(16) *Nec etiam excluduntur tenentes*, &c.] Here the tenant hath election either to take the benefit of this act, by taking the proceſſe given by the ſame, or to take the proceſſe at the common law, and this was *abundans cautela*; for this ſtatute being in the affirmative, the tenant might have had election (if this clauſe had not been) but *abundans cautela non nocet:* and the ancient ſages of the law did ever make things as plain, and leave as little to conſtruction, as might be. 13 E. 2. meſn. 68. 50 E. 3. 23. F.N.B. 137. b.

(17) *Sed ſolummodo quando unus ſit medius*, &c.] Hereby it appeareth, that no fore-judger can be, but when there is but one meſne betweene the lord paramount and the tenant.

(18) *In caſu quando medius eſt plenæ ætatis.*] Albeit a feme covert be not here excepted, yet by good conſtruction ſhe is excepted. 7 E. 2. meſn. 76. 9 E. 2. ibid. 67.

(19) *Sine præjudicio alterius.*] Theſe words were ſpecially intended of tenant in dower, or of tenant for life, or in taile with a remainder over; for againſt them no fore-judger ſhall be given, but their extent is farre more large. 7 E. 3. fol. 41. 34 E. 3. meſn. 47. Dyer 2. mar. 104. 14 E. 2. tit. meſn. 70.

If the diſſeiſſor, or any other that hath a defeaſible title in the tenancy doth fore-judge the meſne, this ſhall not prejudice the diſſeiſee, or him that right hath; for they are within the remedy of theſe words, that every fore-judger ought to be *ſine præjudicio alterius.*

But if the daughter fore-judge the meſne, and a ſon is borne after the fore-judgement, the ſon ſhall not avoid it; for it was *ſine præjudicio alterius*, when the judgement was given.

If two joyntenants bring a writ of meſne, and the one is ſummoned and ſevered, and the other ſueth forth, he cannot fore-judge the meſne, becauſe he cannot *reſpondere capitali domino de eiſdem ſervitiis et conſuetudinibus, quæ prius facere debuit prædictus medius.* 14 H. 4. 37.

So it is, if there be two joynt meſnes, and the one appeare, and the other make default, no fore-judgement ſhall be, for the ſame cauſe neceſſarily collected upon the ſame words.

They that are ſeiſed in *auter droit*, as the biſhop in right of his biſhopricke, or the abbot or prior in the right of his monaſtery, or the like, ſhall neither fore-judge, nor be fore-judged, becauſe it is to be intended, that it cannot be done *ſine præjudicio alterius*, for that the conſent of them is not had, which by law to the alteration of any eſtate is requiſite, as the deane and chapter to the biſhop, and the covent to the abbot, prior, &c. 19 E. 3. tit. meſn. Statham.

If the meſne hanging the writ of meſne againſt him alien by fine, albeit the right of the meſnalty paſſeth to the conuſee, yet the meſne may be fore-judged, and the conuſee ſhall not take advantage of theſe words, *ſine prædjudicio alterius*, becauſe he came to the meſnalty, *pendente brevi*, and in judgement of law the meſne (as to the plaintife) remaine ſeiſed of the meſnalty; for, *pendente lite nihil immovetur.* 34 E. 3. meſne 47.

CAP. X.

CUM in itinere juſtic' proclamat' fuerit, quod omnes qui brevia liberare voluerint, ea liberent infra certum terminum (1), *poſt quem nullum breve recipiatur, multi de hoc confidentes, cum moram fecerint uſque ad prædictum terminum, et nullum breve ſuper eos fuerit liberatum, de licentia juſtic' recedunt, poſt quorum receſſum adverſarii ſui ipſorum abſent' percipientes, brevia ſua porrigunt in cera, quæ aliquando per favorem, aliquando pro dono per vicecomitem recipiuntur, et illi, qui ſecure credebant receſſiſſe, ten' ſua amittunt: ut hujuſmodi fraudi ſubveniatur imposterum, ſtatuit dominus rex, quod juſtic' in itineribus ſuis ſtatuant terminum quindena, vel menſis, minoris vel majoris termini, ſecundum quod comit' fuerit major vel minor, infra quem terminum publice proclametur, quod omnes qui brevia liberare voluerint, ea liberent infra terminum illum. Et in adventum illius termini certificet vicecomes capituli juſtic' itineranti, quot brevia habet, et quæ, et quod ultra illum terminum nullum breve recipiatur, quod ſi receptum fuerit, proceſſus per illud factus pro nullo habeatur* (1): *excepto quod breve* (2) *ceſſatum durante toto itinere relevari poterit. Breve etiam de dote de viris qui obierint al' ſeiſiti infra ſummonitionem itineris, aſſiſe ultime præſentationis, et quare impedit, de eccleſiis vacantibus, infra ſummonitionem præd', quocunq; tempore ante receſſum juſtic' recipiantur in itinere. Brevia etiam novæ diſſeiſinæ, quocunque tempore facta fuerit diſſeiſina, recipiantur in itineribus juſtic'.*

Concedit dominus rex de gratia ſpeciali (3) *quod illi qui habent tenem'* (4) *in diverſis comitatibus, in quibus*

WHEREAS in the circuit of juſtices it was proclaimed, that all ſuch as would deliver writs, ſhould deliver them within a certain time, after which no writ ſhould be received; many truſting upon the ſame, and tarrying until the ſaid time, and no writ ſerved upon them, departed by licence of the ſaid juſtices; after whoſe departure their adverſaries, perceiving their abſence, delivered their writs in wax, which ſometime by fraud, and ſometimes for rewards, be received of the ſheriff, and they, that thought to have departed quiet, loſe their lands. For the remedy of ſuch fraud from henceforth, the king hath ordained, that the juſtices in their circuits ſhall appoint a time of fifteen days, or a month, or a time more or leſs (after as the county ſhall happen to be more or leſs) within which time it ſhall be openly proclaimed, that all ſuch as will deliver their writs, ſhall deliver them before the ſame time; and when the time cometh, the ſheriff ſhall certifie the chief juſtice in eyre how many writs he hath, and what, and that no writ be received after the ſame time; and if it be received, the proceſs iſſuing thereupon ſhall be of none effect; but only that a writ abated any time during the circuit may be amended; alſo writs of dower of men that died within the ſummons of the circuit, aſſiſes of darrain preſentment, quare impedit, of churches vacant within the foreſaid ſummons, ſhall be received at any time before the departure of the juſtices; alſo writs of novel diſſeiſin, at what time ſoever the diſſeiſin was done, ſhall be received in the circuit of juſtices.

Our lord the king of his ſpecial grace granteth, that ſuch as have land in divers ſhires where the juſtices make

*quibus juſtic' itinerant, vel de quibuſdam ten' in com' in quo juſtic' non itinerant, timent implacitar', et de aliis tenem' in comitatu, in quo juſtic' non itinerant, implacitentur: ut coram juſtic' apud Weſtm', vel * de banco domini regis, vel coram juſticiariis ad aſſiſas capiendas aſſignatis, vel in aliquo comitatu coram vic', vel in aliqua cur' baronum, facere poſſint generalem attornat'* (6) *ad proſequendum pro eis in omnibus placitis in itinere* (7) *juſtic' pro ipſis, vel contra ipſos motis vel movendis, durante itinere. Qui quidem attornatus, vel attorn', habeat poteſtatem in placitis motis in itinere quouſque placitum terminetur* (5), *vel dominus ſuus ipſum amoverit, nec per hoc excuſentur, quin ſint in juratis, et aſſiſis, coram eiſdem juſtic'* (8).

make their circuit, and that have land in ſhires where the juſtices have no circuit, that fear to be impleaded, and are impleaded of other lands in ſhires where they have no circuit, as before the juſtices at Weſtminſter, or in the king's bench, or before juſtices aſſigned to take aſſiſes, or in any county before ſheriffs, or in any court baron, may make a general attorney to ſue for them in all pleas in the circuit of juſtices moved or to be moved for them, or againſt them, during the circuit; which attorney or attorneys ſhall have full power in all pleas moved during the circuit, until the plea be determined, or that his maſter remove him; yet ſhall they not be excuſed thereby, but they ſhall be put in juries and aſſiſes before the ſame juſtices.

Regiſt. 19. b. (13 Ed. 2. ſtat. 1. c. 4.)

(1) *Cum in itinere juſtic. proclamat. fuerit, quod omnes qui brevia liberari voluerunt, ea liberent infra certum terminum, &c.*]

Hereby is recited the miſchiefe which was before the making of this act, the remedy followeth.

Ut hujuſmodi fraudi imposterum, ſtatuit dominus rex, quod juſticiarii in itineribus ſuis ſtatuant terminum, quindenæ, vel menſis, minoris vel majoris termini ſecundum quod comitatus fuit major vel minor, infra quem terminum publice proclametur quod omnes qui brevia liberare voluerint ea liberent infra terminum illum, et in adventu illius termini certificet vicecomes capitalem juſticiar' itinerant' quot brevia habent et quæ, et quod ultra illum terminum nullum breve recipiatur, quod ſi receptum fuerit proceſſus per illud factus pro nullo habeatur.] Upon this purview was great queſtion, whether the king might diſpenſe with this law, and give a further day then hereby is preſcribed, and in the end adjudged that he might for advancement and furtherance of juſtice: of this purview, the Mirror with too much aſperity ſaith thus, *Leſtatute de ſuſpention de brieſes en eyres eſt reprovable come reſeignant a la grand chartre que dit nous ne vecrons a nul droit, ne deierons, & pur quoy ſont brieſes rebotables de audience eins pur le multitude des brieſes que adonques ſe font & pur le petit nombre des juſtices fait droit de pluſors.*

Fleta, li. 1. c. 19.

Tr. 6 E. 2. in Theſaur. Regiſt. fo. 19. F.n.b. 17. E.

Mirror, c. 5. § 5.

(2) *Excepto quod breve, &c.*] Here followeth five exceptions:

1. The firſt is, that a writ abated, may, during the whole eyre, be amended.

2. Writs of dower, of the ſeiſin of men that dyed within the ſummons of the heir (which is by the ſpace of forty dayes) before the beginning of the heir.

Brit. c. 2. Fleta, lib. 1. c. 19. §. 9.

3. Aſſiſes of darrein preſentment.

4. *Quare impedit* of churches vacant within the aforeſaid ſummons, ſhall be received at any time before the departure of the juſtices.

5. Writs of aſſiſe of novel diſſeiſin, at what time ſoever the diſſeiſin

disseisin was done, shall be received during the eyre of the justices.

Regist. fo. 19, 20. F.N.B. 25. c. e. 26. a. c. d. 18 E. 3. 46. 8 E. 3. 20. * [378]

(3) *Concedit dom' rex de gratia speciali quod illi qui habent tenem'*, &c.] Here is an act of grace, and therefore it is termed accordingly, *De * gratia speciali*; for where the king by his prerogative before this and other statutes might by letters patents, or by writ under his great seal, grant to any demandant or pl', tenant, or defendant, to make attorney in any action, and to command the judges to admit such persons to be attorneys for them: Now justly is this act stiled an act of grace, for that the king gave his royall assent to this law for the quiet and safety of his subjects, giving them power hereby to make attorneys in cases herein expressed, whereby the king lost such profit of the great seal, as he formerly received in such cases. *Statutum ex gratia regia dicitur, quando rex dignatur cedere de jure suo regio pro quiete et commodo populi sui.*

(4) *Illi qui habent*, &c.] This act extends aswell to corporations aggregate of many, as maior and commonalty, and to sole corporations, as to private persons: and it extendeth aswell to justices in eyre of the forest, as to other justices in eyre; see the fourth part of the Institutes, cap. Justices in Eyre, & cap. the Courts of the Forests, and the Register *ubi supra* for claim of liberties.

4 E. 3. Attorney 13 & 8 E. 3. 9. 32 H. 6. 1. 33 H. 6. 49. 34 H. 6. 51

(5) *Quousque placitum terminetur.*] By the judgement against the defendant, the warranty of attorney is determined; for thereby *placitum terminatur*, but onely to sue execution (which is the fruit of the judgement) within the yeer: and if he sue out execution within the yeer, he may prosecute the same after the yeer; but if he sue out no execution within the yeer, then after the yeer is ended after judgement, his warrant of attorney is determined.

8 E. 3. 20. 18 E. 3. 47. F.N.B. 25 E. Regist. 19, 20.

(6) *Attornatum generalem.*] Of this generall attorney you shall often reade in our books.

(7) *In omnibus placitis in itinere.*] This is not understood of an assise of novel disseisin, for it is *querela*, and not *placitum assisæ*, whereof (as elsewhere hath been said) there is plentifull authority in our books.

Marlbr. cap. 14. 39 E. 3. 15. 34 H. 6. 25. 35 H. 6. 42.

(8) *Nec per hoc excusentur quin sint in juratis et assisis coram eisdem justic'.*] The wisdom of parliaments, and of the sages of the law hath ever been, that able and sufficient men should not (to the hindrance of justice) be exempted for service in juries and assises.

CAP. XI.

DE servientibus (1), *balivis* (2), *camerariis* (3), *et quibuscunque receptoribus, qui ad compotum reddendum tenentur* (4): *concordatum est et statutum, quod cum dominus hujusmodi servient' dederit eis auditores* (5) *compoti, et contingat ipsos esse in arreragiis super compotum suum omnibus allocatis,*

CONCERNING servants, bailiffs, chamberlains, and all manner of receivers, which are bound to yield accompt, it is agreed and ordained, that when the masters of such servants do assign auditors to take their accompt, and they be found in arrearages upon the accompt, all things

locatis, et allocandis (6), *arreſtentur corpora eorum* (7), *et per teſtimonium auditorum ejuſdem compoti, mittantur et liberentur proximæ gaolæ domini regis* (8) *in partibus illis, et à vic', ſeu cuſtode ejuſdem gaolæ recipiantur* (9), *et carceri mancipentur* * *in ferris* (10), *et ſub bona cuſtodia, et in illa priſona remaneant de ſuo proprioviventes* (11), *quouſque dominis ſuis de arreragiis plenariè ſatisfecerint. At tamen ſi quis ſic gaolæ liberatus conqueratur, quod auditores compoti ſui ipſum injuſtè gravaverunt* (12), *onerando ipſum de receptis quæ non recepit, vel non allocando ei expenſas aut liberationes rationabiles, et inveniat amicos, qui eum manucapere voluerint ad ducendum coram baronibus de ſcaccario, liberetur eis, et ſcire faciat vicecomes (in cujus priſona fuerit) domino, quod ſit coram baronibus de ſcaccario* (13) *ad aliquem certum diem cum rotulis et aliis, per quos compotum ſuum reddiderit, et in præſentia baronum vel auditor', quos aſſignare voluerint, recitetur compotus, et fiat partibus juſtitia, ita quod ſi fuerit in arreragiis, committatur gaolæ de Fleeté, ut ſupradictum eſt. Et ſi diffugerit, et gratis compotum reddere noluerit* (14), *ſicut in aliis ſtatutis alibi continetur*; Marlbridge, cap. 23. *diſtringatur ad veniendum coram juſticiariis, ad compotum reddendum, ſi habeat per quod diſtringi poſſit. Et cum ad curiam venerit, dentur ei auditores compoti, coram quibus ſi fuerit in arreragiis, et ſtatim arreragia ſolvere non poſſit, committatur gaolæ cuſtodiend' in forma prædict'. Et ſi diffugerit, et teſtificatum* (15) *fuerit per vicecomit', quod non ſit inventus, exigatur de comit' in comitatum, quouſque utlagetur. Et ſit hujuſmodi incarceratus irreplegiabilis. Et caveat ſibi vicecomes, vel cuſtos ejuſdem gaolæ, ſive ſit infra libertatem* (16) *ſive extra, quod per commune breve, quod dicitur replegiare, vel alio modo ſine aſſenſu*

things allowed which ought to be allowed, their bodies ſhall be arreſted, and by the teſtimony of the auditors of the ſame accompt, ſhall be ſent or delivered unto the next gaol of the king's in thoſe parts; and ſhall be received of the ſheriff or gaoler, and impriſoned in iron under ſafe cuſtody, and ſhall remain in the ſame priſon at their own coſt, until they have ſatisfied their maſter fully of the arrearages. Nevertheleſs if any perſon being ſo committed to priſon, do complain, that the auditors of his accompt have grieved him unjuſtly, charging him with receipts that he hath not received, or not allowing him expences, or reaſonable diſburſements, and can find friends that will undertake to bring him before the barons of the exchequer, he ſhall be delivered unto them; and the ſheriff (in whoſe priſon he is kept) ſhall give knowledge unto his maſter, that he appear before the barons of the exchequer at a certain day, with the rolls and tallies by which he made his accompt; and in the preſence of the barons, or the auditors that they ſhall aſſign him, the accompt ſhall be rehearſed, and juſtice ſhall be done to the parties, ſo that if he be found in arrearages, he ſhall be committed to the Fleet, as above is ſaid. And if he flee, and will not give accompt willingly, as is contained elſewhere in other ſtatutes, he ſhall be diſtrained to come before the juſtices to make his account, if he have whereof to be diſtrained. And when he cometh to the court, auditors ſhall be aſſigned to take his accompt, before whom if he be found in arrearages, and cannot pay the arrearages forthwith, he ſhall be committed to the gaol to be kept in manner aforeſaid. And it he flee, and it be returned to the ſheriff that he cannot be found, exigents ſhall go againſt him from county to

aſſenſu domini (17) *ipſum à priſona exire non permittat. Quod ſi fecerit, et ſuper hoc convincatur, reſpondeat domino de dannis, per hujuſmodi ſervientem ſibi illatis, ſecundum quod per patriam verificare poterit, et habeat dominus ſuum recuperare per breve de debito* (18) *verſus cuſtodem. Et ſi cuſtos gaolæ non habeat, per quod juſticietur, vel unde ſolvat, reſpondeat ſuperior ſuus qui cuſtodiam hujuſmodi gaolæ ſibi commiſit* (19), *per idem breve.*

county, until he be outlawed, and ſuch priſoner ſhall not be repleviſable. And let the ſheriff or keeper of ſuch gaole take heed, if it be within a franchiſe, or without, that he do not ſuffer him to go out of priſon by the common writ called replegiare, or by other means, without aſſent of his maſter; and if he do, and thereof be convict, he ſhall be anſwerable to his maſter of the damages done to him by ſuch his ſervant, according as it may be found by the country, and ſhall have his recovery by writ of debt. And if the keeper of the gaol have not wherewith he may be juſtified, or not able to pay, his ſuperior that committed the cuſtody of the gaol unto him, ſhall be anſwerable by the ſame writ.

Fleta, lib. 2. c. 64. Brit. fol. 70. a. (1 Inſt. 295. a. 2 Inſt. 378. Fitz. Accompt, 96. 109. Fitz. Auowry, 220. Regiſt. 137. Raſt. 14, &c. Fitz. Accompt, 23. 26. 47. 74. 106. 52 H. 3. c. 23. 29 Ed. 3. f. 5. 17 Ed. 3. f. 59. 1 R. 2. c. 12. 7 H. 4. c. 4. 2 Leon. 9. Fitz. Debt. 172. Fitz. Iſſu. 260. Bro. Dett. 103. 2 Bulſtr. 321.)

3. E. 3. 8. 4 E. 3. 7. 13 E. 3. Account 76. 41 E. 3. ib. 74. 8 E. 3. 46. 2 K. 2. Account 45. 11 R. 2. ib. 48. F. N. B. b. c. d. e.

(1) *Servientibus.*] Every writ of account muſt be brought againſt one, either as bailife, receiver, or gardein in ſocage; and therefore againſt a ſervant as ſervant, or againſt an apprentice, or a controller, ſurveyor, meſſenger *, or the like, a writ of account lyeth not, unleſſe he be charged as bailife or receiver.

A gardein in ſocage cannot be committed to priſon by force of this act, for a gardein in ſocage is *in loco parentis*, and this act beginneth with *ſervientibus*, and this word *ſervientibus* is to be applyed to *balivis, camerariis, et receptoribus*; for this act ſoon after this ſaith, *Cum domini hujuſmodi ſervientum dederit eis auditores, &c.* Where theſe words are to be obſerved, *viz. domini*, the lords or maſters, and *ſervientes*, ſervants, which word *ſervientes* extends to all; and therefore the gardein in ſocage being no ſervant, nor the heir lord, or maſter is not by this act to be impriſoned, &c.

(2) *Balivis.*] This word is ſufficiently known, and if gardein in ſocage occupy after the heir attain to the age of 14 yeers, he may be charged as bailife.

(3) *Camerariis.*] Receivers were anciently called chamberlains, becauſe they were wont to keep the money received in chambers ſpecially provided for that purpoſe; yet cannot he be charged as chamberlain in an account, but as bailife, or receiver, for the cauſe aboveſaid.

(4) *Et quibuſcunq; receptoribus qui ad compotum reddend' tenentur.*] *Receptores* is a known word, and needeth no further explication.

