his heires againſt the intrudor, abator, diſſeiſor, or other wrong doer himſelfe.

And *de ſon fait demeſne*, is interpreted *de ſon tort demeſne*, of his owne wrong. And therefore if a coparcener refuſe to make partition in a writ of partition againſt her, the plaintiffe ſhall not recover damages, for this writ is a writ of right in his nature, and ſhe hath a right *per my et per tout* to take the profits. 33 E. 3. dam. 6. 28 E. 3. ibid. 61. 13 E. 3. ibid. 97. 4 E. 3. 39, 40. 21 E. 3. 57. 7 H. 6. 35, 36. 3 E. 3. fo. 48.

If a man make a leaſe for life, the leſſee dieth, an eſtranger intrudes, the leſſor or his heire ſhall have the writ of intruſion againſt the intrudor himſelfe, and recover damages by this act, *Et ſic de ſimilibus*. [ 290 ]

And that I may obſerve it here once for all concerning theſe auncient ſtatutes both of thoſe that are paſt, and thoſe that are to come, how neceſſary it is not onely to know the law, but alſo the roote and reaſon, out of which the law deriveth his life, *viz.* whether from the common law, or from ſome act of parliament, leſt if he taketh it to ſpring from the common law it may lead him into error in like caſes.

# CAP. II.

*SI enfant deins age ſoit tenus hors de ſon heritage apres la mort ſon pier, coſin, ayel, ou beſayel* (1), *per que il covient, que il purchaſe briefe, et ſon adverſary veigne en court et en reſpoignant alleage feoffement, ou auter choſe* (2) *dit, per que juſtices agardent lenqueſt, la ou lenqueſt fuit delay jeſque al age lenfant, cy paſſa ore lenqueſt auxy come il fuit de pleine age* (3).

IF a child within age be holden from his heritage after the death of his father, coſin, grandfather, or great grandfather, whereby he is driven to his writ, and his adverſary cometh into the court, and for his anſwer alledgeth a feoffment, or pleadeth ſome other thing, whereby the juſtices award an enqueſt, there whereas the enqueſt was deferred unto the full age of the infant, now the enqueſt ſhall paſs as well as if he were of full age.

(1 Inſt. 6. f. 3. Dyer, f. 104. 3 Bulſtr. 137.)

Firſt it is good to cleare this chapter, which is a very beneficiall law made for avoyding of delay, that great enemy to juſtice.

*Juſticiam non juſticium vult juris amicus,*
*Juſticium non juſticiam vult juris inimicus.*

For the very text of this law in two maine points hath been falſified or miſtaken.

Firſt of auncient time ſome manuſcripts of this chapter before printing came to us were *apres le mort ſon coſin, aiel, ou beſaiel*, omitting theſe words, *ſon pier*; which being ſhewed to the judges in 8 E. 3. they were of opinion that a writ of mordaunceſter was not within this law. And Fleta following that error rehearſing this chapter ſaith, *Apud Gloc' proviſum fuit, ſi hæres infra ætatem petat* 8 E. 3. 23. 8 Aſſ. 12.

See the books in 3 E. 2. age 133. 42 E. 3. 13. 18 E. 3. 23, &c.

*petat ſeiſinam conſanguinei, avi ſui, vel proavi, et excipitur contra eum, &c.* omitting *patris ſui.*

But in the print the former error is amended, and accordeth with our latter bookes.

And it is not to be thought, that the wiſdome of the parliament would provide for the ſeiſins of them that were ſo farre remote, as in the writ of beſaiel and coſinage, and leave unprovided the ſeiſin that was in the next aunceſter of all, as of the father, &c.

And therefore the rule is good, *Satius eſt petere fontes, quam ſectari rivulos.*

The other error, and that continueth ſtill in the print, was, the words of the record be, *per que les juſtices agardent le age*, and in ſtead of *le age*, it is in the print *lenqueſt*, which is *oppoſitum in ſubjecto*, for in the writ of aiel, beſaiel, and coſinage, there could be no enqueſt awarded before an iſſue joyned, neither could any enqueſt in thoſe writs enquire of circumſtances (as in the aſſiſe of mord', or aſſiſe) but of the iſſue joyned onely, and this alſo may well be collected by our books.

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18 E. 4. 23. 8 E. 3. 23. Dier 3 & 4 Ph. & Mar. 137. Li. 6. fo. 3. Markhalls caſe.

And theſe words next following, [*ou lenqueſt fuit delay jeſque al age lenfant*] are to be referred to the mordanceſter onely, becauſe in that writ there appeareth a jury the firſt day, as in the aſſiſe of *novel diſſeiſin*, but ſo it is not in the writ of ayel, beſaiel, or coſinage, unleſſe you will take enqueſt for triall, and then the ſenſe is, where triall is delayed untill the age of the infant, and then it may have reference to all the writs named in this chapter.

Now theſe clouds being removed, we ſhall more cleerly peruſe the text.

Before the making of this act, albeit the anceſtor dyed ſeiſed of the lands, ſo as a free-hold in law was caſt upon the heir; if an eſtranger abated, in a mordaunceſter, ayel, beſaiel, or coſinage, the tenant might have ſhewed, that the demandant was within age, and have prayed that the paroll might demurre untill the age of the heir, as he may do when the action is aunceſtrell droiturell, that is when the anceſtor hath but a right, and no poſſeſſion, that is, no free-hold and inheritance at his death, ſo as no free-hold and inheritance deſcend to the heir, but a bare right; and ſo note a diverſity between an action aunceſtrell droiturell, and an action aunceſtrell poſſeſſary. But at the common law, if in a mordanceſter, ayel, beſaiel, or coſinage, the tenant did plead a feoffment, or a releaſe from a collaterall anceſtor with warranty in barre, &c. there, leſt the infant for want of intelligence might receive prejudice by tryall thereof during his infancie, the law in his favour at the firſt gave him the benefit of his age, which when it was uſed for delay to his prejudice, this act was made for his relief therein.

Bract. fol. 253, 254. Brit. f. 180. Flet. li. 2. cap. 1, 2, 3, &c.

(1) *Apres le mort ſon pier, couſin, ayel, ou beſaiel.*] After the death of his father. By this is neceſſarily implyed the aſſiſe of mordanceſter; and the caſe of the father is here put for an example, for it extendeth to the caſes of the mother, brother, ſiſter, uncle or aunt, nephew or neece, after the dying ſeiſed, of all which perſons a writ of mordanceſter doth lye; for all the ſaid caſes are in equall miſchiefe with the caſe of the father, and therefore are within the ſame remedy.

3 E. 2. Age 133. 33 E. 3. Age 153. 8 E. 3. 9.

But in a formedon in the deſcender brought by an infant, if the feoffment of his anceſtor be pleaded in barre with warranty and aſſets,

aſſets, or a collaterall warranty without aſſets, this caſe is not within this ſtatute for two cauſes; firſt, for that is an action aunceſtrell droiturell, for nothing deſcended but a right, and therefore had not any freehold and inheritance at the time of his death, and therefore out of the letter and meaning of this act. 2. The Formedon in the deſcender is in nature of his writ of right, for the iſſue in tail can have no writ of an higher nature, and therefore not within this ſtatute; for ſeeing this act gave the infant a tryall during his minority, it gave it him in ſuch actions as he might not be for cloſed of his right; but though he were barred in any of the ſaid actions during his minority, he might at his full age have recourſe to his writ of an higher nature, ſo as he ſhould not be remedileſſe, or any finall judgement given againſt him during his infancy.

42 E. 3. 13. 34 H. 6. 3, 4. 18 E. 4. 23. Dier 3 & 4 Ph. & Mar. 137. Lib. 2. fol. 3. Markhalls caſe.

By this it appeareth, that the writ of formedon in the reverter, or remainder, *Dum non fuit compos mentis, dum fuit infra ætatem, ſur cui in vita, in caſu proviſo, caſu conſimili*, and all actions of like nature are neither within the miſchief, nor within the letter or meaning of this act, for that none of them are actions aunceſtrel poſſeſſary, as hath been ſaid.

12 E. 2. Age 145. 8 E. 3. 36. 59. 3 E. 3. Age 72. 34 H. 6. 3, 4. Markhalls caſe. ubi ſupra.

(2) *Alledge feoffment ou auter choſe.*] A feoffment with warranty from the ſame anceſtor is a barre to the aſſiſe, and no barre in the aſſiſe of mordanceſter; and therefore this is to be intended of a feoffment of a collaterall anceſtor with warranty, or a releaſe with warranty from ſuch an anceſtor, or ſuch other matter, whereunto the infant during his minority could not anſwer, as hath been ſaid, at the common law: and the rule of Glanvile is good, *Generaliter verum eſt, quod de nullo placito tenetur reſpondere is, qui infra ætatem eſt, per quod poſſit exhæredari, nec ipſi minori ſuper recto reſpondebit donec plenam habuerit ætatem.* And that of Bracton, *Quod minor ante tempus agere non poteſt maxime in caſu proprietatis, nec etiam convenire, differetur uſque ætatem, ſed non cadit breve.*

30 Aſſ. p. 25. 43 Aſſ. p. 20. 9 E. 2. Age 143. 19 E. 2. Mord. 45. 8 E. 3. 23. 8 Aſſ. 12. 6 E. 4. 11. 43 E. 3. 5. 18 E. 4. 23. Glanv. lib. 13. cap. 15.

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Bract. lib. 5.

(3) *Si paſſa ore lenqueſt come il fuit de plein age.*] So as now ſuch pleading, triall and proceeding ſhall be in theſe four actions, as if the plaintiſe were of full age.

## CAP. III.

*ESTABLIE eſt enſement, que ſi home alien tenement* (1), *que il tient per le* * *ley Dengleterre* (2), *ſon fits ne ſoit pas forbarre* (3) *per le fait ſon pier (de que nul heritage luy diſcend') (4) a demander et recoverer per briefe de mordanceſter* (5) *de la ſeiſin ſa mier, tout face le charter ſon pier mention que luy et ſes heyres ſont tenus a la garrant. Et ſi heritage luy diſcend' de part ſon pier, donques ſoit il forcloſe de le value del heritage, que luy eſt*

IT is eſtabliſhed alſo, that if a man aliene a tenement, that he holdeth by the law of England, his ſon ſhall not be barred by the deed of his father (from whom no heritage to him deſcended) to demand and recover by writ of mortdaunceſtor, of the ſeiſin of his mother, although the deed of his father doth mention, that he and his heirs be bound to warranty. And if any heritage deſcend to him of his father's ſide, then he ſhall be barred for

*eſt diſcendus. Et ſi en tiel cas apres la mort ſon pier, heritage luy ſoit diſcendus per meſme le pier* (6), *donques avera le tenant vers luy recovery de la ſeiſin ſa mier* (7), *per briefe de judgement que iſſera hors de rolles des juſtices, devant queux le plee fuit pleade, a reſom' ſon garrantie ſicome avant ad eſtre fait en auters caſes, ou le garantie vient en court, et dit que riens ne luy eſt diſcend' de luy per que fait il eſt vouche. Et en meſme le maner eit liſſue le fits recover per briefe de coſinage, ayel, et beſaiel. Enſement et en meſme le maner ne ſoit l'heire la feme* (8) *apres la mort le pier et la mier barr' daction a demander le heritage ſa mier* (9) *per briefe dentre* (10), *que ſon pier en temps ſa mier aliena, dont nul fine neſt levie en court le roy* (11).

for the value of the heritage that is to him deſcended. And if in time after any heritage deſcend to him by the ſame father, then ſhall the tenant recover againſt him of the ſeiſin of his mother by a judicial writ that ſhall iſſue out of the rolls of the juſtices, before whom the plea was pleaded, to reſummon his warranty, as before hath been done in caſes where the warrantor cometh into the court, ſaying, that nothing deſcended from him by whoſe deed he is vouched. And in like manner the iſſue of the ſon ſhall recover by writ of coſinage, aiel, and beſaiel. Likewiſe in likemanner the heir of the wife ſhall not be barred of his action after the death of his father and mother, by the deed of his father, if he demand by action the inheritance of his mother by a writ of entry, which his father did aliene in the time of his mother, whereof no fine is levied in the king's court.

* Cuſtumer de Norm. cap. 119. fol. 138. (Vaughan 366. Stat. 4 & 5 Ann. c. 16. Bro. Formedon, 73. . Rep. 80. 8 Rep. 52. 1 Inſt. 365, 366. 381. a. 382. a. 383. a. b. Dyer, f. 148. Fitz. Garranty, 5. 9 Rep. 26. Fitz. Cui in vita, 7, 8. 32 H. 8. c. 28. Keilw. 104. b. 124, 125.)

Before the making of this ſtatute, when the heir demanded inheritance on the part of his mother, the warranty of the tenant by the courteſie, whoſe heir he was, barred him of that inheritance without any aſſets. This ſtatute doth provide, that it ſhall not be a barre without aſſets.

Bract. li. 4. fo. 321, 325. Fleta, li. 5. c. 34. See the firſt part of the Inſtitutes, ſect. 197. 724. 726, 727. 32 E. 3. Gar 30.

But at the common law, if the heir had been within age, and his entry congeable, though he had not entred in the life of the anceſtor, the warranty bound him not, but that he might enter and avoid the warranty; but if he were driven to his action, the warranty had bound him, and ſo it was in caſe of a *feme covert*.

Temps E. 1. 87. 31 E. 1. ibid. 95. 7 E. 3. 53. Bract. li. 4. fol. 328.

(1) *Alien tenements.*] This extendeth to alienations made after the ſtatute, and not before, for it is a rule and law of parliament, that regularly *nova conſtitutio futuris formam imponere debet, non præteritis.*

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See before ca. 1. W. 2. cap. 41. Temps E. 1. gar. 87. 27 E. 3. 80. 14 E. 4. gar. 5. 17 E. 3. 83. Dier 4 Mar. 148. Firſt part of the Inſtitutes, ſect. 724, 725.

This word (alien) doth properly ſignifie a tranſmutation of poſſeſſion, but yet a releaſe or confirmation of the tenant by the courteſie with warranty, where no tranſmutation of poſſeſſion is, is within the ſame miſchief, and therefore is within the remedy of this ſtatute; for otherwiſe the ſtatute ſhould ſerve to little purpoſe.

(2) *Tient per la ley Dangleterre.*] If the heir demand the heritage of the part of his father, and the warranty on the part of his mother be pleaded, this caſe is not holpen by this ſtatute, as in the firſt part

part of the Inſtitutes it appeareth; for this act by this branch provideth onely for the caſe of the tenant by the courteſie, and therefore tenant for life, or tenant in dower is not within the caſe or claſſis of this act; but as concerning the caſe of the tenant by the courteſie, which is the caſe of this act, this ſtatute is taken by equity, as heretofore hath been partly touched, and hereafter ſhall appear.

See the ſtatute of 11 H. 7. c. 20. Temps E. 1. gar. 86. 12 Aſſ. p. 9.

(3) *Son fits ne ſoit pas forbarre.*] This doth not onely extend to the ſon, but to the daughter, and to any other heire immediate, as here the example is put, or mediate, as coſin and heire, be they never ſo remote.

11 E. 3. gar. 83.

(4) *De que nul heritage luy deſcend.*] That is to ſay, from whom no lands or tenements in fee ſimple of the yearly value of the inheritance of the part of the mother doth deſcend to the heire, for the warranty is no barre without ſuch aſſets.

And by the equity of this ſtatute the warranty of tenant in taile is no barre unleſſe there be aſſets in fee ſimple deſcended.

11 E. 2. garranty. Statham. 21 E. 3. 28. 38 E. 3. 23. Pl. Com. 110. Lib. 8. fol. 53. Syms caſe. Doct. & St. fo. 76. Kelwey 124, 125.

Albeit the word heritage be generall, yet hath it in conſtruction a ſpeciall ſignification, for the aſſets muſt reſpect the eſſentiall quality of the inheritance, whereof the heire is to be barred, and that is, that it be a locall, poſſeſſary, and certaine inheritance, as lands, rents, commons, and the like: and therefore an annuity, that is a perſonall inheritance, and lieth in action, nor any right of action of inheritance is no heritage within this ſtatute, untill it be reduced into poſſeſſion, *Et ſic de ſimilibus.*

(5) *Per briefe de mordaunceſter.*] And after the writs of aiel, beſaiel, and coſinage are alſo named.

11 E. 2. gar. 83. 8 E. 2. ibid. 81.

The intendment of the makers of this act is, that the warranty of him that held by the courteſie ſhould not be a barre to the heir of his wife, unleſſe he left aſſets; and the makers of the ſtatute could not put all the caſes that might happen, but did put the ſtrongeſt caſes, and by conſtruction the leſſer ſhall be included, and therefore in all actions, as the writ of right, the formedon in the deſcender, the writ of entry in the *per*, the writ of entry *ad communem legem*, and the like are within this ſtatute.

46 E. 3. age 76. 4 E. 2. gar. 63. F.N.B. 203. b.

(6) *Heritage luy deſcend de meſme le pier.*] If a ſeigniory of homage and fealty deſcend to the heire, this is no aſſets, but if a tenancy doth eſcheat to the heire, although it were never in the father, this ſhall be accounted aſſets, becauſe the ſeigniory that came from the father was the means to bring it to the heire, *Et ſic de ſimilibus.*

16 E. 3. age f. 41. Br. 5. 6 H. 4. 1. Kelwey 104. b. Pl. Com. Chapmans caſe.

(7) *Donques avera le tenant vers luy recovery de la ſeiſin ſa mere.*] By this act the warranty of a tenant by the courteſie being pleaded with aſſets deſcended is a bar to the heire of the mother; but if aſſets be not then deſcended, but after it deſcend from the ſame father, then the tenant ſhall have recovery of the inheritance of the mother by a writ of judgement, as this act appointeth: and by the equity of this act it is taken, that in a formedon in the deſcender, if the warranty of tenant in taile be pleaded, where no aſſets is then deſcended, but after aſſets doth deſcend to the iſſue, there the tenant ſhall have a *ſcire facias* to have the aſſets, and not the land in taile, for if he ſhould have the land in taile, it was conſidered, that if the iſſue aliened the aſſets, his iſſue might recover the land tailed in a formedon: wherein is to be obſerved the great wiſdome of the ſages of the law in auncient times, ever ſo to reſolve, and give judgement,

Hil. 9 E. 2. 62. b. in Entr. ſur diſſ. 43 E. 3. 26. 46 E. 3. 29. Pl. Com. fo. 110.

judgement, *Ut ſit finis litium.* But in none of the bookes that treat of this matter is expreſſed how the tenant ſhall demeane himſelfe in pleading to take advantage upon this ſtatute of the aſſets, which after deſcended.

And therefore if in a mordanc', &c. the tenant plead the warranty of the tenant by the curteſie with aſſets (as in ſome of the books it is ſaid) or in a *formedon* the tenant plead a lineall warranty with aſſets, and the demandant take iſſue upon the aſſets, and it is found that nothing deſcended, and thereupon the demandant recover, and after the recovery aſſets deſcend, the tenant ſhall never have a *ſcire facias* to take benefit of this act, for he that will take benefit of this act muſt not begin with an untruth, but muſt plead the warranty, and confeſſe the title of the demandant, and pray the advantage of this act, when aſſets ſhall deſcend, and upon this record when aſſets deſcend, he ſhall have a *ſcire facias*; for our act ſaith, *Per briefe de judgement que iſſera hors de rolles des juſtices*; and this expoſition agreeth with the words of this act, *a reſummon ſon garrantie ſicome avant ad eſtre fait en auters caſes ou le garrantee vient en court, et dit, que riens ne luy eſt deſcend' de luy, per quel fait il eſt vouch:* for there without queſtion after aſſets ſhall deſcend, upon the record a *ſcire facias* ſhall be awarded.

Pl. Com. 110.

Lib. 8. fol. 53. Syms caſe.

(8) *Enſement et en meſme le maner ne ſoit le heire la fem,* &c.] This is the laſt branch of this act.

(9) *Barre daction a demander le heritage ſa mere,* &c.] By the firſt branch the act provideth remedy againſt the warranty made by tenant by the curteſie after the deceaſe of his wife; this branch provideth remedy againſt the alienation of the huſband with warranty during the life of his wife: upon theſe words ſome have conceived, that this warranty ſhall not binde, albeit aſſets doth deſcend from the father, becauſe aſſets is not mentioned in this branch, as it is in the former. But theſe words, *enſement et en meſme le maner*, doe ſo couple this branch by reference to the former, as if in this caſe aſſets doth deſcend, by the warranty and aſſets the heire is barred.

9 E. 2. gar. 81. Hil. 9 E. 2. ubi ſup. 27 E. 3. 51. 27 E. 3. 89. Hil. 9 E. 2. ubi ſup. Thomas de Mertons caſe.

If the huſband make a feoffement in fee of the wives land with warranty, and hath iſſue by her, and they both die, in a writ of entry *ſur diſſeiſin* brought againſt the feoffee he vowcheth the heir of the huſband, who is alſo the heire of the wife, he may upon this ſtatute devolve the ten' of the warranty, for that the huſband left no aſſets, and that he hath an action as heire to his mother to recover the land, and if he ſhould enter into the warranty, he ſhould forcloſe himſelfe of his action, and therefore by the rule of the court he entred not into the warranty.

(10) *Briefe dentre.*] That is a *ſur cui in vita*, but if the lands were entailed to the wife, and after the ſtatute of *donis condic' de W.* 2. the heire brought a formedon, the collaterall warranty of the huſband ſhall barre in that action.

See the firſt part of the Inſtitutes, cap. Gar. ſæpe.

(11) *Dont nul fine eſt levie en court le roy.*] This is to be underſtood whereof no fine is lawfully levied, that is by the huſband and wife, for then her heire claiming a fee-ſimple is barred; but a fine levied by the huſband alone was a wrong, and at that time a diſcontinuance, and therefore ſuch a fine was not within the intention of this act.

27 E. 3. 89. Pl. Com. 57. First part of the Inſtitutes, ſect. 719, 730, 731.

CAP.

# CAP. IV.

*ENSEMENT ſi home leſſa ſa terre à ferme* (1), *ou a trover eſtovers en viver, ou en veſture* (2), *que amount a la quart part de la veray value* (3) *de la terre, et celuy que la terre tient* (4) *iſſint charge la leſſeſt giſer freſh* (5), *iſſint que home ne puit trover diſtreſſe per deux ans* (6), *ou per trois, a faire le ferme render, ou a faire ceo que eſt contenue en leſcript* (7) *ou leas: Eſtablie eſt, que apres les deux ans paſſés eit le leſſor action* (8) *a demander la terre en demeign'* (9) *per briefe que il avera en le chancery* (10). *Et ſi celuy vers que la terre eſt demande, veigne avant judgement, et render les arrerages et les damages* (11), *et trova ſuerty tiel come la court verra que ſoit ſuffiſant* (12) *a render en apres [ſolonque] ceo que eſt contenue en leſcript du leas, ci, reteign' la terre. Et ſil demurr' tanque ele ſoit recover per judgement, ſoit il forcloſe a remmant* (13). W. 2. cap. 21. & cap. 41.

