ingly: the king by advice of his councell reciting under his great ſeal the joyning of battell in the ſaid writ of right of advowſon, and the proceeding thereupon did ſignifie, *Quod in duello prædicto coram juſticiariis prædictis percuſſo, irruerit in eundem Philippum tanta multitudo hominum, unde oppreſſus ſe defendere non potuit, qui homines perpetuam defamationem ſibi impoſuerunt, et in eodem duello creantiam proclam': rex inde certior factus, &c. ſtatuit quod prædictus Philippus propter creantiam prædict' liberam legem non amitteret, &c.*

Vide Mic. 15 E. 1. Rot. 8. in Banco Norff. *Duellum percuſſum, & ſerviens Abbatis de Bury, terentis devictus & interfectus.* Vide Mich. 3 E. 1. Rot. 19.

Of this triall by battell, Fleta ſaith thus, *Duellum ſingularis pugna inter duos ad probandam veritatem litis, et qui vicerit probaſſe intelligitur; et quamvis judicium Dei expectetur ibidem, quicunque tamen monomachiam, i. ſingularem pugnam, ſponte ſuſceperit, vel obtulerit, homicida eſt, et mortale contrahit peccatum.*

Fleta. li. 1. c. 32. See li. 9. f. 32. b. Le caſe del Abbot de Strata Marcella.

(2) *Son pier luy commande a faire la dereign'.*] And theſe words are well explained by Glanvill, *Cui pater ſuus injunxit in extremis agens, in fide qua filius tenetur patri, quod ſi aliquando loquelam de terra illa audiret, hoc dirationaret, ſicut id quod pater ſuus vidit et audivit.*

Deuter. cap. 18. ver. 10. Glanv. ubi ſupra. Bract. li. 5. fo. 373.

(3) *Ne ſoit le champion le demandant conſtreint a ceo jurer.*] Hereby it appeareth that preventing juſtice is better then puniſhing juſtice, *melior eſt juſtitia verè præveniens, quàm ſeverè puniens*; for when it is puniſhed, yet the offence is committed, but when it is prevented, then there is neither offence nor puniſhment: this law preventeth perjury, which taketh away that part of the oath which ſeldome or never was or could be kept.

CAP. XLII.

PUR ceo que en briefe daſſiſe, dattaints (1), *et de juris utrum* (2), *les jurors ſont ſovent travels per eſſoines des tenants: purvieu eſt, que del heure que le tenant* (3) *un foits apparuſt en court, jammes ne puiſſe le tenant ſe eſſoine* (4), *mes faire ſon attourney a ſuer pur luy* (5), *ſil voile. Et ſi non, ſoit laſſiſe, on le jurie priſe per ſon default.*

FORASMUCH as in a writ of aſſiſe, attaints, and juris utrum, the jurors have been often troubled by reaſon of the eſſoins of tenants; it is provided, that after the tenant hath once appeared in the court, he ſhall be no more eſſoined, but ſhall make his attorney to ſue for him, if he will; and if not, the aſſiſe or jury ſhall be taken through his default.

(Fitz. Eſſoin, 52. 55, 56. 63, 64. 13 Ed. 1. ſtat. 1. c. 28.)

The miſchiefe doth appeare by the preamble, and that the rather, for that in theſe actions here rehearſed there is a jury retourned the firſt day, and therefore the delay of the jurors was the greater, but of two miſchiefes, one onely remedy was provided; for as great delay had the jurors where the demandant, as where the tenant was eſſoigned, and here proviſion is made for the eſſoine of the tenant which was the greater miſchiefe, for commonly the tenant ſeeks delay, and the plaintifes expedition; *petens præſumitur deſiderare potius inſtantiam litis, quam dilationem.*

Bract. li. 5. fo. 342.

This

Button, f. 164. Flet. li. 6 c. 9. 10 H. 6. 22. 11 H. 6. 22. 8 Ass. 22. 22 Ass. 29. 30 Ass. 51. 34 Ass. 6. 6 E. 3. 25.

This act is not understood of a writ of assise *de novel disseisin*, for that in that writ, the tenant shall not be essoined, neither before, nor after appearance, *locum non habet essonium in persona disseisitoris, vel redisseisitoris*; but this is intended of an assise of *mordauncester*, and it is said, that the justices of the kings bench will not allow an essoine for the plaintiffe in no manner of assise, nor for the tenant in assise of *mordaunc'*.

44 E. 3. 5. 44 Ass. 24.

But albeit no essoine for the tenant doth lie in assise of *novel disseisin*, yet if the same be discontinued by the *non venu* of the justices, or by the demise of the king, in a reattachment the tenant shall be essoined, and so shall the tenant be in a resummons after a discontinuance in assise of *mord.*

30 Ass. p. 5. 8 Ass. p. 22.

An assise of *mord.* was brought in Chester, the tenant vowched a foreiner to warranty, whereupon the record was removed into the court of common pleas, 15 Pasch. at which day (though it be in an assise of *mord.*) the tenant may be essoined, for the plea in bank is not the plea of assise, but the plea there is onely upon the warranty, for the assise shall not be taken in bank.

W. 2. ca. 28. 26 Ass. p. 35. 45 Ass. 2. 30 H. 6. 1. 16 Ass. 10.

The statute of W. 2. doth provide for the other mischiefe in the case of assise of *mord. attaint*, and *juris utrum*, *viz.* that the demandant therein after appearance shall not be essoined; but that statute extendeth not to the assise of *novel disseisin*.

26 Ass. p. 25. 34 Ass. p. 6.

(1) *Dattaints.*] This statute is intended of the tenant in an attaint as well in a plea personall, or mixt, as upon a plea meerly in the reality.

6 E. 3. 25.

(2) *Juris utrum.*] See the statute of W. 2. abovesaid.

22 Ass. p. 79. 23 Ass. p. 15.

(3) *Que le tenant.*] This doth extend as well to the tenant in law, as the vowchee, and tenant by receipt, as to the tenant in deed, for it is to oust delay for expedition of justice, and for the ease and benefit of the jurors, and therefore being in equall mischiefe shall be within the same remedy.

Hereby it appeareth that this statute provideth onely against the tenant after appearance, and leaveth the essoine of the plaintiffe (as hath been said) at large.

12 E. 1. essoin 175. 4 E. 3. 34. 6 E. 3. essoine 55.

(4) *Se essoine.*] Though here essoine be spoken indefinitely, yet is it to be taken in a common sense, and therefore is it to be understood of a common essoine, and not of an essoine *de service le roy*, for *statuta per regem, dominos, et communitatem regni ordinata in communi, et vulgari sensu intelliguntur.*

F.N.B. 25. Brit. 285, 286, 287, &c. Merton, ca. 10. Gloc. cap. 8. W. 2. ca. 10. 27 E. 1. de terris. amortisand. Stat. de York. 12 E. 2. cap. 1. 15 E. 2. Stat. de Carlile. 3 H. 7. c. 1. 23 H. 8. cap. 3, &c. In the preface to the fourth book, and here before, cap. 26.

(5) *Mes fait son attourney a suer pur luy.*] By the policy of the common law, that suits might not encrease and multiply, *cum lites potius restringendæ sunt, quam laxandæ*, both plaintife, and defendant, demandant, and tenant in all actions reall, personall, and mixt did appeare in person, as well in courts of record, as not of record, because the writs doe command the tenant or defendant to appeare, which was alwayes taken in proper person; and the entry in every action for the demandant or plaintife is, *et prædictus petens*, or *querens obtulit se 4. die*, which was ever understood in proper person: but when this and other statutes had given way to appeare by attourney, it is not credible how (with attourneys and their multiplication) suits in law (for the most part unnecessary and for trifling causes) when the parties themselves might sit quiet at home, increased and multiplied: so dangerous and ill successe have ever had the breach of the maximes and auncient rules of the common law, as elsewhere hath been observed.

It

It appeareth in Glanvils time, that the juſtices admitted the parties, *per reſponſalem loco ſuo ad lucrandum vel perdendum*, but then onely when the parties themſelves were preſent, for he ſaith, *Verum oportet eum eſſe præſentem in * curia, qui reſponſalem ita in loco ſuo ponit: et nota differentiam inter reſponſalem et attornatum.*

Glan. li. 11. c. 1. Bract. lib. 5. fo. 353, 360. Mirr. c. 2. § 21. Des Attornies. See the firſt part of the Inſtitutes, ſect. 196.

And the Mirror ſpeaking of the auncient law before the ſtatute ſaith, *Abuſion eſt a receiver attourney, ou nul poier eſt a ceo done per briefe en la chauncery: et abuſion eſt a receiver attourney, ou le parol neſt my attaine per preſence des parties, &c.*

After this in divers parliaments it was thought good to decreaſe the number of attourneys, finding them to be the cauſes of multiplication of ſuits. But though divers good laws have been made therein, yet the number of them daily increaſeth, to great inconvenience in the common-wealth, and to the no ſmall blemiſh and diſcredit of that auncient and neceſſary vocation.

Rot. Parl. 20 E. 1. De Attournatis.

4 H. 4. ca. 14. 33 H. 6. ca. 7.

CAP. XLIII.

PUR ceo que les demandants (2) *ſont ſovent delayes de tout droit, pur ceo que ou ſont pluſors parceners tenants* (3), *dont nul puit reſpoign' ſans auter, ou quil ad pluſours tenants jointment feoffes* (4), *ou nul ne ſciet ſon ſeveral, et ceux tenants ſovent forchient per eſſoine* (1), *iſſint que cheſcun eit un eſſoine: purvieu eſt deſormes, que ceux tenants neient eſſoigne, forſque a un jour, nient pluis que un ſole tenant naveroit, iſſint que jammes ne puiſſent forcher, forſque tant ſolement aver un eſſoine.*

FORASMUCH as demandants be oftentimes delayed of their right, by reaſon that many parceners be tenants, of which none may be compelled to anſwer without the other, or there may be many jointly infeoffed (where none knoweth his ſeveral) and ſuch tenants oftentimes fourch by eſſoin, ſo that every of them hath a a ſeveral eſſoin; it is provided, that from henceforth ſuch tenants ſhall not have eſſoin, but at one day, no more than one ſole tenant ſhould have; ſo that from henceforth they ſhall no more fourch, but only ſhall have one eſſoin.

(Hob. 8. 46. Fitz. Eſſoin, 82. 119. Fitz. Fourcher, 3, 4. 10. 13, 14. Bro. Fourcher, 20. 6 Ed. 1. ſtat. 1. c. 10.)

(1) *Forchient per eſſoine.*] The true underſtanding, what it is to fourch by eſſoin, doth open both what was the miſchiefe before, and what is remedied by this ſtatute.

Fourcher by eſſoine, on the part of the tenant, is when a *præcipe* is brought againſt two or more tenants, and after each of them have had one eſſoine, which is due to them by law, they over again delay the demandant by ſucceſſive eſſoines.

Bract. l. 5. f. 342. 33 H. 6. 25. 2 E. 4. 19.

For example, a *præcipe* is brought againſt A. and B. A. is eſſoined, and B. appears, and hath *idem dies* given him; at which day A. appears, and B. is eſſoined, this is lawfull, but then at that day E. is eſſoined again, and C. appears, *et ſic viciſſim et alternis vicibus*, this is called fourcher by eſſoine, and ſo it is explained in our books.

39 H. 6. 28, 29. See hereafter verbo Tenants.

This

Fleta, li. 6. c. 9. Britton, f. 184.

This doth Fleta comprehend in few words, and rendreth to fourch by essoine *essoniare vicissim*: for he saith, *Si autem plures fuerint tenentes pro indiviso provisum est, quod non essonientur vicissim, sed simul ad unicum diem, sicut fuissent unum corpus ratione unitatis juris, et hereditatis.*

To fourch in one of the significations is to divide, and because they divide themselves in delay of the demandants by essoines and appearances interchangeably, it is called *fourcher per essoine.*

2 R. 4. 19.

Now this mischiefe was not that every one of the tenants should not have one essoine, but that there should be a fourcher, a vicissitude of essoines after each of them have had one essoine. So as this act doth onely prohibite the fourcher by essoine, which was used for delay, and not one onely essoine, as hath beene said, which is lawfull and necessary.

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20 E. 2. Fourcher 1. 16 E. 3. ibid. 9. 38 E. 3. 1. 12 H. 4. 14 H. 4. 17. 3 H. 6. 36. 8 H. 6. 15. 9 H. 6. 21. 44. 22 E. 3. 5. 38 E. 3. 12. 18. 43 E. 3. 20. Glouc'. ca. 20. 3 H. 6. 36. F. tit. Fourcher 3. 44 E. 3. 38. Dyer 28 H. 8. 26.

(2) *Demandants.*] This act doth extend onely to reall actions in respect of this word *demandant*, which is proper to reall actions; and the words be also, Where be divers parceners tenants, or tenants joyntly infeoffed, and those tenants fourch by essoine; so as this act extendeth to actions in the realty.

But this statute extends not to an action of debt upon an obligation, covenant, or other like personall actions.

Bract. ubi supra. 33 H. 6. 25. Flet. ubi supra. Glouc' ca. 10. 6 E. 1.

(3) *Tenants.*] This act is to be understood after apparance, and so doth the statute of Glouc' recite it, for there is no fourcher but after former essoins and reciprocall apparance, as hath been said; and this doth also prove what fourcher is.

This statute being made for expedition of justice, and for ousting of delays is benignly interpreted; for in a writ of annuity against a parson, he prayeth in aid of the patron and ordinary, and they, after each of them have had one essoin, would have fourched by essoin, and could not by the rule of the court; and yet the price in aid is no party to the writ.

And this statute is made against the fourcher by essoin of the tenants, and not of the demandants.

(4) *Parceners et jointment feoffes.*] This statute speaking expresly of parceners and jointenants, extends not to baron and feme seised in the right of the wife, which is remedied by the said statute of Glouc': but where baron and feme be joyntly infeoffed, they are within the purview of this statute: all jointenants are within this statute, although their estate be created by any other conveyance then by feoffment.

CAP. XLIV.

PUR ceo que multes des gentes se font fauxment essoine (1) *de ousire le mere* (2), *la ou ils fuerent en Engleterre le jour de le summons: purview est desormes, que cel essoine ne soit pas de tout aliow, si le demaundant le challenge, et soit prist daverrer* (3) *quil fuit en Engleterre le jour que le summons fuist*

FORASMUCH as divers persons cause themselves falsly to be essoined (for being over the sea) where indeed they were within the realm the day of the summons; it is provided from henceforth, that this essoin be not always allowed, if the demandant will challenge it, and will be ready to aver

fuiſt fait, et iii. ſemaignes apres (4): *mes ſoit ajourne en ceſt forme, que ſi le demandant ſue a tiel jour averment per pais, ou ſicome la court le roy agardre et ſoit attaint que le tenant fuiſt deins le quater meres Dengleterre* (5) *le jour que il fuit ſummons, et trois ſemains apres, iſſint que il puit eſtre reaſonablement garny de la ſummons* (6), *ſoit leſſoine turne en un default* (7), *et ceo fait a entend' tantſolement devant les juſtices le roy.*

aver that he was in England the day of ſummons and three weeks after; but ſhall be adjourned in this form: that if the demandant be ready at a certain day, by averment of the country, or otherwiſe as the court ſhall award, to prove that the tenant was within the four ſeas the day that he was ſummoned, and three weeks after, ſo that he might be reaſonably warned by the ſummons, the eſſoin ſhall be turned into a default; and that is to be underſtanden only before juſtices.

Of the diverſity of eſſoins, and amongſt them, of this eſſoin, called here *ultra mare*, you have heard before in the expoſition of the ſtatute of Marlebridge: for the better underſtanding of the miſchief before this act, and of the purview thereof, it is neceſſary to underſtand the diverſity of eſſoins *ultra mare*; ſome of which, ancient authors call *eſſoines de ſervitio regis æterni*: and ſome, *de ſervitio regis temporalis*: of the firſt ſort were, *viz. ad terram ſanctam.* And this was two-fold, *viz. Cum peregrinatio vel paſſagium generale fuerit ad terram ſanctam, et tunc recedant partes ſine die, quouſque eſſoniatus redierit, vel obierit, &c. Semper tamen non habet locum iſtum eſſonium, quia non niſi tempore transfretationis alicujus regis cum peregrinatione publica et generali, aut cum ſimplex fuerit, dabitur eſſoniato terminus unius anni et unius diei.*

Marlebridge, cap. 12.

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Et ſi ſimplex ſit peregrinatio, et ultra annum et diem moram fecerit ultra mare, excuſatur ejus abſentia ſecundum quoſdam per eſſonium ſimplex de ultra mare, et ſic habebit ſpacium 40. *dierum et unius ſlud et unius ebbe; et ſi adhuc moram longiorem protraxerit, habet eſſonium ſimplex de malo veniendi citra mare, per quod habebit ad minus ſpacium* 15. *dierum quod verum eſt ad minus habebunt eſſoniati tantum tempus et ex cauſa majus tempus ſecundum diſcretionem juſticiariorum. Et quid ſi tunc non venerit? procedatur ad defaltam contra eum, niſi forte contingat talem eſſoniari de morte ad cautelam. Si quis autem eſſoniatus fuerit eſſonio de ultra mare citra mare Græcorum quod profectus ſit in ſervitio domini regis æterni in peregrinatione alia quam ad terram ſanctam, ſicut apud Sanctum Jacobum, vel alibi, datur dilatio ad minus quadraginta dierum et unius ſlud et unius ebbe ad excuſationem eſſoniati de ſimplici eſſonio de ultra mare, &c.* And after he ſaith, *In hoc caſu induciæ ſunt arbitrariæ dum tamen ad minus quadraginta dierum ut ſupra.* And Fleta further ſaith, *Eſſonia autem ultra mare Hiberniæ et Scotiæ vertenda ſunt in eſſonium de malo veniendi* 1. *per* 15. *dies.*

Bract. lib. 5. fo. 338, 339. Fleta, lib. 6. cap. 8. Brit. cap. 123. Bracton, Britton, Fleta } ubi ſupra. 3 E. 3. 29. Acc. Mirror, cap. 2. § 20. de Eſſoins. Mirror. Bracton, Britton, Fleta } ubi ſupra. Fleta ubi ſupra. 7 E. 4. 27.

And Glanvile, who wrote before all theſe, ſaith, *Eſt aliud genus eſſoniandi et neceſſarium, cum quis eſſoniat ſe de ultra mare, et tunc ſi recipiatur eſſonium, dabuntur ipſi eſſoniato ad minus quadraginta dies, &c.* And ſpeaking of eſſoins, by reaſon of peregrination, he ſaith, *Si verſus Jeruſalem iverit is qui ſe eſſoniare facit, tunc ſolet ei dari reſpectus unius anni et unius diei ad minus, &c.*

Glanv. li. 1. c. 25. Idem li. 1. c. 29.

By theſe ancient authors it appeareth, what delay this *eſſoine de ultra mare* wrought to the demandant; and by the law no averment could be had againſt it, no more then in a protection, or in

the *eſſoine de ſervice le roy*, which (ſpecially in thoſe dayes when ſuch *eſſoines de ultra mare* were ſo frequent) was vere miſchievous; for ſome fained ſuch a paſſage or peregrination, and ſome went of purpoſe after the purchaſe of the *præcipe*, which is well expreſſed by Fleta: *Sunt tamen quidam, qui cum fuerint brevia ſuper ipſos impetrata, extra regnum ſe divertunt, ne ſummonitione ſint præventi ut ſic jus petentis per eſſonium de ultra mare deferri poſſit, et unde proviſum eſt, quod ſi petens offerat verificare, quod tenens fuerit in Anglia die ſummonitionis, et per tres ſeptimanas ſequentes, adjournetur eſſonium, et irrotuletur calumnia petentis, et ſi alia die conſtare poſſit juſtitiariis per inquiſitionem, vel alio modo, quod tenens fuit in Anglia die ſummonitionis, et per tres ſeptimanas ſequentes, ita quod potuit rationabiliter præmuniri, vertatur illud eſſonium in defaltam, ſed hoc obſervetur tantummodo coram juſtitiariis.*

Ubi ſupra.

Mirror, ca. 5. § 1. & 4.

(1) *Font fauxmer eſſoine.*] All falſhood is abhorred in law, and therefore the Mirrour ſaid well, *Abuſion eſt que faux cauſes de eſſoine ſont de cy que droit ne allowe fauxime en aſcun caſe*; the law alloweth no falſhood in any caſe, which is a maxime of the common law, *contra veritatem lex nunquam aliquid permittit.*

21 H. 6. 20.

(2) *Eſſoine de ouſtre mere.*] This act doth extend onely to the *eſſoine de ultra mare*, whereof we have ſpoken at large, and not to the *eſſoine de ſervitio regis, &c.* *Vide* 21 H. 6. fol. 20.

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(2) *Et ſoit priſt daverrer*, &c.] This averment, as hath been ſaid, could not be taken by the common law, no more then in caſe of a protection before the ſtatute of 33 E. 1. which giveth an averment in caſe of protection; of which ſtatute you ſhall read in our books, and how the protection may be repealed; and in the common *eſſoine de malo veniendi*, or *de ſervice le roy*, no ſuch averment can be taken againſt it. [a] But if the tenant be eſſoined in any action *de ſervitio regis*, where in truth he is not in the kings ſervice, then the demandant or plaintife may ſue a [b] ſpeciall writ out of the chancery directed to the juſtices, rehearſing, that he is not in the king ſervice, and commaunding them to proceed; then the eſſoin ſhall not be adjourned, but ſhall be quaſhed preſently.

