

T H E  
English Lawyer:

S H E W I N G

The Nature and Forms of Original  
Writs, Processes and Mandates, of  
the Courts at *Westminster*.

A S A L S O

The Forms of Returns and Directions of  
Writs, Processes, &c.

*With many curious Observations on the Whole.*

Written and Composed in Pursuance of the  
late Act 4 Geo. II. Cap. 26. That all Pro-  
ceedings in Courts of Justice shall be in the  
*English Language.*

By WILLIAM BOHUN of the *Middle-  
Temple*, Esq;

*It is an Abuse, that the Laws and Customs of the Realm, are not  
Written so, that they may be known of all Men.*

*Mirror. c. 5. Sect. 1.*

In the SAVOY:

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THE  
PREFACE.

**T**HE Ensuing Treatise *being occasioned by the late Act, that all Proceedings in Courts of Justice shall be in the English Language, it may seem necessary to prefix here, some few Observables, both on the one and the other.*

*And first, as to the Act it self, I shall observe in Genera', that in its first View it seems to be unded on the most exalted Motives of publick Good, and the most amiable Result of all Divine and Human Laws, viz. Salus Populi, or The Happiness and Security of Mankind.*

*And undoubtedly to this great End the All-wise Creator, having in the Beginning*

*ginning form'd the Universe for the Contemplation and Service of Man, gave him at first the plain and easy Common Law of Nature to be his Rule and Guide; and afterwards for his own People formed a Body of Statutes, more brief, more legible, and more easily understood than any human Laws whatsoever.*

*Puffendorff  
c. 11, 56.*

*Puffendorff  
iis. 2. c. 3.*

*That the Law of Nature was founded on the same plain and obvious Principles, and throughout all its Operations and Effects constantly tends to the universal Good of the whole, as well as the Preservation of every individual Species, must be acknowledged by all.*

*Nor does the Law of Nations any Way derogate from the same beneficent Principles; it generally acts on the same Motives; and pursues the same Ends; and tho' it secondarily intends the Advantage of Particulars, yet its primary Regard is the Benefit of all Mankind.*

*See the Stat.  
36 E. 3. infra.*

*It may be also urged in Favour of our Statute, that whatever concerns the Interest of all, ought to be known and understood by all; and seeing Laws and Customs will the rather be perceived and known, and better understood in the usual Tongue, 'tis highly rational they should*

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should be promulgated and practised in such known Tongue.

*And as all Nations in the World had their Laws originally promulgated in their own Language, so the Practice of those Laws, and the Modes and Forms of their Judicial Proceedings were consonant to those Laws, viz. Every Nation in its own Language.*

*But more particularly with Respect to England, or rather Britain, we may observe, that the antient Britains had and exercised their Laws and Customs in their own Language, long before that Body said to be composed by Hoel Dha, the greatest Part whereof was in Being long before his Time.*

*And in that Body lately published, we find not only the Positive Laws to be enacted and promulgated in the British Language, but also the Forms of their Processes, Pleadings, Judicial Proceedings and Entries were solely in the British Language.*

See L. L.  
Hoeli 136,  
494, &c. and  
lib. 5. c. 10.  
per totum.

*Also their Saxon Successors, when once civilized, pursued the same Method both in their enacting Laws, and in distributing Justice in the Saxon Language, tho' it must be confess'd they took most of their*

*Laws from British Paterns. See the Laws of Ina, Alfred, &c. Dugdale's Monasticon Vol. 1. p. 32, 39, 43. Ponticus Virunnius, Lib. 3. p. 10, 14. Taylor's Gavelkind, 49, 52, 53. Hollingshead pa. 15, &c.*

*Nor did W. 1. proceed on a different Ground; for his Aim being to introduce and establish the Norman Language here, had that Design succeeded, it would have been highly reasonable to have had our Laws, both in Theory and Practice, in the Norman Language; but his Attempts failing in that Particular, we may well wonder how our Laws for above 500 Years came to be pleaded in that Language, which was ever the Aversion of Englishmen and Freemen. And what other Cause can be assigned, than that the Creatures of Arbitrary Power were naturally its Advocates, which chiefly maintain'd its Authority by keeping the People in Ignorance of the Law.*

*Notwithstanding which, we find many Footsteps of the English Tongue used both in legal Proceedings, and Acts of State, soon after the Conquest; as in the London Charters of W. 1. the Proclamation of Rufus for raising the Siege of Rochester, the Speeches of H. 1. to his Parliaments; one whereof spoken to a*

Parliament of Englishmen, *in Opposition to the Normans, Runs in this Strain, viz.*

Vos (Angligeni) Amici & fideles mei indigenes ac naturales, &c. *You my beloved and faithful Englishmen; the antient Inhabitants and true-born Natives of this Land; you know the fierce and bloody Disposition of my Brother Robert; and that he hates you with Detestation, &c. But I a mild and peaceable Prince; born and bred among you, desire to govern you in Peace, and in the Enjoyment of your antient Liberties; I am willing to be guided by your Counsels, &c. And if you'll provide a Charter, I am ready to restore to you all the Laws of the Holy King Edward; and will command them to be inviolably observed, &c. that so you joining with me, we may repel the Attempts of my Brother and his Normans; for if I am assisted with the Courage of you Englishmen, I shall not value the Threats of these (scoundrel) Normans.*

Si enim Fortitudine Anglor' roborer, inanes Normannor' minas nequaquam censeo formidandas.

*I the rather mention this Speech, for that I take it H. 1. did hereupon execute another Charter (besides that which he granted at his Coronation) wherein he fully restored all the Confessor's Laws, and which in Truth was the Original of the several Magna Charta's of H. 2. King John,*

H. 3. &c. *And I am the rather induced hereto, for that about this Time I find not only Officers Civil and Military, to be elected by the People, but even Bishops were about this Time elected à clero & populo, which must have been owing to the entire Restoration of those Saxon Laws, whereby all Officers sacred, Civil and Military were so elected.*

*'Tis true, this King (as also seven or eight of his next Successors) soon broke through all Oaths, Charters, &c. and notwithstanding the Grant supra, the former Practice as to the Law being in Norman, &c. soon revived, the Mischiefs of which were complained of in divers succeeding Parliaments without Redress.*

*But after 300 Years from the Conquest, the Cloud began to withdraw. For Ed. 3. in his 36 Year, pass an Act, that Pleadings (at Law) should be in the English Tongue. The Preamble of it is very remarkable, and shows the strong Motives the Parliament had to pass it, and the Opposition it formerly met with: But there being in the End of it, a Clause or Sentence (added by the Judges of those Times,) which Perverts the Intent of the Act; and neither Lords nor Commons ever consented to, shews us, how easily  
Craft,*

*Craft, when supported by Authority, may pervert all human Laws whatsoever.*

*The aforesaid Stat. 36 Ed. 3. in its Preamble recites thus: Because it has been often shewed to the King by the Prelates, Dukes, Earls, Barons and all the Commonalty, of the great Mischiefs, which have happened to divers of the Realm; because the Laws, Customs and Statutes of this Realm be not commonly holden and kept in the same Realm; for that they be pleaded, shewed and adjudged in the French Tongue, which is much unknown in the said Realm, so that the People, which do Implead or be impleaded in the King's Courts, and in the Courts of others, have no Knowledge nor Understanding of that which is said for them or against them, by their Serjeants and other Pleaders: And that reasonably, the said Laws and Customs will be rather perceived and known, and better Understood in the Tongue used in the said Realm; and by so much, every Man of the said Realm may the better govern himself without offending of the Law, and the better keep safe and defend his Heritage and Possessions; and for that in divers Regions and Countries, where the King and Nobles and others of the said Realm have been, good Governance, and full Right is done to every*

Stat. 36.E. 3.  
cap. 15.  
Note; Many  
Petitions had  
been to the  
like Purport.

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every Person, because *that* their Laws and Customs be learned and used in the Tongue of *the* Country: *The King desiring the good Governance and Tranquility of his People; and to put out, (remove) and eschew the Harms and Mischiefs, which do or may happen in this Behalf, by the Occasions aforesaid, hath ordained and established by the Assent aforesaid:* That all Pleas which shall be pleaded in any Court whatsoever, before any of his Justices whatsoever, or in his other Places, or before any of his other Ministers whatsoever, or in the Courts and Places of any other Lords whatsoever, within the Realm, shall be pleaded; shewed, defended, answered, debated and adjudged *in the English Tongue. (And that they be entered and inrolled in Latin.)*

\*Note; These Latin Words are not in the Record. Cotton's Records, 94.

