Sect. 174.

APaier un fine pur le mariage, &c.

[q] And this villeine and ſervile tenure is called in old bookes *marchetum*, or *merchet*. *Marchetum verò pro filia dare non competit libero homini, inter alia, propter liberi ſanguinis privilegium, &c.* And this is true *de communi jure, ſed medius et conventio vincunt legem.* And as Littleton here ſaith, it is the folly of ſuch a freeman to take ſuch mannors, lands or tenements, to hold of the lord by ſuch bondage. And yet this doth not make ſuch a freeman a villeine, [r] *Quia hujuſmodi præſtationes fiunt ratione tenementi, & non ratione perſonæ in donatione comprehenſæ & reſervatæ; non enim unum & idem eſt, ſed longe aliud, tenere libere, et per liberum ſervitium, &c.* for the ſignification of this word, *vide* ſect. 194. 74. 441.

[q] 15. E. 3. tit. Aid. 33. Bracton, lib. 2. fo. 26. Mirror, ca. 2. ſect. 18.

See more of this after in this chapter. ſect. 194. (Dr. & Stud. 66. b.)

[r] Fleta lib. 3. cap. 13. Mir. cap. 2. ſect. 18.

MES ſi aſcun franke home voile prender aſcun terres ou tenements, a tener de ſon ſeignior per tiel villein ſervice, ſ. a payer un fine a luy (1) *pur le mariage de ſes fits ou files, donque il paiera tiel fine pur le mariage; & nient obſtant, que il eſt le follie de tiel frank home de prender en tiel forme terres ou tenements a tener de le ſeignior per tiel bondage, uncore ceo ne fait le franke home villeine* (2).

BUT if a free man wil take any lands or tenements, to hold of his lord by ſuch villeine ſervice, *viz.* to pay a fine to him for the marriage of his ſonnes or daughters, then he ſhall pay ſuch fine for the mariage; and notwithſtanding, though it be the folly of ſuch free man to take in ſuch forme lands or tenements to hold of the lord by ſuch bondage, yet this maketh not the free man a villeine.

Sect. 175.

CHeſcun villeine ou eſt villein per title de preſcription, &c.

Every villeine is, either by preſcription, or confeſſion. *Servi autem naſcuntur, aut fiunt.* By preſcription, either regardant to a mannor, &c. or in groſſe. In groſs either by preſcription, or by granting away a villeine that is regardant, or by confeſſion. [s] *Fit etiam ſervus liber homo per confeſſionem in curia regis fact'* (3).

(2. Ro. Abr. 732.) Lib. Rub. cap. 76, 77. Bracton, lib. 1. cap. 6. Bract. fol. 77.

(Poſt 120. a.)

[s] Bract. lib. 1. cap. 6. Fleta lib. 1. cap. 3. 8. Aſſ. p. 13. 11. Aſſ. 12. 24. Aſſ. 1. 73. Aſſ. 1. 17. E. 3. 78, 79. 27. E. 3. 89. 18. E. 4. 25. 27. H. 8. 7. b. Le ſtatute de 17. E. 3. 17.

[t] 17. E. 3. 23. 11. H. 4. 26. 37. H. 6. 21. Dier Mich 7. & 8. Eliz. 242. Pl. Com. 79. &c.

[u] Glanvil lib. 9. cap. 8. Bracton lib. 3. fo. 156. Britton fol. 121.

[x] 6. Co. 11. & 12. in Jentleman's caſe.

(3. Inſt. 71. F. N. B. 138. Poſt 128. 260. a. 4. Co. 71. a. 8. Co. 38. 1. Rol. Abr. 527. 2 Rol. Abr. 862, 863. Plow. 491. b. 1. Sid. 94. 2. Rol. Abr. 573. 576. 1. Sid. 314.)

ITEM cheſcun villeine, ou eſt un villeine per title de preſcription, ceſtaſcavoir, que il & ſes auncеſtors ont eſte villeins de temps dont memorie ne curt; ou il eſt villein per ſon confeſſion demeſne en court de record.

ALSO every villeine is, either a villeine by title of preſcription, to wit, that hee and his anceſtors have beene villeines time out of mind of man; or he is a villeine by his owne confeſſion in a court of record.

En court de record. Record is derived of the Latine word *recordor*, that is to keepe in minde as the poet ſaith, *Si rite audita recordor.* And therefore a record or inrolment is a memoriall or monument of ſo high a nature, [t] as it importeth in it ſelfe ſuch an abſolute verity, as if it be pleaded (4), that there is no ſuch record, it ſhall not receive any triall by witneſſe, jury, or otherwiſe, but onely by itſelfe. [u] And every court of record is the king's court, albeit another may have the profit, wherein, if the judges doe erre, a writ of error doth lye. [x] But the county court, the hundred court, the court baron, and ſuch like are no courts of record; and therefore the proceedings therein may be denyed, and tryed by jury, and upon their judgements a writ of error lyeth not, but a writ of falſe judgement

to apprentices in the *ſeafaring* way; whoſe wages and prize money as ſeamen, though earned whilſt in another ſervice, have been recovered by thoſe to whom they were bound. But the principle, which governs them, ſeems to apply to apprentices and ſervants in *general*. See 6. Mod. 69. 12. Mod. 415. Comberb. 450. 1. Stra. 582. 1. Barnard. Rep. 312. 1. Veſ. 48. 83. Some of the caſes go ſo far, as to give the maſter a right to the wages or earnings, whether the ſervice is performed by the apprentice *with* or *without the maſter's licence*; and even though the earnings accrue in a *trade* or ſervice *different* from that to which the apprentice is bound. 6. Mod. 69. 12. Mod. 83. 1. Veſ. 83. But though the rule ſhould be ſo large in reſpect to *apprentices*, it may be doubted, whether it is equally ſo in the caſe of *other* ſervants. There is a caſe of the reign of James the firſt, in which a judgment againſt the maſter appears to be principally founded on the want of his conſent and privity to the retainer. Cro. Jam. 653. 2. Rol. Rep. 269. Independently too of authority, the maſter's proper remedy in all caſes, except thoſe in which the ſervant is intentionally employed on his maſter's account, ſeems to be an action, either againſt the employer for loſs of ſervice if he knew of the firſt retainer, or againſt the ſervant himſelf for breach of his contract; ſuch a caſe rather importing the maſter's right to damages for injury ſuſtained by the conſequences of the ſecond retainer, than a right to the profits accruing from it. We have already mentioned, that moſt of the caſes, which occur in the books, relate to the apprentices of watermen and ſeafaring perſons. It may therefore be proper to add, that in 31. Geo. 2. c. 10. one object of which is to regulate the pay of ſeamen in the royal navy, there is a proviſion, that in particular caſes the maſter ſhall not be intitled to the wages of his apprentice. See ſect. 10. Note alſo the 17th. ſection in the 2. & 3. Anne c. 6. from which it ſeems, as if the framers of that law doubted, whether the maſter of an apprentice, who goes into the royal navy, would be intitled to his wages without an expreſs proviſion.—(2) This ſection was firſt introduced in Redman's edition.—(3) The cauſe meant is, that the 27. of H. 8. tranſfers uſes into poſſeſſion. See lord Coke's note on ſect. 115. fol. 84. b.

(1) In Roh. the words *pur ſon marriage ou* come in here.—(2) This ſection in L. and M. ſtands the laſt in the chapter of Villenage.—(3) From our law's thus permitting a perſon to be a villein by *acknowledgment* in a court of record, ſome have argued, that it is a legal mode of *creating* perſonal bondage; with a view to prove, that there is not any thing ſo repugnant in our law to domeſtic ſlavery, as is generally imagined, and thence to lay a foundation for more eaſily inferring the lawfulneſs of importing ſlavery from our colonies. But in another place we have had occaſion to object to this way of conſidering the acknowledgment, and to explain, why it ſhould be deemed merely a confeſſion of that immemorial antiquity in the villein's ſlavery, which was otherwiſe neceſſary to be proved. See the editor's *Argument in the Caſe of Somerſett a Negro*, 60 to 65. and Hob. 99.—(4) The words *if it be pleaded* are material; for *in evidence before a jury* the *copy* of a record will be a ſufficient proof of its exiſtence and contents. See Law of Nif. Pri. 226. ed. 1775. Com. Dig. tit. *Certiorari*.

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we muſt apprize the reader, that there is an expreſſion of lord chief juſtice Vaughan in his reports, which conveys or ſeems to convey

ment; for that they are no courts of record, becauſe they cannot hold plea of debt or treſpaſſe, if the debt or damages doe amount to forty ſhillings, or of any treſpaſſe *vi & armis* (1). (14. H. 8. 15. 1. Rol. Abr. 543.)

Monumenta, quæ nos recorda vocamus, ſunt veritatis & vetuſtatis veſtigia.

Sect. 176.

MES ſi frank home ad divers iſſues, & puis il confeſſe luy meme deſtre villein a un auter en court de record; uncore les iſſues, que il avera devant le confeſſion ſont franks, mes les iſſues, que il avera apres le confeſſion, ſerront villeines.

BUT if a freeman hath divers iſſues, and afterwards he confeſſeth himſelfe to be a villaine to another in a court of record; yet thoſe iſſues, which he hath before the confeſſion are free, but the iſſues, which he ſhall have after the confeſſion, ſhall be villaines.

This is ſo evident as it needeth no explication.

Sect. 177.

ITEM, ſi le villein purchaſe terre, et alien la terre a un auter devant que le ſeignior enter, donques le ſeignior ne poit enter; car il ſerra adjudge ſon follie, que il n'entra pas, quant la terre fuit en le maine le villein. Et iſſint eſt dez biens. Si le villeine achate biens, et eux vend ou done a un auter, devant que le ſeignior ſeiſiſt les biens, adonques le ſeignior ne poit eux ſeiſer. Mes ſi le ſeignior, devant aſcun tiel vender ou done, vient deins la ville la lou tielx biens ſont, et la, overtment enter les vicines, claima les biens, et ſeiſiſt parcel

ALSO, if a villaine purchaſe land, and alien the land to another before that the lord enter, then the lord cannot enter; for it ſhall be adjudged his folly, that he did not enter, when the land was in the hands of the villaine. And ſo it is of goods. If the villaine buy goods, and ſell or give them to another, before the lord ſeiſeth them, then the lord may not ſeiſe the ſame. But if the lord, before any ſuch ſale or gift, commeth into the towne where ſuch goods be, and there, openly amongſt the neighbors, claime the goods, and ſeiſe part of the goods, in the name of ſeiſin

IN this caſe before the lord doth enter, hee hath neither *jus in re nec jus ad rem*, but onely a poſſibilitie of an eſtate, which eſtate he muſt gaine by his entry; and therefore if the villaine doth by way of prevention alien before the lord doth enter, the lord is barred of the poſſibility, which he had to the land, for ever. [*a*] *Si autem ſervus vendiderit feodum, quod ſibi & hæredibus perquiſiverit, antequam dominus ſeiſinam inde ceperit, valet donatio, et dominus ſibi ipſi imputet, quod tantum expectavit.* But [*b*] if the villaine of the king purchaſeth land, and alieneth, before the king (upon an office found for him) doth enter, yet the king after office found ſhall have the land; *quia nullum tempus occurrit regi*, as Littleton himſelfe ſaith in the next ſection (2). And yet, after office found, the king ſhall not have the meane profits; becauſe the title is by the ſeiſure. (Dr. & Stud. 140. 2. Rol. Abr. 735.)

[*a*] Fleta lib. 3. ca. 13. Britton fol. 98. a. 19. E. 2. Dower 17.

[*b*] 35. E. 3. tit. Villenage 22. 9. H. 6. 21. per Babington. 12. H. 7. 12.

(8. Co. 170. 7. Co. 28. 2. Rol. Abr. 734.)

Purchaſe terre. The like law is of ſeigniories, advowſons, reverſions, remainders, rents, commons certaine and ſuch like certaine inheritances, wherein the villaine hath

(1) See *poſt* 260. a.—(2) See *poſt* 119. a.

Continuation of notes to 115. *a. from* 117. *a.*

(15) It having been denied by perſons of conſiderable reſpect, that ſuch a preſcription is good, we ſhall give ſome account of the ſtate of the arguments for and againſt it.—The *general* ground, on which lord Coke aſſerts the preſcription to be lawful, is, *firſt*, that a ſtatute, though expreſſed in negative words, yet, if it is a mere affirmance or declaration of the common law, may be preſcribed againſt; and *ſecondly*, that the ſtatute againſt cutting down trees in a foreſt without view of the foreſter, are *negative* ſtatutes of this ſort. As to the *firſt* of theſe propoſitions, we have endeavoured to evince it's reaſonableneſs in a former note; in which alſo the reader is referred to the various authorities on the ſubject, for the purpoſe of ſhewing, that they greatly preponderate in favour of lord Coke. See note 13. In reſpect to the *ſecond* propoſition, the authorities not only ſupport it, but are ſo uniform, that we do not find it any where controverted. See note 14. The *particular* argument for the preſcription conſiſts principally of various allowances of it at *eyres of the foreſt*, and of two expreſs adjudications of the point on demurrers in *courts of common law*. The cited inſtances of *allowances* are not few; for, beſides the three caſes of *Henry de Percy Thomas lord Wake of Liddel* and *Gilbert de Aſton* here mentioned by lord Coke, he in his *fourth Inſtitute* cites another, which was in the 8th. of Edward the third on a claim by *Thomas Pickering* and *Margaret his wife*. See 4. Inſt. 297. The caſes at common law are *Sellinger's*, and *lord Hatton's*. The *former* is ſtated by lord Coke to have been before the Exchequer in the time of Elizabeth, and to have been adjudged *upon argument and long adviſement*; and probably is the ſame caſe he here cites as one of the 16th. of Elizabeth. See 4. Inſt. 297. and 12. Co. 22. The *latter* is taken notice of by judge Croke, who reports lord Coke to have cited it as a judgment on demurrer in the King's Bench. Cro. Jam. 155. To theſe authorities we may add an *extrajudicial* opinion of all the judges, on being conſulted by James the firſt; the words of which ſeem to imply, that a cuſtom for cutting wood in the king's foreſts without view of the foreſter may be good. See the third reſolution of the judges in 4. Inſt. 299. It is ſaid too, that in a caſe of the 19. of E. 1. between the *prebend of Chicheſter* and the *earl of Arundel*, iſſue was joined on ſuch a cuſtom; from which it may be inferred, that in thoſe ancient times the goodneſs of the cuſtom was not doubted. W. Jo. 290.—On the other hand lord Lovelace's caſe, whoſe claim came before an eyre in the 8th of Charles the firſt, is a direct deciſion againſt the allowance of a preſcription for cutting wood without view of the foreſter; and in that caſe lord chief juſtice Richardſon, when this part of the Commentary upon Littleton was referred to, denied lord Coke's *general doctrine* about negative ſtatutes declaratory of the common law. W. Jo. 270. Two other adjudications, to the like effect, appear to have been made at eyres in the ſame reign; one of which was on a claim by the tenants of the manor of Bray, who, in proof of the cuſtom they alledged, offered in evidence an inquiſition of the reign of Edward the ſecond. W. Jo. 289, 290, 348. The principle, on which Noy attorney-general argued in theſe caſes, was a general one, that negative ſtatutes, ſuch as thoſe which occur againſt cutting wood in the king's foreſt without licence, cannot be controuled by cuſtom or preſcription. To prove this he appealed to a caſe from a year-book of Henry the ſixth;

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convey a different opinion; for, ſpeaking of the guardian under the ſtatute of Charles the ſecond, he ſays, *this new guardian hath*

hath any eſtate or intereſt. If the villaine purchaſe land, either in feeſimple, feetaile, or for life, if the villaine doth alien before the lord doth enter, hee doth prevent the lord. But yet the iſſue of the villaine ſhall recover the land entailed in a formedon, and then the lord may enter.

des biens, en noſme de ſeiſin de touts les biens que le villeine ad ou aver poit (1), *&c. ceo eſt dit bon ſeiſin en ley; et le occupation, que le villeine ad apres tiel claime en les biens* (2) *ſerra pris en le droit le ſeignior.*

of all the goods which the villaine hath or may have, &c. this is a good ſeiſin in law, and the occupation, which the villaine hath after ſuch clayme in the goods, ſhall be taken in the right of the lord.

Alien la terre. Alien commeth of the verbe *alienare, id eſt, alienum facere, vel ex noſtro dominio in alienum transferre, ſive rem aliquam in dominium alterius transferre.* If a freeman hath iſſue, and afterward by confeſſion becommeth bond, and purchaſe lands in fee, and, before the lord enter, he dieth ſeiſed, and the land deſcends to his iſſue which is free; in this caſe the lord ſhall not enter upon the heire, and yet this is a deſcent and no alienation. The like law it is, if the land ſo purchaſed by the villaine doth eſcheate to the lord of the fee before any entry made by the lord of the villaine: ſo as the act of the law, that is, the deſcent or eſcheat may as well prevent the lord of his entry, as the act of the party by alienation.

If a villaine be diſſeiſed before the lord doth enter, the lord may enter into the land in the name of the villaine, and thereby gaine the inheritance of the land; but if there be a deſcent caſt, ſo as the entry of the villaine be taken away, then the villaine muſt recontinue the eſtate of the land by judgement and execution, before the lord of the villaine can enter. And this word alien doth not onely extend to alienations of land in deed, but alſo to alienations in law; as if the villaine purchaſe land and dyeth without heire, and the land eſcheate, or if there be a recovery againſt the villaine in a *ceſſavit* or the like.

(2. Rol. Abr. 732. 5. Co. 109. 2. Rol. Abr. 58. Cro. Eliz. 386.)

Et iſſint eſt des biens, &c. *Biens, bona,* includes all chattels, as well real as perſonall. *Chattels* is a French word, and ſignifies goods, which by a word of art wee call *catalla.* Now goods, or chattels, are either perſonall or reall. Perſonall, as horſe and other beaſts, houſholdſtuffe, bowes, weapons, and ſuch like, called perſonall, becauſe for the moſt part they belong to the perſon of a man, or elſe for that they are to be recovered by perſonall actions. Reall, becauſe they concerne the reality, as tearmes for years of lands or tenements, wardſhips, the intereſt of tenant by ſtatute ſtaple, by ſtatute merchant, by elegit and ſuch like.

Bona dividuntur in mobilia & immobilia. Mobilia rurſum dividuntur in ea, quæ ſe movent, & quæ ab aliis moventur. But, by the common law, no eſtate of inheritance or freehold is comprehended under theſe words *bona* or *catalla* (3). And it is to be obſerved, that as the title of the lord to his villaine's lands beginneth by his entry, ſo his title to the goods beginneth by the ſeiſure of them. And here againe it is to be obſerved, that where our author, in this branch concerning goods, uſeth theſe words (ſell or give) that the ſame extendeth as well to gifts in law, as gifts in deed. And therefore if a neife hath goods, and taketh baron, by this gift in law by force of the mariage, the lord is barred. And ſo it is if a villaine make his executors and dieth, by this gift in law the lord is barred, as ſhall be ſaid hereafter.

3. H. 4. 15. 46. E. 3. Barre 217. Doct. and Stud. cap. 43. fol. 139. 22. E. 3. 6. Baldwin Freuil's caſe. (Ante 88. Poſt. 145. b.)

Et claime les biens et ſeiſiſt parcel des biens. For a claime onely of the goods of the villaine is not ſufficient in law, but he muſt ſeiſe ſome part in the name of all the reſidue, as here it appeareth; or that the goods be within the view of the lord, for the claime and his view amount to a ſeiſure, as the clayme of a ward being preſent by word is a ſufficient ſeiſure, albeit the gardian layeth no hands of him. See hereafter ſect. 321. And ſo note a diverſity betweene a claime of lands or tenements, and goods. [c] In an action of treſpaſſe or detinue brought by the villaine, a releaſe made to the defendant by the lord is a good barre; for that amounts to a ſeiſure and grant. If the villaine doth buy goods and make his executors, and dieth before the lord doth ſeize them, the executors ſhall detaine them againſt the lord of the villaine.

[c] 18. H. 6. 23. b. per Aſcough. 3. H. 4. 16. 46. E. 3. Barre 217.

Ad ou aver poit, &c. Here (&c.) doth imply an excellent point of learning; for that ſuch a claime doth not only veſt the goods, which the villaine then hath, but alſo which he after that ſhall acquire and get (4). But otherwiſe it is of lands of freehold or inheritance; for there ſuch a generall entry or claime extends only to the lands the villaine hath at that time

ſixth; which, he conſidered as directly in point, and as a judgment that tithe of timber cannot be preſcribed for againſt the ſtatute of *ſylva cædua*, though only an *affirmance* of the old law, merely becauſe the ſtatute is *negative*. See W. Jo. 270. 290. and 25. E. 3. c. 3. The year book reported to have been cited by Noy is the 20th. of Hen. 6. but we do not meet with any caſe of that year relative to the ſtatute of *ſylva cædua*, and therefore the 9. of Hen. 6. 56. which is to the point, was probably meant; though if it was, it contains no *judgment*, but only a *query*, which Brooke, in abridging the caſe, by miſtake calls the reporter's *opinion*. Bro. *Preſcription* 2. Noy alſo cited the earl of Arundel's caſe from a record of the 16. of Edward the ſecond, as a deciſion, that a preſcription to cut wood againſt the foreſt ſtatutes was not good. W. Jo. 270. As to the caſes urged againſt him, he obſerved, that the caſe between the *prebend of Chicheſter* and *the earl of Arundel* was of a *chace*, and the ſtatutes only related to *foreſts*; that in *Percy's* caſe the foreſt was *not in the hands of the crown* when the ſtatutes were made; and that the caſe of the reign of Elizabeth, which lord Coke reports from lord Popham, was of a *chace*, of which the king was ſeiſed *in right of his duchy of Lancaſter*. W. Jo. 290, 291. It is obſervable however, that Mr. Noy leaves the two caſes of *lord Wake* and *Gilbert de Actos* wholly unanſwered, though they were cited againſt him. As to the other authorities we have ſtated for a preſcription againſt the *foreſt* ſtatutes, or thoſe againſt *negative* ſtatutes in *general* being declaratory, they do not appear to have been urged againſt Mr. Noy. But beſides the authorities relied on by Noy, there is one more; for judge Croke, after taking notice of the judgment for the preſcription in *lord Hatton's* caſe, reports Popham to have ſaid, that *it was adjudged otherwiſe about the ſame time in the Exchequer*. Cro. Jam. 155. However this is irreconcileable with lord Coke's repreſentation of the judgment of the *Exchequer* both here and elſewhere, unleſs we ſuppoſe him to mean a different caſe.—Having thus brought together and digeſted, what we found ſcattered in the books on this much litigated ſubject, we ſhall diſmiſs it, leaving the reader to his own judgment, with this ſingle remark. If the *greater* number of authorities, which, unleſs the caſes we have referred to are miſtated or miſunderſtood, is in favour of the preſcription, ſhall be thought to be of *equal* or *nearly of equal* weight with the *more modern* deciſions on the other ſide; then probably, as the ſubject ſtrikes us, the good ſenſe of lord Coke's diſtinction as to negative ſtatutes, together with a conſideration of the multiplicity of books, which favour his *general* doctrine, will ſo ſtrongly turn the ſcale in this *particular* inſtance of foreſt-law, as ſcarce to leave any doubt. Indeed it was for the ſake of explaining, how far the *general* doctrine may be affected by the deciſion on this point of *foreſt* law, that we have detained the reader ſo long upon it.

(1) The words, *que le villein ad ou aver poit*, not in L. & M. or Roh.—(2) Inſtead of *les biens* it is *ley* in L. & M. and Roh.—(3) See farther as to chattels, Bro. Abr. tit. *Chattels*, Com. Dig. tit. *Biens* and *Aſſets*, and Vin. tit. *Executors* U—Y—Z.—(4) *Contra*, as to the goods *afterwards* acquired, Dr. and Stud. dial. 2. chap. 4.

Continuation of notes to 113. a. from 114. b.

—Lord Coke next takes for granted, that if there is a deviſe *to A. for life, and that after his deceaſe the land ſhall be ſold by the teſtator's*

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hath the cuſtody, not only of the lands deſcended or left by the father, but of lands and goods any way acquired or purchaſed by the infant, which

time, and not to any other which he ſhall purchaſe after, as by our author in this ſection may juſtly be collected.

Sect. 178.

MES ſi le roy ad un villein, que purchaſe terre, & alien devant que le roy entra; uncore le roy poit enter, en que maines que la terre deviendra. Ou ſi le villein achata biens, & eux vendiſt devant que le roy ſeiſiſt les biens; uncore le roy poit ſeiſer les biens, en que maines que les biens ſont. Quia nullum tempus occurrit regi.

BUT if the king hath a villeine, who purchaſes land, and alien it before the king enter; yet the king may enter, into whoſe hands ſoever the land ſhal come. Or if the villeine buyeth goods, and ſell them before that the king ſeizeth them; yet the king may ſeize theſe goods, in whoſe hands ſoever they be. Becauſe *nullum tempus ocurrit regi* (1).

SI le roy ad villein, &c. This is evident upon that which hath beene ſaid before. Vide ſect. 125. Vide Stamford Prær. f. 32. c.

Ou ſi tiel villeine achata biens, &c. If the king's villeine acquire any goods or chattels, the propertie of them is in the king before any ſeiſure or office; and it is well ſaid of an ancient author, [d] *Al roy, quant al droit de la corone ou a franch eſtate, ne poet nul temps occurre*; and another [e] ſpeaking in the perſon of the king ſaith, *Nul temps neſt limit quant a mes droits.* 35. E. 3. tit. Villenage 22. [d] Mirror cap. 3. [e] Britton fol. 88. Bract. lib. 1. quæ res dari poſſint.

Sect. 179.

ITEM ſi home leſſa certeine terre a un auter per terme de vie, ſavant le reverſion a luy, & un villein purchaſe del leſſor le reverſion; en ceſt cas il ſemble, que le ſeignior del villeine poit maintenant vener a la terre, & claime le reverſion come le ſeignior le dit villeine, & per cel claime le reverſion eſt maintenant en luy. Car en auter forme il ne poit vener a le reverſion. Car il ne poit enter ſur le tenant a terme de vie. Et ſil doit demurrer, tanque apres le mort le tenant a terme

ALSO if a man let certaine land to another for terme of life, ſaving to himſelfe the reverſion, and a villeine purchaſe of the leſſor the reverſion; in this caſe it ſeemeth, that the lord of the villeine may preſently come to the land, and claime the reverſion as the lord of the ſaid villeine, and by this claime the reverſion is forthwith in him. For in other forme or manner he cannot come to the reverſion. For he cannot enter upon the tenant for life. And if he ſhould ſtay untill after the death of the tenant for

PUIT main tenant vener a la terre. For he cannot claime the reverſion but upon the land, and he by his comming upon the land for that purpoſe is no treſpaſſor; becauſe the law giveth him power to claime the reverſion, leſt he ſhould be prevented, and claime he cannot unleſs he commeth to the land. So likewiſe if the villeine purchaſe a ſeigniory, rent, common, or any other freehold or inheritance, out of any lands or tenements of another, the

teſtator's executors, they cannot ſell the *reverſion*, but muſt wait till the death of the wife; and the caſe cited from Bro. Abr. *Deviſe* pl. 1. countenances this opinion. But in one report judge Haughton argues, that the words, *after the deceaſe* of the tenant for life, mean only to mark the determination of his eſtates, *not to limit the time for ſale*, and therefore, that a ſale may be in his life-time; and in another judge Clench expreſſes himſelf almoſt to the ſame purpoſe. 2. Bulſt. 125. Godb. 46. There is alſo a caſe againſt lord Coke in 2. Leon. 220. and the point is doubted in Cro. Cha. 382.—See further in reſpect to ſuch deviſes, Vin. Abr. K. E. to S. E.—(3) The caſe cited in the margin from 19. H. 6. is in fo. 23. (4) See 115. a.

(1) See Acc. 41. b. 57. b. 90. b. 118. a. 294. b. and for inſtances, Plowd. 243.—But the rule of *nullum tempus occurrit regi* is ſubject to various exceptions, both at *common law* and by *ſtatute*.—1. There are many caſes, in which the ſubject may make title againſt the king by *preſcription*, as to treaſure-trove, waifs, eſtrays, and ſuch other things as may be ſeized without matter of record. Ante fol. 114. a and b.—2. In ſome caſes the king's right *neceſſarily* fails for want of exertion in due time, either becauſe the *ſubject* of his right *determines* before he claims it, or becauſe it is *ſpecially limited in point of time* by its creation. An inſtance of this is, where the land of tenant for life is found to be forfeited, and he dies before ſeizure by the king; for it is then too late to ſeize for the king, who, as Staundford expreſſes it, hath *forceaſed his time*, the eſtate forfeited being determined, and the right of entry being in him in reverſion. Staundf. Prærog. 32. b. The law is the ſame, where the king is intitled to the *next* preſentation, in which caſe, if another preſents, and the incumbent dies, the king cannot have the ſecond or any ſubſequent preſentation. This was the opinion of Browne juſtice againſt Weſton in Willion and Berkeley, Plowd. 243. 249. and was ſo adjudged in Baſkerville's caſe 7. Co. 28. a. Lord Chancellor Egerton finds fault with the doctrine of this laſt caſe; but his objections do not appear in the leaſt ſatisfactory. See his obſervations on lord Coke's Reports 8.—3. Sometimes lapſe of time drives the king *to a ſuit*. Thus by the ſtatute of the 13th. of Richard the IId. and according to lord Coke by the *common law*, if the king preſents to a benefice already full with an incumbent, the king's preſentee ſhall not be received by the ordinary, till the king has *recovered* his preſentment by due proceſs of law. 13. R. 2. ſt. 1. c. 1. Staundf. Prærog. 32. b. 2. Inſt. 358. Poſt. 344. b. See alſo Cro. Jam. 385. 4. H. 4. c. 22. Gibſ. Cod. 1ſt. ed. 802.—4. There are ſeveral ſtatutes, which wholly extinguiſh the king's title, if not exerted within a limited number of years. By a ſtatute of the 14th. of Edward the third, the king loſt his preſentment, where he was intitled by having in his hands the temporalties of a biſhoprick or the lands of a perſon within age, unleſs he preſented within three years after the voidance. But this ſtatute was ſoon repealed. See 14. E. 3. ſt. 3. c. 2. 25. E. 3. ſt. 3. c. 2. 2. Gibſ. Cod. 1ſt. edit. 800. The chief ſtatutes, for limiting the king's title to a certain time, now in force, are the 21. of Jam. 1. c. 2. and the 9. of Geo. 3. c. 16. By the *former* the king is diſabled from claiming any manors lands or hereditaments, except liberties and franchiſes, under a title accrued 60 years *before the beginning of the then ſeſſion of parliament*, unleſs within that time there has been a poſſeſſion under ſuch title. But the efflux of time rendering this proviſion continually more ineffectual, the *latter* ſtatute introduced one of a permanent kind, by limiting the king to ſixty years *before the commencement of the ſuit or proceeding for recovery* of the eſtate claimed. See further a Commentary on the 21. Jam. in 3. Inſt. 188. See alſo ſomething relative to the rule of *nullum tempus occurrit regi*, in Hob. 152. 154. 347.

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which the guardian in ſocage had not. Vaugh. 186.—It is ſuperceded both as to the body and lands, if the father exerciſes his power

the lord may lawfully come to the land to make his claime to the seigniory, rent, or other profit out of the land. But if the villeine purchase a seigniorie, or a rent, common, or other inheritance issuing out of the land of the lord himselfe, it is said, that the seigniorie, rent, common, or such other inheritance, is extinguished in the lord's possession without any claime.

de vie, donques per cas il viendra trope tarde. Car peraventure le villeine voile granter ou aliener le reversion a un auter, en le vie le tenant a terme de vie, &c.

life, then perchance he should come too late. For peradventure the villeine will grant or alien the reversion to another, in the life of the tenant for life, &c.

Vide 41. E. 3. tit. Audita querela 18. 12. H. 4. tit. Execution. 28. F. N. B. 104. 1. H. 7. 15. b.

Grant. Here must be intended an attornement; for after the grant and before attornement the lord may not (1) claime the reversion (2).

En la vie del tenant per vie, &c. Here by (*&c.*) is included tenant in taile, tenant *per auter vie*, tenant by statute marchant, staple, *elegit*, and for yeares; for during all these estates the lord may claime the reversion, as well as in case of the tenant for life.

Sect. 180.

ADvowson. Advocatio so called; because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church; *viz. rationis fundationis*, as where the ancestor was founder of the church; or *ratione donationis*, where he endowed the church; or *ratione fundi*, as where he gave the soile, whereupon the church was built. And therefore they were called *advocati*. They were also called *patroni*, and thereupon the advowson is called *jus patronatus*. And in one word, advowson of a church is the right of presentation or collation to the church. *Advocatus est ad quem pertinet jus advocationis alicujus ecclesiæ, ut ecclesiam nomine proprio, non alieno, possit præsentare.* Every church is either presentative, collative, donative, or elective. *Vide* section 645. 648.

EN meisme le maner est, lou un villein purchase un advowson, dun esglise plien dun incumbent, le seignior del villein poit vener al dit esglise, & claime le dit advowson, & per cel claime l'advowson est en luy. Car sil doit attendre tanque apres le mort l'incumbent, & adonque a presenter son clerke a le dit esglise, donque, en le meane temps, le villeine poit aliener le advowson (3), *& issint ouster le seignior de son presentment.*

IN the same manner it is, where a villeine purchases an advowson of a church full of an incumbent, the lord of the villeine may come to the said church, and claime the said advowson, and by this claime the advowson is in him. For if he will attend till after the death of the incumbent, and then to present his clarke to the sayd church, then, in the mean time, the villein may alien the advowson, and so oust the lord of his presentment.

13. H. 14. b.

Fleta lib. 5. cap. 14.

Plein dun incumbent, If the church be presentative, the church is full by admission and institution against any common person; but against the king it is not full untill induction.

24. E. 3. 30. 25. E. 3. 47. 38. E. 3. 9. 44. E. 3. 3. 9. H. 6. 31. 22. H. 6. 27. 21. E. 4. 34. b. Vide sect. 648. (Post. 344. a.)

Incumbent. Commeth from the verbe *incumbo*, that is to be diligently resident, *id est, obnixe operam dare*; and when it is written *encumbent*, it is falsely written, for it ought to be *incumbent*, as Littleton doth here (4). And therefore the law doth intend him to be resident on his benefice.

10. H. 6. 7.

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(1) This is apparently an error of the press, the sense requiring the omission of *not*. Accordingly the 1st edition is without it. But the error appears in all the subsequent editions.

(2) But now by the 9. Ann. c. 16. s. 9. the grant of a reversion is perfect without attornment.

(3) *&c.* L. & M.

(4) However in L. & M. and Roh. the word is *encombent*.

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power of appointing a testamentary or other guardian according to the statute of 12. Cha. 2. See chap. 24.—Regularly it ends, when the infant, whether male or female, attains fourteen; though some say, that this must be understood, only where another guardian, either by election of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time. Andr. 313.

As to guardianship by *nurture*, it only occurs, where the infant is without any other guardian; and none can have it, except the father or mother. 8. E. 4. 7. b. Br. *Guard.* 70. 3. Co. 38.—It extends no further than the custody and government of the infant's person, and determines at fourteen in the case both of males and females. Ibid.—Lord chief baron Comyns refers to *Fleta*, as if according to that ancient book *grandfathers* and *great grandfathers* might be guardians by *nurture*. Com. Dig. v. 3. p. 421. But the passage cited doth not point at this *species* of guardian, it describing the *patria potestas* in *general*, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianship, as our own law regulates it.—(14) The direct object of the 4. & 5. Ph. & M. was to prevent the taking away or marrying maidens under sixteen against the consent of their parents. But the statute prohibited it in terms, which implied, that the custody and education of such females should belong to the father and *mother*, or the person appointed by the former. It is observable on this statute, that, though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have real or personal estate, yet the enacting part mentions maidens under sixteen *generally*. For other cases on this statute besides Ratcliff's, see Poph. 204. Cro. Cha. 465. 1. Sid. 362. 2. Mod. 128. 3. Mod. 84. 168.—(15) There is now another statute in respect to the appointment of guardians; for the 12. Cha. 2. c. 24. after taking away guardianship in chivalry, enables the father by deed or will attested by two witnesses to appoint, who shall be guardians of his children after his decease. The substance of this parliamentary regulation is, 1. That the father shall have the power, though *under twenty-one*. 2. That he shall have it as to *all* his children under twenty-one and unmarried at his decease, or born after. 3. That he may appoint any persons, except popish recusants. 4. That the appointment may be either in possession or remainder. 5. That he may appoint the guardianship to last till twenty-one, or for any less time. 6. That the appointment shall be effectual against all claiming as guardians in socage or otherwise. 7. That the guardian so appointed shall have ravishment of ward on trespass, and recover damages for the ward's benefit. 8. That such guardian shall have the custody of the infant's estate both real and personal, and have the same actions in relation to them as a guardian in socage. 9. That the statute shall not prejudice the custom of London or any other city or corporate town.—For cases on the constitution of this statute, see tit. Guardian in Vin. Abr. and Com. Dig.

and

Le ſeignior del villeine poit vener al egliſe & claime le dit advowſon. Note, albeit the advowſon is a thing incorporeall, and not viſible, yet, becauſe the principall duty of the preſentee of the patron is to be done in the church, the claime of the lord of the villeine muſt be made there; and by that claime the inheritance of the advowſon ſhall be veſted in the lord; for every claime or demand to deveſt any eſtate or intereſt muſt be made in that place, which is moſt apt for that purpoſe.

Apres la mort del incumbent. *Nota*, a church preſentative may become void five manner of wayes, *viz.* by death, whereof Littleton here ſpeaketh. 2. By creation. 3. By reſignation. 4. By deprivation. 5. By ceſſion, as by taking a benefice incompatible. Doct. & Stud. lib. 2. ca. 31. 5. E. 3. 180. 10. E. 3. 482. 25. E. 3. 49. 9. E. 3. 462. 11. H. 4. 37. 59. & 76. 41. E. 3. 5. F. N. B. 31, 32.

Et donques a preſenter ſon clerke al dit egliſe, &c. A preſentation is derived *a præſentando; quia præſentare nihil aliud eſt, quam præſto dare, ſeu offerre.* And Littleton here briefly expreſſeth the effect of a preſentation; for it is the act of the patron offring his clerke to the biſhop of that dioceſſe, to be inſtituted to ſuch a church, in theſe or the like words directed to the biſhop, *præſento vobis A. B. clericum meum ad eccleſiam de Dale, &c.* This may be done as well by word, as by writing; and if it be by writing it is no deed, for the preſentation is of the clerke, and the direction to the biſhop, ſo as this writing is in nature of a letter to the biſhop: and this is the reaſon, that the king himſelfe may preſent by word, as elſewhere is ſaid. A villein at this day purchaſeth an advowſon in fee, the church becomes voide, the lord for one hundred pound given by A. B. clerke preſents him to the church, and his clerke is admitted, inſtituted, and inducted; yet this gaineth not the advowſon to the lord. [*d*] And ſo it is in that caſe, if any on the behalfe of A. B. had given or contracted with the lord in conſideration of any valuable thing to preſent A. B. to the ſaid church, albeit it had beene without the conſent or knowledge of A. B. yet it ſhould not have veſted the advowſon in the Lord. But this was not law when Littleton wrote. [*e*] But now by the ſtatute of 31. Eliz. the preſentation, admiſſion, inſtitution, and induction in both the ſaid caſes and in the like are made voide (1), where before the ſaid ſtatute they were but voidable by deprivation (2). And if a man preſent by uſurpation to a benefice, by reaſon of any corrupt contract, agreement, &c. that preſentation, and the inſtitution and induction thereupon are void; for that act extends to all patrons as well by wrong as by right. But where any preſents by uſurpation, the rightfull patron, and not the king, ſhall preſent; for otherwiſe every rightfull patron may loſe his preſentation. And ſuch an incumbent, that commeth in by reaſon of any ſuch corrupt agreement, is ſo abſolutely diſabled for ever after to be preſented to that church, as the king himſelfe, to whom the law giveth the title of preſentation in that caſe, cannot preſent him againe to that church; for the act, being made for ſuppreſſion of ſymony and ſuch corrupt agreements, ſo bindes the king in that caſe, as he cannot preſent him that the law hath diſabled (3), for the words of the act be, ſhall thereupon and from thenceforth be adjudged a diſabled perſon in law to have or enjoy the ſame benefice. [*f*] And the party being diſabled by the act of parliament (which being an abſolute and direct law) cannot be diſpenſed withall by any grant, &c. with a *non obſtante*; as it may be, when any thing is prohibited *ſub modo*, as upon a penalty given to the king (4). And the ſaid act doth not onely extend to benefices with cure, but to dignities, prebends, and all other eccleſiaſticall livings.

(2. Ro. Abr. 353.)

[*d*] Adjudge in communi banco. Mich. 41. & 42. Eliz. inter Baker & Rogers.

[*e*] Adjudged in the King's Bench. Mich. 13. Ja. in a quar. imp. brought by the king againſt the biſhop of Norwich, Thomas Cole and Robert Secker clerke for the vicarage of Haverell in Suffolk. (Cro. Jam. 385. Hob. 75. Hob. 165. 12. Co. 100. 73. 3. Inſt. 153. 1. Ro. Abr. 370. Cro. Jam. 385. 533. Cro. Cha. 477. 7. Co. 32. Poſt. 234. 11. Co. 68. Cro. Cha. 331.)

[*f*] Pl. Com. 503. 27. H. 8. 2. H. 7. 6. 11. H. 7. 11. 13. H. 7. 8. b. 11. H. 4. 76. 5. E. 3. 29. F. N. B. 211. E.

Clerke. *Clericus* is twofold, *eccleſiaſticus* (which Littleton here intendeth) and he is either ſecular, or regular, ſo called becauſe he is *ſervus & hæreditas domini:* and *laicus*, and in this ſenſe is ſignified a pen-man, who getteth his living in ſome court or otherwiſe by the uſe of his pen. 4. H. 4. ca. 12.

Note, if the church becommeth void, albeit the preſent avoidance be not by law grantable over, yet may the lord of the villeine preſent in his owne name, and thereby gaine the inheritance of the advowſon to him and his heires; for albeit it be not grantable over, yet it is not meerly a choſe in action; [*g*] for if a feme covert be ſeiſed of an advowſon, and the church becommeth void, and the wife dyeth, the huſband ſhall preſent to the advowſon; [*h*] but otherwiſe it is of a bond made to the wife; becauſe that is meerely in action. (Ante 117. a.)

[*g*] 14. H. 4. 12. 38. E. 3. 35. 13. E. 3. quare imp. 57.

[*h*] 43. E. 3. 10. 39. E. 3. 5. 4. H. 6. 5. (Poſt. 351. a. 1. Ro. Abr. 345.)

Sect. 181.

ITEM il y ad villeine regardant, & villeine en gros. ALSO there is a villeine regardant, and a villein in groſſe.

Villein regardant. He is called regardant to the mannour; becauſe he hath the charge

(1) Though the perſon preſented is not privy to the ſimony, yet the preſentation is void, the ſtatute making no diſtinction in this reſpect, but giving the turn to the king as a puniſhment of the patron. Adjudged 12. Co. 100. Agreed 12. Co. 73.

(2) The effect of the difference between *void* and *voidable*, in the inſtance of a ſimoniacal preſentation, may be ſeen in Windſor's caſe, 5. Co. 102. and Winchcombe's caſe Hob. 165. the judgment in both turning upon it.

(3) Adjudged accordingly in the king againſt the biſhop of Norwich Hob. 75. Cro. Jam. 385. In Sir Arthur Ingram's caſe on the 5. E. 6. againſt the ſale of offices, there was a like deciſion, that the king could not diſpenſe with a diſability created by ſtatute. Poſt. 234. a. Hob. 75. Cro. Jam. 385. 3. Inſt. 154. When the famous caſe of Sir Edward Hales in the reign of James the ſecond was argued, theſe two caſes were urged to prove, that the king could not diſpenſe with the diſability for not taking the oaths and ſacrament according to the 25. Cha. 2. uſually called the teſt act; and lord Coke himſelf in his Third Inſtitute applies them to a like caſe on the 5. Eliz. in reſpect to the oath of ſupremacy. 3. Inſt. 154. The principal judicial authority relied on for the diſpenſation was the caſe in the year-book of 2. H. 7. [illegible]. in which, notwithſtanding the ſtatutes making void a grant of the office of ſheriff for more than a year, the judges are repreſented to have held a grant for life with a *non obſtante* to be good: But truſting to ſuch an authority only expoſed the weakneſs of the cauſe it was intended to ſuſtain. The book cited, ſo far from containing any judgment of the point, ends with an adjournment of the caſe, accompanied with this remarkable declaration, that both judges and counſel agreed, what they had then ſaid *ſhould be taken for nothing*. As far too as appears, the grant in queſtion might have been adjudged good on the ground of being within an exception of the ſtatutes. The king alſo had been ſpecially enabled by the 9. H. 5. c. 5. to diſpenſe with the ſtatutes for four years on account of the wars and a peſtilence. But, laſtly and principally, it was an inſuperable objection to the authority of this caſe, that the 23. H. 6. to remove all doubts, provides, that the king's grant for more than a year ſhould be *void* notwithſtanding any *non obſtante*. What reſpect could be due to a *judicial* opinion, declaring a diſpenſation *good*, which the *legiſlature* itſelf had poſitively enacted ſhould be *void*? Yet it is not to be concealed, that in the report of Calvin's caſe, Lord Coke juſtifies the king's diſpenſation in this inſtance on the principle of its being beyond the power of parliament to take away his right to the ſervice of his ſubjects. Calvin's caſe 7. Co. 14. This ſtrange language is the more unaccountable, as it is inconſiſtent with his own doctrine here, and in the caſe on the ſtatute againſt the ſale of offices.

(4) But by the bill of rights, 1. W. & M. it was declared, that, *from the then ſeſſion* of parliament, no diſpenſation with any ſtatute ſhould be valid, unleſs ſuch ſtatute allows it, and except in ſuch caſes as ſhould be ſpecially provided for the then ſeſſion. 1. W. &. M. ſeſſ. 2. c. 2. ſ. 12. The occaſion of this excellent proviſion was the equally extravagant and unwarrantable exerciſe of

and the continuation of the latter book. The nature of this new kind of guardianſhip, which the ſtatute profeſſedly models after

charge to do all baſe or villenous ſervices within the ſame, and to gard and keep the ſame from all filthie or loathſome things that might annoy it: and his ſervice is not certaine, but he muſt have regard to that which is commanded unto him. And thereupon he is called regardant, *a quo præſtandum ſervitium incertum & indeterminatum, ubi ſcire non poterit veſpere, quale ſervitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit*, as before hath beene obſerved. And Littleton ſayth hereafter, that no other thing is ſaid to be regardant, but onely a villeine: [i] yet in old bookes it was ſometimes applyed to ſervices.

Bract. li. 2. fo. 26. Mir. ca. 2. ſect. 18.

Vide ſect. 84.

[i] 20. E. 3. tit. Iſſue 30.

In groſſe: Is that which belongs to the perſon of the lord, and belongeth not to any mannor, lands, &c.

Villein regardant eſt, ſicome, home eſt ſeiſi dun mannor, a que un villein eſt regardant, & celuy, que eſt ſeiſie del dit mannor, ou ceux, que eſtate il ad en meſme le mannor, ount eſte ſeiſies de le dit villein & de ſes auncеſtors, come villeins & niefs (1) regardants a meſme le mannor, de temps dont memorie ne curt. Et villeine en groſſe eſt, lou un home ſeiſie dun mannor, a que un villeine eſt regardant, & il graunt meſme le villein per ſon fait a un autre, donques il eſt villein en groſſe, & nemy regardant.

