THE

SECOND PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

VOL. I.

THE

SECOND PART

OF THE

Inſtitutes of the Laws of England.

CONTAINING

THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES.

Juriſperito dixit, In lege quid ſcriptum eſt? quomodo legis? Luc. 10. 26.

Quod non lego, non credo. *Auguſt.*

Juriſprudentia eſt juvenibus regimen, ſenibus ſolamen, pauperibus divitiæ, & divitibus ſecuritas.

Authore EDWARDO COKE, MILITE, *J. C.*

Hæc ego grandævus poſui tibi, candide lector.

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M.DCC.XCVII.

A TABLE

Of the ſeveral Statutes treated of in this Second Part of the INSTITUTES.

THE TABLE.

DEO,

DEO,

PATRIÆ,

TIBI.

A PROEME

TO THE

SECOND PART *of the* INSTITUTES.

IN the firſt part of the Inſtitutes, following Littleton our guide, we have treated of ſuch parts of the common laws, ſtatutes, and cuſtomes, as he in his three books hath left unto us. We are in this ſecond part of the Inſtitutes to ſpeak of *Magna Charta*, and many ancient and other ſtatutes, as in the table precedent doe appeare.

It is called *Magna Charta*, not that it is great in quantity, for there be many voluminous charters commonly paſſed, ſpecially in theſe later times, longer then this is; nor comparatively in reſpect that it is greater then Charta de Foreſta, but in reſpect of the great importance, and weightineſſe of the matter, as hereafter ſhall appeare: and likewiſe for the ſame cauſe *Charta de Foreſta*, is called *Magna Charta de Foreſta*, and both of them are called *Magnæ Chartæ libertatum Angliæ.*

Marlb. can. 5. Inſpex. 25 E. 1. 12 H 3. *Sententia lata ſuper chartas* Bract. lib. 3. fol. 291. & lib 5 fol. 434. Mirror, cap. § Regiſtr. 8 E. 3. Itin' Pick. Rot. 43. Arons caſe. Rot. Pat. 20. Marcii 1 E. 3. de perambulatione for' in com' Eſſex. Rot. Parl. 22 E. 3. nu. 36.

King Alexander was called Alexander Magnus, not in

reſpect of the largeneſſe of his body, for he was a little man, but in reſpect of the greatneſſe of his heroical ſpirit, of whom it might be truly ſaid,

Mens tamen in parvo corpore magna fuit;

ſo as of this great charter it may be truly ſaid, that it is *magnum in parvo.*

And it is alſo called *Charta libertatum regni*; and upon great reaſon it is ſo called of the effect, *quia liberos facit:* ſometime for the ſame cauſe, *communis libertas*, and *le chartre des franchiſes.*

The Ends. *Sapiens incipit à fine.*

There be four ends of this great charter, mentioned in the preface, *viz.* 1. The honour of Almighty God, &c. 2. The ſafety of the kings ſoule; 3. The advancement of holy church; and 4. The amendment of the realme: foure moſt excellent ends, whereof more ſhall be ſaid hereafter.

By what authority, and when.

By charter bearing date the 11. day of February, in the 9 yeare of king H. 3. and ſecondly, by that charter eſtabliſhed by authority of parliament then ſitting, and ſo entred into the parliament roll; the witneſſes to the ſaid charter were 31. lords ſpirituall, *viz.* Stephen Langton archbiſhop of Canterbury, E. biſhop of London, I. B. of Bath, P. of Wincheſter, H. of Lincoln, Robert of Saliſbury, W. of Rocheſter, W. of Worceſter, I. of Ely, H. of Hereford, R. of Chiceſter, William of Exeter, biſhops. The abbot of S. Edes, the abbot of S. Albons, the abbot of Battaile, the abbot of S. Auguſtines in Canterbury, the Abbot of Eveſham, the abbot of Weſtminſter, the abbot of Burghe S. Peter, the abbot of Reading, the abbot of Abindon, the abbot of Malmeſbury, the abbot of Winchcombe, the abbot of Hyde, the abbot of Certeſey, the abbot of Shernborn, the abbot of Cerne, the abbot of Abbotebury, the abbot of Middleton, the abbot of Selbie, the abbot of Cirenceſter; and 33. of the nobility, *viz.* Hubert de Burgo chiefe juſtice of England,

land, and 32. earles and barons, *viz.* Randall earle of Chester and Lincoln, William earle of Salisbury, William earle Warren, Gilbert of Clare earle of Gloceſter and Hertford, William de Ferrars earle of Derby, William Mandevile earle of Essex, H. de Bigod earle of Norffolk, William earle of Albemarle, H. earle of Hereford, John Constable of Chester, Robert de Ros, R. Fitzwalter, Robert de Vipount, William de Bruer, R. de Mountfitchet, P. Fitzherbert, William de Aubeine, Robert Gresly, Reignald de Brehus, John de Movenne, J. Fitz-Alen, Hugh de Mortimer, Walter de Beauchamp, William de S. John, Peter de Mololacu, Brian de Lisle, T. de Multon, Richard de Argentein, Jeffrey de Nevill, William Maudint, John de Baalim, and others.

There were many of the great charters, and *Charta de Forcſta*, put under the great seale, and sent to archbishops, bishops, and other men of the clergie, to be safely kept, whereof one of them remain at this day at Lambeth, with the archbishop of Canterbury. The great providence and policy for preservation of it.

Also the same was entred of record in a parliament roll.

And after king E. 1. by act of parliament did ordain that both the said charters should be sent under the great seale, as well to the justices of the forest, as to others, and to all sheriffes, and to all other the kings officers, and to all the cities through the realm, and that the same charters should be sent to all the cathedrall churches, and that they should be read and published in every county four times in the yeare in full county, *viz.* the next county day after the feast of S. Michael, and the next county day after Christmas, and the next county day after Easter, and the next county day after the feast of S. John. 25 E. 1. cap. 1. 25 E. 1. cap. 3. 28 E. 1. ca. 2. & 17.

It was for the most part declaratory of the principall grounds of the fundamentall laws of England, and for the residue it is additionall to supply some defects of the common The quality.

law;

Mat. Par. fo. 246, 247, 248.

law; and it was no new declaration: for king John in the 17 yeare of his raigne had granted the like, which alſo was called *Magna Charta*, as appeareth by a record before this great charter made by king H. 3.

Paſch. 5 H. 3. tit' Mordaunc' f. 53.

Home ne ſuer' mordanc' apud Weſtmonaſterium des terres in auter countie, car ceo ſer encont' leſtatut de Magna Charta ſinon que illa aſſiſa ſemel interminata fuit coram juſtic'.

Stat. 25 E. 1. Confirm. Chart.

Alſo by the ſaid act of 25 E. 1. (called *Confirm' Chartar'*) it is adjudged in parliament that the great charter, and the charter of the foreſt ſhould be taken as the common law.

How and upon what grounds it hath been impugned.

Soon after the making of this great charter, the young king by evill counſell fell into great miſlike with it, which *Hubert de Burgo ſummus juſticiarius Angliæ* perceiving (who in former times had been a great lover, and well deſerving patriot of his country, and learned in the laws (for

Rot. clauſ. 11 H. 3. membr. 44. 5 H. 3.

Rot. clauſ. 11 *H.* 3. *membr.* 44. I finde that he, and many others were juſtices itinerant in 5 H. 3. and I have ſeen a fine levied before him, and ſixe other judges, between Stephen de Wamceſle, and the abbot of Hales) yet meaning to make this a ſtep to his ambition (which ever rideth without reines) perſwaded and humored the king that he might avoid the charter of his father king John by dureſſe, and his own great charta, and *Charta de Foreſta* alſo, for that he was within age when he granted the ſame, whereupon the king in the 11 yeare of his raign, being then of full age, got one of the great charters, and of the foreſt into his hands, and by the counſell principally of this Hubert his chiefe juſtice, at a councell holden at Oxford, unjuſtly cancelled both the ſaid charters, (notwithſtanding the ſaid Hubert de Burgo was the primier witneſſe of all the temporall lords to both the ſaid charters) whereupon he became in high favour with the king, inſomuch as he was ſoon after (*viz.* the 10 of December, in the 13 yeare of that king, created to the higheſt dignity that in thoſe times any ſubject had) to be an earle, *viz.* of

Kent.

Kent. But ſoon after (for flatterers and humoriſts have no ſure foundation) he fell into the kings heavy indignation, and after many fearfull and miſerable troubles, he was juſtly, and according to law ſentenced by his peeres in open parliament, and juſtly degraded of that dignity which he unjuſtly had obtained by his counſell for cancelling of *Magna Charta*, and *Charta de Foreſta*. And the king by his charter granted, *Quod nos firmiter & integre tenebimus judicium de Huberto de Burgo per barones dictum*; he was buried in the Frier Predicants where Whitehall is now built, ſo as no monument remains of him at this day.

Rot. claus. 17 H. 3. m. 1. & 2. Rot. Pat. 17 H. 2. m. 1. à tergo & 12.

In this advice Hubert de Burgo either diſſembled his opinion, or groſly erred (as ever ambitious flattery bedazles the eye, even of them, that be learned) firſt, for that a king cannot avoid his charter, albeit he make it when he is within age, for in reſpect of his royall and politique capacity as king, the law adjudgeth him of full age. Secondly, it being done by authority of parliament, and enrolled of record, it was ſtrange that any man ſhould think that the king could avoid them in reſpect he was within age. Thirdly, it was to no end to cancell one where there were ſo many, or to have cancelled all, when they were of record in the parliament roll, or to have cancelled roll and all, when they were, for the moſt part, but declaratories of the ancient common laws of England, to the obſervation, and keeping whereof, the king was bound and ſworn. What ſucceſſe thoſe potent and opulent ſubjects, Hugh Spencer the father, and ſon had, for giving raſh and evill counſell to king E. 2. *enconter la forme de la grand chartre*, I had rather you ſhould read then I ſhould declare.

Exilium turgonis la Spencer pais & filii.

After the making of *Magna Charta*, and *Charta de Foreſta*, divers learned men in the laws, that I may uſe the words of the record, kept ſchooles of the law in the city of London, and taught ſuch as reſorted to them, the laws of the realme, taking their foundation of *Magna Charta*, and *Charta de*

Rot. claus. anno 19 H. 3. m. 22.

Foreſta,

Foreſta, which as you have heard, the king by ill advice ſought to impeach.

19 H. 3. ubi ſupra.

The king in the 19 year of his raign, by his writ, commanded the maior and ſheriffes of London, *Quod per totam civitatem London clamari faciant & firmiter prohiberi, ne aliquis ſcholas tenens de legibus in eadem civitate de cætero ibidem leges doceat, & ſi aliquis ibidem fuerit hujuſmodi ſcholas tenens, ipſum ſine dilatione ceſſare fac'; Teſte Rege, &c.* 11 *die Decembris, anno regni ſui decimo nono.* But this writ took no better effect then it deſerved, for evill counſell being removed from the king, he in the next yeare, *viz.* in the 20 yeare of his raigne compleat, and in the one and twentieth yeare current, did by his charter under his great ſeale confirme both *Magna Charta*, and *Charta de Foreſta*, he being then 29 years old. And after in the 52 yeare of his raigne eſtabliſhed and confirmed both the ſame by act of parliament, with the clauſe, *Quod contravenientes per dominum regem, cum convicti fuerint, graviter puniantur.* Hereby ſhall ſome opinions and reſolutions in our books be the better underſtood, which ſpeak of alienations without licenſe before or after 20 H. 3. which yeare was named for that the king then confirmed the ſaid great charter, and in like manner did king E. 1. by act of parliament in the 25 year of his raign: and the ſaid two charters have been confirmed, eſtabliſhed, and commanded to be put in execution by 32 ſeverall acts of parliament in all.

Marlb. cap. 7. 15 E. 4. 13.

20 Aſſ. p. 17. 14 H. 4. 2, & 3. Br. Alien. fans licenſe. 10.

Of what high eſtimation it hath been.

This appeareth partly by that which hath been ſaid, for that it hath ſo often been confirmed by the wiſe providence of ſo many acts of parliament.

Confirm. Chart. 25 Ed. 1. ca. 1. & 2. Vet. Mag. Chart. 2. part, fol. 35.

And albeit judgements in the kings courts are of high regard in law, and *judicia* are accounted as *juris dicta*, yet it is provided by act of parliament, that if any judgement be given contrary to any of the points of the great charter, or *Charta de Foreſta*, by the juſtices, or by any other of the kings

kings miniſters, &c. it ſhall be undone, and holden for nought.

And that both the ſaid charters ſhall be ſent under the great ſeale to all cathedrall churches throughout the realm there to remain, and ſhall be read to the people twice every yeare. 25 E. 1. ubi ſupra.

The higheſt and moſt binding laws are the ſtatutes which are eſtabliſhed by parliament; and by authority of that higheſt court it is enacted (only to ſhew their tender care of *Magna Charta*, and *Charta de Foreſta*) that if any ſtatute be made contrary to the great charter, or the charter of the foreſt, that ſhall be holden for none: by which words all former ſtatutes made againſt either of thoſe charters are now repealed; and the nobles and great officers were to be ſworn to the obſervation of *Magna Charta*, and *Charta de Foreſta*. 42 E. 3. cap. 1. 25 E. 1. ubi ſupra.

Magna fuit quondam magnæ reverentia chartæ.

We in this ſecond part of the Inſtitutes, treating of the ancient and other ſtatutes have been inforced almoſt of neceſſity to cite our ancient authors, Bracton, Britton, the Mirror, Fleta, and many records, never before publiſhed in print, to the end the prudent reader may diſcerne what the common law was before the making of every of thoſe ſtatutes, which we handle in this work, and thereby know whether the ſtatute be introductory of a new law, or declaratory of the old, which will conduce much to the true underſtanding of the text it ſelfe. We have alſo ſometime in this and other parts of the Inſtitutes, cited the Grand Cuſtumier de Normandy, where it agreeth with the laws of England, and ſometime where they diſagree, *ex diametro*, being a book compounded as well of the laws of England, which king Edward the Confeſſor gave them, as he that commenteth upon that book teſtifieth (as elſewhere we have noted) as of divers cuſtomes of the duchie of Normandie, which book was compoſed

posed in the raign of king H. 3. *viz.* about 40 yeares after the coronation of king Richard the first, 3 *Septembris anno* 1 of his raign, *anno Dom.* 1189. about 138 yeares after the conquest. See that book cap. 22. fo. 29. a. and the comment upon the same, & cap. 112. In which Custumier a great number of the courts of justice, of the originall writs, and of many other of the titles of the laws of [illegible]ngland, are not so much as named or mentioned. And seeing we have in these, and other parts of our Institutes, cited the laws and statutes of divers kings before the conquest, and in the Conquerors time, we have thought good for the ease of the reader, to set down the times wherein those kings lived, and deceased. *Inas* began to raign *anno Dom.* 689. and deceased 726. *Aluredus, alias Alfredus, alias Elfredus*, began to raign *anno Dom.* 872. and deceased 901. Of this *Alured* it is thus written, *Aluredus acerrimi ingenii princeps per Grimbaldum & Johannem doctissimos monachos tantum instructus est, ut in brevi librorum omnium notitiam haberet, totumque novum & vetus Testamentum in eulogiam Anglicæ gentis transmutaret (cujus translationis pars nobis feliciter accidit.)* This learned king in advancement of divine and humane knowledge, by the perswasion of those two monks founded the famous university of Cambridge. *Edwardus*, son of the said *Alured*, began to reign *anno Dom.* 901. and deceased 924. [a] *Ethelstanus*, alias, *Adelstane* eldest son of the said [illegible]dward began to raign *anno Dom.* 924. and deceased 940 [b] *Edmundus* began to raign *anno Dom.* 940. and deceased [illegible]46. [c] *Edgarus* began to raign *anno Dom.* 959. and deceased 9[illegible]5. [d] *Etheldredus* began to raign *anno Dom.* 979. and deceased 10[illegible]6. [e] *Canutus* began to raign *anno Dom.* 1016. and deceased 1035. [f] *Edwardus* began to raign *anno Dom.* 1042. and deceased 1066. [g] *Willielmus Bastardus* began to raign *anno Dom.* 1066. and deceased 1087.

Some fragments of the statutes in the raigns of the abovesaid

In Historia Eliensi fo. 98. lib. 2.

Cl: Caius D. m. Cant.

[a] *Fortis, ing[illegible]s, & fortu[illegible]tus: Danos expulit & Angliam in mona[illegible]chiam re[illegible]xit.*

[b] *Martir apud Hoxon olim Hegilsdon.*

[c] *Pacificus, rex excellentissimus.*

[d] Named in Domesday. Glouc' Ecclesia de Evesham. Adelredus.

[e] In Domesday he is ever written *Cnut' Rex.*

[f] He is ever called in Domesd. *Episcopus S Edw. Cus : Rex Edwardus dedit regi Griffin terram quæ jacebat trans aquam quæ De vocatur.*

[g] He is in Domesd. written Willielmus Rex, *vel* Willielmus, *vel* W. Rex.

ſaid kings doe yet remain, but not onely many of the ſtatutes, and acts of parliament, but alſo the books and treatiſes of the common laws both in theſe and other kings times, and ſpecially in the times of the ancient Brittons (an ineſtimable loſſe) are not to be found.

It is to be obſerved that in Domeſday Haroldus, who uſurped the crown of England, after the deceaſe of king Edward the Confeſſor, is never named *per nomen regis, ſed per nomen Comitis Haroldi, ſeu Heraldi*; and therefore we have omitted him.

In citing of the aboveſaid laws originally written in the Saxon tongue, we have referred you to M. Lambard, who accurately and faithfully tranſlated the ſame into Latin, one page containing the Saxon, and next the Latin, and is in print (for our manner is not to cite any thing, but ſo to referre the reader, as he may eaſily finde it;) *ſed ut unicuique ſuus tribuatur bonos*, all thoſe ſtatutes in the raigns of all the aboveſaid kings were of ancient time plainly and truly tranſlated into Latin, (whereof we have a very ancient, if not the firſt manuſcript) which no doubt did not a little abbreviate M. Lambards pains.

Upon the text of the civill law, there be ſo many gloſſes and interpretations, and again upon thoſe ſo many commentaries, and all theſe written by doctors of equall degree and authority, and therein ſo many diverſities of opinions, as they do rather increaſe then reſolve doubts, and incertainties, and the profeſſors of that noble ſcience ſay, that it is like a ſea full of waves. The difference then between thoſe gloſſes and commentaries, and this which we publiſh, is, that their gloſſes and commentaries are written by doctors, which be advocates, and ſo in a manner private interpretations: and our expoſitions or commentaries upon Magna Charta, and other ſtatutes, are the reſolutions of judges in courts of juſtice in judiciall courſes of proceeding, either related and reported in our books, or extant in judiciall records, or in both, and

therefore

therefore being collected together, ſhall (as we conceive) produce certainty, the mother and nurſe of repoſe and quietneſſe, and are not like to the waves of the ſea, but

Regula. *Statio bene fida peritis:* for *Judicia ſunt tanquam juris dicta.*

Finis Prooemii.

But now let us peruſe the Text it ſelfe.

MAGNA

MAGNA CHARTA.

EDITA *Anno nono* H. III.