*From the Preamble of this Act, we may observe the many Motives the Parliament had to pass it, viz. 1st, The great Mischiefs that arose from the Non-Observance or not keeping of the Law; 2. That this was occasioned by Mens Ignorance thereof; 3. That that Ignorance arose from its being pleaded, &c. in an unknown Tongue. 4. That the People had no Knowledge of what was said for or against them. 5. That it might be reasonably hoped, the Law would*

*would be better known and understood when in English. 6. That thereby People will better know how to govern themselves, without offending the Law. And 7. That they will better keep and defend their Heritage and Possessions. And lastly, The Example of other Nations, &c. From all which we may clearly see the strong Desires and Intentions of both Prince and People, to have the Law pleaded, &c. in the English Tongue. We may also Note these Words, and that they be entered and enroll'd in Latin, were craftily added to the Act after the Rising of the Parliament: And as Mr. Rymer, Cotton, and others have observed, are not in the Record of that Act.*

See Cotton's Records, 94. and a MS. of Mr. Rymer, in my Possession.

*And yet it is strange, to find the Multitude of Judgments and Resolutions, to be met with in our Books, built on that apocryphal Text of the Statute, and 'tis well known, that within Time of Memory 'twas little less than legal Heresy, to Report any Case of Law in English: And till my Lord Hobart's Reports, we had not one Book of Law Cases published in our own Language.*

First Published, Anno, 1641.

But in the Year '1650, the then Parliament passed an Act; entitled, an Act for turning the Books of Law, and all Processes

*An Act passed*  
22 Nov.  
1650.  
For Law  
Books and  
Proceedings  
to be in En-  
glish. See  
*Scibel*, 148,  
149.

Processes and Proceedings at Law, into English; thereby enacting, That all the Report-Books of the Resolutions of Judges, and other Books of the Laws of England, shall be translated into the English Tongue; and that from and after the 1st of *January* 1650, all Report-Books of the Law of England, which shall be Printed, shall be in the English Tongue only. *And further*, That after the first Return of *Easter Term*, 1651, all Writs, Processes and Returns thereof, and all Pleadings, Rules, Orders, Indictments, Inquisitions, Certiorari's, Patents, Commissions, Records, Judgments, Statutes, Recognizances, Rolls, Entries and Proceedings of Courts-Leet, Courts-Baron and Customary Courts, and all Proceedings whatsoever, in any Courts of Justice, and which concern the Law and Administration of Justice, shall be in the English Tongue only, and not in Latin or French, &c. (as in *Scct.* 1. of the present Act) with a Penalty of 20 *l.* for every Offence.

*But the then Legislature, not having thereby assigned any Person or Persons, for the carrying on of that great and necessary Work, the Defect of the said Act in that particular, was soon perceived, and therefore, in the following Session, another Act passed to supply that Defect:*  
Whereby

Whereby it was enacted ; 1st, *That the Translation into English, of all Writs, Procces and Returns thereof, and of all Patents, Commissions, and all Proceedings whatsoever, in any Courts of Justice in England, and which concerns the Law and Administration of Justice, to be made and framed in the English Tongue, according to the Act, Entitled, &c. (as above) be and are hereby referred to the Speaker of the Parliament, the Lords Commissioners of the Great Seal of England, the Lord Chief Justice of the upper Bench, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, for the Time being, or to any two or more of them ; and what shall be agreed by them, or any two or more of them, in translating the same, the Lords Commissioners shall and may affix the Great Seal thereunto, in Cases where the same is to be fixed. And also that Mistranslation or Variation in Form, by reason of Translation, or Part of Proceedings or Pleadings already begun, being Part in Latin and Part in English, shall be no Error, nor make void any Proceedings by reason thereof.*

*Passed 9 Apr. 1651. The Translation thereof referred to the Judges, &c. Scobel 154.*

*Note ; The former Part of this Clause, 'tis said was struck out of the present Act, by some who it seems are unwilling to touch the Burthens they bind for others.*

Provided that the said recited Act shall not extend to the certifying beyond the Seas, any Case or Proceedings in the  
Court

Court of Admiralty, but that in such Cases the Commissions and Proceedings may be certified in *Latin*, as formerly they have been.

*These two Acts contain the whole Plan of the present Act, and by comparing the Act of 1651 with the present, 'twill be easily seen, that the second Clause of the present Act, touching Mistranflation, &c. has a Relation to and Dependance on those Directions in the former Act, viz. the appointing the Persons by whom such Translations were to be made; which Direction being omitted in the present Act, has not only occasioned the Inconsistency of a Relative Clause without any Antecedent; but will doubtless in a great Measure render the whole Act ineffectual, except remedied by a future Act.*

*For as 'tis obvious to Common Sense, that all Writs, Processes, Pleas, and the other operative Words in the Statute, ought to be established under a certain Form of Words (which in Truth is essentially necessary in legal Proceedings) so it is as evident to Experience, that except there be a Uniformity in the Phraseology or Manner of Diction to be used in those Writs, Processes, Pleas, &c. the Law it self must become an Individuum vagum, or an uncertain Jumble of disagreeing Forms.*

*Fron*

*From this Consideration it seems highly reasonable, nay absolutely necessary, in order to render the late Act effectual, that (seeing those who are sworn to serve, have declined the Service) some learned, discreet and industrious Persons be selected and authorized by publick Authority, and with a due Reward encouraged to undertake and perfect a Translation of, and reduce into one Methodical Body, the most usual and approved Forms and Precedents in our Law: And that this, when perfected, have the Sanction of the Legislature for its Approbation.*

*The Present Act has in some Measure schem'd out a Method of proceeding herein (though not so exact but it may be corrected on a Review) being entitled, An Act, That all Proceedings in Courts of Justice, within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language. And reciting, Whereas many and great Mischiefs do frequently happen to the Subjects of this Kingdom, from the Proceedings in Courts of Justice being in an unknown Language, those who are summoned and impleaded having no Knowledge or understanding of what is alledged for or against them in the Pleadings of their Lawyers*

The Stat.  
4 Geo. 2. c. 26.  
The Title.

The Pream-  
ble.

See the Pre-  
amble of  
§6 E. 1. ante.

Lawyers and Attornies, who use a Character not legible to any but Persons practising the Law. To remedy these Mischiefs, and to protect the Lives and Fortunes of the Subjects, of that Part of *Gr. Brit.* more effectually than heretofore, from the Peril of being ensnared or brought in Danger, by Forms and Proceedings in Courts of Justice, in an unknown Language; *It thereupon Enacts,*

*After 25 Mar.  
1733. all Pro-  
ceedings at  
Law to be in  
English.*

( 1. ) *That after the 25th of March 1733, all Writs, Proccs and Returns thereof, and Proceedings thereon, and all Pleadings, Rules, Orders, Indictments, Informations, Inquisitions, Presentments, Verdicts, Prohibitions, Certificates, and all Patents, Charters, Pardons, Commissions, Records, Judgments, Statutes, Recognizances, Bonds, Rolls, Entries, Fines and Recoveries; and all Proceedings relating thereunto; and all Proceedings of Courts-Lect, Courts-Baron, and Customary Courts, and all Copies thereof; and all Proceedings whatsoever, in any Courts of Justice within that Part of Great Britain called England, and the Court of Exchequer in Scotland, and which concern the Law and Administration of Justice, shall be in the English Tongue and Language only, and not in Latin or French,*

French, or any other Tongue or Language whatsoever.—— And shall be written in such a Common legible Hand and Character, as the Acts of Parliament are usually ingrossed in. And the Lines and Words of the same to be written at least as close as the said Acts usually are, and not in any Hand, commonly called Court-Hand, and in Words at Length, and not abbreviated, any Law, Custom, &c. to the contrary.

And be written in a common legible Hand, and in Words at Length, &c.

And all and every Person or Persons, offending against this Act, shall for every such Offence forfeit and pay the Sum of 50 l. to any Person who shall sue for the same by Action of Debt, Bill, Plaint. or Information, in any Court of Record at Westminster, or the Exchequer in Scotland, wherein no Essoin, Protection or Wager of Law shall be, nor more than one Imparlance.

