(3) *Et per ceſt ſtatute nentend' pas le roy, que grace de hoſpitalitie ſoit juſtreit as beſoignes.*] Here it appeareth that the grace of hoſpitality conſiſteth in diſtributing to them that have neede. 3. *Branch.*

(4) *Ne que les avowes des meſons les puiſſent per lour ſovent venues ſurcharger ne deſtruer.*] This is evident. 4. *Branch.*

(5) *Purview eſt enſement que nul graund ne petit, per colour de parent', ou deſpecialtie, ou per auter aſſiance, ne per auter encheſon, ne courge en auter parke, ne peſche en auter viver,* &c.] Hereof Fleta ſaith, *Nec etiam præſumat quis temere illicentiatus currere in parco alieno, nec in alterius vivario piſcari, veruntamen ſi contingat aliquis in hujuſmodi domibus per licentiam magiſtri domus vel ejus baliwi, quod non aperiat feneſtras inhibitas, vel aliquas frangat ſeruras, et victualia vel alia bona violenter capiat, vel extrahat ſub colore emptionis, vel alio quoquo modo,* &c. 5. *Branch.* Fleta ubi ſupra.

Here note that *vivarium*, vivary is here taken for waters where fiſhes are nouriſhed and kept. Vide hic. cap. 20.

(6) *Et que nul face barter blee ne prender blee,* &c.] This branch againſt purveiors doth extend as well to lay, as eccleſiaſtical perſons, and is well explained and confirmed by divers and many ſtatutes. 6. *Branch.* Mag. Chart. c. 21. Artic. Cler. c. 11. 14 E. 3. cap. 3. 18 E. 3. c. 3. Regiſt. 92.

(7) *Et que nul preigne chivals, boefs, chares, ne charets nefs, ne bateux, ne auter choſe a faire carriage,* &c.] And by the ſtatutes aboveſaid, and many other, this branch concerning cariage is alſo well explained and confirmed. 7. *Branch.*

(8) *Et ceux queux viendront encontre les eſtabliſhments avandits, & de ceo ſoient attaints.*] Here is contained the puniſhments of ſuch as doe offend againſt any of theſe eſtabliſhments, as well at the kings ſuit, as at the ſuit of the party grieved. 8. *Branch.*

And herewith agreeth Britton, for he ſaith, *Et auxi des viſcounts & des toats nous autres miniſters, juſtices, & coroners, & autres gue gents de religion, & autres gents greveront per ſurcharges de lour venues par herberger oveſque eux ſovent a auter coſtages, oveſq; trope de frep de gents & per ſojourners de lour gents, & de lour chivaux, ou de cheines, ou autrement per empromptes de lour chivaux ou de cariage, ou de deniers, ou per begger merime, ou fees, ou auter choſe a eux ou a eſcun de lour meyne, ou de lour amys, & in ceo caſe ſoient puny per ſyns.* Brit. fol. 37.

(9) *Et le roy defend, & commaund que nul deſormes face male damage,* &c.] This clauſe extends as well to lay as eccleſiaſticall perſons. 9. *Branch.*

(10) *Et eſt purview que ceux points licnt auxibien nous counſellors, juſtices de foreſts, et autres juſtices, et autres gents.*] Of theſe two branches Fleta ſaith thus, *Item nec gravantur viri religioſi, perſonæ eccleſiaſticæ, vel alii, pro eo quod receperunt hoſpitium, vel victualia alicui, vel pro eo, quod queſti fuerunt de aliquo gravamine eis illato in præmiſſis articulis contento, quod ſi quis fecerit, et inde convincatur, puniatur per pœnam ſupradictam, nec excipiantur in præmiſſis conſiliarii regis nec juſtic' de foreſta, vel alii quicunque juſticiarii vel miniſtri regis, non magis quam mediocres, vel minores.* 10. *Branch.* Fleta ubi ſupra.

(11) *Et que les points avandits ſoient mainteynes,* &c.] This branch extends as well to lay, as eccleſiaſticall perſons. 11. *Branch.*

(12) *Et que nul avoerie a meaſon,* &c.] This is alſo as generall as the former. 12. *Branch.*

Note it is an article, *inter capitula itineris de biis qui miſerunt*

ad domus vel maneria religiosorum homines, equos, vel canes perhendinando ad custum eorum.

13. *Branch.* Fleta ubi supra.

(13) *Uncore est purview que viscounts ne herbergent ove nulluy,* &c.] Of this Fleta saith, *De vic' provisum est quod non hospitentur alicubi nisi propriis sumptibus, veruntamen concessum est, quod in domibus religiosorum vicissim per unam noctem tantum cum sex equis, et non pluribus sumptibus alienis in suis balivis hospitentur, dum tamen frequenter non venerint.* See cap. *Itineris de vicecomitibus venientibus ad hospitandum cum pluribus quam* 5. *vel.* 6. *equis in balivis suis, vel qui per frequentes adventus ultra quoscunque oneraverint.*

Here is to be observed that often in Fleta, and other old authors and statutes this word *perhendinare* is used, which signifieth to sojourne, and *perhendinationes* signifieth sojourning.

35 E. 3. cap. Itin. Vet. Magna Cart. 154.

And that we may note once againe for all, whensoever an act of parliament doth generally prohibit any thing, as in this chapter it doth, the party grieved shall not have his action onely for his private relieſe, but the offender shall be punished at the kings suit for the contempt of his law; and therefore upon this statute it shall be inquired at the kings suit, *De his qui miserunt ad domos vel maneria religiosorum vel aliorum homines, equos, vel canes perhendinando ad custum eorum, et de vicecomitibus venientibus ad hospitandum cum pluribus quam quinque vel sex equis in balivis suis, vel qui per frequentes adventus ultra quoscunque oneraverint.*

CAP. II.

PURVIEW est ensement, que quant clerke est prise pur rette de felony, et il soit demande per lordinary, il luy soit liver, solonque le priviledge de saint esglise, en tiel peril come ils appent (1), *solonque le custome avant les heures ise. Et le roy amonist les prelates, et eux enjoine en la foy que ils luy doient, et pur la common profit de la peace de la terre, que ceux que sont endites de tiel rette per solempne questes des probes homes fait en la court del roy, en nul manner ne les deliverent* (2) *sans due purgation* (3), *issint que le roy neit mestier de mitter auter remedy.*

IT is provided also, that when a clerk is taken for guilty of felony, and is demanded by the ordinary, he shall be delivered to him according to the privilege of holy church, on such peril as belongeth to it, after the custom aforetimes used. And the king admonisheth the prelates, and enjoineth them upon the faith that they owe to him, and for the common profit and peace of the realm, that they which be indicted of such offences by solemn inquest of lawful men in the king's court, in no manner shall be delivered without due purgation, so that the king shall not need to provide any other remedy therein.

Marlb. cap. 27. (18 El. c. 7. Hob. 288, Chart. de Pardon, Br. 21. 23 H. 8. c. 11.)

The mischiefes before this statute were three: 1. That the ordinary would often challenge one for a clark that was none. 2. That when any that were or had ability to be of the clergy, were endicted of felony, the ordinary would presently demaund them, and the court would deliver them without inquisition. But alwayes

alwayes after this ſtatute, the court took an inquiſition of office, *Ut ſciatur qualis ordinario deliberari debeat.* 3. That the ordinaries would often deliver them without due purgation, whereby the king loſt his forfeiture, and offences remained unpuniſhed.

(1) *En tiel peril come il appent.*] The perill was, that if the ordinary ſhould demand any man for a clark that was none, his temporalties ſhould be for that contempt ſeiſed, and ſome have holden that he ſhould loſe that franchiſe or priviledge to demaund clarks for him and his ſucceſſors for ever; but ſee the ſtatute of 25 E. 3. cap. 6. for ſince that ſtatute it hath been holden but finable.

20 E. 2. Coro. 233. 26 Aſſ. 19. 7 H. 4. 36. 9 E. 4. 28. 25 E. 3. cap. 6.

(2) *Que ceux queux ſont endites de tiel rette per ſolemne enqueſt des probes homes en la court le roy in nul manner ne deliveront ſans due purgation.*] Before this ſtatute if any clark had been arreſted for the death of a man, or any other felony, and the ordinary did demaund him before the ſecular judge, he was delivered without any inquiſition to be made of the crime; and this appeareth by Bracton, who writing before this ſtatute ſaith, *Cum verò clericus, &c. captus fuer' pro morte hominis, vel alio crimine, et impriſonatus, et de eo petatur curia chriſtianitatis ab ordinario loci, &c. impriſonatus ille ſtatim ei deliberetur ſine aliqua inquiſitione facienda.*

Leſtatute de Bigamis, cap. 6. & Artic. Cler. ca. 15. Bract. l. 3. fo. 123. Artic. Cler. c. 15.

But after this ſtatute, to the end that the ordinary might have more care of purgation to be duly done according to the proviſion of this act, when any clark was indicted of any felony, and refuſed to anſwer to the felony, but claimed *privilegium clericale*, and was demaunded by his ordinary, yet before he was delivered to the ordinary, all the records ſay, *Sed ut ſciatur qualis ei (s. ordinario) liberari debeat, inquiratur inde rei veritas per patriam:* and thereupon an inquiſition was taken whether he were guilty of the fact or no, and if he were found guilty, his goods and chattels were forfeit, and his lands ſeiſed into the hands of the king.

Britton, that wrote after this ſtatute, ſaith, *Si le clerk encoupe de felony (i. indite ou appeale de felony) alledge clergie, & eſt riel trove (i. q. eſt un clerke) & p. lordinary demaund, donques ſerra inquiſe coment il eſt meſcrue (i. culpable) & ſil ſoit nient meſcrue, &c. donques il ſerra aroge touts quits, & ſil ſoit meſcrue ſi ſoient ſes chateux taxes, & ſes terres priſes in noſtre maine, & ſon corps deliver al ordinarie:* ſo as by the one author, who wrote a little before this ſtatute, and the other who wrote preſently after (togerher with the continuall practiſe thereof) the diverſity doth appeare.

Brit. c. 4. fo. 11.

Monachus indictatus de felonia, petiit privilegium clericale, abbas præſens petiit eum tanquam ſuum profeſſum, et ad hoc fuit admiſſus loco ordinarii, inquiſitio capta ex officio dixit quod non culpabilis, ideo quietus receſſit, et ſi culpabilis inventus fuiſſet, ad huc dicto abbati liberaretur, &c.

8 E. 2. Coro. 417. 17 E. 2. ibid. 386. 3 H. 7. 12.

But of the allowance of the benefit of clergy upon the arraignment, it was very prejudiciall to the priſoner, for that he loſt his challenges to the inqueſt, that found him guilty, and yet upon the inqueſt of office formerly uſed, *ut ſciatur qualis ordinario liberari debet*, he forfeited all his goods, and chattels, and the profits of his lands untill he had made his purgation: and therefore that thrice reverend and learned judge ſir John Priſot chiefe juſtice of the court of common pleas, ſtudying how to relieve the poore priſoners that were deſtitute of counſell, with the advice of the reſt of the judges in the raigne of H. 6. for the ſafety of the innocent, would

3 H. 7. fo. 1. 12.

would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and having had the benefit of his challenges and other advantages, had beene convicted thereof: which just
[165] and charitable course hath been generally observed ever since.

(3) *Sans due purgation.*] Before this statute, purgations were unduly made, more for favour, then for furtherance of justice, whereby malefactors were encouraged to offend; wherefore the king admonished and enjoyned by this act of parliament the prelates upon the faith which they ought unto him, &c. to deliver no clerks, that were indicted, without due purgation, as they tendred the common profit of the peace of the land. But this royall admonition and injunction (and many other in succeeding ages, as it by parliament rolls appeareth) tooke little effect, but the abuses in making purgations in the end became so intollerable, as queene
18 Eliz. cap. 6. Elizabeth, by assent of the lords spirituall and temporall, and the commons in parliament assembled, as matter unreformable, tooke it quite away; but yet, what the law was therein before that statute, is good to be knowne, and therefore somewhat shall be said thereof in the treatise of the pleas of the crowne, being the proper place for the same.

CAP. III.

PURVIEW est ensement, que nul rien .deformes soit demande, ne prise, ne levie per viscount, ne per auter, pur escape de laron, ou felon, jesque a tant que lescape soit adjudge per justices errants (1). *Et que auterment le ferra, cy rendra a celuy, ou a ceux que tiel averont pay, quant que il avera prise et receive, et au roy au tant.*

IT is provided also, that nothing be demanded nor taken from henceforth, nor levied by the sheriff, nor by any other, for the escape of a thief or a felon, until it be judged for an escape by the justices in eyre. And he that otherwise doth, shall restore to him or them that have prayed it, as much as he or they have taken or received, and as much also unto the king.

Regist. 184. cap. Itineris. Vet. Mag. Chart. 154. (21 Ed. 3. f. 54.)

13 E. 2. Stat. de visu Franc'. The mischiefe before this statute was, that sheriffes in their tournes, and lords in their leets, who had jurisdiction to enquire of escapes of theeves and felons, upon presentment before them of such escapes, would levie fines or amerciaments for such escapes, for that they pretended that the said presentment was not traversable: now forasmuch as it required judgement in law to discerne betweene a voluntary escape and a negligent in case of felony, and also what should be judged an escape, and what not, they might enquire onely, and the judgement thereupon belonged to the justices in eire.

This statute doth declare, that nothing should be demanded, taken, or levied by any sheriffe, or other, untill the escape be adjudged by the justices in eire, and addeth a penalty if any such thing be done.

For

For proof whereof, we find before the making of this ſtatute, *Quod evaſiones latronum ſecundum legem et conſuetudinem regni coram juſticiariis regis itinerantibus, et non alibi, debeant et conſueverunt judicari, et amerciamenta inde provenientia per ſummonitionem ſcaccarii ſint levand'*. We find alſo in the ſame yeare, that before this act of 3 E. 1. was made another record, *Quia evaſiones latronum coram juſticiariis regis itinerantibus, et non alibi judicari debent, mandatum eſt vicecomiti quod reſtituat 8. l. W. C. quas ab eo cepit pro evaſione cujuſdam hominis, &c.* Now that the common law, the miſchiefe before the ſtatute, and the purview of the ſtatute be underſtood, let us peruſe the words of the act.

Rot. clauſ. 2 E. 1. m. 11.

Mirror, ca. 2. ſect. 9.

Rot. clauſ. 3 E. 1. m. 15.

(1) *Per viſcount, ne per auter, &c. jeſque a tant que leſcape ſerra adjudge per juſtices errants.*] By theſe words the court of the kings bench, which is holden *coram rege*, is not excluded, but preſentment of ſuch eſcapes may be made there: Firſt, for that this prohibition beginneth with ſheriffes, and therefore the generall words [or by any other] ſhall be intended of leets, being inferiour courts, and not of the juſtices of the kings bench, being the higheſt of any ordinary court of juſtice in England. Secondly, for that the court of the kings bench is an eire (the returnes there being *ubicunq; fuerimus in Anglia*) and more than an eire; for if the kings bench had come into a county where the eire had ſit, the eire had ceaſed, for *in præſentia majoris ceſſat poteſtas minoris.*

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Lib. 2. fol. 46. Marleb. c. 19. 2 R. Hic cap. 15.

21 E. 3. 54. b. 21 aſſ. 12. 27 aſſ. p. 2.

Regula.

But by the ſtatute of 31 E. 3. it is enacted, that eſcapes of theeves and felons, &c. from henceforth to be judged before any of the kings juſtices ſhall be levied from time to time as they ſhall fall, as well in the time paſt, as in the time to come.

31 E. 3. cap. 14. ſtat. 1. 1 R. 3. cap. 3.

CAP. IV.

DE *wreck de mere* (1) *eſt accorde, que la ou home, chien, ou chat* (2) *eſcape vive hors de la nieſe, la nieſe ou batell', ou nul rien, que la eins fuit, ne ſoit* [*adjudge*] *wreck, mes ſoient les choſes ſaves et gardes pur le vicu del vicont, coroner* (3), *ou al', ou del bailiffe le roy, et bailes en les mains ceux de la ville, ou les choſes ſont troves, iſſint que ſi nul ſue les biens, et puit prover que ils ſoient, ou a ſon ſeigniour, ou en ſa garde peris, deins lan et le jour* (4), *ſans delay luy ſoient rendus: ſi non, remaigne au roy. Et ſoient priſes per le vic' et coroners, et bailes a la ville pur reſpoign' devant juſtices de wrecke que appent a roy* (5). *Et la ou wrecke appent a auter que au roy* (6), *ci le eit per meſme le maner. Et que autrement fra, et de ceo ſoit attaint, ſoit a-*

CONCERNING wrecks of the ſea, it is agreed, that where a man, a dog, or a cat eſcape quick out of the ſhip, that ſuch ſhip nor barge, nor any thing within them, ſhall be adjudged wreck: but the goods ſhall be ſaved and kept by view of the ſheriff, coroner, or the king's bailiff, and delivered into the hands of ſuch as are of the crown, where the goods were found; ſo that if any ſue for thoſe goods, and after prove that they were his, or periſhed in his keeping, within a year and a day, they ſhall be reſtored to him without delay; and if not, they ſhall remain to the king, and be ſeiſed by the ſheriffs, coroners, and bailiffs, and ſhall be delivered to them of the town, which ſhall anſwer before the juſtices of the wreck belonging

garde al priſon, et rent al volunt le roy (7), *et rendra les dammages enſement. Et ſi le bailiſe le face, et ſoit diſavow de ſon ſeigniour, et le ſeigniour ne ottrie de ceo a luy, reſpoign' le bailiſe, ſil eit de quoy, et ſil neit de quoy, rendra le ſeigniour le corps du bailiſe au roy.*

belonging to the king. And where wreck belongeth to another than to the king, he ſhall have it in like manner. And he that otherwiſe doth, and thereof be attainted, ſhall be awarded to priſon, and make fine at the king's will, and ſhall yield damages alſo. And if a bailiff do it, and it be diſallowed by the lord, and the lord will not pretend any title thereunto, the bailiff ſhall anſwer, if he have whereof; and if he have not whereof, the lord ſhall deliver his bailiff's body to the king.

Cuſtumier de Norm. cap. 17. (5 Rep. 106. 5 Ed. 3. 3. Bro. Wreck, 1. 17 Ed. 2. ſtat. 1. c. 11. 12 Ann. ſtat. 2. c. 18.)

Doct. & Stud. cap. 51. fo. 156.

Many have doubted what the common law was before the making of this ſtatute; and ſome have holden, that the common law was, that the goods wrecked upon the ſea were forfeited to the king, and that they be forfeited alſo ſince the ſtatute, unleſſe they be ſaved by following this ſtatute. To this I anſwer with Macrobius, *Multa ignoramus, quæ nobis non laterent, ſi veterum lectio nobis eſſet familiaris*: for Bracton, who wrote before this ſtatute, proveth, that this act is but a declaration of the common law, *Magis propriè dici poterit wreccum, ſi navis frangatur, et de qua nullus vivus evaſerit, et maxime ſi dominus rerum ſubmerſus fuerit, et quicquid inde ad terram venerit, erit domini regis, &c. et quod hujuſmodi dici debeant wreccum, verum eſt, niſi ita ſit, quod verus dominus aliunde veniens per certa indicia et ſigna docuerit res eſſe ſuas, ut ſi canis vivus inveniatur, &c. Et eodem modo ſi certa ſigna appoſita fuer' mercibus et aliis rebus.*

Bract. li. 3. fo. 120.
Brit. fo. 7. 26. 85.
Fleta. li. 1. c. 41.

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Mirr. c. 1. § 13. & c. 3. § de wrecks.

The Mirrour ſaith, *A lour view, (s. les coroners) de wrecks a les appent denquirer ou les wrecks vient a terre, quel les choſes, combien & la value diſtinctment per parcells. Et ſi home, beſte, oiſell, ou auter choſe vivant vint avecq; ou non, & eſſint per dividend ſoit livre a la prochein ville, un ou pluſors pur ent reſponder al verey ſeigneur (i. proprietarie) ſi la vient challenger, & defreſuer de deins lan.*

And albeit this author wrote after this ſtatute, yet he wrote of the ancient lawes before the ſame, and is more large then the words of the act: for therein is named onely of a man, a dog, and a cat, that eſcapeth alive; and this author ſpeaketh generally of any beaſt, hawke, or other living thing, ſo as he purſueth not this act, but treateth of the common law.

Rot. cart. an. 20 H. 3. Rot. claus. 14 H. 3. m. 6. Vide li. 5. fo. 107. Sir Henry Conſtables caſe.

Rex pro ſalute animæ ſuæ, et ad malas conſuetudines abolendas, conceſſit, quod bona in mari periclitata non perdantur nomine wrecci, quando aliquis homo, aut beſtia vivus de navi evaſerit. And now having cleared this point, let us peruſe the words of our act.

Cuſtumier de Norm. c. 17.

(1) *De wreck de mere.*] Wrecke or ſhipwrecke is an Engliſh word, in French, *naufrage*, in ancient French, *varech*, in Latine, *naufragium*, legally *wreccum maris*, wrecke of the ſea in legall underſtanding is applyed to ſuch goods as after ſhipwreck at ſea are by

by the sea cast upon the land, and therefore the jurisdiction thereof pertaineth not to the lord admirall, but to the common law.