ALSO if a man let his land to ferm, or to find eſtovers, in meat or in cloth, amounting to the fourth part of the very value of the land, and he which holdeth the land ſo charged letteth it lie freſh, ſo that the party can find no diſtreſs there by the ſpace of two or three years to compel the farmor to render, or to do as is contained in the writing or leaſe; it is eſtabliſhed, that the two yeares being paſſed, the leſſor ſhall have an action to demand the land in demean by a writ which he ſhall have out of the chancery. And if he againſt whom the land is demanded come before judgement, and pay the arrearages and the damages, and find ſurety (ſuch as the court ſhall think ſufficient) to pay from thenceforth as is contained in the writing of his leaſe, he ſhall keep the land. And if he tarry until it be recovered by judgement, he ſhall be barred for ever.

(7 H. 8. f. 28. Fitz. Reſceit, 96. 105. Fitz. Scire fac' 154. Kel. f. 75. 132. Fitz. Ceſſavit. 2; 10. 14. 19, 20. 23. 25. 27. 29. 32. 38, 39. 49. 52, 53. 56. Raſt. pla. f. 111. Regiſt. 237. 13 Ed. 1. ſtat. 1. c. 21. 41. 10 Ed. 2.)

What the common law, or ſome cuſtome was before the making of this ſtatute, you may reade in Bracton who wrote a little before this ſtatute; *Item poterit intervenire juſtum judicium ab initio, ut in caſtrationibus faciendis, et vertitur ex poſt facto in diſſeiſinam, ſicut in burgagiis, terris, tenementis, et tenuris exterioribus. Ut ſi dominus per conſiderationem curiæ ſuæ pro defectu ſervitii ceperit tenementum tenentis ſui in manum ſuam, ſicut ſimplex namiū, donec de redditu fuerit ſatisfactum; ſed cum talis, cujus ten' fuerit, obtulerit de ſatisfaciend' de redditu et arreragiis, reſtitui ei debet poſſeſſio, et ſi dominus hoc recuſaverit, tunc erit manifeſta diſſeiſina.* And afterwards in another place he ſaith; *Item ſi propter paupertatem poſſeſſionem dereliquerit, et ita quod dominus capitalis pro defectu ſervitii tenementum ſuum in manum ſuam ceperit et retinuerit, vel alio excolend' dederit, &c. ſatis moritur tenens ſeiſitus.* Bract. lib 4. fol. 205. b. Fol. 262.

And I reade amongſt auncient records, that a *ceſſavit* was brought in the raigne of king John, but this act is the firſt ſtatute that was made by authority of parliament concerning the *ceſſavit*; after this came the ſtatutes of Weſtm. 2. and 10 E. 2. *De Gamletto*; Int' Record 87. Regis Johannis.

W. 2. c. 21 & 41. 10 E. 2. Stat. de gimletto. Vet. Mag. Cha. f. 122. Pasch. 17 E. 3. coram Rege. Rot. 139. London. First part of the Institutes, sect. 1. 45 E. 3. 27. 33 H. 6. 53. 13 E. 2. Cessavit 51. F.N.B. 209. E. See Mich. 9 E. 1. in Banco Rot. 39. Banc. Hil. 13 E. 1. in Banco Rot. 7. Pasch. 16 E. 1. Rot. 5.

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*letto*; and note that the writ framed upon this act doth recite this statute.

(1) *Lessa sa terra a ferme.*] *Lessa, demise, nota dimittere* is a good word of a feoffement, and therefore if a man let or demise lands to a man and his heires, and make livery of seisin, this is a good feoffement, and so is this word here to be intended, for a *cessavit* lieth not against tenant in taile, or tenant for life, unlesse the remainder be limited over to another in fee, so as he is tenant to the lord, as tenant by the curtesie is.

(2) *Estovers en viver ou vesture.*] That is to say, *estovers in victu et vestitu*, of this sufficient hath been said in the exposition upon the seventh chapter of *Magna Charta*.

(3) * *A la quart part de la verie value.*] *Vide* for fee ferme the exposition upon the twenty seventh chapter of *Magna Charta*. And such rent or other profit, as was answered to the owner of the land, was accounted the verie value.

(4) *Celui que la terre tient.*] So as there must be a tenure betweene the feoffor and the feoffee in fee-simple, for a *cessavit* lieth not upon a reservation without such a tenure, and so was it adjudged in 11 E. 2.

11 E. 2. cessav. 50. 21 E. 3. 23. 45 E. 3. 15. 27. 21 H. 6. 50. 33 H. 6 53. F.N.B. 208. 11 H. 4. 3. 21 H. 8. 28. Kel. 104, 105.

At the making of this act all estates of inheritance were in fee simple, and therefore the donor upon an estate in taile (created by a statute made after this act) shall not have a *cessavit* against the donee in taile, nor against tenant for life; neither for the cesser of the mesne a *cessavit* lieth for he holdeth not the land as this act speaketh, which ought to be overt, and sufficient to the distresse of the lord, which is a good plea in a *cessavit*.

Pasc. 16 E. 1. in Ban. Rot. 5. *Non potuit excedere per duras distringas.* Fitz. 237. F.N.B. 210. a. 43 E. 3. 45. 8 E. 3. 46, 47. 10 E. 3. 6. 21 E. 3. 20, 21. 30 E. 3. 22. 43 E. 3. 15. 8 H. 6. 17. 33 H. 6. 8.

And in this writ the tenure between the demandant and the tenant is traversable, because this writ is grounded upon the tenure by force of this act; but in this writ the seisin is not traversable, because it is not grounded upon the seisin, neither is the quantity of the services traversable, but to be taken by protestation; for whether he hold by more, or lesse, the *cessavit* lieth; but in an avowry the seisin is traversable, for that is grounded as well upon the seisin, as the tenure: also in the *cessavit* the land is to be recovered, and not the services, and it is in his nature a writ of right, and the jury shall measure in their consciences the quantity of the service.

Neither is *hors de son fee* a good plea in a *cessavit*, because (as hath beene said) the tenure is traversable.

(5) *La lessa giser fresh.*] The tenant of the land is called tenant *per availe*, because it is presumed, that he hath availe and profit by the land, and therefore the law never expected, that he would let the land lie fresh, that in his proper sense is as much, as unmanured, or unoccupied.

Temps E. 1. cessavit 58. 10 E. 4. 1. 2. 30 E. 3. 22. 11 E. 3. cessavit 21. 35 H. 6. ibid. 7. F.N.B. 208, 209.

It is said in law to lie fresh, not onely when there is no cattle, or other thing distrainable upon the land of the value of the rent, or other profit behinde; but also, though there be a sufficient distresse to be taken, yet by construction upon this act, if the land be so immured or inclosed about, as the lord caunot come to take and carry away the distresse to the pound, it is said to lie fresh, that is, without profit as to the lord, for though it be sufficient, yet it is not sufficient to his distresse, so as the land must lie open and sufficient to the distresse of the lord: or else it is said in law to lie

lie freſh within this ſtatute, which conſtruction is worthy of obſervation.

(6) *Per deux ans.*] *Per biennium*; ſo as by theſe words is implied, that it lieth onely for annuall ſervices, and not for homage, fealty, or the like. And upon theſe words, *rien arere, &c.* is a good plea in this action.

12 E. 3. ceſſavit. 8 E. 3. 46, 47. 17 E. 3. 57. 27 E. 3. 17. 14 H. 4. 44. 33 H. 6. 44. 6 H. 7. 7. 8 H. 7. 2. 30 E. 3. 22. 14 E. 3. ceſſavit 20. 19 R. 2. ſurety 27. 35 H. 6. ceſſavit 7. F.N.B. 209.

This act ſaith, if the tenant let the land lie freſh, yet if a ſtranger wrongfully occupy the ground by putting in his cattle and feeding of it, or otherwiſe by manurance of the ground, this is ſufficient to the diſtreſſe of the lord within this act, for the lord may diſtrein them, which is the end of this act; otherwiſe it is in this caſe, if cattle eſcape, and the owner freſhly follow to take them.

(7) *Ou a faire choſe que eſt contenue en leſcript.*] By theſe words the *ceſſavit* did lie for non-payment of a fee ferme contained in the deed.

(8) *Eyt le leſſor action a demaunder terre en demeign'.*]

Five doubts were conceived upon this act:

1. Whether the heires of the lord might have a *ceſſavit*, becauſe the words be *eyt le leſſor.*

[ 297 ] Regiſt. 237.

2. Upon the ſame words whether the grauntee of the ſeigniory with attornement, or tenant by the curteſie, tenant in dower, &c. might have a *ceſſavit.*

3. Whether againſt the alienee of the tenant or his diſſeiſor, &c. a *ceſſavit* did lie upon this act, becauſe the letter of this law extended but to the feoffee.

4. Whether the *ceſſavit* ſhould be againſt the heires of the feoffee. 45 E. 3. 15.

5. Whether it extended to rents and ſervices created without deed, for as much as this act ſpeaketh of ſuch onely, as were reſerved by deed.

Theſe doubts were conceived upon that notable rule delivered in our bookes in the caſe of *ceſſavit, Ou recoverie eſt done en ſpeciall caſe per eſtatut, il coveit que home aver touts voies accord al ſtatut.*

As to the firſt Britton ſaith, *Fee fermes ſont terres tenus en fee a reſpondre pur eux per an le verie value, ou pluis, ou meyns, de quel rent ſi les feffees ceſſent a reſpoudre per deux ans enſemble per tant accreſt action as feoffors et lour heires a demaunder les tenements en demeane.* But notwithſtanding this point and the reſidue of the doubts are briefly and excellently remedied by the ſtatute of W. 2. made ſeven yeares after this act, as we ſhall ſhew when we ſhall come to it. W. 2. cap. 21.

(9) *Demaunder ſa terre in demeign'.*] Upon theſe words it is concluded that a *ceſſavit* doth not lie of a meſnalty conſiſting of rents and ſervices, but this writ lieth againſt the tenant *per availe.* 13 E. 3. gard. 38. 21 E. 3. 44. 27 H. 8. 28. 1 H. 4. 3. 12 R. 2. ceſſav. 46.

It is holden that a *ceſſavit* doth lie of an advowſon, and yet it is not in demeſne, and *overt*, and ſufficient to his diſtreſſe cannot be pleaded. 5 H. 7. 37. 43 E. 3. 15 31 E. 3. ceſſavit 24. 33 H. 6. 34. Regiſt. 237. F.N.B. 210.

(10) *Per briefe que il avera en la chauncery.*] Hereupon alſo great queſtion grew for the forme of the writ, but in the end a writ was conceived upon this act, as it appeareth in the Regiſter, and F. N. B.

17 E. 3. 27. 29. 21 E. 3. 23. 33 H. 6. 19. 7 E. 3. 58. 13 E. 3. ceſſavit 29. 15 H. 7. 10.

(11) *Avant judgement, et tender les arrerages et damages*, &c.] After verdict and before judgement, the tenant may tender the arrerages, &c. He ought to tender the arrerages in proper perſon, though he be a lord of parliament, for the words of this act be, *Celuy vers que le terre eſt demande vient*, &c. and he ought to finde ſurety.

Tr. 9 E. 2. f. 65. In libro meo in ceſſavit.

In a *ceſſavit* after the enqueſt joyned, the tenant made default, and at the retourne of the *petit cape*, the tenant appeared, and offered to pay the arrerages with damages, and to finde ſuch ſurety as the court would award, which was received, becauſe he came before judgement, and found ſurety, that is, three pledges, which bound their lands to the diſtreſſe of the lord in the ſame forme as the tenant his land is bound.

5 E. 3. 30. 7 E. 3. 58. 21 E. 3. 23. 25 E. 3. 42. 6 E. 2. ceſſavit 49.

He ought to tender all the arrerages, for ſo are the indefinite words to be taken as well before as after the two yeares, and damages to be allowed of by the court, but if the demandant doe not alledge how much is behinde over and above the two yeares, &c. and that be found by the jury that findes the iſſue, the tenant need not tender more then for the two yeares, becauſe it appeare not of record, or by neceſſary conſequence as ſuch arrerages as incurre hanging the writ; and for any arrerages incurred before this tender, the lord ſhall not avow, becauſe the tenant ought to have paid all.

17 E. 3. 57.

13 E. 3. ceſſav. 20. 13 E. 3. ubi ſupra. 14 H. 4. 3, 4.

The court may aſſeſſe the damages by their diſcretion.

Where this act ſaith, that he ſhall tender the arrerages, it is to be underſtood of ſuch things as may be yeelded, as rent, &c. but of ſuit, divine ſervice and ſuch like which cannot be yeelded, damages ſhall be paid for the ſame.

40 E. 3. 40. 31 E. 3. ceſſav. 23. F.N.B. 209. a. Mic. 31 E. 3. fo. 50 & 51. in lib. meo in ceſſavit.

If two joyntenants be impleaded in a *ceſſavit*, and the one make default, &c. the other cannot tender the arrerages but for the moity, for the other joyntenant hath * power to alien and loſe his moity, the words of the ſtatute be, *Celuy vers que la terre eſt demaund*, and the land is demaunded againſt both.

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But if A. and B. be ſeiſed to them and the heires of A. and B. make default, A. may tender for the whole in reſpect of his remainder.

6 E. 2. tit ceſſavit 49.

In a *ceſſavit*, the jury in *anno* 6 E. 2. found the ceſſer, and that the rent was behinde by 30 yeares, part of which time was before the ſtatute whereupon the writ was grounded, and yet the demandant ſhall recover all the arrerages, as is well warranted by the ſtatute.

If the demandant in the *ceſſavit* be outlawed in a perſonall action, this outlawry may be pleaded in barre of the action, becauſe the arrerages are due to the king.

(12) *Et trovera ſuertie come le court verra ſufficient*, &c.] This ſurety is referred to the diſcretion of the court, for herein upon theſe words there is a rule conceived, *Suretie eſt al court d'ordeiner, et al tenant daſſent et affirme.* And therefore being referred to diſcretion, in divers caſes ſeverall ſureties have been ordained upon due conſideration had in reſpect of the ſtate of every particular caſe.

25 E. 3. 42.

30 E. 3. 23. 19 E. 4. 5. 17 E. 3. 57. 21 E. 3. 23. 29 E. 3. 33. Vet. N. B. 138.

Sometime in reſpect of the quality of the demandant, as if he be a body politique or corporate, eccleſiaſticall or temporall for feare of a mortmain, therefore their collaterall ſurety is to be found, &c. *Vide*

*Vide* 15 *Martini, anno* 4 E. 3. *coram juſtic' itin' apud Dunſtable,* ſurety was graunted to the prior of D. demandant in a *ceſſavit,* that he ſhould diſtrain for the rent in other lands.

[a] Sometime in reſpect of the quality of the tenant in reſpect he is a body politique or corporate, or a feme covert, or an infant.

[b] Sometime in reſpect of the tenancy it ſelfe, as if it be a houſe, &c. leſt the tenant ſhould waſte it, and ſo make it not ſufficient to pay the rent.

Though the ſtatute referreth the ſurety to the diſcretion of the court, yet will it be good to follow precedents of former times, for *diſcretio eſt diſcernere per legem quod ſit juſtum.*

[c] Albeit it is for the benefit of the demandant to have ſurety, yet he cannot waive it, becauſe it is made parcell of the judgement.

[d] But what if the ſurety be a judgement of the court, that if he ceſſe againe by one or two years, *que la t're incurgera la remnant,* that is, that he ſhall have judgement to hold the land, &c. for ever, wherein the tenant ſhall never tender any more, and his remedy, that after ſuch ceſſer again, he ſhall have a *ſcire facias* upon the record, and if the tenant be warned and make default, &c. the demandant ſhall have judgement againſt him for ever.

If the tenant after a judgement given againſt him in a *ceſſavit*, that if he ceaſe againe, *Que la terre incurgera le remnant*, in that caſe if the tenant alien, the alienee ſhall not be bound by the ſaid ſurety or judgement, becauſe it bound him that was tenant in the *ceſſavit* onely, and upon a new ceſſer a new *ceſſavit* muſt be brought. But if the ſurety or judgement be, that if he or his aſſignes doe ceaſe again, &c. then the aſſignee is bound thereby, and upon a *ſcire facias* the matter ſhall come in queſtion.

(13) *Soit forcloſe a remnant.*] That is, ſhall be forcloſed or barred for ever, for this writ is a writ of right in his nature; by this act if the lord recover by defalt, judgement finall by theſe words, [*Soit forcloſe del remnant*] ſhall be given, and ſhall be a barre in a writ of right: otherwiſe it is of a judgement by verdict.

See more of the writ of *ceſſavit* in our expoſition upon the ſtatute of W. 2. cap. 21.

[a] 10 E. 4. 5. Temps E. 1. ceſſavit 55, 56. 19 R. 2. ſurety 27. 15 E. 2. ibid. 20. 19 E. 2. ibid. 21. 4 E. 3. 42. 13 E. 3. ceſſavit 29. 21 E. 3. 23. Doct. & Stud. lib. 2.

[b] 41 E. 3. 29. 19 E. 4. 5.

[c] 50 E. 3. 23. 19 E. 4. 5.

[d] 41 E. 3. 29. 19 R. 2. Scire fac' 134.

6 E. 3. 45.

4 E. 3. droit 41.

## CAP. V. [299]

*ENSEMENT eſt purview, que home eit deſormes* (1) *briefe de waſt* (2) *en le chancery vers home que tient per le ley Dengleterre* (3), *ou en auter maner a terme de vie* (4), *ou des ans* (5), *ou feme que tient en dower* (6). *Et celuy que ſerra attaint de waſte* (7), *perde le choſe que il aver' waſte* (8): *et ouſter ceo face grce del treble de ceo que le waſte ſerra taxe* (9). *Et*

IT is provided alſo, that a man from henceforth ſhall have a writ of waſte in the chancery againſt him that holdeth by law of England, or otherwiſe for term of life, or for term of years, or a woman in dower. And he which ſhall be attainted of waſte, ſhall leeſe the thing that he hath waſted, and moreover ſhall recompence thrice ſo much as the waſte ſhall

*Et en waſte fait en gard'* (10), *ſoit fait ſelonque ceo que contenue eſt en le graund charter, cap.* 4. *Et per la ou il eſt contenue en la grand charter, que celuy que avera fait waſte en garde, perdr' le garde: accorde eſt, que il rendra al heire les damages del waſte* (11), *ſi iſſint ſoit que la garde perdue ne ſuffiſt mie a le value des damages, avant lage del heire de meſme le garde* (12). W. 1. cap. 21. Articuli ſuper chartas, cap. 18.

ſhall be taxed at. And for waſte made in the time of wardſhip, it ſhall be done as is contained in the great charter. And where it is contained in the great charter, that he which did waſte during the cuſtody, ſhall leeſe the wardſhip, it is agreed that he ſhall recompenſe the heir his damages for the waſte, if ſo be that the wardſhip loſt do not amount to the value of the damages before the age of the heir of the ſame wardſhip.

(Dyer, 25. Fitz. Waſt. 62. 117. 146. Bro. Parl. 17. Fitz. Judgement, 85. 134. 255. Fitz. Damage, 7. 22 42. 52. 90. 114. 133. 1. Inſt. 53. b. 54. b. 200. b. 355. b. 1. Roll, 91. 97. 156. Rast. 689, &c. Savill, 42. 9 H. 3. c. 4. Regiſt. 72.

12 H. 4. 3.
21 H. 6. 28.
Doct. & Stud. lib. 2. cap. 1.
Regiſt. 72.
Firſt part of the Inſtitutes, ſect. 67.

At the common law waſte was puniſhable in three perſons, *viz.* tenant in dower, tenant by the curteſie, and the guardien, but not againſt tenant for life, or tenant for yeares; and the reaſon of the diverſity was, for that the law created their eſtates and intereſts, and therefore the law gave againſt them remedy: but tenant for life, and for yeares came in by demiſe and leaſe of the owner of the land, &c. and therefore he might in his demiſe provide againſt the doing of waſte by his leſſee, and if he did not, it was his negligence and default.

7 H. 6. 35.
8 H. 6. 34.
32 H. 6.
Bract. l. 4. fo. 315. Doct. & Stud. l. 2. c. 1.
F.N.B. 55. c.
W. 2 cap. 14.

There is alſo an action of waſte by cuſtome, as in London, &c.

Now the remedy at the common law was in two degrees: firſt, if he that had the inheritance did feare (for example) that tenant in dower would doe waſte, he that had the inheritance might before any waſte done have a prohibition directed to the ſheriffe, that he ſhall not permit her to doe waſte in this forme.

*Rex vicecom' ſalutem. Præcipimus tibi quod non permittas quod talis mulier faciat waſtum, vel venditionem, vel exilium de terris, hominibus, redditibus, domibus, boſcis, vel gardinis, quæ tenet in dotem de hæreditate talis in tali villa, ad exhæredationem ipſius talis ne amplius, &c.*

And Bractons advice hereupon is as followeth:

*Regula.* *Et hoc faciat tempeſtive, ne per negligentiam damnum incurrat, quia melius eſt in tempore occurrere, quam poſt cauſam vulneratam remedium quærere.*

Lib. 5. fol. 115. Foljambes caſe.

And the ſheriffe having the warrant of this writ may, as in caſe of a writ of *eſtrepement*, take *poſſe comitatus*, and withſtand the doing of any waſte.

And this was the remedy that the law appointed before the waſte done by the tenant in dower, tenant by the curteſie, or the gardien, to prevent the ſame, and this was an excellent law, for *præſtat cautela quam medela*, and preventing juſtice excelleth puniſhing juſtice. And this remedy may be uſed at this day. Now after waſte done there lay an action of waſte at the common law in this forme. *Rex vicecom'. Salutem. Si talis fecerit te ſecurum de clamore ſuo proſequendo, tunc pone per vad', et ſalvos plegios talem mulierem, &c. quod ſit coram juſticiariis noſtris, &c. oſtenſura quare fecit waſtum*

*Regula.* Vide W. 2. c. 14.

*vaſtum, venditionem, et exilium de terris, hominibus, redditibus, boſcis, vel gardinis, quæ tenet in dotem de hæreditate talis, in tali villa, contra prohibitionem noſtram, et habeas ibi nomina plegiorum, et hoc breve, teſte, &c.*

Where in this writ it is ſaid *contra prohibitionem noſtram*, the plaintiffe ſhould have well maintained his writ, albeit no writ of prohibition of waſt had been ſued out before, for that the common law was a prohibition of it ſelfe, and ſo ſaith Bracton ſpeaking of the waſte done by a guardien, *Dominus vaſtum emendabit ſic, quod damna reſtituat, ſive vaſtum fecerit ante prohibitionem, ſive poſt.*

4 H. 3. Waſt, 129. ib. 140. 8 R. 2. tit. Attachment ſur prohib. 15. Bract. l. 4. fo. 285. Vide W. 2. c. 14.

By this writ of waſte the plaintiffe, if the waſte were done in woods, *Et mulier inde per inquiſitionem convincatur, talis erit ei pœna injungenda, et in tantum erit coarctanda, quod de cætero nihil capiat in boſco illo, niſi (per viſum *foreſtariorum hæredis) rationabile eſtoverium ſuum, et talis ſervitus imponetur ei ad pœnam, et de foreſtario apponendo fiat tale breve* (which there you may reade at large) *Si cuſtos de veſto convincatur, amittit cuſtodiam, et reſtituet damna, et det domino regi miſericordiam, quod non eſt in muliere, ſi de dote ſua fecerit vaſtum, quia dotem ſuam non amittit, ſed cuſtos vel curator ei adjungatur, qui impediat ne faciat, et damna debet refundere.*

Bract. fo. 315, 316.

