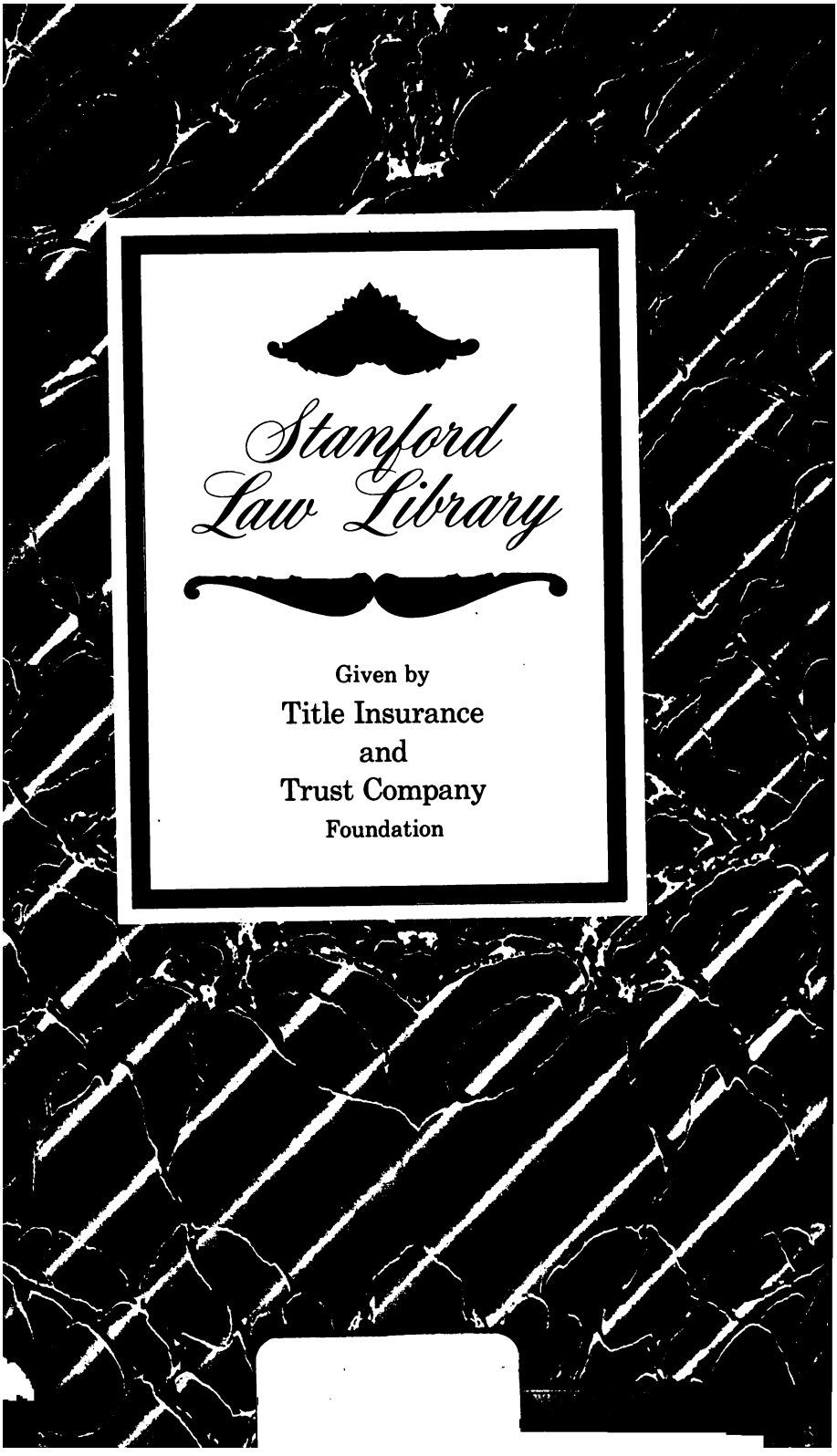
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THE LAW AND PRACTICE OF Diſtreſſes and Replevin;

By the late Lord Chief Baron GILBERT. Sir Geoffrey

To which is added,

An APPENDIX of PRECEDENTS.

The SECOND EDITION,

With conſiderable ILLUSTRATIONS,

By a BARRISTER at LAW.

LONDON:

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M.DCC.LXXX.

PREFACE.

TO THE

FORMER EDITION.

AS *ſolidity of judgment, utility of matter, and perſpicuity of method, will be too obvious to every intelligent reader, on the firſt peruſal of the following Treatiſe, not to convince him that it is one of the elaborate pieces of the late lord chief baron* GILBERT, *we preſume there needs no further apology for making it publick, eſpecially ſince it is a ſubject eſſentially neceſſary to be known by every individual who has any kind of inheritance or poſſeſſion; for it is calculated in ſuch a manner*

as to be of uſe to the public in general, but more particularly to ſheriffs, underſheriffs, ſtewards, landlords, tenants, &c. who ought to be thoroughly acquainted with this branch of the law.

The tranſlations at the bottom of the pages are intended that this book may be uſeful not only to gentlemen of the law, but to ſuch alſo as are unacquainted with the original.

An appendix of ſome well choſen precedents is added for the eaſe of the practiſer, and the whole rendered the beſt and compleateſt book of its kind.

ADVER-

ADVERTISEMENT

TO THE

PRESENT EDITION.

SOME time ſince, the publiſher of the preſent edition of this work, prevailed on a gentleman, well known at the bar, to reviſe it, and make ſuch additions, as to him ſhould ſeem neceſſary. This, he flatters himſelf, has been done in a manner not undeſerving of the attention of the profeſſion. The work has received a very minute correction, as well in language, as in punctuation. The references have been all carefully examined; thoſe that were inappoſite have been retracted, thoſe that were inaccurate have been rectified, and ſuch as were neceſſary have been ſupplied. The diviſions have in ſome meaſure been altered; at the ſame time that others have been

added. Such of the modern acts of parliament, as well as of the judicial deciſions, which in any wiſe relate to the ſubject, have been introduced: and to the whole is ſubjoined a few practical directions, as alſo a new and complete index. That the reader may entertain a competent idea of the neceſſary alteration which this treatiſe has undergone, it may not be improper to remind him, that ALL the ADDITIONS are included within brackets; it was candid ſo to denote them, leſt the faults of the editor ſhould be attributed to the author. The "tranſlations at the bot-"tom of the pages" which diſgraced the former edition, the editor of this has thought proper to omit.

March 1ſt, 1780.

THE

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THE LAW OF DISTRESSES AND REPLEVINS.

CHAP. I.

Of Distresses.

THE diſtreſs is a remedy given to the lord, to recover the rent or ſervices, which the tenant hath obliged himſelf by his feudal contract to pay, by way of retribution for his farm.

Theſe ſervices, when the feudal tenures prevailed, were chiefly of two ſorts; either MILITARY, as attending on the lord in war; or MINISTERIAL, as attending his courts in time of peace, and there aſſiſting him in the diſtribution of juſtice; or, ploughing and tilling his demeſne. Spel. Rem. 40. Bacon on Government. 47. Runnington's edit. of Hale.

The non-performance of theſe ſervices was, by the old feudal law, a forfeiture of the feud. This is evident from ſeveral paſſages in *Vigellius*, (under the title of *cauſæ ex quibus feudum amittitur*)—*Si vaſſalus domino non ſerviat, fidelitatemque ei non præſtet*——*Si vaſſalus, a domino ejus vocatus, non venerit*—*Si pactum feudi non ſervietur*— Theſe, ſays he, were all forfeitures, and the lord on ſuch failures of his tenant, was at liberty by that law to re-aſſume his feud.

Vigel. 257, 271. 326. Jur. feud. Ann. 126. 129. Run. edit. of Hale.

The rigour of this law was mitigated with us, and theſe feudal forfeitures changed into diſtreſſes, according to the pignorary method of the civil law; from whence the notion ſeems to have been firſt borrowed; as may be ſeen in the title, *de diſtrictione pignorum*.—*Creditoris arbitrio permittitur, ex pignoribus ſibi obligatis quibus velit diſtrictis, ad ſuum commodum pervenire.* For there appear no footſteps of it in the feudal authors.

Bacon on government, 48.

Dig. lib. 20. tit. 5. fol. 660.

From whence ſoever the name or the notion came, the remedy obtained ſo early in our law, that we have no memorial of its original with us; and as this power was anciently uſed by the lords, it grew as burthenſome and grievous to tenants, as the feudal forfeiture;—there being no difference to the tenant, between the lord's ſeizing the land itſelf and turning him out of poſſeſſion, and his ſtripping him of the whole produce of it at his pleaſure.

And

And not only the produce of the farm, but the *inducta & illata*, and every thing that was brought on the land, were liable to the lord's diſtreſs. By this means all the plunder of the war, which the vaſſal had brought home, was often carried off by the lord, and the diſtreſs, by his power, removed out of the reach of the tenant; and that on the ſlighteſt occaſions.

This power, thus practiſed by the lords, did not only oppreſs the tenants, but put them ſo entirely under the power of their lords, as to enable them to bring great numbers of vaſſals into the field againſt their prince and thereby diſturb the publick peace of the kingdom.

Barr. on ſtat. 12. 13. 51. Madox Ex. c. 13. ſtat. marl. Sulliv. lect. 101. 102.

There were yet two other inconveniencies which aroſe from the abuſe of theſe diſtreſſes.

The firſt was, that in the diſputes which frequently aroſe between neighbouring lords themſelves, whilſt each lord was endeavouring to enlarge his bounds and encroach on his neighbour's property, the tenants were generally diſtrained by both; by which the tenant was brought within the ſeignory, and ſo became ſubject to that feudal dependence and ſervice which accompanied the military tenure.

The other miſchief was, that when the lords had brought them under their dependence, they would diſtrain them for the amerciaments of their courts; and, as the

52 Hen. 3. c. 1. statute of *Marlbridge* expreſſes it,—*graves ultiones fecerunt, & diſtrictiones quouſque redemptiones receperint ad voluntatem ſuam.* And what made the abuſes the more inſupportable, was, that the lords——*per*

2 Inſt. 102, 3. *miniſtros domini regis juſticiari non permittunt, nec ſuſtineant quod per ipſos liberentur diſtrictiones, quas auctoritate propriâ fecerint ad voluntatem ſuam.*—So that they ſeemed to throw off the authority of the law, and to ſubvert the fundamental rule, that no property was to be altered without the king's writ.

But theſe oppreſſions ended with the diſtractions of the barons wars. For towards the end of the reign of *Hen.* 3. there were particular laws made to regulate the manner of diſtraining; not permitting the lords to extend this remedy, beyond the miſchief it was firſt introduced for; which was no more than to empower the lord by ſeizing the chattles, TO OBLIGE the tenant to perform the feudal ſervices.

Brac. l. 3. p. 130. Spelm. voc. eſcheata. Glan. l. 7. c. 17. Heng. parva, c. 6. Co. Lit. l. 1. c. 1. Dalrym. on feud. prop. 62. ed. 1757. Sulliv. lect. 65. 97. 100. ed. 1776.

Theſe were to remain in the lord's hands AS PLEDGES to compel the performance; and the detention was no longer lawful, than while the tenant refuſed to do the ſervices, which were reſerved by the feudal contract. By what ſteps it came to be brought under the regulations which govern it at this day, we ſhall have occaſion to obſerve, by conſidering,

I. The ſeveral ſorts of diſtreſſes, and in what caſes a diſtreſs lies.

II. What

II. What things are diſtrainable.

III. [Of the time, place, and manner of making the diſtreſs.]

IV. How the diſtreſs is to be uſed [and diſpoſed of;] and herein, of the POUND; [and of ſelling the diſtreſs.]

I. Of the ſeveral ſorts of diſtreſſes, and in what caſes a diſtreſs lies.

The diſtreſs at common law was uſed in ſix caſes; *viz.*

1. For the ſervice due to the lord ariſing from the tenure; as homage, fealty, rent, ſuit of court, *&c.* For the diſtreſs, as is already obſerved, came in, in lieu of the forfeiture, and was a mild alteration of the feudal law, which allowed the lord to ſeize the feud for the non-performance of the ſervices. 1 Ro. abr. 665.

[*Rents* at common law, are of three kinds; rent-*ſervice*, rent-*charge*, and rent-*ſeck*.

Rent-ſervice, is where the tenant holdeth land of his lord, by fealty and certain rent; or by homage, fealty, and certain rent; or by other ſervice, and certain rent. It is called rent SERVICE, becauſe it hath always ſome CORPORAL SERVICE incident to it; which at the leaſt is fealty. And in caſe it be not paid at the day appointed, the lord may diſtrain for it of common right, without reſerving any ſpecial power of diſtreſs. Co. Lit. 96. a. 142.

Co. Lit. 143. *Rent-charge* is rent, for which the owner may diſtrain, not of common right, but by virtue of a clauſe in the deed which creates it.

Co. Lit. 143. *Rent-ſeck, redditus ſiccus*, or dry rent, is in effect nothing more than a rent reſerved by deed, but without any clauſe of diſtreſs. And for this ſpecies of rent there was no remedy by diſtreſs at the common law; but the grantee could only have charged the perſon of the grantor, in a writ of annuity.

2 Inſt. 19. There are alſo other ſpecies of rents, which are reducible to theſe three; ſuch as, rents of aſſiſe, chief rents, *&c.*

Rents of aſſiſe, are the certain eſtabliſhed rents of freeholders, and antient copyholders; and are ſo called, becauſe they are *aſſiſed* and certain; and of theſe, the former are frequently called chief rents.

Having given this general diviſion of rents, it remains to be obſerved that the difference between them, in reſpect to the mode of recovering them by diſtreſs, is now totally aboliſhed by the 4 G. 2. c. 28. §. 5. which declares, that all perſons may have the like remedy by diſtreſs for rents ſeck, rents of aſſiſe, and chief rents, as in caſe of rents reſerved upon leaſe.—So that now it may be laid down as an univerſal principle, that a diſtreſs may be taken for any kind of rent in arrear.

And

And by the 11 G. 2. c. 19. §. 18. if any tenant ſhall give notice of his intention to quit the premiſes, at a time mentioned in ſuch notice, and ſhall not accordingly deliver up the poſſeſſion thereof at the time; he ſhall from thenceforth pay double rent, to be recovered in like manner as the ſingle rent.]

So the lord may diſtrain for relief—*aid pur file marrier*, and *pur faire fitz chevalier*. For though theſe were not annual, yet they were parts of the feudal profits, and were therefore recoverable in the ſame manner. 1 Rol. abr. 665. 4 Co. 49. b. 1 Jones 132. Latch. 129.

But it may be neceſſary to diſtinguiſh relief, into the relief proper and improper.

The PROPER relief is the ancient relief, which was due to the lord at or before the entry of the heir, or new tenant, into the land. This was anciently paid in money, and was not ſo properly a ſervice, as a perquiſite or incident to the feudal tenure. It aroſe from this, that whilſt the feud was temporary and precarious, the lords uſed upon the death of their tenants, and before the heir was admitted into the feud, to oblige the heir to pay a ſum of money. This, after the feud came to be eſtabliſhed, and made perpetual, came to be part of the feudal profits; the tenants eaſily conſenting to it upon the eſtabliſhment of the feud. Co. Lit. 83. a. Spel. Rem. 32. 1 Jon. 132. Latch 130. 3 Bulſt. 323. Run. edit. of Hale.

In analogy to this, the lords, after *magna charta* had indulged to the tenants the licence of alienation, uſed in their grants to reſerve a ſum of money on every alienation of their tenants; and where ſuch reſervation appeared in their grants, with a clauſe of diſtreſs, the lord might reſort to that remedy where the tenant failed to perform his part of the contract. It afterwards happened that the grants in which theſe reſervations appeared, were by length of time worn out or loſt, and then the lords PRESCRIBED in taking the relief. But for theſe preſcriptive reliefs, the lord could not diſtrain, unleſs he could likewiſe preſcribe in the diſtreſs. For as the preſcription created the right to this IMPROPER relief, ſo there muſt be a preſcription to give the remedy; otherwiſe they were looked upon as burdens and exactions of the lords upon their tenants, tending to diſable them from appearing in the field, armed and equipped for the publick ſervice: and for that reaſon were ſaid to be againſt common right; that is, againſt the policy of the law, which provided for the publick ſafety, before the private profit of the lord. And therefore they were not encouraged, nor any remedy either by diſtreſs, or action, given for them, unleſs the lord could ſhew as early a title to the remedy, as to the duty itſelf.

In like manner the heriot is of two ſorts; the heriot ſervice and the heriot cuſtom.

The

The heriot NOW is the BEST BEAST of the tenant, but anciently was taken out of the *militiæ apparatus*. It was a device firſt introduced to keep a conquered nation in ſubjection, and to ſupport the publick ſtrength and military furniture of the kingdom, by taking on the death of the tenant his beſt armour. Hence it became part of the ſervices ariſing from the tenure, and therefore to be diſtrained for as other ſervices. This, as the military ſervice declined, was turned into ſomething of private profit to the lord; and inſtead of the *militiæ apparatus*, he took the beſt horſe, ox, or cow; and the ſame remedy was continued, as where the heriot was paid in the habiliments of war. Spelm. Rem. 32.

The reſervation of this heriot ſervice was of publick utility. It was alſo for the private ſafety of all the tenants in the manor, that the habiliments of war ſhould be kept amongſt themſelves for their defence; and therefore where there was no ſuch tenure between the lord and tenants of ſome particular manor, the tenants by agreement conſented that the lord ſhould have the beſt part of the military furniture. This agreement created a cuſtom, which being the law of the manor, created a right in the lord to ſeize. Bro. Abr. tit. Heriot, pl. 7, 8. Keilw. 82. a.

But the lord could not diſtrain; becauſe wherever there was any footſteps of a diſtreſs, it was always ſuppoſed to be part of the feudal reſervation: and the heriot cuſtom ariſing originally from the grant of the tenant,

tenant, and not being reſerved by the lord upon his feudal donation, was not a ſervice ariſing from the tenure between lord and tenant; and therefore was not under the regulation of feudal ſervices, and conſequently not to be diſtrained for, as ſuch ſervices were.

Keilw. 82. a. Bro. abr. tit. Heriot, pl. 7. Show. 81. Salk. 356. Cro.Car.260.

But where ſuch heriot cuſtom obtains, the property of the heriot is actually in the lord upon the death of the tenant; becauſe the choice of the beſt beaſt is in the lord, and not in the tenant. And hence it is, that the lord may ſeize the heriot cuſtom wherever he finds it, either on the tenant's land, or off it, or even in the king's highway. And if it be eloigned he may have treſpaſs or detinue for it; for the bringing the action determines the choice for that beaſt, as if he had ſeized at firſt; and whoever takes it, violates the property, which was veſted in the lord by the death of the tenant. But in the caſe of ſuch eloignment the lord cannot diſtrain the tenant, as he may for the heriot ſervice; becauſe the diſtreſs was introduced for the recovery of feudal duties, of which the heriot cuſtom is no part.

Plowd. 96. Keilw. 82. a. Bro.tit. heriot pl. 7. 3 Bulſt. 325. Dr. & Stud. 74. Moor 540. Cro. Eliz. 32.

But it hath been much doubted whether the lord might SEIZE the heriot SERVICE; becauſe that being part of the feudal duties ariſing from the tenure between the lord and tenant, ought to be governed by the ſame regulations with the other ſervices; and therefore where the tenant holds by a capon, or a hen, &c. the lord muſt diſtrain, and cannot

cannot ſeize as for his own property; ſo neither ought he to ſeize for a heriot ſervice. But it now ſeems to be ſettled, that the heriot ſervice is ſeizable, as well as the heriot cuſtom; becauſe the choice of the beſt beaſt is in the lord, and therefore he only is to determine that choice, by a ſeizure. But where the tenure is by the rent of a hen or a capon, &c. he is to render, and therefore the lord can only compel him to do it by diſtreſs.—[But a ſuit heriot reſerved by deed, cannot be taken off the manor. Show. 81.] Show. 81. 2Lutw. 1367.

2dly. The ſecond ſort of diſtreſs is for fines and amerciaments in court-leets. This ſtands upon a different bottom. The former diſtreſs only relates to private contracts between landlord and tenant;—this diſtreſs relates to tranſactions in a court of juſtice, and is allowable either for a fine impoſed by the ſteward, or for amerciaments aſſeſſed by the jury on perſons guilty of nuſances; or of any other crime preſentable or conuſable in the leet. Cro. Jac. 382. 1 Ro. Abr. 664. 8 Co. 38, 41. 11 Co. 45.

But for amerciaments in a court-baron, the lord cannot diſtrain, but is put to his action of debt for recovery thereof.

To underſtand this rightly, we muſt obſerve that court leets were originally derived out of, or rather exemptions from, the ſheriff's torn, and therefore are courts of record, as the torn is.

In

In thoſe leets, though the lord or his ſteward preſides as judge, yet the court is *curia domini regis*, and was at firſt eſtabliſhed to puniſh treſpaſſes and publick nuſances, which aroſe within the precincts of the leet, as the torn through the whole county. Hence it comes that in all things neceſſary for the ſupport of the juriſdiction of the court, the judge was armed with the ſame power with the judges above; and therefore the ſteward for any contempt in court might impoſe a fine, and impriſon for it, as the judges above:—becauſe, what is neceſſary for the vindication of the honour of the court, the ſteward is not obliged to go to a ſuperior court to ſeek redreſs for. But for an amerciament, which is impoſed for a tranſgreſſion out of court, of which the court has cognizance, there was no fine or impriſonment; becauſe that court could only try leſſer offences, which were not fineable; the greater offences being remitted to the juſtices in eyre. This fine for contempt in court, when impoſed, being grounded on the judgment of the king's court of record, CREATED A DEBT, for which the ſteward might either impriſon, or levy the ſame on the goods and chattels of the debtor; but for the amerciaments the ſteward could ONLY DISTRAIN, and not fine and impriſon.

Dal. Sher. 401. Finch 125. 8 Co. 41. b.

The proceſs that levies this debt, is in the books called a diſtreſs; becauſe the lord might at common law impound the diſtreſs until the fine was paid;—but as the *diſtringas* or *levari* for levying thoſe fines and

and amerciaments iſſued in the king's name; and as the lord may likewiſe ſell this diſtreſs, it is rather to be eſteemed IN THE NATURE OF AN EXECUTION, than a diſtreſs, in the genuine ſenſe of the word;—the diſtreſs originally being no more than a pain on the tenant, and a pledge in the lord's hands to compel the tenant to perform the ſervices,—and therefore could not be ſold,—till the ſtat. 2 *W. & M.* c. 5.

[That a power to ſell the goods diſtrained for rent, ſo neceſſary to make the rent effectual, ſhould not have been introduced at a more early period, is ſomewhat ſurprizing.]

And hence it hath been held, that the ſteward may impoſe a fine upon a man for refuſing to be ſworn a conſtable, and may diſtrain for that fine. 5 Co. 38, 41.

So if a man oweth ſuit to the ſheriff's torn, and refuſeth to be ſworn, or if a bailiff of a leet refuſeth in court to execute his office; theſe are all contempts to the authority of the court; and the ſteward may impoſe a fine, and levy it by diſtreſs of the offender's goods. Dalt. Sher. 400.

So if a man oweth ſuit to the ſheriff's torn, and doth not make his appearance, he may be amerced and diſtrained for the ſame; becauſe it is a contempt to the court in refuſing obedience to their lawful commands. Dalt. Sher. 401. Bro. tit. diſtr. pl. 8. Fitz. abr. tit. avowry, pl. 194.

mands. But *qu.* whether this be properly an amerciament.

The difference between fines and amerciaments is, that the fine was *pro gravioribus delictis*,—the amerciament *pro minoribus*.

The *graviora delicta* were puniſhed either by the view of the judge himſelf, as fines for contempts done in courts, or on a view of nuſances; but out of court by the juſtices of the peace, or upon indictment, or other conviction.

Of ſuch *graviora delicta*, the fine is ſet by the court itſelf, becauſe ſuch *graviora delicta* muſt be againſt the king's peace, the quantity of which the court are judges of, who have commiſſion from the king to ſee that ſuch peace be preſerved. In ſuch caſes, the jury are only judges whether the defendant be guilty of the fact or not; but the court is judge of the quantity of the fine. It is called a fine, becauſe it ends with the court, and is not to be affeered by the jury.

In *minoribus delictis*, as for not appearing at the court leet, or torn, the judge may order the jury to affeer an amerciament on ſuch a defaulter, and iſſue a *diſtringas* for levying the ſame.

But it ſeems that at the aſſizes and ſeſſions, where the judges and juſtices ſit by an immediate commiſſion from the king to keep the peace of the county, the non-appearance

pearance of ſuitors to make enquiries for breaches of the peace is among the *graviora dilecta*;—ſo that there the court hath power of itſelf to impoſe a fine, which muſt be eſtreated into the Exchequer to be levied.

And ſo where the king grants to any corporation a power to hold ſeſſions, if ſuch court fines for non-appearance, ſuch fines muſt be eſtreated into the exchequer, and levied by the proceſs of that court; and ſuch corporation, though they have the grant of ſuch fines from the crown, cannot get them out of the exchequer but by petition, or *monſtrans de droit*.

And if inſtead of fining ſuch perſons, the ſeſſions order that they be amerced, and the jury aſſeer the amerciaments, they may be levied by *diſtringas*.

But court barons were inſtituted for the private advantage of the lord, and the eaſe of the tenants of the manor;—*curia domini manerii*, in which the ſuitors are judges; and their amerciaments being impoſed only for the lord's advantage, and for not doing ſuit to his courts, or performing the ſervices due to him, ſuch amerciaments are not grounded on the judgments of the king's courts, or courts of record; and therefore only created a debt for the lord, to be ſued for in the king's court, that the juſtice of it might be there CONTROVERTED; for which reaſon the law never allowed the lord to diſtrain Cro. Eliz. 748.

for thoſe amerciaments in either of the ways abovementioned. For the lord ought not to have a diſtreſs for them in the nature of an execution, becauſe that were to alter property without the king's writ, or the proceſs of the king's courts. Nor was it reaſonable to allow the lord to diſtrain and impound for theſe amerciaments, becauſe they were ſet, among other cauſes, for not doing ſuit to the lord's court and other ſervices ariſing from the feudal tenure, and were in nature of a penalty inflicted on the tenant for the non-performance thereof; for which the lord might diſtrain by virtue of the feudal grant, and therefore ought not to diſtrain for the amerciament too. That were in effect to allow the lord a double diſtreſs for the ſame thing;—for the ſervice itſelf, and for the amerciament;—which is the penalty for the non-performing that ſervice; which were vexatious, and would put the tenant too much in the power of the lord.

11 Co. 45. a. Ro. abr. 666. But if the lord can PRESCRIBE in a diſtreſs for the amerciament, then the diſtreſs becomes lawful; becauſe ſuch a preſcription is preſumed to be founded on a grant of the tenants, by which they ſubjected themſelves to the diſtreſs. And though the grant which created the diſtreſs, be worn out by length of time, yet the continual uſage is good evidence of it; and therefore the tenants muſt ſubmit to that cuſtom which their anceſtors have put them under.

But

But if the manor belongs to the crown, the king by his prerogative may diſtrain the tenants for amerciaments impoſed in his court baron, without preſcription; becauſe it is of publick advantage that the king's treaſure ſhould be collected in the moſt expeditious manner. Cro. Eliz. 748. Rowleſton v. Alman.

There is, however, this diſtinction to be obſerved in fines impoſed by a court leet. They are either impoſed by a ſteward for a contempt to the court,—and this is abſolutely neceſſary for the ſupport of the authority and dignity of the court within the boundaries of its duty;—or elſe they are impoſed as a puniſhment for thoſe crimes which are conuſable by the court. But where by cuſtom the leet hath juriſdiction to impoſe a fine, for a thing not originally within the juriſdiction, but only acquired by cuſtom, in ſuch caſe, as that particular cuſtom gave the leet a right to impoſe the fine, ſo the cuſtom only can create the right of diſtreſs.

Thus where a leet laid a cuſtom for a townſhip to ſend one to be ſworn conſtable, which not being done, a fine was impoſed, and a diſtreſs taken for it, the diſtreſs was held unlawful; becauſe there the ſteward of the leet did not preſcribe in the diſtreſs, and nothing elſe could warrant it. Vent. 105. Pierſon v. Ridge. Raym. 204. S. C.

So it is, *pro certo letæ*; which was a ſum given by the tenants to reimburſe the lord for the purchaſe of the leet; and for this the lord cannot diſtrain without a cuſtom to warrant 11 Co. 44. b. Rol. Rep. 32. Godfrey's caſe. 2 Leon. 74. 3 Leon. 178

rant the diſtreſs; becauſe this is a ſum purely of private advantage to the lord, and in no ſort neceſſary to be paid to keep up the juriſdiction of the court.

8 Co. 41. b. But for fines and amerciaments in leets, the lord may either diſtrain and ſell the diſtreſs, and then the diſtreſs is in nature of an execution, of the judgment of a court of record; or elſe he may impound the diſtreſs, and then it is repleviſable.

Here it may not be improper barely to mention another ſort of diſtreſs, which is the laſt and great proceſs in courts of judicature, to bring the defendant into court, and oblige him to appear in civil caſes, in actions as well real as perſonal.

This proceſs is the attachment, which lies as well in inferior courts, not of record, as in ſuperior courts; and it is given when the defendant has been ſummoned to appear and makes default. And it is not a proceſs againſt the body of the defendant, but againſt his goods and chattels; for the officer attaches the defendant by his horſe, his ox, or his cow. And where this proceſs iſſues out of a court of record, there is no doubt but if the defendant makes default, the goods he was attached by are forfeited, becauſe in ſuch caſe there is a judgment of the king's court of record condemning the goods, which alters the property.

Dalt. Sher. 417. Booth 8. Dyer 199. pl. 54.

And

And it ſeems that in the county court and court baron, which are not courts of record, if the defendant does not appear upon the attachment or diſtreſs, the goods by which he was attached or diſtrained, are likewiſe forfeited on his default. The reaſon why in this ſingle inſtance the property is altered without the king's writ, or the judgment of a court of record, ſeems to be, for the more ſpeedy adminiſtration of juſtice, which is of publick advantage; and the party by his appearance might have prevented the forfeiture. Kitch. 155. Dalt. 418. Bro. tit. Court Bar. pl. 1.

And here we may likewiſe obſerve, that where the plaintiff recovers in the county court, or court baron, the execution is only BY DISTRESS; that is, there iſſues a precept to the officer of the court to take the goods of the defendant, and keep them in pound, untill the defendant ſatisfy the plaintiff his debt. The reaſon is, becauſe theſe are NOT courts of record; being held only in the lord's or ſheriff's name; and therefore all the proceſs run in their names and not in the king's, and without the king's writ no property can be altered. So that the execution in theſe inferior courts, only ſeizes and DETAINS the defendant's goods until he makes the plaintiff ſatisfaction for his debt. We find therefore in the regiſter, the king's writ *de executione judicii* of theſe inferior judgments, and by virtue of that they may levy the plaintiff's debt as if he had recovered it in a court of record.

In the lord's court, if the defendant does not appear to do juſtice to the complainant on the ſummons, on the next proceſs he ought to give pledges, or caution for his appearance; and therefore upon the attachment they may return him attached *per plegios*; and then if he don't appear his pledges ſhall be amerced; for which amerciament the lord may have his action of debt. If the defendant cannot find pledges, the attachment is *per vadios*; and ſince the lord would have had the amerciament if the defendant had been attached, by pledges, and had not appeared, therefore if he be attached *per vadios*, and do not appear, the *vadii* are forfeited; for the *vadii* come inſtead of the *plegii*, and therefore are hypothecated for his appearance in judgment of law. And by conſequence, if he doth not appear to perform the condition of ſuch pignoration, the *vadii* are forfeited; and therefore the defendant, where he is attached *per vadios*, may before the day of his appearance replevy the *vadios*, and put in pledges who are anſwerable for his appearance, and if he makes default are amerced.

But if there be a *levari facias* for a debt recovered in the lord's court, there the goods are not forfeited on the return; becauſe after judgment he hath no day to appear; and therefore there can be no forfeiture ariſing to the lord nor the party: inaſmuch as he was not bound by his fealty to do any ſuch act to the party recovering, and conſequently here the lord only ſeizes the

chattels of his tenant to make him pay his debts. But the plaintiff muſt apply to the king's court to have the property altered by a writ *de executione judicii*, and ſo hath a compleat remedy for his demand.

But if the *vadii* were not to be forfeited on meſne proceſs, the tenant would let ſuch goods lie till at his leiſure he could come in to conteſt the debt, which would tend to the delay of juſtice.

And here, note by the way, that the lord's diſtreſs for rent is in nature of a prerogative proceſs, to take the goods and chattels of his debtor in the firſt inſtance without any ſummons; but at the next court day ſuch diſtreſs is not forfeited to the lord, if not replevied; becauſe then he would judge of forfeitures in his own cauſe.

But if the tenant was aggrieved he muſt apply to the king who is the lord paramount; and the complaint is, that he was diſtrained *contra* VADIOS *& plegios*; that is, when he was ready to give good ſecurity to conteſt the lord's debt;—and therefore the judgment in replevin is of return irrepleviſable; that is, that the lord has a juſt cauſe to detain,—that ſuch prerogative of the lord's ſhould take place till the debt be ſatisfied.

3dly. A third caſe where a diſtreſs lies is, for toll in a fair or market.

Ro. Abr. 666. Raym. 233. Hob. 187. And here the law is clear, that where a lord hath a fair or market by preſcription, and hath uſed to take toll of cattle ſold, if ſuch toll be not paid, the lord may ſeize any of the cattle ſo ſold, and retain them till ſatisfaction be made him for the toll. For the preſcription is built on a grant of the KING, which by length of time is ſuppoſed to be worn out; and that grant was originally made for publick utility; fairs and markets being inſtituted for the more convenient ſupplying the ſubject with the neceſſaries and conveniencies of life. And therefore every ſubject that buys there, may very reaſonably be charged for that conveniency with a moderate toll; and the lord hath the advantage of the toll, as a compenſation for the miſchief done to his ſoil by the beaſts ſold. And as the lord might have diſtrained the beaſts for *damage feaſant*, if he had not ſuch fair, ſo he may diſtrain for the toll, which is in nature of a compenſation for that damage.—Hence it ſhould ſeem reaſonable, that where the fair or market ſubſiſts meerly by grant from the crown,—as where the fair is newly created by grant,—and toll thereby given to the grantee, that he may diſtrain for ſuch toll; for *qui ſentit commodum ſentire debet & onus*; and an action of debt would be no remedy. But THIS diſtreſs is only a pledge to be DETAINED till ſatisfaction made, and doth not ſeem to be within the ſtatute to be ſold.

Dr. & Stud. Dial. 2. cap. 9. *4thly*. If a townſhip be amerced, and they by conſent aſſeſs a certain ſum on every inhabitant

habitant for the raiſing thereof, and likewiſe agree that if it be not paid by ſuch a day, that certain perſons appointed for that purpoſe by the townſhip ſhall diſtrain for the ſum aſſeſſed on each inhabitant;—this is a lawful diſtreſs; becauſe conſented and ſubmitted to by the agreement of thoſe perſons who are to pay the tax. It is the more reaſonable, becauſe the raiſing the tax in that manner is for the eaſe of the inhabitants; in regard the publick officer muſt otherwiſe levy and collect the amerciaments.

5*thly*. A penalty inflicted for a breach of a by-law may be levied by diſtreſs; but this only in caſe where ſuch remedy is APPOINTED for recovery thereof by the power that made the by-law, and at the time the by-law was made;—becauſe the by-law only binds the members of that community who make the law, and therefore the aſſent of every member is preſumed in the inſtitution of that law; and conſequently the penalty may be recovered by diſtreſs where the parties themſelves have agreed to that remedy. But unleſs the diſtreſs be EXPRESSLY provided for by the corporation, the penalty can be recovered only by action of debt. The ſubject cannot be impriſoned for the breach of any by-law, though it be ſo expreſsly ordained by the power that made the by-law, becauſe ſuch impriſonments are againſt *magna charta*, and therefore the by-law appointing it is ſo far void, as being againſt the law of the land.

5 Co. 64. a. Clarke's caſe. Ro. abr. 366. Dyer 321. pl. 23.

But where the corporation can preſcribe in the diſtreſs, they may lawfully diſtrain for the penalty; becauſe the preſcriptive right is grounded on a by-law originally appointing that remedy for recovery of the penalty, and therefore is good; though the by-law on which it is grounded be by length of time worn out or loſt.

Fleta 101. Bro. tit. diſtr. pl. 3.

6thly. A man may diſtrain beaſts *damage feaſant.* This, according to *Fleta*, is grounded on a particular cuſtom of the realm. *Si dicere poterit captor*, ſays he, *quod juſte cepit averia quia invenit illa in terrâ ſuâ, & ſecundum conſuetudinem regni imparcavit illa, donec damnum ſuum fuerit emandatum.* But from whence this notion was borrowed, or whenever it was introduced, it is highly reaſonable that the owner of the land ſhould defend himſelf from injury by driving out the beaſts, and likewiſe by detaining the thing that did the injury, in a public pound, till compenſation be made for the treſpaſs; for otherwiſe he might never find the perſon whoſe beaſts committed the treſpaſs.

30 E. 3. 27. 4 Burr. 2426.

[A commoner may juſtify the taking of a STRANGER'S cattle, damage feaſant, upon the common. And this was admitted in a late caſe, where the queſtion upon an avowry for damage feaſant, was "whether one commoner can diſtrain "another commoner's cattle, with which "he has overcharged the common be-"yond his ſtinted number of cattle;"

and

and in that caſe it was determined, that SUCH a right to diſtrain turns upon this diſtinction—That wherever there is a COLOUR of right for putting in the cattle, a commoner cannot diſtrain; becauſe in ſuch a caſe it would be judging for himſelf; and that in a queſtion which depends upon a more competent inquiry, by aſſize, by a writ of admeaſurement, or by an action on the caſe for ſurcharging the common. But where the cattle are put upon the common WITHOUT ANY COLOUR or pretence of right, there the commoner may diſtrain them; and upon that ground he may diſtrain the cattle of a ſtranger.

But if a man come to diſtrain, and ſee the beaſts on his ground, and the owner chaſe them out before the diſtreſs be taken, though it be of purpoſe to prevent the diſtreſs, yet the owner of the ſoil cannot diſtrain them; and if he doth, the owner of the cattle may reſcue them; for the beaſts muſt be damage feaſant at the time of the diſtreſs. Co. Lit. 161. 12 Mod. 661.

And if many cattle are doing damage, a man cannot take one of them, as a diſtreſs for the whole damage; but he may diſtrain one of them, for its own damage, and bring an action of treſpaſs for the damage done by the reſt.] 12 Mod. 660.

II. What things are diſtrainable.

The

Bro. tit. distr. pl. 8.

The diſtreſs, as is already obſerved, was anciently no more than a pledge in the hands of the lord, to compel the tenant to pay the ſervice, or perform the duty, for which it was taken; and therefore at common law could not be ſold, but like all other pawns or pledges was to be reſtored to the owner when the ſervice or duty was performed.

The nature then of contracting by pawns or pledges being, that upon payment of the money for ſecurity whereof they were given, the pawn or pledge ought to be reſtored to the owner in the ſame plight and condition it was delivered; it follows, that MONEY cannot be diſtrained, except it be in a bag; for then the knowledge of the bag, eſpecially if it be ſealed ſufficiently, ſecures the ſeveral pieces of money therein, ſo as the ſame individual pieces may be reſtored on redemption of the pledge.—

Rol. abr. 666. (H.) pl. 4. 2 Bac. abr. 109.

[So milk, fruit, &c. cannot be diſtrained.]

1 Jones 197. Cooper *v.* Pollard. Ro. abr. 666, 667. Sid. 440.

So ſheaves of corn, at common law, could not be taken as pledges for rent; becauſe all pledges were to be returned in the ſame plight and condition as they were in when taken; but theſe ſhed and ſcatter the grain by being removed, and conſequently cannot be reſtored in the ſame condition upon the redemption. For the ſame reaſon, corn or hay, in a cock or barn, could

could not be diſtrained at the common law. Yet, at common law, corn or hay IN A CART might have been diſtrained, together with the cart itſelf; becauſe then the pledge might have been removed without damage to the owner, and might likewiſe have been reſtored in the ſame condition it was in when taken, the whole being removed with the cart.—But this law was found inconvenient to landlords, and too great an encouragement to tenants to withhold their rent; and therefore it is provided by *Stat.* 2 *W.* 3. *c.* 5. that it ſhall be lawful for any, having arrear of rent, to ſeize and ſecure any ſheaves or cocks of corn, or corn looſe or in the ſtraw, or hay lying in any barn or granary, or upon any hovel, ſtack or rick, or otherwiſe, upon any part of the land charged with ſuch rent, and to lock up or detain the ſame in the place where it ſhall be found, in the nature of a diſtreſs, until the ſame ſhall be replevied, or ſold.

[And by the 11 G. 2. c. 19. §. 8. The landlord may take and ſeize corn, graſs, hops, roots, fruits, pulſe, or other produce GROWING, as a diſtreſs; and the ſame may cut, gather, make, cure, carry, and lay up, when ripe, in the barns or other proper place on the premiſes; and if there ſhall be no barn or proper place ON THE PREMISSES, then in any other barn or proper place which he ſhall procure, SO NEAR AS MAY BE to the premiſſes; the appraiſement whereof ſhall be taken when cut, gathered, cured,

cured, and made, and not before; provided that notice of the place where ſuch diſtreſs ſhall be lodged, ſhall, in one week after the lodging thereof, be given to the tenant, or left at the laſt place of his abode; and that if the tenant ſhall pay or tender the arrears of rent and coſts of the diſtreſs, before the corn, &c. ſhall be cut, the diſtreſs ſhall ceaſe, and the corn, &c. be delivered up.]

Co. Lit. 47. Dyer 312. 2 Inſt. 132. 565.

2*dly*. Tools and utenſils of a man's trade cannot be diſtrained; becauſe this would tend to the ruin of particular tenants, by taking away the very means of their ſupport and preſervation, and would conſequently be of public inconvenience; and therefore the ax of a carpenter, the books of a ſcholar, and the like, are not diſtrainable, while any other diſtreſs can be had.—But leſt this rule ſhould be carried ſo far as to privilege the ſheep of the tenant, and his beaſts of the plough (they being the materials of huſbandry, to plough and manure the land), and by that means the landlord be totally diſappointed of the rents,—this matter hath been ſettled by the *Stat. de deſtrictione ſcaccarii*; which enacts that no man ſhall be diſtrained by the beaſts of his plough or his ſheep, either by the king or any other, while there is another ſufficient diſtreſs; unleſs for damage feaſant, in which caſe the thing that does the treſpaſs muſt make compenſation.

[But

[But the rule of the common law which exempts utenſils, tools, inſtruments of huſbandry, &c. from diſtreſs, hath been adjudged to hold only as to diſtreſſes for RENT ARREAR, AMERCIAMENTS, &c.—and not in caſes where a diſtreſs is given in the nature of an execution, by any particular ſtatute; as for POORS RATES, &c. The ſame doctrine hath been extended to *averia carucæ*, by a ſubſequent caſe, in which one of the queſtions was "whether *averia carucæ* may be taken as a "diſtreſs for the poors rate, where there "are other diſtrainable goods ſufficient." —As to this it was decided, that a ſeiſure under the 43 of Eliz. and ſuch like acts of parliament, is but partly analogous to the common law diſtreſs, as being repleviſable, &c. but is much more analogous to the common law execution by *fieri facias*, where the ſurplus after ſale ſhall be returned. And though it was admitted, that in the old common law diſtreſſes, which were in nature of a *nomine pœnæ* to compel payment, it would have been abſurd to ſuffer the implements, by which a man gained his livelihood, to be holden as a pledge, becauſe that would have been taking from him the only means he had of being able to diſcharge the debt; yet it was determined, that this reaſon does not hold, where the things diſtrained may be immediately ſold by way of ſatisfaction; which though called a diſtreſs, yet really is, in this reſpect, AN EXECUTION; and in

3 Salk. 136, pl. 4.

Hutchins & Chambers, 1 Bur. 579.

in cases of execution, *averia carucæ* may be distrained, although there be other sufficient distress. On this ground therefore, the court were unanimously of opinion, that there was no objection to the distress from the *averia carucæ* being taken: inasmuch as they were distrainable under the 43 of Eliz. and such like acts of parliament.]

Co. Lit. 47. Salk. 249. 3 Bur. 1502.

3dly. Things sent to publick places of trade, as cloth in a taylor's shop, yarn in a weaver's, a horse in a smith's, and the like, are not distrainable; for it is of publick utility that the shops of traders should be privileged from the lord's distress for his rent; for otherwise no man could supply himself with the necessaries of life, without the danger of losing them for another's debt, and therefore the landlord cannot distrain these things for the rent of the shop.

Ld. Raym. 386.

[But it has been adjudged, that there is no such restriction, where the distress is for a personal duty, as for toll.

Palmer 367, 374. Rex v. Collins, & others. 2 Rol. Rep. 345. S. C. 3 Bulst. 269.

So the cattle and goods of a guest are not distrainable at an inn; for an inn is *publici juris*; and every man has a right to put up at it. Indeed, it has formerly been questioned, whether a man could erect an inn at his own pleasure: at least, it appears that common inns are so much devoted to the public service, that their owners are obliged to receive all guests and horses that come

come to them for reception. And the privilege which exempts cattle and goods from being diſtrained at an inn ariſes from this circumſtance, that they are there by authority of law. Co. Lit. 47. a. Bro. abr. tit. diſtreſs, pl. 56. Rol. abr. 668. pl. 12.

In a modern caſe, the queſtion was, "whether a gentleman's chariot, which "ſtood in a coach-houſe belonging to "a common LIVERY STABLE keeper, was "diſtrainable for rent due to the landlord "from the livery ſtable keeper, for this "coach-houſe, which (together with the "ſtables, &c.) he rented of the landlord, "who diſtrained it." For the plaintiff, it was argued that the chariot was not diſtrainable, under a ſuppoſed analogy between a livery ſtable and a common public inn; and from the principle of general utility and convenience to the community. On the other hand, it was inſiſted for the defendant that a livery ſtable keeper differs widely from an innkeeper; inaſmuch as the former is not liable to the ſame inconveniencies as the latter, and therefore ought not to enjoy the ſame privileges; and that if a livery ſtable keeper has no ſuch privilege himſelf, it muſt of courſe follow that none can be claimed under him. As to the principle of utility and convenience, it was urged, that there was no neceſſity for a gentleman to ſet up his chariot at a livery ſtable: and that the inconvenience would be much greater on the ſide of the landlord, if he ſhould be debarred of his legal right, to diſtrain goods found upon his premiſſes, for rent in 3 Bur. 1498.

in arrear, than any that could ariſe from allowing him this eſtabliſhed ſecurity for his rent, in the caſe of a perſon who appears to be no more than an ordinary undertenant, and without any reaſonable pretence of exemption from the general law of diſtreſſes. Lord Mansfield and the other judges preſent, ſaw this queſtion in ſuch a light, with regard to the conſequences of it, and the inconvenience that might attend it, even to the landlords, owners and keepers of livery ſtables, as well as to gentlemen who uſed them, (in caſe this diſtreſs ſhould be ſolemnly adjudged a good one,) that they intimated to the avowant, who happened to be perſonally preſent, that it might be well worth his while to conſider, whether it would be for his own intereſt to wiſh "that judgment ſhould "be formally pronounced FOR him." Accordingly, there was no judgment given. But (adds the reporter) it ſeems extremely clear, "that the chariot was li-"able to the diſtreſs, and that there was "not a ſhadow of legal claim for an ex-"emption."]

Cro. Eliz. 549, 596. Read v. Burley.

J. S. a clothier put wool to *B.* a ſpinner to ſpin, and afterwards *J. S.* comes with a horſe to bring back the yarn; but *B.* having no weights in his own houſe to weigh it, *J. S.* took his horſe and went with *B.* to the houſe of *C.* to get the yarn weighed; and *C.*'s landlord, while the yarn was weighing came and diſtrained the yarn and the horſe of *J. S.* for *C.*'s rent. But the diſtreſs

ſtreſs was held unlawful, becauſe if the yarn had been weighed either in *B.*'s houſe, or in a publick weigh-houſe, it had been unqueſtionably privileged, for the encouragement of trade. So in this caſe the deſign of bringing the horſe and yarn into the houſe of *C.* being only in the way of trade, that deſign ſecures them from a diſtreſs in the houſe of *C.*—as much as if they were in a publick weigh-houſe.——As a horſe that brings corn to a market, and is put into a private yard while the corn is ſelling, cannot be diſtrained; becauſe the bringing of the horſe there is in the way of trade, and conſequently public benefit.

4thly. If a ſtranger's beaſts be upon the lord's land, by eſcape or otherwiſe, though they be not *levant* and *couchant*, the lord may diſtrain them, not only for rent, but for the accidental ſervices of heriots, amerciaments in leets, *&c.* 10 H. 7. 21, b. Co. Lit. 47. b. Dr. & St. c. 7. p. 15. *contra.*

This rule was obſerved in the civil law, in the *prædiis urbanis*, but not in *prædiis ruſticis.*——But when the forfeiture of the feud, which originally accrued to the lord by not anſwering the ſervices, was changed into a diſtreſs, this was thought a mild alteration; and the diſtreſs was the rather extended by our law to ſtranger's cattle for the recovery of the ſervices, to prevent any trick in the tenant, who might otherwiſe diſappoint the lord of his remedy, by grazing and ſtocking the land with other men's cattle. And if the ſtranger ſuffers, it is

through his own default, in ſuffering his cattle to treſpaſs on another's ſoil.

2 Saund. 289. And this rule hath been carried ſo far, that if a freeholder be bound to repair his neighbour's fences, and lets the land, and the leſſee ſuffers the fences to decay, whereby his neighbour's beaſts enter and come upon his lands, yet the freeholder may diſtrain theſe beaſts, thus eſcaped, for rent. But the reporter obſerves, that this caſe is hard to be maintained; for though it be reaſonable that the lord of an antient ſeignory, who is no way concerned in the fence, ſhould diſtrain beaſts thus eſcaping; yet it is not therefore juſt that a leſſor, who is obliged to ſee the fences kept, ſhould be ſuffered to take advantage of his own wrong.

Ld. Raym. 168. [The ſame diſtinction was taken and admitted in a ſubſequent caſe. And it ſeems to be now ſettled, that where beaſts eſcape, and come upon land, by the negligence or default of their owner, and are treſpaſſers there, they may be diſtrained immediately by the land-

Lutw. 1580. lord for rent arrear. But where they come upon the land, by the inſufficiency of fences, which the tenant, being a leſſee, ought to repair, the leſſor cannot diſtrain ſuch beaſts, till ACTUAL NOTICE has been given to the owner that they are there, and he has afterwards neglected to remove them. In the caſe of an ancient ſeignory however the lord may diſtrain the beaſts of a ſtranger, which have eſcaped by default of the tenant, in not repairing his fences; and that (as it ſhould ſeem) before they are *levant* and *couchant*, though the books differ in that particular;

Ld. Raym. 169.
Lutw. 1580.
2 Rol. Rep. 124.

particular; becauſe the lord hath nothing to do with repairing the fences, and he hath no remedy but by diſtreſs. But the owner may prevent the diſtreſs, by making freſh purſuit; for then the cattle remain, as it were, in his own poſſeſſion. Ld. Raym. 168.

If beaſts are turned in upon land by conſent of the owner, they are immediately diſtrainable for the landlord's rent;] and therefore it hath been held, that where a ſtranger puts in his beaſts to graze for a night, by the conſent of the leſſor, and licence of the leſſee, yet the leſſor may diſtrain them for rent due out of thoſe lands which he conſented the beaſts ſhould graze on; becauſe the conſent for putting in the beaſts was not a waiver of his right to diſtrain, unleſs it had been expreſly agreed ſo: for being but a parol agreement it could not alter the original contract between the leſſor and leſſee, from which the power of diſtraining ariſes. Cro. El. 549. Fowkes, v. Joyce. 3 Lev. 260. 2. Ventr. 50. S. C. 2 Lutw. 1161. S. C.

But as in that caſe the beaſts were going to the London market, and only grazed one night on the land in their way thither, it was diſputed, whether their being on the road to market ſhould privilege them from the diſtreſs; and it was reſolved it ſhould NOT; becauſe then ſuch privilege muſt extend through the whole kingdom, which would lay too great a reſtraint on landlords; and the privilege of trade is local, and only relates to the place where the market is kept; therefore the ſafeſt way is to drive cattle to a public inn, and then (as is ſaid before) they are privileged from diſtreſſes.

[However, in the foregoing caſe of Fowkes and Joyce, the owner of the cattle was afterwards relieved in equity, on the ground of fraud and contrivance in Joyce, the leſſor, to ſubject the cattle to his diſtreſs. And the court of Chancery ſeemed to think that the grounds uſed with an inn, ought to have the ſame privilege, as the inn itſelf; and therefore that the cattle of ſtrangers or paſſengers, ought not to be there diſtrained. 2 Vern. 129. Prec. Chan. 7.

In a caſe alſo where a rent-charge had been in arrear for twenty years, and cattle, eſcaping out of the adjoining grounds, had been diſtrained for the arrears, the diſtreſs was relieved againſt in equity. Broden and Pierce, 2 Vern. 131.]