5 E. 3. 3. 11 H. 4. 16. F.N.B. 112. c. Sir Hen. Const. case, ubi sup.

Although this statute speaketh onely of wrecke, yet this statute extendeth to flotsam, jetsam, and lagan: for which see sir Henry Constables case, lib. 5. *ubi supra.*

The cause wherefore originally wrecke was given to the crowne, stood upon two maine maximes of the common law; First, that the property of all goods whatsoever must be in some person. Secondly, that such goods, as no subject can claime any property in, doe belong to the king by his prerogative, as treasure trove, strayes, wrecke of the sea, and others; because of ancient time, when the art of navigation was not so perfect, nor trade of merchandize grown to such perfection, as now it is, it was a matter of great difficulty to be proved, in whom the property of goods wrecked at sea was. Bracton saith, *Item tempore dicuntur res in nullius bonis esse, ut thesaurus. Item ubi non apparet dominus rei, sicut est de wrecco maris. Item de bis quæ pro waivio habentur, sicut de averiis ubi non apparet dominus, quæ olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.* Others have yeelded another reason, that the king by old custome of the realme, as lord of the narrow sea, is bound to scoure the sea of the pirats and petie robbers of the sea: and so it is read of that noble king Edgar, that he would twice in the yeare scoure the sea of such pirats, &c. and because that could not be done without great charge, the law gave unto him such goods as be wrecked upon the sea towards the charge.

Bract. li. 1. fo. 8. 9 H. 6. 45.

If a ship be ready to perish, and all the men therein for safeguard of their lives leave the ship, and after the forsaken ship perisheth, if any of the men be saved and come to land, the goods are not lost.

Rot. pat. 28 E. 1. m. 23. in dorso. the Merchants of Portugals case. 46 E. 3. 15. Rot. claus. 5 R. 2. pro Willielmo Fishlake.

A ship on the sea is pursued with enemies, the men for safegard of their lives forsake the ship, the enemies take the ship, and spoile her of her goods and tackle, and turne her into sea, by the weather she is cast on land, where her men arrived, and it was resolved by all the judges of England that the ship was no wrecke, nor lost.

(2) *Home, cheine, ou cat.*] This statute, as hath beene said, being but declaratorie of the common law, these three instances are put but for examples, for besides these two kind of beasts, all other beasts, fowles, birds, hawkes, and other living things are understood, whereby the ownership or property of the goods may be knowne: and Bracton yet goeth farther, *Si certa signa apposita fuerint mercibus, et aliis rebus, &c.*

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Bract. ubi supra, fo. 120. 27 E. 3. c. 13. by his marks cart or cocket. 31 H. 6. c. 4. 2 R. 3. fo. 2. a. Pl. Com. 466.

(3) *Mes soient les choses saves & gardes per le view del vise', coroner*, &c.] Yet if the goods be *bona peritura*, the sheriffe may sell such goods within the yeare, lest they should perish, and nothing be made of them; and therefore for necessity (which is excepted out of law) the sale in that case is good within the yeare.

(4) *Et poient prover, &c. deins l'an & le jour.*] Yet if the owner die within the yeare, his executors or administrators may make proofe, for that this act is but a declaration of the common law.

Doct. & Stud. fo. 118.

This yeare and day shall be accounted from the seisure made as wrecke, for that is the thing whereof the owner may take the best notice.

35 H. 6. 27. per Noringhair. Sir Hen. Const. case, ubi supra.

35 H. 6. 27. But if the kings goods be wrecked, and caſt upon ground, where a ſubject hath wreck of the ſea, who ſeiſeth the ſame, the king may make his proofes at any time when he will, and is not confined to a yeare and a day, as the ſubject is.

Regiſt. fo. F.N.B. 112. Now if the goods or merchandiſes ſo caſt upon the land be not ſeiſed, as is aforeſaid, but taken away by certaine wrong doers not knowne, the partie may have a commiſſion of oier and terminer to enquire of them, that did the treſpaſſe, and to heare and determine the ſame, and to make reſtitution to the partie.

Vide Raſt. Pl. cor. fol. 611. 15 R. 2. cap. 3. (5) *Devant les juſtices del wrecke que appent al roy.*] That is, it ſhall not be tryed in the admirall court, but before the kings juſtices at the common law, becauſe the wrecke is ever caſt upon the land.

(6) *Et la ou wrecke appent al' auter que au roy*, &c.] Wrecke may belong to the ſubject, either by graunt from the king, or by preſcription.

Bract. li. 3. fo. 120. Britt. 7. 26. 85. Of ancient time, wrecke of the ſea, and other caſualties, as treaſure trove in the land, ſtrayes, and the like, were *primi inventoris quaſi totius populi, ſed poſtea ad regem tranſlata fuerunt, quia non modo totius populi, ſed reipublicæ etiam caput eſt*: but if treaſure be found in the ſea, the finder ſhall have it at this day.

2 R. 3. fol. 11. Vide hic ca. 9. 20. 24, 25, 26. 29. (7) *Et rent al volunt le roy.*] That is, be fined at the kings will, which is to be underſtood, that the kings juſtices, before whom the party is attainted, ſhall ſet the fine, *Et non dominus rex per ſe in camera ſua, nec aliter coram ſe, niſi per juſticiarios ſuos: Et hæc eſt voluntas regis, viz. per juſticiarios, et legem ſuam, unam eſt dicere.*

CAP. V.

ET pur ceo que elections doient eſtre frankes, cy defend le roy ſur la greeve forfeiture (1), *que nul haute home, ne auter, per poyar des armes, ne per malice ou manaces, ne diſturbe de faire franke election.*

AND becauſe elections ought to be free, the king commandeth upon great forfeiture, that no man by force of arms, nor by malice, or menacing, ſhall diſturb any to make free election.

Art. ſuper cart cap. 8. & 13. 33 H. 8. cap. 27. Dier, 8 El. 247. 14 H. 8. 2. 29. 31 Eliz. cap. 6. (Br. Amercement, 6. 13. 32. 35. 37. 9 Ed. 2. ſtat. 1. c. 14.)

7 H. 4. cap. 14. [169] See the ſtatute of 7 H. 4. that knights of ſhires for the parliament ſhall be choſen *libere et indifferenter ſine prece aut præcepto.*

There were two miſchiefs before the making of this ſtatute. 1. For that elections were not duly made. 2. That elections were not freely made; and both theſe were againſt the ancient maxime of the law, *Fiant electiones rite et libere ſine interruptione aliqua*; and again, *Electio libera eſt*; for before this act in the irregular raign of H. 3. the electors had neither their free, nor their due elections, for ſometimes by force, ſometimes by menaces, and ſometimes by malice the electors were framed, and wrought to make election of men unworthy, or not elegible, ſo as their election was neither due, nor free: this act briefly rehearſeth the old rule of the com-

Regiae

7 H. 6. 12.

mon

mon law (for that elections ought to be free) wherein both the ſaid points are included; 1. It muſt be a due election, and 2. It muſt be a free election.

This ſtatute doth enact, that no man upon grievous forfeiture ſhall diſturb any to make free election, and is excellently penned in two reſpects; firſt, for that generally it extendeth to all elections, that is to ſay, to every dignity, office, or place elective, be it eccleſiaſticall or temporall, of what kinde or quality ſoever. Secondly, the act is penned in the name of the king, *viz.* the king commandeth: and therefore the king bindeth himſelf not to diſturb any electors to make free election, as in the like caſe upon a ſtatute made in the raigne of the ſaid king; the act ſaying, *rex perpendens, &c.* the ſame bound the king. Now that electors might make free and due elections without diſpleaſure or fear thereof, by this act of parliament, as a ſure defence, the king commandeth the ſame upon grievous forfeiture: and this act extends to all elections, as well by thoſe that at the making of this act had power to make them, as by thoſe whoſe power was raiſed, or created ſince this act.

W. 2. 13 E. 1. c. 1. Pl. Com. The Lord Berklies caſe. 14 H. 4. 20, 22. Stamf. Pl Cor. 168. c. d. 12 E 2. Coro. 381. 22 E. 3. ibid. 275. Dier 12 El. 289. ſemble.

(1) *Greve forfeiture.*] That is, the diſturbers to be puniſhed by grievous fines and impriſonment.

What offices and places be eligible, ſee Artic. ſuper Chart. cap. 8. and this act extendeth to all elections in counties, univerſities, cities, corporations, and other places.

Art. ſuper Chart. ca. 8. & vide hic. ca. 10.

And thus much ſhall ſuffice for the underſtanding of this excellent and neceſſary act. See hereafter cap. 10.

CAP. VI.

ET que nul city, borough, ne ville, ne nul home ſoit amerce ſans reaſonable encheſon, et ſolonque le quantity del treſpaſſe (1), *s. franke home ſavant ſon contenement, merchant ſavant ſon merchandiſe, et villein ſavant ſon gainage, et ceo per lour peeres.*

AND that no city, borough, nor town, nor any man be amerced, without reaſonable cauſe, and according to the quantity of his treſpaſs; that is to ſay, every free-man ſaving his freehold, a merchant ſaving his merchandiſe, a villain ſaving his waynage, and that by his or their peers.

Cap. Itin. Vet. Mag. Chart. fol. 164. b. (Regiſt. 187. 9 H. 3. ſtat. 1. c. 14.)

One miſchiefe before this ſtatute was, that ſeeing the words of the ſtatute of Magna Charta were *Liber homo non amercietur, &c.* it extended not onely to naturall and ſingular men, but to ſole bodies politique or corporate, and not to corporations, or companies aggregate of many, as cities, boroughs, and towns. Another miſchiefe was, that many times not onely cities, boroughs, and townes, but private men alſo were amercied without cauſe. Laſtly, that the ſaid ſtatute of Magna Charta extended but to him that was *liber homo.*

Mag. Chart. ca. 14.

13 E. 1. Attachment 8. F.N.B. 170.

For all theſe three this ſtatute provideth, *viz.* that no city, borough

rough or town, nor any man ſhall be amercied without reaſonable cauſe, and according to the quantity of his treſpaſſe, and upon this ſtatute the party grieved may have an attachment without any prohibition precedent; for this act is a prohibition of it ſelfe.

Mirror, c. 5. § 4. And yet the Mirror doth take it, that all this was contained in the graund charter.

(1) *Quantity de treſpaſſe.*] Here treſpaſſe, *tranſgreſſio* ſignifieth offence, fault or default, and ſo it is taken in many auncient records, as taking one example for many: the ſtatute, that is calied Ragman, ordaineth that juſtices ſhall goe through the land, to enquire, heare, and determine the plaints and querels of treſpaſſes, as well of the bayliffes and miniſters of the king, as of the bayliffes of others, and of other people whatſoever they be, except appeales of felony, &c. which was underſtood as well of outragious takings, as of all manner of treſpaſſe, contempt, neglect, default, or offence to the king or any other, &c.

Stat. voc. Ragman anno 4 E. 1.

And in that ſenſe the apoſtle ſaith, *Ubi non eſt lex, ibi non eſt tranſgreſſio.* Fleta deſcribing it ſaith, *Tranſgreſſio autem eſt, cum modus non ſervatur nec menſura, debet etenim quilibet in facto ſuo modum habere et menſuram.*

Fleta, lib. 2. c. 1.

CAP. VII.

DES priſes des conſtables, ou caſtelleins, faits des auters que des gents de la ville, ou la caſtles ſont aſſiſe. Purview eſt, que nul conſtable ne caſtelein deſormes nul manner de priſe ne face dauter home que de la ville ou ſon caſtle eſt aſſiſe, et ceo ſoit paie, ou gree fait deins xl. jours, ſi ceo ne ſoit auncient priſe due au roy, ou a caſtle, ou al ſeignior del caſtle.

OF priſes taken by conſtables, or caſtellains, upon ſuch folk as be not of the town where the caſtle is; it is provided, that no conſtable, nor caſtellain, from henceforth exact any priſe, or like thing, of any other than of ſuch as be of their town or caſtle; and that it be paid, or elſe agreement to be made within fourty days, if it be not an antient priſe due to the king, or to the caſtle, or to the lord of the caſtle.

Cap. Itineris vet. Mag. Chart. fol. 154. b. (9 H. 3. ſtat. 1. c. 19. Altered by 13 Car. 2. ſtat. 1. c. 8.)

Of this chapter Fleta ſaith thus, *Nullæ priſæ capiantur de aliquo per aliquem conſtabularium caſtellanum, præterquam de villa, in qua ſitum ſit caſtrum, et illis ſatisfact' ſit infra* 40 *dies, niſi ſint priſæ antiquæ debit' regi aut domino caſtri aut caſtro debend'.*

Fleta, lib. 2. ca. 43.

Upon the ſtatute of Magna Charta, and this act, there were two articles amongſt others, that the juſtices in eyre enquired of, *viz. De priſis factis per vicecomites, vel conſtabularies, vel alios balivos contra voluntatem eorum quorum catalla fuerint: item de priſis domini regis ſive in terra, ſive in mari, ſive in aqua dulci, ſive in libertatibus ſpectantibus ad caſtra ſua, ſive ad civitates ſuas, ſive ad burgos ſuos, vel in aliis locis, quæ ſunt, et quantum valeant, vel quis eas occupaverit, celaverit, vel ſuffocaverit, et quis eas ceperit, conſtabularius, vel alius, et quid valent.*

Mag. Chart. c. 19.

Bracton

Bracton treating of the articles of the juſtices in eyre ſaith thus, *De priſis domini regis in terra, ſive in aqua dulci, ſive ſalſa, et libertatibus ſpectantibus ad caſtella ſua, ſive ad comitatum, ſive ad burgos ſuos, quæ ſunt, et quantum valeant per annum.* Bract. li. 3. fo. 117.

And Britton writing of the ſame matter ſaith, *Et auxi des priſes faits, per nous caſtellans, & autres que ſont perners de vittaile, ou de autre choſe, per queux tiels priſes ount eſtre faits, & a queux damages, & de quels gents, & en tiel caſe, voillons nous que nul ne ſoit garrant per continuance de ſeiſin in damage.* Brit. fol. 47. [171]

And Fleta hath it thus, *De priſis factis per vicecom. conſtabularios, vel alios contra voluntat' eorum quorum catalla illa fuerint: item de priſis conſtabulariorum caſtrorum factis de bonis aliorum, quam eorum, qui ſunt de villis, ubi caſtra ſita ſunt, et de bonis eorum, &c. ſi non ſatisfact' fuer' infra* 40 *dies, &c.* Fleta ubi ſupra.

It is to be obſerved, that in the raigne of this king, and in moſt of the ſucceeding kings, there have been many other ſtatutes made concerning purveyors, yet never did any reporter publiſh any caſe, that I have ſeene, and remember, that may ſerve for the expoſition of any of them, and many proceedings have beene judicially upon many of them againſt purveyors, which doe appeare of record. *Vide* Magna Charta, cap. 19. and the expoſition thereof, and the third part of the Inſtitutes, cap. Purveyors.

CAP. VIII.

ET que nul fine ſoit priſe pur beaupleder, ſicome auterfoits fuit defendu en temps le roy Henry, pier le roy que ore eſt.

AND that nothing be taken for fair pleading, as hath been prohibited heretofore in the time of king Henry, father to our lord the king that now is.

(52 H. 3. c. 11. 1 Ed. 3. ſtat. 2. c. 8. Regiſt. 179.)

That is to ſay, by the ſtatute of Marlebridge, anno 52 H. 3. Marleb. cap. 11. where this matter is explained.

CAP. IX.

ET pur ceo que la peace de la terre ad eſtre feeblement garde avant ces heures, pur defalt de bone ſuit fait ſur les felons ſolonque due manner (1), *et noſment per encheſon des franchiſes ou les felons ſont reſceves: purview eſt, que touts communement ſoient preſtes, et aparailes, au commandement et a les ſummons des viſconts* (2), *et au crie de pays* (3), *deſuer et arreſter les felons* (4), *quant,*

AND foraſmuch as the peace of this realm hath been evil obſerved heretofore for lack of quick and freſh ſuit making after felons in due manner, and namely becauſe of franchiſes, where felons are received; it is provided, that all generally be ready and apparelled, at the commandment and ſummons of ſheriffes, and at the cry of the country, to ſue and arreſt felons, when

quant meſtier ſerra, auxibien deins franchiſes come dehors (5). *Et ceux que ceo ne ferront, et de ceo ſoient attaintes, le roy prendra a eux grevement* (6). *Et ſi le default ſoit trove en le ſeignior de la franchiſe, le roy ſe prendra meſme le franchiſe* (7). *Et ſi le default ſoit trove en le bailife, eit lenpriſonment dun an* (8), *et puis ſoit grevement renie, et ſil neit de quey, eit lenpriſonment de ii. ans. Et ſi viſcount, coroner, ou auter bailiſe deins franchiſe, ou dehors* (9), *per lower, ou per prier, ou *per poies, ou per nul manner daffinity, concelent, conſentent, ou procurent de conceler les felonies faits en lour bailies, ou autrement, ſe teignont attacher, ou arreſter les miſfeſants per la ou ils purra, ou autrement ſe feignont de faire lour office, en nul maner de ſavour des miſfeſants, et de ceo ſoient attaintes, que ils eient lenpriſonment dun an* (10), *et puis ſoient greevement rentes a le voluntie le roy* (11), *ſils eient de quey, ſinon, eient lenpriſonment de iii. ans.*

* [172]

when any need is, as well within franchiſe as without; and they that will not ſo do, and thereof be attainted, ſhall make a grievous fine to the king: and if default be found in the lord of the franchiſe, the king ſhall take the ſame franchiſe to himſelf; and if default be in the bailiff, he ſhall have one year's impriſonment, and after ſhall make a grievous fine; and if he have not whereof, he ſhall have impriſonment of two years. And if the ſheriff, coroner, or any other bailiff within ſuch franchiſe, or without, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, conſent, or procure to conceal, the felonies done in their liberties, or otherwiſe will not attach nor arreſt ſuch felons there, as they may, or otherwiſe will not do their office for favour born to ſuch miſdoers, and be attainted thereof; they ſhall have one year's impriſonment, and after make a grievous fine at the king's pleaſure, if they have wherewith; and if they have not whereof, they ſhall have impriſonment of three years.

(4 Ed. 1. ſtat. 2. *Officium Coronat.* 13 Ed. 1. ſtat. 2. c. 1, 2. & 6. 28 Ed. 3. c. 11. 7 R. 2. c. 6. 27 El. c. 13. 39 El. c. 25.)

(1) *Pur default de bone ſute fait ſur les felons in due manner.*] Some have thought that hue and cry have been grounded upon this ſtatute, but this act proveth that hue and cry for the apprehenſion of felons was before this ſtatute, for it findeth fault that good ſuit, that is, freſh ſuit, was not duly made; and it appeareth that hue and cry in thoſe caſes hath been by the auncient laws of this realme.

Mirror, ca. 1. § 3. The author of the Mirror writing of the auncient laws before the conqueſt under the title *Des articles des viels royes ordeines*, ſaith, *Ordeine fuit que cheſcun del age de xiiii. ans, & ouſtre de mortels pecheors enſuivre de ville, & ville a hue and cry.*

Inter leges Regis Canuti. *Si quis latroni obviam dederit, eumque nullo edito clamore abire permiſerit, quanticunque fuerit latronis vita æſtimata, extremum ſolvat denariolum, aut pleno et perfecto jurejurando de facinore nihil habuiſſe cogniti confirmato. Sin quis proclamantem audierit, neque vero fuerit injectus, ſuæ in regem contumaciæ (ni omnem criminis ſuſpicionem diluerit) pœnas dato.*

Glanv. li. 14. c. 3. Glanvill calleth hue and cry *clamor popularis juxta aſſiſam (i. ſtatutum) ſuper hoc proditam.* But this ſtatute is not now extant.

Brac. l. 3. fo. 121. Bracton of hue and cry ſaith, *Statim et recenter inveſtiganda ſunt veſtigia malefactorum, et ſequenda per ductum carectæ, paſſus equorum, et*

et veſtigia hominum, et alio modo, ſecundum quod conſultius et melius fieri poſſit.

And it is one of the articles of that auncient court of the view of frankpledge (of whoſe antiquity we have ſpoken before) to enquire of hue and cries levied and not purſued. Mag. Chart. c. 35.

All theſe authorities were before the making of our act, and therefore it was truly ſaid, whoſoever ſaid it, *Per vetuſta Anglorum lege ſancitum eſt, ut ſi quis damnum ex furto paſſus, aut qui ipſum ſpoliatum viderit, ſontem per acclamationem inſequatur, conſtabularius ejus villæ cujus opem implorat, auxilia ciere furemque perquirere debeat; quod ſi furem illic non deprehenderit, in proximam commigrare, et conſtabularium ad ferendas ſuppetias iterum invocare, &c.*

Of this hue and cry our auncient authors ſince our ſtatute have alſo written, and divers acts of parliament have ſince been made, concerning hue and cry, as the ſtatute *De officio coronatoris*, made the next yeare after our act, where it is ſaid, *Et omnes ſequantur huteſium, et veſtigium, ſi fieri poteſt; et qui non fecerit, et ſuper hoc convictus fuerit, attachietur, quod ſit coram juſticiariis de gaola, &c.* 28 E. 3. & 27 Eliz. Brit. fol. 19, 20. Fleta, lib. 1. ca. 24. Anno 4 E. 1. 4 E. 1. De Offic. Coro. Vid. 13 E. 1. Stat. de Winch. 28 E. 3. ca. 11. 27 Eliz. ca. 13. Cap. Itin. Vet. Mag. Chart. 155. W. 2. cap. 29.

(2) *Au commandement et a les ſummons des viſcounts*, &c.] Men ought to be in theſe caſes at the commandement of the ſheriffe, for he hath *cuſtodiam comitatus* committed to him; and he that goeth not at the commandement of the ſheriffe or conſtable at the cry of the country, that is, upon hue and cry, ſhall be grievouſly fined and impriſoned. 5 H. 7. 5. a. 2 H. 7. 15. b.

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(3) *Ou a crie de pais.*] Note, in legall underſtanding hue and crie is all one; in ancient records they are called *hutеſium et clamor*, and here crie is uſed for both. And this hue and crie may be by horne and by voice, *avec hue & crie de corne & de bouche.* Now the hue and crie ſhall be made, and all incidents thereunto, you ſhall reade in the aboveſaid ſtatutes, and in our reports you ſhall find how the ſame have been expounded. Mirr. cap. 2. Britt. ubi ſup. Lib. 7. fo. 6, 7. Dier 23 El. 370.

