The Advowant in *Replegiari* shall recover his Damages and Costs of Suit. 2 Cro. 520. 19 H. 8, c. 11. Bro. Damages, 8. 2 Roll. 140. 21 8, c. 19.

The first part of this Statute gives a remedy by action or distress to recoverors in common recoveries in cases where the tenants refused to attorn, or the recoverors could not once obtain possession of the rents, &c., by payment, &c., by the tenants. This section, together with 21 H. 8, c. 19, s. 3, (*q. v.* and which is a *quasi* exposition of this Act and extends its provisions to nonsuits,) in case the distress was for rent, customs, services, or *damage feasant*,[1] gives an inquiry of damages and costs where the defendant or avowant succeeds in an avowry, cognizance, or justification, or the plaintiff is nonsuit or otherwise barred. As when the writ abates only, the plaintiff is not barred from having another replevin and driven to his writ of second deliverance, the defendant in such a case is not entitled under these Acts to damages and costs, Smith v. Walker, 2 Ld. Raym. 788, where the defendant pleaded *cepit in alio loco*, and it was confessed by the plaintiff. In James v. Tutney, Cro. Car. 532, it is said to have been adjudged that the defendant shall recover damages upon a demurrer, though out of the words of the Acts. And avowries made by executors are also within them, Tidd Prac. 887. The practice in England is for the defendant to sue out a *retorno habendo* and an inquiry of damages usually in the same writ, and on the return of the Sheriff, final judgment is entered for the defendant to recover as well the damages and costs assessed by the jury, as the costs adjudged by the Court. If the issue were found for the defendant, the same jury find the damages and costs, but their omission to do so may be supplied at any time by a writ of inquiry. Execution may issue for these by *fi. fa.*, but the damages are often remitted. The practice with us under the Act of 1794, ch. 46, Code, Art. 75, sec. 62,[2] amended by the Act of 1864, ch. 175, is for this inquiry to be executed in open Court by the jury attending at the same or next term. It has been determined that these Statutes give costs as consequential upon damages, and if a defendant, not being being content to take judgment at common law for a return, takes judgment of *non pros.* for a return and costs, it is essentially an interlocutory judgment, and requires the intervention of a jury in an inquiry of damages to assess the costs as consequential on the *damages* which they alone can ascertain, Wright v. Lewis, 9 Dowl. P. C. 183. See also Bac. Abr. Costs, F., and Mounson v. Redshaw, 1 Wms. Saund. 195 n. 3. The costs were merely a small fixed sum allowed *by way of the costs*, but the Court of Appeals have said in Kierstead v. Rogers, 6 H. & J. 288, that for years back it has been the practice of our Courts to enter judgments for the damages assessed by the jury, and for the costs taxed by the Court, overlooking entirely the former method of finding a nominal sum by the jury and giving the judgment for costs as an increase of the nominal sum. See 23 H. 8, c. 15.

It has been held here that the case of a defendant claiming property is *casus omissus* under these statutes, and therefore in Hopewell v. Price, 2

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[1] As to distress *damage feasant*, see note 1 to 1 & 2 P. & M., c. 12.

[2] Code 1911, Art. 75, sec. 89.