2 Leon. 7, 8. For a rent-charge the grantee cannot diſtrain a ſtranger's beaſts until they are *levant* and *couchant*. For this rent doth not ſtand upon a feudal title, as the rent-ſervice, but it is ſaid to be againſt common right; and therefore the ſtranger's beaſts muſt be ſo long reſident on the lands, out of which the rent-charge iſſues, that notice may be preſumed to the owner of them; that is, they muſt be lying down and riſing up on the premiſſes FOR A NIGHT AND A DAY, without purſuit made by the owner of them.

Bro. tit. Diſtr. pl. 40. And it ſeems the ſheriff may diſtrain the beaſts of a ſtranger on my land, for the iſſues forfeited by me in the king's courts for non-appearance; for the iſſues forfeited by my default create a debt to the king, which is to be levied on my land;—

Bro. tit. Diſtr. pl. 3.

and

and the obligation on me to appear on the ſummons in the king's courts, ariſes from my being proprietor of ſuch land, and I am ſummoned to appear, on the penalty of forfeiting ſo much of the iſſues of that land; which creates the obligation on me; and therefore whatever is found on that land ſhall be anſwerable for the iſſues forfeited by me.

5thly. Whatever is part of the freehold cannot be diſtrained, for what is part of the freehold cannot be ſevered from it without detriment to the thing itſelf in the removal; conſequently that cannot be a pledge which cannot be reſtored *in ſtatu quo* to the owner. Co Lit. 47. b.

Beſides, what is fixed to the freehold is part of the thing demiſed; and the nature of the diſtreſs is not to reſume part of the thing itſelf for the rent, but only the *inducta* and *illata* upon the ſoil or houſe. Hence it is that doors, windows, furnaces, *&c.* affixed to the freeeold, are not diſtrainable.

So a millſtone is not diſtrainable though it be removed out of its proper place in order to be picked; becauſe ſuch removal is OF NECESSITY, and the ſtone ſtill continues part of the mill. So it is of a ſmith's anvil on which he works; for this is accounted part of the forge, though it be not actually fixed by nails to the ſhop. B. o. tit. Diſtr. pl. 23.

6thly. What is in the hands and actual occupation of another cannot be diſtrained; for that cannot be a pledge to me which another has the actual uſe of; conſequently the diſtreſs, which follows the nature of a pledge, cannot be of thoſe things which cannot be reduced into the ACTUAL poſſeſ- Co. Lit. 47. a. Ro. Abr. 667. Sid. 440.

ſion of the perſon diſtraining; therefore the ax in a carpenter's hand, or the horſe on which I am riding, cannot be diſtrained; [for rent] for they are for that time privileged by law.

7thly. Goods in the cuſtody of the law are not diſtrainable; for it is *ex vi termini* repugnant, that it ſhould be lawful to take goods out of the cuſtody of the law.—And that cannot be a pledge to me which I cannot bring into my actual poſſeſſion. Hence it is that goods deſtrained for *damage feaſant* cannot be taken for rent; nor goods in a bailiff's hands on an execution; nor goods ſeized by proceſs at the ſuit of the king; nor will a replevin lie of them.

3 H. 7. 1. But if a replevin come after goods are ſold on the execution, the defendant muſt claim property, for then they are out of the cuſtody of the law in the hands of a private perſon.

Co. Lit. 47. [And laſtly, as every thing which is diſtrained, is preſumed to be the property of the wrong doer, it follows that ſuch things wherein no man can have an abſolute and valuable property, as dogs, cats, rabbets, and all animals *feræ naturæ*, cannot be diſtrained. Yet if deer, which are *feræ naturæ*, are kept in a PRIVATE incloſure for the purpoſe of SALE or PROFIT, this ſo far changes their nature, by reducing them to a kind of ſtock or merchandize, that they may be diſtrained for rent.]

Davis v. Powell, C. B. Hil. 11 G. 2.

When we ſpeak of chattels not diſtrainable, it muſt be underſtood of chattels not diſtrainable FOR RENT; for all chattels whatever are diſtrainable *damage feaſant:* it being but natural juſtice that whatever doth the

the injury ſhould be a pledge to make compenſation for it.—Therefore all chattles are liable to make ſatisfaction for the treſpaſs by them committed; hence it is that the tools and utenſils of a man's trade, ſtacks of corn, and the horſe on which a man rides, are diſtrainable *damage feaſant*; nay the horſe may be led to the pound with the rider on him. Co. Lit. 47. Sid. 449.

[III. of the time, place, and manner of making the diſtreſs.]

1. A man cannot diſtrain for rent in the night [which, according to the author of the Mirror, is after ſunſet and before ſunriſing;] becauſe the tenant hath not thereby notice to make a tender of his rent, which poſſibly he might do, to prevent the impounding of his cattle. Dr. & St. 15. Co. Lit. 142. a. Mir. c. 2. ſ. 6. 2 Inſt. 10, 7.

But a man may diſtrain in the night beaſts *damage feaſant*; becauſe the beaſts might eſcape before morning, or before he could take them; and then he would have no remedy for the injury.

[The diſtreſs for rent, muſt be for rent in arrear; therefore it may not be made the ſame day on which the rent becomes due; for if the rent be paid at any time during that day, whilſt a man can ſee to count it, the payment is good. And it muſt not be after tender of payment; for if the landlord come to diſtrain the goods of his tenant for rent, the tenant may, before the diſtreſs, tender the arrearages; and if the diſtreſs be afterwards taken, it is illegal. So if the landlord have diſtrained, and the tenant make a tender of the arrearages be- 2 Inſt. 107.

fore the impounding of the diſtreſs, the landlord ought to deliver up the diſtreſs; and if he does not, the detainer is unlawful.

At common law, the landlord muſt have diſtrained for rent in arrear, during the continuance of the leaſe; but now by the ſtatute of 8 Ann, c. 14 §. 6, 7. it is enacted, that it ſhall be lawful to diſtrain after the determination of the leaſe, in the ſame manner as if it had not been determined: provided that the diſtreſs be made within ſix kalendar months after the determination of the leaſe, and during the continuance of the landlord's title or intereſt; and during the poſſeſſion of the tenant.]

2 Inſt. 131. Mr. c. 2. ſ. 26.

2. No private perſon can diſtrain beaſts off his own land, or on the high road;—ſo is the ſtatute of *Marlbridge, c.* 15. *Nulli liceat ex quacunque cauſâ diſtrictiones facere extra feodum ſuum, nec in regiâ viâ, aut communi ſtratâ, niſi domino regi, &c.* for the high road is privileged for the convenience and encouragement of commerce.

[Yet this ſhall not be taken to make the diſtreſs illegal, ſo as to give an advantage thereof in bar of the avowry—but to this purpoſe only, that if the lord diſtrain in the highway, the tenant may have an action againſt him upon this ſtatute. 2 Inſt. 131.—As to the king's power of diſtreſs on any lands of the tenant, though not holden of the king, the reader may conſult, 5 Co. 4, 56. 1 Rol. abr. 670. 2 Rol. abr. 159. 2 Inſt. 132. 4 Inſt. 119. Lane 39.]

And though chattels or pledges on the land only, are to anſwer the lord's rent; yet if

if the lord comes to diſtrain, and the tenant ſeeing him drives the cattle off the land, the lord may follow the beaſts and diſtrain out of his fee, if he had once a view of his cattle on his land. But if the beaſts go off the land of themſelves before the lord obſerve them, he cannot diſtrain them afterwards, as he might where the tenant drives them off: for the tenant by his own wrong cannot prevent the lord of his right.

[In treſpaſs for taking goods, the defendant juſtified, that he demiſed ſome tenements to the plantiff for one term, and others for another term; and that rent being in arrear on both demiſes, he diſtrained the goods. On demurrer the diſtreſs was held ill; for theſe being ſeparate demiſes, there ought to have been ſeparate diſtreſſes, on the ſeveral premiſſes ſubject to the diſtinct rents: and no diſtreſs on one part can be good for both rents. For theſe reaſons, therefore, the plaintiff had judgment. Str. 1040.

But where lands, lying in different counties, are held under one demiſe, at one intire rent; in ſuch caſe, a diſtreſs may be lawfully taken in either county, for the whole rent in arrear. Ld. Raym. 55.

And now, (by 11 G. 2. c. 19.) if any tenant for life, —years, at will, ſufferance, or otherwiſe, ſhall fraudulently, or clandeſtinely convey his goods off the premiſſes, to prevent his landlord from diſtraining the ſame; ſuch perſon, or any perſon by him lawfully empowered, may in thirty days next, after ſuch conveyance, ſeize the ſame, wherever they ſhall be found, and diſpoſe

of

of them in ſuch manner as if they had been diſtrained on the premiſſes.—But (by §. 2. of the ſame ſtatute) the landlord ſhall not diſtrain any goods, which ſhall have been previouſly ſold, *bona fide*, and for a valuable conſideration, to any perſon not privy to ſuch fraud.

And by the ſame ſtatute, (§. 3.) every tenant who ſhall ſo convey away his goods, and every perſon who ſhall knowingly aid or aſſiſt him therein, or in concealing the ſame, ſhall forfeit to the landlord, double the value of ſuch goods.

By the ſame ſtatute, the landlord may diſtrain any cattle or ſtock of the tenant, depaſturing on any common belonging to the demiſed premiſſes.

3. At common law, no perſon was allowed to break open or throw down any gates or in incloſures, to make a diſtreſs; for that would have amounted to a diſſeiſin. Co. Lit. 161. And the leſſor could not, in any caſe, have entered into the houſe, nor even into the barn of his tenant, for the purpoſe of making a diſtreſs, unleſs the outer door had been open. Bac. abr. 2 v. p. 111. But when he was in the houſe, it was held that he might break open an inner door. Comb. 17. So he might have taken the diſtreſs out at a window. Bac. abr. *ib.*

And now by ſtatute, (11 G. 2. c. 19. §. 7.) where any goods or chattels, fraudulently, or clandeſtinely conveyed off the premiſſes, to prevent the landlord from diſtraining them for rent, ſhall be put placed or kept in any houſe, barn, ſtable, outhouſe, yard,

cloſe, or place, locked up, faſtened, or otherwiſe ſecured; it ſhall be lawful for the landlord, his ſteward, bailiff, receiver, or other perſon or perſons impowered for that purpoſe, to take and ſeize, as a diſtreſs for rent ſuch goods and chattels, (firſt calling to his aſſiſtance, the conſtable, headborough, borſholder, or other peace officer of the hundred, diſtrict or place, where the ſame ſhall be ſuſpected to be concealed; and in caſe of a dwelling houſe, oath being alſo firſt made, before a juſtice of the peace, of a reaſonable ground to ſuſpect that ſuch goods or chattels are therein,) in the day time, to break open, and enter into ſuch houſe, barn, ſtable, outhouſe, yard, cloſe and place; and to take and ſeize ſuch goods and chattels for the arrears of rent, as he might have done if they had been in any open place.

If a landlord comes into a houſe and ſeizes upon ſome goods as a diſtreſs in the name of all the goods in the houſe, it is a good ſeizure of the whole. 6 Mod. 215.]

Diſtreſſes ought not to be exceſſive; but in proportion to the duty diſtrained for.—This is provided by the ſtatute of *Marlbridge, c.* 4. *Diſtrictiones inſuper ſint rationabiles & non nimium graves; & qui diſtrictiones fecerint irrationabiles graviter amercientur.* 2 Inſt. 106, 107.

Thus if the lord diſtrain two or three oxen for 12 *d.*—this is unreaſonable; ſo if he diſtrain a horſe or an ox for a ſmall ſum, where a ſheep or a ſwine may be had, this is an exceſſive diſtreſs, becauſe he might have taken a beaſt of leſs value.—But if there be 2 Inſt. 107. Ro. Abr. 674.

be no other diſtreſs on the land, then the taking of one entire thing, though of never ſo great value, is not unreaſonable.

4 Co. 8, 66. Ro. Abr. 674. Bro. abr. tit. Aſſiſe 291. Prerogative, 98.

No diſtreſs for *homage*, *fealty*, or for the expences of knights in parliament can be exceſſive, becauſe theſe are ſervices of ſuch abſolute neceſſity to the publick, that men cannot be under too great an obligation to perform them.

[Before the ſtatute of the 17 Car. 2. c. 7. in caſe a diſtreſs was too little, where ſufficient diſtreſs was to be had, a man could not diſtrain again, were the demand ever ſo great; becauſe it was his folly that he did not diſtrain ſufficient in the firſt inſtance. Moore 7. Comb. 546.

But now, by that ſtatute, "in all caſes where the value of the cattle diſtrained ſhall not be found to be to the full value of the arrears diſtrained for; the party to whom ſuch arrears were due, his executors or adminiſtrators, may diſtrain again for the reſidue of the arrears."

So where the diſtreſs is made by virtue of the warrant of a juſtice of the peace, in nature of an execution. As, in the caſe of Hutchins and Chambers, where one of the queſtions was, "whether a ſe-"cond diſtreſs could be at all juſtified, "when there was enough, which might "have been taken upon the firſt, if the di-"ſtrainer had then thought proper."

It was reſolved, that a man who has an entire duty ſhall not ſplit the entire ſum; and diſtrain for one part of it at one time, and for other part of it at another time; and ſo *toties quoties*, for ſeveral times: for

that is great oppreſſion. And ſo is the caſe of Wallis *v.* Savil in 2 Lutw. 1532. Where the ſecond diſtreſs was holden unjuſtifiable; becauſe both diſtreſſes were taken for one and the SAME rent, and it was the leſſor's folly, that he had not taken a ſufficient diſtreſs at firſt.

But, if a man SEISES for the whole ſum that is due to him and only MISTAKES the value of the goods ſeiſed; which may be of very uncertain or even imaginary value, as pictures, jewels, racehorſes, &c. there is no reaſon why he ſhould not afterwards complete his execution by making a further ſeizure. And how can the officer who ſeiſes judge of the real, or perhaps imaginary, value of the horſes or goods ſeiſed? The value of them may be quite unknown to him, or may even depend upon whim and fancy.

It is to the advantage of the owner of the goods that this ſhould be ſo. It is better for him that the officer ſhould be at liberty to ſeize a ſecond time, in caſe he makes an inſufficient ſeiſure the firſt time: or elſe, it might induce him to a neceſſity of taking effects of a very great value, at firſt. For if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at the firſt.

Now pictures, horſes, jewels, books, and ſome other ſuch effects, may be of ſo uncertain, and even imaginary, or fancied value, that it may be exceedingly uncertain how much money they may fetch when they come to be ſold: ſo that the perſon ſeiſing may

may not be at all able to judge, HOW MUCH they may produce upon ſale.

And if he does not take the value of the whole at firſt, out of tenderneſs and moderation, perhaps, there is no reaſon why he ſhould not complete it by a ſecond ſeiſure; provided it be for the ſame ſum due. 3 Bur. 589.—The latter part of this reaſoning ſhould ſeem to extend only to a SEISURE under an execution.

Another queſtion in the caſe of Hutchins and Chambers was,—" whether the SECOND " diſtreſs, being EXCESSIVE, was a ſufficent " ground for an action of TRESPASS."—Several authorities were cited to ſhew that an action of treſpaſs will not lie for taking an EXCESSIVE diſtreſs; but that it ought to be a particular action grounded upon the ſtatute; and particularly one caſe in 2 Stra. 851. Lynne *v.* Moody, in which it was ſaid that the remedy ought to be a ſpecial action founded on the ſtatute of Marlebridge.

" So that it was ſufficiently eſtabliſhed " that a general action of treſpaſs cannot " be maintained for taking an exceſſive " diſtreſs."

One caſe was cited to the contrary, which was the caſe of Moir v. Munday, H. 28. G. 2. B. R. and that was an action of treſpaſs; where ſix ounces of gold, and one hundred ounces of ſilver, were taken for 6*s.* 8*d.* which was holden to be an EXCESSIVE diſtreſs, and there judgment was given for the plaintiff.

But that appeared upon the face of it, and upon the pleadings to be exceſſive: and ſo the court expreſsly declared. And it

it was a diſtreſs of gold and ſilver, which are of a certain known value, and even the meaſure of the value of other things. But it was there holden, "that in all OTHER "caſes of goods or OTHER things of arbi- "trary and uncertain value, it MUST be "an action upon the ſtatute." And this was the diſtinction there taken. And that is therefore an exception and was there conſidered as being ſo from the general rule; and ſerves to confirm the rule itſelf. The court were therefore of opinion, that there was no cauſe of action maintainable in the preſent caſe, it being an action of TRESS-PASS. 1 Bur. 590.

But if any diſtreſs and ſale be made, as for rent in arrear and due, when in truth not any is due, in ſuch caſe the owner may recover double the value, with full coſts. 2 W. ſeſſ. 1. c. 5.

And if the diſtreſs be made without cauſe, the owner may make reſcous; yet, if in ſuch caſe it be impounded, the owner cannot break the pound and retake it, becauſe, then it is in the cuſtody of the law. 1 Inſt. 47.]

At common law, no man was obliged to give notice of his having taken a diſtreſs; becauſe the tenant muſt have known the arrears that were due; and therefore at his peril muſt have taken care to pay them;—it was his own default that ſubjected the land to the lord's diſtreſs. Beſides the law has appointed a publick pound for keeping the diſtreſs, where the tenant by reſorting may have notice. Ro. Abr. 674.

[But

[But quære, whether notice must not be given of dead chattels, which must be kept in a private pound?

It seems that, at common law, where the distress was impounded in a common pound overt, the owner must have taken notice of it at his peril; but if it were impounded in a special pound overt, so constituted for that particular purpose; or in a pound covert; the distrainor must have given notice of it to the owner. But the common law, as to giving notice in cases of distress for rent, is now altered by a statute which will be mentioned hereafter.]

IV. How the distress is to be used, [and disposed of.]

Spelm. 447. First, we shall consider where the distress, which is but a pledge, is to be kept;—and that is in the pound;—This is described by *Spelman* in these words.—*Parcus est stabulum, vel area angustior repagulis firmiter conclusa, quâ noxia in frugibus prædictis pecora tandem in carcere coercentur.—Parci autem usum a continente traduxisse Saxones nostros*

Tit. 82. § 2. *hinc intelligas, quod in ripuariorum legibus jam olim utpote ante 800 vel 900 annos reperitur. Si quis peculium alienum in messe deprehen-*

Gall. mener. *sum ad parcum minare non permiserit, 15 sol culpabilis judicetur.*

Co.Lit. 47. b. The pound then being nothing more than a publick prison for goods and chattels, is either *overt* or *covert*. All living chattels distrained, are regularly to be put in the pound *overt*, because the owner at his peril is to sustain them, and therefore they ought to be put in such an open place as

as that he may have reſort to them for that purpoſe.

At common law a man might have impounded his diſtreſs in what county he pleaſed; but this was found very inconvenient to the owner, who was thereby at a loſs where to find his beaſts, either to feed or replevy them. This miſchief was therefore provided againſt by the ſtatute of *Marlbridge*, *c.* 4. "*nullus de cætero* "*faciat ducere diſtrictiones quas fecerit, extra* "*comitatum in quo captæ fuerint.*" 2 Inſt. 106.

Yet upon this ſtatute it hath been held, that where the tenancy is in one county and the manor in another, the lord may drive the diſtreſs to the manor pound though it be out of the county where the diſtreſs was taken;—becauſe the tenant by attending the manor court is preſumed to know every thing tranſacted in the manor; and therefore this caſe is out of the miſchief provided againſt by that law. Ibid.

But now by the ſtatute of 1 & 2 *Ph.* & *M.* *c.* 12. no diſtreſs of cattle is to be driven out of the hundred, &c. where the ſame is taken, except it be to a pound *overt* within the ſame ſhire, not above three miles from the place where the ſame is taken; nor impounded in ſeveral places, whereby the owner may be conſtrained to ſue ſeveral replevins; on pain to forfeit to the party aggrieved, 100 ſhillings and treble damages.

[And by the ſame ſtatute (§. 2.) no perſon ſhall take for keeping in pound, or impounding any diſtreſs, above four-pence for any one whole diſtreſs: and where leſs hath

been uſed, there to take leſs; on pain of forfeiting 5 *l.* to the party grieved, beſides what he ſhall take above four-pence.

2 Str. 1272. The defendant juſtified impounding cattle *damage feaſant*; and in evidence it appeared

3 Lev. 48. that he put them into the next pound, though it happened to be in another county. And Lee Ch. J. held that it did not make him a treſpaſſer, though it ſubjected him to the penalty in the ſtatute of 1 & 2 Ph. & M. c. 12.

Ld. Raym. 55. [And in another caſe, where lands, lying in two adjoining counties, were held under one demiſe, at one entire rent, and the landlord diſtrained cattle in both counties for rent arrear, it was holden that he might chaſe them all into one county; though if the counties had not adjoined, it would have been otherwiſe.]

Co. Lit. 47. b. Dead chattels, as houſhold goods, *&c.*

Ro. Abr. 673. which may receive damage by the weather, muſt be put into a pound *covert*;—otherwiſe the diſtrainer is anſwerable for them if they be damaged, or ſtolen away; and this pound *covert* muſt be within three miles in the ſame county.

But beaſts, as is ſaid, ought to be put in a publick pound; for if they be placed in a private pound the diſtrainer muſt keep them at his peril with proviſion, for which he ſhall have no ſatisfaction; and if they die for want of ſuſtenance, the diſtrainer ſhall anſwer for them.

[Now 11 G. 2. c. 19. §. 10. any perſon diſtraining, may impound, or otherwiſe ſecure the diſtreſs, of what kind ſoever it be, in ſuch place or on ſuch part of the premiſſes,

as ſhall be moſt convenient; and may appraiſe and ſell the ſame, as any perſon before might have done off the premiſſes.]

But the diſtrainer cannot work or uſe the thing diſtrained, whether it lie in a pound *overt* or *covert*; becauſe the diſtrainer has only the cuſtody of the thing as a pledge, and therefore is not to make uſe of it; but the owner may make profit of it at his pleaſure. 2 Bac. abr. 112.

[But there is an exception to this general rule in the caſe of milch kine, which may be milked by the diſtrainer; becauſe it may be neceſſary to their preſervation, and conſequently of benefit to the owner.] Cro. Jac. 148.

The diſtrainer cannot tie or bind a beaſt in the pound, though it be to prevent its eſcape; for BEASTS IN POUND ARE IN CUSTODY OF THE LAW, which intends the preſervation of the pledge; and therefore the diſtrainer at his peril muſt do no act that tends to the hurt or deſtruction of them. Ro. abr. 673. Ld. Raym. 720. 1 Salk. 428.

[But if cattle diſtrained die in the pound, without any fault in the diſtrainer; in ſuch caſe, he who made the diſtreſs ſhall have an action of treſpaſs; or may diſtrain again, if the diſtreſs was for rent.] Ld. Raym. 720. Salk. 248. S. C.

If a diſtreſs be taken without cauſe, a ſtranger cannot reſcue them from being driven to pound; but the owner may make reſcue BEFORE THEY ARE IMPOUNDED. But after the beaſts are impounded, the owner himſelf cannot reſcue them, unleſs he find the pound unlocked, for he cannot break it open. The reaſon is, that the naked Ld. Raym. 105.

poſſeſſion is a title againſt any perſon but the owner; but the owner has a title, and therefore may take the beaſts at any time, though cannot break the pound which the law hath ordained.

Mir. c. 2. ſ. 26. [By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth againſt the peace, and doth a treſpaſs to the king, and to the lord of the fee, and to the ſheriffs, and hundredors, in breach of the peace, and to the party, and in delay of juſtice; and therefore hue and cry is to be levied againſt him as againſt thoſe who break

Co. Lit. 47. the peace. And the party who diſtrained may take the goods again, whereſoever he ſhall find them, and impound them again.

2 W. & M. c. 5. ſ. 4. And now by ſtatute, on any pound breach, or reſcous of goods diſtrained for rent, the perſon grieved thereby ſhall, in a ſpecial action UPON THE CASE, recover treble damages and coſts againſt the offender, or againſt the owner of the goods, if they be afterwards found to have come to his uſe or poſſeſſion.

Co. Lit. 161. When a man hath taken a diſtreſs, and the cattle diſtrained, as he is driving them to the pound, go into the houſe of the owner; if he that took the diſtreſs demand them of the owner, and he deliver them not, this is A RESCOUS in law.

2. Diſtreſſes for rent being in the nature of pledges, the diſtrainer had no power to ſell them, at the common law. But now by ſtatute, (2. W. & M. ſeſs. 1. c. 5.) it is enacted, that where any goods ſhall be diſtrained

diſtrained for rent reſerved and due upon any demiſe, leaſe or contract whatſoever, and the tenant or owner of the goods diſtrained, ſhall not within five days next after ſuch diſtreſs taken, and notice thereof (with the cauſe of ſuch taking) left at the chief manſion houſe, or other moſt notorious place on the premiſſes, replevy the ſame; in ſuch caſe the perſon diſtraining ſhall, with the ſheriff or under ſheriff of the county, or with the conſtable of the hundred, pariſh or place, where ſuch diſtreſs ſhall be taken, cauſe the goods ſo diſtrained to be appraiſed by two ſworn appraiſers (whom ſuch ſheriff, under ſheriff, or conſtable ſhall ſwear to appraiſe the ſame truly, according to the beſt of their underſtandings;) and AFTER ſuch APPRAISEMENT, ſhall SELL the ſame for the beſt price that can be gotten for them, for ſatisfaction of the rent, and charges of the diſtreſs, appraiſement and ſale; leaving the overplus (if any) with the ſheriff, under ſheriff, or conſtable, for the owner's uſe."

In an action of treſpaſs, for entering the plaintiff's houſe, and keeping poſſeſſion of it for eight days, the defendant juſtified under a diſtreſs for rent. But by the court, the defendant ought to have removed the goods at the five days end; and for the other three he is a treſpaſſer, and there is no juſtification. Str. 717.

But quære, as to the time of removing the diſtreſs; for the tenant is to have five days to make replevin; and as thoſe muſt be whole days, excluſive of the day of taking the diſtreſs, it follows that the diſtrainer

ſtrainer cannot remove the diſtreſs till the ſeventh day.

Ld. Raym. 54. In an action of trover brought for cattle which had been diſtrained for rent, it was found that the plaintiff was owner of the cattle, and that the defendant, after taking the diſtreſs, gave notice to the plaintiff, according to the ſtatute of 2 W. & M. ſeſſ. 1. c. 5. And it was objected that the notice was ill; for the act ſays, that it ſhould be at the chief manſion-houſe, or other notorious place upon the premiſſes; but in this caſe, it was given to the plaintiff himſelf. *Sed non allocatur*; for by the court, the intent of the act was only, that the party ſhould have notice, which is performed by this mean, better than if it had been left at the houſe or other place. It was alſo objected to the notice, that, according to the finding of the jury, it was given to the owner of the cattle, and not to the tenant of the land. And that although the act is in the disjunctive, yet it ought to have a reaſonable conſtruction; and it is moſt reaſonable, that the notice ſhould be given to the tenant of the land, becauſe he may ſhew that the rent is ſatisfied, which does not lie in the knowledge of the owner of the cattle. *Sed non allocatur*; for the act has expreſsly provided, that notice may be given to the owner of the goods. But if the tenant had ſued a replevin, then the notice muſt have been given to him; but notice to the owner ſufficiently affects the owner; and the plaintiff is found owner of the cattle, therefore notice to him is ſufficient.

In

In the ſame caſe it appeared, that the tenement, whereupon the diſtreſs was made, lay part in the hundred of Kinaſley in Wiltſhire, and part in the hundred of Andover in the county of Southampton; that part of the diſtreſs was taken in Kinaſley, and part in Andover; but that all was impounded together in the hundred of Kinaſley; and that the conſtable of Kinaſley adminiſtered the oath to the appraiſers for the whole in the preſence of the conſtable of Andover. It was objected, that the goods which were taken in Andover, ought to have been appraiſed and ſold there, and that the conſtable of Andover, though preſent in Kinaſley when the appraiſement was made, had no juriſdiction there; ſo that the whole was done ſolely by the conſtable of Kinaſley, which therefore, as to the goods taken in Andover, was void. But by the court, as the diſtreſs was taken for ONE INTIRE rent, the diſtrainer might well impound the whole of it in Kinaſley; and the chaſing of the cattle, taken in Andover, to the pound in Kinaſley, was but a continuance of the taking: therefore, the conſtable of Kinaſley was the proper officer, within the act, to ſuperintend and adminiſter the oath for the appraiſement of the whole diſtreſs.

As to the mode of ſelling a diſtreſs under warrant from a juſtice of the peace, it is enacted, by the 27 Geo. 2. c. 27. that the juſtice, granting the warrant of diſtreſs, ſhall therein order and direct, that the goods diſtrained ſhall be ſold, within a certain limited time not being leſs than four, nor

more than eight days; unleſs the penalty or ſum of money diſtrained for, with the reaſonable charges of the diſtreſs, be ſooner paid. And after ſuch ſale, the overplus (if any) is to be returned on demand to the owner of the goods diſtrained.

At common law, the many particulars which attended the taking of a diſtreſs, rendered it a hazardous mode of proceeding; for, if any one irregularity was committed, it vitiated the whole diſtreſs, and made the diſtrainer a treſpaſſer *ab initio*.

11 G. 2. c. 19. ſ. 19. But now it is provided, by ſtatute, that where any diſtreſs ſhall be made for any kind of rent JUSTLY due, and any irregularity ſhall be afterwards done by the party diſtraining or his agent; the diſtreſs ſhall not be deemed unlawful, nor the diſtrainer a treſpaſſer AB INITIO; but the party grieved may recover ſatisfaction for the ſpecial damage in an action of treſpaſs or on the caſe at his election. But no tenant ſhall recover in ſuch action, if tender of amends hath been made before the action brought. And the defendant in ſuch action may plead the general iſſue, and give the ſpecial matter in evidence.

Ib. ſ. 20.

Ib. ſ. 21.

2 W. & M. ſeſſ. 1. c. 5. ſ. 5. But though the tenant ſhall only make ſatisfaction for the real damage ſuſtained, by any irregularity in taking or diſpoſing of the diſtreſs; yet if any diſtreſs and ſale ſhall be made, for rent pretended to be due to the perſon diſtraining, where in truth no ſuch rent is due, the tenant ſhall recover double the value of the goods diſtrained, together with full coſts of ſuit.]

CHAP.

CHAP. II.

OF THE

REPLEVIN.

HAVING in the foregoing chapter ſhewn in what caſes a diſtreſs or pledge may be taken, and how it is to be diſpoſed of; the next thing, in order, to be treated of is, THE REMEDY given the party to controvert the legality of ſuch caption, in order to bring back the pledge to the proprietor, in caſe the diſtreſs were unlawfully taken, and without juſt cauſe. This being a writ of great uſe, and of every day's practice, deſerves a very full conſideration.

Spelman in his *gloſſary* deſcribes it thus: *replegiare eſt rem apud alium detentam, cautione legitimâ interpoſitâ, redimere—et hæc cautio eſt ſtipulatio in formâ juris adhibita, de ſtando juri et ſiſtendo ſe foro; dictum autem* replegiare *quaſi* revadiare, *hoc eſt vadium vel pignus unum, loco alterius, ſuggerere & conſtituere.* Spel. Gloſſ. 485.

Or,

Or, in other words, a replevin is a juſticial writ to the ſheriff, complaining of an unjuſt taking and detention of goods or chattels; commanding the ſheriff to deliver back the ſame to the owner, upon ſecurity given to make out the injuſtice of ſuch taking, or elſe to return the goods and chattels.

Under this head is to be conſidered;

I. How the replevin ſtood at common law, and the alterations which have been made therein by ſtatutes.

II. Of the duty of the ſheriff in the execution of the replevin; and herein of the pledges.

III. Of the proceſs to make the defendant appear.

IV. Of the proceſs where the goods are eloigned; and herein of the writ of *withernam*.

V. Of the proceſs and proceeding where the defendant claims property.

VI. Of the proceſs, as well for the plaintiff as defendant, in removing the replevin from the inferior courts.

VII. Of the replevin itſelf; and herein are to be conſidered,

1. For whom and in what caſes it lies.
2. The declaration in replevin.
3. The ſeveral pleas in this action.
4. The judgment in this action, whether for the plaintiff or defendant; and herein of the writ *de retorno habendo*, and the writ of ſecond deliverance.

VIII. Of the writ of recaption.

I. Of the replevin as it ſtood at common law. Here it is firſt to be obſerved,

ed, that the replevin was at common law a juſticial writ, that is, gave the ſheriff a juſticial power to determine the point complained of in the county, whereas other writs gave him only a miniſterial power. This juſticial power is taken from theſe words in the writ: *Et eum juſte deduci facias*—by which the ſheriff is made judge, whether the taking be juſt or not. This was highly reaſonable, in order that this remedy might be ſpeedy, leſt the party ſhould want his beaſts for carrying on of his huſbandry; and therefore not to have formed this writ juſticial, would have been not only detrimental to private perſons, but injurious to the commonwealth. Hence it is called *feſtinum remedium*. Beſides, it would have been of great trouble and expence to private perſons to have taken the determination of theſe ſort of complaints, which muſt have happened every day, out of the neighbourhood. And yet the manor court was not truſted with this power in any cauſe between lord and tenant, becauſe the lord was not to be judge in his own cauſe. 2 Inſt. 140. Reg. 81. a.

2*dly*. It is to be obſerved that there are two things complained of in this writ, *viz.* The taking and detention of the pledges, as the words of the writ expreſs it—*quæ cepit & injuſte detinet*.—But what is principally controverted in the replevin, is, whether the taking be juſt or not. For there are but two caſes wherein a diſtreſs juſtly taken, whether for rent or *damage feaſant*, can be unlawfully detained. The firſt is where the arrear of rent, or amends for the Dr. & Stud. c. 27. 2 Inſt. 107. 5 Co. 76 a. 8 Co. 146. b. Cro. Eliz. 813. 1 Brownl. 173.

the damage, is tendered to the party diſtraining.—And this tender muſt be made before the beaſts are impounded; for when the beaſts are in cuſtody of the law, the perſon diſtraining cannot be ſaid unlawfully to detain that which is in the cuſtody and care of the law.

Hence it is, that if a tender be made after impounding, and the beaſts die in pound, the owner ſhall bear the loſs; becauſe ſuch tender comes too late to fix any fault or injuſtice on the perſon diſtraining. But if the tender had been before the impounding, it ſeems the diſtrainer is anſwerable, becauſe the impounding is unlawful.

5 Co. 76. a. Cro. El. 813. Rol. Rep. 258

But here it is to be obſerved, that the tender of amends muſt be pleaded to the lord himſelf, and not to the bailiff, who makes conuſance of the cauſe of the caption and detention in right of the lord; for that right is not barred by a tender to any other than the lord himſelf.—But if a tender be pleaded to the lord, and they give in evidence a tender to the lord's bailiff, where the lord was preſent, that won't maintain the plea; becauſe the derivative power of the bailiff ceaſes where the lord is preſent; and they ought to prove the tender to that proper perſon to whom the amends belong, and who was ready to receive it. Yet if they plead a tender to the lord, and prove a diſtreſs taken by a bailiff, the lord not being preſent, and prove the bailiff to be the uſual receiver of the lord; *qu.* if that will not be a proof of ſufficient

cient tender of amends to the lord himſelf?

The ſecond caſe where the detainer is unlawful, is where the avowant hath return irrepleviſable, and the owner of the beaſts tender all that appears to be due on the judgment in the avowry; the detainer of the avowant is unlawful, and the owner may have his action of detinue for the detainer after the tender made. For though by the judgment the return is made irrepleviſable, yet that is no final condemnation of the beaſts or goods diſtrained; they are ſtill to be conſidered as pledges in the hands of the avowant, and therefore in their own nature liable to a redemption upon payment or ſatisfaction of that rent or damages, for which they were originally taken.—Lord *Coke* aſſigns another remedy for the owner to recover his beaſts, and that is upon ſatisfaction made in court to have a writ for their delivery. 2 Inſt. 107, 341. 2 Inſt. 107.

Qu. The form of this writ.

The detention then being complained of in this writ, it may not be improper to look into the antient method of trying ſuch unlawful detention, and what remedy the owner of the beaſt has for it at this day. The antient method of trying the legality of the detention was very inconvenient, for the plaintiff in replevin was to have his ſuitors ready to prove *inſtanter*, that he had offered a pledge, under the notion that the pledge was ſufficient; the lord was then put to his law-wager, that the pledge offered

fered was not ſufficient to anſwer the debt, ſo that it was totally thrown upon his conſcience to determine the ſufficiency of the pledge. This method of trial was antiently practiſed and allowed, becauſe originally the lord might have ſeized the land for non-performance of the ſervices, and therefore, when the rigour of that law was mitigated, by turning the forfeiture into a diſtreſs, it could not be thought any unreaſonable indulgence to the lord, to make him judge of the ſufficiency of the pledge which was to be put into his hands while the ſuit depended; becauſe in all events the lord ought to be ſafe.

This account of trying the legality of the detention is given by *Bracton* in the following words:

Bract. 156. Fleta 94. *Si autem defenderit detentionem injuſtam, & querens ſectam habeat ſtatim ad manum, quæ examinata in omnibus concors fuit, & quod omnia facta fuerint ſub eorum præſentia, tunc vadiabit defendens legem ſe duodecima manu; in qua ſi defecerit, incidet in manum vicecomitis, & reſtituet querenti damna ſua quæ habuit per illam detentionem; ſi autem legem fecerit dominus, tunc quietus recedet, & querens in miſericordiâ, ſed nulla damna recuperabit, & returnabit domino averia capta.*—The lord recovered no damages where he prevailed on the law-wager, becauſe he had no damage where the tender proved inſufficient. But if the lord prevailed not on the law-wager, the plaintiff in replevin had HIS damages, becauſe he really was injured by the lord's refuſal, in loſing the uſe of his

his beaſts or goods, which he had a right to, upon the ſufficient tender.

But the legality of the detention depending entirely on the ſufficiency of the tender, a more equal and better method of trial was found out by the conſcience of twelve diſintereſted men; no way concerned in the event of the trial. And the point comes in iſſue in the following caſe. Where the lord impounds the beaſts notwithſtanding the ſufficient tender of the tenant, the tenant hath no way to recover his cattle but by his writ of replevin; for if he takes them out of the pound himſelf, he is liable to an action for breaking the pound:—this puts the lord to his avowry, wherein he muſt ſhew the cauſe of his taking and detention; to which the plaintiff in replevin pleads, that after the taking, and before the impounding, he made a ſufficient tender; and thereupon it ſhall be tried by a jury whether the tender was ſufficient, and if it be found ſo, the plaintiff in replevin ſhall have damages for ſuch unlawful detention. Dr. & Stud. c. 27. Cro. El. 813. F.N.B.69.G.

But though by the common law this writ was made juſticial for the eaſe of the ſubject, and the more ſpeedy adminiſtration of juſtice, yet the ſubject, both lord and tenant, was expoſed to many difficulties and inconveniencies in the progreſs of the ſuit, which were afterwards removed by ſeveral ſtatutes. For,

1*ſt*. The replevin at common law was only by writ, and this application muſt have been to the chancery, which was too tedious for the diſtant parts of the kingdom. 2 Inſt. 139. 5 Mod. 253.

To

52 H. 3. To make this remedy therefore more expeditious, it is provided by the ſtatute of *Marlbridge, c.* 21. *Quod ſi averia alicujus capiantur, & injuſte detineantur, vicecomes poſt querimoniam inde ſibi factam, ea ſine impedimento, vel contradictione ejus qui dicta*
2 Inſt. 139. *averia ceperit, deliberare poſſit.*—By force of this ſtatute the ſheriff may hold plea in replevin BY PLAINT of any value, as he might at common law on a writ of replevin; the writ of replevin being A JUSTICIES or commiſſion for that purpoſe.

F.N.B.69.E. Co. Lit. 145. 2 Inſt. 139. 16 H. 7. 14. And to take away all the delays which attended the replevin by writ, the ſheriff, by this act, may, upon complaint made, command his bailiff, either by word or precept, to replevy the plaintiff's beaſts; for poſſibly the ſheriff cannot write, which was frequently the caſe in thoſe days, or has not the materials of writing with him;

Bro. tit. Replevin, pl. 46. and this the ſheriff may do out of his county court. For this act being made for the more ſpeedy adminiſtration of juſtice, hath received the moſt favourable conſtruction. It would be very inconvenient that the owner of the beaſts, for whoſe benefit the act was made, ſhould ſtay till the next county court, which is held only from month to month. But then the ſheriff muſt enter the plaint at the next court, that it may appear on the rolls of the court.

L. Raym. 219. [Yet a preſcription to replevy upon plaints levied out of court, is bad.]

2*dly*, Another miſchief at common law was, that the replevin being juſticial, and determinable in the county court, if the plaintiff in replevin pleaded to the lord's avowry

avowry that the tenancy was *hors de ſon fee*, the inferior court had no farther conuſance of the action; becauſe this plea brought THE FREEHOLD in queſtion, which the county court, not being a court of record, had no power to try, and therefore could not proceed. By ſuch means the lord was left without remedy to recover the beaſts as his pledges; becauſe the court could not determine the point on which the return was to be made. This was remedied by *Weſtm.* 2. *c.* 2. which gave the lord a *pone* to remove the cauſe into the king's courts, where that plea might be tried, and the lord be eſtabliſhed in the poſſeſſion of his ſervices, and ſtill have the pledges *de retorno habendo* retained for him. 13 Ed. 1.

A third miſchief at common law was, that when the avowant had judgment for a return of the beaſts, he had very often no benefit by his ſuit; becauſe it frequently happened that, pending the ſuit, the tenant had ſold the cattle delivered to him on the replevin, and become inſolvent. The miſchief aroſe from this, that the ſheriff could only take from the plaintiff *plegii de proſequendo* in this, as in other actions; which pledges were only to anſwer the amerciament to the king *pro falſo clamore*, and looked no further: and even theſe being very ſmall did ſoon degenerate into mere matter of form. To remedy this inconvenience the ſaid ſtatute of *Weſtm.* 2. *c.* 2. hath directed the ſheriff, *non ſolummodo recipere plegios de proſequendo à conquerentibus, ſed etiam de averiis retornandis, ſi adjudi-* 13 Ed. 1.

cetur retornand'; *& ſi quis alio modo plegios ceperit, reſpondeat ipſe de pretio averior'.*— But the method of proceeding in this caſe will be fully treated of under the writ *de retorno habendo.*

2 Inſt. 340. 4*thly.* Another miſchief was, that if the plaintiff had nonſuited himſelf, and the avowant had judgment, yet he could not have a return irrepleviſable; but the tenant might replevy the ſame diſtreſs *in infinitum.* This alſo is remedied by the ſame ſtatute of *Weſtm.* 2. *c.* 2. by which it

13 Ed. 1. is provided, *quod quam cito adjudicatum fuerit retornum averiorum diſtringenti; per breve de judicio, mandetur vicecomiti, quod retornum habere faciat diſtringenti de averiis, in quo brevi inſeratur, quod vicecomes ea non deliberet ſine brevi, in quo fiat mentio de judicio per juſtic' reddit'; quod fieri non poterit niſi per breve quod exeat de rotulis juſtic', coram quibus deducta fuerit loquela.* Purſuant to this law, the writ *de Retorno habendo* con-

Reg. Jud. 4. a. cludes thus, after a recital of the judgment for the avowant,—"*ideo tibi præcipimus quod præd'* (the avowant) *averia præd' ſine dilatione retornari facias, & ea ad querimoniam ipſius* (the plaintiff in replevin) *non deliberes ſine brevi noſtro, quod de præfat' judicio expreſſam faciat mentionem.*"

"Therefore we command you, that the aforeſaid (the avowant) the beaſts aforeſaid without delay you return, and that you do not deliver them upon the complaint of (the plaintiff in replevin) without our writ, which ſhould expreſly mention the aforeſaid judgment."

This

This writ, which muſt recite the former judgment, is the writ of ſecond deliverance, which will be treated of in its proper place.—Only here it may be neceſſary to obſerve, that if the avowant hath judgment in the ſecond deliverance, he ſhall have return irrepleviſable of the beaſts; but ſubject ſtill to redemption by the tenant on payment of the rent; becauſe they are ſtill in the nature of a gage or pledge. The ſeveral other alterations that have been made in the replevin will be taken notice of under the ſubſequent heads. 2 Inſt. 341.

II. Of the duty of the ſheriff in the execution of the replevin; and herein of the pledges.

Whether the replevin be by plaint or writ, the ſheriff, before he grants the one or executes the other, ought to take from the plaintiff pledges *de proſ'* and pledges *de retorno habendo*. The firſt, as has been ſaid, was at common law, to anſwer the amerciaments to the king *pro falſo clamore*, in caſe the plaintiff did not prevail in the ſuit. The other pledges were introduced by *Weſtm.* 2. *c.* 2. for the ſecurity of the avowant, in caſe he ſhould have judgment for return of the beaſts.—And by this act theſe pledges are anſwerable to the avowant, if the plaintiff hath diſpoſed of the beaſts pending the ſuit. And if the pledges are inſufficient, the ſheriff is made anſwerable by that ſtatute for their inſufficiency. Dalt. Sher. 277. 439. Cro. Car. 446. 3 Mod. 57. Comb. 1. S. C. Skin. 244. S. C.

And it ſeems the pledges *pro retorno habendo*, may be by bond even of the plaintiff in replevin himſelf. The condi- Dalt. Sher. 440. Offic. Brev. 222.

Ld. Raym. 278. tion of which is, not only that the plaintiff ſhall proſecute the ſuit in replevin, but alſo that he will make return of the beaſts, if return thereof be adjudged by law, and alſo to ſave harmleſs and indemnify the ſheriff for delivery of the ſaid beaſts: for the ſheriff being anſwerable for the ſufficiency of the pledges, may take the ſecurity as he pleaſes, ſince it is at his own peril.

Cro. Car 446. 1 Jones 378. Dalt. Sher. 434. Theſe pledges are in the nature of ſureties *pro retorno habendo*, and therefore money or any other cattle being a pawn, is not a pledge within this ſtatute; for the proceſs, as ſhall be hereafter ſhewn, is by *ſcire facias*, which is a proceſs to bring the pledge or ſurety into court to ſhew cauſe, and therefore cattle cannot be a proper pledge. For this reaſon, a ſheriff has been adjudged to be liable to an action on the caſe for taking money, as a pledge *de retorno habendo*; becauſe the money was not ſuch a pledge as the ſtatute directs. And it ſeems there need not NECESSARILY be more pledges than one, if that be ſufficient; though the words of the act are *pledges* in the plural number: becauſe if one pledge be ſufficient, the defendant hath no loſs, and therefore the intention of the ſtatute is anſwered which provides for the defendant's ſafety.

[Now, for the greater ſecurity of perſons diſtraining FOR RENT, it is provided by ſtatute (11 G. 2. c. 19. §. 23.) that ſheriffs and other officers, having authority to grant replevins, ſhall in every replevin of a diſtreſs FOR RENT take in their own names, from

from the plaintiff and two ſureties, a bond in double the value of the goods diſtrained (ſuch value to be aſcertained by the oath of one or more witneſſes not intereſted, which oath the perſon granting ſuch replevin is to adminiſter) and conditioned for proſecuting the ſuit with effect and without delay, and for returning the goods in caſe a return ſhall be awarded, before any deliverance be made of the diſtreſs; and ſuch ſheriff or officer taking ſuch bond, ſhall at the requeſt and coſts of the avowant, or perſon making conuſance, aſſign ſuch bond to the avowant, &c. by indorſing the ſame, and atteſting it under his hand and ſeal in the preſence of two or more witneſſes, which may be done without any ſtamp; provided the aſſignment be ſtamped before any action brought thereon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name, and the court may by rule give ſuch relief to the parties upon ſuch bond, as may be agreeable to juſtice; and ſuch rule ſhall have the effect of a defeazance.]

The ſheriff having thus taken pledges from the plaintiff in replevin, he ought forthwith to make deliverance of the goods or cattle diſtrained; but if the diſtreſs was taken within a liberty and impounded there, the ſheriff ought firſt to iſſue his warrant to the bailiff of the liberty, having return of writs, to make deliverance. And if the bailiff makes no anſwer, or as the ſtatute of *Marlbridge* ſays, *c.* 21.—*Ea deliberare noluerit, tunc vicecomes pro defectu ipſius ballivi ea faciat deliberari.*—This act, as

2 Inſt. 139, 140. F.N.B.68.F.

to this part of it, was made to enlarge the power of the ſheriff, by impowering him to enter into the liberty to make delivery, where the bailiff was negligent. Whereas at common law the ſheriff could not enter into the liberty without a *non omittas*, which was too dilatory.

2 Inſt. 140. And by this act, if a diſtreſs was taken out of a liberty and impounded within it, the ſheriff might enter the liberty without any previous warrant to the bailiff; becauſe the caption, which is one of the points complained of in the replevin, was in the county, and out of the liberty; and therefore the right to make a deliverance, ought to be in that officer, within whoſe diſtrict or juriſdiction the cauſe of complaint firſt aroſe. And all this is law, whether the replevin be by plaint or by writ.

If the diſtreſs be drawn into a houſe, caſtle, or other ſtrong hold, the ſheriff or his bailiff, after demand made for deliverance of the diſtreſs, may break open the houſe or caſtle to replevy them.—This ſeems to be the common law;—for though a man's houſe is privileged by common law for himſelf, his family, and his own goods, ſo that the ſheriff cannot break it open to attach any of them in a civil action at the ſuit of a private perſon;—yet a man's houſe could not privilege or protect the goods of ANOTHER perſon unjuſtly taken, ſo as to prevent the officer to make replevin; becauſe the privilege and ſecurity of a man's houſe could protect but his own goods.—This practice however, of driving diſtreſſes into ſtrong holds, was ſo frequent in the barons

barons wars, and the poorer ſort ſuffered ſo much from the men of power, that the ſtatute of *Weſtm.* 1. *c.* 17. expreſly gives this power to the ſheriff, or his officer, to break the houſe to make delivery of the cattle, whether the replevin be by plaint or by writ. — But this, as is ſaid, muſt be after demand made, and notice given to the lord to ſuffer them to be replevied. And, to deter the perſon diſtraining from refuſing or neglecting to deliver the diſtreſs, the ſtatute further directs, that the caſtle, or ſtrong hold, ſhall be razed and thrown down; but this muſt be on a ſuit in behalf of the king, wherein all parties concerned in intereſt muſt firſt be heard. And by this act, if the bailiff of a liberty, having return of writs, ſhall not make deliverance for the reaſon aforeſaid, the ſheriff may proceed without delay, or any new authority, to make replevin in manner afore-mentioned. Though in other actions, even in executions, at the ſuit of private perſons, he cannot enter a liberty, without a *non omittas*.

2 Inſt. 193. Dalt. Sher. 438, 439. 2 Inſt. 194.

If the replevin be executed, and the deliverance made, where it is by plaint, the bailiff, at the time he makes deliverance, ought alſo to attach the defendant by his goods, to make him appear at the next court day; for in this action the attachment is the firſt proceſs; becauſe the replevin complains of a tortious taking, which is in nature of a treſpaſs.

Dalt. Sher. 438, 439.

Where the replevin is by writ, and the ſheriff executes it before the *alias* or *pluries* comes

F. N. B. 70. Dalt. Sher. 440.

comes to his hands, the ſheriff may hold plea of it in his county court; but either party may remove it by *pone* or *recordare* into the courts above; the plaintiff without cauſe, and the defendant upon cauſe ſhewn.

This writ of *pone*, if it be taken out by the plaintiff in replevin, hath a clauſe in it, to ſummon the defendant to appear in the court above, at the return of the writ; *quod tunc ſit ibidem præfato* A. (the plaintiff) *inde reſponſurus*; and ſo *vice verſa*. If the replevin be removed by the defendant, then the *pone* commands the ſheriff, "*quod dicat præfato* A. (the plaintiff) *quod ſit ibi loquelam ſuam verſus prædictum* B. (the defendant) *inde proſecuturus, ſi voluerit, &c.*" —"To tell the aforeſaid *A.* (the plaintiff) to be there to proſecute his plaint thereof againſt the aforeſaid *B.* (the defendant) if he ſhall think proper." And by this means both parties have days in the court above.

F.N.B.68.E. If the ſheriff doth nothing upon the firſt writ, the plaintiff may have an *alias*, and after that a *pluries* replevin. In the *pluries* is always inſerted this clauſe, "*vel cauſam nobis certifices, quare mandatum noſtrum, alias tibi inde directum, exequi noluiſti vel non potuiſti.*" —"Or certify your reaſon to us why you would not or could not execute our commands heretofore to you hereupon directed."

The ſame may be inſerted in the *alias*, if the plaintiff pleaſes, and then both the *alias* and *pluries* are returnable in the king's

bench or common pleas; and the *pluries* always determines the power of the ſheriff to hold plea of the replevin in the county; and ſo doth the *alias*, where the ſaid clauſe of *vel cauſam nobis certifices, &c.* is inſerted. The reaſon is, becauſe this clauſe gives either party a right to call upon the ſheriff, in the courts above, to give an account of the execution of the writ; and this on the pretence or ſuppoſition, that the ſheriff hath not legally executed the writ. The ſheriff, thus called upon, cannot give the court an account how he hath executed the writ, but by his return on the writ itſelf; and that cannot appear judicially to the court, till the writ and the return be filed; and the ſheriff having thus parted with the writ, he has no authority to proceed farther in the court below.

