tamen *et feoffamentum eorum, quibus tenementum ſic fuit datum ſub conditione, excluſi fuerunt hucuſque de reverſione eorundem* tenementorum, *quod manifeſtè fuit contra formam doni: propter quod dom' rex perpendens, quod neceſſarium et utile eſt in prædictis caſibus apponere remedium, ſtatuit* (10) *quod voluntas donatoris, ſecundum formam in charta doniſui* (12) *manifeſtè expreſſam, de cætero obſervetur, ita quod non habeant illi, quibus tenementum ſic fuit datum* (13) *ſub conditione, poteſtatem alienandi tenementum ſic datum, quo minus ad exitum illorum, quibus tenementum ſic fuerit datum remaneat poſt eorum obitum, vel ad donatorem, vel ad ejus hæredem (ſi exitus deficiat) revertatur* (11), *per hoc quod nullus ſit exitus omnino, vel (ſi aliquis exitus fuerit, et per mortem deficiet) hærede de corpore hujuſmodi exitus deficiente. Nec habeat de cætero ſecundus vir* (14) *hujuſmodi mulieris aliquid in tenemento ſic dato per conditionem, poſt mortem uxoris ſuæ, per legem Angliæ: nec exitus de ſecundo viro et muliere ſucceſſionem hæreditariam* (15): *ſed ſtatim poſt mortem viri et mulieris, quibus tenementum ſic fuit datum, poſt eorum obitum ad eorum exitum, vel ad donatorem, vel ad ejus hæredem (ut prædictum eſt) revertatur. Et quia in novo caſu novum* * *remedium eſt apponendum* (16): *fiat impetranti tale breve.*

donors have heretofore been barred of their reverſion, which was directly repugnant to the form of the gift. Wherefore our lord the king, perceiving how neceſſary and expedient it ſhould be to provide remedy in the aforeſaid caſes, hath ordained, that the will of the giver, according to the form in the deed of gift manifeſtly expreſſed, ſhall be from henceforth obſerved; ſo that they to whom the land was given under ſuch condition, ſhall have no power to aliene the land ſo given, but that it ſhall remain unto the iſſue of them to whom it was given after their death, or ſhall revert unto the giver, or his heirs, if iſſue fail (whereas there is no iſſue at all) or if any iſſue be, and fail by death, or heir of the body of ſuch iſſue failing. Neither ſhall the ſecond huſband of any ſuch woman, from henceforth, have any thing in the land ſo given upon condition, after the death of his wife, by the law of England, nor the iſſue of the ſecond huſband and wife ſhall ſucceed in the inheritance, but immediately after the death of the huſband and wife (to whom the land was ſo given) it ſhall come to their iſſue, or return unto the giver, or his heir, as before is ſaid. And foraſmuch as in a new caſe new remedy muſt be provided, this manner of writ ſhall be granted to the party that will purchaſe it:

* [333]

Præcipe A. quod juſtè, &c. reddat B. (17) *tale manerium cum pertinentiis, quod C. dedit tali viro, et tali mulieri, et hæred' de ipſis viro et muliere exeuntibus.*

Vel,

Quod C. dedit tali viro in liberum maritagium cum tali muliere, et quod poſt mortem prædictorum viri et mulieris prædicto B. filio eorundem viri et mulieris deſcendere debet per formam donationis prædictæ, ut dicit.

Vel,

Quod C. dedit tali et hæred' de corpore ſuo exeuntibus, et quod poſt mortem ipſius talis, prædict' B. filio prædicti talis deſcendere debet per formam donationis, &c.

Breve per quod donator habet recuperare deficiente exitu, ſatis eſt in uſu in cancel-

The writ whereby the giver ſhall recover (when iſſue faileth) is common

cancellaria (18). *Et ſciendum eſt, quod hoc ſtatutum quoad alienationem tenementi contra formam doni imposterum faciendam, locum habeat, et ad dona prius facta non extendatur* (19). *Et ſi finis ſuper hujuſmodi tenementum imposterum levetur, ipſo jure ſit nullus* (20). *Nec habeant hæredes hujuſmodi, aut illi ad quos ſpectat reverſio, (licet fuerunt plenæ ætatis, in Anglia, et extra priſonam* (21)) *neceſſe apponere clameum ſuum.*

mon enough in the chancery; and it is to wit, that this ſtatute ſhall hold place touching alienation of land contrary to the form of the gift hereafter to be made, and ſhall not extend to gifts made before. And if a fine be levied hereafter upon ſuch lands, it ſhall be void in the law; neither ſhall the heirs, or ſuch as the reverſion belongeth unto, though they be of full age, within England, and out of priſon, need to make their claim. *Altered by* 32 *H.* 8. *c.* 36.

(1 Leon. 212. 1 Roll 48. 153. 158. 333. 357. 385. 2 Roll 429. Godbolt, 308. 367. pl. 458. Vaughan 365. Larch. 67. Savil 67. 88 7 Rep. 33. Fitz. Tail, 11, 12, 13, 14. 16, 17, 18. 21, 22, 23. 1 Inſt. 18. b 19. a. 24. a. 223. b 224. a. 12 Rep. 81. Fitz. Formed. 61. 65. Fitz. Tail, 9, 10. Fitz. Tail, 15. Hob. 293. Fitz. Garranty, 16. 46. 57. 59. 3 Co. 85. Fitz. Formed 1. 27. 33. 35. 52. 54. 59. 62 64. Fitz. Dower, 87. 3 Rep. 8. 5. 14. 7. 32, 33. 8. 35. 86. 166. 9. 105. 11. 72 1 Inſt. 327. b. Regiſt. 238. Co. pla. 317. 338. 341. Dyer 216. 247. Fitz. Fines 125. Fitz. Formed. 5, 6, 7. 11. 14. 22. 30. 42. 44. 46, 47. 49. 8 H. 4. f. 8. Fitz. Continual Claim, 9.)

See the firſt of the Inſtitutes, ſect. 14.

(1) *In primis de tenementis.*] What inheritances may be intailed within this act, you may read at large in the firſt part of the Inſtitutes, cap. Taile, ſect. 14.

See the firſt part of the Inſtitutes, ſect. 13.

(2) *Multotiens dantur ſub conditione.*] Before this ſtatute, all inheritances were eſtates in fee, *viz.* either fee-ſimple abſolute, or fee conditionall, or a qualified fee, whereof you may alſo read in the firſt part of the Inſtitutes, ſect. 1. And tenant of lands intailed, had before this ſtatute a fee-ſimple conditionall ſubſequent; for

Brit. cap. 36.

albeit Britton, who wrote before this ſtatute, ſaith, that if any purchaſe to him and his wife, and to the heirs of them lawfully begotten, the donees have preſently but an eſtate of free-hold for the term of their lives, and the fee accrueth to their iſſue, &c. taking the condition to be precedent, yet had the donees at the common law a fee-ſimple conditionall preſently by the gift.

19 E. 2. Formd. 61. 30 E. 1. ibid. 65. Pl. come often in Lord Berkleys caſe.

For if lands had been given to a man and the heirs of his body iſſuing, and before iſſue he had before this ſtatute made a feoffment in fee, the donor ſhould not have entred for the forfeiture, but this feoffment had barred the iſſue had afterwards; which proveth that he preſently by the gift had a fee ſimple conditionall, and this agreeth with the authority of Littleton, *ubi ſupra.*

Now for the better underſtanding of this act, ſeeing that the eſtate was conditionall at the common law, it is neceſſary to be known when the condition was performed, and to what purpoſes. If the donee had iſſue, he had not thereby a fee-ſimple abſolute, for if after he had dyed without iſſue, the donor ſhould have entred as in his reverter. But after iſſue had, the condition was performed to this purpoſe, that he might have aliened, and thereby have barred the donor and his heirs from all poſſibility of reverter for default of iſſue, for the heirs of his body (he having a fee conditionall) might have barred them as well before iſſue (as hath been ſaid) as after: and to what other purpoſes the condition by having of iſſue

See the firſt part of the Inſtitutes, ca. Tail, ſect. 13.

iſſue was performed, *vide* the firſt part of the Inſtitutes, *ubi ſupra.*

(3) *Et hæredibus de ipſis.*] For to a gift in tail made, this word [heirs] is requiſite, unleſſe it be in caſe of a laſt will, &c. See the firſt part of the Inſtitutes, ſect. 1. & 14.

(4) *Adjecta conditione expreſſa tali,* &c.] If this condition expreſſed had not been added, the very gift would have implyed ſo much.

(5) *In caſu etiam cum quis dat tenementum alicui in liberum maritagium,* &c.] By this clauſe it appeareth that an inheritance paſſeth by theſe words frank-mariage, whereof we have in another place written at large. See the firſt part of the Inſtitutes, ſect. 17.

(6) *In caſu etiam cum quis dat tenementum alicui et hæredibus de corpore ſuo exeuntibus,* &c.] This act having put two examples of eſtates tail ſpeciall, *viz.* the firſt to a man and to his wife, and to the heirs of their bodies; the ſecond, of a gift in frank mariage, a ſpeciall caſe, and a ſpeciall eſtate in tail; here he putteth a caſe of an eſtate tail generall, not that the makers of this ſtatute meant to enumerate all the forms of eſtates in tail, but to put theſe as examples, ſo as all manner of eſtates tail, generall or ſpeciall, are within the purview of this act. 3 E. 3. 31, 32. 18 E. 3. 46. 33 E. 3. Tail 5. Dier 1 Mar. 96.

(7) *Poteſtatem alienandi,* &c.] That is to ſay, by fine, feoffment, releaſe, or confirmation. 8 E. 3. 379. 44 E. 3. 3.

But the tenant in tail had not onely *poteſtatem alienandi,* but *foriſfaciendi, &c.* alſo; for if after iſſue had, he had been attainted of treaſon or felony, the land entailed had been forfeited, and thereby the donor barred of the poſſibility of reverter, and *forisfacere* is *alienum facere,* and therefore in this act is included in theſe words, *poteſtatem alienandi.* And ſo might the tenant in tail, before the making of this act, have charged the land with rent, common, or the like, to have bound his iſſue, but by this act he is reſtrained aſweil to charge as to alien. 7 E. 3. 368. 5 E. 3. 141. 7 H. 4. 31. 3 E. 3. Formed. 46.

But the having of iſſue before this act did not alter the courſe of deſcent, as in another place we have ſaid. See the firſt part of the Inſtitutes, ſect. 3. In the firſt part of the Inſtitutes, ubi ſupra.

(8) *Exhæredandi exitum eorum contra voluntatem donatorum.*] Hereby it appeareth that there were two miſchiefs before this act, *viz.* firſt, the diſheriſon of the iſſues in tail; ſecondly, that it was *contra voluntatem donatorum, et contra formam in dono expreſſam,* for the donor and his heirs were barred of the poſſibility of reverter: and both theſe were wrongs, for which at the common law there lay no remedy; for diſheriſons, and breaking the expreſſe will and intention of the donor are wrongs which this act doth remedy. Pl. Com. 247. a.

(9) *Per formam in charta de dono,* &c.] It was ſaid before, *contra formam in dono expreſſam,* ſo as whether the eſtate were made by deed or without deed, it is all one to the intention of this act, and the moſt uſuall gifts in tail being of inheritance, were by deed.

(10) *Propter quod dominus rex, &c. ſtatuit.*] Albeit here be no mention made of the aſſent of the lords and commons (whoſe aſſents are neceſſary to the making of every law) yet foraſmuch as in the preface of this parliament it is ſaid, *dominus rex in parliamento ſuo, &c. ſtatuta edidit,* and that this act and the reſt were entred into the roll of the parliament, and that this word [*ſtatuit*] implyeth the aſſent of the lords and commons, for it cannot be *ſtatutum* without 7 H. 7. 14. 11 H. 7. 27. 39 E. 3. 7. For the divers forms of parliaments, ſee lib. 8. the Princes caſe. Bro. tit. Parliament 76.

without their aſſents, therefore it hath (as many other of like form) been without queſtion received for an act of parliament.

(11) * 1. *Quod voluntas donatoris, ſecundum formam in charta doni ſui manifeſte expreſſam, de cætero obſervetur; 2, Ita quod non habeant illi, quibus tenementum ſic fuerit datum ſub conditione poteſtatem alienandi tenementum ſic datum, quo minus ad exitum illorum, quibus tenementum ſic fuerit datum remaneat poſt eorum obitum, vel ad donatorem, vel ad ejus hæredem (ſic exitus deficiat) revertatur*, &c.] Upon theſe two branches, *viz.* that the will of the donor ſhould be obſerved, and that the donee ſhould not have power to alien, the judges by a threefold conſtruction did not onely remedy all the ſaid former miſchiefes, but prevent all other that might ariſe.

1. 1. Therefore in execution of the will of the donor, and that he ſhould have no power to alien either lands that lay in livery, or tenements that lay in graunt, they adjudged that the donee ſhould not have a fee-ſimple, but divided the eſtates, and created a particular eſtate in the donee, and a reverſion in the donor, ſo as where the donee had a fee-ſimple before, by this act he had but an eſtate taile, and where the donor had but a poſſibility before, which after iſſue might be barred at the pleaſure of the donee, now by conſtruction upon this act the donor had the fee-ſimple expectant upon the eſtate taile, which we call a reverſion; ſo as by this diviſion of the eſtates the donee after iſſue, or before could not barre or charge his iſſue, nor for default of iſſue the donor or his heirs, either by alienation, forfeiture, or any charge whatſoever.

5 H. 7. 14. vide c. 4. verb. quando ux' dotata, &c. et verb. non habeant aliud recuperare, &c.

Sir William Herle chiefe juſtice of the court of common pleas ſaid of them that made this ſtatute, *Ilz fueront ſages gents queux fieront ceſt ſtatut*; and I may ſay as truly, *Que ils fueront ſages gents queux interpretont ceſt act.* And in another place he ſaith, *Nous veiomus ceux queux fieront leſtatut, & auxi en temps de quel roy leſtatut fuit fait, que fuit le pluis ſage roy que unques fuit, & le cauſe del ſtatut fuit, a ſaver le heritage en le ſang ceux as queux le done ſe fiſt.*

9 E. 3. 22.

5 E. 3 14.

2. The ſecond conſtruction was, that no lineall warranty ſhould barre the iſſue in taile, unleſſe there were aſſets deſcended in fee-ſimple from the ſame aunceſtor, but a collaterall warranty made by a collaterall aunceſtor ſhould barre the iſſue in taile without aſſets, for that warrantry is not reſtrained by this act, whereof we have ſpoken at large in another place; and ſo likewiſe the collaterall warranty of the donee ſhall barre the donor, and is not reſtrained by this act, as well as the warranty of the donor ſhall barre the donee, as there alſo it appeareth.

See the firſt part of the Inſtitutes, ſect. 712.

3. The third conſtruction was, that albeit tenant in taile was reſtrained from power of alienations, yet of lands and tenements that lay in livery, his fine or feoffment ſhould worke a diſcontinuance, and drive the iſſue in taile to his action: for ſeeing he had an eſtate of inheritance, the judges compared it to the caſe where a man was ſeiſed in the right of his wife, or a biſhop in the right of his biſhoprick, or an abbot in the right of his monaſtery, *et ſic in ſimilibus*; and of inheritances that lay in graunt, as of rents, advowſons, and the like, tenant in taile could not make any diſcontinuance, no more then the others before recited might doe, which conſtruction was made according to the rule and reaſon of the common law in other like caſes.

(12) *Secundum formam in charta doni ſui*, &c.] This holdeth, though there be no deed, as before hath been ſaid.

(13) *Non*

(13) *Non habeant illi quibus tenementum ſic fuerit datum.*] It was adjudged by Beresford, that the iſſues in taile ſhould not alien no more then * they to whom the land was given, and that was the intent of the makers of this act, and it was but their negligence, that it was omitted, as there it is ſaid. In this caſe by way of purchaſe the land is given to the donees, and by way of limitation to the iſſues in taile, and therefore by a benigne interpretation the purview of this extends to the iſſues in taile.

5 E. 2. Formedon 52. 4 E. 3. 29.

(14) *Nec habeat de cætero ſecundus vir*, &c.] Theſe are but conſequents to the words of the purview, and are but explanatory, and not of ſubſtance, and might well have been omitted.

Pl.Co. 247. Sieg' Berklies caſe.

Yet was it adjudged ſoon after the making of this act, that where lands were given in frankmarriage, and the huſband died, and the wife took another huſband, and had iſſue before this act, that the huſband ſhould be tenant by the curteſie, and the principall reaſon was upon this branch of the ſtatute, *Nec habeat de cætero ſecundus vir, &c.* for that this reſtraint proved, as there it is ſaid, that the law before was, that he ſhould be tenant by the curteſie, and yet without queſtion the iſſue ſhould not inherit that land.

10 E. 1. Form. 66. Vide Paſc. 18 E. 1. in banco Rot. 27. in Dower.

(15) *Succeſſionem hæreditariam.*] In auncient time if land had been given to I. S. and his ſucceſſors, hee had had a fee-ſimple, but otherwiſe it is at this day, as it appeareth in the firſt part of the Inſtitutes, ſect. 1.

(16) *Et quia in novo caſu novum remedium eſt apponendum.*]

Ea quæ de novo emergunt, novo indigent remedio.

Regula. 10 E. 2. Formed. 55. 4 E. 2. ib. 50. 21 E. 3. 47. F.N.B. 211. Pl. Com. 240.

Hereby it appeareth that a formedon in the deſcender lay not at the common law, but was given by this act, and the forme of the writ is here ſet downe.

(17) *Præcipe A. quod juſte reddat B*, &c.] Here is the forme of the formedon in the deſcender ſet downe, and therefore this ſtatute need not be recited, nor any ſtatute which giveth the forme of the writ.

Fleta, li. 5. c. 34. Regiſt. 238, 239. 5 H. 7. 17. b.

(18) *Breve quod donator habeat recuperare deficiente exitu ſatis eſt in uſu in cancellaria.*] The formedon in reverter did lie at the common law, but not a formedon in remainder upon an eſtate taile, becauſe it was a fee-ſimple conditionall, whereupon no remainder could be limited at the common law, but after this ſtatute a remainder may be limited upon an eſtate taile in reſpect of the diviſion of the eſtates.

Regiſt. 243. F.N.B. 217, 218.

(19) *Sciendum eſt quod hoc ſtatutum quoad alienationem tenementi contra formam doni impoſterum faciendam locum habeat, et ad dona prius facta non extenditur.*]

This clauſe ought to receive a two-fold interpretation. 1. That [*ad dona prius facta*] muſt be intended of feoffements or alienations made by the donee or his iſſues, and not to guifts made by the donor, for to them this act doth extend.

2. *Dona prius facta*, that is, *poſt prolem ſuſcitatam*, for then the alienation by the tenant in taile, or his iſſues was good in law: ſo as [*dona*] here are to be intended lawfull gifts, and made in due manner, and ſuch as could not be avoided, for law alloweth no wrong.

4 E. 2. Formed. 50. 12 H. 4. 7. 21 E. 3. 45. Pl. Com. 246. Firſt part of the Inſtit. ſect. 729, 730.

(20) *Et ſi finis ſuper hujuſmodi tenementum impoſterum levetur, ipſo jure ſit nullus.*] This act doth not make the fine void, but *ipſo jure ſit nullus*, that is, it ſhall not binde the right, yet it ſhall (as hath been ſaid) make a diſcontinuance.

6 E. 3. 20. 8 H. 4. 10. 33 E. 3. Eſtoppel, 280. 33 H. 6. 18.

But now by the ſtatutes of 4 H. 7. cap. 24. and 32 H. 8. cap. 34. a fine levied with * proclamations doth barre the iſſues in taile, but a fine without proclamations is a diſcontinuance onely, and no barre.

See the firſt part of the Inſtitutes, ſect. 440. Cuſtumier, cap. 48. See the firſt part of the Inſtitutes, ſect. 441. 4 H. 7. cap. 24. Stat. de modo levand. finis. 18 E. 1.

(21) *Nec habeant hæredes hujuſmodi, nec illi ad quos ſpectat reverſio, licet fuerint plenæ ætatis, in Anglia, et extra priſonam.*] Here is *non compos mentis* left out, and ſo is a *feme covert*.

Hereby it may be gathered (as the law was) that a fine at the common law did not binde a ſtranger that was within age, in priſon, or beyond the ſeas.

See more for the conſtruction of this ſtatute in the firſt part of the Inſtitutes, ſect. 21, 22, 23. 271. 362, 363. 441. 746, 747.

CAP. II.

