

cases adjudged in the kings bench, whereunto they were referred by the parliament. See Michael. 17 Edw. 1. in Banco. Rotulo. 33. Southampton.

The chapter of *Magna Charta* here intended, and in both the said records expressed, is this 17 chapter of *Magna Charta* now in hand. By these records two things are to be observed. 1. That this is a generall law, by reason of these words, *Vel alii balivi nostri*, under which words are comprehended all judges or justices of any courts of justice. 2. Albeit it be provided by the ninth chapter of *Magna Charta*, *Quod barones de quinque portibus, et omnes alii portus habeant omnes libertates, et liberas consuetudines suas*; that these generall words must be understood of such liberties, and customes onely, as are not afterwards in the same charter by expresse words taken away, and resumed to the crown. And therefore if the maior and barons of the cinque ports had power before this act to hold pleas of the crown, yet by this act of the seventeenth chapter, they are abrogated, and resumed; a notable and a leading judgement. Both these records being within two years after the confirmation of king E. 1. of *Magna Charta*, are worthy to be read and observed.

(1) *Vicecomes.*] See for his name, office, and antiquity in the first part of the Institutes, sect. 234.

(2) *Constabularius.*] Is here taken for *castellanus*, a *castellein*, or constable of a castle, for so doth the Mirror interpret. And *castellanus est qui custodit castellum, aut est dominus castelli*; and so doth Bracton; *Debet, &c. ostendere castellano, sicut constabulario turris, &c.* And therewith agreeth Fleta, *Item nullæ prisæ capiantur de aliquo per aliquem constabularium, castellanum, præterquam de villa, in qua situm est castrum.*

And the statute of W. 1. agreeth herewith, *Des prises, des constables, ou castelleins, faits des autres, &c.*

And *castellani* were men in those dayes of account, and authority, and for pleas of the crown, &c. had the like authority within their precincts, as the sheriffe had within his bailiwick before this act, and they commonly sealed (which I have often seen in many, and have cause to know, that some of the auncient family of *de Sperham* in *Norff.* did) with their portraiture on horseback.

Now for the number of castles, in ancient time, within this realme, *Certum est regis Henrici secundi temporibus castella 1115. in Anglia extitisse.*

And it is to be observed, that regularly every castle containeth a manor: so as every constable of a castle, is constable of a manor, and by the name of the castle the manor shall passe, and by the name of the manor the castle shall passe.

For this word, *constabularius*, his office, and antiquity, see the first part of the Institutes, sect. 379.

And albeit the franchises of infangthiefe, and outfangthiefe, to be heard and determined within court barons belonging to manors, were within the said mischiefe, yet we finde, but not without great inconvenience, that the same had some continuance after this act. But either by this act, or *per desuetudinem*, for inconvenience, these franchises within manors are antiquated and gone.

(3) *Coronator.*] His name is derived *a corona*, so called, because he is an officer of the crown, and hath conusance of some pleas, which are called *placita coronæ*.

[31]

See Pasch. 33 E. 1. coram Rege. The prior of Tinemouth's case. Northumberl.

1 part Institutes, sect. 234. 248. Mirror, cap. 5. § 2. Bracton, lib. 5. fo. 363. li. 2. fo. 69. Vide cap. 19. Fleta, lib. 2. ca. 43. W. 1. ca. 7. & 31.

See the first part of the Institutes, fol. 5. verbo Holme. Lamb. leg. Ed. c. 26. Bract. li. 3. fo. 154. Brit. ca. 15. fo. 90. Fleta, li. 1. ca. 47. Hovend. pte. posterior. fol. 345. Mat. Par. anno 1259. 44 H. 3. Pl. Parl. 18 E. 1. Rot. 11. 2 R. 3. 10.

Mirror, cap. 1.
§ 3.

For his antiquity, see the Mirror, who (treating of articles established by the ancient kings, Alfred, &c.) saith, *Auxi ordains fuer coronours in chescun county, et viscounts a garder le peace, quant les countees soy demisterent del gard, et bayliffes in lieu de centeners* (that is) coroners in every county, and sheriffes were ordained to keep the peace, when the earles dismiss themselves of the custody of the counties, and bailiffes in place of hundreders.

Brit. ca. 3. fol. 3.
Stam. Pl. Cor.
48. c.
[32]

For his dignitie and authority, Britton saith in the person of the king, *Pur ceo que nous volons, que coroners sont in chescun county principals gardens de nostre peace, a porter record des pleas de nostre corone, et de lour vieus, et abjurations, et de utlagaries, volons que ilz sont esliens solonque ceo, que est contein in nous statutes de lour election, &c.*

Rot. brevium.
5 E. 3. nu. 38.
Registr. 177.
W. 1. cap. 10.
* Registr. 177.

And a common merchant being chosen a coroner, was removed, for that he was *communis mercator*.

* By the auncient law, he ought to be a knight, honest, loyall, and sage, *Et qui melius sciat, et possit officio illi intendere*. For this was the policy of prudent antiquity, that officers did ever give a grace to the place, and not the place only to grace the officer.

Videa postea,
c. 35.
Glanv. li. 1. cap.
2. & lib. 14.
cap. 8.
W. 2. cap. 13.
22 E. 4. fol. 22.

But what authority had the sheriffe in pleas of the crown before this statute? this appeareth by Glanvill, that the sheriffe in the tourn (for that is to be intended) held plea of theft, for he saith; *Excipitur crimen furti, quod ad vicecomitem pertinet, et in comitatibus placitatur*; but he may enquire of all felonies by the common law, except the death of man.