* *Foreſtarius* in ancient authors, is taken for *cuſtos boſcorū*, a woodward.

So as the tenant in dower (and likewiſe the tenant by the curteſie) had two puniſhments, *viz.* to yeild damages to the value of the waſte, and a keeper or curate to be appointed to them, who ſhould withſtand any waſte to be afterwards done by them.

And the guardien had three puniſhments. 1. He ſhould loſe the cuſtody. 2. He ſhould yeeld damages to the value of the waſte: and 3. He ſhould be fined to the king, for that contrary to the truſt in him repoſed by reaſon of his guardienſhip he did waſte to the diſheriſon of the heire, and this did hold as well in caſe of a guardien in *droit*, as a guardien in *fait*.

10 H. 3. Waſt. 138. 20 H. 3. ib. 139. 34 E. 3. Waſt, 146.

And the reaſon wherefore at the common law the action of waſte did lie againſt the tenant in dower, or tenant by the curteſie, albeit they had aſſigned over their eſtates, was, becauſe no action of waſte by the common law lay againſt the aſſignee for waſt done after the aſſignment, therefore the action of neceſſity did for ſuch waſte (after the aſſignement) lie againſt the tenant by the curteſie, or tenant in dower, which law continueth to this day.

Temps E. 1. Waſt, 132. 30 E. 3. 16. 38 E. 3. 23. 40 E. 3. 33. 11 H. 4. 18. Doct. & Stud. l. 2. ca. 1. F.N.B. 56.

But if the heire granted away the reverſion and the tenant attourned, the action failed at the common law, as hereafter ſhall be ſhewed more at large. Hereby it appeareth how neceſſary it is for the underſtanding of this act, to know what the common law was, and the reaſon thereof, before the making of our ſtatutes, whereof you ſhall reade more largely in Bracton both concerning the points aboveſaid, and other matters concerning waſte, worthy of your reading and obſervation.

Bract. ubi ſupra. Firſt part of the Inſtit. ſect. 67. F.N.B. 56. b.

But at the common law if the guardien in *droit* had aſſigned over his eſtate and intereſt, the heir ſhould have had an action of waſte for waſte done after the aſſignement againſt the aſſignee, for he was guardien in *fait*, and ſo within the rule of the common law.

(1) *Home eyt deſormes*, &c.] Here the perſons are not named who ſhall have the action of waſte, but that is left to the common law to judge thereupon, of which matter you ſhall reade plentifully in our books, and it were too long to be here inſerted, neither

neither doth it tend to the expoſition of this act being left to the common law.

(2) *Brieſe de waſte.*] *Breve de vaſto.* Of this word *vaſtum* you may reade in the firſt part of the Inſtitutes, ſect. 67. onely this may be added that neither this act, nor the ſtatute of Marlebridge doth create new kinde of waſtes, but doe give new remedies for old waſtes; and what is waſte, and what not, muſt be determined by the common law.

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(3) *Home que tient per la ley d'Angleterre.*] Here tenant by the curteſie is named for two cauſes: 1. For that albeit the common opinion was, that an action of waſte did lie againſt him, yet ſome doubted of the ſame, in reſpect of this word *tenet* in the writ, for that the tenant by the curteſie did not hold of the heire, but of the lord paramount, and after this act the writ of waſte grounded thereupon doth recite this ſtatute.

20 H. 6. 1.
21 H. 6. 38.

2. For that greater penalties were inflicted by this act, then were at the common law.

(4) *Ou en auter maner a terme de vie.*] If a leaſe be made *quam diu ſola fuer'*, or *quam diu ſe bene geſſerit*, or *quouſque promotus fuerit*, &c. in all theſe and like caſes they are in judgement of law leaſes for life within this act.

37 H. 6. 26.

Upon theſe words there be many concluſions worthy of obſervation.

Firſt, albeit the aſſignee of the tenant by the curteſie, or tenant in dower, is within the letter of this law, for he holdeth in ſome manner for life, yet no action of waſte ſhall be brought by the heire againſt the aſſignee, but onely againſt the tenant by the curteſie, or tenant in dower; for in conſtruction of ſtatutes, the reaſon of the common law giveth great light, and the judges, as much as may be, follow the rule thereof.

Temps E. 1. Waſt, 122. 4 E. 3. 25. 18 E. 3. 3. 30 E. 3. 16. 38 E. 3. 23. 11 H. 4. 18. F.N.B. 56. f.

But if the heire granteth away the reverſion, and the aſſignee attorne, there the grauntee by this ſtatute ſhall have an action of waſte againſt the aſſignee, and the plaintiffe muſt declare upon this ſtatute: for (as hath been ſaid) in that caſe there lay no action of waſte at the common law, ſo as in this point our act is introductory of a new law.

Regiſt. 72. lib. 3. fol. 23. b. Walkers caſe, li. 11. fo. 84. Bowles caſ.

2. If the heire had graunted his reverſion expectant upon an eſtate in dower or by the curteſie, the grauntee ſhould not have had an action of waſte againſt tenant in dower or by the curteſie at the common law, for that the privity was deſtroyed, therefore the grauntee in an action upon this ſtatute doth recite the ſtatute.

Regiſt. 72. 11 H. 4. 3. 5 H. 7. 17. Lib. 11. fol. 83. Bowles caſe.

Marlb. cap. 23.

3. A leſſee for his own life, or for another mans life, is within the words and meaning of this law, and in this point this act introduceth that which was not at the common law.

33 E. 3. Waſt, 144. 11 E. 3. graunt 13. 11 E. 3. receit 118. 4 E. 3. 18. 50 E. 3. 3. 10 E. 4. 9. 1. 5 E. 4. 89. Regiſt. F.N.B. 59. Lib. 5. fol. 76. b. Pagets caſe.

4. If a leaſe for life be made to A. the remainder for life to B. he in the reverſion ſhall have no action of waſte againſt the firſt leſſee, for then the eſtate of him in the remainder ſhould be deſtroyed, and ſuch conſtruction muſt be made to preſerve the eſtate of an eſtranger, in whom there is no fault or default. But if he in the remainder for life dieth, then the waſte is puniſhable as well before as after his death.

8 E. 3. 26. * 17 E. 3. 68. 39 E. 3. 25. 6 E. 3. 19.

* 5. If a leaſe be made to A. for his life, the remainder to A. for the life of B. if A. doth waſte, an action of waſte doth lie againſt him, for the wrong doer hath both the ſtates in him, and of that

that opinion was ſir James Dier chiefe juſtice of the common pleas, Paſch. 18 Eliz.

6. If a leaſe for life be made, the remainder for years, an action of waſte ſhall lie againſt the leſſee, for the recovery therein ſhall not deſtroy the terme for yeares. — 4 E. 3. 18. 3 E. 3. 18. F.N.B. 59. h.

7. Fem' leſſee for life taketh huſband, the huſband doth waſte, the wife dieth, the huſband ſhall not be puniſhed by this law, for the words of this act be, *home que ticnt, &c. pur vie*, and the huſband held not for life, for he was ſeiſed but in the right of his wife, and the eſtate was in his wife. — 46 E. 3. 32. 46. tit. Waſte Statham. Lib. 10. fol. 11. Southcots caſe.

8. An occupant is within this law, for the words of this act (as hath been ſaid) are *home que tient*, which are more liberall words then if the ſtatute had ſpoken of a leaſe or demiſe, and certain it is that the occupant holdeth for life, ſo it is of the lord that entreth on his villein tenant for life. — 48 E. 3. 19. l. 6. fol. 3. Le D. de Worceſters caſe. Lib. 10. fol. 98.

9. He that hath an eſtate * for life by conveyance at the common law, or by limitation of uſe, is a tenant within this ſtatute. — [ 302 ] * Hil. 16 E. 1. in Banco Rot. 63. Buck. & Rot. 73. Hereford.

10. A leaſe for life is made, the remainder over in taile or in fee, he in the remainder ſhall by this act have an action of waſte; for the words of the ſtatute are generall.

11. Albeit tenant in taile *apres* poſſibility of iſſue extinct doth hold but for life, and ſo within the letter of this law, yet is he out of the meaning thereof in reſpect of the inheritance which was once in him, in reſpect whereof his eſtate is by law diſpuniſhable of waſte, but his aſſignee ſhall be puniſhed for waſte by this ſtatute. — Temps E. 1. Waſt, 126. 39 E. 3. 16. 45 E. 3. 25. Li. 11. fol. 83. Ewens caſe, 27 H. 6. Aide Statham.

12. It is to be obſerved that ſuch remedy as the heire had againſt the tenant in dower, and tenant by the curteſie, &c. by the common law, ſuch remedy had the leſſor and his heires againſt the farmors for life or yeares by the ſtatute of Marlebridge, which remaineth to this day. — 29 E. 3. 1. b. Doct. & Stud. li. 2. ca. 1. Marlb. c. 23. l. 11. fol. 81. b. Bowles caſe. Regiſt. 72. 16 E. 3. Waſt, 100. 21 E. 3. 26. Doct. & Stud. fo. 66. b. F.N.B. 58. h. li. 6. fo. 37. Firſt part of the Inſtit. ſect. 67.

(5) *Ou des ans.*] See before the ſtatute of Marlebridge, cap. 23.

Tenant by ſtatute merchant, or ſtaple, or *elegit*, are not within this act, for albeit they have but a chattell, yet are they not tenant for yeares.

Although the words of the act be tenant for yeares in the plurall number, yet tenant for a yeare, or halfe a yeare, &c. is within this act.

Executors or adminiſtrators of a terme for yeares, though they hold in *auter droit*, ſhall be puniſhed for waſte done in their time, but not in the time of the teſtator, or inteſtate. — 38 E. 3. 17. 10 E. 4. 1. 23 H. 8. Waſt. Br.

Two executors be of a ward, the one doth waſte, the action lieth againſt him onely. See more hereof hereafter, and note the diverſity. — 3 E. 2. Waſte, 3.

Tenant for yeares graunts his eſtate upon condition, the leſſee doth waſte, the grauntee enters for the condition broken, the action of waſt is to be brought againſt the grauntee, and ſo it is in caſe of leſſee for life. — 30 E. 3. 16.

Tenant by the curteſie, or other tenant for life maketh a leaſe for yeares, he in the reverſion confirmeth it, tenant by the curteſie dieth, an action of waſte lieth againſt the leſſee. — 8 E. 3. 26. 10 E. 3. 32.

Tenant for yeares of a moity, third, or fourth part *pro indiviſo* holdeth a terme for yeares, he is within this act; and ſo it is of a tenant by the curteſie, or other tenant for life of a moity, &c. In like — 44 E. 3. 34. 45 E. 3. 35. 9 H. 6. 11. 12 E. 4. 2. 21 H. 7. 40.

like manner if two be plaintiffes, and one of them is ſummoned, and ſevered, a moity ſhall be recovered.

Lib. 5. fol 12. Foljambs caſe. Tenant for yeares or for life aſſignes over his leaſe for yeares, or eſtate for life, excepting the timber trees, and after waſte is done in felling downe the trees, the action of waſte is maintainable againſt the aſſignee, for as to the leſſor they are not ſevered from the land.

Lib. 5. fol. 78. Booths caſe. Tenant for yeares, or for life aſſignes over his eſtate, and notwithſtanding takes the profits, an action of waſte lieth againſt the firſt leſſee, and ſo it is of meane aſſignes, the action lieth againſt him that taketh the profits, but this is by the ſtatute of 11 H. 6. cap. 5. for in that caſe the pernor of the profits did not hold the land.

33 E. 3. p. 6. 6 E. 3 54. 34 E. 3 Fetom 111. Two joyntenants for yeares, or for life, one of them doth waſte, this is the waſte of them both, as to the place waſted, and yet the words of the act are, *(home que tient)* but treble damages ſhall be recovered againſt him that did the waſte onely.

40 E. 3. 33. 41 E. 3. 27. 43 E. 3. 15. 48 E. 3. 19. F.N.B. 56. a. Temps E. 1. Waſte, 126. Tenant for yeares or for life doth waſte, and after aſſigneth over his eſtate, now the words be *(home que tient)*, &c. he that holdeth for life or for yeares, and after the aſſignement he holdeth not the land, yet ſhall the action of waſte be brought againſt him in the *tenet*, becauſe in the eye of the law he is tenant as to the action of waſte, and againſt him that was the wrong doer did the action accrew, which he cannot avoid by his aſſignement, and againſt him ſhall the treble damages be recovered and the place waſted, and ſo it is of the meane aſſignes; a juſt interpretation that he that did the wrong ſhould anſwer the ſame, and this is the cauſe that generall nontenure is no plea in an action of waſte, but ſpeciall nontenure may be pleaded, as the granting over of his eſtate, before which graunt no waſte was done.

40 E. 3. 33. 43 E. 3. 8. 44 E. 3. 5.

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Tr. 7 E. 1. in Communi Banco. Rot. 21. Norff. (6) *Ou feme que tient en dower.*] This is to be underſtood of all the five kindes of dowers whereof Littleton ſpeaketh, *viz.* dower at the common law, dower by the cuſtome, dower *ad oſtium eccleſiæ*, dower *ex aſſenſu patris*, and dower *de la pluis beale*, and againſt all theſe the action of waſte did lie at the common law.

(7) *Et celuy que ſerra attaint de waſte.*] As it hath beene ſaid, if one joyntenant doe the waſte, both ſhall be attainted of the waſte, &c.

In an action of waſte brought againſt tenant by the curteſie, tenant for life, tenant for yeares, or tenant in dower, which before hath been named in this act, the entry of the plea of the tenant is *quod predict' (talis) non fecit vaſtum*, and yet all theſe by conſtruction of law ſhall anſwer for the waſte done by any ſtranger,

32 E. 3. Waſt, 30 19 E. 3. ib. 30. 41 E. 3. ibid. 81. for he in the reverſion cannot have any remedy but againſt the tenant, and the tenant ſhall have his remedy againſt the wrong doer, and recover all in damages againſt him, and by this meanes the loſſe ſhall light upon the wrong doer; for voluntary waſte and permiſſive waſte is all one to him that hath the inheritance. But

33 H. 6. 1. F N.B. 59. b. Dier, 25 H. 8. 33. 29 H. 8. 36. 14 Eliz. 314. Paſch. 9 E. 2. 63. b. In libro meo, Un brieſe de Waſte. 19 E. 3. Waſt, 31. if the waſte be done by the enemies of the king, the tenant ſhall not anſwer for the waſte done by them, for the tenant hath no remedy over againſt them. The ſame law it is if the waſte be done by tempeſt, lightning, or the like, the tenant ſhall not anſwer for it. It is adjudged in 9 E. 2. that if theeves burn the houſe of tenant for life, without evill keeping of leſſees for lives fire, the leſſee

leſſee ſhall not be puniſhed therefore in an action of waſte; *nota* the caſe of fire, &c.

A. ſeiſed of land in fee acknowledgeth a ſtatute merchant, and infeoffeth B. who letteth the ſame for life, the land is extended upon the ſtatute, B. bringeth an action of waſte againſt the leſſee, he may plead this execution, &c. before which execution no waſte done, for the poſſeſſion of the land is lawfully taken from him by courſe of law, which he could not withſtand, and if he ſhould be puniſhed for waſte, he ſhould have no remedy over.

So it is if a man make a leaſe for yeares, and put out the leſſee, and make a leaſe for life, the leſſee enter upon the leſſee for life, and doth waſte, the leſſee for life ſhall not be puniſhed therefore for the cauſe aforeſaid.

If tenant in dower be of a mannor, and a copiholder thereof commit waſt, an action of waſte lieth againſt tenant in dower. 32 E. 3. Waſte, 104.

If an infant be tenant by the curteſie, or leſſee for life, or yeares, he ſhall anſwer for the waſte done by a ſtranger, and have his remedy over, though ſome have holden the contrary, for in that caſe alſo the loſſe ſhall be upon the wrong doer; and ſo it is in caſe of a feme covert, for the priviledge of infancy and coverture in this caſe ſhall not prevaile againſt the wrong and diſheriſon done to him that hath the inheritance, eſpecially when they have their remedy over, and the eſtate is of their owne purchace or taking. And ſo it is if a leaſe be made to the huſband and wife, and the huſband doth waſte and dieth, if the wife agreeth to the eſtate, ſhe ſhall be puniſhed for the waſte done by her huſband in like manner, as if a ſtranger had done the waſte, and after the death of her huſband ſhe is in from the leſſor, and if the action had been brought againſt the huſband and wife, the writ ſhould have been *quod fecerunt waſtum*, ſo as it was as well the waſte of the wife, as of the huſband. Doct. & Stud. Temps E. 1. Waſte, 128. 3 E. 3. 13. 46. 9 E. 3. 42. 11 Aſſ. 11. 10 E. 3. 17. 42 E. 3. 21. 46 E. 3. 25. 2 H. 4. 3. a. 7 H. 6. 2. b. 2 H. 6. 24. b. 33 H. 6. 31. 19 E. 3. brie. 246. 10 E. 4. 18. 15 H. 3. Waſte, 133.

(8) *Perdra le choſe que il aver waſte.*] That is, theſe foure tenants before named ſhall loſe the thing which he hath waſted, but it is ever rendred *amittet locum waſtatum.*

* If waſt be committed in a houſe *ſparſim* in divers ſeverall parts, the whole houſe ſhall be recovered, although all be not waſted. In auncient time it was holden ‡ by ſome, that if the hall were waſted, the whole houſe ſhould be recovered, for that in thoſe dayes the hall was the place of greateſt reſort, and uſe, in ſo much as the whole houſe was called by the name of the hall, as Dalehall, &c. but the purview of this act is, that he ſhall loſe the thing that he hath waſted. * Temps, E. 1. Waſte, 127. 8 E. 2. Waſte, 112. 4 E. 3. 32. 15 E. 3. Judgement, 134. 15 E. 3 Waſt, 108. 34 H. 6. 44. 15 H. 7. 11. ‡ [ 304 ]

So it is of a wood, if waſte be done *ſparſim*, though all the wood be not waſted, the whole wood ſhall be recovered: and the reaſon of both theſe caſes was, for that if waſte were done *ſparſim* in houſes or woods, that by the conſtruction of theſe words, the whole ſhould be recovered, for that otherwiſe the houſe that was for the habitation of man, or the woods that ſo many wayes were for mans neceſſary uſe, could not be enjoyed, neither by him that had the inheritance, nor by the tenant without continuall treſpaſſing the one to the other, *et boni judicis eſt cauſas litium dirimere*; but if waſte were done in one part of the wood that might be conveniently divided from the reſt, that part only is *locus waſtatus*, and ſhall be recovered. 4 E. 6. Waſte Br. 136. 18 H. 8. 1.

And

And ſo it is of brook medow, if the tenant plough it up *ſparſim* (as hath been before ſaid.)

7 H. 3. Waſt, 141. Pl. Com. in Caſe de Mines. 5 R. 2. Waſte, 97. Tēps E. 1. Walt, 128.

A tenant for life or yeares of a parke, vivary, warren, or dovehouſe, if he deſtroy the deere, or the fiſh in the vivary or ponds, or the game in the warren, or the doves in the dovehouſe, it is waſte, and hee that hath the inheritance ſhall recover the park, vivary, warren, or dovehouſe, and therefore the makers of *this* act meaning to include all kinde of waſts, uſed this generall word [*choſe.*]

And ſo it is if the tenant kill ſo many of the deere, fiſh, game or doves, as there be not left ſufficient for ſtore having regard to the number that were there when his eſtate or intereſt was created or made, this is waſte, and ſo it was holden, Patch. 15 Eliz. *in communi banco, et ſic de ſimilibus.*

Exile and deſtruction of villeins by tallage and oppreſſion is waſt, and this act ſaith [*perdra le choſe.*]

3 E. 2. Waſte, 2. 9 E. 2. Waſte, 2. 16 H. 3. ib. 135. 9 H. 6. 42. 22 H. 6. 10, 11. 11 H. 7. per Fineux, 8 E. 2. Waſt, 113. 17 E. 2. ib. 118. 15 H. 3. ib. 130. 2 H. 6. 10. F.N.B. 60. o. Lib. 5. fol. 115. Foliambes caſe. Regiſt. 72.

(9) *Et ouſter eco face gree de treble de ceo que le waſte ſerra taxe.*] Concerning coſts in this action ſufficient hath been ſpoken, ca. 1.

The plaintiffe ſhall not recover damages for any waſte done hanging the writ, and therefore the plaintiffe may have a writ of *eſtrepement* in this action, *et ſic de ſimilibus.*

Leſſee for yeares committeth waſt, and the years doe expire, yet ſhall the leſſor have an action of waſte for the treble damages, although he cannot recover the place waſted, and though the ſtatute be in the conjunctive, *perdra le choſe, &c. et ouſter eco face gree, &c.* for as there was at the common law two forms of actions of waſte, *viz.* in the *tenet*, as againſt tenant by the curteſie, &c. and in the *tenuit* againſt the gardein after full age, ſo upon this act the like kinde of formes is framed by equall conſtruction, *viz.* in the *tenet* to recover the place waſted, and treble damages, and in the *tenuit* to recover treble damages only.

46 E. 3. 25.

But this is to be underſtood when the terme expires by effluxion of time, as in the caſe of a leaſe for years, or when the eſtate determines by the act of God, as when *ceſti que vie* dieth, or when the eſtate is ended or defeated by the act and wrong of the tenant, as when he makes a feoffement in fee, or commits any other forfeiture, and the leſſor enters, yet the leſſor ſhall have his action of waſte; but when the tenant commits waſte, and after ſurrendreth to the leſſor his eſtate or terme, and he in the reverſion agreeth thereunto, he ſhall not have an action of waſte in the *tenuit*, for he cannot by his owne act alter the forme and nature of his action from the *tenet* to the *tenuit*, and he cannot plead, *devant quel ſurrender mal waſte fait.*

19 E. 2. Waſt, 190. 8 H. 6. 10. 45 E. 3. 9.

8 H. 5. 3. 4 E. 3. 33. 14 H. 6. 14. 19 H. 6. 41. 66. 12 H. 4. 5. 2 H. 6. Waſte, 35. 32 E. 3. barre 262. 12 R. 2. Waſt, 99.

An action of waſte is brought againſt the leſſee for years, or againſt tenant *pur terme dauter vie*, and hanging the action the term expires, or *ce' que vie* dieth, yet the writ ſhall not abate, for that an action of waſte (as hath been ſaid) lieth onely for the damages in thoſe caſes, which he ſhall recover in that action then depending.