HENRICUS Dei gratia rex Angliæ (1), *dominus Hiberniæ, dux Normaniæ, et Aquitaniæ, et comes Andegaviæ, archiepiſcopis, epiſcopis, abbatibus, prioribus, comitibus, baronibus* (2), *vicecomitibus, præpoſitis, miniſtris, et omnibus ballivis, et fidelibus ſuis, præſentem chartam inſpecturis, ſalutem. Sciatis quod nos intuitu Dei, et pro ſalute animæ noſtræ, &c. et ad exaltationem ſanctæ eccleſiæ, et emendationem regni noſtri* (3), *ſpontanea et bona voluntate noſtra* (4), *dedimus et conceſſimus archiepiſcopis, epiſcopis, abbatibus, prioribus, comitibus, baronibus, et omnibus liberis de regno noſtro, has libertates ſubſcript', tenend' in regno noſtro Angliæ inperpetuum.*

HENRY by the grace of God, king of England, lord of Ireland, duke of Normandy and Guyan, and earl of Anjou, to all archbiſhops, biſhops, abbots, priors, earls, barons, ſheriffs, provoſts, officers, and to all bailiffs, and other our faithful ſubjects, which ſhall ſee this preſent charter, greeting. Know ye that we, unto the honour of Almighty God, and for the ſalvation of the ſouls of our progenitors and ſucceſſors kings of England, to the advancement of holy church, and amendment of our realm, of our meer and free will, have given and granted to all archbiſhops, biſhops, abbots, priors, earls, barons, and to all free-men of this our realm, theſe liberties following, to be kept in our kingdom of England for ever.

(1 Inſt. 81. Statutes of Confirmation. 52 H. 3. c. 5. 25 Ed. 1. c. 1, 2, 3, & 4. 28 Ed. 1. ſtat. 3. c. 1. 1 Ed. 3. ſtat. 2. c. 1. 2 Ed. 3. c. 1. 4 Ed. 3. c. 1. 5 Ed. 3. c. 1, 9. 10 Ed. 3. ſtat. 1. c. 1. 14 Ed. 3. ſtat. 1. c. 1. 15 Ed. 3. c. 1. 28 Ed. 3. c. 1. 31 Ed. ſtat. 1. c. 1. 36 Ed. 3. c. 1. 37 Ed. 3. c. 1. 38 Ed. 3. ſtat. 1. c. 1. 42 Ed. 3. c. 1. 45 Ed. 3. c. 1. 50 Ed. 3. c. 2. 1 Rich. 2. c. 1. 2 Rich. 2. c. 1. 5 Rich. 2. c. 1. 6 Rich. 2. c. 1. 7 Rich. 2. c. 2. 8 Rich. 2. c. 1. 12 Rich. 2. c. 1. 1 Hen. 4. c. 1. 2 Hen. 4. c. 1. 4 Hen. 4. c. 1. 7 Hen. 4. c. 1. 9 Hen. 4. c. 1. 13 Hen. 4. c. 1. 4 Hen. 5. c. 1.)

(1) *Henricus Dei gratia Rex Angliæ*, &c.] Concerning the ſtyles of the kings of England, both before and after this king, and how often they altered the ſame, ſee in the firſt part of the Inſtitutes, *Sectione prima.*

(2) *Archiepiſcopis, epiſcopis, abbatibus, prioribus, comitibus, baronibus*, &c.] This or the like particular direction, this king and his progenitors before him uſed; and ſo did E. 1. E. 2. and E. 3. King R. 2. in his letters patents uſed a more generall, and compendious direction, viz. *Omnibus ad quos præſentes literæ pervenerint*, &c. which direction is uſed to this day, ſaving in charters of creation of dignities, the directions to this day, are *archiepiſcopis, epiſcopis, ducibus, marchionibus*, &c. and *biis teſtibus*, in the end.

(3) *Nos intuitu Dei, pro ſalute animæ noſtræ, ad exaltationē ſanctæ eccleſiæ, et emendationem regni noſtri.*] Here bee foure notable cauſes of the making of this great charter rehearſed. 1. The honour of God.

The firſt Part of the Inſtitutes, *Sect.* 1.

Note not onely the preamble of this Charter, & of the foreſt, but the bodies of the Charters themſelves are contained in the Charter of King *Iohn*, An. 17. of his reign, *Mat. Par. pag.* 246. *Quæ ex parte maxima leges antiquas & regni conſuetudines continebant. p.* 244.

God. 2. For the health of the king's ſoul. 3. For the exaltation of holy church; and fourthly, for the amendment of the kingdome.

Theſe be thoſe excellent laws contained in this great charter, and digeſted into 38. chapters, which tend to the honour of God, the ſafety of the king's conſcience, the advancement of the church, and amendment of the kingdome, granted and allowed to all the ſubjects of the realme.

[2] (4) *Spontanea, et bona voluntate noſtra.*] Theſe words were added, for that king John, as hath been ſaid, made the like charter in effect, and ſought to avoid the ſame, pretending it was made by dureſſe.

This great charter is divided into 38. chapters.

CAP. I.

IMPRIMIS, conceſſimus Deo (1), *et hac præſenti charta noſtra confirmavimus pro nobis et hæredibus noſtris in perpetuum* (2), *quod eccleſia Anglicana* (3), *libera ſit* (4), *et habeat omnia jura ſua integra* (5), *et libertates ſuas illæſas* (6). *Conceſſimus etiam, et dedimus omnibus liberis hominibus regni noſtri* (7), *pro nobis et hæredibus noſtris in perpetuum, has libertates ſubſcriptas* (8). *Tenend' et habend' eis et hæredibus,* (9) *ſuis, de nobis,* (10) *et hæredibus noſtris in perpetuum.*

FIRST, we have granted to God, and by this our preſent charter have confirmed, for us and our heirs for ever, that the church of England ſhall be free, and ſhall have all her whole rights and liberties inviolable. We have granted alſo, and given to all the free-men of our realm, for us and our heirs for ever, theſe liberties underwritten, to have and to hold to them and their heirs, of us and our heirs for ever.

(2 Inſt. 1. 52 H. 3. c. 5. & 42 Ed. 3. c. 1.)

* *Inter Leges ſeu Inſtitutiones Regis*, H. 1. cap. 1.

*Sanctam * Dei, imprimis, eccleſiam liberam facio, ita quod nec vendam, nec ad firmam ponam, nec mortuo archiepiſcopo ſive epiſcopo, vel abbate aliquid accipiam de dominio eccleſiæ, ſeu de hominibus ejus, donec ſucceſſor in eam ingrediatur, et omnes malas conſuetudines, quibus regnum Angliæ injuſte opprimebatur, inde aufero.*

(1) *Conceſſimus Deo.*] We have graunted to God: when any thing is graunted for God, it is deemed in law to be graunted to God, and whatſoever is graunted to his church for his honour, and the maintenance of his religion and ſervice, is graunted for and to God; *Quod datum eſt eccleſiæ, datum eſt Deo.*

See the firſt part of the Inſtitutes. Sect. 1.

And this and the like were the formes of ancient acts and graunts, and thoſe ancient acts and graunts muſt be conſtrued and taken as the law was holden at that time when they were made.

Here in this charter, both in the title and in divers parts of the body of the charter, the king ſpeaketh in the plural number, *conceſſimus.* The firſt king that I read of before him, that in his graunts wrote in the plurall number, was king John, father of our king

king *H.* 3. other kings before him wrote in the ſingular number, they uſed *Ego*, and king John, and all the kings after him, *Nos*.

(2) *Pro nobis et hæredibus noſtris inperpetuum.*] Theſe words were added to avoid all ſcruples, that this great parliamentary charter might live and take effect in all ſucceſſions of ages for ever. More of this word (heires) hereafter in this chapter: When *Pro nobis, hæredibus et ſucceſſoribus noſtris* came in, ſhall be ſhewed in his fit place.

(3) *Quod eccleſia Anglicana*, &c.] This at the making of this great charter, extended not to Ireland, nor to any of the king's foraign dominions; but by the law of Poynings, made by the authority of parliament in Ireland, in anno 11. H. 7. all the laws and ſtatutes of this realm of England before that time had or made do extend to Ireland, ſo as now Magna Charta doth extend into Ireland.

(4) *Quod eccleſia Anglicana libera ſit.*] That is, that all eccleſiaſticall perſons within the realm, their poſſeſſions, and goods, ſhall be freed from all unjuſt exactions and oppreſſions, but notwithſtanding ſhould yeeld all lawfull duties, either to the king or to any of his ſubjects, ſo as *libera* here, is taken for *liberata*, for as hath been ſaid, this charter is declaratory of the ancient law and liberty of England, and therefore no new freedom is hereby granted, (to be diſcharged of lawfull tenures, ſervices, rents and aids) but a reſtitution of ſuch as lawfully they had before, and to free them of that which had been uſurped and incroached upon them by any power whatſoever; and purpoſely, and materially, the charter ſaith *eccleſia*, becauſe *eccleſia non moritur*, but *moriuntur eccleſiaſtici*, and this extends to all eccleſiaſticall perſons of what quality or order ſoever. [3]

(5) *Et habeat omnia jura ſua integra.*] That is, that all eccleſiaſticall perſons ſhall enjoy all their lawful juriſdictions, and other their rights wholly without any diminution or ſubſtraction whatſoever; and *jura ſua* prove plainly, that no new rights were given unto them, but ſuch as they had before, hereby are confirmed; and great were ſometimes their rights, for they had the third part of the poſſeſſions of the realme, as it is affirmed in a parliament roll. Rot. Parliam. 4 R. 2. Nu. 13.

(6) *Et libertates ſuas illæſas.*] *Libertates* are here taken in two ſenſes. 1. For the laws of England ſo called, becauſe *liberos faciunt*, as hath been ſaid. 2. They are here taken for priviledges held by parliament, charter or preſcription more then ordinary; and in this ſenſe it is taken in the writ *De libertatibus allocandis*, and in another writ *De libertatibus exigendis in itinere*, but it is but *libertates ſuas*, ſuch as of right they had before; *jura eccleſiæ publicis æquiparantur*. Regiſt. fol. 191 & 262. F. N. B. fo. 229. *Regula.*

Every archbiſhoprick and biſhoprick in England are of the king's foundation, and holden of the king *per baroniam*, and many abbots and priors of monaſteries were alſo of the king's foundation, and did hold of him *per baroniam*, and in this right the archbiſhop and biſhops, and ſuch of the abbots and priors as held *per baroniam*, and called by writ to parliament, were lords of parliament; and this is a right of great honour that the church, viz. the archbiſhop and biſhops now have. *Eccleſia eſt infra ætatem, et in cuſtodia Domini Regis, qui tenetur jura et hæreditates ſuas manutenere et defendere*; and in other records it is ſaid, *Eccleſia quæ ſemper eſt infra ætatem fungitur ſemper vice minoris, nec eſt juri conſonum* Glanv. l. 7. c. 1. Bract. lib. 3. fol. 226. l. 5. fo. 427. Tr. 22. E. 1. in com.

Banc. Rot. Fleta lib. 2.

ſorum quod infra ætatem exiſtentes, per negligentiam cuſtodum ſuorum exhæredationem patiantur ſeu ab actione repellantur.

They are diſcharged of purveyance for their own proper goods.

See hereafter c. 21. 14 E. 3. cap. 12. ſtat. 2. 18 E. 3. cap 4. 1 R. 2. cap. 3. 8 E. 3. fol. 26. Regiſt. 289. vid. 27. H. 8. c. 24. vid *Preſat.* c. 21.

And this was the ancient common law, and ſo declared by divers acts of parliament, and there is a writ in the regiſter for their diſcharge in that behalfe: and this is not reſtrained by the ſaid act of 27. H. 8. for thereby it is provided that the purveyor ſhall obſerve the ſtatutes for them provided, ſo as where the purveyor is prohibited to purvey by any ſtatute, the ſaid act of 27 H. 8. ſetteth him not at liberty.

And true it is, that eccleſiaſticall perſons have more and greater liberties then other of the king's ſubjects, wherein, to ſet down all, would take up a whole volume of it ſelf, and to ſet down no example, agreeth not with the office of an expoſitor; therefore ſome few examples ſhall be expreſſed, and the ſtudious reader left to obſerve the reſt as he ſhall reade them in our books, and other authorities of law.

Regiſt. 58. F. N. B. 175.

If a man holdeth lands or tenements, by reaſon whereof he ought (upon election, &c.) to ſerve in a temporall office, if this man be made an eccleſiaſticall perſon within holy orders, he ought not to be elected to any ſuch office, and if he be, he may have the king's writ for his diſcharge, and the words of the writ are obſervable, *Rex*, &c. *cum ſecundum legem et conſuetudinem regni noſtri Angliæ clerici infra ſacros ordines conſtituti ad tale officium eligi non debeant, nec hactenus conſueverunt*, &c. and the reaſon thereof is expreſſed in the writ, *Quia juri non eſt conſonum, quod hii qui ſalubri ſtatui animarum*, &c. *(in tali loco*, &c.) *deſerviunt, alibi extra (eundem locum) ſecularibus negotiis compellantur.*

[4]

2 Timot. c. 2.

By this writ it appeareth that this was the ancient common law, and cuſtome of England, and had a ſure foundation, *Nemo militans Deo, implicet ſe negotiis ſecularibus, ut ei placeat cui ſe probavit.* Eccleſiaſticall perſons have this priviledge that they ought not in perſon to ſerve in warre. Alſo eccleſiaſticall perſons ought to be quit and diſcharged of tolles and cuſtomes, avirage, pontage, paviage, and the like, for their eccleſiaſticall goods, and if they be moleſted therefore, they have a writ for their diſcharge, by which writ it appeareth that this was the ancient common law of England. *Rex*, &c. *cum perſonæ eccleſiaſticæ ſecundum conſuetudinem hactenus in regno noſtro uſitatam, et approbatam; ac ad telonium, paviagium et muragium*, &c. *de bonis ſuis eccleſiaſticis alicubi in eodem regno præſtand' nullatenus teneantur*, &c.

Litt. fol. 20. Regiſt. fol. F. N. B. 227.

If any eccleſiaſticall perſon be in feare or doubt that his goods or chattells, or beaſts, or the goods of his farmor, &c. ſhould be taken by the miniſters of the king, for the buſineſſe of the king, he may purchaſe a protection *cum clauſula nolumus.*

F. N. B. 29. Regiſt. 289.

Diſtreſſes ſhall not be taken by ſheriffs or other of the king's miniſters in the inheritance of the church wherewith it was anciently endowed, but otherwiſe it is of late purchaſe.

See the expoſition of the ſtatute of Artic. Cler. cap. 9. Regiſt. 300. F. N. B. 266. a. 16. E. 3. proces 165. Regiſt. judi. 22.

If any eccleſiaſticall perſon knowledge a ſtatute merchant or ſtatute ſtaple, or a recognizance in the nature of a ſtatute ſtaple, his body ſhall not be taken by force of any proceſſe thereupon, and for more ſurety thereof the writ thereupon to take the body of the conuſor is *ſi laicus ſit.*

If a perſon bee bound in a recognizance in the chancery or in any

any other court, &c. and he pay not the ſum at the day, by the common law, if the perſon had nothing but eccleſiaſticall goods, the recognizee could not have had a *levari fac'* to the ſheriffe to levie the ſame of theſe goods, but the writ ought to be directed to the biſhop of the dioces to levie the ſame of his eccleſiaſticall goods.

[a] In an action brought againſt a perſon (wherein a *capias* lieth) for example, an account, the ſheriffe returns *quod clericus eſt beneficiatus, nullum habens laicū feodum*, in which he may be ſummoned, in this caſe the plaintiffe cannot have a *capias* to the ſheriffe to take the body of the perſon, but he ſhall have a writ to the biſhop to cauſe the perſon to come and appeare. But if he had returned *quod clericus eſt nullum habens laicum feodum*, then is a *capias* to be granted to the ſheriffe, for that it appeared not by the returne that he had a benefice, ſo as he might bee warned by the biſhop his dioceſan, and no man can be exempt from juſtice. See more of this matter *Artic. Cleri. cap.* 9.

[a] 18. E. 2. Proc. 205. 9 E. 3. 30. 24 E. 3. 44. 25. E. 3. 44. 29. E. 3. 44. 32. E. 3. Proces 58. 34. E. 3. *Scir fac.* 153. 45. E. 3. 6. 47 E. 3. 14. 21 H. 6. 16. Regiſ. judic 62. *Artic. Cler. c.* 9.

Secundum legem et conſuetudinē regni Angliæ clerici in decenna, &c. *poni non debeant, vel ea occaſione diſtringi vel inquietari non conſueverunt:* and eccleſiaſticall perſons are not bound to appeare at tournes or viewes of frankpledge. Marlebr. c. 10. Briton. f. 19. B. Fleta. li. 2. c. 45. Rot. brevi. an. 2. R. 2. part 2. m. 8.

But hereof this little taſte ſhall in this place ſuffice, with this, that as the overflowing of waters doe many times make the river to loſe his proper chanell, ſo in times paſt eccleſiaſticall perſons ſeeking to extend their liberties beyond their true bounds, either loſt or enjoyed not that which of right belonged to them.

(7) *Conceſſimus etiam et dedimus omnibus liberis hominibus regni noſtri*, &c.] Theſe words *(omnibus liberis hominibus regni)* doe include all perſons eccleſiaſticall and temporall incorporate politique or naturall, nay they extend alſo to villeines, for they are accounted free againſt all men ſaving againſt the lords. Litt. ſect. 189.

(8) *Has libertates ſubſcriptas.*] Here it is to be obſerved that the aforeſaid clauſe that concerned the church onely, is in favour of the church generall without any reſtraint, but this clauſe that concernes all the king's ſubiects hath a reſtraint by reaſon of this word *(ſubſcriptas)* which reſtraineth *libertates* to the 38. chapters of this great Charter. See the ſtatute of 34. E. 1. de tallagio non conc. cap. 4. which is more general.

(9) *Hæredibus.*] At this time *hæredes* were taken for *ſucceſſores*, and *ſucceſſores* for *hæredes*.

(10) *De nobis.*] In this place theſe words are not inſerted to make a legall tenure of the king, but to intimate that all liberties at the firſt were derived from the crowne.

[5]

[a] Mich. 17. E. 1. in Com. banc. rot. 221. leic. ſee the firſt part of the Inſtitut. ſect. 1.

[a] Note that courts of juſtice are alſo called *libertates*, becauſe in them the lawes of the realme *quæ liberos faciunt*, are adminiſtred.

CAP. II.

SI quis comitum, vel baronum (1) *noſtrorum, ſive aliorum tenentium de nobis in capite* (2) *per ſervitium militare* (3), *mortuus fuerit, et cum deceſſerit, hæres ejus plenæ ætatis* (4) *fuerit, et relevium nobis debeat, habeat hæreditament' ſuum per antiquum relevium* (5), *ſcilicet, hæres, vel hæredes* (6), *comitis, de com' integro, per centum libras, hæres vel hæredes baronis, de baronia integra, per centum marcas, hæres vel hæredes militis, de feodo militis integro, per centum ſolidos ad plus* (7). *Et qui minus habuerit, minus det, ſecundum antiquam conſuetudinem feodorum* (8).

IF any of our earls or barons, or any other, which hold of us in chief by knights ſervice, die, and at the time of his death his heir be of full age, and oweth to us relief, he ſhall have his inheritance by the old relief; that is to ſay, the heir or heirs of an earl, for a whole earldom, by one hundred pound; the heir or heirs of a baron, for an whole barony, by one hundred marks; the heir or heirs of a knight, for one whole knights fee, one hundred ſhillings at the moſt; and he that hath leſs, ſhall give leſs, according to the old cuſtom of the fees.

(7 Rep. 33. 9. 124. 40 Ed. 3. f. 9. 1 Inſt. 76. a. 83. b. 106. a. 3 Bulſt. 325. Bract. 84. a. altered by 12 Car. 2. c. 24. which takes away Knight's Service, &c.)

Rot. Parliam. anno 11 E. ii. 5. to. 1. in caſu principis.

(1) *Si quis comitum vel baronum.*] At this time there was never a duke, marqueſſe, or viſcount in England, for if there had been, they had (no doubt) been named in this chapter: the firſt duke that was created ſince the conqueſt, was Edward the Black Prince, in 11 E. 3. Robert de Vere earle of Oxford, was in the 8. year of Richard the ſecond, created marqueſſe of Dublin in Ireland, and he was the firſt marqueſſe that any of our kings created.