(4) *De ſuer & arreſter les felons.*] By theſe words it is holden, that there muſt be a felonie done, or elſe the arreſting of the party, though it be upon hue and cry, is unlawfull, becauſe it wanteth a foundation; but if a felonie be done, and the hue and cry is againſt one, that is neither indicted, nor of ill fame, nor ſuſpicious, nor unknowne, yet the arreſt of him is lawfull, though he be not guilty; for the hue and cry of it ſelfe is cauſe ſufficient, where there is a foundation of a felonie committed. And he that levieth hue and crie upon another without cauſe, ſhall be attached and puniſhed for diſturbance of the kings peace. 29 E. 3. 39. 11 E. 4. 4. b. 5 H. 7. 5. 2 H. 7. 15.

(5) *Auxibien deins franchiſes come dehors.*] This was not intended of ſanctuaries, but of lords, and others, that had franchiſes of infangtheſe, outfangtheſe, and the like.

(6) *Le roy prendra eux grevement.*] That is, at the kings ſuit they ſhall be fined grievouſly, and impriſoned.

(7) *Et ſi le default ſoit trove in le ſeigniour de la franchiſe, le roy ſe prendra a meſme le franchiſe.*] It ſeemeth hereby, that the franchiſe is loſt for ever, for the words be, that the king ſhall take to himſelfe the franchiſe (*viz.* as forfeit.)

(8) *Et ſi le default ſoit trove en le bailife, eit lenpriſonment dun an*, &c.] And this is according to the old rule, *Qui non habet in ære, luet in corpore.*

(9) *Et ſi viſcount, coroner, ou auter bailife de franchiſe, ou de hors,* &c.] Note here five things are rehearſed, as cauſes wherefore ſheriffes, and other the kings officers and miniſters of juſtice doe neglect their duties. 1. By prayer, *prece* (by letters, meſſages, or word of mouth.) 2. Reward, *precio* (ſordid bribery.) 3. Feare, *metu* (the baſeſt, and yet the moſt forcible of all affections.) 4. *Sanguine*, any manner of conſanguinitie or affinitie: under which word (affinitie) in this act is included as well neereneſſe of bloud, as alliance by marriage. Laſtly, *favore*, favour, in reſpect of friendly affection, for men may be corrupted, not onely by reward, but in reſpect of the other foure alſo, all tending to one and the ſame end, to ſuppreſſe truth; as here to conceale, conſent, or procure to conceale the felonies done within their ſeverall precincts or bayliwicks.

Præce.
Precio.
Metu.
Sanguine.
Favore.

(10) *Ils eyent Lunpriſonment dun an,* &c.] Note here the puniſhment for concealement of felonies, or conſenting to, or procuring the concealment of the ſame; for all this make not them acceſſarie to the felony, for then they were to have been puniſhed in another manner, but it is called miſpriſion, or concealement of felonie. Obſerve well the puniſhment of this miſpriſion, but the learning thereof appertaines to the treatiſe of the pleas of the crowne, and therefore this little touch here ſhall ſuffice. See the 3. part of the Inſtitutes, cap. Miſpriſion.

(11) *Al voluntle roy.*] See here cap. 4. 20. 25.

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CAP. X.

ET par ceo que petits gents meins ſages ſoient eſlieus (1) *ore de novel commencement al office de coroner: et meſſier ſerroit que probes homes loialx et ſages ſe intermellent de cel office: purvieu eſt, que per touts les counties ſoient eſlieus ſuffiſant* (3) *homes coroners* (2), *des plus loyals et plus ſages chivallers* (4), *queux melius ſachent, puiſſent, et voilent a cel office entender* (5), *et que loyalment attachent et repreſentent les pleas de la corone* (6). *Et que le vicont eit conter-rolles ove les coroners, auxybien des appeales, come des enqueſts, de attachments, ou des auters choſes, que a cel office appendent. Et que nul coroner riens demande, ne preign' de nulluy pur faire ſon office, ſur paine de la greeve forfeiture al roy* (7). [14 E. 1. Stat. Exon.]

AND foraſmuch as mean perſons, and undiſcreet, now of late are commonly choſen to the office of coroners, where it is requiſite that perſons honeſt, lawful, and wiſe, ſhould occupy ſuch offices; it is provided, that through all ſhires ſufficient men ſhall be choſen to be coroners, of the moſt wiſe and diſcreet knights, which know, will, and may beſt attend upon ſuch offices, and which lawfully ſhall attach and preſent pleas of the crown; and that ſheriffs ſhall have counter-rolls with the coroners, as well of appeals, as of enqueſts, of attachments, or of other things which to that office belong; and that no coroner demand nor take any thing of any man to do his office, upon pain of great forfeiture to the king.

Cap. Itin. fo. 155. (28 Ed. 3. c. 6. 1 H. 8. c. 7. 4 H. 6. 15. 4 Ed. 1. ſtat. 2. *Officium Coronat.* 3 H. 7. c. 1.)

The

The miſchiefe before doth appeare in the preamble, *viz.* That men of ſmall value and little underſtanding, of late times were choſen to the office of a coroner, where it ſhould be needfull that a coroner ſhould have five qualities: 1. That he ſhould be *probus homo:* 2. Lawfull, *i. legalis homo:* 3. Of ſufficient underſtanding and knowledge: 4. Of good ability and power to execute his office according to his knowledge: 5. and laſtly, Of diligence and intendance for the due execution of the ſaid office. And reaſon required it ſhould ſo be, for that coroners were in thoſe dayes the principall gardeins of the peace, and therefore the common law did not onely require expert men to be coroners, but men of ſufficient ability and livelihood for three purpoſes: 1. The law preſumes that they will do their duty, and not offend the law, at the leaſt for feare of puniſhment, whereunto their lands and goods be ſubject. 2. That they be able to anſwer to the king all ſuch fines and duties as belong to him, and to diſcharge the country thereof, wherewith the country being their electors were chargeable, as hereafter ſhall be touched. 3. That they might execute their office without bribery. And theſe five properties are neceſſary to every officer. *Vide* the laſt clauſe of this act.

(1) *Scient eſſiens.*] It is to be knowne, that the office of a coroner ever was, and yet is eligible in full county by the freeholders, by the kings writ *De coronatore eligendo:* and the reaſon thereof was, for that both the king and the country had a great intereſt and benefit in the due execution of his office, and therefore the common law gave the freeholders of the county to be electors of him. And for the ſame reaſon of ancient time the ſheriffe called *vicecomes*, who had *cuſtodiam comitatus*, was alſo eligible; for firſt, the earle himſelfe of the county had the office of the ſheriffe of the county, and when he gave it over, the *vicecomes* (as the word ſignifieth) came in ſtead of the earle, and was eligible by the freeholders of the county: and moreover, for the ſame cauſe were conſervators of the peace in like manner choſen, and ſo were, and yet are elected the verderors of the foreſt, and all theſe for the time of peace: for the time of war, there were likewiſe leaders of the counties ſouldiers, of ancient time choſen by the freeholders of the county. Vide devant, c. 5.

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*Erant et aliæ poteſtates et dignitates per provincias et patrias univerſas, et ter ſingulos comitatus totius regni prædict' conſtitutæ, qui Heretoches apud Anglos, vocabantur, ſcilicet barones, nobiles, et inſignes ſapientes, et fideles et animoſi: Latinè verò dicebantur ductores exercitus, apud Gallos, capitales conſtabularii, vel mareſchalli exercitus. Illi verò ordinabant acies denſiſſimas in prœliis, et alas conſtituebant prout decuit, et prout eis viſum fuit, ad honorem coronæ, et ad utilitatem regni. Iſti verò viri * eligebantur per commune concilium pro commune utilitate regni, per provincias et patrias univerſas, et per ſingulos comitatus in pleno Folkemote, ſicut et * vicecomites provinciarum et comitatuum eligi debent, &c.* Inter leges Edw. regis, cap. de Heretochiis. * Nota. * Nota.

The Mirrour ſpeaking of the articles by old kings ordained, ſaith, *Auxi fuer' ordeines coroners in cheſcun countie, et viſcounts a garder le pais, quant les countes joy demiſſeront del gard, &c.* And the ſheriffe was choſen by writ directed to the coroners. Mirr. cap. 1. § 3.

And ſo were the conſervators of the peace eligible alſo, by writ directed to the ſheriffe. Rot. pat. an. 5 E. 1.

For

For the verderor, he is ſtill choſen by the freeholders of the county by the kings writ.

Art ſuper cart. an. 28 E. 1. c. 8 13. Vide ſupra.

Our king in the 28 yeare of his raigne reſtored to his people the ancient election of ſheriffes in theſe words, *Le roy ad grant a ſon people, que ils eint election de lour viſcount en cheſcun countie, ou viſcount neſt ny de ſee, ſilz voilliont.*

12 R. 2. cap. 2. Vide Stat. 9 E. 2. De Vic'. 14 E. 3. 7.

But now by the ſtatute of 12 R. 2. the chancellor, treaſurer, keeper of the privy ſeale, ſteward of the kings houſe, the kings chamberlaine, clerke of the rolls, juſtices of the one bench and of the other, barons of the exchequer, and all other that ſhall be called, are to ordaine, name or make ſheriffes, ſhall be firmly ſworne that they ſhall not ordaine, name, or make any ſheriffe, for any gift or brocage, favour or affection, but that they ſhall be of the moſt lawfull men, and ſufficient, to their eſtimation and knowledge.

Dier, 1 El. fo. 165.

It is holden in our books, that albeit the king dieth, yet the coroner, becauſe he is elected by the freeholders of the county by writ, and retourned of record in the chancery, which is a judiciall act, remained, and ſo of the verderor: otherwiſe it is of judges and juſtices, that hold their places by writ, commiſſion, letters patents, or otherwiſe at will, which might be a reaſon wherefore the ſheriffe of ancient time was eligible, for that he had *cuſtodiam comitatus*, and a principall conſervator of the peace; and therefore his authority ſhould not ceaſe by the death of the king, no more then that of the coroner.

Now ſeeing that coroners are elected by the county, if they be inſufficient, and not able to anſwer ſuch fines and other duties in reſpect of their office, as they ought, the county as their ſuperiour ſhall anſwer the ſame: as for example, the county of Kent made election, by force of the kings writ, of William Herlizon to be one of the coroners for the ſame county, who after was amercied *pro falſo retourno* 40 *s.* whereupon proceſſe went out to the ſheriffe to levie it; the ſheriffe upon his oath ſaid, that the ſaid William Herlizon *non habet terras vel tenementa, bona ſeu catalla in baliva ſua, nec habuit, unde dict' denarii levari poſſint:* now ſaith the record, *Et quia ipſe coronator electus fuit per comitatum, &c. ita quod in defectu ejuſdem coronatoris totus comitatus ut electur et ſuperior, &c. tenetur regi reſpondere; præceptum fuit nunc vicecomiti, quod de terris et tenementis hominum totius comitatus in baliva ſua fieri fac' prædict'* 40 *s.* And the like law was of the ſheriffe, and other the ſaid officers, when they were eligible. But now let us returne to the purview of our act.

In Scaccar. inter præcept. Term. Hill. anno 14 E. 3. ex parte Rememb. Regis. 20 H. 9.

Reſpondeat ſuperior.

(2) *Homes coroners.*] The number of coroners are not ſet down by law: in moſt counties there are foure, in ſome counties ſixe, in ſome fewer, and in ſome counties one.

2 Inſt. p. 7. 11 H. 4. 34. 37. Li. 6. 40. F.N.B. 163. k.

For the word *coronator*, ſee Mag. Cart. cap. 17.

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(3) *Sufficients.*] *Sufficiens* is a large word, and implyes as much as *idoneus*, and it hath two of the attributes mentioned in the preamble, that is lawfull, and ſage.

Li. 8. fo. 41. Greſſlies caſe. F.N.B. 163. n. 4 E. 1. de offic' Coronat'. 14 E. 3. cap. 7. Brit. 3. b. Flet. lib. 1. cap. 18. 25. 23 aſſ. p. 7. Mag. Chart. c. 17. F.N.B. 164.

(4) *Chivaliers.*] In ancient times none were choſen under the degree of knighthood to be coroners. But ſome ſay, that this word *(chivaliers)* was put into this ſtatute, to the end that the party to be choſen might have ſufficient in the county, which may ſerve for interpretation of divers other ſtatutes, being accompanied with uſe and experience.

(5) Queux

(5) *Queux melius ſachent, puiſſent, et voilent a cel office entender,* &c.] *Qui melius ſciant, poſſint, et velint officio illi intendere, &c.* Note well theſe three qualities.

Now what cauſes there be to remove a coroner, *vide* Regiſt. & F. N. B.

(6) *Que les coroners loialment attachent et repreſentent les plees del coron,* &c.] By this it appeareth, that the coroner is judge of the cauſe, and not the ſheriffe; and this agreeth with our old and latter books, onely the ſheriffes have counter-rolls with the coroners by force of this act, and therefore a *certiorari* may be directed to the ſheriffe and coroner to remove an appeale by bill before the coroner, becauſe the ſheriffe hath a counter-roll: but if the *certiorari* be directed to the ſheriffe onely in caſe of appeale or indictment of death, it is not ſufficient to remove the record, becauſe he is not judge of the cauſe, but hath onely a counter-roll. *Vide* Magna Chart. cap. 17. many authorities cited there concerning this matter.

(7) *Et que nul coroner riens demaund, ne preigne de nulluy pur faire ſon office, ſur peine de la greve forfeiture al roy.*] And this was the ancient law of England, that none having any office concerning adminiſtration of juſtice, ſhould take any fee or reward of any ſubject for the doing of his office, to the end he might be free and at liberty to doe juſtice, and not to be fettered with golden fees, as fetters to the ſuppreſſion or ſubverſion of truth and juſtice: and therefore this ſtatute was made in affirmance of the common law; this onely is added, *ſur paine de greve forfeiture al roy.*

A coroner received 1 d. of every viſne when they came before the judges in eire, as belonging to his office, which was neither againſt the common law, nor this ſtatute; for he toolke it not for doing of his office, but a right due to his office, which might have a reaſonable beginning, *viz.* for and towards his travaile, attendance, and charges.

And this ſtatute ſtood in force untill the ſtatute made in 3 H. 7. ca. 1. which gave him a fee of xiii. s. iiii. d. upon the view of the body, of the goods of the murderer, &c.

But if the coroner ſit upon the view of any ſlaine by miſadventure, he ſhall have nothing. More ſhall be ſaid hereof hereafter, cap. 26.

See the next chap. & chap. 36.
See hereafter Stat de milit.
Regiſt. 177. b.
F.N.B. 163. m.
Regiſt. & F.N.B. ubi ſup.
Mirr. lib. 1. cap. de office de Coroner. Bract. li. 3. fo. 121.
Britt. fol. 3.
Flet. lib. 1. ca. 18 & 25. 4 E. 1.
Stat. de officio Coronat. Regiſt. jud. 16. 22 aſſ. 98. 4 H. 6. 16.
Mag. Char. c. 17.
Hic cap. 14.
4 H. 6. ubi ſupra.
14 E. 1. Stat. de Exonia.
3 H. 7. cap. 1.
Vide hic c. 26.
See 5 E. 6. c.

3 E 3. coron. 372.

3 H. 7. cap. 1.

1 H. 8. cap. 7.

CAP. XI. [177]

ET pur ceo que pluſors reintes de mort de home, et que ſont culpables de meſme la mort ſont (per favorables enqueſts, priſes per viſconts et per bre' le roy que eſt appelle odio et atia) *repleties, jeſques a la venue des juſtices errants: purview eſt, que tiel enqueſts ſoient deformes priſes per probes homes eſlieus per ſerement, dount les deux ſoient a meines chivalers' que per nul affinitie,*

AND foraſmuch as many being indicted of murther, and culpable of the ſame, by favourable inqueſts taken by the ſheriff, and by the king's writ of *odio et atia*, be replevied unto the coming of the juſtices in eyre; it is provided, that from henceforth ſuch inqueſts ſhall be taken by lawful men choſen out by oath (of whom two at the leaſt ſhall be knights) which by no affinity

affinitie, touchent a les prisoners, ne auterment ne soient suspectious. [Gloc. c. 9. West. 2. c. 29.]

affinity with the prisoners, nor otherwise, are to be suspected.

(5 H. 7. f. 5. Regist. 133. 9 H. 3. stat. 1. cap. 26. 6 Ed. 1. stat. 1. c. 9.)

Mag. Cart. ca. 26.

See the 26 chapter of Magna Charta where this matter is handled at large, and need not here to be repeated, and how this writ *De odio et atia* was taken away, and since revived by a later statute, as there it appeareth.

CAP. XII.

PURVIEW est ensement, que les felons (1) *escries, et queux sont apertement de male fame* (2), *et ne sy voilent mitter en enquests des felonies* (3), *que homes met sur eux devant justices a la suit le roy* (4), *soient mises en la prison forte et dure* (5), *come ceux queux refusent estre al common ley de la terre. Mes ceo nest mye a entender pur prisoners que sont prises per legier suspection.*

IT is provided also, that notorious felons, and which openly be of evil name, and will not put themselves in enquests of felonies, that men shall charge them with before the justices at the king's suit, shall have strong and hard imprisonment, as they which refuse to stand to the common law of the land. But this is not to be understood of such prisoners as be taken of light suspicion.

(Dyer, 205. Kel. 70. 8 H. 4. 2. 4 Ed. 4. 11. 14 Ed 4. 7. 21 Ed. 3. 8. Fitz. Coron. 235. 283. 359.)

19 E. 4. 32. Stanf. pl. cor. 153.

(1) *Que les felons.*] This statute extendeth not to treason, which is the highest offence, nor to petit larceny, which is of all felonies the lowest.

Tr. 40. El. coram Rege, Ro. 4. Jone Wilkinsons case.

This act doth extend as well to women as to men, and so it doth appeare by divers auncient and late precedents, and to that end the makers of this act did use this generall word, felons.

(2) *Escries et apertement de male fame.*] No person shall be put to this punishment unlesse the matter be evident or provable, which is the duty of the judge to look unto.

(3) *Ne soy voilent mitter en enquests des felonies.*] This act speaketh onely of indictments at the suit of the king. But the judgement of *paine forte et dure* was at the common law, both in appeales, and in indictments.

43 Ass. Pl. 30. 8 H. 4. 1. 4 E. 4. 11. 7 E. 4. 29. 14 E. 4. 7.

A man may stand mute two manner of wayes; first, when he stands mute without * speaking of any thing, and then it shall be inquired, whether he stood mute of malice, or by the act of God; and if it be found, that it was by the act of God, then the judges of the court (who ever are to be of counsell with the prisoner, to give him law and justice) *ex officio* ought to inquire whether he be the same person, and of all other pleas which hee might have pleaded, if hee had not stood mute.

* [178]

And note well the abovesaid words of our books [whether of malice, or by the act of God] for it may be, the prisoner in truth cannot

cannot ſpeake, and yet being not mute by the act of God, he ſhall be forthwith put to his penance, as if the delinquent cut out his owne tongue, and thereby become mute.

Another kinde of mute is, when the priſoner can ſpeake, and perhaps pleade Not guilty, or pleade a plea in law, and will not conclude to the enqueſt according to this act; or ſpeake much, but doe not directly anſwer, &c. for *idem eſt nihil dicere, et inſufficienter dicere*: to be ſhort, when in the end he will not put himſelfe upon the enqueſt, that is, *de bono et malo* to be tried by God and the countrey, then this act is ſufficient warrant, if the cauſe be evident or probable, to put him to his penance; but if he demurre in law, and it be adjudged againſt him, he ſhall have judgement to be hanged: and though by his demurrer he refuſe to put himſelfe upon the enqueſt according to the letter of this act, yet for as much as he is out of the reaſon of this act, for that he refuſeth not the triall of the common law, the demurrer being allowed to him by law, and to be tried by the judges, he ſhall not be put to his penance, but have judgment to be hanged; and ſo it is if he challenge above the number of 36. he ſhall be hanged, and not have *paine fort et dure*.

4 E. 4. 11. 7 E. 4. 29. 14 E. 4. 7. 3 H. 7. 2. & 12.

(4) *Al ſute le roy.*] This act extends not to the ſuit of the party by appeale, becauſe the judgement of *paine fort et dure* was both in appeale and indictment at the common law, as hath been ſaid, and hereafter ſhall be ſaid and proved.

(5) *Soient myſes en la priſon fort et dure.*] Upon theſe words there have beene divers opinions; firſt that the puniſhment of *paine fort et dure* was given by this act.

Stamf. Pl. Cor. 149. f.

Some other have holden, that at the common law for felony the priſoner ſtanding mute ſhould upon a *nihil dicit* be hanged, as at this day it is in caſe of high treaſon, and, as they ſay, in caſe of appeale. Others have holden that at the common law, in favour of life he ſhould neither have *paine fort et dure*, nor have judgement to be hanged, but to be remaunded to priſon untill he would anſwer.

8 H. 4. 2. Stamf. Pl. Cor. ubi ſupra. 21 E. 3. 18.

For the finding out of the truth herein, let us firſt ſee, what the judgement, which our act calleth *fort et dure* is, and then what the reaſon ſhould be, that ſo ſevere a judgment is given in that caſe.