A villein regardant is, as if a man be ſeiſed of a mannor, to which a villeine is regardant, and he which is ſeiſed of the ſaid mannor, or they whoſe eſtate he hath in the ſame mannor, have beene ſeiſed of the villein and of his anceſtors as villeins and niefs regardant to the ſame mannor time out of memory of man. And villein in groſſe is, where a man is ſeiſed of a mannor wherunto a villein is regardant, and granteth the ſame villein by his deed to another, then he is a villein in groſſe and not regardant.

Sect. 182.

Mir. ca. 2. ſect. 18.

THIS needeth no explanation, but to adde the ſaying of an ancient author. *Servage de home eſt ſubjection, iſſuant de cy grand antiquitie, que nul franke cep poet eſtre trove per humane remembrance.*

ITEM ſi un home & ſez anceſtors, que heire il eſt, ount eſte ſeiſies dun villeine et de ſes anceſtors, come des villeins en groſſe, de temps, dont memorie ne curt, tiels ſont villeines en groſſe.

ALSO if a man and his anceſtours, whoſe heire he is, have beene ſeiſed of a villeine, and of his aunceſtors as of villeines in groſſe, time out of memorie of man, theſe are villeines in groſſe.

Sect. 183.

Vid. ſect. 441. 194. 174. 74.
[l] Bract. li. 5. tract. 5. c. 28. (Poſt. 262. a.)
[m] Glan. li. 8. ca. 1.

OU fine. In Latine, *finis.* [l] *Ideo dicitur finalis concordia; quia imponit finem litibus, & eſt exceptio peremptoria.* [m] *Finis eſt amicabilis compoſitio & finalis concordia, ex conſenſu & licentia*

ET hic nota, que tiels choſes, que ne poient eſtre grants, ne alienees, ſans fait ou fine, home, que voile aver tiels choſes per

AND heere note, that ſuch things, which cannot be granted, nor aliened, without deed or fine, a man, which will have

pre-

(1) *Et niefs* not in L. & M.

of the diſpenſing power by James the ſecond, who, having procured the ſanction of a judicial opinion to a diſpenſation with the teſt act in favour of Sir Edward Hales, madly proceeded to a ſuſpenſion of the principal laws for the ſupport of the eſtabliſhed religion; an exceſs, in which, monſtrous as it was, ſeveral of the judges, to the great ſcandal of Weſtminſter hall, gave him countenance, the prieſts of the temple of juſtice treacherouſly aiding to pollute it, inſtead of manfully oppoſing the ſacrilege. Till the time of this prince the doctrine of diſpenſation was received with very important qualifications, of which the principal were theſe.—1. It was ſaid, that the king could not diſpenſe with the common law; though lord chief juſtice Vaughan ſeems to deny this poſition. Dav. 75. 3. Inſt. 154. Vaugh. 334.—2. It appears to have been generally agreed, that the king could not diſpenſe with a ſtatute, which prohibited what was *malum in ſe*.—3. *Malum prohibitum* was not deemed univerſally diſpenſable with; for ſome held, the king could not diſpenſe with a ſtatute, if the prohibition was *abſolute*, and not *ſub modo*, as under a penalty to the king, or as others expreſs it, where the ſtatute was made for the *general* good, and not with a view ſolely to the king's profit and intereſt.—4. None contended, that the royal diſpenſation could diminiſh or prejudice the property or the right of the ſubject.—5. It was underſtood, that the king could diſpenſe, *not generally*, but only in favour of *particular perſons*, and, according to ſome, for theſe only in *particular inſtances*.—But ſome of theſe diſtinctions had great uncertainty and variety in them, and were ſo open to controverſy, that they only tended to create embarraſſment; and though the others greatly reſtricted the largeneſs of the claimed prerogative, yet they were far from obviating the chief objection to ſo formidable a pretenſion. Had the boundary of the diſpenſing power been ever ſo clearly marked, ſtill it was wiſe and prudent to annihilate it. So far as it reſembled the power of repealing laws, it was an intolerable corruption, wholly irreconcileable with the firſt principle of our conſtitution, by which the power of legiſlation cannot be exerciſed by the king without the two houſes of parliament. So far as it did not fall within this idea, it was unneceſſary; for, thoſe acts, which were the fruits of it, might have derived their force from other acknowledged powers of the crown, ſuch as the right of waiving penalties and forfeitures belonging to itſelf, and the prerogative of pardoning.—It is worthy notice, that, the *declaration of rights*, which the lords and commons made on tendering the crown to William and Mary, diſtinguiſhes between *ſuſpending* laws by regal authority, and *diſpenſing* with them. The former, being a *general* and *abſolute* abrogation for a time, is condemned without any exception; but the latter, being only a *ſpecial exemption* of certain individuals, is merely declared illegal, *as it had been exerciſed of late*. Alſo the *bill of rights*, though it declares againſt the *future* exerciſe of a diſpenſing power in any caſe, except where the king is ſpecially authoriſed by act of parliament, yet contains a proviſo ſaving from prejudice all prior charters grants and pardons. 1. W. & M. ſeſſ. 2. ch. 2. ſect. 12. & 13. If the condemnation of the diſpenſing power for the *time paſt* had been unqualified, it might have deſtroyed the titles under numberleſs ſubſiſting grants from the crown, the validity of which it was deemed moſt equitable to leave to the deciſion of the courts of juſtice in the ordinary way.—Such as wiſh to go more deeply into the controverſy about the diſpenſing power, may

after that in ſocage except as to duration, is particularly diſcuſſed in Bedell and Conſtable. Vaugh. 177. and in Lord Shaftesbury's caſe

preſcription, ne poet auterment preſcriber forſque en luy, & en ſes aunceſtors, que heire il eſt, & nemy per ceux parols, en luy & en ceux que eſtate il ad; pur ceo que il ne poet aver lour eſtate ſans fait ou auter eſcripture, le quel covient deſtre monſtre a le court, ſi il voile aver aſcun advantage de ceo. Et pur ceo que le grant et alienation dun villeine en groſs (3) *ne giſt ſans fait ou autre eſcripture, home ne poit preſcriber en un villein en gros ſans monſtrans d'eſcripture, ſinon en ſoy meſme que claime le villeine, et en ſes anceſtors que heire il eſt. Mes de tiels choſes, que ſont regardants ou appendants a un mannor ou a auters terres et tenements, home poet preſcriber, que il, et ceux que eſtate il ad, queux fueront ſeiſies de le mannor, ou de tiels terres et tenements, &c. ont eſte ſeiſies de tiels choſes come regardants ou appendants a le mannor, ou a tiels terres et tenements* (4) *de temps dont memorie, &c.* (5) *Et la cauſe eſt pur ceo que tiel manor,*

ſuch things by preſcription, cannot otherwiſe preſcribe, but in him and in his aunceſtors, whoſe heire he is, and not by theſe words, In him and them whoſe eſtate he hath; for that he cannot have their eſtate without deed or other writing, the which ought to be ſhewed to the court, if he will take any advantage of it. And becauſe the grant and alienation of a villeine in groſſe lyeth not without deed, or other writing, a man cannot preſcribe in a villein in groſſe, without ſhewing forth a writing, but in himſelfe which claims the villeine, and in his aunceſtours whoſe heire he is. But if ſuch things, which are regardant or appending to a mannour, or to other lands and tenements, a man may preſcribe, that he and they whoſe eſtate he hath, who were ſeiſed of the mannor, or of ſuch lands and tenements, &c. have been ſeiſed of thoſe things, as regardant or appendant to the manor, or to ſuch lands and tenements time out of mind of man. And the

domini regis, vel ejus juſticiariorum (1). [n] *Talis concordia finalis dicitur, eo quod finem imponit negotio, adeo ut neutra pars litigantium ab eo de cætero poterit recedere* (2). Of the ſeverall parts of a fine, and many incidents to the ſame, you ſhall reade in my Reports.

[n] 9. Co. cap. 3. Statut. de modo levandi fines. Pl. Com. 357.

(3. Co. 84. 8. Co. 51.) 5. Co. fol. 38. Teye's caſe.

Que eſtate, &c.

Quorum ſtatum, as much as to ſay, whoſe eſtate he hath. Here Littleton declareth one excellent rule, [o] that a man cannot preſcribe in any thing by a *que eſtate*, that lyeth in grant, and cannot paſſe without deed or fine; but in him and his anceſtors he may, becauſe he comes in by deſcent without any conveyance. Neither can a man plead a *que eſtate* in himſelfe, of any thing, that cannot paſſe without deed; [p] but in another he may, as, in barre of an avowry, the plaintife may plead a *que eſtate* in the ſeigniory in the avowant. But Littleton's words are to be obſerved, *(home que voile aver tiels choſes per preſcription)*. Therefore [q] when a thing, that lyeth in grant, is but a conveyance to the thing claimed by preſcription, there a *que eſtate* may be alledged of a thing that lyeth in grant, as a man may preſcribe, that he and his anceſtors, and all thoſe whoſe eſtate he hath in an hundred, have time out of minde, &c. had a leet, &c. this is good, &c.

[o] 22. Aſſ. 53. 23. Aſſ. 6. 12. H. 7. 16. 18. (Doct. Pla. 302, 303, 304.)

[p] 39 H. 6. 8. 18. E. 4. 23.

[q] 11. H. 4. 89. 10. R. 2. Action ſur le caſe 51. 13. E 3. Br. 674. (Cro. Jam. 673. 10. Co. 59. b)

[r] Regularly the plaintife ſhall not intitle him by a *que eſtate*, but he muſt ſhew how he came by it; but after avowry made, the plaintife ſhall plead a *que eſtate*, becauſe he is now become as a defendant.

[r] 9. E. 4. 2. b. 29. Aſſ. 19. 2. H. 6. 10. 48. E. 3. tit. 33. 3. H. 6. 28. (Bro. Que eſtate 3.)

[s] A man may plead a *que eſtate* of a tenancy in taile or of an eſtate for life, ſo as he averreth the life of them; but he cannot plead a *que eſtate* of a leaſe for yeares (6), or at will.

[s] 41. Aſſ. 2. 40. Aſſ. 28. 2. H. 4. 20. 15. E. 4. 1. 5. H. 7. 39. 18. E. 4. 10. 7. E. 6. tit. Que eſtate Br. 31. 27. H. 6. 3. 7. El. Dyer 238. (1. Co. 46. 1. Sid. 298. Doc. Plac. 304.)

[t] A diſſeiſor, abatour, intruder, recoveror, or any other that cometh in the *poſt*, ſhall

[t] 22 H. 6. 34. 6. E. 4. 12. 31 H. 8. Que eſtate Br. 48. 39. H. 6. 14. 9. H. 6. Eſſop. 25.

may find the following references uſeful:—For the hiſtory of diſpenſations, ſee Dav. 69. b. Pryn. on 4. Inſt. 128. to 133. Atkyns on power of diſpenſ. with pen. ſtat.—For the caſes on the ſubject, ſee the caſe of the merchants of Waterford in 2. R. 3. 11. 1. H. 7. 2. the ſheriff's caſe in 2. H. 7. 6. b. the doctrine in 11. H. 7. 11. b. 12. a. Grendon and the biſhop of Lincoln Plowd. 502. caſe of the aulnager Dy. 303. Calvin's caſe 7. Co. 15. the Prince's caſe 8. Co. 29. b. caſe of the taylors of Ipſwich 11. Co. 53. caſe of monopolies ibid. 84. Iriſh caſe of commendam Dav. 68. caſe of cuſtoms 12. Co. 18. the caſes cited ante note 3. Colt and Glover v. the biſhop of Litchfield, or Engliſh caſe of commendam Mo. 898. 1. Rol. Rep. 151. Hob. 146. Evans and Kiſſins v. Aſkwith, W. Jo. 158. Palm. 457. Latch 31. 233. Noy 93. 2. Rol. Rep. 450. caſe of clerk of the court of wards Hob. 214. Needler and the biſhop of Wincheſter Hob. 230. Lord Wentworth's caſe Mo. 713. caſe of diſpenſation with 3. Jam. 1. c. 5. againſt a recuſant's holding an office Hardr. 110. caſes of diſpenſation with ſtatutes againſt retailing wine without licence; namely, Young and Wright 1. Sid. 6. Thomas and Waters Hardr. 443. 2. Keb. 425. Thomas and Boys, Hardr. 464. Thomas and Sorrell Vaugh. 330. 1. Lev. 217. 1. Freem. 85. 115. 128. 137. 2. Keb. 245. 280. 322. 372. 416 790. 3. Keb. 76. 119. 143. 155. 184. 223. 233. 264. Sir Edward Hales's caſe on the teſt act of 25. Ch. 2. in 2. Show. 475. Comberb. 21. State tri. v. 7. p. 612. 4. Bac. Abr. 179. and caſe of the ſeven biſhops in the reign of Jam. 2. State tr. 4th. ed. v. 5. p. 303. Of theſe caſes, Thomas and Sorrel and Sir Edward Hales's are the principal. The former was argued with the greateſt ſolemnity in the Exchequer-chamber, the delivery of the opinion of the judges, of whom the majority was for the diſpenſation, taking up a day in four ſeveral terms. The latter was treated with leſs form; but gave occaſion to ſome conſiderable publications on the ſubject; particularly lord chief-juſtice Herbert's account of the authorities on which the judgment was given in ſir Edward Hale's caſe, Mr. Atwood's anſwer to it, and a tract by lord chief-baron Atkyns againſt the king's power of diſpenſing with penal ſtatutes. In a manuſcript report of ſir Edward Hale's caſe, ſir Bartholomew Shower is mentioned to have replied to lord chief-baron Atkyns. But we have not yet met with any ſuch piece. Mr. Hume's ſtate of the arguments for and againſt the diſpenſing power, though written with an evident bias in favour of the crown's prerogative, is worth conſulting. Hume's Hiſt. 8vo. ed. v. 8. p. 242. 254. See alſo Tyrr. Bibliothec. Politic. 589. to 597.—For the proceedings in parliament after the Revolution, in reſpect to ſir Edward Hales's caſe and the diſpenſing power, ſee Gray's Deb. v. 9. p. 297. to 307. 314. to 334. 336. to 344. 396. Chandl. Deb. of the Lords, v. 1. p. 394.

(1) This, though a juſt deſcription of fines, conſidered according to their original and ſtill apparent import, yet gives a very inadequate idea of them in their modern application. In Glanville's time they were really amicable compoſitions of *actual* ſuits. But for ſeveral centuries paſt, fines have been only ſo in *name*, being in *fact fictitious* proceedings, in order to transfer or ſecure real property, by a mode more efficacious than ordinary conveyances. What the ſuperiority of a fine in this reſpect conſiſts of will beſt appear, by ſtating the chief uſes to which it is applied.—One uſe of a fine is *extinguiſhing dormant titles*, by ſhortening the uſual time of limitation. Fines, being agreements concerning lands or tenements ſolemnly made in the king's courts, were deemed

2. caſe. 1. P. Wms. 102. Gilb. 172.—(16) Another ſpecies of cuſtomary guardianſhip is, where by the ſpecial cuſtom of a manor the lord

shall plead a *que estate*.

[u] A *que estate* must be alledged in the tenant or defendant himselfe, and not in one in the meane conveyance, from whom he claimeth; and yet some bookes be to the contrary.

[u] 11. H. 4. 81. 27. H. 6. 32. 9. E. 4. 3. 2. E. 6. tit. Que estate 8. 1. E. 6. Que estate Br. 49. (Cro. Cha. 54. 1. Lev. 190.)

ou terres et (1) *tenements poyent passer per alienation sans fait, &c.*

reason is, for that such manor or lands and tenements may passe by alienation without deed, &c.

Le quel covient destre monstre al court. The reason wherefore a deed, that is pleaded, ought to be shewed to the court is; because every deed must prove itselfe to have sufficient words in law, whereof the court must adjudge, and also to be proved by others, as by witnesses or other proofe if the deed be denyed, which is matter of fact.

Per alienation sauns fait, &c. Here by (*&c.*) is implyed, that whatsoever passeth by livery of seisin, either in deed or in law, may passe without deed; and not only the rents and services parcell of the mannor shall with the demeanes, as the more principall and worthy, passe by livery without deed, but all things regardant, appendant, and appurtenant to the mannor, as incidents or adjuncts to the same, shall, together with the mannor, passe without deed, all which, as here it appeareth, and elsewhere is said, shall passe, without saying *cum pertinentiis* (2).

Sect. 184.

REgardant: vide sect. 181.

Appendants. Appendant is any inheritance belonging to another, that is superior or more worthy. In law it is called *pertinens, quasi invicem tenens*, holding one another, a word indifferent both to things appendant, and things appurtenant. The quality and nature of the things do make the difference. But regardant (as our author saith) is only applyed to a villeine. (*) Appendants are ever by prescription (4); but appurtenants may be created in some cases at this day. (5) As if a man at this day grant to a man and his heires common in such a moore for his beasts leavant or couchant upon his mannor, or if he grant, to another, common of estovers, or turbary in fee simple, to be burnt or spent within his mannor; by these grants these commons are appurtenant to the mannor, and shall passe by the grant thereof. In the civill law it is called *adjunctum* (6).

Vide sect. 1.
(*) 5. Ass. 9. 8. H. 7. 4, 5. 28. H. 8. Dier 30. b. Pl. Com. 381. F. N. B. fol. 181. (2. Ro. Abr. 60. 5. Co. 17. b.)

ET est ascavoir, que nul chose est nosme regardant a un mannor, &c. forsque villeine. Mes certeine auters choses come advowson et common de pasture, &c. sont nosmes appendants al mannor ou al terres et (3) *tenements, &c.*

AND it is to be understood, that nothing is named regardant to a mannor, &c. but a villeine. But certaine other things, as an advowson and common of pasture, &c. are named appendant to the mannor, or to the lands and tenements, &c.

[x] 43. Ass. p. 10. 43. E. 3. 22. (10. Co. 64, 65. 2. Ro. Abr. 185.)

[x] If A. be seised of a mannor, whereunto the franchise of waife and stray and such like are appendant, and the king purchaseth the mannor with the appurtenances, now are the royall franchises reunited to the crowne, and not appendant to the mannor. But if he grant the mannor in as large and ample manner as A. had, &c. it is said, that the franchises shall be appendant (or rather appurtenant) to the mannor.

[y] Hill and Grange's case. Pl. Com. 168.

Concerning things appendant and appurtenant, two things are implied [y],

First, that prescription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unlesse the thing appendant or appurtenant agree in quality and nature to the thing, whereunto it is appendant or appurtenant; as a thing corporeall cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall (7). But things incorporeall, which lye in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeall, as a mannor house or lands; or things corporeall to things incorporeall, as lands to an office. [z] But yet (as hath been said) they must agree in nature and quality; for [a] common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there. [b] Nor a leet, that is temporall, to a church or chappell, which is ecclesiasticall. Neither can a nobleman, esquire, &c. claime a seat in a church by prescription

(1. Rol. Abr. 230.)
[z] 1. H. 7. 24. Pl. Com. 169.
[a] 5. Ass. 9. (1. Sid. 354.)
[b] 10. E. 3. 5. 37. H. 6. 34. 26. H. 8. 4. 4. Co. 36, 37. in Tirringham's case.

For notes to this side of fol. 121. *b. see* 126. *a.*

deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all, who should not claim within a year and a day. See Plowd. 357. Hence we may probably date the origin and frequent use of fines as feigned proceedings. But this puissance of a fine was taken away by the 24. E. 3. and this statute continued in force till the 1. R. 3. and 4. H. 7. which revived the ancient law, though with some change, proclamations being required to make fines more notorious, and the time for claiming being enlarged from *a year and a day* to *five years*. See 24. E. 3. c. 16. 1. R. 3. c. 7. 4. H. 7. c. 24. The force of fines on the rights of strangers being thus regulated, it has been ever since a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might subsist, with a right of *entry* for twenty years, and with a right of *action* for a much longer time.—Another use or effect of fines is barring estates tail, where the more extensively operative mode by common recovery is either unnecessary or impracticable. The former may be the case when one is tenant in tail with an immediate reversion or remainder in fee; for then none can derive a title to the estate except as his *privies* or *heirs*, in which character his fine is an immediate bar to them. The latter occurs, when one has only a remainder in tail, and the person, having the freehold in possession, refuses to make a tenant to the præcipe for a common recovery, which would bar all remainders and reversions; for, under such circumstances, all which the party can do is to bar those *claiming under himself* by a fine. How this power of a fine over estates tail commenced, has been *vexata quæstio*. The statute *de donis*, after converting fees conditional into estates tail, concludes with protecting them from fines, there being express words for that purpose. But the doubt is, when this protection was withdrawn, whether by the 4. H. 7. or the 32. H. 8. It is a common notion, into which some of our most respectable historians have fallen, that the 4. H. 7. was the statute which first loosened entails; and thus opening the door for a free alienation of landed property has been attributed to the deep policy of the prince then on the throne. See Hume's History 8vo. ed. v. 3. p. 400. But this is an error proceeding from a strange inattention to the real history of the subject. Common recoveries had been sanctified by a judicial opinion in Taltarum's case, as early as the twelfth of Edward the fourth; and from them it was, that intails received their death wound; for, by this fiction of common recoveries, into the origin of which we mean to scrutinize in some other place, every tenant in tail in possession was enabled to bar intails in the most perfect and absolute manner; whereas fines, even now, being only a *partial* bar of the issue of the persons who levy them, must in general be an inefficacious mode. In respect to the 4. H. 7. it was scarce more than a repetition of the 1. R. 3. the only object of which indisputably was to repeal the statute made the 34. E. 3. in favour of non claims, and against them to revive the ancient force of fines, but with some abatement of the rigor in point of time and other improvements, as we have already hinted; a provision of the utmost consequence to the security of titles. Accordingly lord Bacon, whose discernment none will question, in his life of Henry the seventh, commends the statute of the 4th of his reign, merely as if aimed at non claims. Bac. Hen. 7. in Ken. Comp. Hist. ad. ed. v. 1. p. 596. Nor indeed could there have been the least

lord names, or is himself the guardian of an infant copyholder. See 2. Com. Dig. 399. The nature of this guardianship depends wholly on the custom of the particular manor; and though it is not expresly saved by the 12. Cha. 2. yet it has been held, that

tion as appendant or belonging to land, but to a houſe; for that ſuch a ſeat belongeth to the houſe in reſpect of the inhabitancy thereof; and therefore, if the houſe be part of a mannor, yet in that caſe he may claime the ſeat as appendant to the houſe for the reaſon aforeſaid.

Secondly, that nothing can be properly appendant or appurtenant to any thing, unleſſe the principall or ſuperior thing be of perpetuall ſubſiſtance or continuance. For example, an advowſon, that is ſaid to be appendant to a mannor, is *in rei veritate* appendant to the demeſnes of the mannor, which are of perpetuall ſubſiſtance and continuance, and not to rents or ſervices, which are ſubject to extinguiſhment and deſtruction (1).

(12. Co. 104.) 5. E. 6. Dier 70. b. (1. Rol. Abr. 230.)

An advowſon is appendant to the mannor of *Dale*, of which mannor the mannor of Sale is holden, the mannor of Sale is made parcel of the mannor of Dale by way of eſcheat, the advowſon is only appendant to the mannor of Dale.

(1. Rol. Abr. 230.)

And where it is ſaid, that a chamber may be parcell of a corody, and paſſe by the name of the corody, which may be extinguiſhed, there he, that hath the corody, hath but his habitation in the chamber; as a fellow of Trinity colledge in Cambridge hath in his chamber, or as one, that had a corody and a chamber in an houſe of religion, he had but his habitation only. As for offices of fee, whereunto land may appertaine, they are of perpetuall ſubſiſtance, either being *in eſſe*, or in that they are grantable over.

31. H. 6. 15. b.

Note that an advowſon at one turne may be appendant, and at another turne in groſſe. As if the mannor be divided betweene coparceners, and every one hath a part of the mannor without ſaying any thing of the advowſon appendant, the advowſon remaines in coparcenary, and yet, in every of their turnes, it is appendant to that part, which they have; and ſo it is, if they make compoſition to preſent againſt common right, yet it remaines appendant. But if upon ſuch a partition an expreſſe exception be made of the advowſon, then the advowſon remaines in coparcenarie and in groſſe, and ſo are the bookes reconciled.

13. E. 2. Quar. imp. 170. 43. E. 3. 35. 13. E. 3. Quar. imp. 58. 17. E. 3. 38. 9. Eliz. Dier 259. 7. E. 3. 20. 19. E. 3. Quar. imp. 59. 35. H. 6. 32, 33. 38. H. 6. 9. 2. H. 7. 5. (6. Co. 64. a.)

Common de paſture. [*c*] *Communia*, it cometh of the Engliſh word common, becauſe it is common to many; and thereupon and accordingly is here called by Littleton common of paſture, for that the feeding of beaſts in the land wherein the common is to be had belongs to many.

[*c*] Glanvill lib. 3. ca. 36. Bract. lib. 4. c. 19. & 42. Brit. cap. 55, 56, 57. Fleta lib. 4. ca. 19. Mirror ca. 5. ſect. 3.

[*d*] There be foure kinds of common of paſture, *viz.* common appendant, which is of common right, (and therefore a man need not preſcribe for it) (2) for beaſts commonable (that is) that ſerve for the maintenance of the plough, as horſe and oxen to plough the land, and for kine and ſheepe to compeſter the land, and is appendent to arrable land (3).

[*d*] 20. E. 3. Admeaſurement 8. Temps E. 1. Common 24. 17. E. 2. ibid. 23. 4. H. 6. 22. H. 6. (1. Rol. Abr. 396. Cro. Cha. 542. 6. Co. 69.)

[*e*] The ſecond is common appurtenant, that is, for beaſts not commonable; as ſwine, goats, and the like. [*f*] If a man purchaſe part of the land, wherein common appendant is to be had, the common ſhall be apportioned, becauſe it is of common right; but not ſo of a common appurtenant, or of any other common of what nature ſoever. But both common appendant and appurtenant ſhall be apportioned, by alienation of part of the land, to which common is appendant or appurtenant; and for common appurtenant one muſt preſcribe (4).

[*e*] 37. H. 6. 34. 26. H. 8. 4. F. N. B. 181. (Dier 70. b.)
[*f*] 4. Co. f. 37, 38. &c. Tiringham's caſe. (Hob. 235. 1. Roll. Abr. 399. Cro. Cha. 482. Cro. El. 531.)

Morse v. Webb Xhe acc. 2 Brownl. 297.

[*g*] The third is *common per cauſe de vicinage*, which differeth from both the other commons; for that no man can put his beaſts therein, but they muſt eſcape thither of themſelves by reaſon of vicinity, in which caſe one may incloſe againſt the other, though it hath beene ſo uſed time out of mind, for that it is but an excuſe for treſpaſſe.

[*g*] 8. Co. 78, 79. W. Wilde's caſe. (7. Co. 5. Corbet's caſe.)

The laſt is common in groſſe, which is ſo called, for that it appertaineth to no land, and muſt be by writing or preſcription. Of common appendant, appurtenant, and in groſſe, ſome be certaine, that is, for a certaine number of beaſts; ſome certaine by conſequent, *viz.* for ſuch as be levant and couchant upon the land; and ſome be more incertaine, as common *ſauns number* in groſſe, and yet the tenant of the land muſt common or feed there alſo (5).

(1. Saund. 345.)

There be alſo [*h*] divers other commons, as of eſtovers, of turbary, of piſchary, of digging for coles, minerals and the like. [*i*] If common appendant be claymed to a mannor, yet *in rei veritate* it is appendant to the demeſnes, and not to the ſervices; and therefore if a tenancy eſcheate, the lord ſhall not encreaſe his common by reaſon of that. [*k*] If a man claime by preſcription any manner of common in another man's land, and that the owner of the land ſhall be excluded to have paſture, eſtovers or the like, this is a preſcription or cuſtome againſt the law, to exclude the owner of the ſoyle; for it is againſt the nature of this word common, and it was implyed in the firſt grant, that the owner of the ſoyle ſhould take his reaſonable profit there, as it hath beene adjudged. * [*l*] But a man may preſcribe or alledge a cuſtome to have and enjoy *ſolam veſturam terræ*, from ſuch a day till ſuch a day, and hereby the owner of the ſoyle ſhall be excluded to paſture or feed there (6); and ſo he may preſcribe to have *ſeparalem paſturam*, and exclude the owner of the ſoyle from feeding there. *Nota diverſitatem.* [*m*] So a man may preſcribe to have *ſeparalem piſcariam* in ſuch a water, and the owner of the ſoyle ſhall not fiſh there; but if he claim to have *communiam piſchariæ*, or *liberam piſchariam*, the owner of the ſoyle ſhall fiſh there (7). And all this hath beene

[*h*] Fleta ubi ſupra.
[*i*] 18. E. 3. fol. 43.
[*k*] 15. E. 2. Preſcript. 51. 12. H. 8. fol. 2. (Cro. Jam. 208. 257. 1. Ro. Abr. 396. 2. Rol. Abr. 267. 7. Co. 5. 1. Vent. 391. 1. Saund. 351.)
* Paſch. 26. Eliz. in the King's Bench, inter White and Shirland in com. Oxon. Vide ſect. 1. & 2. (F. N. B. 180. c. 2. Saund. 326. 1. Rol. Abr. 405.)
[*l*] Vid. 3. H. 3. 29, 30. 4. E. 3. 7. 46. E. 3. 23. 15. E. 2. Preſcript. 51.
[*m*] 20. H. 6. 4. 10. H. 7. 24. Temps E. 1. Aſſiſe 422. (2. Rol. Abr. 258.)

For the notes to this ſide of fol. 122. a. ſee 126. b.

leaſt pretence to extend the meaning of the law further, if it had not been for ſome ambiguous expreſſions in the latter end of it. Like the 1. R. 3. after declaring a fine with proclamation to be an univerſal bar, it ſaves to all, except *parties*, five years to claim after the proclamations of it. But this ſaving did not ſuit the caſe of the iſſue in tail, or of thoſe in remainder or reverſion; becauſe during the life of the immediate tenant in tail, theſe could have no right to the poſſeſſion, and it was poſſible, that he might live more than five years from the proclamation of the fine. The framers of the 4. H. 7. foreſaw this; and therefore like the 1. R. 3. it contains an additional ſaving of five years for all perſons, to whom any title ſhould come *after* the proclamation of the fine by force of any intail ſubſiſting *before*; words, which as ſtrongly apply to the iſſue of the tenant in tail levying a fine, as to thoſe in remainder or reverſion. Had therefore the 4. H. 7. ſtopped here, what the learned and inſtructive obſerver on our ancient ſtatutes writes would be ſtrictly juſt, that, inſtead of deſtroying eſtates tail, the ſtatute expreſly ſaves them. Barrington. Ant. Stat. 2d. ed. p. 337. But a ſubſequent part of the ſtatute, in declaring how a fine ſhall operate on ſuch as have five years allowed, if they do not claim within that time, expreſſes, that they ſhall be concluded *in like form as parties and privies*; and another clauſe, in regulating, who ſhould be at liberty to aver againſt a fine *quod partes nihil habuerunt*, ſaves this plea for all perſons, with an exception of *privies* as well as *parties*. From theſe two clauſes, though the former of them was copied from the 1. R. 3. grew a doubt, whether the ſtatute did not enable tenant in tail to bar his iſſue by a fine. The arguments for it were, that the iſſue were *privies* both in blood and eſtate; and that if the ſtatute meant to bind them, when the tenant in tail had *not any* eſtate in the land at the time of the fine, it was highly improbable, there ſhould be a different intention, when he really had one. 2. Show. 114. On the other hand it might be ſaid, that, as the word *privies* in the ſtatute *de modo levandi fines* and in the 1. R. 3. was not deemed ſufficient to reach heirs in tail, and to control the ſtatute *de donis*, why then ſhould the ſame word in the 4. H. 7. include them; more eſpecially, when it was conſidered, that it was as much the profeſſed ſcope of the 4. H. 7. as it was of the 1. R. 3. to revive the operation of fines againſt non claims, and that both contained the ſame expreſs ſaving for perſons claiming under intails? 2. Inſt. 517. Pollexf. 502. By ſuch contrariety of reaſoning, the judges in the 19. H. 8. became divided in opinion; three holding, that the 4. H. 7. was not a bar to the iſſue, and four that it was. See 19. H. 8. 6. b. Dy. 2. b. pl. 1. Br. Abr. Fines, 1. 121. 123. Bro. N. C. 144. Pollexf. 502. To remove the doubt the legiſlature paſſed the 32. H. 8. by which the heirs in tail are expreſly bound. 32. H. 8. c. 36. But the laſt named ſtatute, though entitled an expoſition of the 4. H. 7. and though made to operate *retroſpectively*, contained ſeveral exceptions, particularly one of fines of lands, of which the reverſion is in the crown. Conſequently room was ſtill left for conteſting the effect of the 4. H. 7. independently of the 32. H. 8. and in the reign of Charles the ſecond a caſe aroſe, which made a diſcuſſion of the point almoſt unavoidable. It was the caſe of the earl of Derby againſt one claiming under a fine by the earl's father, who was tenant in tail with reverſion in the crown, and ſo within an exception in the 32. H. 8. Two points were made, of which the firſt was whether this fine, thus depending wholly on the 4. H. 7. was a bar to the iſſue in tail; and on adjournment of the caſe into the Exchequer-chamber, eight judges againſt three held, that the fine of tenant in tail was a bar to the

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that the father's appointment of the cuſtody of his child under that ſtatute will not extend to copyhold eſtates. Church and Cudmore, 2. Lutw. 1181. 3. Lev. 395. and Comberb. 253.—But beſides the ſeveral kinds of guardians enumerated by lord Coke, and

(*) Inter Chiner and Fiſhen in le Com. Banke in replevin & Mich. 29. & 30. Eliz. inter Shirlond and White in com. Oxon. Et inter Foiſton & Crachrode eodem termino in Eſſex. (2. Rol. Abr. 267.)

beene reſolved. (*) And therefore it is neceſſary for every man by learned advice to plead according to the truth of his caſe; for *parols font plea*.

[n] A man ſeiſed of land, whereunto common is appendant, and is diſſeiſed, the diſſeiſee cannot uſe the common, untill he entreth into the land whereunto it is appendant. [o] But if a man be diſſeiſed of a manner, whereunto an advowſon is appendant, he may preſent unto the advowſon, before he enters into the mannor; and the reaſon of this diverſitie is, becauſe in the caſe of the common it ſhould be a prejudice to the tenant of the ſoile, for if the diſſeiſee might do it, the diſſeiſor alſo might put on his cattle, which ſhould be a double charge to the tenant, but not ſo of the advowſon.

[n] 19. H. 6. 33.
[o] Vide ſect. 541. (4. Co. 31. a. Poſt. 307. 349. b. 363. b.)

Sect. 185.

ITEM ſi home voile en court de record ſoy conuſter deſtre villeine, que ne fuit villein adevant, tiel eſt villeine en groſſe.

ALSO if a man will acknowledge himſelfe in a court of record to be a villeine, who was not a villein before, ſuch a one is a villeine in groſſe (1).

Bract. lib. 1. cap. 6. Britton fol. 78. Fleta li. 1. c. 3. 43. E. 3. 4. b. 19. E. 2. tit. Vil. 34. 18. E. 4. 29.

THIS is intended in ſome action brought againſt him that made ſuch confeſſion, [p] or where he is brought into court by courſe of law; for if he commeth into the court extrajudicially and not by any due courſe of law, ſuch confeſſion is without warrant of law, and bindeth not the partie, becauſe the court had no warrant to take it. But if a *præcipe* be brought againſt one, he may confeſſe himſelfe villeine to an eſtranger, and that he holds the land in villenage of him, and this is good and ſhall bind him. And if in that caſe the demandant reply, that he the day of his writ purchaſed was a freeman (2), and thereupon iſſue is taken, and he is tryed to be free, yet he ſhall remaine villeine to the ſtranger in reſpect of his confeſſion.

[p] 19. H. 6. 32. 26. Aſſ. 62. 37. Aſſ. 17. 11. H. 4. 16. in appeale. (2. Ro. Abr. 732.)

41. E. 3. tit. Vill. 6.

19. H. 6. 32. b.

If a writ of *nativo habendo* be brought againſt one, and the plaintiffe, as he ought, offereth in his count to prove the villenage by the couſins and kindred of the defendant, and therupon produceth the uncles of the defendant, who upon examination confeſſe themſelves to be villeines to the demandant, this confeſſion, being entred of record, doth ſo bind, that, albeit they were ſo free before, they and the heires of their bodies are by this confeſſion bond and villeines for ever, for the uncles came in by due courſe of law in an action depending in court.

Sect. 186.

ITEM home que eſt villein eſt appelle villeine (3), *et feme que eſt villein eſt appelle niefe: ſi come home que eſt utlage eſt dit utlage, et feme que eſt utlage eſt dit waive.*

ALSO a man which is a villeine is called a villeine, and a woman which is villein is called a neife: as a man which is outlawed is called outlawed, and a woman, which is outlawed is called waived.

F. N. B. 161. a. Regiſt. 132. & 277. Britton fol. 20. Bract. l. 3. tract. 2. ca. 12, 13. Fleta lib. 1. cap. 28. 3. H. 5. tit. Utlawry Statham.

Niefe. Or *naife* is in Latine *naturalis, ſeu nativa*, becauſe for the moſt part niefes are bond by nativitie.

Feme que eſt utlage eſt dit waive.

Waive, waviata, and not *utlagata* or *exlex*; for that women are not ſworne in leets, or tornes, as men, which be of the age of twelve yeares or more be; and therefore men may be called *utlagati, id eſt, extra legem poſiti*, but women are *waiviatæ, id eſt, derelictæ*, left out or not regarded, becauſe they were not ſworne to the law; wherein it is to be noted, that of ancient time a man was not ſaid to be within the law, that was not ſworne to the law, which is intended of the oath of allegiance in the leet (4).

Regiſt. orig. 132. (2. Rol. Abr. 804.)

And the outlawrie of a woman is legally called *waiviaria mulieris*.

Sect.

For notes to this ſide of fol. 122. & ſee 126. b.

the iſſue before the 32. H. 8. great ſtreſs however being laid by thoſe of this opinion on the expoſition of the former by the latter. See Murrey on the demiſe of the earl of Derby againſt Eyton and Price, Paſch. 31. Ch. 2. in Scacc. T. Raym 260. 286. 319. 338. Pollexf. 491. Skinn. 95. 2. Show. 104. T. Jo. 237. It is obſervable, that both lord keeper North and lord chief-juſtice Saunders, the lateneſs of whoſe promotions prevented their publickly giving their opinions, concurred with the majority of the judges in the conſtruction of the 4. H. 7. and further, that Pollexfen, who as counſel argued moſt ably for the earl of Derby the iſſue in tail, afterwards declared his private ſentiments to be againſt the earl on that ſtatute. But it ſhould be adverted to, that, though the majority of the judges were againſt lord Derby on this point, they gave judgment for him on a ſecondary one, which was, that the intail, being of the gift of the crown, fell within the protection of the 34. H. 8. Therefore their opinion on the 4. H. 7. finally proved to be wholly extrajudicial. But we do not know of any caſe, in which the controverſy has been again agitated.—A third effect of fines is paſſing the eſtates and intereſts of married women in the inheritance or freehold of lands and tenements. Our common law bountifully inveſts the huſband with a right over the whole of the wife's perſonalty, and entitles him to the rents and profits of her real eſtate during the coverture. It further gives him an eſtate for his own life in her inheritance, if the huſband is actually in poſſeſſion, and there is born any iſſue of the marriage capable of inheriting. But the ſame law, which confers ſo much on the huſband, will not allow her, whilſt a feme-covert, to enlarge the proviſion for him out of her property, or to ſtrip herſelf of any claims which the law gives her on his. On the contrary, jealous of his great authority over her, and fearful of his uſing compulſion, it creates a diſability in her to give her conſent to any thing, which may affect her right or claims after the coverture, and makes all acts of ſuch a tendency abſolute nullities. By the rigour of the ancient law, we take this rule to have been ſo univerſally applicable, that a married woman could in *no* caſe bind herſelf or her heirs by any *direct* mode of alienation. But accident gave birth to two *indirect* modes, namely, by fines and common recoveries. Though it might be proper to incapacitate the wife, from being influenced by the huſband to prejudice herſelf by any conveyances or agreements during the coverture, yet juſtice to others required, that ſuch, as might have any claim on the wife's freehold or inheritance, ſhould not be forced to poſtpone their ſuits till the marriage was determined; for if they ſhould, then, to uſe the words of Bracton, in explaining why the huſband's infancy would not warrant the parol to demur in a ſuit for the wife's land, *mulier implacitata de jure ſuo ſi propter minorem ætatem viri poſſet differre judicium, ita poſſet quælibet mulier in fraudem nubere.* Bract. lib. 5. tract. 5. c. 21. fo. 423. a. Probably it was on this principle, the common law allowed a judgment againſt huſband and wife in a ſuit for her land to be as concluſive, as if given againſt a feme ſole; which was carried ſo far, that, till the ſtatute of Weſtminſter the ſecond, even judgment againſt them, on default in a *poſſeſſory* action for the wife's freehold, drove the wife after the huſband's death to a writ of right to recover her land. 2. Inſt. 342. From enabling the huſband and wife to defend her title, and making the judgment on ſuch defence to be concluſive, permitting them to compound the ſuit by a final agreement of record, in the ſame manner as other ſuitors, was no great or difficult tranſition; more eſpecially when its conſidered, that in the caſe of femes covert fines are never allowed to paſs, without the court's ſecret examination of them apart from their huſbands, to know, whether their conſent is the reſult of a free choice, or of the huſband's compulſive influence. Such, we conceive is the true ſource, whence may be derived the preſent force of fines and common recoveries as againſt the wife, who joins in them; for, whatever in point of bar and concluſion was their effect, when in ſuits really *adverſe*, of courſe attended them, when they were *feigned*, and in that form gradually roſe into modes of alienation, or, as the more uſual phraſe is, *common aſſurances*. The conjecture

and thoſe we have already mentioned in addition, there are *four* others which ſtill remain to be noticed.

The *firſt* of theſe is guardian by election of the infant himſelf. But the right of making ſuch an election only ariſes, when from

Sect. 187.

ITEM si un villein prent franke feme a feme, et ad issue enter eux, lissues serront villeines. Mes si niese prent franke home a sa baron, lour issues serra franke.

* *Et ceſt contrarie a le ley civil; car la eſt dit,* partus ſequitur ventrem * (1).

ALSO if a villeine taketh a free woman to wife, and have issue betweene them, the issues shall be villeines. But if a niefe taketh a freeman to her husband, their issue shall be free.

* This is contrarie to the civill law; for there it is said, *partus ſequitur ventrem* *.

SUrculus totum alimentum à ſtipite capit, poma tamen edit ſua. The ſiens (2) takes all his nourishment from the stocke, and yet it produceth his owne fruit. Fortescue cap. 42. Glanvill lib. 5. cap. 6. Hil. 29. E. 1. coram rege Eborum in thesaur.

[q] *Si quis de ſervo patre natus ſit & matre libera, pro ſervo reddatur occiſus in ea parte; quia ſemper à patre, non à matre generationis ordo texitur. Si pater ſit liber & mater ancilla, pro libero reddatur occiſus.* [q] Lib. Rub. cap. 77.

[r] *Lex Angliæ nunquam matris, ſed ſemper patris, conditionem imitari partum judicat.* [r] Fortescue ubi supra.

see an instance on a question of alienage in Coo. Cha. 601. 602.

[s] The husband and wife are all one person in law, and the niefe, marrying a freeman is infranchised during the coverture (3); and therefore by the common law of England, the issue is free (4). [s] Herewith agreeth Britton fol. 78. b.

[t] *Si mulier ſerva copulata ſit libero, &c. quod partus habebit hæreditatem, & mater nullam dotem, quia mortuo viro ſuo libero redit in priſtinum ſtatum ſervitutis, niſi hæres ei dotem fecerit de gratia* (5). And when a bondman marieth a free woman, they are all one person in law, and *duæ animæ in carne una*, and *uxor ſubjecta eſt viro, & ſub poteſtate viri* (6). [t] Bract. lib. 4. fol. 298. b. idem lib. 1. cap. 6. Mirror cap. 2. sect. 28.

[u] *Obſervatur in com' Cornubiæ de tali conſuetudine, quæ talis eſt, quod ſi liber homo ducat nativam aliquam in uxorem ad liberum tenementum & liberum thorum, ſi ex ea duæ procreantur filiæ, una erit libera & altera villana, quia ibi partiti ſunt pueri inter liberum patrem & dominum uxoris villanæ.* [u] Bract. lib. 4. fol. 271.

[x] *Qui vero procreantur ex nativa unius & nativo alterius, proportionabiliter inter dominos ſunt dividendi.* [x] Glanvill lib. 5. cap. 6.

Et ceo eſt contrarie al ley civil. (7) For true it is, that by that law *partus ſequitur ventrem*, as well where a free man takes a bond woman to wife, as where a bondman takes a free woman to wife. In the first case the issue is by the civill law bond, and in the other free; both which cases are contrarie to the law of England. But this is no part of Littleton; and therefore we in this manner pass it over. Fortescue cap. 42.

Sect. 188.

ITEM nul baſtard poit eſtre villein, ſi non que il voile ſoy conuſter eſtre villeine en court de record; car il eſt en ley quasi nullius filius, *pur ceo que il ne poit enheriter a nulluy.*

ALSO no bastard may be a villeine, unless he will acknowledge himselfe to be a villeine in a court of record; for he is in law *quaſi nullius filius*, because he cannot be heir to any.

NUllius [a] filius. Cui pater eſt populus, pater eſt ſibi nullus & omnis. [a] Vide sect. 399. 13. E. 1. tit. Villein 36. (Ante 3. b. Post. 244. b.)

Cui pater eſt populus, non habet ille patrem.

[b] Some hold that the bastard of a niefe shall be a villeine. [c] And others hold, that if a villeine hath a bastard by a woman, and after marieth the woman, that this bastard is a villeine. But the law is contrary in both cases; for in both cases, the issue by the common law is a bastard, and consequently, *quaſi nullius filius*, as Littleton here saith. [d] Though a bastard be a reputed sonne, yet is he not such a sonne, in consideration whereof an use can be raysed, for the reason that Littleton here yeelds; because in judgment of law he is *nullius filius*. [e] (8) And, for [b] Bract. lib. 1. fo. 5. a, Fleta lib. 1. cap. 3. Britton fol. 78. [c] 39. E. 3. 34. 43. E. 3. 4. Britton ubi supra. [d] 23. Eliz. Dyer 374. [e] 13. Eliz. Dier 296.