Rot. Pat. 8 R. 2.

Rot. Pat. 18 H. 6. 12 Febr.

The firſt viſcount that I finde of record, and that ſate in parliament by that name, was John Beaumont, who in the 18. yeare of H. 6. was created viſcount Beaumont.

Bract. lib. 1. fol. 5. b. Fleta lib. 1. cap. 5. Briton 68. b.

Comites.] *Dicuntur comites, viz. quia in comitatu ſive à ſocietate nomen ſumpſerunt, qui etiam dici poſſunt conſules à conſulendo: Reges enim tales ſibi aſſociant ad conſulendum et regendum populum Dei, ordinantes eos in magno honore, et poteſtate, et nomine, quando accingunt eos gladiis, ringis gladiorum, &c. gladius autem ſignificat defenſionem regni et patriæ.*

Bract. *ubi ſupra.*

Barones.] *Sunt et alii potentes ſub rege qui dicuntur barones, hoc eſt, robur belli:* and where ſome have thought that *baro* is no Latin word, we find it in Tullies Epiſtles, *apud patronem, et alios barones te in maxima gratia poſui. Galfridus Cornwall tenet manerium de Burford de rege, per ſervitium barniæ,* but it is to be underſtood, that if the king give land to one and his heirs, *tenend' de rege per ſervitium baroniæ,* he is no lord of parliament untill he be called by writ to the parliament. Theſe which are earls and barons have offices and duties annexed to their dignities of great truſt and confidence, for two purpoſes. 1. *Ad conſulendum tempore pacis.* 2. *Ad defendendum regem et patriam tempore belli.* And prudent antiquity hath given unto them two enſignes to reſemble, and to put them

Ad. Attic. Ep. 5. Inquiſ. 40. E. 3.

Inter record. in Turri 27 Aug. 5 H. 4 the Earle of Northumb. Caſe, &c.

them in minde of their duties; for firſt they have an honourable and long robe of ſcarlet reſembling counſell, in reſpect whereof they are accounted in law, *de magno conſilio regis*. 2. They are girt with a ſword that they ſhould ever be ready * to defend their king and country: and it is to bee obſerved that in ancient records the barony (under one word) included all the nobility of England, becauſe regularly all noblemen were barons, though they had a higher dignity, and therefore of the charter of king E 1. in the expoſition of this chapter hereafter mentioned, the concluſion is, *teſtibus archiepiſcopis, epiſcopis, baronibus*, &c. So placed, in reſpect that *barones* included the whole nobility: and the great councell of the nobility, when there were beſides earles and barons, dukes and marqueſſes, were all comprehended under the name *de la councell de baronage*.

Glanv. l. 9. c. 4.

5 H. 4. *ubi ſup.*

(2) *Sive aliorum tenentium in capite.*] It is worthy of obſervation, with what great judgement this ſtatute concerning reliefe is penned; for by the act of parliament called, The Aſſiſe of Clarendon, anno 10 H. 2. *Anno Domini* 1164, it is thus enacted; *archiepiſcopi, epiſcopi, et univerſæ perſonæ regni, qui de rege tenent in capite habeant poſſeſſiones ſuas de rege, ſicut baroniam, et inde reſpondeant juſticiariis et miniſtris regis, et ſicut cæteri barones debent intereſſe curiæ regis cum baronibus*, &c. Therefore this chapter beginneth, *Si quis comitum, vel baronum*; So as (as to reliefe of an earle or baron) it is not materiall that he hath *baroniam*, unleſſe he be noble, that is, earle or baron, and others being not noble, but holding in *capite*, ſhall pay reliefe according to the knights fees which he hath. See hereafter *Cap.* 31. who ſhall be ſaid to hold in *capite*.

(3) *Per ſervitium militare.*] For this ſee the firſt part of the Inſtitutes, Sect. 103, 112, 154, 157, 126, 127. whereunto you may adde this record following.

Per aſſiſam Iohannes de Moyſe, qui eſt infra ætatē, implacitat Thom' de W'eylaund & Marg' ux' ejus pro uno Meſſuag. ii. molendinis, iiii. acris prati, & xlii. s. red. in Eaſtſmithfield ext' Algate. Ipſi voc' ad war' Rad' de Berners, qui war' & dic' quod nihil clamat niſi cuſtod. eo quod Iohannes pater dicti Iohannis tenuit de eo prædicta ten' per homag' & ſervic' vi. d. & inveniendi quendam hominem pro eo in turri London. cum arcubus & ſagittis per quadraginta dies tempore guerræ. Iohannes dic' quod tenet ten' præd. per homagium & ſervitium quorundam calcariorū vel vi. d. pro omni ſervic'. Et ſic omittendo multa ex utraq' parte manifeſte patebit per verd' Iur' & per Iud' Cur' quid in hac aſſ. terminatum fuit. Iur' dic' quod prædicta ten' tenent' de prædicto Radulpho per homagium & ſervic' unius paris calcariorū deauratorū vel ſex den' [a] & inven' quend' hominē pro ipſo Radulpho in turri Lond. cum arcub' & ſagit' per xl. dies tempore guerræ in boreal' Angulo turris prædictæ pro omni ſervic'. [b] Et quia compertū eſt, &c. quod Radulphus cognoſcit in reſponc' quod prædict' herestenere debet eadem ten' per prædict' homag' & ſervic' prædict' calcar' vel ſex denar' & per ſerjantiā inveniendi unū hominē pro eo in præd' turri per xl. dies, & manifeſtè liquet quod huōdi minores ſerjantiæ quæ debent fieri pro Dominis ſuis de quibus tenent tenementa ſua per alios quā ſeipſis nullā inde dabunt cuſtodiā eiſdē Dominis, nec dare debent licèt iidem Domini infra ætatem hæredū per negligentiam propinquorum parentū hujuſmodi cuſtodias occupaverint, & iſte Radulphus non poteſt dedicere quod unquā aliquā habuit ſeiſinam de prædict' cuſtod' niſi per occupationem ſuam & negli-

Hil. 3. E. 1. in Banc. Rot. 86. Midd. Which Record is cited in the firſt part of the Inſtit. Sect. 157. in marg.

Veredictum.

[a] Tr. 17. E. 1. in Banc. Rot. 29. Salop. Waall. de Hoptons Caſe. Acc.

[b] The Judgement.

negligentiam parentum prædicti hæredis anteceſſoris ſui dum infra ætatem fuit, & non alio jure. Conſiderat' eſt quod prædict' Iohannes rec' inde ſeiſ. &c. & damn' Cx. l. iv. s. vii. d. &c. Valor terr' per annum xx. l. x. d.

See the firſt part of the Inſtitutes, ſect. 155. & 157. and note the diverſitie between ſuch a tenure of the king, for in that caſe it ſhould be a tenure by grand-ſerjanty, and that grand-ſerjanty, for the greateſt part, is to be done within the realme, and knights ſervice out of the realme, as Littleton there ſaith.

See 11 H. 4. 72. & 24. E. 3. 32.

[7]

(4) *Plenæ ætatis.*] See the firſt part of the Inſtitutes, ſect. 104.

(5) *Antiquum relevium ſcilicet, &c.*] Concerning the word *relevium, vide* 1. part Inſtitut. ſect. 103. It appeareth that the reliefe here ſet down, is the ancient relief, and was certain at the common law; but there had been of long time an heavy incroachment of an incertain reliefe at will and pleaſure, which under a fair term was called *rationabile relevium*, and this act had juſt cauſe to ſay, *per antiquum relevium*, for in the raign of H. 2. grandfather to H. 3. the king exacted an incertain reliefe, for ſo Glanvill ſaith, who wrote in his time, *De baroniis verò nihil certum ſtatutum eſt, quia juxtà voluntatem et miſericordiam Domini Regis ſolent baroniæ capitales de releviis ſuis Domino Regi ſatisfacere.* And Glanvill under the name of baronies doth include earledomes alſo, ſo the reliefe of all the nobility was taken as incertain at that time, and therefore how neceſſary it was that the ancient reliefe ſhould be reſtored is evident.

Glanv. l. 9. c. 4. Ockham cap. *Quod non abſolvitur. Cuſtummer de Norm. cap.* 34. and the Comment thereupon.

(6) *Scilicet hæres vel hæredes.*] Of this word *(heire)* ſee the firſt part of the Inſtitutes, ſect. 1. whereunto you may adde that which was there omitted, concerning the antiquity of deſcents, which the Germanes had agreeable with the ancient laws of the Britons, continued in England to this day, out of that faithfull and learned hiſtorian, who of the ancient Germanes ſaith; *Hæredes ſucceſſoreſq; ſui cuique liberi, et nullū teſtamentum: ſi liberi non ſunt, proximus gradus in poſſeſſione, fratres, patrui, avunculi, &c.* Wherein we obſerve three things. 1. That for default of children and brethren, the uncle, &c. and not the father, or any in the right line aſcendent ſhould inherit, but the collaterall onely. 2. That by the common law no teſtament or laſt will could be made of land. 3. That of ancient time *ſucceſſores* were *ſynonyma* with *hæredes*. But in this ancient ſtatute it is pertinently ſaid, *hæres*, and not ſucceſſor, for every biſhop of England hath a barony, and ſo had many abbots and priors (in reſpect whereof they were lords of parliament) and yet they paid no reliefe, becauſe their ſucceſſors came to it by ſucceſſion and not as heire by inheritance; and this act ſaith, *Habeat hæreditatem ſuam*, and they are ſeiſed in *jure epiſcopatus monaſterii, &c. de comitatu integro et de baronia integra.* The barons in Domeſday are accounted amongſt the tenants in chiefe. Vide Glanv. lib. 9. cap. 6. Magna Charta cap. 31.

Tacitus de moribus Germanorum.

Bract. lib. 2. fol. 76. a. 84. 16 E. 3. eſch unge 2. 20 E. 3. Aſſiſe. 122. & tit. avowr. 126. 22. E. 3. 18. 18. Aſſ. Pl. ult. 24. E. 3. 66.

It is to be underſtood that of ancient time (as it evidently appeareth by this chapter, and by our books) every earledome and barony were holden of the king in *capite*, which proveth that both the dignities of the earle and the baron, and the earldome and barony were derived from the crown. [a] And is to be known that the fourth part of the yearly value of an earledome, a barony, and the living of a knight, was the ancient reliefe that this chapter ſpeaketh

ſpeaketh of. And for that of ancient time, [b] a knights living was eſteemed at 20l. per ann. (which in thoſe days was ſufficient to maintain the dignity of a knight) his ancient [c] relief was 5l. which is the fourth part of his living by one year.

The yearly value of a barony was to conſiſt of 13 knights fees, and a quarter, which by juſt account amounted to 400 marks by the year, therefore his relief was as is here ſet down 100 marks.

See an ancient manuſcript intituled, *De modo tenendi parliamentum, &c. tempore Regis Edwardi filii Regis Etheldredi, qui quidem modus fuit per diſcretiores regni corā Willielmo Duce Normannorū et Conqueſtore et Rege Angliæ ipſo conqueſtore hoc tempore præcipiente recitat' et per ipſum approbat', &c.* Of the authority and antiquity whereof you may reade in the fourth part of the Inſtitutes, cap. of the Court of Parliament, *Et hic infra.*

Now every earledome conſiſted of the value of an entire barony and an halfe, which amounted to 20. knights fees amounting to 400l. per annum, and therefore his ancient reliefe here called *Antiquum relevium*, being the fourth part of the yearly value of his earledome was 100 l. In that excellent charter which king H. I. made on the day of his coronation, *Communi concilio et aſſenſu baronum regni Angliæ*, amongſt other things it is thus contained, *Omnes malas conſuetudines, quibus regnum Angliæ opprimebatur, inde aufero, quas malas conſuetudines exinde ſuppono. Si quis baronum meorum, comitum, ſive aliorum, qui de me tenet, mortuus fuerit, hæres ſuus non redimet terram ſuam, ſicut faciebat tempore fratris mei, ſed legitima et juſta relevatione relevabit eam, ſicut homines baronum meorum legitima et juſta relevatione relevabunt terras ſuas a dominis ſuis, &c. Legem * regis Edw. vobis reddo cum illis emendationibus, quibus pater meus emendavit conſilio baronum ſuorum.*

By this charter it appeareth, 1. that there was a lawfull and juſt reliefe, to bee paid by the earle, and baron, which implyeth a proportionable reliefe according to the value of the living, by reaſon of this word (*Juſta*) which cannot be intended of an uncertaine reliefe, but of the juſt reliefe, upon the computation of ſo many knights fees contained in the *Modus*, whereunto this charter hath relation. 2. It appeareth that there was an unjuſt reliefe, in the time of William Rufus his brother, which upon ſearch we haue found in an ancient manuſcript in the librarie of arch-biſhop Parker, which we have ſeene, and will tranſcribe, in that language that we finde it.

De releeſe al cunte que al Roy afert 8. *chivals enfrenees, & enſebees, &* 4. *Hauberts &* 4. *Hawmes &* 4. *eſcues, &* 4. *launces, &* 4. *eſpees les aultres, &* 4. *chaceurs &* 4. *palefrees à freins et a cheveſtre.*

De reliefe a barun 4. *chivals les* 2. *enfrenes & enſeeles &* 2. *hauberts &* 2. *hawmes &* 2. *eſcus, &* 2. *eſpees &* 2. *launces, & les autres* 2. *chivals un chaceur & un palfrey a freins & a cheveſtres.*

De reliefe a vavaſſur a ſon lige ſenior doit eſtre quite per le chival ſon pier, tiel come il avoit jour de ſon mort, & per ſon hawme, & per ſon eſcu & per ſon haubert, & per ſon lance, & ſil fuit diſaparoile, que il nouſt chival ne arme juſte quite per C. ſol.

Le relief al villain le meliour avoir que il averad 2. *chivals,* 2. *boefs,* 2. *vaches durrad a ſon ſeignior, & puis ſont touts les villains in frankpledge.*

In K. Canutus time, *Relevatio comitis fuit* 8. *equi,* 4. *ſellati,* 4. *inſellati,* Inter leges Canuti. cap. 97.

nontenure 16. 46 E. 3. forfeit 18. 10 H. 7. 19 a.

[a] See the firſt part of the Inſtitutes, ſect 95. Cambden Brit. 122. Acc.

[b] 1 E. 2. cap. 1. 7 H. 6. 15. M. 2 Jac. lib. 11. Metcalf's Caſe, fol. 33, 34.

* 1. Edw. filii Etheldredi.

4. *inſellati, & galeæ* 4. *& lorice.* 4. *cum* 8. *lanceis, & totidem ſcutis, et gladii.* 4. *et* * CC. *mancæ auri.*

* CC. mar.

* i. Baronis.

Poſtea * *thani regis, qui ei proximus ſit,* 4. *equi,* 2. *ſellati,* 2. *non ſellati.* 2. *gladii.* 4. *lancee, et totidem ſcuta, et galea cum lorica ſua, et* 50. *mancæ auri.*

Et mediocris thani equus cum apparatu ſuo et arma ſua et halſtang in Weſt-ſexa, &c.

Laſtly, this chapter of Magna Charta is but a reſtitution and declaration of the ancient common law, and that *antiquum relevium* of the earle, and baron was certaine, ſo now joyning both together, this certaine reliefe here ſet downe is *legitimum, juſtum & antiquum relevium*, mentioned in the *Modus, &c.*

It is ſaid that there be ancient precedents in the exchequer, that he that held by a dukedome, which being valued at two earles livings, ſhould pay according to the proportionall and juſt fourth part of his living by yeare, 200. li. And a marques that held by a marqueſdome, who ſhould have two baronies, ſhould pay for his reliefe 200. marks. What the value of the living of a viſcount ſhould be, I have not heard, but certaine it is he ſhould pay the fourth part of the yeerely value of his viſcounteſdome.

But all this is to be intended, where the king granteth a Dukedome, marqueſdome, earledome, viſcounteſdome, or barony to hold, as here it is ſpoken, *de nobis in capite per ſervitium militare, viz. De comitatu integro & de baronia integra, & qui minus habuerit, minus det ſecundum antiquam conſuetudinē feodorū.*

[9]

But in ſome caſes the heire of an earle, or a baron may pay the reliefe expreſſed in this ſtatute, albeit he hath not ſo many knights fees, as is aboveſaid: for if upon the creation of the earle the king did grant any mannors, lands, or annuity *per comitatum, & nomine comitis*, or *ſub nomine & honore comitis*, or the like, he ſhould pay, C. li. for reliefe, and ſo of the baron, *mutatis mutandis*, for a ſpeciall reſervation may derogate from the common law.

Com. Mich. 14. E. 3. rot. 8. expte rem. Theſ. Com. Hil. 25. E. 3. rot 4. expte rem. Theſ. Com. Hil. 7. H. 4. rot. 2. rot. cart. 36 E. 3. nu. 8. the Earle of Cambridge's caſe.

But otherwiſe it is, if the mannors, lands, or annuity be granted unto the earle, *ut idem comes ſtatum & honorem comitis melius manuenere & ſupportare poſſit*, or *ad ſuſtinendum nomen et onus*, or the like; for then the earle holdeth not *per comitatum*, or *nomine comitis.*

But now the ancient manner of creation is altered, for now, when the king creates a duke, a marques, an earle, a viſcount, or baron, he ſeldome creates a dukedome, marquiſdome, earledome, &c. *ad ſuſtinendum nomen et onus, viz.* to grant him mannors, lands, tenements, &c. to hold of him in chiefe, for commonly upon creations the king grants to them created an annuity; and therefore at this day noblemen doe pay ſuch reliefes, as other men uſe to doe, in reſpect of their tenures, for as the heire of a knight ſhall not pay reliefe, unleſſe he have a knights fee, &c. ſo the heire of an earle, or baron, ſhall not pay reliefe by this great charter, unleſſe he hath an earledome, or baronie, as is aforeſaid.

6. H 8. Dier. 2.

17. E. 2 prer. regis cap. 3.

(7) *Ad centum ſolidos ad plus.*] And this was the ancient reliefe for a knights fee, and ſo it was holden in the reigne of H. 2. for Glanvil ſaith, *dicitur autem rationabile relevium alicujus juxta conſuetudinem regni de feodo unius militis per centum ſolidos*, ſo as the fee of a knight at that time was certaine, viz. the fourth part of his living *per annum*, and ſo ought, as appeareth, the relief of the nobility to have beene in certainty, though they were not permitted to have it ſo,

Glanvil lib. 9. cap. 4 lib. 9. fol. 124 Antony Lowe's caſe. Stat 1. E. 2. de militibus. 1. part of the Inſtitut ſect. 103. 112. 113.

ſo, which ſavored of the power of a conqueror to keepe the nobility under, or to make himſelfe the more amiable to them.

(8) *Secundum antiquam conſuetudinem feodorum.*] This is obſervable, that theſe certaine and proportionable rates are according to the ancient cuſtome of reliefes.

154. 157. *vide* Bracton *ubi ſupra*. Britton cap. 69. Fleta. l. 3. c. 17.

* A knight holds land by grand ſerjantie, he is not within this ſtatute, and therefore ſhall not pay the reliefe of a knight declared by this act, but the heire being of full age at the deceaſe of his anceſtor, ſhall pay the value of his lands for one yeere which is his *primer ſeaſin.*

* 11. H. 4. 72. b. 1. part of the Inſtitut. ſect. 154. 157. Litt. ſect. 156.

