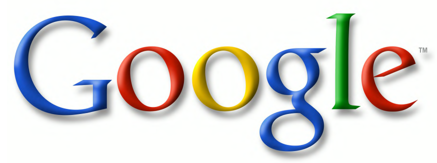


This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

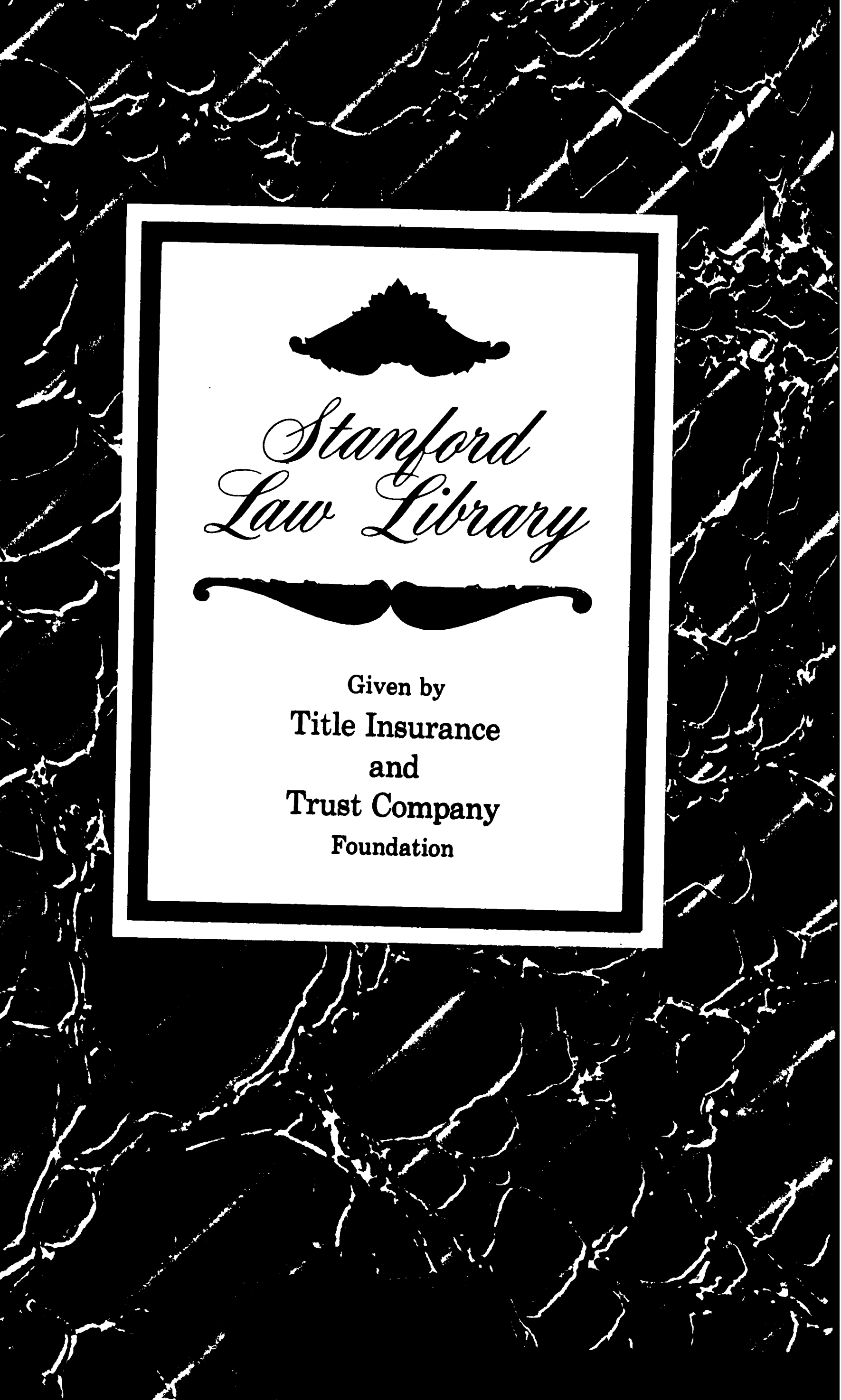
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



Stanford
Law Library
Given by
Title Insurance
and
Trust Company
Foundation

LAW-BOOKS lately published, wrote By Lord Chief Baron *GILBERT*; Sold by J. WORRALL, and B. TOVEY.

1. REPORTS of Cases in Equity in the Courts of Chancery and Exchequer, from the 4th of Queen *Anne* to the 12th of King *George* the First. To which are added, some Select Cases in Equity in the Court of Exchequer in *Ireland*. The Second Edition, corrected, with additional Notes and References. Folio.
2. Historical View of the Practice of the Exchequer, and of the King's Revenues there answered. 8vo.
3. History and Practice of the Court of Common Pleas, teaching in an easy and familiar Method the Rules and Orders of conducting the Plea through every Branch of Practice. 8vo.
4. Law and Practice of Ejectments, to which are added select Precedents. 8vo.
5. Law of Evidence, corrected from the Errors of the *Irish* Edition, and many new References added. 8vo.
6. Law of Uses and Trusts, collected and digested in a proper Order from the Reports of adjudged Cases in the Courts of Law and Equity, *&c.* together with a Treatise on Dower. 8vo.
7. Law of Devises, Revocations and lasts Wills, with Precedents. 8vo.
8. Treatise of Tenures, in two Parts; containing, 1. The Original, Nature, Use and Effect of feudal or common Tenures. 2. Of Customary and Copyhold Tenures, and their particular Customs. 8vo.

DL
AGH
IG.1

THE LAW OF Distresses and Replevins, DELINEATED.

WHEREIN THE
Whole LAW under those Heads is considered; what Things may, or may not be distrained; and the regular Method to be pursued in suing out REPLEVINS, *&c.* agreeable to the present Practice.

With many References to the best Authorities.

BY THE
Late Lord Chief Baron *GILBERT*.

To which is added,
An APPENDIX of *English* Precedents in REPLEVIN.

In the SAVOY:
Printed by HENRY LINTOT, Law-Printer to the King's most Excellent Majesty; for J. WORRALL, at the *Dove* in *Bell-Yard*, near *Lincolns-Inn*; and B. TOVEY in *Westminster-Hall*. MDCCLVII.

PREFACE.

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 public, 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,*

CONTENTS.

VI. *Of the Process for removing the Cause out of the inferior Courts.* Page 129

1. *By* Pone. 130
2. *By* Recordari. 140, 141

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

1. *For whom and what Cases it lies.* 157
2. *Of the Declaration in Replevin.* 165
3. *Of the several Pleas to this Action,* viz.
   1. *Pleas in Abatement.* 168
   2. *The General Issue* Non cepit. 174
   3. *The Justification.* 176
   4. *The Avowry; and herein are to be considered,*
      1. *What is Substance, and what is Form.* 180
      2. *Of the several Pleas to Avowries,* viz.
         1. *Of the Disclaimer.* 203
         2. *Of the Plea of* Hors de son Fee. 207
         3. *In what Cases the Tenure is traversable.* 215
         4. *In what Cases the Seisin of the Services is traversable.* 217
4. *Of the Judgment in Replevin; and herein of the Writs* de Retorno Habendo, *and second Deliverance.* 223

VIII. *Of the Writ of Recaption.* 247

Appendix, containing Precedents of Pleadings in Replevins. 257

THE LAW OF DISTRESSES AND REPLEVINS.

CHAP. I.
Of the Distress.

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.

Spel. Rem. 40. Bacon on Government 47.

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 the Lord in the Distribution of Justice, or ploughing and tilling his Demesne.

Vigel. 257, 271. Jur. feud. Ann. 126, 129.

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 Title, * *Causæ ex quibus feudum amittitur*) *Si Vassalus Domino non serviat, fidelitatemque ei non præstet* —— *Si Vassalus a Domino in jus vocatus non venerit* —— *Si pactum feudi non servetur* —— 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.

* The Causes for which the Feud was lost. If a Vassal does not serve his Lord, or is not faithful to him.——If a Vassal being summoned by his Lord to a Court of Justice, does not come.——If he break his feudal Agreement.

The

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 first to have been borrowed, as may be seen in the Title, * *De distractione pignorum, Creditoris arbitrio permittitur ex pignoribus sibi obligatis quibus velit distractis 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 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 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 the Tenant

* Of the Obligation of Pledges. The Creditor may at his Choice come at his Interest from either of the Pledges that were bound to him.

out of his Possession, and his stripping him of the whole Produce or Fruits of it at his Pleasure.

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 all this on the slightest Occasions.

This Power, as it was 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 their Vassals into the Field against their Prince, and thereby disturb the publick Peace of the Kingdom.

There were yet two other Inconveniencies which arose from the Abuse of these Distresses.

The first was, that in the Disputes and Contests 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 Statute of *Marlbridge* expresses it, * *Graves ultiones fecerint, et districtiones quousque redemptiones receperint ad voluntatem suam:* And what made these Abuses the more insupportable, was, that these Lords † *per Ministros Domini Regis justiciari non permittant, nec sustineant* 2 Inst. 102, 3.

* Would take severe Revenge and Distresses until they had received Fines at their Pleasure.

† Would not be justified by the Officers of the Lord the King, nor suffer them to deliver the Distresses they had taken by their own Authority at their Pleasure.

quod per ipsos liberentur districtiones quas authoritate propria 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 Opressions 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, and not to suffer 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 Chattels, to oblige the Tenant to perform the feudal Services.

51, 52 H. 3.

These were to remain in the Lord's Hands as Pledges to compel the Performance, and the Detention was no longer lawful than the Tenant refused to do the Services which were reserved by the feudal Contract; and by what Steps it came to be brought under the Regulations which govern it at this Day,

Day, we ſhall have Occaſion to obſerve, by conſidering,

I. The ſeveral Sorts of Diſtreſſes, and in what Caſes a Diſtreſs lies.

II. What Things are diſtrainable.

III. How the Diſtreſs is to be uſed; and herein of the Pound, the Place appointed by Law for the Cuſtody of the Pledge or Diſtreſs.

I. The ſeveral Sorts of Diſtreſſes, and in what Caſe a Diſtreſs lies.

The Diſtreſs at Common Law was uſed in ſix Caſes, *viz.*

1. For the Services 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 the Place 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.

1 Ro. Abr. 665. 4 Co. 49. b. 1 Jon. 132, 133. Latch 129.

So for Relief, * *Aid pur file marrier, or pur faire fitz Chevalier*, the Lord may distrain; for these were Parts of the feudal Profits, tho' they were not annual, and therefore recoverable in the same Manner.

But it may here be necessary to distinguish the Relief into the Relief proper and improper.

Co. Lit. 83. a. Spelm. Rem. 32. 1 Jon. 132, 133. Latch 130. 3 Bulst. 323. Plowd. Com. 94.

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, and 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.

* Relief for marrying the Daughter, or for making the Son a Knight.

In

In Analogy to this, the Lords, after * *Magna Charta* 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 these 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 prescriptible 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; for otherwise they were looked upon as Burdens and Exactions of the Lords upon their Tenants, and tended 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

* The great Charter.

Policy

Policy of the Law, which provided for the publick Safety, before the private Profit of the Lord, and therefore 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 he did to the Duty itſelf.

In like Manner the Heriot is of two Sorts, the Heriot Service and the Heriot Cuſtom.

Spelm. Rem. 32.

The Heriot now is the beſt Beaſt of the Tenant, but anciently was taken out of the * *Militiæ apparatus*, and 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; and 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

* Military Apparatus.

the

the Lord; and, instead of the * *Militiæ apparatus*, they took the best Horse, Ox, or Cow; and the same Remedy was continued as where the Heriot was paid in the Habiliments of War.

The Reservation of this Heriot Service was not only of publick Utility, but 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; and this Agreement created a Custom, which being the Law of the Manor, created a Right to the Lord to seize.

Bro. Abr. tit. Heriot, pl. 7, 8.
Keilw. 82. a.

But the Lord could not distrain, because where-ever there was any Footsteps of a Distress, it was always supposed to be Part of the feudal Re-

* Military Apparatus.

servation:

servation: And the Heriot Custom arising originally from the Grant of the Tenant, and not 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 these Services were.

Keilw. 82. a. Bro. Abr. tit. Heriot, pl. 7. 2 Inst. 182. 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

was introduced for the Recovery of feudal Duties, of which the Heriot Custom is no Part.

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 if where the Tenant holds by a Capon or a Hen, &c. the Lord must distrain, and cannot seize as for his own Property, so neither ought he to seize for a Heriot Service. But this Point seems now 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.

Plowd. Com. 96. Keilw. 82. a. Bro. tit. Her. pl. 7. 3 Bulst. 325. Dr. & Stud. 74. Moor 540. Cro. Eliz. 32. Show. 81. 2 Lutw. 1367.

2. The second Sort of Distress is for Fines and Amerciaments in Court Leets; and this stands upon a different Bottom;

Cro. Jac. 382. 1 Ro. Abr. 664. 8 Co. 38, 41. 11 Co. 45.

Bottom; the former Diſtreſs only relates to private Contracts between Landlord and Tenant; this Diſtreſs relates to the 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.

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 Sheriffs Torn, and therefore are Courts of Record as the Torn is.

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

* The Court of the Lord the King.

aroſe

arose within the Precincts of the Leet, as the Torn did through the whole Kingdom. 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 any 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; and 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.

The

Dalt. 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 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.

5 Co. 38, 41.

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.

Dalt. Sher. 400.

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

Court, and the Steward may impose a Fine, and levy it by Distress of the Offender's Goods.

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: But *Qu.* whether this be properly an Amerciament.

Dalt. Sher. 401. Bro. tit. Distr. pl. 8. Fitz. Abr. tit. Avowry, pl. 194.

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.

* For greater Offences.
† For less.
‖ Greater Offences.

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; and therefore 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, and therefore it is called a Fine, because it ends with the Court; and is not to be affeered by the Jury.

But 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

---

* Greater Offences.
† Less Offences.

the

the King to keep the Peace of the County, the Non-appearance of Suitors to make Enquiries for Breaches of the Peace is among the * *graviora delicta*; 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*.

But if instead of fining such Persons, the Sessions shall order that they be amerced, and the Jury affeer the Amerciaments, it may be levied by *Distringas*.

* Greater Offences.
† Shew of Right.

Cro. Eliz. 748. But Court Barons were instituted for the private Advantage of the Lord, and the Ease of the Tenants of the Manor, this is * *Curiâ Domini Manerii*, in which the Suitors are Judges, and therefore their Amerciaments being imposed only for the Lord's Advantages, 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 controverted in the King's Court, and therefore the Law never allowed the Lord to distrain 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 im-

* The Court of the Lord of the Manor.

pound

pound 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; but for these the Lord might distrain by Virtue of the feudal Grant, and therefore ought not to distrain for the Amerciament too, for 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.

But if the Lord can prescribe in a Distress for the Amerciament, then the Distress becomes lawful, because such Prescription is presumed to be founded on a Grant of the Tenants, by which they subjected themselves to the Distress, and though the Grant be worn out by Length of Time which created the Distress, yet the continual Usage is a good Evidence of it, and therefore the Tenants must submit to that

11 Co. 45. a. Ro. Abr. 666.

Custom which their Ancestors put them under.

Cro.Eliz.748. Rowleston v. Alman.

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.

There is, however, this Distinction to be observed in Fines imposed by a Court Leet itself; for 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 their Duty; or else they are imposed as a Punishment on 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 a 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

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 would 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; the Lord cannot distrain for it without a Custom to warrant 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.

11 Co. 44. b. Rol. Rep. 32. Godfrey's Case. 2 Leon. 74. 3 Leon. 178.

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

8 Co. 41. b.

* For a Fine in a Court Leet.

elſe he may impound the Diſtreſs, and then it is repleviſable.

And 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, and the Attachment which precedes it, lies as well in inferior Courts, not of Record, as in ſuperior Courts, and is given when the Defendant has been ſummoned to appear and makes Default, then goes the Attachment, which 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 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, until the Defendant ſatisfy the Plaintiff of 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 Proceſſes run in their Names and not in the King's,

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; and therefore we find 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; and if the Defendant cannot find Pledges, the Attachment is || *per Vadios*; and ſince the

* Of Execution of the Judgment.
† By Pledges.
|| By Gages.

Lord would have had the Amerciament if the Defendant had been attached, and 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 inftead of the || *Plegii*, and therefore are hypothecated for his Appearance in Judgment of Law; and by Confequence if he doth not appear to perform the Condition of fuch Pignoration, the † *Vadii* are forfeited; and therefore the Defendant where he is attached * *per Vadios*, may before the Day of his Appearanee replevy the † *Vadios*, and put in Pledges who are anfwerable for his Appearance, and if he makes Default are amerced.

But if there be a *Levari* for a Debt recovered in the Lord's Court, there the Goods are not forfeited on the Return, becaufe after Judgment he hath no Day to appear, and therefore there can be no Forfeiture arifing to

---

* By Gages.
† Gages.
|| Pledges.

the

the Lord nor the Party, because 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 mean Process, the Tenant would let such Goods lie till he at his Leisure could come in to contest the Debt, which would tend to the Delay of Justice.

And here note by the Way the Lord's Distress for Rent 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 reple-

* Of Execution of the Judgment.
† Gages.

vied,

vied, becaufe then he would judge of Forfeitures in his own Caufe.

But if the Tenant was aggrieved he muft apply to the King who is the Lord Paramount, and the Complaint is, that he was diftrained * *contra Vadios. & Plegios*, that is, when he was ready to give good Security to conteft the Lord's Debt, and therefore the Judgment in Replevin is of Return irreplevifable, that is, that the Lord has a juft Caufe to detain, that fuch Prerogative of the Lord's fhould take Place till the Debt be fatisfied.

3dly. A third Cafe where a Diftrefs lies is for Toll in Fair or Market.

And here the Law is clear, that where a Lord hath a Fair or Market by Prefcription, and hath ufed to take Toll of the Cattle fold, if fuch Toll be not paid, the Lord may feize any of the Cattle fo fold, and retain them till Satisfaction be made him for the Toll; for the Prefcription is built on a

Ro. Abr. 666.
Raym. 233.
Hob. 187.

* Againft Gages and Pledges.

Grant

Grant of the King's, 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; and 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*;

---

* Doing Damage.

† He who has the Advantage should also have the Burden.

and

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.

4thly. If a Township be amerced, and they by Consent assess a certain Sum on every Inhabitant 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; and 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.

Dr. & Stud. Dial. 2. Cap. 9.

5thly. 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

5 Co. 64. a. Clarke's Case. Ro. Abr. 366. Dyer 321. pl. 23.

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 but by Action of Debt; but 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.

But where the Corporation can preſcribe in the Diſtreſs, they may lawfully diſtrain for the Penalty, becauſe the preſcriptible Right is grounded on a By-Law originally appointing that Remedy for Recovery of the Penalty, and therefore is good though the By-

* The great Charter.

Law

Law on which it is grounded be by Length of Time worn out or lost.

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 sua, & secundum Consuetudinem Regni imparcavit illa donec damnum suum fuerit emandatum*. But from whence this Notion was borrowed, or whenever introduced, 'tis highly reasonable that the Owner of the Land should defend himself from Injury by driving out the Beasts, and likewise detaining the Thing that did the Injury in a publick Pound, till Compensation be made for the Trespass; for otherwise the Person injured might never find the Person whose Beasts committed the Trespass.

Fleta 101. Bro. tit. Distr. pl. 3.

* Doing Damage.

† If the Captor (says he) could say that he took the Beasts justly, because he found them upon his Demesnes, and according to the Custom of the Realm impounded them until he had Recompence for his Damage.

II. What Things are diftrainable.

Bro. tit. Diftr. pl. 8.

The Diftrefs, as is already obferved, 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 fold, but like all other Pawns or Pledges was to be reftored 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 reftored to the Owner in the fame Plight and Condition it was delivered——It follows,

Ro. Abr. 666. (H.) pl. 4.

1ft. That Money cannot be diftrained, except it is in a Bag, for then the Knowledge of the Bag, efpecially if it be fealed fufficiently, fecures the feveral Pieces of Money therein, fo as the fame individual Pieces may be reftored on Redemption of the Pledge.

2*dly.*

adly. 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 taken, for 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 Hay in a Cock or Barn could not be distrained; 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 be restored in the same Condition it was 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 'tis 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 loose in the Straw or Hay lying in any Barn or Granary, or upon the Hovels, Stack or Rick, or otherwise upon any Part of the Land or

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

7 W. 3. c. 22. in Ireland.

or Ground charged with ſuch Rent, and to lock up or diſtrain the ſame in the Place where it ſhall be found in the Nature of a Diſtreſs until the ſame ſhall be replevied, &c.

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

3*dly*. Utenſils of a Man's Trade cannot be diſtrained, becauſe this would tend to publick Inconveniencies, and to the Ruin of particular Tenants, by taking away the very Means of their Support and Preſervation, and therefore the Ax of a Carpenter, the Books of a Scholar, 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 their 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.* 51 *H.* 3. * *De Diſtrictionibus Scaccarii*, that no Man ſhall be diſtrained by the Beaſts of his Plough or his Sheep, either by the King or any other,

* Of the Diſtreſſes of the Court of Exchequer.

while

while there is another sufficient Distress unless for * *Damage Feasant*, in which Case the Thing that does the Trespass must make Compensation.