The judgement is, that the man or woman ſhall be remaunded to the priſon, and laid there in ſome low and dark houſe, where they ſhall lie naked on the bare earth without any litter, ruſhes, or other clothing, and without any garment about them, but ſomething to cover their privy parts, and that they ſhall lie upon their backs, their heads uncovered and their feet, and one arme ſhall be drawne to one quarter of the houſe with a cord, and the other arme to another quarter, and in the ſame manner ſhall be done with their legges, and there ſhall be laid upon their bodies iron and ſtone, ſo much as they may beare, and more, and the next day following they ſhall have three morſels of barly bread without any drink, and the ſecond day they ſhall drinke thrice of the water that is next to the houſe of the priſon (except running water) without any bread, and this ſhall be their diet untill they be dead.

8 H. 4. 1. 4 E. 4. 11. Tr. 40 El. ubi ſup.

So as upon the matter they ſhall die three manner of wayes, viz. *Onere, fame, et frigore*, by weight, famine, and cold, and therefore this puniſhment (if it were executed according to the ſeverity

of

affinitie, touchent a les prisoners, ne auterment ne soient suspectious. [Gloc. c. 9. West. 2. c. 29.]

affinity with the prisoners, nor otherwise, are to be suspected.

(5 H. 7. f. 5. Regist. 133. 9 H. 3. stat. 1. cap. 26. 6 Ed. 1. stat. 1. c. 9.)

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(1) *Que les felons.*] This statute extendeth not to treason, which is the highest offence, nor to petit larceny, which is of all felonies the lowest.

Trin. 40. El coram Rege, Rot. 4. June Wiseman's case.

This act doth extend as well to women as to men, and so it doth appeare by divers auncient and late precedents, and to that end the makers of this act did use this generall word, felons.

(2) *Escries et apertement de male fame.*] No person shall be put to this punishment unlesse the matter be evident or provable, which is the duty of the judge to look unto.

(3.) *Ne soy voilent mitter en enquests des felonies.*] This act speaketh onely of indictments at the suit of the king. But the judgement of *paine forte et dure* was at the common law, both in appeales, and in indictments.

43 Ass Pl. 30. 8 H. 4. 4. 1. 4 E. 4. 11. 7 E. 4. 29. 14 E 4. 7.

A man may stand mute two manner of wayes; first, when he stands mute without * speaking of any thing, and then it shall be inquired, whether he stood mute of malice, or by the act of God; and if it be found, that it was by the act of God, then the judges of the court (who ever are to be of counsell with the prisoner, to give him law and justice) *ex officio* ought to inquire whether he be the same person, and of all other pleas which hee might have pleaded, if hee had not stood mute.

* [178]

And note well the abovesaid words of our books [whether of malice, or by the act of God] for it may be, the prisoner in truth cannot

cannot speake, and yet being not mute by the act of God, he shall be forthwith put to his penance, as if the delinquent cut out his owne tongue, and thereby become mute.

Another kinde of mute is, when the prisoner can speake, and perhaps pleade Not guilty, or pleade a plea in law, and will not conclude to the enquest according to this act; or speake much, but doe not directly answer, &c. for *idem est nihil dicere, et insufficienter dicere:* to be short, when in the end he will not put himselfe upon the enquest, that is, *de bono et malo* to be tried by God and the countrey, then this act is sufficient warrant, if the cause be evident or probable, to put him to his penance; but if he demurre in law, and it be adjudged against him, he shall have judgement to be hanged: and though by his demurrer he refuse to put himselfe upon the enquest according to the letter of this act, yet for as much as he is out of the reason of this act, for that he refuseth not the triall of the common law, the demurrer being allowed to him by law, and to be tried by the judges, he shall not be put to his penance, but have judgment to be hanged; and so it is if he challenge above the number of 36. he shall be hanged, and not have *paine fort et dure.*

4 E. 4. 11.
7 E. 4. 29.
14 E. 4. 7.
3 H. 7. 2. & 12.

(4) *Al sute le roy.*] This act extends not to the suit of the party by appeale, becaus̃e the judgement of *paine fort et dure* was both in appeale and indictment at the common law, as hath been said, and hereafter shall be said and proved.

(5) *Soient mysses en la prison fort et dure.*] Upon these words there have beene divers opinions; first that the punishment of *paine fort et dure* was given by this act.

Stamf. Pl. Cor. 149. f.

Some other have holden, that at the common law for felony the prisoner standing mute should upon a *nihil dicit* be hanged, as at this day it is in case of high treason, and, as they say, in case of appeale. Others have holden that at the common law, in favour of life he should neither have *paine fort et dure*, nor have judgement to be hanged, but to be remaunded to prison untill he would answer.

8 H. 4. 2.
Stamf. Pl. Cor. ubi supra.
21 E. 3. 18.

For the finding out of the truth herein, let us first see, what the judgement, which our act calleth *fort et dure* is, and then what the reason should be, that so severe a judgment is given in that case.

The judgement is, that the man or woman shall be remaunded to the prison, and laid there in some low and dark house, where they shall lie naked on the bare earth without any litter, rushes, or other clothing, and without any garment about them, but something to cover their privy parts, and that they shall lie upon their backs, their heads uncovered and their feet, and one arme shall be drawne to one quarter of the house with a cord, and the other arme to another quarter, and in the same manner shall be done with their legges, and there shall be laid upon their bodies iron and stone, so much as they may beare, and more, and the next day following they shall have three morsels of barly bread without any drink, and the second day they shall drinke thrice of the water that is next to the house of the prison (except running water) without any bread, and this shall be their diet untill they be dead.

8 H. 4. 1.
4 E. 4. 11.
Tr. 40 El. ubi sup.

So as upon the matter they shall die three manner of wayes, *viz. Onere, fame, et frigore*, by weight, famine, and cold, and therefore this punishment (if it were executed according to the severity

of

of the law) ſhould be of all other the moſt grievous and fearfull. But what ſhould be the reaſon of this ſo terrible a judgement? This act anſwereth, becauſe he refuſeth to ſtand to the common law of the land, that is, lawfull and due triall according to law, and therefore his puniſhment for this contumacy without compariſon is more ſevere, laſting, and grievous, then it ſhould have beene for the offence of felony it ſelfe; and for the felony it ſelfe, it cannot be adjudged without anſwer.

Now let us examine the opinions aboveſaid, and we hold, that none of them are conſonant to law; for as to the firſt, we hold that this heavy puniſhment was not given, that is, firſt inflicted by this act: for what court, or judges upon theſe words [have ſtrong and hard impriſonment] could frame ſuch a judgement as is aboveſaid, conſiſting upon ſo many divers particulars? and therefore it muſt neceſſarily follow, that the ſaid puniſhment which this ſtatute calleth *fort et dure* impriſonment, becauſe the penance was to be done in priſon, was before this act, but ſufficiently ſignified (as it hath beene ever ſince) by theſe two epithets, *fort et dure*; ſo as this act ſetteth forth the quality of the judgement, and not the judgement it ſelfe.

2. This act deſcribeth what perſons ſhall be puniſhed by *paine fort et dure*, *viz.* notorious felons, and which be openly of ill name, but ſetteth not downe (as hath been ſaid) what the puniſhment is, but provideth it ſhall not be for legier ſuſpition.

Mirror, cap. 5. § 4. 41 Aſſ. p. 30. 8 H. 4. 1. 4 E. 4. 11. 14 E. 4. 7. 3 H. 7. 2. Fleta, li. 1. c. 32. Britton, fo. 40. Fleta ubi ſupra.

3. All books, that held with great authority, that in caſe of appeale the priſoner upon ſtanding mute ſhould have judgement *de paine fort et dure*, do prove that ſuch a judgement was before the making of this act, for this ſtatute extends not to appeales, which are the ſuit of the ſubject, but onely to the ſuit of the king, which is by way of indictment: and herein the words of Fleta are very remarkable, *Si autem appellatus nihil reſpondere velit, &c. et appellans inde petierit judicium, indefenſus remanebit, morti tamen non condemnabitur, ſed gaolæ committetur, &c.* And there ſetteth downe the penance, which of neceſſity muſt be (as hath been ſaid) by the common law. And herewith agreeth Britton that wrote ſoone after this act; ſo as the penance in caſe of appeale, is both by auncient and found authority.

Britton ubi ſupr.

To the ſecond opinion, if the priſoner ſtanding mute ſhould be hanged by the common law; the aunſwer to the firſt doth anſwer this alſo, and if he ſhould be hanged by the common law, this ſtatute taketh it not away, but ordaineth that he ſhall have ſtrong and hard impriſonment. And therefore by their opinion, the felon ſtanding mute might be hanged at this day, which is againſt all our books, and againſt conſtant and continuall experience.

To the third, let no man imagine that the common law, which is the abſolute perfection of reaſon, could foſter ſo unreaſonable and unjuſt a meane of encouragement of felons, that they by their owne contumacy againſt the common law ſhould ſuffer onely one of the loweſt puniſhments, *viz.* impriſonment untill they would anſwer; and the anſwers to the firſt are anſwers to this alſo.

Now let us ſee what our auncient authors (who as you have often perceived, have heretofore beene our good guides) ſay in this behalfe.

Britton, fo. 11. a. & 40. b.

You have already heard Fleta; and Britton alſo mentioneth this penance in two ſeverall places, both upon the indictment, and in the

the appeale, and voucheth no ſtatute therefore, as no doubt in this caſe he would, as in other like caſes he had done, and ſpecially, ſeeing he wrote ſoone after this ſtatute, hee would have mentioned the act that had inflicted ſo ſtrange and ſtupendious a punithment, if the ſtatute had not beene made in affirmance of the common law.

And the Mirror ſaith, *In peche de homicide chient mortalment ceux que occiont home in priſon per ſurcharge de peine en caſe quant aſcun eſt judge al penance.* And in another place writing upon our very chapter, hee ſaith, *Le point de mitter gents rettes de felony, que ſe ne veillent mitter in paiis, a penance, eſt cy diſuſe que ben les tue ſans aver regard as conditions des perſons, &c.* This author, as hath been ſaid, writeth of the auncient law long before this act, as he himſelfe teſtifieth in the beginning of his booke. He calleth this puniſhment of *paine forte et dure* (the penance) becauſe it is the greateſt and moſt ſevere penance, and paine of all other, and ſo it is commonly called in our books.

Mirror, c. 1. § 9.

Mirror, c. 5. § 4.

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CAP. XIII.

ET le roy defende, que nul ne raviſe ne preigne a force (1) *damaſelle deins age* (2), *ne per ſon gree, ne ſans ſon gree, ne dame ne damaſelle de age, nauter feme mauger le ſoen. Et ſi ul le face, a le ſuit celuy que ſuera deins les 40 jours, le roy luy fra common droiture. Et ſi nul commence la ſuit deins les 40 jours, le roy ſuera, et ceux queux il trovera culpables, ils averont la priſonment de ii. ans, et puis ſerront rentes, a la volunt le roy, et ſils neient dont eſtre rentes, ſoient punies per plus longe priſonment, ſolonque ceo que le treſpaſſe demande.*

AND the king prohibiteth that none do raviſh, nor take away by force, any maiden within age (neither by her own conſent, nor without) nor any wife or maiden of full age, nor any other woman againſt her will; and if any do, at his ſuit that will ſue within fourty days, the king ſhall do common right; and if none commence his ſuit within fourty days, the king ſhall ſue; and ſuch as be found culpable, ſhall have two years impriſonment, and after ſhall fine at the king's pleaſure; and if they have not whereof, they ſhall be punihed by longer impriſonment, according as the treſpaſs requireth.

Cap. Itineris. 155. 4 E. 1. Offic. Coronatoris. Vide Paſc. 6 E. 1. Rot. 4. in Banco Lanc. W. 2. 13 E. 1. ca. 34. 6 R. 2. ca. 6. 4 & 5 Ph. & Mar. ca. 18. 18 Eliz. c. 6. Regiſt. fo. 97. (22 Ed. 4. 22. 1 Inſt. 123. b. 2 Inſt. 180. 2 Rep. 37. Hob. 91. 13 Ed. 1. ſtat. 1. c. 34. 6 R. 2. c. 6.)

For the better underſtanding of this and other ſtatutes concerning rapes, it is firſt to be ſeene, what this word [rape] doth ſignifie, and ſecondly, what offence rape was at the common law before this ſtatute.

This is well deſcribed by the Mirror, *Rape ſolonque le volunt del eſtatute eſt priſe pur un proper mote done pur cheſcun aſſorcement de feme, de quelle condition q. el ſoit*; but better in another place, rape is, when a man hath carnall knowledge of a woman by force, and againſt her will; and, as the Mirror ſaith, it is a proper word; and *rapere* to raviſh legally ſignifieth as much, as *carnaliter cognoſcere*, and

Mirror, ca. 1. § 12.

See the firſt part of the Inſtitutes, ſect. 190. Third part Inſt. cap. Rape. 9 E. 4. 26.

and cannot be expreſſed in legall proceeding by other words, as elſewhere hath been ſaid.

The offence is called *raptus*, and the offender *raptor*. This offence was felony at the common law, but had a puniſhment under ſuch a condition as no other felony had the like, that I have read of; for firſt, divers of our auncient authors, that wrote before our ſtatute, agree, that of old time rape was felony, for which the offender was to ſuffer death, but before this act the offence was made leſſer, and the puniſhment changed, *viz.* from death, to the loſſe of the members whereby he offended, *viz.* his eyes, *propter affectum decoris, quibus virginem concupivit. Amittit etiam teſticulos, qui calorem ſtupri induxerunt*; ſo as it was no felony at the making of this act: and in thoſe dayes if the offender in the appeale brought by her, that was raviſhed, had been condemned by the country, without any redemption he ſhould loſe his eyes and his privy members, unleſſe ſhe that was raviſhed before judgement demaunded him for her huſband; for that was onely in the will of the woman and not of the man: for if (ſay they) it ſhould have been in the will of the man, this inconvenience might have followed, that a ribaud, or a raſcall ſlave might raviſh a noble-woman, and by occaſion of one ſhamefull pollution, perpetually to defile her, and to the diſhonour of her houſe to take her to wife.

Glan. li. 1. c. 2. lib. 14. ca. 6. Mirror, c. 4. de homicide. Bracton, lib. 3. fo. 147. Brit. fo. 3. 7. 39. 45. Fleta, l. 1. c. 25. 33.

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But admit that the raviſher had been a nobleman, and the woman raviſhed baſe and ignoble, it might be thought that the like inconvenience might follow, if in that caſe the woman ſhould have the election. *Reſponſio; quod ſive vir nobilis, ſive ignobilis ſit, voluntas ſemper erit fœminæ, et electio; quia quod eſt in fœmina voluntarium, in viro erit neceſſarium, ut membra ſua redimat ex neceſſitate: cum igitur mulier habeat electionem, et ſpreto judicio petit eum in virum, conceditur ei de gratia domini regis ob favorem matrimonii.*

Mirr cap. 4. de homicide.

And herewith agreeth the Mirrour; that before the time of our king Edw. the 1. the puniſhment was by caſtration and putting out of the eyes of the offender, &c. but of ancient time at the common law it was death at the election of the ſingle woman raviſhed.

Li. 2. controverſiarum, contr' 5. and 24.

And that alſo was the law amongſt the Romans, for Seneca ſaith, *Rapta raptoris aut mortem, aut indotatas nuptias optet:* upon which law there aroſe this caſe, *Una nocte quidam duas rapuit, altera mortem optat, altera nuptias:* there the caſe is largely and doubtfully diſputed, which in our law would make but little queſtion; for though the one for the offence done to her might take him to her huſband, yet ſhall he ſuffer death according to the law for the offence done to the other.

Inter leges regis Canuti.

Int. leges Aluredi regis.

Now let us heare what the law was herein before the conqueſt, *Qui viduam per vim ſtuprarit proprii capitis æſtimatione compenſato, nec mitiori conditione qui virgini vim intulerit. Qui per vim pagani hominis ancillam ſtuprarit, pagano ſol' ſenos numerato, et 60 præterea ſol' mulctator: ſervus autem ſi ſervulam ſtuprarit, virga virilis ei præciditor; qui teneræ ætatis virginem ſtuprarit, eadem lege tenetor, qua is qui adultam compreſſerit.*

See the 1. part of the Inſt. ſect. 190.

And if the lord had raviſhed his nieſe or bondwoman, ſhe might have had an appeale of rape againſt her lord, as at this day ſhe may.

Br. ubi ſupra, & li. 3. fo. 125.

And the puniſhment aboveſaid, *viz.* the loſſe of the ſaid members in ſuch ſort, as Bracton expreſſed the ſame, continued untill the

the making of this act; the purpose of which act was once againe to change the punishment, and yet to make it lesser, that is, to make it punishable by fine and imprisonment at the kings suit, if she pursued not her remedy within forty dayes, as by this act appeareth.

But it is not credible what ill succesſe this act, that mitigated the former punishment, had; for many ill disposed persons taking upon this occasion encouragement to follow the heat of lust, did many shamelesse and shamefull rapes in barbarous and inhumane manner: as taking one example for all; Warren de Henwicke ravished openly in the high way Matild the daughter of Syward de Warton, and after he came and desired to have her to his wife, which was granted by the justices, and was affianced to her in open court. Hil. 6 E. 1. in com. banc. Rot. 4. Lanc'.

This crying sin daily increasing, our noble king, ten yeares after this act, made rape by authority of parliament felony, as by the statute in that case provided, appeareth. W. 2. 13 E. 1. c. 34.

Now this that hath been said doth agree with our books, and therefore it is *benedicta expositio*, when our ancient authors, and our yeare books, together with constant experience doe agree: for if rape had not been made felonie by the statute of W. 2. but had been felony when that act was made, then should the court of the leet have enquired of it, as of a felonie by the common law; but seeing it was made felonie by that statute, it hath been often adjudged, that the leet cannot inquire thereof: for albeit it was once felonie, yet the nature of the offence being changed, as is above-said, to be no felonie, when another act made it felonie againe, yet could not the leet enquire thereof, as of a felonie, which is worthy of observation. 18 E. 2. Stat. de virtu franc'. 9 E. 4. 26. 22 E. 4. 22. 1 R. 3. 1. 6 H. 7. 4. 11 H. 7. 22. Dier, 3 El. 201.

More shall be said of rape in the treatise of the pleas of the crowne, and when we come to the said statute of W. 2. cap. 34.

(1) *Ne preigne a force.*] The taking away by force of a woman whatsoever * against her will, albeit there be no rape, &c. is generally prohibited by this act, upon the penalty herein expressed. Regist. fo. 97. 22 E. 4. 22. Rast. pl. 496. Dier, 9 El. 256.

Deins age.] Here it shall be taken for her age of consent, that is 12 yeares old, for that is her age of consent to mariage; and the taking her away within that age, whether she consent or no, is prohibited by this act. Whereof, notwithstanding all the above-said statutes, good use may be made, because it is generall, and not bound with so many fetters as some of them be. See more hereof in the third part of the Institutes, cap. Rape. * [182]

CAP. XIV.

ET pur ceo que home ad use en ascun pays de utlager les gentes appeales de commandement (1), *force* (2), *aide* (3), *ou de receiptment* (4), *deins mesme la terme, que home doit utlager celuy que est appelle de fait: purview est et commaunde per le roy, que null' ne soit utlage*

AND forasmuch as it hath been used in some counties to outlaw persons being appealed of commandment, force, aid, or receipt within the same time that he which is appealed for the deed, is outlawed; it is provided and commanded by the king, that

utlage pur appele de conmandement, force, aide, ou de receiptment, jeſque a taunt que lappellee del fait (5) *ſoit attaint* (6), *iſſint que un meſme ley ſoit de ceo per tout la terre* (7), *mes celuy que voit appeller, ne leſſa pas pur ceo de attacher ſon appele, al procheine counties* (8) *vers ceux, auxibien come vers les appelles du fait: mes lexigent de eux demurge* (9) *tanque les appellees de fait ſoient attaints per utlagarie, ou autrement.*

that none be outlawed upon appeal of commandment, force, aid, or receipt, until he that is appealed of the deed be attainted, ſo that one like law be uſed therein through the realm: nevertheleſs he that will ſo appeal, ſhall not, by reaſon of this, intermit or leave off to commence his appeal at the next county againſt them, no more than againſt their principals, which be appealed of the deed; but their exigent ſhall remain until ſuch as be appealed of the deed be attainted by outlawry, or otherwiſe.

Utlage, utlagatus, exlex. Utlagaria, exlegalitas. Vide Lam. inter leges Ed. Confeſſ. cap. 38. 3. Part of the Inſt. ca. Appeals. Un meſme ley. (9 Rep. f. 119. Plowd. 97. 2 R. 3. 21. 9 H. 7. 19. 20 Ed. 4. 7. 7 H. 4. 36. Fitz. Coron. 10. 12. 33. Raſt. pla. f. 42. 47, 48.)

3 Part of the Inſt. ca. Principall et Acc.

Here are acceſſaries divided into two parts, *viz.* to acceſſaries before the fact, and to acceſſaries after the fact.

Againe, acceſſaries before the fact are divided into three branches: *De commandement, force, et aid*; acceſſaries after the fact is only by recitement.

(1) *Commandement.*] *Præceptum.* Under this is underſtood all thoſe that incite, procure, ſet on, or ſtir up any other to doe the fact, and are not preſent when the fact is done.

(2) *Force.*] *Fortia*, is a word of art, and properly ſignifieth the furniſhing of a weapon of force to doe the fact, and by force whereof the fact is committed, and he that furniſheth it is not preſent when the fact is done: for theſe two words, *præceptum, et fortia*, heare what Bracton ſaith, *Ubi factum nullum, ibi fortia nulla, nec præceptum nocere debet.* And againe, *Vulnus, fortia, et præceptum, generant unicum factum; non eſſet vulnus ſorte, ſi non adfuiſſet fortia; nec vulnus, nec fortia, niſi præceptum præceſſiſſet:* and ſometimes in a large ſenſe is taken for any that is acceſſary before the fact.

