

that C. tenant of the freehold of White acre, whereof execution was also sued of record, is not named in the writ, to whom this suit was as well given, as to the plaintife, judgement of the writ, *et non allocatur*; whereby it appeareth by the rule of the court, that any one feoffee may have a *scire fac'*, and tender * the whole money to the tenant by statute merchant, or to his assignee. Another exception was taken to the writ, for that every *scire fac'* ought to be warranted or grounded upon a record, and this *scire fac'* is not grounded upon the record, but maintained upon a suggestion of tending of the money, in which case he ought to have a *venire fac'*, and not this writ of *scire fac'*, *et non allocatur*; whereby it appeareth, that partly upon a record, and partly upon a suggestion (no *scire facias* being granted without some suggestion) the *scire fac'* upon this certainty of the tender was maintainable. Lastly, it was excepted against the writ, that it appeared to the court, that the *scire fac'* was brought by the assignee of Blacke acre, against the assignee of tenant by statute merchant, so as each of them, as well of the one part as of the other, plaintife and defendand, were strangers to the record, *et non allocatur*, for that it had been often seen, that this writ did lye as well between strangers, as privies, and the writ of *venire fac'* also to make the conusee, &c. to account, &c. Then doth Belknap of counsell with the defendand put a case upon the statute of Gloc. cap. 3. It is given by statute (saith hee) that if the father alien the right of the mother, that the son and heire of the mother shall not be barred, if he hath not affets by discent, &c. and other lands may after descend to him from his father, that the alienee of the father shall have recovery against him by *scire facias*: but if lands descend to him afterwards from his father, and he alieneth the lands, which he recovered as heire to his mother, the alienee of the father shall not have a *scire fac'* against the alienee of the heire; which opinion is grounded upon these words in the statute, *Donques a vera le tenant, (id est, the alienee of the father) recovery vers luy (id est, the son and heire of the mother) de la seisin son mere, &c.* And therefore Belknap concludeth, that no *scire fac'* lyeth against the alienee in that case, no more here. Whereunto Thorp chiefe justice answereth, although it be so in the case put by Belknap, it is given by the statute, &c. Wherefore (saith Thorp) will you receive the mony, or no? Belknap, Yes, if he will tender the mises and costages. Kirton, The mises and costages shall be taxed by the court. Thorp, They shall not: for wee cannot know them: and after he tendred a demy marke for mises and costages, and the other said they were not sufficient, and the court held them sufficient. Thorp demanded, if he would receive the money, or no, for mises and costages, as he tendred, otherwise we will (saith he) re-baile to the party his mony. And afterwards he received the same, and the plaintife had execution.

These things are necessary to be knowne, for the better understanding of this statute of 32 H. 8.

(7) *Shall have fully and wholly levied or received the said whole debt.]* Although the conusee have received the whole debt by execution upon the statute merchant, statute staple, or recognizance in the nature of a statute staple, yet cannot the conusor enter; for he must hold the land untill he be satisfied, not onely of his debt, but of his costs, damages, labours, and expences: otherwise, it is in case of *elegit*, as hath been said, for there after the debt satisfied, the conusor may enter: for tenant by *elegit* holdeth the land but untill the debt be satisfied.

* Nota, hereby the land of the other feoffee shall be discharged, when the whole debt is paid.
2 R. 3. 17.
15 H. 7. 15.

Vi. 17 E. 3. 45.
b. 21 E. 3. scire fac' 109. 47 E. 3. 11.

Gloc. 6 E. 1. ca. 3.

See the stat. de Mercat. 13 E. 1. ubi sup.

[680]

Vid. lib. 4. fo. 67. in Fulwoods case. 2 R. 3. 8. 17. 15 H. 7. 47 E. 3. fol 11, 12. 44 E. 3. 14, 16.

(8) *For which the said lands were delivered, &c.*] These words are not to be taken literally but according to the meaning of the makers of this law, and ever such construction is to be made, as the party grieved, and in equall mischief may be relieved: and therefore if a feignory consisting of fealty and rent be delivered in execution, and after the rent become secke by surplufage, and after is evicted, he shall have the remedy of this statute: but if a villaine be delivered in execution, and the villaine purchase land in fee, and the tenant by execution enter into the perquisite of the villaine, and after it is evicted, he shall have no remedy by this statute, the cause is apparent.

(9) *Then every such recoverer, obligee, and recognissee shall and may have a writ of scire fac' out of the same court.*] If judgement and execution be awarded in the court of common pleas, and in a writ of error the judgement is affirmed in the kings bench, the tenant by execution may upon eviction have a *scire fac'* out of the kings bench; for it is the same court in equall mischief to the party grieved.

[681]

An Exposition upon the latter Part of the Statute of 32 H. 8. Cap. 28. concerning Discontinuances, &c.

AND moreover, for certaine considerations, be it enacted, by authority aforesaid that no fine, feoffment, or other act or acts hereafter to be made, suffred, or done by the husband onely, of any mannors lands, tenements, or hereditaments, being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be, or make any discontinuance thereof, or be prejudiciall or hurtfull to the said wife, or to her heires, or to such as shall have right, title, or interest to the same, by the death of such wife or wives. But that the same wife or her heires, and such other to whom such right shall appertaine, after her decease, shall and may then lawfully enter into all such mannors, lands, tenements, and hereditaments, according to their rights and titles therein: any such fine, feoffment, or other act to the contrary notwithstanding: fines levied by the husband and wife (whereunto the said wife is party and privy) onely except.

See lib. 8. fol. 71, 72. &c. Grenelies case, Dier, 4 & 5 Ph. & Mar. 162. 2 El. 191. b. Hawtries case. 21 El. 363. b.

Mich. 4 & 5 El.
in Kaccano.

We will adde hereunto a notable and a leading case upon this part of the act vulgarly and commonly cited by the name of Beaumonts case; the truth of which was, that Humfrey Foster leased in fee of the site of the monasterie of *Gracedicu int' alia*, gave them to John Beaumont esquire, and Eliz. his wife, and to the heires of their two bodies begotten, the remainder in fee to the said Jo. Beaumont. *An. 6 E. 6.* John Beaumont levied a fine thereof, with proclamation *comecco*, &c. to king Ed. 6. his heires and successours: King Ed. 6. *anno regni sui 7.* granted the said site &c. by his letters patents to Francis earle of Huntingdon and his heires in fee ferme; after-

In the 5th of
5. 1555.

afterwards John Beaumont died, after whose death, and within five yeares Eliz. entred, inclaiming her estate; the fee farme rent was behind: Henry earle of Huntingdon, sonne and heire of Francis, having the inheritance of Gracedieu &c. was called into the exchequer for the arrerages of the said fee farme, where all the said case being disclosed in pleading, at the last upon open argument, great deliberation and conference, five points were resolved and adjudged:

First, albeit the king is not named in the act, yet he is bound by the act, because it is made to suppress a wrong, and to give her &c. that right had a more speedy remedy, viz. by entry, where by the common law, she &c. was driven to a reall action, and every ^a discontinuance worketh a wrong, and the king being Gods lieutenant ^b cannot doe wrong, and therefore that the entry of Eliz. was lawfull, &c.

Secondly albeit the words of this act be [being the inheritance or freehold of the wife:] and in this case the lands were as wel the freehold and inheritance of the husband as of the wife, yet for that it was a beneficiall law to suppress a wrong, and to give the party wronged a speedy remedy, and that it was in equall mischief, it was adjudged to be within this statute: and this point hath been commonly cited in arguments in Westminster-hall, and at moots, &c. by the name of Beaumonts case.

^a Thirdly, that the fine with proclamations levied by the husband only, was a barre by the statute of 4 H. 7. because the issue in taile must claime as heire to both of them.

Fourthly, that the state of the wife was changed to an estate for life dispunishable of waste, for that the issue in taile by the fine was disabled to inherit; as if the donees had been divorced *causa consanguinitatis*, &c. whereby the issue was disabled to inherit, the donees should have had but an estate for life: but in that case they shall be punishable for waste, because the estate in taile was never perfect, but defeasible by divorce *ab initio*.

Fifthly, that when Elis. entred upon earle Henry into Gracedieu, &c. and defeated the fee farme during her estate, yet the earle having an estate of inheritance remaining in him, the fee farme rent, which was reserved presently by the kings prerogative, was leviabie upon his other lands during the estate of Elisabeth; for now upon the matter it is as much in the kings case, as if Elisabeth, being in seison of her estate, the king had granted the inheritance after her estate ended to the earle and his heires, reserving the rent presently: but queen Elisabeth, being acquainted with the equity of the case, was pleased by letters patents under the great scale, which we have seen, to exonerate earle Henry of the arrerages, and of the fee farme it selfe, during the continuance of the estate of the said Elis. that had evicted the land from him: which case we have reported the more at large, for that in the collections of my lord Dyer, written with his own hand, which we have seen, reporteth this case, and maketh a question in these words: *si lentre la feme soit congeable per lestatute, eo que le roy nest ly per lestatute*, which was justly omitted out of the print, for that the judgement, as is aforesaid, was given against that private opinion. And it hath been very many times since adjudged in the exchequer, in pleading for the discharge of the debts of Henry earle of Huntingdon, that the entry of the said Elis. was lawfull, divers whereof we have seen.

^a Vi. li. 11. fo. 72. a. Magd. Colledge case. Pl. com. 246. Seignior Berkelyes case acc^o.
^{*} 13 E. 4. 8. lib. 1. fol. 44. Alten Woods case acc^o
^a Just. Dalyson an. 5 El. Dyer, 18 El. 351. acc^o.
 Dier 16 El. 362. simil. lib. 9. fol. 139. Beaumonts case.
 5 H. 7. 32. by Brian.

[682]

Lib. 9. fol. 139. ubi supra.
 7 H. 4. 16. lib. 9. fol. 139. ubi sup.

Otherwise it is in the case of a common person, for he shall be exonerated of the rent during the state evicted, because the rent was reserved out of the whole estate.

An

An Exposition upon the Statute of 32 H. 8. cap. 38. concerning what Marriages be lawfull, and what not.

SEE the first part of the Institutes, sect. 380. fol. 235. a. Parsons case upon this act of 32 H. 8.

For the better understanding whereof, and of this statute, the Leviticall degrees are necessary to be set downe in certaine.

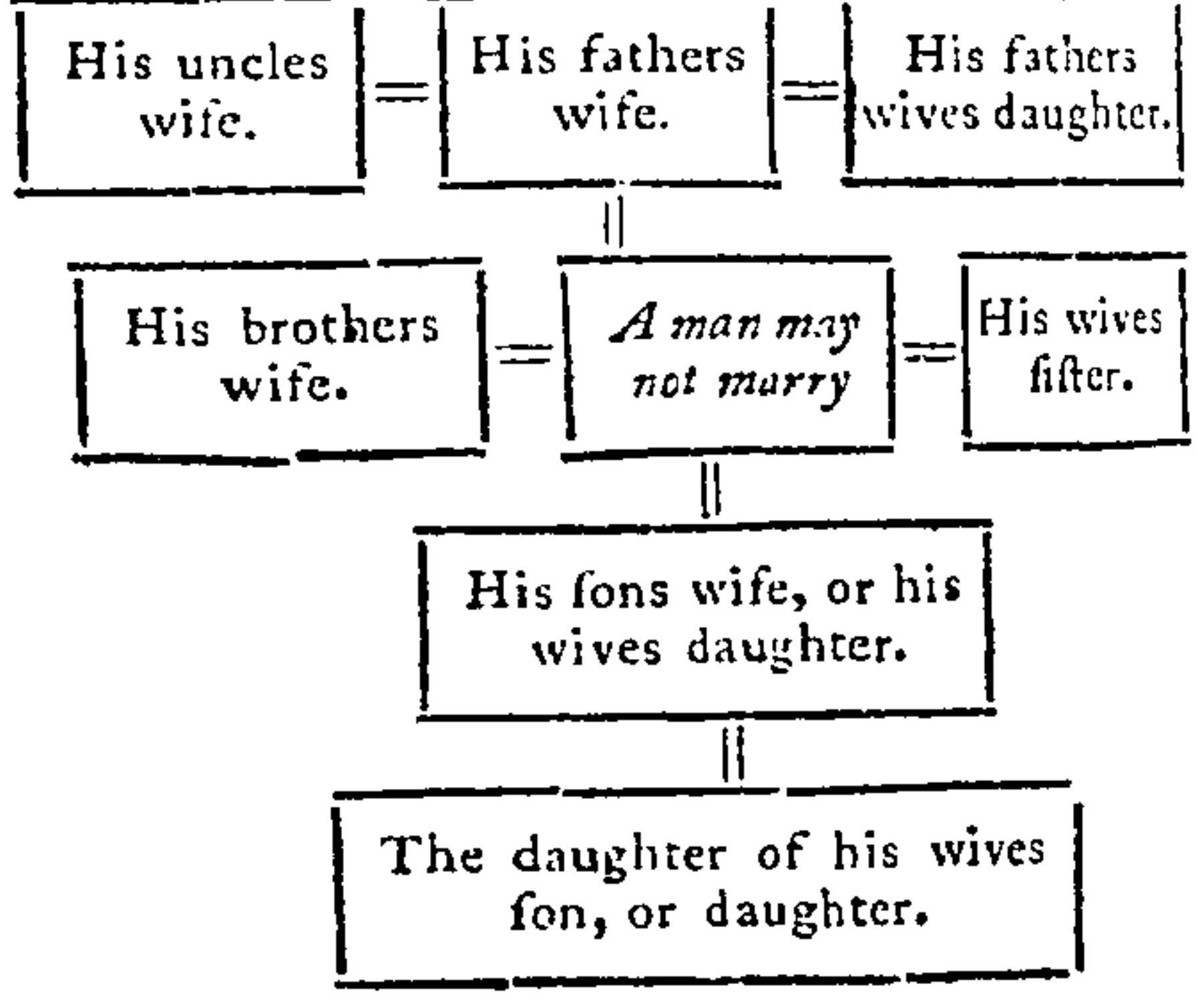
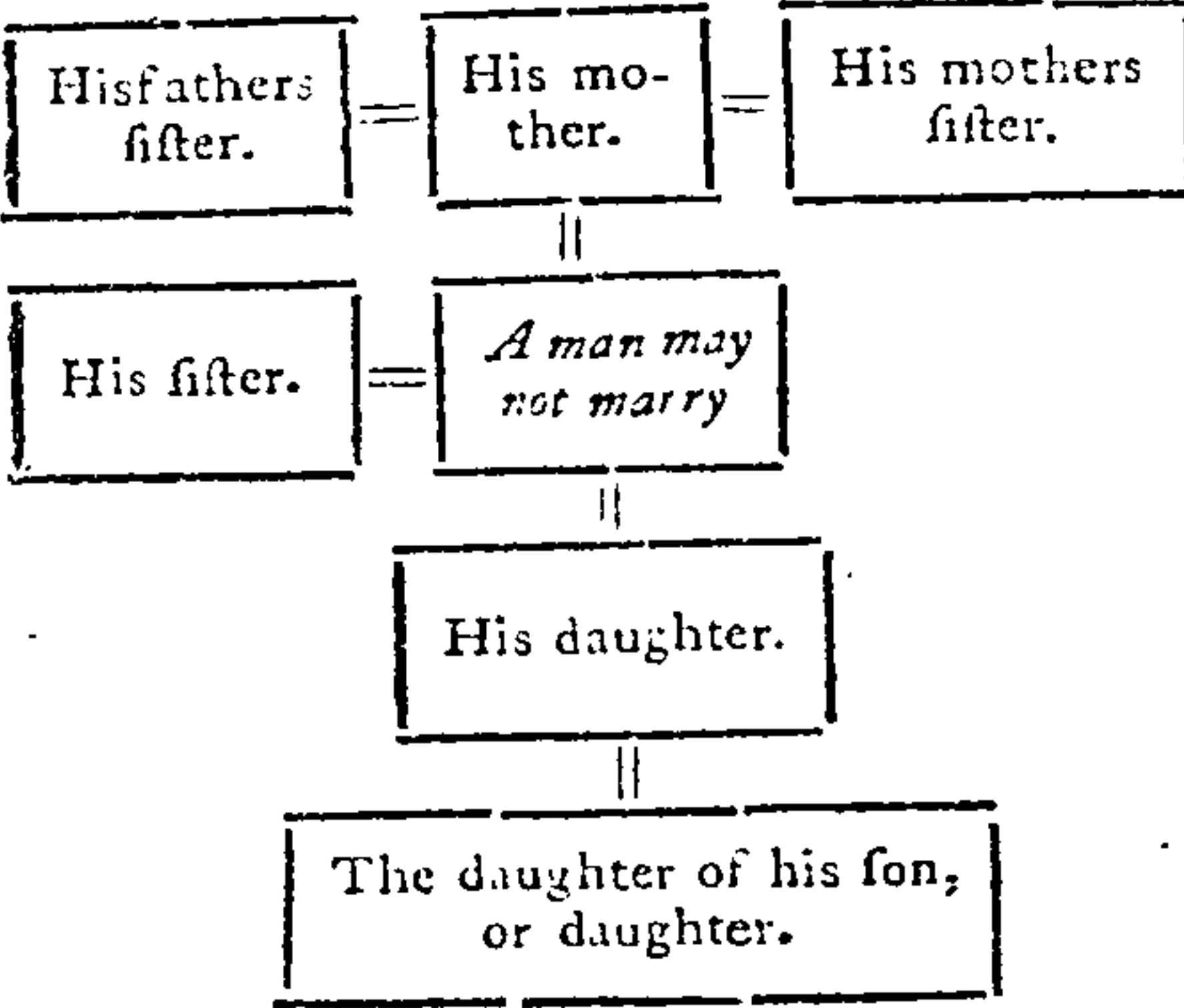
It is to be understood, that by the 18 chapter of Leviticus, not onely degrees of kinred and consanguinity, but degrees of affinity and alliance doe let matrimonie, which may best be illustrated and expressed in this manner :

See these degrees truly set down in the Stat. of 25 H. 8. cap. 22. and 28 H. 8. cap. 7.