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33 E. 3. Judgement, 255.

In an action of waſte againſt a leſſee for life for waſte done in three acres, the defendant claimeth fee, whereupon iſſue is joyned, the jury findes againſt the defendant that he hath but an eſtate for life, and enquired further of the waſte, and found the waſte done in one acre onely, the plaintiffe cannot have judgement for the whole

whole land, in reſpect of the forfeiture and treble damages; for that judgement is not according to this act, that is to ſay, of the place waſted, and treble damages in reſpect of the place waſted, wherefore he had judgement according to the ſtatute of the one acre and treble damages.

Upon this branch it hath been received for a certain rule, that if waſte be committed, and he in the reverſion dieth, that the action of waſte faileth, for that the heire cannot recover damages for the waſte done in the life of the aunceſtor, and the waſte was not done by the diſheritance of the heire, and yet the law doth extend the action of waſte favourably as much as with convenience may be, leſt waſte which is hurtfull to the common wealth ſhould remaine unpuniſhed; and therefore if two coparceners be, and they make a leaſe for life or yeares, and the leſſee commit waſte, and one of them hath iſſue and dieth, and after the leſſee commit waſte againe, albeit the writ ſhall ſay that both the waſts were done to the diſheritance to the aunt and neece, yet ſhall the action be maintained, and the judgement ſhall be ſeverall, though the action be joynt, for judgement ſhall be given for them both for the place waſted, and the damages treble for the waſte done in their owne time, and the aunt ſhall have a ſole judgement for the whole damages for the waſte done in the time of her ſiſter by ſurvivor, which is a leading caſe, and worthy of great obſervation.

8 E. 2. Waſt, 110. 11 E. 2. ib. 115. 45 E. 3. 3. 20 E. 3. Quar. Imp. 63. 35 H. 6. 23. F.N.B. 6. r. Kelwey, 105.

(10) *Et en waſte fait en garde.*] There is gardein in chivalry, and gardein in ſocage: again gardein in chivalry is twofold, gardein in *droit*, and gardein in *fait* of the graunt of the king, or of the ſubject; alſo both theſe are either gardeins by right, or gardeins by claime and poſſeſſion without right: likewiſe gardein in ſocage is two-fold, *viz.* gardein by right, who is called *tutor proprius*, and gardein by poſſeſſion and claime, who is called *tutor alienus*.

[a] Againſt all theſe both a prohibition of waſte, and an action of waſt lie at the common law, but none of theſe gardeins ſhall be charged but for the voluntary or permiſſive waſte, and not for the waſte done by a ſtranger. But if there be two joyntenants of a ward, and the one doth waſte, this is the waſte of both, for he is no ſtranger, 3 E. 3. 18.

[a] Glan. l. 7. c. 9, 10. Bract. li. 4. fol. 28. & 316, 317. Britton, 33, 34. Fleta, l. 1. c. 11. 7 H. 3. Waſte, 141. 9 H. 3. ib. 136. 10 H. 3. ibid. 142. 20 H. 3. ibidem. 2 E. 2. ib. 1. 4 E. 2. Account. 107.

If the gardein ſuffereth a ſtranger to cut down timber trees, or to proſtrate any of the houſes, and according to his name of gardein doth not endeavour to keep and preſerve the inheritance of the ward in his cuſtody and keeping, nor to forbid and withſtand the wrong doer, this ſhall be taken in law for his conſent, for in this caſe, *qui non prohibet quod prohibere poteſt, aſſentire videtur.*

[b] And if ſuch waſte and deſtruction be done without the knowledge of the gardein, or with ſuch number as he could not withſtand, then ought the gardein to cauſe an aſſiſe to be brought againſt ſuch wrong doers by the heire, whereon he ſhall recover the freehold and damages for ſuch wrong and diſheriſon: ſo note a diverſity between the intereſt of a gardein created by law, for there in an aſſiſe the heir ſhall recover damages, but otherwiſe it is in the caſe of a leaſe for yeares, which is the leſſors own act.

16 E. 3. Waſt, 100. 13 E. 3. Account, 77. 32 E. 3. ib. 59. 41 E. 3. ib. 35. 40 Aſſ. 22. 44 E. 3. 27. 5 R. 2. Waſte, 97. 11 R. 2. ib. 98. 28 H. 6. ib. 9. 10 H. 6. 7. 32 H. 6. 7. F.N.B. 59. b. [b] 40 Aſſ. 12. Temps E. 1. Waſte, 126. 27 E. 3. 81. F.N.B. 60. g. 26 E. 3. Waſte, 10.

[c] The gardein doth waſte, and after aſſigneth over his intereſt, an action of waſte lieth againſt the grantor in the *tenet*.

[c] Regiſt. 72.

[d] Note that the action of waſte againſt the gardein is generall, *ſecit vaſtum, &c. de terris, &c. quas habet vel habuit in cuſtodia de hæreditate*

[d] F.N.B. 59. r. 2 E. 2. Waſte, 1.

[c] Mag. Chart. c. 4. 19 E. 2. tit. Waſte, 117. Temps E. 1. ib. 127. See Mich. 7 E. 1. in communi banco Eſſex. Picots caſe. Hil. & E. 1 ibid. Rot. 52. North Lovets caſe, 48 E. 3. 10. F.N.B. 60. c.

*hæreditate prædict'*, which writ doth extend as well to the gardein in ſocage as in chivalry.

(11) [c] *Perdra le gard, et rendra al heire les damages del waſte.*] So as if the heire bring his action of waſte within age, the judgement by this act is, that he ſhall loſe the whole wardſhip, not *locum vaſtatum* onely, and * yeeld to the heire ſingle damages, if the wardſhip be not ſufficient to ſatisfie the damages; ſee before what the judgement was at the common law.

3 E. 2. Waſte, 3. 7 E. 3. 12, 13. 43 E. 3. 88. Regiſt. 72. F.N.B. 59. e. & 60. c. coram rege per bre. de errore placita apud Dublin. Coram Johanne, juſtic. Hibern. Paſc. 30 E. 1.

But then it may be demanded, What if the gardein commit waſte, and the heire did not, or perhaps could not bring an action of waſte, being done ſo neare his full age, or having no notice thereof, what remedy hath the heire after his full age, for the gardein cannot loſe the wardſhip, for his eſtate is ended, and it ſeemeth by the letter of the law that he muſt bring his action upon this ſtatute within age, for the words bee [*perdra la garde.*] To this it is anſwered that the heire at his full age ſhall have an action of waſte, and recover treble damages by this act, for the wardſhip cannot bee loſt, and the wrong and diſheriſon done to the heire ought to be fully recompenced, and the ſtatute hath annexed treble damages to the action of waſte, as if it were enacted by parliament, that an action of waſte ſhould lie againſt tenant in taile *apres poſſeſſ.* therein treble damages ſhould be recovered as incident or annexed by this law to the action of waſte.

Bract. l. 4. fo. 316. F.N.B. 60. c.

And whereſoever the common law gave ſingle damages againſt any, this act doth give treble, unleſſe there be any ſpeciall proviſion made by this act. Alſo in an action of waſte, the jurors ſhall have the view of the place waſted, &c. as an incident to the action of waſte, for in the action at the common law the jurors ſhould have had the view.

Bract. l. 4. fo. 316. 38 E. 3. 7. 14 H. 4. 11, 12. 8 E. 2. Waſt, 111. 34 E. 3. ib. 146. 12 H. 4. 3. F.N.B. 60. p. Pl. Com. in Stowels caſe.

The law appointeth not of what value the waſte ſhall be, neither in the caſe of the foure tenants firſt before mentioned, nor in the caſe of the gardein, who is to loſe all for waſte done in any part. Herein the rule of Bracton is good, *Vaſtum erit injurioſum, niſi vaſtum ita modicum fuerit, propter quod non ſit inquiſitio faciend'*; and *de minimis non curat lex*; for waſte done to the value of xx. d. (which now is v. s.) the gardein loſt the whole wardſhip.

If a feme ſeignioreſſe take huſband, the tenant holding by knights ſervice dieth his heire within age, the huſband doth waſte and dieth, the action of waſte lieth againſt the wife. So if an infant be gardein in chivalry, and doth waſte, an action of waſte lieth againſt him, for he is within the letter and meaning of this law made againſt waſte and deſtruction.

Mich. 6 E. 1. in Banco Rot. 47. Eſſex Petrus Picots caſe.

(12) *Si le gard' perdue ne ſuffiſt a la value des damages, avant le age de meſme le garde.*] See a notable record upon this branch in the ſame yeare that this ſtatute was made.

A. hath the wardſhip of Blackacre and the heire of B. and Whiteacre and the heire of C. *per cauſe de gard*, A. doth waſte in Blackacre, he ſhall loſe but Blackacre, for that waſte is done onely to the diſheriſon of that heire; and ſo it is if he doth waſte in Whiteacre, he ſhall onely loſe that acre for the waſte done there to the diſheriſon of that heire.

11 H. 4. 75. 12 E. 4. 10. 15 H. 7. 4. Lib. 8. fol. 146. Les Carpenters caſe.

At the common law in caſe of tenant by the curteſie, tenant in dower, or gardein, the heire, &c. might have entred into the houſes and lands to ſee if waſte were done, to the end that if he found any waſte done, he might bring his action, and to that end might

might the heire or he in reverſion ſend any other to that intent; now this act giving an action of waſte againſt tenant for life, and tenant for years, doth impliedly give authority to him in the reverſion either by himſelf, or by another to enter into the houſes or lands ſo letten for life or years, to ſee if any waſte be done, *quia quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud*, and therefore he in the reverſion may lawfully enter, to ſee if any waſte be done, whereupon he may ground an action upon this ſtatute.

An action of waſte lieth not upon this act in the court of ancient demeſne, becauſe that court fails of the incidents to an action of waſte, *viz.* to award a writ to the ſheriffe to enquire of the waſte, &c. 28 H. 6. 25. 7 H. 6. 35. 8 H. 6. 35. 22 H. 6. 18. 20 E. 3. Waſt, 32. 38 Aſſ. p. 1. 42 E. 3. 22.

If a tenant for life or yeares commit waſte, ſo as he in the reverſion is intituled * to his action of waſte, yet if the tenant repaire the ſame before any action brought, he in the reverſion cannot have an action of waſte, but the tenant muſt plead it ſpecially: but if the tenant doth repaire it after the writ brought, and before he hath day to plead, he cannot plead it in barre of the action. * [ 307 ]

Upon the conſtruction of this act, whether in this mixt action the place waſted is the principall, or the damages, ſome queſtion hath been made, and in divers reſpects the one is more principall then the other, for in reſpect of the antiquity againſt tenant in dower, and the tenant by the curteſie, the damages are the principall, as hath been before ſhewed; and therefore they ſhall be ſometime preferred, *viz.* the plaintiffe to have execution of the damages before the place waſted. But in reſpect of the quality, the realty is ever preferred before the perſonalty, and therefore in waſte, if the defendant confeſſe the action, the plaintiffe may have judgement of the land, and releaſe his damages, which proveth the realty to be the principall, and an accord is no plea in an action of waſte in the *tenet*, for *omne majus dignum trahit ad ſe minus*. 40 E. 3. 37. 38 E. 3. 27. 13 E. 4. 15. 34 H. 6. 7. tit. Waſte, 50. 48 E. 3. 19. per Finchd. 11 H. 7. 13. 13 H. 7. 20. Lib. 6. fol. 43, 44. Blaks caſe.

And in an action of waſte there ſhall be ſummons, and ſeverance, for the writ is *ad exhæredationem*, and the action of waſte is a plea reall: in an action of waſte brought by two in the *tenuit*, a releaſe of the one is a barre to both, but otherwiſe it is in the *tenet*, for there it barreth but himſelfe. 6 E. 3. 47. 9 H. 5. 15. 30 H. 6. barre 39.

Thus have we endeavoured to expound this excellent law enacted *pro bono publico*, for preſervation of buildings for the habitation of mankinde, and of woods and timber, ſometime one of the beautifull, and profitable ornaments of England, and generally againſt all waſte and deſtruction by particular tenants, which law being very penall, and ſhortly and artificially penned hath beene with great wiſdome and judgement expounded in our bookes, and may be a light to many other like caſes. *Vide* Magna Charta, cap. 4. Marlebridge, cap. 23. W. 1. cap. 21. W. 2. cap. 14. 21. 20 E. 1. Vet. Magna Charta, 124. 28 E. 1. ca. 18. See the firſt part of the Inſtitutes, ſect. 67. 71. 380, 381, 382. 492. 570. 573, 574. 577. 585, 586. 666, 667, 668. 674, 675.

# CAP. VI.

*PURVIEW eſt enſement, que ſi home mourge* (1), *& eit pluſors heires* (2), *dont lun eſt fits ou file* (3), *frere ou ſoer, nephew ou niece* (4), *& les autres ſont en pluis longe degree, touts les heires deſormes* (5) *eyent recoverie per briefe de mortdaunceſter* (6).

IT is provided alſo, that if a man die, having many heires, of whom one is ſon or daughter, brother or ſiſter, nephew or niece, and the other be of a further degree, all the heirs ſhall recover from henceforth by a writ of mortdaunceſtor.

(Fitz. Joinder, in Act 11. 31. 34, 35, 36. 1. Inſt. 164. a.)

Bract. l. 4. fol 254. 283. Brit fol. 181. b. Fleta, lib. 5. cap. 2.

It appeareth by our auncient authors that this act is made in affirmance of the common law, for Bracton ſaith, *Cum ſit aſſiſa mortis anteceſſoris conjungenda cum conſanguinitate, non erit poſt recurrendum ad præcipe de conſanguinitate, ſed ad aſſiſam mortis, quia perſona quæ propinquior eſt, et facit aſſiſam, et trahit ad ſe perſonam et gradum remotiorem, ut ibi potius procedat aſſiſa, quam præcipe, quia illud quod eſt majus remotum non trahit ad ſe quod eſt majus junctum; ſed è contrario in omni caſu, et bene poterit quælibet iſtarum conjungi cum alia actione, quia quælibet loquitur de ſeiſina ejus quam habuit die quo obiit, quod non eſt in brevi de recto, et quælibet de poſſeſſione et non de proprietate.*

So as it appeareth by Bracton that the aboveſaid rule doth not hold onely in caſe of mordaunceſter, but in the writ of aiel and beſaiel, which is alſo a proofe of the common law, for this act nameth the aſſiſe of mordaunc' onely, and his opinion is approved by our books.

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Alſo this act extends to dying ſeiſed after the ſtatute, and yet like joyning ſhall be in the writ of mordaunc', aiel and beſaiel of dying ſeiſed afore the ſtatute, which is another proofe of the common law. And the ſame law it is in a formedon in the deſcender, and in writs of entry *ſur diſſeiſin* to the common anceſtor, and in a *ſur cui in vita*, writs of entry *in caſu proviſo, conſimili caſu ad communem legem*, and the like, the aunt and the neece ſhall joyne at the common law.

Temps, E. 1. joyndre in action, 35. 32 E. 1. ib. 34. 19 E. 2. ib. 31. 1 E. 3 ib. 29. 19 E. 3. ib. 31. 12 E. 3. ib. 11. 7 E. 3. 34. 24 E. 3. 13. 28. 48 E. 3. 14. 27 E. 3. 89. 30 E. 1. joyndre en action 36. 19 E. 2. Judgement 239.

To know what the common law was before the making of any ſtatute (whereby it may be known whether the act be introductory of a new law, or affirmatory of the old) is the very lock and key to ſet open the windowes of the ſtatute, as partly appeareth by that which hath been ſaid, and particularly in the expoſition of this act ſhall appeare.

(1) *Si home mourge.*] Hereby it appeareth that one right muſt deſcend from one anceſtor, or elſe the caſe is not within this law.

5 E. 3. 185.

If two coparceners die ſeiſed, and a ſtranger abate, the aunt and the neece ſhall not joyne in a writ of mordaunc' but have ſeverall writs, the one a mordaunc', and the other a writ of aiel.

In

In like manner if two coparceners be diſſeiſed, the one hath iſſue and die, the aunt and the neece ſhall not joyne, for they have not one right, but ſeverall, and therefore they muſt have ſeverall actions, but when they have recovered they ſhall hold in coparcenery. 37 H. 6. 8. 35 H. 6. 23.

(2) *Pluſors heires.*] Divers heires either in gavelkinde by the cuſtome, or heirs females coparceners by the common law, for this act extends to both of them.

(3) *Dont lun eſt fits ou file,* &c.] By this it appears that this act extends as well to heires by the cuſtome, as by the common law.

The aunt and the neece bring a writ of mordaunc' of the dying ſeiſed of the father, the aunt is ſummoned and ſevered, yet the neece ſhall proceed and recover the moity (although ſhe alone could never have a writ of mordaunc' of the dying ſeiſed of the grandfather) becauſe the writ was rightly and duly commenced, and when the neece hath recovered, the aunt may enter, and enjoy that moity with her; for the rule of the law is, that in all caſes when coparceners, or joyntenants may joyn in action, and have one and the ſame remedy, there if one be ſummoned and ſevered, and the other ſueth forth and recovers the moity, the other may enter with her; but when they are driven to ſeverall actions, or where their remedies are not equal, there if one recover or continue the one moity, the other cannot enter with her, and yet when both have recovered they ſhall be coparceners again. 10 H. 6. 10. 19 H. 6. 45. 31 H. 6. Entry cong. 54. First part Inſt. ſect. 696.

(4) *Frere ou ſoer, nephew ou niece.*] Here is implied the uncle and aunt being relatives, and then here be all the perſons that may have an aſſiſe of mordaunc', and ſo there be one that may have an aſſiſe of mordaunc', it maketh no matter how remote the other is. See the auncient authors, ubi ſup. F.N.B. 195. c.

(5) *Deſormes.*] So as this law extends to the future, and not to the time paſt, and yet being made in affirmance of the common law, the ſame law that guideth *in futuro*, ruleth alſo *in præterito*.

(6) *Eyent recoverie per briefe de mordaunc'.*] Theſe words are generall, but they have a ſpeciall intendment, for as to the damages, the aunt alone ſhall recover damages untill the death of her huſband, and both of them damages from the death of her ſiſter, and ſo it is in the writ of aiel, and beſaiel, and all this is according to the courſe of the common law before the making of this act, ſee the expoſition upon the firſt chapter of this parliament. See cap. 1. 45 E. 3. 3. 35 H. 6. 23.

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# CAP. VII.

*ENSEMENT ſi feme vende, ou done en fee, ou a terme de vie* (2), *tenement que el tient en dower* (1). *Eſtablie eſt, que le heire, ou auter, a que la terre deveroit reverter* (3) *apres le deceaſe la feme, eit maintenant*

ALSO if a woman ſell or give in fee, or for term of life, the land that ſhe holdeth in dower; it is ordained, that the heir, or other to whom the land ought to revert after the death of ſuch woman, ſhall have preſent

*nant* (4) *ſon recoverie per briefe dentre* (5) *fait de ceo en la chauncerie.*

preſent recovery to demand the land by a writ of entry made thereof in the chancery.

Cuſtumier de Norm. cap. 113. fol. 138. (Fitz. Entre, 7, 8. Bro. Ingreſs, 3. 1 Roll. 161. 11 H. 7. c. 20. Regiſt. 235.)

Regiſt. 237. Mirror, ca. 5. § 5. First part of the Inſtit. ſect. 483.

The miſchief before the making of this ſtatute was not, where a giſt or feoffement was made in fee, or for terme of life by tenant in dower, for in that caſe he in the reverſion might enter for the forfeiture, and avoid the eſtate: but the miſchiefe was, that when the feoffee, or any other died ſeiſed, whereby the entry of him in the reverſion was taken away, he in the reverſion could have no writ of entry *ad communem legem* untill after the deceaſe of tenant in dower, and then the warranty contained in her deed (as in thoſe dayes all deeds of feoffement for the moſt part comprehended warranty, and ſpecially when ſhe intended to barre her heire that had the reverſion) barred him in the reverſion, if he were her heir, as commonly he was, and for the remedy of this miſchief this ſtatute gave the writ of entry in *caſu proviſo* in the life time of tenant in dower, which is implied by this word [*maintenant*, *&c.*] The purview of this act Fleta rendreth thus, *Eſt autem quoddam breve proviſum de ingreſſu, per quod habens ſtatum, recuperabit dotem alienatam per formam ſtatuti, quod tale eſt; ſi mulier alienet dotem ſuam in feodo, vel ad terminum vitæ donatoris, hæres vel alius ad quem ſpectat reverſio, ſtatim ipſo facto habeat actionem petendi dotem illam in dominico.*

Fleta, li. 5. c. 34.

(1) *Fem', &c. que tient en dower.*] The tenant by the curteſie, or the leſſee for life is not within the caſe of this ſtatute, but he in the reverſion upon their alienation ſhall have a writ of entry *in conſimili caſu* by that excellent ſtatute of W. 2. cap. 24. *quotieſcunque evenerit in cancellaria, quod in uno caſu reperitur breve, et in conſimili caſu cadente ſimili indigente remedio, &c. concordent clerici de cancellaria in brevi faciendo,* as we ſhall ſhew more at large when we come to that ſtatute.

22 Aſſ. 37. 29 Aſſ. 54. 5 E. 2. entry 8. F.N.B. 207. f. 5 H. 7. 31. 14 H. 7. 13, 14. 38 H 6. 3. 30. 14 E. 4. 28.

Tenant in dower taketh huſband, the huſband aliens in fee, he in the reverſion during the huſbands life may enter for the forfeiture, but he cannot have a writ of entry *in caſu proviſo*, for the huſband hath nothing but during the coverture in the right of the wife, and our act ſaith, *Fem' que tient en dower vend' ou done*, ſo as the alienation of the huſband is not within the caſe of the ſtatute, and ſo it is *in conſimili caſu* when tenant for life take huſband and he alien.

16 Aſſ. 11.

(2) *Done en fee ou a terme de vie.*] At this time all eſtates of inheritance were fee-ſimple, and here (for terme of life) is intended of a ſtate for the terme of the life of a ſtranger, and not for the life of the tenant in dower her ſelfe, for ſuch an eſtate wrought no wrong.

See the firſt part of the Inſtitutes, ſect. 483. 205. F N.B. 206. g. Bract. fol. 323.

The words of the writ grounded upon this ſtatute are generall, *Et quæ poſt dimiſſionem factam ad præfatum B. reverti debet*, without expreſſing any eſtate, and doth count that the tenant in dower did alien in fee, and the tenant ſaith that the tenant in dower did not alien in manner and forme, &c. if it be found that the tenant in dower did alien in fee taile, or for life, the demandant ſhall recover, as it appeareth by Littleton, for auncient formes of writs or counts cannot be altered.

