BOOK IV.

OF PLEAS RELATING TO ADVOWSONS AND THE PROPERTY OF CHURCHES; AND OF ATTAINTS.

CHAPTER I.

Of the Assise of Last Presentation.

I.

An assise of last presentation is the recognisance of twelve jurors, which tries the right of possession to the advowson of any church, that is, who last presented in his own name in time of peace. *This may sometimes be pleaded before our Justices Itinerant, sometimes in the Bench at Westminster by the ordinance of the Great Charter, and sometimes for the dispatch of justice before our Justices especially authorized for that purpose. Sometimes the assise is begun in one place and is ended in another; and sometimes it is begun out of the county, and the recogniance or jury is taken in the county; and sometimes the parties are adjourned to hear their judgment, and sometimes not adjourned.

2. Therefore where any person has presented to a vacant church to which he or his ancestors have presented in time of peace, inasmuch as every heir ought to enjoy the seisin which his ancestor had, unless the

disturbor or deforceor can show plain reasons to the contrary, which contest is determinable by this assise of last presentation, we must first see to whom it belongs to bring this assise. For it belongs only to him who has, once or oftener, presented in his own name, or to his heir by reason of his succeeding to the inheritance and the right of an ancestor who died seised of the advowson.

3. What is said of one heir may be understood of several who are parceners and as one heir. But if several parceners *recover the advowson of any church by this assise, and the church is void, no parcener can present without the other by any prerogative of seniority, or for any other reason. By this assise shall never lie for those who hold in common by feoffment and not by descent, before they have been seised of the presentation, since two persons can never recover by this assise who make their demand of the seisin of him or of them whose heirs they are not, any more than in pleas of right. Neither does it lie for those who hold for term of years, or for term of life by reason of dower, or by the law of England, or in gage, or by feoffment, or by escheat, or by any mode of acquisition other than succession.

4. If the plea is not in the Bench, then one essoin and no more lies for each party, so that after their appearance there is no essoin. And if the deforceor makes default, then the process above-mentioned in the chapter of summons takes place. And if the plea is in the county, although it commenced out of the

county, no resummons after default shall lie, nor any essoin, nor any delay. And if the plaintiff is under age, neither essoin nor resummons ever takes place, whether the plea be within the county or without; *for in such case the absence of the tenant is as good as his presence. Neither does resummons lie in cases of contumacy; as, where the tenant or the disturbant appears in court, and contemptuously departs, after he has been seen by the Justice in court; but in such case the assise shall be forthwith taken without any resummons: also, if the defendant makes default,[1] resummons shall not lie. So, when he appears, and will not or cannot allege any cause why the assise should be stayed, let the assise be presently taken, if the jurors are present, and if not, let the sheriff be commanded to have their bodies at another day.

CHAPTER II.

Of the day of Plea; and of the Count of the Plaintiff.

When the parties appear in court, it will then behove the plaintiff, after the writ has been read in audience, to declare his case in such a way as to show how he hath right of action and reason to complain, and of whose seisin he has brought the assise,—whether of his own seisin or of that of another. If of his own

[1] That is, default after resummons; see the parallel places in Bracton and Fleta. Perhaps we should read, 'defaute apres defaute.'

seisin, it will be necessary for him, in order to certify the court of his right, to say further, whether, when he presented, he held any glebe, such as rent or soil, to which the advowson was appendant, or not, *and if he holds such glebe, then he must set forth how he holds it, whether in fee or for term of life or for any other term.[1] If he says that he demands the seisin of some ancestor, them he must show how he is the heir of such ancestor, so that it may appear by his statement whether he has a several action, or one in common with any parcener. And if his plaint is in an action upon a common right, it should be further known whether it be his turn to present this time or not.

CHAPTER III.

Of Exceptions in Assise of Last Presentation.

1. The deforceor must thereupon answer. For voucher of warrant does not lie, because the object of the writ is to ascertain by the assise, who has the best right to the presentation. The deforceor may answer to the declaration by exceptions, of which the dilatory are first to be proposed.

2. As to the words in the writ, 'who is the

[1] The word 'glebe' is used for the land to which the advowson is appurtenant. 'Nota, quod verus advocatus dicitur ille, qui patronus est ut de feodo et recto ex descensu hæreditatis. Quasi advocatus est ille, qui possidet glebam, ad quam pertinet advocatio, non in feodo sed ad terminum.' (Note in MS. *N.*)

advocate,' it must be understood that the advocate is he to whom the right of the advowson of any church belongs, so that he may present to that church in his own name, and he is called advocate by way of distinction from those who have occasion *to present in the name of another, as guardians do in the name of infants under age, whose lands are in their ward, and also from those who hold the tenement to which an advowson is appendant for a term of life or years only,[1] or by intrusion or disseisin, provided these have never presented; for if they have presented, and so are in seisin of the advowson, they are thereby become in a manner advocates, so far as regards the seisin of the presentation, as long as they hold the tenements to which the advowson is annexed; for until the disseisee or the true possessor has recovered the tenement, which is the principal subject, he can have no claim to anything accessory thereto.

3. The words also 'in time of peace' are used in distinction from time of war, under which are comprehended all times of injuries done by one neighbour to another by violence, and by intrusions, disseisins, robberies, disturbances, oppressions, and other wrongs; whence time of peace may be thus distinguished and understood; for one may present before the time of war, or in the time, or after the time, and yet the presentation will be sufficient and lawful; and so in the reverse case, a presentation may be made by extortion, in despite of the true possessor, by fraud and

[1] See the note from MS. *N.* in p. 173.

contention. *And as the one is in all points good and lawful, so the wrongful presentation is never of any effect, because in wrong and so not in time of peace. And from such wrongful acts of violence and oppression there do always arise exceptions in favour of the plaintiff against the title of the disturbor.

4. With regard to the word also contained in the writ, 'presented,' care must be taken to see whether the parson who was then presented was upon the presentation of such an one admitted and instituted by the bishop or not; for otherwise the presentation was of no avail. And if two clerks are presented to the same church by different patrons, both of them cannot be admitted at the same time, but one at least must be refused; and it may also well happen that neither of them shall be admitted, although one of the patrons have the right to present, and this for two reasons. One is, that if the church remains unprovided beyond six months, then according to the Council of Lateran, upon the disagreement of the parties, the bishop of the diocese shall provide for it, and shall *ex officio* give the church to some clerk saving every one's right. The other reason is the minority of one of the presentors, as where charters of his ancestors are produced against any presentor who is under age, to which charters he can give no answer before he is of age; in such case if the parties do not agree in the presentation of a parson, the collation belongs to the ordinary of the place, saving every one's right when the person under age comes of age; but in such case it should be so

ordered by advice of the Justices, that some annual pension be reserved to the infant until he comes of age, for the saving of his right to present when he shall attain his age.

5. Two persons may present at the same time, one having a right and the other none, or both of them some colour of right; and if it should happen that they both agree in one clerk, without trying the right, by that presentation the right of no one is diminished or altered, but resort must be had to the seisin of that patron, of whom it is certain that he last presented of right alone. But if any one has once presented without opposition, and some person at the next avoidance makes a disturbance, and afterwards assents to the presentation of the true patron, by this assent the estate of the patron, as regards his right of presentation at another avoidance, is not prejudiced. For it is one thing to assent and another to consent. Assenting is where any person who has no right to present, after having made a disturbance, says, 'I assent to this presentation, saving my future right;' and such assent is not prejudicial to the true patron, nor does any right *accrue thereby to the disturbor. Consenting is when any one who is in seisin of the advowson consents to the presentation of him who has a better right. For the one may be in seisin of the possessory right, and the other of the property, and he who has more of the property has the greater right. And such consent may be made simply, or with protestation. If made simply, he thereby renounces all his right;

if with protestation in these words, 'saving to me my right at other avoidances,' he thereby retains the right that he has, whatever it may be. The same rule holds in advowsons of chapels, prebends, vicarages, hospitals, abbeys, priories, and other places to which one may present on occasion of avoidance.