Stat de 33 E. 1. de prot. 28 H. 6. 3. 21 H. 6. 20. 39 E. 3. 35. 47 E. 3. 6. 1 H. 6. 6. 34 H. 6. 62. 35 H. 6. 58. 19 H. 6. 35. 5 E. 4. 2. 21 E. 4. 20.

[a] Regiſt. fol. 18. F. N. B. 17. H.

[b] Glouc. cap. 8.

And ſo before this ſtatute in the *eſſoine de ultra mare*, if the party were in England, the demandant might have purchaſed the like writ, as is aboveſaid; but for that many times that could not be obtained without great difficulty, this averment was given for avoiding of falſhood.

(4) *Jour que le ſomons fuiſt fait, et per tres ſemaignes apres.*] For the ſummons alwayes is made upon the land by two ſumners, whether the tenant, or any for him, be there or no.

The day of the ſummons is not counted parcell of the three weeks, but it muſt be three weeks after that day; otherwiſe had it been, if the words had been, three weeks after the ſummons made.

(5) *Deins le quater meres d'Angleterre.*] Within the four ſeas, is as much to ſay, as within the juriſdiction of the king of England; for all within the four ſeas was either part or holden of the crown of England, as by many ancient records appeareth.

(6) *Que il puit eſtre reaſonablement garny de la ſummons.*] The three weeks after the day of the ſummons were given as a reaſonable time, wherein by common intendment he might have notice of the ſummons made upon his land.

(7) *Soit leſſoine turne en un default.*] This is the remedy given by this act, for the benefit of the demandant, who was unjuſtly delayed by this eſſoin.

A woman tenant in a writ of entre, &c. was eſſoined, for that ſhe was in *terra ſancta, viz.* from the time of the eſſoin, for a yeer and a day; and it was ſaid, that the tenant ſhould loſe her land, if it be found by inqueſt, that ſhe was in England the day of the eſſoin; and there it is ſaid, that at the day that the parties have by the eſſoin, the demandant ſhall be received to aver his challenge. Conſider well this book, and the book alſo of 28 H. 6. which expounds the ſtatute of 33 E. 1. *Vide* Raſt. Pl. fol. 297. See more for the antiquity of eſſoins, and great variety of matter, both of this eſſoin and of all other, in the Mirrour. 3 E. 3. 29. 28 H. 6. 3. Mirror, cap. 1. §. 3. cap. 2. §. 20. de Eſſoins. cap. 5. §. 1.

And though this kinde of eſſoin is this day out of uſe, yet have I ſpoken of the ſame thus much for two cauſes: firſt, for that mine endeavour hath been, to explain theſe ancient laws, and to make every word of them ſo to ſpeak, as they may be underſtood. Secondly, the ſeverall points of learning that do riſe out of this law (though the particular caſe be out of uſe) may ſerve to good purpoſes, you ſhall obſerve in this and many others of this nature, in this ſecond part of mine Inſtitutes.

Where the text is evident, it were loſſe of time to make any expoſition.

CAP. XLV. [254]

DE delayes en touts maners des briefes, et des attachments (1) *eſt purview, que ſi le tenant ou le defendant, apres le primer attachment teſmoign', face default, maintenant ſoit le grand' diſtreſſe* (2) *agarde. Et ſi viſc' ne reſpoigne ſufficientment au jour, ſoit grevouſment amercie. Et ſil maunde que il ad fait lexecution en due maner, et les iſſues bailes as mainpernors, adonques ſoit maunde au viſcount, que il al auter jour face venir les iſſues devant juſtices. Et ſi lattachee veigne a ceo jour a ſaver ſes defaults, eit il ſes iſſues* (3). *Et ſil ne veigne, eit le roy les iſſues* (4). *Et les juſtices le roy* (5) *les facent liverer a la gardrobe* (6), *et juſtices del banke a Weſtminſter* (7) *les facent liver al exchequer, et juſtices en eyre, au viſcount de cell' countie* (8) *ou ils pledent, auxybien de cel countie, come des forreine counties, et de ceo ſoient charges*

CONCERNING delays in all manner of writs and attachments, it is thus provided, that if the tenant or defendant, after the firſt attachments returned, make default, that incontinent the great diſtreſs ſhall be awarded; and if the ſheriff do not make ſufficient return by a certain day, he ſhall be grievouſly amerced; and if he return, that he hath done execution in due manner, and the iſſues delivered to the ſureties, then the ſheriff ſhall be commanded, that he return iſſues at another day before the juſtices; and if the party being attached come in at his day to ſave his defaults, he ſhall have the iſſues; and if he come not, the king ſhall have them; and the king's juſtices ſhall cauſe them to be delivered in the wardrobe; and the juſtices of the bench at Weſtminſter ſhall deliver them

charges en ſummons per rolles des juſtices (9).

them in the exchequer; and the juſtices in eyre unto the ſheriff of that ſhire where they plead, as well of that ſhire, as of foreign ſhires, and ſhall be charged therewith in ſummons by the rolls of juſtices.

The miſchief appeareth by this ſhort preamble, to be delay, &c.

27 H. 6. 2. 7 H. 6. 9 Brit. ca. 76 de attachments.

(1) *Attachment.*] The attachment muſt be made by moveable goods, and meer perſonall, which may be forfeited by outlawry, and not by goods which he hath as executor or adminiſtrator, nor by a clod of the earth, nor by any chattell reall, as wardſhip, or the like.

Regiſt. judic' fol 1. Brit. fol 50. b. 48 E. 3. 26.

(2) *Grand diſtreſſe.*] *Diſtrictio magna*, it is ſo called, not for the quantity, for it is very ſhort; but for the quality, for the extent is very great: for thereby the ſherife is commanded, *Quod diſtringat tenentem, ita quod ipſe, nec aliquis per ipſum ad ea manum apponat, donec habuerit aliud præceptum, et quod de exitibus eorundem nobis reſpondeat, et quod habeat corpus ejus, &c.*

This writ lyeth in two caſes, either when the tenant or defendant is attached, and ſo retourned, and appeareth not, but makes default, then by this act a grand diſtreſſe is to be awarded; or when the tenant or defendant hath once appeared, and after makes default, then this writ lyeth by the common law in lieu of a *petit cape*.

Brit. ubi ſupra.

Britton ſpeaketh of diſtreſſes perſonall, which he intendeth of perſonall goods upon the attachment, and diſtreſſes reall, which concern the realty; and a third may be added, *viz.* diſtreſſes which do concern both the realty and perſonalty, as this grand diſtreſſe doth.

18 E. 3. judgement. 120 f. 6 E. 2. ibid. 220. 14 E. 3. Default. 57.

In a *ſecta ad molendinum*, after apparance the defendant made default, whereupon a grand diſtreſſe was awarded, and the defendant made default again, and thereupon the plaintife had judgement.

(3) *Et ſi latachee veigne a ceo jour a ſaver ſes defaults, eit il ſes iſſues.*] Here the *lattachee* is taken for him that is diſtrained, and appeareth upon the grand diſtreſſe.

[255]

(4) *Et ſil ne veigne eit le roy les iſſues.*] For then judgement is to be given againſt the defendant, as hath been ſaid before, and the king to have the iſſues.

(5) *Et les juſtices le roy.*] That is, the juſtices of his bench, ſo called, for that all the pleas there are *coram rege*.

Ockham. 51 H. 3. ſtat. de Scacc. Artic. ſuper Chart. 28 E. 1. cap. 2. Fleta, l. 2. cap. 6.

(6) *Les facent liver a le gardrobe.*] There hath been an ancient officer of the kings houſhold of old time, called *cuſtos magnæ gardrobæ*, warden or keeper of the great wardrope or wardrobe, of later times called maſter of the wardrobe, ſo called, becauſe he hath the keeping and charge of the royal robes of former kings and queens, and for providing of robes, &c. of the king: he hath alſo the charge of keeping and providing of hangings, bedding, &c. in ſtanding wardrobes in the kings houſes, and the delivery of velvet and ſcarlet allowed for liveries, &c. And many other things belong to his office, which are not neceſſary to be here repeated: he is accountable in the exchequer.

De

De articulis porrectis coram domino rege per comitem mareſchallum pro hiis quæ ad officium ſuum in curia regis clamabat pertinere, dominus rex vult quod dicti articuli irrotulentur in garderoba, et quod tranſcriptum eorundem liberetur præfato comiti, et quod nec ipſe nec miniſtri, ſui aliquid habeant, ſeu ſibi attrahant ultra ea quæ ibidem inveniuntur, &c.

Rot. Parl. Paſch. 21 E. 1. Rot. 44.

Vide in the exchequer, *de anno* 19 E. 2. a privy ſeale bearing date 30 *Junii, anno* 19 E. 2. concerning his account amongſt others.

Int' communia in Scac. de anno 19 E. 2.

But here it may be demanded wherefore theſe iſſues were to be delivered into the wardrobe; for the anſwering hereunto, it muſt be underſtood, that the kings juſtices of his bench did in thoſe dayes follow the court (the retourne of the proceſſe of which court to this day is *coram rege ubicunque fuerimus in Anglia*) therefore it was fitteſt for them to make delivery of theſe iſſues to this officer of court.

Art. ſuper Chart. cap. 5. Fleta, l. 2. ca. 2.

(7) *Les juſtices del banke al Weſtm'.*] That is, the juſtices of the court of common pleas ſhall make their eſtreats, and theſe iſſues are part of the green waxe.

(8) *Al viſcount de cel countie.*] In this particular caſe of iſſues the juſtices in eyre delivered the eſtreats to the ſheriffe, *vide* before ca. 18. which extendeth to fines and amerciaments.

W. 2. ca. 18.

(9) *Per rolles des juſtices.*] That is, particularly, and not a totall.

W. 2. ca. 18.

Vide more for eſtreats the ſtatutes of 51 H. 3. W. 2. cap. 8. 42 E. 3. cap. 9. 7 H. 4. cap. 3.

CAP. XLVI.

*PURVIEW eſt enſement, et per le roy commaunde, que les juſtices de bauke le roy, et juſtices de banke a Weſtminſter (1) deſormes per pledant les plees a terminer a un jour (2), avant que rien ſoit arraine, ou commence des plees del jour * enſuant, forſpris que lour eſſoines ſoient entres, judges, et rendus, et per encheſon de ceo nul home ſe affie, que il ne veigne au jour que don' luy eſt.*

IT is provided alſo, and commanded by the king, that the juſtices of the king's bench at Weſtminſter from henceforth ſhall decide all pleas determinable at one day, before any matter be arraigned, or plea commenced the day following, ſaving that their eſſoins ſhall be entered, judged, and allowed; yet, by reaſon hereof, let none preſume to abſent himſelf at the day to him limited.

* [256]

First, in ſome impreſſions both in French and Engliſh of this act, theſe words [*Et juſtices de bank al Weſtm'*] be omitted, and towards the end theſe words [*forpriſe lour eſſoines*] be likewiſe omitted, both which without queſtion ought to be inſerted as parcell of this excellent law.

The miſchiefe before this ſtatute was, in reſpect of prepoſterous or diſorderly hearing of cauſes; for many times the judges of the kings bench, and of the court of common pleas would by importunacy of great men and others in the irregular time of H. 3.

put off matters to be heard at one day untill another, and at that time heare ſome other matters appointed to be heard on a day following, whereby the parties, whoſe cauſes were then diſappointed, were not onely delayed, and put to further charges, but many times, when their cauſe came to be heard, either were diſappointed of their councell which they had inſtructed, or the day appointed not being come, had no councell inſtructed at all; and beſides where witneſſes were requiſite, they many times failed of them: this law therefore is made to remedy theſe prepoſterous and diſorderly proceedings, and to give judges a juſt cauſe of deniall of any ſuch requeſts, though never ſo powerfully, or importunately made, and that this law may ſerve for their buckler and ſhield, which Fleta rendreth in theſe words:

Fleta, li. 2. c. 29. *Et proviſum eſt, quod juſticiarii de utroque banco placita ad unum diem adjournata perfiniant, antequam placita dici ſequentis quicquam placitare incipiant, hoc tamen excepto, quod eſſonium illius dici ſupervenientis admittatur, adjudicetur, et reddatur.*

And hereby it appeareth that both the ſaid clauſes ſo omitted, as is aforeſaid, ought to be inſerted. Of this kinde of hearing of cauſes it is truly ſaid, *Merito hæc dicuntur præpoſtera, quia in his præſunt poſteriora.*

(1) *Que juſtices de banke le roy, & del banke al Weſtm'*, &c.] This ſtatute being made in affirmance of common right doth extend to the court of chauncery, court of exchequer, and to all other courts of juſtice, for that all are within the ſame miſchiefe, and therefore ought to be within the ſame remedy.

(2) *A terminer a un jour.*] Upon this act this auncient concluſion of law doth follow, *Judicis officium eſt opus diei in die ipſo perficere.*

Mag. Chart. c. 29. And this agreeth with that excellent law of *Magna Charta*, *Nulli vendemus, nulli negabimus, aut differemus juſtitiam, vel rectum.*

CAP. XLVII.

PURVIEW eſt enſement, que ſi nul deſormes purchaſe briefe de novel diſſeiſin (1), *et celuy ſur que le briefe vient, come principal diſſeiſor mourge avant que laſſiſe ſoit paſſe, que le pl' eit ſon briefe dentre foundus ſur diſſeiſin, ſur le heire, ou ſur les heires les diſſeiſors* (2), *de quel age que ils ſoient. En meſme le maner eit le heire, ou les heires le * diſſeiſee lour briefes dentre ſur les diſſeiſors lour auncęſtre, ou lour heires* (3), *de quel age que ils ſoient. Et ſi paraventure le diſſeiſee mourge avant que il eit ſon purchaſe fait* (4), *iſſint que pur les nonages des heires dun part ne dauter* (5) *ne ſoit le briefe*

IT is provided alſo, that if any from henceforth purchaſe a writ of novel diſſeiſin, and he againſt whom the writ was brought as principal diſſeiſor, dieth before the aſſiſe be paſſed, then the plaintiff ſhall have his writ of entrie upon diſſeiſin againſt the heir or heirs of the diſſeiſor or diſſeiſors, of what age ſoever they be. In the ſame wiſe the heir or heirs of the diſſeiſee ſhall have their writs of entrie againſt the diſſeiſors, or their heirs, of what age ſoever they be, if peradventure the diſſeiſee die before that he hath purchaſed his writ; ſo that for the nonage of the heirs of the one

br. ſe abatus, ne le plee delay (6), *mes en quant que lhom' poit ſans ley offender, ſoit haſte pur la freſh ſuit apres le diſſeiſin* (7). *Et en meſme le maner ſoit en ceo point gard' en droit des prelates, gents de religion, et auters* (8), *as queux terres et tenements en nul maner puiſſent devener apres auter mort, le quel que ils ſoient diſſeiſees, ou diſſeiſours. Et ſi les parties en pledant diſcendont en enqueſt, et lenqueſt paſſa encounter le heire deins age, et noſmement encounter le heire le diſſeiſee, que il en ceo caſe eit lattaint* (9) *de la grace le roy ſans rien doner.*

one party, nor of the other, the writ ſhall not be abated, nor the plea delayed; but as much as a man can without offending the law, it muſt be haſted to make freſh ſuit after the diſſeiſin. And in like manner this ſhall be obſerved in all points for the right of prelates, men of religion, and other to whom lands and tenements can in no wiſe deſcend after others death, whether they be diſſeiſees or diſſeiſors. And if the parties in pleading come to an inqueſt, and it paſſeth againſt the heir within age, and namely, againſt the heir of the diſſeiſee, that in ſuch caſe he ſhall have an attaint of the king's ſpecial grace.

Mirror, ca. 5. § 4. (Dyer 137. 6 Rep. 4. 17 Ed. 3. 16. 12 Ed. 4. 17. 8 Ed. 3. 71. 21 Ed. 3. 27. 27 H. 6. 1. Fitz. Age, 71. 3 Bulſtr. 137. Regiſt. 229, 230. 13 Ed. 1. ſtat. 1. c. 15.)

See the Cuſtum. de Norm. ca. 43.

The miſchiefe before this ſtatute was, that if a man had been diſſeiſed, and either the diſſeiſee, or the diſſeiſor had died, their heire being within age, in a writ of *entre ſur diſſeiſin* brought by the heire of the diſſeiſee being within age, or by the diſſeiſee or his heire againſt the heire of the diſſeiſor being within age, the paroll had demurred untill the full age of the heire reſpectively, which was a great delay, and is remedied on both parts by this act.

(1) *Purchaſe briefe de novel diſſeiſin.*] Albeit the diſſeiſee purchaſed no writ of aſſiſe of *novel diſſeiſin*, yet the heire or heires of the diſſeiſor are within this ſtatute; for ſeeing in this caſe here put by the makers of this law, true it is, that notwithſtanding the purchaſe of the writ in a writ of *entre ſur diſſeiſin* brought by the diſſeiſee againſt the heire of the diſſeiſor, the heire ſhould have had his age to the great delay of the demandant, this is ſhewed for a miſchiefe in this particular caſe, to perſwade that the law might be generall, though no writ was brought, as by the body of the act appeareth.

3 E. 3. age 71. 8 E. 3. 71.

(2) *Briefe de entry fundus ſur diſſeiſin, ſur le heire ou heires les diſſeiſors.*] This is to be underſtood of a writ of entry in the *per*, and not in the *poſt*, for the words of the ſtatute be *ſur le heire le diſſeiſor*, which is a writ of entry in the *per*, and therefore if the heire of the diſſeiſor make a feoffment in fee, and the feoffee dieth, his heire within age, in a writ of entry againſt the heir, he ſhall have his age, for this act extends but to the heir of the diſſeiſor, who ſitteth in his fathers ſeat, and commeth to the land without conſideration; but otherwiſe it is of him that purchaſeth the land of the heir, for he and his heires are out of the letter and meaning of this act: the ſame law is of the vowchee and priee in aide within age.

12 E. 4. 17. 5 E. 3. age 70. 6 E. 3. 3. 21 E. 4. 15. 27 H. 6. 1. Dier 4 Mar. 137.

If the fem' heire of the diſſeiſor taketh huſband, and hath iſſue within age, and dieth, the diſſeiſee bring a writ of entry againſt the tenant by the curteſie, he pray in aide of the heir within age,

17 E. 3. 61. 27 H. 6. 1.

he shall have his age, for this is a writ of entry in the *post*, being brought against the tenant by the curtesie, and so out of the statute.

24 E. 3. 25. b. 46, 47. If there be two brothers, and a sister, the elder brother disseiseth one, and dieth, and the land descendeth to his brother, and he enters and dieth seised, and the land descendeth to the sister within age: in a writ of entry brought by the disseissee against the sister, she shall be ousted of her age by this statute: wherein three things are to be observed. First, that the mediate heire on the part of [258] the disseisor is within this statute. 2. That though the sister is to make herself sister and heire to the younger brother, and not to the disseisor, for that her younger brother entred, yet is she heire within the meaning of this statute to the disseisor, and therefore to be ousted of her age. 3. That a writ of entry in the *per* and *cui* in this speciall case is within this act.

Speciall heires, as in gavelkinde, borough English, and the sister of the whole blood are on both sides within this statute, for though they be not heires by the common law, yet are they heires within the intention of this law, which is to be taken benignly, being made for expedition of justice, and to oust delay.

8 E. 3. 71. 10 E. 3 53. 21 E. 3 27. 6 E. 3. 31. (3) *En mesme le maner eit le heire, cu les heires le disseisee lour briefes dentre sur les disseisors ou lour heires.*] This is to be understood as well of the mediate as of the immediate heire of the disseisor; and therefore if there be grandfather, father, and son, and the grandfather is disseised and dieth, and the father of full age likewise dieth, the son is within age, and brings his writ of entry against the disseisor, he is an heire within this statute, for he maketh himselfe heire to the grandfather, who was the disseisee.

(4) *Et si peraventure le disseisee marge avant que il eit son purchase fait.*] Here by expresse words provision is made, though the disseisee die before the purchase of his writ, whereof somwhat hath been said before.

(5) *Issint que pur les nonages des heires dun part ne dant'*, &c.] Where the demandant or the tenant shall have his age at the common law, you may reade at large in Markals case abovesaid: it is there resolved, that the heire as well of the demandant as the tenant, should have had his age in this case.