QUIA domini feodorum diſtringentes tenentes ſuos (1) pro ſervitiis et conſuetudinibus ſibi debitis multotiens gravantur per hoc, quod cum tenentes ſui diſtrictionem ſuam per breve, vel ſine brevi replegiaverint, ac cum ipſi domini (ad querimoniam tenentium ſuorum) ad com', vel ad aliam curiam (3) habentem poteſtatem placitandi placita de vetito namio (2), per attachiament' venerint, et rationabilem et juſtam diſtrictionem advocāverint, per hoc quod tenentes diſadvocant (4) nihil tenere, nec clamant tenere de eo qui diſtrictionem fecit, et advocavit, remanſit ille qui diſtrinxit in miſericordia, et tenentes ſui quieti, quibus pro illa diſadvocatione per recordum com', ſive aliarum curiarum, quæ recordum non habent, pœna infligi non poteſt. De cætero proviſum eſt et ſtatutum, quod cum hujuſmodi domini in com' vel hujuſmodi curia juſticiam de hujuſmodi tenentibus ſuis conſequi non poſſint, quam cito attachiati fuerint ad ſectam tenentium ſuorum, concedatur eis breve ad ponend' loquelam (6) illam coram juſticiariis (5), coram quibus et non alibi juſticia hujuſmodi dominis exhiberi poterit, et inſeratur cauſa in brevi, quia talis diſtrinxit in feodo ſuo pro ſervic' et conſuetud' ſibi debitis. Nec per

FORASMUCH as lords of fees diſtraining their tenants for ſervices and cuſtoms due unto them, are many times grieved, becauſe their tenants do replevy the diſtreſs by writ, or without writ: and when the lords, at the complaint of their tenants, do come by attachment into the county, or unto another court, having power to hold pleas of withernam, and do avow the taking good and lawful, by reaſon that the tenants diſavow to hold ought, nor do claim to hold any thing of him which took the diſtreſs and avowed it, he that diſtrained is amerced, and the tenants go quit; to whom puniſhment cannot be aſſigned for ſuch diſavowing by record of the county, or of other courts having no record. It is provided and ordained from henceforth, that where ſuch lords cannot obtain juſtice in counties and ſuch manner of courts againſt their tenants, as ſoon as they ſhall be attached at the ſuit of their tenants, a writ ſhall be granted to them to remove the plea before the juſtices, afore whom, and none otherwhere, juſtice may be miniſtred unto ſuch lords; and the cauſe ſhall be put in the writ, becauſe ſuch a man diſtrained in his fee for ſervices and cuſtoms to him due.

per iſtud ſtatutum derogat' legi communi uſitatæ, quod non permiſit aliquod placitum poni coram juſtic' ad petitionem defendentis (7): quia licet prima facie videatur tenens actor, et dominus defendens, habito tamen reſpectu ad hoc quod dominus diſtrinxit, et ſequitur pro ſervitiis et conſ. ſibi aretro exiſten' realiter apparebit potius actor, ſive querens, quam defendens (8). *Et* ut in certo ſint juſtic'* (9) *de qua recenti ſeiſina poterint domini advocare rationabilem diſtrictionem ſuper tenentes ſuos: de cætero concordatum eſt, quod rationabilis diſtrictio poterit advocari de ſeiſina anteceſſorum vel prædeceſſorum ſuorum, à tempore quo breve novæ diſſeiſinæ currit.* Vide W. 1. cap. 38. *Et quia aliquando contingit, quod tenens poſtquam replegiaverit averia ſua, averia illa vendit vel elongat, quo minus retornum poſſit fieri domino diſtringenti, ſi adjudicetur: proviſum eſt, quod vicecomes, vel balivi de cætero non recipiant à conquerentibus ſolummodo plegios de proſequendo, antequam deliberationem faciant de averiis, ſed etiam de averiis retornandis* (10), *ſi adjudicetur retornand'. Et ſi quis alio modo plegios ceperit, reſpondeat ipſe de precio averiorum. Et habeat dominus diſtringens recuperare per breve, quod reddat ei tot averia, vel catalla. Et ſi non habeat balivus unde reddat, reddat ſuperior ſuus* (11). *Et quia aliquando contingit, quod poſtquam adjudicat' fuerit diſtringenti retornum averiorum, et ſic diſtrictus, poſtquam averia ſic retornata* (13) *iterum replegiaverit, et cum viderit diſtringent' comparentem in curia paratum ſibi reſpondere, defaltam fecerit* (12), *ob quam iterum readjudicabitur diſtringenti retornum averiorum, et ſic bis, vel ter, et in infinitum* (14) *replegiabuntur averia, nec habebunt judicia* (15) *curiæ regis in hoc caſu effectum, ſuper quo non fuit prius remedium proviſum. Ordinat' eſt in hoc caſu talis proceſſus, quod*

due. Neither is this act prejudicial to the law commonly uſed, which did not permit that any plea ſhould be moved before juſtices at the ſuit of the defendant. For though it appear at the firſt ſhew that the tenant is plaintiff, and the lord defendant, nevertheleſs, having reſpect to that, that the lord hath diſtrained, and ſueth for ſervices and cuſtoms being behind, he appeareth indeed to be rather actor, or plaintiff, than defendant. And to the intent the juſtices may know upon what freſh ſeiſin the lords may avow the diſtreſs reaſonable upon their tenants; from henceforth it is agreed and enacted, that a reaſonable diſtreſs may be avowed upon the ſeiſin of any anceſtor or predeceſſor ſince the time that a writ of novel diſſeiſin hath run. And becauſe it chanceth ſometimes that the tenant, after that he hath replevied his beaſts, doth ſell or aliene them, whereby return cannot be made unto the lord that diſtrained, if it be adjudged: it is provided, that ſheriffs or bailiffs from henceforth ſhall not only receive of the plaintiffs pledges for the purſuing of the ſuit, before they make deliverance of the diſtreſs, but alſo for the return of the beaſts, if return be awarded. And if any take pledges otherwiſe, he ſhall anſwer for the price of the beaſts, and the lord that diſtraineth ſhall have his recovery by writ, that he ſhall reſtore unto him ſo many beaſts or cattle; and if the bailiff be not able to reſtore, his ſuperiour ſhall reſtore. And foraſmuch as it hapneth ſometime, that after the return of the beaſts is awarded unto the diſtrainor, and the party ſo diſtrained, after that the beaſts be returned, doth replevy them again, and when he ſeeth the diſtrainor appearing in the court ready to anſwer him, doth make default, whereby return of the beaſts ought to be awarded again unto the

quod quam cito adjudicatum fuerit retornum averiorum diſtringenti per breve de judicio, mandetur vicecomiti, quod retornum habere faciat diſtringenti de averiis, in quo brevi inſeratur, quod vicecom' ea non deliberet ſine brevi, in quo fiat mentio de judicio per juſtic' reddit': quod fieri non poterit, niſi per breve quod exeat de rotulis juſtic', coram quibus deduct' fuerit loquela (16). *Cum igitur diſtrictus adierit juſtic', et petierit averia ſua iterum ſibi replegiari, fiat ei breve de judicio* (17), *quod vic' (capta ſecuritate de proſequendo, et etiam de averiis ſeu catallis retornand', vel eorum precio, ſi adjudicetur retornum) deliberet ei averia, vel catalla prius retornata: et attachietur ille qui diſtrinxit ad veniend' ad certum diem coram juſtic', coram quibus placitum deducatur in præſentia partium. Et ſi iterato ille, qui * replegiaverit averia, fecerit defaltam, vel alia occaſione adjudicetur retornum diſtrictionis jam bis replegiat', remaneat diſtrictio illa in perpetuum irreplegiabilis* (18). *Sed ſi de novo, et de nova cauſa* (19) *fiat diſtrictio, de nova diſtrictione ſervetur proceſſus ſupradictus.*

* [339]

diſtrainor, and ſo the beaſts be replevied twice or thrice, and infinitely, and the judgements given in the king's court take no effect in this caſe, whereupon no remedy hath been yet provided; in this caſe ſuch proceſs ſhall be awarded, that ſo ſoon as return of the beaſts ſhall be awarded to the diſtrainor, the ſheriff ſhall be commanded by a judicial writ to make return of the beaſts unto the diſtrainor; in which writ it ſhall be expreſſed, that the ſheriff ſhall not deliver them without writ, making mention of the judgement given by the juſtices, which cannot be without a writ iſſuing out of the rolls of the ſaid juſtices before whom the matter was moved. Therefore when he cometh unto the juſtices, and deſireth replevin of the beaſts, he ſhall have a judicial writ, that the ſheriff taking ſurety for the ſuit, and alſo of the beaſts or cattle to be returned, or the price of them (if return be awarded) ſhall deliver unto him the beaſts or cattle before returned, and the diſtrainor ſhall be attached to come at a certain day before the juſtices, afore whom the plea was moved in preſence of the parties. And if he that replevied make default again, or for another cauſe return of the diſtreſs be awarded, being now twice replevied, the diſtreſs ſhall remain irrepleviable; but if a diſtreſs be taken of new, and for a new cauſe, the proceſs aboveſaid ſhall be obſerved in the ſame new diſtreſs.

(16 H. 7. f. 1. Regiſt. 83. Dyer, 188. 2 H. 6. 15. 8 Ed. 3. 72. 9 H. 6. 42. Fitz. Return des Aver', 35. Cro. Car. 594. Dyer, 41. 59. Kel. 92. 26 H. 8. 6. 21 H. 7. 28. 12 H. 7. 4. 14 H. 7. 6. Dyer, 280. Fitz. Return des Aveis, 6. 15. 18, 19. 24. 26. 32, 33, 34, 35.

(1) *Quia domini feodorum diſtringentes tenentes ſuos*, &c.] In this preamble is the miſchief ſet down, that was at the common law before the making of this act.

Fleta, li. 2. c. 37.

Mirror, cap. 5. § 5. The Mirror without cauſe doth finde great fault with this act, which you may read, and being of no uſe need not here to be inſerted.

(2) *Ad*

(2) *Ad comitatum vel aliam curiam habentem poteſtatem placitandi de vetito namio.*] *De vetito namio*, of a forbidden or unjuſt taking, and is not underſtood of a taking in withernam, for that is a juſt and no forbidden taking, as in another place I have proved more at large. Vide Marlebr. cap. 21.

(3) *Vel aliam curiam.*] So as lords of hundreds, wapentakes, &c. may have power to hold plea of replevin, &c. Marlbr. ubi ſupra F.N.B. 73. b.

(4) *Diſad-vocant*, &c.] That is diſclaim, whereof the court being no court could have no conuſans, becauſe it concerned free-hold. F.N B. 70. b.

(5) *Quod cum hujuſmodi domini in com' vel hujuſmodi curia juſticiam de hujuſmodi tenentibus ſuis conſequi non poſſunt, &c. concedatur illis breve ad ponend' loquel' illam coram juſticiariis*, &c.] Failer of juſtice, is ever a good cauſe to remove the plea.

(6) *Ad ponend' loquelam.*] The writ of *pone* doth lye when there is a replevin depending by writ out of the chancery, the plaintiſe or defendant may remove the plea by a *pone*; and if the plea be depending in the county, the plaintiſe may remove the ſame without cauſe, but the defendant cannot remove it without cauſe, and that cauſe muſt be put in the end of the writ. And if it be upon this ſtatute, the words be, *Quia prædict' B. cepit averia prædict' in feodo ſuo pro conſuetudinibus et ſervitiis ut dicitur*, which are the very expreſſe words of this act. Fleta ubi ſupra. F.N.B. 69. in Regiſt. 84. a. Regiſt. ubi ſup.

And when the plaint is in the county by writ or without writ, or in the court of any other, the ſame may be removed by a writ of *recordari fac' loquelam.*

And if the plaint be in the county, the plaintife may remove the ſame without cauſe, as hath been ſaid; but the defendant cannot remove it (as hath been ſaid) without cauſe. But if the plaint be in the court of any other, neither the plaintife nor defendant can remove the plaint without cauſe, for the prejudice that may come thereby to the lord.

(7) *Quod non permiſit aliquod placitum poni coram juſtic' ad petitionem defendentis.*] This muſt be underſtood without cauſe ſhewed, for by the common law, the defendant for cauſe ſhewed might remove the plaint. F.N.B. 70. a. Regiſt. 83.

(8) *Potius actor ſive querens quàm defendens.*] In truth the defendant by making avowry doth become actor, and ſhall have judgement given for him, and after avowry he ſhall not have a protection caſt for him no more then a plaintife ſhall, becauſe he is become an actor, and not meerly a defendant. [340] 5 H. 5. 5.

(9) *Et ut in certo ſint juſticiarii*, &c.] It was a doubt before this act, within what limitation of time an avowry might be made, and by this act it is provided, *Quod rationabilis diſtrictio poterit advocari de ſeiſina anteceſſorum, vel prædeceſſorum ſuorum a tempore quo breve novæ diſſeiſinæ currit*; which limitation in an aſſiſe appeareth before in W. 1. cap. 38. which was *poſt primam transfretationem regis H. 3. in Vaſconiam*, in the fift yeer of his raign. But this limitation, both in the aſſiſe and in the avowry, is altered by a latter ſtatute. 5 H. 3. W. 1. cap. 38. 32 H. 8. cap. 3.

(10) *Non ſolummodo plegios de proſequendo, &c. ſed etiam de averiis retornandis, &c.*] If the ſherife retorn inſufficient pledges, they are no pledges within this ſtatute, and in that caſe the ſherife ſhall be charged by this act, as if he had taken no pledges at all. Fleta, li. 2. c. 38. Regiſt. Judic. 4. 2 H. 6. 15.

If the retorn of pledges be upon a writ of replevin, then if the plaintife be nonſute, &c. if upon the writ *de retorno habendo*, the ſherife retorn *averia elongata, &c.* the plaintife may have a writ to have retorn of the beaſts of the pledges. But if the deliverance were by plaint, becauſe in that caſe the pledges do not appear to the court, the plaintife can have no ſuch writ.

8 E. 3. 72.
39 E. 3. 28.

And if upon the writ to have retorn of the beaſts of the pledges, the ſherife retorn *nihil*, then may the plaintife have a *ſcire facias* againſt the ſherife, *quod reddat ei tot averia*, or *tot catalla*; and that which hath been ſaid of the ſherife, is to be intended of the bailife of a franchiſe.

2 H. 6. 15.
9 H. 6. 42. & 48.

(11) *Et ſi non habeat balivus unde reddat, reddat ſuperior ſuus.*] *Vide* Simile, 44 E. 3. 13. *Vide* 52 H. 3. Leſtatute del Eſchequer. *Vide* 2 H. 6. cap. 10.

(12) *Defaltam fecerint*, &c.] At the common law, if the plaintife in the replevin had been nonſute either before or after verdict, the defendant that diſtrained ſhould have had retorn, but not irrepleviſable, ſo as the plaintife after nonſute might have had as many replevins as he would, which was vexatious and miſchievous; for remedy whereof, this act doth reſtrain the plaintife from any more replevin after nonſute, but giveth a writ of ſecond deliverance, whereof we ſhall ſpeak in his proper place.

34 E. 1. Judgement, 244.
34 H. 6. 37.
19 E. 2. Repl. 25.
6 E. 3. 37.
24 E. 3. 71.
21 E. 4. 6.

If the writ of replevin doth abate for want of form in default of the clerk, the defendant ſhall not have retorn at all; but if it abate for matter apparant by miſinformation, or other default of the plaintife, the defendant ſhall have retorn, but not irrepleviſable.

11 E. 2. Ret. des avers 31. 16 E. 2. ibid. 5. 41 E. 3. ib. 14. 21 R. 2. ib. 29. 3 H. 6. 2, 3. 27 H. 6. 3. 43 E. 3. 16. 49 E. 3. 24. 2 H. 4. 23. 4 H. 6. 8, 9. 34 H. 6. 37. 12 H. 7. 4, 5. 13 H. 7. Retorne des avers miſreport per Fitzh. See the authorities next before concerning theſe matters. Temps E. 1. Ret. des avers 33.

But if the defendant doth plead a plea to the writ, and the plaintife confeſſeth it, then the plaintife ſhall have retorn, but not irrepleviſable, for the plaintife may have a new writ of replevin; for this act onely giveth remedy in caſe of nonſute.

But if the plea to the writ, or any other plea be tryed by verdict, or judged upon a demurrer, retorn irrepleviſable ſhall be awarded, and no new replevin ſhall be granted, nor any ſecond deliverance by this act, but (as it hath been ſaid) upon a nonſute.

(13) *Averia ſic retornata.*] Note neither court baron, nor county court, nor any court that is not the court of the king before his juſtices can award retorn irrepleviſable.

(14) *In infinitum.*] *Infinitum in jure reprobatur.*

(15) *Nec habebunt judicia*, &c.] Here is a maxime of the common law implyed, *viz. Judicia ſuum effectum habere debent. Judicium non debet eſſe illuſorium.*

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17 E. 2. Repl. 21. 6 E. 3. 37. 20 E. 3. Eſtopp. 186. 20 E. 3. Avowry 125. 21 E. 3. 43. 16 E. 3. Aide 131. 3 H. 6. 9. 12 H. 7. 4. 21 H. 7. 28. 26 H. 8. 6. Vide Mich. 31 E. 3. fo. 50. in lib. meo. Dier, 36 H. 8. f. 59. Regiſt. Judic. 58.

(16) *Per breve de judicio, &c. quod exeat de rotulis juſtic' coram quibus deducta fuerit loquela.*] The writ of ſecond deliverance given by this act is a writ judiciall, as here it appeareth, and iſſueth out of the record of the replevin in which the nonſute was; and regularly the judiciall writ ought not to vary from the record, out of which it iſſueth; and therefore if after nonſute the ſherife retorn *averia elongata*, and the defendant upon the withernam hath other beaſts delivered to him, the plaintife is to have his ſecond deliverance of the firſt beaſts mentioned in the former record.

(17) *Fiat ei breve de judicio*, &c.] The effect of the writ of ſecond deliverance is here ſet down, and appeareth in the Judiciall Regiſter.

And

And this writ is a ſuperſedeas in law to the ſherife, that he make no retorn to the defendant upon the former nonſute.

(18) *Et ſi iterato, ille qui replegiaverit averia, fecerit defaltam, vel alia occaſione adjudicetur retornum diſtrictionis jam bis replegiat', remaneat diſtrictio illa in perpetuum irreplegiabilis.*] If the plaintife in the ſecond deliverance by nonſute, or if the plea be diſcontinued, or the writ abate, or if he prevail not in his ſute, retorn irrepleviſable ſhall be granted.

But if retorn irrepleviſable be granted, the owner of the cattell or other goods diſtrained may come to the defendant and offer the arrerages, &c. and if the defendant refuſe to deliver the diſtreſs, the plaintife may have an action of detinue, and by that means recover them, for they are in nature of a gage.

(19) *Sed ſi de nova cauſa.*] The ſecond deliverance muſt be brought for the ſame diſtreſſe, but if the ſame lord diſtrain the ſame tenant for a rent, or other ſervice behinde at another day, or for another cauſe, there the replevin doth lye, and ſuch proceeding as is aboveſaid.

33 Avowry 256. Dyer, 30 H. 8. 41. b.

5 E. 2. Ret. des avers 64. 10 E. 2. ib. 5. 33 E. 3. ib. 34. 8 R. 2. ib. 35. 6 E. 3. 37. 17 H. 8. Second Deliverance. Br. 15. Pl. Com. 82. b. 45 E. 3. 9. 14 H. 4. 4. 33 H. 6. 27.

CAP. III.

IN caſu quando vir amiſerit (1) *per defaltam* (2) *tenementum, quod fuit jus uxoris ſuæ* (3), *durum fuit quod uxor poſt mortem viri non habuerit aliud recuperare, quam per breve de recto: propter quod dominus rex ſtatuit, quod mulier poſt mortem viri ſui habeat recuperare per breve de ingreſſu, cui ipſa in vita* (4) *ſua contradicere non potuit, quod in forma ſubſcripta erit placitandum* (5). *Si contra petitionem mulieris tenens excipiat, quod habuerit ingreſſum per judicium, et compertum fuerit, quod per defaltam, ad quod tenens neceſſe habet reſponder', ſi ab eo quæratur, tunc ulterius habet neceſſe oſtendere jus ſuum, ſecundum formam brevis, quod prius impetravit ſuper virum et uxorem. Et ſi verificare poterit quod* habuerit, vel habet jus in tenemento petito, nihil capiat mulier per breve ſuum. Quod ſi oſtendere non poterit, recuperet mulier tenementum petitum: hoc obſervato, quod ſi vir abſentaverit* (6) *ſe, et noluerit jus uxoris ſuæ defendere, vel invita uxore ſua reddere voluerit, ſi uxor ante judicium venerit pa-*

IN caſe when a man doth loſe by default the land which was the right of his wife, it was very hard that the wife, after the death of her huſband, had none other recovery but by a writ of right; wherefore our lord the king hath ordained, that a woman, after the death of her huſband, ſhall recover by a writ of entry (whereto ſhe could not diſagree during his life) which ſhall be pleaded in form under-written. If the tenant do except againſt the demand of the wife, that he entered by judgement, and it be found that his entry was by default, whereto the tenant of neceſſity muſt make anſwer, if it be demanded of him, then he ſhall be compelled to make further anſwer, and to ſhew his right according to the form of the writ that he purchaſed before againſt the huſband and the wife. And if he can verify that he hath or had right in the land demanded, the woman ſhall gain nothing by her writ; which thing if he cannot ſhew, the woman ſhall recover the land in demand; this being obſerved,

(7), *parata petenti reſpondere* (8), *et ius ſuum defendere* (9), *admittatur uxor. Eodem modo* (11) *ſi tenens in dotem, per legem Angliæ, vel aliter ad terminum vitæ* (12), *vel per donum* (13) *in quo reſervatur reverſio, fecerit defaltam, vel reddere voluerit* (16), *admittantur hæredes* (14), *vel illi ad quos ſpectat reverſio* (15), *ad reſponſionem* (17), *ſi venerint ante judicium* (10). *Et ſi per defaltam, vel reddition' reddatur judicium, tunc habeant hæred', vel illi ad quos ſpectat reverſio, poſt mortem hujuſmodi tenentium, recuperare per breve de ingreſſu* (18): *in quo obſervetur idem proceſſus, ſicut prædict' eſt in caſu ubi vir amittat per defaltam tenementum uxoris ſuæ. Et ſic in caſibus prædict' duæ concurrunt actiones* (19) *una inter petentem et tenentem, et alia inter tenentem jus ſuum oſtendentem et petentem.* Vide 20 E 1. defenſio juris, fol. 88.

obſerved, that if the huſband abſent himſelf, and will not defend his wife's right, or againſt his wife's conſent will render the land, if the wife do come before judgement, ready to anſwer the demandant, and to defend her right, the wife ſhall be admitted. Likewiſe if tenant in dower, tenant by the law of the land, or otherwiſe for term of life, or by gift, where the reverſion is reſerved, do make default, or will give up; the heirs, and they unto whom the reverſion belongeth, ſhall be admitted to their anſwer if they come before judgement; and if upon ſuch default, or ſurrender, judgement hap to be given, then the heirs, or they unto whom the reverſion belongeth after the death of ſuch tenants, ſhall have their recovery by a writ of entry, in which like proceſs ſhall be obſerved as is aforeſaid, in caſe where the huſband loſeth his wife's land by default. And ſo in the caſes aforeſaid two actions do concur, one between the demandant and tenant, and another between the tenant ſhewing his right, and the demandant.

(Regiſt. 232. 6 Rep. 8. 8 Co. 72. 26 H. 8. 2. Fitz. Cui in vita, 7, 8, 9, 10, 11. 14. 16, 17. 19, 20. 22. 26. 28. 30. 32. 34. 1 Inſt. 352. b. 353. a. 355. a. 356. a. Dyer, 298. 315. 341. Fitz. Reſceit, 1. 3. 5, 6. 9. 11, 12. 19. 27. 30. 32. 139. 10 Rep. 44. 5 Ed. 3. 61. Cro. Car. 43. Keilw. 128. Regiſt. 133. 32 H. 8. c. 28.)

(1) *Vir amiſerit.*] This is to be underſtood of the huſband and the wife, for the huſband alone is not tenant to the *præcipe*, and therefore it was the opinion of Hankford, that if the land be recovered againſt the huſband ſole, that after the death of the huſband the wife ſhall have an aſſiſe; but Fitzh. in abbreviating this caſe ſaith, that it is hard to be proved by reaſon, becauſe the wife cannot be diſſeiſed (during the coverture) but where the huſband is diſſeiſed, but of ſuch a recovery ſhe cannot have a *cui in vita* upon this ſtatute: but ſeeing the huſband was not tenant to the *præcipe*, this can be no diſcontinuance, and therefore not like to a feoffment, for that conveyance is compleat and good, but ſo is not the recovery, and therefore in that caſe the wife may enter after the death of her huſband; but when the *præcipe* is brought againſt the huſband and wife, it may be ſaid that *vir amiſerit*, for it is principally his act or default; and therefore though the words of the ſtatute of 32 H 8. be (ſuffered by the huſband onely) yet a feined recovery againſt the huſband and wife is within that ſtatute.

10 H. 4. Diſſeiſ. 7. 30 E. 3. 6. Reſceit 128. 48 E. 3. Pl. Com. 57. b. 19 E. 2. Receit 176. 2 E. 2. ib. 148.

32 H. 8. cap. 28.

(2) *Per*

(2) *Per defaltam.*] A recovery by render is within the equity of this ſtatute, becauſe it is within the ſame miſchief; but a recovery by action tryed is out of this ſtatute. 49 E. 3. 23. 50 E. 3. 7. 47 E. 3. 13.

It is ſaid, that a recovery by default in a ceſſavit againſt the huſband and wife, doth binde the wife; but I hold the law to the contrary, unleſſe the cauſe of the action be juſt, and then it bindeth, as in all other caſes; for this act giveth no remedy, but where the recovery is without title. See the firſt part of the Inſtitutes, ſect. 675. 4 E. 2. Cui in vita. 20. F.N.B. 193. j.

In a *quid juris clam', quod permittat*, aſſiſe of rent, *ſcire facias*, attaint, &c. the wife upon default of the huſband ſhall be received. 36 H. 6. Fauxer Recovery 27. 2 H. 5. 1. 7 E. 3. 15. 19 E. 3. Receit 14. 34 Aſſ. p. 3. Paſch. 28 E. 1. Coram rege. Ceſtria. Bract. li. fo. 367. Fleta, li. 5. c. 22. 7 E. 3. 62. Lib. 6. fol. 8. Ferrers caſe.

In a *quare impedit* againſt the huſband and wife, the wife ſhall not be received upon the default of the huſband; for the Record ſaith, *Inſpecta cauſa confectionis ſtatuti manifeſte liquet, quod non eſt in caſu conſimili*; for the huſband may preſent alone.

