thefe ten maſters of families, were bound one for anothers family, that each man of their ſeverall families ſhould ſtand to the law, or if he were not forth coming, that they ſhould anſwere for the injury or offence by him committed, *de eo autem qui fugam ceperit, diligenter inquirend' ſi fuerit in franco plegio, et decenna, tunc erit decenna in miſericordia coram juſtitiariis noſtris, quia non habent ipſum malefactorem ad rectum.*

Brit. ubi. ſup.

Bract. l. 3. f. 124.

Hereby it appeareth, that the precinct of this frank pledge was called *decenna*, becauſe it conſiſted moſt commonly, as hath been ſaid, of tenne houſholds, and every man of theſe ſeveral houſholds, for whom the pledge or ſurety was taken were called *decennarii*, becauſe every particular perſon in the kingdome was of one *decenna* or other, which names are continued as ſhadowes of antiquity to this day. *Ordeine fuit ancientment, que nul ne demurraſt en le realme, ſi ne fuit en dizein et plevye de frank homes, appent aux viſc' de viewer un fois per an' franke pledges et les plevys, &c.*

Brit. cap. 12. Fleta, lib. 1. cap. 27. acc.

Mirror, cap. 1. §. 17.

By the due execution of this law, ſuch peace (whereof this chapter ſpeaketh) was univerſally holden within this realme, as no injuries, homicides, robberies, thefts, riots, tumults, or other offences were committed; ſo as a man with a white wand might ſafely have ridden before the conqueſt, with much mony about him, without any weapon throughout England; and one ſaith truely, *conjectura eſt, eaq; non levis, haud ita multis ſtatuiſſe priſca tempora ſceleribus, quippe quibus rapinæ, furto, cædi, plurimiſq; aliis ſceleribus mulctæ imponebantur pecuniariæ, cum hiis hac noſtra tempeſtate, nos omnibus merito capitis pœnam irrogamus, &c.*

Lamb. verb. Æſtimatio capitis.

(5) *Et quod trithinga teneatur integra.*] *Trithinga* or *Tithinga* is expounded for *Theothinga*, which ſignifieth the frankpledge of tenne houſholds, as hath been ſaid, and it is notably expounded by Fleta, which there you may read at large, the ſenſe hereof is, *quod trithinga, ſive theothinga. i. decemvirale collegium teneatur integrum.* i. that no man be not within ſome *decema* or other, ſo as he may be brought forth to ſtand to right if he ſhall offend: *olim trithinga ſignificabat tria vel quatuor hundreda, quod autem in trithinga definiri non poterat, ferebatur in ſcyram.*

Fleta, lib. 2. c. 54. § de Trithingis.

Lamb. Int. leges ſanct. Edw. nu. 34. Merton, c. 10.

What perſons ſhall come to the tourne and leete, &c. and who be exempted, ſee the ſtatute of Marlebridge, and the auncient authors.

Marlebridg. c. 10. Mirror c. 1. § 16. Bract. lib. 3. fol. 124. Brit. 19. b. Fleta, lib. 1. c. 29. lib. 2. cap. 45.

(6) *Tempore regis Henrici avi.*] Twice repeated in this chapter: vid. before cap. 15. 16.

* See the expoſition of this ſtatute Rot. clauſ. anno 18 H. 3. nu. 10.

(7) *Et quod vicecomes non quærat occaſiones, &c.*] By the common law, to avoid all extortion and grievance of the ſubject, no ſheriffe, coroner, goaler, or other of the kings miniſters ought to take any reward for doing of his office, but only of the king; and this appeareth by our books, and is ſo declared and enacted by act of parliament in the 3 E. 1. And a penalty added to the prohibition of the common law by that act: and Forteſcue, cap. 24. ſaith, *Vicecomes jurabit ſuper ſancta Dei evangelia, inter articulos alios quod non aliquid recipiet colore, aut cauſa officii ſui, ab aliquo alio, quam a rege.*

Mirror, c. 2. § 5. Britton, fol. 3. b. 6. a. 18. b. 37. b. Fleta, lib. 1. c. 18 § Item ii officium. & lib. 2. c. 39. 27 Aſſ. p. 14. 42 E. 3. 5. 23 H. 6. cap. 10. 17. 1 H. 8. c. 7. 33 H. 8. cap. 22. 21 H. 7. fol. 17. * W. 1. cap. 26.

But after that this rule of the common law was altered, and that the ſheriffe, coroner, goaler, and other the kings miniſters, might in ſome caſe take of the ſubject, it is not credible what extortions, and oppreſſions have thereupon enſued. So dangerous a thing it is, to ſhake

shake or alter any of the rules or fundamentall points of the common law, which in truth are the maine pillars, and supporters of the fabric of the common-wealth, as elsewhere I have noted more at large, and yet not so largely, as the weight of the matter deserveth.

See the preface to the 4. part of my reports.

(8) *Contentus sit de eo quod vicecomes habere consuevit, &c.*] These words are not to be intended of any reward, &c. (for the sherife by law, as hath been said, could take no reward for doing of his office) but of the profits of the court of the tourn, and such only as were accustomed in the raigne of H. 2. So they must be very auncient, for the which the sherife should (by an auncient law) pay a certaine summe *de proficuis comitatus*, and should be charged in the exchequer for this certain summe.

42 E. 3. 5.
38 H. 6, 7.
6 H. 7. 2, 3.

Regist. 16. 174. 175.
F. N. B. 161. d.
Marleb. cap. 10.

And it is to be observed, that if any man be grieved contrary to the purview of this act, he may, as hath been said, for his relefe therein, have an action upon this statute, albeit no action be expresly given, which in this, and many other like cases upon the branches of *Magna Charta*, is worthy of observation.

CAP. XXXVI.

NEC liceat de cætero alicui, dare terram suam alicui domui religiosæ, ita quod illam resumat de eadem domo tenend'. Nec liceat alicui domui religiosæ terram alicujus sic accipere, quod tradat illam illi, a quo eam accepit tenend'. Si quis autem de cætero terram suam alicui domui religiosæ sic dederit, et super hoc convincatur, donum suum penitus cassetur, et terra illa domino illius feodi incurratur.

IT shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. If any from henceforth give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.

Mirror, c. 5. § 2. Glanv. l. 6. c. 7. (Fitz. Mortm. 1, 3. Bro. Mortm. 36. 7 Ed. 1. stat. 2. 13 Ed. 1. stat. 1. c. 32. 27 Ed. 1. stat. 2. 15 R. 2. c. 5. 23 H. 8. c. 10. 18 Ed. 3. c. 3. 1 & 2 Ph. & M. c. 8. 39 El. c. 5. 21 Jac. 1. c. 1. 13 & 14 Car. 2. c. 12. 9 Geo. 2. c. 36.)

3 E. 4. 12.
See the 1. part of the Institutes, fol. 133. 157.
stat. de 7 E. 1. de religiosis.
23 H. 3. Aff. 436. Britton, fol. 32. b. Fleta, lib. 3. cap. 5.

This chapter is excellently abridged according to the effect thereof, and notably expounded by a parliament holden by king Edw. 1. sonne of H. 3. the words whereof are these, Of late (*viz. anno* 9 H. 3. cap. 36.) it was provided that religious men should not enter into the fees of any without licence, and will of the chiefe lords, of whom such fees been holden immediately: whereby it appeareth, that by this chapter of *Magna Charta*, a gift of lands to any religious house was prohibited, notwithstanding the religious house gave not the same back again to hold of the same house, &c. but kept the lands so given unto themselves in their own hands: and in that case, that the land should incurre to the lord of the fee, consider well the words; and the interpretation is worthy observation for the interpretation of other statutes in like cases.

For

For the word Mortmain, ſee the firſt part of the Inſtitutes.

First part of the Inſtitutes. cap. Frankalmoigne.

There were two cauſes of making of this ſtatute: one that the ſervices that were due out of ſuch fees, and which in the beginning were created for the defence of the realme, were unduly withdrawn. 2. The chiefe lords did loſe their eſcheats, wardſhips, reliefes, and the like; for which cauſes, divers provident lords at the creation of the ſeigniory had a clauſe in the deed of feoffement, *quod licitum ſit donatori rem datam dare, vel vendere cui voluerit, exceptis viris religioſis, et Judæis. Vide* Bracton, libro 1. fol. 13. Many of theſe deeds I have ſeene.

Bract. li. 1. fol. 13.

But the eccleſiaſticall perſons (who in this were to be commended, that they had ever the beſt learned men in the law, that they could get, of their councell) found many wayes to creep out of this ſtatute, viz. religious men; as abbots, priors, and other eccleſiaſticall perſons regular, to purchaſe lands holden of themſelves, or take leaſes for long term for years, and many other devices they had to eſcape out of this ſtatute: and biſhops, parſons, and other eccleſiaſticall perſons ſecular took themſelves to be out of this ſtatute.

Fleta, lib. 3. cap. 5.

The ſaid ſtatute of 7 E. 1. intended to provide againſt theſe devices, in theſe words, *quod nullus religioſus, aut alius quicunque* (i. other whatſoever of like quality of being, a body politique, or corporate, eccleſiaſticall, or lay, ſole, or aggregate of many) *terras aut tenementa aliqua emere, vel vendere ſub colore donationis aut termini*; and to prevent all other inventions and evaſions added theſe generall words, *aut ratione alterius tituli cujuſcunq; terras aut tenementa ab aliquo recipere aut alio quovis modo * arte vel ingenio ſibi appropriare præſumat, ſub forisfactura eorundem.*

15 R. 2. cap. 5. 29 Aſſ. p. 17. Br. 29 H. 8. Mortmain, 39.

* Theſe words are notably explained. 15 R. 2. ca. 5. 19 H. 6. 56. 41 E. 3. 16. 41 E. 3. 21. 29 H. 8. Br. Mortmain 39. 17 E. 3. 59. 21 E. 3. 46. Rot. parliam. 5 R. 2. nu. 92. Quant le terre eſt per covin convey al roy.

A man would have thought that this ſhould have prevented all new devices, but they found alſo an evaſion out of this ſtatute, for this ſtatute of 7 E. 1. extended but to gifts, alienations, and other conveyances made between them and others, *arte vel ingenio, &c.* and therefore they gave over them; and they pretending a title to the land (that they meant to get) brought a *præcipe qd. reddat*, againſt the tenant of the land, and he by conſent and colluſion ſhould make default, and thereupon they ſhould recover the land, and enter by judgement of law, *et ſic fieret fraus ſtatuto.*

When this new invention was provided for, and taken away by the ſtatute of W. 2: yet found they out an evaſion out of all theſe ſtatutes, for now they would neither get any land by purchaſe, gift. leaſe, or recovery, but they cauſed the lands to be conveyed by feoffement, or in other manner to divers perſons, and their heires, to the uſe of them and their ſucceſſors, by reaſon whereof they took the profits; but this was enacted by the ſtatute of 15 R. 2. to be mortmain within the forfeiture of the ſaid ſtatute of 7 E. 1.

W. 2. cap. 32. Fleta, lib. 3. cap. 5. 45 E. 3. 19.

15 R. 2. cap. 5. 8 H. 4. 16.

But the foundation of all theſe ſtatutes, was this chapter of *Magna Charta.*

CAP.

CAP. XXXVII.

SCUTAGIUM (1) *de cætero capiatur ſicut capi conſuevit tempore Henrici regis avi noſtri* (2).

ESCUAGE from henceforth ſhall be taken like as it was wont to be in the time of king Henry our grandfather.

Fleta, lib. 2. ca. [illegible].

(1) *Scutagium.*] *Vide* for this the firſt part of the Inſtitutes, lib. 2. cap. Eſcuage, ſect. 95.

Tempore Henrici regis avi noſtri.] Here is another reference to the raigne of king Henry the ſecond. See for this before, cap. 15. &c.

CAP. XXXVIII.

SALVÆ ſint archiepiſcopis, epiſcopis, abbatibus, prioribus, templariis, hoſpitalariis, comitibus, baronibus, et omnibus aliis, tam eccleſiaſticis perſonis, quam ſecularibus, omnes libertates et liberæ conſuetudines, quas prius habuerunt. Omnes autem iſtas conſuetudines et libertates prædictas, quas conceſſimus in regno noſtro tenend' (quantum ad nos pertinent) erga noſ et hæred' noſtros obſervemus, et omnes de regno noſtro, tam clerici quam laici obſervent (quantum ad ſe pertinent) erga ſuos. Pro hac autem donatione et conceſſione libertatum iſtarum, et aliarum libertatum contentarum in charta noſtra de libertatibus foreſtæ, archiepiſcopi, epiſcopi, abbates, priores, comites, barones, milites, liberi tenentes, et omnes de regno noſtro dederunt nobis quinto-decimam partem omnium mobilium ſuorum. (vide ſtat. 7. anno 25 E. 3) Conceſſimus etiam eiſdem pro nobis et hæredibus noſtris, quod nec nos, nec hæredes noſtri, aliquid perquiremus, per quod libertates in hac charta contentæ infringantur vel infirmentur. Et ſi ab aliquo contra hoc aliquid perquiſit' fuerit, nihil valeat, et

RESERVING to all archbiſhops, biſhops, abbots, priors, templers, hoſpitallers, earls, barons, and all perſons, as well ſpiritual as temporal, all their free liberties and free cuſtoms, which they have had in time paſſed. And all theſe cuſtoms and liberties aforeſaid, which we have granted to be holden within this our realm, as much as appertaineth to us and our heirs, we ſhall obſerve; and all men of this our realm, as well ſpiritual as temporal (as much as in them is) ſhall obſerve the ſame againſt all perſons in like wiſe. And for this our gift and grant of theſe liberties, and of other contained in our charter of liberties of our foreſt, the archbiſhops, biſhops, abbots, priors, earls, barons, knights, freeholders, and other our ſubjects, have given unto us the fifteenth part of all their moveables. And we have granted unto them on the other part, that neither we, nor our heirs, ſhall procure or do any thing whereby the liberties in this charter contained ſhall be infringed or broken; and if any thing be procured by any perſon contrary to the

et pro nullo habeatur. Hiis teſtibus Bonefacio Cantuar' archiep', E. Londonenſi epiſcopo, et aliis. Datum apud Weſtm' decimo die Februarii, anno regni noſtri nono.

the premiſſes, it ſhall be had of no force nor effect. Theſe being witneſſes; lord B. archbiſhop of Canterbury, E. biſhop of London, and others.

This chapter doth conſiſt of ſixe parts.

[77]

First it is enacted, that all the liberties, and free-cuſtomes, which any archbiſhop, biſhop, abbot, prior, templar, hoſpitalier, earle, baron, or any perſon either eccleſiaſticall or ſecular, have had, be ſafe, that is, whole without prejudice unto them, for the words be *ſalvæ ſint omnibus archiepiſcopis, &c. omnes libertates, &c.* all the liberties, &c. be ſafe to all archbiſhops, &c. ſo as this is no ſaving to them, but in effect, an act that they ſhould enjoy them: for regularly a ſaving in an act of parliament enlargeth not, nor extendeth to any new thing, but preſerveth a right or intereſt, that is former to things contained in the act, which by the words of the act might have been given away. But this clauſe doth enlarge, and extendeth to all other liberties, and free cuſtomes, which any ſubject eccleſiaſticall, or temporall ought to have; and therefore the Engliſh tranſlation, both in this and many other places of this great charter, is very vicious. But it is principally to be obſerved, that here is not any ſaving at all for the king, his heires, or ſucceſſors, to the end that the king, his heirs, and ſucceſſors againſt all pretences of evaſions, ſhould be bound by all the branches of both theſe charters.

The ſecond is, that all the cuſtomes, and liberties, which the king had graunted to be holden within his realme, for him and his heires, the king himſelfe and his heires, as much as appertained to him or them, ſhould obſerve and keepe.

The third is, that all the men of this realme, as well of the clergy as of the laity, the ſaid cuſtomes and liberties for themſelves and their heirs, as much as to them appertained, ſhould obſerve and keepe.

This is the chiefe felicity of a kingdome, when good lawes are reciprocally of prince and people (as is here undertaken) duly obſerved.

The fourth is, that for this gift and graunt by the king, of the liberties contained in this great charter, and of others contained in the kings charter of liberties of the foreſt, the archbiſhops, biſhops, abbots, priors, earles, barons, knights, free-holders, and other the kings ſubjects, citizens, and burgeſſes, (aſſembled in parliament) gave unto the king one fifteenth; which proveth, that as the fifteenth was graunted by parliament, ſo was this great charter alſo graunted by authority of the ſame; but ſince this time the manner of the fifteenth is altered; for now the fifteenth, which is alſo called the Taſk, is not originally ſet upon the polles, as at this time it was, but now the fifteenth is certainly rated upon every towne. And this was by vertue of the kings commiſſions into every county of England in 8 E. 3. taxations were made of all the cities, boroughes, and towns in England, and recorded in the exchequer, and that rate was at that time the fifteenth part of the value of every town, and therefore retaineth the name of the fifteenth ſtill.

Hil. 3 Jacobi. lib. 8. The Princes caſe.

Rot. pat. 6 E. 3. 2. part. nu. 26.

And after the fifteenth is graunted by parliament, then the inhabitants

bitants rate themſelves for payment thereof, and if one towne bee joyned with another in the rate of the totall, and ſubdivided on each a certain rate in that commiſſion, and the one is rated too low, and the other too high, there lieth a writ called, *ad æqualiter taxand'* to be taken out of the exchequer to rate the townes equally. The ſubſidie is uncertaine, becauſe it is ſet upon the perſon, in reſpect of his lands, or goods, which commonly doe ebb and flow.

The fift is, that the king did graunt for him, and his heires, that neither he, nor his heires, ſhall ſeeke out any thing, whereby the liberties in this charter contained may be broken, or weakned: and if by any man againſt this charter any thing ſhould be ſought out, it ſhould be of no value, and holden for nought. And all theſe doe evidently appeare in this chapter.

The ſixt and laſt is *hiis teſtibus*.

It is true, that of auncient time nothing paſſed from the king of franchiſes, liberties, priviledges, mannors, lands, tenements, and hereditaments of any eſtate of inheritance, but it was by the advice of his councell expreſſed under *hiis teſtibus*, as it was then, and continues to this day in the creation of any to any degree of nobility, for thereto *hiis teſtibus* is ſtill uſed.

[78] This concluſion of the kings graunts with *hiis teſtibus* was uſed by king H. 3. and his progenitors kings of this realme before him, and by his ſon E. 1. and by E. 2. and E. 3. after him: afterwards, in the beginning of the raigne of R. 2. I finde the clauſe of *hiis teſtibus* was left out, and in ſtead thereof came in *teſte me ipſo* in this manner, *in cujus rei teſtimonium has literas noſtras fieri fecimus patentes: teſte me ipſo*, which ſince by all his ſucceſſors kings, and queens of this realme (except in creations) hath been uſed.

Thoſe that had *hiis teſtibus*, were called *chartæ*, as this charter is called *Magna Charta*, and ſo is *charta de foreſta*, &c. and thoſe other that be *teſte me ipſo*, are called letters patents, being ſo named in the clauſe of *in cujus rei teſtimonium has literas noſtras fieri fecimus patentes*.

See the firſt part of the Inſtitutes, ſect. 1.

And this was the auncient forme alſo of the deeds of ſubjects, concluding with *hiis teſtibus*, which continued untill, and in the raigne of H. 8. but now is wholly omitted, and now the witneſſes are ſubſcribed under the deed, or endorſed thereupon.

Now upon this occaſion to treat how theſe clauſes, *datum per manum noſtram, per manum cancellarii noſtri, per ipſum cuſtodem, et concilium*, &c. entred in, and went out: when theſe clauſes, *de gratia ſpeciali*, and *ex certa ſcientia, et mero motu* began, which continue to this day) and the cauſe and reaſon of the inſerting of the ſame; and when and wherefore theſe clauſes were ſubſcribed under the letters patents, *per ipſum regem, per breve de privato ſigillo, authoritate parliamenti*, &c. came in, (which ſtill doe continue) would aſke a ſeverall treatiſe of it ſelfe, and not pertinent to our purpoſe for the underſtanding of this charter of *Magna Charta*, and therefore purpoſely I ſpeake not of them.

Here be witneſſes to this great charter, a great number of reverend, and honourable perſonages, in all 63. of which there were of the clergy 31. whereof there were 12. biſhops, and 19 abbots, and Hugh de Burgo chiefe juſtice, and 31 earles and barons, as hath been ſaid before.

Beſides, it was eſtabliſhed by authority of parliament, which was holden at Weſtminſter, in forme of a charter, as many others have been,

Hil. 3 Jac. in Cancellaria. The Princes caſe. Lib. 8. fol. 19.

been, for which, as hath been ſaid likewiſe, by parliament the lords and commons gave a fifteenth. Of acts of parliament in form of a charter, you may reade at large in the princes caſe, and therefore need not to be recited.

STATUTUM de MERTON. [79]

EDITUM *anno* 20. H. III.

Bracton, li. 2. c. 96, ſaith it was in anno 18 H. 3.

IT is called the ſtatute of Merton, becauſe the parliament was holden at the monaſtery of the canons regular of Merton, ſeaven miles diſtant from the city of London, which monaſtery was founded by Giſlebert a noble Norman, that came in with the Conqueror. And this is that monaſtery of Merton, the prior whereof had a great caſe in law, which long depended between him and the prior of Bingham.

