &c. Registr. 3. b. The Writ.

3. This is removeable into the Common Pleas, as others: View, Battle nor Voucher lies in this Writ, nor can the Tenant put himself upon the Grand Assise, because of the Privity of Blood, F. N. B. 22. Pl. Com. 306. Finch Law 294. Removeable into Common Pleas.

4. The Count is thus—— Unde dic' quod pd' *W.* pater, &c. fuit seisit' de integr' tenement', cum pertinen' in Dominico suo ut de feodo & jure tempore pacis tempore Domini Regis nunc capiendo inde expleſ' ad valenc', &c. Et de ipso *W.* patre descend' jus, &c. ist' *E.* & *A.* ut filiabus & hæredibus, &c. Qu' quidem *M.* & *A.* totum tenent & rationabilem partem pd' *J.* deforc' Et inde produc' Sectam, &c. Rast. Entr. 541. Count.

Pleadings

Pleadings in this Writ.

Non-tenure. 1. Non-tenure is no Plea in Abatement in this Action. F. N. B. 22.

Defence. 2. The Defence is ven' & defend' vim, &c. Br. Defens.

Barr. 3. The Tenant may plead (as I conceive) That the Anceſtor died ſeis'd in Abatement of the Writ, Regiſtr. 3. b F. N. B. 22, 23. For in that Caſe the Demandant ought to to have a Nuper obiit.

Barr. 4. So he may plead in Abatement, that the Anceſtor had nothing in the Land, but to him and the Heirs of his Body, or ſome other Eſtate-tail; in which Caſe one Copartener ought to have a Formedon againſt the other. Reg. & F. N. B. ibidem.

Voucher, View, Battle, Grand Aſſiſe ne giſt. The Tenant cannot vouch, demand the View, offer Battle, put himſelf upon the Grand Aſſiſe in this Action, becauſe of the Privity of Blood, F. N. B. ibid. Finch Law 294. Pl. Com. 306.

CAP.

## CAP. VIII.

# Writ of Right of Advowſon.

1. AT the Common Law there were three Writs for the Recovery of the Poſſeſſion of an Advowſon or Right of Patronage. 1. The one was meerly in the Right, as a Writ of Right of Advowſon, and the other two Poſſeſſory, i. e. ultimæ Preſentationis, and a Quare Impedit, Vid. Stat. W. 2. c. 5. Co. 2. Inſt. 356. b. What.

2. By the Common Law, if one that had no Right had preſented by uſurpation, and his Clerk was admitted and inſtituted (which makes the Church full in caſe of a common Perſon) that had put the lawful Patron out of Poſſeſſion, and the Uſurper had thereby gain'd the Inheritance, and the rightful Patron was put to his Writ of Right of Advowſon to recover the Inheritance, but the Incumbent could not be removed: This was the Caſe of all common Perſons whatſoever, as may be ſeen at large in Boſwell's Caſe, Co. lib. 6. 49, 50, 51. Uſurpation at Com. Law.

3. But becauſe Infants who claim'd by Deſcent, and Feme-coverts, and Perſons in Reverſion depending upon Lives or Years, as upon the life of Tenant by the Curteſie or in Dower, were many times greatly prejudic'd by ſuch Uſurpations which they themſelves could not poſſibly prevent; therefore the Stat. of Weſtminſter 2. c. 5. was made that in ſuch Caſes the Infant &c. ſhould not be put to his Writ of Right, but have ſuch Action by Quare Impedit, or Aſſiſe of Darrein Preſentment as the Anceſtor might have had. 2ly. It was provided by that Statute, that Plenarty in an Aſſiſe of Darrein Preſentment or Quare Impedit, ſhall be no Plea if the Writ were purchaſed within ſix Months next after the Church is full, i. e. after Inſtitution (as I conceive) Vid. Co. 2. Inſt. 360. This ſix Months ſhall be computed according to the Calendar, and not according to twenty eight days per menſem. Co. 2. Inſt. 361. 3ly. By this Statute Damages were given in a Quare Impedit and Darrein Preſentment, i. e. two years Value, if the Patron hath loſt his Preſent- *Stat. W. 2. c. 5.* *Quare Impedit.* Six Months according to the Calendar.

ſentment by lawful Collation of the Biſhop hac vice, or otherwiſe only half a years Value, if the Incumbent be remov'd by Judgment within the ſix Months or after. Co. ibidem 363.

At Common Law, Purchaſor could not have a Writ of Right, Remedy *per Stat. W. 2. c. 5.*

4. At the Common Law a Purchaſer could not have a Writ of Right unleſs he had once preſented, but was without Remedy; but now by the ſecond Proviſion in this Statute of W. 2. he may have a Quare Impedit, if he commence it within ſix Months, Co. 2. Inſt. 358. So an Infant Purchaſer is not within the firſt, but within the ſecond Branch of the Statute of W. 2. c. 5. Vid. Boſwel's Caſe 50 b.

Of the nature of the Quare Impedit, more ſhall be ſaid in its proper place; but by theſe things premiſed, the nature and uſe of the Writ of Right may be better underſtood.

The Writ is thus——

The Writ.

Rex, &c. Vic. C. ſalutem Præcipe *A.* quod juſte, &c. reddat *B.* Advocationem Eccleſiæ de *S.* qu' ei injuſte deforc' ut dic. & niſi, &c. Regiſtr. 29.

By whom to be brought.

This Writ is always to be brought by him who is ſeis'd in Fee-ſimple, and not by Tenant for Life, or in Tail, but at the Common Law Tenant in Tail might have this Writ becauſe he was then Tenant in Fee-ſimple conditional. Therefore ſince the Statute de Donis Conditionalibus in Caſe of an Uſurpation the Iſſue in Tail would be without Remedy but for the Stat. of W. 2. c. 5. where the Iſſue in Tail is taken to be within the Equity of that Statute to have a Quare Impedit as well as an Infant or Feme-Covert. Vid. Boſwell's Caſe. Co. lib. 6. f. 51.

Proceſs.

The Proceſs before and after Appearance, are the ſame as in other Writs of Right Patent.

The Count is thus.

Count.

Unde dic. quod quidam *J. M.* Avus ipſius *T.* cujus hæres ipſe eſt fuit ſeiſit. de Advocatione Vicar. Eccleſiæ pd. ut de feod. & jure tempore pacis tempore Domini Henrici nuper Regis Angl. Et ſic inde ſeiſit. exiſten. ad eand. Vicar. vacantem præ-

preſentavit quend' I. L. Clericum ſuum qui ad preſentacon' ipſius G. M. fuit admiſſus inſtitutus & inductus in eadem tempore pacis tempore dict' nuper Regis Capiend' inde Exple's, ut in groſſis decimis minut' decimis oblationibus & obventionibus ad Valenc', &c. ut de jure Vicar' ſu' prædict', Et de ipſo G. M. deſcend' jus iſt' T. qui nunc pet' ut Conſanguineo & hæred' prædict' G. M. videlicet fil' & hæred' prædict' R. fil' & hæred' prædict' G. M. Avi, &c. Et quod tal' ſit jus ſu' offert, &c.

5. The Tenant may Imparle, demand the View, Vouch, offer Battle, or put himſelf upon the Grand Aſſiſe, as in other Writs of Right. Co. Entr. 181. b. 182. a. Raſt. Entr. 103. b. View, Voucher, Battle, Grand Aſſiſe.

6. If the Right of Tithes between Two Parſons of ſeveral Patrons, come in queſtion in the Spiritual Court, then he who is there ſued, may have a Writ called an Indicavit, which is in nature of a Prohibition to the Spiritual Judge not to proceed till the Right of the Patronage be tried in the King's Temporal Court, and then he who is prohibited may ſue a Writ of Right of the Advowſon of Tithes, and this Writ muſt be brought by the Patron of the Parſon prohibited, by the Statute of Weſtminſter 2. c. 5. for at Common Law the Parſon Prohibited was without Remedy, for the Two Parſons could not maintain a Writ of Right between themſelves. Co. 2 Inſt. 364. Indicavit.

This Writ of Right of Advowſon of Tithes is thus.——

Rex, &c. Præcipe A. B. quod reddat C. advocacon' decimar' tertiæ partis Eccleſ' de N. vel decimar' uniuscarucat' Terr' cum pertinen' in M. &c. Regiſt. 29. The Writ of right of Tithes

7. This Writ is to be brought to trie the Right of the Advowſon, which ought not to be tried in the Spiritual Court; and if the Patron be not ſeiſed in Fee, he cannot have this Writ, but in ſuch Caſe, the Defendant in the Indicavit. appearing upon the Attachment, may plead to the Right of Tithes in the King's Court by Conſtruction of the Statute of W. 2. c. 5. otherwiſe the Parſon prohibited were without Remedie. Co. ibidem. Where the Parſon may plead to the Right

Remand the Cauſe.

8. If the Right be tried for the Demandant, the Cauſe ſhall be remanded into the Spiritual Court, ibidem.

*Indicavit*, where, Stat. 9 *E.* 2.

9. By the Statute of Articul' Cleri c. 2. an Indicavit might be granted, let the value of Tithes demanded be what they would; but by that Statute made 9 E. 2. they muſt amount to the value of the Fourth part of the Church. Co. 2 Inſt. 364. F. N. B. 71.

Where uſeful at this day.

This Writ of Right of Advowſon is now little in uſe, becauſe upon an Uſurpation, the Patron now by the Statute of W. 2. c. 5. has Six months after to bring his Quare Impedit, which is ſeldom let ſlip, but if he do not bring his Quare Impedit within that time, then he is put to his Writ of Right at this day, unleſs the Patron were an Infant, Feme Covert, &c. which are holpen by the Statute of W. 2. c. 5.

## Pleas in this Action.

What cannot be pleaded as in other Writs of Right.

1. Though this be a Writ of Right, and by the Common Law cannot be brought by any, but a Tenant in Fee ſimple, yet the Tenant cannot plead as in a Writ of Right Patent, or other Writs of Right for Land, That the Demandant has nothing but in Tail; becauſe in this Action the Tenant in Tail is holpen by the Equity of the Statute of W. 2. c. 5. Otherwiſe Tenant in Tail would be without Remedy. Boſwells Caſe. Co. Lib. 6. 51.

Defence.

2. The Defence is in this as in other Writs of Right for Land, Raſt. Entr. 103. a. Co. Entr. 181, 182. a.

Count.

3. He muſt alledge both Inſtitution and Induction in the Count, or this Writ lies not. 26 H. 8. 3. Br. Droit. 1.

Grand Aſſiſe, Battle.

4. He may joyn the Miſe, &c. and put himſelf upon the Grand Aſſiſe, or offer Battle. Raſt. Entr. 103. b. Co. Entr. 181, 182. Dyer.

Barr.

5. He may plead in barr the ſame Pleas as in Writs of Right for Lands, &c. and the ſame as in a Quare Impedit, quod vid poſtea.

CAP.

## CAP. IX.

# Writs of Right in their Nature,

WE have now done with Writs of Right, properly so called, there are other Writs, which are Writs of Right in their nature, which are most of them of little use, and some of them altogether useless, (as to practice) yet for Method and Learning sake, we shall take them before us; they are these, Viz. Writs of Right in their nature.

Writs of Right in their nature.

1. Ne injuste vexes.
2. Nativo hendo'.
3. Quo jure.
4. De Rationabilibus divisis.
5. De Recto Custodie.
6. De Consuetudinibus & servitiis.
7. Secta ad molendinum.
8. De Recto Disclam'.
9. Cessavit.
10. Escheate.
11. Bre de Medio.
12. Formedon. — 1. in Remainder. 2. in Reverter. 3. in Descender. } ad Com. legem per Stat.
13. Bre de Dote unde nihil habet.

These are so called to distinguish them from the pure Writ of Right, which is always to be brought by him who is Tenant in Fœsimple, and is for the Recovery of Lands and Possessions; but these, some of them may be brought by Tenant in Fee, for Life, or in Tail, and in others of them, neither Battle nor the Grand Assise lies, and most of them concern Relief to be had for other things, than the Recovery of the Possession of Lands and Hereditaments. Why so called.

CAP.

## CAP. X.

## *Ne injuſte vexes.*

Writ. 1. This is an ancient Common Law Writ, and not grounded upon the Statute of Magna Charta, as F. N. B. ſuppoſeth; and it lay when the Tenant and his Anceſtours had held of the Lord and his Anceſtours by ſuch Services, i. e. Fealty, and 2d. &c. and the Lord had obtain'd ſeiſin of more or greater Services (as of 3d.) by the payment of the Tenant himſelf, and then diſtrained upon his Tenant for this 3d. the Tenant could not avoid this in an Avowry, becauſe of the ſeiſin by his own hands, but was driven to this Writ directed to the Lord. and is in nature of a Prohibition, and is Patent thus, viz.——

The Writ. Rex, &c. M. ſalutem, Prohibeo vel prohibemus tibi ne injuſte vexes vel vexari permittas H. de libero Tenemento ſuo quod tenet de te in B. nec inde ab eo exigas, aut exigi permittas Conſuetudines & Servitia quæ tibi inde facere non debet, &c. Co. 2 Inſt. 21. F. N. B. 10.

The Proceſs. The Proceſs in this Writ is an Attachment and Diſtreſs againſt the Lord. And when the Lord appears upon the Attachment, then the Tenant ſhall Count againſt him in the Common Pleas, and the Lord ſhall make Defence, and defend the wrong and force, &c. and ſhall plead in nature of a Count upon a Writ of Right, which Count the Tenant ſhall defend, and may put himſelf upon the Grand Aſſiſe. Raſt. Entr. 57.

Two Counts in this Action, Tenant Actor. So note that in this Action there are Two Counts, and the Lord who is Tenant in the Writ, is made Actor or Demandant in the Proceeding, as in an Avowry. Vid. for all this, Raſt. Entr. 437.

By whom to be brought. This Writ is to be brought by Tenant in Fee-ſimple. But Tenant in Tail may avoid ſuch ſeiſin had by the hands of his Anceſtours, by Plea in an Avowry by virtue of the Stat. of Magna Charta, c. 10. So may Tenant for Life, &c. Co. 2 Inſt. 21.

Battle

Battle may be offered by the Lord in this Action. F. N. B. 11. French. Battle.

Judgment final may be given in this Writ. Rast. ibidem. & F. N. B. 11. And that upon Default or Nonsuit after the Mise joyned. F. N. B. ibidem. Judgment final

Note, if the Lord Distrain for other Services, the Tenant may Traverse the Tenure in an Avowry, or if the Incroachment be gotten by Coersion of Distress. Co. 2 Inst. 21.

Pleas in this Action.

For the Count see, Rast. Entr. 437. b. Count.

The Defence by the Lord is, Ven' & defend' vim' & injur' quando, &c. Defence.

The general Barr is, Non injuste exigit præd' redditu' xs. præter præd. al' servitia quia dic' quod——And then makes a Title in nature of a Count, and so becomes Actor. Barr.

In the Replication, the Plaintiff makes defence, as the Tenant does in a Writ of Right, and puts himself upon the Grand Assise. Replication.

## CAP. XI.

## *Nativo Habendo.*

1. THis is a Writ directed to the Sheriff to deliver the Lords Villain or Bondman, who is run away from his Lord's Mannor; and the Lord must Enter a Plaint in the County Court first, as in a Replevin, which may be remov'd by a Pone into the Common Pleas, and there the Lord may Declare. Whas.

2. The

Proceſs. 2. The Proceſs is Summons, Attachment and Diſtreſs.

*Libertate probanda.* 3. The Sheriff cannot ſeiſe the Villain if he ſaies he is Free; but in ſuch Caſe the Lord may Remove the Plaint by Pone; or the Villain may ſue forth a Writ De libertate probanda, and then all muſt ceaſe till the Record be remov'd before the Juſtices in Eyre, and there the Lord may proceed. F. N. B. 186. Engliſh.

*Seiſure del villaine.* Stat. 25 *E.* 3. *c.* 8. 4. By the Statute of 25 E. 3. c. 8. the Lord may ſeiſe the Villain although the Libertate probanda be depending. F. N. B. ibidem.

Two to Confeſs, or Writ abate. 5. The Lord muſt have two of the Blood of the Villain ready in Court to Confeſs themſelves Villains to the Lord, and alledge the ſame in his Count, or the Writ ſhall abate. F. N. B. 189. Engliſh.

Count, *&c.* For the Count, Pleading, and Judgment, vid. Raſt. 436. a. b. 437.

Battle or Gr. Aſſiſe *ne giſt.* Battle, nor the Grand Aſſiſe are not in this Action.

This Writ is now much out of uſe. The laſt we have in our Books are Butler & Crutches Caſe, 11 Eliz. Dyer 283. & Dighton & Bartholomew's Caſe, 1 Jac. in Yelverton 2. and Reported by Cr. 44 Eliz. 3. part 881.

CAP.

## CAP. XII.

## *Quo Jure.*

1. THis Writ concerns Common, and lies against a Man who claims Common in Land, whereof the owner is seis'd in Feesimple. The Writ is thus.—— What.

Rex, &c. salutem, &c. Si A. fecer' &c. tunc sum', &c. B. quod sit coram Justiciar', &c. ostens' quo jure exigit Communia' pastur' in Terra ipsius A. desicut idem A. nullam habeat Communiam in Terra ipsius B. nec idem B. servitiu' ei faciat quare Communia' in Terra ipsius A. habere debeat, ut dic' & habeas, &c. Registr. 156. The Writ.

2. The Process before Apppearance is Summons, Attachment and Distress, and after Appearance in Case of Default, a Grand Distress shall issue in lieu of a Petit Cape. F. N. B. English 310. Process.

3. In this Action the Plaintiff Counts, and then the Tenant makes defence, and pleads in nature of a Count in a Writ of Right, alledging seisin, and taking the Expleas, Et quod tal' sit jus su' offert, &c. And then the Plaintiff defends the Right of the Defendant and his seisin, and may either put himself upon the Grand Assise or Battle, Vid. Rast. Entr. 539. a. b. Two Counts, Tenant Actor.

4. So note, here are Two Counts, and the Defendant in the Writ becomes Actor in the Procedings, as in Replevin and the Ne injuste vexes before. Two Counts.

5. Summons and Severance lies in this Writ, and several may be joyned in this Writ, but they must make several defences, and put themselves severally upon the Grand Assise. F. N. B. 310. Engl. Summons, & Severance *gist.*

This Writ is out of Use likewise, for Actions of Trespass, and upon the Case are now generally used for the deciding the Right of Commons.

Pleas in this Action.

Count, &c. A to the Count, Barr, Replication, how the Defendant is become Actor, vid. antea.

Barr. The Defendant may plead in Barr Common by preſcription, appurtenant to a Tenement. Raſt. Entr. 539. b.

Replication. In the Replication, the Plaintiff makes defence as in a Writ of Right, and ſays the Land is Solum ſuum ſeparale, and Traverſeth the Preſcription, and then puts himſelf upon the Grand Aſſiſe. Raſt. ibidem.

So note a Traverſe of the Defendant's Plea and joining of the Miſe, &c. in one and the ſame Plea.

## CAP. XIII.

## *De Rationibilibus diviſis.*

Where lies. 1. THis Writ lies where Two Men or more are ſeis'd of Lands in ſeveral Townſhips, the Lands in one Townſhip being to one, and the Lands in another, being to the other, and there is a difference how far the ſeveral Townſhips extend, and therefore to have a reaſonable Diviſion by Metes and Bounds, this Writ was uſed. This Writ is directed to the Sheriff, and determinable before him, as a Replevin, but may be remov'd into the Common Pleas by Pone. Vid. F. N. B. 311. Engliſh. The Writ is as follows.——

The Writ. Rex, &c. Præcipimus tibi quod juſte & ſine dilacon' facias eſſe rationabiles diviſas inter Terram A. B. in C. & Terra' S. de K. in S. ſicut eſſe debent & ſolent unde idem B. queritur quod prædict' S. plus inde trahit ad feodum ſuum, quam ad ipſum pertinet hend' ne amplius inde clamorem, &c. pro defectu recti. T. &c. Regiſt. 257.

This

This Writ is to be brought only by Tenant in Fee-simple, and the Process is Summons, Attachment, and Distress, and upon default after Appearance, division shall be made according to the Demandants Count, without any further Process as I conceive. Vid. the Count, Rast. Entr. 541. where after the Bounds set forth, the Demandant sets forth in his Count the seisin of the Land incroached, and the taking of the Expleas, as in a Writ of Right. The Mise may be joyned by Battle or the Grand Assise. F. N. B. 311. Engl. Rast. Entr. 541, 542. This Writ is now much out of use. For the trial by Ejectione Firm' will ascertain the Bounds of Townships by Witnesses. By whom to be brought.

Pleas in this Action.

If there be several Demandants, the Tenant must make his defence severally, and may joyn the Mise by Battle or Grand Assise. F. N. B. 129. French. Several defence by several Defendants.

Joynt-tenancy or Coparcenery is a good Plea in Abatement to this Writ. F. N. B. ibidem. View, Summons, and Severance lies in this Writ. ibidem. Joynt-tenancy or Coparcenary *nul* Plea.

## CAP. XIV.

Bre' de Recto Custod' Terr' & hæredis, De Consuetudinibus & Servitiis, Sur Disclaimer, Cessavit, Escheate, & De Medio. ——

These Writs were of use when Wards and Tenures were in force and Practice, but now all Tenures being turn'd into Common Soccage, and the Court of Wards and Liveries being aboliſh'd by the Statute of 12 Car. 2. c. 24. these Actions are now out of Use, and therefore I have Couch'd them all into one Chapter, and shall do little more than declare the nature of them severally, and in what Case they lay. These Writs, when in Use.

Note in general, That it is held as a Rule in Law, that in Writs of Right which concern the Seignory, neither Battle nor the Grand Assise lay. Br. Droit. 34.

What. 1. De Recto Custod' Terr' & hæredis. This Writ was provided for the Lord in Knights Service, where his Tenant died in his Homage, and a Stranger Entred into the Land and took the Body of the Heir, he might have this Writ to recover the Land and the Heir. F. N. B. 139. Fr. Or he might have his Writ de Custod' hæred' only, if the Heir were detained, ibidem. Or Custod' Terr' only, if the Land were only withheld. ibidem. See the several Writs there in F. N. B. Of a Writ of Ravishment of Ward, of Intrusion against the Ward, Ejection' Custod' by Guardian in Soccage and Guardian in Chivalry, &c.

What. 2. De Consuetudinibus & Servitiis. This is a Writ of Right in its nature for the Lord against his Tenant, who withholds from him the Rents and Services usually due to the Lord for the Land. F. N. B. 151. Fr.

Returnable into *Common Pleas.* This Writ may be sued returnable into the Common Pleas, and directed to the Sheriff, or it may be sued in the County by Justices, ibidem.

Justices

The Writ. See the Writs there, Præcipe A. quod faciat, &c. Consuetud' & servitia qu' ei facere debet, &c.

*Debet & Solet.* The Writ is in the Debet & solet, when he Counts of his own seisin. F. N. B. 151. b. but in the debet when of the seisin of his Ancestour, ibidem.

Several Tenants may be sued by one Writ, by several Præcipes, 151. ibidem.

By whom to be brought. This Writ may be brought both by Tenant in Fee simple, and by Tenant for Life or in tail; and the Writ is Close, ibidem. And the Mise may be joyned and put upon the Grand Assise, ibidem.

Counts Vid. The Count, Rast. Entr. 143. b. The Tenant may disclaim if he will. F. N. B. ibidem.

3. Writ

3. Writ of Right upon Diſclaimer. This is no particular Writ of Right upon an ancient Right, but a Writ of Right Patent grounded upon a Diſclaimer, and lies when the Tenant does diſclaim upon Record to hold the Land of his Lord; as in Replevin, if the Lord avow for Rents and Services, and the Tenant diſclaim in his barr to the Avowry, the Lord loſes the Services, and Judgment ſhall be forthwith given againſt him; and then the Lord may bring his Writ of Right for the Land. See Raſt. Entr. 224, 225. The Writ remov'd from the Lord's Court to the County, thence into the Common Pleas; the Count, and the Miſe joyn'd, and the Grand Aſſiſe,——And then the Pannel of the Grand Aſſiſe Return'd by Four other Perſons for want of Knights. 225. b. What.

4. Ceſſavit: this Writ lies where there is Lord and Tenant, and the Tenant pales not his Rent and Services, but ceſſes for Two years, and there be no ſufficient Diſtreſs upon the Land, then the Lord may have this Writ to Recover the Land by the Statute of Weſtminſter, 2. c. 21. And it lies where a Tenure is created by Deed or without Deed, and a Fee-farm be reſerv'd, if the Tenant ceaſe to pay the Rent for two years, and no Diſtreſs be upon the Land ſufficient, and this by the Statute of Gloceſter, c. 4. Vid. F. N. B. 208. b. Fr. Co. 2 Inſt. 295. & 400. Where it lies.

There muſt be a Tenure in Fee, or the Ceſſavit lies not. Co. 2 Inſt. 296. therefore it lies not againſt Tenant in tail, or for Life, ibidem. But lies for a Tenant for Life, as Tenant in Dower, per le Curteſie. F. N. B. 209. a. There muſt be a Tenure in Fee.

Before Judgment, after Verdict, or Default, at the Return of the Petit Cape, if the Tenant tender all the Arrears, and give Surety to pay the Rent, and perform the Services for the future, as the Court ſhall award, he ſhall be receiv'd. This muſt be done in Perſon, and the Sureties bind their Lands to the ſame Services. F. N. B. ibidem. & Co. 2 Inſt. 297. Raſt. Entr. 112. a. Tenant to be receiv'd, *ſi tend'* Arrearages and find Sureties.

Vid. the Writ F. N. B. 208. Præcipe E. quod reddat, &c. qu' idem E. de eo tenet per certa Servitia, &c. The Writ.

The

Tenure traverſable. The Tenure is traverſable, but not the Seiſin, Co. 2. Inſt. 296.

Bar. *quod non ceſſit.* That he did not ceaſe for two years before the Writ purchaſed, a good Plea. F. N. B. 209. a.

Judgment Final may be given in this Writ. 2 Inſt. 298. Raſt. Entr. 112. a. Keilw. Rep. 75. b.

Bar qu' le terr' fuit liable & overt al ſufficient Diſtreſs. And it's a good Plea that the Land was obert and ſufficient to the Diſtreſs of the Lord, at the time of the Writ brought. F. N. B. ibidem. Raſt. Entr. 110. See there the Count, Barr, &c. 110, 111, 112.

The Proceſs is Grand Cape & Petit Cape.

Ceſtr. 35 E. 3. In 35 E. 3. there's an Original brought in Ceſſavit in the Court of the County of Cheſter, or County Court, by Robert the Son of Ric. of Foulsehurſt, againſt John the Son of Henry Samyn of an Houſe in Wico Mabbano. Teſt. Bartholo' Burgerſh Juſtic' Ceſtr' ix. Julii 35 E. 3. Returnable ad prox' Com' Ceſtr'.

The Writ it ſelf is in theſe words.——

Ceſtr. Writ 35 E. 3. Edwardus illuſtris Regis Angliæ Filius, Princeps Walliæ, Dux Cornub' & Comes Ceſtr. Vic. Ceſtr' ſalutem, Præcipe Johanni Fil' Henrici Samyn quod juſte & ſine dilacon' reddat Roberto Filio Ric' de Fouleſhurſt unum Meſſuagium cum pertinen' in Wico Malbano, quod Henricus Samyn Pater prædict' Johannis cujus hæres ipſe eſt, tenuit de Rico' de Fouleſhurſt, patre præd' Roberti cujus hæres ipſe eſt per certa Servitia, & quod ad prædict' Robertum reverti debet per formam Statut' de coi' Conſilio Regni Angliæ inde provis' eo quod prædict' Johannes in faciendo prædict' Servitia per bienniu' jam ceſſavit, ut dic' Et niſi fecerit & prædict' Robertus fecerit te ſecurum de clamore ſuo pros' tunc ſum' per bon' ſum' præd' Johannem quod ſit ad prox' Com' Ceſtr', oſtens' quare non fecerit, Et habeas ibi ſum' & hoc Bre' T. Bartho' de Burgerſh Juſtic' noſtr' Ceſtr' apud Ceſtr. xi. die Julii, Anno Regni Domini Edwardi Regis Patris noſtri triceſimo quinto. (Recuperet ſeiſinam) at the bottom of the Writ.

*Thom' le Young* Vic Ceſtr.'

Note

Note, this Writ is T. the Juſtice of Cheſter, though it be an Original Writ, which I wonder at. For now they are all T. meipſo.——

5. Eſcheat, Is a Writ for the Lord where his Tenant dies without Heir, that was ſeis'd of Lands in Fæſimple, in ſuch Caſe the Lord ſhall have this Writ to recover the Land in lieu of his Services. F. N. B. 143. Fr. Where it lies.

And the Tenant may die without Heir in three Caſes. 1. In Fact, where no Perſon is known. 2ly. In Law where the Tenant was a Baſtard. 3ly. In Caſe of Forfeiture, where the Tenant is attainted of Felony. In theſe ſeveral Caſes there are ſeveral Writs of Eſcheat. For Example in Caſe of Baſtardy. Vid. F. N. B. 144. a. How a Man may be without Heir in 3 Caſes.

Præcipe A. quod reddat B. un' Meſſ' &c. qu' C. de eo Tenuit & quod ad ipſum B. reverti debet tanq' Eſcheata ſua eo quod B. C. Baſtardus fuit & obiit ſine hærede ut dic' &c. The Writ.

If Tenant in tail die without Heir, then the Lord ſhall not have a Ceſſavit, but a Formedon in Reverter, but if the Remainder in Fee be in the Tenant in tail, and he die without Heir, the Lord ſhall have the Eſcheat, becauſe the Tenant in tail was Tenant to the Lord for the Feeſimple. F. N. B. 144. b. Where not a Ceſſavit but a Formedon.

In Caſe of Treaſon, the King ſhall have the Lands whoſoever is Lord. Co. 2 Inſt. 64. Treaſon.

Now all Tenures are turn'd into Common Soccage, if one commit Felony, or be a Baſtard, &c. Quær. to whom the Land ſhall Eſcheat, whether to the Lord of whom the Land was formerly held, and now held in Common Soccage, or to the King; and I conceive to the Lord of whom it is now held in Common Soccage, as by paying ſome Rent, or doing ſome other Service, &c. for theſe Rents and Services are ſtill preſerv'd by the Statute of 12 Car. 2. c. 24. But if it be not known of whom the Land is holden, then the King as the Great and Chief Lord, ſhall have the Land by Eſcheat. All Tenures now Common Soccage per Stat. 12 *Car.* 2. *c.* 24.

The

Proceſs. The Proceſs in this Action is Grand Cape and Petit Cape. F. N. B. 144. b.

Eſcheat triable in Ejection' Firme. The Title of Lands now by Eſcheat, (I conceive) may be tried in an Ejection' Firme; if he who has Title Enters in due time. But if he do not Enter of 20 years after, Quær. if he may not then have this Writ, and I conceive he may, for Soccage-tenure is a Tenure.

Commiſſion for the King. Where the King is to be Intitled by Eſcheat for Felony, there is to iſſue out a Commiſſion to ſeveral Perſons to inquire what Lands the Perſon was ſeis'd of, of what yearly value, and of whom holden, &c. F. N. B. 144. b.

By whom may be brought. This Writ of Eſcheat may be brought by Tenant for Life of a Seignorie. F. N. B. 144. b.

What. 6. Medio. This is where there is Lord Paramount, Meſne Lord, that is, middle Lord, and Tenant peravaile, that

Where it lies. is, the Tenant that takes the Profits, and the Meſne holds of the Chief Lord, by the ſame or greater Services, (as xx s. Rent, &c.) as the Tenant peravaile holds of the Meſne, if the Meſne ſuffer the Tenant to be Diſtrained upon for the Rent which he ſhould pay to the Chief Lord, the Tenant ſhall have this Writ againſt him, and Recover his Damages, and have Judgment againſt the Meſne that he ſhall acquit him. F. N. B. 135. b. Raſt. Entr. 434. a. Co. 2. Inſt. 375.

The Writ. The Writ is,——Præcipe A. quod juſte, &c. acquietet B. de Servitio quod C. ab eo exigit de libero Tenemento ſuo, quod de præfat' A. tenet in L. & unde Quer' quod pro defectu ejus diſtringitur ſicut rationabiliter monſtrar' poterit quod eum acquietar' debeat ne amplius, &c.

Who may bring it. Tenant in tail, in Dower, or by the Curteſie, may have a Writ of Meſne. F. N. B. 136. a. b.

Where not to Abate. The Writ of Meſne ſhall not Abate by the death of the Lord Paramount. 4 H. 6. 28. F. N. B. 136. b.

The

The Proceſs at Common Law was Summons, Attachment, and Diſtreſs infinite; but now by Stat. of Weſtm. 2. c. 9. Summons, Attachment and the Grand Diſtreſs; and if he appear not at the Return of the Grand Diſtreſs, (which muſt have ſo long time of Return as two County Courts may be held, ſo as the Sheriff may make Proclamation for the Meſne to appear) The Meſne ſhall be forejudg'd of his Meſnalty, i. e. he ſhall loſe the Service of his Tenant, and the Tenant ſhall be only Attendant upon the Chief Lord. Vid. le Stat. W. 2. c. 9. Co. 2 Inſt. 374, 375. See Raſt. Entr. The Diſtreſs, Proclamation, and Forejudger. 434. b. Proceſs. Attachment & Grand Diſtreſs per Stat. W. 2. c. 9. Forejudger.

Not Diſtrained in his Default, is the Common Plea in this Action. Raſt. Entr. 433. b. F. N. B. Barr.

For the ſeveral ſorts of Acquittal, vid. Co. 2 Inſt. 373.

## CAP. XV.

## *Secta ad Molendinum.*

IS a Writ that lies for a Man when one that owes Suit to his Mill, that is, that ought to Grind his Corn at his Mill either by virtue of Preſcription or Tenure, and withdraws his Suit, then he may Compel him by this Writ. F. N. B. 295. What.

2. This Writ is either Vicontiel, or may be brought in the Common Pleas. F. N. B. ibidem. Quotuplex.

3. It may be brought by a Tenant for Life or in Dower. 296. F. N. B. By whom.

4. The Proceſs is Summons, Attachment, and Diſtreſs, and if he make Default after an Appearance, a Diſtringas in nature of a Petit Cape ſhall iſſue, and if he cannot ſave his Default, Judgment ſhall be given againſt him. F. N. B. 296. Proceſs.

Debet & ſolet. 5. If the Demandant have bæn ſeis'd of the Suit, then the Writ is in the debet & ſolet, but otherwiſe in the debet which ſavours of the mær Right.

View. 6. View lies in this Writ of the Milne or Land where the Milne ſtands. F. N. B. 296.

The Writ is thus.——

Original. Rex, &c. Vic' ſalutem, Præcipe A. quod juſte & ſine dilacon' faciat ſectam ad molendinum E. in C. quam ad illam facere debet & ſolet, ut dic', Et niſi, &c. Regiſtr. 153.

The Count.——

Count. Unde dic' quod prædict' A. facere debet & ſolet ſectam ad molendinum præd' de omnibus bladis creſcen' in C. acr' Terr' in eadem Vill' ſcilicet molendi omnia blada præd' ad viceſimum vas de qua ſecta idem E. fuit ſeiſit' per manus præd' A. ut de feodo & jure tempore pacis tempore, &c. Capiend' inde Exples' ad valenc' &c. quouſque præd. A. per quinque Annos ante diem impetracon' bris' ipſius E. ſcilicet die Anno &c. præd' ſectam ei ſubſtraxit, Unde dic' quod deteriorat' eſt, Et damn' het', &c. Et inde produc' ſectam', &c. Raſt. Entr. 591. b. vid. Co. Entr. 641. By Preſcription against one as an Inhabitant within his Manor.

Judgment. The Judgment is to recover the (Suit) and Damages aſſeſſed by the Jury and Coſts. Co. Entr. ibidem. 16, 17 Eliz.

Pleas in this Action,

Count. The Declaration muſt alledge a ſeiſin of the Suit by the hands of the Tenant or his Anceſtours. Raſt. Entr. 591. b. Againſt Inhabitants within a Manor, the Count by Preſcription. Co. Entr.

Barr. The Tenant may plead, That the Demandant was not ſeis'd per manus, &c. prout, &c. niſi ex ſpontanea Voluntate præd' L. &c.

Hors

Hors de ſon Fee, is no good Plea. 17 E. 3. 64. Fitz. Abr. Hors de ſon Fee 22.

## CAP. XVI.

## A *Formedon* in general.

1. A Formedon is a Writ ſo called à Forma donationis, because the Form and manner of the Gift is ſet forth in the Writ, and is a peculiar Writ for an Iſſue in Tail, or for him in Remainder or Reverſion, to Recover the Poſſeſſion of Lands and Tenements, or Hereditaments, when the Eſtate tail is diſcontinued, and the Remainder or Reverſion diſplac'd and turn'd into a Right. Vid. Stat. W. 2. c. 1. Co. 1 Inſt. 327. F. N. B. 527, 528. What.

2. And this is the Writ of Right of the Iſſue in tail, for he can have no higher Writ. Co. 1 Inſt. 326. b. ¶. 2. Inſt. 291. a. For Tenant in tail cannot have a Writ of Right ſur Diſclaimer, nor a Quo Jure, nor a Ne injuſte vexes, nor a Nuper obiit, or a Rationabil' parte, nor a Mortdanceſter, nor a Sur cui in vita, for none but Tenant in Fee ſhall have them. Co. 1 Inſt. 327. b. ¶. But a Writ of Entry in Caſu conſimili or in Caſu proviſo he may have. Co. ibidem. 512. 514. and ſome other Writs relating to the Seignory, as Ceſſavit, Eſcheat, Waſte, &c. and the like. Co. ibidem. Is a Writ of Right in its nature.

3. There are three kind of Writs of Formedon. 1. In Deſcender, to be brought by the Iſſue in tail, who claimeth by Deſcent ſecund' formam Doni. 2. In the Reverter, for him in Reverſion after the Eſtate tail ſpent. 3. In the Remainder, for him in the Remainder, his Heirs or Aſſigns after the determination of the Eſtate tail, or other particular Eſtate upon which the Remainder depended. Co. 1 Inſt. 326. b. ¶. Quotuplex. Deſcender.

1. The firſt of theſe is given by the Statute of W. 2. c. 1. de Donis Conditionalibus, and the Form is there ſet down. Co. 2. Inſt. 336. Pl. Com. 240. But at Common Law in one

ſpecial Caſe there was Formedon in diſcender. Vid. Pl. Com. 234. b.

Reverter. 2. The Second, in Reverter lay at Common Law after the determination of the Eſtate tail, which was then an Eſtate in Fée-ſimple Conditional. Pl. Com. 235. a.

Remainder. 3. The laſt, in Remainder, was before at Common Law in ſome Caſes, as upon an Eſtate for Life, but not upon an Eſtate tail, becauſe no Remainder could be limitted upon it at Common Law becauſe it was a Fée-ſimple; but after the Statute a Remainder may. Co. 2 Inſt. ibidem.

4. To prevent deceits between the Demandants and Tenants that the Rights of Strangers might not be loſt, Proclamation anciently was made before judgment, upon Confeſſion or Default in a Formedon. 33 H. 6. 34. a. and that remarkable Caſe. 7 H. 4. 19. b. Fitz. abr' tit. Proclam. 14. Br. 2. Pl. Com. 358. a.

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## CAP. XVII.

# Formedon in Deſcender.

What. 1. THis Writ is given by the Statute of W. 2. c. 1. and lieth where a gift is made to a Man and the Heirs of his Body begotten, or to a Man and a Woman and the Heirs of their two bodies begotten, or where any other Eſtate-tail is made or limitted, and the Donee being ſeiſed, alieneth the Lands by Feoffment, &c. or diſſeiſed of them dieth, his Heir ſhall have this Writ of Formedon to recover the Lands given in Tail. F. N. B. 527.

Tail, Feeſimple at Common Law. 2. At the Common Law, that which is now by the ſaid Statute called an Eſtate-tail, was a Fée-ſimple Conditional, and before iſſue had, the Donée might have Aliened by Feoffment and have barr'd his iſſue, but not the Donor or his Heirs, but after iſſue, he might have Aliened and barr'd both his Iſſue and the Donor for ever. Co. 2 Inſt. 333. Pl. Com.

Bever-

Beverlyes Caſe. Co. 1 Inſt. 19. Litt. Sect. 13. At Common Law the Iſſue might have had a Mortdanceſter. Pl. Com. 239. b.

3. Now by the Statute of W. 2. It is provided, quod non habeant illi quibus Tenementa' ſic fuer' dat' ſub Condicon' poteſtatem alienandi Tenement' ſic dat' quo minus ad exitum illorum quibus Tenement' ſic fuer' dat' remaneat poſt eorum obitum, vel ad ejus hæred' (ſi exitus deficiat) revertatur, &c. *W.* 2.

4. And in Caſe of ſuch Alienation, the ſame Statute has ſet down the Form of the Writ for the Iſſue in Tail, i. e. this Formedon in Deſcender; where the Alienation was by Feoffment whereby the Eſtate-tail was diſcontinued, (which diſcontinuances were not by Conſtruction of Law reſtrain'd by the Words (Poteſtatem alienandi) for many ſound and excellent Reaſons) which you may read in Co. 1 Inſt. 327. a. b. Co. 2 Inſt. 335. But in ſome Caſes, Alienations may be avoided by Action Entry or Claim, at the Election of the Iſſue in tail, and ſome are meerly Void. Co. 1 Inſt. 327. b. Form of the Writ by Stat. *W.* 2 in caſe of Alienation.

Only in one Caſe it's ſaid, a Formedon in Deſcender lay at Common Law. Vid. Pl. Com. 239. b. Lord Barkley's Caſe.

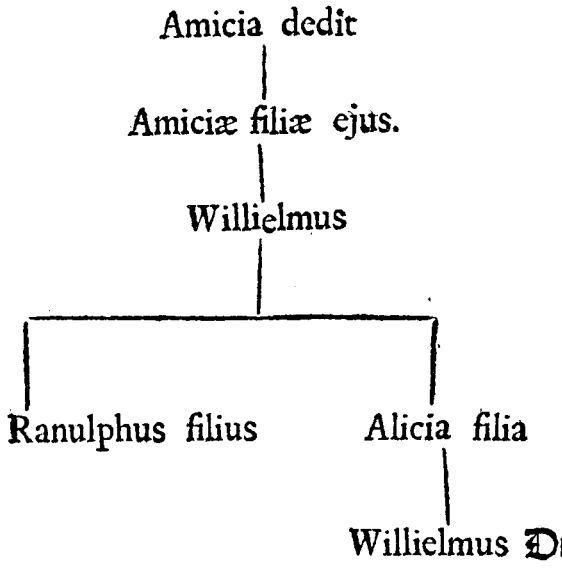
### The Writ is thus.——

Rex, &c. Præcipe *A.* quod juſte & ſine dilatione reddat *B.* Maner' de *N.* cum pertinen' quod *C.* dedit *D.* & hæredibus de corpore ſuo exeuntibus & quod poſt mortem prædict' *D.* præfat' *B.* fil' & hæred' ejuſdem *D.* deſcendere debet per formam donationis pd' ut dic' Et niſi, &c. Regiſtr. Origin. 238. b. Original.

This

Deſcent. This Writ is for the firſt and immediate Iſſue in Tail, when Land is given to a Man and the Heirs of his Body. There are other Forms according to the particular Caſe of the Demandant, which you may ſee in the Regiſter.

Pedegree.




If Lands be given by the firſt Amy to Amy her Daughter and the Heirs of her Body, and Randle is laſt ſeized, and dies without Iſſue; now the laſt William has a Title to the Land, as Heir to his Uncle Randle: The Formedon is thus—— As by a Writ 34 E. 3. In Caſtr. Ceſtr. coram Juſtic. Ceſtr. *Viz.*

Cheſtr' Original. E 3. Edwardus illuſtris Regis Angliæ filius Princeps Wall' Dux Cornub' & Comes Ceſtr. Vic. Ceſtr. ſalutem Præcipe Willielmo fil' Ricardi del Hogh quod juſte & ſine dilatione reddat Willielmo de Hatton unum Meſ. & decem acr' terr' cum pertinen' in Wiſtaſton qu' Amicia de Wiſtaſton dedit Amiciæ filiæ ſuæ & hæredibus de corpore ſuo exeuntibus Et qu' poſt mortem pd. Amiciæ filiæ Amiciæ & Willielmi filii & hæred' ejuſdem Amiciæ filiæ Amiciæ & Ranulphi filii & hæred. pd. Willielmi filii Amiciæ & Aliciæ ſororis ejuſdem Ranulphi præfato Willielmo de Hatton filio prædict. Aliciæ & conſanguineo & hæred. prædict. Ranulphi deſcendere debent per formam donationis prædict. ut dic' Et niſi fecerit & pd. Willielmus de Hatton fecer' te ſecurum de clamore ſuo proſequend' tunc ſum' per bon' ſum' pd. Willielmum fil' Ric'i qd. ſit ad proximum Com' Ceſtr' oſtenſ' quare non fecerit Et habeas ibi ſum' & hoc

Bre'

Bre' T. Barthol' de Burgeher Juſtic' noſtr' Ceſtr' apud Ceſtr' xxii. die Octobr. Anno Regni Domini Edvardi Regis patris mei xxxiv.

Pleg' de Pros' { Hugo de Boydhull. / Robertus Cote.

Thomas le Young Vic. Ceſtr. ad iſtud Bre' reſpond', iſtud Bre' adeo tarde ven' quod exequi non potuit.

Then a Voucher is endors'd thus, viz.———

Ten' ven' & voc' ad Warr' Ch. fil' & hæred' Richardi del Hogh & habeat, &c.

1. Note, In this Writ of Formedon for a Rule that the Demandant muſt always make himſelf Heir to him who was laſt ſeiſed, as you may obſerve by this Writ, Alice the Mother was never ſeis'd, and therefore he makes himſelf Heir to his Mothers Brother. F. N. B. 530. Engl. Demandant muſt be Heir to him laſt ſeis'd.

2. Note, That the Anceſtours that were ſeis'd, muſt be named in the Writ, and named (Son and Heir) F. N. B. 528. as by this Writ, but if any were not ſeis'd, ſuch need not be named (Son and Heir) or (Siſter and Heir) as if the eldeſt Son die before any Entry, he need not be named (Son and Heir) as here (Alice) in this Writ is not named Heir, F. N. B. 529. Buckmeir's Caſe. Co. Lib. 8. 88. b. The laſt ſeis'd to be named Son and Heir.

3. Such as were never ſeis'd, nor Right deſcended to them, as if the eldeſt Son die before the Father, without Iſſue, need not be named at all, Co. ibid. 46 E. 3. 9. He never ſeis'd needs not to be named.

4. Note, The Clauſe (Et qu' poſt mortem) brings in the Deſcent; but in this Writ there is no Clauſe (Eo quod, &c.) but that is only proper when the Eſtate-tail is ſpent in a Formedon in Remainder or Reverter. Co. ibid. Clauſe (eo qd') not in this Writ.

The Proceſs is Sum' Grand Cape before Appearance, and Petit Cape after Appearance. Raſt. Entr. 368. b. 369. a. Proceſs.

Upon the Return of the Grand Cape the Tenant may wage his Law of Non-ſummons for which and the manner of proceeding

ceeding, ſee before Default, Grand Cape, Petit Cape. Raſt. Entr. 368. a.

Eſſoin. Upon the Return at the day of Appearance upon the Original the Tenant may Eſſoin. Vid. antea Eſſoin.

At the Eſſoin-day the Tenant ought to appear, or a Grand Cape is awarded againſt him. Vid. Raſt. Entr. 369. a.