(6) *Ne soit le briefe abatus ne le plea delay.*] Here abatement is taken for putting off the writ and plea without day untill full age, but the writ is not abated, that is, overthrown, *non cadit breve*, for

Bract. li. 5. fo. & lib. 4. f. 218. b. so Bracton saith, *Minor ante tempus agere non potest infra ætatem, maxime in causa proprietatis, nec etiam convenire, sed differetur usque ætatem, sed non cadit breve.*

8 E. 3. 71. Dier 4 Mar. ubi supra. 24 E. 3 25. 46, 47. Lib. 6. fol. 4. Markals case. 10 E. 3. 53. 6 E 3. 11. 9 E. 2. age 141. 24 E. 3. 25. 46. (7) *Pur la fresh suit apres le disseisin.*] *Statutum de W.* 1. *habetur intelligi, ubi hæres disseisiti facit recentem sectam, aliter non.*

This fresh suit is not to be understood between the disseisor and the disseisee, although the disseisor continue in possession by the space of 30 or 40 yeares, &c. But when the disseisor dies, then is the fresh suit to be made, and that is regularly within a yeare and a day after the death of the disseisor, for within that time continuall claim may be made, which is in law *recens et continuum clameum*, and within that time an appeale of death may be brought, which is *recens insecutio*, and *sic in multis aliis similibus.*

(8) *En droit des prelats, gents de religion, et autcrs*, &c.] This clause is to be understood of ecclesiasticall persons, that be regular, and not of ecclesiasticall persons, that be secular, for the regular are dead

dead perſons in law, to whom no lands (as this ſtatute ſpeaketh) can deſcend after the death of any other: but to the ſecular, as to biſhops, parſons, vicars, and the like lands may deſcend, and therefore they are not within this clauſe, but within the former branches of this act for ſuch lands as they are ſeiſed of to them and their heirs in their naturall capacity.

(9) *Eit lattaint.*] Of the writ of attaint, ſee before the ſtatute of Marlebridge, cap. 14, and here cap. 37.

CAP. XLVIII.

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SI gardein ou chiefe ſeignior enfcoffe (1) *ul home de la terre que eſt del heritage del enfant (que eſt deins age et en ſa garde) a le diſheritance del heire: purview eſt, que le heire eyt maintenant ſon recoverie per briefe de novel diſſeiſin vers ſon gardein, et vers le tenant* (2). *Et ſoit la ſeiſin baille per juſtices (ſi el ſoit recover') al prochein amy lenfant, a que le heritage ne purra my diſcend'* (3), *pur approver al oeps lenfant, et a reſpender des iſſues al heire quant il viendre a ſon pleine age. Et le gardein perde a tout ſa vie la garde* (4) *de meſme la choſe recover', et tout la remainder del heritage, quel tient en noſme del heire. Et ſi auter gardein que chiefe ſeigniour* (5) *le face, perde le garde de tout cel choſe* (6) *a cel foits et ſoit en grieve peine envers le roy. Et ſi lenfant ſoit eſloigne, ou diſturbe per le gardein, ou per le ſcoffee, ou per auter, per que il ne puiſſe ſa aſſiſe ſuer, ſue pur luy* (7) *un de ſes prochein amies* (8) *que voudra, et ſoit a ceo reſceve.* W. 2. cap. 15.

IF a guardian, or chief lord, infeoff any man of land, that is the inheritance of a child within age, and in his ward, to the diſheritance of the heir; it is provided, that the heir ſhall forthwith have his recovery by aſſiſe of novel diſſeiſin againſt his guardian, and againſt the tenant; and the ſeiſin ſhall be delivered by the juſtices (if it be recovered) to the next friend of the heir (to whom the inheritance cannot deſcend) for to improve to the uſe of the heir, and to anſwer for the iſſues unto the heir, when he ſhall come unto his full age; and the guardian, during his life, ſhall loſe the cuſtody of the thing recovered, and all the inheritance that he holdeth by reaſon of the heir. And if another guardian than the chief lord do it, he ſhall loſe the wardſhip of all together, and be grievouſly puniſhed by the king. And if the infant be carried away, or diſturbed by the guardian, or by the feoffee, or by other, by reaſon whereof he cannot ſue his aſſiſe, then may one of his next friends (that will) ſue for him, which ſhall be thereto admitted.

(Fitz. Aſſiſe, 105. Bro. Aſſiſe, 491. 2 Ed. 3. 16. 8 Aſſ. pla. 22. 27 H. 8. 1. 40 Ed. 3. 16. 13 Ed. 1. ſtat. 1. c. 15. Raſt. 366, 367.)

The miſchief before this ſtatute was, that when the gardein in chivalry made a teoffment in fee, the judges, for the ſaving of the warranty between the ſeoffor and the feoffee, and that the right of each might be ſaved, allowed that a writ of entry in the *per* did lye for the heir before this ſtatute, as it appeareth by Bracton, and 15 H. 3. nay, Bract. l. 5. fo. 324. 15 E. 3.

Bre. 877. 19 E. 2. Aff. 4 0. 4 E. 2. Bre. 790.

nay, the judges in ancient time did allow a writ of entry in the *per*, as it appeareth by the old Regiſter, of a feoffment made by a baillie: but this opinion, or errour rather, was holpen by the reſolution of the judges; and the alienation of the gardein (after this act) to be made is holpen by this act, by enacting and declaring, that an aſſiſe of *novel diſſeiſin* doth lye againſt the gardein and his feoffee; therefore of a feoffment made by the gardein after the ſtatute, no writ of entry in the *per* doth lye, but an aſſiſe of *novel diſſeiſin*: and the ſtatute hath adjudged the feoffment a *diſſeiſin*; but of an alienation by the gardein before this ſtatute, a writ of entry in the *per* doth lye after this act, becauſe this act doth extend to feoffments made afterwards, as appeareth by the letter thereof; but if the tenant alien, and the gardein and his feoffee dye, or if the heir dye, ſo as no aſſiſe can lye by this act, then of ſuch an alienation after this act a writ of entry doth lye: and all this is approved by the authority of our books, and upon theſe diverſities all the books are reconciled.

19 E. 2. Aff. 400. 7 E. 3. 69. 8 E. 3. 63 8 Aſſ. 28. 14 E. 3. Feoffmt. 67. 10 E. 4. 18. Vid. W. 2. c. 25.

This ſtatute ſpeaketh onely of a gardein in chivalry, therefore tenant for yeers, tenant by *elegit*, ſtatute merchant, &c. ſhall be reſerved till we come to the ſtatute of W. 2. cap. 25.

Weſt. 2. ca. 25.

(1) *Enfeoffe.*] The feoffment at theſe times was the generall aſſurance of the realm, but a fine is within this act, for that is a feoffment of record.

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(2) *Maintenant ſon recoverie per briefe de novel diſſeiſin vers ſon gardein, et vers le tenant.*] Here two things are to be obſerved, 1. upon this word *maintenant*, that is, preſently without any delay: and this is the 7. act made at this parliament for expedition of juſtice, and for the outling of delayes; for as it is commonly ſaid, the devill deviſeth delayes: wherein this noble king followed the ſteps of that good king Alfred, in whoſe time the law of England was as followeth; *En ſon temps puiſſoit chaſcun pl' aver commission, ou briefe a ſon viſc' al ſeigniour de fee, ou a certein juſtices aſſignes ſur chaſcun tort; en ſon temps ſe haſta droit de jour en jour, iſſint que ouſter* 15 *jours neſtoit nul default, ne nul eſſoine adjornable.*

Mirror, cap. 5. § 1.

2. By this act, not onely the gardein is a diſſeiſor, but the feoffee alſo; and ſo doth Fleta render it, *Et apud Weſtm' fuit proviſum quod cuſtos, qui alienat terras hæredis, habeatur pro diſſeiſitore, &c.* and ſoon after he ſaith, *Habeantur pro diſſeiſitoribus tam cuſtos, quam emptor.*

Fleta, li. 1. c. 11. 10 E. 4. 18. W. 2. cap. 25.

(3) *Et ſoit le ſeiſin bailie per juſtices, &c. al proclein amy del infant, a que le heritage ne purra my diſcend'.*] This clauſe Fleta rendreth in this manner, *Et cum terra fuerit recuperata, tradatur propinquiori amico, cui hæreditas deſcendere non debeat, qui reſpondeat puero de exitibus, cum ad ætatem ſuam pervenerit.*

Fleta ubi ſupra.

And where the ſtatute ſaith, *Soit, &c. bailie per juſtices*, the meaning is no more but this, that the juſtices before the recovery was had, ſhall charge the next of the kin, to whom the land cannot deſcend, to take according to this act the cuſtody of the lands, and to yeeld a true account to the heir at his full age, and to enter an order of court thereof accordingly.

And he is neither a gardein in chivalry, nor in ſocage, but a ſtatute gardein in lieu of the gardein in chivalry by force of this act.

And if this gardein dye before the full age of the heir, his executors ſhall not have the cuſtody, but the next of kin, to whom the land

land cannot deſcend; for this act hath annexed it to the next of blood, to whom the land cannot deſcend.

(4) *Et le gardein perde a tout ſa vie la garde*, &c.] This branch is to be underſtood of a gardein in *droit*, that is to ſay, of the chief lord, for he is not onely to loſe the cuſtody of the land aliened, and of all the reſidue of the heritage which he had in ward; but alſo to loſe all benefit of wardſhip of that tenancie, by the letter of this law, during his life, for that againſt the office and duty of a gardein, he hath fought the diſheriſon of the heir which he had in his cuſtody: and Fleta tranſlateth this clauſe in theſe words, *et ſi ſit capitalis dominus qui hoc faciat, amittat cuſtodiam tota vita ſua tam de reſiduo, quam de terra alienata*; but in this caſe the lord by his feoffment of the tenancie, or any part thereof hath extinguiſhed his ſeigniority for ever, whether the feoffment be made of all the tenancie, or but of part, by the common law: and theſe words (during his life) being in the affirmative, reſtraineth not the operation of the common law in this caſe. Fleta, li. 1. c. 11. Vide 1. part Inſtit. ſect. 968.

(5) *Et ſi autor gardein que chiefe ſeigniour.*] This is intended of a gardein *in fait*: as where the lord aſſigneth over the cuſtodies to another, he is called a gardein *in fait*; hereof Fleta ſaith, *et ſi alius fuerit cuſtos, quam capitalis dominus feodi illius, amittat cuſtodiam rei recuperatæ, &c.* Fleta ubi ſupra.

(6) *Perde le garde de tout cel choſe.*] The feoffment made by the gardein *in fait* is a forfeiture of his eſtate by the common law of the whole, if the feoffment were made of the whole; and if of part, then of that part onely by the common law; but this ſtatute giveth the forfeiture of the whole land in ward: but it ſeemeth in this, the wardſhip of the body is not loſt, becauſe this branch extendeth to the land onely; no more then upon the ſtatute of Glouc' in caſe of waſte done to the diſheriſon of the heir, the ſtatute ſaith, *perdra le garde*, yet ſhall he not loſe the cuſtody of the body: and in both theſe caſes, the ſeigniory, which is the cauſe of the wardſhip, continueth; but where the ſeigniory is extinct, there the heir ſhall be out of ward, both for body and land. [261] Gloc'. cap. 5. Mich. 28 H. 8. Benloes.

(7) *Sue pur luy un de ſes prochein amies.*] Before the making of this act, the gardein or his feoffee, or ſome other would eſſoigne or diſturb the infant, ſo as he could not take his remedy by law, and by attorney he could not appear, therefore this act in this particular caſe doth give the infant to purchaſe and follow his writ of aſſiſe upon this act by *prochein amy*, albeit he be not preſent in court; and ever ſince the ſtatute of Weſtm. 2. which is generall, the common rule is holden, that an infant ſhall ſue by *prochein amy*, and defend by *gardein*. See before, c. 42. 40 E. 3. 16. W. 2. ca. 15.

(8) *Prochein amy.*] *Amicus propinquior*; in our books the names of *gardein* and *prochein amy* are ſometimes taken the one for the other becauſe the *gardein* and *prochein amye* are oftentimes all one, as the gardien in ſocage is alſo *prochein amy*, &c. And now as well the *gardein*, as the *prochein amy* are allowed by the judges to be ſome of the officers of the court, and both in reſpect of their place and ſkill are in troth the beſt *prochein amyes* for the good and furtherance of the infants cauſe.

Fleta rendreth this clauſe in theſe words, *Et ſi hæres impeditus fuerit ad ſequendum, ſequatur unus de propinquioribus amicis, et admittatur*; and this admiſſion is by the order of the court, but the gardein muſt put in a warrant. Fleta ubi ſupra. 40 E. 3. 16. 48 E. 3. 10. 33 E. 3. Attorney 94. 19 Aſſ. 10. 27 Aſſ. 53.

In

34 Aſſ. 5. 28 Aſſ. 2. 29 Aſſ. 67. 35 H. 6. 12. 20 E. 4. 2. 16 H. 7. 5. F.N.B. 27. I. 13 E. 3. Attorney 76.

In an action of waſte, brought by an infant againſt the abbot of R. as gardein in chivalry, *quas tenet*, the infant came not in perſon, but one came as *prochein amy* by the ſtatute, which is intended by the ſaid ſtatute of Weſt. 2. and prayed to be received to ſue, for that the infant was eſſoined; againſt which this objection was made, that it appeared not judicially to the court that the infant was eſſoined, and that ſuch a ſuggeſtion in the caſe of aſſiſe and mordanceſter had uſed to be made, becauſe the eſſoyning, which is the cauſe that the ſtatute ſetteth down, might be enquired of, being a jury, the firſt day, but otherwiſe it was in the caſe at the barre being an action of waſte; but it was reſolved, that the *prochein amy* ought to be admitted upon the ſaid ſuggeſtion in this caſe, for that the writ is brought againſt the *gardein*, which peradventure had eſſoined the infant, and he of his own wrong ſhall not take advantage, and therefore the court did award that the *prochein amy* ſhould be admitted to ſue, &c. Which caſe I have remembred here, becauſe it may ſerve for an expoſition as well of this act of Weſtm. 1. as of the ſaid act of Weſtm. 2.

CAP. XLIX.

EN briefe de dower dont dame riens nad, ne ſoit le briefe abatus per exception del tenant (1), *pur ceo que el avera reſceive ſon dower de auter home avant ſon briefe purchaſe, ſil ne puit monſtre que el eit reſceive part de ſa dower de luy meſme* (2), *et en meſme la ville* (3) *avant ſon briefe purchaſe* (4).

IN a writ of dower called *unde nihil habet*, the writ ſhall not abate by the exception of the tenant, becauſe ſhe hath received her dower of another man before her writ purchaſed, unleſs he can ſhew that ſhe hath received part of her dower of himſelf, and in the ſame town, before the writ purchaſed.

(Regiſt. 170, 171. Fitz. Voucher, 196. Fitz. Dower, 75, 76. 86. 89. 114. Kel. 128.)

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Bract. li. 4. fo. 311. b.

The miſchief before this act doth notably appear by Bracton, who treating of this writ, *Unde nihil habet*, ſaith, *ad hoc autem quod dicit mulier in intentione ſua (et unde nihil habet) ſi quidem partem dotis habuerit, licet minimam, ſi hoc dedicere non poſſit, vel cum hoc probatum fuerit, cadit breve, nec de reſiduo quod ei deſuerit poterit ſibi proſpicere niſi per breve de recto de dote, nihil igitur recipiat de dote ſua ante brevis impetrationem, ita quod breve contineat omnes deforcientes ubicunq; fuerint in uno comitatu, vel in diverſis. Et cum omnes contineantur, tunc primo recipiat, et ſi recipiat ante judicium, etiam ſine judicio non obſtabit ei exceptio, quod aliquid habuerit, quia reſpondere poterit, quod ſatisfactum eſt ei ante judicium, &c. ſi petens dicat quod exceptio, &c. ei nocere non debet, quia nihil habet in tali villa, vel in alia tali villa, non valebit talis ſua replicatio, quia id quod dicitur (unde nihil habet) non debet referri ad villas, ſed ad dotem:* hereby doth the miſchiefe before this act manifeſtly appear.

Fleta, li. 5. c. 25.

And Fleta rehearſing the effect of this ſtatute, ſaith, *in brevi autem de dote unde mulier petens nihil habet, non cadit breve per exceptionem tenentis petentis judicium de brevi, deſicut ſupponit eam nihil habere, cum*

cum aliquid habeat, vel dotem ſuam de aliquo receperit pro parte ipſam contingente, niſi partem dotis receperit a ſeipſo in eadem villa ante brevis impetrationem.

(1) *Per exception del tenant.*] Regularly tenant is taken for him that is tenant of the free hold, but in the caſe of dower, it lyeth againſt gardein in chivalry, becauſe in that caſe he is to anſwer for the heir, but not againſt the gardein in ſocage. See hereafter in this chapter, where this exception ſhall lye in the mouth of the vouchee being tenant in law.

Brit. fo. 258. 13 E. 1. Bre. 863. 8 E. 2. ibid. 809. 18 E. 2. ibid. 833. 6 E. 3. 257. 7 E. 3. 308. 8 E. 3. 384. 10 E. 3. 509. 11 E. 3. Bre. 475. 13 E. 3. ibid. 242. 16 E. 3. ibid. 657. 4 E. 3. 42.

(2) *De luy meſme.*] Firſt, it muſt be of the ſame tenant, and not of another, though it be in the ſame town; as if the huſband infeoffeth A. of Whiteacre, and B. of Blackacre, both in Dale, and the wife receiveth dower of A. ſhe notwithſtanding ſhall have a writ of dower *(unde nihil habet)* againſt B. by the expreſſe purview of this act, for he is not the ſame tenant of whom ſhe received her dower.

Secondly, if A. having a wife doth infeoffe the huſband of one acre, and the wife of another, and both in Dale; A. dyeth, the huſband aſſigneth dower of his acre, yet doth the writ of dower *(unde nihil habet)* lye againſt the huſband and wife, for they are not the ſame tenant.

Brit. fol. 257. 12 E. 3. Dower 89.

Thirdly, if the baron be ſeiſed of Blackacre and Whiteacre in Dale, and after the coverture maketh a leaſe for life of Blackacre, and granteth Whiteacre and the reverſion of Blackacre to A. and his heirs, to whom attornment is made, and dyeth; the wife receiveth dower of A. of Whiteacre, and after the leſſee for life dyeth, the wife ſhall have a writ of dower *(unde nihil habet)* to be endowed of Blackacre; for albeit it be againſt the ſame tenant, and in the ſame town, and before the writ purchaſed, which are the three points required by this act, yet is there another property neceſſarily implyed, and that is, that he be ſuch a tenant of both the one land and the other, at the time of the receit of dower, as ſhe might have had her writ of dower *(unde nihil habet)* againſt him, of both which ſhe could not have in this caſe, in reſpect the leſſee for life was tenant of the free-hold at that time, and ſo no default in her.

2 E. 2. Dower 124. 12 E. 3. Dower 86.

The baron is ſeiſed of a carue of land holden by knights ſervice, and of Whiteacre in Dale, and after the coverture infeoffeth A. of Whiteacre with warranty, and dyeth, his heir within age, the gardein aſſigneth dower of the carue of land, and then the wife brings her writ of dower againſt A. who voucheth the heir in the cuſtody of the gardein, the gardein pleads the receit of dower of the ſaid carue in the ſame town, and adjudged a good plea and the writ of dower *(unde nihil habet)* abated.

3 E. 3. Dower 76. 3 E. 3. Voucher 196. Kelw. 128.

The ſame law it is, if the gardein that aſſigned the dower dyed, and the heir had been vouched in the guard of his executors, his executors in the caſe aboveſaid ſhould plead the ſame plea.

And ſo if the heire in that caſe had been vowched of full age, he might have pleaded as vowchee, as an aſſignement of dower by himſelfe in the ſame towne.

[263] First part of the Inſt. ſect. 39.

(3) *En meſme la ville.*] A writ of dower, *unde nihil habet*, doth lie in an hamlet, but yet if the demandant have received dower out of the hamlet, and in the ſame town, the writ ſhall abate; otherwiſe it is, though it be in the ſame pariſh, if it be

18 E. 2. bre 829. 4 E. 3. ibid. 745. 4 E. 3. 52. 8 E. 4. 6.

be in another town, for the words of the ſtatute be, *en meſme la ville.*

Fleta ubi ſupra. Bracton ubi ſupr. 3 E. 3. Vowch. 196. 12 E. 3. Dower 86. Regiſt. 171.

(4) *Avant ſon briefe purchaſe.*] Of this clauſe Fleta ſaith thus, *Si partem dotis ſuæ receperit poſt breve impetratum, quamvis ab ipſo tenente, non propter hoc cadit breve mulieris, cum dicere poterit ante judicium, quod de reſiduo, vel omiſſione eſt ei ſatisfactum,* and ſo it appeareth by Bracton, it was, as to this point, at the common law.

CAP. L.

ET pur ceo que le roy ad fait cel choſe (1) *al honour de Dieu, et ſaint eſgliſe, et pur le common profit de people, et pur le allegeance de ceux queux ſont greves* (2), *il ne voit my que auterfoits puiſſent turner a prejudice de luy, ne de ſa corone: mes que les droits, que a luy apperteign'* (3), *luy ſoient ſaves en touts points.*

AND foraſmuch as the king hath ordained theſe things unto the honour of God and holy church, and for the commonwealth, and for the remedy of ſuch as be grieved, he would not that at any other time it ſhould turn in prejudice of himſelf, or of his crown; but that ſuch right, as appertains to him, ſhould be ſaved in all points.

This is a ſaving to the king of the rights of his crowne.

(1) *Cel choſe.*] That is, that this ſtatute of W. 1. which hath been made to foure excellent ends, *viz.* the honour of God, the honour of the church, for the commonwealth, and for the remedy, diſburdening, and eaſe of them, that be grieved, ſhould not be prejudicial to him, or to his crown, but that the rights, which to him appertain, ſhould be ſaved.