Penalty for every Offence 50 l.

( 2. ) And further, that Mistranslation, Variation in Form, by Reason of Translation, Misspelling or Mistake in Clerkship, or Pleadings or Proceedings, begun or to be begun before the said 25th Day of March 1733, being Part in Latin and Part in English, shall be no Error, nor make void any Proceedings by Reason thereof; but that all Manner of Mistranslation, Errors in Form, Misspellings

Mistranslation before 25 Mar. 1733. amendable before or after Judgment.

pellings, Mistakes *in* Clerkship, may at any Time be amended, whether in Paper or on Record, or otherwise, before or after Judgment, upon Payment of reasonable Costs only.

Note: 'Tis said this Clause was

at first annex'd to another Clause, directing the Judges, &c. to make Translations of proper Forms, as was provided by the Act of 1651. But they unwilling to assume the Task struck out the Clause that related to their Duty, and new modelled this in such a Manner, that it has neither *Head* nor *Tail*. After which follows a like Clause with the last, in the Act 1651, *viz.*

( 3. ) Provided that nothing in this Act, nor any Thing herein contained, shall extend to certifying beyond the Seas, any Case or Proceedings in the Court of Admiralty; but that in such Cases the Commissions and Proceedings may be certified in Latin, as formerly they have been.

( 4. ) The last Clause in the Act is, That all the Statutes of Jeofails, &c. shall be extended to Proceedings in Law (except in Criminal Cases) when the Forms are in English, &c. whereto I see no great Objection to be made (except to the Exception, which I conceive may have very pernicious Consequences, as it entirely deprives the Prisoner of those Rights, which are allow'd him by the very Statutes of Jeofails.)

Objections to the Act.

*But besides, the Matters abovementioned, some other Objections may justly be made against the penning of this Act, three of which are most obvious, viz.*

1. That all Proceedings and Copies, 1. Objection.  
 &c. are to be written in such (*i. e.* so large) a Hand and Character as the Acts of Parliament are usually ingrossed in: *Which being an excessive large Hand and Character, will occasion Copies of Records, Processes, Pleadings, &c. to extend to four Times the Quantity of Paper, when in English, than they are now in Latin; and as the Increase of the Paper will necessarily increase the Stamp Duties; so it will put the Suitor to far greater Expence than at present. And thus the Act, instead of being an Ease or Benefit to the Subjects, will become their Grievance and Oppression. Also,*

Note.

*The second Objection confirms the former, 2. Objection.  
 for the Words being, That 'Proceedings, &c. shall be written in Words at Length, and not abbreviated. Hereby the Clerk is restrained under the Penalty of 50 l. not to write any Word abbreviated, altho' it be a known English Abbreviation, as (&) (&c.) (the Exec<sup>r</sup>.) (Adm<sup>r</sup>.) or the like; nay, if a Word has a double m or n, or the like, if he writes it singly with a Dash over as usual, he incurs the like Penalty;*

*all which will very much contribute to extend Pleadings and Copies to an excessive Length. But if the Legislature will please to remit the Duty, these Objections may be easily answered, and the People satisfied of the just and good Design in passing this Act.*

3. *Objection.* *A third Objection will arise from the general Scope of the Act, viz. That all Writs, Processes, &c. shall be in English. Now it must be granted, that most of the Names of Writs, and some Officers in the Law, as Custos Brevium, Chirographer, Prothonotary, &c. are either Latin or Greek Terms; and consequently by the Direction of this Act are to be translated into English; whereas 'tis well known, no English Words are proper or significant enough to express the Sense they bear, as they are appropriated to such respective Writs or Officers. And seeing the common People have been accustomed to, and have as good or a better Notion of those Writs and Officers, when express'd in Latin, &c. than possibly they can have when in English; nay, their being put into English, would but confound and distract their Thoughts and Ideas, I see no more Reason for rendering the Names of Writs or Officers in English, than I do for rendering into the same Language, any of our*

*COMMON*

*common* Christian Names, *tho' perhaps they are Greek or Hebrew.*

Note; *Also in some Cases, especially in* 4. *Objection,*  
Criminal Prosecutions, *it may be worth*  
*while to forfeit the Penalty of the Act,*  
*which is the utmost the Law prescribes, but*  
*seems no way to Invalidate the Proceed-*  
*ings, tho' in Latin, &c. Quare therefore,*  
*if it is not necessary to amend the Act in*  
*that Particular, by declaring all Proceed-*  
*ings, &c. in Latin to be void, &c.*

*There are some other slighter Objections*  
*may be made against the Act, as 'tis now*  
*penned; but as the approaching Parlia-*  
*ment will doubtless find Occasion to review,*  
*so I doubt not they will not only endea-*  
*our to make the Act effectual, for the*  
*Purposes intended, but also consider of some*  
*Method of rendring this and other Laws*  
*more beneficial to the People. But Cyn-*  
*thius aurem, &c. I must not prescribe.*

*Secondly. As to the Book itself, the* Secondly as  
*Reader will easily see the Scope of it in* to the Book.  
*the Title Page; but I may here fur-*  
*ther inform him, that it being a pur-*  
*posed Treatise, of the Nature and Forms* Its Contents,  
*of Writs, Processes and Mandates, with*  
*Directions and Returns in English; I*  
*have in the first 100 Pages of the*  
*Book, examined into the Nature and* and Method.  
*Forms*

Forms of such Writs, as are either constitutional and political; as Writs of Ad quod Damnum, Oyer and Terminer, Nuisances, Of the Peace, &c. or such as concern the King's Prerogative; as De Idiota inquirendo, &c. After which I come to such Writs and Processes as are of a more practical Nature. See pag. 109. But in tracing some Writs of this later Kind, I have been forced in a few Instances, to introduce other political and prerogative Writs, besides those at first intended, and which I did not then foresee; which has occasioned my being somewhat Prolix on the Head of Writs, and frequently to insert Forms of Processes under the same Title, in order to shew the Analogy between them, and the Method of turning antient Writs into modern Processes, &c. Thus under the Heads of Covenant, Debt, &c. are inserted the Processes adapted to these Titles; and under Trespass and Trover, you will find not only the Forms of Bills of Middlesex and Latitats, but also a peculiar Discourse, shewing the Original of those Processes.

Commissions.

After this follows a Tract of the Form of Returns of Writs and Processes, which being concise and exact, both in its Matter and Method, was thought fit

*fit to be added, as being comprehended in the three first operative Words of the Act, viz. Writs, Processes and Returns.*

*As for the Alphabetical Table or List of the Forms of Directions of Writs and Processes, I do assure the Reader, that on examining all the Lists formerly published of that Kind in Latin, I could not find one that was free from Multitudes of Errors and Mistakes; I have therefore, after Examination of what Writs, Grants or Charters I could meet with, endeavoured to collect and reduce into English, a Table of the Stiles or Directions of the several Cities, Burrows, Towns, &c. to which such Writs and Processes are usually directed.*

*I may further inform the Reader, that in the Translation of some of the later Precedents, I have rather followed the English Phraseology and Mode of Speech, than adhered to the Latin Phrase, as conceiving my self warranted to do so by the Act it self, which says in the English Tongue or Language, and doubtless extends to the English Mode or Form of Speech: But yet I have had this regard to the Latin Phrase, that there is not any the least Particle in the Latin Original, but what is express'd in these Translations. Nor have I given any translated Precedent*  
without

*without shewing the Original, or referring to the Place where the Original may be seen, whereby 'twill be easy for a curious Inquirer to discover my Mistakes, for which I will sincerely thank him.*

*'Tis true, I have in many Places corrected the Errors of the Originals themselves, and in others added Synonyma's and Expositive Words; for that the Original Word, in its true Classical Sense, sometimes bore an improper Import; but as such Synonyma's and expositive Words are included in Parentheses (thus) so it is presumed they will Occasion no Difficulty to a Reader or Translator, and may in some Measure serve to illustrate the subject Matter; if not, they are easily rejected.*

Expostulator.