(1) The sentence between the stars is not in L. & M. Roh. or P.—(2) *Siens*, or, according to the modern spelling, *cion*, signifies the *shoot* of a tree, and is derived from the French word *scion*, which is the same as *surculus* in Latin.—(3) According to Fitzherbert, the marriage enfranchises the woman *for ever*; and he cites as an authority Britton, who considers it as a negligence in the lord not to have prevented the marriage. F. N. B. 78. G. Brit. 79. b. But Bracton, in the passage cited by lord Coke two or three lines further, confines the enfranchisement to the coverture; and there are several authorities, which concur with him. Bro. *Villenage* 23. Pasch. 33. E. 3. Statham tit. *Villenage*. Fitzh. Abr. *Villenage* 21. 30. 46. Lord Coke was aware of this contrariety in the books; for in a subsequent part he takes notice of it, but calls the opinion, that the enfranchisement ceases with the coverture, the better one. Post. 136. b. 137. b. However he inclines to except the case of the neif's marrying with her own lord. But even this is denied by Perkins. Perk. sect. 314. It is a strong argument against this latter writer, that, in other cases of *constructive* manumissions, though in some the ground of inference was not so strong as the lord's marriage with his nief, the enfranchisement was *perpetual*. It is a still more forcible reason, that reviving the slavery on the lord's death, if he left an heir by his nief, would have necessarily induced the *unnatural* consequence of making the mother the slave of her own issue.—(4) It was unnecessary to resort to this reason to prove the issue of such a marriage free. The rule of our law being, that the child shall follow the father's condition, consequently, whether the nief was *free* or *bond* during the coverture, made no difference to her issue.—(5) In the chapter of Dower lord Coke represents a nief marrying a free-man to be dowable. Ante 31. a. But this passage from Bracton is direct to the contrary. Perkins distinguishes, allowing dower to the nief from a *stranger*, but not from her *lord*. Perk. sect. 314.—(6) Here lord Coke omits explaining what effect the marriage of a villein with a free woman has on his condition. As Britton writes, if the villein marries his own *lady*, it enfranchises him for ever. Brit. 78. b. If the marriage is with any other woman, it is clear from Littleton's declaring the issue villeins, that the father remained a slave as before.—(7) This difference between our and and the civil law is the subject of the chapter in Fortesc. de Laud. Leg. Angl. cited in the margin. See also Mr. Selden's and Mr. Gregor's notes in the 8vo. ed. of 1775.—(8) This point was so held in Worseley's case of 23. Eliz. in Dyer, which lord Coke refers to in the margin. According to Dyer judge Periam was of a contrary opinion. But Anderson, who reports the same case, informs us, that the judges were agreed. 1. And. 75. In the queen against an illegitimate son of sir John Perrot, and in Frampton against Gerrard, two subsequent cases of the same reign, the judges recognized the doctrine. 2. Rol. Abr. 785. 791. and Mo. 735. However it should be observed, that, though a bastard is not a *son*, for whom the consideration of blood will *raise* an use, yet, on an estate otherwise effectually passed, an use may be as well *declared* to a bastard being *in esse* and sufficiently described as to another person; and so Rolle in his Abridgment, states the law to be, but at the same time cites the case of Frampton and Gerrard as determined to the contrary. 1. Ro. Abr. 791. Gilb. on Uses 207. The reason, why the use to the bastard is good in the first instance and bad in the second, depends on the common, but perhaps obscure, distinction, between uses raised by transmutation of the possession, as on a feoffment grant fine or common recovery, and those raised without, as a covenant to stand seised or bargain and sale; or, to express it in more intelligible terms, between declaring uses on a possession or estate actually *transferred* to a *third person*, and declaring them on a possession or estate *retained* in the *party himself*. In the former case the estate is passed completely

Continuation of notes to 121. *a.*

jecture we have thus hazarded to illustrate, how it happens, that a married woman may alienate her real rights by fine, though not

from a defect of the law, the infant finds himself wholly unprovided with a guardian. This may happen to be the case, either from

14. Eliz. Dier 313. 18. Eliz. Dier 345.

for the ſame reaſon, where the ſtatute of 32. H. 8. of wills, ſpeaketh of children, baſtard children are not within that ſtatute, and the baſtard of a woman is no child within that ſtatute, where the mother conveys lands unto him.

[f] Trin. 18. E. 1. rot. 61. Bedf. coram rege. (Cro. Jam. 541. 1. Rol. Abr. 536. Godb. 281. Palm. 9.)

[f] It was found by verdict, that Henry the ſonne of Beatrice, which was the wife of Robert Radwell deceaſed, was borne *per undecim dies poſt ultimum tempus legitimum mulieribus conſtitutum.* And thereupon it was adjudged, *quod dictus Henricus dici non debet filius prædicti Roberti ſecundum legem & conſuetudinem Angliæ conſtitut'* (1). Now *legitimum tempus* in that caſe appointed by law at the furtheſt is nine moneths, or forty weeks (2); but ſhe may be delivered before that time, which judgement I thought good to mention. And this agreeth with that in Eſdras. *Vade & interroga prægnantem, ſi quando impleverit novem menſes ſuos, adhuc poterit matrix ejus retinere partum in ſemetipſa? & dixi, non poteſt, domine.*

4. Eſdras 4. 41. Vide Panciroll, Nova reporta, pag. 485. &c.

Sect. 189.

CHeſcun villeine eſt able & franke de ſuer, &c.

ITEM cheſcun villein eſt able & franke de ſuer touts manners d'actions envers cheſcun perſon, forſpris envers ſon ſeignior, a que il eſt villeine. Et uncore en certain choſes il poit aver action envers ſon ſeignior. Car il poit aver envers ſon ſeignior un action d'appeal de mort ſon pere, ou d'auters de les aunceſters, que heire il eſt.

ALSO every villein is able and free to ſue all manner of actions againſt everie perſon, except againſt his lord, to whom he is villeine. And yet in certaine things he may have againſt his lord an action. For he may have againſt his lord an action of appeale for the death of his father, or of his other anceſtors, whoſe heire he is.

[g] Bract. lib. 4. fol. 196. Britton cap. 49. fo. 125.

[g] In an action brought by a villeine, *verſus non dominum, non valebit ei exceptio, quia eſt ſervus alienus, ex quo nihil ad ipſum utrum liber ſit an ſervus.* [h] And it is to be obſerved, that he, that hath but a particular eſtate in a villeine, as tenant for life or for yeares, ſhall diſable the villeine, if he brings an action againſt him; but the leſſor ſhall not (as it is ſaid) diſable him. [i] *Examinatio villenagii non tenet, niſi ex ore veri domini fuerit pronunciata.*

[h] 14. E. 4. 6 b. 15. E. 4. 32. 20. E. 3. tit. Villein 10. 38. E. 3. 21.

[i] Fleta lib. 2. cap. 4.

Appeale. *Appellum* commeth of the French word *appeller*, that ſignifieth to accuſe or appeach. An appeach. [k] An appeale is an accuſation of one upon another; with a purpoſe to attaint him of felonie by words ordained for it.

(3. Inſt. 131.)

[k] Brit. cap. 22. fo. 38. Bracton lib. 1. fo. 6.

De mort [l] for a villeine ſhall not have an appeale of robberie againſt his lord; for that he may lawfully take the goods of the villein as his own. [m] And if in an appeale of death it be found for the plaintife, he is infranchiſed for ever. *Hinc enim eſt, quod eo ipſo ſunt hujuſmodi domini ſervos ſuos amiſſuri, cum de injuriis fuerint convicti.* And there is no diverſitie herein, whether he be a villein regardant, or in groſſe, although ſome have ſaid the contrary.

[l] 18. E. 3. 32. 11. H. 4. 93. 1. H. 4. 6. 29. H. 6. tit. Corone 17.

[m] Fleta li. 1. c. 5. 1. H. 4. 6

Sect. 190.

RAPE. [n] *Raptus* is, when a man hath carnall knowledge of a woman by force and againſt her will.

AUXY un niefe, que eſt ravie per ſa ſeignior, poit aver un appeale de rape envers luy.

ALSO a niefe, that is raviſhed by her lord, may have an appeale of rape againſt him.

[n] Mirror ca. 1. ſect. 12. cap. 3. de Rape & cap. 4. de Homicide. (3. Inſt. 60.)

Appeale de rape. By the generall purview of the ſtatutes, (*) that give the appeale of rape, the nieſe ſhall have an appeale of rape againſt the lord. [o] And it ſeemeth by the ancient authors of the law, that this ſo hainous an offence was ſeverely puniſhed by loſſe of eyes, and privy members; but of old time it was felony, which you may reade at large in the ſecond part of the Inſtitutes W. 1. ca. 13.

(*) W. 1. ca. 13. W. 2. ca. 35. 6. R. 2. ca. 6. 11. H. 4. cap. 13. 1. E. 4. cap 1.

[o] 29 H. 6. tit. Coron. 17. Bract. lib. 3. fol. 147.

[p] And

pletely from the grantor or donor, without the aid of a court of equity; and therefore it is immaterial, whether the uſe declared on the eſtate is gratuitous or not, it being ſufficient, that the grantee or donee receives it coupled with a truſt or uſe. But in the latter caſe, the tranſaction reſts in covenant or agreement between the covenantor or bargainor and the *ceſtuique uſe*; and if the covenant or agreement was not founded on the conſideration of *blood* or a *valuable* conſideration, ſuch as marriage or money, our courts of equity, which till the 27. of H. 8. had the ſole cognizance of uſes, would not interpoſe to compel the performance. In fewer words, Chancery would enforce uſes annexed to a *perfect gift*, however gratuitous they might be, but not thoſe reſting only on a *naked contract*, without even ſo much as the conſideration of *blood* to maintain them. The authorities in proof of this diſtinction are abundant; nor do we know of any ſeeming to impeach it, except the ſingle caſe of Frampton and Gerrard already cited from Rolle, which, if it did turn on ſuch a point, is ſufficiently controled by other caſes to make the doctrine indiſputable. Mo. 102. Ow. 40. 1. Leon. 197. 1. Co. 176. b. W. Jo. 346. Cart. 143. 12. Mod. 161. Gilb. on Uſes 113. 207. Add to this the diſfavour of our law to baſtardy, in not recognizing any but *legitimate* blood to be a good conſideration, and the whole ſecret of the rule as to uſes to baſtards will be diſcloſed. On a covenant to ſtand ſeized, an uſe will not riſe to a baſtard; becauſe, the uſe depending on *contract*, ſome conſideration is requiſite, and *lawful blood* and *marriage* are the two conſiderations *peculiar* to ſuch a covenant, which neceſſarily excludes *baſtardy*. But on bargains and ſales of land, in which the eſſential conſideration to raiſing an uſe is *money* or a *price*, or on any conveyances, on which, the eſtate being paſſed out of the grantor and therefore not depending on his contract, uſes may be declared without any conſideration, baſtards ſtand precisely on the ſame footing with other perſons, and are equally capable of having uſes limited to them. To give the ſum of this elucidation in one ſentence, where the uſe will not riſe without the conſideration of *blood*, if derived through any but the pure channel of marriage, however near the blood may be, it will not avail.

(1) Lord Hale, in a note on a paſſage about legitimacy in fol. 8. a. gives a fuller extract of this caſe from the record, than is here expreſſed. His words are theſe:

Trin. 18. E. 1. Coram rege, rot. 13. Bedford, et M. 22, 23. E. 1. rot. 2. *In aſſiſe by John Radwell againſt Henry ſon of Beatrice, who*

Continuation of notes to 121. a.

not by any inſtrument or act ſtrictly and nominally a conveyance, leads to proving, that the common notion of a fine's binding femes covert merely by reaſon of the *ſecret examination* of them by the judges is incorrect. If the ſecret examination of *itſelf* was ſo operative, the law would provide the means of effectually adding that form to ordinary conveyances, and ſo make them concluſive to femes covert equally with a fine. But it is clearly otherwiſe; and, except in the caſe of conveyances by *cuſtom*, there muſt be a *fine* depending for the freehold or inheritance, or the examination being *extrajudicial* is ineffectual. In the ſecond Inſtitute

before fourteen, when the infant has no property ſuch as attracts a guardianſhip by tenure, and the father is dead without having

[p] And this word *rape*, which out author here uſeth, is ſo appropriated by law to this caſe, as without this word *(rapuit)* it cannot be expreſſed by any periphraſis or circumlocution; for *carnaliter cognovit eam* or the like, will not ſerve.

[p] 9. E. 4. 26. Mirror ca. 1. ſect. 13.

Sect. 191.

AUXY ſi un vill' ſoit fait executor a un autre, & le ſeignior del villeine fuit en dette a le teſtator en un certeine ſumme dargent, que neſt my paie, en ceo caſe, le villeine, come executor de le teſtator, avera action de det envers ſon ſeignior; pur ceo que il ne recovera le det a ſon uſe demeſne, mes al uſe le teſtator.

ALSO if a villeine be made executor to another, and the lord of the villeine was indebted to the teſtator in a certaine ſum of mony, which is not paid, in this caſe, the villein, as executor of the teſtator, ſhall have an action of debt againſt his lord; becauſe he ſhall not recover the debt to his owne uſe, but to the uſe of the teſtator.

OF this matter ſufficient hath beene ſpoken in this chapter before. The villein ſhall have an action as executor againſt his lord, and it is no plea for the lord, to ſay, that the plaintife is his villeine; for he ſhall not be enfranchiſed by the uſer of this action; becauſe he hath it by a gift in law to the uſe of the teſtator, and not to his owne uſe.

(Doc. Plac. 388.)

21. E. 4. 50. a.

Sect. 192.

ITEM le ſeignior ne poit prender hors del poſſeſſion de tiel villein, que eſt executor, les biens le mort; et ſil face, le villeine come executor avera action de treſpaſſe de meſmes les biens iſſint priſes envers ſon ſeignior, & recouvera damages al uſe le teſtator. Mes en touts tielx caſes il covient, que le ſeignior, que eſt defendant en tielx actions, face proteſtation, que le plaintife eſt ſon villein; ou autrement le villeine ſerra enfranchiſe, co-

ALSO the lord may not take out of the poſſeſſion of ſuch villeine, who is executor, the goods of the deceaſed; and if he doth, the villeine as executor ſhall have an action for the ſame goods ſo taken againſt his lord, and ſhall recover damages to the uſe of the teſtator. But in all ſuch caſes, it behoveth, that the lord, which is defendant in ſuch actions, maketh proteſtation, that the plaintife is his villein; or otherwiſe the villeine ſhall be infran-

LE ſeignior ne poet prender hors del poſſeſſion, &c. Of this alſo ſufficient hath beene ſaid before.

Et recovera damages al uſe del teſtator.

[q] Note damages recovered by the executor in an action of treſpaſſe ſhall be aſſets; and yet they were never in the teſtator. And ſo it is in other like caſes, as by our bookes it appeareth.

[q] 21. E. 4. 4 b. 11. H. 6. 35. b. 3. Ji. 6. 2. 2. H. 4. 21. 1. H. 4. 6.

[r] If an executor hath a villeine for yeares, and the villein purchaſes land in fee, the executor entreth, he ſhall have the whole fee ſimple; but becauſe he had the villein *in auter droit*, viz. as executor to the uſe of the dead, it ſhall be aſſets in his hands. Note a diverſity between the quantity of the eſtate, and the quality of it; for the law reſpecteth not the quantity of the eſtate, for not onely

[r] Doct. & Stud. Brooke tit. Villenage 70. (Ante 117. a.)

(Ante 117. a)

[s] tenant

who was wife of Robert Radwell, quia compertum eſt, quod dictus Henricus fuit natus per 11 dies poſt 40 ſeptimanas, quod tempus eſt uſitatum mulieribus pariendi, ex quo prædictus Robertus non habuit acceſſum ad prædictam Beatricem per unum menſem ante mortem ſuam, præſumitur dictum Henricum eſſe baſtardum, ideo *judgment for the plaintiff.* Hal. MSS.

If this ſtate of the caſe is correct, lord Coke's is erroneous in ſeveral particulars of conſequence. 1. He is ſhort in not expreſſing, that the record mentions *forty weeks*, and ſo leaving it to be deemed an *inference* of his own, as which it has been accordingly treated. 2. He exceeds the record, by repreſenting it to ſtile *that time* the *lateſt* for a woman's going with child, when the record only calls it the *uſual* period. 3. He wholly omits the huſband's having had *no acceſs to the wife for one month before his death*; a fact very material, it being very eaſy to allow *eleven days* after the *uſual* time, but requiring a ſtrong caſe to warrant

Continuation of notes to 121. *a.*

Inſtitute lord Coke repreſents this to be the *general* law, and, amongſt many authorities cited to prove it, refers to a caſe of Hen. 7. reported by Keilwey, in which, whether the examination of a feme covert, on the inrolment of a bargain and ſale to the *king*, ſufficed to bind her, was largely debated. 2. Inſt. 673. Keilw. 4. a. to 20. a. The juſt explanation therefore of the ſubject is, that the *pendency of a real action* for the *freehold* of the land, in conſequence of previouſly taking out an original writ, without which preliminary even at this day a fine is a nullity, ſhould be deemed the *primary* cauſe of the fine's binding a feme covert; and that the *ſecret examination* of her, on taking the aknowledgment of the fine, is only a *ſecondary* cauſe of this operation.

Such are the *three* chief effects, by reaſon of which, fines, no longer uſed, according to their original, as recorded agreements for concluſion of *actual ſuits*, have been changed into, and are ſtill retained as *feigned* proceedings; and being thus accommodated to anſwer purpoſes, to which ordinary conveyances cannot be applied, it is no wonder, that they ſhould not only be conſidered as a ſpecies of conveyance, but alſo be deemed a principal guard to the titles to real property, and as ſuch be ranked amongſt the moſt valuable of the common aſſurances of the realm.

In this digreſſion on the properties of a fine, we have purpoſely omitted to conſider its operation, either as an *eſtoppel*, except ſo far as it may be ſaid to be one to the iſſue in tail by force of the 4. H. 7. and 32. H. 8. or as a *diſcontinuance*, or laſtly in reſpect of the conuſor's *warranty*, which is always inſerted in it. The virtues of a fine, in the three points of view we have examined it, namely to extinguiſh dormant titles, to bar the iſſue in tail, and to paſs the intereſts of femes covert; theſe conſtitute the more *peculiar* qualities, on account of which it is moſt uſually, if not always, reſorted to. As to the three other effects, it may be enough to obſerve here, that they are equally incident to feoffments, or any other deeds having warranties annexed. The diſtinct conſideration of them is reſerved for another occaſion.—(2) If binding the *parties*, or even *privies*, excluſive of heirs in tail, was the only effect of a fine, it would ſcarce be preferable to leſs ſolemn agreements; for, without doubt they alſo are ſo far binding. The moſt diſtinguiſhable properties of a fine are barring *ſtrangers* unleſs they claim within five years, barring the *iſſue in tail immediately*, and binding *femes covert*, as we have explained in the foregoing note.—(3) *In gros* not in L. and M. or Roh.—(4) *&c.* in L. and M. and Roh.—(5) *Court* inſtead of *&c.* in L. and M. and Roh.—(6) But ſee 1. Lev. 100. and 1. Sid. 298.

ing executed his power of appointing a guardian for his child; or *after* fourteen, when the cuſtody of the guardian by ſocage terminates

[s] tenant in taile, and tenant for life of a villeine, ſhall have the perquiſite of the villeine in fee, but [t] tenant for yeares, and tenant at will alſo ſhall have it in fee.

[s] L. 5. E. 4. 61.

[t] 21. H. 3. 6. 37. (Ante 117. a.)

ment que le matter ſoit trove pour le ſeignior, & encounter le villein, come eſt dit.

chiſed, although the matter be found for the lord, and againſt the villein, as it is ſaid.

But the law reſpecteth the quality, for in what right he hath the villeine, in the ſame right ſhall he have the perquiſite; as in the caſe of the executor aboveſaid, and in the caſe of the biſhop [u] that hath the villeine in right of his church, he ſhall have the perquiſite in the ſame right.

[u] 41. E. 3. 21.

[x] So if a man hath a villeine in the right of his wife, he ſhall have the perquiſite alſo in her right. But if the purchaſe be after iſſue had, then the baron ſhall have the perquiſite to him and his heires; becauſe by the iſſue he is intituled to be tenant by the curteſie in his owne right.

[x] 18. E. 3. 29.

Vide ſect. 193.

Proteſtation. [y] *Proteſtatio* is an excluſion of a concluſion that a party to an action may by pleading incurre; or it is a ſafeguard to the party, which keepeth him from being concluded by the plea he is to make, if the iſſue be found for him. But in this caſe without a proteſtation, albeit the iſſue be found for the lord, the villeine ſhall be enfranchiſed, as it appeareth hereafter in this ſection.

[y] Pl. Com. 276. b. In Greiſbrok's caſe.

Sect. 193.

CEO ſerra trie en le countie, &c. Be tryed, that is, as it it is intended by the verdict of twelve men, that is called in law a triall *triatio.*

Brit. fol. 79. 125. b. 126. a.

[a] In this caſe the law doth favour the villein in the iſſue; for otherwiſe by the rule of law in like caſes he ought to anſwer to the ſpeciall matter, *viz.* to the regardancy; but in favour of liberty he may reply, that he is free and of free eſtate, and conſequently this iſſue concerning the perſon ſhall be tryed where the writ is brought. [b] The like law it is, if iſſue be joyned upon the ideocy of the plaintife or defendant, it ſhall be tryed where the writ is brought; becauſe it concerneth the perſon.

[a] 7. E. 50. 26. E. 3. 73. 38. E. 3. 34. 40. E. 3. 36. 43. E. 3. 4. 31. 44. E. 3. 36. 47. E. 3. 26. 22. H. 6. 52. 35. H. 6. 12. 39. H. 6. 24. Vide ſect. 534.

[b] 2. Mar. Dier 112. (Poſt. 125. 7. Co. 1.)

In favorem libertatis. It is commonly ſaid, that three things be favoured in law; life, liberty, dower.

(F. N. B. 77. f.)

[c] *Impius & crudelis judicandus eſt, qui libertati non favet. Angliæ jura in omni caſu libertati dant favorem.*

[c] Forteſcue cap. 42.

Tryall is to finde out by due examination the truth of the point in iſſue or queſtion betweene the parties, where-

ITEM ſi villeine ſuiſt un action de treſpaſſe, ou un auter action envers ſon ſeignior en un county; et le ſeignior dit, que il ne ſerra reſpondus, pur ceo que il eſt ſon villein regardant a ſon manor en auter county (1); *& le plaintife dit, que il eſt franke et de franke eſtate, et nemy villeine; ceo ſerra trie en le county lou le plaintife avoit conceive ſon action, et nemy en le county lou le manor eſt: et ceo eſt* in favorem libertatis. *Et pur cel cauſe un eſtatute fuit fait* an. 9. R. 2. cap. 2. *le tenor de quel enſuiſt en tiel forme. Item pur la ou pluſors villeins, et neifes, ſibien des graundes ſeigniors*

ALSO if a villeine ſueth an action of treſpaſſe, or any other action, againſt his lord in one county; and the lord ſaith, that he ſhall not be anſwered, becauſe he is his villeine regardant to his mannour in another county; and the plaintife ſaith that he is free, and of a free eſtate, and not a villein; this ſhall be tryed in the county where the plaintife hath conceived his action, and not in the county where the mannor is: and this is in favour of liberty. And for this cauſe a ſtatute was made *anno* 9. *R.* 2. *ca.* 2. the tenor whereof followeth in this forme. Alſo for that where manyvilleins and neifs, *ors*

(1) *&c.* in L. and M. and Roh.

rant extending ſuch liberality to nearly *ſix weeks*. 4. The word *præſumitur*, which lord Coke paſſes over, is of importance; for it indicates, that, notwithſtanding the great exceſs of time, it was conceived to create only a *preſumption* for the baſtardy, and conſequently, if very cogent circumſtances, to account for the protraction of the birth, and in favour of the wife's chaſtity, had occurred, the judgment might have been for the legitimacy.

So far we had advanced, when on looking into Rolle's Abridgment, we found this ſame ancient caſe of Radwell more at large, than either in lord Coke or lord Hale. But Rolle agrees with the former as well in reſpect to the record's not mentioning the *forty weeks*, as to its ſtating the birth to be eleven days after the *lateſt time in law for a woman's going with child*; and as from Rolle's particularity he ſeems to have moſt minutely attended to the record, his authority, till the whole record appears, ſeems moſt deciſive. However the two laſt particulars, in which lord Coke differs from lord Hale, ſtill remain, to which Rolle adds theſe further circumſtances, that the *huſband languiſhed of a fever a long time before his death*; that on the taking of an inquiſition afterwards in the court of a lord, of whom he held lands by knight's ſervice, *the wife ſwore ſhe was not pregnant*, and to prove it uncovered herſelf in open court; and that, in conſequence of all this, the lord received a *collateral* relation as heir. The words deſcribing the wife's expoſure of her perſon are remarkable; for the record ſtates, that ſhe, being interrogated, *juramento aſſerebat, ſe non eſſe prægnantem; et, ut hoc omnibus manifeſte liqueret, veſtes ſuas ad tunicam exuebat, et in plena curia ſic ſe videri permiſit* 1. Ro. Abr. 356. pl. 3. and 18. E. 1. rot. 13. in B. R. there cited. It reflects great diſcredit on the lord's court, which permitted ſuch a groſs indecency; and ſtill more on the king's judges, who ſuffered it to be recorded as one of the grounds for a verdict before them. How laudably contrariant is the proceeding on the writ *de ventre inſpiciendo*. This remedy for the heir againſt the pretence of pregnancy, ſo well known to be of earlier date than the reign of Edward the firſt, as it was framed in the times of Bracton Britton and Fleta, delicately requires the widow to be inſpected by a jury of *her own ſex*; and though in ſubſequent times the ſheriff was ordered to ſummon a jury compoſed both of men and women, yet ſtill the *ſearch* was to be made by the latter only. Bract. 69. a. Brit. 165. b. Flet. lib. 1. c. 15. Reg. Br. Orig 227. a. What harſh ideas of the times might we be led to adopt, if the early introduction of the writ *de ventre inſpiciendo* did not demonſtrate, that the unſeemly record we are obſerving upon was a *ſingularity*, and ſo many other teſtimonies of a more advanced refinement in judicial proceedings did not concur, to reſcue the age of our Engliſh Juſtinian, from the ſuſpicion of a *general practice* of ſuch barbariſm.

Let us then ſuppoſe the record to be as it is in Rolle, which is the more probable to be the truth; becauſe a contemporary judge, who reports its having been *produced* on a trial of legitimacy, repreſents it much in the ſame way. Cro. Jam. 541. But ſtill it will not warrant lord Coke's inferring from it, that *forty weeks* conſtitute the lateſt time our law allows for a woman's going with child. On the contrary no particular time being mentioned, what period was meant, muſt be found out through ſome other *medium*; and as the record ſtates *other* unfavourable circumſtances beſides the exceſs of time, and that the jury *preſumed*

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terminates, and from the want of the father's appointment there is no other ready to ſucceed to the truſt and to take care of the infant

ors, come des auters gentes, ſibien eſpirituals come temporals, s'enſuent, deins cities, villes, & lieux enfranchiſe, come en la citie de Londres, & auters ſemblables, & feignont divers ſuits envers lour ſeigniors, a cauſe de eux faire franks per le reſpons de lour ſeigniors: accorde eſt et aſſentus, que les ſeigniors, ne auters, ne ſoyent my forbarres de lour villeines per cauſe de lour reſpons en ley. Per force de quel eſtatute, ſi aſcun villeine voylloit ſuer aſcun maner de action a ſon uſe demeſne en aſcun county, ou il eſt fort a trier envers ſon ſeignior, le ſeignior, poyt eſlyer de pleader, que le plaintife eſt ſon villeine, ou de faire proteſtation, que il eſt ſon villeine, & de pleder ſon auter matter en barre. Et ſi ils ſont a iſſue, & liſſue ſoit trove pur le ſeignior, donque le villein eſt villein, come il fuit devant per force de meſme leſtatute. Mes ſi le iſſue ſoit trove pur le villeine, donque le villeine eſt franke; pur tco que le

aſwell of great lords as of other men, aſwell of ſpirituall and temporall, flye and go into cities, townes, and places franchiſed, as into the city of London and other like places, and feine divers ſuits againſt their lords, becauſe they would make themſelves free by the anſwer of their lords: it is accorded and aſſented, that lords nor others ſhall not be forebarred of their villeins by reaſon of their anſwer in law. By force of which ſtatute, if any villeine will ſue any manner of action to his own uſe in any countie, where it is hard to try againſt his lord, the lord may chuſe whether he will plead, that the plaintife is his villeine, or make proteſtation that he is his villeine, and plead his other matter in bar. And if they be at iſſue, and the iſſue be found for the lord, then the villeine is a villeine, as he was before by force of the ſame ſtatute. But if the iſſue be found for the villeine, then the villeine is free; becauſe that the lord tooke

upon judgement may be given. And as the queſtion betweene the parties is twofold, ſo is the triall thereof: for either it is *quæſtio juris*, (and that ſhall be tried by the judges either upon a demurrer, ſpecial verdict or exception, for *cuilibet ſua arte perito eſt credendum*; & *quod quiſque norit in hoc ſe exerceat*; and it is commonly and truly ſaid, *ad quæſtionem juris non reſpondent juratores*) or it is *quæſtio facti* (1). And the triall of the fact is in divers ſorts, whereof a light touch is given before, ſect. 10. Of theſe a triall by xii. men (here intended by Littleton) is the moſt frequent and common. And ſome few rules of law, are neceſſary here to be remembred (for the better underſtanding of the bookes of law hereafter) where and from what place, *viz. de quo vicineto*, out of what neighbourhood the jury ſhall come, a neceſſarie poynt to be knowne; for if there be a mis-tryall, (that is) if the jury commeth out of a wrong place, or returned by a wrong officer and give a verdict, judgement ought not to be given upon ſuch a verdict. [d] Wherein the moſt general rule is, that every tryall ſhall be out of that towne, pariſh, or hamlet, or place known out of the towne, &c. within the record, within which the matter of fact iſſuable is alledged, which is moſt certaine and neereſt thereunto, the inhabitants whereof may have the better and more certaine knowledge of the fact (2). As if the fact be alledged *in quadam platea vocat' King-ſtreet in civitate Weſtm. in com' Midd.* In this caſe the viſne cannot come out of *platea*; becauſe it is neither town, pariſh, hamlet, nor place out of the neighbourhood whereof a jury may come by law. But in this caſe it ſhall not come out of Weſtminſter, but out of the pariſh of St. Margaret, becauſe that is the moſt certaine. But therein

Vide ſect. 234.

Vide ſect. 102.

Vide ſect. 234. more of this matter.

(6. Co. 47. 5. Co. 36. b. Cro. Cha. 480.)

[d] 3. E. 3. 73. 20. H. 6. 10. 7. H. 4. 27. 9. H. 5. 8. 8. H. 6. 34. 7. H. 6. 27. 17. E. 3. 56. 43. E. 3. 5. 47. E. 3. 6. 34. H. 6. 1.

(2. Rol. Abr. 618. Cro. Jam. 150. 326. 513. 676. Hob. 76. 9. Co. 66. b. 11. Co. 25. b. 6. Co. 14.)

ſumed againſt the child's being the iſſue of the deceaſed huſband, it ſeems fair to ſuppoſe, that the law was underſtood, not to be ſo ſtrict in the time alluded to, whatever that time might be, as indiſcriminately to condemn as illegitimate all children not born within it, but rather to conſider every exceſs, unleſs very extraordinary indeed, as only raiſing a preſumption againſt them. This conſtruction is clearly moſt conſiſtent with the terms of the record in queſtion. In the next note, we ſhall attempt to ſatisfy the reader, that the rule reſulting from it is moſt conformable to other precedents and authorities, as well as to the reaſon of the thing.

After the caſe of Radwell from the record of E. 1. lord Hale gives the four following caſes.—Rot. Parl. 9. E. 2. m. 4. Gilbert de Clare comes Glouc. obiit 30. Junii 7. E. 2. in parliamento tent. quindena, Hil. 9. E. 2. the *ſiſters and coheirs pray livery. Matilda*, quæ fuit uxor comitis, *pretends to be big by the earl, which was accordingly found* per inquiſitionem. *The coheirs reply, that*, ſi comitilla prægnans eſſet, tantum tempus elapſum eſt, ut ſecundum curſum pariendi non poteſt dici impregnari a comite. *Yet they could not obtain livery till* Paſch. 10. E. 2. *but the queſtion hung in deliberation.*—Note 18. R. 2. *where a woman in ſuch a caſe immediately after the death of the firſt huſband took a ſecond huſband, and had iſſue born forty weeks and eleven days after the death of the firſt huſband, and it was held to be the iſſue of the ſecond huſband.*—M. 17. Jac. B. R. *Alſop and Stacey. Andrews dies of the plague. His wife, who was a lewd woman, is delivered of a child forty weeks and ten days after the death of the huſband. Yet the child was adjudged legitimate and heir to Andrews; for* partus poteſt protrahi *ten days* ex accidente.—M. 4. Car. in Cur. Ward. *and afterwards* P. 5. Car. B. R. *Thecar marries a lewd woman, but ſhe doth not cohabit with him, and is ſuſpected of incontinency with Duncomb; Thecar dies; Duncomb within three weeks after the death of Thecar marries her; two hundred and eighty-one days and ſixteen hours after his death ſhe is delivered of a ſon. Here it was agreed, 1. If ſhe had not married Duncomb, without queſtion the iſſue ſhould not be baſtard, but ſhould be adjudged the ſon of Thecar. 2. No averment ſhall be received that Thecar did not cohabit with the wife. 3. Though it is poſſible, that the ſon might be begotten after the huſband's death, yet, being a queſtion of fact, it was tried by a jury, and the ſon was found to be the iſſue of Thecar.* Hal. MSS.

Lord Hale's caſe of E. 2. appears very extraordinary, the time from 30. June 7. E. 2. when the earl of Glouceſter died, to the *quindene* of Hilary, or 19. Jan 9. E. 2. when the livery to his ſiſter was further poſtponed in parliament, being *within one day of a year and ſeven months*; which is a much later date for the delivery of a live child, than the moſt liberal in their calculations have hitherto aſſigned. However, on reading the printed copy of the original record, in the rolls of parliament lately publiſhed, we find lord Hale's note quite accurate. See Rot. Parl. v. 1. p. 353. As to the caſe of R. 2. it confirms the doubt we have elſewhere ſtated of the opinion, that, if a widow marries again and has a child within nine months after the death of the firſt huſband, the child may chooſe his father; and is an authority for deciding according to the proof of the woman's condition when her firſt huſband died. Ante fo. 8. a. note 7. Terms of the Law, firſt edit. tit. *Baſtard*, and Cowel Inſt. lib. 1. t. 9. Lord Hale's two other caſes are reported in ſeveral books, Alſop and Stacey being in Cro. Jam. 541. Godb. 281. Palm. 9. 1. Ro. Abr. 356. and Thecar's in Cro. Jam. 68. Winch. 71. Litt. Rep. 177.

For the remainder of the notes to 123. *b. ſee* 129. *a.*

(1) See Poſt. 139. b, 228. a. (2) Both in civil and criminal ſuits the common law is very nice in requiring every iſſuable fact to be alledged, not only within a *county*, but alſo within a *pariſh*, *town*, or, *hamlet*, or, for want of either of theſe, ſome other *known place* of the ſame county, not being a *hundred*, which probably was excluded as *too large* a diviſion; and if this rule was not obſerved, it might be pleaded in abatement, or otherwiſe taken advantage of, by either party, according to the ſtage of the ſuit. Cro. Eliz. 260. Thel. Dig. Br. lib. 2. c. 15. to 18. Com. Dig. *Abatement* H. 13. *Pleader* C. 20. The neceſſity of having the county

infant or his property. Lord Coke only takes notice of ſuch an election, where the infant is *under fourteen*, and as to this omits to

ſeignior ne priſt al commencement pur ſon plee, que le villeine fuit ſon villeine, mes ceo priſt per proteſtation, &c.

not at the beginning for his plee, that the villeine was his villeine, but tooke this by proteſtation, &c.

therein alſo it is to be noted, that if it had been alledged in Kingſtreet in the pariſh of St. Margaret in the county of Middleſex, then ſhould it have come out of Kingſtreet, for then ſhould Kingſtreet have beene eſteemed in law a towne[e]; for whenſoever a place is alledged generally in pleading (without ſome addition to declare the contrary, as in this caſe it is) it ſhall be taken for a towne. [f] And albeit *parochia* generally alledged is a place incertaine, and may (as we ſee by experience) include divers townes; yet, if a matter be alledged in *parochia*, it ſhall be intended in law, that it containeth no more townes than one, unleſſe the party doth ſhew the contrary. [g] But when a pariſh is alledged within a city, there without queſtion the viſne ſhall come out of the pariſh, for that is more certaine then the city.

[b] If a treſpaſſe be alledged in D, and *nul tiel ville* is pleaded, the jury ſhall come out *de corpore comitatus*; but if it be alledged in S and D and *nul tiel ville de D* is pleaded, the jury ſhall come out *de vicineto de S*, for that is the more certaine. So if a matter be alledged within a mannor, the jury ſhall come *de vicineto manerii*; but if the mannor be alledged within a towne, it ſhall come out of the towne, becauſe that is moſt certaine, for the mannor may extend into divers townes. And all theſe points were reſolved by all the judges of England upon conference betweene them in the caſe of John Arundel eſquire indited for the death of William Parker *.

[i] In a reall action, where the demandant demands land in one county, as heire to his father, and alledges his birth in another county, if it be denied that he is heire, it ſhall *not* be tryed where the birth was alledged, but where the land lyeth, for there the law preſumes it ſhall be beſt knowne who is heire. But if the defendant make himſelf heire to a woman, for that is the furer and more certain ſide, and the mother is certaine, when perhaps the father is incertaine, and therefore there it ſhall be tryed, where the birth is alledged; becauſe they have more certaine conuſance then where the land lyeth. And ſo it is where generally baſtardy is alledged, the tryall ſhall be in like caſe *mutatis mutandis*. [k] If a man plead the king's letters patents, and the other party plead *non conceſſit*, it ſhall not be tryed where the letters patents beare date, for they cannot be denyed, but where the land lyeth.

Every tryall muſt come out of the neighbourhood of a caſtle, mannor, town or hamlet, or place known out of a caſtle, mannor, towne or hamlet, as ſome forreſts and the like, as before and by the authorities thereupon quoted appeareth.

Every plea concerning the perſon of the plaintiſe, &c. ſhall be tryed where the writ is brought, as it appeareth before.

When the matter alledged extendeth into a place at the common law, and a place within a franchiſe, it ſhall be tryed at the common law.

[l] In an action againſt two, the one pleads to the writ, the other to the action, the plea to the writ ſhall be firſt tryed; for, if that be found, all the whole writ ſhall abate, and make an end of the buſineſſe.

[m] In a plea perſonall againſt divers defendants, the one defendant pleads in barre to parcell, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth to the whole, the plea, that goeth to the the whole, (that is) to both defendants, ſhall be firſt tried; and of this opinion was Littleton in our bookes, for the tryall of that goeth to the whole; and the other defendant ſhall have advantage thereof, for in a perſonall action the diſcharge of one is the diſcharge of both. As for example, if one of the defendants in treſpaſſe pleade a releaſe to himſelfe, (which in law extends to both) and the other pleads not guilty (which extends but to himſelfe) or if one pleads a plea which excuſes himſelfe onely, and the other plead another plea which goeth to the whole, the plea, which goeth to the whole, ſhall be firſt tryed; for, if that be found, it maketh an end of all, and the other defendant ſhall take advantage hereof, becauſe the diſcharge of one is the diſcharge of both. But in a plea reall it is otherwiſe; for every tenant may loſe his part of the lands. [n] As if a *præcipe* be brought as heire to his father againſt two, and one plead a plea which extendeth but to himſelfe, and the other pleads a plea which extends to both, as baſtardy in the demandant, and it is found for him, yet the other iſſue ſhall be tryed, for he ſhall not take advantage of the plea of the other, becauſe one joyntenant may loſe his part by his miſplea. [o] But where an iſſue is joyned for part, and a demurrer for the reſidue, the court may direct the tryall of the iſſue, or judge the demurrer firſt at their pleaſure.

[p] If a *venire fac.* be awarded to the coroners where it ought to be to the ſheriſe, or the viſne commeth out of a wrong place, yet if it be *per aſſenſum partium*, and ſo entred of record, it

(7. Co. 1. 1. Sid. 9. 88. Hob. 89. 1. Sid. 10. 2. Ro. Abr. 609. 1. Roll. Rep. 369. Cro. Eliz. 818.)

[e] 4. E. 3. 30. 8. E. 3. 68. 39. H. 6. 13. Brooke Pleading 61.

[f] 4. E. 4. 41. 5. E. 4. 20. 22. E. 4. 2. 35 H. 6. 30. 22. H. 6. 47. 1. Co 162. Digges caſe 11. Co. 25. 6. Co. 14. (Hob. 190. 2. Rol. Abr. 616.)

[g] 1. E. 3. 8. 7. H. 6. 38.

[b] 22. E. 4. tit. Viſne f. 27. 6. H. 7. 3. b. 11. H. 7. 22. b. 9. E. 4. 3. a. 3. E. 4. 26. 39. H. 6. Treſp 93. 4. E. 3. 30. (Hob. 89. 266. 6. Co. 65. b. 1. Leon. 109. Cro. Car. 17. Cro. Jac. 302, 303. 308.)

[*] 6. Co. 14. Arundel's caſe.

[i] 45. E. 2. 5. a. 46. E. 3. 6. & 7. Gernon's caſe. 18. E. 3. 58. 11. H. 4. 56. b. 57. 17. E. 3. 36. b. 39. Aſſ. 10. 38. Aſſ. 30. 35. Aſſ. 7. (Cro. Jac. 239.)

[k] Mich. 31. & 32. Eliz. Rot. 365. in the King's Bench, inter Edan & Frankline, adjudge 3. Mar. Dier 129. 18. Eliz. Dier 353. 17. Eliz. Dier 342. (1. Rol. Abr. 604. Plowd. 232. Cro. Jam. 239. 9. Co. 47. a.)

[l] 8. E. 4. 24. 9. H. 6. 46, 47. 21. H. 6. 4. 18. Aſſ. 7. 30. E. 3. 16, 17. 7. E. 4. 31. 27. H. 8. 30. 11. H. 4. 68.

[m] 15. E. 4. 25. b. 9. H. 6. 46. 26. E. 3. 7. E. 4. 31. 39. E. 3. 16. 17. (Cro. Jac. 134. 1. Sid. 76. Hob. 54. 66. Noy 144. 2. Rol. Abr. 103.)

[n] 9. H. 6. 46. 39. E. 3. 16, 17.

[o] 10. Co. 54. and the bookes there cited.

[p] Mich. 21 & 22. Eliz. Dier 367. 5. Co. 36. b. Bainham's caſe. 39. E. 3. 2. b. 44. E. 3. 6. 11. H. 6. 13. 5. Co. 40. Dormer's caſe. (5. Co. 36. b. Hob. 5. 1. Sid. 193. 2. Rol. 625. 1. Sid. 339.)

county named is very obvious; as otherwiſe it could not be known, whether the court had juriſdiction, who was the proper officer to direct the proceſs of the court to, or whence the jury was to come, and conſequently the cauſe could not go on. Nor is it difficult to account for ſtating a *particular place* in the *county*. One reaſon might be, that, if there was no other explanation of the caſe where the cauſe of action or ground of defence aroſe, than by reference to the extenſive limits of a county, the allegation might fail in that certainty ſo eſſential to its being either well underſtood or properly controverted; and the rule, ſo far as it may have this foundation, ſtill continues unchanged. But the other and principal reaſon was, that, if iſſue was taken on the fact alledged, it might be tried by a jury of the *viſne* or neighbourhood, which our anceſtors conceived to be more likely to be qualified to inveſtigate and diſcover the truth, than perſons living at a diſtance from the ſcene of the tranſaction. For this purpoſe the *venire facias* always directed the ſheriff to ſummon a jury from the neighbourhood of the *pariſh* or *place*, within which the fact to be tried was alledged; and this was not mere form; for it was the ſheriff's duty to attend to the direction; and if *at leaſt four* of the hundred, in which the place was ſituate, were not included in the panel returned by him, it was a good cauſe of challenge to the *array* or *whole panel*; or if four ſuch perſons did not attend to be ſworn, the *polls*, or particular jurors, might be challenged for the ſame default. Poſt. 157. a. 48. E. 3. 30. 48. Aſſ. 5. 7. H. 4. 46. 21. E. 4. 59. b. Nay, ſo very eſſential did the common law deem the having ſome of the neighbours on the jury, that, if the viſne appeared on the record to be from a wrong place, whether in conſequence of the party's alledging the fact in a place not proper for a *viſne*, or of the court's miſawarding it, in both caſes it was equally a miſ-trial, and a good ground for a motion to arreſt the judgment or for reverſing it by error. Cro. Eliz. 260. Hob. 5. But thus reſtricting every *viſne* to a particular part of the county, though well intended, was followed with great inconveniencies. It encouraged the loſing party after a trial, to make trivial objections to the *viſne*, in order to diſappoint his adverſary of the fruits of a juſt verdict; and either becauſe the rules for laying the *viſne* were in themſelves vague, or becauſe they were perverted by an over curious interpretation, ſuch objections not only became very common, but often ſucceeded, as appears from the profuſion of caſes and learning to be met with on the ſubject in our reports. See Roll. Abr. and Vin. Abr. tit. *Trial*. At length the grievance became ſo intolerable to ſuitors, that parliament interpoſed to relieve them; for which purpoſe ſeveral ſtatutes were made. The 21. Jam. c. 13. gives aid after verdict, where the *viſne* is *partly* wrong, that is, where it is awarded out of too many or too few places in the county named. The 16. & 17. Cha. 2. c. 8. goes further; and cures the defect of the viſne *wholly*, ſo that the cauſe was tried by a jury of the proper county, without any regard to the part of the county from which the jury came. Still, however, either party was at liberty to object to the default of hundredors at the trial, which was found to be very troubleſome on account of the difficulty of always having four jurors ſo qualified. The 4. & 5. An. c. 16. therefore directs, that every *venire facias* ſhall be awarded from *the body* of the county, in which the action is triable. But theſe ſtatutes do not extend to *indictments* or other *criminal* ſuits; nor has any act been yet made to include any ſuch, except the 24. G. 2. c. 18. which only applies to actions on penal ſtatutes. Why a regulation ſo convenient ſhould be thus confined principally to civil caſes, ſeems unaccountable. However, though the ancient law continues in force as to trials for crimes, yet it hath been long deviated from in practice; lord Hale taking notice, that even during his time he never knew an inſtance of a challenge for want of hundredors in treaſon or felony; and the ſheriffs, as we are well informed, now always ſummoning juries from the county at large, without the leaſt regard to the viſne of each indictment. 2. Hal. Hiſt. Pl. C. 272. Under ſuch circumſtances, retaining the form of a *viſne* from the particular place of the county, in which the crime is alledged, merely ſerves

to ſtate how and before whom it ſhould be made, nor have we yet met with any prior or cotemporary writer who, ſupplies the defect

it ſhall ſtand; for *omnis conſenſus tollit errorem.* (1) And thus much of theſe excellent points of learning: and if you deſire to know the inſtitution and right uſe of this triall by twelve men, and of the antiquitie thereof, and more of this matter, reade the 234. ſection hereafter, which is worthy of your obſervation.

(5. Co. 40. b. Cro. Eliz. 664. 1. Sid. 269.)
Vid. ſect. 234.

Eſtatute. Or ſtatute. This commeth of the Latine word *ſtatutum*, which is taken for an act of parliament made by the king, the lords and commons, and is divided into two branches generall and ſpeciall. This ſtatute here mentioned is a generall ſtatute, and darkely and obſcurely penned.

Vid. 25. E. 3. ca. 18. F. N. B. 77. c. 26. E. 3. 73.

Et ſils ſont a iſſue. [q] Iſſue, *exitus*, a ſingle, certaine, and materiall point iſſuing out of the allegations or pleas of the plaintife and defendant, conſiſting regularly upon an affirmative and negative to be tried by twelve men. And it is twofold, a ſpeciall iſſue, as here in the caſe of Littleton; or generall, as in treſpaſſe, not guilty, in aſſiſe, *nul tort nul diſſeiſin, &c.* And as an iſſue naturall commeth of two ſeveral perſons, ſo an iſſue legal iſſueth out of two ſeverall allegations of advers parties.

[q] Vid. ſect. 414. 7. H. 6. 43. 9. E. 4. 36. 36. H. 6. 15. 5. E. 4. 26. 11. H. 4. 79. (Mo. 80. 1. Ro. Rep. 86. 1. Leon. 78. 9. Co. 110. Cro. Cha. 164. 80. Doct. Plac. 256, 257. Cro. Jam. 87. 560. Doct. Plac. 187. Cro. Jam. 580. 586, 589. Hob. 233.)

And to make our bookes more eaſie to be underſtood concerning this point, it is good to ſet downe ſome neceſſary rules (among many other) concerning joyning of iſſues. An iſſue being taken generally referreth to the count, and not to the writ. As in an account the writ chargeth him generally to be his receiver, the count chargeth him ſpecially to be his receiver by the hands of T; the defendant pleadeth, that he was never his receiver in manner and forme, &c. this ſhall referre to the count, ſo as he cannot be charged but by the receipt of the hands of T.