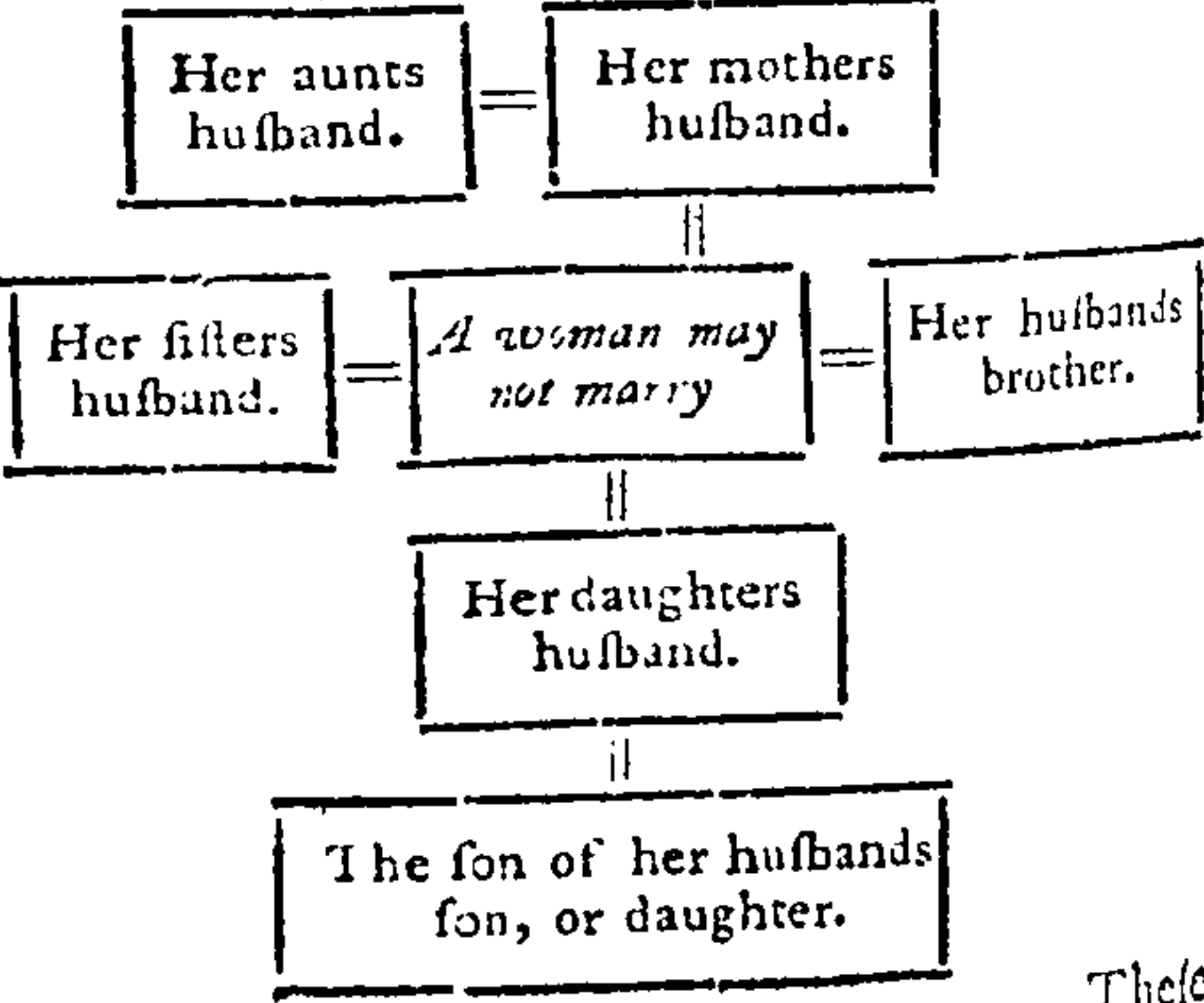
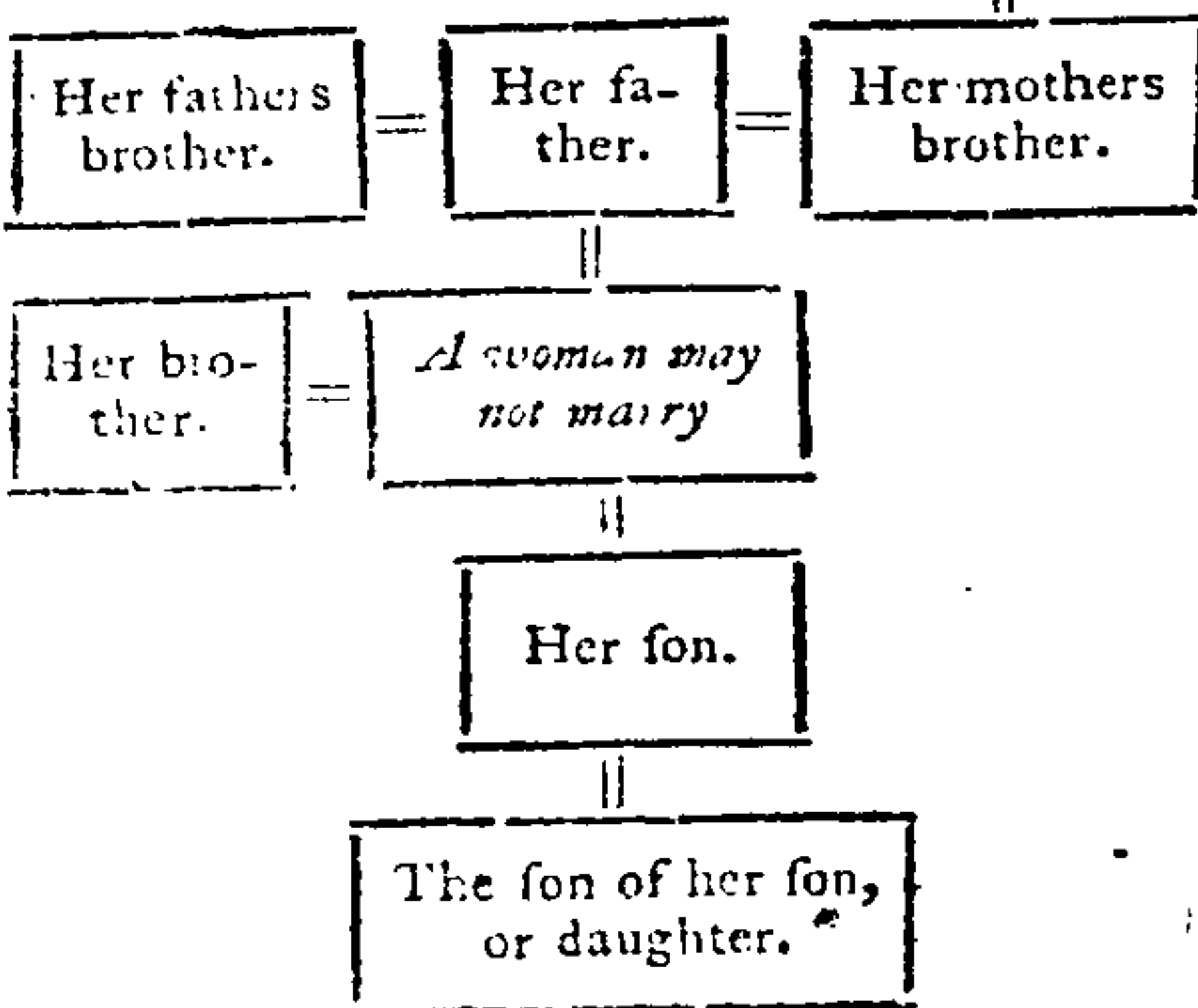
Of the Mans part.

Degrees of Kinred and Consanguinity prohibited.

Degrees of Affinity or Alliance prohibited.



Of the Womans part.



These

These be the Leviticall degrees, which extend as well to the woman as to the man. And herein note, that albeit the marriage of the nephew *cum amita et matertera* is forbidden by the said 18 chapter of Leviticus, and by expresse words the marriage of the uncle with the niece is not thereby prohibited, yet is the same prohibited, *quia eandem habent rationem propinquitatis cum eis qui nominatim prohibentur, et sic de similibus.*

By the preamble of this statute it appeareth, "That by other prohibitions then Gods law admitted for their lucre by that court invented, the dispensation whereof they always reserved to themselves (where there are expressed these examples:) First, as in kinred and affinity between^a cousins germans, and so to the fourth degree. Secondly,^b carnall knowledge of any of the same kin or affinity before in such outward degrees." But now by this act all persons are declared to be lawfull to contract matrimony, that be not prohibited by Gods law to marry, and that no reservation or prohibition (Gods law excepted) shall trouble or impeach any marriage without the Leviticall degrees. So as without question, the son of the father, by another wife, and the daughter of the mother, by another husband, and *è converso*, may marry. And now at this day men need not to be at that charge and suit that Roger Donington was, who for that he had committed fornication before marriage, with one that was of kin to his wife in the fourth degree, was driven to sue for a ligitimation of his marriage.

See the statute of 1 and 2 Phil. and Mar. cap. 8. a divorce *propter impedimentum publicæ honestatis et justitiæ.*

Neither after this statute can the husband be afraid to lose his wife, or the wife her husband, nor the heire of them to be bastarded, for that the husband before marriage had been godfather either at baptisme, or confirmation to the cousin of his wife, or that she had been godmother before the marriage to the cousin of her husband, for the divorces *causa * compaternitatis et commaternitatis* (which in the act of 1 and 2 Phil. and Mar. is called *cognatio spiritualis*) are by this act taken away; and the divorce *causa professionis* alio, and so is the devorce *causa cognationis legalis*, that is to say, *jure adoptionis, et sic de similibus.*

Alice de Stircheley took to husband William de Chaddeworth, and after, at her suit, was divorced from him, and the cause of the divorce is expressed in the record. *Et fuit causa divortii eò quòd dictus Willielmus de Chaddeworth carnaliter cognoverat quandam filiam dictæ Aliciæ Stircheley, antequam ipsam desponsavit.*

By the Leviticall degrees it is prohibited, that a man shall not uncover the nakednesse of his wife, and of her daughter, and so it is of the rest of the degrees there prohibited.

By this act of 32 H. 8. the divorce *causa præcontractus* was taken away, where the marriage was consummate by carnall copulation, &c. but that is repealed, and the divorce allowed by the statute of 2 E. 6. cap. 23. and 1 El. cap. 1.

The residue of the act of 32 H. 8. was repealed by 1 and 2 Phil. and Mar. cap. 8. and revived 1 Elis. cap. 1.

But our chiefe aime and endeavour being to set downe in all the parts of the Institutes, how the law at this day standeth, notwithstanding the change and alteration of many statutes, and the repeales of divers, and after repeales of those repeales, and the reviving of statutes repealed, &c. and having mentioned the divorce *causa*

[684]

^a 18 E. 4. 28, 29.
11 H. 4. 76.
^b 24 H. 8. bastard Br. 44.
Vid. 28 H. 8. cap. 7. Pasch.
30 E. 1. coram rege, Chadworths case in the 1 part Institut. ubi supra.

Vid. Conc. Trid. sess. 24. cap. 2. de reform. Bract. li. 4. 298. b. an. 39 E. 3. fol. 31, 32. in assise. Vid. 10 E. 3. 34, 35. * Bract. ubi sup. 1 & 2 Phil. & M. ca. 8. 47 E. 3. fol. 27. 21 H. 7. Pasch. 32 E. 1. coram rege, rot. 83. Nott.

Levit. cap. 18. ver. 17.

Lib. 4. fol. 29. a. Charles Buntings case, lib. 6. fol. 66. Bracton, lib. 4. fol. 298. b.

causa professionis, it shall be necessary in this place to declare what the law is at this day concerning the marriage of ecclesiasticall persons. And to that end we will report a case resolved, which concerneth not onely the point in question, but another matter of great consequence, which, because the rule and discussing of both points stand in effect upon the same ground of reason, we will relate the whole case :

[685]

At the session of parliament holden *anno 4 regis Jacobi*, upon a branch of an act made at the first session in the first yeare of his majesties reigne, for continuance and reviving of divers statutes, it was enacted, That an act made in the first yeare of queen Mary, stat. 2. cap. 2. entituled, An act for the repeale of certaine statutes made in the time of king Edw. 6. should stand repealed and void, two doubts were moved: the first concerning the bishops, the second touching the lawfulnessse of ecclesiasticall persons marriages; the first was divided into two questions: the one, Whether any bishop, made especially since the first day of that first session of parliament, were lawfull or no; the other, Whether the proceedings in the bishops, or other ecclesiasticall courts, being made under the name, stile and seale of the bishops, were warranted by law. And the reason and cause of these two doubts was this: By the statute of *anno 1 Ed. 6. cap. 2.* it was enacted, That bishops should not be elective, as before that time they had been, but donative by the kings letters patents. Secondly, by the said act it is provided, That all summons, citations, and processe in ecclesiasticall courts should be made in the name and stile of the king, and that their processe should be sealed with a seale of the kings armes, &c. And it was strongly urged and enforced, that this act of 1 Ed. 6. was now in force, and consequently, all bishops made (at the least since it became of force) by election, &c. and not by donation, according to the said act of 1 Edw. 6. are unlawfull, and all their processe, proceedings, being in their owne names, stiles and seales (where by the said act they ought to have been in the kings name, and under the kings seale) were all unlawfull, and void. And to prove, that the said act of *anno 1 Edw. 6.* was now in force, they alledged, that this act of 1 Edw. 6. was repealed by the said act of 1 Mar. above mentioned, which act of repeale, being repealed by the said branch of *primo regis Jacobi*, consequently the said act of 1 Edw. 6. was thereby revived: for when an act of repeal is repealed, the first act that was repealed is revived, *remoto impedimento reviviscit statutum*, and herewith agreeth the booke case in 15 Ed. 3. tit' petition, placit' 2. And this is true, and cannot be denied.

The king having understanding hereof, and being informed of the consequents thereof, being matters tending not onely to the infinite prejudice of his subjects in cases of great importance (especially, if any diocesse had no lawfull bishop or ordinary) but to the scandall and impeachment of his majesties justice not onely in those proceedings, but also in administration of justice in certaine cases in his courts of common law at Westminster, commanded his two chiefe justices to consider of the said objections, and to informe him of the true state thereof, that either the scruple conceived might be cleared and satisfied, or the inconvenience (if any were) timely provided for and prevented; who upon diligent consideration had of the said objection, agreed the law to be (as the said case was put) as it had been taken. But upon further
search

search and consideration had, other manifest and direct matters were found to satisfy and clear the said scruple and question, which afterwards was agreed and resolved accordingly by the chiefe baron and other judges then attending in the upper house of parliament. For the understanding whereof it is to be observed, that the said act of 1 Edw. 6. was repealed by three severall acts of parliament, viz. by the said statute of *anno* 1 Mar. in the whole. 2. By the act of 1 and 2 Phil. and Mar. cap. 8. by sufficient words, as concerning the name, stile, and seale of their processe, &c. And lastly, by the statute of 1 Elis. cap. 1. the whole act of 1 Edw. 6. is also repealed: for *leges posteriores priores contrarias abrogant*. And as a man that is strongly bounden with three cords or ligaments, albeit one or two of them be untied or cut asunder, remains bound, notwithstanding by and with the second or third, which remaine firme and untouched; so a statute repealed by force of three severall acts remains repealed, so long as any of them remaine in force, albeit one or two of them be made void: and therefore although the act of 1 Mar. be repealed by 1 *regis Jacobi*, yet the other two acts remaining in force, the act of *anno primo* E. 6. remaine repealed.

First therefore, as to the name, stile, and seale, &c. in ecclesiasticall courts, it is enacted by 1 and 2 Phil. and Mar. cap. 8. in these words:

1.

“ And the ecclesiasticall jurisdiction of the archbishops, bishops, and ordinaries to be in the same state for processe of sutes, punishment of crimes, and execution of censures of the church, with knowledge of causes belonging to the same, and as large in those points as the said jurisdiction was in *anno* 20 Hen. 8.”

By which clause, if the act of repeale of 1 Mar. (now repealed) had never been made, the act of 1 Ed. 6. as to the name, stile, and seale in ecclesiasticall proceedings had been repealed by this latter act of 1 and 2 Phil. and Mar.

[686]

But it was objected, that the said act of 1 and 2 Phil. and Mar. (which is the second cord or ligament) is repealed by the act of 1 Elis. cap. 1. To this it was answered and resolved, that this second cord or ligament remains in force: for true it is, that the act of 1 Elis. repeales the act of 1 and 2 Phil. and Mar. *secundum quid*, but not *simpliciter*; for the act of 1 Elis. doth repeale every branch and article of 1 and 2 Phil. and Mar. other then for such branches as therein be excepted. And afterwards, by another branch of the said act of 1 Elis. it is enacted, That all other lawes and statutes repealed, and made void by the said act of 1 and 2 Phil. and Mar. and not in that act specially mentioned and revived, should stand, remaine, and be repealed and void, as the same were before the making of that act. But the act of 1 Ed. 6. (as it hath been often said) is sufficiently repealed by the act of 1 and 2 Phil. and Mar. as to the name, stile, and seale, &c. and the act of 1 Ed. 6. is not specially mentioned and revived by the act of 1 Elis. so the same remaine repealed by the act of 1 and 2 Phil. and Mar.

2.

The third act which clearly repeales and adnulls the act of 1 E. 6. as well for the making and constituting of bishops, as for the name, stile, and seale of processe, is the act of 1 Elis. cap. 1. for that act doth revive the act of 25 H. 8. cap. 20. and further enacteth, that the same shall stand in full force and effect to all intents,

3.

intents, constructions, and purposes. By which act of 25 H. 8. it is enacted as followeth:

“ And that at every avoidance of any archbishoprick, or bishoprick, the king, his heires and successors may grant to the prior and convent, or to the dean and chapter a licence under the great seale, as of old time hath been accustomed to proceed to an election of an archbishop or bishop, with a letter missive, containing the name of the person which they shall elect and choose, &c.” And according to this statute revived by *anno* 1 Elis. all archbishops and bishops at this day be made, and if they were made according to the act of 1 E. 6. they were unlawfull.

And further it is enacted by the said act of 25 H. 8. “ That every person chosen, elected, invested, and consecrated archbishop or bishop, according to the forme and effect of this act, &c. shall doe and execute in every thing and things touching the same, as any archbishop or bishop of this realme, &c. might at any time heretofore doe.”

Which latter branch doth extend to all processe and proceedings in ecclesiasticall courts, and that the same shall be in such sort, as the same were before the act of 25 H. 8. and before that act, the name, stile, and seale of their processe, &c. were as now they be.

And the said act of 1 Elis. reviving the act of 25 Hen. 8. doth impliedly repeale the act of 1 Ed. 6. which had repealed 25 H. 8. in both the said points: for, as by repealing of a repeale, the first act is revived; so by reviving of an act repealed the act of repeale is made of no force.

As to the second point, concerning the marriage of ecclesiasticall persons, it is to be observed, that the intention of the act of repeale of *anno* 1 *regis Jacobi*, was to repeale the statutes of 2 Ed. 6. cap. 2. and 5 E. 6. cap. 12. concerning the marriage of ecclesiasticall persons, by which stat. of 5 E. 6. it is enacted, “ That the matrimony of all and every priest, and other ecclesiasticall person, shall be adjudged, deemed, and taken, for just, true, and lawfull matrimony, to all intents, constructions, and purposes, and that all children borne in any such matrimony shall be deemed, and judged to all intents and purposes to be borne in lawfull matrimony, and legitimate, and hereditable to lands, tenements, and hereditaments, and that there shall be tenant by the curtesie, and tenant in dower, &c.” But the act of 1 Mar. repealing the said statutes of 1 E. 6. concerning bishops, as of 2 E. 6. cap. 21. and of 5 E. 6. concerning marriages of ecclesiasticall persons, and the statute of 1 *regis Jacobi* repealing generally the statute of 1 Mar. it followeth, that if no other statute had repealed the said act of 1 E. 6. concerning bishops, but the said act of 1 Mar. then all the said three statutes, and 5 E. 6. had remained in force, when the act of 1 Mar. was repealed; but other acts repealing 1 Edw. 6. as before hath appeared, and no other act repealing the acts of 2 and 5 E. 6. concerning marriages, it followeth, that by the repeale of the said act of 1 Mar. the acts of 2 and 5 E. 6. are of force, and that of 1 E. 6. remaine repealed, and is not for the causes abovesaid revived by the statute of 1 *regis Jacobi*.