But here it is demanded, ſeeing Littleton ſaith, that tenure by cornage, if it be of any other lord then the king, is knights ſervice, what releefe the heir of ſuch a tenant ſhall pay, or whether he ſhall pay any reliefe at all. Littleton in the ſame place ſaith, that tenure by cornage draweth unto it ward, and mariage, and ſpeaketh nothing of reliefe, and by this act reliefe is to be payed according to the quantity of the knights fee, viz. *De feodo militis integro per centum ſolidos & qui minus habuerit, minus:* but a tenure by cornage hath no ſuch quantities, *nec ſuſcipit majus & minus*, and therefore tenure by cornage, though it be knights ſervice, is not within this ſtatute; hereof you may read a record to this effect.

Mich. 18. E. 1. in Banco rot. 84 Weſtmerl. *& eodem anno.* rot. 158. Cumberland. Io. Swinborne caſe *acc. cornagium.*

Inter Iohannem Craiſtoke querentem verſus Idoneam de Leybourne quæ diſtrinxit ipſum per averia pro relevio dando, pro terris in Dunſton Brampton yanene which Eſeclyve, *et* Boulton, *quæ valent* C. li. per ann. *quæ tenet de ea per homagium et cornagium. Et ipſe dicit quod talis eſt conſuetudo patriæ de Weſtm. quod hæredes poſt mortem anteceſſorum ſuorum debent relevare terras ſuas dominis de quibus,* &c. *ſcilicet ſolvendo pro relevio quantum terræ valent per annum, quæ de ipſis dominis tenentur, niſi de minori ipſis dominis poſſunt ſatisfacere, unde ipſa advocat captionem pro relevio ſecundum prædictam conſuetudinem, &c.*

Iohannes negat talem eſſe conſuetudinem, ſed concedit, quod tenet tenementa prædicta per cornag' xxv. s. vi. d. et dicit quod anteceſſores ſui prius duplicarunt anteceſſor. ipſius Idoneæ ſolvendo Li. s. Ipſa dicit quod cum Iohannes cogn', quod ipſe tenet prædicta ten' de ipſa per cornagiū, ad quod hujuſmodi relevium mere eſt acceſſor,' ratione conſuet' prædictæ. Et dic' quod idem Iohannes exigit tale relevium verſus tenentes ſuos in eadem patria à tempore quo non, &c. Et de conſuet' uterq', pon' ſe ſuper patriam. Ideo ven' Iur' in Cra. S. Iohannis Baptiſtæ, &c. Inſuper Idonea dic' quod duplex eſt tenura in Com' Weſtmerl. ſcilicet, una per Albā firmā, et alia per Cornagium. Et quod tenentes per Albam firmam poſt mortem anteceſſorum ſuorum debent duplicare firmam ſuam tantum. Et tenentes per Cornagium poſt mortem anteceſſ. ſuorum tenentur reddere valorem terrarum ſuarum unius anni. Et Iohannes è contra dic' quod conſuetudo patriæ eſt quod hæredes non ſolvant niſi duplicando Cornagium, &c.

Alba firma Cornagium.

Bracton li. 2. fo. 84. cap. 36. nu. 2. *Et imprimis de feodo militari quale ſit rationabile relevium antiquum de feodo militari diſtinguitur in carta libertatum, cap. 2. &c.* And in the ſame chapter, nu. 7. ſaith thus, *De ſerjantiis vero nihil certum exprimitur, quid vel quantum dare debeant hæredes ideò juxta voluntatem Dominorum Dominis ſatisfaciant pro relevio, dum tamen ipſi Domini rationem & menſuram non excedant.*

Bract. l. 2. fo. 84. vide Glanv. l. 7. cap. 9. Flet. li. 3. cap 17. Brit. fo. 177, 178, &c.

Certain it is, that he that holdeth by caſtle-guard ſhall pay no eſcuage, for eſcuage muſt be rated according to the quantity of the knights fees,

Lit. ſect. 111.

fees, as for a whole knights fee or half a knights fee, &c. and of that nature is not caſtle-guard. Littleton treating of caſtle-guard, ſaith, that in all caſes where a man holdeth by knights ſervice, ſuch ſervice draweth to it ward and marriage, and ſpeaks not there of relief.

Lit. ſect. 97.
Lit. ſect. 111.

CAP. III.

SI autem hæres (1) *alicujus talium fuerit infra ætatem, dominus ejus non habeat cuſtodiam ejus, nec terræ ſuæ, antequam homagium ceperit* (2); *et poſtquam talis hæres fuerit in cuſtodia, cum ad ætatem pervenerit (ſcilicet xxi. annorum) habeat hæreditatem ſuam ſine relevio, & ſine fine, ita tamen quod ſi ipſe (dum infra ætatem fuerit) fiat miles* (3), *nihilominus terra remaneat in cuſtodia dominorum ſuorum* (4), *uſque ad terminum prædictum.*

BUT if the heir of any ſuch be within age, his lord ſhall not have the ward of him, nor of his land, before that he hath taken of him homage. And after that ſuch an heir hath been in ward (when he is come to full age) that is to ſay, to the age of one and twenty years, he ſhall have his inheritance without relief, and without fine; ſo that if ſuch an heir, being within age, be made knight, yet nevertheleſs his land ſhall remain in the keeping of his lord unto the term aforeſaid.

(Hob. 46. Fitz. Gard. 136, 142, 156. 15 Ed. 4. f. 10. Plowd. f. 267. 6 Rep. 73. 8 Rep. 173. 12 Rep. 81. F. N. B. fo. 269. Altered by 12 Car. 2. c. 24. which takes away wardſhip &c. by reaſon of tenure.)

35 H. 6. 52.

(1) *Hæres.*] This ſtatute is onely to be intended of an heire male, whereof *hæres* is derived: and who ſhall be *hæres*, &c. See the firſt part of the Inſtitutes, lib. 1. ſect. 1, 2, 3. *Cuſtumier de Norm.* 99. and the expoſitions upon the ſame.

See the Cuſtumier de Norm. cap. 29. and the Comment upon the ſame. & cap. 32. & le Latine Com. fol. 43. b.

(2) *antequam homagium ceperit.*] For homage ſee the firſt part of the Inſtitutes, ſect. 85. and it is to be obſerved that in England and France it is called *Homage, Homagium,* and in Italy *Vaſſalagium.*

Some have thought that theſe words are to be underſtood that the heire within age ſhall not be in ward untill the lord hath taken the homage of ſome of the aunceſters of the ward, ſo as the aunceſter of the heire may die in the homage of the lord: for in a writ of ward brought by the lord, it is a good plea to ſay that the aunceſter died not in his homage, and the ſtatute ſaith not *Antequam homagium ſuum ceperit*, but *homagium* generally; and, ſay they, if the lord ſhould receive homage of the heire, he ſhould not be in ward at all.

[11]
16 E. 3 Relief 6. & 10.

But this is not the right intendment of theſe words, but the ſtatute meant that the homage ſhould be taken of the heire himſelfe, and that for the benefit of the heire, and ſo doth it appear by [a] our old books that wrote ſoone after this ſtatute, and *contemporanea expoſitio eſt fortiſſima in lege*, and ſo do the words themſelves of this law import, and the reaſon thereof is notable, which was, that before the lord ſhould have benefit of wardſhip, he ſhould be bound to two things; [b] 1. To warrant the land to the heir, and to that end the heir might have a writ, *De homagio capiendo*; 2. To acquit him from

[a] Brac. l. 2. fo. 41, 71, 81, 89, 252. Brit. fol. 171. Fleta, li. 1. ca. 9. Mirror, ca. 9. § 2. Glanv. lib. 9.

from ſervice and other duties to be done and paid to all other lords, both which the lord was bound to do ([c] as the law was then holden) if the lord accepted homage *de droit* of his tenant, (in ſuch ſort as the lord is, if he receiveth homage *auncęſtrel* at this day) but otherwiſe it is of homage in fait; [d] *Homagium eſt juris vinculum, quo quis aſtringitur ad warrantizandum, defendendum, & acquietandum tenentem ſuum in ſeiſina verſus omnes per certum ſervitium in donatione nominatum & expreſſum; & etiam vice verſa, quo tenens aſtringitur ad fidem Domino ſuo ſervand. & ſervitium debitum faciend.* [e] We have an ancient manuſcript of a caſe adjudged in a writ of cuſtomes and ſervices betweene Alexander of Poulton, and Robert de Norton, that homage is of an higher nature to divers purpoſes then eſcuage. 1. [f] For that homage bindeth to warranty, which eſcuage doth not. 2. Homage is ſo ſolemne as that it cannot be done again as long as the tenant that made it liveth, but eſcuage may be given every other year. [g] And Littleton ſaith that homage is the moſt honourable ſervice, and humble ſervice of reverence, and yet it is true that eſcuage taking it for ſervice, draweth to it homage.

[h] But at the common law, if a man holding land by knights ſervice, had made a gift in frank-marriage, and the donee had died his heir within age, the heir ſhould be in ward before any homage received, *Quia dominus non poteſt capere homagium uſque ad tertium hęredem*, and this ſtatute is to be intended where homage was to be received by law, yet did the tenant in judgement of law die in the homage of the lord, or otherwiſe he could not be in ward, a caſe worthy of great conſideration.

[i] But after when it was reſolved for law, and ſo held to this day, that homage of it ſelfe doth not binde the lord to any warranty or acquitall, unleſſe it were homage auncęſtrell, which either is worne out, and very rare in England at this day; then according to the old rule, *Ceſſante ratione legis ceſſat ipſa lex*; the heir cannot binde the lord to receive homage in this caſe, but if the tenure be by homage auncęſtrell there the lord ſhall not have the cuſtody of body or land before he receiveth homage of the heire, for that homage bindeth him to warranty and acquittall, and conſequently within the reaſon of this law.

[k] Here is to be noted that one within age may doe homage, but he cannot do fealty becauſe that is to be done upon oath, *Hoc obſervato, quod ſi minor homagium fecerit nullum tamen juramentum fidelitatis, antequam ad ætatem pervenerit, præſtabit.* See more concerning this matter 1. part. Inſtitut. lib. 2. cap. Homage and Fealty.

(3) *Fiat miles.*] Be made a knight; and his tenure of ſervice is called *Servitium militare*, knights ſervice, [l] and therefore if the king create the heire within age, a duke, a marqueſſe, an earle, a viſcount or a baron, yet he ſhall remain in ward for his body, but if the heire of a duke, or of any other of the nobility be made a knight, he ſhall be out of ward for his body. If the heire in ward be created a knight of the garter, a knight of the bathe, a knight banneret, or a knight bachelor, he ſhall be out of ward for his body for that he is a knight, and ſomewhat more, and the ſtatute ſpeaketh generally, unleſſe a knight, and therefore within the words and meaning of this law, and the ſoveraigne of chivalry hath adjudged him able ſo doe knights ſervice.

And

[c] cap. 1. & 6. 13 E. 1. gard. 136. 31 E. 1. gard. 155.

[b] Trin. 4 E. 2. fo. 65. b. *in Libro nigro.* William St. Quintin's caſe. Homage auncęſtrel only bindeth to warranty, but homage *in fait* bindeth to acquitall.

See the firſt part of the Inſtitutes, ſect. 143, fol. 101. Verb & ad receive homage.

[c] Tr. 9. E. 2. *Ubi ſupra.*

[d] Bract. fol. 78. Britt. & Fleta *ubi ſupra.* 47 E. 3. gar. 99. Temp. E. 1. garr. 90.

[e] M.S. in temp. E. 1.

[f] See the firſt part of the Inſtitutes, ſect. 149.

[g] Lit. ſect. 85. ſect. 99.

[h] 13 H. 3. gar. 42.

[i] 35 H. 6. gard. 72. 14 H. 7. 11. Lit. ſect.

[k] Brac. l. 2. fo. 79.

See the firſt part of the Inſtitutes. Lit. lib. 2. cap. Homage & Fealty.

[l] Lib. 6. fol. 73. Sir Drue Druries caſe. 15 E. 4. 10. Pl. Com. Ratcliffe's caſe. See hereafter *verbo remaneat.*

And this word *Fiat*, be made, proveth that knighthood ought to be by creation or making, and cannot be by deſcent.

[m] But albeit the heir be made a knight within age, yet is he not freed of the value * of his marriage, for that was veſted before in the king, or other lord, and the king being ſoveraigne of chivalry hath adjudged him of full age, that is, able to doe knights ſervice, to this intent, to free his body from cuſtody, but neither to barre the king or other lord of the value of the marriage, no more then if he had attained to his full age of 21 years.

[m] See Sir Drue Druries caſe, *ubi ſupra.*

(4) *Remaneat in cuſtodia dominorum ſuorum.*] This word (*remaneat*) implieth that this ſtatute is to be underſtood onely, where the heir after he be in ward is made knight within age, for when the heire apparent is made knight within age in the life of the auncеſter, and the auncеſter dieth, his heir within age, he ſhall be out of ward both for body and land, becauſe the ſoveraign of chivalry hath adjudged him of full age, and able to do knights ſervice in the life of his auncеſter, ſo as in that caſe no title of wardſhip did ever accrew, and there can be no *remanere* or reſidue, but of that thing that had his eſſence or beeing.

Lib. 8. fol. 171. Sir Henry Conſtable's caſe. 15. E. 4. 10. Pl. Com. 267. 2 E. 6. tit gard. Br. Sir Anthony Brown's caſe; Sir Drue Druries caſe. *Ubi ſupra.* Pl. Com. Ratcliff's caſe

CAP. IV.

CUSTOS (1) *terræ hujuſmodi hæredis, qui infra ætatem fuerit, non capiat de terra hæredis, niſi rationabiles exitus* (2), *et rationabiles conſuetudines* (3), *et rationabilia ſervitia* (4), *et hoc ſine deſtructione, et vaſto hominum et rerum* (5). *Et ſi nos commiſerimus* (6) *cuſtodiam alicujus talis terræ vic', vel alicui alii, qui de exitibus terræ illius nobis debeat reſpondere, et ille de cuſtodia illa, deſtructionem, vel vaſtum fecerit: nos ab eo capiemus emend'* (7), *et terra committatur duobus legal' et diſcretis hominibus de feodo illo, qui de exitibus terræ illius nobis reſpondeant, vel illi cui nos illam aſſignaverimus. Et ſi dederimus, vel vendiderimus cuſtod' alicujus* (8) *talis terræ, et ille inde deſtructionem fecerit, vel vaſtum, amittat illam cuſtod'* (9), *et tradatur duobus diſcret' et legal' hominibus de feodo illo, qui ſimiliter nobis reſpondeant, ſicut prædict' eſt.*

THE keeper of the land of ſuch an heir, being within age, ſhall not take of the lands of the heir, but reaſonable iſſues, reaſonable cuſtoms, and reaſonable ſervices, and that without deſtruction and waſte of his men and his goods. And if we commit the cuſtody of any ſuch land to the ſheriff, or to any other, which is anſwerable unto us for the iſſues of the ſame land, and he make deſtruction or waſte of thoſe things that he hath in cuſtody, we will take of him amends and recompence therefore, and the land ſhall be committed to two lawful and diſcreet men of that fee, which ſhall anſwer unto us for the iſſues of the ſame land, or unto him whom we will aſſign. And if we give or ſell to any man the cuſtody of any ſuch land, and he therein do make deſtruction or waſte, he ſhall loſe the ſame cuſtody; and it ſhall be aſſigned to two lawful and diſcreet men of that fee, which alſo in like manner ſhall be anſwerable to us, as afore is ſaid.

(Raſt. pl. 693. Fitz. Waſt. 15, 24, 138, 146. 1. Inſt. 54. a. 12 H. 4. f. 53. 6 Ed. 1. c. 5. 28 Ed. 1. ſtat. 3. c. 18. 14 Ed. 3. ſtat. 1. c. 13. 36 Ed. 3. c. 13. See 12 Car. 2. c. 24. which renders obſolete the three laſt mentioned acts reſtraining eſchetors from waſte.)

(1) *Cuſtos*

(1) *Cuſtos.*] A keeper, ſome derive the word *à cura & ſto, quia cuſtos eſt is cui cura rei ſtat cuſtodiend.*; and thereupon ſometime he is called *curator*, in French he is called a *gardien*, ſo as his name *cuſtos* doth put him in minde of his office and duty, that is not onely to keep and preſerve the lands and tenements of the ward committed to his cuſtody in ſafety, but alſo to educate and bring up his ward vertuouſly, and to advance him in marriage without diſparagement. Vide 1. part Inſtitut. Sect. 103. of the cauſe and end of wardſhip; and ſee the 4. part of the Inſtitut. cap. Court of Wards and Liveries.

(2) *Rationabiles exitus.*] *Exitus* is derived *ab exeundo*, and ſignifieth the rents and profits iſſuing out or comming of the lands or tenements of the ward, which muſt be taken by the gardien in reaſonable manner, and therefore to *exitus*, *rationabiles* is added, for that nothing that is unreaſonable is allowed by law. Bract. l'b 7. fol. 87. W 2. ca 39. Flet. li. 6. ca. 61. 5 E 3. 6. 24 E. 3. 28, 29.

(3) *Rationabiles conſuetudines.*] That is, things due by cuſtome or preſcription, and appendant or appurtenant to the lands or tenements in ward, as advowſons, commons, waiſe, ſtraie, wreck, and the like; alſo the reaſonable cuſtomes, fines, &c. of tenants in villenage, or by copy of court-roll where fines be incertain: for though the cuſtomes, duties, fines, or the like be incertaine, yet if that which is exacted or demanded be unreaſonable, it is againſt the common law. For this word (*conſuetud.*) and the divers ſignifications thereof, ſee hereafter cap. 30. Brac. li. 2. fo. 87.

(4) *Et rationabilia ſervitia.*] This alſo, as appeares by Glanvill that wrote in the reigne of H. 2. was the common law of England, that incertain ſervices and aides ought to be reaſonable; for, ſaith he, the lord may *rationabilia auxilia de hominibus ſuis inde exigere, ita tamen moderate ſecundum quantitatem feodorum ſuorum et ſecundum facultates, ne minus gravari inde videantur, vel ſuum contenemen-* *Contenementū.* *tum amittere*; and that which he ſpeaketh there of aids, is to be applied to all incertain ſervices, cuſtomes, fines, or duties. Glanv. li. 9. c. 8. W. 1. cap. 31. 25 E. 3. cap. 11.

But it may be demanded, how and by whom ſhall the ſaid reaſonableneſſe in the caſes aforeſaid be tried? this you may reade in the firſt part of the Inſtitutes, ſect. 69.

(5) *Et hoc ſine deſtructione et vaſto hominum et rerum.*] For theſe words, deſtruction and waſte, ſee the firſt part of the Inſtitutes, ſect. 67. and the ſtatute of Gloc. cap. 5. Marleb. cap. 17. Mirror. cap 5. § 2. li. 4. fol. 57.

(6) *Et ſi nos commiſerimus*, &c.] For this word *commiſerimus*, vide the firſt part of the Inſtitutes, ſect. 58. & 531. Here the committee of the king is taken for him to whom the king committeth the cuſtody of the land to one or more; by this word *commiſimus*, reſerving a rent, *Quandiu quis alius plus dare voluerit*, and there the king remain gardien.

(7) *Nos ab eo capiemus emenda.*] And this may be upon an office found, or by writ directed to the ſheriffe to this effect, *Quia datum eſt nobis intelligi, &c.* Reg. fo. 72, 73. Brac. li. 2. fo. 47. lib. 4. fol. 317. 20 H. 3. Waſte 138. 40 Aſſiſ. Pl. 22. lib. intrat. Raſt. 616.

(8) *Et ſi dederimus vel vendiderimus alicui cuſtodiam*, &c.] In this caſe the king graunteth, or ſelleth the very cuſtody it ſelfe, ſo as the grauntee or vendee becommeth guardian in fact: and that this diſtinction betweene the committee and grauntee was by the common law, hear what Glanvill ſaith, *Si verò Dominus Rex aliquam cuſtodiam alicui commiſerit, tunc diſtinguitur utrum ei cuſtodiam pleno jure commiſerit ita quod nullum inde reddere computum oportet ad Scaccarium, aut aliter:* Glanv. li. 7. c. 10.