(3) * *Quod fuerit jus uxoris ſuæ.*] This is intended of a fee-ſimple, for ſo is *jus* regularly taken; and this act ſaith, that the wife had no recovery but by a writ of right, which none can have but tenant in fee-ſimple, and ſo one part of this act doth expound another; and for tenant in taile (reduced formerly (as hath been ſaid) at this parliament to a divided and particular eſtate) and for tenant for life proviſion is made in the next chapter by a *quod ei deforceat*, as ſhall be declared when we come thereunto; for tenant in taile, and tenant for life are out of the letter of this ſtatute, becauſe they could have no writ of right; and yet if the huſband and wife ſeiſed in the right of his wife for terme of her life loſe in a *præcipe quod reddat* by default, and the huſband die, the wife ſhall have a *cui in vita*, for this is, as it were, a demiſe made by the huſband, for otherwiſe ſhe ſhould be without remedy, for ſhe cannot have a *quod ei deforceat*, as ſhall be ſaid hereafter. 4 E. 3. 38, 39. 5 E. 3. 4. 33 E. 3. Avowry 255. 2 E. 4. 13. F.N.B. 156.

If lands during the coverture be given to the huſband and wife, and their heirs, this is *jus uxoris* within this ſtatute. 7 E. 3. 6. 4 E. 3. 19.

(4) *Cui ipſa in vita.*] Sir William Herle ſaid, that he had ſeene in auncient time, that where the huſband aliened the right of his wife, ſhe had no other recovery but by a writ of right, yet I finde in Bracton and Fleta, that a *cui in vita* in their times lay upon the alienation of her huſband. 5 E. 3. 58. See the firſt part of the Inſtitutes, ſect. 594. Bract. li. 4. 321. b. Fleta, l. 5. c. 34. 36. Cuſtumier de Norm. cap. 10.

(5) *Quod in forma ſubſcripta erit placitand'.*] If the tenant doth plead in barre the recovery by default, he muſt averre the title of his writ, whereupon if iſſue be taken, and found for the tenant, the demandant ſhall take nothing by her writ, and if it be found for her, ſhe ſhall recover the land. 21 E. 4. 65. 22 E. 4. 30. 24 H. 8. Pleadings Br.

(6) *Hoc obſervato quod ſi vir abſentaverit.*] This act having before given the wife a *cui in vita* after the deceaſe of her huſband, doth by this branch give her a remedy upon the default, or reddition of her huſband in his life time to defend her right, ſo as ſhe ſhould not be driven to a reall action after the deceaſe of her huſband, and this receit to the wife is given by this act, which ſhe could not have at the common law.

[a] This act doth extend to courts that be not of record; as if huſband and wife be ſued in a court baron by writ of right, &c. upon the huſbands default the wife ſhall be received. [a] Regiſt. F.N.B. 19. g. Mich. 18 E. 1. in banco Rot. 222. Thomas de Maws caſe.

Upon *feint pleder* of the huſband, the wife ſhall not be received by the opinion of Priſot: but it is reſolved in 8 E. 2. to the contrary; yet I hold the law with Priſot; upon a *nient dedire*, and a *nihil* 33 H. 6. 21. Vide 13 R. 2. c. 17. 8 E. 2. receit 182. 4 E. 3. receit 46.

nihil dicit the feme shall be received within the purview of this statute, 4 E. 3. receit 46.

(7) *Si uxor ante judicium venerit.*] [b] It is to be observed, First, that the time of the receit is when judgement should be given. 2. It is to be understood *de principali judicio*, as in an admeasurement of pasture judgement is given that admeasurement shall be made, and if after admeasurement made and retourned the baron maketh default, the wife shall be received before the principall judgement given.

[c] And so in an assise of mordaunc' against the husband and wife, if the assise be awarded by default, if after the baron make default before the principall judgement, the wife may bee received; and so in the assise of novel disseisin.

[d] And albeit she come not at the time of the default, yet if she come before judgement she shall be received, and so of him in the reversion or remainder, and so if default be made at the *nisi prius*, receit may be prayed in bank, for the justices * of *nisi prius* have no power to allow the receit, but the safe way is to pray it there.

In an assise the husband and wife plead a record and faile thereof, the words of an act made at this parliament, cap. 25. be, *Habeat' pro dissisitore absque ulla recognitione*, and yet the wife shall be received in that case upon the default of her husband, for the words be *absque ulla recognitione*, that is, of the recognitors of the assise, and not *absque ulla receptione, &c.*

Al briefe de enquirer pur waste le fem serra receive, mes apres le waste trove sur le briefe d'enquirer pur waste, el ne serra receive, car serra inconvenient que le fem trier' le matter de novel.

(8) *Parata petenti respondere.*] And in respect of this word [*parata*] tenant by receit ought alway to appeare, for upon any default made, judgement shall be given.

Littleton saith, that in every case that the wife is received for default of her husband, she shall plead and have the same advantage in pleading to defend her right, as if she were a fem sole (see the first part of the Institutes, sect. 665. 668, 669). But she cannot after receit levy a fine, for that † were not to defend, but to give away her right, but he in the reversion that is received may confesse the action.

* The wife after she is received shall have her age, or pray in aide, though the words of this act be *parata petenti respondere*, that is to be understood, that when she ought to plead by law, then she shall be ready to plead.

The wife after she be received shall vowch and plead all manner of pleas, and take all other advantages, which she and her husband might have done, and specially such pleas, as trench to the mischiefe of the warranty.

(9) *Et jus suum defendere.*] This right must be intended, which the wife had in the lands in demaund at the time when the *præcipe* was brought against her husband and her, and not at the time of the receit, for if a *præcipe* be brought against her and her husband, and after the husband and wife levy a fine, and after the husband make default after default, albeit the wife hath no right in the land at this time, yet may she pray to be received for the right which she had at the time of the originall purchased, which in judgement, and by preservation of law, as to the demandant, shall be supposed to continue *in uno et eodem statu* in the tenancy as tenant

[b] 5 E. 2. receit 165. See the first part of the Institutes, sect. 668, 669. 675. Lib. 11. fol. 39. Metcalfes case. 12 Ass. 31. 22 E. 3. receit 139. 17 E. 2. ibid. 173.

[c] 22 Ass. 11. 22. 24 E. 3. 29. 2 H. 4. 2.

[d] 10 E. 3. 27. 12 E. 3. receit 139. 14 E. 3. ib. 139. 29 Ass. 36. 38 E. 3. 23. 3 H. 4. 18. 34 H. 6. receit 73. 22 H. 6. 1. 2 E. 4. 16. 33 H. 6. 19. 37 H. 6. 1. 3 H. 6. 58. 20. 11 H. 6. 51. 11 H. 4. 3. 3 H. 4. 13. 22 H. 6. 1. 14 H. 6. 1.

* [344]

7 H. 4. 16. 2 H. 4. 2. 7 E. 3. 32. 28 E. 91. 20 E. 3. receit 16. 22 Ass. 27. 9 E. 3. 12. 20 H. 6. 37. First part of the Institutes, sect. 665. 668, 669. 42 Ass. 4. 3 E. 3. receit 47. 19 E. 3. ib. 15. 10 E. 3. 51. 9 E. 4. 16.

† 10 E. 3. 4. 12 R. 2. receit 97. 18 E. 3. 32, 33.

* 5 E. 3. age 61. 24 E. 3. 68. 20 H. 6. 23. 10 E. 3. 27. 10 E. 3. 32, 33. 31 E. 3. receit 126. 11 E. 3. ib. 119. 48 E. 3. 25. 2 E. 4. 27. 17 Ass. 41. 22 Ass. 13. 23 E. 3. 21. 9 E. 3 17. 38 E. 3. 10, 11. 12 Ass. 41. 25 E. 3. 40. 14 E. 3. procedendo 4. 32 E. 3.

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nant in law without any change or alteration of the eſtate, notwithſtanding any act done by the tenant.

This alſo is to be underſtood not onely of a tenancy in deed, but alſo of a tenancy in law, for if the huſband and wife be vowched, the wife upon the default of her huſband ſhall be received, and yet ſhe can have no *cui in vita* in that caſe according as this act limits.

The words be *jus ſuum defendere*, and therefore ſhe being not to all intents a feme ſole cannot confeſſe, nor render the action, but he in the reverſion that is received may confeſſe, or render the action.

(10) *Eodem modo ſi tenens in dotem, per legem Angliæ, vel aliter ad terminum vitæ, vel per donum in quo reſervatur reverſio fecerit defaltam vel reddere voluerit, admittantur hæredes vel illi ad quos ſpectat reverſio ad reſponſionem, ſi venerint ante judicium.*] It appeareth by Bracton who wrote before this ſtatute, that he in the reverſion ſhould be received by the common law, for he ſaith, *Poterit etiam quis intrare in warrantiam, et ſi non vocetur ad warrantum ad proprii juris tuitionem, ut ſi quis tenuerit ad vitam ſuam, ſicut mulier nomine dotis, vel alio modo, vel ad terminum terram aliquam, quæ poſt vitam vel terminum reverſura eſſet ad dominum proprietatis, ſi ſe in fraudem et exhæredationem ipſius permiſerit implacitari ab aliquo cum poſſit dominum proprietatis inde vocare ad warrantum ad defenſionem ſuam, hoc omiſerit; bene poterit dominus ille proprietatis, cum ſibi viderit exinde periculum imminere, comparere per ſe, et ſi non vocetur, intrare in warrantiam ad ſui proprii juris defenſionem; cum melius et utilius ſit in tempore occurrere, quam poſt cauſam vulneratam quærere remedium, et maliciis hominum ob-viare.*

Upon the recovery againſt ſuch a particular tenant he in the reverſion was driven to his writ of right, but he in the remainder was without remedy, if he never had ſeiſin; ſee the firſt part of the Inſtitutes.

(11) *Eodem modo.*] Though it be ſaid here *eodem modo*, in the ſame manner, yet it is not in the ſame manner to all purpoſes, for the wife upon the default of her huſband ſhall be received without ſhewing any cauſe. But ſo ſhall not he in the reverſion, and therefore it is not *eodem modo* in that reſpect, and the reaſon of the diverſity is, for that the feme is party to the action, and affirmed tenant by the bringing of the *præcipe*, but he in the reverſion is a meere ſtranger to the action, and therefore ought to ſhew cauſe how the reverſion is in him.

But as to age, he in the reverſion ſhall have the ſame in the ſame manner, as the wife ſhall have it, the demandant ſhall count of new againſt the wife that is received, and *eodem modo* againſt them in reverſion or remainder.

(12) *Si tenens in dotem vel aliter ad terminum vitæ.*] In a writ brought againſt a feme gardein in chivalry and her huſband, the wife ſhall not be received for the default of her huſband, for it is out of the words of the ſtatute, and the huſband hath power to alien, or loſe the chattell.

(13) *Vel per donum.*] This is to be underſtood of a tenancy in taile, *apres poſſibilitie de iſſue extinct*, and not of an eſtate in taile generall or ſpeciall, for upon an eſtate in taile no receit is given by this act, becauſe it is an inheritance which may continue for ever.

(14) *Ad-*

Quar. Imp. 2. 9 E. 4. 16.
5 E. 2. receit 62. 8 E. 2. ib. 181, 182, 183. 19 E. 2. ib. 176. 7 E. 3. 44. 45 E. 3. 23. b. 31 E. 1. receit 186. 9 H. 5. 10. 10 E. 3. 4. 12 R. 2. receit 97. 18 E. 3. 32, 33.
See the firſt part of the Inſtitutes, ſect. 302.
Bracton, lib. 5. f. 393. b. nu. 14.

See the firſt part of the Inſtitutes, ſect. 481, 482.
28 E. 3. 90. 12 E. 3. iſſue 25. 22 E. 3. ib. 20. 10 E. 3. 10. 4 H. 6. 5. 8 H. 16. 21 H. 6. 13. 32 H. 6. 12. 33 H. 6. 39. 41. 9 H. 5. 3. 8 E. 3. 39. 18 E. 3. 32. 3 H. 6. 41. 21 H. 6. 48. 21 Aſſ. 17. 21 E. 3. 45. 33 H. 6. 52. 15 E. 3. receit 122, 123. 19 E. 2. ib. 179. 8 E. 2. ib. 170. 32 Aſſ. 9 E. 4. 16. 2 E. 2. receit 147. 5 E. 2. ib. 161. 11 H. 4 13. 39 E. 3. 18. 42 E. 3. 12. 20 E. 3. receit 17. 16 E. 2. ib. 104. 33 H. 6. 22. 1. 10. fo. 44. Jenings caſe. Regiſt. 135.

(14) *Admittantur hæredes.*] * By colour of theſe words, the heire apparent of tenant in taile making default, &c. hath been admitted, *ſed non eſt lex, quia nullus eſt hæres viventis.*

(15) *Ad quos ſpectat reverſio.*] He muſt have a reverſion, and not onely a condition or poſſibility.

A wife being tenant for life is received upon the default of her huſband, and after makes default, he in the reverſion ſhall be received; and ſo note a receit upon a receit; and ſo if a baron and feme be received, and after the baron make default, the feme ſhall be received.

If an infant make a leaſe for life, though the leaſe be defeaſible, yet upon the default of the leſſee, he ſhall be received, and ſo it is of a leaſe by baron and feme.

One may be received by attorney by a ſpeciall writ affirming infirmity, and the words of the ſtatute are generall.

In a *præcipe* the tenant maketh default, &c. he in the reverſion prayeth to be received, and ſheweth that he let the land to the tenant and another for life, and the demandant was driven to maintain his writ.

If tenant for life pray in aide of him in reverſion, and he refuſe to joyne, and after tenant for life maketh default, &c. he in reverſion ſhall not be received, becauſe he refuſed to joyne, but if he had joyned, and after the tenant make default, he ſhould have been received.

Regularly for a reverſion created hanging the writ there ſhall be no receit: but if the leſſee make the writ good, there ſhall be a receit: as if a *præcipe* be brought againſt B. that hath nothing, and the terre-tenant make a leaſe for life to B. he ſhall be received.

[a] If tenant for life be impleaded, and ſurrender hanging the writ to him in reverſion, he ſhall be received, and yet he hath no reverſion in him, *et ſic in ſimilibus.*

[b] If a rent be demaunded againſt tenant for life, he in the reverſion or remainder ſhall be received by the equity of this ſtatute; albeit the words be, *ad quos ſpectat revertio*, yet he in the remainder upon default of tenant for life, ſhall be received, for he is in the ſame miſchiefe.

The king ſhall not be received, for he cannot become tenant, nor be *in loco tenentis.* 4 E. 3. 38. 25 E. 3. 47.

[c] It is not neceſſary, that he that prayeth to be received hath the immediate reverſion; for if a leaſe for life be made, the remainder for life, he in the reverſion ſhall be received; ſo it is where the reverſion is graunted for life, he in the reverſion in fee may be received: but if he that hath the meane eſtate, and he in the reverſion or remainder in fee pray to be received at one time, he that hath the immediate particular eſtate, in reſpect of the proximity ſhall be received, but if he be received and make default, he in the reverſion in fee ſhall not be received.

(16) *Fecerit defaltam vel reddere voluerit.*] [d] *Feynt pleder* was not (as hath been ſaid) within this act, but is remedied by a later ſtatute, in caſe of him in reverſion.

[e] But a *nient dedire*, and a *nihil dicit* are (as hath been ſaid) within the purview of this act, both for him in the reverſion, and the wife alſo, for they are in equall miſchiefe.

If

* 2 E. 2. receit 147. 20 E. 3. receit 17. 8 E. 3. 3. 45 E. 3. 19. 23 H. 6. receit 156. 5 E. 3. 61. 6 E. 3. 14. 15 E. 3. receit 124. 5 H. 5. 11. 11 E. 3. receit 117. 10 H. 6. 24. 28 E. 3. 98. 33 H. 6. 52. 41 E. 3. 8. 22 H. 6. 1. 19 H. 6. 46. 40 E. 3. 12. 4 E. 2. receit 160. 18 E. 3. 13. 23 E. 3. tit. receit 156. 4 E. 4. 14. 18 E. 4. 25, 27. 5 H. 4. 2. 32 H. 6. 12. 7 E. 3. 15. 18 E. 3. 13, 47. 16 H. 7. 5.

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[b] 32 E. 1. receit 185. 9 E. 4. 40. 10 E. 4. 9. 13 E. 3. receit 17 E. 2. ib. 175. 24 E. 3. 33. 35. 4 E. 2. receit 160. 13 E. 3. ib. 145. 19 E. 3. ib. 111. 14 E. 3. mians. des faits 6. 29 E. 3. 48. Rot. Parliam. 29 E. 3. nu. 11 H. 4. 15. 4 E. 3. 38. 25 E. 3. 47. [c] 11 E. 3. receit 118. 4 E. 3. ib. 160. 18 E. 2. ib. 174. 18 E. 3. 12. 42 E. 3. 10. b. 24 E. 3. 32. Lib. 10. fol. 44. Jenings caſe. [d] 13 R. 2. c. 17. 6 E. 3. 16. 4 E. receit 4. 22 E. 3. 10. 1 H. 6. 4. 2 H. 6. 14. 20 E. 3. receit 18, 19. [e] 4 E. 3. receit 46. 19 E. 2. ib. 184. 158. 6 E. 2. ib. 168. 14 E. 3 ib 136. 19 E. ib. 114. F.N.B. 155 i.

If the appearance of the tenant be recorded, and after he depart in deſpight of the court, he in the reverſion ſhall be received, for judgement is to be given upon the default.

(17) *Ad reſponſionem.*] [f] That is, when the time come when by law he ought to anſwer, and therefore he ſhall have his age, or pray in aide, &c.

[g] *Vide ſtatut. de anno* 20 E. 1. where he that prayeth to be received, before his receit ſhall finde ſurety, &c. and the ſtatute of 13 R. 2. cap. 17. to that purpoſe, but thoſe ſtatutes extend not to a feme, that is to be received in default of her huſband, becauſe ſhe is party to the writ, but to him in the reverſion or remainder, that is a ſtranger to the writ, *et venit a latere.*

(18) [h] *Poſt mortem hujuſmodi tenentium recuperare per breve de gryſa,* &c.] This is underſtood of a writ of entry *ad communem legem*, which is a ſpeedier remedy, then a writ of right, and the demandant ſhall count upon a demiſe according to the writ and uſuall forme, and if the tenant traverſe the demiſe, the demandant ſhall maintain his count by the recovery by default.

(19) *Et ſic in caſibus prædictis duæ concurrunt actiones.*] For in theſe caſes the tenant ſhall ſhew his right according to the forme of the writ, whereupon he recovered, even as the tenant ſhall doe in the *cui in vita*, upon the former part of this act, and therefore this branch ſaith, *Duæ concurrunt actiones, viz.* the writ of entry upon this action, and the former writ, whereupon the recovery was by default.

[f] 19 E. 3. receit 1. 5 E. 2. ib. 163.

[g] 9 H. 5. 10. 48 E. 3. 13. 29 E. 3. 48. 34 E. 3. receit 190. 11 E. 3. ib. 117. 19 E. 3. ib. 112. 6 R. 2. ibid. 94.

[h] Vet. N.B. 136. Regiſt. 235.

Regiſt. ubi ſupra.

CAP. IV. [347]

IN caſu quando vir implacitatus (1) *de tenemento reddit tenementum peritum adverſario ſuo de plano, poſt mortem viri, juſticiarii adjudicent mulieri dotem ſuam, ſi per breve petat. Sed in caſu quando vir amittet per defaltam tenementum petitum, ſi mulier poſt mortem viri petat dotem, et compertum eſt, quod per aliquos juſticiarios adjudicata fuit dos mulieri petenti, non obſtante defalta, quam vir ſuus fecit, aliis juſticiariis in contraria opinione exiſtentibus, et contrarium judicantibus, ut de cætero hujuſmodi ambiguitas amputetur, et ſit in certo: ordinatum eſt quod in utroque caſu audiatur mulier, quæ dotem petit. Et ſi excipiatur contra ipſam, quod vir ſuus tenementum, unde dos petita eſt, amiſit per judicium, per quod dotem habere non debet, et ſi quæratur per quod judicium,*

IN caſe where the huſband, being impleaded for land, giveth up the land demanded unto his adverſary by covin; after the death of the huſband, the juſtices ſhall award the wife her dower, if it be demanded by writ. But in caſe where the huſband loſeth the land in demand by default, if the wife, after the death of her huſband, demandeth her dower, it hath been proved, that ſome juſtices have awarded unto the woman her dower notwithſtanding the default which her huſband made, other juſtices being of the contrary opinion, and judging otherwiſe. To the intent that from henceforth ſuch ambiguity ſhall be taken away, it is thus ordained in certain, that in both caſes the woman demanding her dower ſhall be heard. And if it be alledged againſt her, that

dicium, et compertum fuerit quod per defaltam, ad quod tenens neceſſe habet reſpondere, tunc oportet tenentem ulterius reſpondere, et oſtendere quod ipſe tenens jus habuit, et habet in prædicto tenemento, ſecundum formam brevis, quod tenens prius ſuper virum impetravit. Et ſi oſtendere poterit, quod vir mulieris non habet jus in tenement', nec aliquis alius quam ipſe qui tenet: recedat quietus, et uxor nihil capiat de dote. Quod ſi oſtendere non poterit, recuperet mulier dotem ſuam. Et ſic in caſibus iſtis, et in quibuſdam caſibus ſubſequent'. s. quando uxor dotata amittat dotem (3) *ſuam per defaltam* (4), *et tenentes in libero maritagio per legem Angliæ, vel ad terminum vitæ, vel per feodum talliatum, concurrunt plures actiones* (2). *Quia hujuſmodi tenentes, cum oporteat eos petere tenementa ſua per defaltam amiſſa* (9), *et cum ad hoc pervent' fuerit, quod tenens neceſſe habeat* (6) *oſtendere jus ſuum, non poſſunt ipſi, ſine his* (7) *ad quos ſpectat reverſio, de jure reſpondere: et ideo conzedatur eis, quod vocent ad warrant' ſecundum tenorem brevis, ac ſi eſſent tenentes in priori brevi* (8) *warrant' habeant* (5). *Et cum warrantus warrantizaverit, procedat placit' inter illum qui ſeiſitus eſt et warrantum, ſecundum tenorem brevis, quod tenens prius impetravit, et per quod recu-*