18 E. 4. 22.
19 E. 4. 2. 7.
20 E. 4. 16.
21 E. 4. 60.

PROVISUM eſt in curia domini regis apud Merton, die Mercurii, in craſtino Sancti Vincentii, anno regni regis Henrici filii regis Johannis viceſimo, coram W. Cantuarienſi archiepiſcopo, et coepiſcopis ſuffraganeis ſuis (1), *et coram majore parte comitum et baronum Angliæ ibidem exiſtentium, pro coronatione ipſius domini regis* (2) *et Elianoræ reginæ* (3), *pro qua omnes vocati fuerunt, cum tractatum eſſet de communi utilitate regni ſuper articulis ſubſcriptis, ita proviſum fuit et conceſſum, tam à prædict' archiepiſcopis, epiſcopis, comitibus, baronibus, quam ab ipſo rege, et aliis.*

IT was provided in the court of our lord the king, holden at Merton on Wedneſday the morrow after the feaſt of St. Vincent, the 20th year of the reign of king Henry the ſon of king John, before William archbiſhop of Canterbury, and other his biſhops and ſuffragans, and before the greater part of the earls and barons of England, there being aſſembled for the coronation of the ſaid king, and Helianor the queen, about which they were all called, where it was treated for the commonwealth of the realm upon the articles underwritten, thus it was provided and granted, as well of the foreſaid archbiſhops, biſhops, earls, and barons, as of the king himſelf and others.

(1) *Coram Cant. archiepiſcopo, et coepiſcopis ſuffraganeis ſuis.*] *Suffraganeus* properly is a vicegerent of a biſhop, inſtituted to aid and aſſiſt him in his ſpirituall office, and is ſo called *a ſuffragiis*: of theſe you may read in the ſtatutes of 26 H. 8. 1 & 2 Phil. & Mariæ. 1 Eliz. And where ſome copies have *coram Cantuar' archiepiſcopo, et coepiſcopis et ſuffraganeis*; this latter conjunction (&) is more then ought to be; for *ſuffraganeis ſuis* muſt referre to *coepiſcopis*, that is that

26 H. 8. cap. 14.
1 & 2 Ph. and Mar. ca. 8.
1 Eliz. ca. 1.

See the first part of the Institutes, Cap. Frankalmoigne.

that the bishops should aide and assist the archbishop with their suffrages: for other suffragans, which were vicegerents of bishops, never had voyce in parliament, because they held not *per baroniam*, as all bishops doe, and many abbots and priors, as hath beene said, did, in respect whereof they were lords of parliament.

Pro coronatione ipsius domini regis.] The king was formerly crowned at Glouceſter on the 18 of October, in the beginning of the first yeare of his raigne, then being about nine yeares old: and here it appeareth that in the twentieth yeare of his raigne, he was crowned again, then being about 29 yeares old, twice crowned as king Henry the second, and king John before him had been, and as king R. 2. after him was.

Et Elianoræ reginæ.] This Elianor was daughter, and one of the heires of Raymond Berengary earle of Province; she was sister to the earle of Province, and to Boniface, archbishop of Canterbury, and she was crowned at Westminster.

[80] She survived the king, and of a crowned queen became a professed nun in Ambresbury, and died a nun there, in the nineteenth yeare of her widowhood.

The statutes enacted at this parliament are divided into eleven chapters.

CAP. I.

DE viduis primo, quæ post mortem virorum suorum expelluntur de dotibus suis, et dotes suas, vel quarentenam suam habere non possunt sine placito, videlicet, quod quicunque deforciaverit eis dotes suas, vel quarentenam suam, de tenementis quibus viri sui obierunt seisiti, et ipsæ viduæ postea per placitum recuperaverint, si ipsi deforc' de injusto deforciamento convicti fuerint, reddant eisdem viduis damna sua, scilicet valorem totius dotis eis contingentis, à tempore mortis virorum suorum, usque ad diem quo ipsæ viduæ per judicium curiæ seisinam suam inde recuperaverint. Et nihilominus ipsi deforciatores sint in misericordia domini regis.

FIRST, of widows which after the death of their husbands are deforced of their dowers, and cannot have their dowers or quarentine without plea, whosoever deforce them of their dowers or quarentine of the lands, whereof their husbands died seised, and that the same widows after shall recover by plea; they that be convict of such wrongful deforcement shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging from the time of the death of their husbands unto the day that the said widows, by judgement of our court, have recovered seisin of their dower, &c. and the deforcers nevertheless shall be amerced at the king's pleasure.

(Dyer, 284. pl. 33. 4 Rep. 30. 14 H. 8. 25. 38 Ed. 3. 13. 11 H. 4. 39. Fitz. Dower. 24. 46. 59. 73. Fitz. Damage, 10. 83. 119. 3 Bulstr. 278. V. N. B. fo. 7. Rast. Ent. 22. 1 Inst. 32. b. 9 H. 5. c. 7.)

First part of the Institutes, sect. 36.

This chapter is explained in the first part of the Institutes, in all the points thereof, which you may see there at large; whereunto you may adde (upon this word *recuperaverint*) a case in 9 E. 2. that in

in a writ of dower, the tenant plead that the husband is alive; &c. and the triall awarded by proofes, and a day therefore given, &c. at which day the demandant came with her proofes, and the tenant made default, the demandant had judgement to recover, but if the demandant had not had her proofes there, then she should have had but a *petit cape*.

Hil. 9. E. 2. fo. 62. b. in libro meo, un fem. &c.

CAP. II.

ITEM omnes viduæ (1) *de cætero possint legare* (2) *blada* (3) *sua de terra sua, tam de dotibus suis, quam de aliis terris, et tenementis suis* (4); *salvis* (5) *consuetudinibus, et servitiis dominorum de feodo, quæ de dotibus, et aliis tenementis suis debentur.*

ALSO from henceforth widows may bequeath the crop of their ground, as well of their dowers, as of other their lands and tenements, saving to the lords of the fee, all such services as be due for their dowers and other tenements.

(Kel. 125. Fitz. Bar. 149. 294.)

Before the making of this statute, it was a question, whether tenant in dower might devise the corn, which she had sowen, or whether he in the reversion should have them. Some held that she could not devise them; or if she devised them not, that her executors should not have them, but he in the reversion, for that her estate was freely created by act in law; and as she when her dower was assigned to her, should have the land sowen, or unsowen for her dower, so at the time of her death, he in the reversion should have the land sowen, or unsowen. And of this opinion is Bracton who saith, *antiquitus solet observari, quod sicut uxor dotem suam recipit post mortem viri sui cultam sive incultam, ita post mortem uxoris solet restitui hæredi culta seu inculta, quia de bladis et fructibus a tenemento non separatis non habuit uxor testamenti factionem, sed nova superveniente gratia, et provisione, sicut patet de provisione apud Merton.*

[81]

Bracton, lib. 2. fol. 96.

And true it is, that if the husband sow the ground and die, the property of the corne is in the executors, but subject to this condition, that if the heire assigne unto her the land sowen for her dower, she shall have the corne, for she shall be in *de optima possessione viri*, above the title of the executor.

15. El. Dier. 316.

And Fleta saith, *vidua per statutum de Merton poterit disponere de rebus suis, et fructibus in dote sua existentibus, sive separati sint a solo, sive non, quod quidem olim facere non potuit.*

Fleta, lib. 2. c. 50.

And they that held this opinion, relied much upon these words, *de cætero*, which imply, as they say, a new law. Now others held the contrary, and that, for advancement of tillage, and incouragement thereunto, which is so profitable for the commonwealth, and by reason of the incertainty of her estate for life they held opinion, that the executors or administrators of the wife should have, or she her selfe by her will might dispose them, as well as any other tenant for life might doe, and they vouch authority before this statute in 4 H. 3. where it is said, note that tenant in dower may devise her corne growing upon the land at the time of her death. Now to cleare this doubt, was this statute made, and *de cætero* may as well be

4 H. 3. devise 26. 19 E. 3. bar. 249. 12 H. 7. 25. Pasch. 38. El. lib. 5. fo. 85.

be applied to the clearing of a doubt from thenceforth, as for making of a new law, and ſo of neceſſity it muſt be taken in this chapter for ſuch lands and tenements, as the widow hath of inheritance, &c. *quam de aliis terris et tenementis ſuis.*

Regula. (1) *Omnes viduæ, &c.*] *Qui omne dicit, nihil excludit.*

Regula. *Generale dictum generaliter eſt intelligendum.*

1 part of the Inſtitutes, ſect. 51. Cuſtumier de Norm. cap. 102.

And therefore where there are five kindes of dowers, *viz.* dower at the common law: dower by the cuſtome: dower *ad oſtium eccleſiæ:* dower *ex aſſenſu patris:* and dower *de la pluis beale:* this chapter doth extend to them all. But if the wife be by cuſtome endowed *durante viduitate ſua*, and ſhe ſowe the ground with corne, and after take huſband, hee in the reverſion ſhall have the corne, becauſe though her eſtate was incertaine, yet ſhe hath determined it by her owne act.

Hil. 44. El. lib. 5. fol. 116. Oland's caſe.

(2) *Legare.*] This word is appropriated to a laſt will, and ſignifieth to bequeath goods, chattels, and in ſome caſes lands and tenements. *Legatum a lege dicitur, quia lege tenetur ille, cui intereſt perimplere.*

Bracton, lib. 4. 235. Kelw. 125.

(3) *Blada* ſignifieth corne or graine while it groweth: It properly ſignifieth corne or graine while it is *in herba, dum ſeges in herba:* but it is taken for all manner of corne or graine, or things annuall comming by the induſtry of man, as hemp, flax, &c.

And of this word *blada*, an ingroſſer of corne or graine is called *bladier*, but this word *blada* extendeth not by this act to graſſe, or to any thing that groweth *ſuapte natura*, albeit it groweth by ſowing of hay-ſeed, or the like.

(4) *Quam de aliis terris et tenementis ſuis.*] This is manifeſtly in affirmance of the common law, and extendeth to the lands, which ſhe hath in franck-mariage, or of any other eſtate of inheritance, the corne or graine growing thereupon ſhee may lawfully diſpoſe.

[82]

(5) *Salvis, &c.*] Here is a ſaving to the lords, of whom the lands in dower, or other lands been holden, ſuch cuſtomes and ſervices, as are due unto them, ſo as they ſhall not be barred, or prejudiced by this act for or concerning ſuch cuſtomes, and ſervices, as they had before, but they ſhall be ſaved to them, as if this ſtatute had not been made: for that is the nature of a ſaving, as hath been ſaid, to ſave a former right, and to create no new, and by this ſaving the lord may diſtreine the corne after it be reaped and put into a cart, for his rents and ſervices, but the corne in ſheafes cannot be diſtreined.

7 H. 7. 16. Kelw. 125.

See the firſt part of the Inſtitutes, ſect. 68.

CAP. III.

SI quis fuerit diſſeiſitus de libero tenemento ſuo (1), *et coram juſtic' itinerantibus ſeiſinam ſuam recuperavit* (2), *per aſſiſam novæ diſſeiſinæ* (3), *vel per recognitionem* (4) *eorum qui fecerint diſſeiſinam: et ipſe diſſeiſitus per*

ALSO if any be diſſeiſed of their freehold, and before the juſtices in eyre have recovered ſeiſin by aſſiſe of novel diſſeiſin, or by confeſſion of them which did the diſſeiſin, and the diſſeiſee hath had ſeiſin delivered

per vic' ſeiſinam ſuam habucrit (5), *ſi iidem diſſeiſitores poſtea, poſt iter juſtic', vel infra de eodem tenement' iterum eundem conquerentem diſſeiſiverint* (6), *et inde convicti fuerint* (7), *ſtatim capiantur, et in priſona domini regis detineantur, quouſque per dominum regem per redemptionem, vel aliquo alio modo deliberentur* (8). Vide Marlb. cap. 8. *Et hæc eſt forma qualiter tales convicti puniri debeant, videlicet, cum conquerentes ad curiam veniant, habeant breve domini regis vic' directum, in quo contineatur eorū narratio de diſſeiſina facta ſuper diſſeiſinā. Et ideo mandetur vic. quod aſſumptis ſecū cuſtodibus placitorū* (9) *coronæ domini regis, et aliis legalibus militibus in propria perſona ſua accedat ad tenementū illud, vel ad paſturā illā de quibus facta fuerit querela, et corā eis per primos juratores* (10), *et per alios vicinos, et legales homines* de vicineto illo, *diligentem inde faciat inquiſitionē. Et ſi ipſū iterū invenerint diſſeiſitū* (*ſicut prædictū eſt*) *tunc faciat ſecundū proviſionē prædictā, ſin autem, tunc ſit conquerens in miſericordia domini regis, et alius quietus recedat. Nec debet vic'* (*ſine ſpeciali præcepto domini regis*) *hujuſmodi loquelā proſequi. Eodē modo fiat de illis, qui ſeiſinā recuperaverint per aſſiſā mortis anteceſſoris, et ſimiliter de omnibus terris et tenementis recuperatis per jurat'* (11) *in curia domini regis, ſi poſtea diſſeiſiti fuerint a prioribus deforciatoribus, verſus quos recuperaverint per jurat' quoquomodo.* Vide W. 2. cap. 26.

delivered by the ſheriff, if the ſame diſſeiſors, after the circuit of the juſtices, or in the mean time, have diſſeiſed the ſame plaintiff of the ſame freehold, and thereof be convict, they ſhall be forthwith taken and committed, and kept in the king's priſon, until the king hath diſcharged them by fine, or by ſome other mean. And this is the form how ſuch convict perſons ſhall be puniſhed; when the plaintiff's come into the court of our lord the king, they ſhall have the king's writ directed to the ſheriff, in which muſt be contained the plaint of diſſeiſin framed upon the diſſeiſin. And then it ſhall be commanded to the ſheriff, that he, taking with him the keepers of the pleas of the king's crown, and other lawful knights, in his proper perſon, ſhall go unto the land or paſture, whereof the plaint hath been made, and that he make before them, by the firſt jurors, and other neighbours and lawful men, diligent inquiſition thereof; and if they find him diſſeiſed again (as before is ſaid) then let him do according to the proviſion aforementioned; but if it be found otherwiſe, the plaintiff ſhall be amerced, and the other ſhall go quit; neither ſhall the ſheriff execute any ſuch plaint without ſpecial commandment of the king. In the ſame manner ſhall be done to them that have recovered their ſeiſin by aſſiſe of mortdaunceſtor; and ſo ſhall it be of all lands and tenements recovered in the king's court by enqueſts, if they be diſſeiſed after by the firſt deforceors, againſt whom they have recovered any wiſe by enqueſt.

See the ſtatute of Marlbridge, c. 8. W. 2. cap. 26. See the firſt part of the Inſtitutes, 233. (18 H. 8. 1. 11 H. 4. 6. 7 H. 7. 4. Fitz. Reddiſſeiſin, 6, 8, 9. 1 Inſt. 154. a. Hob. 96. 2 Buſtr. 93. 52 H. 3. c. 8. 13 Ed. 1. ſtat. 1. c. 25, 26. Mirror, 317. Raſt. Ent. 548.)

(1) *De libero tenemento ſuo, &c.*] That is, of land, rent, common, or ſuch like, whereof if a man be diſſeiſed he may have an aſſiſe *de novel diſſeiſin.* [83]

By this chapter the writs of rediſſeiſin and *poſt diſſeiſin*, are given for the cauſes hereafter expreſſed, which lay not at

the common law, and both theſe writs are vicountels, and not retournable, but the ſheriffes ſhall hold the plea and give the judgement.

23 Aſſ. p. 7. 30 Aſſ. Pl. 35. Bract. li. 4. fo. 236, 237.

(2) *Et coram juſtic' itinerantibus ſeiſinam ſuam recuperaverit.*] Here juſtices in eyre are named, but for example, and becauſe aſſiſes were taken moſt commonly before them, for though the aſſiſe be taken in the king's bench, or court of common pleas, or before juſtices of aſſiſe, yet is it within this ſtatute: for though the words be ſpeciall, yet the reaſon of the law is generall; *et quando lex eſt ſpecialis, ratio autem generalis, generaliter lex eſt intelligenda.*

Regula.

F. N. B. 189. d. 23 Aſſ. tit. rediſſeiſin 3. 30. aſſ. 35.

(3) *Per aſſiſam novæ diſſeiſinæ.*] This branch extends not to an aſſiſe of *mordaunceſter*, or *darrein preſentment*, or of *utrum*; but if a man recover in a writ of rediſſeiſin, upon that recovery he ſhall have a rediſſeiſin, and the like, as often as he is rediſſeiſed.

14 E. 3. rediſſeiſin 8. 14 E. 2. ibid. 9.

Upon a plaint in the nature of a freſh force, according to the cuſtome of a city, or borough, and a recovery thereupon had, a rediſſeiſin doth not lie, for no rediſſeiſin doth lie, but where the firſt plea began by writ.

See the firſt part of the Inſtitutes, ſect. 234.

(4) *Per aſſiſam novæ diſſeiſinæ, vel per recognitionem.*] That is to ſay, by the aſſiſe, *i.* the verdict of the recognitors of the aſſiſe, or by confeſſion of the diſſeiſor, &c. and yet a rediſſeiſin doth lie upon a recovery in an aſſiſe, upon the pleading of a record, and failer of it, or upon a demurrer, or by default, or the like; and ſo it is explained by a later ſtatute.

W. 2. cap. 26. Fleta, li. 4. c. 29.

See the firſt part of the Inſtitutes ubi ſupra, F. N. B. 188. Bract. lib. 2. fol. 294, 295.

(5) *Per vic. comitem ſeiſinam ſuam habuerit.*] And ſo it is, if the plaintife in the aſſiſe doth enter and execute the recovery by entrie.

(6) *Iidem diſſeiſitores poſtea, &c. de eodem tenemento iterum eundem conquerentem diſſeiſiverunt.*] For the expoſition hereof ſee the firſt part of the Inſtitutes, ſect. 233.

33 E. 3. rediſſ. 7. 40 Aſſ. 23.

Et inde convicti fuerint.] For in the writ of rediſſeiſin the tenant may plead to the writ as joyntenancy, or the like; or in barre, as a releaſe, or the like; or give it in evidence.

Mirror, cap. 5. § 2. Regiſt. 206. Marleb. ca. 8. W. 2. ca. 26. Bracton, lib. 4. fol. 236. b. Fleta, lib. 4. cap. 29. Brit. fol. 246.

(8) *Statim capiantur et in priſona regis detineantur quouſque per dominum regem, per redemptionem, vel alio modo deliberentur.*] And Bracton hereupon ſaith this, *Talis quidem qui ita convictus fuerit, dupliciter delinquit contra regem, quia facit diſſeiſinam, et roberiam contra pacem ſuam, et etiam auſu temerario irrita ea quæ in cur' domini regis rite acta ſunt: et propter duplex delictum merito ſuſtinere debet pœnam duplicatam.*

And Britton ſpeaking of a rediſſeiſin, *Pur ceo que il defuy de recover per judgement choſe, que il ad conquiſe per ſa proper force in deſpiſant la ley.*

Weſt. 2. c. 8. 7 E. 4. 23. F. N. B. 126.

And this reaſon holdeth in other caſes, as after a judgement in an admeaſurement of paſture, if there be a ſurcharge by the party who was admeaſured, a writ *de ſecunda ſuperoneratione* doth lie, and the like.

Regula.

And it is to be noted, that whereſoever a man did recover the ſeiſin or poſſeſſion of the land, and the tenant or defendant did after diſſeiſe or eject him, this was a contempt at the common law, becauſe it is done againſt the judgement of the court, and in deſpite of the law, for the which the court may commit him, for *intereſt reipublicæ ut judicia rata ſint: et ea quæ in curia noſtra rite acta ſunt debite executioni demandari debent.*

Regula.

(9) *A Tempis*

(9) *Aſſumptis ſecum cuſtodibus placitorum.*] This is ſpoken in the plurall number, therefore where there are two or more coroners, he ought to take at leaſt two, but where there is but one, if he take him, it is ſufficient within the meaning of this ſtatute: though regularly the plurall number is not ſatisfied with one. 23 Aſſ. p. 7. F. N. B. 189.

(10) *Per primos juratores et alios.*] This muſt bee underſtood where there were *juratores* in the aſſiſe; for if there were none, then it muſt be tried onely *per alios:* as if the diſſeiſor plead a record, and fail of it, or if he plead a bar, and confeſſe an immediate *ouſter*, upon which the plaintife doth demur, and judgement is given for the plaintife, and after the plaintife is rediſſeiſed, the plaintife ſhall have a rediſſeiſin, and it ſhall be tried onely *per alios*, becauſe there were no jurors at all in the former aſſiſe; for the ſtatute, (albeit it bee penal) ſhall not be ſo literally expounded, that if it cannot be tried *per primos juratores*, that it ſhall not be tried at all, for *verba intelligi debent cum effectu.* But where there were any jurors, it ſhall be tried by them and others, and where there were none, then by others alone; but if there were jurors in the aſſiſe, and they all die, and after he which recovered is rediſſeiſed, there (by the act of God) the rediſſeiſin faileth. And ſo it is, if all the jurors be dead ſaving one, becauſe the words of the ſtatute be, *per primos juratores, et alios:* and ſo note a diverſity where there were never any *juratores* at all, for there the ſtatute could by no poſſibility have wrought, but upon others onely, but where there were once *juratores*, and the party neglecteth his time, and by the act of God they faile, there the rediſſeiſin failes, becauſe it cannot be tried *per primos juratores*, (which ſometimes were in *eſſe*) *et alios*, as the ſtatute ſpeaketh. *Regula.* 8 H. 5. 1. F. N. B. 189. h.