6. That which is said in the writ, 'the parson who is dead,' is said to distinguish him from a vicar, to whose vicarage none can present. The word 'dead' has a double meaning, being used either of natural death, or death to the world, as in the case of him who becomes professed in religion, and has renounced all worldly things, or of that which in this matter is equivalent to death, as where a parson has married a wife, or done any other thing whereby he is unable to retain any church.

7. It is contained in the writ, 'to such a church which is void; and here it must be observed whether it is entirely void, or the parsonage only; *for if any pension has been granted by virtue of some accord between parties or by way of a simple benefice, and he who received that benefice dies, the church and parsonage do not thereby become vacant. The same is to be understood of a vicar whose vicarage is not in any one's presentation, and which upon his death accrues entirely to the parson, and in particular of a vicarage endowed by the ordinary for the reasonable support of a vicar.[1] The word 'church' is also used

[1] There appears to be an error here. In the parallel passage of Bracton the case here mentioned is stated as an exception to the

by way of distinction from chapel, and therefore if in the writ it is said 'church' where it ought to have been 'chapel,' the writ is thereby abatable. But whether it is a chapel or not is not to be tried in lay courts, but in court Christian.[1]

8. If the assise is brought of the entire church, where the moiety only or the third or fourth part is void, and there is a dispute about the avoidance, for that one side says it is void and the other that it is full, let the truth thereof be inquired by the assise. For if the cognisance thereof was referred to the bishop, the church might be encumbered by him, or the truth perhaps would not be returned; as suppose he had admitted and instituted any clerk in such church upon the presentation of one who had no right to present, in such case he might return that the church was full and provided, which would be a prejudice to the true patron.

*9. And upon the verdict of the assise let the bishop be commanded that he admit the clerk presented, and if he will not, let him be forthwith summoned to answer why he refuses; and thus the incumbrance

general rule, by which a vicarage became merged in the parsonage. 'Et hoc dico *nisi* taxata fuerit per ordinarios ad rationabilem sustentationem vicarii.' Brac. 241 *b*. The same error occurs in Fleta (as printed), where the words are, 'et hoc ubi taxata fueri, &c. Fle. 322 (§ 9).

[1] This question was treated in 32 Edw. I. as one determinable by the assise. Year Book, 32 Edw. I. pp. 107, 349. Compare Fle. 323 (§ 18).

of the bishop or other ordinary, if any there be, may be proved. And if any ordinary is found guilty of such incumbrance, let it be immediately adjudged that he set the church free, or otherwise make satisfaction to the patron and let the ordinary remain in our mercy. Thus the church may be void in law but not in fact. But where it is void both in law and in fact, the assise shall run immediately, for then the church is truly and rightfully void.

10. And if any clerk has of his own folly thrust himself into the church at the time of avoidance, yet the assise shall not be stayed, but shall be taken as if it was entirely void and unprovided. And if the jurors say that it is full by the intrusion of such a clerk, let the plea be immediately sent to the court Christian, that the bishop of the diocese may certify our Justices whether the intrusion be rightful or tortious, and upon this let judgment be given. For the recognisance of spiritual intrusions, whether they are rightful or not, does not belong to the temporal court any more than that of other spiritual matters. Yet such returns of bishops are not always fully sufficient, without further support from muniments or other evidence.

*11. Whereas it is said in the writ, 'which advowson such an one saith belongs to him,' it is right that the plaintiff should plainly show how he hath right, and reason for complaint. It is likewise said, 'summons such an one;' therefore the plaintiff must in the declaration of his case point out how and in what way the defendant wrongfully deforces him.

12. Although the writ says, 'who deforceth him of the aforesaid advowson,' yet it is not to be understood thereby that the deforceor is in seisin of the advowson. But the word 'deforce' is used because he is sufficiently a deforceor who disturbs another in the whole or in part, although he does not actually eject him from the whole, as above is said. From the points aforesaid exceptions may be drawn either wholly to destroy the assise or to delay it.

CHAPTER IV.

Of Exceptions independent of the Writ.

1. Although the disturbor admits all the articles of the writ, yet he may except against the assise, and say, that, whereas the plaintiff counts of the seisin and presentation of his ancestors, he wrongfully complains, because after his own presentation, he granted to this same disturbor or to one of his ancestors a tenement to which the advowson was appendant, and that by such a charter; and therefore, although the plaintiff or any of his ancestors did present, yet he ought not to present on account of the aforesaid deed.

*2. If, then, the plaintiff is of full age, he may acknowledge the charter and admit the gift, and say in answer to the exception, that after the making of such gift he presented such an one by name, who was admitted on his presentation, whereby the gift is null and the charter void. And if this be proved or not

denied, there is an end to the exception,[1] unless the deforceor can say that although that charter be void and the gift null for the last presentation of the donor, yet after such presentation this same plaintiff or his ancestor made a new gift and a new charter to him, whereby the presentation belongs to him. Or he may say that the plaintiff confirmed the first charter to him, and so that which was before weakened by want of seisin he did afterwards strengthen by confirmation; and if this be verified or not denied, the assise shall fall, unless the plaintiff can aver a later presentation. Or he may grant that the presentation was so made by the plaintiff or his ancestor after the gift and after the making of the charter; but he may say that he purchased out against him a writ of warranty of charter, upon which the plaintiff was summoned, and

[1] 'A gives a manor with the advowson of a church to B; A dies. C, son and heir of A, is under age, and in ward of D. The church avoids. D presents in right of wardship, and his clerk is admitted and instituted. When C is of age, the parson dies. C presents, and B, the purchaser, presents also. C brings assise. B, the disturbor, alleges his purchase. C replies of the continuance of seisin by the last presentation. *Quæstio, quit fiet. Solutio.* C shall recover, and B take nothing; because purchase without fine levied is invalid (riens ne valt) without seisin. *Contra.* Induction of seisin of the principal substance (del gros e del principal), to which the appurtenances are appendant and accessory, suffices for seisin of both. But the glebe is a principal substance to which the advowson is appendant and accessory; therefore the induction of seisin of the glebe is sufficient for the principal and for the accessory.' (Note in MS. *N.*) See before, p. 173, note.

in our court acknowledged the charter to be his deed, and allowed the gift, so that a fine was levied, and a chirograph made; and thus the plea shall be ended.

3. In order to see this matter clearly, let us suppose that one has granted to another a manor, with the advowson of a church, to him and his heirs in fee, and before the church *becomes void the purchaser gives the same manor with the advowson to another; then the parson of the first donor dies, and the former purchaser presents, and the latter also. The first purchaser has no right, inasmuch as he was never seised; neither has the latter any right, for no one could give a thing which he had not; so that the right of presentation must of necessity remain with the first donor, who always continued in possession of the right of presentation, inasmuch as the purchaser aliened his right before seisin, that is to say, before he presented.[1] And the same reason holds in case of several alienors.