4*thly*. 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 Forge, and the like, are not distrainable; for 'tis 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.

Co. Lit. 47. Salk. 249.

Ld. Raym. 386.

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

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

* Doing Damage.

was weighing, came and distrained the Yarn and the Horse of *J. S.* for *C.*'s Rent; but the Distress 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 Purpose of bringing the Horse is * *pro bono publico*, and in the Way of Trade.

10 H. 7. 21. b. Ro. Abr. 668, 669. Co. Lit. 47. b. 2 Saund. 289, 290. See Raym. 197-8-9.

But if a Stranger's Beasts be upon the Lord's Lands 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.

* For the publick Good.

This

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 Strangers 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 Mens Cattle: And if the Stranger suffers, 'tis thought his own Default for suffering his Cattle to trespass on another's Soil.

And this Rule hath been carried so far, that if a Freeholder be bound to repair his Neighbours Fences, and lets the Land, and the Lessee suffers the Fences to decay, whereby his Neighbours Beasts enter and come upon his

2 Saund. 289. Poole *v.* Longueville. See Ro. Abr. 668. pl. 6, 7.

* Town Farms.
† Country Farms.

 Lands,

Lands, yet the Freeholder may diſtrain theſe Beaſts thus eſcaped for Rent. But the Reporter obſerves this to be a hard Law; for though it be reaſonable that the Lord of the Manor who is no way concerned in the Fence ſhould diſtrain Beaſts thus eſcaping, yet 'tis not therefore juſt that the Freeholder who is obliged to ſee the Fences kept, ſhould be ſuffered to take Advantage of his own Wrong.

3 Lev. 260, 261. Foulkes *v.* Joyce. 2 Ventr. 50. S. C. 2 Lutw. 1161. S. C. But note, the Grazier was afterwards relieved in Equity, it being deemed a Fraud in the Leſſor. 2 Vern. 129. Prec. Chan. 7.

So 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 his Beaſts was not a Waiver of his Right of diſtraining, 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.

Note; Thoſe Beaſts were driving to the Market of *London*, and only grazed one Night on theſe Lands on the Road; and

and it was disputed in the Case whether their being on the Road to that Market should privilege them, and it was resolved it should not, because then such Privilege must extend thro' 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 all Cattle to publick Inns, and then they are privileged from all Distresses.

But 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 is said to be against common Right, as is elsewhere observed; 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.

2 Leon. 7, 8.

And

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 my Non-appearance; for the Issues forfeited by my Default create a Debt to the King, which is to be levied on my Land, because 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.

Bro. tit. Distr. pl. 3.

Co. Lit. 47. b.

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, and consequently that cannot be a Pledge that cannot be restored *in statu quo* to the Owner.

Besides, what is fixed to the Freehold is Part of the Thing demised; but

but 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 Freehold, 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.

Bro. 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; and consequently the Distress which follows the Nature of the Pledge cannot be of those Things which cannot be reduced into the actual Possession of the Person distraining; therefore the Ax in a Carpenter's Hand, or the Horse on which I am riding, cannot

Co. Lit. 47. a. Ro. Abr. 667. Sid. 440.

not be distrained, for they are for that Time privileged by Law.

7thly. Goods in the Custody of the Law are not distrainable; for 'tis * *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 distrained 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.

Having thus shewn what Things are distrainable, before we come to con-

* From the Term itself.
† Doing Damage.

sider

sider the Pound, which is the common Repository for all Distresses, it will be necessary in this Place to observe these Things in general of Distresses.

1*st*. When we speak of Chattels not distrainable, it must be understood not distrainable for Rent; for all Chattels whatever are distrainable * *Damage Feasant*, it being natural Justice that whatever doth the Injury should be a Pledge to make Compensation for it.— Therefore all Chattels are liable to make Satisfaction for the Trespass by them committed; and hence it is that the Utensils of a Man's Trade, Stacks of Corn, and the Horse on which a Man rides, are distrainable * *Damage Feasant*, and the Horse may be led to the Pound with the Rider on him.

Co. Lit. 47. Sid. 440.

2*dly*. No private Person can distrain Beasts off his own Land on the high Road; so is the Statute of *Marlbridge*, c. 15. † *Nulli liceat ex quacunque*

2 Inst. 131.

* Doing Damage.

† No one shall on any Account take Distresses out of his Fee, nor in the King's Highway or common Street, except the King, &c.

Causa

Causa 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; but though Chattels or Pledges on the Land only are to answer the Lord's Rent; yet 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 seizes 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.

Dr. & Stud. 75. a. Co. Lit. 142. a.

3dly. A Man cannot distrain in the Night for Rent, because the Tenant hath not thereby Notice to make a

* Altered by 8 *Ann. c.* 14. and Landlord may seize in five Days after Lessee has conveyed them off the Land; and by 11 *Geo.* 2. *c.* 19. the Time is enlarged to thirty Days.

Tender of his Rent, which possibly he might do to prevent the impounding of his Cattle.—But a Man may distrain in the Night Beasts * *Damage Feasant*, because the Beasts might escape before Morning, and then he would have no Remedy for the Injury.

4thly. Distresses ought not to be excessive but in Proportion to the Duty distrained for.—This is prohibited 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.—But if there be no other Distress on the Land, then the taking of one entire Thing, though

2 Inst. 107. Ro. Abr. 674.

* Doing Damage.
† Moreover Distresses should be reasonable, and not too heavy; and they who shall take unreasonable Distresses shall be severely amerced.

of

of never ſo great Value, is not unreaſonable.

4 Co. 8, 66. Ro. Abr. 674.

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.

Ro. Abr. 674.

5thly. No Man is obliged to give Notice of his having taken a Diſtreſs, becauſe the Tenant muſt know the Arrears that are due, and therefore at his Peril muſt take Care to pay them, ſo that it is his own Default that ſubjects 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.

But *Qu.* Whether Notice muſt not be given of dead Chattels, which muſt be kept in a private Pound.

Spelm. Gloſſ. 447.

The next Thing to be conſidered is where the Diſtreſs, which is but a Pledge, is to be kept, and that is in the

the Pound. —— This is described by *Spelman* in these Words: * *Parcus est Stabulum, vel area Angustior Repagulis firmiter conclusa, quâ Nociva in frugibus prædiisq; pecora tanquam in carcere Coercentur.—— Parci autem usum a Continente traduxisse Saxones nostros hinc intelligas, quod in Ripuariorum legibus jam olim utpote ante* 800 *vel* 900 *Annos reperitur*, (Tit. 82. S. 2.) † *Si quis peculium alienum in Messe adprehensum ad Parcum minare non permiserit*, 15 *Sol Culpabilis judicetur.* Gall. mener.

The Pound then being nothing more than a publick Prison for Goods and Chattels, is either || *Overt* or ‡ *Covert*; Co. Lit. 47. b.

---

* A Pound is a Stall or narrow Place closely confined with Railing, in which Cattle destructive of the Corn and Farms are penned up as it were in a Prison.——But you may hence learn that our *Saxons* derived the Use of Pound from the Continent, in as much as it is found now about eight or nine Hundred Years since among the Laws of the *Repuarii*, Tit. 82. S. 2.

† If any one should prevent strange Cattle caught among the Corn from being drove to the Pound; he shall be adjudged guilty to the Value of fifteen Pence.

|| Open.

‡ Close.

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 that he may have Resort to them for that Purpose.

2 Inst. 106. At Common Law a Man might have impounded his Distress in what Country he pleased; but this was found very inconvenient to the Owner, who was thereby at a Loss where to find them, either to feed the Beasts or to replevy them: This Mischief was provided against by the Statute of *Marlbridge*, c. 4. † *Nullus de cætero faciat ducere districtiones quas fecerit extra Comitatum in quo Captæ fuerint.*

Yet upon this Statute it hath been held, that where the Tenancy is in one County and the Manor in another County, the Lord may drive the Di-

* Open.

† No one for the future shall cause the Distresses which they have made, to be drove out of the County in which they were taken.

ftrefs to the Manor Pound though it be out of the County where the Diftrefs was taken; becaufe the Tenant by attending the Manor Court is prefumed to know every Thing tranfacted in the Manor; and therefore this Cafe is out of the Mifchief provided againft by this Law.

But now by the Statute of 1 & 2 *Ph.* & *M.* *c.* 12. no Diftrefs of Cattle is to be driven out of the Hundred or Barony where the fame is taken, except it be a Pound * *Overt* within the faid Shire, not above three Miles from the Place where the fame is taken; nor fhall a Diftrefs be impounded in feveral Places whereby the Owner may be conftrained to fue feveral Replevins, on Pain to forfeit to the Party aggrieved five Pounds and treble Damages.

1 Car. 1. Seff. 2. c. 25. in Ireland.

Dead Chattels, as Houfhold Goods, &c. which may receive Damages by the Weather, muft be put into a Pound † *Covert*, otherwife the Diftrainer is anfwerable for them if they be damaged

Co. Lit. 47. b. Ro. Abr. 673.

* Open.
† Clofe.

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. —— But he cannot in any Case make any Use or Advantage of the Thing distrained, whether it lies in a Pound * *Overt* or † *Covert*, either by working or milking the Beasts, though it were for its Ease and Benefit; 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.

Ro. Abr. 673. The Distrainer cannot tie or bind a Beast in the Pound though it be to prevent its Escape, for the Beasts in

* Open.
† Close.

Pound

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. 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 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, but he cannot break the Pound the Law hath ordained.

In Sir *John Strange's Reports*, published since the Author's Death, are the following Cases.

1. The Landlord must remove the Goods at five Days End, or is a Trespasser. *Griffin* v. *Scott*, *Strange* 717. *Ld. Raym.* 1424. See 11 *Geo.* 2. *c.* 19. §. 10.

2. Trespass does not lie for taking an excessive Distress. See *Lynne* v. *Moody*, *Strange* 851.

3. Where two Parcels of Land are distinctly let, there cannot be a joint Distress for both Rents. See *Rogers* v. *Birkmire*, *Strange* 1040.

4. Impounding in another County does not make a Trespasser. *Strange* 1272. *Gimbart* v. *Pelah*.

THE

THE LAW OF REPLEVINS.

OF THE REPLEVIN.

CHAP. II.

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 that the Diſtreſs were unlawfully taken, and without juſt Cauſe; and this being a Writ of great Uſe, and every Day's Practice, deſerves a very full Conſideration.

Spelman

Spel. Gloss. 485.

Spelman in his *Glossary* describes it thus: * *Replegiare est rem apud alium Detentam Cautione Legitimâ interpositâ redimere.——Et hæc Cautio est stipulatio in forma Juris adhibita, de stando Juri et sistendo se foro; dictum autem* Replegiare *quasi* revadiare, *hoc est Vadium vel pignus unum loco alterius suggerere & constituere.*

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.

* To replevy is to redeem a Thing detained by another by the Interposition of a lawful Provision.——And this Provision is a Stipulation exhibited in a formal Right, to stand to that Right, and to be present in Court; but to replevy is said as it were to regage, that is to alledge or assign a Gage or Pledge at another Place.

Under

Under this Head is to be considered;

I. How the Replevin stood at Common Law, and the Alterations that 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

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 Reception.

I. To consider how the Replevin stood at Common Law; and here it is first to be observed 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 Country, 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; and this was

2 Inst. 140.
Reg. 81. a.

* Of having the Return.
† And shall cause it to be carried on justly.

highly

highly reasonable, 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 to the Damage of 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*dly*. 'Tis 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

* A speedy Remedy.
† Which he took and unjustly detains.

con-

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 Arrears of Rent, or Amends for 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 the Custody of the Law, the Person distraining cannot be said unlawfully to detain what is in the Custody and Care of the Law.

Dr. & Stud. 112.
2 Inst. 107.
5 Co. 76. a.
8 Co. 146. b.
Cro. Eliz. 813.
Pilkington's Case.

And 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.

* Doing Damage.

But

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 the Right of the Lord, and 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. But 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 Tender of Amends to the Lord himself?

5 Co. 76. a. Cro. El. 813. Rol. Rep. 258. Brownl. 173.

The second Case where the Detainer is unlawful, is where the Avowant hath Return irreplevisable, and the Owner

2 Inst. 107, 341.

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 that 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, for 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.—My 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.

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

gality of the Detention was very inconvenient, for the Plaintiff in Replevin was to have his Suitors ready to prove *instanter* that he offered a Pledge under that Notion as a Pledge sufficient, and the Lord was then put to his Law-Wager, that the Pledge offered was not sufficient to answer the Debt; so that it was totally thrown upon the Lord's Conscience to determine of the Sufficiency of the Pledges; and 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 Favour of 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 the Lord in all Events 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 misericordia, sed nulla damna recuperabit, & returnabit Domino averia capta.*—The Lord recovered no Damages where he prevailed on the Law-Wager, because the Lord had no Damage

* But if he should defend the unjust Detention, and the Plaintiff should have a Suit immediately at Hand, which being examined, agreed in all Respects, and that all the Facts were in their Presence, then the Defendant should wage his Law by twelve Men, in which if he failed, it fell into the Hands of the Sheriff, and he should restore to the Plaintiff his Damages which he had by the Detention; but if the Lord prevailed in the Law-Wager, then he should depart quiet, and the Plaintiff in Mercy; but should recover no Damages, and should return to the Lord the Beasts taken.

where

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 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 replies, That after the Taking, and before the Impounding, he made a sufficient Tender, and there-

Dr. & Stud. 112.
Cro.Eliz.813.
N. B. 69. b.

upon 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.

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,

2 Inst. 133. 5 Mod. 253.

1*st*. The Replevin at Common Law was only by Writ, and this Application must be to the Chancery, which was too tedious for the distant Parts of the Kingdom.

Stat. Marlb. c. 21.

To make this Remedy therefore more expeditious, 'tis provided by the Statute of *Marlbridge*, c. 21. * *Quod si Averia* *alicujus*

* That if the Beasts of any Person are taken and unjustly detained, the Sheriff after Complaint made to him may deliver them without the Impediment or Contradiction of him who had taken the said Beasts.

alicujus capiantur & injuste detineantur, Vicecomes post querimoniam sibi factam ea sine Impedimento, vel contradictione ejus qui dicta 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.

2 Inst. 139.

And to take away all the Delays that 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, 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. For 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 from Month to Month; but then the Sheriff

F. N. B. 69. Co. Lit. 145. 2 Inst. 139.

Bro. tit. Rel. pl. 46. 21 E. 4. 66.

must enter the Plaint at the next Court, that it may appear on the Rolls of the Court.

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 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 which 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 *W*. 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,

* Out of his Fee.

and

and ſtill have the Pledges * *de Retorno habendo* retained for him.

A third Miſchief at Common Law was, that when the Avowant had Judgment for a Return of the Beaſts, he had frequently 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 became inſolvent. This 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 Form. To remedy this Inconvenience the ſaid Statute of *W.* 2. *c.* 2. hath directed the Sheriff, ‖ *non ſolummodo recipere Pleg.*

2 Inſt. 338, 340.

* Of having the Return.

† Pledges of proſecuting.

‡ For his falſe Claim.

‖ Not only to take Pledges of proſecuting from the Complainants, but alſo of returning the Beaſts if a Return of them ſhould be adjudged; and if any Body ſhould otherwiſe take Pledges, he himſelf ſhould anſwer the Value of the Beaſts.

de prosequendo de Conquerentibus, sed etiam de Averiis retornandis, si adjudicetur 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. 338, 340.

4*thly*. Another Mischief was, that if the Plaintiff had nonsuited himself, and the Avowant had Judgment never so often on such Nonsuit, 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 *W*. 2. *c*. 2. by which it is provided, || *Quod quam cito adjudicatum fuerit retornum*

Stat. West. 2.

* Of having the Return.

† Without End.

|| That as soon as the Return of the Beasts should be adjudged to him who made the Distress, the Sheriff should be commanded by a judicial Writ, that he return the Beasts to him who made the Distress, in which Writ is to be inserted, that the Sheriff could not deliver them without a Writ, in which let Mention be made of the Judgment given by the Justices, which could not be done but by a Writ from the Justices Rolls before whom the Plaint was carried on.

ave-

averior. 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; and pursuant to this Law the Writ *de Retorno habendo* concludes thus after a Recital of the Judgment for the Avowant, * *Ideo tibi præcipimus quod præd'* (the Avowant) *averia præd' sine delatione retornari facias, & ea ad Querimoniam ipsius* (the Plaintiff in Replevin) *non deliberes sine Brevi nostro, quod de præfat. Judicio expressam faciat mentionem.*

Regr. Jud. 4. a.

This Writ which must recite the former Judgment is the Writ of second

* 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.

Deli-

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 of 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 must 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.

2 Inst. 139, 140.
F. N. B. 68.

The Sheriff having thus taken Pledges from the Plaintiff in Replevin, he ought forthwith to make Deliverance of the Goods or Cattle distrained; but

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, * *Ea deliberare noluerit, tunc Vicecomes pro defectu ipſorum Ballivorum ea faciat deliberari.* —— This Act as 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.

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 com-

2 Inſt. 133, 140.

* Will not deliver them, then the Sheriff for the Default of his Bailiffs ſhall cauſe them to be delivered.

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 the 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 Wars,

 and

and the poorer Sort suffered so much from the Men of Power, that the Statute of *West.* 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, 194.

Dalt. Sher. 438, 439.

If

Dalt. Sher. 438, 439.

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 depending in the County Court, 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.

F. N. B. 69. M. 70. Dalt. Sher. 440.

Where the Replevin is by Writ, and the Sheriff executes it before the *Alias* or *Pluries* 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,

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.* and by this Means both Parties have Days in the Court above.

If the Sheriff doth nothing upon the first Writ, the Plaintiff may have an *Alias*, and after 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*, and the same may be inserted in the *Alias*, if the Plaintiff pleases, and then F. N. B. 68.

* That he be then there to answer the aforesaid *A.* (the Plaintiff) hereof.

† The Course being changed.

|| 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.

‡ Either certify your Reason to us why you would not or could not execute our Commands heretofore to you hereupon directed.

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.

Ro. Abr. 581.

By this Means the Plaintiff in Replevin may controvert the Sheriff's Return, and shall recover Damages

* Either the Cause certify to us.

against

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; and here we may observe 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 as 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

Ro. Abr. 581. Gawen v. Ludlow.

 must

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, because otherwise he can never have the Return of the Cattle; and thus the Defendant becomes Plaintiff or Actor. —— And 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 have the Judgment of the Court for a Return of the Beasts.

Ro. Abr. 581. Gawen v. Ludlow.

But

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?

Officin. Brev. 413. Dyer 246. a. Raſt. Entr. 570.

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*

F.N.B. 68. E.

Raſt. Ent. 578. a. Vide the Form.

* And that no other Writ, &c.

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*.

III. We come now to the Process in Replevin to make the Defendant appear.

Reg. 81. 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; 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*

* By Pledges.

Plegios

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* put in the third Process, because the Officer as a Defaulter is not answerable for not executing mesne Process till after two Faults; but for the above Reason, because the Beasts may be eloigned, and the *Withernam* may issue on the second Process, the † *Causam nobis significes* is put in the *Alias*; and this *Alias* is either 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; and into Chancery, because he may have a *Withernam* thence upon an *Elongata*,

* Either signify to us the Cause.
† Signify to us the Cause.

 since

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 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 by the Reporter, 2 *H.* 7. 5. that ſince the Writ is to replevy † *vel, Cauſam ſignifices*, the *vicontiel* Power continues.—— But if he does not replevy them, he is to ſhew Cauſe why he did not; and this the Reporter argues to be the Senſe of the Writ, from the disjunctive Words in it.

Fitz. Abr. tit. Replev. pl. 16. Salk. 410.

Bro. tit. Jour. pl. 82.

2 H. 7. 5.

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

* Signify to us the Cauſe.

† Either ſignify to us the Cauſe.

therefore

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.

Ro. Abr. 580.

By the *Pluries* there is no Day in Court, either to the Plaintiff or Defendant; but to the Sheriff in order to fine him, for disobeying the first Writ. —But the way to give the Parties Day on the *Pluries* Replevin is thus:

22 H. 6. 20. Rast. Ent. 570. Process in Replevin.

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.

* Offers himself.

The

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 that the Defendant does not appear, and * *nulla Bona* 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.

2 H. 6. 2. Bro. tit. Record. pl. 2.

But if the Defendant comes in at the Day the Sheriff has in Court, he cannot demand the Plaintiff, because

* No Goods.
† Eloignment.

the

the Plaintiff has given the Defendant no Day in Court, and if the Defendant hath no Day, he cannot 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 as 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 there is removed, and on such Writ if the Defendant appears, the Plaintiff was not demandable, because there was no Day given to the Defendant, but he had 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.

III. Of the Process where the Goods are eloigned; and herein of the Writ of *Withernam*.

Withernam

2 Inst. 140, 141.

Spelm. de verbis namium, vetitum namium.