[348] *paverit per defaltam. Et ſi ex pluribus actionibus ad ultimum perveniat ad unum judicium, videlicet ad hoc quod hujuſmodi petentes recuperent petitionem ſuam, vel quod tenentes eant quieti. Et ſi actio hujuſmodi tenentis, qui neceſſe habet oſtendere jus ſuum, nota fuerit per breve de recto, licet magna aſſiſa, vel duellum jungi non poſſunt per verba conſueta, jungi tamen poſſunt per verba ſatis apta. Quia cum tenens in hoc quod oſtendat jus ſuum, quod ei competet per breve quod prius impetravit et ſit loco actoris, benè poterit*

that her huſband loſt the land, whereof the dower is demanded by judgement, whereby ſhe ought not to have dower, and then it be enquired by what judgement, and it be found that it was by default, whereunto the tenant muſt anſwer; then it behoveth the tenant to anſwer further, and to ſhew that he had right, and hath in the foreſaid land, according to the form of the writ that the tenant before purchaſed againſt the huſband. And if he can ſhew that the huſband of ſuch wife had no right in the lands, nor any other but he that holdeth them, the tenant ſhall go quit, and the wife ſhall recover nothing of her dower; which thing if he cannot ſhew, the wife ſhall recover her dower. And ſo in theſe caſes, and in certain other following, that is to ſay, when the wife being endowed loſeth her dower by default, and tenants in fee marriage, by the law of England, or for term of life, or in feetail, divers actions do concur for ſuch tenants, when they muſt demand their land, loſt by default: and when it is come to that point, that the tenants muſt be compelled to ſhew their right, they cannot make anſwer without them to whom the reverſion of right belongeth; therefore it is granted unto them to vouch to warranty, as if they were tenants, if they have a warranty. And when the warrantor hath warranted, the plea ſhall paſs between him that is ſeiſed and the warrantor, according to the tenor of the writ that the tenant purchaſed before, and by which he recovered by default; and ſo from many actions at length they ſhall reſort to one judgement, which is this, that the demandants ſhall recover their demand, or the tenants ſhall go quit. And if the action of ſuch a tenant, which is compelled to ſhew his right, be moved by a writ of right, though that the great aſſiſe or battail cannot be joyned

terit warrant' defendere jus tenentis, qui loco petentis (ut dictum eſt) habet, et ſeiſinam anteceſſoris ſui offerre et defendere per corpus liberi hominis ſui, vel ponere ſe in magnam aſſiſam, et petere inde recognitionem fieri, utrum ipſe majus jus habeat in tenemento petito, an prædictus talis: vel alio modo jungi poterit magna aſſiſa, et ſic talis warrantus defend' jus, &c. Et cognoſcit ſciſinam anteceſſoris ſui et ponit ſe in magnam aſſiſam, &c. et petit recognitionem fieri, utrum ipſe majus jus habeat in prædicto tenemento, ut in illo de quo feoffavit talem, vel quod talis remiſit, et quietum clamavit, &c. an prædictus talis, &c. Cum aliquando contingat (10), *quod mulier non habens jus petendi dotem hæreditatis hæredis alicujus infra ætatem exiſten', impetret breve de dote ſuper cuſtodem, et cuſtos per favorem mulieri dotem reddiderit, vel defaltam fecerit, vel placitum ita fictum per colluſionem defenderit, per quod dos hujuſmodi mulieri (in præjudicium hæredis) adjudicata fuerit: proviſum eſt quod hæres, cum ad ætatem pervenerit, habeat actionem petendi ſeiſinam anteceſſoris ſui verſus hujuſmodi mulierem, qualem haberet verſus quemcunque alium deforciatorem, ita tamen quod ſalva ſit mulieri verſus petentem exceptio oſtendendi, quod jus habet in dote ſua, quod ſi oſtendere poterit, recedat quieta, et dotem ſuam retineat, et ſit hæres in miſericordia, et amercietur graviter ſecundum diſcretionem juſticiariorum. Sin autem recuperet hæres petitionem ſuam. Eodem modo ſubveniatur mulieri, ſi hæres vel alius eam implacitaverit de dote ſua, ſi dotem ſuam per defaltam amiſerit. In quo caſu ſua defalta non ſit ei ita præjudicialis, quin dotem ſuam (ſi jus habeat) recuperare poſſit, et fiat ei tale breve:*

joyned by the words accuſtomed, yet it ſhall be joyned by words convenient; for when the tenant, in that he ſheweth his right which belongeth to him by the writ that he before purchaſed, inſtead of a demandant, the warrantor may well defend the right of the tenant, which is accounted in place of the demandant, as before is ſaid, and offer to defend the ſeiſin of his anceſtors by the body of his freeman, or put himſelf in the great aſſiſe, and pray recognizance to be made, whether he hath more right to the land in demand, or elſe the party before named. Or otherwiſe the great aſſiſe may be joyned thus, *talis defendit jus, &c.* and ſo the warrantor may defend the right, and knowledge the ſeiſin of his anceſtor, and put himſelf in the great aſſiſe, &c. and pray recognizance to be made, whether he hath more right in the foreſaid land, as in that whereof he infeoffed ſuch a man, or that ſuch a one releaſed and quit claimed, &c. or elſe the foreſaid party, &c. And where ſometime it chanceth that a woman not having right to demand dower, the heir being within age, doth purchaſe a writ of dower againſt a guardian, and the guardian endoweth the woman by favour, or maketh default, or by colluſion defendeth the plea ſo faintly, whereby the woman is awarded her dower in prejudice of the heir; it is provided, that the heir, when he cometh to full age, ſhall have an action to demand the ſeiſin of his anceſtor againſt ſuch a woman, like as he ſhould have againſt any other deforceor; yet ſo, that the woman ſhall have her exception ſaved againſt the demandant, to ſhew that ſhe had right to her dower, which if ſhe can ſhew, ſhe ſhall go quit and retain her dower, and the heir ſhall be grievouſly amerced, according to the diſcretion of the juſtices; and if

if not, the heir ſhall recover his demand, &c. In like manner the woman ſhall be aided, if the heir or any other do implead her for her dower, or if ſhe loſe her dower by default, in which caſe the default ſhall not be ſo prejudicial to her, but that ſhe ſhall recover her dower, if ſhe have right thereto, and ſhe ſhall have this writ:

Præcipe A. quod juſte * (11), *&c. reddat tali, quæ fuit uxor talis tantam terram cum pertinentiis in C. quam clamat eſſe rationabilem dotem ſuam, vel de rationabili dote ſua, et quam prædictus talis ei deforceat.*

Et ad iſtud breve habeat tenens exceptionem ſuam, ad oſtendendum, quod mulier jus non habet in dote (12). *Quod ſi verificare poterit, recedat quietus, alioquin recuperet mulier tenementum, quod prius tenuit in dote. Et cum temporibus retroactis aliquis amiſiſſet terram ſuam per defaltam, non habuit aliud recuperare quam per breve de recto, quod eis competere non potuit, qui de mero jure loqui non potuerunt, veluti tenentes ad terminum vitæ, vel per liberum maritagium, vel per feodum talliatum, in quibus caſibus ſalvatur reverſio* (13). *Proviſum eſt quod de cætero non ſit eorum defalta eis ita præjudicialis, quin ſtatum ſuum (ſi jus habeant) recuperare poſſint per aliud breve quam per breve de recto. De maritagio amiſſo per defaltam fiat tale breve:*

And to this writ the tenant ſhall have his exception, to ſhew that ſhe had no right to be endowed; which if he can verify, he ſhall go quit; if not, the woman ſhall recover the land whereof ſhe was endowed before. And whereas before time, if a man had loſt his land by default, he had none other recovery than by a writ of right, which was not maintainable by any that could not claim of meer right, as tenants for term of life, in free marriage, or in tail, in which eſtates a reverſion is reſerved; it is provided, that from henceforth their default ſhall not be ſo prejudicial, but that they may recover their eſtate by another writ than by a writ of right, if they have right. For land in free marriage, loſt by default, ſuch a writ ſhall be made:

Præcipe A. quod juſtè (11), *&c. reddat B. manerium de C. cum pertinentiis, quod clamat eſſe jus et maritagium ſuum, et quod prædictus A. ei deforceat.*

Eodem modo de tenemento ad terminum vitæ per defaltam amiſſo, fiat tale breve:

Likewiſe of land for term of life, loſt by default, this writ ſhall be made:

Præcipe A. quod juſte, &c. reddat B. manerium de C. cum pertinentiis, quod clamat tenere ad terminum vitæ ſuæ, et quod prædictus A. ei deforceat.

Similiter,

Similiter,

Quod clamat tenere ſibi et hæredibus ſuis de corpore ſuo legitimè procreatis, et quod prædictus A. ei deforceat, &c.

(14 H. 4. f. 31. 50 Ed. 3. f. 7. Fitz. Dower, 80. 140. 173. Fitz. Voucher, 46 59. 159. 167. 166. 261. 275, 276. 300. 11 Rep. 62. Hob. 299. 6 Rep. 8. 1. Inſt. 131. b. 354. b. 355. a. 355. b. Fitz. Quid ei deforceat, 1, 2, 3, 4, 5, 6. 8, 9, 10, 11, 12, 13. 17. Cro. Car. 445. F.N.B. 155 b. Reg. 171. b. 230. Raſt. 491.)

(1) *In caſu quando vir implacitatus*, &c.] It appeareth by the preamble of this ſtatute, that if a recovery had been in a reall action againſt the huſband, and the huſband did render the land to the demandant, that notwithſtanding this recovery, the wife ſhould recover her dower. But if the huſband had loſt by default, it was a queſtion and a doubt, whether in that caſe ſhe ſhould recover or no; and ſome judges would give judgement for the woman, and ſome were in a contrary opinion. Here is to be noted, that a recovery by reddition of the huſband, is not of ſo great account in law as a recovery againſt the huſband by default: but therein before this act this diverſity was holden for law, that if in a writ of dower the tenant did plead the recovery in barre, the demandant might reply, *Que ceo fuit per fraud, ou per colluſion, ou per gree le baron*, as Britton ſaith, who wrote before this ſtatute; but if it were by default without covin, then the greater opinion was, it barred the ſame.

Brit. c. 109. fol. 261. Fleta, lib. 5. cap. 22.

But the reddition of the huſband was holden for clear law, as it was adjudged the yeer before the making of this act, for that the wife was ready to maintain the title of her huſband.

12 E. 1. dower 173. 49 E. 3 25. 12 H. 4 21.

All this is to be underſtood, where he that recovereth hath no right, for where he that recovered either by reddition or default had right, there neither the common law, nor this ſtatute extended thereunto.

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36 H. 6. Parker de recovery 57.

If the recovery he had by verdict, the feme ſhall not falſifie in the point tryed, but ſhe may ſay, that he might have pleaded a better plea, or confeſſe and avoid the recovery.

47 E. 3. 13. 50 E. 3. 7. 36 H 6. ubi ſup. 14 H. 4. 32.

(2) *Quando uxor dotata amittat dotem ſuam per * defaltam, et tenures in libero maritagio per legem Angliæ, vel ad terminum vitæ, vel per ſcodum talliat', concurrunt plures actiones, &c.*] By this act the writ of *quod ei deforceat* is given; at the common law there lay no writ of *quod ei deforceat*, but by cuſtome there did, as in Wales.

4 E. 3. 52. 53. * Cuſtumier de Norm. cap. 23. fol. 56.

If tenant in dower, tenant by the courteſie, or tenant for life had loſt by default, they were without remedy, becauſe they could not have a writ of right. Another miſchief was, that ſeeing by the firſt chapter of this parliament it did alter the eſtate of tenant in frank-mariage, and tenant to them and the heirs of their bodies, &c. from a fee-ſimple to an eſtate tail, whereupon a reverſion in point of ſtate was in the donor expectant; by reaſon whereof, if a recovery by default had been againſt tenant in frank-mariage, or other tenant in tail, they had been alſo without remedy, becauſe their eſtate being ſo changed, they could not have a writ of right no more then the other tenants for life here recited could have; therefore by this act a *quod ei deforceat* is given to them all, whereby it appeareth, that (as hath been ſaid) the makers of the act intended a change of the eſtate tail, and providently made proviſion for tenant in tail by this act.

2 E. 4. 13. 33 H 6. 46. 4 H 7. 2. Lib. 5. fo. 85. li. 3. fo. .

See the firſt part of the Inſtitutes, 481, 482. 673. 675.

4 E. 3. 38. 5 E. 3. 4. 8 33 E. 3. Avowry 255. 29 E. 3 47. 41 E. 3. 30. 2 E. 4. 13. F N.B. 156. a. c.

It is agreed, that if a recovery by default be had againſt the huſband and wife, tenants in frank-mariage, or tenants for term of their lives, that they ſhall have a *quod ei deforceat* upon this act; but it is holden in ſome books, that if the huſband and the wife be ſeiſed, as in the right of the wife, for term of her life, and a recovery be had againſt them by default, that they ſhall not have a *quod ei deforceat* for three reaſons:

1. That the huſband is not within the words of the ſtatute, for he is not tenant for life, but ſeiſed in the right of his wife, who is tenant for life.

2. That the huſband may diſpoſe of his wives eſtate, and alien the ſame during his life.

3. Proviſion is made by the next precedent chapter, that the wife in this caſe may have a *cui in vita* after the deceaſe of her huſband.

But I take it that in this caſe, if the recovery be had meerly by default without the agreement of the huſband, that the huſband and wife may have a *quod ei deforceat* by this act; for as to the firſt reaſon, though the huſband be ſeiſed but in the right of his wife, yet the wife is tenant for life, and the huſband is named but for conformity.

And if a leaſe be made to a feme ſole, and ſhe taketh huſband, and a recovery be had by default againſt them, they ſhall have a *quod ei deforceat* by this act.

As to the ſecond reaſon, the ſame may be ſaid, when the huſband and wife are donees in frank-mariage, or joyntenants for life; for in theſe caſes the huſband may diſpoſe of the lands during his life.

And as to the laſt reaſon, this ſtatute intended to give to the tenants for life a preſent remedy to relieve themſelves, as in this caſe the huſband and wife may during the life of the huſband; for it is agreed, that after the death of the huſband the wife ſhall have a *quod ei deforceat*.

But if the recovery be had by the agreement of the huſband, then he can never bring a *quod ei deforceat*.

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10 E. 4. 2.

(3) *Amittat dotem*, &c.] This ſtatute doth alſo extend to courts that be not of record, as the court baron, as in a writ of right in a court baron, &c.

See the firſt part of the Inſtitutes, ſect. 674, 675. 46 E. 3. 21. a 46 E. 3. 21. F.N.B. 155 h. b 14 H. 7 5. b. F.N.B. 155. f. 5 H. 7. Quod ei deforc' 9. c 15 E. .. Quod ei deforc' 9. F.N.B. 155. i. Patch. 33 Eliz. Rot. 1125. in Banco Elimers cate. d 33 E. 3. Quod ei deforc' 17. F.N.B. 155. c. 49 E. 3. 8. 2 H. 4. 2. 21 H. 6. 56. 5 E. 4. 16.

(4) *Per defaltam.*] If A. and B. be ſeiſed of lands, and to the heires of A. a recovery is had againſt them by default, A. ſhall have a writ of right of his moity, and B. a *quod ei deforceat* upon this ſtatute, and when they recover they ſhall be joyntenants again.

[a] Two coparceners in taile loſe by default, they ſhall joyne in a *quod ei deforceat*, yet the default of the one is not the default of the other: [b] but if tenant in taile loſe by default, &c. and die, the iſſue in taile ſhall not have a *quod ei deforceat* but a formedon in the deſcender.

[c] A departure in deſpight of the court (unleſſe it be in a writ of right after the miſe joyned) is holden to be within this act, for he makes default in that caſe when he is demaunded; but upon a *nihil dicit*, no *quod ei deforceat* doth lie.

[d] A tenant for term of life makes default in a *præcipe*, whereupon he in the reverſion is received and plead to iſſue, and it is found againſt the tenant by receit, and judgement is given for the demandant,

demandant, the tenant ſhall have a *quod ei deforceat*, for albeit there is a verdict given, yet the judgement is given upon the default.

But in an aſſiſe, and in an action of waſte, although the tenant make default, yet there is a verdict given, and upon that verdict the judgement is given in both caſes, and therefore there no *quod ei deforceat* doth lie within this act.

A woman brings a writ of dower againſt tenant for life, and recover by default, the tenant brings a *quod ei deforceat*, and recover by default, the tenant in dower ſhall have a *quod ei deforceat* by this ſtatute: and ſo note a *quod ei deforceat* upon a *quod ei deforceat*. 13 E. 1. vowcher 286.

If the tenant for life in a *præcipe* vowch, and the vowchee will not appeare, by reaſon whereof the tenant loſeth by default, he ſhall have a *quod ei deforceat* by this act, albeit the judgement is not given for the proper default of the tenant, for this ſtatute ſaith, *per defaltum* generally, and not *per defaltam ſuam*. F.N.B. 156. b.

(5) *Cum ad hoc perventum fuerit, quod tenens neceſſe habet oſtendere jus ſuum, non poſſunt ipſi ſine hiis ad quod ſpectat reverſio de jure reſpondere: et ideo concedatur eis quod vocent ad warrant' ſecundum tenorem brevis ac ſi eſſent tenentes in priori brevi, warrant' habeant.*] For the better underſtanding whereof the forme and order of the entry of the record and pleading (a window which letteth in light to many caſes) is herein to be known, which is, that in the *quod ei deforceat*, the demandant count that he or ſhe was ſeiſed of the land for terme of life, or in taile, without ſhewing of whoſe leaſe or gift, for that the action is brought of his owne poſſeſſion, and alledgeth the eſples in himſelfe, and that the defendant hath deforced him without making of any mention of the record. And then the tenant may defend the right of the demandant, &c. and either ſhew how he recovered againſt the demandant by formedon or other reall action, and in the purcloſe of his plea ſhall ſay, that *ipſe paratus eſt ad manutenendum jus et titulum ſuum prædict' per donum prædict', &c. unde petit judicium*, whereby the defendant in the *quod ei deforceat* is become actor, and in effect reviveth the former action, and the demandant in the *quod ei deforceat* is become in manner of a tenant to the former action, and may vowch as if he were tenant to the former action, becauſe if he hath but an eſtate for life, it is not ſafe for him to pleade in chiefe, but to vowch him in the reverſion, therefore he can vowch no other, but him in the reverſion; or if the defendant notwithſtanding upon the title of the former recovery plead ſome other barre, then the demandant in the *quod ei deforceat* ſhall not vowch at all, becauſe the former action is not revived. And if the defendant plead the former recovery, the demandant may traverſe the title, or plead any thing in barre of the title. 29 E. 3. 47. 10 E. 4. 2. F.N.B. 156. d. 9 E. 3. 22. 41 E. 3. 30. 48 E. 3. 8. 2 E. 4. 11.

(6) *Quod tenens neceſſe habet.*] It is not of neceſſity that the defendant in the writ of *quod ei deforceat*, doe plead the former recovery, but (as hath been ſaid) he may plead any other barre.

(7) *Non poſſunt ipſi ſine hiis*, &c.] By theſe words the demandant in the *quod ei deforceat* after the recovery pleaded cannot vowch any other but him in the reverſion. 9 E. 3. 22. 33 E. 3. Count Pl. de vowch. 101. 33 H. 6. 46. Lib. 11. fol. 62. D. Foſters caſe.

(8) *Concedatur iis quod vocent ad warrantum, &c. ac ſi eſſent tenentes in priori brevi.*] Upon theſe words, two concluſions are to be obſerved.

Firſt, that albeit the demandant in the *quod ei deforceat* after the recovery pleaded cannot vowch, yet the *quod ei deforceat* may be maintenable.

Secondly, if the recovery by default be in ſuch an action where no vowcher doth lie, yet the *quod ei deforceat* is maintenable, and theſe words are to be intended, that ſuch tenant ſhall vowch which might have vowched in the firſt writ.

11 H. 7. 9. 18 b. 41 E. 3. 30. 44 E. 3. 42. 11. ubi ſup.

And therefore if the judgement by default be in a *ſcire facias* brought upon a recovery or fine, or in a writ of entry, or in the *quibus* brought againſt the diſſeiſor himſelfe, there lieth no vowcher, and yet a *quod ei deforceat* is given by this act upon ſuch a recovery by default. And where the vowchee ſhould not have his age in the former writ, hee ſhall not have his age in this writ, for this writ is of the nature of the other.

50 E. 3. 25.

10 H. 7. 10.

The tenant in a *quod ei deforceat* may vowch, &c. and ſo both tenant and demandant (as hath been ſaid) may vowch in this act, ſeeing the ſtatute doth give a vowcher, by conſequence he ſhall recover in value.

19 H. 7. 29. a. 9 E. 3. 22.

But note this act doth give but one vowcher, and therefore the vowchee ſhall not vowch over, and ſir William Herle ſaid, that they were *ſages gents queux fieront ceſt ſtatut.*

41 E. 3. 8 30. 50 E. 3. 25. F.N.B. 155. f.

(9) *Cum oportet eos petere tenementa per defaltam amiſſa.*] Hereupon it is holden, that he that loſt by default may have a *quod ei deforceat* againſt the alienee of the recoveror, becauſe the words of the ſtatute are indefinite; and unleſſe the writ did lie againſt the alienee, the demandant could not have the effect of his ſuit, *viz.* the reſtitution of the land.

See the firſt part of the Inſtitutes, ſect. 674, 675.

(10) *Cum aliquando contingat.*] By the purview of this ſtatute, if the wife having no right to be endowed, bring a writ of dower againſt the gardien in chivalry, and by favour the gardein in chivalry doe yeeld dower, or make default, or plead faintly, by means whereof the wife recovereth her dower in prejudice of the heire, the heire after he commeth to his full age ſhall have a writ of mordaunc' againſt the wife, as he might have againſt any other deforceour.

See the Statute of Marlb. c. 16.

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(11) *Præcipe A. quod juſte,* &c.] Here the forme of the writ of *quod ei deforceat* for tenant in dower is ſet down, and it is ſo called, becauſe of theſe words in the writ, *quod ei deforceat,* and ſeeing the forme of the writ is here expreſſed, the ſtatute that giveth the writ needs not to be recited, as before hath been ſaid.

See before cap. 1. Formedon.

Regiſt. 171.

Note in none of theſe writs it is ſaid *injuſte deforceat* (as commonly in writs it is) becauſe this act giveth the forme, and *injuſte* is not in the ſtatute.

(12) *Quod mulier jus non habet in dote.*] Note, this is a good barre in a *quod ei deforceat.*

(13) *Non habuit aliquod recuperare quam per breve de recto, quod eis competere non potuit qui de mero jure competere non potuerunt veluti tenentes ad terminum vitæ vel liberum maritagium, vel per feodum talliatum, in quibus caſibus ſalvatur reverſio.*] Upon theſe words foure things are to be obſerved,

1. Firſt, that none ſhall have a writ of right, but he that hath a fee-ſimple, here called *merum jus.*

2. That tenants in taile cannot have a writ of right.

3. This

3. This is an expoſition of the firſt chapter of this parliament, that thereby the eſtate taile is of an eſtate in fee-ſimple become a divided and particular eſtate, whereupon the reverſion in fee is expectant.

4. Fourthly, albeit tenant by the curteſie be not expreſſely named in theſe former writs, yet is he within the miſchiefe and purview of this ſtatute, for he is *tenens ad terminum vitæ*. Regiſt. 171. b.

CAP. V.