(11) *Eodem modo fiat de illis, qui ſeiſinam recuperaverunt per aſſiſam mortis anteceſſoris, et ſimiliter de omnibus terris et tenementis recuperatis per juratam, &c.*] Here is the *poſt diſſeiſin* given, where the recovery in a *mordaunc'*, or in any other reall action is by verdict, and in this caſe the recoveror ſhall have a *poſt diſſeiſin* againſt the former tenant being deforceour, that diſſeiſed him after the recovery; but if the recovery be by reddition or default, &c. he ſhall have a *poſt diſſeiſin* upon the ſtatute of W. 2. cap. 26. *Nota*, here *eodem modo* are words of great operation, for they imply, that there muſt be *idem conquerens de eodem tenemento, et idem tenens*, againſt whom the recovery was had after the ſame manner, as is before ſaid in caſe of a rediſſeiſin. Poſt diſſeiſin. Marlebr. c. 8. W. 2. ca. 26. F. N. B. 190. Regiſt. 206. b.

CAP. IV. *[85]

ITEM quia multi magnates Angliæ, qui feoffaverunt milites et alios libere tenentes (2) *ſuos de parvis tenementis in magnis maneriis ſuis, queſti fuerunt, quod commodum ſuum facere non potuerunt* (1) *de reſiduo maneriorum* (3) *ſuorum* *, *ſicut de vaſtis, boſcis, et paſturis* communibus, *cum ipſi feoffati habeant*

ALSO becauſe many great men of England (which have infeoffed knights and their freeholders of ſmall tenements in their great manors) have complained that they cannot make their profit of the reſidue of their manors, as of waſtes, woods, and paſtures, whereas the ſame feoffees have

habeant ſufficientem paſturam, quantum pertinet ad tenementa ſua; ita *proviſum eſt, et conceſſum, quod quicunque hujuſmodi feoffati aſſiſam novæ diſſeiſinæ deferant de communia paſturæ ſuæ, et coram juſtic' recognit' fuerit* (7), *quod tantam paſturam habeant, quantum ſufficit ad tenementa ſua, et quod habeant liberã ingreſſum* (4), *et egreſſum, de liberis tenementis ſuis, uſque ad paſturam ſuam: tunc inde ſint contenti, et illi de quibus conqueſti fuerint recedant quieti* (6), *de hoc quod commodũ ſuum de terris, vaſtis, boſcis, et paſturis fecerint* (5). *Si autem dixerint, quod ſufficientem paſturã non habeant, vel ſufficientem ingreſſum, vel egreſſum, quantum pertinet ad tenementa ſua: tunc inquiratur veritas per aſſiſam. Et ſi per aſſiſam recognitum fuerit* (8), *quod per eoſdem deforciatores, in aliqua fuerit impeditus eorum ingreſſus, vel egreſſus, vel quod non habeant ſufficientem paſturã, et ſufficientem ingreſſum, et egreſſum, ſicut prædictum eſt: tunc recuperent ſeiſinam ſuam, per viſum juratorum, ita quod per diſcretionem et ſacramentum eorum habeant conquerentes ſufficientem paſturam, et ſufficiẽte ingreſſũ et egreſſũ in forma præd'*, *et diſſeiſitores ſint in miſericordia domini regis, et dampna reddant, ſicut reddi ſoient ante proviſionẽ iſtã. Si autẽ recognitũ fuerit per aſſiſam, quod querentes ſufficientẽ habeant paſturam, cum libero et ſufficienti ingreſſu et egreſſu, ſicut præd' eſt: tunc licitè* & libere *faciant* dom' *commodum ſuum de reſiduo, et recedant de ill' aſſiſa quieti. Weſt.* 2. *cap.* 48.

ſufficient paſture, as much as belongeth to their tenements; it is provided and granted, That whenever ſuch feoffees do bring an aſſiſe of novel diſſeiſin for their common of paſture, and it is knowledged before the juſticers, that they have as much paſture as ſufficeth to their tenements, and that they have free egreſs and regreſs from their tenement unto the paſture, then let them be contented therewith; and they on whom it was complained ſhall go quit of as much as they have made their profit of their lands, waſtes, woods, and paſtures; and if they alledge that they have not ſufficient paſture, or ſufficient ingreſs and egreſs according to their hold, then let the truth be inquired by aſſiſe; and if it be found by the aſſiſe, that the ſame deforceors have diſturbed them of their ingreſs and egreſs, or that they had not ſufficient paſture (as before is ſaid) then ſhall they recover their ſeiſin by view of the inqueſt: ſo that by their diſcretion and oath the plaintiffs ſhall have ſufficient paſture, and ſufficient ingreſs and egreſs in form aforeſaid; and the diſſeiſors ſhall be amerced, and ſhall yield damages, as they were wont before this proviſion. And if it be certified by the aſſiſe, that the plaintiffs have ſufficient paſture, with ingreſs and egreſs, as before is ſaid, let the other make their profit of the reſidue, and go quit of that aſſiſe.

Mirror, cap. 5. § 2. Bract. li. 4. fol. 222. Britton. cap. 58. Fleta, li. 4. ca. 20. (1 Roll. 365. 8 Ed. 3. 30. 7 Ed. 3. 67. Mirror, 318. Enforced by 3 & 4 Ed. 6. c. 3. 13 Ed. 1. ſtat. 1. c. 46. 2 Vern. 290. 322.)

(1) *Quod commodum ſuum facere non potuerunt.*] Hereby it appeareth, that the lord could not approve by the order of the common law, becauſe the common iſſued out of the whole waſte, and of every part thereof, and yet ſee Tr. 6 H. 3. where the lord approved two acres, and left ſufficient, the tenant brought an aſſiſe, and the ſpeciall matter being found, the plaintife *retraxit ſe*.

Tr. 6 H. 3. tit. Common 26.

(2) *Libere*

(2) *Libere tenentes.*] The purview of this ſtatute extends onely for the lord to make an approvement againſt his tenant, and not againſt any ſtranger, nor where the lord had common appendant in the tenancy, as he may have; but the ſtatute of W. 2. provideth, *De cætero quod ſtatutum de Merton, proviſum inter dominos et tenentes ſuos locum habeat de cætero inter dominos vaſtorum boſcorum, et paſturarum, et vicinos, &c.*

W. 2. ca. 46. Bract. lib. 4. fol. 228. Fleta, lib. 4. ca. 20. 18 Aſſ. p. 4. 18 E. 3. 43. 19 E. 3. tit. Aſſ. 18 Aſſ. p. 4. F. N. B. 179. e.

(3) *De reſiduo maneriorum.*] By this recitall a point of the auncient common law appeareth, that when a lord of a mannor (wherein was great * waſte grounds) did enfeoffe others of ſome parcells of arable land, the feoffees *ad manutenend. ſervitium ſocæ*, ſhould have common in the ſaid waſts of the lord for two cauſes. 1. As incident to the feoffement, for the feoffee could not plough, and manure his ground without beaſts, and they could not bee ſuſtained without paſture, and by conſequence the tenant ſhould have common in the waſtes of the lord for his beaſts, which doe plough and manure his tenancy, as appendant to his tenancy, and this was the beginning of common appendant. The ſecond reaſon was for maintenance and advancement of agriculture, and tillage, which was much favoured in law; like as when a man gives the land to a parſon and his ſucceſſors, whereupon a church is built for the ſervice of God, to hold of him in *frankalmoigne*, the land is holden, and by conſequent, and operation of law, the advowſon, which the law doth give to the founder, that is, the giver of the land, is alſo holden, for that the advowſon doth in a manner adhere to the church, and as the tenant had made a feoffement before the ſtatute of *quia emptores terrarum*, to hold of himſelfe by fealty, and xij. d. this meſnalty by operation of law had been holden of the lord paramount.

W. 2. ca. 46. 18 Aſſ p. 4. 18 E. 3. 43. and above cited. * [86] Temps E. 1. Common 24. 17 E. 2. ibid. 23. 18 E. 3. 30. 20 E. 3. Admeaſurement 8. Mich. 26 & 27 Eliz. lib. 4. fol. 37. Tirringham's caſe. Pl. Com. 498. b.

(4) *Tantam paſturam habeant, quantum ſufficit ad tenementa ſua, et quod habeant liberum ingreſſum.*] The lord may approve againſt a tenant that hath * common of paſture appendant, but if the lord graunt common of paſture within his waſts, there is no approvement by this act againſt a common in groſſe, for the words of the ſtatute be *quantum pertinet ad tenementa ſua, &c.*

* See the firſt part of the Inſtitutes, ſect. 184.

And ſo was the law taken and adjudged ſoon after the making of this act, and latter authorities agree with the ſame; and albeit the common appendant be without a certain number, as to have ſufficient paſture for beaſts, *quantum pertinet ad tenementa ſua*, which may be reduced to a certainty, for, *id certum eſt quod certum reddi poteſt*, and therefore this act doth extend to it. And the writ of admeaſurement of paſture doth lie only for and againſt ſuch commoners, as have common appendant, for the words of the writ be, *et ad ipſos pertinet habendum ſecundum liberum tenementum ſuum, &c.* ſo as common appendant, be it certain or incertain, is within this ſtatute; and ſo is common appurtenant certaine or incertaine, for *pertinet* extendeth as well to common appurtenant as appendant.

W. 2. cap. 46. 31 E. 1. Common. 26. 32 E. 1. ibid. 29. 3 E. 2. ibid. 21. 10 E. 3. 56. 34 Aſſ. 11. 22 Aſſ. p. 65. 7 H. 4. 33. 11 H. 4. 26. a. F. N. B. 125. See Bracton, li. 4. fol. 228.

Bracton treating of this chapter, ſaith, *imprimis videndum eſt qualiter conſtitutio illa ſit intelligenda, ne male intellecta trahat utentes ad abuſum:* and then expoundeth the ſame in this manner: 1. *Si ſit alienus (et non proprie tenens) non ei imponit legem conſtitutio.*

Bracton ubi ſupra.

2. *Si fuer' liberi tenentes proprii, tunc refert qualiter fuer' feoffati, &c. utrum feoffati fuer' large ſcilicet p. totū, et ubiq;, et in omnibus, locis, et ad omnimoda averia, et ſine numero, &c.* So as by his opinion

nion this ſtatute extendeth not to a common in groſſe, nor to a common ſans number; *tales*, ſaith he, *non ligat conſtitutio memorata, quia feoffamentum, (i. conceſſionem communiæ) non tollit, licet tollat abuſum.*

3. *Si autem communia fuer' ſtricta cum numero averiorum certo, &c.* (which he intendeth of common appendant) *licet uſus ſe largius et latius habuerit quam neceſſe eſſet, tales ligat conſtitutio quod coarctentur ad certum locum, et infra certum locum, dum tamen locus inde ſufficiens ſit et competens cum libero ingreſſu, et egreſſu, et competenti, quod non ſit gravis nec difficilis: competens autem debet eſſe locus ita quod non longius diſtet, ſed propinquius aſſignetur, &c. cum diſtantia inducit incommoditatem.*

4. *Item eodem modo ſi ita feoffatus fuerit quis, ſine expreſſione numeri vel generis, ſed ita, cum paſtura quantum pertinet ad tantum tenementum in eadem villa, talem ligat conſtitutio ſicut prius cum expreſſione; quia cum conſtet de quantitate tenementi, de facili perpendi poterit de numero averiorum, et etiam de genere ſecundum conſuetuainem locorum.*

[87]

5. *Item tempus ſpectandum erit cum omnis nova conſtitutio, futuris formam imponere debeat et non præteritis.*

Tr. 18 E. 1. in Banco Rot. 50. Cantabr.

Walterus Bonde implacitat Aliciam de Bordeley, & vi. alios pro eo quod cum averiis ſuis blada ſua ad Madingle creſcentia noctanter depaſti ſunt, &c. Alic' & Nicholaus Ruſſell dic' quod placea ubi tranſgreſſio ſupponitur fieri vocatur Leylonſurlonge, quæ quidem placea ſemper fuit pratum uſque ad prædictum annum quod prædictus Walterus prædictum pratum aravit, & ſeminavit, & in quo prato ipſa Alicia habet communiam ſuam poſt fena levata: et quia prædictus Walterus, ad auferendum ei communiam ſuam in prædicto prato, ſeminavit, ſicut prædictum eſt, dicunt quod quando fena in pratis adjacentibus levata fuerunt, ipſi cum averiis ſuis communiam ſuam in prædicta placea depaſti fuerunt, ſicut eis bene licuit. Et inde ponunt ſe ſuper patriam. Walterus dic' quod in electione ſua eſt ad dimittend' prædictam placeam jacere pratum, & illud falcare, vel placeam illam arare, & ſeminare pro voluntate ſua.

Note this caſe for common, &c.

* Verdict.

*Et de hoc ponit ſe ſuper patriam, &c. * Jur' dict' quod prædicta placea à tempore quo non extat memoria fuit pratum falcabile, uſq; ad prædictum annum quod prædictus Walterus illud aravit: dicunt etiam quod prædictus Walterus eſt parvus tenens ejuſdem villæ, & * non licet alicui tali parvo tenenti ſine licentia ipſius Aliciæ prata aliqua in eadem villa arare, & quod prædicta Alicia in eiſdem pratis poſt fena aſportata communicare debet *: dic' etiam quod quando fena in pratis adjacentibus levata fuerint, ipſi cum averiis ſuis communiam ſuam in prædicta placea depaſti fuerunt, ſicut bene licitum eſt eis: ideo conſiderat' eſt quod * prædictus Walterus nihil capiat per breve ſuum, ſed ſit in miſericordia. Et aſſer' per jur' ad dimid. marc.*

* Note this cuſtome.

* Note this, for feeding of corn, Vide 21 E. 4. 41.

* Judgement.

Vide Paſch. 15 E. 1. in Banco. Rot. 6. Buck. Lib. 5. fol. 78. common of paſture, *ſub modo*, or with limitation.

Throughout all this ſtatute, *paſtura et communia paſturæ*, is named ſo as this ſtatute of approvements doth not extend to common of piſchary, of turbary, of eſtovers, or the like.

(5) *Quod commodum ſuum de terris vaſtis, &c. fecerint.*] Now it is to be ſeene how this approvement muſt be. And it muſt be divided by ſome incloſure or defence, as it may be made ſeverall, for it is lawfull to the tenant to put on his cattle into the reſidue of the common, and if they ſtray into that part, whereof

whereof the approvement is made, in default of incloſure, he is no treſpaſſer.

And if the lord make a feoffement of certain acres, the feoffee may incloſe, becauſe the feoffement is an approvement in his nature

31 E. 1. Common 27. 16 E. 2. Garr. de Charters 31. 10 E. 3. 15.

(6) *Tunc inde ſint contenti, et illi de quibus conqueſti fuer' recedant quieti de hoc quod commodum ſuum de terris vaſtis, &c. fecerint.*] By the approvement of part according to this ſtatute, that part by this act is diſcharged of the common, in ſo much as if the tenant which hath the common purchaſe that part, his common is not extinguiſhed in the reſidue.

Dier. Mich. 16 & 17 Eliz. 339.

If the lord, &c. doe make an approvement, hee may improve eft-ſoons as oft as hee will, ſo hee leave ſufficient common, and ſo it was done in 18 E. 3.

18 Aſſ. p. 4. 18 E. 3. 30. 43.

If the tenant at the time of the approvement have ſufficient common left unto him in the reſidue, with a competent way thereunto, according to this act, and after the reſidue becommeth not ſufficient; yet the approvement remaineth good, for the words of this act be, *tantam paſturam habeant, quantum ſufficit ad tenementa ſua.*

8 Aſſ. 18. 16 E. 3. Common 9.

[88]

(7) *Coram juſticiariis recognitum fuit, &c.*] And yet it may bee tried in an action of treſpaſſe: for many times he ſhall faile to have an aſſiſe.

10 E. 3. 15.

Or if the lord doth incloſe any part, and leave not ſufficient common in the reſidue, the commoner may break down the whole incloſure, becauſe it ſtandeth upon the ground which is his common.

8 E. 3. 38. 16 E. 3. Common 9. 22 Aſſ. 42. 15 H. 7. 10.

Bracton reciteth a writ deviſed upon this ſtatute by that ſage of the law William de Ralegh, one of the kings juſtices, in caſe where the lord was diſturbed to incloſe, or when hee had incloſed according to this ſtatute, and his incloſure broken downe, which you may reade there at large.

Bracton, li. 4. fo. 222. a. & 227.

(8) *Et per aſſiſam recognitum fuit.*] If by the aſſiſe it ſhall be found, that the plaintife had not ſufficient ingreſſe and egreſſe, or not ſufficient paſture, then the plaintife ſhall recover ſeiſin by the view of the jurors; ſo that by the diſcretion and oath of them, the plaintife ſhall have ſufficient paſture, and ſufficient ingreſſe and egreſſe aſſigned to him, and that the diſſeiſors ſhall be amerced, and yeeld damages.

Upon this branch of the ſtatute, we have a notable caſe in our books, viz. a commoner brought an aſſiſe of common of paſture belonging to his freehold, the tenant ſaid, that he was lord, &c. and approved part of his waſte, and left the plaintife ſufficient common, &c. The plaintife denied that he left ſufficient common, and thereupon iſſue was taken, and Sir William Herle chiefe juſtice of the court of common pleas tooke the aſſiſe, and the aſſiſe found, that the plaintife had not ſufficient common; whereupon the court did award that the plaintife ſhould recover his common, &c. and the recognitors of the aſſiſe were going from the barre: and albeit the iſſue was found againſt the tenant, yet for his advantage the recognitors of the aſſiſe ought to come back again, and to ordaine by their diſcretion and oath ſufficient common to the plaintife, ſo that the defendant might approve of the remnant by this ſtatute of Merton, as Trewood affirmed: whereupon Sir William Herle peruſed this ſtatute (for no man can carry the words of a poſitive law by parliament in his head) and found the ſtatute as Trewood had ſaid, and

7 E. 3. fol. 67.

therefore was in purpose to have caused the jurors to come againe (the record yet being in his brest) to appoint sufficient common to the plaintife according to the statute, but it was prevented, for that the parties agreed.

CAP. V.

SIMILITER provisum est, et à domino rege concessum, quod de cætero non current usuræ contra aliquem infra ætatem existen' a tempore mortis antecessoris sui, cujus hæres ipse est usque ad legitimam ætatem suam, ita tamen quod propter hoc non remaneat solutio debiti principalis simul cum usuris ante mortem antecessoris sui, cujus hæres ipse est inde provenientibus.

LIKEWISE it is provided and granted by the king, that from henceforth usuries shall not run against any being within age, from the time of the death of his ancestor (whose heir he is) unto his lawful age; so neverthelesse, that the payment of the principal debt, with the usury that was before the death of his ancestor (whose heir he is) shall not remain.

(1 Inst. 246. b, 1 Roll. 151. 37 H. 8. c. 9.)

[89]

Inter leges Sancti Edw. Lamb. Si quis de usura convictus. Glanvil. lib. 7. ca. 16. Ockham ca. quod alter non absolvitur. Ca. Itineris de catallis usurariis 15 E. 3. ca. 5 Rot. parl. 50 E. 3. nu. 58. 6 R. 2. nu. 57. 14 R. 2. nu. &c. [a] 18 E. 1. de Judaismo. See hereafter the exposition of it.

This statute hath been diversly expounded.

1. That this statute extended to the usurious Jewes, that then were in England: for at that time and before the conquest also, it was not lawful for Christians to take any usury, as it appeareth by the lawes of Saint Edward, &c. and Glanville and other auncient authors and records. And by this act it is manifest that the usury intended by the statute was not unlawfull, for the usury due before the death of the auncestor is enacted to be paid, and after the full age of the heire also, and no usury was then permitted but by the Jewes only.

[a] But king Edward the first (that mirror of princes) by authority of parliament made this law, which is worthy to be written in letters of gold: Forasmuch as the king had seene that many of the evils and disherisons of the good men of his realme had come to passe by the usuries which the Jewes had made in times past, and many other mischiefes had risen thereupon, albeit that the said king and his auncesters have had great profit of the Jewes: neverthelesse in honour of God, and for common weale of the people; it is ordeined and established, that no Jewe from thenceforth should take any usury, &c. But yet provideth for the time past in such manner, as by the act appeareth.

[b] Rot. Pat. 5 E. 1. nu. 14. 17. 26.

And true it is, that great was the profit (as in that act is recited) that the crowne had by the Jewes, [b] for betweene the 50 yeare of H. 3. and the 2 yeare of E. 1. the crowne was answered *de exitibus Judaismi* foure hundred and twenty thousand pounds, and then the ounce of silver was five greats.

Pl. com. 126. b. 35 H. 6. 61.

Others expound these words *non currant usuræ contra aliquem infra ætatem existentem* in this manner, that the rent shall not be doubled during the nonage of the heire (which in a large sense is called usury, for *dicitur usura quia datur pro usu æris*). As if the king

king give land to another, reſerving a rent payable at a feaſt certaine, and for default of payment, that he ſhall double the rent for every default, and after the grantee dieth his heire within age, he ſhall not double the rent to the king.

If a man by obligation bind himſelfe and his heires to pay 100 l. at ſuch a feaſt, and if he pay it not at that feaſt, that then he and his heires ſhall pay 10 l. for every quarter it ſhall be behinde, the obligor dieth and leaveth aſſets in fee ſimple his heire within age, he ſhall have his age, and ſhall not pay this 10 l. incurred during his minority after his full age; and this agreeth with the words of the ſtatute, *Non remaneat ſolutio debiti principalis*, and in this caſe there is a *principale debitum*, but *debitum* ſignifieth not only debt, for the which an action of debt doth lie, but here in this ancient act of parliament it ſignifieth generally any duty to be yeelded or paid; for *debitum* is derived of the verb *debeo*, *id enim eſt*, *quod vel lege naturæ*, *vel obligatione civili debetur*, as rents and the like.

11 H. 7. 22. Mich. 26 & 27. El. lib. 3. fol. 13.

So if A. knowledge a recognizance to B. of 20 l. to be paid at a certain feaſt, and A. doth grant, that if the 20 l. be not paid at the day, then he ſhall pay 10 s. a weeke for every week it ſhalbe behind, and before the feaſt A. dieth ſeaſed of fee ſimple lands, his heire within age; in a *ſcire facias* upon the recognizance the heire ſhall have his age, as in the next caſe before, by the common law, and after his full age he ſhall be freed of the 10 s. a weeke by this ſtatute.