(3) *A que le terre deveroit reverter.*] If a man hath the reverſion in fee, in taile, or for life, either upon his own gift or leaſe, or by aſſignation, he ſhall have a writ of entry upon this ſtatute (and in like caſe *à conſimili caſu*) for the words of this act are generall (to whom the land ought to revert) and the words of the writ grounded upon this ſtatute are, *Quam clamat eſſe jus et hæreditatem ſuam*, but yet an eſtate for life, as hath been ſaid, is within this ſtatute. And this act providing againſt the alienation of tenant in dower, ſpeaketh onely of him in the reverſion, becauſe there can be no remainder limited upon her eſtate, otherwiſe it is of the writ of *conſimili caſu*, as we ſhall ſhew when we come to the ſtatute of W. 2. cap. 24.

Fleta ubi ſupra. 31 E. 1. Entry 64. 12 E. 2 ibid. 60. 20 E. 2. bre. 149. 7 E. 3. 54. 8 E. 3. 48. 21 E. 3. 11. F.N.B. 205. n.

And this act ſpeaketh onely of land which lieth in livery, for the feoffement or eſtate for life made by tenant in dower deveſteth the reverſion, otherwiſe it is of rents, and other things that lie in graunt.

Pl. Com. Colthirſts caſe.

(4) *Eyt maintenant.*] That is, preſently after the alienation made in the life of tenant in dower, which writ he could not have, as hath been ſaid, at the common law in the life of tenant in dower.

(5) *Son recovery per briefe dentre.*] This writ of entry goeth by the name of a writ of entry *in caſu proviſo*, ſo called, becauſe it hath the words of the writ of entry, *ad communem legem* (mentioned by Bracton) with this addition, by force of this act, *Et quæ poſt dimiſſionem per ipſum C. (viz. tenentem in dotem) præfato D. contra formam ſtatuti de Gloc', de communi concilio regni noſtri inde proviſi ad præfatum B. reverti debet per formam ejuſdem ſtatuti ut dicit*, and of theſe words, *inde proviſo*, it taketh his name of the writ of entry *in caſu proviſo*, and by theſe words this writ differeth from the writ of entry, *ad communem legem*, becauſe this writ lieth during the life of tenant in dower by the reference it hath to this act, which giveth the writ *maintenant*, &c. as hath been ſaid.

Bract. l. 4. f. 324. Fleta ubi ſupra.

But the writ of entry *ad communem legem* lieth not during the life of tenant in dower, and the writ of entry *ad communem legem* doth not make mention of the death of the tenant for life, but that muſt be expreſſed in the count.

16 E. 3. bre. 661.

# CAP. VIII.

*PURVIEW eſt enſement, que les viſconts pled' en counties* (1) *les plees de treſpas, auxy come ils ſoilent eſtre pledes. Et que nul neit deſormes brieſes de treſpaſſe devant juſtices* (2), *ſil ne affirme per ſoy, que les biens emportes vailent* 40. s. *al meins* (3). *Et ſil ſe pleint de batery affirme per ſoy que ſa pleint eſt veritable. Des plaies, et des maihemes, eit home briefe ſicome home ſoleit aver* (4). *Et graunt eſt, que les defend' puiſſent faire attornecies*

IT is provided alſo, that ſheriffs ſhall plead pleas of treſpaſs in their counties, as they have been accuſtomed to be pleaded. And that none from thenceforth ſhall have writs of treſpaſs before juſtices, unleſs he ſwear by his faith, that the goods taken away were worth forty ſhillings at the leaſt. And if he complain of beating, he ſhall anſwer by his faith, that his plaint is true. Touching wounds and maims, a man ſhall have his

*neies en tiel plees, ou appell' ne gist* (5) *mie, issint que fils soient attaints* du treſpas *en lour absence, soit maund' al vise', que ils soient prises* (6), *et eient adonques * la peine, que ils averont fils ussent estre presents quant le judgement fuit rendus. Et si les plaintiffes deformes en tiel treſpas se facent essoine apres la primer apparans, soit jour done jesques a la venue des justices errants* (7), *et les def. en dementires soient en peace en tielx plees, et en auters plees, ou attachments, et distres gisent* (8). *Si le defend' se face essoine del service le roy* (9), *et ne port son garrant* (10) *au jour que done luy est per son essoine: establie est que il rendra al plaintife les damages de la tourne de xx. s. ou de pluis, solonque le discretion des justices* (11), *et jademains soit en le greve mercy le roy.*

his writ as before hath been uſed; and it is agreed, that the defendants in ſuch pleas may make their attornies, where appeal lieth not; ſo that if they be attainted being abſent, then the ſheriff ſhall be commanded to take them, and ſhall have like pain as they ſhould have had, if they had been preſent at the judgement given. And if the plaintiffs from henceforth in ſuch treſpaſſes cauſe themſelves to be eſſoined after the firſt appearance, day ſhall be given them unto the coming of the juſtices in eyre, and the defendants in the mean time ſhall be in peace. In ſuch pleas and other, whereas attachments and diſtreſſes do lie, if the defendant eſſoin himſelf of the king's ſervice, and do not bring his warrant at the day given him by the eſſoin, he ſhall recompenſe the plaintiff damages for his journey twenty ſhillings, or more, after the diſcretion of the juſtices, and ſhall be grievouſly amerced unto the king.

(Fitz. Brief. 550. 14 H. 8. f. 15. Bro. Attorn. 64. 74. 78. 82. 88. Fitz. Eſſoin, 16, 17. 39 41. 79. 116. 118. 198. Cro. El. 96. 43 El. c. 6. 21 Jac. 1. c. 16. Keilw. 106. b.)

This act is divided into two branches.

The firſt branch is in affirmance of the common law.

The ſecond branch concerning the affidavit, this is new, and made in favour of the county court, but experience taught, that this courſe was ſo full of danger and trouble, that it was forborne, and the defendant left to take ſuch exceptions as the common law gave him.

(1) *En countie courts.*] This is put for an example, for the hundred court, and the court baron being no courts of record are alſo within this law.

Regiſt. fo. 111. F.N.B. 47. a. 239. d.

(2) *Brieſes de treſpas devant juſtices.*] Writs of treſpaſſe are here put but for an example, for debt, detinue, covenant and the like: but if the treſpaſſe be *vi et armis*, where the king upon the conviction of the defendant ſhall have a fine, there the ſheriffe in his county cannot hold plea of it, for no court can aſſeſſe a fine but a court of record, becauſe a capias to take the body is incident to it: for it is a rule in law, *Quod placita de tranſgreſſione contra pacem regis in regno Angliæ vi et armis factis ſecundum legem et conſuetudinem Angliæ ſine brevi regis placitari non debent.*

Regiſt. 11. F.N.B. 47.

Neither ſhall he hold plea of treſpaſſe for taking away of charters concerning inheritance or free-hold, for it is a maxime in law, *Quod placita concernent' chart', ſeu ſcript' liberum tenementum tangentia in aliquibus*

*quibus curiis quæ recordum non habent ſecundum legem et conſuetudinem regni Angliæ ſine brevi regis placitari non debent.*

(3) *Vaillent* 40. *s. al meyns.*] For as the inferiour courts which are not of record regularly cannot hold plea of debt, &c. or damages, but under 40 s. ſo the ſuperior courts that are of record cannot hold plea of debt, &c. or damages regularly, unleſſe the ſumme amount to 40 s. or above. Now the ounce of ſilver was at the time of making of this act but 20 d. and now it is above thrice ſo much; for the wiſdome of the common law was, that men ſhould not be troubled for ſuits of ſmall value in the kings courts, but that they ſhould be heard and determined in the country with ſmall charge, and little or no travell or loſſe of time, for it was then accounted againſt the dignity and inſtitution of thoſe high courts, to hold plea of ſmall or trifling cauſes, *Ne dignitas curiarum illarum vilesceret, et ne materiam ſuperaret opus*; otherwiſe the law that was inſtituted for the quiet of man, and for his defence, might be abuſed to his charge, vexation, and offence.

Now as the ſuperior courts ought not to incroach upon the inferiour, ſo the inferiour courts ought not to defraud the ſuperiour courts of thoſe cauſes that belong to them. For example, if in the county court, or other inferiour courts, they ſhall divide a debt of xx. l. into ſeverall pleints under 40 s. in this caſe the defendant may plead the ſame to the juriſdiction of the court, or may have a prohibition to ſtay that indirect ſuit, for as an ancient record ſaith, *Contra jus commune eſt, petere integrum debitum excedens ſummam* 40 *s. per diverſas querelas, per parcellas, ſcilicet,* 39 *s.* 11 *d. ob. q.* Regiſt. 146. F.N.B. 46. [ 312 ] Paſch. 20 E. 3. Coram Rege. Rot. 164. Ceſtr.

The maxime of the common law is, *Quod placita de catallis, debitis, &c. quæ ſummam* 40 *s. attingunt, vel eam excedunt, ſecundum legem et conſuetudinem Angliæ ſine brevi regis placitari non debent.* Regiſt. 146. F.N.B. 46. Brit. ca. 28. fo. 61.

And theſe words, *ſine brevi regis* are materiall words, for by the kings writ the ſheriffe in the county court may hold plea of goods, debts, &c. above the value of 40 s. and by force of the kings writ of juſticies, he may hold plea of an obligation of what ſumme ſoever, for example of 1000 marks, the which writ is in nature of a commiſſion to the ſheriffe to hold plea of debt above 40 s. the words of which writ are, *Rex vicecom' ſalutem: Præcipimus tibi, quod juſticies A. quod juſte et ſine dilatione reddat B. mille marcas, quas ei debet, ut dicit, &c. ne amplius inde clamorem audiamus pro defectu juſticiæ.* By force of which writ he may hold plea of the ſame, and the proces therein is attachment by his goods, &c. but no capias, and although the power of the court by this writ is in this particular inlarged, and the words of the writ to the ſheriffe are, *Quod juſticies, &c.* yet is not the juriſdiction of the court as concerning the judicature thereof, altered, for thoſe words of the writ do not, nor can make the ſheriffe judge of that court in that particular caſe, for that were to alter the juriſdiction and judicature of the court, whereof by the common law the ſuitors be judges, which cannot be altered but by act of parliament: the plaintiffe may remove this plea without cauſe ſhewed, but the defendant cannot without ſhewing of cauſe. 3 H. 6. 54, 55. Glanv. l. 12. c. 18. Brit. fo. 53, 54. Fleta, l. 2. c. 55. Brac. l. 3. f. 105. b. F.N.B. hereafterwards.

Alſo by force of a juſticies to the ſheriffe, he may hold plea of a treſpaſſe *vi et armis*. *Vide* Regiſter, and F. N. B. divers formes of writs of juſticies in many actions. Bract. ubi ſupra. Brit. ubi ſupra. 8 E. 4. 5. 14 H. 8. 15. F.N.B.

86. b. c. d. 85. g. 86. a. 7. a. 117. a c. 119. 123. 125. 128. 132. 135. 137. 139. 148. 161. 184. 151, 152.

The ſheriffe may alſo hold plea in a replevin of goods and chattels above the value of 40 s. for if it be by writ, the words of the writ be, *Rex vicecom', &c. Præcipimus tibi quod juſte, et ſine dilatione replegiari facias B. averia ſua*, or *bona et catalla ſua, quæ D. cepit et injuſte detinet, ut dicit, &c. ne amplius inde clamorem audiamus pro defectu juſticiæ.* By force of which writ, which is in nature of a commiſſion, the ſheriffe may deliver the beaſts, or goods and chattels of what value ſoever. And if the replevin be by pleint in the county court, the ſheriffe by the ſtatute of Marlebridge may hold plea of what value ſoever.

The like writs in the nature of a commiſſion directed to ſheriffes are the admeaſurement of paſture, recaption, *nativo habendo*, and many others.

Brit. c. 28. f. 61. 19 H. 6. 8. b.

The ſaid words, *vaillent* 40 *s. al meins*, have received this conſtruction, that the ſame muſt ſo appeare to be of value in the plaintiffes count, for it is not ſufficient that it appeares by verdict that the ſumme is under 40 s. For example, if the plaintiffe count in treſpaſſe, debt, detinew, covenant, &c. to the damage of 40 s. and the jury finde the damages under 40 s. yet the plaintiffe ſhall have no judgement, albeit in truth the cauſe *de jure* belonged to the inferiour courts.

This ſhall ſuffice for the expoſition of this branch of our act, the reſidue ſhall be referred to the treatiſe concerning the juriſdiction of courts whereunto this matter properly belongeth.

(4) *Des playes et des maybems eyt home briefe ſicome home ſoleit aver.*] This is the third branch of this act, and hereby it appeareth that the county court hath no juriſdiction to hold plea *de plagis et maihemiis*, of wounds and maihems, but thoſe pleas muſt be determined in the kings higher courts, but of battery (without wounding or maiheming) this act proveth that the county court hath juriſdiction.

What in law is adjudged a maiheme, and whereof the word is derived, you ſhall reade in the firſt part of the Inſtitutes, ſect. 194.

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(5) *Et graunt eſt, que les defend' puiſſent faire attornies en tiels pleas, ou lappeale ne giſt, &c.*] See before W. 1. cap. 41. Merton cap. 10. W. 2. cap.

Regiſt. 19. b. this extends to juſtices in eyre.

Some have thought that this clauſe concerning making of attourneys is generall, and extendeth to all actions reall and perſonall, but it ſeemeth to be particular, for in ancient manuſcripts the former branch, *viz. des playes et des maybems, &c.* is a diſtinct chapter by itſelfe, and this branch is parcell of that chapter, ſo as theſe words,

6 H. 7. 1.

*en tiels pleas*, ſuch pleas muſt be referred to pleas of treſpaſſe, battery, wounding, and mayheming, unleſſe it be in appeal of mayheme,

3 H. 7. cap. 1.

which being *felonice maihemavit*, the defendant ſhould not make an attorney no more then he could at the common law: and the words ſubſequent *(iſſint que ſils ſoient attaint de treſpaſſe en lour abſence)* prove that this branch is not generall, but referred to the clauſe next precedent: and note that neither the plaintiffe nor defendant at the common law could make an attourny in any appeale untill triall, acquitall, judgement, &c.

40 Aſſ. 17. 40 E. 3. 42. 11 H. 4. 14. 8 E. 4. 3.

But it may be objected that againſt this expoſition the booke in

21 H. 7. 39. b.

21 H. 7. is, *Que home ferra attorney in appeale de maiheme, quod vide de common courſe* 16 H. 7. in Caworths caſe; which caſe is incertainly reported, for it appeareth not whether it be meant of the plaintiffe

or

or defendant; but of the defendant it cannot be intended, for that ſhould be againſt our books, the true interpreters of this act. And of the plaintiffe (it ſeemeth it was intended) he cannot be by attourney, and that was Caworths caſe mentioned in the report of 21 H. 7. the record whereof being found out is againſt the report thereof; which very point came in queſtion in my time in the kings bench in an appeale of mayheme brought by Hudſon againſt Marwood, the plaintiffe appeared by attourney, and declared againſt the defendant, the defendant prayed that the plaintiffe might be demaunded, for that he could not appeare by attourney, and if the plaintiffe appeared not, that he might be nonſuited; againſt which the councell of the plaintiffe objected, that the plaintiffe in an appeale of mayheme might appeare by attourney, for that it might be, that he was ſo wounded as he could not appeare, and for authority cited the ſaid booke in 21 H. 7. whereunto anſwer was made by the councell of the defendant, and reſolved by the whole court, that the plaintiffe could not appeare by attourney, for the defendant may demand *oyer* of the mayhem, &c. which ſhall be peremptory to him being a tryall of the mayheme, which is a triall which the law giveth him.

8 E. 3. Attourney 93. 2 R. 3. 13. 6 H. 7. 1. F.N.B. 26, 27. Vet. N.B. 19, 20. M. 25 & 26 Eliz. Coram Rege Rot.

And albeit it may be hard and difficult in ſome particular caſe in reſpect of the grievouſneſſe of the mayheme for the plaintiffe to appeare in perſon, as it was in 16 H. 7. where the mayheme was hainous and horrible, the legges of the plaintiffe being broken over a threſhold, yet that muſt not change the law, nor take from the defendant his juſt defence and triall, for ſo upon the like ſurmiſe the defendant might be barred thereof in all caſes.

And Sir Chriſtopher Wray chiefe juſtice ſaid that the record of Caworths caſe had been ſeen, and that the record thereof was againſt the report, and thereupon the plaintiffe was called, and by the rule of the court was non-ſuit, and I was of councell in this caſe, which I have the rather reported the more at large, for that no man ſhould bee deceived by the ſaid report of 21 H. 7.

(6) *Soit maund al viſc' que ils ſont priſes.*] This is the fourth branch of this act.

Albeit this ſtatute ſpeaketh onely of the execution of the body, yet might he have had at the making of this act a *fieri fac'*: and afterwards by the ſtatute of W. 2. cap. 45. he may have an *elegit*, for this branch being in the affirmative doth not reſtrain the plaintiffe to take any other remedy.

(7) *Si les plaintifes deſormes en tiel treſpas, &c. ſe facent eſſoine, &c. ſoit jour done tanq; al venu des juſtices errants*, &c.] This is the fift branch of this act, and is to be intended of an eſſoine *de ſervice le roy*, and extendeth to actions of treſpaſſe, and not actions of debt. Touching common eſſoines, which were uſed for delay onely, former proviſions had been made. By matter ſubſequent this branch is become of no uſe, for ſeeing the authority of juſtices in eyre is ceaſed, when the plaintiffe is eſſoined of the ſervice of the king, the court cannot give day before the juſtices in eyre, and therefore it remaineth, as it was before the making of this act.

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45 E. 3. 10. b. Marleb. c. 13. 19. W. 1. c. 41, 42, 43, &c.

Note that when the demandant or plaintiffe is eſſoined *de ſervice le roy*, and at the day brings not in his warrant, this ſhall be adjudged a non-ſuit,

Tr. 18 E. 3. 21 E. 3. 37. b.

(8) *En*

27 E. 3. 81. 12 H. 4. 14. per Skrene.

(8) *En tiels pleas et en auters pleas, ou attachments et distres gisont.*] That is to say, in personall actions, where the processe is by attachment and distresse. This is the sixt branch of this act.

Marl. c. 19. 12 H. 4. 14. 2 E. 4. 16. l. 5 E. 4. 70.

(9) *Essoine de service le roy.*] Herein the delay is great, *viz.* for a yeare and a day, therefore he that cast the essoine must appeare in person in court to the end he may be sworne, &c. and that day may be given to bring in the warrant for the essoine.

34 H. 6. 1. 35 H. 6. 2.

(10) *Et ne port son garraut.*] A warrant under the privy seale is not sufficient, but it must be by writ under the great seale directed to the justices; also the warrant must testifie that he is in the kings service, &c. which commonly is upon certificate made to the lord chancellor by the captaine of the host under whom he serves.

And this is the first act, that concerned the essoine *de service le roy.*

4 E. 2. essoine 79. 28 E. 3. 98. Kelwey 106 & 107.

(11) *Il rendra al plaintife les damages de la journey de* 20 *s. ou de pluis solonque le discretion les justices.*] The statute speaketh where there is one defendant, &c. he shall pay 20 s. and if there be divers defendants, and they are essoined *de service le roy*, and at the day bring in no warrant, every one of them shall pay 20 s. for they are in law several essoins.

29 E. 3. 13. 36.

And the court by their discretion may by force of the act increase it to a greater summe, as sometime to 40 s. &c.

29 E. 3. 36. 21 E 3. 37.

And albeit this branch doth not by expresse words determine what shall be further done, yet if the essoine were cast after issue in a personall action, and seeing the essoine for want of a warrant is turned to a default, it followeth that by the common law the enquest shall be awarded by default, and therefore in that case he shall have the * 20 s. *pur la journey* by the statute, and by the enquest recover his damages and costs by the common law; for statutes made for the ousting of delayes are ever construed liberally and beneficially.

* Hil. 16 E. 1. in Banco 75 Buck. & Rot. 73. Hereford.

In a reall action if an essoine be cast for the tenant *de service le roy*, and no warrant is brought in at the day, he shall not pay the * 20 s. &c. for this act extends not to reall actions; but a *petit cape*, or a graund *cape* shall lie as upon a default, as the case shall require.

* Hil. 16 E. 1. ubi supra. 20. s. in Action de Walle vers Tenant pur vie.

* [315]

## CAP. IX.

*PURVIEW est ensement, que nul briefe ne isser' desormes de le chauncerie pur mort de home, denquirer si home occist auter per misadventure, ou soy defend', ou en auter maner * sans felony* (1), *mes celuy soit en prison jesque al venue des justices errants, ou assign' a gaole deliverie* (2), *et se mist en pais devant eux de bien et male. Et si soit trove per pais que il le fist soy defend', ou*

THE king commandeth that no writ shall be granted out of the chancery for the death of a man to enquire whether a man did kill another by misfortune, or in his own defence, or in other manner without felony; but he shall be put in prison until the coming of the justices in eyre, or justices assigned to the gaol-delivery, and shall put himself upon the

*ou per miſadventure* (3), *donques fra les juſtices aſſavoier au roy* (4), *et le roy luy en fra ſa grace, ſi luy pleiſt* (5.) W. 1. cap. 11. *Purview eſt enſement, que nul appell' ſoit abatue* (7) *ci legierment come avant ad eſte* (6), *mes ſi lappellour* (8) *counte le fait* (9), *lan* (10), *le jour* (11), *le heure* (12), *le temps le roy* (13), *et la ville* (14), *ou le fait fuiſt fait, et de quel arme il fuiſt occiſe* (15), *ſe eſtoia la appell', et jammes ne ſoit lappell' abatus per default de freſh ſuit* (16) *puis que home ſue dedeins lan et le jour* (17) *apres le fait* (18).

the country before them for good and evil: in caſe it be found by the country, that he did it in his defence, or by misfortune, then by the report of the juſtices to the king, the king ſhall take him to his grace, if it pleaſe him. It is provided alſo, that no appeal ſhall be abated ſo ſoon as they have been heretofore; but if the appellor declare the deed, the year, the day, the hour, the time of the king, and the town where the deed was done, and with what weapon he was ſlain, the appeal ſhall ſtand in effect, and ſhall not be abated for default of freſh ſuit, if the party ſhall ſue within the year and the day after the deed done.

(Kel. fo. 53. 108. Woods Inſt. 628. 2 Ed. 3. c. 2. 1 Bulſt. 80. Regiſt. 134. 300. 14 Ed. 3. ſtat. 1. c. 15.)

Before the making of this ſtatute, for that men were detained long in priſon before they were called to anſwer, which was ever odious in law, writs *de odio et atia* iſſued out of the chancery for their relief (as it appeared before in the expoſition upon the ſtatute of *Magna Charta*) ſpecially where the fact was either by miſadventure, or *ſe defendendo*; and therefore this act reſtraining thoſe writs, doth preſcribe a courſe for their ſpeedy calling to anſwer in thoſe two caſes. But now the writ *de odio et atia* is revived by the ſtatute of 42 E. 3. cap. 1. as it appears in the expoſition upon the ſix and twentieth chapter of *Magna Charta*.

See the Mirror, cap. 5. § 5. Magn. Chart. ca. 26. 29. See W. 2 ca. 29. Regiſt. 134.