[1] 'If one purchase a tenement to which an advowson is appendant, and alien the tenement before he has presented to the church, the second purchaser hath lost for ever his action to recover the advowson by reason of his purchase. *Probatio hujus.* Feoffor cannot make higher estate to his feoffee than he himself had; but the feoffor had no estate in the advowson. Therefore he could make none. *Contra.* Seisin of principal is seisin of accessory; but the purchaser, by means of the glebe, takes seisin of the principal; therefore of the accessory. *Responsio.* Seisin cannot be taken more largely than it is delivered, but seisin was never delivered of the advowson; therefore it could not be taken. *Solutio.* There are some appurtenances which may be severed by the owner; as a garden belongs to a house, but if the owner gives the house with its appurtenances, retaining the garden,

4. For if the last purchaser could in any way vouch his feoffor to warranty, it would not avail him, because the warrant was never seised. For no one is bound to defend any other in his seisin, except him who is found in possession;[1] and if the vouchee should warrant to him in fact,—since in law he would not be bound to do so,—and should himself vouch the first alienor, the latter would not be bound to warranty, and this for two reasons; first, because the vouchor is not in seisin; and, secondly, because the last purchaser cannot claim or have again what he never had or could have. And although the first alienor confirm the gift to the first purchaser,[2] *yet the last purchase is not thereby strengthened, since that gift is not the

there are two principal matters where before there was but one (sunt deuz gros qe avant ne furent fors qe un gros). So in the former case (Auxi par decha); the donor aliened the land with the advowson, but retained the advowson by the presentation after the gift; as, if I enfeoff you of two acres, and continue in seisin of one, the charter is void as to that acre. But if he who purchased the land with the advowson had not aliened the land, but had presented in time of avoidance, and had been disturbed by his feoffor or other, and had proceeded by law, he might have recovered the advowson. But since he did not do so, the right remains with the donor. Et sic nota, quod actio alienari non potest.' (Note in MS. *N.*)

[1] The text here is ambiguous, and the previous sentence might seem to show *celi* to be used in the nominative case. But the meaning is shown by the parallel places of Bracton and Fleta.

[2] The sense appears to require 'last purchaser;' compare Brac. 243, Fle. 324 (§ 2).

deed of the confirmor or any of his ancestors, and because the gift itself was never of any effect. And therefore if the first donor presents, and the last purchaser also presents, whether he has a confirmation of his purchase or not, the seisin shall be awarded by the assise to the confirmor on account of the seisin from which he never parted, since it never began to attach anywhere else.

5. But where the last purchaser in fact presents a clerk, who is admitted on his presentation, and then it is aliened from hand to hand, each purchaser being in seisin of the presentation, and upon the avoidance of the church, both the first donor and the last purchaser present, if both bring this assise, let the assise be first taken of the last seisin, and let no assise upon assise be afterwards taken, but let the first donor proceed by writ of right upon the property, if he thinks fit to do so; and he may impute it to his own negligence that he has lost his recovery in the possession.

6. If a charter produced against this assise is denied, let it be proved by the witnesses therein named, and by the assise taken in the manner of a jury, unless he against whom it is proffered is under age; for an infant in that condition cannot answer to any charter; but to a fine or other recognisance made *by his ancestor every heir, of whatever age he may be, shall answer.[1] In case of nonage, the assise shall be put off until age; but by advice of our court an annual pension shall be provided

[1] 'Carta dedici poterit, finis vero dedici non poterit; unde minor ad finem respondere cogetur.' (Note in MS. *N.*)

for such infant, to be taken until he is of age. But if no charter is produced, the assise shall run forthwith, although one of the parties be under age. So where a fine or other recognisance made by the ancestor of any of the parties is vouched, the assise shall not be stayed by reason of the nonage of the heir.

7. If a charter only of an ancestor is produced, and the same is denied, let it be proved; and if it is admitted, but is objected against it that it is void and of no force by reason of the subsequent presentation, and the adverse party denies that there was any such presentation after the making of the charter, let the assise forthwith run in manner of a jury by the consent of the parties upon this question, whether the donor who brings the assise presented to the church, after he made the gift to such an one, which the charter witnesseth, or not.

8. Again, it may be answered to the assise, that it ought not to pass, because he who brings the assise, or some of his ancestors, gave and aliened to the other party, or to some of his ancestors, the whole of the tenement in right whereof he has presented, with all its appurtenances,[1] without retaining anything, whether they were in possession of the presentation or not, and without any exception or condition, or without any

[1] 'Nota quod unum est dicere, Do tibi cum pertinentiis, et aliud, cum omnibus pertinentiis, vel, cum pertinentiis sine ullo retenemento; quia per hoc quod dico, cum pertinentiis, aliquæ possunt pertinentiæ transmutari, et aliquæ retineri.' (Note in MS. *N*.)

lease for term of life or years.[1] And this allegation may sometimes be manifested by charter and by writings, which being produced in court, the assise shall proceed, and if any of them be denied, averment shall lie by the assise taken in form of jury, if the parties consent thereto. Charter must always be produced before judgment given: for afterwards they are not admissible, except in certifications and attaints.

9. Again, it may be excepted against the assise, that he who brings it hath not in hand any tenement to which the advowson was ever appurtenant, inasmuch as he lost such tenement by judgment, or by disseisin,[2] or in some other way, and therefore, even if he has a right in the tenement and in its appurtenances, yet he ought first to recover the tenement to which the advowson belongs, which is the principal subject, before he has any ground for presenting. And upon his point it is said that, if any one has once recovered the presentation of

[1] The sense requires, 'or leased it for term of life or years;' compare Bract. 243, and Fle. 325 (§ 2).

[2] 'A man inherits a manor to which an advowson is appendant; and is disseised of the entire manor. The church avoids. The disseisee and disseisor both present. The disseisee brings assise, and the disseisor *Quare impedit*. The disseisor shall recover. *Contra*. The disseisor ought not to be in a better condition than a purchaser, but if a purchaser had purchased the manor with the appurtenances, without special mention of the advowson, the advowson had remained with the donor; with much stronger reason should it remain with the disseisee. *Responsio*. True it is, the disseisor is in a better condition *quoad hoc*.' (Note in MS. *N*.)

a church by this assise, and there is another having a greater right to it who demands the advowson, or the tenement to which the advowson belongs, by writ of right, and pending the plea the parson dies, still the plaintiff has no right to present before he has deraigned the advowson or the tenement in the plea of right.

10. The party may also except against the assise, that neither he who brings it nor any of his ancestors ever had any *right in the advowson except for term of life or other term which is passed. And if any woman after the decease of her husband disturbs the presentation of the heir, who is warrant of her dower, and alleges that the presentation belongs to her by reason of her dower which she has in the same vill where the church is situate, thereupon purchases a writ of *Quare impedit* against the same warrant, care must be taken to observe in what manner her dower was assigned to her. For if she has the third part of a vill with the appurtenances in dower, and in virtue of this dower claims the third presentation, the claim cannot be allowed, unless she has some specialty which makes mention thereof, as where the advowson has been assigned to her in her third part; for otherwise she cannot claim or challenge anything, although the church be situate in her third. And if she is endowed of the whole vill entirely, with all the appurtenances without any exception, than she has a right; but if the advowson be excepted, she has no right.

11. If the bishop is asked to admit any clerk to a presentation by parcels, as where a manor, to which

the advowson of some church is appendant, is aliened by parcels to divers tenants, each of whom is enfeoffed of his portion with the appurtenances, and all the tenants severally present to the church, when it becomes void, the presentation of the *tenant of the last remaining parcel is to be taken, as before is mentioned. For in such case the advowson, not being expressly aliened, always remains with the portion retained.