Mirror, cap. 1.
§ Coroners. &
cap. 5. § 2.
Bracton, lib. 3.
fol. 121.
Brit. c. 1. fol. 3.
Fleta, li. 1. cap.
18. 25.
22 Aff. 97, 98.
&c.
3 H. 7. cap. 3.
Stamf. Pl. co. 64.
116, 117.

And what authority had the coroner? the same authority he now hath, in case when any man come to violent, or untimely death, *super visum corporis, &c.* Abjurations, and out-lawries, &c. appeales of deaths by bill, &c. This authority of the coroner, viz. the coroner solely to take an indictment, *super visum corporis*; and to take an appeale, and to enter the appeale, and the count remaineth to this day. But he can proceed no further, either upon the indictment, or appeale, but to deliver them over to the justices. And this is saved to them by the statute of W. 1. cap. 10. And this appeareth by all our old books, book cases, and continuall experience.

19 H. 6. fol. 47.

And for the further authority of the coroner in case of high treason, see the book of 19 H. 6. fol. 47. and consider well thereof.

W. 2. c. 13.
1 E. 3.
Stat. 2. ca. 17.
1 E. 4. 3 1 R. 3.
cap. 4.

But the authority of the sheriffe to heare and determine theft, or other felonies, by the common law (except the death of man) in the tourn is wholly taken away by this statute, howbeit his power to take indictments of felonies, and other mis deeds within his jurisdiction, is not taken away by this act.

C A P. XVIII.

S*I quis tenens de nobis laicum feodum moritur, et vic', vel balivus noster ostendat literas nostras patentes de summonitione [nostra] de debito, quod defunctus nobis debuit: liceat vic', vel balivo*

I*F any that holdeth of us lay-fee do die, and our sheriff or bailiff do shew our letters patents of our summon for debt, which the dead man did owe to us; it shall be lawful to our sheriff*

balivo nostro attachiar', et imbreviare omnia bona et catalla defuncti inventa in laico feodo ad valentiam ipsius debiti, per visum et testimonium legalium hominum, ita tamen quod nihil inde amoveatur, donec persolvat nobis debit', quod clarum fuerit, et residuum relinquatur executoribus ad faciendum testamentum defuncti. Et si nihil nobis debeatur ab ipso, omnia catalla cedant defuncti: salvo uxori ejus, et liberis pueris suis, rationabilibus partibus suis.

sheriff or bailiff to attach and inroll all the goods and chattles of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men, so that nothing thereof shall be taken away, until we be clearly paid off the debt; and the residue shall remain to the executors to perform the testament of the dead; and if nothing be owing unto us, all the chattles shall go to the use of the dead (saving to his wife and children their reasonable parts).

(Rast. Ent. f. 541. Co. Ent. f. 564. Fitz. Detinue, 52, 56, 58, 60. Bro. Ration. 2, 5, 6. Supra, cap. 8. 33 H. 8. c. 39.)

By this chapter three things are to be observed; first, that the king by his prerogative shall be preferred in satisfaction of his debt by the executors, before any other: secondly, that if the executors have sufficient to pay the kings debt, the heire that is to beare the countenance, and sit in the seate of his ancestor, or any purchaser of his lands shall not be charged. Thirdly, if nothing be owing to the king, or any other, all the chattells shall goe to the use of the dead, that is, to his executors, or administrators, saving to his wife and children their reasonable parts, which is consilium, and not præceptum; and the nature of a saving regularly is, to save a former right, and not to give, or create a new, and therefore, where such a custome is, that the wife and children shall have the writ *de rationabili parte bonorum*, this statute saveth it. And this writ doth not lye without a particular custome, for that the writ in the Register is grounded upon a custome, which (as hath been said) is saved by this act.

* But that it was never the common-law (though there be great variety in books) heare what Bracton saith, who wrote soone after this act, *Neq; uxorem, neq; liberos amplius capere de bonis defuncti patris vel viri mobilibus, quam fuerit eis specialiter relictum, nisi hoc sit de speciali gratia testatoris, utpote si bene meriti in ejus vita fuerint, Sc. vix enim inveniretur aliquis civis, qui in vita magnum quæstum faceret, si in morte sua cogeretur in-vitus bona sua relinquere pueris indoctis, vel luxuriosis, et uxoribus male meritis: et ideo necessarium est valde, quod illis in hac parte libera facultas tribuatur. Per hoc enim tollet malefium, animabit ad virtutem, et tam uxoribus, quam liberis bene faciendi dabit occasionem, quod quidem non fieret, si se scirent indubitanter certam partem obtinere etiam sine testatoris voluntate.*

But the administrators of a man that die intestate, or executor of any, that make no disposition of his whole personall estate, goods, debts, and chattells, the administrators or executors after the debts paid and will performed, ought not to take any thing to his or their owne use, but ought, though there be no particular custome, to divide them, according to this statute: and the said ancient, and latter authorities (then which there can be no better direction) may guide them therein: and this right doth this statute of *Magna*

Ockham Regist.
281. b.
17 E. 3. 73.
27 E. 3. 88.
[33]
29 E. 3. 13.
41 E. 3. 15.
41 E. 3. execut.
38.
4 E. 4. 16. F. N. B.
28. b.
33 H. 8. c. 39.
See before cap. 8.
Mirror, cap. 5.
§ 2.
Glanv. lib. 12.
c. 20.
Bracton, l. 2.
fol. 60. b.
Fleta, l. 2. cap.
50.
Regist. 142.
34 E. 1. detincw
60.
1 E. 2. ib. 56.
17 E. 2. ib. 58.
30 E. 3. 2. 26.
31 E. 3. rn'der. 6.
39 E. 3. 6. 10.
17 E. 3. 17.
40 E. 3. 38.
3 E. 3. det. 156.
1 E. 4. 6.
7 E. 4. 21.
13 H. 4.
Sever. 30.
31 H. 8. Ratio-
nab. parte Bro. 6.
Bract. l. 2. fol.
61. Note the
reason hereof
maketh against
perpetuities.