And it is to be observed, that it appeareth in our bookes, that if a deacon or secular priest had taken wife, the marriage was not void.

void, but voidable, *causa professionis*, and if either party had died before divorce, their issue had been legitimate, and should have inherited, for that deacons and priests within England were not votaries, that is, had not vowed chastity. But if a monk or a nun had married before the statutes of 32 H. 8. cap. 38. and of 2 E. 6. cap. 21. and this act of 5 E. 6. the marriage had been (as it was then holden) meerly void, for that they had taken a vow of chastity, as it appeareth by our bookes in 5 E. 2. tit' non habilit' 26 19 H. 7. tit' bastard' 33. 21 H. 7. 39. b. for avoiding of which scruple, the said acts of 32 H. 8. 2 E. 6. and 5 E. 6. were made.

See the stat. of
31 H. 8. cap. 6.

There be also other divorces which declare the marriage to be void, as a divorce *causa * frigiditatis*, where the party hath *perpetuam impotentiam generationis*, &c. And *b causa metus, sive duritie*, also *c causa impubertatis*: these marriages are said to be prohibited by Gods law, otherwise the statute of 32 H. 8. would extend unto them.

Gen. 2. ver. 24.
Mat. 19. 5.
Ephes. 5. 31.
1 Corin. 7. 2.
&c. Mar. 10.
7, 8.
* Dyer 2 Elis.
118. b. lib. 5.
c 39 E.

fol. 98. Buries case. ^b 11 H. 4. 14. rot. parl. 17 H. 6. nu. 15. Isabel Lady Butlers case. ^c 39 E. 3. 32, 33.

An Exposition upon the Statute of 2 E. 6. Cap. 8. Of Offices.

[688]

WH E R E many and divers persons holding, or that have holden lands, tenements, or hereditaments, some for terme of yeares, and some by copie of court roll, have been expelled, and put out of their termes and holds, by reason of inquisitions, or offices founden before eschetours, commissioners, and other, containing tenures of the king in capite, intitling the king to the wardship or custody of such lands or tenements; and sometime intitling the king to the same, upon attainders of treason, felony, or otherwise, by reason that such leases for terme of yeares, or interest by copie of court roll (1) of such persons, have not been found in such inquisitions or offices: after which expulsion or putting out, the said persons have been without remedy, for the obtaining of the said fermes, and holds, during the kings possession therein, and can have no traverse, monstrance de droit, nor other remedy for the same, because their said interest is but a chattell in the law, or customary hold, and no estate of freehold. And also, where any person or persons hath any rent, common, office, fee, or other profit apprender of any estate of freehold, or for yeares, or otherwise out of such lands or tenements, specified in such offices or inquisitions, the said rent, common, office, fee, or profit apprender, not found in the same office or offices, such persons are in like manner without remedy to obtaine, or have the said rent, common, office, fee, or profit apprender

apprender by any traverse, or other speedy meane, without great and excesse charges, during the kings interest therein, by force of such inquisition or office.

Where and in what cases before the statutes of 34 E. 3. cap. 14. and 36 Ed. 3. cap. 13. and 8 H. 6. cap. 19. the party grieved by any office might have had his *traverse*, or *monstrans de droit* by the common law, and where he was driven to his petition, and how, and in what manner, and in what cases the subject was relieved by those statutes. And where before this statute of 2 E. 6. the party was put to his petition, you may read in lib. 4. fol. 54, 55. &c. 24 E. 3. 55. untill the end of the case, adding thereunto, that Mich. 34 & 35 Elis. it was resolved in the court of wards by the two chiefe justices, in the case of the countesse of Rutland, upon consideration had of the said acts of 34 E. 3. 36 E. 3. & 8 H. 6. that he in the remainder expectant upon an estate taile or freehold, or that hath a drie reversion expectant upon any estate of freehold, without any rent or profit, but onely fealty, shall not traverse a false office, finding the dying seised of such a remainder or reversion: for these statutes give a traverse, when the lands are seised by the king, and the party ousted thereof: and the seisin of tenant for life is the seisin of him in remainder or reversion. And the judgement cannot be given, *quod manus domini regis amoveantur*. See Stamf. prerog. 13. he in the reversion may sue livery, &c. Dyer, 14 Elis. 319. Stamf. prerog. 62. a. b.

Lib. 4. fol. 54,
55. &c. Br. tra-
vers 55. Stamf.
prerog.

See 37. aff. p. 11.
4 E. 4. 21.

[689]

(1) *Leases for terme of years, or interest by copie of court roll, &c.*] Upon these words it hath been doubted, whether a tenant by statute merchant, by statute staple, by *elegit*, or executors that have interest in lands by devise for payment of debts, and the like were within this law, because they are not lessees for yeares; but the common opinion is, that these interests are within the purview of this act: for that they are not onely within the same mischief, being without remedy, but within the expresse reason of this law, *viz.* because their said interest is but a chattell reall, and all the abovesaid interests are but chattels realls, *et ratio legis est anima legis. Lex benefi- cialis rei consimili remedium præstat. Quæcunque intra rationem legis inveniuntur, intra ipsam legem esse judicantur.*

7 H. 7. 11.
Vid. 9 H. 6. 21.

29 H. 8. tit. *Travers d' office* 50. A termor could not traverse an office by the common law, but if it were found in the office, he might have a *monstrans de droit*, and so of others that had but chattels realls, 13 E. 4. 8.

But *nota*, though there be a double matter of record to entitle the king to a chattell personall, as an attainer, and an office, that the person attainted was possessed of a horse, the office may be traversed, 34 H. 6. 51. 4 E. 4. 24. 47 E. 3. 26. 13 E. 4. 8. 1 H. 7. fol. because chattels personall are *bona peritura*, and cannot abide the delay of a petition. *Vid.* W. 1. cap. 4. that goods wrecked be in safety, and kept by the view of the sherifes, &c. and yet such as be *bona peritura* the sherife, &c. may sell them within the yeare.

By the words of the writ of *diem clausit extremum, mandamus, &c.* the escheatour might, according to the common law, seise, &c. before office: but by the statute of Lincolne, anno 29 E. 1. *de Escheatoribus, Vet. Mag. Chart.* 108. and by *Artic' super Chart.* anno 28 E. 1. cap. 19. the escheatour, &c. cannot seise before office, and yet

yet the words of the writs keep their old forme. Here it appeareth, that the king is intituled by office.

For remedy whereof, be it enacted by authority of this present parliament, that where any such office or inquisition is or shall be founden (2), omitting such titles, interests, or matters, as aforesaid, that in all such cases, every lessee, tenant for terme of yeares, or copiholder, and every such person or persons that have, or shall have any interest to any rent, common, or profit apprender, for terme of yeares, life, or otherwise, out of any of the lands, tenements, or hereditaments contained in such office or inquisition, where the king, his heires or successors is, or shall be entituled, as is aforesaid, to any such lands, tenements, or hereditaments, shall have, hold, enjoy, and perceive all and every their leases and interests for terme of yeares, or by copie of court roll, rents, commons, offices, fees, and profit apprender, in such manner, forme, state, and condition, as they and every of them should, or might have done, in case there had been no such office or inquisition found, and as they should or lawfully might, or ought to have done, in case such lease, interest by copie of court roll, rent, common, office, fee, or profit apprender, had been founden in such office or inquisition: any law, custome, or usage to the contrary heretofore used in such cases, in any wise notwithstanding. And also, where it is or shall be founden for the king, his heires or successors, that the heire or heires of his tenant or tenant is, or shall be within age, where in deed such heire or heires is, or shall be at the same time of full age, or of a more or greater age, then is, or shall be contained within such office.

Note this first branch of this beneficial law.

(2) *Where any such office or inquisition is, or shall be found, &c.*] This hath reference to the preamble, and extendeth not onely to offices in case of wardship by tenure *in capite*, but to offices upon attainders of treason, felony, or otherwise. Wherein the generality of these words [or otherwise] are to be observed.

Be it further enacted by the authority aforesaid, that in every such case, such heire and heires, shall and may at his or their very full age, or after, prosecute a writ of *ætate probanda* (3), and sue his or their liverie, or *ouster le maine*, as his or their cases shall lye, and have the profits of his or their lands, tenements, or hereditaments, from the time of his or their very full age: any such untrue office or inquisition, or any law or custome to the contrary in any wise notwithstanding. Also where one person or moe is or shall be founden heire to the kings tenant by office or inquisition (4), where any other person is, or shall be heire; or if one person or moe be or shall be founden heire by office, or inquisition in one county, and another person or persons is or shall be founden heire to the same person in another county, or if any person be, or shall be untruly founden lunatick, ideot, or dead.

[690]
The 2. branch.

Sec 5 E. 4. 3. Stamford prer. 61. b. 21 R. 2. livery 4. 13 H. 4. 6, 7. Calestons case. 1 H. 7. 3. 14. & 28. Bro. tit. *Office devant Escheator* 27. 40. & *ibid.* 50. Br. tit. *Travers de office* 47. Kelwey, 7 H. 8. fol. 177.

(3) Or after sue a writ of *estate probanda*, &c.] Or a commission in the nature of an *estate probanda*, F.N.B. 257. c. d. e. Regitr. 294, 295, 296.

See a notable president of an *estate probanda*, together with the reasons of the jurors. Suff. Hill' 25 E. 1. rot. 14. *coram rege*, Benedict de Blakenhams case.

See Rot. Parl. 40 E. 3. nu. 14, 15. where the heire is found of full age, where in truth he is within age.

(4) Also where one person or more is, or shall be found heire to the kings tenant by office or inquisition, &c.] This act is general, and extendeth as well to offices found *virtute officii* (whereof there was no interpleader by the common law, because a generall livery could not be sued thereupon: but speciall liveries (now and long since in use) may be sued upon such an office found *virtute officii*) as to offices found *virtute brevis aut commissionis*.

The reason wherefore no generall livery could be sued at the common law upon an office found *virtute officii*, was, *Quia vigilantibus, non dormientibus jura subveniunt*. And the office, whereupon livery is to be granted to the heire, is to be upon an office to be found by writ or commission at the suit of the heire, and the escheator may retorne an office *virtute officii* into the court.

See the jurisdiction of courts, cap. the court of wards.

The 3. branch.

Be it enacted by the authority aforesaid, that every person and persons grieved, or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same, immediately, or after, at his or their pleasure, and proceed to tryall therein, and have like remedie and advantage, as in other cases of traverse upon untrue inquisitions or offices founden: any law, usage, or custome to the contrary in any wise notwithstanding.

See the statute of Marlbridge, ca. 16. and the exposition thereupon. 2 E. 4. 13. 5 E. 4. 3, 4. F.N.B. 262. 12 E. 4. 18. 2 H. 6. 5. 8 Hen. 7. 118. 11 H. 7. 3. Vide Dyer 5 Mar. 161, 162. lib. 7. 45. in Kennes case, this act doth not take away any incidents in law: for if one heire traverse the office of another, he first must have an office found for himselfe, as there it is resolved. Vid. 36 E. 3. tit. Travers 44. 12 H. 6. travers 45. 5 E. 4. 4. 1 H. 7. 14. 29. aff. 13. 43. aff. p. 20. 32 H. 6. travers 39. 16 E. 4. 4. F.N.B. 262. Stamford prer. 58. Kennes case, *ubi supra*, the cause of this word [immediately] to make it cleare that before was *vexata quaestio* so as by this an interpleader, as the case shall require, shall be immediatly.

[691]
The 4. branch.

And where it is or shall be hereafter untruly founden by office or inquisition, that any person or persons attainted, or that shall be attainted of treason, felonie, or premunire, is or shall be seised of any lands, tenements, or hereditaments, at any time of such treason, felonie, or offence committed or done, or any time after, whereunto any other person or persons hath, or shall

shall have any just title or interest of any estate of freehold, that then in every such case, every person and persons grieved thereby, shall have his or their traverse, or *monstrans de droit* to the same (1) without being driven to any petition of right: and like remedy and restitution upon his or their title, found or judged for him or them therein, as hath been accustomed and used in other cases of traverse, although the kings majestic, his heires or successors be, or shall be, in such case intituled to any such lands, tenements, or hereditaments, by double matter of record: any law, custome, or usage to the contrary in any wise notwithstanding.

Lib. 4. fol. 57. b. the reason is notably expressed, wherefore in these cases at the common law the party grieved was put to his petition. See 49 Ed. 3. 11. 13 H. 4. 7. 10 H. 6. 15. 4 E. 4. 25. 21 E. 4. 2, 3. 4 H. 7. fol. 7. Stamf. prer. 72, 73. 1 E. 5. 8. Pl. com. 486. Rot. parl. 11 H. 6. nu. 29. John Earle of Somersets case, Br. *travers de office* 51. *Vid.* 43. aff. p. 28. 33 H. 8. petition Br. 35.

(5) *Shall have his or their traverse, or monstrans de droit to the same, &c.*] Note, that the traverse and *monstrans de droit* are here dis-junctively divided, and by the ninth branch of this act, the party that shall traverse, must sue out one writ or severall writs of *scire facias*, as the case shall require, and that there shall be two writs of search granted upon every traverse, that shall be pursued by vertue or meanes of this act. But *nota*, that proviso extends onely to traverses, and not to any *monstrans de droit* to be pursued by force of this act, either for the suing out of writs of *scire facias*, or that therein writs of search shall be granted, because the *monstrans de droit* doth confesse and avoid the title of the king, and the traverse denieth it, 14 E. 4. 1, 7.

Stamf. prer. 70,
71. simile.

And further be it enacted by the authoritie aforesaid, that where any inquisition or office is or shall be founden (6) by these words, or the like, *Quod de quo, vel de quibus* (7) *tenementa prædicta tenentur, jurat' prædict' ignorant*: or else founden holden of the king, *per quæ servitia ignorant*, or such like; that in such case, such tenure so uncertainly founden, *de quo, vel de quibus tenementa prædicta tenentur, ignorant*, shall not be taken for any immediate tenure of the king; nor such tenure so founden of the king, *per quæ servitia ignorant*, shall not be taken any tenure *in capite*; but in such cases a *melius inquirendum* to be awarded (8), as hath been accustomed in old time; any usage of latter time to the contrarie notwithstanding.

The 5. branch.

(6) *That where any inquisition or office is or shall be found, &c.*] Upon an office found before the escheator, *virtute officii*, there lay no *melius inquirendum* before this act; for the words of the writ be, *per quandam inquisitionem capt' coram A. eschaetore nostro, &c. de mandato nostro capt'*. F.N.B. 255. Regist. fol. But this act is generall, and giveth it when it is found, *virtute officii*. *Vid.* 8. H. 6. cap. 16.

Kelwey 199.

(7) *Quod de quo vel de quibus, &c.*] *Vide* 10 H. 4. 2. b. 13 H. 7. 4. 29 Hen. 8. Br. office 58. & 30 H. 8. *ibid.* 59.

* (8) *But in such cases a melius inquirendum to be awarded, &c.*] *Vide* Dyer; 12 Elis. fol. 291. *Si sur le melius tenure est trouve dun common person in certaine, ne bejoigne travers.* Dyer 13 Elis. fol. 306. *Si ignoramus soit trouve sur le melius, ceo sera prise tenure in capite. Issint fuit resolve Mich. 33 & 34 Eliz. per les 2. chiefe justices in le court de gardes.* For this act extends not to the second inquisition upon the melius. And it was then resolved, that he which should traverse such an office, should traverse, that the land was not holden of the king *in capite*; for so much is implied in the office, Dyer 5 Mar. 161, 162.

Dyer 13 Elis. *ubi supra, si sur le melius soit trouve tenure dun roigne ut de manerio, &c. sed per quæ servitia ignorant.* This is a tenure by knight-service, as of the mannor. *Vide per melius inquirend'* lib. 8. fol. 168. Paris Stoughters case, & 5 Mar. Dyer 155. b. 156. that no *melius inquirendum* is grantable of any office found *de quo vel de quibus, &c.* before this statute.

The 6. branch.

And be it further enacted by the authoritie aforesaid, that where it is or shall be found by any office or inquisition (9), that any lands, tenements, or hereditaments, are, or shall be descended, remained, or common to any heire within age, and in the kings ward, or that ought to be in the kings ward, and that such lands, tenements, or hereditaments are holden of the king immediately, where in deed the same are, or shall be holden of some other common person (10), and not of the king immediately: that in such case, such heire or heires shall and may have their traverse to the same within age, and like remedie and restitution upon his or their title founden or judged for him, or them therein, as hath been accustomed and used in other cases of traverses: any law, usage, or custome to the contrarie in any wise notwithstanding.

(9) *Where it is, or shall be found by any office or inquisition, &c.*] Note the generality of this clause.

(10) *Shall be holden of some other common person, &c.*] The lord might traverse by the common law. 5 Mar. Dyer 161, 162. but the heire could not before this act. *Vide* 1 H. 7. 3.

The 7. branch.

Also where the kings majestie by his prerogative ought to have as well such lands and tenements as be holden of other persons, as holden of himselfe immediately, whereof his tenant holding of him in chiefe, dyeth seised, his heire being within age, untill such time as liverie be sued (11) by such heire, and that the meane lords, of whom the said other lands and tenements of such heire be holden, used to spare the rents (12) due to them for the same lands or tenements holden of them, during the kings possession. And when such heire hath sued his or their liverie they use by distresse, or otherwise to compell the said heire to pay to them the arrerages of such rents, for such time as the said lands, or tenements were in the kings possession

possession by such minoritie, where they should have sued by petition to the kings majestie, to have obtained the same out of the kings hands, if they would have the same which is to the great detriment, losse, and hindrance of such heire and heires. For redresse whereof, be it enacted by the authoritie of this present parliament, that from henceforth such meane lords, during such minoritie shall have, receive, and take the said rents by the hands of such of the kings officers, as shall be appointed to have, receive, and take the issues, revenues, and profits of the same lands and tenements so holden of such meane lords, during the minoritie and nonage of such heire and heires, and until such heire and heires sue his or their liverie, and that such heire and heires, untill such time as he or they shall have sued their liverie, or might conveniently have sued their liverie, shall be thereof clearly discharged. And that such officer or officers, shall upon request made, pay the same to such meane lords (they giving to such officer and officers a sufficient acquittance, or acquittances for the receipt of the same.) And that such payment thereof made with acquittance, or acquittances thereof shewed, shall be to such officers a sufficient discharge against the kings majestie and his heires, upon his or their accompt in that behalfe: any law, usage, or custome heretofore had, or used to the contrary hereof in any wise notwithstanding.

[693]

(11) *Untill such time as liverie be sued.*] *Nota*, there be two sorts of liveries, *viz.* liveries in deed, and liveries in law. Of liveries in deed there be two kinds, *viz.* a generall livery, and a speciall livery. For a generall livery an office must be found in every county, an *etate probanda* found and returned in the chancery; a writ to the lord privie seale, that the heire is of full age: and thereupon a privie seale to the chamberlaine of England to receive his homage, &c. which kind of livery is dangerous, tedious, and chargeable. Vid. 44 E. 3. 12. 12 H. 4. livery 4. 21 R. 2. livery 5. 1 H. 7. 14. E. 4. 18. 7 H. 8. Kelwey 176, 177.

There is also a speciall livery with a pardon much more safe, speedy and beneficiall for the party, and it may be had upon any office found in any one county, and all the rest to come in by certificate, as now the use is without *etate probanda*, &c. 7 H. 8. Kelwey 177. or without any office at all, and may be made to the heire within age, 21 E. 3. 40. 29 H. 8. livery Br. 56.

By the statute of 33 H. 8. cap. 22. power is given to the master of the wards, surveyor, attorney, and receiver, or three of them, whereof the master or surveyor to be one, to grant a generall or speciall livery. Whereupon some have thought, that speciall liveries became commonly to be granted; but it appeareth by 7 H. 8. *ubi supra*, that it was so commonly used by a good time then past. Dyer, 23 Elis. fol. 377. a speciall livery is not grantable at this day *ex debito justitiæ*.