11 E. 3. age 4. 15 E. 3. ibidem. 95. 29 aſſ. 37. 29 E. 3. 50. 42 aſſ. 4.

CAP. VI.

* [90]

*DE hæredibus per parentes, vel per alios, contra pacem vi abductis, vel detentis, ſeu maritatis, ita proviſū eſt, qd. quicunque * laicus inde convictus fuerit* (1), *quod puerū aliquē ſic detinuerit, abduxerit, ſeu maritaverit, reddat perdenti valorē maritagii: et pro delicto corpus ejus capiatur, ut impriſonetur, donec perdenti emendaverit delicū ſi puer maritetur: et præterea donec domino regi ſatisfecerit pro transgreſſione ſua. Et hoc de harede infra quatuordecim annos exiſten'* (2). *De hærede autē cum ſit quatuordecim annorum, vel ultra, uſque ad plenam ætatem, ſi ſe maritaverit ſine licentia domini ſui, ut ei auferat maritagiū ſuum, et dominus ejus offerat* (3) *ei rationabile maritagium, ubi non diſparagetur* (4), *dominus ſuus tunc teneat terrā* (5) *ejus ultra terminū ætatis ſuæ, ſcilicet xxj. annorū, per tantū tēpus quod inde poſſit percipere* (6) *duplicē*

OF heirs that be led away, and withholden, or married by their parents, or by other, with force againſt our peace, thus it is provided, that whatſoever layman be convict thereof, that he hath ſo withholden any child, led away, or married, he ſhall yield to the loſer the value of the marriage; and for the offence his body ſhall be taken and impriſoned until he hath recompenſed the loſer, if the child be married; and further, until he hath ſatisfied the king for the treſpaſs. And this muſt be done of an heir being within the age of fourteen years. And touching an heir being fourteen years old, or above unto his full age, if he marry without licence of his lord to defraud him of the marriage, and his lord offer him reaſonable and convenient marriage (without diſparagement) then his lord ſhall hold his land beyond the term of his age, that is to ſay,

plicē valorē maritagii, ſecundū æſtima-tionē legaliū hominū (7), *vel ſecundū quod ei pro eodē maritagio prius fuerit oblatum, ſine fraude et malitia* (8), *et ſecundū quod probari poterit in curia domini regis.*

ſay, of one and twenty years, ſo long that he may receive the double value of the marriage after the eſtimation of lawful men, or after as it hath been offered before without fraud or colluſion, and after as it may be proved in the king's court.

Bracton, lib. 2. fo. 91. Fleta, li. 1. cap. 12. 3 E. 3. 3. 8 E. 3. 52. 21 E. 3. 52. 21 E. 3. 19. 29 aſſ. 35. 29 E. 3. 37. (1 Inſt. 76. a. 4 Rep. 82. 6 Rep. 74. 9 Rep. 72. Dyer, 255. to 26c. pl. 23. Bro. Forſ. de Marriage, 9, 12, 13. Bro. Gar. 109. 40 Ed. 3. 6. 1 Inſt. 80. a. 81. b. Hob. 94. 90.)

Before the making of this ſtatute the law gave the lord two ſeverall remedies, if his ward were taken away, detained, or maried, *viz.* 1. An action of treſpaſſe, wherein he ſhould recover damages only. 2. Or a writ of right of ward, wherein he ſhould recover the cuſtody of body, and lands, but if the ward were maried, then was he driven to his action of treſpaſſe *Quare ſe intruſit maritagio non ſatisfact.* The lord had alſo his writ, but that lieth againſt the heire, when he entreth into the land before or after his full age: alſo the lord may have his writ *de valore maritagii* at the common law, but that lay alſo againſt the heire himſelfe after his full age when he intruded not.

Tr. 9. El. lib. 9. fo. 72 Doct. Huſſey's caſe.

7 E. 3. 53. 40 E. 3. 6. 31. aſſ. 26. F. N. B. 141.

The writ of *raviſhment de garde* is framed by the ſtatute of W. 2. cap. 35. whereof more ſhalbe ſaid hereafter in his proper place.

5 E. 3. 52. Regiſt. 162.

This ſtatute giveth, that in the writ of right of ward the plaintife ſhould recover *Valorem maritagii, et pro delicto corpus ejus capiatur, ut impriſonetur donec perdenti emendaverit delictum, ſi puer maritetur: et preterea donec domino regi ſatisfecerit pro tranſgreſſione ſua.*

Mirror, ca. 5. § 3.

(1) *Si laicus inde convictus fuer'.*] The Mirror ſaith, that this point is reprovable, inſomuch as the ſtatute extends not to clerks, *car eſt nient pluis droit que clerke peche ſans payne, que lay home.*

35 H. 6. 53. See the firſt part of the Inſtitutes, § 104. Cuſtumier de Norm. cap. 33. & le commentarie ſuperinde.

(2) *Et hoc de hærede infra 14. annos exiſten'.*] Upon theſe, and the words ſubſequent this ſtatute doth not extend to the heire female, for the age of conſent to mariage of a male is 14, and of a woman 12, and after 14 (at the making of this ſtatute) the female was to be out of ward.

But note albeit the mariage within the age of conſent be voydable, yet the gardein ſhall recover the value, and albeit the heire at the age of conſent diſagree, ſo as the gardein ſhall have the mariage again, yet there is no remedy for the raviſher.

7 H. 6. 12. 21 E. 3. 19. 20. 27 H. 6 and 16. 1. part of the Inſtitutes, fect. 103.

Now what alterations the ſtatute of W. 1. cap. 22. and W. 2. cap. 35. have made, doe at large appear in Doctor Huſſeys caſe aboveſaid, and in the firſt part of the Inſtitutes.

(3) *Si ſe maritaverit ſine licentia domini, &c. Et dominus ejus offerat.*] Here the ſtatute provideth remedy when the heire male, after the age of 14 yeares (when he may, as is aforeſaid, conſent to mariage) after tender made marieth himſelfe without the licence of his lord, and giveth a writ of forfeiture of mariage, ſo called, becauſe the lord ſhall thereby recover the double value of the

the mariage; as if the mariage were worth one hundred pounds, he ſhall recover two hundred pounds. But this forfeiture of mariage is not due by this ſtatute, but where the gardein after 14, and before 21, had tendered a covenable mariage to him, and he refuſed her, and of himſelfe maried (as it were in deſpite of him) another within age; and ſo is this ſtatute to be conſtrued, that the ward maried himſelf without licence, &c. after the lord had tendered unto him a covenable mariage; for if the ward firſt marie himſelfe after the age of 14, a tender of mariage to him that is ſo maried is void, and the ſtatute muſt be intended of a lawfull tender. And this ſtatute that only giveth the forfeiture of mariage not extending to an heire female, there is no forfeiture of mariage of an heire female.

18 E. 3. 18. 14 E. 3. Action ſur leſtatute 16. F. N. B. 241. g. Regiſt.

1. part of the Inſtitutes, § 103. Bro. forfeiture de marriage 12. 4 Jacobi, lib. 6. fo. 70, 71. Seignor Darcies caſe. 19 E. 3. Judgement 123. W. 1. c. 22. No forfeiture of marriage of an heire femal.

But if a ward be taken away and maried *infra annos nubiles*, at the age of ten yeares, there, for that he may diſagree, the lord may tender to him after his age of fourteen, which if he refuſe, and after diſagree, and mary elſewhere within age, the gardein ſhall have the forfeiture.

(4) *Ubi non diſparagetur.*] Vide Magna Charta cap. 6. and ſee the next chapter following.

(5) *Dominus ſuus tunc teneat terrā*, &c.] The lord ſhall have election either to waive the land, and to take his action of forfeiture of mariage, (for perhaps the land may be of ſmall value, and the mariage of great value,) or to enter into the land, and take the profits, til of the ſame he be ſatisfied thereby of the double value: for the words of the ſtatute be *per tantum tempus quod inde poſſit percipere duplicem valorem*, ſo as the taking of the profits in that caſe ſhall goe in ſatisfaction of the double value; but if the heire ouſte the gardein before he be fully ſatisfied of the forfeiture, the gardein ſhall recover the whole forfeiture againſt him, becauſe the heire ſhall not take advantage of his owne wrong, and the double value is caſual.

18 E. 3. 182. E. 2. action ſur leſtatute 23. 16 E. 3. ibidem 14.

43 E. 3. 20. 13 H. 7. 7. 40 E. 3. 6. 4 Jac. li. 6. fo. 70. Dier 9 El. 260. b.

The king ſhall have the forfeiture of the mariage, albeit he be not particularly named, but then the king muſt purſue the ſtatute, and make a tender, for in caſe of the forfeiture there muſt be a tender, but not for the ſingle value.

The grauntee of the body only either by the king or a common perſon ſhall not retaine the land, but he may have upon a tender and mariage elſewhere within age a forfeiture of mariage.

If the gardein entereth into the land for the double value, he cannot have a writ of forfeiture of mariage, although he waive the poſſeſſion of the land.

Temps E. 1. action ſur leſtat. 36.

(6) *Quod inde poſſit percipere*, &c.] If the gardein entereth into the land, and after ſuffer others to take the profits, ye he ſhall hold it no longer then he might have levied the double value, and his negligence ſhall be his own damage.

Mich. 41 & 42. El. li. 4. 82. Sir Andrew Corbets caſe. 15 E. 4, 5.

Although the ſtatute ſaith, *Dominus teneat terram*, yet if he die, his executors or adminiſtrators ſhall hold the land, or have a writ of forfeiture of mariage, for this act had veſted an intereſt therein in the lord, which after his death goeth to his executors, or adminiſtrators, as it doth to the ſucceſſors of an abbot.

7 H. 6. 12. 11 H. 6. 8. 15 H. 7. 14. See the 1. part of the Inſtitutes, ſect. 110.

But if the heire in ward die either within age, or of full age before the value or the forfeiture (as the caſe require) be yeelded or paid, there the lord hath no remedy by action for this incertaine perſonall

27 H. 8. 3. 28. aſſ. 7. 11 H. 4. 82. Dier 14. El. 306. 41. aſſ. p. 15.

7 H. 4. 6.
18 E. 3.
18 Dier ubi ſupra.

perſonall duty againſt his heires, executors or adminiſtrators, no more then an action of debt lyeth againſt executors upon an eſcape made by the gardien upon the ſtatute of W. 2. and yet Thirning chiefe juſtice held opinion, that if I give lands in tayl to hold of me by knights ſervice, and the donee *devie ſon iſſue deins age, et ieo tender a luy mariage, et il ceo refuſe, et luy marie ſans ma volunt, uncore eſteant deins age, et puis moruſt in ceſt caſe ieo retiendra la terre pur la forfeiture del double value accordant al ſtatute de Merton, et le procheine heire in tayle navera remedy*, whereby it appeareth that by his opinion the gardein after the death of the heire might hold the land by this ſtatute for the double value.

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Wherein it is to be obſerved that the lord, or donor ſhall have nothing but the land holden of him, and which moved from him, until he be ſatisfied with the profits of that land of the double value by the words and meaning of this ſtatute, the words whereof be, *teneat terram per tantum tempus quod inde poſſit percipere duplicem valorem.* But otherwiſe it is of the ſingle value, for there the profits taken by the lord goe not in ſatisfaction of the value, as ſhall be ſaid in the next chapter.

14 El. Dier. 306.

And the grantee of the body only is without remedy, if the heire dieth.

And albeit the ſtatute ſaith *teneat terram*, yet it extendeth to the holding of the meſnalty by the lord paramount, and in many caſes the meaſne ſhall be ſuppoſed to hold the land.

(7) *Secundum æſtimationem legaliū hominum.*] That is, by a jury of twelve men in an action to be brought: concerning the forfeiture or value of the marriage conſideration muſt not only be had of that land that is holden, but of all other lands, leaſes, goods, and chattels, and other perſonall eſtate which may advance the eſtimation of the ward, and yet the value of the marriage ought to be ſo moderate, as the heire may well undergoe the ſame.

(8) *Vel ſecundum quod ei pro eodē maritagio prius fuerit oblatū ſine fraude*, &c.] And herein the gardein hath the election either to have ſo much, as an indifferent jury will give him, or ſo much as for the marriage have *bona fide* been offered unto him.

CAP.

CAP. VII.

DE dominis qui maritaverint illos quos habent in custod' villanis, vel aliis, sicut burgens. ubi disparagent': si talis hæres fuerit infra 14. *annos, et talis ætatis quod consentire non possit matrimonio: tunc si parentes conquerantur de illo domino, dominus ille amittat custodiā usque ad ætatem hæredis, et omne commodū quod inde perceptū fuerit, convertatur in commodū ipsius hæredis, qui infra ætatem est, secundum dispositionem et provisionē parent' suorū, propter dedecus ei factum. Si autē fuerit* 14. *annorū et ultra, qd. consentire poterit, et tali maritagio consenserit, nulla sequatur pœna. Si quis hæres, cujuscunque fuerit ætatis, pro domino suo se noluerit maritare, non compellatur hoc facere, sed cum ad ætatē pervenerit, det domino suo, et satisfaciat ei de tanto, quantum inde percipere posset ab aliquo pro maritagio suo* (1), *antequam terrā suā recipiat, et hoc sive se voluerit maritare, sive non: quia maritagiū ejus, qui infra ætatem est, de mero jure pertinet ad dominum feodi* (2).

AND as touching lords, which marry thoſe that they have in ward to villains, or other, as burgeſſes where they be diſparaged, if any ſuch an heir be within the age of fourteen years, and of ſuch age, that he cannot conſent to marriage, then, if his friends complain of the ſame lord, the lord ſhall loſe the wardſhip unto the age of the heir; and all the profit, that thereof ſhall be taken, ſhall be converted to the uſe of the heir being within age, after the diſpoſition and proviſion of his friends, for the ſhame done to him; but if he be fourteen years, and above, ſo that he may conſent, and do conſent to ſuch marriage, no pain ſhall follow. If an heir (of what age ſoever he be) will not marry at the requeſt of his lord, he ſhall not be compelled thereunto; but when he cometh to full age, he ſhall give to his lord, and pay him as much as any would have given him for the marriage before the receipt of his land, and that whether he will marry himſelf, or not; for the marriage of him that is within age of meer right pertaineth to the lord of the fee.

(9 H. 3. c. 6. Regiſt. 161, &c. 3 Ed. 1. c. 22. 13 Ed. 1. ſtat. 1. c. 35. Kel. 133. Dyer, 25. 260. 306. Fitz. Brief. 937. Fitz. Gard. 68. 128. 131. 138. 153, 156. 6 Rep. 70. 73. 5 Rep. 126. b. Co. Ent. 396. Cro. El. 469.)

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Sicut burgensibus, &c.] Hereof ſee the firſt part of the Inſtitutes: and albeit the ſtatute of 5 R. 2. cap. 4. doth rank divers degrees that are to come to parliament, as dukes, earles, barons, barerets, knights of ſhires, citizens, and burgeſſes; yet this act of Merton doth extend alſo to citizens, becauſe all cities were firſt barroughs, and with the Saxon and Germane bungh ſignifieth a city.

See the firſt part the Inſtitutes, ſect. 107, 108.

This ſtatute concerning diſparagement doth not extend to heires females, but onely to heires males, therefore the forfeiture given by this ſtatute onely extends to the caſe of the heire male, but by other ſtatutes the diſparagement of the heire female is forbidden.

Magna Charta, cap. 6. W. 1. c. 22. 1 pt. Inſt. ſect. 107.

(1) *Det domino, et ſatisfaciat ei de tanto quantum inde percipere poſſet de aliquo pro maritagio ſuo antequam terram ſuam recipiat.*] Note the ſeveiall pennings of this clauſe concerning the ſingle value, and the clauſe in the chapter next before concerning the double value,

43 E. 3. 20. 31 Aſſ. 26. 27 H. 8. 4.

Mich. 41 et 42 El. lib. 4. fol. 82. Sir Andrew Corbet's caſe. See the firſt part of the Inſtitutes, ſect. 110. Mich. 4 E. 1. *in* Banco Rot. 118. Lincolne, a notable caſe for holding the land for the forfeit of the marriage. * Keylw. 133, 134. Hil. 4 Jac. li. 6. fol. 70, 71. Paſch. 3 Jac. l. 5. fol. 126, 127.

value, and for the ſingle value the guardein ſhall hold the land untill the heire ſatisfie him of the value, ſo as in this caſe the taking of the profits ſhall not be accounted as parcell of the value, but as a penalty to cauſe the heire to pay it the ſooner.

* But note, that neither in the writ *De valore maritagii*, nor for forfeiture of marriage, the lord ſhall not recover the land, but damages, for this act giveth no action for the land.

And the words of this branch are to be obſerved, *Cum (hæres) ad ætatem pervenerit, det domino ſuo*, whereby it appeareth that the paiment of the ſingle value is perſonally appropriated to the heire, and therefore if he dieth, it is loſt, but the clauſe concerning the double value is otherwiſe penned, as hath been obſerved.

(2) *De mero jure pertinet ad dominum feodi.*] See for the expoſition of this branch, and where a tender is requiſite, and concerning the differences between the caſe of the heire male, and of the heire female, the lord Darcies caſe, and Palmers caſe, and the firſt part of the Inſtitutes, ſect. 107. Hereunto may be added a caſe, where the lord cannot at any time ſeiſe the ward, or tender a marriage to him, and yet he ſhall have the wardſhip. Edward Hampden holding lands of the queen by knights ſervice in capite had iſſue a daughter, who *poſt annos nubiles* (viz. at twelve yeares) contracted matrimony with William Ditton, and after married with John Croke, and then the father died ſeiſed in fee of the land in capite, his daughter being of the age of thirteen yeares, and after the daughter had paſſed the age of ſixteen yeares, her marriage with Croke was diſſolved by divorce, *cauſa præcontractus*: and it was reſolved by both the chiefe juſtices upon hearing of councell learned on both ſides, that in this caſe (or the lord in the like caſe) ſhall have the wardſhip of the daughter, albeit never any ſeiſure could be made of her, nor tender of marriage to her, becauſe the marriage was never lawfull, and was after diſſolved by divorce, as it had never been, and ſhe ſhall take no advantage of her own wrong, to barre the queene or other lord of that which by law is due to them, notwithſtanding the opinion of Laicon, 35 H. 6. 40. b. that if one hold land of another by knights ſervice, and the tenant hath iſſue a daughter, which entreth into religion, and is profeſſed, and after the tenant dieth, his daughter being in religion, and within fourteen yeares, and when ſhe is of the age of fourteen ſhe is deraigned, that ſhee ſhall not be in ward. *Nota*, he ſheweth not for what cauſe ſhe was deraigned: But by the divorce, *cauſa præcontractus*, there is a nullity of the mariage, *ab initio*, and the children between them are meere baſtards.

Caſus in Cur. Wardorum. Tr. 29 Eliz.

35 H 6. 40. b.

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CAP. VIII.

DE narratione diſcenſus in brevi de recto (1) *ab anteceſſore a tempore H. regis ſenioris anno et die, proviſum eſt, quod de cætero non fiat mentio de tam longinquo tempore, ſed a tempore H. regis avi noſtri, et locum habeat iſta proviſio*

TOUCHING conveyance of deſcent in a writ of right from any anceſtor from the time of king Henry the elder, the year and day, it is provided, that from henceforth there be no mention made of ſo long time,

ejis ad Pentecoſten, anno regni domini regis nunc 21. *et non antea: et brevia prius impetrata proccdant. Brevia mortis anteceſſoris, de nativis, et de ingreſſu, non excedant ultimum redit' domini regis Johannis de Hibern' in Angliam* (2), *et locum habeat iſta proviſio, &c. ut ſupra. Brevia novæ diſſeiſinæ non excedant primam transfretationem domini regis qui nunc eſt in Vaſcon'* (3), *et locum habeat iſta proviſio a tempore prædict', et brevia prius impetrata procedant* (4). *Vide Weſt.* 1. *cap.* 38. *et* 32 *H.* 8. *cap.* 2.

time, but from the time of king Henry our grandfather; and this act ſhall take effect at Pentecoſt, the one and twentieth year of our reign, and not afore, and the writs before purchaſed ſhall proceed. Writs of mortdauncestor, of nativis, and entre, ſhall not paſs the laſt return of king John from Ireland into England; and this act ſhall take effect as before is declared. Writs of novel diſſeiſin ſhall not paſs the firſt voyage of our ſovereign lord the king, that now is, into Gaſcoine. And this proviſion ſhall take his effect from the time aforeſaid; and all writs purchaſed before ſhall proceed.

(1 Inſt. 114. b. 115. b. 3 Ed. 1. c. 39. 21 Jac. 1. c. 16.)

(1) *De narratione diſcenſus in breve de recto.*] It appeareth by Glanvill, that in the raigne of H. 2. the limitation in an aſſiſe of novel diſſeiſin, was *poſt ultimam transfretationem regis in Normaniam*, which was in the yeare of his raigne.

Glan. li. 13. c. 33. Cuſtumier de Norm. cap. 22. 110, 111. 125.

But of this limitation he ſaith, *Infra tempus à domino rege de conſilio procerum ad hoc conſtitutum, quod quandoque majus, quandoque minus cenſetur*, &c.

Idem eodem lib. cap. 32.

The limitation in the aſſiſe of mordaunc', was *poſt primam coronationem* H. 2. which was 20 Octob. 1154.

Eodem libro, c. 3.