Charta save by these words, salvo uxori, et liberis suis, rationabilibus partibus suis. So as though the statute doth give no action, yet their parts are saved hereby, which by *Glanvile*, and other ancient authors appear to belong to them; and the executor, or administrator shall be allowed of this distribution, according to this statute, upon his account before the ordinary.

C A P. XIX.

NULLUS constabularius, vel ejus balivus capiat blada, vel alia catalla alicujus, qui non sit de villa, ubi castrum suum situm est, nisi statim reddat denarios, aut respectum inde habere possit de voluntate venditoris: Si autem de villa illa fuerit, infra quadraginta dies precium reddat.

NO constable, nor his bailiff, shall take corn or other chattles of any man, if the man be not of the town where the castle is, but he shall forthwith pay for the same, unless that the will of the seller was to respite the payment; and if he be of the same town, the price shall be paid unto him within forty days.

(Mirror, 313. 3 Ed. 1. c. 7. Altered by 13 Car. 2. stat. 1. c. 8.)

See W. 1. cap. 7.
& 31.

Mirror, cap. 5.
§ 2.

[34]

36 E. 3. cap. 2.
23 H. 6. cap. 2.

Here also it appeareth, that in this chapter *constabularius* is taken for *castellanus*: and this taking by *castelleins*, though the castell was kept for the defence of the realme, was an unjust oppression of the subject, and this expressly appeareth by the Mirror, *Ceo que est defendu a constables a prender le autre, defend droit a tous gents de cy que nul difference parenter prise dautrui maugre soen, et robbery, lequel cel prise soit de chi-valls, de vitaille, de marchandise, de cariage, de ostiels, ou des autres manners de biens.* And this appeareth also by *Fleta*, l. 2. cap. 43. *Quia multa gravamina multis inferuntur per diversas distriktiones, quae quidem sub colore prisarum advocantur, &c. inhibetur in Magna Charta de libertatibus, &c.* no purveyance shall be taken, but only for the houses of the king, and queene, and for no other person: so as the grievance before this, and other like acts, is wholly taken away.

C A P. XX.

NULLUS constabularius distringat aliquem militem ad dandum denarios pro custodia castri, si ipse eam facere voluerit, in propria persona sua, vel per alium probum hominem faciat, si ipse eam facere non possit, propter rationabilem causam. Et si nos abducerimus, vel miserimus eum in exercitum, sit quietus de custodia castri, secundum

NO constable shall distrain any knight for to give money for keeping of his castle, if he himself will do it in his proper person, or cause it to be done by another sufficient man, if he may not do it himself for a reasonable cause. And if we do lead or send him in an army, he shall be free from castleward

cundum quantitatem temporis, quo per nos fuerit in exercitu, de feod' pro quo fecit servitium in exercitu.

ward for the time that he shall be with us in fee in our host, for the which he hath done service in our wars.

(1 Inst. 70. a. 12 Car. 2. c. 24.)

Here *constabularius* is taken in the former sense: see the first parte of the Institutes, Sect. 96.

See this act in Fleta: and note, this act (consisting upon two branches) is declaratory of the common law, for first, that he, that held by castle gard, that is, to keepe a tower, or a gate, or such like of a castle in time of warre might doe it, either by himselfe, or by any other sufficient person for him, and in his place. And some hold by such service, as cannot doe it in person, as major and cominalty, deane and chapter, bishops, abbots, &c. Infants being purchasers, women, and the like, and therefore they might make a deputy by order of the common law. If two joyn-tenants hold by such service, if one of them performe, it is sufficient.

Fleta, lib. 2. ca. 43.

See the 1. part of the Instit. 96.

For the second; if such a tenant be by the king led, or sent to his host, in time of warre, the tenant is excused and quit of his service for keeping of the castle, either by himselfe, or by another during the time, that he so serve the king in his host, for that when the king commandeth his service in his host, he dispenceth with his service, by reason of his tenure, for that one man cannot serve in person in two places, and when he serves the king in person in one place, he is not bound to finde a deputy in the other, for he is not bound to make a deputy, but at his pleasure, and this is also declaratory of the ancient common law. See the first part of the Institutes, 111. 121.

C A P. XXI.

*NULLUS vicecomes, vel balivus noster, vel aliquis alius, capiat equos, vel carectas alicujus pro caria-gio faciendo, nisi reddat liberationem antiquitus statutam, scilicet pro una carecta ad duos equos decem denarios per diem, et pro carecta ad tres equos quatuordecim denarios per diem. Nulla carecta dominica alicujus personæ ecclesiasticæ, vel militis, vel alicujus * domini, per balivos nostros capiatur, nec nos, nec balivi nostri, nec alii, capiemus boscum alienum ad castra, vel ad alia agenda nostra, nisi per voluntatem illius, cujus boscus ille fuerit.*

NO sheriff nor bailiff of ours, or any other, shall take the horses or carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse, x. d. a day; for three horse, xiv. d. a day. No demesne cart of any spiritual person or knight, or any lord, shall be taken by our bailiffs; nor we, nor our bailiffs, nor any other, shall take any man's wood for our castles, or other our necessaries to be done, but by the licence of him whose the wood is.