By this means the plaintiff in replevin may controvert the ſheriff's return, and ſhall recover damages againſt him, if it be found to be falſe, or not duly made.—This is allowed the plaintiff, not only for his damages, but alſo to intitle the king to a fine againſt the ſheriff for his contempt; and is the moſt expeditious way to oblige the ſheriff to make the deliverance fairly, that the plaintiff may not want his beaſts to carry on his huſbandry.——But if the ſheriff injures the defendant in the execution of the replevin, by taking ſome of his cattle, the defendant has his action of treſpaſs againſt him to puniſh him, as in all other caſes of treſpaſs. Here we may obſerve

ſerve one thing peculiar to this writ of replevin, that the defendant on the return of the *alias* and *pluries* has no day in court; nor is he ſo much as ſummoned to appear by the writ in the court above; whereas in all other actions, the defendant by the very original is put to his pledges for his appearance.—But the reaſon of the difference is this. In other originals, the defendant is but ſummoned to anſwer the plaintiff's demands, and the plaintiff by ſuch writ gets nothing from the defendant till the event of the ſuit, and therefore the defendant muſt have a day in court by the original.—But in replevin the plaintiff hath his beaſts reſtored to him on the execution of his writ, and the defendant ſhall never have return, unleſs in his avowry he can juſtify the caption; ſo that from hence it appears the defendant need not be ſummoned in this writ; becauſe it is plainly for his intereſt to do ſo, otherwiſe he can never have a return of the cattle.—— Thus the defendant becomes plaintiff or actor.—Hence it follows that the parties in replevin, may appear and plead at any other term than that in which the replevin is returned; becauſe having no day in court on the return, as is before obſerved, there can be no diſcontinuance of the ſuit, though the plaintiff ſhould not declare in the ſame term.—If the plaintiff ſhould not declare in replevin, the defendant, though he hath no day in court, may however come in, and oblige the plaintiff by rule of court to declare; becauſe otherwiſe the defendant could never

1 Rol. Abr. 581.

never have the judgment of the court, for a return of the beaſts.

But if the plaintiff ſhould of himſelf declare without any compulſion from the defendant, as he may do, the defendant is brought into court by attachment, *&c.* to plead; and if the plaintiff ſhall obtain judgment by default, what remedy hath he for his damages? Offic. Brev. 413. Dyer 246. a. Raſt. Entr. 570. a.

It is uſual now for the plaintiff to take out the replevin, *alias* and *pluries*, at the ſame time; and if he has a mind to take the cauſe at once out of the ſheriff's hands, he may deliver the *alias* or *pluries* as he thinks fit to the ſheriff, without ever ſhewing him the original writ.—By this the plaintiff, as is already obſerved, has a right to call for the ſheriff's return, and the ſheriff ought himſelf to appear in the court above, to purge his contempt, for diſobeying or not executing the original writ, which the law preſumes was delivered to him; and then the ſheriff may excuſe himſelf by making an honeſt return on the *alias* or *pluries*,—*& quod nullum aliud breve*, *&c.* came to his hands. And thus the plaintiff, if he pleaſes, may at once ouſt the ſheriff of his juriſdiction, without the trouble of removing the plea out of the ſheriff's court by *pone*. F. N. B. 68. E. Raſt. Ent. 570. a.

III. We come now to the proceſs in replevin to make the defendant appear.

And here it is to be known, that the replevin is *vicontiel*, and is a commiſſion to give the ſheriff authority to gage deliverance of the beaſts, and therefore there is no day given to the defendant by this writ. Reg. 81.

But

But on this commiſſion the ſheriff makes out a precept to deliver the beaſts, and alſo an attachment to the defendant to appear at the next court day.—So if it be by plaint, the precept is made to the bailiff to deliver the beaſts, and to attach the defendant. And the reaſon why attachment is the firſt proceſs, is, that replevin complaining of a tortious taking, is in nature of a treſpaſs; and there an attachment *per plegios* is the firſt proceſs, leſt the defendant ſhould eſcape.

But if the ſheriff do not execute the replevin, then an *alias* goes out, in which there may be a *vel cauſam nobis ſignifices*; and the reaſon is, that the plaintiff being deprived of the uſe of his beaſts, which he is obliged to ſuſtain in the pound, the law allows that he ſhould in the *alias* inſert the third proceſs; becauſe though the officer, as a defaulter, is not anſwerable for not executing meſne proceſs, till after two defaults; yet, becauſe the beaſts may be eloigned, the *withernam* may iſſue on the ſecond proceſs, and the *cauſam nobis ſignifices* be put in the *alias*. And this *alias* is returnable into the king's bench or common pleas. In the common pleas, becauſe it is a civil plea; and in the king's bench, becauſe it is in the nature of a treſpaſs. It is alſo returnable into chancery, becauſe he may have a *withernam* thence upon an *elongata*, ſince there is another original, *viz.* a *pluries*, which is yet to be iſſued out of that court.

If there be not *cauſam nobis ſignifices*, it is only *vicontiel*, as the firſt writ. In the *pluries* they muſt put in the clauſe, *vel cauſam*

cauſam nobis ſignifices, becauſe there have been two neglects already in the proceſs.— When the *pluries* iſſues, it has been much diſputed whether the ſheriffs *vicontiel* power be determined. And it is ſaid, in one caſe, that ſince the writ is to replevy *vel cauſam ſignifices*, the *vicontiel* power continues.— But if the ſheriff does not replevy, then he is to ſhew cauſe why he did not; and this is argued to be the ſenſe of the writ, from the disjunctive words contained in it. 2 H. 7. 5. Fitz Abr. tit. Replev. pl. 16.

But I take it, that the *vicontiel* power is determined by the *pluries*. 1. Becauſe the ſheriff has been twice guilty of neglecting his duty, and therefore is not to be truſted with judicial power. 2. He is anſwerable to the court how he has obeyed the writ; and therefore the court muſt have the writ, to ſee whether he has done his duty or not. And if the court be intitled to the writ, to ſee whether the officer has done his duty, he cannot proceed on the writ. Fitz. Abr. *ubi ſupra.*

[The *pluries* replevin ſuperſedes the proceedings of the ſheriff, and the proceedings are upon that writ, and not upon the plaint; as they are, when the plea is removed by *recordari*. Ld. Raym. 617.]

By the *pluries* there is no day in court, either to the plaintiff or defendant, but only to the ſheriff in order to fine him for diſobeying the firſt writ. [But though there is neither ſummons nor attachment in the *pluries*, yet the return of it is a good day in court to the parties. And the entry in ſuch caſe is, that the defendant *attachiatus eſt ad reſpondendum de placito quare cepit*, &c. for though there is no actual attachment, yet there

there is an attachment in conſequence of law, the defendant being obliged to appear upon the peril of a *withernam*. Ld. Raym. 617. Salk. 583. S. C.] If the parties neglect to appear on the return of the *pluries*, the way, to give them day, is as follows.

If the plaintiff comes into court, and *obtulit ſe*, at the day on which the ſheriff is to ſhew cauſe to that court, why he did not execute the firſt *vicontiel* proceſs, there, as it appears by the entries in *Raſtel*, he ſhall have an attachment againſt the defendant, to bring him in to anſwer, and this writ gives them both a day in court.

Raſt. Ent. 570. a.

The reaſon is, that replevin is in nature of a treſpaſs, and on every treſpaſs the attachment is the firſt proceſs; and therefore as well in the ſheriff's court below, as in the court above, the plaintiff may have an attachment in the firſt proceſs, and if the defendant does not appear, and *nulla bona* be returned, then on the ſtatute 25 *E.* 3. *ch.* 17. they may have a *capias* and proceſs of outlawry.—But at common law, there was only a diſtreſs infinite; becauſe there was no fine to the king on the replevin; unleſs where the *elongata* or claim of property was returned by the ſheriff; for theſe being contempts of the king's proceſs, there was a fine at common law, and therefore a *capias* in the common proceſs came in by the ſtatute.

Bro. tit Jour. pl. 82.

But if the defendant comes in at the day the ſheriff has in court, he cannot demand the plaintiff, becauſe the plaintiff has given the defendant no day in court; and if the defendant hath no day, he cannot demand

demand the plaintiff under the peril of a nonſuit; and therefore the method is for the defendant to have a ſpecial writ to warn the plaintiff to come into court and proſecute his plaint, which is in nature of a *venire*; and if the plaintiff does not come into court at the return of ſuch writ, then he ſhall be nonſuited, and the pledges amerced.—In the ſame manner where there is a vitious *pone*, that gives the defendant no day in court; yet the record being removed, the court proceeds on the firſt writ; and on ſuch writ if the defendant appears, the plaintiff is not demandable, becauſe there is no day given to the defendant, but he has a ſpecial writ to warn the plaintiff to come in and proſecute, and if the plaintiff does not on ſuch writ appear, he is nonſuited. F. N. B. 69. M.

IV. Of the proceſs where the goods are eloigned; and herein of the writ of *withernam*.

Withernam is derived from the Saxon words *weder* (other) and *naam* (diſtreſs) ſignifying another diſtreſs, inſtead of the former, which was eloigned. *Vetitum namium* ſignifies a forbidden diſtreſs; and therefore though a diſtreſs were originally lawful, yet if it be detained againſt the replevin, it is *vetitum namium* and unlawful. 2 Inſt. 140, 1. Spelm. *de verbis namium et vetitum namium.*

The *withernam* is part of the *lex talionis*, which as it prevailed in the caſes of maihem, where the judgment of old was in this kingdom,—eye for eye, and tooth for tooth,—ſo was it in the caſe of taking and detaining againſt pledges,—beaſt for beaſt.

Withernam was twofold.

In

In the county below; and
In the courts above.

Reg. 82. 1. In the county below, though the ſheriff's bailiff returned that the beaſts were eloigned, yet the *withernam* did not IMMEDIATELY go, becauſe the defendant was not to loſe his own beaſts on the return of a bailiff, againſt whom, if the return were falſe, he could have no ſatisfaction.—Therefore in ſuch caſe, there was an inqueſt of office holden by the ſheriff, to ſee whether the beaſts were found to be eloigned or not; and if the beaſts were found eloigned, then there iſſued a *withernam*, for the eloignment found by the jury, *ſecundum legem talionis*.

2. In the courts above, the *withernam* is awarded on the *elongata* returned. For the king's miniſter having returned, that the beaſts were eloigned, ſo that he could not do execution, there is a proper ground to award this proceſs.—

Firſt, becauſe the ſheriff is liable for a falſe return, who is a perſon ſufficient to anſwer the party. Secondly, becauſe the ſheriff's return is ſuppoſed to be true till the contrary appears. And there is no miſchief to the defendant in this caſe, ſince on producing the cattle which he has taken, he may have his beaſts again; and therefore it was proper ſuch a writ ſhould go out *ſecundum legem talionis*, on the ſheriff's return, *without any inqueſt*, rather than the plaintiff ſhould want his cattle, and his huſbandry ſtand ſtill in the mean time.

F. N. B. 73. E. This writ lieth where a man takes the goods or cattle of another man, and the party

party ſueth a replevin by writ, and an *alias* and *pluries*; and upon the *pluries* the ſheriff doth return, that the cattle or goods are eloigned, *&c.* then this writ of *withernam* ſhall iſſue out of the court where the *pluries* is returned;—returnable in the king's bench or common pleas. And the form of the writ is ſuch:

" *Rex vic. Linc. ſalutem. Quum pluries tibi præceperimus, quod juſte, &c.* A. *averia ſua quæ* B. *&c. vel cauſam, &c. quare mandatum noſtrum, pluries tibi inde directum, exequi noluiſti vel non potuiſti; ac tu nobis ſignificaveris, quod poſtquam prædictus* B. *averia prædicti* A. *cepit in comitatu tuo, ea fugavit de comitatu prædicto in comitatum* B. *per quod ea eidem* A. *replegiare non potuiſti; nos malitiæ ipſius* B. *obviare volentes in hac parte, tibi præcipimus quod averia prædicti* B. *in balliva tua inventa, ſine dilatione capias in withernam, & ea detineas, donec eidem* A. *averia ſua prædicta ſecundum legem & conſuetudinem regni noſtri replegiare poſſis, juxta tenorem mandatorum noſtrorum prædictorum, prius tibi, &c.*"

" George the third, *&c.* To the ſheriff of *&c.* greeting: Whereas we have often commanded you that juſtly, *&c.* to *A.* his beaſts, which *B. &c.* or the reaſon, *&c.* wherefore you would not or could not execute our command hereupon often directed to you; and you have ſignified to us that after the aforeſaid *B.* the beaſts of the aforeſaid *A.* had taken in your county, he drove them out of the aforeſaid county into the county of *B.* by reaſon whereof you could not replevy them to the ſaid *A.*

We, being desirous to prevent the mischievous design of the said *B.* in this behalf, do command you, that without delay you take *in withernam* the beasts of the aforesaid *B.* found in your bailiwick, and detain them until you are able to replevy to the said *A.* his beasts aforesaid, according to the law and custom of our realm, and pursuant to the tenor of our commands aforesaid, before to you, *&c.*"

11 H. 8. 16. But this writ does not lie upon suggestion only that the beasts are eloigned, by reason whereof the sheriff cannot replevy them, *&c.* for this being an award *secundum legem talionis*, cannot be on a surmise, but only be where the eloignment is found by inquest below, or returned above, by the proper officer.

F. N. B. 73. E. 22 H. 6. 22. And this writ shall not issue out of chancery, unless *elongata* be returned into that court upon the *alias*, *&c.* for the *elongata* being the foundation of the *withernam*, wherever the *elongata* is returned, there the *withernam* must be awarded; and since the *alias*, as it is said, is returnable into chancery, the *withernam* must thence issue. But though it goes out from thence, it is returnable into one of the benches, because it gives the defendant day thereon to proceed; for since the defendant's goods are taken *secundum legem talionis*, he must have a day given to dispute the legality of such taking.

F N. B. 73. F. 7 H. 4. 27. 45 E. 3. 26. 35 H. 6. 47. Dyer 189. The defendant shall have a day in this writ by attachment, and not otherwise; as if *elongata* be returned on the *pluries replegiari facias*, then the writ of *withernam* has this clause,—"*Et si querens fecerit, &c. tunc pone*

pone defendentem, &c. ad respondendum tam domino regi de contemptu, quam præfato querenti de captione et injustâ detentione catallorum prædictorum."

"And if the plaintiff shall make, *&c.* then put the defendant, *&c.* to answer as well the lord the king for the contempt, as the aforesaid plaintiff for the taking and unjust detention of the aforesaid cattle."

The attachment is put into this writ, because it is not a *vicontiel* writ, as the replevin, but a judicial writ, founded on the supposition of an original unlawful taking; and likewise of a contempt, by not permitting the sheriff to gage deliverance.

But it seems there had been no such clause in the *withernam*, if it had been on a plaint in the county; for the sheriff cannot upon his plaint punish the eloignment, as a contempt of the authority of the king, since it is only a contempt of the process of his own court. For the same reason it seems, that if a plaint be removed by *recordare*, which gives the parties day in court, the *withernam* shall go without such special attachment, to answer the contempt of the sheriff's court below. But if the replevin had been by writ, and such writ had been removed by *pone*, and the sheriff had returned an eloignment, there it seems the attachment for the contempt had been in the *withernam*, because there the plaintiff had been attached for his contempt to the king. Dyer 189. 44 Ass. 15.

The writ of *withernam* ought to rehearse the cause which the sheriff returneth, for which he cannot replevy; as to say, F. N. B. 73. G.

"*Ac poſtquam prædictus* B. *catalla vel averia illa cepit, catalla vel averia illa (aut bovem vel equum illum) elongavit extra ballivam tuam, ita quod nullam deliberationem inde eidem* A. *facere potuiſti, ſicut nobis ſignificaſti, &c. Nos tibi præcipimus quod catalla vel averia, &c. prædicti* B. *ſine dilatione cap' in withernam, et ea detineas donec eidem* A. *&c.*"

"And after the aforeſaid *B.* had taken the cattle or beaſts, he eloigned the cattle or beaſts, (or ox, or horſe) aforeſaid, out of your bailiwick, ſo that you could not make any delivery of them to the ſaid *A.* as you have ſignified to us, *&c.* We command you that without delay you take *in withernam* the cattle or beaſts, *&c.* of the aforeſaid *B.* and them detain until to the ſaid A. *&c.*"

Reg. 82. And there are very many cauſes that the ſheriff may return upon the *pluries*, wherefore he cannot replevy, whereof divers of them do appear in the *regiſter*, which may be ſeen there.

F. N. B. 74. A. And if the ſheriff return upon the *pluries* replevin, that he hath ſent unto the bailiff of the liberty, who hath return of writs, and that the bailiff hath given anſwer that he cannot execute the writ, becauſe he cannot have a view of the cattle or goods which were taken; then the court in which ſuch return is made, ſhall award a writ of *withernam* directed unto the ſheriff; and the ſheriff ſhall thereupon make his precept unto the bailiff of the liberty; and if the bailiff of the liberty doth not make a return thereof unto the ſheriff, then the ſheriff ſhall return the whole matter in court, and thereupon the court ſhall award a writ of *withernam*,

withernam, and a *non omitas* with the ſame; and the form of the writ ſhall be ſuch:

"*Rex vic.* B. *ſalut'. Cum plur' &.* [*uſq; ibi, 'vel non potuiſti',*] *ac* R. *de* C. *balliv' libertat' de* J. *cui return' brev' noſtr' habere feciſti, tibi reſponderit, quod executionem brevis illius facere non potuit, &c. ſicut tu nobis ſignificaſti; per quod tibi præceperimus, quod averia prædicti* B. *in ballivâ tuâ ſine dil'one caperes in withernam, et ea detineres donec eidem* A. *averia ſua, &c. vel cauſam nobis ſignificares, &c. ac tu nobis returnaveris, quod idem* R. *balliv. libertat. præd. cui return. &c. habere feciſti, nullum tibi inde dedit reſponſ'. Tibi præcipimus, quod non omittas propter libertat' prædictam, quin eam ingrediaris, et capias, &c. in withernam, donec, &c. juxta, &c. Teſte, &c.*"

"George the third, *&c.* To the ſheriff of *&c.* greeting: Whereas many times, *&c.* ['until or could not execute, *&c.*'] And *R.* of *C.* bailiff of the liberty of *J.* whom you have made to have the return of our writ, hath anſwered you that he could not execute that writ, *&c.* as you have ſignified to us; wherefore we commanded you, that you ſhould without delay take *in withernam* the beaſts of the aforeſaid *B.* in your bailiwick, and them detain until to the ſame *A.* his beaſts, *&c.* or ſhould ſignify to us the reaſon, *&c.* why you could not; and you have returned to us, that the ſame *R.* bailiff of the liberty aforeſaid, whom you have made to have the return, *&c.* gave you no anſwer thereupon. We command you, that you do not omit by reaſon of the aforeſaid liberty, but that you enter

it, *&c.* and take, *&c.* in *withernam* until, *&c.* purſuant, *&c.* Witneſs, *&c.*"

F. N. B. 74. B. Stat. Marlb. c. 21. Weſtm. 1. c. 17.

And if a man's cattle be diſtrained, and he ſue a replevin, by plaint made unto the ſheriff, for which the ſheriff makes a precept to the bailiff to replevy them, and the bailiff return at the next county court, that he cannot replevy the cattle, becauſe they are eloigned, or that he cannot have view of the cattle; then the ſheriff in the ſame county court ought to make enquiry, if it be true which is returned; and if it be ſo found by the jury, then the ſheriff, *ex officio*, ſhall make a precept unto his bailiffs in the nature of a *withernam*, to take as many cattle of the other party.

Dalt. Sher. 437.

[This precept muſt be in writing, and not by word only; becauſe it is in nature of a ſecond execution of the award of the county court, and therefore not like the plaint in replevin, which, for the ſuddenneſs of the thing, may be verbal only.

Reg. 82.

But in the regiſter it is ſaid that the ſheriff is not bound to make ſuch precept without a writ.]

And if the ſheriff make ſuch precept, to take the other's cattle *in withernam*, and the bailiff will not execute the writ, then the party may have a ſpecial writ out of the chancery, directed unto the ſheriff, commanding him to do *withernam*, and to do execution of the firſt judgment; and the writ ſhall be ſuch:

"*Rex vic. &c. Monſtr' nobis* A. *quod cum* B. *et* C. *averia prædicti* A. *cepiſſent et injuſte detinuiſſent, idemq;* A *coram te proſecutus fuiſſet,*

iſſet, pro averiis prædictis ſibi, ſecundum legem et conſuetud. regni noſtri, replegiandis; ac licet per J. *ballivum tuum, quem ad averia prædicta prædicto* A. *repleg' miſiſti, teſtatum fuerit, et per inquiſitionem (prout moris eſt) in pleno com' tuo factum compertum, quod idem balliv' viſum de eiſdem averiis habere non potuit, ad eadem præfat'* A. *replegiand'; per quod in pleno com' tuo conſideratum fuit, quod averia prædict'* B. *et* C. *in ballivâ tuâ caperentur in withernam, et detinerentur quouſq; eidem* A. *averia ſua prædicta ſecundum legem et conſuetud' regni noſtri repleg' poſſint; idem tamen* A. *executionem conſiderationis prædictæ nondum aſſecutus eſt, ad damnum ipſius* A. *non modicum et gravamen; et quia præfato* A. *ſubvenire volumus in hac parte, tibi præcipimus quod ſi ita ſit, averia prædictorum* B. *et* C. *cap' in withernam, et ea detineas, quouſq; eidem* A. *averia ſua prædicta repleg' poſſis, ſecundum legem et conſuetud' regni noſtri, et juxta conſideration' prædictam, &c.*"—

"George the third, *&c.* To the ſheriff of *&c. A.* hath ſhewn to us, that whereas *B.* and *C.* took and unjuſtly detained the beaſts of the aforeſaid *A.* and the ſame *A.* before you proſecuted for the beaſts aforeſaid to be replevied to him, according to the law and cuſtom of our realm; and although it was atteſted by *I.* your bailiff, whom you ſent to replevy the beaſts aforeſaid for the aforeſaid *A.* and the fact found by inquiſition (as uſual) in your full county, that the ſame bailiff could not have a view of the ſame beaſts in order to replevy the ſame to the aforeſaid *A.* whereupon in your full county it was conſidered, that the beaſts of

the aforeſaid *B.* and *C.* in your bailiwick ſhould be taken *in withernam* and detained until to the ſame *A.* his beaſts aforeſaid, according to the law and cuſtom of our realm, ſhould be replevied; yet the ſame *A.* hitherto hath not obtained execution of the conſideration aforeſaid, to the no ſmall damage and grievance of the ſaid *A.* and becauſe we are willing to aſſiſt the aforeſaid *A.* in this behalf, we command you, that if it be ſo, you take *in withernam* the beaſts of the aforeſaid *B.* and *C.* and them detain until you are able to replevy to the ſame *A.* his beaſts aforeſaid, according to the law and cuſtom of our realm, and purſuant to the conſideration aforeſaid, *&c.*"

Reg. 83. a. [This is a writ *de executione judicii*, and therefore recites the award of the county-court as a judgment: *ſed quære*; for, in a

Salk. 582. caſe reported by *Salkeld*, the court denied that a *withernam* is an execution, for that cannot be before judgment; and they held it to be only a meſne proceſs. But in this writ, there is no attachment for contempt againſt the defendant; becauſe the proceeding was not by the king. And this writ ſeems to be deſigned to prevent the ſheriff's ſleeping upon the judgment of *withernam* in his own court; for though it be not returnable into any of the king's courts, yet the king's writs are always to be obeyed, and an attachment lies upon the ſheriff's diſobedience.]

F.N.B. 74. E. And by this writ it appears, that the

9 E. 4. 48. ſheriff may award *withernam*, on replevin ſued by plaint, if it be found by inqueſt in the county, that the cattle are eloigned,

according

according to the bailiff's return, *&c.* But upon the *withernam* awarded in the county, if the bailiff do return that the other party hath not any thing, *&c.* he ſhall have an *alias* and a *pluries*, and ſo infinite; and he hath no other remedy there, becauſe no *capias* lies but in the king's courts.

But upon a *withernam* returned in the king's bench or common pleas, if the ſheriff do return that the party hath not any thing, *&c.* there a *capias* ſhall be awarded againſt him, and *exigent* and proceſs of outlawry. F.N.B. 74.C. 20 E. 4. 11. 28 E. 3. 57.

In replevin ſued by writ, if at the *pluries* returnable the ſheriff doth return, *quod averia elongata ſunt, &c.* and the defendant appears, the plaintiff ſhall not have a *withernam*; becauſe the defendant appears at the day when the ſheriff returns the *pluries*; which is a voluntary appearance, ſince there is no day given him; therefore he has time to purge his contempt, by gaging deliverance of the cattle. But if he doth not gage deliverance of the cattle, it ſeems they may either award a *withernam*, or commit him for his contempt. F.N.B. 74.D. 2 H. 4. 9. Bro. Abr. tit. Withernam, pl. 3.

And if the defendant's cattle be taken *in withernam*, they ſhall not be delivered to the plaintiff, but the ſheriff ſhall keep them *quouſque, &c.* and the ſame appears by the words of the writ. But it is ſaid that it is the uſage in the king's bench, that they ſhall be delivered unto the plaintiff; by which it ſeems that the form of the writ of *withernam*, there is different from that in the regiſter.

This

2 H. 4. 9. This is a point that has been ſeveral times controverted, and ſome of the clerks made the diſtinction between the practice of the king's bench and common pleas; but the true diſtinction is between the ORIGINAL and JUDICIAL writ of *withernam*; by the former the ſheriff is to take *et ea detinere donec eidem, &c.* which obliges the ſheriff to detain the beaſts in his own cuſtody; but in the judicial *withernam* the words are, *capias in withernam, et ſalvo et ſecure cuſtodiri facias, donec, &c.* which is to be interpreted, that he muſt deliver them to the plaintiff upon good ſecurity, for that is making them to be ſafely kept.

Reg. Orig. et Jud. Bro. Abr. tit. Withernam, pl. 3.

The reaſon of the difference is this, that on the *vicontiel* writ below, where it was found that the beaſts were eloigned, the award of taking the defendant's beaſts could be only *quouſque* he gaged deliverance; for even an execution in the ſheriff's court was no more than levying a pain, to make the party perform the ſentence of that court; for they could not execute the ſentence of that court, by changing the property, or delivering it over to the ſuitor, but by levying pains to make them perform it. And when the return of *elongata* is made into chancery, the *withernam* goes out as a *vicontiel* proceſs, and is conceived in the ſame manner as it is below; and therefore in the writ *de executione faciendâ in withernam*, there is no return into the king's courts. But where the *elongata* is returned into the king's bench or common pleas, there the *withernam* goes out as a judicial proceſs, and there the courts, who can

Raſt. 702, 4. Co. Ent. 612. b. 1 Co. 75. Dyer 189.

can alter the property, have made it *ſecundum legem talionis, viz.* that the defendant's goods ſhall be delivered to the plaintiff to make uſe of them, until his own are reſtored. And it was ſaid to be the practice of the king's bench, becauſe that was the court where the *lex talionis*, in caſe of murder and *maihem*, firſt ſettled the practice.—

Where the ſheriff in his county levies goods of the plaintiff *in withernam*, after a return hath been awarded on a nonſuit, if he doth not deliver them to the defendant, he ſhall have an action againſt the ſheriff. Fitz. Abr. tit. Gage-Deliverance, pl. 8.

On a *recordare* the plaintiff declares, and the defendant avows; the plaintiff prays the defendant may gage deliverance, and the defendant pleads that part of the beaſts were delivered, and the other dead through the plaintiff's default; to this the plaintiff replies, that he commenced a replevin by plaint, that the ſheriff made deliverance, and took ſecurity to have return, or the value; that he was nonſuit in replevin, and on this the plaintiff took from him 20 *s.* on a *withernam*, and of this he would have the defendant gage deliverance; and it was inſiſted that it ought to be delivered by the defendant, becauſe he had avowed the taking, and that the defendant might have an action againſt the ſheriff: but in order to have deliverance, the plaintiff was forced to take iſſue, that the ſheriff delivered the 20 *s.* to the defendant. 25 E. 3. 47. Fitz. Abr. tit. Gage-Deliverance, pl. 8.

The writ of *withernam* is *ad reſpondendum tam domino regi de contemptu, quam parti de damno et injuriâ*; for to eloign the goods Raſt. Ent. 701. b. 35 H. 6. 47.

was

was to ſtop the replevin, and hinder the plaintiff from purſuing his juſt right, for which he was fineable to the king.

Stat. Marlb. c. 3. 2 Inſt. 105. Dalt. Sher. 435.

If on the *withernam* the ſheriff returns that the defendant hath no goods, a *capias* iſſues and proceſs of outlawry; and this was at common law, both in the writ of *withernam* and the writ *de proprietate probandâ:* becauſe, on both theſe writs, a contempt is ſuppoſed and appears againſt the defendant by the return of the ſheriff; and therefore the party is fineable for his contempt: and wherever there was a fine for the king, a *capias* lay at common law, as it did for a treſpaſs *vi et armis*, where there was a fine for the king. The 25 E. 3. c. 17. gives the *capias* in replevin as meſne proceſs; but this *capias* does not lie in the ſheriff's court, for it is given as in account, which was always in the king's courts, on the ſheriff's return of *nulla bona* upon the attachment.

Where the *retorn' habend'* is awarded for the defendant, *withernam*, *capias*, and proceſs of outlawry lies againſt the plaintiff, becauſe there likewiſe is a contempt againſt the king.

2 Inſt. 106. And here we muſt take notice, that the ſtatute of *Marlb.* c. 4. which ſays, that *nullus de cætero faciat ducere diſtrictiones quas fecerit extra com' in qua captæ fuerint, et ſi, &c. puniatur per redemption' veluti de re facta contra pacem*, and gives a fine to the king upon an eloignment returned by the ſheriff

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in the king's court, is but in affirmance of the common law.

If the ſheriff return that the diſtreſs is eloigned, ſo that he cannot deliver them upon the replevin, or upon the *retorno habendo*, the *withernam* goes; for where it appears there cannot be a delivery made of the ſame, the law commands an equivalent *ſecundum legem talionis*.

In a replevin at the *pluries* returnable, if the ſheriff doth return *quòd averia elongata ſunt, &c.* and the defendant doth appear, and plead that he did not diſtrain them, the plaintiff ſhall not have *withernam*. And ſo if the defendant at the *pluries* returned, appear and plead that the cattle were dead in the default of the plaintiff, the plaintiff ſhall not have *withernam*; for if he did not take them, or if the cattle be dead by the default of the plaintiff, then, *ſecundum legem talionis*, he ought not to have the defendant's cattle; and therefore, while this is in iſſue, no *withernam* ought to be awarded. F.N.B.74.E.

And if in replevin *withernam* is awarded, and afterwards the defendant avows the taking as his proper goods, or for a heriot; or denies the taking; the plaintiff ſhall gage deliverance of the *withernam*; for the *withernam* ought not to have been awarded. But the defendant ſhall not gage deliverance of the goods taken, ſince he claims them as his own. And though the defendant might have come *in pais* and claimed property, yet, whenever he claims, it is ſufficient to ſtop the deliverance. F.N.B.74.E. 30 E. 3. 9. Ld. Raym. 614. Carth. 287.

7 H. 4. 28. If *withernam* be taken, and afterwards the defendant comes into court and makes conuſance as bailiff to *J. S.* and prays aid of him, who joins in aid, the defendant ſhall have deliverance of the beaſts *in withernam*; for it belongs to the lord to make deliverance of the firſt beaſts, and not the bailiff; becauſe the bailiff took them only as a ſervant, and therefore his cattle ought not to be taken as a compenſation for the maſter's not reſtoring the diſtreſs.

2 Leon. 174. pl. 211. [The defendant in replevin avowed for *damage feaſant*, and had judgment for a return and damages; the court awarded a *retorno habendo*, the ſheriff returned *elongata*, and in conſequence a *withernam* iſſued; upon this, the plaintiff came into court, and tendered the damages aſſeſſed by the jury, and prayed a ſtay of the *withernam*, which was granted by the court, on the plaintiff's paying a ſmall fine for his contempt.

Cro. Eliz. 162. And in another caſe, where the plaintiff's cattle had been taken on a *withernam*, which iſſued under ſimilar circumſtances, the plaintiff ſatisfied the defendant his damages, and then prayed a writ of reſtitution of his cattle; upon which the court adjudged, that though the cattle were not repleviſable, yet that, upon ſatisfaction, they ſhould be reſtored to the plaintiff by a writ of reſtitution; and this they declared to be the uſual courſe.]

F.N.B. 74. F. Tr. 7 R. 2. And the defendant in ſome caſes ſhall have a *withernam* againſt the plaintiff; as if the defendant has a return awarded for him, and he ſueth a writ *de retorno habendo*, and the

the ſheriff return upon the *pluries*, *quod averia elongata ſunt*, *&c.* he ſhall have a *ſcire facias* againſt the pledges, according to the ſtatute of Weſtm. 2. c. 2. and if they have nothing, then he ſhall have *withernam* againſt the plaintiff, of the plaintiff's cattle. But in one caſe, it was held, that the avowant may have a *withernam* preſently, for it was at the common law. 5 H. 5. 7.

Hence it has been doubted, whether on the ſtatute of Weſtm. 2. c. 2. that gives pledges *de retorno habendo*, it be neceſſary to ſue out a *ſcire facias*, and to have a *nihil* returned, before you can have a *capias in withernam*; inaſmuch as you muſt ſhew it impoſſible to have the cattle returned, before you can, by the *lex talionis*, come at the goods of the plaintiff. But it ſeems the better opinion, that the ſtatute only gives him another ſecurity and remedy by *ſcire facias* againſt the pledges, and does not take away nor alter the remedy given by the common law. 5 H. 5. 7. Fitz. Abr. tit. Proceſs, 115.

In replevin, *Withernam* is awarded againſt the defendant, and afterwards the defendant claims property, and the parties are at iſſue; the plaintiff gages deliverance of the *Withernam*, and a writ iſſues for him to make deliverance accordingly; the ſheriff returns *elongata*, on which *Withernam* is awarded againſt the plaintiff, and upon *nil* returned, a *capias* iſſues; then the iſſue is found for the plaintiff, upon which he has judgment.—Now upon the return of the *pluries* againſt the plaintiff, the defendant prays an *exigent* againſt him, *& habuit*; and by 11 H. 4. 10. F.N.B. 74. A. Bro. Abr. tit. Withernam, pl. 5.

Thirwit

Thirwit the defendant ſhall recover damages for the detaining of the *withernam* in this action. The reaſon is, that as ſoon as the defendant claimed property, the *withernam* beaſts were detained unjuſtly by the plaintiff, and the ſubſequent verdict, though found for the plaintiff, did not make the detainer, which was in itſelf unlawful, lawful *ex poſt facto*; for the plaintiff could not detain beaſts *in withernam*, when the defendant claimed the thing replevied as his own property, and not as a diſtreſs. The *withernam* proceeds on the ſuppoſition that the original taking was a diſtreſs, and if the firſt beaſts had been the defendant's, they ought not to have been removed out of his poſſeſſion, much leſs ought other beaſts to have been taken *in withernam*.

35 H. 6. 47. *Per Danby* and *Moyle*, the defendant ſhall recover damages in *withernam*, on an *elongata* returned on a writ *de retorno habendo*; becauſe, if the *retorno habendo* be entirely to right the defendant, damages muſt be recoverable in caſe the beaſts be eloigned. Others were of a different opinion; and held that it is only a judicial writ to cauſe the beaſts to be returned.—But the better opinion is, that he ſhall have DAMAGES; becauſe by the eloignment he is deprived of the benefit and uſe of the beaſts, which he ought to have been immediately put in poſſeſſion of, in purſuance of the judgment.

Dyer 41.

Dyer ib. If the plaintiff be nonſuit, he may have a ſecond deliverance preſently, and this ſhall be a *ſuperſedeas* to the *retorno habendo*. And if the *retorno habendo* be ſued after the ſecond

ſecond Deliverance granted, the ſheriff ought to execute the ſecond deliverance. And this prevents the miſchief of the *withernam* againſt the plaintiff.

A. brings replevin againſt *B.* and has deliverance, and after is nonſuit, and a return is awarded to *B.* And upon this, an *elongata* being returned, *B.* has the beaſts of *A. in withernam.*—In this caſe, if the plaint was firſt in the county court, and removed into *C. B.* the ſecond deliverance muſt not be ſued of the beaſts delivered *in withernam*, but of the beaſts firſt taken; and the defendant ſhall be put to gage deliverance of the *withernam*, *(quod nota)*; and yet the plaintiff himſelf is poſſeſſed of the beaſts for the taking of which he complains; and if he makes his plaint or count, of the beaſts delivered *in withernam*, it is not good. The reaſon is before given, for the ſecond deliverance is a judicial writ appointed by ſtatute, and therefore muſt in all points purſue the record out of which it iſſues. And the plaintiff cannot declare on the *withernam*, for this is the award of the court upon his eloigning the cattle; and if he is injured by the return of the ſheriff, he has his action againſt him.

F. N. B. 74. A. *Note.* 25 Ed. 3. 90. pl. 38. 33 Ed. 3. Avowry 256. 13 Ed. 3. Replevin 37. Dyer 59. Poſt

Weſtm. 1. c. 17.

If the *withernam* be awarded againſt the defendant, on behalf of the plaintiff, *on meſne* proceſs, the ſheriff may take the beaſts of the defendant to any value, as a pain to make him appear. And when the defendant comes in, he will be fined in court, and committed till he has paid that fine, and gaged deliverance of the beaſts; and then he can have his own goods reſtored

Offic. Brev. tit. Withernam.

that were taken *in withernam*, and interplead with the plaintiff. And here he cannot plead that either he did not eloign, or that the beasts were dead in pound; for that is contrary to the *elongata* returned by the sheriff, and not to be denied; but if it be false, he has remedy against the sheriff for his false return.

Ld. Raym. 613. Salk. 581. S. C.

[But the defendant, as appears before, may plead *non cepit*, after the return of *elongata*; and the reason is, because the sheriff must either return *deliberari feci*, *elongata*, or that no person came to shew him the cattle; but he cannot return that they were not taken, for that goes to the point of the writ, which the defendant is to falsify, and not the sheriff. The sheriff must necessarily return *elongata* where he cannot make deliverance; and therefore it should seem, that no action lies against the sheriff for such return, as being false. And for the same reason, because the return of *elongata* was unavoidable, it shall not conclude the defendant from pleading *non cepit*.]

9 H. 6. 42.

If on the *withernam* awarded against the defendant, *nulla bona* be returned, a *capias* issues against the defendant, and on that *capias* if the defendant be taken, he shall be in custody until he has paid the fine, and likewise gaged deliverance; and if he be not taken, they proceed to process of outlawry.

V. Of the writ *de proprietate probandâ*.

Reg. 83, &c. Brev. Jud. 135.

If the replevin be either by plaint or by writ, and the defendant claims property, the sheriff's power to replevy the beasts is

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at a ſtop; becauſe, the defendant claiming the beaſts as his own, the ſheriff cannot redeliver that property to the plaintiff which is claimed by the defendant; and therefore, if the replevin be by plaint, the juriſdiction is at an end by ſuch claim, till the plaintiff purchaſes the writ *de proprietate probandâ*; becauſe no controverſy of property can be determined in the county court without the king's writ. Co. Lit. 145.

On the purchaſing of this writ an inqueſt of office is holden; and if on ſuch inqueſt the property be found for the plaintiff, the ſheriff is to make deliverance; but the defendant may remove it by *recordari*, and put in his plea of property above, and it ſhall be determined by a verdict. But if the inqueſt of office find for the defendant, there is an end of the replevin by plaint, becauſe the property is found for the defendant, and ſo no redeliverance can be made by the ſheriff. But the plaintiff may bring a new replevin by writ, for what is done on the plaint is no bar, nor has it any concern with the proceeding upon the writ. Dalt. Sher. 435.

If the replevin were by original writ, and the defendant claims property, the ſheriff cannot make deliverance any more than he could upon the plaint, and therefore the ſheriff in ſuch caſe returns ſuch claim of property on the *cauſam nobis ſignifices* (on the *alias* or *pluries* replevin,) as a cauſe why he cannot execute the writ; and on this return of the ſheriff, the writ *de proprietate probandâ* iſſues, that the plaintiff may not want his beaſts in the mean time;

and, if the property be found for the plaintiff, orders a redeliverance to the plaintiff, and gives the defendant a day in court. And the plaintiff may not only declare on the unjuſt caption, but on the ſubſequent injuſtice of the defendant, in claiming the goods as his own; and here the defendant may likewiſe ſet up his claim of property, and try it by verdict, where the matter will be determined under peril of an attaint.—But if this claim be found againſt the defendant on the inqueſt of office below, he is ſubject to a fine for his falſe claim of property, whereby he has ſtopped the courſe of replevin by hindrance of the deliverance of the goods, which is a contempt of the court, and ſubjects him to a fine; as likewiſe to damages to the party, who wants his goods in the mean time. The defendant muſt appoar in proper perſon to anſwer his fine to the king, but after payment of the fine he may appear by attorney; but until payment of the fine, he muſt plead in perſon.

Brev. Jud. 135, &c. Fitz. abr. tit. Propr. prob. pl. 5.

But if the verdict be found for the defendant in the writ *de proprietate probandâ*, there is an end of the replevin, as well by writ as by plaint; for the ſheriff is not by the writ *de proprietate probandâ* to deliver the goods to the plaintiff, unleſs the jury find them to be the plaintiff's. And if the defendant has the goods and poſſeſſes them as his own, they cannot proceed in an action, which ſuppoſes the goods to be re-delivered to the plaintiff. But if the plaintiff has any right to them, ſince the poſſeſſion by the inqueſt is eſtabliſhed on the ſide of the defendant, the plaintiff cannot

not get back his poſſeſſion of the goods, until he has eſtabliſhed his right in an action of law for the ſame; and therefore he may bring his action of detinue, trover, or treſpaſs, for recovering the goods, but cannot continue his action, whereby the poſſeſſion ſhould be delivered to him.

A bailiff cannot claim property BELOW when the ſheriff comes to make replevin; becauſe being only ſervant to another, in whoſe right he has taken the goods, he cannot ſay they are his own, and therefore cannot hinder the ſheriff from delivering the goods according to the command of the writ, as the proprietor might.—For though a man by claiming property may prevent his own goods being delivered, yet he cannot hinder other people's goods, becauſe the ſheriff cannot hear any ſtranger interpoſe againſt his obeying the king's writ. But the owner himſelf ſhews a juſt cauſe why the goods ſhould not be delivered until further enquiry. Yet the bailiff ABOVE may plead property in a ſtranger; for this is a ſufficient reaſon to excuſe him from damages, ſince he has not taken the plaintiff's goods from him.

Co. Lit. 145. 11 H. 4. 4. Bro. Jud. 137. Theſ. Brev. 170. 1 Lev. 90.

VI. Of the proceſs for removing the cauſe out of the inferior court.

Since the replevin is *vicontiel*, and determinable in the inferior court, where the ſuitors are judges both of the law and the fact;—and ſince the ſuitors are not awed by the peril of an attaint, nor the matter of law determined without danger of falſe judgment, from their ignorance or partiality;—

tiality;—the law hath appointed two writs to remove ſuch cauſes out of inferior courts into the ſuperior, and thoſe are the *pone* and *recordari*.

2 Inſt. 339. The *pone* is when the proceeding is by WRIT of replevin; for when a writ of replevin iſſues, and it is returned out of the county court, THAT gives the judges above authority to proceed thereon, whether the proceeding below be recorded or not: for the judges want no record from below when they have the king's writ with them.

But the *recordari* is to record the proceedings, and, when recorded, to return them into the king's bench or common pleas. So that it gives authority to record thoſe proceedings that were not of record before; therefore, if the replevin were by plaint, it muſt be removed by *recordare*, becauſe the courts muſt have their authority by proceedings returned of record.

We ſhall conſider each of them ſeparately.

I. Of the *pone*.

F. N. B. 69. M. If the replevin be removed out of the county court into the common pleas, the writ of *pone* ſhall be as follows:

"*Rex vic' Linc' ſalutem. Pone, ad petitionem petentis, coram juſticiariis noſtris apud Weſtm. (tali die) loquelam quæ eſt in com' tuo per breve noſtrum, inter* A. *&* B. *de averiis ipſius* A. *captis & injuſte detentis, ut dicitur, & ſummoneas per bonos ſummonitores præd.* B. *quod tunc ſit ibi, præfato* A. *inde reſponſurus, & habeas ibi ſummonitores & hoc breve.*"—* George the third, &c. To the ſheriff of, &c.

&c. greeting: At the petition of the plaintiff, put before our juſtices at Weſtminſter (ſuch a day) the plaint which is in your county by our writ between *A.* and *B.* of the beaſts of ſaid *A.* taken and unjuſtly detained, as is ſaid, and ſummon by good ſummoners the aforeſaid *B.* that he be then there to anſwer the aforeſaid *A.* hereof, and have there the ſummoners and this writ."

And if it be removed into the king's bench, then the writ is ſuch:

"*Rex, &c. Pone, ad petitionem petentis, coram nobis ubicunque tunc fuerimus in Angliâ, loquelam, &c.*"—"George the third, &c. At the petition of the plaintiff, put before us whereſoever we ſhall then be in England, the plaint, &c."

The reaſon why the defendant is ſummoned in this writ is, that he being already *attached* in the court below, and having appeared, it is preſumed he would have come in upon the ſummons; and when he hath appeared below to avow his diſtreſs, it is not to be ſuppoſed that the caption is an unlawful caption, on which he ſhould be attached; and therefore, when the plea is removed, the entry is, *quod defendens ſummonitus fuit ad reſpondendum.*

The plaintiff may remove the plea out of the county court, either by *pone* or *recordari*, without cauſe ſhewn, for it is his own delay; but the defendant cannot remove it without cauſe ſhewn; for, ſince it is in delay of the plaintiff, a juſt cauſe ought to appear upon record for ſuch removal. F. N. B. 69. M. 70. B.

Reg. 84. F.N.B 70.A. 2 Inſt. 339.

There are ſeveral cauſes of removal at common law; as if either party were related to the lord or ſheriff, &c. But the ſtat. of *Weſt.* 2. *c.* 2. hath added one cauſe, and that is, if the defendant diſtrain for cuſtoms and ſervices, and the plaintiff pretend to be out of his fee; for by this means the plaintiff recovered his beaſts, and drove the lord to his writ of cuſtoms and ſervices, whereby the lords were often diſpoſſeſſed of their diſtreſſes; and therefore this ſtatute provided that ſuch defendant ſhould, upon ſuch pretence of the plaintiff, remove the plea into the ſuperior courts, and try the tenure in this action.

F.N.B.70.A.

And the cauſe of removal is inſerted in the writ, after the *teſte* thereof, in this manner:

"*Quia* C. *clericus* D. *vicecomitis prædicti qui frequenter in abſentiâ vicecomitis illius tenet placita ejuſdem comitatus, eſt conſanguineus prædicto* A. *propter quod idem vicecomes favet ipſi* A. *in loquelâ prædictâ, ut dicitur, fiat executio iſtius brevis, ſi cauſa ſit vera et præd'* B. *petit, et aliter non.*"—"Becauſe *C.* clerk of *D.* the ſheriff aforeſaid, who frequently in the abſence of that ſheriff holds pleas of the ſame county, is akin to the aforeſaid *A.* wherefore the ſame ſheriff favours the aforeſaid *A.* in the plaint aforeſaid, as is ſaid, let this writ be executed if the cauſe be true, and the aforeſaid *B.* requires it, and otherwiſe not."

Or thus: "*Quia præd'* B. *cepit averia præd. in feodo ſuo pro conſuetudinibus et ſervitiis ſibi debitis, ut dicitur, fiat executio, &c. (ut ſupra.")*—"Becauſe the aforeſaid *B.* took the beaſts

beaſts aforeſaid in his fee for cuſtoms and ſervices due to him, as is ſaid, let execution, &c. as above."

Or thus: "*Quia præd'* B. *clamat præd'* A. *eſſe nativum ſuum, et eâ occaſione aſſerit averia præd' eſſe ſua propria, propter quod loquela illa in comitatu deduci non debet, ut dicitur, fiat executio, &c. (ut ſupra.")*—"Becauſe the aforeſaid *B.* claims the aforeſaid *A.* to be his villain, and upon that account aſſerts the beaſts aforeſaid to be his own, wherefore that plaint ought not to be carried on in the county, as is ſaid, let execution, &c. as above."

And the ſheriff cannot return that the cauſe is not true.—But notwithſtanding the ſaid cauſes, the defendant may avow for *damage feaſant*; for the cauſe of removal is no material part of the writ, nor is it traverſable, and therefore the defendant may juſtify the taking and detention of the diſtreſs in any other manner. 7 H. 6. 32. 10 Ed. 2. Avowry 213, 515. 20 Ed. 3. Avowry 130.

But if either plaintiff or defendant remove the ſuit out of the LORD'S COURT, they ought to ſhew cauſe, becauſe they ſhould not ouſt the lord's court of the profits of ſuch juriſdiction, without apparent reaſon. F.N.B. 70. A.

And it ſeems that ſuch cauſes uſed anciently to be examined, before ſuch writs were granted. So in chancery they uſed to examine the cauſe of action before the granting of original writs; but this in both caſes is now neglected, and ſuch writs iſſue of courſe.

And the cauſe of removal out of the lord's court ſhall be ſhewn in this manner: F.N.B. 70. A. Reg 84. b.

"*Quia*

" *Quia prædictus abbas eſt dominus curiæ de* C. *in quâ loquelâ illa pendet per retornum brevis noſtri, propter quod idem* A. *in loquelâ præd' in eâdem curiâ juſtitiam conſequi non poteſt, ut dicitur, fiat executio, &c.*"—" Becauſe the aforeſaid abbot is lord of the court of *C.* in which that plaint hangs by the return of our writ, wherefore the ſame *A.* cannot obtain juſtice in the plaint aforeſaid in the ſame court, as is ſaid, let execution, *&c.*"

Or thus: " *Quia* J. *Ballivus* K. *archiepiſcopi Cantuar' curiæ ſuæ de* N. *coram quo loquela illa pendet, per retornum brevis noſtri in eâdem curia implacitatur per præd.* B. *de quodam debito* 20 *marcarum, coram præf. juſticiariis noſtris per breve noſtrum, propter quod idem ballivus in odium ipſius* B. *favet ipſi* A. *in loquelâ ſuâ præd', ut dicitur, fiat executio, &c.*"—" Becauſe J. bailiff of K. archbiſhop of *Canterbury*, of his court of *N.* before whom that plaint hangs, by the return of our writ in the ſame, is impleaded by the aforeſaid *B.* of a certain debt of 20 marks, before our juſtices aforeſaid by our writ, by reaſon whereof the ſame bailiff out of hatred to the ſaid *B.* favours the ſaid *A.* in his aforeſaid plaint, as is ſaid, let execution, *&c.*"

The former concluſion is proper when the plea is removed at the ſuit of the plaintiff; but the latter when it is removed at the ſuit of the defendant.

21 H. 6. 50. F.N.B. 70. A. *Note.* If the plaint be removed by the defendant by *pone*, the plaintiff ſhall be demanded at the day in bank, under the peril of a nonſuit, and if he make default, a return ſhall

ſhall be awarded and no proceſs; but if the plaintiff appear, and the defendant make default, a *diſtringas* ſhall iſſue, and on *nulla bona* returned, then a *capias* and proceſs of outlawry. So if the plaint be removed by *pone* or *recordari* by the plaintiff, there if he make default he ſhall be nonſuit; and if the defendant make default, then ſhall iſſue a *pone per vadios*, and ſo proceſs of outlawry.

By this it appears that whenever the defendant hath day in court by the writ, there the plaintiff is demandable under peril of a nonſuit; and the reaſon is, that when the plaintiff brings in the defendant, he ought to attend himſelf; and when the defendant is brought into the court below, and removes the plea into the court above, he thereby gives himſelf and the plaintiff a day in the court above, and the plaintiff, having put in pledges of proſecution, ought to follow the writ; ſo that wherever day is given, there the defendant may demand the plaintiff, under peril of a nonſuit. But where day is given to the defendant by the writ, there no judgment can be given againſt him till he appears, for that would be to give judgment *parte inauditâ*; and therefore though he himſelf removes the plaint by *recordari*, whereby he gives himſelf a day in the ſuperior court, yet if he do not appear at the day, they muſt carry on the proceſs to make him appear, though he has appeared in the court below, ſince ſuch appearance does not give authority to the court above to proceed, unleſs he has firſt appeared there. But there is judgment

ment of nonſuit againſt the plaintiff if he does not appear, for his non-appearance is not proſecuting his plaint, which is a non-ſuit.

3 H. 6. 2. F.N.B.69.M. *Note.* *Pone* (at the ſuit of the defendant) *loquelam quæ eſt in comitatu tuo, inter* A. & B. *de averiis ipſius* A. *captis, &c.* and ſays, *præfato* B. where it ſhould be *præfato* A. The plaintiff's council prayed damages, for that otherwiſe the plaintiff had no remedy; for the *pone* is abated, and ſo the court is without warrant: yet it ſhall not be remanded, for the county court and the courts above are the courts of the king; and a new *pone* doth not lie, becauſe the plaint is here. On the other hand it was ſaid, that a *pone* or *recordari* is but to remove the plaint, ſo that when the plaint is removed, the *pone* or *recordari* ſhall never abate, for that the court is poſſeſſed of the plaint; but yet the plaintiff hath not a day in court, becauſe ſuch writ, not being good, cannot give the plaintiff or defendant a day; therefore the court may make a ſpecial writ to the ſheriff to warn the plaintiff to purſue the plaint; and ſo it was done in this caſe.