The limitation in a writ of right before this ſtatute of Merton, was *à tempore regis* H. 1. and now by this ſtatute of Merton, *à tempore regis* H. 2. Note H. 1. began his raigne the firſt of Auguſt 1100. and H. 2. began his raigne 1154. ſo as this ſtatute of Merton did abridge the limitation in a writ of right 54 yeares, whereof Bracton ſpeaketh thus, *Quia breve de recto ſicut alia brevia infra certū tempus limitatur, non enim excedit tempus regis Henrici avi domini regis* (1 *H.* 2.) *et eſt ratio, quia ultra tempus illud* (*quod inter initium regni H.* 2. *et ſtatutum de Merton, anno* 20 *H.* 3. *eſt circiter nonginta annos*) *non poterit quis aliquid probare, licet jus habeat in re: cum nullus aliquid probare poſſit ultra tempus illud, ex quo loqui non poterit de viſu ſuo proprio, vel de viſu patris ſui, qui ei injunxit quod teſtis eſſet ſi inde audiret loqui; et unde ſi quis loqueretur de tempore Henrici regis ſenis,* (1 *H.* 1. *quod fuit circiter* 125. *annos*) *amittere poſſit propter defectum probationis.*

Bract. li. 4. fo. 373. Fleta, lib. 4. c. 5. & lib. 2. c. 38.

(2) *Brevia mortis anteceſſoris, de nativis, et de ingreſſu non excedant ultimum reditum domini regis Johannis de Hibernia in Angliam.*] King John went firſt into Ireland in the ſecond yeare of his raigne, and returned in the third yeare: In the 12 yeare of his raigne he went into Ireland againe, and returned the ſame yeare into England, and this was *ultimus reditus*, that this act ſpeaketh of, ſo as betweene the twelfth yeare of king John, and 20 H. 3. were about twenty five yeares.

(3) *Brevia novæ diſſeiſinæ non excedant primam transfretationem domini regis qui nunc eſt, viz. H.* 3. *in Vaſconiam.*]

King

King H. 3. firſt paſſage into Gaſconie, was in the fift yeare of his raigne, ſo as there exceeded not the fifteen yeares between that transfretation and this ſtatute.

Bract. l. 2. fol. 179. It appeareth by Bracton, that before this ſtatute of Merton, the limitation in a writ of aſſiſe, was *Poſt ultimum reditum domini regis de Britannia in Angliam.*

W. 1. c. 38. W. 2. c. 2. & 46. But theſe times of limitations were altered in the raigne of king Edw. 1.

Tr. 7 E. 1. in Banco Rot. 71. Hunt. And then the limitation in a writ of right was from the time of king R. 1. betweene the beginning of R. 1. and 3 E. 1. there had paſſed about eighty eight yeares.

Mich. 7 E. 1. ibid. Rot. 50. Cantab. And that the writ of aſſiſe of *novel diſſeiſin* and the writ of purparty, which is called the *nuper obiit*, ſhould have the terme of the firſt transfretation of H. 3. into Gaſcony, which as hath been ſaid, was in anno 5 H. 3.

And the writs of *Mordaunc', de Coſinage, de Aiel, de Entre, et bre. de Nieſte eyent le terme de coronement meſme le Henry*, 1 *H.* 3. which between that and this ſtatute of W. 1. was about 58 years: Note (as hath been ſaid) this king was twice crowned, firſt the 28 day of October, in the firſt yeare of his raigne, and the ſecond time on Whitſonday, in the fourth yeare of his raigne: but this ſtatute of W. 1. ſpeaking indefinitely, is to be underſtood of the firſt coronation, for *quod prius eſt tempore potius eſt jure*; And by the ſtatute of W. 2. cap. 2. in an avowry the like limitation for ſeiſin ſhall be accounted, as in the aſſiſe, which, as is aforeſaid, is *poſt primam transfretationem Regis Henrici* 3. *in Gaſconiam.*

Regula.

But albeit theſe times of limitations were reaſonable, when theſe ſtatutes were made, yet in proceſſe of time (there being ſet times appointed in former kings raignes) the times of neceſſity grew too large, whereupon many ſuits, troubles, and inconveniences did ariſe, and therefore the makers of the ſtatute of 32 H. 8. took another, and more direct courſe which might indure for ever, and that was to impoſe diligence and vigilancy in him that was to bring his action, ſo that by one conſtant law certaine limitations might ſerve both for the time preſent, and for all times to come, *viz.* That the demandant ſhould alledge ſeiſin in a writ of right not above ſixty yeares next before the teſte of his writ. In *mordaunc', coſinage, aiel, entry ſur diſſeiſin*, or other poſſeſſary action upon the ſeiſin or poſſeſſion of any of his auncеſtors or predeceſſors, of a ſeiſin within fifty years: In any action upon his or their own poſſeſſion within thirty years: In an avowry, or conuſance for any rent, ſute, or ſervice within 40 years; In a *formedon* in reverſion or remainder, or *ſcire facias* upon fines within fifty yeares; and yet this ſtatute prefixing a certain time extended not to divers caſes, which were within the auncient ſtatutes, as to accidentall ſervices, as hereafter ſhall appeare. See the firſt part of the Inſtitutes, ſect. 170.

32 H. 8. cap. 2. 1 Mar. cap. 5.

Bract. l. 4 fo. 228. Tr. 7 E. 1 Rot. 71. in Banco. Hunt. Bract. l. 2. fo 228. 1 pt. Inſt. ſect. 170. lib. 4. fol. 10. 11. lib. 7. fol. 40. lib. 8. fol. 65 & 126. (4) *Brevia prius impetrata procedant*, &c.] For the rule is, *Omnis nova conſtitutio futuris formam imponere debet, et non præteritis.* See a caſe upon this branch in 7 E. 1. Tho. de Redberwes caſe.

And albeit Bracton ſaith, that *omnes actiones in mundo infra certa tempora limitationem habent*; and in another place he ſaith, *Omnis querela et actio injuriarum limitata eſt infra certa tempora*; yet ſome actions

actions were not limited by any ſtatute, as by divers authorities quoted in the margent appeareth.

But ſomewhat more is neceſſary to be added to the former reports, and booke caſes before quoted in the margent, for the ſaid act of 32 H. 8. extends only concerning avowries to rent, ſute, or ſervice, ſo as reliefe is not within the purview of the law, for it is no ſervice but a duty, by reaſon of the tenure and ſervice*, and albeit homage, fealty, and eſcuage, and other accidentall ſervices (being ſervices) are within the letter of the law, yet they and all other accidentall ſervices, as heriot ſervice, or to cover the lords hall, and the like, for that they may not happen within the times limited by that act, are by conſtruction out of the meaning of this ſtatute of 32 H. 8. as it appeareth by the caſes quoted before: but albeit reliefe be not within this ſtatute, yet in avowry for reliefe, the avowant muſt alledge a ſeiſin of the ſervices within the auncient ſtatute, *viz. Poſt primam tranſfretat. regis Henrici in Gaſconiam*, and the ſeiſin of the ſervices is traverſable.

lib. 9. fol. 36. li. 11. fol. 68. 17 E. 3. 11. 20 E. 4. 14. Fleta, lib. 2. ca. 28. 7 E. 6. Br. avowry 96. gard 69. Bract. li. 2. fo. 52. & lib. 4. fol. 314.

* [96]

13 H. 4. fol. 6. Edw. Latimer's caſe adjudged.

And ſo it is of homage, and fealty, and eſcuage; albeit they be out of the ſtatute of 32 H. 8. yet are they within the auncient ſtatute.

And it is to be noted, that where the tenure is by homage, fealty, and eſcuage incertain, and by ſuite of court, or rent, or any other annuall ſervice, the ſeiſin of the ſute or rent, or any other annuall ſervice is a good ſeiſin of the homage, fealty, or eſcuage, or other accidentall ſervices, as wardſhip, heriot ſervice, or the like: and hereby (if you ſhall heedfully peruſe over the reports and book caſes before quoted) you ſhall underſtand the ſame the better.

7 E. 6. tit. gard. Br. 69. Avowr. 96. 31 E. 3. gard. fol. 118.

By this act it is declared, that the ſaid act of 32 H. 8. ſhall not extend to writs of right, of advowſon, *quare impedit*, aſſiſe of *darrein preſentment*, or *jure patronatus*, nor to any writ of right of ward, writ of raviſhment of ward, for the body or land holden by knights ſervice, but that theſe actions may be maintained, as they might have been before the making of the ſaid act of 32 H. 8.

1 Mar cap. 5. 17 E. 3. fol. 11. a. in Quare imped.

And ſeeing perſonall actions are at this day more frequent, then they have been in times paſt, it were to be wiſhed for eſtabliſhment of quiet, and avoiding of old ſuits, that Bractons rules by ſome new proviſion extended to them alſo, and that they were limited within ſome certain time.

Since we wrote this commentary, there is a good ſtatute made concerning certain perſonall actions, in *anno* 21 *Jacobi regis*, ca. 16. and therein a limitation ſet down in the formedon in diſcender, formedon in remainder, and formedon in reverter.

CAP. IX.

AD breve regis de baſtardia, utrum aliquis natus ante matrimonium habere poterit hæreditat', ſicut ille qui natus eſt poſt matrimonium, reſponderunt omnes epiſcopi, quod nolunt nec poſſunt ad iſtud breve reſpondere, quia hoc

TO the king's writ of baſtardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the biſhops anſwered, that they would not, nor could not, an-

hoc eſſet contra communem formam eccleſiæ (1). *Et rogaverunt omnes epiſcopi magnates, ut conſentirent, quod nati ante matrimonium eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium, quantum ad ſucceſſionem hæreditariam, quia eccleſia tales habet pro legitimis. Et omnes comites et barones una voce reſpon erunt, quod nolunt leges Angliæ mutare, quæ hucuſque uſitatæ ſunt et approbatæ* (2).

ſwer to it; becauſe it was directly againſt the common order of the church. And all the biſhops inſtanted the lords, that they would conſent, that all ſuch as were born afore matrimony ſhould be legitimate, as well as they that be born within matrimony, as to the ſucceſſion of inheritance, forſomuch as the church accepteth ſuch for legitimate. And all the earls and barons with one voice anſwered, that they would not change the laws of the realm, which hitherto have been uſed and approved.

See the firſt part of the Inſtitutes, ſect. 399, 400. & 188. (Fitz. Baſtardy, 21, 22. 25. 27, 28. 30, 33. 1 H. 6. 3. 11 H. 4. 84. 39 Ed. 3. 14. 44 Ed. 3. 12. 12 Rep. 72.)

Vide Decret. Gregorii 9. fol. 26c. col. 1.

* [97]

(1) *Contra communem formam eccleſiæ*, &c.] For the better underſtanding of this branch, it is to be known, that in the time * of pope Alexander the third, (who lived *anno Domini* 1160, which was *anno* 6 H. 2.) this conſtitution was made, that children borne before ſolemnization of matrimony, where matrimony followed, ſhould be as legitimate to inherit unto their auncеſtors, as thoſe that were borne after matrimony, and thereupon the ſtatute ſaith, *Eccleſia tales habet pro legitimis.*

Glanv. li. 7. c. 15.

Of this canon, or conſtitution Glanvill writeth thus, *Orta eſt quæſtio, ſi quis antequam pater matrem ſuam deſponſaverat fuerit genitus vel natus, utrum talis filius ſit legitimus hæres, cum poſtea matrem ſuam deſponſaverat: Et quidem licet ſecundum canones et leges Romanas talis filius ſit legitimus hæres, tamen ſecundum jus et conſuetudinem regni nullo modo tanquam hæres in hæreditate ſuſtinetur, vel hæreditatem de jure regni petere poteſt.*

Bract li. 5. fo. 416, 417. Fleta, l. 6. c. 38. Fortescue c. 39. 11 Aſſ. p. 20.

And herewith doe agree not onely other auncient authors, but the conſtant opinion of the judges in all ſucceſſion of ages ever ſince, of the auncient law of England. Hereupon theſe two concluſions doe follow:

1. That any forein canon or conſtitution made by authority of the pope, being (as Glanvill ſaith) *Contra jus et conſuetudinem regni*, bindeth not untill it be allowed by act of parliament, which the biſhops here prayed it might have beene; for no law, or cuſtome of England can be taken away, abrogated, or adnulled, but by authority of parliament.

4 E. 1. Stat. de Bigamis, c. 9. ſimile.

2. That although the biſhops were ſpirituall perſons, and in thoſe dayes had a great dependency on the pope, yet in caſe of generall baſtardy, when the king wrote to them to certifie, who was lawfull heire to any lands, or other inheritance, they ought to certifie according to the law, and cuſtome of England, and not according to the Romane canons, and conſtitutions, which were contrary to the law, and cuſtome of England, wherein the biſhops ſought at this parliament to be relieved.

Glanv. ubi ſupra.

See the firſt part of the Inſtitutes, ſect. 399, & 400. and adde thereunto:

Aſſiſa venit, &c. Si Nicholaus de Lewkenor pat' Thom' de Lewke-

nor

*nor fuit ſeiſitus, &c. de manerio de Southmyms quod Rogerus de Lewke-nor tenet, qui dicit quod ipſe eſt frater ipſius Thomæ antenatus de eodem patre, & eadem matre, & eſt ſeiſitus de prædictis tenementis, & clamat per eundem diſcenſum, et petit judiciū. Thom' dic' quod Rogerus non poteſt clamare per eundē deſcenſum, quia dicit quod idem Rogerus natus fuit extra ſponſalia, &c. Et quia idem Tho' non poteſt dicere, quin idem Rogerus ſit frater ipſius Tho' antenatus de eodem patre, & eadem matre, & poſt mortem prædicti Nicholai patris, &c. intravit in eiſdem tenementis ut filius ejus & hæres, * conſideratum eſt quod prædictus Rogerus ind' ſine die. Et Tho. Nich. cap' per aſſiſam, et ſit in miſericordia, &c.*

Paſch. 18 E. 1. in Banco Rot. 80. Mid. in Aſſ. de Mordaunc'.

Note by this judgment, that the baſtard eigne to this intent is accounted heire, and of the blood with the mulier puiſne, as the mulier puiſne cannot have an aſſiſe of mordaunc' againſt him.

Vide Mic. 15 E. 1. in Banc. Rot. 129. Hertf. Tr. 15 E. 1. ibid. Rot. 60. Not.

We remember not that we have read in any book of the legitimation, or adoption of an heire, but onely in Bracton, lib. 2. cap. 29. fol. 63. b. and that to no little purpoſe; but the ſureſt adoption of an heire, is by learned advice, to make good aſſurance of the land, &c.

* Judgement.

(2) *Et omnes comites, et barones, una voce reſponderunt quod nolunt leges Angliæ mutare quæ hucuſque uſitatæ ſunt et approbatæ.*] The nobility of England have ever had the laws of England in great eſtimation and reverence, as their beſt birth-right, and ſo have the kings of England as their principall royalty and right belonging to their crown and dignity: this made king H. 1. that noble king ſirnamed Beauclerk, to write to pope Paſcall, *Notum habeat ſanctitas veſtra, quod me vivente (auxiliante Deo) dignitates et uſus regni noſtri Angliæ non imminuentur, et ſi ego (quod abſit) in tanta me dejectione ponerem, optimates mei et totus Angliæ populus id nullo modo pateretur.*

See the firſt part of the Inſtitutes, ſect. 400.

Chart. Hen. 1.

And it is worthy the obſervation, how dangerous it is (as elſewhere hath been often noted) to change an ancient maxime of the common law.

Some have written, that William the Conquerour being borne out of matrimony, Robert his reputed father did after marry Arlot his mother, and that thereby he had right by the civil and canon law, but that is *contra legem Angliæ*, as here it appeareth. And during this parliament in the 20 yeare of H. 3. it may be collected by the 23. and 24. epiſtles of Robert Groſtead then biſhop of Lincoln, directed to William Rawleighe (prieſt) then one of the kings juſtices, that this matter to bring the *nati ante matrimonium* to be made legitimate was vehemently laboured by the clergie: and in the 26. epiſtle to the biſhop of Canterbury, he findeth fault with the arch-biſhop, for that the king and his councell had reſolved that the law and cuſtome of the realme in this point ſhould continue ſtill: whereby it appeareth, that not onely the nobles, but the king himſelfe was againſt it.

William Malmſ. lib. 3. circa initiū Ingulphus, lib. 6. cap. 19. See the Cuſtumer de Nor. ca. 27. fo. 42 & 44.

And in the letters, which all the nobilitie of England by aſſent of the whole cominalty aſſembled in parliament at Lincoln wrote to pope Boniface, it is thus conteyned, *Ad obſervationem et defenſionem libertatum, conſuetudinum, et legum paternarum ex debito præſtiti ſacramenti aſtringimur, quæ manutenebimus toto poſſe, totiſque viribus cum dei auxilio defendemus, nec etiam permittimus aut aliquatenus permittemus, ſicut nec poſſumus nec debemus præmiſſa tam inſolita, indebita, præjudicialia, et alias inaudita dominum noſtrum regem, etiam ſi vellet, facere,*

Rot. Par. 28 E. 1. apud Lincoln.

Jus coronæ.

cere, seu quomodolibet attemptare: (and there the inconveniences are set down,) *præcipue cum præmissa cederent manifeste in exheredationem juris coronæ regis Angliæ et regiæ dignitatis, ac subversionem status ejusdem regni notoriam, nec non in præjudicium libertatum, consuetudinum, et legum paternarum.* Sealed by the severall seales of armes of 104. earles and barons, and in the name of all the comminalty of England. And to that effect king E. 1. wrote also to the pope.

Leges Angliæ.] Here our common lawes are aptly and properly called the lawes of England, because they are appropriated to this kingdome of England as most apt and fit for the government thereof, and have no dependancy upon any forreine law whatsoever, no not upon the civill or cannon law other then in cases allowed by the laws of England, as partly hath been touched before: and therefore the poet spake truly hereof, *Et penitus toto divisos orbe Brittannos*: so as the law of England is *proprium quarto modo* to the kingdome of England; therefore forrein precedents are not to be objected against us, because we are not subject to forrein lawes.

And it is a note worthy of observation, that where at the holding of this parliament in *anno* 20 H. 3. and before, and some time after, many of the judges and justices of this realme were of the clergy, as bishops, deanes, and priests, and all the great officers of the realme, as lord chancellor, treasuror, privy seale, president, &c. were for the most part of the clergy; yet even in those times the judges of the realme, both of the clergy and laity, did constantly maintaine the lawes of England, so as no incroachment was made upon them or breach unto them by any forreine power, as partly hath been shewed in Caudries case: and many more judgements and authorities in law might be produced for the manifestation thereof: see the first part of the Institutes, many of the clergy judges and justices of the realme of ancient time.

Lib. 5. fo. 1. &c. Caudries case. 1 part of the Institutes, § 534.

Et rogarunt omnes episcopi magnates ut consentirent, &c.] Here was the motion and request, but Bracton saith, *Rogarunt regem et magnates: et omnes comites et barones una voce responderunt, Nolumus leges Angliæ mutare,* &c. for so it is in ancient manuscripts.

Bracton, lib. 5. fo. 416, 417.

This is the first of this kind, that we remember, that hath been printed, for it is to be understood that by the parliamentary order all motions and petitions made (as this was) though they were denied, and never proceeded to the establishment of a statute, yet the same were entered into the parliament roll together with the answers thereunto: but this is the first of this kinde (as hath been said) that hath been printed.

See the last clause of Merton the like. 52 Ass. p. 20.

And yet in our books this is called a statute, for Sir Galfred le Scrope chiefe justice saith, before the statute of Merton the party pleaded not generall bastardy, but that he was borne out of espousals; and the bishop ought to certifie whether he were borne before espousals or not, and according to that certificate to proceed to judgement according to the law of the land: and the prelates answered that they could not to this writ answer, and therefore ever since special bastardy (viz. that the defendant, &c. was borne before espousals) have been tried in the kings courts, and generall bastardy in court christian; and herewith agreeth our old books and the constant opinion of the judges ever since.

Bract. li. 5. fo. 416. Fleta, li. 6. ca. 38. 47 Ass. 3. 14. 21 E. 3. 49. 43 ass. 46. 46 E. 3. 24.

Now for that this point was resolved in parliament, it is here in a large sense called a statute.

CAP.

CAP. X.

PROVISUM eſt inſuper, quod quilibet liber homo (4), *qui ſectam debet* (1) *ad comitatum, trithingum* (2), *hundredum et wapentagium* (3), *vel ad curiam domini ſui, libere poſſit facere attornatum* (5) *ſuum, ad ſectas illas pro eo faciendas* (6).

IT is provided and granted, that every freeman, which oweth ſuit to the country, trything, hundred, and wapentake, or to the court of his lord, may freely make his attorney to do thoſe ſuits for him.

(Fitz. Attorney, 106. Regiſt. 172. F. N. B. 156, &c.)

(1) *Sectam debet.*] *Nota*, There be two kinds of ſuits, viz. ſuit reall, that is, in reſpect of his reſiance to a leet or tourne: and ſuit ſervice, that is, by reaſon of a tenure of his land of the county, hundred, wapentake, or mannor whereunto a court baron is incident: before this act every one that held by ſuit ſervice ought to appeare in perſon, becauſe the ſuiters were judges in thoſe courts, otherwiſe he ſhould be amercied, which was miſchievous, for it might be, that he had lands within divers of thoſe ſeigniories, and that the courts might be kept in one day, and he could be but in one place at one time: but this ſtatute extends not to ſuit reall, becauſe he cannot be within two leets, &c.

41 E. 3. Avowry 77. Vid. Gloc. c. 8. W. 2. cap. 10.

(2) *Trithingum or trithinge.*] Here it ſignifieth a court which conſiſteth on three or foure hundreds, and doth not here ſignifie a leet or view of frankpledge.