* [35]

(W. 1. c. 1. verb. & que nul face, &c. Artic. super cart. cap. 2. Regist. fol. 98. Bracton lib. 3 fol. 177. Britton fol. 33. 36. 38. Fleta, lib. 1. c. 20. see cap. Itineris. 3 Bulstr. 4. 14 Ed. 3. stat. 2. c. 19. 25 Ed. 3. stat. 5. c. 6. 13 Car. 2. stat. 1. c. 8.)

This

This chapter consisteth of three branches, the first setteth down the auncient hire or allowance for the carriage for the king; the second setteth down, who are exempted from that carriage; the third, concerning purveyance of wood.

W. 1. cap. 1. &
32. 36 E. 3. cap.
2. 38 H. 6. cap.
2. Fleta, lib. 2.
ca. 1. & 24.
32 E. 3. Barre
259. 7 H. 3. tit.
Waste.

For the first, the carriage must be taken for the king, and queen onely, and for no other, implied in these words, *Nullus vicecomes vel balivus noster*, and this is explained by divers other statutes, and by our books.

The hire or allowance is certainly expressed, as aunciently due, *Reddat liberationem antiquitus statutam*; so as this also is declaratory of the auncient law, and the hire or allowance ought to be paid in hand, for the statute saith, *Nullus capiat, &c. nisi reddat, &c.*

And this *liberatio antiquitus statuta*, is (as it appeareth by this act) *per diem*, by the day.

Aver-penny, and *averagium*, are words common in auncient charters, and signifie to be free from the kings carriages, *cum averiis*, and this is meant where it is said, *Aver-penny, hoc est, quietum esse de diversis denariis pro * averagiis domini regis.*

Rastall * i. car-
ragiis cum ave-
riis.

W. 1. cap. 1.
14 E. 3. cap. 1.
1 R. 2. cap. 3.
10 E. 2. Vet.
Mag. Chart. pt.
2 fo. 46. Fleta,
lib. 3. cap. 5.

For the second branch: no demean, or proper cart for the necessary use of any ecclesiasticall person, or of any knight, or of any lord, for or about the demean lands of any of them, ought to be taken for the kings carriage, but they are exempted by the auncient law of England from any such carriage.

This statute extendeth not to any person ecclesiasticall, of what estate, order, or degree soever: and this was an auncient priviledge belonging to holy church.

Also it extendeth to all degrees, and orders of the lesser, and greater nobility, or dignity, as of knighthood, dukes, marquesses, earles, viscounts, and barons, for albeit there were no dukes, marquesses, or viscounts within England at the making of the statute, yet this statute doth extend to them, for they are all *domini*, lords of parliament, and of the barony of England; and this also was an ancient priviledge belonging to these orders and dignities: and all this concerning the ecclesiasticall and temporall state was (amongst other things for the advancement and maintenance of that great peacemaker, and love-holder, hospitality) one of the auncient ornaments, and commendations of the kingdome of England.

W. 1. cap. 1. &
32. See 25 E. 3.
ca. 6. 35 H. 6.
cap. 17. 5 Eliz.
cap. 8. 7 H. 3.
tit. Wa. 141.
11 H. 4. 28 Pl.
Com. 322.
42 E. 3. cap. 1.
Mich. 2. Jac. re-
solved 11 H. 4.
fo. 28. No pur-
veyance of gra-
vell, because it
is part of the in-
heritance.
See 47 E. 3.
fo. 13. Issue
taken upon the
sale of timber
for reparation of
Calais.

The third branch is, that neither the king, nor any of his baylies, or ministers, shall take the wood of any other, for the kings castles, or other necessities to be done, but by the license of him whose wood it is. And all statutes made against this branch (amongst others) before the parliament of 42 E. 3. are repealed: and this branch, amongst others, hath (as hath been said) been confirmed, and commanded to be put in execution at 32 sessions of parliament. And so it was resolved by all the judges of England, and barons of the exchequer, Mich. 2 Jac. Reg. upon mature deliberation; and that the kings purveyor could take no timber, growing upon the inheritance of the subject, because it was parcell of the inheritance, no more then the inheritance it selfe. Whereof the king, and counsell being informed, the king by his proclamation, by advise of his counsell, under the great seale, 23 Aprilis, anno 4. declared the law to be in these words: first, when we were informed, that some inferiour ministers had presumed to goe so farre beyond their commission, as they have adventured, not onely to take timber trees growing, which being parcell of our subjects inheritance,

inheritance, was never intended by us to be taken without the good will, and full consent of the owners, but have accustomed also to take greater quantities of provisions for our house, and stable, then ever came, or were needfull, to our use, &c. As by the said proclamation bearing date 23 Aprilis, anno 4 Jac. Reg. appeareth. And divers purveyors were according to the said resolution of the judges punished in the starchamber, for purveying of timber growing, without the consent of the owners.

Boscus is an ancient word used in the law of England, for all manner of wood, and the Italian useth the word *bosco* in the same sense, and the French, *boys*, accordingly. *Boscus* is divided into two sorts, viz. high wood, *haut-boys*, or timber, and coppice-wood (so called, because it is usually cut) or under wood. High-wood is properly called *Saltus, quia arbores ibi exiliunt in altum*. It is called in Fleta, *maeremium*.

Fleta, ubi supra.
Pl. Com. 236.

The common law hath so admeasured the prerogative of the king, as he cannot take, nor prejudice the inheritance of any, and (as hath been said) a man hath an inheritance in his woods.

And see the statute of Marlebridge, anno 52. H. 3. *Magna Charta in singulis teneatur, tam in hiis, quæ ad regem pertinent, quam ad alios*, and 31 other statutes. So as all pretence of prerogative against *Magna Charta* is taken away.

Marlebr. cap. 5.