12 H. 4. 14. 3 H. 6. 2. 4 Inſt. 266.

F.N.B.69.M *Note.* 1 R. 3. 4. 7 E. 4. 23. 6 E. 3. 55. 8 E. 3. 71. Cro. El. 543. Moor 30. *contra.* The plaint is well removed, although the *pone* bear date before the plaint entered. So if the plaint be removed by *certiorari*, where it ought to be by *pone* or *recordari*. So if one plaint be removed where another ought to have been. Or where there is a variance between the plaint and the writ.

II. Of the writ of *recordari*.

F.N.B.70.B. When the plaint is in the county, and the replevin ſued there without writ, then if

if the plaintiff or defendant will remove it, he ought to ſue a writ of *recordari*, out of the chancery, directed unto the ſheriff; and the writ ſhall be ſuch:

"*Rex vic' Linc' ſalutem. Præcipimus tibi, quod in pleno com' tuo recordari facias loquelam, quæ eſt in eodem com' ſine brevi noſtro, inter* A. *&* B. *de averiis ipſius* A. *captis & injuſte detentis, ut dicitur, & recordum illud habeas coram juſticiariis noſtris apud Weſt.' (tali die) &c. ſub ſigillo tuo & ſigillis quatuor legalium militum ejuſd' com' ex illis qui record. ill. interfuerunt; & partibus eundem diem prefigas, quod tunc ſint ibi, in loquelâ illâ, prout juſtum fuerit proceſſuri; & habeas ibi nomina præd' quatuor militum, & hoc breve. Teſte, &c. Fiat executio iſtius brevis, ſi præd.* A. *hoc petat, & aliter non.*"—"George the third, &c. To the ſheriff of, &c. greeting: We command you that you cauſe to be recorded in your full county the plaint which is in the ſame county, without our writ, between *A.* and *B.* of the beaſts of the ſaid *A.* taken and unjuſtly detained, as is ſaid, and have that record before our juſtices at *Weſtminſter* (ſuch a day, &c.) under your ſeal and the ſeals of four lawful knights of the ſame county of thoſe who were preſent at the recording it, and prefix the ſame day to the parties that they be then there, to proceed in that plaint according to juſtice, and have there the names of the ſaid four knights and this writ. Witneſs, &c. Let this writ be executed if the aforeſaid *A.* requires it, and otherwiſe not."

The

38 Ed. 3. 31. The words *ut dicitur* are only inſerted when the writ is brought by a common perſon, and not when it is brought by the king.

F.N.B.70.B. And by this writ it appeareth that the plaintiff may remove the plaint by *recordari*, without any cauſe put in the writ; but the defendant cannot remove the plaint without ſhewing cauſe in the writ, as is before ſaid upon the *pone*. And the cauſes for the defendant ought to be ſuch.

"*Quia præd'* B. *placitando in com' præd. aſſerit ſe averia præd' cepiſſe in ſeparali ſolo ſuo, ut in damno ſuo ibidem, in quo quidem ſolo præd'* A. *clamat communiam paſturæ, ut dicitur; quæ quidem loquela, eo quod tangit liberum tenementum (ut prædictum eſt) in eodem com' ſecundum legem & conſuetudinem regni noſtri ſine brevi noſtro placitari non debet. Fiat executio iſtius brevis (ſi cauſa ſit vera) & præd.* B. *hoc petat, & aliter non.*" —Becauſe the aforeſaid *B.* in pleading in the county aforeſaid, aſſerts that he took in his ſeparate ſoil the beaſts aforeſaid, as in his damage there, in which ſoil the aforeſaid *A.* claims common of paſture, as is ſaid, which plaint inaſmuch as it concerns the freehold (as is aforeſaid) ſhould not be pleaded in the ſame county, according to the law and cuſtom of our realm, without our writ. Let this writ be executed (if the cauſe be true) and the aforeſaid *B.* requires it, and otherwiſe not."

12 H. 4. 17. Mich. 50 Ed. 3. 12. Fitz. *abr. tit.* If the plea be removed out of the court of the lord, (in ancient demeſne, *ut videtur*) the cauſe is traverſable; *contra*, if out of

of the court of the king. And if the cauſe be inſufficient, or none at all, yet the parol ſhall not be remanded; otherwiſe if in ancient demeſne; for, upon a *recordari* out of ancient demeſne, the plea is wholly upon the cauſe, and therefore the plaintiff may be nonſuit in ſuch *recordari*; but if it be out of any other court, the plea is upon the mere matter, and therefore the plaintiff cannot be nonſuit upon the *recordari*, but it muſt be in the action; the reaſon is, becauſe ancient demeſne is a privilege going with the ſoil (ſuch manors being anciently compoſed of the king's huſbandmen), and the pleas cannot thence be removed without cauſe, becauſe it would alter the condition of the ſoil, to be impleaded in the king's courts, without ſuch real cauſe made out. *Cauſe de remover plea*, pl. 10. F. N. B. 70. B. *Note.*

Beaſts were taken in *D.* in the county of *Wilts*, (which was within the precincts of the honour of *Wallingford* in the county of *Berks*,) and were driven into the county of *Berks*, (where the caſtle and court of the honour of *Wallingford* was) and there the plaintiff had deliverance without writ; the defendant ſued a *recordari* to the ſheriff of *Berks*, *quia diſtrinxit in feodo*, and the plaintiff came, but the defendant made default; and it was adjudged: 1. That the parol was well removed, notwithſtanding the taking was in another county. 2. That proceſs of outlawry did not lie here without a default of the defendant, as it does in replevin. 3. That yet if he came in by proceſs of outlawry, he ſhould be put to anſwer. 4. That he might avow *damage feaſant*, 20 Ed. 3. 21. Dyer 168.

ſant, notwithſtanding this ſpecial cauſe aſſigned.

F.N.B.70.B. And if a replevin be ſued by plaint, in the court of any other lord, than in the county court before the ſheriff, then the *recordari*, which is ſued by the plaintiff or defendant, ſhall be directed unto the ſheriff; and the writ ſhall be thus:

"*Rex vic' Linc.' ſalutem. Præcipimus tibi quod aſſumptis tecum quatuor diſcretis & legalibus militibus de com' tuo in propriâ perſonâ tuâ accedas ad curiam* W. *de* C. *& in illâ plenâ curiâ recordari facias loquelam quæ eſt in eâdem curiâ ſine brevi noſtro &c. & recordum illud habeas ſub ſigillo tuo & ſigillis quatuor legalium hominum ejuſdem curiæ qui record. ill. interfuerint, & partibus, &c. (ut ſupra) quia præd.* A. *eſt ballivus præd.* W. *de* C. *curiæ ſuæ præd. & tenet placita ejuſdem curiæ, & judex in ſuâ cauſâ eſſe non debet.*"—"George the third, &c. To the ſheriff of, &c. greeting: We command you that you take with you four diſcreet and lawful knights of your county, and go in your own proper perſon to the court of *W.* of *C.* and in that full court cauſe to be recorded the plaint which is in the ſame court, without our writ, &c. and have that record under your ſeal and the ſeals of four lawful men of the ſame court, who were preſent at the recording it, and to the parties, &c. (as above) becauſe the aforeſaid *A.* is bailiff of the aforeſaid *W.* of *C.* of his court aforeſaid, and holds the pleas of the ſame court, and ought not to be judge in his own cauſe."

[Note,

[Note, this writ is sometimes called a *recordari facias loquelam*, and sometimes an *accedas ad curiam*.]

If the plea be discontinued in the county, yet the plaintiff or defendant may remove the plaint into the common pleas or king's bench by *recordari*, and it shall be good, and the plaintiff shall declare upon the same; and the court shall hold plea upon the same plaint: and therefore if the defendant be without addition in the plaint, he shall not have addition in the *recordari*, although process of outlawry lie thereon. For the plea is not held on a writ, but a plaint only, and so not within the intent of the stat. of 1 *H.* 5. *c.* 5. which speaks only of writs original, &c. F.N.B. 71. a. 2 H. 5. 6. 3 H. 6. 30. F. N. B. 71. A. Note.

And if the plaint be continued, and issue joined, in the county court, yet nothing shall be removed but the plaint; and therefore in the court above, the plaintiff is to declare *de novo*. The reason is, that the *pone* and *recordari* give the defendant a day in the court above; and when at common law the plaintiff and defendant appeared at the day, the plaintiff counted and declared, and the defendant avowed *ore tenus*, that the court might know the cause of complaint; and being in a new court, it was all to be rehearsed, in order that they might understand it. And this the rather, because, being a superior court, they were not bound by any decision made on the proceedings below. This could be no inconvenience in replevin at common law, where the plaintiff might bring his replevin *toties quoties*; and where when the defendant removed it,

and gave another day, it was upon cauſe ſhewn of inability or partiality in the courts below.

[But yet, to ſome purpoſes, the court are made judges of the whole proceedings, on the removal of the plaint by *recordari*; and therefore, if a *withernam* be awarded in the court below, the plaintiff ſhall gage deliverance in the court above. 21 H. 6. 40.]

And not only on a *pone* or *recordari* is the court to take no notice of any pleadings or proceedings but what are rehearſed or recorded before them; but even on a *habeas corpus*, which is a writ of liberty, the plaintiff muſt follow the body of the priſoner, and declare againſt him *de novo*; for the court cannot take notice of the pleadings rehearſed before inferior judges, which do not come up before them, but by writ of falſe judgment, where the court is not of record;—or by writ of error, where it is;—and therefore they have nothing to do with their proceedings until judgment is given.

But where they have the body of the defendant, the plaintiff may proceed originally againſt him. So in *pone*, where they have the original writ, they may proceed originally upon it. And the *recordari* makes the plaint of record; for the ſtatute of *Marlbr'* which gives the plaint provides, in the firſt chapter, that all complaints of diſtreſſes ſhall come into the courts of the king; which gives the king's courts authority to record ſuch plaint as was in the county. The words are, *Et præterea, quidam*

dam eorum ſe per miniſtros domini regis juſticiari non permittant, nec ſuſtineant quod per ipſos liberenter diſtrictiones, quas authoritate propriâ fecerint ad voluntatem ſuam; proviſum eſt, concordatum & conceſſum quod tam majores quam minores juſticiam habeant & recipiant in curia domini regis, & nullus de cætero ultiones aut diſtrictiones faciat per voluntatem ſuam abſq; conſideratione curiæ domini, ſi forte damnum vel injuria ſibi fiat unde amendas habere voluerit de aliquo vicino ſuo, ſive majore ſive minore.

By this ſtatute it appears, that the plaint, though given for expedition before the ſheriff, may at any time be removed and recorded in the court of the king. [It has even been adjudged, that the delivery of a *recordari* to the clerk of a county court, after an interlocutory and before final judgment, is a ſtay of all further proceedings in that court. 2 Bur. 1151.

And when the plaint is removed by *recordari*, the court above will award a *capias* on the defendant's default, though no ſuch proceſs could have iſſued in the court below. 3 H. 6. 55. But it is otherwiſe of a *juſticies*, for on that no *capias* lies, even in the court above. 4 Inſt. 266.]

In a *recordari* to remove a record out of ancient demeſne, the writ ſhall ſay *loquelam et proceſſum*, and not *recordum*; yet the form of the regiſter in the *recordari*, as before ſaid, is *et recordum illud habeas*. 36 H. 6. F.N.B. 70. B.

In the ſheriff or lord's court, and in ancient demeſne, in all replevins, the plaint is called *loquela*, becauſe it is not a record, as it is in their court; but in the *accedas ad*

curiam, the tranſmiſſion of the plaint by the king's writ, under the ſeals of four of the ſuitors, in the preſence of the ſheriff and four knights, is called *a record*, becauſe it is ſent to be a record in the courts above.

9 H. 6. 58. 34 H. 6. 42. *contra.* F.N.B. 71. C. Where by *recordari* the record was removed by the ſheriff out of the court of chancery at *Canterbury*, it was ſaid, that the court of *Canterbury* might have refuſed to obey the writ; for being a court of record by commiſſion, the plea ought not to be removed by *recordari*, but by *habeas corpus cum cauſâ*, or *certiorari*. And it was held, that inaſmuch as the plea was come hither without warrant, all was void, and that therefore the court could not remand it, for the record remained at *Canterbury*; and if no proceeding there according to the ſuit of that court, it was diſcontinued.

Reg. 6, 7. Yet in the regiſter there is a *recordari* on a foreign voucher out of *Cheſter*.

The reaſon is, becauſe the *recordari* is to return a *loquela*, and when the proceedings are in a court of record, it is not a *loquela*, but a RECORD in its own nature in the court below.—Again, the *recordari* ſuppoſes a partiality in the court below, which cannot be ſuppoſed in a court of record, acting under the king's commiſſion. Nor have the ſuperior courts any inherent right, to judge of what any other inferior court of the king is poſſeſſed of, until it comes before them by *habeas corpus cum cauſâ*, or by *certiorari*.

The *habeas corpus* is the WRIT OF LIBERTY; and the law hath that tenderneſs for the liberty of a man, that when any perſon

is

is impriſoned, he may purchaſe that writ to any ſuperior court; and if any of theſe courts ſee cauſe on the return to diſcharge him, he ſhall be freed. Hence it is, that the body muſt be ſent, and the cauſe of impriſonment muſt be ſent with it.

A *certiorari* is to return the proceedings on another ground. All inferior courts are of definite and bounded authority, and cannot award execution out of the diſtrict; therefore, leſt juſtice ſhould fail, proceſs of *certiorari* goes to remove the record into the upper courts. And both theſe ways have been uſed to give juriſdiction to the upper courts.

The *certiorari* coming to remove a record on ſuppoſition that inferior juriſdictions may exceed their bounds, they muſt ſend the record in the condition it was when the *certiorari* came to them; but it ſtops their proceedings, from the time they receive it.

If a record be removed out of a court of record by *recordari*, it cometh in without warrant, and the court ſhall not hold plea thereof. But if a record cometh in court without a warrant, the party may ſue a writ directed unto the juſtices, that they may proceed upon that record *quod coram vobis reſidet*. F.N.B.71.C.

The meaning of the diſtinction is this, that when a *recordari* is ſent down to a court of record to remove a replevin there depending, they may proceed and not obey the writ; becauſe that replevin is of record in the king's court, and conſequently *in curia regia* according to the ſtatute: and therefore the writ to make it a record is

actum agere. But if they do obey the writ, and ſend the record, they cannot afterwards proceed upon it, becauſe they have ſent it away from them: and the court above cannot proceed upon records of another court, as they do in replevin on the plaint ſent before them by *recordari*; and therefore there muſt be a writ to give them authority to proceed on the record *quod coram vobis reſidet.* But they have an inherent authority to ſee that other juriſdictions do not exceed their limits; and therefore, when they ſend a *certiorari* to remove ſuch record, they ought to proceed above on the plaint
F.N.B.71.D. entered in the county. [If the *recordari facias* bear date before the plaint was entered in the county,] yet the record is well removed, becauſe both courts are the courts of the king. But if the record be removed out of the court of any other lord by ſuch writ, which beareth date before the plaint, it is not good. The reaſon is, becauſe the ſheriff's county being held or farmed from the king, as immediate deputy, the king may remove the replevin out of the ſheriff's court into his own, without any cauſe ſhewn; and therefore it is not material whether the *recordari* be teſted before the plaint or not: and although the defendant cannot remove the plaint without cauſe, yet this is not to prevent the ſheriff from being ouſted of his juriſdiction, but that the plaintiff may not be delayed without good cauſe ſhewn.—But where the record is removed out of the lord's court, which has a juriſdiction by grant or preſcription, there muſt be cauſe ſhewn for ſuch removal; and

ſuch

ſuch cauſe will be abſurd if the *accedas ad curiam* bears date before the plaint; for that cannot be a cauſe to ouſt the lord of juriſdiction, which was not in being at the time of the writ iſſuing.

VII. Of *replevin* itſelf, and herein are to be conſidered,

1. For whom, and in what caſes it lies.
2. The declaration in replevin.
3. The ſeveral pleas in this action; and herein of the avowry.
4. Of the judgment in this action, whether for the plaintiff or defendant; and herein of the writ *de retorno habendo*, and of the writ of ſecond deliverance.

1. For whom and in what caſes it lies.

The replevin lies as well for goods in which I have only a qualified property, as for thoſe in which I have the abſolute property. As if goods be in my hands, in order to be delivered over to *J. S.*—and *J. N.* takes them from me, I may have a replevin againſt *J. N.* to bring back theſe goods into my own poſſeſſion; becauſe I have a right to the poſſeſſion of theſe againſt every body but *J. S.* and therefore as *J. N.* is a treſpaſſer for violating that poſſeſſion, ſo I may qualify that tort he hath done, by bringing the replevin which complains of the unjuſt taking, and that *J. N.* detains them *contra vadios & plegios*. Bro. Abr. tit. Repl. pl. 29. 2 Ro. Abr. 430. Bro. tit. Repl. pl. 8. Doct. Plac. 314.

So it is if cattle be farmed to me to manure my land; if they be taken out of my cuſtody, I may bring replevin for them; becauſe during the term I ought to have the uſe of them: and therefore the caption and detention of them, by any perſon, is unlawful,

lawful, which is the injury complained of in the replevin; or I may have in this caſe a ſpecial replevin, ſetting forth my ſpecial property.

2 Ro. Abr. 431. If *A.* takes my goods by the command of *B.* I may take the replevin againſt both; becauſe in treſpaſs both are principals, and equally guilty of the unjuſt caption and unjuſt detention.

2 Ro. Abr. 430. 1 H. 4. 18. Bro. Abr. tit. Replev. pl. 14, 54. 9 Co. 22. b. 23. a. If the lord diſtrains the beaſts of the tenant, and the meſne puts his own beaſts in the pound in lieu of the tenant's, the meſne may afterwards have a replevin for his own beaſts, and the lord cannot plead that the beaſts of the tenant, and not of the meſne, who is the plaintiff in replevin, were taken:—becauſe, the tenant having paid his rent to the meſne, the meſne is thereby obliged to defend the tenant from the lord's diſtreſs. But this cannot be done unleſs the meſne becomes party to the ſuit, and be ſubſtituted in the place of the tenant.

By this means, the meſne may ſhew the ſervices performed to the lord, for which the diſtreſs was taken; and conſequently that the tenant ought not to be diſturbed. Hence it is, that the writ of meſne is allowed to the tenant, to bring in the meſne if he does not come in of himſelf; becauſe the tenant being a ſtranger to the tranſactions between the lord and the meſne, he cannot defend himſelf againſt the lord but by the meſne; and therefore, where the meſne is to take the defence, it is but fit he ſhould be allowed to pledge his own cattle, and diſcharge his tenants. And the lord hath no prejudice, becauſe there is ſtill a good

a good pledge to anſwer his ſervices if there be any due. So and for the ſame reaſon it is, if my leſſor diſtrains my tenant, I may put my beaſts in the pound in lieu of my tenant's, and then replevy them, as if they had been originally taken.

Several perſons cannot join in one replevin for ſeveral chattels, where the property of them is ſeveral; becauſe, where ſeveral diſtreſſes are taken by the ſame perſon of different men, each hath a ſeveral and particular injury done him, if the diſtreſſes be unlawful; and therefore they cannot jointly complain of an unjuſt caption and detention, where the property is ſeveral. For what reaſon have I to complain, or to ſeek redreſs in my own name, for an injury ſuppoſed to be done to another? 3 H. 4. 16. Bro. Abr. tit. Repl. pl. 12. Doct Plac. 315. Co. Lit. 145.

If beaſts which are *feræ naturæ* be reclaimed by me, and are reſtrained or taken out of my cuſtody, I may have a replevin for them; becauſe I have a property in them while they continue with me. But this property only remains while they are in my poſſeſſion, or retain the *animum revertendi*; and therefore if they leave me of themſelves, and another takes them while they are out of my poſſeſſion, and they have not the *animum revertendi*, I cannot have a replevin for them; becauſe, in ſuch caſe, I have no property in them. 2 Ro. Abr. 430. Bro. Abr. tit. Repl. pl. 64. Doct. Plac. 314.

If a ſuperior juriſdiction award an execution, it ſeems that no replevin lies for the goods taken by the theriff by virtue of the execution; and if any perſon ſhould pretend to take out a replevin, and execute it, the court of juſtice would commit them for a Lev. Ent. 152. Lutw. 1191. Raſt. Entr. 275. Bro. Abr. tit. Repl. pl. 22.

contempt

contempt of their juriſdiction, becauſe by every execution the goods are in the cuſtody of the law; and the law ought to guard them: and it would be troubling the execution awarded, if the party on whom the money was to be levied, ſhould fetch back the goods by a replevin. And therefore they conſtrue ſuch endeavours, to be a contempt of their juriſdiction, and upon that account commit the offender. But if any INFERIOR juriſdiction iſſues an execution, a replevin will lie for the goods taken by that execution; becauſe the inferior juriſdiction being reſtrained within particular limits, the officer who took the goods, is obliged to ſhew that he took the goods within thoſe limits, and that the inferior court which iſſued the execution did not exceed their authority in iſſuing it. Beſides, an inferior court of record cannot commit for contempt out of the court. Hence it is, that the officer of an inferior court, is to ſhew by what authority he took the goods. Thus, in a replevin, the defendant was put to juſtify, by a condemnation before a juſtice of peace, for not entering ſtrong waters, and a warrant on that for levying 20*s.* fine on the plaintiff. [But, in a ſubſequent caſe, the court granted an attachment againſt the under-ſheriff, for granting a replevin of goods, diſtrained on a conviction for dear ſtealing. Str. 1184.]

3 Lev. 204. Ayleſbury v. Harvy.

A replevin doth not lie againſt the king, nor where the king is party, nor where the taking is in right of the king; and if ſuch replevin ſhould be granted, the ſheriff ought to forbear to execute it, when he is informed

3 H. 7. 1. Bro. Abr. tit. Repl. pl. 33. Vide ibid. pl. 51. contr.

informed the king is party; becauſe all the king's debts are of record,—he taking nothing but by matter of record: and therefore the cattle are ſeized for the king's debts by the *levari facias*, which is a writ of execution, and conſequently no replevin lies againſt the king, any more than it does for goods taken in execution at the ſuit of common perſons.

Executors ſhall have replevin for the goods of the teſtator taken in his life time, becauſe the general property is in the executors, and the poſſeſſion ought to follow that; and therefore the executor may recover the poſſeſſion by this writ of replevin. Bro. Abr. tit. Repl. pl. 56. Sid. 80. Arundel v. Trevyl. Raſt. Ent. 560, 561.

If the goods of a feme ſole be taken and ſhe marries, the huſband alone may ſue the replevin, becauſe the property is transferred by the marriage, and veſted abſolutely in the huſband, ſo that he may releaſe it; and conſequently he may have an action in his own name to bring back the property. F.N.B.69.K.

In replevin for a ſow and pigs, the defendant, as to the ſow avows *damage feaſant*, and for the pigs pleads *non cepit*. The jury found for the defendant, as to the ſow; and for the pigs, they found that the ſow farrowed them after ſhe was diſtrained, and in the poſſeſſion of the defendant. The plaintiff had damages for the pigs on this plea of *non cepit*; becauſe the pigs were taken by the defendant as well as the ſow, though they were not *damage feaſant*; and therefore the defendant ſhould have ſet forth the ſpecial matter as to the pigs. Bro. Abr. tit. Repl. pl. 41. Sid. 82.

No

Bro. Abr. tit. Repl. pl. 34. No replevin lies for charters relating to the inheritance, becauſe the charters are reckoned part thereof, and as ſuch deſcend with it to the heir; and not being eſteemed in law chattels, are not by law repleviſable.

2 Show. 91. Nightingale v. Adams. A replevin doth not lie for goods taken in foreign parts, though afterwards brought into the realm; becauſe ſuch a foreign caption might have been juſtifiable according to the law and cuſtom of the place where it was made, though it may be illegal by our law: and therefore ſuch caption ought not to be tried here.

F.N.B. 69. I. Doct. Plac. 315. If beaſts be taken in one county and carried into another, the plaintiff may have his replevin in either county; becauſe it is a caption in every county where they are taken by the defendant.

Regr. 81. b. Bro. Abr. tit. Repl. pl. 65. This writ of replevin is always executed by the ſheriff, even in his own caſe, where he diſtrains the goods of another, becauſe this writ is a *juſticies* to the ſheriff, on which he is to hold plea in his county court; and therefore no other can intermeddle in the execution thereof but the ſheriff, who is to preſide over the ſuitors, as judge therein.

2. Of the declaration in replevin.

Hob. 16. Moor 678. 2 Mod. 199. Doct. Plac. 315. Bro. Abr. tit. Repl. pl. 47. 2 H. 6. 14. Cro. Eliz. 896. Wardv. Savil. And this is little more than a tranſcript or recital of the writ itſelf. But in the declaration you muſt not only alledge that the defendant took the beaſts at ſuch a place, but alſo you muſt alledge the *locus in quo*, as *in quodam loco ibidem vocato*, &c. for it is not enough to alledge ſuch a place from whence the *venue* may come; but the place muſt be ſo PARTICULARLY ſpecified, as to give the avowant an opporunity to ſhew

ſhew that he had a right to take the goods, in that PARTICULAR place; becauſe the right of the caption may turn on the place; and in this action the freehold may come in diſpute. And therefore it is neceſſary to ſpecify the place particularly, wherein the beaſts were taken, which is equivalent to the new aſſignment in treſpaſs. If the *locus in quo* be not particularly ſpecified in the count, the defendant may demur SPECIALLY, and ſhew it for cauſe; for the defendant may juſtify the taking in that particular place, for cauſes he could not have any where elſe. But if the defendant ſhould plead *non cepit*, the count would be good, becauſe then the place cannot be material when the defendant denies the taking.

The writ of replevin is: *quod cepit averia & injuſte detinet contra vadios & plegios*; to which writ the ſheriff returns *replegiari feci*. There you go on in the replevin only for damages for the caption, and then in the count you recite the writ in the *detinuit*, and count in the *detinuit* for damages;—and though the writ be taken out in the *detinet*, yet when the ſheriff hath returned *replegiari feci* upon it, that return is a warrant to recite the writ in the *detinuit*;—for if the writ was recited in the *detinet*, and the count was in the *detinuit*, it would be a variance for which the judgment may be arreſted, or the defendant might have demurred. But where the ſheriff does not replevy the beaſts, there you muſt recite the writ in the *detinet*, and count in the *detinet* alſo, becauſe the beaſts are not delivered; and there you recover as well the value

2 Lutw. 1150. Petree v. Duke. F.N.B. 69. L. Co. Ent. 610, 611.

value of the beaſts in damages, as damages for the detention. And this is a ſhorter way than to ſue a *withernam* and *cap.* for a return of the beaſts.

3. Of the ſeveral pleas to this *action*, and theſe are of four ſorts. Pleas in abatement. The general iſſue, *non cepit.* The juſtification; and this of two ſorts, either diſaffirming property in the plaintiff, or admitting it. The avowry.

As to pleas in abatement. There is a difference between pleas in abatement of the writ in replevin, and in other actions; for in other actions the pleas in abatement go merely to the form of the writ; becauſe other actions are for debt or damages, in which the plaintiff hath no poſſeſſion of the thing itſelf until judgment and execution, and therefore the pleas in abatement are to the form of that writ only, and all pleas to the right are in bar of it: but in replevin, the deliverance of the goods is immediate, ſo that the plaintiff hath the poſſeſſion before the defendant can plead thereunto; and therefore, according to the genius of this action, pleas that are in abatement, muſt give the defendant a TITLE to the return of the beaſts. For it is not enough merely to quaſh the writ, as in other caſes, where the defendant is *in ſtatu quo* when the writ is quaſhed;—but in this action, that the defendant may be *in ſtatu quo*, he muſt not only ſhew that the writ ought to be quaſhed, but that he ought to have a return of the beaſts himſelf. And here, the pleas in abatement, differ from the pleas in bar only

only in this; that in abatement they do not avow or acknowledge the caption and detention, which is the gift of the action; but they muſt go ſo far as to entitle the defendant to a delivery, or elſe they do not take away the force and effect of the writ of replevin, which is always executed by the delivery.

Therefore in this action the defendant may plead PROPERTY in himſelf in abatement; for by ſuch plea he doth not deny, or confeſs, and avoid the caption, and therefore it is not a bar; but only ſhews that the plaintiff hath not a right to a deliverance; and by ſhewing that, the goods ought to be returned to the defendant on ſuch abatement, as they were before the writ was taken out. But *quære*, for it ſeems by the later authorities, that it ſhould be pleaded in bar. 1 Vent. 249. 6 Mod. 81.

[It is to be obſerved that theſe *later authorities* are not pointed out, and the editor, after a diligent ſearch, hath not been able to find them. There are indeed caſes, in which the courts have determined, that property in the defendant MAY be pleaded IN BAR, but none that EXCLUDE the defendant from pleading it *in* ABATEMENT: on the contrary, the caſes cited in the margin moſt clearly convey the idea, that *the defendant in replevin may plead property, whether it be in himſelf or a ſtranger, either in abatement* OR IN BAR, *according to his election.*] Cro Jac. 519. 3 Keb. 232. 1 Vent. 249. 6 Mod. 81.

If the defendant pleads property in *J. S.* a ſtranger, he may plead it in abatement, and becauſe he ſhews that there is no property 2 Lev. 92. Salk. 5. Ld. Raym. 984. S. C.

Salk. 94. Carth. 243. S. C. 6 Mod. 81.

perty in the plaintiff, and by conſequence that he had no right to a deliverance by this writ, he ought to have return without making any conuſance.

If the defendant pleads property in the plaintiff and *J. S.*—there the plea is in abatement of the replevin, as it is in other actions; for though it admits a right of deliverance in the plaintiff, yet it does not allow it by a writ under the preſent form; but gives a better writ to be brought by the plaintiff and *J. S.*—But here the defendant ought to make a conuſance; becauſe, this plea not diſaffirming the property, it leaves a right in the plaintiff to have his beaſts, without ſuch conuſance be made.

Raſt. Ent. 554.

As a man may plead in abatement of the writ, ſo he may of the count; and by abating the count he doth in conſequence abate the writ; and there it is pleaded *ad narrationem & breve:* for if a man doth not purſue his writ by a regular count, his writ in conſequence is abated. And therefore if a man declare of a caption in *Blackacre*, and the defendant pleads in abatement of the count, that he took them in *Whiteacre*, *abſq; hoc* that he took them in *Blackacre*, this will abate the count under THAT form. But then he muſt go over and make conuſance; becauſe, not diſaffirming the plaintiff's title to the beaſts, he leaves the plaintiff a right to retain. But this conuſance is not traverſable where it is pleaded in abatement; becauſe the plaintiff muſt maintain the form of his own count without falling on the title of the defendant; and

Cro. El. 372. Mod. Caſes 103. Bro. Abr. tit. Repl. pl. 31, 45. Vent. 127. Salk. 93. Carth. 139. Ld. Raym. 1017.

if the plaintiff ſhould join iſſue on the traverſe in the plea of abatement, and traverſe the conuſance alſo, it would be double; which would be bad upon ſpecial demurrer; and if the plaintiff traverſed the conuſance only, it would be a diſcontinuance of the plea in abatement.

But if a juſtification for *damage feaſant* had been pleaded in bar, there the caption and detention, according to the form of the writ, is acknowledged. And therefore there the plaintiff may traverſe the title of the defendant; becauſe the defendant having acknowledged the caption and detention according to the form of the count, he hath put himſelf on the ſtrength of his own title. So in the caſe of time, if the plaintiff in his count lay the caption the 26th of *March*, and the defendant pleads in abatement, that he was poſſeſſed of the *locus in quo* by leaſe determinable the 25th of *March*, and that he took the beaſts the 24th of *March damage feaſant*, *abſq; hoc* that he took them the 26th;—this is a good plea IN ABATEMENT only;—becauſe it goes only to the form of the plaintiff's count: for the time here becomes neceſſary to be laid in this action, becauſe the defendant may have a right to take at one time, and not at another. But in this and every other caſe in abatement, where the property is not diſaffirmed to be in the plaintiff, the defendant muſt make conuſance of a juſt cauſe of return; for otherwiſe he doth not deſtroy the force and effect of the writ, by which the deliverance was made; but leaves the Doct. Plac. 316.

plaintiff a right to retain his own property.

Of the general iſſue.

Bro. Abr. tit. Repl. pl. 5. Vent. 249.

The general iſſue in replevin is *non cepit*. Here it is to be conſidered that the caption and detention is only in iſſue, and not the property; and in this, replevin differs from treſpaſs. For in treſpaſs where the general iſſue is *non vulp.* the defendant may, on evidence, ſhew a property in himſelf, becauſe he cannot be guilty of treſpaſs in taking his own goods; but in replevin, upon *non cepit*, the property by the plea is admitted to be in the plaintiff, and therefore is not in queſtion at all; but whether the defendant took the goods mentioned in the declaration. And he cannot be admitted on the iſſue, to ſhew where the property was, becauſe he hath put it in iſſue only, before the jury, whether HE TOOK the beaſts or not, and not whoſe they were.

Str. 507.

[In replevin for taking guns in London, the plaintiff proved a taking in Surrey; upon which it was objected, that the plaintiff had not proved his iſſue, for the place is material, and therefore part of the iſſue under the *modo et formâ*. The counſel for the plaintiff admitted that it was traverſable; but inſiſted that by not traverſing it particularly, the place was admitted, and could not be inſiſted on upon *non cepit*. But chief juſtice Pratt held, that where the plaintiff avows at a different place, in order to have a return, he muſt traverſe the place in the count, becauſe his avowry is inconſiſtent

ſiſtent with it; but where he does not inſiſt upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. And therefore the plaintiff was nonſuit. But *quære* the legality of this deciſion.]

In replevin for a mare and colt, the defendant pleads *non eſt culpabilis de captione prædictâ infra ſex annos ultimos elapſos.* The plea was over-ruled, becauſe it gives no anſwer to the unjuſt detention, which the replevin complains of, as well as the caption; for the caption may be juſt, and the detention unlawful. As where the defendant eloigns the beaſts, or drives them to a caſtle, ſo that the ſheriff cannot replevy them at all, this is an unlawful detention, however juſt the caption might have been. And in the preſent caſe, it might be that the colt was foaled in the pound, and then was never taken by the defendant, yet it may be unlawfully detained; and though he might not have taken it within ſix years, yet he might have detained it until the day of purchaſing the writ, and that detention is complained of by the writ, and not barred by the ſtatute. Sid. 81, 82. Arundel v. Frail.

Of the juſtification.

There is ſome difference between the avowry and the juſtification; for the juſtification confeſſes the caption and avoids the injuſtice of it: the avowry MAKES TITLE to ſuch caption of the property of another. The confeſſing and avoiding the caption may be *quoad* damages only; the avowry is always *pro retorno habendo*. 2 Jones 25.

Vent. 249. Bro. Abr. tit. Repl. pl. 3. 6 Mod. 81.

1. Of juſtifications that diſaffirm property in the plaintiff. As if the defendant acknowledges the caption and pleads property in himſelf; this is a good bar, becauſe it confeſſes the caption, which is the giſt of the action, but avoids the injuſtice thereof, by ſhewing that he had a right to take them; and this not only will abate the writ of the plaintiff whereby the deliverance was made, but alſo deſtroy all right of complaint for ſuch caption and detention; and therefore goes in bar of the action, and conſequently gives a return without conuſance *pro retorno habendo*.

2 Lev. 92. Salk. 5, 94. 6 Mod. 81.

If the defendant confeſſes the caption, and pleads property in *J. S.* this is in bar of the action, as well as in abatement of the writ;—for this not only ſhews that the plaintiff had no right to a deliverance upon the writ, but alſo that he has no cauſe to complain of the caption and detention againſt his pledges, which is in bar of the action. And this is not only a juſtification to cover the defendant from damages, but for the return of the beaſts; becauſe he doth not admit property in the plaintiff, but diſaffirms it; and therefore the beaſts ought to come back to the defendant, who ought to retain the beaſts againſt every one but *J. S.*

Ld. Raym. 217.

2. As to juſtifications that affirm property in the plaintiff. Theſe cover the defendant from damages only, becauſe the plaintiff is intitled to his beaſts, as having property in them; and the defendant in ſuch pleas not making title to the beaſts as a pledge to anſwer any demand, he ought

not to have the beasts back, but may cover himself from the damages only for the caption.

Thus if the lord distrains for homage, and the tenant dies, and his executors sue replevin. Here the defendant may justify and cover the damages, because the distress was rightly taken at first, though by the death of his tenant he can no longer retain it as a pledge for his homage, and therefore cannot be intitled to a return; because the homage was a service to be performed by the tenant IN PERSON, and the distress being to compel him to it, cannot be detained longer than his life; therefore the lord must destrain the heir *de novo*. Doct. Plac. 316. Ro. Abr. 319. Danv. Abr. 652.

Of avowries, and the pleas thereto.

Having thus considered the replevin and the writ that issues upon proper returns of the sheriff, we come now to the avowry.

The avowry is the taking up the defence of such distress. It acknowledges the distress taken, but avoids the injustice of the caption complained of, and sets forth a good cause for taking such distress, in order to have it returned again to the defendant. So that in replevin both parties ARE ACTORS;—the plaintiff to have damages for the taking and detaining his goods,—and the avowant to have return of the plaintiff's beasts and damages.

Avowries are either for rents, services, heriots, *&c.* or for *damage feasant*; and here are to be considered.

I. What is ſubſtance, and what is form.

II. The ſeveral pleas to the avowries; and herein of the ſeveral traverſes and diſclaimer.

1. What is ſubſtance, and what form in avowries.

At common law the lord was obliged to avow upon his real tenant, which as the antient law ſtood was eaſily done, becauſe the tenant paid fines on every alienation, and the alienee was preſented by the next homage. But when theſe ſmall fines for alienation were not gathered, nor the courts regularly kept, the lords were at a loſs to find their real tenants, and conſequently to know whom to avow upon. To remedy this the *ſtat.* 21 *Hen.* 8. *c.* 19. *ſ.* 3. was made; by this the lord may diſtrain on the lands holden of him, and avow as in lands within his fee or ſeignory, alledging in the avowry, the lands to be holden of him, without naming any certain perſon or tenant.

9 Co. 22. a. Co. Lit. 268. b. Raſt. Ent. 156.

Upon this act it hath been held, that though the words are, that if the lord diſtrain on the lands holden of him, yet if the lord come to diſtrain, and the tenant drive the beaſts which were once IN VIEW of the lord, off the land, or out of the ſeigniory, and the lord purſues and diſtrains them out of his fee, yet he may avow upon this act;—becauſe the diſtreſs, in conſtruction of law, is taken upon the land, by reaſon of the view and freſh ſuit of the lord.

Leon. 301. Cro. Eliz. 146.

In avowry the defendant ſaid that *B.* was ſeiſed of the lands where, *&c.* and held them

them of *A.* by fealty and rent;—and for rent arrear he made conuſance as bailiff to *A.* in land held of him, according to the ſtatute.—This was held a good avowry upon the ſtatute, though it was objected, that having once named the tenant in his avowry, the whole avowry ſhould have been at common law, becauſe the ſtatute was made to eſtabliſh the avowry without naming the tenant at all, and therefore it ought much more to be good, where he names him but once. Lucy v. Fiſher.

If *A.* holds of *B.* by rent, as of his manor of *C.* and *A.* conveys to the king, and the king grants it over to *D.*—*B.* cannot for his rent avow, as on land held of him; becauſe by *A.*'s grant to the king the tenure is deſtroyed, though the rent remains; for the king cannot hold of a ſubject; and therefore *B.* muſt avow according to the nature and particular circumſtances of his caſe. And. 159. Broker v. Smith.

In avowries on the ſtatute, the lord alledges that the lands, or *locus in quo*, are held of him by ſuch ſervices, and avows as on lands within his fee or ſeigniory, without naming or avowing upon any certain perſon or tenant; this diſtinguiſhes it from the avowry at common law, wherein the tenant muſt be named; but in both avowries the lord alledges ſeiſin of the ſervices. Raſt. Ent. 556. Bro. Abr. tit. Avow. pl. 4. Fitzh. Plead. 727. Co. Ent. 591, 594, 597, 598.

In the avowry at common law, the lord ſays *J. S.* his very tenant is ſeiſed in fee of the *locus in quo*, and that he holds of him by homage, fealty and rent, or ſuch like, of which ſervice the lord was ſeized by the

hands of the ſaid *J. S.* and becauſe the rent, *&c.* was in arrear, the lord diſtrains and avows the taking, and prays a return. So that by this avowry to make the diſtreſs lawful, the lord muſt ſhew A SEISIN of the rent by the hands of ſome CERTAIN tenant; for the lord's poſſeſſory right is mentioned in no other manner, than by ſhewing that the tenant, who was in the actual poſſeſſion of the land, did actually pay the rent to the lord, or to thoſe under whom he derives: for if ſo, the ſeiſin of the tenant of the land, and of thoſe claiming under him, continued for the time of ſuch payment of the rent, to the time of the diſtreſs, is a ſeiſin in order to continue the payment to the lord; for out of the yearly profits he ought to have made the payment demanded.—

8 Co. 54. a. Co. Lit. 298. b. Therefore it is not like the caſe of any real action, where they lay the ſeiſin within the time of limitation, and that they were diſpoſſeſſed; for in ſuch real actions the count ſuppoſes the demandant is out of poſſeſſion of the thing to be recovered. But in the avowry, the lord ſuppoſes his ſeiſin to continue, until the very actual taking of the diſtreſs; and therefore the lord need not alledge his ſeiſin to be within forty years, according to the ſtatute of limitation, when the lord ſuppoſes himſelf ſtill ſeiſed, even at the very day of the avowry, and that this diſtreſs is the very collection of the rent of which he is in poſſeſſion. If he were not in poſſeſſion the diſtreſs would be unlawful; for if the lord had a right to the ſervices, yet if he was not actually ſeiſed of them, he muſt be put

put to his writ of cuſtoms and ſervices, before he can continue the ſeiſin of the ſervices, in order to recover them in this poſſeſſory action.

When the tenant comes in, if he do not diſclaim, or plead *hors de ſon fee*, of which hereafter, he muſt admit that he is ſeiſed of the eſtate; though he may deny that he holds that eſtate of the lord by ſuch ſervices, which is a traverſe of the tenure; or he may traverſe the ſeiſin of the ſervices by that particular hand by which the lord in his avowry alledges himſelf to be ſeized:—becauſe, if that ſeiſin be deſtroyed, which is the ſeiſin from whence the lord continues his own poſſeſſion to the time of the new caption, there is an interruption of the ſeiſin of the lord, and of his title in this poſſeſſory action. And therefore, if that ſeiſin be found againſt the lord, he cannot recover in replevin, becauſe he is out of poſſeſſion; but is driven to his writ of cuſtoms and ſervices, in order to recover the ſeiſin.

If the lord avows for rent on a gift in tail, or leaſe for life, or years, there the lord lays, that he, or the perſon from whom he claims, was ſeiſed in fee of the land itſelf, and that he, or ſuch perſon, made ſuch demiſe or gift; and by this method the lord continues his right to ſeize the diſtreſs. Doct. Plac. 317, 318. Bro. Abr. tit. Avow. pl. 52.

And here plainly the lord continues his ſeiſin to the very time of the diſtreſs; becauſe his tenant was ſeiſed of the very land itſelf, in order to raiſe ſuch rent, and pay it to him by the original ſtipulation; and therefore the ſeiſin of the tenant was all along

along the ſeiſin of the lord, and maintains his poſſeſſion in order to take pledges for his rent.

But if ſuch gift in tail, or leaſe for life or years, were made before the ſtatute of limitations, and there had been no ſeiſin continued, there the ſtatute of limitations may be pleaded in bar,—becauſe the words and intention of that ſtatute are to bar ſuch antient rights, where the lord had not actual ſeiſin within the forty years.

2 Co. 65. Doct. Plac. 317. 318. Browal. 169. 170.

If a man makes a grant of a rent-charge, there the ſeiſin of eſtate is laid in the tenant of the land, and it is the deed that gives him ſeiſin of ſuch rent, or the power to get it. And there if the tenant cannot deny the deed, if the commencement of it be within the act of limitation, the grantee's power of diſtraining will thereby appear, and his right to continue the poſſeſſion under that deed.

And if any other actual ſeiſin had been required by the law in caſes of leaſes, gifts in tail, or rent-charges, the lord would have no compulſory means to acquire ſuch rent at firſt, without the tenant's voluntary payment, which had been to elude ſuch leaſes, gifts and deeds; and therefore the ſtatute of limitations does not extend to ſuch leaſes, gifts or deeds of rent-charge, where the law, before the ſtatute, required no ſeiſin at all neceſſary to be alledged in the avowry; ſince, as is ſaid, the lord and grantee continue the poſſeſſion of ſuch rents without actual ſeiſin, and the ſtatute hath not altered the law in that particular.

If *A.* be poſſeſſed of a term of [illegible] he hath Brown's Ent. 304. rendering rent, and diſtrains the beaſts of a ſtranger for an arrear of this rent, it is not ſufficient for *A.* in his avowry to ſay generally *quod poſſeſſionatus fuit* of the *locus in quo*; becauſe *A.* having taken the beaſts of a ſtranger, he muſt ſhew by what title he took them; and this cannot be done without alledging a ſeiſin in fee in his leſſor, in order to ſhew a right in himſelf to diſtrain. L. Raym. 333.

If *A.* leſſee for years, lets for years to *B.* by deed indented, and diſtrains *B.* for rent, it is ſufficient for him in his avowry to ſay *quod poſſeſſionatus fuit*, and leaſed to *B.* by deed indented; for then *B.* will be eſtopped to controvert *A.*'s title to the land during the leaſe; though *B.* had taken a leaſe of his own land from *A.* But if the leaſe were by parol, then it ſeems he muſt alledge the ſeiſin in fee;—becauſe taking the property of another, and there being no eſtoppel in the caſe, whereby the plaintiff in replevin cannot controvert the right of *A.* to the land, it ſeems that *A.* muſt ſhew a right, or elſe he cannot maintain the taking of another's property. 3 Lev. 146.

[But now by the ſtatute of 11 G. 2. c. 19. ſ. 22. reciting that "great difficulties often "ariſe in making avowries or conuſance "upon diſtreſſes for rent, quit-rents, re-"liefs, heriots, and other ſervices," it is enacted "that it ſhall be lawful for all defendants in replevin to avow or make conuſance GENERALLY, that the plaintiff in replevin, or other tenant of the lands and tenements whereon the diſtreſs was made, enjoyed

along[illegible] a grant or demiſe
his[illegible] years during the time
[illegible] ined for incurred,
[illegible] d ſtill remains due;
[illegible] re the diſtreſs was
[illegible] h. certain tenements,
[illegible] lordſhip or manor,
[illegible] the rent, relief, be-
[illegible] diſtrained, was at the
[illegible] s, and ſtill remains
[illegible] er ſetting forth the
grant, tenure, [illegible]e, or title of the land-lord, leſſor, or owner of ſuch manor."]

2 Lutw. 1492. 3 Mod. 132. Carth. 9. 2 Mod. 70. contra. See Fort 256. Salk. 643. Lucas 37.

If a termor diſtrains the beaſts of another *damage feaſant*, and the owner of the beaſts brings his action of treſpaſs or replevin, it is not ſufficient for the termor in his juſtification or avowry to ſay *quod poſſeſſionatus fuit* generally; becauſe where the termor takes the beaſts themſelves for the damages, he muſt ſet forth by what right or title he took them, for he cannot ſeize another's beaſts for any damages done to that which doth not appear to be his rightful poſſeſſion or property; and therefore the termor to juſtify this caption in treſpaſs, or in his avowry, where the proprietor ſeeks a reſtitution of his beaſts by replevin, muſt alledge the ſeiſin in fee in his leſſor, and ſo derive a title to himſelf.

[In treſpaſs, I believe *quod poſſeſſionatus fuit*, is ſufficient.]

Raſt. Ent. 561. b. Clift's Entr. 564. Owen 51. Dyer 171. b.

But if the avowant for *damage feaſant* alledges the *locus in quo* to be his *ſolum & liberum tenementum*, that is ſufficient without alledging the ſeiſin in fee; for the quantity of the eſtate is not material where the avowant

avowant poſſeſſes *jure proprio*; for he hath ſhewn enough to entitle him to the caption, if the *locus in quo* be his *liberum tenementum*. But the leſſee that poſſeſſes *nomine alieno* hath no more than a precarious poſſeſſion, which is either good or bad according to the eſtate of him in whoſe right he poſſeſſes; and therefore if he doth not ſhew an eſtate to entitle himſelf to the caption, he doth not ſhew any right to take them at all: for it covers the right only to ſhew a term, and not a freehold out of which it is derived. It is only the freeholder, or his bailiff, or perſon deriving under him, that hath authority to take another man's beaſts upon the ſoil; for a ſtranger that is no bailiff of the freeholder is a treſpaſſer, if he doth it; and therefore if a perſon doth not ſhew in his avowry that he doth it in his own right, or by whoſe right he doth, he ſhews no right at all to take ſuch diſtreſs. Brown's Ent. 304. L. Raym. 333.

But if the termor inſtead of taking the beaſts into his own hands for a compenſation of damages, ſhall recur to the law to have amends by action of treſpaſs, *quare clauſum fregit*, ſince here he comes to the law only for a compenſation for the damages done to his poſſeſſion, he hath nothing to do but to ſhew his poſſeſſion, unleſs the defendant ſhew a right to the land itſelf.

If the grantee of a rent-charge avows for his rent, he muſt alſo alledge a ſeiſin in fee-ſimple in his grantor of the lands out of which the rent iſſues; for this being a rent not ariſing from any tenure, doth not turn on the rule that governs the feudal ſervices. Clift 642. Hob. 28. Bro. Abr. tit. Avow. pl. 88, 164.

ſervices. The reaſon is, that the avowry being in the nature of a declaration, the avowant, as all other plaintiffs in other actions, ought to ſhew to the court, that what he ſues for is ſubſiſting, and this he doth not do unleſs he alledges a ſeiſin in fee in the grantor; for if the rent-charge was granted in fee by a perſon who is only tenant for life, the grant determines by his death; and therefore the grantee ought to ſhew to the court, that his grant has ſtill a continuance; which is beſt done by alledging a ſeiſin in fee in the grantor, and this ſeiſin in fee in the grantor is traverſable.

But vide 11 Geo. 2. c. 19. ſ. 22. ante. 139.

Salk. 562. If tenant in fee leaſes for years, rendering rent, and brings an action of debt for the arrear of rent, he need not alledge any ſeiſin in fee in his declaration; becauſe the action of debt ariſes from the contract of the parties, and was not ſubſtituted by the feudal law in the place of forfeiture; and therefore in debt for rent, the leſſor only declares *quod cum demiſit* ſuch lands to *A.* for ſuch a term, rendering ſuch certain rents, by virtue of which demiſe *A.* entered, *&c.*

Cliff. 225. But where in debt for rent the plaintiff ſues AS ASSIGNEE OF THE REVERSION AND RENT, it ſeems by the precedent, that he muſt alledge a ſeiſin in fee in the leſſor; becauſe ſince the plaintiff did not demiſe himſelf, he muſt ſhew who did, and that the reverſion came by ſuch aſſignment to him, in order to make his title to the action. For it ſeems abſurd that the plaintiff ſhould ſay, that the firſt leſſor granted the reverſion to him, without firſt ſhewing that

he had it in himſelf. Hence it ſhould ſeem to be neceſſary even in debt for rent, to alledge in this caſe a ſeiſin in fee in the firſt leſſor, for he doth not come in as a repreſentative of the contractor, but as aſſignee of the reverſion; and therefore muſt ſhew the particular eſtate of the reverſioner.

In avowries there muſt be always a place CERTAIN mentioned where the caption was; as the avowant muſt admit the caption to be in the place mentioned in the declaration, in order to ſhew the cauſe of taking it there; for if the avowant ſhould lay the taking in another place than the plaintiff hath done, without traverſing the place mentioned in the declaration, this would be altogether bad: becauſe the avowant neither confeſſes and avoids, nor traverſes the declaration, and therefore ſuch plea is nugatory, and not to the purpoſe. Sid. 10, 20. Hob. 16.

Where a man avows in his own right, the form is *quod bene advocat captionem & juſte, &c.*—Where he makes conuſance in right of another, he ſays, *bene cognovit captionem, &c.* Though this be the regular form, yet it hath been held upon demurrer, that where the defendant avowed in his own right by *bene cognovit captionem, &c.* it was well enough; becauſe the avowry is a confeſſion of the caption, which both the words *advocat* and *cognovit* do confeſs, and avoids the injuſtice of ſuch caption for the reaſons mentioned in the avowry. Danv. 653. Cro. Jac. 372. Wheadon v. Sugg.

If the defendant avows for rent being in arrear at *Michaelmas, & tempore captionis*;—this is good, though he doth not ſay, *quod adhuc aretro exiſtit:* for the avowant avoids Daliſon 81. Benl. 72. Cro. Jac. 283.

avoids the injuſtice of the caption, if he ſhews that the rent was in arrear at the time he took the beaſts. Nor is he obliged to ſay *quod adhuc aretro exiſtit*, to excuſe himſelf from an unlawful detention; becauſe, after the beaſts are once impounded, no ſubſequent tender or payment can make the detention unlawful in this action.

Cro. Jac. 283. Bowles v. Poor. Bulſt. 139. S. C.