When to count. Upon the Tenant's Appearance the Demandant ought to Count; and the Count is as various as the Writ, according to the particular Circumſtances of the Caſe; but according to the Caſe of the Writ herein before-mentioned, the Count ought to thus, viz.———

Count. Willielmus de Hatton pet' verſus Willielmum fil' Richardi del Hogh un' Meſ. & . qu' Amicia de Wyſtaſton dedit Amiciæ filiæ ſu' & hæred' de corpore ſuo exeun' Et qu', &c. (as in the Writ till ut dic') Et unde dic' quod Amicia de Wyſtaſton dedit præd' Meſ. & predict. decem acr' terr' cum pertinen' præfat. Amiciæ fil' ſuæ & hæredibus de corpore ſuo exeuntibus in forma pd' virtute cujus doni Amicia fuit ſeiſit' de Meſ. & decem acr' terr' prædict' cum pertinentiis in Dominico ſuo ut de feodo & jure per formam, &c. tempore pacis, &c. tempore, &c. capiend' exples' ad valenc', &c. Et de ipſa Amicia fil' pd. Amiciæ de Wyſtaſton deſcend' jus, &c. cum pertinen' per formam, &c. cuidam Willielmo ut fil' & hæred' ejuſdem Amiciæ fil' Amiciæ & de ipſo Willielmo deſcend' jus, &c. cum pertin' per formam, &c. cuidam Rano' ut fil' & hæred' prædict' Willielmi & de ipſo Rano' deſcend' jus, &c. per formam, &c. iſt' Willielmo qui nunc pet' ut conſanguin' & hæred' prædict' Ran'i ſcilicet fil' pd' Aliciæ ſoror' prædict' Ran'i fil' Willielmi fil' Amiciæ filiæ Amiciæ de Wyſtaſton, &c. Et qu' poſt mortem, &c. Et inde produc' ſectam, &c.

He never ſeis'd, not named Heir. Note here, That it appears by the Writ, that Alice was never ſeis'd, becauſe ſhe is named (ſororis Ran'i) and not (ſororis & hæredis) therefore the Count muſt make the Demandant Heir to Randal, who was laſt ſeis'd, and the Right deſcend from him, becauſe he was the perſon that made the Diſcontinuance, or was diſſeiſed, or after whoſe Death an Abatement was made by the Tenant; for by the Writ it appears all were ſeis'd but Alice, for they are all named (Son and

and Heir) Vid. Raſt. Entr. for the Counts in Formedon en Deſcender. 365. a. b. Co. Entr. 326, 327, 328.

Note, it's ſaid in the Count always that (deſcend' jus) though the Anceſtour died ſeis'd, as de B. (deſcend' jus) al C. de C. deſcend. jus al N. & de N. deſcend. jus iſt' peten. ut fil. & hæred. &c. Co. Entr. ibidem. The Reaſon of this is (as I conceive) becauſe it is not material whether the Anceſtours after the firſt were actually ſeis'd or not, ſo as a Right did deſcend, and the Demandant make himſelf Heir to him who laſt died ſeis'd, or to whom the Right did laſt deſcend.

Deſcend' jus, Though the Anceſtour died ſeis'd.

But that Anceſtour that never had any Right deſcended to him, needs not be mentioned in the Writ or Count.

Who had never any Right deſcended, needs not be named.

As ſuppoſe there be Grandfather, Father and Son; and the Grandfather Aliens, and the Father dies in the life of the Grandfather, and the Son is to bring his Formedon: He may ſay in his Writ thus ——Et qu' poſt mortem A. B. le Aiel fil' & hæred' A. eidem C. le Fitz fil' L. fil' B. fil' A. ut Conſanguineo & hæredi præd' B. deſcendere debet. And not qu' poſt mortem A. & B. fil' & hæred' A. & L. fil' ejuſdem B. fil' A. eidem C. fil' & hæred' L. fil' B. & hæred' A. deſcendere debet. So in the Count L.' the Father may be left out thus,——Et de A. deſcen' jus B. ut fil' & hæred', Et de B. deſcend' jus iſt' C. modo Peten' ut Conſanguineo & hæred' ipſius B. ſcilicet fil' L. fil' B. fil' A.

Example.

Note. The Demandant may have one Formedon upon ſeveral Gifts, Cr. 2. P. 329.

When the limitation of this Action and all other Formedons were 50 years by the Statute of 32 H. 8. in the Count, when they came to the Anceſtour that was ſeis'd within the 50 years, it is ſometimes Counted thus—— Et de ipſo A. deſcend' jus &c. B. Qui quidem B. ſeiſit' fuit de Tenement' præd' cum pertinen' in dominico ſu' ut de feodo & jure tempore pacis tempore H. 8. infra 50 Annos jam ultime Elaps' capiendo inde Exples', &c. Co. Entr. 325, 326. &c.

Stat. of Limitation 32 H. 8.

Now the Limitation is within 20 years next after the Title accrued, by the Statute of 21 Jac. c. 16.

Stat. 21 Jac. c. 16. of Limitation.

Imparlance, View. After the Count the Tenant may Imparle, and after Imparlance, demand View, which at Cheſter is but de die in diem, but at Weſtminſter, Nine Returns between the Teſte and the Return, Co. 2 Inſt. 567. Dyer 252. Dyer 210. Vid. Vieu antea Raſt. Entr. For the Return days of mean Proceſs now, vid. 16 Car' 2. c. 6.

Eſſoin after View. And upon Return of the Writ of View, the Tenant may be Eſſoined again. Vid. Eſſoine antea f. 19. And the Demandant muſt adjourn the Eſſoine 15 days at Weſtminſter, but in Cheſter, but one day.

Aid, Voucher. Aid, Voucher, Receit, lies in this Action, and all other Formedons.

Judgment. The Judgment is, ——Ideo Conſideratum eſt quod B. recuperet ſeiſinam ſuam verſus præd. C. de Meſſ. &c. cum pertinen. & præd. C. in mia. &c.

I ſhall conclude this Chapter with a Record in the time of H. 5. in the Court of the County before the Juſtice of Cheſter, wherein you have the Voucher of one within age, a Counterplea, a waver of a Counterplea, and then the trial of the Age by Inſpection of the Court, According to the Rules before f. 53. and 65. And one other Record in the time of H. 4.

Record. *Ad Com. Ceſtr. coram Gilberto Domino de Talbot Juſtic. die Martis proxim. poſt Feſtum St. Lucie Virginis Anno W.* H. 5. 3.

Ceſtr. ſſ. Willielmus Brereton Chivaler, pet. verſus Nichol. fil. Rogeri de Mouldſworth unum Meſſ. unam bovat. Terr. & medietat' un. acr. prat. cum pertinen. in Tervin qu. Simon de Blaſten & Johanna Uxor ejus deder. Willielmo de Brereton ſen. & Roeſie Uxor' ejus & hæred. de Corpore eorund. Willielmi ſen. & Roeſie exeun. &c.

Count.

Voucher Infant. Et præd. Nichol. in propria perſona ſua ven. & defend. jus ſu. quando, &c. Et voc' inde Warr. Johan' de Huxley & Elena. Uxor' ejus, Conſanguin' & hæred. Margerie qu. fuit Uxor præd. Nichol. cujus hæres ipſa eſt ſum. in Com. præd. per auxilium Cur. &c. ad Warr. verſus eum, &c.

Qui

Quæ quidem Ellena eſt infra ætatem, &c. Et pet' quod loquela illa remanr' ſine die uſque plenam ætatem ipſius Ellenæ, &c.

Et prædict. Willielmus dic' quod prædict. Nichol' ad hujuſmodi vocare ad warr', &c. admitti non debet quia dic quod pd' Ellena aut aliqu' anteceſtor' nihil habuer' in eiſdem tenement' cum pertinentiis in Dominico, in ſervitio, nec in reverſione ante diem impetrationis Bris', &c. Et pet' quod inquiratur per patriam & Nichol' ſimiliter. **The** Venire **is continued** per Vic' non mis' Bre', **and then upon the Return of the** Venire **the Demandant waves his Counterplea, and admits the Voucher thus**——— Et prædict Willielmus per Attornatum ſuum pd' reliquit verificato ſu' prædict' & admiſit vocare pd' ſed dic' quod loquela illa remanere non debet quia dic' quod præd' Ellena eſt plenæ ætatis, &c. Et pet' quod prædict' Ellena per Cur' hic videatur, &c. per quod præceptum eſt Vic' quod Venire fac' coram Juſtic' hic ad prox' Com' ſcilicet præd' Ellen' ut per aſpectum corpor' ſui conſtare poterit Cur' hic ſi ſit plenæ ætatis nec non, &c. Idem dies dat' eſt partibus prædict. hic &c. **The** Venire **is continued by** Vic' non miſit Bre' **till ad** Com'——— Ad quem diem ven' partes prædict', &c. ac etiam prædict' Ellena in propria perſona ſua & per aſpectum corpor' prædict' Ellenæ hic in Cur' per Juſtic' & Judicator' Cur' prædict' conſideratum eſt quod prædict' Ellena eſt plenæ ætatis, &c. Ideo, &c. **Then goes out a Summons** ad warr', &c.

Counterplea de Voucher.

Waver de Voucher.

Inſpection.

Trove plenæ ætatis.

**There's another remarkable Record in the** 8th **of** H. 4. **where in a** Formedon in the deſcender **the Tenant vouches, and the Vouchée ſummon'd, and Proceſs to the** (ſequatur ſub ſuo periculo) **and he appears, vouches over with the like Proceſs, and the ſecond Vouchee appears and vouches over a third; which Voucher is counterpleaded, and the Return of the** Venire **waved, and then Proceſs againſt the third Vouchée, as before the Record in part hereafter follows, for the whole Record is a long Roll, but what is material I ſhall ſet down** in hæc verba.———

Record 8 H. 4. Ceſtr.

Record. 8 H. 4.

*Adhuc de Placitis Com' Ceſtr' apud Ceſtr' coram* Gilberto *Domino de* Talbot *Juſtic' Ceſtr' die Martis prox' ante Feſtum Nativitatis beatæ* Mariæ *Virginis Anno Regni Regis* Henrici *quarti poſt Conqueſtum octavo.*

*Ceſtr.* ſſ. Riehardus Chalons per Attorn' ſuum pet' verſus Ro-
Count. bertum Browe octo Meſ. quatuordecem bovatas terr' du' acr' prati ſexagint' acr' pastur' quatuor libratas du' ſolidatas ſeptem denaratas & un' obolatam redditus cum pertinen' in magna Cryſtelton, parva Cryſtelton Rowecryſtleton, magna Cotton & parva Cotton qu' Philippus de Valie Corta dedit Johanni fil' Johannis Chalons & hæredibus de corpore ipſius Johannis fil' Johannis exeunt' Et qu' poſt mortem prædict' Johannis fil' Johannis & Johannis fil' & hæred' ejuſdem Johannis fil' Johannis fil' Johannis & Roberti fil' & hæred' ejuſdem Johannis fil' Johannis fil' Johannis præfat' Rado' fil' & hæred' prædict' Roberti fil' Johannis deſcendere debent per formam donationis prædict' ut dic' Et unde dic quod prædict' Philippus, &c.

Et præd. Robertus per Johannem Lowe Attornatum ſuum
Voucher. ven' & defend. jus ſuum quando, &c. Et quoad omnia tenementa pd. præter tertiam partem unius acr' terr' cum pertinen' de eiſdem ten' vocat inde ad warr Thom' de Wilbraham Capellan' ſuum per auxilium Cur' in Com' pd. &c. Et quoad pd.
Plead *Non dedit quoad partem.* tertiam partem (pleads Non dedit) Et de hoc pon' ſe ſuper patriam Et pd. Radus' ſimiliter Io' præcept' eſt Vic' quod Venire fac' hic ad prox' Com' ſcilicet die Martis prox' poſt Feſtum Sancti Michaelis Archangeli xii. &c. per quos, &c. Et qui
Counterplea de Voucher. nec, &c. Ad recogn', &c. quia tam, &c. Et pd. Radus' dic' qd. pd. Thom' quem, &c. nihil habuit in tenement' pd' poſt titulum pd. Johannis fil' Johannis Et hoc pet' quod inquiratur per patriam Et pd. Robertus ſimiliter Io' præceptum eſt Vic' quod Ve-
*Venir.* nire fac', &c. Ad quem diem ven' partes pd. per Attorn' ſuum pd. hic, &c. Et ſuper hoc loquela pd. inter alias adjornata eſt
Adjournment. &——hanc diem hic ad prox' Com' ſcilt' ad diem Martis prox' poſt Feſtum Conceptionis beatæ Mar' Virginis per Commun' adjornamentum hactenus in Com. pd. a tempore cujus contrar' memoria hominum non exiſtit uſitat', &c. Idem dies dat' eſt partibus pd. hic, &c. Ad quem diem ven' partes pd. hic, &c.
Waver de Voucher. Et ſuper hoc loquela pd. &c. (adjourn'd as before) Ad quem diem ven' partes pd. &c. Et ſuper hoc pd. Radus' bene concedit quod pd. vocar. ad warr. ſuct. &c. Ideo pd. Thom. Wilbraham

voc.

voc. ad warrant' ſum' per auxilium Cur. &c. in pd. Com. quod ſit hic ad prox. Com. ſcilicet die Martis prox. ante Feſtum Sancti Matthei Apoſtoli ad warr. &c. Idem dies dat. eſt partibus pd. hic, &c. Et ſimiliter jurat. pd. quoad hoc quod partes pd. ſuperius placitaver. ad patriam ponitur in reſpectu hic uſq; ad præfat. Com. &c. pro defectu Jurat. quia nul' ven' Io' vic. habeat corpora, &c. Idem dies dat' eſt partibus pd. hic &c. Ad quem diem ven. tam pd. Radus' quam pd. Robertus per Attornatum ſuum pd. hic, &c. Et Vic. modo mand' quod pd. Thom. nihil habet. &c. Et ſuper hoc teſtat' eſt hic quod ſat habet Io' ipſe ſum' ſicut prius quod ſit hic ad prox. Com. ſcilicet diem Martis, &c. ad warr' in forma pd. &c. Et ſimiliter Jurat. pd. continuatur ad hanc diem hic ad eund. Com. ſecundum conſuetudinem Com. pd. a tempore, &c. Idem dies dat' eſt partibus prædict. hic, &c. Ad quem diem ven' tam pd. Rad'us quam pd. Robertus per Attorn' ſu' pd. &c. Et Vic' modo mand' quod pd. Thom. nihil habet Et ſuper hoc teſtat' eſt quod ſatis habet Ideo ipſe ſum' ſicut plur' quod ſit hic ad prox' Com. ſcilicet diem Martis, &c. ad warr' in forma pd. &c. Et ſimiliter Jurat' prædicta continuatur & habet diem hic ad eund' Com. ſecundum conſuetudinem, &c. Idem dies dat' eſt partibus pd' hic, &c. Ad quem diem ven' tam pd. Rad'us, &c. Et Vic. modo mand' quod pd. Thom. nihil habet Et ſuper hoc teſtatur qd. eſt hic quod ſatis habet Io' ipſe ſum' ſicut plur' quod ſit hic ad prox' Com. ſcil. die Martis prox. poſt Feſtum Sanctæ Trinitatis ad warr' in forma prædict. Et dictum eſt pd. Roberto quod ſequatur ſuo periculo, &c. Et ſimiliter Jurat. pd. continuatur, &c. Ad quem diem ven' tam pd. Rad'us, &c. Et pd. Thom. ſum', &c. ſolemniter exact' fecit ſe Eſſon' de malo veniendi verſus pd. Rad'um de Placito pd. Et habuit inde diem per Eſſon' ſu' hic ad prox. Com. &c. & ſimiliter Jurat. pd. &c. Idem dies dat' eſt partibus præd' hic, &c. Ad quem diem Ven' tam præd' Radus' quam præd. Robertus & Thom. per Attornatum ſuum præd' hic, &c. Et ſuper hoc loquel' præd' & Jurat' præd' continuat' ſunt & hent' diem hic ad prox' Com' ſcilicet, &c. Idem dies dat' eſt partibus præd' hic, &c. Ad quem diem Ven' tam prædict' Radus' quam præd' Robertus & Thom. per Attornat' ſu' præd' hic &c. Et ſimiliter Jurat' ven' quoad hoc quod idem Radus' Et Robert' ſuperius placitaver' ad patriam hic, &c. Et ſuper hoc idem Radus' calum' arraiament' Panell', &c. **Challenge for Affinity between John le Maynwaring the Sheriff, and the Wife of the Tenant, which was Confeſſed and the Pannel quaſh'd, And Proceſs**

Sum. ad warr.

*Hab. corpora quoad exitum.*

*Nihil ſur ſum.*

*Alias ſum.*

*Nihil ſur al.*

*Plur. ſum.*

*Nihil ſur plur.*

*Sequatur ſub ſuo periculo.*

*Vouchee Eſſoin.*

*Jurat. competuit quoad exitum.*

Challenge.

Pannel quaſh

Proceſs al Coron'. Proc is awarded to the Coroner of Broxon Hundred, Returnable ad prox' Com'. Et ſuper hoc præd. Thom' gratis Warr' præd' Roberto tenementa præd. except' præd' tertia parte ſuperius excepta, &c. Et voc' ultr' inde ad Warr', &c. Robertum Madover Cler' per auxilium Cur' &c. Et ſum' in eodem Com', &c. Ideo ipſe ſum' quod ſit hic ad præfat' die' Martis prox' poſt feſtum St. Michael' Archi' &c. Idem dies dat' eſt partibus præd. hic' &c. Ad quem diem ven' tam præd' Radus' quam præd' Robertus & Thom' per Attorn' ſu' præd. hic, &c. Et vic' modo mand' quod Robertus Madorer nihil het', &c. And then goes on against the Second Vouchée to Sequatur ſub ſuo periculo, and till Eſſoine and Appearance as before. And the Second Vowchee appears, and vouches over a Third Vouchee with the like Proceſs and Proceedings.

Voucher over.

Simil' Proceſs.

2. Voucher.

3. Voucher.

This Record evidences the learning and Rules concerning the Proceſs in Voucher, and how a Deed of Vouchers may be managed to delay the Demandant, for every Vouchee may wave appearing till the Return of ſub ſuo periculo, if he be not Returned ſummoned before. Vid. Fol. 63. & 51, 52.

For Pleas in Formedons, vid. at the Cloſe of Formedon in Reverter.

CAP.

## CAP. XVIII.

## *Formedon en Remainder.*

1. A Formedon en Remainder, lies where a Gift is made in Tail or for Life, Remainder en Tail, or in Fée, and the Tenant in tail or for Life alieneth or is diſſeis'd, and dieth without Iſſue, he in Remainder ſhall have this Writ. F. N. B. 542. What.

2. This Writ is partly grounded upon the Equity of the Statute De donis Conditionalibus, for no Formedon en Remainder is expreſly given by that Statute, but the Remainder Man upon an Eſtate-tail being in the ſame miſchief with the Iſſue in Tail, equitable Conſtruction hath all times ever ſince brought the Remainder Man within the ſame Remedy. F. N. B. 543. But for a Remainder upon an Eſtate for Life (ſome are of opinion) a Formedon in Remainder lay at Common Law; but Quær. for at the ſame Parliament that the Stat. de Donis Conditionalibus was made, the Statute of W. 2. c. 24. was made, which wills, that as often as it happens in Chancery that in one Caſe a Writ is found, and in the like Caſe failing in Conſimili Caſu cadente ſub eodem jure & ſimili indigente remedio non reperitur, Concordent Clerici de Cancellar. de bri. faciendo. And upon this Statute the Writ of Entry in Conſimili caſu was grounded, which was a Writ for him in Reverſion or Remainder after an Eſtate for Life, to Recover his Reverſion or Remainder, when the Tenant for Life aliens in Fée or in Tail; and conſequently it ſeems to appear, that before this Statute, ſuch Remainder Man had no Remedy in the life of Tenant for Life; but yet after the death of Tenant for Life, I ſee no reaſon but he might have had this Formedon en Remainder, or the Writ of Entry ad Communem Legem. Grounded upon equity, Stat. *W.* 2. Where a Formedon lay at Common Law. *W.* 2. *c.* 24. Entry in conſimil Caſu. Entry ad communem Legem.

However, now at this day, if the Tenant for Life alien, he in Remainder ſeldom or never brings either his Writ of Entry in Conſimili Caſu in the life of the Tenant for Life, or his Formedon after his death, or Writ of Entry ad Communem Legem, but Enters for the forfeiture, and brings his

his Ejectione firme. But Quær. if the Alienée of the Tenant for Life die seis'd before the Entry of him in Remainder or Reversion, whether their Entry be not taken away at this day? But of this hereafter when we come to the Writ of Entry in Consimili Casu. vid. Co. 2 Inst. 309.

Q. Entry taken away at this day.

The Writ of Formedon en Remainder follows.——

Original. Rex, &c. Præcipe A. quod reddat B. unum Messuagium, &c. in C. qu. L. dedit M. & hæredibus suis de corpore suo exeunt' ita quod si idem M. sine hæred. de corpore suo exeunt' obiret quod Mess. præfat. B. & hæredibus suis remaneret & quod post mortem præd. M. præfat. B. remanere debet per formam donacon' præd. eo qd' præd' M. obiit sine hærede de corpore su. exeunt' ut dic. &c. Regist. 243.

This Writ varies according to the Case, as the other, the various Forms you may see in the Register.

Remainder executed. Note, if a Remainder be once Executed, that is to say, if the Remainder Man be once seis'd of the Estate-tail in Possession, and Right descend to the Heir, the Heir shall never make mention of the Remainder, but shall have the general Writ of Formedon in descender, for it is a Rule in the Register, That Bria. nunquam faciunt mentionem de remanere, quando bre. est in le descender. For Example, A. gives Lands to B. in Tail. Remainder to C. in Tail, B. dies without Issue, C. Enters and aliens in Fée and has Issue D. D. shall not have a Formedon in Remainder, because C. his Father was seis'd, and the Right descended to him, but he shall have the general Writ of Formedon in descender, which shall be thus, viz.——

Formedon en descender.

There's another Rule in the Register, that if the Ancestour in remainder were never seis'd, it shall never be said Descendere debet ut filio & hered', but remanere debet

*Co. Lib. 8. f. 89. a. Buckmers Case.*

Original. Præcipe, &c. Qu. A. dedit C. & hæredibus suis de corpore suo exeunt' & quod post mortem præd. C. ist. D. ut fil. & hæred' ipsius C. descendere debet, ut dic. &c. Regist. 244. Co. Lib. 8. Buckmer's Case, 88. a. F. N. B. 546. b.

All precedent remainders to be named. But a Demandant in a Formedon in Remainder ought to make mention of all the precedent Remainders in Tail. Co. ibidem. But Quær. whether all that were seis'd in the precedent

cedent Remainders need to be named, viz. the Iſſues of the Remainder Men? I conceive not, no more than the Iſſues of the Donée in a Formedon in Reverter. This Q. is put by Dyer 216. He needs but to ſay, Eo quod, &c. the precedent Remainder died without Iſſue.

The Proceſs and Proceedings are the ſame with the Formedon en deſcender, both before and after Appearance. Proceſs.

The Count is various according to the Writ, but the general Count according to the Writ before mentioned, is thus.—— Count.

B. per I. S. Attornatum ſuum pet' &c. Unde dic' quod præd. L. dedit Meſſ. &c. cum pertinen. præfat. M. & hæred. de Corpore ſuo exeunt' ita quod ſi idem M. ſine hæred' de corpore ſuo exeunt' abiret Meſſ. præd. cum pertinen. præfat. B. &. hæred ſu. remaner. virtute cujus Doni idem M. fuit inde ſeiſit. in dominico ſuo ut de feodo & jure per formam, &c. tempore pacis tempore, &c. capiendo &c. Et de ipſo M. quia obiit ſine hæred' de corpore ſuo exeunt' remanſit jus per formam, &c. iſt. B. qui nunc petit, &c. Et qu. poſt mortem &c. Et inde produc. ſect' &c. Raſt. Entr. 369. b.

This is a Declaration where the Right fell upon him in the Remainder named in the Gift, and the Formedon is brought by him.

If the Formedon be brought by the Heir of him in Remainder, or by the Son and Heir of the Heir, it is thus. Count.
——Et de ipſo M. quia obiit ſine hæred. de corpore ſuo exeunt' remanſit jus præfat. N. Et de ipſo N. remanſit jus per formam, &c. iſt. B. ut fil. & hæred. &c. Raſt. Entr. 369. b.

In the Precedent in Raſt. Entr. 369. b. The Count concludes, Et profert hic in Cur. quandam cart. ſub nominibus, &c. qu. donum & Remaner. præd. teſtatur, &c. which needs not be done in the Count, but a Deed muſt be ſhewn if Oyer be demanded by the Tenant, but the Count ſhall not mention the Deed. F. N. B. 546.

View, Voucher Aid. View, Voucher, Aid, &c. and the ſame Proceedings are in this Writ as in the Formedon in Deſcender. And now we come to the Formedon in Reverter.

Vid. antea & poſtea, Who ſhall be named in the Pedigree. The reaſon why none of the Iſſues of the precedent Remainders need to be named in the Writ or Count (as I conceive they need not) is becauſe it ſtands upon the ſame reaſon with a Formedon in Reverter, where the Iſſues of the Donée need not be named, for the Remainder Man's Title depends upon the precedent Remainder dying without Iſſue, as his in Reverſion upon the Donées dying without Iſſue; and therefore needs but to ſay, Eo quod præd. D. obiit ſine exitu. &c.

## CAP. XIX.

## *Formedon in Reverter.*

Where it lieth. 1. A Formedon in Reverter lieth where the Donée in Tail or his Heirs dieth without Iſſue, then the Donor or his Heirs may have this Writ, or if the Donor or his Heirs grant the Reverſion in Fée, or the Donée or his Heirs die without Iſſue, then the Grantée or his Heirs may have this Writ. F. N. B. 546. Dyer 125.

Special Writ in remainder. 2. But if the Reverſion be granted in Tail, then the Donée dies without Iſſue, and a Stranger abates, the Grantée ſhall have a ſpecial Writ in Remainder, becauſe the Reverſion is in another Perſon, i. e. the firſt Donor F. N. B. 544.

Lay at Common Law. 3. This Writ as hath been ſaid lay at Common Law.

The Writ is as followeth, viz.——

Original. Rex, &c. Vic. ſalutem Præcipe A. quod reddat B. un. Meſſ. &c. qd. C. pater præd. B. cujus hæres ipſe eſt dedit L. & hæredibus ſuis de corpore ſuo exeunt' & quod poſt mortem

tem præd. L. præfat. D. B. reverti debet per formam donationis præd. eo quod L. obiit ſine hærede de corpore ſuo exeunt', ut dic. & niſi, &c. Reg. 242. a. Vid. al. formam ibidem.

Note, in this Writ none of the Anceſtours of the Donor that were ſeis'd of the Reverſion, or to whom a Right to the Reverſion deſcended, are to be omitted in the Pedigrée, and therefore the omiſſion of the eldeſt Son who ſurvived the Father, ſhall abate the Writ, as for Example, if there be Grandfather, Father and Son, and the Grandfather gives Land to B. in Tail, and the Grandfather dies, and then the Father dies, and then B. dies without Iſſue, and a Stranger Abates, the Son in his Formedon in Reverter muſt ſay, Et quod poſt mortem B. ad præfat. C. fil. & hæred. L. ~~fil. & hæred. L.~~ fil. & hæred. M. the Grandfather reverti debet per formam, &c. Eo quod præd. B. obiit ſine hæred. de corpore ſuo exeunt', &c. Co. Lib. 8. f. 88. Buckmers Caſe. Who are not to be omitted in the Pedigree.

But on the part of the Donée, the Demandant need not name any of the Iſſues in tail in the Pedigrée, either in the Writ or Count, but ſhall ſay, Et qu' poſt mortem B. (the Donee) ad ipſam reverti debet eo quod (the Donee) obiit ſine, &c. Co. ibidem. Yet if he will take upon him to name them, he may, or any of them, as in the Count in Raſt. Entr. 375. a. where it's ſaid, Eo quod M. (the Son of the Donee) obiit ſine exitu, &c. But Q. whether that be good; for according as the Law is ſaid to be in Dyer 14. and Co. Lib. 8. Buckmer's Caſe, it ſhould be no good Count, for though the Son be dead without Iſſue, yet its poſſible the Eſtate-tail is not ſpent, for the Donée might have other Sons alive according to theſe Books, and therefore he ought to have ſaid, Eo quod (the Donée died without Iſſue) Dyer 216. Pl. 56. 16. b. On the part of the Donee none of the Iſſues need to be named in the Writ or Count.

The Count is thus,——I. M. in propria perſona ſua pet' verſus C. un. Meſſ. &c. Et unde dic. quod præd. T. avus præd. I. M. &c. fuit ſeiſit. de tenement præd. cum pertinen. in dominico ſuo ut de feodo & jure tempore pacis, &c. Capiend. &c. Et ſic inde ſeiſit. poſtea tenement. præd. cum pertinen. dedit præfat. H. & hæred. de Corpor. ſuo exeunt' in forma præd. virtute cujus Doni idem H. fuit inde Count.

ſeiſit' in dominico ſuo ut de feodo & jure per formam, &c. tempore, &c. Capiend. &c. Et de ipſo H. pro eo quod obiit ſine hæred. de Corpor. ſuo exeunt' remanſit jus per formam &c. præfat. W. W. & hæred. de Corpor. ſuo exeunt', Et de ipſo W. W. eo quod obiit ſine hæred. de Corpor. ſuo exeunt' revertebat jus, &c. per formam, &c. iſt. I. M. qui nunc pet. ut Conſanguineo & hæred. præd. T. videlicet fil. I. fil ipſius T. Et quod poſt mortum, &c. Et inde produc. Sectam &c. Raſt. Entr. 375. a.

This Count is for the Grandchild of the Donor where a Gift is made in Tail, Remainder in Tail, and both die without Iſſue.

Note, by this Count the Father never had any Right deſcended to him, becauſe the Demandant makes himſelf Heir to his Grandfather.

Explees both in Donor & Donee

Note, for a Rule in the Count in a Formedon in Reverter, the Eſplees muſt be alledg'd both in the Donor and Donée, as you may ſee by this Count. F. N. B. 549.

Proceſs.

The Proceſs and Proceedings are the ſame with other Formedons; Now in regard theſe Actions do ſometimes happen at this day by diſcontinuances of Eſtates-tail by Fines, and Feoffments, &c. I ſhall here at leaſt give ſome light how long theſe Actions may be regularly delaied before any judgment can be given in them, which is much for the advantage of the Tenant, who ordinarily deſires to keep the Poſſeſſion as long as he can; yet this cannot always be delaied alike, becauſe the Circumſtances of the Caſe may not admit it, for he that may Vouch or Pray in Aid, &c. may delay the Cauſe much longer than he that has no ground for a Voucher, &c. And he that may have a Foreign Voucher (in a particular juriſdiction) more than he that has only cauſe to Vouch within the juriſdiction of the Court, &c.

Vid. for Pleas in Formedons, f. 184.

CHAP.

## CAP. XX.

# Proceedings in a *Formedon*, how they be manag'd and delay'd.

1. UPon the Original, the Tenants Attorney may Eſſoine at Weſtminſter, 15 days, 1. day in Cheſter. 1. Eſſoine.

2. If there be no good Summons, and a Grand Cape iſſue for want of an Appearance, that delays the Demandant Two Terms according to the Statute of 16 Car. As if the Original be Returnable Tres Michael. the Grand Cape is Returnable Craſtino Purificationis, from the 20th. of October to the 3d. of February. ——— 15 Weeks. How Formedons may be managed. 2. Grand Cape.

At Cheſter, the Grand Cape is Returnable the next day after the Return of the Original, or any other day in the Aſſiſe week; but the Sheriff (if he pleaſes) may delay the Demandant, and favour the Tenant by his Return, by returning a Tarde upon the Grand Cape, becauſe of the ſhortneſs of the time, and ſo the Demandant in Cheſhire may be delayed. ——— 6 Months. Cheſter delays Grand Cape.

3. At the Return of the Grand Cape, the Tenant may wage his Law of Non Summons, and then he ſhall have day to make his Law ſome day in Term, 15. days at leaſt, or it may be to another Term, for theſe are days of grace. ——— 15 days, 3. Ley gager de Non Summons.

At Cheſter, day to wage his Law is ſometime in the ſame Seſſion Week. Cheſter.

4. After Appearance, the Delays may be thus; After the Demandant hath Counted, the Tenant may demand the View, or upon Oyer of the Writ. And that delays the Demandant at Weſtminſter, two Terms at leaſt, i. e. nine Returns. ——— 2 Terms. View.

At

Cheſtr. At Cheſter, the Writ of View is commonly Returnable the next Seſſions.——————————— 6 Months.

5. Eſſoine puis View. 5. At the Return of the Writ of View, the Tenant may Eſſoine, and that gains 15. days more at Weſtminſter.——————————————————— 15 days.

Cheſtr. At Cheſter, 1. day.——————————— 1 day.

6. Count de novo. 6. At the day given by the Eſſoine, the Demandant Counts de novo, and the Tenant is then called to Plead,

7. Imparlance. and then the Tenant may Imparle generally or ſpecially, and that's to ſome day in Term, or to the next Term, at the pleaſure of the Court, for they are days of grace. ——————————————————— 15 days.

Cheſtr. At Cheſter, the day given by the Imparlance, whether general or ſpecial, is ſome day in the Seſſions week, or to the next Aſſiſes, at the pleaſure of the Court, but commonly day is given to the next Aſſiſes, which delays——— 6 Months.

Note, that View may be granted either before or after a Special Imparlance.

8. Voucher. 7. At the day given by the Imparlance, the Tenant muſt Plead or Vouch; by the Voucher the Tenant at Weſtminſter is delayed nine Returns more, for the Summons ad Warrantizand' muſt have ſuch Return, viz. if it be Teſt. Octab. Purificationis, it muſt be returnable Tres Trinitatis, which will be Two Terms more, ——————— 2 Terms. 5 Months.

Cheſtr. At Cheſter, it is returnable pro prox' Seſſion. unleſs in Common Recoveries,——————————— 6 Months.

9. Summons ad Warrantizand. 8. At the Return of the Summons ad Warrantizand, if the Sheriff return (nihil) the Tenant may have an al Sum. ad Warr. and that gains at Weſtminſter, ——————— 15 Weeks.

Cheſtr. At Cheſter, the (al') is returnable ſome day in the Seſſion week.

10. Al' plur'. 9. At the Return of the Al' and (Nihil) return'd, iſſues out a Plur' Sum' which gains——————————— 15 Weeks.

At

At Cheſter, the Plur' is returnable ſome day in the Aſſiſe week if the time will permit, otherwiſe pro prox', &c. Cheſter.

10. At the Return of the Plur' if a Nihil be return'd iſſues out a Plur' with a Sequatur ſub ſuo periculo, which at Weſtminſter gains 15 weeks more.——————15 Weeks. 11. Sequatur ſub ſuo periculo.

At Cheſtr. pro prox'——————6 Months. Cheſter.

11. At the Return of the Sequatur, if the Sheriff return the Vouchee Summon'd, the Vouchee may Eſſoine 15 days.——————15 Day. 12. Eſſoine pro Vouchee.

When the Vouchee appears, the Tenant may Eſſoine, Hob. Rep. 46. Tenant Eſſoine.

At Cheſtr. 1 day.——————1 Day. Cheſter.

12 At the day given by the Eſſoine, the Demandant Counts de novo, and the Vouchee may Imparle as the Tenant before. 13. Count de novo. Imparlance per Vouchee.

13. At the day given by the Imparlance, the Vouchee muſt Plead or Vouch over, &c. both at Weſtminſter and Cheſter. 14. Voucher over.

After iſſue joyned, then is awarded the Venire fac'. 15. Venire fac.

I have obſerv'd the Courſe of the Proceſs, how long the Demandant may be delated before he can bring the Action to an iſſue where there is but one Tenant, and in the ordinary Courſe where there is but one Voucher, but if there be many Tenants and Vouchers to be Vouched over, it makes the delay poſſibly as long as the Parties live, though the Suit continue many years, and if one Tenant dies, the Writ in all Præcipes is abated. But by this that hath been ſaid, it appears that in all theſe Actions at Weſtminſter, and all other Præcipe quod Reddats, (except Writs of Dower, unde nihil het') The Demandant may be delayed at leaſt a year and an half before the Cauſe can be brought to iſſue, but at Cheſter much longer.

And if the Tenant be an (Infant) the Cauſe may be delayed till he comes of Age.

CAP.

## CAP. XXI.

# Delays in *Cheſter* in theſe Actions.

Delays in *Cheſter*.

1. ORdinarily the Tenant cannot avoid an Appearance at the next Seſſions, when the Original Writ is returnable, becauſe he can but eſſoin de primo die uſque ſecund' ſcilicet a die Lun' uſque diem Martis; but after an Appearance, has two Rules to plead, in nature of Imparlances, which are only de die in diem, unleſs the Court give further time, which commonly upon a ſpecial Imparlance is till next Seſſions, pro prox'.

Eſſoin.

2. Appearance Imparlance.

3. Rules to plead in *Cheſter*

2. The Common Rules to Plead are thus,——If he be called to plead upon Tueſday, the Rule to plead is ante prim' Mercur', and then on Wedneſday another Rule, ~~another Rule~~ ante ſecund' Mercur' or ante prim' Jovis, at the pleaſure of the Court, after theſe Rules are out, in ſtrictneſs of Practice the Tenant cannot have any further Imparlances.

4. View.

3. But upon Thurſday mornings Court he may demand the View, and then the Writ of View is made returnable Vener' or Sabbat' (as it may be) but is commonly not returnable till the next Seſſions pro prox', that the Demandant may ſhew the Land to the Sheriff, otherwiſe he may be delayed by the Sheriff's return by a Tarde, &c. ſo here is 6 Months gain'd by the Tenant.——————————— 6 Months.

5. Eſſoin pais View.

4. At the next Seſſions, at the Return of the Writ of View the Tenant may be Eſſoin'd a die Lun' uſque diem Martis. And that day he muſt Plead or Vouch, &c. if he have imparled before. So that it is moſt for the advantage of the Tenant to demand the View at the firſt, before he takes any Rule to Plead, for by that means he may perhaps gain Two Seſſions, i. e. for the View uſque prim' prox', and then a ſpecial Imparlance uſque pro prox', which is ſeldom denied.

5. Upon

5. Upon the Voucher, the Writ of Summons ad Warr. may be returnable die Mercur. or Jovis, and then if Nihil be returned, an Al. is returnable die Vener. or Sabbat. and then a Plur. returnable pro prox. &c. But commonly the Summons ad Warrantizand' is returnable pro prox. &c. as is ſaid before. 6. Voucher. Summons ad Warr. how returnable, al plur' ſequatur, &c.

6. At the next Seſſions when the Sequatur ſub ſuo periculo is returned, the Vouchee muſt appear or Eſſoin uſque diem Martis If he appear, he muſt enter into the Warr. or demand what the Tenant or he that Vouched hath to bind him to warrant the Land (as the Caſe may be) and then if he enter into the Warr. the Demandant Counts de Novo againſt the Vouchee, and then the Vouchée Imparles uſque diem Mercur. or other day in the Seſſions, or he may have day till pro die prox. Seſſion', &c. and then muſt plead or Vouch over, if he plead to iſſue, and iſſue be joyned, then a Venire, &c. 7. Appearance per Vouchee. Eſſoin per Vouchee. Count de novo.

So that the Demandant is delayed 12 Months certainly before an iſſue; but if the Tenant have Cauſe to Vouch a Foreigner who has no Land in the County, which is called a Foreign Voucher, then day is given to Uſque pro prox. &c. Et interim quod petens ſequatur alibi ſi, &c. And that delays the Demandant another ——————6 Months. 8. Foreign Voucher.

7. In the mean time a Writ to Remove the Record before the Juſtices of the Common Pleas at Weſtminſter is procured from the Chancery, in order to ſummon the Vouchee, and that delays the Demandant till the Return at Weſtminſter, which may be is the next Term, and then if the Tenant make Default, a Procedendo is awarded from Weſtminſter to the Judges at Cheſter to give judgment upon the Default, and that cannot be till the next Seſſions, which gains 6 Months more. ——————6 Months. 9. Proceedings in a Foreign Voucher in *Cheſter*.

So that it is Two years before Judgment can be given upon a Default of the Tenant upon a Foreign Voucher. But if the Tenant appear at Weſtminſter, then a Summons ad Warrantizand' iſſues to Warn the Vouchee at Weſtminſter, which delays the Demandant Nine Returns, as is ſaid

before, and the Al' and Plur' 15 Weeks apiece more, which is a year or thereabouts, and ſometimes more——12 Months

10. Vouchee may Eſſoin at *Weſtminſter* upon a Record remov'd from *Cheſter*.

8. Upon the Return of the Sum' or Plur' Sum' ad warr' the Vouchee may Eſſoin at Weſtminſter, and that gains 15 days ——15 days.

9. At the day given by the Eſſoin, the Vouchee muſt appear and enter into the Warr', and then a Procedendo is ſent down together with the Record to the Juſtice of Cheſter, and then at Cheſter the Demandant Counts de Novo againſt the Vouchée, and upon that the Vouchee may imparle a die Lunæ uſq; diem Martis, and then muſt plead or vouch over, &c.

So that upon one ſingle Voucher the Demandant is neceſſarily delay'd from the time of the Return of the Original at leaſt two years and an half (if all Proceedings go regularly on) before he can get an Iſſue; but if there be any miſawarding of Proceſs or other Irregularities, he may be delayed much longer, and ſometimes forced to begin again. And if the Tenant have a Deed of Vouchers, or there be more Tenants than one, it is not likely to be ended before either Demandant or Tenant die, and then all muſt begin again. Vid. Co. Entr. 342, 343, 344.

Vid. the manner of Proceeding upon a Deed of Vouchers before.

CAP

## CAP. XXII.

# Pleas in Formedons.

Pleas in Formedons. Abatement.

PLeas in Abatement are common, and the ſame with other Real Actions as falſe Latin, Variance, Non ſummons, &c.

Bar.

1. It may be pleaded in Bar, That the Alienation by the Tenant or Demandant was before the Statute De Donis Conditionalibus, Raſt. Entr. 360. b. But this is a Plea never probable to be put in practice now ſince the Statute of Fines and Limitation of Actions.

A Feoffment and lineal Warranty.

2. In Bar may be pleaded a Feoffment and Lineal Warranty with Aſſets by Deſcent, Raſt. Entr. 361. a. 362. a. 14 H. 6. 3. Fitz. Abr. 5. Tit. Form. Br. Tit. Form. 73.

Collateral War.

3. So likewiſe may be pleaded a Collateral Warranty in a Fine or Feoffment to a Formedon in Remainder, Syms Caſe, Co. lib. 8. 51. So in Reverter, Raſt. Entr. 361. b. Br. Tit. Form. 73.

A Fine with Proclamations.

4. A Fine with Proclamations may be pleaded to a Formedon in Deſcender, and five Years paſt, by the Statute of H. 7. This is a Bar by vertue of the Nonclaim within five years; but by the Statute of 32 H. 8. c. 36. the Fine it ſelf being proclaim'd, is a Bar to the Eſtate-Tail, and ſo may be pleaded, Co. Entr. 317. a. b. and 324, 325. a. 326. a. b. 328. b.

Replication. *Partes finis nihil habuer'.*

5. If a Fine be pleaded in Bar, the Demandant may reply, Quod partes finis nihil habuer', &c. Co. Entr. 318. a.

*Non dedit.*

6. Non dedit, i. e. no ſuch Intail is a good Plea in Bar of all Formedons; and it may be pleaded by the Vouchee, Co. Entr. 322. b. 329. b. 341. a.

Abatement by the Donor.

7. An Abatement into the Land by the Donor and avoiding it by a Remitter of the rightful Issue in Tail after is a good Plea in Bar of any Formedon, Co. Entr. 325. b. *Crowther* verſ. *Crowther*.

Remitter.

8. To a Formedon in Remainder may be pleaded in Bar an Eſtate-tail made by another long before the Donor to the Count had any thing, and that the Tenants are Heirs to the firſt Intail, Co. Entr. 334. a. b. 335. a. And note, that there in this Plea is pleaded a Fine at Common Law by the firſt Donor, which only makes a Diſcontinuance, and ſhews how the Tenants are ſeis'd as in their Remitter to the Eſtate Tail, Co. Entr. 335. a. b.

9. To this laſt mentioned Plea the Demandant may reply and maintain his Count, and traverſe the Gift in Tail, Co. Entr. 336. a. b. And the Tenant in his Rejoynder may take Iſſue and maintain his Bar, i. e. that there was ſuch a Gift, Co. Entr. 337. b.

Common Recovery.

10. A Common Recovery may be pleaded in Bar to a Formedon in Remainder or Reverter, either with double or ſingle Voucher; with ſingle if the Tenant to the Writ were ſeis'd of the Eſtate-tail at the time of the Recovery, with double Voucher, though he were not ſeis'd. Co. 1. lib. 63. Capell's Caſe. Vid. the Pleading of a Recovery with a double Voucher, the Tenant to the Præcipe being made by Fine. Co. ibidem 56, 57. Vid. Co. lib. 3. f. 5. a. b. Owen and Morgan's Caſe cited in the Marqueſs of Wincheſter's Caſe. The Caſe it ſelf in Moor, Rep. 210. Co. lib. 3. 59. a. Lincoln Colledge Caſe.

Donor ſeiz'd after the Gift.

11. It's a good Plea to ſay, That after the Gift the ſame Donor was ſeis'd, and gave the Lands to the ſame Donees in Fee, but not good, except he ſays that he was ſeis'd after the Gift. T. 2 H. 6. 15. Tit. Formedon 1. Fitz. Abr.

Remitter.

12. A Remitter may be pleaded in Bar, as thus—— That the Donée was ſeis'd in Fee, and being an Infant made a Feoffment to the Donor, who gave the Land to the Infant in Tail, by which he was remitted, whoſe Eſtate the Tenant hath. M. 3 H. 6. 19. H. 11. H. 6. 20. Tit. Formedon.

Fitz.

Fitz. Abr. 2. and 11 H. 4. 5. Br. Form. 24. & 5 E. 4. 9.

13. In a Formedon the Tenant may plead in Bar an Exchange between the Anceſtour of the Demandant, and he under whom the Tenant claims, and that the Demandant entred into the Lands given in exchange, and takes the Profits. An Alienée may plead this Plea, though he be a Stranger, for he is privy in Eſtate, 3 E. 3. Tit. Form. 44. Exchange.

14. A Recovery in an Aſſiſe, and the Gift mean, between the Diſſeiſin and the Recovery, 27 H. 6. 8. Br. Tit. Form. 3. Recovery in an Aſſiſe, Gift mean, &c.

15. By way of Rebutter every Stranger may plead a Warranty, if he has the Deed by way of a Qu' Eſtate, 42 E. 3. 19. Br. Tit. Form. 10. Warranty.

16. Vid. Br. Tit. Form. 46. 7 E. 6. How the Writ ſhall be General and the Count Special in a Formedon upon a Uſe created by the Statute of 27 H. 8. And vid. where the Writ and Count ſhall be General, and ſur ne dona pas, pleaded the Replication ſhall be ſpecial, and conclude Iſſint dona. Br. 49. 2 E. 6. 1. Mar. And ſo the Writ and Count may be general, and the Replication ſpecial, where a Formedon is brought of Land recovered in Value. Br. Tit. Form. 75. See Winch's Entries 517. The Record in Formedon in Remainder where the Writ is General and the Count Special after the Statute of Uſes grounded upon this Caſe of Br. Tit. Formedon 46. How the Writ ſhall be general, Count ſpecial. Vid. Co. 2. p. 47. The Feoffer after the Stat. of Uſes, ſhall be ſuppos'd Donor in a Formedon, as it is in Winch. Entries 517.

CAP.

## CAP. XXIII.

# Dower unde nihil habet.

What. 1. THis is a Writ of Right in its nature called Bre' de dote unde nihil het'. And lieth where a Woman taketh Husband, who is sole seis'd at any time during the Coverture of Lands in Fée-simple or Fée-tail of such Estate, as the Issue begotten between them may inherit the same. F. N. B. 361.

Part of Dower. 2. And the Widow may have this Writ though she have part of her Dower in another Will and of another Person, unless she have receiv'd part of the Tenant himself in the same Town, and then she must have a Writ of Right of Dower. Westminster 2. c. 48. 3 E. 1.

The Original Writ follows.——

Original. Rex, &c. Præcipe A. quod reddat B. qu' fuit Uxor' C. rationabillem dotem suam qu' eam contingit de libero Tenemento quod fuit prædict' C. quondam viri sui in N. unde nihil het' ut dic' & unde queritur quod prædict' A. ei deforceat & nisi, &c. tunc sum' per bon' sum' prædict' A quod sit coram Justic' nostris, &c. ad respondendum eidem B. in plito' prædict' & habeas ibi sum' & hoc bre' Teste, &c.

For a Man and his Wife it is—— Quod reddat B. & C. Uxor' ejus rationabil' dotem ipsius C. qu. &c. unde nihil het' ut dicunt & unde queruntur quod præd. A. eis deforceat & nisi, &c.