7. E. 3. 34. (Cro. El. 372)

[r] A ſpeciall iſſue muſt be taken in one certain materiall point, which may be beſt underſtood, and beſt tryed.

[r] 20. E. 3. Iſſue 31. 22. Ed. 4. 28. 8. E. 3. 8. 9. H. 6. 18. 38. E. 3. 33.

[s] An iſſue ſhall not be taken upon a negative pregnant, which implyeth another ſufficient matter, but upon that, which is ſingle and ſimple. As *ne dona pas per le fait* imply a gift by parol; therefore the iſſue muſt be *ne dona pas modo & forma.*

[s] 21. H. 6. 9. b. 16. E. 4. 5. 24. E. 3. 32. 33. 75. 31. E. 3. Iſſue 17. 13. E. 3. Ib. 27. 21. E. 3. 49. 30. E. 3. 8. 10. E. 3. 32. 22. E. 3. 13. 18. E. 3. Iſſue 35. 5. H. 7. 8. 31. Aſſ. 25. 12. E. 4. 4. 8. 2. H. 4. 23. 38. H. 6. 22. 40. E. 3. 5. 5. E. 3. 24.

[t] An iſſue joyned upon an *abſque hoc, &c.* ought to have an affirmative after it. Two affirmatives ſhall not make an iſſue unleſſe it be, leſt the iſſue ſhould not be tried.

[t] 12. El. Dyer 253. 22. H. 6. 19. 32. H. 6. 23. 2. R. 3. 6. H. 7. 5. 11. H. 4. 79.

[u] Some iſſues be good upon matter affirmative and negative, albeit the affirmative and negative be not in preciſe words. As in debt for rent upon a leaſe for yeares, the defendant pleades, that the plaintife had nothing at the time of the leaſe made; the plaintife replyeth that he was ſeiſed in fee, &c. this is a good iſſue.

[u] 2. H. 7. 4. 5. H. 7. 12. 26. 11. H. 4. 83. 6. E. 4. 6. b. 26. H. 8. Dyer 6. in Formedon.

[w] Where the iſſue is joyned of the part of the defendant, the entry is *et de hoc ponit ſe ſuper patriam*; but if it be of part of the plaintife, the entry is *et hoc petit quod inquiratur per patriam.*

28. H. 8. Dyer 31. 18. H. 6. 8. 9. 15. E. 4. 32. 32. H. 6. 23. 7. H. 6. 27. 43. Aſſ. 4. 9. E. 4. 36. Pl. Com. 172. a. 36. H. 6. 15. (6. Co. 24)

[x] There be ſome negative pleas, that be iſſues of themſelves, whereunto the demandant, or plaintife, cannot reply, no more than to a generall iſſue, which is, *et prædictus A. ſimiliter.* As if the tenant do vouch, and the demandant counterplead that the vouchee or any of his aunceſtors had any thing, &c. whereof he might make a feoffment, he ſhall conclude, *et hoc petit quod inquiratur per patriam, & prædictus tenens ſimiliter.* So in a fine pleaded by the tenant, &c. the demandant may ſay, *quod partes finis nihil habuerunt, & hoc petit quod inquiratur per patriam, & præd' tenens ſimiliter.* And ſo in a writ of dower, the tenant pleads *unques ſeiſie que dower*, he ſhall conclude, *et de hoc ponit ſe ſuper patriam, et præd', petens ſimiliter*; and ſo in many other caſes; and of this opinion was Littleton in our bookes.

[w] 26. H. 8. 3. 18. El. Dyer 353. (1. Sid. 215. 290. 340. 341. Cro. Cha. 164.)

[y] A man leaves his wife enſeint with a child, iſſue ſhall not be taken, that ſhe was not enſeint by her huſband on the day of his death, for *filiatio non poteſt probari*; but the iſſue muſt be, whether ſhe was enſeint the day of his death (2).

[x] 22. H. 6. 57. 59. 33. H. 6. 21. 3. H. 7. 9. 12. E. 4. 13. 17. E. 3. 53. 77. 78. 22. E. 3. 16. 17. 24. E. 3. 50. 40. E. 3. 19.

[y] 41. E. 3. 11. b.

[z] A proteſtation availeth not the partie that taketh it, if the iſſue be found againſt him; and therefore if the iſſue be found for the villeine, he is infranchiſed for ever. And yet in ſome ſpecial caſe, albeit the iſſue be found againſt him that maketh the proteſtation, yet he ſhall take benefit by his proteſtation. (*) As if a man entreth into warrantie, and taketh by proteſtation the value of the land, albeit the plea be found againſt him, yet the proteſtation ſhall ſerve him for the value.

[z] 10. E. 4. Proteſt. 5. 10. E. 4. 12. 32. Aſſ. 9. 30. E. 3. 14. 9. H. 6. 59. Vid. ſect. 192. (Plowd. 276. Cro. Cha. 365. Doct. Plac. 295.)
(*) 30. E. 3. 14.

Sect. 194.

ITEM le ſeignior ne poet mayhemer ſon villeine; car ſil maihema ſon villein, ALSO the lord may not mayme his villeine; for if he mayme his villeine, *Mayhemer,* [a] or *mehaigner*, a French word, of which commeth *mayhim, mahemium (id eſt) membri mutilatio*, and

[a] Stamf. lib. 1. ca. 41. Glanvil. lib. 14. ca. 7. Bract. lib. 3. fol. 144. 145. Brit. cap. 25. fol. 48. 49. Flet. lib. 1. ca. 38. (Poſt. 288. 1. Sid. 215.)

ſerves to create delay and embarraſſment in the diſtribution of criminal juſtice, whenever an accuſed perſon may chuſe captiouſly to exert his right of challenging for default of hundredors. *See post 158. b.*

(1) The caſes to this point diſagree; but the moſt modern are with lord Coke. See Vin. Abr. *Trial* S. a. 2.—(2) The caſe cited from the Year Book of 41. E. 3. is a direct authority to this purpoſe. However it may be doubted, whether the doctrine continues to be law. At leaſt it fails in principle, if it is founded on the notion that the preſumption of the huſband's being the father of every child, the wife bears or conceives during the marriage, cannot be repelled by evidence to the contrary. Such a poſition indeed is aſſerted more than once by lord Coke in the preſent work, and may be met with in other books. Poſt. 244. a. 373. a. Vin. Abr. *Baſtard* A. 2. & B. But it never was an univerſal rule, lord Coke and all the authorities agreeing, that, if the huſband is beyond ſea during the whole time of the wife's going with child, the iſſue is a baſtard. Nor is the poſition in any degree true at preſent; for ever ſince Pendrel's caſe in the 5. G. it has been ſettled, that not only proof of being out of the kingdom, but alſo every other kind of evidence, tending to prove the impoſſibility or even improbability of the huſband's being the father, is admiſſible. 1. Blackſt. Comment. 5. edit. 457. 2. Stra. 925. 3. P. Wms. 365. Bott's Poor Laws, 2d. ed. 105. Our books do not ſtate on what grounds Pendrell's caſe was determined. But very ancient authorities are not wanting to juſtify over-ruling the doctrine, which prevailed in lord Coke's time. Bracton taking notice of the preſumption, that marriage proves legitimacy, adds, *et ſemper ſtabitur hiis præſumptionibus, donec probetur contrarium, ut, ecce, maritus probatur non concubuiſſe aliquamdiu cum uxore, infirmitate vel alia cauſa impeditus, vel erat in ea invaletudine ut generare non poſſit.* Bract. fo. 6. a. In another place the ſame author is ſtill more explicit, for he ſtates it to be a violent preſumption againſt the child's legitimacy, if the huſband is proved, *propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam coeundi, per multum tempus non concubuiſſe cum uxore*, or *ſi probetur, quod extra regnum vel provinciam per biennium & ultra longè extiterit, quod vehementer præſumi poſſit, quod ad uxorem acceſſum habere non potuit.* Bract. fo. 63. b. There are alſo other paſſages to a like effect both in Bracton and Fleta. Bract. fo. 70. b. 278. a. Flet. lib. 1. c. 15. It is worthy remark too, that not only theſe limitations of the rule of *pater eſt quem nuptiæ demonſtrant*, but even the words of them are in a great degree borrowed from the text of Juſtinian. See Dig. lib. 1. tit. 6. l. 6. But this by no means ought to leſſen their value with our common lawyers. On the contrary, it ſhould be deemed an additional reaſon for deferring to them; becauſe the trial of *general* baſtardy belongs to the eccleſiaſtical courts, and theſe, in this inſtance, as well as in others, are much ſwayed by the authority of the Roman law. See further on this ſubject Godolph. Repertor. Canon. 477. Bryd. Law of Baſtard. 83. Voet ad Pandect. lib. 1. tit. 6. ſect. 6. Ayl. Parerg. tit *Baſtardy*, and ſame title in the Abridgments.

Notes to fol. 121. b.

(1) *Ou* inſtead of *et* in L. and M.—(2) But by the 17. E. 2. *de prærogativa regis*, the king's grant of a manor will not paſs an advowſon appendant without expreſs mention of it. Yet there are ſome caſes, which have been deemed not within the reaſon of the ſtatute; ſuch as the crown's *reſtitution* of lands to wards at their full age and to the heirs of ideots, or of temporalties to new biſhops. Staundf. Prærog. 43. a. Doder. Advowſ. 36. Even words of *reference* have been held ſufficient; as where the king granted a manor with all its appurtenances, as fully as the ſame came to and were poſſeſſed by the crown, and an advowſon was appendant to the manor. Adjudged in Whittier's caſe, 10. Co. 63. a.—It is agreed in our old books, that before the ſtatute *de prærogativa regis*, the king's grant of a manor would paſs an advowſon appendant, without naming it, or ſo much as uſing the word *appurtenances*. Staundf. Prærog. 42. a. 10. Co. 64. a. But in the Hiſtory of Weſtmorland, lately publiſhed by Mr. Nicholſon

Defect. Ante 87. b. As to a guardian after *fourteen*, it appears from the ending of guardianſhip in ſocage at that age, as if the common

il serra de ceo indite a le suit le roy, & sil soit de ceo attaint, il serra pur ceo un grievous fine & ransome al roy. Mes il semble, que villeine navera pas per le ley un appeale de mayhem envers son seignior; car en appeale de mayheme home recovera forsque damages; & si le villeine en ceo cas recovera damages envers son seignior, & ent avoit execution, le seignior poit prender ceo que le villeine avoit en execution de le villeine, & issint le recoverie voide, &c.

he shall of that be indicted at the king's suit, and, if he be of that attainted, he shall for that make grievous fine and ransome to the king. But, it seemeth, that the villeine shall not have by the law any appeale of mayhem against his lord; for in appeale of mayhem a man shall recover but his damages; and if the villeine in that case recover dammages against his lord, and hath thereof execution, the lord may take that the villeine hath in execution from the villeine, and so the recovery is void, &c.

Mirror cap. 1. sect. 9.

and *membrum est pars corporis habens destinatam operationem in corpore. Mayhemium vero dici poterit, ubi aliquis in aliqua parte sui corporis effectus sit inutilis ad pugnandum.* And the law hath so appropriated this word *mayhem*, which our author here useth, to this offence, as *mayhemavit* cannot be expressed by any other word, as, *mutilavit*, *truncavit*, or *detruncavit*, or the like.

Vide sect. 1. (4. Co. 39. b.)

Il serra indite, or rather *endite*, and so is the original; for it commeth of the French word *enditer*, and signifieth in law an accusation found by an enquest of 12 or more upon their oath; and the accusation is called *indictamentum*. And, as the appeale is ever the suit of the partie, so the inditement is alwaies the suite of the king, and as it were his declaration. [b] Some derive it from the Greeke word ἐνδείκνυμι to accuse.

[b] Lamb. Just. of Peace.

[c] *N'avera &c. appeale de mayhem.* Because in that appeale he shall recover but damages, which the lord after execution might take againe, and so the judgement *inutile* and illusory, and *sapiens incipit à fine*. And the law never giveth an action, where the end of it can bring no profit or benefit to the plaintife. But here it is to be observed, that, albeit the party grieved can have no action for the mayhem, yet at the king's suite he shall be punished therefore, for the reason hereafter expressed in this section. [d] And in ancient time there were appeales *de plagis & de imprisonamento*; but they are out of use and turned to actions of trespasse.

[c] Vide 1. H. 4. 6. b. (4. Co. 43.)

[d] Fleta lib. 1. cap. 40. Britt. cap. 25. Bract. 145. Mirror cap. 3.

Fine, *finis*. Here fine signifieth a pecuniarie punishment for an offence, or a contempt committed against the king, and regularly to it imprisonment appertaineth. And it is called *finis*; because it is an end for that offence. [e] And in this case a man is said *facere finem de transgressione, &c. cum rege*, to make an end, or fine with the king for such a transgression. It is also taken for a summe given by the tenant to the lord for concord, and an end to be made. [f] It is also taken for the highest and best assurance of lands, &c.

[e] Regist. Judic. 25. 8. Co. 59. Beecher's case. (8. Co. 38.)

[f] Vide sect. 74. 174. 441. (11. Co. 42.)

Here it is good to see, what a fine differeth from an amerciament. [g] Amerciament in Latine is called *misericordia*; for that it ought to be assessed mercifully. And this ought to be moderated by affeerement of his equals, or else a writ *de moderata misericordia* doth lie. And thereof Glanvill saith thus. [h] *Est autem misericordia domini regis, qua quis per juramentum legalium hominum de vicineto eatenus amerciandus est, ne aliquid de suo honorabili contenemento amittat.*

[g] 8. Co. 59. Beecher's case. F. N. B. 76. (1. Ro. Abr. 238.)

[h] Glanvil. lib. 9. cap. 11. Magna Charta cap. 14. Fleta lib. 2. cap. 43. & 60. & lib. 1. cap. 43. Bract. lib. 3. fol. 116.

[i] The cause of an amerciament in plea reall, personall or mixt (where the king is to have no fine) is, for that the tenant or defendant ought to render the demand (as he is commanded by the king's writ) the first day: which, if he do, he shall not be amerced. So as for the delay, that the tenant or defendant doth use, he shall be amerced. [k] And albeit the amerciament cannot be imposed, nor the king fully intitled thereunto, untill judgement be given, because by the judgement the wrong is discerned; yet a pardon before judgement, after judgement given, shall discharge the party, because the originall cause, *viz.* the delay, &c. is pardoned [l] What then if a *præcipe* be brought against an infant, and, hanging the plea, he commeth of full age? He

[i] 22. E. 3. 1. & 2. 14. E. 3. Amerciam. 16. 8. R. 2. ibid. 26. &c.

[k] Pl. Com. 401. Cole's case. 37. H. 6. 21. 5. Co. 49. Vaughan's case.

[l] Vaughan's case ubi supra. Beecher's case ubi supra. (1. Roll. Rep. 11.)

son and Dr. Burn, the record of a case of *darrein presentment* of the 15. E. 1. is cited, in which the court adjudged, that a grant of the manor of Burgh, with its *appurtenances*, being from the crown, would not pass the advowson of the chapel though appendant to the manor; and thence the 17. E. 2 is concluded to be only declaratory of the common law. See vol. i. p. 564, 565. The case appealed to seems full in point. But then there is a strong current of authorities the other way; for the case of 43. E. 3. 23. is to the contrary; and so are the instances of things appendant not within the statute. Staundf. Prærog. 42. a. 10. Co. 64. a.—(3) *Ou* for *et* in L. and M.—(4) See note 2. to 122. a.—(5) Acc. 1. Ventr. 407.—(6) *Adjunctum* is rather a term of the logicians. The *accessorium* of the civil law answers best to our terms of *regardant*, *appendant*, *appurtenant*, and *incident*. How these differ from that, which is *part* or *parcel* of a thing, is explained in judge Doderidge's Treatise on Advowsons. See p. 38.—(7) This position is not universally true. It sometimes fails as to things appurtenant. *Return of writs* or a *leet* may be appurtenant to an *hundred*; so may *waif* and *stray* to a *leet*; and yet in these instances *both* subjects are *incorporeal*. Ante 121. a. 8. H. 7. 1. 2. 3. Rast. Entr. 128. The true test seems to be the propriety of relation between the *principal* and the *adjunct*; which may be found out, by considering, whether they so agree in nature and quality, as to be capable of union without any incongruity. See 1. Ventr. 386.

Notes to 122. a.

(1) Acc. Dy. 70. b. and two adjudged cases in marg. of ed. 1688. Acc. also by Dyer in 2. Leon. 225. The same point was agitated in *Long* and *Heming*, 31. Eliz. of which case the reports differ so much, that it is difficult to say, what was decided by the court. But it rather seems to have ended with an opinion consonant to lord Coke's. Sav. 103. Cro. Eliz. 209. 1. Leon. 267. 4 Leon. 216. Doder. Advows. 41.—(2) This may at first seem to clash with the doctrine before, that *appendants are ever by prescription*. Ante 121. b. n. 4. But they may be reconciled; for, as appendancy cannot be without prescription, the former always *implies* the latter; and therefore if one pleads common appendant, it is unnecessary to add the usual form of prescribing.—(3) See Fulb. Prepar. 68. b. and 1. Saund. 351.—(4) But not if there is a *grant* to shew; common appurtenant being claimable by *grant*, as well as by *prescription*. Adj. Cro. Cha. 482.—(5) It has been denied, that common in *gross* can be *sans nombre*. 1. Saund. 346. But see Fulb. Prepar. 70. a. and the books there cited.—(6) For the cases about *sola vestura* see ante 4. b. n. 1. As to *seperalis pastura*, whether a prescription for it can be made against the owner of the soil, has been the subject of argument in three different cases since lord Coke's time. In the first the court of Common Pleas was equally divided. North and Cox, Mich. 20. Cha. 2. Vaugh. 251. 1. Lev. 253. In the second the court of King's Bench inclined to think such a prescription good; but the demurrer, on which the point arose, being over-ruled by consent, in order to try the fact, and a verdict being found against it, a decision of the question of law became unnecessary. Potter and North, Easter 21. Cha. 2. 1. Ventr. 383. 1. Saund. 347. 1. Lev. 268. But in the third case, which was on a motion to arrest judgment, the whole court of King's Bench adjudged for the prescription. Hopkins and Robinson, East. 23. Cha. 2. Pollexf. 13. 1. Mod. 74. 1. Saund. 314. 2. Leon. 2. Since this last case lord Coke's doctrine seems to have been generally acquiesced in.—(7) According to this passage, ownership of the soil is not necessarily included in a *several fishery*, and *common of fishery* and *free fishery* are the same thing. But one, whose works will be admired, as long as a good taste for literary compositions or gratitude for the pleasure and instruction derived from them shall

Notes to 122. b. are postponed to 127. b.

common law deemed a guardian *afterwards* unnecessary. However, since the 12. of Cha. 2. enabling the father to appoint a guardian

he ſhall be amerced for the delay after his full age. So likewiſe if the demandant or plaintife be nonſuit or judgement given againſt him, hee ſhall be likewiſe amerced *pro falſo clamore*. (5. Co. 49. a. Cro. Cha. 410. 8. Co. 62. b.)

[*m*] And for the payment of this amerciament the defendant or plaintife, &c. ſhall finde pledges; and thoſe demandants or plaintifes, that ſhall find no pledges, (as the king, the queene, an infant, &c.) ſhall not be amerced. And therefore when ſuch are demandant or plaintife, the writ ſhall not ſay, *Si rex, &c. fecerit te ſecurum de clamore ſuo proſequendo.* [*m*] F. N. B. 31. f. 47. c. & 101. a. Bract. lib. 4. tol. 254. 17. E. 3. 75. 18. E. 3. 2. Br. tit. amerciam. 53. 43. Aſſ. 45. &c.

[*n*] If a writ doe abate by the act of the demandant or plaintife, or for matter of forme, the demandant or plaintife ſhall be amerced; but if it abate by the act of God, as by the death of one, where there is two or the like, there ſhall be no amerciament. And to an amerciament, impriſonment belongeth not, as it doth to a fine or ranſome. If you deſire to read more of fines and amerciaments, Vide 8. Co. 38. 39. &c. Greſlye's caſe: & 11. Co. 43. 44. Godfreye's caſe (1). [*n*] Beecher's caſe 8. Co. 60. b. (1. Ro. Abr. 213.)

[*o*] It is to be knowne that *wit, wita*, is an old Saxon word, and ſignifieth an amerciament, as *fledwite* an amerciament for fleeing or being a fugitive, and ſo is *flemiſwite*, *blodwite* an amerciament for drawing of blood, *ferdwite* concerning warfare, and ſo *letherwite*, *childwite*, *wardwite*, and the like. Sometime it ſignifieth forfeiture, ſometime freedom, or acquitall. [*o*] Fleta lib. 1. cap. 47. Stat. de expoſit. verborum.

[*p*] And *bote* is alſo an ancient Saxon word, and ſometime ſignifieth amerciament, or compenſation, as *theftbote*, *manbote*; or freedome from the ſame, as *brigbote*, *caſtlebote*, *burghbote*. [*p*] Lam. explication of Saxon words. Leges Inæ. cap. 19.

Wera or *were* [*q*] ſometime ſignifieth amerciament or compenſation, but properly *Wera Anglice idem eſt in Saxonis lingua viz. pretium vitæ hommis appretiatum*; which and the like words you ſhall often reade in ancient charters. [*q*] Lamb ubi ſupra, & Fleta lib. 1. cap. 47.

Ranſome. [*r*] *Redemptio* is here taken for a grand ſumme of money for redeeming of a great delinquent from ſome heynous crime, who is to be captivate in priſon untill hè payeth it. Some hold it to amount to his whole eſtate, and others hold that ranſome is a treble fine. [*s*] But in legall underſtanding a fine and ranſome are all one; for, upon the ſtatute of Merlebridge, cap. 3. upon theſe words *Non ideo puniatur dominus per redemptionem*, [*t*] the tenant ſhall not have (where the lord diſtraineth within his fee where nothing is behind) an action of treſpaſs *quare vi & armis* againſt his lord; for therein the lord ſhould be puniſhed by redemption, that is, by fine, and in that action the fine is very ſmall. And this is manifeſt by many authorities in all ſucceſſion of ages: and this appeareth by our author in this place, for he ſaith, *Il ferra pur ceo un grievous fine & ranſome*, where fine and ranſome muſt of neceſſitie, in his opinion, be taken for all one; for if the fine and ranſome were divers, then ſhould the party, that mahemed the villeine, pay two ſummes, one for a fine, and another for a ranſome, which never was done. And aptly a redemption and a fine is taken to be all one; for, by the payment of the fine, he redeemeth himſelf from impriſonment, that attendeth the fine, and then there is an end of the buſineſſe. [*r*] Dier. 6. Eliz. 232. [*s*] See the ſecond part of the Inſtitutes Merlebr. cap. 3. (2. Inſt. 106. Plowd. 66. b. F. N. B. E. 4. Co. 11. b. Poſt. 281. b.) [*t*] 5. H. 7. 10. 48. E. 3. 5 6. 41. E. 3. 26. 44. E. 3. 13. 2. H. 4. 4. 11. H. 4. 78. 1. H. 6. 6. 9. H. 7. 14. 8. E. 4. 15. 10. E. 4. 7. 20. E. 4. 3. 21. E. 4. 3. Mich. 17. & 18. Eliz. Bevel's caſe, 4. Co. 11. & 9. Co. 76. Comb's caſe.

It ſignifieth properly a ſumme of money paid for the redemption of a captive, and is compounded of *re* and *emo*, that is to redeeme or buy again. And it is to be knowne, that [*u*] by the ancient law of England, if the defendant in an appeale of mayhem had been found guilty, the judgement againſt the defendant had beene, that he ſhould loſe the like member, that the plaintife loſt by his means; as if the plaintife had loſt an hand, the defendant alſo ſhould loſe one, *& ſic de cæteris*, in reſpect whereof the writ ſaid, [*w*] *felonice mahemauit*; for that the defendant ſhould loſe a member. [*u*] 40. Aſſ. 9. Mirror cap. 4. & ca. 5 Sect. 18. Britton cap. 25. fol. 48. Bract. lib. 3. fol. 144. 145. Fleta lib. 1. cap. 38. [*w*] Bract. ubi ſupra. Britt. cap. 3. fol. 77. b. (4. Co. 43. Poſt. 288. a.)

Alwaies at the common law, when the defendant ſhould loſe life or member, the writ ſaid *felonice, &c.* And now albeit the law be changed (for at this day, the plaintife ſhall, as our author ſaith, recover but dammages) yet the writ of appeale ſaith ſtill *felonice*.

Note the life and members of every ſubject are under the ſafegard and protection of the king, for, as Bracton [*x*] ſaith, *Vita & membra ſunt in poteſtate regis.* And therewith agreeth a notable record, Paſch. 19. E. 1. *coram rege* Rot. 36. Northt. *vita & membra ſunt in manu regis*, to the end that they may ſerve the king and their countrie, when occaſion ſhall be offered. Nay, the lord of the villeine, for the cauſe aforeſaid, cannot mayheme the villeine, but the king ſhal puniſh him for mayheming of his ſubject (for that hereby he hath diſabled him to do the king ſervice) by fine, ranſome, and impriſonment untill the fine and ranſome be paid. So as there is a manifeſt diverſity between a ranſome and an amerciament; for ranſome is ever when the law inflicted a corporal puniſhment by impriſonment, (and ſo is alſo a fine) but otherwiſe it is of an amerciament, as hath bin ſaid. And [*y*] ancients have ſaid, that *ranſome neſt forſque redemption de paine corporel per fine des deniers.* This offence of mayhem is under all felonies deſerving death, and above all other inferior offences; ſo as it may be truly ſaid of it, that it is, *Inter crimina majora minimum, & inter minora maximum* (2). And in my circuit in anno 11. Jacobi regis, in the county of Leiceſter, one Wright, a young ſtrong and luſtie [*x*] Bract. lib. 1. fol. 6. Paſch. 19. E. 1. coram Rege. Rot. 36. Northt. [*y*] Mirror. cap. 5. Sect. 1. & 3.

rogue,

ſhall have any influence, gives a very oppoſite explanation; for, according to him, ownerſhip of ſoil is *eſſential* to a *ſeveral fiſhery*; and a *free fiſhery* differs both from *ſeveral fiſhery* and *common of fiſhery*, from the former by being confined to a *public* river and not *neceſſarily* comprehending the ſoil, from the latter by being *excluſive*. 2. Blackſt. Com. 8. ed. 39. But we doubt, whether this diſtinction may not be in a great degree queſtionable.—1. In reſpect to a *ſeveral fiſhery*, where is the inconſiſtency in granting the *ſole* right of fiſhing with a reſervation of the ſoil and its other profits? Bracton expreſsly takes notice of ſuch a grant; for his words are, that one may *ſervitutem imponere fundo ſuo, quod quis poſſit piſcari cum eo, et ita in communi, vel quod alius per ſe ex toto.* Bract. fo. 208. b. There are alſo numerous other authorities for it; the old books of entries agreeing, that one may preſcribe for a *ſeveral fiſhery* againſt the owner of the ſoil, to which ſhould be added the three caſes of Elizabeth cited by lord Coke. See Lib. Intrat. 162. b. 163. a. Raſt. Entr. 597. b. and the books cited under the letter *d* in fol. 4. b. and under *m* here, and the caſes referred to under the * on the other ſide. Nor do we underſtand, why a *ſeveral piſcary* ſhould not exiſt without the ſoil, as well as a *ſeveral paſture*, as to which latter we have already ſhewn the doctrine to be ſettled. *Supra* note 6. The chief reaſons, which occur againſt lord Coke, ſeem to be theſe.—Several writs, never applicable except to the ſoil, lie for a piſcary; ſuch as a *præcipe quod reddat, monſtraverunt de rationabilibus diviſis*, and *treſpaſs*, which latter writ is particularly inſiſted upon by lord chief Juſtice Holt. Dav. 55. b. Hugh. Comm. Orig. Wr. 11. W. Jo. 440. 1. Ventr. 122. 2. Salk. 637. Skinn. 677. *Suum liberum tenementum* is a good plea to treſpaſs for fiſhing in a *ſeveral piſcary*. 17. E. 4. 6. 18. E. 4. 4. 10. H. 7. 24. 26. 28. The ſoil will paſs, as it is ſaid, by the grant of a piſcary. Plowd. 154.—But all theſe objections may be repelled.—The writs relied on will not always lie for a piſcary. Thus if a *præcipe quod reddat* is brought of a piſcary in the water of another perſon, the writ is bad, and a *quod permittat* is the proper remedy. Fitz. Abr. Briefe 861. F. N. B. 23. i. and note b. of the 4to. ed. Beſides, in the caſes of actions for treſpaſs in a *ſeveral piſcary*, or at leaſt in ſome of them, the writ ſeems in effect to ſtate a *ſeveral piſcary* in the *plaintiff's own ſoil*, which therefore proves nothing as to the ſenſe of *ſeveral piſcary* without further explanation. Reg. Br. Orig. 95. b. Carth. 285. Skin. 677. The plea *liberum tenementum* may be replied to by preſcribing for a *ſeveral piſcary*. See the books before cited as to ſuch a preſcription. Though the grant of a piſcary *generally may*, perhaps, paſs the ſoil, yet it will not, if there are any words to denote a different intention; as where one ſeized of a river grants a *ſeveral fiſhery* in it, which is the caſe put by lord Coke in another place; and much leſs will the ſoil paſs, when there is an expreſs reſervation of it. Ante 4. b. & n. 2. there.—Hence, as it ſhould ſeem, the arguments are ſhort of the purpoſe; for at the utmoſt they only prove, that a *ſeveral piſcary* is *preſumed* to comprehend the ſoil, till the contrary appears, which is perfectly conſiſtent with lord Coke's poſition, that they may be in different perſons, and indeed

For notes to this ſide of fol. 127. ſee 127. b.

guardian to his children till twenty-one, it has been uſual for want of ſuch a guardian to allow the infant to elect one for himſelf; and according to one book, this practice ſeems to have prevailed in ſome degree before the Reſtoration. Phil. Tenend. non Tollend. 169. Such election is ſaid to be frequently made before a judge on the circuit. 2. Veſ. 375. But we do not conceive this form to be eſſential. The laſt lord Baltimore, when he was turned of *eighteen*, having no teſtamentary guardian, and being under the neceſſity of having one for ſome ſpecial purpoſes relative to his proprietary government of Maryland, named a guardian

rogue, to make himſelfe impotent, thereby to have the more colour to begge or to be relieved without putting himſelfe to any labour, cauſed his companion to ſtrike off his left hand; and both of them were indited, fined, and ranſomed therefore, and that by the opinion of the reſt of the juſtices for the cauſe aforeſaid.

Voyde, &c. Here by (&c.) is implyed a maxime in law, *quod inutilis labor & ſine fructu non eſt effectus legis.* And againe, *Non licet, quod diſpendio licet.* And *ſapiens incipit à fine*, and *lex non præcipit inutilia.* [z] Therefore the law forbiddeth ſuch recoveries, whoſe ends are vaine, chargeable, and unprofitable.

[z] Vide Sect. 273. & 578.

Section 195.

DEmaundant, petens, is hee which is actor in a reall action, becauſe hee demandeth lands, &c. And *plaintife, quereus* in actions perſonals and mixt, *quia queritur de injuria, &c. Tenant, tenens* in reall actions, and *defendant, defendens* in actions perſonall and mixt.

ITEM ſi un villein ſoit demandant en action real, ou plantife en action perſonal, envers ſon ſeignior, ſi le ſeignior voile pleder en diſabilitie de ſon perſon, il ne poit faire pleine defence; mes il defendera forſque tort & force & demander a judgement, ſil ſerra reſpondus, & monſtra ſon matter maintenant, comment il eſt ſon villein, & demandera judgment ſil ſerra reſpondue.

ALSO if a villeine be demandant in an action real, or plaintiffe in an action perſonall againſt his lord, if the lord will plead in diſabilitie of his perſon, he may not make plaine (1) defence, but he ſhall defend but the wrong and the force, and demand the judgement, if he ſhall be anſwered, and ſhew his matter by and by, how he is villeine, and demand judgement if he ſhall be anſwered.

Defence. (2) Commeth of the word *defendo*, ſo called of the manner of the pleading, *viz. prædict. A. B. defendit vim & injuriam, &c.*

For example, in a perſonall action brought by A. B. againſt C. D. the defence is, *& prædictus C. D. defendit vim & injuriam quando, &c. & damna, & quicquid quod ipſe defendere debet, &c.*

In this defence there be three parts to be conſidered. Firſt, when he defendeth the wrong and the force, this hath a double effect, viz. to make himſelfe partie to the matter, and this is the reaſon, that the defendant in this and the like actions can plead no plea at all, before he makes himſelfe partie by this part of the defence, as it appeareth here by Littleton, that [a] if the defendant will plead in diſabilitie of the perſon of the plaintiffe, he muſt firſt make himſelfe partie by this firſt part of the defence. Neither can he plead to the juriſdiction of the court without this part of the defence (3). Secondly [b] by the defence of the damages, he affirmeth that the plaintiffe is able to ſue, and (upon juſt cauſe) to recover damages. (4) Thirdly, and by the laſt part, viz. and all that which he ought defend, when and where he ought, he affirmeth the juriſdiction of the court, *& ſic de ſimilibus.* And of ſuch neceſſitie is it for the tenant or defendant to make a lawfull defence, as [c] albeit he appeareth and pleads a ſufficient barre without making defence, yet judgement ſhall be given againſt him.

[a] 40. E. 3. 36. 14. H. 6. 18. 35. H. 6. 12. 1. E. 4. 15.

[b] 29. E. 3. 23. 8. H. 6. 3.

[c] 36. H. 6. judgement 58.

[d] 18. E. 4. 6. & 7.

[d] If villenage be pleaded by the lord in an action reall, mixt or perſonal, and it is found that he is no villaine, the bringing of a writ of error is no enfranchiſement; becauſe thereby he is to defeat the former judgement; and if, in the mean time, the plaintiffe or demandant bring an action againſt the lord, he need make no proteſtation, ſo long as the record remaines in force, for at that time he is free, but the lord ſhall be reſtored to all by a writ of error.

Sect. 196.

[e] Bract. lib. 5. fol. 421. Britton. cap. 49. fol. 125. Mirror. cap. 2. Sect. 18.

UN eſt lou villeine ſuiſt action, &c. Littleton here

ITEM 6 maners de homes y ſont, (5) queux, ſils ſuont ac-

ALSO there are ſixe mannerofmen, who, if they ſue judgement

tion

indeed appears to us the true doctrine on the ſubject.—2. Both parts of the deſcription of a *free* fiſhery ſeem diſputable. Though, for the ſake of diſtinction, it might be more convenient to appropriate *free fiſhery* to the franchiſe of fiſhing in *public* rivers by derivation from the crown; and though in other countries, it may be ſo conſidered; yet, from the language of our books, it ſeems, as if in our law practice had extended this kind of fiſhery to *all* ſtreams whether *private* or *public*, neither the Regiſter, nor other books, profeſſing any diſcrimination. R. 95. b. Fitzh. N. B. 88. g. Fitzh. Abr. Aſſ. 422. 4. E. 4. 28. 17. E. 4. 6. b. 7. a. 7. H. 7. 13. b. Cro. Cha. 554. 1. Ventr. 128. 3. Mod. 97. Carth. 285. Skinn. 677. Again, it is true, that in one caſe the court held *free fiſhery* to import an *excluſive* right equally with *ſeveral piſcary*, chiefly relying on the writs in the Reg. 95. b. and the 44. E. 3. 24. But then this was only the opinion of two judges againſt one, who ſtrenuouſly inſiſted, that the word *libera, ex vi termini*, implied *common*, and that many judgments and precedents were founded on lord Coke's ſo conſtruing it. 2. Salk. 637. Carth. 285. That the diſſenting judge was not wholly unwarranted in the latter part of his aſſertion, appears from two determinations a little before the caſe in queſtion. See *Upton* and *Dawkins* 3. Mod. 97. and *Peake* and *Tucker* cited in Carth. 286. in marg. We may add to this the three caſes cited by lord Coke as of his own time; and that there are paſſages in other books, which favour his diſtinction. See Cro. Cha. 554. 17. E. 4. 6. b. 7. a. 7. H. 7. 13. b.—Theſe remarks on *ſeveral* and *free fiſhery* may ſerve the ſtudent as a notice of the doubts on the ſubject, and alſo aſſiſt in any future diſcuſſion for removing them; which, in truth, is the whole ſcope of the annotation.

(1) It ſhould be *full*.—(2) It has been well obſerved, that *defence*, as applied in our law-pleadings, means, not a *juſtification*, which is the ordinary ſignification, but a *denial*. 3. Blackſt. Comm. 8th. ed. 296. Had this occurred to the author of the book on *real* actions, he would not have been at a loſs for the reaſon of the *tenant's defending* the *demandant's right* in a writ of right. Booth on Real Actions 112.—(3) Held *contra* by three judges againſt Holt chief juſtice. Carth. 220.—(4) Adjudged Acc. on Demurrer, Carth. 229.—(5) In L. & M.—Roh.—P.—& Red. the reading is *contre queux*.

Notes to 127. a.

(1) In very ancient times amercements were a conſiderable object in our law, as appears by the *Great Charter's* prohibiting their exorbitancy, and the writ of *moderata miſericordia* for relieving againſt exceſſive amercements in courts not being of record. F. N. B. 75. a. But ſo far as regards amercements on judgments in civil ſuits in the king's courts of record, they have *long* been *mere form*. Yet in lord Coke's time it was error to omit the entry of them. 5. Co. 49. a. Now indeed by the 16. & 17. Ch. 2. c. 8. ſuch an error is amendable.—(2) Since lord Coke's time, *premeditated* maiming, accompanied with *laying in wait*, has been made a *capital* felony. See 22. & 23. Ch. 2. c. 1. commonly ſtiled the *Coventry* act.

Notes to 122. b.

(1) See ante 117. b. n. 3.—(2) This replication was given by the 37. E. 3. c. 16. before which ſtatute the plea of being a villein to a ſtranger to the writ could not be denied.—(3) *Ht nief* in L. & M.—& Roh.—(4) See ante 68. b. n. 1. 2. to which add Poll. 172. b. Spelm. Gloſſ. voc. *fidelitas* 2. Inſt. 75. Britt. cap. 29. Cow. Inſt. l. 2. t. 3. ſ. 14. Flet. l. 2. c. 52. l. 3. c. 16. Mirr. c. 3. ſect. 35. 7. Co. 6. b. 7. a. Calvin's caſe Tyrr. Biblioth. Polit. 4th. ed. 907. Ellesmere's argument in Calvin's caſe 76.

a guardian by deed. This mode was adopted by the advice of two eminent barriſters; for though one of them at firſt doubted, whether

tion, judgement poit eſtre demand, ſils ſerront reſpondus, &c. Un eſt, lou villeine ſuiſt action envers ſon ſeignior, come en le cas avantdit.

may be demanded, if they ſhall be anſwered, &c. One is, where a villeine ſueth an action againſt his lord, as in the caſe aforeſaid.

uſed in the ancient authors of the law. [f] *Reſponſalis* was he, that was appointed by the tenant or defendant, in caſe of extremity and neceſſitie, to alleage the cauſe of the parties abſence, and to certifie the court upon what tryall he will put himſelfe, viz. the combate or the country. So as his power was more than the eſſoinor, which caſteth an eſſoigne only to excuſe the abſence of the party, as an eſtranger, which caſteth a protection, doth. For by the common law, the plaintife or defendant, demandant, or tenant, could not appeare by attornie without the king's ſpecial warrant by writ or letters patent, but ought to follow his ſuite in his owne proper perſon (by reaſon whereof there were but few ſuites.) [g] *Abuſion eſt a reteiner attorny ſans breve de la chancerie.* And therefore Bracton ſaith truly, [h] *attornatus hæc omnia facere poteſt* (that is, plead all manner of pleas). *Eſt igitur magna differentia inter attornatum & reſponſalem.* So as the ſtatutes, that give the making of attorneyes, have worne out *reſponſales.* Now what manner of men attorneys ought to be, or rather what they ought not to be, heare what antiquity hath ſaid, [i] *attorneyes poient eſtre touts ceux, aux queux ley voile ſuffer. Feme ne poient eſtre attorneyes, ne enfans, ne ſerfs, ne nul que eſt en garde ou auterment faut de foy, ne nul criminous, ne nul eſſoigne, ne nul que neſt a le foy le roy, ne nul que ne poet eſte counter, &c.*

[f] Bract. lib. 4. fo. 212. b. & lib. 5. fol. 349. Fleta lib. 6. ca. 11. Glanvill lib. 11. cap. 1. Britton cap. 126. Vid. W. 1. c. 43. F. N. B. 25. C. Regiſt. 9. (F. N. B. 156. E.)

[g] Mirr. ca. 5. ſect. 1.

[h] Bracton ubi ſupra.

(5 Co. 89. 7. Co. 74.)

[i] Mirror. ca. 2. ſect. 21.

Section 197.

LE 2. eſt, lou un home eſt utlage ſur action de det, ou treſpas, ou ſur autre action, ou indictment, le tenant, ou defendant, poit monſtrer tout le matter de record, & lutlagarie, & demaunder judgement, ſil ſerra reſpondue; pur ceo que il eſt hors de la ley de ſuer aſcun action durant le temps que il ſoit utlage.

THE 2. is, where a man is outlawed upon an action of debt or treſpaſſe, or upon any other action or indictment, the tenant, or the defendant may ſhew all the matter of record, and the outlawry, and demand judgement if he ſhall be anſwered; becauſe he is out of the law to ſue an action during the time that he is outlawed.

LE 2. eſt [k] *lou un home eſt utlage, &c.* But theſe generall words receive a diſtinction, *viz.* [l] if an executor or an adminiſtrator ſueth any action, utlary in the plaintife ſhall not diſable him: becauſe the ſuit is *in auter droit*, that is, in the right of the teſtator, and not in his owne right. And for the ſame reaſon, [m] a maior and communalty ſhall have an action, though the maior be outlawed. [n] In a writ of error to reverſe an utlary, utlawry in that ſuit, or at any ſtrangers ſuite, ſhall not diſable the plaintife, becauſe if he in that action ſhould be diſabled, if he were outlawed at ſeveral mens ſuits, he ſhould never reverſe any of them. [o] In an attaint outlary in the plaintife cannot be pleaded in diſability of the perſon (1). [p] Outlary in Cheſter or Durham ſhall not diſable the plaintife in any court at Weſtminſter, &c. [q] *Minor vero, & qui infra ætatem 12 annorum fuerit, utlagari non poteſt, nec extra legem poni; quia ante talem ætatem non eſt ſub lege aliqua nec in decenna.* [r] He that is abjured the realme may be diſabled; for that he is *extra legem*; and yet he is not properly outlawed.

[k] Bracton. lib. 5. fol. 421. Britton ca. 22. fol. 39. Mirr. ca. 3. de exceptions a provors ca. 4. defaults puniſhable.

[l] 21. E. 4. 49. b. 21. H. 6. 30. b. 14. H. 6. 15.

[m] 12 E. 4. fol. 12.

[n] 7. H. 4. 40.

[o] 23. H. 8. c. 3. 2. H. 7. 7. (1. Sid. 43. Cro. Jam. 425. 616.)

[p] Mirror ca. 3. acc. 12. E. 4. 16. 33. H. 6. ca. 2.

[q] Bract. lib. 3. fo. 125. 3. H. 5. Utlagary 11. 38. E. 3. 5.

[r] Britton fo. 39.

Monſtrer tout le matter de record. Here note two things firſt by this word, (*monſtrer*) that, [s] when any man pleads an utlary in diſability of the perſon, hee muſt ſhew

[s] 20. E. 2. Coron. 232. 19. Aſſ. p. 10. 3. H. 6. 15. b. 37. H. 6. 23. 5. H. 7. 6. Eliz. Dyer 228. F. N. B. 244. Stanf. Pl. Coro. 105. (Noy. 74. 143.)

(1) Rot. Parl. 20. H. 6. n. 18. c. 2. Hal. MSS.

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whether the adminiſtration of the government of the province was not devolved upon the crown during the infancy, yet he afterwards retracted this idea, and concurred in thinking, that the guardian named by the infant might act as lord proprietor. Indeed it ſeems, as if there was no preſcribed form of an infant's electing a guardian *after* fourteen, any more than there is before; and therefore election by *parol* might perhaps be ſufficient, though it would be wrong to truſt to a mode ſo unſolemn. But we do not wonder at the deficiency; becauſe guardianſhip by election of the infant is of very late origin, it being, we believe, not only unnoticed by any writer before lord Coke, except Swinburn, but there ſtill being no caſes in print to explain the powers incident to it, or whether the infant may change a guardian ſo conſtituted by himſelf. Swinb. Teſtam. ed. 1590. fol. 97. b. Even lord Coke, we ſee, though profeſſing to enumerate the different ſorts of guardianſhip, and though he had before mentioned this latter one, omits it here; whence it may be probably conjectured, that, in his time, it was in ſtrictneſs ſcarcely recognized as legal.

The *ſecond* is guardian by appointment of the lord chancellor. How this juriſdiction was acquired by him is not eaſy to ſtate. The uſual manner of accounting for it appears to us quite unſatisfactory. See Gilb. Eq. Rep. 172. Saying, that his juriſdiction over idiots and lunatics is undoubted, furniſhes an argument againſt his having any over infants; for he derives the former from a *ſeparate commiſſion* under the ſign manual, but there is not any ſuch to warrant the latter. The writs of *raviſhment of ward* and *de recto de cuſtodia* prove as little: for were not theſe returnable in the courts of common law; or, though they had not

shew forth the record of the outlawrie *maintenant sub pede sigilli*, (becauſe the plea is but dilatorie) unleſſe the record be in the ſame court. But if he plead an outlawrie in barre, if it be denyed, he ſhall have a day to bring it in.

(8 Co 142. b.)

Secondly [*t*] before the defendant can diſable the plaintife, the outlawrie muſt appeare of record; and the judgement after the *quinto exactus* given by the coroners in the county court, is not ſufficient, untill the writ of *exigent* be returned, and the outlawrie appeare of record: which is manifeſt by Littleton's owne words, (viz.) *matter de record*, whereof ſee more hereafter, ſect. 503.

[*t*] 28 Aſſ. 49. 12. E. 3. Utlagarie 3. M. 4. &. 5. El. Dyer 222. 38. E. 3. 13. (Poſt. 288. b. 5. Co. 111.)

It is to be obſerved, that there be two kind of appearances before the *quinto exactus*, to avoid the outlawry, viz. an apparance in deed, that is, to render himſelfe, &c. And the other is by an apparance in law, [*u*] that is, by purchaſing a *ſuperſedeas* out of the court where the record is, which is an apparance of record: and therefore, though it be not delivered to the ſherife before the *quinto exactus*, yet it ſhall avoid the outlawrie; and ſo are the bookes, that ſpeake hereof, to be intended.

[*u*] Tr. 44. El. in Com. Banc. inter Mere & Dolburne. 33. H. 6. 1. 11. H. 4. 34. Dyer 3. El. 192. 5. El. 223. 4. H. 4. le 1. caſe. 8. H. 4. f. 7. 37. H. 6. 17. 33. E. 3. Err. 77. 21. H. 6. 20. (Mo 73.)

[*w*] If a man be outlawed at the ſuit of one man, all men ſhall take advantage of this perſonall diſability. And ſo it is in caſe of *alien née*, and of *excommengement*. But otherwiſe it is in caſe of villenage; for that diſability is onely given to the lord.

[*w*] 33. H. 6. 19. b. &c.

Durant le temps que il eſt utlage. [*x*] If the defendant plead an outlawrie in the plaintife, in diſability of his perſon, and the plaintife after that plea pleaded purchaſe a charter of pardon; becauſe the charter hath reſtored him to the law, the defendant ſhall anſwer. So note, the diſability abateth not the writ, but diſinableth the plaintife, untill he obtaineth a charter of pardon, and ſo it appeareth here by Littleton.