(2) *Allegeance de ceux queux ſont greves.*] This ſhould be *alleviance de ceux, &c.* That is, diſburdening, remedying, and eaſing of ſuch as be grieved.

Regiſt. fol. 61. Bracton.

(3) *Mes que les droits queux a luy appertain.*] That is to ſay, the kings rights, or the kings rights of his crowne, or the rights of the crown, for ſo theſe, which ſince are called prerogatives, before this time were called *jura regia*, or *jura regia coronæ*, or *jura coronæ*; Bracton cals them *privilegia regis*, and Britton, *droit le roy.*

Britton, fol. 1.

17 E. 2. Prærog. Regis. 26 E. 3. Quar. Imp. 95. 18 E. 3. Scire fac' 10. 8 H. 4. 2. 9 H. 4. 6. 15 E. 4. 12, 13.

But ſince this act *jus regni, &c.* hath been commonly called *prærogativa regis*, which is all one with this, that this act calls *droit le roy.*

See the firſt part of the Inſtitutes, ſect. 3. *Lex coronæ.*

CAP.

CAP. LI.

ET pur ceo que graund charitie ſerra de faire a roit a touts en tout temps (1), *ou meſtier ſerroit: purview eſt per aſſentment des prelates* (2), *que aſſiſes de novel diſſeiſin, mortdaunceſter, et de darrein preſentment* (3) *fuiſſent priſes en le Advent* (4), *en Septuageſime* (5), *et en Quareſme* (6), *auxibien come le home prent lenqueſts, et ceo pria le roy as eveſques* (7).

AND foraſmuch as it is great charity to do right unto all men at all times (when need ſhall be) by the aſſent of all the prelates it was provided, that aſſiſes of novel diſſeiſin, mortdaunceſter, and darrain preſentment, ſhould be taken in Advent, Septuageſima, and Lent, even as well as enqueſts may be taken, and that at the ſpecial requeſt of the king, made unto the biſhops.

The cauſe of the making of this ſtatute doth manifeſtly appeare by Britton, who being B. of Hereford, and expert both in the common and canon law in his chapter *De challenge de jurors*, ſaith thus, Britton, ca. 53.

Et ſils yſcient aſſis des jurors uncore purrount aſcuns eſtre removables per verie challenges des parties, et auxi pur le temps en caſe: car heures ne ſont pas meures: car per canon eſt defendu de ſaint eſgliſe ſur peyne de excommengement, que de la Septuageſme jeſque al utas de Paſche, ne del commencement de Advent jeſque al utas de la Epifayne, ne en jours del quatre temps, ne en jours de major letanies, ne en jours de roveyſouns, ne en le ſemaigne de Pentecoſt, ne en temps de ſcier lees, ne de vendenges que durent de la S. Margaret jeſque al 15. de ſainct Mi hael, ne en ſolemne jours de ſeſaints de ſaints, nulluy ne jurge ſur le evan elies, ne nul ſecular plea ne teigne, ne ſummons ne face en temps avandits, iſſint que touts eſt temps ſoit done a Dieu prier, et de peſer contekes, et de accorder ceux, que ſont a diſcord, et pur coiller les biens del terre, dont le people doit vivre.

Which in reſpect of ſome difficulty I have thought good to tranſlate; "and if ſufficient jurors appeare, ſome are removeable for "juſt challenges of the parties, and alſo for the time in caſe; for "all houres are not fit for all ſeaſons: for it is forbidden by the "canon of holy church upon paine of excommunication, that from "the Septuageſme untill eight days after Eaſter, and from the begin-"ning of Advent untill eight days after the Epiphany, (or twelfe day) "or in the dayes of the foure times (that is, the ember dayes ap-"pointed for publike faſts foure times in the yeare) or in the dayes "of the great letanies, or in rogation or gange dayes, or in the "week of Pentecoſt. or in time of harveſt, or of vintage which Harveſt, *Arvivæſtis.*
"dureth from the feaſt of S. Margaret (which is the thirteenth of "July) untill 15 dayes after the feaſt of S. Michael the arch-"angell, or in the ſolemne feaſts of the acts of ſaints, no man be "ſworne upon the holy evangeliſts, nor any ſecular plea be holden "in the times aforeſaid, but that all theſe times be given for "prayer to God, and to appeaſe debate, and to accord them that "be at diſcord, and to gather the fruits of the earth, whereof the "people may live, which were works of piety and charity."

This act beginneth with a maxime of law, *Summa charitas eſt facere*

facere justitiam singulis in omni tempore, quando opus fuerit, and therefore provideth that the three assises, *viz.* of *novel disseisin, mordaunc'*, and of *darrein presentment* should be taken in Advent, Septuagesme, and Quaresme.

Int' leges Edw. regis, anno Dom. 924.

(1) *Tout temps.*] Here is understood *covenable in ley*, for in the common law there be *dies juridici, et dies non juridici*; *dies non juridici sunt dies dominici*, the lords dayes throughout the whole yeare, so called, because the Lord and Saviour of the world did arise again on that day: and this was the ancient law of England, and extended not onely to legall proceedings, but to contracts, &c. *Dacus si die dominico quicquam fuerit mercatus, re ipsa, et oris præterea duodecim mulctator, Anglus triginta solidos numerato*; and it is truly said, *reges, qui serviunt Christo, faciunt leges pro Christo.*

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27 H. 6. c. 5.

2. In Easter terme the day of the ascension of the Lord Jesus Christ.

3. Before the statute of 32 H. 8. Trinity terme extended into the time of harvest, and then in that terme the day of the nativity of S. John Baptist was not *dies juridicus*, but by that statute that terme is so abbreviated, as that day fals not within the same, onely *dies dominici* are not *dies juridici* in that terme. In Michaelmasse terme the day of All Saints, and the day of All Soules; and in Hilary terme, the day of the Purification of the blessed Virgin Mary, are not *dies juridici.*

Fortescu, c. 51. fol. 66. b.

And it should seem by Fortescue, that there be also *horæ juridicæ*, for he dedicating his book to the prince saith, *Scire te etiam cupio, quod justiciarii Angliæ non sedent in curiis regis, nisi per tres horas in die, scilicet ab hora octava ante meridiem, usque horam undecimam completam, quia post meridiem curiæ ille non tenentur, sed placitantes tunc se divertunt ad perviśum, et alibi consulentes cum servientibus ad legem, et aliis consiliariis suis. Quare justiciarii postquam se refecerint, totum diei residuum pertranseunt studendo in legibus; sacram legendo scripturam, et aliter ad eorum libitum contemplando, ut vita ipsorum plus contemplativa videatur, quam activa, &c.*

Mirror, c. 5. § 1.

And the Mirror saith, *Abusion est que tient pleas per Dimenches* (i. sabbath dayes) *ou per auters jours defendus, ou devant le soleil levie, ou nocturne, ou in dishoneſt lieu.*

(2) *Purview est per assentment des prelates.*] Which is expressed, not that the prelates assented alone, but that it was enacted by the king with the whole assent of parliament, which is implied by these words, *purview est*, and this act is entred into the parliament roll with the rest made in this parliament. But *per assent des prelates* is added to manifest that this act concerning the crossing of a canon of the church was enacted by their assents.

See the first part of the Institutes, sect. 524.

And here it is worthy of observation, that albeit divers judges of the realme were men of the church, as Britton, Martin de Pattesh ull, William de Raleighe, Robert de Lexinton, Henricus de Stanton, and many others; and that the honourable officers of the realme, as lord chauncellor, lord treasurer, lord privie seale, master of the rolls, &c. were in those dayes men of the church, yet they ever had such honourable and true-hearted courage, as they suffered no incroachment by any forein power upon the rights of the crowne, or the lawes and customes of the realme, as in Cawdryes case in the fifth part of my Reports is partly shewed, and much more (if it were requisite) may be said in that behalfe.

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Brit. ubi supra.

fount

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(4) *Advent.*] *Adventus Domini in carne, et incipit die dominica proxim' ante festum Sancti Andreæ, vel ipsa die Sancti Andreæ, si in dominica venerit*; and endeth eight dayes, after twelfe-tide, or the Epiphany. 7 ass. p. 7. 14 ass. 4.

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(6) *Quaresme.*] *Quadragesima* beginneth the first Sunday in Lent, and endureth all Lent. [266]

(7) *Et ceo pria le roy as evesques.*] Faire and good words many times further, but never hinder any good work.

How the canon abovesaid tooke no place in other actions not named in this act (if you observe the times forbidden by the canon) is manifelt by our bookes, and common experience in all ages since the making thereof.

STATUTUM DE BIGAMIS. [267]

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IT is called *Statutum de Bigamis* of the fift chapter of this parliament, wherein those that be *bigami*, are barred of the privilege of clergie.

IN præsentia venerabilium patrum quorundam episcoporum Angliæ, et aliorum de consilio regis, recitatæ fuerunt constitutiones subscriptæ, et postmodum coram domino rege et consilio suo auditæ et publicatæ, quia omnes de consilio, tam justiciarii, quam alii concordaverunt (1), *quod in scripturam redigerentur ad perpetuam memoriam, et quod firmiter observentur.*

IN the presence of certain reverend fathers, bishops of England, and others of the king's council, the constitutions under-written were recited, and after heard and published before the king and his council, forasmuch as all the king's council, as well justices as other, did agree that they should be put in writing for a perpetual memory, and that they should be stedfastly observed.

Here may you observe the ancient order of proceeding in parliament for passing of bills; first a select committee of certain bishops, barons, and some of the commons, with the judges assistants (who after are expresly named) expressed here under these words, *et aliorum de consilio regis* (for at this time the lords and commons sate together) and after the committee of both houses had resolved hereupon, then to report it to the whole councell here

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expreſſed under theſe words [*auditæ et publicatæ:*] which order in the ſeverall houſes is continued to this day.

30 Aſſ. 5. 8 E. 2. Dower 169. 5 E. 3. 65. 9 E. 3. 33. 10 E. 3. 26. 39 E. 3. 12, 13. 2 H. 7. 7. 4 H. 7. 1 2. tit. Aide le roy 33.

Shard beholding the manner of the penning of this act, was of opinion that it was no act of parliament; but the contrary is holden by many expreſſe authorities both before, and after him. And theſe words in the firſt chapter [*Concord' eſt per juſticiarios et alios ſapientes de conſilio regni*] do prove it to be by authority of parliament, for *conſilium regni*, is the lords and commons, legally called *commune conſilium regni.*

(1) *Quia omnes de conſilio, tam juſticiarii, quam alii concordaverunt,* &c.] And becauſe this was done by the advice of the juſtices, and was but a declaration of the common law concerning *aid prier* of the king, and warranties, as by the words of the act it appeareth, therefore they are inſerted into the act with this addition, *Qui conſuetudines et uſum judiciorum hactenus habuerint*; and ſir Ralph de Hengham was chiefe juſtice of the kings bench, and ſir Thomas de Weyland chiefe juſtice of the court of common pleas at this parliament.

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CAP. I.

DE placitis ubi tenens excipit, quod ſine rege reſpondere non poſſit: concordatum eſt per juſticiarios, et alios ſapientes de conſilio regni domini regis (1), *qui conſuetudines et uſum judiciorum hactenus habuerunt* (2), *quod ubi feoffamentum factum fuerit per regem, et charta ſuper hoc confecta, tantum ſe habeat, quod ſi alia perſona per conſimile feoffamentum et conſimilem chartam teneretur ad warrantiam, juſticiarii ulterius procedere non potuerunt* (3), *nec hucuſque proceſſerunt, niſi ſuper hoc præceptum à rege habuerint* (4), *nec videre poſſint quod procedere poſſint.*

CONCERNING pleas where the tenant excepteth, that he cannot anſwer without the king; it is agreed by the juſtices, and other learned men of our lord the king's council of the realm, which heretofore have had the uſe and practice of judgement, that where a feoffment was made by the king with a deed thereupon, that if another perſon by a like feoffment and like deed be bounden to warranty, the juſtices could not heretofore have proceeded any further, neither yet do proceed without the king's commandment had therefore, neither can it be thought that they may proceed.

(2 H. 7. 11. 5 H. 7. 16. 9 H. 7. 15. 15 H. 7. 10. Fitz. Proced. 5, 6. Fitz. Traverſ. 41. 1 Roll 288.)

(1) *Per juſticiarios, et alios ſapientes de conſilio regni domini regis.*] Here was uſed the ancient forms of parliaments, when the acts were *Rex ex conſilio ſapientum*, &c.

Inter leges Inæ, an. Dom. 727.

At a parliament holden by king Inas, *anno domini* 727. the ſtatutes began thus, *Ego Inas Dei beneficio rex juſſu et inſtituto Conradi patris mei, Heddæ et Erkenwaldi epiſcoporum meorum, omnium ſenatorum meorum, et natu majorum ſapientum populi mei in magna ſervorum Dei frequentia*, &c. Here is the parliament expreſſed, as it continueth to this day.

Has

Has ego Aluredus rex ſanctiones in unum collegi, &c. multa tamen quæ nobis minus commoda videbantur ex conſulto partim antiquanda, partim innovanda curavi.

Inter leges Aluredi regis, anno dom. 900.

And again, *Hæc ſunt ſenatus conſulta ac inſtituta, &c. quæ à ſapientibus recitata ſæpius, atque ad communem regni utilitatem amplificata ſunt.*

Decreta actaque ſunt hæc omnia in celebri Grantaleano concilio, cui Walſtanus interfuit archiepiſcopus, et cum eo optimates et ſapientes ab Æthelſtano evocati frequentiſſimi; this is that Grandceſtier in Cambridge-ſhire, of which the poet ſaid,

Inter leges Æthelſtani, anno dom. 940.

Olim Granta fuit multis urbs inclyta rebus,
Nunc etenim mágnum nil niſi nomen habet.

And that great parliament which Etheldred held, is called *ſapientum conſilium*: and more of this kinde might be remembred.

Inter leges Etheldredi, anno dom. 1016.

(2) *Qui conſuetudines et uſum judiciorum hactenus habuerunt.*] For of ancient, and at this time many of the nobility and of the clergie were expert in the laws and cuſtomes of the realm, and had judiciall places, as partly hereby, and more at large may appear in the firſt part of the Inſtitutes.

See the firſt part of the Inſtitutes, ſect. 534.

(3) *Tantum ſe habeat, quod ſi alia perſona per conſimile feoffamentum et conſimilem chartam teneretur ad warrantiam, juſtic' ulterius procedere non potuerunt.*] By this branch, if the king give lands with clauſe of an expreſſe warranty, yet the patentee, &c. ſhall not have or recover in value againſt the king, without ſpeciall words that the king ſhall yeeld lands in value upon eviction, &c. and nevertheleſſe, in that caſe he ſhall have aid of the king by the generall purview of this law, for it is for the honour of the king, that he aid the patentee with any records or evidence that he hath for maintenance of the eſtate which he hath granted and warranted to him. [a] But if the king exchange lands with another by this warranty in law, the king is bound to warranty, and to yeeld in value, and ſo it was adjudged, Hil. 6 E. 1. *in communi banco* Rot. 2. William Brewſes caſe, Wallia.

3 H. 6. 56. ſic adjudicatur tempore E. 1.

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[b] If the king give lands to one in fee, by this word *dedi*, this bindeth not the king to warranty, and yet the patentee ſhall have aid of the king by the letter of this branch, becauſe in that caſe another perſon ſhould be bound to warranty by this word *dedi*: and ſo it is, albeit the tenure by the patent is to hold of the chief lords.

[c] If it appear to the court, that the letters patents, or other caſes of *aide prier* be void, againſt law, or inſufficient in law, no aid ſhall be granted, for the law will not ſuffer thoſe things to be aided or maintained by the countenance of law, which appear to the court to be void, againſt law, or inſufficient; *ubi lex aliquem cogit ejendere cauſam, neceſſe eſt quod cauſa ſit juſta et legitima.*

[d] And according to former authorities of law, ſo was it adjudged 13 Eliz. in Foxleys caſe, and that *aid prier* ought not to be uſed for delay of juſtice, ſee notable and ancient records; and where *feoffamentum* and *charta* mentioned in this chapter muſt be taken for lawfull feoffments and charters, as in other caſes.

[e] And as it hath been ſaid in the caſe of *aid prier*, ſo it holdeth in all points, in the caſe when the tenant or defendant prayeth not in aid, but a writ *de domino rege inconſulto* is brought and directed to the judges; if it appear to the court, that the cauſe is not

a 17 E. 3. 12. H. 6 E. 1. Rot. 2. in banc' Wallia.
b 8 E. 3. 10. 18 E. 3. tit. Aide. 31 & 142. 2 H. 7. 7. & 15 H. 7. 10.
c 28 Aſſ. 19. 39. 38 E. 3. 94. b. 24 E. 3. 34. b. 26 E. 3. 58. 31 Aſſ. 2. 7 E. 3. 7. 39 E. 3. 12. 7 H. 4. 43. 11 H. 4. 86. 13 H 4. 14. 4 H. 6. 29. 7 H. 6. 36. 8 H. 6. 25. 11 H. 6. 12. 8 H. 7. 9. 11.
d Lib. 5. fo. 106. 111. Foxleys caſe. Tr. 18 E 1. Coram rege Rot. 43. Wiltſh. 27 E. 1. Coram Juſt. ad Aſſ. in Com' de Suff. Raduiphus de Mounthering comes Gloc.
e Paſch. 10 E. 3. Corā rege Rot. 86. Wiltſh.

Tr. 11 E. 3. Coram rege Rot. 101. South. 21 E. 3. 24. 44. 22 E. 3. 6. 25 E. 3. 48. 2 R. 3. 13. tit. Aide le roy 33. 9 H. 7. 15. 4 H. 7. 1. F.N.B. 153. f. & 154. d. e. Regist. 220, 221. 227. lib. 9. fol. 16. Anna Bedingf. case.

not available or sufficient in law, the court ought to disallow the writ, and to proceed in the cause; and if the cause appear to the court to be just and lawfull (as in our books it appeareth to be, and not brought for delay) then the judges ought to surcease, &c. and so it was resolved, Mich. 34 & 35 Eliz. *in communi banco*, between Giles Blofeild pl' *in ejectione firmæ* of the demise of Reighnold earl of Kent plaintife, and Thomas Havers farmor of the earl of Arundell defendant, of the mannour of Winfarthinge in Suffolk.

[f] Upon the *aide prier*, or writ, the award is *quod tenens sive defendens sequatur pones dominum regem*, and the tenant or defendant ought to remove the record into the chancery, and in case of the *aide prier* the plea is not put without day.

(4) *Nisi super hoc præceptum à rege habuerint.*] This *præceptum* is by the kings writ of *procedendo*, whereof there be two sorts, *viz. in loquela et ad judicium*; for the kings commandments in judiciall proceedings are ever by writ, according to the course of the common law, whereof you may read in the [g] Register, F. N. B. and our books; and which writs the king, *ex merito justiciæ*, in due time ought to grant; for the king himself by the great charter is presumed in law to sit in court, and to say *Nulli vendemus, nulli negabimus, vel differemus justiciam, vel rectum*; but if a title doth appear for the king to the possession, then no *procedendo* shall be granted.

[f] Lib. 9. fo. 16. Anna Bedingf. case. 10 E. 3. 61. 22 Ass. p. 5.
[g] Regist. 220, &c. F.N.B. 153, &c. 26 E. 3. 58. 12 H. 4. 18. 11 H. 4. 72. 12 H. 4. 5. 9 H. 6. 20. 12 H. 6. Proc. 9. Dier 1. Mar. 101. 4 Eliz. 209. 5 Eliz. 256. 15 Eliz. 320.

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CAP. II.

IN certis autem casibus, utpote ubi rex confirmaverit, vel ratificaverit (1) *factum alicujus in rem alienam, vel rem aliquam alicui concesserit, quantum in ipso est* (2), *vel ubi charta profertur, quod rex tenement' aliquod reddiderit, nec clausula aliqua in ea contineatur, per quam warrantizare debeat* (3), *et in consimilibus casibus, non erit supersedendum occasione confirmationis, ratificationis, concessionis, seu redditionis, aut aliorum consimilium, quin postquam hoc regi fuerit ostensum, sine dilatione procedatur* (4).

AND it seemeth also, that they could not proceed in certain cases, as where the king hath confirmed or ratified any man's deed to the use of another, or hath granted any thing as much as in him is, or where a deed is shewed, and clause contained therein, whereby he ought to warrantize: and in like cases they shall not surcease by occasion of a confirmation, grant, or surrender, or other like, but, after advertisement made thereof to the king, they shall proceed without delay.

3 Ass. p. 5. 8 E. 3. 33. 39 E. 3. 12. 35 H. 6. 56. 9 H. 6. 58, &c.

(1) *Ubi rex confirmaverit, vel ratificaverit.*] Here be three cases where aid, &c. ought not to be granted of the king, nor the court surcease by force of a writ *de domino rege inconsulto*: whereof the first is, when the king confirms or ratifies, &c. which must so be understood, when the confirmation giveth no estate, and if it giveth any estate, where no rent or service is reserved, or where in like case

caſe (as hath been ſaid) another perſon were not bound to warranty; but if a rent or ſervice be reſerved, and by the action brought (if the demandant prevail) the rent or ſervice ſhould be defeated, then there is good cauſe of *aide prier*, &c. or if a common perſon were in that caſe bound to warranty, then is the confirmation in nature of a feoffment, and within the firſt chapter: what hath been ſaid in caſe of confirmation, the ſame holdeth in caſe of releaſe.