In an avowry by huſband and wife in right of his wife, for arrears of a rent-charge incurred before the coverture, the avowry concludes, "*and becauſe at* Michaelmas, &c. 20 l. *was in arrear and not paid to the huſband and wife, he diſtrained and avows*, &c." It was objected, that by his own ſhewing the arrears were not due to himſelf and his wife, and therefore the avowry ill; but the objection was over-ruled, becauſe if he had ſaid, "*for* 20 l. *arrear he diſtrained*," that had been good, and the reſt was held ſurpluſage.

Hob. 208.

If one avows as adminiſtrator for arrears of a rent-charge, where he may claim the arrears in his own right, and it appears that the avowry is not ſo framed as to entitle him to the arrears as adminiſtrator, yet the avowry is good; becauſe where there are two titles ſet forth in the avowry, and only one ſufficiently alledged, that one title only gives him as good a right to the rent as both, and therefore he ought to recover, and the avowry as adminiſtrator ſhall be ſurpluſage. As if a rent-charge be granted to the huſband and wife during the life of the wife, and the huſband dies, and the wife avows as adminiſtratrix to her huſband, where ſhe might avow *jure proprio*, yet

yet ſhe having a title to it in her own right by the grant, the avowry is good.

If a man avows for an entire rent, where it appears that he hath title only to a moiety of it, the avowant cannot recover; becauſe he hath not avowed according to the circumſtances of his caſe, and therefore cannot make out his title as he hath laid it. Suppoſe *A.* and *B.* were jointenants of a rent, and *A.* diſtrains and avows for the whole, this avowry is bad; for if it ſhould ſtand, and *A.* ſhould recover his moiety, then there muſt be two ſuits for one joint demand, which would be vexatious and abſurd. And in this caſe the avowry and action of debt ſtand on the ſame reaſon, and agree.

Saund. 282. 284. Duppa v. Mayo, &c. Cro. Eliz. 340,637,651. Yelv. 23. Cro.Car.154. Raſt. Entr. 565. a. Ro.Abr.320. 2 Lutw.1211. Carth. 328.

So likewiſe coparceners muſt join in avowry; therefore if one jointenant or coparcener diſtrains alone, he muſt avow in his own right and as bailiff to the other.

Salk. 390. Carth. 364.

If in the avowry the leſſor avows for only part of an half year's rent that is due, and doth not ſhew that the reſidue is ſatisfied, ſuch avowry is ill; becauſe where a certain rent is due it muſt be demanded at once; for if part only ſhould be demanded, and the reſidue not appear by the avowry to be ſatisfied, and the avowant ſhould recover that part which he demands, he may then multiply ſuits by ſuing for part of his rent at one time and part at another, which is againſt reaſon, and the end and policy of the law. And in this alſo, the avowry and action of debt for rent, agree.

Cro.Car.104. 137. Cro. Jac.498. 4 Mod. 402.

If executors avow on the 32 H. 8. c. 37. for the arrears of a rent in fee granted to

Cro. Eliz. 547. Miles v. Willoughby.

the teſtator, they muſt ſhew that the lands liable to the rent-charge continue in the hands of the tenant or purchaſer in whoſe time the rent ſued for incurred; becauſe, this remedy being given by the ſtatute, the method preſcribed by the ſtatute muſt be obſerved.

2 Mod. 4, 5. In an avowry for a heriot, the avowant as bailiff to *J. S. bene cognovit captionem averiorum prædictorum in prædicto loco*, without ſaying, *tempore quo, &c* and yet held good; becauſe the acknowledging the caption as ſet forth in the declaration, admits it to be at the time laid there.

Lit. Sect. 317. Co. Lit. 198. b. Cro. Eliz. 530. If two tenants in common diſtrain for rent, they muſt make ſeveral avowries; becauſe they claim the rent and reverſion by different titles, and therefore muſt ſeverally ſet them forth in diſtinct avowries.

5 Co. 19. a. 38. b. If two perſons diſtrain an ox, or an horſe, and are obliged to make different avowries, both avowries muſt abate; becauſe if both ſhould ſhew cauſe to have return, the court could not give judgment for both, and therefore neither can have it.

Hutton 4. Cro. Car. 260. Hob. 176. In an avowry for heriots, you cannot avow for a heriot generally, but you muſt avow for the beſt beaſt or the two beſt beaſts of the tenant, as the caſe is; for otherwiſe the plaintiff would be ouſted of his plea in bar, that the tenant left no beaſts.

II. Of the ſeveral pleas to avowries.

21 H. 8. c. 19. ſ. 3. Though the avowant may now by the ſtatute avow as in lands holden of him and within his fee and ſeigniory, yet it is provided by the ſaid act, that the plaintiffs and

and defendants in writs of replevin and ſecond deliverance ſhall have like pleas and like aid-prayers in all ſuch avowries, conuſances and juſtifications, as they might have had before, and as though the ſaid avowry, conuſance or juſtification had been made after the due order of the common law, pleas of diſclaimer only excepted. For this reaſon, and becauſe the lord is ſtill left to his avowry according to the common law, it will be neceſſary to conſider the ſeveral anſwers and pleas that at common law might have been made to the avowry; and herein,

1. Of the diſclaimer.
2. Of the plea *hors de ſon fee*.
3. In what caſes the tenure was traverſable.
4. In what caſes the ſeiſin of the ſervices was traverſable.

Of the diſclaimer.

And here it is to be obſerved, that at common law the avowry was always upon ſome certain perſon, and if ſuch perſon claimed or pretended no right to the tenancy, he might have diſclaimed. By ſuch diſclaimer he denied to hold the tenancy of the land at all. It was a renunciation of his homage and fealty, and that he would not hold of the lord upon any terms. And therefore the lord, on ſuch diſclaimer, was intitled to the reſtitution of the land itſelf, which was originally given for the ſervices avowed for; and in order to bring back the land itſelf, the lord had a writ of right, ſetting forth the proceedings in the replevin, and ſuch diſclaimer. Hence we may ſee the reaſon why there could be no

Raſt. Ent. 224. 225. Doct. Plac. 133. Co. Lit. 102. a. 268. b.

diſclaimer to any avowry on the ſtatute of H. 8.—becauſe the avowry on the act is not on any perſon CERTAIN, but on lands within the lord's fee and ſeigniory; and therefore whoever takes up the defence to ſuch avowry muſt be only a perſon concerned in the tenancy; becauſe if an entire ſtranger ſhould take up the defence, and be allowed to diſclaim, the lord could not have return of his diſtreſs, but muſt take his writ of right for the lands themſelves; and in the proſecution of that writ he could not prevail, as the rightful tenant would appear to bar him, and ſo the lord be diſappointed both ways.

Doct. Plac. 131, 132. But a diſclaimer cannot be where a man levies a fine of a ſeignory, and the conuſee brings a *per quæ ſervitia* to have the attornment of the tenant; becauſe the lord will not be entitled to the ſervices, or to the land itſelf in caſe of a diſclaimer, until he hath poſſeſſion of ſuch ſervices by attornment; therefore the tenant in the *per quæ ſervitia* ſhall not diſclaim, inaſmuch as the lord, upon ſuch diſclaimer, cannot have a right to the land itſelf. But whenever the lord is in poſſeſſion of the ſeignory, and purſues his right for the ſervices by replevin, *ceſſavit*, or the like, there the tenant may diſclaim; becauſe the lord on ſuch diſclaimer ſhall have the land itſelf, which was originally given for ſuch ſervices.

Doct. Plac. 132. Here it is to be noted, that the tenant muſt be a perſon capable of the act of diſclaimer; for if he be an infant, ſuch diſclaimer ſhall not turn to his prejudice, by reaſon of his indiſcretion.

So

So where the tenant is ſeiſed of the lands in right of another, in order to preſerve ſuch right; and therefore the diſclaimer of the abbot ſhall not hurt the church, nor of the huſband, the wife; becauſe they are intruſted by law to defend the right of the tenancy, and not to deſtroy it. Doct. Plac. 131, 132.

If there be a lord, meſne and tenant, and the meſne diſclaim the right of the meſnalty, the meſnalty is extinct; and the tenant holds of the ſuperior lord, as the meſne held over; for here, by ſuch diſclaimer, the lord cannot have poſſeſſion of the land, becauſe the tenant's intereſt therein by the diſclaimer of another cannot be hurt; but the lord comes nearer the tenancy by ſuch diſclaimer, becauſe, if the tenant dies without heirs, the eſcheat of the lands is immediate to the lord and not to the meſne. Doct. Plac. 133.

In a *formedon*, which the ſtatute *de donis* hath given to recover the lands and not damages, if the tenant diſclaim, the demandant ſhall recover the land itſelf immediately; but in an aſſiſe and writ of entry, where the demandant ſeeks damages as well as the land, it is not enough for the tenant to diſclaim, becauſe then every diſſeiſor, when the action is brought againſt him, would diſclaim, in order to ſcreen himſelf from damages; but the demandant, notwithſtanding ſuch diſclaimer, may aver that he was tenant of the land, in order to have his damages. Doct. Plac. 133. Co. Lit. 362, a.

If a *præcipe* be brought againſt two, and one diſclaim, the whole frank-tenement veſts in the other. But if one pleads non- Doct. Plac. 133.

tenure, the whole does not veſt in the other; becauſe though the other be not ſeiſed of them, yet a right may remain in him, and his pleading that he doth not hold the lands, doth not veſt the right in another.

Doct. Plac. 134. If one diſclaims, and the other pleads non-tenure, the demandant may enter into the whole;—becauſe by the diſclaimer of one, the tenancy ſhall not veſt in the other, who hath no ſeiſin againſt his own plea of non-tenure; and therefore the demandant's right of entry is open to him.

Doct. Plac. 134. If a *præcipe* be brought againſt two, and one makes default after default, and the other diſclaims, the demandant ſhall recover the whole; becauſe the default bars one, and the diſclaimer the other.

Of the plea of *hors de ſon fee.*

Raſt. Ent. 566. b. See the form of the plea. As the tenant may diſclaim, ſo he may plead *extra feodum*; and ſuch plea doth not amount to a diſclaimer; for if they ſhould conſtrue the plea of *extra feodum* to amount to a diſclaimer IN ALL CASES, then thoſe tenants that were boundaries of manors, would be exceedingly haraſſed by the neighbouring lords. And therefore as the tenant might diſclaim, which is an entire renunciation to hold of the lord, and whereby the tenant diſclaims to pay thoſe ſervices as the price of the land itſelf, ſo he may plead *hors de ſon fee*;—which is taking upon him the ſtate of the land, and acknowledging to hold by ſuch ſervices, if he be within the ſeignory of the lord. For in this plea he doth not renounce the ſervices, for

for that is the plea of diſclaimer, but he takes up the land under the ſervices the lord demands of him, and owns them as the price of the land, in caſe the lord be entitled to ſuch ſervices. And therefore the tenant may plead *extra feodum* as well as diſclaim in replevin; becauſe he may ſhew that he is willing to hold by ſuch ſervices, in caſe the lord be entitled thereunto.

If the lord brings a writ of *mortdauncestor* for his ſervices, the tenant cannot plead *hors de ſon fee*; becauſe there the lord makes title in his writ, and the tenant muſt anſwer to the title ſet out in the writ; therefore he cannot plead generally, out of his fee, for that doth not anſwer the title in the writ: but he muſt plead that the plaintiff's anceſtor did not die ſeiſed, which goes to the title in the writ. Doct. Plac. 216.

If the lord in replevin do not avow upon his VERY tenant, but upon a ſtranger, ſuch ſtranger, when he comes in, may plead that he himſelf is *extra feodum*; for having never held of the lord, the lord cannot maintain his avowry; the lord cannot ſay that he held of him, if the tenant never was in his homage. This plea of *hors de ſon fee* is the only plea that a mere ſtranger to the avowry, yet made party by *aid prayer*, may plead in ABATEMENT of the avowry. Doct. Plac. 216, 217. 2 Co. 20. b.

But to explain this matter fully, we muſt conſider the antient avowry of the lord upon diſſeiſins committed. On ſuch diſſeiſin, the diſſeiſor did not become tenant to the lord, (not even if the lord had accepted rent of him) ſo as to prevent the diſſeiſee Co. Lit. 268.

from compelling the lord to avow on him; though by ſuch acceptance of rent the diſſeiſor was eſtopped to ſay, he was not his tenant; and the lord *quoad* him was alſo eſtopped from ſaying, that he was not his lord. So that if the diſſeiſee died without heirs, the lord could not enter into the tenancy, having already, by his own acceptance of the rent, admitted the land to be full of another: but between the lord and diſſeiſee, there was no eſtoppel at all: becauſe the diſſeiſin being a tortious act, if the lord did collude with ſuch diſſeiſor, that ſhould be no prejudice to the diſſeiſee. And it was often uſual on ſuch diſſeiſins, for the lord to obtain more rents from ſuch diſſeiſors; and when the diſſeiſee came to take poſſeſſion and put in his beaſts, the lord would diſtrain the beaſts of the diſſeiſee, and avow on the diſſeiſor for the rents that he had accepted from him. Now on ſuch avowry of the lord, it was a dangerous plea for the diſſeiſee to ſay, that "the diſſeiſor was out of the fee of the lord," becauſe the acceptance of ſuch rents and ſervices from the diſſeiſor brought him within the lord's fee; and therefore the diſſeiſee was compelled to ſhew the ſpecial matter, that he was very tenant to the lord; — that he had paid the ſervices, or tendered them, that were due; and that the lord ought to avow on him: the which was in abatement of the lord's avowry, becauſe it deſtroyed that avowry upon his beaſts for the ſervices which the lord had accepted from the diſſeiſor, and compelled the lord to avow the caption of his beaſts for the tenure that

9 Co. 21. a.

was

was really due from the diſſeiſee to the lord. But as an inducement to this he was obliged to ſhew that the rent was tendered, or not in arrear, that the injury might appear on the lord's ſide, and that he did not accept of another for want of payment from him: and as the diſſeiſee might have entered himſelf and put in his beaſts, ſo he might have let to another, who might likewiſe put in his beaſts; and then if the lord had avowed upon the diſſeiſor, ſuch leſſee might have ſhewn, that there was a very tenant, the diſſeiſee who had paid or tendered the rent to the lord, and had made a leaſe to him who put in his beaſts which were diſtrained. For the leſſee, who kept poſſeſſion for the diſſeiſee, had the ſame privilege that the diſſeiſee himſelf had, to plead this ſpecial matter; becauſe he ſhould not be liable to the ſervices unjuſtly accepted from ſuch diſſeiſor; and he had a right to *pray in aid* of ſuch diſſeiſee, that the diſſeiſee who had the title-deeds of the land, might be brought in to make out his right; or, if he fail, that the leſſee might have the writ *de plegiis acquietandis* againſt ſuch leſſor.

So it is, if the very tenant in poſſeſſion made a leaſe to *A.* for years, and the lord had diſtrained *A.* and avowed upon a mere ſtranger;—*A.* might upon ſpecial matter, have *prayed in aid* of the leſſor, and by that means have brought him in to defend the tenancy from the diſtreſs of the lord, by compelling the lord to avow upon the leſſor: for *A.* being only a termor cannot plead the payment of the rent and ſervices without his leſſor, 9 Co. 20.

leſſor, who is the very tenant; and when the leſſor is brought in, if the ſervices are really done, that abates the lord's avowry. If they are not performed, the lord ſhall have return of his pledges, but then *A.* hath a remedy over againſt his leſſor by writ *de plegiis acquietandis.*

Co. Lit. 268. a. But if the diſſeiſor had died ſeiſed, and the lord had accepted rent from the heir of the diſſeiſor who came in by title, the lord was obliged to avow on ſuch heir; and the entry of the diſſeiſee, or the right of putting in his beaſts, or demiſing to his tenants, was taken away; and then the diſſeiſee was not very tenant, nor could he compel the lord to avow upon him until he recovered his right in the real action. Lord *Coke* ſays, the feoffee of the diſſeiſor is in the ſame condition with the heir. But *quære* of this, unleſs it be in antient times, when a feoffment was conſtrued to toll an entry, as well as a deſcent.

When the lord avows upon a ſtranger, and takes the beaſts of a ſtranger, who is neither very tenant nor leſſee of the very tenant, ſuch ſtranger can plead nothing but *hors de ſon fee*; becauſe he hath nothing to do with the right of rent, ſince the avowry is not on the very tenant. But ſuch ſtranger may diſengage himſelf by the plea of *hors de ſon fee*, becauſe the lord hath not ſhewn juſt cauſe of caption of ſuch beaſts, if he hath not maintained his avowry by proving ſuch ſervices are due from the perſon he avowed on.

When

When the tenure is traverſable.

And this is when the tenant doth not entirely withdraw himſelf out of the homage of the lord, but doth not admit the ſame ſort of ſervices as the lord hath avowed for. As if the lord avows for fealty, rent, and ſuit of court, and alledges ſeiſin of all; if the ſervices were really but fealty and rent, the tenant in ſuch caſe may traverſe the tenure; — that is, he may admit that he holds by fealty and rent, and as to the rent that there is nothing in arrear, and traverſe the tenure with an *abſque hoc*, that the tenancy was held by fealty, rent, and ſuit of court, *modo & forma prædictâ, &c.* And in this caſe, though the avowry had been only for rent arrear, yet if the tenure thus traverſed be found againſt the lord, he ſhall not have return, becauſe the point in iſſue is found againſt him. The reaſon is, becauſe the tenure is the lord's title, and the lord muſt ſet forth his title as it really is; and therefore if it be by knight's ſervice, he muſt ſet forth by knights ſervice; if it be by fealty only, he muſt ſet it forth ſo; if it be by fealty and rent, he muſt ſet forth in that manner; and if the lord fails in making out the title he hath ſet forth, there is an end of the lord's avowry, becauſe he doth not prove the title he hath alledged. But if the lord ſets out a title by 10*s.* rent, the tenant cannot ſay that he holds by 5*s.* *abſque hoc* that he holds by 10*s.*; becauſe the tenant holds by rent-ſervice, whether more or leſs, and the *quantum* of the rent doth not alter the nature of the ſervice, whether it be leſs or more. And

3 Co. 33, 59. Bucknal's Caſe. Cro. Eliz. 799.

after the ſtatute of *quia emptores* the ſervices were ſubdivided, but the tenure remained the ſame; and therefore it would have been a dangerous thing after the ſtatute, when the ſervices were ſubdivided and apportioned by the alienation of the tenant, to have ſuffered the tenant to have traverſed the quantity of the ſervices, which were more or leſs according to his ſhare of the land. They allowed him to traverſe the ſeiſin, as is ſaid hereafter, becauſe the lord could not recover more of him in replevin than the ſervices of which he was ſeiſed.

9 Co. 35. a. Doct. Plac. 318. But the WHOLE tenure is NOT traverſable; as in the aforeſaid caſe, the tenant cannot plead that he holds the tenancy of a ſtranger by ſuch ſervices, *abſq; hoc* that he holds them of the avowant: becauſe by ſuch plea the tenant withdraws himſelf entirely from the homage of the lord, and where he does that, his proper plea is a *diſclaimer* or *hors de ſon fee*.

Where the ſeiſin is traverſable.

9 Co. 33. And this is where the tenant doth not only take the eſtate of the land upon him, but admits alſo the tenure by the ſame ſort of ſervices, and diſagrees with the lord only in the quantity. As if the lord avows for 10*s*. rent, where the original reſervation was only of 5*s*. and the lord had obtained the ſeiſin of the 10*s*. by coercion of diſtreſs, the tenant may traverſe ſuch ſeiſin, and thereby avoid ſuch encroachment in the avowry. For the tenant in this caſe, cannot plead *hors de ſon fee*, becauſe he is plainly within the homage of the lord; nor can he traverſe the tenure, becauſe that is by

by the ſame ſort of ſervices as are avowed for. But he may traverſe ſuch ſeiſin of ſuch ENCROACHED ſervices, becauſe what the lord hath obtained by coercion, can be no foundation to ground a right upon. But if ſuch ſeiſin of the 10*s.* rent had been obtained by the voluntary payment of the tenant, he cannot traverſe ſuch ſeiſin, nor avoid the payment of ſuch encroached rent in the action of replevin; for the tenant cannot traverſe the tenure for the former reaſon, nor the ſeiſin, becauſe that iſſue muſt be againſt him, in regard the caſe ſuppoſes the lord to be actually ſeiſed by his volunary payment; and therefore where the ſingle iſſue is whether the lord is ſeiſed or not, it muſt be againſt the tenant in his poſſeſſory action.

The tenant however may avoid ſuch encroached rent by *ne injuſte vexes*; becauſe that is a writ of right, where the mere right to ſuch ſervices may be controverted, and conſequently the bare ſeiſin of the ſervices will not avail the lord, unleſs they were originally reſerved. For when the bare right to the rent is in queſtion, there can be no reaſon to compel the tenant to pay that for ever, which he once paid though voluntarily in his own wrong. So it is in a *ceſſavit* brought by the lord, becauſe the mere right to the ſervices is controverted in it.

If the tenant, inſtead of ſuing a replevin for the diſtreſs taken by the lord for thoſe encroached ſervices, brings an action of treſpaſs againſt the lord, there the ſeiſin ſhall not conclude the tenant. So in an

9 Co. 34. a. Doct. Plac. 318.

aſſiſe

aſſiſe, or writ of *reſcous*, brought by the lord; becauſe if the lord hath really no right to the encroached ſervices the lord is puniſhable as a treſpaſſer for taking the tenant's beaſts; and when there is no juſt cauſe of caption the tenant may reſcue; and if the lord bring a writ of *reſcous*, the mere right to the ſervices will come in queſtion; and if that appear againſt the lord, the tenant hath a right to reſcue the beaſts diſtrained.

9 Co. 34. a. But even the traverſe of the ſeiſin in the avowry is to be underſtood with theſe reſtrictions.

Doct. Plac. 318. For 1. The iſſue in tail may traverſe the ſeiſin of ſervices of the ſame nature, though the lord had obtained ſuch ſeiſin by the voluntary payment of the donee in tail; becauſe the donee, during the continuance of the intail, cannot charge or incumber the lands intailed, ſo as to bind or affect the iſſue; and for the ſame reaſon the ſucceſſor of a biſhop or prior, ſhall traverſe the ſeiſin of the encroached rent given by the voluntary payment of their predeceſſors.

9 Co. 34. a. Doct. Plac. 318. 2. So the VERY tenant ſhall traverſe ſuch ſeiſin, if he hath a deed to ſhew by which the ſervices were reſerved; for the deed deſtroys that title which the ſeiſin of the ſervices gave the lord, if theſe ſervices appear not to have originally been reſerved.

9 Co. 34. b. 3. The ſeiſin of ſervices by incroachment is not material where there is no tenure; becauſe, where there is no tenure, the

the tenant may plead *hors de ſon fee*, and ſo diſcharge himſelf from ALL ſervices.

4. If the ſeiſin was not within the ſtatute of limitations, the tenant may plead the ſtatute to defeat the ſeiſin of the lord before the ſtatute of limitation; for this is a ſtatute bar to quiet mens poſſeſſions againſt ſtale demands. But the tenant in ſuch plea muſt acknowledge the tenure, to give the lord a writ of cuſtoms and ſervices, which being an action of an higher nature, hath longer time of limitation allowed to it than a poſſeſſory action. 9 Co. 34. b.

5. In avowries the tenant ſhall not plead *ne unq; ſeiſie de ſervices* generally, becauſe this amounts to a traverſe of the tenure; ſince if a man had never been ſeiſed of an immemorial ſervice, he can have no right to it. And in ſuch a caſe the tenure ought to have been traverſed, which ſtands confeſſed in this plea, ſince he hath not traverſed *quod non temuit*. Doct. Plac. 152. 9 Co. 34. b.

6. The ſeiſin is not traverſable but only of ſervices for which the avowry is made, except a ſeiſin be alledged of ſervices of a higher nature, which include thoſe in the avowry. As if the tenure be by homage, fealty, rent, and a pound of pepper, and the lord alledges a ſeiſin of all; and avows only for the pound of pepper;—the tenant cannot traverſe the ſeiſin of the rent, becauſe it is not material whether the lord was ſeiſed of the rent or not to make out his demand for the pound of pepper. Yet if the tenure be by homage, eſcuage, and rent, and he alledges ſeiſin of all, and avows for homage which is included in eſcuage 9 Co. 35. a.

eſcuage, there, by traverſing the ſeiſin of the eſcuage, you traverſe the ſeiſin of the homage, which the lord demands in his avowry.

4. Of the judgment in replevin.

Co. Ent 573. b. It is already obſerved that on the execution of the writ of replevin by the ſheriff, the beaſts diſtrained are actually returned to the plaintiff, ſo that he hath the poſſeſſion and uſe of the cattle pending the ſuit; conſequently if the plaintiff in replevin hath judgment, it can only be for damages; and therefore the entry is, *quod* (the plaintiff) *recuperet verſus* the defendant, *damna ſua occaſione præmiſſ', ſed quia neſcitur quæ damna præd.* the (plaintiff) *ſuſtinuit occaſione præmiſſ',* [that the plaintiff recover againſt the defendant his damages by occaſion of the premiſſes, but becauſe it is unknown what damages the aforeſaid (the plaintiff) has ſuſtained by occaſion of the premiſſes,] a writ of enquiry is awarded to enquire; *quæ damna præd.* (the plaintiff) *ſuſtinuit tam occaſione præmiſſ', quam pro miſis et cuſtagiis ſuis, per ipſum circa ſectam ſuam in hac parte appoſitis,* [what damages the aforeſaid (the plaintiff) hath ſuſtained, as well by occaſion of the premiſſes, as for his coſts and charges by him about his ſuit in this behalf expended.] And on the return of this inquiſition, the plaintiff hath final judgment, *quod recuperet verſus præfatum* (the defendant) *damna ſua præd. ad,* &c. *per inquiſitionem præd.' in formâ præd.' comperta, nec non,* &c. *eidem* (the plaintiff) *ad requiſitionem ſuam pro miſis*

2d Book of Judgm. 203.

Carth. 362. 5 Mod. 118. Salk. 205. Co. Ent. 575. a.

&

& cuſtagiis ſuis præd. per curiam hic de incremento adjudicata; quæ quidem damna in toto ſe attingunt ad, &c. *& præd'* (the defendant) *in miſericordiâ.*"—"That he recover againſt the aforeſaid (the defendant) his damages aforeſaid to £.—— by the inquiſition aforeſaid in form aforeſaid found; and moreover £.—— to the ſame (the plaintiff) at his requeſt, for his coſts and charges aforeſaid by the court here of increaſe adjudged, which damages in the whole amount to £.—— and the aforeſaid (the defendant) in mercy."

This writ of inquiry muſt be underſtood to iſſue where the plaintiff hath judgment on a demurrer, *&c.* and not on a verdict; for if there be a verdict for the plaintiff, the jury on that verdict aſcertains the damages that the plaintiff hath ſuſtained by the unjuſt caption and detention, and alſo the coſts of ſuit, and then there is no occaſion for a writ of enquiry. The judgment is, "*quod* (the plaintiff) *recuperet verſus* (the defendant) *damna prædicta per juratores prædictos in formâ prædictâ aſſeſſa, nec non*, &c. —*pro miſis*, &c. *de incremento adjudicata*, &c.—And the defendant *in miſericordia*," "that the plaintiff recover againſt the defendant the damages aforeſaid by the jurors aforeſaid in form aforeſaid aſſeſſed; and moreover £.—— for coſts, *&c.* of increaſe adjudged, *&c.* and the defendant in mercy."

On the other hand, if judgment be for the avowant on demurrer, then the entry is, "*quod* (the plaintiff) *nil capiat per breve ſuum præd' ſed ſit in miſericordiâ pro falſo clamore ſuo, & præd'* (the defendant) *eat inde ſine die*,

Co. Ent. 572. b. 2d Book of Judgm. 205.

die, &c. *& habeat retornum averiorum præd' detinend' ſibi irrepleg' in perpetuum, & qualiter*, &c. *vic' conſtare faciat hic*, &c. *& quod præd'* (the defendant) *damna ſua occaſione præmiſſ' recuperare debeat; ſed quia*
21H.8.c.19. *neſcitur*, &c."—"That the plaintiff take nothing by his writ aforeſaid, but be in mercy for his falſe claim, and the aforeſaid (the defendant) go hence without day, *&c.* and have the return of the beaſts aforeſaid detained to him irrepleviſable for ever, and in what manner, *&c.* the ſheriff make appear here, *&c.* and that the aforeſaid (the defendant) ought to recover his damages by occaſion of the premiſſes; but becauſe it is unknown, *&c.*"

2d Book of Judgm. 206. But if there be a verdict for the avowant, the jury in that verdict aſcertains the damages, and then there needs no writ of enquiry; but the judgment is entered, "*quod* (the defendant) *habeat retornum averiorum prædictorum*, &c. *Conſideratum eſt etiam quod præd'* (the defendant) *recuperet verſus præf.* (the plaintiff) *damna ſua præd'* &c. *per juratores præd' in forma præd' aſſeſſa, nec non*, &c.—*eidem* (the defendant) *ad requiſitionem ſuam pro miſis & cuſtagiis*, &c."—"That (the defendant) have the return of the beaſts aforeſaid, *&c.* It is alſo conſidered, that the aforeſaid (the defendant) recover againſt the aforeſaid (the plaintiff) his damages aforeſaid, *&c.* by the jurors aforeſaid in form aforeſaid aſſeſſed; and moreover, *&c.*—to the ſame (the defendant) at his requeſt for coſts and charges, *&c.*"

2d Book of Judgm. 206. So that wherever the judgment is given on a verdict, either for plaintiff or defendant,

ant, that verdict aſcertaining the damages, there needs no writ of enquiry to iſſue; but where the judgment is not founded on a verdict, but on a demurrer or *non proſſ'* of the plaintiff, *&c.* there the damages muſt be aſcertained by a jury on a writ of enquiry; becauſe what damages either party hath ſuſtained, is a matter of fact, and therefore to be ſettled by a jury. But if both parties conſent that the court ſhall ſettle the damages without a jury, then the entry is, "*ſuper quæ juſtic. hic ad petitionem ipſius* (the defendant) *ex aſſenſu præd'* (the plaintiff) *aſſident damna ipſius* (the defendant) *occaſione præmiſſ'*, &c. *ultra miſas*, &c." And this judgment is good, *quia conſenſus tollit errorem.*

[By the 17 *Car.* 2. *c.* 7. it is enacted, that "wherever the plaintiff in replevin, upon a diſtreſs FOR RENT, ſhall be nonſuit before iſſue joined, in any court of record, the defendant making a ſuggeſtion, in nature of an avowry or cogniſance for the rent in arrear, to aſcertain the court of the cauſe of the diſtreſs,—the court, upon his prayer, ſhall award a writ to the ſheriff, to enquire of the ſum in arrear, and the value of the goods or cattle diſtrained. And that, upon the return of ſuch inquiſition, the defendant ſhall have judgment to recover againſt the plaintiff the arrearages of rent, in caſe the goods or cattle diſtrained ſhall amount unto that value; and in caſe they ſhall not amount to that value, then ſo much as the value of the goods or cattle diſtrained ſhall amount unto, with his full coſts of ſuit; and ſhall

have execution for the ſame by *fieri facias*, *elegit*, or otherwiſe." And by the ſame ſtatute, the like proceeding may be had, where judgment is given for the avowant, or for him that maketh cognizance for any kind of rent. And it is thereby further enacted, that "in caſe the plaintiff ſhall be nonſuit after cognizance or avowry made, and iſſue joined, or if the verdict ſhall be given againſt the plaintiff, then the jurors that are impannelled to enquire of ſuch iſſue, ſhall, at the prayer of the defendant, enquire concerning the ſum in arrear, and the value of the goods or cattle diſtrained. And thereupon the avowant, or he that maketh cognizance, ſhall have the like judgment, *&c.*" as before.

2 Wilſ. 117. By this ſtatute the legiſlature intended, that the proceeding by *writ of enquiry*, *fieri facias*, and *elegit*, ſhould be final, for the avowant to recover his damages, and that the plaintiff ſhould keep his cattle, notwithſtanding the courſe of awarding a *retorno habendo*, which is the right judgment; for the ſtatute hath not altered the judgment at common law, but has only given a farther remedy to the avowant.

Carth. 253. The defendant had judgment upon demurrer for a return irrepleviſable, as at common law, upon which a writ of enquiry was awarded purſuant to the ſtatute. And on error brought, it was objected, that when the defendant proceeds on the ſtatute, he ought not to have judgment for a return; but the court held that the judgment

ment was well given, for the reaſons before mentioned.

But where the defendant pleaded *non cepit*, and after obtaining judgment of *retorno habendo*, procured a writ of enquiry of damages to be executed,—the court ſet aſide the writ of enquiry, and the inquiſition taken thereon,—becauſe there had been no avowry; for the avowry, which is in the nature of a declaration, is the only ground of an inquiry for the defendant in replevin. Ca. of Prac. in C. P. 42.

Where the jury who try the iſſue, omit to enquire of the rent in arrear, purſuant to the ſtatute, no writ of enquiry can be AFTERWARDS awarded to ſupply the omiſſion; and therefore, in ſuch caſe, the defendant muſt purſue the common law judgment of *retorno habendo*. But where the defendant avows, as overſeer, for a poor's rate, under the 43 *Eliz. c.* 2. and the plaintiff is nonſuit, or a verdict paſſes againſt him, and the jury are diſcharged without enquiring of the treble damages, given by that ſtatute to the defendant, the defect may be cured by a writ of enquiry; becauſe ſuch enquiry is no more than an inqueſt of office. 1 Lev. 255. Carth. 362. 3 Wilſ. 442.

As to the coſts in replevin, it is to be obſerved, that as the plaintiff in ſuch action might have recovered damages at the common law, before the ſtatute of *Gloceſter*, ſo now by that ſtatute, (*c.* 1.) he is entitled to coſts, as a conſequence of thoſe damages. But the avowant or defendant in replevin had no right to coſts till the 7 *H.* 8. *c.* 4. which gives damages and

costs to every avowant, and to every person making cognizance, or justifying as bailiff in replevin, for any rent, custom or service, if his avowry, cognizance or justification be found for him, or the plaintiff be otherwise barred. The statute of 21 *H.* 8. *c.* 19. extends the same benefit to defendants, avowing, making cognizance, or justifying, for *damage feasant*.

2 Rol. Rep. 437. It has been holden, that altho' the power of making an avowry be given to an executor by the 32 *H.* 8. *c.* 37. which is subsequent to both the statutes which give costs to an avowant,—yet such executor is entitled to costs, altho' they be not mentioned in the statute which gives the avowry.

Hard. 153. But it has been resolved, that the defendant in replevin shall not recover costs, if he claim property in the distress; because that is a case omitted out of the statutes which give the defendant his costs in replevin. *Tamen quære*; for by the statute of 4 *Jac.* 1. *c.* 3. the defendant obtaining judgment, shall recover costs in every action, wherein the plaintiff might have recovered them against the defendant.

Cro. Jac. 520. And therefore in another case, where the defendant avowed for an amerciament by a court leet, which is equally a *casus omissus* with the former; it was holden, that the avowant should have his costs.

When the defendant proceeds by inquiry on the 17 *Car.* 2. *c.* 7. he shall recover his full costs of suit, as appears before.

And

And by the 11 *G.* 2. *c.* 19. which declares it to be lawful for the defendant in replevin to make a *general* avowry or cognizance for rent, relief, heriot, or other ſervice, it is enacted, that "if the plaintiff in ſuch action ſhall become nonſuit, diſcontinue his action or have judgment againſt him, the defendant ſhall recover DOUBLE coſts of ſuit."

The defendant in replevin avowed the taking as a *ſeiſure* for an heriot *cuſtom*; and the plaintiff being nonſuited, a queſtion aroſe, whether the defendant was entitled to double coſts? And it was holden that he was not; for, the avowry not being for a diſtreſs, the caſe is not within the ſtatute. Barnes's notes, 4to. 148.

By the 8 & 9 *W.* 3. *c.* 11. it is enacted, that "where ſeveral perſons ſhall be made defendants in any action or plaint of treſpaſs, *&c.* and any one or more of them ſhall be acquitted by verdict, every perſon ſo acquitted ſhall recover his coſts." But it has been holden, that this ſtatute does not extend to actions of replevin; for the word *treſpaſs*, as it is there uſed, only relates to treſpaſſes *vi et armis*.] 3 Bur. 1284.

As to the *Retorno Habendo*, and *ſecond Deliverance*.

In all caſes where the defendant in replevin avows and hath judgment, on ſuch avowry he ſhall have return of the beaſts awarded; becauſe the avowry allows the caption, but avoids the injuſtice thereof, by ſhewing he had good cauſe of taking

ſuch diſtreſs; and conſequently, if ſuch cauſe of caption be approved of by the court, they muſt, in juſtice, return the pledge to the avowant.

And where the defendant, inſtead of an avowry, pleads to the writ of replevin; that is, where he does not admit the caption and avoid the injuſtice of it, but by plea inſiſts, that the plaintiff ought not to have the writ of replevin, whether he the defendant took them or not; yet here the defendant in ſome caſes ſhall have return without any avowry or conuſance made.—And in order to ſettle this, it will be neceſſary to take up a diſtinction already obſerved, between pleas that diſaffirm property in the plaintiff, and pleas that admit property in the plaintiff. As if the defendant in the replevin pleads property in the beaſts in himſelf, or in a ſtranger, (whether it be pleaded in abatement of the writ, in bar of the action, or in juſtification,) if the defendant prevails in it, he ſhall have return WITHOUT ANY AVOWRY; becauſe if theſe pleas be true, they deſtroy all right of complaint in the plaintiff for the caption and retention: and if the plaintiff hath no right to the writ of replevin, under the preſent form, nor under any other, he ought to have no benefit from his unjuſt complaint; and therefore the court muſt award reſtitution of the beaſts to the defendant, out of whoſe poſſeſſion they were taken by the replevin.

Salk. 94.

Bro. Abr. tit. Retorn des Avers, pl. 28. Vent. 249.

But if the defendant pleads property in the plaintiff, and *J. S.*—though this plea abates the writ under the preſent form, yet by

by admitting the property in the plaintiff, it ſhews that the plaintiff and *J. S.* have a right to a replevin, tho' under another form, and conſequently the defendant ſhall not have return of the plaintiff's beaſts, unleſs he ſhews good cauſe for ſuch return, and avoids the injuſtice of the firſt caption complained of by the plaintiff.

So if the plaintiff in replevin lays the caption in *D.* and the defendant pleads that he took them in *S. abſque hoc* that he took them in *D.*—This plea, if found for the defendant, may excuſe him from damages, but can never give him a return of the beaſts without a conuſance or an avowry; becauſe he leaves the plaintiff a right to retain his beaſts, when he neither denies the property to be in the plaintiff, nor ſhews any cauſe why he ſhould take them as a pledge.

Bro. Abr. tit. Retorn des Avers, pl. 28. Raſt. Ent. 554. Ld. Raym. 1017. Poſt 175.

If the tenant offers his rent at the time of the diſtreſs taken, or before impounding, and the lord refuſes to accept it, he ſhall never after have return of the beaſts, though the rent be in arrear;—becauſe the diſtreſs is but a pledge for the rent, and when the rent is offered, the pledge ought to be reſtored; conſequently the court will never award the return of the pledge to the lord, which he ought to have reſtored to the plaintiff before the replevin was taken out.

If the plaintiff be nonſuit before he declares, the defendant ſhall have return of the beaſts without making any conuſance or avowry; becauſe where there is no expreſs charge made againſt the defendant by

Bro. Abr. tit. Retorn des Avers, pl. 33. Dyer 280. pl. 14.

a declaration in court, the defendant hath not an opportunity to ſhew his cauſe of caption; and ſince this is owing to the default of the plaintiff, he ſhall have no advantage from it by detaining the beaſts; and therefore the defendant, on ſuch nonſuit, ſhall have return, though he hath made no avowry. But if the plaintiff in replevin hath counted, and afterwards is nonſuited; ſince by the count, the defendant is charged with an unjuſt caption and detention, he muſt purge himſelf thereof by an avowry, before he can be entitled to have return; for the return of the beaſts is ordered by the court on the juſtice of the original caption; and therefore the defendant muſt firſt ſhew the juſtice of this caption, before he can have a return.

Bro. Abr. tit. Retorn des Avers, pl. 23. 2 Inſt. 340.

The return in this action was never irrepleviſable at common law, whether the nonſuit of the plaintiff had been before the avowry or after, or before or after iſſue joined; becauſe where the defendant had judgment for a return on a nonſuit, though after verdict, that judgment was not founded upon the verdict, but on the default of the plaintiff in withdrawing himſelf, at any continuance day after the verdict. So that though the defendant had return, yet he had not the juſtice or legality of his caption eſtabliſhed by ſuch judgment; and therefore as long as the caption and detention was not determined by the judgment of the court, ſo long they allowed the plaintiff after his own nonſuit to take a new replevin.

But

But this was found very inconvenient, becauſe, by this means the defendant could never get reſtitution of the beaſts; and therefore was not likely to recover his rent, ſince he wanted the pledge to compel the tenant to the payment.

To remedy this miſchief the ſtatute of *Weſt.* 2. *c.* 2. taking notice, that *poſtquam adjudicatum fuerit diſtringenti retornum averiorum, et ſic diſtrictus, poſtquam averia ſic retornata iterum replegiaverit, et cum viderit diſtringentem comparentem in curiâ, paratum ſibi reſpondere, defaltam fecerit, ob quam iterum readjudicabitur diſtringenti retornum averiorum, et ſit bis, vel ter, et in infinitum replegiabuntur averia*; provides, that *quam cito adjudicatum fuerit retornum averiorum diſtringenti, per breve de judicio mandetur vicecomiti, quod retornum habere faciat diſtringenti de averiis, in quo brevi inſeratur, quod vicecomes ea non deliberet ſine brevi, in quo fiat mentio de judicio per juſticiarios reddito, &c.* which is the writ of *ſecond deliverance*. So that by this act, if the plaintiff in replevin be once nonſuit, he cannot now have a new replevin, but the writ of ſecond deliverance; which is a judicial writ, and iſſued out of the record of the replevin, in which the nonſuit was, and is to this purpoſe.

"*Rex vicecomiti* E. *ſalutem: Si* A. *fecerit te, &c. et etiam de catallis retornandis, quæ* B. *in curiâ noſtrâ, &c. adjudicata fuerunt ob defaltam ipſius* A. *ſi retornum inde adjudicetur: tunc eidem* A. *averia et catalla prædicta ſine dilatione liberari facias, et pone, &c. prædictum* B. *&c.*" Reg. Jud. 58. b. 2 Inſt. 341.

"George

"George the third, &c. To the ſheriff of &c. greeting: If *A.* ſhall make you, &c. as well of the cattle to be returned, which to *B.* in our court, &c. were adjudged by reaſon of the default of the ſaid *A.* if a return of them ſhould be adjudged, that you then cauſe the beaſts and cattle aforeſaid to be delivered without delay to the ſame *A.* and put, &c. the aforeſaid *B.* &c."

2 Inſt. 341. And by the above mentioned act, it is further provided, *quod ſi iterato ille qui replegiaverit averia, fecerit defaltam, vel alid occaſione adjudicetur retornum diſtrictionis, jam bis replegiatæ, remaneat diſtrictio illa in perpetuum irreplegiabilis.* So that now if the plaintiff do not prevail in the writ of *ſecond deliverance*, but the defendant hath judgment, whether by the nonſuit of the plaintiff, by abatement of the writ, or by diſcontinuance of the plea, the retorn is awarded irrepleviſable; that is, the defendant ſhall detain the beaſts as a pledge until the rent or duty for which they were originally taken, be paid to the defendant; and the plaintiff ſhall never be admitted to diſturb the defendant's poſſeſſion, by replevin or writ of *ſecond deliverance*.

2 Inſt. 107, 341. But if the plaintiff tender the rent for which the diſtreſs was originally taken, the defendant ought to reſtore the beaſts; and

Cro. Jac. 148. if he refuſes, the plaintiff may recover them by action of *detinue*: becauſe, notwithſtanding the judgment for return irrepleviſable, the beaſts ſtill remain as a pledge; and if the defendant refuſe to make reſtitution of the pledge upon tender of the rent, his detention

detention then is unlawful, and the plaintiff may puniſh ſuch detention in an action of *detinue*. For though the return irrepleviſable prevents the bringing back of the pledge; yet it does not veſt the abſolute property thereof in the defendant, but only a qualified property until the rent is paid.

The writ of *ſecond deliverance* is a *ſuperſedeas* in law to the ſheriff, to forbear to execute the writ *de retorno habendo*, obtained on the nonſuit of the plaintiff, if it comes to the ſheriff before return be made. If after return be made, it is in the nature of a new replevin, as appears by the form thereof before mentioned. 2 Inſt. 341. Dyer 41.

[But though the writ of ſecond deliverance is a *ſuperſedeas* of the writ *de retorno habendo*, yet it has been adjudged to be no *ſuperſedeas* of the writ of enquiry of damages upon the 21 H. 8. c. 19. for thoſe damages are not avowed for, but are given as a compenſation for the expence and trouble the avowant has undergone. Latch 72. Palm. 403. Salk. 95.

So it has been determined that the writ of ſecond deliverance is no *ſuperſedeas* of the writ of enquiry of damages upon the 17 Car. 2. c. 7. And therefore it ſhould ſeem that the writ of ſecond deliverance is in effect taken away, where the defendant proceeds upon that ſtatute, by writ of enquiry of damages, and does not purſue the common law judgment *de retorno habendo*.] 2 Wilſ. 116. Ventr. 64.

And the *ſecond deliverance* is always to bring back the ſame diſtreſs which was firſt taken by the defendant, and for which he 2 Inſt. 341.

he hath already judgment for a return. So that if after the nonſuit, upon a *retorno habendo*, the ſheriff returns *elongata*, by means whereof the defendant hath other beaſts of the plaintiff delivered him *in withernam*, in this caſe, though there never was any return of the original diſtreſs made to the defendant, (becauſe they were eloigned by the plaintiff, ſo as the ſheriff could not make any return of them) yet the *ſecond deliverance* muſt go for the firſt diſtreſs, and the plaintiff muſt declare of THAT diſtreſs. For the writ of ſecond deliverance is a judicial writ, which iſſues out of the record of the FIRST replevin, and therefore cannot vary from the record out of which it iſſues; becauſe it ſeeks a deliverance of thoſe cattle which were formerly adjudged to the defendant on the plaintiff's nonſuit; and therefore *ex vi termini* this ſecond deliverance muſt be of the ſame beaſts, of which the firſt deliverance was made to the plaintiff by replevin. But it ſeems that after the ſecond deliverance purchaſed, the plaintiff may move the court for a reſtitution of the *withernam* beaſts.

Ld. Raym. 217. Where the defendant puts in a plea to the writ of replevin, as property in a ſtranger, or in the defendant;—and theſe pleas diſaffirming the property of the plaintiff, are by verdict found for the defendant, or upon demurrer adjudged for him; in theſe caſes the defendant ſhall have return irrepleviſable: for there could be no new replevin at common law, as upon a nonſuit, becauſe the court had already given their judgment upon the legality of the caption. For if

the property be in the defendant, or a ſtranger, the plaintiff could have no cauſe to complain; and therefore to grant a new replevin, or, which is the ſame thing, not to have made the return irrepleviſable, were to leave that ſame point open to an examination, which had already been determined; and no writ of ſecond deliverance can be given by the ſtatute, for that is only upon the plaintiff's nonſuit.

But if the defendant pleads property in the plaintiff and *J. S.* which only abates the writ under the preſent form; or pleads *cepit in alio loco*, which abates the count, and conſequently the writ; in theſe caſes, as there can be no return without an avowry, for reaſons already given; ſo that return cannot, in the nature of the thing, be irrepleviſable; becauſe theſe pleas, only abating the writ, muſt neceſſarily allow a writ under a better form. And it were a contradiction to allow a new replevin to the plaintiff, for the ſame beaſts which the court hath returned to the defendant irrepleviſable. So if the plaintiff confeſſeth the plea of the defendant to be true, the defendant ſhall have return, but not irrepleviſable. Ante 168, 169.

If the writ of replevin abate for any miſpriſion in the clerk, the defendant ſhall have no return at all; becauſe the plaintiff is in no default, but the officer: ſo that, after ſuch abatement of the writ, the plaintiff's poſſeſſion of the beaſts continues. And therefore it ſeems that the defendant, in this caſe, is driven to a new diſtreſs. 2 Inſt. 340.

But

2 Inſt. 340. But if the writ abate by miſinformation, or other default of the plaintiff, the defendant ſhall have return of the beaſts, but not irrepleviſable; becauſe the defendant, by pleading to the writ, allows the plaintiff another writ, under another form.

2 Inſt. 340. The act which awards the return irrepleviſable, extends only to the king's SUPERIOR courts of juſtice. For the act directs, *quod attachietur ille qui diſtrinxit ad veniendum ad certum diem coram juſticiariis, coram quibus placitum deducatur in præſentiâ partium*;—which words are to be underſtood of the king's juſtices in his ſuperior courts. For the judges of inferior courts, are looked upon as more ſubject to miſtake and partiality, and therefore not to be truſted with the power of awarding a return irrepleviſable, which is for ever to conclude the plaintiff. But it ſeems that where judgment was given upon verdict, and not upon nonſuit, the inferior courts could award a return irrepleviſable at common law.

We come now to ſhew what remedy the defendant hath when he cannot come at the beaſts, on the writ *de retorno habendo*.

2 Inſt. 338. It is already obſerved, that by the before mentioned act of *Weſt.* 2. *c.* 2. the ſheriff, before he executes the writ of replevin, is obliged to take from the plaintiff *non ſolum plegios de proſequendo, ſed etiam de averiis returnandis, ſi adjudicetur returnand'; & ſi quis alio modo plegios ceperit, reſpondeat ipſe de pretio averiorum, et habeat dominus diſtringens recuperare per breve quod reddat ei tot averia vel catalla, et ſi non habeat ballivus unde*

unde reddat, reddat ſuperior ſuus. The method of proceeding upon this act is, that if the ſheriff by the writ *de retorno habendo* cannot find the original diſtreſs, but returns *elongata*, the defendant hath a *ſcire facias* to ſummon the perſons who became pledges for the plaintiff, at the execution of the original replevin, that the plaintiff would make return of the original diſtreſs, if return thereof ſhould be awarded. This *ſcire facias* brings the pledges into court, and thereby gives them an opportunity to conteſt, why the defendant ſhould not have return of their beaſts, ſince the plaintiff's beaſts cannot be found, for whom they were pledges. If the pledges cannot ſhew cauſe, then the defendant hath A WRIT to have return of the beaſts of the pledges, inſtead of the plaintiff. 2 Inſt. 340. 3 Mod. 56, 57. Raſt. 569, 570. which ſee.

[But here it may be proper to obſerve, that the proceſs againſt the pledges in replevin, in ſuch courts as are not of record, is not properly a *ſcire facias*; for every *ſcire facias* ought to be grounded upon a record; but it is rather A PRECEPT in nature of a *ſcire facias*.] Ld. Raym. 278.

If the pledges prove inſufficient, ſo as the ſheriff can find none of their cattle, and thereby is obliged to return *nihil* on the writ iſſued againſt the beaſts of the pledges, the ſheriff himſelf, by the ſaid act, then becomes liable. And the defendant hath a *ſcire facias* grounded upon the ſaid act, *quod reddat ei* (the defendant) *tot averia* or *catalla*. [Or, in ſuch caſe, the defendant may proceed againſt the ſheriff by action on the 2 Inſt. 340. Bro. Abr. tit. Retorn des Avers, pl. 2. Dalt. Sher. 275. Ld. Raym. 278.

caſe, for omitting to take pledges, or for taking ſuch as are inſufficient.

But it ſhould be remembered, that there is another act of parliament relative to pledges in replevin; and that is the 11 G. 2. c. 19. which ordains, that, "the ſheriff, or other officer, granting a replevin, ſhall firſt take in his own name, from the plaintiff and two pledges, a bond in double the value of the goods diſtrained, conditioned for proſecuting the ſuit with effect and without delay, and for returning the goods, in caſe a return ſhall be awarded; which bond may be aſſigned to the avowant, who may bring an action thereupon in his own name."—The mode of proceeding on this act is now generally preferred, to the old remedy by *ſcire facias*, where the replevin is upon a diſtreſs for rent. And it is not affected by the 17 Car. 2. c. 7. for where the avowant had judgment for want of a plea in bar, in purſuance of that ſtatute, it was held, that he had two methods of proceeding in his election; either to execute a writ of enquiry, or to ſue upon the replevin bond; the plaintiff not having proſecuted his ſuit with effect.

2 Wilſ 42.

If the ſheriff upon a replevin take pledges *de retorno habendo*, and upon a return awarded return, *quod averia elongata ſunt*, and then a *ſcire facias* is brought againſt the pledges, and a *nihil* is returned, an action lies againſt the ſheriff; or, an action may be maintained againſt him, *upon ſuggeſtion* of this matter.

11 H. 6. 16. b.

From hence it ſhould ſeem, that it is not neceſſary to ſue out a *ſcire facias* againſt the

the pledges, and to have it returned *nihil*, in order to ground an action againſt the ſheriff for their inſufficiency. And this opinion is authorized by the following determination.