*To conclude this Preface; If any Man shall happen to be offended, by reason of some free Expressions and Opinions delivered in the Book: I declare solemnly my whole Endeavour has been to Discover and Deliver TRUTH impartially, and therefore, to any angry Expostulator, my only Answer is, I have said I'F.*

*Middle-Temple,  
Nov. 16. 1731.*

W. BOHUN.

O F

## W R I T S

## In G E N E R A L.

**A** WRIT (in *Latin Breve*, in *French Writ*, its *Definition*, *Brief*) may properly be defined to be a *Precept* or legal Command of the King, written in Parchment, and sealed with his Seal, whereby something is commanded to be done, or not to be done, as it regards either a publick or a private Right. But more generally an Original Writ is said to be the King's legal Command, to a Subject to do something which by Law he ought to do, or (as in the *Pluries* or Third Writ, &c.) to shew Cause to the contrary. *Finch's Law.* And in this Sense, a Writ is the Foundation of a Suit or Action at Law, setting forth *briefly*, the Cause of Action or Foundation of the Suit. 237, 251.

Writs in general (exclusive of *Processes*, *Divisions*, which see hereafter) are usually divided into two Kinds, *viz. Original* and *Judicial*. The former must be under the King's Seal, as aforesaid, and attested in his own Name, as (*Teste meipso*) *Witness my self*, &c. whereas the *Teste*, *Teste*,  
 B or

or Attestation of the later, may be in the Name of the Chief Justice of the Court whence it Issues, as (*Teste*) *Witness, Raymond, or R. Eyre, &c.* But I shall postpone the Consideration of *Judicial Writs*, till I come to Title *Judgments*, being the 19th operative Word in the said *Statute*.

Note; a Writ is not good without a *Teste*, or In *Witness, &c.*

*Original.*

*Summoners.*

*Pledges.*

Original Writs are such as are usually issued for *summoning* a Defendant to answer to the Plaintiff's Suit; and by the Provision of the Common Law, were not to *arrest* the Defendant's Body. Nor indeed could the Sheriff, &c. even summon him, by good Summoners, &c. (as the Course then was) except the Plaintiff had first indemnified or secured the Sheriff, by giving good Pledges that his Claim or Action was just, as the Words of the Original do still import, *viz. Si A. fecerit te securum, (i. e. by giving good Pledges) de clamore suo prosequendo tunc summoneas B. per bonos summonitores, &c.* as will appear in the following Precedents; and which doubtless was an excellent Provision of the Common Law against frivolous, vexatious and groundless Suits.

*Frank pledges.*

*An excellent Institution.*

Nor was the Common Law less careful in securing to all Men their just Debts, by instituting that admirable *Bulwark* (as I may justly term it) of private Rights and Properties; I mean the Law of *Frank-pledges* and *Decennaries*, whereby all the Freemen in the Kingdom were form'd into such admirable Communities, Fraternities or Fellowships, that all the Members of each Society were *Fidei jussores*, or Pledges for each other, and were responsible, not only in Cases that affected the publick Peace and Security, but even in Cases of private *Debts* and *Duties*,

*i. e.*

*i. e.* if lawfully contracted. For as nothing could be bought or sold, but in Presence, and on vouching others of the same Decenary; so in Case there after happened any Defect of Property in the Seller, or Insolvency in the Buyer, the rest of the Fraternity were to make up the Loss by Contribution.

And thus as in private Life, none could contract with, or become indebted to another, (even to the Value of 4*d.*) without the Voucher of two others of the same Decenary or Free-borough: So in all Cases that respected the Publick, as in Suits of Law, &c. the Common Law principally aimed rather to prevent the committing of Torts and Injuries, by taking Caution or Security against wrongful and vexatious Suits, than by encouraging Actions for Damages, when the Tort or Wrong was committed. And hence, on good Reason, were Pledges *de prosequendo* introduced, and originally actually given by the Plaintiff, on suing out any *Original Writ*.

Note; the Policy of the Common Law to prevent Suits.

Pledges of prosecuting.

It is very justly observed by my Lord Coke and others, That Original Writs are the Foundation on which the Common Law depends: And certainly a careful Perusal of, and attending to the various Forms of the Writs laid down in the *Register*, and in the *Natura Brevium*, will discover not only much of the Practice and Method of Proceeding, but also, in many Cases, the very *Rationale* and fundamental Principles upon which our Common Law is built. Besides which, the Phrasiology and Diction of those Writs, is so artificial and exact, that there is scarce to be found in any of them the least Redun-

The Nature of Originals. Co. Lit. 73.b.

Sir T. Smith.  
See the Pre-  
face to the  
10th Rep. p.  
14.

Co. Lit. 73. b.

dancy or Defect; the Truth of which Observation induc'd a learned Secretary of State, long since, to declare, That it was not possible to comprehend so much Matter, so perspicuously, in fewer Words as in those *Writs*.

And doubtless these, or some other like Considerations, have constantly induced our Legislature, when ever they attempted any Regulations in the Practice or Profession of the Law, to have in the first Place, a Regard to the due Formation, Regulation and Execution of *Writs* and *Processes*. And hence we find these Words to be placed as the primary and principal operative Words in the before recited Act, which directs all *Writs*, *Process* and *Returns* thereof, to be in the *English* Language, &c.

I shall therefore begin with *Writs*, and after descend to the other operative Words, in the same Order as they lie in the said Act, and under this Head of *Writs*, in the first Place, treat of such as may shew the Foundation of their Constitution, and may be properly termed *Prerogative Writs*, as *Ad quod Damnum*, *Oyer* and *Terminer*, &c. and then descend to such as are at this Day chiefly in Use, or most necessary to be known by the Practicers of the Law, viz. *Writs of Account*, *Assumpsit*, *Case*, *Covenant*, *Debt*, *Ejectment*, *Homine Replegiando*, *Mandamus*, *Prohibition*, (vide post) *Quare Impedit*, *Quo Warranto*, *Replevin*, *Scire Facias*, *Trespafs*, *Trover*, *Waste*, &c.

Names of  
*Writs*.

Names of  
*Processes*.

All which being *Originals*, are carefully translated from the Register and the *Natura Brevium*, and adapted with the utmost Exactness to modern Practice; but for *Judicials* see

see hereafter, Tit. *Judgments*; and for *Processes*, commonly (though not truly) called *Writs*, as Bills of *Middlesex*, which may still be so named, a *Latitat*, *i. e.* he Skulks, or a *Hide and Seek*, a *Non omittas*, *i. e.* don't omit your Duty, a *Clausum fregit*, *i. e.* he broke the Close, though it sometimes signifies he broke my Head, or he lay with my Wife, &c. These I say, and the like, being only the Mandates of the Chief Justices, and not properly *Writs*, I shall refer to the Tit. *Process*, under which Word the Act itself seems to have placed them.

Some of these Writs are said to be *Ex officio, de Jure*, or of Right, others are *Ex gratia, i. o.* such as the Prince is not obliged to grant *ex debito Justitiæ*, but flow merely from the Prince's Favour. These later seem to be all Honorary Writs, for conferring Dignities or Offices, Writs of Privilege, and the like. But as I apprehend, all *Remedial Writs, i. e.* such Originals as are used for Recovery of *Rights* or *Duties*, are *Due* of Right, *ex debito Justitiæ*; and these are the Writs we shall principally treat of.

And note; an Original Writ is not amendable, where it is erroneous in Substance, by Default of him who gave the Instructions, because he who took it out may have a new Original, and so he is not without a Remedy; but if the Clerk who makes the Writ, commits an Error therein, it shall be amended by his Instructions; and if there be no Original, &c. after Verdict, it is helped by the Statutes of *Jeofails*.

But if a Judicial Writ be erroneous, it must be amended, because the Party cannot

*Difference of Writs.*  
*Ex gratia.*

*Ex debito, &c.*

*Where amendable.*  
*See 8 Co. 86 to 89.*

*2 Lilly 716.*

have a new Writ; and if it should not be amended, the Party (as to that way of proceeding at Law) would be without Remedy. But all Writs, whether Original or Judicial, ought to pursue their proper established Form, in order to prevent Error and Confusion, which the Law abhors.