[*x*] 44. E. 3. 27. (Doctr. Plac. 162. 396.)

Judgement ſil ſerra reſpondue. [*y*] If the ground or cauſe of the action bee forfeited by the outlawry, then may the outlawry bee pleaded in barre of the action; as in an action of debt, detinue, &c. But in reall actions, or in perſonall, where dammages be incertaine, (as in treſpaſſe of batterie, of goods, of breaking his cloſe, and the like) and are not forfeited by the outlawry, there outlawry muſt be pleaded in diſability of the perſon.

[*y*] 9 El. Dyer 262. 7. H. 4. 4. b. Staſf. Pl. Coron. 188. 5. Co. 109. in Foxleye's caſe. 28. E. 3. 92. 29. Aſſ. p. 47. 63. 30. H. 6. 5. (Doctr. Plac. 395.)

[*z*] And it is to be obſerved, that, in the reign of king Ælfred, and untill a good while after the conqueſt, no man could have been outlawed but for felonie, the puniſhment whereof was death. But now the law is changed, as it appeareth by that which hath beene ſayd. And hereby you ſhall underſtand old bookes and records, which ſay, that an outlawed man had *caput lupinum*; becauſe he might be put to death by any man, as a wolfe that hateful beaſt might. [*] *Utlagatus & waiviata capita gerunt lupina, quæ ab omnibus impunè poterunt amputari; merito enim ſine lege perire debent, qui ſecundum legem vivere recuſant.* And another ſaith, [*a*] *utlage pur felonie teigne leu pur loup, & eſt criable woolfeſhered, pur ceo que loupe eſt beaſt hay de touts gents, & de ceo en avant liſt al aſcun de le occider al foer del loup, dont cuſtome ſoloit eſtre de porter les teſtes al chiefe lieu del county, ou de la franchiſe, & ſoloit la avoire demy mark del countie pur cheſcun teſte de utlage & de loupe.* And this agreeth with the law before the conqueſt, [*b*] *utlagus lupinum gerit caput, quod Anglicè woolfeſhead dicitur; & hæc eſt lex communis & generalis de omnibus utlagatis.* [*c*] But, in the beginning of the raigne of king Edward the third, it was reſolved by the judges, for avoyding of inhumanity, and of effuſion of Chriſtian blood, that it ſhould not be lawfull for any man, but the ſherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he ſhould undergoe ſuch puniſhments and paines of death, as if he had killed any other man; and ſo from thenceforth the law continued untill this day. (*Nota*, *woolfeſhead*, and *wulferfod* is all one). [*] And after in Bracton's time, and ſomewhat before, proceſſe of outlawry was ordained to lie in all actions, that were *quare vi & armis*, which Bracton calleth *delicta*; for there the king ſhall have a fine (1). But ſince, by divers ſtatutes, proceſſe of outlawry doth lie in account, debt, detinue, annuity, covenant, *action ſur le ſtatute de* 5. Rich. 2. *action ſur le caſe*, and in divers other common or civill actions. But now let us heare what Littleton will ſay unto us.

[*z*] Mir. c. 1. ſect. 3. & c. 3. & 4. ſæpe cap. 5. Sect. 1.

[*] Fleta lib. 1. ca. 27. Bract. li. 5. fol. 421. Britton fol. 20. b.

[*a*] Mir. ca. 4. ſect. 4. defaults puniſhable.

[*b*] Lamb. fol. 128.

[*c*] 2. Aſſ. P. 3. 2. E. 3. tit. Coron. 148.

[*] Bracton. lib. 5. fo. 421. 8. H. 6. 9. b. 40. E. 3. 5. 35. H. 6. 6. 40. E. 3. 2.

But see 1. Reeves' Hiſt. of Engl. L. 2d ed. 484. & note inſerted. of New Edit. Sir Henry Gwillim's outlawry.

Section 198.

ALIEN. [*a*] *Alienigena* is derived from the Latine word *alienus*, and according

LE 3. eſt un alien, que eſt née hors de la ligeance

THE third is an alien, which is born out of the ligeance of *noſtre*

[*a*] Bract. li. 5. fol. 415. 427. Mir. c 1. ſect. 3. c. 5 ſect. 1. & ca. 3. except a provors. Flet. li. 6. c. 47. Brit. fo. 29. 13. E. 3. Bre. 677. 25. E. 3 de Natis ultra mare. 31. E. 3. Coſinage 5. 42. E. 3. 2. 9. E. 4. 7.

(1) Whether the common law gives proceſs of outlawry againſt crimes, being merely *conſtructive* breaches of the peace, was queſtioned in a late caſe before the King's Bench on a *libel*. But the chief juſtice, in delivering the court's judgment, ſpoke at large to prove, that ſuch proceſs lies againſt crimes *univerſally*. Mr. Wilkes's caſe 4. Burr. v. 4. page 2537. However, the reaſoning, on which this opinion is grounded, ſtands oppoſed by a former judgment of the Common Pleas on a prior caſe relative to the ſame gentleman. 2. Wilſ. 151. But it was adopted by both houſes of parliament, when, in his caſe, they reſolved, that privilege of parliament doth not extend to *libels*. See Annual Reg. for 1764. The arguments for the contrary opinion are forcibly expreſſed in a proteſt by ſome of the lords, who were againſt making ſuch a reſolution. Journ. Dom. Proc. 29. Nov. 1763.—(2) Ubi natus in partibus tranſmarinis *ſhall not be an alien, ſee Hill.* 13. *E.* 1. rot. 1. Hal. MSS.

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not been ſo, how doth a juriſdiction, to decide between contending competitors for the right of guardianſhip, prove a power of appointing a guardian, where it happens, that one is wanting? The writs *de cuſtode admittendo*, in the Regiſter, only relate to guardians *ad litem*. Reg. Br. Orig. 198. a. The aſſertion, that the appointment of guardians belonged to the chancellor before the erection of the Court of Wards, remains to be proved; or at leaſt we, after a diligent ſearch, do not find any authority in print. The paſſage referred to in *Fleta* and the doctrine in Beverley's caſe 4 Co. by no means warrant the uſe made of them; for in neither is any notice taken of *infants*. Though the caſe of infants, as well as of ideots and lunatics, ſhould be admitted to belong

noſtre ſeignior le roy, ſi tiel alien voile ſuer un action reall ou perſonall, le tenant ou defendant poit dire, que il fuit née en tiel pais, que eſt hors de la ligeance le roy, & demaunder judgement ſi il ſerra reſpondue.

our ſoveraigne lord the king, if ſuch alien will ſue an action reall or perſonal, the tenant or defendant may ſay, that he was borne in ſuch a country, which is out of the king's allegeance, and aſke judgement if he ſhall be anſwered.

liegeance. And he that is borne within the king's liegeance is called ſometime a *denizen*, *quaſi deins née*, borne within, and thereupon in Latine called *indigena*, the king's liegeman; for *ligeus* is ever taken for a naturall borne ſubject. But many times in acts of Parliament, *denizen* is taken for an alien borne, that is infranchiſed or denizated by letters patent, whereby the king doth grant unto him, [b] *quod ille in omnibus tractetur, reputetur, habeatur, teneatur, & gubernetur, tanquam ligeus noſter, infra dictum regnum noſtrum Angliæ oriundus, & non aliter, nec alio modo.* But the king may make a particular denization: [c] as he may grant to an alien, *quod in quibuſdam curiis ſuis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem, quod ſit alienigena & natus in partibus tranſmarinis*, to enable him to ſue onely. The ſeverall ſenſes of which word muſt be gathered, *ex antecedentibus, adjunctis, & conſequentibus*; and they that take him in that ſenſe, derive the word from *donaiſon* (i. e.) *donatio*, becauſe his freedome is given unto him by the king.

to the etymologie of the word, it ſignifieth one borne in a ſtrange country, under the obedience of a ſtrange prince or country, (and therefore Bracton ſaith, that this exception, *propter defectum nationis*, ſhould rather be *propter defectum ſubjectionis*) or as Littleton ſaith, (which is the ſureſt) out of the liegeance of the king. Note, here Littleton ſaith not *Hors del realme*, but *hors de ligeance*; for he may be borne out of the realme of England, yet within the

11. H. 4. 26. 14. H. 4. 19, 20. 3. H. 6. 55. 22. H. 6 38. Stanf. Pl. Cor. 197. a. 7. Co. 1. Calvin's caſe. Pl. Com. 268. per Sanders. Vid. ſect. 1. 439. 440. 441.

(2. Inſt. 741.)

[b] 9. E. 4. f. 8. Pl. Com. 130. b.

[c] Rot. Parl. 22. E. 1. Elias de Daubenie.

There is another kind, and that is an alien naturalized, and that muſt be by act of Parliament. And this alien naturalized to all intents and purpoſes, is as a naturall borne ſubject (1), and differeth much from denization by letters patent; for if he had iſſue in England before his denization, that iſſue is not inheritable to his father; but if his father be naturalized by parliament, ſuch iſſue ſhall inherite. So if an iſſue of an Engliſhman be borne beyond ſea, if the iſſue be naturalized by act of Parliament (2), he ſhall inherit his father's lands; but if he be made denizen by letters patent, he ſhall not; and many other differences there be betweene them.

(Cro. Cha. 601.)

Vide Calvin's caſe ubi ſupra.

Ligeance. *À ligando*, being the higheſt and greateſt obligation of dutie and obedience that can be. Liegeance is the true and faithfull obedience of a liegeman or ſubject, to his liege lord, or ſoveraigne. *Ligeantia eſt vinculum fidei, ligeantia eſt legis eſſentia.*

Ligeantia domino regi debita eſt duplex.

- *Perpetua.*
  1. *Originaria, ſive naturalis, ſive nata,* [d] and this is alwayes abſolute and incident inſeparably. *Nemo patriam, in qua natus eſt, exuere, nec ligeantiæ debitum ejurare poſſit.*
  2. *Data, aut per denizationem, aut per naturalizationem (ut ſupradictum eſt) & iſta ligeantia per denizationem poteſt eſſe ſub conditione.*
- *Temporanea aut*
  - *Localis, quia quilibet alienigena, qui in hoc regno ſub protectione regis degit, domino regi ligeantiam debet.* And if he be indicted of high treaſon, the indictment ſhall ſay, [e] *contra ligeantiæ ſuæ debitum; & ideo dicitur temporanea & localis, quia non durat, niſi quouſque infra regnum moratur.*
  - *Limitata,* as when one is made denizen for life, or in taile. [f] But one cannot be naturalized, either with limitation for life, or in taile, or upon condition: for that is againſt the abſoluteneſſe, puritie, and indebility of naturall allegiance.

[d] 13. El. Dier fo. 300. b. Doctor Storie's caſe.

(Hob. 271.)

[e] 3. & 4. P. & M. Di. 144. 7. Co. 6. &c. Calvin's caſe.

[f] 9 E. 4. 7. Calvin's caſe ubi ſupra. (Cro. Jam. 539. 2. Ro. Rep. 95.)

[*] An abbot, prior, or prioreſſe alien, ſhall have actions reall, perſonall, or mixt, for any thing concerning the poſſeſſions or goods of his monaſtery here in England, though hee bee an alien borne out of the king's liegeance; becauſe hee bringeth it, not in his owne right, but

[*] 13. E. 3. Br. 264. 20. E. 3. Annuity 24. 17. E. 3. 21. 43. E. 3. 10. 27. Aſſ. 48. 14. H. 4. 37. 22. E. 4. 44. 21. H. 7. 7. Stanf. Prær. 54. L'eſtat. de Carliſle. 35. E. 1.

(1) But now by the 12. & 13. W. 3. c. 2. naturalized perſons are incapacitated from being of the privy council, members of either houſe of parliament, or enjoying any office or place of truſt, civil or military, or from having any grant of lands or other hereditaments. The 1 G. 1. goes ſtill further; for it enacts, that no bill of naturalization ſhall be received without a clauſe to this effect. 1. G. 1. ſt. 2. c. 4. ſ. 2. But when any foreigner, diſtinguiſhed by eminence of rank or ſervices, is naturalized, it is uſual, firſt to paſs an act for the repeal of theſe ſtatutes in his favour, and then to paſs an act of naturalization without any exception.—(2) This imports a ſpecial act of parliament to be neceſſary. But, whatever the law might be in lord Coke's time, now, by ſeveral modern ſtatutes, perſons born beyond ſea, if their fathers, or paternal grandfathers, were natural born ſubjects, are likewiſe made ſo, though with an excluſion of ſome unfavoured perſons. 7. Ann c. 3. 4. G. 2. c. 21. 13. G. 3. c. 21. See ante fo. 8. a. note 1.

Continuation of notes to 123. *b. from* 125. *a.*

(2) If our law was really as ſtrict in point of time, as is here repreſented, it would not ſufficiently conform to the courſe of nature. The phyſicians, it is true, generally call *nine* months, each being of thirty days, the *uſual* period for a woman's going with child. But then they allow, that, as a delivery may be accelerated by accidental cauſes, ſo it is frequently protracted, not only for *ten days* beyond the nine months, but to the end of the *tenth* month, and ſometimes for a conſiderably longer time. See Zacch. Quæſt. Medico legal. lib. 1. tit. 2. Juſtice therefore requires, that, in the caſe of poſthumous children, an exceſs of the uſual time ſhould not operate further, than by raiſing a proportional *preſumption* againſt the legitimacy. The Roman law was very liberal in this reſpect; for the *decemviri* allowed, that a child may be born in the tenth month; and though a law of the Digeſt excludes the eleventh, yet the emperor Adrian, after conſulting with the philoſophers and phyſicians, decreed even for this, where the mother was of good and chaſte manners. See Dig. 1, 4. 12. Paul. Sentent. lib. 4. t. 9. ſ. 5. Nov. 39. c. 2. (1.) with

belong to the crown, yet ſomething further is neceſſary to prove, that the chancellor is the perſon conſtitutionally delegated to act

but in the right of his monaſtery, and not in his naturall but in his politique capacity (1).

(Doctr. Plac. 8. Dy. 2. b.)
[b] Bracton 426. 427. 430. 8. E. 3. 51. 5. E. 2. Aiel 8. 13. E. 3. Bre. 677. 22. E 3. 14. 20. 21. E. 3. Coſinage 5. 42. E. 3. 2. 13. E. 4. 9 11. H. 4. 26. 9. E. 4. 7. 19. E. 4. 7. 20. E. 4. 6. 13. E. 4. 9. 10. 32. H. 6. 23. 38. H. 8. Br. Denizen 10. 1. E. 6. Nonhab. Br. 13. & 62. Vid 4. H. 3. Dower 179. 6. E. 3. 263. 31. H. 6. ca. 4. Livre de Entries in eiect. 7. 6. H. 8. Dier 2. 6. H. 7. 15.
[*] 29. E. 3. Br. Denizen 15. Vid. Stanſ. Pl. Co. 197. a.

Reall ou perſonall. [b] In this caſe the law doth diſtinguiſh betweene an alien, that is a ſubject to one that is an enemy to the king, and one that is ſubject to one that is in league with the king; (2) and true it is that an alien enemie, ſhall maintaine neither reall nor perſonall action, *donec terræ fuerint communes*, that is untill both nations be in peace (3); but an alien, that is in league, ſhall maintaine perſonall actions, for an alien may trade and traffique, buy and ſell, and therefore of neceſſity he muſt be of ability to have perſonall actions; but he cannot maintaine either reall or mixt actions. An alien, that is condemned in an information, ſhall have a writ of error to relieve himſelfe, *et ſic de ſimilibus.*

[*] If an alien be made a prior or abbot, the plea of *alien née* ſhall not diſable him to bring any reall or mixt action concerning his houſe; becauſe he is *in auter droit*, as before is ſaid (4).

Hors del ligeance noſtre ſeignior le roy. Here Littleton doth not ſay, out of the realme or beyond the ſea, (5) (as he doth ſect. 439. 440. 441. 677.) but out of ligeance; for (as hath beene ſaid before) a man may be borne out of the realme, viz. of England, as in Ireland, Jerſey, and Gernſey, &c. (6) and yet ſeeing he is not borne out of the ligeance of the king, as Littleton here ſpeaketh, he is no alien. But hereof there is ſo much, and ſo plentifully ſpoken in our bookes, and eſpecially in the caſe of Calvin *ubi ſupra*, as this ſhall ſuffice.

Et demaunder judgement ſil ſerra reſpondue. So as the tenant or defendant ſhall neither plead alien *née* to the writ or to the action, but in diſability of the perſon, as in caſe of villenage and outlawrie before. [i] And Littleton is to be intended of an alien in league; for if hee be an alien enemy, the defendant may conclude to the action.

[i] Livre d' Entries Alien 1. (Doc. Plac. 89. Dy. 2. b.)

Sect. 199.

(3. Inſt. 119.)
For Statutes.
Vid. 35. E. 1. ſtat. de Carliſle. 25. E. 3. c. 22. 25. E. 3. ſtat. de Provilors. 27. E. 3. c. 1. 38. E. 4. c. 3. 2. R. 2. c. 12. 3. R. 2. c. 3. 12. R. 2. c. 5. 16. R. 2. c. 5. 2. H. 4. c. 3. & 4. 6. H. 4. c. 1. 24. H. 8. c. 12. 25. H. 8. ca. 19 20. 26. H. 8. c. 16. 1. Eliz. ca. 1. 5. Eliz. c 1. 13. Eliz. ca. 1. 2. 8. 27 Eliz. ca. 2. 39. Eliz. ca. 18.

For Preſidents.
Vide Mich. 29. E. 3. coram Rege in Theſaur. Paſch. 44. E. 3. ibid. Melbourne's caſe. Mich. 38. H. 6. ibid. The caſe of Rich. Beauchamp and others, Hil. 25. H. 8. Coram rege. The caſe of Nic. Biſhop of Norwich. Trin. 36. H. 8. Rot. 9. coram Rege. The caſe of the Biſhop of Bangor. Mich. 26. & 27. Eliz. coram Reg. Perrot againſt D. Bevance and others, booke of Entries, fo. 429. & 430. & ibid. Mich. 9. H. 7. f. 23.

Booke caſes.
21. E. 3. 40. B. 18. H. 6. 6. 9. E. 4. 2. 35. E. 3. 7. 24 H. 8. tit. Præmunire 16 10. H. 4. 12. 27. E. 3. 84. 6. H. 7. 14. 44. E. 3. 36.

PRæmunire. Some hold an opinion that the writ is called a *præmunire*; becauſe it doth fortifie *juriſdictionem jurium regiorum coronæ ſuæ* of the kingly lawes of the crown againſt foreine juriſdiction, and againſt the uſurpers upon them, as by divers acts of Parliaments appeare. But in truth it is ſo called of a word in the writ; for the words of the writ be *præmunire facias præfatum A. B. &c. quod tunc ſit coram nobis, &c.* where *præmunire* is uſed for *præmonere*, and ſo doe divers interpreters of the civill and canon law uſe it; for they are *præmuniti* that are *præmoniti*. By the ſtatutes before quoted in the margent you ſhall perceive what ſtatutes were made before Littleton wrote, and what have beene ordained ſince to make offences in danger of a *præmunire*.

Hors del protection le Roy. The judgement in a *præmunire* is, that the defendant ſhall bee from thence forth out of the king's protection, and his lands and tenements, goods and chattels forfeited

LE 4. eſt un home, que per judgment done envers luy ſur un briefe de præmunire facias, &c. *eſt hors de protection le roy. Si il ſuiſt aſcun action, & le tenant ou le def. monſtra tout le record envers luy, il poit demaunder judgement ſil ſerra reſpondu; car la ley le roy, & les briefs le roy ſont les choſes, per queux home eſt protect & aide, et iſſint, durant le temps que home en tiel cas eſt hors de la protection le roy, il eſt hors de eſtre aide ou protect per la ley le roy, ou per brief le roy.*

THE 4. is a man, who by judgement given againſt him upon a writ of *præmunire facias, &c.* is out of the king's protection. If he ſue any action, and the tenant or defendant ſhew all the record againſt him, he may aſke judgement if he ſhall be anſwered; for the law and the king's writs be the things, by which a man is protected and holpen; and ſo, during the time, that a man in ſuch caſe is out of the king's protection, he is out of helpe and protection by the king's law, or by the king's writ.

(1) Here, as alſo generally where lord Coke mentions *profeſſed* perſons, he muſt, we conceive, be underſtood to write, as of the law before the diſſolution of monaſteries, and the conſequent eſtabliſhment of the proteſtant faith. See *ante* 3. b. note 7 — (2) Et nota *it ſhall be tried by the record, if he be in amity or not*, viz. *a proclamation of war. But a proclamation prohibiting commerce, as anciently between the emperor and the queen, doth not diſable a German in a perſonal action.* Trin. 41. Eliz. C. B —Hal. MSS.— (3) But now, on declaring war, the king uſually, in the proclamation of war, qualifies it, by permitting the ſubjects of the enemy reſident here, to continue ſo long as they peaceably demean themſelves; and, without doubt, ſuch perſons are to be deemed alien friends in effect.—(4) *A feme alien ſhall have dower.* Rot. Parl. 8. H. 5. n. 15. 9. H. 5. n. pro comitiſſa *Arundell.* Hal. MSS.—See *ante* 31. b. note 9.—(5) See *ante* 107. a. n. 6. there and poſt. 244. a.—(6) Rot. Parl. 9. H. 6. n. 20. *indenization of one born in Wales.* Simile Rot. Parl. 23. H. 6. n. 26. Co. 2. Inſt. 741. on ſtat. 2. H. 4.—Hal. MSS.

with Gothofred's learned notes on thoſe two texts of the Roman law. Cod. lib. 6. t. 29. leg. 2. Aul. Gell. lib 3. cap. 16. Huber. Prælect. in Dig lib. 1. tit. 6. A like liberal diſcretion probably prevails in moſt countries of Europe; for an inſtance of which, we appeal to a writer of great authority, who reports a deciſion by a majority of judges in the ſupreme court of Friefland, by which a child was admitted to the ſucceſſion, though not born till three hundred and thirty-three days from the day of the huſband's death, which period wants only three days of *twelve lunar* months. Sand. Deciſ. lib. 4. tit. 8 Definit. 10. Nor will our own law, notwithſtanding what lord Coke advances, if the authorities are duly collected and conſidered, be found deficient on this intereſting ſubject. Indeed there is a paſſage in Britton, which gives countenance to lord Coke's limitation of forty weeks; for this writer excludes from the

act for the king. It is no wonder therefore, that lord chancellor Hardwicke took occaſion to diſapprove of comparing the court's juriſdiction over infants with that over ideots and lunatics. 2 Atk. 315. As to the writs relative to the appointment and removal of guardians in the Regiſter, they merely relate to *ſuits*; which is of very different conſideration from *general* guardians. See Index to Reg. Brev. Orig. tit. *Cuſtodes.* Nor will it anſwer the purpoſe, to attempt including guardianſhip in the idea of *truſts*, which are the peculiar objects of equitable juriſdiction, as it muſt be ſeen, that this is an overſtrained refinement; for, though

forfeited to the king, and that his body ſhall remaine in priſon at the king's pleaſure. So odious was this offence of *præmunire*, that a man, that was attainted of the ſame, might have bin ſlaine by any man, without danger of law; becauſe [*k*] it was provided by law, that a man might doe to him as to the king's enemy, and any man may lawfully kill an enemy. But queene Elizabeth and her parliament [*], liking not the extreme and inhumane rigor of the law in that point, did provide, that it ſhould not be lawfull for any perſon to ſlay any perſon in any manner attainted in or upon any *præmunire*, &c. Tenant in taile is attainted in a *præmunire*, he ſhall forfeit the land but during his life; for albeit the ſtatute of 16. R. 2. ca. 5. enacteth, that in that caſe their lands and tenements, goods and chattels, ſhall be forfeit to the king, that muſt bee underſtood of ſuch an eſtate as he may lawfully forfeite, and that is during his owne life. And theſe generall words doe not take away the force of the ſtatute *de donis conditionalibus*, but hee ſhall forfeit all his fee ſimple lands, ſtates for life, goods and chattels; and ſo was it reſolved in Trudgin's caſe.

11. H. 7. tit. Præmunire, p. 5. 17. H. 7 Juſtice Spilmans in Turbervile's caſe. Kelwey, fo. 195. Doct. & Stud. Lib. 2. cap. 32. Brooke, tit. Præmunire, 21. Temps E. 6. Biſhop Barloe's caſe.
[*k*] 24. H. 8. Brooke Coron. 196.
[*] 5. Eliz. ca. 1. Hil. 21. El. Trudgin's caſe reſolved per les Juſtices. 7. H. 4. 20. Simon Beverley's caſe. (Poſt. 391. 2. Ro. Abr. 177.)

Car la ley le roy & les briefes le roy, &c. There be three things, as here it appeareth, whereby every ſubject is protected, *viz. rex, lex, & reſcripta regis*, the king, the law, and the king's writs. The law is the rule, but it is mute. The king judgeth by his judges, and they are the ſpeaking law, *lex loquens*. The proceſſe and the execution, which is the life of the law, conſiſteth in the king's writs. So as he, that is out of the protection of the king, cannot be aided or protected by the king's law, or the king's writ. *Rex tuetur legem, & lex tuetur jus.* [*l*] Beſides men attainted in a *præmunire*, every perſon, that is attainted of high treaſon, petit treaſon, or felony, is diſabled to bring any action: for he is [*] *extra legem poſitus*, and is accounted in law *civiliter mortuus*.

[*l*] 4. E. 4. 8. 1. E. 4. 1. b. 30. E. 3. 4. 8. Eliz. Dier 245.
[*] Mich. 9. E. 3. coram rege Rot. 84. Warw.

It is to be underſtood, that there is a generall protection of the king, whereof Littleton here ſpeaketh; and this extends generally to all the king's loyall ſubjects, denizens and aliens within the realme, whoſe offences have not made them uncapable of it, as before it appeareth. And there is a particular protection by writ, which is one of the king's writs, that Littleton here ſpeaketh of. This particular protection is of two ſorts; one, to give a man an immunity or freedome from actions or ſuits; the ſecond for the ſafetie of his perſon, ſervants and goods, lands and tenements, whereof he is lawfully poſſeſſed, from violence, unlawfull moleſtation or wrong. The firſt is of right, and by law; the ſecond are all of grace, (ſaving one) for the generall protection implyeth as much. Of the firſt ſort ſome are *cum clauſula (volumus)* ſo called, becauſe the writ hath this word *(volumus)* in it, *viz. volumus quod interim ſit quietus de omnibus placitis & quærelis, &c.* and the other a protection *cum clauſula (nolumus)* ſo called for the like reaſon. Of protections *cum clauſula (volumus)* for ſtaying of pleas and ſuites there be foure kindes, *viz. quia profecturus* (ſo called by reaſon they are part of the words of the writ). 2. *Quia moraturus* (ſo named for diſtinction for the like cauſe). 3. *Quia indebitatus nobis exiſtit* of the matter. 4. When any ſent into the king's ſervice in warre is impriſoned beyond ſea. The former are for ſtaying of actions and ſuits in generall. The third is for ſtaying of ſuits of the ſubject for debts and duties due by the king's debtor to them. Of the fourth you ſhall reade hereafter in this place. For the former two theſe nine things are to be obſerved. Firſt, for what cauſe they are to be granted. 2. For what perſons they are allowable. 3. A three fold time is to be conſidered, viz. the time of the purchaſe of them, the time of the continuance of them, and the time when they ſhall be caſt. 4. In what place the ſervice is to bee performed. 5. In what actions theſe protections are allowable. 6. Under what ſeale and to whom they are directed. 7. Who is to allow, or diſallow of them. 8. By whom they are to bee caſt, and in what manner. 9. How upon juſt cauſe they may be repealed or diſallowed. I muſt but point at theſe matters to make the ſtudious reader capable of them, and referre him to the bookes and other authorities at large being excellent points of learning.

Protection. { Generall. / Particular.
Of the generall, vid. 7. Co. Calvin's caſe per totum.
(F. N. B. 28. B. 1. Leon. 185. Mo. 239. 2. Ro. Abr. 32.)

As to the firſt, it is of two natures, the one concerne ſervices of war as the king's ſouldier, &c. the other wiſedome and counſell, as the king's ambaſſador or meſſenger *pro negotiis regni*. Both theſe being for the publique good of the realme, private mens actions and ſuites muſt be ſuſpended for a convenient time; for, *jura publica anteferenda privatis*; and againe, *jura publica ex privatis promiſcue decidi non debent.* [*a*] And the cauſe of granting of the protection muſt be expreſſed in the protection, to the end it may appeare to the court that it is granted *pro negotiis regni & pro bono publico*, [*b*] or as ſome others ſay, *pur le common profit del realme.* And Britton ſaith, *noſtre ſervice, ſicome eſtre en noſtre force, & le defence de nous & de noſtre people, &c.* [*] A man in execution *in ſalva cuſtodia* ſhall not be delivered by a protection.

[*a*] 39. H. 6. 39. 3. H. 6. tit. Protection 2. 13. R. 2. ca. 16.
[*b*] Mirror cap. 3. Sect. 23. Britton fo. 281. Fleta lib. 6. cap. 7. 8. &c. Bracton.
[*] 5. Marie Dyer 162. (Cro. Cha. 389.)

[*c*] To the ſecond, theſe protections are not allowable onely for men of full age, but for men within age, and for women (1), as neceſſary attendants upon the campe, and that in three caſes, *quia lotrix, ſeu nutrix, ſeu obſtetrix.*

[*c*] 19. H. 6. 51. 30. E. 3. 21. F. N. B. 28. I. 11. E. 3 Rot. pat. 3. part for the Counteſſe of Warw.

[*d*] Corporations aggregate of many are not capable of theſe two protections either *proſecturæ*, or *moraturæ*; becauſe the corporation itſelfe is inviſible, and reſteth onely in con-

[*d*] 30 E. 3. 1. 21. E. 4. 36. 21. E. 3. 97.

(1) A reſpectable writer, conſidering women as not requiſite in a camp, thinks, that here lord Coke miſtakes *protections* for *eſſoins*. Barr. on Ant. Stat. Ir. ed. 154. But, as we apprehend, thoſe, who have been accuſtomed to a camp-life, will bear teſtimony to the neceſſity of each of the three capacities mentioned by lord Coke.

the inheritance poſthumous children not born within forty weeks from the huſband's death. Britt. 166. a. However, even this writer ſeems to extend in ſome degree beyond the forty weeks; unleſs he meant to make the wife's conception exactly of equal date with the huſband's death, which ſurely is not a very reaſonable conſtruction. But without dwelling on ſuch a nicety, it is ſufficient, that the principal of the few other authorities in our books are againſt ſo rigid a rule. Bracton is very cautious, illegitimatizing only the iſſue born ſo long after the huſband's death, as to create an improbability of its being his child, without naming any fixed period. Bract. lib. 5. fo. 417. b. As to the determined caſes, the only authorities of this ſort, we meet with, are enumerated in the preceding annotation; and theſe duly weighed, will not be found, it is apprehended, to warrant lord Coke's concluſion. In Radwell's caſe, the finding againſt the iſſue is expreſſed to have been grounded merely on *preſumption*; and beſides, if we conſtrue the record properly, the preſumption aroſe from proof of the huſband's non acceſs to the wife for a month before his death. The caſe of 9. E. 2. is an inſtance of allowing ſo much time beyond forty weeks, that it ſeems too ſtrong to have much weight; but ſo far as it can claim any, it counts againſt lord Coke. The caſe of 18. Rich. 2. at firſt ſeems full for lord Coke's rule, the child, though born only *eleven* days beyond the *forty weeks* having been declared not the iſſue of the deceaſed huſband. But when it is further conſidered, there will be found nothing to prove a *poſitive general* rule; for it was very ſpecial, the widow having married a ſecond huſband the day after the death of the firſt, ſo that the queſtion was, not

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though guardianſhip in the *common* acceptation of the word *truſt* may be properly ſo denominated, yet it as ſurely is not ſo in the *technical*

consideration of lawe. [e] Protection for the husband shall serve also for the wife.

[f] Albeit the vouchee, tenant by reseeit, preiee in aide, or garnishee, bee no parties to the writ, yet before they appeare a protection may be cast for them; because when the demandant grants the voucher or reseeit, in judgment of law they are made privie. But if the demandant counterplead the voucher or receit, then untill it be adjudged for them, and so privie in law, a protection cannot be cast for them. And so it is of the garnishee, a protection may be cast for him at the day of the returne of the *scire facias*. [g] No protection can be cast for the demandant or plaintife; because the tenant or defendant cannot sue a re-sommons, or a re-attachment, but the plaintife onely, that sued out the summons or attachment, &c. must sue also the re-sommons or re-attachment. And so it is of an actor in nature of a plaintife, &c. as the garnishee after appearance, and an avowant, and the like. [h] An officer of the king's receit, or any other officer in any court of record, whose attendance is necessary for the king's service or administration of justice, being sued, cannot have a protection cast for him.

[i] In every action or plea reall or mixt against two, where a protection doth lie, a protection cast for the one doth put the plea without day for all. So it is in debt, detinue and account. But in trespasse, or any action in nature of trespasse, which is in law severall, where every one may answer without the other, there a protection cast for the one shall serve for him onely, unless they joyne in pleading; or if they plead severall pleas, and one *venire facias* is awarded against all, there a protection cast for one, shall put the plea without day for all; and therefore in former times the plaintife used to sue out severall *venire facias* in those cases for feare of a protection, &c.

[k] As to the three fold time, first, a protection *profecturæ* regularly must not be purchased hanging the plea. But this faileth, when he goeth in the king's service in a voyage royall; and that is two fold, either touching warre, and that onely is when the king himselfe or his lieutenant, that is *prorex* goeth; or when any goeth in the king's ambassage, *pro negotio regni*, or for the marriage of the king's daughter, or the like, this also is called a voyage royall. But a protection *moraturæ* may be purchased and cast, *pendente placito*.

[l] Regularly a protection cannot be cast, but when the party hath a day in court, and when if he made default, it should save his default. Therefore when execution is to bee granted against body, lands, or goods, no protection can be cast; because the defendant hath no day in court. If a protection be cast at the *nisi prius* for one, if before the day in banke it bee repealed by *innotescimus*, yet because it was once well cast, it shall save his default; but if the protection be disallowed, either for variance, or that it lay not in the action, or the like, there it shall turne to a default.

If a man hath a protection, and notwithstanding plead a plea, yet at another day of continuance, after that a protection may be cast; so at a day after an exigent; but after appearance he cannot cast a protection in that terme, untill a new continuance be taken.

[n] Thirdly, no protection, either *profecturæ* or *moraturæ*, shall indure longer than a yeare and a day next after the *teste* or date of it. And so it is of an *essoigne de service le roy*. If a protection beare *teste 7. die Januarii*, and have allowance *pro uno anno*, the re-summons, re-attachement, or re-garnishment, may be sued 8. *Januarii* the next yeare; and yet that is the last day of the yeare.

And where Britton, treating of an essoigne beyond the Græcian sea, in a pilgrimage, &c. saith thus, [o] *ascun gent nequident se purchasent nos letters de protection patents durable a un an, ou a 2 ou a 3 ans, & jalameyns font attorneys generals, ausi per nos letters patents: & ceux font bien & sagement, car nul grand seignior, ne chivalier de nostre realme, ne doit prender chemyn sauns nostre conge, car issint poet le realme remainer disgarny de fort gente.*

Three things are hereupon to be observed, first, that this was a protection of grace, whereof more shall be said hereafter. Secondly, that it was for safetie of the great men of the realme, and that they should make generall atornies, so as no actions, or suits should be thereby staied. Thirdly, (by the way) that great men could not passe out of the realme without the king's licence. [p] A protection granted to one, &c. untill he returned from Scotland, was disallowed for the incertaintie of the time.

[q] To the fourth, the protection, as well *moraturæ* as *profecturæ*, must bee regularly to some place out of the realme of England, and that must be to some certaine place, as *super salva custodia Caliciæ*, &c. and not to Carlisle or Wales, which are within the realme, or to the like. But it may be to Ireland or Scotland; because they are distinct kingdomes; or to Calice, Aquitaine, or the like. But a protection, *quia moratur super altum mare*, will not serve, not onely because (as some thinke) that *mare non moratur*, but for the incertaintie of the place, and for that a great part of the sea is within the realme of England.

[r] To the fifth. In some actions, protections shall not be allowed by the common law; and in some actions they are ousted by act of parliament. Actions at the common law, as all actions that touche the crowne, as appeales of felony, and appeales of mayhem. [s] So where

[e] 35. H. 6. 3. 43. E. 3. 23. 43. E. 3 7. 4. H. 5. Protection 107.
[f] 45. E. 3. Protect. 37. 3. H. 6. 18. 30. 8. H. 6. 16. 9. H. 6. 36. 40. E. 3. 18. 32. E. 3. Protect 54. 21. E. 3 14. H. 4. 16. 45. E 3 tit protect. 40. 14. E. 3. Protect. 66. (2. Ro. Abr. 324.)
[g] 24. E. 3 26. 47. E. 3. 5. 5. H. 5. 5. 38. E. 3. 1. F. N. B. 28. g. 20. R. 2. Protect. 106. 22. H. 6. 28. 9. H. 6. 36 43 E. 3. 36. 17. E 3. 24. 25 E. 3. 43. 24. E. 3. 26. 13. E. 3. Protection 71. 14. E. 3. ibid. 65. 63. 20. E. 3. ibid. 84.
[h] 7. H. 4. 3. a.
[i] 9. E. 3. protect. 80. 81. 32. E. 3. ibid. 55. 16. E. 2. ibid. 77. 13. E. 3. ibid. 70. 41. E. 3. ibid. 95. 41. E. 3. 32. 42. E. 3. 9. 5. H. 5. 7. 3. H 4. 15. 2. R. 2. Protect. 45. 43. E. 3. ibid. 31. 2. H. 6 22. 21. H. 6. 41. 38. E. 3. 12. 7 H. 6. 21. 33. E. 3. Protect. 116. 4. H. 4. 4. 29. E. 3. 41. 45. E. 3. 24. 28. 11. E. 4. 7. F. N. B. 28. k. (11. Co. 5. b.)
[k] 3. H. 6. Protect. 2. 39 H. 6. 39. 44. E. 3. 12. 13. R. 2. ca. 16. 3. H. 4. 16. 11. H. 4. 7. 7. E. 4. 27. 28. H. 6. 1. 17. H. 6. protect. 56. 10. E. 3. 54. 13. E. 3. Amerciament 18. 7. Co. 7. 8. Calvin's cate 13. R. 2. cap. 16. (2. Ro. Abr. 322. *Ante* 69. b.)
[l] 4. H. 6. 22. 17. E. 3. 76. 33. E. 3. tit. Protect. 115. 34. E. 3. ibid. 124. 27. E. 3. 79. 29. E. 3. Protect. 85. 88. 2. E. 4. 15. 19. E. 3. Protect. 82. 79. 13. E. 3. ibid. 72. 9. E. 3. 21. 3. H. 6. 55. 4. H. 6. 22. 11. H. 6. 14. 14. H. 6. 22. 21. H. 6. 10. 27. H. 6. 4. 28. H. 6 1. 35. H. 6. 58. 44. E. 3. 2. 16. 48. E. 3. 8. 7. H. 4. 5. 14. H. 4. 23. 27. E. 3. 78.
[m] 22. E. 3. 4. 16. E. 3. Protect. 47. 44. E. 3. 16. 3. E. 3. Amerciament 18. 34. E. 3. Protection 123.
[n] 39. H. 6. 39. F. N. B. fol. 28. Fleta lib. 6. cap. 8. Temps E. 1. G and cape 26. (Post. 254. b.)
[o] Brit. fo. 282. 283. & 280. Fleta lib. 6. cap. 8. Accord.
[p] 1. E. 3. 25.
[q] 7 Co. 8. Calvin's case. 7. E. 4. 29. F. N. B. 38. c. g. h. 7. H. 4. 14. 19. H. 6. 35. 38. H. 6. 3. 32. H. 6. 3. R. 2. Rot. Parliament nu. 21. 22. E. 4. Protect. 18. 8. R. 2. ibid. 125. 11. H. 4. 57. Regist. judic. 14. 36. H. 6. tit. Protect. 27. 6. R. 2. ibid. 14. Regist. orig. 88. sæpe.
[r] Bract. lib 5. 139 140. Britton 181. Fleta lib. 6. cap. 7. 8. &c. 14. E. 2 Protect. 109. 34. E. 3. ibid. 122. 19 E. 3. ibid. 78. 33. E. 3. *ibid.* 99. 21. E. 3. 13.
[s] 10. H. 6. Protect. 105.

not of legitimacy, but merely to which husband the issue belonged. One of the two only remaining cases considerably extends the time beyond the forty weeks, for, in *Alsop and Stacey* the first of them, the issue was found legitimate, notwithstanding the lapse of forty weeks and *ten days* and the lewd character of the wife: and even as to *Thecar*'s case, which is the other of them, the issue having been born two hundred and eighty-two days, there was an excess of the forty weeks, though but a trifling one. The precedents, therefore, so far from corroborating lord Coke's limitation of the *ultimum tempus pariendi*, do, upon the whole, rather tend to shew, that it hath been the practice in our courts to consider forty weeks merely as the more *usual* time, and consequently not to decline exercising a discretion of allowing a longer space, where the opinion of physicians or the circumstances of the case have so required.—In the course of our enquiries into the subject of this note, we were curious to know the general sentiments of that eminent anatomist, Dr. Hunter, on three interesting questions. These were, what is the *usual* period for a woman's going with child, what is the *earliest* time for a child's being born alive, and what the *latest*. The answer, which he obligingly returned through a friend, we have liberty to publish; and it was expressed in the words following. 1. *The usual period is nine calendar months; but there is very commonly a difference of one two or three weeks.* 2. *A child may be born alive at any time*

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technical sense, in which our lawyers use the word, and Chancery exercises a jurisdiction over trusts; for, in this latter, trusts are invariably applied to *property*, especially *real estates*, and not to the *person*. However we must not be understood by these remarks

where the king is sole partie, no protection is to bee allowed; in like manner in a *decies tantum*, where the king and the subject are plaintifes; but, in late acts of parliament, protections in personall actions are expresly ousted. A protection may be cast against the queene the consort of the king.

[t] In a writ of dower *unde nihil habet*, no protection is allowable; because the demandant hath nothing to live upon. Otherwise it is in a writ of right of dower. Likewise in a *quare impedit*, or assise of darreine presentment, a protection lieth not, for the eminent danger of the laps. Neither lieth a protection in an assise of *novel disseisin*; because it is *festinum remedium*, to restore the disseisee to his freehold, whereof he is wrongfully and without judgement disseised. [u] In a *quare non admisit*, a protection is not allowable; because it is grounded upon the *quare impedit*; and the like in a certificate upon an assise for the like reason; and *sic de similibus*. A protection, *quia profecturus*, is not allowable (as hath beene said) in any action commenced before the date of the protection, unlesse it bee in a voyage royall. [w] An infant is vouched, and at the *pluries venire facias*, a protection was cast for the infant; and disallowed, because his age must be adjudged by the inspection of the court.

[t] 39. H. 6. 39 43. E. 3. 6 & 32. 27. H. 6. 1. F. N. B. 28. 17. E. 3. 23. 4. Co. 35. Bozom's case. Bract. lib. 5. fo. 139. 140. (2. Ro. Abr. 325. 326.)
[u] 13. E. 3. tit. Protection 52. 12. E. 3. ibid. 69. 31. E. 1. ibid. 112.
[w] 19. E. 2. Protect. 111. 32. E. 3. ibid. 54.

[x] By act of parliament no protection shall be allowed in an attaint; (but at the common law a protection for one of the petite jury hath put the plea without day for all); nor in an action against a gaoler for an escape; nor for victuals taken or bought upon the voyage or service; nor in pleas of trespasse, or other contract, made or perpetrated after the date of the same protection.

[x] 23. H. 8. c. 3. 34. E. 1. Protection 38. 7. H. 4. c. 4. 1. R. 2. cap. 8.

[y] In a writ of error brought by an infant upon a fine levied, the plaintife sued a *scire facias* against the conusee, for whom a protection was cast, and the court examined the age of the plaintife, and by inspection adjudged him within age, and recorded the same, and then allowed the protection; and this can bee no mischiefe to the plaintife, whereupon it followeth, that, albeit the plaintife dyeth afterwards before the fine be reversed, yet, after his age adjudged and recorded, his heire shall in that case reverse the fine for the nonage of his ancestor. [a] And so it was resolved in the case of Kekewiche (1) in a writ of error brought by him by the opinion of the whole court of the king's bench. Otherwise it is, if the plaintife dyeth before his age inspected.

[y] 21. E. 3. 24. 31. E. 3. Protect. 97. 5. E. 4. 50. 35. H. 6. 43. 46. 8. E. 4. 8. 17. E. 3. 22. 13. E. 3. Protect. 73. (Post. 380. b. Mo. 78. 189. Cro. Jam. 230.)
[a] Pasch. 12. Ja. Regis in the King's Bench. Post. 300.

[b] Note in judiciall writs, which are in nature of actions, where the partie hath day to appeare and plead, there a protection doth lie; as in writs of *scire facias* upon recoveries, fines, judgements, &c. Albeit by the statute of W. 2. essoignes and other delayes bee ousted in writs of *scire facias*, yet a protection doth lie in the same. So it is in a *quid juris clamat*, and the like. But in writs of execution, as *habere facias seisinam*, *elegit*, execution upon a statute, *capias ad satisfaciendum*, *fieri facias*, and the like, there no protection can bee cast for the defendant; because he hath no day in court, and the protection extendeth onely *ad placita & querelas*, and must be allowed by the court, which cannot bee but upon a day of appearance.

[b] 13. E. 3. Protect. 72. Fleta l. 2. c. 12. 40. E. 3. 18. 48. E. 3. 18. 19. 37. H. 6. 32. 21. E. 4. 19. 15. H. 7. 8. 47. E. 3. 5. 17. E. 3. 68. 14. E. 3. Protect. 64. W. 2. cap. 45.

[c] In a writ of disceit brought against him, that obtained and cast a protection upon an untrue surmise in delay of the plaintife, that protection is allowable. In an action brought upon the statute of labourers a protection doth lie, *& sic de similibus*.

[c] 20. E. 3. Protect. 83.

[d] To the sixth, no writ of protection can be allowed, unlesse it be under the great seale, [*] and it is directed generally.

[d] 35. H. 6. 2. Artic. super Cart. 6. 46. E. 3. Petition 19.
[*] 2. Co. 17. Lane's case. 8. Co. 68. Trallop's case. 20. H. 6. 25. 2. E. 4. 4. 38. H. 6. 23.

[e] To the seventh, the courts of justice, where the protection is cast, are to allow, or disallow of the same, bee they courts of record, or not of record, and not the sherife, or any other officer or minister.

[e] 43. E. 3. Protect. 96.

[f] To the eighth, the protection may be cast, either by any stranger, or by the partie himselfe. An infant, feme covert, a monke, or any other, may cast a protection for the tenant or defendant. And this difference there is when a stranger casteth it, and when the tenant or defendant casteth it himselfe; [g] for the defendant or tenant casting it, he must shew cause wherefore he ought to take advantage of the protection; but an estranger neede not shew any cause, but that the tenant or defendant is here by protection.

[f] 21. E. 4. 18.
[g] 38. H. 6. 23.

[h] As to the ninth, a protection may be avoyded three manner of wayes. First, upon the casting of it before it be allowed. Secondly, by repeale thereof after it be allowed. (2) By disallowing of it many wayes, as for that it lieth not in that action, or that he hath no day to cast it, or for materiall variance betweene the protection and the record, or that it is not under the great seale, or the like. [i] Thirdly, after it be allowed, by *innotescimus*; as if any tarry in the country without going to the service for which he was retained, over a convenient time after that he had any protection, or repaire from the same service, upon information thereof to the lord chancellor, he shall repeale the protection in that case by an *innotescimus*. But a protection shall not be avoyded by an averment of the partie in that case; because the record of the protection must be avoyded by matter of as high nature.