Process. The Process is Summons, Grand Cape and Petit Cape.

The Plaint in lieu of a Count is thus,—— Viz. A. qu' fuit Uxor C. per I. S. Attornatum suum pet. versus N. tertiam partem un. Mess. &c. cum pertinen. in W. ut dotem ipsius A. ex dotacon. præd. C. quondam viri sui, &c. Rast. Entr. 234. b.

3. Essoine

3. Eſſoine de ſervitio Regis lies not in this Writ by the Statute of 12 E. 2. but the Common Eſſoin lies, and but one after iſſue joyned by Stat. Marl. c. 13. Eſſoine.

Voucher likewiſe lies as in other Real Actions. Voucher.

View lies in a Writ of Dower unde nihil habet, as by Raſt. Entr. appears, though ſome have queſtioned it; but in a Writ of Dower where the Husband died ſeis'd, the Heir, nor any claiming under him ſhall have View by the Common Law, nor the Alienæ of the Husband, now by the Statute of Weſtminſter 2. c. 48. Co. 2. Inſt. 481. View.

4. The Tenant ſhall not have his Age in this Writ, i. e. the Parol ſhall not demurr for the Nonage of the Tenant in favour of Dower. 5 H. 5. 13. 12 E. 4. 12. Age.

5. At Weſtminſter a Writ of Dower, unde nihil habet, the Return of the Proceſs is abridg'd by the Statute of Marl. c. 12. 52 H. 3. In Dower Four days ſhall be given in the Year, and more if conveniently may be, Quær. how that is to be underſtood, for the Lord Co. 2. Inſt. 124. does not expound it. And by Raſt. and Co. Entr. the days are given according to the Statute of 51 H. 3. as in Actions long after the Statute of Marl. and the Statute of 32 H. 8. c. 21. Days in bank.

6. But after iſſue joyned, by the Statute of 16, 17 Car. c. 6. in Dower 15 days only are to be given between the Teſt and the Return of every judicial Proceſs. In Cheſter it is de die in diem. 15 Days in judicial Proceſs per Stat. 16, 17 Car. c. 6.

7. If the Tenant plead the Husband to be alive, that ſhall be tried by Witneſſes, and in no other Caſe, in the Law. 8 H. 6. 23. Raſt. Entr. 228. Finches Law. 423. Co. 2 Inſt. 80. 9 E. 2. lately Printed by Serjeant Maynard. Death of the Husband, trial by proofs.

8. There is another Plea in this Action which draws the Trial out of the ordinary Courſe of a Jury, and ſhall be tried by the Biſhop, and that is when the Tenant pleads ne unques accouple in loyal Matrimony, and if it be an inferiour Juriſdiction that cannot write to the Biſhop, as if the Action be brought in the Huſtings in London, or in any other Corporation, the Record is to be removed, to have it tried Ne unque' accouple in loyal Matrimony.

in

in the Superiour Court, who may write to the Bishop, and upon Return of the Bishop's Certificate the Record is to be remanded as in a Foreign Voucher. Rast. Entr. 228. b. Co. Entr.

Record Cestr' Bre' Episcopo, 12 H. 4.

There is a Record Inter' Rotul' Cestr' in Castr' Cestr' 12 H. 4. Die Martis prox' post Festum Epiphan' Domini in bri' de dote per Johannam Uxor' Thom' Hollinworth vers' Hugoem' de Hollinworth of Lands in Hollinworth. Ne unques accouple, &c. pleaded, and a Writ is awarded to the Bishop of Coventry and Litchfield, who returned the Writ that the Demandant was lawfully married, and Judgment given for the Demandant. This is an Evidence that the Court of Common Pleas before the Justice of Chester, ever was reputed a Superiour Court, Coordinate in its Jurisdiction with the Courts at Westminster.

Record remove a Civit' Cestr' in Com. Cestr' fur plea de ne unques accouple, &c.

So in the City of Chester a Record was removed (out of the Portmoote Court) before the Justices of Chester in order to have a Writ to the Bishop, and at the day in Court before the Justices the Tenant made Default, and the Record was remanded, 22 or 23 Car. 2. Inter Berand Peten' & Harrison Tenen' in Dote, &c.

Damages recovered Stat. Mert. 20 H. 3. c. 1.

9. By the Statute of Merton 20 H. 3. c. 1. the Widow shall recover Damages, i. e. the yearly value of the Third part from the time of the death of her Husband; but this must be in Case the Husband die seised, of which the Jury must inquire, for if the Husband died not seised, the Wife can recover neither Damages nor Costs. Co. 1. Inst. 32. b.

Bre de inquir' de dam' lou ferr'.

If Judgment be given upon a Confession, nihil dicit, or any other way than upon a Verdict, if the Wife suggest that her Husband died seised, a Writ of Inquiry of Damages issues, by which Writ the Sheriff is Commanded to inquire whether the Husband died seised, and if he did, what Value the Lands are by the Year, and how long it is since the Husband died, in which Writ there may be likewise contained an Habere fac' seisinam of the Third part recovered; And upon Return of the Inquisition, Judgment is Entred for the Damages. vid. the Writ and Judgment. Rast. Entr. 238. a. b.

10. The

10. The Sheriff upon the Execution of the Writ of Haber' fac' ſeiſinam is to give ſeiſin of her Third part by Metes and Bounds (if it can be done) to hold in ſeveralty, particularizing the Lands and parts of the Houſe, &c. And this he may do without a Jury, wherein it differs from an Elegit and a Partitione faciend'. Vid. Raſt. Entr. 238. b. *Habere fac' ſeiſinam, how to be executed.*

## CAP. XXVI.

## Pleas in *dote unde nihil habet.*

IN Abatement of the Writ, the Tenant may plead that the Demandant has ſo much Land for her Dower in the ſame Town aſſigned, and accepted before ſhe brought her Writ. 3 E. 3. Itiner. Norf. Dower 76. *Pleas in Dower. Abatement, 1. Land in the ſame Town &c.*

So Entry into Part, ſince the laſt Continuance is a good Plea in Abatement. Raſt. Entr. 234. Dyer 6 E. 6. 76. b. *2. Entry into part.*

Sole-tenancy, Joynt-tenancy, ſeveral Tenancy are pleadable in this as in other Real Actions. Raſt. Entr. 230. *3. Sole-tenancy &c.*

1. Pleas in Barr—The general Plea is, Ne unques ſeiſe qu' Dower, &c. Raſt. Entr. 230. a. 10. *Barr. 1. Ne unques ſeiſe.*

2. That the Demandant was not Nine years old at the time of the death of her Husband, is a good Plea in barr. H. 15 E. 3. Dower 67. Raſt. Entr. 228. a. 2. *2. Not Nine years old.*

3. That the Husband is not dead, a good Plea. Vid. how this ſhall be tried, antea Fol. *3. Husband not dead.*

Ne unques accouple, &c. Vid. antea *4. Ne unques accouple.*

5. Detaining of Evidences of the Land by the Wife is a good Plea in barr. And if in her Replication ſhe ſays, ſhe was always ready to deliver them, and do tender them *6. Detainer of Charters.*

in Court, she shall forthwith have Judgment for her Dower. Rast. Entr. 229. b. 7, 8. & 230. a. Dyer 230. a.

6. Demandant seised by disseisin.

6. It's a good Plea, That the Demandant Entred and disseised the Tenant before her Writ brought, and still is seised by disseisin. Rast. Entr. 231. a.

7. Judgment vers le Heir Vouchee & nemy vers le Tenant.

7. Note, when the Heir is Vouch'd in Dower, if he have Assets, Judgment shall be always against the Heir, and not against the Tenant, and the Tenant shall recover in Value against the Heir. And this is different from all other Cases of Voucher. H. 4 H. 7. Dower 20. 16 E. 3. Dower 56. 41 E. 3. 24. Br. Dower 10. This is Confirm'd by a Record in the Castle of Chester, ~~Avint~~ Sess. Ro. 10. Oct. 11 Eliz. in Dower where Judgment is Entred exactly according to this Rule.

*Flint*

8. Issue nemy inheritable.

A Woman shall never be indow'd of that Land which her Issue by her Husband could never inherit, Lit. Sect. Dower. And therefore a Remitter may be pleaded in barr, as to say, That the Husband and a former Wife were seis'd in special Tail, and discontinued, and took back an Estate in Fée or Tail general, and that the Tenant is Heir to the first in Tail, and so remitted. 44 E. 3. 26. Br. Dower 14. Note this Remitter cannot be given in Evidence upon the Plea of Ne unques seise qu' Dower, &c. Dyer 30 H. 8. f. 41. a.

9. Attainder de Treason, &c.

9. Attainder of Treason or Felony in most Cases may be pleaded in barr, Vid. le Stat. Br. Dower 82. 13. E. 3.

10. Joynt-tenancy ove le Tenant.

10. Joynt tenancy with the Tenant, i. e. That the Baron had nothing but as Joynt-tenant with the Tenant in Fée is a good Plea in barr, not to be given in Evidence upon Ne unques seise, &c. 10 H. 6. 17. Br. Dower 84. H. 14 H. 4. f. 13. p. 3.

And now I have done with Writs of Right, and with Writs of Right in their nature, and with them shall conclude this Second Book. And proceed in the next place to

to Writs of Entry. 2ly. To Writs poſſeſſory Anceſtrell, as the Writs of Ayel, Beſayel, Cozinage. 3ly. To thoſe Writs which contain no certainty of Meſſuages or Acres in the Writs, As Nuper obiit, Mortdanceſter & Aſſiſe of Novel diſſeiſin, and with this I ſhall make up and Cloſe the Third Book.

# LIB. III.

## CAP. I.

## Of Writs of Entry in general.

When to be brought.

1. These Writs are brought commonly where the Tenant or he that has the Freehold in the Land came to the Possession, or did Enter lawfully, i. e. without Fraud or Tort. As by the Deed or Consent of another, who either came to the Land unlawfully (as by disseisin) or who had but a particular or defeasible Estate.

Why so called.

And they are called Writs of Entry, not only because they speak of the Entry of the Tenant in the Writ, but likewise shew for what reason the Possession ought not to be detain'd from the Demandant.

Entry in nature of an Assise, what.

2. This description will comprehend the nature of most Writs of Entry. But there is another Writ of Entry upon a Disseisin, which is called a Writ of Entry in le Quibus or a Writ of Entry in nature of an Assise against the Tenant who made the Disseisin to the Demandant himself, which differs not from an Assise of Novel disseisin in the Cause of Action, but in the Proceedings and Process. Quær. the reason of these two Remedies for the same Cause. Vid. Reg 228, 229. Finches Law. 261.

3. Degrees in Writs of Entry.

3. In this Plea or Writ there are three degrees, 1. Against him who had the Land by Demise, &c. from the Demandant himself. 2. In the Per. 3. In the Per and Cui. The First is where the Demandant Counts of his own Seisin, As for Example, In the Writ of Entry ad Termin' qui non præteriit. In the First degree it is thus.——

Primo gradu.

Præcipe A. quod juste, &c. reddat B. un' Mess. &c. in S. qu' idem B. ei demisit ad terminum qui præteriit, ut dic' Et nisi fecerit, &c. Reg. 227. b.

In

In the Per or Second degree when the Lands were Let by another, and not the Demandant himself, as thus,——

Præcipe A. quod juſte, &c. reddat B. un' Meſſ. &c. in S. quod clam' eſſe jus & hæreditatem ſuam & in quod idem A. non habet ingreſſum niſi per C. Patrem, &c. cujus hæres ipſe eſt qu' ill' demiſit ad terminum qui præteriit ut dic' Et niſi, &c. Reg. 228. a. 2. Gradu.

In the Per and Cui or Third degree, where one demands Land of that Tenant who had Entry by one to whom ſome Anceſtour of the Demandant or the Demandant himſelf did Demiſe it for a Term now expired. As thus,——

Præcipe, &c. in quod idem A. non habet ingreſſum niſi per C. cui præd. B. (le demandant) illud dimiſit ad terminum &c. vel per C. cui L. pater præd. B. cujus hæres ipſe eſt dimiſit ad terminum qui, &c. 3. Gradu.

4. When the Conveyances of the Land or Deſcents from one to another, went beyond the degrees at Common Law, the Demandant was put to his Writ of Right, i. e. that if there were above two Deſcents and two Alienations before any Action brought, and this was for the repoſe and quieting of Mens Poſſeſſions. Co. 2 Inſt. 153. Writ of Right when beyond the Degrees.

5. But now the Statute of Marl. c. 30. has given remedy out or beyond theſe Degrees, which is called a Writ of Entry in the Poſt; and this in Caſe of Alienations and Deſcents, where the Entry of the Tenant was at firſt lawful by Deſcent or lawful Conveyance, for in Caſe of Diſſeiſin or Intruſion, there was a Writ of Entry in the Poſt at Common Law. Fleta. Lib. 5. c. 34. Co. ibidem. F. N. B. 474. Stat. Marl. c. 30. Writ of Entry in the Poſt.

6. What is ſaid of the Degrees in the Writ of Entry ad terminum qui præteriit is applicable to other Writs of Entry, as Writs of Entry upon a Diſſeiſin, &c. F. N. B. 474. Entry ad terminum qu' præteriit.

7. A Man ſhall not have a Writ of Entry in the Poſt, when he may have it within the Degrees in the Per, or in the Per or Cui. F. N. B. 476. No Writ of Entry in the Poſt, where in the Degrees.

8. He

Entry in the Poſt, againſt what Perſons.

8. He who cometh into any Land by Record, or by Election, Succeſſion, or by Diſſeiſin, the Writ ſhall be againſt ſuch Perſon always in the Poſt. ibidem.

Writs of Entry are of divers ſorts, as Firſt, Writs of Entry in the nature of an Aſſiſe. 2. Writs of Intruſion. 3. Cui in vita. 4. Cui ante divortium. 5. Sur Cui in vita. 6. Dum non fuit compos mentis. 7. Writs of Entry ad Commun' Legem. 8. Dum fuit infra ætatem. 9. Ad terminum qui præteriit. 10. Cauſa matrimon' prælocuti. 11. In Caſu proviſo. 12. In conſimili Caſu. And Britton in the 114th. Chapter of his Book, fo. 264. B. ſays, that they are without certainty; but I ſhall Treat only of theſe that are particularly mentioned.

All thoſe Writs may be brought in the Per, or Per & Cui, or Poſt, as the Cauſe requires, as appears by F. N. B. where he deſcribes the nature of thoſe Writs, and how they are to be brought.

## CAP. II.

# Of a Writ of Entry in nature of an Aſſiſe.

What.

1. THE Writ of Entry Sur diſſeiſin in nature of an Aſſiſe, is properly grounded upon a diſſeiſin done to the Demandant himſelf, and then it may be brought in place of an Aſſiſe, and it is called a Writ of Entry in De Quibus.

Entry in the Quibus, wherein the Per, Cui, or Poſt. &c.

2. But a Writ of Entry in De Quibus grounded upon a Diſſeiſin may be brought againſt him who did the diſſeiſin to ſome Anceſtour of the Demandant, or againſt him who comes under him that did the diſſeiſin either to the Anceſtour or the Party himſelf. And then it is a Writ of Entry Sur diſſeiſin in le Per: Or againſt him who claims under him who claim'd

claim'd under the Diſſeiſor; And then it is called a Writ of Entry in the Per and Cui: But if he againſt whom the Writ is brought Claim at a farther diſtance from the firſt Diſſeiſor; then it is called a Writ of Entry in the Poſt. And they who claim'd in the Per or Per and Cui, were ſaid to be in the Degrees; And he that came to the Eſtate or Land in the Poſt, was ſaid to claim out of the Degrees. Vid. ſupra f. & F. N. B. ibidem. & Co. Lit. 238. b. & 239. a. where thoſe Writs are treated of at large, and when it is ſhewn what makes a Degree.

3. The Writ of Entry in nature of an Aſſiſe is thus.——

Præcipe A. quod juſte & ſine dilacon' reddat B. unum Meſſ. &c. cum pertinen' in L. de qu' idem A. injuſte & ſine judico' diſſeiſivit prædict' B. infra triginta Annos jam ultime elaps', ut dic' Et niſi fecerit, &c. Original.

Note, the time for limitation of Seiſin in this Writ before the Statute of 32 H. 8. c. 2. was from the firſt Voyage of H. 3. into Gaſcoine, Reg. 229.

Where it is brought of the Anceſtours Seiſin it is thus.—

Quod juſte, &c. reddat B. unum Meſſ. in L. quod clam' eſſe, &c. de qu' idem A. injuſte & ſine judico' diſſeiſivit C. patrem vel matrem vel al' anteceſſorem prædict' B. cujus hæres ipſe eſt infra quinquagint' Annos jam ultime elaps' ut dic' & niſi, &c. Original.

The Limitation antiently was as is ſaid before, but now altered by the Statute of H. 8. to 50 years.

When it is brought in the Per, it is thus,———

Quod clam', &c. & in quod idem A. non habet ingreſſu' niſi per C. qu' illud ei demiſit, qu' inde injuſte & ſine judico' diſſeiſivit L. patrem, &c. prædict' B. infra quinquagint' Annos, &c. Original in the Per.

When it is brought in the Per & Cui, it is thus,———

In quod idem A. non habet ingreſſum niſi per C. cui D. illud demiſit qu' inde injuſte, &c. L. patrem, &c. Original in the Per & Cui.

When

When the Alienations or Diſcents go further, i. e. out of the Degrees, then the Writ of Entry in the Poſt is thus,

Original in the Poſt.

Quod clam', &c. & in quod, &c. niſi poſt diſſeiſinam qu' L. inde injuſte & ſine judico' fecit S. patri vel' al' anteceſſor' prædict' B. cujus hæres ipſe eſt infra quinquagint' Annos, &c. But if it be done to the Demandant himſelf, then it is thus——niſi poſt diſſeiſinam qu' L. inde injuſte, &c. fecit eidem B. infra triginta Annos, &c.

Common Recovery upon Originals in the Poſt.

And upon this laſt Writ of Entry in the Poſt, of the Demandant's own Seiſin, are all or moſt Common Recoveries ſuffered at this day. And I conceive this Real Writ is rather choſen for ſuch Recoveries, becauſe of the Vouchees, in regard the Tenant may Vouch at large and is not bound to Vouch within the Degrees as in other Writs of Entry in the Per & Cui, and ſo it is moſt ſafe for Purchaſers who need not fear Writs of Error of Wrong or Illegal Vouchers. Vid. for Voucher within the Lien, and Voucher out of the Lien. W. 1. c. 40. Co. 2. Inſt. 243. 153, 154.

Proceſs.

4. The Proceſs in all theſe Writs is Summons, Grand Cape before appearance, Petit Cape after appearance, in Caſe of default.

View, Voucher, &c.

5. View, Voucher, Receit, lies in all theſe Actions.

Quær. of View in a Writ of Entry in the Quibus antea. c. View.

Voucher lies not by the Diſſeiſor himſelf. Co. 2 Inſt. 352.

6. The Count in a Writ of Entry Sur diſſeiſin in nature of an Aſſiſe of his own Seiſin, is thus,——

Count.

I. S. Arm' per L. B. Attornatum ſuum pet' verſus M. un' Meſſ. &c. in N. de quo idem M. injuſte & ſine judic' diſſeiſivit præfat' I. S. infra trigint' Annos jam ultime elaps', &c. Et unde dic' quod ipemet' fuit ſeiſit' de Meſſ. prædict' cum pertinen' in dominico ſuo ut de feodo & jure, tempore pacis, tempore

tempore Domini Regis nunc capiend' inde Exples' ad valenc' &c. Et de qu' &c. Et inde produc' Sectam &c. ſee Stowels Caſe, Pl. Com. 353.

Note, it's not ſaid (qu' clam' ut jus & hæreditatem ſu') in this Action in the Writ or Count, becauſe it is brought of his own Seiſin and againſt the immediate Diſſeiſor. Vid. Reg. 229. Raſt. Entr. 276. b. But ſee F. N. B. 474 That it ought to be (qu' clam') in this Writ as well as in thoſe of his Anceſtours Seiſin. Note.

The Count in the Writ of Entry in the Per is as the other, ſave inſtead of de qu', &c. it's ſaid, Et in qu', &c. Vet. Lib. Entr. 7. b. The ſame may be ſaid of the Writ of Entry Sur diſſeiſin in the Per & Cui. Count in the Per.

When it is of the Seiſin of the Anceſtour, the Count muſt ſet forth the Title, and is thus.——— Where the Count may ſet forth the Title.

Unde dic' quod I. S. Pater ipſius B. cujus hæres ipſe eſt fuit ſeiſit' de Meſſ. prædict' cum pertinen' in dominico ſuo, ut de feodo tempore pacis, tempore, &c. Capiend' inde Exples' ad valenc', &c. Et de ipſo I. S. deſcend' jus, &c. iſt' B. qu' nunc pet' ut fil' & hæred', &c. Et de qu' idem A. injuſte & ſine judico' diſſeiſivit eund' I. S. infra quinquagint' An' jam ultim' elaps', &c. Et inde produc' Sectam &c. Raſt. Entr. 280. 279. b. Count.

7. Note, this Writ of Entry in nature of an Aſſiſe, may be brought by a Tenant in Tail or Tenant for Life. And the Count by Tenant for Life ſhall ſay,———Quod ſeiſit' fuit de Meſſ. prædict', &c. in dominico ſuo ut de libero Tenemento, And ſo may a Tenant in Tail without ſetting forth how the Eſtate-tail begun, or he may ſhew the Gift in Tail ſpecially in his Count as it is done in Raſt. Entr. 277. 278. Vid. F. N. B. 475. Dyer 101. Co. Entr. 219. b. By whom to be brought.

The Demand and Count in a Writ of Entry Sur diſſeiſin in the Poſt, brought by the Diſſeiſee himſelf is in every Common Recovery. And is thus———I. S. per T. Attornatum ſuum pet' verſus A. unum Meſſ. &c. ut jus & hæreditatem ſuam. Et in qu' idem A. non habet ingreſſum niſi poſt diſſeiſinam qu' H. inde injuſte & ſine judicio Count in the Poſt.

fecit præfat' S. infra triginț' Annos jam ultim' elaps', &c. Et unde dic' quod ipſemet fuit ſeiſit' de Meſſ. prædict' cum pertinen' in dominico ſuo ut de feodo & jure tempore pacis, tempore Domini Regis Capiend' inde Exples' ad Valenciam, &c. Et in qu', &c. Et inde produc' Sectam &c. Co. Entr. 219. a.

Title, where to be alledg'd.

Thus a Writ of Entry Sur diſſeiſin in the Poſt brought by the Heir of the Diſſeiſee, and then there muſt be a Title alledg'd as before. Raſt. Entr. 280.

Imparlance, Aid, Receit, &c.

8. After the Count, the Tenant may Imparle, Voucher, Prayer in Aid, Receit, lies in all theſe Writs, for which ſee before. Raſt. Entr. 271. 285, 286.

Judgment.

9. The Judgment againſt the Tenant is,——Ideo Conſiderat' eſt quod prædict' I. S. recuperet verſus prædict' A. ſeiſinam ſuam de Meſſ. prædict' cum pertinen' & idem A. in mia' &c.

Judgment againſt Vouchees.

10. If there be a Voucher or more, as in all Common Recoveries there are, then it is,—— Recuperet verſus prædict' A. ſeiſinam ſuam de Meſſ. prædict' cum pertinen', Et quod idem A. habeat de Terr' prædict' L. (le Vouchee) ad Valenc' &c. Et idem L. in mia' &c. And if there be more Vouchers than one, then it is,——Et quod prædict' L. habeat de Terr' prædict' C. (the Second Voucher) ad Valenc', &c. and ſo further according to the number of the Vouchers. Co. Entr. 219. b. Raſt. Entr. 284.

This Writ was chiefly uſed where the Entry was taken away, after a diſſeiſin by the Diſſeiſee dying ſeiſ'd, and a Deſcent, otherwiſe an Aſſiſe againſt the Diſſeiſee himſelf was the only Remedy.

CAP.

## CAP. III.

# Pleadings in a Writ of Entry, in nature of an Aſſiſe.

1. NOn-tenure in Abatement of the Writ is a good Plea, as in all Real Actions. Raſt. Entr. 277. b. briefe. 1. c. 2. Abatement. Non-tenure.

2. Joynt-tenancy with another who is alive, a good Plea, in Abatement, to which the Demandant may Replie that the Feoffment was by Covin, and that the Tenant takes the Profits. Raſt. Entr. 276. a. 272. b. Joynt-tenancy.

3. Sole-tenancy may be pleaded in Abatement, and over in Barr Non diſſeſivit. Raſt. Entr. ibidem. Sole-tenancy.

4. When the Tenant did not Enter by him alledg'd in the Writ, it's a good Plea. 44 E. 3. 39. Raſt. Entr. 249. a. Keilw. Rep. 93. a. No entry by him in the Writ.

### Pleas in Barr.

1. In a Writ of Entry in nature of an Aſſiſe of a Rent, Hors de ſon fee is a good Plea. Raſt. Entr. 272. b. 5. Barr. Hors de ſon fee.

2. Non diſſeiſivit is the general Iſſue. Raſt. Entr. 272. b. Non diſſeiſivit.

3. A Man may Plead a Diſcent in Barr giving colour to the Demandant, otherwiſe it amounts but to the general Iſſue. Raſt. Entr. 273. a. 8. Deſcent with colour.

4. The Deſcent before, Confeſſed and avoided by virtue of a Recovery in a Writ of Right againſt a Tenant for Life, the Remainder in Fée being in the Father of him who pleaded the Deſcent, who Entred by virtue of his Remainder, and died ſeis'd, and the Recoverer Entred upon him. Raſt. Entr. 273. a. b. Replication. Deſcent avoided.

Rejoynder. Recovery falsified.

5. The Tenant may falsifie the Recovery by pleading that the Tenant in the Recovery had not the particular Estate granted to him, so as to make him Tenant to the Præcipe. Rast. ibidem.

Entry by Escheat.

6. Entry by Escheat for want of an Heir, is a good Plea in Barr. Rast. Entr. 273. b. But must give Colour, otherwise it amounts but to the general Issue. Replication, Quod habuit exitum, the Rejoynder, Quod est Bastardus. Rast. ibidem.

Recovery.

7. A Recovery in a Writ of Entry en le Post, against a Stranger, and the Title of the Demandant Mesne between the Disseisin and the Recovery. Rast. Entr. 274. a.

Sale by Executors.

8. Sale by Executors by virtue of a Will with Colour to the Demandant, may be pleaded in Barr. Rast. Entr. 274. a. b.

Feoffment.

9. A Feoffment may be pleaded in barr with a Colour Rast. Entr. 275. a. In the Replication the Feoffment may be avoided by a former Feoffment by another. The Defendant may Rejoyn that the Feoffment was by disseisin and continual Claim pleaded. The Plaintiff in the Rebutter may Travers the continual Claim. Rast. 275. a. b.

Entry for a Forfeiture. Nient Compris.

10. An Entry may be pleaded in Barr, by reason of an Alienation by Fine made by a Tenant for Life, Rast. Entr. 280. In the Replication may be pleaded, not Compriz'd in the Fine. ibidem.

Bastardy.

11. Bastardy in the Demandant may be pleaded. Rast. Entr. 279. b. 2. 279.

Re-entry upon the Demandant.

12. In Entry in the Post that he was seis'd till by the Demandant disseised, and he re-entred, a good Plea in Barr. 16 H. 7. 4. Br. Tit. Entr. 40.

CAP.

## CAP. IV.

# Writ of Intruſion.

1. A Writ of Entry grounded upon an Intruſion, lies where Tenant for Life, in Dower or by the Curteſie die ſeis'd, and after their deaths, one intrudes and Enters into Poſſeſſion of the Land, then he in Reverſion in Fée or for Life ſhall have a Writ of Entry upon this Intruſion. F. N. B. 506. 509. What.

The Writ of Entry after the death of Tenant in Dower is thus,—— After death of Tenant in Dower.

Rex, &c. Præcipe A. quod juſte &c. reddat B. unum Meſſ. &c. cum pertinen' in C. qu' clam' eſſe jus, &c. & in qu' non het' ingreſſum niſi per intruſionem qu' in illum fecit poſt mortem L. qu' fuit Ux' D. qu' ill' tenuit in dotem de dono prædict' D. quondam viri ſui patris vel, &c. prædict' B. cujus hæres ipſe eſt ut dic', &c. Original.

In the Per thus,——In quod non het' ingreſſum niſi per C. qu' ill' ei dimiſit qu' ſe in ill' intruſit poſt mortem D. qu' fuit Uxor' E. qu' ill' &c. Original en le Per.

In the Per & Cui thus,——In qu' idem A. non habet ingreſſum niſi per C. cui D. ill' dimiſit qu' ſe in ill' intruſit poſt mortem, &c. Original en le Per & Cui.

In the Poſt it is, ——In qu. idem A. non habet ingreſſum niſi poſt intruſionem qu. C. in ill. fecit poſt mortem prædict. D. ad præfat. D. reverti debet ut dic. &c. Et unde quer. &c. Vid. Regiſter 233, 234. For ſeveral Writs brought after the death of Tenant in Dower. Original in le Poſt.

The Writs poſt mortem Tenen. per legem Angl. & Tenen. pro vita, in the Per, Cui and Poſt. Vid Regiſter 234. a. b. After death of Tenant per Curteſie.

Note

No Preſident for Count in Lib. Entr.

Note, there's no Precedent in the Book of Entries, Co. or Raſtall, or Vet. Lib. Entr. for the Count in Intruſion after the death of Tenant in Dower, or by the Curteſie. But in Dower I conceive it may be thus upon the firſt Writ mentioned before——

Count after death of Tenant in Dower.

B. per S. Attornatum ſuum pet. verſus A. unum Meſſ. &c. qu. clam. ut jus & hæreditatem ſuam, Et in quod idem A. non habet ingreſſum niſi per intruſionem qu' ill' fecit poſt mortem L. qu' fuit Uxor D. quam ill' tenuit in dot' de dono prædict. D. quondam viri ſui Patris vel &c. al. anteceſſor. &c. cujus hæres ipſe eſt, Et unde dic. quod prædict. D. fuit ſeiſit. de Meſſ. prædict. cum pertinen. in dominico ſuo ut de feodo tempore pacis tempore Dom. Regis nunc, &c. Capiendo inde Exples. &c. ad Valenc. &c. Et ſic inde ſeiſit. apud——obiit, &c. poſt cujus mortem prædict. L. qu. fuit Uxor prædict. D. ill. tenuit in dot' de dono prædict. D. q uondam viri ſui & fuit inde ſeiſit. in dominico ſuo ut de libero Tenemento tempore pacis tempore Domini Regis nunc Capiendo inde Expleſ. &c. ad valenc. &c. Et de ipſo D. deſcend. Reverſio Meſſ. prædict. cum pertinen. præfat. B. ut fil. & hæred. &c. Et poſtea ſcilicet —— die ——Anno——eadem L. apud——obiit de tal. Stat. ſeiſit. Et in qu. &c. Et inde produc. &c.

Count variant.

If the Wife come to her Dower by Recovery, or the Reverſion be purchaſed of the Heir, the Declaration varies according to the Writs, as you may find in the Regiſter.

And after death of Tenant by the Curteſie, the Count may be thus,——

Count after death of Tenant per Curteſie.

B. per I. S. Attornatum ſuum pet. verſus A. unum Meſſ. &c. qu. clam. ut jus & hæreditatem ſuam, Et in qu. idem A. non habet, &c. niſi per intruſionem qu. in ill. fecit poſt mortem E. qu. ill. tenet per legem Angliæ poſt mortem D. quondam Uxor. ſu. matris vel al. anteceſſor. &c. per B. cujus hæres ipſe eſt, Et unde idem B. dicit quod prædict. E. & D. in jure ipſius D. fuer. ſeiſit. de Meſſ. præd. cum pertinen. in dominico ſuo, ut de feodo tempore pacis, tempore Domini Regis nunc, &c. Capiend. inde Expleſ. &c. ad valenc. &c. Et ſic inde ſeiſit. eadem D. apud ——————obiit poſt cujus mortem præd. E. ill. tenuit,

tenuit ut ten. per legem Angliæ, Et fuit inde ſeiſit' in dominico ſuo ut de libero Tenemento per legem Angliæ tempore pacis, tempore Domini Regis nunc, Capiendo inde Exples. ad valenc. &c. Et de ipſa D. deſcend. Reverſio Meſſ. præd. cum pertinen. præfat. B. ut fil. & hæred. præd. D. Et poſtea ſcilicet——die——Anno——idem E. apud L. obiit de tal. Stat. ſeiſit. Et in qu. &c. Et inde produc. ſectam, &c.

**This may be in the** Per, Per **and** Cui, **and** Poſt. **And by ſuch as Purchaſe the Reverſion, which is term'd** (Ex aſſignatione) **and then the Declaration varies according to the Caſe.** Vid. Regiſter. 234. Per, Cui, Poſt.

**The Count after the Tenant for life is thus,——**

B. per I. S. Attornatum ſuum pet. verſus A. unum Meſſ. &c. qu. clam. eſſe jus & hæreditatem ſuam, & in qu. idem A. non habet ingreſſum niſi per intruſionem quam in ill. fecit poſt mortem C. cui præd. B. illud dimiſit ad vitam ipſius C. &c. Et unde idem B. dicit quod ipſe fuit ſeiſit. de Meſſ. præd. cum pertinen. in dominico ſuo ut de feodo tempore pacis, tempore Domini Regis nunc Capiendo inde Exples. ad valenc. &c. Et ſic inde ſeiſit. exiſten. Meſſ. præd. cum pertinen. dimiſit præfat. C. ad vitam ipſius C. virtute cujus quidem idem C. fuit inde ſeiſit' in dominico ſuo ut de libero Tenemento tempore pacis tempore Domini Regis nunc, Capiendo inde Exples. ad valenc. &c. idemque C. poſtea obiit ſeiſit. Et in qu. &c. Et inde produc. ſectam, &c. Count after death of Tenant for Life.

**For the Counts in the** Per, Per **and** Cui **and in the** Poſt, **and for the Heir upon the demiſe of his Anceſtour, and** Ex aſſignatione **when the Reverſion is purchaſed.** Vid. Raſt. 415, 416.

**The Proceſs in this Writ before Appearance, is** Summons, **and** Grand Cape; **and after Appearance,** Petit Cape. Proceſs.

View, Aid, Voucher, Receit, **lies in theſe Writs,** Quær. de View, vid. Raſt. Entr. 416. a. b. F. N. B. 509. View, Aid, Voucher, &c.

**The Judgment is,** Quod petens recuperet ſeiſinam, &c. **as in the other Actions next before.** Judgment.

CAP.

## CAP. V.

# Pleas in this Action.

Abatement, Non-tenure &c.

PLeas in Abatement, as to Non-tenure, Joynt-tenancy, Sole-tenancy, &c. are the same as in other Real Actions.

A Plea in Abatement peculiar in this Action as to Non-tenure.

But there is a particular Plea in Abatement peculiar to this Action, As that such an one died seis'd, and the Land descended to him, pending the Writ with a Traverse that he was Tenant at the time of the Writ brought, whereas in other Pleas of Non-tenure he must say, that he was not Tenant at the time of the Writ brought, nor at any time after. Rast. Entr. 416. a. 4. But the reason of this pleading in Intrusion is because the Writ must nèeds be false if he were not Tenant at the time of the Writ, and that the Land descended to him pending the Writ, for then he could be no Intruder before the Writ brought.

Traverse upon a traverse.

And note, that in the Entries there's a Travers upon a Travers, i. e. The Demandant does not take issue upon the Non-tenure travers'd in the Tenants Plea, but upon the dying seis'd—And in the Rejoynder, the Tenant joins issue upon the dying seis'd. Rast. ibidem. vid. 14 H. 4. 17.

Barr.

Barr. Q. to say Tenant for life was seis'd in Fee.

1. Quær. If the Writ be brought for an Intrusion after the death of a Tenant for Life, whether the Tenant may plead that he who is named Tenant for Life was seis'd in Fée, issue was taken upon it, but doubted. 43 E. 3. 5. Br. Intrusion 2.

The Ancestour never had any thing. Replication, that he was seis'd.

2. It's a good Plea in Intrusion brought by the Heir after the death of a Tenant for Life upon a Lease made by his Ancestour, That the Ancestour never had any thing in the Land. In this Case the Demandant must reply and shew that he was seis'd and demis'd, and issue shall be upon the seisin. 43 E. 3. 19. Br. Intrusion 3.

3. In-

3. Intruſion upon the death of Tenant for Life upon a Leaſe made by the Demandant, That he, nam'd Tenant for Life was Tenant in Tail of the Gift of the Tenant, and that he died without Iſſue, And he Entred as in his Reverſion abſque, hoc, that he nam'd Tenant for Life had any thing in Leaſe from the Demandant at the time of his death, a good Plea. 24 E. 3. 74. Br. Intr. 11. Tenant noſme ten' pur Vie, had nothing from the Demandant.

Note, the Heir may Enter upon the Intrudor or Abator if he will, and ſo at this day he may bring his Ejection' firm' which is now the Common Action for Recovery of Land where the Entry is lawful. 5 H. 7. 6. Br. Entrie Congeable, 119. Ejectment may be brought at this day.

## CAP. VI.

## Cui in Vita.

1. THE Writ of Cui in Vita lies where the Husband alieneth the Right, Inheritance or Freehold of his Wife by Feoffment or Grant for Life, or in Tail, then the Wife after the death of her Husband may have this Writ; or the Heir of an Eſtate in Fee-ſimple may have his Writ called Sur Cui in Vita, if the Wife die before ſhe brings her Cui in Vita. F. N. B. 481. What.

2. This Writ lieth where the Wife hath an Eſtate for Life or in Tail aliened by the Husband, but in the Caſe of an Eſtate-tail the Heir cannot have a Sur Cui in Vita, but muſt bring his Formedon, F. N. B. ibidem. Where lieth.

3. This Writ is Twofold, Either at Common Law, or by the Statute. At the Common Law, as in Caſe of Alienation by the Husband. F. N. B. ibidem. Co. 2 Inſt. 343. Fleta. lib. 5. c. 34. 36. By the Statute, in Caſe where the Husband loſt the Wifes Land by Default or by Render in a Real Action, in which Caſe the Wife was put to Quotuplex.

her Writ of Right at Common Law, but now by the Stat. of W. 2. c. 3. she may bring her Cui in Vita. Co. 2 Inst. 341. This is to be understood where the Wife was seis'd in Fée-simple, and the Action is brought against the Husband and Wife. Co. 2 Inst. 342, 343.

Recovery per def. vers baron dun' estat. pur Vie.

But in Case of a Tenancy for Life, if the Husband lose by Default in a Præcipe quod reddat, the Wife shall have a Cui in Vita, for the Recovery shall be intended as a Demise by the Husband, otherwise the Wife should be without Remedy. Co. 2 Inst. 343.

Quod ei deforceat upon Recovery by default vers bar.

In Case of an Estate-tail, the Wife shall have a Quod ei deforc' upon the Husband's losing by Default by the Stat. of W. 2. c. 4.

Original.

The Writ is as followeth, viz.——Præcipe A. quod juste, &c. reddat B. quæ fuit Uxor L. unum Mess. &c. qu' clam' esse jus & hæreditatem suam & in qu' idem A. non habet ingressum nisi per prædict' L. quondam virum ipsius B. qu' illud ei dimisit Cui ipsa in Vita sua contradicere non potuit ut dic', &c. Reg. 232. b.

Demise alleg'd, though a recovery by default.

This Form will serve both in Case of an Alienation, and losing by Default, and in Case the Demise be travers'd the Demandant may set forth the Recovery, by default instead of a Demise. Reg. 235. a.

Per, Cui, Post.

This Writ may be brought in the Per, Cui and Post, Reg. 232. a.

The Form where the Wife was seis'd of an Estate-tail, Vid. Reg. 232.

Count variant.

The Count varies in this Action according to the Case. There's no Count for the Wife according to the first Writ before mentioned, either in Co. or Rast. Entries. But I conceive it may be thus.——B. qu' fuit Uxor L. per I. S. Attornatum suum pet' versus A. unum Mess. &c. qu' clam' &c. Et in qu' &c. Et unde eadem B. dicit quod ipsa fuit seisit' de Mess. præd. cum pertinen. in dominico suo ut de feodo tempore pacis, tempore Domini Regis nunc Capiendo inde Exples. ad Valenc. &c. Et in qu. Et inde produc. sectam, &c.

Count

Count per Bar. & Feme'.

Count where the Wife is Tenant in Tail brought by Barton and Feme is thus,——A. & C. Uxor ejus per I. S. Attornatum ſuum pet. verſus T. B. unum Meſſ. &c. in S. qu. clamat ſibi & hæred. de Corpore ejuſdem C. & R. quondam viri ſui ſu. exeunt. ex dimiſſione qu. L. M. inde fecit eidem C. & R. & in qu. idem T. B. non habet ingreſſum niſi per præfat. R. qui ill. ei dimiſit cui ipſa in Vita ſua contradicere non potuit, &c. Et unde dic. quod præd. L. M. fuit ſeiſit. de Tenement. præd. cum pertinen. in dominico ſuo ut de feodo & ſic inde ſeiſit' dedit Meſſ. præd. cum pertinen. præfat. C. & R. & hæred. de Corpore eorundem C. & R. legitime procreat. virtute cujus Doni iidem C. & R. fuer. inde ſeiſit. in dominico ſuo ut de feodo & jure per formam, &c. tempore pacis tempore Domini Regis E. nuper Regis Angliæ Capiend. inde Exples. ad Valenc. &c Et poſtea præd. R. obiit, Et præd. C. ipſum ſupervixit & cepit in virum ipſum A. & in qu. &c. Et inde produc. ſectam, &c. Raſt. Entr. 139. a.

Things to be obſerved in the Count.

Note, here by this Count you may obſerve theſe things. 1. That a Gift in Tail may be alledg'd in the Writ as a demiſe (ex dimiſſione qu. L. M. inde fecit) 2. That in the Count the beginning of the Eſtate-tail muſt be ſet forth. So if the Eſtate-tail, or an Eſtate for Life were limited by way of uſe, the Deed of Uſes muſt be ſet forth in the Count, as you may ſee in Co. Entr. Cui in Vita. Vid. the Count for the Heir in the Per and in the Poſt. Raſt. Entr. 139. a. b.

Proceſs.

The Proceſs is Summons, Grand Cape and Petit Cape.

View, Voucher, &c.

View, Voucher, Receit, Aid, Summons and Severance, lies in this Action; But note once for all, that Summons and Severance lies in all or moſt Real Actions. Vid. ſupra. Raſt. Entr. 140. a. b.

Judgment.

The Judgment is as in other Real Præcipes.

This Action out of uſe per Stat. 32 H. c. 28.

But note that this Writ or Action of Cui in Vita or Sur Cui in Vita, is now of no uſe ſince the Statute of 32 H. 8. c. 28. which ſays, that the Alienation of the Husband by Fine, &c. of the Land of the Wife ſhall be no diſcontinuance to take away the Entry of the Wife or her Heirs.

Pleas in this Action.

Barr. Barr.

Acceptance of Rent by the Wife. If a Leaſe be made or a Feoffment by Baron and Feme, reſerving a Rent, and the Wife accept the Rent after the death of the Husband, this is a good Plea in Barr, otherwiſe if the Wife do not joyn. 26 H. 6. 2. Br. Cui in Vita 2. Thus much ſhall ſuffice for Pleas in this Writ, being out of uſe.

## CAP. VII.

## Cui ante Divortium.

What. This Writ is where the Husband aliens the Wives Lands whereof ſhe was ſeis'd in Fee-ſimple, Tail, or for Life, and after they are Divorc'd, the Wife may have this Writ to recover the Land, as ſhe might have the Cui in Vita after the Husband's death. It's of the ſame nature, and the ſame Proceſs and Procedings as in the Cui in Vita.

Per, Cui, Poſt. This Writ may be brought in the Per, Cui and Poſt. F. N. B. 510.

Sur Cui in Vita by the Heir. Formedon, where. The Heir may have Sur Cui ante Divortium, Except his Mother had an Eſtate-tail, and then he is put to his Formedon. F. N. B. 510.

The Writ in the Per is thus.———

Original. Rex, &c. Præcipe A. quod reddat C. qu' fuit Uxor L. unum Meſſ. &c. quod clam' &c. & in quod, &c. niſi per præd. L. quondam virum ipſius C. qui illud ei dimiſit cui ipſa ante divortium inter eos celebrat' contradicere non potuit, &c. Reg. 233. Vid. there for the Cui & Poſt. Vid.

Vid. le Count and Proceſs antea mutat' mutand' in Cui in Vita. 209, 210. Count, Proceſs

Pleas in this Action.

This Writ and the next following, viz. (non Compos mentis) are now of little uſe, and therefore the Pleadings in them are of no great uſe neither.

In this Writ the Tenant may plead the Divorce repeal'd. Raſt. Entr. Cui ante Divor. Divorce.

In the Dum non fuit Compos mentis, Fuit Compos mentis tempore Feoffamenti, &c. is the general Iſſue. Raſt. Entr. 249. b. A Feoffment pleaded in the Dum non fuit, &c. made by him who was ſuppoſed non Compos, &c. and others, as to the others pet' judic' &c. As to the part of him non Compos &c. tenens dic' quod fuit Compos, &c. Raſt. Entr. 249. b. Pleas in Dum non fuit Compos, &c. fuit Compos, &c.

Note, the Heir after the death of non Compos, &c. may Enter if he pleaſe. Heir may enter

## CAP. VIII.

## Dum non fuit Compos mentis.

1. IS a Writ of Entry for him who has alien'd his Land in Fee-ſimple, Tail, for Life or years, whilſt he was of unſound memory. F. N. B. 504. And may be brought againſt the immediate Alienée, or in the Per, Cui, or Poſt. ibidem. What.

The Writ againſt the immediate Alienée is thus,——

Rex, &c. Præcipe A. quod reddat B. unum Meſſ. &c. qd. idem B. ei dimiſit dum non fuit Compos mentis ſu' ut dic' Et ſi fecerit, &c. Reg. 228. Original.

See

Per, Cui, Poſt. See there in the Per, Cui and Poſt. And for the Heir in the Per, Cui and Poſt.

Quær. Quær. how this agréed with the ancient Marim in Law, That a Man cannot ſtultifie himſelf, as it is ſolemnly reſolv'd in Beverley's Caſe. Co. Lib. 4. 123. But for the Heir it is agréed by all, that he may have this Writ in Caſe of any Alienation of his Anceſtour by matter in pais, but not by matter of Record.

Beverley's Caſe

It ſeems ſtrange that there is ſuch a Writ in the Regiſter, and yet Beverley's Caſe be ſo reſolv'd. And Lit. Sect. 405. acc.

Count, Pleadings, &c. For the Count and Pleadings, Vid. Raſt. Entr. 248. and before 211.

But there is no Count for the Idiot himſelf.

## CAP. IX.

# Entry ad Commun' Legem.

What. 1. A Writ of Entry ad Communem Legem is for him in Reverſion after the death of Tenant in Dower, for Life, or Tenant by the Courteſie, where any of them have aliened the Land in Fée, in Tail, or for any other Life. F. N. B. 518.

Why ſo call'd. 2. It's ſo called, becauſe it was an ancient Writ at Common Law in thoſe Caſes, but in ſome other Caſes it is given by the Statute of W. 2. c. 3. As where any of thoſe Tenants do loſe by Default, or Render in a Real Action. Vid. Co. 2 Inſt. 346. & Reg. 235. whereas before the Statute of W. 2. theſe Tenants were put to a Writ of Right.

3. This

3. This Writ is always after the deaths of the said particular Tenants in Case of Alienation, for of an Alienation of Tenant in Dower, in the life time of the Tenant there is given a Writ of Entry in Casu proviso, by the Statute of Gloceſter, c. 7. 6 E. 1. Where it lies.

4. This Writ is thus,——— Rex, &c. Præcipe A. qd. reddat B. unum Meſſ. &c. quod clam' eſſe jus & hæreditatem ſuam & in quod idem A. non habet ingreſſum niſi per C. qu' fuit Uxor D. qu' ill' ei dimiſit qu' ill' ten' in dot' de dono præd. D. quondam viri ſu' Patris (vel alter' anteceſſor') præd. B. cujus hæres, &c. Reg. 234. Original.

This may be brought in the Per, Cui, or Poſt.