Bract. li. 3. fo. 139.
Britt. li. 5. b.
Mirr. ca. 1. § 13.
40 aſſ. 25.

Et poteſt quis corporaliter occidi, facto, et lingua.

Fleta, li. 1. c. 23.

(3) *Aide.*] *Auxilium.* Under this word is comprehended all perſons counſelling, abetting, plotting, aſſenting, conſenting, and encouraging to doe the act, and are not preſent when the act is done; for if the party commanding, furniſhing with weapon, or aiding, be preſent when the act is done, then is he principall.

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(4) *Reſceitment.*] This is underſtood after the fact done, that is, when one knowing the felonie doth receive the felon, and not onely conceale his offence, but favour and aid him, that he be not knowne.

Brit. ubi ſupra.

In the preamble the miſchiefe is recited, that before this act in ſome countries it had been uſed to outlaw acceſſaries within the ſame time, that the principall was outlawed. Here it is to be underſtood, that in thoſe dayes moſt appeals of death, &c. were ſued by bill in the county before the coroner, in which bill of appeale the appellant doth make a diſtinction betweene the principall and the acceſſary. And therefore this act is intended of appeales commenced

43 E. 3. 17. 18. 34.

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commenced by bill, for in the appeale by originall writ, both principalls and acceſſaries are generally charged alike, without any diſtinction, who be principalls, and who be acceſſaries, untill the plaintife maketh his counte, and therein he muſt diſtinguiſh them; but if the defendants in ſuch an appeale, where ſome be principals, and ſome acceſſaries, make default, the appellant before the exigent ought to declare, to the end it may be knowne who be principals, and who be acceſſaries, and to take the exigent onely againſt the principals, and continue the plea againſt the acceſſaries, untill the principals be attainted; for if the plaintife ſhould pray an exigent againſt them all, he is concluded afterward to charge any of them as acceſſaries.

The difference between an appeal by bill and by writ. 7 H. 4. 31. Nota.

Declare before any appearance.

This act was made in affirmance of the common law, and it doth not hold onely in appeals at the ſuit of the party, but in indictments alſo at the ſuit of the king: for it is an ancient and fundamentall maxime of the common law, *juri non eſt conſonum, quod aliquis acceſſorius in curia regis convincatur, antequam aliquis de facto fuer' attinctus*: yet if the acceſſary will, he may pray proces againſt the enqueſt before the principall be attainted, for *qulibet poteſt renunciare juri pro ſe introducto.* *Regula.*

(5) *Jeſque lappellee del fait ſoit attaint.*] If the principall wage battaile, and is ſlaine in the field, yet he is not attainted, but the judgement muſt be, that he was vanquiſhed in the field, *Ideo conſideratum, quod ſuſ' per coll', &c.* And this was agreed by the juſtices, for otherwiſe in this caſe the lord ſhould have no eſcheat, nor any outlawrie could be ſued by the appellant againſt the acceſſarie. 8 E. 3. judgm. 225. 3. part of the Inſtit. Hic cap. 14. fo. 353.

Our act ſpeaketh *appellee* in the ſingular number; yet in an appeale brought againſt two as principals, and againſt another as acceſſarie to them, in this caſe both of them muſt be attainted before the acceſſary be outlawed; and if one of the principals be found not guilty, the acceſſarie is diſcharged, for the plaintife made him acceſſary to two, and therefore he cannot be found acceſſary to one. But where there be divers principals, the appellant may have his appeale againſt any one of them, and make the acceſſary acceſſary to him only, if he will, for the felonie is ſeverall, but the appellant cannot have ſeverall appeals of one death. 40 aſſ. 25. 7 H. 4. 30. Pl. com. 99. Li. 4. fo. 47. Waits caſe. & fo. 44, 45. Vaux caſe.

In caſe of poyſoning, albeit the delinquent be not preſent when the poiſon is received, yet is he principall, and ſo the principall and acceſſarie may be both abſent. Vaux caſe, ubi ſupra.

It is to be obſerved, that in the higheſt offence, and loweſt injury, there are no acceſſaries, but all be principals; as in treaſon, petit larcenie, and treſpaſſe.

And in one caſe of felonie all be principals as well before as after, though they be abſent at the doing of the felonie; but that is ſpecially provided by the ſtatute of 3 H. 7. cap. 2. of taking of women againſt their wils, &c. 3 H. 7. cap. 2. 2 E. 3. 27. 5 lib. aſſ. 5. 13 aſſ. 14. 22 E. 3. coro. 260. 7 H. 4. 16. 36. 10 H. 4. 5. 11 H. 4. 93. 3 H. 7. 1. 3 H. 7. coron. 53. 4 E. 6. coron. Br. 184. Li. 4. fo. 43, 44. Eyres caſe, & Bibithes caſe.

(6) *Soit attaint.*] That is, have judgement in caſe of felonie for the felonie; for if the principall be convict by verdict, and prayeth his clergie; or if the principall upon his arraignment confeſſe the felonie, and before judgement obtaine a pardon, the acceſſarie is thereby diſcharged, becauſe the principall was never attainted, as our ſtatute ſpeaketh; and ſo it is if the principall * die before judgement, or upon his arraignment ſtand mute. And theſe caſes have been according to this declaratorie act well reſolved, wherein there had been great variety of opinions.

2 R. 3. fo. 21, 22.

If the principall be erroniously attainted, yet this erronious attainder is within this act, for the accessary shall not take advantage of the error, but the principall onely.

7 H. 4. 47. 9 H. 7. 19. b.

And note, that the attainder of the principall must be in the same suit where the accessary is also to be put to answer; and therefore if the principall be attainted of murder at the kings suit, and after the wife bring an appeale against the principall and accessary, the principall plead the former attainder, the accessary shall not be put to answer, and yet the principall is attainted.

40 ass. p. 3. 7 H. 4. 30. 9 H. 4. 2. Li 9. fo. 19. Scig. Zanchars case.

The experience and course at this day is, and warranted by good authority and reason, that if the principall plead not guilty, the accessary shall plead not guilty also, and may be tryed by one inquest; but the charge of the jury is, that if they find the principall not guilty, they shall find the accessary not guilty also; and this is for advancement of justice; for if there were no procurers before, nor any receivers after, there would be fewer principals.

9 H. 7. 19. 50 E. 3. 15, 16.

But if the principall plead not directly to the felonie a plea to bar the plaintife, as *auterfoits attaint*, or *unques accouple*, or the like; there the accessary shall not plead untill that plea be determined: and so if the principall plead a plea to the writ, the accessary shall not be driven to answer untill the plea be determined.

For this word [attaint] and of attainders in deed and in law, see the first part of the Institutes, sect. 747.

(7) *Issint que un mesme ley soit de ceo per tout la terre.*] This is the honour of the law, when all the courts of justice through the whole land, in all cases pronounce the law *tanquam uno ore*, which this branch doth aime at in this particular case, and ought to be observed in all other cases; *lex uno ore omnes alloquitur*.

(8) *Dattacher son appeale al procheine countie.*] That is, to commence his appeale before the coroner at the next countie.

F. N. B. pl. 42. 47, 48.

(9) *Lexigent de eux demurge*, &c.] So much hath been said as may serve for the exposition of this act, the residue shall be handled in the treatise of the pleas of the crowne. See the third part of the Instit. *ubi supra*.

CAP. XV.

ET pur ceo que visconts, et auters (1), *queux ount prises et retenus en prison gents retles de felonie* (2) [*et*] *meint foits ount lesse per replevin les gents, queux ne sont my repleviſables, et ont detenus en prison ceux queux sont repleviſables, per encheson de gaign' des uns, et de grever les auters, et pur ceo que avant ces heures ne fuit my determine* (3) [*certainment*] *queux gentes fuissent repleviſables* (4), *et queux non, forspris ceux queux fuissent prises* (5), *pur mort de home* (6), *ou per commandement le roy* (7), *ou de les justices* (8), *ou*

AND forasmuch as sheriffs, and other, which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not repleviſable, and have kept in prison such as were repleviſable, because they would gain of the one party, and grieve the other; and forasmuch as before this time it was not determined which persons were repleviſable, and which not, but only those that were taken for the death of man, or by commandment of the king, or of his justices, or for the forest;

ou pur la foreſt (9): *purview eſt, et per le roy commande, que les priſoners queux ſont avant utlages* (10), *et ceux queux eyent forjure la terre* (11), *provours* (12), *et ceux queux ſont priſes ove mainer* (13), *et ceux queux ount debruſe la priſon le roy* (14), *larons apertment eſcries et notories* (15), *et ceux que ſont appelles des provours tanque come les provours ſont en vie (ſils ne ſoient de bone fame)* (16) *et ceux queux ſont priſes pur arſon felonioufment fait* (17), *ou pur faux money* (18), *ou fauxer le ſeale le roy* (19), *ou excommenge priſe per prier' leveſque* (20), *ou pur appiert melveiſt* (21), *ou pur treaſon que touche le roy* (22) *meſme, ne ſoient en nul maner repleviſables per le common briefe, ne ſans briefe* (23): *mes ceux queux ſont endites de larceny* (24), *per enqueſts des viſconts, ou des bailifes* (25) *priſes de lour offices, ou per legier ſuſpection, ou pur petit larceny, que namount ouſter le value de xii. deniers, ſils ne ſoient rettes dauter larceny devant cel heure, ou rettes de receiptment des larons, ou des felons, ou de commaundement, ou de la force, ou del aide de le felony fait, ou rettes dauter treſpaſſe, pur le quel un ne doit perdre vie ne member, et home appell' de provour puis la mort le provour, ſil ne ſoit apert laron eſcrie, ſoit deſormes leſſe per ſuffiſant plevin, devant le vicont* (26), *dont le vicont voile reſpondre* (27), *et ceo ſans rien doner* (28) *de lour biens pur la plevin. Et ſi le vicont ou auter leſſent per plevin ul', que ne ſoit repleviſable* (29), *ſi ceo ſoit vicount, conſtable, ou auter bailife de fee que eit gard de priſons* (30), *et de ceo ſoit attaint, perdr' le fee et baillie a touts jours. Et ſi ſoit ſouth-vicount* (31), *conſtable, ou bailife, ou celuy que ad tiel fee pur garder les priſons, et ait ceo fait ſans la volunt ſon ſeignior, ou auter bailife que ne ſoit de fee, eit lenpriſonment de* 3. *ans, et ſoit rent a le volunt le roy. Et ſi ul' deteigne les priſoners repleviſables, puis que le priſoner eit offre ſuffiſant ſuerty, il*

foreſt; it is provided, and by the king commanded, that ſuch priſoners as before were outlawed, and they which have abjured the realm, provors, and ſuch as be taken with the manour, and thoſe which have broken the king's priſon, thieves openly defamed and known, and ſuch as be appealed by provors, ſo long as the provors be living (if they be not of good name) and ſuch as be taken for houſe-burning felonioufly done, or for falſe money, or for counterfeiting the king's ſeal, or perſons excommunicate, taken at the requeſt of the biſhop, or for manifeſt offences, or for treaſon touching the king himſelf, ſhall be in no wiſe repleviſable by the common writ, nor without writ: but ſuch as be indicted of larceny, by enqueſts taken before ſheriffs or bailiffs by their office, or of light ſuſpicion, or for petty larceny that amounteth not above the value of xii d. if they were not guilty of ſome other larceny aforetime, or guilty of receipt of felons, or of commandment, or force, or of aid in felony done; or guilty of ſome other treſpaſs, for which one ought not to loſe life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief, nor defamed) ſhall from henceforth be let out by ſufficient ſurety, whereof the ſheriff will be anſwerable, and that without giving ought of their goods. And if the ſheriff, or any other, let any go at large by ſurety, that is not repleviſable, if he be ſheriff or conſtable or any other bailiff of fee, which hath keeping of priſons, and thereof be attainted, he ſhall loſe his fee and office for ever. And if the under-ſheriff, conſtable, or bailiff of ſuch as have fee for keeping of priſons, do it contrary to the will of his lord, or any other bailiff being not of fee, they ſhall have three years impriſonment, and make fine at the king's pleaſure. And if any

il ſerra en le greve mercy le roy (32). *Et ſil prent loure pur luy deliverer* (33), *il rendra le double au priſoner, et eſſement ſerra en le greve mercy le roy.* De Finibus levatis. 27 E. 1. cap. 13.

any with-hold priſoners repleviſable, after that they have offered ſufficient ſurety, he ſhall pay a grievous amerciament to the king; and if he take any reward for the deliverance of ſuch, he ſhall pay double to the priſoner, and alſo ſhall be in the great mercy of the king.

Cap. Itin. Vet Mag. Char. 155. 27 E. 1. cap. 3. 23 H. 6. cap. 10. Pl. com. 67. (1 Roll, 134. 192. 268. Bro. Mainprife, 11. 56. 78. Fitz. Mainprife, 1. 39, 40. Bro. Mainprife, 54. 57. 59, 60. 75. 78. 91. 11 Rep. 29. Bro. Main. 6. 9. 19. 22. 30. 48. 50, 51. 53. 58. 63, 64. 73. 91. 94. 97. 2 Bulſtr. 328. 3 Bulſtr. 113. 27 Ed. 1. ſtat. 1. c. 3. 3 H. 7. c. 3. 1 & 2 Ph. & M. c. 13.)

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Lib. 2. fol. 45. Marleb. c. 19. 28.

(1) *Viſcounts et autres.*] That is to ſay, ſheriffes and gaolers that have cuſtody of gaoles, ſo-as this act extends not to any of the kings juſtices, or judges of any ſuperiour courts of juſtice; firſt, for that they being ſuperiours are not comprehended in the generall words, as often have been obſerved. 2. *Queux ount priſes ou reteynus priſoners*, which judges doe not. 3. Becauſe in thoſe dayes priſoners were commonly bailed by the kings writ *de homine repleg'*, and then alſo by the writ *de odio et atia*, both which were directed to the ſheriffe.

Brit. fol. 34. b.

And here it is proved, that it is an offence as well to baile a man not bailable as to deny a man baile, that ought to be bailed; and the reaſon is yeelded wherefore the ſheriffes and others did ſo offend, becauſe they would gaine of the one, and grieve the other, *viz.* either for avarice, or for malice.

(2) *Gents rets de felony.*] In thoſe dayes felony comprehended in it as well treaſon (as in this chapter it appeareth) as homicide, rape, or burglary, robbery, arſons, and all larcenies and thefts; for the word and ſignification, ſee the firſt part of the Inſtitutes, ſect. 745.

For the word repleviſable, ſee Marleb. cap. 28. Stamf. Pl. Cor. 72. Regiſt. 77.

(3) *Avant ces heures ne fuit determine*, &c.] Here is another miſchiefe recited, that it was not certainly determined, what people were repleviſable, and what not, within the generall words of the writ *de homine repleg'*, *viz.* *Pro aliquo alio retto, quare ſecundum conſuetudinem regni non ſunt replegiabiles.*

Marlb. ca. 28. Regiſt. F.N.B. 249.

(4) *Et queux homes fuer' repleviſables.*] This word [repleviſable] proveth, that this act intendeth what perſons were to be replevied by the common writ *de homine replegiando*, which was directed to the ſheriffe under whoſe cuſtody the priſoners are, and of whom this act ſpeaketh, and ſo it appeareth by the Regiſter: and replevy, or plevy is applied to the ſheriffe to take pledges, and baile to the higheſt courts of record. And the writ *de manucaptione* directed to the ſheriffe is grounded upon this act, in which writ not onely *replegiar'* but *manucapere* alſo is uſed.

Regiſt. 77. & 133. Brac. l. 3. 121. 154. Fleta, lib. 2. cap. 2. Britton, fo 73. H. 43 E. 3. Coram Rege. Rot. 110.

(5) *Forſpris ceux queux fuer' priſes pur mort de home.*] Here our act firſt ſetteth downe what perſons were not baileable for certain offences by the common writ *de homine repleg'*, and they be in number foure. But by the auncient law of the land in all caſes of felony, if the party accuſed could finde ſufficient ſureties, he was not to be committed to priſon, *quia carcer eſt mala manſio*; but afterwards it was provided by parliament that in caſe of homicide

micide the offender was not bailable, for ſo Glanvill ſaith, *In omnibus autem placitis de felonia ſolet accuſatus per plegios dimitti, præterquam in placito de homicidio, ubi ad terrorem aliter ſtatutum eſt.*

(6) *Pur mort de home.*] The death of man is ſo odious in law, that, (as is aboveſaid) by the common writ *de homine repleg'*, neither principall nor acceſſary was repleviſable.

(7) *Per maundement le roy.*] *Per præceptum regis.*

1. [a] The king being a body politique cannot command but by matter of record, for *rex præcipit, et lex præcipit* are all one, for the king muſt command by matter of record according to the law.

2. [b] When any judiciall act is by any act of parliament referred to the king, it is underſtood to be done in ſome court of juſtice according to the law. And the opinion of Gaſcoine chiefe juſtice is notable in this point, that the king hath committed all his power judiciall to divers courts, ſome in one court, ſome in another, &c. And becauſe ſome courts, as the kings bench, are *coram rege*, and ſome *coram juſticiariis*, therefore the act ſaith, *per maundement le roy*, and the next words be, *ou de ſes juſtices.*

Huſſey chiefe juſtice reported, that ſir John Markham ſaid to king E. 1. that the king could not arreſt any man for ſuſpition of treaſon, or felony, as any of * his ſubjects might, becauſe if the king did wrong, the party could not have his action: if the king commaund me to arreſt a man, and accordingly I doe arreſt him, he ſhal have his action of falſe impriſonment againſt me, albeit he was in the kings preſence; reſolved by the whole court in 16 H. 6. which authority might be a good warrant for Markham to deliver his ſaid opinion to E. 4.

The words of the ſtatute of 1 R. 2. cap. 12. are, *Si non que il ſoit per briefe ou auter maundement le roy*; and it was reſolved by all the judges of England, that the king cannot doe it by any commandement, but by writ, or by order, or rule of ſome of his courts of juſtice, where the cauſe dependeth, according to law.

Dominus rex de aliquo contemptu ſibi illato, alium judicem in regno, quam in curia ſua, habere non debet. *Vide* Marleb. cap. 1.

And Forteſcue ſpeaking to the prince to inſtruct him againſt he ſhould be king, ſaith, *Melius enim per alios, quam per teipſum judicia reddis, quo, proprio ore nullus regum Angliæ uſus eſt, et tamen ſua ſunt omnia judicia regni, licet per alios ipſa reddantur, ſicut et judicum olim ſententias Joſaphat aſſeruit eſſe judicia Dei.*

And Bracton ſaith, *Nihil aliud poteſt rex, &c. quam quod de jure poteſt.*

So as, *maundement le roy* is as much as to ſay (as ſome affirme) as by the kings court of juſtice; * for all matters of judicature, and proceedings in law are diſtributed to the courts of juſtice, and the king doth judge by his juſtices, 8 H. 4. fol. 19. & 24 H. 8. cap. 12. and regularly no man ought to be attached by his body, but either by proces of law, that is (as hath beene ſaid) by the kings writs, or by indictment, or lawfull warrant, as by many acts of parliament is manifeſtly enacted and declared, which are but expoſitions of *Magna Charta*; and all ſtatutes made contrary to *Magna Charta*, which is *lex terræ*, from the making thereof untill 42 E. 3. are declared and enacted to be void, and therefore if this act of W. 1. concerning the extrajudiciall commandement of the king be againſt *Magna Charta*, it is void, and all reſolutions of judges

Glanv. l. 14. c. 1. 3.
Bract. l. 3. fo. 123.
25 E. 3. 42.
28 E. 3. 94.
40 E. 3. 42.
44 E. 3. 38.
43 E. 3. 17.
29 Aſſ. 44. 37.
12. 43 Aſſ. 49.
41 Aſſ. 14.
7 H. 4. 27.
21 E. 4. 84.
F.N.B. 250. b.
a Pl. Com. 234. Seign. Berkleyes caſe. & 217. le Duchy caſe. Stamf. Pl. Cor. 72, 73.
b See before c. 4.
2 R. 3. fol. 11.
1 H. 7. 4. See hereafter at this mark †.
Paſch. 18 E. 3. Coram Rege. Rot. 33. Jo. de Bildeſtons caſe. optime. 16 H. 6. tit. Monſtrans des faits 182. Stamf. Pl. Cor. 72. c. Dier 4 & 5. Ph. & Mar. 162. b. 10 Eliz. 275. Mich. 12 & 13 Eliz. 297. Tr. 21 E. 3. Norf. Coram Rege. Rot. 170. Marlb. cap. 1. Forteſc. cap. 8.

Mag. Char. c. 29. 5 E. 3. c 9 28 E. 3. ca. 3. 38 E. 3. ca. 9. 42 E. 3. c. 3. 2 E. 3. fo. 2 & 3. See Mag. Chart. ca. 29. verb. per legem terræ.
* 8 H. 4. 19 Gaſc. & 24 H. 8. ca. 12. 42 E. 3. ca. 1.

judges concerning ths commandement of the king are to be understood of judiciall proceeding.

Britton, fo. 73. 2 R. 3. 11. (8) *Ou de les justices,*] Upon any cause, whereof they are judges, appearing to them.

1 E. 3. ca. 9. (9) *Ou par la foreſt.*] And all theſe foure are particularly excepted out of the common writ *de homine replegiando*, that the ſheriffe in his county court, which is not a court of record, ſhall not replevy any of theſe foure that are committed; for example, though the party be committed by the perſonall commandement of the king, albeit the commitment be unlawfull, yet the ſheriffe ſhall not deal therein by the writ *de homine replegiando*, but the ſuperiour courts at Weſtm. upon a *habeas corpus, &c.* ſhall doe juſtice to the party in all thoſe foure cauſes; ſo as Stamford, being well conſidered, impugneth not in any ſort this opinion, for his opinion extendeth only to the county court upon the writ *de homine replegiando*, and not to the ſuperiour courts.