[h] 44. E. 3. 12. 47. E. 3. 6.
[i] 13. R. 2. c. 16. 11. H. 4. 70. 7. H. 6. 22. 22. H. 6. 50. 30. H. 6. 3. 19. H. 6. 35. 21. E. 4. 20. 1. H. 6. 6. 42. E. 3. 9. 44. E. 3. 2. 39. E. 3. 4. 5. 20. E. 3. Protect. 80. 34. E. 3. ibid. 119.

There

(1) S. C. Mo. 844.—(2) The sense requires *thirdly* here; and that, where *thirdly* is, it should be *fourthly*. But the print in the former editions is, as we have given it.

time from three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time. At six months it cannot be. 3. I have known *a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months, and* believe *two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.*

remarks to controvert the *present* legality of the jurisdiction thus exercised in Chancery over infants: our intent being simply to shew, that such jurisdiction is not, *as far as yet appears*, of *ancient* date; and that, though it is now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Our conjecture, as to the late commencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, which have been obligingly communicated to us by a respectable gentleman in the Register's office. According to these, the first instance to be found of a guardian appointed by the chancellor, *on petition without bill*, was in 1696,† in the case of Hampden.

† In a MS. note, of Lord Ch. ... Sir Dudley Ryder ... there is the following case.
"In re Lord Abergavenny Nov. 6. 1744."
"Lord A. being above ye age of 14, & his father having died intestate without appointing him a guardian, petitioned to have Mr Pelham appointed his guardian, & to have a maintenance allowed him, & that a receiver might be appointed.
Lord Chancellor, — This court has never appointed a receiver without a bill depending; & Sir Joseph Jekyll was the first who ever appointed a guardian in this summary way without a bill. Lord A. being in court nominated Mr Pelham, & it was referred to the master to fix the maintenance." See acc. 3. Bro. Chan. Cas. 500.

[k] 44. E. 3. 4. 12. 47. E. 3. 6. 34. E. 3. Protect. 119. 28. H. 6. 3. 34. H. 6. 22. 30. H. 6. 3. 32. H. 6. 4.

[k] There is a clauſe in the protection to this effect, *præſentibus minime valituris, ſi contingat ipſum, &c. à cuſtodia caſtri prædicti recedere.* Or *ſi contingat iter illud non arripere, vel infra illum terminum à partibus tranſmarinis redire.* Whereupon there be two concluſions to bee obſerved.

Firſt, that though the protection be allowed by the court for a yeare, yet if it be repealed by an *inuoteſcimus*, that the re-ſommons or re-attachment ſhall be granted upon the repeale within the yeare; for the protection that was allowed had the ſaid clauſe in it. And of that opinion be our latter bookes; and the repeale by *inuoteſcimus* ſhould ſerve for little purpoſe, if the law ſhould not be taken ſo.

Secondly, that albeit he, that had the protection either *moraturæ* or *profecturæ*, returne into England, and haply be arreſted and in priſon, yet, if he came over to provide munition, habiliments of warre, victuals or other neceſſaries, it is no breach of the ſaid conditionall clauſe, nor againſt the act of 13. Richard 2. cap. 16. for that in judgement of law comming for ſuch things as are of neceſſity for the maintenance of the warre, *moratur*, according to the intention of the protection and ſtatute aforeſaid. And thus much of the two firſt protections, *cum clauſula volumus*, *profecturæ* and *moraturæ*.

[l] Regiſtrum 281. b. F. N. B. 28. b. 33. H. 8. ca. 29. in the Preamble 41. E. 3. tit. Execution 38. 18. E. 3. ibid. 56. 27. E. 3. 88. b. 4. E. 4. 16. 3. Eliz. Dier. 197. Rot. Par. 27. E. 3. part. 1 m. 2.

[m] 25. E. 3. cap. 19. (Cro. Cha. 389. 390. Hob. 115.)

[l] As to the third protection *cum clauſula volumus*, the king by his prerogative regularly is to be preferred in payment of his duty or debt by his debtor before any ſubject, although the king's debt or duty be the latter; and the reaſon hereof is, for that *theſaurus regis eſt fundamentum belli, & firmamentum pacis.* (1) And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he ſhould not be ſued or attached untill hee paid the king's debt. But hereof grew ſome inconvenience, for to delay other men of their ſuits, the king's debts were the more ſlowly paid. And for remedie thereof [m] it is enacted by the ſtatute of 25. E. 3. that the other creditors may have their actions againſt the king's debtor, and proceed to judgement, but not to execution, unleſſe he will take upon him to pay the king's debt, and then he ſhall have execution againſt the king's debtor for both the two debts.

This kind of protection hath (as it appeareth) no certaine time limited in it. But in ſome caſes the ſubject ſhall be ſatisfied before the king; [n] for regularly whenſoever the king is intitled to any fine or duty by the ſuit of the party, the party ſhall be firſt ſatisfied, as in a *decies tantum*. And ſo if in an action of debt, the defendant denie his deed, and it is found againſt him, he ſhall pay a fine to the king, but the plaintife ſhall be firſt ſatisfied, and ſo in all other like caſes. And ſo it is in bills preferred by ſubjects in the Star-chamber, there coſts and dammages (if any be) ſhall be anſwered before the king's fine, as it is daily in experience.

[n] 41. E. 3. 15. 17. E. 3. 73. 29. E. 3. 13. 4. E. 4. 16.

The fourth protection, *cum clauſula volumus* is, when a man ſent into the king's ſervice beyond ſea is impriſoned there, ſo as neither protection *profecturæ* or *moraturæ* will ſerve him; and this hath no certaine time limited in it, [o] whereof you ſhall read at large in the Regiſter, and F. N. B.

[o] Regiſt. ſæpe. F. N. B. 28. c.

[p] Now are we at length come to protections *cum clauſula nolumus*, all which, ſaving one, are of grace, and, as hath beene ſaid, are implyed under the generall protection; for as Fitzherbert ſaith, every loyall ſubject is in the king's protection. Of theſe protections of grace, you ſhall not read much in our yeare bookes; becauſe they ſtayed no actions or ſuites. [q] Of the divers formes of theſe you ſhall read at large in the Regiſter, and F. N. B. which were too long and needleſſe to be here recited.

[p] Vide 7. Co. 8. 9. Calvin's caſe.

[q] Regiſter 280. &c. F. N. B. 29. A. B. C. D. E. F. G. H. Regiſter 280. Statut. de 14. E. 3. F. N. B. 30 A.

The protection *cum clauſula nolumus*, that is of right, is, that every ſpirituall perſon may ſue a protection for him and his goods, and for the fermors of their lands and their goods, that they ſhall not be taken by the king's purveyor, nor their carriage or chattels taken by other miniſters of the king, which writ doth recite the ſtatute of 14. E. 3.

Of theſe protections I cannot ſay any thing of mine owne experience, for albeit queene Elizabeth maintained many warres, yet ſhee granted few or no protections; and her reaſon was, that he was no fit ſubject to be imployed in her ſervice, that was ſubject to other mens actions, leſt ſhe might be thought to delay juſtice (2).

Section 200.

ENTRE & profeſſe en religion. *LE 5. eſt un home que eſt enter et profeſſe en religion.* *Si tiel* THE fifth is, where a man entred and profeſſed in religion. If *ſuiſt*

(1) See ante 36. b.—(2) Since lord Coke's time protections have fallen wholly into diſuſe; lord Cutts, a famous officer in the reign of William the third, being the laſt perſon indulged with one, of whom our Reports take notice. 3. Blackſt. Comm. 8th. ed. 289. & 3. Lev. 332. However it is ſtill uſual in acts of parliament to guard againſt the uſe of protections in ſuits, to which perſons acting under the authority of the legiſlature are parties.

Hampden. But ſince that time, the court of Chancery hath exerciſed the power of appointing guardians, without its being once called into queſtion. Therefore in the caſe of lady Teynham againſt Mr. Lennard, which was heard on an appeal to the lords in 1724, the counſel for the reſpondent very properly ſtated it as a thing fixed, that the lord chancellor was intruſted with that part of the crown's prerogative, which concerned the guardianſhip of infants. 1. Brown. Caſ. in Parl. 544. Under the ſame idea too, the laſt marriage-act refers to the chancellor for the appointment of a guardian to conſent to marriage, where the infant is without aguardian and the mother is not living. 26. G. 2. c. 33. §. 11.

The *third* kind of guardian, not hitherto mentioned, is guardian by *appointment of the eccleſiaſtical court.* The right of appointing guardians for the perſonal eſtate, and, if there is no other guardian by tenure or otherwiſe, for the perſon alſo, is, we underſtand, claimed by the eccleſiaſtical court. Swinburne takes notice of ſuch a guardian; but confines his obſervations, on the appointment and his extent of power, to the cuſtom within the province of York. Swinb. on Teſtam. 11.

ſee a case of similar nature in this subject in where the child was illegiti- namely, Horner v. Liddell decided by Sir Wm Scott in May 1799. & published by Dr Croke & Hughes in 1800. See also Jac.

ſuiſt un action, le tenant ou defendant, poit monſtrer, que tiel eſt enter en religion en tiel lieu en lorder de Saint Benet, *& la eſt moigne profeſſe, ou en l'order des friers preachers, ou minors, & la eſt frere profeſſe, & iſſint des auters orders de religion, &c. & demaundera judgement ſil ſerra reſpondue. Et la cauſe eſt; pur ceo que quant un home entra en religion, & eſt profeſſe, il eſt mort en ley, & ſon fits, ou auter couſin, maintenant luy enheritera, auxy bien ſicome il fuit mort en fait. Et quant il entra en religion, il poit faire ſon teſtament, & ſes executors; les queux executors averont un action de det due a luy devant lentre en religion, ou auter action que executors poient aver, ſicome il fuit mort en fait. Et ſil ne fait ſes executors quant il entra en religion, donques l'ordinarie poit committer l'adminiſtration de ſes biens a auters homes, ſicome il fuit mort en fait.*

ſuch a one ſue an action, the tenant or defendant may ſhew, that ſuch a one is entred into religion in ſuch a place, into the order of Saint Benet, and is there a monke profeſſed, or in the order of friers minors or preachers, and is there a brother profeſſed, and ſo of other orders of religion, &c. and aſke judgement if he ſhall be anſwered. And the cauſe is this; that when a man entreth into religion, and is profeſſed, he is dead in the law, and his ſonne, or next couſin, incontinent ſhall inherit him, as well as though he were dead indeed. And when he entreth into religion, he may make his teſtament and his executors, and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed. And if that he make no executours when he entreth into religion, then the ordinary may commit the adminiſtration of his goods to other, as if he were dead indeed.

[a] It is to be obſerved, that a man doth enter into religion at his firſt comming, and liveth under obedience; but hee is not profeſſed, till a yeare be paſt, or ſome time of probation. And he is ſaid to be profeſſed, when he hath taken the habit of religion, and vowed three things, obedience, wilfull poverty, and perpetual chaſtity. And therefore our authour ſaith here, *enter & profeſſe.*

[a] Bract. lib. 5. fo. 415. 421. Britt. ca. 22. fo. 39. Fleta lib. 6. ca. 41. 5. E. 2. tit. Nonabil. 26. 3. H. 6. 24. 1. E. 3. 9. 7. H. 4. 2. Doctor & Stud. 141. 21. R. 2. Judgment 263. 11. R. 2. ibid. 107. (Poſt. 136. a.)

En l'order, des freres preachers, ou [b] *minors.* It appeareth in our bookes, that of friers there were foure orders, viz. minors, auguſtins, preachers, and carmelites; and the *franciſcani*, *capuchini*, and *obſervantes*, are included under the title of minors; and they were called obſervants, becauſe they bee not conventuall or joyned together in a brotherhood, but live ſeparately, and bound themſelves to obſerve more ſtrictly the rights of their order. [c] *Cum quis ſemel ſe religioni contulerit, renunciat omnibus quæ ſeculi ſunt, habita diſtinctione, utrum habitum probationis ſuſceperit, vel habitum profeſſionis.*

[b] 4. H. 4. ca. 17. 25. H. 8. ca. 12.

[c] Bracton. fo. 421. b.

Il eſt mort en ley. *Civiliter mortuus*, or *mortuus ſeculo.* [d] There is a death in deede, and there is a civill death or a death in law, *mors civilis* and *mors naturalis*, as here it appeareth; and therefore to ouſt all ſcruples, Leaſes for life are ever made during the natu-rall life, &c. (1) If the father enter into religion, then ſhall his ſonne and heire have an aſſiſe of Mordanceſter, and the writ ſhall ſay, [e] *Si W. pater, &c. die quo obiit habitum religionis aſſumpſit, in quo habitu profeſſus fuit ut dicitur.*

[d] Bracton, fo. 301. 426. Britton fo. 226. 250. 251. Fleta lib. 6. ca. 41.

[e] F. N. B. 196. 5. E. 4. 3.

Auxibien

(1) See Acc. 2. Co. 48. b. Blackſt. Comm. 8. ed. v. 1. p. 132. v. 2. 121. But by lord Coke's obſerving here, that *natural* is added to *ouſt all ſcruples*, it ſeems as if he did not conceive it to be abſolutely neceſſary.

ſtit. ed. 99. b. In a caſe, firſt before the King's Bench in lord Hale's time, he admitted the right of the eccleſiaſtical court to appoint a curator of the perſonal eſtate; and after his death the court inclined to the ſame opinion. 2. Lev. 162. T. Jo. 90. In another caſe ſoon after, the court of King's Bench allowed the right as to the infant's *portion*, but denied it over the *perſon*. 3. Keb. 384. In the next caſe on the ſubject, the queſtion as to the right was largely debated on a plea in prohibition. This alledged, that by the common law uſed and approved in England, if any perſon by his will deviſes any goods to his children, the ordinary, before whom the will is proved, hath uſed to commit the cuſtody of the ſons and their portions till fourteen, and of the daughters and their portions till twelve, except where they are in the cuſtody of any other by reaſon of any tenure or by the father's appointment; and if any perſon detained ſuch infants or their portions, the ordinary hath alſo uſed to compel the delivery of them by eccleſiaſtical cenſures. 2. Lev. 217. But on a demurrer this plea was over ruled and the prohibition ordered to ſtand; the latter being founded on the libel in the ſuit in the eccleſiaſtical court, which had ſtated the right in a more *extenſive* way; for the libel was, that by the eccleſiaſtical law, every perſon having the tuition of any infant under age, by the will of the father or *per judicem competentem*, ought to have the cuſtody of the infant and ſuit in the eccleſiaſtical court for the detainer. After this caſe we find nothing on the ſubject for a long time. But, in a caſe of the late king's reign, Lee juſtice caſually takes notice of the eccleſiaſtical court's appointment without objection, ſaying, that the courſe of the ſpiritual court is, that if the infant is under ſeven years, they chuſe a curator, but if he is ſeven he chuſes. Fitzgib.

Auxibien come il fuit mort en fait. But yet to three purpoſes, profeſſion, that is, the civill death, hath not the effect of a naturall death.

First, this civill death ſhall never derogate from his owne grant, nor be any mean to avoid it. And therefore if tenant in taile maketh a feoffment in fee, and entereth into religion, his iſſue ſhall have no formedon during his life; becauſe that ſhould be in derogation of his own grant, and be a meane to avoyd the ſame. (F. N. B. 213 A.)

[f] Secondly, it ſhall never give her availe, without whoſe conſent he could not have entered into religion, and therefore his wife after his civill death ſhall not be indowed, untill his naturall death. But if the wife, after her huſband hath entered into religion, alien the land which is her owne right, and after her huſband is deraigned, the huſband may enter and avoid the alienation. [f] 32. E. 1. Dower 176 31. E. 3. Colluſion 29. 33. E. 3. Entre conge. 52. 21. E. 4. 14. (Ante 33. b.)

Thirdly, it ſhall not worke any wrong or prejudice to a ſtranger that hath a former right; and therefore if the diſſeiſor entereth into religion, and is profeſſed, ſo as the land deſcends to his heire, yet this deſcent ſhall not tolle the entrie of the diſſeiſee.

[g] A woman cannot be profeſſed a nunne during the life of her huſband. But ſome do hold a diverſitie, [b] that, *ante carnalem copulam*, the huſband or wife may enter into religion without any conſent, but *poſt carnalem copulam* neither of them can without conſent of other. [g] 5. E. 4. 3. a. [b] 18. H. 6. 33. per Forteſc.

[i] But if a man holdeth lands by knight's ſervice, and is profeſſed in religion, his heire within age, he ſhall be in ward. [k] If I be diſſeiſed, and my brother releaſeth with warranty, and is profeſſed in religion, and the warrantie deſcendeth upon me, this warrantie ſhall binde me; becauſe I am his heire, and ſuch inheritance as my brother had ſhall deſcend upon me. [i] 31. E. 3. Colluſion 29. [k] 34. E. 3. Garranty 71. Vid. the chapter of Warranty, ſect.

[l] And if one joyntenant be profeſſed in religion, the land ſhall ſurvive to the other If a man or a woman be profeſſed in religion in Normandie, or in anie other foraine part, ſuch a profeſſion ſhall not diſable them to bring any action in England; becauſe it wanteth triall, but they muſt be profeſſed in ſome houſe of religion within this realme, for that may be tried by the certificate of the ordinarie, ſo as of foraine profeſſions the common law taketh no knowledge (1). [m] And yet in ſome caſe one that is profeſſed in religion within the realme ſhall have an action; as if he be made an executor, or if he be an adminiſtrator, he ſhall maintaine an action, not in his owne right, but in right of the dead. [l] 21. R. 2. Judgm. 263. (Poſt. 181. b.) [m] 10. E. 3. 511. 14. E. 3. Executers 87. 5. H. 7. 25. 21. H. 6. 30. 3. H. 6. 24.

[n] If a monke be made a biſhop, or a parſon, or a vicar, he ſhall have an action concerning his biſhoprick, parſonage, or vicarage, & *ſic de ſimilibus*. [n] 44. E. 3. 9. Nonability 3. 14. H. 8. 16.

[o] And if a monke be farmer of the king, yeelding a rent, he ſhall have an action concerning that farme. And albeit Littleton ſpeaketh generally of one that is profeſſed in religion, yet muſt it not be underſtood of the ſoveraigne or head of the religious houſe, as of the abbot, prior, and the like; [*] for albeit they be profeſſed in religion, yet by the policie of the law, they are perſons able to purchaſe, and to implead, and to be impleaded, to ſue, and to be ſued for any thing that concernes the houſe of religion; for otherwiſe the houſe might be prejudiced, and other men alſo of their lawful actions. And this is the ancient law of England, as it appeareth in theſe words, [p] *des biens des gents de religion appent l'action al chiefe en ſon noſme pur luy & ſon covent.* But what if a monke, &c. were beaten, wounded, or impriſoned, &c. doth the law give no remedie therefore? Yes, verily; [q] for in that caſe the abbot and the monke ſhall joyne in an action againſt the wrong doer; and if the writ be, *ad damnum ipſius prioris*, the writ is good; and if it be *ad damnum ipſorum*, it is good alſo. Alſo if a monke be by conſpiracie falſely and maliciouſly indicted of felony and roberie, and afterwards is lawfully acquitted, his ſoveraigne and he ſhall joyne in a writ of conſpiracy and the like. And where Littleton ſpeaketh of a man that is profeſſed in religion, the ſame law is of a nunne, *ſanctimonialis*, *mutatis mutandis*. [o] 2. H. 4. 7. 8. H. 5. 6. 7. E. 4. 30. 44. E. 3. 4. 20. E. 3. Vill. 10. & Nonability 9. 49. E. 3. 4. [*] Bract. fo. 415. 416. 429. Mir. c. 2. ſect. 14 14. H. 4. 37. b. 5. H. 7. 26. Vid. ſect. 296. 14. E. 4. 36. [p] Mir. ubi ſupra. [q] 22. Aſſ. 87. 21 E. 3. 41. 22. 22. E. 3 2. 37. H. 6 8. 32. H. 6 36. Bract. l. 5. f. 416. 420. 13. E 3. Bre. 261. 22. Ed. 3 2. 38. H. 6. 7. b. 24. E. 3. 34. b. 45. 7. R. 2. Nonability 3. 9.

[r] A wife is diſabled to ſue without her huſband, as much as a monke is without his ſoveraigne; and yet we read in books, that in ſome caſes a wife hath had abilitie to ſue and be ſued without her huſband: [s] for the wife of Sir Robert Belknap, one of the juſtices of the court of common pleas, who was exiled or baniſhed beyond ſea, did ſue a writ in her owne name, without her huſband, he being alive; whereof one ſaid, *ecce modo mirum, quod fœmina fert breve regis non nominando virum conjunctum robore legis.* [r] 4. H. 3. Bre 766. [s] 2. H. 4. f. 7. a. (1. Bulſtr. 140. Mo. 7. 666. 851. 1. Ro. Rep. 400.)

[t] King Edward the third brought a *quare impedit* againſt the lady of Maltravers; and ſhe pleaded, that ſhe was covert of baron; whereunto it was replyed for the king, that her huſband the lord Maltravers was put in exile for a certaine cauſe, and ſhe was ruled to anſwer. [t] 10. E. 3. 53.

[u] King Henrie the fourth brought a writ of ward againſt Sibel B. who pleaded, that ſhee was covert baron, &c. whereunto it was replied for the king, that her huſband for a crime, that he had committed againſt the king and the peeres, was relegate or exiled into Gaſcoigne, there to remaine untill he obtained the king's grace: and Gaſcoigne chiefe juſtice, *ex aſſenſu ſociorum*, awarded that ſhe ſhould anſwer. [u] 1. H. 4. 1. b.

Sir Tho. Egerton, lord chancellor, in his argument which he publiſhed apart by himſelfe in Cal-

(1) See ante 3. b. n. 7. to which add the arguments in the caſe of *Thornby* and *Fleetwood* 1 Stra. 347. Com. 207. 10. Mod. 113. 356. 406.

Fitzgib. 164. However, in a looſe note of a ſtill later caſe, lord Chancellor Hardwicke is made to ſay, that only guardians *ad litem* can be appointed by the eccleſiaſtical court. 14. Vin. Abr. 176. pl. 7. in a note. In another caſe, the report of which is more to be relied upon, the ſame reſpectable judge reprobated it, as a preſumption in the eccleſiaſtical court to appoint a guardian of the *perſon* and *eſtate*, and declared their appointment of any, except when a ſuit was depending, to be an interference with his power as chancellor; and ſo diſpleaſed was he in the inſtance before him, as to conclude with recommending to the attorney-general, to conſider, whether a *quo warranto* would not lie againſt the eccleſiaſtical court. 3. Atk. 631. Under a like apprehenſion of the ſubject, the preſent chief juſtice of the King's Bench, in Miſs Catley's caſe, ſpoke of the appointment by the eccleſiaſtical courts as confined to guardians *in litem*, and therefore as perfectly inſignificant. 4. Burr. v. 3. p. 1436. Theſe authorities being brought before the reader, we ſhall leave him to his own judgment, with this further information only, that, in the warm debates in parliament about the laſt marriage act, this ſpecies of guardianſhip is ſaid to have been incidentally diſcuſſed.

The *fourth* kind of guardian, not yet enumerated, is the guardian *ad litem*. But of this *ſpecial* guardian it may ſuffice for the preſent purpoſe to obſerve, that the power of appointing ſuch is incident to all courts; and that the king *may*, as it is ſaid, by letters patent appoint a guardian to proſecute or defend for an infant in ſuits generally, though ſuch appointments have been long out of uſe. F. N. B. 27. L. See further as to guardian *ad litem* Poſt. 135. b.

In the preceding notes about guardianſhip, we have purpoſely confined ourſelves to the ſubject excluſive of the *royal family*. Their caſe is too delicate to warrant our touching on the ſubject without better materials, than we are at preſent poſſeſſed of. Therefore

Calvin's caſe *de poſt natis* demanded what former preſident there was for the warrant of the lady Belknap's caſe in 2. H. 4. 7. (1) which occaſioned me to ſearch, and upon ſearch I found, that the like judgment had bin given before at the parliament holden in Craſt. Epip. an. 19. Edw. 1. where the caſe was, that Thomas of Weyland being abjured the realme for felony in the yeare before, Margerie de Moſe his wife, and Richard ſonne of the ſaid Thomas, exhibited their petition of right into the parliament, for the manor of Sobbir, wherein her huſband had but an eſtate for life joyntly with her, and the inheritance in Richard the ſon by fine. The earle of Glouceſter, lord of the fee, (who, claiming the land by eſcheat, had taken the poſſeſſion thereof) alleged, *quod non fuit juri conſonum, quod aliqua fœmina intraret in aliquas terras vivente marito ſuo, eo quod præfatus Thomas abjuravit regnum, & adhuc vivit; & aſſerit idem comes nunquam hujuſmodi caſum accidiſſe, & inde petit poſt multas allegationes, quod poſſit prædictum manerium tenere ut eſchaetam ſuam. Super quo per ipſum dominum regem præceptum fuit, quod tam juſtic' ſui de utroque banco, quam cæteri de regno ſuo, tam milites quam ſervientes, in legibus & conſuetudinibus Angliæ experti, mandarentur, quod eſſent coram rege & ejus conſilio, &c. ad certiorandum ipſum regem, qualiter & quomodo in caſu iſto fuerit procedendum, & qualiter temporibus præteritis & anteceſſorum ſuorum in caſibus conſimilibus fieri conſuevit, & interim ſcrutantur recorda de conſimilibus, ubi recitantur duo vel tres conſimiles caſus. Et quia, licet prius non videbatur aliquibus juri conſonum fuiſſe, quod uxor in vita viri ſecundum ſanctam eccleſiam, qualitercunque deliquiſſet quoad forum regium, non poſſet nec deberet à viro ſuo ſeparari, & ſic quicquid foret in poſſeſſione uxoris converteretur in poteſtatem viri ſui, & hoc manifeſte immineret contra conſuetudinem regni; & etiam quia quidam dubitabant, quod de poſſeſſionibus & bonis uxoris vir poſſit aliqualiter ſuſtentari: tamen coram conſilio domini regis, vocatis theſaurar' & baronibus & juſticiariis de utroque banco, concordatum eſt, quod prædicta Margeria rehabeat talem ſeiſinam, &c. ſecundum purportum finis prædict. &c.* (2) *Patet etiam conſimile exemplum tempore Henrici patris regis.* I have cited this ſolemne reſolution the more at large; becauſe there be many excellent things to be obſerved in it: ſo as by that which hath beene ſaid, it plainly appeareth, that this opinion, concerning the hability of the wife of a man abjured or baniſhed, was not firſt hatched by the judges in Henry the fourth's time. And here is to be obſerved, that an abjuration, that is, a deportation for ever into a forreine land, like to profeſſion, (whereof our author ſpeaketh here) is a civil death; and that is the reaſon that the wife may bring an action, or may be impleaded during the naturall life of her huſband. And ſo it is, if by act of parliament the huſband bee attainted of treaſon or felony, and ſaving his life, is baniſhed for ever, as Belknap, &c. was, this is a civill death, and the wife may ſue as a *feme ſole*. And hereby you may underſtand your bookes, which treat of this matter. But if the huſband, by act of parliament, have judgement to be exiled but for a time, which ſome call a relegation, that is no civill death (3). And in 8. E. 2. an abjuration is called a divorce betweene the huſband and wife. *Sed opus eſt interprete*; for by law no ſubject can be exiled or baniſhed his country, whereby he ſhall *perdere patriam*, but by authority of parliament, or in caſe of abjuration, and that muſt be upon an ordinary proceeding of law, as it was in this caſe of Weyland.

Another example we have in our bookes to this effect. If the huſband had aliened the land of his wife, and after had committed felony and beene abjured the realme, the wife ſhall have a *cui in vita* in his life time, agreeable with the ſaid reſolution in parliament: for that the abjuration was a civill death (4).

See in the Regiſter, a woman was baniſhed out of the towne of Calice for adultery, by the law or cuſtome of that place, and there appeareth *carta pardonationis pro muliere bannita. Sed nos non habemus talem conſuetudinem.*

[*a*] But by the common law, the wife of the king of England is an exempt perſon from the king, and is capable of lands or tenements of the gift of the king, as no other feme covert is, and may ſue and be ſued without the king; for the wiſedome of the common law would not have the king (whoſe continuall care and ſtudy is for the publike, *& circa ardua regni*) to be troubled and diſquieted for ſuch private and petty cauſes! ſo as the wife of the king of England is of ability and capacity to grant and to take, to ſue and be ſued as a feme ſole by the common law.

[*b*] And ſuch a queene hath many prerogatives, as, ſhe ſhall find no pledges, for ſuch is her dignity, as ſhe ſhall not be amerced.

The queene, nor the king's ſonne, are reſtrained by the ſtatute of 1. H. 4. cap. 6. concerning grants by the king.

[*c*] In a *quare impedit* brought by her, ſome ſay, that plenarty is no plea, no more than in the caſe of the king.

[*d*] If any bailife of the queene's bring an action concerning the hundred, he ſhall ſay, *in contemptum domini regis & reginæ.*

The

Pl. in Parliam. 19. E. 1.

See an observat^n. in Lord Coke's account of this case of Weyland in MS. Reading on Statute of 23. Hen. 8. ch. 6. concerning recognizance Purge

Note the ancient triall of difficult matters in law.

The great authority of judicial records and precedents.

A ſolemne reſolution of the law in this point.

(3. Inſt. 217.)
8. E. 2. Coron. 425.
So reſolved in parliament upon the making of the ſtatute of 35. E. 1. ca. 1. exilium Hugonis de Spencer patris & filii tempore E. 2.
31. E. 1. Cui in vita 31.
(Ante 3. a.)

Regiſt. fol. 312. b.

[*a*] Vide in my preface to the ſixt booke. This was law before the Conqueſt. 10. E. 3, 26. b. 30. E. 3. 5. 18. E. 3. 1. 22. E. 3. 21. 49. E. 3. 4. 49. Aſſ. 8. 11. H. 4. 67. 14. Ed. 3. Voucher 110. 20. E. 3. Nona. 9. 31. E. 3. Quar. imp. 146. 3. H. 7. 14. 19. H. 6. 2. 28. H. 6. 13. 7. H. 7. 7. a. 26. H. 6. Aid le roy 24. Flet. li. 2. ca. 63. in Fine. Pl. Com. 231. Stanf. Prær. 10. b. (Ante 3. a.)
[*b*] 18. E. 3. 2. 33. E. 3. Brief 916. F. N. B. 101. a.
[*c*] 18. E. 3. 32. 24. E. 3. 35. 75.
[*d*] 32. E. 3. Bre. 346. 9. E. 3. 33.

(1) See Elleſm. Argum. in the caſe of the *poſt nati* 56.—(2) The whole record of Weyland's caſe is amongſt the Collection of Parliamentary Records lately publiſhed; and by this it appears, that lord Coke is not very accurate in the *words* of his extract. 1. Parl. Rec. 66. Amongſt other deviations from the record, one is, that he mentions *two or three like caſes* to have been recited, whereas in the record the *only one* taken notice of is that of Matilda the wife of Robert Ciſſor, in the reign of Henry the third. —(3) But though it is not a civil death, yet for the time the effect is the ſame to the wife; and therefore it is equally neceſſary, that ſhe ſhould have a right to ſue alone. For the authorities on this ſubject, ſee 4. Vin. 152. 1. Com. Dig. 185.—(4) Vid. Mich. 9. & 10. E. 1. Rot. 46. *A wife ſhall have a writ of deceit againſt her huſband, who levies a fine in her name.*—Vid. Rot. Parl. 3. & 4. E. 4. n. 42. *Special act to enable the ducheſs of Exeter to act as a ſingle woman during the life of her huſband, who was attainted of treaſon.* Hal. MSS.—See the act in Ro. Parl. v. 5. p. 548.

Therefore we can only refer to the arguments, in the caſe on the king's right in reſpect to the education and marriage of his grand-children, which was referred to the judges in the reign of George the firſt. See Forteſc. Rep. 401. & Poſt. 133. b. note 1.

The queene ſhall pay no tolle.

[c] If the tenant of the queene alien a certaine part of his tenancie to one, and another part to another, the queene may diſtraine in any one part for the whole, as the king may doe; but other lords ſhall diſtraine but for the rate; and therefore where the queene ſo diſtrained, there lyeth a writ *de onerando pro rata portione.* [f] The writ of right ſhall not be directed to the queene no more than to the king, but to her bailiſe. Otherwiſe it is, when any other is lord.

[c] F. N. B. 235. A.

[f] F. N. B. 1. F.

[g] In caſe of aide prier of the queene, it is *domina regina inconſulta*, and the cauſe of the aide prier ſhall not be counterpleaded no more than in the king's caſe. And ſee where the aide ſhall be granted of the king and queene, and where of the queene onely, and ſhe of the king. [b] But a protection ſhall be allowed againſt the queene, but not againſt the king. Neither ſhall the queene be ſued by petition, but by a *præcipe*. [i] The queene is not bound by the ſtatute of Marlebridge for driving a diſtreſſe into another county.

[g] 14. E. 3. Voucher 110. 21. E. 3. 53. 22. E. 3. 3. b. 17. E. 3. 65. 10. E. 3. 17. 5. E. 3. 4. 15. E. 3. Aide del roy 66. 10. E. 3. 18. 26. H. 6. Aide le roy 24.

[b] 21. E. 3. 13. 34. E. 3. Protect. 122. 11. H. 4. 67. b.

[i] 30. E. 3. 5.

[k] If any doe compaſſe the death of the queene, and declare it by any over fact, the very intent is treaſon, as in the caſe of the king.

[k] L'eſtat. de 25. E. 3. de Proditionibus.

[l] No man may marry the queene dowager without the king's licence. (1) But let us now returne to Littleton.

[l] Rot. Parliam. 8. H. 6. nu. 7. *Same print of Statute*

Il poet faire ſon teſtament & ſes executors, &c. [m] If A be bound to the abbot of D. A is profeſſed a monke in the ſame abby, and after is made abbot thereof, he ſhall have an action of debt againſt his owne executors.

[m] 4. E. 4. 25. 6. E. 4. 4. 45. E. 3. 10. a. 18. E. 4. 19. 22. H. 6. 5. 5. H. 7. 25. b.

Donques l'ordinary poet commiter adminiſtration, &c. ſicome il fuit mort en fait. [n] Note the ſtatute of 31. E. 3. ca. 11. that giveth actions to the adminiſtrators, ſpeaketh of a man that dies inteſtate, which by the authority of Littleton extendeth as well to a civill death as to a naturall.

[n] Pl. Com. 280. 281. Greiſbrooke's caſe.

Section 201.

EXcommenge, excommunicatus, excommunicatio. [a] *Sicut quis poterit habere lepram in corpore, ita & in anima. Excommunicato interdicitur omnis actus legitimus, ita quod agere non poteſt, nec aliquem convenire, licet ipſe aliis poſſit conveniri.*

Excommunicatio eſt nihil aliud quam cenſura, à canone vel judice eccleſiaſtico prolata & inflicta, privans legitima communione ſacramentorum, & quandoque hominum. * It is divided into the greater and the leſſer. *Minor eſt, per quam quis à ſacramentorum participatione conſcientia vel ſententia arceatur. Major eſt, quæ, non ſolum à ſacramentorum, verùm etiam fidelium communione excludit, & ab omni actu legitimo ſeparat & dividit.* But either of them both diſableth the party. [b] *Cum excommunicato, autem, nec orare nec loqui, nec palam, nec abſconditè, nec veſci licet, exceptis quibuſdam perſonis.* But every excom-

[a] Bracton, lib. 5. fo. 415. 426. 427. Fleta lib. 6. c. 44. Britton, ca. 49. fol. 125. (F. N. B. 62. Doctr. Plac. 8.)

* F. N. B. 64. F.

[b] Bracton 426. b. acc.

LE vi. eſt, lou un home eſt excommenge per la ley de ſaint eſgliſe, & il ſuiſt un action real ou perſonal, le tenant ou defendant poit pleder, que celuy, que ſuiſt, eſt excommenge, & de ceo covient monſtrer lettre de l'eveſque ſouth ſon ſeale, teſmoignant l' excommengement, & demaundera judgement, ſil ſerra reſpondue, &c. Mes en ceſt cas, ſi le demandant ou plaintiſe ceo ne poit dedire, le breve n'abatera my, mes le judgement ſerra, que le tenant ou defendant alera quite ſans

THE 6. is, where a man is excommunicated by the law of holy church, and he ſueth an action reall or perſonall, the tenant or defendant may pleade, that he, that ſueth, is excommunicated, and of this it behoves him to ſhew the biſhop's letters under his ſeale, witneſſing the excommunication, and aſke judgment, if he ſhall be anſwered, &c. But in this caſe, if the demandant or plaintife cannot deny it, the writ ſhall not abate, but the judgment ſhall be, that the tenant or defendant ſhall go quite without

jour,

(1) We have ſearched in vain for the parliamentary roll of 8. Hen. 6. cited in the margin, as an authority for this poſition. It is neither amongſt the printed Statutes at Large, nor amongſt the Rolls of Parliament lately publiſhed. Yet it is taken notice of as a ſtatute in the Abridgment of Parliamentary Records. Cott. Rec. 589. In another of lord Coke's works, he cites it as of the 8. Hen. 6. See 2. Inſt. 18. But we cannot find any ſuch ſtatute in print. It is not meant by this to doubt the exiſtence of ſuch a ſtatute. We only apprize the reader of the inaccuracy in the reference to it. For the doctrine of marriages of the *royal family*, we refer the curious reader to the opinion of the judges in the reign of George the firſt, when they were conſulted on the prerogative claimed by the king over his grand children; and to the debates, whilſt the act of the preſent reign for regulating the future marriages of the royal family was under the conſideration of parliament. See Forteſc. Rep. 401. 12. Geo. 3. c. 11. Ann. Reg. for 1772. and the two proteſts of the diſſentient lords in Journ. Dom. Proc. 3. March 1772.

jour, pur ceo que quant le demandant ou plaintife ad purchaſe les letters de abſolution, & ceux ſont monſtres a le court, il poit aver un reſommons, ou reattachment, ſur ſon original, ſolonque la nature de ſon briefe. Mes en les auters v caſes le briefe abatera, &c. ſi le matter monſtre ne poit eſtre dedit.

day, for this, that when the demandant or plaintife hath purchaſed his letters of abſolution, and ſhewed them to the court, he may have a reſummmons or a reattachment, upon his originall, after the nature of his writ, &c. But in the other caſes the writ ſhall abate, &c. if the matter ſhewed may not be gainſaid.

munication diſableth not the party. [c] If Bailifes and commons, or any other corporation aggregate of many, bring an action, *excommingement* in the bailifes ſhall not diſable them; for that they ſue and anſwer by attorney. Otherwiſe it is of a ſole corporation. But if executors or adminiſtrators be excommunicated, they may be diſabled; becauſe they, which converſe with a perſon excommunicate, are excommunicate alſo. [d] If a biſhop be defendant, an excommunication by the ſame biſhop againſt the plaintife ſhall not diſable him, and it ſhall be intended for the ſame cauſe, if another be not ſhewed.

[c] 30. E. 3. 15. 42. E. 3. 13. 21. H. 6. 30. 21. E. 4. 49.

[d] See Artic. Cleri ca. 7. 5. E. 3. 8. 8. E. 3. 70. 9. H. 7. 21. 10. H. 7. 8. & 9. 18. E. 3. 58. 28. E. 3. 97. 16. E. 3. Excom. 5. 20. E. 3. ibid. 9. 3. H. 4. 3.

Lettre del eveſque de ſouth ſon ſeale. [e] None can certifie excommengement, but only the biſhop, unleſſe the biſhop be beyond ſea or *in remotis*; or one that hath ordinary juriſdiction, and is immediate officer to the king's courts, as the *archdeacon of Richmond*, or the dean and chapter in time of vacation. [f] But in ancient time every officiall or commiſſary might teſtify excommengement in the king's court; and, for the miſchiefe, that enſued thereupon, it was ordained by parliament, that none ſhould teſtifie excommengement but the biſhop only.

[e] Bracton lib. 5. fo. 426. b. 12. E. 4. 15. 20. H. 6. 17. 20. E. 3. Excommengement 20. 33. E. 3. ibid. 29. 44. E. 3. ibid. 23. 11. H. 4. 14. F. N. B. 64. 65. 239. 7. E. 4. 14. 8. H. 6. 3. Regiſtr. 67. (8. Co. 68. 1. Ro. Abr. 883.)

[f] 11. H. 4. 62. in Debt.

[g] If a biſhop certifie, that another biſhop hath certified him, that the partie, which is his dioceſan, is excommunicated, this certificat upon another's report is not ſufficient. [h] If the biſhop of Rome, or any other having foraigne authority, doth excommunicate any ſubject of this realm, and certifieth ſo much under his ſeale of lead, this ſhall not diſable the party; for the common law diſallowes all acts done in diſability of any ſubject of this realm by any forraine power out of the realme, as things not authentique, whereof the judges ſhould give allowance. [i] If the biſhop certifieth the excommunication under ſeal, albeit he dyeth, yet the certificate ſhall ſerve. [k] *Si quis innodatus fuerit per excommunicationes diverſas pro diverſis delictis, & profert literas abſolutionis de una ſententia, non erit abſolutus, quouſque de omnibus aliis abſolvatur.*

[g] 33. E. 3. Excom. 29. F. N. B. 65. (Dy. 371. b. 4. Inſt. 327.)

[h] 16. E. 3. Excom. 4. 31. E. 3. ibid. 4. & 6. 30. Aſſ. 19. F. N. B. 64. 4. H. 7. 15. 12. E. 4. 15. 14. H. 4. 14.

[i] 14. E. 3. Excom. 8. 8. E. 2. ibid. 26.

[k] Hil. 14. E. 3. Coram rege, London. in Theſaur. (Ante 97. a. Poſt. 344.)

Eveſque. Epiſcopus, a biſhop is regularly the king's immediate officer to the king's court of juſtice in cauſes eccleſiaſticall, and all the biſhoprickes in England are of the king's foundation, and the king is patron of them all; [l] and at the firſt they were donative, and ſo it appeares by our bookes, and by acts of parliament, and by hiſtory, and that was *per traditionem annuli & paſtoralis baculi*. i. e. the croſier (1). And king Henry the firſt, being perſuaded by the biſhop of Rome to make them elective by their chapter or covent, refuſed it (2). [m] But king John by his charter, acknowledging the cuſtome and right of the crowne in former times, yet granted *de communi conſenſu baronum*, that they ſhould bee eligible, which after was confirmed by divers acts of parliament. And afterward the manner and order, as well of election of archbiſhops and biſhops, as of the confirmation of the election and conſecration, is [n] enacted and expreſſed in the ſtatute of 25. H. 8. But by the ſtatutes of 31. H. 8. and 1. E. 6. (3) they were made donative by the king's letters patents, both which ſtatutes are repealed (4), and the ſtatute of 25. H. 8. doth yet remaine in full force and effect (5).

[l] 17. E. 3. fo. 40. 25. E. 3. cap. de Proviſſ. 25. H. 8. ca. 10. 3. Co. 73. le Caſe de Deane & Chapter de Norwich. Mat. Par. pag. 62. Vid. ſect. 133. 134.

[m] Rot. Patent. 15. January 17. Regis Johannis. Mat. Par. pag. 252. 35. E. 1. Leſtat. de Carliſle. 25. E. 3. Leſtatut. de Proviſſ. 13. R. 2. ca. 2.

[n] 25. H. 8. ca. 20.

And where Littleton ſaith, that the biſhop under his ſeale muſt teſtifie, &c. it is to be knowne, [o] that none but the king's courts of record, as the court of common pleas, the king's bench, juſtices of gaole delivery, and the like, can write to the biſhop to certifie baſtardy, mulierty, loyalty of matrimony, and the like eccleſiaſtical matter: for it is a rule in law, that none but the king can write to the biſhop to certifie; and therefore no inferiour court, as London, Norwich, Yorke, or any other incorporation, can write to the biſhop, but [p] in thoſe caſes the plea muſt be removed into the court of common pleas, and that court muſt write to the biſhop, and then remand the record againe. And this was done in reſpect of the honor and reverence, which the law gave to the biſhop, being an eccleſiaſticall judge, and

[o] 2. E. 3. Corone, 160. 8. E. 3. 59. 24. E. 3. 33. 44. E. 3. 28. 8. R. 2. Conuſans, 88. (2. Ro. Abr. 589.)

[p] 41. E. 3. 42. E. 3. fo. 18. E. 3. 61. 14. H. 4. 25. 3. H. 4. 12. Regiſt. 7. a. F. N. B. 6. E.

(1) Mr. Waſhington, one of the writers againſt the diſpenſing power in the reign of James the ſecond, inſiſts, that in the Saxon times biſhopricks were conferred in parliament; and that the king's inveſtiture was ſubſequent to ſuch election. For proof of this poſition, one of his chief authorities is the following paſſage in Ingulphus: *A multis annis ante retroactis nulla erat electio prælatorum mere libera et canonica; ſed omnes dignitates, tam epiſcoporum quam abbatum, regis curia pro ſua complacentia conferebat.* Ingulph. Hiſt. fol. 509. b. Obſervat. on Eccleſ. Juriſd. 24. Another inſtance relied on is the election of Wulſtan biſhop of Worceſter, which Matthew Paris deſcribes in the words following: *Ulſtanus, electo ad archiepiſcopatum Eboracenſem Aldredo, unanimi conſenſu, tam cleri, quam totius plebis, rege inſuper, ut quem vellent ſibi eligerent præſulem et animarum paſtorem, annuente, in epiſcopum ejuſdem loci eligitur.* Matth. Par. Hiſt. 20.—(2) After ſome ſtruggles, Henry gave up the point of inveſtiture: but, according to Mr. Waſhington, elections of biſhops continued as before till king John's time; and he ſays, there are precedents of many biſhops elected in parliament in the reigns of Stephen and Henry the ſecond. Obſervat. on Eccleſ. Juriſd. 33. & 2. Spelm. Concil. 42. & 119.—(3) 31. H. 8. c. 9. & 1. E. 6. c. 2. But the former ſtatute only relates to the new biſhopricks erected by Henry. See Raſtall's 3. ed. of Stat.—(4) But notwithſtanding the repeal of the 1. E. 6. the election of biſhops is, as that ſtatute emphatically expreſſes it, mere *ſhadow, colour*, and *pretence*; for by the 25. of Hen. 8. if they do not elect the perſon recommended by king's *letter miſſive*, which accompanies his *congé d'élire*, they incur the penalties of a *præmunire*. See ſ. 7. There is no ſuch ſtatute

and a lord of parliament by reason of the baronie which every bishop hath. (1) And this was the reason [a] a *quare impedit* did lye of a church in Wales in the county next adjoyning; for that the lordship's marchers could not write to the bishop, [b] neither shall conusance be granted in a *quare impedit*, because the inferior court cannot write to the bishop. And herewith agreeth antiquitie. [c] *Nullus alius præter regem potest episcopo demandare inquisitionem faciendam.* [d] And another speaking of loyaltie of marriage, *nec alius quàm rex super hoc demandaret episcopo, quod inde inquireret. Episcopus alterius mandatum, quam regis, non tenetur obtemperare.* And therewith agreeth Britton also.

[a] 8. E. 3. 59. 36. H. 6. 33. tit. Quar. Imp. Brooke 109. 35. H. 6. 30. 11. H. 6. 3. 24. E. 3. 33.
[b] 15. E. 3. Conusans 41. Jurisdict. 24. 40. E. 3. 2. vide sect. 134.
[c] Bract. lib. 3. 106.
[d] Fleta lib. 5. cap. 14. Britton fol. 248. b.

Le briefe n'abatera, &c. *Abater* is a French word, and signifieth *destruere*, or *prostruere*, to destroy or prostrate. And *abatement de briefe* is a prostration or overthrowing of the writ.

[*] Bract. lib. 5. fol. 425. 11. R. 2. Excom. 25. 13. E. 4. 8. 3. Ass. p. 12. Vide, sect. 691.