12. If one presents to a church, and such presentee is admitted, and another person raises a dispute by some other clerk, and it is afterwards agreed between the presentors that he who raised the dispute shall *de facto* a second time present to the bishop the clerk already instituted, and the bishop thereupon admits him in prejudice of the right of the first presentor, and so this clerk remains instituted all his lifetime, having been twice presented and twice instituted, and if upon a new avoidance the person who presented last desires to proceed by this assise, he ought not to be heard. For presentation upon presentation at one turn and one avoidance is of no force.

13. If any one presents to a church, and before the presentee is admitted, the presentor pending the presentation dies, and the guardian of the heir by reason of the nonage of the heir and in right of the wardship presents another clerk, and during the litigation between the clerks thus presented the heir becomes of full age, and presents a third clerk; in such case the presentee of the heir is to be admitted to the church.

14. If a woman endowed of an advowson presents her clerk, who is admitted, and the heir who is the warrant of her dower makes a gift of the advowson in the lifetime of the widow; and before the *purchaser has seisin of the advowson by presentation the widow dies, so that the dower falls into the hands of the right heir; in such case the purchaser must get his purchase renewed or confirmed; for until he can allege seisin, he can never plead in the property.

15. If there are several parceners and heirs, some of whom are under age and others of full age, and some in seisin of their inheritance by their guardians and some in their own names, and there is only one church vacant, all ought to present thereto jointly, and to consent in one clerk; othewise the presentation shall not take place so long as they disagree, and the bishop when the time comes shall dispose of the church. But if all are of age, and every one knows his several share, then the presentation shall go according as they shall agree in the partition. Neither does the collation belong to the bishop if every such parcener severally presents his clerk, when they are all of age and have made partition of their inheritance,[1] because in such case the bishop could not admit the clerk of one without prejudice to the other parceners. But it might be otherwise, if one single person who had the entire

[1] This clause, ' when they are all,' &c., appears to have slipped into the text by mistake. The sense intended appears to be, that where of several parceners each presents his own clerk, the bishop is not entitled to make his choice.

right of presentation presented two or more clerks at once, or one after the other.

*16. Whereas in respect of one avoidance and of the presentation to one church several persons may be plaintiffs upon different grounds, for two or more may complain and bring this assise, and demand the presentation by title of succession as of the seisin of their ancestors, or of their own presentation and a widow endowed, or several widows, in right of their dower, or of any manner of term of life or years according to the different kinds of tenures, either by writ of *Quare Impedit* or *Quare non permittit*, or by reason that such a widow holds part of the vill where the church is situate, and therefore might present in turn, and upon several other grounds,—all these reasons should be carefully examined in proper order, so that it may be ascertained who has a right to the action and who not; and in the letters to be directed to the bishop mention should be made of the proceedings in the case of person.

17. When a widow in right of her dower has presented to any church, and her clerk is admitted by the bishop, and the heir, who is the warrant of her dower, afterwards grants away the advowson, and the church being again void in the lifetime of the widow she presents again, if her clerk is admitted, the right of presentation is thereby reserved to the heir and to his heirs; and the grant will be ineffectual, and the charter void for want of seisin.

18. When any one says, by way of defence to this

assise, that he who brings it cannot present by reason of a gift and feoffment, and thereupon shows a charter, if the charter and feoffment cannot be denied, the assise is at an end, and the other shall retain his seisin, when he is thus as it were in seisin after the gift and making of the charter. *And if the charter and gift are denied, let them be proved; and if they are proved, the plaintiff cannot further hinder the presentation. And if the donor acknowledge the charter and the gift, and say that he afterwards presented, as aforesaid, let this be inquired by the assise, for his bare allegation is not to be believed, nor any presumption alone, although he should produce in evidence the letters patent of the bishop of the diocese testifying that he admitted his clerk to that church. Nor need the assise in this case inquire concerning the seisin of the donor; for by acknowledging the charter he has barred himself from the seisin and from his presentation, when he is unable to show that he has presented after his gift or after the making of the charter.

19. When the plaintiff counts of his own seisin or of that of his ancestors, and says that he presented a certain parson, who was admitted, and thereof puts himself upon the jurors of the assise, if the jurors say that they do not know who presented the last parson, or the one before him, or if they say that they absolutely know nothing thereof, in such case let the plaintiff take nothing, but remain in mercy.[1] So, if in one vill

[1] Bracton cites a case of the tenth year of Henry III. to show

there are two lords and diverse fees, and but one church, and the jurors cannot say who last presented, nor in whose fee the church is, or if the *ground on which the church is built is common to both parties, in such case the parties must be told to agree upon a parson,[1] or neither of them will take anything, but the plaintiff shall remain in mercy, not for want of right, but for want of proving his right.

CHAPTER V.

Of the Verdict and Judgment in Assise of Last Presentation.

1. When the jurors are present in court, and the parties have pleaded to the assise, if the jurors are not rejected by the challenges of the parties, they shall swear one after the other thus: 'Hear this, ye Justices, that I will speak the truth concerning this assise of the church (or of the chapel), whereof by the king's precept I have made the view, and that I will not fail for anything to speak the truth, so help me God and the Saints.' Then let the writ be rehearsed to them, and the manner in which the parties have pleaded, so far as necessary.

that in the above circumstances the parties without further writ might proceed upon the proprietary right, which would be tried by battle or the great assise.

[1] Bracton says they should agree to present alternately.

2. When the jurors have spoken together, and are agreed in their verdict, they may say that the plaintiff presented the last parson, who is dead, to the aforesaid church in time of peace, to wit, such a clerk by name, who last died parson in the same church; or they may say, on the other hand, that he did not present the last clerk, but that another, such an one by name, did so; or they may give all the reasons which the deforceor himself might allege, if he were present, why the presentation does not belong to the plaintiff, and show that the other does not wrongfully deforce him, as where the plaintiff or his ancestor after the last presentation aliened the advowson in some manner in fee or for a term.

3. It is not sufficient for the jurors to say merely that the plaintiff or his ancestor presented last, but they must also declare how the deforceor has wrongfully disturbed the presentation. Likewise, it is not enough to say 'wrongfully,' without saying that the wrong was done to him who complains, since this must appear before the plaintiff can take anything by this assise, however useful the verdict might be to another person having the right. Or they may say that they know nothing of the fact; and then they must inquire who presented the next parson before, and so from parson to parson as long as the limited time permits.

4. If the jurors say that the plaintiff presented, then judgment shall pass for him; and if they say that his ancestors presented the last parson but one, but they

know not who presented the parson who died last, still let judgment be given for the plaintiff, unless there is any reason to exclude the Justices from the presumption that the plaintiff, who is right heir to him who last presented, has the mere right by title of succession But if the presentation was made before the time limited in a plea of Mortdancester, the assise falls; and let the plaintiff proceed by writ of right, if he thinks fit to do it. And if the jurors are undecided and in doubt, then let the seisin remain where it is, and the plaintiff in mercy. The like where the jurors have no knowledge of the person of the plaintiff, or although they have some knowledge of him, yet they do not know for certain whether he is the next heir of the ancestor who last presented or not.

5. If any one has once recovered seisin of a presentation by this assise, and he against whom he has recovered proceeds to demand the advowson by writ of right, and pending the plea the church becomes void, and both of them present, the presentee of the person who recovered by the assise ought to be admitted, saving to the plaintiff his right in the property.

CHAPTER VI.

Of the Action of the Quare impedit.