CUM de advocationibus eccleſiarum non ſint niſi tria brevia originalia videlicet breve de recto, et duo de poſſeſſione, ſciz ultimæ præſentationis, et quare impedit (1), *et hucuſq; uſitatum fuerit in regno, quod cum aliquis jus præſentandi non habens* (4) *præſentaverit* (3) *ad aliquam eccleſiam* (5), *cujus præſentatus ſit admiſſus* (6), *ipſe qui verus eſt patronus per nullum aliud breve recuperare potuit advocationem ſuam* (2), *quam per breve de recto* (7) *quod habet terminare per duellum, vel per magnam aſſiſam, per quod hæredes infra ætatem exiſtentes per fraudem et negligentiam cuſtodum, hæredes etiam ſive majores, ſive minores per negligentiam vel fraudem tenentium per legem Angliæ, vel mulierum tenentium in dotem, vel alio modo ad terminum vitæ, vel annorum, vel per feodum talliatum,* [354] *multotiens exhæredationem patiebantur de advocationibus illis, vel ad minus (quod eis melius fuit) ponebantur ad breve de recto, et in caſu omnino exhæredati fuerunt hucuſquè: ſtatutum eſt quod hujuſmodi præſentationes* (8) *non ſint hujuſmodi rectis hæredibus* (9), *aut illis ad quos poſt mortem aliquorum, hujuſmodi* (11) *advocationes reverti debent* (10) *ita præjudiciales, quin quotieſcunque aliquis jus non habens, tempore hujuſmodi cuſtodiarum præſentaverit, vel tempore tenentium in dote, per legem Angliæ, vel alio modo, ad terminum vitæ, vel annorum* (12), *vel per*

WHEREAS of advowſons of churches there be but three original writs, that is to ſay, one writ of right, and two of poſſeſſion, which be darrein preſentment, and quare impedit; and hitherto it hath been uſed in the realm, that when any having no right to preſent, had preſented to any church, whoſe clerk was admitted, he that was very patron could not recover his advowſon, but only by a writ of right, which ſhould be tried by battail or by great aſſiſe, whereby heirs within age, by fraud, or elſe by negligence of their wardens, and heirs both of great and mean eſtate, by negligence or fraud of tenants by the courteſie, women tenants in dower, or otherwiſe, for term of life, or for years, or in fee-tail, were many times diſherited of their advowſons, or at leaſt (which was the better for them) were driven to their writ of right, in which caſe hitherto they were utterly diſinherited; it is provided, that ſuch preſentments ſhall not be ſo prejudicial to the right heirs, or to them unto whom ſuch advowſons ought to revert after the death of any perſons: for as often as any, having no right, doth preſent during the time that ſuch heirs are in ward, or during the eſtates of tenants in dower, by the courteſie, or otherwiſe for term of life, or of years, or in tail; at the next avoidance, when the heir is come to full age, or when after the death of the tenants before named the advow-

per feodum talliatum (13), *in proxima vacatione, postquam hæres ad ætatem pervenerit* (14), *vel advocatio post mortem tenentium in forma prædicta ad hæredem plenæ ætatis existentem revertetur, habeat eandem actionem et recuperationem per breve de advocatione possessorium* (15), *qualem haberet ultimus antecessor* (16) *hujusmodi hæredis plenam habens ætatem, in ultima vacatione tempor' suo accidente ante mortem suam, vel antequam dimissio facta fuerit ad terminum vel ad feodum talliatum* (17), *ut prædictum est. Hoc idem observetur de præsentationibus factis ad ecclesias de hæreditate uxorum* (18), *tempore quo fuerunt sub potestate virorum suorum, quibus per istud statutum subveniatur, per remedium suprædictum. Viris etiam religiosis* (19), *episcopis, archidiaconis, rectoribus ecclesiarum, et aliis personis ecclesiasticis per istud idem statutum subveniatur: si aliquis jus præsentandi non habens præsentaverit ad ecclesias domus sive prælatiæ, dignitati aut personatui spectantes, tempore quo vacaverint prælatiæ, dignitates, aut personatus hujusmodi. Nec tamen ita large intelligatur istud statutum, quod personæ, ad quorum remedium statutum istud est editum, habeant recuperare suprad.ctum, dicentes quod custodes, tenentes in dotem, per legem Angliæ, vel alias ad terminum vitæ, vel annorum, vel viri facte defenderint* (20) *placitum per ipsos, vel contra ipsos motum, quia judicia in curia regis reddita* (21) *per istud statutum non adnihilentur, sed stet judicium in suo robore, quousque per judicium curiæ regis tanquam erroneum (si error inveniatur) adnulletur, vel*

[355] *assa ultimæ præsentationis, vel inquisitio per quare impedit si transierit per attinctam, vel per certificationem adnulletur, quæ gratis concedatur. Et de cætero una forma placitandi in brevibus ultimæ præsentationis, et quare impedit, inter justiciarios observetur, quoad hoc, quod si pars*

son shall revert unto the heir being of full age, he shall have such action by writ of advowson possessorie, as the last ancestor of such an heir should have had at the last avoidance happening in his time; being of full age before his death, or before the demise was made for term of life, or in feetail, as before is said. The same shall be observed in presentments made unto churches, being of the inheritance of wives, what time they shall be under the power of their husbands, which must be aided by this estatute by the remedy aforesaid. Also religious men, as bishops, archdeacons, parsons of churches, and other spiritual men, shall be aided by this estatute, in case any having no right to present do present unto churches belonging to prelacies, spiritual dignities, parsonages, or to houses of religion, what time such houses, prelacies, spiritual dignities, or parsonages be vacant. Neither shall this act be so largely understanden, that such persons, for whose remedy this statute was ordained, shall have the recovery aforesaid, surmising that guardians of heirs, tenants in tail, by the courtesie, tenants in dower, for term of life, or for years, or husbands, faintly have defended pleas moved by them, or against them; because the judgements given in the king's courts shall not be adnulled by this statute, the judgement shall stand in his force, until it be reversed in the court of the king as erroneous, if errour be found; or by assise of *darrein presentment*, or by enquest by a writ of *quare impedit*, if it be passed, or be adnulled by attaint, or certification, which shall be freely granted. And from henceforth one form of pleading shall be observed among justices in writs of darrein presentment and quare impedit, in this respect, if the defendant alledgeth plenarty of the church of his own presentation, the plea shall not fail by reason

ſi pars rea excipiat de plenitudine eccleſiæ per ſuam propriam præſentationem, non propter illam plenitudinem remaneat loquela, dummodo breve (22) *infra tempus ſemeſtre* (23) *impetretur, quanquam infra tempus ſemeſtre præſentationem ſuam recuperare non poſſit. Et cum aliquando inter plures clamantes advocationem alicujus eccleſiæ pax fuerit formata inter partes, et irrotulata coram juſticiariis in rotulo, vel in fine ſub hac forma, quod unus primo præſentet* (24), *et in ſequente vacatione alius, et in tertia tertius, et ſic de pluribus, ſi plures ſint. Et cum unus præſentaverit, et habuerit ſuam præſentationem, quam habere debet per formam conventionis illius, et in proxima vacatione impediatur ille ad quem ſpectat ſequens præſentatio per aliquem qui fuit pars illius conventionis, vel loco ejus: ſtatutum eſt quod de cætero non habeat hujuſmodi impeditus neceſſe perquirere breve de quare impedit, ſed habeat recurſum ad rotulum, vel ad finem. Et ſi in rotulo, vel in fine comperta fuerit prædict' pax, vel conventio, mandetur vicecomiti, quod ſcire faciat parti impedienti, quod ſit ad aliquem brevem diem continentem ſpacium xv. dierum, vel trium ſeptimanarum, ſecundum quod locus eſt propinquus vel remotus oſtenſ. (ſi quid ſciat dicere) quare ſic impeditus talem præſentationem ſuam habere non debeat. Et ſi non venerit, vel forte venerit, et nihil ſciat dicere, quare ſic impeditus præſentationem ſuam habere non debeat, ratione alicujus facti poſt pacem factam, vel irrotulatam, vel chirographatam, recuperet præſentationem ſuam cum dammis ſuis. Et cum contingat quod poſt mortem anteceſſoris ſui, qui ad aliquam eccleſiam præſentavit perſonam, aſſignata fuerit illa advocatio in dotem alicujus mulieris, vel tenenti per legem Angliæ, et tenentes in dotem, vel tenentes per legem Angliæ præſentaverint, et verus hæres poſt mortem hujuſmodi tenentium per legem Angliæ, vel in dotem, impediatur præſentare,*

ſon of the plenarty; ſo that the writ be purchaſed within ſix months, though he cannot recover his preſentation within the ſix months. And ſometimes when an agreement is made between many claiming one advowſon, and inrolled before the juſtices in the roll, or by fine, in this form, that one ſhall preſent the firſt time, and at the next avoidance another, and the third time another; and ſo of many, in caſe there be many. And when one hath preſented, and had his preſentation, which he ought to have according to the form of their agreement and fine, and at the next avoidance he to whom the ſecond preſentation belongeth, is diſturbed by any that was party to the ſaid fine, or by ſome other in his ſtead; it is provided, that from henceforth they that be ſo diſturbed ſhall have no need to ſue a quare impedit, but ſhall reſort to the roll or fine; and if the ſaid concord or agreement be found in the roll or fine, then the ſheriff ſhall be commanded, that he give knowledge unto the diſturber, that he be ready at ſome ſhort day, containing the ſpace of fifteen days, or three weeks (as the place happeneth to be near or far) for to ſhew if he can alledge any thing, wherefore the party that is diſturbed ought not to preſent: and if he come not, or peradventure doth come, and can alledge nothing to bar the party of his preſentation, by reaſon of any deed made or written ſince the fine was made or inrolled, he ſhall recover his preſentation with his damages. And where it chanceth that after the death of the anceſtor of him that preſented his clerk unto a church, the ſame advowſon is aſſigned in dower to any woman, or to tenant by the curteſie, which do preſent, and after the death of ſuch tenants the very heir is diſturbed to preſent when the church is void, it is provided, that from henceforth

*ſentare, cum eccleſia vacaverit: proviſum eſt, quod de cætero ſit in electione impediti, utrum * perquirere velit per breve de quare impedit, vel ultimæ præſentationis (25). Hoc etiam de cætero obſervetur de advocationibus dimiſſis ad terminum vitæ, vel annorum, vel ad feodum talliatum. Et de cætero in brevibus ultimæ præſentationis, et quare impedit adjudicentur dampna, videlicet, ſi tempus ſemeſtre tranſierit per impedimentum alicujus, ita quod epiſcopus eccleſiam conferat (28), et verus patronus ea vice præſentationem ſuam amittat, adjudicentur dampna (26) ad valorem eccleſiæ (29) de duobus annis. Et ſi tempus ſemeſtre (27) non tranſierit, ſed diſrationetur præſentatio infra tempus prædictum, tunc adjudicentur damna ad valorem mediætatis eccleſiæ per unum annum. Et ſi impeditor (30) nihil habeat, unde reſtituere poſſit damna, in caſu quando epiſcopus confert eccleſiæ per lapſum temporis, puniatur per priſonam duorum annorum. Et ſi advocatio diſrationetur infra tempus ſemeſtre, puniatur tamen impeditor per priſonam dimidii anni. Et de cætero concedantur brevia de capellis, præbendis, vicariis, hoſpitalibus, abbatiis, prioratibus, et aliis domibus quæ ſunt de advocationibus aliorum, quæ prius concedi non conſueverunt (31). Et cum per breve (32) indicavit (33), impeditur rector alicujus eccleſiæ, ad petend' decimas (34) in vicina parochia, habeat patronus rectori ſic impedit' breve ad petendum advocationem decimarum petitarum. Et cum diſrationatum fuerit, procedat poſtmodum placitum in curia chriſtianitatis, quatenus diſrationatum fuerit in curia regis (33). Cum advocatio deſcendat participibus, licet unus bis præſentet, et uſurpet ſuper cohæredem, non propter hoc excluſus ſit ille in toto qui fuit negligens, ſed alias habeat turnum ſuum præſentandi, cum acciderit (35).*

forth it ſhall be in the election of the party diſturbed, whether he will ſue a writ of quare impedit, or of darrein preſentment. The ſame ſhall be obſerved in advowſons demiſed for term of life, or years, or in fee-tail. And from henceforth in writs of quare impedit and darrein preſentment, damages ſhall be awarded, that is to wit, if the time of ſix months paſs by the diſturbance of any, ſo that the biſhop do confer to the church, and the very patron loſeth his preſentation for that time, damages ſhall be awarded for two years value of the church. And if the ſix months be not paſſed, but the preſentment be deraigned within the ſaid time, then damages ſhall be awarded to the half year's value of the church; and if the diſturber have not whereof he may recompenſe damages, in caſe where the biſhop conferreth by lapſe of time, he ſhall be puniſhed by two years impriſonment: and if the advowſon be deraigned within the half year, yet the diſturber ſhall be puniſhed by the impriſonment of half a year. And from henceforth writs ſhall be granted for chapels, prebends, vicarages, hoſpitals, abbeys, priories, and other houſes which be of the advowſons of other men, that have not been uſed to be granted before. And when the parſon of any church is diſturbed to demand tythes in the next pariſh by a writ of indicavit, the patron of the parſon ſo diſturbed, ſhall have a writ to demand the advowſon of the tythes being in demand; and when it is deraigned, then ſhall the plea paſs in the court chriſtian, as far forth as it is deraigned in the king's court. When an advowſon deſcendeth unto parceners, though one preſent twice, and uſurpeth upon his coheir, yet he that was negligent ſhall not be clearly barred, but another time ſhall have his turn to preſent when it falleth.

(13 Rep. 6. 1 Roll. 151. 156, 157, 158. 211. 462. St. 7 Ann. c. 18. Raſt. 101. 144. 496. 3 Bulſt. 40. Hob. 240. Kel. 1. Fitz. Quare imp. 43. 67. 87. 92. 96. 99. 105. 127. 142. 167. 39 Ed. 3. 15. Cro.

15. Cro. El. 207. Cro. Jac. 166. 6 Rep. 61. Fitz. Quare impedit. 19. 48. 73. 96. 116. 169. Fitz. Encumbent, 1, 2. 4. Bro. Plenarty, 1, 2. 7. 11, 12. 14, 15. 16. Bro. Presentat. 46. 58. 1 Inst. 344. b. 5 Rep. 102. 13 Ed. 4 3. Dyer, 29. Fitz. Quare impedit, 7. 49. 62. 196. Fitz. Darrein present. 11. Co. pl 468. 479. Hob. 244. Fitz. Darrein present. 13. Regist. jud. 50. V. N.B. 25, 26. Cro. El. 31. 162. Hob. 242. Fitz. Damage, 4. 9. 17. 29. 38. 93. 106. Fitz. Quare impedit, 24. 45. Dyer, 135. 236. 241. Kel. 57. 6 Rep. 48. 2 Roll. 112. 24 Ed. 3. 26. Fitz. Quare impedit. 4. 16. 18 27. 30. 38. 70. 82. 129. 140. 157 183. Disturbance by Indicavit. Regist. 35. 31 H. 6. 13. Bro. Droit, 8. 7 Rep. 25. 27. 35 H. 6. 60. 38 H. 6. 9. 22 Ed. 4. 8. Fitz. Quare impedit, 1. 3. 7. 8. 20. 39, 40. 51. 58, 59. 64, 65. 69. 104. 148. 196. Hob. 238. 2 & 3 Ed. 6. c. 13.)

(1) *Cum de advocationibus ecclesiarum non sint nisi tria brevia originalia, v.z. breve de recto, et duo de possessione, scil. ultimæ præsentationis et quare impedit.*] An assise of *darrein presentment* no man can have, without alledging a presentment in his own time.

A writ of right of advowson a purchaser cannot have, without alledging a presentation in his own time, but a *quare impedit* a purchaser may have, and alledge a presentation in him, from whom he purchased the same; and to that end saith Britton was the *quare impedit* provided for remedy of such purchasers, but the *quare impedit* is more ancient than the time of E. 1. as appeareth by Glanvile.

Brit. c. 94. fol. 233. Bract. li. 4. 246, 247. Fleta, li. 5. c. 12, 13, 14, 15, 16. Glan. lib. 6. ca. 17. li. 13. cap. 20, 21.

In 8 E. 1. it appeareth *quod sunt tria brevia de advocatione placitabilia, breve de recto, quare impedit, et ultimæ præsentationis*; but yet the originall writs of dower and cessavit, &c. do lye of an advowson, and so doth the judiciall writ of *scire facias*.

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Tr. 8 E. 1 Rot. 26. Coram Rege. Bract. li. 4. fo. 246, 247. Fleta, li. 5. c. 17. 7 E. 3. 27. 43 E. 3. 15. 14 E. 2. Quare imp. 172.

(2) *Et hucusque usitatum fuerit in regno, quod cum aliquis jus præsentandi non habens præsentaverit ad aliquam ecclesiam, cujus præsentatus sit admissus, ipse qui verus est patronus, per nullum aliud breve recuperare potuit advocationem suam, quā per breve de recto.*] For these words, *advocatio, præsentatio, ecclesia, &c.* whereof they are derived, and the severall sorts of them see the first part of the Institutes.

See the first part of the Institutes, sect. 10. 180. 184. 643, 644, 645, 646, 647, 648.

(3) *Præsentaverit.*] By the order of the common law, if one had presented to a church whereunto he had no right, and the bishop had admitted and instituted his clerk, this incumbent could not be removed for divers reasons.

See li. 6. fo. 50. Boswels case.

First, for that he came into the church by a judiciall act from the bishop (who the law intended, *scrutatis archivis*, to do right) the incumbent could not be removed, neither by writ of right of advowson, nor assise of *darrein presentment*, nor *quare impedit*, onely the patron should recover his advowson in a writ of right of advowson, which by the usurpation was devested from him.

Bro. tit. Present. al eglise 46. 6 E. 3. 38, 39. See the first part of the Institutes, sect. 648.

1.

Secondly, that by the common law in every town and parish there ought to be *persona idonea*, and this appeareth by the words of the writ of *quare impedit, &c. quod permittat præsentare idoneā person', &c.* And when the bishop had admitted him able, which implyed that he was *idonea persona*, then the law had his finall intention, *viz.* that the church should be sufficiently provided for, and then the church was said to be *plena et consulta*.

2.

Regist. F.N.B. 36.

Thirdly, that the incumbent having *curam animarum* might the more effectually and peaceably intend so great charge, the common law provided, that after institution he should not be subject to any action, to be removed at the suit of any common person, without all respect of age, coverture, imprisonment or non-sane memory, and without regard of title, either by descent or purchase, or of any estate; wherein you may (as often it hath been) observe what inconveniences

3.

Bract. li. 4. fo. 244. 35 E. 1. Quare imp. 130. 1 E. 2. ibid. 41. 10 E. 2. Common 22. 6 E. 3. 52. 11 E. 3. Quare imp. 158. 39 E. 3. 24.

44 E. 3. 21.
35 H. 6. 64.

conveniences follow, when the right inſtitution of the common law is not obſerved.

Lib. 6. fol. 5. Boſwels caſe.
17 E. 3. 64. b.

By this words *præſentaverit*, it appeareth that no plenarty doth put the patron that hath title to preſent, out of poſſeſſion, but onely plenarty by preſentation; but plenarty by collation doth put him that had right to collate out of poſſeſſion.

50 E. 3. 14. b.

(4) *Pari jure et ratione jus præſentandi non habens.*] If tenant for yeers, or gardein in chivalry bring a *quare impedit*, although the defendant hath a writ to the biſhop againſt the termor or gardein, and his clerk is admitted, inſtituted and inducted, notwithſtanding the tenant of the free-hold of the advowſon is not put out of poſſeſſion. Note a diverſity between a meer uſurpation, and him that comes in by courſe of law.

(5) *Ad eccleſiam.*] This is intended of a church preſentative.

(6) *Cujus præſentatus ſit admiſſus.* Albeit that *admiſſus* in his proper ſenſe is, when the biſhop upon examination findeth him able (that is) *idonea perſona*, yet here it is taken for inſtitution; for here is implyed *ad eandem eccleſiam*, and therefore of neceſſity it muſt

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be here taken for inſtitution, and the rather, for that before inſtitution the rightfull patron is not put out of poſſeſſion. And it is to be obſerved, that by the inſtitution the church, as to all common perſons, is *plena et conſulta* as to the ſpiritualty, that is to ſay, the cure of ſouls: for when the biſhop doth inſtitute him, he ſaith, *inſtituo te ad tale beneficium, et habere curam animarum, et accipe curam tuam et meam*; but before induction the parſon hath not the temporalties belonging to his rectory.

33 H. 6. 13. Boſwels caſe ubi ſup. Pl. Com. fo. 528. lib. 4. fo. 79. Digby's caſe. 18 Eliz. Dier. Giles caſe, lib. 9. fol. 132. Holts caſe. Regiſt. 286. b. F N.B 246. m. 2 H. 4. 17. 8 H. 4. 20. 14 H. 6 21. 1 H. 7. 19. 10 H. 7. 15. 25 E. 3. cap. 3. 13 R. 2. cap. 1. 4 H. 4 ca. 21. F.N.B. 36. k. 143. & 34. k. 21 E. 4. 34. 43 E. 3. 3. b. 22 H. 6. 27. 38 E. 3. 8, 9. * Paſch. 24 E. 3. Coram Rege Cornub. Tr. 32 E. 1. Coram Rege Rot. 75. 17 E. 3. 40. 21 E. 3. 40. 41 E. 3. 5. 46 E. 3. 32. 8 Eliz. Dier 228. 45 E. 3. Quare Imp. 139. 43 E. 3. 15. 43 Aſſ. 21. 5 E. 3. 60. F.N.B. 34. 35 H. 6. 54, 60. 5 E. 3. 60. 19 H. 6 40.

But the church is not full againſt the king before induction, becauſe in the kings caſe plenarty is to be intended of a full and compleat plenarty, aſwell to the temporalties as to the ſpiritualty. *Nota*, preſent admiſſions and inſtitutions, &c. are the life of advowſons; and therefore if patrons ſuſpect that the regiſter of the biſhop will be negligent in keeping of them, he may have a *certiorari* to the biſhop, to certifie them into the chancery.

And if there be an uſurpation upon the king by a compleat plenarty, the king cannot preſent to the church, before he hath removed the incumbent by *quare impedit*, leſt contentions might grow in the church between the ſeverall claimers of the benefice, to the diſturbance or hindrance of divine ſervice, and this was by the common law.

But in that caſe the king is onely put out of poſſeſſion, as to the bringing of an action, but the inheritance of the advowſon is not deveſted out of him: ſee in the fourth part of the Inſtitutes, cap. Ireland; when an * incumbent is made a biſhop, either in England or Ireland, &c. who ſhall preſent.

(7) *Quam per breve de recto.*] This is to be underſtood where the patron that had a fee ſimple, and that he or ſome of his anceſtors had preſented: but if the patron claimed the fee-ſimple of the advowſon by purchaſe, and had never preſented, there he could have no writ of right of advowſon, but before this ſtatute had loſt the advowſon. And likewiſe if tenant in tail, or tenant for life had ſuffered any uſurpation, they had been remedileſſe by the common law, becauſe they could have no writ of right.

If a biſhop, abbot or prior, &c. purchaſe an advowſon, and ſuffer an uſurpation before they preſent, they and their ſucceſſors are barred for ever, unleſſe by force of this act the uſurpation be avoided in a *quare impedit*.

Therefore

Therefore in peruſing over the ſeverall branches of this ſtatute, it ſhall appear what caſes be remedied by this act, and what remain at the common law.

Per quod hæredes infra ætatem exiſtentes per fraudem et negligentiam cuſtodum, hæredes etiam ſive majores ſive minores per negligentiam, vel fraudem tenentium per legem Angliæ, vel mulierum tenentium in dotem, vel alio modo ad terminum vitæ, vel annorum, vel per feodum talliatum multotiens exhæredationem patiebantur de advocationibus illis, vel ad minus (quod eis melius fuit) ponebantur ad breve de recto, et in caſu omnino exhæredati fuerunt hucuſq; &c.

Here is the preamble containing the miſchief, let us therefore peruſe the words of the act.

(8) *Statutum eſt quod hujuſmodi præſentationes.*] The preamble extendeth onely to heirs in ward, *per fraudem et negligentiam cuſtodum, &c.* and the words of the body of the act are, *quod hujuſmodi præſentationes*, ſuch preſentations; but theſe words are to be expounded, ſuch preſentations that be in the ſame miſchief: and therefore this act extends to heirs of advowſons, though they be out of ward. 44 E. 3. 21. lib. 11. fol. 33. Powlters caſe. For this word *Hujuſmodi*, ſee ca. 4. & circumſpecte agatis.

(9) *Rectis hæredibus.*] This act relieveth onely infants that have advowſons by deſcent; for if an infant have an advowſon by purchaſe, he remaineth at the common law, and is not remedied by this act. 35 H. 6. 64.

And this being a law that ſuppreſſeth wrong, and advanceth right, doth binde the king, though he be not named in the act. [359] 35 H. 6. ubi ſup. Lib. 21. fo. 72. Magd. Colledge caſe.