Withernam is derived from the *Saxon* Word *Everder*, or *other*, and *Naam*, which signifies *Distress*, as who should say *another Distress*, instead of the former that was eloigned. ——*Vetitum Namium*, is *unlawfully taken*, because though the taking of the Beasts might be originally lawful, yet the detaining against the Replevin, is unlawful or forbidden.

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 against detaining Pledges, Beast for Beast.

Withernam was twofold.

I. In the County below: And

II. In the Courts above.

* Law of Retaliation.

1. In

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.——And 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*. Reg. 82.

2. In the Court 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.——

* According to the Law of Retaliation.

First,

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 sueth a Replevin by Writ, and an *Alias* and *Pluries*, and upon the *Pluries* the Sheriff doth † Re-

† And not upon Suggestion only that the Beasts are eloigned, (11 *H.* 8. 16. *per Cotton*) by Reason whereof he could not replevy them, &c. for this being an Award *secundum Legem Talionis*, could not be on a Surmise, unless the Eloignment was found on him by Inquest below, or returned upon him above, by the proper Officer.

* According to the Law of Retaliation.

turn,

turn, that the Cattle or Goods, *&c.* 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 Praecepimus, &c. quod juste,*

* And not out of the Chancery, (42 & 43 *Eliz. inter Crindel* and *Pound*, *C. B.*) but if *Elongata* be returned upon the *Alias* in Chancery, then the *Withernam* shall issue out of the Chancery, (22 *H.* 6. 22. *per Brown*) 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 Lawfulness of such taking.

† *George* the Second, *&c.* To the Sheriff of, *&c.* Greeting: Whereas we have often commanded you, *&c.* that justly, *&c.* to *A.* his Beasts which *B. &c.* or the Reason, *&c.* wherefore you have not or could not execute our Command hereupon often directed to you, and you shall signify to us wherefore after the aforesaid *B.* the Beasts of the aforesaid *A.* had taken in

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 Reglegiare possis, juxta tenorem Mandatorum nostrorum prædictorum prius tibi, &c.*

---

in your County, did drive 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, pursuant to the Tenor of our Commands aforesaid before to you, &c.

That

That the Defendant shall have a Day in this Writ by Attachment, and not otherwise. See 7 *H.* 4. 27. 43 *E.* 3. 26. 35 *H.* 6. 47. *viz.* if the * *Elongata* be returned on the *Pluries Replegiari facias*, then it has such Clause, † *Et si querens fecerit, &c. tunc Pone Defendentem, &c. ad Respondendum tam Domino Regi de Contemptu, quam præfato Querenti de Captione & injusta Detentione Catallorum prædictorum.* Dyer 189.

F.N.B. 73. F. in the Notes.

There is an Attachment 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 continuing 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

* Eloignment.

† 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.

H

had been a Plaint in the County, (*vide ibid.* & 44 *Ass.* 15.) 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; and therefore it seems that if a Plaint be removed by *Recordare*, which gives the Parties Day in Court, it 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.

Reg. 83. a. Salk. 582. That the Withernam is only mesne Process, for it cannot be an Execution before Judgment.

Note; This is a Writ * *de Executione Judicii*, and therefore recites the Award of the County Court as a Judgment.——But there is no Attachment for Contempt against the Defendant, because the Proceeding was not by the King.——And note, this Writ

* Of Execution of the Judgment.

seems

ſeems to be deſigned to prevent the Sheriff's ſleeping upon ſuch 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.

Note; The Sheriff's *Capias* in *Withernam* 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.

Dalt. Sher. 417.

By the Statute of *Marlbr. c.* 3. the Sheriff has Power of fining the Defendant that refuſes to deliver the Diſtreſs; and the Writ of *Withernam* ought to rehearſe the Cauſe which the Sheriff returneth, for which he cannot replevy, as to ſay,

Dalt. Sher. 435. 2 Inſt. 150.

F.N.B. 73.

* *Ac postquam prædictus* B. *Catalla vel Averia illa cepit, Catalla vel Averia illa aut Bovem vel Equum 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, & ea detineas donec eidem* A. *&c.*

Reg. 82. And there are very many Causes that the Sheriffs may return upon the *Pluries*, wherefore he cannot replevy them, whereof divers of them do appear in the *Register*, which a Man may see there.

---

* And after the aforesaid *B.* had taken the Cattle or Beasts, he eloigned the Cattle or Beasts, or Ox or Horse 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.*

And

And if the Sheriff do return upon the *Pluries* Replevin, that he hath ſent unto the Bailiff of the Liberty, who hath Return of Writs, &c. 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 *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*, and a *Non omittas* with the ſame, and the Form of the Writ ſhall be ſuch,

* *Rex Vic*. B. *Salut. Cum plur. &c. uſq; ibi, vel non potuiſti, ac* R. *de* C. *Balli.*

* *George* the Second, &c. To the Sheriff of, &c. Greeting: Whereas often, &c. (until) or could not execute, &c. and *R.* of *C.* Bailiff of the Liberty of *J.* whom you cauſed to have the Return

Balli. Libertat. 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 Balliva tua sine dil'one caperes in Withernam, et ea detineres donec eidem* A. *averia sua, &c. inde direct. vel Causam nobis Significares, &c. vel tu non potuisti, ac tu nobis returnaveris, quod idem* R. *Ballio. Libertat. pred. cui return. &c. habere fecisti, nullum tibi inde dedit respons. tibi præcipimus quod non omittas propter Libertat. prædictam quam eam ingre-*

Return of our Writs, hath given you Answer that he could not execute that Writ, *&c.* as you have made known 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.* hereupon directed, or make known to us the Reason, *&c.* why you could not; and you returned to us, that the same *R.* Bailiff of the Liberty aforesaid, whom the Return, *&c.* you caused to have, 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.* that you take in *Withernam* until, *&c.* pursuant, *&c.* before to you, *&c.* Witness, *&c.*

diaris,

diaris, &c. Capias in Withernam, donec, &c. Juxta, &c. prius tibi, &c. Teste, &c.

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's.— 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 spe-

1 Stat. Marlb. c. 22. West. 1. c. 17.

† But see the Register 82. where it is said, he is not bound to do it without a Writ.

* By his Office.

cial 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. & C. *averia prædicti* A. *cepissent & injuste detinuissent, idemq;* A. *coram te prosecutus fuisset pro averiis prædictis sibi secundum Legem & Consuetud. Regni nostri replegiandis, ac licet per* J. *Ballivum tuum, quem ad Averia prædicta prædicto* A. *repleg. misisti,*

---

* *George* the Second, &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 altho' it was attested by 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

miſiſti, Teſtatum fuerit, & 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. & C. *in Ballivа tua caperentur in Withernam, & detinerentur quouſq; eidem* A. *averia ſua prædicta ſecundum Legem & Conſuetud. Regni noſtri Repleg. poſſint; idem tamen* A. *Executionem Conſiderationis prædictæ nundum aſſecutus eſt, ad Damnum ipſius* A. *non modicum & Gravamen, & quia præfato* A. *Subvenire Volumus in hac parte, tibi præcipimus quod ſi ita ſit, averia prædictorum* B. & C. *cap. in Withernam, & ea*

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.

detineas,

detineas quousq; eidem A. averiq; sua prædicta Repleg. possis, secundum Legem & Consuetud. Regni nostri & Juxta Consideration. prædictam, &c.

And further by this it appears, that the Sheriff may award *Withernam*, on Replevin sued by Plaint, if it be found by Inquest in the County, that the Cattle are eloigned 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 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 (*a*) hath not any Thing, *&c.* there a *Capias* shall be awarded against him, and *Exigent* and Process of Outlawry.

(*a*) See 28 *E.* 3. 57. and 2 * *sicut alias* there granted.

---

* As before.

In

In Replevin sued by Writ, if at the *Pluries* returnable the Sheriff doth return, * *Quod averia Elongata sunt, &c.* Now if the Defendant appear, 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; 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: (a) But

F.N.B. 74. D.

(a) See the like Diversity, 2 *H.* 4. 9. yet *quære Rast. Ent.* 702, 704. that the Clause of the *Withernam*, Whether for the Plaintiff or Defendant is, ‡ *Quod Vicecomes capiat in Withernam, &c. & eâ præf.* A. *deliberet, detinenda quousque,*

* That the Beasts are eloigned.

† Until, &c.

‡ That the Sheriff take *in Withernam, &c.* and deliver to the said *A.* to be detained until, &c.

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.

2 H. 4. 9.
Bro. tit. With. pl. 3.
Raſt. 702, 704.
Co. Ent. 612.
Dyer 188.

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 * *& ea detineas donec eidem, &c.* which obliges the Sheriff to detain the Beaſts in his own Cuſtody; but in the judicial *Withernam* the

quouſque, &c. So is the Entry in *Bredon's* Caſe, 1 *Co.* 75. and which was in the Common Pleas, ſee 25 *E.* 3. 4. 7. but more fully in *Fitz. Abr.* tit. *Gage Deliverance, pl.* 8. 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,

* And them keep until to the ſame, &c.

Words

Words are, * *Capias in Withernam, & salvo & 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.

The Reason of the Difference is this, that on the *vicontiel* Writ below, where it was found that the Beasts were eloigned, the judicial Award of taking the Defendant's Beasts could be only *quousque* he gaged Deliverance, because every Execution in the Sheriff's Court was no more than the 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 therefore when the Return of † *Elongata* is made into Chancery, the *Withernam* then goes out as a *vicontiel* Process, and is therefore conceived in

* Do you take in Withernam, and cause them to be safely and securely kept until, &c.

† Eloignment.

the

the same Manner as it is below; and in the Writ * *de Executione facienda 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 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 it till 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.

25 E. 3. 90. Fitz. Abr. tit. Gage-Deliver. 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 re-

* Of causing Execution to be done.
† According to the Law of Retaliation.
|| Law of Retaliation.

plies, 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.* *per Withernam*, and of this he would have the Defendant gage Deliverance; and insisted that it ought to be delivered by the Defendant, because he had avowed the Taking, and that therefore the Defendant was to have an Action against the Sheriff, and in order to have Deliverance, the Plaintiff was forced to take Issue, that the Sheriff delivered the 20 *s.* to the Defendant.

Note; the Writ of *Withernam* is * *ad respondendum tam Domino Regi de Contemptu, quam Parti de Damno & Injuria*; for to eloign the Goods was to stop the Replevin, and hinder the Plaintiff from pursuing his just Right, for which he was fineable to the King.

Rast. Ent. 708. 35 H. 6. 47. 2 Leon. 85.

* To answer as well the Lord the King for the Contempt, as the Party for the Damage and Injury.

If

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* * *& de proprietate probanda*, because on both these Writs a Contempt is supposed and appears against the Defendant by the Returns 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 & armis*, where there was a Fine for the King.——But 25 *E.* 3. *c.* 17. gives the *Capias* in Replevin, on that Attachment issuing to bring in the Defendant; 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.*

* And of trying the Property.
† With Force and Arms.
‖ No Goods.

Where

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.

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, & 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 in the King's Court, is but in Affirmance of the Common Law.

2 Inst. 106.

If the Sheriff return that the Distress is eloigned, so that he cannot deliver them upon the Replevin, or upon

* Have the Return.

† No one should for the future carry the Distresses which he had made out of the County in which they were taken, and if, &c. he should be punished by a Fine as for a Thing done against the Peace.

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.*

F.N.B. 74. E. Carth. 286. 4 Mod. 183.

In a Replevin at the *Pluries* returnable, if the Sheriff doth return ‖ *quod averia Elongata sunt*, &c. and the Defendant doth appear, and plead that he did not distrain them, now 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.

---

* Returns being had.
† According to the Law of Retaliation.
‖ That the Beasts are eloigned.

Note,

Note, that 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 the Deliverance of the Goods taken, since he claims them as his own; yet the Defendant might have come *in pais* and claimed the Property, but whenever he claims them it is sufficient to stop the Deliverance. 30 *E.* 3. 9. 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, 7 *H.* 4. 28. *per Horton*, because the Bailiff took them only as a Servant, therefore his Cattle ought not to be taken as a Compensation for the Master's not restoring the Distress.

F.N.B. 74. E. Note.

F.N.B. 74. E. 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 Sheriff return upon the *Pluries*, † *quod averia Elongata sunt*, &c. he shall have a *Fieri Facias* against the Pledges, &c. 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, ‖ *quod vide*, *Tr.* 7 *R.* 2. see 5 *H.* 5. 7. the Avowant may have a *Withernam* presently, for it was at the Common Law, 7 *Ric. Withernam* 11. he cannot have it before a *Scire Fac.* returned against the Pledges, in an Attachment against the Party, and for a Default of a Distress, Process of Outlawry lies.

It has been doubted, whether on *Westm.* 2. c. 2. that gives Pledges ‡ *de Retorno Habendo*, it be necessary to sue

---

* To have the Return.
† That the Beasts are eloigned.
‖ Which see.
‡ Of having the Return.

a *Scire Facias*, and have a * *Nihil* returned, before you can have a *Capias in Withernam*, in as much as you must shew it impossible to have the Cattle returned before you can by the † *Lex Talionis* come on the Goods of the Plaintiff. But it seems that the better Opinion is, that the Statute only gives him another Security and Remedy by *Scire Faciâs* against the Pledges, and does not take away nor alter the Remedy given by Common Law. 5 *H.* 5. 7. *Fitz. Abr.* tit. *Process*, *pl.* 115.

In Replevin, *Withernam* was awarded against the Defendant, and afterwards the Defendant claims Property, and they 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* issued; then the Issue is found for the Plaintiff, upon which he had Judgment; now

11 H. 4. 10. Bro. Abr. tit. With. pl. 5. F.N.B. 74. A. Note.

* Nothing.

† The Law of Retaliation.

upon the Return of the *Pluries* against the Plaintiff, the Defendant prays an *Exigent* against him, * *& habuit*; and by *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; for 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 be removed out of his Possession, much less ought other Beasts have been taken *in Withernam*.

* And had it.
† By an after Fact.

Per

Per Danby and *Moyle*, the Defendant shall recover Damages *in Withernam* on an * *Elongata* returned, on a Writ † *de Retorno Habendo alii.* ‖ *Contra*, If the Reason of the Doubt is, because if the ‡ *Retorno Habendo* be entirely to right the Defendant, Damages must be recoverable in Case the Beasts be eloigned.——The other Opinion is, 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.

See Dyer 41.

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

---

* Eloignment.
† To have another Return.
‖ On the other Hand.
‡ Having the Return.

Deliverance granted, the Sheriff ought not to execute the second Deliverance; Now this prevents the Mischief of the *Withernam* against the Plaintiff.

F. N. B. 74. A. Note.

A. brings Replevin against *B.* and has Deliverance, and after is nonsuit, and a Return 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, and removed in *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 whereof he complains; and if he makes his Complaint, or Count of the Beasts delivered *in Withernam*, it is not good.—25 *E.* 3. 90. *pl.* 38. 33 *E.* 3. *Avowry* 256. 13 *E.* 3. *Replevin* 37. *Pluries* 3. *Dyer* 59. accordingly *per Cur.* in second Deliverance; the Reason is before given,

* Eloignment.
† Which observe.

for

for the second Deliverance is a judicial Writ appointed by the Statute, and therefore must in all Points pursue the Record out of which it issues; and the Plaintiff cannot declare on that *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.

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 gage Deliverance of the Beasts, and then he can have his own Goods restored 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,

Offic. Brev. tit. Withernam.

See Salk. 581. L. Raym. 613.

* Eloignment.

and

and not to be denied; but if it is false, he has Remedy against the Sheriff for his false Return.

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.

Stat. West. 2. c. 2. See ante.

Upon the *Retorno Habendo*, if the Sheriff returns * *Elongata* on the Plaintiff, then there is some Difference in the Books, whether they must proceed against the Pledges to have them amerced, and have Issues returned against them to the Value of the Beasts; or if they have nothing then to do, but to take a *Withernam* against the Plaintiff. But it seems by the better Opinion, as is here before mentioned, that they may have a *Withernam* immediately against the Plaintiff, on an *Elongata* returned by the Sheriff, and

---

* Eloigned.

on

on such *Withernam*, they may take all the Beasts of the Plaintiff, until he has returned the Beasts to the Defendant; for it is a Pain to make him do the Thing required.

By the Judgment of a *Fieri Facias*, *Capias* and *Elegit* lie on the Award of the Judgment, if on the *Withernam* * *Bona* be returned, then the Plaintiff's Goods are taken, and they shall not be delivered until the Plaintiff has paid his Fine to the King for his Contempt, and delivered his Beasts; if † *nulla Bona* be returned on the *Withernam*, a *Capias* issued at Common Law against the Plaintiff for his Contempt, and if on the *Capias* the Plaintiff be taken, he shall lie by it until he has satisfied the Fine for his Contempt, and returned the Goods.

But by *Stat.* 17 *Car.* 2. *c.* 7. if the Plaintiff in Replevin be nonsuit before Issue joined, the Defendant is to make a Suggestion, in Nature of an Avowry

---

* Goods.
† No Goods.

or Cognisance, for his Rent, and on this a Writ of Enquiry issues to ascertain the Arrears of Rent, and the Value of the Distress, and he shall have Judgment to recover the Rent, and Costs of Suit out of the Goods, if they are sufficient; if not, for so much as the Value of the Goods amounts to, and shall have Execution thereon by *Fieri Facias* or *Elegit*, or otherwise. —— The same Writ of Enquiry goes where a Demurrer is joined, and Judgment given thereon, and the same Enquiry by the Jury where Issue is joined.

V. Of the Writ *de Proprietate Probanda*.

Reg. 83, 84, 85. Brev. Jud. 135. Co. Lit. 145.

If the Replevin be either by Plaint or by Writ, if the Defendant claims Property, the Sheriff's Power to replevy the Beasts is 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

Writ * *de Proprietate Probanda*, because no Controversy of Property can be determined in the County Court without the King's Writ.

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.

But if the Replevin were by original Writ, and the Defendant claims Property, the Sheriff cannot make Deli-

* Of proving the Property.

verance

verance no 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* and *Pluries* on the Replevin, as a Cause why he cannot execute the Writ; and on this Return of the Sheriff the Writ † *de Proprietate Probanda* 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 over 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

* Signify the Cause to us.
† Of proving the Property.

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 appear in proper Person to answer his Fine to the King, but after Payment of the Fine he may appear by Attorney; but until the Payment of the Fine, he must plead in Person.

But if the Verdict be found for the Defendant in the Writ * *de Proprietate Probanda*, there is an End of the Replevin, as well by Writ as by Plaint; for the Sheriff is not by the Writ * *de Proprietate Probanda* to deliver the Goods to the Plaintiff, unless the Jury finds them to be the Plaintiff's; and if the Defendant has the Goods and possesses them as his own, they cannot proceed on 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

Brev. Jud. 135, 136, 137.

* Of proving the Property.

the

the Inqueſt is eſtabliſhed on the Side of the Defendant, the Plaintiff cannot 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 the Recovering of the Goods, but cannot continue his Action, whereby the Poſſeſſion ſhould be delivered to him. *Fitz. Abr.* tit. *Propr. Prob.* 5. & *per tot.*

Co. Lit. 145. Q. 1 Lev. 90.

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 to interpoſe againſt the obeying the King's Writ; but the Owner himſelf ſhews a juſt Cauſe why the Goods ſhould not be delivered until further Enquiry; but the Bailiff

Bro. Jud. 137. Theſ. Brev. 170.

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.

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, the Law hath appointed two Writs to remove such Causes out of inferior Courts into the superior, and those are the *Pone* and *Recordare*.

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

2 Inst. 339.

want no Record from below when they have the King's Writ with them.

But the *Recordare* 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*

* *George* the Second, &c. To the Sheriff of, &c. Greeting: Put by upon the Petition of the Peti-

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.*

And if it be removed into the King's Bench, then the Writ is such:

* *Rex, &c. Pone ad Petitionem petentis, ubicunque tunc fuerimus in Anglia loquelam, &c.*

The Reason why he is summoned in this Writ is, that the Defendant being already attached in the Court

---

Petitioner 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 summons 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.

* *George* the Second, *&c.* Put by on the Petition of the Petitioner wheresoever we shall then be in *England* the Plaint, *&c.*

 below,

Comitatus, est Consanguineus prædicti A. *propter quod idem Vicecomes favet ipsi* A. *in loquela prædicta ut dicitur, Fiat executio istius brevis, si causa sit vera & præd.* B. *petit, & aliter non.*

Or thus: * *Quia præd.* B. *cepit averia præd. in feodo suo pro Consuetudinibus & servitiis sibi debitis, ut dicitur, Fiat executio, &c. ut supra.*

Or thus: † *Quia præd.* B. *clamat præd.* A. *esse Nativum suum, & 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.* took the Beasts aforesaid in his Fee for the Customs and Services due to him, as is said, Let Execution, &c. as above.

† Because the aforesaid *B.* claims the aforesaid *A.* to be his Relation, and upon that Account asserts the Beasts aforesaid to be his own, whereupon that Plaint ought not to be carried on in the County, as is said, Let Execution, &c. as above.

But

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.