If the office be traversed, and the king, hanging the traverse, grant livery, &c. the traverse goeth to the ground. Kelw. 2 H. 8. 157. a. b. 1 H. 7. 12. 27. adjudged. See Dyer, 23 Elis. *ubi supra*.

13 H. 4. 6. 7. tit Travers, an office is found, that A. died seised of the manor of B. and held the same *in capite* by knights-service his

his heire within age; this office is traversed, that A. infeoffed him that traverseth in fee, and traverse the dying seised: whereupon the king taketh issue, and hanging the traverse, it is found by another office, that the said seoffment was by collusion, and after the issue was found against the king; whereupon, by the rule of the court, the party had judgement, and an *amoveas manum*. For the office, found depending the traverse, shall not grieve the party; for so he might be infinitely vexed: but in a *scire fac'* by the king upon the latter office he shall answer, &c. an excellent case for the benefit and speed of them that are driven to traverse. Vid. 11 H. 4. fol. 8. 13 H. 4. tit. travers 16 et 13 H. 4. tit. livery 21.

* There be also liveries in law, as by pardons, either by act of parliament, or by charter under the great seale, to the heire of the kings tenant *in capite*, be he within age, or of full age. But where some books say, that a pardon of intrusions to such an heire amounts in law to a livery, it is so to be understood, that in the pardon there be words also, that the heire may enter, &c. for a speciall livery is no other, but that the heire *habeat licentiam ingrediendi, &c.*

Note, upon every livery the king hath the value of the land for halfe a yeare, but upon an *ouster le mayne* the kings hands be amoved without any profit, &c.

(12) *Used to spare the rents, &c.*] Not onely rents, but reliefes also were due by the common law, 26 H. 8. 8. 24 E. 3. 24. 29 ill. p. 5. 39 E. 3. reliefe 1. Vide Br. tit. Arrerages, pl. 1. & 19. For though there be a kind of suspension of rents, &c. by reason of the kings possession; yet the rents, &c. are due, because the prerogative of the king doth no man wrong, 13 E. 4. 8. &c.

Provided alwaies, and it is enacted by the authoritie aforesaid, that this act, or any thing therein contained, shall not in any wise extend to any inquisition or office taken or founden, at any time before the twentieth day of March next coming; nor to hinder, prejudice, or take away the title, interest, or possession of our soveraigne lord the king, or of any other person or persons growne, or commen by vertue, meane, or occasion of any inquisition or office taken, or found before the same day; but that as well our said soveraigne lord the king, as all other person or persons, having any title, interest, or possession by vertue, meane, or occasion of any inquisition or office found before the same day, shall, and may have, hold, and enjoy the same in like manner and forme, as though this act had never been had or made: any thing in the same act to the contrary in any wise notwithstanding.

Provided also, and it is enacted by the authoritie aforesaid, that in all such cases, as any person or persons shall be enabled by this act (13) to have any traverse, and shall pursue his or their traverse, that then he or they that shall pursue such traverse, shall sue one writ, or severall writs of *scire facias* (as the case shall require) against all and singular such person and persons, as shall have interest by the king, or by his patentee or patentees, in like manner and form as is requisite upon traverses, or petitions heretofore pursued. And that in every such *scire facias*

* 23 H. 8. Br.
intrusion 19. 21.
2 H. 6. 57.
Kelw. 10 H. 8.
198. 13 H. 4. 3.
See Dyer, 12 El.
286. 46 E. 3.
grant 50.
34 H. 8. Charter
de pardon 54.
21 H. 8. ib. 52.
16 E. 3. fol. 1.
[604]
32 H. 8. Br. 62.
Stamf. pier.
40. b.

The 8. branch.

Vid. Dier 5 Mar.
155, 156.

The 9. branch.

the

the patentees, or other defendants shall have like plees and advantages, as they had in any *scire facias*, before this time awarded against any patentee in any case of petition. And also, that upon every traverse that shall be pursued by vertue or meane of this act, in such case as the partie or parties that shall pursue any such traverse, should, by the order of the common lawes of this realme, have been put to sue by petition to the king, there shall be two writs of search granted in manner and forme, as like writs have been granted upon petitions made to the king.

(13) *Shall be enabled by this act, &c.*] Hereof somewhat hath been spoken in the fourth branch. *Vid.* 5 E. 4. 3.

Nota, in many cases two matters of record with necessary averrements shall amount to an office, but thereupon a *scire fac'* is to be granted, wherein the partie may traverse any of the materiall averrements, &c. 21 ass. p. 36. 21 E. 3. liverie. 40 ass. 46. 50 ass. 2. 2 E. 3. 10. b but because such records amounting are not within any branch of this act, we will speak no further of them.

Provided also, and it is enacted by the authoritie abovesaid, that if after any judgement shalbe given upon any traverse (9) that shalbe tendred, or sued by vertue or mean of this act, it shal appear by any matter of record, that the king hath any other former title, right, or interest to the mannors, lands, tenements, or other hereditaments mentioned in the same traverse, that then the same title, right, and interest shall be saved to the king, the said traverse and judgement thereupon given, in any wise notwithstanding.

The 10. branch.

[695]

(14) *Upon any traverse.*] This extendeth not to a *monstrans de droit* to be pursued upon this statute.

This proviso was added (for that this act gave a traverse, where none was at the common law, and that it should be judged for them, for whom it was found, &c.) lest the judgement, being warranted by authority of parliament, should bind any former right the king had; and that appeareth also by the conclusion of this branch, *viz.* The said traverse and judgement thereupon given notwithstanding: but it seemeth to be *abundans cautela*, for the judgement upon a traverse is, *quod manus domini regis amoveantur, et possessio restituatur* to him that traverseth *salvo jure, &c.*

Br. tit. Travers de office 54.

It is to be observed, that there be certaine records which intitle the king, that by law are not traversable; in which cases, though the king be entituled but by single matter of record, yet the party grieved is put to his petition, and cannot be holpen by traverse, or *monstrans de droit*. As taking one example for many: king Henry the fourth recovered in the kings bench in a *quare impedit* against the prior of T. the presentation to a church, and had a writ to the bishop, and his clerke received, &c. where in truth the prior never knew of the suit, nor was summoned, attached, or distrained by the sherife; and thereupon the prior moved the court of kings bench to grant a writ, to cause to come before them the summoners, the pledges, and mainperners upon the destresse to be examined in this matter.

Mich. 10 H. 4.
tit. Travers 51.
Fitz. N.B. 99. f.
Stamf. prer. 73.

matter. And in this case five points were resolved by Gascoigne chiefe justice, and the court, *viz.* first, that the prior was driven to his petition in nature of a writ of deceit, albeit in this case the king recovered in *auter droit*. 2. That if a common person had recovered, the defendant had been driven to his originall writ out of the chancery, and could not proceed upon any judiciaall proceffe out of this court. 3. That if the conclusion of the petition be, that the king should command the court of kings bench to proceed to the examination, &c. then without any writ out of the chancery, the court may proceed to the examination. 4. But if the petition doth conclude generally, that the king should doe right, then the prior should be driven to his originall out of the chancery. 5. That before such writ be granted, the prior upon a commission out of the chancery, ought to have his right found by enquest.

But seeing our statute extendeth to offices found by writ, commission, or *ex officio*, and not to other records, we will speak no further of them.

3 H. 4. 14.
13 E. 4. 8.
46 E. 3. Tra-
vers 17.

Mine advice to such as shall traverse by force of this act, is, that in the inducement to the traverse, they alledge their owne title, (which they ought to doe; for no man shall have the lands out of the kings hands, without making a title) justly and truly: for the attorney generall for the king may either take issue upon the traverse, or by the kings prerogative upon the title of the party, that traverseth at his choice.

17 E. 3. 10.
Henry Hills case.
20 E. 4. 11. 14.
21 E. 4. 1. 2.
quare imped.
101. 14 H. 7. 21.
15 H. 7. 6.

It is a maxime in law, that whensoever any man is by any office traversable amoved from his possession, that he must traverse the office in the court, where the office is returned. Of houses and lands, which doe lye in livery, and whereof there is manuell occupation, and profit presently taken, the party by finding of the office is out of possession; but of rents, villeins, commons, advow- sions, and other inheritances incorporeall which lye in grant, the owner is not out of possession (be they appendant, or in grosse) by the finding of an office; and therefore in any information or action brought by the king for the same, the party may traverse the office in that court, where the information or action is brought for the king.

[696]
29 aff. p. 4c.
32 aff. p. 28.
50 aff. 2. Stamf.
prer. 54. b.

And in all cases, when the king is not in possession by the office, and he obtaine not possession within the yeare after the office found, then cannot the king scize without a *scire facias*.

We have taken this statute of 2 E. 6. into our consideration, the rather, for that justice Stamford wrote his treatise upon the prerogative (wherein he setteth forth the common law) before this statute of 2 E. 6. by which statute the subject is relieved in many things, which lay heavie upon him, when justice Stamford wrote; our chieffest endeavour being, that it may be knowne how the law standeth at the edition of this second and other parts of the Institutes.

An Exposition upon the Statute of 22 H. 8.
Cap. 5. concerning the repairing of decayed
Bridges in Highwaies, and by whom.

BE it enacted by the king our soveraigne lord, and the lords spirituall and temporall, and the commons in this present parliament assembled, and by authoritie of the same, that the justices of peace in every shire of this realme, franchise, citie, or borough, or foure of them at the least, whereof one to be of the quorum, shall have power and authoritie to enquire, heare, and determine in the kings generall sessions of peace, of all manner of annoyances of bridges broken in the high-waies, to the damage of the kings liege people, and to make such proccesse and paines upon every presentment afore them for the reformation of the same, against such as owen to be charged for the making or amending of such bridges, as the kings justices of his bench use commonly to doe, or as it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges.

And where in many parts of this realme it cannot be knowne and proved what hundred, riding, wapentake, citie, borough, towne, or parish, nor what person certain, or bodie politick, ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lacke of knowledge of such as owen to make them, for the most part, lye long without any amendment, to the great annoyance of the kings subjects.

For the remedy thereof, be it enacted by authoritie afore-said, that in every such case the said bridges, if they be without the citie or towne corporate, shall be made by the inhabitants of the shire (1) or riding, within the which the said bridge decayed shall happen to be: and if it be within any citie or towne corporate, then by the inhabitants of every such citie, or towne corporate, wherein such bridges shall happen to be. And if part of any such bridges so decayed happen to be in one shire, riding, citie, or towne corporate, and the other part thereof in another shire, riding, city, or towne corporate; or if part be within the limits of any citie, or towne corporate, and part without; or part within one riding, and part within another: that then in every such case the inhabitants of the shires, ridings, cities, or townes corporate shall be charged, and chargeable to amend, make, and repaire such part and portion of such bridges so decayed, as shall lye and be within the limits of the shire, riding, citie, or towne corporate, wherein they be inhabited at the time of the same decaies.

And be it further enacted, that in every such case, where it cannot be knowne and proved (2) what persons, lands, tenements,

[698]

ments, and bodies politick owen to make and repaire such bridges, that for speedy reformation and amending of such bridges, the justices of peace within the shires or ridings, wherein such decayed bridges been out of cities and townes corporate; and if it be within cities or towns corporate, then the justices of peace within every such citie, or towne corporate, or foure of the said justices at the least, whereof one to be of the quorum, shall have power and authority within the limits of their severall commissions, and authorities, to call before them the constables of every town and parish, being within the shire, riding, city, or town corporate, as well within liberty, as without, wherein such bridges, or any parcell thereof shall happen to be, or else two of the most honest inhabitants within every such towne or parish in the said shire, riding, city, or towne corporate, by the discretion of the said justices of peace, or foure of them at the least, whereof one to be of the quorum: and at, and upon the apparances of such constables, or inhabitants, the said justices of peace, or foure of them (3), whereof one to be of the quorum, with the assent of the said constables, or inhabitants (4), shall have power and authority to taxe, and set every inhabitant (5) in any such city, towne or parish, within the limits of their commissions and authorities, to such reasonable aid, and summe of money, as they shall thinke by their discretions convenient and sufficient for the repairing, re-edifying, and amendment of such bridges, and after such taxation made, the said justices shall cause the names and summes of every particular person so by them taxed, to be written (6) in a roll indented (7). And shall also have power and authority to make two collectors of every hundred, for collection of all such summes of money, by them set and taxed, which collectors receiving the one part of the said roll indented under the seales of the said justices, shall have power and authoritie to collect and receive all the particular summes of money therein contained (8); and to distraine every such inhabitant, as shall be taxed, and refuse payment thereof, in his lands, goods, and chattells (9), and to sell such distresse, and of the sale thereof retaine and perceive all the money taxed, and the residue (if the distresse be better) to deliver to the owner thereof (10). And that the same justices, or foure of them, within the limits of their commissions and authorities, shall also have power and authoritie to name and appoint two surveyors, which shall see every such decayed bridge repaired, and amended from time to time, as often as need shall require, to whose hands the said collectors shall pay the said summes of money taxed, and by them received: and that the collectors and surveyors, and every of them, and their executors and administrators, and the executors and administrators of them, and every of them, from time to time shall make a true declaration and accompt to the justices of peace of the shire, riding, citie, or town corporate, wherein they shall be appointed collectors,

lectors or surveyors, or to foure of the same justices, whereof one to be of the quorum, of the receipts, payments, and expences of the said summes of money: and if they, or any of them refuse that to doe, that then the same justices of peace, or foure of them, from time to time by their discretions, shall have power and authoritie to make processe against the said collectors and surveyors, and every of them, their executors and administrators, and the executors and administrators of every of them, by attachments under their seales returnable at the general sessions of peace: and if they appeare, then to compell them to accompt, as is aforesaid, or else if they, or any of them, refuse that to doe, then to commit such of them, as shall refuse, to ward, there to remaine without baile or mainprise, till the said declaration and accompt be truly made.

[699]

And where any bridge or bridges lien in one shire or riding, and such persons inhabitants, bodies politick, lands or tenements, which owen to be charged to the making and amending of such bridges, lien and abiding in another shire or riding, or where such bridges been within any citie, or towne corporate, and the persons inhabitants, bodies politick, lands or tenements, that owen to make or repaire any such bridges, lien and been out of the said cities and townes corporate: be it enacted, that in every such case, the justices of peace of the shire, citie, or towne corporate, within the which such decayed bridges, or any part thereof shall happen to be, shall have power to enquire, heare, and determine all such annoyances, being within the limits of their commissions or authorities. And if the annoyance be presented, then to make process into every shire within this realme against such as owen to make, or amend any such bridges so presented before them, to be decayed, to the annoyance and let of the passage of the kings subjects, and to doe further in every behalfe in every such case, as they mought doe by authoritie of this act, in case that the persons or bodies politick, lands or tenements, which owen to be charged to the amending or making of such bridges, or any part thereof, were in the same shire, riding, citie, or towne corporate, where such annoyance shall happen to be. And that all sherifes and bailifes of liberties and franchises, shall truly serve and execute such processe, as shall come to their hands from the said justices of peace, afore whom any presentment shall be had for any such annoyance, according to the tenour and effect of the said processe to them directed, without favour, affection or corruption, upon paine to make such fine as shall be set upon them, or any of them, by the discretion of the said justices.

Provided alway, that this act, nor any thing therein contained, be not prejudiciall to the liberties of the five ports, or members of the same, and for reformation of annoyance of bridges within the said ports and members.

Be it enacted by authoritie of this present parliament, that the warden, maiors, and bailiffes elected, and jurates of the same
ports,

ports, and every of them, have power and authoritie to enquire, heare, and determine all manner of common annoyances of bridges within the same ports and members, and to make such processe, paines, taxations, and all other things within the same ports and members, as the justices of peace may doe in other shires, or places out of the same ports, by vertue and authoritie of this present act in every behalfe.

And be it further enacted by the authoritie aforesaid, that the justices of peace, or foure of them, shall have full power and authoritie to allow such reasonable costs and charges to the said surveyors and collectors, as by their discretions shall be thought convenient.

[700]

For as much that albeit bridges decayed were amended and repaired, according to the tenour of this act, yet neverthelesse, if speedy remedy for the amendment of the waies next adjoining to every of the ends of such bridges, should not be had and made, the kings subjects should take little or none availe or commoditie in any parts of this realme by the making of the bridges: in consideration whereof, be it enacted by the king our soveraigne lord, and the lords spirituall and temporall, and the commons in this present parliament assembled, and by the authoritie of the same, that such part and portion of the high-waies in every part of this realme, as well within franchise, as without, as lye next adjoining to any ends of any bridges within this realme, distant from any of the said ends, by the space of three hundred foot, be made, repaired, and amended as often as need shall require. And that the justices of the peace in every shire of this realme, franchise, citie, or borough, or foure of them at the least, whereof one to be of the quorum, within the limits of their commissions and authorities, shall have power and authoritie to enquire, heare, and determine in the kings generall sessions of peace, all manner of annoyances of and in such high-waies, so being and lying next adjoining to any ends of bridges within this realme, distant from any of the ends of such bridges, three hundred foot, and to doe in every thing and things concerning the making, repairing, and amending of such high-waies, and every of them, in as large and ample manner as they might and may doe, to and for the making, repairing, and amending of bridges, by vertue and authoritie of this present act.

Before we enter into the exposition of this act, we will take into consideration, for a necessary introduction thereunto, what the common law was concerning the reparation of decayed * bridges in three points: First, who were to reparaire the same: 2. what was the remedy for the reparation thereof: 3. before what judges.

* Pons significat omne quod super aquas transimus, unde ponticulus.

*Nil Tadcaster habet musis aut carmine dignum,
Præter magnificè structum sine flumine pontem.*

Vidit et scripsit poeta in ætate.

As to the first some persons spirituall or temporall, incorporate, or not incorporate, are bound to reparaire bridges *ratione tenuræ suce*
tenuræ, sive tenementorum, &c. some *ratione prescriptionis tantum,*
ratione tenuræ, by reason that they and those, whose estate they
have in the lands or tenements, are bound in respect thereof to re-
paraire the same; ^a but they which have lands on the one side of the
bridge, or on the other, or on both, are not bound of common right
to reparaire the same.

^b If a man, which holdeth an hundred acres of land, ought to
reparaire a bridge by the tenure of them, if he for example alien
twenty acres of them to one, and ten to another, and after one of
them is onely upon a presentment found thereof, distrained to re-
paraire this bridge, he shall have a speciall writ *de ouerando pro rata*
portione, et sic de similibus.

Ratione prescriptionis tantum, but herein there is a diversity be-
tween bodies politicke or corporate, spirituall or temporall, and
naturall persons: for ^c bodies politicke or corporate, spirituall or
temporall, may be bound by usage and prescription only, because
they are locall, and have a succession perpetuall: but a naturall per-
son cannot be bound by act of his ancesster, without a lien, or bind-
ing, and assents.

^a *Nota,* if a bishop or prior, &c. hath at once or twice of almes
reparaired a bridge, it bindeth not (and yet is evidence against him,
untill he prove the contrary) but if time out of mind, they and
their predecessors have reparaired it of almes, this shall bind them
to it. * *De pontibus et calcetis fractis in omnibus transitionibus quis*
ta reparare, et sustentare debet.