43 E. 3. 31. 49 E. 3. 2. 50 E. 3. 17. 27 Aſſ. 3.

(5) *Dederit eis auditores.*] An account taken before one auditor, is not within the purview of this ſtatute; for this act is in nature of a com-

* [380] 17 E. 2. Procl. 203. 18 E. 2. Avowry 220. 17 E. 3. 59. 29 E. 3. 5. See the firſt part of the Inſtitutes, f. 8. 124. For this *ſervientes*, ſee towards the end of this chapter. 1. Part of the Inſtitutes, ubi ſup. 1. Part of the Inſtitutes, 153. Fleta, li. 2. c. 70.

a commiſſion, and a commiſſion being made to two or more, cannot be executed by one alone.

20 H. 6. 17, 18. 41. 45. 8 H. 6. 15. 14 H. 6. 24. 22 H. 6. 35. 47. lib. 10. fol. 103. Denbauds caſe.

By this act the auditors are judges of record, and therefore by conſequence in an action of debt for the arrerages of an account before two or more auditors, the defendant ſhall not wage his law.

38 H. 6. 6. 2 H. 6. 41. 10 H. 6. 24, 25. Denbauds caſe, ubi ſupra.

And by the ſame conſequence of reaſon, if the lord be found in ſurpluſage upon the account determined by the auditors as an incident to their authority in an action of debt brought by the bailife for this ſurpluſage, the lord ſhall not wage his law, becauſe by force of this act (they being judges of record) no wage of law can be allowed againſt their record: and ſo was it adjudged in the exchequer chamber, as it is reported in 20 H. 6. But if the account be made before one auditor, this (as hath been ſaid) is out of the ſtatute, and therefore there he ſhall wage his law; but the lord cannot be committed to priſon (for the cauſe aforeſaid) by force of this act.

5 H. 4. cap. 8. 20 H. 6. 17, 18. 14 H. 6. 24. Vide infra, †.

43 E. 3. 21.

In an action of account againſt a receiver, for 13 s. 4 d. or any other ſum under 40 s. the ſherife in his county court ſhall not hold plea of it; and the reaſon thereof is, becauſe the ſherife cannot aſſigne auditors who (as hath been ſaid) are judges of record, and the county court is no court of record.

(6) *Omnibus allocatis et allocandis.*] † By theſe words, if the lord be found in ſurpluſage, it is within their authority, and therefore parcell of their record, and ſo in that caſe (as hath been ſaid) no wager of law.

But albeit the auditors do diſallow a juſt demand, yet ſhall he take no averment or advantage upon theſe words, againſt the record of the judgement of the auditors; for, *judicium pro veritate accipitur*, and *nemo poteſt contra recordum verificare per patriam*: but he hath remedy after by this act, by a writ of *ex parte talis* for his relief, whereof more ſhall be ſaid hereafter in his proper place.

Marlbr. cap. 23. lib. 3. fol. 11. Sir William Herberts caſe.

(7) *Arreſtentur corpora eorum.*] Note at the common law, the proceſſe in account was ſummons, attachment, and diſtreſſe infinite; by the ſtatute of Marlbr. a writ of *monſtravit de compoto* was given; and here by this branch the body may be arreſted, and after by this act proces of outlawry is given in account, ſo as after the account determined the body of the defendant may be arreſted, &c.

46 E. 3. 30. 27 H. 6. 8. li. 8. fo. 119. D. Bonhams caſe.

Note the words in effect be *ſuper compotum ſuum, &c. arreſtentur et liberentur*, ſo as the auditors by force of this act ought to commit him, &c. preſently after the account determined.

13 E. 3. barre 253. 27 H. 6. 8.

(8) *Proximæ gaolæ domini regis.*] This is intended of the next gaole, though it be not in the ſame county, for, as it hath been ſaid, the ſtatute is in nature of a commiſſion, and therefore this word *proximæ* muſt be purſued.

Dier, 24 H. 8. 249. lib. 3. fol. 44. Roytons caſe. Lib. 8. fol. 100. Pl. Com. 360. a. Brac. l. 3. 105. 137. Brit. fo. 14. 17. Fleta, l. 1. ca. 26. Mirror, c. 5. § 1. 8 E. 2. Coron. 432. Vide 3. part des Inſtitutes. Cap. petit treaſ. in fine.

(9) *Et à vic' ſeu cuſtode ejuſdem gaolæ recipiantur.*] The auditors muſt make a warrant in writing under their ſeales to the ſheriffe upon the ſpeciall matter, and thereupon the ſheriffe ought to receive the accountant in execution.

(10) *Carceri mancipentur in ferris.*] Hereby it appeareth that the ſheriffe ought to keep him *in ſalva et arcta cuſtodia*, and hath power by this act, if need require, to lay irons upon him for his ſafe keeping; but this the gaoler could not have done by the common law, as by all our ancient authors it appeareth.

(11) *De ſuo proprio viventes.*] By this clauſe it appeareth, that he that is ſo impriſoned muſt live of his owne.

Britton, fol. 70. Fleta, l. 2. c. 64. Reviſt. 137. F.N.B. 129. f. 13 E. 3. barre 253. 14 E. 3. account 74. 2 E. 3. 12.

(12) *Auditores compoti ſui ipſum injuſte gravaverunt.*] By this clauſe is the writ of *ex parte talis* given to the accountant, if the auditors aſſigned by the lord either charge him *de receptis quæ non recepit, vel non allocando ei expenſas aut liberationes rationabiles*, and this writ is, in nature of a commiſſion to the barons of the exchequer, for that they are the ſoveraigne auditors of England to heare and audite the account, *et quod fiat juſticia partibus.*

But this writ lieth not, but where the account is taken before auditors aſſigned by the lord, for if there be a writ of account brought, and the court aſſigneth auditors, there lieth no writ of *ex parte talis*, for in that caſe he ought to ſhew his griefe to the juſtices, and they ought to doe him juſtice, and the writ of *ex parte talis* is grounded upon this act, where the lord aſſigneth auditors.

(13) *Quod ſit coram baronibus de ſcaccario.*] The writ in the Regiſter, and F.N.B. *ubi ſupra*, is *coram theſaurario et baronibus noſtris de ſcaccario*, but it ought to be *coram baronibus de ſcaccario* according to this act, and that the rather, becauſe the barons are (as hath been ſaid) the ſoveraigne auditors of England, and herewith agreeth Fleta.

Fleta, l. 2. c. 64.

Dier. 36 H. 8. c. 64.

Upon ſureties found he ſhall be at large to follow his writ of *ex parte talis*, before the barons, but if it be found that he was in arrerages, he ſhall be in execution again.

(14) *Et ſi diffugerit, et gratis compotum reddere noluerit*, &c.] *Vide* Marlebridge whereby the writ *de monſtravit de compoto* is given.

Marlb. ca. 23.

Fleta, ubi ſupra.

(15) *Et ſi diffugerit et toſtificatum*, &c.] Here is proces of outlawry given in account.

(16) *Et caveat ſibi vicecomes vel cuſtos ejuſdem gaolæ ſi ſit infra libertatem.*] This act extends to all keepers of gaoles, and therefore if one hath the keeping of a gaole by wrong, or *de facto*, and ſuffereth an eſcape, he is within this ſtatute, as well as he, that hath the keeping of it *de jure.*

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11 H. 4. 73. Sect 1 R. 2. c. 12.

27 H. 8. 24. b. per Curiam.

(17) *Sine aſſenſu domini.*] And this aſſent may be by paroll, and ſhall be a ſufficient barre in an action of debt brought for the eſcape.

(18) *Et habeat dominus ſuum recuperare per breve de debito*, &c.] There was no action of debt againſt the gaoler for an eſcape at the common law, but the party was driven to his ſpeciall action upon his caſe, which action was grounded upon a treſpaſſe or wrong, and not upon any contract in deed or in law, but this act firſt gave the action of debt againſt the gaoler, which had let one to eſcape, which was committed to priſon by auditors for arrerages of account, but it lieth not againſt the gaolers executors, becauſe it is a treſpaſſe, and before any other act of parliament by the equity of this act an action of debt did lie againſt the gaoler for an eſcape in court pipowders, and ſo in all other caſes.

14 E. 4. 3. Dier, 15 El. 322. 16 E. 3. damag. 81. 13 E. 3. barre 253. 42 Aſſ. Pl. 11. 45 E. 3. 1. 2 R. 2. iſſue 160. 9 H. 6. 19. 35 H. 6. 6. Dier, 30 Liz. 275.

Afterwards the ſtatute of 1 R. 2. for a further declaration gave the action againſt the gardein of the Fleet.

1 R. 2. cap. 12.

But albeit this act, and the ſtatute of 1 R. 2. alſo doth ſpeake *per breve*, yet a bill of debt lieth alſo by the equity of this and that ſtatute, albeit it hath been holden to the contrary, but ſince it hath been

been often adjudged that a bill of debt is maintenable upon the ſaid acts. 42 Aſſ. p. 11. 7 H. 6. 5. Pl. Com. 38. a.

Now for as much as the ſtatutes doe give recovery by writ of debt, incidently, they do give damages alſo. 16 E. 3. dam. 81. 13 E. 3. ibid.

This act doth extend to feme coverts and infants, that are keepers of gaole-, to charge them in an action of debt for the eſcape of one in execution. Lib. 8. fol. 44. Wittinghams caſe.

(19) *Reſpondeat ſuperior ſuus, qui cuſtodiam hujuſmodi gaolæ ſibi commiſerit.*] This is to be underſtood, when one that hath the cuſtody of a gaol of freehold or inheritance, committeth the ſame to another that is not ſufficient, his ſuperior ſhall anſwer for the eſcape of the priſoner; but he ſhall not have the action of debt againſt the ſuperior as long as the inferior is ſufficient. See cap. 43. 13 E. 3. barre 253.

The mayor and citizens of London have the ſherivalty of London in fee, and the ſheriffes of London are gardeins under them, and removable from yeare to yeare, in this caſe the ſheriffes of London are gardeins, and the mayor and citizens their ſuperiors; and though the ſheriffes appoint a keeper under them, yet he is not within this ſtatute, becauſe it is intendable when the gardein commeth in by him that hath the freehold or inheritance in the cuſtody, for this act doth extend but unto two ſuch degrees, for there cannot be two ſuperiors within this act, but one ſuperiour and one inferiour. 11 E. 2. Debt 272. 11 El. Dier, 278.

The duke of Norffolk being marſhall of England of inheritance, and having authority to make a deputy doth make a deputy, who hath the cuſtody of the gaole, he is the gardein, and the duke of Norffolk his ſuperiour within this act. 11 El. ubi ſupra.

CAP. XII. [383]

QUIA multi per malitiam (1) *volentes alios gravare, procurant falſa appella* (2) *fieri de homicidiis, et aliis feloniis* (3), *per appellatores nihil habentes, unde domino regi pro falſo appello, nec appellatis de damnis reſpondere poſſint: ſtatutum eſt, quod cum aliquis ſic appellatus de felonia ſibi impoſita ſe acquietaverit in curia regis modo debito* (4), *vel ad ſectam appellatoris, vel domini regis: juſticiarii coram quibus auditum erit hujuſmodi appellum et terminatum, puniant appellatorem per priſonam unius anni, et nihilominus reſtituant hujuſmodi appellatores damna appellatis, ſecundum diſcretionem juſtic', habito reſpectu ad priſonam vel arreſtationem quam occaſione hujuſmodi appellorum ſuſtinuerint appellati, et ad infamiam ſuam* (5), *quam*

FORASMUCH as many, through malice intending to grieve other, do procure falſe appeals to be made of homicides and other felonies by appellors, having nothing to ſatisfy the king for their falſe appeal, nor to the parties appealed for their damages; it is ordained, that when any, being appealed of felony ſurmiſed upon him, doth acquit himſelf in the king's court in due manner, either at the ſuit of the appellor, or of our lord the king, the juſtices, before whom the appeal ſhall be heard and determined, ſhall puniſh the appellor by a year's impriſonment, and the appellors ſhall nevertheleſs reſtore to the parties appealed their damages, according to the diſcretion of the juſtices, having reſpect to the impriſon-

quam per impriſonamentum, vel alio modo incurrerunt, et nihilominus verſus dominum regem graviter redimantur. Et ſi ſorte hujuſmodi appellatores non habeant, unde prædicta damna reſtituere poſſint, inquiratur per quorum abbettum (6) *formatum fuerit hujuſmodi appellum per malitiam, ſi appellatus hoc petat. Et ſi inveniatur per illam inquiſitionem, quod aliquis ſit abbettator per malitiam* (7), *per breve de judicio ad ſectam appellati diſtringatur* (8) *ad veniendum coram juſtic'. Et ſi legitimo modo convictus fuerit de hujuſmodi abbetto per malitiam, puniatur per priſonam, et teneatur ad reſtitutionem damnorum, ſicut ſuperius dictum eſt de appellatore.* Vide anno 1 R. 2. cap. 13. *Nec facear de cætero appellatori in appello de morte hominis eſſonium* (9), *in quacunque curia ubi appellum fuerit terminandum.*

impriſonment or arreſtment that the party appealed hath ſuſtained by reaſon of ſuch appeals, and to the infamy that they have incurred by the impriſonment or otherwiſe, and ſhall nevertheleſs make a grievous fine unto the king. And if peradventure ſuch appellor be not able to recompenſe the damages, it ſhall be inquired by whoſe abetment or malice the appeal was commenced, if the party appealed deſire it; and if it be found by the ſame inqueſt, that any man is abettor through malice, at the ſuit of the party appealed he ſhall be diſtrained by a judicial writ to come before the juſtices; and if he be lawfully convict of ſuch malicious abetment, he ſhall be puniſhed by impriſonment and reſtitution of damages, as before is ſaid of the appellor. And from henceforth in appeal of the death of a man there ſhall no eſſoin lie for the appellor, in whatſoever court the appeal ſhall hap to be determined.

(12 Rep. 126. Hob. 98. Fitz. Damage, 77. Fitz. Coron. 12. 77. 98. 386. 11 Rep. 77. 1 E. 3. Stat. 1. c. 7. Regiſt. 56. 12 Rep. 125. Cro. El. 223. 71. 14 H. 7. 2. 26 H. 8. 3. Dier, 120. 131. 8 H. 5. 6. 8 Ed. 4. 3. Regiſt. 134.)

See the Mirror, c. 4. de homicide. 43 E. 3. 22. Stamf. Pl. Cor. 167. c. F.N.B. 114. f. Regiſt. 134.

By the words hereof it appeareth, that before this ſtatute the defendant being duly acquited, ſhould recover his damages, but that is to be underſtood in a writ of conſpiracy, wherein he ſhould recover damages for ſatisfaction in regard of the infamy, impriſonment, and vexation done to him, and further that the parties convicted ſhould be fined to the king and impriſoned, which, I have read, began in this ſort before the raigne of H. 1. They which plotted, or compaſſed the death of a man under pretext of law by bringing falſe appeales, or preferring untrue indictments againſt the innocent of felony, who being duly acquited, both the appellant and his abbettors were to ſuffer death.

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But king H. 1. by authority of parliament did mitigate the ſeverity of this auncient law (leſt men ſhould be deterred and afraid to accuſe) and did ordaine that if the delinquents were convicted at the ſuit of the party, they ſhould make ſatisfaction, and be fined and impriſoned: but if they were convicted by judgement at the ſuit of the king (whom they pretended to intitle to the forfeiture) then they ſhould loſe the freedome of the law, they ſhould be ſo infamous as never to be any witneſſe, or to be of any jury. That they ſhould never come in or neare the kings court, but make their attournies, that they, their wives, and their children, ſhould be caſt out of their houſes, and their houſes proſtrated, their trees eradicated

24 E. 3. 24. 27 Aſſ. 59. Tr. 18 E. 3. Coram rege. Rot. 148. 43 E. 3. coron. 11.

cated and ſubverted, their meadowes plowed up and waſted, every thing to be deſtroyed which nouriſhed or comforted them in reſpect of the villany, and ſhame done to the delinquent, all againſt nature and order, for that the delinquent ſought the blood of the innocent under pretext and colour of law, and this in later bookes is called a villanous judgement, all which in caſe of conſpiracy remaine a conſtant law to this day. But this act doth give the party a ſpeedier remedy for his ſatisfaction then he had before, as hereafter ſhall appeare.

(1) *Per malitiam.*] Theſe words doe open divers windowes for the better underſtanding and inlightening of the generall words of this ſtatute.

Paſch. 30 E. 1. Coram rege. Northampt. Johs de Boſco, &c. Hil. 26 E. 1. Coram rege. Leic' Will. Burnell. 22 Aſſ. 39. 40 Aſſ. p. 18. 40 E. 3. 42. 33 H. 6. 2. 14 H. 7. 2. 26 H. 8. 3, 4. Firſt part of the Inſtitutes, ſect. 208. 9 H. 4. 2. 9 H. 5. 2. 20 E. 4. 6.

1. If the appellee be firſt indicted of the felony whereof he is appealed, the appeale ſhall not be underſtood to be commenced *per malitiam*, becauſe the plaintiffe hath a foundation to build upon, *viz.* an indictment by the other of twelve or more men, ſo as it ſhall be preſumed that the plaintiffe was moved to his appeale by the indictment, *et non per malitiam*; for in thoſe dayes (as yet it ought to be) indictments taken in the abſence of the party, were formed upon plain and direct proofe, and not upon probabilities or inferences: but if the indictment be inſufficient, then it is in judgement of law as no indictment, and then the appeale may notwithſtanding be commenced *per malitiam, et ſic in ſimilibus*, or if it be a good indictment, and found after the appeale commenced, yet may the appeale be commenced *per malitiam.*

22 Aſſ. p. 77.

2. If one be appealed of murder, and it is found by verdict that he killed him *ſe defendendo*, this ſhall not be ſaid to be *per malitiam*, becauſe he had a juſt cauſe, for *quod quiſque ob tutelam corporis ſui fecerit, jure id feciſſe videtur*; *et ſic de ſimilibus.*

Term. Mich. 21 E. 1. Coram rege. Rot. 276. Hoylands caſe. 6 E. 3. 33.

3. The heire or other near of kin, may, abbet the wife plaintiffe in the appeale, *Et ſic adjudicatur quod pater, mater, frater, &c. non ſunt in caſu hujus ſtatuti ratione propinquitatis ſanguinis, et ad eos pertinet prædictam mortem ulciſci:* Hoylands caſe, and cannot be ſaid to be *per malitiam.*

4. *Malitia* referreth onely to the procurers and abbettors, as it appeareth by the expreſſe words of this act.

Mich. 34 E. 1. Coram rege. Linc' Rot. 19. Potius ſtultitia quam falſitas.

(2) *Falſa appella.*] Soone after the making of this ſtatute, the wife and her ſecond huſband brought an appeale for the death of her former huſband, the record ſaith, *Non poteſt eſſe appellatrix pro morte prioris mariti, &c. ipſa pro repellend. pœna ſtatuti pro falſis appellis advocat appellum ſuum eſſe juſtum nec falſum, licet ſit caſſatum, et licet illud proſequi non poteſt, quia habet virum; quæ quidem cauſa potius eſt quædam ſtultitia quam falſitas, ideo ex gratia curiæ conceſſ. eſt in præſent' aliorum juſtic' de banco, poſtquam priſonam* 15. *dierum habuerit, quod finem fac' cum rege.*

(3) *De homicidio et aliis feloniis.*] This is not onely intended of ſuch offences as were felonies at the making of this act, but of all ſuch offences alſo, as have been made felonies by any act of parliament ſince this act.

(4) *Se acquietaverit in curia regis modo debito.*] This ſtatute doth extend both to acquitals in deed, and to acquitals in law.

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Regiſt. 34. 24 E. 3. 73. 41 E. 3. Coro. 98. 21 H. 6. Cor. 12.

Acquitals in deed, as either by verdict, or by battell, and in that caſe when the plaintiffe yeelds himſelfe creant, or vanquiſhed in the field, the judgement ſhall be that the appellee ſhall goe quite, and that he ſhall recover his damages againſt the appellor, but if the

the plaintiffe had been ſlaine, then no judgement can be given againſt a dead perſon.

Acquitals in law, as if two be appealed of felony, the one as principall, and the other as acceſſary, and both of them plead not-guilty, &c. and the jury doth acquite the principall, in this caſe by law the acceſſary is acquited, and ſhall recover damages by this act againſt the appellant, &c. or may have his writ of conſpiracy at the common law.

33 H. 6. 2. 8 H. 5. 6.

But if the principall be acquited by verdict, proces depending againſt the acceſſory, the acceſſory ſhall not recover damages within this ſtatute, becauſe no jury can be retourned to aſſeſſe them.

41 Aſſ. 24.

If one be appealed as acceſſory to two principals, one of the principals is acquited, the acceſſory ſhall recover no damages untill the other principall be acquited.

3 Mar. 120. Dier.

If the plaintiffe in an appeale be non-ſuit, and the defendant is arraigned at the ſuit of the king, and acquited, he ſhall recover his damages by this act, for the words be, *Vel ad ſectam appellantis vel domini regis*, but this ſuit of the king muſt be intended upon the appeale after non-ſuit, for an acquitall upon an indictment is not within this ſtatute.

41 Aſſ. 24. 46 E. 3. Coro. 102. 14 H. 7. 2. 9 H. 5. 2. Stamf. Pl. Cor. 135. F.N.B. 214.

For *debito modo acquietatus*, ſee 9 H. 5. 2. that the defendant being acquited by verdict, yet if his life was never in jeopardy either in the originall, or proces, though it be in default of the plaintiffe himſelfe, yet is he not *debito modo acquietatus* within this ſtatute.