[*] *Alera quite sauns jour, &c.* That is, to goe quiet without any continuance to any certaine day; and therefore the defendant is not bound to any certaine attendance, untill the party purchaseth his letters of absolution, and the reattachment or resommons bee sued, the entry of which award is, *ideo loquela prædicta remaneat sine die quousque, &c.*

[e] 51. H. 3. cap. 1. & 2. Marlebr. ca. 12. 32. H. 8. ca. 21.

Jour. *Dies* [e] in legall understanding is the day of appearance of the parties, or continuance of the plea. And you shall understand, that first in reall actions there are *dies communes*, common dayes, whereof you shall reade in divers ancient statutes.

[f] Articul. super Cart. ca. 15. 28. E. 1.
[g] 8. H. 6. 20. 30. H. 6. 35. 8. Eliz. Dier. 252.
(2. Inst. 567.)

[f] Also in all summons upon the originall there must be fifteene dayes after the sommons before the appearance. [g] But if the originall be returned *tarde*, and *sommons alias* goeth forth, there must be nine returnes betweene the *teste* and the returne. And so in other judiciall processe in reall actions, saving if conusans be demanded to be holden within his mannor, there processe shall be awarded from three weekes to three weekes.

[q] Mirror cap. 2. sect. 19. Bract. lib. 5. fol. 334. & lib. 4. fol. 255. Brit. fol. 279. b. Fleta. lib. 6. cap. 6. 12. E. 4. 15.
[*] 11. H. 6. 23. 15. E. 3. Jour. 22. 21. E. 3. 29. 15. Ass.

And before the statute of *articuli super cartas*, in all sommons and attachments in plea of land there shall be contained the terme of fifteene dayes. [q] And it appeareth as well by the statute, as by the ancient authors of the law, who wrote before the statute, that this was the ancient common law: and the reason of these long dayes given in reall actions was the recovery being so dangerous, that the tenant might the better provide him both of answer and of proofes. [*] But by consent they may take other than common dayes.

Britton fol. 10. b.

And it is not amisse to note what the ancient law was in proceeding against a man for his life. And therefore heare what Britton saith, *sur le presentment de cest felony* (under which he includeth also treason) *voilons nous* (for he wrote in the king's name) *que treslous ceux, que ent serr' endites, face le viscont hastiment prender, & safement lour corps en prison garder, & que ilz sont menes devant nous, ou devant nos justices: & pur ceo que nulluy ne soit disgarnis de lour respons, voilons que ceux, que issint soient prise, qui ilz eynt temps de purveyer lour respons 15 jours au meyns silz le prient, & en dementiers soient safement gardes.* [r] Vide Fortescue of this matter. And see the Mirror, that in some cases the party convicted had forty dayes, or at least thirty dayes to shew some matter to disturbe, (that is to arrest) judgement, which now I know is gone *in desuetudinem*, and great expedition is now made in pleas of the crowne concerning the life of man. *Sed de morte hominis nulla est cunctatio longa.*

[r] Fortescue in libro de Laudibus Legum Angliæ. Mirror. ca. 4. sect. Sept. choses disturbent judgement mortels.

[s] 9. Co. 118. b. Zancher's case.
(2. Inst. 568.)

[s] And the use of the king's bench at this day is, that, if the offence be committed in another county than where the bench sits, and the inditement be removed by *certiorari*, there must be fifteene dayes betweene every processe and the returne thereof; but, if it be committed in the same county where the bench sit, they may proceed *de die in diem*; but so they will doe rarely. But let us returne againe to the common pleas.

[a] Artic. super Cart. ubi supra. F. N. B. 177. c. 11. Ass. 30. 12. Ass. 4. 22. Ass. 79. 3. H. 6. Ass. 2. 9. E. 4. 5. a. 27. E. 3. 1. 2. W. 1. cap. ult.
[*] F. N. B. 177. D. 7. Ass. 7. 14. Ass. 4. 24. E. 3. 31. 39. E. 3. 20. 9. E. 4. 18. 12. E. 4. 15. 8. H. 5. Error 87. 12. E. 4. 15.

Secondly, there is a day called *dies specialis*, [a] as in an assise in the king's bench or common pleas, the attachment need not be 15 dayes before the appearance. Otherwise it is before justices assigned. But generally, in assises, the judges may give a speciall day at their pleasure, and are not bound to the common dayes; [*] and these daies they may give as well out of terme as within. So upon an imparlance the court may give any speciall or particular day; but that must be in the terme time; and likewise in a *scire facias*, upon a fine or a recovery in a reall action, because it is a writ of execution; and so it is in a *per quæ servitia* and the like, and in all judiciall writs, in processe against an infant to judge of his age, or where the husband prayeth in ayd of his wife, or in a *pone* at the suit of the defendant, there need not be fifteene dayes. And after demurrer in law, the court may give what day they will. [b] And it is worthy the noting, that if in an assise the parties be adjourned to Westm. *usque* 15. Paschæ, there they be not demandable till the fourth day; but if it be adjourned *usque diem Lunæ*, or *diem Martis*, there the parties are demandable on that day.

[b] 41. E. 3. Jour. 16. 8. E. 4. 4. 1. H. 6. 4. 27. Ass. 33.
[c] 3. E. 2. Avowrie. 188. 15. E. 3. Jour. 20. 22. E. 3. 20. 1. E. 3. 4. 9. Co. 49. Countee de Salop's case. 33. H. 6. 42.

Thirdly, [c] there is a day of grace, *dies gratiæ*, or a day of courtesie. The name doth shew of what kind it is; and regularly this day is granted by the court, at the prayer of the demandant

See also 94. a.

(1) Acc. ante 70. b. & 97. a.—We have already taken notice, that, according to lord Hale, the title, by which bishops sit in parliament, is, ~~not having~~ *baronial* possessions, but *usage* and *custom*; and that his notion had been ably controverted by bishop Warburton.

statute now in force, in respect to deaneries, which we have observed in a former note; and yet the election to the *old* deaneries is in practice controuled by the king's letter missive, as much as the election to bishopricks. See ante 96 a. note 3.—It is probable, therefore, that the *letter missive* is of considerably greater antiquity as to both than the statute of Hen. the eighth. Ibid.—(5) This was once doubted; for the 1. Ma. st. 2. c. 20. which repealed the 1. Edw. 6. was, by an oversight, as it seems, wholly abrogated by the 1. Jam. 1. c. 25. instead of being abrogated merely so far as relates to the marriage of priests. At length, however, the judges held, that the 1. E. 6. c. 2. was virtually repealed by the 1. & 2. Ph. & M. c. 8. and 1. Eliz. c. 1. See Tracts by Antiq. Soc. v. 3. p. 416. 12. Co. 7.—It is observable, that lord Coke, in this his account of the patronage of bishopricks, omits distinguishing those of the *old* foundation from those of the *new*. But this is material, the latter being still *donative* by letters patent, according to the statute of 31. H. 8. which authorized their erection. See 31. H. 8. c. 9. in Rastall's edition of the Statutes.—As to the *Irish* and *Welsh* bishopricks, about which lord Coke is silent, the former, by force of the Irish statute of 2. Eliz. c. 4. are made *donative* by the king's letters patent; but what the latter are, we cannot at present inform the reader, Mr. Brown Willis's *Survey of the Cathedrals*, which is the only book we are possessed of on the subject, not stating, how the Welsh bishops are created.

But quære whether the new English bishopricks are not in practice elective under a conge d'eslire; Oxford one of them is so, see Gazette of 31. Dec. 1811. In Ruffhead's stat. the title only of 31. Hen. 8. ch. 9 (which title is "An act for authorizing the King's Highness to make bishops by letters patent") is given, & the statute is mentioned as repealed, which is according to Lord Coke here in this fol. 124. & the case in 12. Co. 7. Therefore at present I am impressed, that I should not have considered the new English bishopricks as non donative.

mandant or plaintife in whose delay it is, and never at the prayer of tenant or defendant. But it is worthy of observation, [d] that a day of grace is never granted, where the king is party by aide prayer of the tenant or defendant; nor where any lord of parliament or peere of the realme is tenant or defendant. [e] And sometime the day, that is *quarto die post*, is called *dies gratiæ*; for the very day of returne is the day in law, and to that day the judgement hath relation; but no default shall be recorded till the fourth day be past, unlesse it be in a writ of right, where the law alloweth no day, but onely the day of returne. This day is sometime called *dies amoris*, and sometime a *dies datus*. But it were too long to enumerate all. This shall be sufficient to give the reader a taste to understand the residue concerning this matter.

[d] 14. E. 3. Jour 24. 15. E. 3. ibid. 21. 22. E. 3. 9. 27. E. 3. 88.

[e] 22. E. 4. Jour 39. 18. E. 3. ibid. 20. 38. E. 3. 20. 9. Ass. 21. 21. E. 3. 13. 41. E. 3. ibid. 16. 33. H. 6. 42. 34. H. 6. 27. 10. Eliz. Dier. 269. 39. H. 6. 29. 24. E. 3. 28. 24. E. 3. brieve 556. Bract. lib. 5. fol. 367.

[f] There is also a day of appearance in court by the writ, and by the roll. By writ, when the sherife returns the writ. By the roll, when he hath a day by the roll, and the sherife returne not the writ, there the defendant, to save himselfe from corporall paine, as by imprisonment, or to prevent the losse of issues, or to save his freehold or inheritance, may appeare by the day he hath by the roll.

[f] 21. E. 3. 43. 3. H. 6. 2. a. 22. H. 6. 20. 3. E. 4. 15. 6. E. 4. 7. E. 4. 15. 8. E. 4. 18. 3. H. 7. 8. 10. H. 7. 11. b. 27. H. 8. 14. 11. Co. 40. 17. E. 3. 2. 11. Eliz. Dier. 286

[g] Note, it is said commonly, that the day of *nisi prius*, and the day in bank, is all one day. That is to be understood as to pleading, but not to other purposes.

[g] 21. H. 6. 10. 20. 4. H. 6. 9. 40. E. 3. 31.

There are *dies juridici* (which [h] Britton calleth *temps covenables*) and *dies non juridici*. *Dies juridici* (except it be in assises) are onely in the tearme. [i] And there be also in the tearme *dies non juridici*. As in all the foure termes the sabbath day is not *dies juridicus*; for that ought to be consecrated to divine service. (1) Also in Michaelmasse tearme the feasts of All Saints and of All Soules. (2) In Hillarie tearme, the Purification of the blessed Virgin Marie; and in Easter terme the feast of the Ascension are not *dies juridici*, but set apart by the ancient judges and sages of the law for divine service. For Trinity tearme, (which sometime had seven dayes of returne, and was as long as Michaelmasse tearme is now: but for avoiding of infection in that hot time of the yeare, and that men might not be letted to gather in harvest, three returnes (since Littleton wrote) *viz. Crastino Sancti Johannis Baptistæ, Octabis Sancti Johannis Baptistæ, and* 15 *Sancti Johannis Baptistæ* are by the statute of 32. H. 8. cut off and become *dies non juridici*. And in those dayes the feast of Saint John the Baptist was not *dies juridicus*. And the said statute called, *Dies Communis in Banco*, is in divers points (since Littleton wrote) altered, as by the said statute appeareth. And in ancient time respect and reverence was had by law to certaine times, as it appeareth [k] by the statute of W. 1. cap. 51. which hath a short but an excellent preamble: *viz. & pur ceo que grand charitie serra de faire droit a touts en tout temps, ou mestior serroit; purvieu est per assentment des prelates, que assises de novel disseisin, mortdauncester, & darreine presentment, fuissent prises en le advent, en septuagesime, & en quaresme, auxibien come (le home) prent lenquestes, & ceo pria le roy, as evesques.*

(Cro. Jam. 646.)

[h] Britton. fol. 134. a. (2. Inst. 264.)

[i] Mirror cap. 3. sect. Exception de temps & cap. 5. sect. 1. (Plowd. 265. Cro. Cha. 602. Cro. Eliz. 227.)

32. H. 8. cap. 21.

[k] W. 1. cap. ultimo.

[l] This statute is expounded in bookes, which I have onely added, to the end the studious reader might understand the bookes that darkly speake of this matter, and be ignorant of nothing that belongs to the understanding of any part of the law. Now *advent* is a moneth before the feast of the Nativity of our Saviour Christ, so called, *de adventu Domini in carne*. *Septuagesima* beginneth ever on the sabbath day, and is the third sabbath before Shrove Sunday, so called; because it is the 70th day before the feast of Easter. *Sexagesima* is the second sabbath before Shrove-Sunday, so named, because it is the 60th day before Easter; and so of *Quinquagesima*, and *Quadragesima*, [m] whereof you shall reade in acts of parliament, and ancient authors. (3) Now as there be *dies juridici*, so there be *horæ convenientes*, whereof the Mirror saith, [n] *abusion, que len tient pleas per demenches (id est sabbaths) ou per auters jours defendus, ou devant le soliel levy, ou noctantre, ou en dishonest lieu.*

[l] 7. Ass. p. 7. 14. Ass. 5. F. N. B. 177. &c. Britton fol. 134. b.

[m] W. 1. cap. 51. fait anno 3. E. 1. Britton. fol. 134. ca. 53.

[n] Mirror lib. 5. sect. 1.

[o] Furthermore, there are (as ancient authors term them) *dies solaris & dies lunaris, secundum quod Deus divisit lumen à tenebris, ex quibus duobus diebus efficitur unus dies, qui dicitur artificialis ex die præcedente & nocte subsequente, qui constat ex* 24 *horis.*

[o] Bract. lib. 4. fol. 264. Britton fol. 209. (Cro. Eliz. 43. 1. Saund. 286.)

But we at this day, retaining the same method, doe differ in words. For we say, *dierum alii sunt naturales, alii artificiales; dies naturalis constat ex* 24 *horis, & continet diem solarem & noctem:* and therefore in indictments of burglary, and the like, we say, *in nocte ejusdem diei. Iste dies naturalis est spatium, in quo sol progeditur ab oriente in occidentem, & ab occidente iterum in orientem. Dies artificialis sive solaris incipit in ortu solis, & definit in occasu:* and of this day the law of England takes hold in many cases. Now divers nations beginne the day at divers times. The Jewes, the Chaldeans, and Babylonians, beginne the day at the rising of the sunne; the Athenians at the fall; the *Umbri* in Italy beginne at midday; the Ægyptians and Romanes from midnight; and so doth the law of England in many cases. Of all which you shall reade plentifull matter in our bookes, and in my Reports, which by this short instruction you shall the better understand.

Gen. cap. 1. ver. 4. 5.

[p] There is also *annus minor* and *major*. The lesser yeare consisteth of 365 dayes, and sixe houres, whereby in every fourth yeare there is *dies excrescens*, which makes that yeare to have

[p] Bract. lib. 5. fol. 359. Britton fol. 209. a.

(1) Writ of summons in a common recovery was made returnable in a month from the day of Easter, which happened to be *Sunday*; and the tenant in tail, who was vouchee, died the same day. The judgment was reversed; because it could not be given till the day after the vouchee's death, and then it came too late. *Swan* and *Broome* 4th. part Burr. v. 3. p. 1596. But though *Sunday* is not *dies juridicus* for giving judgment, or awarding judicial process, yet it is for some other purposes, as for exhibiting an information on the 5. & 6. E. 6. against ingrossing. W. Jo. 156.—(2) In consequence of the abbreviation of Michaelmas term, by the 24. Geo. 2. c. 48. these two days do not now fall within it.—(3) See further, as to *dies non juridici*, Spelman's Treatise on the Terms amongst his Posthuma, page 87.

Warburton. Ante 70. b. n. 2. However, on further investigating the subject, we incline to concur with lord Hale. But then it is with some little addition. In the Anglo-Saxon times the bishops certainly were admitted to sit in parliament; and as this was prior to their holding their estates by a baronial tenure, it could not then be on account of their baronies; nor will it be easy to suggest any other probable reason for their presence during that period, than an usage founded on the propriety of having the heads of the church to guard it from injury, and to assist the other members of the legislature in their deliberations on religion and other ecclesiastical concerns. At the Conquest, as all agree, the possessions of the bishops were converted into baronies; and for a long time after they were summoned to parliament as barons by tenure. But it is no less certain, that, for many centuries past, they have been called to sit, without any regard to their temporal possessions or the tenure by which they are holden; which is more especially true in the instance of the new sees erected by Henry the eighth, the bishops

Se Whitelock's MS. Read. 3 ... 21. H. 8. c. 13. fol. 50. b. & 51. a.

have *in rei veritate* 366 daies, and that is called *annus major*. [q] A quarter of a year containeth by legall computation 91 dayes, and half a yeare containeth 182 days; for the odde houres in legall computation are rejected; and by [r] the ſtatute *de anno biſſextili*, it is provided, *quod computentur dies ille excreſcens & dies proximè præcedens pro unico die*, ſo as in computation that day excreſcent is not accounted. A month, *menſis*, is regularly accounted in law 28 dayes, and not according to the ſolar month, nor according to the kalendar [s] unleſſe it be for the account of the laps in a *quare impedit*. There is *menſis ſolaris*, and *menſis lunaris*. *Solaris eſt* 12 *pars anni, viz. ſpatium* 30 *dierum, horarum* 10 *& minutorum* 30 *& lunaris eſt ſpatium* 28 *dierum*.

[q] 17. Eliz. Dier. 345. (2. Ro. Abr. 521.)

[r] 21. H. 3. ſtat. de anno biſſextili.

[s] 6. Co. 62. Cateſbye's caſe. (2. Ro. Abr. 521. Cro. Jam. 167.) *See 6. Dunf. & East in case of Lacon v. Hooper.*

Reſommons ou re-attachment. Theſe are writs, that the demandant or plaintife, after he hath obtained his letters of abſolution, may ſue out to bring the tenant or defendant againe into court to have day, to make anſwer unto him. [t] And theſe writs doe lye in all caſes, when the plea is diſcontinued or put without day, either in this caſe, or in caſe when the demandant or tenant hath his age, or for the *non venue* of the juſtices, or in caſe of a protection or *eſſoine de ſervice le roy*, &c. Of theſe writs there be two ſorts, viz. generall and ſpeciall, whereof you may ſee preſidents, and reade more at large in the caſe of diſcontinuance of proceſſe in my Reports, and need not here to be inſerted.

[t] Bract. lib. 5. fo. 425. Britton ca. 74. 7. Co. 29. 30. (Poſt. 363. a.)

But in the caſe of outlawry the writ ſhall abate if he obtaine not his pardon. 44. E. 3. 27.

Sur ſon originall. This is intended of his originall writs, or of that, which is inſtead of an originall writ. But note, that in the other five caſes the writ ſhall abate; and in the caſe of excommengement the writ ſhall not abate, but the plea to be put without day untill the plaintife purchaſe his letters of abſolution, and ſue out his reſummons, or re-attachement.

See 2. Inſt. 54.

In ancient times more perſons ſeemed to be diſabled, then theſe ſixe recited by Littleton. As firſt he that was a leper, and by the writ *de leproſo amovendo* was *propter contagionem morbi prædicti* (as the writ ſaith) *& propter corporis deformitatem* (as others ſay) to be removed from the ſociety of men to ſome ſolitary place; and thereupon [u] it is ſaid, *datur etiam exceptio tenenti, ex perſona petentis peremptoria propter morbum petentis incurabilem & corporis deformitatem, ut ſi petens leproſus fuerit, & tam deformis quod aſpectus ejus ſuſtineri non poſſit, & ita quod à communione gentium ſit ſeparatus, talis quidem placitare non poteſt, nec hæreditatem petere.* [x] And herewith Britton agreeth. Treating of diſabled men, as men outlawed, abjured the realme, attainted of felony, &c. he addeth, *ne meſel, ouſte de common gents.*

[u] Bract. lib. 5. fol. 421.

[x] Britton fol. 39. & 88.

[y] And Fleta ſaith, *competit etiam ei exceptio propter lepram manifeſtam, ut ſi petens leproſus fuerit, & tam deformis, quod à communione gentium merito debet ſeparari; talis enim morbus petentem repellit ab agendo.*

[y] Fleta lib. 6. cap. 39. 22. E. 3. in dorſ. clau. 20. Part. nu. 14. F. N. B. 234. Regiſter.

See letter to Mr Perceval Ch: of the Exchequer on regulating variolous inoculation, published in Sept. 1807. & said to be written by Sir ~~John~~ C. E. Carrington late Chief Justice of Ceylon.

And if theſe ancient writers be underſtood of an appearance in perſon, I thinke their opinions are good law; for they ought not to ſue nor defend in proper perſon, but by atturney; for they are ſeparated *à communione gentium propter contagionem morbi & deformitatem corporis.*

Before the Conqueſt this diſeaſe was not knowne in England; for maſter Camden, writing of Burton Lazers, in Leiceſterſhire, ſaith, [a] *primis Normannorum temporibus collecto per Angliam ſtipe noſocomium hoc conſtructum ferunt, quo tempore lepra (quæ à nonnullis elephantiaſis) graviſſimè vi contagionis per Angliam ſerpſit.* And it is called *morbus elephantiaſis*; becauſe the ſkinnes of lepers are like to elephants. [b] And the law of England, for the removing of the lepers from the ſociety of men to ſome ſolitary place, is grounded upon God's law.

[a] Cambden in Leiceſterſhire, verbo Burton.

[b] Levit. cap. xiii. verſe 44. 45. 46. Numer. cap. v. verſe 1. 2. 4. Regum c. 15.

[c] Alſo there was a time, when ideots, madmen, and ſuch as were deafe and dumb naturally, were diſabled to ſue; becauſe they wanted reaſon and underſtanding, (*tales enim non multum diſtant à brutis*). But at this day they all may ſue; for the ſuit muſt be in their name, but it ſhall be followed by others. [d] And note, that, when an ideot doth ſue or defend, he ſhall not appeare by gardian or procheine amy, or atturney, but hee muſt bee ever in perſon; [e] but an infant, or a minor, ſhall ſue by procheine amy, and defend by gardian. (1) But now let us heare what Littleton will ſay unto us.

[c] Britton fol. 39. Fleta lib. 6. cap. 37.

[d] 33. H. 6. 18. F.N.B. 27. G.

[e] 27. H. 8. 11. 40. E. 3. 16. 20. E. 4. 2. F. N. B. 27. H. (2. Inſt. 261.)

Sect. 202.

[a] Mirror cap. 2. ſect. 18. Doct. & Stud. fol. 141. 4. E. 4. 25. per Danby. 27. Aſſ. pl. 49.

CHAPLEINE [a] *ſeculer* is he, that is *infra ſacros ordines*; but he is not regular, (that is) liveth not under certaine rules,

ITEM ſi un villein eſt fait un chapleine ſeculer, uncore ſon ſeignior poit luy

ALSO if a villeine be made a ſecular chaplaine, yet his lord may ſeiſe him (2) as *ſeiſer*

(1) Acc. Fitzh. N. B. 27. H. At common law, infants could neither ſue or defend, except by *guardian*; by whom was meant, not the guardian of the infant's perſon and eſtate, but either one admitted by the court for the particular ſuit on the infant's

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biſhops of theſe never having had any eſtates by a baronial tenure, and conſequently having no claim to be called to parliament otherwiſe than as prelates of the church, and by reaſon of the uſage, which had ſo long before prevailed in reſpect to their order. If all this be ſo, then, though the biſhops once ſat in parliament for their baronies, yet lord Coke's poſition, which imports, that they ſtill ſit by the ſame title, is not ſtrictly accurate; but we ſhould rather adopt lord Hale's idea of their ſitting by uſage as more applicable to the preſent circumſtances. Perhaps, indeed, lord Coke only meant to refer to the more ancient reaſon of their being ſummoned to parliament, and thence to infer, that in preſumption of law they are ſtill deemed to be called on the ſame account; in which caſe there is little more than a difference of words between him and lord Hale. As to biſhop Warburton's hypotheſis on this ſubject, we ſtill think that he ſhews great ability; but at the ſame time we cannot help owning, that he appears to us to have too much indulged in ſpeculation, more adverting to what ſtruck him as the moſt rational and proper grounds of admitting the biſhops into the houſe of lords, than to the fact of the real title. He repreſents the biſhops to ſit as *barons by tenure*, ſo far as regards the *judicial* capacity of the lords, and as *prelates of the church*, ſo far as the lords act in a *legiſlative* character. But the fact, on which he builds the firſt part of this diſtinction, fails him; becauſe, for the reaſons already ſtated, the biſhops no longer have baronies by tenure, nor have had any for ſeveral centuries paſt. Beſides,

ſeiſer come ſon villein, & ſeiſer les biens, &c. Mes il ſemble, que ſi le villein entre en religion, & eſt profeſſe, que le ſeignior ne poit luy prender ne ſeiſir, pur ceo que il eſt mort en ley; nient plus que ſi un frank home prent un nieſe a ſa feme, le ſeignior ne poit prender ne ſeiſer la feme de le baron, mes ſon remedy eſt daver un action envers le baron, pur ceo que il priſt ſa nieſe a feme ſan ſon licence & volunt, &c. Et iſſint poit le ſeignor aver action envers le ſoveraign del meaſon, qui priſt & admittaſt ſon villein deſtre profeſſe en meſme le meaſon ſans licence & la volunt le ſeignior, & recoverra ſes damages a la value de le villein. Car celuy, qui eſt profeſſe moigne, ſerra un moigne, & come un moigne ſerra pris per terme de ſa vie natural, ſinon que il ſoit deraigne per la ley de ſaint eſgliſe. Et il eſt tenus per ſon religion de garder ſon cloiſter, &c. Et ſil ſeignior luy puiſſoit prender hors de ſa meaſon, donques his villeine, and ſeiſe his goods, &c. But it ſeemeth, that if the villeine enter into religion, and is profeſſed, that the lord may not take nor ſeiſe him, becauſe he is dead in law; no more than if a free man taketh a neiſe to his wife, the lord cannot take nor ſeiſe the wife of the huſband, but his remedy is to have an action againſt the huſband, for that he took his neiſe to wife without his licence and will, &c. And ſo may the lord have an action againſt the ſoveraigne of the houſe, which takes and admitteth his villeine to be profeſſed in the ſame houſe, without the licence and leave of the lord, and he ſhall recover his damages to the value of the villeine. For he, which is profeſſed a monke, ſhall be a monk, and as a monke ſhall be taken for terme of his naturall life, unleſſe he be deraigned by the law of holy church. And he is bound by his religion to keepe his cloyſter, &c. And if the lord might take him out of his houſe,

nor hath vowed thoſe three things above ſpecified.

[b] *Enter en religion & eſt profeſſe.* That is intended (as hath been ſaid) when he is regular and profeſt under certain rules, as to become one of the foure orders of friers (that is to ſay) *freres minors*, Auguſtines, Preachers, or Carmelites, or become a monke, cannon or nunne, &c. *Qui ad vivendum regulariter ſe aſtringunt, ſive ſunt monachi, ſive canonici regulares, ſive ſanctimoniales.* For all theſe are regular and votaries, and are dead perſons in law; but ſo are not the ſecular perſons, as prebends, parſons, vicars, &c.

[b] Britton cap. 31. fol. 79. Doctor & Student. fo. 141. (Doctr. Plac. 9. Ante 132. a.)

4. H. 4. cap. 14.

And therefore it is holden in our bookes, [c] that if a ſecular prieſt taketh a wife and hath iſſue and dyeth, the iſſue is lawfull and ſhall inherite as heire to his father, &c. for (as it was then holden) the marriage was not void, but voidable by divorce, and after the death of either partie no divorce can be had(1).

[c] 21. H. 7. 39. 19. H. 7. tit. Baſtardy. 33. 5. E. 2. tit. Nonabilit. 26. 47. E. 3. Caſu ult. (12. Co. 9. 1. Ro. Abr. 340.)

But if a man marieth a nunne, or a monke marieth, theſe marriages were holden void, and the iſſues baſtards; becauſe (as it was then holden) the mariage was utterly voyde; for that the nunne and the monke (as Littleton here ſaith) were dead perſons in law. And that is the reaſon yeelded by Littleton, wherefore a villeine, being profeſſed in religion, cannot be ſeiſed by the lord; becauſe he is dead in law; and yet his blood or bondage is not thereby altered, but his perſon, in reſpect of his profeſſion only privileged. [d] *In decretalibus ſtatutum eſt, quod nullus epiſcopus ſpurios, aut ſervos, donec à dominis ſuis fuerint manumiſſi, ad ſacros ordines promovere præſumat.* But notwithſtanding his perſon is privileged till he be diſgraded. And ſo it is holden in our

[d] Glanvil. lib. 5. cap. 5. Britton fo. 79. & 82.

(1) See 2. Inſt. 687.

infant's perſonal appearance, or appointed for ſuits in general by the king's letters patent. F. N. B. 27. H. & L. Sty. 369. Bro. Garden pl. 11. & 17. But this rule was found inconvenient, it ſometimes happening, that an infant was ſecreted by thoſe having the legal cuſtody of him, and ſo prevented from applying to have a guardian *ad litem* appointed. Hence was ſeen the neceſſity of permitting any perſon to litigate for the infant's benefit, who ſhould be diſpoſed to riſque the expence. On this principle the ſtatute of Weſtminſter the firſt enables any one to ſue as *prochein amy* for an infant in an aſſiſe, where the infant himſelf

Beſides, independently of this, the whole of the ſpeculation ſeems to us unfounded in any ſufficient authority, and conſequently the mere offspring of modern refinement; our ſimple and unlettered anceſtors, when they laid the foundations of the Engliſh parliament, not being likely to have acted under the influence of a policy ſo deep, as the nice diſtinction thus attributed to them neceſſarily ſuppoſes. At preſent we have only to add further on this curious and difficult ſubject, that, as we have touched it ſo ſlightly, our obſervations ſhould be underſtood as intended to convey only a general idea. Should the reader have occaſion to penetrate more deeply into the ſubject, he muſt conſult the ſeveral pieces publiſhed in 1679 on the controverted queſtion, whether the biſhops can vote in the preliminary ſteps of a bill of attainder; particularly the tracts by biſhop Stillingfleet and Mr. Hunt for the right, and thoſe by lord Hollis againſt it. See 1. Burn. Hiſt. fol. ed. 460. 2. Stillingfleet's Eccleſ. Caſ. 228. Hunt's Argument for the Right of the Biſhops in Capital Caſes 128. Hollis's Remains, 122.—See further Seld. Tit. Hon. ed. 1678. p. 697. Staundf. Pl. C. 153. See alſo Whitelocke's Mſs. Read. 9 on 21. Hen. 8. ch. 13. fol. 50. a. & 51. a.

our old bookes. [e] If a villeine be made a knight, for the honour of his degree his perſon is priviledged, and the lord cannot ſeize him untill he be diſgraded. *Nullam vilem perſonam natione ſpurium, vel ſervilis conditionis, ad militiæ ſtrenuitatis ordinem promoveri licebit; ſed cum à dominis ſuis petantur ut nativi, ipſis primo degradatis, ſtatim ad judicium procedatur.*

[e] Fleta lib. 2. cap. 44. Britton ubi ſupra.

il ne viveroit come un mort perſon, ne ſolonque ſon religion, le quel ſerroit inconvenient, &c.

then he ſhould not live as a dead perſon, nor according to his religion, which ſhould be inconvenient, &c.

Si un frank home prent un niefe. [f] Some have holden, that by this marriage the wife ſhall be free for ever; but the better opinion of our bookes is, that ſhe ſhall be privileged during the coverture onely, unleſſe the lord himſelf marrieth his niefe, and then ſome hold, that ſhe ſhall be free for ever (1).

[f] F. N. B. 78. b. 30. E. 1. tit. Villen. 46. 33. E. 3. ibid. 21. (Poſt. 137. b.) 18. E. 2. ibid. 30. 46. E. 3. 6. 4. E. 4. 25. 1. H. 4. 6. 13. E. 1. Villen. 36. 18 Aſſ. 10. Doct. & Stud. 141. Mirror. ca. 2. ſect. 18. acc.

If a niefe be regardant to a mannor, and ſhe taketh a freeman to huſband by licence of the lord, and the lord maketh a feoffment in fee of the manor, the huſband dieth, the feoffee ſhall not have the niefe but the feoffor; for that during the marriage ſhe was ſevered from the mannor. And ſo is the booke 29. Aſſ. (which is falſly printed) to be underſtood.

[g] If two coparceners be of a villeine, and one of them taketh him to huſband, ſhe and her huſband ſhall not have a *nuper obiit* againſt her coparcener, but after the deceaſe of her huſband ſhe ſhall.

[g] 16 H. 3. nuper obiit 17. 8. H. 3. Breve 789.

[h] Mes ſon remedie eſt daver un action vers le baron, &c. Albeit marriage is lawfull, yet when it worketh a prejudice to a third perſon, an action in this caſe lyeth againſt the huſband to the value of his loſſe. And albeit he did not know her to be a niefe, yet the action lyeth againſt him; for he muſt take notice thereof at his perill, [i] unleſſe ſhe be out of the ſervice of the lord and vagrant; and then if one not knowing her to be a niefe marrieth her, ſome ſay, that in that caſe no action lyeth againſt the huſband. [k] And likewiſe the lord ſhall have an action againſt thoſe that were the meanes to make the villeine a knight.

[h] Vide Britton fol. 82. Forteſc. c. 43. 46. E. 3. 6. a.

[i] 7. R. 2. tit. Barre 240. (F. N. B. 168. b. 1. Leon. 240.)

[k] Britton fol. 82. b.

Sovereigne, præcipuus, chiefe, as here, *ſovereigne del meaſon* is the chiefe of the houſe.

31. H. 6. ca. 5. 12. H. 7. c. 7. 11. H. 4. 5. b.

Si non que il ſoit deraigne. This word (*deraigne*) commeth of the French word *derayer*, or *deraiguer*, that is to ſay, to diſplace or to turne one out of his order; and hereof commeth *deraignment* a diſplacing or turning out of his order. So when a monke is derained, he is degraded and turned out of his order of religion, and become a lay man.

31. H. 8. cap. 29.

Le quel ſerroit inconvenient. *Ab inconvenienti* is a good argument in law, as Littleton often obſerveth. And here Littleton concludeth, that the lord cannot take a monke out of his houſe, for that it ſhould be inconvenient, which Littleton here ſheweth, for divers reaſons, and therefore unlawfull. And the inconvenience is, that where a man of religion ſhould live according to his profeſſion in religion, by the taking of him out he ſhould not.

40. Aſſ. 27. per Finchden.

Si le ſeignior luy puiſſoit prender, &c. By this it appeareth, that, if a man detaineth a villaine in his houſe, the lord of the villaine may take him out of the houſe, for here the impediment, wherefore the lord could not take him out of the houſe, was, for that the villaine was a monke profeſſed. And ſo in caſe of the wardſhip here next following.

Section 203.

BRIEFE de raviſhment de garde. This writ is given by the ſtatute of W. 2. cap. 35. *in verbis conceptis*, the words of which writ be, that the defendant, *talem hæredem, cujus maritagium ad ipſum A.*

EN meſme le maner eſt, ſi ſoit gardeine en chivalrie de corps & de terre d'un enfant deins age, ſi l'enfant, quant

IN the ſame manner it is, if there be a gardian in chivalry of the body and land of an infant within age, if the infant,

il

(1) See ante 123. n. 3. Poſt. 137. b.

himſelf is eſloigned by his guardian, or otherwiſe diſturbed from ſuing the aſſiſe. 3. E. 1. c. 49. 2. Inſt. 261. The ſtatute of Weſtminſter the ſecond extended this proviſion, by permitting the *prochein amy* to ſue in *all* actions; and though in this ſtatute, as well as in the former, eloignment of the infant was mentioned, yet by conſtruction it is not deemed neceſſary, but the *prochein amy* may ſue, whether that circumſtance occurs or not, it being conſidered merely as an inſtance of the neceſſity of the caſe, and as ſuch only taken notice of by thoſe who framed the ſtatute. 13. E. 1. c. 15. 2. Inſt. 390. But notwithſtanding theſe ſtatutes, as there is not any thing in them which prohibits the ſuing by guardian, we preſume, that it remains as lawful as it was before. It is therefore probable, that Fitzherbert and lord Coke, when they tell us, that an infant *ſhall* ſue by *prochein amy*, did not mean to exclude the election of ſuing either in that way or by guardian. That Fitzherbert did not mean this, appears from his afterwards mentioning without diſapprobation a caſe of debt, in which ſuing by guardian was allowed. Coke too, in his report of Rawlyns's caſe, ſays, that on ſearch many precedents of infants ſuing by guardian were found; nor in that caſe was any objection grounded on its being a ſuit by guardian. 4. Co. 53. b. But whether we conſtrue the meaning of theſe two judges rightly or not, a caſe occurred, in which the point is ſaid to have been ſo adjudged. Young v. Young W. Jo. 177. However the reader

il vient al age de 14 ans entra en religion, & eſt profeſſe, le garden n'ad auter remedy (quant a le garde de le corps) forſque breve de raviſhment de garde envers le ſoveraigne de le meaſon. Et ſi aſcun eſteant de plein age, que eſt coſin & heire delenfant, enter en le terre, le gardein n'ad aſcun remedie, quant al garde de la terre, pur ceo que lentrie del heire lenfant eſt congeable en tiel caſe.

when he comes to the age of 14 yeares, entreth into religion, and is profeſt, the gardian hath no other remedy (as to the wardſhip of the body) but a writ of raviſhment *de gard* againſt the ſoveraign of the houſe. And if any being of full age, who is couſin and heire of the infant, entreth into the land, the gardian hath no remedy as to the wardſhip of the land, for that the entry of the heire of the infant is lawfull in ſuch caſe.

land, becauſe he is *civiliter mortuus*, a dead man in law, and cannot hold any inheritance; neither can the gardian continue the wardſhip of the land, becauſe by the civill death of the ward the inheritance is deſcended to another, who is either to be in ward, or pay reliefe. So as in this caſe the gardian hath *damnum*, but it is *abſque injuria*, becauſe he loſeth the wardſhip of the land by act of law, viz. the deſcent thereof to another, and therefore the law giveth to him no remedy in this caſe, neither by any formed writ, nor by action upon his caſe, for Littleton's words are generall, (he hath not any remedy).

pertinet, &c. rapuit & abduxit &c. contra pacem. Now *rapere* ſignifieth properly to take away by violence and force. And when the ſoveraigne took and admitted the ward into his houſe to be profeſſed, this in judgement of law is a raviſhment of the ward; and as it appeareth in our bookes before the ſaid ſtatute, there lay a generall action of treſpas in that caſe. 9. Co. Doctor Huſſey's caſe fol. 72.

Apres l'age de 14 ans, &c. Our author mentioned this age, becauſe it is prohibited by the ſtatute of 4. H. 4. that no childe ſhall be received into any houſe of religion before that age without conſent of his parents and gardians, &c. 4. H. 4. cap. 17.

Le gardein n'ad aſcun remedie, &c. Here it appeareth, that, by the profeſſion of the ward, the lord loſeth the wardſhip of the (Noy. 184. 1. Ro. Abr. 107. Poſt. 197. b.)

Sect. 204.

ITEM, en mults divers caſes le ſeignior poit faire manumiſſion & enfranchiſement a ſon villein. Manumiſſion eſt properment, quant le ſeignior fait un fait a ſon villein de luy enfranchiſer per hoc verbum (manumittere) quod idem eſt quod extra manum vel extra poteſtatem alterius ponere. *Et pur ceo que per tiel fait le villein*

ALSO, in many and divers caſes the lord may make manumiſſion and enfranchiſement to his villeine. Manumiſſion is properly, when the lord makes a deed to his villeine to enfranchiſe him by this word (*manumittere*), which is the ſame as to put him out of the hands and power of another. And for that that by ſuch deed

Manumiſſion. [l] *Manumittere, quod idem eſt quod extra manum vel poteſtatem ponere.*

Quia quamdiu quis in ſervitute eſt, ſub manu & poteſtate domini ſui eſt.

Qui in poteſtate domini ſui eſt, in manu domini ſui eſſe dicitur; ſed poſtquam manumiſſus eſt, ab illo liberabitur, ergo dicitur quaſi extra manum, id eſt, extra poteſtatem domini ſui miſſus. And here is to be noted (as in many other places is obſerved) what regard Littleton hath to the true etymologies of words. [l] Glanvil. lib. 5. cap. 5. Britton fol. 78. &c. 82. 97. 110. Fleta lib. 3. cap. 13. & lib. 2. cap. 44.

[m] *Enfranchiſement.* (Hereby Littleton explaineth manumiſſion) and [m] Mirror ca. 2. ſect. 18.

reader ſhould at the ſame time be apprized, that according to another report of the ſame caſe, the court delivered no opinion on the point, whether an infant may ſue by guardian. Cro. Cha. 86. See further on this ſubject Palm. 295. & Vin. Abr. *Guardian* and *Ward* N. 7.—What we have hitherto advanced as to ſuing by *prochein amy* applies to the courts of common law only: As to our courts of equity, the uſual practice in them is to ſue for infants by *prochein amy* and to defend by guardian. But it is ſaid, that they may ſue in either way. Pract. Reg. in Chanc. 296.—(2) Vide tamen Paſch. 8. E. 1. rot. 7. *the caſe of Edward Rowald* contra.—Hal. MSS.

is derived from the French word *franchiſe*, that is, liberty; and in the common law it hath divers ſignifications; ſometimes the incorporating of a man to bee free of a company or body politique, as a free man of a city, or burgeſſe of a burrough, &c. ſometimes to make an alien a deniſon; and here to manumiſe a villeine or bondman. So as this word (*enfranchiſement*) is more general than *manumiſſion*; for that is properly applyed to a villeine; and therefore every manumiſſion is an infranchiſement, but every infranchiſement is not a manumiſſion. [n] There be two kindes of manumiſſions, one expreſſe, and the other implyed. Expreſſe, when the villeine by deed in expreſſe words is manumiſed and made free. The other implyed, by doing ſome act, that maketh in judgement of law the villeine free, albeit there be no expreſſe words of manumiſſion or enfranchiſement. [o] If a villeine be manumiſed, albeit he become ingratefull to the lord in the higheſt degree, yet the manumiſſion remaines good: and herein the common law differeth from the civill law, for *libertinum ingratum leges civiles in priſtinam redigunt ſervitutem, ſed leges Angliæ ſemel manumiſſum ſemper liberum judicant, gratum & ingratum.*

eſt mis hors de la main & de la poier ſon ſeignior, il eſt appell' manumiſſion. Et iſſint cheſcun maner de enfranchiſement fait a un villein poit eſtre dit manumiſſion.

the villeine is put out of the hands and out of the power of his lord, it is called manumiſſion. And ſo every maner of infranchiſement made to a villein may be ſaid to be a manumiſſion.

[n] Mirror cap. 2. ſect. 18.

[o] Forteſcue cap. 46.

There be alſo ſome caſes where the villeine ſhall be privileged from the ſeiſure of the lord, albeit he be not abſolutely manumiſed or infranchiſed. Sometimes *ratione loci*, [p] as if a villeine remaine in the ancient demeane of the king a yeare and a day without claime or ſeiſure of the lord, the lord cannot have a writ of *nativo habendo*, or ſeiſe him, ſo long as he remaines and continues there; and the reaſon of this was, in reſpect of the ſervice he did to the king in plowing and tillage of the demeanes, and other labours of huſbandry for the king's benefit. And herewith agree old bookes, [q] which ſay, that this immunity was ſometime granted by common conſent to the king for his profit, and for the help or eaſe of his villeins. [r] If a villein be a prieſt of the king's chappel, the lord cannot ſeiſe him in the preſence of the king, for the king's preſence is a privilege and protection for him. Sometime *ratione profeſſionis*, [s] as if a villeine be profeſſed a monke, or a nieſe a nun, as hath been ſayd. [t] Sometime (as ſome hath ſaid) *ratione dignitatis*, as if the villeine be made a knight, &c. Sometime *ratione matrimonii*, as if a nieſe marry a free man, ſhe is priviledged during the marriage, but not abſolutely enfranchiſed; for if her huſband dye, ſhe is nieſe againe, unleſſe the lord himſelfe marrieth the nieſe, and then ſhe is enfranchiſed for ever, as hath been ſaid before. (1) And it ſhall not be amiſſe to obſerve the wiſedome of our ancients, with what ſolemnity (for more ſurety thereof) manumiſſions were made. *Qui ſervum ſuum liberat, in eccleſia, vel mercato, vel comitu, vel hundredo, coram teſtibus & palam faciat, & liberas ei vias, & portas conſcribat apertas, & lanceam & gladium, vel quæ liberorum arma, in manibus ei ponat.* Our author having ſpoken of an expreſſe manumiſſion, here followes infranchiſements in law.

[p] 39. E. 3. 6. b. F. N. B. 79. a. (Dy. 266. b. 283 b.)

[q] Glanvil. lib. 5 cap. 5. Fleta lib. 2. cap. 44. Brit. fol. 79. Mirror cap. 2. ſect. 18. (2. Ro. Abr. 736. 737.)

[r] 27. Aſſ. p. 49.

[s] Glanvil. lib. 5. ca. 5.

[t] Britton ubi ſupra. (Ante 136. b.)

Lib. Rub. cap. 78.

Sect. 205.

FOR when the lord enableth the villeine to have an action againſt him as for debt or annuity, &c. or giveth to the villeine a certaine and fixed eſtate in lands, tenements, or hereditaments, as a leaſe for yeares, this amounteth to an infranchiſement, not only during the yeares, but for ever; [u] and albeit the leaſe be made to the villeine without deed, yet it is an infranchiſement for ever.

(5. Co. 56. a.)

[u] 50. E. 3. tit. Vil. 25. 11. H. 7. 13.

AUXI, ſi le ſeignior fait a ſon villeine un obligation de certeine ſomme dargent, ou grante a luy per ſon fait un annuity, ou leſſa a luy per ſon fait terres ou tenements pur terme des ans, le villeine eſt enfranchiſe.

ALSO, if the lord maketh to his villeine an obligation of a certaine ſum of money, or granteth to him by his deed an annuity, or lets to him by his deed lands or tenements for terme of yeares, the villeine is enfranchiſed.

Sect.

(1) Ante 123. a. n. 3.

Sect. 206.

AUXY ſi le ſeignior fait un feoffment a ſon villeine, d'aſcun terres ou tenements, per fait ou ſans fait, en fee ſimple, fee taile, ou pur terme de vie ou ans (1) *& a luy liver a ſeiſin, ceo eſt un enfranchiſement.*

ALSO if the lord maketh a feoffement to his villeine of any lands or tenements, by deed or without deed, in fee ſimple, fee taile, or for terme of life or yeares, and delivereth to him ſeiſin, this is an enfranchiſement.

This is evident and agreeth with our bookes. Vide 24. E. 3. 32. 12. H. 3. tit. Vill. 42.

Sect. 207.

MES ſi le ſeignior fait a luy un leaſe des terres ou tenements, a tener a voluntle ſeignior, per fait ou ſans fait, ceo n'eſt aſcun enfranchiſement; purceo que il n'ad aſcun manner de certainty, ne ſuertie de ſon eſtate, mes le ſeignior luy poit ouſter quant il voilet.

BUT if the lord maketh to him a leaſe of lands or tenements, to hold at will of the lord, by deed or without deed, this is no enfranchiſement; for that he hath no manner of certainty or ſuerty of his eſtate, but the lord may ouſt him when he will.

PER fait. So as a deed, made to a villeine by the lord, is no infranchiſement, when the deed transferreth no certaine or fixed eſtate, but revocable at the lord's will. If the lord releaſe to his villeine all his right in black acre, and the villeine is not thereof ſeiſed, this is no infranchiſement; becauſe it is voyd and can give no cauſe of action. If the lord attorneth to his villeine, this is no infranchiſement. 11. H. 7.

Sect. 208.