Lamb. int. leges Ed. regis, nu. 34. Magna Cart. c. 35. Temps E. 1. Attorn, 106. Regiſt. 172. 23 E. 3. cap. 4. F N.B. 156.

(3) *Wapentagium.*] That, which in ſome countries is called a hundred court, in ſome countries is called a wapentake. * *Quod Angli vocant hundredum ſupradicti comitatus vocant wapentagium.* Now the reaſon of the name was this: when any on a certaine day and place took upon him the government of the hundred, the free ſuiters met him with launces, and he deſcending from his horſe, all roſe up to him, and he holding his launce upright, all the reſt, in ſigne of obedience, with their launces touched his launce or weapon: for the Saxon word *wapen*, is weapon, and *tac*, is *tactus*, or touching: and thereof this aſſembiie was called wapentake, or touching of weapon.

* Lam. verbo centuria int. leges Ed. regis, nu. 33. Bracton, lib. 3. Mirror, cap. 5. § 3.

Now albeit he that holdeth by ſuit ſervice may make an attorney, yet that attorney cannot ſit as judge, as the free ſuiter himſelfe might doe, for he cannot depute another in his judiciall place; and the words of the ſtatute be, *Libere poſſit facere attornatum ad ſectas illas pro eo faciendas.*

(4) *Liber homo.*] This doth extend to free-holders in ancient demeſne, but not to copie-holders.

Temps E. 1. Attorny 106.

(5) *Facere attornatum.*] He muſt make a letter of attorney under his ſeale, which the ſteward ought to allow; and if he doe not, the ſuiter may have a writ out of the chancery for the allowance of him: or if he doubted that he ſhould not be allowed, he might have a writ before-hand to receive him as attorney: and ſuch a writ ſhall ſerve during the life of the tenant, &c. for the words of another writ be, *Et quia virtus brevium noſtrorum de hujuſmodi attornato*

F.N.B. 156. E. W. 1. cap. 33.

F.N.B. 157.

attornato faciendo terminum non capit, nec terminus limitatur durantibus perſonis, &c.

W. 1. cap. 33. Cuſtumier de Norm. cap. 65.

What ſuch an attorney may doe, and who cannot be attorney, ſee the ſtatute of W. 1.

(6) *Ad ſectas i las pro eo faciendas.*] So as by force of this act he may doe ſuch ſuit, as the free-holder ought to doe.

See the Regiſter 19. This act extendeth to juſtices in eire.

CAP. XI.

DE malefactoribus in parcis, et vivariis (1) *nondum eſt diſcuſſum, quia magnates petierunt propriam priſonam* (2) *de illis, quos caperent in parcis, et vivariis ſuis. Quod quidem dominus rex contradixit, et ideo differtur.*

CONCERNING treſpaſſes in parks and ponds it is not yet diſcuſſed; for the lords demanded the proper impriſonment of ſuch as they ſhould take in their parks and ponds, which the king denied; wherefore it was deferred.

(1) *Vivarium.*] Is a word of a large extent, and *ex vi termini* ſignifieth a place in land or water, where living things be kept. Moſt commonly in law it ſignifieth parks, warrens, and piſcharies or fiſhings; here it is taken for warrens and fiſhings, for that parks were named before.

(2) *Propriam priſonam.*] This petition of the lords in parliament ſtood upon three branches: 1. That they might impriſon ſuch as they ſhould take in their parks or vivaries, which ſeemed to be againſt the 29 chapter of *Magna Charta.* 2. That they ſhould have *propriam priſonam*, a priſon of their owne, which no ſubject can have; for all priſons or gaoles are the kings priſons or gaoles, but a ſubject may have the cuſtodie or keeping of them. 3. That they ſhould not be impriſoned in the common gaole. All which *dominus rex contradixit.*

See the like before, cap. 9.

STATUTUM

STATUTUM DE MARLEBRIDGE.

Editum 52 *H. III. Anno gratiæ* 1267.

Marlebridge.] Now called *Marleborough*, a town in Wiltſhire, the greateſt fame whereof is the holding of this parliament there. *Henricus vero, &c. Concilium convocavit Marlebrigium, quod eſt pagus celebris comitatus Wilceriæ, qui in eo conventu primum leges ab ſe latas, & præſertim Magnæ Chartæ de concilii ſententia approbandas, deinde alias condendas curavit, quæ ad ſtatum et commodum regni maxime conducerent.* Polyd. Virg. p. 314, 20.

This towne in our books is called a citie, and the freemen thereof citizens. 39 E. 3. fo. 15.

52 H. 3.] This king raigned longeſt of any king ſince the conqueſt, or before, that we remember; for he raigned 56 yeares. But the great and famous queene Elizabeth was of greater yeares then any of her progenitors, for ſhe attained neere to 70 yeares. So king H. 3. raigned longeſt, and queen Eliz. lived longeſt. She raigned the yeares of the emperour Auguſtus, and lived the yeares of king David.

ANNO gratiæ M. CC. LXVII. regni autem domini Henrici filii regis Johannis quinquageſimo ſecundo, in octabis S. Martini, providente ipſo domino rege, ad regni ſui Angliæ melioracionem, et exhibitionem juſtitiæ (prout regalis officii expoſcit utilitas) pleniorem, convocatis diſcretioribus ejuſdem regni, tam majoribus quàm minoribus: proviſum eſt et ſtatutum, ac concordatum et ordinatum, ut cum regnum Angliæ multis tribulationibus et diſſentionum incommodis nuper eſſet depreſſum, reformatione legum et jurium (quibus pax et tranquillitas incolarum conſervetur) indigeat, ad quod remedium ſalubre per ipſum regem et ſuos fideles oportuit adhiberi: proviſiones, ordinationes, et ſtatuta ſubſcripta, ab omnibus regni ipſius incolis, tam majoribus quàm minoribus, firmiter et inviolabiliter temporibus perpetuis ſtatuerit obſervari.

IN the year of grace, one thouſand two hundred ſixty ſeven, the two and fiftieth year of the reign of king Henry, ſon of king John, in the Utas of St. Martin, the ſaid king our lord providing for the better eſtate of his realm of England, and for the more ſpeedy miniſtration of juſtice, as belongeth to the office of a king, the more diſcreet men of the realm being called together, as well of the higher as of the lower eſtate: it was provided, agreed, and ordained, that whereas the realm of England of late had been diſquieted with manifold troubles and diſſenſions; for reformation whereof ſtatutes and laws be right neceſſary, whereby the peace and tranquillity of the people muſt be obſerved: wherein the king, intending to deviſe convenient remedy, hath made theſe acts, ordinances, and ſtatutes underwritten, which he willeth to be obſerved for ever firmly and inviolably of all his ſubjects, as well high as low.

This generall preamble to all the ſtatutes of Marlebridge doth conſiſt on foure parts.

1. The end wherefore theſe ſtatutes were made, for *ſapiens incipit a fine*, and that is two fold; 1. *ad meliorationem regni Angliæ.* 2. *Ad exhibitionem juſtitiæ (prout regalis officii expoſcit utilitas) pleniorem.*

2. Of what numbers this parliament conſiſted, *convocatis diſcretioribus ejuſdem regni, tam majoribus, quàm minoribus.*

3. What was the cauſe of calling this parliament, *cum regni Angliæ multis tribulationibus et diſſentionum incommodis nuper eſſet depreſſum.* The many fearfull and dangerous troubles and diſſentions between the king and his barons, which I had rather you ſhould reade in hiſtory, then I ſhould relate, grew originally out of this root, that the king ſometimes allowed, and ſometimes diſallowed *Magna Charta*, and *Charta de Foreſta.*

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4. What ſhould be the remedy that peace and tranquillity might enſue. *Ut cum regnum &c. reformatione legum et jurium quibus pax et tranquillitas incolarum conſervetur indigeat, ad quod remedium ſalubre per ipſum regem et ſuos fideles proviſiones, ordinationes, et ſtatuta ſubſcripta, ab omnibus regni ſuis incolis tam majoribus quam minoribus firmiter et inviolabiliter temporibus perpetuis ſtatuerit obſervari.*

This remedy that ſhould for ever in all future times be inviolably obſerved, conſiſted upon two parts.

1. For eſtabliſhing of *Magna Charta*, and *Charta de Foreſta*, whereof more ſhall be ſaid when we come to the firſt chapter. In the meane time, this is to be obſerved, that after this parliament neither *Magna Charta*, nor *Charta de Foreſta*, was ever attempted to be impugned or queſtioned: whereupon peace and tranquillity, whereof this preamble ſpeaketh, have ever ſince enſued.

2. For enacting of new lawes, or declaring of old, with addition of great puniſhment.

CAP. I.

CUM autem tempore turbationis nuper in regno Angliæ ſubortæ, et deinceps multi magnates et alii juſtitiam indignati fuerint recipere per dominum regem, et curiam ſuam, prout debuerunt, et conſueverunt temporibus prædeceſſorum ipſius domini regis, et etiam tempore ſuo: ſed de vicinis ſuis, et aliis per ſeipſos graves ultiones fecerint, et diſtrictiones, quouſque redemptiones reciperent ad voluntatem ſuam. Et præterea quidam eorum, ſe per miniſtros domini regis juſticiari non permittant, nec ſuſtineant quod per ipſos liberentur diſtrictiones, quas authoritate propria fecerint

WHEREAS at the time of a commotion late ſtirred up within this realm, and alſo ſithence, many great men, and divers other, refuſing to be juſtified by the king and his court, like as they ought and were wont in time of the king's noble progenitors, and alſo in his time; but took great revenges and diſtreſſes of their neighbours, and of other, until they had amends and fines at their own pleaſure; and further, ſome of them would not be juſtified by the king's officers, nor would ſuffer them to make delivery of ſuch diſtreſſes as they

fecerint ad voluntatem ſuam. Proviſum eſt, concordatum et conceſſum, quod tam majores, quam minores, juſtitiam habeant et recipiant (1), *in curia domini regis* (2). *Et nullus de cætero ultiones, aut diſtrictiones faciat per voluntatem ſuam* (4), *abſque conſideratione curiæ domini regis* (3), *ſi forte dampnum vel injuria ſibi fiat, unde emendas habere voluerit de* aliquo *vicino ſuo, ſive majore ſive minore. Super articulo autem ſupradicto proviſum eſt et conceſſum, quod ſi quis de cætero ultiones hujuſmodi capiat per voluntatem ſuam* propriam *abſque conſideratione curiæ domini regis (ut prædictum eſt) et inde convincatur, puniatur per redemptionem* (5), *et hoc ſecundum quantitatem delicti. Et ſimiliter* * *ſi vicinus ſuper vicinum ſuum faciat diſtrictionē ſine conſideratione curiæ domini regis, per quod dampnum habeat, puniatur eodem modo, et hoc ſecundum quantitatem delicti. Et nihilominus fiant emendæ plene et ſufficienter eis, qui dampna ſuſtinuerunt per hujuſmodi diſtrictionem.*

they had taken of their own authority: it is provided, agreed, and granted, that all perſons, as well of high as of low eſtate, ſhall receive juſtice in the king's court; and none from henceforth ſhall taken any ſuch revenge or diſtreſs of his own authority, without award of our court, though he have damage or injury, whereby he would have amends of his neighbour either higher or lower. And upon the foreſaid article it is provided and granted, that if any from henceforth take ſuch revenges of his own authority, without award of the king's court (as before is ſaid) and be convict thereof, he ſhall be puniſhed by fine, and that according to the treſpaſs. And likewiſe if one neighbour take a diſtreſs of another without award of the king's court, whereby he hath damage, he ſhall be puniſhed in the ſame wiſe, and that after the quantity of treſpaſs. And nevertheleſs ſufficient and full amends ſhall be made to them that have ſuſtained loſs by ſuch diſtreſſes.

(Mert. cap. 11. 12 Rep. 13. 11 H. 4. 2. 17 Ed. 3. 9. 2 Inſt. 162.)

This firſt chapter conſiſteth of a preamble, and the body of the act.

The preamble ſhews the miſchiefs, which were foure.

1. That in the time of the late troubles, great men and others refuſed to be juſtified by the king and his court, as they ought, for here it is ſaid, *multi magnates et alii indignati fuerint recipere juſtitiam per dominum regem, et curiam ſuam.*

2. *Sed graves ultiones fecerint*, That they (refuſing the courſe of the kings lawes) tooke upon them to be their owne judges in their owne cauſes, and to take ſuch revenges as they thought fit, untill they had ranſomes at their pleaſures. *Aliquis non debet eſſe judex in ſua propria cauſa.* *Regula.*

3. That ſome of them would not be juſtified by the kings officers.

4. Nor would ſuffer them to make delivery of ſuch diſtreſſes, as they had taken of their owne authority at their pleaſure. Here you may ſee the defects of a diſordered and troubled ſtate.

The body of the act conſiſteth of divers branches.

Firſt, a remedy in generall for all the ſaid miſchifes.

(1) *Proviſum eſt, concordatum, et conceſſum, quod tam majores quam minores, juſtitiam habeant et recipiant in curia domini regis.*] This is the golden met wande, that the law hath appointed to meaſure the caſes

8 H. 4. 19. Gasc. 24 H. 8. cap. 12. 25 H. 8. cap. 21.

caſes of all and ſingular perſons, high and low, to have and receive juſtice in the kings courts; for the king hath diſtributed his judiciall power to ſeverall courts of juſtice, and courts of juſtice ought to determine all cauſes, and that all private revenges bee avoided.

Upon this generall law, foure concluſions doe follow.

1. That all men, high and low, *muſt* be juſtified, that is, have and receive juſtice in the kings courts of juſtice.

See cap. Itineris, Artic. ult.

2. That no private revenge be taken, nor any man by his owne arme or power revenge himſelfe: and this article is grounded upon the law of God, *vindicta eſt mihi et ego retribuam*, ſaith Almighty God. All revenge muſt come from God, or from his lieutenant the king, in ſome of his courts of juſtice.

3. That all the ſubjects of the realme ought to be juſtified, that is, ſubmit themſelves to the kings officers of juſtice according to law.

4. That they ought to ſuffer replevies to be made according to the law, to the end that men may poſſeſſe their horſes, beaſts, and other cattle and goods in peace, whereof they have ſo great and continuall uſe. See hereafter cap. 4.

(2) *In curia domini regis.*] Theſe words are of great importance, for all cauſes ought to be heard, ordered, and determined before the judges of the kings courts openly in the kings courts, whither all perſons may reſort; and in no chambers, or other private places: for the judges are not judges of chambers, but of courts, and therefore in open court, where the parties councell and attorneys attend, ought orders, rules, awards, and judgements to be made and given,

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and not in chambers or other private places, where a man may loſe his cauſe, or receive great prejudice, or delay in his abſence for want of defence. Nay, that judge that ordereth or ruleth a cauſe in his chamber, though his order or rule be juſt, yet offendeth he the law, (as here it appeareth) becauſe he doth it not in court. And the opinion is good, and agreeable to this law, *qui aliquid ſtatuerit parte inaudita altera, æquum licet ſtatuerit, haud æquus fuerit:* Neither are cauſes to be heard upon petitions, or ſuggeſtions and references, but *in curia domini regis.*

Seneca.

(3) *Et nullus de cætero ultiones aut diſtrictiones faciat per voluntatem ſuam abſque conſideratione curiæ domini regis.*] The firſt clauſe was affirmative: this clauſe, for the more ſurety, is in the negative.

(4) *Diſtrictiones faciat per voluntatem ſuam.*] That is, taking diſtreſſes not according to the law, as for ſervices, rents, or for damage feſaunt, or for other lawfull cauſe, but for revenge without cauſe, of his owne head and will, that is, to be his owne judge and carver, to ſatisfie himſelfe without any lawfull meane or courſe of law, and ſo it is to be underſtood through this whole chapter: for this chapter is to be underſtood *de ultionibus*, of revenges, which are of two natures, 1. perſonall, as by combat, impriſonment, and the like: 2. By diſtreſſes, that is, revengefull taking of goods. Concerning takings in nature of diſtreſſes, proviſion is made in the next three chapters.

1 part Inſtitutes, ſect. 194. Here, cap. 4.

(5) *Puniatur per redemptionē.*] For this word *(redemptio)* and the ſignification thereof, ſee the firſt part of the Inſtitutes, ſect. 194.

CAP.

CAP. II.

NULLUS insuper major (1) *vel minor distringat aliquem ad veniendum ad curiam suam, qui non sit de feodo suo, aut super ipsum non habeat jurisdictionem per hundredum*, wapentagium, *vel balivam* (2), quæ sua sit *nec districtiones faciat extra feodum suum, seu locum ubi balivam habeat, vel jurisdictionem. Et qui contra hoc statutum fecerit, puniatur eodem modo, et hoc secundum delicti quantitatem, et etiam qualitatem.*

MOREOVER, none (of what estate soever he be) shall distrain any to come to his court, which is not of his fee, or upon whom he hath no jurisdiction, by reason of hundred, or bailiwick; nor shall take distresses out of the fee or place where he hath no bailiwick or jurisdiction: and he that offendeth against this statute, shall be punished in like manner, and that according to the quantity and quality of the trespass.

(Fitz. Barre, 281.)

(1) *Nullus insuper major, &c.*] This chapter concerning distresses enacteth three things: 1. That no man shall distreine any to come to his court but such as be within his fee: this is intended of suit service in respect of a seigniory, and not of suit reall in respect of resiance. 2. Or that he hath jurisdiction by hundred, wapentake, or bayliwick. 3. That he shall not take distresses out of his fee or place where he hath a bailiwick or jurisdiction.

Fleta, li. 2. ca. 40. W. 1. cap. 16. Here, cap. 15. Artic. cler. c. 6. Artic. super cart. cap. 12.

This chapter is a declaration of the common law, saving for the penaltie hereby inflicted; and therefore if A. distreine B. and in a replevie A. avow as lord for rent or service, B. plead *hors de son fee*, and it is found for B. A. shall not in this replevy be punished by ransome, &c. according to this act, but hee must have an action upon this statute, *et sic de similibus*.

41 E. 3. 26. 47 E. 3. 7.

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Regist. 97. 4 E. 3. 1. 19 E. 3 Barre 281. 19 E. 2. breve 842.

(2) *Infra balivam.*] Here *baliva* is well expounded by the statute it selfe, for it signifieth here jurisdiction, and therefore it is here said, *infra balivam seu jurisdictionem*.

11 R. 2. Avow. 87. 18 E. 2. Action sur le stat. 85. F.N.B. 89, 90.

CAP. III.

SI quis autem major vel minor permittere noluerit liberari per ministros domini regis, secundum legem et consuetudinem regni, districtiones quas fecerit: aut etiam sustinere noluerit summonitiones, attachiamenta, executiones judiciorum curiæ domini regis fieri secundum legem et consuetudinem regni ut prædict' est *puniatur modo prædicto*,

IF any, of what estate soever he be, will not suffer such distresses as he hath taken, to be delivered by the king's officers, after the law and custom of the realme, or will not suffer summons, attachments, or executions of judgments given in the king's court, to be done according to the law and custom of the realm, as is aforesaid,

prædicto, tanquam se justiciari non permittens, et hoc secundum delicti quantitatem. Et si quis major vel minor districtiones faciat super tenentem suum pro servitiis et consuetudinibus, quæ sibi deberi dicat, vel pro re altera, unde ad dominum feodi pertineat districtiones facere, et postea convincat', quod tenens ea sibi non debeat: non ideo puniatur dominus per redemptionem, ut in supradictis casibus, si permittat districtiones deliberari secund' legem et consuetudin' regni, sed amercietur, velut hactenus consuetum est, et tenens dampna sua recuperet versus eum.

aforesaid, he shall be punished in manner aforesaid, as one that will not obey the law, and that according to the quantity of the offence. And if any, of what estate soever he be, distrain his tenant for services and customs being due unto him, or for any other thing, for the which the lord of the fee hath cause to distrain, and after it is found that the same services are not due, the lord shall not therefore be punished by fine, as in the cases aforesaid, if he do suffer the distresses to be delivered according to the law and custom of the realm; but shall be amerced as hitherto hath been used, and the tenant shall recover his damages against him.

W. 1. cap. 17. (Bro. Trespass, 16, 384. 5 H. 7. c. 9.)

This chapter consisteth on three branches.

Regist. 97. 1. That all of what estate soever, shall suffer such distresses as have been taken to be delivered by the kings officers after the law and custome of the realme. But if any will not suffer them to be delivered, it is no good returne for the sheriffe to say, that he was resisted, for he may take *posse comitatus*.

2. That all shall suffer summons, attachments, or executions of judgements in the kings court, &c.

44 E. 3. 20. li. 4. fol 11. Bevils case. li. 9. fo. 76. Combes case. 3. If the lord distrein his tenant for customes, services, or any other duty, which the lord alledged to be behinde, if it be found that it is not behinde, *non puniatur dominus per redemptionem, &c.* But at the common law an action of trespasse *vi et armis* in that case did lie.

This branch is interpreted that the lord shall pay no fine, and therefore since this act by a consequent no action of trespasse *quare vi et armis* lieth against the lord in this case, for then he should pay a fine.

41 E. 3. 26. 44 E. 3. 13. 28 E. 3. 97. 8 E. 4. 15. 10 E. 4. 7. 20 E. 4. 3. 21 E. 4. 3. 2 H. 4. 4. 11 H. 4. 78. 1 H. 6. 6. 9 H. 7. 14. Combes case. ubi supra. 9 H. 6. 20. 44 E. 3. 13. 19 R. 2. Heriot 5. The former chapters inflict punishment, where the distresse is unlawfull, for that he that distrained had no seigniory or jurisdiction at all, or distrained out of his fee or jurisdiction, &c. But in this last branch, he which distrained had a lawfull seigniory, and distrained within his fee and seigniory, and so this case differeth from the other, (although in truth nothing was behinde.) But this * is to be intended where the lord himselfe doth distrain; for if his baylie take a distresse, where nothing is behinde, there an action of trespasse, *quare vi et armis* lieth against him, because the baylie is not *dominus*; and so it is against a guardien in socage. And if the lord himselfe doth cut any wood, or break the house, or feed the ground of his tenant, or the like, which he doth not in respect of his seigniory, there an action of trespasse, *quare vi et armis* lieth against him, for he doth not these things as *dominus*.