9 H. 5. 2. 20 E. 4. 5. 9 H. 4. 2.

The wife of Copleſton brought an appeale of murder againſt Stowell, and five of his ſervants as principals by being preſent, aiding and abetting Stowell to commit the murder, and Stowell appeared, againſt whom the plaintiffe declared with a *ſimul cum* of his five ſervants, and Stowell pleaded not-guilty, and proceſſe was continued againſt the other five, and by verdict it was found that Stowell killed Copleſtone in his owne defence, whereupon he was acquited, and had his pardon of grace; and it was reſolved by all the judges of England, that this acquitall of him was in law an acquitall of all the other five that were charged as principals by being preſent, aiding, and abbetting, and Stowell could not upon this ſtatute recover damages for the cauſe before remembred.

Paſch. 15 Eliz. Coram rege. Dier Manuſcript.

If the defendant plead that there is a nearer heire, and iſſue thereupon taken, and found for the defendant, he is diſcharged of the action, but is not acquited of the felony within the purview of this ſtatute; ſo it is if the defendant be diſcharged by clergy, he is not acquited within the purview of this ſtatute.

27 Aſſ. 25. 17 E. 2. Coro. 386.

If the defendant wage battell, and the plaintiffe demurre upon it, and it is adjudged againſt the plaintiffe, the defendant is diſcharged of the appeale, but hee is not acquited, untill he be acquited of the fact at the ſuit of the king.

Damna appellatis ſecundum diſcret' juſticiar' habito reſpectu ad perſonam.] Though this branch bee generall, yet every appellee ſhall not upon his acquitall recover damages, for if a monke be appealed, or a feme covert be appealed alone without her huſband and acquited, they cannot recover any damages by this act in reſpect of their diſability, for the generall words of this act doth not enable any to recover damages that thereunto was diſabled by law. But if an appeale bee brought againſt the huſband and wife, and they

22 E. 3. Coro. 276. Artic. Cleri. c. 16. Lib. 9. fol. 73. D. Huſſeyes caſe. Lib. 11. fol. 77. Magd. Coll. caſe. 22 R. 2. judg. 108.

they be acquitted, damages ſhall be given to the huſband alone for his damage, and to the huſband and wife for the damage of the wife.

And where ſeverall perſons be acquited, the damages muſt be ſeverall, for the words of the ſtatute be *habito reſpectu ad perſonam.*

But then may be demaunded, what remedy hath the monke or feme covert being ſolely appealed: the anſwer is, that they have no remedy by this ſtatute, but the abbot and monke, and the huſband and wife may have a writ of conſpiracy at the common law. Tr. 30 E. 1. Rot. 2. London. 8 H. 6. 5, 6. 24 E. 3. 73.

Whenſoever any is acquited by verdict, and yet his life was never in jeopardy, either by reaſon of the erronious proces, or originall, or otherwiſe, though this be within the letter of the law, yet it is out of the meaning, and therefore the defendant in that caſe ſhall recover no damages. 9 H. 5. 2. ubi ſupra.

(5) *Ad infamiam ſuam.*] For a mans fame is above all things to be repaired.

Omnia ſi perdas, famam ſervare memento:
Que ſemel amiſſa, poſtea nullus eris. Cato.

(6) *Et ſi forte hujuſmodi appellatores non habeant, &c. inquiratur per quorum abettum.*] If the defendant in an appeale be tried before juſtices of *niſi prius*, albeit they have but *delegatam poteſtatem*, yet ſhall they inquire of the inſufficiency of the plaintiffe, and of the abbettors, and the words of this act are, *Quod juſtic' coram quibus auditum fuerit appellum et terminatum*; but that great over-ruler *experientia* hath ruled, and over-ruled it by precedents, that they cannot give judgement for the damages. 3 E. 2. Action ſur leſtat. 28. 22 E. 4. 19. 10 E. 4. 14. Dier, 3 Mar. 120. Tr. 30 E. 1. Coram rege. Rot. 2. London.

This inſufficiency of the plaintiffe in the appeale muſt be found by the jury, and cannot come in by the averment of the party, and ſo it is in other like caſes.

But here it may be demanded, What if the plaintiffe in the appeale be ſufficient for part of the damages, and not for all, may not the defendant by this act recover part againſt the plaintiffe, and part againſt the abbettors? And it is reſolved that he muſt recover either all againſt the plaintiffe, or all againſt the abbettors, and not by parcels, ſo as if the plaintiffe be not ſufficient for the whole, the defendant ſhall recover the whole againſt the abbettors, for *prædicta damna et omnia damna*, are all one. 8 E. 4. 3. 8 H. 5. 6. 17 E. 2. Cor. 386. 26 H. 8. 3, 4. Tr. 30 E. 1. ubi ſup.

It is a certain concluſion upon theſe words of the ſtatute, that where damages ſhall not be recovered againſt the plaintiffe, there none ſhall bee recovered againſt the abbettors; alſo where the plaintiffe is ſufficient and ſo found by the jury, the abbettors ſhall not be inquired of.

(7) *Abbettator per malitiam.*] Abbettors were found (upon the acquitall of the defendant) by name, *Et quod procuraverunt, inſtigaverunt et abbettaverunt prædictum querentem ad capiendum et proſequendum appellum prædictum in forma prædicta*, and ſaid not *per malitiam*, and yet allowed of. But *nota* the ſurer way is to purſue the words, *falſo et per malitiam*, according to this act. 3 Mar. Dier, 120. Tr. 30 E. 1. ubi ſupra.

(8) *Per breve de judicio ad ſectam appellati diſtringatur, &c.*] This writ is given in lieu of the writ of conſpiracy at the common law, the abbettors comming in upon this proces may travers the abbetment, becauſe they were eſtrangers to the verdict, and if the Reg. 34. 8 E. 4. 3. 17 E. 2. Cor. 386. Tr. 19 E. 2. Coram rege. Rot. 82. 40 E. 3. dam. 77.

Tr. 30 E. 1. ubi ſupra. 22 E. 4. Coro. 45.

the defendant that ſueth the diſtreſſe be non-ſuit, yet may he have a new writ, and it is not peremptory to him. And albeit the jury finde neither the time, nor the place where the abbetment was, yet if they finde the abbettors, it is ſufficient, for when the plaintiffe appeareth, the defendant may ſhew time and place in good time.

[387] 46 E. 3. Coron. 102. 3 E. 2. Action ſur le ſtatut. 28. 8 H. 6. cap. 10. F.N.B. 115. i. Kelwey, 21. Tr. 30 E. 1. Coram rege. Rot. 2. Hil. 35 E. 1. ib. Rot. 19. Tr. 19 E. 2. ibid. 82. Mich. 14 H. 7. ib. Rot. 76. Tr. 14 H. 7. ib. Rot. 74. Hil. 10 H. 7. ib. Rot. 38. Mich. 19 H. 7. ib. Rot. 27. Liure de entries. Raſt. 56. & 297. Stamf. Pl. Cor. 297.

Note in 46 E. 3. the court granted firſt a *venire facias*, and then diſtreſſe, but it ſeemeth that the proceſſe given by the ſtatute is a diſtreſſe infinite.

But if the jury give too ſmall damages, it being but an enqueſt of office, the plaintife may have an originall writ of abbetment, and count to greater damages. *Vide* 8 H. 6. cap. 10.

Note reader, that judiciall precedents, and the right entries of pleas upon this (or any other) ſtatute are good interpreters of the ſame, and of queſtions that have been, or may be moved thereupon.

(9) *Nec jaceat de cætero appellatori in appello de morte hominis eſſoniam.*] The defendant that is appealed of the death of man ought to have convenient expedition, and not to be detained in priſon, or to live under the infamy of a murtherer longer than there is cauſe: and this ſtatute was chiefly made for the benefit of the defendant.

Vide the ſtatute of 1 E. 3. cap. 7. parliament' primo, & ſtatut' de 1 R. 2. cap. 13.

CAP. XIII.

QUIA etiam vicecomites multotiens fingentes aliquos coram eis in turnis ſuis indictatos de furtis, et aliis malefactis (1), *capiunt homines non culpabiles, nec legitimo modo indictatos, et eos impriſonant, ut ab eis pecuniam extorqueant* (3); *cum legitimo modo per duodecim juratores non fuerint indictati: ſtatutum eſt, quod vic' in turnis ſuis, et alibi, cum inquirere habeant de malefactoribus per præceptum regis* (4), *vel ex officio ſuo, per legales homines* (2) *ad minus duodecim faciant inquiſitiones ſuas de hujuſmodi malefactoribus, qui hujuſmodi inquiſitionibus ſigilla ſua apponant* (5), *et illos quos per hujuſmodi inquiſitiones invenerint culpabiles, capiant et impriſonent, ſecundum quod alias fieri conſuevit. Et ſi aliquos aliter impriſonaverint, quam per hujuſmodi inquiſitiones indictatos, habeant hujuſmodi impriſonati*

FORASMUCH as ſheriffs, feigning many times certain perſons to be indicted before them in their turns of felonies and other treſpaſſes, do take men that are not culpable nor lawfully indicted, and impriſon them, and do exact money from them, whereas they were not lawfully indicted by twelve jurors; it is ordained, that ſheriffs in their turns, and in other places where they have power to enquire of treſpaſſors by the king's precept, or by office, ſhall cauſe their inqueſts of ſuch malefactors to be taken by lawful men, and by twelve at the leaſt, which ſhall put their ſeals to ſuch inquiſitions; and thoſe that ſhall be found culpable by ſuch inqueſts, they ſhall take and impriſon, as they have uſed aforetimes to do. And if they do impriſon other than ſuch as have been indicted by

impriſonati actionem ſuam per breve de impriſonamento (6) *verſus vicecom', ſicut haberent verſus quamcunque aliam perſonam, qui eos impriſonaret ſine warranto. Et ſicut dictum eſt de vicecom' obſervetur de quolibet balivo libertatis* (7).

by inqueſt, the parties impriſoned ſhall have their action by a writ or impriſonment againſt the ſheriffs, as they ſhould have againſt any other perſon that ſhould impriſon them without warrant. And as it hath been ſaid of ſheriffs, ſo ſhall it be obſerved of every bailiff of franchiſe.

(2 Inſt. 387. 1 E. 3. ſtat. 2. c. 7. 1 E. 4. c. 2.)

(1) *Quia etiam viceconites multoties fingentes aliquos coram eis in turnis ſuis indictatos de furtis et aliis malefactis.*] Two things are provided, or rather declared by this act. Flet, li. 2. c. 45.

1. *Per legales homines ad minus* 12. *faciant inquiſitiones.* 1.

That indictments *in tournes* ought to be found by 12. at the leaſt.

(2) *Legales homines.*] More ſhall be ſaid hereof when we come to the eight and thirtieth chapter of this parliament, and the ninth chapter of Articuli ſuper Chartas. [388] F.N.B. 165.

(3) *Ut ab eis pecuniam extorqueant.*] This is the greateſt injuſtice, when the innocent under colour of juſtice, whereby he ought to be protected, is oppreſſed, and wrought to give money to redeem his vexation: three things (it is ſaid) overthrew the flouriſhing eſtate of the Roman empire, *Latens odium, juvenile conſilium, et privatum lucrum.* Vide cap. Itineris.

By this act you may ſee that juſtice was pretended, and ſordid lucre intended, which this act in reliefe of the innocent provideth to prevent.

(4) *Per præceptum regis.*] That is, by the kings writ or commiſſion; but thereupon grew ſo many evils and miſchiefes for the ſingular profit of the ſherifes, that by a latter ſtatute it is provided that no ſuch writs or commiſſions ſhould be granted to them; ſo as at this day the ſherifes cannot proceed in thoſe caſes *per præceptum regis.* See hereafter how this power *ex officio* is reſtrained. 28 E. 3. cap. 9. F.N.B. 92. c. 144. I. 250. a.

(5) *Qui hujuſmodi inquiſitionibus ſigilla ſua apponant.*] The 2. part is, that the jurors do put their ſeals to the inquiſitions or indictments. 2.

By a latter ſtatute, theſe indictments are to be by a roll indented, whereof one part is to remain with the indictors, and the other part with him that takes the enqueſt. 1 E. 3. Parliam. 2. cap. 17.

This act of 1 E. 3. doth extend to preſentments or indictments, not onely in tourns, but in leets alſo, and the like.

See the ſtatute of 1 R. 3. of what quality, hability, and livelyhood, the indictors in tournes and leets ought to be. 1 R. 3. ca. 4.

But ſuch corrupt and partiall proceedings upon preſentments and indictments before the ſherife *ex officio*, were, notwithſtanding all theſe proviſions in tourns and leets, continued, untill by the ſtatute of 1 E. 4. the power of them, ſave only to take preſentments and indictments, and to deliver the ſame to the juſtices of peace at the next ſeſſions of the peace, &c. is taken away; and by that act authority is given to juſtices of peace, to award proceſſe upon all ſuch 1 E. 4. c. 2. 4 E. 4. 31. 8 E. 4. 5. lib. 9. fol. 96. Strata Marcella.

ſuch preſentments and indictments delivered to them, &c. which is to be intended of ſuch as be lawfull.

(6) *Per breve de impriſonament'.*] This act doth not onely preſcribe a form for the ſheriife to purſue, but giveth the party remedy againſt the ſherife, if he purſueth not the form of the act; for, *Non obſervata forma infertur adnullatio actus.*

(7) *Et ſicut dictum eſt de vicecom', obſervetur de quolibet balivo libertatis.*] Every bailife of franchiſe, that is, of leets, and views of frankpledge, which are exempted out of the ſherifes tourn, and are the franchiſes here intended.

THE

SECOND PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

VOL. II.

THE

SECOND PART

OF THE

Institutes of the Laws of England;

CONTAINING

THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES.

Jurisperito dixit, In lege quid scriptum est? quomodo legis? Luc. 10. 26.

Quod non lego, non credo. *August.*

Jurisprudentia est juvenibus regimen, senibus solamen, pauperibus divitiæ, & divitibus securitas.

Authore EDWARDO COKE, Milite, *J. C.*

Hæc ego grandævus posui tibi, candide lector.

London:

Printed for E. and R. BROOKE, Bell-Yard, near Temple Bar.

M.DCC.XCVII.

ADVERTISEMENT.

THE preſent Edition of Lord *Coke*'s Second, Third, and Fourth Inſtitute, is executed on the plan of uniformity with the late Edition of the Firſt Inſtitute, publiſhed with the Notes of Mr. HARGRAVE and Mr. BUTLER.

In addition to the more ancient Statutes, commented upon and explained in the Second Inſtitute, which, in all the former Editions were extant only in the original Latin and Law French, Tranſlations are now given from the moſt authentic copies, accompanied with ſuch illuſtrative references to more modern authorities as have occurred to the learned induſtry of the later Editors of the Statute Law, particularly of the very accurate and laborious *John Cay*, Eſq. which are diſtinguiſhed from the original references of Lord *Coke*, in the ſame manner as the additional references in the margin of the Firſt Inſtitute.

The particular chapters, ſections, and paſſages commented upon, are alſo now firſt pointed out by a numerical mark of reference applying to the correſpondent part of the Commentary; which will be found greatly to aſſiſt the reader in the peruſal of and occaſional reference to, any part of each Statute or Chapter.

In the courſe of the examination which the Text has undergone, aſſiſted by a corrected copy from the library of the late *Henry Boult Cay*, Eſq. it appears that a great number of alterations

tions had been adopted, without any emendation, in the laſt printed edition in folio, not merely in the orthography and other trivial reſpects, but very frequently in the references to authorities, which are in many inſtances very erroneouſly printed.

It had been propoſed to accompany each Chapter with notice of various judicial determinations and obſervations of later writers, which appear to contradict ſome of the authorities, poſitions and doctrines contained more particularly in the Third and Fourth Inſtitute, as alſo with Notes explanatory of ſuch alterations as have ſucceſſively taken place in the law, relating to the ſubjects of theſe Inſtitutes, ſince the time of Lord *Coke*; and ſome collections and progreſs have accordingly been made towards that undertaking: But it has ſince been found adviſeable to preſerve the original order and connection of Lord *Coke*'s Work, and to preſent, at a future period, thoſe Notes in a ſeparate form, correſpondent to the ſeveral diviſions and chapters of theſe Inſtitutes, in conformity with the arrangement of the text and notes in the laſt improved edition of the Firſt Inſtitute.

Jan. 23,
1797.

STATUTUM de WESTMINST. SECUNDO.

CAP. XIV.

CUM de vaſto facto in hæreditate alicujus per cuſtodes, tenentes in dotem, per legem Angliæ, vel aliter ad terminum vitæ, vel annorum, conſueverit fieri breve de prohibitione vaſti (1), *per quod breve multi fuerunt in errore, credentes quod illi qui vaſtum fecerint, non habuerint neceſſe reſpond', niſi tamen de vaſto facto poſt prohibitionem eis directam, dominus rex (ut hujuſmodi error de cætero tollatur) ſtatuit, quod de vaſto quocunque ad nocumentum alicujus facto, non fiat de cætero breve de prohibitione* (2); *ſed breve de ſummonitione, ita quod ille, de quo queritur, reſpondeat de vaſto facto quocunque tempore. Et ſi poſt ſummonitionem non venerit, attachietur, et poſt attachiamentum diſtringatur, et poſt diſtrictionem, ſi non venerit, mandetur vicecom'* (3), *quod in propria perſona, aſſumptis ſecum xii, &c. accedat ad locum vaſtatum* (4); *et inquirat de vaſto facto* (5), *et retornet inquiſitionem. Poſtquam retornata fuerit inquiſitio, procedatur ad judicium, ſecundum quod continetur in ſtatuto prius edito apud Gloceſt', cap. 5. de vaſto, 20 E. 1.*

WHEREAS for waſte done in the inheritance of any perſon, by guardians, tenants in dower, tenants by the courteſie of England, or otherwiſe for term of life, or years, a writ of prohibition of waſte hath been uſed to be granted, by which writs many were deceived, thinking that ſuch as had done the waſte ſhould not need to anſwer but only for waſte done after the prohibition to them directed; our lord the king, to remove from henceforth this error, hath ordained, that of all manner of waſte done to the damage of any perſon, there ſhall from henceforth be no writ of prohibition awarded, but a writ of ſummons, ſo that he of whom complaint is ſhall anſwer for waſte done at any time; and if he come not after the ſummons, he ſhall be attached, and after the attachment he ſhall be diſtrained; and if he come not after the diſtreſs, the ſheriff ſhall be commanded that in proper perſon he ſhall take with him twelve, &c. and ſhall go to the place waſted, and ſhall enquire of the waſte done, and ſhall return an inqueſt, and after the inqueſt returned, they ſhall paſs unto judgement, like as it is contained in the ſtatute of Glouceſter.

(Fitz. Waſte, 129, 130, 131. 134, 135, 136, 137. Regiſt. 72, &c. 1 Brownl. 240. Dyer, 264. 3 Cro. 18. 6 Ed. 1. ſtat. 1. c. 5. 20 Ed. 1. ſtat. 2. Raſt. 697.)

(1) *Cum de vaſto facto in hæreditate alicujus per cuſtodes, &c. conſueverit fieri breve de prohibitione vaſti,* &c.] This errour herein recited is hereby cleerly confuted, and hereof you may read more in the ſtatute of Gloc.

Gloc. cap. 5.
4 E 3. Waſte 129. 15 H. 3. ibid. 130. Regiſt. 172. F.N.B. 55.

(2) *Non fiat de cætero breve de prohibitione.*] By this the prohibition of waſte, whereupon an attachment did lye, &c. is taken away, and in lieu thereof an action called here a writ of ſummons, becauſe the writ beginneth, *Si A. fecerit te ſecurum, &c. tunc ſummoneas per bonos ſummonitores, &c.* is given.

(3) *Ita quod reſpondeat de vaſto facto quocunque tempore. Et ſi poſt ſummonitionem non venerit, attachietur, et poſt attachiamentum diſtringatur, et poſt diſtrictionem, ſi non venerit, mandetur vicecomiti,* &c.]

21 H. 6. 56.
34 H. 6. 24.
11 H. 6. 3.

If the defendant be retourned *nihil, &c.* ſo as peradventure he was never ſummoned, nor any other writ ſerved, whereby he might have notice, yet a writ of inquiry of waſte ſhall be awarded by this branch; for here it is not ſpecified that iſſues ſhould be retourned, &c. but generally and by the writ, the waſte ſhall be inquired of by the oath of twelve men, where the defendant or any for him may attend if he will, and the jurors may finde againſt the plaintife.

3 H. 6. 29.

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Note the words here be, *et poſt diſtrictionem, ſi non venerit, mandetur vicecomiti, &c.* So as if the defendant appear upon the diſtreſſe, and plead, and after make default, the plaintife ſhall not by this branch have a writ to inquire of the waſte, becauſe it is out of the words and purview of this act.

7 H 4. 15.
22 H. 4. 3, 4.

(4) *Quod in propria perſona ſua aſſumptis ſecum duodecim accedat ad locum vaſtatū.*] Here are three things to be obſerved:

1. [a] That the ſherife ought to go in proper perſon, for that, though in *rei veritate* he is no judge, yet this writ is in nature of a commiſſion unto him, and he is in *loco judicis*, and therefore he ought to go in *propria perſona*. If the ſherife upon this writ return *quod mandavi baliwo libertatis, &c. qui mihi nullam dedit reſponſionem*, the return is inſufficient, becauſe by the writ (as the book ſaith) he is a judge, and hath power to enter into the franchiſe.