5. After the death of Tenant by the Courteſie, it's thus,—

Rex, &c. Præcipe A. &c. quod clam' &c. & in qu' idem A. non habet ingreſſum niſi per N. qu' ill' ei dimiſit qu' ill' tenuit per legem Angliæ poſt mortem D. quondam Uxoris ſuæ matris præd. B. cujus hæres ipſe eſt ut dic' &c. Reg. 235. Original.

6. He in Reverſion may have this Writ or a Mortdanceſter, by the Stat. of Gloceſter, c. 3. notwithſtanding the Tenant by the Courteſie was laſt Seis'd. Who may have it.

It lies in the Per, Cui, and Poſt. Per, Cui, Poſt.

7. After the death of Tenant for Life it's thus,—— After death of Tenant for life.

In qd' idem A. &c. niſi per L. cui præd. B. vel D. Pater vel al' Anteceſſor præd. B. cujus hæres ipſe eſt illud dimiſit ad vitam ipſius L. ut dic' Et niſi, &c. Reg. ibidem. Original.

It lies in the Per, Cui, and Poſt.

8. The Count in this Action is to be varied according to the Caſe, and is as in other Writs of Entry as to the general Form. I find no Count in the Books of Entries in this Action. Count.

It

Count. It is thus (as I ſuppoſe) in the firſt Writ.——.

Et unde idem B. dic' quod D. Pater ipſius B. fuit ſeiſit' de Meſſ. præd. cum pertinen' in dominico ſuo ut de feodo tempore pacis tempore Domini Regis nunc Capiend' inde Expleſ. ad valenc' &c. Et ſic inde ſeiſit' exiſten' idem D. apud L. duxit in Uxor' præd. C. Et de ipſo D. deſcend' jus iſt' B. qu' nunc pet' ut fil' & hæred. &c. Et in qu' &c. Et inde produc' ſectam, &c.

Proceſs. 9. The Proceſs is as in other Writs of Entry.

Note, that this Writ is intended as a Remedy where the Alienée died ſeis'd, and the Land deſcended to his Heir, for if a Tenant for Life had alienet, and the Alienée were living, it was a forfeiture at Common Law, as it is at this day, and in ſuch Caſe he in Reverſion may Enter. Vid. Co. 2 Inſt. 309.

Forfeiture.

Pleas in this Action.

Vid. Antea. The Pleas in Abatement are as in other Real Actions.

Barr. In Barr. The Tenant may plead (Ne alien' pas) or any other thing that may Barr the Demandants Title.

CAP.

## CAP. X.

# Dum fuit infra ætatem.

1. This Writ of Entry is for him who during his nonage has made a Feoffment, Leaſe for Life, or in tail, after he attains to full Age he may have this Writ; ſo may the Heir upon the Alienation of his Anceſtour within Age. F. N. B. 476, 477. What.

2. Or the Infant may Enter and avoid his own Feoffment while he is under Age, if he pleaſe. ibidem. Infant may Enter.

3. This Writ is not now in uſe ordinarily, becauſe the Entry of the Infant is not taken away, either while he is under Age or after (as I conceive) and an Ejection firm. is now the ordinary Remedy. Vid. Reg. 229. a. Whether now in uſe.

But if the Alienée had died ſeiſed, or had aliened to another, and the Infant had not Entred during his Nonage, the Infant at full Age could not have Entred, but was put to this Writ. Quær. at this day whether the Entry in ſuch Caſe be not taken away, eſpecially if he that is in by Deſcent or Conveyance has had quiet Poſſeſſon for Five years according to the Statute of 32 H. 8. 33. Co. 2. Inſt. 153.

4. The Writ againſt him to whom the Alienation is made, is thus, viz.

Rex, &c. Vic' L. ſalutem, &c. Præcipe B. &c. quod juſte, &c. red'at M. qu' plenæ ætatis eſt ut dicitur du' Meſſ. &c. cum pertinen' in C. qu' idem M. ei dimiſit du' infra ætatem fuit ut dicit, Et niſi fecer', &c. Reg. 228. b. Original.

In the Per and Cui———

In qu' &c. idem N. non habet ingreſſum niſi per L. cui pd. C. ill' dimiſit dum infra ætatem fuit ut dic' &c. Et unde quer. &c. Et niſi fecer', &c. Original in the Per, Cui, &c.

In the Poſt thus,——

Original in the Poſt. In quæ, &c. niſi poſt dimiſſionem qu' præd. C. dum fuit infra ætatem inde fecit W. ut dic' &c. Et niſi, &c.

(Unde quer.) is never in a Writ in the Per, or Per and Cui, but in the Poſt. F. N. B. 502.

5. The Count is as follows,——

Count. A. qu' plenæ ætatis eſt, &c. pet' verſus H. unum Meſſ. &c. cum pertinen' in N. in qu' idem H. non habet ingreſſum niſi poſt dimiſſion' qu' præd. A. dum fuit infra ætatem inde fecit W. &c. Et unde dic' quod ipemet' fuit ſeiſit' in dominico ſuo ut de feodo & jure tempore, &c. Et in qu', &c. Et inde produc' ſectam, &c.

Count as Heir. 6. If the Action be brought as Heir, then the Count is thus,——Viz. In qu' idem A. non habet ingreſſum niſi per B. Patrem ipſius A. cujus hæres ipſe eſt qu' ill' eidem H. dimiſit dum idem B. infra ætatem &c. Et unde dic' qd. præd. B. Pater ipſius A. cujus hæres ipſe eſt fuit inde ſeiſit' in dominico ſuo ut de feodo & jure, &c. Reg. 229. Raſt. Entr. 248. b.

Proceſs. 7. The Proceſs is Summons, Grand Cape, Petit Cape, View, Voucher and Receit lies in this Writ.

Pleas in this Action.

In Abatement as in all other Real Actions.

Barr. In Barr. Fuit plenæ ætatis tempore, &c. Raſt. Entr. 248. b.

CAP.

## CAP. XI.

# Ad Terminum qui præteriit.

1. This Writ of Entry lies where a Man makes a Leaſe for Life or years, and the Leſſée after the Term is ended, or a Stranger Enters into the Land and detains the Poſſeſſion from the Leſſor or his Heir. F. N. B. 501. What.

2. This Writ may be brought in the Per, Per and Cui, or in the Poſt.

3. But note, this Writ is little in uſe, becauſe the Entry of the Leſſor or his Heir is not taken away, for that he may bring an Aſſiſe of Novel deſſeiſin by the Statute of W. 2. c. 25. which is now ſupplied by the Ejection' firm'. Reg. 228. F. N. B. 502. Whether in uſe.

4. While the Leſſée who has alienéd is living, or his Alienée, this Writ does not lie ſince the Statute of W. 2. c. 25. (but an Aſſiſe of Novel deſſeiſin only) which has made both the Feoffor and Feoffée being both Diſſeiſors even at Common Law, Vid. Co. 2 Inſt. 413. Sed Quær. for the Reg. 228. & Co. 2 Inſt. 413. ſeem to differ. In all Caſes of Land, &c. where a Man may have an Aſſiſe, he may have an Ejection' firm'. Note, if both Feoffor and Feoffée be dead, this Writ lies. Co. ibidem. Where it lies not. W. 2. c. 25.

5. The Writ in the Firſt Degrée is thus,———

Rex, &c. Præcipe A. quod juſte, &c. reddat B. unum Meſſ. &c. cum pertinen' in L. qu' idem B. ei dimiſit ad Terminum qui præteriit ut dic' Et niſi fecer' &c. Reg. 227. b. Original 1. gr.

6. In the Second Degrée in the Per and Cui.——

Rex, &c. In qu' idem A. non habet ingreſſum niſi per C. cui præd. B. illud dimiſit ad Terminum qu' &c. Original 2. gr.

7. **In the Poſt thus,**——————

Original 3 gr. Rex, &c. In qu' idem A. non habet ingreſſum niſi poſt dimiſſionem qu' idem B. inde fecit D. ad Terminum qu' &c. Et quod poſt terminum ill' ad præfat' B. reverti debet ut dic' unde quer' quod præd' A. ei deforc' Et niſi fecer' &c.

Count. 8. **The Count is as follows,** ——Et unde dic' quod ipſe fuit ſeiſit' de Meſſ. præd' cum pertinen' in dominico ſuo ut de feodo tempore pacis tempore Domini Regis nunc Capiendo inde Exples' ad valenc' &c. Et ſic ſeiſit' die Anno Regni Domini Regis apud Meſſ. præd' cum pertinen' dimiſit' præfat' B. ad Terminum Annorum tunc prox' ſequen' & plenar' complen' Et qu' &c. Et inde produc' Sectam, &c. Reg. Raſt Entr. 25.

Proceſs. 9. **The Proceſs is in this as other Writs of Entry.**

Pleas in this Action.

Barr. **The Demiſe is traverſable,** viz. non dimiſit ad Term' &c. Raſt. Entr. 25.

CAP.

## CAP. XII.

## Cauſa Matrimonii prælocuti.

1. THis Writ lies where a Woman gives Land to a Man in Fée or for Life to Marry her in convenient time, and he does not, ſhe may have this Writ. F. N. B. 511. Where it lies.

This Writ is obſolete, and therefore I ſhall not inlarge upon it. Vid. the Writ in the Regiſter, in the Per, Cui, and Poſt. 233. Not in uſe.

The Count is not in Raſtall's Entries, but is eaſie to be drawn as other Counts in Writs of Entry, obſerving the Writ. Count.

The Proceſs is Summons, Grand Cape, Petit Cape. Proceſs.

## CAP. XIII.

## Entry in Caſu proviſo.

1. THis Writ is given by the Statute of Gloceſter, c. 7. 6 E. 1. where a Tenant in Dower aliens in Fée, for Life or in Tail, he in Reverſion may have this Writ during the Life of Tenant in Dower. Where it lies. Stat. Gloceſter, 6 E. 1. c. 7.

2. Note, at Common Law he in Reverſion might have Entred for the Forfeiture, but if the Feoffée had died ſeis'd before Entry, then he in Reverſion could not have Entred, nor could have any Action till after the death of Tenant in Dower, The Common Law before Stat. Gloceſter.

Dower, so that the warranty of Tenant in Dower would be a perpetual Barr to him in Reversion if he was Heir to her; to prevent which mischief this Statute was made, for the Writ of Entry Ad Communem Legem lay not during the life of Tenant in Dower. Co. 2 Inst. 309. F. N. B. 512.

Per, Cui, Post. 3. This Writ lies in the Per, Cui, and Post. In the Per thus,——Rex, &c. Vic' salutem Præcipe B. &c. quod reddat

Original. A. unum Mess. &c. qu' clam' &c. Et in quod, &c. nisi per C. qu' fuit Uxor M. qu' ill' ei dimisit qu' ill' tenuit in dotem de dono præd. M. quondam viri sui Patris (vel al' antecessor' præd. A.) cujus hæres ipse est & quod post dimissionem per ipsam C. præfat' B. contra formam Stat. de Gloucester de Communi Consilio, &c. provis' fact' in feodo ad præfat' A. reverti debet per formam ejusdem Stat. ut dic' Et nisi, &c. Reg. 235.

In the Per, Cui and Post, vid. Register, ibidem. & F. N. B. 513.

Count. The Count is in this as other Writs of Entry, mutat' mutand', viz.——Unde dic' quod præd. S. pater vel al' antecessor, &c. fuit seisit' de Mess. præd. cum pertinen' in dominico suo ut de feodo tempore pacis tempore Domini Regis nunc, &c. Capiendo, &c. Et qu' post dimissionem, &c. Et inde produc' Sectam, &c.

No Count in the Book of Entries. Note, there's no Count in the Old or New Book of Entries, but in the Writ of Consimil' Casu which is of the same nature with this Writ, being for him in Reversion during the life of any other Tenant for Life, as this is during the Life of Tenant in Dower.

Process. The Process is Grand Cape, and Petit Cape, View, Voucher, and Receit lies in this Writ.

Useless per Sta. 11 H. 7. c. 20. The Statute of 11 H. 7. c. 20. makes all Alienations by Tenant in Dower void, and gives Entry to him in Reversion, and therefore a Descent can do him in Reversion no harm, though the Alienée do die seis'd, and Consequently this Writ is now useless by this Statute.

CAP.

## CAP. XIV.

## Sine aſſenſu Capituli.

VID. F. N. B. 194. Fr. This Writ is now out of uſe by virtue of the Statute of 13 Eliz. c. 10. which reſtains alienations by ſeveral Bodies Corporate, Uſeleſs per Stat. 13 Eliz. c. 10.

## CAP. XV.

## Entry in Conſimil' Caſu.

1. This Writ is given by the Statute of W. 2. c. 24. which wills, that as often as it ſhall happen in the Chancery that in one Caſe a Writ is found, and in the like Caſe falling wanting the ſame Remedy, the Clerks of the Chancery ſhall agree in making of the Writ. Where lies. W. 2. c. 24.

2. Now the Writ in Caſu proviſo before mentioned, being given by the Statute of Gloceſter in Caſe of an Alienation by a Tenant in Dower, and not in any other Caſe of a Tenant for Life, or by the Courteſie or the like (which were of equal miſchief) there this Writ was fram'd by the Clerks of the Chancery by virtue of the ſaid Statute of W. 2. Vid. Co. Lib. 8. Webb's Caſe. Co. 2 Inſt. 407. Why given and how framed per Stat. W. 2. c. 24.

3. The Writ, Count, and other Proceedings are the ſame with the Writ of Entry in Caſu proviſo, mutatis mutand'. Writ, Count, &c. the ſame with the preceding Writ.

4. The Writ in this, and the Writ next before do ſuppoſe the Tenant for Life hath alienedin Fee, but that is not material, for if it be in Fee, in Tail or for Life, it is a forfeiture of his Eſtate. F. N. B. 515. Suppoſes the Tenant aliened in Fee, not material though for Life, &c.

Quær.

Whether he in Reverſion in ſome Caſe be not forc'd to this Action at this day?

Quær. whether he in Reverſion be not at this day put to this Writ where any other Tenant for Life doth alien (other than Tenant in Dower) by Fine or Feoffment, if the Alienée die and a Deſcent be caſt before Entry of him in Reverſion. It's true, that in Caſe of a Diſſeiſin no Deſcent ſhall take away an Entry, unleſs the Diſſeiſor had peaceable Poſſeſſion for five years next after the diſſeiſin by the Statute of 32 H. 8. 33. but this (I conceive) Extends not to Diſcents where the Anceſtour comes in by Title and Conveyance.

Stat. 32 H. 8. c. 33.

Perſons now uſually Enter preſently.

But Perſons are now uſually quick in their Entries, and Tenants for Life ſeldom now preſume to make ſuch Alienations, and therefore both theſe Writs are now out of uſe, eſpecially the Writ of Entry in Caſu proviſo, and therefore the pleadings are of no Import, neither are there any peculiar to them but what may be pleaded in other Real Actions.

And now we come to Writs poſſeſſory Anceſtrel, as Ayel, Beſayel, Cozenage, &c.

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## CAP. XVI.

# Ayel, Beſayel, Cozenage.

Where they lie.

1. THeſe Writs lie where the Grandfather, Great Grandfather or other Collateral Cozens (other than the Father, Mother Brother, Siſter, Uncle, Aunt, Nephew, or Neece, for of them an Aſſiſe of Mortdanceſter lies) die, being ſeis'd of Lands or Tenements in Fee-ſimple the day of their deaths, the Heir ſhall have theſe Writs againſt him that Abates and Enters upon the Heir. F. N. B. 221. a. b. French.

Stat. Gloceſter, c. 6.

Vid. Stat. Gloceſter, c. 6. & Co. 2 Inſt. 308. How Nephew and Neece may joyn in theſe Actions as well as in Mortdanceſter.

The

The Writ is thus,——

Rex, &c. Vic' L. ſalutem, &c. Præcipe B. quod juſte reddat C. unum Meſſ. cum pertinen' in M. de qu' W. avus (vel proavus, avita vel proavia, vel conſanguineus) præd. C. cujus hæres ipſe eſt fuit ſeiſit' in dominico ſuo ut de feodo die quo obiit ut dic' Et niſi, &c. F. N. B. 221. a. b. French. Co. 2 Inſt. 399. Reg. 226. Original.

The Count is as followeth. viz. ——

Et unde dic' quod præd. W. Avus, &c. fuit ſeiſit' de Meſſ. &c. in dominico ſuo ut de feodo tempore pacis tempore Domini Regis nunc Capiendo inde Exples' ad valenc', &c. Et de ipſo W. avo, &c. deſcend' jus, &c. iſt' C. qu' nunc pet' ut Conſanguineo & hæred' præd. W. videlicet fil' T. fil' præd' W. &c. de quibus, &c. Et inde produc' Sectam, &c. Count.

Or thus,——

Unde dic' quod præd. W. avus fuit ſeiſit' de præd. Meſſ. cum pertinen', &c. Et de tal' Stat. inde obiit ſeiſit', &c. Et de ipſo W. deſcend' feod', &c. cuid' N. ut fil' & hæred', &c. Et de ipſo N. deſcend' feod' iſt' C. qu' nunc pet', &c. ut fil' & hæred', &c. Et de quibus, &c. Et inde produc' Sectam, &c, Raſt. Entr. 28. Count where the Anceſtour died ſeis'd.

For the Count in Cozenage, Vid. Raſt. Entr. 28. b. 29. a.

5. By the Stat. of W. 2. c. 20. The Tenant may alledge in theſe Writs that the Demandant is not next Heir to the Anceſtour who died ſeis'd, and pray the ſame may be inquired by the Inqueſt as in Mortdanceſter, and if this be found againſt the Demandant, it is peremptory. Co. 2 Inſt. 399. & 400. Stat. W. 2. 20 What may be inquired by this Statute.

6. The Parol ſhall not demurr for the Nonage of the Demandant by the Statute of Gloceſter, c. 2. Co. 2 Inſt. 290. Parol ſhall not demurr.

7. The Proceſs is Grand Cape, and Petit Cape. Proceſs.

8. View, Receit, Voucher, lies in theſe Writs. Raſt. Entr. 28, 29.

Court of Cheſter. The antient Juriſdiction of the Court before the Chief Juſtice of Cheſter further appears by the Records following, Viz.

Ad Com' die Martis prox' poſt Feſtum St. Barnabæ Apoli' Anno xxvi E. 1.

Ceſter. ff. A Writ of Ayel by Urian' fil' Johannis de Sancto Petro vers' Johan' fil' Regnald' de Gray pro Maner' de Anderton ac un' caruc' Terr' in Faddelgh.

The Tenant pleads he claims nothing but as Guardian ration' minor' ætat' præd. Urian' ex conceſſione Domini Regis &c. quia dic' quod Maner' de Anderton tenetur de Domino Rege per ſervitium quint' partis feod' un' mil'.

Urian ſays that the ſaid Manor is held de Domino Rege per ſervitium un' libr' piperis per An' pro omnibus ſervitiis, & non, &c. Et quod caruca præd. tenetur de Roberto de Praiers per ſervitium xii s. per An', &c. Et non de Domino Rege, &c.

The Recognitors find the Tenure for the ſaid Urian', and Judgment is entred for the Demandant.

Ad eund' Com' xxvi. E. 1.

Ceſtr. ff. There's another Writ of Ayel between the ſame parties, as Heir to Idonea fil' David de malo paſſu avia præd. Urian' pro Maner' de Pecforton cum pertinen' in un' molend' medietat' un' molendin' cum pertinen' in Beſtan quart' part' Maner' de Fulwico un' ſalin' & medietat' un' ſalin' in Wico malbano.

The Tenant pleads the ſame Plea as in the former.

The Demandant replies, That the Manor of Pecforton is held of one Cudugon de Hynton or Hilton per ſervitium un' par' Cirothecarum per An' pro omni ſervitio Et non, &c. Et quod un' ſalina & medietas un' ſalin' tenetur de Roberto de Praiers per ſervitium un' denar' in Soccagio, Et quod

quod molendin' & medietat' molendin' tenentur de hæred' Rici' de Bunbur', Rogero de Walaſton & Margaret' Uxor' ejus in Soccag. & non, &c. Et pd. quarta pars Maner' de Fulwico tenetur de Richardo de Sutton & Iſabella Uxor' ejus per ſervitium un' par' Cyrothecarum pro An' per omni ſervitio, Et non, &c.

**The Recognitors find the Tenure for the Demandant, and Judgment for the Demandant.** Mia' Condonatur.

Pleas in theſe *Actions*.

1. Abatement, vid. antea. **Entry pending the Writ a good Plea in Abatement.** Raſt. Entr. 30. a. Abatement.

2ly. Barr. **The common Plea in Barr is that the Anceſtour was not ſeiz'd the day of his death, or that he died not ſeis'd.** Raſt. Entr. 28. b. 2. & 29. a. 5, 6. **Yet it's ſaid, that the dying ſeis'd is not traverſable, but the dying ſeis'd the day of his death.** 40 E. 3. 38. 13 E. 3. Br. Cozenage, 10. Barr.

3ly. **Baſtardy in the Demandant is pleadable, but this is common to other Real Actions. The Trial of Baſtardy,** Raſt. Entr. 29. b. 7. Cur. Com. Ceſtr' 35 E. 1. **Writ to the Archbiſhop of Litchfield and Coventry to Certifie Baſtardy,** Inter Hugonem Pulaford & Richardum Longnour, & Agnettam Uxor' ejus in bre' de Cozenage **of Lands in** Pulford. Baſtardy.

4ly. **A Releaſe with warranty is no Plea without traverſing the dying ſeis'd,** (but Quær. **whether the dying ſeis'd ought not to be travers'd, or only the Seiſin die quo obiit) for he might be diſſeis'd the day of his death, and at another part of the day make the Releaſe, and then the Releaſe and warranty may be a Barr.** Vid. 40 E. 3. f. 19. 11. Br. Cozenage. 10. Releaſe with warranty.

5ly. **The Tenant may plead that the Anceſtour had two Sons, and that the Demandant is of the younger Brother, and the Tenant of the Elder, and ſo in all theſe Writs he may falſifie the Deſcent by the Pedigree.** 11 H. 4. 56. Br. Coz. 2. 4. Demandant younger Son.

May be brought at this day. Eject' Firm'

These Writs may be brought at this day, but the Entry not being taken away, the Ejection' Firm' is now commonly used to gain the Possession, and these Actions are now out of use.

Having now gone through with those Writs called Real Præcipe quod reddats, we come in the next place to those Real Writs which though they demand Lands in Demesne, yet contain no express Demand in the Writ, i. e. no number of Messuages or Acres, &c. And these are Nuper obiit, Assise of Mortdancester, and Assise of Novel disseisin.

In the first and last, there are no certain numbers named in the Writ, and in the Mortdancester the Process is different; but where there's no certainty in the Writ, there must be a Plaint or Demand wherein the certainty may appear, as a Plaint in Assise thus, viz. Et unde idem B. per Attornatum suum quer' quod disseisiver' eum de uno Mess. &c. In the Nuper obiit, A demand thus, ———A. B. & L. C. per Attornatum suum pet' versus M. un' Mess.——&c. Rast. Entr. 73. & 440. b.

Plaint in Assise Certainty in plaint or demand.

## CAP. XVII.

# Nuper obiit.

Where it lies.

1. This Writ is where the Grandfather, Father, &c. or any other Ancestour of the Demandant dies seiz'd of the Land in Fœsimple, and one of the Heirs Enters, and holds the other out, as in Case of Coparceners, or Heirs in Gavelkind, if one Enter and outs the other, the rest, he or they who are ousted, may have this Writ against the other. F. N. B. 490.

2. The

2. The Writ is thus,———————

Rex, &c. Vic' ſalutem, &c. Si A. B. fecer' te ſecurum de clamore ſuo proſequend' tunc ſum', &c. C. quod ſit coram Juſticiar' noſtris, &c. (tal' die) oſtenſur' quare deforc' præfat' A. & B. rationabil' partem ſu' qu' eis contingit de hæreditate qu' fuit W. in N. Patris vel al' anteceſſor' prædict' A. B. & C. cujus hæredes ips' ſunt & qu' nuper obiit dic', Et habeas ibi ſum' & hoc bre' T. &c. Reg. 226. Original.

3. This Writ and the Writ of Right De rationabil parte, are of Affinity, for both are for the Recovery of Land by one Coparcener againſt another, and lie in privity. The difference is, that the Writ of Right may be brought if the Anceſtour was ſeis'd at any time, but in the Nuper Obiit, the Anceſtour muſt die ſeis'd, Reg. 226. vid. antea. 134. Difference between this Writ and the Writ de rationabil' parte.

4. The Count,———Et unde dic' quod prædict' W. Pater, Mater vel Avunculus, &c. fuit ſeiſit' de prædict' Tenement' integr' cum pertinen' unde, &c. in dominico ſuo ut de feodo & jure tempore pacis tempore, &c. Capiend' inde Exples' ad valenc', &c. Et inde nuper obiit ſeiſit', &c. Et de ipſo W. deſcend' jus, &c. iſt' A. & B. qu' nunc pet' ſimul, &c. Et præfat' C. ut filiabus & hæredibus, &c. qu' quidem C. prædict' Tenement' integra modo tenet & rationabil' partem inde eiſdem A. & B. deforc. &c. Et inde produc. ſectam, &c. Raſt. Entr. 440. Note, there's a Demand to be made of the certainty of the Meſſuages, &c. before this Count. Raſt. ibidem. Count.

5. View, nor Voucher lies in this Writ. Quær. of View for I conceive it lies by Stat. of 12 E. 2. View, Voucher, &c.

6. The Proceſs is Grand Cape and Petit Cape. Proceſs.

Pleas in this Action.

1. Non tenure, or ſeveral tenancy are no Pleas in this Writ, becauſe of the privity of Blood; but if the Tenant claim by Purchaſe or diſclaim in the Blood, then he may plead theſe Pleas in Abatement. F. N. B. 492. 197. Fr. b. 7 H. 6. 8. If the Tenant diſclaim, the Demandant may have Non tenure &c. no Plea.

a

Barr. a Mortdanceſter for the whole, Co. 1. Inſt. 2ly. In Barr may be pleaded a Feoffment, and traverſe dying ſeis'd. Raſt. Entr. 441.

Now not in uſe. This Action is out of Uſe (as others) where the Entry is not taken away, and the Coparcener ouſted, might have an Aſſiſe (as I conceive) againſt the other at Common Law. Vid. Co. 1 Inſt. 167. b.

What judgmt. in this Action. Vid. Co. 1 Inſt. 167. The judgment ſhall be to have her Part, and not in ſeveralty; though ſome Books ſay in Severalty.

## CAP. XVIII.

## Aſſiſe of Mortdanceſter.

Where it lies. 1. THis Writ lieth where the Father, Mother, Brother, Siſter, Uncle, Aunt, Nephew or Neece, die ſeis'd, or ſeis'd the day of his death of Lands, Rents or Hereditatments in Fée-ſimple, and a Stranger Abate after their death, the Heir ſhall have this Writ. F. N. B. 195. Fr.

2ly. The Writ is thus,———————

Original. Rex, &c. Si A. fecer. te ſecur. &c. tunc ſum. &c. duodec. liberos, &c. de vicineto de W. quod ſint coram dilectis & fidelibus noſtris R. C. & I. H. & hiis, &c. uſque parat. Sacramento ibi recognoſcere ſi B. Pater prædict' A. fuit ſeiſit. &c. de uno Meſſ. &c. cum pertinen. in W. die qu. obiit. Et ſi obiit, &c. Et ſi idem A. propinquior ſit hæres &c. Et inter. prædict. Meſſ. videant, &c. Et ſum. &c. L. de N. qu. prædict. Meſſ. &c. tenet quod tunc ſit ibi ad audiend. ill. recognitionem. Et habeas ibi, &c. Teſte, &c. Reg. 223. b.

This

This Writ is when the Aſſiſe is returnable before ſpecial Commiſſioners, but may be returnable before Juſtices of Aſſiſe or Juſtices at Weſtminſter, F. N. B. ibidem. Special Commiſſioners.

The Commiſſion for ſpecial Commiſſioners, vid. Reg. 223.

3ly. There are three Points in this Writ to be inquired of by the Jury. 1. Si A. Pater vel Mater, &c. fuit ſeiſit. in dominico ſuo ut de feodo die quo obiit. 2. Si obiit infra tempus de limitatione ut infra 50 ans, &c. 3. Si petens ſit propinquior hæres? 3 Points to be inquired.

4ly. But theſe Points are not to be inquired of if the Tenant pleads in Barr of the Aſſiſe, i. e. ſome other matter, as a Releaſe, a Warranty, &c. out of the three Points of the Aſſiſe, for then upon iſſue joyned, the trial is peremptory, and the Jury ſhall not inquire of the three Points, and ſuch Pleas always begin Aſſiſa non, &c. Co. 2 Inſt. 399. Where the 3 Points are not to be inquired.

5ly. But if the Tenant make Default, yet the three Points ſhall be inquired, and unleſs they be found for the Demandant he ſhall not Recover. Co. ibidem. Where to be inquired in caſe of Default.

6ly. If the Tenant Appear, and ſay he is ready to hear the Recognitſance of the Aſſiſe of one of the Points in the Points in the Writ, or traverſe one of the Points in the Writ, or plead in Abatement, or Vouch, and the Demandant Counter-plead the Voucher, and theſe Pleas be tried and adjudged for the Demandant, yet the Court ex Officio ought to inquire of all the Points in the Writ. Co. ibid. Vid. Dyer 310. Finches Law. 93. 2 E. 3. 47. b. 9 E. 3. 349. 10 E. 3. 393. 9 Aſſiſe 17. & 40 E. 3. 48. 39 Aſſiſe 13. 8 Aſſiſe 17. Where to be inquired in other Caſes.

7ly. This Writ lies, though the Anceſtour was in by diſſeiſin. Aſſ. pl. 3. Lies though the Demandant's Anceſtour was a diſſeiſor.

8ly. In this Action, a Certificate, Writs of Aſſociation & Si non omnes, &c. may be had as well as in Aſſiſe of Novel diſſeiſin, for which ſee more in Aſſiſe de Novel diſſeiſin. f. F. N. B. 196. Fr. Certificate, &c. Si non omnes, &c.

9ly. The

Proceſs. 9. The Proceſs is Summons and Reſummons, and upon Default at the Return of the Reſummons, Capiatur Aſſiſa, the Inqueſt ſhall inquire of the three Points. F. N. B. ib. Raſt. Entr. 435. b.

Count muſt ſhew how Heir. 10. In the Count in this Writ the Demandant muſt ſhew how he is Heir, i. e. how Couzen by the Pedigrée. 2 Aſſ. pl. 15.

Eſſoin. W. 1. c. 42. W. 2. c. 28. 11. Neither Tenant or Demandant ſhall be Eſſoin'd in this Writ after Appearance, and therefore they muſt Eſſoin the firſt day. Stat. W. 1. c. 42 W. 2. c. 28. Co. 2 Inſt. 248.

Whether now in uſe ſince Stat. H. 8. of Wills. 12. Quær. whether ſince the Statute of H. 8. whereby Lands are deviſable by Will, this Action be altogether uſeleſs, becauſe it did not lie for Lands deviſable by Will before the Statute. F. N. B. ibidem. vid. Leon. 1. P. 267. it ſeems it does lie ſtill.

## Pleas in this Action.

Abatement. 1. Abatement, That another or the Demandant himſelf was laſt ſeized, is a good Plea in Abatement. 5 Aſſ. pl. 1. Br. Mortd. 16. Br. Mortd. 27.

Baſtardy. 2. Barr, Baſtardy may be pleaded in Barr though it be a poſſeſſory Action. 1 Aſſ. pl. 15. Br. Mortd. 13.

Nontenure and over, &c. He may plead Nontenure, and over to the Aſſe. 2 Aſſ. pl. 10. 10.

Leaſe for years. 4. A Leaſe for years may be pleaded in Barr, 36 Aſſ. pl. 6.

Feoffment. Common Recovery. Fine. 5. So of a Feoffment with a traverſe of the Seiſin. But if a Fine or Recovery be pleaded, the Seiſin needs not be traverſed, becauſe it ſhall never be intended that the Anceſtour was ſeis'd againſt matter of Record. 6 E. 4. 11. Br. 52. Mortd.

*Ad Com' die Martis prox' poſt Feſtum Sancti Barnab' Apoli' Anno E. I. xxvi.*

*Ceſtr. ff.* Aſſiſa Mortdanceſter per Urian' de Sanct' Petro verſ. Johannem fil' Reginald' de Gray de medietate Maner' de Bonbur' quarta parte Maner' de Beſton & quarta parte Maner' de Spurſtow.

The Tenant pleads he claims nothing but as Guardian, Ex dimiſſione Domini Regis de qu' Tenement' tenentur per ſervitium Militar'.

The Plaintiff replies that the moity of the Manor of Bonbury and the fourth part of the Manor of Beſton are held of Edwin the Son of Philip Burnell per ſervitium un' Sagittæ per An' pro omnibus ſervitiis, and the fourth part of the Manor of Spurſtow is held of one Hona ap Eignon' & Alic' Uxor' ejus per ſervitium un' Denar' per An' pro omnibus, &c. Et non de Domino Rege per aliqu' ſervitium Militar'.

The Jury found the Land as the Plaintiff alledg'd. Judgment for the Plaintiff.

Ad eund Com'.

*Ceſtr. ff.* Another per Johannem Cherlton upon the death of Thom' of Cherlton his Father, of one Meſſ. octo Acr' Terr' duab' Acr' boſci & un' Acr' Mor' cum pertinen' in Weſton juxta Bertomlegh, againſt Simon of Cherlton and Emma his Mother.

The Tenant pleads non ſeiſit' die, c&. Found for the Plaintiff, Judgment for him.

## CAP. XIX.

# Aſſiſe of Novel diſſeiſin.

Where lies. 1. AN Aſſiſe of Novel diſſeiſin lies where a Man is Tenant in Fée-ſimple, Tail or for Life, is diſſeiſed and ouſted of his Poſſeſſion, he may recover his Poſſeſſion by this Action. F. N. B. 437.

Why ſo call'd. 2. It's called an Aſſiſe from the French word Aſſis, i. e. aſſeſſum locatum, either becauſe they ſettle the Poſſeſſion, or becauſe they were anciently Executed at a certain time and place. Vid. Blunt's Diction. Aſſiſe of Utrum. And they were called Aſſiſes of Novel diſſeiſin, i. e. of a late or new diſſeiſin done ſince the laſt Eyre, for if it were done before, the Action was gone, and every Eyre was from Seven years to Seven years. Co. 1 Inſt. 153. b. ¶.

Jury appears the firſt day. 3. In the Procéedings in this Action, the Original Commands a Jury to appear the Firſt day, who are called (Recognitors of the Aſſiſe) it may be returnable before the Judges of the Common Pleas, or King's Bench, if the King's Bench be in the County where the Lands lie, or otherwiſe in the Common Pleas. F. N. B. 437. or they may be returnable before Juſtices in Eyre, or Juſtices of Aſſiſe by the Stat. of W. 2. c. 13. without any Patent.

Special Commiſſioners. 4. There's a way of Procéeding before ſpecial Commiſſioners which is called a Special Aſſiſe, and in that Caſe there muſt be a ſpecial Patent directed to the Juſtices. F. N. B. 439. And in this Special Aſſiſe there may be a Writ of Aſſociation of Aſſiſe in nature of a Patent, and a Writ of Si non omnes, &c. ſued forth by the Plaintiff if he pleaſe. F. N. B. 462.

Original. 5. The Original Writ is thus,———Rex, &c. Queſtus eſt nobis, A. quod B. injuſte & ſine judicio diſſeiſivit eum de libero Tenemento ſuo in E. infra triginț. Annos jam ultime elaps', Et ideò tibi præcipimus quod ſi præd

A.

A. fecer' te ſecur' de clamore ſu' proſequend' tunc facias Tenenement' illud reſeiſiri de Catallis qu' in ipſo capt' fuer' & ipſum Tenementum cum Catallis eſſe in pace uſque ad primam Aſſiſam cum Juſtic' noſtri in partes ill' venerint, Et interim fac' xii. liberos & legales homines de Vicinet' ill' videre Tenement' ill' & nomina eorum imbreviar', Et Summon' eos per bon' Summonit' quod ſint coram præfat' Juſtic' ad præfat' Aſſiſam parat' inde facere recognitionem. Et pon' per vad' & ſalvos pleg' præd. B. vel Ballivum ſuum ſi ipſe invent. non fuer. quod tunc ſit ibi ad audiend. ill. recognitionem. Et habeas ibi Sum. nomina plegiorum & hoc bre. Teſte, &c. Reg. 196.

6. This Writ is made returnable before the Juſtices of Aſſiſe. If it be returnable before the King in Banc' ſuo or Juſtices of C. B. then the Writ in that is to be altered quod vid. Reg. ibidem.

7. From the frame of this Writ there are theſe Four things to be obſerved. 1. That the Sheriff is to take Security of the Plaintiff to proſecute, or he may give Security in Chancery. 2ly. Formerly the Sheriff was to reſeiſe the Land and all the Cattle upon it, and keep all in his hands to be anſwerable to the Party that ſhould recover, and not ſuffer the Diſſeiſor to alienate the Land, and this was for the preſervation of the Peace by virtue of theſe words in the Writ, Et Tenement. ill. reſeiſiri de Catallis qu. in ipſo, &c. but now it is otherwiſe, for the Plaintiff ſhall recover Damages by the Verdict of the Aſſiſe. 3ly. That the Jurors, the Recognitors of the Aſſiſe ſhould View the Land, or other thing whereof the diſſeiſin is complained, and this muſt be done by Seven at the leaſt of the Jury, per Fleta. 4ly. That the Jury is to appear the firſt day. 5ly. That the Proceſs againſt the Jury is Summons, and againſt the Party and his Bayliff an Attachment by his goods or Lands, and if he do not appear, the Aſſiſe ſhall be taken. Vid. Fleta. Lib. 4. c. 5. 222. & Cap. 7. 4 Things obſervable from the Writ.

8. It lies of any thing that a Præcipe quod reddat lies at Common Law. But by the Stat. of 32 H. 8. c. 7. it lies of a Parſonage, Vicarage, Tithes, &c. and by W. 2. c. 25. of Profits apprender, as of Eſtovers, de nucibus, glandibus, &c. in alieno Solo. vid Co. 2 Inſt. 412. It lies of Offices. Of what it lies.

9. The Plaint in Aſſiſe is as a Count in other Real Actions, for there's no Count beſides, and is as followeth, viz.———

Plaint. Aſſiſa ven. recognitur. ſi A. injuſte, &c. diſſeiſivit B. de libero Tenemento ſuo in C. infra trigint. Annos jam ultime elaps. &c. Et unde idem B. in propria perſona ſua quer. quod A. diſſeiſivit eum de dict. Meſſ. cent. Acr. Ter. &c. cum pertinen. in D. &c.

Note, this limitation within 30 years is by virtue of the Statute of 32 H. 8. c. 2.

Special things obſervable in this Action. 10. In this Action, there are ſome ſpecial things worthy to be conſidered. 1. What is meant by taking the Aſſiſe. 2ly. What it is to take the Aſſiſe at large. 3ly. What it is, and when a Man may ſay Ven. Aſſiſa ſuper titulum. 4ly. When the Inquiry ſhall be in modum Aſſiſæ. 5ly. When in modum jurat. or Qualiter Aſſiſa vertitur in jurat. as Fleta expreſſeth it.

1. Taking of the Aſſiſe, what it means. 1. As to the firſt, the taking of the Aſſiſe is the ſwearing of the Recognitors to inquire of the Points of the Aſſiſe, i. e. of the Seiſin and Diſſeiſin, and in ſuch Caſe the Recognitors are ſworn to that effect. But if any other matter be pleaded in abatement or in barr of the Aſſiſe, as Villenage in the Plaintiff, Releaſe, Agreement, Warranty, &c. and are at Iſſue out of the Points of Aſſiſe, &c. i. e. upon ſome other Collateral matter, then the Recognitors are ſworen only as another Common Jury, i. e. to trie the Iſſue, &c. And therefore the Tenant always begins his Plea in barr Aſſiſa non, &c. Fleta Lib. 4. c. 9. P. 236. & c. 11. P. 238. Co. 2 Inſt. 399.

2. Taking the Aſſiſe at large, what. 2. To take the Aſſiſe at large is to take a ſpecial Verdict of the Recognitors of the Aſſiſe, finding not only the Seiſin but the ſpecial manner of the Entry, and ſo leaving it to the judgment of the Court whether there be any diſſeiſin or not. Litt. Sect. 366. but this is common with other Actions. But to take Aſſiſe at large, peculiar to an Aſſiſe is, 1. where the Recognitors are bound to find and inquire after other matters beſides the ſeiſin and diſſeiſin, as where an Infant

Infant brings an Aſſiſe, and the Feoffment of his Anceſtour is pleaded againſt him, the Aſſiſe then ſhall be taken at large, i. e. to inquire not only of the Points of the Aſſiſe, but whether the Anceſtour were of age, of good memory, out of Priſon when he made the Deed pleaded. 26 Aſſ. 5. Kitchin f. 66. 2ly. Another ſenſe of taking the Aſſiſe at large is when the Recognitors ſhall only inquire of the Seiſin and Diſſeiſin, and Damages, and not of the Plaintiff's Title, as where the Tenant makes Default. Pl. Com. 415. 22 Aſſ. 11. 36 Aſſ. 29.

3. As to the Third, Ven. le Aſſiſe ſur le Title, &c. this is a Plea for the Tenant when the Plaintiff hath made a Title at large, without anſwering to the Barr pleaded before by the Tenant as in ſome Caſes he may, then the Tenant may pray that the Aſſiſe may be taken upon the Title, i. e. That the Recognitors may inquire of all matters and circumſtances concerning the Title, but if the Plaintiff traverſe the Barr, and they are at Iſſue, nothing can be inquired but the Barr which is traverſed, and not the Title to be inquired after, for the Title in ſuch Caſe is but to induce the traverſe of the Barr, 5 H. 7. 29. b. Vid. there where the Tenant may plead Ven. Aſſiſa ſuper titulum, and where not, 30, 31, 32, 33. & 21 E. 4. 31. For Example, if the Tenant plead that his Father was ſeiſed and died ſeiſed, and he Entred and gives Colour to the Plaintiff, if the Plaintiff Reply that the Father of the Tenant Infeoff'd him, and traverſe the dying ſeiſed, upon which they are at Iſſue, the dying ſeiſed ſhall only be inquired and not the Plaintiff's Title i. e. the Feoffment; but if the Plaintiff make a Title at large and ſay, That after the Deſcent his Father Entred by a Stranger and died ſeiſed, and he Entred, then the Tenant may plead Ven. Aſſiſa, &c. ibidem. So that in ſhort, when the Plaintiff does not traverſe, but confeſs and avoid the Barr by making a Title to himſelf, the Tenant may ſay, Ven. aſſiſa ſuper titulum, &c.

Ven' l' Aſſiſe ſur le Title, what.

Where ven' l' Aſſiſe ſur, &c.

4. As to the Fourth, when Aſſiſa vertitur in Jurat. the Aſſiſe is ſaid to be turned into a Jury when they are to inquire of matters put in Iſſue out of the Point of the Aſſiſe, i. e. out of the Point of ſeiſin and diſſeiſin, which Points muſt firſt be determined before the Aſſiſe can be taken as to the ſeiſin and diſſeiſin, as if the Tenant plead

When Aſſiſa vertitur in Jurat.

in Abatement to the Writ, as Villenage, &c. or other matters triable by a Jury, and Iſſue is taken, or matters in Barr, as a Releaſe, Agreement, &c. Vid. Fleta Lib. 4. c. 10. And the Aſſiſe is ſaid to paſs in modum juratæ: So if a Foreign matter be pleaded in a Foreign County, that muſt be tried by a Jury before the Aſſiſe can be taken, and in ſuch Caſe the Aſſiſe is adjourned and the Record ſent to the Common Pleas for the trial of the Foreign Plea, and this called Aſſiſa extra Aſſiſam, or in modum juratæ. Bract. Lib. 4. P. 1. c. 34.

Obſervable things in pleading in this Action.
2. Colour.
5. Abatement, and over in Barr.
3. Title at large.
4. Ven Aſſiſe, &c.
5. Abridgment of the Plaint.

5. There are ſeveral things ſpecially obſervable in pleading in this Action. 1. In Pleading a Title in Bar, Colour muſt be given by the Plaintiff, 21 E. 4. 82. 21 E. 4. 5. Dr. & St. c. 53. 158. Co. Lib. 10. 90. a. Leyfields Caſe. 2ly. The Tenant may plead in Abatement and over in Barr, or take the general Iſſue Nul tort, Nul diſſeiſin, 12 E. 2. Jur. Utrum 12. 40 E. 3. 29. Finch Ley 385. 3ly. The Plaintiff may Traverſe or Confeſs and avoid the Barr, or in moſt Caſes (where the Tenant pleads in Barr) may in his Replication make a Title at large without anſwering to the Barr, vid. antea 5 H. 7. 29, 30, 31. &c. 4ly. Where the Plaintiff makes a Title at large, the Tenant may in his Rejoynder ſay, Ven' Aſſiſa ſuper titul', &c. and not be forced to maintain his Barr. 5 H. 7. ibidem, and 15 H. 7. 13. 5ly. Before Verdict, the Count or Plaint may be abridged as if the Plaint be of Land or Rent, he may abridge it for the Rent. So of two Manors he may abridge it for one, 14 Aſſ. 9. 4 E. 4. 33.

No Eſſoin, Voucher, Receit lies.

6. No Eſſoin, Voucher or Receit lies in this Action, unleſs the Vouchée be party to the Writ and appear preſently and enter into the Warranty. Co. 2 Inſt. 249. & 411.

Plea in Abatement firſt to be tried.

7. Where the Tenant pleads in Abatement and over to the Aſſiſe, the Plea in Abatement muſt be firſt tried, but never no Iſſue taken upon it or anſwered. 7 E. 6. Pl. 91. Finch's Law. 416.

Where Title cannot be made at large.

8. If the Tenant plead a Recovery, Fine, grant of the Reverſion and Attornment in another County in Barr, the Plaintiff cannot make a Title at large, but muſt anſwer the Barr, and if the Plaintiff make a Title by a Fine, Recovery,

very, The Tenant cannot plead Ven' Assisa super titul', &c. because these matters are not triable by the Assise. 5 H. 7. 29.

9. If an Infant bring an Assise, if a matter in Abatement be pleaded against him, or the Deed of his Ancestour in Barr, not only the Seisin and Disseisin, and the Point in Issue shall be inquired, but all other Circumstances, i. e. whether the Ancestour was of Age, out of Prison, &c. which is taking the Assise at large as before, f. 214. Otherwise in a Writ of Entry sur disseisin, or other Præcipe qd Reddats, for there the Point in Issue and no other shall be tried. 11 Ass. 6. 48 E. 3. 33. 9 E. 4. 34. So if any matter of Record be pleaded against the Infant in Assise, that must be answered, and the Jury shall not inquire of the Circumstances. 48 E. 3. 33. Where in case of an Infant the Assise shall be taken at large. Vid. Kel. 111. a.

10. If the Infant plead to the Assise at large, i. e. nul tort nul disseisin, and a Title be pleaded against him, all the Circumstances shall be inquired, otherwise if he plead in Barr. 28 Ass. 21. Infant plead nul tort, &c.

11. The Jury ex Officio ought to enquire of the Force in Assise, but if they do not, it's no Error. Co. 2 Inst. 236. Force to be inquired ex Officio.

These matters are more fully spoken of in the Supplemental Tract, which I have added to this Treatise at the end of it, and therefore I shall only say something of a Certificate of Assise and set down some Entries of Records in this Action. Supplemental Tract.

Certificate of Assise is a Writ for the Party griev'd by a Verdict or Judgment given against him in an Assise when he had something to plead, as a Record or Release, and it was not or could not be pleaded by the Bailiff of the Tenant in his absence, or in case the Assise was taken by default, by this Writ the Tenant shall have the Deed tried, and Record brought in before the Justices, and the former Jury shall be summoned to appear before them at a certain day and place for a further examination and trial of the matter. Vid. F. N. B. 447. Co. 2 Inst. 414. Certificate of Assise.

There

Sorts of Certificates of Assise.