See hereafter the exposition of the statute *De tallagio, anno 34 E. 1. & de prisis, anno 18 E. 2. vet. Magna Charta. fol. 125. 1 part.*

34 E. 1. Vet.
Magna Charta.
fol. 37. 2. Part.

C A P. XXII.

NOS non tenebimus terras (1) illorum, qui convicti fuerint (2) de feloniam (3), nisi per unum annum, et unum diem, et tunc reddantur terræ illæ dominis feodorum.

WE will not hold the lands of them that be convict of felony but one year and one day, and then those lands shall be delivered to the lords of the fee.

(Mirror, 313.)

This appeareth by Glanvill, to be due to the king by his ancient prerogative, for he saith, *Sin autem de alio, quam de rege tenuerit is, qui utlagatus est, vel de feloniam convict. tunc quoque omnes res sue mobiles regis erunt, terra quoq; per unum annum remanebit in manu domini regis, clapsa autem anno, terra eadem ad rectum dominum, scilicet ad ipsum de cujus feod. est, revertetur, veruntamen cum domorum subversione, et arborum extirpatione.*

Glanv. li. 7.
ca. 17. fol. 59.

This chapter of *Magna Charta* doth expresse that, which doth belong to the king, viz. the yeare, and the day, and omit the waste, as not belonging to him, and this is notably explained by our ancient books with an uniforme consent: Bracton treating of the yeare, and the day in this case due to the king, saith, *Sed quæ sit causa, quare terra remanebit in manibus domini regis? Videtur quod talis est, quia revera, cum quis convictus fuerit de aliqua feloniam, in potestate domini regis erit, prosternendi ædificia, extirpandi gardina, et arandi prata, et quoniam hujusmodi verterentur in grave damnum dominorum,*

Bracton lib. 3.
fol. 129. & 137.

Nota.
Provisum fuit.

norum, pro communi utilitate provisum fuit, quod hujusmodi ædificia, gardina, et prata remanerent, et quod dominus rex propter hoc haberet commoditatem totius terræ illius per unum annum, et unum diem, et sic omnia cum integritate reverterentur in manus dominorum capitalium, nunc autem petitur utrumque, s. finis pro termino, et similiter pro vasto, et non video rationem quare, &c.

Britton, cap. 5.
fol. 14.

[37]

And Britton treating of this very matter, saith, *Lour biens mobles sont les nous, et lour heires disberit. et voilons aver lour tenements de qui que unques sont tenu le an, et le jour, issent que lour heritages, demourgent un an et un jour in nostre maine, si que nous ne faisons estre perie les tenements, ne gaster les boys, ne aver les prees, sicome lensoloit faire in remembrance des felons attaints, &c.*

Fleta, li. 1. cap.
28.

Fleta saith, *Si autem utlagati, vel alii convicti terram liberam habuerint, illa statim capienda est in manus regis, et per unum annum, et unum diem tenend. ad capitales dominos post illum terminum re-versura, et hoc habetur ex statuto Magnæ Chartæ, quod tale est, nos non tenebimus terras illorum, qui convicti fuerint de feloniam, nisi per unū annū, et unum diem, et tunc reddantur terræ illæ dominis feodorū, causa vero talis termini regis, quia in signum feloniam olim provisum fuit, quod ædificia talium prosternentur in terram, extirpentur gardina, ararentur prata, truncarentur bosci, et quoniam hujusmodi verterentur in grave damnum dominorum feodorum, pro communi utilitate provisum fuit, quod hujusmodi dura, et gravia cessarent, et quod rex propterea per annum et diem totius terræ commoditatem perciperet, secus autem, si terra non esset eschaeta dominorum, post quem terminum dominis proprietariis integre absque vasto vel destructione reverterentur.*

Nota.

Nota.

Mirror, cap. 5.
§ 2.

The Mirror speaking of this chapter, saith, *Le point des terres aux felons tener per un an, est desusie, car p. la ou le roy ne duist aver q. le gast de droit, ou lan in nosine de fine, par sauver le fief de lestripment, preignent les ministers le roy ambideux.* Upon all which it appeareth, that the king originally was to have no benefit in this case, upon the attainder of felony, where the free-land was holden of a subject, but onely in detestation of the crime, *ut pœna ad paucos, metus ad omnes perveniat*, to prostrate the houses, to extirpe the gardens, to eradicate his woods, and to plow up the medows of the felon, for saving whereof, *et pro bono publico*, the lords, of whom the lands were holden, were contented to yeeld the lands to the king for a year, and a day, and therefore not only the waste was justly omitted out of this chapter of *Magna Charta*, but thereby it is enacted, that after the year and day, the land shall be rendred to the lord of the fee, after which no waste can be done.

And where the treatise of *Prerogativa Regis*, made in 17 Ed. 2. saith, *Et postquam dominus rex habuerit annum, diem, et vastum, tunc reddatur tenementum illud capitali domino feodi illius, nisi prius faciat finem pro anno, die, et vasto.* Which is so to be expounded, that forasmuch, as it appeareth in the said old books, that the officers, and ministers, did demaund both for the waste, and for the year, and day, that came in lieu thereof, therefore this treatise named both, not that both were due, but that a reasonable fine might be paid for all that, which the king might lawfully claim. But if this act of 17 E. 2. be against this branch of *Magna Charta*, then is it repealed by the said act of 42 E. 3. cap. 1.

Vide Stamford.
Pl. Cor. 190,
191. Vide 3 E. 3.
coron. 327.
3 E. 3. ibid. 58.
3 E. 3. ibid.
310.