(10) *Aut illis ad quos poſt mortem aliquorum hujuſmodi advocationes reverti debent.*] *Nota* [*illis*] *hoc eſt illis hæredibus*, to thoſe heirs that have the reverſion of the advowſon by deſcent; for the preamble ſaith, *hæredes etiam ſive majores, ſive minores, &c.* And the percloſe of this branch is, *qualem haberet ultimus anteceſſor hujuſmodi hæredis, &c.* So as this ſtatute doth help the heir of him in the reverſion, and not the leſſor himſelf, but the heir of him in the remainder is not within the purview of this act. P. com. 58. F.N.B. 31. g. Bro. tit. Preſentment al egliſe 46.

(11) *Poſt mortem aliquorum hujuſmodi.*] That is, of tenant by the courteſie, tenant in dower, or otherwiſe for life, or for yeers, or in fee tail.

(12) *Pro termino annorum.*] Tenant for term of half a yeer, or a yeer, and grantee of the next avoidance are within the purview and meaning of this act; tenant by ſtatute merchant, or ſtaple, or *elegit*, are within the purview of this ſtatute. 34 H. 6. 30.

(13) *Vel feodum talliatum.*] Tenant in tail of a mannor, whereunto an advowſon was appendant, and before this ſtatute an eſtranger uſurped, and then the ſtatute of *donis condit'* and this act is made, tenant in tail dyeth, and the mannor deſcendeth to his iſſue; yet the heir in tail hath no remedy, becauſe the advowſon was ſevered by the uſurpation: and this act extendeth not to uſurpations before this act. 8 E. 2. Quare impedit. 167. 16 E. 3. ibid. 67.

But if tenant in tail ſuffer an uſurpation after this act, and dyeth, his iſſue ſhall have remedy by *quare impedit* within the purview of this ſtatute. 8 E. 2. ubi ſupra. 46 Aſſ. 4.

(14) *In*

16 E. 3. Quare imp. 67. F.N.B. 31. b. Bolwels case, ubi supra.

(14) *In proxima vacatione post quam hæres ad ætatem pervenerit.*] Note, albeit the heir hath the advowson by descent, yet if he suffereth an usurpation, he hath no remedy by this branch, untill after he cometh of full age; this is to be intended when the heir is in ward, for so this act putteth the case: but if the heir be out of ward, he may have his *quare impedit*, or his assise of *darrein presentment* during his minority.

(15) *Per breve de advocatione possessorium.*] This is by *quare impedit*, or assise of *darrein presentment*.

(16) *Qualem haberet ultimus antecessor*, &c.] Then put case, that one purchaseth an advowson in fee, and dieth before any presentation made by him, and this descends to his heir within age, the church becomes void; if the heir be in ward, the heir may have his *quare impedit* at his full age, and if he be within age, and out of ward, he may have his *quare impedit*, and count of a presentation made by him of whom the purchase was made: but he can have no writ of right of advowson, because his ancestor, or he never presented.

Note it is not said here, *qualem habuit*, but *qualem haberet*, as the ancestor should have had if the church had become void in his time, and his title to present had accrued unto him, for there the right, or at least the possibility of action doth descend.

2 E. 3. 10, 11. One seised of an advowson in fee, presenteth to the church being void, and granteth the same to A. for life, and after granteth the reversion to K. and his heirs; A. tenant for life suffereth an usurpation to the church, the heir of K. having the right of this advowson by descent, shall, after the death of A. the church becoming void, present, and yet K. could not have had a *quare impedit*: but if A. had dyed before the usurpation, then might K. have had a *quare impedit*, and therefore his heir shall have at the next avoidance that remedy which by possibility he might have had; and herewith agreeth the authority of the book in 2 E. 3. for there Tond taketh this exception, but durst not demur.

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(17) *Vel antequam dimissio facta fuerit ad terminum vel ad feodum talliatum.*] Hereof sufficient hath been said before.

(18) *Hoc idem observetur de præsentationibus factis ad ecclesias de hæreditate uxorum.*] If a feme covert hath an advowson by purchase, she is not within the remedy of this act, and that for two reasons:

1 E. 2. Quare imp. 43. 5 E. 3. 30. 43 E. 3. 15. Thorp. F.N.B. 34. s Bro. tit. Presentment al eglise 46.

First, here it is said, *hoc idem observetur*; but an infant having an advowson by purchase is not holpen by this act, *et hoc idem observetur* in case of a feme covert.

Secondly, *de hæreditate uxorum*, is here intended of an advowson by descent; for this word *hæreditas*, see the first part of the Institutes, sect. 9.

See the first part of the Institutes, sect. 443. F.N.B. 34. m. Br. Presentment al eglise 46. See Marlbr. ca. 28.

(19) *Viris etiam religiosis*, &c.] By this presentation and usurpation in time of vacation, albeit the free-hold and inheritance is *in abeiance in gremio legis*, yet the usurper gaineth a fee-simple in the advowson: like as if one entereth into lands during the vacation, and claim the same as his inheritance, he gaineth an inheritance by wrong; but yet as the dying seised of lands in that case during the vacation shall not take away the entry of the successor, no more shall the usurpation during the vacation take away his right of presentation, when the church becomes void, and if he be disturbed, he shall have his *quare impedit*.

(20) *Nec*

(20) *Nec tamen ita large intelligatur, &c. ficte defenderint.*] So great regard the law hath to judgements, as this act provideth, that by any generall words of this act they ſhall not be avoided by pretence of *feint defence: quia judicia in curia regis reddita pro veritate accipiantur, et judicia ſint tanquam juris dicta.*

(21) *Quia judicia in curia regis reddita.*] Here is one of the maximes of the common law.

" *Judicia in curia regis reddita non adnihilentur, ſed ſtent in ſuo robore, quouſque per errorem, aut attinctam adnullentur.*

" *Nihil tam conveniens eſt naturali æquitati, unumquodq; diſſolvi ligamine, quo ligatum eſt.*

" *Intereſt reipub. res judicatas non reſcindi.*

(22) *Et de cætero una forma placit' in brevib' ultimæ præſent' et quare impedit inter juſtic' obſervetur, quoad hoc, quod ſi pars rea excipiat de plenitudine eccleſiæ per ſuam propriam præſentationē, non propter illam plenitudinē, remaneat loquela, dummodo breve infra tempus ſemeſtre impetretur.* By the common law (as hath been ſaid) plenarty before the writ of *quare impedit* brought was a good plea, but plenarty hanging the writ was no barre at the common law; but now by this ſtatute, plenarty is no plea in a *quare impedit*, or *darrein preſentment*, unleſſe it be by the ſpace of ſix moneths before the *quare impedit* brought; for if the rightfull patron bring his action within the ſix moneths, it is maintainable by this ſtatute, which ſhort purview doth remedy many miſchiefs at the common law. Brit. fo. 234.

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But this act doth not bind the king, for plenarty by the ſpace of ſix moneths is no barre againſt him, but he may have his *quare impedit* when he will, for *nullum tempus occurrit regi.*

But ſome have taken a diverſity, when the king claimeth the advowſon in his owne right *in jure coronæ*, and when he claimeth it in the right of a ſubject; for then he ſhall not be in better caſe then the ſubject was: as where the king was intitled to preſent in the right of a ward, and one did uſurp, and the church was full by the ſpace of ſix moneths, and it was adjudged within twelve yeares after the making of this act, that the king by this plenarty was barred of his *quare impedit.* But ſince that time the law hath been otherwiſe taken. Mich. 25 E. 1. rot. 148. in banco. 3 H. 6. tit. coron. ſimil. 18 E. 3. 2. 8 E. 3. 38. 43 E. 3. 13. 25 E. 3. 54. 4 E. 3. 1. 18. E. 3 2. 24 E. 3. 76.

Plenarty by ſix moneths againſt the queen is a good plea, albeit ſhe claime the advowſon by the kings indowment.

And yet in all caſes plenarty by ſix moneths is no plea in a *quare impedit.* If an advowſon be aliened in mortmain, and the church become void, and a ſtranger uſurp, and his clerke is in by ſix moneths, yet the immediate lord ſhall have a *quare impedit* within the yeare, for the ſtatute of 7 E. 1. *de religioſis*, giveth him a yeare, and the immediate lord halfe a yeare after, &c. and for that cauſe alſo no deſcent of lands in the meane time ſhall take away his entry.

(23) *Infra tempus ſemeſtre.*] *i. infra ſex menſes.* And becauſe this computation doth concerne the church, it is great reaſon that it ſhall be made according to the computation of the church, which church-men do beſt know; and therefore the computation ſhall be made according to the kalender for one halfe year, and not accounting 28 daies to the moneth, and ſo was it reſolved in the court of common pleas, *temps* E. 2. and *temps* H. 8. as in the ſaid caſe it appeareth. Lib. 6. f. 61, 62. Cateſbies caſe.

Ante

Bract. li. 4. fo. 247. nu. 5. Flet. lib. 5. c. 14. Extr. suppl. prælat. negl. 3. & 4. de conc' præb. ca. 5. &c. Cap. unico. § 1. de jure patronatus. Mich. 3. E. 1. in banco 105. Stafford. prior de Lauda.

Ante concilium Lateranense nullum currebat tempus contra præsentantes, but the bishop was to provide one to serve the cure in the meane time, and the patron might present when he would. Britton fo. 225. a. calleth it the councell of Lyons in France, for the councell of Lateran in Rome. This councell of Lateran was holden under pope Alexander the third, *anno domini* 1179. 25 H. 2. But our lapse is not according to the times and persons expressed in the canons; for they do give foure moneths to a lay patron, and six moneths to an ecclesiasticall, &c. neither hath therein the king any supreme title by them to conferre by lapse. And by the councell, *tempus semestre* is to be accounted *per dies, et non per menses anni*: and therefore we hold, that the time and title to present by lapse, is *per legem Angliæ*, occasioned and established it may be by reason of the said generall councell. See lib. 6. fol. 62. in Catesbyes case.

Mich. 5. E. 1. rot. 100. in banco Lincoln. Nota.

* Rot. pat. 27 E. 3. pars 1. m. 18. The councell bound not the prerogative of the king.

* In the reigne of Ed. 3. the clergy pretended that lapse should incurre against the king, whereupon it was thus resolved and published, *Rex ad agnitionem veritatis, et ad tollendum dubitationis scrupulum, quam quidem prærogativarum et jurium coronæ suæ, nescii hæredicuntur, omn' patr' voluit notitiæ, quod ab exordio nascente ecclesia in Anglia. Reges Angliæ ad omnia ecclesiastica beneficia qualitercunque vacantia, ad eorum collationem, &c. spectantia, quandocunq; placeret eis, jure suo regio præsentarunt, &c. suique præsentati, &c. admissi fuerunt, &c. non obstantibus aliquibus curriculis temporum, seu * constitutionibus de præsentationibus hujusmodi infra certū tempus fact' in contrarium edit' &c.*

* Concilium Lateran.

Regist. 42. b. Nota per lapsum, &c. est secundum legem & consuetudinem Angliæ. Pasch. 9 E. 1. in banco rot. 58. Southt' the Bishop of Canterburies case per tempus semestre. 19 E. 2. brev. 842. Regist. fo. 98. nota.

But see the Register, *rex venerabili in Christo patri R. episcopo London, &c. Quia secundum legem et consuetudinem regni nostri Angliæ, episcopi, seu alii diocesani ecclesias, seu alia beneficia de quorumcunque patronatu existunt, infra diocesariam suam vacantia per lapsum temporis ante sex menses à tempore vacationis earundem transactas conferre non debent, &c.*

And albeit if the lapse were established by authority of some act of parliament now (as many others be in like cases) not extant, yet the writ may serve *secundùm legem et consuetudinem Angliæ*, as our bookes doe warrant.

It was well and graciously done of king James, in his generall pardon at his parliament holden *in anno* 21. of his reigne, he pardoned all titles and actions of *quare impedit*, as his majesty had or might, by reason of laps incurre above three yeares then past. A necessary branch to be contained in every generall pardon. For we have known an incumbent turned out of his benefice after 40 yeares quiet possession, by pretence of a laps upon the statute of 21 H. 8. ca. 13. yet after so long possession *omnia præsumi debent solemniter esse acta.*

22 E. 3. 9. 30 E. 3. quare imp. 49. 43 E. 3. 35. F.N.B. 36. c.

(24) *Et cum aliquando inter plures clamantes advocationem alicujus ecclesiæ pax fuerit formata inter partes quod unus primo præsentet*, &c.] This clause extendeth as well to strangers of bloud, as to coparceners that are privie in bloud, and if one of the parties or his heires, or any stranger usurp in the turne of another, the party wronged is not driven to his *quare impedit*; for so it may be, that the *quare impedit*, or assise of *darren presentment* may faile, and yet he may have remedy by this branch of the act, for albeit there be a plenarty by six moneths, yet the party may have a *scire facias* upon the roll or fine, and therein recover the presentation and damages.

(25) *Et*

(25) *Et cum contingat, &c. utrum perquirere velit breve de quare impedit, vel ultimæ præsentationis.*] Upon this branch two conclusions are to be observed.

1. First, that the heire in reversion is provided for in this case, and not the lessor himselfe, for here it is said, *verus hæres.*

2. That albeit tenant by the curtesie, tenant in dower, tenant for life or tenant in taile presented last, yet the heire, to whom the reversion falleth in possession, shall have by this branch an assise of *darren* presentment, albeit the heire or his ancester did not immediately present before.

F.N.B. 31. g. 1. Glanv. l. 13. ca. 19 Bract. l.b. 4. 240, 241. &c. Brit. ca. 62. fol. 224. Flet lib. 5 c. 11. 20 E. 3 Darr. present. 13.

Et de cætero in brevibus ultimæ præsentationis, et quare impedit, adjudicentur damna, viz. si tempus semestre transierit per impedimentū alicujus, ita quod episcopus ecclesiam conferat, et verus patronus ea vice præsentationem suam amittat, adjudicentur damna, ad valorem ecclesiæ de duobus annis.

(26) *Adjudicentur damna.*] Before the making of this act, the plaintife in a *quare impedit* recovered no damages, lest any profit the patron should take should savour of simony, which the common law did so deteste: and this is the cause that the king in a *quare impedit* recovereth no damages, because he could recover none by the common law, and the king is not within the purview of this act, for the causes shewed in Bolwels case.

Lib. 5. f. 58, 59. Speed's case. Lib. 6. f. 49. 51. Bolwels case. 14 E. 3 quare imped. 54. Temps E 1. ibid. 181. 3 H. 6. damag 17. 34 H. 6. 51 18 E. 1 coram rege & concilio ad parliament. fol. 2. inter dominum regem & episcopum Winton. pro custod. hospit. South.

And forasmuch as no damages were in a *quare impedit* at the common law, and this act after the statute of Glocester giveth damages only, the plaintife shall recover no costs.

In a *quare impedit* against a prior patron, and incumbent, the prior plead in barre, and the incumbent plead the same plea, whereupon issues are joyned, the prior dyeth, the issue is found for the incumbent, he shall not recover damages by this act, for he cannot have a writ to the bishop, and he continued in possession.

(27) *Si tempus semestre.*] If upon the foundation of a chauntery the composition be, that if the patron present not within a moneth, the ordinary shall collate in a *quare impedit* brought for this chauntery, if the moneth be past, the plaintife shall recover damages for two yeares within the equity of this statute, for that the patron in this case loseth the presentation, although the words of the statute be *per tempus semestre.* and this is *per tempus mensis tantum.*

27 H. 6. 10. 9 H. 6. 30. 32. 13 E. 4. 3.

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(28) *Ita quod episcopus ecclesiam conferat,* &c.] Here *conferat* is to be taken for *legitimè conferat*

11 H. 4 80. lib. 9. fo. 26. Strat. mercella. 43 E. 3. 11.

Albeit the bishop hath not collated, yet if he hath *jus conferendi,* the plaintife shall, if he will, recover double damages within the meaning of this act.

But albeit the six moneths be past, so as the bishop hath a just title to present by lapse, yet if the church doth remaine void, the plaintife at his perill may pray a writ to the bishop: but then he shall not recover double damages but for halfe a yeare only, because in that case he shall recover his presentation, so as it is in the plaintifes election in that case, either to lose his presentation, and have double damages, or to have his presentation, and single damages.

8 E. 35. quare imped. 24. 39 E. 3. 15. 46 E. 3. 15. 13 E. 3. enquest 43. 11 H. 4. 40. 13 E. 4. 3. Dyer 3. El. 15. 7 El. 241.

The plaintife in a *quare impedit* after appearance was non-suit, whereupon the court awarded a writ to the bishop for the defendant, and a writ to the sherife to enquire when the church became

27 E. 3. damages 106.

void, the yearly value thereof, and whether the church were full, &c. the ſheriffe returned the time of the voidance, the yearly value, and that the biſhop had collated by lapſe, whereby it appeared *tempus ſemeſtre* was paſt before the writ could be ſerved, yet ſeeing the judgement was given within the ſix moneths, he could recover the damages but for halfe a yeare.

And it is to be obſerved, that albeit the biſhop doth collate, yet if his incumbent be removed by judgement within the ſix moneths, or after, the plaintife ſhall recover the damages but for halfe a yeare, for the words of this branch are, *et verus patronus ea vice præſentationem ſuam amittat*, ſo as if he loſe not his preſentation, the collation of the biſhop is not materiall.

24 E. 3. 35. 39 E. 3. 15 Regiſt. 50. 54. F.N.B. 52. 46 E. 3. 15 b.

(29) *Ad valorem eccleſiæ.*] This ſhall be accounted according to the very true value, as the ſame may be letten.

(30) *Et ſi impeditor*, &c.] No damages by this act are to be recovered but againſt him that is *impeditor*, a diſturber.

In a *quare impedit* againſt the patron and incumbent, the plaintife recovers the advowſon *poſt ſemeſtre tempus*, and becauſe the incumbent was *impeditor*, for that he had counterpleaded the title of the plaintife, therefore he recovered the value for two yeares as well againſt the incumbent as the patron.

Trin. 23. H. 3. rot. 15 in turri. Bract. lib. 4. fol. 241. b. Brit. fol. 226. b. Flet. li. 5. ca. 14. 14 H. 3. quare imped. 183. 34 E. 1. ibid. 187. 47 E. 3. 4. 8 H. 6. 32. 24 E. 3. ibid. 26. 45 E. 3. ibid. 128. 14 H. 4. 11. Inter brevia 28 Maii, anno regis E. 1. 11. 6 E. 3. 5. 39. Bract. li. 4. f. 240, 241. Regiſt. 31. a. 19 H. 3. Dar. preſentment, pl. ult. Vid. Rot. clauſ. 18 H. 3. m. 3.

(31) *Et de cætero concedantur brevia de capellis, præbendis, vicariis, hoſpitalibus, ablatiis, prioratibus, et aliis domibus quæ ſunt de advocationibus aliorum, quæ prius concedi non conſueverunt.*] *Eccleſia, capella.* When the queſtion was, whether it were *eccleſia, aut capella pertinens ad matricem eccleſiam*, the iſſue was, whether it had *baptiſterium et ſepulturam:* for if it had the adminiſtration of ſacraments and ſepulture, it was in law judged a church, Trin. 20. E. 1. *in banco* Rot. 177. *in quare imped.* Ric' de Smithes caſe. Mich. 21. E. 1. *in banco* Rot. 1. Hertf. Prior de Elies caſe. Hill. 8 E. 1. *in banco*, Roger de Bigod, & Counte de Norff. caſe, Hill. 8 E. 2. *coram rege Cornub. pro capella ſancti Berione. A capella venit capellanie* Rot. Cart. 26. Nov. *an.* 28 H. 3. *in cart' fact' Will. Oxon' epiſcopo et capellan' ut patet*, Mich. 32. E. 1. *coram rege Gloc' capellania Sancti Oſwaldi, prioratus Sancti Oſwaldi de Gloc' quæ eſt de libera capellanie noſtra.*

It appeareth here, and by 6 E. 3. that before this act writs did not lye *de capellis, præbendis, &c.* and yet it is adjudged in 14 H. 3. which was long before this ſtatute, that a *quare impedit* did lye of a chappell, and it was reſolved in parliament, Hill. 19 H. 3. *Quod nulla aſſiſa ultimæ præſentationis capiatur de * eccleſiis præbendatus, nec de præbendis:* but now this act hath made it cleare, and the writ ſhall be *ad capellam, &c.*

If a patron of a chappell preſent unto it by the name of a church and the clerke be inſtituted and inducted thereunto, &c. it hath loſt the name of a chappell.

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47 E. 3. 4. 8 H. 6. 32.

(32) *Brevia.*] That is, writs of right of advowſon, *quare impedit*, and aſſiſe of *darren* preſentment, which in this act had been named before.

Et cum per breve de indicavit impeditur rector alicujus eccleſiæ ad petendum decimas in vicina parochia, habeat patronus rectoris ſic impediti breve ad petendam advocationem decimarum petitarum. Et cum diſtrictum fuerit, procedat poſtmodum placitum

citum in curia chriſtianitatis, quatenus diſrationatum fuerit in curia regis.

(33) *Indicavit.*] Hereby, and by the Regiſter, and F. N. B. it appeareth where the writ of *indicavit* doth lye, and it properly appertaineth to another treatiſe. Regiſt. 35, 36.

But this is an ancient writ by the common law of England, the forme whereof appeareth in Glanvile, and other ancient authors. Glanvile, lib. 4. ca. 13. Bract. li. 5. fol. 402. b. Britt. fo. 260. 31 H. 6. 14. b. Mich. 2 E. 1. in banco rot. 52. Leic' indicavit de 4. part. * 4 E. 3. 27. 7 E. 3. 42. 31 H. 6. 14. 38 H. 6. 20, 21. 12 E. 4. 13. 2 H. 7. 12.

(34) * *Ad petendum decimas.*] By the common law, if the incumbent of one patron demanded tithes againſt the incumbent of another patron, the writ of *indicavit* did lye, for that the right of the patronage ſhould come in queſtion, for by the preſentation of the patron, his incumbent is to have the tithes, which are the profits of the church; and in a writ of right of advowſon the patron ſhall alledge the eſplees in his incumbent in taking of the great and ſmall tithes: and therefore if the right of tithes came in queſtion, that concerned the right of advowſon, the writ of *indicavit* did lye, and this appeareth by the writ it ſelfe.

But for ſubtraction of tithes againſt an inhabitant within the pariſh of the rector claiming from one patron, where the right of the advowſon of the tithes never come in queſtion, the court chriſtian hath juriſdiction. Bract. li. 5. 402. Brit. fol. 33. 28 E. 3. 97.

The miſchiefe before this ſtatute was, that ſeeing the right of tithes could not be tried between the two perſons after the *indicavit* granted, the perſon prohibited was without remedie for tryall of the right of tithes; and therefore this act doth give the patron, whoſe clerke is prohibited, a writ of right *de advocatione decimarum*, the forme of which writ appeareth in the Regiſter, and if the right be tryed for the demandant, the cauſe ſhall be remaunded into the court chriſtian. 4 E. 3. 27. 31 H. 6. 14. 38 H. 6. 20, 21.