(2) *Alicui conceſſerit, quantum in ipſo eſt.*] Here is the ſecond caſe where no aide ought to be granted, for the king granteth but his own eſtate without any warranty.

(3) *Quod rex tenementum aliquod reddiderit, nec clauſula aliqua in ea contineatur, per quam warrantizare debeat*, &c.] This is the third caſe where no aide ſhall be granted, in caſe of a reſtitution.

(4) *Poſtquam hoc regi fuerit oſtenſum, ſine dilatione procedatur.*] Here ſome have ſuppoſed, that in theſe three caſes aide ſhould be granted, but by force of theſe words, that no ſearch ſhould be granted, wherein two errours be committed: 1. That aide ſhould be granted, which is againſt the expreſſe letter of the ſtatute, *non erit ſuperſedendum*, &c. and againſt the book of 39 E. 3. *ubi ſupra*. 2. That in caſe of *aide prier* of the king, or of the writ *de domino rege inconſulto*, no ſearch ought to be granted, but onely in a petition of right.

2 H. 7. 7, 8. 39 E. 3. 12, 13. 14 E. 3. ca. 14. 9 E. 4. 32. Dier. 15 Eliz. 320.

And if aid had been in any of theſe three caſes erroniouſly granted, the tenant or defendant ſhould have a *procedendo ſine dilatione*, that is, without delay, and of courſe, which is the ſenſe of theſe words.

CAP. III. [271]

DE dotibus mulierum ubi aliqui cuſtodes hæreditat' maritorum ſuorum cuſtodias habent ex dono vel conceſſione regis, ſive cuſtodes rem petitam teneant, ſive hæredes dictorum tenementorum vocentur ad warrant', ſi exciſiant, quod ſine rege reſpondere non poſſint, non ideo ſuperſedeatur, quin in loquela prædict', prout juſtum' fuerit, procedatur.

CONCERNING the endowment of women, where the guardians of their huſbands inheritance have wardſhip by the gift or grant of the king, or where ſuch guardians be tenants of the thing in demand; or if the heirs of ſuch lands be vouched to warranty, if they ſay that they cannot anſwer without the king: they ſhall not furceaſe upon the matter therefore, but ſhall proceed therein according to right.

(Fitz. Aid de Roi, 11, 12. 17. 30. 34. 37, &c.)

This ſtatute having not been put in print untill towards the latter part of the raigne of H. 8. and thereby, as it ſeemeth, not commonly known; there have divers aide prayers been graunted directly againſt both the points of the purview of this ſtatute, as well when the writ of dower hath been brought againſt the kings grauntee

8 E. 3. 15. 18 E. 3. 38. 19 E. 3. aide le Roy 64. 39 E. 3. 8. 46 E. 3. 19. 13 R. 2. bre. 646. 11 H. 4. 39. 5 H. 5. 13. F.N.B. 154. d.

4 H. 7. 1, 2. 8 E. 2. Dower 169. Li. 9. fo. 15, 16. Anna Bedingfields cafe. Ad Parliam. tent' poſt feſtum S. Hil. 18 E. 1. fo. 6.

grauntee or committee, as where the heire came in as vowchee in his cuſtody; and the like rule Brian gave in 4 H. 7. but when juſtice Townefend remembred him of this ſtatute of Bigamis, the aide was over ruled.

And at the parliament holden in 18 E. 1. an act is in the parliament roll thus entred, *Quod viduæ recipiant dotem de terris in cuſtodia regis exiſtentibus, dominus rex præcepit juſticiariis de banco, quod viduæ poſt mortem virorum ſuorum petant dotem ſuam, &c. et quod in placitis illis procedant ſecundum communem legem regni, et quod partibus faciant debitum juſticiæ complementum.*

So as ſeeing the letter of this chapter of 4 E. 1. extends but where the king hath graunted the cuſtody over, or where the heire came in as vowchee, this act of 18 E. 1. made about fourteen yeares after, addeth, that theſe widowes ſhall recover dower againſt the heire in the cuſtody of the king, where the king grauntch not the cuſtody to any, but keepeth the lands in his owne hands. And I am verily perſwaded, that ſeeing the graunting of aide, where no aide was grauntable, was not any error (whereby the judgement might be reverſed) ſome judges either for that cauſe, or for feare, have graunted aide of the king in many caſes, where it was not to be graunted by law, and the rather, for that in ancient times aides of the king were little or no delay at all; for writs of *procedendo* were ſpeedily graunted, whereas of later times aides prayers, and ſpecially writs *de domino rege inconſulto* are uſed meerly for delay of juſtice, and that for no ſmall time.

CAP. IV.

DE purpreſturis (1), *ſeu occupationibus* (2) *quibuſcunque factis ſuper regem, ſive in libertatibus, ſive alibi* (3). *Concordatum eſt quod tempore regis H. diffinitum erat et concordat', quod ubi occupatores ſuperſtites fuerint* (4), *rex de plano reſumat* * (5) *ibi rem taliter occupatam de manibus occupantium, quod etiam de cætero in regno obſervetur. Et ſi aliquis de hujuſmodi reſumptionibus conqueratur* (6), *prout juſtum fuerit, audiatur.*

CONCERNING purpreſtures, or any manner of uſurpations, made upon the king within franchiſes, or elſewhere, it was agreed and determined in the time of king Henry, that where ſuch uſurpers were living, the king ſhould reſeiſe of new the land ſo uſurped out of the hands of the uſurpers; the which thing alſo ſhall be from henceforth obſerved in the realm; and if any do complain upon ſuch reſeiſers, he ſhall be heard like as right requireth.

17 E. 2. cap. 13. (9 Rep. 16. Fitz. Dower, 169. 17 Ed. 2. c. 13)

This act is but a confirmation of a former ſtatute made in the raigne of king H. 3.

(1) *De purpreſturis.*] *Purpreſtura* commeth of the French word *turpriſe*, or *pourpris*, which ſignifieth an incloſure or building, and in legall underſtanding ſignifieth an incrochment upon the king, either upon part of the kings demeſne lands of his crown, which

are

are accounted in law as *res publicæ, et ſemper favorabile fuit in omni republica principis patrimonium*; or in the high-wayes, or in common rivers, or in the common ſtreets of a city, or generally when any common nuſans is done to the king and his people, endeavouring to make that private, which ought to be publique, which Glanvill very aptly deſcribeth in theſe words, *Dicitur autem purpreſtura, vel porpreſtura propria, quando aliquid ſuper dominum regem injuſte occupatur, ut in dominicis regis, vel in viis publicis obſtruēd', vel in aquis publicis tranſverſis à recto curſu, vel quando aliquis in civitate ſuper regiam plateam aliquid ædificando occupaverit, et generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regiæ viæ, vel civitatis.* Glanv. li. 9. cap. 11.

It was an article of the eyre before this act to enquire *De purpreſturis factis ſuper dominum regem, ſive in terra, ſive in mari, ſive in aqua dulci, ſive infra libertatem, ſive extra.* Cap. Itineris.

It appeareth alſo by Glanvill, that there be alſo purpreſtures done to ſubjects, but this chapter treateth onely of purpreſtures done to the king and his people.

(2) *Seu occupationibus.*] Here *occupationes* are taken for uſurpations upon the king, and it is properly, when one uſurpeth upon the king by uſing of liberties and franchiſes, which he ought not to have: and as an unjuſt entry upon the king into lands or tenements is called an intruſion, ſo an unlawfull uſing of franchiſes or liberties is ſaid an uſurpation, but *occupationes* in a large ſenſe are taken for purpreſtures, intruſions, and uſurpations.

(3) *Seu in libertatibus, ſive alibi.*] That is to ſay, within liberties, or places that have franchiſes, or priviledges, or without.

(4) *Ubi occupatores ſuperſtites fuerint.*] This was a law of great equity, for it extended not but to the wrong doers themſelves.

(5) *Rex de plano reſumat.*] That is, may clearly reſeiſe. But this is to be intended upon due conviction, for ſo ſaith Glanvill, *Et qui per juratam ipſam aliquam hujuſmodi feciſſe purpreſturam convictus fuerit, in miſericordia domini regis remaneat, &c. et quod occupavit, reddet.* Glanv. ubi ſupra.

(6) *Et ſi aliquis de hujuſm' reſumptionibus conqueratur, &c.*] And yet ſuch reſeiſures ſhall not be finall, but the party grieved may complaine of ſuch reſeiſures, *Et prout juſtum fuerit, audiatur.*

CAP. V. [273]

DE *bigamis* (1) *quos dominus papa in concilio ſuo Lugdunenſi* (2) *omni privilegio clericali privavit, per conſtitutionem inde editam, et unde quidam prælati* (3) *illos qui effecti fuerant bigami ante prædictam conſtitutionem, quando de felonia rettati fuerunt, tanquam clericos exegerunt ſibi liberandos: concordatum eſt et declaratum coram rege et concilio ſuo, quod conſtitutio illa intelli-*

CONCERNING men twice married, called *bigami*, whom the biſhop of Rome, by a conſtitution made at the council of Lions, hath excluded from all clerks priviledge, whereupon certain prelates (when ſuch perſons have been attainted for felons) have prayed for to have them delivered as clerks, which were made *bigami* before the ſame conſtitution; it is agree

intelligenda ſit (4), *quod ſive effecti fuerint bigami ante prædictam conſtitutionem, ſive poſt, de cætero non liberentur prælatis, immo fiat eis juſticia ſicut de laicis.*

agreed and declared before the king and his councill, that the ſame conſtitution ſhall be underſtood in this wiſe, that whether they were *bigami* before the ſame conſtitution, or after, they ſhall not from henceforth be delivered to the prelates, but juſtice ſhall be executed upon them, as upon other lay people.

(Altered by 1 Ed. 6. c. 12. Raſt. 106. 1 Jac. 1. c. 11.)

Mirror, ca. 3. de excepc. de Clergy. Britton, fo. 11. b. Fleta, li. 1 c. 32. 11 H. 4. 10. 18 E. 3. ca. 3. 2 E. 6. c. 12. Stam. Pl. Co. 135. Per decret. Epiſtol' Gregor. 9. lib. 6. decretal. a Bonifacio 8. in Lugdunenſi conc' edit. Britton, fo. 225. Fleta, li. 1. c. 32. Bract. l. 4 fo. 247.

(1) *De bigamis.*] *Bigamus* is he that either hath maried two or more wives, or that hath maried a widow, as it appeareth in the ſtatutes of 18 E. 3. cap. 2. 1 E. 6. cap. 12.

(2) *Concilium Lugdunenſe,* &c.] The conſtitution here mentioned is in theſe words, *Altercationis antiquæ dubium præſentis declarationis oraculo decidentes bigamos omni privilegio clericali declaramus eſſe nudatos, et curtioni fori ſecularis addictos, conſuetudine contraria non obſtante; ipſis quoque anathemate prohibemus deferre tonſuram, vel habitum clericalem.*

This conſtitution is hereafter in this chapter explained.

This councell was holden at the city of Lyons in France, Bonifacius the eight being pope.

At the councell of Lyons, Britton and Fleta ſay, at Lateran ſaith Bracton, the pope endeavoured to take away the preſentations from princes and lay patrons to preſent by laps, for that the conſtitution ſaith, *Quod collatio beneficii eſt res ſpiritualis, et aliter credentes eſſent hæretici, &c.* and the common law ſaith, that a preſentation to a benefice is temporall, and ſo it is declared by divers acts of parliament.

Regiſt. 18 E. 3. 21. 38 E. 3. 2. 27 E. 3. 8. 5 E. 3. 26. 11 H. 4. 80. 13 E. 4. 3. Doct. et Stud. 116. F.N.B. 38. f. & 35. a. See W. 2. ca. 5. verbo ſemeſtre.

At this councell after ſixe moneths the dioceſan ſhall preſent: the Regiſter ſaith, that to preſent by laps was *dioceſanis ſpecialiter indultum* after ſixe months, and yet if after the ſixe moneths the patron preſent before the dioceſan collate, he ought to receive his clerk, notwithſtanding the generall councell.

But when the kings turn came to preſent *jure coronæ* by laps, the Regiſter ſaith, *Nullum tempus occurrit regi ex conſuetudine hactenus obtent' in regno Angliæ,* ſo as the councell did not binde the right of the king, nor could the dioceſan preſent by laps untill it was *ei indultum*; that is, untill it was allowed to him by conſent of the realme with ſuch limitations and reſtrictions, and with binding him in many caſes to give notice, as was thought juſt and reaſonable in ſubjects caſes, for the better ſervice of God and inſtruction of the people. But the king, who is *ſupremus dominus,* loſeth not his preſentation by any laps at all, the ſaid conſtitution notwithſtanding.

[274] See Art. Cler. cap. 15. 2 R. 2. cap. 6.

(3) *Unde quidam prælati,* &c.] Certain prelates did interpret the ſaid generall councell to extend onely to ſuch as became *bigami* after the councell, and they challenged ſuch clerks, as were *bigami* before that councell, when they were arraigned for felony, and required to have delivery of them.

But hath the parliament power in theſe caſes to make declarations? yea, and in greater, for by authority of parliament it was declared,

declared, that Urban the twelfth was duly elected, and ought to be accepted pope; the truth is, that the cardinals forsook Urban, and accepted Clement the seventh, therefore it was enacted that all benefices and possessions of cardinals rebels within England should be seised, &c.

This schisme between these two popes continued 39 years, till the councell of Constance, one cursing and warring with another, in so much, that by reason of this schisme, above 200,000 Christians were miserably slain, this Urban drowned, five cardinals slew the bishop of Aquitane, gave authority to Spencer bishop of Norwich against Clement the anti-pope. Theorike Crantz.

(4) *Concordatum est et declaratum coram rege et concilio suo quod constitutio illa intelligenda sit.*] Here the king by advise and counsell of his high court of parliament doth expound and explain this constitution made at the said generall councell, and declareth where clergy should be taken away in respect of bigamy.

And this interpretation of the parliament was against the practise of the prelates, as before it appeareth, and contrary to the custome before used, as by the constitution it self appeareth.

But the true cause of this declaration by act of parliament was, that seeing the judges of the common law were judges of allowance or disallowance of clergy to him that was arraigned of felony, and that the said constitution tooke away the priviledge of clergy, and by consequent the life of man, the judges, before they allowed of the said constitution, would have it declared by authority of parliament. 12 E. 3. Cor. 117. 34 H. 6. 42. 9 E. 4. 29. 22 E. 4. Coron. 44. 15 H. 7. 9.

This law to deprive men that were *bigami* of the priviledge of their clergy was complained of in parliament, in 51 E. 3. and by king E. 6. in the first year of his raigne wholly abrogated and taken away. Rot. Parl. 51 E. 3. nu. 63. 1 E. 6. c. 12.

It fell out at this councell of Lyons mentioned in our act (as our histories report) that the popes wardrobe in that city (wherein was that detestable charter which king John made to the pope to bring the crown of England in servage to the see of Rome) then was wholly consumed with fire; a divine and fiery revocation of that most unjust and forceleste charter, as was unanimously resolved both in parliament and elsewhere. William Thorn, Thomas Sprotte, &c. Rot. Parl. anno 40 E. 3. nu. 8. Rot. claus. 3 E. 1. memb. 9. in schedula.

CAP. VI.

IN chartis autem ubi continentur (dedi et concessi tale tenementum sine homagio (1), *vel sine clausula quæ continet warrantiam, et tenend' de donatoribus et hæredibus suis* (2) *per certum servitium) concordat' est per eosdem justiciar'* (3), *quod donatores et hæredes sui teneantur ad warrantiam. Ubi autem continentur (dedi et concessi, &c.) tenendum de capitalibus dominis feodi, aut*

IN deeds also where is contained *dedi et concessi tale tenementum* without homage, or without a clause that containeth warranty, and to be holden of the givers, and their heirs, by a certain service; it is agreed, that the givers, and their heirs, shall be bounded to warranty. And where is contained *dedi et concessi, &c.* to be holden of the chief lords of the fee, or of

*aut de aliis, quam de feoffatoribus, vel hæredibus ſuis, nullo ſervitio ſibi retento, ſine homagio *, vel ſine dicta clauſula warrantiæ, hæredes ſui non teneantur ad warrantiam. Ipſe tamen feoffator in vita ſua* (4) *ratione doni proprii tenetur warrantizare* (5). *Prædict' autem conſtitutiones editæ fuerunt apud Weſtmonaſterium in parliamento poſt feſtum Sancti Michaelis, anno regni regis E. filii regis H. quarto, et extunc locum habeant.*

of other, and not of feoffors, or of their heirs, reſerving no ſervice, without homage, or without the foreſaid clauſe, their heirs ſhall not be bounden to warranty, notwithſtanding the feoffor during his own life, by force of his own gift, ſhall be bound to warrant. All theſe conſtitutions aforeſaid were made at Weſtminſter, in the parliament next after the feaſt of St. Michael, the fourth year of the reign of king Edward, ſon of king Henry; and from that time forth they ſhall take effect.

(Dyer 15, 221. 1 Rep. 1. 1. 3 Rep. 58. 4 Rep. 31. 5 Rep. 17. 8 Rep. 51.)

There be two branches of this act, and two conſequents thereupon, the firſt branch is, that where *dedi* is contained in a deed (albeit there be no other warranty) to hold of the donor and his heires (as at the making of this act, *viz.* in 4 E. 1. a man might have done) there the feoffor and his heires had beene bound to warranty, and this was the common law; for where *dedi* is accompanied with a perdurable tenure of the feoffor and his heirs, there *dedi* importeth a perdurable warranty for the feoffor and his heires to the feoffee and his heirs; and herewith agreeth Glanvill, *Tenentur autem hæredes donatorum donationes et res donatas ſicut rationabiliter factæ ſunt, illis quibus factæ ſunt, et hæredibus ſuis warrantizare.*

Glanv. l. 7. c. 2.

And Bracton herewith agreeth ſaying, *Et ſciendum eſt quod ad omnes chartas de ſimplici donatione competit tenenti warrantizatio, et tenentur donatores et eorum hæredes ad warrantiam, ſi hora congrua, et modo debito cum proſecutione competenti vocati fuer' ad warrantiam, niſi forte in charta de feoffamento contrarium exprimitur.* And in thoſe dayes regularly the donee did hold of the donor, unleſſe there were a ſpeciall limitation to the contrary. And when the feoffement was made by this word [*dedi*] to hold of the donor and his heires, then he and his heires are bound to warranty.

Bracton, lib. 5. fol. 388. b

31 E. 1. Vowcher 290.

The conſequent is, that although there be an expreſſe warranty contained in the deed, yet that taketh not away the warranty that is wrought by force of *dedi*, but the feoffee may take advantage either of the one, or the other at his pleaſure.

20 E. 3. Count. de garr. 7. 31 E. 3. Vow. 286. Li. 4 81. Nokes caſe.

The ſecond branch is, that where *dedi* is contained in the deed, to hold of the chiefe lord, and not of the feoffor, there, although there were no other warranty in the deed, the feoffor ſhall be bound to warranty during life. Britton ſaith, *Si le purchaſor ſoit del done challenge in ſa ſeiſin, ſi ert le donor tenu de garranter auter ſin done tant come il vivera, tout ne ſoit a ceo oblige per eſpecialtie de eſcript tout face le purchaſor de ceo homage a auter que al donor, ſicome al chiefe Seigniour.*

Britton, fo. 88. b.

31 E. 1. Vowcher 290.

If the gift be made to hold of the chiefe lord of the fee, then *dedi* bindes none to warranty, but him that made the gift.

6 E. 2. Vouch. 258. 39 E. 3. 20 2 H. 7 7.

And it is to be known that ſince the ſtatute of *quia emptores*, 18 E. 1. the feoffee in fee ſimple doth hold of the chiefe lord, and therefore

therefore at this day in that caſe the feoffor is onely bound to warranty during his life; but if a man at this day give lands in taile by the word *dedi*, the donor and his heires are bound to warranty; and ſo it is of a leaſe for life, reſerving a rent, though it be without deed.

6 H. 7. 2.
20 E. 3. Count. de garr. 7.
6 E. 3. 11. 22 Aſſ. 52. 18 E. 3. 8 14 H. 6. 25.
6 H. 7 2. 10 H. 7. F. N. B. 134 h.
5 Eliz. Dier 121. Nokes caſe, ubi ſupra.

The conſequent hereupon is, that albeit there be in this caſe of the ſecond branch an expreſſe warranty, the feoffee may take advantage of the one or the other, as upon the firſt branch hath been ſaid. See for this Nokes caſe aboveſaid.