[a] Regiſt. judi. 23. 25. 27. 2 H. 4. 2. 3 H. 6. 29. 21 H. 6. 6. 21 H. 4. 32. lib. 4. fo. 65. Fulwoods caſe, lib. 8. fol. 52. Aitkins caſe.

2. [b] Where ſome have holden, that the ſherife may inquire upon this writ by the oath of 6 or 8 perſons, it appeareth, that there ought not to be under 12, for the words of this branch are, *aſſumptis ſecum* 12, yet this is but an inqueſt of office, for it is taken *ſans miſe des parties*, that is without any iſſue joyned.

[b] F N. B. 10. 7. c. Regiſt. judic. ubi ſup. 41 E. 3. 7. 48 E. 3. 19. 2 H. 4. 2. 3 H. 6. 29. 21 H. 6. 56. 34 H. 6. 12.

3. [c] The ſherife muſt go *ad locum vaſtatum*, together with the jurors, and view the ſame; for, *iſta cadunt potius ſub viſu, quam ſub auditu.*

[c] 16 E. 3. Retorn de Viſ. 82. 34 H. 6. 42. 44.

(5) *Et inquirat de vaſto facto.*] [d] If the waſte be aſſigned in divers towns, the ſherife and the jurors muſt view (as hath been ſaid) all the places waſted in every of the towns, but he may inquire thereof in any one of the towns; and this copulative doth ſo knit the words together, as he cannot inquire of it in a foreign town.

[d] 16 E. 3. ubi ſup. 34 H. 6. ubi ſup.

See more of this matter in the expoſition upon the ſtatute of Gloc. cap. 5.

CAP.

CAP. XV.

IN omni caſu quo minores infra ætatem implacitare poſſunt: conceſſum eſt, quod ſi hujuſmodi minores elongati ſint, quo minus perſonaliter ſequi poſſint, propinquiores amici admittantur ad ſequendum pro eis. Weſtminſt' 1. cap. 47.

IN every caſe whereas ſuch as be within age may ſue, it is ordained, that if ſuch within age be eloined, ſo that they cannot ſue perſonally, their next friends ſhall be admitted to ſue for them.

(Dyer, 104. 2 Ed. 3. 16. 40 Ed. 3. 16. Bro. Gardein, 13. 22. 24, 25, 26, 27. Regiſt. 78. 3 Ed. 1. c. 47)

The act of W. 1. touching this matter was particular, but this act is generall. W. 1. cap. 47.

Upon this ſtatute, whether the infant be eſloigned or no, he ſhall ſue by *prochein amy*, for the eſloignment is put in this act, to ſhew what miſchief may fall out in this caſe; and therefore when a ſergeant offered, that oath ſhould be made of the eſloignment of the heir, the judge ſaid, he would take it upon his honeſty; but if the ſurmiſe that the plaintife is within age be untrue, and that the plaintife is of full age, his admittance by *prochein amy* is errour. Regiſt. 78. 28 Aſſ. 22. 2 E. 3. 16 40 E. 3. 6. 13 E. 3. Attorney 76. 34 H. 6. 4. 20 E. 4. 2. F.N.B. 27. 27 H. 8. fol. 11.

See before in the expoſition upon the 40 chapter of W. 1. where this matter is handled at large; and obſerve well our books, where many times a gardein is taken for a *prochein amy*, and a *prochein amy* for a gardein.

This act extends not to an ideot. 33 H. 6. 28. F.N.B. 24. g.

CAP. XVI. [391]

IN caſu quo alicui minori deſcendat hæreditas (2) ex parte patris, qui tenuit de uno domino, et ex parte matris quæ tenuit de alio domino (1), dubitatio hucuſque extitit de maritagio hujuſmodi minoris, ad quem de duobus dominis pertineat. Concordatum eſt, quod ille dominus de cætero habeat maritagium (3), de quo anteceſſor ſuus prius fuit feoffatus, non habito reſpect' ad ſexum, nec ad quantitatem tenementi, ſed ſolummodo ad antiquius feoffamentum (4) per ſervitium militare.

IN caſe where inheritance deſcendeth to one within age of the father's ſide, that held of one lord, and the mother's ſide that held of another lord, there hath been hitherto doubt, for the marriage of ſuch an heir, to which of the two lords it ſhould belong; it is agreed, that the ſame lord ſhall from henceforth have the marriage of whom the child's anceſtor was firſt infeoffed, not having reſpect to the ſex, nor to the quantity of the land, but onely to the more ancient feoffment by knights ſervice.

(44 Ed. 3. f. 15. Dyer, 11. 5 Ed. 3. f. 4. Bro. Gard. 114, 115, 116. Fitz. Prerog. 23, 24. Fitz. Gard. 2. 3. 16. 19. 27. 36. 46. 53. 81. 86. 115. 134. 139. Stat. 12 Car. 2. c. 24.)

4 E. 3. receit 46.

Albeit this act putteth a case onely where one inheritance descends on the part of the father, and when another descends on the part of the mother, yet this statute extends to all cases of priority.

By these words in the act, [*non habito respectu ad sexum nec ad quantitatem*] the doubts at the common law are here mentioned: the first, that some did hold opinion that the part of the father being *digniori de sanguine*, the worthier blood should be preferred; others did hold opinion that if the lord of the land of the part of the mother, first happed or seised the ward, he should have it, and that *melior est conditio possidentis*.

14 E. 3. gard 37. 8 H. 3. gard 139.

Lastly, some did hold that the tenure by the greater quantity and value should be preferred: all which doubts are cleared by the purview of this act.

(1) *De uno domino, &c. de alio domino*, &c.] This act extendeth not to the king, because before the making of this act hee was to have the wardship of the body though the land were holden of him by posteriority; and so it is, if the king graunt that seigniory for life, the grauntee shall have the same benefit, in respect that the reversion remaine in the king: but if the king graunteth the fee-simple to another, there the lord by priority shall have the wardship, and the tenure by priority is revived, for the king had the wardship in respect of his person and prerogative.

11 E. 2. c. 2. 21 E. 3. 41. 11 E. 3. gard. Statham. 5 E. 3. 4. 12 E. 3. Præro. 23. 24 E. 3. 31. 65. 18 E. 3. 29. 12 H. 4. 25. 14 H. 4. 9. 9 H. 4. 4. simile.

(2) *Alicui minori descendat hæreditas.*] This act is to be understood of a descent from one auncestor to one heire, and not from divers auncestors to one heire, nor from one auncestor to divers heires, nor from one auncestor to one heire at severall times.

As if a man seised in fee of the mannor of D. of the part of the father holden of A. by knights service, and of the mannor of S. of the part of the mother holden of B. by knights service, and dieth, his heire within age, this case (as by the letter thereof it appeareth) is within the scope and purview of this statute; for if the father holdeth land by knights service, and the mother hold land also by knights service, which of them die first, the lord of whom the land is holden, albeit there be but one heire to both, shall have the wardship of the body, which being once vested, shall not after be devested in respect of any priority, no though it were in the king's case.

24 E. 3. 26. 45. 15 E. 4. 14. 3 H. 7. 15.

Vet. N.B. 97. b.

The tenant maketh a feoffement in fee upon condition of the land holden by priority, and dieth seised of the land holden by posteriority his heire within age, the lord by posteriority seiseth the body, the condition is broken, the heire entreth into the land holden by priority, the lord by posteriority shall retain the wardship, for seeing that both descended not at one time, it is out of this statute.

(3) *Habet maritagium.*] The lord by priority shall have the wardship of the body, for the lord by posteriority shall have the wardship of the land holden of him, as well as the lord by priority of the land holden of him, but the wardship of the body being intire, and which both cannot have, of right belongeth to the lord by priority by this act, and therefore if the lord by priority waive the wardship of the body, and refuse to take the same, yet the lord by posteriority cannot take advantage of it, for by this act the wardship of the body belongeth to the lord by priority and to no other.

44 E. 3. 15.

(4) *De*

(4) *De quo anteceſſor ſuus fuerit feoffatus, habito reſpectu ſolummodo ad antiquius feoffamentum.*] Here it appeareth that the feoffement of the tenancy doth onely make the priority, and not the change of the ſeigniory. 14 E. 3. gard 37.

But where this ſtatute ſpeaketh of a feoffement, it is to be underſtood of any other aſſurance or conveyance of the tenancy.

Per antiquius feoffamentum, are not to be underſtood of the feoffement of the lord upon the creation of the ſeigniory, but of the feoffement made by the tenant of the land. 3 E. 3. gard 19.

To illuſtrate the meaning of this law by examples:

One holdeth Black acre of A. by knights ſervice, and White acre of B. by knights ſervice, *anno* 10 reg. Eliz. infeoffeth C. of Black acre, and 20 reg. Eliz. infeoffeth C. of White acre, who dieth his heire within age, B. ſhall have the wardſhip of the body, for C. had Black acre *per antiquius feoffamentum*.

So it is if the heire of C. die ſeiſed, and both acres had deſcended to his heire, he had holden Black acre by priority, that is *per antiquius feoffamentum* made to his auncеſtor, and ſo from heire to heire ſo long as both acres continue in that line by deſcent.

On the lords ſide the priority ſhall not onely continue as long as the ſeigniories continue in the lines of the lords, but alſo the change of the ſeigniory maketh no alteration, and therefore though the lord of whom Black acre is holden alien the ſeigniory, yet if he taketh it back to him again, Black acre ſhall be ſtill holden of him by priority, the aſſignee of the lord by priority ſhall take advantage of it as well as the grauntor.

But if the tenant had aliened Black acre to another, and acquired it backe againe, yet ſhall he hold it by poſteriority, for now he holdeth White acre, *per antiquius feoffamentum*; ſo as the feoffement of the land (as hath been ſaid) doth make the priority, and that feoffement muſt be underſtood of the immediate feoffement, but the priority of the land doth attend on the ſeigniory, into whoſe hands ſoever it commeth. Temps E. 1. gard. 134. F.N.B. 142. f. 13 E. 1. Cor. Rege Rot. 40. Eborum. 2 E. 2. gard. 2. 7 E. 3. 11. 34, 35. 13 E. 3. gard. 39. 18 E. 3. 29. b. 7 E. 3. 11. 63, 64. 11 E. 3. gard. 115. 14 E. 3. gard. 37. 33 E. 3. ibid. 12. F.N.B. 142. 13 E. 3. gard. 38.

If there be lord, meſne, and tenant, and the meſne hold by priority, the tenant in a writ of meſne doth forejudge the meſne; in this caſe the meſnalty is extinct, and the tenant ſhall be anſwerable to the lord, *de eiſdem ſervitiis et conſuetudinibus quæ prius facere debuit præditus medius*; in this caſe the tenant ſhall hold by priority: for 1. he ſhall hold *per antiquius feoffamentum*; 2. The meſne in ſuppoſition of law was ſaid to hold the land. 3. The ſtatute of W. 2. that give the forejudger, provideth that he ſhall hold by the ſame ſervices, and cuſtomes, and in ſuch ſort, as it may be done *ſine prejudicio alterius*, and this ſhould be to the prejudice of the lord by priority, if he ſhould loſe that benefit.

In a ravithment of ward the defendant pleaded that the father of the infant held the mannor of D. of him the defendant by knights ſervice, *et quod tenuit * manerium illud de ipſo per antiquius feoffamentum, quam pater ſuus tenuit manerium de A. de modo querente*; and this was agreed to be a good plea without ſhewing of whoſe feoffement he held by priority, but generally, which is worthy of obſervation. 7 E. 3. 11. 34, 35. 21 E. 3. 11. 19. 4 E. 3. 37 30 E. 3. 7. 13 E. 3. gard. 39. 30 E. 3. 7.

* [393]

A. holds land of B. by priority, and other land of C. by poſteriority, and infeoffeth D. of both: this caſe is out of this ſtatute, becauſe he commeth to both the lands at one time, ſo as he holds not 8 E. 3. 57. 18 E. 3. 29. Vet. N.B. 97. F.N.B. 142. f. Bro. gard. 115.

not either of them *per antiquius feoffamentum, ſed per unum et idem feoffamentum*; and therefore if he dieth, his heire within age, the lord which firſt ſeiſeth the body in this caſe ſhall have it.

CAP. XVII.

IN itinere juſtic' (2) *non admittatur de cætero eſſonium de malo lecti* (1) *de tenemento in eodem comitatu* (3), *niſi ille, qui ſe facit eſſoniari, veraciter ſit infirmus, quia ſi excipiatur à petente, quod tenens non eſt infirmus, nec in illo ſtatu, quo minus venire potuit coram juſticiariis, admittatur ejus calumnia. Et ſi hoc per inquiſitionem convinci poterit, vertatur illud eſſonium in deſaltam. Nec jaceat de cætero illud eſſonium in brevi de recto inter duos clamantes per eundem deſcenſum* (4).

IN the circuit of the juſtices an eſſoin *de malo lecti* ſhall not be from henceforth allowed for lands in the ſame ſhire, unleſs he that cauſed himſelf to be eſſoined be ſick indeed; for if the demandant except, that the tenant is not ſick, nor in ſuch plight but that he may come before the juſtices, his exception ſhall be admitted. And if it can be ſo proved by enqueſt, the eſſoin ſhall be turned to a default. And from henceforth ſuch eſſoin ſhall not lie in a writ of right between two claiming by one deſcent.

(Fitz. Eſſoin, 176. 186, 187, 188, 189, 190. 192, 193, 194. 196, 197. Regiſt. 8.)

See Marlb. c. 12. We have before in generall ſpoken of the five kindes of eſſoines, but reſerved to ſpeak more particularly of this kinde of *eſſoine de malo lecti* in the expoſition of this chapter, as in his proper place.

20 E. 3. eſſoine 27. (1) *De malo lecti.*] This eſſoine differeth from all other kindes of eſſoines, for this eſſoine lieth only *ad certum diem*, for he ought to appeare *ad primum diem, &c. et ad tertium diem il avera eſt eſſoine.*

And in this caſe he ſhall have two eſſoiners, and the one ſhall caſt the eſſoine, and the other ſhall ſweare, that he ſaw the party ſick, &c.

The miſchiefe before this act was, that the adverſe partie could not take iſſue, that he that offered to be eſſoined *de malo lecti* was in health, and not ſick, and try it by a jury; but it was inquired by foure knights retourned for that purpoſe by the ſheriffe, *ſi fuer' languidus aut non*, and if they found that he was not *languidus*, then he ſhould have fifteene dayes after to appeare, ſo as the party was delayed thereby fifteene dayes, and all the time before, and this was miſchievous: for remedy whereof this act provideth, that the party ſhall take iſſue, that he is not *languidus*, which if it be ſo found it ſhall turne to a default; and if it be found that he is *languidus*, then he ought to have time to appeare a yeare and a day, and before he commeth out, he ought to have a writ *de licentia ſurgendi, &c.* as it appeareth by the authorities cited in the expoſition of the ſaid 12 chapter of Marlebridge.

3 H. 3. eſſoine 186.

(2) *In itinere juſtic'.*] Although juſtices in eyre are here particularly mentioned, yet this act being a beneficiall law to ouſte delayes

delayes is taken by equity, and doth extend to the court of common pleas.

1) * *De malo lecti.*] Sufficient hereof hath been ſpoken, onely this may be added that this eſſoine lieth not for an attourney, for no eſſoine ſhall be caſt for an attourney but the common eſſoine onely.

(3) *De tenementis in eodem com'.*] This eſſoine *de malo lecti* doth onely lie in a writ of right right, and not in a writ of right in his nature. 15 H. 3. eſſoin 196.

(4) *Clamantes per eundem deſcenſum.*] This eſſoine *de malo lecti* is wholly ouſted in a writ of right between two claiming by the ſame deſcent. 15 H. 3. eſſoin 191, 192. 194. 20 E. 3. eſſoine 27.

As between two parceners either at the common law or by cuſtome, &c. But if one coparcener claime the land by feoffement made by her aunceſter in fee, now if the other coparcener deforce her of this land in a writ of right brought againſt her ſiſter, ſhe may be eſſoined *de malo lecti*, and ſo between two brethren: ſo as this ſtatute is intended where they claime the land *per eundem deſcenſum*, and not where they derive their blood onely *per eundem deſcenſum*; for in the caſe put before where they claime by ſeverall titles, they may joyne the miſe by graund aſſiſe, or by battell, which they cannot doe when they claim by one deſcent. Bract. l. 2. fo. 66. Britton, fo. 190. 13 E. 1. droit 51. F.N.B. 10. a.

CAP. XVIII.

CUM debitum fuerit recuperatum (1), *vel in curia regis recognitum* (2), *vel damna adjudicata, ſit de cætero in electione illius* (3) *qui ſequitur pro hujuſmodi debito, aut damnis, ſequi breve quod vicecom' fieri faciat* (4) *de terris et catallis debitoris, quod vicecom' liberet ei omnia catalla debitoris, (exceptis bobus et afris carucæ)* (5) *et medietatem terræ ſuæ* (6), *quouſque debitum fuerit levatum* (7) *per rationabile precium et extentum* (8). *Et ſi ejiciatur de illo tenemento, habeat recuperare per breve novæ diſſeiſinæ, et poſtea per breve de rediſſeiſina* (9), *ſi neceſſe fuerit.*

WHEN debt is recovered or knowledged in the king's court, or damages awarded, it ſhall be from henceforth in the election of him that ſueth for ſuch debt or damages, to have a writ of *fieri facias* unto the ſheriff for to levy the debt of the lands and goods; or that the ſheriff ſhall deliver to him all the chattels of the debtor (ſaving onely his oxen and beaſts of his plough) and the one half of his land, until the debt be levied upon a reaſonable price or extent. And if he be put out of that tenement, he ſhall recover by a writ of novel diſſeiſin, and after by a writ of rediſſeiſin, if need be.

Fleta, li. 2. cap. 55. See the firſt part of the Inſtitutes, ſect. 504. verb. per Elegit. (Hob. 57. 3 Bulſtr. 320. Dyer, 306. 373. 3 Rep. 12. 4 Rep. 65. 74. 5 Rep. 87, 88. 90. Fitz. Extent, 13. Fitz. Proceſs, 51. Fitz. Execut. 35. 37. 41. 46. 66. 85, &c. Raſt. 72. 327. Regiſt. 299. Cro. Car. 44. 2 Leon. 84. 88.)

Vide Mag. Char. ca. 8. Dier 23 El. 305. b.

At the common law where a ſubject ſued execution upon a judgement for debt or damages, he ſhould not have the body of the defendant, or his land in execution (unleſſe it were in ſpeciall caſes,) and the reaſon of the law was: that the body in caſe of debt ſhould not be detained in priſon, but be at liberty, not onely to follow his owne affaires and buſineſſe, but alſo to ſerve the king and his country when need ſhould require; nor to take away the poſſeſſion of his lands in that caſe, for that would hinder the following of his huſbandry and tillage, which is ſo beneficiall to the common wealth, whereof you may reade at large in ſir William Herberts caſe.

Lib. 2. fo. 11, 12, &c. Sir Will Herberts caſe.

But by the common law he ſhould have execution in that caſe onely of his goods and chattels, and of his corne, and other preſent profit that grew upon his land, to which purpoſe the law gave him two ſeverall writs to be ſued within the yeare, one a *levari facias*, whereby the ſheriffe was commaunded, *quod de terris et catallis ipſius A. levari fac'*, and the other called a *fieri fac'*, which alſo was onely *de bonis et catallis*.

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Now the common law being underſtood, let us peruſe the words of the act.

(1) *Cum debitum fuerit recuperatum.*] That is, by judgement in an action of debt, or any action wherein damages are recovered.

(2) *Aut recognitum.*] That is, by recogniſance knowledged in any court of record that hath power to receive the ſame.

49 E. 3. 38, 39. 5 E. 3. 26. 35. 34 E. 3. Execution 129. 36 H. 6. 2, 3. 18 E. 3. 34, 35. F.N.B. 267 c. lib. 3. fol. 65. Fu woods caſe. 21 Aſſ. 15. 15 H. 7. 5. 20 E. 2. Execution Statham. 2 R. 3. 3. F.N.B. 267. b. Regiſt. 299. 15 H. 7. 15. 21 H. 7. 19. 30 E. 3. 24. 31 E. 3. Prec. 52. 47 E. 3. 26. 50 E. 3. 4. 30 E. 3. Execution. Statham. 22 Aſſ. 43. 17 E. 4. 4. b. 18 E. 4. 12. 34 H. 6. 20. 19 H. 6. 4. Lib. 3. fol. 65. Fuwoods caſe.

If two do knowledge a recogniſance of C. I. *quilibet eorum in ſolido*, that is, joyntly and ſeverally, the conuſee may ſue ſeverall *ſcire fac'* againſt the conuſors upon this recogniſance.

A ſpeciall recogniſance may by expreſſe words binde the lands of the conuſor in one county onely.