10 Ed. 2. Avowry 213, 515. 20 Ed. 3. Avowry 130.

But if either Plaintiff or Defendant removed 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; as 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 prædictus Abbas est Dominus Curiæ de* C. *in quâ loquela illa pendet per retornum brevis nostri, propter quod idem* A. *in loquela præd. in eadem Curiâ justitiam consequi non potest, ut dicitur, Fiat executio, &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*

---

* 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.

† 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.

ipsius

ipsius B. *favet ipsi* A. *in loquelâ suâ præd. ut dicitur, Fiat executio, &c.*

And note, that 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.

If the Plaint be removed by the Defendant by *Pone* at the Day in Bank, the Plaintiff shall be demanded under the Peril of a Nonsuit, and if he make Default, a Return shall be awarded, and no Process; but if the Plaintiff appears, and the Defendant makes 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 *Recordare* by the Plaintiff, there if he makes Default he shall be nonsuit; if the Defendant makes Default, then shall issue a * *Pone per vadios*, and so Process of Outlawry.

21 H. 6. 50. F.N.B.70. A. in the Notes.

* Put by Gages.

Wherever

Wherever the Defendant hath Day in Court by the Writ, there the Plaintiff is demandable under Peril of a Nonsuit, for he bringing another in, ought to attend himself; and if he has brought the Defendant into the Court below, if the Defendant removes it above, he thereby gives himself and the Plaintiff a Day in the Court above; for the Plaintiff, having put in Pledges of Prosecution, ought to follow the Writ, and wherever Day is given, there he 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 against him till he appears, for that would be to give Judgment * *parte inauditâ*; and therefore tho' he himself removes the Plaint by *Recordare*, whereby he gives himself a Day in the superior Court, if he does not appear at the Day, they must carry on the Process to make him appear, tho' he has appeared in the Courts below, since such Appearance does not give Authority to the Court above to proceed, unless he has first appeared there; but

* One Side unheard.

there

there is Judgment of Nonsuit against the Plaintiff if he does not appear, for his Non-appearance is not prosecuting his Plaint, which is a Nonsuit.

* *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. *Rolph* came for *A.* the Plaintiff, and prayed Damages, for that otherwise the Plaintiff had no Remedy; for the *Pone* is abated, 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. *Baker*, *Martin* and *Preston contra*; a *Pone* or *Recordare* is but to remove the Plaint, so that when the Plaint is removed, the *Pone* or *Recordare* shall never abate, for that the Court is possessed of the Plaint;

3 H. 6. 2. F.N.B.69.M. in the Notes.

12 H. 4. 14. 3 H. 6. 2. 4 Inst. 266.

* Put by.

† The Plaint which is in your County between *A.* and *B.* of the Beasts of the said *A.* taken, &c.

|| Aforesaid *B.*

‡ Aforesaid *A.*

but

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 take a special Writ to the Sheriff to warn the Plaintiff to pursue the Plaint, and so it was done in this Case.

F.N.B.69.M. in the Notes.

The Plaint is well removed, altho' the *Pone* bear Date before the Plaint entered, 1 *R.* 3. 4. So if the Plaint be removed by *Certiorari*, where it ought to be by *Pone* or *Recordare*. See 7 *E.* 4. 23. So if one Plaint be removed where another ought to have been, *ibid.* or where there is a Variance between the Plaint and the Writ, 6 *Ed.* 3. 55. 8 *Ed.* 3. 71. *Cro. Eliz.* 543. See *Moor* 30. *contra.*

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 the Plaintiff or Defendant will remove that Plaint, he ought to sue a Writ of *Recordari* out of the Chancery, directed unto the Sheriff, and the Writ shall be such;

* *Rex*

* *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 recordo illo interfuerunt;* Reg. 85.

† Note, these Words, ‖ *ut dicitur*, are only in the Writ when brought by a common Person, and not by the King. 38 *Ed.* 3. 31.

‖ As is said.

* *George* the Second, &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 the Record before our Justices at *Westminster* (such a Day, &c.) under your Seal and the Seals of four lawful Suitors of the same County with those who were present at the recording it, and fix the same Day to the Parties that they were there, and proceeded in that Plaint according to Justice, and have there the Names of the said four Suitors, and this Writ. Witness, &c. Let this Writ be executed if the aforesaid *A.* petitions for it, and otherwise not.

terfuerunt; & partibus eundem diem figas, 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. *

It appeareth that the Plaintiff may remove the Plaint by *Recordari*, with-

* See 20 *Ed.* 3. 21. where 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*, where the Plaintiff had Deliverance without Writ, and the Defendant sued a *Recordari* to the Sheriff of *Berks*, † *Quia districit 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*, notwithstanding this special Cause assigned. *Note*; the Beasts were driven into the County of *Berks*, where the Castle and Court of the Honour of *Wallingford* was. *Dyer* 168.

† Because he distrained in his Fee.

2 out

out 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:

* 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 the Court of the King. 12 *H.* 4. 17. *Mich.* 50 *Ed.* 3. *pl.* 6. *Fitz. Abr.* tit. ‡ *Cause de remover Plea*, *pl.* 10. 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.

‖ As it seems.
‡ Cause to remove a Plea.

* *Quia*

* *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.*

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

* Because the aforesaid *B.* by pleading in the County aforesaid, asserted that he took in his separate Ground the Beasts aforesaid, as in his Damage there, in which Ground the aforesaid *A.* claims Common of Pasture, as is said, which Plaint in as much 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.* petitions for it, and otherwise not.

the

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 eadem Curiâ ſine brevi noſtro, &c. & recordum illud habeas ſub ſigillo tuo, & ſigillis quatuor legalium hominum ejuſdem Curiæ qui recordo illo interfuerint, & partibus, &c. (ut ſupra) quia præd. A. eſt Ballivus præd. W. de C. Curiæ*

---

* *George* the Second, *&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 Pleas of the ſame Court, and ought not to be Judge in his own Cauſe.

sua præd. & tenet placita ejusdem Curiæ, & Judex in sua Causa esse non debet.

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; for if the Plaint be * continued in the County Court, and Issue joined upon it, yet nothing shall

* If the Defendant be without Addition in the Plaint, he shall not have Addition in the *Recordari*, altho' the Process of Outlawry lie thereon. 2 *H.* 5. 6. (30 *H.* 6. 30. accordingly) adjudged. 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.*

Note; a *Capias* lies on a Default made by the Defendant, on a *Pone* brought by the Plaintiff in a Replevin by Plaint, but not upon a Default upon a *Justicies*. 3 *H.* 6. 54. See 14 *H.* 6. 21. Yet if a *Withernam* be awarded in a County, (after a *Pone*) the Plaintiff shall gage Deliverance of the *Withernam* here; for the *Recordari* made the Court judge of the whole Matter. 21 *H.* 6. 40. See 39 *H.* 6. *Recordari* 5. 20 *Ed.* 3. *Recordari* 10, 20.

be

be removed but only the Plaint, and in the Common Pleas the Plaintiff may declare * *de novo*.

For 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, and this could be no Inconvenience in Replevin at Common Law, where the Plaintiff may bring his Replevin ‖ *toties quoties*; and where the Defendant removed it, and gave another Day, it was upon Cause shewn of Inability or Partiality in the Courts below.

* Anew.
† By Word of Mouth.
‖ As often as.

But not only in *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 in a *Habeas Corpus*, which is a Writ of Liberty, there the Plaintiff must likewise follow the Body of the Prisoner, and there declare against him * *de novo*; for the Court cannot take Notice of the Pleadings rehearsed before inferior Judges; for those Records don't 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 'till there be Judgment against them.

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.*

* Anew.

which

which gives the Plaint, does in the first Chapter provide that all Complaints of Distresses should 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 eorum per Ministros Domini Regis Justiciari non permittant nec sustineant quod per ipsos liberentur 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*

* And moreover some of them would not be justified by the Officers of the Lord the King, nor would suffer them to make Delivery of such Distresses as they had taken of their own Authority at their Pleasure. It was provided, agreed and granted, that as well high as low should have and receive Justice in the Court of the Lord the King, and that no one thereafter should take Revenge or Distresses without the Consideration of the Lord's Court in Case any Damage or Injury should happen to him, whereof he should desire to have Amends from any of his Neighbours whether high or low.

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 tho' given for Expedition before the Sheriff might at any Time be removed and recorded in the Court of the King.

In a *Recordari* to remove a Record out of Ancient Demesne, the Writ shall say * *Loquelam & Processum*, and not † *Recordum quod v.* 36 *H.* 6. by all the Justices; yet the Form of the Register in the *Recordari*, as before is said, is ‖ *& Recordum illud Habeas.*

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,

* The Plaint and Process.
† Record, which see.
‖ And have that Record.
‡ A Plaint.

but

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.

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 Causa* or *Certiorari*; and it was held, that in as much 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. Yet *vide Reg.* 6, 7. *a.* a

9 H. 6. 58. See Nat. Brev. 12.

* Cause to be recorded.
† Have the Body with the Cause, or certify.

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, 'till it comes before them by † *Habeas Corpus cum Causa*, or by *Certiorari*. The *Habeas Corpus* is the Writ of Liberty. The Law hath that Tenderness for the Liberty of a Man, that when any Person is imprisoned, he may purchase a Writ to any superior Court; and if any of these Courts see Cause on the Return to discharge him, he shall be freed;

* The Plaint.
† Have the Body with the Cause.

from

from hence it is that the Body must be sent, and the Cause of Imprisonment must be sent with it.

A *Certiorari* also 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 a *Recordari*, it cometh in without Warrant, and the Court shall not hold Plea thereof.

But

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*.

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, as they do in Replevin on the Plaint sent before them by *Recordari*; and therefore there must be a Writ to

* Which remains with you.
† In the King's Court.
‖ To do a Deed.

give

give them Authority to proceed on the Record * *quod coram vobis resdet.*

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 entered in the County; yet the Record is well removed, because that 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; but where the Record is removed out of the Lord's Court, where there is a Jurisdiction by Grant or Prescription, there must be Cause shewn for

* Which remains with you.

such

such Removal; and 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; and altho' the Defendant cannot remove the Plaint without Cause, yet this is not to oust the Sheriff of Jurisdiction, but that the Plaintiff may not be delayed without good Cause shewn.

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.

4. 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 laid 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 have the Use of them, and

* Against Gages and Pledges.

therefore

therefore the Caption and Detention of them by any Person is unlawful, 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 Detension.

2 Ro. Abr. 430. 1 H. 4. 18. Bro. Abr. tit. Repl. 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 can't 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

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; and 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 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 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

5 H. 4: 16. Bro. Abr. tit. Repl. pl. 12. Doct. Plac. 315. Co. Lit. 145.

by the same Person of different Men, each hath a several and particular Injury done him, if the Distresses be unlawful, and therefore they can't 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?

2 Ro. Abr. 430. Bro. Abr. tit. Repl. pl. 64. Doct. Plac. 314.

If Beasts which are * *feræ Naturæ* be reclaimed by me, and are distrained 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 a Case I have no Property in them.

---

* Wild Beasts.
† The Inclination to return.

If

If a superior Jurisdiction award an Execution, it seems that no Replevin lies for the Goods taken by the Sheriff 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 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

Lev. Ent. 152. Lutw. 1191. Raft. Entr. 275. Bro. Abr. tit. Repl. pl. 22.

cannot commit for Contempt out of the Court: And 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 of strong Waters, and a Warrant on that for levying 20 s. Fine on the Plaintiff.

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 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 the Goods taken in Execution at the Suit of common Persons.

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

Executors shall have Replevin for the Goods of the Testator taken in his Life, 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,

Bro. Abr. tit. Repl. pl. 41. Sid. 82.

* Doing Damage.
† He did not take them.

and in the Poffeffion of the Defendant; and the Plaintiff had Damages for the Pigs on this Plea of * *non cepit*, becaufe the Pigs were taken by the Defendant as well as the Sow, tho' they were not † *Damage Feafant*; and therefore the Defendant fhould have fet forth the fpecial Matter as to the Pigs.

Bro. Abr. tit. Repl. pl. 34.

No Replevin lies for Charters relating to the Inheritance, becaufe the Charters are reckoned Part thereof, and as fuch defcend with it to the Heir, and not being efteemed in Law Chattels, are not by Law replevifable.

2 Show. 91. Nightingale *v.* Adams.

A Replevin doth not lie for Goods taken in foreign Parts, tho' afterwards brought into the Realm, becaufe fuch a foreign Caption might have been juftifiable according to the Law and Cuftom of the Place where it was made, tho' it may be illegal by our Law; and therefore fuch Caption ought not to be tried with us.

* He did not take them.
† Doing Damage.

If

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.

F.N.B. 69. I. Doct. Plac. 315.

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.

Regr. 81. b. Bro. Abr. tit. Replev. pl. 65.

II. Of the Declaration in Replevin.

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*

Hob. 16. Moor 678. 2 Mod. 199. Doct. Plac. 315. Bro. Abr. tit. Repl. pl. 47. 2 H. 6. 14. Cro. Eliz. 896. Ward v. Savil.

† Place wherein.

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 Opportunity to 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; and 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.

---

* In a certain Place there called.
† Place in which.
|| He did not take them.

The

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 tho' 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 wou'd 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

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

* That he took the Beasts and unjustly detains them, against the Gages and Pledges.

† I have replevied.

‖ Detained, or præterperfect Tense.

‡ Detains, or present Tense.

well the 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.

III. Of the several Pleas to this *Action*, and these are of four Sorts.

1. Pleas in Abatement.

2. The General Issue, *non cepit.*

3. The Justification; and this of two Sorts, either disaffirming Property in the Plaintiff, or admitting it.

4. The Avowry.

I. 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 till Judgment and Execution, and therefore the Pleas

in

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 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* where 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 only from the Pleas in Bar in this, that in the Abatement they do not avow or acknowledge the Caption and Detention, which is the Gist of the Action, but they must go so far as to entitle the Defendant to a Delivery,

* In his former Condition.

or else they don't take away the Force and Effect of the Writ of Replevin, which is always executed by the Delivery.

2 Lev. 92. Vent. 249. Salk. 5, 92. Carth. 243. L. Raym. 217, 984.

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.

Mod. Cas. 81. Vent. 249.

If the Defendant pleads Property in *J. S.* a Stranger, this may be in Abatement, because he shews, that there is no Property in the Plaintiff, and by Consequence that he had no Right to a Deliverance by this Writ, and therefore he ought to have Return without making any Conusance.

Mod. Cas. 163.

If the Defendant pleads Property in the Plaintiff and *J. S.* there the Plea is

is in Abatement of the Replevin, as it is in other Actions, for tho' 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.

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

Rast. Ent. 554.

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

* To the Declaration and Writ.
† Without that.

took

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 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

* Doing Damage.

acknow-

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

Doct. Plac. 316.

* Place in which.
† Doing Damage.
|| Without that.

which

which the Deliverance was made; but leaves the Plaintiff a Right to retain his own Property.

II. Of the General Issue.

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

The General Issue in Replevin is * *non cepit*; and 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 culp.* 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 did not take them.
† Not guilty.

he

he took the Beasts or not, and not whose they were.

In Replevin for a Mare and Colt, the Defendant pleads * *non est Culpabilis de Captione prædictâ infra sex Annos ultimos elapsis*; and 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, tho' he might not have taken it within six Years, yet he might have detained it 'till the Day of the Purchasing the Writ; and that Detention is complained of by the Writ, and not barred by the Statute.

Sid. 81, 82. Arundel v. Frail.

* Is not guilty of the Caption aforesaid within six Years last past.

III. Of the Justification.

See 2 Jones 25.

And 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*.

Mod. Cas. 81. 2 Lev. 92. Vent. 249. Bro. Abr. tit. Repl. pl. 3.

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 Cap-

* As to.
† To have a Return.

tion

tion and Detention, and therefore goes in Bar of the Action, and consequently gives a Return without Conusance * *pro Retorno Habendo*.

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, as 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, because he ought to retain the Beasts against every one but *J. S.*

2 Lev. 92. Vent. 249. Mod. Cas. 81.

2. As to Justifications that affirm Property in the Plaintiff; and these cover the Defendant from Damages

* To have a Return.

N only,

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.

Doct. Plac. 316. Ro. Abr. 319. Danv. Abr. 652.

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, tho' 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, and therefore the Lord must distrain the Heir * *de novo*.

* Anew.

IV. Of

IV. Of Avowries, and the Pleas thereunto.

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, and 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.

* Doing Damage.

 II. The

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. *f.* 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 said Avowry the said Lands to be holden of him without naming any certain Person or Tenant.

Stat. 33 H. 8. Sess. 1. c. 7. in Ireland.

Upon

Upon this Act it hath been held, that tho' 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.

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

In Avowry the Defendant said that *B.* was seised of the Lands where, *&c.* and held 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; and this was held a good Avowry upon the Statute, tho' 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

Leon. 301. Cro. Eliz. 146. Lucy v. Fisher.

 to

to be good where he names him but once.

And. 159. Broker *v.* Smith.

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, tho' the Rent remains, because the King cannot hold of a Subject; and therefore *B.* must avow according to the Nature and particular Circumstances of his Case.

Rast. Ent. 556. Bro. Abr. tit. Avow. pl. 4. Hern's Plead. 727. Co. Ent. 591, 594, 597, 598.

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.

* The Place in which.

In

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 seised by the Hands of the said *J. S.* and because the Rent, *&c.* was 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 that was in the actual Possession of the Land did usually 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

* The Place in which.

 have

8 Co. 54. a. Co. Lit. 298. b.

have made the Payment demanded; and 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 'till the very actual taking of this 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; and 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 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

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; but 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 seised, 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 Per- son

Doct. Plac. 317, 318. Bro. Abr. tit. Avow. pl. 52.

* Out of his Fee.

son 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.

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 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.

If

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.

8 Co. 65. Doct. Plac. 317, 318. Brownl. 169, 170.

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 doth 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

hath not altered the Law in that Particular.

If *A.* be possessed of a Term of Years, 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.

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, tho' *B.* had taken a Lease of his own Land from *A.* but if the Lease was by Parol

3 Lev. 146.

* That he was possessed.
† Place in which.

then

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 *.

If

* *The* Irish *Stat. of* 9 Geo. 2. c. 13. sect. 4. *reciting that the Remedy for recovering Arrears of Rent, by taking a Distress upon the Lands chargeable therewith, is tedious and difficult, by Reason of the Avowant being obliged in his Avowry to deduce the Title to the Lands from him who was seised in Fee, and to produce Deeds that no way belong to him, enacts,* That where any Distress or Distresses shall be taken by any Landlord or Lessor for any Arrears of Rent then due, or that shall thereafter become due, upon any Lease for Lives or Years, or upon any Contract or Writing, purporting a Demise of any Lands, &c. whereon any Rent has been paid by the Tenant who shall be in Possession of the Land at the Time of such Distress taken, or by any Person under whom such Tenant claims, where the Title to the Lands is not in Question, and a Replevin is taken or issued for such Distress, it shall and may be lawful for any Avowant, in his Avowry, to set forth only that he was seised or possessed, without setting forth the Commencement of his Estate, or deducing a Title from the Person under whom he derives his Interest, or that such Person was seised in Fee of the said Lands,

&c.

2 Lutw. 1492. Ball v. Garlick. 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

&c. and that the Want thereof shall not be any Cause of Demurrer to such Avowry.

The Irish *Stat.* 25 Geo. 2. c. 13. f. 4. *taken from the* English *Stat.* 11 Geo. 2. c. 19. f. 22. *reciting that several Lands, Tenements and Hereditaments, are enjoyed under Articles, Minutes and Contracts in Writing, whereby the Rent payable for the same is ascertained, but the said Articles, Minutes or Contracts, do not contain an actual Demise; and that Avowries or Conusances upon Distresses for Rent could not be made, as the Law then stood, upon such Articles, Minutes or Contracts, and that other Difficulties often arise in making Avowries or Conusance upon Distresses for Rent, not sufficiently remedied by the Laws heretofore made, enacts*; That it shall be lawful to and for all Defendants in Replevin, to avow or make Conusance generally, that the Plaintiff in Replevin, or other Tenant of the Lands, &c. whereon such Distress was made, enjoyed the same under a Grant or Demise, or Article, Minute

* Doing Damage.
† That he was possessed.

the Termor takes the Beasts themselves for the Damages, he must set forth by what Right or Title he took them, for he cannot seise 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.

But if the Avowant for * *Damage Feasant* alledges the † *Locus in quo* to be his || *solum & Liberum Tenementum*, that is sufficient without alledging the

Raft. Ent. 561. b. Clift's Ent. 564. Owen 51. Dyer 171. b. Brown's Ent. 304. L.Raym.333.

Minute or Contract in Writing at such a certain Rent, during the Time wherein the Rent so distrained for incurred, which Rent was then, and still remains due, without further setting forth the Grant, Tenure or Demise, or Title of such Landlord, Lessor or Owner of such Lands, &c. and it shall be no Objection to any such Article, Minute or Contract, that the same doth not contain an actual Demise.

---

* Doing Damage.
† The Place wherein.
|| Land and Freehold.

Seisin in Fee, for the Quantity of the Estate is not material where the 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

* In his own Right.
† The Place wherein.
‖ Freehold.
‡ In another's Name.

doth,

doth, he shews no Right at all to take such Distress.