(1) *Sine homagio.*] The law was generally holden in thoſe dayes, that homage being parcell of the tenure reſerved to the feoffor and his heires, imported a warranty to the feoffee and his heires, and ſo much is implied by theſe words in this act, *ſine homagio*, that is, without any warranty by reaſon of homage, but that was ever intended, ſo long as the tenancy continued * by deſcent in blood of the firſt purchaſer, for if the tenement were tranſferred out of his blood by feoffment, or any other tranſlation, in that caſe the tenant ſhould vouch his feoffor or his heirs, if he had any warranty, but not in reſpect of the homage: and that this was the ancient law, appeareth by Glanvile, who ſaith, *Si aliquis alicui donaverit aliquod tenementum pro ſervitio et homagio ſuo, quod poſtea alias verſus eum diverſionaverit, tenebitur quidem dominus tenementum illi warrantizare, vel competens excambium ei reddere. Secus eſt tamen de eo, qui de alio tenet feodum ſuum ſicut hæreditatem ſuam, et inde fecerit homagium, quia licet is terram illam amittat, non tenebitur dominus ad eſchambium*; and this is ſignified in the doing of homage, *Homagium ſi dominus recipere voluerit, tunc in ſignum warrantiæ acquietationis et defenſionis manus tenentis infra manus ſuas tenere debet, dum tenens profert verba homagii.* And this day it holdeth in caſe of homage aunceſtrell.

Glanv. li. 9. c. 4.
14 H. 6. 25.

Vide the firſt part of the Inſtitutes ubi ſup.
31 E. 1. Voucher 290.

(2) *De donatoribus et hæredibus ſuis.*] So it is if a body politique or incorporate had by deed, wherein *dedi* was contained, infeoffed another to hold of him and his ſucceſſors, this had created a like warranty, as in this act is mentioned.

(3) *Concordatum eſt per eoſdem juſticiarios.*] That is (as hath been ſaid before) enacted according to the advice, and reſolution of the juſtices.

(4) *Ipſe tamen feoffator in vita ſua.*] The letter of this act extends but to the feoffor upon a feoffment made, but if *dedi* doth enure by way of releaſe or confirmation, it importeth a warranty during the life of him that makes the deed; ſo it is if a reverſion expectant upon an eſtate for yeers, life, or in tail be granted by this word *dedi*, and attornment had, here *dedi* doth import a warranty, though the ſtate paſſeth not by way of feoffment; ſo it is of a rent, of an advowſon, or the like.

Bracton ſaith, *Si vero charta fuerit de confirmatione, non ſequitur inde warrantizatio, niſi in ſe contineat donationem; ut ſi dicatur, do, et confirmo tali et hæredibus ſuis, &c.* If a man by *dedi* letteth land for life, by this the leſſee ſhall vouch the leſſor (though the reverſion be granted away) and yet the leſſor is not properly *feoffator*.

Bract. ubi ſupra.
48 E. 3. 2. a.
14 H. 6. 25.

(5) *Ratione doni proprii tenetur warrantizare.*] Albeit in two places before in this act *dedi et conceſſi* are coupled together, yet theſe words *ratione doni proprii* do appropriate the warranty to *dedi* oncly;

11 H. 6. 41.
11 H. 4. 41.
14 H. 6. 25.
6 H. 7. 2. F.
13. 4. h.

* [276]

onely; and agreeable to this expoſition in our books is the common and conſtant opinion of learned men at this day.

39 E. 3. 26. Two jointenants make a feoffment in fee by this word *dedi*, the one dyes, the ſurvivour ſhall be vouched, and render in value for
11 H. 7. 13. the whole; for though the ſtate paſſed from both, and the ſtatute ſaith, *ratione doni proprii*, yet each of them did warrant the whole by this word *dedi*, otherwiſe the ſurvivour ought not to have yeelded the whole in value, as it hath been adjudged; and the reaſon is, for that the heir of the jointenant that dieth cannot be bound by the warranty created by this word *dedi*.

But if two jointenants make a feoffment in fee, with an expreſſe warranty for them and their heirs to the feoffee and his heirs, and the one of them dye, the ſurvivour ſhall not be vouched alone, but the heir alſo of the other, and the recompence in value ſhall lye equally upon them; but if the one of them have nothing, the other ſhall anſwer the whole; for it is a maxime in law, *Quando de una et eadem re duo onerabiles exiſtunt, unus pro inſufficientia alterius de integro onerabitur.* But in the ſaid caſe of *dedi*, the ſurvivour was onely chargeable with the warranty.

[277]

STATUTUM de GLOCESTER.

Editum Anno 6 Edw. I.

THIS parliament was holden at Glocester bordering upon Wales, for the better preſervation of peace in Wales, Lluellin prince of Wales, and the Welſh-men being a little before this parliament brought to quietneſſe.

LAN du grace M. CC. lxvii. (1) *et del raigne le roy Ed. fits le roy Henry vi. a Glouceſtre le moys Dauguſt, purview ante meſme le roy, pur amendement de ſon roialme, et pur plus pleiner exhibition de droit* (2) *ſicome le profit doffice demaunde, appelles les pluis diſcrectes de ſon roialme, auxibien des greinders come des meinders. Eſtablie eſt et concordantment ordaine, que come meſme le roialme en pluſours divers caſes, auxibien des franchiſes, come dauters choſes, en les quels ley avant fallit, et a eſchever les treſgreves damages, et les nient numerables diſberiſons, les quels icel maner default de ley fiſt a la gent du roialme, eit meſtier de divers ſuppletions de ley, et de novels purveiances: les eſtatutes, ordeinments, et purveyances ſuis eſcriptes de tout la gent de la roialme deſormes ſoient firmement gardes, come prelates, countees, barons, et auters del roialme clament daver divers franchiſes, et les quels examiner' et judger', le roy a meſmes les prelates, countees, barons, et auters, avoit done jour. Purview eſt, et concordantment grante, que les avantdits prelates, countees, barons, et auters cel maner de franchiſe uſent, iſſint que rien ne lour accreſer per uſurpation, ou occupation, ne rien ſur le roy occupient, jeſque al prochein venue ceo roy per le countie, ou a le procheine venue des juſtices errants, as common plees en meſme le countie, ou jeſques le roy commande*

autr

*auter choſe: ſave le droit le roy cõme il en voudra parler, ſolonque ceo que il eit contenue en le briefe le roy. Et de ceo ſoient maundes briefes as viſcontes, bailifes, ou auters purcheſcun demandant. Et ſoit la forme del briefe change, * ſolonq; la diverſitie des franchiſes, les quels cheſcun claime daver. Et les viſcontes per touts lour baillies ferront communement cryer, ceſtaſcavoire, en cities, burghes, et villes merchandes, et aylors, que touts ceux que aſcuns franchiſes claimeut aver per les charters les predeceſſors le roy, royes Dengleterre, ou en auter maner, ſoient devant le roy, ou devant juſtices en eire a certaine jour et lieu, a monſtrer quel manner de franchiſes ils claimant daver, et per quel garrant. Et les viſconts meſmes donques ſerront illonq; perſonalment, ou lour bailifes et miniſters a certifier le roy ſur les avantdits franchiſes, et auters choſes que celles franchiſes touchent. Et ceſt crie deſtre devant le roy conteigne garniſement dee iij. ſemaignes. Et in meſme le maner ſerront les viſconts crier en oyer de juſtices. Et in meſme le maner ſerront ils perſonalment, ou lour bailifes, et lour miniſters, a certifier les juſtices de tiel maner de franchiſes, et des auters choſes que celles franchiſes touchent. Et ceſt crie conteigne garniſement de quarante jours, ſicome le common ſummons contient: iſſint que ſi la partie, que claime daver franchiſes, ſoit devant le roy, ne ſoit paz mis en defaut devant les juſtices en eyre, pur ceo que le roy de ſa grace eſpeciall ad grant, que il gardera la partie de dammage quant a cel ajornement. Et ſi cel party ſoit impled' ſur tiels maners de franchiſes devant un payer de juſtices avantdits, meſmes les juſtices devant les queux la partie eſt en plee, garderent le partie de dammage devant auters juſtices, et devant le roy luy meſme, meſq; il ſache per les juſtices, que le partie fuit en plee devant eux, ſicome il eſt avantdit. Et ſi ceux que tiels franchiſes claiment aver, ne veignent paz al jour avantdit, donques ſoient les franchiſes en noſine de diſtreſſe priſes en la maine le roy per le viſcont del lieu, iſſint quils tiel manner de franchiſes ne uſent, jeſques ils veigne a receiver droit. Et quant ils veignent per cel diſtres, lour franchiſes eux ſoient replevies ſils les demand, les quels replevies reſpoignent maintenant in la forme avantdit. Et peradventure les parties exceptent, quils ne debuient nient de ceo reſpondre ſans briefe original, donques ſil puiſſe eſtre ſure que eux de lour proper fait, eient uſurpe ou occupy aſcuns franchiſes ſur le roy, ou ſur ſes predeceſſors, dit lour ſoit que maintenant reſpoignent ſans briefe, et puis reſceivent judgement, ſicome le court le roy agardera. Et ſils dient* [279]
ouſter, que lour anceſter, ou lour anceſters de meſmes les franchiſes morront ſeiſies, ſoient oyes, et maintenant ſoit le verity enquiſe, et ſolonque ceo aillent les avant en le beſoigne. Et ſil ſoit trove que lour anceſters ent moruſt ſeiſie: donques eit le roy briefe original de ſa chancery en forme fait de ceo. Le roy mande ſalute au viſcount: ſummones per bone ſummonours un tiel, que il ſoit devant nous a tiel lieu en noſtre prochein venue en cel countie, ou devant nous juſtices a primer aſſiſes, come ils en celles parties veindront, a monſtrer per quel grant il claime daver quitance de torn' pur ſey ou pur ſes homes per tout noſtre roialme per continuation apres la mort tiel ja dis ſon predeceſſor. Et eiets les ſummonours et ceo briefe. Et ſi les parties veignont al jour, reſpoignent, et ſoit reply et juge. Et ſils ne veignent, ne ſoy eſloinent devant le roy, et ſi le roy demurra ouſter en cel county, ſoit commande au viſcont que il le face vener al quart jour. A quel jour ſils ne veignent, et le roy demurr' ouſter en cel county, ſoit fait ſicome en eyre de juſtices. Et ſi le roy depart del countie, ſoient les parties ajornes a briefe jour, et eint reaſonables delaies, juxte les diſcretions des juſtices, ſicome en actions perſonal. Et les juſtices en eyre facent de ceo en lour oyers ſolonque lordeinment avantdit, et ſolonque ceo que tiel maner de plees debuient eſtre deduct. En oyer de pleints faits et affaires des bailifes le roy, et dauters bailifes, ſoit fait ſolonque lordeinment

deinment avant fait de ceo, et ſolonque les enqueſts de ceo avant priſes, et de ceo ferront les juſtices en eyre ſolonque ceo que le roy lour ad enjoynt, et ſolonque les articles que le roy lour ad livere. Vide tout ceo in Latin pluis plaine 30 E. 1. leſtat' de Quo warranto, tit. Franchiſes 5.

[*The ſaid ſtatute of* Quo Warranto, *being neceſſary to the intelligence of our author's commentary, is here ſubjoined.*]

ANNO Domini M.CC.LXXVIII. regni autem domini regis E. ſexto, apud Glouceſt. menſe Auguſti, providente ipſo domino rege, ad regni ſui Angliæ melioracionem, et exhibicionem juſtice pleniorem, prout regalis officii expoſcit utilitas, convocatis diſcretioribus ejuſdem regni, tam ex majoribus quam minoribus, ſtatutum eſt, concordatum et ordinatum, quod cum regnum Anglie in diverſis caſibus, tam ſuper libertatibus, quam in aliis in quibus prius lex deficiebat, ad evitand' incommoda gravia et importabilia, quæ hujuſmodi legum defectus induxerat, diverſis legum ſuppletionibus, et novis quibuſdam proviſionibus indigeat, proviſiones, ordinationes, et ſtatuta ſubſcripta ab omnibus regni ſui incolis de cetero firmiter ac inviolabiliter obſerventur. Cum prelati, comites, barones, et alii de regno noſtro diverſas libertates habere clamant, ad quas examinand' et judicand' rex hujuſmodi prelatis, com', baron', et aliis diem prefixerat, proviſ. eſt, et concorditer conceſſum (4), *quod dicti prelati, com', baron', et alii, hujuſmodi libertatibus utantur* (3) *in forma brevis ſubſcripti* (5):

THE year of our Lord M.CC. LXXVIII. the ſixth year of the reign of king Edward, at Glouceſter, in the month of Auguſt, the king himſelf providing for the wealth of his realm, and the more full miniſtration of juſtice, as to the office of a king belongeth (the more diſcreet men of the realm, as well of high as of low degree, being called thither) it is provided and ordained, That whereas the realm of England in divers caſes, as well upon liberties as otherwiſe, wherein the law failed, to avoid the grievous dammages and innumerable diſheriſons that the default of the law did bring in, had need of divers helps of new laws, and certain new proviſions, theſe proviſions, ſtatutes, and ordinances underwritten ſhall from henceforth be ſtraitly and inviolably obſerved of all the inhabitants of his realm. And whereas prelates, earls, barons, and other of our realm, that claim to have divers liberties, which to examine and judge, the king hath prefixed a day to ſuch prelates, earls, barons, and other; it is provided and likewiſe agreed, that the ſaid prelates, earls, barons, and other ſhall uſe ſuch manner of liberties, after the form of the writ here following:

Rex vic' ſalutem. Cum nuper in parliamento noſtro apud Weſtmonaſterium (6), *per nos et conſilium noſtrum proviſum ſit et proclamatum* (7), *quod prelati, comites, barones, et alii de regno noſtro, qui diverſas libertates per chartas progenitorum noſtrorum regum Angliæ habere clamant, ad quas examinandas et judicandas diem præfixerimus in eodem parliamento, libertatibus illis taliter uterentur, quod nihil ſibi per uſurpationem ſeu occupationem accreſcerent, nec aliquid ſuper nos occuparent, tibi precipimus, quod omnes illos de comitatu tuo libertatibus ſuis quibus hucuſque rationabiliter uſi ſunt* (8) *uti et gaudere*

gaudere permittas in forma prædicta, uſque ad proximum adventum noſtrum per comitatum prædictum, vel uſque ad proximum adventum juſticiariorum itinerantium (9) *ad omnia placita in comitatu, vel donec aliud inde præceperimus: ſalvo ſemper jure noſtro cum inde loqui voluerimus. Teſte, &c.*

Eodem modo et in eadem forma dirigantur brevia vic' et aliis ballivis pro quolibet petente, et mutetur forma ſecundum diverſitatem libertatis, qua quis habere clamat, ſic:

In like manner and in the ſame form writs ſhall be directed to ſheriffs and other bailiffs for every demandant, and the form ſhall be changed after the diverſity of the liberty which any man claimeth to have, in this wiſe:

Rex vic' ſalutem. Præcipimus tibi, quod per totam ballivam tuam, videlicet, tam in civitatibus, quam in burgis, et aliis villis mercatoriis, et alibi, publice proclamari facias, quod omnes illi qui aliquas libertates per chartas progenitorum noſtrorum regum Angliæ, vel alio modo, habere clamant, ſint coram juſticiariis noſtris ad primam aſſiſam, ad oſtendendum cujuſmodi libertates habere clamant, et quo warranto, et tu ipſe ſis ibidem perſonaliter una cum ballivis et miniſtris tuis, ad certificandum ipſos juſticiarios noſtros ſuper his et aliis negociis illud tangentibus.

This clauſe of liberties, that beginneth in this wiſe, *Præcipimus tibi, quod publice proclamari facias, &c.* is put in the writ of common ſummons of the juſtices in eyre, and ſhall have a premonition by the ſpace of forty days, as the common ſummons hath; ſo that if any party that claimeth to have a liberty, be before the king, he ſhall not be in default before any juſtices in their circuits; for the king of his ſpecial grace hath granted, that he will ſave that party harmleſs as concerning that ordinance. And if the ſame party be impleaded upon ſuch manner of liberties before one or two of the foreſaid juſtices, the ſame juſtices, before whom the party is impleaded, ſhall ſave him harmleſs before the other juſtices; and ſo ſhall the king alſo before him, when it ſhall appear by the juſtices, that ſo it was in plea before them as is aforeſaid. And if the foreſaid party be afore the king, ſo that he cannot be the ſame day afore the ſaid juſtices in their circuits, the king ſhall ſave that party harmleſs before

Iſta clauſula de libertatibus que ſic incipit. Precipimus tibi, quod publice proclamari fac', &c. ponitur in brevi de communi ſumm' itin' juſtic', et habeat premunitionem quadraginta dierum (10) *ſicut communis ſummonitio habet: ita quod ſi pars aliqua, q. clamat habere libertatem, fuerit coram rege, non ponatur in defalta coram aliquibus juſticiariis in ſuis itineribus, eo quod rex de gratia ſua ſpeciali conceſſit conſervare partem illam indemnem, quo ad illam ordinationem. Et ſi pars illa ſit in placito ſuper hujuſmodi libertatibus coram domino pari juſtic' predictorum, iidem juſtic', coram quibus pars illa ſit in placito, conſervabunt eam indemnem coram aliis juſticiariis, et rex etiam coram ipſo, dum tamen conſtiterit per juſticiarios quod ſic fuerit in placito coram ipſis, ſicut predictum eſt. Et ſi pars predicta fuerit coram rege, ita quod ad diem coram juſtic' predictis in itineribus ſuis eſſe non poſſit, rex hujuſmodi partem indemnem conſervabit coram juſticiariis predictis in itineribus ſuis ad diem illum quo fuerit coram rege. Et ſi ad diem illum non venerit,*

nerit, tunc libertates ille nomine diſtrictionis capiantur in manum domini regis per vic' loci: ita quod eis non utantur, donec venerint coram juſticiariis reſponſ. Et cum per diſtrictionem venerint, replegientur libertates ſuæ, ſi eas petent: quibus replegiatis ſtatim reſpondeant ad formam brevis predicti. Et ſi forte excæperint, quod non tenentur ſine brevi originali inde reſpondere (11) *tunc ſi quoquo modo conſtare poſſit, quod ipſi de facto ſuo proprio aliquas libertates uſurpaverint, vel occupaverint ſuper regem, vel predeceſſores ſuos, dicatur eis quod ſtatim reſpondeant ſine brevi, et ulterius recipiant judicium, prout curia domini regis conſideraverit. Et ſi ulterius dicant, quod anteceſſores ſui inde obierint ſeiſiti, ſtatim audiantur, et ſtatim veritas inquiratur* (12), *et ſecundum hoc ad judicium procedatur. Et ſi conſtiterit quod anteceſſores ſui inde obierint ſeiſiti, tunc habeat rex brevi originale de cancellaria ſub hac forma:*

before the foreſaid juſtices in their circuits for the day, whereas he was before the king. And if he do not come in at the ſame day, then thoſe liberties ſhall be taken into the king's hands in name of diſtreſs, by the ſheriff of the place, ſo that they ſhall not uſe them until they come to anſwer before the juſtices; and when they do come in by diſtreſs, their liberties ſhall be repleviſed (if they demand them) in the which replevins they ſhall anſwer immediately after the form of the writ aforeſaid; and if peradventure they will challenge, and ſay that they are not bounden to anſwer thereunto without an original writ, then if it may appear by any mean, that they have uſurped or occupied any liberties upon the king, or his predeceſſors, of their own head or preſumption, they ſhall be commanded to anſwer incontinent without writ, and moreover they ſhall have ſuch judgement as the court of our lord the king will award; and if they will ſay further, that their anceſtors died ſeiſed thereof, they ſhall be heard, and the truth ſhall be inquired incontinent, and according to that judgement ſhall be given; and if it appear that their anceſtors died ſeiſed thereof, then the king ſhall award an original out of the chancery in this form:

Rex vic' ſalutem. Sum' per bonos ſummonitores talem, quod ſit coram nobis apud talem locum in proximo adventu noſtro in comitatum prædictum vel coram juſticiariis noſtris ad primam aſſiſam, cum in partes illas venerint, oſtenſurus quo warranto tenet viſum franciplegi in manerio ſuo de N. vel ſic, quo warranto tenet hundredum de S. in comitatu prædicto; vel, quo warranto clamat habere tholonium pro ſe et hæredibus ſuis per totum regnum noſtrum; et habeas ibi hoc breve. Teſte, &c.

Et ſi ad diem illum venerint, reſpondeant replicetur et triplicetur. Et ſi non venerint, nec eſſon' fuerint coram rege, et rex ulterius moretur in comitatu illo, precipiatur vic', quod faciat eos venire ad quartum diem.