An action on the caſe was brought againſt the ſheriff for taking inſufficient pledges upon a replevin, to which he pleaded not guilty; and a verdict being found againſt him, judgment was given thereon in the court of *C. B.* A writ of error was brought in *B. R.* and it was objected, firſt, that an action on the caſe was not the proper remedy; and ſecondly, that ſuppoſing ſuch action lay, there ought to have been a *ſcire facias* firſt ſued out againſt the pledges. As to the firſt objection, the court held that by the ſtatute of *Weſtm.* 2. the party diſtraining has an intereſt in the pledges, and if the ſheriff omits to take them, or, which is the ſame thing, takes inſufficient ones, the party is aggrieved, and conſequently is entitled to his action. And as to the ſecond objection, it was determined, that tho' a *ſcire facias* may be brought againſt the pledges, yet it does not follow from thence, that an action does not lie againſt the ſheriff, without firſt bringing a *ſcire facias* againſt the pledges. For tho' ſome books (2 *Inſt.* 340. *F. N. B.* 74. *F. Bro. ſci. fa.* 3. *Raſt.* 569. *b. Co. Ent.* 637. *Skin.* 244.) mention ſuch a previous ſtep, yet, as the ſtatute does not direct it, and as no caſe declares it to be neceſſary, it would be hard to require ſuch a circuitous mode of proceeding: and therefore the judgment of *C. B.* was affirmed.]

Rous v. Patterſon. 16 Vin. Abr. 399.

So that the defendant is now ſecured againſt the danger he was expoſed to at common law, which was, that the plaintiff who had the poſſeſſion of the diſtreſs reſtored to him by the execution of the replevin, would often ſell or diſpoſe of them pending the ſuit; and ſo the defendant, though he had judgment, loſt the fruits of it.

There is another remedy for the defendant, where the ſheriff returns *elongata* on the writ *de retorno habendo*, and that is by *withernam* againſt the plaintiff's beaſts; but this has been already mentioned, and diſcuſſed.

VIII. Of the writ of recaption.

F.N.B 71.E. It is already obſerved, that where the defendant hath judgment upon his avowry in replevin, he ſhall have reſtitution of the beaſts, to detain them as a pledge, until the rent or duty for which they were taken be paid or ſatisfied; and ſince he hath got ſecurity to have return upon making out the juſtice of his firſt caption, it is highly reaſonable, that pending that ſuit, the tenant ſhould be protected from farther diſtreſſes, for the ſame rent or cauſe, for which the firſt diſtreſs was taken. For this purpoſe the writ of recaption was framed; in which, if the defendant be convicted, he ſhall be fined to the king; becauſe by the ſecond caption the defendant takes upon him to determine the juſtice and legality of the firſt, while that very point is under the conſideration of the court of juſtice in which

which the replevin depends. For if the firſt diſtreſs were lawful, he ſhall have return of it, and therefore the ſecond is unreaſonable; if the firſt were unlawful, much more ſo is the ſecond taking for the ſame cauſe; ſo that the recaption lies even where the cauſe of the firſt caption was juſt.

But it ſeems that if *A.* diſtrains beaſts *damage feaſant*, and pending that ſuit, the ſame cattle or other cattle of the ſame proprietors, treſpaſs on the ſoil of *A.* — *A.* may diſtrain again pending the firſt ſuit; becauſe each diſtreſs is for a DISTINCT and SEVERAL treſpaſs or injury, for which *A.* is entitled to ſatisfaction. The reſtitution of the cattle for the firſt treſpaſs will be no compenſation for the ſecond treſpaſs, ſince *A.* cannot legally with-hold them as a pledge for ſatisfaction of a ſecond treſpaſs, when the firſt is ſatisfied. F.N.B.71.E.

[And if a plaint be removed out of the county into the common pleas by *pone* or *recordari*, and afterwards the plaintiff be nonſuit in the common pleas, before or after an avowry made, the lord after this nonſuit may diſtrain again for the ſame cauſe, and the tenant ſhall not have a recaption; becauſe there is not any plea depending; and yet the plaintiff may ſue a writ of ſecond deliverance upon the ſame record.] Id. 72. D.

The deſign then of the writ of recaption being to prevent a ſecond diſtreſs for the SAME rent or duty, it follows that the defendant cannot avow as in replevin, becauſe the avowry is in order to have a return of the pledges; but in recaption, F.N.B.72.B.

whether the firſt diſtreſs were juſt or unlawful, the defendant cannot have return of the beaſts under the notion of the pledge; for that were to invert the deſign of the law, by allowing the defendant a ſecond diſtreſs, by judgment upon that very writ, which was framed to puniſh the perſon taking a ſecond diſtreſs, for the ſame thing.

F.N.B.72.B. In the writ therefore of recaption, the defendant muſt JUSTIFY as in treſpaſs; becauſe ſince he cannot avow the taking under the notion of a pledge for a rent or duty, (inaſmuch as he hath already a pledge for that, which will be returned to him, if in the event of the ſuit in replevin the rent appears to be in arrear) he muſt therefore be looked upon as a treſpaſſer, unleſs he can juſtify the taking

29 E. 3. 28. for ANOTHER cauſe. And his defence muſt be thus;—*defendit vim & injuriam quando*, &c. *& quicquid eſt in contemptum domini regis & ejus mandati.*

Hence it is, that there are no pledges *de retorno habendo* taken from the plaintiff, as in the replevin; becauſe tho' the deliverance of the beaſts to the plaintiff be immediate, as in the replevin, yet the defendant can have no return. For if the rent or duty was unpaid, for which the diſtreſs was taken, the defendant will have reſtitution of his firſt diſtreſs; which being to remain in his hands till the rent be paid, there is no reaſon for the reſtitution of the ſecond diſtreſs; and conſequently no occaſion for the pledges *de retorno habendo*, as in the original replevin.

And

And here it is not neceſſary to entitle a man to the writ of recaption, that the SAME BEASTS or cattle be taken the ſecond time, which were firſt taken; but only that the cattle or beaſts of the SAME PERSON were diſtrained for the SAME RENT or duty; for the injury is the ſame to the plaintiff in replevin, whether the firſt diſtreſs be again taken, or any other goods or cattle of the plaintiff, and the writ of recaption is to puniſh the injury. F.N.B.72 G.

But if the lord diſtrains the beaſts of his tenant for rent, and afterwards diſtrains the beaſts of *J. S.* a ſtranger, being on the land, for the ſame rent; in this caſe no writ of recaption lies for this ſecond diſtreſs; not for the tenant, becauſe the ſecond diſtreſs is not of the tenant's beaſts; —nor for *J. S.* becauſe the beaſts of *J. S.* were not formerly taken, and therefore *J. S.* muſt take out an original replevin, or bring his action of treſpaſs, as he thinks fit. F.N.B.71.H.

Yet if the lord diſtrains his tenant, and, pending that plea, commands his ſervant to diſtrain the tenant again, for the SAME rent, the tenant ſhall have a recaption againſt the lord himſelf for the ſecond diſtreſs; becauſe the ſecond diſtreſs is eſteemed in law to be taken by the lord himſelf, according to the rule *qui facit per alium, facit per ſe ipſum.* So if the ſervant had taken the ſecond diſtreſs without the lord's command, yet if the lord had afterwards, by any ſubſequent act, agreed to the taking of the ſecond diſtreſs, as by joining in *aid* with the ſervant to defend the juſ- F.N.B.71.F.

tice of the caption;—ſuch ſubſequent agreement makes it a diſtreſs of the lord, and to have been taken in his right *ab initio*. For *omnis ratihabitio mandato æquiparatur*; and a parol agreement of the lord to the ſecond diſtreſs ſeems ſufficient.

But if there be no ſuch command, or ſubſequent agreement of the lord, the tenant ſhall have no recaption either againſt the lord or the ſervant, though the ſervant makes conuſance of the ſecond diſtreſs in right of his lord, and for the ſame rent for which the lord took the firſt diſtreſs: for the writ of recaption is to puniſh the ſecond caption, only where it is wilfully made by the SAME perſon that made the firſt, or by another under his direction or authority; and it may be, that the lord and his ſervant had not notice of each other's caption.

F.N.B.71.G. So that where there is no precedent command, nor a ſubſequent agreement of the lord to the ſecond caption, the tenant is left to his action of treſpaſs againſt the ſervant; becauſe the ſecond caption is a violation of property, and unlawful, tho' the rent be in arrear; ſince the lord, by the firſt diſtreſs, hath taken a pledge for his rent, which will be returned to him if, in the event of the ſuit in replevin, the tenant be found to be in arrear.

F.N.B.71.I. 72 E. If the lord diſtrains the beaſts of *A.* and *B.* for rent, and for the ſame rent diſtrains a ſecond time the beaſts of *A.* only, *A.* ſhall have a writ of recaption againſt the lord; becauſe there is a diſtreſs of *A.* already

ready for that rent, which the lord will have a return of, if the rent be found in arrear. But if the firſt diſtreſs had been only of *A.* the tenant, and the ſecond diſtreſs had been the cattle of *A.* and of *B.* a ſtranger, which they have in common, *Fitz-Herbert* makes a doubt whether *A.* in this caſe ſhall have a recaption, becauſe of *B.*'s intereſt in the cattle; for it is plain *B.* cannot join in the recaption, becauſe his beaſts were never diſtrained before.

If the lord diſtrains his tenant, and he replevies, and the lord avows for rent, and the tenant pleads *rien arrear*, or levied by diſtreſs, and pending this ſuit other rent becomes due, the lord may diſtrain again the beaſts of the tenant for the laſt rent incurred, and no writ of recaption lies for the tenant; becauſe theſe diſtreſſes are for two diſtinct cauſes. But if the tenant had pleaded to the avowry in the firſt replevin, *hors de ſon fee*, and pending that ſuit the lord had diſtrained again for another half year's rent, the tenant ſhould have a writ of recaption; becauſe by the plea of *hors de ſon fee* the lord's title to the rent itſelf, and not to this or that particular arrear, is in diſpute, and that title may be determined by the firſt caption; and therefore the ſecond diſtreſs being unneceſſary to try the title to the rent, the writ of recaption lies to prevent it, and puniſh the lord for taking the ſecond diſtreſs, and to protect the tenant from ſuch oppreſſion. F.N.B.71.M.

And this writ of recaption lies for the tenant before avowry made by the lord in the F.N.B.72.A.

the firſt replevin; for otherwiſe the remedy would not be adequate, becauſe the lord might harraſs the tenant by ſeveral diſtreſſes, before the lord, by the rules of the court, could be compelled to avow. But then the tenant muſt, in his declaration on the recaption, aver that the ſecond diſtreſs was taken for the ſame cauſe as the firſt; otherwiſe the tenant fails in making out to the court his title to the writ of recaption, and conſequently cannot puniſh the lord for taking the ſecond diſtreſs.

F.N.B.72.G. [And a recaption lieth as well where the plea is depending in the county before the ſheriff, as where it is depending before juſtices of record.]

APPEN-

APPENDIX.

PRECEDENTS of Pleadings in Replevin.

THE king, &c. We command you that juſtly and without delay you cauſe to be replevied the cattle of *B.* which *D.* took and unjuſtly detains, as it is ſaid, and afterwards thereupon cauſe him juſtly to be removed, that we may hear no more amour thereupon for want of juſtice, &c. **Writ of replevin.**

A. B. complains againſt *C. D.* in a plea of taking and unjuſtly detaining his cattle againſt ſureties and pledges, &c. **Plaint.**

Pledges to proſecute, { *E. F.* and *G. H.*

Walker

Walker *againſt* Towerſy and others.

M. 9 *W.* 3. *Roll* 48.

Declaration. Pract. Reg. 157.

Midd', to wit, JOHN *Towerſy*, *Robert Wheeler* and *William Stubbins*, were ſummoned to anſwer to *Thomas Walker* in a plea, why they took a ſilver porrenger of the ſaid *Thomas* and unjuſtly detained it, againſt ſurety and pledges until, *&c.* And whereon the ſame *Thomas* by *J. L.* his attorney complains that the ſaid *John*, *Robert* and *William*, on the firſt day of *May* in the 9th year of the reign of the Lord *William* the third, now king of *England*, &c. in the *Charter-houſe* in the county of *Middleſex* aforeſaid, in a certain place there called the *dwelling-houſe* of him the ſaid *Thomas*, took the ſaid porrenger of him the ſaid *Thomas*, and unjuſtly detained it, againſt ſurety and pledges until, *&c.* whereby the ſame *Thomas* ſays that he is prejudiced, and hath damage to the value of 30*l.* And therefore he produces the ſuit, *&c.*

Cogniſance by overſeers for a poor's rate.

And the ſaid *John*, *Robert* and *William*, by *R. H.* their attorney come and defend the force and injury when, *&c.* and well acknowledge the taking of the porrenger aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* becauſe they ſay, that at the ſaid time when, *&c.* the ſame *John* and *Robert*, being overſeers of the poor of the pariſh of St. *Sepulchre* in the county of *Middleſex*, by virtue of a certain warrant under the hands and ſeals of *William Withers*,

thers, Eſq; and *Thomas Smith*, Eſq; then two of the juſtices of the lord the now king, aſſigned to preſerve the peace in the county aforeſaid (*quorum unus*) to the warden of the church and the overſeers of the poor of the ſame pariſh, or any of them, directed, at the ſaid place in which, &c. demanded of the ſaid *T. Walker* to pay them 10*s.* 6*d.* of lawful money upon him duly aſſeſſed towards the relief of the poor of the pariſh aforeſaid, by the authority and according to the tenor, purport and effect, of a certain ſtatute made and provided in a parliament of the lady *Elizabeth*, late queen of *England*, &c. held at *Weſtminſter* in the county of *Middleſex* in the 43d year of her reign; and becauſe the ſame *Thomas* then and there refuſed to pay the ſaid 10*s.* 6*d.* to them the ſaid *John* and *Robert*, they the ſame *John* and *Robert*, as overſeers of the poor aforeſaid, and the ſaid *William* at their requeſt and in their aid, for the preſervation of the peace of the ſaid lord the king, (the ſame *William* being then a conſtable within the pariſh aforeſaid) by virtue of the ſtatute and warrant aforeſaid well acknowledge the taking of the porrenger aforeſaid, the ſaid time when, &c. in the ſaid place in which, &c. in the name of a diſtreſs for the ſaid 10*s.* 6*d.* upon him the ſaid *T. Walker* as aforeſaid aſſeſſed towards the relief of the poor of the pariſh aforeſaid, then being in arrear and unpaid, and juſtly, &c. And this they are ready to verify: wherefore they pray judgment, and a return of the porrenger aforeſaid, to be adjudged to them, &c. 43 Eliz. c. 2. §. 19.

2 And

Repl. *De injuria ſua propria.* And the ſaid *Thomas* ſays, that the ſaid *John*, *Robert* and *William*, by the reaſon before alledged, the taking of the porrenger aforeſaid of him the ſaid *Thomas* in the ſaid place in which, *&c.* ought not to acknowledge juſt, becauſe he ſays, that the ſaid *John*, *Robert* and *William*, the day and year aforeſaid in the declaration aforeſaid mentioned, of their own wrong, without ſuch cauſe by them in their cogniſance aforeſaid above mentioned, the porrenger aforeſaid of him the ſaid *Thomas* in the ſaid place in which, *&c.* took and unjuſtly detained, againſt ſurety and pledges, *&c.* in manner and form as the ſaid *Thomas* above againſt them complains: and this he prays may be inquired of by the country: and the ſaid *John*, *Robert* and *William* likewiſe, *&c.* Therefore, *&c.*

Croſſe againſt *Bilſon*.

Declaration. For taking a mare in the highway. Salk. 3. Pract. Reg. 157.

North'ton, to wit. *JOHN Bilſon* was ſummoned to anſwer to *Samuel Croſſe* in a plea, why he took a mare of him the ſaid *Samuel* and unjuſtly detained it, againſt ſurety and pledges, *&c.* And whereon the ſame *Samuel* by *W. L.* his attorney complains, that the ſaid *John* on the firſt day of *October* in the 12th year of the reign of the lord *William* the third, late king of *England*, &c. at *Hardingſton* in the county aforeſaid, in a certain place there called the *king's highway*, a mare of him the ſaid *Samuel* took and unjuſtly detained it, againſt ſurety and pledges, until, *&c.*

&c. whereby the ſame *Samuel* ſays that he is prejudiced, and hath damage to the value of 10*l.* And therefore he produces the ſuit, *&c.*

And the ſaid *John Bilſon* by *J. B.* his attorney comes and defends the force and injury when, *&c.* and as bailiff of the moſt noble *William* lord *Leimpſter* well acknowledges the taking of the mare aforeſaid the ſaid time when, *&c.* in a certain place called the *queen's highway*, and juſtly, *&c.* becauſe he ſays, that the ſaid place contains, and the ſaid time when, *&c.* did contain in itſelf, half a rod of land with the appurtenances in *Hardingſton* aforeſaid; which ſaid half rod of land long before and the ſaid time when, *&c.* was parcel of a certain antient meſſuage in *Hardingſton* aforeſaid; which ſaid meſſuage long before, and the ſaid time when, *&c.* was the ſoil and freehold of the ſaid lord *Leimpſter*; and becauſe the mare aforeſaid the ſaid time when, *&c.* was in the ſaid half rod of land in which, *&c.* doing damage there, the ſaid *John*, as bailiff of the ſaid *William* lord *Leimpſter*, well acknowledges the taking of the mare aforeſaid, in the place in which, *&c.* and juſtly, *&c.* doing damage there, *&c.* without that, that the ſaid *John* took the mare aforeſaid in a certain place called the *king's highway*, as the ſaid *Samuel* againſt him hath declared: and this he is ready to verify: wherefore he prays judgment, and a return of the mare aforeſaid, to be adjudged to him, *&c.* Cogniſance for damage feaſant.

And

Plea in Maintenance of the declaration.

And the ſaid *Samuel* ſays, that the ſaid *John Bilſon*, as bailiff of the moſt noble *William* lord *Leimpſter*, the taking of the mare aforeſaid ought not to acknowledge juſt, becauſe he ſays, that he the ſaid *John Bilſon* the ſaid time when, *&c.* took the mare aforeſaid in the ſaid place then called the *king's highway*, in manner and form as the ſaid *Samuel* above by declaring hath alledged: and this he prays may be inquired of by the country.

Demurrer.

And the ſaid *John* ſays, that he to the plea of the ſaid *Samuel* above in replying pleaded hath no neceſſity, nor is by the law of the land obliged in any manner to anſwer, becauſe he ſays, that the ſame plea is not ſufficient in law to maintain his declaration aforeſaid: and this he is ready to verify: wherefore for want of a ſufficient replication in this behalf the ſame *John* as before prays judgment, and that the declaration aforeſaid may be quaſhed.

Joinder.

And the ſaid *Samuel*, for that he hath above alledged ſufficient matter in law for him the ſaid *Samuel* to maintain his action and declaration aforeſaid, which he is ready to verify, which ſaid matter the ſaid *John* doth not deny, nor to the ſame in any wiſe anſwer, but that averment hath altogether refuſed to admit, prays judgment, and his damages by reaſon of the taking and unjuſt detention of the mare aforeſaid, to be adjudged to him, *&c.* And becauſe the juſtices here will adviſe themſelves of and upon the premiſſes before they give judgment thereon, day is given to the parties afore-

1 Sid. 189, 190.
1 Vent. 135, 136.
Cro. El. 202.

aforeſaid here until from the day of St. *Michael* in three weeks to hear their judgment thereon, becauſe the ſame juſtices here thereof not yet, *&c.* On which day here comes as well the ſaid *Samuel* as the ſaid *John* by their attornies aforeſaid; and hereupon the premiſſes being ſeen, and by the juſtices here more fully underſtood, it ſeems to the ſame juſtices here, that the plea of the ſaid *Samuel* above in replying pleaded is ſufficient in law to maintain his declaration aforeſaid, as the ſaid *Samuel* hath above alledged; wherefore the ſaid *Samuel* ought to recover his damages by reaſon of the premiſſes againſt the ſaid *John*: but becauſe it is unknown what damages the ſaid *Samuel* hath ſuſtained by reaſon of the premiſſes, the ſheriff is commanded, that by the oath of twelve good and lawful men of the county aforeſaid he diligently inquire what damages the ſaid *Samuel* hath ſuſtained, as well by reaſon of the premiſſes, as for his coſts and charges by him about his ſuit in this behalf expended; and the inquiſition which he ſhall thereof make, certify here on the octave of St. *Hilary* under the ſeal, *&c.* and the ſeals, *&c.* On which day here comes the ſaid *Samuel* by his attorney aforeſaid; and the ſheriff, to wit, *Cæſar Child*, Bart. hath now returned here a certain inquiſition taken before him at the town of *North'ton* in the county aforeſaid on the 19th day of *January* laſt paſt by the oath of twelve, *&c.* whereby it is found that the ſaid *Samuel* hath ſuſtained damages by reaſon of the premiſſes, beſides his coſts and charges by him about his ſuit in this

Judgment for the plaintiff.

Inquiry awarded.

behalf expended, to 80 *s.* and for thoſe coſts and charges to 2 *d.* Therefore it is conſidered, that the ſaid *Samuel* do recover againſt the ſaid *John* his damages aforeſaid to 80 *s.* and 2 *d.* by the inquiſition aforeſaid in form aforeſaid found, and alſo 12 *l.* 17 *s.* 4 *d.* to the ſaid *Samuel* at his requeſt for his coſts and charges aforeſaid, by the court here of increaſe adjudged; which ſaid damages in the whole amount to 16 *l.* 17 *s.* 6 *d.* And the ſaid *John* in mercy, *&c.*

Final judgment.

Afterwards, to wit, on day next after in this ſame term, before the lady the queen at *Weſtminſter* comes the ſaid *John* by *A. M.* his attorney, and ſays, that in the record and proceedings aforeſaid, and likewiſe in the rendition of the judgment aforeſaid, there is manifeſt error, in this, to wit, that by the record aforeſaid it appears that the judgment aforeſaid, in form aforeſaid given, was given for the ſaid *Samuel Croſſe* againſt him the ſaid *John Bilſon*; when, by the law of the land of this kingdom of *England*, judgment in the plea aforeſaid ought to have been given for the ſaid *John* againſt the ſaid *Samuel:* there is error alſo in this, to wit, that by the record aforeſaid it appears that the ſaid *John* was ſummoned to anſwer to the ſaid *Samuel* in the plea aforeſaid; yet no original writ between the parties aforeſaid, in the plea aforeſaid, is filed of record, nor remains of record in the ſaid court of the lady the queen of the bench; therefore in that there is manifeſt error: there is error alſo in this, to wit, that by the record aforeſaid it appears

General errors aſſigned.

No original.

No warrant of attorney.

pears that the ſaid *Samuel*, in the ſaid court of the lady the ſaid queen of the bench, came and appeared by *W. L.* his attorney; yet the ſaid *W. L.* had no warrant of attortorney of record by writ of the now lady the queen, nor without writ, to warrant his appearance for the ſame *Samuel* in the plea aforeſaid: there is error alſo in this, to wit, that by the record aforeſaid it appears, that the ſaid *John*, in the ſaid court of the ſaid lady, the now queen of the bench, appeared by *William Marriot* his attorney; nevertheleſs *W. M.* had no warrant of attorney of record by writ of the lady the queen, nor without writ, to warrant his appearance for the ſaid *John* in the plea aforeſaid: and the ſame *John* prays ſeveral writs of the lady the queen, to wit, one to the chief juſtice of the ſaid lady the queen of the bench, and another writ to the *cuſtos brevium* of the ſaid lady the queen of the bench aforeſaid to be directed, to certify the ſaid lady, the now queen, more fully the truth thereof: and to him they are granted, *&c.* Whereupon *Tueſday* next, after 15 days of the *Holy Trinity*, is given by the court of the ſaid lady the queen now here, to return to the court of the ſaid lady the queen, before the queen herſelf at *Weſtminſter*, the ſaid ſeveral writs of *certiorari* above prayed: the ſame day is given to the ſaid *Samuel* there, *&c.* And the ſaid chief juſtice of the bench aforeſaid, and the ſaid *cuſtos brevium* of the ſaid lady the now queen, on that day have not, nor hath either of them, returned the ſeveral writs aforeſaid, neither

Several *certioraries* prayed.

Rule to return them.

have they, or either of them, done any thing therein: and hereupon the ſaid *Samuel* freely here into court comes and ſays, that there is no error either in the record and proceedings aforeſaid, or in the rendition of the judgment aforeſaid; and prays that the court of the ſaid lady the queen, now here, may proceed to the examination as well of the record and proceedings aforeſaid, as of the matters aforeſaid above for error aſſigned, and that the judgment aforeſaid may be in all things affirmed: but becauſe the court of the ſaid lady the queen, now here, are not yet adviſed to give their judgment of and upon the premiſſes, day therefore is given to the parties aforeſaid, before the lady the queen, until in a month of St. *Michael* whereſoever, *&c.* to hear their judgment thereon; becauſe the court of the ſaid lady the queen now here thereof not yet, *&c.* On which day, before the lady the queen at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid; whereupon as well the record and proceedings aforeſaid, and the judgment on the ſame given, as the ſaid cauſes and matters above for error aſſigned and alledged, being ſeen, and by the court of the ſaid lady the queen now here more fully underſtood and diligently examined, becauſe it ſeems to the court of the ſaid lady the queen here, that the judgment aforeſaid is in nothing vitious or defective, and that there is no error in that record; it is conſidered, that the judgment aforeſaid be in all things affirmed, and remain in its full force and effect, the

No error.

Judgment affirmed.

ſaid cauſes above for error aſſigned in any wiſe notwithſtanding, *&c.* And it is further conſidered by the ſame court, that the ſaid *Samuel* do recover againſt the ſaid *John* 12 *l.* to the ſame *Samuel* by the court of the ſaid lady the queen now here by his aſſent adjudged, according to the form of the ſtatute thereof lately made and provided, for his coſts, charges and damages, which he hath ſuſtained by reaſon of the delay of execution of the judgment aforeſaid, on pretence of proſecuting the ſaid writ of the lady the queen to correct error, of and upon the premiſſes; and that the ſame *Samuel* may have thereof his execution, *&c.* 3 H. 7. c. 10.

Hubbard againſt *Handford.*

Midd', to wit. *Richard Handford* was ſummoned to anſwer to *Richard Hubbard*, in a plea, why he took the goods and chattels of him the ſaid *Richard Hubbard*, and unjuſtly detained them, againſt ſurety and pledges, until, *&c.* And whereon the ſame *Richard Hubbard* by *J. P.* his attorney complains, that the ſaid *Richard Handford* on the 7th day of *October* in the 2d year of the reign of the lord and lady *William* and *Mary*, now king and queen of *England*, *&c.* at the pariſh of St. *Margaret Weſtminſter* in the county aforeſaid, in a certain place there called *Peter-ſtreet*, took the goods and chattels following, to wit, one jack, two ſpits, 18 pewter plates, *&c.* *(reciting ſeveral other particulars)* of the ſaid Declaration. Replevin in K. B.

Richard Hubbard, and unjuſtly detained them, againſt ſurety and pledges, until, *&c.* whereby the ſame *Richard Hubbard* ſays, that he is prejudiced, and hath damage to the value of 20 *l.* And therefore he produces the ſuit, *&c.*

And the ſaid *Richard Handford* by *J. L.* his attorney comes and defends the force and injury, when, *&c.* and well avows the taking of the goods and chattels aforeſaid, in the ſaid place where, *&c.* and juſtly, *&c.* becauſe he ſays, that the ſame place, where the taking of the goods and chattels aforeſaid is ſuppoſed to be, contains, and at the ſame time when the taking of thoſe goods and chattels is ſuppoſed to be, did contain in itſelf, a certain piece or parcel of land, with the appurtenances, in a place called *Peter-ſtreet*, otherwiſe *Bowling-alley*, in the pariſh of St. *Margaret Weſtminſter* aforeſaid, in the county aforeſaid; of which ſaid piece or parcel of land, with the appurtenances, one *Robert Marſham*, knt. before the ſaid time when, *&c.* was ſeiſed in his demeſne as of fee; and being ſo thereof ſeiſed, the ſaid *Robert*, before the ſaid time when, *&c.* to wit, on the 16th day of *May*, in the firſt year of the reign of the lord and lady the now king and queen, at the pariſh of St. *Margaret Weſtminſter* aforeſaid, in the county aforeſaid, demiſed the ſame piece or parcel of land, with the appurtenances, to the ſaid *Richard Handford*, to hold to the ſame *Richard* and his aſſigns from the feaſt of the Bleſſed Virgin *Mary* then laſt paſt before the date of the ſame demiſe, for the term of 51 years from thence

Sir *Robert Marſham* ſeiſed in fee of the place where, *&c.* demiſed it to the defendant for 51 years.

thence next enſuing and fully to be compleat and ended: by virtue of which ſaid demiſe the ſaid *R. Handford* was poſſeſſed of the ſame piece or parcel of land for the term aforeſaid; and ſo being thereof poſſeſſed, the ſame *R. Handford*, afterwards, and before the ſaid time when, *&c.* had erected and built the ſaid meſſuage or tenement on the piece or parcel of land aforeſaid, and was thereof poſſeſſed; and being ſo thereof poſſeſſed, he the ſame *Richard Handford*, before the ſaid time when, *&c.* to wit, on the 20th day of *December*, in the firſt year of the reign of the ſaid lord and lady the now king and queen aboveſaid, demiſed the meſſuage aforeſaid, with the appurtenances, to the ſaid *Richard Hubbard* from the feaſt of the birth of our Lord then next following for the term of one whole year from thence next enſuing fully to be compleat and ended; yielding therefore for the ſame year to the ſaid *Richard Handford*, or his aſſigns, the rent of 15 *l.* of lawful money of *England*, at the four moſt uſual feaſts in the year, to wit, the feaſts of the annunciation of the Bleſſed Virgin *Mary*, St. *John* the baptiſt, St. *Michael* the archangel, and the birth of our Lord, by even and equal portions: by virtue of which ſaid demiſe the ſaid *Richard Hubbard* into the meſſuage aforeſaid with the appurtenances entered, and was thereof poſſeſſed, and the ſame meſſuage with the appurtenances for the ſpace of three quarters of a year occupied; and becauſe the ſum of 11 *l.* 5 *s.* of the rent aforeſaid, after the demiſe ſo made

who demiſed it to the plaintiff for a year at 15 *l.*

and for three quarters rent arrear diſtrained.

for the ſaid three quarters of a year at the feaſt of St. *Michael* laſt paſt, and before the taking of the goods and chattels aforeſaid, were to the ſame *Richard Handford* in arrear and unpaid, the ſame *Richard Handford* well avows the taking of the goods and chattels aforeſaid in the ſaid place where, &c. and juſtly, &c. for the ſaid 11 *l.* 5 *s.* to the ſame *Richard Handford* in form aforeſaid being in arrear, as in the meſſuage aforeſaid with the appurtenances to the diſtreſs of the ſaid *Richard Handford* in form aforeſaid charged and bound: and this he is ready to verify: wherefore he prays judgment, and a return of the goods and chattels aforeſaid, to be adjudged to him.

Repl' That the rent was not in arrear.

And the ſaid *R. Hubbard* ſays, that the ſaid *R. Handford* for the reaſon before alledged ought not to avow the taking of the goods and chattels aforeſaid in the ſaid place where, &c. juſt, becauſe he ſays, that the ſaid 11 *l.* 5 *s.* of the rent aforeſaid at the ſaid time when, &c. were not in arrear and unpaid to the ſaid *Richard Handford*, nor was any penny thereof at the ſaid time when, &c. in arrear to the ſaid *Richard Handford*, as the ſaid *Richard Handford* in his avowry aforeſaid hath above alledged: and this he prays may be inquired of by the country: and the ſaid *Richard Handford* likewiſe, &c. Therefore the ſheriff is commanded, that he cauſe to come before the lord and lady the king and queen from the day of the Holy *Trinity* in three weeks wherefoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c.

Iſſue.

becauſe

becauſe as well, &c. The ſame day is given to the parties aforeſaid, &c. On which day before the lord and lady the king and queen at *Weſtminſter* come the parties aforeſaid by their attornies aforeſaid; and the ſheriff hath not returned the writ, nor done any thing therein; therefore as before the ſheriff is commanded, that he cauſe to come before the lord and lady the king and queen from the day of St. *Michael* in three weeks whereſoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid, &c.

Legg againſt *Stephens and others.*

Glouceſter, to wit. THomas *Stephens*, eſq; *Robert Parker*, eſq; and *Richard Broke*, were ſummoned to anſwer to *Nicholas Legg* in a plea, why they took the cattle of him the ſaid *Nicholas* and unjuſtly detained, againſt ſurety and pledges until, &c. And whereon the ſame *Nicholas* by *P. Hodges* his attorney complains, that the ſaid *Thomas*, *Robert* and *Richard*, on the tenth day of *November* in the 32d year of the reign of the lord *Charles* the ſecond, now king of *England*, &c. at the pariſh of *Old Sodbury* in the county aforeſaid, in a certain place there called the *Stub Riding*, took the cattle, to wit two oxen, of him the ſaid *Nicholas* and unjuſtly detained them, againſt ſurety and pledges Declaration.

pledges until, &c. whereby the ſame *Nicholas* ſays that he is prejudiced, and hath damage to the value of 20 *l.* And therefore he produces the ſuit, &c.

Avowry for a diſtreſs for an amercement at a leet.

And the ſaid *T. Stephens*, *R. Parker* and *R. Broke*, by *T. Edwards* their attorney come and defend the force and injury when, &c. and the ſaid *T. Stephens* and *R. Parker* well avow, and the ſaid *Richard*, as bailiff of the ſaid *T. S.* and *R. P.* well acknowledges the taking of the cattle aforeſaid in the ſaid place where, &c. and juſtly, &c. becauſe they ſay, that the ſame place, where the taking of the cattle aforeſaid is ſuppoſed to be, doth contain, and at the ſaid time, when the taking of thoſe cattle is ſuppoſed to be, did contain in itſelf 80 acres of meadow with the appurtenances, called *Stub Riding*, ſituate in the pariſh of *Old Sodbury*, and then and from time immemorial was and yet is parcel of the manor and within the manor of *Old Sodbury* in the county aforeſaid, and within the juriſdiction of the court-leet and view of frankpledge within ſpecified; and that long before the ſaid time when, &c. to wit, on the 10th day of *March* in the 32d year of the reign of the ſaid lord the now king, and long before, the ſaid *T. S. R. P.* and one *J. Neale* late of *Deane* in the county of *Bedford*, eſq;

Seiſin.

were jointly ſeiſed of and in the ſaid manor of *Old Sodbury* aforeſaid with the appurtenances, ſituate within the pariſh of *Old Sodbury* aforeſaid, in their demeſne as of fee; and that at the ſaid time when, &c. the ſaid *N. Legg* was and yet is occupier of the ſaid cloſe called *Stub Riding*, and that the

the ſaid *T. S. R. P.* and *J. N.* and all thoſe whoſe eſtate the ſame *T. R.* and *J.* have in the ſame manor with the appurtenances, from time immemorial have had, and been accuſtomed to have, within the manor aforeſaid, a certain court of view of frankpledge, and all things which to a court of view of frankpledge belong, of all the inhabitants and reſiants within the manor aforeſaid twice a year, to wit, once within a month next after the feaſt of *Eaſter*, and again within a month next after the feaſt of St. *Michael* the archangel, before their ſteward of that court for the time being within that manor yearly to be held, as to the ſaid manor with the appurtenances belonging and appertaining: and the ſaid *Thomas*, *Robert* and *Richard* farther ſay, that before the ſaid time when, *&c.* to wit, at a court of view of frankpledge of the ſaid *Thomas*, *Robert* and *John*, held at *Old Sodbury* aforeſaid within the manor aforeſaid, within a month next after the feaſt of *Eaſter*, to wit, on the 19th day of *April* in the 32d year of the reign of the ſaid lord the now king of *England*, *&c.* before *T. Edwards*, being then ſteward of the ſaid *T. Stephens*, *R. Parker* and *J. Neale*, of the court of view of frankpledge, by the oath of 12 free and lawful men within the pariſh aforeſaid reſiant and inhabiting, then and there to inquire and preſent thoſe things which to the court-leet and view of frankpledge aforeſaid then belonged, then in the ſame court being charged and ſworn, then and there in the ſame court it was preſented, among other things, that the ſaid

Prescription.

Court-leet.

Presentment.

Nicholas

Nicholas Legg the now plaintiff, then and for three months then laſt paſt being occupier of the ſaid cloſe called the *Stub Riding* within the juriſdiction of that court, had not opened the king's highway, being within the precinct of the manor aforeſaid, and within the precinct of the leet aforeſaid, and the juriſdiction of the ſaid court of view of frankpledge, leading from the pariſh of *Yate* in the county aforeſaid croſs the ſaid cloſe called the *Stub Riding* unto and into a certain common field called *Horwood Common* within the precinct of the ſame manor, and within the precinct of the ſaid leet, and the juriſdiction of the court of view of frankpledge aforeſaid, which before then there within the juriſdiction of the court-leet aforeſaid he had ſtopped up and ſtraitened, and the ſame way ſo ſtraitened and ſtopped up then and for the ſpace of three months then laſt paſt had continued ſtraitened and ſtopped up, to the common nuſance of the people of the ſaid lord the king there by that way deſiring to paſs; whereupon the ſaid *N. Legg*, the occupier of the ſaid cloſe called the *Stub Riding*, for the cauſe aforeſaid, at and by the ſame court of view of frankpledge then and there was amerced; which ſaid amercement by affeerors then and there in the ſame court of view of frankpledge, to wit, *N. White* and *T. Adey*, Affeerors in the ſame court, thereto then charged and ſworn, then and there was duly affeered to 40 *s.* and farther in the ſame court by the ſaid then ſteward of the ſaid court, and the jurors aforeſaid, it was ordered, that the ſaid *N. Legg*, being the

For ſtopping a way.

Amercement affeered.

the occupier of the close aforesaid, should open and leave open the way aforesaid for the subjects of the lord the now king there after to travel and pass before the 23d day of *May* then next following, under the penalty of 4*l.* of lawful money of *England*, to be forfeited to the lord in default thereof: and the same *T. Stephens*, *R. Parker* and *R. Broke* farther say, that the said *N. Legg* afterwards, to wit, the same day, year and place last mentioned, had notice of the order aforesaid, and that he being as aforesaid the occupier of the close aforesaid called the *Stub Riding*, did not open the same way for the liege subjects of the said lord the king there to travel and pass at any time before the said 23d day of *May* then next ensuing, according to the form of the order aforesaid, by reason whereof at another court of view of frankpledge of the said *T. Stephens*, *R. Parker* and *J. Neale*, held at *Old Sodbury* aforesaid within the manor aforesaid, before the steward aforesaid, within one month next after the feast of St. *Michael*, to wit, on the 23d day of *October* in the 32d year of the reign of the said lord the king aboveſaid, by the oath of twelve other free and lawful men, being then in the same court last mentioned, lawfully sworn and charged to inquire and present in form aforesaid, it was in the same court presented, that the said *N. Legg*, the occupier of the close aforesaid called the *Stub Riding*, had not opened the same way for the liege subjects of the lord the now king there to travel and pass, according to the form of the

Order to open the way.

Notice.

Presentment, that it was not opened.

the ſaid order laſt mentioned in that behalf ſo as aforeſaid then before for that purpoſe made; and that by reaſon thereof the ſaid *N. Legg*, the occupier of the ſaid cloſe called the *Stub Riding*, had forfeited to the ſame *T. Stephens*, *R. Parker* and *J. Neile*, the lords of the court aforeſaid, and of the manor aforeſaid with the appurtenances being then in form aforeſaid ſeiſed, the ſaid ſum and penalty of the ſaid 4*l.* of lawful money of *England:* And the ſaid *T. Stephens*, *Robert Parker* and *Richard* farther ſay, that afterwards, and before the ſaid time when, &c. to wit, 28th day of *October* in the 32d year of the reign of the ſaid lord the now king, the ſaid *John Neile* at *Old Sodbury* aforeſaid in the county aforeſaid died, whereby not only the ſaid manor with the appurtenances came to the ſame *T. Stephens* and *R. Parker* by right of ſurvivorſhip, but the right of having the ſaid amercement and penalty accrued to them the ſaid *Thomas* and *Robert:* and the ſame *T. Stephens*, *Robert Parker* and *Richard* farther ſay, that at the time of the ſeveral preſentments and courts aforeſaid ſo as aforeſaid held and made, the way aforeſaid was ſtopped and ſtraitened, and ſo continued, by the ſaid *N. Legg*, the occupier of the cloſe aforeſaid, to the common nuſance of the ſubjects of the ſaid lord the king; and becauſe the ſaid ſum and penalty of 4*l.* above mentioned at the ſaid time when, &c. was in arrear and unpaid, altho' it was demanded of the ſaid *N. Legg*, to wit, at *Old Sodbury* aforeſaid, the ſame *T. Stephens* and

Death of one of the lords.

and *R. Parker* in their own right well avow, and the ſaid *R. Broke*, as bailiff of the ſaid *T. Stephens* and *R. Parker*, and by their command, well acknowledges the taking of the cattle aforeſaid, then being the cattle of the ſaid *N. Legg* at the ſaid time when, *&c.* in the ſaid place where, *&c.* for the ſaid penalty of 4*l.* being in form aforeſaid due and in arrear, and juſtly, *&c.* Avowry for non-payment.

And the ſaid *Nicholas* ſays, that neither the ſaid *Thomas* and *Robert* the taking of the cattle aforeſaid in the ſaid place where, *&c.* for the reaſon aforeſaid before alledged ought to avow juſt, nor the ſaid *Richard* for the ſame reaſon the ſame taking in the ſame place ought to acknowledge juſt, becauſe by proteſting that there is not any ſuch king's highway as is above ſuppoſed, for plea the ſame *Nicholas* ſays, that the way aforeſaid was not ſtraitened and ſtopped by the ſaid *Nicholas* in manner and form as the ſaid *Thomas* and *Robert* above by avowing, and the ſaid *Richard* above by acknowledging, have ſuppoſed: and this he is ready to verify: wherefore for that the ſaid *Thomas Stephens*, *Robert Parker* and *Richard Broke*, the taking of the cattle aforeſaid have above confeſſed, the ſame *Nicholas* prays judgment, and his damages by reaſon of the taking and unjuſt detention of thoſe cattle, to be adjudged to him, *&c.* Bar, proteſting there was no ſuch way, ſays he did not ſtop it.

And the ſaid *Thomas Stephens*, *Robert Parker* and *Richard Broke* ſay, that the plea aforeſaid by the ſaid *Nicholas* above in bar to the avowry and cogniſance aforeſaid above pleaded, and the matter in the ſame Demurrer.

contained, are not ſufficient in law to preclude them the ſaid *Thomas*, *Robert* and *Richard*, from having their avowry and cogniſance aforeſaid, and that they to that plea in manner and form aforeſaid pleaded have no neceſſity, nor are by the law of the land obliged in any manner to anſwer: and this they are ready to verify: wherefore, for want of a ſufficient plea in this behalf, the ſame *Thomas*, *Robert* and *Richard*, as before, pray judgment, and a return of the cattle aforeſaid, together with their damages, coſts and expences, by them about their ſuit in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to them, *&c.* And for

The cauſes.

27 El. c. 5. 4 Ann. c. 16.

cauſes of demurrer in law, the ſame *Thomas*, *Robert* and *Richard*, according to the form of the ſtatute in ſuch caſe lately made and provided, do ſet down, and to the court here expreſs the cauſes following, to wit; becauſe the matter is traverſed otherwiſe than it is alledged in the declaration, whereby the plaintiff is obliged to prove what he hath not alledged, and likewiſe becauſe the matter traverſed is not traverſable by the laws of this kingdom of *England* in the manner in which it is traverſed in the plea.

Joinder in demurrer.

And the ſaid *Nicholas* ſays, that the plea aforeſaid by him the ſaid *Nicholas* above in bar to the avowry and cogniſance aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law to preclude the ſaid *Thomas*, *Robert* and *Richard*, from having their avowry and cog-

cogniſance aforeſaid; which ſaid plea, and the matter in the ſame contained, the ſaid *Nicholas* is ready to verify and prove, as the court, *&c.* And becauſe the ſaid *Thomas*, *Robert* and *Richard*, do not anſwer to that plea, nor the ſame hitherto in any wiſe deny, the ſame *Nicholas* as before prays judgment, and his damages aforeſaid by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.* But becauſe the court of the ſaid lord the king here are not yet adviſed to give their judgment of and upon the premiſſes, day therefore is given to the parties aforeſaid, before the lord the king from the day of St. *Michael* in three weeks whereſoever, *&c.* to hear their judgment of and upon the premiſſes, becauſe the court of the ſaid lord the king here thereof not yet, *&c.*

Ingram and *Hale* at the ſuit of *Fletcher*.

M. 7 *W.* 3. *Roll.* 107.

Stafford, to wit, *Joſeph Ingram* and *John Hale* were ſummoned to anſwer to *James Fletcher* in a plea, why they took a cow of him the ſaid *James* and unjuſtly detained it, againſt ſurety and pledges, *&c.* And whereon the ſaid *James* by *John Lilly* his attorney complains, that the ſaid *Joſeph* and *John* on the 20th day of *February* in the 7th year of the reign of the lord *William* the third, now king of *England*, *&c.* at *Shenſton* in the county afore- Declaration.

aforeſaid, in a certain place there called the *Lane*, took the cow aforeſaid of him the ſaid *James* and unjuſtly detained it, againſt ſurety and pledges, until, *&c.* whereby the ſaid *James* ſays that he is prejudiced, and hath damage to the value of 20*l.* And therefore he produces the ſuit, *&c.*

Cogniſance for a diſtreſs for a fine at a court-leet.

And the ſaid *Joſeph* and *John Hale* by *Thomas Callowe* their attorney come and defend the force and injury when, *&c.* and as bailiffs of *Rowland Fryth*, Gent. well acknowledge the taking of the cow aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* becauſe they ſay, that the ſame place in which the taking of the cow aforeſaid is ſuppoſed to be contains, and at the ſaid time when the taking of the cow aforeſaid is ſuppoſed to be, contained in itſelf an acre of land with the appurtenances in *Shenſton* aforeſaid; which ſaid town of *Shenſton* is, and at the ſaid time when, *&c.* and alſo from time out of mind was, within the manor of *Shenſton* with the appurtenances in the county

Seiſin in fee.

aforeſaid; of which ſaid manor with the appurtenances the ſaid *Rowland* is, and at the ſaid time when, *&c.* and long before was, ſeiſed in his demeſne as of fee; and

Preſcription for a court-leet.

the ſaid *Rowland*, and all thoſe whoſe eſtate he hath in the ſame manor with the appurtenances, for time out of mind have had, and been accuſtomed to have, a court-leet or view of frankpledge of the ſame manor, and whatever to view of frankpledge belongs, of all the inhabitants and reſiants of that manor, before the

the ſteward of the ſame court for the time being, every year within a month next after the feaſt of St. *Michael* the Archangel, at that manor yearly to be held, as to the ſame manor with the appurtenances belonging: and the ſame *Joſeph* and *John* farther ſay, that within the manor aforeſaid there is, and from time out of mind hath been, ſuch cuſtom, that the jurors to inquire and preſent thoſe things, which to that court-leet and view of frankpledge belong, charged and ſworn, at the court of view of frankpledge of the manor aforeſaid, held at that manor within a month next after the feaſt of St. *Michael* the archangel, yearly have choſen, and for all the time aforeſaid have been accuſtomed to chooſe, a proper man from the inhabitants within the manor aforeſaid to be conſtable of the conſtablewick of *Shenſton* aforeſaid, to ſerve for one year in that office; which ſaid man ſo elected hath taken upon himſelf, and for all the time aboveſaid hath been uſed and accuſtomed to take upon himſelf that office, and hath taken and been accuſtomed to take an oath for the due execution of that office, under a reaſonable penalty, for all the time aboveſaid, by the jurors aforeſaid at ſuch court-leet and view of frankpledge in that behalf ſet: and the ſame *Joſeph* and *John* farther ſay, that the ſaid *Rowland* being lord of the manor aforeſaid, and of the ſame in form aforeſaid ſeiſed, at a court-leet or view of frankpledge of that manor, held at that manor within a month next after the feaſt of St. *Michael* the archangel, to wit, on

Cuſtom to chooſe a conſtable.

Objected, that it ſhould be for one year next enſuing.

A court-leet held.

the ninth day of *October* in the fifth year of the reign of the lord *William* now king and the lady *Mary* late queen of *England*, &c. before *Henry Fryth*, gent. then ſteward to the ſaid *Rowland* of that court, the ſaid *James Fletcher* then and long before being an inhabitant within the manor aforeſaid at *Shenſton* aforeſaid, and a proper man to be conſtable of the ſaid conſtablewick of *Shenſton* aforeſaid, by *E. Thornton*, *T. Grace*, *J. C. J. A. J. H. W. M. W. R. N. W. T. S. J. M. J. S. J. A.* and *J. D.* good and lawful men, and inhabiting within the manor aforeſaid, and then and there in the ſame court charged and ſworn to inquire and preſent thoſe things which to that court-leet and view of frankpledge belonged, duly and according to the cuſtom aforeſaid was choſen to be conſtable of the conſtablewick of *Shenſton* aforeſaid for one year then next enſuing to ſerve in that office; and thoſe jurors then and there in the ſame court ordered, that the ſaid *James* ſhould take his oath for the due execution of his office aforeſaid, under the penalty of forfeiting 40*s.* whereof the ſaid *James Fletcher* immediately afterwards, to wit, the ſame day and year there had notice: * nevertheleſs the ſaid *James* hath not

The plaintiff elected conſtable.

The order of the jury.

The penalty for not ſerving.

* The chief juſtice held this to be naught; for, ſaid he, they ſhould only elect him, and he ſhould have notice of ſuch election, and if he did not thereupon go to a juſtice of peace to be ſworn, he ſhould be preſented for this default at the next court, and ſhould be amerced, and the amercement aſſeer'd. The court alſo held it naught for not laying the notice more particular, as that he was preſent in court,

of

not taken his oath for the due execution of the office of conſtable aforeſaid, nor hath executed or taken upon himſelf that office, but to do it then and often afterwards there abſolutely refuſed; wherefore afterwards and before the ſaid time when, *&c.* to wit, at a court-leet or view of frankpledge of the ſaid manor of the ſaid *Rowland*, held at that manor within a month next after the feaſt of St. *Michael* the archangel, to wit, on the 11th day of *October* in the 6th year of the reign of the ſaid lord king *William* and the lady *Mary*, late queen of *England*, before *Henry Fryth* then ſteward to the ſaid *Rowland* of that court, by *Edward Thornton*, *J. C. W. P. T. G. T. G. J. P. J. J. E. H. T. S. J. M. W. M. G. H. J. S.* the younger, and *J. A.* good and lawful men then inhabiting within the manor aforeſaid, then and there in the ſame court ſworn and charged to inquire and preſent thoſe things which to that court-leet or view of frankpledge belonged, it was preſented, that the ſaid *James Fletcher*, becauſe he was duly elected to be conſtable of the conſtablewick of *Shenſton* aforeſaid at the laſt leet held for the manor aforeſaid, and under the penalty of 40*s.* on him ſet, was ordered to take upon himſelf that office, and execute it, and take his oath in form aforeſaid for

or that he had notice given that he was elected conſtable, and required to take an oath before a juſtice of peace. A ſecond preſentment *prout per* record, *&c.* The fine not paid. *Note*; it is ſaid in a caſe in *Moore*, that the bailiffs ſhould have had a warrant from the ſteward to diſtrain.

the due execution of that office; which, or any part whereof, he had not done, wherefore he had forfeited to the lord of the manor aforeſaid the ſaid 40*s.* of the penalty aforeſaid, then to be paid to the lord of the manor aforeſaid, as by the record thereof in the cuſtody of the ſaid ſteward of the court of the manor of him the ſaid *Rowland* at that manor remaining more fully appears: and becauſe the ſaid 40*s.* for that penalty to the ſame *Rowland*, ſo as aforeſaid being lord of the manor aforeſaid, at the ſaid time when, *&c.* were in arrear and unpaid, the ſame *Joſeph* and *John Hale*, as bailiffs of him the ſaid *Rowland*, well acknowledge the taking of the cow aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* for the ſame 40*s.* for the penalty or amercement aforeſaid to the ſaid *Rowland* ſo being in arrear and unpaid, and within the manor aforeſaid, *&c.*

Demurrer. And the ſaid *James* ſays, that by any thing by the ſaid *Joſeph* and *John* above in the cogniſance aforeſaid by pleading alledged, the ſame *Joſeph* and *John* the taking of the cow aforeſaid in the ſaid place in which, *&c.* ought not to acknowledge juſt, becauſe he ſays, that the plea aforeſaid by them the ſaid *Joſeph* and *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are not ſufficient in law to acknowledge the taking of the cow aforeſaid in the ſaid place in which, *&c.* juſt, and that he to that cogniſance in manner and form aforeſaid made and pleaded hath no neceſſity,

nor

nor is by the law of the land obliged, to anſwer: and this he is ready to verify: wherefore for want of a ſufficient plea in this behalf the ſame *James* prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cow aforeſaid, to be adjudged to him, *&c.*

And the ſaid *Joſeph* and *John* ſay, that the plea aforeſaid by them the ſaid *Joſeph* and *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law for them the ſaid *Joſeph* and *John* to acknowledge the taking of the cow aforeſaid in the ſaid place in which, *&c.* juſt; which ſaid plea, and the matter in the ſame contained, they the ſaid *Joſeph* and *John* are ready to verify and prove, as the court, *&c.* And becauſe the ſaid *James* hath not pleaded or anſwered to that cognizance, nor hitherto any way denied it, the ſame *Joſeph* and *John* pray judgment, and a return of the cow aforeſaid, together with their damages, coſts and charges, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to them, *&c.* But becauſe the court of the ſaid lord the king now here are not yet adviſed to give their judgment of and upon the premiſſes, day therefore is given to the parties aforeſaid before the lord the king until whereſoever, *&c.* o hear their judgment of and upon thoſe premiſſes, becauſe the court of the ſaid lord the king now here thereof not yet, *&c.*

Joinder in demurrer.