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; but 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

Clift 642. Hob. 28. Bro. Abr. tit. Avow. pl. 80, 164.

* Wherefore he broke the Close.

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.

Salk. 562.

If Tenant in Fee leaſes for Years, rendring 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, rendring ſuch certain Rents, by Virtue of which Demiſe *A.* entered, &c.

* That whereas he demiſed.

But

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; and 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 Reversion.

Clift 225.

In Avowries there must be always a Place certain mentioned where the Caption was, for 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

Sid. 10, 20. Hob. 16.

 Taking

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.

Danv. 653. Cro. Jac. 372. Wheadon *v.* Sugg.

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.* but tho' 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.

* That he well avows the Taking, and justly, *&c.*

† He well makes Conusance of the Taking, *&c.*

|| Avows and makes Conusance of.

If

If the Defendant avows for Rent being in Arrear at *Michaelmas*, * & *Tempore Captionis*, this is good, tho' he doth not say, † *quod adhuc aretro existit*; for the Avowant 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.

Dalison fin. Benl. 72. Cro. Jac. 283.

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. and it was objected, that by his own shewing the Arrears were not due to himself and his Wife, and therefore

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

* And at the Time of the Taking.
† That it is still behind.

 the

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 she having a Title to it in her own Right by the Grant, the Avowry is good.

* In her own Right.

If

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. For 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 Caparceners must join in Avowry; therefore if one Jointenant or Caparcener 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

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

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. Eliz. 547. Miles *v.* Willoughby.

If Executors avow on the 32 *H.* 8. *c.* 37. for the Arrears of a Rent in Fee granted to 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*

* Well makes Conusance of the Taking of the aforesaid Beasts in the Place aforesaid.

rum

rum 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.

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. Lit. Sect. 317. Co. Lit. 198. b. Cro. Eliz. 530.

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. 5 Co. 19. a. 38. b.

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 Replication that the Tenants left no Beasts. Hutton 4. Cro. Car. 260. Hob. 176.

* At the Time when, &c.

II. Of

II. Of the several Pleas to Avowries.

Tho' 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 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 tho' 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*.

* Out of his Fee.

3. In

3. In what Cases the Tenure was traversable.

4. In what Cases the Seisin of the Services was traversable.

1. 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; and hence we may see the Reason why there could be no Disclaimer to any Avowry on the Statute of *H.* 8. because

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

cause 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, because 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 Seigniory, 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; and therefore the Tenant in the *quæ Servitia* shall not disclaim, because the Lord upon such Disclaimer cannot have a Right to the Land itself; but whenever the Lord is in Possession of the Seigniory, and pursues his Right for

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.

But here it is to be noted, that the Tenant must be a Person capable of the Act of Disclaimer, because if he be an Infant, such Disclaimer shall not turn to his Prejudice by Reason of his Indiscretion.

Doct. Plac. 132.

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

Doct. Plac. 133.

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 immediately to the Lord and not to the Mesne.

Doct. Plac. 133. Co. Lit. 362. a.

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.

If a *Præcipe* be brought against two, and one disclaim, the whole Franktenement vests in the other; but if one pleads Non-tenure, the Whole does not vest in the other, because tho' the

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.

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 that 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. Doct. Plac. 134.

2. Of the Plea of * *Hors de son Fee.*

As the Tenant may disclaim, so he may plead † *extra Feodum*, and such Rast. Ent. 566. b. See the Form of the Plea.

* Out of his Fee.
† Out of his Fee.

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 harrassed 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 Seigniory of the Lord; for in this Plea he doth not renounce the Services (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

* Out of his Fee.
† Out of his Fee.

to

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, and 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, for 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

Doct. Plac. 216, 217. 2 Co. 20. b.

* Out of his Fee.

Stranger to the Avowry, yet made Party by * *Aid Prayer*, may plead in Abatement of the Avowry.

Co. Lit. 268. But to explain this Matter fully, we must consider the antient Avowry of the Lord upon Disseisins committed; and 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 from compelling the Lord to avow on him, tho' by such Acceptance of Rent the Disseisor was stopped 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

* Prayer in Aid.
† As to.

to the Disseisor; 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 Beast, 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, 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 was really due from the Disseisee to the Lord; but as an Inducement to

9 Co. 21. a

 this

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*

* To quiet his Pledges.

Plegiis

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, 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 Remedy over against his Lessor by Writ * *de Plegiis acquietandis*.

9 Co. 20.

But if the Disseisor had died seised, and the Lord had accepted Rent from the Heir of the Disseisor who came in

Co. Lit. 268. a.

* To quiet the Pledges.

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 till he recovered his Right in the real Action. My Lord Coke says, the Feoffee of the Disseisor is in same Condition with the Heir: But Qu. 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

* Out of his Fee.

Cause

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.

3. 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 prædicta*, &c. and in this Case tho' the Avowry had been only for Rent Arrear, yet if the Tenure thus traversed be

9 Co. 33, 359. Bucknal's Case. Cro. Eliz. 799.

* Without that.

† In the Manner and Form aforesaid.

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 Knights 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 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

* Without that.

were

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 State of the Land; but 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.

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*.

9 Co. 35. a. Doct. Plac. 318.

4. Where the Seisin is traversable.

And this is where the Tenant doth not only take the Estate of the Land

9 Co. 33.

* Without that.
† Out of his Fee.

upon

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 Coertion 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 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 Coertion and Force, 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 enroached Rent in the Action of Replevin, for the Tenant cannot traverse the Tenure for the

* Out of his Fee.

former

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 voluntary 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.

But the Tenant may avoid such an 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 tho' 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

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

clude the Tenant; so in an *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, tho' 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

Rent given by the voluntary Payment of their Predecessors.

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. a. Doct. Plac. 318.

3. The Seisin of Services by Incroachment is not material where there is no Tenure, because where there is no Tenure the Tenant may plead * *Hors de son Fee*, and so discharge himself from all Services. 9 Co. 34. b.

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, 9 Co. 34. b.

* Out of his Fee.

which

which being an Action of an higher Nature, hath longer Time of Limitation allowed to it than a possessory Action.

Doct. Plac. 132.
9 Co. 34. b.

5. In Avowries the Tenant shall not plead * ne unqs Seise de Services generally, because this amounts to a Traverse of the Tenure, since if a Man had never been seised of an immaterial 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 Tenuit.

9 Co. 35. a.

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

* Never seised of Services.
† That he did not hold it.

Lord was seised of the Rent or not to make out his Demand for the Pound of Pepper; but if the Tenure be by Homage, Escuage and Rent, and he alledges Seisin of all, and avows for Homage which is included in Escuage, there by traversing the Seisin of the Escuage you traverse the Seisin of the Homage, which the Lord demands in his Avowry.

IV. Of the Judgment in Replevin.

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, and 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.*

Co. Ent. 573 b.

* That the Plaintiff should 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.

præd. (the Plaintiff) *sustinuit occasione præmiss'*, a Writ of Enquiry is awarded to enquire * *quæ Damna præd.* (the Plaintiff) *sustinuit tam occasione præmiss'*, *quam pro Misis & Custagiis suis, per ipsum circa sectam suam in hac parte appositis.* And on the Return of this Inquisition the Plaintiff hath final Judgment, † *quod recuperet versus præfatum* (the Defendant) *Damna sua præd. ad per Inquisitionem præd. in forma præd. comperta, nec non eidem* (the Plaintiff) *ad requisitionem suam pro Misis & Custagiis suis præd. per Curiam hic de incremento adjudicata, quæ quidem Damna in toto se attingunt ad & præd.* (the Defendant) *in Misericordia.*

2d Book of Judgm. 203.

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

---

* To inquire what Damages the aforesaid (the Plaintiff) sustained, as well by Occasion of the Premisses, as for his Costs and Charges by him about his Suit in this Behalf expended.

† 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

This Writ of Enquiry must be understood to issue where the Plaintiff hath Judgment on a Demurrer, &c. and not on a Verdict; but 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; but the Judgment is, * *quod* the Plaintiff *recuperet versus* the Defendant *Damna prædicta per Juratores prædictos in forma prædicta assessa, nec non pro Misis,* &c. *de Incremento adjudicata,* &c. and the Defendant *in Misericordia.*

On the other Hand if the Judgment be for the Avowant on Demurrer, Co. Ent. 572. b. 2d Book of Judgm. 205.

* 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.

Q then

then the Entry is, * *quod* the Plaintiff *nil capiat per breve suum præd. sed sit in Misericordia pro falso Clamore suo, & præd.* (the Defendant) *eat inde sine 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 nescitur, &c.*

21 H. 8. c. 19.

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 præ-*

* 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.

† That (the Defendant) have the Return of the Beasts aforesaid, &c. It is also considered that

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 eidem* (the Defendant) *ad requisitionem suam pro Misis & Custagiis, &c.*

So that wherever the Judgment is given on a Verdict either for Plaintiff or Defendant, 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-pros.* 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

2d Book of Judgm. 208.

---

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 to the same (the Defendant) at his Request for Costs and Charges, *&c.*

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 præmissa, &c. ultra Misas, &c.* and this Judgment is good *quia Consensus tollit Errorem.*

As to the *Retorno Habendo.*

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.

---

* Whereupon the Justices here on the Petition of the said (the Defendant) with the Assent of the aforesaid (the Plaintiff) assess the Damages of the said (the Defendant) by Occasion of the Premisses, &c. besides Costs, &c.

And

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 the 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 consequently 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

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

 from

from under 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.

But if the Defendant pleads Property in the Plaintiff, and *J. S.* tho' this Plea abates the Writ under the present Form, yet by admitting the Property in the Plaintiff, it shews that the Plaintiff and *J. S.* have a Right to a Replevin 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.

Bro. Abr. tit. Retorn des Avers, pl. 28. Rast. Ent. 554.

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 that.

without

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.

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, tho' the Rent be Arrear, because the Distress is but a Pledge for the Rent, and when the Rent is offered, the Pledge ought to be restored, and 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 a Declaration in Court, the Defendant hath not an Opportunity to shew his Cause of Caption; and since this is owing to the Default

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

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, tho' 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 Return.

Bro. Abr. tit. Return des Avers, pl. 23.

But 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, tho' 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 tho' the Defendant had

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 this was found very inconvenient, because by this Means the Defendant could never get the Restitution of the Beasts; and therefore was not likely to recover his Rent, since he wanted the Pledge or Pain to compel the Tenant to the Payment.

To remedy this Mischief the Stat. of *West.* 2. *c.* 2. taking Notice, that * *postquam adjudicatum fuerit Distringenti retornum averiorum, & sic districtus, postquam averia sic retornata* [illegible] *iterum*

Stat. West. 2.

* After the Return of the Beasts had been adjudged to him who made the Distress, and being thus distrained after he had again replevied the Beasts so returned; and when he foresaw that he who made the Distress was preparing to be ready to answer him in Court, made Default, whereupon

iterum replegiaverit, & cum viderit distringentem comparentem in Curia, paratum sibi respondere, defaltum fecerit; ob quam iterum readjudicabitur distringenti retornum averiorum, & sic bis, vel ter, & 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,

---

upon the Return of the Beasts was again re-adjudged to him who made the Distress, and so the Beasts would be replevied twice or thrice, and without End, Provides, that as soon as the Return of the Beasts should be adjudged to him who made the Distress, the Sheriff should be commanded by a judicial Writ, that he cause him who made the Distress to have the Return of the Beasts, in which Writ should be inserted, that the Sheriff could not deliver them without a Writ, in which Mention should be made of the Judgment given by the Justices, &c.

but

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. & etiam de Catallis Retornandis, quæ* B. *in Curiâ nostrâ, &c. adjudicata fuerunt ob defaltam ipsius* A. *si Returnum inde adjudicetur: tunc eidem* A. *averia & catalla prædicta sine dilatione liberari facias, & pone, &c. prædictum* B, *&c.*

Reg. Jud. 58. b.
2 Inst. 341.

And by the above mentioned Act it is further provided, † *quod si iterato*

2 Inst. 341.

* *George* the Second, *&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.*

† That if he who replevied the Beasts should make Default a second Time, or the Return of the Distress should be adjudged by any other Means now twice replevied, the Distress should be for ever irreplevisable.

ille

ille qui replegiaverit Averia, fecerit defaltam, vel aliâ 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 'till 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. 341.

But if the Plaintiff tender the Rent for which the Distress was originally taken, the Defendant ought to restore the Beasts, and 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,

Rent, his Detention then is unlawful, and the Plaintiff may punish such Detention in an Action of *Detinue*, for the Return irreplevisable prevents the bringing back the Pledge, but does not vest the absolute Property thereof in the Defendant, but only a qualified Property 'till 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.

And the *second Deliverance* is always to bring back the same Distress which was first taken by the Defendant, and for which 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 2 Inst. 341.

* Eloigned.

him

him *in Withernam*, in this Case tho' 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 after the second Deliverance purchased, the Plaintiff may move the Court for a Restitution of the *Withernam* Beasts.

Where the Defendant puts in a Plea to the Writ of Replevin, as Property

* From the Term itself.

3 in

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 hath 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

* He took them in another Place.

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.

2 Inst. 340.

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 if the Writ abate by Misinformation or other Default of the Plaintiff, the Defendant shall have Return of

of the Beasts, but not irreplevisable, because the Defendant by pleading to the Writ, allows the Plaintiff another Writ under another Form.

This 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.

2 Inst. 340.

* That he should be attached who made a Distress for the coming at a certain Day before the Justices, before whom the Plea is to be carried on in the Presence of the Parties.

R We

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 beforementioned 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, & habeat Dominus distringens recuperare per breve quod reddat ei tot averia vel catalla, & si non habeat Ballivus unde reddat, reddat superior suus.* The Method of Proceeding upon this Act is, if the

2 Inst. 340.
3 Mod. 56, 57.

* Not only Pledges of prosecuting, but also of returning the Beasts, if a Return of them should be adjudged; and if any one should take Pledges any other Way, he himself should answer the Value of the Beasts, and the Lord who made the Distress should recover by Writ; that he restore so many Beasts or Cattle to him; and if his Bailiff should not have wherewithal to restore, his Superior should do it.

Sheriff

Sheriff by the Writ *de Retorno Habendo* cannot find the original Diftrefs, but returns * *Elongata*, the Defendant hath a *Scire Facias* to fummon the Perfons who became Pledges for the Plaintiff at the Execution of the original Replevin, that the Plaintiff would make Return of the original Diftrefs if Return thereof fhould be awarded; this *Scire Facias* brings the Pledges into Court, and thereby gives them an Opportunity to conteft why the Defendant fhould not have Return of their Beafts, fince the Plaintiff's Beafts cannot be found, for whom they were Pledges; if the Pledges cannot fhew Caufe, then the Defendant hath a Writ to have Return of the Beafts of the Pledges inftead of the Plaintiff's.

If the Pledges prove infufficient, fo as the Sheriff can find none of their Cattle, and thereby is obliged to return *nihil* on the Writ iffued againft the Beafts of the Pledges, the Sheriff then himfelf by the faid Act becomes liable, and the Defendant hath a *Scire*

2 Inft. 340.

Bro. Abr. tit. Retorn des Avers, pl. 2.

Dalt. Sher. 275.

* An Eloignment.

Facias grounded upon the said Act, *quod reddat ei* (the Defendant) † *tot averia* or *catalla*; 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 tho' 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 is already mentioned under the Title *Withernam*.

7 W. 3. c. 22. Irish.

And now by the Statute of 17 *Car.* 2. *c.* 7. it is enacted, That wherever any Plaintiff in Replevin shall be nonsuit before Issue joined in any Court of Record, the Defendant

* That he return to him.
† So many Beasts or Cattle.

making

making a Suggestion in Nature of an Avowry or Conusance for such Rent, to ascertain the Court of the Cause of such Distress, the Court upon his Prayer shall award a Writ, *&c.* to enquire touching the Sum in Arrear at the Time of such Distress taken, and the Value of the Goods or Cattle distrained, *&c.* and upon the Return of the Inquisition, the Defendant shall have Judgment to recover against the Plaintiff the Arrearages of such Rent, in Case the Goods or Cattle distrained amount unto the Value; and in Case they shall not amount to that Value, then so much as the Value of the said Goods and Cattle so distrained shall amount to, with his full Costs of Suit; and shall have Execution thereupon by *Fieri Facias* or *Elegit*, or otherwise. So if Judgment be given upon Demurrer for the Avowant for any Rent. And in Case the Plaintiff shall be nonsuit after Conusance or Avowry made, and Issue joined; or if the Verdict shall be given against the Plaintiff, the Jurors that are impanelled 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 thereon the Avowant ſhall have Judgment, &c.

Carth. 253. Baker v. Lade.

Where upon a Demurrer the Defendant had Judgment for a Return irreplevisable at Common Law, and a Writ of Enquiry awarded purſuant to this Statute, 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 was well given, for the Statute doth not alter the Judgment at Common Law, but only gives a farther Remedy.

Quære, Whether a Writ of * ſecond Deliverance lies ſince this Statute, when the Avowry is for Rent, ſee *Vent.* 64.

* *Mich.* 6 *Geo.* 2. *Keaf* v. *Weldon* in *B. R.* in *Irel.* a ſecond Deliverance was denied in the Caſe of a Nonſuit for Rent.

VIII. Of

VIII. Of the Writ of Recaption.

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 Tenants ſhould be protected from farther Diſtreſſes for the ſame Rent or Cauſe for which the firſt Diſtreſs was taken; and 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 the Replevin depends; for if the firſt Diſtreſs were lawful, he ſhall have Return of it, and therefore the ſecond is unreaſonable; and if the firſt were

F.N.B. 71. E.

unlawful, much more ſo is the ſecond Taking for the ſame Cauſe; ſo that the Recaption lies where the Cauſe of the firſt Caption was juſt.

F.N.B. 71. E. 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 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 intitled to Satisfaction; for 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. 72. B. 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 whether the firſt Diſtreſs were juſt or unlawful,

lawful, 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.

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, (in as much as he hath already a Pledge for that, which will be returned to him, if in the Event of the Suit in the Replevin the Rent appears to be in Arrear) he must therefore be looked upon as a Trespasser, unless he can justify the Taking for another Cause.

F.N.B. 72. R.

* Note the Defence, *viz. defendit vim & Injuriam quando, &c. & quicquid est in contemptum Domini Regis & ejus mandati.* 29 Ed. 3. 28.

---

* He defends the Force and Injury when, &c. and whatever is in Contempt of the Lord the King and his Command.

And

And 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, because 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.

F.N.B. 72. B. 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 be 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.

But

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 his Action of Trespass, as he thinks fit. F.N.B.72.G.

Yet if the Lord distrains his Tenant, and pending that Plea the Lord 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 after- F.N.B.71.H.

* He who does by another does it by himself.

wards

wards by any Act ſubſequent agreed to the Taking of the ſecond Diſtreſs, as by joining in *Aid* with the Servant to defend the Juſtice of the Caption, ſuch ſubſequent Agreement makes it a Diſtreſs of the Lord's, and to have been taken in his Right * *ab initio*; for † *omnis ratihabitio mandato æquiparatur*; and a parol Agreement of the Lord's to the ſecond Diſtreſs ſeems ſufficient. But if there be no ſuch Command, or ſubſequent Agreement of the Lord's, the Tenant ſhall have no Recaption either againſt the Lord or the Servant, tho' 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.

* From the Beginning.
† Every Ratification is equal to a Command.

So

So that it seems that where there is no precedent Command, nor a subsequent Agreement of the Lord's to the Servant's 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.G.

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 for that Rent, which the Lord will have a Return of if the Rent be found in Arrear.

F.N.B.71.I. 72.E.

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

F.N.B.72.E.

2 whether

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.

F.N.B. 71. M. If the Lord distrains his Tenant, and he replevies them, and the Lord avows for Rent, and the Tenant pleads * *rien Arrear*, or levied by Distress, and pending this Suit another Gale of 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, that is for two several half Year's Rent.

But if the Tenant 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

* Nothing in Arrear.
† Out of his Fee.

Lord's

Lord's Title to the Rent itself, and not to this or that particular Gale, 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.

And this Writ of Recaption lies for the Tenant before Avowry made by the Lord in the first Replevin, for otherwise the Remedy would not be adequate, because the Lord might otherwise harrass the Tenant by several Distresses, before the Lord by the Rules of 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, for 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. A.

OBSER-

OBSERVATIONS.

The two following *Cases* are taken from *Strange's Reports* since the Author wrote.

1. Where in Replevin the Place is material, see *Johnson* v. *Wollyer*, *Strange* 507.

2. No Replevin of Goods taken upon a Conviction, see *The King* v. *Monkhouse*, *Strange* 1084.

APPENDIX.

APPENDIX.

PRECEDENTS of Pleadings in Replevins.

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 Clamour 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 *against* Towersey and others.

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

Declaration. Pract. Reg. 157.

Midd', to wit, *JOHN Towersey*, *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*,

Middlesex, by Virtue of a certain Warrant under the Hands and Seals of *William Withers*, 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

43 El. c. 2. §. 19.

wards 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.

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*

muel 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. 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.

Cognisance for Damage Feasant.

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 ac-

knowledges 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.*

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.