Hereby it also appeareth, how necessary the reading of auncient authors is for understanding of auncient statutes. And out of these old books, you may observe, that when any thing is given to the king-

king in lieu, or satisfaction of an auncient right of his crown, when once he is in possession of the new recompence, and the same in charge, his officers and ministers will many times demand the old also, which may turn to great prejudice, if it be not duly, and discreetly prevented.

(1) *Non tenebimus terras.*] If there be lord, mesne, and tenant, and the mesne is attainted of felony, the lord paramount shall have the mesnalty presently. For this prerogative belonging to the king extends onely to the land, which might be wasted, in lieu whereof the yeare and day was granted.

And this is to be understood when a tenant in fee-simple is attainted, for when tenant in taile, or tenant for life is attainted, there the king shall have the profits of the lands, during the life of tenant in taile, or of the tenant for life.

(2) *Convicti fuerint.*] Here *convicti* in a large sense is taken for *attincti*, for the nature, and true sense of both these words, see the first part of the Institutes, and likewise for this word felony there.

(3) *De feloniam.*] Must be understood of all manner of felonies punished by death, and not of petit larceny, which notwithstanding is felony.

Pasc. 31 E. 1.
Cor. Rege
Norff. Wil. de
Ormesby.

See the first part
of the Institutes,
sect. 745.

[38]

C A P. XXIII.

OMNES kidelli (1) deponantur de cætero penitus per Thamesiam et Medewein per totam Angliam nisi per costeram maris.

ALL weares from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the sea-coasts.

(25 E. 3. cap. 4. 1 H. 4. cap. 12. 12 E. 4. cap. 7. 10 Rep. 138. 13 Rep. 35. 12 Ed. 4. c. 7.)

Rex, &c. Noveritis nos pro communi utilitate civitatis nostræ London' et totius regni nostri concessisse, et firmiter præcepisse, ut omnes kidelli qui sunt in Tamisia, vel Medeweia, ubicunque fuerint in Tamisia, vel in Medeweia, amoveantur, et non de cætero kidelli alicubi ponantur in Tamisia, vel in Medeweia, super forisfactur' decem libr' sterlingorum: quietum etiam clamavimus omne id, quod custodes turr' nostræ London' annuatim percipere solebant de prædictis kidellis: Quare volumus et firmiter præcipimus, ne aliquis custos præfat' turr' aliquo tempore post hoc, aliquid exigat ab aliquo, nec aliquam demandam, aut gravamen, sive molestiam alicui inferat occasione prædictorum kidellorum, satis enim nobis constat, et per fideles nostros sufficienter nobis datum est intelligi, quod maximum detrimentum, et incommodum prædictæ civitati London', nec non et toto regno nostro occasione prædictorum kidellorum perveniebat; quod ut firmum, et stabile perseveret imperpetuum, præsentis paginæ inscriptione et sigilli nostri appositione communimus, sicut carta domini regis Johannis patris nostri quam barones nostri London' inde habent rationabilit' testat'.

(1) *Kidelli.*] Kidels is a proper word for open weares whereby fish are caught.

It was specially given in charge by the justices in eire, that all juries should enquire, *De hiis qui piscantur cum kidellis et skar-*

Rot. cart.
18 Feb. Anno
11 H. 3.

Lib. 10. fo. 138.
in the case of
Chester Mill.
Keylw, 15 H. 7.
15.
Cap. Itineris,
nu. 5. Tr. 5 E. 2.
Coram Rege.

And Rot. 18.

Glanv. li. 9.
ca. 11.

And it appeareth by Glanvill, that this *pourpresture* was forbidden by the common law, for he saith, *Dicitur autem purprestura, vel porprestura proprie, quando aliquid super dominum regem injuste occupatur, ut in dominicis regis, vel in viis publicis obstructis, vel in aquis publicis transversis a recto cursu, vel quando aliquis in civitate super regiam plateam aliquid ædificando occupaverit, et generaliter, quoties aliquid fit ad nocumentum regii tenementi, vel regie viæ, vel civitatis, and every publique river or streame, is alta regia via, the kings high-way.*

Pourpresture commeth of the French word *pourprise*, which signifieth a close, or inclosure, that is, when one encroacheth, or makes that severall to himselfe, which ought to be common to many.

[39]

C A P. XXIV.

BREVE (1) *quod dicitur præcipe in capite, de cætero non fiat alicui de aliquo libero tenemento, unde liber homo perdat curiam suam.*

THE writ that is called *præcipe in capite* shall be from henceforth granted to no person of any freehold, whereby any freeman may lose his court.

(Mirror, cap. 5. §. 2. Bracton lib. 5. fol. 328. & 414 b. Registr. 4. 3 E. 3. 23. 6 E. 3. 15. 38 E. 3. 13. 39 E. 3. 26. F. N. B. 5. c. 38 Ed. 3. f. 13. 13 Rep. 42. F. N. B. fol. 5, 12, 39. h.)

20 E. 3. estoppel. 187. 22 E. 3. 17. 40 E. 3. 30.

This is for reformation of an abuse, and wrong offered to the lord, of whom the land was holden, and yet upon this statute, the tenant cannot pleade, that the lands are not holden of the king in chiefe, for two causes, first for that this act was made for the benefit of the lord, of whom this land is holden, and he cannot pleade it, because he is an estrang', and if one claiming to be lord should be admitted, another might come in and pretend the like, and so infinite. Secondly, this act extends to the chancery, for the words be *Breve, Sc. non fiat*, so in that court the writ is made: and therefore when the writ is granted in the chancery, and returned into the court of common pleas, that which is by this act prohibited in the chancery, extendeth not to the court of common pleas; and therefore they cannot admit of such a plea: now the tenant, least he be concluded, must take the tenure by protestation, and the king, though he be not party to the record, yet shall he take advantage of the estoppel, for he is ever present in court.