And

And *(dominus)* in this act is extended to the leſſor upon a leaſe for life, or for yeares made, for the leſſee for yeares ſhall doe fealty alſo; but if the leſſor put out the leſſee for yeares, or diſſeiſe the tenant for life, or doe any act, not as *dominus*, the leſſee ſhall have an action of treſpaſſe againſt him, *vi et armis*.

48 E. 3. 5, 6. 28 E. 3. 97. 38 E. 3. 33. 5 H. 7. 10.

CAP. IV.

NULLUS de cætero faciat ducere diſtrictiones quas fecerit extra comitatum in quo captæ fuerint. Et ſi vicinus hoc fecerit ſuper vicinum ſuum, et per voluntatem ſuam, et ſine judicio, puniatur per redemptionem ut ſupra, veluti de re facta *contra pacem. Veruntamen ſi dominus hoc ſuper tenentem ſuum facere præſumpſerit, caſtigetur per gravem miſericordiam. Diſtrictiones inſuper ſint rationabiles, et non nimis graves. Et qui diſtrictiones fecerint irrationabiles, et indebitas, graviter amercientur propter exceſſum (1) diſtrictionum ipſarum.* Vide ſtatut. anno 1 & 2 Phil. & Mar. cap. 13.

NONE from henceforth ſhall cauſe any diſtreſs that he hath taken, to be driven out of the county where it was taken; and if one neighbour do ſo to another of his own authority, and without judgement, he ſhall make fine (as above is ſaid) as for a thing done againſt the peace: nevertheleſs, if the lord preſume ſo to do againſt his tenant, he ſhall be grievouſly puniſhed by amerciament. Moreover, diſtreſſes ſhall be reaſonable, and not too great. And he that taketh great and unreaſonable diſtreſſes, ſhall be grievouſly amerced for the exceſs of ſuch diſtreſſes.

W. 1. c. 16. (Fitz. Bar. 120, 275. 29 Ed. 3. c. 23. Kel. 50. 1 & 2 P. & M. c. 12. 28 Ed. 1. ſtat. 3. c. 12.)

This chapter emptieth itſelfe into five parts, viz.

1. That none ſhall drive any diſtreſſe out of the county, where he hath taken it.

2. If one neighbour doe ſo to another, (as for damage feſant, or rent charge) of his owne authority, he ſhall make ranſome, that is a fine, as of a thing done againſt the peace. 22 E. 4. 11.

3. If the lord preſume to doe it againſt his tenant, he ſhall be puniſhed by a great amerciament.

At the common law a man might have driven the diſtreſſe to what county he would, which was miſchievous for two cauſes: 1. Becauſe the tenant was bound to give the beaſts being impounded in an open pound ſuſtenance, and being carried into another county, by common intendment he could have no knowledge where they were. Another cauſe, he could not know where to have a replevy, but the party was before this ſtatute driven to his action upon his caſe; and albeit this ſtatute be in the negative, yet if the tenancy be in one county, and the mannor in another county, the lord may drive the diſtreſſe which he taketh in the tenancy to his mannor in the other county, for that the tenant is out of both the ſaid miſchiefes; for the tenant by doing of ſuite and ſervice to the mannor, by common intendment may know what is done there, and therefore may give his beaſts ſuſtenance; and to know where to have his

6 H. 3. Avow. 242. Temps E. 1. ibid. 192. 30 Aſſ. 38. 29 E. 3. 13. 1 H. 6. 9. 22 E. 4. Barre 120. F.N.B. 89. Pl. Com. 9. b.

his replevy, the bayliffe of the mannor uſually drive the cattell diſtrained to the pound of the mannor; and this act extends as well to goods as to beaſts: note here by a caſe out of the miſchiefs is out of the meaning of the law, though it be within the letter.

Regiſtr. 97.
1. pt. Inſt. ſect. 69.
29 E. 3. 23.
42 E. 3. 26.
11 H. 4. 2.
8 H. 4. 16.
29 E. 23.

4. That diſtreſſes be reaſonable, and not too great: vide the firſt part of the Inſtitutes, what ſhall be ſaid reaſonable, and by whom it ſhall be tried in this and in all other caſes: ſome ſay that for homage, or fealty, for the expences of the knights of the parliament an exceſſive diſtreſſe cannot be taken; but this ſtatute is generall, and extendeth unto all.

5. He that takes unreaſonable and undue diſtreſſes, ſhall be grievouſly amerced for the exceſſe of theſe diſtreſſes.

Stat. 51 H. 3. W. 1. c. 16.
28 E. 1. c. 12.
1 & 2 Phil. & Mar. c. 12.

It is worthy of obſervation, how provident the makers of theſe and other ſtatutes be, that mens beaſts, cattell, or other goods be not unjuſtly or exceſſively diſtrained; and if they be, that deliverance be ſpeedily made of them by replevy, otherwiſe the huſbandry of the realme, and mens other trades might be overthrowne or hindred: and this agreeth with the reaſon of the common law.

7 E. 3. S. b.
20 Aſſ. 38.
13 H. 4 17.
14 H. 4. 4.
Lib. S. fol. 147. le 6. Carpenters caſe. li. 5. fo. 76.
Pilkingtons caſe.

And therefore if the lord or his bayliffe come to diſtraine the beaſts or goods of his tenant for his rent behinde, before the diſtreſſe the tenant (that he may keep and uſe his beaſts or other goods) may upon the land tender the arrerages, and if after that a diſtreſſe be taken, it is wrongfull: and if the lord have diſtrained, if the tenant before the impounding of them tender the arrerages, the lord ought to deliver the diſtreſſe, and if he doth not, the detainer is unlawfull: even ſo it is in caſe of a diſtreſſe for damage feaſant, the tender of amends before the diſtreſſe, maketh the diſtreſſe unlawfull, and after the diſtreſſe, and before the impounding, the detainer unlawfull. But if a man bring an action of treſpaſſe for taking away his beaſts or other goods, there tender of ſuch ſufficient amends before the action brought is no barre, becauſe he that tendred the amends is not the owner of the goods; as in the other caſes, but a treſpaſſer, whom the law favoureth not: and further, if the avowant hath retourned irreplegiable, yet if the owner of the beaſts or goods tender to him all that is due upon the judgement in the avowry (whereby the certainty doth appeare) he may have an action of detinue for the detainer afterward, or upon ſatisfaction made in court, have a writ for their delivery.

21 H. 7. 30. a. But this is now holpen by the Statute of 21 Jac. cap.
13 H. 4. 4. a.
33 H 6. 27. a.
45 E. 3. 9.

51 H. 3. diſtr. de Scacear. acc.

(1) *Diſtrictiones ſunt inſuper rationabiles et non minus graves, &c. propter exceſſum, &c.*] *Quicquid in exceſſu actum eſt, lege prohibetur.*

Regiſt. 97.
22 E 4 26.
11 H. 4. 2.
8 H. 4. 16.
F.N.B. 89.

For example, if the lord diſtraine two or three oxen for xij. d. or the like ſmall ſumme, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the twelve pence, &c. of his owne ſhewing hee ſhall make fine, &c. or the party may have his action upon the ſtatute.

If the lord diſtraine an oxe, or horſe for a penny, if there were no other diſtreſſe upon the land holden, the diſtreſſe is not exceſſive, but if there were a ſheepe or ſwine, &c. then the taking of the oxe or horſe is exceſſive, becauſe he might have taken a beaſt of leſſe value.

CAP.

CAP. V.

MAGNA Charta (1) *in ſingulis ſuis articulis teneatur, tam in his quæ ad regem pertinent, quam quæ ad alios* (2), *et hoc coram juſticiariis itinerantibus* (3) *in ſuis itineribus, et vicecomes in comitatibus ſuis, cum opus fuerit demandetur, et brevia verſus eos qui contravenerint gratis concedantur* (4) *coram rege* (5), *vel coram juſticiariis de banco*, (6), *vel coram juſticiariis itinerantibus, cum in partes illas venerint. Similiter Charta de Foreſta in ſingulis ſuis articulis teneatur* (7), *et contravenientes per dominum regem, cum convicti fuerint graviter puniantur modo ſupradicto.*

THE great charter ſhall be obſerved in all his articles, as well in ſuch as pertain to the king, as to other; and that ſhall be enquired afore the juſtices in eyre in their circuits, and afore the ſheriffs in their counties, when need ſhall be. And writs ſhall be freely granted againſt them that do offend, before the king, or the juſtices of the bench, or before juſtices in eyre, when they come into thoſe parts. Likewiſe the charter of the foreſt ſhall be obſerved in all his articles, and the offenders when they be convict, ſhall be grievouſly puniſhed by our ſovereign lord the king in the form above mentioned.

(15 E. 4. 13)

This, as hath beene ſaid, was one of the principall cauſes of the ſummons of this parliament, and after this enſued great and conſtant peace and tranquility.

And where ſome have thought, that *Magna Charta* had not the ſtrength of a parliament before this act, how they miſtake it, you may reade before in *Magna Charta*, cap. 32, and 38. Magna Charta, c. 32, 38.

(1) *Magna Charta.*] By this time this charter had got the name of *Magna Charta*, and by that name onely is here confirmed.

(2) *Tam in hiis quæ ad regem pertinent quam ad alios.*] Theſe be ſhort and effectuall words, and to avoid all ſcruples, the king is expreſly named, and it hath not words of confirmation, but words of eſtabliſhment, *Quod Magna Charta in ſingulis ſuis articulis teneatur*, which is the ſureſt way.

(3) *Coram juſticiariis itinerantibus.*] Vide cap. *itineris*, the articles of *Magna Charta* eſpecially given in charge, and enquired of, &c. by juſtices in eyre, and by this act they had their authority therein. Cap. Itineris. Vet. Mag. Cart. 150. b.

(4) *Brevia gratis concedantur.*] Writs againſt the breakers of *Magna Charta* ſhall be freely graunted, to encourage ſuch as would purſue againſt them. Mag. Cart. c. 29.

(5) *Coram rege.*] That is, in the kings bench.

(6) *Coram juſticiariis de banco.*] That is, in the court of common pleas.

(7) *Similiter charta de foreſta, in ſingulis ſuis articulis teneatur, &c.*] This was another of the principall cauſes of the ſummons of this parliament, as hath been ſaid.

CAP.

CAP. VI.

DE his autem qui primogenitos, et hæredes (1) *ſuos infra ætatem exiſtentes* (2) *feoffare ſolent de hæreditate ſua* (3), *ut per hoc amitterent domini feodorum cuſtodias ſuas, proviſum eſt, concordatum, et conceſſum, quod occaſione hujuſmodi* falſi *feoffamenti, nullus capitalis dominus amittat cuſtodiam ſuam. De his inſuper qui de terris ſuis* (4), *quas tradere voluerint ad terminum annorum* (5), *ut per hoc domini feodorum amittant cuſtodias ſuas, falſa ſingunt feoffamenta continentia, quod eis ſatisfactum eſt de ſumma ſervitii in illis contenti uſque ad terminum aliquem: ita quod ſi ad dictum terminum ſolvere tenentur hujuſmodi feoffati ſummā aliquam ad valorem terrarum illarum, vel in multo excedentem, ut ſic poſt terminum illum terra eorum revertatur ad ipſos vel ad hæredes ſuos, eo quod nemo eam pro tanto tenere curaret: proviſum eſt, concordatum, et conceſſum, ut per hujuſmodi fraudem nullus capitalis dominus amittat cuſtodiam* (6) *ſuam: veruntamen non licebit eis hujuſmodi feoffatos ſine judicio diſſeiſire* (7): *ſed breve habeant de hujuſmodi cuſtodia ſibi reddenda* (8), *et per teſtes in charis* (9) *ne hujuſmodi feoffamento contentos, una cum aliis liberis et legalibus hominibus de patria, et per quantitatem et valorem tenement', et per quantitatem ſummæ, quæ inde reddi debeant poſt terminum* prædictum *attingatur, utrum hujuſmodi feoffamenta bona fide facta ſint, an in fraudem, ad auferendum capitalibus dominis feodorum cuſtodiam ſuam. Si vero capitales domini per judicium curia in hujuſmodi caſibus recuperaverint cuſtodiam ſuam, ſalva ſit nihilominus hujuſmodi feoffatis actio ſua, quo ad terminum, ſeu ad feodum recuperandum, quam inde habuerint cum hæredes ad legitimam ætatem per-*

AS touching them that uſe to infeoff their eldeſt ſons and heirs, being within age, of their heritage, for to defraud the lords of the fee of their wardſhips, it is provided, accorded, and agreed, that by occaſion of any ſuch feoffment no chief lord ſhall leeſe his ward. Moreover, touching them that fain falſe feoffments of their lands, which they will leaſe for term of years, for to defraud the chief lords of their wards, wherein it is contained, that they are ſatisfied of the whole ſervice due unto them until a certain term; ſo that ſuch feoffees are bound at the ſaid term to pay a certain ſum to the value of the ſame lands, or far above; ſo that after ſuch term the land ſhall return unto them, or to their heirs, becauſe no man will be content to hold it upon the price; it is provided and agreed, that by ſuch fraud no chiefe lord ſhall leeſe his ward. Nevertheleſs, it ſhall not be lawful to them to diſſeiſe ſuch feoffees without judgement, but they ſhall have a writ for to have ſuch a ward reſtored unto them; and by the witneſſes contained in the deed of feoffment, with other free and lawful men of the country, and by the value of the land, and by the quantity of the ſum payable after the term, it ſhall be tryed whether ſuch feoffments were made bona fide, or by colluſion, to defraud the chief lords of the fee of their wards. And if the chief lords in ſuch caſes recover their wards by judgement, the feoffees ſhall nevertheleſs have their action to recover ſuch term or fee, which they had therein, when the heirs come to their lawful age. And if any chief lords do maliciouſly implead ſuch feoffees, faining this

caſe

pervenerint. Et si aliqui capitales domini feoffatos aliquos malitiosè implacitaverint, fingentes casum istum, maximè ubi feoffamenta legitimè et bona fide facta fuerint (11), *tunc adjudicentur feoffatis dampna sua, et misæ suæ* (10), *quas fecerint occasione præd' placiti, et ipsi actores per misericordiam graviter puniantur.*

case, namely, where the feoffments were made lawful, and in good faith, then the feoffees shall have their damages awarded, and their costs which they have sustained by occasion of the foresaid plea, and the plaintiffs shall be grievously punished by amerciament.

(34 & 35 H. 8. c. 5. 1 Roll 91. 2 Roll 106, 134. Godbolt 78. pl 92. Fitz. Gard. 79, 102, 155. 6 Rep 76. Dyer 9. 27 H. 8. 7. Fitz. Gard. 33. Fitz. Collusion, 12, 14, 29, 36, 47. 11 Rep. 77. Fitz. Gard. 119. Fitz. Brief, 779. 19 H. 6. f. 30. Ejectione custodiæ, Co. Ent. 183. Regist. 161. 4 H. 7. c. 17.

Robert Walrand penned and preferred this act, and by aid and common assent of the great lords of the realme, obtained to passe it for a statute. This Robert Walrand was learned in the lawes of the realme, and soone after this statute, died: his son and heire conveyed his lands holden by knights service to his son and heire apparent, being within the age of 21 yeares, rather trusting his land in his son within age, then in himselfe, and died, his son being still within age; and this statute which Robert Walrand the grandfather had penned and preferred, took first effect in the heire of his heire, as Britton reporteth.

[110]
Brit. c. 36. fo. 95. b.

The mischiefe before this first branch of this statute was, that such a feoffment as well in the kings case, as in the case of a common person, did take away the wardship of the heire, as it appeareth by the preamble, and our books, because by the common law the heire could not be in ward, unlesse he were in by descent, and tenaunt by knights service to prevent the lord of the wardship, would enfeoffe him or her to whom the land should descend by the common law. And upon this statute collusion of this kind was divided into two branches; the first was called collusion apparent, upon this first branch, *qui primogenitos feoffare solent*; the second was called collusion averrable, that is to be proved upon issue thereupon to be taken upon the second branch, *De hiis inquirendum super qui de terris suis, &c.*

9 H. 4. 6.
33 H. 6. 15. b.
Lib. 6. fo. 76. Sir Geo. Curfons case.
17 E. 3. reliefe 3.
33 H. 6. 16.
Pl. com. 82.

(1) *Qui primogenitos et hæredes.*] Albeit the heire be not *primogenitus*, but an heire female, or male lineall or collaterall, yet every of them is within the same mischiefe; and therefore the auncient sages of the law (that I may say it once for all) did ever apply the remedy to the mischief; and therefore here this (*et*) a conjunctive, was by construction taken for a disjunctive, *viz. qui primogenitos vel hæredes, &c.*

Rot. claus. an. 2. E. 1. m. 14. Pl. com. ubi sup. Hil. 16 E. 1. in Banco Rot. 51. Norf. Johannes de Brampton.

If a tenant by knights service of land of the nature of borough-english infeoffe his youngest sonne, he is within this statute; for *hæres dicitur ab hæreditate, et sic sè similibus.*

9 H. 4. 6. See the stat. of 34 H. 8. c. 15. versus finem. 13 Eliz. cap. 5.

(2) *Infra ætatem existentes.*] This branch extends not to give remedy for reliefes which is due when the tenant dieth, his heire of full age; but by divers statutes of later time provision is made for reliefe. And thus much concerning the person to be infeoffed within this first branch.

17 E. 3. 63. relief 3. 31 E. 3. tit. collusion 29. 7 E. 3. tit. rel. 11. 4 E. 3. 22.

(3) *Feoffare solent de hæreditate sua.*] 1. [a] This word *feoffare* implyeth a fee-simple, and therefore if the auncestor had made a lease

[a] 1. Part Instit. 1. sect. 1. for this word *feoffare.* 33 H. 6. 14. 27 H. 8. 19.

leaſe for life, or a gift in taile to his heire apparent with a remainder or without a remainder over of the eſtate in taile, it was out of this ſtatute.

b 31 E. 1. collu. 29. 33 H. 6. 14.

2. b This act ſpeaketh of a feoffement made ſolely to the heire; and therefore if a feoffement had beene made to the heire and an eſtranger, though the fee-ſimple were limited to the heires of the heire, yet it was out of this act.

c 33 H. 6. ubi ſup.

3. c And this is to be underſtood of an immediate gift to the heire apparent; for if a leaſe for life be made, the remainder to the heire apparent in fee, this is no colluſion.

4. Though it was not a feoffment, but inured by way of graunt; as if the meſne had graunted his meſnaltie to his heire, or if the tenant or meſne had levied a fine, or ſuffered a recovery by conſent, or had made a leaſe and releaſe, or confirmation, or the like, ſuch conveyances had beene in equall miſchiefe, and therefore within the remedy.

27 H. 8. 8. b.

5. This act extended not to a feoffment to the uſe of his heire, or to the uſe of himſelfe and his heires; for at the common law the lord ſhould not have the wardſhip but of the heire of his tenant, that died in his homage, and therefore the ſtatute of 4 H. 7. cap. 17. was made to remedy this miſchiefe.

33 H. 6. 16. Lib. fo. Him Stranges caſe, and Porriges caſe.

6. If the eldeſt ſon within age purchaſe of his father the lands holden by knights ſervice for valuable conſideration, *bona fide*, by feoffment or other conveyance, this is within the letter, but not within the meaning of this ſtatute, no more then if he had ſold the land to any other.

[111]

13 H. 7. 7. 27 H. 8, 9.

7. If *ceſtuy que uſe* after the ſtatute of 4 H. 7. cap. 17. and before the ſtatute of 27 H. 8. cap. 10. of uſes, had enfeoffed his eldeſt ſon, this was taken within the equitie of this ancient act.

33 H. 6. 16.

8. When ſhall this feoffment be upon this act deemed to be by colluſion? The anſwer is, after the deceaſe of the auncеſter, for then the title of wardſhip accrues, and not in his life time.

33 E. 3. gar. 12. 31 E. 1. ibid. 155. 32 E. 3. ibid. 33. 33 H. 6 16. Tr. 7 Jac. li 8. fo 164. Mights caſe.

9. If the lord accept homage of the heire apparant (after the feoffment made to him by his auncеſter) in the life of the auncеſter, he ſhall not have the wardſhip, becauſe he allowed him to be his tenant.

10. But at this day, albeit the father infeoffe his eldeſt ſon, or any of his children, though it be found to be made upon colluſion, to defeat the king or other lord of wardſhip, yet the king or other lord ſhall not have but a third part by the ſtatutes of 32 and 34 H. 8. of Wills. So note this ſtatute altered in part. And thus much of the manner of the feoffment.

(4) *De hiis inſuper qui de terris ſuis*, &c.] This is the ſecond branch of this act concerning colluſion averrable, when feoffments are made to ſtrangers, whereof here is an example ſet downe in this act.

Briton, 95. b. 32 E. 3. gard 33. 4 E. 2. gard. 119.

(5) *Qui tradere voluerint ad terminum annorum.*] This is to be underſtood of a feoffment in fee reſerving no rent, for that they ſuppoſe they are ſatisfied for a certaine terme, which ſhould end when the heire ſhould come to full age, and then it was conditioned that the feoffee ſhould pay more then the land was worth, and thereupon the heire entred, for that none would give ſo great a price.