ſi

ſi vero plene ei cuſtodiam commiſerit, tunc poterit, &c. negotia ſicut ſua rectè diſponere. King H. 7. graunted a ward to the dutches of Buckingham, *quam diu in manibus ſuis fore contigerit*; and afterwards the king made a ſpeciall livery, as by law he might, to the heir within age, and it was adjudged, as juſtice Frowick reported, that the duches was without remedy; but otherwiſe it had been if the graunt were *durante minore ætate hæredis*, or *durante minore ætate et quamdiu in manibus noſtris, &c.*

7 E. 3. 12, 13. 3 E. 2. Waſte 3. Regiſtr. 72.

But here it may be materially demaunded, what if the committee or grauntee doth waſte, and the king during the minority taketh no amends, what remedy hath the heire after his full age? The anſwer is, that he ſhall have an action of waſte, and that by order of the common law: and then it is further doubted and demanded, what ſhall the heire then recover, for the wardſhip cannot be loſt, ſeeing the heire is of full age, neither by this ſtatute nor by the ſtatute of Gloc. To this the anſwer is very obſervable, that ſeeing that the wardſhip cannot be loſt, and the waſte, being to the heirs diſheriſon, ought not to remain unpuniſhed, that the heire ſhall recover treble damage, for that penalty is annexed to the action of waſte; and therefore if an action of waſte were given againſt tenant in *tail apres poſſibilitie*, generally the plaintife ſhall recover treble damages, becauſe they are annexed to this ſuit. But if the king doe take amends, then the heire at full age ſhall have no action of waſte.

12 H. 4. 3. F. N. B. 59. e. & 60. c. Vide *notabile recordum*, M. 32 E 1. Coram Rege. Rot. 76. Dublin. See hereafter in the Expoſition upon the Statute of Gloc. c. 5.

[14]

(9) *Amittat cuſtodiam.*] This is underſtood of the land, and not of the body, for the words be *tradatur duobus, &c. qui de exitibus terræ nobis inde reſpondeant.*

Bracton lib. 4. fol. 285. 316, 317. Gloc. cap. 5. Dier 28 H. 8. fol. 25. Britt. fo. 33, 34.

* *Nota*, ſince this ſtatute of *Magna Charta* divers other ſtatutes againſt waſts and deſtructions in the lands of wards have been made.

* W. 1. cap. 21. Gloc. cap. 5. Artic. ſup. cart. cap. 18. 14. E. 3. cap. 13. 36. E. 3. cap. 13.

At the making of this ſtatute, the king had not any prerogative in the cuſtodie of the lands of idiots during the life of the idiot, for if he had had, this act would have provided againſt waſt, &c. committed by the committee, or aſſignee of the king to be done in their poſſeſſions, as well as in the poſſeſſions of wards, but at this time the gardianſhip of idiots, &c. was to the lords and others accordihg to the courſe of the common law. And idiots from their nativity were accounted alwayes within age, and therefore the cuſtodie of them was perpetuall ſo long as they lived, for that their impotencie was perpetuall. And the lord of whom the land was holden, had not a tenant that was able to doe him ſervice. And therefore within the reaſon of a cuſtodie of a minor or of an heire within age in caſe of wardſhip. And this appeareth by Fleta, *Solent tutores idiotarum et ſtultorum cum corporibus eorum perpetuo, quod licitum fuit et proviſum, eo quod ſe ipſos regere non noverint, * nam ſemper judicabantur infra ætatem: vel quia verumq; plures per hujuſmodi cuſtodiam exhæredationes compatiebantur, proviſum fuit, et cõmuniter conceſſum quod Rex corporũ et hæreditatũ hujuſmodi idiotarum et ſtultorum ſub perpetuis cuſtodiam obtineret, dum tamen a nativitate fuerint idiotæ et ſtulti; ſecus autẽ ſi tardæ a quocunque Domino tenuerint, et ipſos maritaret et ex omni exhæredatione ſalvaret hoc cum adjecto quod dominis feodorum et aliis quorum interfuerit ut ſervitiis, redditibus et cuſtodiis uſque ad legitimam ætatem ſecundum conditionem feodorum, releviis et hujuſmodi nihil juris deperiret.*

Fleta. lib. 1. cap. 10. § Solent. * Nota, the cauſe of alteration by act of parliament. Mirror cap. 1. c. 9. § *En auter maner acc.* Britton. cap. 66. fol. 167. b. acc.

But then it is demanded, when was this prerogative given to the king? Certainè it is, that the king had it before ſtatute of 17 E.

17 E. 2. *de prærogativa regis*, for it appeareth in our bookes, that the king had this prerogative, *anno* 3 E. 2. And before that, it is manifeſt that the king had it before Britton wrote in the raigne of E. 1. as you may read in his booke.

Britton, cap. 66. fol. 167. b.

Brac. l. 5. 421. a. Stanf. Prerog. ca 9. fol. 33, 34.

And it is as cleare, that when Bracton wrote (who wrote about the end of the reigne of H. 3. that the king had not then this prerogative.

And therefore it followeth, that this prerogative was given to the king E. 1. before that Britton wrote, by ſome act of parliament, which is not now extant. And it appeareth by the Mirror of Juſtices agreeing with Fleta, that this prerogative was granted by common aſſent, vide lib. 4. Beverley's caſe, fol. 126.

CAP. V.

CUSTOS autem quamdiu cuſtodiam terræ hujuſmodi habuerit, ſuſtentet domos, parcos, vivaria, ſtagna, molendina, &c. ad terram illam pertinentia, de exitibus terræ ejuſdem, et reddat hæredi cum ad plenam ætatem pervenerit, terram ſuam tot' inſtauratam de carucis, et omnibus aliis rebus, ad minus, ſicut illam recepit. Hæc omnia obſerventur de cuſtodiis archiepiſcopatuum (1), *epiſcopatuum, abbatiarum, prioratuum, eccleſiarum, et dignitatum vacantium, quæ ad nos pertinent, except' quod cuſtod' hujuſmodi vendi non debent.*

THE keeper, ſo long as he hath the cuſtody of the land of ſuch an heir, ſhall keep up the houſes, parks, warrens, ponds, mills, and other things pertaining to the ſame land, with the iſſues of the ſaid land; and he ſhall deliver to the heir, when he cometh to his full age, all his land ſtored with ploughs, and all other things, at the leaſt as he received it. All theſe things ſhall be obſerved in the cuſtodies of archbiſhopricks, biſhopricks, abbeys, priories, churches, and dignities vacant, which appertain to us; except this, that ſuch cuſtody ſhall not be ſold.

(10 H. 7. f. 30. 3 Ed. 1. c. 21. 36 Ed. 3. c. 13.)

[15]

That this was the common law appeareth by Glanvile, who ſaith, *Reſtituere autem tenentur cuſtodes hæreditates ipſis hæredibus inſtauratas et debitis acquietatas juxta exigentiam temporis cuſtodiæ et quantitatis hæreditatis.*

Glanvil, lib. 7. cap. 9. Fleta, li. 1. c. 11. 10 H. 7. 6. & 30.

(1) *Hæc omnia obſervantur de cuſtodiis archiepiſcoporum*, &c.] The cuſtodie of the temporalties of every arch-biſhop and biſhop within the realme, and of ſuch abbeyes, and priories, as were of the king's foundation, after the ſame became voide, belonged to the king during the vacation thereof by his prerogative: for as the ſpiritualties belonged during that time to the deane and chapter *de cõmuni jure*, or to ſome other eccleſiaſticall perſon by preſcription, or compoſition, ſo the temporalties came to the king as founder, and this doth belong to the king, being *patronus et protector eccleſiæ*, in ſo high a prerogative incident to his crowne, as no ſubject can claime the temporalties of an arch-biſhop, or biſhop, when they fall by grant or preſcription.

See the 1. part of the Inſtitutes, ſect. 67. See prer. regis, cap. 14. W. 1. cap. 21. Fleta, li. 1. c. 11. 14 E. 3. ca. 4, 5. *vide* cap. 33.

adjudged 21 E. 1.

Regula.

But as, *in omni re naſcitur res quæ ipſam rem exterminat*, unleſſe it bee timely prevented (as the worme in the wood, or the mothe in the cloth, and the like) ſo oftentimes no profeſſion receives a greater blow then by one of their owne coat: for Ranulph an eccleſiaſticall perſon, and king William Rufus his chaplain, a man *ſubacto ingenio*, and *profunda nequitia*, was a factor for the king in making merchandize of church livings, in as much, as when any archbiſhopricke, biſhopricke, or monaſtery became void, firſt he perſwaded the king to keepe them voide a long time, and converted the profits thereof ſometime by letting, and ſometime by ſale of the ſame, whereby the temporalties were exceedingly waſted, and deſtroyed. Secondly, after a long time no man was preferred to them *per traditionem annuli et baculi*, by livery of ſeaſon, freely, as the old faſhion was, but by bargain and ſale from the king to him, that would give moſt, by meanes whereof the church was ſtuffed with unworthy, and inſufficient men, and many men of lively wits, and towardlineſſe in learning deſpairing of preferment turned their ſtudies to other profeſſions. This Ranulph, for ſerving the kings turnes, was advanced, firſt, to be the kings chancellour, and after to be biſhop of Dureſme, who after his advancement to ſo high dignities, made them ſervants to his ſacrilegious and ſimoniacall deſignes. King Henry the firſt ſeeing this miſchiefe, and foreſeeing the great inconvenience that would follow thereupon, was contented for his owne time to binde his owne hands, to the end the church now naked and bare might receive ſome comfort, and have meanes to provide things neceſſary for their profeſſion, and calling. He thereupon at his coronation made a charter to this effect, *Quia regnum oppreſſum erat injuſtis exactionibus, ego in reſpectu dei et amore quem erga vos omnes habeo, ſanctã Dei eccleſiam imprimis liberam fac' ita quod nec vendam, nec ad firmam ponam, nec mortuo archiepiſcopo, ſive epiſcopo vel abbate, aliquid accipiam de dominio eccleſiæ vel hominibus ejus, donec ſucceſſor eam ingrediatur, et omnes malas conſuetudines, quibus regnum Angliæ opprimebatur, inde aufero.* He committed the ſaid Ranulph then biſhop of Durham to priſon for his intolerable miſdeeds, and injuries to the church, where he lived without love, and died without pity, ſaving of thoſe, that thought it pity, he lived ſo long.

See this charter at large in Mat. Par. See *libr. rubeũ in principio.*

Vendi non debent.] Fleta, *ubi ſupra*, ſaith, *vendi non debent nec legari*; yet the king may commit the temporalties of them during the vacation, as by the ſtatute of 14 Ed. 3. appeareth.

Flet. *ubi ſupra.* 14 E. 3. ca. 4, 5. F. N. B. 59. b.

CAP. VI.

HÆREDES autem maritentur abſque diſparagatione.

HEIRS ſhall be married without diſparagement.

(1 Inſt. 80. 20 H. 3. c. 6.)

This is an ancient maxime of the common law: ſee more hereof in the firſt part of the Inſtitutes, ſect. 107, 108, 109.

CAP.

CAP. VII.

VIDUA poſt mortē mariti ſui ſtatim et ſine difficultate aliqua, habeat maritagiū ſuū et hæreditatē ſuam: nec aliquid det pro dote ſua, nec pro maritagio ſuo, vel pro hæreditate ſua habenda, quā hæreditatē maritus ſuus, et ipſa tenuerunt ſimul, die obitus ipſius mariti ſui: et maneat in capitali meſſuagio mariti ſui, per quadraginta dies (1) *poſt obitū mariti ſui* (2), *infra quos dies aſſignetur ei dos* (3) *ſua, niſi prius ei aſſignata fuerit, vel niſi domus illa ſit caſtrū* (4): *et ſi de caſtro receſſerit, ſtatim domus ei competens provideatur, in qua poſſit honeſte morari* (5), *quouſq; dos ſua ei aſſignetur, ſecundū quod prædictum eſt: et habeat rationabile eſtoverium ſuum interim de communi* (6). *Aſſignetur autem ei, pro dote ſua, tertia pars totius terræ mariti ſui* (7), *quæ fuit ſua in vita ſua, niſi deminori fuerit dotata ad oſtium eccleſiæ. Nulla vidua diſtringatur ad ſe maritandam* (8) *dummodo voluerit vivere ſine marito: Ita tamen quod ſecuritatem faciat, quod ſe non maritabit ſine aſſenſu noſtro, ſi de nobis tenuerit, vel ſine aſſenſu domini ſui, ſi de alio tenuerit* (9). [*Prærogativa Regis, cap.* 4.]

A Widow, after the death of her huſband, incontinent, and without any difficulty, ſhall have her marriage, and her inheritance, and ſhall give nothing for her dower, her marriage, or her inheritance, which her huſband and ſhe held the day of the death of her huſband, and ſhe ſhall tarry in the chief houſe of her huſband by forty days after the death of her huſband, within which days her dower ſhall be aſſigned her (if it were not aſſigned her before) or that the houſe be a caſtle; and if ſhe depart from the caſtle, then a competent houſe ſhall be forthwith provided for her, in the which ſhe may honeſtly dwell, until her dower be to her aſſigned, as it is aforeſaid; and ſhe ſhall have in the mean time her reaſonable eſtovers of the common; and for her dower ſhall be aſſigned unto her the third part of all the lands of her huſband, which were his during coverture, except ſhe were endowed of leſs at the church-door. No widow ſhall be diſtrained to marry herſelf; nevertheleſs ſhe ſhall find ſurety, that ſhe ſhall not marry without our licence and aſſent (if ſhe hold of us) nor without the aſſent of the lord, if ſhe hold of another.

(Hobart 153. Dyer, f. 76. Plow. 32. Bro. Dower, 101. Regiſt. fol. 175. Co. Lit. 32. b. 19 H. 6. f. 14. 17 Ed. 2. c. 4. Fitz. Dower, 194, 196. 20 H. 3. c. 1.)

It appeareth by Bracton of ancient time, that a woman being heire, *ſine dominorum diſpoſitione et aſſenſu, hæreditatem habens, maritari non poteſt, nec etiam in vita anteceſſorum de jure ſine aſſenſu domini capitalis, quod ſi olim feciſſent, hæreditatem amitterent ſine ſpe recuperandi, niſi ſolum per gratiam: hodie tamen aliam pœnam incurrunt, ſicut inferius dicetur, et hoc ideo ne cogatur dominus homagium capere de capitali inimico, vel de alio minime idoneo.*

Bracton, li. 2. fol. 88. Fleta, li. 5. cap. 23. 35 H. 6. 52. Mat. Par. 407.

Alſo it appeareth by the ſame author, *quod ſi mulier dotem habens pro voluntate ſua alicui nuberet, præter aſſenſum warranti ſui de dote, olim ex tali cauſa dotem amitteret, nunc tamen non amittet.*

Mirrour, cap. 1. § 3. See the 1. part of the Inſtitutes ſect. 36.

Item cum ſemel legitime maritatæ fuerint, et poſtea viduæ, iterum non cuſtodientur ſub cuſtodia dominorum, licet teneantur aſſenſum eorum requirere maritandi ſe, &c. And herewith agreeth Glanvile, who wrote before this ſtatute.

Glanvil, lib. 7. cap. 12. Fleta, lib. 3. cap. 23.

Hereby you may ſee what had beene uſed of ancient time in theſe caſes: but at this day widowes are preſently after the deceaſe of their huſbands, without any difficulty to have their marriage (that is, to marrie where they will without any licence, or aſſent of their lords) and their inheritance, without any thing to be given to them; but in this branch the king is not included, as hereafter in the end of this chapter ſhall appeare.

Bract. li. 2. c. 40. Britton, c. 103. Fleta, li. 5 c. 23.

(1) *Et maneat in capitali meſſuagio mariti ſui per quadraginta dies poſt obitum mariti ſui.*] And this is called her quarentine, and if the widow be witholden from her quarentine, ſhe ſhall have her writ, *De quarentena habenda* to the ſherife, which reciting this ſtatute, is in nature of a commiſſion to him, *Quod vocatis coram vobis partibus prædictis, et auditis inde earum rationibus, eidem B. C. viduæ plenam et celerem juſtitiam inde fieri faciatis juxta tenorē cartæ prædictæ, ne pro defectu juſtitiæ querela ad nos perveniat iterata.* By force of which writ, the ſherife may make proceſſe againſt the defendant, retournable within two or three dayes, &c. and may, and ought (if no juſt cauſe may be ſhewed againſt it) ſpeedily to put her in poſſeſſion; and the reaſon why ſuch ſpeed is made, is for that her quarentine is but for forty dayes.

Regiſter. 175. F. N. B. 161.

[17]

1 Mar. Br. Dower 101.

Vidua, &c. *maneat,* &c.] Therefore if ſhe marry within the forty dayes, ſhe loſeth her quarentine, for then her widow-hood is paſt, and ſhe hath provided for her ſelfe, and the quarentine is appropriate to her widowes eſtate.

Britton, ca. 103.

(2) *Infra quos dies aſſignetur ei dos.*] Here it appeareth how ſpeedily dower ought to be aſſigned, to the end the widow might not be without livelihood.

Dier, 7 E. 6. fo. 76. 4 & 5 Phil. & Mar. fol. 161.

(3) *Poſt obitum mariti ſui.*] The day wherein the huſband dieth, ſhall be accounted the firſt day, ſo as ſhe ſhall have but thirty nine after.

Bract. li. 2. fol. 46. Britton, ca. 103. Fleta, lib. 5. ca. 23. 30 E. 3. Dow. 81. 30 E. 1. vouch. 298. 8 H. 3. Dower 196. 8 H. 3. Dower 194. 17 H. 3. ibid. 192. Rot. pat. part 1. nu. 17. Eſcheat, 4 E. 1. m. 88.

(4) *Niſi domus illa ſit caſtrum.*] This is intended of a caſtle, that is warlike, and maintained for the neceſſary defence of the realm, and not for a caſtle in name maintained for habitation of the owner, but hereof ſee more in the firſt part of the Inſtitutes, ſect. 36. & 242. *De ædibus kernelatis. Kernellare,* or *cernellare,* by ſome is derived from the French word *kerner,* or *cerner,* to fortifie, inviron, or incloſe round about: and by others, from *karnean* or *carnean,* a battlement of a wall; or from *karnele* or *carnele,* imbatteled, or having imbattlements; and the truth is, it beareth all theſe ſignifications in the lawes of England, and the uſe of it in caſtles and forts was to defend himſelfe by the higher place, and to offend the aſſailants at the lower.

Britton ubi ſupra.

Brittons words be, *Si le chief mees ſoit chief del countee, ou del barony, ou caſtle, &c.* So as it appeareth by him that ſhe is not to have her quarentine of that, which is *caput comitatus, ſeu baroniæ,* and

Ubi ſupra.

with him, agreeth Fleta, but Bracton only ſpeaketh *de caſtro.* The ancient law of England had great regard of honour and order.

Britton ubi ſupra.

(5) *Statim domus ei competens provideatur, in qua poſſit honeſtè morari.*] But this muſt be of a houſe, whereof ſhe is dowable, for ſhe

ſhe muſt have her quarentine of that, whereof ſhe may be endowed.

(6) *Et habeat rationabile eſtoverium interim de communi.*] Britton ſaith, *Que eux eient des iſſues del intier de les terres lour covenable ſuſtenance*, &c. Britton ubi ſupra.

Fleta ſaith, *Ubi inveniantur ei neceſſaria honeſtè de hæreditate communi, donec rationabilis dos fuerit ei aſſignata.* Fleta ubi ſupra.