^e But admit none at all were bounden to the reparation of the
bridge, how then? † and by whom should it be reparaired by the com-
mon law? The answer is, that the whole county, that is, the in-
habitants of the county or shire, wherein the bridge is, shall reparaire
the same; for of common right the whole county must reparaire it,
because it is for the common good, and ease of the whole
county.

If a bridge be within a franchise, those of the franchise are to
reparaire it. If the bridge be part within a franchise, and part
within the gildable, so much as is within the franchise shall be re-
paraired by those of the franchise; and so much as is within the
gildable, by those of the gildable. ^f And so it is, if it be in two
counties, *mutatis mutandis.*

If a man make a bridge for the common good of all the subjects,
hee is not bound to reparaire it; for no particular man is bound to
reparation of bridges by the common law, but *ratione tenuræ,* or
prescriptionis.

As to the second the remedy was, if it were a private bridge:
as to a mill which A. was bound to maintaine, over which B. had
a passage, &c. if the bridge were in decay, B. might have his
writ *de ponte reparando.* But if the bridge were for the publicke,
&c. the remedy was by presentment at the suit of the king, for
avoiding of multiplicity of suits.

As to the third, this presentment might be at the common law
before the justices of the ^g kings bench, or before ^h justices in eire,
or ⁱ commissioners of oier and terminer, or before the sherife by
commission, or ^k writ in nature of a commission. ^l But as to the
sherife, his power to take inditements, by force of any such writ
Or

44 E. 3. 31.

21 E. 4. fol. 46.

5 H. 7. 3.

^a 8 H. 7. 5. b.^b Regist. 268. a.
F.N.B. 235 b.^c 21 E. 4. 38. b.
46. 43 aff. 37.

49 E. 3. 5. b.

the prior of
Markiats case.

10 E. 4. 10. a.

& b. in scir' fac'

19 H. 6. 75. a. b.

^d 10 E. 3. 28, 29.

27 aff. pl. 8.

44 E. 3. 31.

* Cap. Itineris.

M. 13 E. 3. fo.

73, 74. in libro

meo, the abbot of

S. Austins case.

^e Pasch. 10 E. 3.

28, 29. in the

Mast. of Leo-

nards case.

Vid. Regist. 192.

2 E. 3. coron.

147. 14 E. 3.

stat. 1. cap. 4.

where the whole

county is

amerced.

† [701]

14 E. 3. tit.

Barre 276. the

bishop of Chesh-

ters case.

^f Regist. 154. a.

F.N.B. 127. c.

8 H. 7. 5.

Regist. 153,

154. F.N.B.

127. d.

^g 21 E. 3. 54.

43 aff. 37.

^h 3 E. 3. aff. 445.ⁱ 27 aff. p. 8.

33. aff. p. 10.

38. aff. p. 15.

22 E. 3. 1.

^k 14 E. 3. barre

276.

^l Fitz. N. B. fol.

276. c.

m 29 E. 3. 21.

or commission in the nature of a commission, is taken away by the statute of 28 E. 3. cap. 9. But it may be presented in the ^m turne or leet.

See the second part of the Institutes, *Mag. Chart. cap. 15. Nulla villa nec liber homo distringatur facere pontes, &c. nisi qui ab antiquo et de jure facere consueverunt tempore regis Henrici avi nostri.*

For Pontage, *vid.* the second part of the Institutes, Westmin' 1. cap. 31. W. 2. cap. 25. 3 E. 3. ass. 445. 35 H. 6. 29. b. *per* Fortescue, Pl. Com. 334. 407. *Vide* 13 H. 4. 17. F.N.B. 178. f. Flet. lib. 4. cap. 1. *Vid.* 1 H. 8. cap. 9. 39 El. cap. 24.

Pontage is a toll or contribution for repaire of bridges. See a reasonable taxation therefore 39 Elis. cap. 24. See also of Pontage, lib. 8. fol. 46. b. John Webs case.

5 E. 3. 2. 7 H. 4. 3 &c.

It appeareth in our bookes, that before bridges were made how often defaults were saved, and delayes had *per cretance del ewe*, by encrease of waters.

39 Elis. cap. 24. 45 Elis. cap. 16.

None can be compelled to make new bridges, where never any were before, but by act of parliament.

9 H. 5. cap. 12, H. 6. cap. 28.

ⁿ The law before the conquest was, *Oppida pontesque posthac instaurantur.* And againe, *Qui pensionem ad oppida pontesve reficiendas denegabit, militiamve subterfugerit, dabit is regi (si Anglus fuerit) 26. solidos, &c.*

3 Jic. cap. 24. ⁿ Inter leges Canuti regis, ca. 10. & 62.

Now having considered what the common law was concerning the reparation of bridges, we will peruse the parts of this act of 22 H. 8. which may be divided into eight branches.

The first branch.

ⁿ Just. of peace have power to enquire of nufances, &c. in high-waies, by the statutes of 2 Mar. cap. 8. 5 Elis. cap. 13. 18 Elis. cap. 9.

1. That ^o justices of peace, or any foure or more of them, whereof one to be of the quorum, at the kings generall session of peace, shall have power, and authority (which consisteth in these foure things) first to enquire, heare and determine.

^p Pons à pendendo, quia tanquam in aère pendet.

2. Whereof? of all manner nufances of bridges broken in the high-waies, to the damages of the kings liege people. This extendeth only to common bridges in the kings high-waies, where all the kings liege people have, or may have passage, and not to private bridges to mills, or the like. And therefore the inditement upon this statute saith, *Quod P pons publicus et communis situs in alia regia via super flumen, seu cursum aquarum, &c.*

3. In what place? In every shire of this realme, franchise, citie, or borough.

[702]

But this is to be understood, *reddendo singula singulis*, that is to say, 1. in every shire or county where there be foure or more justices of peace, whereof one or more is of the quorum. 2. Franchise, where there be foure or more justices of the peace, and one or more of the quorum. 3. Citie, where be foure or more justices of the peace, and one or more of the quorum. 4. Or borough, where there be foure or more justices of the peace, and one or more of the quorum, and where they keep generall sessions of the peace for such franchises, cities, or boroughes; but for want thereof, the justices of peace of the county shall enquire. But if the franchise, citie, or borough be a county of it selfe, and have not foure or more justices of peace, whereof one or more is of the quorum, no other justices of peace of any other shire or county, have any power by this act to enquire of, hear and determine the decay of bridges there, but such decay must be reformed by such remedies (before specified) as the common law did give; therefore it was necessary

to be knowne what the common law was before the making of this statute.

4. Such proceffe they are to make upon every presentment afore them, for reformation of the same, * against such as owen to be charged for the * making or amending of such bridges, as the justices of his majesties bench use commonly to doe, or it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges.

* This whole branch, divided into these parts, extendeth only, where such as owen to be charged for

making or amending of such bridges are knowne, and presented. decayed, &c. it must be made againe, and re-edified.

^a If the whole bridge be de-

Having provided remedy against such as owen to be charged for the making or amending of such bridges, &c. The second and third branches doe provide more speedy remedy, where it cannot be knowne or proved what hundred, riding, wapentake, citie, borough, towne or parish, or what person certaine, or body politicke ought of right to make such bridges decayed, &c. how the same shall be repaired. And these branches doe consist on three parts.

The 2. and 3. branches.

1. That in every such case the said bridges (if they be without city or towne corporate) shall be made by the inhabitants of the shire or * riding, within which the said bridges decayed shall happen to be.

* This was added for Yorkshire, wherein there are ridings.

2. And if they be within a city or towne corporate, then by the inhabitants of every such city or towne corporate.

3. And if part of any bridges so decayed be within shire, riding, citie, or towne corporate, or if part be within the limits of any city, or towne corporate, and part without, or part within one riding, and part within another, that in every such case the inhabitants of the shires, ridings, cities, or townes corporate shall be charged and chargeable to amend, make, and repaire such part and portion of such bridges so decayed, as shall lye and be within the limits of the shire, riding, city, or towne corporate, wherein they be inhabited at the time of such decayes. By this part the law is declared by whom such decayed bridges in any shire, riding, city, or towne corporate ought to be repaired: a necessary clause to be added, for that such decayed bridges may not be within the remedy of the fourth branch: yet the law (who are chargeable) being declared hereby, the remedy shall be by the course of the common law, which before hath been shewed.

(1) *That the inhabitants of the said shires, &c.*] The persons to be charged by this act are comprehended under this only word [inhabitants;] which word is needfull to be explained, being the largest word of this kind.

See the statute of 23 H. 8. ca. 2. concerning making of gaoles.

First, although a man be dwelling in an house in a forraigne county, riding, city, or towne corporate, yet if he hath lands or tenements in his owne possession and manurance in the county, riding, city, or towne corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands or tenements in his owne possession within this statute. *Nota, habitatio dicitur ab habendo, quia qui propriis manibus, et sumptibus possidet, et habet, ibi habitare dicitur.*

* Vid. li. 5. fol. 66, 67. Jeffreyes case. ibid. fo. 64. in Clarkes case. Vid. 3. Jac. c. 23.

2. If a man dwelleth in a forraigne shire, riding, city, or towne corporate, and keepeth a house and servants in another shire, riding, city,

city, or town corporate, he is an inhabitant in each shire, riding, city, or town corporate within this statute.

3. *Ex vi termini.* Every person that dwelleth in any shire, riding, city, or towne corporate, though he hath but a personall residence, yet is he said in law to be an inhabitant, or a dweller there, as servants, &c. But this statute extendeth not to them, but to such as be householders. And this is gathered by the words of the fourth branch of this act, that giveth the distresse, *viz.* and to distraine every such inhabitant, &c. in his lands, goods, and chattels. And besides, it were in a manner infinite and impossible, to tax by the next branch of this act every inhabitant, being no householder.

4. Every corporation and body politicke residing in any county, riding, citie, or towne corporate, or having lands or tenements in any shire, riding, city, or towne corporate, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there within the purview of this statute.

5. An infant that hath house or lands by descent or purchase, is lyable to this publike charge, and so is the husband of a feme covert.

Now the law being declared who were chargeable to reaire decayed bridges, where no person, &c. where bound thereunto. The fourth branch, for a more speedy reformation and remedy, provideth and enacteth these fixe things:

1. That in every case, where it cannot be knowne and proved what persons, lands, tenements, and bodies politick owen to make and reaire such bridges, for the speedy reformation and amendment of such bridges, the justices of peace within the shires or ridings, where such bridges been (being out of cities and townes corporate) and if it be within cities or townes corporate, then the justices of peace in every such city or towne corporate, or foure of the said * justices at the least, whereof one to be of the quorum, shall have power and authority within the limits of their severall commissions and ^a authorities, to ^b call before them the constables of every towne or parish, being within the shire, riding, citie, or towne corporate, as well within liberty as without, where such bridges, or any parcell thereof shall happen to be, or else two of the next honest inhabitants within every towne or parish in the said shire, riding, city, or towne corporate, by the discretion of the said justices, or foure of them at the least, whereof one to be of the quorum. But it is good policie, that more then foure justices, &c. doe take upon them the authority committed to them by any branch of this act: for if there be but foure, if any of them dyeth, or be out of the commission, the surviving three have no authority to proceed.

* These words referre as well to the justices of the shires or ridings, as of the cities or townes corporate.

^a Justices of peace in shires and ridings are by commission, in cities and townes corporate for the most part by charter; therefore this word

[*authorities*] is used.

^b The first thing the justices are to doe when they are assembled, is to call, &c. if they be present (as commonly they are) at the generall sessions of peace, or else to make warrants to call, &c. before them at a certain day and place, and in those warrants to signifie that it is for a taxation of the inhabitants of the whole county, for reparation of such a bridge.

(2) *Where it cannot be knowne or proved, &c.*] By the context and order of this statute, first, for inquiry at the generall sessions, who ought to reaire such decayed bridges: and secondly of this branch, where it cannot be knowne or proved (that is, at the generall sessions who owen to reaire it.) It hath been gravely advised,

The 4. branch.

is advised, that for the better warrant of these foure justices of peace, inquiry should be made by the great inquest for the body of the county at the generall quarter sessions, who ought to reparaire it, and if that cannot appeare upon any prooffe made, then a presentment to be made, that the bridge is in decay. And to conclude, *et ulterius juratores prædicti præsentant, quod prorsus nescitur quæ personæ, quæ terræ, sive tenementa, aut corpora politica eundem pontem, aut aliquam inde parcellam ex jure, aut antiqua consuetudine reparare debent, aut consueverunt.* And by this meanes, the foure, or more justices of peace, being judges of record, shall be informed of record, that it cannot be knowne or proved, &c. A safe way for these foure or more of the justices; for to charge the subject without just cause, and not warranted by this act, is a great misprision.

c Hereof we have seen a good presentment; and the like for the presentment you may reade in Lambards justice of peace.

[704]

2. At the apparance of such constables or inhabitants, the said justices of peace, or foure of them, whereof one to be of the quorum, with the assent of the said constables or inhabitants, shall have power and authority to taxe, and set every inhabitant in such city, towne, or parish, &c. to such reasonable aide and summe of mony, as they shall thinke by their discretions convenient and sufficient, for the repairing, d re-edifying, and amendment of such bridges.

d Nota, for re-edifying, or new building.

It is not here mentioned by any expresse words, that these foure or more justices must execute their authority of this act in the generall sessions of the peace, as it was in the first branch. See for this in the last branch.

First by whom, and in what manner taxation shall be made.

(3) *Justices of peace, or foure of them, &c.*] That is, in such cities, or townes corporate, where foure justices, &c. be: for if there be not foure such justices, they are not within the remedy of this branch, but (as hath been said) are left to the remedy at the common law.

(4) *With the assent of the said constables or inhabitants.*] So as neither the justices, without such assent, nor the constables or inhabitants, without the justices, can make any taxation by this act.

(5) *To taxe and set every inhabitant.*] *Unumquemque inhabitantium, i. singulos inhabitantes,* so as every one may be taxed by himself, and each one beare his owne burthen. And the taxation cannot be set upon the hundred, parish, towne, &c. for then one or a few might be distrained for the whole. What inhabitant is here meant, we have touched before.

By these words [every inhabitant] all priviledges of exemptions or discharges whatsoever from contribution, for the reparation of decayed bridges (if any were) are taken away, although the exemption were by act of parliament.

See the second part of the Institutes, Magn. Chart. ca. 15.

How the money so taxed shall be collected.

(6) *And after such taxation made, the said justices shall cause the names and summes of every particular person so by them taxed, to be written in a roll indented.*

Note the names and sums of every particular person, so as (as hath been said) the taxation must be severall and particular.

(7) *In a roll indented.*] This is intended of every severall hundred, and they must be inrolled in parchment, and sealed by the said justices, and this to be done presently after the taxation made.

3. (8) *And shall also have power and authoritie to make two collectors of every hundred, for collection of all such summes of money, by them set and taxed, which collectors (viz. of every hundred) receiving the one part of the said roll indented, under the seales of the said justices, shall have power and authoritie, to collect and receive all the particular summes of money * therein contained.*

* By this it appeareth, that the severall ingrossments must be of the severall summes, &c. in every severall hundred, because the collectors be severall of every severall hundred, and these rolls ingrossed are their severall warrants.

4. (9) *And to distraine every such inhabitant, as shall be taxed, and refuse payment thereof, in his lands, goods, and chattells.]* Hereby foure things are to be observed: first (as hath been said) that the taxation must be severall. 2. That the remedy for levying, is by distresse in his lands, goods, and chattels in any place within that hundred, and to sell such distresse. And this the collectors of that hundred may doe by force of this act. 3. That if upon demand the summe be not paid, albeit the inhabitant doe not expressly refuse, it is a refusall in law. 4. Albeit two collectors be appointed, yet one of them, by the command and consent of the other, may distraine and sell; for this is the distresse and sale of them both.

[705]

5. (10) *And if the distresse be better, to deliver to the owner thereof.]* That is, the surplufage upon the sale, above the summe so distrained for, must be delivered to the owner inhabitant.

6. The residue of this branch, concerning the appointment of two surveyors, and the account of them, and of the two collectors, and other things depending on the same, are evident, and need no explanation.

* The effect of this branch is, that the said justices in every shire, riding, city, or towne corporate, shall make processe respectively into every shire, and other place out of the shire, riding, city, or towne corporate. And that the sherife shall serve the processe, upon paine of such fine as shall be assessed by such justices.

The 6. branch. The sixth branch excepteth the five ports, and provideth remedy, and giveth jurisdiction to the warden, mayors, and bailiffes elect, and jurats of the same ports, to enquire, heare and determine all manner of annoyances of bridges.

The 7. branch. The seventh branch giveth power to the said justices of peace, or foure, or more of them, to allow reasonable costs and charges to the said surveyors and collectors.

The 8. branch. The last branch containeth a law for amendment of high-waies at the end of the bridges, and power given to foure or more justices of peace, whereof one to be of the quorum in every shire, franchise, or borough, to enquire, heare, and determine in the * " kings generall sessions of the peace, all manner of annoyances of and in such high-waies so being and lying, next adjoyning to any ends of bridges wifin this realm, distant from any ends of such bridges three hundred foot, and to do in every thing and things concerning the making, repairing, and amending of such high-waies, and every of them, in as large and ample maner, as they might and may do to and for the making, repairing, and amending of bridges, by virtue and authority of this present act."

* Nota.

In the kings generall sessions of the peace, &c.] Hereupon it is colleted, that seeing the first branch referreth the proceeding concerning

cerning the decay of bridges to the generall sessions of the peace, and the second branch concerning the calling of the constables, &c. and this last branch referreth the proceeding for the amendment of high-waies at the end of bridges, to the generall sessions of the peace: it is the safest way, and nearest to the meaning of the makers of this law (all the parts thereof being considered) that the justices of peace, where no certain person, &c. is knowne, that ought to repaire any decayed bridge, (and the inhabitants of the whole county are generally to be charged) doe proceed as well for the reparation of the bridges, as of the high-waies at the end of those bridges at the generall sessions of the peace, one of them as it were depending upon the other.

The freehold as well of bridges, as of the high-waies, is in him that hath the freehold of the soile, but the free passage is for all the kings liege people.

See the statutes of 13 Elis. cap. 18. 18 El. cap. 18. & 17. 23 El. ca. 11. 39 El. cap. 24. &c. concerning bridges.

See the ^a statute of 23 Hen. 8. cap. 2. concerning the new erecting of gaoles, which cannot be done without act of parliament. That act had little effect; for that the justices of peace did little or nothing within the time to them prescribed by that act; yet reade it, for it hath divers good provisions in it, and divers of them much like to our act.

A right profitable law was made, *anno* 43 Elis. for commissioners, to enquire for mis-employment of lands, tenements, rents, annuities, profits, hereditaments, goods, chattells, money, and stockes of money given, limited, appointed, or assigned to or for repaire of bridges (*inter alia*) and by their orders to reforme the same, which in some cases is a ready and speedy way, and have wrought good effect. And therefore we will in the next place enumerate and explaine the parts and branches of that act, for the better encouragement and instruction of the commissioners in that behalfe.

^a 23 H. 8. ca. 2. Parliam. 51 E. 3. nu. 68 it appeareth that gaoles were to be repaired at the kings charge.

[706]

43 Elis. ca. 4.

A speedy remedy in many cases;

An Exposition upon the Statute of 43 Elis. Cap. 4. concerning Commissioners authorized to enquire of Misemployment of Lands or Goods given to Hospitalls, by their Orders shall be reformed.