And where the ſtatute of Marlbridge had determined, that killing of a man by miſadventure ſhould not be any offence for the which the delinquent ſhould dye, this ſtatute maketh the killing of a man *ſe defend'* in the ſame degree, where by the common law he ſhould have dyed for it.

Marlb. ca. 26. 21 E. 1. 17. b.

Laſtly, where the ſtatute of Marlbridge took an order for the parties ſpeedy delivery out of priſon in caſe of miſadventure, this act provideth for the ſame both in caſe of miſadventure, and of *ſe defendendo*.

(1) *Per miſadventure ou ſoy defendant, ou en auter manner ſans felony.*] Of this matter ſomewhat hath been ſaid in the expoſition upon the ſtatute of Marlbridge: an indictment or a verdict that A. killed B. *ſe defendendo* is not good, but the ſpeciall matter muſt be ſet down, to the end the court may adjudge it to be upon inevitable neceſſity; whereof you ſhall read a notable record in the parliament rolls of 3 R. 2. John Imperials caſe; note the words here, *Sans felony, vide Marlbridge ubi ſupra*, and in our books it is ſaid to be no felony; and the reaſon is, becauſe neither of them is done *felleo animo*.

Marlbr. ca. 25. 43 Aſſ. p. 3. 3 E. 3. Coron. 302. 354. 15 E. 3. ibid. 116. 2 H. 4. 18. 11 H. 7. 23. Fleta, lib. 1. cap. 31. Rot. Parliam. 3. R. 2. nu. 18. John Imperials caſe.

If a man kill another in his own defence, if he eſcape, &c. the town ſhall be amerced, as an ancient mark of the common law, that made it felony.

(2) *Soit*

Magn. Chart. ca. 26. & 29.

(2) *Soit en priſon jeſque al venue des juſtices errants ou aſſign' a gaole deliverie.*] Hereby it appeareth what expedition ought to be uſed for avoiding of long impriſonment, *viz.* untill the next coming of the juſtices; ſee for this *Magna Charta.*

And here it is to be obſerved, that the law of England is a law of mercie, *Lex Angliæ eſt lex miſericordiæ*, for three cauſes:

Firſt that the innocent ſhall not be worn and waſted by long impriſonment, but (as hereby, and by the ſtatute of *Magna Charta* appeareth) ſpeedily come to his triall.

* *Regula.*

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Bract. lib. 3. fol. 137. a. Brit. fo. 17. b.

Fleta, li. 1. c. 31.

Secondly, that priſoners for criminall cauſes, when they are brought to their triall, be humanely dealt withall; for * *Severos quidem facit juſticia, inhumanos non facit.* And therefore it is ſaid, *Cum autem captus coram juſticiariis producendus fuerit, produci non debet ligatis manibus (quamvis aliquando compedibus propter periculum evaſionis) et hoc ideo, ne videatur coactus ad aliquam purgationem ſuſcipiendam.* And Fleta ſaith, *Cum autem capti in judicio produci debeant, non producantur armati, ſed ut judicium recepturi, nec ligati, ne videantur reſpondere coacti.*

Thirdly, the judge ought to exhort him to anſwer without fear, and that juſtice ſhall be duly adminiſtred to him.

It is to be obſerved, that juſtices of gaole delivery may take an indictment of killing of a man *ſe defend'*, becauſe their authority is generall, but juſtices of peace cannot take ſuch an indictment, becauſe their commiſſion is limited, and it is taken not to be within their commiſſion.

(3) *Et ſi ſoit trove per paiis que il ſoy fiſt ſoy defendend' ou per miſadventure*, &c.] This may be two wayes, either when he is indicted of murther or homicide, and the jury finde it *ſe defendendo*, or when he is ſpecially indicted, that he killed a man *ſe defendendo*, whereunto (for ſafeguard of his goods) he may plead not-guilty; and if he be found guilty *ſe defendendo*, he forfeiteth his goods, if not guilty, he ſaveth them.

37 H. 8. Appeal. B. 122. 26 Aſſ. 32. 29 Aſſ. 23. Stamf. Pl. Cor. 15. Pl. Com. 101. 25 E. 3. 42. 29 E. 3. 94.

Here is implyed a maxime of the common law, that the life of a man is of ſo precious regard in law, that the death of a man cannot be juſtified, as in this caſe the defendant in the appeal cannot juſtifie the death *ſe defendendo*, but muſt plead not-guilty, and as our act ſpeaketh, *Si ſoit trove per paiis, &c.* the jury may finde *veritatem facti*, the truth of the fact.

And herein note a diverſity between an appeal of death, and an appeal of mayhem; for in appeal of mayhem, if the defendant plead not-guilty, he cannot give in evidence that it was *ſe defendendo*, for that he ought to have pleaded it by way of juſtification in barre of the action.

19 H. 6. 31. 21 H. 6. 27. 41 Aſſ. 21. 9 E. 4. 28. 22 H. 6. 48.

There is alſo another diverſity betwcen an appeal of mayhem, or an action of treſpaſſe for wounding, or mannas of life and member; and an action of treſpaſſe of aſſault and battery for a man in defence, or for the preſervation of his poſſeſſion of lands or goods; for in that caſe he may juſtifie an aſſault and battery; but he cannot juſtifie either mayheming, or wounding, or mannas of life and member: and ſo note a diverſity between the defence of his perſon, and the defence of his poſſeſſion or goods.

3 E. 3. Coron. 286. See Marlbr. cap. 25.

If a man be indicted before the coroner of the death of a man *ſe defendendo*, and that he fled for the ſame, he ſhall forfeit his goods, which favoureth of the common law.

No

No man can be acceſſary to one that killeth another *ſe defendendo.* — 15 E. 3. Coron. 116.

If a man be indicted for killing of a man by miſadventure, or *ſe defendendo*, and is out-lawed thereupon, he ſhall forfeit no lands, but goods and chattels onely.

(4) *Ferra les juſtices aſſavoir au roy, et le roy luy ferra grace ſil luy pleiſt.*] To the king, that is, in the court of chancery the pleas whereof be *coram domino rege in cancellaria*; and there the lord chancellor, upon the record certified to him in the chancery by force of a writ of *certiorari*, ſhall of courſe by force of this act grant him his pardon without ſpeaking hereof to the king, for that ſpeaking is intended judicially in court, as hath been ſaid: and note this clauſe is generall, and extendeth as well to an appeal, as to an indictment; and therefore if a man be appealed of murther, and it is found that he did it *ſe defendendo*, or by miſadventure, the king is to pardon it, for the offender cannot be put to death, which is the end of his ſuit, and an appeal lyeth not for ſuch a killing; otherwiſe it is where the appellee is to have judgement of death, for there the king cannot pardon it. — 3 E. 3. Coron. 261. 44 E. 3. 44. 2 H. 4. 18. Stamf. Pl. Cor. fol. 16.

(5) *Ferra grace ſi luy pleiſt.*] Are but words of reverence to the king, for the king is obliged *ex merito juſticiæ*, to grant the pardon, albeit ſome opinion is to the contrary; otherwiſe the lord chancellor could not do it without warrant from the king. — [ 317 ] 3 E. 3. Coron. 361. ibid. 354. 29 E. 3. 42. 44 E. 3. 44. Stamf. Pl. Cor. 16. b. Kelwey 103.

(6) *Purview eſt enſement que nul appeale ſoit abatu cy ligerment come avant ad eſtre.*] The miſchief before this branch of this act, was, that there were ſo many exceptions to abate the appeal, eſpecially being ever allowed learned councell to defend them; and the miſchief was the greater, for that the appeal being once abated, never any other appeal (in favour of life) could be brought afterward. — Brit. fo. 40. b.

At the common law, theſe exceptions were allowed to the plaintife in the appeal of death:

1. That the plaintife was not preſent at the mortall blow given, or felony done; for Glanvile ſaith, *Ita ut de morte loquatur ſub viſus ſui teſtimonio mulier auditur accuſare aliquem de morte viri ſui ſi de viſu loquatur.* And Bracton ſaith, *In omni vero caſu criminali, quæ ſub ſe continet feloniam, in appello debet fieri mentio de anno, de loco, de die, de hora, loqui etiam oportet de viſu et auditu.* And the concluſion of the writ of appeal then was, *Offert ſe diſrationare, &c. ſicut ille, ſeu illa, qui vel quæ præſens fuit, et hoc vidit.* — Glanv. lib. ult. ca. 3, 4, 5, &c. Bract. li. 3. fol. 138, &c.

And in another place he ſaith, *Non autem habet appellum fœmina, niſi de morte viri ſui inter brachia ſua interfecti, &c.* And Britton ſaith, *Des fems volons nous que nul ne puiſſe appeale de felony de mort de home, forſque de mort ſon baron tue deins lan et jour enter ſes braches.* — Lib. 3. fol. 125. Brit. ubi ſupra.

Theſe words, *infra brachia*, have this ſignification, that ſhe muſt not onely be his wife *de jure*, but alſo *de facto*, that is, in poſſeſſion; for the wife in poſſeſſion without lawfull matrimony ſhall not have the appeal, but ſhe muſt be his wife both in right and in poſſeſſion without elopement from her huſband, &c. or divorce, &c. Many other exceptions were before this act, as appeareth by our ancient authors, to be taken, and another manner of count made before this act, now this act hath retained all that was certain, and rejected the reſt, as hereafter ſhall appear. — Mirror, c. 2. § 7. 7 E. 4. 15. 14 E. 4. 7. 22 E. 4. 39. 50 E. 3. 15. 28 E. 3. 91. 27 Aſſ. 3. Ubi ſupra.

If

If the writ of appeal doth comprehend the ſpeciall matter, *viz.* that the huſband or anceſtor was ſlain *ſe defendendo*, or by miſadventure, the writ of his own ſhewing ſhall abate; for an appeal, as hath been ſaid, lyeth not of ſuch a killing, becauſe the end of the appeal of death is, that the appellee may have judgement of death, *viz.* death for death.

(7) *Purview eſt que nul appeale ſoit abatu*, &c.] This clauſe, if it be taken by it ſelf, is generall, and literally, as ſome hath taken it, extendeth to all appeals, as of death, robbery, rape, felony, mayhem, &c. but *ex antecedentibus et conſequentibus fit optima interpretatio*, and all the antecedent clauſes do concern the death of man; nay in this very ſentence theſe words are contained, *et de quel arme il fuit occiſe*, which manifeſtly do prove that this act is onely intended of the appeal of the death of man. And therefore the appeals of robbery, rape, and of other felony and mayhem are not within this act; for the miſchief was, as hath been ſaid, in the caſe of the death of man.

See 1. part of the Inſtit. ſect. 500, 501. Brit. f. 45, 46. 22 Aſſ. p. 97. 7 H. 4. 38. Stamf. Pl. Cor. 62.

(8) *Lappellour counte le fait, lan, le jour, le heure, le temps le roy, et la ville ou le fait fuiſt fait, et de quel arme il fuit occiſe.*] By this act the count of the appellant muſt comprehend theſe ſeven things: 1. the fact, 2. the yeer, 3. the day, 4. the hour, 5. the time of the king, 6. the town where the fact was done, and laſtly, with what weapon.

See the ſtatute of 4 E. 1. de offic. coronatoris.

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(9) *Le fait.*] The fact: herein muſt be ſet forth, firſt, whether it was by wound, or without wound; if by wound, 4. things are neceſſary to be rehearſed in the ſetting out of the fact, beſides the circumſtances mentioned in the act, *viz.* 1. In what part of the body the wound was: 2. of what length and depth the wound was, where the wound is of ſuch a quality, ſo as it may appear to the court that the wound was mortall; but if his arm were cut off, or the like, there the length or depth cannot be ſhewed: 3. that the party wounded dyed of that wound; and laſtly, that it may appear that he dyed of that wound within the yeer and day after the giving of the wound; if without wound, either by weapon or without; if by weapon, as by a blow or bruiſing, or by putting up a hot iron in the fundament or the like, then as many of the circumſtances before mentioned in the declaration of the fact as do agree therewith, and the reſt of the circumſtances required by the act are to be ſet forth: if without weapon, as by poyſoning, drowning, burning, ſuffocating, ſtrangling, or the like, the manner of the fact muſt be ſet forth, and ſo many of the circumſtances required by the act as agree therewith, namely, all the circumſtances, ſaving with what weapon the felony was done, becauſe no weapon was uſed in committing of this felony: but notwithſtanding, this act extendeth to all homicides, though they were not done with any weapon.

Brit. fo. 7. li. 5. fo. 120. 122. Longs caſe. See hereafter Heydons caſe.

(10) *Lan.*] That is, the yeer of the raign of the king.

(11) *Le jour.*] The day here is taken for the naturall day, comprehending both the ſolare day, and the night alſo, containing 24 hours, and therefore if it be done in the night, it is ſaid, *In nocte ejuſdem diei.*

Bract. li. 5. fo. 359.

If a man be felonioufly ſtrucken the 10 day of December, &c. whereof he dyed the 10 day of January, he cannot alleage the killing the 10 day of December when the ſtroke was, but he may alleage the killing to be the day that he dyed; but the ſureſt concluſion is; and ſo he killed him in manner and form aforeſaid: for

Lib. 4. f. 41, 42. Heydons caſe. 22 E. 3. Coron. 244. 11 H. 4. 12. Pl. Com. 401.

for though to ſome purpoſe the death hath relation to the blow, yet this relation being a fiction in law maketh not the felony to be then committed.

(12) *Le heure.*] *Hora conſtat ex* 40 *momentis.* The hour, as for example to ſay, 10 *die Decembris, viz. in hora decima in nocte ejuſdem dici.*

There are divers diverſities between the alleaging of the hour, and the day, or yeer; 1. In the count upon the appeal one may ſay, *circa horam* 10 *ante meridiem, &c. or, inter horam decimam et undecimam ante meridiem*; but the like cannot be done either of day, yeer, or part of the body: as the fact cannot be alleaged to be done *circa* 10 *diem Decembris, &c.* or, *inter decimum et* 11 *diem Decembris,* or *circa annum ſextum domini regis nunc,* or *inter ſextum et ſeptimum dicti domini regis nunc,* or alleage the wound to be given *circa* or *circiter pectus*: and the reaſon of this diverſity is, that it is more difficult to alleage the true hour, then the true day or yeer; and yet the plaintiffe in the appeal is not bound to prove in evidence, neither the preciſe hour, nor the very day that he alleageth in his count: another diverſity is between the appeal and the indictment, for in the indictment the hour needs not to be alleaged. Bract. ubi ſupra. Heydons caſe, ubi ſupra. Lib. 9. fol. 62. Seign' Zanchars caſe.

And although the day be alleaged, yet if the jury finde him guilty at another day, the verdict is good, but then in the verdict it is good to ſet down on what day it was done, in reſpect of the relation of the felony; and the ſame law is in the caſe of an indictment.

At the ſeſſions of the peace holden for the county of Norff. one Syer was indicted of burglary, 1 *Auguſti,* 31 Eliz. and upon not guilty pleaded, it fell out in evidence that the burglary was done, 1 *die Septembris in eodem anno,* ſo as *primo Auguſti* there was no burglary done, and thereupon he was found not guilty, and afterwards he was indicted againe 1 *Septembris, &c.* and it was reſolved by Wray and Periam juſtices of aſſiſe, and by the greateſt part of the judges, that he ought not to be tried again, for he mought have been found guilty upon the firſt indictment, for the day is not materiall; but it is neceſſary for the jury in that caſe to ſet down the day, and ſo in caſe of appeale. Paſch. 32 Eliz. reſolved by the juſtices. [ 319 ]

(13) *Le temps le roy.*] The yeare being already named, it might ſeem that the time of the king, which is the year of the raigne of the king, is needleſſe, but it is here againe added, to the end, that not onely the yeare ſhall be alledged wherein the blow, &c. was given, but alſo the yeare when the death enſued thereupon, to the end that it may appeare, that he died of that blow, &c. within the yeare and day; and whenſoever the yeare of the king ought to be alledged, it draweth with it time and place, that is, the day and time, when and where the death enſued. Vide Machallis caſe here following, and Heydons caſe, and Longs caſe ubi ſupra.

(14) *La ville.*] This muſt be underſtood, if the murder or homicide, were done in a town, but if it were done in a place knowne out of any towne, then may it be alledged in that place knowne in ſuch a county.

And ſo in a city it may be alledged in a pariſh, &c. becauſe ſuch a pariſh is in lieu of a towne.

But in the country if a pariſh contain divers towns, the murder or homicide cannot be alledged in ſuch a pariſh, for that this ſtatute requireth, that the fact be alledged in a town.

(15) *Et*

Lib. fo. Machallis caſe.

(15) *Et de quel arme fuit occiſe.*] With what weapon the wound was given: and albeit one certaine weapon muſt be alledged in the count, yet upon the evidence, if it be proved that the wound were given with any other weapon, the offender ſhall be found guilty; as if it be alledged in the indictment that the wound was given with a dagger, and it is proved in evidence, that it was given with a ſword, rapier, hooke, hatchet, bill, or any like weapon with which a wound may be made; for it were unreaſonable to drive the plaintiffe in the appeale to prove the ſelfe ſame particular weapons whereof many times he cannot have notice; but upon ſuch a count, or an indictment in evidence it cannot be proved, that the party was poyſoned, or drowned, or burnt, ſuffocated or ſtrangled, or the like, where no weapon at all was uſed; for that evidence doth not maintain the count in the appeale or the indictment, becauſe it is murder or homicide of another kinde, and not under the ſame *claſſis* that is alledged in the count or indictment, and thereof the plaintiffe by ſuch as viewed the body may have notice.

And albeit this ſtatute requireth, that it be alledged in the count of the appeale, with what weapon he was killed, it is to be underſtood in caſe where he is killed with a weapon, for albeit (as hath been ſaid) there was no weapon at all, as in caſe of poyſoning, drowning, &c. yet doth the appeale lie for ſuch a murder or homicide; and the weapon is in this act mentioned for example.

(16) *Pur default de freſh ſute.*] At the common law if the plaintiffe in the appeale of death had not made freſh ſuit, he ſhould not have maintained his appeale: for freſh ſuit *recens inſecutio*, that is, a ſpeedy and continuall purſuit of the felon for his apprehenſion and conviction, and that is for two ſeverall purpoſes, one to have reſtitution of his goods, as in the appeale of robbery and the like, and the other for the maintenance of the appeale it ſelfe, as here in the caſe of death, where no reſtitution of goods is to be had, but puniſhment of the offender by death, and that freſh ſuit which the plaintiffe in the appeale of death is to make, is here intended. What this freſh ſuit was at the common law doth notably appeare by Bracton, *Qui appellare voluerit et bene ſequi, debet ille cui injuriatum erit, ſtatim quam cito poterit hutеſium levare, et cum hutеſio ire ad villas vicinas et propinquiores, et ibi manifeſtare ſcelera et injurias perpetratas, et continuo accedere debet ad ſervientes domini regis, ſi inveniri poſſint et deinde ad coronatores, et ſic inde ſine intervallo ad proximum comitatum, &c.*

Bract. l. 3. fo: 139. Brit. fol. 43. Acc'.



(17) *Deins l'an et le jour.*] Here the yeare is to be accounted for the whole yeare according to the kalender, and not according to 28 dayes to the moneth, and the day is intended of the naturall day, and by this act if the appeale of death be commenced within the yeare and the day, it is ſufficient freſh ſuit, but after the yeare and day the appeale of death cannot be commenced.

27 E. 3. 83. 32 E. 3. age 57. 45 E. 3. 21. 13 Aſſ. 10. 21 Aſſ. 24. 21 E. 3. 23. 11 H. 4. 94. 17 E. 4. 2. b. 27 H. 8. 11. a. Stamf. Pl. Cor. fo. 60. c. d.

If the next heire of the dead be within age, he muſt bring his appeale of death within the yeare and the day according to this act, but it hath been holden in many books that the paroll ſhould demurre untill his full age; and the reaſon yeelded therefore is, that the defendant cannot wage battell, &c. But it hath beene often adjudged and approved by continuall experience of latter times that it ſhall proceed during his minority, and the reaſon of failer of battell is of no force, for that a man above ſeventy yeares of age ſhall

ſhall have an appeale, &c. and yet the defendant ſhall be ouſted of battell, and ſo if the plaintife in an appeale be mayhemed, &c. the defendant ſhall be ouſted of battell, and yet the appeale ſhall proceed. 15 E. 2. Cor. 385.

(18) *Apres le fait.*] That is, after the felony by homicide committed.

If a man be mortally wounded, &c. the firſt day of May, and thereof dieth the firſt day of July, ſome doe hold that the appeale is to be brought within the yeare and day after the blow given, for that the death enſuing hath relation to it, and that is the cauſe of the death, and the offender did nothing the day of the death. Stamf. Pl. Cor. fo. 63. a.

Here the law hath made a limitation in the appeale of death: by the ancient law juſtices in eyre did ride from ſeven yeare to ſeven yeare, and before them no plea of the crown could be inquired of for any offence committed before the laſt former eyre: ſo the juſtices in eyre in the kings foreſts may hold a juſtice ſeat from three yeare to three yeare. But no offence in the foreſt can be at the juſtice ſeat inquired of before the laſt former juſtice ſeate. See the fourth part of the Inſt. cap. Juſtices in Eyre, and all the auncient authors quoted there. See the fourth part of the Inſt. cap. the Courts of the Foreſt.

* But the yeare and the day ſhall be accounted from the death, for before that time no felony was committed, and thus it hath been often reſolved and adjudged, and the reaſon aboveſaid grounded upon relation, which is a fiction in law, holdeth not in this caſe. * Heydons caſe ubi ſupra.

If an appeale of murder be brought, and hanging the ſuit, and after the year and day is run out, one become acceſſary to the appellee, the plaintiffe ſhall have an appeale againſt him after the yeare and day paſt after the death, but it muſt be brought within the yeare and day after this new felony as acceſſary, for that in this caſe [*apres le fait*] is underſtood after this new felony as acceſſary done. 26 Aſſ. p. 52.

Thus much ſhall ſuffice for the expoſition of this law, more ſhall be ſaid concerning appeales in the treatiſe of pleas of the crowne, whereunto it properly belongeth.

See the ſtatute of 3 H. 7. cap. 1.

# CAP. X.

*COME il ſoit contenue en leſtatute le roy que ore eſt* W. 1. cap. 43. *que deux parceners, ou deux queux teigne en common, ne puiſſent fourcher per eſſoine, del heure que * ils ount un foits apparus en courte: purview eſt, que meſme ceo ſoit tenus et garde per la ou home et ſa feme ſont enpledes en la court le roy.*

* [ 321 ]

WHEREAS it is contained in the ſtatute of the king that now is, that two parceners, or two that hold in common, may not fourch by eſſoin, after that they have once appeared in the court: it is provided, that the fame be obſerved and kept, where a man and his wife be impleaded in the king's court.