So as *eſtoverium* here is taken for ſuſtenance: there is an opinion in our books, that the widow cannot kill any of the oxen of the huſbands, whiles ſhe remain in the houſe; but the Regiſter ſaith, *Quod interim habeant rationabilia eſtoveria de bonis eorundem maritorum*, which ſeemeth to be an expoſition of this branch. 19 H. 6. 14. b. Regiſtr. 175.

In the ſtatute intituled, *De catallis felonum*, it is ſaid, *Cum ibidem captus coram juſticiariis noſtris fuerit convictus de felonia, tunc reſid. catallorum ultra eſtoverium ſuum ſecundum regni conſuetudinem nobis remaneant*; where *eſtoverium* ſignifieth ſuſtenance, or aliment, or nouriſhment. This word *eſtoverium* commeth of the French verb *eſtover, id eſt, alere*, to ſuſtain, or nouriſh, and this agreeth with the ſaid old books, and in this ſenſe it is taken in the ſtatute of *Gloc. Trover eſtovers in viver et veſture*, that is, things that concern the nouriſhment, or maintenance of man in *victu et veſtitu*, wherein is contained meat, drink, garments, and habitation. *Alimentorum appellatione venit victus, veſtitus, et habitatio.* Vet. Mag. Chart. 2. pt. fol. 66. Bract. li. 3. fo. 137. Gloc. ca. 4.

When *eſtovers* are reſtrained to woods, it ſignifieth houſebote, hedgebote, and ploughbote. [18]

(7) *Aſſignetur autem ei pro dote ſua tertia pars totius terræ mariti ſui*, &c.] See for this in the firſt part of the Inſtitutes, ſect. 37.

(8) *Nulla vidua diſtringatur ad ſe maritandam*, &c.] This is to be underſtood of widowes tenants in dower of lands holden of the king by knights ſervice in chiefe, and thereupon ſhe is called the kings widow, and if the kings widow marry without licenſe, ſhe ſhall pay a fine of the value of her dower by one year. Prer. Regis, cap. 4. Stamford prer. 17. F. N. B. 265. c. Britton, fol. 28. a. & 29. b.

And the reaſon of this law is yeelded wherefore they ſhould not marry without the kings licenſe, *Ne forte capitalibus inimicis domini regis maritentur.* Rot. pat. 4 E. 1. m. 31. Bract. ubi ſupra.

And old readers have yeelded this reaſon, leſt they ſhould marry unto ſtrangers, and ſo the treaſure of the realme might be carried out, and others ſay that the reaſon is for that upon the aſſignement of her dower ſhe is ſworn in the chancery, *Que el ne marier ſans licenſe, et pur ceo ſi el fait encont. ſon ſerement el ferra fine.* Fleta, lib. 1. ca. 12. 35 H. 6. 52. Fortes.

Others ſay that it is a contempt to marry without the kings licenſe, and againſt this ſtatute, and therefore for this contempt ſhe ſhall make a fine.

If the kings tenant in *capite* dye ſeiſed, his heire female of full age, if ſhe marry without the kings licenſe, ſhe ſhall pay no fine, for ſhe is no widow, and the words be *nulla vidua diſtringatur*, &c. 35 H. 6. 52. 15 E. 4. 13.

If the queene being the widow of a king be endowed, and marry without the kings licenſe, becauſe ſhe is endowed of the ſeiſon of the king himſelfe, ſhe is out of this ſtatute: but at the parliament holden in *anno* 6 H. 6. it is enacted by the king, the lords temporall, and the commons, that no man ſhould contract with, or marry himſelfe to any queen of England, without the ſpeciall licenſe or aſſent of the king, on pain to loſe all his goods, and lands; Rot. Parl. anno 6 H. 6. nu. 41.

to which act the biſhops, and other lords ſpirituall gave their conſent, as farre forth, as the ſame ſwerved not from the law of God, and of the church, and ſo as the ſame imported no deadly ſin.

See the firſt part of the Inſtitutes, ſect. 174.

(9) *Si de alio tenuerit.*] This is to be underſtood, where ſuch a licenſe of marriage in caſe of a common perſon was due by cuſtome, preſcription, or ſpeciall tenure, the words being *ſi de alio tenuerit*; and this expoſition is approved by conſtant and continual uſe and experience, *Et optimus interpres legum conſuetudo.*

CAP. VIII.

NOS vero (1), *vel ballivi noſtri* (2), *non ſeiſiemus terram aliquam, vel redditum* (4) *pro debito aliquo, quamdiu catalla debitoris præſentia ſufficiunt ad debitum reddendum* (3), *et ipſe debit' paratus ſit inde ſatisfacere. Nec pleg' ipſius debitoris* (5) *diſtringantur, quamdiu ipſe capitalis debitor ſufficiat ad ſolutionem ipſius debiti. Et ſi capitalis debitor defecerit in ſolutione debiti, non habens unde ſolvat, aut reddere noluerit cum poſſit* (6), *plegii* * *de debito reſpondeant, et ſi voluerint, habeant terras et reddit' debitoris* (7), *quouſque ſi eis ſatisfact' de debit', quod antea pro eo ſolverint, niſi capitalis debitor monſtraverit, ſe eſſe quietum verſus eoſdem plegios.*

WE or our bailiffs ſhall not ſeiſe any land or rent for any debt, as long as the preſent goods and chattels of the debtor do ſuffice to pay the debt, and the debtor himſelf be ready to ſatisfy therefore. Neither ſhall the pledges of the debtor be diſtrained, as long as the principal debtor is ſufficient for the payment of the debt. And if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges ſhall anſwer for the debt. And if they will, they ſhall have the lands and rents of the debtor, until they be ſatisfied of that which they before payed for him, except that the debtor can ſhew himſelf to be acquitted againſt the ſaid ſureties.

* [19]

(Pl. Com. 457. in Sir Tho. Wrothes caſe. Pl. Com. in the Lord Berklies caſe, &c. Plow. 440. Regiſt. 158. Infra, c. 18. 33 H. 8. c. 39.)

(1) *Nos vero.*] Theſe words being ſpoken in the politique capacity doe extend to the ſucceſſors, for in judgement of law the king in his politique capacity dieth not.

See the firſt part of the Inſtitutes; and hereafter, cap. 23.

(2) *Vel ballivi noſtri.*] In this place the ſheriffe and his underbailiffes are intended and meant, and to this day the ſheriffe uſeth this in his returns, *Infra ballivam meam*, for *Infra comitatum*, &c.

See Artic. ſuper Cart. cap. 12. li. 3. fol. 12. b. Sir William Herbert's caſe. 5 Eliz. Dier 224. Walter de Chirton's caſe. 24 E. 3. Pl. Com. 32. *Debet ſemper principalis excuti*

(3) *Non ſeiſiemus terram aliquam, vel redditum pro debito aliquo, quamdiu catalla debitoris præſentia ſufficiunt ad debitum reddendum.*] By order of the common law, the king for his debt had execution of the body, lands, and goods of the debtor: this is an act of grace, and reſtraineth the power that the king before had.

(4) *Redditum.*] For the ſeverall kinde of rents, ſee the firſt part of the Inſtitutes; Lit. lib. 2. cap. 12. whereunto you may adde, 1. *Redditus aſſiſus*, or *redditus aſſiſæ*: vulgarly rents of aſſiſe are the certain rents of the freeholders, and ancient copiholders, becauſe they

they be aſſiſed, and certain, and doth diſtinguiſh the ſame from *redditus mobiles*, farm rents for life, years, or at will, which are variable and incertain. 2. *Redditus albi*, white rents, blanch farmes, or rents, vulgarly and commonly called quitrents; they are called white rents, becauſe they were paid in ſilver, to diſtinguiſh them from work-d yes, rent cummin, rent corn, &c. And again theſe are called, 3. *Redditus nigri*, black maile, that is, black rents, to diſtinguiſh them from white rents; ſee Rot. clauſ. 12 H. 3. m. 12. *Rex conceſſit hominibus de Andevor maneria de M. F. A, &c. Reddendo per annum ad Scaccar. Regis* Lxxx. li. blanc, *de Antiqua firma*. 4. *Redditus reſoluti* be rents iſſuing out of the manors, &c. to other lords, &c. *Feodi firma*, fee farm, for this kinde of rent, vide infra Gloc. cap. 8.

After the ſtatute of 33 H. 8. cap. 39. was made for levying of the kings debts the uſuall proceſſe to the ſheriffe at this day, is, *Quod diligenter per ſacramentum proborum et legalium hominum de baliva tua, &c. inquiras quæ et cujuſmodi bona et catalla, et cujus precii idem (debitor) habuit in dicta baliva tua, &c. Et ea omnia capias in manus noſtras, ad valentiam debiti prædict', et inde fieri fac' debitum prædict', &c. Et ſi forte bona et catalla prædict' (debitoris) ad ſolutionem debiti prædict' non ſufficerent, tunc non omittas propter aliquam libertatem, quin eam ingrediaris, et per ſacramentum præfat. proborum, et legalium hominum diligenter inquiras, quas terras et quæ tenementa, et cujus annui valoris, idem (debitor) habuit, ſeu ſeiſitus fuit in dicta baliva tua, &c. Et ea omnia et ſingula in quorumcunque manibus jam exiſtunt, extendi fac', et in manus noſtras capias, &c. Et capias prædict' debitorem, ita quod habeas corpus prædict' (debitoris) ad ſatisfac' nobis de debito prædict.'*

Whereby it appeareth, that if the goods and chattels of the kings debtor be ſufficient, and ſo can be made to appeare to the ſheriffe, whereupon he may levy the kings debt, then ought not the ſheriffe to extend the lands, and tenements of the debtor, or of his heire, or of any purchaſer, or terre-tenant. To conclude this point with the authority of old and auncient Ockham.

Terræ et tenementa debitoris regis, ad quaſcunq; manus quocunq; titulo devenerunt, poſt debitum regis inceptum regi tenentur, ſi non aliunde ſatisfacere poſſit.

(5) *Nec plegii ipſius debitoris.*] As pledges, or ſureties to keepe the peace, pledges for a fine to the king upon a contempt, &c. are within this branch, but otherwiſe it is of mainperners, and this appeareth by Glanvile, to be the common law before the making of this act.

And the author of the Mirror ſaith, *ceux ſont pleges queux plevisher aut' choſe que corps de home, car ceux ne ſont propment pledges, mes ſont mainperners pur ceo que ils ſuppoſont plevisables ſont liver a ceux per bailie corps pur corps.*

(6) *Et ſi capitalis debitor defecerit in ſolutione, &c. aut reddere noluerit cum poſſit.*] Some have thought that this branch hath taken away the next precedent, concerning pledges, but both doe ſtand well together, for *reddere noluerit cum poſſit* muſt be underſtood, when the principall is able, and yet his ability cannot bee made to appeare, being in money, treaſure or the like, or in debts owing to him, which he conceales, and will not *reddere*, ſo as *de non apparentibus, et non exiſtentibus eadem eſt lex*, and in that caſe, *plegii de debito reſpondeant*, and yet the former branch concerning pledges doth

antequã perveniatur ad fidei juſſores. An act of grace, ſee W. 2. ca. 10. & 29. 18 E. 1. Stat. de quo warranto optime. Art. ſuper Cart. ca. 12 & 14. Cuſtumier de Norm. cap. 60. Vide 43. El. c. 13.

See cap. 18. Glanv. li. 10. ca. 3. Britton, cap. 28. Fleta, lib. 2. ca. 62. F. N. B. 137. f. Pl. Com. 440. Pepy's caſe, lib. 3. fol. 13. Sir William Herbert's caſe, lib. 7. fol. 17, 18, 22. 50. aſſ. p. 5. 21 E. 4. 21.

Ockham, cap. quod vicecomes a rundis ejus, &c. Cuſtumier de Nor. cap. 60. fol. 73, &c. 76. Gianvil. lib. 10. cap. 3.

doth ſtand, where the pledges can make it appeare to the ſheriffe, that he may levie the kings debt: ſee in the ſtatute of *articuli ſuper cartas*, cap. 11.

a Britton, cap. 28. Fleta, lib. 2. c. 56. F. N. B. 137. Reg. 158. 43 E. 3. 11. a. 44 E. 3. 21. 48 E. 3. 28. 32. E. 3. mians. des faitz, 179. 1 E. 46. Dyer. 22. Eliz. 170.

(7) *Et ſi voluerint, habeant terras, et redditus debitoris*, &c.] a Upon theſe words ſome have ſaid that the writ *de plegiis acquietandis* is grounded, and ſeeing no mention is made in this ſtatute of any deed, the pledges ſhall have that writ without any deed. And if the pledges have any deed, covenant, or other aſſurance for their indemnitie, then may they take their remedie at the common law; b but it appeareth by Glanvile that this was the common law, for he ſaith, *Soluto vero eo quod debetur ab ipſis plegiis, recuperare inde poterint ad principalem debitorem, ſi poſtea habuerit unde eis ſatisfacere poſſit per principale placitum*, and ſet downe the c writ *de plegiis acquietandis*.

b Glanvil. lib. 10. cap. 4, 5. c Regiſt. 158.

Note here is a chapter omitted, viz. *nullum ſcutagium, vel auxilium ponam in regno noſtro niſi per commune couciliū regni noſtri*, which clauſe was in the charter, anno 17 *regis Johannis*, and was omitted in the exemplification of this great charter, by Ed. 1. vide *cap.* 30.

Mat. Pariſ. 247 a. Wendov. Walſ. 40. Vide poſtea Stat. de Tallagio concedendo. 34 E. 1.

CAP. IX.

CIVITAS London' habeat omnes libertates ſuas antiquas, et conſuetudines ſuas. Præterea volumus, et concedimus, quod omnes aliæ civitates, burg', et villæ, et barones de quinque portubus, et omnes alii portus, habeant omnes libertates, et liberas conſuetudines ſuas.

THE city of London ſhall have all the old liberties and cuſtoms, which it hath been uſed to have. Moreover we will and grant, that all other cities, boroughs, towns, and the barons of the five ports, and all other ports, ſhall have all their liberties and free cuſtoms.

(Cro. Car. 251. 45 Ed. 3. f. 26. 5 H. 7. f. 10, 19. 11 H. 7. f. 21. 5 Rep. 63. 8 Rep. 125. 3 Bulſtr. 2. Mirror, 311.)

d Mirror, ca. 5. § 2. Flet., lib. 2. cap. 48. Pl Com. fol. 400. 5 H. 7. 10. 19. 8 H. 7. 4. 11 H. 7. 21. 28 Aſſiſ 24. 45 E. 3. 26 See acts of parliament. Art. ſuper chartas c. 7. W. 3. cap. 9. 7 R. 2. nient imprimee. 9 H. 4 cap. 1. 2 H. 6. cap. 1. &c. See the firſt of the Inſtit. ſect. 7. 31. 8 H. 7. 4. b.

d This chapter is excellently interpreted by an ancient author, who ſaith, *In pointe que demaunde, que le Citie de Londres eit ſes auncient franchiſes, et ſes frank cuſtomes, eſt interpretable in ceſt maner, que les citizens eient lour fraunchiſes, dont ils ſont inherit per loyall title, de dones, et confirmements des royes, et les queux ilz ne ont forfeits per nul abuſion, et que ilz eient lour franchiſes, et cuſtomes, que ſont ſufferable per droit, et nient repugnant al ley: Et le interpretation que eſt dit de Londres ſoit intendu de les cinque ports, et des autres lieus*; and this interpretation agreeth with divers of our later books.

It is a maxime in law, that a man cannot claim any thing by cuſtome or preſcription * againſt a ſtatute, unleſſe the cuſtome, or preſcription be ſaved by another ſtatute; for example: they of London claim by cuſtome, to give lands without licenſe to mortmain becauſe this cuſtome is ſaved, and preſerved, not onely by this chapter of *Magna Charta*, but by divers other ſtatutes, *et ſic de cæteris*. See more in particular concerning London, in the fourth part of the Inſtitutes, *cap.* Of the Courts of the City of London.

CAP.

CAP. X.

NULLUS distringatur ad faciendum majus servitium de feodo militis, nec de alio libero tenemento, quam inde debetur.

NO man shall be distrained to do more service for a knights fee, nor any freehold, than therefore is due.

(Custumier de Norm. cap. 114. fol. 132. b. 1 Roll, 164. 2 Roll, 182. 10 Rep. 108. Fitz. Avowry, 96, 157, 200. Plow. 243. 14 H. 7. f. 14. Fitz. Brief, 661, 881, 882. Fitz Prærog. 28. V. N. B. f. 15.)

That this was the auncient law of England, appeareth by Glanvill, and also that the writ of *Ne injuste vexes*, was not grounded upon this act, appeareth also by him, for he saith, *Et alia quædam placita, veluti, si quis conqueratur se curiæ de domino suo, quod consuetudines, et indebita servitia, vel plus servitii exigit ab eo, quã inde facere debeat:* and setteth down the form of the writ of *Ne injuste vexes*; *Rex N. salutem. Prohibeo tibi, ne injuste vexes, vel vexari permittas H. de libero tenemento suo, quod tenet de te in tali villa, nec inde ab eo exigas, aut exigi permittas consuetudines vel servitia, quæ tibi inde facere non debet, &c.*

Glanv. li. 12. ca. 9, 10. Reg. fol. 4. & 59. b. Bracton, fo. 329. Fleta, li. 5. cap. 38. lib. 2. c. 60. Brit. c. 27. fo. 60. b.

And another ancient author which wrote of the ancient laws long before this statute, maketh mention of the writ of *Ne injuste vexes.*

Mirror, cap. 2. § 19. & cap. 5. § 1.

Hereby it appeareth how they are deceived, that hold that this writ is grounded upon this act, and how necessary the reading of ancient authors is, to give the ancient common law his right, as hereby it appeareth.

F. N. B. 10. e. Pl. Com. 243. b.

The words of the statute be, *nullus distringatur*, therefore if the lord incroach more rent of the same nature, by the voluntary payment of the tenant, he shall not avoid this incroachment in an avowry, but in an assise *cessa vit*, or *ne injuste vexes*, the tenant shall avoyd the incroachment; this rule holdeth not in case of a successor, or of the issue in taile, for they shall avoyd it in an avowry, but if the service incroached be of another nature, the tenant shall avoyd that season in an avowry, for *majus servitium* implieth a greater exaction of the same nature: if the incroachment of the same nature be gotten by cohertion of distresse, there the tenant shall avoyd that season in an avowry, for *nullus distringatur ad faciendum majus servitium.* But if an incroachment be made upon a tenant in tail, or tenant for life, or any other, who cannot maintain a writ of *ne injuste vexes*, nor a *contra formam coliationis*, nor other remedy, he shall have an action upon this statute; for this statute intendeth to relieve those, which had no remedy by the common law.

Pl. Com. 94. 243. 10 H. 7. 11. b. 30 H. 6. 5. b. 22. ass. 68. 28. ass. 33. 12 E. 4. 7. b. 8 E. 4. 28. b. 4 E. 2. Avow. 202. 18 E. 2. ibidem. 217. 20 E. 3. ibid. 131. 5 E. 4. 2. 16 E. 4. 11. 20 E. 4. 11. 12 H. 423. F. N. B. 10. h.

See the first part of the Inst. sect.

CAP.

CAP. XI.

COMMUNIA placita (1) *non ſequantur* (2) *curiam noſtram* (3), *ſed teneantur in aliquo certo loco.*

COMMON Pleas ſhall not follow our court, but ſhall be holden in ſome place certain.

(Mirror. cap. 5. § 2. 1 Inſt. 71. a. Plow. 244. 12 Rep. 59. Regiſt. 187. 28 Ed. 1. c. 4. 4 Inſt. 99. 11 Rep. 75.)

[22]

Before this ſtatute, common pleas might have been holden in the kings bench, and all originall writs retournable into the ſame bench: and becauſe the court was holden *coram rege*, and followed the kings court, and removable at the kings will, the retourns were *ubicunque fuerimus*, &c. whereupon many diſcontinuances enſued, and great trouble of jurors, charges of parties, and delay of juſtice, for theſe cauſes this ſtatute was made.