(3) *Sit in electione illius.*] This election ſhall the executors or adminiſtrators of the plaintife, or reconuſee have, albeit they be not named; and ſo likewiſe ſhall the ſucceſſor of the conuſee have alſo: but the executors ſhall not have execution of the judgement or recogniſance in the time of the teſtator, within the yeer, without ſuing a *ſcire facias*; but otherwiſe it is of a ſtatute, &c.

When the plaintife or conuſee prayeth an *elegit*, the entry is *quod elegit ſibi executionem fieri de omnibus catallis, et medietate terræ*; and the writ of *elegit* is *ac cum idem H. juxta ſtatutum inde editum* (meaning this ſtatute) *elegerit ſibi liberari pro prædict'* 20. *libris omnia catalla, et medietatem terræ ipſius R.* And therefore after the ſuing out of the *elegit*, the plaintife, that hath a judgement in an action of debt, cannot have a *capias*, &c.

(4) *Fieri facias.*] Here under theſe words is alſo the writ of *levari facias* included.

(5) *Vel quod vicecom' liberet ei omnia catalla, exceptis bobus et aſris carucæ.*] The maior and aldermen of London take a recogniſance of 250 pounds to the chamberlain of the city of London, and his ſucceſſors according to the cuſtome for orphanage money; in this caſe the chamberlain for the time being may ſue out a precept in the nature of an *elegit* to a ſerjeant at mace, and miniſter of that court to do execution upon this act: and albeit the words of this ſtatute are, *quod vicecomes liberet*; yet being a beneficiall law, by equity it is extended to every other immediate officer to every other court of record.

If

[a] If the chattels be ſufficient to pay the debt, and ſo may appear to the ſherife, whereby he may ſatisfie the debt, then he ought not to extend the land for the reſidue; and all this appeareth by the writ of *elegit* framed upon this act.

[a] Regiſt. 299.

(6) *Et medietatem terræ ſuæ,*] [b] This is to be underſtood of the half of ſuch land as the defendant had at the time of the judgement given, or of the recogniſance knowledged, unleſſe it be conveyed away by fraud and covin to deceive his creditors, contrary to the ſtatutes in that caſe provided.

[b] 19 E. 2. Execut. 249. 2 H. 4. 14. 42 E. 3. 11. 42 Aſſ. 17. 3 E. 3. Execut. 107. 10 E. 2. Execut. 137. 6 E. 3. 15. 17. 7 E. 3. 7. 8 E. 3. 15. 17. 17 E. 3. 15. 30 E. 3. 26. 50. 11 H. 4. 70. 9 H. 6. 58.

[c] A man doth knowledge a recogniſance of 100 pounds to be paid at five dayes; preſently after the firſt day he may ſue an *elegit* upon this act for 20 pounds, and have the moity of the land delivered unto him and when the ſecond day is paſt, he may have another *elegit* for that 20 pounds, and have the moity of the remnant delivered to him, *et ſic de cæteris*; for they be in effect in nature of ſeverall judgements in law.

[c] 16 E. 2. Execut. 138. 2 E. 2. ibid. 120. 16 E. 3. Fieri fac. 4. F.N.B. 267. b. Vide Mich. 31 E. 3. fo. 50. b. in libro meo per Fiſher & Finchden.

* And upon theſe words, *medietatem terræ ſuæ*, the ſheriffe hath extended a term for yeers, and the like.

It is to be obſerved, that the generall words of this act doth not take away the priviledge which the law giveth to any perſon; and therefore no *elegit* upon this act ſhall be ſued againſt the heir of the conuſor during his minority.

* [396]

Upon the equall conſtruction of theſe words, if the conuſor be ſeiſed of Black acre, White acre, and Green acre, and after the judgement given, or recogniſance knowledged, infeoffeth A. of White acre, and B. of Blackacre, and retains Green acre to himſelf, in this caſe he may have the moity of Green acre, and never intermeddle with the reſt: but he cannot extend the moity of the acre in the hand of any purchaſer, except he extend alſo the moity of all the land ſubject to the judgement, or recogniſance; and if he omit any, the extent ſhall be avoided in an *audita querela:* for where it is ſaid in books, that each purchaſer ſhall have contribution in that caſe, the meaning is, that ſuch extent of part ſhall be avoided, and all the land extended and equally charged; and ſo it is if Green acre deſcend to an heir, the moity thereof may be onely extended, without dealing with any of the reſt: ſo likewiſe if there be two or more conuſors, the lands of them all muſt be extended; and hereof you may read at large in ſir William Herberts caſe, all which are juſt and righteous expoſitions.

31 Aſſ. 6. 38 Aſſ. 4. li. 8. f. 171. Sir George Fletwoods caſe. 44 E. 3. 16. 7 H. 6. 2. 29 Aſſ. 37. 29 E. 3. 50. Sir William Herberts caſe, ubi ſupra.

29 Aſſ. 37. 29 E. 3. 50. Sir William Herberts caſe, ubi ſupra.

(7) *Quouſque debitum fuer' levatum.*] The *elegit* framed upon theſe words, ſaith, *tenendum ut liberum tenementum, quouſque debitum prædict' inde fuer' levatum*; and yet whenſoever the party pay and ſatisfie the debt of record, he ſhall enter into his land: and ſo it is when the tenant by *elegit* is ſatisfied by the ordinary extent, the tenant of the land may enter. But if it be in reſpect of any caſuall profit, to avoid the extent he muſt have a *ſcire fac'* in reſpect of the incertainty.

13 E. 3. Scire fac. 17. 21 E. 3. 36. 17 E. 3. 43. 46 Aſſ. tit. Scire fac. 47 E. 3. 11. 31 E. 3. Extent 31. Regiſt. 299. Fulwoods caſe, ubi ſupra.

(8) *Per rationabile precium et extentum.*] *Per rationabile precium* doth refer to goods and chattels, and *rationabile extentum* referreth to lands.

And hereby is implyed, that this appriſement and extent upon the *elegit* muſt be found by enqueſt of 12 men, and ſo returned of record.

Dier 2 Mar. 100. lib. 4. fol. 74. Palmers caſe.

That

15 H. 7. 15. 9 H. 7. 9. 22 Ass. 44. 22 E. 3. 31. 44 E. 3. 10. Temps R. 2. Pl. ult. tit. Extent. 15 E. 3. Scire fac. 115. 31 E. 3. Extent 13. 15 E. 3. ibid. 17. 22 E. 3. Recovery in value 22. 7 H. 4. 19. 22 R. 2. Execution 165. Dier 6 E. 6. 73. Regist. Judic. 13, 14. 20. * 19 E. 2. Execut. 246. 28 Ass. p. 7. F.N.B. 159. I.

That shall be said a reasonable extent, which is found by the oath of 12. men, and returned by the sherife, and filed, and there can be no re-extent granted upon surmise, that it is more then the half in value, or the like, because it extendeth onely to a chattell in lands: but before the extent be filed, the court may examine the cause, and if there be found fraud, deceit, or partiality, they may stay the filing of that writ, and grant a new.

But see 22 R. 2. 165. in dower, and in case of free-hold in Hil. 13 E. 2. fol. 74. b. the case of the hospitall of T. a *scire facias* granted for the surplusage upon a return in value, and delivered to the sherife by *habere fac' ad valorem*, for that it concerneth an inheritance, and so it was adjudged. Note the diversity, the tenant by *elegit* may for reasonable cause hold over the ordinary course of the extent, * by a reasonable construction upon this statute.

(9) *Per breve novæ disseisinæ, et per breve de redisseisina*, &c.] The words of the writ of *elegit* (as hath been said) are, *tenendum ut liberum tenementum, &c.* because this statute giveth him remedy by assise, &c. but he hath but a chattell, and no freehold; and therefore it is said, *si ejiciatur:* and the writ saith similitudinary, *ut liberū tenement'*, in respect of the assise, &c.

This branch doth give the assise to the tenant by *elegit*, and yet his executors or administrators shall have it by the equity of this act; and so shall the executors or administrators of tenant by statute merchant, and tenant by statute staple.

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Tr. 15 E. 2. coram Rege. Rot. 40. John Semers case.

I have seen a record of a judgement in the raign of E. 2. that the assignee of a tenant by *elegit* should not have an assise by the purview of this statute.

Mich. 31 E. 1. coram Rege Ebor. Ranulp. de Huntingfelds case.

Tenant by statute merchant of lands, which the conusor had in the right of his wife, brought an assise upon this statute, the tenant pleaded ancient demesne, &c. and so found, &c. and yet the plaintife had judgement; and the reason of the judgement given in the record is this, *Licet manerium prædict' sit de antiquo dominico coronæ, et tenementa in eodem manerio existentia per parvum breve tantum placitabilia, et prædict' Ranulphus Huntingfeld in cognitione prædict' quam fecit præd' I. in statuto obligavit tenementa præd' in summa ejusdem cognitionis, quæ quidem obligatio naturam eorundem tenementorum non mutat, nec est ad præjudicium domini, aut exhæredationem tenentium, ex quo tenementa illa per obligationem præd' solummodo onerata sunt ad certum tempus, post quod tempus reverti debent præd' Ranulpho et uxori suæ exonerata, tenend' ut prius, &c. Consideratum est, &c.*

By this judgement three things are to be observed; 1. that lands in ancient demesne may be † extended by the statute *de mercatoribus, anno* 13 E. 1. 2. That ancient demesne is * no plea in assise brought by tenant by statute merchant, upon this statute. 3. That in an assise of *novel disseisin* (which is *festinum remedium*) ancient demesne shall be tryed by the recognitors of the assise.

† 7 H. 7. 1. li. 5. fol. 105. Aldens case.
* 22 Ass. 45. li. 5. ubi supra.
22 Ass. ubi supra. 6 Ass. p. 35. 9 Ass. 9. 12 Ass. 18. 2 E. 3. 42. b. 41 E. 3. 2. 49 E. 3. 23. 3 li. 6. 47.

CAP.

CAP. XIX.

CUM poſt mortem alicujus decedentis inteſtati (1), *et obligati* (2) *aliquibus in debito* (3), *bona deveniant ad ordinarium diſponend'* (4), *obligetur de cætero ordinarius* (5), *ad reſpondendum de debitis quatenus bona defuncti ſufficiunt. Eodem modo quo executores reſpondere tenerentur, ſi teſtamentum feciſſent.*

WHEREAS after the death of a perſon dying inteſtate, which is bounden to ſome other for debts the goods come to the ordinary to be diſpoſed; the ordinary from henceforth ſhall be bound to anſwer the debts as far forth as the goods of the dead will extend, in ſuch ſort as the executors of the ſame party ſhould have been bounden, if he had made a teſtament.

(Dyer, 232. 5 Rep. 83. Fitz. Brief, 822. Fitz. Execut. 77.)

(1) *Decedentis inteſtati.*] There be divers kindes of inteſtates, one that make no will at all, another that make a will and executors, and they refuſe; in this caſe he dyeth *quaſi inteſtatus*, and theſe are within the purview of this act; therefore the ordinary is the perſon whom the law appointeth to have the charge or adminiſtration of the goods and chattels of the party that dyeth inteſtate, or *quaſi inteſtatus*; and juſtly did the law in this caſe appoint the ordinary: for the law preſumed, that he that had the care of his ſoul in his life time, would after his death have care of his temporall goods and chattels, to ſee them well diſpoſed and adminiſtred. Lib. 6. fol. 67. Sir Moyle Finches caſe.

And this act was made in affirmance of the common law, as hereafter upon the expoſition of ſome parts of the act ſhall appear. 17 E. 2. Br. 822. 24 E. 3. 55. 11 E. 3. Executors 77. 18 H. 6. 23. 9 E. 4. 33. 11 H. 7. 12. F.N.B. 120. lib. 5. fol. 83. Snellings caſe. Dier 8 Eliz. 247.

(2) *Et obligati.*] This is not onely intended of an obligation or deed in writing, but howſoever he was charged in law, as for rent upon a leaſe, or upon an *aſſumpſit*, or the like.

And after it is ſaid in this chapter, *obligetur de cætero ordinar'*, where *obligetur* is not taken, that he ſhould be bound in an obligation, but that he ſhould be charged, or ſubject to an action.

(3) *In debito.*] This act is not onely intended of that which is properly a debt, but of all duties, covenants, or juſt cauſes of actions, ſuch as might be brought againſt executors.

(4) *Bona deveniant ad ordinarium diſponend'.*] Unleſſe ſome of the goods or chattels came to the hands and poſſeſſion of the ordinary, he was not to be charged by the common law; but if they came to his hands, and he would neither adminiſter and pay the debts and duties himſelf, nor commit them over to the kin and friends of the inteſtate that would, the common law did charge him, and ſo doth this act which is made in affirmance of it.

If a man dye inteſtate, and a ſtranger taketh the goods, the ordinary ſhall not have an action of treſpaſſe for taking of them (unleſſe he had taken them into his poſſeſſion.) But the executor or adminiſtrator before ſeiſure may have an action of treſpaſſe. 7 H. 4. 18.

Neither

31 E. 3. ca. 11. 19 E. 3. Adminiſt. 20. & 24. 7 H. 4. 18. F. tit. Treſp 97. 25 E. 3. Exec. 105. 11 H. 4. 71. 18 H. 6. 22. F. N. B. 92. a. Pl. com. 278.

Neither can the ordinary have any action of debt, covenant, or any other action which belonged to the inteſtate; but thoſe to whom the ordinary commit adminiſtration may have all theſe actions by the ſtatute of 31 E. 3. but before that ſtatute, there was no remedy by law given to the adminiſtrators to recover thoſe things in action.

[a] But by the common law, an action of debt did lye againſt the adminiſtrators, but it was by the name of executors untill the ſaid ſtatute of 31 E. 3.

[a] 41 E. 3. 2. 11 H. 4. 72. l. b. 5. fo. 82, 83. Snellings caſe.

[b] If the ordinary take goods of the inteſtate, being out of his dioceſſe, he ſhall not be charged as ordinary by this act, becauſe he taketh them of his own wrong, and not as ordinary, in which right he is to be charged by this act.

[b] 12 R. 2 Adminiſtrat. 21. Lib. 5. fo. 29. the Princes caſe. 9 Eliz Dier 255, 256. lib. fo. Sir Moyle Finches caſe.

If it be demanded what intereſt the ordinary hath in the goods of the inteſtate, which come to his hands; it is anſwered, that he hath ſuch an intereſt as the adminiſtrator, to whom adminiſtration is committed *durante minore ætate executoris, ad opus, commodum, et utilitatem ipſius executoris, et non aliter, ſeu alio modo.* So as the ordinary may adminiſter for the good of the inteſtate, but cannot give the goods of the inteſtate, or do any thing to his prejudice.

(5) *Obligetur de cætero ordinarius.*] *Ordinarius*; this word in the law of England, in the uſuall and common ſenſe ſignifieth a biſhop, or he or they that have ordinary juriſdiction, and is derived *ab ordine*, to put him in minde of the duty of his place, and of that order and office that he is called unto; and this was the wiſdom of antiquity, that names of men in great places ſhould put them in minde (as often as they were named) of their duty: as the treaſurer of England to have ſpeciall care of the kings treaſure; and they that had places in the kings principall courts of juſtice are called juſtices to put them in continuall memory to do juſtice, *et ſic de cæteris.*

[c] 17 E. 2. Br. 822. 5 E. 2. ibid. 16. 17 E. 3. 23. 21 E. 3. 60. 41 Aſſ. 29. 7 E. 4. 24. 12 E. 4 15. 31 H. 6. 10. 15 E. 3 quare non adminiſt 5. Dier 18 Eliz. 350. Regiſt. 67. Capitulum ſede vacante ſuccedit epiſcopo in ordinaria juriſdictione. And this is regularly true, unleſſe it be by preſcription or compoſition. Vide li. 3. f. 73. the dean and chapter of Norwich caſe.

[c] In this ſtatute *ordinarius* is not onely taken for a biſhop, but every one that is *in loco epiſcopi*; as gardeins of the ſpiritualties, and ſuch as have peculiar and exempt eccleſiaſticall juriſdiction, and be immediate officers to the kings courts of juſtice: and not onely an ordinary or gardein of the ſpiritualties, or others that be *in loco ordinarii*, that of right are within this act, but alſo ſuch as uſurp the place, and are in poſſeſſion by wrong, are to be charged by this act.

[d] 11 R. 2. Adminiſtrat. 21. F. N. B. 120. Pl. Com. 280.

[d] If goods of the inteſtate come to the hands of the ordinary, and he dyeth; although the words be [*obligetur de cætero ordinarius*] yet his executors or adminiſtrators ſhall be charged in an action of debt; for when this act bindeth the ordinary, by conſequent his executors or adminiſtrators are bound. But if the ordinary commit adminiſtration to one, and he taketh the goods into his poſſeſſion and dyeth no action lyeth againſt his executors.

[e] If the ordinary take goods into his hands of the inteſtate, and after commit adminiſtration, and the ordinary retaineth the goods, he ſhall be charged, notwithſtanding the committing of adminiſtration.

[e] 11 R. 2. Adminiſtrat. 21.

CAP.

CAP. XX.

CUM justiciarii in placito mortis anteceſſoris conſueverint admittere reſponſionem (1) *tenentis, quod petens non eſt propinquior hæres* (2) *anteceſſoris, de cujus morte tenementum petitur, et hoc paratus eſt per aſſiſam inquirere: concordatum eſt, quod in brevibus de conſanguinitate, avo, et proavo, quæ ſunt ejuſdem naturæ, admittatur illa reſponſio, et inquiratur, et ſecundum illam inquiſitionem ad judicium procedatur.*

WHEREAS that juſtices in a plea of mortdaunceſtor, have uſed to admit the anſwer of the tenant, that the plaintiff is not next heir of the ſame anceſtor, by whoſe death he demanded the land, and is ready to enquire the ſame by aſſiſe; it is agreed, that in writs of coſinage, aiel, and beſaiel, which be of the ſame nature, his anſwer ſhall be admittted and enquired, and according to the ſame inquiſition they ſhall proceed to judgement.

Fleta, li. 5. ca. 8.

(1) *Conſueverint admittere reſponſionem.*] Hereby it appeareth that admiſſion and allowance of the juſtices ought to be holden for law, and ſo it is affirmed by this act.

(2) *Quod petens non eſt propinquior hæres.*] It is to be underſtood that the entry in an aſſiſe of mord' brought for (example) by P. againſt R. of 20 acres of land in S. is according to the words of the writ *aſſiſa venit recognoſcere ſi* [1] *O. pater P. cujus hæres ipſe eſt, fuit ſeiſitus in dominico ſuo ut de feodo de 20 acris terræ cum pertinentiis in S. die quo obiit. Et* [2] *ſi obiit infra 50 annos jam ultime elapſos ante teſte brevis. Et* [3] *ſi P. propinquior hæres ejus ſit.*

These three points in this aſſiſe of mordaunc' ſhall be inquired of by the recognitors of the aſſiſe, albeit the tenant make default, and no iſſue be joyned thereupon: but ſo it is not in the writs of aiel, beſaiel, or coſinage; for they are no aſſiſes but writs of *præcipe quod reddat*, and therefore if default be made therein, judgement ſhall be given by default, as in other writs of *præcipe quod reddat*, without inquiry of any point of the writ: the three points of the aſſiſe are hypotheticall, the demandant affirming nothing, and the words of the other three writs here mentioned are categoricall; *præcipe A. quod juſte, &c. reddat B. unum meſſuagium, &c. de quo W. avus prædict' B. cujus hæres ipſe eſt, fuit ſeiſitus in dominico ſuo ut de feodo die quo obiit*; now *quod petens non eſt propinquior hæres* is a deniall of one of the points of the writ of mordaunc'.

And it is to be underſtood that when the tenant pleadeth in barre of the aſſiſe, as matter of record, or a releaſe, or warranty, or any other barre that is out of the ſaid three points of the aſſiſe, there the tenant beginneth his plea with *aſſiſa non, &c.* and therefore the triall of that iſſue is peremptory, and the aſſiſe ſhall never inquire of any of the points of the writ; but when the tenant ſaith, that he is ready to heare the recogniſance of the aſſiſe, he cannot ſay *aſſiſa non*, for that ſhould be repugnant to his owne ſaying; and if hee ſay that he is ready to heare the recogniſance of the aſſiſe of one of the

31 E. 1. Mord. 58.

4 E. 2. Mord. 35. 8 E. 2. ibid. 42. 2 E. 3 9. 9 E. 3. 30. 9 Aſſ. 3. 10 E. 3. 4. 45. 30 E. 3. 8. 2 Aſſ. 10. 8 Aſſ. 17. 14 E. 3. Mord. 8. 29 Aſſ. 1. 11. 39 Aſſ. 13. 40 E. 3. 48. 33 E. 3. Mord. 34. 27 H. 8. 14.

the points of the writ, or traverse one of the points of the writ, yet the court *ex officio* ought to enquire of them all: and so it is if the tenant pleade in abatement of the writ, or vowch, and the demand-
12 Ass. 48. ant counterplead the vowcher, and these pleas bee tried, or adjudged for the demandant, yet the points of the writs shall bee enquired, and ought to bee found for the demandant, or else he shall not recover.

[400] Now the mischiefe before this statute was, that in the writs of aiel, besaiel, and cosinage, the tenant was not admitted to plead,
6 E. 3. 55. that the demandant was not heire to him, upon whose dying seised the writ was conceived, but he must shew who was his next heire, which now by this act he need not to doe, but yet he may plead the like plea, as he might have done at the common law as he did in 6 E. 3.