AUXY ſi le ſeignior ſuiſt envers ſon villein un præcipe quod reddat, *s'il recover, ou ſoit nonſue apres appearance, ceo eſt un manumiſſion, pur ceo que il puiſſoit loyalment enter en la terre ſans tiel ſuit. En meſme le manner eſt, s'il ſuiſt envers ſon villeine un action de debt, ou d'account, ou de covenant,*

ALSO if the lord ſueth againſt his villeine a *præcipe quod reddat*, if he recover, or be nonſuite after appearance, this is a manumiſſion, for that he might lawfully have entered into the land without ſuit. In the ſame manner it is, if he ſue againſt his villeine an action of debt, or account, or of covenant, or of

SI ſeignior ſuiſt en vers ſon villeine un præcipe quod reddat, &c. *ceo eſt un manumiſſion.* And the principall reaſon hereof is, for that by his ſuit he enableth the villeine to be a perſon able to render him the land by courſe of law, where the lord without any ſuch ſuit might have entred. (a) But if the tenant in tayle be of a manor whereunto a villeine is regardant, and enfeoffeth the villein of the mannor, and dyeth, the iſſue ſhall have a *formedon* againſt the villeine, and after the recovery of the mannor he ſhall ſeiſe the villein. And the

[a] 24. E. 3. Diſcont. 16. Vid. Britton 78. & 126.

(1) The words *ou ans* not in L. & M.—Roh. or P. They firſt appear in Redm.

(Ante 122. b. 2. Ro. Rep. 409.) the reaſon is, for that he could not ſeiſe the villeine till hee had recovered the mannor which was the principall, and at the time of the writ brought he was no villeine.

The tenant infeoffes the villeine of the lord and an eſtranger upon colluſion: in this caſe, although the lord may enter upon the villeine for the moity, yet, may he have a writ of ward againſt them both without infranchiſement of the villeine; for, if the lord ſhould enter upon the villeine, then ſhould his feigniory be ſuſpended, and then could not he have a writ of ward againſt the other.

The lord, upon a writ of covenant brought by the villeine, levies a fine to his villeine of land, which is ancient demeſne; the lord of whom the land is holden reverſeth the fine in a writ of deceit; albeit the authority and juriſdiction of the court is diſproved, and that the lord of the villeine ſhall bee reſtored to the land given by the fine, yet is it an enfranchiſement, for that he anſwered to the writ of covenant, and the fine was voydable, and not voyde, and therefore, being once an enfranchiſement, it cannot be avoided by the reverſing of the fine.

Soit nonſue (id eſt) non eſt proſecutus breve ſuum, for by the law the plaintife is firſt agent at every continuance; and therefore the record ſayth, *quod petens ſeu querens* (naming them) *obtulit ſe*, who if he bee called, and make default, then he is ſaid to be nonſuit, *id eſt, non eſt proſecutus, &c.*

By Littleton here it appeareth, that there is a nonſuite before appearance at the returne of the writ, or after appearance at ſome day of continuance. [x] The difference between a *nonſuit* and a *retraxit* on the part of the demandant or plaintife is this. A *nonſuite* is ever upon a demand made, when the demandant or plaintife ſhould appeare, and he makes a default. A *retraxit* is ever, when the demandant or plaintife is preſent in court (as

ou de treſpaſſe, ou de hujuſmodi, ceo eſt un enfranchiſement; pur ceo que il puiſſoit empriſon le villein, & prender ſes biens ſans tiel ſuit. Mes ſi le ſeignior ſuiſt ſon villeine per appeale de felony, ou il fuit endict de ceo devant, (1) *ceo ne enfranchiſera pas le villeine, coment que le matter de l'appelle ſoit trove encounter le ſeignior, pur ceo que le ſeignior ne puiſſoit aver le villein deſtre pendue ſans tiel ſuit. Mes ſi villeine ne* (2) *fuit endict de meſme le felonie, devant l'appeale ſue envers luy, & puis eſt acquite de ceſt felony, iſſint que il recovera dammages envers ſon ſeignior pur le faux appeal, donques le villeine eſt enfranchiſe, pur la cauſe de le judgement de dammages a luy d'eſtre done envers ſon ſeignior. Et pluſors autres caſes & matters y ſont, per queux un villein poit eſtre enfranchiſe envers ſon ſeignior, &c.* Sed de illis quære (3).

treſpaſſe, or of ſuch like, this is an infranchiſement, for that he might impriſon the villeine, and take his goods without ſuch ſuite. But if the lord ſue his villeine by appeale of felonie, where he was indited of the ſame before, this ſhall not enfranchiſe the villeine, albeit that the matter of appeale be found againſt the lord, for that the lord could not have the villeine to be hanged without ſuch ſuit. But if the villeine were not indited of the ſame felonie, before the appeal ſued againſt him, and afterward is acquited of this felony, ſo as he recover dammages againſt his lord for the falſe appeale, then the villeine is infranchiſed, becauſe of the judgment of dammages to be given unto him againſt his lord. And many other caſes and matters there be, by which a villeine may be enfranchiſed againſt his lord, &c. But enquire of them.

[x] 8. Co. 58. 62. Becher's caſe. 3. H. 6. 13. Brooke tit. Nonſuit 1. 8. H. 6. 7. 50. E. 3. 12.

(1) *Ou il fuit endict de ceo devant* in Red. but not in L. & M.—Roh.—or P.—(2) *Ne* in Roh. & Red. but not in L. & M.—or P. (3) *De illis quære* not in L. & M. or Roh.

(as regularly he is ever by intendment of law untill a day be given over, unleſſe it be when a verdict is to be given, for then he is demandable.) And this is in two ſorts, one privative and the other poſitive. Privative, as upon demand made, that he make default, and depart in deſpite of the court, and then the entry is, [y] *et poſtea eodem die devenit ad barram prædict' tenens, & præd' petens tunc ſolenniter exactus non venit, ſed à ſecta ſua prædicta in contemptum curiæ ſe retraxit, ideo conſideratum eſt, &c.* Poſitive, as when the entry is, *et ſuper hoc idem quærens dicit, quod ipſe non vult ulterius placitum ſuum prædictum proſequi, ſed abinde omnino ſe retraxit, ideo, &c.* Another form thereof is, *quod idem quærens fatetur ſe (ſeu cognovit ſe) ulterius nolle proſequi verſus prædict' defend', &c. de placito prædicto.* [z] A departer in deſpight of the court is on the part of the tenant, and is, when the tenant or defendant after appearance and being preſent in court upon demand makes departure in deſpight of the court, and then the entry is, *et prædict' tenens ſeu defendens licet ſolenniter exactus non revenit, ſed in contemptum curiæ receſſit & defaltam fecit, ideo, &c.* It is called a *retraxit*, becauſe that word is the effectual word uſed in the entry, as before it appeareth, and it is ever on the part of the demandant or plaintife. [a] Another difference betweene a *retraxit*, and a nonſuit is, that a *retraxit* is a barre of all other actions of like or inferiour nature: *qui ſemel actionem renunciavit, amplius repetere non poteſt.* But regularly a nonſuit is not ſo, but that he may commence an action of like nature, &c. againe. For it may be, that he hath miſtaken ſomewhat in that action, or was not provided of his proofes, or miſtaking the day, or the like. But yet for ſome ſpecial reaſons, nonſuit in ſome actions is peremptory.

[y] Tr. 5. H. 6. Rot. 320. In Com. Banco.

[z] F. N. B. 78. f. & 108. d. 19 E. 2. Villein 31.

[a] 8. Co. ubi ſupra.

In a *quare impedit*, if the plaintife be nonſuite after appearance, the defendant ſhall make a title, and have a writ to the biſhop [b] and this is peremptory to the plaintife, and is a good barre in another *quare impedit* (1); and the reaſon is, for that the defendant had by judgement of the court a writ to the biſhop, and the incumbent, that commeth in by that writ, ſhall never be removed, which is a flat barre as to that preſentation; and of this opinion is Littleton in our bookes. And the ſame law, and for the ſame reaſon it is in the caſe upon a diſcontinuance.

[b] 5. E. 3. 35. 2. H. 5. 31. H. 6. 15. 22. H. 6. 44. 45. 33. H. 6. 1. 55. 19. E. 4. 9. 21. E. 4. 2. b. &c. F. N. B. 38. k. 7. Co. 27. b. Sir Hugh Portman's caſe.

[c] In a writ *de nativo habendo*, nonſuit after appearance is peremptory; for thereby the villeine is infranchiſed. And ſo it is if two be plaintifes in a *nativo habendo*, if one be nonſuit, this is the nonſuit of both, and no ſummons and ſeverance doth lie in that caſe, albeit it be a reall action. And this is *in favorem libertatis*; for, in a *libertate probanda*, nonſuit after appearance is not peremptory, neither is the nonſuit of the one the nonſuit of both.

[c] 6. E. 2. Vill. 26. 12. E. 2. ibid 28. 19. E. 2. ibid. 31. F. N. B. 78. c. 4. E. 2. Nonſuit 29.

[d] Nonſuit in an appeale of murder, rape, robbery, &c. after appearance is peremptory, and this is, *in favorem vitæ*, for if the defendant be acquited, and take out proceſſe upon the ſtatute of W. 2. againſt the abettors, or if he purchaſe his originall writ, for that cauſe he may be nonſuit.

[d] 9. H. 4. 1. 12. Stamf. Pl. Cor. 148. a. & 171. c. 22. Aſſ. 97. Fitz. Cor. 184. 22. E. 3. 6. 47. E. 3. 16. 7. H. 7. 5. 40. E. 3. Dam. 77. 17. E. 2. Coron. 386. 3. E. 2. Action ſur l'eſt. 28.

[e] If the plaintife in an appeale of mayhem be nonſuit after appearance, it is peremptory; for the writ ſaith, *felonicè maihemavit*, and therefore the nonſuit is peremptory.

[e] 43. Aſſ. 39. 40. Aſſ. 1. (1. Sid. 32.)

[f] In an attaint, if the plaintife after appearance be nonſuit, it is peremptory, and the reaſon is, for the faith that the law gives to the verdict, and for the terrible and fearefull judgement that ſhould be given againſt the firſt jury if they ſhould be convicted, and therefore upon the nonſuit, the plaintife ſhall be impriſoned, and his pledges amerced. But if the proceſſe in an attaint be diſcontinued, the plaintife may have another writ of attaint; becauſe upon the nonſuit there is a judgement given, but not upon the diſcontinuance. *Note* it is truly ſaid, that *exceptio probat regulam*; for theſe caſes excepted ſtand upon their ſpecial and particular reaſons, and fall not within the general reaſon of the rule. It is a general rule, that nonſuite before appearance is not peremptory in any caſe; for that a ſtranger may purchaſe a writ in the name of him that hath cauſe of action, as ſhall be ſaid hereafter in this ſection.

[f] 32. Aſſ. 13. 19. Aſſ. 13. 20. E. 3. Attaint 42. 22. E. 3. 7. F. N. B. 108. d.

[g] In reall or mixt actions the nonſuit of one demandant is not the nonſuit of both, but he that makes default ſhall be ſummoned and ſevered; but regularly in perſonall actions, the nonſuit of the one is the nonſuit of both, unleſs it be in certaine particular caſes.

[g] 11. H. 6. 23. 35. F. N. B. 35. b. 19. E. 3. tit. Sever. 14. 3. E. 2. Nonſu. 18. 19. E. 3. Sev. 16. 12. E. 3. ib. 22. 38. E. 3. 9. 29. H. 6. 45, 38. E. 3. 35. 41. E. 3. Nonſuit 10. 45. E. 3. 10. 2. H. 4. 2. (2. Ro. Abr. 132. 10. Co. 134.)

[h] In perſonall actions brought by executors there ſhall be ſummons and ſeverance; becauſe the beſt ſhall be taken for the benefit of the dead. And ſo it is in an action of treſpaſſe as executor for goods taken out of their owne poſſeſſion. Like law in account as executors by the receit of their owne hands.

[h] 42. E. 3. 13. 48. E. 3. 14. 28. H. 6. 3. 11. E. 2. Sev. 26. 13. E. 3. ib. 15. 18. E. 3. ib. 28. 5. E. 3. ibid. 20. 7. E. 3. 12.

[i] In an *audita querela* concerning the perſonalty, the nonſuite of the one is not the nonſuit of the other; becauſe it goeth by way of diſcharge and freeing of themſelves, and therefore the default of the one ſhall not hurte the other.

[i] 15. E. 3. Sever. 23. 6. Co. 25. Ruddock's caſe.

[k] In a *quid juris clamat*, the nonſuit of the one is the nonſuit of both; becauſe the tenant cannot attorne according to the grant.

[k] 20. E. 3. Severance 17.

[l] Some actions follow the nature of thoſe actions, whereupon they are grounded; as the writs of error, attaint, *ſcire facias*, and the like. If a reall action be brought by ſeverall *præcipes* againſt two or more, if the demandant be nonſuite againſt one, he is nonſuite againſt

[l] 47. E. 3. 6. b. 47. Aſſ. 3. 29. Aſſ. 34. 7. H. 4. 45. 34. H. 6. 31. 25. H. 6. 19. 29. E. 3. 37. 6. Co. ubi ſupra. 22. H. 6. 42. 4. E. 4. 33. 19. E. 2. Nonſuit 32. 18. E. 3. ibid. 31. 20. E. 3. ib. 26. 27. 19. E. 3. ibid. 12. 3. E. 3. ibid. 17. 38. E. 3. 9. 10. H. 6. 45. 44. E. 3. 16. 19. E. 3. Severance 16. (1. Sid. 378.)

(1) But lord Dyer held the nonſuit not peremptory, if another *quare impedit* was brought within the ſix months. Dall. 81. 82. Perhaps, however, he only meant to aſſert this in the caſe of a nonſuit *before* appearance. As to lord Coke's doctrine, other authorities for it may be added to thoſe he cites. See 1. Brownl. 161. 2. Salk. 559.

against all; for as to the demandant it is but one writ under one *teste*. *Note*, severance is two-fold, *viz.* by summons *ad sequendum simul*, and that is when one of the demandants or plaintifes never appeared: and by award of the court of nonsuit without any summons, and that is after appearance.

[m] 6. R. 2. Nonsuit 73. 25. H. 8. Nonsuit Br. 68. 20. H. 7. 5. (2. Ro. Abr. 130. 131. Post. 227. b.)

[m] The king's majesty cannot be nonsuite, because in judgement of law, he is ever present in court; but the king's attorney, *qui sequitur pro domino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of a nonsuite. But in an information by an informer, *qui tam*, &c. the informer may be nonsuited.

[n] 2. H. 4. ca. 7. 3. E. 3. 21. 47. E. 3. 1. 2. 3. E. 4. f. 11.

[n] At the common law upon every continuance or day given over before judgement, the plaintife might have been nonsuited; and therefore before the statute of 2. H. 4. after verdict given, if the court gave a day to be advised, at that day the plaintife was demandable, and therefore might have been nonsuit, which is now remedied by that statute.

[o] 2. H. 5. 5. 8. R. 2. Nonsuit 34.

[o] But after demurrer in law joyned, if the court doth give a day over, at that day the demandant or plaintife is demandable, and therefore may be nonsuit, for that is not holpen by any statute.

[p] 9. H. 7. 1. 21. E. 3. 32. 11. Co. 39. 41. Metcalfe's case. (2. Ro. Abr. 131. contra.)

[p]. And after an award to account, the plaintife may be nonsuit; and so note a diversity betweene an interlocutory award of the court, and a final judgement (1).

By these few instructions you shall the more easily understand the bookes of tearmes and yeares, and other authorities of law. And here (to returne to Littleton) it is to be noted, that, albeit the lord be nonsuit, yet the infranchisement of the villeine doth remaine; for that grew by the appearance to the writ, and cannot be taken away by the nonsuit subsequent. So it is if the writ do abate, yet the infranchisement remaines.

[q] 7. H. 4. 8. 11. H. 4. 13. 9. E. 4. 23. 7. H. 4. 8. a. 7. H. 7. 6. b. 5. H. 7. 15.

[q] *Apres appearance*, for otherwise a stranger may purchase a writ in his name, and therefore Littleton materially added these words, after appearance.

Præcipe. There be three kinds of *præcipes*. 1. A *præcipe quod reddat*, whereof Littleton here speaketh. 2. A *præcipe quod permittat*; and 3. a *præcipe quod faciat*, whereof you may read plentifully in the Register, and Fitzherbert's *Natura Brevium*, and belongs not properly to this treatise.

Account. Of this sufficient hath beene said before.

Vid. sect. 748. 4. Co. 80. Noke's case F. N. B. 145.

Covenant. *Conventio.* Hereof there be two kinds, *viz.* a covenant personall, and a covenant reall; and a covenant in deed, and a covenant in law.

[r] W. 2. cap. 12. 22. Ass. p. 39. 33. H. 6. 2. 14. H. 7. 2. 40. Ass. 18. 40. E. 3. 42.

Ou il fuit endite de ceo. [r] For if the villeine be not first indited of it, then, upon the acquitall of the villeine, the villeine shall recover damages against the lord by the stat. of W. 2. *quia multi per malitiam*, &c. and consequently shall be enfranchised. But if the villeine be formerly indited of the felony, then though the villeine be acquited upon the appeale, he shall recover no damages against the lord. For whersoever the lord giveth to the villeine a just cause of action, he is enfranchised.

[s] Kelway 134.

[s] And therefore if the lord kill his villeine, his sonne and heire shall have an appeale, and thereby his heire shall be enfranchised, because the offence of the lord gave to the heire a just cause of action against the lord.

Sect. 209.

QUE *il ad esté Custome*, &c.

Here some may object, that such a custome may have a lawful beginning; for Littleton in the beginning of this chapter, sect. 174. alloweth,

[a] 10. E. 3. 23. Roger de Vale's case, 15. E. 3. Aid. 33.

that [a] a freeman may take lands of the lord to be holden of him, that is, to pay a fine for the mariage of his sonne or daughter, and

[b] 34. H. 6. 15. a. per Litt.

therefore [b] some have thought that such a custome generally within the mannor should be good. But the

ITEM *si seignior d'un manor voile prescriber, que il ad esté custome deins son manor de temps dont memory ne curt, que chescun tenant deins mesme le mannor, que maria sa file a ascun home sans licence de le seignior del man-*

ALSO if the lord of a mannor will prescribe, that there hath beene a custome within his mannour time out of minde of man, that every tenant within the same mannor, who marieth his daughter to any man without licence of the lord of the

nor

(1) But Brooke says, that the *award* to account is a *judgment*, and therefore that a man cannot be nonsuited after such award. Bro. Abr. *Nonsuit* pl. 17. 21. E. 3. 7. Rolle, to the same purpose, cites 3. H. 4. 7. 21. E. 3. 7. 21. H. 6. 26. 1. H. 7. 1. b. See 2. Ro. Abr. 131. However he adds, that the 27. E. 3. 87. and Co. Litt. are *contra*. Lord Coke's opinion is particularly warranted by Metcalfe's case in the Eleventh Report, which, as he here explains, proceeded on the distinction between an *interlocutory* and a *final* judgment.

nor, ferra fine (1), *& ont fait fine al ſeigniour del mannor pur le temps eſteunt, ceſt preſcription eſt void. Car nul doit faire tiels fines forſque tantſolement villeines. Car cheſcun franke home poit frankement marier ſa file, et que pleiſt a luy & ſa file. Et pur ceo que ceſt preſcription eſt encounter reaſon, tiel preſcription eſt voyd.*

mannour, ſhall make fine, and have made fine to the lord of the mannor for the time being, this preſcription is voyd. For none ought to make ſuch fine, but onely villeines. For every free man may freely marry his daughter to whom it pleaſeth him and his daughter. And for that this preſcription is againſt reaſon, ſuch preſcription is voyd.

villeines, (that is) either villeines of blood, or freemen holding in villenage. So note a diverſity betweene a freeholder and a freeman holding in villenage. Villeines uſe to pay to their lords in acknowledgement of their bondage for their ſeveral heads, and thereupon it is called *chevage, chevagium*, of the French word *chiefe*, as it were the ſervice of the head. Of which Bracton ſaith, [c] *chevagium dicitur recognitio in ſignum ſubjectionis & dominii de capite ſuo.* And ſometimes it is written *chivage*, but more properly *chiefage*. [d] *Chevagium* ſignifieth alſo a great miſpriſion for any ſubject to take ſummes of money, or other gifts yearly in name of *chevage*; becauſe they take upon them to be their chiefe heads or leaders (3).

[c] Bracton lib. 1. cap. 10. Britton fol. 79. b.
[d] 27. Aſſ. 44.

Pur ceo que ceſt preſcription eſt encounter reaſon, ceo eſt voyd. This containes one of the maximes of the common law, *viz.* that all cuſtomes and preſcriptions that be againſt reaſon are voyd.

(2. Ro. Abr. 265. Ante 113. a.)

anſwer is, that, though it may be ſo in a particular caſe upon ſuch a ſpecial reſervation of ſuch a fine upon a gift of land, yet to claime ſuch a fine, by a generall cuſtome within the mannor, is againſt the freedome of a freeman, that is not bound thereunto by particular tenure. But a cuſtome may be alledged within a mannor, [b] That every tenant (albeit his perſon be free) that holdeth in bondage or by native tenure, the freehold being in the lord, ſhall pay to the lord, for the mariage of his daughter without licence, a fine: and it is called *marchet*, as it were a *chete* or fine for marriage (2). And here Littleton ſaith, that none ought to pay ſuch fines, but in villenage or baſe tenure.

[b] 43. E. 3. 5. 14. H. 6. 15.

Sect. 210.

MES en le county de Kent, ou terres & tenements ſont tenus en gavelkind, la, ou, per le cuſtome & uſe de temps dont memory ne curt, les fits males doient ovelment enheriter, ceo cuſtome eſt allowable; pur ceo que il eſtoit ove aſcun reaſon; pur ceo que cheſcun fits eſt auxy graund gentlehome come leigne fits eſt,

BUT in the county of Kent, where lands and tenements are holden in gavelkinde, there, where by the cuſtome and uſe out of minde of man the iſſues male ought equally to inherite, this cuſtome is allowable; becauſe it ſtandeth with ſome reaſon, for every ſonne is as great a gentleman as the eldeſt ſonne is, and perchance will grow

EN [e] *le county de Kent.* For, that in no county of England lands [f] at this day be of the nature of gavelkinde of common right, ſaving in Kent onely. But yet in divers parts of England, within divers mannors and ſeigniories, the like cuſtom is in force.

[e] Vide L'eſtatute de Conſuetudinibus Kanciæ, ann. 21. E. 1. 2. E. 3. 12. 3. E. 3. 21. 38. 23. Aſſ. pl. 12. 8. E. 3. 42. b. (Poſt. 175. b.)
[f] Vide Mirror cap. 1. ſect. 3.

En gavelkinde. That is, *gave all kinde:* for this cuſtome giveth to all the ſonnes alike (4).

Les fitz males inheriter. And this is the generall cuſtome extending to ſonnes. But yet [g] by cuſtome, when one brother dieth without iſſue, all the other

[g] 23. Aſſ. pl. 21.

(1) The words *a le volunte le ſeignior* are added in L. & M.—(2) See further, as to *marchet*, the word in Spelm. Gloſſ. and the Appendix to Robinſon on Gavelkind p. 2.—(3) The caſe, cited by lord Coke from the book of Aſſiſes, conſiſts of various articles enquired of by a jury in the court of King's Bench; and the ſeventeenth of theſe relates to thoſe, *who receive perſons under their patronage, taking from them certain yearly fees, by gift, rent, or in the name of chevage, to maintain them in wrong or right.* Lambard, in treating of unlawful aſſemblies, deſcribes the offence of chevage from the Book of Aſſiſes, and takes notice of it as ſtill inquirable. Lamb. Eirenarch. ed. 1602. p. 163.—(4) This was the common etymology, when lord Coke wrote; and it was countenanced by Mr. Lambard, in the explication of words prefixed to his Anglo Saxon laws. Lamb. de Priſc. Anglor. Leg. voc. Terra ex Scripto. But the latter afterwards inclined to a more probable derivation, conjecturing that *gavel* ſignified *rent*, and ſo *gavelkind* imported land of ſuch a *kind* as to yield *rent*. Lamb. Perambulat. of Kent, ed. 1596. p. 529. Mr. Somner purſues the ſame idea, and expatiates to ſupport it. Somn. Gavelk. 1ſt. edit. 3. It is rather ſurpriſing, that lord Coke did not hit upon a like derivation, as elſewhere he deſcribes *gavel* or *gabel* to ſignify *rent*. Poſt. 142. a.—See further to this point Robinſ. on Gavelk. 1.

(1. Ro. Abr. 624.)

other brethren may inherit (1).

Chescun fitz est auxy grand gentlehome come leigne fitz est. By this it appeareth, that gentry and armes is of the nature of gavelkinde; for they descend to all the sonnes, every sonne being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity.* But yet *jure primogenituræ*, the eldest shall beare, as a badge of his birthright, his father's armes without any difference; for that, as Littleton saith, sectione 5. he is more worthy of blood; but all the younger brethren shall give several differences, & *additio probat minoritatem*, and [b] *hæreditas inter masculos jure civile est dividendâ.*

[b] Fortescue cap. 40.

Ou auterment peradventure il ne puissoit tielment cresser. The reason of this is rendered by the poet.

Horace.

Haud facile emergunt, quorum virtutibus obstat
Res angusta domi.———

31. H. 8. ca. 3. V. 18. H. 6. cap. 1. (1. Sid. 136.)

But now by the statute of 31. H. 8. a great part of Kent is made descendable to the eldest sonne, according to the course of the common law (2); for that, by the meanes of that custome, divers ancient and great families after a few descents came to very little or nothing.

In plures quoties rivos deducitur amnis,
Fit minor, ac undâ deficiente, perit.

Sect. 211.

Vide Sect. 165.

PER custome appel burgh English. Of this custome Littleton hath spoken before in the chapter of Burgage. And in our bookes there is a speciall kind of Borough English [i]; as, it shall descend to the yonger sonne, if he be not of the halfe blood, and if he be, then to the eldest sonne (3).

[i] 32. E. 3. tit. Age 81.

[k] Mich. 10. Ja. Eliot's case in Briefe de faux Judgement.

[k] Within the mannor of B. in the county of Berke, there is such a custome, that if a man have divers daughters, and no son, and dieth, the eldest daughter shall only inherit; and if he have no daughters, but sisters, the eldest sister by the custome shall inherit, and sometime the yongest. And divers other customes there be in like cases. And herewith agreeth Britton, who saith, (l) *de terres des ancienes demeynes soit use solonque le antient usage del lieu, dount en ascun lieu le tient len per usage, que le heritage soit departable entre touts les enfants freres & sores, & en ascun lieu que le eigne avera tout, & en ascun lieu que le puisne frere avera tout.*

[l] Brit. 187. b.

ITEM, lou per custome appel Burgh English en ascun burgh, le fits puisne inheritera touts les tenements, &c. ceo custome estoit ove ascun certaine reason; pur ceo que le fits puisne (sil fault pere & mere) per cause de son juventute poit le pluis meins de touts ses freres luy mesme aider, &c.

ALSO where by the custome called Burrough English in some burrough, the yongest son shall inherit all the tenements, &c. this custome also stands with some certaine reason; because that the yonger sonne (if he lacke father and mother) because of his yong age, may least of all his brethren helpe himselfe, &c.

Pur cause de son juventute poit le pluis meins de touts ses freres luy mesme aider, &c. Hereby (&c.) are implyed those causes wherefore a youth is lesse able to ayd himselfe, &c. which the poet briefely and pithily expresseth thus:

Imberbis

(1) This extension of the custom of gavelkind, to *collaterals*, prevails universally in Kent. See Robinf. on Gavelk. 92.—(2) There are six other statutes for disgavelling particular lands in Kent, besides the 31. Hen. 8. though that is the only statute in print. They are mentioned in Mr. Robinson's book on Gavelkind, and the learned writer is very full in his explanation as well of them, as of the 31. H. 8. especially observing, that they are construed to alter only the partible quality of the customary descent to males, which agrees with lord Coke's manner of mentioning the 31. H. 8. See Robinf. on Gavelk. p. 75.—(3) The reader will find the chief instances of special kinds of Borough-English brought together in Mr. Robinson's Book on Gavelkind. See Append. p. 6.

Imberbis juvenis, tandem cuſtode remoto,
Gaudet equis, canibuſque, & aprici gramine campi;
Cereus in vitium flecti, monitoribus aſper,
Utilium tardus proviſor, prodigus æris,
Sublimis, cupiduſque, & amata relinquere pernix.

Horace.

And againe, no living creature more infirme than man:

Nil homine infirmum tellus animalia nutrit
Inter cuncta magis.———

Homer.

Sect. 212.

MES ſi home voile preſcriber, que, ſi aſcuns avers fueront ſur les demeſnes de ſon mannor là dammage feaſants, que le ſeignior del mannor pur le temps eſteant ad uſe eur de diſtreyner, & le diſtreſſe retainer tanque fine fuit fait a luy pur le dammage a la volunt, ceſt preſcription eſt void; pur ceo que il eſt encounter reaſon, que, ſi tort ſoit fait a un home, que il de ceo ſerroit ſon judge demeſne; car per tiel voy, s'il avoit dammages forſque al value d'un mail, il puiſſoit aſſeſſer & aver pur ceo C. l. que ſerroit encounter-reaſon. Et iſſint tiel preſcription, ou aſcun autre preſcription uſe, ſi ceo ſoit encounter reaſon, ceo ne doit (1) *eſtre allow devant judges*; quia malus uſus abolendus eſt (2).

BUT if a man will preſcribe, that, if any cattle were upon the demeanes of the mannor there doing damage, that the lord of the mannor for the time being hath uſed to diſtreine them, and the diſtreſſe to retaine till fine were made to him for the damages at his will, this preſcription is voyd; becauſe it is againſt reaſon, that if wrong be done any man, that he thereof ſhould be his own judge; for by ſuch way, if he had dammages but to the value of an halfpeny, he might aſſeſſe and have therefore C. li. which ſhould be againſt reaſon. And ſo ſuch preſcription, or any other preſcription uſed, if it be againſt reaſon, this ought not, nor will not bee allowed before judges; *quia malus uſus abolendus eſt.*

EST encounter reaſon, que ſi tort ſoit fait a un home, que il de ceo ſerra ſon judge demeſne. For it is a maxime in law, *aliquis non debet eſſe judex in propria cauſa.* * And therefore a fine, levied before the baylifes of Salop, was reverſed; becauſe one of the bailifes was partie to the fine, *quia non poteſt eſſe judex & pars* (3).

10. E. 3. 23. 4. E. 3. 54. 7. E. 3. 24. 38. E. 3. 18. 2. H. 3. 4. 3. H. 4. 8. H. 6. 19. 5. H. 7. 9. b.

* Hil. 4 H. 4. coram rege Salop. (2. Ro. Abr. 92. 93. 1. Ro. Abr. 492. 496.)

Malus uſus abolendus eſt: and every uſe is evill, that is (as our author ſaith) againſt reaſon, *quia in conſuetudinibus non diuturnitas temporis, ſed ſoliditas rationis eſt conſideranda* (4).

(5. Co. 84)

And by this rule cited by our author, at the parliament holden at Kilkenny in Ireland, Lionel Duke of Clarence being then lieutenant of that realme, the Iriſh cuſtoms called there the Brehon law, (for that the Iriſh call their judges Brehons) was wholly aboliſhed; for that (as the parliament ſayd) it was no law, but a lewd cuſtome, & *malus uſus abolendus eſt* (5).

An. 40. E. 3. at Kilkenny.

The Brehon law.

Vide ſect. 265.

But our ſtudent muſt know, that king John in the twelfth yeare of his raign went into Ireland, and there, by the advice of grave and learned men in the laws whom he carrieth with him, by parliament *de communi omni de Hibernia conſenſu*, ordained and eſtabliſhed, that Ireland ſhould be governed by the

(Vaugh. 293.)

(1) Inſtead of *doit* it is *voet* in L. & M. Roh. & P.
(2) Sect. 174. is placed here in L. & M. as we have formerly noticed. See 117. b. note 2.
(3) See 14. Vin. Abr. 573. 4. Com. Dig. 6.
(4) See Dav. Rep. 32. & 7. Vin. Abr. 180. 185.
(5) Acc. 4. Inſt. 358. So much of the Iriſh ſtatutes of 40. E. 3. as relates to aboliſhing the Brehon law, is in Dav. on Ireland, fol. ed. 28. The other heads of theſe ſtatutes are alſo given in the ſame book p. 44. What were the moſt exceptionable parts of the Brehon law, or Iriſh cuſtoms, are explained ibid. 36. in Spenſ. Irel. 111. ed. 4. and Ware's Antiq. of Ireland. Harris's ed. 69.

the lawes of England (1), which of many of the Iriſhmen, according to their owne deſire, was joyfully accepted and obeyed, and of many the ſame was ſoone after abſolutely refuſed, preferring their Brehon law before the juſt and honourable lawes of England. *Rex, &c. baronibus, militibus, & omnibus libere tenentibus ſalutem. Satis, ut credimus, veſtra audivit diſcretio, quod quando bonæ memoriæ Johannes quondam rex Angliæ, pater noſter venit in Hyberniam, ipſe duxit ſecum viros diſcretos & legis peritos, quorum communi conſilio, & ad inſtantiam Hybernenſium, ſtatuit & præcepit leges Anglicanas in Hybernia, ità quod leges eaſdem in ſcripturas redactas reliquit ſub ſigillo ſuo ad Scaccarium Dublin.*

Rot. Pat. 11. H. 3. 7. Co. 22. b. Calvin's caſe.

Rot. Patent 18. H. 3. M. 17. N. 21.

Rex comitibus, baronibus, militibus, & liberis hominibus & omnibus aliis de terra Hiberniæ ſalutem. Quia manifeſtè eſſe dinoſcitur contra coronam & dignitatem noſtram & conſuetudines & leges regni noſtri Angliæ, quas bonæ memoriæ dominus Johannes rex pater noſter, de communi omnium de Hybernia conſenſu, teneri ſtatuit in terra illa, quòd placita teneantur in curia Chriſtianitatis de advocationibus eccleſiarum & capellarum, vel de laico feodo, vel de catallis, quæ non ſunt de teſtamento, vel matrimonio : vobis mandamus, prohibentes quatenus hujuſmodi placita in curiæ Chriſtianitatis nullatenus ſequi præſumatis in manifeſtum dignitatis & coronæ noſtræ præjudicium, ſcituri pro certo, quod ſi feceritis, dedimus in mandatis juſticiario noſtro Hyberniæ, ſtatuta curiæ noſtræ in Anglia contra tranſgreſſiones hujus mandati noſtri cum juſticia procedat, & quod noſtrum eſt exequatur. In cujus, &c. teſte rege apud Winchcomb, 28 die Octobris, anno regni noſtri 18. Et mandatum eſt juſticio Hyberniæ, per literas cauſas, quod prædictas litoras patentes publicè legi & teneri faciat.

Rot. Patent 30. H. 3.

Rex, &c. pro communi utilitate terræ Hyberniæ, & pro unitate terrarum, proviſum eſt, quod omnes leges & conſuetudines, quæ in regno Angliæ tenentur, in Hibernia teneantur, & eadem terra eiſdem legibus ſubjaceat, ac per eaſdem regatur, ſicut Johannes rex, cum illic eſſet, ſtatuit & firmiter mandavit. Ideo volumus, quod omnia brevia de communi jure, quæ currunt in Anglia, ſimiliter currant in Hybernia ſub novo ſigillo regis. In cujus, &c. teſte me ipſo apud Woodſtocke. Wherein it is to be obſerved, that union of lawes is the beſt meanes for the unity of countries. * *Una & eadem lex eſſe debet tam in regno Angliæ quam Hyberniæ.* [*m*] *Terra Hyberniæ inter ſe habet parliamentum & omnimodas curias prout in Anglia, & per idem parliamentum facit leges & mutat leges, & illi de eadem terra non obligantur per ſtatuta in Anglia, quia hii non habent milites parliamenti* (2).

* Tri. 13. E. 1. coram rege in Theſaur. in longo placito.
[*m*] 2. R. 3. 12. In Camera Stellata 1. H. 7. 3. (4. Inſt. 350.)

By an act of parliament (called Poyning's law) holden in Ireland in the tenth yeare of Henry the ſeventh, it is enacted, that all ſtatutes, made in this realme of England before that time, ſhould be of force and be put in uſe within the realme of Ireland (3); which (though it be by way of digreſſion) is not unneceſſary for our ſtudent to know. But now let us heare our author (4).

Chap. 12. Of Rents. Sect. 213.

SOME have divided rents into foure kindes, *viz.* rent ſervice, rent charge, rent diſtreynable of common right, (whereof ſomewhat ſhall be ſaid in this chapter) and rent ſecke.

TROYS maners de rents y ſont, ceſtaſcavoir, rent ſervice, rent charge, & rent ſecke. Rent ſervice eſt, l'ou le tenant tient ſa terre de ſon ſeignior per fealty & certaine rent, ou per homage fealtie & certain rent, ou per autres ſervices & certaine rent. Et ſi rent ſervice

THREE manner of rents there be, that is to ſay, rent ſervice, rent charge, and rent ſecke. Rent ſervice is, where the tenant holdeth his land of his lord by fealtie and certaine rent, or by homage fealty and certaine rent, or by other ſervices and certaine rent. And if rent ſervice at any day, that *ſoit*

[*a*] Fleta lib. 3. ca. 14. Britton ca. 41. Mirror ca. 2. ſect. 16. Pl. Com. 132. b.
* 10. Co. 127. Clun's caſe.

Rent. In Latine *redditus*, (*a*) by ſome *dicitur à redeundo, quia retroit, & quotannis redit.* * And others ſay it is derived of *reddere*, for that the rent is reſerved out of the profits of the land, and is not due till the tenant or leſſee take the profits; for *reddendo inde* or *ſolvendo*, or *reſervando inde*, or the like, [*b*] is as much to

[*b*] Pl. Com. 138. 139. &c. in Browning's & Beſting's caſe. 35. H. 6. 34.

☞ *The continuation of the note on the origin of feuds, left unfiniſhed in fol. 71. a. and intended to have been inſerted here, is further poſtponed to the end of the work. See poſt. fol. 395. a.*

(1) Some think, that the laws of England were introduced into Ireland before this charter of John by his father Henry the ſecond. This opinion is ſtrongly enforced by the teſtimony of an hiſtorian of the reign of Henry the third; for Matth. Paris writes, that *rex Henricus, antequam ex Hibernia rediret, apud Liſmore concilium congregavit, ubi leges Angliæ ſunt ab omnibus gratanter receptæ, &, juratoriâ cautione preſtitâ, confirmatæ.* Molyn. Caſe of Irel. Lond. ed. of 20. p. 14. & Matth. Par. ad ann. 1172. vit. H. 2. ibid. cit. The other authorities to eſtabliſh the ſame fact are well collected by Mr. Harris in his edition of Ware's Antiquities of Ireland. See p. 78. See further 1. Lel. Hiſt. Irel. 76. & Vaugh. 291. *See ſpeech, Sept. 2 Jac.*

For the remainder of the notes to this ſide of fol. 141. ſee poſt. fol. 143. a.

ſoin a aſcun jour, que doit eſtre pay, adererre, le ſeignior poit diſtrainer pur ceo de common droit.

it ought to be payed, be behinde, the lord may diſtraine for that of common right.

ſay as the tenant or leſſee ſhall ſhall pay ſo much out of the profits of the lands; for *reddere nihil aliud eſt, quam acceptum, aut aliquam partem ejuſdem, reſtituere. Seu reddere eſt quaſi retro dare,* and hereof commeth *redditus* for a rent.

Here note for the better underſtanding of ancient records, ſtatutes, charters, &c. *gabel*, or *gavell, gablum, gabellum, gabellettum, galbellettum,* and *gavillettum,* doe ſignifie a rent (1), cuſtome, duty, or ſervice, yeelded or done to the king or any other lord; as *Wallingford continet* 276 *hagas i. e. domos reddentes* 9 *libras de gablo i. de redditu.* And Oxford, *hæc urbs reddebat pro theolonio et gablo regi* 20. *l'.* & *ſextarios mellis, comiti Alpharo* 10 *libras.* And this is the legall ſignification thereof (2). Domeſday. Statutum de gaviletto anno 10. E. 2. (Ante 87. b. Poſt. 144. 2. Ro. Abr. 446.)

Rent ſervice. It is called a rent ſervice, becauſe it hath ſome corporall ſervice incident unto it, which at the leaſt is fealty, as here it appeareth.

Sa terre. [*c*] A rent ſervice cannot be reſerved out of any inheritance but ſuch as is manurable, whereinto the lord may enter and take a diſtreſſe, as in lands and tenements, reverſions, remainders, and as ſome have ſaid, out of the herbage of lands, and regularly not out of any inheritances incorporeall, or that lye in grant. [*d*] By act of law one rent or ſervice may iſſue out of another, as if A, before the ſtatute of *quia emptores terrarum* had given lands to B, to hold to him by fealty and ten ſhillings rent, and B had made a feoffment in fee to C, &c. whereby there was a meſnalty created, in this caſe C ſhould hold of B, either by the ſame ſervices the law created, or ſuch as he ſpecially reſerved, and B did by operation of law hold thoſe ſervices of A by fealty and ten ſhillings rent, that is to ſay, rent and ſervice out of rent and ſervice; and if the rent be behinde, the lord paramount may diſtraine upon the land for his rent, for both meſnalty and ſeigniory doe iſſue out of the land, the meſnalty immediately, and the ſeigniory mediately, which is worthy of due conſideration and obſervation. Vide ſect. 218. (Ante 47. a.) [*c*] 44. E. 3. 45. 5. Co. 4. Seignior Mountjoye's caſe 9. Aſſ. 24. 30. Aſſ 5. 17. E. 3. 75. 7. Co. 23. But's caſe. Pl. Com. 139. [*d*] 3. H. 6. 21 5. H. 7. 36. 21. H. 7. 39. 1. H 4. 82. 10. H. 6. 12. 19. E. 3. tit. Gard. 40. 21. H. 6. 11.

Certaine rent. [*e*] For the rent muſt be certaine, or which may bee reduced to a certainty, for *id certum eſt, quod certum reddi poteſt.* [*f*] *Continetur carta reddendo inde annuatim ad tales terminos, vel faciendo inde talia ſervitia, vel tales conſuetudines, quæ omnia debent eſſe certa & in carta expreſſa &c.* But of this I have ſpoken ſect. 136. And the rent may as well be in delivery of hens, capons, roſes, ſpurres, bowes, ſhafts, horſes, hawkes, pepper, comine, wheat, or other profit that lyeth in render, office, attendance, and ſuch like, as in payment of money. [*g*] But a man upon his feoffment or conveyance cannot reſerve to him parcell of the annuall profits themſelves, as to reſerve the veſture or herbage of the land or the like (3); for that ſhould be repugnant to the grant, *non debet enim eſſe reſervatio de proficuis ipſis, quia ea conceduntur, ſed de redditu novo extra proficua.* [*e*] Britton fol. 100. a. (Ante 96. a.) [*f*] Fleta lib. 3. ca. 14. (Ante 91. b.) [*g*] 38. H. 6. 38. a. (Ante 47. a. 4. b.)

Poet diſtreiner pur ceo. For where there is fealty, &c. incident to the rent, there is a diſtreſſe incident alſo thereunto. [*b*] But it is to be underſtood, that for a rent or ſervice, the lord cannot diſtreine in the night, but in the day time; and ſo it is of a rent charge. But for dammage feaſaunt one may diſtreine in the night, otherwiſe it may bee the beaſts will be gone before he can take them. [*b*] Mirror ca. 2. ſect. 16. 10. E. 3. Avowry 137. 11. H. 7. 5.

De common droit. Of common right, [*i*] that is, by the common law ſo called; becauſe the common law is the beſt and moſt common birth-right, that the ſubject hath for the ſafeguard and defence, not onely of goods, lands and revenues, but of his wife and children, his body, fame, and life alſo. So as the meaning of Littleton in this particular caſe is, that the lord may diſtreine for this rent of common right, that is, by the common law, without any particular reſervation or proviſion of the party. And it is to be obſerved, that the common law of England ſometime is called right, ſometime common right, and ſometime *communis juſtitia.* In the grand charter the common law is called right. *Rectum nulli vendemus; nulli negabimus aut differemus juſtitiam vel rectum.* In the ſtatute of W. 1. c. 1. it is called *common droit. En primes voet le roy, & commande, que le peace de ſ. eſgliſe & de la terre ſoit bien garde & maintaine en touts points, & que common droit ſoit fait a touts, auxibien aux riches, ſauns regard de nulluy;* which agreeth with the ancient law in the time of king Edgar. *Porro autem has populo, quas ſervet, proponimus leges. Primum publici juris beneficio quiſquam fruitor, idque ex æquo & bono, ſive is dives ſive inops fuerit jus redditor.* And Fleta ſaith, *Item quod pax eccleſiæ et terræ inviolabiliter obſervetur, & quod communis juſtitia ſingulis pariter exhibeatur.* And all the commiſſions and charters for execution of juſtice are, *facturi quod ad juſtitiam pertinet ſecundum legem & conſuetudinem Angliæ.* So as in truth juſtice is the daughter of the law, for the law bringeth her forth. And in this ſenſe being [*i*] W. 1. ca. 1. 2. H. 4. ca. 1. 7. H. 4. ca. 1. 4. H. 8. ca. 8. Lamb. fo. 78. inter Leges Regis Edgari. Fleta lib. 1. c. 29.

(1) See Acc. ante 140. a. note 4.

(2) But though in old deeds *gavelet* may often ſignify *rent*, and this uſe of the word may beſt agree with its origin, yet it is not the only legal ſignification. On the contrary, the word is now moſt uſually applied to a remedy or proceſs, peculiar in denomination to Kent and London, by which the lord of the fee, when his tenant is in arrear for rent or ſervice, may force him to pay the arrears and damages, by ſeizing the land and holding it till payment. In Kent this remedy is founded on immèmorial uſage; Mr. Robinſon learnedly deducing it as well from the general law of fiefs, as from the practice of our Anglo-Saxon anceſtors; and the paſſages cited by another eminent writer, in treating of forfeiture by *ceſſer*, tending to the ſame point. Robinſ. on Gavelk. 243. Wright's Ten. 197. The *gavelet*, thus prevailing by the cuſtom of Kent, may be uſed whether there is a ſufficient diſtreſs on the land or not, but is reſtricted to gavelkind tenure. Robinſ. on Gavelk. 243. To London a writ of the ſame denomination was given for rent-ſervice *generally* by the 10. of Edward the ſecond, which is therefore called the ſtatute of *gavelet*. But by the words of the ſtatute this latter *gavelet* only lies, where the lord cannot obtain payment by diſtreſs. From this account of the *gavelet* in Kent and London, it appears that Sir Henry Spelman was well juſtified, when, after giving the etymon of *gavelet*, and deſcribing it ſometimes to ſignify the tenure of *gavelkind*, he adds, *gaveletum juris etiam proceſſus eſt huic dicatus tenuræ, caſu quo tenens redditus & ſervitia ultra modum ſubduxit; quod & Londonienſibus ceditur ſtatuto an.* 10. *Edwardi* 2. *de gaveleto.* Spelm. Gloſſ. voc. *Gaveletum.* We take notice of this paſſage from Spelman, becauſe the learned and ingenious obſerver on our ancient ſtatutes, ſeems to have miſunderſtood the *gavelet* thus deſcribed, for though the word originally imported *rent*, yet our explanation ſhews, that it alſo means *a proceſs for the recovery of rent*, technically called *gavelet* both in Kent and London. See Barr. on Ant. Stat. 2d. ed. 149.—Beſides the two remedies thus called *gavelet*, there is another very ſimilar one for rents-ſervice in all parts of the kingdom; and this is the writ of *ceſſavit*, which is regulated by, if it did not wholly originate from the ſtatutes of Glouceſter and Weſtminſter the ſecond. 6. E. 1. c. 4. 13. E. 1. ſt. 1. c. 21. 41. But lord Coke, in his comment on the ſtatute of Glouceſter, mentions his having read the record of the proceedings on a *ceſſavit* in