There are Two sorts of Certificates of Assise, One at Common Law, and this was after Verdict or before, and after Judgment when the Verdict was not well examined by the Justices, the Justices ex Officio might examine it, and in that Case the same Recognitors must be summoned, and if any of them died, the Certificate at Common Law had fail'd, Co. 2 Inst. 415. The other by the Stat. of W. 2. c. 25. That is after Judgment when the Baily had appear'd, and the Assise had found against him, whereas the Tenant himself had a Record to plead, or a Release which the Baily could not plead though he had offered to plead the Record, but had not the Release, in such Case the Tenant shall have a Writ of Certificate of Assise returnable before the same, or other Justices, whereby the Recognitors of the former Assise and the Plaintiff shall be summon'd at a certain day and place, &c. And this extends to all, 1. Novel disseisin. 2ly. Juris Utrum, 3ly. Darreine presentmt. 4ly. Mort-dancester. Co. 2 Inst. 415. The Certificate must be sued and judged where the Assise was sued. 12 H. 4. 20. 26 Ass. 5. Co. 2 Inst. 416.

W. 2. c. 25.

The Writ of Certificate at Common Law is thus,——

Writ of Certificate.

Rex, &c. Vic' salutem Quia super quibusdam articul' contingentib' Assisam nove disseisine qu' inter A. & B. sum' fuit & capt' coram dilectis & fidelibus nostris H. & R. apud N. per br' nostrum de Tenement' in I. quæd' subsunt dubitationes sicut ex querela ipsius A. accepimus Constituimus præfat' H. & R. vel præfat' H. & dilectum & fidelem nostrum L. vel sic, dilectos & fideles nostros una cum iis qu' sibi associavimus ad Certificationes inde capiendas. Et ideo tibi præcipimus quod ad certam diem & locum qu' iidem N. & R. tibi Scire fac' jurator' ill' Assise coram eis Venire fac' ad Certificand' eos super articul' prædict' & sum' per bon' summon' prædict' A. & B. quod tunc sint ibi ad audiend' ill' Certificationem, Et habeas ibi Sum' nomina jurat' & hoc bre' T. &c. Reg. 200. a. Vid. ibidem, the Writ upon the Stat. Vid. plus in the Supplement.

*Aſſiſes in Com'* Ceſtr.

Ad Com' proxim' poſt Feſtum St. Lucæ Evang' Anno Regni R. E. 1. xxvj.

Ceſtr. *ff.* **An Aſſiſe** per Johannem del Holt de libero Tenemento ſuo in Hunſterton, i. e. de un' Meſſ' du' Toft' vigint' acr' Terr' xx. acr' boſci octo acr' vaſti & ſexta parte un' molendin' in eadem Vill. vers' Johannem fil' Willielmi Friend & Ricu' fratrem ejus.

**The one pleads** Non-tenure & nul tort, **the other.** John, **pleads Tenancy in Common, and over in Barr a Diſcent, and the Plaintiff replies at large, That he was in quiet Poſſeſſion for Four years till diſſeis'd by the Tenant, and Judgment for the Plaintiff upon the Verdict of the Recognitors.**

Ad Com' die Martis proxim' poſt Feſtum St. Barnabe Apoli' xxvj. E. 1.

Ceſtr. *ff.* Aſſiſa per Adam de Burcheles vers' Alanu' de Aſthull, Johannem fratrem ejus, Jordan' fratr' ejus de un' Meſſ. ſex acr' Terr' & dimid' acr' prati cum pertinen' in Burcheles.

Johannes & Jordan' plede non tenure, & quod null' fecer injur' &c. pet' quod inquir' per Aſſiſam. Alan' **as Tenant pleads in Barr the Feoffment of the Plaintiff, the Plaintiff traverſeth the Barr, and found for the Defendant, and Judgment for him.**

Ad Com' die Martis proxim' poſt Feſtum St. Barnab' Apoſ' Anno E. 1. xxvj.

Ceſtr. *ff.* Aſſiſa verſus Willielm' Lancellyn, Henric' fil' Robert' de Tnemoll Bigertham qu' fuit Uxor Rogeri le Mowere & Johan' Redeoks per Nicholau' fil' Rici' Textor' & Leuc' Uxor' ejus de un' Meſſ. cum pertinen' in ſuperiori Bebington.

William Lancellyn **pleads** Non tenure & nihil Clam. **but the Founderſhip, the Houſe being an Hoſpital for poor Peo-**

ple, Founded by his Anceſtours, Et quod nullam fecit injur. &c. The others plead as Tenants in Abatement, that the Houſe is in Pulton and not in Bebington, and over in Barr, and pray the Aſſiſe, Ideo Capiatur Aſſiſa, &c. and the Recognitors found the Houſe was in Pulton and not in Bebington. Judgmt. quod defend. eant ſine die & præd. Johannes & Luca in mia' &c. Condonantur quia pauperes.

The Procædings and Pleadings were very Conciſe and Summary in thoſe times of E. 1. I ſhall only ſet down one at large as it is in the Record, viz. That of Adam de Burches before mentioned.

Ceſtr. ff. Aſſiſa ven. recognitur. ſi Alanus de Aſthull Robertus frater ejus & Jordanus frater ejuſdem diſſ. Adam. de Burcheles de libero Tenemento ſuo in Burcheles poſtquam, &c.

Et unde quer. quod prædict. Alanus, Robertus & Jordanus diſſ. eum de un. Meſſ. ſex acr. Terr. & dimid. acr. prati cum pertinen. in Burcheles.

Et prædict. Robertus & Jordanus ven. & dic. quod nihil habent in prædict. Tenement. nec aliquod inde here. Clam. & quod null. injur. fecer. nec diſſeiſinam pet. quod inquir. per Aſſiſam.

Et prædict. Alanus qu. eſt Tenen. eorund. Tenement. ven. & dic. quod Aſſiſa non debet inde procedere dicit enim quod ipſe ſeiſit. eſt de prædict. Tenement. per donum & Feoffament. prædict. Ade qu. tul. iſtam Aſſiſam pro octo marc. argenti quas ſibi pacavit præ manibus & poſtea fecit inde homag. capital. Domino feodi ill. & hoc per cart. prædict. Ade qu. profert qu. hoc teſtatur.

Et prædict. Adam dicit quod ingreſſus eſt per diſſeiſinam & non per cartam prædict. Et hoc pet. quod inquir. per Aſſiſam. Alanus ſimiliter.

Mia. ij ſ. Jur. dic. ſuper Sacrament. ſu. quod prædict. Alanus, Robertus nec Jordanus null. fecer. injur. nec diſſeiſinam. Ideo Conſiderat. eſt quod prædict. Adam nihil Cap. per bre. ſu. ſed ſit in mia. pro falſo clamore, Et quod prædict. Alanus & al. ſint inde quiet. ſine die.

In

In the time of E. 4. There was an Aſſiſe brought againſt the Mayor and Citizens of Cheſter, for Lands upon Hole Heath, which I have the rather taken notice of because of late years there have been Suits by the Earl of Shrewsbury againſt the ſaid Citizens concerning their Title to the ſaid Lands. And theſe Records ſet forth their Title of Commoning. The Record in ſubſtance, is to this effect, viz. Mayor and Citizens of *Cheſter.*

Ceſtr. ff. Placita Com. Ceſtr. apud Ceſtr. coram Thom, Domino Stanley Mil. Juſtic. domini Principis ibidem die Matis proxim. poſt clauſum Paſche Anno xxij E. 4.

It is brought by Richard Cholmondeley for diſſeiſing him of his Freehold in Hole. i. e. xx acr. Terr. &c.

The Mayor and Citizens plead that the City of Cheſter is an ancient City time out of mind, Corporated of a Mayor and Commonalty, and that E. 1. was ſeis'd of the County of Cheſter, of which the City is parcel in the right of his Crown in Fee, and had Common for himſelf and all his Tenants inhabiting within the City of Cheſter in a place called Hole-Heath, and that E. 1. by his Charter dated at York, xij Jun. xxviij Regni ſui gave the City of Cheſter to John Arnewey then Mayor of the City of Cheſter, and to the Commonalty of the ſame City and to their Succeſſors, Yielding to the King and his Succeſſors, Cl. per Annum at the Exchequer at Cheſter at Michaelmas and Eaſter, by equal Portions, and then ſhew how afterwards they have ever had Common for all manner of Beaſts at all times of the Year; and then ſet forth how the County deſcended to E. 4. and that he gave the County and the Rent to Edward his Son, Prince of Wales, and ſo pray aid of the Prince, which is granted: And then the Action is continued to ſeveral Counties, and Procedendo at length ſent to the Juſtice of Cheſter, Teſt. apud Ceſtr. xxvi Decemb. xxij E. 4.

I ſhall conclude this Chapter with one other Record in the Court of Common Pleas in the County of Cheſter, in an Aſſiſe of Darreine Preſentment in the time of E. 1. In which ſome things more than ordinary are obſervable.

Placita apud Ceſtr. die Martis prox. poſt Feſtum St. Laurentii Martyr' Anno E. 1. xxvi.

Ceſtr. ff. An Aſſiſe of Darreine Preſentment to the Church of Aſtbury by the Abbot of Cheſter, againſt William Venables of Newbolt.

Aſſiſe of Darreine preſentment. The Recognitors find as the Plaintiff Declared, That Reginald, Son of John de Gray was the laſt Incumbent, and preſented by Simon Abbot of Cheſter, and inquire of the Mortmaine, and whether the ſaid William was of full Age, infra quatuor Maria, extra Priſonam, & bon. memor. at the time of the Preſentment of Reginald.

The Recognitors find for the Abbot, upon the whole matter, viz. That William was under Age at the time, &c. under the Guardianſhip of one Roger Puleſdon, and that the ſaid Roger for the ſaid William withſtood the ſaid Preſentation, but that Simon the Abbot, recovered againſt the ſaid William in an Aſſiſe of Darreine Preſentment, and find other Preſentments made by the ſame Simon and his Predeceſſors; and find the manner of the diſturbance made by the ſaid William upon the ſaid Vacancy, i. e. That he intruded into the Church and took the Keyes, and put 30 armed Men into the ſaid Church to keep Poſſeſſion for him as Patron, ſome of which continued there xv Days, and for that time would not ſuffer the Pariſhioners to enter into the ſaid Church, &c. The Defendant in this Action made default, and Judgment for the Abbot. Dam. V. mark.

Juris Utrum. There's one Writ more called a Juris Utrum, which as it is in nature of an Aſſiſe, may not improperly come next in order, though as it is a Parſons Writ of Right it might have been brought under the learning of Writs of Right, and with this Writ I ſhall cloſe this third Book.

CAP.

## CAP. XX.

# Juris Utrum.

1. There are Five Real Actions wherein a Jury to try the Cauſe are returned upon the firſt day, as 1. Aſſiſe of Novel diſſeiſin. 2. Aſſiſe of Mortdanceſter. 3. Aſſiſe of Darreine Preſentment. 4. Juris Utrum. 5. Attaint. 5 Writs where the Jury appears the firſt Day.

2. This is a Writ for a Parſon at Common Law, and for a Vicar, Warden of a Chantery, Chappels, Provoſts, &c. by the Statute of 14 E. 3. to recover their Lands where the Predeceſſor alienedthem or loſt them by Default or Reddition in a Real Action, or by Verdict (unleſs it be in a Writ of Right) tri'd if the Patron and Ordinary were not Party by Aid praier. F. N. B. 50. d. Fr. c. 48. Reg. 32. What.

3. This is a Parſon's Writ of Right, and the higheſt he can have. F. N. B. 48. 50. Parſons Writ of Right.

But I conceive this Writ is now clearly out of uſe ſince the Statute that reſtrained all alienations by Eccleſiaſtical Perſons. 13 Eliz. c. 10. Except a Parſon be out of Poſſeſſion above 20 Years, then I conceive he is put to this Writ by the Statute of 21 Jac. 1. c. 6. but the Succeſſor may Enter, becauſe he comes in the Poſt. Now uſeleſs per Stat. 13 Eliz. c. 10.

The Writ is as followeth.———————

Rex, &c. Si A. Perſona Eccleſiæ de D. fecer', &c. tunc ſum. &c. xij. liberos, &c. vicinet' de D. quod ſint coram Juſticiar. noſtris ad primam Aſſiſam, &c. vel coram Juſtic. noſtris tal. die parati ſacramentum recognoſcere utrum unum Meſſ. &c. in E. ſit libera Eleemoſyna pertinen. ad eccleſiam ipſius A. de D. an laic. feod. S. & interim Meſſ. ill. videant & nomina eorum imbreviar. fac. Et ſum. per bon. ſummonit. prædict. S. qui Meſſ. ill. tenet quod tunc ſit ibi ad audiend. ill. recognitionem, Et habeas, &c. ſum. & hoc bre. T. &c. Reg. 32. b. Original.

The

The Entry. The Entry is Jurata ven. recognitura Utrum unum Meſſ. &c. in E. ſit libera Eleemoſyna pertinen. ad Eccleſiam, &c.——Vid. le Count in Co. Lib. Entr. 399.

One brought, 10 Jac. Ther's one brought in the 10 Jac. in Co. Entr. but I ſuppoſe it was upon an Alienation before the Statute of Eliz.

Proceſs. 4. The Proceſs is Summons and Reſummons, and then if the Tenant make Default, the Jury ſhall be taken. F. N. B. 48.

Jury taken by Default without a Reſummons. But by Co. Entr. 401. a. The Jury is taken by Default, without a Reſummons upon a Default the firſt Day.

Plead in Abatement and over in Barr. 5. The Tenant may plead as in an Aſſiſe, Two or Three Dilatories to the Writ and over in Barr. Et ſi ne trove ſoit, &c. F. N. B. 49.

The general Iſſue, what. 6. The general Iſſue for the Tenant is, That it is his Lay-fee, and not the Alms of the Church. Co. Entr. 400.

Eſſoin. W. 1. c. 42. W. 2. c. 28. 7. In an Aſſiſe of Mortdanceſter, Juris Utrum, or Attaint, the Tenant ſhall not be Eſſoined after Appearance by the Statute of W. 1. c. 42. Nor the Demandant after the firſt Day per Stat. W. 2. c. 28. And therefore in Cheſter upon the firſt Day of the Aſſiſes or great Seſſions, the Prothonotary or his Clerk cauſe a Proclamation to be made, that if any Perſon will be Eſſoined in an Aſſiſe of Mortdanceſter, Certificate of Aſſiſe, Juris Utrum, or Attaint. he muſt come forth and Enter the ſame ſitting the Court, or none will be received.

*Cheſter.*

Recovery pleaded, & iſſint ſon lay fee. 8. A Recovery in a Real Action againſt the Predeceſſor of the Demandant, and ſo his Lay-fee is a good Plea in Barr and not double, for the Juris Utrum is a Writ of Right for the Parſon, and in a Writ of Right, the Tenant may plead a Recovery or other Special matter, and Conclude, Et ſic ipſe habet majus jus, &c. 19 H. 8. 7. Br. Juris Utrum, 1.

LIB.

# LIB. IV.

## CAP. I.

## Quare Impedit.

HAving now gone through with Real Writs which concern the Right, or in the Right and for the Recovery of Lands in Demesne, we proceed to those which concern the Recovery of Hereditaments, or for the doing or performing of other things, of which sort are 1. Quare Impedit. 2ly. Quo jure. 3ly. Quod permittat. 4ly. Bre. de Medio. 5ly. Bre. de Consuetudinibus & servitiis. 6ly. Secta ad molendinum. 7ly Warrantia cartæ. 8ly. Cur. claudend. 9ly. Partition. faciend. 10. Writ of Covenant Real. And when we have done with these, we shall conclude with such Writs and Actions as relate to the Redressing of Force and Fraud, and quieting of Mens Possessions after they have duly Recovered them by Law. As 1. The Writ of Deceit. 2ly. Quod ei deforceat. 3ly. Entry upon the Stat. 5 R. 2. 7. 15 R. 2. 2. 8 H. 6. 9. 13. El. 11. 21 Jac. 15. 4ly. Redisseisin and Post-disseisin, and lastly Attaint.

1. Quare Impedit is a Writ for the Recovery of an Advowson, or rather a Presentation of a Clerk to a Church, where another by a Presentation hinders his Clerk from being Instituted upon his Presentation, or where one that has no Right procures his Clerk admitted, i. e. Instituted, in such Case the true Patron may have this Writ to remove the Incumbent, and to have his Clerk admitted if he bring his Writ within Six months next after the Institution. What.

2. This

Lay at Common Law before Institution.

2. This Writ lay at Common Law against the Disturber at any time before Institution, Co. 2 Inst. 360. But plenarty before the Writ brought, was a good Plea at Common Law. ibidem.

3 Sorts of Writs for Advowsons at Com. Law.

3. At Common Law there were three sorts of Writs for Recovery of Advowsons to Churches. 1. The Writ of Right of Advowson spoken of before. 2ly. Quare Impedit. 3ly. Assise of Darreine Presentment; which two last are called Writs of Possession, because they lie only where the Plaintiff is not put out of Possession, and a bare Right only left in him, for where he has nothing but a Right, he is put to his Writ of Right of Advowson, Vid. Co. 2 Inst. 356, 357. Fleta, Lib. 5. c. 17.

Stat. W. 2. c. 5. which gave Remedies in Quare Impedit.

4ly. But because there were several defects and mischiefs in the Quare Impedit at Common Law, therefore the Statute of W. 2. c. 5. 13 E. 1. was made. For whereas at Common Law, if the Clerk of an Intruder, one that had no Right, had got his Clerk admitted, that is, Instituted, the rightful Patron had been put out of Possession and was driven to his Writ of Right of Advowson, Co. Lib. 6. 49, 50, 51. Boswell's Case, which was very mischievous to some persons especially, as 1. Purchasers. 2ly. Infants. 3ly. Feme Coverts. 4ly. Persons in Reversion depending upon Estates for Life or Years, as Tenants by the Courtesie, Tenants in Dower. For the Purchaser if he never had presented, in Case of a Usurpation upon him, had lost his Advowson for ever, for he could not have a Writ of Right because he never had presented, but a Quare Impedit he may have by this Statute within the Six months, and may alledge a Presentment in his Count in him from whom he purchased; and so at Common Law (I conceive) he might have done if he had brought his Quare Impedit before the admission of the Intruder's Clerk. Sed Quær. de eo Co. 2 Inst. 356.

Usurpations mischievous to 4 sorts of Persons at Common Law. 1. Purchasers. 2. Infants. 3. Feme Coverts. 4. Reversioners.

Infants, Feme Coverts, Reversioners, relieved against Usurpations.

5. So now by this Statute, Infants, Feme Coverts, Reversioners, may at the next Avoidance after they come of Age, after the death of their Husbands, and the death of their particular Tenants, may have a Quare Impedit or Assise of Darreine Presentment, as their Ancestors, Husbands or Lessors might have

have had in the laſt Vacancy in their own times, and ſhall not be put to their Writ of Right.

5. By this Statute none ſhall be put out of Poſſeſſion of his Advowſon that brings his Quare Impedit within Six months, (infra tempus ſemeſtre) next after the Diſturbance, ſo that now Plenarty is no Plea as it was at Common Law; but Plenarty for the ſpace of Six Months is ſtill a good Plea, except againſt the King. Co. 2 Inſt. 360, 361. Plenarty, no Plea if not in Six months

6. The Plaintiff may recover Damages by this Statute, which he could not at Common Law, Co. 2 Inſt. 362. But the Plaintiff cannot recover Coſts, nor the Defendant, becauſe no Damages lay at Common Law for the Plaintiff. Co. ibidem, Vid. Stat. 23 H. 8. c. 15. & 4 Jac. c. 3. Quære, whether the Plaintiff ſhall recover Damages in any Caſe but where the Biſhop has Collated or might Collate. By the words of the Statute it ſeems not. Vid. Co. Lib. 6. Boſwell's Caſe. f. 51. Damages recoverable, no Coſts.

7. By force of this Branch of Damages there are three Points the Jury are to inquire of in a Quare Impedit, or Aſſiſe of Darreine Preſentment. 1. Si Eccleſia ſit plena & conſulta. Et ſi ſit, de cujus præſentatione. 2ly. De annuali valore Eccleſiæ. 3ly. Si tempus ſemeſtre tranſivit. Co. Lib. 6. Boſwell's Caſe, f. 51. Dyer 194. Which Points were not inquirable at Common Law. Co. ibidem. Bract. Lib. 4. Tract. 2. c. 6, 7. f. 246. 3 Points to be inquired in a Quare Impedit

8. A Man may have Title to the Advowſon or Patronage of a Church, Chappel, Abbey, Prebendary, &c. many ways, as, 1. By purchaſe. 2ly. Deſcent. 3ly. Grant of the next Avoidance. 4ly. As Executor, if the Church become void at the time of the Teſtator, and be void at the time of his death. 5ly. By laps, as belonging to the Biſhop, if the Patron do not Preſent within Six months after the Avoidance, the Biſhop may Collate, and ſo the Metropolitan if the Biſhop neglect to Collate for Six months, and then at length the King in Default of the Metropolitan. How many ways a Man may have Title to an Advowſon.

9. The Writ is thus,———Rex, &c. Vic. ſalutem, &c. Præcipe A. quod juſte, &c. permittat B. præſentare idoneam perſonam ad Eccleſ. de N. qu. vacat & ad ſuam ſpectat Original.

ctat donationem ut dic. Et unde quer. quod præd. A. eum injuſte impedit, Et niſi fecer. ſum. per bon. ſum. præd. A. quod ſit coram Juſtic. noſtris Ceſtr. apud Ceſtr. primo die prox. Seſſion. Com. Ceſtr. apud Ceſtr. tenend. oſtenſur' quare non fecer. Et habeas ibi ſum. & hoc Bre. Teſt. Regiſtr. 30.

Againſt whom may be brought

10. This Writ may be brought againſt the Diſturber only or againſt the Incumbent and Diſturber, or againſt the Biſhop, Diſturber and Incumbent. But if the Biſhop be not made a Party to the Writ, he may Preſent by laps after the Six months paſt, and if the Incumbent be not made a Party, he cannot be removed by Judgment in the Quare Impedit. Cro. 2. pt. 93. Lancaſter vers. Low. Co. Lib. 6. f. 5. Boſwell's Caſe. Reg. 31. Cro. 2. pt. 96. But note, to prevent the Biſhop Preſenting, Br. de Quare Impedit pendente, though he be not made Party to the Writ, the Plaintiff may have a Writ called a Ne admittas in nature of a Prohibition, forbidding him to Collate, pending the Cauſe in the Quare Impedit. Reg. 31. And ſee there the Writ of Ne admittas.

Ne admittas.

Summons in Perſon or Church, &c. 15 days.

11. The Sheriff muſt Summon the Defendant in Perſon, or at the Church 15 days at leaſt before the Return. Br. 101. Quare Impedit.

Eſſoin. Cheſter.

12. At the Return of the Writ every Defendant may have one Eſſoin, which in Cheſter is de die in diem. In the Common-Pleas the days given are de Quindena in Quindena. vel de tribus ſeptiman. in tres ſeptiman. i. e. 15 days, or 21 days at the moſt by the Statute of Marl. c. 12. 52 H. 3. which reſtrain'd the Common days of Return in Bank, in Caſe of Dower, Aſſiſe of Darreine Preſentment & Quare Impedit. Vid. Co. 2 Inſt. 123, 124.

Proceſs. Summons. Attachment. Diſtreſs.

13. If the Defendant appear not, nor Eſſoine in Caſe he be return'd Summon'd, then an Attachment ſhall be awarded, and if he appear not upon the Return and be returned Attach'd, then ſhall be awarded the grand Diſtreſs, and if he be return'd diſtrain'd and do not appear, then Judgment ſhall be given againſt the Defendant, and a Writ awarded to the Biſhop, and this by virtue of the ſaid Statute of Marl. for at Common Law it was only Summons, Attachment and Diſtreſs infinite. Co. 2 Inſt. 124.

*

14. Note,

14. Note, if the Defendant make default after an Eſſoin before Appearance, the Proceſs is the ſame as before. Raſt. Entr. 520. b. Proceſs, the ſame after an Eſſoin.

15. If there be ſeveral Defendants, if one make Default, the other may Eſſoin, and Proceſs ſhall go forth againſt him only that made the Default, Raſt. Entr. 520. a. b. Some Eſſoin, others make Default.

16. If the Sheriff return Nihil upon the Summons, Attachment and Diſtreſs, Judgment ſhall be Entred for the Plaintiff as if the Defendant had made Default upon Summons. Co. 2 Inſt. 124. Judgment upon Nihil returned.

17. After an Appearance upon the Diſtringas, if the Defendant take day by Prece Partium, and then make Default, then an Al. Diſtringas ſhall be awarded, and not a Writ to the Biſhop. Co. 2 Inſt. 125. Reg. 2. a. Al. Diſtringas, when.

18. After the Defendant hath Appear'd, the Plaintiff muſt Declare; but becauſe the Declaration is various, and many times long according to the nature of the Plaintiff's Title, I ſhall not ſet it down at large in hæc verba, but refer to the Book of Entries, both Coke and Raſtall. Only ſhall obſerve ſome Rules of direction to be made uſe of for the better drawing of the Declaration. Declaration, various.

1. In the Declaration muſt be alledg'd a Preſentment in the Plaintiff or his Anceſtors, or in ſome other Perſon, under whom he claims. As the Heir may alledge a Preſentment of his Anceſtor, a Purchaſer, a Preſentment by him from whom he purchaſed. F. N. B. 78. Eng. Co. Lib. 5. f. 98. 8 H. 5. 10. 9 H. 7. 23. 16 H. 7. 8. Dyer 106. Co. 2 Inſt. 356. Preſentment to be alledg'd in the Declaration.

2ly. If a Man build a Church Parochial, though he never Preſented, yet he may have a Quare Impedit without alledging any Preſentment in his Count, præter neceſſitatem. 16 H. 7. 8. 21 E. 4. 3. b. So if a Perſon come to an Advowſon by Recovery in a Writ of Right in his Declaration, he may alledge a Preſentment in him againſt whom he recovered without any other Preſentment. 39 H. 6. 25. b. 14 H. 6. 5. b. Co. Lib. 5. 97. 16 H. 7. 8. Where a Preſentment needs not be alledg'd.

Preſentment of Tenant for years, &c. ſufficient for the Reverſioner.

3. If Tenant for Life or Years do Preſent, this is ſufficient for him in Reverſion, and he muſt alledge it in his Declaration, and if there be ſeveral mean Preſentments by the Tenant for Life or Termor, they muſt be all alledged in the Count or Declaration. 16 H. 7. 8. 22 E. 4. 9. 4 E. 4. 3. a. 7 E. 4. 20. b. 42 E. 3. 4. a.

The manner of the Voidance muſt be ſhew'd.

4. In the Declaration, the Plaintiff muſt ſet forth how the Church became void, i. e. by death, Reſignation, or Deprivation, becauſe the Defendant may Traverſe the manner of the Avoydance, if he Claims by another ſort of Avoidance, as by Simony, taking a Second Benefice, or the like. Cro. 2 part 6. Sr. George Farmer againſt Nicholſon, Cro. 1 pt. 51. Raſt. Entr. 485. 490. 511.

Judgment by Default without a Declaration.

5. Note, the Plaintiff may have Judgment by Default of Appearance without making any Declaration of his Title, Dyer 241. But I conceive it ſafer to make a Title, Moore Rep. 81. n. 214.

Attachment & Diſtreſs judicial Writs.

19. The Attachment and Diſtreſs are Judicial Writs, and are to be ſued forth out of the Court where the Original Writ is return'd.

The Attachment is as follows.——

Attachment.

Rex, &c. Vic. Salutem. Præcipimus tibi quod pon. per Vad. & ſalvos pleg. T. quod ſit coram Juſtic noſtris, &c. ad reſpondend. L. de plito. quod ipſe ſimul cum W. Epo. C. & M. permittant ipſum præſentare idoneam perſonam ad Eccleſiam de B. quæ vacat & ad ſuam ſpectat donationem & ad oſtend. quare non fuit, coram Juſtic' noſtris, &c. a die, &c. poſtquam ſum' fuit, Et habeas ibi nomina pleg. & hoc bre. &c. Teſt, &c. Raſt. Entr. 520.

This Writ may be made returnable die Martis, Mercur. or any other day in the Aſſiſe week in Cheſter.

The Grand Diſtreſs is thus,——

Diſtringas.

Rex, &c. Præcipimus tibi quod Diſtringas T. per omnes Terr. & Catal. ſua in Balliva tua ita quod nec ipſe nec aliqui s per ipſum ad ea man. appon. donec aliud a nobis inde

inde habuer' præcept. & quod de exitibus nobis inde reſpond. Et quod Habeas Corpus ejus coram Juſtic. &c. ad reſpond. W. de placito quod ipſe ſimul cum W. Epo. &c. Et ad audiend. judic. ſuum de plur. default. Et habeas ibi hoc bre. Teſt. &c. Reg. 1.

20. In ſome Caſes the Trial of the Iſſue in this Action ſhall be by the Certificate of the Biſhop, as 1, Plenarty for the ſpace of Six months, Raſt. Entr. 498. b. Brief. 1. 2. Whether the Incumbent were Inſtituted at the Preſentation of ſuch an one? Raſt. Entr. 533, 534. And ſo I conceive it ought to be upon an Iſſue of Reſignation or Deprivation. Trial ſometimes by Certificate of the Biſhop.

20. The Judgment in this Action is, Quod I. S. recuperet verſus L. præſentation. ſuam ad Eccleſiam prædict. pro defalt. (ſi ſit per default) Et habeat bre. Epo. loci illius Ordinario quod non obſtan. reclamatione præd. L. ad præſentacon. præd. I. S. ad Eccleſiam præd. idoneam perſonam admittat & idem L. in mia. &c. Raſt. Entr. 507. a. Judgment.

21. Obſerve theſe Rules, when a Writ to the Biſhop ſhall be had and Judgment given. Rules where a Writ to the Biſhop.

1. If the Defendant makes default at the Grand Diſtreſs, the Plaintiff ſhall have a Writ to the Biſhop, Vid. Raſt. ibidem. Moore Rep. 81. n. 214. This is by force of the Stat. of Marl. c. 12. but then he muſt make a Title by Moore ibidem. 10 H. 6. 4. b. Where the Plaintiff ſhall have a Writ to the Biſhop.

2. If there be ſeveral Defendants, and one make default, Judgment and a Writ to the Biſhop ſhall be awarded againſt him, with a Ceſſ. Executio till the Plea be ended as to the other. Raſt. 507. a. 4. 25 E. 3. 34. b. Ceſſat executio where.

3. When the Plaintiff recovers by default, he muſt have a Writ to inquire of the damages (if he will inſiſt upon it, otherwiſe he may releaſe them) with a Ceſſ. bre. Epo. till the Return of the Writ of Enquiry, in which Writ of Enquiry there's a Command to inquire of the three Points before mentioned, ſi Eccleſia ſit plena? &c. Raſt. Entr. 507. b. 8. Where Plaintiff ſhall have a Writ to enquire of Damages.

4. In

Where Defendant may be an Actor, and may have a Writ to the Bishop.

4. In this Action both Plaintiff and Defendant as the Case may be, may be Actors, and may have a Writ to the Bishop and a Writ to inquire of Damages, as 1. If the Plaintiff be Non-suited, Rast. Entr. 508. a. Quær. whether the Defendant must not make a Title first. Co. Lib. 7. 27. b. 9 H. 6. 4. b. 2 H. 5. 6. 11 H. 6. 8. Hob. Rep. 163. 2ly. If a Verdict be given for the Defendant. 19 H. 6. 31. 18 E. 3. 15. 3ly. Upon demurrer to the Count, and adjudg'd for the Defendant, the Defendant shall have a Writ to the Bishop, because the Title of the Defendant appears by the Count. Dyer 24. pl. 153. 4ly. If the Writ abate for Misnosmer of the Plaintiff or Defendant, insufficiency, false Latin, the Defendant shall have a Writ to the Bishop. 31 H. 6. 15. Co. Lib. 7. f. 27. Portman's Case. 5ly. If the Writ abate by the act of the Plaintiff, the Defendant shall have a Writ to the Bishop, as if the Plaintiff be made Knight after the Writ purchas'd. Co. ibidem. 6ly. If the Bishop pleads that he Claims nothing but as Ordinary, &c. the Defendant shall have a Writ to the Bishop with a Cess. Executio, &c. 17 E. 3. 71. 17 H. 7. Kell. 43.

Note.

Note, all this concerning a Writ to the Bishop for the Defendant, is to be understood when the Incumbent of the Patron Defendant is not admitted, for if he be admitted, then the Defendant is meerly of the defensive part and not an Actor. Vid. Vaughan's Rep. 8. Hob. 193. Wincomb vers. Puleston.

Incumbent to be removed by the Judgment.

5. If the Incumbet be made a Party to the Writ, he shall be removed by the Judgment. Co. Lib. 6. Boswell's Case 51. And so all others Presented and Instituted pending the Writ. And who is Instituted and Inducted, and by whom, and when, appears by the return of the Writ of Inquiry. Rast. Entr. 508. 9. But such as come in pendente lite, and are no parties to the Writ, are not to be remov'd by the Judgment, but by a Scire fac. because he shall not be put out without answer; and therefore Boswell's Case in this Point is denied to be Law. See Cro. 2. part Lancaster vers. Lowe. Siderfin's Rep. 14 Car. 2. P. 94.

The

### The Writ to the Biſhop,———

Rex, &c. M. Arch. Eborum ſalutem Sciatis quod R. ar' in Cur' noſtra coram Juſtic' noſtris apud W. recuperavit præſentationem ſuam ad Eccleſiam de W. in Com. B. qu' vac' & ad ſuam ſpectat donation' verſus H. Mil. & L. Cler. per bre' noſtrum de Quare Impedit, Et ideo vobis mandamus quod non obſtant' reclamatione prædict' H. & L. licet præd' R. ad Eccleſiam præd. Admiſſus, Inſtitutus & Inductus exiſtit eundem R. ab eadem Eccleſia amoveat' Et ad Eccleſiam ill' ad præſentation' ipſius R. idoneam perſonam admittas, Et qualiter hoc Mandat. noſtrum execut' fueritis conſtare fac. Juſtic' noſtris, &c. Teſt, &c. Raſt. Entr. 507. b. 7. The Writ to the Biſhop.

### The Writ of Inquiry of Damages is directed to the Sheriff, and is as followeth, viz.———

Rex, Vic' ſalutem Scias quod A. in Cur' noſtra coram Juſtic' noſtris apud W. per conſideration' ejuſdem Cur. recuperavit verſus B. Epiſc. Winton' C. Mil' & D. Capellanum præſentationem ſuam ad Eccleſiam de M. vacantem, & ad ſuam donationem hac vice ſpectan' unde idem A. in eadem Cur' noſtra tul' bre' de Quare Impedit verſus eos & quia neſcitur utrum Eccleſia prædict' plena ſit necne nec quantum Eccleſia præd' valet per Annum juxta verum valorem inde tibi præcipimus per Sacrament' duodecim proborum & legalium hominum de Com. tuo diligenter inquir' utrum Eccleſia præd. ſit plena necne & ſi ſit plena ad cujus vel quorum præſentationem eadem Eccleſia plena exiſtit, Et quantum tempus elabitur a tempore quo Eccleſ. præd' ultim' cepit vacar' Et quantum Eccleſia præd' valet per Annum juxta verum valor' ejuſdem & inquiſitionem quam inde fecer' Scire fac' Juſtic' noſtris apud W. &c. ſub ſigillio tuo & ſigillis eorum per quorum Sacrament' inquiſitionem ill' fecer' Et habeas ibi nomina eorum per quorum ſacrament' inquiſitionem ill' fecer' Et hoc bre' Teſt. &c. Raſt. Entr. 507. 8.. The Writ of Inquiry.

Note, **this is upon a Recovery by default, upon the grant of the next avoidance, but differs not from others, ſave in theſe words** (hac vice) ſpectan'.

No Writ of Inquiry upon a Verdict.

If the Plaintiff Recover upon a Verdict, then there needs no Writ of Inquiry of damages, for then the Jury at the Barr ſhall inquire of the ſame Points, as upon the Writ of Inquiry. Vid. Entry upon a Verdict, Raſt. Entr. 508. 9.

*The Entry of a Judgment upon Default at the Return of the Grand Diſtreſs.*

Entry of Judgment upon Default.

I. Mil. per N. Attornatum ſuum obtul' ſe quarto die verſus B. & D. de placito quod permittat ipſum præſentare idoneam Perſonam ad Eccleſiam de O. qu. vacat & ad ſuam ſpectat donationem, Et ipſi non ven', &c. & præcept' fuit Vic' quod Diſtring' eos, &c. Et quod de exitibus, &c. Et quod haber' Corpus ejus hic ad hunc diem ſcilicet' ——— Et Vic' modo mand' quod Diſtrict' eſt per Catall' ad valenc', &c. Et manucapt' per, &c. ideo ipſi in mia', &c. Et Conſideratum eſt quod præd' I. recuperet verſus præd' B. &. D. præſentationem, &c. Et habeat bre' &c. as before is ſaid, Vid. Raſt. Entr. 507. Judgmt. 2. & ibidem. 3. 4.

Though many Books (as I have before obſerved) ſay that upon default the Plaintiff ſhall not have a Writ to the Biſhop without making a Title, i. e. without a Count, yet the Entries in Raſtall are without.

The Record following I have the rather here inſerted, not only becauſe it proves the Antiquity of the Juriſdiction in the County Pallatine of Cheſter, as other Records here before more Antient, but for that it ſerves to make out part of the Pedigree of the Booth's of Dunham in Cheſhire, who are deſcended in a direct Line of Heirs males from Sr. Robert Booth mentioned in the ſaid Record, concerning the Advowſon of Winleſlow which now belongs to the Trafford's.

*Placita Com' Ceſtr. apud Ceſtr. coram Jacobo del Holt, Juſtic' Domini Regis ibidem die Martis prox' poſt Feſtum conceptionis beatæ Mariæ Virginis Anno Regni Regis Henrici quinti poſt Conqueſtum Angliæ Sexto. Ro. 24.*

Ceſtr. *ſſ. Robertus del Bothe* in propria Perſonâ ſua ob' ſe verſus Galfridum Boſcley Cler' de placito quod ſimul cum Johannem de Legh del Bothes Vic' Ceſtr', Ranulpho del Hope, un' Coron' Hundred' de Northwico, Willielmo del Meoles Coron' Hundred' de Wyrchale, Richardo de Ridley Coron' Hundred' de Broxon', Johanne Triket Coron' Hundred' de Edesbury, Ranulpho de Swetentham Coron' Hundred' de Bucklowe, Willielmo Brett & Thom. Bruyndeley Coron' Hundred' Wici Malbani & Johanne de Legh del Bache Coron' Hundred' de Macclesfield, permittat prædict' Robertum præſentare idoneam Perſonam ad Eccleſiam de Wilmeſlow qu' vac' & ad ſuam ſpectat donationem, &c. Et ipſe non ven' Et Præceptum fuit Vic' quod diſtring' eum per omnes Terr. &c. Et quod de exitibus, &c. Et quod Haber' Corpus ejus ad hunc Com' ſcilicet die Martis prox' poſt Feſtum Beatæ Mariæ, &c. Et Vic' modo mand' quod Diſtrict' eſt per Catall' ad valenc' ſex denar' Et manucapt' per Johannem Fox. Willielmum Pye. Henric' Hert & Thom. Cutt. Ideo ipſi in mia', &c. Et ſuper hoc prædict' Robertus dic' quod quidam Willielmus Venables Mil' dudum fuit ſeiſit' de Maner' de Bolyn cum pertinen' ad quod advocatio Eccleſiæ præd' pertinen' & Maner' ill' de Domino Rege ut Comit' Ceſtr' tenuit in Capite per ſervitium Militar' & ad eandem Eccleſiam preſentavit quend' Thom' Forſt Cler' ſuum qui ad præſentationem ſuam admiſſus fuit & inſtitutus in eâdem tempore pacis tempore Domini Richardi nuper Regis Angliæ Secundi poſt Conqueſtum & poſtea prædict' Willielmus Venables de Maner' præd' cum pertinen' ad quod, &c. obiit ſeiſit' poſt cujus mortem Maner' præd' cum pertinen' ſuis ad quod &c. ſimul, &c. deſcend' quibuſdem Alicie & Dulcie ut fil' & hæred' ipſius Willielmi Venables & tunc infra ætatem exiſtentibus per quod Dominus Rex adtunc Comes Ceſtr' præd' Maner' cum ſuis pertinen' ad quod, &c. in manibus ſuis ſeiſir' fecit ratione minor' ætatis præd' Alicie & Dulcie & poſtea quc-

Awarding of the Diſtreſs.

Deafult.

Count & mon. ſtr' Title.

1. Preſentment.

Richard. 2.

dam Johanna qu' fuit Uxor præd' Willielmi de Venables profecut' fuit coram Juſtic' & Camerar' Domini Regis adtunc Com' Ceſtr' in Scaccar' ſuo ibidem liberation' tertie partis Maner' præd' cum ſuis pertinen' ad quod, &c. nomine dotis ſu' ipſ' per mortem præd. Willielmi de Venables quondam viri ſui contingen' una cum tertia præſentatione ad Eccleſiam præd' cum accider' videlicet' quod præd' Alicia & Dulcia haberent duas præſentationes & præd. Johanna tertiam præſentationem cum acciderint & poſtea Dominus Rex tunc Princeps Walliæ & Comes Ceſtr' per liter' ſuas Patentes quarum dat' eſt apud Ceſtr' triceſimo die April' Anno Regni Domini H. nuper Regis Angliæ Patris Domini Regis nunc quarto conceſſit dilecto Aro' ſuo Olivero de Stanely cuſtod' duar' partium præd. Maner' cum ſuis pertinen ad quod, &c. ſimul, &c. per nomen omnium Terrar' & Tenementor' reddituum ſervitiorum feodorum reverſionum & advocation' cum pertinen' qu' fuer' præd' Willielmi de Venables per nomen Willielmi de Venables de Bolyn Mil' Habend' eidem Olivero cum omnibus exitibus & proficuis inde provenientibus uſque ad legitimam ætatem præd. Alicie & Dulcie & poſtea Eccleſia præd. per mortem præd' Thom' Forſt vacavit per quod pro eo quod præd. Alicia & Dulcia adtunc fuer' infra ætatem & in Cuſtod' præd' Oliveri, idem Oliverus præſentavit quend. Galfridum Boſeley Cler. ſuum ad eandem Eccleſiam qu. ad præſentationem ſuam admiſſus fuit & inſtitutus in eadem tempore pacis tempore Domini H. nuper Regis Angliæ Patris, &c. Et poſtea eadem Alicia cepit in virum quend. Edmund. de Trafford & præd. Dulcia cepit in virum quend. Robert. fil. Johannis del Bothe, & poſtea præd. Edmundus & Alicia, & Robertus fil. Johannis & Dulcia ad plenam ætatem præd. Aliciæ & Dulciæ modo debito profecut. fuer. liberationem præd. duarum partium Maner. præd. cum pertinen. una cum feodis & advocationibus præd. extra manus Domini Regis. Et poſtea præd. Edmundus & Alicia, & Robertus fil. Johan. & Dulcia per quoddam ſcriptum ſuum Cur. hic oſtens. cujus dat. eſt in Feſto Nativitatis Sancti Johannis Baptiſt. Anno Regni Domini Regis nunc quinto dimiſer' cuidam Johanni del Bothe hær. & aſſignatt' ſuis præd. duas partes Maner. præd. cum ſuis pertinen. una cum advocatione Eccleſiæ præd. ad terminum vigint. Annorum prox. dat. ſcript. præd. ſequen. & poſtea præd. Johannes del Bothe per quoddam ſcript. ſuum Cur. hic oſtens. cujus dat. eſt die lun. prox. poſt Feſtum Apoſt. Petri & Pauli Anno Regni Domini Regis nunc quinto

Grant del Gardſhip per Liter patent' 30 Apr' 4 H. 4.

Vacancy per mortem.

2. Preſentation' per Guardian'.

5. H. 5.

quinto dimiſit totum Stat. ſuum quem habuit in præd. du. partibus Manor. præd. cum pertinen. una cum advocatione Eccleſiæ præd. præfat' Roberto del Bothe in bri. præd. nominat. Et poſtea præd. Galfridus Boſeley coram Henric de Hallſall Arch. Ceſtr. & Commiſſar. Magiſtr. Walter. Bullock Vicar. general. Johannis Epi. Coventr. & Lich. de Eccleſia præd. privatus fuit virtute cujus privationis Eccleſia præd. vacavit. & ea vacatio ad ipſum Robertum del Bothe virtute dimiſſionis præd. ut prædictum eſt ad Eccleſiam præd. ad preſens pertinet præſentare, Et præd. Galfridus de Boſeley ſimul, &c. ipſum Robert. del Bothe injuſte impedit, &c. Ideo Conſideratum eſt quod præd. Robertus del Bothe recuperet verſus præd. Galfridum de Boſeley præſentationem ſuam ad Eccleſiam pd. de Wilmeſlow per defalt. ipſius Galfridi de Boſeley, &c. Et habeat bre. Coventr. & Lich. Epo. loci ill. Dioces. quod non obſtan. reclam. ipſius Galfridi de Boſeley idoneam perſonam ad præſentationem pd. Roberti del Bothe ad Eccleſiam ill. admittat, Et pd' Galfridus de Boſeley in mia. &c. Et affer. pro Cur. ad xij d. Et ſuper hoc Robertus del Bothe pet. bre. ad inquir. de dam. Et ei conceditur returnabil. hic ad prox. Com. ſcilicet. die Martis prox. poſt Feſtum Sancti Hillar. prox. futur. &c.

Vacancy per deprivation.

Judgment per Default.

Bre Epo.'

Bre de inquir' de dam.

**By this Record moſt of the former Rules I have ſet down may be obſerved, and that here the Plaintiff makes a Title though Judgment be given by default.**

Pleas in this Action.

1. **THE pleading in this Action is very difficult by reaſon of the variety and incertainty of the Rules concerning it. And therefore my Lord Hobert adviſes Plaintiffs in** Quare Impedit **to name no more Defendants than needs muſt be, and particularly the Biſhop not to be named, if an Incumbent be Inſtituted before the** Quare Impedit **brought, for then the Biſhop can do no more hurt to the Plaintiff, for he can but Conſtitute pending the** Quare Impedit. 2ly. **Not to name more diſturbers than ſuch as are like to have reaſonable Titles; for every diſturber may make ſeveral Titles, or Confeſs and avoid the Plaintiffs Title, and if any paſs againſt him, he is Barr'd.** Hob. Rep. 320.

Pleadings difficult in this Action.

Rules of pleading in this Action.

Some few Rules there are which may be useful. 1. In Abatement of the Writ, if the Patron be not named the Writ shall Abate, Hob. Rep. 316. Co. Lib. 7. f. 26. Hall's Case. 2ly. No such Church in the County, is a good Plea in Abatement. Co. Lib. 6. 65, 66. see false Latin, misnomer: But the Defendant shall not have a Writ to the Bishop. Co. Lib. 7. 27. b.

Abatement.

Death of the Patron shall not abate the Writ. Co. Lib. 7. f. 26. Hall's Case.

If the Writ abate by the Plaintiff's own Act, as being made Knight, &c. the Defendant shall have a Writ to the Bishop. Co. Lib. 7. 27. b.

Barr. Several Pleas by Bishop, Patron, &c.

Now for Pleas in Barr, where the Writ is brought against Bishop, Patron and Incumbent, they may plead severally, several Titles if they please, but ordinarily the Bishop pleads, That he claims nothing but as Ordinary, &c. to free himself from disturbance and damages being recovered against him; and upon his Plea, the Plaintiff may demand, and shall have a Writ to the Bishop with a Cess. executio, till the Plea be decided against the other Defendants, Co. Lib. 10. 54. 2ly. The Patron may plead any Plea to shew his Title, or to barr the Plaintiff's Title. 3ly. The Incumbent at Common Law could not plead any Plea which concerned the Right of the Patronage, but now by the Equity of the Statute of 25 E. 3 c. 7. he may. Co. Lib. 7. 26. Hall's Case, 4 H. 8. Dyer 1. Hob. Rep. 316. Neither could the Ordinary at Common Law plead any Plea to the Title of the Patronage before the said Statute, nor now since the Statute but in Case where he hath already Collated by Laps. Hob. Rep. 316. 319. 2ly. The Incumbent when he pleads in barr, must always say, that he is Persona imperſonata, that it may appear to the Court that he is a Parson Instituted, and so able to plead. Co. Lib. 7. f. 26. a. 3ly. The Incumbent must say of whose Presentation he is Persona imperſonata, that it may appear to the Court that he defends his own Title, and his Patrons. Hob. Rep. 320. And this is traversable. Hob. 321.