And

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 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 12 good and law-

Joinder.

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

Judgment for the Plaintiff.

Inquiry awarded.

 ful

ful 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. *Hillary* 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 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.

General Errors assigned.

Afterwards, to wit, on Day next after in this same Term, before the Lady the Queen at *Westminster* comes the said

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 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 Attorney 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

No Original.

No Warrant of Attorney.

the now Queen of the Bench appeared by *William Marriot* his Attorney; neverthe-less *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 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

Several *Certioraries* prayed.

Rule to return them.

No Error.

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 said Causes above for Error assigned in any wise notwithstanding, &c. And it is farther considered by the same Court, that the said

Judgment affirmed.

Samuel

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 Execuion 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.*

Declaration. Replevin in K. B.

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 *Richard Hubbard*,

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*,

Sir *Robert Marsham* seised in Fee of the Place where, &c. demised it to the Defendant for 51 Years.

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 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

Who demised it to the Plaintiff for a Year at 15 l.

By Virtue of which said Demise the said *Richard Hubbard* into the Messuage aforesaid with the Appurtenances entred, 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 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.

and for three Quarters Rent Arrear distrained.

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

Repl' That the Rent was not in Arrear.

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 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. 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.

Issue.

Legg against *Stephens and others.*

Declaration.

Gloucester, to wit. THomas *Stephens*, Esq; *Robert Parker*, Esq; and *Richard Broke*, were summoned to answer to *Nicholas Legg* in a Plea, why they

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 10th 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 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. Brooke*, 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; 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 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

Seisin.

Prescription.

Court-Leet.

ther 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 *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 Pre-

Presentment.

For stopping a Way.

cinct 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 order'd, that the said *N. Legg*, being 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. Brooke* farther say, that the said *N. Legg* afterwards, to

Amercement affeered.

Order to open the Way.

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 12 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 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. Neale*,

Notice.

Presentment, that it was not opened.

Neale, 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 Neale* 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 Amercements 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 *R. Parker* in their own Right well avow, and the said *R. Broke*, as Bailiff of the said *T. Stephens* and *R.*

Death of one of the Lords.

Avowry for Non-payment.

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.

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 Brown* 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 the 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 Brown* say, that the Plea aforesaid by the said *Nicholas* above in Bar to the Avowry and Cognisance were

Demurrer.

said above pleaded, and the Matter in the same 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 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.

The Causes.

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

Joinder in Demurrer.

And the said *Nicholas* says, that the Plea aforesaid by him the said *Nicholas* above in Bar to the Avowry and Cogni-

fame 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 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* 167.

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

Declaration.

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 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 this Suit, &c.

Cognisance for a Distress for a Fine at a Court-Leet.

And the said *Joseph* and *John Hale* by *Thomas Colleshe* 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 aforesaid; of which said Manor with the Appurtenances the said *Rowland* is, and

Seisin in Fee.

at

at the said Time when, &c. and long before was, seised in his Demesne as of Fee; and 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 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 *Shinston* 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

Prescription for a Court-Leet.

Custom to choose a Constable.

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

3

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 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 Constable-

A Court-Leet held.

The Plaintiff elected Constable.

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 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.*

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 affeer'd. The Court also held it naught for not laying the Notice more particular, as that he was present in Court, 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.

W. P.

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 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

said 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 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.

Joinder in Demurrer.

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

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 Cognisance, 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. to hear their Judgment of and upon those Premisses, because the Court of the said Lord the King now here thereof not yet, &c.

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

Declaration. *Hertford*, to wit. WIlliam *Parkins* late of *Busbey* 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

Lord *James* the Second, now King of *England*, &c. at *Bushey*, in a certain Place there called *Marryhill Ground*, the Cattle of him 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.

3 Lev. 225.

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 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

Avowry and Cognisance for Damage Feasant.

U the

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.

Bar, that the *locus in quo* is Copyhold held of the Manor of *Bushey*, &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 demiseable 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

That the Defendant being Lord of the Manor, granted it to the Plaintiff in Fee, according, &c.

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 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

Day of *April* in the first Year aforesaid, 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 Appurtenaces 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 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

and he being seised put in his Cattle,

and the Defendant distrained them.

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.

Repl. That the Land is held of the Manor of *B*.

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 demiseable 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 lawfully Lords of the Manor aforesaid; and

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*

Grant by Copy.

 was

was as aforesaid admitted, at the said Time of the Admission of the said *Sylas* to the 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

The yearly Value.

The Fine.

per

ner and Form aforesaid granted to the said *Sylas* was a reasonable Fine; and that the said *S. Titus*, altho' he had Notice from the said Lords of the Manor aforesaid, at the Court aforesaid held as aforesaid at the 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. entred, and were and yet are thereof seised in their Demesne as of Fee; and because the Cattle aforesaid after the Entry

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.

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 same W. as before in his own proper Right well avows, and as Bailiff to the said Earl well acknowledges 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 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.

Protesting the Fine is unreasonable, pleads a Custom to pay a Year's Value only.

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 should 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

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, 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: Where-

The Lands worth but 28 *l. per Ann.* which he offered to pay.

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.

Joinder in Demurrer.

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 Cognifance 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 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 Cognifance 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

Judgment for the Plaintiff.

Inquiry awarded.

known 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, beside his Costs and Charges by him about his Suit in this Behalf expended, to four Pence, and for those Costs and Charges to 6 *d.* Therefore it is considered, that the said *Sylas* do recover against the said *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

Signed 3 *May* 2 Jac. 2.

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.

An Avowry for Damage-Feasant in the Defendant's Freehold.

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.

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

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 *Hebrew*, and justly,

justly, &c. because they say, that the same Place called *Hebrom* contains, and at the said Time when the 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.

Repl' and Issue on the Property.

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.

AND

Where the Defendant pleads Property as to Part, and *Non cepit* as to the Residue.

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 Flower, Part of the Goods and Chattels aforesaid, he the said *R.* saith, That the 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

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.

Cognisance as Bailiff for a Rent-Charge.

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 46th 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 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

by the Hands of any Tenant, as he hath above alledged: And of this he puts himself upon the Country: And the said A. 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 *G.* 2.

AND the said *Francis* by *Andrew Hays* his Attorney comes and defends the Force and Injury when, &c. and well 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 *Glocester*, 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.

Avowry for Damage-Feasant in his Freehold.

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

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 Cognifance 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 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 Cognifance 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

Joinder in Demurrer.

Judgment for the Plaintiff.

mainder 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 King 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 entred, 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 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

The Entry of the Plaintiff.

Prescription for Common.

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 11th 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.

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 the said *Francis*; and because the Cattle

Repl. That it is his Freehold.

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.

Issue on the Traverse.

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,

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, in Manner and Form as he the said *John Liddiard* hath above alledged: And this he prays may be inquired of by the Country: And the said *Francis* likewise. Therefore the Sheriff is commanded, that he cause to come before the Lord the King in the Octave of St. *Hillary* 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.*

A Plea in Bar to an Avowry, that the Plaintiff tendered to the Defendant sufficient Amends for the Damage-Feasant.

AND the said *A.* pleads, That the said *C.* by Reason of any Thing above alledged, ought not to avow the Taking of the Cattle and Chattels aforesaid in the said Place wherein, *&c.* to be just, (or *ought not to justify*) because he saith, That after the said *C.* had taken the Cattle and Chattels in the Place aforesaid, (to wit, [*on such a Day and Year*] at *W.* aforesaid, he the

the said *A.* tendred to the said *C.* 6*s.* 8*d.* which were sufficient Amends for the Damages done to him in the said Place wherein, &c. which 6*s.* 8*d.* the said *C.* then and there totally refused to accept, and unjustly detained the Cattle and Chattels aforesaid, against Sureties and Pledges, &c. until, &c. as he the said *A.* doth above complain against him; and this he is ready to verify; wherefore, in as much as the said *C.* doth above acknowledge the Taking of the said Cattle and Chattels in the said Place wherein, &c. he the said *A.* prays Judgment and his Damages, occasioned by the Taking and unjustly Detaining of the Cattle and Chattels aforesaid, to be adjudged to him, &c.

Defendant protesting, that the 6 s. 8 d. tendred was not a sufficient Amends, for Plea denies the Tender.

And the said *C.* protesting, that the 6*s.* 8*d.* were not sufficient Amends for the Damages aforesaid done to the said *C.* in the said Place where, &c. for Plea saith, That the said *A.* did not tender to the said *C.* the said 6*s.* 8*d.* for the Damage done in the said Place where, &c. as the said *A.* hath above alledged; and this he is ready to verify; wherefore he prays Judgment, and a Return of the Cattle and Chattels aforesaid, to be adjudged to him, &c.

Plaintiff rejoins, that he did tender the 6 s. 8 d. and Issue: Pl. Gen. 596, 597, 598.

And the said *A.* as before saith, That he did tender to the said *C.* the said 6*s.* 8*d.* for the said Damages done him in the said Place where, &c. as he hath above alledged; and this he prays may be inquired of by the Country.

AND

AND the said *H.* by *J. T.* his Attorney comes and defends the Force and Injury when, &c. and pleads, That in the said County of *D.* there is a Place called *M. D.* and another Place called *M.* in *E.* and another Place called *M. J.* in *E.* aforesaid; without that, that in the said Vill of *K.* there is, or at the said Time when, &c. was any Place called or known 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*

An Avowry, where the Defendant traverseth the Place, and saith, that there are several Places known by the same Name, but that they are differently to be described, they having different Additions.

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* Returno 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 is not within that Statute, and it being only for this particular Purpose, is not traversable.*

7 & 21 H. 8. cap. 19.

Plea.

AND the said *Richard Poole* pleads, that the said *Thomas Longevill* 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,

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.

&c.

&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 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

That those Fences before the Time when, &c. were out of Repair.

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.

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 in as much 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.

Plaintiff prays Judgment, and his Damages.

2 Saund. 289, 290. 2 Keb. 660, 680, 709. 2 Danv. 640. pl. 57. 2 Vent. 50. 3 Lev. 260. Lutw. 1165, 1577, 1578. 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.

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, and the Counsel for the Plaintiff in Error argued, that the Judgment was erroneous, and that the Cattle could not be distrained, because they escaped for the Default of Fences, which upon the Face of the Record ought to have been repaired by the Defendant *Longuevill*: But notwithstanding this the Judgment was affirmed, and 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,

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; for otherwise he would take an Advantage of his own Wrong, which would be inconvenient; and 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 Lessor, whether they are Levant and Couchant or not. *Note*, the Case of *Reynolds* and *Oakley*, reported in 1 *Brownl.* 1[illegible]0. 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

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. 11[illegible].
2 Lev. 22.
5 Mod. 147, 148.

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 in as much 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 *Burfeild.*

Nonsuit in Replevin for not declaring.

Sussex, to wit. THomas *Eldridge* was summoned to answer to *Robert Burfeild* 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 Person hath offered himself the fourth Day against the said *Robert* in the Plea aforesaid; and the same *Robert*, altho' solemnly called, doth not come, but hath made Default: Therefore it is considered, that

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 Burfeild* 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.

Inquiry of Damages in Replevin where Judgment was given for the Defendant on Demurrer.

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 Vallance, two Blankets, one Quilt, one Chest of Drawers, 20 Books, one Looking-glass, one large Brush, one large Trunk, and four Chairs, and unjustly detained them, against Surety and

 Pledges,

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 Vallance, 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

singular the Goods and Chattels aforesaid, 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

Joinder.

 the

the Goods and Chattels aforesaid, together with his Damages, &c. to be adjudged to him, &c. And it was thereupon in such 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.

Judgment for the Defendant.

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, 8 ewes and 6 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 5 Acres of Land with the Appurtenances in the said

An Inquiry of the Arrear of Rent and Value of the Cattle distrained on a Nonsuit in Replevin.

3 Leon. 213.

said Parish of *Ripe*, otherwise *Cocklington* in the County aforesaid, of which said 5 Acres of Land with the Appurtenances the same *Robert R.* before the said Time when, &c. 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 12th 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 5 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 5 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

of *March* in the Year last aforesaid, into the said 5 Acres of Land with the Appurtenances whereof, &c. entred, 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 5 Acres of Land with the Appurtenances being seised in his Demesne 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

Demise of the Queen.

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*, altho' 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 thereof without Day, &c. Therefore we command you, that according to the 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.

Nonsuit.

Inquiry. 17 C. 2. c. 7.

The Execution of this Writ appears in a certain Schedule to this Inquisition annexed.

Sussex,

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.

The Return.

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.

An Inquiry of Damages in Replevin after Judgment on Demurrer.

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 C.* 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* the Second, late King of *England*, &c. was seised of and in the Forest or Chase called *Kings-wood*, 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

Avowry and Cognisance.

the same late King of the one Part, and one *Baynbam 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 *Baynbam* 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 Mangotsfield*, otherwise *Mangersfield Stapleton*, otherwise *Stableton*, *Hembrooke* and *Westanbam* in your County, containing by Estimation 3430 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

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 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,

ſeſſed, 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 entred 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 entred, and were and yet are thereof poſſeſſed; and becauſe the Cattle aforeſaid at the ſaid Time when, &c. were

in

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 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,

Plea.

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 *Cobham* 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 entred, 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 *Cobham* aforesaid, took the Cattle aforesaid of him the said *John*, and unjustly detained them against

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 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

Demurrer.

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

Joinder in Demurrer.

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, 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 con-

Judgment for the Plaintiff.

Z ſidered

ſidered 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 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.

Inquiry.

The

The Manner of entring 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 Hogsheads 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

* 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.

by

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.

1 Saund. 195.

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

quire 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

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 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 Decla-

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 belonged 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* 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

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 Britain*, under your Seal,
and

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 *Retorn' 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

said in the County aforesaid, on the 1st Day of *October* last past, by the Oath of twelve, &c. by Virtue of the Warrant aforesaid 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.

A *Retorn' Habend'* against the Plaintiff, for Default of his Plea in Bar to an Avowry. Thes. Brev. 220.

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, 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.* tho' 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;

ment; and in what Manner you execute this Writ, you make appear to us in three Weeks from the Day of St. *Michael*, wheresoever, &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 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

Second Deliverance.

K. B.

A Writ of Second Deliverance. Thef. Brev. 503.

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 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. Thef. 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. *Hillary*, 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.

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 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

The Entry of an Award of this Writ.

Misericordia.

Sine die.

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.

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.

A Writ of Second Deliverance after Bail taken. Offic. Brev. 348.

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: 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

safe Pledges, that he be before our Justices at *Westminster* on the Octaves of St. *Hillary*, 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*, Knight, 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 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 *J. 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. *Hillary*, 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 re-

turning

turning 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 be 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, 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 expresly 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

The Declaration.

The Avowry.

Default.

Misericordia.

Sine die.

Return of the Cattle.

Second Deliverance.

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 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

Elongata returned by an Inquisition.

The finding of the Jury.

Judgment.

ed 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. *Hillary*, 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 you have his Body before us at the Time aforesaid, wheresoever we shall than be in *England*, to satisfy the said *J. P.* for the Damages aforesaid; and have you there then this Writ. Witness, *&c.*

Withernam.

Ca. Sa.

Thes. Brev. 62.

TABLE

A TABLE OF THE PRINCIPAL MATTERS.

Abatement.

Recordari, *Pone* and *Certiorari* not abateable, for they do not give the Superior Court a Jurisdiction. *Page* 139, 140
If two Persons distrain one Horse, Ox, *&c.* and are obliged to make different Avowries, both shall abate. 201
Difference between Pleas in Abatement in Replevin, and other Actions. 168
Difference between Pleas in Abatement, and in Bar. 169
Property in Defendant or a Stranger, or in Defendant and a Stranger, may be pleaded in Abatement. 170, 171
Cepit in alio loco, may be pleaded in Abatement. 171
Where the Time is material, it may be traversed by the Defendant, and such Plea is in Abatement. 173

Acceptance.

If the Tenant be disseised, and the Lord accept Rent from the Disseisor, it worked an Estoppel between the Lord and Disseisor. *Page* 210
If the Lord avow for Rents or Services he had by Collusion encroached in the Disseisor's Time before the Disseisee re-entered, the Disseisee must plead the special Matter. 210
But cannot plead that the Disseisor was out of the Fee of the Lord. 211

Addition.

If the Defendant be without Addition in the Plaint, he shall have no Addition in the *Recordari*, tho' he may be outlawed, for the Plea is not held on the Writ. 146 *N.*

Aid.

Lessee for Years of very Tenant, in Case the Lord avows on a Stranger, might pray in Aid of his Lessor, and oblige the Lord to avow on him. 213

Alias, Pluries Replevin.

The *Alias* sometimes, the *Pluries* always has the Clause *vel causam nobis significes, &c.* and by this Clause the Sheriff's Power is determined. 81, 82, 87, 88

But

But unless this Clause be inserted, the Sheriff may proceed. Page 88
They are generally all served together. 85
The Reason the *Alias* issues. 82
The *Alias* is returnable in *C. B.* in *B. R.* or in *Canc.* 87
No Day is given the Defendant on the return of them. 83, 89

Appearance.

The Parties may appear in Replevin in any other Term than the Term the Sheriff makes his Return, and why. 83
If the Plaintiff declares of himself without a Rule to force him, the Method to oblige Defendant to appear, is by Attachment. 85, 89
If the Defendant's claim of Property be found against him, he must appear in Person, and cannot by Attorney. 126, 127
Wherever Day is given the Defendant, there cannot be Judgment given against him before Appearance. 138
Where by Plaintiff's Appearance, a Parol held removed, tho' the Taking in one County, and the *Recordari* issued to another. 142 *N.*

Appendix.

Of Precedents of Pleadings in Replevins. 257

Attach-

Attachment.

Attachment is the first Process in Replevin by Plaint. Page 80, 88, 96
Gives the Parties a Day in Court. 90
Is contained in a *Withernam*, when the Replevin is by Writ, but not when by Plaint. 97, 98

Avowry.

Avowry, what. 179
Difference between it and a Justification. 176
At Law, was to be on the very Tenant. 189
Altered by the Statute of 21 *H.* 8. and the Lord need only avow on the Lands holden of him. 180
Except they be granted to the King by the Tenant. 182
By this Act the Lord may pursue the Tenant's Beasts, and take them if once in View, and avow on this Act. 181
Though the Tenant be named, the Avowry may be on the Statute. 181
How to avow on the Statute. 182
In what Cases necessary to lay a Seisin, and in what not. 182
In Avowry the Place laid may be traversed, but cannot be varied without such Traverse. 196
The formal Word when a Man avows in his own Right, is *bene advocat*, and for making Conusance in Right of another, *bene cognovit*. 196

But

But *bene cognovit* hath been held good on Demurrer, where Defendant avowed in his own Right. Page 196
Avowry for Rent in Arrear *tempore captionis*, without saying, *adhuc aretro existit*, good. 197
Baron concluded his Avowry for Arrears of Rent-charge due to the Feme before Coverture, as for an Arrear due to the Husband, and yet held good. 197
If one avows as Administrator, and has no Right as such, but it appears he has a Right *jure proprio*, yet he shall recover. 198
If a Man avows for an Entirety, and hath only a Right to a Moiety, he cannot recover, 199
Therefore Jointenants and Coparceners must sever in Avowry. 199
And if one of them distrains, he must avow in his own Right, and as Bailiff to the other. 199
Tenants in Common must make several Avowries. 201
Where Lessor avows for only Part of an half Year's Rent, he must shew how the Rest has been satisfied. 199
Where Executors avow on the Statute of 32 *H.* 8. for Arrears of Rent in Fee granted to their Testator, they must shew that the Lands continue in the Hands of the Tenant in whose Time it incurred. 200

Two

Two Persons cannot make several Avowries for an Ox, &c. for Judgment cannot be given for both. Page 201
In an Avowry, *bene cognovit captionem averior. præd. in præd' loco,* without saying *tempore quo, &c.* good. 200, 201
Avowry cannot be for a *Heriot* generally, but must be for the best Beast. 201
Defendant cannot avow on a Writ of Recaption, as he may in Replevin. 248

Baron and Feme.

Baron concluded his Avowry for Arrears of Rent-charge due to the Feme before the Coverture as for an Arrear due to the Husband, and yet held good. 197
Feme may avow after the Death of the Husband, as Administratrix for Arrears of a Rent-charge granted to her Husband and her for her Life, because it appears by the Grant that the Avowry is good. 198
Baron alone may bring Replevin for the Goods of his Wife taken whilst she was Sole. 163

Certiorari.

A *Certiorari* is to return the Proceedings of a Court, of a circumscribed Authority, to enable a superior Court to grant Execution. 153
Inferior Court must send the whole Record in the same Plight as when the Writ came. 153

County Court and Court Inferior.

Proceſs of Execution in the County Court and Court Baron by Diſtreſs. *Page* 15
Inferior Court cannot commit for a Contempt out of Court. 15
Inferior Court on a Nonſuit cannot order a Return irreplevisable on the Statute, but at Law might on a Verdict. 241

Day in Court.