1. Not all those to whom an advowson belongs have an action to demand it by the assise of last presentation, either in virtue of their own presentation or of the seisin of their ancestors, as hath been explained in treating of the assise of last presentation. For there are some who purchase advowsons of churches and a right to present by good titles, as by title of gift in fee or for a term, or by judgment in our court; also by disseisins and by intrusions in the tenements to which the advowsons are annexed, and in many other ways, whereby if such churches become void, and the purchasers present thereto and are disturbed, they can have no remedy by the aforsaid assise. For the writ of last presentation is a writ of possession, and such purchasers cannot count of their possession. And therefore the writ of *Quare impedit* was provided as a remedy for such purchasers; which writ is pleadable by summons, attachments and distress.

*2. The force of this writ lies wholly in the trespass of the tortious disturbance. Therefore where any one having a right to present by a good title desires to present, and another who has less right interposes a disturbance by presenting another clerk or in any

other manner, if he who is thus disturbed cannot count of his own seisin or of the seisin of his ancestor, then this writ of *Quare impedit* properly lies, which is as much as to say, wherefore the disturbor wrongfully sets his foot in that right which the plaintiff has in the presentation, and whereof, although he was never fully seised of the possessory right, he is seised of the property by title of good purchase; and therefore the disturbing him is equivalent to ejecting him from the whole, and is equally injurious; and thus remedy lies by this writ.

3. But if the plaintiff presentor has no sort of seisin either of the possessory right or of the property by any colour of tenure of tenement, or other title in his right, there can be no setting foot wrongfully, because he has no right upon which a man can set his foot either rightfully or wrongfully; and in this case the writ of *Quere impedit* does not properly lie, but that of *Quod permittat*. This writ of *Quod permittat* also lies in the person of a purchaser against his feoffor, if he disturbs him in using his seisin of the advowson which he has given to him.[1]

[1] The above section is a perverted paraphrase of Bracton, whose text, as printed, is somewhat obscure, but appears to mean, that where the plaintiff had not had seisin and did not claim property, but only an usufructuary or possessory right, his remedy was by *Quare non permittit*; so that if the plaintiff or his ancestor had had actual seisin by a former presentation, his remedy was by assise of Darreign presentment; if he claimed the advowson, and had not had seisin by himself or his ancestor,

4. When the parties have appeared in court, the *disturbor may say that he has a right to disturb the plaintiff, by reason that he and his ancestors have always presented, so that he is seised both of the one right and the other. Or he may say that he has not wrongfully disturbed, because he holds the tenement, to which the advowson is appendant, with all its appurtenances, by sale of the plaintiff or his ancestor, or by some other title, as by release, quitclaim, or otherwise.

5. And when any one, who has lost the right to the presentation by judgment, or any other person who has not any right presents, and causes the clerk who has already been instituted to be summoned to answer why he disturbs the plaintiff from presenting, the clerk may say that the plaintiff ought not to present save in time of vacation, and that the church is full and provided, wherefore he ought not now immediately to present. And if the plaintiff say, that the church is void, the court shall be certified thereof by the ordinary of the place; and according to the bishop's return the plea shall be determined.

6. One clerk may wrongfully molest another after he has been instituted, and after his patron has made good his right of presentation by judgment of our court. And because such molestation is prejudicial to our dignity, and tends to defeat that which has been

his remedy was by *Quare impedit ;* if he claimed only a possessory right as tenant in dower or by the curtesy, his remedy was by *Quare non permittit.* See before, c. 4. s. 16.

legally done in our court, we will that such as are so troubled be aided by us and by our prohibitions, and by attachments in pursuance thereof, as well to the judges, that they hold not such plea, as to the parties, that they do not prosecute the same.

7. The bishop also pending the plea in our court may wrongfully incumber the church by his clerk within the six months. *Therefore if any one be apprehensive of this, let him purchase our writ of prohibition to the bishop that he do no such thing, or that he do not admit any clerk upon the presentation of any until the plea pending in our court be concluded, and in particular within the period of six months;[1]

And if the bishop acts contrary to our prohibition, an attachment presently follows. And if he does not admit the clerks presented pursuant to our mandate, let him be immediately summoned to answer why he has not done so.

[1] These words, which are derived from Bracton or Fleta, seem to imply some uncertainty as to the bishop's right to present by lapse where the suit is undetermined at the end of the six months. It has been held in later times, that if he is not a party to the action of *Quare impedit*, he may present by lapse. Consequently it is now the universal practice to make the bishop a party. See Lancaster *v.* Lowe, Croke's Reports, *t.* Jac. 93; Blackstone's Comm. vol. iii. p. 247. 'The bishop shall present in all cases, where there is disturbance and the king does not write to the bishop to certify him of the right patron within the term of six months. Which may be for diverse reasons; either because the court cannot take cognizance thereof so soon, or because the plea cannot be ended so soon, or cannot be ended at all for want

CHAPTER VII.

Of the Assise of Utrum.

1. The fourth assise is that of *Utrum*, which partakes very much of both rights, because both are determined by it. For after judgment in this assise there is no recovery except sometimes by attaint. By this assise recognisance is made whether the tenement, whereof the plea is brought, be the lay fee of the tenant or frankalmoigne belonging to the church of the plaintiff,—whether the clerk or the layman be plaintiff.[1] For the assise may well lie at the suit of either, yet not of all clerks, but for such only as are parsons and rectors of parochial churches instituted therein by bishops or other ordinaries, *and also for canons in cathedral churches, and abbots and priors who have churches appropriated to their use, and are in the position of parsons; and this, although they

of proof of right; and although the court may certify, yet the collation belongeth to the bishop where there are several perceners, and they cannot agree.' (Note in MS. *N.*)

[1] Bracton informs us, it had been at one time decided that this assise could only be had upon the plaint of the parson, but its extension was considered advisable, as it offered a means of avoiding the delays of a writ of right, and the decision by battle or great assise. Brac. 285 *b*.

have only moieties by reason of there being divers fees and divers patrons, for which moieties each patron may severally plead and be impleaded; though it would be otherwise of a thing held in common between them. And if any church is given to two parsons by one patron, neither of them can plead or be impleaded by this assise without the other.[1]

2. The Writ of *Utrum* in favour of the clerk was provided as his writ of right, because he could not count by descent in the right. Thus, it is of the nature of a plea of right, and therefore they are limited by the same term.[2] The proceedings in this writ are similar to those in an assise of last presentation. Nevertheless the tenant may vouch to warranty.

[1] 'There are sometimes two parsons, or more: and this by reason that it was the original ordinance of the first patron, or because the church is founded upon divers fees, whereof each lord is patron and advocate of his own lordship.' (Note in MS. N.) Half-churches, and smaller fractions of churches, occur frequently in Domesday-book. Compare before, c. 3, s. 8.

[2] It was said by Brumpton, Justice, in the Cornish Iter, 30 Edw. I., that the right of action in this writ was not barred by prescription of time. Year Book, 30 Edw. I. p. 207.

CHAPTER VIII.

Of Exceptions in the Assise of Utrum.

1. The tenant may aid himself by his general and dilatory exceptions. And if the layman is tenant, he may plead that the church was never seised of the tenement demanded : and that, although it were at any time seised, yet the plaintiff cannot recover anything therein, for he hath received fealty and service for the same tenement ; and if this be verified or not denied, *the assise shall fall at least for the parson's life. For in this case the taking of fealty bars the action, as in other cases the taking of homage, because homage excludes the demesne. The assise is also at an end if his predecessor aliened the tenement in fee to a layman, who has since obtained a confirmation of the feoffment from the bishop of the diocess and the patron.