[707]

WHEREAS lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stockes of money, have been heretofore given, limited, appointed and assigned, as well by the queenes most excellent majestie, and her most noble progenitors, as by sundry other well disposed persons; some for reliefe of aged, impotent, and poore people; some for maintenance of sicke and maimed

souldiers and mariners, schooles of learning, free schooles, and scholars of universities; some for repaire of bridges, ports, havens, cawfies, churches, sea-bankes, and high-waies; some for education and preferment of orphans, some for or towards reliefe, stocke or maintenance for houses of correction; some for marriages of poore maides, some for supportation, aide, and help of young tradesmen, handy-crafts-men, and persons decayed, and others for reliefe or redemption of prisoners or captives, and for aide or ease of any poore inhabitants, concerning payment of fifteens, setting out of souldiers, and other taxes: which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stockes of money, neverthelesse have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same. For redresse and remedy whereof, be it enacted by authoritie of this present parliament, that it shall and may be lawfull to and for the lord chancellor, or keeper of the great seale of England for the time being, and for the chancellor of the duchie of Lancaster for the time being, for lands within the county palatine of Lancaster, from time to time, to award commissions under the great seale of England, or the seale of the county palatine, as the case shall require into all or any part or parts of this realme, respectively, according to their severall jurisdictions, as aforesaid, to the bishop of every severall diocesse and his chancellor (in case there shall be any bishop of that diocesse, at the time of awarding of the same commissions,) and to other persons of good and sound behaviour, authorizing them thereby, or any foure or more of them, to enquire as well by the oaths of 12 lawfull men or more of the county, as by all other good and lawfull waies and meanes of all and singular such gifts, limitations, assignments, and appointments aforesaid, and of the abuses, breaches of trusts, negligences, mis-employments, not employing, concealing, defrauding, mis-converting, or mis-government of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stockes of money, heretofore given, limited, appointed, or assigned, or which hereafter shall be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed. And after the said commissioners, or any foure or more of them (upon calling the parties interested in any such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, moneys, and stockes of money) shall make enquiry by the oathes of twelve men or more of the said county (whereunto the said parties interested shall and may have, and take their lawfull challenge and challenges) and upon such enquiry, hearing, and examining thereof, set downe such orders, judgements, and decrees, as the said lands, tenements, rents, annuities, profits, goods, chattels, money, and stockes of money, may be duly and faithfully employed, to and for

for such of the charitable uses and intents before rehearsed, respectively, for which they were given, limited, assigned, or appointed, by the donors and founders thereof. Which orders, judgements, and decrees, not being contrary or repugnant to the orders, statutes, or decrees of the donors or founders, shall by the authoritie of this present parliament stand firme and good, according to the tenour and purport thereof, and shall be executed accordingly, untill the same shall be undone or altered by the lord chancellor of England, or lord keeper of the great seale of England, or the chancellor of the county palatine of Lancaster, respectively within their severall jurisdictions, upon complaint by any party grieved to be made to them.

Provided alwaies, that neither this act, nor any thing therein contained, shall in any wise extend to any lands, tenements, rents, annuities, profits, goods, chattels, money, or stockes of money given, limited, appointed, or assigned, or which shall be given, limited, appointed or assigned to any colledge, hall, or house of learning within the universities of Oxford or Cambridge, or to the colledges of Westminster, Eaton, or Winchester, or any of them, or to any cathedrall or collegiat church within this realme.

And provided also, that neither this act, nor any thing therein, shall extend to any citie, or towne corporate, or to any the lands, or tenements given to the uses aforesaid, within any such citie, or town corporate, where there is a speciall governour or governours appointed to governe or direct such lands, tenements, or things disposed to any the uses aforesaid, neither to any colledge, hospitall, or free schoole, which have speciall visitors, or governours, or overseers appointed them by their founders.

Provided also, and be it enacted by the authoritie aforesaid, that neither this act, nor any thing therein contained, shall be any way prejudiciall or hurtfull to the jurisdiction of the ordinary, or power of the ordinary, but that he may lawfully in every cause execute and perform the same, as though this act had never been had or made.

Provided also, and be it enacted, that no person or persons that hath or shall have any of the said lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stockes of money in his hands or possession, or doth or shall pretend title thereunto, shall be named a commissioner or a juror for any the causes aforesaid, or being named, shall execute or serve in the same.

And provided also, that no person or persons, which hath purchased or obtained, or shall purchase or obtaine upon valuable consideration of money or land, any estate or interest of, in, to, or out of any lands, tenements, rents, annuities, hereditaments, goods, or chattels that have been, or shall be given, limited, or appointed to any the charitable uses above mentioned, without fraud or covin, having no notice of the same

[709]

charitable uses, shall not be impeached by decrees or orders of commissioners above mentioned, for or concerning the same his estate or interest. And yet neverthelesse, be it enacted that the said commissioners, or any foure or more of them, shall and may make decrees and orders for recompence to be made by any person or persons, who being put in trust, or having notice of the charitable uses above mentioned, hath or shall breake the same trust, or defraud the same uses by any conveyance, gift, grant, lease, demise, release, or conversion whatsoever, and against the heires, executors, and administrators of him, them, or any of them, having assents in law or equitie, so farre as the same assents will extend.

Provided alwaies, that this act shall not extend to give power or authoritie to any commissioners before mentioned, to make any orders, judgments or decrees for or concerning any manors, lands, tenements, or other hereditaments, assured, conveyed, granted, or come unto the queens majestie, to the late king Henry the eighth, king Edward the sixth, or queene Mary, by act of parliament, surrender, exchange, relinquishment, escheat, attainder, conveyance, or otherwise. And yet neverthelesse, be it enacted, that if any such manors, lands, tenements, or hereditaments, or any of them, or any estate, rent, or profit thereof, or out of the same, or any part thereof have, or hath been given, granted, limited, appointed, or assigned to or for any the charitable uses before expressed at any time sithence the beginning of her majesties reigne, that then the said commissioners, or any foure or more of them, shall and may as concerning the same lands, tenements, hereditaments, estate, rent, or profit so given, limited, appointed or assigned, proceed to enquire, and to make orders, judgments and decrees according to the purport and meaning of this act, as before is mentioned: the said last mentioned proviso notwithstanding.

And be it further enacted, that all orders, judgments and decrees of the said commissioners, or of any foure or more of them, shall be certified under the seales of the said commissioners, or any foure or more of them, either into the court of the chancery of England, or into the court of the chancery within the countie palatine of Lancaster, as the case shall require respectively, according to the severall jurisdictions, within such convenient time as shall be limited in the said commissions.

And that the said lord chancellor, or lord keeper, and the said chancellor of the dutchy, shall and may, within their said severall jurisdictions, take such order for the due execution of all or any of the said judgments, decrees, and orders, as to either of them shall seem fit and convenient.

And that if after any such certificate or certificates made, any person or persons shall find themselves grieved with any of the said orders, judgments, or decrees, that then it shall and may be lawfull to and for them, or any of them to complaine in that behalfe unto the said lord chancellour, or lord keeper, or to the

chancellour

chancellour of the said duchie of Lancaster, according to their severall jurisdictions, for redresse therein. And that upon such complaint, the said lord chancellour, or lord keeper, or the said chancellour of the duchy, may, according to their said severall jurisdictions, by such course as to their wisdomes shall seeme meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof: and upon hearing thereof, shall and may adnull, diminish, alter or enlarge the said orders, judgements and decrees of the said commissioners, or any foure or more of them, as to either of them in their said severall jurisdictions shall be thought to stand with equitie and good conscience, according to the true intent and meaning of the donors and founders thereof, and shall and may taxe and award good costs of suit by their discretions, against such persons as they shall find to complaine unto them without just and sufficient cause of the orders, judgements, and decrees before mentioned, 39 El. 6. 43 El. 9.

Authority is given to the lord chancellour, or lord keeper, and to the chancellour of the dutchy respectively, to grant commissions under the severall scales.

Concerning these commissions, these fixe things are to be observed:

1. First the number must be foure, or more.
2. The commissioners to be the bishop and chancellor of that diocesse (if there be a bishop) and other persons of good and sound behaviour.
3. In that commission any foure of them doe suffice to make orders and decrees, for therein none is of the quorum.
4. None shall be commissioners that have any part of the lands, &c. or goods, or chattels, money, or stockes in question.
5. The commission is to limit a certaine time, within which the commissioners are to order, decree, and certifie.
6. Their authority is to enquire as well by the oath of twelve lawfull men, or more, as by all other good waies and meanes.

Concerning the jurors, or inquest of inquiry, these two things are to be observed:

1. First, the parties interessed may have and take their lawfull challenge and challenges.
2. None that pretend title to any of the lands, &c. goods or chattels, money, or stockes in question, shall be a juror, &c.

They are to enquire of all and singular gifts, limitations, and appointments of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stockes of money, for 21. charitable uses in relieving, maintaining, repairing, educating, preferring, marrying, supporting, aiding, helping, redeeming and easing.

1. For reliefe of aged, impotent, and poore people, 2. for maintenance of sicke and maimed souldiers, 3. schooles of learning, 4. free schooles, 5. scholars in universities, 6. and houses of correction, 7. for repaire of bridges, 8. of ports or havens, 9. of sawsies, 10. of churches, 11. of sea-bankes, 12. and of high-waies, 13. for

13. for education and preferment of orphans, 14. for marriage of poore maides, 15. for supportation, aide, and help of young tradesmen, 16. of handi crafts men, and 17. of persons decayed, 18. for redemption or reliefe of prisoners or captives, 19. for ease and aide of any poore inhabitants, concerning payment of fifteenes, 20. setting out of souldiers, 21. and other taxes.

[711]

And the commissioners have power also to enquire of these nine things:

- | | | |
|---|---|--|
| <ul style="list-style-type: none"> 1. Of abuses, 2. Breaches of trust, 3. Negligences, 4. Mis-employments, 5. Not employing, 6. Concealing, 7. Defrauding, 8. Mis-converting, 9. Mis-government, | } | of any lands, tenements, &c. rents, &c. goods, money, &c. given to any of the charitable uses aforesaid. |
|---|---|--|

But this act doth not extend to all lands, &c. nor to all goods and chattels, money, or stockes given to any of the charitable uses aforesaid; but certaine are excepted in these eight severall cases, *viz.*

First, of the colledges, halls, or houses of learning in either of the universities.

- 2. Of the colledge of Westminster.
- 3. Of the colledge of Eaton.
- 4. Of the colledge of Winchester.
- 5. Of any city, or towne corporate, where there is a speciall governour or governours of such lands, &c.
- 6. Of any colledge, hospitall, or free schoole, which have speciall visitors, or governors, or overseers, appointed to them by their founders.

7. Of purchasers, having these three qualities: first, for * valuable consideration of money or land: 2. without fraud or covin: 3. having no notice of the same charitable use. But albeit the commissioners cannot make any decree against any such purchasers, yet may they make decrees for recompence to be made by any person or persons, who being put in trust, or having notice of the charitable uses aforesaid, have or shall breake the said trust, or defraud the same uses by any conveyance, gift, grant, lease, release, or conversion, and against his or their heires, executors and administrators, having assets in law or ^a equity, so farre as the same assets will extend.

8. Of purchasers of lands, tenements, and hereditaments assured, conveyed, or come to queen Elisabeth, Hen. 8. Edw. 6. or queen Mary by act of parliament, surrender, exchange, relinquishment, escheat, attornment, conveyance, or otherwise. But if any such manors, lands, &c. have since the beginning of queen Elisabeths reigne been given, &c. to any of the charitable uses before expressed, then this act doth extend to the same.

Concerning the certificate of the commissioners, these foure things are to be observed:

First, that they certifie their order and decree respectively, either into: he court of the chancery of England, or into the chancery of the county palatine of Lancaster, as the case shall require.

2. That

* So as none but valuable consideration, and no valuable consideration, but for any other use, will serve the turne.

^a Nota, assets in equity, as trusts, confidances, and the like.

2. That it ought to be in parchment, under the hands and seals of the commissioners.

3. It must be within the time limited in the commission.

4. That the lord chancellor, or lord keeper, and the said chancellor of the duchy shall and may within their severall jurisdictions take such order for the due execution of all or any of the said judgments, decrees and orders so certified, as to either of them shall seem fit and convenient.

In the remedy for the party grieved with such decrees so certified, these five things are to be considered:

First, that he complaine to the lord chancellor, or lord keeper, or to the chancellor of the duchy, according to their severall jurisdictions for redresse thereof. And this complaint is to be by bill.

2. Upon such complaint, first, they shall respectively by such course, as to their wisedomes shall seem meetest, the circumstance of the case considered, proceed to the examination, hearing, and determining thereof. 2. Upon hearing thereof shall or may admit the whole (which rarely is done) diminish (in part) or enlarge (that is, to confirme the former, and to enlarge the same by adding something thereunto) the judgements and decrees so certified.

3. As shall be thought to stand with equity and good conscience.

4. According to the true intent and meaning of the * donors and founders thereof

5. And shall and may taxe and award good costs of suit by their discrecons (respectively) against such persons as shall complaine to them respectively, without just and sufficient cause of the orders, judgements, and decrees before mentioned. But this order being given and limited by act of parliament, no costs (if the order, judgement, or decree be adnull'd, diminished, or enlarged) ought to be given to the party complaining.

[712]

* This is the *lapis ductitius*, whereby the commissioners and chancellors must institute their course.

The Exposition of the Statute of 31 Elis. Cap. 12. concerning Sellers of Horses in * Faires and Markets, &c.

[713]

* Forum à ferendo (aut quod fit foris) quia ibidem merces

asportari solent: Latinè, *Feriae*, quia ibidem merces portantur. Unde *Feires*, or *Faires* Anglicè, & *Foire* Gallicè. *Nundinae* à nono die, &c. *Mart* is derived à *mercando*, of buying and selling, and so is *mercatus* alto. *Emporium*, Græcè *Ἐμπορίον*, quia ibi conveniunt *Ἐμπόροι*, i. *Mercatores*.

BEFORE we enter into the exposition of this statute, we will consider, first, what the common law was before the making of this statute, 2. what any acts of parliament have wrought in this case, before this act of 31 Elis. 3. we will descend to the exposition of our said act of 31 Elis.

As to the first, the common law did hold it for a point of great policie, and behovefull for the common-wealth, that faires and markets overt should be replenished, and well furnished with all manner

manner of commodities, vendible in faires and markets, for the necessary sustentation and use of the people. And to that end the common law did ordaine (to encourage men thereunto) that all sales and contracts of any thing vendible in faires or markets overt should not be good onely between the parties, but should bind those that right had thereunto. But this rule hath many exceptions.

35 H. 6. 29. Pl.
Com. 243 Doct.
& Stud. 39. b.

First, it shall not bind the king for any of his goods sold in market overt by any person, but regularly the sale by a stranger in market overt bindeth an infant, a feme covert that hath right either in their owne right, or as executor, or administrator, idiots, *non compos mentis*, men beyond sea, and in prison, that right have to the same.

Lib. 5. fo. 83. b.
Lib. int' Rast.
327. 2 & 3 Ph.
& Mar. cap. 7.
Lib. 5. fo. 83. b.
35 H. 6. 7. simile.

2. Although the faires or markets be overt, yet the sale must be made in a place that is overt and open, not in a backe roome, ware-house, &c. as you may reade, lib. 5. fol. 83. b. case de market overt.

3. Although it be in an open place, yet overt in this case implies apt and sufficient, as not to sell plate openly in a scrivener's shop, or the like, but openly in a goldsmiths shop, &c. lib. 5. fol. 83. *ubi supra*.

12 E. 4. 12. b.
and all the
bookes.

4. It must be a sale, and not a free gift, without any valuable consideration: for faires and markets were not instituted for gifts, but for sales; therefore gift in this act is to be intended of a gift for valuable consideration, and not a free gift.

Doct. & Stud. 64.
b. 33 H. 6. 5.

^a 5. If the buyer doth know whose goods they were, and that the seller thereof hath at the most but a wrongfull possession, this shall not bind him that right hath.

12 H. 8. 10. b.
^a 14 H. 8. 8. Pl.

^b 6. If they be sold by covin between two of purpose to barre him that right hath, this barreth not.

Coro. 46. 18 E.

^c 7. If a sale be made of goods by a stranger in a market overt whereby the right of A. is bound, yet if the seller acquireth the goods againe, A. may take them againe, because he was the wrong doer, and he shall not take advantage of his owne wrong.

4. 24. 10. 3. fol.

8. There must be a sale and contract; and therefore a sale to a man of his owne goods in market overt, bindeth not; and likewise a sale in market overt by an infant of such tenderneffe of age, as it may appeare to the buyer that he is within age, or by a ^d feme covert, if the buyer know her to be a feme covert (unlesse for such things as she usually trades for, or by the consent of her husband) bindeth not. *Et sic de similibus*.

73. b. in Fer-

^e 9. The contract must be originally and wholly made in the market overt, and * not to have the inception out of the market, and the consummation in the market.

mons case, & 83.

10. By the common law the property was altered (though some opinions be to the contrary) by sale in market overt, albeit no toll was paid either in respect of the freedome of the faire or market, wherein no toll at all was to be paid, or for that many were discharged of payment of toll, as the king, and some of his subjects by charter, and some by tenure, as ancient demesne, &c. where toll of others was to be taken.

a. in Wind-

11. The sale must not be in the night, but between the rising of the sun, and the going downe of the same: for he that hath a faire or market, either by grant or prescription, hath power to hold it

hams case.

Doct. & St. f. 39.

b Vid. the books

to the 5.

c 34 H. 6. 10.

& 11.

7 E. 4. 15.

32 H. 6. 1.

15 E. 4. 6. 24.

9 H. 6. 45.

d 21 H. 7. 40. b.

Finex chiefe

justice. Also for

the feme covert,

vid. Mich. 22 &

23 Elis. ceram

rege in action

for le case, inter

Guibton &

Thorpell, Suff.

e Dyer 1 Mar.

fo. 99. 121.

* [714]

Vid. 9 H. 6. 45.

35 H. 6. 2 & 3

Ph. & Mar. c. 7.

Doct. & St. 39. b.

Lib. int' Rast.

327. divisione

reies. &c.

per

per unum diem, seu duos, vel tres dies, &c. where (*dies*) is taken for *dies solaris*; for if it should be taken for *dies naturalis*, then might the sale be made at midnight. And yet the sale that is made in the night is good between the parties, but not to bind a stranger that right hath.

12. A. commit a robbery or felony of the goods of B. the officer of the king doth seise the goods (in lawfull manner) to the kings use. B. pursueth his appeale freshly, the kings officer, or any other selleth the goods in market overt; B. pursueth his appeale against A. untill he hath convicted him of the felony, the king shall make him restitution of his goods, notwithstanding the sale in market overt, because of the fresh and diligent suit and pursuit of record, the goods were so protected thereby, and by the kings seisure, that the property of the same, being *tanquam in custodia legis*, cannot be altered by sale in market overt. And by the statute of 21 H. 8. cap. 11. it is enacted, that if any felon be of any money, goods, or chattels, and the said felon be indicted, and after arraigned of the same felony, and found guilty, or otherwise attainted, by reason of evidence given by the party so robbed, or owner, or by any other by their procurement, ^a that the party so robbed, or owner shall be restored to his said money, goods, and chattels. And that the justices, &c. have power by this present act to award from time to time writs of restitution, &c. in like manner, ^b as though any such felon were attainted at the suit of the party in appeale.

See Stamf. Pl. Cor. 365. b.