W. 1. cap. 43. (Fitz. Eſſoin, 5. 62.)

39 E. 3. 29. The miſchiefe before this ſtatute was, that notwithſtanding the ſtatute of W. 1. the huſband and wife (unleſſe they were joyntly enfeoffed) might fourch by eſſoine, for that ſtatute extended but to parceners and joyntenants: ſee in the expoſition upon the ſtatute of W. 1. cap. 43.

13 E. 3. eſſoine 5. 3 E 3. 29. 12 H 4 3. 38 E. 3. 18. 39 E 3 29. 12 H. 4. 1. 22 E. 3. 5. b. & 14. a. 2 E. 4. 1. This ſtatute extendeth to common eſſoines, and not to eſſoine *de ſervice le roy*.

Alſo this ſtatute extendeth onely to reall actions, and therefore in perſonall actions baron and feme may fourch by eſſoyn.

Moreover this act extendeth to eſſoynes after appearance, that is, that all the tenants have appeared, and therefore baron and feme may fourch by eſſoyne before appearance notwithſtanding this act; hereby it appeared that eſſoynes, at the firſt allowed upon juſt cauſe, were afterwards uſed meerely for delay.

# CAP. XI.

*PURVIEW eſt enſement, que ſi home bailla en la citie de Londres* (2) *ſon tenement a terme des ans* (1), *et celuy a que le franktenement eſt* (3), *ſe face empleid' per colluſion* (4), *et face default apres default, ou veigne en court, et la voile render* (5) *pur faire le termour perdre ſon terme, et le demandant eit querele* (6), *iſſint que le termour puiſſe aver recover' per briefe de covenant, le maire et les bailifes puiſſent enquirer* (7) *per bone viſne en la preſence del termour, et del demandant, le quel le demandant moveſt ſon plee per bon droit quel avoit, ou per colluſion et per fraude pur faire le termour perdre ſon terme. Et ſi trove ſoit per enqueſt, que le demaundant moveſt ſon plee per bon droit quil avoit, ci ſoit le judgement performe maintenant. Et ſi trove ſoit per enqueſt, que il luy empleda per fraud' pur toller le termour ſon terme, ci demurge le termor en ſon terme, et lexecution del judgement pur le demaundant ſoit ſuſpendus* (8), *jeſques apres le terme paſſe. Et en meſme le maner ſoit fait de equitie en tiel caſe devant juſtices, ſi le termour le challenge devant judgement* (9) *rendus.*

IT is provided alſo, that if any man leaſe his tenement in the city of London, for term of years, and he to whom the freehold belongeth, cauſeth himſelf to be impleaded by colluſion, and maketh default after default, or cometh into the court, and giveth it up, for to make the termor loſe his term, and the demandant hath his ſuit, ſo that the termor may recover by writ of covenant: the mayor and bailiffs may inquire by a good inqueſt, in the preſence of the termor and the demandant, whether the demandant moved his plea upon good right that he had, or by colluſion, or by fraud to make the termor loſe his term: and if it be found by the inqueſt, that the demandant moved his plea upon good right that he had, the judgement ſhall be given forthwith: and if it be found by inqueſt, that he impleaded him by fraud, to put the termor from his term, then ſhall the termor enjoy his term, and the execution of judgement for the demandant ſhall be ſuſpended until the term be expired. And in like manner it ſhall be of equity before the juſtices in ſuch caſe, if the termor do challenge it before the judgement.

(2 Roll, 221, 222. 245. 21 H. 8. c. 15. 1 Inſt. 46. a. Raſt. 81.)

The

The generall miſchiefe before this ſtatute was, that the tenant for terme of yeares was ſubject to the pleaſure of him that had the freehold, for if he had ſuffered a recovery in a reall action, though in truth it were by colluſion (ſuch credit the common law gave to recoveries in reall actions) the intereſt of the termour was overthrown, becauſe he could not falſifie the recovery of the freehold, for that by the common law none could falſifie a recovery of a freehold, but he that had a freehold. This act provideth a twofold remedy: 1. for the city of London by writ in nature of a commiſſion to the mayor and baylifes grounded upon this ſtatute, &c. 2. generally by receit before judgement, which act Fleta doth render in theſe words, *Conſtitutum eſt, quod ſi quis in hujuſmodi locis (viz. civitatibus et burgis privilegiatis) tenementum dimiſit ad terminum annorum, et ille cujus liberum eſt tenementum permiſerit ſe implacitari per colluſionem, et defaltam fecerit poſt defaltam,* (and ſo to the end) *vide* Fleta. [ 322 ] Fleta, li. 2. c. 48.

Another miſchiefe was, that after ſuch a recovery had by colluſion, and the leſſee ouſted thereupon, he ſhould have his action of covenant at the leaſt upon this word *dimiſit, &c.)* againſt the leſſor, and ſo the termour loſt his poſſeſſion, and was driven to his action, which was a cauſe of multiplication of ſuits, *et boni legiſlatoris eſt lites dirimere.*

(1) *Bailla a ſon tenant a terme des ans.*] At the making of this ſtatute there was neither tenant by ſtatute merchant, nor ſtaple, nor *elegit*, for theſe executions againſt lands were given by acts of parliament made afterwards, and yet having but chattels, they could not falſifie (as hath beene ſaid) no more then tenant for yeares. And though in our books there be a *conceſſum* that tenant by ſtatute merchant might falſifie, yet the reaſon yeelded there doth weaken the authority thereof, for there they give the reaſon, for that he was not made party, which he could not be in the *præcipe* he having but a chattell: and latter authorities are againſt it, and a judgement in parliament alſo, yet being in equall miſchiefe, though they be created ſince our ſtatute, yet are they within the remedy of this act, for upon the matter they are but termours. But otherwiſe it is holden in caſe of a gardein in chivalry, that he is not within this act, for he commeth not in by any contract betweene the parties, as leſſee for yeares, and tenant by ſtatute merchant, ſtaple, or *elegit* originally doe, but meerly by act in law.

19 E. 3. Aſſ. 82. 10 E. 3. 46. 22 E. 3. 8. 16 E. 3. receit 100. 7 H. 4. 12. a. & b. 30 H. 6. Fauxer de recovery 9. 30 H. 6. 16. 9 E. 4. 38. 1 H. 7. 9. 7 H. 7. 12. Pl. Com. 83. Kelwey 105. F.N.B. 198. Lib. 6. fo. 135. Bredimans caſe. Lib. 9. 85. Alcoughs caſe. 21 H. 8. ca. 15. 24 E. 3. 27. 7 H. 4. 12. Kelwey 128.

This termour for yeares intended by this law muſt be by deed by the expreſſe words of the body of this act, *iſſint que le termour eyt recoverie per briefe de covenant*; which muſt be by deed, as in thoſe dayes few were made otherwiſe, and ſo it was reſolved by the court of common pleas, and this act required a deed, leſt it might be uſed for delay. But now by the ſtatute of 21 H. 8. cap. 15. tenant for yeares by deed or without deed may falſifie, and ſo by that law may tenant by ſtatute merchant, ſtaple, or *elegit* doe, which act being a beneficiall law is conſtrued favourably.

33 H. 6. 41. b. Priſot. 9 E. 4. 30. 19 E. 3. receit 15. 9 Eliz. Dier. Britton, 93. b. Tr. 3 Jacobi in Communi Banco. 21 H. 8 ca. 15. Li. 11. 33. b. Powlters caſe.

(2) *En la citie de Londres.*] That is in the court of the huſtings the greateſt and higheſt court in London: it is called *huſtingum* or *huſtings* of two Saxon words, *viz. Huſ. i. domus, et* Ding, *i. placitum*, ſo *huſtingum* is as much to ſay, as *domus placitorum*, or *forum contentioſum*, where cauſes are pleaded; and other cities have the like court, and ſo called, as York, Lincoln, Wincheſter, &c.

Here the city of London is named, but it appeareth by that which hath been ſaid out of Fleta, that this act extends to ſuch cities and boroughs Fleta ubi ſupra.

boroughs priviledged, that is, ſuch as have ſuch priviledge to hold plea as London hath.

But London was named for excellency, for that in thoſe dayes it excelled in freedome and fulneſſe of trade and merchandizing (with order, but without monopolizing) like the good bayliffes of the kingdome exporting our native, neceſſary, and reall commodities, and importing profitable and neceſſary commodities. And in thoſe dayes the exportation farre exceeded the importation, whereby [ 323 ] the realme flouriſhed in all opulency and in multitude of ſhips, merchants, and mariners, aſwell in war as in peace, inſomuch as taking one example that was next my hand, in time when England was deeply ingaged in a long and chargeable war, the native commo- 28 E. 3. in Scaccar'. dities exported (as taking one yeer for example) amounted to the value of two hundred and twelve thouſand, three hundred thirty and eight pounds, the ounce of ſilver then being xx. d. and the goods imported to the ſum of thirty and eight thouſand fourſcore pounds, and nine pence; whereby it may be concluded what money was brought into the realm, and how much the exportation exceeded the importation.

And to the end, that merchants and others might enjoy the houſes which they held for yeers, for the advancement of trade and traffique, London was particularly named.

(3) *Et celuy a que frankten.ment eſt.*] Theſe words are ſtronger, then if the ſtatute had ſaid tenant, and yet the vouchee is taken within this, and the other branch alſo, as in the expoſition upon the ſecond branch ſhall be ſhewed.

(4) *Sc face implead per colluſion.*] But the termor that is to be received by the ſecond branch, which referreth to this, muſt not onely alledge the colluſion, but alledge matter for the ſafeguard of his intereſt, as there ſhall be ſhewed.

(5) *Face default ou voille render.*] Faint pleader is not taken to be within this act; ſee the laſt clauſe of this act.

(6) *Et le demandant eyt querel'.*] That is, if the demandant have execution, and the termor ouſted, ſo as he may have his action of covenant.

Regiſt. 179. a. (7) *Le maire et les bailifes puiſſent inquirer*, &c.] And this enquiry muſt be done by writ in nature of a commiſſion grounded upon this act, directed to the maior and bailifes, reciting the leaſe, the bringing of the action by colluſion, and this ſtatute, and concluding thus, *ideo vobis mandamus, quod convocatis partibus coram vobis, et inquiſita ſuper hoc plenius veritate, eidem A.* (that is, the termor) *de prædict' meſſuagio terminum ſuum quod juſtum fuerit, ſecundum formam ſtatuti prædict' habere faciatis.* And ſo regularly, when any like authority is generally given by any act to do juſtice, it ought to be done by force of the kings writ grounded upon the act, and the writ grounded upon this act is called, *Breve de inquirendo veritatem ſuper ſtatutum Gloc'.*

17 E. 3. fo. 29. Kelw. 108. b. (8) *Execution del judgement pur le demandant ſoit ſuſpendus.*] So as the leſſor and his heirs in the mean time having the reverſion, notwithſtanding the judgement, ſhall have the rent, and ſhall puniſh waſte, &c.

4 E. 2. Receit 150. 10 E. 3. 45. 21 E. 3. 1. 17 E. 3. 29. (9) *En meſme le manner ſoit fait de equitie in tiel caſe devant juſtices, ſi le termor ceo challenge devant judgement.*] This termor muſt be by force of a leaſe by deed, as it was reſolved Trinit. 3. Jacobi *ubi ſupra.*

This

This is the firſt act that gave receit in any caſe, and by force of this act the termor before judgement may pray to be received to defend the right and intereſt of his term upon the default, or render, or *nient dedire* of the tenant, but not upon faint pleader: and tenant by ſtatute merchant, ſtaple, and *elegit* are taken within this branch, aſwell as within the former branch of this act.

22 E. 3. 8. 19 E. 3. Receit 112. 9 E. 4. 30. 7 H. 7. 11, 12. 21 H. 7. 25. 14 H. 8. 4 45 E. 3. 7. 27 H. 8. 7. 19 Eliz. Dier 263. b.

And it is not ſufficient for the termor to alledge colluſion, but he muſt alſo traverſe the point of the demandants writ, or plead ſome barre to his title; for this law that giveth him to be received, enableth him to plead for the ſafeguard of his intereſt.

[ 324 ]

The termor muſt be received before judgement, and albeit he doth defend his term, he ſhall not arreſt judgement, but ſuſpend execution during the term; for theſe words, *En meſme le manner*, maketh this branch in equipage with the former.

19 E. 3. Receit. 15.

If the tenant vouch, and the vouchee enter into warranty, and after make default, the termor ſhall be received; for albeit the firſt branch (whereunto this doth refer) is when he that hath the franktenement make default, yet in as much as the vouchee is tenant in law (this law being beneficiall for ſafeguard of the intereſt of the termor) he ſhall be received, for it is within the ſame miſchief.

14 H. 8. 4. 27 H. 8. 7.

# CAP. XII.

*PURVIEW eſt enſement, que ſi home ſoit implede de tenement en meſme la citie* (1), *et vouch forrein' a garrantie* (2), *quel veigne en la chancery et eit briefe de ſommons* (3) *ſon garrantor a certe jour devant juſtices du banke, et un auter briefe au maire et as bailifes, que ils ſurceſſent* (5) *en le parolle que eſt devant eux per briefe, jeſques a taunt que le paroll' de le garrantee ſerra termine devant juſtices du bank* (4): *et quant le parol de la garrant' ſerra termine devant juſtices du bank, donques ſerra dit au garrant' que il veigne en la citie de Londres a reſpoign' de chiefe plee. Et le demandant per ſa ſuit eit brief de juſtices* (6) *de bank, au maire et as bailifes, que ils voilent avant en le plee. Et ſi le demandant recover vers le tenant, veigne le tenant as juſtices de bank, et eit briefe au maire et as bailifes, que ſi le tenant eit la terre perdus, que ils facient extende la terre* (7), *et retorne lextent en bank a certe jour, et apres ſoit*

IT is provided alſo, that if a man, impleaded for a tenement in the ſame city, doth vouch a foreigner to warranty, that he ſhall come into the chancery, and have a writ to ſummon his warrantor at a certain day before the juſtices of the bench, and another writ to the mayor and bailiffs of London, that they ſhall ſurceaſe in the matter that is before them by writ, until the plea of the warranty be determined before the juſtices of the bench: and when the plea at the bench ſhall be determined, then ſhall he that is vouched be commanded to go into the city, to anſwer unto the chief plea. And a writ ſhall be awarded at the ſuit of the demandant by the juſtices unto the mayor and bailiffs, that they ſhall proceed in the plea. And if the demandant recover againſt the tenant, the tenant ſhall come before the juſtices of the bench, which ſhall direct a writ to the mayor and bailiffs, that if the tenant have loſt

*ſoit maunde au viſcount du pais ou le garrantee fuiſt ſummons, que il luy face aver de la terre le garrantor a le value.* Vide Articul' Glouc. correct' anno 9 Edw. 2.

loſt his land, they ſhall cauſe the land to be extended, and valued, and ſhall return the extent at a certain day into the bench, and after it ſhall be commanded to the ſheriff of the ſhire (where the warrantee was ſummoned) that he ſhall cauſe him to have as much of the land of the warrantor in value.

(Raſt. 240. 354. Coke pla. f. 170. 41 Ed. 3. f. 2. Kel. f. 109. Fitz. Reſceit, 106. Regiſt. 1. 9 Ed. 1.)

Regiſt. 2. b. 14 H 4. 25. See how this is corrected by the ſtatute of 9 E. 2. intitled, *Articuli Statuti Gloc' correctos, &c.*

The miſchief at the common law, when the tenant did vouch one to warranty, and prayed that the vouchee might be ſummoned in a forein county, was the great delay that the demandant had thereby, and ſpecially in London, for that in London the plea could not be removed neither by *tolt* nor *poxe*; but the plea was put without day, and the record removed by the kings writ into the court of common pleas, &c. and ſome did hold, that at the common law the inferiour court was put out of juriſdiction: but now by this ſtatute, and that of 9 E. 2. the demandant ſhall ſue out of the chancery a writ of *ſummons ad warrantizandum* againſt the vouchee, retornable before the juſtices of the court of common pleas at a certain day, and another writ out of the chancery called a *recordare* to the maior and bailifes to remove the record before the ſame juſtices at the ſame day, and thereupon the maior and bailifes, being required thereunto by that writ, to prefix the day of the return of that writ to the parties to appear at the return of that writ; and when the court of common pleas hath determined of the warranty, then the vouchee ſhall be commanded to go into London to anſwer to the chief plea, and by a judiciall writ the court of common pleas ſhall remand the record, requiring them to proceed in the ſame plea; and ſo forth, as it is contained in both theſe acts.

[ 325 ]

Fleta, li. 2. c. 48. Reſiſt. 2 7. 8 Aſſ. 2. 15 E. 3. Record 37. 49 E. 3. 9. 3 Aſſ. p. 10. 10 E. 3. 24. Record 13. 11 H. 4. 27, 28. 14 H. 4. 25. 18 H. 8. 1. 5 E. 6. Dier 69. 12 E. 3. Voucher 115. 21 E. 3. ibid. 122 13 E. 1. ibid. 269. 35 E. 3. ibid. 316. 8 E. 4. 10. 34 H. 6. 42. 13 E. 4. Cauſe de remover plea 23. Temps E. 1. Gar' de Chartres 23. 1 H. 7. 30. 27 H. 8. 12. Paſch. 15 H. 8. Rot. 345. in communi banco.

(1) *En la citie.*] That is, the citie of London ſpecially named for the cauſe aforeſaid, but extended by equity to all other priviledged places where a forrein voucher is made, as to Cheſter, Durham, Salop, &c.

Ancient demeſne is (as ſome do hold) within this ſtatute, becauſe the freehold is in the tenants, and is within theſe words (*Soit implead de tenement*) but otherwiſe it is of a tenant by copy roll in a court baron, becauſe he hath no franktenement.

(2) *Vouch forrein' a garrantie.*] *De forinſecis vocatis ad warrantiam*, that is, when one is vouched, and the tenant prayeth that the vouchee may be ſummoned in a forrein county.

[a] This act being a beneficiall law for furtherance of juſtice, and for ouſting of delay is taken in this point alſo by equity, not onely to forrein pleas in reall actions, but alſo to pleas although they be not forrein, yet for default of power to proceed, the ſame ſhall be removed *ut ſupra*, and remanded *ut ſupra*: as if in an action auncestrell the tenant plead baſtardy in the demandant, or in a writ of dower the tenant plead *unques accouple in loyall matrimony*, neither the

[a] 46 E. 3. Voucher 223. 3 H. 4. 12. a. 32 H 6. 26. 34 H. 6. 43. F. N. B. 6. b.

[b] the court in London, or any like inferiour court cannot award a writ to the biſhop for tryall thereof, for *nullus alius præter regem poſſit epiſcopo demandare inquiſitionem faciendam.* And another treating of the plea of *ne unques accouple*, in barre of a writ of dower, ſaith, *ac ſi alius quam rex demandaret epiſcopo quod inde inquireretur, epiſcopus alterius mandatum quam regis non tenetur obtemperare*; and herewith agree our books in all ſucceſſions of ages.

And therefore if ſuch pleas be pleaded in London, or ſuch other inferiour courts, the record ſhall be removed; and after a writ to the biſhop, and certificate made by the biſhop, the record ſhall be remanded: [c] and it appeareth that this act doth extend to reall actions wherein voucher lyeth, and not to perſonall actions; [d] and leſt that forrein vouchers ſhould be uſed for delay, they muſt ſhew a charter, &c. comprehending warranty to the court.

(3) *Veigne en la chauncerie et eit briefs de ſummon*, &c.] [e] This is corrected and altred by the ſaid article upon this ſtatute in *an.* 9 E. 2. for by that ſtatute the maior and bailifes ſhall adjourn the parties before the juſtices of the bench at a certain day, and ſhall ſend the record thither, *Et le juſtices face ſummon le garrantee devant eux et pledent le garrantie*, and hereby the juſtices of the bench ſhall award the ſummons *ad auxiliandum*, &c. and [f] not fetch it out of the chancery: and by the ſaid act of 9 E. 2. it is provided, that if at the day given in banke the tenant make default, a petit cape ſhall be awarded to the maior and bailifes, to give judgement upon that default, if it cannot be ſaved, &c.

In a præcipe in the huſtings in London, the tenant voucheth one in London, and other forrein vouchees in the county of Norffolk, &c. In this caſe aſwell the voucher within London as the forrein vouchers ſhall be removed, for although the words of this act be, *vouch forrein' a garrantie*, yet becauſe proceſſe muſt be made againſt all the vouchees at one time, and if proceſſe ſhould be made by the court of common pleas onely againſt the forrein vouchees, although they came in, they ſhould not warrant, nor anſwer without the others before proceſſe were determined againſt them in London; ſo as neceſſity requireth, that proceſſe ſhould be made againſt all at one time, and that ought to be done in the more worthy court, and when the warranty is determined in the court of common pleas, all ſhall be remanded.

(4) *Que le parol del garrantie ſerra termine devant les juſtices del banke.*] This is the power given to the juſtices of the court of common pleas, and this act is in nature of a commiſſion to them, therefore it is good to be ſeen what is within their commiſſion, the words of the ſaid writ of *recordare* are, *Ut terminata warrantia illa coram præfat' juſtic' eadem recordum et proceſs' vobis remittamus*, &c.

If the tenant vouch a foreiner to warranty, and the record is removed into the court of common pleas to determine the warranty, the vouchee may vouch over in a forein county, and that vouchee may vouch over, and if the vouchee make default, the court may make proceſſe againſt him, &c. *Quia quando lex aliquid alicui concedit, omnia incidentia tacite conceduntur*; but none of the vouchees can plead in chief, but that muſt be pleaded in the inferiour court, for that is not within the ſaid commiſſion given by this act. But if the demandant in banke appear not, the court may award

[b] Bract. l. 3. fo. 106. Brit. f. 248. b. Fleta, li. 5. c. 24. 8 E. 3. 59. 14 E. 3. Trials 63. 24 E. 3. 33. 42. 40 E. 3. 2. 44 E. 3. 28. 35 H 6. 30. 36 H 6 33. 37 H. 6. 30. 14 H. 7. 21. 21 H. 7 34, 35. 14 H. 4. 26. b. Judgement cite per Hankford.

[c] 3 H. 4. fo. 12. 32 H. 6. 26.

[d] 35 E. 3. Voucher 316.

[e] 9 E. 2. ubi ſupra.

[f] See a notable caſe, Paſch. 31 E. 3. fo 31. a & b. in libro meo.

49 E. 3. 9 & 10. 50 E 3. Voucher 217. 29 Aſſ. 48.



18 E. 3. 1. 49 E. 3. 9, 10. Paſch. 15 H. 8. Rot. 343. in communi banc. 5 E. 6. Dier 69.

Kelw. 109. 13 E. 3. Vouch. 18. 32 E. 3. ibid. 101. 50 E. 3. ibid. 217. 41 E. 3. 31. 42 E. 3. 1. 49 E. 3. Vouch. 223. 20 E. 3. Eſſoin 28. 8 Aſſ. 22. 16 E. 3. Eſſoin 167. 28 H. 8. 1.

award a non-ſuit as incident, and ſo the tenant in banke may be eſſoined.