Mirror, ca. 1. § 4. Stamf. Pl. cor. fo. 1. Vide cap. 17.

(1) *Communia placita.*] Here it is to be underſtood, a diviſion of pleas, for *placita* are divided in *placita coronæ*, and *communia placita: Placita coronæ* are otherwiſe, and aptly called *criminalia*, or *mortalia*, and *placita communia* are aptly called *civilia: Placita coronæ* are divided into high treaſon, miſpriſion of treaſon, petit treaſon, felony, &c. and to their acceſſories, ſo called, becauſe they are *contra coronam et dignitatem*; and of theſe the court of common pleas cannot hold plea; of theſe you may reade at large in the third part of the Inſtitutes. Common or civill pleas are divided into reall, perſonall, and mixt.

Vide cap. 17.

They are not called *placita coronæ*, as ſome have ſaid, becauſe the king *jure coronæ* ſhall have the ſuite, and common pleas, becauſe they be held by common perſons. For a plea of the crown may be holden between common perſons, as an appeale of murder, robbery, rape, felony, mayhem, &c. and the king may be party to a common plea, as to a *quare impedit*, and the like.

Now as out of the old fields muſt come the new corne, ſo our old books do excellently expound, and expreſſe this matter, as the law is holden at this day, therefore Glanvill ſaith, *Placitorum aliud eſt criminale, aliud civile*; where *placitum criminale*, is *placitum coronæ*; and *placitum civile, placitum commune*, named in this ſtatute.

Glan. li. 1. cap. 1.

Bracton, lib. 3. fol. 101. b. Fleta, li. 2. cap. 58.

And Bracton that lived when this ſtatute was made, ſaith, *Sciendum quod omnium actionum ſive placitorum (ut inde utatur æquivoce) hæc eſt prima diviſio, quod quædam ſunt in rem, quædam in perſonam, et quædam mixtæ; item earū quæ ſunt in perſonam alia criminalia et alia, civilia, ſecundum quod deſcendunt ex maleficiis vel contractibus; item criminalium, alia major, alia minor, alia maxima, ſecundum criminum quantitatem.*

Fleta, li. 1. cap. 35.

Fleta ſaith, *Perſonalium injuriarum quædam ſunt criminales, et quædam civiles; criminalium quædam ſententialiter mortem inducunt, quædam vero minime.*

Britton

Britton calleth them pleas *de la corone*, and common pleas, and the court taketh his name of the common pleas. Britton, fol. 3. &c.

To treat of the jurisdiction of this court, doth belong to another part of the Institutes, but a word or two of the antiquity of the court of common pleas, which is the lock and the key of the common law.

Glanvill saith, *placita in superioribus*, &c. *sicut et alia quælibet placita civilia*, &c. *solet autem id fieri corã justiciariis domini regis in banco residentibus*, &c. And in another place, *coram justic' in banco sedentibus*. Glanv. lib. 11. c. 1. & lib. 2. cap. 6.

Bracton in divers places cals the justices of the court of common pleas, as Glanvill did, *justiciarii in banco residentes*, so called for that the retourns in the kings bench, are *coram rege ubicunque fuerimus in Anglia*, as hath been said, because in ancient time it was, as hath been said, removable, and followed the kings court. Bract. li. 3. fol. 105. b. & 108. b.

And therefore all writs retournable, *coram justiciariis nostris apud Westm.* are retournable before the judges of the common pleas, and all writs retournable, *coram nobis ubicunque tunc fuerimus in Anglia*, are retournable into the kings bench. Artic. super Cart. cap. 5. Fleta, lib. 2. cap. 2. F. N. B. 69. m.

Britton speaking of the court of common pleas, saith, *Ouster ceo voillons que justices demurgent continualment a Westm. ou ailours, ou nous voudrous ordinaire* a pleader common pleas, &c. Britton.

Fleta saith, *Habet et (rex) curiam suam et justiciarios suos residentes qui recordum habent in hiis quæ coram eis fuer' placitata, et qui potestatem habent de omnibus placitis, et actionibus realibus, personalibus, et mixtis*, &c. Fleta, li. c. 28. & 54.

It is manifest that this court began not after the making of this act, as some have thought, for in the next chapter, and divers others of this very great charter mention is made *de justiciariis nostris de banco*, which all men know to be the justices of the court of common pleas, commonly called the common bench, or the bench, and Doct. and Stud. saith, that it is a court created by custome. & cap. 13. 7 E. 4. 53. D. & St. 12. b. [23]

The abbot of B. claimed conusans of plea in writs of assise, &c. in the times of king Etheldred, and Edward the Confessor, and before that time, time out of minde, and pleaded a charter of confirmation of king H. 1. to his predecessor, and a graunt, &c. so that the justices of the one bench, or of the other should not intermeddle. 26 Ass. p. 24.

It appeareth by our books that the court of common pleas was in the reign of H. 1. 4 E. 3. 49 39 E. 3. 21.

That there was a court of common pleas in anno 1 H. 3. which was before this act; *Martinus de Pateshull* was by letters patents constituted chiefe justice of the court of common pleas in the first yeare of H. 3. Rot. pat. 1 H. 3.

It is resolved by all the judges in the exchequer chamber, that all the courts viz. the kings bench, the common place, the exchequer, and the chancery, are the kings courts, and have been time out of memory, *Issint que home ne poet scaver que est plus auncient*. 9 E. 4. 53. 21 H. 3. brief. 883.

(2) *Non sequantur curiam nostram.*] Divers speciall cases are out of this statute. Tr. 26 E. 1. coram rege Northampton.

1. The king may sue any action for any common plea in the kings bench, for this generall act doth not extend to the king. Tr. 18 E. 1. coram rege Rot. 62. 31 E. 3. prer. 28.

* 2. If any man be in *custodia mareschalli* of the kings bench, any other may have an action of debt, covenant, or the like personall action 17 E. 3. 50. * 31 H. 6. fo.

10, 11. Artic. ſuper cart. cap. 4. Pl. Com. 208. b. 38 aſſ. p. 20. ſimil.

action by bill in the kings bench, becauſe he that is in *cuſtodia mareſchalli* ought to have the priviledge of that court, and this act taketh not away the priviledge of any court, becauſe if he ſhould be ſued in any other court, he ſhould not in reſpect of his priviledge anſwer there, and ſo it is of any officers, or miniſters of that court: the like law is of the court of chancery, and eſchequer.

3. Any action that is *Quare vi et armis*, where the king is to have a fine, may be purchaſed out of the chancery, retournable into the kings bench, as *ejectione firmæ trns. vi et armis*, forcible entry and the like.

9 H. 7. 10. 19 E. 3. aſſiſe 84. 2 H. 7. 12. Reg. F. N. B. 177. 14 H. 7. 14. 16 E. 3. bre. 661.

4. And a replevin may be removed into the kings bench, becauſe the king is to have a fine, and ſo it is in an aſſiſe brought in the county where the kings bench is.

5. Albeit originally the kings bench be reſtrained by this act to hold plea of any real action, &c. yet by a mean they may. As if a writ in a real action be by judgment abated in the court of common pleas, if this judgment in a writ of error be reverſed in the kings bench, and the writ adjudged good, they ſhall proceed upon that writ in the kings bench, as the judges of the court of common pleas ſhould have done, which they doe in the default of others, for neceſſity, leſt any party that hath right ſhould be without remedy, or that there ſhould be a failer of juſtice, and therefore ſtatutes are alwayes ſo to be expounded, that there ſhould be no failer of juſtice, but rather then that ſhould fall out, that caſe (by conſtruction) ſhould be excepted out of the ſtatute, whether the ſtatute be in the negative, or affirmative.

Stat. de Mirton, cap. 10.

6. In a *rediſſeiſin*, or the like.

(3) *Curia noſtra.*] Are words collective, and not onely extend to the kings bench, but into the court of eſchequer, vide artic. ſuper Cart. cap. 4.

F. N. B. 190. 224. 246.

When judgment is given before the ſheriffe, and the tenant hath no goods, &c. in that county, he may have a *certiorare* to remove the record into the kings bench, and there have execution, for that is not *placitum*. See more hereof in the fourth part of the Inſtitutes, cap. Of the Court of Eſchequer.

[24]

CAP. XII.

RECOGNITIONES de nova diſſeiſina, et de morte anteceſſoris (2), *non capiantur niſi in ſuis comitat'* (1), *et hoc modo; Nos vero ſi extra regnum fuerimus, capital' juſtic' noſtri* (3) *mittent juſticiar' noſtros per unumquemque comitatum, ſemel in ann', qui cum militibus eorund' in com', capiant in com' illis aſſiſ. prædict'. Et ea quæ in adventu ſuo in illo comitat' per juſtic' noſtr' prædict' ad dictas aſſijas capiend' miſſos, terminari non poſſunt, per eoſdem terminent' alibi in itinere ſuo* (4). *Et ea quæ*

ASSISES of novel diſſeiſin, and of mortdanceſter, ſhall not be taken but in the ſhires, and after this manner: if we be out of this realm, our chief juſticers ſhall ſend our juſticers through every county once in the year, which, with the knights of the ſhires, ſhall take the ſaid aſſiſes in thoſe counties; and thoſe things that at the coming of our foreſaid juſticers, being ſent to take thoſe aſſiſes in the counties, cannot be determined, ſhall be ended by them in ſome other place in their circuit; and thoſe things, which

quæ per eoſdem, propter difficultatem aliquorum articulorum terminari non poſſunt, referant' ad juſticiar' noſtros de banco, et ibi terminentur.

which for difficulty of ſome articles cannot be determined by them, ſhall be referred to our juſticers of the bench, and there ſhall be ended.

(12 Rep. 31, 52. 13 Rep. 8. Fitz. Aſſize, 21. 8 Rep. 57. Fitz. Mortdanc. 2, 21, 53. 24 Ed. 3. f. 23. 1 Anderſon, 230. 2 H. 4. f. 1, 20. Regiſt. 197. 13 Ed. 1. ſtat. 1. c. 30.)

Before the making of this ſtatute, the writs of aſſiſe of *novel diſſeiſin*, and *mordanc'* were retournable, either *coram rege*, or into the court of common pleas, and to be taken there, and this appeareth by Glanvill, *Coram me, vel coram juſticiariis meis.* But ſince this ſtatute, theſe writs are retournable, *Coram juſticiariis noſtris ad aſſiſas, cum in partes illas venerint*; by force of theſe words, *Mittent juſticiarios noſtros per unumquemque comitat' noſtrum ſemel in anno, qui cum militibus eorundem comitatuum capiant in comitat' illis aſſiſas prædict'.*

Glanv. li. 13. ca. 3. & 33. F. N. B. 177. f. Regiſtrum.

(1) *Niſi in ſuis comitatibus.*] This tended greatly to the eaſe of the jurors, and for ſaving of charges of the parties, and of time, ſo as they might follow their vocations, and proper buſineſſe, and the rather, for that the aſſiſe of *novel diſſeiſin* was *frequens et feſtinum remedium* in thoſe dayes, and ſo was the aſſiſe of *mordanc'* alſo. It is a great benefit to the ſubject to have juſtice adminiſtered unto him at home in his owne country.

Mirror, ca. 5. § 2. See W. 2. ca. 30.

For an aſſiſe of *novel diſſeiſin*, and aſſiſe of *mordanc'*, ſee the firſt part of the Inſtitutes.

See the firſt part of the Inſtitutes, ſect. 234. Bract. l. 4. fo. 164.

And where Bracton ſaith, *Succurritur ei (i. diſſeiſito) per recognitionem aſſiſæ novæ diſſeiſinæ multis vigiliis excogitatam, et inventam recuperandæ poſſeſſionis gratia, quam diſſeiſitus injuſte amiſit, et ſine judicio, ut per ſummariam cognitionem abſq; magna juris ſolemnitate quaſi per compendium, negotium terminetur.* See the *Cuſtumier de Normand'*, (compoſed, as hath been ſaid, in 14 H. 3.) ſect. 91. & 93. of the aſſiſe of *novel diſſeiſin*, which being invented and framed in England, as Bracton and others have teſtified, muſt of neceſſity be tranſported into Normandy.

But where we yeeld to Bracton, that the aſſiſe of *novel diſſeiſin* was ſo invented, ſo he muſt yeeld to us, that it was a very auncient invention, for Glanvill maketh mention thereof, and of the aſſiſe of *mordaunc'*, as hath been ſaid, and by the Mirror alſo the antiquity of aſſiſe *de novel diſſeiſin* doth appeare, who ſaith, that this writ of aſſiſe of *novel diſſeiſin*, was ordained in the time of *Ranulph de Glan-vil.*

See the preface of the 2d part of the Inſtitutes. Glanv. lib. 13. ca. 3. & 33. Cuſtumier de Norm. ubi ſupra. Mir. ca. 2. § 15. 26 Aſſ. p. 24.

But the caſe of 26. *aſſiſe* before touched, doth prove that the writs of *aſſiſe* are of farre greater antiquity, for there it appeareth that in an *aſſiſe* of *novel diſſeiſin*, claimed to have conuſans of plea, and writs of *aſſiſe*, and other originall writs out of the kings courts by preſcription time out of minde of man, in the times of S. Edmond, and S. Edward the Confeſſor, kings of this realme before the conqueſt, and ſhewed divers allowances thereof; but true it is, as the ancient authors affirme, that a new forme of writs of aſſiſe, for the more ſpeedy recovery of poſſeſſion, which were called *feſtina remedia*, was invented in England ſince the conqueſt, and were called *brevia de aſſiſa novæ diſſeiſinæ*; which writs ſo altered continue ſo until this day, and according to the alteration is cited in the *Cuſtumier*, cap. 93. fol. 107. b.

If

24 E. 3. 23.
2 E. 3. 23. 1.
1 E. 4. 1.

If an aſſiſe be taken in *proprio comitatu*, and the tenant pleade, and after the aſſiſe is diſcontinued by the *non venu* of the juſtices, this act extends to the aſſiſe, but not to a reattachment thereupon, for that the aſſiſe was firſt arraigned and examined in the proper county, neither doth this act extend to a writ of attaint, brought upon the verdict of the recognitors of the aſſiſe: and herewith agreeth Britton, who ſaith, *Et tout conteine la grand Chre. des franchiſes, que aſcuns aſſiſes ſoient priſes in counties, pur ceo ne intent nul que certifications, et attaints auter foitz eſtre pledes*, &c.

6 E. 3. 55, 56.
Britton, cap. 97. fol. 240.
F. N. B. 181.

Bracton, lib. 4. fol. 291.

And Bracton ſaith, *Et ſi ad hoc ſe habeat communis libertas, quod aſſiſæ extra comitatum capi non debeant, non ſequitur quod propter hoc remaneant juratæ in com' capiendæ; aliud enim habet privilegium aſſiſa, et aliud jurata.*

6 E. 3. 55, 56.
19 E. 3. aſſ. 84.

An aſſiſe is brought in the kings bench, then being in the county of Suff. (as it may be, as hath been ſaid) of lands lying in that county, the tenant plead in barre, the pl' reply and pray the aſſiſe, the kings bench is removed to Weſtm. and there the pl' prayed the aſſiſe, this ſtatute is, that the aſſiſe ſhall not be taken but in the county, and now the kings bench is in another county, and the originall cannot goe out of this place, for when a record is once in this court, here it muſt remaine, wherefore by th'adviſe of all the judges, the aſſiſe was awarded at large, *quia nihil dicit*, and a *niſi prius* granted in the county of Suff. that there might the aſſiſe be taken. A caſe worthy of obſervation, how by this expoſition both the parties ſute was preſerved, and the purvien of this ſtatute obſerved.

18 E. 2. aſſiſe 382.
13 E. 3. Juriſd. 23. Rot. Parliam. de anno 18 E. 1. inter petitiones.
28 E. 3. cap. 2.

Yet in ſome caſe notwithſtanding this negative ſtatute, the aſſiſe ſhould not have been taken in his proper county. And therefore if a man be diſſeiſed of a commote or lordſhip marcher in Wales, holden of the king in *capite*, as for example of *Gowre*, the writ of aſſiſe ſhould have been directed to the ſherife of Gloc. within the realme of England, and albeit the land of *Gowre* was out of the power of the ſherife of Gloc. being out of his county within the dominion of Wales, and this ſtatute ſaith that the aſſiſe ſhall not be taken but in his proper county, yet was the aſſiſe taken in the county of Gloc. and judgment thereupon given and affirmed in a writ of error: and the reaſon is notable, for the lord marcher though he had *jura regalia*, yet could not he doe juſtice in his owne caſe, and if he ſhould not have remedy in this caſe by the kings writ out of the chauncery in England, he ſhould have right and no remedy by law given for the wrong done unto him, which the law will not ſuffer, and therefore this caſe of neceſſity is by conſtruction excepted out of the ſtatute. And it was well ſaid in an'old booke, *Quamvis prohibetur quod communia placita non ſequantur curiam noſtram, non ſequitur propter hoc, quin aliqua placita ſingularia ſequantur dominum regem*, and the like in this negative ſtatute.

20 H. 3. tit. brev. 881.

Hereby it appeareth (that I may obſerve it once for all) that the beſt expoſitors of this and all other ſtatutes are our bookes and uſe or experience.

More ſhall be ſaid hereof in the expoſition of the ſtatute of W. 2.

(2) *De morte anteceſſoris.*] See the firſt part of the Inſtitutes, ſect. 234. *Cuſtumier de Norm.* cap. 98. fol. 115.

(3) *Nos vero ſi extra regnum fuerimus, capitales juſtitiarii noſtri.*] This *capitalis juſtitiarius* (when the king is *extra regnum*, out of the

the realme) is well deſcribed by Ockham, *Rege extra regnum agente, bria. dirigebantur ſub nomine præſidentis juſtitiarii et teſtimonio ejuſdem.* This is he that is * conſtituted by letters patents when the king is out of the kingdome, to be *cuſtos ſive gardianus regni*, keeper of the kingdome, and *locum tenens regis*, and for his time is *prorex*, ſuch as was Edward duke of Cornewall 13 E. 3. Lionell duke of Clarence 21 E. 3. And the *teſte* to all originall writs, were *teſte Lionello filio noſtro chariſſimo cuſtode Angliæ, &c.* John duke of Bedford 5 H. 5. Richard duke of Warwick 3 E. 4. and many others: before whom as keepers of the kingdome, parliaments have been holden, and as hath been ſaid, the *teſte* of originall writs are under the name of the keeper, which no officer can doe when the king is within the realme. In 8 H. 5. a great queſtion aroſe whether if the kings lieutenant, or keeper of his kingdome under his *teſte*, doth ſummon a parliament, the king being beyond ſea, and in the meane time the king returne into England, whether the parliament ſo ſummoned might proceed: it was doubted that in *præſentia majoris ceſſaret poteſtas minoris*, and therefore it was enacted that the parliament ſhould proceed, and not be diſſolved by the kings returne. Now that this ſtatute is to be intended of ſuch a lieutenant or keeper of the kingdome, it is proved by this act itſelfe, *capitales juſtitiarii noſtri mittent juſtitiarios noſtros*, that is, they ſhall name and ſend juſtices by authority under the great ſeale under their owne *teſte*, which none can doe but the king himſelfe if he be preſent, or his lieutenant, or the keeper or guardian of his kingdome, if he be, as this act ſpeaketh, *extra regnum:* and this expoſition is made *ex verbis et viſceribus actus.* But then it is demanded, whether this *locum tenens regis, ſeu cuſtos regni*, was called *capitalis juſtitiarius* before the making of this act, and this very name you ſhall read in Glanvile, who ſaith *Præterea ſciendum, quod ſecundum conſuetudines regni, nemo tenetur reſpondere in curia domini ſui de aliquo libero tenemento ſuo ſine præcepto domini regis vel ejus capitalis juſtitiarii*, where *capitalis juſtitiarius* is taken for *cuſtos regni.*

Rot. Parliament 13 E. 3. nu. 11. 5 H. 5. nu. 1. 3 E. 4. nu. 14. 21 E. 3. fol. 37.