In Replevin, *Alias* or *Pluries*, no Day is given the Defendant on the Return of the Writs, as in other Originals. 83, 86
Way to give the Parties Day on the *Pluries* Replevin. 89
Every *Pone* ought to give a Day in Court. 80
And in *Withernam* it is given by the Attachment. 97
The Writ *de proprietate probanda* gives the Parties Day in Court. 126

Damages.

Whilſt the Law Wager was allowed, the Defendant had no Damages, tho' the Tender proved inſufficient. 65
But if the Defendant failed in his Law Wager, the Plaintiff had Damages. 67
Defendant ſhall have Damages in a *Withernam*, on an *Elongata* returned on a Writ *de Retorno Habendo.* 119

Damages

Damages are recoverable on a false Claim of Property. Page 126
Pleas of Justification cover the Defendant from Damages. 177, 178

Declaration.

Declaration in Replevin is little more than a Recital of the Writ. 165
Must charge the Caption at such a Place, and likewise shew the *Locus in quo.* 166
But if the Defendant pleads *Non cepit*, this makes the Count good. 166
Where the Sheriff returns *Replegiari feci*, tho' the Writ be in the *Detinet*, the Count may be in the *Detinuit*; but if there be no Delivery of the Cattle, it must be in the *Detinet.* 167
When a Cause is removed out of the County Court, the Plaintiff must declare *de novo.* 147
Defendant may compel Plaintiff to declare tho' he hath no Day in Court, for otherwise he could have no Return. 84

Demurrer.

Unless the *Locus in quo* be mentioned in the Declaration, the Defendant may demur. 166
But if he doth not, and pleads *Non cepit*, it is cured. 166
If the Writ be in the *Detinet*, and the Count be in the *Detinuit*, Defendant may demur. 167

Detention.

Detention.

Where Arrears of Rent, or Amends in Case of Trespass are tendered before impounding, the Detention is unlawful. Page 62
So where after the Avowant hath Judgment for Return irreplevisable, the Owner tenders all that is due on the Judgment. 63
Formerly the Trial of the Legality of the Detention was by proving *Instanter* a sufficient Tender. 64
But it is now put in Issue, and tried by a Jury. 67
If the Detention be not originally lawful, it cannot become so *ex post facto*. 118
The Detention must be answered to in Pleading as well as the Caption. 175
And yet the Plaintiff may avow for Rent Arrear *tempore Captionis*, without *adhuc aretro existit*. 197

Disclaimer.

Is a Renunciation of the Tenancy upon which, under the Feud, the Lord was entitled to a Restitution of the Land. 203
Tenant cannot disclaim to an Avowry under the Statute, and why. 203
Tenant cannot disclaim where Conusee of a Fine of a Seigniory brings a *per quæ servitia*, to enforce an Attornment. 204

Tenant disclaiming must be a Person *Capax*, as an Infant cannot be. *Page* 205
Nor a Person seised *jure alieno*, as an Abbot. 205
Mesne may disclaim, and the Tenant holds of the Lord. 205
Tenant in a *Formedon* may. 206
Difference betwixt Disclaimer and Non-tenure. 206
Demandant may aver on Tenant in Assize, that he was Tenant, to have Damages. 206

Discontinuance.

Plaint may be removed after a Discontinuance. 146
If Defendant plead in Abatement of the Writ, and make Conusance as he ought, if the Plaintiff traverse the Conusance, it is a Discontinuance. 172

Disseisin.

Disseisee had a Power to compel the Lord to avow upon him, after his Acceptance of the Rent from the Disseisor. 210
But after such Acceptance, if the Disseisee died without Heirs, the Lord could not enter on the Tenancy for the Escheat. 210
If the Lord accepts greater Rent from the Disseisor than the Disseisee was obliged to pay, and he afterwards avows on the Disseisee, Disseisee may plead the special Matter. 211
So may his Lessee. 212

Distress.

Distress, what. *Page* 1
Given in Lieu of the Forfeiture, for not performing the feudal Services reserved by those Tenures. 1
Became grievous and oppressive. 3
Redressed by *Stat. Marlb. c.* -- and turned only to Pledges. 5, 6
No Distress should be excessive. 47, 48
He that distrains need not give Notice of his taking the Distress. 48
Unless in Case of dead Chattels, and *Q.* 48
A Distress ought not to be used or bound. 50
Landlord must remove the Goods distrained, or he is a Trespasser. 53
Trespass does not lie for taking an excessive Distress. 54
One joint Distress cannot be for two Parcels of Land distinctly let. 54
Impounding Distress in another County does not make a Trespasser. 54

In what Cases Distress lies, and in what not.

It lies for Services arising from the Tenure, as Homage, Fealty, *&c.* 7
For Relief proper, and for Relief improper by Prescription. 8
For Heriot Service. 10
But not for Heriot Custom. 11

For Fines and Amerciaments in a Court-Leet. *Page* 13
But not for Amerciaments in a Court-Baron. 14
Unless by Prescription, or where the Manor belongs to the King, and the Reason thereof. 21, 22
Lies for Rent in the Nature of prerogative Process, to take without Summons. 28
For Toll in Fairs or Markets, as a Recompence for the Damage done the Soil. 29
For Amerciaments on a Township, and the same assessed to be raised by a Day certain, or Distress. 31
For Penalty for Breach of a By-Law, if provided by the By-Law. 31
For *Damage Feasant.* 33

What Things are distrainable, and what cannot be distrained for Rent.

Money cannot be distrained if loose, otherwise if in a Bag. 34
Nor loose Shocks of Corn before the Stat. 35
Yet Corn and Hay in a Cart might. 35
Utensils of one's Trade, and Beasts of the Plough cannot for Rent, if other Things can be found; *aliter* for *Damage Feasant.* 36, 37
Goods sent to a Tradesman cannot. 37

If Beasts escape into another's Land, they may for Rent, or any accidental Services. *Page* 38
But if they come in for want of Fences in the Lessee, *Quære* if he can distrain *Damage Feasant*; the Landlord may for Rent. 39
So where a Stranger grazes for a Night, by Lessor's Consent, and Licence of the Lessee, yet the Lessor may distrain for Rent in Arrear. 40
But Cattle in a publick Inn are not distrainable. 41
Grantee of a Rent-charge cannot distrain the Beasts of a Stranger until they are *Levant* and *Couchant*. 41
Sheriff may distrain a Stranger's Beasts on my Land for Issues forfeited by me in the King's Court. 42
Things fixed to the Freehold, or Part of the Freehold, cannot be distrained. 42
A Milstone cannot be distrained, tho' it be removed to be picked. 43
Nor Things in the manual Occupation of another, as an Ax in the Hands of a Carpenter. 43
Nor Goods in the Custody of the Law, as Goods taken *Damage Feasant*, cannot be taken for Rent. 44

At what Time, and in what Place a Distress may or may not be taken.

No private Person can distrain Beasts off his own Land. *Page* 45
Or in the Highway. 45
Nor Things removed or gone off the Land in his View, until the Stat. 46
Nor in the Night, unless for *Damage Feasant.* 46, 47

Double.

If the Defendant in Replevin plead in Abatement of the Writ and make Conusance, if the Plaintiff should join Issue on the Plea, and traverse the Conusance also, it is double. 172

Enquiry, and Writ of Enquiry.

Where necessary to ascertain Damages. 224
Not where there is a Verdict. 224, 227
Or if the Parties Consent that the Court shall settle them. 227

Entry.

A Disclaimer gives the Demandant a Right of Entry. 207
Where Plea of Non-tenure does so. 207
In a *Præcipe* against two, if one makes Default after Default, and the other disclaims, the Lord may enter. 207

Estoppel.

If the Lord collude with the Disseisor, and accept Rent from him, he is estopped, in Case Disseisee dies without Heirs, to enter for the Escheat, and the Disseisor was estopped to say, he was not his Tenant. *Page* 210

Aliter if Disseisor had died seised, and the Lord had accepted Rent from the Heir, for the Estoppel remains, the Disseisee's Entry being tolled. 213, 214

If the Lord get more Rent from Disseisor than the Disseisee is obliged to pay, and after avows on Disseisee for the Rent he encroached, Disseisee may plead the special Matter, and is not estopped. 210, 211

Evidence.

If Tender be pleaded to the Lord, and the Evidence is a Tender to the Bailiff in the Lord's Presence, this won't maintain the Plea. 63

But if Tender be pleaded to the Lord, and a Distress proved to be taken by a Bailiff in the Lord's Absence, who is his usual Receiver, *Quære* if not sufficient. 63

On *Non cepit* for a Sow and Pigs, Defendant can't justify that the Sow farrowed after Caption. 163

In Trespass the Defendant may in Evidence shew a Property in himself on the General Issue, but not in Replevin. *Page* 174.

Execution.

Distress taken for an Amerciament in a Court Leet, is in Nature of an Execution. 15
Execution in a Court Baron and County Court, only by Distress. 25
But a Writ *de Executione Judicii* lies on such Judgments. 26

Fines, Amerciaments.

Difference between Fines and Amerciaments. 13, 17
What Court hath Power to impose a Fine. 15
A Fine creates a Debt, which may be levied by Distress. 15
At Law no Fine to the King, but where the Sheriff returned an *Elongata*, or Claim of Property, and that only for the Contempt of the Process. 90
Sheriff may fine the Defendant that won't deliver his Distress. 99
When Defendant comes in to gage Deliverance after a *Withernam* in mesne Process he is to be fined. 121
So for a false Claim of Property. 126, 127
Or on Conviction on a Writ of Recaption. 247

Forfei-

Forfeiture.

Forfeiture for Non-performance of the feudal Service turned into Diſtreſs. *Page* 3
If the Defendant's Goods are attached to compel an Appearance in the Court Baron, or County Court, and he make Default, the Goods are forfeited, and why, 25
Aliter in Execution on a *Levari*, before the Writ *de Executione Judicii.* 27

Gage Deliverance.

If the Defendant appears at the *Pluries* returnable, he may gage Deliverance, and the *Withernam* ſhall not go. 107
The Defendant ſhould gage Deliverance of what was levied of the Plaintiff by *Withernam*, on his being nonſuited. 110, 111
If *Withernam* is awarded, and afterwards the Defendant avows the Taking as his proper Goods, or denies the Taking, the Plaintiff ſhall gage Deliverance of the *Withernam.* 115

Habeas Corpus.

Writ of Liberty. 152
The Body muſt be ſent to the ſuperior Court, and the Cauſe of Impriſonment. 153

Heriot.

What *Heriot* is, and what it was formerly. Page 10, 11
Heriot Service, a Reservation on the Tenure by the Lord. 11
Heriot Custom, a Grant of the Tenant to the Lord. 11, 12
One cannot avow for a *Heriot* generally, but for the best Beast. 201

Hors de son Fee.

The Plea of *Hors de son Fee* is, where the Tenant takes upon him the State of the Land, and acknowledges to hold by such Services, if he be within the Seigniory of the Lord. 208
Cannot be pleaded to a Writ of *Mortdauncestor* for the Services. 209
May be pleaded by a Stranger, if the Lord avows upon him. 209
And a Stranger can plead nothing but *Hors de son Fee*. 214

Issue General.

In Replevin the General Issue is *Non cepit*. 174
The Caption and Detention only in Issue by that Plea, and not the Property. 174
Non est culpabilis de captione prædictâ, no Plea, because it does not answer the Detention. 175

Judgment.

Judgment.

For the Plaintiff is only for Damages. *Page* 223

For the Defendant is that he ſhall have Return irreplegiable of the Cattle. 226

Judgment for a Return at Common Law, and a Writ of Enquiry, according to the *Stat.* of 17 *Car.* 2, *c.* 7. held good. 246

Juſtification.

Difference between an Avowry and a Juſtification. 176

Two Sorts, where they diſaffirm the Property in the Plaintiff. 176

And where they affirm the Plaintiff's Property, but cover the Defendant from Damages. 177

King.

The King may diſtrain for an Amerciament in his Manor. 22

Replevin lies not againſt him, and the Reaſon thereof. 162

Leet.

Leet derived out of the Torn of the Sheriff. 14

Limitations.

The Lord in his Avowry need not alledge a Seiſin within 40 Years, and why. 184

But

But in an Avowry on a Rent reserved on a Gift in Tail, &c. if the Seisin of the Rent be within the Statute of Limitation, the Statute may be pleaded in Bar. Page 186
So Grantee of a Rent-charge may plead the Statute, unless Seisin be within the Time thereby prescribed. 187
When the Tenant pleads this Statute, he should acknowledge the Tenure, that the Lord may have a Writ of Customs. 221

Manor.

If a Distress was taken in a Manor, at Law the Sheriff could not deliver the Distress without a *Non omittas*. 77
But now by the Statute he may, if he issues a Warrant to the Bailiff, who neglects or refuses to answer. 77
If a Distress be taken in the County, and impounded in a Liberty, he may without a previous Warrant. 77
A Cause cannot be removed out of the Lord's Court by *Pone* or *Recordare*, without shewing Cause. 135
The Form of such Cause. 135, 136

Nonsuit.

After a Nonsuit at Law, Plaintiff might replevy the same Distress *in infinitum*. 72
This remedied by Statute, which gave the Writ of second Deliverance. 72
If the Defendant comes into Court the Day the Sheriff is to return the Writ, he can't nonsuit

nonsuit the Plaintiff that Day, because the Plaintiff has given no Day to the Defendant in Court. *Page* 90
But there is a special Writ to summon the Plaintiff to come in, and if he doth not he shall be nonsuited. 91
Where a *Pone* doth not contain a Summons, as it ought, such special Writ must be taken out before the Plaintiff is demandable. 91
But if taken out regularly, the Plaintiff is demandable on Peril of a Nonsuit. 137
Plaintiff is always demandable where a Day is given the Defendant. 138

Notice.

He that distrains living Chattels, need to give Notice of the Caption, because there is a publick Pound appointed by Law to keep the Distress. 48
Aliter of dead Chattels——*Qu.* 48

Pleas, Pleadings, see Traverse.

Pleadings in Replevins. 257
Hors de son Fee at Law pleaded to an Avowry, prevented a Trial because the Freehold in question. 70
This redressed by the Statute that gave a *Pone* to the Lord to remove the Cause without taking away the Pledges. 70
Defendant can't plead what is contrary to the Sheriff's Return, as *Non Elongata*, or that the Beasts died in Pound. 121

Dif-

Difference between Pleas in Abatement, in Replevin, and other Actions. *Page* 168
How Pleas in Abatement differ from those in Bar. 169
Defendant may plead Property in himself in Abatement, or in Bar. 170
He may plead Property in a Stranger in Abatement. 170
Or in Plaintiff and a Stranger. 170
Or *Cepit in alio loco.* 171
So where he traverses the Time of the Caption, and by that makes the Time material. 172
Non Culpabilis de Captione not sufficient, for the Detention must be answered. 175
Yet an Avowry for Rent in Arrear *tempore Captionis*, is good. 197
Difference between a Justification and an Avowry. 176
And between Pleas in Justification, that affirm or disaffirm the Plaintiff's Property. 176

Pledges.

At Law were only *de prosequendo* to answer Amerciaments *pro falso clamore*, but by the Statute are required *de averiis Retornandis.* 71, 72, 75, 78
Pledges *de Retorno Habendo* may be by Bond even of the Plaintiff himself. 75
But not Money or other Cattle pawned, and why. 76
Tho' the Statute says Pledges in the Plural Number, yet if one Pledge be sufficient to answer, it is enough. 76

No

No Pledges are required in a Writ of Recaption. *Page* 250
If Defendant don't appear on the Summons in Replevin, he ought to give Pledges. 26
Where *Retorno Habendo* issues against the Pledges Beasts. 243

Pone.

Given by the Statute to the Avowant, and the Pledges not destroyed. 70
Where Replevin is served without *Alias* or *Pluries*, the Sheriff may hold Plea himself; but either of the Parties may remove it by *Pone.* 80
Form of the Writ. 130
Pone contains a Summons in it, by which Day is given to the other Party in the Court above. 132
If the *Pone* doth not contain such Summons it is bad, yet the Court will proceed on the bad Writ removed. 91
Difference between *Pone* and *Recordare.* 129, 130
Plaintiff on a *Pone* need not shew Cause for removing a Cause out of the County Court, but the Defendant must. 132
Aliter out of the Court of the Lord. 143
The several Causes of Removal. 126, 132, 133, 135, 136
Capias lies on Default on a *Pone.* 137

Pound.

What. 49

Overt

Overt or Covert. Page 49
Living Chattels diftrained fhould be put regularly into a Pound Overt. 50
Dead Chattels in a Pound Covert. 51
At Law a Man might impound his Diftrefs any where. 50
But Inconveniencies attending this, it was altered by Statute. 50
Impounding *loco alterius*, who may do fo. 158

Prefcription.

Where the Lord is entitled to Relief by Prefcription, he muft alfo fhew a prefcriptible Remedy to take the Diftrefs. 9
So of Amerciaments. 21
So of Fines impofed by a Leet, where its Jurifdiction is by Cuftom, and *pro certo letæ*. 23

Procefs.

Attachment or Diftrefs of the Defendant's Goods, is the laft and great Procefs to make the Defendant appear. 24
If Defendant makes Default the Goods are forfeited. 24, 25
Execution in the County Court or Court Baron, is only by Diftrefs. 25
If Defendant does not appear on the Summons in the Lord's Court, he ought to give Pledges. 26
If he cannot find Pledges, he is to be attached *per vadios*. 27

In a *Levari* for a Debt recovered in the Lord's Court, the Goods are not forfeited. *Page* 27
First Process in Replevin at Common Law, was only Distress infinite. 90
But now is by Attachment. 80, 85, 89
Whether the Suit be by Writ or Plaint, the Sheriff should attach the Defendant by his Goods to appear at his next Court. 86, 87
If the Plaintiff comes into Court on the *Pluries*, the Defendant may be brought into Court by Attachment. *89
But the Defendant can't demand the Plaintiff, but must have a special Writ. 91
A *Capias* and Process of Outlawry given against the Defendant in Replevin by the Statute. 91, 113
Process *in Withernam* is by Attachment. 97
A *Capias* and Process of Outlawry lies *in Withernam* at Common Law. 107, 112, 121, 122
And in the Writ *de proprietate probanda*. 112
Lies against the Plaintiff on a *Retorno Habendo*. 113
Withernam is sometimes an original Process, sometimes a judicial one, in the first Case it is only a Pain *quousque* the Defendant gages Deliverance, in the last it changes the Property. 109, 110
Capias lies on a Default made by the Defendant, on a *Pone* brought by the Plaintiff in a Replevin by Plaint, but not on a *Justities*. 146 *N.*

Property.

Property.

No Property to be changed without the King's Writ, except for Default of Appearance on an Attachment in a Court Baron or County Court. *Page* 24
Not by a *Levari* in an inferior Court, without a Writ *de executione Judicii.* 26, 27
Where changed by the *Withernam*, and where not. 110
How to be pleaded by the Defendant. 170

Proprietate probanda.

How the Proceedings are on a Plaint when Property is claim'd. 124, 125
How on original Writ. 125
If the Property be found for the Plaintiff, the Defendant may remove it by *Recordari.* 125
What Remedy the Plaintiff hath if the Inqueſt or Verdict be for the Defendant. 125, 127
If the Property be found for the Defendant on the Writ, there is an end of the Replevin. 127
Bailiff can't make claim of Property on a Plaint. 125
Aliter of a Bailiff above. 128, 129

Recaption.

Recaption, what. 247
Lies where the firſt Caption was juſt. 248
Lies not in Caſe of *Damage Feaſant.* 248
The Deſign of the Writ is to prevent two

Diſtreſſes for the ſame Rent or Duty. *Page* 248
Defendant can't avow on this Writ as in Replevin, and why, 248
But muſt juſtify as he may in Treſpaſs. 249
No Pledges in this Writ. 250
Not neceſſary the identical Cattle be taken, if the Cattle be the ſame Perſon's, and taken for the Duty by the ſame Perſon, or by his Direction. 250
If the Lord diſtrains the Beaſts of his Tenant for Rent, and afterwards diſtrains the Beaſts of a Stranger for the ſame Rent, there can be no Recaption. 251
If the Lord diſtrains his Tenant, and pending that Plea the Lord commands his Servant to diſtrain again, the Tenant ſhall have Recaption. 251
So if the Lord had by any act ſubſequent agreed to the ſecond Diſtreſs. 252
But if there be no ſuch precedent Command or ſubſequent Agreement, the Tenant is left to his Action of Treſpaſs againſt the Servant. 252
If *A.* and *B.* are once diſtrained, and a ſecond Diſtreſs is taken for the ſame Duty againſt *A.* alone, a Recaption lies. 253
But if the firſt Diſtreſs had been againſt *A.* the Tenant alone, and the ſecond againſt *A.* and *B.* a Stranger, *Quære.* 253
If a Diſtreſs be taken for Rent, and a Replevin, and pending the Suit another Gale becomes due, and Diſtreſs taken for that Gale, no Recaption lies. 254

Unless the Tenant plead *Hors de son Fee* to the first Gale. *Page* 254
It lies before Avowry. 255

Recordari.