But ſince we had written thus much, and paſſed over; ſee the Petition of Right, *anno* 3 *Caroli regis*, reſolved by the king, the lords ſpirituall, and temporall, and the commons in full parliament.

Now this act doth provide, that theſe priſoners hereafter following ſhall not be repleviſable neither by the common writ (that is the writ *de homine repleg'*, nor *ex officio* (without writ) by the ſheriffe or other gaoler, and they be 13 in number, and all theſe 13 are excepted out of the ſaid common writ by the ſaid generall words, *viz. Vel pro aliquo alio retto, quare ſecundum conſuetudinem regni non ſunt replegiabiles.*

Bract. l. 3. 154. 2 Eliz. Dier 179. 15 H. 7. 9. Britton, fol. 73. * [188] (10) 1. *Perſons utlages.*] Perſons outlawed are attainted in law, and therefore * are not repleviſable or to be bailed: for if a man be arraigned of homicide, and plead not-guilty, and is found guilty, and for difficulty of clergy is reprieved, it was reſolved by the juſtices, that he was not bailable, for the intendment of the law in bails is, *Quod ſtat indifferenter*, whether he be guilty or no; but when he is convict by verdict or confeſſion, then he muſt be deemed in law to be guilty of the felony, and therefore not bailable at all, *à fortiori*, when the party is attainted in law.

Bract. l. 3. 121. b. 5 H. 7. 14. 9 H. 6. fo. 2. And herewith agreeth Bracton, *Nec ſunt illi qui culpabiles inveniuntur, per plegios dimittendi, &c.* And yet if the party upon the *cap. utlag'* plead miſnomer, or alledge error, &c. he may be bailed.

(11) 2. *Queux eient forjure.*] They be alſo attainted upon their owne confeſſion, and therefore not bailable at all by law.

Brac. l. 3. fo. 153. b. (12) 3. *Provours.*] The reaſon wherefore provours or approvours be not bailable is, for provours doe firſt confeſſe the felony to be done by themſelves, and therefore they are not bailable, becauſe it appeareth that they be guilty of the fact.

(13) 4. *Ceux queux ſont priſes ove le mainer.*] For in this caſe *non ſtat indifferenter*, as hath been ſaid, whether he be guilty or no, being taken with the mainer, that is with the thing ſtolne, as it were in his hand, aunciently called handhabbend; the like is aunciently called backberend, as a bundle or fardle at his back, which Bracton uſeth for manifeſt theft, *furtum manifeſtum*, and ſo doth Britton.

Bract. li. 3. fo. 154. Brit. fo 22. b. & 72. b.

Bract. l. 3. 153. b. (14) 5. *Ceux queux ont debruſe la priſon le roy.*] Here be two offences: 1. His breaking of the priſon; for it is preſumed, that he

he that is innocent will never break priſon: and 2. his flying *Quia fatetur facinus, qui judicium fugit.*

(15) 6. *Larons apertment eſcries et notories.*] Felons openly known and notorious are not bailable. 16 E. 4. 5.

(16) 7. *Ceux queux ſont appelles des provours tanque come les provours ſont en vie (ſilz ne ſoient de bone fame.)*] The appeale of the approver is forcible againſt the appellee, becauſe the approver confeſſeth himſelfe guilty of the ſame felony, and therefore it ſerveth in nature of an indictment againſt the appellee, ſo long as the approver liveth, unleſſe the appellee be of good fame. But yet the generall words doe receive qualification, for albeit the prover be alive, yet if the approver waive his appeale, the appellee ſhall bee bailed, if no other appeale bee againſt him. 25 E. 3. 42.

(17) 8. *Ceux queux ſont priſes pur arſon, felonioufment fait.*] Burning of houſes, &c. was felony by the common law, as it appeareth by this act, and by our auncient authors, *viz.* Glanvill, the Mirror, Bracton, Britton: and Fleta ſaith, *Si quis ædes alienas nequiter et ob inimicitiam vel prædæ cauſa tempore pacis combuſſerit, et inde convictus fuerit, &c. capitali debet ſententia puniri.* And this ſeemeth to be the law before the conqueſt: [a] *Incendiariis capitis pœna eſto.* And againe, [b] *Sanè quidem tectorum exciſiones et incendia, aperiæ compilationes, cædes manifeſtæ, dominorumque proditores ſcelera ſunt jure humano inexpiabilia.* Lib. 11. fo. 29. Alex. Powtiers caſe. Glanv. li. 14. & 1. cap. 2. Mirror, ca. 1. § 8. De Ardours. Bract. l. 3. fo. 118. Brit. fo. 16. 39. Fleta, li. 1. c. 35. 10 E. 4. 14. 11 H. 7. 1.

(18) 9. *Ou pur faux money.*] This appeares to be treaſon by the common law. Glanvill, lib. 14. cap. 7. Bracton, lib. 3. fo. 118. Britton, fol. 16. Fleta, lib. 1. cap. 22. Mirror, cap. 6.

Præterea autem ſtatuimus, ut unus per omnem ditionem noſtram atque idem ſit nummus, eumque nemo extra oppidum cudito, atqui ſi monetariorum quiſq; nummos corruperit, ei manus ſcelere violata præciditor. See the third part of the Inſtitutes, in the expoſition upon the ſtatute of 25 E. 3. c. 1. of Treaſon.

(19) 10. *Ou fauxer le ſeale le roy.*] This was alſo treaſon by the common law, as it appeareth by the ſaid ancient authors.

And both theſe were declared to be high treaſon at the common law, by the ſtatute of 25 E. 3. cap. 1. See more hereof in the third part of the Inſtit. *ubi ſupra.*

(20) 11. *Ou excommenge priſe per prier del eveſque.*] That is, he that is certified into the chancery by the biſhop to be excommunicated, and after is taken by force of the kings writ of *excommunicato capiendo* (which is ſo called of words in the writ called a *Significavit*) is not baileable, for in ancient time men were excommunicated but for hereſies, *propter lepram animæ*, or other hainous cauſes of eccleſiaſticall conuſance, and not for ſmall or petie cauſes; and therefore in thoſe caſes the partie was not baileable by the ſheriffe, or gaoler without the kings writ: but if the party offered ſufficient caution *de parendo mandatis eccleſiæ in forma juris*, then ſhould the party have the kings writ to the biſhop to accept his caution, and to cauſe him to be delivered. And if the biſhop will not ſend to the ſheriffe to deliver him, then ſhall he have a writ out of the chancery to the ſheriffe for his delivery: or if he be excommunicated for a temporall cauſe, or for a matter whereof the eccleſiaſticall court hath no conuſaunce, he ſhall be delivered by the kings writ without any ſatisfaction. Bract. l. 5. f. 408, 409. Flet. li. 6. cap. 44. Regiſt. F. N. B. 63. &c. Doct. & Stud. li. 2. cap. 32.

(21) 12. *Ou pur apert malveiſt.*] Or for open or manifeſt offences.

[a] Inter leges Ethelſtani.

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[b] Int' leges Canuti. Int. leges Ethelſtani regis.

fences. For, as hath beene ſaid, baile is *quando ſtat indifferenter*, and not when the offence is open and manifeſt.

Brit. fo. 73. (22) 13. *Ou pur treaſon que touche le roy.*] Britton, who wrote after this ſtatute, ſaith, *Queux ſon repleviſables, et queux non, avons dit in nous ſtatutes. Et ouſter ceo ne ſont my repleviſables endites ou appeales de compaſſement de noſtre mort, ſicome deſuis eſt dit, ne ceux que ſont priſes per judgement de nous juſtices, &c.*

For by the common law a man accuſed or indicted of high treaſon, or of any felonie whatſoever, was bayleable upon good ſurety; for at the common law the gaole was his pledge or ſurety that could find none. And this appeareth by Glanvill, who ſaith, *Is qui accuſatur, ut prædiximus, per plegios ſalvos et ſecuros ſolet attachiari, aut ſi plegios non habuerit, in carcerem detrudi:* ſo as a man by the common law was baileable for any offence, untill he were convicted: and this ſeemeth to be the old law of the land before the conqueſt, *viz. Ingenuus quiſque fidejuſſores, qui enim (ſi quando in crimen vocetur (jus ſuum cuique tribuere quam paratiſſimum fore præſtent, fidiſſimos adhibeto.*

Glanv. li. 14 c. 1. & 3. 40 aſſ. p. 33.

Int. leges Ethelred. regis.

(23) *Ne ſoient in nul manner repleviſables per le common briefe, ne ſauns briefe.*] That is, the ſheriffe ſhall not replevie them by the common writ *de homine replegiando*, nor without writ, that is, *ex officio:* but all or any of theſe may be bailed in the kings bench, &c.

(24) *Mes ceux queux ſont endites de larcenie.*] *Latrocinium, larcinium, i. furtum*, theft: and this act divideth larcenie into two kinds: *ſc.* grand and petit; grand larcenie is when the thing ſtolne is above the value of xii. d. *ouſter le value de xii. d.* as our act ſpeaketh: and petit larcenie is when it is of the value of xii. d. or under. And the things ſtolne are to be reaſonably valued, for the ounce of ſilver at the making of this act was at the value of xx. d. and now it is of the value of v. s. and above.

[190]

Regiſt. 269. Flet. li. 1. c. 36. Bract. lib. 3. fo. 150, 151. Britt. fo. 22. 45. Forteſcue ca. 46. 8 E. 2. coro. 404, 406. 415. 18 aſſ. 34. 22 aſſ. p. 39. Tr. 21 E. 3. Coram rege Rot. 42. 10 E. 4. 14.

Eſt enim furtum de re magna, et re parva: pro minimo tamen latrocinio 12. *denariorum, et infra, nullus morte condemnetur, &c. ex pluralitate tamen et cumulo modicorum delictorum poterit capitalis ſententia generari:* And this is good law at this day, and approved by many authorities.

(25) *Per enqueſts des viſcounts ou des bailiffes*, &c.] That is, of ſheriffes in their tournes, or lords in their leets, or thoſe that have infangthiefe and outfangthiefe, &c.

Here our act ſetteth downe ſeaven kinds of offenders that may be bailed.

Regiſt. 83. 268.

1. Perſons indicted of larceny before the ſheriffe, &c. yet this is ſo expounded by the Regiſter, that they be of good fame.

2. Impriſoned for light ſuſpicion. Here is added alſo, *dum tamen bonæ famæ ſunt.*

3. For petit larceny, which doth not amount above the value of xii. d. if they be not charged with other larceny.

Regiſt. ubi ſup. F. N. B. 249, [illegible].

4. Accuſed for the receiving of thieves or felons.

5. Or of commandement, force, or aid of the felonie done.

6. Or accuſed for other treſpaſſe, for which a man ought not to loſe life or member.

Regiſt. ubi ſup. F. N. B. ubi ſup.

7. Or the appellee of an approver after the death of the approver; and upon our act is the writ *de mainucaptione* grounded, which maketh mention thereof.

(26) Soit

(26) *Soit deſormes leſſe per ſuffiſant plevin devant le viſcount.*] That is to be underſtood where the indictment was taken before the ſheriffe in his tourne, for there he was judge of the cauſe, for other priſoners could not be bayle without writ: and if the ſheriffe having ſufficient ſurety offered unto him, refuſed to bayle him, he ſhould have a writ *de manucaptione* directed to the ſheriffe to take pledges of him; and if the bailiffe of a hundred (which is intended of a ſteward in a leet) refuſed to take pledges of one indicted before him, the priſoner ſhould have had a writ *de manucaptione* to the ſheriffe to take pledges of him; and all this appeareth by the writ *de manucaptione*. But ſince this time (to ſpeak once for all) this writ of *manucaptione* is taken away by the ſtatute of 28 E. 3.

Bract. li. 3. fo. 154. Regiſt. 83. 268. 291. F.N.B. 249, 250. F.N.B. ubi ſup.

The ſtatute of 1 & 2 Phil. & Mar. concerning baylement by juſtices of peace, hath relation to our act, which hath made me the longer in explaining hereof. And ſee the ſtatute of 2 & 3 Phil. & Mar. concerning that matter.

1 & 2 Ph. & M. c. 13. 2 & 3 P. & M. ca. 10.

(27) *Per ſufficient plevin dont le viſcount voille reſponder.*] They which take pledges, ought to take ſufficient pledges, for which they will anſwer.

Vide ca. 10. & 26.

(28) *Et ceo ſans riens doner.*] For neither the ſheriffe, nor other of the kings officers could take any thing for doing his office. *Vide* cap. 26.

(29) *Et ſi le viſcount ou auter leſſent per plevin ul que ne ſoit plevijable.*] *Ou auter.* This is expounded by the words following.

(30) *Si ceo ſoit viſcount, conſtable, ou auter bailife de fee que eit gard de priſoners.*] So as at this time there were ſheriffewickes in fee, and conſtables and bailiwicks in fee, which had the keeping of priſons: theſe being attainted of letting to baile of any priſoner not bailcable, ſhould loſe the fee and bayliwicke for ever: and upon office found, the king ſhould have the inheritance of the office in him to be grantable over.

(31) *Et ſi ſoit ſouth viſcount*, &c.] Here it appeareth, that under-ſheriffes are of greater antiquity, then ſome have ſurmiſed. [191]

Note, the act of the under-ſheriffe or other under baylie without the aſſent of his ſuperiour is no forfeiture of the fee, or bayliwick of his ſuperiour, though in many other caſes the ſuperiour ſhall anſwer for his deputie.

39 H. 6. 32. For this ſee the ſtat. of 26 E. 1. intituled, *Contra Vic' & Clericos.* Vet. Mag. Chart. 159, 160. Vet. N.B. fo. 40.

(32) *Et ſil detcine les priſoners replevijables puis que le priſoner eit offie ſaſſiſant ſuretie, il ſerra en le greve mercy le roy.*] Here it appeareth, that to deny a man plevin that is plevijable, and thereby to detaine him in priſon, is a great offence, and grievouſly to be puniſhed.

(33) *Et ſi il priſt louer pur luy deliverer.*] And if the ſheriffe, &c. take any reward for his deliverance, the party ſhall recover double the value, and alſo he ſhall be in the great mercy of the king. *Vide* cap. 26.

There be many ſtatutes made ſince our act, that doe prohibite baile or mainpriſe in very many caſes, and alloweth the ſame in many other, which tend not to the expoſition of our act, and doe belong to another treatiſe, and therefore we omit to ſpeak of them any farther in this place.

See the ſtatute of 1 E. 4. cap. 2. that upon all preſentments and indictments taken before any ſheriffe or other in their tournes, leets,

2 E. 4. ca. 2.

Icets, or law-dayes, they ſhall have no power to attach, arreſt, or put in priſon any perſon ſo preſented or indicted, but that the ſheriffe ſhall deliver all ſuch preſentments and indictments to the juſtices of peace at their next ſeſſions.

CAP. XVI.

EN droit de ceo que aſcun gents parnount, et prendre ſount les avers des auters, et les chaſent hors del countie ou les avers fueront priſes: purview eſt, que nul deſormes ne le face. Et ſi ul le face, ſoit grevement rente ſolonque ceo que eſt contenue en les eſtatutes de Marleb. cap. 4. *faits en temps le roy H. pier le roy que ore eſt. Et per meſme le maner ſoit faits de ceux, queux parnont les avers a tort, et queux font diſtres en auter fee, plus grevement ſoient punies, ſi le maner de treſpas le demaund.*

IN right thereof, that ſome perſons take, and cauſe to be taken, the beaſts of other, chaſing them out of the ſhire where the beaſts were taken; it is provided alſo, that none from henceforth do ſo; and if any do, he ſhall make a grievous fine, as is contained in the ſtatute of Marlebridge, made in the time of king Henry, father to the king that now is. And likewiſe it ſhall be done to them which take beaſts wrongfully, and diſtrain out of their fee, and ſhall be more grievouſly puniſhed, if the manner of the treſpaſs do ſo require.

Vide Flet. lib. 2. c. 40. 30 aſſ. 28. (1 H. 5. 3. 7 H. 7. f. 1. 52 H. 3. c. 4. 1 & 2 Ph. & M. c. 12. Regiſt. 183.)

This ſtatute conſiſteth upon two branches: the firſt is a confirmation of the ſtatute of Marlebridge, cap. 4. and the ſecond branch is a confirmation of the ſtatute of Marlebridge, cap. 2. & 15. where you may reade the expoſition of them: Onely theſe differences I obſerve betweene them, that Marlebridge, ca. 4. ſpeaketh onely of diſtreſſes, and our act ſpeaketh of all manner of takings. Marlebridge prohibiteth diſtreſſes generally; our act, of beaſts, and goeth no farther. Marlebridge ſpeaketh of diſtreſſes which he hath taken; our act which he hath taken, or cauſed to be taken. Marlebridge, cap. 15. excepteth the king and his miniſters, &c. which our act doth not, but yet by conſtruction of law they are excepted, becauſe the king might doe it by his prerogative.

Vide Cap. Itin. Vet. Mag. Char. fo. 155.

13 E. 4. 6.

Fleta ubi ſup.

This act Fleta reciteth in this manner: *Proviſum eſt quod nullus averia aliena capiens per ſe, vel per ſuos notos vel ignotos extra com', in quo capta fuerint, fugare præſumat, &c.*

CAP.

CAP. XVII.

PURVIEW eſt enſement, que ſi ul deſormes preigne les avers des auters, et les face chaſe en chaſtell, ou en forcelet (1), *et illonques dedeins le cloſe du chaſtell, ou de forcelet les deteign' encounter gage et pledge, pur que les avers ſerront ſolempnement demandes per viſc', ou per auter bailiſe le roy a la ſuit del pl', le viſc' ou le bailiſe priſe ove luy poyar de ſon countie* (2), *ou de ſa bail', et voile aſſaier de faire de ceo repl'* (3) *des avers a celuy que les aver' priſe, ou a ſon ſeigniour, ou as auters des homes ſon ſeigniour quicunque queux ſont troves en le lieu, ou les avers fueront enchaſes. Et ſi home luy deforce adonques de la deliverance des avers, ou quel ne trove home pur le ſeigniour, ou pur celuy que les aver' priſe que reſpoign' et face le deliverance, apres ceo que le ſeigniour, ou parnour, per viſc' ou per bailiſe, ſerra admoniſt de faire la deliverance, ſi ſoit en pays, ou pres, ou la ou il purra per le parnour, ou per auters des fees covenablement eſtre garnie de faire le deliverance, ſil fuit hors de cel pays quant le priſe fuit fait, et ne face adonques maintenant les avers deliver, que le roy pur le treſpas et pur le deſpite, face abate le chaſtell, ou le forcelet ſans recoverie* (4) *: et touts les damages que le plaintiſe avera reſceve de ſes avers, ou de ſon gainage diſturbe* (5), *ou en auter maner puis le primer demaund des avers fait per le vic', ou per le bailiſe, luy ſoient reſtores au double, de ſeigniour ou de celuy que les avers aver' priſe, ſil eit de quoy, et ſil neit de quoy, reſpoign' le ſeigniour quel heure, et en quel maner deliverance ſoit fait apres ceo que le vicount ou le bailiſe ſerra venue pur la deliverance faire. Et ſoit aſcavoire, que la ou le vic' dever' faire returne del briefe le roy ou bailiſe le ſeigniour du chaſtell, ou le forcelet, ou*

IT is provided alſo, that if any from henceforth take the beaſts of other, and cauſe them to be driven into a caſtle or fortreſs, and there within the cloſe of ſuch caſtle or fortreſs do withhold them againſt gage and pledges, whereupon the beaſts be ſolemnly demanded by the ſheriff, or by ſome other bailiff of the king's; at the ſuit of the plaintiff, the ſheriff or bailiff, taking with him the power of the ſhire or bailiwick, do aſſay to make replevin of the beaſts from him that took them, or from his lord, or from other, being ſervants of the lord (whatſoever they be) that are found in the place whereunto the beaſts were chaſed; if any deforce him of the deliverance of the beaſts, or that no man be found for the lord, or for him that took them, for to anſwer and make the deliverance, after ſuch time as the lord or taker ſhall be admoniſhed to make deliverance by the ſheriff or bailiff, if he be in the countrey, or near, or there whereas he may be conveniently warned by the taker, or by any other of his to make deliverance; if he were out of the countrey when the taking was, and did not cauſe the beaſts to be delivered incontinent, that the king, for the treſpaſs and deſpite, ſhall cauſe the ſaid caſtle or fortreſs to be beaten down without recovery; and all the damages that the plaintiff hath ſuſtained in his beaſts, or in his gainure, or any otherwiſe (after the firſt demand made by the ſheriff or bailiff) of the beaſts, ſhall be reſtored to him double by the lord, or by him that took the beaſts, if he have whereof; and if he have not whereof, he ſhall have it of the lord, at what time, or in what manner the deliverance be made, after that the ſheriffe or bailiff ſhall come

ou a auter a que returne de briefe le roy appent, ſi le bailife de cel franchiſe ne face le deliverance, puis que le vicount aver' le return' a luy fait, face le vicount ſon office ſans delay (6), *et ſur lavantdit peine. Et per meſme le maner ſoit fait la deliverance* per attachment de pleint fait ſans briefe, et ſur meſme la peine* (7). *Et ceo face a entender per tout la, ou le briefe le roy court. Et ſi ceo ſoit en le marche de Gales* (8), *ou ailors, la ou le briefe le roy ne court mye, le roy que eſt ſoveraigne ſeignior eut fra droit* (9) *a ceux queux pleindre ſe voudront.*

come to make deliverance; and it is to wit, that where the ſheriff ought to return the king's writ to the bailiff of the lord of the caſtle or fortreſs, or to any other, to whom the return belongeth, if the bailiff of the franchiſe will not make deliverance after that the ſheriff hath made his return unto him, then ſhall the ſheriff do his office without further delay, and upon the foreſaid pains: and in like manner deliverance ſhall be made by attachment of plaint made without writ, and upon the ſame pain. And this is to be intended in all places where the king's writ lieth. And if that be done in the marches of Wales, or in any other place where the king's writs be not current, the king, which is ſovereign lord over all, ſhall do right there unto ſuch as will complain.