And if they come in at the ſame day, they ſhall anſwer, and replication and rejoinder ſhall be made; and if they do not come, nor be eſſoined before the king, and the king do tarry longer in the ſame ſhire, the ſheriff

diem. Quo die si non venerint, et rex in com' illo extiterit, fiat sicut in itiner' justic' (13). *Et si rex a com' illo recesserit, adjornentur ad bres dies, et habeant dilationes competentes, juxta discretionem justic', sicut in actionibus personalibus. Etiam justic' itinerantes in itineribus suis faciant secundum ordinationem predictam, et secundum quod hujusmodi placita deduci debent in itineribus suis. De querimoniis factis et faciend' de ballivis regis et aliorum, fiat secundum ordinationem prius inde factam* (14) *et secundum inquisitiones prius inde captas: et ponatur clausula subscripta in brevi de communi summ' itiner' justic' ad communia placita directo vic', &c. quod tale est:*

sheriff shall be commanded to cause them to appear the fourth day; at which day if they come not, and the king be in the same shire, such order shall be taken as in the circuit of justices; and if the king depart from the same shire, they shall be adjourned unto short days, and shall have reasonable delays according to the discretion of the justices, as it is used in personal actions. Also the justices in eyre in their circuits shall do according to the foresaid ordinance, and according as such manner of pleas ought to be ordered in the circuit. Concerning complaints made and to be made of the king's bailiffs, and of other, it shall be done according to the ordinance made before thereupon, and according to the inquests taken thereupon heretofore; and the clause subscribed shall be put in a writ of common summons in the circuit of the justices assigned to common pleas directed to the sheriff, &c. and that shall be such:

Rex vic' salutem. Præcipimus tibi, quod publice proclamari facias, quod omnes conquerentes, seu conqueri volentes, tam de ministris et aliis ballivis nostris quibuscunque, quam de ministris et ballivis aliorum quorumcunque, et aliis, veniant coram justiciariis nostris ad primam assisam, ad quascunque querimonias suas ibidem ostendendas, et competentes emendas, inde recipiendas secundum legem et consuetudinem regni nostri, et juxta ordinationem nostram per nos inde factam, et juxta tenorem statutorum nostrorum, et juxta articulos eisdem justiciariis nostris inde traditos (15), *prout predicti justiciarii tibi scire faciant ex parte nostra. Teste meipso, &c. decimo die Decembris, anno regni nostri xxx.*

(1) *L'an du grace*, 1267.] This should be 1278. for that was *anno* 6 E. 1. this parliament being holden in August, *anno* 6 E. 1. for 1267. was in 51 H. 3. Vet. Mag. Chart. fol. 130.

This chapter concerning liberties and franchises, and the *quo warranto* (and intituled *Statutum de quo warranto*) hath been supposed by many to be enacted in Latin, *anno* 30 E. 1. and therefore some have omitted to insert it in the 6. yeare; but it is utterly mistaken: for the king in the 30. yeare did publish and proclaime this act under the great seale, and doth recite it to be made *anno Dom.* 1278. and in the 6. yeare of his raigne. *Vide* 14 E. 1. *Inter original' de anno* 14 E. 1. *Breve de libertatibus allocandis*, and there is another statute made in 18 E. 1. called *Statutum de quo warranto novum*, so called, in respect of this former statute. Lib. 9 fol. 28. In the case of Strata Marcella.

 And

And beſides, the ſtatute in French differeth from the recitall thereof in 30 E. 1. which, for that it agreeth with the record, we will follow it when we come to the body of the act.

(z) *Pur amendement de ſon realme, & pluis plenier exhibition de droit.*] Which by the ſaid proclamation in 30 E. 1. is rendred thus, *Ad regni ſui Angliæ melioratiouem, et exhibitionem juſticiæ pleniorem:* two excellent ends of a parliament, *regni melioratio*, that is for the common good of the kingdome, the parliament being *commune concilium*, and *exhibitio juſticiæ plenior*, for nothing is more glorious, and neceſſary, then full execution of juſtice.

And it is added, *Prout regalis officii expoſcit utilitas*; and accordingly at this parliament many profitable and juſt laws were made, as one ſpeaking of this parliament ſaith truly, *In quo quædam de regni ſtatu decreta ſunt, quæ nunc ut jura, et æquitate plena maxime ejurpantur.* And that I may ſpeak once for all, it is worthy of obſervation that the ſtatutes made in this noble kings time are ſo agreeable to common right and equity, as few or none of them have been abrogated, but being founded upon theſe two pillars (the amendment of the kingdome, and the due execution of juſtice) remaine and continue as juſt and conſtant laws to this day.

Pol. Virgil.

Vide Vet. Magna Charta, fo. 130. Stat. de Quo Warranto. Pol. Virgil.

(3) *Hujuſmodi libertatibus utantur*, &c.] For the better underſtanding of this act it ſhall be neceſſary out of hiſtory to ſhew the cauſe of the making hereof.

The truth is, that the king wanting money, there were ſome *innovatores* in thoſe dayes, that perſwaded the king, that few or none of the nobility, clergy, or commonalty, that had franchiſes of the graunts of the kings predeceſſors, had right to them for that they had no charter to ſhew for the ſame, for that in troth moſt of their charters either by length of time, or injury of wars and inſurrections, or by caſualty were either conſumed, or loſt: whereupon (as commonly new inventions have new wayes) it was openly proclaimed, that every man, that held thoſe liberties, or other poſſeſſions by graunt from any of the kings progenitors, ſhould before certain ſelected perſons thereunto appointed ſhew, *quo jure, quove nomine ill' retinerent*, &c. whereupon many that had long continued in quiet poſſeſſion, were taken into the kings hands, *Eo quod nulla tabella conſtarent*: Hereof the ſtory ſaith, *Viſum eſt omnibus edictum ejuſmodi poſt homines natos longe acerbiſſimum: qui fremitus hominum? quam irati animi? quanto in odio princeps eſſe repente cœpit?*

Aug. Charta. cap. 1. 9. 38.

The good king underſtanding hereof, and finding himſelfe abuſed by ill counſell, and conſidering the ſtatute of Magna Charta, at the parliament holden in the end of his fourth yeare by proclamation, and at the petition of the lords and of the commons now at this parliament, by authority of parliament provideth remedy, as hereafter you ſhall heare: this is fully agreed upon in all our hiſtories, onely the time in ſome of them (as oftentimes in other caſes it falleth out) is miſtaken, which by this act ſhall be rectified according to true chronologie.

(4) *Proviſum eſt et concorditer conceſſum.*] It was rightly ſaid *concorditer conceſſum*, for that the ſaid innovation was like to have beene a cauſe of great diſcord between the king and the better ſort of his ſubjects.

(5) Quod

(5) *Quod dicti prælati, comites, barones, et alii hujusmodi libertatibus utantur in forma brevis subscripti.*] This * forme of a writ is more satisfactory, then any other forme is, and this was the auncient use.

(6) *Cum nuper in parliamento nostro apud Westm'.*] That is, in the last parliament holden after Michaelmas, towards the end of the fourth yeare of his raigne, and therefore the great grievances aboveſaid muſt be before that parliament, for the cure was after the diſeaſe, and the remedy after the grievance.

(7) *Proviſum ſit et proclamatum.*] But this was never (that I can finde) recorded: now by this act it is provided that a writ ſhall be graunted.

(8) *Quibus hucuſque rationabiliter uſi ſunt.*] See the Regiſter 162, 163. *De libertatibus allocandis*, & F. N. B. 229, 230.

(9) *Uſque ad adventum noſtrum per comitatum prædictum, vel uſque proximum adventum juſticiariorum itinerantium*, &c.] That is, untill the court of kings bench came thither, or the next comming of the juſtices in eyre: ſo all men ſhould quietly enjoy their franchiſes, which they had reaſonably uſed, untill the court of kings bench, or untill the juſtices in eyre came into that county: here it is to be obſerved, that this good king and his councell in parliament referred the party grieved to a legall proceeding, which implieth, that a contrary courſe was holden before. But you will demand, What remedy was this for him, that could not produce his charter, to be left to the law? I anſwer, that this was a full and perfect remedy according to juſtice and right; for the better apprehenſion whereof theſe diſtinctions are to be obſerved: Firſt, theſe franchiſes intended by this act be of two ſorts, the one may be claimed by uſage and preſcription, as wreck of the ſea, waife, ſtray, faires, markets, and the like, which are gained by uſage, and may become due without matter of record: and felons goods, outlawes goods, and the like, which grow not due but by matter of record, and therefore cannot be claimed by uſage in *pais*, but by charter: and yet all theſe at the firſt were derived from the crowne.

8 E. 3. 18. 17 E. 3. 11. 26 Aſſ. 24. 30 Aſſ. 31. 34 Aſſ. 14. 38 Aſſ. 1. 1 H. 4. 3. 12 H. 4. 23. 8 H. 6. 8. 2 E. 4. 22. 7 H. 6. 33. 9 H. 7. 12. 10 H. 7. 14. 16 H. 7. 16. 20 H. 7. 7. Kelwey 189, 190. 8 H. 8.

Secondly, *Judicis officium eſt, ut res, ita tempora rerum quærere*; all theſe were graunted either before the time of memory, or after the time of memory: if before the time of memory, then for the former ſort, ſuch as might be claimed by preſcription, the party grieved might preſcribe, and by law he ought to be relieved. And for ſuch as lay in point of charter graunted before time of memory, the party grieved had two remedies, either by allowance, or confirmation; by allowance in the kings bench, or before the juſtices in eyre, and in ſome caſe before the juſtices of the court of common pleas, and in the exchequer; or by confirmation of the king under the great ſeale: and theſe were ſufficient for him without ſhewing the charter, and the equity of the law herein was notable, for that no charter before time of memory was pleadable by law.

18 H. 6. preſcript. 45. 2 E. 3. 29. 8 H. 8. Kelwey 189. Stat. de 18 E. 1. De quo warranto novum. Lib. 9. fo. 29. in caſe de Strat' Marcella.

If thoſe franchiſes either of the one ſort or other were graunted within memory, yet if the ſame had been allowed, as is aforeſaid, the ſame might alſo be claimed by force of the charter and allowance, without ſhewing the charter, becauſe it had been adjudged and allowed of record. And it is to be knowne that all franchiſes, which any man had either by preſcription or by charter, ought to

be claimed before juſtices in eyre, or elſe for non-claime the ſame might bee loſt, as hereafter ſhall bee ſaid: ſo as the remedy provided by this act was plenary and perfect to give reliefe to them that right had.

[282] To this for the time may be added, that ancient charters, whether they be before time of memory, or after, ought to be conſtrued, as the law was taken when the charter was made, and according to ancient allowance. * Now what the time of memory is, ſee the firſt part of the Inſtitutes, ſect. 170.

34 Aſſ. pl. 14. 40 Aſſ. 21. 6 E. 3. 54, 55. 7 E. 3. 40, 41. 18 E. 3. Connuſ. 39. 12 H. 4. 12. 14 H. 6. 12. 33 H. 6. 22. 35 H. 6. 54. 9 H. 7. 11. 10 H. 6. 13. 16 H. 7. 9. * Regiſt. 158. 5 E. 3 50, 51. 6 E. 3. 18. 20 H. 6. 34. 34 H. 6. 36. Dier, 8 El. 245.

[a] But now by the ſtatutes of 3 E. 6. and 13 Eliz. there is further remedy given: for albeit the charters or letter patents be loſt, yet the exemplification or *conſtat* of the roll may be ſhewed forth, &c. And when any claimed before the juſtices in eyre any franchiſes by an ancient charter, though it had expreſſe words for the franchiſes claimed; or if the words were generall, and a continual poſſeſſion pleaded of the franchiſes claimed, or if the claim was by old and obſcure words, and the party in pleading, expounding them to the court, and averring continuall poſſeſſion according to that expoſition; the entry was ever *Inquiratur ſuper poſſeſſionem et uſum, &c.* which I have obſerved in divers records of thoſe eyres, agreeable to that old rule, *Optimus interpres rerum uſus.*

[a] 3 E. 6. c. 4. 13 El. ca. 6.

(10) *Habeant præmunitionem per* 40. *dies.*] This was by writ of the common ſummons of the eyre, by the ſpace of 40 dayes before the ſitting of the juſtices in eyre.

Now leaving all that is evident, and needeth no expoſition, let us come to the next that is worthy of obſervation.

Bract. li. 1. fo. 5. & 171. 6 E. 3. 5c. 22 E. 3. 3. 24 E. 3. 1. 23. 43 E. 3. 22. 11 H. 4. 86. 9 H. 6. 58.

(11) *Et ſi forte exceperint quod non tenentur ſine brevi originali reſpondere.*] Here is an ancient maxime in the law implyed, that regularly no man ought to anſwer for his freehold, franchiſes, or other thing without originall writ *ſecundum legem terræ*; and that the * ſtatutes to that end provided are but declarations of the ancient common law, as here it is to be ſeen in caſe of franchiſes in the kings own caſe.

* Magna Charta. cap. 29. 25 E. 3. cap. 4. Stat. 5. 28 E. 3. ca. 3. 42 E. 3. ca. 3. Stat. de 18 E. 1. de quo war' nov. 6 E. 35. 8 E. 3. 10, 11. 16 E. 4. 6. 3 H. 7. 15. Stanf. Prærog. 74. Paſch. 9 E. 1. Coram rege Rot. 17. Suſſex.

(12) *Et ſi ulterius dicunt quod anteceſſores ſui inde obierint ſeiſiti, ſtatim audiantur, et ſtatim veritas inquiratur, &c.*] By this it appeareth that a deſcent of franchiſes doth put the king to his writ of *quo warranto*, which writ is here expreſſed; and note that the *quo warranto* is in nature of the kings writ of right for franchiſes and liberties, wherein judgement finall ſhall be given either againſt the king for the point adjudged, or for the king; and the *ſalvo jure* for the king ſerveth for any other title then that which was adjudged; and therefore William de Penbrugge the kings attorney, for proſecuting of a *quo warranto* againſt the abbot of Fiſchamp for franches within the mannour of Steynings *ſine præceptο*, was committed to the gaole.

2 E. 3. 29. 6 E. 3. 5. 15 E. 4. 6, 7.

(13) *Et ſi non venerint, &c. præcipiatur vicecom' quod faciat eos venire, &c. quo die ſi non venerint, &c. fiat ſicut in itinere juſticiariorum.*] If before the juſtice in eyre the party came not, the franchiſe ſhould be ſeiſed into the kings hands *nomine diſtrictionis*, which the party in the ſame eyre might replevy; but if he did not replevy them while the eyre ſate in that county, the franchiſes were loſt and forfeited for ever.

Therefore if the party now upon the *venire facias* (which this act doth give) come not while the eyre ſit in that county, the franchiſes be loſt for ever.

And ſo it is in the kings bench, if the party come not in upon the *venire facias* during that term, and replevy his franchiſes, they be loſt for ever. And therefore we concurre not with that chiefe juſtice that ſaid, that non-claim of liberties before juſtices in eyre loſt the liberties, for that (ſaith he) was but of the kings grace to grant a replevy of them, and not of right; for this opinion is againſt the authority of our books, and the continuall practice before the juſtices in eyre.

Pl. Com. 372. in le Signior Zouches caſe.

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See the ſtatutes of 18 E. 1. *De quo warranto novum*, and *De tallagio non concedendo.*

(14) *De querimoniis factis et faciendis de ballivis regis et aliorum fiat ſecundum ordinationem prius inde factam.*] That is, according to the articles of the juſtices in eyre called *capitula itineris* collected and authoriſed amongſt other things, as here it appeareth, by ordinance of parliament, and entred into the parliament roll, which you may ſee in old Magna Charta, fol. 150, 151, &c.

(15) *Juxta articulos eiſdem juſtic' noſtris tradit'.*] The French faith, *Solonque les articles que le roy lour ad livere.* Theſe articles were delivered by the king to the juſtices in eyre to be enquired of, heard, and determined by them through all the counties of England, which afterwards were encreaſed, as by the ſame may appear.

CAP. I.

COME avant ces heures damages ne fuerent agardes en aſſiſes de novel diſſeiſin forſque tantſolement vers les diſſeiſors: purview eſt, que ſi les diſſeiſors aliont les tenements (1), *& neient dont les damages puiſſent eſtre levies* (2), *que ceux a que maines ceux tenements deviendront, ſoient charges des dammages, iſſint que cheſcun reſpoign' de ſon temps* (3). *Purview eſt enſement, que le diſſeiſee recover' damages en briefe dentre foundue ſur diſſeiſin, vers celuy que eſt trove tenant apres le diſſeiſor* (4). *Purview eſt enſement, que la ou avant ces heures damages ne fueront agardes en plee de mortdanceſtor* (6), *forſque en caſe* (5) *ou tenements fueront recoveres devers chiefes ſeigniors* (7) [*cco ſuiſt per ſtatut' Marlbr. cap.* 16.] *que deſormes damages ſoient agardes en touts caſes* (8), *ou home recover per aſſiſe de mortdanceſtor, ſicome eſt avantdit en aſſiſe de novel diſſeiſin. Et in meſme le*

WHEREAS heretofore damages were not awarded in aſſiſes of novel diſſeiſin, but only againſt the diſſeiſors: it is provided, that if the diſſeiſors do aliene the lands, and have not whereof there may be damages levied, that they to whoſe hand ſuch tenements ſhall come, ſhall be charged with the damages, ſo that every one ſhall anſwer for his time. It is provided alſo, that the diſſeiſee ſhall recover damages in a writ of entry, upon novel diſſeiſin againſt him that is found tenant after the diſſeiſor. It is provided alſo, that where before this time damages were not awarded in a plea of mortdaunceſtor (but in caſe where the land was recovered againſt the chief lord) that from henceforth damages ſhall be awarded in all caſes where a man recovereth by aſſiſe of mortdaunceſtor, as before is ſaid in aſſiſe of novel diſſeiſin: and likewiſe damages ſhall be recovered

le maner recover' home damages en briefe de coſinage, ayel, & beſayel (9). *Et la ou avant ces heures damages ne fueront taxes, forſque a le value des iſſues de la terre: purview eſt, que le demandant puit recover vers le tenant les coſtages de ſon briefe purchaſe* (11), *enſemblement oveſque les damages* (12) *avantdits* (10.) *Et tout ceo ſoit tenus en touts caſes, ou home recover damages* (13). *Et ſoit deſormes cheſcun tenus a render damages, la ou home recover vers luy de ſa intruſion demeſne, ou de ſon fait demeſne* (14).

in writs of coſinage, aiel, and beſaiel. And whereas before time damages were not taxed, but to the value of the iſſues of the land; it is provided, that the demandant may recover againſt the tenant the coſts of his writ purchaſed, together with the damages aboveſaid. And this act ſhall hold place in all caſes where the party is to recover damages. And every perſon from henceforth ſhall be compelled to render damages, where the land is recovered againſt him upon his own intruſion, or his own act.

(Fitz. Damage, 14. 43. 66. 68. 82. 95. 101, 102. 104. 108. 110. 121. 123. 127. 129. Hob. 95. Godbolt, 112. 1. Inſt. 10. 116. Dyer, f. 370. Fitz. damage, 6. 19. 97.)

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See the firſt part of the Inſtitutes, 685.
37 H. 6. 35.

Before this ſtatute no damages were recovered in aſſiſe of novel diſſeiſin (which then was *frequens et feſtinum remedium*) but onely againſt the diſſeiſor, and not againſt the tenant that came to the lands or tenements after the diſſeiſin, for no damages could be recovered by the common law, but againſt the wrong doer by him, to whom the wrong was done.

Now the miſchief was, that many times the diſſeiſor was inſufficient, and not able to ſatisfie the damages, and by that means the diſſeiſee recovered damages in ſhew againſt the diſſeiſor (who was the wrong doer to him) but had not the effect thereof; now this branch doth remedy this miſchief, as by the ſame it appeareth.

(1) *Alienont les tenements.*] The letter of this law extendeth onely to them, that came in by title, as by feoffment, or fine after the diſſeiſin; but by equity it extendeth to them, that came in by wrong, and to them alſo, whoſe eſtate was before the diſſeiſin; for example, if the diſſeiſor were diſſeiſed, the ſecond diſſeiſor is within this ſtatute, for if he that comes in by title ſhall be within the remedy of this law, *à fortiori*, he that comes in by wrong; and ſo it is of all others, that come in under the diſſeiſor, though it be not by alienation.

14 H. 7. 28. per Wood.

10 Aſſ. p. 3.
10 E. 3. 24.

Alſo if the lord diſtraineth for his rent, and a ſtranger without the privity of the tenant maketh reſcous, the ſtranger is onely the diſſeiſor, and though the tenant claim not under him, but his eſtate is before, &c. yet in aſſiſe againſt the diſſeiſor and the tenant, if the diſſeiſor be found inſufficient, the plaintife by force of this ſtatute ſhall recover damages againſt them both.

22 Aſſ. 28.

And yet in ſome caſes the tenant that claimeth under the diſſeiſor ſhall not for the inſufficiencie of the diſſeiſor be anſwerable to yeeld damages by this ſtatute; as if the diſſeiſor of lands holden in *capite* alien the ſame to another, the alienee dyeth, his heir within age, upon office found the king committeth the cuſtody to A. who taketh the whole profits, the diſſeiſor is inſufficient, the heir within age is no tenant within this ſtatute, for that he never did, nor

nor could take any profit: but if the diſſeiſor alien to an infant, who taketh the profits, he is a tenant within this ſtatute; or if the infant coming in as heir had been out of ward, and had taken the profits, he had been a tenant within this ſtatute.

If the diſſeiſor infeoffe the villein of the diſſeiſee and a ſtranger, and the diſſeiſor is inſufficient, in this caſe either the diſſeiſee muſt loſe his damages, or infranchiſe his villein. 48 E. 3. 17.

No leſſee for yeers, or tenant by ſtatute ſtaple, or merchant, or the like, that have but a chattell, ſhall be accounted a mean occupier within this ſtatute, but he that hath the inheritance or free-hold at the leaſt; otherwiſe he is not ſaid to be a tenant of the land; and ſo much is implyed in this word alien, which cannot be intended of a leſſee for yeers, &c. where he, that bringeth the aſſiſe, hath right to the inheritance or free-hold: but where tenant by ſtatute merchant, or ſtaple, &c. brings an aſſiſe, there leſſee for yeers, or tenant by ſtatute merchant, &c. may be a mean occupier, becauſe the plaintife in the aſſiſe hath right but to a chattell.