*Distinction between a Writ and a Commission.*

*Writs at Common Law, &c.*

*Commissions, Acts of Regal Power.*

*What Offices the King might grant by Commission.*

It may be also proper in this Place to observe, That altho' in some of our Books, the Terms *Writ* and *Commission* seem to be used promiscuously, yet the Law has established a very essential Difference between them; for though both of them issued under the Great Seal, in the King's Name, and with a *Teste meipso*, and consequently both had equal Marks of Royal Authority; yet it appears from the Instances in the *Register* and *F.N.B.* That the King's Writ was always directed to, and to be executed by, some publick and known Officer in the Law (*i. e.* such as were originally elected by the People) as Sheriffs, Coroners, Escheators, &c. who, by Virtue of their Election, were originally to be solely intrusted with the Execution of the Law over Freemen. Whereas the Act of granting Commissions to the King's Nominees, for the like Purpose, seems to have been originally a politick Stretch of Regal Power, and as such was at first censured, and restrained by divers Acts of Parliament, as *Articuli super Chartas*, *Stat. 2 E. 3. c. 2*, &c. Nor at first was any Power granted by Commission to be executed, but only over the King's own Tenants, as in ancient Demesne, &c. and of such Matters of the Prerogative only, wherewith the Common Law had intrusted him, as Commissioning Admirals and other Officers for Guard

Guard of the Sea-Coasts ; as the Lord Warden of the Cinque Ports, the Constables and Guardians of his Forts and Castles ; the Wardens and Officers of his Forests, Chases, Parks, &c. the Bailiffs, Reeves and Stewards of his Honors, Manors, Lands, &c. These Offices, and the like, the King might confer by Commission, on whom of his Subjects he thought fit, and therein grant them such Powers and Authorities as were proper for the due Execution of their Offices. See *F. N. B.* 83, 84, &c. and the several Writs *De auxilio*, & *Scutagio habendo*, &c. and hereafter under Title of Writs of *Oyer* and *Terminer*, &c.

But in Matters relating to Civil Publick Justice, and the common Rights of the People, the Case was far otherwise ; for in such Cases the King originally could not grant or delegate any Authority by his *Commission* : No, the Law could not be executed but by a legal Method, *i. e.* by *Writ* duly issued and directed to publick and known *Officers*, *i. e.* such who derived their Authority from those very Persons over whom they were to exercise their Authority ; and this, and only this, at first gave the People of *England* the Denomination of a Free People ; for I think it might be evidently proved, That by the ancient *Laws* of *Edward* the Confessor, and other *Saxon* Kings, (which *Laws* the Kings of the *Norman* Race, were for some Ages sworn to observe) no Person could exercise any Authority, either Civil or Military, or even Ecclesiastical, over the Freemen of this Kingdom, without the previous free Election and Consent of the Persons over whom he was to exercise such Authority ; and hereof we have

*Officers concerned in the Administration of publick Justice eligible, and to act by Writ, &c.*

still some Footsteps left us in the Register, as the several Writs *De coronatore*, and *De viridario eligendo*, &c. The *Saxon* Laws expressly mention, That Earls or Sheriffs of Counties, and *Heretochs*, or Lords Lieutenants of Counties, and other Civil and Military Officers, were to be elected by the Freeholders in *pleno Folkmote*; and the *Saxon* Chronicle gives us an Instance of an Earl so elected, and avers it to be according to Law. And I find Instances, even in King *Hen. I.*'s Time, of Bishops elected *a clero & populo*, which whether it were *Jure Divino* or *Humano*, I shall submit to the Judgment of the Reverend Fathers of our Church.

It is true our Kings, or their Privy Council, soon fell on the Expedient of changing Writs into Commissions, thereby assuming, not only a Power of nominating whom they pleased, but likewise extending or restraining their Authority in what Manner they thought fit; though generally it was with the like Intent, which (as *Suetonius* mentions) was usually dictated by a certain Emperor to his Commissioners, *Scitis quid volo, & quibus (opibus) opus habeo*. But this Practice becoming grievous to the Subject, under *Ed. 2.* occasion'd an Act of Parliament, *viz. 2 E. 2. c. 2.* whereby it is enacted, That no Commission of *Oyer* and *Terminer*, &c. should be granted but to Judges of the one Bench or the other, &c. And there is a Writ in *Fitz. N. B.* which mentioning the said Statute, does expressly revoke an Authority granted by such a Commission, as illegal, &c. *viz.*

See F. N. B.  
169, 110.

The King to his beloved and faithful F. and F. N. B. G. of E. greeting: Although we lately consti- 190. H. tuted (commissioned) you our Justices to take (the Verdict of) a Jury of twenty-four Knights, which J. who was the Wife of E. had arraign'd before you against E. who was the Wife of A. of L. (in order) to convict the Jurors of the Assize between him A. and the said J. and others, &c. (vide ibid.) yet because the Constitution (Commission) aforesaid was made contrary to the Form of our Statute at Northampton lately set forth, in which it is contained, That Assizes, Juries and Certificates, be taken before our Justices commonly\* assign'd, and no others; which Stat. in all and singular its Articles, willing inviolably to be observed; We command you that in taking of the Jury aforesaid, by Pretence of our Commission so made as aforesaid, you do in no wise intermeddle. Witness our selves at Westminster, &c.

\* Quære, if not originally elected.

But for a further Discourse touching Commissions, see hereafter in Writs of Oyer and Terminer, and in Title Commissions.

I have thought fit here to prefix the foregoing Remarks in order to explain some Incidents that occur in the Forms of divers of the ensuing Writs; and seeing the Forms of many Originals in the Register and F. N. B. will give us great Light into our original Constitution, I hope it will not be unacceptable to all such as have any Regard for that, if I first shew the Nature and Form of some of those constitutional or political Writs, before I come to those which are founded on particular and private Rights.

Of

## Of the Writ Ad quod Damnum, (To what Damage, &c.)

*Its Original Institution.*

**T**O trace the Original Institution of this Writ, and observe the many memorable Cases wherein its Practice was formerly frequent, would give us a noble Idea of the End and Design of the Common Law, which hereby so admirably provided for the *Salus Populi*, or Safety and Security of the People's Rights against the Stretches of Prerogative, and the irregular Acts of Regal Power.

*To restrain Acts of Regal Power.*

*In his Letters Patent, Charters, Grants, Licences, &c.*

*F. N. B. 225. F. & C. 226. H.*

*The Writ.*

*Inquisition*

For it appears by the Forms of those Writs in the Register and *F. N. B.* that in former Times upon every Charter, Patent, Grant, Lease, Release, Confirmation or Licence to be made by the King, there was first a Writ of *Ad quod damnum* to be issued to the Escheator, &c. wherein the Effect of such Charter, Letters Patent, Grants, &c. was to be recited; and whereon a Jury of the Country was to be summoned, who were to inquire of the whole Truth, and every Circumstance alledged in such Charter, Grant, &c. and what Damage or Prejudice the King or any other Person might receive by such Charter, Grant, &c. And no Charter, Grant, Release, Confirmation or Licence of the King, if it respected Lands, Tenements, Hereditaments, Offices, Liberties, Privileges or the like, could be good in Law, till such Writ had issued, and such Inquisition made, and the same returned *ad damnum nullius*, or, that

that no body would be prejudiced by the *and Return.*  
King's making of such a Grant.

By this provident Provision of our Ancestors, it was rendered impracticable in those Times either to aliene or lessen the Lands, Rents, Revenues, Regalities, Dignities or Offices of the Crown; or to injure, oppress or dispossess any of the Subjects in the Enjoyment of his Rights, Liberties or Properties, by Reason or under Pretext of the King's Grant or Letters Patent. *Its Effect.*

Give me Leave to give a few Instances of the Use of this Writ in particular Cases, which will in a great Measure prove how useful and beneficial it was in others, *Its particular Use.* *viz.*

If the King intended to grant any Lands, Tenements, Liberties or Offices, this Writ ought first to issue, *Grants of Lands, &c.* *Et c. F. N. B. 225. F. G.*

If the King intended to make any Lease, Release, Confirmation or Licence, this Writ ought first to issue, *Leases, Releases, &c.* *Et c. F. N. B. 226. H.*

If the King will grant to any City, Town, or Vill, a Fair, Market, or other Franchise, *Markets, Fairs.* *Et c.* this Writ is first to issue. See 3 *Levinz* 220. 2 *Ventr.* 344.