What Pleas Incumbent might not plead.

Ssát. 25 E. 3. 7.

Parson must say he is Persona imperſonata.

Of whose Presentation.

Plenarty, for the ſpace of Six months is a good Plea in Barr to a Quare Impedit, Co. Lib. 6. f. 50. and in ſuch Caſe the Patron is put to his Writ of Right notwithſtanding the Statute of W. 2. Plenarty for ſix months, where a good Plea.

Note this Rule; when the Defendant traverſeth any part of the Plaintiff's Count in a Quare Impedit, it ought to be ſuch part as is both inconſiſtent with the Defendants Title, and being found againſt the Plaintiff, doth abſolutely deſtroy his Title; and by this Rule a Man may be guided in that Point greately Controverted, when a Liſſin in groſs or appendancy to a Manor ſhall be traverſ'd, and when the Preſentation. Vid. 10 H. 7. 27. Anderſ. Rep. 1. p. 296. Lord Buckhurſt's Caſe, 27 H. 8. 29. Hob. 301. Sr. Henry Gorndyes Caſe, Vaughan Rep. 8, 9, 10, 11, 12, 13. Rule in traverſing any part of the Plaintiff's Count.

If a Man come to a Benefice any other way than by the Death, Reſignation or Deprivation of the laſt Incumbent, as by Simony and Preſentation of the King, he may traverſe the Vacancy by Death, Reſignation or Deprivation. Cro. 2. P. 6. Raſt. Entr. 485, 490. Traverſe of the manner of the Vacancy.

For the Writ of Quo Jure, vid. antea.

## CAP. V.

## Quod Permittat.

1. This is a Writ which lies in many Caſes, as where a Man is diſturbed in the injoyment of his Common, whether of Paſture, Turbary, Piſcary or reaſonable Eſtovers, of a Way, Nuſance levied, &c. F. N. B. 123. Fr. It lies chiefly by the Heir of the Diſſeiſee againſt the Diſſeiſor or his Heir, or his Alienee who levied the Nuſance by the Stat. of W. 2. c. 24. What.

2. This

A Writ of Right in its nature.

2. This Writ is a Writ of Right in its nature, and as such might come under the Title of Writs of Right before. At Common Law it lay not for Tenant for life, by reason whereof, and that there was great delay therein, the Stat. of W. 2. c. 25. was made, which gave an Aſſiſe of Novel diſſeiſin for profits appender, as Eſtovers, Corodies, Toll, Paſſage, Pannage, Cuſtod' Parcar', Commun' Piſcar', Turbar', &c. which lay not at Common Law.

Original.

The Writ follows, viz.——————Rex, &c. Vic. ſalutem. Præcipe A. quod juſte, &c. permittat B. habere communiam Paſtur. in N. qu. pertinet ad liberum Tenementum ſuum in eadem Vill. vel al. de qu. idem A. vel W. Pater vel Mater, &c. præd. A. cujus hæres ipſe eſt injuſte diſſeiſivit R. Patrem vel, &c. præd. B cujus hæres ipſe eſt poſtquam, &c. (now infra ſexagint. Annos.)

As a Writ of Entry.

This Writ is in nature of a Writ of Entry Sur diſſeiſin done to the Anceſtour. Reg. 155. b.

As a Writ of Right.

Sometimes it is meerly in the Right, and then it is in the (Debet) thus,——————Rex, &c. Præcipe, &c. habere communiam Paſtur. in C. qu. pertinet, &c. vel aliter quam habere debet ut dic. &c.

Count.

And in this Writ he ſhall Count as in a Writ of Right, and joyn the Miſe upon the meer Right, and Battle lies. Reg. 156. a. F. N. B. 124. a. Fr.

There's likewiſe a Quod permittat in the Debet and Solet, and this is in the Poſſeſſion to be brought of his own Poſſeſſion, and this he Counts as in a Writ of Entry. Reg. 156.

Counts.

Vid. The Counts for a Way, Common of Paſture, Eſtovers, in Raſt. Entr. 538, 539. a.

View.

View, but not Voucher, lies in a Quod permittat. F. N. B. 297. Eng. in the Margent. 2 H. 4. 13. 45 E. 3. 8. Tit. View.

Proceſs.

The Proceſs is Summons, Attachment and Diſtreſs, and if Nihil be return'd, a Capias. F. N. B. 124. b.

This

This Writ is now out of use, for at this day all Actions for Ways, Commons, Nusances, and the like are turned into Actions upon the Case, or the Right may be tried upon Actions of Trespass. Out of Use.

Note, this Writ is Vicontiel, and may be sued in the County by Justicies as well as in the Common Pleas. F. N. B. 123. Fr.

For the Writ De Medio. vid. f. 154. And De Consuetudin. & Servitiis. f. 150. And Secta ad molendinum f. 156.

## Pleas in Quod Permittat.

He may plead several Pleas, according to the nature of the Action that is brought.

If it be brought in the Debet in the nature of a Writ of Right, whether for a Way, Common, Estovers or the like, the Mise may be joyn'd upon the meer Right. Mise joyned.

If it be brought in the nature of a Writ of Entry sur disseisin, if it be for Common, he may plead the holding of the Land in severalty, and traverse the Common, or traverse the disseisin. Rast. Entr. 539. Traverse of the Common.

If it be in the nature of a Writ of Entry for Common, or a Way, &c. he may traverse the Prescription for the Common or Way. Rast. Entr. 538. b. Traverse of the Prescription.

CAP.

## CAP. VI.

# Warrantia Chartæ.

What.

1. THis Writ lieth where a Man is Infeoff'd by Deed with Warranty, and is impleaded in an Aſſiſe, or Writ of Entry in nature of an Aſſiſe, or any other Action wherein he cannot Vouch, then he ſhall have this Writ againſt the Feoffor or his Heir. F. N. B. 134. Fr.

Who may have it.

2. Tenant for Life or in Tail rendring Rent, may have this Writ againſt him in Reverſion, though they have no Deed, therefore (unde Chartam habet in the Writ) is not material; for a Reverſion and Rent reſerv'd maketh a Warranty. So other Caſes there are which make a Warranty, for which, vid. F. N. B. 135. Fr.

Lies pendente placito.

3. Note, a Man may have a Warrantia Chartæ, though he be impleaded in an Action wherein he may Vouch; This is to be underſtood that he may have a Warrantia Chartæ pendente placito, and if he recover his Warranty againſt him, and after loſe the Land, he ſhall have an Haber. fac. ad Valenciam againſt him that warranted without a Scire fac. But

Where the party muſt Vouch.

if the Warrantia Chartæ be brought before, and he have recovered his Warranty, then if an Action be brought againſt him for the Land, he muſt Vouch if he can Vouch, or have a Scire fac. againſt him that warranted upon the former Judgment of Recovery of his warranty. But if an Action be brought, and the Land loſt before any Warrantia Chartæ be brought, and he did not Vouch the warrantor (if it were an Action wherein he might Vouch) he ſhall not have a Warrantia Chartæ afterwards, and ſo is F. N. B. 134. 135. Fr. to be underſtood.

Warr. Chartæ quia timet.

4. A Man may have a Warrantia Chartæ quia timet before any Action brought, though the Writ does ſuppoſe that he is impleaded, and if he recover his warranty, then if he be afterwards impleaded and loſe, he ſhall Recover in Value ſuch Land as the Warrantor had at the time of the

Recovery in Value from the Teſt of the Warr. Chartæ.

Teſt of the Warrantia Chartæ; but in Voucher a Man ſhall render in Value only ſuch Land as he had at the time of

the

the Voucher. F. N. B. 135. Fr. 12 H. 4. 12. 10 H. 7. 13. See the Case of Sr. Henry Roll vers. Osborne, Hob. Rep. 21, 22. &c. for the learning in a Warrantia Chartæ. And Moore Rep. 859. some good Observations, and the same Case Leon, 4. P. 250. Where from the time of the Voucher.

5. The Writ is as followeth, —— —— Rex, &c. Præcipe A. quod juste, &c. Warr. B. un. Mess. &c. cum pertinen. in L. quod tenet & de eo tenere clam. & unde Chartam suam habet (vel Chartam H. Patris vel Matris) cujus hæres ipse est ut dic. Et nisi, &c. Original.

6. The Count is various according to the particular Case of the Plaintiff, the Warranty sometimes arising upon a Deed, sometimes upon a Fine made by the Defendant or his Ancestours to the Plaintiff or his Ancestours: See for the Count. Rast. Entr. Garranty de Chaters. 396. b. 397. a. b. 398. a. b. Co. Entr. 691, 692. Count.

7. The Process is Summons, Attachment and Distress infinite, and upon a Nihil, a Cap. as in a Writ of Covenant, for this Writ is in some respects personal, in nature of a Writ of Covenant. 4 E. 2. Garrant. Chart. 29. for he shall Recover both in Value and Damages. If default be made after appearance, a Distringas peremptory is awarded in nature of a Petit Cape. Process.

8. The Judgment in this Action is, That the Defendant shall warrant the Land and likewise Damages to the Plaintiff, unless it be brought Quia timet, before any Action brought against the Plaintiff, for in that Case he shall not Recover damages, though he must declare ad damn' in his Count. Hob. Rep. ibidem. Co. Entr. 692. a. Judgment.

This Action is brought rarely, though sometimes at this Day it may be, for I remember one about 20 or 22 Years agoe before the Justices of Chester, between Sr. George Warburton Baronet Plaintiff, and John Brerewood Esq; Defendant, which was Confessed as I think. I conceive it was about 15 or 16 Car. 2. Another there is, the last Sessions at Chester Assises, April 10 W. 3.

Pleas in this Action.

(Non dedit &c.) The general Plea in this Action is, (Non dedit. Non conceſſit) Co. Entr. 692.

Forfeiture. 2. Note, the Pleading in Raſtall Entr. 398. b. where the Defendant pleads that he who made the warranty claim'd under him who was but Tenant for Life, who levied a Fine to the diſinheriting of him in Reverſion, and that he in Reverſion Entred for the Forfeiture upon the Plaintiff, and the Plaintiff after Entred and diſſeis'd him in Reverſion, and demands Judgment, &c. Quær. the Strength of this Plea where the Point lies to barr him of his Warrantia Chartæ. It ſeems to me to lie in the change of the Eſtate for the Diſſeiſee Entring upon the Plaintiff before the Writ of Warrantia Chartæ brought, and the Plaintiff Reentring upon him, is a Diſſeiſor, and conſequently is in of another Eſtate than that to which the warranty was annexed, for by the Entry of him in Reverſion, the Eſtate that was wrongfully had by the Fine, was avoided, and conſequently the warranty. This may appear by Hob. 26. Sr. Henry Roll's Caſe.

## CAP. VII.

## Curia claudenda.

What. 1. This is a Writ lies for him who is Tenant for Life, or has other Eſtate of Freehold in Land, and he who has Land next adjoyning, ought to incloſe his Land, and will not, to the Nuſance of the Plaintiff. F. N. B. 127. French.

For whom. 2. This lies only for him that has a Freehold, and not for Tenant for Years. F. N. B. ibidem. and againſt him whoſe Cloſe is next adjoyning to the Plaintiff's Land.

3. This

3. It may be brought either in the County Court by Justicies, or in the Common Pleas. F. N. B. ibidem. Reg. 155. Where to be brought.

4. The Writ followeth, viz.——————Rex, &c. Præcipe A. quod juste, &c. claudat Curiam suam in N. qu. aperta est ad nocument. liber. Tenement. B. in eadem Villa (vel in alia) quam claudere debet & solet ut dic' Et nisi, &c. Original.

5. The Count sets forth how the Plaintiff is seis'd of such Land, and the Defendant of such Contigue adjacen' to the Plaintiff's Land, and how he ought to Inclose, and by reason of Non-closure the Cattle of the Defendant come into the Plaintiff's Land. Vid. Rast. Entr. 141, 142. Cur. claudend. Count.

6. View lies in this Writ. Rast. ibidem. The Process is Summons, Attachment, and Distress, and upon Default after Appearance a Distringas, in nature of a Petit Cape, and then if he do not appear and save his default, a Writ of Inquiry of damages shall be awarded. 13 R. 2. Cur. Claud. 3. F. N. B. 128. Fr. View. Process.

7. The Judgment is, That the Defendant shall Inclose, and the Plaintiff shall recover damages, and he shall be distrain'd per omnes Terr. till he Inclose. F. N. B. ibidem. Judgment.

This Writ is now much out of Use, and turned into an Action upon the Case to Recover Damages from time to time.

Pleas in this Action.

1. Non-tenure, may be pleaded to the Writ, for it must be brought against him that is Tenant of the Freehold. Rast. Entr. 142. a. Non-tenure.

2. In Barr (if the Inclosure be grounded upon a Prescription) the Defendant may traverse the Prescription. Rast. ibidem. Prescription traversed.

## CAP. VIII.

## Partitione facienda.

What. 1. IS a Writ to compel thoſe that hold Lands in Common inſimul & pro indiviſo, to divide the Lands in ſeveralty by Meets and Bounds, as Coparceners and Heirs in Gavelkind at the Common Law; Tenants in Common and Joynt-tenants of Inheritance by the Statute of 31 H. 8. 1. and of an Eſtate of Freehold or for Years by the Stat. of 32 H. 8. c. 32. Lit. Sect. 247.

By whom. 2. It lies by one Coparcener againſt another, or by one againſt Three, or Two againſt Two, if there be Four, and ſo againſt all the others that will not Conſent by them that do Conſent. Lit. Sect. 247. It lies not for Tenant by the Courteſie. Reg. 76. b. Tenet always implies a Tenant of the Freehold, and therefore if one of the Coparceners make a Leaſe for Life, it cannot be brought againſt him for that Land, becauſe in that Caſe, they do not hold inſimul & pro indiviſio, and then the Writ muſt be againſt the Tenant of the Freehold. 4 H. 7. 9. Co. Lit. 167. It lies againſt Tenant by the Courteſie; but to have it perpetual, he muſt pray in Aid of the Heir in Reverſion. Reg. 76. b.

Original. 3. The Writ is thus,———————Rex, &c. Vic' C. ſalutem, Si A. fecer. &c. tunc. ſum. B. quod ſit, &c. oſtenſur. quare cum iidem A & B. inſimul & pro indiviſo teneant tres Acr. Terr. &c. cum pertinen. de hæreditate qu. fuit M. Patris vel Matris præd. A. & B. cujus hæred. ipſi ſunt in I. idem B. partitioni inde inter eos ſecundum legem & conſuetudinem Regni noſtri Angliæ faciend. contradic. & eadem fieri non permittit minus juſte ut dic. Et habeas, &c. T. &c. Reg. 76. a.

The like Writ of Partition by a Man and his Wife againſt a Third Coparcener, where the Husband purchaſed the part of the Second Coparcener. Reg. ibidem. a. b.

4. The

4. The Count in Partition in the ſeveral Caſes, Vid. Raſt. Entr. 449, 450, 451. between Tenants in Common and Joynt-tenants per Statute, Vid. Co. Entr. 410. 412. a. b. 413. a. b. Between Joynt-tenants for Years. Co. Entr. 418. b. 419. a. Count.

5. The Proceſs is Summons, Attachment, and Diſtreſs infinite. F. N. B. 62. Fr. Proceſs.

6. Aid lies in this Action which may be Counterpleaded, and if it be found againſt the Defendant, it is Peremptory, Quod partitio fiat, &c.

The Tenants may have ſeveral Eſſoins, every one, one Eſſoin, as in other Real Actions, though no Land be demanded. Hob. Rep. 8. Eſſoin.

7. There are two Judgments in this Action. 1. One that the Partition ſhall be made, viz. ——————Quod Partitio fiat inter partes præd. de Tenement. præd. cum pertinen. Lit. Sect. 248. Co. Lit. 167. 2. The Second Judgment is ——Ideo Conſideratum eſt per Cur. quod partitio firma & ſtabil. imperpetuum teneatur, &c. Co. Lib. 11. f. 40. Metcalf's Caſe. Co. Lit. 169. a. ꝧ. Two Judgments in this Action.

8. Upon the firſt Judgment goes out a Judicial Writ, as an Execution to the Sheriff to make Partition, which is as followeth, viz.—— First Judgment.

Rex, &c. Vic' C. ſalutem Cum A. nuper in Cur. noſtra coram, &c. ſum. fuit ad reſpondend' I. H. de placito quare cum iidem A. & I. H. inſimul & pro indiviſo ten. xx Meſſ. &c. and ſo recite the Writ and firſt Judgment, then proceed.—— Ideo tibi præcipimus quod aſſumpt' tecum xij liberis & legal' hominibus de Vicin' de C. per quos rei veritas melius ſcir' poter' in propria perſona tua acced' ad Tenementum præd. cum pertinen' Et ibidem per eorumSacram' in preſentia partium præd. per te premuniend' ſi intereſſe voluer' prædict' Tenement' cum pertinen' per Sacrament' probor' hominum prædict' habit' reſpect' ad verum valor' eorund' in duas partes equal' partir' & dividi & un' partem partium illar' præfat' I. H. & alter' partem inde præfat' A. tenend' in ſeperalitat' liberari & aſſig- Bre' Vic' quod fiat partitio.

nari

nari fac' ita quod neuter prædict' I. H. & A. plus habeat in parte ſua de hæreditate præd. quam habere debeat & ad ipſum pertin' habend' ita quod pd' I. H. de proparte ipſius I. H. & præd. A. de proparte ipſius A. ipſos' de hæreditate ill' contingen' ſe appruare poſſunt & partitionem ill' diſtincte & aperte habeas coram, &c. ſub ſigill' tuo & ſigill' eorum per quorum Sacrament' partition' ill' fecer' Et habeas ibi nomina eorum per quorum Sacrament' partionem ill' fecer' Et hoc Bre, Teſt. &c.

Inquiſition. Upon the Return of this Writ, the Sheriff returns an Inquiſition (annexed to the Writ) of the Partition, which, Vid. Raſt. Entr. 452. a. b. And then upon motion to the Court the Second Judgment is given, Quod partitio ſit ſtabilis, &c.

This Writ is commonly brought by Conſent, and Confeſſed.

Non inſimul tenuer' is the general Iſſue in this Action.

There's now an Act, 8 & 9 W. 3. which impowers the Court to examine the matter, and Enter Judgment if the Tenant in Poſſeſſion does not appear within 15 days after the Return of the Attachment, having had 40 days notice before the Return. See the Statute.

CAP.

## CAP. IX.

# A Writ of Covenant to Levy a Fine.

1. THis Writ is in the Reality, and lies where a Man Covenanteth to Levy a Fine to a Man and his Heirs of Lands or Hereditaments, he to whom the grant is made, shall have a Writ of Covenant. F. N. B. 140. Fr. What.

This Writ is in ordinary Practice, and brought by Consent for the assurance of Lands.

The Writ is as follows, viz——————Rex, &c. Vic C. salutem, Præcipe A. quod teneat B. Conventionem inter eos fact' de Maner' &c. de N. cum pertinen', &c. vel de un' Mess. &c. in M. Et nisi, &c. Original.

Note, the same Order in the particulars must be observed, as in a Præcipe quod reddat. Reg. 165.

2. Upon this Writ when it is taken forth, a Fine is paid in the Hamper to the King, called the Præ-Fine, (as in other Real Writs) Co. 2 Inst. 511. it is vis. viij d. for every Five Marks of the Yearly value of the Land. In Chester it is paid to the Seal-keeper of the Exchequer at the Sealing of the Writ, and he Indorseth upon the back of the Writ what the Land is valued at upon a Composition, viz. Tenement' infrascript non exced' vi l. per Annum, vel plus. Præ-Fine.

There's no other King's Silver paid in Cheshire, for there is no Post Fine (which is properly the King's Silver) paid there. But there's an old Entry of xxij d. entred of Course upon the King's Silver Roll, under the Entry of every Præ-Fine in the Roll thus,——————De eod' B. pro denar' vocat' le King's Silver——xxij d. And the Entry of the Præ-Fine in the Roll in the Prothonotaries Office is thus, ——A dat Dom' Regi sex solid' & octo denar' (vel plus) pro licentia concordand' cum C. de un' Mess. &c. in M. unde habet Cyrogr'——vj s. viij d. Post Fine. No Post Fine in Chester. xxij d.

It

Which is the King's Silver in Chester.

It has been a great Question in Chester whether of these Two last mentioned was accounted the King's Silver, for the xxij d. called the King's Silver, does not answer the proportion of the Post Fine (which is the King's Silver) which should be as much, and half as much as the Præ-Fine. Co. 2 Inst. 511. And the Præ-Fine is Entred (as aforesaid) before the Justices of Chester, as if it were the King's Silver, for it is (pro licentia Concordand'.)

Upon the whole matter I conceive that which is Entred as the Præ-Fine is the King's Silver, and that by the Custom of the County Palatine of Chester no other was due to the Earl, and the Ground of this Conception is, because it is Entred as the King's Silver is at Westminster, scilicet (pro licentia Concordand') and likewise because its Entred in the Court of the Great Sessions at Chester before the Justices of Chester, upon a Roll by the Prothonotary as aforesaid, whereas the Præ-Fine is never Entred in the Common Pleas, but only the Post Fine. When, or upon what ground the xxij d. came to be Entred, I cannot determine, but it may be after the Earldom came to the Crown for more caution, because the King's Silver was a Prerogative due to the Crown, such a small Sum was thought fit to be Entred under the other as aforesaid, for the xxij d. was not always the Sum; for I find 26 E. 1. Ro. Cestr. xij d. pro licentia Concordand', neither is it in any Roll in Chester before the Justices Entred, beyond the time of Queen Elizabeth as I think.

Entring the King's Silver in Chester.

It has been an antient Usage in Chester when a Fine is acknowledged in the Vacation between the Two Sessions, to bring the Writ, Præcipe and Concord into the Prothonotary's Office to Enter the Præ-Fine and the xxij d. which is Entred in a Paper Book in the Office, and this has been taken as an Entry of the King's Silver, to prevent the avoiding of the Fine, in Case the Party Deforc' shall die before the next Assises following.

3. At Common Law every Fine was to be acknowledg'd in Person in open Court, but now by the Statute of Carlile, 15 E. 2. in Case of Sickness, Age, &c. other Persons may take the Fine, and upon this Statute is grounded the

the Dedimus poteſtatem to other Perſons to take the Fine. 2 Inſt. 512. The manner of taking a Fine both in Perſon before the Juſtices and by Commiſſion, is well known by daily practice. Vid. Weſt's Preſid. 39. The manner of Levying a Fine in Cheſter. Dedimus Poteſtatem.

4. There are two ſorts of Fines. 1. Executed, or 2. Executory. Executed, are either 1. Sur cognizanzs de droit come ceo que il ad de ſon done, &c. which is the higheſt and moſt principal Fine; or 2ly. Sur Releaſe, Confirmation or Surrender, Co. 2 Inſt. 563. How many ſorts.

Executory ſur Grant & Render, ibidem.

The Fine Executed, ſuppoſeth the preſent Eſtate in the Cognizee by ſome precedent Feoffment, Grant, &c. and the Cognizee needs not Enter or have an Haber' fac' poſſeſſion. 41 E. 3. 14. Sur Cognizance de droit, &c.

~~Writ of Covenant to Levy a Fine.~~

The Executory is when no Eſtate is Executed in the Cognizee until Entry, Action or Execution by habere fac' ſeiſinam vel poſſeſſionem, ibidem. Co. 2 Inſt. 563. And this is the Fine ſur Grant & Render. And this is done by a Fine ſur Cogniſance de droit tantum, or other Fine Executed, and then the Cognizee (and at the ſame inſtant) grants and renders a Rent out of the Land or ſome other Eſtate in the Land, &c. to the Cognizor. Or where a Man grants a Remainder or Reverſion upon a particular Eſtate, there the Reverſion does paſs, but the Grantee cannot Diſtrain for Rent, or bring an Action of Waſt before Attornment. Lit. Sect. 579. Co. 1 Inſt. 309. a. ¶. b. †. Snr Grant & Render.

And to compel the particular Tenant to Attorn, the Cognizee ſhall have a judicial Writ call'd a Quid juris Clam. Co. 1 Inſt. 320. a. b. †. Leon. 2. p. 40. For the Proceſs in a Quid juris Clam. ſee Pl. Com. 209, 210, 211. Sanders vers. Freeman. Quid juris Clam.

So where a Man grants a Seignory by Fine, and the Tenant will not Attorn, the Grantee may have a Per qu. ſervitia to compel him. Co. Inſt. ibidem. & 252. a. ¶. Per qu. ſervitia.

Quem reddi-tum reddit.

And if the Rent be granted by Fine, and the Tertenant will not Attorn, the Grantee may have a Quem redditum reddit to compel him.

Quid juris clam, &c. out of Use per Stat. H. 8. de Uses.

But now since the Statute of H. 8. for Execution of Uses into Possession, these Writs of Quid juris Clam. Per qu. Servitia and Quem redditum reddit are out of use where Fines are Levied to Uses; for the Statute executing the Use to the Possession by the Præcipe and Concord before the Ingrossing of the Fine, the Cognisee cannot Compel the Tenant to Attorn, his benefit by a Quid juris Clam. being taken away by the Statute; therefore he shall distrain without Attornment, for these Writs at Common Law were always to be brought against the Tenants before the Ingrossing of the Fine. Co. Lib. 6. 68. Sr. Moyle Finches Case, Co. 1 Inst. 309. b.

## CAP. X.

# Writ of Deceit, Quod ei deforceat, Attaint, Forcible Entry, Rediſſeiſin and Poſtdiſſeiſin.

There are three things especially (that have relation to the giving Possession of Lands) that are great Enemies to Justice and the due Administration and Execution of Law. 1. Fraud. 2. Force. 3. Vexation.

Fraud.

1. For Fraud, is when a Man gains Possession by some undue means or contrivances in a Court of Record, i. e. procures a Judgment for him or a false Verdict, and so makes the Law a Patronage for his injustice. For Remedy in this Case, the Law has provided the Writ of Deceit, and Quod ei deforc' against a Judgment fraudulently had, and the Writ of Attaint against a false Verdict.

2ly. For

2. For Force, its likewise odious in Law, and is when a Man will not wait an orderly Course of Law for the gaining of his Possession, but will be his own Carver, both Judge and Party in his own Cause, and therefore takes Possession by Force and Strength of Arms. Against these, several Statutes have been made, as 5 R. 2. 7. 15 R. 2. 2. 8 H. 6. 9. 13 Eliz. 11. 21 Jac. 15. Force.

3. Vexation, which is a great Contempt of the Law, when a Man will not rest satisfied with the Judgment the Law has given, but after Judgment and Execution will make new Entries and Disseisins upon the Recoverer, against which are provided the Writs of Redisseisin and Post-disseisin. Of these I shall observe something in their Order, and so Conclude this Tract of Real Actions. Vexation.

## Sect. 1. Writ of Deceit.

1. When any thing is done deceitfully and fraudulently to the Damage of another in some Court of Record, as purchasing a Writ in my Name I knowing nothing of it, Confessing an Action, an Attorney making default fraudulently in a Real Action, whereby I lose my Land or other thing, in those and several other Cases, the Writ of Deceit lies. F. N. B. 95, 96. &c. Fr. What.

2. But I shall only speak of this Writ as it has relation to Real Actions, where the Possession of Lands or Hereditaments is unjustly or irregularly gain'd. And in that respect it lies where an Attorney by Covin makes default in a Real Action, whereby the Land is lost. Vid. Reg. 113. Fitz. N. B. says the Writ of Deceit lies against the Attorney. But Quær. whether it does not lie against the Attorney and the Demandant, and that the Tenant shall be restored to the Land? And I conceive it does.

3. It lies in a Præcipe quod reddat, where the Sheriff Returns the Tenant Summon'd, when as he was not summon'd, by which the Tenant loses the Land at the return of the Grand Cape. F. N. B. 232. Eng. And this Writ is to be brought against the Sheriff and him who recovered, and the Tenant shall be restored to the Land, ibidem. Where it lies.

Out of what Court.

4. It may be ſued either out of the Common Pleas, or out of the Chancery, ſo it is either Judicial or Original, at the election of the Party. 22 E. 3. Deceit. 6. F. N. B. 99. Fr.

Proceſs.

5. In this Caſe of loſing by Default, the Writ of Deceit is in nature of an Audita Querela, and begins Queſtus eſt nobis, &c. And the Proceſs againſt the Sheriff, Summons,

Venire fac'.

Veiors, and him that recovered, is a Venire fac' in nature of a Summons contained in the ſame Writ, Raſt. Entr. 222. a. b. But in other Writs of Deceit, the Proceſs is Attachment and Diſtreſs, &c. F. N. B. 100.

When the Action fails.

6. If the Summoners in the Præcipe quod reddat and the Summonors and Veiors in the Grand Cape be dead,

Summonors and Veiors.

this Action fails. F. N. B. 99. Fr. If one Summonor and Veior be alive it is ſufficient. 8 H. 6. 1. 18 E. 4. 1. F. N. B. 234. Eng. For the Trial muſt be by Examination upon Oath of the Summonors and Veiors. F. N. B. 99. Fr. 232. Eng.

7. For the Proceſs, the Appearance of the Summonors, Sheriff, &c. and manner of the Examination, Vid. Raſt. Entr. 222. b. 223. a. b.

Inquiſition in the Original Writ.

8. By the Original Writ the Sheriff is Commanded to Return an Inquiſition by the Oaths of 12 Men of the yearly value of the Land recovered, and when Judgment is given for the Plaintiff in the Deceit, he ſhall recover the yearly value from the time of the firſt Judgment, together with the Seiſin of the Land. Raſt. Entr. 222. b.

Scire fac'.

9. In a Scire fac' where a Man loſes Land by Default, the like Remedy by Writ of Deceit, as in Caſe of Nonſummons in other Pleas of Land by the Statute of 2 E. 3. 17.

Quare Impedit.

10. So if a Man for want of Summons loſes by Default in a Quare Impedit. 26 H. 6. droit. 15. 34 E. 1. droit. 57. Leon. 1. p. 294.

11. This

11. This Action in Caſe of loſing by default is now worn out of Uſe, eſpecially ſince the Statute of 31 Eliz. c. 3. which orders Sheriffs in Real Actions after Summons to make Proclamation of the Summons upon Sunday following, &c. And all Actions of Deceit are now generally turn'd into Actions upon the Caſe. Yet the Caſe may be ſo now, as this Action may of neceſſity be ſometimes uſeful at this day; as in a Formedon or Writ of Dower, if the Attorney of the Tenant of purpoſe make default when the Tenant was duly ſummon'd, what other remedy has the Tenant but this Writ? or a Quod ei deforceat? or a Writ of Right? Stat. 31 Eliz. 3. Of the manner of Summons. Much out of Uſe.

## Sect. 2. Quod ei deforceat.

1. This Writ lies for a particular Tenant of the Freehold, as Tenant for Life, Tenant in Dower, by the Courteſie, and Tenant in Tail where they loſe their Land in a Real Action by default, whether they were duly ſummon'd or not. And this Writ is given by the Statute of W. 2. c. 4. For at Common Law ſuch Tenants and the Tenant in Tail after the Statute de donis Conditionalibus were without remedy if they loſt by default, and were duly ſummon'd, for they could not have a Writ of Right, which none but Tenants in Fee-ſimple could have. Co. 2 Inſt. 350. Co. 1 Inſt. 481. 674, 675. Where it lies.

2. If the Tenant be not duly ſummon'd, he may have his Writ of Deceit or this Writ of Quod ei deforceat at his election. F. N. B. 381. Eng. Deceit or Quod ei deforceat.

3. This Writ lies not upon a default of Nihil dicit, after appearance. Vid. le reaſon. Anderſ. 1. p. 271. Elmers Caſe. Cro. 3. p. 263. Owen's Rep. 101. Lies not upon Nihil dicit.

4. It lies againſt the Heir or Alienee of him who recover'd as well as againſt the Recoveror himſelf. Lit. Sect. 674, 675. Co. 2 Inſt. 352. Againſt the Heir.

5. It lies not for the Heir of Tenant in Tail, but he muſt bring his Formedon. F. N. B. 382. Eng. Formedon.

The

Original. The Writ is thus, viz.——————Rex, &c. Præcipe A. quod, &c. reddat B. qu' fuit Uxor C. un' Meſſ. cum pertinen' in L. quod clam' eſſe rationabil' dotem ſu' (vel quod clam') &c. & quod idem A. ei deforc' ut dic' &c. Reg. 171.

Original. For Tenant in Tail the Writ is as followeth, viz.——— Rex, &c. Præcipe A. quod juſte, &c. un' Meſſ. &c. in L. quod clam' tener' ſibi & hæred' de Corpore ſuo exeunt' & quod præd' A. ei deforc' ut dic', &c. ibidem.

So for the Tenant by the Courteſie, and for Life, vid. ibid. b.

Defendant Actor. 6. This Writ is of the nature of the firſt Writ, ſo that the Demandant in this Writ being Tenant in the former, may Vouch as Tenant to the former Action: And the Tenant in this Action is as it were Actor or Demandant; for he pleads the former Recovery and ſets forth his Title. and ſays,——(paratus eſt ad manutenend' jus & titul' ſu' præd', &c.) and then the former Action is revived, and the Demandant may Vouch, as is ſaid before, if Voucher lay in the former Action. Co. 2 Inſt. 351. 2 E. 4. 11. Co. 2 Inſt. 352.

Demandant may Vouch.

Voucher. Note, the Demandant in this Action can Vouch none but him in Reverſion. Co. 2 Inſt. 352.

Demandant & Tenant poent Vouch. And both Demandant and Tenant may Vouch. Co. ibi. 10 H. 7. 10.

There can be but one Voucher in this Action, and therefore the Vouchee ſhall not Vouch over. 10 H. 7. 29. 9. E. 3. 22. Co. ibidem.

7. The Count is thus,——————————

Count. W. de H. pet' verſus B. un' Meſſ. &c. in L. qu' clam' tener' ad term' vitæ ſuæ, Et præd. B. ei injuſte deforceat, &c. Unde dic' quod ipſemet fuit ſeiſit' de præd. Tenement' cum pertinen' in dominico ſuo ut de libero Tenemento tempore pacis tempore, &c. Capiend' inde Exples ad valenc', &c. Et in quam, &c. Et inde produc' Sectam, &c. Raſt. Entr. 537. a. b.

Note

Note, This Count the Demandant Counts that he was ſeis'd of the Land for Life without ſhewing of whoſe Leaſe, &c. becauſe the Action is brought of his own Poſſeſſion, and this puts the Tenant in this Writ either to plead the former Recovery, and his Title or ſome other matter in Barr, for he may do either. Co. 2 Inſt. 351. 10 E. 4. 2. 29 E. 3. 47.

Vid. the Recovery pleaded, and Iſſue upon the Title. Raſt. Entr. 537. b. 1. 2.

8. The Proceſs in this Action is, Summons, Grand Cape, and Petit Cape, as in other Præcipe quod Reddats. Proceſs.

9. The Judgment is as in all other Real Præcipe quod Reddats.

## Sect. 3. Attaint.

1. Attaint, is a Writ or Action where a falſe Verdict is given in a Plea Real or Perſonal, by Writ or Bill, then he againſt whom this Verdict is given may have this Writ. F. N. B. 252. Eng. What.

2. In this Action the Jury appears the firſt day, as in Aſſiſe or Juris Utrum. Vid. Raſt. Entr. 86. a. 88. a. 4.

3. This Writ is either Judicial or Original, i. e. it may be ſued out of the Com. Pleas, or King's Bench upon a falſe Verdict given in the ſame Courts, or out of the Chancery. F. N. B. 257. Quotuplex.

4. It muſt be brought againſt him that was Tenant or Defendant in the former Action; if it be in a Real Action, he muſt continue Tenant at the time of the Attaint brought, or it may abate. 6 Aſſ. 6. Againſt whom.

5. The Jurors likewiſe of the firſt Inqueſt muſt be attach'd to appear the firſt day with the former Defendant, and all this appears by the Writ.

For

For the Writ and Return both of the Jurors upon the Writ of Attaint, and of the first Inquest, Vid. Rast. Entr. 86. 2.

Proceſs at Com. Law.

6. The Proceſs against the Defendant at Common Law was Reſummons, if he appear not the first day, and upon the Return of the Reſummons the Jury ſhall be taken by default. Rast. Entr. 86. b. Now it's Summons, Reſummons, and Diſtreſs infinite per Stat. 23 H. 8. c. 3.

Per Stat. 23 H. 8. c. 3.

Diſtring. vers. the firſt Jury.

7. The Proceſs againſt the firſt Jury is a Diſtringas if they do not appear the firſt day, then at the Return of the Diſtringas, the Jury ſhall be taken againſt them by default. Rast. Entr. 86. b. Now Summons, and Reſummons and Diſtreſs infinite per Stat. 23 H. 8. c. 3. And if upon the Diſtreſs neither Defendant nor Petit Jury do appear, yet the Grand Jury ſhall be taken per Stat. of H. 8. aforeſaid.

Demand of Oyer.

8. Upon the Appearance the Defendant or Tenant and the former Jury may demand Oyer of the Writ of Attaint, and the Record upon which it is grounded, and if there be any variance, it may be pleaded in Abatement. 7 Aſſ. 5 Rast. Entr. 88. b. 5. & 89. a. b. And then upon demand the Plaintiff may ſhew the falſe Oath. Rast. ibidem.

Eſſoin.

9. The Tenant may Eſſoin the firſt day, but not after appearence no more than in an Aſſize of Mortdanceſter or Juris Utrum. Vid. ſupr. 7 Aſſ. 8 W. 1. 42. No Eſſoin per Stat. 23 H. 8. c. 3.

Entry of the Action.

10. The Entry begins thus,——Jurator' vigint' quatuor Mil' de Vicin' de E. ven. recognitur' ſi Jur' per quos quæd' Inquis' in Cur', &c. inter, &c. falſum fecer' Sacrament', &c. Reg. Entr. 89. a. b.

Judgment in Attaint.

11. The Judgment in Attaint at Common Law was dreadful, That the Plaintiff ſhould be reſtored to all that he had loſt; That the Petit Jury i. e. the Jury which gave the falſe Verdict ſhould be Impriſoned, their Lands taken into the King's Hands, and waſted and deſtroyed, their Wives and Children turn'd out of their Poſſeſſions, and all their Goods forfeited

forfeited to the King, and themſelves to be as Outlaws. 6 Aſſ. 7. Raſt. Entr. 92. b. Judgment 1. Co. 2 Inſt. 130.

12. But now the Rigor of this Judgment is altered, and ſeveral other Proceedings in Attaint by the Statute of 23 H. 8. c. 3. which is now the Rule for Attaints. Vid. Dyer 201. a. b. 3 Eliz. Co. 1 Inſt. 294. b. * Leon. 1. p. 279. Judgment altered by the Stat. 23 H. 8.

13. By force of this Statute an Attaint now can be brought in no Court but in the Common Pleas or King's Bench. In what Court.

Time hath worn out the uſe of this Action, and therefore I ſhall not proceed in it any further. Though I conceive it may be very uſeful ſtill where Juries give exceſſive damages. 12 E. 4. 5. Vid. Co. 1 Inſt. 355. b. In what Actions it lieth not. Vid. Co. Lib. 11. Priddle and Napper's Caſe. In what Caſes an Attaint lieth. Out of Uſe.

## Sect. 4. Forcible Entry.

1. THE former Actions relate to Fraud and Deceit, and to remedy in ſuch Caſes, or where the Party is ſurprized, and Judgment obtain'd againſt him by default, or by falſe Verdict. Theſe now that follow relate to Force, againſt which the Law has provided ſutable Remedies.

I ſhall not ſay any thing as to Indictments, for forcible Entries and Detainers, being not ſo proper to the nature of the preſent ſubject, but only ſet down ſomething concerning Actions the Party may have in Caſe of ſuch unlawful Entries.

2. But this is to be noted for a difference between an Indictment and an Action for the Force, as to the remedy of the Party. If the Entry be lawful, i. e. if the Party that Entred have good Title to the Poſſeſſion, there no Action can be brought upon the Statutes, but the Party may be Indicted for the Force, and he who is Duſted (after ſuch Indictment found) may be reſtored to his Poſſeſſion. So that in ſuch Caſe an Indictment now upon the Statute of H. 6. is better than an Action. 15 H. 7. 17. Br. Force 11. Difference between an Action and Force, Indicted.

Stat. againſt forcible Entry.

3. The Statutes againſt forcible Entries whether the Party have Right or not, are the 5 R. 2. c. 7. 15 R. 2. c. 2. & 8 H. 6. c. 9.

4. The Action of Treſpaſs upon the Statute of 5 R. 2. and 8 H. 6. we ſhall ſpeak to And firſt the Declaration which ſhews the nature of the Action next followeth,——

Norfolk. ff. Declaration.

A. Attatchiat' fuit ad reſpondend' tam Domino Regi qu' W. de placito quare cum in Statut' in Parliament' Domini Richardi Regis Angliæ, &c. Secundi poſt Conqueſtum apud Weſtminſt. Anno Regni ſui quinto tent' edit' inter Cetera ordinatum ſit quod nullus faciat ingreſſum in aliquam Terr' ſeu Tenement. niſi in Caſu ubi ingreſſus datur per Legem & in ill' Caſu non manu forti nec multitudine gentium ſed licito & quieto modo tantum & ſi quis in Contrariu' fecerit & inde debite Convict' fuer' per Impriſon' Corpóris ſui puniatur & ad voluntatem Domini Regis redimatur prout in Statut' præd' plenius continetur, præd' A. in un' Meſſ. &c. ipſius W. in B. in qu' eidem A. ingreſſus non datur per legem &c. ibidem ingreſſum fecit in Domini Regis nunc Contempt' & ipſius W. grave dam' & contra formam Statut' præd', &c. Et unde idem W. qui tam pro Domino Rege quam pro ſeipſo ſequitur per I. L. Attornatum ſuum quer' quod præd' A. iv die Maij Anno, &c. in unum Meſſ. &c. ipſius W. in B. in qu' eidem W. ingreſſus non datur per legem, &c. ibid' ingreſſum fecit in Domini Regis nunc Contempt' & ipſius W. grave dam' & contra formam Statut' præd' unde dic' quod deteriorat' eſt & dam' habet ad valenc', &c. Et inde produc' Sectam, &c. Raſt. Entr. 534.

The Declaration upon the Statute of 8 H. 6. is in the ſame form mutat' mutand' reciting the Statute.

No Action given per Stat. 5 R. 2. but implied.

5. Note, no Action is given to the Party in expreſs terms by the Statute 5. R. 2. yet Actions are very frequent in the old Books; but I conceive the reaſon is upon a general Rule in Law, That where a Statute forbids a thing generally there he that is damnified by doing it, may have an Action upon the Statute. Co. Lib. 10. 75. b. As the Action of Scandalum Magnatum is grounded upon the Statute of 2 R. 2. c. 5. though no Action is given thereby expreſly to the Party. Modern Rep. 233.

Scándalu' magnatum not given per 2 R. 2. but implied.

6. But

6. But by the Statute of 8 H. 6. an Action is given expreſly, and treble Damages; and both Coſts and Damages ſhall be trebled. Vid. Leon. 1. p. 282. & 2. p. 52. Action given per Stat. 8 H. 6. & treble Damages.

7. The general Iſſue (Non expulit & deſſeiſivit) may be pleaded in theſe Actions where the Party Entred peaceably. Raſt. Entr. 351. Or a ſpecial Plea in Barr, as in an Action of Treſpaſs, and muſt Conclude with a Traverſe Abſque hoc quod præd. A. eundem B. inde manu forti expul', &c. Raſt. Entr. 352. b. 4. which Traverſe is not to be anſwered by the Plaintiff, but the ſpecial matter only, which if it be found againſt the Defendant, the Force ſhall be implied, and not inquired of by the Jury; and if it be found for him, the Force ſhall not be inquired into, but the Defendant ſhall go quit, becauſe his Entry was lawful. F. N. B. 618. Eng. 15 H. 7. 17. 21 H. 6. 39. 9 H. 6. Entr. 15. 9 H. 6. 13. But the Force ſhall be inquired upon the general Iſſue. 15 H. 7. 17. Where the Force ſhall not be inquired after.

8. He that hath been in Poſſeſſion three years peaceably, may hold with Force, and is not puniſhable by the Statute of H. 6. or any other Statute. Vid. le Proviſo in the Statute. Poſſeſſion for Three years.

9. None can have this Action upon the Statute of H. 6. but he that is ſeis'd of an Eſtate of Freehold. F. N. B. 617. Eng. for none can be diſſeis'd but a Tenant of the Freehold. But the Action upon the Statute of 5 R. 2. a Tenant for years may have. Muſt have a Freehold.

10. The Proceſs is the ſame as in an Action of Treſpaſs. Proceſs.

11. Note, in an Action upon the Statute of R. 2. a Man cannot plead his Freehold generally, without making a Title, as he may in an Action of Treſpaſs; ſo note the difference. Kel. Rep. 46. 11 H. 7. 15. 27 H. 8. 26. F. N. B. 249. D.

## Sect. V. Rediſſeiſin and Poſt-diſſeiſin.

What.

1. THis Writ of Rediſſeiſin and Poſt-diſſeiſin is in nature of a Commiſſion to the Sheriff and Coroners to hold Plea in ſuch Caſes, and the Entry is Pl'ita. apud C. coram H. Vic' S. aſſumpt' ſecum T. & D. Cuſtod' Placitorum Coron', &c. in Com' præd' tal' die & Anno, &c. Vid. Bulſtr. Rep. 2. p. 93.

Given per Stat. of Merton.

Where it lies.

Vid. Cro. 2. p. 335. 40 Aſſ. 30. F. N. B. 189. b.

2. The Writ of Rediſſeiſin is given by the Statute of Merton. c. 3: 20 H 3. and lies when after a Man has Recovered in an Aſſiſe, Land, Rent, or Common, &c. and has Execution, and then the former Diſſeiſor does again diſſeiſe him that Recovered; then he who is diſſeis'd ſhall have this Writ directed to the Sheriff, Commanding him that taking with him the Coroners of the County, they go to the place, and there by the firſt Jurors and others, they take an Inquiſition; and if they find the Rediſſeiſin, to Commit the Rediſſeiſor to the Goal till he be delivered by Ranſom. &c.

Poſt-diſſeiſin per Merton.

3. And the ſame Statute of Merton gives the Writ of Poſt-diſſeiſin after a Recovery in any Real Action by Verdict.

Stat. W. 2. c. 26. gives double damages.

4. But the Statute of W. 2. c. 26. gives double Damages in a Rediſſeiſin beſides the Fine and Impriſonment, and the Writ of Poſt-diſſeiſin after a Recovery in any Real Action by Default or Reddition, or any other way. Co. 2. Inſt. 416.

Difference between Rediſſeiſin and Poſt-diſſeiſin.

5. The difference between a Rediſſeiſin and Poſtdiſſeiſin is this, that the Rediſſeiſin is againſt him who was found Diſſeiſor before, but the Poſt-diſſeiſin is againſt him that was Tenant in the former Writ, in what Real Action ſoever. Co. 2 Inſt. 417. Vid. Raſt. Entr. 548. b. The Writ and Judgment in a Rediſſeiſin and Poſt-diſſeiſin.

What the Sheriff is to do.

He may plead though the words of the Stat. do not warrant it. vid. Kelw. 125. b.

6. When the Sheriff has received the Writ that he has to warn the Rediſſeiſor, and who is complained againſt by the Writ to appear at the taking of the Inquiſition if he thinks fit, if he does not appear, the Inqueſt ſhall be taken by Default, if he do appear, he may plead in Abatement of the Writ, Joynt-tenancy or the like, or in Barr, as a Releaſe

Releaſe, 33 E 3. Rediſ. 7. 40 Aſſ. 23. Co. 2 Inſt. 83. If he do appear and ſay nothing to the contrary by pleading, the Inqueſt ſhall be taken. Raſt. Entr. 549. a.

7. If the Inqueſt find the Rediſſeiſin or Poſtdiſſeiſin, the Judgment is Entred before the Sheriff thus, viz.——— Ideo conſideratum eſt quod præd. I. recuperet ſeiſinam ſuam verſus præd. A. de præd. Meſſ. &c. cum pertinen' & dam' ſu' occaſione Rediſſeiſin' præd. in duplu' per formam Stat. inde provis' qu' quidem dam' in duplo attingunt ad CC l. Et inde A. Capiatur & Priſon' Domini Regis ſalvo Cuſtod' ita quod a Priſona illa nullo modo deliberetur ſine Mandat' Domini Regis ſpecial', &c. Judgment.