Form of the Writ of *Recordari.* 136
Difference between *Pone* and *Recordari.* 129
Replevin by Writ or Plaint removed by *Recordari.* 129, 130
Plaintiff may remove a Cause without shewing Cause out of County Court, Defendant cannot 132, 142, 143
But neither Plaintiff nor Defendant can remove out of the Lord's Court without Cause. 135, 144, 145
Recordari can't remove a Record out of a Court of Record, it ought to be by *Habeas Corpus* or *Certiorari*; but if they obey the Writ which they needed not, they ought not to proceed after. 151
The superior Courts have no Authority to proceed on a Record in Replevin removed by *Recordari,* without a Writ *Quod coram vobis, &c.* *Aliter* if by *Certiorari.* 153, 154
Where Defendant sued *Recordari* in a different County from the Place of the Caption, yet the Plaint was removed. 142 *N.*

Relief.

Two Sorts, proper and improper, 8

Replevin.

Replevin, what. *Page* 58
At Common Law a justicial Writ. 60
Two Things complained of in it, *viz.* the Taking and Detention. 61
Must principally consider whether the Caption be just or not. 61, 62
The Replevin by Plaint introduced by the Statute of *Marlbr.* *c.* 21. 68, 69
Where Freehold came in question, the County Court could not proceed; but this was remedied by *West.* 2. *c.* 2. which gave the Defendant a *Pone.* 70
Must be executed by the Sheriff even in his own Case. 165
Where in Replevin the Place is material. 256

For whom Replevin lies, and in what Cases.

For Goods I have an absolute Property in. 157
If the Property be only possessory or qualified, but then the Replevin must be special. 158
If *A.* takes my Goods by Command of *B.* Replevin lies against both. 158
If my Lessor distrains my Tenant, I may put my Beasts in Pound instead of my Tenant's, and replevy them as if taken at first. 158
Several cannot join in Replevin where the Property is several. 159

It lies for Beasts *Feræ Naturæ*, if reclaimed and taken out of my Possession, or if they have *Animum revertendi*. Page 160
Lies not for Goods taken in Execution by a superior Court; *aliter* if by an inferior Court. 161
Lies for Executors for the Goods of their Testator. 163
For Husband alone for the Goods of his Wife taken whilst she was Sole. 163
Lies for Sow and Pigs, tho' the Pigs farrowed after the Sow was taken *Damage Feasant*. 163, 164
Lies not for Charters relating to the Inheritance, for they descend to the Heir. 164
Nor for Goods taken in foreign Parts. 164
If Beasts are taken in one County; and carried into another, it lies in either County. 165
Lies not against the King where he is a Party. 162
No Replevin of Goods taken upon a Conviction. 256

Rescue.

If a Distress be taken without Cause, the Owner may rescue them before they are impounded, not after. 53
But a Stranger cannot. 53
After the Cattle are impounded without a Cause, if the Owner finds the Pound unlock'd, he may rescue. 53

Retorno Habendo.

In Pleas in Abatement, Defendant muſt make Conuſance for a Return, or he leaves a Right in the Plaintiff to retain the Diſtreſs. *Page* 170

Wherever the Defendant avows and hath Judgment in his Favour, he ſhall have a Return. 228

Wherever the Defendant pleads Property in himſelf or a Stranger, and it is found, he ſhall have a Return irreplevifable. 229, 238, 239

But if he pleads Property in the Plaintiff and a Stranger, he ſhall have no Return. 238, 239

So on Defendant's traverſing the *Locus in quo*, he ſhall have no Return tho' the Iſſue be found for him, without a Conuſance or Avowry made. 230

If the Lord refuſe a Tender of the Rent before the Diſtreſs impounded, he ſhall not have a Return. 231

If Plaintiff be nonſuited before he counts, Defendant ſhall have Return. 231

But if he be nonſuit after counting, Defendant muſt avow to have a Return. 232

Upon Nonſuit of the Plaintiff, the Return was never irreplevifable at Common Law. 232

But this being inconvenient was remedied by the *Stat.* of *Weſt.* 2. *c.* 2. which gives

gives the Writ of ſecond Deliverance. *Page* 233
If the Defendant in ſecond Deliverance hath Judgment, whether by Nonſuit of the Plaintiff, by Abatement of the Writ, or by Diſcontinuance of the Plea, the Defendant ſhall have Return irreplevi-ſable. 236
If the Writ abate by Miſtake of the Officer, Defendant ſhall not have Return. 240.
But it is otherwiſe if the Writ abate by the Miſinformation of the Plaintiff, for there ſhall be a Return, but not irreplevi-viſable. 240
If the Plaintiff confeſſeth the Defendant's Plea to the Writ, Defendant ſhall have Return, but not irreplevi-ſable. 240
Where *Retorno Habendo* ſhall go againſt Pledges Cattle. 242

Scire Facias.

Scire Facias the proper Proceſs to bring in the Pledges in Replevin. 76, 243
Need not be returned to entitle the Party to a *Capias in Withernam.* 116, 122
If on the *Retorno Habendo* againſt the Pledges Cattle, the Sheriff return *Nihil*, a *Scire Facias* iſſues *quod Vicecomes ipſe reddat ei tot averia, &c.* 243, 244

Second

Second Deliverance.

Given by the *Stat.* of *Westm.* 2. *c.* 2. *Page* 233
A Writ *Judicial.* 234
The Form of it. 235
Second Deliverance is a *Superſedeas* to the *Retorno Habendo*, if it come before the Return made; if after, it is in the Nature of a new Replevin. 237
Where a *Withernam* iſſues on a *Retorno Habendo* on a Nonſuit, the ſecond Deliverance muſt not be ſued of the Beaſts delivered in *Withernam*, but of the Beaſts firſt taken. 120, 237, 238
Second Deliverance is not grantable in Caſe of a Nonſuit for Rent after Avowry ſince the Statute of 17 *Car.* 2. 247

Seiſin.

Seiſin neceſſary to be laid in Avowry at Law, and on the Statute. 183
How ſuch Seiſin differs from the Seiſin laid in real Actions. 184
Defendant may deny the Seiſin which traverſes the Tenure laid in the Avowry. 185
Seiſin laid in Defendant, or thoſe *que Eſtate* he hath in an Avowry for Rent on a Gift in Tail. 185
In whom Grantee of a Rent-charge ſhall lay the Seiſin. 187, 202

If Leſſee for Years diſtrains the Beaſts of a Stranger, he muſt lay the Seiſin in his Leſſor. *Page* 188

If a Termor avows for Rent on his under Tenant by Deed indented, he need not lay a Seiſin. 188, 189

Aliter if by Deed Poll or Parol, for then a Seiſin muſt be laid. 188, 189

If he diſtrains Cattle *Damage Feaſant*, and the Owner brings Treſpaſs, he muſt lay a Seiſin. 190

Avowant for *Damage Feaſant*, lays the *locus in quo* to be his *ſolum & liberum Tenementum*, he need not lay a Seiſin. 191

Aliter of the Tenant who poſſeſſes it *jure alieno*. 192

If the Termor brings an Action for the Treſpaſs, in that Caſe his Poſſeſſion is ſufficient without laying a Seiſin. 193

Tenant in Fee, in an Action of Debt againſt his Leſſee for Years, need not lay a Seiſin. 194

Aliter if it is not on his own Demiſe, but as Aſſignee of the Reverſion. 195

The Statute of 9 *Geo.* 2. *c.* 13. and 25 *Geo.* 2. *c.* 13. relating to this Matter, of laying a Seiſin in Fee, and deducing the Title. 189

Services.

Services by the Feud, of two Sorts, Military or Miniſterial. 2

Non-

Non-performance incurred a Forfeiture of the Feud. *Page* 2
If the Lord encroaches on the Services paid by the Tenant, how the Tenant may avoid them in a Plea to the Lord's Avowry. 218
How he may avoid such Incroachment by Writ or by Plaint. 218, 219

Sheriff.

May command his Bailiff to replevy Beasts out of his Court. 69
He ought to take Pledges *de prosequendo & de Retorno Habendo*, whether the Replevin be by Writ or by Plaint. 74
On taking Pledges he ought to make Deliverance. 76
If a Distress be taken out of a Liberty but impounded in it, he may make Deliverance without a previous Warrant. 77
May break open Houses to execute a Replevin if denied Entrance. 78
Where the Suit is by Writ, and the Sheriff executes the Replevin before the *Alias & Pluries* come to him, he may hold Plea himself. 80
Unless the *Alias* Replevin contain the Clause *vel Causam nobis significes*, it is *Vicontiel*, and the Sheriff may proceed. 81
The *Pluries* Replevin always determines the Sheriff's Power. 81

If the Plaintiff be Nonsuit, and a *Retorno Habendo* awarded, and the Sheriff levies Goods on a *Withernam*, and won't deliver them to the Defendant; an Action lies. *Page* 108 *N.*
Cannot return to a *Pone* that the Cause is not true. 133 *N.*
Can execute a Replevin though in his own Case, because the Suitors are Judges. 165
If on a *Retorno Habendo* against the Pledges Cattle be return *Nil*, he is answerable himself by the Statute. 243

Tender.

Must be made before impounding, or the Detention not unlawful. 62
Must be pleaded to the Lord himself, and not to the Bailiff. 63
Defendant was formerly obliged to prove a sufficient Tender *Instanter.* 64, 67
And on such Proof the Lord might wage his Law. 65
But this is now changed into a Trial by a Jury. 67
Though there be Judgment of a Return irreplevisable, yet if the Plaintiff tender the Rent for which the Distress was taken, the Defendant ought to restore the Beasts. 236

T

Traverse.

Traverse.

The Cause assigned in a *Pone* or *Recordari* for Removal is not traversable. *Page* 133. 143 *N.*
Where the Defendant in Replevin pleads in Abatement of the Writ, and makes Conusance, the Conusance is not traversable. 171
In a Justification for *Damage Feasant*, the Plaintiff may traverse the Defendant's Title. 172
If Avowant should lay the Taking in another Place than the Plaintiff hath done, without traversing the Place in the Declaration, it would be bad. 195, 196
Where the Tenure is traversable. 215
If the Tenure be by Rent, the *Quantum* of the Rent is not traversable. 216
The whole Tenure is not traversable. 217
The Seisin of the *Quantum* of the Services is traversable where they were gained by Encroachment or Coertion. 217
Not where obtained by the voluntary Payment of the Tenant. 218
Except where obtained by the voluntary Payment of one who could not charge the Lands, as Tenant in Tail, a Bishop, &c. 220
Or where the very Tenant hath the Deed whereby they were reserved in his Power. 221

On Avowry the Tenant ſhall not plead *ne unques ſeiſie de Services* generally, for this amounts to a Traverſe of the Tenure. *Page* 222
No Seiſin of Services traverſable but of ſuch as are laid in the Avowry. 222
Or thoſe of a higher Nature which are included. 223

Wager of Law.

Wherever in former Times a Tender was proved, the Lord might wage his Law. 65

Withernam.

Part of the *Lex talionis.* 92
Twofold in the County Court and Courts above. 92
In the County Court if the Bailiff return *Elongata*, the *Withernam* did not iſſue before the Sheriff held an Inqueſt. 93
In the Courts above it iſſues on the Sheriff's Return. 93
Could not iſſue on a Suggeſtion. 95 *N.*
It iſſues out of the Court where the *Pluries* is returnable, and not out of Chancery. 95
Therefore if *Elongata* be returned on the *Alias* into Chancery, it iſſues out of Chancery, and is returnable in *B. R.* or *C. B.* 95
Form of *Withernam.* 95, 96

Not

Not *Vicontiel*, therefore an Attachment in the Writ. *Page* 97
Unless it be commenced by Plaint. 98
Sheriff's *Capias* in *Withernam* must be in Writing. 99
It recites the Cause the Sheriff returns why he cannot replevy. 101
Where there shall be a *Non omittas* in the Writ. 101
If the Sheriff return *Nil*, *&c.* *Capias* and *Exigent* goes. 106, 112
If the Defendant appear on the *Pluries*, he may gage Deliverance, and the *Withernam* shall not go. 107
So if he plead *Non cepit*, or that the Cattle are dead in Default of the Plaintiff. 114
Or Property in himself. 115
Or makes Conusance as Bailiff and prays in Aid. 115
But if he does not gage Deliverance, a *Withernam* goes, or a *Capias* for the Contempt. 106
If the Sheriff levies Goods of the Plaintiff in *Withernam*, after a Return awarded on a Nonsuit, he should deliver them to the Defendant, or an Action lies. 107 *N.*
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. 107, 108
Withernam is either an original or a judicial Writ; in the first Case it is only a Penalty *quousque* Defendant gages Deliverance,

Law-Books lately published.

BUNBURY's Reports of Cases in the Court of Exchequer, from the Beginning of K. *George* the First, until the fourteenth Year of the Reign of K. *George* the Second, with the Approbation of the Lord Chancellor and all the Judges.

ANDREWS's Reports of Cases in the Court of King's Bench, in the Reign of his present Majesty K. *George* the Second.

Precedents in Chancery: Being Cases in the High Court of Chancery in the Reign of K. *Will.* 3. Q. *Anne*, and K. *George* the First.

LUCAS's Cases in Law and Equity during the Time Lord *Macclesfield* presided in the Courts of King's Bench and Chancery.

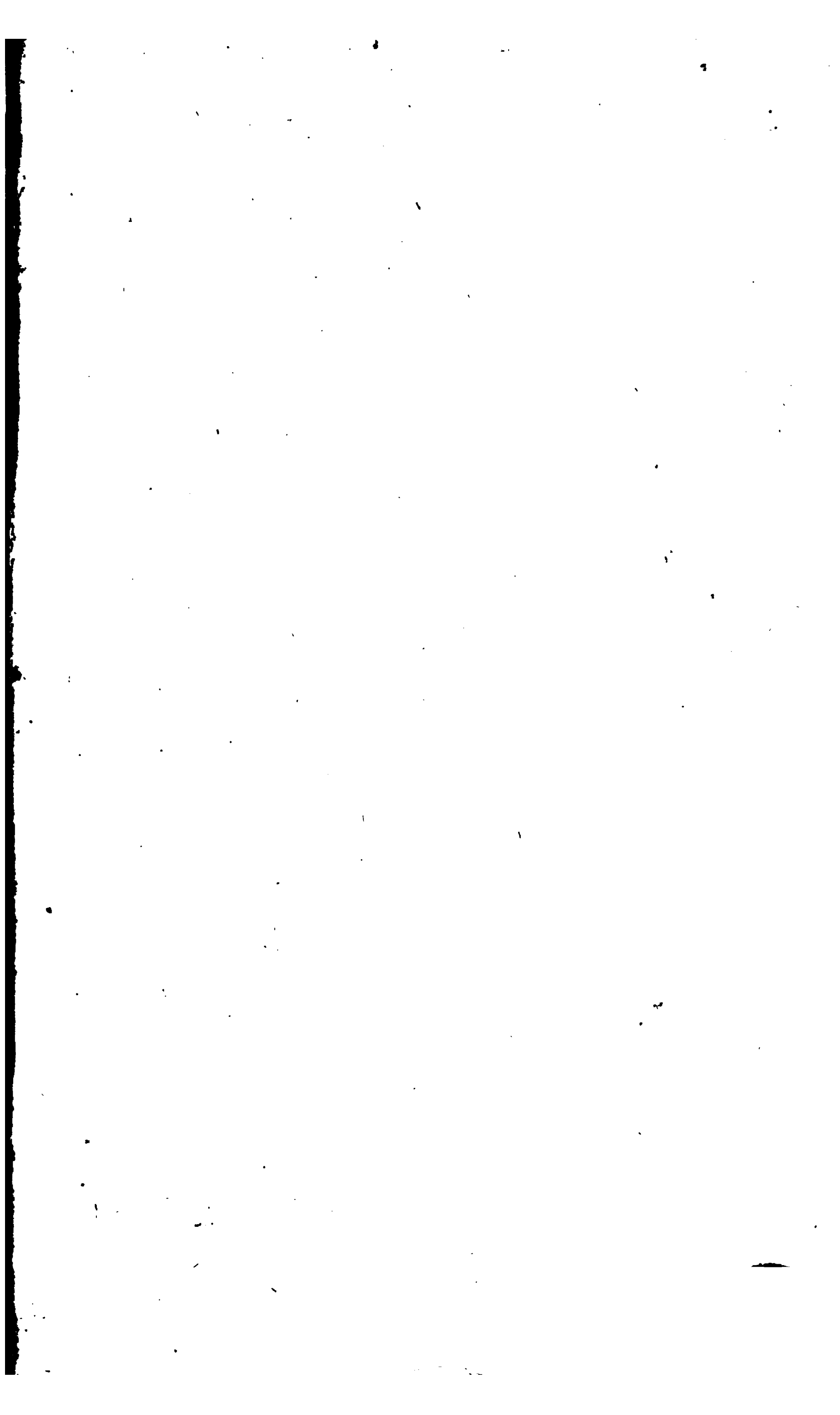
This is cited in Mr. Viner's Abridgment *as* 10*th* Modern Report.

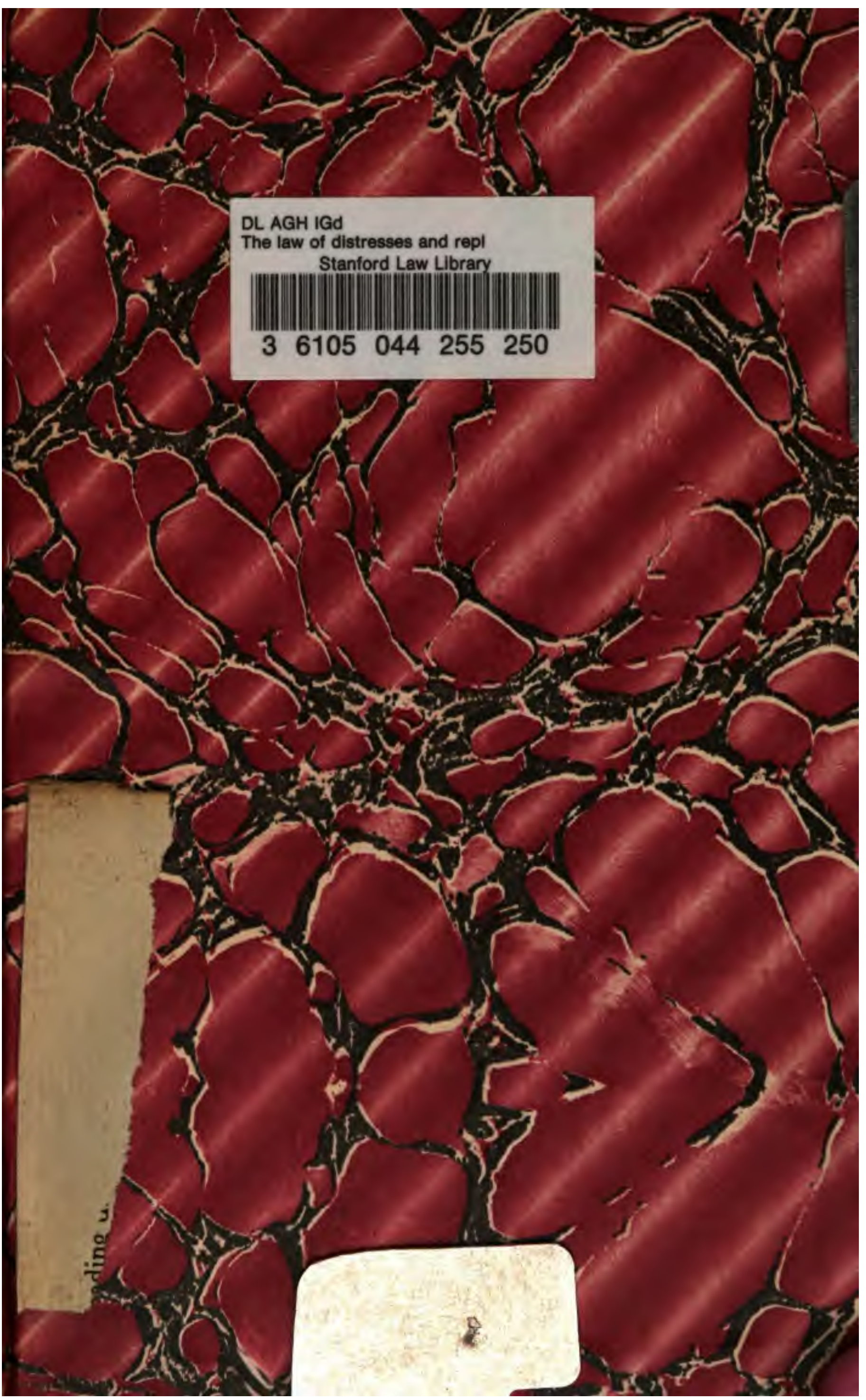
YELVERTON's Reports of some special Cases in the King's Bench, from the 44 *Eliz.* to the 10 *James* the First.

MOSELY's Reports of Cases in the High Court of Chancery during the Time of the late Lord Chancellor *King*.

Acts of Parliament and Abstracts of Acts of Parliament for several Years past, on superfine Paper.

Appeals to the House of Lords, with the Manuscript Indorsements and private Acts of Parliament for settling Estates of the Nobility, &c.




DL AGH IGd
The law of distresses and repl
Stanford Law Library
3 6105 044 255 250