If the King will grant to any City, *Assizes, Weights, &c.* *Et c.* the Assize of Bread and Beer, or the keeping of Weights and Measures, this Writ ought first to issue. *F. N. B. 225. F.*

And it seems the King could not licence one to build a Bridge over a River where a Ferry was before, nor licence one to lay out a better Way, where the common Highway was foul, nor to build a new common Bridge where none was before, nor to change the common Highway in any Case, except this Writ was first issued, and returned to be of *Bridges.* *Highways.*

no

no Damage. See *Cro. Car.* 366, 266, 267. *Vaugh.* 341. 2 *Saund.* 160. See now the Stat. 8 & 9 *W. 3. c.* 16.

*Water-course.*

If the King will licence or grant to one to make a Ditch in his own Land near the King's Pond, in order to draw the Water from the Pond by the Ditch to his Mill, rendering therefore yearly to the King and his Heirs a certain Rent, yet this Writ shall issue, and it shall recite the Grant or Licence, and also the Rent reserved. *F. N. B.* 225. *E.*

Nor can any new Watercourse be made without first suing out this Writ.

*Trenches.*

If an old Trench or Ditch which comes from the Sea with Boats, &c. be stopped by the working and Violence of the Sea, or by any other Means, the King can't grant a Licence for making a new Trench, without a Writ of *Ad quod damnum* do first issue, to inquire what Damage it will be to the King or any others. See *F. N. B.* 225. *E.* 10 *Co.* 142.

*For a Licence to aliene, &c.*

If the King will licence one to enter into Lands aliened, where a Fine is due for the Alienation, without paying the said Fine, a Writ of *Ad quod damnum* shall issue. *F. N. B.* 225. *B.* where the Writ is set down in this Form, *viz.*

GEORGE, &c. *To our beloved Clerk of C. our Escheator in the County of S. Greeting: M. hath supplicated us, That whereas A. lately had granted, that one Messuage with the Appurtenances in N. which of us is held in chief, as is said, and which J. and B. his Wife hold for the Life of her B. of the Demise of the foresaid A. which also after the Death of her B.*  
ought

ought to revert to the foresaid A. and his Heirs, after the Death of the same B. to D. and his Heirs should remain. And F. the Son and Heir of him D. had further granted that the Messuage aforesaid with the Appurtenances, which to him F. and his Heirs, by reason of the Grant and Attornment to him in this Behalf made, after the Death of her B. ought to revert, after the Death of her B. to R. and W. and their Heirs should remain. And (also) that the same R. and W. had granted, that the Messuage aforesaid, with the Appurtenances, which to them R. and W. and their Heirs, by reason of the Grant and Attornment aforesaid to them of the Premises, made after the Death of her B. ought to revert, after the Death of the same B. to the foresaid M. for her whole Life should remain. So that after the Death of her M. that Messuage with the Appurtenances, after the Death of her B. to K. and the Heirs of him K. should remain. Our Licence hereupon not being obtained, we are willing to grant to the same M. that she that Messuage with the Appurtenances after the Death of her B. may enter and hold for her Life of us and our Heirs by the Services therefore due and accustomed. So that after the Death of her M. the foresaid Messuage, with the Appurtenances, to the foresaid K. and the Heirs of him K. should remain to be held of us by the Services aforesaid for ever. (Now) We by thee being willing to be certified if without Damage or Prejudice to us, or to any other whatsoever, we may yield to the Supplication aforesaid in this Part, we command thee, that by the Oaths of honest and legal Men of thy Bailiwick (or of thy County,) by whom the Truth of the Matter may be better known,

Note; the Limitation of the several Estates in Remainder, &c.

Note; it may be directed to Sheriff or Escheator.

thou

*thou diligently inquire if it may be to the Damage or Prejudice of us or of others, if we grant to the foresaid M. that she the Messuage aforesaid with the Appurtenances, after the Death of her B. may enter and hold in form aforesaid, or not, &c.*

*King not to pardon an Alienation without an Ad quod Damnum, &c.*

And if *B.* the King's Tenant (*in capite*) alien'd in Fee to *A.* and afterward *A.* gave back the same Land to the same *B.* and *C.* his Wife in Tail, and then *A.* died, and then *B.* had died without Heir of his Body, and afterwards *D.* the Brother and Heir of *A.* released all his Right in the Land to *C.* the Widow of *B.* in Fee without the King's Licence. If the King would pardon that Trespass (against himself and Crown, &c.) for making of that Release, a Writ of *Ad quod Damnum* was to have been awarded to inquire what Damage or Prejudice the same would be to the King, &c. See *F. N. B.* 225. G.

And if the King's Tenant aliened without Licence, for which the King seized the Lands (as he well might) If the King would restore the Lands, and pardon the Trespass, yet the Writ *Ad quod Damnum* should issue to enquire what Damage it would be to the King, &c. if he made such Grant. And so if an Abbot (or other spiritual Body) had purchased Lands without Licence, and afterwards the King would pardon him for that Purchase, and grant that he might retain and keep the Lands, yet an *Ad quod Damnum* should first issue, &c.

*Nor other Trespass, &c.*

*See F. N. B.*  
*226. B. c.*

So if the King were Lord, and there were a Mesne and Tenant, and the Tenant held of the Mesne by Homage and 20s. and the Mesne

Mefne held of the King *in Capite*, and afterwards the Mefne released to the Tenant the 20s. to hold the Lands to him and his Heirs by Homage, and one Penny, without the King's Licence; the King might feize those Services; and if he would by his Grant make Restitution to the Tenant *Peravail*, an *Ad quod Damnum* should issue to inquire to whose Damage, &c.

And it appears, says *Fitzh.* by the Register, that if the King's Tenant had intruded after the Death of his Ancestor without suing his Livery, before the King could pardon the Intrusion, a Writ of *Ad quod Damnum* should issue to inquire to whose Damage such Pardon would be. *Or Intrusion.*

So if a Forester of one of the King's Forests, who holds his Office of the King, grants the same to another, he ought to have the King's Licence for so doing. But before such Licence shall be granted, a Writ of *Ad quod Damnum* shall issue to inquire what Damage such Licence will be, &c. *Office of Forester.*

And so if the King will licence one to cut down his Trees, or his Wood in his Forests, or to make Assart of the Wood or Forest Lands, or to put it into Tillage, &c. a Writ of *Ad quod Damnum* shall be awarded as appears by the Register. *Trees, Woods, Assart.*

And so if the King will grant Parcel of the Waste within his Forest, &c. to another in Fee rendring Rent, and that the Feoffee may inclose the same with a Hedge, or Ditch, &c. this Writ shall issue to inquire if such Grant will be to the Damage of the King or any other; or if the King would only Lease the same for Years, rendring Rent, yet this Writ

Writ should Issue to the Keeper of the Forest, to know to what Damage of the King or of his Forest, the same would be.

F.N.B.226.G.

*Proceedings  
Everton, &c.*

And (says *Fitzb.*) If the King will grant Part of his Free-chase to one in Fee, rendering Rent, and that he may inclose the same with Hedge and Ditch, &c. a Commission shall be directed to certain Persons to inquire to *what Damage of the King or others,* the same will be, &c. and thereupon a Writ shall be directed to return the Inquest and Panel, before the Commissioners at a certain Day, assigned by the Commissioners; and the Commissioners shall make a Precept to the Sheriff to do the same, and to return the Writ at a Day appointed by the said Commissioners by their said Precept.

Where the King's Tenant would have alienated Land held of the King (*i.e.* his Crown) to another, either in Fee or in Tail or for Life, then by Course of the Common Law, he ought to have had the King's Licence by Letters Patent so to do; and before any such Alienation made, the King ought to have been certified by a Writ of *Ad quod Damnum*, what Damage or Prejudice such Alienation would be to the King. And the Form thereof was thus:

F. N. B. 224.

*Note: on these Writs directing an Inquest more than twelve, may make the Inquiry, but not less.*

GEORGE, &c. To R. M. Knt. Escheator of the County of S. greeting: We command thee, that by the Oath of—, honest and lawful Men of thy County, by whom the Truth of the Matter may be better known, thou inquire if it be to the Damage or Prejudice of us, or any other, if we grant to J. that he of his Manor of N. with the Appurtenances, which is held of us in Chief, shall infeoff P. to have and

to hold to him and his Heirs, of us and our Heirs, by the Services therefore due and accustomed, or not; and if it be to the Damage or Prejudice of us or others, &c. And what the Prejudice of others is, and of whom, and in what Manner, and how. And if that Manor be held of us in Chief, as is aforesaid, or of another; and if of us, then by what Service, and in what Manner, and how, and what the Value of the foresaid Manor is by the Year, in all (its) Issues, according to the true Value of the same; and if any Lands and Tenements remain to the same J. besides the Manor aforesaid, then what Lands and Tenements, and where, and of who or of whom they are held, to wit, Whether (held) of us or of another; and if of us, then by what Service, and in what Manner and how; and if of another, then of who, or of whom, and by what Services, and in what Manner, and how, and what the Value is by the Year in all Issues, and the Inquisition thereupon, by thee taken, distinctly and openly made, to us in our Chancery, under thy Seal, and the Seals of them, by whom it was made, do thou, without Delay, send. Witness ourselves at Westminster this—Day, &c.