Mirror, c. 5. § 5. But heare what the Mirror speaking of this act saith, *Lestatut de allower un manner de exception in semblable actions ne fuit my mistier daver estre ordein sinon pur negligence des justices, car chescun affirmative est encounterable de son negative al peril del deliverant.*

12 E. 3. Mordaunc' 10. 30 E. 3. E. 33 E. 3. Mord. 34. If the tenant saith, that he is ready to heare the recognisance of the assise, he cannot give in evidence that the demandant is a bastard, but he ought to have pleaded the same.

(3) *Antecessoris.*] This *antecessor* in a writ of mordaunc' is intended of the father, mother, brother, sister, uncle, aunt, nephew, or niece of the demandant, and of no other.

(4) *Quæ sunt ejusdem naturæ.*] The difference betweene the assise of mordaunc', and these three præcipes appeareth by that which hath been said, and yet in some respect the words of this act that they be *ejusdem naturæ* are true.

For as the writ of mordaunc' saith, *Si O. pater P. cujus hæres ipse est, fuit seisitus in dominico suo ut de feodo de 20 acris terræ cum pertinen' in S. die quo obiit.* So the words of the writ aiel be, *De quibus N. avus præalet' P. cujus hæres ipse est, fuit seisitus in dominico suo ut de feodo die quo obiit, &c.*

(5) *Et secundū illiam inquisitionem ad judicium procedatur.*] Herein is the difference between this plea in assise of mordaunc', and the other writs; for in the assise of mordaunc' the rest of the points of the writ, as hath been said, shall be enquired.

But in the writs of aiel, besaiel, and cosinage, the triall of this issue is peremptory, and thereupon the court shall proceed to judgement as here is expressed.

CAP. XXI.

CUM in statuto edito apud Glouc' (1) *contineatur, quod si quis dimiserit terram alicui ad reddend' valorem quantæ partis ten' vel majoris, habeat ille qui dimisit, vel ejus hæres (postquam cessatum fuerit a solutione per biennium) actionem petendi ten' sic dimiss'm in dominico. Eodem modo concor-*

WHEREAS in a statute made at Glouc'ester, cap. 4. it is contained, that if any lease his land to another to pay the value of the fourth part of the land, or more, the lessor, or his heir, after the payment hath ceased by two years, shall have an action to demand the land so leased in demean.

In

concordatum eſt (2), *quod ſi quis detineat* (3) *domino ſuo* (4) *ſervitium debitum et conſuetum per biennium, habeat dominus actionem petendi ten' in dominico* (5) *per tale breve.*

In like manner it is agreed, that if any withhold from his lord his due and accuſtomed ſervice by two years, the lord ſhall have an action to demand the land in demean by ſuch a writ.

Præcipe A. quod juſte, &c. (6) *reddat B. tale ten', quod A. de eo tenuit per tale ſervitium, et quod ad præd' B. reverti debeat, eo quod prædictus A. in faciend' prædictum ſervitium * per biennium ceſſavit ut dicit.*

Et non ſolum in iſto caſu, ſed in caſu de quo fit mentio in prædicto ſtatuto Glouc' fiant brevia de ingreſſu hæredi (7) *petenti ſuper hæredem tenentem, et ſuper eos quibus alienat' fuerit hujuſmodi tenementum.*

*[401]

And not onely in this caſe, but alſo in the caſe whereof mention is made in the ſaid ſtatute of Glouceſter, writs of entry ſhall be made for the heir of the demandant againſt the heir of the tenant, and againſt them to whom ſuch lands ſhall be aliened.

Glouc', cap. 4. (6 Ed. 1. ſtat. 1. c. 4. Fitz. Brief, 249. 269. 6 H. 7 f. 7. Fitz. Ceſſavit. 1, 2, 3, 4. 7, 8. 17. 21. 22. 30. 32, 33, 34, 35. 45, 46. 50, 51. 54. 8 Rep. 118. Fitz. Ceſſavit, 42. 1 Inſt. 154. Regiſt. 237.)

(1) *Cum in ſtatuto edito apud Glouceſt'*, &c.] The ſtatute of Glouc' is miſrecited for [*vel ejus hæres*] are not in that ſtatute.

1. Hereby it appeareth that the ſtatute of Glouc' extended onely, when upon the creation of the tenure a fee farme was reſerved, the deteinment whereof was more prejudice to the lord then common and uſuall rents and ſervices, and therefore that act was not extended by equity to other rents, or ſervices.

2. That albeit the ſtatute of Glouc' mentioneth a deed, yet if the fee farme be reſerved without deed, that act extended to it, for here in the recitall of the act no deed is mentioned, ſo as that ſtatute is extended to all fee farmes.

3. Here it is ſaid *eodem modo concordatum eſt, quod ſi quis detineat domino ſuo ſervitium debitum et conſuetum*; and if the ſtatute of Glouc' had not extended to fee farmes without deed, then ſhould not a *ceſſavit* lie for other ſervices upon this act, unleſſe they had been reſerved by deed, by reaſon of theſe words, *eodem modo, &c.*

(2) *Eodem modo concordatum eſt, &c.*] By theſe words this act is ſo incorporated into the ſtatute of Glouc'; as the letting of the land to lie freſh, the tender of the arrerages, finding of ſurety, &c. are to be applied to this act concerning other ſervices.

(3) *Si quis detineat.*] Theſe words extend as well to bodies politique or incorporate, either ſole or aggregate of many, as to naturall perſons; alſo to feme coverts and infants, unleſſe the infant have the land by deſcent, and then although the ceſſer be in his time, he ſhall have his age, for that by intendment of law he knows not what arrerages to tender. 3 E. 3. 26. 4 E. 2. Cui in vita 22. lib. 8. fo. 44. Wittingham's caſe. li. 9. f. 85. Combs caſe.

If a villein ſeiſe and the lord enter, no *ceſſavit* ſhall lie againſt the lord for the ceſſer by the villein. 34 E. 3. bre. 924.

(4) *Domino ſuo.*] This is not intended onely of a lord that hath an eſtate in fee-ſimple in a ſeigniory, but of ſuch alſo that have an eſtate taile, or any eſtate for life derived out of a fee-ſimple; but he in 32 E. 1. ceſſav. 29. 11 E. 2. ceſſavit. 13 E. 2. ibid. 52. 8 E. 3. receit 36. 43 E.

3. 15. 45 E. 3. 27. 3 H. 6. 53. 9 H. 7. 16. F.N.B. 209. Vet. N.B. 78.

in the reversion shall not have a *cessavit* against the donee in taile or tenant for life, for he in the reversion is not *dominus* within this statute.

If the tenant cease by one year, and the lord graunt over his seigniory, and then the tenant cease another year, neither of them is *dominus* within this act Lib. 2. fol. 93. Binghams case.

See the exposition upon the statute of Glouc' cap. 4. what services are intended within this statute, *viz.* services annuall, as rent, suit, and the like, and not homage, or fealty, or the like, for this act saith *per biennium*, which implieth annuall services. But this act extendeth not to rent service created upon a fee farme, but a *cessavit* upon a fee farme must be conceived upon the statute of Gloucester, for which purpose there be severall writs in the Register.

Regist. 237.

(5) *In dominico.*] It was the wisdome of auncient parliaments to comprehend much matter in few words, as in this case, if the tenant made a lease for life, or a gift in taile, and a cesser was by two yeares, in this case a *cessavit* should be brought against the tenant for life or in taile, and suppose that he in reversion did hold of him, and that the tenant for life, or in taile did cease: and so if the tenant was disseised, and the disseisor ceased, the writ of *cessavit* should suppose that the disseisee did hold, and that the disseisor did cease: and likewise if the tenant by whose hands the lord was seised of his service made a feoffement in fee, the writ of *cessavit* should suppose that the feoffee ceased, and that the feosfor did hold of him, *et sic de similibus:* and the reason of these and the like cases was, for that the lord by his *cessavit* was to recover the land in *dominico*; and therefore these writs were framed and allowed accordingly: and for the same reason, if there be lord mesne and tenant, and the tenant peravaile cease by two yeares; the lord shall have a *cessavit* against the tenant (for a *cessavit* doth not lie of a rent) and suppose that the mesne ceased.

[402]

14 E. 2. bre. 815. 14 E. 3. ibid. 269. 19 E. 3. ibid. 249. 21 E. 3. 44 30 E. 3. 22. 28 E. 3 95. 48 E. 3. 4. 27 E. 3. 27. 39 E. 3. 15. 12 R 2. cessavit 460. 33 H. 6. 53. 12 E. 4. 10. ult. 27 H. 8 28. Keilwey 104, 105. 13 E. 3. gard 38. 1 H. 4. 3. pa. Burgh. Lib. 8. fol. 86. Bucknors case. 21 E. 3. 44. b. & c. Regist. 237. Vet. N.B. 78. 138, 139. F.N.B. 208.

(6) *Præcipe A. quod juste,* &c.] Here is the writ of *cessavit* framed; now the great objection upon that which hath been laid, how the cesser can be alledged in the tenant, against whom the *præcipe* is brought, and the tenure alledged in another, when the writ so formed doth suppose him, against whom the *cessavit* is brought, to hold also of the demandant: the answer is, that the writ formed by this act is put but for example, and seeing that, if such writs, as are above said, should not be maintained, no *cessavit* should be maintenable at all in those cases, therefore they have been adjudged to be good.

Regist. 237.

Here is a writ in a new case framed by this act, and therefore the act is not to be recited, (as often we have observed before) but the forme prescribed is to bee pursued; but in a *cessavit* upon the statute of Glouc', the statute is rehearsed, because there is no forme of writ prescribed by that act.

(7) *Fiant brevia de ingressu hæredi.*] A *cessavit* is properly called *breve de ingressu*, when it is in the *per*, or in the *per et cui.*

33 E. 3. cessav. 42. Pl. Com. 110. F.N.B. 209. f. lib. 8. 18. 118. D. Bonhams case.

Certain it is that the heire shall not have a *cessavit* for a cesser in the life time of the auncester, because the heire cannot have the arrerages which the tenant in the *cessavit* hath power to tender, and therefore this act is to bee intended of a cesser in the time of the

the heire, otherwiſe the act ſhould be contrary to itſelfe, which in all expoſitions is to bee avoided.

And ſo it is of the aunt and neece, they ſhall not joyne for a ceſſer in the time of the mother of the neece, but for a ceſſer in the time of both of them the *ceſſa-vit* doth lie. 33 E. 3. ubi ſupra. F.N.B. ubi ſupra.

Se the ſtatute of 10 E. 1. *ſtatutum de gamletto in London, Vet. Magna Charta fol.* 122. where it is ſaid, *implacitentur de gamletto,* which is a kinde of *ceſſa-vit,* for *gamel* or *gabble,* or *gabel* in one of the ſenſes is taken for *cenſus,* rent, &c. and *gamellettum* is as much to ſay, as to ceaſe, or let to pay the rent, *breve de gamelletto in London eſt breve de ceſſavit in biennium, &c. pro redditu ibidem, quia tenenta fuerunt indiſtringibilia.* Fleta, l. 2. ca. 48. Coram Rege Paſch. 17 E. 3. Rot. 139. London.

CAP. XXII. [403]

CUM duo vel plures teneant boſcum (1), *turbariam, piſcariam, vel alia hujuſmodi in communi* (2), *abſq; hoc quod aliquis ſciat ſuum ſeperale, et aliquis eorum faciat vaſtum* (3) *contra voluntatem alterius: moveatur actio per breve de vaſto. Et habeat defendens, cum ad judicium venerit, electionem* (4) *capiendi partem ſuam in certo loco per vic', et per viſum, et ſacram', ac aſſignationem vicinorum ad hoc elect' et juratorum: vel quod concedat* (5) *quod nihil capiat de cætero in hujuſmodi in boſco, turbaria, et aliis, niſi ſecund' quod participes ſui capere voluerint. Et ſi eligat capere partem ſuam in certo loco, aſſignetur ei locus vaſtatus* (6) *in ſuam partem, ſecundum quod fuit antequam vaſtum fecit. Et eſt tale breve in hoc caſu: ſcil. cum A. et B. teneant boſcum pro indiviſo, B. fecit vaſtum, &c.*

WHEREAS two or more do hold wood, turf-land, or fiſhing, or other ſuch thing in common, wherein none knoweth his ſeveral, and ſome of them do waſte againſt the minds of the other, an action may lie by a writ of waſte; and when it is come unto judgement, the defendant ſhall chooſe either to take his part in a place certain, by the ſheriff, and by the view, oath, and aſſignment of his neighbours ſworn and tried for the ſame intent, or elſe he ſhall grant to take nothing from henceforth in the ſame wood, turf-land, and ſuch other, but as his partners will take. And if he do chooſe to take his part in a place certain, the part waſted ſhall be aſſigned for his part, as it was before he committed the waſte. And there is ſuch a writ in this caſe, that is to ſay, *cum A. & B. tenent boſcum pro indiviſo, B. fecit vaſtum, &c.*

Fleta, li. 1. ca. 11. See the firſt part of the Inſtitutes, 323. (21 Ed. 3. f. 29. Fitz. Waſte, 25, 96. 1 Inſt. 200. Regiſt. 76.)

(1) *Boſcum,* &c.] This act extendeth not to caſtles, houſes, or other places for the habitation of man, for one joyntenant, or tenant in common might have had for reparation of them a writ *de reparatione faciend'.* Regiſt. 76. 23 H. 7. Kelw. 98. F.N.B. 127. a.

(2) *Teneant, &c. in communi,* &c.] Theſe words do include aſwell joyntenants as tenants in common, for both of them hold *in communi,* and ſo do old books and records term them both; but though the generalty of theſe words do extend to coparceners, yet in good 27 H. 8 13. 21 E. 3. 29. 29 E. 3. 39.

conſtruction they are not within the purview of this act, becauſe they were compellable to make partition; for this act extends not to them that had remedy by the common law, as hath been ſaid before.

This word [*teneant*] doth imply a free-hold at leaſt.

F.N.B. 49. 59. d. 21 E. 3. 29. 3 E. 2. Waſte 25. A parſon of a church being tenant in common with another ſhall have an action of waſte upon this ſtatute; and it is holden, that an action of waſte upon this act is maintainable between joyntenants, or tenants in common for lives, and yet the words of the writ be, *ad exhæredationem.*

50 E. 3. 3. If woods be given to two, and the heirs of one of them, he that hath the fee ſhall have an action of waſte upon this ſtatute, for no other action of waſte he can have.

But if woods be letten to two, the one for life, and the other for yeers, they are not within this ſtatute, in reſpect of the ſaid word *teneant*.

(3) *Faciat vaſtum.*] What ſhall be ſaid waſte or deſtruction in a tenant for life, &c. ſhall be ſaid waſte within this act.

Habeat defendens, cum ad judic' venerit, electionem, &c.] Here the defendant hath election, either to have his part in certain, and to take the place waſted as part thereof, or that he findeth ſurety to take no more then belongs to his part.

31 H. 8. cap. 1. 32 H. 8. cap. 32. And the defendant hath at this day a further election, either to have an action of waſte upon this act, or a writ of partition by the late ſtatutes.

(4) *Concedat.*] That is expounded, that he finde ſuch convenient ſurety, as the court ſhall allow of.

(5) *Aſſignetur eis locus vaſtatus.*] This is not literally to be taken, for it may be, that the place waſted is more than his portion, therefore it muſt be underſtood of ſo much as belong to his part.

CAP. XXIII.

HABEANT de cætero executores (1) *breve de compoto, et eandem actionem, et proceſſum* (2) *per illud breve, quale habuit mortuus, et haberet ſi vixiſſet.*

EXECUTORS from henceforth ſhall have a writ of accompt, and the ſame action and proceſs in the ſame writ as the teſtator might have had if he had lived.

(Fitz. Executors, 97. 4 Ed. 3. c. 7. 25 Ed. 3. ſtat. 5. c. 5.)

7 E. 3. 62. 19 E. 3. Account 56 H. 31 E. 3. fo. 30. in libro meo in Account. F.N.B. 117. b. 38 E. 3. 7. 31 E. 3. Account 57. By the common law executors ſhould not have an action of account for an account to be made to the teſtator, becauſe the account reſted in privity: for remedy whereof this act was made; but *per legem mercatoriam* an action of account did lye for executors. The ſucceſſor of a prior, or the like ſhould have an action of account for an account to be made to the predeceſſor, becauſe the houſe never dyeth.

(1) *Executors.*]

(1) *Executores.*] Adminiſtrators had no action untill the ſtatute of 31 E. 3. No action of account was given to the executors of executors till the ſtatute of 25 E. 3. But this act of 25 E. 3. as to the action of debt, covenant, &c. therein mentioned, is but in affirmance of the common law.

31 E. 3. cap. 11. 25 E. 3. cap. 5. Pl. Com. 286, 287. 10 E. 2. Execut. 100.

(2) *Eandē actionē et proceſſum.*] The heir in ſocage dyeth before the age of 14, his executors or adminiſtrators ſhall have an action of account preſently, and yet the heir himſelf ſhould not have an action before 14, but the ſtatute ſaith, *eandem actionem*, and not *ad eadem tempus.*

CAP. XXIV.

IN caſibus in quibus conceditur breve de cancellaria de facto alicujus, de cætero non recedant querentes a cur' (2) *regis ſine remedio* (1), *pro eo quod tenement' transfertur* (3) *de uno in alium. Et in regiſtro de cancellaria* (4) *non eſt inventum aliquod breve in iſto caſu ſpeciale, ſicuti de muro, domo, mercato* (5), *conceditur breve ſuper eum qui levavit ad nocumentum* (6). *Et ſi tranſferatur domus, murus, et his ſimilia in aliam perſonam, breve non deneget': ſed de cætero cum in uno caſu conceditur breve, in conſimili caſu ſimili remedio indigente, ſicuti prius, fiat breve* (7). *Queſtus eſt nobis A.* quod B. injuſte, &c. levavit domum, murum, mercatum, et alia quæ ſunt ad nocumentum liberi tenement' ſui. Et ſi hujuſmodi levata ad nocumentum tranſferantur in aliam perſonam, de cætero fiat breve ſic: queſtus eſt nobis A. quod B. et C. levaverunt, &c. Eodem modo ſicut perſona* (8) *alicujus eccleſiæ* (9) *recuperare poteſt communiam paſtur' per breve novæ diſſeiſinæ. Eodem modo de cætero recuperet ſucceſſor ſuper diſſeiſitorem, vel ejus hæredem per breve, quod permittat, licet hujuſmodi breve prius in cancellaria non fuerit conceſſum. Eodem modo ſicut conceditur breve utrum aliquod tenem' ſit libera eleemoſina alicujus eccleſiæ, vel laicum feodum, tale fiat de cætero breve utrum* (10) *ſit libera eleemoſina talis*

IN caſes whereas a writ is granted out of the chancery for the fact of another, the plaintiffs from henceforth ſhall not depart from the king's court without remedy, becauſe the land is tranſferred from one to another. And in the regiſter of the chancery there is no ſpecial writ found in this caſe, as of a houſe, a wall, a market, but the writ is granted againſt him that levied the nuſance. And if the houſe, wall, or ſuch like be aliened to another, the writ ſhall not be denied; but from henceforth, where in one caſe a writ is granted, in like caſe, when like remedy falleth, the writ ſhall be made as hath been uſed before: *queſtus eſt nobis A. quod D. injuſte, &c. levavit domum, murum, mercatum, et alia quæ ſunt ad nocumentum, &c.* And if ſuch things levied be aliened from one to another, the writ ſhall be thus: *queſtus eſt nobis A. quod B. et C. levaverunt, &c.* In like manner as a parſon of a church may recover common of paſture by writ of *novel diſſeiſin*, likewiſe from henceforth his ſucceſſor ſhall have a *quod permittat* againſt the diſſeiſor or his heir, though a like writ were never granted out of the chancery before. And in like manner as a writ is granted to try whether land be the free alms of ſuch a church, or the lay fee of ſuch a man, even ſo from henceforth a writ ſhall be made to try whether it be the

talis eccleſiæ, vel alterius eccleſiæ, in caſu quo libera eleemoſina unius eccleſiæ transferatur in poſſeſſionem alterius eccleſiæ. Et quotieſcunque de cætero evenerit (11) *in cancellar', quod in uno caſu reperitur breve, et in conſimili caſu* (12) *cadente ſub eodem jure, et ſimili indigente remedio non reperitur: concordent clerici* (13) *de cancellaria in brevi faciendo, vel atterminent querentes in proximum parliamentum: et ſcribantur caſus, in quibus concordare non poſſunt, et referant eos ad proximum parliamentum* (14): *et de conſenſu juriſperitorum fiat breve, ne contingat de cætero quod curia domini regis deficiat* (15) *conquerentibus in juſtitia perquirenda.*

free alms of this church, or of another church, in caſe where the free alms of one church is transferred to the poſſeſſion of another church. And whenſoever from henceforth it ſhall fortune in the chancery, that in one caſe a writ is found, and in like caſe falling under like law, and requiring like remedy, is found none, the clerks of the chancery ſhall agree in making the writ; or the plaintiffs may adjourn it until the next parliament, and let the caſes be written in which they cannot agree, and let them refer themſelves until the next parliament, by conſent of men learned in the law, a writ ſhall be made, leſt it might happen after that the court ſhould long time fail to miniſter juſtice unto complainants.