Sylas Titus, Eſq; againſt *Parkins*, Knt.

Declaration. *Hertford*, to wit. *William Parkins*, late of *Buſhey* in the county aforeſaid, Knt. was ſummoned to anſwer to *Sylas Titus*, Eſq; in a plea, why he took the cattle of him the ſaid *Sylas* and unjuſtly detained them, againſt ſurety and pledges, *&c.* And whereon the ſame *Sylas* by *John Warburton* his attorney complains, that the ſaid *William* on the 18th day of *May* in the firſt year of the reign of the lord *James* the ſecond, now king of *England*, *&c.* at *Buſhey*, in a certain place there called *Marrybill Ground*, the cattle of him
3 Lev. 225. the ſaid *Sylas*, to wit, 36 wether ſheep, 12 ewe ſheep and 8 lambs, took and unjuſtly detained them, againſt ſurety and pledges until, *&c.* whereby the ſame *Sylas* ſays that he is prejudiced, and hath damage to the value of 10*l.* And therefore he produces the ſuit, *&c.*

Avowry and cogniſance for damage-feaſant. And the ſaid *William* by *Randal Baldwin* his attorney comes and defends the force and injury when, *&c.* and the ſame *William* in his own proper right well avows, and as bailiff to *Algernon* Earl of *Eſſex*, well acknowledges the taking of the cattle aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* becauſe he ſays, that the ſame place, in which the taking of the cattle aforeſaid is ſuppoſed to be, contains, and at the ſaid time, when the taking of the cattle aforeſaid is ſuppoſed to be, did contain in itſelf two acres of paſture with the appurtenances in *Buſhey* aforeſaid; which

which ſaid two acres of paſture with the appurtenances are, and at the ſaid time when, &c. were, the ſoil and freehold of them the ſaid *William* and *Algernon* earl of *Eſſex*; and becauſe the cattle aforeſaid at the ſaid time when, &c. were in the ſaid two acres of paſture eating up the graſs in the ſame then growing, and doing damage there, the ſame *William* in his own proper right well avows, and as bailiff to the ſaid *Algernon* earl of *Eſſex*, well acknowledges the taking of the cattle aforeſaid in the ſaid place in which, &c. and juſtly, &c. ſo doing damage there, &c.

And the ſaid *Sylas* ſays, that the ſaid *William*, for the reaſon before alledged, the taking of the cattle aforeſaid in the ſaid place in which, &c. ought not in his own proper right to avow, and as bailiff of the ſaid earl to acknowledge juſt, becauſe he ſays, that the ſaid two acres of paſture in which, &c. are, and at the ſaid time when, &c. and alſo from time immemorial were, parcel of the manor of *Buſhey* and cuſtomary land of the ſame manor, and demiſed and demiſable by copy of court-roll of that manor, by the lord or lords of the ſame manor, or by their ſteward of the court of that manor for the time being, to any perſon or perſons willing to take them in fee-ſimple, or otherwiſe, at the will of the lord or lords, according to the cuſtom of the manor aforeſaid: and the ſame *Sylas* farther ſays, that the ſaid earl and *William* before the ſaid time when, &c. to wit, on the 21ſt day of *April* in the firſt

Bar, that the *locus in quo* is copyhold held of the manor of *Buſhey*, &c.

That the defendant being lord of the manor, granted it to

the plaintiff in fee, according, &c.

first year of the reign of the said lord the now king abovesaid, were lawfully lords of the manor aforesaid; and the said earl and *William*, being then lords of the manor aforesaid, the same earl and *William* afterwards and before the said time when, &c. to wit, on the same 21st day of *April* in the first year abovesaid, at a court of them the said earl and *William*, of their manor aforesaid, then held for that manor within the manor at *Bushey* aforesaid in the county of *Hertford*, by one *Thomas Smith*, Gent. then their steward of the court of their manor aforesaid, by copy of court-roll of that manor granted the said two acres of pasture with the appurtenances in which, &c. among other things, to the said *Sylas*; to have and to hold to the same *Sylas*, his heirs and assigns for ever, at the will of the lords, according to the custom of the manor aforesaid; and the same *Sylas*, according to the custom of the manor aforesaid, then and there was admitted tenant thereof: by virtue of which said grant and admission, the same *Sylas* before the said time when, &c. into the said two acres of pasture with the appurtenances in which, &c. among other things, entred, and was and yet is thereof seised in his demesne as of fee, at the will of the lords, according to the custom of the manor aforesaid; and he the said *Sylas* being so thereof seised, the same *Sylas* before the said time when, &c. put his cattle aforesaid into the said two acres of pasture in which, &c. to feed on the grass there then growing, and

And he being seised put in his cattle,

thoſe cattle were in the ſaid two acres of paſture in which, &c. feeding on the graſs there then growing, until the ſaid *William Parkins* on the ſaid 18th day of *May* in the firſt year abovesaid, at *Buſhey* aforeſaid, in the ſaid two acres of paſture, called *Marryhill Grounds*, in which, &c. took the ſame cattle of the ſaid *Sylas* and unjuſtly detained them, againſt ſurety and pledges, until, &c. as the ſame *Sylas* above againſt him complains: and this he is ready to verify: wherefore for that the ſaid *William Parkins* the taking of the cattle aforeſaid hath above confeſſed, the ſame *Sylas* prays judgment, and his damages by reaſon of the taking and unjuſt detention of thoſe cattle, to be adjudged to him, &c.

and the defendant diſtrained them.

And the ſaid *W.* ſays, that well and true it is, that the ſaid two acres of paſture with the appurtenances in which, &c. are, and at the ſaid time when, &c. and alſo from time immemorial were, parcel of the ſaid manor of *Buſhey*, and cuſtomary lands of the ſame manor, and demiſed and demiſable by copy of court-roll of that manor, by the lord or lords of the ſame manor, or by their ſteward of the court of that manor for the time being, to any perſon or perſons willing to take them in fee-ſimple, or otherwiſe, at the will of the lord or lords, according to the cuſtom of the manor aforeſaid; and that the ſaid earl and *W.* before the ſaid time when, &c. to wit, the ſaid 21ſt day of *April* in the firſt year of the reign of the ſaid lord the now king abovesaid, were law-

Repl. that the land is held of the manor of *B.*

lawfully lords of the manor aforeſaid; and that the ſaid earl and *W.* then being lords of the manor aforeſaid, the ſame earl and *W.* afterwards and before the ſaid time when, *&c.* to wit, on the ſaid 21ſt day of *April* in the firſt year aboveſaid, at *Buſhey* aforeſaid in the county of *Hertford* aforeſaid, by the ſaid *T. Smith*, then their ſteward of the court of their manor aforeſaid, by copy of court-roll of that manor granted the ſaid two acres of paſture with the appurtenances in which, *&c.* among other things, to the ſame *Sylas*; to have and to hold to the ſame *Sylas*, his heirs and aſſigns for ever, at the will of the lords, according to the cuſtom of the manor aforeſaid; and that the ſaid *Sylas*, according to the cuſtom of the manor aforeſaid, was then and there admitted tenant thereof; and that by virtue of the grant and admiſſion aforeſaid, he the ſaid *Sylas* before the ſaid time when, *&c.* into the ſaid two acres of paſture with the appurtenances among other things entred, and was thereof ſeiſed in his demeſne as of fee at the will of the lords, according to the cuſtom of the manor aforeſaid, as the ſaid *Sylas* above by pleading hath alledged: but the ſaid *W. Parkins* farther ſays, that the ſaid two acres of paſture with the appurtenances in which, *&c.* together with the other lands and tenements in the ſame copy mentioned, and by the ſame copy to the ſaid *Sylas* and his heirs granted, and to which the ſaid *Sylas* was as aforeſaid admitted, at the ſaid time of the admiſſion of the ſaid *Sylas* to the ſame,

Grant by copy.

ſame, were and yet are of the clear yearly value of 28 *l.* and that the ſaid earl and *W.* by the ſaid *T. Smith* in the ſaid full court of the manor aforeſaid, held within that manor on the ſaid 21ſt day of *April* in the firſt year of the reign of the ſaid lord the now king aboveſaid, he the ſaid *T. Smith*, being then ſteward as aforeſaid of the ſaid earl and *W.* then lords of the manor aforeſaid, of the ſaid court of their manor aforeſaid, after the ſaid admiſſion of the ſaid *S. Titus* to the ſaid two acres in which, *&c.* and the ſaid other lands and tenements by the copy aforeſaid made to the ſaid *Sylas* granted, then and there did aſſeſs and appoint the ſum of 35 *l.* for the fine for the ſaid grant to the ſaid *Sylas* of the ſaid two acres of paſture with the appurtenances in which, *&c.* and the other lands and tenements aforeſaid, by the copy aforeſaid in form aforeſaid granted, to be paid by him the ſaid *Sylas* to the ſaid earl and *W.* being as aforeſaid lords of the manor aforeſaid, on the firſt day of *May* then next enſuing at the porch of the pariſh church of *Buſhey* aforeſaid in the ſaid county of *Hertford*; and that the ſaid *Sylas* then and there, to wit, at the manor aforeſaid, of all and ſingular the premiſſes had notice: and the ſaid *W.* farther ſays, that the fine aforeſaid for the lands and tenements by the copy aforeſaid in manner and form aforeſaid granted to the ſaid *Sylas* was a reaſonable fine; and that the ſaid *S. Titus*, although he had notice from the ſaid lords of the manor aforeſaid, at the court aforeſaid held as aforeſaid at the manor

The yearly value.

The fine.

manor aforeſaid, on the ſaid 21ſt day of *April* aforeſaid, of the premiſſes aforeſaid, did not pay to the ſaid earl and *W.* lords of the manor aforeſaid, or either of them, the ſaid ſum of 35 *l.* for the fine aforeſaid in form aforeſaid aſſeſſed, on the ſaid firſt day of *May* then next enſuing the admiſſion of him the ſaid *Sylas* at the ſaid porch of the pariſh church of *Buſhey* aforeſaid, but the ſame 35 *l.* to the ſaid earl and *W.* then and there abſolutely denied and refuſed, and yet doth refuſe, to pay; whereby the ſame *S. T.* hath forfeited to the ſaid earl and *W.* being as aforeſaid the lords of the manor aforeſaid, whereof, *&c.* all his cuſtomary right, eſtate, title and intereſt aforeſaid, of and in the ſaid two acres of paſture with the appurtenances in which, *&c.* and the ſaid other lands and tenements in the grant aforeſaid ſpecified; after which ſaid forfeiture in form aforeſaid made, and before the ſaid time when, *&c.* the ſaid earl and *W.* being as aforeſaid lords of the manor aforeſaid, into the ſaid two acres of paſture with the appurtenances in which, *&c.* entered, and were and yet are thereof ſeiſed in their demeſne as of fee; and becauſe the cattle aforeſaid after the entry aforeſaid, to wit, at the ſaid time when, *&c.* were in the ſaid two acres of paſture with the appurtenances in which, *&c.* eating up the graſs in the ſame then growing, and doing damage there, the ſaid *W.* as before in his own proper right with avowry, and as bailiff to the ſaid Harlowell acknowledges the taking of the cattle aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.*

Forfeiture for Non payment.

Denial to pay an uncertain fine is no forfeiture. Raym. 42. Co. Ent. 647.

There ought to be a demand. Cro. El. 779. Cro. Jac. 617.

&c. ſo doing damage there: and this he is ready to verify: wherefore as before he prays judgment, and a return of the cattle aforeſaid, together with his damages, coſts and expences by him about his ſuit in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe thereof lately made and provided, to be adjudged to him, *&c.* 21 H. 8. c. 19.

And the ſaid *Sylas* by proteſting that the ſum aforeſaid of 35 *l.* for the fine aforeſaid for the ſaid lands and tenements by the copy aforeſaid to the ſaid *Sylas* in manner and form aforeſaid granted was not a reaſonable fine, as the ſaid *W.* above by pleading hath alledged, for plea the ſame *Sylas* ſays, that within the manor aforeſaid there is, and from time immemorial hath been, ſuch cuſtom uſed and approved within that manor for all the time aforeſaid, to wit, that every perſon or perſons who ſhall be admitted tenant or tenants to any cuſtomary lands or tenements of that manor by copy of court-roll of that manor, hath and have been and ought to pay to the lord or lords of the ſame manor for the time being, for a fine for his or their admiſſion to ſuch cuſtomary lands or tenements, ſo much money as thoſe lands or tenements were worth by the year at the time of ſuch admiſſion, and no more: and the ſaid *Sylas* in fact ſays, that the ſaid two acres of paſture with the appurtenances in which, *&c.* together with the other lands and tenements in the ſame copy mentioned, and by the ſame copy to the ſaid *Sylas* and his heirs granted,

Proteſting the fine is unreaſonable, pleads a cuſtom to pay a year's value only.

The lands worth but 28 *l. per ann.* which he offered to pay.

granted, and to which the ſaid *Sylas* was as aforeſaid admitted, at the time of the admiſſion of the ſaid *Sylas* to the ſame were worth, and yet are worth, by the year 28 *l.* and no more: and the ſame *Sylas* farther ſays, that at the time of his admiſſion to the tenements aforeſaid with the appurtenances, to wit, at the ſaid court of the manor, held within that manor on the ſaid 21ſt day of *April* in the firſt year aboveſaid, he was ready and offered to pay to the ſaid *W.* then one of the lords of that manor, being then and there preſent in his proper perſon, ſo much money as the ſaid cuſtomary tenements with the appurtenances were worth by the year at the time of the admiſſion of him the ſaid *Sylas* to the ſame, to wit, 28 *l.* of lawful money of *England*; which ſaid 28 *l.* the ſaid *W.* then and there abſolutely refuſed to receive or accept of the ſame *Sylas*: and this he is ready to verify: wherefore as before he prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.*

Demurrer. And the ſaid *W.* ſays, that the plea of the ſaid *Sylas* above in rejoining pleaded, and the matter in the ſame contained, are not ſufficient in law to preclude him the ſaid *W.* from having his avowry and cogniſance aforeſaid, and that he to that plea in manner and form aforeſaid pleaded hath no neceſſity, nor is by the law of the land obliged, to anſwer: and this he is ready to verify: wherefore for want of a ſufficient plea in this behalf, the ſame *W.* as before prays judgment, and a return of the cattle

aforeſaid, together with his damages, coſts and expences by him about his ſuit in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe thereof lately made and provided, to be adjudged to him, *&c.* And for cauſe of demurrer in law to that plea, the ſame *W.* according to the form of the ſtatute in ſuch caſe thereof lately made and provided, ſets down, and to the court here expreſſes this cauſe following, to wit, that the value of the land remains in eſtimation, and the cuſtom aforeſaid by the ſaid *Sylas* above in pleading pretended and alledged is incertain, inſufficient and void in law. The cauſe. 27 El. c. 5. 4 A. c. 16.

And the ſaid *Sylas*, for that he hath above alledged ſufficient matter in law in his plea aforeſaid above in rejoining pleaded to preclude the ſaid *W.* from having his avowry and cogniſance aforeſaid, which he is ready to verify, which ſaid matter the ſaid *W.* doth not deny, nor thereto in any wiſe anſwer, but altogether refuſes to admit that averment, as before prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.* And becauſe the juſtices here will adviſe themſelves of and upon the premiſſes before they give judgment thereon, day therefore is given to the parties aforeſaid here until on the octave of St. *Hillary* to hear their judgment thereon, becauſe the ſame juſtices here thereof not yet, *&c.* On which day here comes as well the ſaid *Sylas* as the ſaid *W.* by their attornies aforeſaid; and hereupon the premiſſes being ſeen, and by the juſtices here more fully underſtood, it ſeems to the ſaid Joinder in demurrer. Judgment for the plaintiff.

juſtices here, that the ſaid plea of the ſaid *Sylas* above in rejoining pleaded, and the matter in the ſame contained, is ſufficient in law to preclude him the ſaid *W.* from having his avowry and cogniſance aforeſaid, as the ſaid *Sylas* hath above alledged; wherefore the ſaid *Sylas* ought to recover his damages againſt the ſaid *W.* by reaſon of the taking and unjuſt detention of the cattle aforeſaid: but becauſe it is unknown what damages the ſaid *Sylas* hath ſuſtained by reaſon of the taking and unjuſt detention of the cattle aforeſaid, the ſheriff is commanded, that by the oath of good and lawful men of the county aforeſaid he diligently inquire what damages the ſaid *Sylas* hath ſuſtained, as well by reaſon of the taking and unjuſt detention of thoſe cattle, as for his coſts and charges by him about his ſuit in this behalf ſuſtained; and the inquiſition which he ſhall thereof make, he certify here from the day of *Eaſter* in 15 days, under the ſeal, *&c.* and the ſeals, *&c.* On which day here comes the ſaid *Sylas* by his attorney aforeſaid; and the ſheriff, to wit, *Joſeph Edmunds*, eſq; hath now returned here a certain inquiſition taken before him at *Stevenage* in the county aforeſaid on the 15th day of *April* laſt paſt, by the oath of 12, *&c.* whereby it is found that the ſaid *Sylas* hath ſuſtained damage by reaſon of the taking and unjuſt detention of the cattle aforeſaid, beſides his coſts and charges by him about his ſuit in this behalf expended, to 4 *d.* and for thoſe coſts and charges to 6 *d.* Therefore it is conſidered, that the ſaid *Sylas* do recover againſt the ſaid *William*

Inquiry awarded.

Signed 3 May 2 Jac. 2.

William his damages aforeſaid to 10 *d.* by the inquiſition aforeſaid in form aforeſaid found, and alſo 9 *l.* 5 *s.* 2 *d.* to the ſame *Sylas*, at his requeſt, for his coſts and charges aforeſaid, by the court here of increaſe adjudged; which ſaid damages in the whole amount to 9 *l.* 6 *s.* And the ſaid *William* in mercy, *&c.*

This judgment was affirmed on a writ of error.

AND the ſaid *C.* by *R. B.* his attorney, comes and defends the force and injury when, *&c.* and well avows the taking of the ſaid cattle in the ſaid place where, *&c.* to be juſt, becauſe he ſaith, that the ſaid place doth, and at the ſaid time when, *&c.* did contain in itſelf ten acres of land with the appurtenances; which ten acres of land with the appurtenances are, and at the time of taking the cattle aforeſaid were the ſoil and freehold of the ſaid *C.* and becauſe the cattle aforeſaid, at the ſaid time when, *&c.* were in the ſaid place, where feeding upon the graſs there growing, and doing damage there, the ſaid *C.* well avows the taking of the cattle aforeſaid, in the ſaid place where, *&c.* and juſtly, *&c.* for the damage there ſo done as aforeſaid.

An avowry for damage-feaſant in the defendant's freehold.

And the ſaid (*plaintiff*) ſaith, That the ſaid *C.* ought not to avow the taking of the cattle aforeſaid in the ſaid place where, *&c.* to be juſt, becauſe he ſaith, That the ſaid ten acres with the appurtenances are, and at the ſaid time when, *&c.* were the ſoil and freehold of the ſaid (*plaintiff*) and

not the ſoil and freehold of the ſaid *C.* as the ſaid *C.* hath above alledged; and this he prays may be inquired of by the country; and the ſaid *C.* does likewiſe the ſame.

Pl. Gen. 574, 575.

Pippin and another at the ſuit of *Maynard.*

Trin. 12 W. 3. in C. B.

Declaration in replevin for the taking of the plaintiff's cattle.

The defendants plead property in a ſtranger, and for a return make cogniſance as bailiffs to *A.* and *B.* for damage-feaſant in their freehold.

AND the ſaid *Edward* and *Sarah* by *W. L.* their attorney come and defend the force and injury when, *&c.* and ſay, that at the time when the taking of the cattle aforeſaid is ſuppoſed to be, the property of thoſe cattle was in one *Stephen Hewes*, who is now ſurviving and in full life, to wit, at *H.* aforeſaid in the county aforeſaid; without that, that the property of the cattle aforeſaid at the time of the taking of them was in the ſaid *Jonathan Maynard*, as he by his writ and declaration aforeſaid above ſuppoſes: and this they are ready to verify: wherefore they pray judgment of the writ and declaration aforeſaid, and a return of the cattle aforeſaid, to be adjudged to them, *&c.* and to have a return of the cattle aforeſaid, the ſame *Edward* and *Sarah*, as bailiffs of *A. B.* and *C. B.* well acknowledge the taking of the cattle aforeſaid in the ſaid place where, *&c.* called *Hebrom*, and juſtly, *&c.* becauſe they ſay, that the ſame place called *Hebrom* contains, and at the ſaid time when the taking

taking of the cattle aforeſaid is ſuppoſed to be, did contain in itſelf 40 acres of paſture with the appurtenances in *Kingſthorpe* in the county aforeſaid; which ſaid 40 acres of paſture with the appurtenances are and at the ſaid time when, &c. were the ſoil and freehold of the ſaid *A. B.* and *C. B.* And becauſe the cattle aforeſaid at the ſaid time when, &c. were in the ſaid place called *Hebrom* aforeſaid, eating up the graſs there then growing, and doing damage there, the ſame *Edward* and *Sarah*, as bailiffs of the ſaid *A. B.* and *C. B.* well acknowledge the taking of the cattle aforeſaid in the ſaid place where, &c. and juſtly, &c. ſo doing damage there: wherefore they pray judgment, and a return of the cattle aforeſaid, to be adjudged to them, &c.

And the ſaid *Jo. Maynard* ſays, that his writ and declaration aforeſaid ought not to be quaſhed, becauſe he ſays, that the property of the cattle aforeſaid at the ſaid time of the taking of them was in the ſaid *Jonathan Maynard* in manner and form as he by his writ and declaration aforeſaid hath above thereof alledged, to wit, at *Hebrom* aforeſaid in the county aforeſaid: and this he prays may be inquired of by the country: and the ſaid *Edward* and *Sarah* likewiſe: therefore the ſheriff is commanded that he cauſe to come, &c. Repl' and iſſue on the property.

AND the ſaid *R.* by *R. B.* his attorney, comes and defends the force and injury when, &c. and as to the taking of ten ſacks of flour, part of the goods and chattels aforeſaid, he the ſaid *R.* ſaith, that the Where the defendant pleads property as to part, and *non cepit* as to the reſidue.

property of thoſe goods and chattels at the ſaid time when, &c. were in the ſaid *R.* and not in the ſaid *T.* as it is above ſuppoſed by the writ aforeſaid; and this he is ready to verify; whereupon, as to the taking and detaining of thoſe goods and chattels, the ſaid *R.* prays judgment of the writ aforeſaid, and that it may be quaſhed, &c. And as to the taking of the reſidue of the goods and chattels aforeſaid, he the ſaid *R.* pleads, that he did not take thoſe goods and chattels, the ſaid reſidue, as the ſaid *T.* doth above complain againſt him; and thereof he puts himſelf upon the country; and the ſaid *T.* does likewiſe the ſame.

And the ſaid *T.* as to the ſaid plea of the ſaid *R.* above pleaded to quaſh the writ aforeſaid, ſaith, that his ſaid writ ought not to be quaſhed by reaſon of any thing above alledged, becauſe he ſaith, that the property of the goods and chattels aforeſaid above ſpecified in the ſaid plea, at the time of taking thoſe goods and chattels, was in the ſaid *T.* as he doth above ſuppoſe by his writ aforeſaid; and this he prays may be inquired of by the country; and the ſaid *R.* does likewiſe the ſame: therefore as well to try that iſſue, as the ſaid other iſſue above joined, the ſheriff is commanded, that he cauſe to come here twelve, &c.

Pl. Gen. 602.

Note; *Upon pleading* non cepit *on a claim of property, the defendant ſhall have his goods again.* Salk. 581.

AND

AND the ſaid *W.* by *H. S.* his attorney comes and defends the force and injury when, &c. and as bailiff of *M. G.* well acknowledges the taking of the cattle aforeſaid in the ſaid place where, &c. and juſtly, &c. becauſe he ſays, that the ſame place, in which the taking of thoſe cattle is ſuppoſed to be, contains, and at the ſaid time when the taking of thoſe cattle is ſuppoſed to be, did contain in itſelf 40 acres of land with the appurtenances in *L.* aforeſaid, and that long before the ſaid time when, &c. the ſaid *F.* was ſeiſed of the ſaid 40 acres of land with the appurtenances, whereof the place where, &c. is parcel, in his demeſne as of fee, and the ſaid 40 acres of land held of the ſaid *M.* as of his manor of *B.* in the county of *S.* aforeſaid, by fealty, ſuit of court, and the rent of 12 *s.* 6 *d.* every year, at the feaſt of St. *Michael* yearly to be paid; of which ſervices the ſaid *M.* was ſeiſed by the hands by the ſaid *F.* as by the hands of his very tenant, to wit, of the fealty and ſuit of court, and of the rent aforeſaid in his demeſne as of fee; and becauſe 5 *l.* 12 *s.* 6 *d.* of the rent aforeſaid, for nine years ended at the feaſt of St. *Michael* in the 26th year of the reign of the ſaid lord the now king, to the ſame *M.* at the ſaid time when, &c. were in arrear and not paid, the ſame *W.* as bailiff of the ſaid *M.* well acknowledges the taking of the cattle aforeſaid in the ſaid place where, &c. and juſtly, &c. for the ſame five pounds twelve ſhillings and ſix pence

Cogniſance as bailiff for a rent-charge.

ſo in form aforeſaid being in arrear, as in parcel of the ſaid land of the ſaid *M.* in form aforeſaid held, and within the fee, *&c.* And this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforeſaid, to be adjudged to him, *&c.*

Bar, that he was not ſeiſed, *&c.*

And the ſaid *F.* ſays, that the ſaid *M.* was not ſeiſed of the ſervices aforeſaid by the hands of him the ſaid *F.* as by the hands of his very tenant, as the ſaid *W.* hath above alledged: and this he is ready to verify: wherefore for that the ſaid *W.* the taking of the cattle aforeſaid in the ſaid place where, *&c.* hath above acknowledged, the ſame *F.* prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.*

Iſſue thereon.

And the ſaid *William* (as before) ſays, that the ſaid *M.* was ſeiſed of the ſervices aforeſaid by the hands of the ſaid *F.* as by the hands of very tenant, as he hath above alledged: and of this he puts himſelf upon the country: and the ſaid *F.* likewiſe, *&c.* Therefore the ſheriff is commanded, that he cauſe to come here from the day of the Holy *Trinity* in three weeks 12, *&c.* by whom, *&c.* and who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.*

Liddiard and *Creſwicke.*

M. 33 *C.* 2.

Avowry for damage-feaſant in his freehold.

AND the ſaid *Francis* by *Andrew Innys* his attorney comes and defends the force and injury when, *&c.* and well avows

avows the taking of the cattle aforeſaid in the ſaid place in which, &c. and juſtly, &c. becauſe he ſays, that the ſame place in which, &c. is known, and at the ſaid time when, &c. and long before was known, as well by the name of *Hannam's Common*, as by the name of *Hannam's Heath*, and contains, and at the ſaid time when, &c. contained in itſelf 50 acres of paſture with the appurtenances in the ſaid pariſh of *Bitton* in the ſaid county of *Glouceſter*, which ſaid 50 acres of paſture with the appurtenances are, and at the ſaid time when, &c. were the ſoil and freehold of him the ſaid *Francis*; and becauſe the cattle aforeſaid at the ſaid time when, &c. were in the ſaid place in which, &c. eating up the graſs there then growing, and doing damage there, the ſame *Francis* in his own proper right well avows the taking of the cattle aforeſaid in the ſaid place in which, &c. and juſtly, &c. ſo doing damage there: and this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforeſaid, together with his damages, coſts and charges, in this behalf ſuſtained, according to the form of the ſtatute in ſuch caſe lately made and provided, to be adjudged to him, &c. 21 H. 8. c. 19.

And the ſaid *John Liddiard* ſays, that the ſaid *Francis*, for the reaſon before alledged, the taking of the cattle aforeſaid in the ſaid place in which, &c. ought not to avow juſt, becauſe by proteſting that the ſame place in which, &c. at the ſaid time when, &c. was not the freehold of him the ſaid *Francis*, as is above ſuppoſed, for

Bar, That *T. M.* was ſeiſed in fee, and demiſed to *W. L.* and the plaintiff for their lives.

for plea the ſame *John* ſays, that long before the ſaid time of the taking of the cattle aforeſaid in the ſaid place in which, &c. to wit, on the 21ſt day of *Auguſt* in the 10th year of the reign of the lord *James*, late king of *England*, &c. *Theodore Newton*, knt. was ſeiſed in his demeſne as of fee of and in one meſſuage and 47 acres and a half of land arable, meadow and paſture, with the appurtenances in *Hannam* and *Bitton* in the pariſh of *Bitton* aforeſaid in the county aforeſaid; and being ſo thereof ſeiſed, afterwards, to wit, on the ſaid 21ſt day of *Auguſt* in the 10th year of the reign of the lord *James*, late king of *England* aboveſaid, at *Bitton* aforeſaid in the county aforeſaid, demiſed the meſſuage aforeſaid and the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, to *William Liddiard* and *Katherine* his wife, and him the ſaid *John Liddiard*; to hold to the ſaid *William Liddiard* and *Katherine* his wife for and during the term of their natural lives, and the natural life of the longer liver of them, and after their deceaſe the remainder thereof to the ſaid *John Liddiard* for and during the term of the natural life of him the ſaid *John*: by virtue of which ſaid demiſe the ſame *William* and *Katherine* afterwards of the ſaid meſſuage and the ſaid 47 acres and a half of land arable, meadow and paſture with the appurtenances, were ſeiſed in their demeſne as of freehold for the term of their lives and the life of the longer liver of them, the remainder thereof after their deceaſe to the ſaid *John* for the term of his life

life ſo as aforeſaid belonging; and the ſaid *William* and *Katherine* being ſo thereof ſeiſed afterwards, to wit, on the firſt day of *September* in the 32d year of the reign of the lord *Charles* the ſecond, now king of *England*, *&c.* at *Bitton* aforeſaid in the county aforeſaid died thereof ſeiſed; after the death of which ſaid *William* and *Katherine* he the ſaid *John*, as in his remainder aforeſaid, afterwards, to wit, on the ſaid firſt day of *September* in the 32d year of the reign of the lord *Charles* the ſecond, now kind of *England*, *&c.* at *Bitton* aforeſaid in the county aforeſaid into the meſſuage aforeſaid and the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, by virtue of the demiſe aforeſaid entered, and was and is yet thereof ſeiſed in his demeſne as of freehold for the term of his life: and the ſame *John* farther ſays, that at the time of the demiſe aforeſaid made, he the ſaid *Theodore Newton*, and all thoſe whoſe eſtate the ſame *Theodore* then had of and in the ſaid meſſuage and 47 acres and a half of land arable, meadow and paſture, with the appurtenances, have had, and for time out of mind have been accuſtomed to have, for themſelves, their farmers and tenants, of the ſaid meſſuage and the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, common of paſture in the ſaid place in which, *&c.* for all their commonable cattle in and upon their tenements aforeſaid with the appurtenances levant and couchant every year at all times of the year, as to their tenements aforeſaid

The entry of the plaintiff.

Preſcription for common.

belonging and appertaining: by reaſon whereof the ſaid *John* before the ſaid time when, &c. to wit, on the 9th day of *September* in the 33d year of the reign of the ſaid lord the now king, the cattle aforeſaid in the declaration aforeſaid above ſpecified, being then the proper cattle of him the ſaid *John*, upon the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, then levant and couchant, into the ſaid common called *Hannam's Common*, being the place in which, &c. put, as he well might, to uſe his common aforeſaid; and the ſaid *Francis* the ſaid cattle, to wit, the ſaid 30 ſheep ſo in the ſaid place in which, &c. put, feeding on the graſs there growing, and uſing the common of paſture of him the ſaid *John* there, afterwards at the ſaid time when, &c. to wit, on the 10th day of *September* in the 33d year aboveſaid, at *Bitton* aforeſaid in the ſaid place in which, &c. commonly called *Hannam's Common*, took and them unjuſtly detained, againſt ſurety and pledges, in manner and form as the ſaid *John* above againſt him complains: and this the ſame *John* is ready to verify: wherefore he prays judgment, and his damages by reaſon of the taking and unjuſt detention of the cattle aforeſaid, to be adjudged to him, &c.

Repl. That it is his freehold.

And the ſaid *Francis Creſwicke* as before ſays, that the ſaid 50 acres of paſture, called *Hannam's Common*, otherwiſe *Hannam's Heath*, are, and at the ſaid time when, &c. were the ſoil and freehold of him

him the ſaid *Francis*; and becauſe the cattle aforeſaid at the ſaid time when, &c. were in the ſaid place in which, &c. eating up the graſs then there growing, and doing damage there, the ſaid *Francis* the ſame cattle took, as he hath above alledged; without that, that the ſaid *Theodore*, and all thoſe whoſe eſtate the ſame *Theodore* then had of and in the ſaid meſſuage and 47 acres and a half of land arable, meadow and paſture, with the appurtenances, have had, and from time out of mind have been accuſtomed to have, for themſelves, their farmers and tenants, of the ſaid meſſuage and the ſaid 47 acres and a half of land arable, meadow and paſture, with the appurtenances, common of paſture in the ſaid place in which, &c. for all their commonable cattle in and upon their tenements aforeſaid with the appurtenances, levant and couchant every year at all times of the year, as to their tenements aforeſaid belonging and appertaining, as the ſaid *John* in bar to the avowry aforeſaid hath above alledged: and this he is ready to verify: wherefore he prays judgment, and a return of the cattle aforeſaid, together with his damages, &c. to be adjudged to him, &c. Traverſe of the preſcription.

And the ſaid *John Liddiard* as before ſays, that the ſaid *Theodore Newton*, and all thoſe whoſe eſtate the ſame *Theodore* then had in the ſaid meſſuage and 47 acres and a half of land arable, meadow and paſture, with the appurtenances, have had, and from time out of mind have been accuſtomed to have, for themſelves, their farmers Iſſue on the traverſe.

are differently to be deſcribed, they having different additions.

by the name of *M.* only, and that he, at the ſaid time when the ſaid cattle is ſuppoſed to have been taken, took the ſaid ſix oxen and eight cows above ſpecified in the ſaid declaration, and alſo an horſe of the ſaid *(plaintiff)* in the ſaid place called *M. D.* without that, that he took the ſaid ſix oxen and eight cows at *K.* aforeſaid, in the ſaid place called *M.* only; as the ſaid *(plaintiff)* doth above ſuppoſe by his ſaid declaration, of all and ſingular which cattle aforeſaid, one Sir *P. E.* Knt. then ſheriff of the ſaid county of *D.* granted a replevin to the ſaid *(plaintiff)* upon his plaint thereon; and this he is ready to verify; wherefore he prays judgment of the declaration aforeſaid, and to have a return of all and ſingular the cattle aforeſaid; and the ſaid *(defendant)* as bailiff to *J. B.* well acknowledges the taking of the ſaid ſix oxen, eight cows, and one horſe, in the ſaid place called *M. D.* and juſtly, *&c.* becauſe he ſaith, [*ſo go on with the avowry, concluding with a prayer of a return*], &c.

This precedent *is agreeable to the caſe reported in* Salk. 93, 94. *where the defendant pleaded, that the cattle were taken in* another place; *without that,* &c. *and it was held by the court that this was not enough, but the defendant muſt go further, and make an avowry for a* return habendo, *yet ſuch avowry is only a ſuggeſtion to bring him within the ſtatute of* H. 8. *for damages; before that ſtatute no damages were given, and without ſuch a ſuggeſtion, he*

7 & 21 H. 8. cap. 19.

he is not within that ſtatute, and it being only for this particular purpoſe, is not traverſable.

AND the ſaid *Richard Poole* pleads, that the ſaid *Thomas Longuevill* ought not to avow the taking of the cattle aforeſaid in the ſaid place in which, *&c.* to be juſt, for the reaſon above alledged, nor ought they the ſaid *Anthony*, *William* and *Thomas Leadale*, as bailiffs to the ſaid *Thomas Longuevill*, to acknowledge the ſaid taking of the cattle aforeſaid in the ſaid place in which, *&c.* to be juſt, for the ſame reaſon, becauſe he ſaith, that he the ſaid *Richard Poole*, at the ſaid time when, *&c.* was, and long before had been poſſeſſed of and in a cloſe of paſture in *Burne* aforeſaid, near adjoining to the ſaid place called *Parks*, in which, *&c.* and further, the ſaid *Richard Poole* ſaith, that the ſaid *Thomas Longuevill*, and all thoſe whoſe eſtate he the ſaid *Thomas Longuevill* now hath, and at the ſaid time when, *&c.* had, of and in the cloſe aforeſaid called *Parks*, in which, *&c.* for ſo long a time as there is no remembrance of any man to the contrary, have made and repaired, and have been uſed and accuſtomed to make and repair, the hedges and fences between the ſaid cloſe called *Parks*, in which, *&c.* and the ſaid cloſe of paſture of the ſaid *Richard*; and the ſaid *Richard* further ſaith, that before and at the time when, *&c.* the hedges and fences between the ſaid cloſe in which, *&c.* and the ſaid cloſe of paſture of the ſaid *Richard Poole* were

Plea.

That plaintiff at the time when, *&c.* and long before, was poſſeſſed of a cloſe adjoining to the place in which, *&c.* and that *T. L.* the principal defendant, and all thoſe, *&c.* time out of mind were uſed to repair the fences of the *locus in quo*, &c, which divided the ſame from the plaintiff's cloſe.

That thoſe fences before the time when, *&c.* were out of repair.

were broken, laid open, and in great decay for want of repairing them, by which means the cattle of the ſaid *Richard* being thentofore put into his ſaid cloſes of paſture, afterwards, and before the ſaid time when, *&c.* that is to ſay, upon the 27th day of *February* in the 18th year aforeſaid, eſcaped out of the cloſe of the ſaid *Richard*, and by the hedges and fences aforeſaid being broken, entred into the ſaid cloſe in which, *&c.* and there remained until they the ſaid *T. L. A. W.* and *T.* afterwards, and before that the ſaid *Richard* had or could have any notice of the ſaid cattle's being in the ſaid place in which, *&c.* (to wit) at the ſaid time when, *&c.* took the ſaid cattle in the ſaid place in which, *&c.* and unjuſtly detained them againſt ſureties and pledges, in the manner and form as the ſaid *Richard* doth above complain thereof againſt them; and this he is ready to verify; wherefore, and inaſmuch as the ſaid *T. A. W.* and *J.* do above acknowledge the taking and detaining of the cattle aforeſaid, he the ſaid *R. P.* prays judgment, occaſioned by the taking and unjuſtly detaining of the cattle aforeſaid, to be adjudged to him, *&c.*

By reaſon whereof plaintiff's cattle eſcaped into the *locus in quo.*

And before the plaintiff had or could have any notice thereof, defendants took the cattle.

Plaintiff prays judgment, and his damages.

2 Saund. 289, 290.
2 Keb. 660, 680, 709.
2 Danv. 642. Pl. 57.
2 Vent. 50.
3 Lev. 260.
Lutw. 1165, 1577, 1578.

To this plea in bar of the avowry the defendant demurred, and the plaintiff joined in demurrer, and judgment was given in the common pleas for the defendant, that the plaintiff's plea in bar was not good; upon which a writ of error was brought. The counſel for the plaintiff in error argued, that the judgment

ment was erroneous, and that the cattle could not be diſtrained, becauſe they eſcaped from the default of fences, which upon the face of the record ought to have been repaired by the defendant *Longuevill.* Notwithſtanding this, the judgment was affirmed. The court relied much upon the caſe in 10 *H.* 7. 21. *B.* where it is ſaid, that if the cattle eſcape into any land, and the lord diſtrains them, ſuch diſtreſs is good, and that it is not material whether they were levant and couchant or not. But *Saunders* in the report of this caſe takes notice, that this caſe, in his opinion, was hard to be maintained; for, ſays he, there is a vaſt difference between a lord's diſtraining within his ſeigniory and a leſſor's diſtraining for rent reſerved upon his own leaſe; for the lord hath nothing to do with the land or the fences, and ſo it is not material to him whether the fences are in repair or not: but it is otherwiſe of a leſſor, for he himſelf ought to repair the fences, or to take care that his tenant repairs them; otherwiſe he would take an advantage of his own wrong, which would be inconvenient. This diſtinction (ſays he) ſeems to be warranted by the books of *Mich.* 14 & 15 *El.* *Dyer* 317, 318. 22 *Ed.* 4. 49. *b.* 7 *H.* 7. 1. 15 *H.* 7. 17. But if the cattle eſcape into the land without any default of the fences, or that the tenant of the land is not bound to repair thoſe fences, for default whereof the cattle eſcape and are diſtrained, it is not material to the lord or the leſſor, whether they

1 Saund. 226, 227.
Co. Lit. 161.
2 Inſt. 192.
1 Rol. Abr. 671.
Plowd. 38.
2 Edw. 4. 6.
2 Leon. 7.
3 Cro. 549, 596, 628.
Dyer 322, 372.
Fitz. Avow. 219.
11 H. 7. 48.
15 H. 7. 17.
Bro. Diſtreſs (43, 57.)
Treſpaſs 181.
43 Ed. 3. 32.
T. Raym. 39, 398.
1 Sid. 70.
2 Mod. 316, 317.
3 Mod. 112.
2 Lev. 22.
5 Mod. 147, 148.

are levant and couchant or not. *Note*; the caſe of *Reynolds* and *Oakley*, reported in 1 *Brownl.* 170. and in *Hob.* 265. ſeems to favour this opinion of *Saunders*. There the defendant avowed for rent reſerved upon a leaſe for life, and the plaintiff in his plea in bar to the avowry ſhews, that the place in which, *&c.* did adjoin to the plaintiff's cloſe, and that the cattle, againſt the plaintiff's will, did eſcape into the other cloſe, and that he did preſently follow the cattle, and before he could drive them out of the cloſe the defendant diſtrained them. The court held, that inaſmuch as the beaſts were always in the plaintiff's poſſeſſion, and in his view, the defendant could not diſtrain thoſe cattle as the cattle of a ſtranger; but if he had permitted the beaſts to have remained there by any ſpace of time, tho' they had not been levant and couchant, the leſſor might have diſtrained them as the beaſts of a ſtranger. In the report of this caſe in *Hob.* the opinion of the court does not appear, for it is there ſaid, the caſe had been ſomewhat better, if the tenant ought to maintain the fences.

Eldridge and *Burfield.*

Nonſuit in replevin for not declaring.

Suſſex, to wit. THomas *Eldridge* was ſummoned to anſwer to *Robert Burfield* in a plea, why he took ſeven cows of him the ſaid *Robert* and them unjuſtly detained, againſt ſurety and pledges, *&c.* And whereon the ſame *Thomas* in his proper

proper perſon hath offered himſelf the fourth day againſt the ſaid *Robert* in the plea aforeſaid; and the ſame *Robert*, although ſolemnly called, doth not come, but hath made default: therefore it is conſidered, that the ſaid *Thomas Eldridge* do go thereof without day, *&c.* and that the ſaid *Robert* and his pledges to proſecute, to wit, *John Doe* and *Richard Roe*, be in mercy, *&c.* *Q.* The names of the pledges, *&c.* and that the ſaid *Thomas* have a return of the cows aforeſaid, *&c.* Afterwards, to wit, on day next after in this ſame term before the lady the queen at *Weſtminſter* comes here into court the ſaid *Robert Burfield* by *A. B.* his attorney, and by the ſtatute, *&c.* prays the writ of the lady the queen of ſecond deliverance of the cattle aforeſaid; and to him it is granted, returnable here from the day of wheresoever, *&c.* 13 E. 1. c. 2.

ANNE, &c. To the ſheriff of *Middleſex*, greeting: Whereas *John S.* late of the pariſh of St. *Clement Danes* in your county, Eſq; was ſummoned to be in our court before us to anſwer to *William P.* Eſq; in a plea, why on the 14th day of *October* in the firſt year of our reign, at the pariſh of St. *Clement Danes* in your county, in a certain place there called a chamber in *Devereux Court*, he took the goods and chattels of him the ſaid *William*, to wit, one bed, one bedſtead, one bolſter, one pillow, four curtains valance, two blankets, one quilt, one cheſt of drawers, 20 books, one looking-glaſs, one large bruſh, one

Inquiry of damages in replevin where judgment was given for the defendant on demurrer.

one large-trunk, and four chairs, and unjuſtly detained them, againſt ſurety and pledges, until, &c. And the ſaid *John S.* came and in our ſame court before us alledged and ſaid, that the ſaid *William* ought not to have or maintain his action aforeſaid thereof againſt him, becauſe he ſaid, that as to the ſaid one bed, one bedſtead, one bolſter, one pillow, four curtains valance, two blankets, one quilt, one looking-glaſs, and 10 books, parcel of the goods and chattels aforeſaid in the declaration aforeſaid mentioned, the property of thoſe goods and chattels at the ſaid time of the taking of the ſame was in him the ſaid *John*; without that, that the property of thoſe goods and chattels at the ſaid time of the taking of the ſame was in the ſaid *William*, as by the declaration aforeſaid was above ſuppoſed: and this he was ready to verify: and as to the ſaid one cheſt of drawers, one large bruſh, one large trunk, 10 other books, and four chairs, the reſidue of thoſe goods and chattels laſt mentioned, the property of the ſame goods and chattels was in one *Richard F.* without that, that the property of the reſidue of thoſe goods and chattels was in the ſaid *William*, as by the declaration aforeſaid was above ſuppoſed: and this he was ready to verify and prove, &c. wherefore he prayed judgment if the ſaid *William* ought to have or maintain his action aforeſaid thereof againſt him, &c. and he prayed alſo a return of all and ſingular the goods and chattels aforeſaid,

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together with his damages, coſts and charges by him about his ſuit in that behalf expended, to be adjudged to him, &c. And the ſaid *William* ſaid, that the plea aforeſaid by the ſaid *John* above pleaded, and the matter in the ſame contained, were inſufficient in law to preclude him the ſaid *William* from having his action aforeſaid againſt the ſaid *John*, and that he to that plea in manner and form aforeſaid pleaded had no neceſſity, nor was by the law of the land obliged in any manner to anſwer: and this he was ready to verify: wherefore, for want of a ſufficient anſwer in this behalf, he the ſame *William* prayed judgment and his damages, by reaſon of the caption and unjuſt detention of the goods and chattels aforeſaid, to be adjudged to him, &c. Demurrer.

And the ſaid *John* ſaid, that the plea aforeſaid by him the ſaid *John* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, were good and ſufficient in law to preclude the ſaid *William* from having his action aforeſaid againſt him the ſaid *John*; which ſaid plea, and the matter in the ſame contained, he the ſame *John* was ready to verify and prove, as the court, &c. And becauſe the ſaid *William* did not anſwer to that plea, nor hitherto in any wiſe deny it, he the ſame *John* (as before) prayed judgment, and a return of all and ſingular the goods and chattels aforeſaid, together with his damages, &c. to be adjudged to him, &c. Joinder.

And it was thereupon in ſuch manner Judgment for the defendant.

manner proceeded in our ſame court before us, that it was conſidered, that the plea aforeſaid by him the ſaid *John* above pleaded, and the matter in the ſame contained, were good and ſufficient in law to preclude the ſaid *William* from having his action aforeſaid againſt him the ſaid *John*: it was alſo conſidered, that the ſaid *William P.* ſhould take nothing by his writ aforeſaid, but for his falſe claim ſhould be in mercy, *&c.* and that the ſaid *John* ought to recover his damages againſt the ſaid *William* by reaſon of the caption and unjuſt detention of the goods and chattels aforeſaid: therefore we command you, that by the oath of 12 good and lawful men of your bailiwick you diligently inquire what damages the ſame *John* hath ſuſtained, as well by reaſon of the caption and unjuſt detention of the goods and chattels aforeſaid, as for his coſts and charges by him about his ſuit in this behalf expended; and the inquiſition which you ſhall thereof take ſend to us on whereſoever we ſhall then be in *England*, under your ſeal and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition, together with our writ to you therefore directed. Witneſs *J. Holt*, Knt. at *Weſtminſter* 12th day of *February* in the ſecond year of our reign.

GEORGE,

GEORGE, &c. To the ſheriff of *Suſſex*, greeting: Whereas *William A.* was ſummoned to be in the court of the lady *Anne*, late queen of *Great Britain*, &c. before the late queen herſelf, to anſwer to *Matthew G.* in a plea, why the ſaid *William* on the 9th day of *April* in the 12th year of the reign of the ſaid lady the queen, at *Chalvington* in the county aforeſaid, in a certain place there called the *Croft*, took the cattle, to wit eight ewes and ſix lambs, of him the ſaid *Matthew*, and them unjuſtly detained, againſt ſurety and pledges, &c. And the ſame *William* in the ſame court before the ſaid lady the late queen appearing, for a certain cauſe by him alledged ſaid, that he took the cattle aforeſaid at *Ripe*, otherwiſe *Cocklington*, in the county aforeſaid; without that, that he took the cattle aforeſaid at *Chalvington* in the county aforeſaid, as the ſaid *Matthew* by his declaration aforeſaid had above alledged: and this he was ready to verify: wherefore he prayed judgment of the writ aforeſaid, and that the ſaid writ and declaration, &c. and to have a return of the cattle aforeſaid; the ſame *William*, as bailiff of *Robert R.* well acknowledged the taking of the cattle aforeſaid in the ſaid place to be juſt, &c. becauſe he ſaid, that the ſame place, called the *Cony Earths*, contained in itſelf five acres of land with the appurtenances in the ſaid pariſh of *Ripe*, otherwiſe *Cocklington* in the county aforeſaid, of which ſaid five acres of land with the appurtenances the ſame *Robert R.* before the ſaid time when, &c.

An inquiry of the arrear of rent and value of the cattle diſtrained on a nonſuit in a replevin.

3 Leon. 213.

was

was ſeiſed in his demeſne as of fee; and being ſo thereof ſeiſed, before the ſaid time when, &c. to wit, on the 18th day of *March* in the 11th year of the reign of the ſaid lady the late queen, at the pariſh of *Semiſton* in the county aforeſaid, the ſaid *Robert R.* demiſed to one *Matthew G.* the younger the ſaid five acres of land with the appurtenances, by the name of all thoſe two pieces or parcels of paſture, called the *Cony Earths*, with the appurtenances, lying and being in *Ripe*, otherwiſe *Cocklington* aforeſaid; to have and to hold the ſaid five acres of land with the appurtenances whereof, &c. to the ſame *Matthew G.* from the feaſt of the annunciation of the Bleſſed Virgin *Mary* then next enſuing unto the end and term of one whole year, and ſo from year to year as long as both parties ſhould pleaſe; yielding and paying therefore the yearly rent or ſum of 50 *s.* of lawful money of *Great Britain*, at the two moſt uſual feaſts or terms in the year, to wit, on the feaſt of St. *Michael* the Archangel and the annunciation of the Bleſſed Virgin *Mary*, by even and equal portions to be paid: by virtue of which demiſe the ſame *Matthew G.* the younger, afterwards, and before the ſaid time when, &c. to wit, on the 26th day of *March* in the year laſt aboveſaid, into the ſaid five acres of land with the appurtenances whereof, &c. entered, and was thereof poſſeſſed; and he the ſaid *Matthew G.* the younger being ſo thereof poſſeſſed, and the ſaid *Robert* of the reverſion of the ſaid five acres of land with the appurtenances being ſeiſed in his demeſne

meſne as of fee; and becauſe 50 *s.* of the rent aforeſaid, for one year ended on the feaſt of the annunciation of the Bleſſed Virgin *Mary* in the 12th year of the reign of the ſaid late queen, to the ſame *Robert* after that feaſt and at the ſaid time when, *&c.* were in arrear and unpaid, the ſame *William*, as bailiff of the ſaid *Robert*, well acknowledged the taking of the cattle aforeſaid in the ſaid place in which, *&c.* as in parcel of the tenements aforeſaid with the appurtenances whereof, *&c.* to the ſame *Matthew G.* in form aforeſaid demiſed; and juſtly, *&c.* for the ſaid 50 *s.* rent to the ſaid *Robert* in form aforeſaid being in arrear, *&c.* And this he was ready to verify: wherefore he prayed judgment, and a return of the cattle aforeſaid, together with his damages, coſts and charges in this behalf expended, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to him, *&c.* And afterwards the ſaid lady the queen departed this life: and upon this the ſaid *Matthew* prayed leave of our court before us until on the morrow of the holy *Trinity*, whereſoever, *&c.* to plead in bar to the cogniſance aforeſaid; and he had, *&c.* The ſame day was given to the ſaid *William*, *&c.* On which day came the ſaid *William* into our ſame court before us at *Weſtminſter*; and the ſaid *Matthew*, although ſolemnly called, did not come, nor farther proſecute his writ aforeſaid: therefore it is conſidered, that the ſaid *Matthew* take nothing by his writ aforeſaid, but be in mercy for his falſe claim thereof, and that the ſaid *William* do go

Demiſe of the queen.

Nonſuit.

Inquiry. go thereof without day, *&c.* Therefore we command you, that, according to the 17 C. 2. c. 7. form of the ſtatute in ſuch caſe lately made and provided, by the oath of 12 good and lawful men of your county you diligently inquire how much of the yearly rent aforeſaid at the ſaid time of the taking and diſtraining of the goods and chattels aforeſaid was in arrear and unpaid, and how much the goods and chattels aforeſaid ſo as aforeſaid taken and diſtrained were worth, according to the true value of the ſame; and the inquiſition which, *&c* ſend to us from the day of St. *Michael* in three weeks under your ſeal and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition, together with this writ. Witneſs *T. Parker*, knt.