* [193]

(52 H. 3. c. 3. 13 Ed. 1. ſtat. 1. c. 39. Regiſt. 85. 52 H. 3. c. 21.)

Vide Marlb. 52 H. 3. ca. 1.

The miſchiefe before this act was, that in the irregular time of H. 3. great men, when they took a diſtreſſe of the beaſts of their tenants or neighbours, that ſerved for their tillage or huſbandry, to prevent the ſpeedy courſe of juſtice, and to enforce the owners of the beaſts for neceſſity to yeeld to their deſire, would drive the beaſts into a caſtle or fortreſſe, and there detaine and keepe them againſt gages and pledges, ſo as no replevy could be made according to the ordinary courſe of law; for that in caſe of a ſubject he could not break the caſtle or fortreſſe, but the ſheriffe was to returne *averia elongata*, and thereupon the owner was to loſe the uſe of his beaſts of long time. But this act giveth remedy, that the ſheriffe taking with him the power of the county may make replevin, as by the body of the act appeareth.

Vide 52 H. 3. c. 3. Britton, 54. b. Fleta, li. 2. c. 40. W. 2. ca. 39. Lib. 5. fo. 91, 92. Semaines caſe. Vet. N B. 43. 44. Regiſt. 83. 85. 8 H. 4. 17. in Repl.

(1) *Chaſe in caſtel ou en forcelet.*] And ſo it is, if he that diſtrain chaſe the diſtreſſe into any other houſe, park, or other place of ſtrength, the ſheriffe to make replevin may by force of this act break the houſe, caſtle, or fortreſſe, park, or other place of ſtrength by force of this act, at the ſuite of a ſubject.

(2) *Pur que les avers ſerront ſolempnement demandes per viſcont, ou auter bailife le roy a la ſute del plaintiſe, le viſcont ou le bailife prife ove luy poyar de ſon county*, &c.] Nota, every man is bound by the common law to aſſiſt not only the ſheriffe in his office for the execution of the kings writs (which are the commandements of the king) according to law; but alſo his baily, that hath the ſheriffes warrant in that behalfe, hath the ſame authority, which his maſter the ſheriffe hath, for the ſheriffe cannot doe all himſelfe, and if they doe it not being required, they ſhall be fined and impriſoned; but this is ſo to be underſtood, where the ſheriffe may lawfully do it, and that before the ſheriffe doth uſe any force, he ought (as our

our act teacheth) to demand according to the law the goods to be delivered, ſo as replevy might be thereof made, for *ſequi debet potentia mandatum legis, non præcedere*, force ought to follow, and not to precede the commandement of the law.

Bracton who wrote before this act ſaith, *Et ſi [vicecomes] aliquem invenerit reſiſtentem, aſſumptis ſecum (ſi opus fuerit) militibus et liberis hominibus de com' ad ſufficientiam capiat corpora hominum reſiſtentium, et illos in priſona ſalvo cuſtodiat, donec dominus rex inde præceperit voluntatem ſuam, &c.* Bract. li. 5. 442. b. Fleta, li. 2. c. 62.

And our ſtatutes of W. 1. W. 2. and Marlebridge are all in affirmance of the common law in that point, ſaving for breaking of the caſtle, fortreſſe, houſe, &c. in caſe of the ſubject; in which caſe our act giveth remedy. W. 1. c. 9. & 17. W. 2. ca. 29. Marlb. ca. 21. Semaines caſe. ubi ſupra.

If any man, how great ſoever, might have reſiſted the ſheriffe in executing of the kings writs, then had it been a good retourn for the ſheriffe to have retourned ſuch reſiſtance, but as the ſtatute of W. 2. ſaith, *Quod hujuſmodi reſponſio multum redundat in dedecus domini regis et coronæ ſuæ*; and that which is in *dedecus domini regis*, &c. is againſt the common law, therefore of neceſſity, if need be, for the due execution of the kings writs, the ſheriffe may by the common law take *poſſe comitatus* to ſuppreſſe ſuch unlawfull force, and reſiſtance. 3 H. 7. 2. 10. 12 H. 7. 17. b. W. 2. ca. 39.

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R. did graunt and render lands by fine to I. I. ſued the kings writ to the ſheriffe to deliver ſeiſin, the ſheriffe retourned, that he could not execute the kings writ for reſiſtance of B. and others unknown; and becauſe the ſheriffe tooke not the power of the county in aid of the execution, as the ſtatute willeth, he was amerced at xx. marks, and an attachment awarded againſt B. and the reſt, &c. 19 E. 2. tit. Execution 24.

And it is holden for a maxime of law, that it is not lawfull for any man to diſturb the miniſters of the king in the due execution of the kings writs, or proceſſe of law. 8 E. 2. tit. Execution 252.

Now beſides the warrant of the common law, the ſheriffe hath his letters patents of aſſiſtance, whereby the king commandeth, that all arch-biſhops, biſhops, dukes, earles, barons, knights, freemen, and all other of that county be to the ſheriffe thereof in *omnibus quæ ad officium illud pertinent, intendentes, auxiliantes, et reſpondentes*; ſo as no man eccleſiaſticall or temporall is exempted from this ſervice being above 15. and under 70. for ſo it is by conſtruction of law.

(3) *Et voille aſſaier de faire plevin.*] By force of this clauſe he ought by the power of the county to make replevin, and it is no retourn for him to ſay, that the beaſts be in a caſtle, &c. whereof you ſhall reade more hereafter in this chapter. Fleta, li. 2. c. 40.

(4) *Que le roy pur le treſpaſſe & pur le diſpite face abater le caſtel ou le forcelet ſans recovery.*] But this totall proſtrating or demoliſhing of the caſtle, &c. cannot be done upon the retourne of the ſheriffe, but upon a ſuit on the kings behalf, wherein the parties intereſted may be called to anſwer, and upon judgement given againſt them proceſſe to be made to the ſheriffe to proſtrate and demoliſh the caſtle and fortreſſe, and ſo is the book that ſpeaks thereof to be intended. Semaines caſe. ubi ſup. fo. 93. a.

(5) *De ſes avers, ou ſon gainage diſturbe.*] For the law doth ever favour tillage, and the huſbandry of the realme, as by this clauſe

clauſe appeareth, and therefore gives the party grieved double damages.

(6) *Et ſoit aſſavoir, que la ou le viſcount dever' faire retourne del briefe le roy au bailife, le ſeignior del caſtel, ou de forcelet, ou a auter a que retorne del briefe le roy appent, ſi le bailiſe del franchiſe ne fait deliverance, &c. face le viſcont ſon office ſans delay.*] This doth give ſome light to the former branch, that if the beaſts be detained in a caſtle or fortreſſe, the ſheriffe muſt doe his office without delay, that is, forthwith to replevy the beaſts; and if he ought to doe it in this caſe of the franchiſe, the ſame he ought to doe in the other caſe.

Regiſt. 83. It appeareth by the Regiſter, that if the conſtable of the caſtle upon a mandat to him to make replevin, *nihil inde cura-vit*, or if he make no retourne, &c. at all, upon retourne hereof, a *non omittas* F.N.B. 68. ſhall be awarded, &c. But ſuch retournes were permitted before 47 E. 3. 33. this act, but now by this act the ſheriffe in that caſe ought preſently to enter, and make deliverance of the beaſts.

(7) *Et per meſme le manner ſoit fait la deliverance per attachment* Marleb. ca. 21. *de plcint fait ſans briefe & ſur meſme la paine.*] See the ſtatute of Marlebridge that provideth to the ſame effect, where you ſhall reade more of this matter.

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(8) *Et ſi ceo ſoit en le marches de Gales.*] The marches of Wales were the commots, great ſeigniories, and baronies in Wales, which were holden of the king in chiefe, and out of every county of England: if any diſtreſſe were driven into a caſtle or fortreſſe in the marches of Wales, and detained, a writ ſhould be directed to the ſheriffe of the county of England next adjoyning to the caſtle, or fortreſſe, where the beaſts be ſo detained, to make replevy.

18 E. 2. Aſſ. 382. 1 F. 3. 14. 3 E. 3. 82. 8 E. 3. 427. 13 E. 3. Juriſdict. 23. 15 E. 3. ib. 24. 24 E. 3. 42. 47 E. 3. 6. 50 E. 3. 26. 6 H. 4. 9. 6 H. 5. Juriſdiction 34. 35 H. 6. 30.

(9) *Le roy que eſt ſoveraigne ſeigniour ent fra droit.*] At this time, *viz.* in 3 E. 1. Lluellen was a prince, or king of Wales, who held the ſame of the king of England as his ſuperiour lord, and ought him liege, homage, and fealty; and this is proved by our act, *viz.* that the king of England was *ſuperior dominus*, *i.* ſoveraigne lord of the kingdome or principality of Wales.

Polydor Virg. 37 H. 3. p. 306. Pl. Com. 126. b. Cambden in Flintſh. p. 525.

King H. 3. after prince Edward had married Elianor daughter of Spaine, perceiving him (to uſe the words of mine author) *Ita ſuapte natura tanta indole præditum, ut maturius ad res gerendas idoneum redderet, primo Walliæ principatu donavit, deinde Aquitaniæ et Hiberniæ præpoſuit; hinc natum, ut deinceps unuſquiſque rex, qui ſecutus eſt, filium majorem natu principem Walliæ facere conſueverit.*

Lluellen prince of Wales, by the incitation of David his brother, in the 9 year of E. 1. rebelled againſt their ſoveraigne lord; in which rebellion Lluellen was ſlaine, and the king brought all Wales under his ſubjection: the ſaid David being brother and heire of Lluellen for his rebellion and treaſon againſt his ſoveraigne lord was after the death of his brother at a parliament Rot. Parl. anno 11 E. 1. holden in the 11 yeare of E. 1. attainted of high treaſon; of whoſe judgement and execution heare what Fleta ſaith, *Et unico* Fleta, li. 1. c. 16. *malefactori plura poterunt infligi tormenta, prout meruerit, ſicut contigit de Davide principe Walliæ cum per recordum quinque judiciis mortalibus torquebatur, ſuis namque meritis exigentibus, detractus, ſuſpenſus, decollatus, diſmembratus fuit et combuſtus, cujus caput principali civitati, quatuorque quarteria ad quatuor partes regni in odium traditorum deferebantur ſuſpendenda.* By reaſon whereof, where Wales was before holden of the king, as of his ſoveraigne lord, as is aforeſaid,

aforeſaid, now king Edw. 1. became king of the ſame in poſſeſſion, which appeareth by the ſtatute of Snowdon in theſe words; *Edwardus Dei gratia, &c. divina providentia (quæ in ſua diſpoſitione non falkitur) inter alia ſuæ diſpenſationis munera, quibus nos et regnum noſtrum Angliæ decorari dignata eſt, terram Walliæ cum incolis ſuis prius nobis jure feodali ſubjectam, jam ſui gratia in proprietatis noſtræ dominium, obſtaculis quibuſcunque ceſſantibus, totaliter et cum integritate convertit, et coronæ regni prædict' tanquā partem corporis ejuſdem annexuit et univit:* by which act it further appeareth, that king E. 1 had conſidered, and peruſed all the laws of Wales, and ſome of them hee utterly abrogated, ſome of them hee permitted, ſome hee corrected, and ſome he newly added to the others.

Rot. Parliam. anno 12 E. 1. Pl. Com. 126. that this is a ſtatute.

We have been, above our uſuall manner, the more copious herein, becauſe our deſire is, that truth might prevaile. See the ſtatutes of 27 H. 8. and 34 and 35 H. 8. concerning Wales. See the fourth part of the Inſtitutes, cap. Of the Courts, &c. of Wales.

27 H. 8. ca. 27. 34 & 35 H. 8.

CAP. XVIII. [196]

PUR ceo que la common fine et amerciament (1) *de tout le county en eyre des juſtices pur faux judgements* (3), *ou pur auter treſpas, eſt aſſeſſe* (2) *per vicount et barretors* (4) *des counties malement, iſſint que la ſumme eſt maintfoits encrue, et les parcels autrement aſſeſſe que eſtre ne duiſſent, au damage du people, et pluſors ſoits ſont paies as viconts et barretors, que ne point les acquitent. Purview eſt, et unt le roy, que deſormes en eyre des juſtices devant eux devant lour departure ſoit tiel ſumme aſſeſſe per ſerement de chivalers et des prebes homes, ſur touts ceux que eſcoter deveront* (5), *et les juſtices facent mitter les parcels en lour eſtreats que ils liverent al eſchequer* (6), *et non pas la ſumme totall* (7).

FORASMUCH as the common fine and amerciament of the whole county in eyre of the juſtices for falſe judgements, or for other treſpaſs, is unjuſtly aſſeſſed by ſheriffs and baretors in the ſhires, ſo that the ſum is many times increaſed, and the parcels otherwiſe aſſeſſed than they ought to be, to the damage of the people, which be many times paid to the ſheriffs and baretors, which do not acquit the payers; it is provided, and the king wills, that from henceforth ſuch ſums ſhall be aſſeſſed before the juſtices in eyre, afore their departure, by the oath of knights and other honeſt men, upon all ſuch as ought to pay; and the juſtices ſhall cauſe the parcels to be put into their eſtreats, which ſhall be delivered up unto the exchequer, and not the whole ſum.

(8 Rep. 39.)

There were foure miſchiefes, or rather grievances before this act.

1. That this common fine and amerciament before juſtices in eyre was promiſcuouſly aſſeſſed by the ſheriffe and barretors of the county (for ſo our act ſpeaketh) upon the faultleſſe, as well as upon

upon the faulty, and that after the justices in eyre were departed and gone.

2. That the same was many times by them increased.

3. That the parcells were otherwise, then they ought to be, to the damage of the people.

4. That the said amerciament was paid to the sheriffe, and barretors, that could not acquite them, and therefore were often doubly charged.

The remedy by the body of the act consisteth on two parts.

1. That such summes shall be assessed by the oath of knights, and other honest men before the justices in eyre, upon such as ought to pay the same.

2. That the justices shall cause the parcels to be put in their estreats, which shall be delivered up in the exchequer, and not the whole summe.

Lib. 8. fo. 39. Greislies case.

(1) *Common fine et amerciament.*] Here fine and amerciament are all one, for, as by this act appeareth, it ought to be afferred, which a fine in his proper sense ought not: this is parcel of the green wax, so called, because the estreats to the sheriffe for levying of them are sealed with green waxe.

42 E. 3. ca. 9. 7 H. 4. ca. 3.

This common amerciament was a great grievance to the people, for that the faultlesse, as well as the faulty, were (as hath been said) thereby charged; and this was *disperdere innocentem cum delinquente*, much like the abuse of the clark of the market, who

23 R. 2. ca. 4.

used to take a common fine, untill it was remedied by act of parliament.

Greislies case. ubi supra. 9 Eliz. Dier 263.

(2) *Est assise.*] That is, is afferred.

(3) *Pur faux judgements.*] The suitors in a base court for false judgements shall be amercied, to the end they may be the more wary, and take better advice to doe justice.

Li. 8. fo. 36, 37. First part of the Inst. sect. 701.

(4) *Per barretors.*] For the signification of this word, see Pasch. 30 Eliz. the case of barretry, and the first part of the Institutes.

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Mirr. li. 4. § de amerciaments leviable. See hereafter cap. 45.

(5) *Sur touts ceux queux escoter devieront.*] This is a law of great equitie, that such as be faulty should onely be contributory to the payment of fine and amerciament.

See hereafter cap. 45.

(6) *Al eschequer.*] For that court is the true center, into which all the kings revenue and profit ought to fall, and by this meane the toll shall come to the right mill.

Rot. Parl. an. 17 E. 3. nu. 37.

(7) *Et non pas le totall.*] But particularly, and by parcell, upon every one that ought to contribute.

The commons petitioned, that no common fine of any county from thenceforth should be made, but that every man may be particularly punished. Whereunto the kings answer was,

The king willeth the same.

CAP.

CAP. XIX.

EN droit des vic', ou auters queux respoign' per lour maines al eschequer, et queux ount resc' de les dets le roy (1) *pier le roy que ore est, ou les dets le roy mesme avant ceux heures, et queux ne ount my acquites de ceo les dettours al eschequer: purview est, que le roy envoiera bones gentes per touts les counties, a oyer touts iceux, queux de ceo pleine se voudront et a terminer issint la besoign', que ceux que purront monstrer que ils eient issint avant paies, a touts jours (ent) ferront quites, le quel que les viconts ou auters serront morts ou vives, en certaine forme que lour serr' baill'. Et ceux que issint naver' fait, silz soient en vies, serront punies grevement; et sils soient morts, lour heires respoign'* (2), *et soient charges de la dette. Et commaund le roy, que les viconts, et les auters avantdits deformes loialment acquitent les dettors a prochin accompt* (3), *puis que ils averont le dette resceive: et donque soit le det allowe al eschequer, issint que jammes ne veign' en summon'. Et si le vic' autrement face, et de ceo soit attaint, cy rendra al plaintife le treble de ceo que il aver' de luy resceive, et soit rent a le volunt le roy. Et bien se garde chescun vicont, que il eit tiel resceiver, pur que il voudra responder* (4), *car le roy se prendra del tout as viscont, et a lour heires. Et si auter que respoign' per sa maine al eschequer le face, il rendra le treble al plaintife, et soit rent en mesme le maner. Et que les vic' facent tayles a touts iceux, queux paieront * le det le roy. Et que la summons deschequer a touts les debtors, queux demander voudront la view, facent monstrer sans denier les a nulluy, et ceo sans rien prender de louer, et sans rien don'* (5),

IN right of the sheriffs, or other, which answer by their own hands unto the exchequer, and which have received the king's father's debts, or the king's own debts before this time, and have not acquitted the debtors in the exchequer; it is provided, that the king shall send good and lawful men through every shire, to hear all such as will complain thereof, and to determine the matters there, that all such as can prove that they have paid, shall be thereof acquitted for ever (whether the sheriffs or other be living or dead) in a certain form that shall be delivered them; and such as have not so done (if they be living) shall be grievously punished; and if they be dead, their heirs shall answer, and be charged with the debt. And the king hath commanded, that sheriffs and other aforesaid, shall from henceforth lawfully acquit the debtors at the next accompt after they have received such debts; and then the debt shall be allowed in the exchequer, so that it shall no more come in the summons; and if the sheriff otherwise do, and thereof be attainted, he shall pay to the plaintiff thrice as much as he hath received, and shall make fine at the king's pleasure. And let every sheriff take heed, that he have such a receiver, for whom he will answer; for the king will be recompensed of all, of the sheriffs and their heirs. And if any other, that is answerable to the exchequer by his own hands so do, he shall render thrice so much to the plaintiff, and make fine in like manner. And that the sheriffs shall make tallies to all such as have paid their debt to the king; and that the summons of the exchequer be shewed to all debtors

et que ne le fra, le roy prendra a luy grevement.

that demand a ſight thereof, without denying to any, and that without taking any reward, and without giving any thing; and he that doth contrary, the king ſhall puniſh him grievouſly.

(51 H. 3. ſtat. 4. 42 Ed. 3. c. 9. 7 H. 4. c. 3.)

W. 1. ca. 32.

(1) *Dettz le roy.*] Under this word [*debitum*] are all things due to the king comprehended; and not onely debts in their proper ſenſe, but duties or things due, as rents, fines, iſſues, amerciaments, and other duties to the king received, or levied by the ſheriffe: for debt in his large ſenſe ſignifies, whatſoever any man doth owe, and *debere dicitur, quia deeſt habere: debitori enim deeſt quod habet, cum ſit creditoris, maxime in caſu domini regis.*

(2) *Lour heires reſponderont.*] That is to be underſtood, *quoad reſtitutionem, ſed non quoad pœnam*; that is, for the civill, but not for the criminall part: for it is a maxime in law, *pœna ex delicto defuncti hæres teneri non debet*: and againe, *in reſtitutionem, non in pœnam hæres ſuccedit.*

(3) *Au prochein account.*] See for this the ſtatute of 51 H. 3. Statutum de Scaccario, and the ſtatute of W. 4. Vet. Mag. Chart. fo. 33, 34.

(4) *Et tiel receivor pur quoy il voet reſpondre.*] For the rule of this, and like caſes of the king, is, *reſpondeat ſuperior.*

(5) *Et que la ſummons deſchequer a touts les debtors, queux demander voudront la view, facent monſtrer ſans denier les a nulluy, et ceo ſans rien prender de louer, et ſans riens don', &c.*] That is, the proces, together with the eſtreats under the ſeale of the exchequer ſhall be ſhewed to the party preſently without denyall, and freely without any thing to be given therefore, upon pain of grievous fine and impriſonment.

42 E. 3. ca. 9.
7 H. 4. ca. 3.

CAP. XX.