And since this statute, no man ought to have this writ out of the chancery upon a suggestion, but oath must be made, before the granting thereof, that the land is holden of the king in *capite*.

Mic. 7. E. 1. in banco rot. 65. Lanc'. acc'. Peter Grellyes case.

See Mich. 4 E. 1. *de banco Rot. 114. Norff. Barth. de Redhams case, pro terris in curia comitis warren apud Castleacre, notabile recordum super hoc statutum. Per breve præcipitur justiciariis quod inquirent, si terræ tenentur de rege in capite.* See the writ in the Register, 4. b. by which writ power is given to the justices, that if it may appeare to them, that the land is not holden in *capite*, then that the plea be holden in the lords court, according to this statute, And for that the demandant Peter Grellye confessed that the

* lands

lands were not holden of the king in *capite*, but of Edmond brother of the king, thereupon the entrie was, *Ideo Petrus perquirat sibi per breve de recto pat' in curia ipsius Ed. versus R. si voluerit.* Mich. 14. E. 1. Rot. 48. Som. acc. Regist. fo. 4. b. & 6. a.

And the lord, of whom the land is holden, shall upon this statute, have his writ of disceit against the demandant, which have recovered by default, and recover his damages, but the record of the judgement shall stand in force; and concerning the conclusion of the tenure, the lord shall have remedy against the king by petition of right. But if the recovery be given upon triall against the tenant, then the tenant hath concluded himself: for the tenure, because his protestation cannot availe him, when his plea is found against him: but the lord may have in that case, his action against the tenant, and his petition of right to the king, to be restored to his seigniorie, and by that meanes the tenant himselve may be relieved.

(1) *Breve.*] *Dicitur ideo breve, quia rem de qua agitur, et intentionem petentis paucis verbis breviter enarrat, sicut faciat regula juris, quæ rem, quæ est, breviter enarrat.*

Breve quidem cum sit formatum ad similitudinem regulæ juris, quia breviter et paucis verbis intentionem proferentis exponit et explanat, sicut regula juris rem quæ est breviter enarrat.

And Fleta defines a writ, *totidem verbis*, as Braeton hath done.

There is a great diversity betweene a writ, and an action (although by some they are often confounded) which will best appeare by their severall definitions.

Actio nihil aliud est, quam jus prosequendi in judicio quod alicui debetur.

And with Braeton agreeth Fleta.

Actio nihil aliud est, quam jus prosequendi in judicio quod alicui debetur, et quod nascitur ex maleficio, vel quod provenit ex delicto, vel injuria.

And the Mirror saith, *Action nest aut' chose que loiall demand de son droit. Actors sont queux suont leur droit per pleint, &c.*

So as the first diversity between an action, and a writ is, that an action is the right of a suite, and the writ is grounded thereupon, and the meane to bring the demandant or pl' to his right.

The second diversity, a writ grounded upon right of action is ever in *foro contentioso*, but so are not all writs, for that writs are much more large, then actions are, as shall appeare by the division of writs.

Of writs grounded upon rights of action, some be criminall, and some be civill or common.

Of criminall, some be in *personam*, to have judgement of death, as writs of appeale, of death, robbetrie, rape, &c. and some to have judgement of dammage to the partie, fine to the king, and imprisonment, as writs of appeale of mayhem, &c.

Of writs civill or common, some be reall, some personall, and some mixt. And of these, some be originall, and all they goe out of the chancery, and some judiciall, and they issue out of the court, where the plea depended. Some conditionall, as writs of error, redissin, &c. some without condition, some retornable, and some not retornable. And all these are warranted, either by the common law, or grounded upon some act of parliament. Which are so well knowne, as this little touch shall suffice.

Of originall writs, some be *brevia formata*, and some *ex cursu*, some *magistralia*, et sæpius variantur.

Regularly

8 E. 4. 6. 6 E.
3. 15. Vet. N.B.
13. a. F.N.B.
98. n.

See the first part
of the Institutes,
sect. 192. 17 E.
3. 31. 36. 37.
59. 32 E. 3.
Avowry 113.
46 E. 3. petition
9.

Braeton. lib. 3.
f. 112. cap. 12.
nu. 2. & lib. 5
fol. 413. c. 17.
nu. 2.

Fleta, lib. 2.
c. 12. § dicun-
tur etiam brevia.

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Braeton, lib. 3.
fol. 98. b. cap. 1.

Fleta, lib. 1.
cap. 16. § actio
& § 3. Actors.
Mirror, cap. 2.
§ 1. nest.

Braeton, lib. 3.
fol. 101. cap. 3.
nu. 1 Fleta lib.
1 cap. 16.

Glanvil. lib. 1.
c. 1. Braeton ubi
sup. Fleta ubi
sup. Mirror ubi
sup. Plowd.
Com. 73. &c.
Regist. 187.

Braeton. l. 5. 413.
b. Fleta, lib. 2.
cap. 12.

^a Dier, 23. Fitz.
377. a.
^b F.N.B. 28,
29.

^c Regist. 227.
^d Ibid. 267.
^e Regist. 133. b.
Fitz. N.B. 185.
Regist. 206.
F.N.B. ib.

Regist. 295.
F.N.B. 170.
Regist. 294.
F.N.B. 165. a.
F.N.B. 85. a.
Regist. 58. b.
Artic. sup. cart.
c. 6. Regist.
187. b. ibid.
179. a. F.N.B.
240. d.

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^a F.N.B. 153.
b. 2 E. 3. ca. 8.
5 E. 3. ca. 9.
14 E. 3. cap. 14.
Regist. fo. 186.
F.N.B. 153.
Regist. 18.
F.N.B. 20.