21 H. 8. ca. 11. Nota hoc.

^a Note these absolute words for restitution, upon the evidence given upon this act, there needeth no fresh suit to be enquired of, as we know by experience. ^b These words referre only to the manner of the writs of restitution.

So as in this case also the party robbed, or owner shall have restitution, notwithstanding any sale in market overt. See the third part of the Institutes, cap. Restitution. And the reason of the law in this case of restitution is, to encourage the owners to pursue the felons, that they might be condignly punished, *ut pœna ad paucos, metus ad omnes perveniat*. And although in this rare case it may be, that one may lose the horse which he came to *bona fide* in market overt; yet *spoliatus debet ante omnia restitui*. And the old rule, *carveat emptor*, doth hold herein: and when two rights come together, the ancient right is to be preferred.

And it is to be observed, that none of these 12 exceptions are abrogated by any act of parliament, but yet remaine in full force.

As to the second, we are to consider the statute of 2 & 3 Ph. & Mar. cap. 7. entituled, Sellers of horses in faires, markets, &c. which (because horse-stealers may flee farre off in a short space) hath made void the sale of horses in market overt in divers cases. The tenour of which act ensueth:

Forasmuch as stollen horses, mares, and geldings, by theeves and their confederates, be for the most part sold, exchanged, given, or put away in houses, stables, backfides, and other * secret and privie places of markets and faires, and the toll also privily paid for the same, whereby the true owners thereof, being not able to trie the falshood and covin betwixt the buyer and seller of such horse, mare, or gelding, is by the common lawes of this realme without remedy:

Be it therefore enacted by the authoritie of this present parliament, that the owner, governour, ruler, fermor, steward, bailiffe,

2 & 3 Phil. & Mar. cap. 7.

* Hereby the vulgar people were deceived, but in law this changed no property, as before it appeareth, lib. 5. fo. 83. ubi supra. The 1. branch.

A certain & special place for the horse-faire.

The 2. branch.
A sufficient person to take toll, & keep the horse-faire from 10 of the clock before noon, till sunset.

The 3. branch.

1. The toll gatherer to receive the toll between these houres.

2. And shall have presently before him the parties to the bargain at the taking of the toll.

3. And the horse, &c.

4. And shall write in a booke the names, surnames, & dwelling places of the said parties, & the colour, with one special marke at the least of every such horse, &c.

* The 4. branch.
The toll-gatherer to deliver the booke to the owner, &c. of the faire or market.

The 5. branch.

Six points to give the property of the right owner, &c.

1. The horse stolne must be ridden, &c. openly in the faire or market, by the space of an hour, between ten of the clock before noon,

bailiffe, or chiefe keeper of every faire and market overt within this realme, and other * the queenes dominions, shall before the feast of Easter next, and so yearly appoint and limit out a certaine and special open place within the towne, place, field, or circuit, where hories, mares, geldings, and colts, have been and shall be used to be sold in any faire or market overt, in which said certaine and open place, as is aforesaid, there shall be by the said ruler or keeper of the said faire or market, put in and appointed one sufficient person or more, to take toll, and keep the same place, from ten of the clocke before noone, untill sun-set of every day of the foresaid faire or market upon pain to lose and forfeit for every default forty shillings.

And that every toll-gatherer his deputy or deputies, shall, during the time of every the said faires and markets, take their due and lawfull tolls, for every such horse, mare, gelding, or colt, at the said open place to be appointed, as is aforesaid, and betwixt the houres of ten of the clocke in the morning, and the sun-set of the same day, if it be tendered, and not at any other time or place, and shall have presently before him or them at the taking of the same toll the parties to the bargain, exchange, gift, contract, or putting away of every such horse, mare, gelding, or colt, and also the same horse, mare, gelding, and colt so sold, exchanged, or put away; and shall then write, or cause to be written in a booke to be kept for that purpose, the names, surnames, and dwelling places of all the said parties, and the colour, with one special marke at the least of every such horse, mare, gelding, or colt, on paine to forfeit at and for every default contrary to the tenour hereof forty shillings.

* And the said toll-gatherer, or keeper of the said booke, shall within one day next after every such faire or market, bring and deliver his said booke to the owner, governour, ruler, steward, bailiffe, or chiefe keeper of the said faire or market, who shall then cause a note to be made of the true number of all horses, mares, geldings, and colts sold at the said market or faire, and shall there subscribe his name, or set his marke thereunto, upon paine to him that shall make default therein to lose and forfeit for every default forty shillings, and also to answer the partie grieved by reason of the same his negligence in every behalfe.

And be it further enacted by the authoritie aforesaid, that the sale, gift, exchange, or putting away after the last day of February now next coming, in any faire or market overt, of any horse, mare, gelding, or colt, that is, or shall be theevishly stolen, or feloniously taken away from any person or persons, shall not alter, take away, nor exchange the propertie of any person or persons to, or from any such horse, mare, gelding, or colt, unlesse the same horse, mare, gelding, or colt, shall be in the time of the said faire or market, wherein the same shall be so sold, given, exchanged, or put away, openly ridden, led, walked, driven, or kept standing, by the space of one houre together

gether at the least, betwixt ten of the clocke in the morning, and the sun-setting, in the open place of the faire or market, wherein horses are commonly used to be sold, ² and not within any house, yard, backside, or other privie or secret place; ³ and unlesse all the parties to the bargaine, contract, gift, or exchange, present in the said faire or market, shall also come together, and bring the horse, mare, gelding, or colt so sold, exchanged, given, or put away to the open place appointed for the toll-taker, or for the book-keeper, where no toll is due, ⁴ and there enter, or cause to be entred their names and dwelling places in manner as is aforesaid, ⁵ with the colour or colours, and one speciall marke at the least of every the same horses, mares, geldings, or colts in the toll-takers booke, or in the keepers booke for that purpose, whereunto toll is due, as is aforesaid, ⁶ and also pay him their toll, if they ought to pay any, and if not, then the buyer to give one penny for the entry of their names, and executing the other circumstances afore rehearsed, to him that shall write the same in the said booke.

and sun-setting, or else no property shall be altered or changed. This is in affirmation of the common law.

[716]

The 6. branch.
Which is added, for, as hath been aforesaid, toll is not ever due nor payable by all persons in faires & markets, to the end that the book-keeper may be equivalent in those cases to the toll receivers.

And if any horse, mare, gelding, or colt, that is, or shall be theevishly stolen, or taken away, shall after the said last day of February next coming be sold, given, exchanged, or put away in any faire or market, * and not used in all points, according to the tenour and intent of this estatute, that then the owner of every such horse, mare, gelding, or colt, shall and may by force of this estatute seise, or take againe the said horse, mare, gelding, or colt, or have an action of detinue or replevin for the same, any sale, gift, exchange, or putting away of any such horse, mare, gelding, or colt, other then according to this estatute in any wise notwithstanding.

The 7. branch.
* This maketh void the sale in faire or market overt, if the horse be not used, &c. in all the said points, according to the tenour and intent of this act. See for these points in the 3, 4, 5, & 6. branches.

The 8. branch.

The penalty to be recovered before justices of peace, &c.

The one halfe of all which forfeitures to be to the king and queens majestie, her heires and successours, and the other to him or them that will sue for the same before the justices of peace, or in any of the king and queenes majesties ordinary courts of record, by bill, plaint, action of debt, or information; in which suits no protection, essoine, or wager of law shall be allowed.

The 9. branch.
Justices of peace to heare and determine all offences against this statute.

And be it enacted by the authoritie aforesaid, that the justices of peace of every place and county, as well within libertics, as without, shall have authoritie in their sessions within the limits of their authoritie and commission, to enquire, heare, and determine all offences against this estatute, as they may doe any other matter tryable before them.

The 10. branch.

The book-keepers fee for his labour in writing the entry of the contract.

Provided alwaies, that in every such faire and market, where any toll is, nor shall be due, ne leviabie by reason of the freedom, liberty, or priviledge of the said faire or market, the keeper or keepers of the booke touching the execution of this present act, shall take nor exact but one penny upon and for every contract, for his labour in writing the entry concerning the premisses, in manner and forme, as is before declared.

But

But seeing neither the rules of the common-law, nor the provisions of this act wrought so good effect as was expected, therefore a right profitable additional law was made *in anno 31 reginae Elisabethæ*, for the saving of the property of horses, mares, geldings, colts, and fillies, to and for the right owners, which hereafter ensueth:

The causes
wherefore
horses, &c. are
so commonly
stoln.

[717]

2 & 3 Phil. &
Mar. cap. 7.
See 2 E. 3. c. 15.
5 E. 3. c. 3.
27 H. 6. c. 5.

The 1. branch.
Nota, for a fur-
ther remedy,
this is an act of
addition, con-
sisting upon six
points, for the
saving of the
property of the
right owner.
2 A gift, with-
out valuable
consideration in
market overt,
altereth no
property, as be-
fore hath been
said. This sta-
ture restraineth
the very sale, and
maketh it void,
if the act be not
pursued, and this
first branch is in
the dis-junctive,
unless either
the toll-taker or
book-keeper
shall and will
take upon him
perfect know-
ledge, &c. or
else that he so
selling, or offer-
ing to sell,
&c. shall bring,
&c. one suffi-
cient and credi-
ble person, &c.

Whereas through the counties of this realme, horse-stealing is growne so common, as neither in pastures or closes, nor hardly in stables the same are to be in safety from stealing, which ensueth by the ready buying of the same by horse-courers and others in some open faires or markets farre distant from the owner, and with such speed as the owner cannot by pursuit possibly help the same: and * sundry good ordinances have heretofore been made touching the manner of selling and tolling of horses, mares, geldings, and colts in faires and markets, which have not wrought so good effect for the repressing or avoiding of horse-stealing, as was expected.

Now for a further remedy in that behalfe, be it enacted by the authoritie of this present parliament, that no person after twenty dayes next after the end of this session of parliament, shall in any faire or market, sell, ¹ give, exchange, or put away any horse, mare, gelding, colt, or filly, unlesse ¹ the toll-taker there, or (where no toll is paid) the book-keeper, bailiffe, or chief officer of the same faire or market, shall and will take upon him perfect knowledge of the person that so shall sell, or offer to sell, give, or exchange any horse, mare, gelding, colt, or filly, and of his true christen name, surname, and place of dwelling or resiencie, ² and shall enter all the same his knowledge into a booke there kept for sale of horses, ³ or else that he so selling, or offering to sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, shall bring unto the toll-taker, or other officer aforesaid of the same faire or market, one sufficient or credible person, that can, shall or will testifie and declare unto, and before such toll-taker, book-keeper, or other officer, that he knoweth the party that so selleth, giveth, exchangeth, or putteth away such horse, mare, gelding, colt, or filly, and his true name, surname, mysterie, and dwelling place: ⁴ and there enter, or cause to be entred in the booke of the said toll-taker, or officer, as well the true christen name, and surname, mysterie, and place of dwelling or resiencie of him that so selleth, giveth, exchangeth, or putteth away such horse, mare, gelding, colt, or filly, as of him that so shall testifie or avouch his knowledge of the same person, ⁵ and shall also cause to be entred the very true price or value that he shall have for the same horse, mare, gelding, colt, or filly so sold.

that shall avouch, &c. who vulgarly is called a voucher; and this branch extendeth to all sales of horses, in market overt, whether the horse, &c. be stolne, or not stolne. The 2. branch. That he so selling, &c. cause to be entred the true christian name, and surname, mysterie, and place of dwelling, &c. and the very true price and value. See for the 6th point in the seventh branch.

And

* And that no person shall take upon him to avouch, testifie, or declare, that he knoweth the party that so shall offer to sell, give, exchange, or put away such horse, mare, gelding, colt, or filly, unlesse he doe indeed truly know the same party, and shall truly declare to the toll-taker, or other officer aforesaid, as well the christen name, surname, myserie, and place of dwelling and resiencie of himselfe, as of him, of, and for whom he maketh such testimony and avouchment.

* The 3. branch.
No person take upon him to avouch, unlesse he do indeed truly know, &c.

And that no toll-taker, or other person, keeping any booke of entry of sales of horses in faires or markets, shall take or receive any toll, or make entry of any sale, gift, exchange, or putting away of any horse, mare, gelding, colt, or filly, unlesse he knoweth the party that so selleth, giveth, exchangeth, or putteth away any such horse, mare, gelding, colt, or filly, and his true christen name, surname, myserie, and place of his dwelling or resiencie, or the party that shall and will testifie and avouch his knowledge of the same person so selling, giving, exchanging, or putting away such horse, mare, gelding, colt, or filly, and his true christen name, surname, myserie, and place of dwelling or resiencie, and shall make a perfect entry into the said booke of such his knowledge of the person, and of the name, surname, myserie, and place of the dwelling or resiencie of the same person, and also the true price, or value that shall be, bona fide, taken or had, for any such horse, mare, gelding, colt, or filly so sold, given, exchanged, or put away, so farre as he can understand the same, and then give to the party so buying, or taking by gift, exchange, or otherwise, such horse, mare, gelding, colt, or filly, requiring and paying two pence for the same, a true and perfect note in writing of all the full contents of the same, subscribed with his hand, on * paine that every person that so shall sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, without being knowne to the toll-taker, or other officer aforesaid, or without bringing such a voucher or witness, causing the same to be entred as aforesaid, and every person making any untrue testimony or avouchment in the behalfe aforesaid, and every toll-taker, book-keeper, or other officer of faire or market aforesaid, offending in the premises contrary to the true meaning aforesaid, shall forfeit for every such default the summe of five pounds; but also that every sale, gift, exchange, or other putting away of any horse, mare, gelding, colt, filly, in faire or market not used in all points according to the true meaning aforesaid, shall be void: the one halfe of all which forfeitures to be to the queenes majestie, her heires and successors and the other halfe to him or them that will sue for the same before the justices of peace, or in any of her majesties ordinary courts of record, by bill, plaint, action of debt, or information, in which no essoin or protection shall be allowed.

The 4. branch.
No toll-taker, or book-keeper shall make any entry, &c but upon the disjunctive in the first branch.

[718]

The 5. branch.
To give to the party so buying, &c. a true and perfect note in writing, &c. requiring and paying two pence for the same.

* On pain, &c.

To forfeit five pounds.

The penalties to be recovered before justices of peace, &c.

And be it further enacted, that the justices of peace of every place and county, as well within liberties as without, shall have

authoritie

The 6. branch.
Justices of peace to enquire, heare, and determine.

authoritie in their sessions within the limits of their authoritie and commission, to enquire, heare, and determine all offences against this statute, as they may doe any other matter tryable before them.

And be it further enacted, that if any horse, mare, gelding, colt, or filly, after twenty dayes next ensuing the end of this session of parliament, shall be stolen, and after shall be sold in open faire or market, and the same sale shall be used in all points and circumstances as aforesaid: that yet neverthelesse, the sale of any such horse, mare, gelding, colt, or filly, within six moneths next after the felony done, shall not take away the property of the owner from whom the same was stolen, so as claime be made within fixe moneths by the party from whom the same was stolen, or by his executors or administrators, or by any other by any of their appointment, at, or in the towne or parish where the same horse, mare, gelding, colt, or filly shall be found, before the maior or other head officer of the same town or parish, if the same horse, mare, gelding, colt, or filly shall happen to be found in any towne corporate, or market towne, or else before any justice of peace of that county neere to the place where such horse, mare, gelding, colt, or filly shall be found, if it be out of towne corporate, or market towne, and so as prooffe be made within forty daies then next ensuing, by two sufficient witnessses to be produced and deposed before such head officer or justice, (* who by vertue of this act shall have authority to minister an oath in that behalfe) that the property of the same horse, mare, gelding, colt, or filly so claimed, was in the party, by, or for whom such claime is made, and was stolen from him within six moneths next before such claime of any such horse, gelding, mare, colt, or filly, but that the party from whom the said horse, mare, gelding, colt, or filly was stolen, his executors or administrators, shall and may at all times after notwithstanding any such sale or sales in any faire, or open market thereof made, have propertie and power to have, take againe, and enjoy the said horse, mare, gelding, colt, or filly, upon payment or readinesse, or offer to pay to the party that shall have the possession and interest of the same horse, mare, gelding, colt, or filly, if he will receive and accept it, so much money as the same party shall depose and sweare before such head officer, or justice of peace (* who, by vertue of this act, shall have authoritie to minister and give an oath in that behalfe) that hee paid for the same bona fide, without fraud or collusion, any law, statute, or other thing to the contrary thereof in any wise notwithstanding.

This act is but an act (as hath been said) of addition to the common law, and to the act of 2 & 3 Phil. & Mar. cap. 7. all standing in force, and must be pursued.

And be it further enacted by the authoritie aforesaid, that after twenty daies after the end of this session of parliament, not
only

†

The 7. branch.
Extendeth only
to hortes. &c.
that are stolne.
The sixth point
for the saving of
the property of
the right owner.
Albeit this act
be pursued in all
points, yet the
sale in market
over shall not
take away the
property, &c. if
the owner, &c.
claime with in
six moneths, &c.

Two sufficient
witnessses.

[719]

* None can examine witnessses in a new manner, without act of parliament.

Upon payment of so much money as was bona fide payed for the same.

* No man can give an oath in a new case, without act of parliament.

The 8. branch.
Clergy taken
from accessories,
&c. after.

onely all accessaries before such felony done, but also all accessaries after such felony, shall be deprived and put from all benefit of their clergy, as the principall by statute heretofore made, is; or ought to be.

So as what by the 12 points of the common law, and what by the 12 points of additions by these two statutes the property of horses; &c. are so preserved, as if the owner be of capacity to understand them (being collected together, and explained by our labours) and be vigilant and industrious to pursue the same, it is almost impossible that the property of the horse, &c. either stolne, or not stolne, should be altered by any sale in market overt by him that is *malæ fidi possessor*.

And let the owner or ruler of the faire, the toll-taker, or book-keeper, and the avoucher take heed, that they performe the duty enjoyned to them by this statute, otherwise it will be very penall to them. And hereby good direction is given to courratiers, horse-courfers how they may safely deale.

Hippocomi,
Mangones eque-
rum.

The Exposition of the Statutes of 39 Elis. [720]
Cap. 5. and 21 Jac. Cap. 1. concerning the
Erection of Hospitals, and Houses of Cor-
rection.

BE it enacted by the authoritie of this present parliament, 39 Elis. cap. 5.
that all and every person and persons (1) seised of an estate
in fee-simple (2), their heires, executors, or assignes (3), at
his or their wills and pleasures, shall have full power, strength,
licence, and lawfull authoritie at any time during the space of
twenty yeares (4) next ensuing, by deed inrolled in the high
court of chancerie, to erect (5), found and establish one or
more hospitals (6), *measōns de dieu*, abiding places, or houses of
correction, at his or their will and pleasure, as well for the
finding, sustentation and reliefe of the maimed, poore, needy,
or impotent people, as to set the poore to worke, to have con-
tinuance for ever (7), and from time to time to place therein
such head and members, and such number of poore, as to him,
his heires and assignes shall seem convenient: and that the
same hospitals or houses so founded (8), shall be incorporated,
and have perpetuall successions (9) for ever, in fact, deed, and
name, and of such head members, and numbers of poore, needy,
maimed, or impotent people, as shall be appointed, assigned,
limited, or named by the founder or founders, his or their
heires, executors or assignes, by any such deed inrolled: and
that such hospitall, *measōn de dieu*, abiding place, or house of
II. INST. 4 A cor.