8 H. 5. cap. 1.

Glanvil, lib. 12. cap. 25.

It is to be obſerved, that before the raigne of king Ed. 1. the kings chiefe juſtice was ſometime called *ſummus juſtitiarius*, ſometimes, *præſidens juſtitiarius*, and ſometimes *capitalis juſtitiarius.* In *anno primo* E. 1. his chiefe juſtice was called *capitalis juſtitiarius ad placita coram rege tenenda*, and ſo ever ſince; and this chiefe juſtice is created by writ, and all the reſt of the juſtices of either bench, by letters patents.

Rot. Pat. an. 1 E. 1.

Hereof you may reade more in the 4. part of the Inſtitut. cap. of the Court of King's Bench.

In Glanviles time, and before, the kings juſtices were called *juſticiæ*, the returnes of writs being *coram juſticiis meis*, ſo as the kings juſtices were antiently called *juſtitiæ*, for that they ought not to be only *juſti* in the *concrete*, but *ipſa juſtitia* in the abſtract. Since that time, as by this great charter in many places it appeareth, they are called *juſtitiarii a juſtitia.* The honourable manner of the creation of theſe juſtices you may read in Forteſcue.

Glanvil, lib. 2. c. 6. Hoved. fol. 413. Forteſcu, cap. 51.

(4) *Alibi in itinere ſuo.*] This is taken largely and beneficially, for they may not only make adjournement before the ſame juſtices in their circuite, but alſo to Weſtm. or to Serjeants Inne, or any other place out of their circuite, by the equity of this ſtatute, and according as it had been alwaies uſed: for conſtant allowance in many caſes doth make law.

12 H. 4. 20. 29 Aſſ. 1. 27 Aſſ. 5. 60. 4 E. 3. 41.

[a] The ſtatute ſpeaking only of an adjournment in aſſiſe of *novell diſſeiſin*, &c. and yet a certificate of an aſſiſe is within this ſtatute.

[a] 12 H. 4. 9.

*

Sed

[b] *Regula.*

[b] *Sed rerum progressus ostendunt multa, quæ initio prævideri non possunt.*

[c] 48. E. 3. 7. 47. aff. 1 39. E. 3. 6. 32 aff. 9. 21 E. 3. 3. 42 E. 3. 11. * 7 H. 6. 9. 3 E. 3. 16. 8 aff. 15 15 E. 3. aff. 96 17 E. 3. 28. 14 E. 3. aff. 110. 20 E. 3. aff. 123.

[c] Time found out, that becauſe the juſtices of aſſiſe came not but once in the yeare, and that any adjournement could not haye beene made by this act, unles the jurors had given a verdict, for this act ſaith *propter difficultatem aliquorum articulorum*, and not upon demurrer, doubtfull plea, *Eſtoppel*, &c. * or for preſervation of the kings peace, and no proviſion was made by this act, if the ten. in the aſſiſe of *mordaunc.* had made a foreine vowcher, or pleaded a foreine plea: all theſe are holpen by the ſtatute of W. 2. cap. 30. as ſhall appeare when we come thereunto.

22 E. 3. 5. 29 aff. 7. 34 aff. 3. 43 aff. 1. 3 H. 4. 18. 22 H. 6. 19.

[27]

CAP. XIII.

ASSISÆ de ultima præſentatione ſemper capiantur coram juſticiariis de banco, et ibi terminentur.

ASSISES of darrein preſentment ſhall be alway taken before our juſtices of the bench, and there ſhall be determined.

(Regiſt. 30. 13 Ed. 1. ſtat. 1. c. 30.)

Glanvil, lib. 13. cap. 16. 18, 19. Bracton, lib. 4. fol. 238, &c. Britton, cap. 90. fol. 222. Fleta, lib. 5. c. 11. Regiſt. fol. 30. F. N. B. fol. 30. W. 2. cap. 30. 5 Mar. Dier. 135. 9 Eliz. Dier. 260.

It appeareth by Glanvil, that before this ſtatute the writ of *darrein preſentment* was retornable *coram me vel juſtic. meis.* And the reaſon of this act was for expedition, for doubt of the laps.

By the ſtatute of W. 2. it is provided, that juſtices of *niſi prius* may give judgement in an aſſiſe of *darrein preſentment*, and *quare impedit.*

CAP. XIV.

LIBER homo (1) *non amercietur* (2) *pro parvo delicto, niſi ſecundum modum illius delicti, et pro magno delicto ſecundum magnitudinem delicti, ſalvo ſibi contenemento ſuo* (3): *et mercator eodem modo, ſalva merchandiſa ſua* (4), *et villanus alterius quam noſter, eodem modo amercietur*: (5) *ſalvo wainagio ſuo* (6), *ſi inciderit in miſericordiam noſtram. Et nulla prædictarum miſericordiarum ponatur, niſi per ſacramentum proborum et legalium hominum de vicineto. Comites et barones non amercientur, niſi* (7) *per*

A Free man ſhall not be amerced for a ſmall fault, but after the manner of the fault; and for a great fault after the greatneſs thereof, ſaving to him his contenement; and a merchant likewiſe, ſaving to him his merchandiſe; and any other's villain than ours ſhall be likewiſe amerced, ſaving his wainage, if he fall into our mercy. And none of the ſaid amerciaments ſhall be aſſeſſed, but by the oath of honeſt and lawful men of the vicinage. Earls and barons ſhall not be amerced but by their peers, and after the

pares (8) *ſuos, et non niſi ſecundum modum delicti. Nulla eccleſiaſtica perſona* (9) *amercietur ſecundum quantitatem beneficii* (10) *ſui eccleſiaſtici, ſed ſecundum laicum tenementum ſuum, et ſecundum quantitatem delicti.*

the manner of their offence. No man of the church ſhall be amerced after the quantity of his ſpiritual benefice, but after his lay-tenement, and after the quantity of his offence.

(Mirror, 312. 3 Ed. 1. c. 6. Regiſt. 184, 187. 1 Roll, 74, 446. Br. Amercement, 2, 25, 32, 33, 53, 65. 10 H. 6. fo. 7. 7 H. 6. fo. 13. 19 Ed. 4. fo. 9. 2 Bulſtr. 140. 3 Bulſtr. 279. 21 Ed. 4. fo. 77. 8 Co. 38, 59.)

(1) *Liber homo.*] A free man hath here a ſpeciall underſtanding, and is taken for him, *qui tenet libere*, for a free-holder, as it is taken in the *venire fac.* where *duodecim liberos*, &c. *homines*, are taken for free-holders, and this appeareth by this act, which ſaith, *ſalvo contenemento ſuo*, whereof more ſhall be ſaid in this chapter. The words of this act being *liber homo*, it extendeth as well to ſole corporations, as biſhops, &c. as to lay men, but not to corporations aggregate of many, as major and commonalty, and the like, for they cannot be comprehended under theſe words *liber homo*, &c.

Vide W. 1. cap. 6.

(2) *Amercietur.*] This act extends to amerciaments, and not to fines impoſed by any court of juſtice: what amerciaments be, and whereof this word amerciament cometh, ſee the 8. book of my reports, ſee alſo there, that this ſtatute is in ſome caſes of amerciaments, to be intended of private men, and not of amerciaments of officers, or miniſters of juſtice, ſo as *liber homo* is not intended of officers, or miniſters of juſtice. And how, and in what caſes the afferment ſhall be, you ſhall alſo read there, together alſo with the ancient authors, and many other authorities of law, concerning theſe matters.

W. 1. cap. 18. 11 H. 4, 5. Lib. 8. fol. 39, 40. Greyſlie's caſe. Glanvil, lib. 9. cap. 11. Fleta, lib. 2. c. 60. 10 E. 2. action ſur le ſtatut. 84. Regiſt. 86. 184. 187.

It appeareth by *Glanvile* that this act was made in affirmance of the common law, as hereafter ſhall appeare, but yet the writ *de moderata miſericordia*, is grounded upon this ſtatute, for it reciteth the ſtatute and giveth remedy to the partie that is exceſſively amercied.

(3) *Salvo contenemento ſuo.*] Firſt for the word, you ſhall read it in Glanvile, *Eſt autem miſericordia domini regis, qua quis per juramentum legalium hominum de vicineto eatenus amerciandus eſt, ne quid de ſuo honorabili contenemento amittat.*

Glanvil. ubi ſup.

And Bracton, *Salvo contenemento ſuo.*

Bracton, lib. 3. fol. 116.

Fleta, *continentia.*

Fleta, lib. 1. c. 43. W. 1. cap. 6.

2. For the ſignification, contenement ſignifieth his countenance, which he hath, together with, and by reaſon of his free-hold, and therefore is called contenement, or continence, and in this ſenſe doth the ſtatute of 1 E. 3. and old Nat. Brev. uſe it, where countenance is uſed for contenement: the armor of a ſouldior is his countenance, the books of a ſcholler his countenance and the like.

1 E. 3. cap. 4. Stat. 2. Vet. N.B. fol. 11.

(4) *Et mercator eodem modo ſalva merchandiſa ſua.*] For trade and traffique is the livelihood of a merchant, and the life of the commonwealth, wherein the king and every ſubject hath intereſt, for the merchant is the good bayliffe of the realme to export and vent the native commodities of the realme, and to import and

bring in the neceſſary commodities for the defence and benefit of the realme.

See the firſt part of the Inſtitutes, ſect. 172. 189.

(5) *Et villanus alterius quam noſter eodem modo amercietur ſalvo wainagio ſuo.*] Here *villanus* is taken for one that is a bondman, *nativus de ſanguine* or *ſervus.*

A villein is free to ſue, and to be ſued, by and againſt all men, ſaving his lord.

See the firſt part of the Inſtitutes, ſect. 172.

(6) *Salvo wainagio ſuo.*] Wainagium, is the contenement or countenance of the villen, and cometh of the Saxon word *wagna*, which ſignifieth a cart or waine, wherewith he was to doe villein ſervice, as to carry the dung of the lord out of the ſcite of the mannor unto the lords land, and caſting it upon the ſame, and the like, and it was great reaſon to ſave his wainage, for otherwiſe the miſerable creature was to carry it on his back; it is ſaid here *wainagio ſuo*, but yet the lord may take it at his pleaſure.

But hereby it appeareth, that albeit the law of England is a law of mercy, yet is it a law, which is now turned into a ſhadow, for where by the wiſdome of the law, theſe amerciaments were inſtituted to deterre both demaundants and plaintiffs from unjuſt ſuits, and tenants, and defendants from unjuſt defences, which was the cauſe in ancient times of fewer ſuits, but now we have but a ſhadow of it. *Habemus quidem ſenatus-conſultum, ſed in tabulis reconditum, et tanquam gladium in vagina repoſitum.*

Cicero.

Mirror, cap. 1. ſect. 3.
38 E. 3. 31.
4 H. 6, 7. 9 H. 6 2.
19 E. 4. 9.
21 E. 4. 77. b.
Mirror, cap. 4. de amerciam.
3 E. 3. Coron. 370.
Staſf. pl. cor. fol. 35. b.
Mirror, ubi ſup.
Britton, fol. 17. b. & 34. b.

(7) *Comites et barones non amercientur niſi per pares*, &c.] Although this ſtatute be in the negative, yet long uſage hath prevailed againſt it, for the amerciament of the nobility is reduced to a certainty, *viz.* a duke 10 l. an earle 5 l. a biſhop, who hath a baronie 5 l. &c. in the Mirror it is ſaid that the amerciament of an earle was an C l. and of a baron an C. marks.

It is ſaid that a biſhop ſhall be amercied for an eſcape 100 l. A gayler ſhall be amercied for a negligent eſcape of a felon attaint 100 l. and of a felon indited only 5 l.

If a noble man and a common perſon joyne in an action, and become nonſute, they ſhall be ſeverally amercied: *viz.* the noble man at C s. and the common perſon according to the ſtatute, therefore when a noble man is plaintife, it is policy rather to diſcontinue the action, then to be non-ſuite.

(8) *Per Pares.*] By his peeres, that is, by his equalls.

[29]

Britton, cap. 2. fol. 36.

The generall diviſion of perſons by the law of England, is either one that is noble, and in reſpect of his nobility of the lords houſe of parliament, or one of the commons of the realme, and in reſpect thereof, of the houſe of commons in parliament: and as there be diverſe degrees of nobility, as dukes, marqueſſes, earles, viſcounts, and barons, and yet all of them are comprehended within this word, *pares*, ſo of the commons of the realme, there be knights, eſquires, gentlemen, citizens, yeomen, and burgeſſes of ſeverall degrees, and yet all of them of the commons of the realme, and as every of the nobles is one a peer to another, though he be of a ſeverall degree, ſo is it of the commons; and as it hath been ſaid of men, ſo doth it hold of noble women, either by birth, or by marriage, but ſee hereof cap. 29.

Bracton, lib. 3. fol. 116. b.
Brit. fol. 2. b.
Fleta, lib. 1.

Bracton ſaith, *Comites vero vel barones, non ſunt amerciandi, niſi per pares ſuos, et ſecundum modum delicti, et hoc per barones de ſcaccario, vel coram ipſo rege. Nulla eccleſiaſtica perſona amercietur ſecundum*

ſecundum quantitatem beneficii ſui eccleſiaſtici, ſed ſecundum laicum tenent. ſuum.

(9) *Eccleſiaſtica perſona.*] For eccleſiaſticall perſons, and their diverſities, and degrees, ſee the firſt part of the Inſtitutes, *ubi ſup.*

(10) *Beneficium.*] Benefice. *Beneficium* is a large word, and is taken for any eccleſiaſticall promotion or ſpirituall living whatſoever.

Here appeareth a priviledge of the church, that if an eccleſiaſticall perſon be amercied (though amerciaments belong to the king) yet he ſhall not be amercied in reſpect of his eccleſiaſticall promotion, or benefice, but in reſpect of his lay fee, and according to the quantity of his fault, which is to be afferred: and Bracton ſeiteth downe the oath of the afferers of amerciaments, *et ad hoc fideliter faciend. affidabunt amerciatores, quod neminem gravabunt per odium, nec alicui deferent propter amorem, et quod celabunt ea quæ audierunt.*

cap. 43. & lib. 2. c. 60.
Vide lib. nigr. Scaccarii parte 1. cap. 4.
Of ancient time the barons of the exchequer were barons and peers of the realme.
See the firſt part of the Inſtitutes, ſect. 133.

Bracton, lib. 3. fol. 116.
Fleta, lib. 1. c. 43.

CAP. XV.

NULLA villa, nec liber homo diſtringatur facere pontes, aut riparias (1), niſi qui ab antiquo, et de jure facere conſueverunt tempore Henrici regis avi noſtri.

NO town nor freeman ſhall be diſtrained to make bridges nor banks, but ſuch as of old time and of right have been accuſtomed to make them in the time of king Henry our grandfather.

Here it is to be obſerved, that in the raigne of king John, and of his elder brother king Richard, which were troubleſome and irregular times, divers oppreſſions, exactions, and injuries, were incroached upon the ſubject in theſe kings names, for making of bulwarks, fortreſſes, bridges, and bankes, contrary to law and right.

But the raigne of king H. 2. is commended for three things, firſt, that his privy counſell were wiſe, and expert in the lawes of the realme. Secondly, that he was a great defender and maintainer of the rights of his crowne, and of the lawes of his realme. Thirdly, that he had learned and upright judges, who executed juſtice according to his lawes. Therefore for his great and never dying honour, this and many other acts made in the raigne of H. 3. doe referre to his raigne, that matters ſhould be put in ure, as they were of right accuſtomed in his time, ſo as this chapter is a declaration of the common law, and ſo in the raignes of H. 4. and H. 5. the parliaments referre to the raigne of king E. 1. who was a prince of great ſortitude, wiſedome and juſtice.

See cap. 35. 37.
See Chart. de Foreſta, cap. 1 & 8.
Rot. Parl. nu. 82. 13 R. 2. c. 5.
4 H. 4. cap. 2.
3 H. 5. cap. 8.

And divers ſtatutes referre to king Edw. 3. who was a noble, wiſe, and warlike king, in whoſe raigne, the lawes did principally flouriſh.

27 H. 6. cap. 2.

(1) *Riparia.*] Is here taken for *ripa*, which is *extrema et eminentior terræ ora, quam fluvius utrinque alluit.*

But the making of bulwarks, fortreſſes, and other things of like kinde, were not prohibited by this act, becauſe they could not be erected, but either by the king himſelf, or by act of parliament.

4 H. 8. cap. 1.
2 & 3 Phil. & Mar. 3. Phil. 1.

CAP. XVI.

NULLÆ ripariæ defendantur de cæter., niſi illæ quæ fuerunt in defenſo tempore Henrici regis avi noſtri, et per eadem loca, et eoſdem terminos, ſicut eſſe conſueverunt tempore ſuo.

NO banks ſhall be defended from henceforth, but ſuch as were in defence in the time of king Henry our grandfather, by the ſame places, and the ſame bounds, as they were wont to be in his time.

That is, that no owner of the banks of rivers ſhall ſo appropriate, or keep the rivers ſeverall to him, to defend or barre others, either to have paſſage, or fiſh there, otherwiſe, then they were uſed in the raigne of king H. 2.

Mirror, ca. 5. § 2. This ſtatute, ſaith the Mirror, is out of uſe, *Car pluſors rivers ſont ore appropries et engarnies, et miſe in defence, que ſoilount eſtre commons a piſcer et uſer en temps le roy Henry* 2.

CAP. XVII.

NULLUS vicecomes (1), *conſtabularius* (2), *coronator* (3), *vel alii balivi noſtri teneant placita coronæ noſtræ.*

NO ſheriff, conſtable, eſcheator, coroner, nor any other our bailiffs, ſhall hold pleas of our crown.

(Mirror, 313.)

One of the miſchiefes before this ſtatute was, that none of them here named, could command the biſhop of the dioceſſe to give the delinquent his clergy, where he ought to have it, for as Bracton ſaith, *Nullus alius, præter regem, poſſit epiſcopo demandare*, &c. And therewith agreeth our other old, and later books, that the biſhop is not to attend upon any inferiour court, nor that any inferiour court can write unto, or command the biſhop, but the king (that is) the kings great courts of record, and ſuch, as ſince that time have authority by act of parliament.

Bract. li. 3. fo. 106.
Brit. c. 104. fo. 248.
Fleta, li. 5. ca. 24.
8 E. 3. 59.
40 E. 3. 2.
14 H. 4. 27.
15 E. 3. conuſans 41.
14 H. 7. 26.
21 H. 7. 34, 35.
Regula.
Paſch. 30 E. 1. Coram Rege Kanc. The mayor and barons of the 5. Ports. compl. in parliament.

Another cauſe was, that the life of man, which of all things in this world, is the moſt precious, ought to be tried before judges of learning, and experience in the laws of the realme: for *ignorantia judicis eſt ſæpenumero calamitas innocentis. Et cum ex quo magna charta de libertatibus Angliæ alias conceſſa (quam quidem chartam dominus rex in parliamento ſuo apud Weſtm. an. regni ſui* 28. *ad requiſitionem omnium prælatorum, comitum, baronum, et communitatis totius regni, de novo conceſſit, renovavit, et confirmavit) placita coronæ ipſi domino regi ſpecialiter reſervantur, per quod nullus de regno hujuſmodi placita tenere poteſt, ſeu habere, ſine ſpeciali conceſſione, poſt confirmationem chartæ prædictæ factæ.* In the ſame yeare, and terme, *coram rege*, a complaint by the abbot of Feverſham, both caſes