In dower in the huſtings in London againſt the huſband and wife, who vouch a foreiner to warranty, whereupon the plea is adjourned into the common pleas at a certain day, at which day the huſband and wife ſued out a writ againſt the vouchee; whereupon the vouchee appeared, and the baron made default, and the wife prayed to be received upon his default; and by the rule of the court ſhe was received, and that it was within their commiſſion, for that the default was made in this court, whereupon the land was to be loſt if ſhe were not received; for it is a maxime in law, *Neceſſitas ſub lege non continetur, quia quod alias non eſt licitum, neceſſitas facit licitum*, but yet others are of another opinion.

18 E. 3. 1. a. b. tit. Receit 106. 31 E. 3. Receit 125.

Bract. li. 2. f. 93. 31 E. 3. Receit 125.

Regiſt. fo. 7.

(5) *Un auter briefe al maire et bailifes que ils ſurceſs'*, &c.] That is, the ſaid writ of *recordare*, whereby they are commanded *quod recordum et proceſſum ejuſdem loquelæ cum omnibus ea tangentibus juſticiariis noſtris de banco ſub ſigillo veſtro mittatis*, &c. which to them is a *ſuperſedeas* in law.

Regiſt. judic. fo. 73.

(6) *Et le demandant per ſa ſute eit briefe des juſtices.*] This is a *procedendo in loquela* directed to the maior, &c. to proceed, which you may read in the Judiciall Regiſter.

(7) *Que ils facient extender la terre*, &c.] For the better performance of this act, the tenant muſt ſurmiſe, that execution is ſued againſt him, and pray a *venire fac' recordum*.

By force of this act the juſtices of the common pleas upon that record ſhall award a writ of *extendi et appreciari fac'*, to the maior and bailifes, which writs grounded upon this act are ſufficient expoſitions of the ſame, and will reſolve many doubts that may ariſe thereupon.

Hil. 24 E. 3. in com. banc'. Raſt. livre des Entres. 240. 354. 615. Coke Plat. 176. Note the foreign Voucher.

A notable record you may read in *libro G.* in the chamber of the Guild-hall in London, fol. 7. in *anno* 24 E. 3. whereby it appeareth that Thomas Droken-field and Emme his wife brought a writ of dower in the huſtings, againſt Alice Colwell, to be indowed of a houſe in London, of the indowment of R. de Envil late her baron; the tenant appeared, and vouched to warranty Thomas ſon and heir of John de Colwell, and prayed that he might be ſummoned in the county of Middleſex, whereupon the record ſaith, *Dies datus eſt partibus coram juſticiariis domini regis de banco apud Weſtm' in craſtino purificationis, ut tunc fiat ibi juxta formam artic' Gloc', pro civibus London inde correcti.*

[ 327 ]

And there it appeareth that the juſtices of the common pleas awarded the ſummons againſt the vouchee, who appeared upon the grand cape, and entred into the warranty, *ideo loquela præd. remittatur in Huſting' coram majore et vicecom' ut ibi ulterius fiat, prout hactenus de jure fieri conſuevit:* whereupon a reſummons was awarded in the huſtings againſt Alice the tenant, *et idem dies* given to the demandant, at which day the tenant appeared and the vowchee alſo, and rendred dower, and thereupon judgement was given againſt Alice the tenant, *et dictum eſt per curiam dictæ Aliciæ, quæ ſequatur in curia domini regis coram juſticiariis de banco ad habendum de terra dict' Thomæ de Colewell tenentis per warrantiam in comitat' Midd', ſi ſibi viderit expedire.* And after the tenant came into the court of common pleas, and prayed her remedy againſt the vowchee ſurmiſing that execution was ſued againſt her, and a third part of the houſe delivered to the demandant, whereupon a writ iſſued out of

of the court of common pleas, *ad venire faciendum recordum coram juſtic' de banco:* by which it appeareth that in the huſtings by the forein vowcher, *placitum prædict' ſine die remanſit, et partes prædict' ſecundum formam ſtatuti coram præfatis juſticiariis noſtris apud Weſtm', ut eadem Alicia verſus prædict' hæredem de warrantia ſua habenda ſecundum formam ejuſdem ſtatuti proſequi poſſit, adjornat' ſuſſent, &c.*

I have ſet forth this record the more at large for that it ſetteth forth this ſtature, and that of 9 E. 2. in their lively colours, ſo as a man may ſee that (as it were) acted, which by thoſe acts is required. And I know that many have followed that precedent; which is worthy to be ſeene at large: but he that is deſirous to reade this whole chapter in a ſmall map, let him reade Fleta who ſaith, *De warrantis vocatis extra juriſdictionem hujuſmodi locorum privilegiatorum (viz. civitat' et burgorum, &c.) taliter ſtatutum eſt, quod ſi implacitati per breve de recto aliquem forinſecum vocarunt ad warrantum, tunc perquirant ſibi de cancellaria duo brevia, viz. ad ſummon' warrant' eorum juſtic' de banco ad certum diem, et aliud balivis civitatis, quod placitum illud ſuperſedeant, donec de placito warrantiæ fuerit terminat', quando terminat', dicatur warrantis, quod adeant civitatem et reſpondeant de placito principali, et habeant brevia judicialia ad balivos quod tenementa petita extendantur ſi fuerint amiſſa, et retornentur extentæ ad certum diem coram juſtic' per quos mandetur vicecom' quod faciat tenentibus habere ad valenciam eſchambium.* And it is worthy the obſervation that at the common law in caſe of a forein vowcher in the huſtings of London, the plea was adjorned before the juſtices in eyre, when they came to the tower of London; for the court of the huſtings London was not derived out of the juriſdiction of the court of common pleas, as other courts that have power to hold pleas reall are, and therefore the adjornement was (as hath been ſaid) before the juſtices in eyre: for the antiquity of this court of huſtings amongſt the laws of S. Edward, you ſhall reade, *Debet enim in London, quæ caput eſt regni et legum, ſemper curia domini regis ſingulis ſeptimanis die Lunæ huſtingis ſedere, et teneri, &c.*

Fleta, li. 2. c. 48.

Int' leges Ed. Regis Lamb. 136. b.

## CAP. XIII.

*PURVIEW eſt enſement, que del heure que plee ſerra move* (1) *en la cite de Londres per briefe, que le tenant* (2) *nait power de faire waſte* (4), *ne eſtrepement du tenement que * eſt en demaunde* (3) *pendant le plee* (5), *et ſi face, le maire et les bailifes facent garde a le ſuit le demandant. Et meſme le ord' et ſtatute ſoit garde en auters cities, boroughs, et ailours per tout le roialme.*

IT is provided alſo, that after ſuch time as a plea ſhall be moved in the city of London by writ, the tenant ſhall have no power to make any waſte or eſtrepement of the land in demand (hanging the plea) and if he do, the mayor and bailiffs ſhall cauſe it to be kept at the ſuit of the demandant. And the ſame ordinance and ſtatute ſhall be obſerved in other cities, boroughs, and every where throughout the realm.

* [ 328 ]

(Raſt. pla. f. 317. 14 H. 7. f. 7. 10. Dyer, f. 325. 5 Rep. 115. Godbolt, 112. pl. 134. Regiſt. 76.)

Before

Bract. fo. 355. 4 H. 3. Eſtrepement 12. 22 E. 3. 2. 21 E. 3. 51. 4 E. 3. 32. 6 H. 4. 1. 5 E. 2. Eſtrepement 11. 2 H. 6. 13. 3 H. 6. 16. 21 E. 3. 51. 34 E. 3. Eſtrepement 14.

Before this ſtatute there lay at the common law a writ of eſtrepement after judgement, and before execution; and ſo an eſtrepement doth lie for waſte done after verdict, and before judgement.

There are two kindes of eſtrepements prohibiting waſte *pendente placito*, one originall, and may be ſued out of the chauncery, either together with the originall *præcipe* by which the land is demaunded, or at any time after *pendant le plea* directed to the ſheriffe, the party, or both; the other is judiciall to be graunted by that court where the plea dependeth.

Lib. 5. fol. 48. Littletons caſe. Regiſt. 126. F.N.B. 61.

And ſome doe hold that the originall writ of eſtrepement did lie at the common law to prohibit any waſte done *pendente placito*, for (ſay they) there lieth a writ *de bonis arreſtandis ne diſſipentur pendente placito, &c. à fortiori* in caſe of inheritance, wherein if waſte ſhould be done, it ſhould be inconvenient, and againſt the common wealth: but certain it is, that the judiciall writ is given *pendente placito* by this ſtatute.

Mirror, fo. 76.

(1) *Que plea ſerra move.*] Some doe hold that this is to be intended of reall actions, wherein no damages are to be recovered, for that in reall actions where the demandant ſhall recover damages, he ſhall recover damages *pendant le brieſe*, and that is the reaſon, that in thoſe caſes the demandant count to no damages, and therefore in thoſe caſes the tenant might be doubly charged, once in the eſtrepement, and again in the principall action. To this it is by ſome anſwered. 1. That this ſtatute is generall to reall actions. 2. There is no miſchiefe, for a recovery of damages in the one is a barre to the other. 3. It is (as hath been ſaid) inconvenient and againſt the common-wealth that waſte ſhould be done. But where damages are to be recovered, but not *pendente placito*, there without queſtion the eſtrepement doth lie.

Lib. 5. fo. 115. Foljambes caſe.

Rot. Parl. 28 E. 3. nu. 19.

Amongſt the petitions of the commons in the parliament holden in *anno* 28 E. 3. one was, that the writ of eſtrepement might lie in every action where the party ſhould recover damages for eſtrepement after the writ purchaſed; and the anſwer was, the old law ſhould be continued.

28 H. 6. 8. b. F.N.B. 61. b.

(2) *Que le tenant.*] If the tenant make a feoffement *pendente placito*, in law he remaineth tenant; and yet the demandant may have an eſtrepement againſt him and the feoffee alſo, and ſo againſt the tenant and the vowchee or *price in aide*.

22 E. 3. 2. F.N.B. 61. p.

If there be two tenants, the demandant may ſue an eſtrepement againſt the one of them; and after judgement a writ of eſtrepement lieth againſt the tenant and ſtranger by the common law.

3 H. 6. 16.

In an eſtrepement the tenant ſhall not have his age, for it is in nature of a treſpaſſe.

12 R. 2. Eſtrepement 6.

In the eſtrepement *pendente placito*, the demandant ſhall not recover damages before judgement be given in the principall.

32 E. 3. ibid. 7. 3 H. 6. 17. F.N.B. 61. h.

If an eſtranger of his owne wrong without the privity of the tenant doth eſtrepement or waſte after the writ ſued out, the tenant ſhall not be puniſhed for this waſte.

2 H. 6. 13. 33 H. 6. 6. 14 H. 7. 8. b. F.N.B. 61. i. Dier. 16 Eliz. 315. 34 E. 3. Eſtrepement 15.

(3) *Dun tenement que eſt en demaund.*] In a *ſcire fac'* to execute a fine or a recovery (though no land be demaunded thereby) yet may the plaintiffe have a writ of eſtrepement, for it is in equall miſchiefe, and ſo it is in * a *quid juris clamat*, and in an attaint an eſtrepement doth lie, and yet no land is demaunded.

In

In an action of waſte no land is demaunded, and yet an eſtrepement in that caſe lieth. 4 E. 3. 32. Foljambs caſe ubi ſupra.

In a *particione fac'* no eſtrepement doth lie, for both of them are in poſſeſſion, and there is no reaſon, that one ſhall be reſtrained, and not the other. 12 R. 2. Eſtrep. Br. 13. Paſch. 33 H. 8. Bendloes.

If a formedon be brought of a mannor, and the demandant ſue out an eſtrepement, and after that a tenancy eſcheat, the writ of eſtrepement extends to the land eſcheated, becauſe it commeth in lieu of the ſervices, and yet that land was not demaunded. F.N.B. 61.

(4) *Neyt power de faire waſte.*] The tenant notwithſtanding the prohibition in the writ of eſtrepement may cut down corn, or graſſe, or underwood, or the like, ſo it be no waſte or deſtruction. F.N.B. 61. c.

(5) *Pendant le plea.*] This is to be underſtood of a judiciall writ of eſtrepement granted out of the court of common pleas, &c. when the principall writ is retourned, for before that it is not depending there, but the demandant may have an originall writ of eſtrepement (as hath been ſaid) together with the principall writ out of the chauncery. 18 H. 8. 5. 2 H. 6. 13.

This act is ſo conſtrued, that by a conſequent the party ſhall recover damages for waſte done *(pendente placito)* after the writ delivered, and therefore it is good policy to purchaſe the writ of eſtrepement together with the writ. Note the writ it ſelfe founded upon this ſtatute is but a prohibition, and upon the attachment the parties doe pleade, &c.

But note upon the writ of eſtrepement at the common law, *viz.* after judgement, the plaintiffe ſhall recover damages for the waſte done before without any prohibition formerly delivered. Regiſt. judic. 13. 22 E. 3. Eſtrepement 9.

And upon a writ of eſtrepement grounded upon this act, the ſheriffe may reſiſt them that doe offer to doe waſte; and if otherwiſe he cannot doe it, he may lawfully impriſon them, or make a warrant to others to doe it, and if neceſſity require it, he may take *poſſe comitatus:* ſo odious in law is waſte and deſtruction. Foljambs caſe, ubi ſupra.

## CAP. XIV.

*LE roy grant de ſa grace as citizens* (1) *de Londres, que la ou avant ces heures ceux queux fueront diſſeiſies de lour franktenement en meſme la citie, ne poient recover lour damages avant le venue des juſtices a la tower: que deſormes iceux diſſeiſies eyent lour damages per recogniſans de laſſiſe, per le quel ils recoveront lour tenements, et les diſſeiſors ſoient amercies devant deux barons dexchequer, queux un foits per an veindr' en le citie a ceo faire. Et*

THE king of his ſpecial grace granteth unto the citizens of London, that whereas beforetimes they that were diſſeiſed of freehold in the ſame city could not recover their damages before the coming of the juſtices to the tower, that from henceforth the diſſeiſees ſhall have damages by recognizance of the ſame aſſiſe whereby they recovered their lands. And the diſſeiſors ſhall be amerced before two barons of the exchequer,

*Et ceo ſoit maunde a treaſorer et as barons dexchequer quels le facent faire cheſcun an per ii. de eux a lour lever apres la chaunceleure. Et les amerce-ments per les ſummons del eſchequer ſoient levies al oeps le roy, et al eſche-quer deliveres.*

chequer, which ſhall reſort once a year into the city to do it. And it ſhall be commanded unto the barons and to the treaſurer of the exchequer, that they ſhall cauſe it every year to be levied by two of them at their riſing after Candlemas. And the amerciaments by ſummons of the exchequer ſhall be levied to the king's uſe, and be deliyered at the exchequer.

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Fleta, li. 2. c. 48.

The miſchiefe before this ſtatute was, that in London if one were diſſeiſed of his freehold, he could not in the aſſiſe of freſhforce recover damages, but the land onely, becauſe the aſſiſe of freſh-force did not lie by originall writ, but by bill; and therefore if he would recover damages, he muſt tarry untill the juſtices in eyre came into the tower, which came but once in ſeven yeares: and therefore this ſtatute doth give damages in the aſſiſe of freſhforce, and by equity it extendeth to Gloceſter, and to other cities and boroughs which by uſage and cuſtome hold plea of aſſiſe of freſhforce by bill.

Lib. intrat. Raſt. F.N.B. 7. 13.

Bract. 164. b.

Note Bracton ſaith, *Recognitio aſſiſæ novæ diſſeiſinæ multis vigiliis excogitata et inventa recuperandæ poſſeſſ. gratia, ut per ſummariam cognitionem abſque magna juris ſolemnitate, quaſi per compendium negotium terminetur:* and it was called [*aſſiſa novæ diſſeiſinæ*] in reſpect of the delay before the juſtices in eyre.

(1) *Citizens de Londres.*] Note London is a corporation by preſcription, and therefore may have divers names of corporation, as namely here (citizens.)

## CAP. XV.

*PURVIEW eſt enſement, que le maire et les bailifes avant le venue de ceux barons enquergent des vines vendus encounter laſſiſe* (1), *et le preſentent devant eux a lour venue, et donque ſoient amercies, la ou ils ſoilent attendre, jeſque a le venue des juſtices errants. Dones a Glouceſtre le quart jour de October, lan du raigne le roy Edward fits le roy Henry*, 6.

IT is provided alſo, that the maior and bailiffes, before the comming of thoſe barons, ſhall enquire of wines ſold againſt the aſſiſe, and ſhall preſent it before them at their comming, and then ſhall be amerced where before they were wont to tary unto the comming of the juſticiers in eyre. Given at Glouceſter the iiij day of October, the VI. year of the reign of king Edward, the ſonne of king Henry. [*Raſtell's tranſlation.*]

The like miſchiefe was concerning the enquiry of the breach of aſſiſe of wines, as before in the former chapter concerning the recovery of damages: therefore this act giveth power to the mayor and bailiffes to enquire of the breach of the aſſiſe of wine, and not to tarry till the juſtices in eyre do come.

(1) *Des*

(1) *Des vines vendus enconter laſſiſe.*] This ſtatute here intended is limited by the ſtatute *de piſtoribus et braciatoribus.* Cap. 5.

*Aſſiſa vini ſecundum aſſiſam domini regis obſervetur, ſcilicet ſixtertium ad xij.d. & ſi tabernarii illam aſſiſam exceſſerint, per majorem et balivos oſtia claudantur, et non permittant vinum vendere, donec licentiam à domino rege obtinuerint.* But this act is repealed by 21 *regis Jacobi.*

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# STATUTUM de WESTMINST. SECUNDO,

## *Editum Anno* 13 Edw. I.

The Preface of the Statute of W. 2.

*CUM nuper dominus rex, in quindena Sancti Johannis Baptiſtæ, anno regni ſui ſexto, convocatis prælatis, comitibus, baronibus, et concilio ſuo apud Glouceſtre: quia plures de regno ſuo exhæredationem patiebantur, eo quod in multis caſibus, ubi remedium apponi debuit prius, non fuit per prædeceſſores ſuos, aut per ipſum remedium proviſum, quædam ſtatuta populo ſuo valdè neceſſaria et utilia edidit, per quæ populus ſuus Anglicanus et Hybernicus ſub ſuo regimine gubernatus, celeriorem juſticiam, quam prius, in ſuis oppreſſionibus conſecutus eſt, ac quidam caſus, in quibus lex deficiebat, remanſerunt indeterminati, et quidam ad reprimendam oppreſſionem populi remanſerunt ſtatuend'. Dominus rex in parliamento ſuo, poſt Paſcham, anno regni ſui tertio decimo apud Weſtminſter, multas oppreſſiones populi, et legum defectus, ad ſuppletionem dictorum ſtatutorum apud Gloceſter editorum, recitari, fecit, et ſtatuta edidit, ut patebit in ſequent'.*

WHEREAS of late our lord the king, in the quinzim of Saint John Baptiſt, the ſixth year of his reign, calling together the prelates, earls, barons, and his council at Glouceſter, and conſidering that divers of this realm were diſherited, by reaſon that in many caſes, where remedy ſhould have been had, there was none provided by him nor his predeceſſors, ordained certain ſtatutes right neceſſary and profitable for his realm, whereby the people of England and Ireland, being ſubjects unto his power, have obtained more ſpeedy juſtice in their oppreſſions, than they had before; and certain caſes, wherein the law failed, did remain undetermined, and ſome remained to be enacted, that were for the reformation of the oppreſſions of the people: our lord the king in his parliament, after the feaſt of Eaſter, holden the thirteenth year of his reign at Weſtminſter, cauſed many oppreſſions of the people, and defaults of the laws, for the accompliſhment of the ſaid ſtatutes of Glouceſter, to be rehearſed, and thereupon did provide certain acts, as ſhall appear here following.

IT

IT is commonly called Weſtminſter the ſecond: Weſtminſter, becauſe this parliament was holden at Weſtminſter; and the ſecond, in reſpect of the former parliament holden at Weſtminſter, called Weſtminſter the firſt.

# CAP. I.

* [ 332 ]

*IN primis, de tenementis* (1), *quæ multotiens dantur ſub conditione* (2), *videlicet, cum aliquis dat terram ſuam alicui viro et ejus uxori, et hæred' de iſſis* (3) *viro et muliere procreatis, adjecta conditione expreſſa tali* (4.) *Si hujuſmodi vir et mulier ſine hæred' de ipſis viro et muliere procreat' obiiſſent, terra ſic data ad donatorem, vel ad ejus hæredem revertatur. In caſu etiam cum quis dat tenementum alicui in liberum * maritagium* (5), *quod donum habet conditionem annexam, licet not exprimatur in charta doni, quæ talis eſt. Quod ſi hujuſmodi vir et mulier ſine hæred' de ipſis viro et muliere procreat' obiiſſent, tenementum ſic datum ad donatorem, vel ad ejus hæredem revertatur. In caſu etiam cum quis dat tenementum alicui, et hæred' de corpore ſuo exeuntibus* (6), *durum videbatur, et adhuc videtur, hujuſmodi donatoribus, et hæredibus donatorum, quod voluntas donatorum ipſorum in donis ſuis expreſſa, non fuit prius, nec adhuc eſt obſervata. In omnibus enim prædictis caſibus poſt prolem ſuſcitatam, et exeuntem ab ipſis quibus tenementum ſic conditionaliter fuit datum, hucuſque habuerunt hujuſmodi feoffati poteſtatem alienandi* (7) *tenementum ſic datum, et exhæredandi exitum eorum, contra voluntatem donatorum* (8), *et contra formam in dono expreſſam. Et præterea cum deficiente exitu de hujuſmodi feoffatis, tenementum ſic datum ad donatorem, vel ad ejus hæredes reverti debuit per formam in charta de dono* (9) *hujuſmodi expreſſam, licet exitus (ſi quis fuerit)* obiiſſet *per factum* tamen

FIRST, concerning lands that many times are given upon condition, that is to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the ſame man and his wife, with ſuch condition expreſſed, that if the ſame man and his wife die without heirs of their bodies between them begotten, the land ſo given ſhall revert to the giver or his heir. In caſe alſo where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expreſſed in the deed of gift, which is this, that if the huſband and wife die without heir of their bodies begotten, the land ſo given ſhall revert to the giver or his heir. In caſe alſo where one giveth land to another, and the heirs of his body iſſuing; it ſeemed very hard, and yet ſeemeth to the givers and their heirs, that their will being expreſſed in the gift, was not heretofore, nor yet is obſerved. In all the caſes aforeſaid, after iſſue begotten and born between them (to whom the lands were given under ſuch condition) heretofore ſuch feoffees had power to aliene the land ſo given, and to diſherit their iſſue of the land, contrary to the minds of the givers, and contrary to the form expreſſed in the gift. And further, when the iſſue of ſuch feoffee is failing, the land ſo given ought to return to the giver, or his heir, by form of the gift expreſſed in the deed, though the iſſue (if any were) had died: yet by the deed and feoffment of them (to whom land was ſo given upon condition) the donors