[721]

correction, and the persons therein placed, shall be incorporated, named, and called by such name as the said founder or founders, his heires, executors or assignes shall so limit, assigne, and appoint: and the same hospitall, *meason de dieu*, abiding place, or house of correction so incorporated and named, shall be a body corporate and politick, and shall by that name of incorporation have full power, authority, and lawfull capacitie and abilitie, to purchase, take, hold, receive, enjoy, and have to them and to their successors for ever, as well goods and cattells, as mannors, lands, tenements, and hereditaments, being freehold, of any person or persons whatsoever. So that the same exceed not the yearly value of two hundred pounds above all charges and reprises, to any one such abiding house, hospitall, *meason de dieu*, or house of correction: and so as the same, or any part thereof be not holden of our soveraigne lady the queene, her heires or successors, immediately in chiefe, or else of our said soveraigne lady the queen, or any other person by knights-service, without licence or writ of *ad quod damnum*, or the statute of mortmain, or any other statute or law to the contrary notwithstanding. And that the same hospitall, *meason de dieu*, abiding place, or house of correction, and the persons so being incorporated, founded and named, shall have full power and lawfull authoritie by the true name of the incorporation thereof, to sue and to be sued, implead and to be impleaded, to answer and to be answered unto, in all manner of courts and places that now are, or hereafter shall be within this realme, as well temporall as spirituall, in all manner of suits whatsoever, and of what nature and kind soever such suits or actions be or shall be: and that the same hospitall, *meason de dieu*, abiding place, or house of correction, shall have and enjoy for ever such a common seale or seales, as by the said founder or founders, his or their heires, executors or assignes shall be in writing under his or their hand and seale assigned (10), named or appointed: whereby the same corporation shall or may seale any manner of instrument touching the same incorporation, and the lands, tenements, hereditaments, goods, or other things thereto belonging, or in any wise touching or concerning the same. And further shall be ordered, directed, and visited, placed, or upon just cause displaced (11) by such person or persons, bodies politick or corporate, their heires, successors or assignes, as shall be nominated or assigned by the founder or founders thereof, their heires or assignes, according to such rules, statutes, and ordinances, as shall be set forth, made, devised, or established by the said founder or founders, their heires or assignes, in writing under his or their hand and seale, not being repugnant or contrary to the lawes and statutes of this realme, any law, statute, custome, usage, or other thing whatsoever to the contrary in any wise notwithstanding. And that it shall be lawfull unto the founder or founders, his and their heires or assignes, upon the death or removing of any head or member of any

any such corporation, to place one other in the roome of him that dyeth, or is removed successively for ever.

Provided alwaies, that all leases, grants, conveyances, or estates, to be made by any corporation so to be founded as aforesaid, exceeding the number of one and twenty yeares, and that in possession, and whereupon the accustomed yearly rent, or more, by the greater part of twenty yeares next before the making of such lease, shall not be reserved and yearly payable, shall be void: saving to all persons, bodies politick and corporate, their heires and successors (other then the founders and givers, their heires and successors) all such right, title, claime, possession, rents, services, commons, demands, interest, and profits, which they or any of them shall have, or of right ought to have, of, in or to any the lands, tenements, or hereditaments, hereafter to be given, limited or assigned in forme aforesaid, in as ample manner, as if this statute had never been had or made.

Provided also, that this act, or any thing therein contained, shall not extend to enable any person or persons, being within age, women covert without their husbands, or of *non sane memorie*, to make any such corporation, or to endow the same: any thing in this present act to the contrary thereof in any wise notwithstanding.

Provided alwaies, that no such hospitall, *meason de dieu*, abiding place, or house of correction shall be erected, founded, or incorporated by force of this act, unlesse upon the foundation, or erection thereof, the same be endowed for ever with lands, tenements, or hereditaments of the cleare yearly value of ten pounds by the yeare.

Provided also, and be it further enacted, that no such incorporation to be founded by force of this act, shall at any time hereafter doe or suffer to be done (12) any act or thing, whereby, or by meanes whereof any of the lands, tenements, hereditaments, stocke, goods or chattels of such incorporation, or any estate, interest, possession, or property, of, or in the same, or any of them shall be vested or transferred in or to any other whatsoever, contrary to the true meaning of this act: and that such construction shall be made upon this act as shall be most beneficiall and available for the maintenance of the poore, and for repressing and avoiding of all acts and devices to be invented, or put in ure contrary to the true meaning of this act, 21 Jac. 1. made perpetuall.

[722]

(1) *That all and every person and persons.*] These words regularly doe extend to any body politick or corporate, but not to such as are restrained by any act of parliament to alien, &c. but doth extend to such bodies politick and corporate as may alien: as maiors and comminalties, bayliffes and burgeses, &c. and the like, and to all other persons whatsoever.

See hereafter the proviso to this effect.

See li. 6. fol. 62. b. 22 E. 3. coron. 276.

Sed abunda is cautela non nocet.

Whereof the hospitals, &c. must be endowed.

This act enables not persons within age, or feme covert without their husbands, of *non compos mentis*, or any other persons disabled by law, to found, &c.

This is a very beneficial law: for the charges of incorporation, and of the licence of mortmaine in these dayes grow so great by one meanes or other, as it hath discouraged many men to undertake these pious and charitable workes, whereas in former times such workes of piety and charity for the poore did ever passe *in forma pauperis*, and so we hope to see it againe.

(2) *Scised of any estate in fee-simple, &c.*] First, the manors, lands, tenements, or hereditaments, whereof the endowment is made, must be of an estate in fee-simple, either absolute, conditionall, or qualified. 2. They must be free-hold. 3. They must be of the cleare yearly value of 10 pounds by the yeare, or more, and not exceeding the yearly value of 200 pounds by the yeare above all charges and reprises. 4. They, or any part thereof must not be holden of the king immediately in chiefe, or of the king, or of any other person by knights-service. But if the first indowment be of the yearly value of 10 pounds or more, and under the yearly value of 200 pounds they may purchase (or any may give to them) manors, lands, tenements, or hereditaments, having the aforesaid foure qualities, untill they have manors, lands, tenements, or hereditaments, to the yearly value of 200 pounds, above all charges and reprises by force of this act of parliament, without any licence of mortmaine,

But if they be at the time of the foundation or indowment of the yearly value of 200 pounds, or under, and afterwards they become of greater value by good husbandry, rising of prices, sudden accidents, as by escheat, or otherwise, they shall continue good to be enjoyed by the hospitall, &c. albeit they be above the yearly value of 200 pounds: for the yearly value must be accounted within this statute, as it was at the time of the indowment made. Also goods and chattels (reall or personall) they may take of what value soever.

(3) *Their heires, executors, or assignes.*] That is, when the tenant in fee-simple that hath not time to found himselfe, shall appoint his heires, executors, or assignes to doe the same; and yet if he make no appointment, his heires or assignes may doe it.

(4) *During the space of 20 yeares.*] This act is made perpetuall by the statute of 21 Jac. regis, cap. 1. as more at large shall be shewed when we come to it.

(5) *By deed inrolled in the high court of chancery to erect, &c.*] It cannot be erected by any other instrument, conveyance, or assurance, but by deed inrolled in the chancery. This deed need not be inrolled in the chancery within 6 moneths after the date, but at any time after (but the sooner the safer.) And this deed need not to be indented, but a deed poll sufficeth. It is good, if the deed bee in paper, but it must bee inrolled in parchment.

(6) *One or more hospitalls, maisons de dieu, abiding place, or houses of correction.*] The first three are expressed to be for the finding, sustentation and reliefe of the maimed, poore, needy, or impotent people in the dis-junctive. And the fourth, *viz.* the houses of correction, to set the poore to worke.

(7) *To have continuance for ever.*] The founder cannot erect, &c. any of these for yeares, lives, or any other limited time, but for ever.

(3) *And that the same hospitalls, or houses so founded, &c.]* That is, founded by deed inrolled in the chancery.

Fundare is not onely *fundamentum ponere, seu jacere*, but also *firmare, seu stabilire*.

Vid. in le case de Suttons Hospitall, lib. 10. fol. 23. &c.

(9) *Shall be incorporated, and have perpetuall succession, &c.]* And forasmuch as the hospitall, &c. is not properly incorporated, but the persons therein placed, &c. are to be incorporated; therefore it is in the next clause added, And that such hospitall, *meason de dieu*, abiding place, or house of correction, * and the persons therein placed shall be incorporated, named, and called by such name as the said founder or founders, his heires, executors, or assigns shall so (that is, by any such deed inrolled) limit, assigne, and appoint. So as the persons, to be by this act incorporated, must be there placed and named, when the founder giveth them their name of incorporation: for the parliament incorporateth them, and the founder giveth them only their name.

* Note these words.

Now it is necessary, for the better furtherance of these godly and charitable works, to set downe a president warrantable by the said acts. And forasmuch as by this act it must be done by deed (which must have writing, sealing, and delivery) and not by a writing only; it is the surest way to have it by deed indented, between the founder of the one part, and A. B. &c. of the other part, which the founder may seale and deliver to A. B. &c. acknowledge it, and cause it to be inrolled in the chancery: for inrolled it cannot be in any other court.

This indenture made the first day of May, in the first yeare of the reigne of our soveraigne lord king Charles, by the grace of God, &c. between A. B. of B. in the county of C. esquire of the one part, and C. D. E. F. &c. of the other part, witnesseth, that whereas the said A. B. of his charitable affection and disposition hath erected and founded certaine buildings and edifices upon a parcell of ground in the parish of F. in the said county of C. lying between the &c. to be an hospitall, for the finding, sustentation, and reliefe of poore and impotent people, to have continuance for ever. And by these presents the said A. B. doth found, erect, and establish the same for an hospitall of poore and impotent people, to have continuance for ever. And according to the power and authority given to the said A. B. by the statute or statutes in that case provided; the said A. B. doth by these presents limit, assigne, and appoint, that the said hospitall, and the poore and impotent persons therein placed, *viz.* D. E. E. F. F. G. &c. to the number of shall for ever hereafter be incorporated by the name of the master and brethren of the hospitall of the holy and individed Trinity of F. in the said county of C. And further, the said A. B. doth by these presents name and appoint the said D. E. E. F. F. G. &c. to be present brethren of the said hospitall, and the said D. E. to be present master of the said hospitall, and that by the name of the master and brethren, they shall have full power and authority, and lawfull capacity and ability to purchase, take, hold, receive and enjoy, and have to them, and their successors for ever, as well * goods and chattels, as mannors, lands, tenements, and hereditaments, being free-hold, of any person or persons whatsoever, according

A president of incorporation by force of this statute.

(and abbutell the same.)

* Nota, they may take, without any restraint, goods and chattels, as well reall, personall and mixt, to what value soever.

[724]

according to the forme and effects of the statutes in that case made and provided. And that the same hospitall, &c. and the persons so being incorporated, founded and named, shall have full power and lawfull authority by the said name of master and brethren, &c. to sue, and to be sued, implead and be impleaded, to answer and to be answered unto in all manner of courts and places within this realme, as well temporall as spirituall, in all manner of suits whatsoever, and of what nature and kind whatsoever such suits or actions be, or shall be. And the said A. B. doth by these presents assigne, name and appoint, that the said master and brethren, and their successors for ever hereafter shall have a common seale, with a crosse graven therein, and in the circumference thereof, *sigillum hospitalis sancte Trinitatis de F.* whereby the said master and brethren, and their successors, shall or may seale any manner of instruments touching the same incorporation, and the lands, tenements and hereditaments, goods, or other things thereto belonging, or in any wise touching or concerning the same. And that it shall be lawfull for the said A. B. during his life, upon the death or removing of the said master, or any of the said brethren, to place one other in the roome of him that dyeth, or is removed. And after the death of the said A. B. it shall be lawfull for the parson of the said towne of F. and the church-wardens of the same for the time being, successively for ever after the decease of the said A. B. upon the death or removing of the master, or any of the brethren of the said hospitall, to place one other in the roome of him that dyed, or is removed, successively for ever. In witnesse whereof, &c.

22 E. 4. tit.
Grant 30. li. 10.
fol. 30. b. & 32.
a. in le case de
Suttons ho-
spitall.

And albeit that the onely essentiall point that the founder is to doe in this case is, to appoint and give a name to the corporation, yet by way of illustration we have thought it fit to adde so much as we have done, following the very words and effect of this act. And although that at the common law a corporation may be of an hospitall that is *in potestate* of certaine persons to be governours of the hospitall, and not of the persons placed therein, yet the safest and surest way upon this statute is, first to prepare the hospitall, and to place the poore therein, and to incorporate the persons therein placed. And this we hold by reason of the said words in this act, *viz.* And that such hospitall, &c. and the persons therein placed shall be incorporated, &c.

(10) *Such a common seale or seals, as by the founder or founders, &c. shall be assigned.*] It is necessary to be knowne, who shall be said to be founder or founders, for the better understanding of the clauses subsequent in this act.

Such onely are said to be founder or founders within this act, as are seised of an estate in fee-simple of any mannors, lands, tenements, or hereditaments, having the foure qualities aforesaid, and giveth the same at the first foundation of the hospitall, &c. to the incorporation of the hospitall. For it is a sure rule, that he or they that give the first possessions, is the founder or founders.

38. ass. p. 22.
adjudge lib. 3.
fol. 74. a. in le
case de dean &
chap. de Nor-
wich.

But then it is demanded, what if R. S. citizen of London, by his last will and testament do devise, that his executors shall bestow a thousand pounds in purchase of lands, tenements, or hereditaments, and that an hospitall shall thereupon be builded and incorporated for the sustentation and reliefe of poore and impotent people, and dyeth: the executors purchase lands, tenements and hereditaments of the yearly value of threescore pounds, having the said foure qualities,

qualities, and cause the estate to be taken to certaine persons and their heires, and build thereupon an hospitall, and place therein poore and impotent people: in this and the like cases the persons that have the estate in fee simple in the lands, tenements, and hereditaments, are by the purview of this statute to be founders, and to doe all things that this act doth appoint the founder or founders to doe. But when they name the corporation, it shall be well and worthily done to name the corporation by the name of the master and brethren of the hospitall of the holy and undivided Trinity, founded in F. in the county of C. at the onely costs and charges of the said R. S. or the like; so as the charitable intention of the said R. S. may be had in remembrance, with some just recitall in the beginning of the deed of foundation of the truth of the case.

The next thing that is to be done after the incorporation, is to convey the lands, tenements and hereditaments to the said incorporation, which may be done safely, with greater facility and lesse charge, by bargaine and sale by deed indented and inrolled (according to the statute of 27 H. 8. cap. 16.) between the founder or founders of the one part, and the master and brethren, &c. of the other part, in consideration of five shillings in hand paid by the master of the said hospitall (for himselfe and for his brethren) and of other five shillings in hand paid by the said master and brethren, &c. whereof you may have a president in the tenth booke of my reports in the case of Suttons hospitall, fol. 17. b. & 34. a. *responsal* 9. *objection*, which judgement is after allowed and ratified by act of parliament, *anno 4 regis Caroli*. And this bargaine and sale to be a day or two, or some short time after the incorporation. But now let us returne to our act of parliament.

(11) *And further shall be ordered and visited, placed, or upon just cause displaced, &c.*] And forasmuch as nothing can prosper and continue, without good rule and government, the next thing to be done after the lands, &c. be conveyed unto them is, that the founder or founders shall set forth, make, devise and establish in writing under his or their hand and seale (for so it must be by force of this act) such rules, locall statutes and ordinances for the order, direction, visitation, placing, or upon just cause displacing of such master and brethren by such person or persons, bodies politick or corporate, their heirs, successors or assignes, as shall be nominated or assigned by the * founder or founders, the said rules, locall statutes and ordinances being not repugnant or contrary to the lawes and statutes of the realme. And these orders, &c. to containe (amongst many others) two especiall things, *viz.* daily prayer to Almighty God: and that the master and brethren be not idle, but that they and every of them exercise such worke meet for them, as the parson of the parish, and the church-wardens (or such other as the founder shall name) shall appoint or allow of, and to take a weekly account thereof. And these orders, &c. to beare date after the bargaine and sale, and it is good to have them inrolled.

(12) *Provided also, and be it further enacted, that no such corporation to be founded by force of this act, shall at any time hereafter doe, or suffer to be done, &c.*] This clause of restraint in this act is as forcible, and rather more then the restraint by the statute of 13 Elis. cap. 10. And therefore hereby they are disabled as well to make any conveyance to the king, as to any subject, contrary to the true meaning of the act.

[725]

27 H. 8. ca. 16.
See before the
exposition of
this statute.

Lib. 10. fol. 17.
& 34. in the case
of Suttons ho-
spitall.

* If the founder
limit not, who
shall visit? The
bishop of the dio-
cesse. Vid. 2 H.
5. ca. 1. stat. 1.
Vid. 14 Elis.
cap. 5. El. cap.
18. 8 aff. p. 29.
31. But if the
founder or found-
ers limit who
shall visit, such
visitor or visitors
by force of this
act of parlia-
ment, shall stand
by the statute of
21 Jac. See the
statute of 13 El.
cap. 17.

Peruse well the statute in print in 13 Elis. cap. 17. for the erection and foundation of an hospitall by Robert earle of Leiceſter, which was the paterne whereby this act was framed. And ſee the orders and locall ſtatutes made by him, for they were done by good advice, and have had good effect.

[726] The Statute of 21 Jac. Regis, Cap. 1. concerning Hoſpitals, and Houſes of Correction.

WHEREAS in the parliament held in the nine and thirtieth yeare of the reigne of the late queen Eliſabeth of happy memory, a good law was made, entituled, An act for erecting of hoſpitals, or abiding and working houſes for the poore: but the power, licence and authoritie given by the ſaid ſtatute, to erect, found, and eſtabliſh ſuch houſes and abiding places, as are therein mentioned, was confined to the ſpace of twenty yeares then next enſuing, which ſaid time is now expired.

Be it therefore enacted by the authoritie of this preſent parliament, that the ſaid act, and all things therein contained, ſhall from henceforth be revived, and made perpetuall to have continuance for ever (1).

And be it alſo enacted, that all hoſpitals, *meaſons de dieu*, and abiding places for poore, lame, maimed and impotent people, or for houſes of correction, at any time ſince the ſaid twenty yeares expired, erected (2), founded or made, or at any time hereafter to be erected, founded or made, according to the purport of the ſaid ſtatute, ſhall be incorporated, and have perpetuall ſucceſſion and capacitie, to have, take and enjoy all other privileges, benefits, and immunities, to all intents and purpoſes, according to the proviſions, tenour, purport and true meaning of the ſaid act, as if the ſame had been made, founded, or endowed within the ſpace of twenty yeares next enſuing the ſaid ſtatute, Stat. 43 El. 4.

(1) *That the ſaid act, and all things therein contained, from henceforth be revived, and made perpetuall to have continuance for ever.*

These words [made perpetuall, and have continuance for ever] have made the ſaid act of 39 Elis. and all things therein contained (at the making thereof but a probationer for 20 yeares long ſince expired) now by this act perpetuall, and to have continuance for ever.

(2) *That all hoſpitals, meaſons de dieu for the poore, &c. or for * houſes of correction, at any time ſince the ſaid twenty yeares expired, erected, &c.] Whereas ſome hoſpitals, &c. or houſes of correction were founded after the ſaid twenty yeares expired, according to*

Nota, *hoſpitale* an hoſpitol, is the generall word, & includes *meaſons de dieu*, & abiding places for the poore, &c. alſo * houſes of correction, as here it appeareth.