(Raſt. 405. Raſt. 441. 6 R. 2. c. 3. 9 Rep. 55. Raſt. 538. Regiſt. 32. Raſt. 419. Coke pla. 399. 14 Ed. 3. 17. Raſt. 123. Fitz. Entry, 3. 7, 8. 10. 61. 64. 67, 68, 69. 74. 1 Inſt. 54. b.)

4 Aſſ. 3. 4 E. 3. 36. 5 E. 3. 43. li. 5. fol. 101. Penſuddocks caſe.

Before the making of this act, an aſſiſe of nuſans did not lye againſt him that levyed the nuſans, and againſt his alienee; ſo as by the alienation of the wrong doer, the aſſiſe of nuſans failed: and he, to whom the nuſans was done, was driven to his *quod permittat* (which was a writ of right in his nature, wherein was great delay) againſt the alienee; and the reaſon thereof was, for that there was no writ of aſſiſe of nuſans in the Regiſter, but that ſuppoſed that the tenant in the aſſiſe *levavit*, which is remedied by this act.

(1) *De cætero non recedant querentes a curia regis ſine remedio.*] This is an ancient maxime of the common law, and the reaſon thereof is, *ne curia regis deficeret in juſtitia exhibenda*, ſo as in one court or other the party injured ſhould have juſtice.

Bract. l. 4. fo. 232. 6 E. 2. Aſſ. 454. Fleta, li. 4. c. 27. 9 E. 4. 35. F. N. B. 184. g. 11. 5. fol. 181. Penrud. caſe.

(2) *A curia*, &c.] The makers of this act knew well, that the party injured by the nuſans, albeit the wrong doer made it in his own ground, yet might the party grieved (albeit he had but an eſtate for yeers) enter and abate, and demoliſh the nuſans, be it houſe, wall, or other nuſans, not onely when it was in the hands of the wrong doer, but in the hands of the alienee: but this act doth give the tenant of the free hold as ſpeedy a remedy by law, as is the aſſiſe of *novel diſſeiſin*, which was ever counted *feſtinum remedium*; and yet if the wrong doer reform the nuſans before the aſſiſe, or *quod permittat* brought, the action lyeth not; howbeit, if the party had any particular loſſe by the nuſans, he ſhall recover damages therefore in an action upon the caſe, *ne querentes recederent a curia ſine remedio.*

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(3) *Tenementum transfertur.*] *Transfertur* is a more generall word then *alienetur*, for *alienare* is regularly intended of the act of the

the party, but *transferre* comprehendeth alſo acts in law, as deſcents, eſcheats, and the like: and therefore if two copa:ceners levie a nuſans upon their ground, and one dye, ſo as her part deſcend to her heir, the aſſiſe of nuſans is maintainable againſt the aunt as a wrong doer, and the neece as a tenant of a moity, which moity is transferred, but not aliened to her, and ſo if the alience dye ſeiſed.

(4) *In regiſtro de cancellaria.*] This is a book of great antiquity and authority in law, whereof in another place I have ſpoken.

(5) *De mercato.*] Here it is to be obſerved, that if one hath a market, either by preſcription, or by letters patents of the king, and another obtains a market to the nuſans of the former market, he ſhall not tarry till he have avoided the letters patents of the latter market by courſe of law, but he may have an aſſiſe of nuſans.

Note there be words in the grant of a market, *ita quod non ſit ad nocumentum alterius mercati.*

And note that fairs are taken within this law, for every fair is a market, but every market is not a fair.

[a] Now in what caſes a fair or market ſhall be ſaid to be levied to the nuſans of another, you may read in our old and latter books, this onely that hath been ſaid is ſufficient touching this point, for the underſtanding of this act.

(6) *Levavit ad nocumentum*, &c.] [b] A grant of a fair, &c. *Niſi ſit ad nocumentum feriarum vicinarum*, where *ad nocumentum feriarum* is put but for example; for if it be *ad aliquod dannum*, either of the king, or ſubject in any other thing, the fair ſhall be revoked.

[c] *Nocumentum eſt triplex*; 1. *publicum ſive generale.* 2. *Commune.* 3. *Privatum ſive ſpeciale.*

Publicum, ad nocumentum totius regni; *commune, ad commune nocumentum tranſeuntium*; *privatum*, to a houſe, a mill, &c.

[d] It is true that a private nuſans may be committed three manner of wayes; *viz. Faciendo, non faciendo, permittendo, et non permittendo.*

[e] By this word *levavit*, and theſe words in the beginning of the chapter, *de facto alicujus*, it appeareth that this act onely extendeth to nuſances that are committed by doing or diſturbing; for, for not doing no aſſiſe of nuſans lyeth, but an action upon the caſe.

[f] Though the word *levavit* is onely here, and in the writ (herein mentioned) uſed, yet *exaltavit, deexaltavit, obſtruxit, obſtupavit, arctavit, divertit*, &c. nay *proſtravit*, which is the oppoſite to *levavit*, &c. are within this act.

(7) *Cum in uno caſu conceditur breve, in cõſimili caſu ſimili remedio indigẽte, ſicuti prius, fiat breve.*] See hereafter in this chapter concerning this rule.

(8) *Eodem modo ſicuti perſona*, &c.] [g] A parſon of a church ſhall have a *quod permittat* of a common in the right, and alſo in nature of a mordanc', &c. becauſe the parſon had an inheritance in the common in the right of his church.

But of a nuſans done in the time of the predeceſſor againſt the diſſeiſor or his heire, being an injury and wrong, no *quod permittat* did lie in that caſe before this ſtatute, as it plainly appeareth by this

1. Part of the Inſtitutes, ſect. 701. 234.
Preface to the 3. book of my Reports.

[a] Bract. li. 4. fo. 235. Brit. f. 159. Flet. li. 4. c. 28. 11 H. 4. 5, 6. 47. 22 H. 6. 16.

[b] Paſch. 37 E. 1. Coram Rege, the Prior of Tynemouths caſe. Northumber.

[c] Fleta, l. 4. c. 27. Glanv. l. 9 cap. 11. li. 13 ca. 34. 19 E. 3. Barre 179.

[d] Glanv. li. 13. ca. 34, &c. Bract. li. 4. fo. 232, &c. Fleta, l. 4. c. 18. 23. 26, &c. Brit. fo. 71. 2 H. 4. 11. 11 H. 4. 83. 29 E. 3. 32.

[e] Temps E. 1. Aſſ. 422. 7 E. 3. 56. 8 E. 3 21. 8 Aſſ. 32 Aſſ. 2. 42 Aſſ. 15. 18 E. 3. 32. 18 E. 2. tit. Aſſ. 375. 5 H. 3. ibid. 426. 3 E. 3. ibid. 445. F.N.B. 183, 184. Regiſt. 452. 9 Aſſ. 19. 48 E. 3. 27.

[g] 13 E. 1. Juris utrum 15. 30 E. 1. Quod permittat 10. 32 E. 1. ibid. 14. & tit. Common 24. 31 E. 1. B. 874. tit. Quod permittat 8. 4 E. 3. 38. 43 E. 3. 25. 1 H. 4. 3. F.N.B. 49. c.

act it ſelfe, and the reaſon was, for that there was no writ in the Regiſter in that caſe.

Regiſt. 32, 33. (9) *Perſona alicujus eccleſiæ.*] Theſe words doe include vicars, prebendaries, &c. and all other eccleſiaſticall perſons which could not have a *quod permittat* in the like caſe before the making of this act; for private perſons, though they had but an eſtate taile they might have had a *quod permittat*, and therefore no proviſion was made for them, but onely for parſons of a church, and the like.

Glan. l. 13. c. 23. Bract. l. 5. f. 286. Brit. fol. 234. 55 65. Fleta, l. 5 c. 19. & 26. 11 E. 3. Juris utrum. 3. Firſt part of the Inſtit. ſect. 646. Cuſtumier de Norm. ca. 115. 20 E. 3. Juris utrum 5 19 H 3. ibid n. 16. 8 E. 3. 60. 5 E. 3. Juris utrum 9. 19 R. 2 ibid. 17. Fract. l. 5. f. 413. Fleta, l. 2. ca. 12. Lib. 8 f. 48, 49. John Webs caſe. Firſt part Inſt. ſect. 67.

(10) *Breve utrum.*] A *juris utrum* did lie at the common law for a parſon againſt a lay man, and for a lay man againſt a parſon, but no *juris utrum* did lie for one parſon againſt another before this act, becauſe it was the right of a church and no lay fee. And the words of the writ at the common law were *an ſit laicum feodum*, &c.

If an abbot hath a parſonage appropriated to him, and aliens the glebe of the parſonage, his ſucceſſor ſhall have a *juris utrum*, which he hath as parſon, and not as abbot.

A parſon or chaplain of a chappel, which comes in by admiſſion and inſtitution, ſhall have a *juris utrum*, becauſe he hath no other remedy; otherwiſe it is of a gardein of an hoſpitall, a prior, and the like, becauſe they may have a writ of right.

(11) *Et quotieſcunque evenerit.*] This is a moſt excellent and neceſſary rule, for before this act the juſtices did punctually hold themſelves to the writs in the Regiſter, becauſe they could not change them without act of parliament; (as elſewhere hath been ſaid) therefore by this generall law it is notably provided for expedition and adminiſtration of juſtice, that as often as it ſhould happen in the chauncery, that in one caſe there is writ (in the regiſter of the chauncery) found, and in like caſe happening under the ſame right, and needing the like remedy, a writ is not found, let the clerks of the chauncery agree in making of a writ, or adjourne the plaintiffe untill the next parliament, &c. But now let us peruſe the words.

31 E. 1. bre. 874. 38 E. 3. 13. (12) *Conſimili caſu.*] Although there be a ſpeciall writ grounded upon this ſtatute, called by the particular name of a writ *in conſimili caſu*, yet many other writs (though they beare not the name) are grounded upon this act, as it appeareth in our books.

First part of the Inſt. ſect. 67. (13) *Concordent clerici.*] And albeit that we have treated of this in another place, yet for the underſtanding of theſe words, ſomewhat ſhall here be ſaid.

Lib. 8. f. 48, 49. John Webs caſe. Fleta, l. 2 ca 12. 21 E. 3. fol. 33. Theſe that here are called *clerici*, were at this time, and before called alſo *magiſtri cancellariæ*, and were aſſociated to the lord chancellor; of whom Fleta ſaith, *Cui aſſocientur clerici honeſti et circumſpecti, domino regi jurati, qui in legibus et conſuetudinibus Anglicanis notitiam habeant pleniorem, quorum officium ſit ſupplicationes, et querelas conquerentium audire et examinare, et eis ſuper qualitatibus injuriarum oſtenſarum debitum remedium exhibere per brevia regis.*

Li. 8. ubi ſupra. And theſe writs agreed upon by theſe maſter clerks were called *magiſtralia*, for diſtinction ſake, between *brevia formata de curſu*, and theſe called *magiſtralia*, but hereof more hath been ſaid in another place.

3 E. 2. Entry 8. F. N. B. 206. f. And one ſpeciall note is to be taken, that this generall law extends not onely to writs at the common law, but to writs alſo grounded upon acts of parliament: for example, the ſtatute of Glouceſter

Glouceſter doth give a writ of entry in caſe of alienation by tenant in dower, to be brought in the life of tenant in * dower, which thereupon is called a writ of entry *in caſu proviſo*: now upon theſe generall words writs have been framed *in conſimili caſu*, that is, where tenant by the curteſie, or tenant for life doe alien, but it muſt be *in conſimili caſu* with the ſtatute of Glouceſter; for where that ſtatute ſpeaketh of a reverſion, a remainder is not *in conſimili caſu*, as ſome doe hold, that a reverſion *ex aſſignatione*, though it be but for life, is within the act.

3 E. 2. ubi ſupra. 28 E. 2. Entry 74. 11 E. 2. Entry 68. ibid. 12 E. 2. 60. 7 E. 3. 27. 8 E. 3. 4 & 6 E. 3. 39, 40. 26 Aſſ. p. 81. Regiſt. 237. & 235. F.N.B. 207 b. 31 E. 1. Entry 64. Bract. li. 1. ca. 2. Britton, fo. 243. 29 H. 3. Juris ut. 26. 3 E. 3. 7, 8. 2 E. 3. 7. 21 E. 3 31. 37. 60. 33 E. 3. Quar. Imp. 94. 37 Aſſ. 7. 38 Aſſ. p. ult. 17 E. 3. 35. 49. 39 E. 3. 21. 35 17 E. 3. 35. 49. 40 E. 3. 34. 38. 42 Aſſ. p. 28. 46 E. 3. petit. 28. 13 vowcher 219. 13 H. 4. 4. 34 H. 4. 34. * Mirr. c. 2. § 3. & cap. 5. § 2.

(14) *Atterminent querentes uſq; in proximum parliamentum.*] Matters of great difficulty were in auncient time uſually adjourned into parliament to be reſolved and decided there, whereof Bracton ſaith, *Si aliqua nova et inconſueta emerſerint, quæ nunquam prius evenerunt, et obſcurum, et difficile ſit eorum judicium, tunc ponantur judicia in reſpectu uſque ad magnam curiam, ut ibi per conſilium curiæ terminetur*: and this agreeth with our books from time to time.

And hereof there be infinite precedents in the rols of parliament. *Vide* the ſtatute of 14 E. 3. cap. 5. ſee 22 E. 3. 3. & 2 H. 7. 19.

To which end parliaments were often holden, * king Alfred or Alured did ordain by authority of parliament, that for ever twice a yeare, or oftner, if need were, in time of peace a parliament ſhould be holden at London: *pur parlamenter ſur le guidement del people de Dieu, coment gents ſe garderont de pecher, viveront in quiet, receiveront droit per certein uſages, et ſaints judgements*, of whom the poet ſung,

Anglorum ſic regna regens, ut non foret illi
Antea rex ſimilis, æqualis poſtea nullus.

In hiſtoria Elienſi. lib. 2. fo. 38.

And in an ancient chronicle I reade of him, *Aluredus acerrimi ingenii princeps et doctiſſimus totumque novum et vetus teſtamentum in eulogiam Anglicæ gentis tranſmutavit, &c.*

In the raigne of E. 1. parliaments were very frequent, and often holden, and for the moſt part one parliament in two yeares.

King Edw. 3. ordained by authority of parliament, that a parliament ſhould be holden every year once, or more often, if need be: to what end? for maintenance and execution of lawes, and for redreſſe of divers miſchieſes, and grievances which dayly happen. 4 E. 3. ca. 14. 36 E. 3. ca. 10.

(15) *Quod curia domini regis deficiat*, &c.] For it is a rule in law, *quod curia regis non debet deficere conquerentibus in juſtitia exhibenda.* W. 2. ca. 51.

CAP. XXV.

QUIA non eſt aliquod breve in cancellaria, per quod querentes habent tam feſtinum remedium (1), *ſicut per breve novæ diſſeiſinæ, dominus rex voluntatem habens ut celeris fiat juſtitia, et quod dilationes* (2) *in placito communi amputentur et abbrevientur, concedit quod breve aſſiſæ novæ diſſeiſinæ locum habeat in pluribus caſibus quam prius habuit* (3). *Et concedit quod de eſtoveriis boſci* (4), *proficuo capiendo in boſco, de nucibus, et glandibus, et aliis * fructibus colligend'* (5), *de corrodio* (6), *liberatione bladi, et aliorum victualium* (7), *ac neceſſariorum* (8) *in certo loco annuatim recipiend'* (9), *tolneto, tronagio, paſſagio, pontagio, pannagio, et bis ſimilibus in certis locis capiend'* (10), *cuſtodiis boſcorum, parcorum, foreſtarum, chacearum, warennarum, portarum, et aliis balivis* (11), *et offitiis in feod'* (12), *jaceat ac cætero aſſiſa novæ diſſeiſinæ. Et in omnibus ſupradictis caſibus modo conſueto fiat breve de libero ten'* (13). *Et ſicut prius jacuit, et locum habuit in communia paſturæ: ita de cætero locum habeat in communia turbariæ, piſcariæ, et aliis commun' bis ſimilibus* (14), *quas quis habet pertinentes ad liberum tenementum, vel etiam ſine ten' per ſpeciale factum ad minus ad terminum vitæ. In caſu etiam quando quis tenens ten' ad terminum annorum, vel in cuſtod' illud alienat in feodo* (15), *et per illam alienationem transfertur liberum ten' in feoffatum, ſiat remedium per breve novæ diſſeiſinæ. Et habeantur pro diſſeiſitoribus tam ille qui feoffat, quam feoffatus: ita quod vivente altero eorum locum habeat prædictum breve. Et ſi per mortem perſonarum eſſet remedium per prædictum breve, ſiat remedium per breve de ingreſſu.*

FORASMUCH as there is no writ in the chancery whereby plaintiffs can have ſo ſpeedy remedy, as by a writ of novel diſſeiſin; our lord the king, willing that juſtice may be ſpeedily miniſtred, and that delays in pleas may be taken away or abridged, granteth that a writ of novel diſſeiſin ſhall hold place in more caſes than it hath done heretofore; and granteth, that for eſtovers of wood, profit to be taken in woods by gathering of nuts, acorns, and other fruits, for a corody, for delivery of corn and other victuals and neceſſaries to be received yearly (in a place certain) toll, tronage, paſſage, pontage, pawnage, and ſuch like, to be taken in places certain, keeping of parks, woods, foreſts, chaſes, warrens, gates, and other bailiwicks, and offices in fee, from henceforth an aſſiſe of novel diſſeiſin ſhall lie. And in all caſes afore rehearſed, according to the cuſtomed manner, the writ ſhall be *de libero tenemento*; and as before times it hath lien and holden place in common of paſture, ſo ſhall it from henceforth hold place in common of turf-land, fiſhing, and ſuch like commons, which any man hath appendant to freehold, or without freehold by ſpecial deed, at the leaſt for term of life. In caſe alſo when any holding for term of years, or in ward, alieneth the ſame in fee, and by ſuch alienation the freehold is transferred to the feoffee, the remedy ſhall be by a writ of novel diſſeiſin, and as well the feoffor as the feoffee ſhall be had for diſſeiſors, ſo that during the life of any of them the ſaid writ ſhall hold place; and if by the death of the parties remedy happen to fail by that writ, then remedy ſhall be obtained

greſſu (16): *et quamvis ſuperius fiat mentio* (17) *de aliquibus caſibus, de quibus locum non habuit prius breve novæ diſſeiſinæ, non propter hoc credat aliquis illud breve non competere, ubi prius competebat. Et licet dubitaverint quidam, utrum in caſu quo quis paſcat alterius ſeperale* (18), *fieri poterit remedium per prædictum breve, teneatur pro certo, quod in caſu illo per prædictum breve bonum et certum eſt remedium. Caveant de cætero illi qui nominati ſunt diſſeiſitores* (19), *quod non proponant falſas exceptiones, per quas captio aſſiſæ differatur, dicendo quod alias tranſivit aſſiſa de eodem ten' inter eaſdem partes, vel dicendo et mentiendo, quod breve de altiori natura pendet inter eaſdem partes de eodem ten', et ſuper his et conſimilibus vocent rotulos, vel recordum ad warrantum, ut per illam vocationem aſportare poſſint veſturam, et levare redditus, et alia proficua ad magnum detrimentum querentis. Et quia prius aliam pœnam non habuit, qui hujuſmodi falſas exceptiones mendaciter propoſuit, niſi tantū quod poſt mendacium ſuum convictum proceſſum fuit ad captionem aſſiſæ: dominus rex,* [410] *cui odioſæ ſunt hujuſmodi falſæ exceptiones, ſtatuit quod ſi quis diſſeiſitor nominatus perſonaliter proponat illam exceptionem ad diem ſibi datum, ſi defecerit de warranto quod vocavit, habeatur pro diſſeiſitore abſque recognitione aſſiſæ, et reſtituat damna prius inquiſita, vel poſt inquirenda de duplo: et nihilominus pro falſitate ſua puniatur per priſonam unius anni. Et ſi illa exceptio proponatur per balivum, non propter hoc differatur captio aſſiſæ, nec judicium ſuper reſtitutione ten'* (20), *et damn': ita tamen quod ſi dominus illius balivi, qui abſens fuerit, poſtmodum veniat coram juſtic', qui aſſiſam ceperint, et offerat verificare per recordum, vel per rotulos, quod aſſiſa alias tranſivit de eodem ten' inter eaſdem*

tained by a writ of entry. And albeit that above mention is made of ſome caſes wherein a writ of novel diſſeiſin held no place before, let no man think therefore that this writ lieth not now where it hath lien before. And though ſome have doubted whether a remedy be had by this writ in caſe where one feedeth in the ſeveral of another, let it be had for certain, that a good and a ſure remedy is given in that caſe by the ſaid writ. And let them which be named diſſeiſors beware from henceforth that they alledge not falſe exceptions, whereby the taking of the aſſiſe may be deferred, ſaying, that another time an aſſiſe of the ſame land paſſed between the ſame parties, or ſaying, and falſly, that a writ of more high nature hangeth between the ſame parties for the ſame land, and upon theſe and like matters do vouch rolls or records to warranty, to the end that by the ſame vouching they may take away the veſture, and receive the rents and other profits, to the great damage of the plaintiff. And where before none other pain was limited againſt him that falſly had alledged ſuch untrue exceptions, but only that after ſuch falſe ſurmiſes diſproved the aſſiſe ſhould paſs; our lord the king, to whom ſuch falſe exceptions be odious, hath ordained, that if any being named diſſeiſor do perſonally alledge the exception at the day to him given (if he fail of the warranty that he hath vouched) he ſhall be adjudged for a diſſeiſor without taking of the aſſiſe, and ſhall reſtore the damages before inquired of, or to be inquired after, to the double, and ſhall nevertheleſs have a year's impriſonment for his falſhood. And if that exception be alledged by a bailiff, the taking of the aſſiſe ſhall not be delayed therefore, nor the judgement upon the reſtitution of the lands and damages. Yet nevertheleſs,

eaſdem partes, vel quod querens alias ſe retraxit de brevi conſimili, vel placitum pendeat per breve de altiori natura: fiat ei breve de faciendo venire ſuper hoc recordum. Et cum illud habuerit, et videant juſtic', quod recordum ita ei miſſum valeret ante judicium, quod per illud excluderetur querens ab actione ſua, ſtatim faciant juſtic' ſcire parti, quæ prius recuperavit, quod ſit ad certam diem, ad quem rehabeat defendens ſeiſinam ſuam, et damna, ſi quæ prius ſolvit per primum judicium, ſimul cum dannis quæ habuit poſt primum judicium reddit': quæ ei reſtituantur in duplo, ſicut ſupradictum eſt: et nihilominus puniatur ille qui primo recuperavit, per priſonam ſecundum diſcretionem juſtic'. Eodem modo ſi defendens, contra quem tranſivit aſſiſa, in ſua abſentia oſtendat chartas, vel quiet' clam' (21), ſuper quarum confectione non fuerunt jurat' examinat' nec examinari poterunt, pro eo quod de eis non fiebat mentio in placitand', et probabiliter ignorare potuerunt confectionem hujuſmodi ſcriptorum: juſtic' viſis ſcriptis illis faciant ſcire parti, quæ recuperavit, quod ſit ad certum diem coram eis: et venire fac' jurat' ejuſdem aſſiſæ. Et ſi per veredictum juratorum (22), vel forte per irrotulamentum ſcripta illa verificaverint, puniatur ille, qui aſſyam impetravit contra factum ſuum, per pœnam ſupradictam. Nec capiat vic' de cætero bovem à diſſeiſito, ſed à diſſeiſitore tantum (23). Et ſi plures ſint diſſeiſitores in uno brevi nominati, nihilominus de uno bove ſit contentus (24): nec exigat bovem niſi de precio v. s. vel precium (25).