2. The assise also fails as to any kind of tenements given to cathedral or conventual churches, if the writ be purchased of such a tenement, because such persons have the same remedy as laymen ; but in gifts made to parochial churches the parsons are not included, and therefore this writ lies only for them. In respect however of their own seisin, if they are ejected or disturbed, they shall have remedy by assise of Novel Disseisin ; and by writ of Entry upon a disseisin done to their

predecessor as long as the time will admit. The assise likewise fails, if the tenement be demanded in demesne where the church was never seised but of the seignory. So in some cases on account of a condition comprised and contained in the feoffment by which the church was enfeoffed.[1]

3. When a layman complains against a clerk who is a parson, he does so either by a possessory writ by descent from some ancestor or by writ of right. If by a possessory writ, then the process between them shall be the same as it would be between other persons. If by writ of right, then the clerk has either a *warrant or not. If he has a warrant who will warrant to him, let the proceedings be carried on between the demandant and warrant as in a writ of right by battle or great assise or otherwise, as between any other persons. If he has no warrant, but defends the action, and answers for himself, in such case he has a double remedy by reason of the writ of right, and he may choose whichever he will; either he may put himself upon a jury, whether the land demanded be frank-almoigne, &c., or lay fee, just as if the layman had brought an assise;— not that the proprietary cause is thus turned to a possessory one, although the jury tries and determines both rights,—or he may defend himself by battle or

[1] The nature of the condition alluded to is more fully explained in Bracton. It was not uncommon for a layman to enfeoff a church on condition of being re-enfeoffed to hold of the church; and thus to make the land feudally subject to the church in order to obtain its protection. (Brac. 286 *b.*)

the great assise, if permitted by the authority of the ordinary and the consent of the patron.

4. Where a layman brings this assise, the clerk may answer and plead, that the ancestor of the plaintiff was never seised. And if he demands in demesne what he ought to demand in service, the assise falls, as before is mentioned in the case of a plaint by a clerk. And if the tenement was aforetime held of the church, and the plaintiff or his ancestor forfeited it by some judgment of felony, in such case the tenement is escheated to the church, and the exception of felony holds. Again, if the tenant dies without heirs, the tenement will also escheat to the church by reason of the mere right, which takes refuge and shelter there *for want of finding any other place where it may descend. But if the church, or the parson in its name, has received nothing from the tenement except a payment by way of alms, nothing can thereby escheat to the church.

5. When the parties have pleaded to the assise, or when the assise is awarded by default of the tenant, and re-summons is proved, or when the assise is demanded by reason of the contumacy of the tenant, having been seen in court by record of the Justices, if the jurors of the assise are present, and none of them is challenged, or, if they be, after the challenges of the parties have been tried, let them straightway be sworn in these words: 'Hear this, sirs Justices, that I will speak the truth of this assise, and of so much land with the appurtenances in N., whereof I have made the

view by the king's precept, whether the aforesaid land with the appurtenances is frank-almoigne belonging to such a church, whereof the plaintiff is parson, or lay fee of the tenant' (or the reverse if the layman be plaintiff), 'and will not upon any account omit,' &c. Afterwards let them be instructed and informed upon what point they are to certify the court. And let judgment be given according to the verdict. And when the assise has once passed in favour of the layman after the manner of an assise, and the tenement is adjudged to the lay plaintiff, the clerk shall never have any recovery but by attaint, the form of which will appear in the following chapter.

*CHAPTER IX.

Of the nature of an Oath, and of the process of Attaint.

1. An oath is an affirmation or denial of anything, whereby a person is charged upon peril of his soul to speak the truth; and it was provided on account of people difficult of belief that oaths should be taken upon the Holy Gospels of God for avoidance of idolatry. Oaths were instituted that men might thereby do good service; for by means of an oath many crimes are convicted and punished, and many a man doth by an oath great good and great service to his neighbour. It was likewise provided that one should swear by God and not by his creatures, or his members, to avoid the sin of blasphemy, and that none should swear but with an intention of doing service by the oath, upon nec-

essary and just occasions. An oath therefore is allowable when the conscience within agrees in every point with the lips, without any addition or abatement; and if there be any disagreement, it is perjury.

2. If any one wilfully perjures himself in obedience to his superior, both of them are to be punished with the same penalty. And he who causes or procures another to take an oath well knowing that he swears falsely, as well as he who knowingly admits such a false oath, is in relation to God a homicide, although he do not kill the body, but is partner in the *felony, forasmuch as he knowingly destroys the soul of him who at such peril takes the oath; and they consequently destroy their souls who are consenting. The like is true of him who is present and hears the oath without speaking and reprehending it. Perjury is a lie affirmed by oath. A person may be guilty of this sin in three ways; first, where he who knows or believes a thing to be false affirms it by his oath to be true; secondly, where one is deceived and thinks a thing to be true which is false, and declares it upon his oath; thirdly, where he who says upon his oath that something is true, which in fact is so, yet in his conscience believes it to be false, as when the Jew swore that Saint Mary was the mother of the Son of God. A lie is a false expression of the voice with an intent to deceive; and this sin is so poisonous that no one ought to be willing to lie, even to ransom another person's life.

3. Of oaths some are promissory respecting the future, and of such oaths there are three kinds. The

first is where any one promises by an oath that he will do or assist in something which ought not to be done, as feloniously to kill a man; and such an oath ought not to be kept. The second is where a person swears that he will do something which he may lawfully do, and this solemnly, but without necessity or reason, and in so doing he is guilty of sin. The third kind of swearing is that which proceeds from a levity in talking and from a bad habit; this kind of swearing is sinful, but less so than the former. *But of these three kinds of oaths we shall not speak in this chapter; for they are not subject to any earthly attaint, nor is any oath except that of assertion, which relates only to time past or present.

4. Therefore if it happens that the jurors in any petty assise have taken a false oath, they may on the complaint of the losing party in the assise be attainted in several ways. Sometimes upon the oaths of twenty-four jurors, sometimes by their own acknowledgment upon examination by the Justices, and sometimes by their repentance and of their own free will; and in the last case there is room for mitigation and mercy. Therefore when any one desires to attaint any jurors, it must be seen how many and what jurors were open upon the assise, so that each juror may have two attainors at least; but if there be more, it is no harm. It is also proper that they be of equal or better conditions than the jurors.[1]

[1] 'The attainors ought to be persons of better condition than the jurors; and therefore the writ says: Summone xxiiii. milites; whereas it is said in the writ of assise: summone xii. legales homines.' (Note in MS. *N.*)

5. Of this offence sometimes the Justice is guilty and sometimes the jurors. But whoever is in fault, credit must always be given to the enrolment of the record of the Justice until it be altered by judgment. Therefore in the first place, before the attainors are summoned, the proceedings and record of the Justice should be examined; for if he only is found to be in fault, it is not to be imputed to the jurors, nor the reverse. *Therefore after examination of the record, and not before, it may be immediately seen whether the assise was taken as a jury, or as an assise. If it was taken by way of jury, then every one may have remedy by attaint; if by way of assise, then an attaint lies only for these persons and their heirs who were seised in their own names, and not for those who were seised in the name of others, as villains, termors, bailiffs, or guardians.