See several other Forms of this Writ in the Register and Fitz. Nat. Brev.

And note in these Writs of *Ad quod Damnum* in the Register, appear notable Forms of Grants and Letters Patent, made by the King in divers Manners; for it is a Rule, that the Manner (Matter) of the King's Grant, and the Effect thereof is to be specified and recited in the Writ of *Ad quod Damnum*, and a Return thereof made into the Chancery, before the Patent could pass.

*The Matter, &c. of the King's Grant to be recited in the Writ.*

Which, as I said before, is a glorious Instance of the Care and Caution of the Common Law, for preventing the Alienation or Embezzilment of any the Lands, Rents, Revenues, Services, Profits or Perquisites of the Crown, and also of the tender Regard it had to the Rights, Properties and Interest of the Subject.

F. N. B. 222. And not only from the above recited Writ, but from divers others in the *Register* and *F. N. B.* it appears, That where ever the King's Grant might prove of Prejudice to the Common-wealth, this Writ lay to prevent it; and herein undoubtedly, it was a *Writ of Right*, and not merely *Ex gratia*. As where any *Freeholder*, who had sufficient Lands to qualify him to serve upon Assises and Juries, would alien his Lands in *Mortmain*, by which Alienation his Heir should not have sufficient Lands to qualify him after the Death of his Father, to be sworn on Assises and Juries, this Writ ought to Issue (as I take it) at the Heir's, or any other Person's Instance, to prevent such an Alienation; for that it was then esteemed an Injury to the Publick, to lessen the Number of Persons qualified for serving on Juries, &c. by giving Lands in *Mortmain*, as may appear by this Writ in *F. N. B. 22.*

*Mortmain.*

Note; this seems to be the Common Law before the Statute of Mortmain.

GEORGE, &c. To our beloved J. of K. *Knt. our Escheator in the County of L. greeting: We command thee, that by the Oath of honest and lawful Men of thy Balwick (or of thy County) by whom the Truth of the Matter may be better known, thou diligently inquire if it be to the Damage or Prejudice of us, or of others,*

if we shall grant to B. that he one Messuage, two Acres of Land, and one Acre of Meadow, with the Appurtenances, may give and assign to a certain Chaplain, to celebrate every Day Divine Service for the Soul of him B. and for the Souls of his Father, &c. in the Church (or Chapel) of St. M. &c. To have and to hold to the same Chaplain, and his Successor's Chaplains, to celebrate Divine Service every Day in the same Chapel (or Church) for ever, or not; and if such Grant be to the Damage or Prejudice of us, or of others, then to what Damage and Prejudice of us, and to what Damage and Prejudice of others, and of whom, and in what Manner, and how, and of who, or of whom the foresaid Messuage, Land and Meadow are held, and by what Service, and in what Manner, and how, and of what Value the same are by the Year in all Issues, according to the true Value thereof; and who, and how many are the Mesnes betwixt us, and the foresaid B. of the Mesne Land and Meadow aforesaid; and what Land and what Tenements remain to the said B. besides the Gift and Assignment aforesaid, and where, and of who, or of whom held, and by what Service and in what Manner and how, and what their Value is by the Year in all Issues; and if the Lands and Tenements, which to the same B. shall remain over (besides) the Gift and Assignment aforesaid, the Customs and Services due, as well of the foresaid Mesne Land and Meadow so given, as of the other Lands and Tenements to him still retained, will suffice to do, and (likewise) all other and singular Charges which he sustaineth and useth to sustain, as in Suits, Views of Frank-pledges, Aids, Tallages, Watches, Fines, Ransoms,

*Amerciements, Contributions, and other Charges whatsoever emergent to sustain; and that the same B. in Assises, Juries and Recognitions whatsoever may be put (and serve) as before the Gift and Assignment aforesaid be might be put (and serve) so that the Country, by the Gift and Assignment aforesaid, in Default of him B. more than was wont, be not charged or grieved. And the Inquisition thereupon (taken) distinctly and openly made, &c. as before, or so that the Heirs of him B. in Assises, Juries and Recognitions whatsoever, may be put as his Ancestors, before the Gift and Assignment aforesaid, have used to be put, so that the Country, &c. as above.*

*See and note F.N.B. 124.E, That though a Licence to alien without any Writ of Ad quod Damnum, was then in use, yet such Licence was not to be allowed of by the Judges, without a Writ of Quod Permittat, &c.*

Many other Forms of this excellent Writ in the Register, shew the great Care the Common Law had to prevent all Grants and Alienations of Lands, &c. which might turn to the Prejudice of the Publick. As by disabling the Subject from serving in publick Offices, &c. But the Times are altered; and it would, I fear, be an odious Inquiry to search out how, or by what Means this Writ at first became discountenanced, and afterwards almost wholly laid aside.

But in brief it appears, This Writ was of Old, often made use of to prevent the giving of Lands to the Church and Churchmen in Mortmain, or to pray for dead Mens Souls, &c. And the Restraint of such pious Donations, being esteemed by the Ecclesiasticks, no less than Heresy, and especially for that Lay Juries were by these Writs empowered to Judge whether such Grants were *ad Dampnum* of the Publick, or not;

it was no Wonder to find the whole Body of Churchmen (of which the Chancellor was then always one) averse to the granting of these Writs, where-ever the Church's Interest was concerned. And as this Practice, in Behalf of the Church, came in Time to prevail, so the Court-Lawyers soon followed the Example, and thence arose this Doctrine, viz. That the King might dispense with a Writ of *Ad quod Damnum*, by inserting a *Non obstante* Clause in his Grants or Patents, viz. *Mat. Paris. Et hoc Damus concedimus, &c. absque aliquo Brevi de ad quod Damnum, &c.*

F.N.B.226.H

Mat. Paris.

It was this Practice of the Chancellors and Ecclesiasticks, first introduced the Claim of dispensing with the Licence, and induced an honest and uncorrupt Judge to exclaim on viewing the like Clause in some of the King's Letters Patent. *Heu! Heu! hæc è sulphurea Fonte Ecclesiasticorum exurgunt*; and by this Confederacy the Common Law, as to this Writ, became a——.

It is true, as before is observed, we have still left us some few Instances where this Writ is in Practice even at this Day; but they wholly relate to these two Cases, viz. 1. Where the King is willing to grant a new Fair or Market; and 2. Where he would change a Highway, or make a new Bridge, &c.

Still practised  
in Cases of  
Fairs, &c.

In both which Cases a Writ of *Ad quod Damnum* ought first to issue to inquire, &c. as aforesaid.

As to *Fairs, &c.* the Case of Sir *Oliver Butler*, argued first in Chancery, *Hill. 31 & 32 Car. 2.* and after in the House of Peers, *Trin. 1 Jac. 2.* will give us some Light into the Practice; Where a *Scire facias* was brought

3 Lev. 220  
to 223.  
2 Vent. 344.

brought in Chancery to repeal a Patent granted by King *Charles 2.* to Sir *Oliver*, for a Market to be kept at *Chatham*, which Patent recited that a Writ of *Ad quod Damnum* had issued before the Grant of the new Patent, and that an Inquest had been thereupon taken, and found (returned) not to be to the Damage of any, but it was averr'd that the said Writ was executed by Surprize, and without Notice; and that the Grant of the new Market at *Chatham* was to the great Damage of a former Market at *Rocheſter*, &c. to which Sir *Oliver* demurred, and it was argued by his Counſel, That the Patent could not be repealed, becauſe it was preceded by this Writ, which was found to be to no Body's Damage, and that ſhould conclude all, or at leaſt that the King could not (now) bring a *Scire facias* to repeal his own Patent. But the Lord Chancellor *Finch*, aſſiſted by *North* Ch. Juſt. of C. B. and *Jones* Juſt. of B. R. gave Judgment that the Patent ſhould be repealed: For the Return of the Writ *Ad quod Damnum* (being but an Inqueſt) was not concluſive; and here by the Demurrer it is confeſſed to be to the Prejudice of the former Market. And where a Patent is granted by the King, to the Prejudice of a Subject, the King of Right is (bound) to permit him upon his Petition to uſe his Name for repeal of ſuch Patent by a *Scire facias* at the King's Suit, &c.