Note, the Jury gives the ſingle Damages, and the Court by the Judgment doubles it. Co. 2 Inſt. 416.

He is not to be diſcharged upon Bail or otherwiſe without the King's Writ, upon payment of a Fine by the Statute of Marl. c. 8. vid. Co. 2 Inſt. 114, 115. And this is the meaning of the Judgment.

Supple-

# SUPPLEMENT

TO AN

# ASSISE

OF

# Novel Diſſeiſin.

WHAT follows concerning an Aſſiſe was brought to my Hands by the Kindneſs of a Friend, and in regard it's very full and may be uſeful upon occaſion, I have here added it as a further inlargement to the Chapter of Aſſiſe herein before mentioned, and for further Explication of the nature of an Aſſiſe and its Proceſs.

What. 1. An Aſſiſe, what it is, Lit. 5. 234. 1 Inſt. 103. Mirror, c. 2. 15. Bract. Lib. 4. c. 4. Fleta, Lib. 4. c. 5. Britton. c. 2. 44, 45.

In an Aſſiſe the Plaintiff ſhall recover his Land, Damages and Coſts of Suit.

Feſtinum Remedium. It's called Feſtinum Remedium. 1. Becauſe the Tenant ſhall not be Eſſoined. 2ly. Shall not caſt a Protection. 3ly. Shall not pray in Aid of the King. 4ly. Shall not Vouch any Stranger, except he be preſent and will enter preſently into the Warranty; ſo of Receit. 5ly. The Parol ſhall not demur for the Non-age of the Plaintiff or Defendant. 6ly. It is moſt beneficial; for in no Action at Common

mon Law a Man ſhall recover Damages, but in an Aſſiſe. Stat. Gloceſter c. 1. Co. 2 Inſt. Co. Lib. 8. 50.

For whom it lies.

It lies for him who is ſeis'd in Fee-ſimple, Tail, for Life, Tenant by Elegit per Stat. 13 E. 1. c. 18. by Statute Merchant, per Stat. 13 E. 1. de Mercatoribus; by Statute Staple, per Stat. 23 H. 8. c. 6. By a Reverſioner upon Duſting his Termor. By the Lord upon Duſting of his Copy-holder, by a Joynt-tenant upon the Duſting of his Companion. By a Parſon of a Church, of a Common or Paſture per Stat. 13 E. 1. c. 20. Co. Lib. 8. 84. By Tenant by Recognizance in nature of a Statute Staple, per Stat. 23 H. 8. c. 6.

Againſt whom. Kell. 20. 28. Aſſ. 37. 46. Aſſ. 10.

It lies againſt the Tenant of the Freehold and the Diſſeſor who ought to be named in the Writ, otherwiſe it ſhall Abate, and ſo if it be of a Rent, the Tenant of the Land ſhall be named. and ſo of an Office, to be exerciſed in Lands, Houſes, &c. Fitz. Aſſ. 449. 4 E. 3. but it's ſufficient if one Tenant and one Diſſeiſor be named, 28 Aſſ. 37. 46 Aſſ. 10. But in an Aſſiſe of Rent Charge or Rent ſeck, all the Tenants of the Land ought to be named, Co. Lib. 6. 58. b. 32 Aſſ. 10. 31 Aſſ. 31. But in an Aſſiſe of Rent againſt the Meſne, the Ter-tenant need not be named, 31 Aſſ. 31. And although the Tenant Alien, hanging the Writ, yet, it is maintainable againſt him as Tenant. 9 Aſſ. 15. 12 Aſſ. 41. Or if the Diſſeiſor be Duſted. But in an Aſſiſe of Tithes, the Ter-tenant needs not be named, and it lies againſt the Pernor where the Tenant hath Alienes, and he who makes the diſſeiſin may be adjudg'd Tenant. 24 E. 3. 31. & 63. But lies not againſt the Pernor except it be brought within the year after the Title accrew'd, or the Diſſeiſor himſelf, againſt whom the Aſſiſe lies during Life if Pernor the day of the Writ purchaced. 4 H. 4. c. 7. 4 H. 7. 24.

Dyer 84 a. 22 H. 6. 16. 1 H. 4. 4 9 H. 6. 11. 12 H. 4. 2. Co Lib. 1. 123 Co. Inſt. 445. Raſt. Entr. Aſſ. 1. Ric. 2. c. 9. 11 H. 6. 4.

Of What.

It lies of any thing, a Præcipe quod Reddat may be brought at Common Law, as of Common. 2 H. 4. 11. Of an Hoſpital, Chappel by the name of a Meſſuage, 13 Aſſ. 2. But by Statute of 32 H. 8. c. 7. it lies of a Patronage, Advowrage, Tithes, &c. and by Statute W. 2. c. 25. it lies of Profits apprender in a certain place * as of Eſtovers, de nucibus, glandibus & al' fructibus colligend' & capiendis in alieno ſolo, de Corrodio, Tolneto, Mercatu, Feria, Tronagio, Paſſagio

Raſt. Entr. Aſſ. Common' Brownlowe's, Entr. 55. 1. p. 65, 66.

* Fitz. Aſſ. 445. F. N. B. 227.

Paſſagio & al' Officiis & Ballivis in feodo * ou pur Vie, and it lay at Common Law of an Office, although Removeable. 7 E. 3. 63. 8 E. 3. 55, 56, 10 E. 3. 27. b. Fitz. View 77. 27 H. 8. 12. 7 H. 6. 8. 7 Aſſ. 12. 10 Aſſ. 11. although removeable, 2 E. 4. 2. It lies of Turbary, Piſcary and other Commons whether appendant or in groſs, which lay not at Common Law, becauſe no Writ in the Regiſter. 8 Co. 48. Of an Office of Packing Wool. 21 H. 6. 10. Of Clerk of the Crown. 9 E. 4. 6. Of Serjeanty of the Bank, of the Keeper of the Foreſt, of the Bailywick of the Foreſt, of the of the Exchequer, Eitz. Aſſ. 7. 7 Aſſ. 12. Of a Boyling of Salt in a certain place in other Lands. 9 Aſſ. 12. Of the Office of Regiſter of the Court of Admiralty, Dyer 103. Of Precedency of a Colledge, Dyer 203. Of the Maſterſhip of an Hoſpital and a Lay Fee. 11 Co. 99. b. Of the Office of Filazer, Dyer 114. b. * Of the Office of Herald. But it lies not of an Office without Profit. And if the Plaintiff be diſſeis'd of the Profit of his Office or any part thereof, he may have his Aſſiſe thereof and not of the Office it ſelf. 21 H. 6. 10. and it may be of part of an Office, as the fourth part of the Office of Serjeanty of the Bank. 7 Aſſ. 12. Fitz. Aſſ. 7. So of a Corody. 22 H. 6. 9. 12 Aſſ. 23. * It lies againſt the Lord for diſtraining his Tenant ſo often that he cannot manure his Land. F. N. B. 78. or 178. 9 H. 7. 3. 27 Aſſ. 51. but it lies not againſt a Stranger becauſe the Tenant may make Reſcous, 27 Aſſ. 51. It lies not for diſtraining for Homage, Fealty, or Suit, 27 Aſſ. 50. and it lies though the Plaintiff continue Poſſeſſion. 21 Aſſ. 51. 28 Aſſ. 50. Contr. Kell. 20. So per Stat. W. 2. c. 25. * It lies where any depaſture in my ſeveral Paſture. F. N. B. 178. 27 Aſſ. 30. 8. Co. 45. And for Fiſhing in my ſeveral Piſcary. F. N. B. 178. 27 Aſſ. 30. Fitz. Aſſ. 438. Of the Veſtur' or prima tonſur' prati, Dyer 71. Of Tithes or a certain portion of Tithes, Dyer 83. and many things may be joyned together in an Aſſiſe, as Common of Eſtovers and Turbary, or of Land and a Corody, or of a Rent Service and a Rent Charge or Seck. 7 Aſſ. 18. 11 Aſſ. 22. Of the Office of a Conſtableſhip of a Caſtle, Keeper of a Park and Goal and Foreſterſhip, Raſt. Entr. Aſſiſe in Office.

* 30 Aſſ. 4. 22 H. 6. 9. 9 E. 4. 6. Dyer 7 Eliz. 114. 153.

Fitz. grant 104 Bract. Lib. 4. c. 2. 231. Fitz. Aſſ. 417. 138.

* Brownlow. 68.

* Raſt. Entr. as in ſovent diſtreſs.

* Raſt. Entr. Aſſ. in Com. 2.

It

It lies not of a Rent out of Land in ſeveral Counties. 10 Aſſ. 4. 18 Aſſ. 1. Nor of Rent out of Rent. 3. H. 6. 20. Nor of an Annuity or Penſion, 14 H. 6. 12. Nor of an Hoſpital or Chappel but by the name of a Meſſuage. 23 Aſſ. 2. nor of a Paſſage over the Water, nor of a Way. Fitz. Aſſ. 440. Nor of the Profit of a Fair. Br. Aſſ. 471. Fitz. Aſſ. 388. 417. Nor for not doing Service. Kell. 130. Nor of Offices without Profit, nor of any Eaſement. 30 Aſſ. 4. 8 E. 4. 22. 17 H. 8. 12. Of what it lies not.

It ſhall be brought in the County where the Land lies; but where a Manor extends into ſeveral Counties, or if it is of Common in one County appendant to Land in another and the Counties are next adjoyning, the Writ ſhall be brought in Confiniis Comitat': See of Offices to be executed in two Counties, it needs not in ſuch Caſes that the Counties be adjacent. 21 H. 6. 9, 10. 10 E. 3. 18. Kell. 98. a. 7. Co. 3. But by the Common Law one cannot have an Aſſiſe in Confiniis Comitat' of a Rent iſſuing out of Land in two Counties; but now by the Statute 7 R. 2. c. 10. one may although Ten Counties intervene, and there ſhall be ſeveral Originals and one Patent, 5 E. 4. 2. F. N. B. 100. If Rent be granted out of Land in one County and Diſtreſs granted in another, it ſhall be brought where the Rent is iſſuing, and not where the Diſtreſs is to be taken. 10 Aſſ. 4. 3 Aſſ. 7. Where it ſhall be brought.

It may be brought in the one Bench or in the other, if the Land lies in the County where they ſit, at the election of the Party. F. N. B. 177. b. 437. 9 Aſſ. 7. 10 Aſſ. 17. But if one Bench be there only, then in that, Reg. 196. but if neither the one nor the other, then before the Juſtices in Eire without a Commiſſion, Reg. 197. a. Br. Aſſ. 496. or before the Juſtices of Aſſiſe of the ſame County by their general Commiſſion, but then the Original ought to bear date before the Patent; or before ſome other by ſpecial Commiſſion, to whom ſome others may be aſſociated, but then there ought to be a Writ of Si non omnes, otherwiſe they all ought to be preſent, and one may be aſſociated in the place of the Principal Judges of Aſſiſe. 28 Aſs. 2. But if the Plaintiff be made one of the Juſtices, the Aſſiſe cannot proceed, 45 Aſs. 3. If the King make ſeveral Writs of Aſſociation, the laſt is void, but if all In what Court and before whom. 12 H. 4. 19. Fitz. Aſſ. 110. Br. 414.

be made at one and the ſame time, that which the Juſtices accept firſt ſhall be only good, 22 H. 6. 10. And if the Parol be put without day per non Venue of the Juſtices, yet the Patent of Si non omnes ſhall ſtand for the whole Plea, 14 Aſs. 15. and if there be new Juſtices at the day of Adjournment, they may proceed, Fitz. Aſs. 110. And though there be a new Commiſſion, and Proclamation have been made, yet the old Juſtices may proceed till notice, Kell. 106. And if it be brought in the Common Pleas or King's Bench which is removed, it ſhall proceed there and be tried, 24 E. 3. 23. 7 H. 4. 4. And if it be there revers'd for Error, it may proceed there to Summons and Attachment de novo, 13 Aſs. 22. And if one and the ſame Perſon have ſeveral Aſſiſes in one County, he may have one ſpecial Patent for them all. Reg. 196. See ſpecial Patent, Raſt. Entr. Aſs. Spec' & per 1 E. 6. c. 7. Its Enacted that a new Commiſſion ſhall not diſcontinue an Aſſiſe.

The Form of the Writ of Aſſiſe. 1. Form. Dyer 84.

At Common Law there are only Two Forms of Writs. One De libero Tenemento in ceſt Forme, viz.—— Rex Vic' L. ſalutem, Queſtus eſt nobis, &c. vid. ante.

Mes ſi ſecurity ſoit trove in Cancellar' donq' ſerr', Et quia præd' A. fecit nos ſecur' de clamore ſuo proſequen' per B. de Com' tuo tibi præcipim', &c. Si coram ſpecial' Juſtic' donq' ſerr' uſque certum diem qu' dilect' & fideles noſtri R. & I. tibi Scire fecer' & interim, &c. Si ſoit returne in B. ou B. le roy donq' ſerr' incert le jour del returne ſolemt', Plowd. 415.

If it be returnable in the Common Pleas or King's Bench, it may be returned at a day out of Term per Stat. Artic' Cart. c. 15. 27 H. 6. 2. The Writ wanted (tunc) ſit, &c. adjudged ill and Plowd. 414. the Writ was returned Cor' præfat' Juſtic' where none were named before, and ill.

In this Form is the Writ, though it be of an Office or any profit appender, ſo if it be by Tenant per Stat. Elegit, &c. and the Plaint ſhall be ſpecial. Dyer 84. 8 Co. 50. b. 27 Aſs. 30. F. N. B. 178.

The

The other Form of the Writ is ——— Rex, Vic' ſalutem, &c. Queſtus eſt nobis, &c. diſſeiſivit eum de Communia paſtur' ſu' in N. ( pertinet ad liberum Tenementum ſuum in eadem Vill' vel alia) infra, &c. & ideo, &c. de dam', &c. & nomina eorum imbreviari & ſum', &c. quod ſint coram Juſtic' noſtris apud E. vel coram nobis apud W. die Jovis prox' poſt Octabis Sancti Michael' prox' futur' vel coram Juſtic' noſtris ad prim' Aſſiſam cum in partes ill' vener' vel coram dilectis & fidelibus noſtris R. & I. & eis qu' ſibi aſſocian' ad cert' diem & locum tibi Scire fac', &c. Si ſoit de Commune in gros precatur hoc. Reg. 197. Si coram general Juſtices de Aſſiſe. Si coram ſpec. Juſtices.

And in like manner are Writs of Common of Turbary, Piſcary and the like, Reg. 197. But if it be in Confin' Com' then the Writ ſhall be ſuch, diſſeiſ' eum de Commun' paſtur' in N. qu' pertinet ad liberum Tenementum ſuum in R. qu' ſunt in Confin' Com' tui & Com' L. infra, &c. In Confinio Com.

And although the Form is to be ſtrictly obſerv'd as before, yet 8 Aſs. 24. Bois or Wood was put before Paſture, and adjudg'd good, 8 Aſs. 1. Toſt before a Milne, and no Exception.

And the Plaintiff ought to find Surety to proſecute either before the Sheriff or in Chancery. 2 H. 4. 20. Pleg. de proſequend.

And if the Sheriff return that he hath not found Pledges, he may do it preſently in Court, and the Form of the Return of theſe Writs is ſuch———Pleg' de proſequendo I. V. R. B. infra nominat' W. & nihil habent nec eorum alter aliquid habet in Balliva mea per quod poſſint ſeu eorum alter poteſt Attachiari, nec habent Ballivum nec Ballivos, nec ſunt invent' nec eorum alter invent' eſt in Balliva mea Reſid' executionis iſtius bris' patet in quodam Panello huic bri' annexat', But if Attachment be made, then the Return is,———Infranominat' W. & I. attachiat' ſunt per un bovem pretii 5 Solid' Reſid', &c. I. B. ar' Vic'. Plowd. 73. 415. Return del brief viz. Nihil nec eſt invent. Return, Attachment.

Infra nominat' W. & I. Attachiat' ſunt per Pleg' I. V. R. R. allowed for a good Return, yet where the Writ was returned per Pleg' infranominat' W. & I. was diſallowed by the better opinion. 5 E. 4. 10. or 109. b. Attachment per Pledges.

Attachment per Baily.

I. B. Ballivus infranominat' W. & I. attachiat' per pleg', &c. or nihil habet. 28 Aſſ. 40. 26 Aſſ. 33.

The Pannel.

Nomina Recognitor' Aſſiſæ novæ diſſeiſinæ inter A. quer' & W. & I. def' de Tenement' in S. ſum' Jurat' I. V. I. R. Manucapt' Jurat' I. B. R. cum W. Py. & H. Fry. I. B. ar' Vic' ſum' Jurat' præd. I. H. & R. S. Manucapt' ſum' Jurat' pd', & eorum cujuſlibet.

Abatement del briefe nemy favour.

Exceptions to the Writ are not favoured Pl. Com. 96. a. Miſnoſmer of the Defendant ſhall not abate the Writ if another Diſſeiſor and Tenant be named, or if Joynt-tenancy as to part be Confeſſed, it ſhall abate only as to that part; for if there be a Diſſeiſor and Tenant to any part, it is ſufficient: So if one of the Tenants be dead, or nul tiel in rerum natura, it ſhall not abate if there be a Diſſeiſor and Tenant. 10 Co. 64. b. 43 E. 3. 18. ſo Entry into one Acre ſhall not abate the whole Writ. 21 E. 3. 34.

14 Aſſ. 8. 19 Aſſ 14. 3 Co. 1.

12 Aſſ. 14. 23 Aſſ. 10. 63. 29 Aſſ. 62.

What Pleas are good in abatement of the Writ.

Yet the Writ ſhall abate for variance between it and the Patent. 22 Aſſ. 20. And in an Aſſiſe of Rent out of the Manor of D. in D. it's a good Plea that the Manor extends into D. and S. Bro. Aſſ. 84. It's a good Plea in abatement that the Sheriff is named Defendant of Covin, and that he is neither Diſſeiſor or Tenant per Stat. 11 H. 6. c. 2. So that Maiors and Lords in antient Demeſne are named Tenants, to out there their Jurisdiction, per Stat. 9 H. 4. c. 5. But a Diſſeiſor ſhall not plead to the Writ an Entry ſince the laſt continuance contra 37 H. 6. 2. nor that the Plaintiff was ſeis'd the day of the Writ purchaſed, 26 Aſſ. 49. a. * nor Joynt-tenancy, 12 Aſſ. 37. which are good Pleas for the Tenant, for he may plead nul tenant del franktenement noſme, Raſt. Entr. Aſſ. Barr. 4. and that the Plaintiff was never ſeis'd. And the Tenant may plead ſeveral Pleas to the Writ and over in Barr. or to the Aſſiſe, and the Tenant may plead there's no Diſſeiſor named, That the Land is in another Town, 30 H. 6. 1. or that he has nothing but joyntly with his Wife not named, 44 E. 3. 8. but none ſhall plead Miſnoſmer but the Party himſelf, 30 Aſſ. 2. Two Dales and none without addition is no Plea. 29 Aſſ. 59. Bro. Aſſ. 304. 471. Fitz. Briefe 417. If the Verdict find there's no Diſſeiſor named, the Writ ſhall abate.

Quenx per Diſſeiſor.

Quenx per Tenant

Raſt. Entr. Aſſ. Barr. 3. R. Entr. Barr. 3.

Abatement per Verdict.

26 Aſſ. 35. 46 Aſſ. 10. 34 Aſſ. 3. Or if the Aſſiſe find one is Joynt-tenant with a Stranger not named, Fitz. Aſſ. 457. Contr. 33 H. 6. 30. or the Plaintiff that Sues in right of his Prebendary and be not ſo named. Fitz. Brief. 675. A Writ of Forcible Entry pending, is a good Plea in abatement. Raſt. Entr. Aſſ. in Barr. 3.

If it be brought againſt Husband and Wife, and the Husband dies, it ſhall abate againſt the Wife, but ſhall ſtand againſt others, if there be a Diſſeiſor and Tenant, 27 Aſſ. 45. but if the Husband was the ſole Diſſeiſor, it ſhall abate againſt all, 28 Aſſ. 37. Fitz. Brief. 883. Br. Aſſ. 474. If it be brought againſt Joynt-tenants, and one dies, it ſhall abate againſt all; ſo if one Diſſeiſor dies and another is named Tenant, but if the Tenant Infeoff one of the Diſſeiſors and dies hanging the Writ, the Writ ſhall not abate, 27 Aſs. 47. But if any of the Defendants were dead the day of the Writ purchaſed, the Writ ſhall ſtand if there be a Diſſeiſor and Tenant. 26 Aſs. 63. 29 Aſs. 70. Per mort.

In Aſſiſe of Rent Diſtreſs pending, the Writ ſhall abate it, 29 Aſs 52. If the Plaintiff make an inſufficient Title in his Plaint, yet it ſhall not abate the Writ. Plowd. 84. Entry hanging the Writ ſhall abate it, but it muſt be a treſpaſſable act and declared to no other intent. Plowd. 93. Inſt. 245. But if it be a Way, or by invitation which may excuſe a Treſpaſs, it ſhall not amount to an Entry. 4 E. 4. 60. Or with another intent, as with the Recognitors to View. Pl. 92. Or to Prohibit Waſt, or to make claim to prevent a diſcent. Lit. Continual Claim. Or if the Lord who hath an Aſſiſe of the Office of Keepership hanging, Enter and kill a Deer. 8 Jac. B. R. Brownlow's Rep. 229. Eſcape of Beaſts into a Common ſhall not abate an Aſſiſe of it. In an Aſſiſe of Rent the Tenant may plead that all the Tenants of the Land are not named, and good, but a Perſon, &c. ſhall not plead it. Fitz. Aſs. 11. 22 H. 6. 23. Auter matters q' abater' le briefe.

If the Defendant plead in abatement and over to the Aſſiſe, the Plea to the Writ ſhall be firſt inquired, and if it be found, the Writ ſhall abate. 44 E. 3. 33. 8 Aſs. 1. 44 E. 3. 23. If Joynt-tenancy be pleaded to part, the Plaintiff may Confeſs it, and pray the Aſſiſe as to the reſidue. 19 Aſs. 14. If the Tenant plead to the Writ and over to the Plea in abatement and over al Aſſiſe.

Queux ſerra primermt' inquir'.

the Aſſiſe, the Plaintiff ſhall not reply to the Plea to the Writ, but it ſhall be firſt inquired, Pl. 91. Neither can he demurr to ſuch Plea, ibidem. 23 Aſs. 10. 26 Aſs. 63. Fitz. Aſs. 168. & Bre. 432. And there adjudg'd that it is not Peremptory but a Reſpondes ouſter. 6 E. 3. 31. If one plead to the Writ, and do not conclude to the Writ, it ſhall be taken as a Barr. 23 Aſs. 9. 9. Aſs. 23. Br. Aſs. 117.

Summons and Severance.

Summons and Severance lies in this Action. 10 H. 6. 22. and ſo for Joynt tenants, 23 Aſs. 9. Raſt. Entr. Aſs. in Summons, &c. Eſſoin lies not in this Action but upon a Re-attachment it lies. Raſt. Entr. Reat. in Aſs. 3. 44 E. 3. 5. 44 Aſs. 24. 2 Inſt. 249. But the Plaintiff may be Eſſoin'd, and it ſhall be entred upon the Record of the Aſſiſe, and not upon the Eſſoin Roll. 30 H. 6. 1. 45 Aſs. 2. It lies alſo for the Plaintiff upon a Summons ad ſequend' ſimul, but the 10 H. 6. 22. Contr. that ſuch Eſſoin was quaſh'd for good Cauſe, and 22 Aſs. 79. It's ſaid that in the King's Bench they will not admit the Plaintiff to be Eſſoin'd in any Aſſiſe. 2 Inſt. 249. And note that W. 1. c. 42. is not intended of Writs of Novel diſſeiſin.

Eſſoin.

The Form of the Plaint in Aſſiſe.

*For the Form of the Plaint in Aſſiſe, Vid. antea. f.*

But if it be of an Office thus,——Aſſiſa ven' recognitur' ſi I. Epus' M. & T. D. injuſte diſſeſiv' E. P. Arm' de libero Tenemento ſuo in L. &c. Et unde idem E. P. in propria ſua perſona quer' quod diſſeiſiv' eum de Officio Conſtabular' ſive Cuſtod' Caſtr' de L. ac de xij d. eidem Officio pertinen' ſingul' hebdomat' apud L. præd. de exitibus & proficuis Caſtr' præd. ſive dominii de L. provenien' per manus receptor' ejuſdem Caſtr' ſive dominii de L. pro tempore exiſten' ibidem precipiend'. Ac de Officio Cuſtod' parci, &c. Vid. Raſt Entr. pro reſid' 74. b. Tit. Aſſiſe. Et vid. 75. a. Et vid. Co. Entr. Tit. Aſſiſe. pl. 1.

Where a Title ought to be ſhewn in the Plaint.

But it ſeems he ought to ſhew in what he received the Profits of the Office, as in the Caſe of Brownlow, 12 Jac. B. R. for the Superſedeas of an Office, and Dyer 14 & 15. 146. But it ſeems he need not ſhew the Year and Day of the diſſeiſin, 20 Aſſ. 16. And in Aſſiſes of Common, Offices, and all things that are againſt Common Right, the Plaintiff ought to make a Title in his Plaint. 15 Aſſ. 15. 35 H. 6. 6

and

and 7. So in Assise of Tithes, Dyer 83. So of all Profits apprender, 34 Ass. 11. But in an Assise for Rent he needs not make a Title, for it shall be intended prima facie, a Rent-service. But in an Assise of Rent-charge or Rent-seck, it's the safest to make a Title, and for this, see a good President, 6 Co. 56. b. Executors ought to make a Title in their Plaint, 28 Ass. 7. But where the Plaintiff makes a Title in his Plaint, it is not peremptory, for if he have any other good Title, it is sufficient. 30 Ass. 5. But in an Assise of Mill the Writ and Count shall be general, Co. 4. Lib. 87. a. And in an Assise of Sovent distress, & in Casu quo quis, &c. the Writ shall be general, and the Count special. 8 Co. 50. a. And though an Assise lies not of an unprofitable Office, yet in the Plaint there needs not be shewn the Profit. 5 E. 4. 2. 22 H. 6. 9. 9 E. 4. 6. 8 E. 4. 22. 30 Ass. 4. 27 H. 8. 12. 32 Ass. 5. A good Writ may abate by reason of an ill Title where it need to have been shewn, Plow. 84. The Plaint for a Rent-service shall be cum pertinen' Rent nemy, 13 Ass. 4. or 41. But Tenant by Statute, by Elegit, &c. need not shew any Title in his Plaint. 22 Ass. 41. And note that in an Assise of a new Office he needs not shew that the Profits belonging to it is granted, Co. Lib. 8. 49. b.

A Disseisor may plead all Pleas which go in discharge of Damages, but not in extinguishment of the Right, as a Release of Actions personal, 1 H. 5. 4. He may plead no Tenant of the Freehold, or another Action pending of an higher nature, or the Plaintiff hath nothing but joyntly with I. S. not named, 12 Ass. 37. Or Entry into part of the Land, hanging the Writ. 35 H. 6. 13. But he shall plead nothing to the Writ which toucheth the Tenancy, 45 E. 3. 37 H. 6. 2. But he shall not plead an Entry since the last Continuance, 37 H. 6. 2. But 8 Ass. 2. it's doubted whether a Disseisor may plead to the Writ, Quod mirum. He may plead Auterfoits acquit, 11 Ass. 9. He may have many Pleas at once, as Misnosmer, Et si, &c. nul tenent', &c. Et si, &c. Ne unque seise, &c. Et si nul tort, &c. 22 Ass. 14. But quær. for it seems he cannot plead Misnosmer, Fitz. Ass. 120. He cannot plead that the Plaintiff was seis'd the day of the Writ, &c. 26 Ass. 49. 27 Ass. 30. Contr. 28 Ass. 41. Or that the Plaintiff never had any thing, 27 Ass. 65. Nor that the Lands are in another Will. 30 H. 6. 1. Nor that there

Queux pleas disseisor plead.

are

Raſt. Entr. in freſh force. Brownlow's Entr. 63.

are many Vills in one Hundred not named, 30 Aſſ. 5. He ſhall not plead a Recovery or matter of Record without ſhewing it preſently, Fitz. Aſſ. 120. Nor no Diſſeiſor nam'd, 16 Aſſ. 10. That one of the Ter-tenants nam'd was dead the day of the Writ purchas'd, 29 Aſſ. 70. The Tenant may, but he ſhall not plead Hors de ſon fee, 14 Aſſ. 13. Nor can he plead Joynt-tenancy, 12 Aſſ. 37. He may plead ancient Demeſne, Co. Lib. 5. 105. It ſeems he may plead Miſnoſmer or Coverture of the Plaintiff, Fitz. Aſſ. 120, or 220.

Queux Pleas un Baily avera.

Kell. 117. b. 8 Aſſ. 2. 12 Aſſ. 4.

Baily may plead a Feoffment of a Stranger whoſe Eſtate his Maſter hath, and ſo in without tort, or that his Maſter recovered the Land from the Plaintiff, and ſo, &c. or that the Land was aſſign'd to his Miſtreſs for her Dower, or given to his Maſter in Exchange, and ſo in &c. And ſo he may plead all Pleas that excuſe his Maſter of a tort, but not to the Writ, and yet he may plead Miſnoſmer of his Maſter, Raſt. Entr. in Aſſiſe Body-politick. 1 Contr. 22 H. 6. 44. He may plead Dilatories and over to the Aſſiſe, as that the Land is in another Vill, Et ſi nul tort, &c. Raſt. Entr. He may plead no Tenant, Et ſi nul tort, &c. Raſt. Entr. Barr Bre' 14. 4. And he may plead Nul Vill, Et ſi, &c. donq' nul Tenant, Et ſi, &c. That the Plaintiff was never ſeis'd &c. Raſt. Entr. Aſſ. in Reattach. 1. But he cannot plead another Writ pending, 8 E. 3. 2. He may have all, 26 Aſſ. 1. Fitz. Aſſ. 140. And he may ſay the Lands are in another Town, but cannot diſclaim, 26 H. 6. 44. He ſhall not plead Dilatories and rely upon them, but over to the Aſſiſe, and therefore he ſhall not plead Joynt-tenancy by Deed or ancient Demeſne, becauſe it is not triable by the Aſſiſe: But he ſhall not plead a Releaſe to his Maſter by the Plaintiff himſelf, nor a Feoffment with Warranty, Kell. 117. He may plead all Pleas triable by the Aſſiſe, per Huſſey. 6 H. 7. 11. & 9. 9 Aſſ. 4. He may plead Hors de ſon fee. 2 E. 3. 8. He cannot plead any matter of Record to the Writ or in Barr, nor any Plea out of the Point of the Aſſiſe and not by it triable, nor any Plea which he cannot Conclude Et ſi trove ne ſoit nul tort, &c. 1 Aſſ. 11. 2 Aſſ. 4. 8 E. 3. 1. 2. 19 E. 3. 13. 16. 9 Aſſ. 4. 25 Aſſ. 26. 8 H. 6. 9. 21 H. 6. 58. 22 H. 6. 44. 1 E. 4. 4. 8 H. 7. 24. 11 H. 7. 11. F. N. B. 182. He ſhall not plead Hors de ſon fee by ſome Opinions, but Contr' tenetur, 2 Aſſ. 4. He cannot Confeſs the Action, 22 Aſſ. 35.

Kell. 117. b. Raſt. Entr. Aſſiſe in Freſh force. 2.

W. 2. c. 25.

2 Inſt. 414. b.

The

The Defendant after Plea by the Bally may plead in Perſon all Pleas whereof a Certificate of Aſſiſe lies, as a Releaſe, 20 Aſſ. 6. 50 E. 3. 9. But after Plea to the Aſſiſe by Bally he cannot plead in Barr, 48 E. 3. 7. But after remanding of the Aſſiſe in Right of Damages, he may plead a Releaſe, Recovery, or any other matter whereof a Certificate lies, 23 Aſſ. 33. But he ſhall not be admitted to ſuch a Plea after the Jurors are Sworn or the Aſſiſe awarded, 29 Aſſ. 18. But by 11 Aſſ. 9. The Tenant after the Aſſiſe awarded may plead.

Queux pleas le party avera in perſon, apres plea per Baily.

3 Aſſ. 11.

The Tenant upon a Re-attachment may plead De novo, if he will, 44 E. 3. 23. But he ſhall not plead to the Writ after he has pleaded in Barr, but he may wave his Barr, and plead to the Aſſiſe, 17 Aſſ. 17. 32 Aſſ. 2. He may plead Nul tiel in rerum natura, as one of the Plaintiffs, Et ſi, &c. Nul tort. 44 E. 3. 26. 50. He may plead Baſtardy, but after an adjournment upon it he ſhall not be admitted to plead a Releaſe, &c. 23 Aſſ. 5. One ſhall not plead Hors de ſon fee, Miſnoſmer, Et ſi, &c. Nul tort, 3 E. 3. 15. One may plead that ſûr, ſo nient noſme, Et ſi, &c. Nul tort 29 Aſſ. 70. If he plead that the Land is in another Vill, he ſhall not plead over Nul Tenant, &c. 30 H. 6. 1. Nor that the Plaintiff had any thing but joyntly with I. S. not named, 30 Aſſ. 2. An Infant pleaded a Plea which was adjourn'd for difficulty, and he was admitted to plead again, and it was remanded, 44 E. 3. 10. 12 H. 4. 19. 20. If he plead Joynt-tenancy by Deed, he ſhall re-plead over, 23 Aſſ. 10. Pl. 91.

What Pleas ſhall be had after others.

3 Aſſ. p. 9.

Raſt. Entr. in Aſſ. in Rent. 1.

The Tenant may plead ancient Demeſne, 21 H. 6. 57. He cannot plead Non-tenure, or that he hath nothing, nor no Tenant of the Freehold named, 8 Aſſ. 14. He may plead Joynt-tenancy, Co-parcenary or Tenancy in Common, and the Plaintiff is Tenant at will to the Defendant, 29 Aſſ. 22. None can plead Miſnoſmer but the Party himſelf, 29 Aſſ. 70. None can plead in Barr without taking the Tenancy upon him, 37 H. 6. 23, 24. Auter Aſſiſe pending, 14 Aſſ. 7. Raſt. Entr. Aſſiſe in Barr, 4. Nul poet plede Miſnoſmer del Vill, but the Tenant, and although one plead to the Aſſiſe, another may plead Joynt-tenancy with him, 14 Aſſ. 16. Quod permittat pendant is a good Plea in an Aſſiſe of Common, 15

What Pleas the Tenant ſhall have. Raſt. Entr. Aſſ. antient Demeſne. 1. 2. Brownl. Entr. 57. Raſt. Entr. Aſſiſe 4.

Ass. 43. If the Tenant plead in Barr to one Plaintiff and to the Assise to another, it's a waver to the Barr, 30 Ass. 7. If the Tenant plead Nul tenant, it is to the Assise, 30 H. 6. 61. That one of the Tenants is dead the day of the Writ purchased is ill, if there be another Disseisor and Tenant 29 Ass. 70. Fitz. Ass. 116. Br. 415. The Tenant may plead in Barr, and pray that the Age of the Plaintiff may be view'd, but he cannot plead generally that he is of full Age. If one plead a Foreign Plea and pray that it may be inquired by the Assise, and does not say per Patriam, it shall be tried by the Assise and not adjourn'd, 14 H. 4. 10. No Tenant nam'd is to the Assise, 30 H. 6. 1. Joynt-tenancy by Deed, Rast. Entr. as in Barr. 3. Br. 7. In Assise of Rent he may plead Nul pernor, Et dehors de son fee, & nul pernor and Tenant, in another Will, Et null tort, Rast. Entr. 1. 18 H. 8. 3. b. To plead a Feoffment with Warranty is double without relying upon the Warranty, 14 H. 8. 24. per Brudnel. And note that if an Assise be brought against a Tertenant by a false Name, he may appear and plead, 24 H. 8. 1. per Bromley.

What matters shall be in Barr.

The Deed of the Ancestour with Warranty is a good Barr, 44 E. 3. 5. 8 H. 4. 7. So of a Descent without a continual Claim, 44 E. 2. 1. but not if it be hanging the Writ, 1 H. 6. 1. So a former Recovery in a Writ of Assise is a good Barr, 44 E. 3. 4. 23 Ass. 16. That the Plaintiff ousted him and he presently re-entred, 45 E. 3. 24. That the Plaintiff was not seis'd within 30 Years is a good barr, 13 H. 4. 17. But the Feoffment of the Plaintiff himself is no good Barr, because it amounts to the general Issue; but his Feoffment to I. S. whose Estate the Tenant hath is good without Colour, 15 E. 4. 31. But by some Books it is not good without a Warranty and relying upon it, 29 Ass. 4. 6 H. 7. 14. nor by the Feoffee, 30 Ass. 40. Coparcenary and that the Plaintiff is seis'd as his Tenant at will, is good. 11 Ass. 29. Or to say that he is seis'd at will, 12 Ass. 1. So of Tenancy in Common, 22 Ass. 29. 29 Ass. 22. So of Joynt-tenancy Another Assise pending is a good Plea, 12 Ass. 1. but not before the Plaintiff's Deed; Arbitrament seems to be a good Barr, 12 Ass. 20. Outlawry in trespass pleaded in Barr, 13 Ass. 5. Another Action of a more high nature depending is good, 29 Ass. 40. A Lease or Feoffment of the Plaintiff himself is no good Plea, because it amounts

Rast. Entr. as Barr. 1. 1 Brownl. Entr. 58.

amounts to the general Iſſue nul tort. 38 Aſſ. 26. A Leaſe for Life or Years the Reverſion to the Plaintiff, a Feoffment of the Plaintiff with Warranty and relying upon it, is good, 18 E. 4. 10. 21 E. 4. 65. Releaſe of one of the Plaintiff's is only a Barr to a moity, 18 E. 4. 14. Fitz. Barr. 39. 59. Recovery of the Land in another Will in the ſame County is good, 24 E. 3. 45. 1 Aſſ. 17. Recovery in a Forcible Entry is a good Barr, 11 H. 7. 15. If one of the Defendants plead to the Aſſiſe, the other may plead Joyntenancy with him, 14 Aſſ. 6. That the Plaintiff is an Alien is good, 22 Aſſ. 25. If the Plaintiff makes a Title in his Plaint, it's not ſufficient for the Defendant to avoid it, but muſt make to himſelf a Title, 36 H. 6. 33.

If the Tenant plead ſpecially in Barr, he may after waive it at his pleaſure and plead the general Iſſue though it be Entred, 34 H. 6. 29. 44 Aſſ. 1. or where the Jury is ready to paſs ibidem, or at another day when it remains pro defectu Jurator' fuit agard, 34 H. 6. 10. And it is to be noted, that in all Caſes when the Defendant pleads any ſpecial Title by a Stranger which binds not the Party in his Blood, he ſhall not give Colour, as where the Defendant relies upon a Warranty, Eſtoppel, Fine, Recovery or Act of Parliament, 3 E. 4. 2. Fitz. Treſpaſs 160. 22 E. 4. 4. 5 H. 7. 10. But if he pleads matter which only binds the Poſſeſſion and not the Right, as a Deſcent, no Colour needs to be given, 19 H. 6. 41. 22 H. 6. But if the Defendant makes Title to himſelf by the Plaintiff, he needs not give Colour, as by a Leaſe for Years, 15 E. 4. 31. Or by a Leaſe for Life, 6 H. 7. 14. So when the Defendant pleads to the Writ, or the Action of the Writ no Colour needs, 21 E. 4. 4. And if one juſtifies as Servant to a Stranger by ſpecial Title, he ſhall give Colour, otherwiſe upon a general Title, as if he ſays that ſuch a one was ſeis'd in Fee, and as Servant, &c. But if he ſays he was ſeis'd in Fee, and Infeoff'd I. and that he as Servant, &c. he ſhall give Colour, 2 R. 3. 8. 1 H. 7. 19. But if one plead a general Barr, as that the place is the Freehold of I. S. &c. or the Tenant Defend himſelf, &c. he ſhall not give any Colour. Every good Colour is to have four qualities. 1. It ought to be a doubtful matter to the Lay people, 19 H. 6. 21. 11 H. 4. 3. 19. E. 4. 3. 23 H. 6. 54. 10 H. 6. 8. 36 H. 6. 7. 20 H. 6. 27. 2ly. Every Colour ought to have

1 Aſſ. 17. Br. Aſſ. 111.

Where the Defendant ſhall give Colour.

2 R. 3. 8. 1 H. 7. 19 R. Entr. Hill. Aſſ. Barr 1. 2. Brownl. Entre. 59. Raſt. Entr. Aſſ. Barr. 1. 2. 4 Co. 10. 90 R. Entr. Corps Polit.

Qualities of good Colour.

Continuance and not to be of any Estate determin'd, or by one whose Estate is determin'd, 2 E. 4. 19. 3ly. It ought to maintain the nature of the Action as Tenant in the Assise, not as Guardian, 32 H. 6. 6. nor to the Ancestours when the Action is of one Possession. 4ly. It ought to be by the first in the Conveiance of the Title, otherwise all is waved, 10 H. 7. 14. And note that Colour shall not be given where Tithes are in demand. Co. Lib. 10. 91. a. And in Assise of Common, approvement is a good Barr without Colour, Fitz. Ass. 137. 7 E. 3. 67. So if the Tenant plead a Lease for Years of a Stranger, its a good excuse without Colour, Dyer 246. And it seems there needs no Colour where the Defendant by his Plea admits that the Plaintiff had such an Estate which is defeated by Condition, Entry, &c. 5 H. 7. 29. per Bryan.

Rast. Entr. Ass. Release with Colour in Barr.

Replication and matter concerning it.

And note that in all Cases where the Defendant shall give Colour in his Plea, there the Plaintiff may make his Title at large; but where the Barr is not at large, but the Defendant gives the Plaintiff Title and destroys it as a Feoffment upon Condition, &c. there the Plaintiff cannot make his Title at large, 5 H. 7. 32. b. And it seems by some, That if the Tenant makes his Title by Fine, Feoffment with Warranty or Act of Parliament, that a dying seis'd is no good Title for the Plaintiff against it, without shewing how the Ancestour of the Plaintiff regain'd the Possession of the Land, 5 H. 7. 32. Fitz. Title. 8. 10 Ass. 23. 5 H. 7. 29. But if a Feoffment with Warranty be pleaded, a dying seiz'd is a good Title, as it is agreed, 18 Ass. 18. Fitz. Title. 9. So if the Tenant plead a Recovery against a Stranger, Descent is a good Title, 10 H. 4. 9. Some other Books agree that a Descent is no good Barr against a Fine, Recovery or Act of Parliament, but admitted against a Feoffment with Warranty, 17 Ass. 18. 29 Ass. 25. 9 E. 3. Fitz. Ass. 1. Br. Title. 55. But other Books make a difference, a Fine or Recovery, Executory, and executed against the last, they admit a Descent a good Title, but not against a Fine, &c. Executory, 28 Ass. 17. 10 Ass. 22. 33 E. 3. Fitz. Title. 4. But a Descent is a good Barr against a Feoffment and Warranty of a Stranger, and with this agrees 28 H. 6. 5. Fitz. Title 19. If the Tenant give Colour to the Plaintiff, he may make his Title at large, Rast. Entr. Ass. Barr. 2. Replic' 1. 2. Where the Barr is travers'd, as to say, that before

Title at large.

18 E. 3. 21 Fitz. Title 30, 31.

before the Tenant had any thing he was ſeis'd and diſſeis'd and traverſe the matter of the Barr, Fitz. Aſſ. 15, 16. If the Tenant give to the Plaintiff a Poſſeſſion and no Colour, then may the Plaintiff traverſe the Barr without a Title, but if he give to him Colour and no Poſſeſſion, the Plaintiff ought to make a Title, 19 H. 6. 20 H. 6. 22 H. 6. 1. 26 H. 6. Fitz. Title 18. And then it is not good to ſay that he was ſeis'd and diſſeis'd, and ſo traverſe the Barr without Conveying to himſelf the Poſſeſſion by Feoffment, &c. In Aſſiſe of Rent its a good Title by Preſcription in him and all his Anceſtours whoſe Heir he is, 18 Aſſ. 17. Or to him and his Predeceſſors, Fitz. Title 34. 18 E. 3. But not that he and all thoſe whoſe Eſtate he hath, 31 Aſſ. 23. Fitz. Title 13. but 23 Aſſ. 6. ſeems Contr. and a dying ſeis'd of Rent is no good Title to it, 10 H. 7. 23. Contr. 30 Aſſ. 33. If Joynt-tenancy by Deed be pleaded, he ſhall reply ſole ſeis'd the day of the Writ purchaſed, 15 Aſſ. 13. If it be without Deed, the like Replication, but no Proceis upon the Statute, Fitz. Aſſ. 16. Br. 290. If a Record be pleaded, ſee what ſhall be the Concluſion, 11 Aſſ. 2. If a Record be pleaded, the Plaintiff ſhall reply habeas Record' hic ad prox', &c. Fitz. Aſſ. 110. If a Plea be to the Writ and over to the Aſſiſe, no Replication ſhall be to the Plea or to the Writ.

If the Defendant plead there's no Tenant of the Freehold named, the Plaintiff may reply the Defendant diſſeiſed him and made a Feoffment to perſons unknown, and takes the profits, and this by the Statute of 1 R. 2. 9. 2 Inſt. 445. 1 H. 5. 4. 12 H. 4. 21. 9 H. 6. 14. 22. H. 6. 16. 39 H. 6. 44. 1 E. 4. 24 E. 4. 17. 21 H. 6. 55. 14 H. 7. 17. And it ſeems this matter may be given in Evidence upon Nul tort, 2 Inſt. 445. And if any Defendant be averr'd Pernor, he ſhall have no other Plea but traverſe the diſſeiſin and Pernancy, Br. Aſſ. 403. But if any Tenant of the Freehold be named, then it is out of the Statute, and he cannot avert Pernancy, 1 H. 5. 4. And it is there ſaid that this Statute extends as well to Joynt-tenancy as Non-tenure. Pernor.

If the Aſſiſe be brought againſt many, and one takes the Tenancy upon him and pleads, and ſo another pleads abſque hoc quod alter aliquid habet, &c. the Form of which, ſee afterwards, then the Plaintiff ought to chuſe his Tenant Election of the Tenant. 1 Brownl. Entr. 60. 64.

nant at his peril, and demur upon the others if they have pleaded in Barr, for none without the Tenant can plead in Barr, Br. Aſſ. 403. Dyer 244. 35 Aſſ. 2. & 3. And then the Tenancy ſhall be firſt inquired and then the Barr, and if the Plaintiff miſelect, the Writ ſhall abate, 8 Aſſ. 1. 44 E. 3. 23. per le Reporter, 9 E. 3. Br. Aſſ. 383. But others conceive that the Plaintiff ſhall be barred, as Lit. 33. H. 6. 36. a. 20 Aſſ. 4. Mes 42 Aſſ. or 12 Aſſ. 1. Contr. although the Plaintiff miſelect his Tenant, if there be a Tenant and Diſſeiſor named it is ſufficient and the Plaintiff ſhall recover, and ſometimes it hath been admitted that the Tenant after he hath been elected ſhall plead in Barr, 28 Aſſ. 42. 22 Aſſ. 7. but 48. E. 3. 7. is Contr. But if there be many Defendants who plead ſeverally in Barr and no traverſe, ſans ceo qu' l' auter riens ad, the Plaintiff needs not Elect his Tenant, but may reply that they are Joynt-tenants, and plead to the ſeveral Barrs, Kell. 117. but if a Diſſeiſor plead in Barr, and the Tenant plead to the Aſſiſe, the Plaintiff is not bound to Elect, but for his advantage he may.

Veigne l' aſſiſe ſur le title.

If the Plaintiff makes his Title at large, then the Tenant may ſay Ven' l' Aſſiſe ſur le title, 15 H. 7. 13. So if he Confeſs and avoid the Title of the Defendant, &c. and all this appears at large, 5 H. 7. 30. Note where the Aſſiſe is taken upon the Title at large, it ſhall inquire of the ſeiſin and diſſeiſin, but if upon traverſe of the Barr, then in right of Damages only; and note that if the Title of the Plaintiff be by matter of Record or matter ariſing in a Foreign County which is not triable by the Aſſiſe, then he ſhall not ſay, Ven' Aſſiſa ſuper titul', Finch 98. b. 5 H. 7. 29. But if the Tenant plead an ill Barr, and the Plaintiff makes Title, it ſhall be as a Title at large, and any other Title ſhall ſerve the Plaintiff, and the ſeiſin and diſſeiſin ſhall be inquired, Kell. 170.