The execution of this writ appears in a certain ſchedule to this inquiſition annexed.

The return. *Suſſex*, to wit. AN inquiſition indented taken at *Eaſtgrinſtead*, in the county aforeſaid on the fifth day of *Auguſt*, *&c.* In witneſs whereof as well I the ſheriff as the jurors aforeſaid have to this inquiſition ſet our ſeals the day, year and place aboveſaid.

James Smith, bart. ſheriff.

The rent in arrear 8 *l.*
The value of the goods 8 *l.*
For coſts, according to the form of the ſtatute 9 *l.*

8 *December* 1715.

James

JAMES, &c. To the ſheriff of *Glouceſter*, greeting: Whereas *John W.* gent. lately in our court before us at *Weſtminſter*, by our writ impleaded *Francis G.* eſq; *Henry C.* the elder, *George T.* *William B.* and *Henry C.* the younger, in a plea, why they took the cattle of him the ſaid *John*, and them unjuſtly detained, againſt ſurety and pledges, &c. And thereupon the ſame *John* by *Thomas E.* his attorney complained, that the ſaid *Francis*, *Henry C.* the elder, *George*, *William*, and *Henry C.* the younger, on the firſt day of *September* in the 36th year of the reign of the lord *Charles* the ſecond, late king of *England*, &c. at the pariſh of St. *Philip* and *James* in your county aforeſaid, in a certain place there called *Conham*, took the cattle, to wit fifty ſheep, of him the ſaid *John*, and them unjuſtly detained, againſt ſurety and pledges, until &c. whereby he then ſaid that he was prejudiced, and had damage to the value of 20 *l.* And therefore he then produced the ſuit, &c. And thereupon the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, by *C. H.* their attorney came and defended the force and injury when, &c. And the ſaid *Francis* in his own right well avowed, and as bailiff of *Thomas S.* and *Stephen C.* gent. well acknowledged, and the ſaid *Henry*, *George*, *William* and *Henry*, as bailiffs of the ſaid *Francis*, *Thomas* and *Stephen*, well acknowledged the taking of the cattle aforeſaid, in the ſaid place in which, &c. and juſtly, &c. becauſe they ſaid that long before the ſaid time when, &c. the lord *Charles*

An inquiry of damages in replevin after judgment on demurrer.

Avowry and cogniſance.

Charles the ſecond, late king of *England*, *&c.* was ſeiſed of and in the foreſt or chaſe called *Kingſwood*, with the appurtenances in your county aforeſaid, in his demeſne as of fee in the right of his crown of *England*; and that the ſaid place in which, *&c.* is and at the ſaid time when, *&c.* and alſo for time immemorial was within the foreſt aforeſaid, and parcel of the ſame foreſt, and that the ſame late king being ſo ſeiſed before the ſaid time when, *&c.* by indenture made at *Weſtminſter* in the county of *Middleſex*, on the 20th day of *January* in the 21ſt year of the reign of the ſame late king, between the ſame late king of the one part, and one *Baynham T.* knt. and bart. of the other part, which ſaid indenture, ſealed under the great ſeal of *England*, the ſame *Francis*, *Henry*, *George*, *William* and *Henry* then in court produced, the date whereof is the day and year laſt aboveſaid, the ſame late king *Charles* the ſecond, for the conſiderations in the ſame indenture mentioned, with the advice of two of the commiſſioners of the treaſury of the ſame late king, granted, demiſed and to farm let to the ſaid *Baynham* the foreſt or chaſe aforeſaid, with the appurtenances, by the name of all that foreſt or chaſe called *Kingſwood*, lying and being in or near the pariſh of St. *Philip* and *James* in the city of *Briſtol* in the pariſh of *Bitten Mangetfield*, otherwiſe *Mangerfield Stapleton*, otherwiſe *Stableton*, *Hambrooke* and *Weſtanham* in your county, containing by eſtimation 3432 acres of waſte land, more or leſs, and extending on ſundry other lands, as well waſte as incloſed, in or near the pariſhes aforeſaid, or

ſome of them, together with all bucks, does and other beaſts then being within the limits of the foreſt or chaſe aforeſaid, and all liberties, franchiſes, privileges, rights and appurtenances to the ſame foreſt or chaſe belonging, incident or appendant, or within the foreſt or chaſe then before had, uſed or enjoyed in the times of the lady *Elizabeth*, late queen of *England*, or of the lord *James*, late king of *England*, and the lord *Charles* the firſt, late king of *England*, or any of them, by reaſon or pretence of the ſaid foreſt or chaſe, or the liberties and franchiſes of the ſame, to have and to hold the ſaid foreſt, chaſe, franchiſes, liberties, privileges, and all and ſingular other the premiſſes in the ſame indenture mentioned and intended to be thereby granted, with their and every of their appurtenances to the ſaid *B. T.* his executors, adminiſtrators and aſſigns, from the feaſt of St. *Michael* the archangel then laſt paſt, for and during the term of 60 years from thence next enſuing, fully to be compleat and ended: and the ſaid late king *Charles* the ſecond willed, and by the ſame indenture for himſelf, his heirs and ſucceſſors, gave and granted to the ſaid *Baynham*, his executors, adminiſtrators and aſſigns, full power and authority to repleniſh the foreſt or chaſe aforeſaid with deer, and by all lawful ways and means to erect lodges for the keepers, and to hinder and ſuppreſs purpreſtures, aſſarts and nuſances there, of what nature or kind ſoever, and alſo to preſerve the covert and vert for the ſafety and preſervation of the beaſts aforeſaid, as

by

by the indenture aforeſaid, among other things, is more fully manifeſt; by virtue of which ſaid demiſe the ſaid *Baynham* into the foreſt or chaſe aforeſaid, with the appurtenances, entered, and was thereof poſſeſſed, and being ſo thereof poſſeſſed, the ſame *Baynham* afterwards, and before the ſaid time when, &c. to wit, on the firſt day of *March* in the 32d year of the reign of the ſaid lord king *Charles* the ſecond, at the pariſh of St. *Philip* and *James* aforeſaid, aſſigned to one *Mary B.* the premiſſes aforeſaid, with the appurtenances, and all his right, title and intereſt of and in the ſame, to have and to hold to the ſame *Mary*, her executors and aſſigns, during all the reſidue of the ſaid term of 60 years then to come and unexpired, by virtue of which ſaid aſſignment the ſame *Mary* into the premiſſes aforeſaid entered and was thereof poſſeſſed; and being ſo thereof poſſeſſed, the ſaid *Mary* afterwards, and before the ſaid time when, &c. to wit, on the third day of *January* in the 33d year of the reign of the ſaid lord king *Charles* the ſecond, at the pariſh of St. *Philip* and *James* aforeſaid, aſſigned to the ſaid *Francis*, *Thomas* and *Stephen*, the premiſſes aforeſaid, with the appurtenances, and all her right, title and intereſt of and in the ſame, to have and to hold to the ſame *Francis*, *Thomas* and *Stephen*, during all the reſidue of the ſaid term of 60 years then to come and unexpired, by virtue of which ſaid aſſignment the ſame *Francis*, *Thomas* and *Stephen*, into the premiſſes aforeſaid, with the appurtenances, entered, and were and yet are thereof

of poſſeſſed; and becauſe the cattle aforeſaid at the ſaid time when, &c. were in the ſaid place in which, &c. eating up the graſs there growing, and doing damage there, the ſaid *Francis* in his own right well avowed, and as bailiff of the ſaid *Thomas* and *Stephen* acknowledged, and the ſaid *Henry*, *George*, *William* and *Henry*, as bailiffs of the ſaid *Francis*, *Thomas* and *Stephen*, well acknowledged the taking of the cattle aforeſaid in the ſaid place in which, &c. and juſtly, &c. ſo doing damage there: and this they were ready to verify: wherefore they prayed judgment, and a return of the cattle aforeſaid, together with their damages, coſts and charges in that behalf expended, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to them, &c. And the ſaid *John W.* thereto ſaid, that the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, for the reaſon before alledged, ought not as bailiffs of the ſaid *Thomas S.* and *Stephen C.* to acknowledge, nor the ſaid *Francis* in his own right to avow the taking of the cattle aforeſaid in the ſaid place in which, &c. juſt; becauſe by proteſting Plea.
that the ſaid lord king *Charles* the ſecond never was ſeiſed of the ſoil or land of the foreſt or chaſe of *Kingſwood* aforeſaid, for plea the ſame *John W.* ſaid, that long before the ſaid time of the taking of the cattle aforeſaid made, and alſo before the ſaid time when it is ſuppoſed that the ſaid late king *Charles* the ſecond was ſeiſed of the foreſt or chaſe aforeſaid, to wit, on the third day of *April* in the 23d year of the

reign of the late king *Charles* the firſt, *John W.* the elder, father of him the ſaid *John W.* was ſeiſed of the manor of St. *Lawrence* within the pariſh of St. *Philip* and *James*, with the appurtenances, in your county aforeſaid, whereof the ſaid place in which, *&c.* is and at the ſaid time when, *&c.* and alſo for time immemorial was parcel, in his demeſne as of fee; and being ſo thereof ſeiſed, the ſame *John W.* the elder afterwards and before the ſaid time when, *&c.* at *Conham* aforeſaid died of ſuch his eſtate thereof ſeiſed, after whoſe death the ſaid manor with the appurtenances, whereof the ſaid place in which, *&c.* is parcel, deſcended to the ſaid *John* as ſon and heir of him the ſaid *John*, by reaſon whereof the ſaid *John* the ſon afterwards and before the ſaid time when, *&c.* into the ſaid manor with the appurtenances entered, and at the time of the taking of the cattle aforeſaid was and yet is ſeiſed thereof in his demeſne as of fee, and being ſo thereof ſeiſed, the ſame *John* before the ſaid time when, *&c.* put his cattle aforeſaid into the ſaid place in which, *&c.* to feed on the graſs there then growing, until the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* on the day and year in the declaration aforeſaid ſpecified at *Conham* aforeſaid, took the cattle aforeſaid of him the ſaid *John*, and unjuſtly detained them againſt ſurety and pledges, until, *&c.* as he above againſt them complained: and this he was ready to verify: wherefore he prayed judgment and his damages, by reaſon of the caption and unjuſt detention of thoſe cattle, to be adjudged

to

to him, &c. And the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* thereupon ſaid, that the ſaid plea of the ſaid *John* above in bar of the avowry and cogniſance aforeſaid pleaded, was inſufficient in law to maintain him the ſaid *John* to have his action aforeſaid againſt them the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, and that they to that plea in manner and form aforeſaid pleaded had no neceſſity, nor were by the law of the land obliged in any manner to anſwer: and this they were ready to verify: wherefore for want of a ſufficient plea in this behalf they prayed judgment, and a return of the cattle aforeſaid, together with their damages in this behalf ſuſtained, to be adjudged to them, &c. And for cauſe of demurrer in law in this behalf, the ſame *Francis*, *Henry*, *George*, *William* and *Henry* did ſet down, and to the court here expreſs the cauſes following, to wit, that the ſaid *John* in his plea aforeſaid did not traverſe the matter in the avowry and cogniſance aforeſaid, when he ought to traverſe that matter, as they ſaid; and becauſe the matter of that plea was not iſſuable nor triable, and becauſe that plea was inſufficient and wanted form, and thereupon the ſaid *John W.* ſaid that the plea aforeſaid by him the ſaid *John* above in bar to the avowry and cogniſance aforeſaid pleaded, and the matter in the ſame contained, were good and ſufficient in law to preclude the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* from having their avowry and cogniſance aforeſaid; which ſaid plea, and the matter in the ſame contained,

Demurrer.

The cauſes. 27 El. c. 5. 4 Ann. c. 16.

Joinder in demurrer.

tained, the ſame *John* was ready to verify and prove, as the court, *&c.* And becauſe the ſaid *Francis*, *Henry*, *George*, *William* and *Henry* to that plea did not anſwer, nor hitherto in any wiſe deny it, the ſame *John* as before prayed judgment and his damages aforeſaid, by reaſon of the caption and unjuſt detention of the cattle aforeſaid, to be adjudged to him, *&c.* And becauſe the court of the ſaid lord the king here were not adviſed to give their judgment of and upon the premiſſes, day therefore was given to the parties aforeſaid before the ſaid lord the king from the day of *Eaſter* in 15 days, whereſoever, *&c.* to hear their judgment of and upon the premiſſes, becauſe the court of the ſaid lord the king thereof, *&c.* On which day before the lord the king at *Weſtminſter* came the parties aforeſaid, by their attornies aforeſaid; whereupon all and ſingular the premiſſes being ſeen, and by the court of the ſaid lord the king fully underſtood, and mature deliberation being thereon had, it was conſidered that the plea aforeſaid by him the ſaid *John* above in bar to the avowry and cogniſance aforeſaid pleaded, was good and ſufficient in law to maintain him the ſaid *John* to have his action aforeſaid againſt them the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*: wherefore it was alſo conſidered, that the ſaid *John* ought to recover his damages againſt them the ſaid *Francis*, *Henry*, *George*, *William* and *Henry*, by reaſon of the caption and unjuſt detention of the cattle aforeſaid; but becauſe it is not known what damages the ſaid *John* hath ſuſtained by

Judgment for the plaintiff.

Inquiry.

by the reaſon aforeſaid; therefore we command you, that by the oath of twelve good and lawful men of your bailiwick you diligently inquire what damages the ſaid *John* hath ſuſtained, as well by reaſon of the premiſſes as for his coſts and damages by him about his ſuit in this behalf expended; and the inquiſition which you ſhall thereupon take, ſend to us whereſoever, *&c.* under your ſeal and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition, together with this writ. Witneſs *Edmund Herbert*, knt. at *Weſtminſter*, the 17th day of *May* in the ſecond year of our reign.

The manner of entering an inquiſition in replevin, according to the ſtatute of 17 Car. 2. *upon a judgment for the avowant upon a demurrer, where a writ of inquiry was awarded to inquire of the value of the diſtreſs, and a judgment thereon.*

After awarding the inquiry, and the words, *The ſame day is given to the (plaintiff) to be there*, &c. you ſay thus:

AT which day the ſaid *T. R.* (*i. e.* the plaintiff) comes before our ſovereign lord the king at *Weſtminſter*, by his attorney aforeſaid, and the ſheriff (to wit) *J. A.* eſq; returns an inquiſition taken before him at the caſtle of *York* in the county aforeſaid, on the 30th day of *March* in the eighth year of the reign of his preſent majeſty, whereby it is found that the ſaid ſix hogſ-

heads of allum, at the time of the taking thereof * *were worth* 100 *l.* according to the true value thereof; therefore it is adjudged, that the ſaid *T. R.* do recover againſt the ſaid *J. M.* the ſaid 100 *l.* for the value of the ſaid ſix hogſheads of allum † *part of the ſaid rent*, being in arrear as aforeſaid, found by the ſaid inquiſition in the manner aforeſaid, and his damages ſuſtained by reaſon of the premiſſes here adjudged by the ſaid court of our ſaid ſovereign lord the king, according to the form of the ſtatute in ſuch caſe made and provided, to the ſaid *T. R.* to 80 *l.* with his conſent, for his expences and coſts laid out by him about his ſuit in this cauſe, which ſaid value, expences and coſts, do in the whole amount to 180 *l.* and be the ſaid *J. M.* amerced, *&c.*

* Note; when the goods are inanimate, they ſay, were worth ſo much; if animate, were of ſuch a price.

† Theſe words are where the diſtreſs doth not amount to the value of the rent.

1 Saund. 195.

An

An inquiſition and judgment upon the ſame ſtatute, upon a judgment on a demurrer for the avowant, and a writ to inquire of the monies in arrear, and of the value of the diſtreſs, and judgment thereon.

After the judgment upon the demurrer that the plea in bar to the avowry is inſufficient, concluding, *that the plaintiff take nothing by his writ, but be amerced for his falſe complaint, and that the defendant is diſmiſſed the court,* you go on thus:

AND thereupon they the ſaid *T. A. W.* and *T.* according to the form of the ſtatute in ſuch caſe made and provided, pray his majeſty's writ to be directed to the ſheriff of the county aforeſaid, to inquire what monies were in arrear for the rent aforeſaid, at the time of the diſtreſs made as aforeſaid, and the value [or price] of the cattle taken; therefore the ſheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick he diligently inquire what ſums of money were in arrear for the rent aforeſaid at the time of the diſtreſs made, and what was the value of the cattle diſtrained according to the true value thereof; and the inquiſition which, *&c.* the ſheriff ſhould return, or make appear here in three weeks from the day of St. *Michael,* under the ſeal, *&c.* and the ſeals, *&c.* at which day *T. A. W.* and *T.* came here by their ſaid attorney, and the ſheriff, (to wit) Sir *R. M.* knight

and baronet, now returns an inquiſition taken before him at the caſtle of *York* in the county aforeſaid, on the 6th day of *Auguſt* laſt paſt, by the oath of twelve good and lawful men, whereby it is found that the ſaid ſums of money in arrear for the rent aforeſaid, to the ſaid *T. L.* at the time of the diſtreſs were 39 *l.* and that the cattle diſtrained, according to the true value [or price] thereof, were worth 38 *l.* Therefore it is adjudged, that the ſaid *T. A. W.* and *T.* do recover againſt the ſaid *R. P.* the ſaid 38 *l.* for the value of the cattle aforeſaid, being part of the rent in arrear as aforeſaid, found by the ſaid inquiſition in the manner aforeſaid, and his damages by reaſon of the premiſſes, by this court adjudged to the ſaid *T. A. W.* and *T.* at their requeſt, by the diſcretion of the juſtices here, for his expences and coſts laid out by them in this ſuit, according to the form of the ſtatute in ſuch caſe made and provided, to 10 *l.* which value, expences and coſts, do in the whole amount to 48 *l.* *&c.*

1 Saund. 286, 287.

Retorno habendo.

A *retorn' habend'* after judgment for the defendant, upon a demurrer in replevin.

GEORGE the ſecond, *&c.* To the ſheriff of *Middleſex*, greeting: whereas *J. S.* late of the pariſh of St. *Clement's Danes* in your county, eſq; was ſummoned to be in our court before us, to anſwer to *W. P.* eſq; of a plea, (or *in an action*) wherefore on the 14th day of *October* in the firſt year of our reign, at the pariſh of St. *Clement's*

Clement's Danes in your county, in a certain place there, called a *chamber in Devereux court*, he took the goods and chattels of the ſaid *W.* (to wit) one bed, one bedſtead, *&c.* [*ſo naming the goods*] and unjuſtly detained them againſt ſureties and pledges, until, *&c.* and the ſaid *J. S.* came into our ſame court before us, and alledged and pleaded, that the ſaid *William* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſaid, that as to the one bed, one bedſtead, [*repeating part of the goods*] part of the goods and chattels aforeſaid in the ſaid declaration mentioned, that the property of thoſe goods and chattels at the aforeſaid time of taking them were the property of the ſaid *J.* and this he was ready to verify; and as to one couch, ten other books, [*ſo naming the goods to which he pleads this plea*] reſidue of the ſaid goods and chattels in the declaration of the ſaid *W.* mentioned, the ſaid *John* pleaded, that at the time of taking thoſe goods and chattels the property of them was in and belonging to one *R. F.* without that, that the property of the ſaid reſidue of the goods and chattels in the declaration mentioned, at the time when, *&c.* was the property of the ſaid *William*, as by the ſaid declaration above was ſuppoſed: and this he was ready to verify and prove; wherefore he prayed judgment, if the aforeſaid *William* ought to have or maintain his ſaid action againſt him for the ſame, *&c.* and he alſo prayed a return to be adjudged to him of all the goods and chattels aforeſaid, together with his damages, expences and coſts laid

out by him about his ſuit in that behalf; and the ſaid *William* replied, that the plea of the ſaid *John* above pleaded, and the matter therein contained, were not ſufficient in law to preclude the ſaid *William* from having his ſaid action againſt the ſaid *John* for the ſame, and that he was not under a neceſſity, nor was bound by the law of the land to anſwer in any manner to that plea, in the manner and form as the ſame was pleaded; which he was ready to verify; wherefore, for want of a ſufficient anſwer in that behalf, he the ſaid *William* prayed judgment, and his damages occaſioned by the taking and unjuſtly detaining the goods and chattels, to be adjudged to him, *&c.* and the ſaid *John* rejoined, that the plea aforeſaid by him pleaded, in the manner and form aforeſaid, and the matters therein contained, were good and ſufficient in law to preclude the ſaid *William* from having his action aforeſaid thereof againſt the ſaid *John*; which plea, and the matters therein contained, he the ſaid *John* was ready to verify and prove, as the court ſhould require; and becauſe the ſaid *William* had not anſwered to that plea, nor in any wiſe denied the ſame, he the ſaid *John*, as above, prayed judgment, and a return of all and ſingular the goods and chattels aforeſaid, together with his damages, *&c.* to be adjudged to him, *&c.* and ſuch proceedings were thereupon had in our ſame court before us, that it was adjudged, that the ſaid plea by him the ſaid *John* above pleaded, and the matters therein contained, were good and ſufficient in law to preclude the aforeſaid

William

William from having his ſaid action againſt the ſaid *John*; and it was alſo conſidered by our ſame court before us, that the ſaid *W.* ſhould take nothing by his ſaid writ, but for his falſe claim therein ſhould be in mercy, (or *amerced*) *&c.* and that the aforeſaid *J. S.* ſhould go thereof without a day, (or *ſhould for ever be diſmiſſed the court*), *&c.* and that he ſhould have a return of the goods and chattels aforeſaid, to be delivered to him for ever irreplegiable: and further, it was conſidered in our ſaid court before us, that the aforeſaid *John* ought to recover his damages againſt the ſaid *W.* by reaſon of the premiſſes: therefore we command you, that without delay you cauſe the ſaid *John* to have a return of the goods and chattels irreplegiable, and that you ſhall not deliver thoſe things of which you have made mention, which belong to the complaint of the ſaid *William*, without our writ, which ſhall expreſly mention the ſaid judgment; and in what manner you ſhall execute this writ, do you make appear to us, whereſoever we ſhall then be in *Great Britain*, on We command you likewiſe, that by the oath of 12 honeſt and lawful men of your bailiwick, according to the form of the ſtatute in that caſe made and provided, you diligently inquire what damages the ſaid *John* hath ſuſtained, as well by reaſon of the premiſſes, as for his expences and coſts laid out by him about his ſuit in that behalf; and the inquiſition which you ſhall take thereon do you return to us at the day aforeſaid, whereſoever we ſhall then be in *Great*

Great Britain, under your ſeal, and the ſeals of thoſe by whoſe oath you ſhall take ſuch inquiſition, together with this our writ to you directed for that purpoſe. Witneſs *Robert* Lord *Raymond*, *&c.*

The return of a *return' habend'* and a writ of enquiry by the bailiff of the liberty, and a *non omittas* and a *capias* awarded.

AT which day comes here the ſaid defendant by his attorney aforeſaid, and the ſheriff, (that is to ſay) *W. H.* eſq; now returneth here, that in order to have an execution of the writ aforeſaid to him directed, he made a mandate to Sir *John Hobbart*, knight and baronet, bailiff of the liberty of our ſovereign lord the king, of his duchy of *Lancaſter* in the county aforeſaid, who hath full power of returning all writs, and of executing the ſame within the liberty aforeſaid, to whom the execution of the writ aforeſaid doth entirely belong to be made; for that no execution of the writ aforeſaid, within the liberty aforeſaid, in his bailiwick, could be made by him, which bailiff made a return to the ſaid ſheriff, upon the mandate aforeſaid, that before the coming of the mandate aforeſaid to his hands, the cattle, goods and chattels aforeſaid were eloined by the ſaid plaintiff to places to the ſaid bailiff unknown, ſo that he could not cauſe the cattle, goods and chattels aforeſaid of the ſaid *(defendant)* to be returned, as by the warrant aforeſaid he was commanded; the ſaid bailiff alſo returned, to the ſaid ſheriff an inquiſition taken before him at *F.* within the liberty aforeſaid in the county aforeſaid, on the 1ſt day of *October* laſt paſt, by the oath of twelve, *&c.* by virtue of the warrant aforeſaid

ſaid directed by the ſheriff upon the writ aforeſaid to the ſaid bailiff, by which it was found, that the ſaid defendant ſuſtained damage by reaſon of the premiſſes, beſides his coſts to and for thoſe coſts and charges to Therefore it is adjudged, That the ſaid defendant do recover againſt the ſaid plaintiff his damages aforeſaid to by the inquiſition found in the manner aforeſaid; and alſo pounds to the ſaid defendant. at his requeſt, for his coſts and charges aforeſaid, adjudged by the court by way of increaſe, which damages do in the whole amount to *&c.* And hereupon the ſheriff is commanded, that he do not omit, by reaſon of any liberty of the duchy of *Lancaſter* aforeſaid; but that of other cattle, goods and chattels of the *(plaintiff)* to the value of the cattle, goods and chattels aforeſaid before taken, he take *in withernam*, and deliver them to the ſaid defendant, to be detained by him until the cattle, goods and chattels aforeſaid before taken be delivered by the (ſaid plaintiff) and in what manner, *&c.* the ſheriff ſhall make appear, *&c.*

GEORGE the ſecond, *&c* greeting: Whereas *A. B.* lately in our court before us at *Weſtminſter*, was ſummoned to anſwer to *C. D.* in an action, wherefore he took nine cows, the cattle of him the ſaid *C.* and unjuſtly detained them, againſt ſureties and pledges, *&c.* and the ſaid *A.* appearing in our ſame court before us, for a certain reaſon by him alledged in our ſame court,

A *retorn' habend'* againſt the plaintiff, for default of his plea in bar to an avowry. Theſ. Brev. 220.

court, in his own right, and the right of *S.* his wife, well avowed the taking of the ſaid cattle in the place in which, *&c.* to be juſt, for 9 *l.* rent due and in arrear from him the ſaid *C.* to the ſaid *A.* and *S.* for one half year, ending at the feaſt of the annunciation of the Bleſſed Virgin *Mary* next before, *&c.* [*as in the avowry*] for one meſſuage, *&c.* with the appurtenances in *W.* demiſed by them the ſaid *A.* and *S.* to the ſaid *C.* whereupon the ſaid *C.* though ſolemnly called, did not appear, nor doth further proſecute his ſaid writ; wherefore it was conſidered in our ſame court before us, That he and his pledges for proſecuting ſhould be amerced, and that the ſaid *A.* might depart the court thereon without a day, and ſhould have a return of the ſaid cattle: therefore we command you, that without delay you return the ſaid cattle to the ſaid *C.* and you ſhall not deliver them at the complaint of the ſaid *R.* without our writ, which ſhall expreſly mention the ſaid judgment; and in what manner you execute this writ, you make appear to us in three weeks from the day of St. *Michael*, wherefoever, *&c.*. and have you there this writ. Witneſs, *&c.*

A retorn' habend' upon a judgment againſt the plaintiff by default. Lilly's Entr. 637.

GEORGE the ſecond, *&c.* greeting: Whereas *T. E.* lately in our court before us at *Weſtminſter*, was ſummoned to anſwer to *R. B.* in an action wherefore he took ſeven cows, the cattle of him the ſaid *R. B.* and unjuſtly detained them, againſt ſureties and pledges, *&c.* as he alledged; and the ſaid *R.* afterwards made default

default in our ſaid court before us; wherefore it was conſidered in our ſame court before us, that he and his pledges for proſecuting ſhould be amerced, and that the ſaid *T.* might depart the court without a day, and ſhould have a return of the cattle aforeſaid: therefore we command you, That without delay you return the ſaid cattle to the ſaid *T.* and you ſhall not deliver them at the complaint of the ſaid *R.* without our writ, which ſhall expreſly mention the ſaid judgment; and in what manner you execute this writ, you ſhall make appear to us in three weeks from the day of St. *Michael*, whereſoever, *&c.* And have you there this writ. Witneſs, *&c.*

Second deliverance.

K. B.

GEORGE the ſecond, to the ſheriff of *Eſſex*, greeting: If *T. W.* ſhall give you ſecurity that he will proſecute his claim, and alſo to return the cattle, (* which in our court before us were lately adjudged to *T. J.* through the default of the ſaid *T. W.*) if a return thereof ſhall be adjudged; then do you cauſe thoſe cattle without delay, (or *forthwith*) to be delivered to the ſaid *T. W.* and by ſureties and ſafe pledges compel the ſaid *T. J.* that he be before * us in three weeks from the day of St. *Michael*, whereſoever we ſhall then be in *England*, to anſwer to the ſaid *T. W.* for taking and unjuſtly detaining the cattle aforeſaid; and have

A writ of ſecond deliverance. Theſ. Brev. 503.

have you there the names of the pledges, and this writ. Witneſs *Philip* Lord *Hardwicke*, the 28th day of *November* in the ninth year of our reign.

K. B.

Another form. Theſ. Brev. 303.

GEORGE the ſecond, *&c.* To the ſheriff of *Eſſex*, greeting: If *C. D.* ſhall give you ſecurity that he will proſecute his claim, and alſo return the cattle which in our court before us were lately adjudged to *A. B.* through the default of the ſaid *C.* we command you, that if by means of our writ *de retorn' habendo* lately directed to you for that purpoſe, you have made a return of the ſaid cattle to the ſaid *C. D.* then do you cauſe them to be delivered to the ſaid *C. D.* and by ſureties and ſafe pledges compel the ſaid *A.* that he be before us on the octaves of St. *Hilary*, whereſoever we ſhall then be in *England*, to anſwer to the ſaid *C.* for taking and unjuſtly detaining the cattle aforeſaid; and have you there the names of the pledges, and this writ. Witneſs, *&c.*

K. B.

The entry of an award of this writ.

T. *F.* by *A. B.* his attorney, offers (or *tenders*) himſelf on the 4th day againſt *W. T.* of a plea, (or *in an action*) wherefore he took the cattle of the ſaid *W. T.* and unjuſtly detained them, againſt ſureties and pledges; and he came not, and the plaintiff was there, *&c.* therefore he and his pledges, to wit, *John Doe* and *Richard*

Richard Roe, are amerced, *&c.* and the said *T. F.* may depart the court therefrom without a day, *&c.* and may have a return of the cattle aforesaid, *&c.* and afterwards, (to wit) on the octaves of St. *Martin* then next following, before our sovereign lord the king at *Westminster*, comes the said *W.* by *J. B.* his attorney, and, by virtue of the statute in such case made and provided, prays his majesty's writ of *second deliverance*, &c. and it is granted him, *&c.* returnable on the octaves of St. *Martin*, wheresoever, *&c.* the same day is given to the said *T. F.* &c. *Misericordia.* *Sine die.*

The difference between this writ in the common pleas from the former, is no otherwise than at the first asterisk in the first writ before, you say, which in our court before our justices at *Westminster* were adjudged to *T. J.* through the default of the said *T. W. And at the second asterisk you say*, that he be before our justices at *Westminster*, in three weeks from the day of St. *Michael*, to answer, *&c.* Thes. Brev. 303.

C. B.

GEORGE the second, *&c.* To the sheriff of *Essex*, greeting: Because *Lewis B.* in our court before our justices at *Westminster*, hath given you security that he will prosecute his claim, and will also make a return of those cattle which in our same court were adjudged to *Stephen R.* through the default of the said *L.* if a return thereof be adjudged to him: A writ of second deliverance after bail taken. Offic. Brev. 348.

therefore we command you, that without delay you cauſe a mare which you have taken *in withernam*, of the cattle of the ſaid *L.* to the value of the cattle formerly taken, to be delivered to the ſaid *L.* and compel the ſaid *S.* by ſureties and ſafe pledges, that he be before our juſtices at *Weſtminſter* on the octaves of St. *Hilary*, to anſwer to the ſaid *L.* for taking and unjuſtly detaining the cattle aforeſaid; and have you there the names of the pledges, and this writ. Witneſs Sir *Thomas Reeve*, Knt. the 28th day of *November* in the ninth year of our reign.

The return of a writ of ſecond deliverance.

BY virtue of this writ to me directed, I have cauſed to be delivered to the within named *L.* his cattle within mentioned, as I am within commanded to do: the pledges within named are *John Denn* and *Richard Fenn*.

J. D. Eſq; ſheriff.

Capias in Withernam.

GEORGE the ſecond, &c. To the ſheriff of *Suffolk*, greeting: Whereas we lately commanded you by our writ, that whereas *T. B.* gentleman, had been attached by our writ of ſecond deliverance, to appear in our court before us, to anſwer to *J. S.* in an action, wherefore he took the cattle of the ſaid *J.* and unjuſtly detained them againſt ſureties and pledges, and the ſaid *J. S.* in our ſame court made default; wherefore it was conſidered in our ſame court, that the ſaid *T. B.* ſhould depart

depart hence without a day, and that the ſaid *J. S.* and his pledges for proſecuting ſhould be amerced; and that the ſaid *T. B.* ſhould have a return of the cattle aforeſaid irreplegiable; and that you without delay ſhould make a return of thoſe cattle to the ſaid *T. B.* to be detained by him irreplegiable; and in what manner you ſhould execute that writ, you ſhould make known to us [*ſuch a return*] whereſoever we ſhould then be in *England*; and you at that day returned to us, that the cattle aforeſaid were eloined by the ſaid *T. S.* to places unknown to you, ſo that you could not return or deliver thoſe cattle to the ſaid *T. B.* as you was commanded by the ſaid writ; therefore we command you, that you take ſo many cattle of the ſaid *J. S.* to the value of the cattle aforeſaid, before taken by the ſaid *J. S. in withernam*, and deliver them to the ſaid *T. B.* to be kept by him irreplegiable, until you can make a return of thoſe cattle before taken, to the ſaid *T. B.* and in what manner you ſhall execute this our mandate, do you make appear to us on the octaves of St. *Hilary*, whereſoever we ſhall then be in *England*; and that you cauſe further to be done therein, what of right, and according to the laws and cuſtoms of this our kingdom of *Great Britain*, we ſhall ſee meet to be done; we alſo command you, that if the ſaid *T. B.* ſhall make you ſecure of proſecuting his claim, and of returning the chattels aforeſaid, if a return thereof ſhould be adjudged, then do you compel the ſaid *J. S.* by ſureties and ſafe

pledges, that he before us [*ſuch a return*] whereſoever we ſhall then be in *England*, to anſwer as well to us for the contempt, as to the ſaid *T. B.* for his damage and injury done him in this caſe; and have you there this writ. Witneſs, *&c.*

A *capias in withernam*, upon a writ of *pluries replegiari facias.*

GEORGE the ſecond, *&c.* To the ſheriff of *E.* greeting: Whereas we have often commanded you, that you ſhould juſtly and without delay grant a replevin to *R. E.* of his chattels (to wit) of thoſe which *T. T.* and *J. C.* had taken and unjuſtly detained (as it is ſaid) according to our writ before delivered to you, or that you ſhould be before us [*ſuch a return*] whereſoever we ſhould then be in *England*, to ſhew us a reaſon, why you neglected to execute our mandates ſo often directed to you: and you at that day made a return to us, that the chattels aforeſaid were eloigned by the ſaid *T. T.* and *J. C.* out of your bailiwick to places to you unknown, ſo that you could in no wiſe grant a replevin thereof to the ſaid *R.* Therefore we command you, *&c.* [*as in the former*].

A *capias in withernam*, upon a *retornum habendo*, after an avowry and a *ca ſa.* againſt the party for the damages.

GEORGE the ſecond, *&c.* To the ſheriff of the city of *G.* greeting: Whereas *J. P.* was lately ſummoned in our court before us, to anſwer to *J. W.* of a plea [or *in an action*] wherefore he on the 28th day of *April* [*in ſuch a year*] at the city of *G.* (to wit) in a place there called *P.* had taken the cattle of the ſaid *J.* to wit,

The declaration.

twenty ſheep, and impounded and unjuſtly detained them, againſt ſureties and pledges,

until, &c. (as he declared); and the ſaid J. P. appearing in our ſaid court, for a certain reaſon therein alledged by him, well avowed the taking of the ſaid cattle in the ſaid place where, &c. to be juſt, &c. for damage-feaſant therein; and the ſaid J. W. afterwards in our ſame court made default: wherefore it was conſidered there, that they and their pledges for proſecuting ſhould be amerced, &c. and that the ſaid J. ſhould be diſmiſſed therefrom without a day; and that he ſhould have a return of the cattle aforeſaid: therefore we lately commanded you, that you ſhould without delay make a return of the cattle aforeſaid to the ſaid J. P. and that you ſhould not deliver them at the deſire of J. W. without our writ, which ſhould expreſsly mention the judgment aforeſaid; and in what manner you ſhould execute that precept, you ſhould make appear to us [*on the return*] whereſoever we ſhould then be in *England*; we alſo lately commanded you, that according to the ſtatute in ſuch caſe made and provided, you ſhould diligently inquire by the oaths of honeſt and lawful men of your bailiwick, what damages the ſaid J. P. hath ſuſtained, as well by reaſon of the premiſſes, as for his expences and coſts laid out by him about his ſuit in that behalf; and that you ſhould return to us at the time aforeſaid, the inquiſition which you ſhould take thereon, under your ſeal and the ſeals of thoſe perſons by whom you ſhould take the inquiſition, together

The avowry.

Default.

Miſericordia.

Sine die.

Return of the cattle.

Second deliverance,

Elongata returned by an

with this writ; and you at that day returned to us, that the ſaid cattle had been eloigned by the ſaid *J. W.* to places unknown to you; for which reaſon you could not return thoſe cattle to the ſaid *J. P.* and you alſo returned a certain inquiſition taken before you in the city of *G.* in the county of the ſaid city, on the 19th day of *April* [*in ſuch a year*] whereby it was found, that the ſaid *J.* had ſuſtained damages by reaſon of the premiſſes, beſides his expences and coſts laid out by him about his ſuit in that behalf, to 10*s.* and for his expences and coſts to 2*d.* Therefore it was adjudged, that the ſaid *J. P.* ſhould recover againſt the ſaid *J. W.* his damages aforeſaid found by the inquiſition aforeſaid; and alſo 10*l.* awarded by our court before us, to the ſaid *J. P.* for his expences and coſts by way of increaſe; which ſaid damages in the whole amounted to 10*l.* 10*s.* 2*d.* and that the ſaid *J. W.* ſhould be amerced; therefore we command you, that you take ſo many cattle of the ſaid *J. W.* in your bailiwick, *in withernam*, and without delay cauſe them to be delivered to the ſaid *J. W.* to be detained by him irreplegiable till he will make a return of the ſaid cattle before taken to the ſaid *J. B.* and in what manner you ſhall execute this our writ, do you make appear to us on the octaves of St. *Hilary*, whereſoever we ſhall then be in *England*: we command you alſo, that you take the ſaid *J. W.* if he ſhall be found in your bailiwick, and keep him ſafely, ſo that

Inquiſition.

The finding of the jury.

Judgment.

Withernam.

Ca ſa.

that you have his body before us at the time aforeſaid, whereſoever we ſhall then be in *England*, to ſatisfy the ſaid *J. P.* for the damages aforeſaid; and have you there then this writ. Witneſs, *&c.* Theſ. Brev. 62.

PRACTICAL DIRECTIONS

As to the making of a diſtreſs for rent, and ſuing a replevin.

THE landlord himſelf may make the diſtreſs: but it is generally made by ſome other perſon employed by the landlord for that purpoſe; in which caſe, the landlord muſt give to the perſon he employs, a warrant or authority in writing, called a warrant of diſtreſs, which is uſually in the following form:

'To Mr. *A. B.* my bailiff, greeting: 'Diſtrain the goods and chattels of *C. D.* '[the tenant] in the houſe he now dwells 'in, [or, on the premiſſes in his poſſeſſion] 'ſituate in ——— in the county of ——— 'for —— pounds, being two year's rent, '[or, as the caſe is] due to me for the 'ſame at *Michaelmas* [or, any other] day 'laſt; and for your ſo doing, this ſhall be 'your ſufficient warrant and authority. 'Dated the ——— day of ——— 17 ——.

W. T.'

Being legally authorized to diſtrain, you enter on the premiſſes, and make a ſeiſure of the diſtreſs. If the diſtreſs be made in a houſe, you ſeize a chair or other piece

Ante 43.

of

of furniture, and ſay, 'I ſeize this chair 'for, whatever it be] in the name of all 'the goods in this houſe, for the ſum of '——— pounds, being two year's rent '[or, as the caſe is] due to me [or, to '*W. T.* your landlord] at *Michaelmas* [or, 'any other] day laſt, [and if the diſtreſs 'be made by any other than the landlord, 'you add] by virtue of an authority from 'the ſaid *W. T.* for that purpoſe.'

You then proceed to take an inventory of ſo many goods, as you judge will be ſufficient to cover the rent diſtrained for, and alſo the charges of the diſtreſs. Having done this, you make a copy of the inventory, according to the following form:

'An inventory of the ſeveral goods and 'chattels diſtrained by me *A. B.* [the di-'ſtrainer] the —— day of —— in the year 'of our Lord ——— in the houſes, out-'houſes, and lands [according to the caſe] 'of *C. D.* [the tenant] ſituate in —— in 'the county of —— [and if the diſtreſs be 'made by any other than the landlord, 'ſay,—by the authority and on the behalf 'of *W. T.* your landlord] for the ſum of '——— pounds, being two years rent, '[or, as the caſe is] due to me [or, to 'the ſaid *W. T.*] at *Michaelmas* [or, any 'other] day laſt.'

In the dwelling-houſe:
One table,
Six chairs, *&c.*
In the cow-houſe:
Six cows,
Two calves, *&c.*

At

At the bottom of the inventory you ſubſcribe the following notice to the tenant:

'Mr. *C. D.*

'Take notice, that I have this day diſtrained [or, that as bailiff to *W. T.* your landlord, I have this day diſtrained] on the premiſſes abovementioned, the ſeveral goods and chattels ſpecified in the above inventory, for the ſum of —— pounds, being two years rent [or, as the caſe is] due to me [or, to the ſaid *W. T.*] at *Michaelmas* [or, any other] day laſt, for the ſaid premiſſes; and that unleſs you pay the ſaid rent with the charges of diſtraining for the ſame, within five days from the date hereof, the ſaid goods and chattels will be appraiſed and ſold according to law. Given under my hand, the ——— day of ——— in the year of our Lord ———.

W. T.'

Ante 54.

A true copy of the above inventory and notice muſt either be given to the tenant himſelf, or left at his houſe; or, if there be no houſe, on the moſt notorious place on the premiſſes. And it is proper to have a perſon with you when you make the diſtreſs, and alſo when you ſerve the inventory and notice, to examine the inventory, and to atteſt, if there be occaſion, the regularity of the proceedings.

The ſafeſt way is to remove the goods immediately, and in your notice to acquaint the tenant where they are removed: but it is now moſt uſual to let them remain

main on the premiſſes, leaving a man in poſſeſſion, till you are entitled by law to ſell them, which is on the ſeventh day. Ante 53.

If the tenant require further time for the payment of the rent, and the landlord chuſes to allow it, he muſt take a memorandum in writing from the tenant, in the following form:

Memorandum, That I *C. D.* do hereby conſent and agree, that *W. T.* my landlord, who hath this day [or, who on the ——— day of ——— laſt] diſtrained my goods and chattels for rent, in a meſſuage or dwelling-houſe [according to the caſe] ſituate in ——— in the county of ——— ſhall continue in poſſeſſion of my ſaid goods and chattels in the ſaid meſſuage or dwelling-houſe for the ſpace of ——— from the date hereof; the ſaid *W. T.* having agreed to forbear the ſale of the ſaid goods and chattels for the ſaid ſpace of time, to enable me to diſcharge the ſaid rent. And I the ſaid *C. D.* do hereby agree to pay the expences of keeping the ſaid poſſeſſion. As witneſs my hand the ——— day of —— in the year of our Lord ——.

C. D.

This memorandum is made, that the landlord may not be deemed a treſpaſſer, which he otherwiſe would, for continuing in poſſeſſion beyond the time, which is limited by act of parliament for the ſale of the diſtreſs. Ibid.

But if there be no allowance of further time, you ſearch the ſheriff's office, on the ſeventh

ſeventh day, to ſee if the goods have been replevied; if they have not, you repair to the premiſſes; where, if the rent and charges of the diſtreſs are not paid, you ſend for a conſtable and two ſworn appraiſers, who having viewed the goods diſtrained, the former muſt adminiſter to the latter the following oath:

'You and each of you ſhall well and 'truly appraiſe the goods and chattels 'mentioned in this inventory, [*the con-'ſtable at the ſame time holding the in-'ventory in his hand, and ſhewing it to the 'appraiſers*] according to the beſt of your 'judgment. So help you God.'

You then indorſe on the inventory, the following *memorandum:*

'*Memorandum*, that on the ——— day 'of ——— in the year of our Lord ——— '*G. H.* of *&c.* and *J. K.* of *&c.* two ſworn 'appraiſers, were ſworn upon the Holy 'Evangeliſts, by me *L. M.* of *&c.* con-'ſtable, well and truly to appraiſe the 'goods and chattels mentioned in this in-'ventory, according to the beſt of their 'judgment. As witneſs my hand,

L. M. conſtable.'

Preſent at the time of ſwearing the ſaid *G. H.* and *J. K.* as above, and witneſſes thereto,

O. P.
P. S.

And

And after the appraiſers have valued the goods, you go on with the indorſement on the inventory, as follows;

'We the abovenamed *G. H.* and *J. K.* 'being ſworn upon the Holy Evangeliſts 'by *L. M.* the conſtable abovenamed, 'well and truly to appraiſe the goods and 'chattels mentioned in this inventory, ac- 'cording to the beſt of our judgment, and 'having viewed the ſaid goods and chat- 'tels, do appraiſe and value the ſame at 'the ſum of —— pounds. As witneſs our 'hands, the —— day of —— in the year 'of our Lord ——.

G. H.
J. K. } Sworn appraiſers.

When the goods are thus valued, it is uſual for the appraiſers to buy them at their own valuation; and a receipt at the bottom of the inventory, witneſſed by the conſtable, is uſually held a ſufficient diſcharge. But, if the diſtreſs be of conſiderable value, it is much more adviſeable to have a proper bargain and ſale between the landlord, the conſtable, the appraiſers, and the purchaſer.

The goods taken in diſtreſs being diſpoſed of, you deduct from the amount of their produce the rent in arrear, and all reaſonable charges attending the diſtreſs; after which, the overplus (if any) is to be returned to the tenant. Ante 53.

If the tenant means to replevy the diſtreſs, he muſt, within the time allowed him by the ſtatute for that purpoſe, that is,

is, within five days after he has notice of the diſtreſs, take with him two houſe-keepers, living in the city or county where the diſtreſs was made, and go to the ſheriff's office of ſuch city or county; where he muſt enter into a bond, with the two houſe-keepers as ſureties, in double the value of the goods diſtrained, conditioned for the proſecution of a ſuit in replevin, againſt the diſtrainer, with effect; and for returning the goods, if a return thereof ſhall be awarded. Upon this, the ſheriff will direct a precept to one of his bailiffs; and by that means, the poſſeſſion of the goods will be reſtored to the tenant, to abide the event of the ſuit in replevin.

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A baron concluded his avowry for arrears of a rent-charge due to the feme before cover-

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Tho' it ſubjects the party to a ſpecial action on the ſtatute of *Marlbridge*. *ibid*
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But where lands, in two counties, are held under one demiſe, the landlord may diſtrain for the whole rent, in either county. *ibid.*
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Provided they be not previouſly ſold to a fair purchaſer. 42
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Cattle depaſturing on a common may be diſtrained for rent. *ibid.*
At common law, no man might break open an outer door to make a diſtreſs. *ibid.*
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At common law, a ſingle irregularity in the diſtreſs, made the diſtrainer a treſpaſſer *ab initio*. 56
But now, the diſtrainer ſhall only anſwer for the ſpecial damage. *ibid.*
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The beaſts of a ſtranger, being on the lord's land by eſcape, are diſtrainable for rent and other ſervices. 33
And where the beaſts eſcape by the negligence of their owner, they may be diſtrained immediately. 34

But where they eſcape by default of the tenant's fences, the owner muſt have ACTUAL NOTICE of the eſcape, before they can be diſtrained. *Page* 34
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At common law, there was no fine to the king on the replevin, but where the ſheriff returned *elongata*, or claim of property. 78

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So the defendant is to be fined for a falſe claim of property. 100

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Habeas corpus.

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For if it be made afterwards, and the beaſts die in the pound, the owner ſhall bear the loſs. 60
And it muſt be made to the lord himſelf, and not to his bailiff. *ibid.*
In what manner the ſufficiency of a tender was antiently tried. 61, &c.
The preſent mode of trying it. 63

Traverſe.

Traverſe.

The cauſe of removal, aſſigned in a *pone* or *recordari*, is not traverſable. *P.* 105, 110
But it is otherwiſe of the cauſe aſſigned in an *accedas ad curiam*. 110
Where the defendant in replevin pleads in abatement of the writ, and makes conuſance, the conuſance is not traverſable. 128
In a juſtification for *damage feaſant*, the plaintiff may traverſe the defendant's title. 129
If the avowant ſhould lay the caption in another place than the plaintiff hath done, without traverſing the place in the declaration, it would be bad. *ibid.*
Where the tenure is traverſable. 155
If the tenure be by rent, the *quantum* of the rent is not traverſable. *ibid.*
And the whole tenure is not traverſable. 156
The ſeiſin of the *quantum* of ſervices was traverſable, where they were gained by coercion. *ibid.*
But not where they were obtained by the voluntary payment of the tenant. 157
Unleſs the tenant had been one, who could not charge the lands; as tenant in tail, a biſhop, prior, &c. 158
Or unleſs the very tenant had the deed whereby the ſervices were reſerved. *ibid.*
The ſeiſin is not traverſable, but only of thoſe ſervices, for which the avowry is made. 159
Except a ſeiſin be alledged of ſervices of an higher nature, which include thoſe in the avowry. *ibid.*

Treſpaſs.

Treſpaſs.

An action of treſpaſs will not lie for taking an exceſſive diſtreſs. *Page* 45
Unleſs it be a diſtreſs of gold or ſilver. *ibid.*
Nor for impounding a diſtreſs in another county. 50
If cattle, taken *damage feaſant*, die in the pound, the diſtrainer may have an action of treſpaſs for the damage. 51
The tenant may have an action of treſpaſs againſt his landlord, if he do not remove the diſtreſs, at the end of five days. 53
Or againſt the ſheriff, for taking his cattle, in the execution of the replevin. 73

Vadii.

The *vadii* are forfeited, on the defendant's non-appearance, in the lord's court. 20

Wager of law.

At common law, when the tenant pleaded a tender, the lord was put to his law wager, as to its ſufficiency. 61, 2

Withernam.

Withernam may iſſue on the ſecond proceſs. 76
Etymology of the word *withernam*. 79
Withernam is part of the *lex talionis*. *ibid.*
And it is twofold; in the county court, and in the courts above. 80

In

In the county court, if the bailiff return *elongata*, the *withernam* does not iſſue, before the ſheriff holds an inqueſt. *Page* 80
But when it iſſues, it is a writ *de executione judicii*. Quære. 88
In the courts above, it iſſues on the ſheriff's return of *elongata*. *ibid.*
But it cannot iſſue on ſuggeſtion only. 82
It iſſues out of the court where the *alias* or *pluries* is returnable. *ibid.*
Therefore, if *elongata* be returned on the *alias* into chancery, it iſſues out of chancery; but then it is returnable in *B. R.* or *C. B.* *ibid.*
Form of the writ of *withernam*. 81
There is always an attachment in the *withernam*. 83
Unleſs it iſſue on a plaint. *ibid.*
The *withernam* ſhould recite the cauſe why the ſheriff cannot replevy. *ibid.*
And it ſhould be in writing, though it be iſſued by the ſheriff. 86
Where there ſhall be a *non omittas* in the *withernam*. 84
If the ſheriff return *nil* on the *withernam*, a *capias* is awarded. 89, 92
If the defendant appear on the *pluries* replevin, the *withernam* ſhall not iſſue. 89
Unleſs, on his appearance, he refuſe to gage deliverance. *ibid.*
But if he plead *non cepit*, or that the cattle are dead in default of the plaintiff, the *withernam* ſhall not be awarded. 93
So, if he plead property in himſelf. *ibid.*
Or make conuſance as bailiff, and pray in aid. 94

The *withernam* againſt the plaintiff, after judgment for the defendant, ſhall be ſtayed, on the plaintiff's tendering the damages. *Page* 94

If the ſheriff levy goods of the plaintiff in *withernam*, after a return awarded on a nonſuit, he ſhould deliver them to the defendant, or an action lies. 91

In *B. R.* cattle taken in *withernam* are delivered to the plaintiff, by the uſage of the court; *aliter* in *C. B*; and the reaſon thereof. 89, &c.

Withernam is either an original or a judicial writ; in the firſt caſe, it is only a penalty *quouſque* the defendant gages deliverance; in the latter, it changes the property. 90

In what caſes the defendant ſhall have a *withernam* againſt the plaintiff. 94

It is not neceſſary to have a *ſcire facias* returned, before a *capias* in *withernam* iſſues. 95

The *withernam* ſuppoſes the original caption to be a diſtreſs. 96

The ſheriff, on meſne proceſs, may take beaſts of any value from the defendant, to compel him to appear. 97.

FINIS.