On this Judgment Sir *Oliver* brought Error in the Houſe of Peers, where, after Argument at the Bar there, the Lords referred the Matter to ſix Judges then attending there, who all agreed, That Judgment ought to be affirmed,

The Writ to be executed on due Notice, &c.

Vide infra The King if deceiv'd, &c. or his Subjects prejudic'd, may repeal his own Patent.

The King bound thereto of Right.

affirmed, and gave the Reasons thereof, with their Answers to these Objections, *viz.*

That a *Scire facias* does not lie to repeal such Patents, because there is another Remedy by the Common Law, *i. e.*, by Assise of Nufance, *Quod permittat, &c.* where the Matter shall be tried by a Jury and several Judges, and not by one Judge only, as in Chancery. 1. Object.

The King has an undoubted Right to repeal a Patent wherein he is deceived, or his Subjects prejudiced, and that by *Scire facias*, as 2 *E.* 3, 34. a *Scire facias* to repeal a Patent which granted Toll to another's Prejudice. So 17 *E.* 3. 59. *b.* of a Market; so 11 *H.* 4, 5. of a Market; so *Dyer* 197, 198, and 276. divers Precedents. And *Stamford's Prerog.* says, It is *Jure Regio* by the Common Law. And in no Case was it ever a Question, Whether the Writ would lie? but only of the Manner of pursuing it. And it is not unusual for the King to have his Remedy, and the Subject also; as in Batteries, Trespases, &c. Answ.

That no *Ad quod Damnum* was here necessary; that the Patent might have been well granted without it; and therefore, though it was surreptitiously executed, that is not material. 2. Object.

*Resolved* by all the Judges: That which is always done in pleading, is necessary to be done; and that an *Ad quod Damnum* was here necessary; but it might have been dispensed with by a *Non obstante*; for there the King takes Notice that it is not *Ad Damnum, &c.* (*Quere*) and yet if it be *Ad Damnum*, the Patent is void; (*note*) for in all such Patents Answ.

there is a Condition implied, *viz.* That it be not *Ad Damnum* of the neighbouring Merchants (Markets); and in this Case it is confessed by the Demurrer.

1. That the Patent is *Ad Damnum* of (the Market at) *Rochester*.

2. That the Writ was ill executed, and in Deceit of the King, &c.

And the Lords thereupon affirmed the Judgment in Chancery.

*A Market granted ad Damnum of another Market, is void.*

But it is said, That afterwards, for that a Market at *Chatbam* was very convenient, if not absolutely necessary, in Respect of Navigation and Shipping, and in Regard of the Ship-builders and Labourers there employed therein, a new Writ *Ad quod Damnum* was duly issued and returned; and thereupon a new Patent was granted for a Market at *Chatbam*, under which the Inhabitants of *Rochester* have acquiesced.

*The King's Power absolute in Maritime Matters. Vide post.*

*Note;* It is probable that as to this Market at *Chatbam*, the King may, by the Common Law, have a superior Prerogative than in the Case of Markets granted to Inland Towns, he being bound *Ex jure Regio* to provide for victualling his Fleets, &c. and for the Maintenance and Support of such as are employ'd therein; also the Market here being kept in the King's Port, or on the Sea-Coast, may fall within the Rule of that Prerogative mention'd in *F. N. B. 113. a.* The King is bound of Right to keep and defend his Kingdom, &c. To which End an absolute Jurisdiction in maritime Matters was vested in him by the Common Law, which is not allowed him in other Cases.

The other Use of the Writ *Ad quod Damnum*, at this Day, is in Cases of common Highways, &c. For by the Common Law, no common Way or publick Passage could legally be stopp'd, and another laid out, but by the King's Letters Patent licensing the same, which was not to be granted before a Writ of *Ad quod Damnum* had issued, and an Inquisition taken thereupon, returned *ad Damnum nullius*. See *Cro. Car.* 266, 267. *Telv.* 141, 142. *Vaugh.* 341, &c.

But now by Stat. 8 & 9 W. 3. c. 15. The Justices of any County, City, &c. or the major Part (being five at least) may, at their Quarter-Sessions, order the enlarging of Highways, so that the Ground taken in do not exceed eight Yards in breadth, and that they do not pull down any House, nor take away any Ground from any Garden, Orchard, Court or Yard. See the Stat. 8 & 9 W. 3. c. 15.

And by *cap.* 16. of the same Sessions, 8 & 9 W. 3. Where any common Highway shall be inclos'd after a Writ of *Ad quod Damnum* executed, any Person grieved by such Inclosure, may complain to the Justices at the next Quarter-Sessions, after the Inquisition returned, who may hear and finally determine the same; but if no such Appeal be made, then the Inquisition and Return (aforesaid) being recorded by the Clerk of the Peace, shall be for ever binding. c. 16.

## Of the Writ De Audiendo & Terminando (or Oyer and Terminer).

*Commission of  
hearing and  
determining  
what it is.  
F. N. B.  
110. b.*

**T**HIS, says *Fitzberbert*, is more properly a Commission than a Writ; and I conceive it appears to be so, not only from the Direction thereof being to particular Persons, thereby specially authorized by the King, but also from the very Language and Stile of the mandating Part thereof.

*In what Cases  
lawful.*

But on the other Hand it must be confessed to be founded on one of these Prerogative Powers, which were vested in the King by the Common Law, and consequently such Commissioners, being only the King's Delegates, were more strictly bound to pursue the Direction of their Commission, than Officers known to the Law; and the Delegates thereof were bound to in the Execution of *Writs*.

In short, it seems, That in such Matters as tended to the general Good of the Kingdom, as the Preservation of the publick Peace, &c. the Common Law intrusted the King with the Power of appointing Commissioners to put the Laws in Execution.

*Trial thereon  
to be by Jury.*

But though the King could lawfully grant such Commissions, yet he could not empower such Commissioners to proceed in order to a Conviction of Crime, or imposing a Penalty, otherwise than the Law had appointed, and that was by a Jury *de vicineto*; so that notwithstanding the King's Commission nominated the Judge or Judges, yet every Person  
accused

accused and tried thereby, was to be adjudg'd by a Jury of his own Neighbours.

Indeed *Empson* and *Dudley*, and some other Tools of arbitrary Power since, have stretched Royal Commissions beyond those due Limits, and impowered Persons to determine of Mens Liberties and Properties, without any such legal Enquiry; which Stretches, I conceive, stand in need of more than an ordinary Act of Parliament to justify them.

*An illegal Method of Executing such Commission is Criminal.*

It is certain, the Crime objected to the above-named, did not consist in the Power or Authority committed, but only in the *Modus* or Method wherewith they acted, *viz.* in convicting without *Juries*; and yet, tho' they acted under an Act of Parliament, as to the Matter, yet erring in the Manner of their Proceedings, it was held highly Criminal, and that the Act did not secure them.

Now, that the foregoing Observations are well founded, will appear from all the Precedents of this Kind that are to be met with, either in the *Register* or *F. N. B.*

*The Manner of issuing such Commission.*

When a great Tumult or Insurrection, or a heinous Misdemeanor or Trespas is committed in any Place, the Manner is to make such a Commission of *Oyer* and *Terminer* (of hearing and determining) such Misbehaviour, &c. And the Stat. 2 *E.* 3. c. 2. before-mentioned, requireth, That no Commission of *Oyer* and *Terminer* be granted, but before Justice of one Bench or the other, or Justices *itinerant*, and that (only) for horrible Trespas. And it is of the King's special Grace, according to the Form of the Stat. thereof made in the Time of the Grandfather of the said

*F.N.B. 110.B.*

*Stat. 2 E. 3. c. 2.*

*Quære Commissions of the Peace.*