But what if the patron hath but an eſtate in taile, or an eſtate for life, &c. ſo as he cannot have this writ of right of advowſon, what remedy ſhall be had for tryall of the right of tithes in this caſe? It ſeemeth that by conſtruction of this ſtatute, the defendant in the *indicavit* appearing upon the attachment ſhall plead to the right of the tithes in the kings court, or otherwiſe he ſhall be without remedy. And this ſtandeth well with the words of the writ of *indicavit, viz. Vobis prohibemus, ne placitum illud teneatis, donec diſcuſſum fuerit in curia noſtra, ad quem illorum pertineat ejusdem eccleſiæ advocatio, &c.*

By this branch it appeareth, that the value of the tithes at the making of this act was not materiall; for of whatſoever value they were of, the right of tithes could not be determined in court chriſtian; but by the ſtatute of *anno' cleri*, cap. 2. the tithes muſt amount to a fourth part of the value of the church in that caſe, or otherwiſe the writ of *indicavit* doth not lye, but the king may have a writ of a leſſer part, for he is not bound by that act. See Art. cleri ca. 2 9 E. 2. Bract. li. 5. 402, 403. 38 H. 6. 20.

Alſo by this act a writ of *indicavit* was maintainable *ante litem conteſtatam*, that * is, when the party hath libelled in court chriſtian, and the adverſe party hath anſwered thereunto, but this is remedied by the ſtatute of *conjunctim feoffatis*. Regiſt. 29. F.N.B. 45. b.

A writ of *indicavit* muſt be brought by the patron before ſentence given in court chriſtian, as it appeareth by the words of the writ; for * [365] An. 34. E. 1. 31 H. 6 13, 14. F.N B 45. b. 12 E. 4. 13.

for it is but a *ſuperſed' donec, &c. ne placitum illud tencatis, donec diſcuſſum fuerit, &c.* and this act ſaith, *procedat poſtmodum placitum in curia chriſtianitatis*, which could not be after ſentence.

38 E. 3. 13. a. 4 E. 3. 28. F.N.B. 45. Doct. & Stud. ca. 25. fol. 108. Ret Parliament. 50 E. 3. nu. 203.

And albeit this ſtatute doth give the writ of right of advowſon of tithes, yet a writ may be brought *de decimis et oblationibus*; for oblations be *in conſimili caſu*.

This writ of *ind. cavit* is againſt the canonicall ſanction, and yet hath been ever obeyed; for all forraine ſanctions or canons againſt the law or cuſtome of the realme are of no force, and binde not here, as elſewhere hath been ſpoke more at large.

F.N.B. 45. d.

The writ of *indicavit* ſhall not mention that the tithes, &c. in ſuit amount to a fourth part of the church, but it ſhall be pleaded by the other party to have a conſultation.

21 H. 6. 24. 38 H. 6. 26. F.N.B. 45. c.

If an abbot be parſon in-parſonee of the church of D. and another abbot is parſon in-parſonee of the church of E. ſo as there be (in reſpect of the appropriations) but two parſons, yet for that each party is both patron and incumbent, an *indicavit* lyeth between them.

13 E. 2. quare Imp. 176. 14 E. 2. ibid. 177. 19 E. 3. ibid. 59. 31 E. 3. ibid. 5. 20 E. 3. ibid. 63, 64. 7 E. 3. 20. 45 E. 3. 12. 11 H. 4. 54. 5 H. 5. 10. 22 H. 6. 47. 34 H. 6. 40. 35 H. 6. 59. 38 H. 6. 8, 9. 2 H. 7. 4. 5 H. 7. 8. 11 H. 7. 20. 22. Walkers caſe. F.N.B. 36. d. 5 E. 3. Darr. preſent. 71. 22 E. 4. 94. 33 E. 3. quare imped. 146. 30 E. 4. Statham quare imped. 21 E. 3. 32. 13 E. 3. quare impedit 58. 2 E. 3. 39. 7 E. 3. 21. 15 H. 3. Darr. preſent. 11. 20 E. 3. monſt' de faits 72. 33 E. 3. quare imped. 53. 27 E. 3 30. 37. 25 E. 3 37. 11 H 4. 34. 27 H. 8. 11. 36 H. 8. tit. preſent. Bro. Brit. lib. 4. fol. 238. 243. Brit. fol. 224.

(35) *Cum advocatio diſcendat participibus, licet unus bis præſentet, et uſurpet ſuper coheredem, non propter hoc excluſus ſit ille in toto qui fuit negligens, ſed alias habeat turnum ſuum præſentandi, cum acciderit.*] By the common law, if an advowſon deſcended to divers coparceners, if they cannot agree to preſent, the eldeſt ſiſter ſhall have the firſt turne, and the ſecond the ſecond turne, *et ſic de cæteris*, every one in turne according to ſeniority: and this priviledge extends not onely to their heires, but to the ſeverall aſſignees of every coparcener, whether he hath the eſtate of them by conveyance, or by act in law, as tenant by the curteſie, hee ſhall have the ſame priviledge by preſenting in turne as the ſiſters had: therefore albeit the coparceners do make compoſition to preſent by turne, this being no more then the law doth appoint, *expreſſio eorum quæ tacite inſunt nihil operatur*: therefore they remaine coparceners of the advowſon, and the inheritance of the advowſon is not divided, and notwithſtanding this compoſition they may joyne in a *quare impedit*, if any eſtranger uſurp in the turne of any of them: and the ſole preſentation out of her turne did not put her ſiſter out of poſſeſſion in reſpect of the privity of eſtate, no more then if one coparcener taketh the whole profits. If one joyntenant preſent alone, this doth not put the other out of poſſeſſion, in reſpect of the unity of the title, but the ordinary might have refuſed his preſentee, as he might the preſentee of one tenant in common, in reſpect of ſome varying opinions in old bookes: therefore this act doth declare the law, as here it appeareth.

This law doth extend to uſurpations by one coparcener upon another, as well before partition, as after.

CAP.

CAP. VI.

CUM quis petat tenementum verſus alium, et implacitatus vocaverit ad warrantum, et warrantus dedicat warrantiam, et diu pendeat placitum inter tenentem et warrantum, cum ad ultimum convincatur, quod vocatus ad warrantum warrantizare tenetur per leges et conſ. hactenus uſitatam, non fuit antea alia pœna inflicta vocato, qui warrantiam dedixit, niſi tamen quod warrantizaret, et eſſet in miſericordia, quia prius non warrantizavit, quod durum fuit petenti, quia multotiens per colluſionem inter tenentem et warrantum magnas ſuſtinuit dilationes. Propter quod dominus rex ſtatuit, quod ſicut tenens amitteret tenementum petitum, ſi vocaſſet ad warrantum, et warrantus ſe poſſet devolvere de warrantia: eodem modo amittat warrantus ſi warrantiam dedicat (1), *et convincatur quod warrantizare debeat. Et ſi inquiſitio pendeat inter tenentem et warrantum, et petens petat per breve ad faciendum venire juratum, concedatur ei, &c.* (2).

WHEN any demandeth land againſt another, and the party that is impleaded voucheth to warranty, and the warrantor denieth his warranty, and the plea hangeth long between the tenant and the warrantor; and at length, when it is tried, that the vouchee is bound to warranty: by the law and cuſtom of the realm hitherto uſed there was none other puniſhment aſſigned for the vouchee that denieth his warranty, but only that he ſhould warrantize, and ſhould be amerced, becauſe he did not warrant before, which was prejudicial unto the demandant, becauſe he ſuffered oftentimes great delays by colluſion between the tenant and the warrantor. Wherefore our lord the king hath ordained, that like as the tenant ſhould leeſe the land being in demand, in caſe where he vouched, and the vouchee could diſcharge himſelf of the warranty, in the ſame wiſe ſhall the warrantor leeſe in caſe where he denieth his warranty, and it be tried againſt him that he is bounden to warranty. And if an inqueſt be depending between the tenant and the warrantor, and the demandant will require a writ to cauſe the jury to come, it ſhall be granted him.

(45 Ed. 3. 16. Raſt. 352. 687, &c.)

Albeit the Mirror ſaith of this act, *L'eſtatute de garranties neſt jeſque revocation de error uſe jeſque a droit ley*, yet the tenant, according as it is here recited in the preamble of this act, after the warranty tryed, could have no other judgement, but that the vouchee ſhould warrant the land, according to the voucher of the tenant, but this was many times in great delay of the demandant by colluſion or agreement between the tenant and the vouchee, for remedy whereof this ſtatute was made.

Propter quod dominus rex ſtatuit quod ſicut tenens amitteret tenementum petitum, ſi vocaſſet ad warrantum, et warrantus ſe poſſet devolvere de warrantia, eodem modo amittat warrantus,

ſi warrantiam dedicat, et convincatur quod warrantizare debeat.

Lib. 6. cap. 23.

Which Fleta rendreth in theſe words:

Si is qui ad warrantiam tenetur warrantizare falſò contradixerit, provifum ſit, quod ſicut tenens amitteret tenementum, ſi vocaſſet ad warrantum, et warrantus ſe poſſet devolvere de warrantia, eodem modo amittat warrantus warrantizare dicens, ſi convincatur quod warrantizare debeat.

Mich. 16 E. 3. in banco rot. 44. Reg. de Mowbraycaſe. 5 E. 3. Voucher 249. Paris caſe. 30 E. 3. 6. Simeons caſe. Liber plac' Reg' 352. 614. 6 H. 4. 3, 4.

(1) *Si warrantiam dedicat.*] This is not to be underſtood onely where the vouchee denieth the deed, or other cauſe of the warrantie, and thereupon iſſue is taken, and found againſt the vouchee: and where the vouchee entereth into the warranty, and demands of the tenant what he hath to bind him to warranty, and the tenant ſheweth ſpeciall matter to bind him to warranty, and the vouchee demurreth in law upon the lien, this is within the remedy of this act; for the words ſubſequent be, *ſi convincatur quod warrantizare debeat*, which the vouchee is in this caſe; and this act being made to ouſt delayes, which are odious in law, is to be interpreted favourably.

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And it is to be obſerved, that here is *ſicut*, which is an adverb of ſimilitude, *viz.* *Sicut tenens amitteret, ſi vocaſſet ad warrantum, et warrantus ſe poſſet devolvere de warrantia.* Under which words are included, if the vouchee can devolve him of the warranty by demurrer, or any iſſue whatſoever, *eodem modo* (ſaith this act) *amittat warrantus, &c.* which fortifieth the former expoſition that hath been made; and to be ſhort, whereſoever the judgement at the common law ſhould have been againſt the vouchee upon falſe plea, or demurrer, &c. *quod warrantizaret*, all theſe caſes are within the proviſion of this act.

(2) *Et ſi inquiſitio pendeat inter tenentem et warrantum, et petens petat breve ad fac' venire juratum, concedatur ei.*] Here is further remedy given for the demandants expedition, that he may ſue out the *venire fac'* for the tryall of any iſſue between the tenant and vouchee.

Theſe things are neceſſary to be knowne; for at this day vouchers are moſt commonly uſed for delay.

CAP. VII.

CUSTODI (1) *de cætero concedatur breve de admenſuratione dotis. Ita quòd ſectatores curiæ ſi fictè et per colluſionem ſequatur* (2) *verſus mulierem tenentem in dotem, præcludatur hæres cum ad ætatem pervenerit ad dotem admenſurandam, ſecundum quod per legem Angliæ fuit admenſuranda. Et tam in iſto brevi, quam in brevi de admenſuratione paſturæ, celerior quam prius de cætero ſit proceſſus* (3), *ita quod*

A Writ of admeaſurement of dower ſhall be from henceforth granted to a guardian; neither ſhall the heir, when he cometh to full age, be barred by the ſuit of ſuch a guardian, that ſueth againſt the tenant in dower feignedly, and by colluſion, but that he may admeaſure the dower after, as it ought to be admeaſured by the law of England. And as well in this writ, as in a writ of admeaſurement of paſture,

quod cum perventum fuerit ad magnam diſtrictionem, dentur dies, infra quos duo comit. teneantur (4), *ad quos publica fiat proclamatio, quod defendens veniat ad diem in brevi contentum querenti reſponſurus. Ad quem diem ſi venerit, procedat placitum inter eos, et ſi non venerit, et proclamatio ſupradicta modo per vicecomitem teſtificata fuerit, procedatur per deſaltam ad admenſurationem faciendam.*

ture, more ſpeedy proceſs ſhall be awarded than hath been uſed hitherto; ſo that when it is come unto the great diſtreſs, days ſhall be given, within which two counties may be holden, at the which open proclamation ſhall be made, that the defendant ſhall come in at the day contained in the writ, to anſwer to the plaintiff; at which day, if he come in, the plea ſhall paſs between them; and if he do not come, and the proclamation be teſtified by the ſheriff in manner aboveſaid, upon his default they ſhall make admeaſurement.

Vide Mich. 10 E. 1. in banco rot. 105. Northt. Paſc. 18 E. 1. in banco rot. 15. Laurence de Oyſileurs caſe. (Fitz. Admeaſur. 3, 4, 5. 9, 10. 13. 17. 7 Ed. 4. 22. 18 Ed. 3. 30. Regiſt. 171. 297.)

Before this act, if the heire within age, before the garden in chivalry enter into the land, had aſſigned dower to the wife more then ſhe ought to have, the garden had been without remedy: for no writ of admeaſurement of dower being a reall action lay for the garden at the common law implyed by *de cætero*. Brit. cap. 113. fol. 263.

(1) *Cuſtodi.*] Garden *in droit* or *in fait* ſhall have this writ by this act, if the aſſignement of dower be made in his owne time; but if the aſſignment be made by the heire in time of garden *in droit*, and after the garden *in droit* aſſigneth his intereſt over, the aſſignee ſhall not have a writ of admeaſurement, for that the garden *in droit* had but a choſe in action; but if the aſſignement had been made in the time of the garden *in fait*, he ſhould have had a writ of admeaſurement of dower by this act. 7 R. 2. tit. admeaſurement 4. F.N.B. 149. a.

But this is to be underſtood (though the ſtatute be generall) when the heire within age aſſigneth dower, as is aforeſaid, or when dower is aſſigned in the right of the heire, or the garden aſſigneth more dower then he ought, the heire after his full age ſhall have a writ of admenſurement of dower by the common law, and he cannot have it before, becauſe the intereſt of the garden (which he may give away) endureth untill that time; but if the heire within age be out of ward, and aſſigneth more dower then he ought within age, he may have an admeaſurement of dower within age, for enter he cannot.

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Glanv. li. 6. ca. 13. Bract. li. 2. fo. 93. lib. 4. 314, 315. Fleta. li. 5. c. 22. & 33. Brit. fo. 263. Mirror, c. 5. § 5. 7 E. 4. 22. b. 7 E. 2. admeaſur. 13. 7 R. 2. ibid. 4. 21 H 7. 43.

If the garden aſſigneth more dower than he ought, and the heire dyeth, his heire ſhall have a writ of admeaſurement of dower.

* And ſo if the heire within age aſſigne dower, and dyeth, his heire ſhall have the like writ; but if the anceſter of full age, being tenant in fee-ſimple, aſſigneth dower more then he ought, his heire ſhall never avoid it, becauſe he had full power to aſſigne as much as he would.

* Brit. c. 113. fo. 263. b. 6 H. 3. admeaſur. 8. 7 R. 2. tit. admeaſur. 4. le Countee de Devons caſe.

The king is intituled by falſe office to the wardſhip of the body and lands of the heire of J. S. being within age, dower is aſſigned

17 E. 3. 71. F.N.B. 149. to the wife more then ſhe ought, the garden in chivalry traverſeth the office, and avoideth it, this garden ſhall by this act have a writ of admeaſurement of dower of the aſſignment made by the king, having but a defeaſible title to the wardſhip.

By the like reaſon, if tenant by knight ſervice dyeth, his heire within age an eſtranger abate, and endoweth the wife of more then ſhe ought, the garden ſeiſeth the ward, he ſhall by this act have a writ of admeaſurement of dower: and ſo if J. S. ſeiſed of lands in fee taketh wife, and is diſſeiſed and dyeth, the diſſeiſor aſſigneth more in dower than ſhe ought, the heir entreth into the reſidue, he ſhall have a writ of admeaſurement by the common law, and this well agreeth with the words of the writ, *viz.* *Quod C. quæ fuit uxor prædict' B. plus habet in dotem de libero tenimento, quod fuit prædict' B quondam viri ſui in N. quam habere debet, et ad ipſam pertinet habendam.*

14 H. 3. admeaſur. 10. F.N.B. 149. c. And albeit the words of the writ be in the preſent time, *plus habet in dotem, &c.* yet it is to be taken, that ſhe had more in value at the time of the aſſignment of dower; for if by her induſtry and policie it be made of greater value afterward, no writ of admeaſurement lyeth for this improvement.

(2) *Nec per ſectam cuſtodis ſi fictè per colluſionem ſequatur*, &c.] Hereby is remedy given to the heire at his full age, if the garden proſecute feinedly, or by colluſion againſt the wife, ſo as the heire ſhall not be barred in his writ of admeaſurement againſt the tenant in dower.

11 H. 4. 3. Plow. com. 55. The heire ſhall not be driven to ſhew the manner of the feint pleading, but to alledge the ſame generally.

9 H. 6. 5. The tenant in a *precipe* doth plead, that an eſtranger hath recovered againſt him by verdict in an aſſiſe, the plaintife againſt this verdict cannot generally averre, that this was by covin, but muſt ſhew ſome ſpeciall matter.

(3) *Et tam in iſto brevi, quam in breve de admenſuratione paſturæ, celerior quam prius de cætero fiat proceſſus.*] Whereas by the common law the proceſſe in both theſe writs were ſummons, attachment, and diſtreſſe infinite, by this act a more ſpeedy proceding is provided. Regiſt 171. Vet. N. B. 9. & 10. F.N.B. 148. h.

34 E. 3. damag. 2. 4. E. 3. 19. Regiſt. 171. There is great affinity between theſe two writs, as hereby it appeareth: amongſt others there is one difference, that in a writ of admeaſurement of dower the demandant ſhall recover damages, if the tenant appeare not the firſt day, and yeeld to admeaſurement for the iſſues in the meane time: but in admeaſurement of paſture no damages ſhall be recovered at all.

Mirror, c. 5. § 5. More ſhall be ſaid of the proceſſe, and proceeding in this writ of admeaſurement of dower in the expoſition of the next chapter, only to remember by the way what the Mirror ſaith, *Le'ſtatute de admeaſurement eſt reprovable in pluſors points quant as proclamations, de ſicome admeaſurement, et ſurchage ſont feaſibles per juries de office.*

(4) *Ita qd' cum pervenīt fuerit ad magnā diſtrictionem, dentur dies, infra quos duo comitatus teneantur*, &c.] By reaſon of theſe words, *cum perventum fuerit ad magnam diſtrict'* the very writ of diſtreſſe ſhall containe, *et interim in duobus plenis comitatibus tuis publice proclamari fac', quod prædict' A. quæ fuit uxor T. veniat coram præfatis juſticiariis ad reſpondendum*, &c. *ſi voluerit, et ad audiendum judicium ſuum pro pluribus defaltis.*

And

And yet I find, that after the grand diſtreſſe returned, the plaintife prayed a proclamation, and there it is taken, that he had not ſurceſſed his time, but it was granted.

4 E. 3. admeaſ. fur. 12.

See more of admeaſurement of dower in the next chapter following.

CAP. VIII.

CUM per placitum motum per breve de admenſuratione paſturæ, paſtura fuerit admenſurata aliquando coram juſtic', aliquando in com' coram vicecom', multotiens contingit, quod poſt hujuſmodi admenſurat' actam, iterum ponit ille, qui primo ſuperoneravit paſturam, pluria animalia quam ad ipſum pertinet habend', nec ſuper hoc hucuſque proviſum fuiſſet (1) *remedium: ſtatutum eſt, quod de ſecunda ſuperoneratione fiat remedium conquerenti ſub hac forma, quod conquerens habeat breve de judicio, ſi coram juſtic' admenſurata fuerit paſtura* (2) *quod vic' in præſentia partium præmonitarum (ſi intereſſe voluerint) inquirat de ſecunda ſuperoneratione. Quæ ſi inventa fuerit, mandetur juſtic' ſub ſigillo vic', et ſigillis juratorum, et juſtic' adjudicent conquerenti damna, et ponant in extractis valorem animalium quæ uperonerat' poſt admenſurationem factam poſuit in paſtura, ultra quod debuit, et extractas liberent baronibus de ſcaccario, ut inde reſpondeant domino regi. Si in com' facta fuerit admenſuratio, tunc ad inſtantiam querentis exeat breve de cancellaria* (3) *quod vic' inquirat ſuper hujuſmodi ſuperonerat', et de averiis poſitis in paſturam ultra debitum numerum, vel de pretio dom' regi ad ſcaccar' ſuum reſpondeat. Et ne vic' fraudem faciat domino regi* (5) *in iſto caſu, concordatum eſt, quod omnia hujuſm'. brevia de ſecunda ſuperonerat'* (4), *quæ exeunt de cancell' irrotulentur, et in fine anni mittantur tranſcripta ad ſcaccar', ſub ſigillo cancellarii, ut videant theſaurius*

WHEREAS by a plea moved upon a writ of admeaſurement of paſture, the paſture was ſometime admeaſured before the juſtices, ſometime before the ſheriff in the county, and it chanced many times, after ſuch admeaſurement made, the paſture to be overcharged again by him that firſt did it, with more beaſts than he ought to keep, whereupon no remedy hath been yet provided; it is ordained, that upon the ſecond overcharge, the plaintiff ſhall have remedy in this manner: if the admeaſurement were before the juſtices, the plaintiff ſhall have a writ judicial, that the ſheriff in preſence of the parties being ſummoned (if they will come) ſhall inquire upon the ſecond overcharge; which if it be found, it ſhall be returned before the juſtices, under the ſeals of the ſheriff, and the ſeals of the jurors; and the juſtices ſhall award the plaintiff damages, and ſhall put in the extreats the value of the beaſts which were put into the paſture after ſuch admeaſurement more than he ought, and ſhall deliver the extreats unto the barons of the exchequer, whereof they ſhall anſwer unto the king. If ſuch admeaſurement were made in the county, then, at the requeſt of the plaintiff, a writ ſhall go out of the chancery, that the ſheriff ſhall inquire of ſuch overcharge; and for the beaſts put in the paſture above the due number, or for the value of them, he ſhall anſwer to the king at the exchequer. And leſt the ſheriff might defraud the king in this caſe, it is agreed,

rius et barones de scaccar' qualiter vic' respondeat de exitibus hujusmodi brevium. Eodem modo irrotulentur brevia de rediſſeiſina, et mittantur ad scaccarium in fine anni.

agreed, that all such writs *de secunda superoneratione*, that pass out of the chancery, shall be inrolled, and at the year's end the transcripts shall be sent into the exchequer under the chancellor's seal, that the treasurer and barons of the exchequer may see how the sheriff doth answer of the issues of such writs. In the same wise writs of redisseisin shall be inrolled and sent into the exchequer at the year's end.

Glanv. li. 12. c. 13. Bract. li. 4. fo. 229. Brit. fo. 138. Flet. lib. 4. cap. 23. Mirr. cap. 5. §. (Rast. 22. Regist. 157.)

7 E. 4. 22. F.N.B. 225 h. & 148. f. g.

It is to be observed, that the writs of admeasurement of pasture and of dower are vicountell, and are not returnable, and the parties may thereupon plead before the sheriffe in the county.

44 E. 3. 10.

Both these pleas may be removed out of the county court by *pone* at the suit of the plaintife, without shewing cause in the writ, but at the suit of the defendant he ought to shew cause.

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Now where this statute saith, *aliquando coram justiciariis*, that is, when the plea is removed before the justices, there upon pleading, or confession before them after admeasurement made and returned, judgement shall be given by the justices; but if the plea be not removed, the admeasurement shall be enquired of, and made before the sheriffe, and so be these words (*aliquando in comit' coram vicecom'*) to be understood.

Regist. judic. fo. 56. b. & 40. a.

Regist. judic. ubi supra.

See the judiciall writ of admeasurement of pasture granted by the court of common pleas for making of admeasurement, which writ is returnable before the justices.