Voucher.

The Tenant ſhall not Vouch any perſon not being party to the Writ or preſent, and who will preſently enter into the Warranty, 8 Aſſ. 17. He cannot vouch after Plea by Bailly, Fitz. Aſſ. 144. 8 E. 3. 39. So of Receit if it be alledg'd that the Land is ſeis'd into the King's Hands, the Eſcheator ſhall be examined, &c. 9 H. 7. 8. But if the Eſcheator be not preſent, it ſhall be inquired by the Aſſiſe, but if the Tenant Infeoff the King hanging the Writ, the Aſ-

Receit.

ſiſe

ſiſe ſhall be awarded, 38 Aſſ. 16. But if the King have intereſt, it ſhall not, Rege in Conſulto, 22 Aſſ. 24. 28. Ayde del roy.

If the Plaintiff plead any Foreign matter or fact done in a Foreign County, or there are Witneſſes named which live in a Foreign County, the Aſſiſe ſhall be adjourned in B. and there tried, or by Niſi prius in the Foreign County, and the Jurors may there inquire of Damages as incident; but if the Witneſſes do not appear upon the grand Diſtreſs, the Aſſiſe ſhall be awarded. 8 Aſſ. 15. 5. Aſſ. 7. Or if the Tenant make default it ſhall be remanded and taken at large, 17 Aſſ. 31. 39 Aſſ. 3. 10. If the matter in bart be found againſt the Tenant, it ſhall be remanded in right of Damages, but if the Plaintiff will releaſe his damages, he ſhall have Judgment preſently in B. 8 Aſſ. 15. 6 Aſſ. 4. 14 H. 4. 9, 10. Where one pleads a Foreign matter, and in Concluſion prays it may be inquired by the Aſſiſe, he was ouſted of Adjournment, becauſe he did not pray it might be inquired per Patriam; ſo the Juſtices may by the Statute of 9 H. 3. 12. adjourn at B. for difficulty, where the Juſtices may adjourn before themſelves in their Circuit or at Weſtminſter, &c. Dyer 375. 47 E. 3. 1. 27 Aſſ. 1. 12 H. 4. 19, 20. And if the Aſſiſe be adjourned in B. for difficulty they may plead to Iſſue, and then it ſhall be adjourned into the proper County, 1 H. 4. 4. Foreign Plea. Adjournment. Remand.

Adjournments ſhall be Indorſed upon the back of the Pannel, Plowd. 415. And upon a general Patent the adjournment ſhall be from one Seſſions to another, but upon a Special from day to day, 32 H. 6. 10. Fitz. Aſſ. 20. Aſſociates may adjourn as well as the firſt Juſtices by Writ of Si non omnes, &c. 12 H. 4. 19. Upon adjournment in B. it is an exception that the Juſtices have no Patent, 29 Aſſ. 21. The Plaintiff may Elect his Tenant after the Aſſiſe is remanded, 23 Aſſ. 16. And the Aſſiſe ſhall be demanded every day of adjournment upon demurrer, &c. although it ſhall not be taken, 44 E. 3. 11. If adjournment be upon the Plea of one of the Defendants, the others have no Continuance, but when the Aſſiſe is remanded, they ſhall be re-attach'd, 22 Aſſ. 11. becauſe they had no Continuances, nor ſhall plead, 22 Aſſ. 14. yet, 12 Aſſ. 12. & 13. is, that if one of the Tenants be adjourn'd, the other ſhall have idem dies. Quær. tamen; Note that Aſſiſes uſually are adjourned for difficulty, to trie a Foreign Iſſue and upon demurrer.

The

Continuance. The continuance of an Aſſiſe ſhall be by Juſticiarii non adviſantur, and not by dies dat. 22 H. 6. 12. And if the Tenant appear by Baily, the Continuances ſhall be between the party and the Baily, 1 H. 4. 4. And ſo of dies dat' partibus præd' ac partibus & Ballivo, 11 H. 7. 11. And there ought to be Entries made of every Juror ſworn and Continuances from day to day, otherwiſe it is error, 39 H. 6. 17. 38 H. 6. 11. If an adjournment be to Weſtminſter for difficulty, no Proceſs ſhall be awarded againſt the Jurors, otherwiſe of an adjournment to the next Aſſiſes, R. Entr. Aſſ. Barr. 4. And if the Defendant have a day over the Continuance ſhall be by idem dies dat' eſt partibus, and not to the Defendant, ibidem per non miſit Bre' and againſt the Jurors, ibidem Contin' 1. 2.

Proceſs. The Proceſs in Aſſiſe againſt the party is Attachment, and upon default or Nihil returned, the Aſſiſe ſhall be taken, but againſt the Jurors it is Summons Hab' Corpor' and Diſtringas ad infinitum, R. Entr. in Proceſs, and the Jurors ſhall not be put to Mainprize the firſt day, 7 Aſſ. 14. And upon Diſcontinuance upon non Ven' of the Juſtices, a Re-attachment againſt the Party and Re-ſummons againſt the Jurors, but if a diſcontinuance be after the Receit of the Wiſe, a Re-attachment ſhall be againſt the Husband and Wife, or Wife ſole, 24 E. 3. 23. If the Tenant make default upon adjournment and ſo the Aſſiſe is awarded by default, and after there be a diſcontinuance for non Ven' of the Juſtices, no Re-attachment ſhall be of the Tenant, becauſe he hath loſt his anſwer and challenge, 28 Aſſ. 42. If one Defendant plead a Foreign Plea which is adjourned and remanded, a Re-attachment ſhall be awarded againſt the other Defendant, but a general Re-attachment is not ſufficient, 26 Aſſ. 3. If the Tenant bring a Certiorar' to remove the Aſſiſe into the King's Bench, and the Record be delivered to the Tenant, and he retains the Record, upon motion a Cap. ſhall be awarded againſt him, 1 Aſſ. 14. Remain pro defectu viſus, R. Entr. Aſſ. Barr. 2. Proceſs againſt Joynt-tenants by Deed, R. Entt. Aſſ. in Brief. 8. Precept to the Sheriff in Aſſiſe, Raſt. Entr. Aſſ. in ſpecial, general Precept, ibidem, in Proceſs. 1.

No

No Receit lies in this Action but of the party to the Writ who appeared, neither after the Aſſiſe awarded, 3 H. 6. Br. 299. But lies after an adjournment in B. 3 H. 4. 18. Or upon failure of Record, 7 H. 4. 6. Or at the day after, reman' pro defectu Jurat' or Recognitor', 13 Aſſ. 2. Receit.

If the Tenant make default, the Aſſiſe ſhall be awarded at large upon the ſeiſin and diſſeiſin and damages, but not upon the Title of the Plaintiff, Pl. 415. So if he make default upon the adjournment of a Foreign Plea, it ſhall be remanded and taken at large, 39 E. 3. 10. 17 Aſſ. 31. 22 Aſſ. 11. 36 Aſſ. 29. And if there be a diſcontinuance for non Ven' of the Juſtices, there ſhall be no Re-attachment becauſe he has loſt his Anſwer and Challenge, 22 Aſſ. 11. Bailiy pleads to the Writ and over to the Aſſiſe, and makes default, it ſhall be taken at large without reſpect to the Plea to the Writ, 10 Aſſ. 30. And if it be againſt many, and one plead a Foreign Releaſe which is adjourn'd and makes default, it ſhall be awarded at large without a Re-attachment againſt his Companions, 28 Aſſ. 42. but with a Re-attachment againſt his Companions, per 22 Aſſ. 11. R. Entr. Aſſ. in Rent. 3. In Aſſiſe of Rent, if the Tenant makes default, the Plaintiff ſhall aſcertain what Rent he demands, 2 Aſſ. 4. 17 Aſſ. 29. 26 Aſſ. 6. But he may make his Title by Deed bearing date in a Foreign County, Dyer 153. b. And where demand was of a Rent-ſervice, the Jury found hors de ſon fee, and a Rent by preſcription, 13 Aſſ. 4. Awarded at large by default.

If an Infant be Plaintiff or Defendant, the Aſſiſe ſhall be taken at large, but if a Record be pleaded in Barr, he ſhall anſwer to it, 22 H. 6. 51. or Confeſs and avoid it, 26 Aſſ. 16. And although the Deed of his Anceſtour with Warranty be pleaded, it ſhall be taken at large, 14 E. 3. 10. 12 H. 4. 19. 20. If a Fine of the Anceſtour be pleaded in Barr, although he ſhall anſwer to it, yet the Aſſiſe ſhall be taken at large, 28 Aſſ. 52. But if an Infant plead in Barr and joyn Iſſue out of the Point of the Aſſiſe, the circumſtances of a Deed pleaded againſt him, i. e. the delivery, time and place, &c. ſhall not be inquired, otherwiſe if he had pleaded to the Aſſiſe at large, 28 Aſſ. 51. Fitz. Aſſ. 99. 116. 10 Aſſ. 1. But if a Barr be pleaded againſt him, it is At large for the Infancy of the Plaintiff or Tenant.

otherwiſe, 31 Aſſ. 18. 22. 38 Aſſ. 24. Fitz. Aſſ. 99. Kell. 111. yet he may plead hors de ſon fee, and ſhall be taken at large, 43 Aſſ. 5. And if he plead a Record and fail, yet it ſhall * Kelw. 111. a. be taken at large, Fitz. Aſſ. 442. 367. Br. 461. * And if one Plaintiff be an Infant and his Coparcener of full Age, and the Deed of their Anceſtour be pleaded in Barr with Warranty, it ſhall be taken at large for the Infant, and the other ſhall anſwer to the Deed and Warranty, 26 Aſſ. 65. 29 Aſſ. 53. An Infant ſhall not be a Diſſeiſor by his aſſent or admittance in pleading, 3 H. 4. 16. 28 Aſſ. 52. Although he plead by Bailly, yet he ſhall not be admitted to plead again after the Aſſiſe awarded, 8 Aſſ. 17. or Jury ſworn 3 Aſſ. 11. But if it be awarded againſt him by default and reman' pro defectu recognitor' at another day he ſhall be admitted to plead in Barr, 29 Aſſ. 36. If one be of full Age, and Sues as an Infant per Guardian, the Tenant may plead in Barr and ſay, that he is of full Age, and pray that he may be viewed, Fitz. Aſſ. 116. 12 E. 3. 12 Aſſ. 36. Six of

View of the Recognitors. the Recognitors at leaſt of the Aſſiſe ought to view the Lands before the taking of the Aſſiſe, that the Plaintiff may by them be put into Poſſeſſion by their view, 22 E. 4. 34. But if things not viſible, as Tithes and profits of Fairs, &c. View needs not; but of Offices to be exerciſed, in a certain place, the view ſhall be where the Office is exercis'd, as of an Herald's Office at the place where the Funeral was. Of Filacers Office, where his Seat is in Court, 2 Brownl. 268. And if the Jurors have had the view without the Sheriff it is ſufficient, Dyer 62. If they know the Land it is ſufficient without the View, 19 H. 6. 43. If they be near the Land though a Hill intervene, it is ſufficient, Dyer 18. b. The Recognitor ſhall be examined upon a Voir dire whether they have had view, and if not, they ſhall be adjourned upon a pain to take the View, 19 H. 6. 43. 22 Aſſ. 22. And if they make not the View upon demand, they ſhall be adjourn'd upon pain, and to be amerc'd, per 24 E. 3. 26. 50. If Rent

Where Aſſiſe ſhall be brought for a Rent. be granted out of Land in one County, and a diſtreſs to be made in another, the Aſſiſe ſhall be brought where the Rent iſſues, 31 Aſſ. 27. 41 Aſſ. 3. 10 Aſſ. 4. 10 E. 3. 18. Br. Aſſ. 150. If a Rent-charge be granted out of ſuch a piece of Land, and a power to diſtrain in another, the Tenants of

Tenants of both Lands to be named. both Lands ſhall be named in the Aſſiſe, 1 Aſſ. 10. 10 Aſſ. 4. And it was held by Pigot, 7 E. 4. 1. That if Iſſue be taken upon a Collateral matter out of the point of the Aſſiſe, no view needs to be, Quære Tamen.

By

By the Statute of 42 E. 3. c. 11. the Sheriff ſhall make his Pannel of the Recognitors four days at leaſt before the Seſſions; but by the Statute of 6 H. 6. c. 2. the Sheriff ſhall make it Six days at leaſt before the Seſſions, and give the parties Copies if they be demanded, under the Penalty of 40 l. Return of the Recognitors.

The Plaintiff may make his Challenge to the Sheriff in his Original Writ and have it directed to the Coroners, Pl. 73. If the Aſſiſe be awarded by default and the Plaintiff Challenge any of the Polls, they ſhall be preſently withdrawn, 28 Aſſ. 42. In all other Caſes the Ordinary Rules of Challenges ſhall be allowed; only in a Certificate of Aſſiſe the Party ſhall not have his Challenges to the Recognitors of the firſt Inqueſt, 12 H. 4. 9. Challenge to the Array ſhall not be till Iſſue joyned, and ſhall be taken as in other Caſes, and then Proceſs ſhall be awarded to the Coroners, Vid. le form R. Entr. Aſſ. in Challenge. Challenge.

Tales de Circumſtantibus ſhall not be granted, but Decem Tal' Co. 10. 105.

Trial of all Aſſiſes ſhall be in the proper County, but if antient Demeſne be pleaded, it ſhall be adjourn'd and tried by Doomsday Book, R. Entr. Aſſ. in antient Demeſne, 1, 2. 22 Aſſ. 24. If the Land be alledged to be in another County it ſhall be inquired by the Aſſiſe, 29 Aſſ. 51. Baſtardy in Iſſue ſhall be adjourned and tried by Certificate of the Biſhop, 38 Aſſ. 30. But if it be not the point in Iſſue, it ſhall be tried by the Aſſiſe, 39 Aſſ. 14. 38 Aſſ. 24. A former Aſſiſe pleaded in Barr ſhall be tried by both Juries if in the ſame County, 22 Aſſ. 16. Of an Office in the Common Pleas, ſhall be tried by Officers and Attorneys in the ſame Bench. If a Foreign Plea be pleaded, it ſhallbe adjourn'd into the Common Pleas, and ſhall be there tried or by a Jury in the Foreign County. Non attachiat' per 15 days ſhall be tried by examination of the Sheriff or Bailiffs if preſent, otherwiſe it ſhall be inquired by the Aſſiſe, 9 H. 4. 1. Fitz. Aſſ. 461. If it be pleaded that the Land is ſeis'd into the King's Hands, it ſhall be tried by examination of the Eſcheater if preſent, otherwiſe by the Aſſiſe. If the Tenant plead a former Recovery, and the Plaintiff averr it to be of other Lands, it ſhall Trial.

be tried by the former Recognitors and the new ones, 22 Ass. 16. but if he say, Nient Comprize, it shall be tried presently by the Assise.

Matters inquirable by the Assise.

If the Tenant plead in abatement or to the Assise, the seisin and disseisin shall be inquired, 26 Ass. 65. So if Issue be upon Villenage, 13 Ass. 12. But if pernancy be in Issue, it shall not be inquired, 30 H. 6. 1. Fitz. Ass. 16. and so in all Cases where an Duster is expressly or implicitely Confessed it shall not be inquired, as if a Release be pleaded, 8 Ass. 15. and so if a Deed be pleaded and not found, 11 Ass. 26. 17 Ass. 17. 17 Ass. 2. Or if a Record be pleaded and fails, 23 Ass. 3. 12 Ass. 1. 11 H. 4. 51. 5 Ass. 16. If one plead to the Assise, and another Release, seisin and disseisin shall be inquired against one in right of Damages, against him who pleads the Release, 23 Ass. 11. Or if the Tenant pray the Assise upon the Title, damages only shall be inquired, 27 Ass. 65. So if the Tenant plead a Deed, &c. and after wave it, it shall inquire only of the seisin, Fitz. Ass. 117. 13 E. 3. 34 H. 6. 32. 16 Ass. 1. If the Barr be not good, seisin and disseisin shall be inquired, 2 H. 7. 4. 32 H. 6. 15. Entr. 28 Ass. 21. 6 H. 7. 2. Vid. Co. Lib. 10. 119. 11 H. 4. 27. That although the Defendant plead a Release, or, &c. which is found against him, yet the seisin and disseisin shall be inquired.

What shall be a good seisin to have an Assise.

The Heir shall have an Assise of the seisin of his Termor, 45 E. 3. 25. So a Reversioner by Fine, 44 E. 3. 16. Successor upon the seisin of his Predecessor, Pl. 193. a. 46 E. 3. 14. 26. Ass. 36. 34. Ass. 1. If one enter for me, and in my Name, this is a good seisin for me to have an Assise though I know nothing of the Entry, but approve of it afterwards, 11 Ass. 11. If one dare not Enter, but approach and is disturbed, this is sufficient seisin, 38 Ass. 23. Rent granted upon Condition which is broken, and distress and Rescouse made, Fitz. Ass. 96. Seisin of part of the Rent is good, 8 E. 3. 12. Fitz. Ass. 141. Co. Lib. 6. 57. a. But seisin of Fealty is not good for Rent to have an Assise, but an Avowry for it, Fitz. Ass. 432. Br. 454. Seisin of Rent by Tenant by Statute, Elegit, or by Bailiff or Procurator per Mandatum Domini, by the Tenant after a Feoffment and before notice is good, Co. Lib. 6. 57. But Tenant for Years

Years may gain ſeiſin for the benefit of the Reverſioner, ibidem. If I have right to two Acres, and my Entry into one is taken away in one County, and I Enter into that in which my Entry is taken away in name of both, its not good, otherwiſe if my Entry had been lawful, Kell. 20. b.

The Queen cannot be a Diſſeiſee or Diſſeiſor, but if the Patentee Enter where the King hath no right to grant, the Patentee is a Diſſeiſor, 1 H. 4. c. 8. And if the Eſcheator or any other Officer of the King ſeiſe Land without Cauſe, he is a Diſſeiſor, W. 1. c. 24. 3 E. 1. c. 24. The King cannot be diſſeiſed if he have the Land as Guardian only, 8 H. 4. 17. But Fitz. Aſſ. 431. ſeems that he may be a Diſſeiſee quod mirum. If the Guardian make a Feoffment, both Feoffor and Feoffee are Diſſeiſors, W. 1. c. 47. W. 2. c. 25. If the Demandant Enter pending a Præcipe quod reddat, he is a Diſſeiſor, 40 E. 3. 42. If the Demandant after Verdict and before Judgment releaſe, and then ſue Execution, he is a Diſſeiſor, 5 H. 7. 4. 43 Aſſ. 19. Fitz. Aſſ, 70. If one execute an Office by appointment of the Court, to which another hath right, he is a Diſſeiſor, Dyer 115. If Eſtovers are to be delivered without requeſt and are not, it is a diſſeiſin, Co. Lib. 5. 25. If the owner of the Soil depaſture all the graſs, or cut all the Wood, he is a Diſſeiſor of Common or Eſtovers, Co. Lib. 9. 112. b. Br. Aſſ. 490. Some ſay that the Plaintiff ſhall not have a diſtreſs for Rent before he hath recovered it; if he do diſtrain it is a diſſeiſin, 46 E. 3. 13. If the Demandant upon a void Recovery Enter, he is a Diſſeiſor, 28 Aſſ. 17. 4 H. 6. 26. 8 Aſſ. 22. otherwiſe if it be only Voidable, ibidem. The Leſſee ſurrenders or levies a Fine to the Leſſor, and continues Poſſeſſion, he is a Diſſeiſor or no diſſeiſor at the election of the Leſſor, Dyer 62. If the Termor be Ouſted it is a diſſeiſin, or not, at the election of the Leſſor, Dyer 178. If my Tenant pay my Rent to another, its a diſſeiſin, or not at my election; of Common, Rent, Tithes, or other profit apprender, a Man ſhall be diſſeis'd or not diſſeis'd at his election, 8 Aſſ. 4. Hob. 1. Edit. 461. If Tenant at will or ſufferance makes a Leaſe for Years, he is a diſſeiſor, 12 E. 4. 12. or if Tenant for Years make a Feoffment, 10 E. 4. 18. 49 H. 6. 18. 3 E. 4. 17. If a Termor continue Poſſeſſion, after the Term ended, he is no diſſeiſor, 9 H. 4. 24. Quær. if he be not a Diſſeiſor, if the Leſſor Enter and

Who ſhall be ſaid a Diſſeiſor who not.

Diſſeiſin at election.

and he continues Poſſeſſion after, I conceive he is. A Diſſeiſor makes a Leaſe rendring Rent, the Diſſeiſee Re-enters, the Leſſee continues payment of the Rent, he is a Diſſeiſor, Dyer 134. Br. Diſſeiſor 76. An Infant or Feme Covert ſhall not be Diſſeiſors by their aſſent or admittance in pleading, 13 Aſſ. 1. 3 H. 4. 7. 2 Aſſ. 2. 10 Aſſ. 1. 11 Aſſ. 14. 12 Aſſ. 33. A Feme Covert is Infeoff'd, the Feoffee is a Diſſeiſor, 9 Aſſ. 2. A Feme Covert may be a Diſſeiſor by her own act, 21 E. 4. 53. If one Enter by Releaſe of an Infant, he is a Diſſeiſor, 7 Aſſ. 17. If a Guardian aſſign Dower to a Wife who is not intitled, they are both Diſſeiſors, 21 E. 3, 4, 5. If a Manor extend into two Counties and one Enter into one part in the name of both, he is not a Diſſeiſor of the other, 22 H. 6. 10. If one Enter to my uſe and I conſent before or after, I am no Diſſeiſor except I command it, 15 E. 4. 5. per Lit. 21 H. 7. 35. Contr. 15 Aſſ. 11. 12 E. 4. 9. 38 Aſſ. 9. He that diverts a Watercourſe is a Diſſeiſor of a Mine, 9 Aſſ. 19. An Attorney who delivers ſeiſin to me by one who has no right is a Diſſeiſor, 10 Aſſ. 22. If he makes Livery in another form than his Warrant, he is a Diſſeiſor, 12 Aſſ. 24. 1 H. 4. 3. 26 Aſſ. 17. If one would enter into Land to which he hath right and is diſturbed, it is a diſſeiſin, 11 Aſſ. 21. To councel one to make an unlawful Entry is a diſſeiſin, 14 Aſſ. 12. 17 Aſſ. 14. 27 Aſſ. 30. If I am cutting Trees, and one who hath right Command me to forbear, this is a diſſeiſin, ibidem. One who Commands a diſſeiſin, is a Diſſeiſor, 29 Aſſ. 59. But if one Command another to Enter, and he hath no right, he who entred only is a Diſſeiſor, 34 Aſſ. 12. If one enter by a void Grant, he is a Diſſeiſor, 24 E. 3. 32. Leſſee for Life rendring Rent upon Condition which is broken, the Leſſor diſtrains and detains the Diſtreſs, and Enters, it is a diſſeiſin, 14 Aſſ. 11. If a Termor alien to one for Life, Remainder to another who Enters, he is a Diſſeiſor, 43 Aſſ. 45. 50 E. 3. 22. He who ſues Execution againſt the Iſſue in Tail, is a Diſſeiſor, Fitz. Aſſ. 77. 18. E. 3. The Feoffee of a Villain is no Diſſeiſor, Fitz. Aſſ. 32. If Tenant by Elegit make a Feoffment, they are both Diſſeiſors, Br. Tit. Elegit 19. If one levy Rent upon my Tenant by Coertion, he only is the Diſſeiſor; but if the Tenant pay it upon a voluntary Agreement, they are both Diſſeiſors, 16 Aſſ. 15. Fitz. Aſſ. 439. If my Tenant Attorn to a Stranger, they are both Diſſeiſors, Fitz. Aſſ. 470.

Infant or Feme Covert ſhall not be diſſeiſors

Denyer,

Denyer, none ready upon the Land upon demand, or to manure the Land, or incloſure, is a diſſeiſin of a Rent ſeck, Lit. Sect. 233. 237. 36 Aſſ. 7. 49 Aſſ. 56. Reſcous, Repleyin and incloſure of Rent-ſervice, Reſcous Repleyin incloſure, and denyer, and menaces by the Tenant are diſſeiſins per Lit. Sect. 238. 9 Aſſ. 7. 14 E. 4. 4. Lit. Sect. 240.

If a Corporation be Plaintiff in an Aſſiſe, it ſhall be inquired whether it be not by Colluſion to mortmize the Land, otherwiſe it is Error, Raſt. Entr. Aſſ. in Corps politick, 1, 2, 3. Mortmain.

In all Caſes where the ſeiſin and diſſeiſin is not to be inquired, the Aſſiſe ſhall be awarded in right of damages, 17 Aſſ. 2. And therefore if a Record be pleaded and fail, damages only ſhall be inquir'd, 15 Aſſ. 16. Dámages where to be inquired only.

In Certificate of Aſſiſe the Tenant ſhall recover double damages, per W. 2. c. 25. If the Tenant fail of the Record, the Plaintiff ſhall recover double Damages, W. 2. c. 25. Double damages given in a Special Aſſiſe upon a forcible Entry per Stat. 4 H. 4. c. 8. The Plaintiff ſhall recover treble damages againſt him who Enters by Patent of the King if he hath no right to grant, per 1 H. 4. c. 8. Other matters concerning damages.

Treble damages in Aſſiſe of Common of Paſture per Stat. of W. and Merton, of Approvement by 3 and 4 E. 6. c. 3. Treble damages is given againſt a Diſſeiſor with Force by 8 H. 6. c. 9. If the Sheriff, Eſcheator or other Officer of the King by Colour of their Office diſſeiſe any, he ſhall recover double damages, W. 1. c. 24. And if a Diſſeiſor alien to defraud the Plaintiff of his Action, he may within the Year bring his Action againſt him and recover double damages per 1 R. 2. c. 9. And if the Tenant plead Joynt-tenancy by Deed, which is found againſt him, the Plaintiff ſhall have double damages by the Statute of Conjunctim Feoffatis, 24 E. 3. Treble damages.

At Common Law no damages were to be recover'd but only againſt the Diſſeiſor, but by the Statute of Gloceſter, c. 1. it's given againſt the Tenants, Et quod quiſque reſponder' pur ſon temps, &c. but then the Plaintiff ought to aver the inſufficiency of the Diſſeiſor and pray that it may be inquired, Againſt whom damages are to be given. At Com. Law. Per Stat.

quired, and who hath taken the profits, and then every one for his time who is party to the Writ shall be charg'd, but Quær. if the Sheriff return the Disseisor insufficient, si Execution' ne fer' agard against the Tenant. It seems it shall, see 31 Ass. 5. 40 E. 3. 44. 40 Ass. 3. 22 Ass. 28. 35 Ass. 5. And it seems this Statute extends to all the Cases aforesaid where double or treble damages are given, 2 Inst. 285. If a Reversioner bring an Assise upon the Entring upon his Tenant who is a Termor, he shall recover no damages; and damages may be recovered because of the Improvment, 14 Ass. 13. And damages shall be recovered hanging the Assise after Verdict and before Judgment, 31 Ass. 31. after an adjournment and before Judgment, 31 Ass. Fitz. Abbe. 17. In an Assise of Rent the Plaintiff shall recover the arrears and damages against the Tenant who had been but Tenant for a Month, 33 H. 6. 46. Successor shall recover damages and arrears in the time of the Predecessor, Fitz. Abbe. 17. And where double or treble damages are recovered, they shall be doubled or trebled by the Court, Br. Ass. 478.

Approvement. If the Tenant in Assise of Common, plead approvement upon the Statute, sufficient or not sufficient shall be inquir'd per le Assise, Fitz. Ass. 137. 7 E. 3. 67.

Force. And it is to be inquired by the Assise ex Officio, whether the Defendant entred with Force, otherwise it is Error, although it be not in Issue, 2 H. 6. 40 Br. Ass. 67. If it be found with Force, the damages shall be trebled by the Court, Br. Ass. 478.

Non-suit. The Plaintiff may be Non-suited after Verdict upon any other day of the adjournment, if he made default, 47 Ass. 1.

Verdict. If the Defendants are found guilty in any part of the Tenements put in View, it is sufficient, 12 Ass. 4. The Recognitors may give a Verdict at large in all Cases, though upon a special Issue, Co. Lib. 9. 12. b. Pl. 93. A Deed by which the Plaintiff makes his Title may be found without pleading, 18 Ass. 3. The Jury may find a Condition made at the livery, but not a Defeasance after, or a Release or a Feoffment with Warranty, for things only shall be found which cannot be pleaded, Fitz. Ass. 359. 7 H. 5. but they

cannot

cannot find matter of Record, 26 Aſſ. 2. If the Plaintiff makes his Title in his Plaint, another Title may be found, Viz. a Verdict upon Six ſeveral ſpecial Iſſues, R. Entr. Aſſ. in Barr. 3.

If a Foreign Iſſue be adjourn'd in B. Re-pleader ſhall be there, 22 H. 6. 18. If the Plaintiff make a good Title, and the Tenant miſrejoyn, no Re-pleader ſhall be, but the Aſſiſe go upon the Title, 5 H. 7. 29. But if they be at Iſſue upon an inſufficient Barr, there ſhall be a Repleader, 22 H. 6. 19. But by this Book it ſeems they ſhall re-plead as in other Actions. Re-pleader.

By the Statute of W. 2. c. 25. a Certificate of Aſſiſe is given, and this is where the Tenant hath pleaded by Baily to the Aſſiſe, or the Aſſiſe is taken by default, where he hath matter of Record, or a Releaſe, or other matter in writing which may diſcharge him, then he may come before or after Judgment and pray that it may be inquir'd, or have a Certificate that it was not well examin'd, and upon this the Jury ſhall appear again and be Sworn to try this matter, and it ſhall be ſued before the ſame Juſtices, or others in B. or B. R. If it happen to ſit in the ſame County: And it ſeems the Juſtices before whom the Aſſiſe was taken, may upon ſuch matter make a Certificate and warn the Party and Jury without any new Commiſſion, and reſtore the Poſſeſſion, and double damages: If the Tenant hath matter of Record, then a Scir' fac' ſhall iſſue againſt the Party, and reſtitution and double damages againſt the Plaintiff, and he ſhall be Impriſon'd. But if the Certificate be had before other Juſtices, then there ought to be a new Commiſſion; and although ſome of the Jurors be dead, yet they may proceed with others if there be Two alive of the former, F. N. B. 183. b. 7 H. 4. 45. 12 H. 4. And if the Record of the Aſſiſe be remov'd in B. the Certificate may be ſued there although that the Land be in another County, 33 H. 6. 20. 21 Aſſ. 7. And the Proceſs is Summons againſt the Jurors, and a Venire againſt the Parties, and after a Diſtringas, &c. and it may be tried by Niſi prius, F. N. B. 183. And it lies upon a Defeaſance which bears date in a Foreign County, and there is to be * tried by adjournment in B. 2 Inſt. 415. And it may be taken by default, and then the Aſſiſe ſhall inquire at large of all Circumſtances, as if it be upon a Releaſe Certificate of Aſſiſe. Proceſs in Certificate. * Quer. inde 23 E. 3. 21.

Aſſiſe inquire at large.

leaſe of the Anceſtour with Warranty, it ſhall be inquir'd whether he be his next Heir, whether he were of full Age, ſound memory, out of Priſon at the time of the making, if the Tenant was ſeiz'd at the time of the Releaſe, or if the Plaintiff had any new Title after, 26 Aſſ. 5. It lies upon a Fine, 32. upon a gift in Tail, 13 Aſſ. 5.

Abridgment of Plaints.

If the Plaintiff abridge his Plaint at any time before Judgment he may, and therefore it is good policy, if the Aſſiſe find againſt the Party for any part to abridge for it, Kell. 116. 6 H. 7. 78. Dyer 88. But by Br. Abridg. 15. it ſeems he cannot abridge after Verdict, nor can abridge as to the Will after a Challenge for the Hundred, 28 Aſſ. 38. Contr. tenetur. Br. Abr. 15. He cannot abridge in a Will in an Aſſiſe, otherwiſe in Dower, 21 E. 4. 24. He may abridge after adjournment, 10 H. 6. 22. He cannot abridge part of an intire Rent, 65. b. nor an Entire Manor, 4 E. 4. 33. 6 H. 7. 38. Kell. 116. b. But in an Aſſiſe of Land and Rent he may abridge, 14 Aſſ. 9. So of a Meſſuage and Land, Dyer 62. a. If the Plaint be of Acres, he may abridge any of them, 4 E. 4. 33. Kell. 116. But now by the Statute of 21 H. 8. c. 3. If the Tenant plead in Barr to any part of a Manor, as the 3d, 4th, or 5th. part, the Plaintiff may in that abridge his Plaint, which ſeems to be againſt the Law before in the 5 H. 7. 7.

Judgment in Certificate.

The Judgment in Certificate of Aſſiſe is that the Tenant ſhall be reſtored to the Land, and recover double damages, and the Plaintiff Capiatur, Fitz. Judgment. 189. If an Aſſiſe be brought againſt Two, and one plead a Record and fail, upon a Releaſe of damages the Plaintiff ſhall have Judgment, 44 E. 3. 23. Contr. 44 Aſſ. 32. If the Plaintiff makes default after Verdict, Quær. whether the Judgment ſhall be upon the Verdict or Non-ſuit, 12 Aſſ. 23. 31 E. 3. 30. Semble ſur le nonſuit, 47 Aſſ. 1. If the Defendants are found guilty in any part, it is ſufficient and in the Entry of the Judgment the Plaintiff ſhall not be amerced for the reſidue, 12 Aſſ. 4. 8 Aſſ. 33. But if any of the Tenants be not found guilty, he ſhall be amerc'd as to them, Raſt. Entr. Aſſ. Barr. 2. 10. Office 1. 31 Aſſ. 31.

Amercement.

Judgment in ſovent diſtreſs.

The Judgment in Aſſiſe of ſovent diſtreſs is, That he ſhall hold the Land without multiplicity of diſtreſs, it ſeems in the Caſe Si quis paſcit, &c. 8 Co. Webb's Caſe. If a

Foreign

Foreign Plea be adjourn'd in B. and there found againſt the Defendant, the Plaintiff may releaſe damages, and have his Judgment, Dyer 250. b. The Judgment between a Tenant in Common and a Joynt-tenant ſhall be, That the Plaintiff ſhall hold one moity in ſeveralty, 10 Aſſ. 17. 7 Aſſ. 10. Contr. 28 Aſſ. 35.

The Execution is an Hab' fac' ſeiſinam and Elegit, Cap', Fier' fac' for Coſts and damages, but after the Commiſſion is determin'd, the Plaintiff may have an Action of Debt for the Damages and Coſts, or remove the Record in B. and there upon a Cap' for the Fine, he may pray the party in Execution, 33 H. 6. 20. If the Tenant hath one Acre in jure ſuo proprio, and another in jure Uxoris, and one is recovered, Execution ſhall be in his own Acre, 48 E. 3. 31. Or it ſeems that a Scire fac' for the damages may Iſſue upon the Aſſiſe remov'd in B. R. Raſt. Entr. Aſſ. in Execution. 3. and Scire fac' ibidem. Execution.

Error lies not in B. but in B. R. only Dyer 250. It's Error to inquire of the Barr (before the Tenancy if there be ſeveral Tenants, or the Plaintiff elect his Tenant,) 11 H. 4. 68. If it be revers'd in B. R. it may proceed there de novo to Iſſue. 31 Aſſ. 18. Error.

If the Tenant plead a falſe Plea, he ſhall be Impriſon'd, 6 Aſſ. 4. If he plead Joynt-tenancy by Deed and it be found againſt him, he ſhall be Impriſon'd. Vid. plus. 31 Aſſ. 11. Impriſonment.

The Plaintiff or Defendant may make an Attorney per 13 E. 3. c. 1. Stat. of York. If the Defendant make many Attorneys and they differ in pleading, and one plead to the Aſſiſe and the other in Barr, the Plea to the Aſſiſe only ſhall be entred; but if for an Infant, the moſt beneficial, Fitz. Aſſ. 120. Warrant of Attorney entred upon the Roll. P. 17 H. 7. Rot. 402. Raſt. Entr. Aſſ. Corps politick, 2. Aſſiſe in ſpecial Warrant of Attorney, and the Husband an Attorney for the Wife. Attorney.

Regularly an Aſſiſe ſhall not be taken by parcels, and therefore if one plead as Tenant to parcel, and another as Joynt-tenant by Deed which is adjourn'd, idem dies ſhall be given to the firſt, becauſe it ſhall not be taken by parcels, 19 E. 2. Parcels.

Fitz. Aſſ. 407. and yet 35 Aſſ. 2. & 3. the tenancy was firſt inquired, and then Adjourn'd, and upon remand was taken at large, 16 Aſſ. 25. it was there taken by parcels.

Joynder in Action. If there be three Coparceners and one diſtrain, the other ſhall have an Aſſiſe by themſelves only, 12 Aſſ. 12. If the Tenant plead ſeveral Barrs, they may reply jointly and plead to the ſeveral Barrs, Kell. 117. a. And one may join ſeveral Diſſeiſors and Tenants in one Aſſiſe, for ſeveral diſſeiſins, at ſeveral days in ſeveral places. Pl. 91.

*Several Entries uſed in an Aſſiſe of Novel diſſeiſin, Viz.*

The Form of pleading where there are 3 Tenants, and one pleads as a diſſeiſor, another as Tenant. 3d. as Tenant ſans ceo q' l' autr' rien ad. Pleading dun Feoffment. I. S. Et præd' A. B. & C. per V. Attornatum ſuum ven' & præd' A. dic' nul' injur' ſive diſſeiſinam præfat', &c. de Tenement' præd' cum pertinen' fecit, Et de hoc pon' ſe ſuper aſſiſam, Et præd' E. ſimiliter Ideo Capiatur inter eos Aſſiſa. &c. Et præd' B. reſpond' ut tenens liberi Tenementi Tenementor' præd' cum pertinen' in viſu Recognitor' Aſſiſæ præd' poſit' & in querel præd' ſpecificat' Et dic' quod Aſſiſa inter ipſum B. & præfat' E. in hac parte fier' non debet quia dic' quidam I. S. ſeiſit' fuit de Tenement' præd' cum pertinen' in viſu, &c. in dominico ſuo ut de feodo, Et ſic inde ſeiſit' exiſten' de eiſdem Tenement' cum pertinen' Feoffavit I. N. hend' ſibi & hæred' ſuis in perpetuum virtute cujus quidem Feoffament' idem I. N. fuit inde ſeiſit' in dominico ſuo ut de feodo cujus quidem ſtatum in præd' Tenement' cum pertinen', idem B. modo habet, Et præd. E. clam' Tenement' præd' cum pertinen' colore cujuſdam cartæ dimiſſionis ſibi inde fact' pro termin' vitæ ſuæ per præd' I. S. ubi nihil Tenementor' præd' cum pertinen' in poſſeſſion' ipſius E. per cartam ill' unquam tranſivit in Tenementa præd' intravit ſuper cujus quidem E. poſſeſſionem inde quidam I. G. in Tenementa præd' cum pertinen' intravit & ipſum E. inde expulit & amovit ſuper cujus quidem I. G. poſſeſſionem inde idem B. reintravit prout ei bene licuit, Et hoc paratus eſt verificare unde pet' judic' ſi Aſſiſa inde inter ipſum & præfat' E. in hac parte fieri debet.

Colour.

Come Tenant ſans ceo q' l' auter rien ad. Et præd' C. dicit quod ipſe eſt ſolus tenens liberi Tenementi, Tenementor' præd' in viſu recognitor' Aſſiſæ poſit' & in querel' præd' ſpecificat' cum pertinen' abſqe hoc quod pd' B. aliquod habet vel die impetracons' bris' original' præd' ſeu unquam

unquam poſtea habuit in eiſdem. Et dic' Aſſiſa non quia dic' quod præd' E. nunquam ſeiſit' fuit de Tenement' ill' cum pertinen' infra præd' 30 Annos de tal' Statu unde diſſeiſeri poteſt & hoc, &c. Nemy ſeiſe infra 30 Annos.

Et præd' E. dic' quod præd' B. eſt & præd' tempore impetraconis' bris' original' Aſſiſæ præd' fuit tenen' liberi Tenementor' præd' cum pertinen' abſqe hoc quod præd' C. aliquod habet in eiſdem & quoád præd' plitum' prædict' C. ſuperius in barr' placitat' idem E. dic' quod plitum' iſtius minus ſufficiens in lege exiſtit ad ipſum E. ab Aſſiſa ſua præd' verſus eum habend' præcludend' quodque ipſe ad præd' plitum' modo & forma ſuperius placitat' neceſſe non habet nec per legem terr' tenetur reſpondere, Et hoc paratus eſt verificare unde pet' judic' & quod ipſe ad Caption' Aſſiſæ præd' inde inter ipſum E. & præfat' C. procedere poteſt. Electio & demurrer al auter.

Et præd' E. quoad præd' plitum' præd' B. ſuperius in barr' Aſſiſæ placitat' idem E. dic' quod ipſe per aliquam in eodem placito præallegat' ab Aſſiſa ſua præd' verſus præfat' B. habend' præclud' non debet quia dic' quod quidam G. S. fuit de Tenement' præd' cum pertinen' ſeiſit' in dominico ſuo ut de feodo & ſic inde ſeiſit' exiſten' obiit inde ſeiſit' poſt cujus mortem Tenement' præd' cum pertinen' deſcendebat cuidem T. S. ut fil' & hæred' præd. I. virtute cujus idem T. in Tenementa præd' cum pertinen' intravit & fuit inde ſeiſit' in dominico ſuo ut de feodo, & ſic inde ſeiſit' exiſten' idem T. inde Feoffavit ipſum E. hend' ſibi & hæred' ſuis per quod idem E. fuit inde ſeiſit' in dominico ſuo ut de feodo quouſque præd' A. B. & C. ipſum E. inde injuſte &c. diſſeiſiver' prout præd' E. ſuperius verſus eum quer' et hoc paratus eſt verificare unde pet' judic' & quod Aſſiſa inter ipſum E. & præfat' B. Capiatur. Title at large.

Et præd. B. pet. quod ſuper dictum titul. præd. E. ven: Aſſiſa & præd. E. ſimiliter Ideo ſuper titul. ill. Aſſiſa illa capiatur inter eos, &c. Et recognitor. exact. non vener. Et ſuper hoc Aſſiſa præd. reman. capiend. uſque tal. diem prox. futur' pro defectu. Recognitor. &c. Ideo Vic. tunc habeat Corpor. &c. & interim, &c. idem dies dat. eſt præfat. A. B. C. hic &c. Ad quem diem hic vener. partes præd. per Attornatum ſuum præd. & recognitor. Aſſiſæ præd. null. eorum ven. ſuper hoc Aſſiſa præd. ulterius continuatur hic uſque, &c. Ven' l' Aſſiſe ſurle title. Reman' pro defectu recognitor. Hab. Corpor.

prox.

Diſtring. recognitor. prox. futur. &c. Et Vic. Diſtring. recognitor. Aſſiſæ præd. &c. & interim &c. Idem dies dat. eſt partibus præd. hic. &c. Ad quem die' Aſſiſa præd. reman. ſine die eo quod R. nunc Rex tertius poſt Conqueſtum ut verus & indubitatus Rex ejuſdem Regni de jure divino & humano Regimen & regiam dignitatem Regni

Diſcontinuance per demiſe del roy. ill. E. 5. nuper Rege abinde legitime remoto in eum actualiter ſuſcepit. Poſteaque ſcilicet tal. die, &c. ven. hic in Cur. præd. E. per Attornatum ſuum præd. & pet. bre. ipſius Do-

Reſummon' & Reattach'. mini Regis nunc. Vic. N. dirigend. ad reſummonend. recognitor' Aſſiſ. præd. quod ſint hic ad faciend. recognitionem ejuſdem Aſſiſæ, &c. & etiam ad reattachiand. præfat. A. B. & C. vel Ballivum vel Ballivos ſuos ſi ipſi invent. non fuer. quod tunc ſint hic auditur. recogn. ill. Et return. hic, &c. Et in-

Reman' pro defectu. terim, &c. Idem dies, &c. Ad quem diem, &c. Et Recognitor. Aſſiſæ præd. reſum. &c. null. eorum ven. ſuper quo Aſſiſa præd. continuatur, hic uſque tal. diem, &c. Ideo Vic. tunc

Hab. Corpor. hic habeat Corpor. recognitor. &c. & interim, &c. Idem dies &c. Ad quem diem, &c. Et Recognitor' exact' ven' ſed quia

Reman. pro defectu viſus. recognitor' præd. non fecer' viſum de Tenement. præd. Ideo Aſſiſa præd. reman. Capiend. uſque tal. diem, &c. Et Vic.

Diſtring. recognitor. diſtring. &c. Idem dies dat. &c. Et Recognitor. præd. interim faciant viſum de Tenement. præd. ſcilicet tal. die, &c. Videli-

View ſur paine. cet quilibet eorum ſub pœna 10 s. ad quem diem hic ven' tam, &c. Et Recognitor. exact. ſiliter. ven. qui ad veritatem de

Verdict. premiſſis dicend. elect. triat' & jurat. dic. ſuper Sacrament. ſuum quod præd. E. fuit ſeiſit. de Tenement. præd. in eorum viſum poſit' & in querel. præd. ſpecificat. cum pertinen. in dominico ſuo ut de feodo, &c. quouſque præd. A. B. & C.

Per force. inde injuſte & ſine judicio, ac vi & armis infra 30 Annos prox. &c. diſſeiſiver. ad damnum ipſius E. occaſione diſſeiſinæ præd. ultra Miſ. & Cuſtag. ſua per ipſum Circa ſectam ſuam in hac

Quale jus. parte appoſit. ad vl. Et pro Mis. & Cuſtag. ill. ad xl s. Et ſuper hoc recognit. præd. querit qual. jus præd. E. habet in Tenementis præd. & quis anteceſſor. ill. fuit in ſeiſin. inde

Colluſio. ut in jure ſua propria (being in Caſe of a Biſhop) Et ſi habeatur aliqua fraus ſive Colluſio inter partes præd. contra formam Statut. quo cavetur ne Terr. ſive Tenement. ad manum mortuam deven. quoquo modo prolocut. & quant. Tenement. præd. cum pertinen. val. per Annum juxta verum valor. dicunt quod præd. Epus. & omnes predeceſſor. ſui Epi. Eccleſiæ Cathedral. ſuperdict. fuer. ſeiſit. de Tenement. præd. cum pertinen. in dominico ſuo ut de feodo & in jure Eccleſiæ præd. a tempore quo non, &c. quouſque præd. A. B. & C.

ipſum

ipſum nunc Epum. inde injuſte & ſine judicio ac vi & armis diſſeiſiver. Et quod quidam R. quond. Epus. Eccleſiæ præd. fuit ſeiſit. in jure Eccleſiæ ill' de Tenement. præd. cum pertinen. tempore E. nuper Regis Angliæ, &c. Et quod non habetur aliqua fraus ſive Colluſio inter partes præd. contra formam Statut. præd. prælocut. & quod Tenement. præd. cum pertinen. valent per Annum in omnibus exitibus ultra repriſ. juxta verum valorem eorund. iij l. Ideo conſideratum eſt quod præd. Epus. recuperet ſeiſinam ſuam de Tenement. pd. cum pertinen. in querel. pd. ſpecificat. per viſum recognitor. ejuſdem Aſſiſæ ad damnum ſuum præd. in triplo ſecundum formam Statut. in humod. Caſu proviſ. per Recognitor. pd. in forma pd. aſſeſs. qu. quidem damna in triplo ſe atting. ad, &c. Et pd. A. B. & C. in mia. &c. Judgment.

Note, this is not an intire Record, but ſeveral, to ſhew the ſeveral Forms as you may diſcern, becauſe the Verdict does not agree with the Title.

Note, if the Tenant in Aſſiſe plead Joynt-tenancy by Deed, a Scire fac. ſhall be awarded againſt the other Joynt-tenant, and the Aſſiſe ſhall be adjourned, and the other Joynt-tenant ſhall be made party by the Statute of Conjunctim Feoffatis, but if he plead it by Will without Deed, it ſhall be tried by the Aſſiſe immediately, 27 Aſſ. 10. & 20. Vid. 22 Aſſ. 1. that he ſhall not have the Plea of Joynt-tenancy generally. Joynt-tenancy pleaded.

FINIS.

A

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