6. It is not the duty of all Justices to take attaints or certifications. For it belongs to those Justices who took the verdict of the assise, to take certifications, so as they do it before they are removed from their office. But it belongs not to those Justices who took the recognisance of the assise to take attaints after judgment given; because we have reserved the amendment of judgments for our own jurisdiction. But if the Justices at the taking of any assise are required before judgment given to attaint the jurors of the assise, they may immediately,[1] upon security and pledge of the party, cause the jury of twenty-four attainors to be taken if

[1] See the note to chap. xi. s. 2, below.

they are present, as well as upon a certification. For since the full power is given them to hear and determine the whole matter, *they are authorized to acquaint themselves with every thing necessary to clear the way to their judgment. And where certification or attaint is accessory to the assise, and the Justices see that without certification, or without attaint, they cannot proceed to judgment to determine the assise, it appears, and true it is, that it belongs to those who have full jurisdiction to determine that assise, to take such attaints and certifications, provided it be presently done; for if not, this duty does not belong to them, neither ought this authority to be granted to them.[1]

7. Although it is contained in the Great Charter of liberties that some assises shall be taken in counties, yet it shall not be understood that certifications and attaints must likewise be taken there. For that is not necessary except in cases where no authority is given but upon the assise. But if any Justice be assigned with fresh power to take an attaint or certification, then it will not be necessary by virtue of that statute to take it in the same county. For assise, certification, attaint, and jury differ in their privilege and nature.

8. When the attaint is brought, the verdict of the assise ought to be thoroughly examined, in what

[1] 'When the Justice, out of favour for one party, allows a false verdict to pass, how shall the falsehood be punished? *Responsio*. Either by the Judge himself, by resummoning the parties, or by another Justice; and this by attaint, or by bill to the king's council.' (Note in MS. *N.*)

manner the twelve jurors pronounced their verdict. For jurors sometimes swear falsely with full knowledge of what they do; and then are more openly perjured and are more severely to be punished than those who are forsworn through some indiscretion. *For some persons lie openly, when conscience does not rest in their thoughts. Others swear falsely, and lie through a foolish hastiness, which does not come directly from their thoughts, as in the case of those who pronounce their verdict before they have thoroughly examined their thoughts, and these are less punishable than such as perjure themselves with malice afore-thought against their conscience. And some are forsworn by a foolish verdict, not being aware of it on account of a presumption that appears true, but is not so; and if they can make it plainly appear how they were deceived, some extenuation should be had as to their punishment, but not as to the redressing of their judgment.

9. Where the jurors have said too little for want of examination by the Justices, or have given their verdict too obscurely, or have not answered fully, as, if they have concealed any part of the truth, being induced thereto by some mistake, in such case the better remedy is by certification than by attaint, that by such certification the jurors may render certain what is uncertain, and reduce to truth what was doubtful and erroneous. But if the record is not found defective or insufficient, but full and sufficient, then there is no room for certification; for the jurors cannot gainsay or challenge the record.

*CHAPTER X.

In what cases an attaint lies.

1. In the examination of every record, before the attaint is granted or takes place, it must be carefully observed whether the assise passed in form of assise upon some material point in the writ, or by way of jury, and whether it was taken in the presence of the tenant or not. And if it passed upon any exception, then it must be seen whether the exception was dilatory or peremptory; and if peremptory, whether peremptory of the writ only, and not of the action, by reason of some mistake in the name of a vill or of a person, which does not affect the assise, or peremptory of the assise as well as of the writ. In the former case attaint does not lie, although the verdict of the jurors may have been mistaken or false, on account of the assise and the action remaining entire. In the latter case, as, where any person demands by the assise a tenement where he ought to have demanded a rent, if the jurors find for the plaintiff, an attaint lies by reason of the falsity.

2. If the writ is suitable and good, the plaintiff must offer to prove the whole of his case by the jurors of the assise; and where the tenant consents, and straightway puts himself on the assise, if the jurors make a false verdict, it is a proper case for attaint; as if they

*find that the tenant disseised the plaintiff, where he did not disseise him at all. Sometimes also an attaint may be brought upon their verdict as to matters which touch the substance of the assise, as where they find that the tenant hath disseised the plaintiff of his freehold, whereas he never held except in villenage, and in like cases. It lies also upon a point of their verdict concerning some exception, although not concerning the action or the assise, where the verdict does not pronounce simply, but adds a reason, as that the plaintiff could not have a freehold, because he is a villain, and holds the tenement in villenage, whereas this is false, because the man is free and holds freely,—and in the reverse case;—if this plaintiff can afterwards by four-and-twenty jurors prove himself to be free, and that the first jurors gave a false verdict, attaint lies, because the assise was charged with the substance of the plaint, and not with an incidental matter for a jury.

3. If the plaintiff had simply denied the exception of the tenant, and said that he was free, and was ready to verify the same by the jurors of the assise, in such case, whether the proof were made against the plaintiff by the jurors or by evidence of suit of kindred or not, although the jurors gave a false verdict, yet no attaint would lie, because the parties of their own consent put themselves *upon their verdict, as upon a jury, to prove the exception; and whether they find for or against the plaintiff, yet his condition is not rendered better or worse or in anywise altered by their

verdict. In such cases the proof always lies upon the tenant; and if the plaintiff in answer to the exception of villenage says that he is free, still it lies on the tenant to prove his exception, unless the plaintiff chooses to prove the negative; and if no suit be brought of the kindred of the plaintiff to make good his exception, then of necessity it must be proved by the jurors.

4. Although the tenant should tacitly admit the declaration of the plaintiff, yet the assise may be stayed by some exception, as by setting up some deed against the plaintiff, such as his writing of covenant or some condition or other title. And if the tenant offers to aver this writing to be the deed of the plaintiff or of his ancestor whose heir he is, and this is either verified or not denied, the assise and the action fall. And if the deed is denied, in that way the assise and the action are brought at an end, and a new plea begins upon the proof of the covenant. This may be proved in several ways; sometimes by the deed and the witnesses therein named, and sometimes where there is no charter, by the jurors of assise, and this will be done in the form of a jury, if the parties *consent, and then no attaint will lie; and if the plaintiff will not consent, let him take nothing by his plaint, and if the tenant refuses, let him be treated as without defence.

5. The same reason holds in the exception of villenage; for in such case the tenant must prove the villenage, and according as the proof turns out for or against the plaintiff the action will be determined. Yet when the tenant alleges that the plaintiff is his villain, it is

not necessary to prove the exception by the kindred of the plaintiff; for such proof, if made against the lord, might be prejudicial to him and would afford the plaintiff a strong exception in a plea of Naifty, if ever the lord chose to claim him as his villain.[1] But if the lord is sure that the proof will be made against the villain, that he was his astrer,[2] reseant in his villenage, and he in seisin of him, with his chattels and his suit, as of his villain within the year, in such case the proof may well pass by the kindred and by the jurors of the assise, and thus, if the plaintiff consents, both the status and the assise will be determined.

6. But if the plaintiff says that he is free and of free condition, and demands award and judgment, whether he ought to put himself concerning his condition upon the assise, before full restitution of all his goods moveable and immoveable, in such case the asssise shall cease, and the tenant will be forced to proceed by writ of Naifty, supposing that the villain is a run-away, and not to be found within the lord's fee. *And if the exception of villenage be tried and proved by the assise by common consent of the parties, yet such proof shall not be prejudicial to the condition of the plaintiff, neither does any attaint lie. For the effect of the exception is not to prove the plaintiff a villain, but to bar

[1] This agrees with Fleta, p. 337. It would appear from Bracton, that the objection to the proof by suit of kindred, where the alleged villain was not actually in his lord's seisin, was rather founded upon consideration for the villain than for the lord. (Brac. 290.)

[2] See before, p. 456, note.

him from taking anything by his plaint. And thus it appears that in these two exceptions of covenant and of villenage the assise remains entire, although it be altered by some collateral matter determined by jury.