Anno 11 H. 3. in archivis turris London.

(1) *Nec super hoc hucusque provisum fuisset.*] Yet I have seen a record in 11 H. 3. where a writ *de secunda superoneratione* was granted.

Regist. 157. Regist. judic. 36. F.N.B. 126. Flet. li. 4. c. 23. 7 E. 4. 22. Vet. N. B. fol. 72.

(2) *Statutum est, quod de secunda superoneratione fiat remedium conquerenti sub hac forma, quod conquerens habeat breve de judicio, si coram justiciariis admensurata fuerit pastura.*] The effect of which judiciall writ is, that the sherife in the presence of the parties, if they will be present, being warned, shall enquire by a jury of the second surcharge, and what cattell secondly surcharged, and the value of them, which if it be found, and returned under the seale of the sherife, and the seales of the jurors, the justices shall adjudge damages to the party, and the cattell which surcharged after the admeasurement made shall be forfeited to the king, and the value of them shall be estreated into the exchequer, that thereof the king may be answered.

Regist. 157.

(3) *Si in com' fact' fuerit admensuratio, tunc ad instantiam querentis exeat breve de cancellaria.*] Which writ you may find in the Register.

Temps E. 1. admeasurement 15. 18 E. 3. 30. 7 E. 4. 23. 8 H. 6. 26. F.N.B. 126. i.

(4) *De secunda superoneratione.*] And here it is to be known, that a writ *de secunda superoneratione* lyeth not against any that surchargeth after a former admeasurement, but onely against them against whom the writ was brought, and which were particularly charged

charged with ſurcharge in the writ; for all the commoners, as well thoſe which ſurcharged not, as thoſe which ſurcharged, are to be admeaſured; and therefore it appeareth not who ſurcharged, but onely they that are charged therewith, and ſo found: hereupon it followeth, that a writ *de ſecunda ſuperoneratione* lyeth not againſt any but againſt them that were named, and thereof convicted in the firſt writ; for he cannot be charged with a ſecond, that was not culpable of the firſt: and therefore none but ſuch as were named in the former writ ſhall forfeit their cattell, &c. or yeeld damages.

(5, *Et ne vicecomes fraudem fac' domino regi.*] Here is proviſion made to prevent the fraud of ſherifes, leſt by their fraud they ſhould prevent the king of his duty.

CAP. IX.

CUM capitales domini diſtringunt feodum ſuum pro conſuetudinibus et ſervitiis (1) *ſibi debitis, et medius ſit* (2) *qui tenentem acquietare debeat* (3), *cum non jaceat in ore tenentis, poſtquam diſtrictionem replegiaverit, dedicere demanda capitalis domini ſui, qui advocat in curia regis juſtam diſtrictionem fieri ſuper tenentem ſuum, viz. ſuper medium: multi per hujuſmodi diſtrictiones hucuſque*
[371] *gravati extiterunt, per hoc quod medius (licet haberet per quod diſtringi poſſet) magnas fecit dilationes antequam ad curiam venerit ad reſpondendum hujuſmodi tenentibus ſuis ad breve de medio: per hoc etiam quod durius fuit in caſu quando medius nihil habuit, in caſu etiam cum tenens paratus eſſet facere capitali domino ſervitia et conſuetudines exactas, et capitalis dominus ſervitia, et conſuet. ſibi debitas renuebat percipere per manum alterius, quam per manum proximi tenentis ſui* (4), *et ſic amiſerunt hujuſmodi tenentes in dominico proficuum terrarum ſuarum aliquando ad tempus, aliquando toto tempore ſuo, nec fuit antea aliquod remedium in hoc caſu proviſum. Ordinatum eſt et proviſum in hoc caſu remedium in poſterum, ſub hac forma, quod quam cito hujuſmodi tenens in dominico, habens medium inter ipſum et capitalem dominum, diſtringitur,*

WHEN chief lords diſtrain in their fee for cuſtoms and ſervices to them due, and there is a mean which ought to acquit the tenant, ſithence it lieth not in the mouth of the tenant, after that he hath replevied the diſtreſs, to deny the demand of the chief lord, which avoweth in the king's court, that the diſtreſs is lawfully taken upon his tenant, which is upon the mean; and many have been heretofore ſore grieved by ſuch diſtreſſes, in ſo much as the mean (not withſtanding that he hath whereby he may be diſtrained) doth make long delays before he will come into the court to anſwer for his tenant unto the writ of mean; and further, the caſe was moſt hard when the mean had nothing: in caſe alſo when the tenant was ready to do his ſervices and cuſtoms unto his lord, and the chief lord would refuſe to take ſuch ſervices and cuſtoms by the hands of any other than of his next tenant, and ſo ſuch tenants in demean loſt ſomewhiles the profits of their lands for a time, and ſomewhiles for their whole time, and hitherto no remedy hath been provided in this caſe; a remedy is provided and ordained hereafter in this form, that ſo ſoon as ſuch tenant in demean (having a mean between him and the chief lord) is diſtrained, incontinent the

tringitur, ſtatim perquirat ſibi tenens breve de medio. Et ſi medius habens terram in eodem comitatu (6) *diffugerit uſq; ad magnam diſtrictionem* (5), *detur querenti in brevi ſuo de magna diſtrict' talis dies, ante cujus adventum duo comitatus teneantur, et præcipiatur vicecom', quod diſtringat medium per magnam diſtrictionem, prout in brevi continetur. Et nihilominus vicecomes in duobus plenis comitatibus ſolemniter proclamare faciat, quod hujuſmodi medius veniat ad diem in brevi contento, reſponſurus tenenti ſuo. Ad quem diem ſi venerit, procedat placitum inter eos modo conjuncto. Et ſi non venerit hujuſmodi medius, amittat ſervitium tenentis ſui, et à modo non reſpondeat* (7) *ei tenens in aliquo, ſed (omiſſo illo medio) reſpondeat capitali domino de eiſdem ſervitiis et conſuetudinibus, quæ prius facere debuit prædictus medius. Nec habeat capitalis dominus poteſtatem diſtringendi tenentis in dominico, dum prædictus tenens offerat ei ſervitia debita et conſueta* (8). *Et ſi capitalis dominus exegerit plus quam medius ei facere deberet, habeat tenens in hoc caſu exceptionem verſus dominum quam haberet medius* (9). *Si vero medius nihil habuerit in poteſtate regis* (10), *nihilominus perquirat tenens breve ſuum de medio ad vicecomitem illius comitatus in quo diſtringitur. Et ſi vicecomes mandaverit, quod medius nihil habet unde poteſt ſummoneri, nihilominus ſequatur breve de attachiamento. Et ſi vicecomes mandaverit, quod nihil habet per quod poteſt attachiari, nihilominus ſequatur breve*

[372] *de magna diſtrictione, et fiat proclamatio in forma prædicta. Si vero medius non habeat terram in comitatu in quo fit diſtrictio, ſed habeat terram in alio comitatu* (11) *tunc exeat breve originale ad ſummonendum medium ad vicecomitem illius comitatus in quo fit diſtrictio. Et cum teſtificatum fuerit per illum vicecomitem, quod nihil habet in comitatu ſuo, exeat*

the tenant ſhall purchaſe his writ of mean. And if the mean, having land in the ſame county, abſent himſelf until the great diſtreſs awarded, the plaintiff ſhall have ſuch day given him in his writ of great diſtreſs, afore the coming whereof two counties may be holden, and the ſheriff ſhall be commanded to diſtrain the mean by the great diſtreſs, like as it is contained in the writ, and nevertheleſs the ſheriff in two full counties ſhall cauſe to be proclaimed ſolemnly, that the mean do come at a day contained in the writ, to anſwer his tenant: at which day, if he come, the plea ſhall paſs between them after the common uſage; and if he do not come, then ſuch meſne ſhall loſe the ſervices of his tenant, and from thenceforth the tenant ſhall not anſwer him in any thing; but the ſame mean being excluded, he ſhall anſwer unto the chief lord for ſuch ſervices and cuſtoms as before he ought to have done to the ſame mean; neither ſhall the chief lord have power to diſtrain, ſo long as the aforeſaid tenant doth offer him the ſervices and cuſtoms due. And if the chief lord exact more than the mean ought to do, the tenant in ſuch caſe ſhall have ſuch exceptions as the mean ſhould. And if the mean have nothing within the king's dominion, the tenant ſhall nevertheleſs purchaſe his writ of mean to the ſheriff of the ſame ſhire wherein he is diſtrained. And if the ſheriff return, that he hath nothing whereby he may be ſummoned, then ſhall the tenant ſue his writ of attachment. And if the ſheriff return, that he hath nothing to be attached by, he ſhall nevertheleſs ſue his writ of great diſtreſs, and proclamation ſhall be made in form aboveſaid. And if the mean have no land in the ſhire where the diſtreſs is taken, but hath land in ſome other ſhire, then a writ original ſhall iſſue to ſummon the mean unto the ſheriff of the ſame ſhire

exeat breve de judicio ad ſummonend' medium ad vicecomitem illius comitatus in quo teſtificatum fuerit quod habet tenem', et fiat ſecta in illo comitatu, quouſq; perveniatur ad magnam diſtrictionem, et proclamationem, ſicut dictum eſt ſupra de medio habente terram in eodem comitatu in quo ſit diſtrictio. Et nihilominus fiat ſecta in comitatu in quo nihil habet (ſicut dictum eſt ſupra de medio nihil habente) quouſq; perveniatur ad magnam diſtrictionem et proclamationem, et ſic poſt proclamationem in utroque comitatu factam adjudicetur medius de feodo et ſervitio ſuo (12). *Et cum aliquando contingat, quod tenens in dominico ſeoffatus eſt ad tenendum de medio per minus ſervitium, quam medius facere debuit capitali domino, cum poſt hujuſmodi proclamationem attornatus ſit tenens capitali domino, medio omiſſo, neceſſe habet tenens reſpondere capitali domino de ſervitiis et conſ. quæ medius ei prius facere debuit, et poſtquam medius venerit in curiam, et cognoverit, quod acquietare debet tenentem ſuum, vel adjudicetur ad acquietandum, ſi poſt hujuſmodi cognitionem aut judicium querimonia perveniat, quod medius non acquietat tenentem* (13), *tunc exeat breve de judicio, quod vicecomes diſtringat medium ad acquietandum tenentem, et ad eſſendum coram juſticiariis ad certum diem, ad oſtendendum quare prius eum non acquietavit. Et cum per diſtrictionem venerit, audiatur querens. Et ſi querens verificare poterit, quod ipſum non acquietavit, ſatisfaciat de damnis, et per judicium recedat* (14) *tenens quietus de ſuo medio, et attornetur capitali domino. Et ſi ad primam diſtrictionem non venerit, exeat breve de alia diſtrictione, et fiat proclamatio, et poſtquam teſtificatum fuerit, procedatur ad judicium, ſicut ſuperius dictum eſt. Et ſciendum eſt, quod per hoc ſtatutum non excluduntur tenentes, quin habeant warrantiam* (15), *ſi de tenementis ſuis implacitentur, ſuper medios ſuos,*

ſhire where the diſtreſs is taken, and when it is returned by the ſheriff that he hath nothing in his ſhire, a writ judicial ſhall iſſue to ſummon the mean unto the ſheriff of the ſame ſhire, in which it ſhall be teſtified that he hath land, and ſuit ſhall be made in the ſame ſhire until they have paſſed unto the great diſtreſs and proclamation, as above is ſaid in the mean having land in the ſame ſhire in which the diſtreſs is taken. And nevertheleſs ſuit ſhall be made in the ſame ſhire where he hath nothing, as above is ſaid of the mean that hath nothing, until the proceſs come to the great diſtreſs and proclamation; and ſo after proclamation made in both counties, the mean ſhall be fore-judged of his fee and ſervice. And where it happeneth ſometimes, that the tenant in demean is infeoffed to hold by leſs ſervice than the mean ought to do unto the chief lord, when after ſuch proclamation the tenant hath attorned to the chief lord, and the mean being excluded, the tenant muſt of neceſſity anſwer unto the chief lord for all ſuch ſervices and cuſtoms as the mean was wont to do to him. And after that the mean is come into the court, and hath confeſſed that he ought to acquit his tenant, or be compelled by judgement to acquit, if after ſuch confeſſion or judgement it is complained that the mean doth not acquit his tenant, then ſhall iſſue a writ judicial, that the ſheriff ſhall diſtrain the mean to acquit the tenant, and to be at a certain day before the juſticers, for to ſhew why he hath not acquitted him before; and when they have proceeded unto the great diſtreſs, the plaintiff ſhall be heard; and if the plaintiff can prove that he hath not acquitted him; he ſhall yield damages, and by award of the court the tenant ſhall go quit from the mean. and ſhall attorn unto the chief lord, And if he come not at the firſt diſtreſs,

ſuos, et eorum hæredes, ſecundum quod prius habuerunt, nec etiam excluduntur tenentes (16), *quin ſequi poſſunt verſus medios ſuos, ſecundum conſuetudinem prius uſitatam, ſi viderint quod proceſſus eorum plus valeat * per antiquam conſuetudinem, quam per iſtud ſtatutum. Et ſciendum eſt, quod per iſtud ſtatutum non providetur remedium quibuſcunque mediis, ſed ſolummodo in caſu cum ſit unus medius* (17) *tantum inter dominum diſtringentem et tenentem, et in caſu quando medius ille eſt plenæ ætatis* (18), *et in caſu quando tenens, ſine præjudicio alterius* (19) *quam medii, attornare ſe poteſt capitali domino, quod dictum eſt pro mulieribus tenentibus in dotem, et tenentibus per legem Angliæ, vel aliter ad terminum vitæ, vel per feodum talliatum, quibus pro aliquibus cauſis nondum eſt proviſum remedium: ſed (Deo dante) alias providebitur.*

treſs, a writ ſhall go forth to diſtrain him again, and proclamation ſhall be made, and as ſoon as it is returned, they ſhall proceed in judgement, as before is ſaid. And it is to be underſtanden, that by this ſtatute tenants are not excluded, but they ſhall have a warranty of the means and their heirs, if they be impleaded of their lands, as they have had before; nor the tenants ſhall be excluded, but that they may ſue againſt their means, as they uſed heretofore, if they ſee that their proceſs may be more available by the old cuſtom, than by this ſtatute. And it is to wit, that by this ſtatute no remedy is provided to any means, but only in caſe where there is but one onely mean between the lord that diſtraineth and the tenant; and in caſe where that mean is of full age; and in caſe where the tenant may attorn unto the chief lord without prejudice of any other than of the mean, which is ſpoken for women tenants in dower, and tenants by the courteſie, or otherwiſe for term of life, or in fee-tail, unto whom for certain cauſes remedy is not yet provided, but (God willing) there ſhall be at another time.

(Regiſt. 160. Fitz. Meſne, 1. 3. 7. 11, 12. 15, 16, 17. 19, 20, 21. 24. 56. 58. Fitz. Proclamat. 20, 21. 1 Inſt. 100. a. Fitz. Meſne, 3. 18. 47. 57. 66, 67. 70. Fitz. Meſne, 1. 53. Fitz. Avowry, 146. 168. Fitz. Meſne, 28, 29. Fitz. Proceis, 153. Fitz. Meſne, 20. 24. 38. 59. 68. 70. Fitz. Meſne, 68. 25. 35. 79. Raſt. 433, &c.)

50 E. 3. 23.

One miſchiefe here firſt mentioned before the making of this ſtatute was, the great delayes which were uſed in the writs of meſne, in which the proceſſe at the common law was ſummons, attachment, and diſtreſſe infinite; and yet the tenant in default of the meſne was preſently diſtrained by the lord paramount, which miſchief appeareth by the preamble of this act: for remedy whereof a more ſpeedy proceeding is given by this act in a writ of meſne.

Another miſchiefe was, when the meſne had nothing within the ſame county; for there the tenant was without remedy, and though the meſne had ſufficient in another county, the common law extended not thereunto, in both which caſes remedy is given by this act.

4 E. 3. 42. F.N.B. 137. a.

(1) *Pro conſuetudinibus et ſervitiis*, &c.] The diſtreſſe muſt bee taken for the cuſtomes or ſervices which the meſne by reaſon of his tenure ought to doe to the lord, within which, ſute ſervice to a hundred

hundred is comprehended, but not ſute reall, that is, by reſiancie either to hundred, leet, or tourne, for that is not by reaſon of his tenure.

But if the tenant be diſtrained for the reliefe of the meſne, or for reaſonable aide, albeit they are rather improvements of ſervices then ſervices, yet the tenant ſhall have a writ of meſne, becauſe they grow by reaſon of the tenure.

5 E. 3. 49. 10 H. 6. 26. 39 H. 6 31. a. 9 E. 4. 27. F.N.B. 136. m.

(2) *Et medius ſit.*] If there be A. lord, B. meſne, C. meſne, D. tenant *per availe*, A. the lord paramount diſtrein D. for ſervices, &c. he bringeth a writ of meſne againſt C. and recovereth damages againſt him, whereupon C. the meſne may have a writ of meſne againſt B. but if B. plead *nient diſtrein de ſon default*, the ſpeciall matter muſt be ſhewed, and not to take the generall iſſue, and ſo every meſne ſhall have his writ againſt his meſne.

18 E. 3. 19. 29 E. 3. 34. 39 E. 3. 19. 39 H. 6. 31. b.

(3) *Qui tenentem acquietare debeat.*] There be two kinds of acquitals; one expreſſe, and the other implyed: expreſſe, three manner of waies:

31 E. 1. meſn. 55. 7 E. 2. ibid. 66. 20 E. 2. ibid. 59. 8 E. 3. 49. 39 E. 3. 19. 38 E 3. 10. F.N.B. 136.

Firſt, by fine or deed, either at the creation of the tenure, or after: ſecondly, by acknowledgement of acquittall: thirdly, by preſcription.

Implyed, five manner of waies:

Firſt, by owelty of ſervices; ſecondly, by tenure in frankalmoigne; thirdly, in frankmarriage; fourthly, by homage auncеſtrell; and fifthly, in dower.

(4) *In caſu etiam cum tenens paratus eſſet facere capitali domino ſervitia et conſuetudines exactas, et capitalis dominus ſervitia et conſuetudines ſibi debitas renuebat percipere per manum alterius, quam per manum proximi tenentis ſui*, &c.] By the common law the lord paramount might have refuſed his ſervices by the * hands of the tenant *per availe*, or by the hands of tenant for life, where the reverſion was over, becauſe the meſne or he in reverſion was his very tenant in privity, for the which remedy is given by this act.

Lib. 6. 58. Bredimans caſe, lib. 9. fol. 110, 111. 21 E. 3. 49. 2 H. 6. 3. 8 H. 6. 16.

(5) *Uſque ad magnam diſtrictionem.*] This muſt be underſtood of a writ of meſne returnable into the court of common pleas, and not of a writ of meſne that is vicountell, and not returnable.

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And although a writ of meſne be depending between the tenant and the meſne, yet the lord paramount may proceed, &c. for he ſhall not tarry till the matter be tried in the writ of meſne.

F.N.B. 136. d.

But it appeareth by Fleta, *Si medius ſit paratus ipſum tenentem acquietare de ſervitiis, quod capitalis dominus ab eo exigit, tunc ſecundum aquitatem juris ſubvenietur tenenti per breve, viz. quod capitalis dominus eſſoniet*, and there the writ in that caſe appeareth.

Flet. li. 2. cap. 43. Brit fol. 58. b.

(6) *Et ſi medius habens terram in eodem comitatu*, &c.] Here is provided a more ſpeedy proceeding in the writ of meſne, if the meſne had land in the ſame county.

Brit. ubi ſupra.

(7) *Et ſi non venerit hujuſmodi medius, amittat ſervitium tenentis ſui, et à medio non reſpondeat*, &c.] If the meſne appeare not at the grand diſtreſſe, he ſhall be fore-judged, that is to ſay, that the meſne ſhall loſe the ſervices of his tenant of the tenements before holden. And that the meſne being omitted, the tenant from thenceforth ſhall be *attendens et reſpondens* to the chiefe lord by the ſame ſervices, as the meſne holdeth by.

Flet. lib. 2. ca. 43. Brit. fol. 58. 10 H. 6. 26.

But it is to be obſerved, that the immediate chiefe-lord muſt be named in the fore-judger; for albeit he be a ſtranger to the writ, and by his death the writ of meſne ſhall not abate: yet in the judgement

21 E. 3. meſn. 48. 10 H. 6. fol. 26. 4 H. 6. 28.

judgement he that is then immediate lord paramount must be particularly named.

(8) *Nec habeat capitalis dominus potestatem distringendi tenentes in dominico, dum prædictus tenens offerat ei servitia debita, et consueta.*] Here three things are to be observed.

1. That the tenant must offer and tender the rent or service due upon the land, and not be ready only, by reason of the word (*offerat.*)

2. This must be done at the time, when the lord comes to distraine.

3. That this act is to be understood of services, and customes which the tenant may doe, as payment of rents, delivery of heriot-service, or the like; but extendeth not to personall services annexed to the person of the mesne, as homage, fealty, &c. for he cannot say, I become your man: nor sweare to him fealty, &c. But after fore judger, then the tenant shall doe all manner of services which the mesne ought to have done, for then the mesnalty is extinct; but as long as the mesnalty remaines, the personall services remaine with the *mesne, servitia personalia sequuntur personam.*

2 H. 6. avowry 1. 2 H. 6 fol. 3. 21 E. 3. 49. Breviman's case, ubi supra, li. 9. fol. 116, 121.

(9) *Et si capitalis dominus exegerit plus, quam medius ei facere deberet, habeat tenens in hoc casu exceptionem versus dominum quam haberet medius.*] Hereby provision is made for the tenant to take any advantage that the mesne might do, if the chiefe lord demand other services then the mesne ought to doe, albeit he be a stranger to the avowry.

Lib. 7. in Calvins case, cap. Itineris, Vet. Magn. Chart. fol. 154.

(10) *Si vero medius nihil habuerit in potestate regis.*] Here *sub potestate regis* is taken for the power of the king to administer justice to his subjects by his writs, *potestas regia est facere justitiam.* See the first part of the Institutes, sect. 199.

And by this branch remedy is given to the tenant where the mesne had nothing, where he had no remedy by the common law,

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(11) *Si vero medius non habeat terram in comitatu in quo fit districtio, sed habeat terram in alio comitatu*, &c.] Here is remedy given to the tenant, where the mesne hath land in a forraine county.

Mich. 17. E. 1. in banco rot. 147. Stat. Rich. de Rokel's case. 31 E. 1. mesn. 55. 18 E. 2. ibid. 57. 46 E. 3. 31.

(12) *Adjudicetur medius de feodo et servitio suo.*] Here also fore-judger is given in the cases here mentioned, which is a better and speedier remedy then the common law gave.

(13) *Et postquam medius, &c. cognoverit, &c. vel adjudicetur ad acquietandum. &c. si post, &c. medius non acquietavit tenentem.*] Medius, the heire of the mesne shall not be fore-judged within this statute, for that this act speaketh of the mesne onely, and not of the mesne and his heires.

31 E. 1. mesn. 55. 18 E. 2. ib. 57. 46 E. 3. 31. 49 E. 3. 8.

(14) *Satisfaciat de dannis, et per judicium recedat*, &c.] This branch of the statute giveth damages and fore-judger, and the plaintife cannot take damages, and leave the fore-judger, but he must either take both according to this branch, or neither of them.

8 E. 3. 49.

(15) *Et sciendum est, quod per hoc stat' non excluduntur tenentes, quin habeant warrantiam.*] By this clause the warranty of the tenant (which was ever much esteemed in law) is saved and preserved, and many deeds comprehended both warranty and acquitall.

(16) *Nec*