PURVIEW eſt enſement de misfeaſors (2) en parkes (1), et en viviers (3), que ſi ul de ceo ſoit attaint per le ſuit del plaintife (4), ſoyent agardes bones et grantes amendes (5), ſolonque le mayn del treſpas, et eit la priſonment de trois ans (6), et dillonq; ſoit rendu a le voluntie le roy (7), ſil ad de quoy poit eſtre rendu, et lors trova bon ſuertie que il jeſnues ne misface (8). Et ſil neit dont poit eſtre iſſint rendu, apres le priſonment de trois ans, trova meſme le ſuertie (9), et ſil ne puiſſe trover

IT is provided alſo for treſpaſſers in parks and ponds, that if any be thereof attainted at the ſuit of the party, great and large amends ſhall be awarded according to the treſpaſs, and ſhall have three years impriſonment, and after ſhall make fine at the king's pleaſure (if he have whereof) and then ſhall find good ſurety, that after he ſhall not commit like treſpaſs; and if he have not whereof to make fine, after three years impriſonment, he ſhall find like ſurety; and if he cannot find

trover la ſuerty, for jur' la realme (10). *Et ſi ul de ceo rette ſoit fugitive, et nait terre, ne tenement ſuffiſant pur quoy il ſoit eſtre juſtifie, cicourt * come le roy avera ceo treve per bone enqueſt, ſoit demaund de countie en countie. Et ſil ne veigne, ſoit utlage. Purview eſt enſement et accorde, que ſi ul ne ſuiſt dedeins an et le jour pur le treſpas fait, le roy avera le ſuit, et ceux queux il trova de ceo rettes per bon enqueſt, ſeront punies per meſme le maner en touts points, ſicome deſuis eſt dit. Et ſi ul tiel miſfeiſour ſoit attaint, quil eit priſe en ſes parkes beaſts domeſtes* (11), *ou auter choſe en le maner de robberie* (12) *en venant, ou demurrant, ou en returnant, ſoit fait de luy common ley, que affiert a celuy que eſt attaint de apert robberie et larceny, auxibien a la ſuit le roy come dauter.*

find like ſurety, he ſhall abjure the realm; and if any being guilty thereof be fugitive, and have no land nor tenement ſufficient (whereby he may be juſtified) ſo ſoon as the king ſhall find it by enqueſt, he ſhall be proclaimed from county to county; and if he come not, he ſhall be out-lawed. It is provided alſo and agreed, that if none do ſue within a year and a day for the treſpaſs done, the king ſhall have the ſuit; and ſuch as be found guilty thereof by lawful enqueſt, ſhall be puniſhed in like manner in all points as above is ſaid. And if any ſuch treſpaſſer be attainted, that he hath taken tame beaſts, or other thing, in the parks, by manner of robbery, in coming, tarrying, or returning, let the common law be executed upon him, as upon him that is attainted of open theft and robbery, as well at the ſuit of the king, as of the party.

Capt. Itin. Vet. Mag. Chart. 155. Rot. Clauſ. 17 H. 3. m. 9. (Regiſt. So. 111. Raſt. 651, &c. Kel. 39. 202. Dyer 238. 47 Ed. 3. 10. 9 H. 6. 2. 5 H. 5. 1. 19 H. 8. 9. 18 H. 6. 21. 21 H. 7. 21. 13 H. 7. 10. 12. Fitz. Barre, 83. Keilw. 114. b. 2 Ed. 4. 4. b. 9 H. 3. ſtat. 2. c. 10, 11. 1 Ed. 3. ſtat. 1. c. 8. 1 H. 7. c. 7.)

The cauſe of the making of this ſtatute was, that at the common law, the plaintife in an action of treſpas, ſhould, as in other caſes, recover no other dammages, but according to the quantity of the treſpaſſe: which the plaintife for treſpaſſes in parks and vivaries eſteemed at a high rate; but the country commonly found the dammages very ſmall; for the common law gave no way to matters of pleaſure (wherein moſt men do exceed) for that they brought no profit to the common-wealth; and therefore it is not lawfull for any man to erect a park, chaſe, or warren, without a licence under the great ſeale of the king, who is *pater patriæ*, and the head of the common-wealth. 47 E. 3. 10. b. 9 H. 6. Temps E. 2. tit. act' ſur leſtat. Br. 48. Li. 11. fo. 86, 87.

(1) *En parks.*] This is underſtood of a lawfull parke, whereunto three things are required: 1. A liberty, either by graunt, as is aforeſaid, or by preſcription. 2. Incloſure by pale, wall, or hedge. And 3. beaſts ſavages of the parke, for the which, and for the name, ſee the firſt part of the Inſtitutes. 1. Part of the Inſt. ſect. 378.

But this ſtatute extendeth not to a nominative park erected without lawfull warrant, albeit it be called a park; for this ſtatute is very penall, and therefore, as hath been ſaid, extendeth onely to a lawfull parke. But he may have an action of treſpaſſe at the common law, *quare clauſum fregit, et unam damam cepit, &c.* 9 H. 6 2. 18 H. 6. 21. 19 H. 6. 6. 22 H. 6. 59. 34 H. 6. 28. 43. 10 H. 7. 6. b. 12 H. 8. 10. a. 43 E. 3. 13. 24. 38 E. 3. 10.

Under this word park, a chaſe is not included.

2 H. 6. 55. 8 E. 4. 5. See the ſtatutes of 13 R. 2. c. 13. 19 H. 7. ca. 11. 14 H. 8. cap. 1. 3 Jac. c. 13. 7 Jac. c. 13. 21 Jac. c. 28. 3 Car. cap. 4.

* 21 H. 7. 21. * This act extends not to a foreſt in the hands of a ſubject, for the law is ſo penall, as it ſhall not be taken by equitie.

(2) *Miſfeſaunts.*] In this act is underſtood when a man either chaſeth in a park, or by bow, or other engine endevoureth to kil ſome of the game of the park againſt the liberty and priviledge of the park, † and not when the lord of a park takes beaſts to agiſtment in his park, and the owner breaks the park, and takes them away without agreement for their paſture, for it is not within theſe words, *de malefactoribus in parcis*, becauſe the treſpaſſe concerneth not the liberty of the park by chaſing of the game thereof, but a collaterall treſpaſſe, *et ſic de ſimilibus*.

† 30 E. 3. f. 11. the counteſſe of Athols caſe.

(3) *Vivers* or *vi-viers.*] This being a French word, ſignifieth fiſh-ponds, or waters wherein fiſh are kept and nouriſhed; which being a matter of profit, and increaſe of victuals, any man may erect; and that in legall underſtanding it ſignifieth a fiſh-pond, or waters where fiſh are kept, it appears by our ancient authors, who wrote ſoone after this time: for Britton ſaith, *Auxi de waſt fait per eux en parks & en vi-viers, de veniſon & de peſſon, & de conies, & auter deſtruction per eux faits en garrens*: where he applyeth *veniſon* to parks, *peſſon* to *vivers*, and *conies* to warrens. And Fleta agreeth with him, for he ſaith, *De feris et piſcibus poteſt fieri furtum: ex benignitate tamen principis conſtituitur, ne quis pro hujuſmodi furto vitam perdat, neque membra: conſtitutio quidem talis eſt, proviſum eſt de malefactoribus in parcis et vi-variis, quod ad ſectam querentis ſtatim adjudicentur emendæ, &c.* and reciteth ſummarily this act; and ſo it is taken before in this very parliament, cap. 1. for fiſh-ponds, or places where fiſh are kept, in theſe words, *ne curge en auter parke, ne piſſbe en auter viver.* And Bracton, who wrote a little before our ſtatute, coupleth them together in the charge given by the juſtices in eyre, as our ſtatute doth, *viz. De malefactoribus in parcis, et vivariis.*

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Britt. fo. 34.

Flet. li. 2. c. 36.

Vide hic cap. 1.

Bract. li. 3. fo. 117.

It appeareth in the Regiſter, that there be divers formes of writs for fiſhing in his piſcarie: one writ is, *quare in vivariis ſuis piſcatus fuit*: another, *quare in ſeparali piſcharia ipſius A. piſcatus fuit, &c.*

F.N.B. 88. H.

Therefore, as ſome have ſtretched this word too far, extending it to warrens of conies, which they might as well under the generality of the word [*vivarium*] extend it to foreſts and chaces (for they be *loci ubi viventes cuſtodiuntur*) whereof you have heard before; ſo ſome would reſtraine this word to fiſh-ponds onely that be in parks, which is expreſly againſt both the letter and meaning of this act, and the fiſh-pond concerneth nothing the liberty and priviledge of the park, whereof alſo a touch hath been given before.

Hic c. 1. Art. Carta cart. c. 13. 34 H. 6. 28. 21 H. 7. 21. F.N.B. 67. d.

If a man committeth a treſpaſſe in the fiſh-pond, &c. of another, by taking and carrying away of water, he is no miſ-feaſor within this ſtatute; but if he let out the water, to the end to take fiſh, he is a miſ-feaſor within this ſtatute, or he muſt fiſh there, if he be within the danger of this law, for collaterall treſpaſſes neither in parks, nor fiſh-ponds, &c. are within this act.

And if one hunt in a park, or fiſh in a pond, &c. though he kill no deer, nor take any fiſh, yet this is a miſ-feaſauns within this ſtatute.

Regiſt. 111. b. 47 E. 3. 10. b.

(4) *Per le ſuit del plaintife.*] This ſuit is intended in an action of treſpas, but the writ muſt rehearſe, and be grounded upon this ſtatute;

ſtatute; for it is a maxime in the common law, that a ſtatute made in the affirmative, without any negative expreſſed or implyed, doth not take away the common law: and therefore in this caſe the plaintife may either have his remedy by the common law, or upon the ſtatute; if he bring his action of treſpaſſe generally without grounding the ſame upon the ſtatute, then he waiveth the benefit of the ſtatute, and taketh his remedy by the common law.

5 H. 5. 1. 2 E. 4. 4. 9 H. 6. 2. F.N.B. 67. d. 87. a. 7 El. Dier 238. Lib. Intr. Faſt. 535.

The preſidents of this action are, *Ad reſpondendum tam domino regi, quam parti querenti*: and yet by the Regiſter, he may have this in his owne name, and that may be gathered by ſome of our books, quoted before in this ſection, in the margent.

7 El. Dier 238. Regiſt. ubi ſup.

(5) *Soient agardes bones et hautes amends.*] By theſe words [ſhall be awarded good and large amends] if the dammages be too ſmall, the court hath power to increaſe the dammages, for this word [award] properly belongeth to the court.

(6) *Et eit la priſonment de trois ans*] Both dammages and impriſonment concerne the plaintife, and therefore the kings pardon cannot diſpenſe with them: but the ranſome, the finding of ſurety, and the forejuring of the realme are puniſhments exemplarie, and concerne the king, and therefore he may pardon the ſame.

Dier ubi ſup. 15 El. Dier 323. 9 El. Dier 269.

(7) *Et dillonque ſoit rent a le volunt le roy.*] And after ſhall make fine at the kings pleaſure.

See before for the expoſition of theſe words, cap. 4.

Vide hic cap. 4.

(8) *Et lors trova bone ſurety, que il jammes ne miſface.*] And then ſhall finde good ſurety, that after he ſhall not miſdoe.

This ſurety muſt be by recogniſance to the king, and not to the plaintife; for example, the ſureties in 10 l. and the defendant in 40 l. the condition muſt be generall, and not reſtrained to that park, or vivary: for example, *Quod ipſe in aliquibus parcis et vivariis contra formam ſtatuti prædict' amplius non malefaciet, &c.*

Hil. 24 H. 7. Cor. Rege. Rot. 26. Tr. 13 H. 8. Cor. Rege. Rot. 480.

(9) *Le roy avera le ſute.*] Either by indictment, information, or action of treſpaſſe upon this act.

(10) *Forjure le realme.*] Fleta tranſlating this act into Latine, ſaith, *abjurabit regnum*, and ſo doth the Regiſter; and Bracton uſeth the ſame word in caſe of felony, *abjurabit regnum.*

Fleta, l. 1. c. 36. Regiſt. 80. b. & fol. 111. b. Bracton.

And Britton uſeth our word, *forjure noſtre realme*, and fol. 25. in the ſame caſe he uſeth the word of abjuration.

Brit. fo. 7. 25.

It ſignifieth in law a perpetuall baniſhment of the defendant out of the realme, which to obſerve he bindeth himſelfe by oath, for ſo much is implied in this word *forjure*, or *abjure*, which properly ſignifieth to forſweare the realme.

By the common law no man can be exiled, or baniſhed out of his country, but in caſe of abjuration for felony: in all other caſes exile or baniſhment ought to be done by authority of parliament (as here it is) and ſo are our books that ſpeak of exile or baniſhment to be underſtood.

Mag. Chart. c. 29.

If ſuch a perſon, as hath forjured or abjured the realme, returne againe, he ſhall be puniſhed at the kings ſuit for the perjury, and high contempt.

(11) *Beaſts domeſts.*] This is underſtood of kine, oxen, ſheep, and other domeſticall beaſts within the park.

If there be within the park tame deere, and miſdoers come to hunt and kill veniſon, and they kill a tame deere, and carry it away, not knowing the ſame to be a tame deere, this is no

10 E. 4. 15. b. Stamf. Pl. Cor. 25. b.

felony, for the intent maketh felony, and so are the books to be intended.

First part of the Instit. sect. 501.

(12) *En le manner de robbery.*] In this act robbery is taken in a large sense; see the first part of the Institutes.

CAP. XXI.

EN droit des terres des heires deins age, queux sont en le garde lour seignions: purvieu est, que les gardeins les garderit, et susteinent, sans destruction faire en tout rien: et que de tiels manners des gardes soit fait en touts points solonque ceo que est conteigne en la graund charter des franchises fait en temps le roy H. pier le roy que ore est, Magna Charta, cap. 4, 5, & 6. *Et que issint soit use desormes, et per mesme le manner soient gardes les archivesqueries, evesqueries', abbies, esglises, et dignities en temps de vacation.* Vide Artic' super Chartas cap. 18.

IN right of lands of heirs being within age, which be in ward of their lords; it is provided, that the guardians shall keep and sustain the land, without making destruction of any thing; and that of such manner of wards shall be done in all points, as is contained in the great charter of liberties made in the time of king Henry, father to the king that now is, and that it be so used from henceforth. And in the same manner shall archbishopricks, bishopricks, abbacies, churches, and all spiritual dignities be kept in time of vacation.

(Bro. Wast. 32. 37 40. 68. 107. 137. 1 Inst. 54. Bro. Wast. 58. Regist. 72. 9 H. 3. stat. 1. c. 4. 6 Ed. 1. stat. 1. c. 5. 13 Ed. 1. stat. 1. c. 14. 28 Ed. 1. stat. 3. c. 18. 36 Ed. 3. c. 13.)

Mag Chart. c 4, 5. 6. Artic. super Chart. ca. 18.

This act both to heires in ward, and the custody of archbishopricks, bishopricks, &c. during vacation, is but a confirmation of the statute of *Magna Charta*, cap. 4, 5, 6. whereof there you may reade at large.

CAP. XXII.

DES h ires maries deins age, sans le grce de lour gardeins, avant que ils averont passés lage de xiiii. ans, soit fait solonque ceo que est contenue en le purveiance de Merton, cap. 6. *Et de ceux que serront maries sans le grce de lour gardeins puis que ils averont passés lage de xiiii. ans, le gardein cit le double value de son mariage, solonque le tenour de mesme le purveyance. Ouster ceo ceux queux averont sustret le mariage* (1), *rendant le droit value del mariage*

OF heirs married within age, without the consent of their guardians, afore that they be past the age of fourteen years, it shall be done according as it is contained in the statute of Merton. And of them that shall be married without the consent of their guardians, after they be past the age of fourteen years, the guardian shall have the double value of their marriage, after the tenour of the same act. Moreover, such as have with-

mariage al gardein pur le treſpaſſe, et jaemeins le roy eit les amends ſolonque meſme le purveyance de celuy que le avera ſuſtret, Weſtm. 2. cap. 35. Et des heires females (2), *puis que ils averont accompli es lage de xiiii. ans, et le ſeignior a que le mariage appent celes ne voudra marier, mes pur covetiſe de la terre, les voudra tener diſmarie. Purviewe eſt, que le ſeignior* (3) *ne poit aver ne tener per encheſon del mariage* (6), *les terres* (5) *a tielx heires females outre deux ans apres la terme de lavantdit xiiii. ans* (4). *Et ſi le ſeignior deins les deux ans ne les marie, donques eient els actions de recover lour heritage quietment ſans rien done pur le garde, ou pur la mariage. Et ſi els pur malice, ou per malveis counſel ne ſe veulent* (7) *pur lour chiefe ſeigniors marier, ou els nes ſont diſparages, que les ſeigniors teignent la terre, et la heritage jeſque al age del enfant male, ceſtaſcavoire, xxi. ans, et ouſter jeſque ils eient priſes le value* (8) *del mariage.*

withdrawn their marriage, ſhall pay the full value thereof unto their guardian for the treſpaſs, and neverthelefs the king ſhall have like amends, according to the ſame act, of him that hath ſo withdrawn. And of heirs females, after they have accompliſhed the age of fourteen years, and the lord (to whom the marriage belongeth) will not marry them, but for covetiſe of the land will keep them unmarried; it is provided, that the lord ſhall not have nor keep, by reaſon of marriage, the lands of ſuch heirs females, more than two years after the term of the ſaid fourteen years. And if the lord within the ſaid two years do not marry them, then ſhall they have an action to recover their inheritance quit, without giving any thing for their wardſhip, or their marriage. And if they of malice, or by evil counſel, will not be married by their chief lords (where they ſhall not be diſparaged) then their lords may hold their land and inheritance untill they have accompliſhed the age of an heir male, that is to wit, of one and twenty years, and further until they have taken the value of the marriage.

(C.o. El. 469. Stat. Merton, cap. 6. Co. Ent. 262. Fitz. Gard. 59. 71. Bro. Gard. 86. 6 Rep. 71. Regil. 161. 13 Ed. 1. ſtat. 1. c. 35. Repealed by 12 Car. 2. c. 24.)

The ſtatute of Merton provideth (as hath been ſaid) that if any lay-man raviſh an heire, or detain him within the age of 14 yeares, that then the gardien ſhould recover the value of the marriage againſt the raviſher together with the infant and his lands, and that the defendant ſhould be impriſoned untill he hath recompenced the plaintiffe, &c. and further, untill he hath ſatisfied the king for the treſpaſſe. Merton, cap. 6. 21 E. 3. 19, 20. 27 H. 6. tit gard. 118. 33 E. 3. Judgement 251.

This act doth firſt confirme the ſtatute of Merton, both concerning the raviſhment, and alſo concerning the forfeiture of mariage: and provideth further, that of them that be above the age of 14 yeares (over and above the double value of the marriage after tender made according to the ſtatute of Merton to be recovered againſt the heire) the gardien ſhall recover againſt the raviſher or detainer, the heire being maried, the full value thereof, and the king ſhall have alſo like amends according to the ſaid act.

(1) *Ceux que averont ſuſtret le mariage.*] That is, the raviſher or detainer of the heire, and which married the heire after 14, and before 21.

This extendeth after 14, as well to eccleſiaſticall, as lay perſons, which

which the statute of Merton of a ravishment before 14, doth not, but to lay men onely.

Brit. fol. 169. 35 H. 6. 40. 35 H. 6. Gard. 71. 39 H. 6. c. 2. F.N.B. 143. d.

(2) *Et des heires females.*] The mischiefe before this act was, that whereas the heire female after her age of 14 yeares, ought of right to be out of ward, the lord for covetousnesse would not marry them, but keep their lands at their will and pleasure many yeares after their age of 14, against the which wrong this statute provideth remedy, and was made for the restraint of the wrong, and in truth for the advantage of the lords.

Bract. l. 2. fo. 86. b.

And here we are occasioned to explain a place in Bracton, *Femina* 14. *vel.* 15. *annorum potest dispensare domui suæ, et habere cone et key, &c.* Which word [*cone*] is mistaken in the impression, for it should be *cover et key*; and for *cover* we use *cofer* at this day, changing the *v* to an *f*, (which is usuall) so as at that age like a good huswife shee is able to discerne what things are in a household fit to bee kept in cofer under locke and key; and the reason wherefore, if the heire female of a tenant by knights service be of the age of 14 years at the death of her auncester, she shall not be in ward, is, for that she is *viri potens*, and can govern an household, and may marry an husband, which may doe knights service.

See the first part of the Institutes, sect. 103, 104.

If a man hath two daughters and dieth, the one above the age of 14, and the other within the age of 14, the lord shall have the wardship of the body of her within age, and the moiety of the land.

35 H. 6. 52.

(3) *Purview est que le seignior.*] 1. Every lord is not within the purview of this act. The heire female shall enter upon the lord by posteriority, because her marriage belongs not unto him.

35 H. 6. ubi supra. Gard. 71.

2. If the lord graunt the mariage of the heire female to one, neither the grauntor nor the grauntee shall have two years, but the heir female shall enter at her age of 14, for the grauntee cannot hold the land, and the grauntor hath not the mariage.

35 H. 6. ubi supra.

3. So it is, if the king graunteth the wardship of the body of the heire female, she shall sue her livery at her age of fourteen, for neither the king nor his grauntee can hold the land during the two yeares.

35 H. 6. 52.

(4) *Per 2. ans ouster les 14. ans.*] By this is understood that the lord shall not have the 2 yeares, but where the heire female was within the age of 14, at the death of her auncester, and in ward to the lord.

(5) *Les terres.*] Here a mesnalty that is holden is understood, though this statute speak of lands onely.

35 H. 6. ubi supra.

(6) *Per encheson de mariage.*] *Cessante causa cessat effectus*, and therefore if within the two yeares the lord marrieth the heire female, the heire female shall presently enter, because for that cause the two yeares are given.

If the gardien marry the heire female after the age of 12 yeares, he shall not detaine her land but untill her age of 14, for the cause ceaseth.

F.N.B. 143. d.

So it is if the auncester marrieth his heir female, and dieth before shee attain to her age of 14, the land shall be in ward, but the lord shall not have the 2 years.

35 H. 6. 40. tit. Gard. 71. 3 Rich. 2. ubi supra.

And it is to be observed, that the lord hath these two years by force of this act, and not as gardien, because his gardienship ended at her age of 14, and therefore a writ of dower doth not lie against