(2) *Et nient dont les damages poient eſtre levies.*] Hereupon do follow three concluſions in law: 1. That if the diſſeiſor be ſufficient to yeeld the whole damages, he is ſolely to be charged therewith; for then this ſtatute extendeth not to the tenant; and, as it appeareth by the preamble, he was not anſwerable by the common law.

The 2. concluſion is, that for the inſufficiencie of the diſſeiſor the tenant ſhall anſwer the damages by this act.

The 3. concluſion is, that if the diſſeiſor be able to yeeld part, and not the whole damages, both ſhall be charged, and therefore judgement is ever given as well againſt the diſſeiſor (though he be found inſufficient) as againſt the tenant generally.

(3) *Cheſcun reſpondra pur ſon temps.*] The ground hereof is, *Quod bonæ fidei poſſeſſor in id tantum, quod ad ſe pervenerit, tenetur.* [285]

Hereupon ſeven concluſions are grounded: 16 E. 3. Damages, 82.

1. Albeit the mean occupiers are neither diſſeiſors nor tenants, yet unleſſe they be named in the aſſiſe, no judgement can be given againſt them, neither can they be charged for the time they take the profit.

2. Though they be named, yet, as hath been ſaid, the diſſeiſor muſt be found by the aſſiſe to be inſufficient, and the mean occupiers muſt be found to take the profits; for if they be omitted, and none but the diſſeiſor and tenant named, and the diſſeiſor is found inſufficient, and no further enquired of, the tenant ſhall be charged for the whole.

3. If the aſſiſe be brought againſt the diſſeiſor and the tenant, and it is found by the aſſiſe, that the diſſeiſor is inſufficient, and that the diſſeiſor infeoffed A. who infeoffed B. who infeoffed the tenant, and that A. had it one yeer, and B. half a yeer, and the tenant two yeers; upon this ſpeciall finding, the tenant ſhall anſwer damages but for his time, for *cheſcun reſpondra pur ſon temps*, and the plaintife hath loſt his damages againſt A. and B. for that they were not named in the writ. 35 Aſſ. 5.

4. If the diſſeiſor, A. and B. and the tenant in the caſe before be all named, and the diſſeiſor, A. and B. are all found inſufficient, the tenant ſhall anſwer for the whole; for although the letter of this law is, where the diſſeiſors have nothing, &c. yet theſe words, 35 Aſſ. p. 5.

cheſcun reſpondra, &c. do imply (if they have ſufficient) for otherwiſe they cannot anſwer, that is, they cannot ſatisfy; for in that ſenſe [anſwer] is here taken.

5. It ſhall never be inquired of the tenants inſufficiencie, for againſt the diſſeiſor and him muſt the aſſiſe of neceſſity be brought.

18 E. 2 tit. Execution, 14. 6. Upon theſe words, *cheſcun reſpondra pur ſon temps*, ſeverall judgements ſhall not be given, but one judgement is to be given intirely againſt all, and ſo was it ever uſed ſince this ſtatute; but the ſherife upon the execution may uſe ſuch indifferencie, as juſtice requireth.

18 E. 2. ubi ſup. And it is ſaid, that if the aſſiſe be brought againſt the diſſeiſor and the tenant, and judgement given for the plaintife, and a writ iſſueth to the ſherife, and he retourns, that the diſſeiſor is inſufficient, the plaintife ſhall have preces to levie it of the tenant.

Weſt 1. cap. 24. 34 E. 1. de plead de Iont. 22 Aſſ. 1. 9 H. 6. 1, 2. 1 H. 4. ca. 8. 8 H. 6. cap. 3 E. 6. cap. 3. *Vide* the ſtatutes of Weſtm. 1. 34 E. 1. 1 H. 4. & 8 H. 6. &c. where double and treble damages are given in aſſiſe, there alſo every mean tenant, that came in to be tenant of the free-hold under the diſſeiſor, ſhall for the inſufficiencie of the diſſeiſor anſwer every one for his time the treble or double damages.

7. Laſtly, this giveth no damages where none was recoverable in the aſſiſe at the common law, but giveth damages againſt the tenant for the inſufficiencie of the diſſeiſor, as hath been ſaid.

As if he in the reverſion upon a term for yeers, or tenant by ſtatute ſtaple, &c. be diſſeiſed, he ſhall have an aſſiſe to recover the ſtate of the land, but ſhall recover no damages for the profits of the lands, becauſe they belonged not to him.

12 E. 4. fol. 1. 32 Aſſ. p. 1. If the diſſeiſor committed the diſſeiſin with force, and inſeoffeth A. who inſeoffeth B. who inſeoffeth C. an aſſiſe is brought againſt them all, and treble damages for the inſufficiencie of the diſſeiſor ſhall be levyed upon all, according to this act *cheſcun reſpondra pur ſon temps*, that is, what damages ſhould be recovered againſt the diſſeiſor, if he were ſufficient, ſhall be recovered for his inſufficiencie againſt the mean occupiers and the tenant, and for inſufficiencie of the mean occupiers, againſt the tenant onely.

[286] (4) *Purview eſt enſement, que le diſſeiſee recovera damages en briefe dextre foundue ſur diſſeiſin vers celuy que eſt trove tenant apres le diſſeiſor.*] Regularly in perſonall and mixt actions damages were to be recovered at the common law, but in reall actions no damages were to be recovered at the common law, becauſe the court could not give the demandant that which he demanded not, and the demandant in reall actions demanded no damages, neither by writ, nor count: *judex non reddit pluis, quam quod petens ipſe requirit*, and it is a maxime in law, *que droit ne done pluis que ſoit demaunde*; and therefore in reall actions, where damages are given by this act, the demandant ſhall recover damages *pendente brevi*, becauſe the old form of the count remaineth. The words of the act are, *Vers celuy que eſt trove tenant*; he may be tenant by title, by wrong, or by act in law; and of theſe in order.

Regula. 33 H. 6. 47. 7 E. 4. 5. 16 H. 7. 5, &c. See li. 10. fo. 117. Pilfords caſe.

If the diſſeiſor make a feoffment in fee, and the diſſeiſee dyeth, the heir of the diſſeiſee ſhall not recover damages by this act againſt the alienee; for this branch of the act provideth for the diſſeiſee, and not for his heirs.

42 E. 3. 7. 39 E. 3. Dam. 66. 20 E. 3. ib. 101. 22 E. 3 2. 12 E. 3. Dam 95. 3 E. 3. ib. 120. 19 E. 3. ibid. 99.

But

* But if a man be diſſeiſed, and the diſſeiſee dye, his heir ſhall recover damages againſt the diſſeiſor, but not by this branch, but by a latter branch of this act, *viz. Et ſoit deſormes cheſcun tenus a render damages la ou home recover vers luy de ſay intruſion demeſne, ou de ſon tort demeſne:* and by this diſtinction the books that ſeemed *prima facie* to differ are well reconciled; but by the intention of this law, the heir in his writ of entry againſt the diſſeiſor ſhall recover damages but from the death of his anceſtor.

* 4 E. 3. 39. 40. 36. 23 Eliz. Dier, 320.

22 E. 3. 2.

The diſſeiſee ſhall recover damages by this act in a writ of entry *ſur diſſeiſin* in the *poſt*: as if the tenant cometh to the land by diſſeiſin, intruſion, or abatement, or when by alienation it is out of the degrees; for the words be, *Vers celuy que eſt trove tenant apres le diſſeiſor*, within which words he that comes in the *poſt* is included. Note the writ of entry in the *poſt* is given by the ſtatute of Marlebridge, *cap. ultimo*; for the diſſeiſee was driven to his writ of right at the common law.

16 E. 3. Dam. 82. 8 E. 3. 23. 23 El. Dier, 320.

And in this ſecond branch the tenant is onely charged with the whole damages, though there were divers mean tenants, for *cheſcun reſpondra pur ſon temps* is onely in the caſe of an aſſiſe upon the firſt branch; neither ought the writ of entry to be brought againſt any, but againſt him, that is the tenant of the land: but in ſome caſe another then the diſſeiſee ſhall recover damages by this branch; as the ſucceſſor of an abbot, but otherwiſe of biſhops, or other ſole ſecular bodies politique.

19 E. 3. Dam. 99. 3 E. 3. ib. 120. 39 E. 3. ib. 66. 26 Aſſ. p. 4.

If the tenant cometh to the land by act in law, which he cannot withſtand, and where there is no act, or default in him; in that caſe he ſhall not be charged: as if the diſſeiſor alien to A. and his heirs, and A. dyeth without heir, the law (that there may be a tenant to a ſtrangers *præcipe*) doth caſt the land upon the lord; in this caſe, if the lord doth not take any profits of the lands, in a writ of entry in the *poſt* brought againſt him for the land, the lord may plead the ſpeciall matter, and how that he never took any profits of the lands, and ſo dicharge himſelf of the damages; for albeit he be a tenant of the land, yet is he no tenant againſt his will within the meaning of this law, becauſe there is no wrong nor default in him.

But if the lord by eſcheat doth enter, and take the profits of the land, then ſhall he be charged as a tenant within this act, for albeit he could not withſtand the eſcheat, which made him tenant in law, yet might he have refrained to take the profits, which in right belonged to the diſſeiſee, but his rent or valuable ſervices ſhall be recouped in damages.

And ſo it is in all reſpects, when the alienee of the diſſeiſor dye ſeiſed, and the land deſcend to his heir, he may refrain from the taking of the profits, and plead the like plea, and diſcharge himſelf of the damages.

In like manner, if the diſſeiſor make a deed of feoffment, by the which he infeoffeth A. and B. and maketh livery of ſeiſin to A. in the name of both, B. never agreeing to the feoffment, nor taking any profit of the land, A. dyeth; in this caſe by the law the freehold and inheritance is veſted in B. by ſurvivor; and in a writ of entry in the *per* brought by the diſſeiſee againſt B. he may, as is aforeſaid, plead the ſpeciall matter, and that he never agreed, nor took any profits, and diſcharge himſelfe of the damages for the cauſe aforeſaid.

First part of the Inſtitutes, ſect. 685.

Et

Regula.

Et ſic in caſibus conſimilibus: for *nemo punitur ſine injuria, facto, ſeu defalta*; and *actus legis nemini eſt damnoſus.*

The ſtatute ſaith, *ce' que eſt trovelenant*, and yet if a writ of entry be brought againſt two joynt-tenants, and the one diſclaime, and the other take the whole tenancy upon him, and plead in barre, and it is found againſt him, the demandant ſhall recover damages for the whole againſt him, becauſe he tooke upon him the whole tenancy.

8 H. 4. 5. 29 E. 3. 49. 8 E. 3. 61. 9 E. 3. 30. 25 E. 3. 51. 30 E. 3. 6.

A diſſeiſor inſeoffeth A. which infeoffeth B. the diſſeiſee brings a writ of entry in the *per* and *cui* againſt B. which vowcheth A. who pleads and loſeth; judgement for the damages ſhall be given againſt the vowchee, for he is found tenant in law.

(5) *Purview eſt enſement que lou avant ceux heures damages ne fuer' agardes en plea de mordaunceſter forſque en caſe*, &c.] This plea of mordaunc', and the other pleas hereafter in this act named are pleas reall, and auncelltrel, and therefore no damages are recoverable (as hath been ſaid) in them by the common law.

Lib. 6. cap. 3. Markals caſe.

But yet it is to be obſerved once for all, that theſe actions in this act named, are actions *auncęſtrel poſſeſſarie*, and not actions *auncęſtrel droiturel.*

Glan. li. 13. c. 2. 3, 4, &c. Bract. l. 3. fol. 282, 283. 253, 254. Brit. fo. 180. Fleta, l. 5. c. 1, 2, &c.

(6) *De mordaunc'.*] Of this writ you ſhall reade plentifully in our auncient authors, and other books.

(7) *Recoveres de vers chiefe ſeigniors.*] This was by the ſtatute of Marlebridge cap. 16.

In auncient time not onely the references, as here, were ever generall, but alſo the citing of authorities in law were in like manner; *eſt tenus in noſtre livres.*

(8) *Damages ſoient agardes en touts caſes*, &c.] This purview being generall muſt be taken in a particular ſenſe, that is, in all caſes in the mordaunc', as in the aſſiſe, having regard to the time of the damages, *viz.* from the wrong done, for in the mordaunc' the plaintiffe ſhall not recover damages againſt the meane occupiers for the inſufficiency of the abator, as in the aſſiſe for the inſufficiency of the diſſeiſor; for in conſtruction of generall references in acts of parliament, ſuch reference muſt be made onely as may ſtand with reaſon and right: and therefore ſeeing the writ of mordaunc' muſt of right be brought againſt the tenant of the land onely, and not againſt the meane occupiers (as hath been ſaid in the former clauſe concerning the writ of entry) the meane occupiers cannot be charged in the mordaunc', but the tenant ſhall be charged for the whole damages.

3 E. 3. damag. 121.

Doct. & Stud. lib. 2. cap. 12.

If a man hath iſſue two ſonnes, and the father dieth ſeiſed of lands in fee ſimple, the eldeſt ſon dieth, the ſecond ſon ſhall have an aſſiſe of mordaunceſter, and he ſhall make himſelfe heire to his father, and he ſhall recover damages, not onely from ſuch time as the right accrued unto him from the death of his brother, but from the death of his father, becauſe he hath not the right of this land as heire to his brother, but as heire to his father. More ſhall be ſaid hereof when we come to ſpeake of the writ of coſinage, &c.

9 E. 3. 30.

In a mordaunc', if the tenant vowch, and the vowchee plead and looſe, in this caſe the plaintiffe ſhall recover againſt the tenant the land, and the tenant in value againſt the vowchee, and the plaintiffe

tiffe ſhall recover his damages againſt the vowchee. And by this act damages ſhall be recovered in a *nuper obiit*.

21 E. 3. 57. 28 E. 3. damag. 61. 13 E. 3. ibidem 97. For this writ ſee all the auncient authors ubi ſup.

(9) *En meſme le maner recoverr' home damages en briefe de coſinage, aiel, et beſaiel.*] In a writ of coſinage, of the ſeiſin of the *treſaiel, de ſeiſina tritavi, ſeu atavi, &c.* it is to be ſeene for what time the demandant ſhall recover damages by force of this act, and ſo of the writ of *beſaiel, breve de proavo*, and of the writ of *aiel de avo*.

6 E. 3. 34. 7 E. 3. 46, &c. 2 E. 3. 9. 3 E. 3. dam. 122. 17 E. 3. 45. 2 H. 4. 13. 2 E. 3. dam. 118.

And it is a rule upon this ſtatute, that in none of theſe writs the demandant ſhall recover damages but from the death of his next immediate auncеſter, whoſe heir he is: as if there be grandfather, father, and ſon, the grandfather dieth ſeiſed, an eſtranger abate, the father dieth, the ſon in a writ of *aiel* muſt make his reſort as ſon and heire of the father, ſon and heire of the grandfather, therefore he ſhall in that caſe recover damages, but from the death of his father, becauſe he is his next immediate auncеſter, and from him the right deſcended: and ſo in the writ of *beſaiel*, and *coſinage*; but in the caſe before, if the grand father had ſurvived the father, the ſon ſhall recover damages from the death of his grandfather, becauſe he is his immediate auncеſter, and the right immediately deſcended to him: *Et ſic de cæteris.*

45 E. 3. 10. 35 H. 6. 23.

If a man hath iſſue two daughters, and dieth ſeiſed of lands, an eſtranger abate, one of the daughters hath iſſue and dieth, the aunt and the niece ſhall joyne in an aſſiſe of mordaunc', and the aunt onely ſhall recover damages till the death of the ſiſter, and both of them from her death, which ſtandeth upon the reaſon aforeſaid.

If there be grandfather, father, and daughter, the grandfather dieth ſeiſed, an eſtranger abate, the father dieth, his wife being *privement enſeint* with a ſon, the ſon is borne, he ſhall recover damages in a writ of *aiel* from the death of the father, for now hee is immediate heire to the father.

(10) *Vers le tenant les coſtages de ſon briefe purchaſe en ſemblement oveſque les damages avandits.*] Before this ſtatute at the common law no man recovered any coſts of ſute either in plea real, perſonall, or mixt: by this it may be collected that juſtice was good cheap of auncient times, for in king Alfreds time there were no writs of grace, but all writs remedialls were graunted freely, and Fleta ſaith, *Ne clerici ſuperflua petant ſtipendia pro ſcriptura ſua, conſtitutum eſt, quod tam clerici juſticiar', quam cancellar' de ſolo denario pro ſcriptura unius brevis ſe teneant contentos.* This ſtatute was the firſt that gave coſts.

Mirror, l. 5 § 1. Glanv. li. 1. ca. 32. Fleta, li. 2. c. 12. 14 H. 6. 13.

(11) *Coſtages de ſon briefe purchaſe.*] Here is expreſſe mention made but of the coſts of his writ, but it extendeth to all the legall coſt of the ſuit, but not to the coſts and expences of his travell and loſſe of time, and therefore *coſtages* commeth of the verb *conſter*, and that againe of the verb *conſtare*, for theſe *coſtages* muſt *conſtare* to the court to be legall coſts and expences.

9 E. 4. 6. 13 H. 4. Execution 118. 21 H. 6. 9 Livre de entres Raſt. 382. Lib. 10. fol. 10. Jentlemans caſe.

If a writ doth abate by the act of God, in a new writ by Journies accounts, he ſhall have coſts for the firſt writ and the proceedings thereupon; but if the firſt writ be faulty in default of the demandant or plaintiffe, in the ſecond writ the demandant or plaintiffe ſhall have no coſts for ſuch an inſufficient or faulty writ.

(12) *Enſemblement ove les damages.*] For coſts are in law ſo coupled together, as they are accounted parcell of the damages.

And

13 H. 7. 16, 17. And therefore if the plaintiffe in treſpaſſe declare to the damages of twenty marks, and the jury give twenty marks for damages, and twenty marks for coſts, yet ſhall the plaintiffe recover in all but twenty marks, for damages and coſts muſt not exceed * the damages, which the plaintiffe demaunds by his count, and the entry reciting both the damages and coſts, *Quæ damna in toto ſe attingunt ad, &c.*

In an action reall, perſonall, or mixt, where double or treble, &c. damages are given by any ſtatute, it hath been controverted in books, whether the demandant or plaintiffe ſhall recover coſts, and whether the ſame ſhall be alſo doubled or trebled; which doubt and variety of opinions hath grown in reſpect the right reaſon of the diverſity of the law in thoſe caſes hath not been obſerved, which is, that whenſoever any ſtatute doth increaſe damages to the double or treble value, &c. where damages before were given, there the demandant or plaintiffe ſhall recover his double or treble damages and coſts alſo, and the coſts alſo as parcell of the damages ſhall be trebled.

22 H. 6. 57. 14 H. 6. 13. 19 H. 6. 6, 7. 32. 27 H. 6. 10. 12 E. 4. 1. F.N.B. 248. c. But where damages double or treble are in an action newly given, where no damages were formerly recoverable, there the demandant or plaintiffe ſhall recover thoſe damages onely, and no coſts. For example, in an action upon the ſtatute of forcible entry upon the ſtatute of 8 H. 6. which giveth treble damages, in this caſe the plaintiffe ſhall recover his damages and his coſts to the treble for that he ſhould have recovered ſingle damages at the common law, and the ſtatute increaſed them to treble.

Dier 2 Eliz. 177. But upon the ſtatute of 1 & 2 Phil. & Mar. for chaſing of diſtreſſes out of the hundred, &c. whereby 5. l. is given and treble damages, the plaintiffe ſhall recover no coſts, becauſe this action and penalty is newly given.

27 H. 6. 10. And ſo in the *quare impedit* no coſts, for that no damages were given at the common law.

30 E. 3. 27. 5 E. 3. dam. 114. 2 H. 4. 17. 9 H. 6. 66. nota 14 H. 6. 13. Mich. 29 H. 6. in Communi Banc. Rot. 103. 5 E. 4. 7. 12 E. 4. 1. In an action of waſte againſt tenant for life, or yeares, the plaintiffe ſhall recover the place waſted, and treble damages given at this parliament, cap. 6. but no coſts, becauſe no action lay againſt them at the common law, but the action and damages are newly given: but againſt the gardein, or tenant in dower, &c. there the plaintiffe ſhall recover treble damages and coſts alſo, for that an action lay againſt them at the common law, and for the waſte damages ſhould be recovered; and ſo are all the books, that ſeeme *prima facie* to be at variance, well reconciled.

(13) *Et tout ceo ſoit tenus en touts caſes ou home recover damages.*] Before the making of this ſtatute no demandant recovered damages in any reall action, but onely in a writ of dower, *unde nihil habet*, by the ſtatute of Merton cap. 1.

This clauſe doth extend to give coſts, where damages are given to any demandant or plaintiffe in any action by any ſtatute made after this parliament: *Ubi damna dantur, victus victori in expenſis condemnari debet.* *Regula.*

(14) *Soit deſormes cheſcun tenus a render damages, la ou home recover vers luy de ſon intruſion demeſne, ou de ſon fait demeſne.*] This is a generall and a beneficiall branch, which we have partly expounded before in our expoſitions upon the ſecond branch of this chapter; generally this branch giveth damages to him that right hath and his