7. Where the assise is taken in the absence of the tenant, or if he is present and alleges no cause why the assise ought to be stayed, but forthwith puts himself thereupon, in such case, whether the jurors find for the one party or the other upon the points of the writ, supposing they find what is false, or if they say that there was a covenant, as aforesaid, where there was none, or that the plaintiff is the villain of the tenant, when he is free, or that he is a bastard, when he is legitimate, or other like thing,—in all these cases an attaint will lie. And whereas the substance of the original writ ought to be contained in the writ of attaint, it follows, and it is true, that an attaint does not properly lie except upon the points of the original writ.

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*CHAPTER XI.

Of the Excuses of Jurors in mitigation of Attaint.

1. Where the tenant is absent at the taking of the assise, the jurors are then more liable to err, inasmuch as they are not instructed by any one how to find for the tenant; and if they should forswear themselves, a probable error ought to excuse them in the attaint, so that they may be spared the penalty either in part or entirely, according as the error has been gross or slight, rightful or colourable.

2. Attaint never lies in the great assise, because the tenant puts himself thereon by his own election. But in petty assises there is frequent occasion for it. Many oaths are taken upon which no attaint lies, as an oath taken by one man alone to another, for in that case vengeance belongeth only to God. Moreover no attaint lies upon the verdict concerning damages,[1] nor in certifications, nor in purgations, nor in defences by wager of law against the suit produced by the plaintiff, nor generally in inquests or juries, except by our special command.

3. With respect to jurors, in order that the punishment upon attaint may be mitigated, it must be observed whether the error be patent or secret; for if it be secret, as it frequently happens in contracts made secretly between the parties where two or three only are privy to it, *in such case the jurors, from their ignorance of the contract, may be easily mistaken, and such error is excuable. But of a thing done openly, so that the greatest part of the country knows it, an error is not excusable.

4. Where the jurors relate the whole truth of the fact just as it happened, and judgment is given accord-

[1] So Bracton and Fleta say that an error in damages is not a case for attaint, but for certification by the jurors. But in the Cornish Iter, 30 Edw. I., Berewick, Justice, being dissatisfied with the verdict of an assise upon the point of damages, warned the jury, that there might be an attaint as well for the damages as for the principal matter, and that immediately, without issuing a writ out of the Chancery. (Year Book, 30, 31 Edw. I. p. 124.) As to the immediate attaint, see before, c. 19. s. 6.

ing to the verdict, if error be found in the judgment, the Justices are in fault for the folly of their judgment rather than the jurors for any false oath. Therefore the Justice must needs make diligent examination into every verdict, whereby matters which are doubtful or erroneous may be reduced to certainty and truth. And if any difficulty arises in giving judgment, it is needful to advise with one more learned. For it is safer for a Justice to be in some doubt as to all matters than to be too confident in his own opinion; and repentance often follows upon rash counsel, and still oftener upon rash judgment.

CHAPTER XII.

Of the Trial and Judgment in Attaint.

1. The writ of attaint being obtained, and the party summoned, he has a right to be essoined at the day. And when the parties on the second day are present in court, but the attainors are not, let another day be given to the parties, and the attainors *be required to find security and pledges to appear at the same day. And if the party summoned makes default, let him be attached to be there some other day. And if the plaintiff makes default, and the party attached or summoned offers himself, the writ falls, and the jurors shall go without day, and the plaintiff and his pledges to prosecute remain in mercy.

2. When the parties, the jurors, and the attainors

are present in court, and the party summoned or attached alleges no exception why the attaint ought not to pass, then in the first place let the record of the assise be heard, to wit, how it passed. Next, let the plaintiff be asked in what points the jurors of the assise are perjured, whether in the articles of the writ, or upon some exception, such exception not having been put forward by the tenant, but only by the jurors of the assise in their verdict, when they were charged to find upon the whole matter of the assise. Thereupon let the attainors be charged by their oath to speak the truth; and the oath whereby they shall be charged shall not be the oath of assise, but the oath of jury. And after they are sworn, let the form of the plaint be forthwith shown to them, and upon what points they are to speak the truth; as for instance, whether he who complains has been wrongfully disseised or not. And let them be informed of the plaintiff's case.

*3. When the jurors are returned, and are ready to give in their verdict, their reasons ought to be strictly examined, so that manifest truth or presumption at least may be on their side, and their verdict grounded on probable reasons; and according thereto let judgment be given. For sometimes they may be as easily deceived by some probable error as the first jurors, and thus for want of good examination by the Justices a false judgment may be given.

4. If the attainors cannot agree in one opinion, let them be afforced by others. And if they say that they know nothing of the fact, or that they are in doubt, so

that they cannot fully declare the truth, let the possession remain undisturbed. So, if they are agreed, and find against the plaintiff in the same way as the jurors of the assise, the possession shall remain as before, and it shall be adjudged that the twelve made a lawful verdict, and that the plaintiff be committed to gaol, and there punished by imprisonment and fine.

5. If the last verdict is contrary to the first, it follows that the first jurors will be attainted of a false oath; and it shall be awarded that the plaintiff recover his seisin, and the tenant be in mercy, and that the first jurors, if they are present, do for ever after lose their free law, so that thenceforth they shall not be credited upon any oath, and that their lands and chattels be taken into our hand, and they be sent to gaol, and there put to ransom. *And if they are absent, it shall be commanded that they be taken. Some jurors however may be sometimes excused with regard to the loss of their free law, although they be not as to the ransom, namely, those who through tenderness of conscience before the exhibition of any plaint confess they took a false oath by reason of some probable error, and pray that they may amend; and in such case, if all the jurors pray to amend their verdict, the attaint need not pass by writ, but the parties should be called to reverse the judgment.[1] The jurors however are

[1] '*Casus.* A parson brings assise of *Utrum* against a lay tenant. The twelve jurors, against their conscience or by a misguided conscience, (ou de conscience blesmie,) say that the land is frank-almoigne belonging to the church. The parson

punishable by simple fines only; and if all the jurors do not repent, yet those who do so shall have the benefit of their goodness.

6. An attaint may be barred from passing in several ways, as where judgment was never given upon the proceedings in the assise, the Justices being divided; or although it was given, yet it was never put in execution; or although it was partly put in execution, part of it still remains to be performed. It is likewise often stayed by agreement of the parties, and in that case let seisin be executed by judgment according to the record of the Justices. *It ought also to be stayed where the fault is in the Justice, which may be owing either to a foolish judgment or to error in the enrolment, or because the Justice would not allow the party his reasonable exceptions or his reasonable challenges of the jurors; and in such cases the proceedings are to be restored to the state they were in at the time of the exception being put forward. An attaint ought likewise to be stayed where the plaintiff is tenant of the tenement which he lost, or of part of it, by his own intrusion, or by redisseisin, because he has lost his right to recover by judgment a thing which has obtained by his own force in despite of the law.

7. As an assise is not to be taken upon an assise, so neither is an attaint to be taken upon an attaint, that is, between the same persons, of the same fact, and of

takes possession. Then the jurors, except two who are dead, come before Justices, and acknowledge of their own accord that they made false oath. *Quid juris?*' (Note in MS. N.)

the same thing. Yet two attaints may follow one assise, as where the jurors ought to have given or taken away the whole, when they gave or took away part only;[1] not however by different attainors, but by the same jurors, to avoid the peril which might ensue if there should happen to be a contrariety between the different attainors. And although an attaint should have once passed, yet the attainors may be aided by certifications in the same manner and in the like cases as in verdicts of assises.

[1] In this case each party might complain of the verdict, and therefore there might be two attaints. See Bracton, f. 295 *b*.