47 E. 3. 19. 32 E. 3. gard. 33. 8 R. 2. collect. 47.

(6) *Per hujuſmodi fraudē nullus capitalis dominus amittat cuſtodiam.*] By ſuch fraud, that is, ſuch in miſchiefe, or ſuch in inconveniencie,

conveniencie, and therefore all other fraudulent feoffments tending to the ſame end are within this ſtatute, whatſoever colourable pretext they have, and ſo is this word [ſuch] oftentimes taken in other ſtatutes. It is the opinion of Huls juſtice, and of Gaſcoine chiefe juſtice of England, that by the words and purview of this ſtatute, it holdeth only betweene lord and tenant; and therefore if a man hold land by knights ſervice in *capite* of the king; and other land of a ſubject by knights ſervice, and maketh a feoffment by colluſion of the land holden of the ſubject, and dieth, his heire within age, the king ſhall not take advantage of this ſtat. for he is not *dominus* of this land; but in this caſe the king is relieved by the ſtat. of 34 H. 8. c. 5. *verſus finem ejuſd. actus.* 9 H. 4. 6.

(7) *Veruntamen non liceat hujuſmodi feoffatos ſine judicio diſſeiſire.*] *Hujuſmodi feoffatos*, ſuch feoffees. And yet the feoffees of the feoffees upon the ſame colluſion are taken to be within this ſtatute; but if the feoffees in the life of the aunceſter make a feoffment in fee *bona fide*, and then the tenant dieth, his heire within age, the lord ſhall not have any action upon this ſtatute, for that the colluſion continued not untill the death of the tenant; but if the tenant had died, his heire within age, and then the feoffees had infeoffed others *bona fide*, yet the lord ſhall recover the wardſhip, becauſe the lord by the death of his tenant was once intitled to his action; but yet in ſome caſes the lord ſhall enter upon the feoffee. 33 H. 6. 16. 31 E. 3. gard. 29.

If the tenant infeoffe a ſtranger upon colluſion, and that ſtranger infeoffe the heire in the life of the tenant, and then the tenant dieth, the lord may enter upon the heire, becauſe no writ of right of ward lyeth againſt the heire; and therefore the lord ſhall enter upon the heire, being feoffee: for otherwiſe he ſhould be without remedy, the words of the writ of ward being *Præcipe A. quod reddat B. cuſtodiam terræ et hæredis C. quæ ad ipſum B. pertinet, &c.* ſo as this writ is ever brought againſt a ſtranger. 33 H. 6. 16. F.N.B. 139.

If the tenant infeoffe the villein of the lord upon colluſion, and dieth, his heire within age, the lord ſhall enter upon this feoffee; for if the lord ſhould be driven to his action againſt the villein, it ſhould amount to an enfranchiſement; and ſtatutes muſt be ſo conſtrued, as no collaterall prejudice grow thereby. [112]

Alſo the heire of the feoffee is within this ſtatute; and if the feoffee dieth, his heire within age, the lord ſhall have his writ of ward againſt the heire, who ſhall not have his age, but the lord ſhall recover againſt him by this act. 18 E. 3. covenāt 7.

The ſtatute ſaith, *feoffatos*, and yet conuſees of fines, and all other conveyances are within this ſtatute. 7 H. 4. 15. 12 H. 4. 16.

And here it appeareth, that the ancient law did ever favour him that came by title, and put him that right had to his action. 1 Part Inſtit. ſect. 472.

If the father had made a feoffment for the maintenance and livelihood of his wife, preferment of his daughters, or of his younger ſons, or for the payment of his debts, and after had infeoffed his heire apparent, this was holden no colluſion; for every man by the law of God and nature, ought to provide for his wife and children, and he is worſe then an infidell that doth not provide for his family: and by the law of God and of nations debts ought to be paid: *Nemini quicquam debeatis, niſi quod invicem diligatis.* 33 H. 6. 14. Dier 10 El. 260. 3 Eliz. 193. 20 Eliz. 361. 19 Eliz. 276. 5 Mar. 158. Lib. 6. fo. 76. Sir Geo. Curſons caſe.

* Now by the ſaid ſtatutes of 32 and 34 H. 8. where the tenant by knights ſervice doth infeoffe others to any of theſe three intents, * See Sir Geo. Curſons caſe *ubi ſupra.*

tents, *viz.* for the livelihood of his wife, preferment of his children, or payment of his debts, the heir ſhal be in ward for his body, and for the third part of his lands ſo conveyed, whereby the common law was changed in that behalfe.

27 H. 8. 10. 4 H. 7. c. 10. Of lands holden by knights ſervice deviſeable by cuſtome, no colluſion could have been averred upon a deviſe by will; the ſame law, if *ceſtuy que uſe* had deviſed the uſe by will; but now that is altered by the ſtatute of 34 H. 8. c. 5.

39 E. 3. 33, 34. (8) *Breve habeat de hujuſmodi cuſtodia reddenda.*] This writ is a writ of right of ward, and when the lord hath recovered the wardſhip againſt the feoffee, the freehold and inheritance is left in the feoffee, and not reſtored to the heire, and therefore if the gardein commit waſte, the ſame is diſpuniſhable, for the feoffee cannot have an action of waſte againſt the gardein in this caſe. And the lord upon this ſtatute could not ſeiſe the body of the heire, or have a raviſhment of ward, before he had recovered the land in a writ of right of ward, for therein ought the colluſion be firſt tryed, becauſe unleſſe that were found according to this ſtatute, there is no cauſe of wardſhip by this act.

4 E. 2. gard. 119. 33 E. 3. ibid. 33. 12 H. 4. 13. b. 4 H. 7. 10 F.N.B. 143. E. 34 H. 8. c. 5. verſus finem. 13 El. c. 5.

12 E. 2. c. 2. 1. Part Inſtit. ſect. 1. (9) *Et per teſtes in cartis.*] Note, the deed is not here denyed, and yet proces to be awarded againſt the witneſſes. For this ſee the firſt part of the Inſtitutes. *Vide poſtea, cap.* 14.

(10) *Adjudicentur feoffatis damna ſua et miſæ ſuæ.*] This is the firſt ſtatute that gave the defendant damages and coſts if it were found for him, and the lord to be grievouſly amercied, and many other ſtatutes have followed this example: and where this ſtatute ſaith *(malitioſè) implacitaverint*, if the matter be fained, and without juſt ground, the law implyeth malice in this caſe.

(11) *Fingentes caſum iſtum maximè ubi feoffamenta legitima et bonæ fidei facta fuer'.*] There is no greater injuſtice, then when under colour of juſtice injury is done.

Regula. *Multi litigant in foro, non ut aliquid lucrentur, ſed ut vexent alios.* Therefore juſtly did this act, which gave an action in a new caſe, give dammages and coſts to the defendant, if he were maliciouſly vexed thereby without good cauſe.

[113]

CAP. VII.

IN placito vero communi de cuſtodiis (1), *ſi ad magnam diſtrictionem non venerint deforciatores* (3), *tunc bis vel ter iteretur breve prædictum ad terminos quibus fieri poterit, infra medietatem anni ſequentis, ita quod ſingulis vicibus legat' breve in pleno comitatu* niſi al' ubi *prius inventus fuerit deforciator. Et ibi publicè denuncietur, ut veniat ad diem ſibi præfixum. Quod ſi ipſe extunc ſe ſubtraxerit, ita quod infra medietatem anni prædict' reſponſurus non venerit, nec vicecomes eum invenire*

IN a plea of communi cuſtodia, if the deforceors come not at the great diſtreſs, then the ſaid writ ſhall be renewed twice or thrice, at ſuch terms as it may be done within the half year following, ſo that every time the writ ſhall be read in the open county (if the deforceor be not found before) and there openly be proclaimed, that he may come at the day limited: ſo that if he abſent himſelf then, and come not to anſwer within the ſaid half year, nor the ſheriff cannot get his

invenire poſſit (5), *per quod corpus ſuum habere non poſſit* (4), *coram juſticiariis* (6), *ad reſpondendum ſecundum legem et conſuetudinem regni, tunc (tanquam rebellis, et ſe juſticiari non permittens) amittat ſeiſinam hujuſmodi cuſtodiæ* (2), *ſalva ſibi alias actione ſua, ſi fortè jus habeat ad eandem. In caſibus autem ubi cuſtodiæ pertinent ad cuſtodes* (7), *hæredum infra ætatem exiſtentium verſus cuſtodes ill'* petatur cuſtodia quæ accidit hæredibus illis *tanquam pertinens ad eorum hæreditates: et non amittant hujuſmodi hæredes infra ætatem exiſtentes, hæreditatem ſuam per negligentiam, vel rebellionem ſuorum cuſtodum, ſicut in caſu prædicto, ſed currat lex communis eodem modo quo prius currere conſuevit.*

his body, to have it before our juſtices to anſwer according to the law and cuſtom of the realm, then as a rebel, and ſuch a one as will not be juſtified, he ſhall leeſe the ſeiſin of his ward; ſaving to him his action at another time, if he have any right to the ſame. But in ſuch caſes, where the wardſhips belong to the guardians of wards being within age, and where the guardians demand a wardſhip which belongeth to the heir, or as appertaining to their inheritance, ſuch heirs within age ſhall not leeſe their inheritance by the negligence or rebellion of their guardians, as in the caſe afore rehearſed; but let the common law run in like manner as it hath been accuſtomed to do.

(13 Ed. 1. ſtat. 1. c. 35. 12 Car. 2. c. 24.)

(1) *In placito communi de cuſtodiis.*] In the common plea of ward, that is, in a writ of right of ward, or in an *ejectment de gard.* 30 E. 3. 10. 24 E. 3. 33. 2 H. 4. 1.

In the chapter going before, remedy was given to the lord for wardſhip, where there was none due to him by the common law: in this chapter more ſpeedy remedy is given to the lord, as well when the lord hath right by the common law, as by the next precedent chapter.

Before the making of this ſtatute, the proces in the writ of ward was ſummons, attachment, and diſtreſſe infinite, and the ſheriffe would many times returne ſmall iſſues, and ſo the lord was greatly delayed, and if the heire came to full age, hanging the writ, the writ abated, which was miſchievous. 9 E. 4. 50. 18 E. 3. ſcire fac. 10.

Now this ſtatute provideth, that if the deforceours come not at the grande diſtreſſe, that after the returne thereof a diſtreſſe with proclamation ſhall be made in the county by ſixe moneths, and if hee appeare not, judgement ſhall be given againſt him, ſaving to him his right at another time, *ſi inde loqui voluerit:* Weſtminſt. 2. cap. 35. preſcribeth but three moneths. 9 E. 3. 15. 3 H. 4. 45. 16 E. 3. Proclam. 4. 30 E. 3. 10. 14 E. 3. Procl. 8. 16 E. 3. gard 138. 2 H. 4. 1.

In a reſummons of gard upon the ſtatute of W. 2. a proclamation ſhall be awarded upon this ſtatute, for it is in equall miſchiefe, but in a raviſhment * of gard, no proclamation ſhall be awarded, for that action is formed, and given by the ſtatute of W. 2. cap. 35. which was but treſpaſſe at the common law. 30 E. 3. 10. 22 E. 3. 8. 14 E. 3. Proclam. 7.

* [114]

(2) *Amittet ſeiſinam hujuſmodi cuſtodiæ.*] If the defendant in a writ of ward make default at the returne of the diſtreſſe with a proclamation, judgement ſhall be given for the plaintife againſt the deforceour to recover the ward and damages, and have a writ to enquire of the damages; and yet this act ſaith, that he ſhall loſe the ſeiſin of cuſtody, and ſpeaketh not of damages, but in this action the plaintife ſhould recover damages at the common law. 7 E. 3. 22. 5 E. 3. Damages 115. 13 E. 3. Judgement 138. 24 E. 3. Damages 5. 24 E. 33. 4 E. 3. 26.

17 E. 3. 70. 14 H. 4. 37. 19 E. 3. Proclam. 5. & 10.

In a writ of ward againſt two, at the grand diſtreſſe one of them appeared, and the other made default, the plaintife prayed a diſtreſſe with a proclamation, and it was denied, for the body is not ſeverable, and therefore the plaintife cannot have judgement to recover the moity of the body, otherwiſe it is of the land, for that is ſeverable.

(3) *Non venerint deforciatores.*] If in a writ of ward, the defendant vouch, no proclamation ſhall be awarded againſt the vouchee for two cauſes. 1. The ſtatute extendeth onely to the ſuite of the plaintife, and this is the ſuite of the defendant againſt the vouchee. 2. The ſtatute provideth that proclamation ſhall be awarded againſt the deforceors, and the vouchee is not deforceor.

29 E. 3. 38. 13 E. 3. Proclam. 9. 33 E. 3. ibid. 19.

(4) *Quod corpus ſuum habere non poſſit.*] This is to be underſtood, that there is no default in the ſheriffe in retourning of good iſſues, ſo as by that meanes he might have his body to appeare, for the ſheriffe cannot arreſt him.

17 E. 3. 70, 71.

(5) *Nec vicecomes eum invenire non poterit.*] This muſt be underſtood of the ſheriffe in that county, where the originall is brought, for no other ſheriffe in another county upon a *teſtatum*, *&c.* ſhall make proclamation, but there proceſſe lieth, as it was at the common law.

3 E. 3. Procl. 17.

(6) *Coram juſticiariis.*] This is before the juſtices of the court of common pleas, and that court being particularly named, this act extended not to juſtices in eyre, as it is ſaid in our books.

(7) *In caſibus ubi cuſtodiæ pertinent ad cuſtodes.*] If one demand a ward againſt me, which I claime by cauſe of ward, he ſhall not have proceſſe upon this ſtatute, leſt by negligence or colluſion of the gardien, the heire within age may be prejudiced, but therein the proceſſe ſhall be at the common law.

* [115]

CAP. VIII.

ILLI autem qui pro iterata diſſeiſina (1) *capti fuerint et detenti, non deliberentur ſine ſpeciali præcepto domini regis, et hoc per finem cum domino rege inde faciend' pro hujuſmodi tranſgreſſione ſua. Et ſi compertum fuerit* (2) *quod vicecomes aliter eos deliberaverit, propter hoc graviter * amercietur, et nihilominus illi qui per vicecomitem ſine præcepto domini regis, ſic deliberantur, pro ſua tranſgreſſione graviter puniantur.* Merton cap. 3. Weſtminſt. 2. cap. 26.

THEY which be taken and impriſoned for rediſſeiſin, ſhall not be delivered without ſpecial commandment of our lord the king, and ſhall make fine with our lord the king for their treſpaſs. And if it be found, that the ſheriff delivereth any contrary to this ordinance, he ſhall be grievouſly amerced therefore; and nevertheleſs, they which are ſo delivered by the ſheriff without the king's commandment, ſhall be grievouſly puniſhed for their treſpaſs.

(1 H. 8. f. 1. Raſt. 10. 548. V. N. B. 108. F. N. B. 188, 189. 20 H. 3. c. 3. Regiſt. 206. 13 Ed. 1. ſtat. 1. c. 26.)

The ſtatute of Merton, cap. 3. as hath been ſaid, gave the rediſſeiſin, and poſt diſſeiſin, the words of which ſtatute being, *In priſona domini regis detineantur, quouſque per dominum regem, vel aliquo alio modo deliberentur.* Upon theſe words, *vel aliquo alio modo deliberentur*; they were delivered by the common writ *de homine replegiando*, for the liberty of a free-man is ſo much favoured in law, as there is ever a benigne interpretation made for the benefit thereof. Now this ſtatute doth enact that they ſhall not be delivered *ſine ſpeciali præcepto domini regis*, that is, by the kings writ reciting the ſpeciall matter, and for a fine with the king therefore to be made. And he that is attainted in a rediſſeiſin, and in priſon, this fine that this act ſpeaketh of, as ſome have ſaid, ought to be aſſeſſed in the chancery, to which end he muſt have a *certiorari* to remove the record thither, and out of the chancery to have his writ to diſcharge him: for *ſine ſpeciali præcepto domini regis*, is intendable by writ (ſay they) in the chancery.

Merton, cap. 3. Regiſt. 206. Mirror, cap. 5. § 3.

Bracton, lib. 3. fo. 154. F.N.B. 66. Dier 36. H. 8. 60, 61. 18 H. 8. 1. 18 H. 8. ubi ſupra.

And therefore if one be attainted in a rediſſeiſin, and is at large, the party may have a *certiorari* to remove the record into the court of common pleas, and by *capias* out of that court he may be taken; and ſome doe hold, that this court cannot aſſeſſe the fine, nor make the ſpeciall writ.

But certain it is, if a man be attainted before the ſheriffe in a rediſſeiſin, and taken in execution, becauſe he cannot be delivered by this act without a ſpeciall commandement of the king, he may ſue a *certiorari* to remove the record before the king in his bench, in which court after he hath made fine, he is thereupon to have a writ for his delivery, reciting the ſpeciall matter, which is the ſpeciall commandement that this act ſpeaketh of, which appeareth in the Regiſter, and F. N. B.

Regiſt. F.N.B. 190. f. & 242 b.

(1) *Pro iterata diſſeiſina.*] This doth extend as well to the poſt diſſeiſin, as rediſſeiſin.

(2) *Et ſi compertum fuerit*, &c.] That is, by way of indictment and conviction of the ſheriffe, and ſo it is of the party, that procureth himſelfe to bee delivered in that manner alſo: but no action can be grounded upon this act.

CAP. IX.

DE ſectis (1) *vero faciendis ad curiam magnatum, vel ad curiam aliorum dominorum ipſarum curiarum, de cætero ſic obſervandum eſt, quod nullus qui per chartam feoffatus eſt, diſtringatur de cætero ad hujuſmodi ſectam faciendam ad curiam domini ſui, niſi per formam* feoffamenti ſui *ſpecialiter teneatur ad ſectam illam faciendam* (2). *His autem exceptis quorum anteceſſores, vel ipſiment, hujuſmodi ſectam facere conſueverunt ante primam tranſfreta-*

FOR doing ſuits unto courts of great lords, or of meaner perſons, from henceforth this order ſhall be obſerved, that none that is infeoffed by deed, from henceforth ſhall be diſtrained to do ſuch ſuit to the court of his lord, without he be ſpecially bound thereto by the form of his deed: theſe only except, whoſe anceſtors, or they themſelves, have uſed to do ſuch ſuit before the firſt voyage of the ſaid king Henry into Britain, ſithence which

fretationem prædicti domini regis Henrici in Britanniam (3), *a tempore cujus transfretationis elapsi sunt xxxix. anni et medietas unius anni ad tempus quo hujusmodi constitutiones fuerunt statutæ. Similiter nullus feoffatus a tempore conquestus* sine charta *vel aliquo alio antiquo feoffamento distringatur ad hujusmodi sectam faciendam; nisi ipsemet, vel antecessores sui eam facere consueverunt ante primam transfretationem prædictam* (4): *qui autem per chartam pro certo servitio* (5), *veluti pro libero servitio tot solidorum annuatim pro omni servitio solvend' feoffati sunt, ad hujusmodi sectam vel ad aliud, contra formam feoffamenti sui, de cætero non teneantur. Et si hæreditas aliqua* (6), *de qua tantum unica secta debeatur, ad plures hæredes participes ejusdem hæreditatis devolvatur, ille vero qui habet amitiam partem* (7) *hæreditatis illius, unicam faciet sectam pro se et participibus suis, et alii participes sui pro portione sua, contribuant ad sectam illam faciendam. Et si plures feoffati fuerint de hæreditate aliqua, de qua tamen unica secta debeatur, dominus illius feodi unicam sectam inde habeat* (8), *nec possit de prædicta hæreditate nisi unicam sectam exigere, sicut prius inde fieri consuevit. Et si feoffati warrantum, vel medium non habeant* (9), *qui* inde *eos acquietare debeat, tunc omnes illi feoffati, contribuant* pro portione sua *ad sectam illam pro eis faciendam. Si autem contingat, quod domini* (10) *curiarum tenentes suos contra hanc constitutionem, pro hujusmodi secta distringant, tunc ad querimoniam tenentium illorum attachientur eorum domini, quod ad curiam regis veniant ad brevem diem, inde responsuri, et unicum inde habeant essonium si fuerint in regno, et incontinenter deliberentur conquerenti averia sua, sive aliæ districtiones, hac occasione factæ, et deliberatæ, remaneant, donec placitum inde inter eos terminetur. Et si domini curiarum, qui hujusmodi districtiones fecerint,*

which nine and thirty years and an half are passed, unto the time that these statutes were enacted. Likewise from henceforth none that is infeoffed without deed, from the time of the conquest, or any other ancient feoffment, shall be distrained to do such suits, unless that he or his ancestors used to do it before the said voyage. And they that are infeoffed by deed to do a certain service, as, for service of so many shillings by year, to be acquitted of all service, from henceforth shall not be bounden to such suits, or other like contrary unto the form of their feoffment. And if any inheritance, whereof but one suit is due, descend unto many heirs, as unto parceners, whoso hath the eldest part of the inheritance, shall do that one suit for himself and his fellows, and the other coheirs shall be contributaries, according to their portion, for doing such suit. And if many feoffees be seised of an inheritance, whereof but one suit is due, the lord of the fee shall have but that one suit; and shall not exact of the said inheritance, but that one suit, as hath been used to be done before. And if those feoffees have no warrant or mean which ought to acquit them, then all the feoffees, according to their portion, shall be contributaries for doing the suit for them. And if it chance that the lords of the fee do distrain their tenants for such suits, contrary to this act, then, at the complaint of the tenants, the lords shall be attached to appear in the king's court at a short day, to make answer thereto, and shall have but one essoin therein, if they be within the realm; and immediately the beasts, or other distresses taken by this occasion, shall be delivered to the plaintiff, and so shall remain, until the plea betwixt them be determined. And if the lords of the courts which took distresses, come not at the day that they were