leſs, that if the maſter of ſuch a bailiff that was abſent, come after before the ſame juſtices that took the aſſiſe, and offer to prove by record or rolls, that another time an aſſiſe paſſed between the ſame parties of the ſame land, or that the plaintiff at another time did withdraw his ſuit in a like writ, or that a plea hangeth by a writ of more high nature, a writ of *venire facias* ſhall be granted unto him to cauſe the ſame record to be brought; and when he hath the ſame, and the juſtices do perceive, that the record ſo ſhewed by him would have been ſo available before the judgement, that the plaintiff by force of the ſame ſhould have been barred of his action, the juſtices ſhall preſently cauſe the party to be warned that firſt recovered, that he appear at a certain day, at the which the defendant ſhall have again his ſeiſin and damages (if he before paid any by the firſt judgement given) which ſhall be reſtored him to the double, as before is ſaid; and alſo he that firſt recovered ſhall be puniſhed by impriſonment according to the diſcretion of the juſtices. In the ſame manner if the defendant, againſt whom the aſſiſe paſſed in his abſence, ſhew any deeds or releaſes, upon the making whereof the jury were not examined, nor could be examined, becauſe there was no mention made of them in pleading, and by probability might be ignorant of the making of thoſe writings; the juſtices upon the ſight of thoſe writings ſhall cauſe the party to be warned that recovered, that he appear at a certain day, and ſhall cauſe the jurors of the ſame aſſiſe to come; and if he ſhall verifie thoſe writings to be true by the verdict of the jurors, or by inrollment, he that purchaſed the aſſiſe contrary to his own deed, ſhall be puniſhed by the pain aforeſaid. And the ſheriff from henceforth ſhall not take

take an ox of the diſſeiſee, but of the diſſeiſor only; and if there be many diſſeiſors named in one writ, yet ſhall he be contented with one ox; nor ſhall receive any ox but of v.s. price, or the value.

(Regiſt. 196, &c. 8 Rep. 45. Fitz. Aſſ. 138. Fitz. Avowry, 142. Raſt. 58, &c. Co. pla. 60. Regiſt. 197. Fitz. Aſſ. 61. 94. 111. 134. 167. 210. 316. 330. 439. 452. Fitz. Aſſ. 395. Fitz. Brief, 790. Bro. Elegit. 20. Bro. diſſeiſin, 86. 105. Raſt. 67. 11 H. 4. 84. Hob. 95. 11 H. 4. f. 49. 22 Ed. 3. f. 4. 30 Ed. 3. f. 12. Fitz. Record. 32. Bro. Covert, 35. 1 Roll. 91. Keilw. 131, 132. Fitz. Aſſ. 5. 123. Fitz. Certificate, 2, 3, 4. 7, 8. 10. F.N.B. 181, &c. Raſt. 110. Regiſt. 200. 17 E. 3. f. 28. 12 H. 4. f. 9. 7 H. 4. f. 45. Fitz. Aſſ. 412.)

(1) *Tam feſtinum remedium.*] The aſſiſe of novel diſſeiſin is not onely *maxime feſtinum, ſed maxime beneficiale remedium*, for many cauſes: [411]

1. The defendant ſhall not be eſſoigned.
2. The defendant ſhall not caſt a protection.
3. He ſhall not pray in aide, but of the king.
4. He ſhall not vouch any ſtranger, nor any party to the writ, unleſſe he enter into warranty maintenant.
5. The ſame law of receit.
6. The parol ſhall not demur, either for the nonage of the plaintife, or the tenant, and for divers other cauſes.

(2) *Ut celeris fiat juſtitia, et quod dilationes*, &c.] This concerneth the common-wealth, for *expedit reipublicæ, ut ſit finis litium*; and the duty of every good judge, for *boni judicis eſt lites dirimere*. *Regula.* *Regula.*

(3) *In pluribus caſibus quam prius habuit.*] It is to be obſerved, that at the common law there were but two forms of writs of aſſiſe of novel diſſeiſin in the regiſter of the chancery, that is to ſay, an aſſiſe *de libero tenemento*, and an aſſiſe *de communia paſturæ* for his cattell, &c. which was ſo neceſſary, as without it his free-hold could not be manured: and the aſſiſe *de libero tenemento* did lye of houſes, land, rent, and other things which lay in render, whereof a *præcipe* did lye at the common law; but of all profits *aprender*, which conſiſted in *capiendo, colligendo, habendo, recipiendo, et exercendo*, an aſſiſe of novel diſſeiſin did not lye at the common law; but the party was driven to his *quod permittat*, in which was great delay, and they which had but an eſtate for life could not maintain that writ: therefore this act doth give in all the ſaid caſes a ſpeedy remedy by an aſſiſe in lieu of the *quod permittat*, ſo the ſaid profits were to be taken or had *in certo loco*; and therefore theſe words, *in pluribus caſibus*, &c. are verified.

4 E 2. Aſſ. 451. 35 Aſſ. p. 11. 11 H. 6. 22. 31 E. 1. Aſſ. 440. 4 E. 2. ib. 449. 8 E. 2. ib. 385. 16 E. 2. ib. 370.

(4) *De eſtoveriis boſci.*] Theſe (as by this act appeareth) conſiſt in *capiendo*.

Of this word *eſtoverium*, and of the ſeverall kindes thereof, I have ſpoken at large in other places. Lib. 5. fol. 25. lib. 8. fol. 47, 48. li. 9. fo. 112.

(5) *De nucibus, glandibus, et aliis fructibus colligendis.*] Theſe and the like conſiſt in *colligendo*, and are to be taken in woods: *Notandum eſt quod ſub nomine herbagii, non continetur glans, et ideo tempore glandis, et peſſonæ excluduntur porci, et capræ, niſi ad hoc ſpecialiter agatur, quod talem habeant communiam; glandis enim nomine continentur* Bract. li. 4. 226.

continentur glans caſtanea, fagina, ficus et nuces, et alia quæq; quæ edi et paſci poterunt præter herbam.

Virg. Geo. 4. *Nec de concuſſa tantum pluit ilice glandis.*

44 E. 3. 24, 25. (6) *De corrodio.*] This being a reaſonable ſuſtenance for a man, conſiſteth in *habendo*, as by the writ *de corrodio habend'* appeareth.

Lib. 8. fol. 46. Jehu Webs caſe. And albeit this act ſpeaketh *de corrodio*, yet an aſſiſe ſhall be maintained of the part of a corrodie, but therein alſo are diverſities, as you may read, lib. 8. in Jehu Webs caſe.

(7) *De liberatione bladorum, et aliorum victualium.*] Theſe conſiſt in *recipiendo*, as belonging to a corrodie.

(8) *Ac aliorum neceſſariorum.*] Theſe alſo conſiſt in *recipiendo*, as things *quæ pertinent ad victum, veſtitum, et habitationem hominis.*

[412] (9) *In certo loco annuatim recipiendis.*] Note this clauſe, *in certo loco*, extends to eſtovers, and all the profits *aprender*, and not to the clauſe of offices. But yet the office muſt be *in certo loco*, which

Jehu Webs caſe, ubi ſupra. is ſo to be underſtood, as albeit the office be removeable, yet it muſt be *in certo loco*, when the aſſiſe is brought.

(10) *Tolneto, tronagio, paſſagio, pontagio, pannagio, et hiis ſimilibus in certis locis capiend'.*] Theſe conſiſt in *capiendo*, and of theſe you may read at large in Jehu Webs caſe, ubi ſupra.

7 E. 3. 63. 8 E. 3. 55, 56. 10 E. 3. 27. 18 E. 3. 27. 19 E. 2. View. 77. 7 Aſſ. 12. 10 Aſſ. 11. 30 Aſſ. 4. 18 E. 2. Aſſ. 377. 4 E. 2. ib. 449. 8 E. 2. ib. 385. 16 E. 2. ib. 370. 7 H. 6. 8. 22 H. 6. 9. 9 E. 4. 6. 27 H. 8. a. 28 H. 8. Dier, 7. 3 Mar. Dier, 153. 31 H. 8. Br. gentes 134. * Jehu Webs caſe, ubi ſupr. F.N.B. 178. f. † 31 E. 1. Aſſ. 440. 21 E. 3. 4. b. 27 H. 8. 12. 13 E. 3. Parl 23. 12. Aſſ. 23. 8 Aſſ. 4. 3 E. 3. Aſſ. 175. 22 H. 6. 11. 15 E. 4. 4. 30 Aſſ. 4. 11 Aſſ. p. 13. Hob. 5. fol. 61. Je. Webs caſe.

(11) *Cuſtodiis boſcorum, parcorum, foreſtarum, chacearum, warrennarum, portarum, et aliis balivis.*] Of theſe and other offices, you may read at large in Jehu Webs caſe; and this act concerning theſe offices is but declaratory, for an aſſiſe did lye of them at the common law, becauſe a *præcipe* did lye of them, as in that caſe it appeareth.

(12) *Et officiis in feodo.*] This ſtatute being herein (as hath been ſaid) made in affirmance of the common law, although the ſtatute ſpeaketh onely of offices in fee *; yet ſuch as have offices in tail, or for life, ſhall have an aſſiſe, as by the authorities before cited doth appear.

† And albeit the words be generall, yet this act is onely to be intended of offices of profits, and not of offices of charge, and no profit.

But this act doth extend aſwell to offices in the admirall court eccleſiaſticall court, or any other court, where either the civill or eccleſiaſticall law, or any other law then the common law, &c. of England doth rule; as to offices in temporall courts which are governed by the common law, &c. as by the authorities aboveſaid, and Jehu Webs caſe appeareth.

If a man be diſſeiſed of the whole office, he ſhall have an aſſiſe *de officio cum pertinen'*; and albeit the ſtatute ſpeaketh, *de officiis*, and if he be diſſeiſed of parcell of the profits, he may have an aſſiſe of that parcell: but therein alſo are diverſities, as you may read in Jehu Webs caſe.

(13) *Breve de libero tenemento.*] So as now by this act, in all the caſes aboveſaid concerning profits *aprender*, the aſſiſe of novel diſſeiſin ſhall be *de libero tenemento.*

(14) *Et ſicut prius jacuit, et locum habuit in communia paſturæ, ita de cætero in communia turbariæ, piſcariæ, et aliis communibus hiis ſimilibus.*] Bracton, who wrote before the making of this act, ſaith, *Quod locum habet aſſiſa de qualibet communia pertinen' ad liberum tenementum,*

Bract. li. 4. fol. 231. 23 H. 3. Aſſ. 438.

nementum, ſcil. communia paſturæ, turbariæ, &c. And in the raign of H. 3. which was before the making of this act, an aſſiſe did lye of a common of piſcarie; and theſe opinions had great probability of reaſon: yet becauſe (as hath been ſaid) there was no writ in the Regiſter in thoſe caſes, therefore before this act no writ did lye by the generall opinion of the judges; but now this act hath cleared the queſtion.

12 H. 3. ib. 417. Temps R. 2. Grant 104.

(15) *In caſu etiam quando quis tenet tenementum ad terminum annorum, vel in cuſtodiam, et alienat in feodo.*] This branch is an affirmance of the common law, for the free-hold being in the leſſor, or in the heir, the livery being made by the leſſee for yeers, or gardein, doth work a diſſeiſin, becauſe by his torcious livery he diſſeiſeth the leſſor or heir, for the which they may have an aſſiſe of novel diſſeiſin at the common law, and both the feoffor for making, and the feoffee for taking a torcious livery were both diſſeiſors: and ſo it is if tenant at will, or tenant at ſufferance make a leaſe for yeers, and the leſſee enter, this is a diſſeiſin to the leſſor at the common law.

4 E. 2. Aſſ. 790. 19 E. 2. ib. 400. 3 E. 4. 1. 15 H. 7. 4.

[413]

12 E. 4. 12.

This act ſpeaketh firſt of a tenant for yeers, and yet a tenant by elegit, ſtatute merchant, or the ſtaple are within this law: and ſo it is of a tenant at will, or a tenant at ſufferance, for all theſe have a poſſeſſion, but otherwiſe it is of a bailife, for he hath no poſſeſſion at all.

See the ancient Terms, cap. Elegit. 3 E. 4. 1. 4 E. 2. Aſſ. 790.

2. Of gardein, which extendeth not onely to gardein in chivalry, but to gardein in ſocage, *et pur cauſe de nurture.*

8 Aſſ. 28. 8 E. 3. 63. 15 H. 3. Bre. 878. 20 H. 3. Aſſ. 432.

3. * Of an alienation in fee, and yet an alienation in tail, or for life is within this act, becauſe they are within the ſame miſchief.

* Bract. li. 4. f. 216. Brit. cap. 32. Diſſeiſin. Fleta, li. 4. c. 17.

4. † If tenant for yeers, or a gardein make a leaſe for life, the remainder for life, the remainder in fee, and tenant for life enter, he is a diſſeiſor, becauſe he taketh the firſt livery; and ſo it is of him in the remainder for life, or in fee, if he enter.

7 E. 3. fi. 43 Aſſ. 45. † 50 E. 3. 22.

(16) *Fiat remedium per breve de ingreſſu.*] Here it is objected, that if *tam feoffator, quam feoffatus* be diſſeiſors, by the common law, and ſo declared by this ſtatute:

1. How the leſſor or heir can have a writ of entry, and ſuppoſe the entry by the leſſee or gardein?

2. Whether the leſſor or the heir may not have an election, either to have his aſſiſe, or his writ of entry?

To the firſt it is anſwered, that albeit it be a diſſeiſin, having regard to the leſſor or heir, for the benefit of the aſſiſe; yet between the leſſee or gardein, and the feoffee, it is a feoffment, whereunto a warranty may be annexed, and a voucher had of the ſame to recover in value (as in another place hath been ſaid) ſo as the leſſor or the heir may have a writ of entry in the *per* againſt the alienee, and principally, becauſe it is affirmed by this act.

See the firſt part of the Inſtitutes, ſect. 698. & 611.

To the ſecond, this act hath preſcribed a form and order concerning alienations after the act, *viz.* that living either the feoffor or feoffee, an aſſiſe ſhould lye; and therefore living either of them, a writ of entry doth not lye: but for alienations before this act, a writ of entry might have been brought ſince this act.

4 E. 2. Aſſ. 790. 19 E. 2. ib. 400. 15 H. 3. Bre. 878.

(17) *Et quamvis ſuperius fiat mentio,* &c.] This is but *abundans cautela,* and yet prudently added *ad majorem rei ſecuritatem.*

(18) *Et licet dubitaverint quidam utrum in caſu quo quis paſcat alterius ſeperale,* &c.] This aſſiſe was in this caſe maintainable by the common law.

Theſe

27 Aſſ. p. 30. Kelwey, 12 H. 7. 20. F.N.B. 178. h. Liure de Entries Raſt. 65.

Theſe words are to be intended, when one claimeth common in the ſeverall land of another, and puts in his cattell to uſe the ſame; the owner of the ſoil hath two wayes to help himſelf, either to waive the poſſeſſion, and then to bring his aſſiſe as one out of poſſeſſion, as in the common caſe of a diſſeiſin, and then he ſhall have judgement to recover the land and damages; or elſe he may keep his poſſeſſion, and bring his generall writ of aſſiſe of novel diſſeiſin: and if the tenant plead to the aſſiſe, that the plaintife was tenant of the land the day of the writ purchaſed, and yet is; the plaintife may maintain his writ, and ſay, that the land was, and is his ſeverall, and the defendant did feed his ſeverall with his cattell, and according to this branch of this act he prayeth the aſſiſe; and in this caſe if it be found for the plaintife, he ſhall have judgement to hold the land as his ſeverall, and damages.

[414] Note that in this caſe he is not diſſeiſed of the land, but of the ſeveralty of his land.

And this feeding is to be underſtood, when one claimeth a common appendant, appurtenant, or in groſſe, and for the uſe of the ſame doth put in his cattell; this claim, and putting in of his cattell is a diſſeiſin of the ſeveralty of the land, and ſhall have judgement, as is aforeſaid, accordingly: but if the cattell come in by way of eſcape, this is a treſpaſſe, and no diſſeiſin of the ſeveralty within this ſtatute.

Bract. li. 4. fo. 217. Fleta, li. 4. cap. 1. 27 Aſſ. p. 51. 28 Aſſ. p. 50. F.N.B. 178. i. Bract. li. 4. fo. 216.

By the common law a man that is in ſeiſin of his land may have an aſſiſe, for that he is diſſeiſed of the quiet injoying of his land; as when the lord, or any other that hath a rent, and oftentimes diſtreineth for the rent, where none is behinde, the tenant ſhall have an aſſiſe of novel diſſeiſin of the land, for that, by reaſon of the frequencie of diſtreſſes, he is diſſeiſed of the quiet injoying of his land, and cannot make his advantage thereof, and *frequentia mutat tranſgreſſionem in diſſeiſinam.*

Mirror, ca. 2. § 15. Brit. fol. 108.

And the Mirror ſaith, that diſturbance of one that is in peaceable poſſeſſion, in three caſes doth amount to a diſſeiſin: as if the lord that is in quiet poſſeſſion of his rent cometh to diſtrein, and is by the tenant diſturbed, ſo as he cannot take a diſtreſſe, this diſturbance is a diſſeiſin of the rent.

2. When the lord hath taken a diſtreſſe, and the tenant pay not his rent, but diſturb him by unjuſt ſute of a replevie.

3. When any diſtrein ſo outragiouſly (that is, ſo often) as the terre tenant cannot plough, or duly uſe his ground.

23 Aſſ. p. 1. 26 Aſſ. p. 35. 44 E. 3. 23. 7 H. 4. 16. 1 H. 4. 51, 52. Bro. c 5. vert. 68. Doct. & Stud. li. 2. fo. 113. 29 E. 3. 27. M. 18 E. 3. Coram rege Rot. 35. North. 13 R. 2. Record 32.

(19) *Caveant de cætero illi qui nominati ſunt diſſeiſitores*, &c.] A feme covert and an infant are not within this ſtatute to have corporall puniſhment by impriſonment by their plea, by vouching of a record, and failing of it.

This act doth not extend to an aſſiſe of mordanc.

See a notable record ſoon after the making of this act, upon this branch of this act, Mich. 18 E. 1. *Coram rege* Rot. 35. North.

In a formedon, or any other reall action, if the tenant plead a record, and fail thereof at the day, the demandant ſhall not have ſeiſin of the land, but onely a petit cape: for this ſtatute extendeth onely to the aſſiſe of novel diſſeiſin: and in caſe of the aſſiſe, if the tenant before this ſtatute had pleaded a record, and failed thereof, yet the aſſiſe ſhould have been taken, as appeareth by this act.