^b Regist. 124,
125. revocat
brevis de au-
diendo &c. All
Writs of super-
fedas.

^c Pl. com. fol.
73. &c. See
12 H. 4. 24. in
debt not cited
in that case,
Regist. 114,
115. Writs of
audita querela
&c. prohibitions
ad jura regal.

^d Regist. 267. a.
^e ib. 126. b.
^f Ib. 192. b.
193. a. b.

Regularly the kings writs are, *ex debito justitiæ*, to be granted to the subject, which cannot be denied; and some be *ex gratia*, as ^a speciall liveries, and ^b writs of protections for the safegard of the subject, being in the kings warre out of the realme.

In nature of commissions; as writs of error, of oier, and terminer, of election of knights and burgeses of the parliament, of election of a coroner, or of discharging of him, of election of verderers, ^c *de ventre inspiciendo*. ^d *De viis et venellis mundandis*, Regist. 267. Of the surety of the good behaviour, or of the peace. ^e *De odio et atia*. Association of *de admittendo in socium*, of *si non omnes*, and the like. Writs of *justicies*.

Of writs of *præcipe*, some be, *quod reddat*, as writs of right, &c. debt, &c. Some be *quod permittat*, as writs *de quod permittat*. Some be *quod faciat*, as *de consuetudinibus et servitiis*. *De domo reparanda*. And of writs of *præcipe*, some containe severall precepts, and some joynt, and some are sole.

Writs mandatory, and extrajudiciall, whereof some be affirmative, and some negative. Affirmative, as calling of men to the upper house of parliament to be peers of the realme. *De comitat' commissis*. Regist. 295. Of *conge de eslier*, licence to choose a bishop. Regist. 294. b. *De regio assensu*. Regist. *ibid.* To call one to be chiefe justice of England. To call apprentices of law to be serjants. *De brevibus et rot. deliberandis*. Regist. 295. *De restitutione spiritualium*. Regist. 294. b. Negative, as *de non ponendis in assisis, et juratis*. *De securitate inveniendâ, quod se non divertat ad partes exteras sine licentia*. *De non residentia clerici regis*. *De clerico infra sacros ordines constituto non eligendo in officium*. *Ne fines capias pro non pulchre placitando*.

Of writs, some are for furtherance of justice, and for ousting of delayes, and to proceed. As the writ *de procedendo ad judicium*, that the justices shall not surcease to doe common right, for no commandement under the great seale, petit seale, or message from the king. Or ^a if the judges of themselves delay judgement, there lyeth also a *procedendo ad judicium*. Againe, there is a *procedendo in loquela, et ad judicium*, after aid of the king. A writ *de executione judicii*.

^b Some for advancement of justice not to proceed.

^c Regularly writs are directed to the sheriffes, or coroners, but in speciall cases to the partie, or others. To the partie, as writs of prohibitions, *ne exeat regnum*. To others, as to judges temporall, ecclesiasticall, and civill. To serjeants at armes. To the ^d party that hath the custody of an idiot. To the ^e major, and bailiffes, &c. *ad amovendum eos ab officio, quousq; inquisitio foret de eorum gestu*. ^f *Liberate thesaurario, et camerariis, thesaurario et baronibus*.

Note of writs of right (whereof the *præcipe in capite* is one) some be close, and some be patent.

Writs of right retornable into the court of common pleas be patent, and writs directed into auncient demesne, are close; and the reason wherefore in other courts of the lords, the writs shall be patent, is, because there is a clause in those writs, *et nisi feceris, vicecomes N. hoc faciat, ne amplius clamorem audiamus pro defectu recti*: which clause is not in the other writs, and necessary it is that such writs should be patent, that the sheriffe might take notice thereof.

C A P. XXV.

UNA mensura vini per totum regnum nostrum, et una mensura cervisie, et una mensura bladi, scilicet, quarterium Lond', et una latitudo pannorum (1) tinctorum, ruffatorum, et haubergettarum, scilicet duæ ulnæ infra listas. De ponderibus vero sic sicut de mensuris.

ONE measure of wine shall be through our realm, and one measure of ale, and one measure of corn, that is to say, the quarter of London: and one breadth of dyed cloth, ruffets, and haberjects, that is to say, two yards within the lists. And it shall be of weights as it is of measures.

(14 Ed. 3. stat. 1. c. 12. 27 Ed. 3. stat. 2. c. 10. 8 H. 6. c. 5. 11 H. 7. c. 4. 16 Car. 1. c. 19.)

This act concerning measures and weights, that there should be one measure and one weight through England, is grounded upon the law of God. *Non habebis in sacculo diversa pondera, majus, et minus, non erit in domo tua modius major et minor, pondus habebis justum et verum, et modius æqualis erit tibi, ut multo vivas tempore super terram,* &c. And this hath often by authority of parliament been enacted, but never could be effected, so forcible is custome concerning multitudes, when it hath gotten an head, therefore good lawes are timely to be executed, and not in the beginning to be neglected.

Stat. de 31 E. 1. 14 E. 3. cap. 12. 27 E. 3. cap. 10. See the Custum. de Norm. cap. 16. Deutr. 25. v. 13, 14.

For weights and measures, there are good lawes made before the conquest: *in dimensione, et pondere nihil esto iniquum, ab iniquitate vero deinceps quisq; temperet: per commune concilium regni statuimus, quod habeant per universum regnum mensuras fidelissimas, et signatas, et pondera fidelissima, et signata, sicut boni prædecessores statuerunt.*

Int' leges Canut. cap. 9. Int' leges Will. Regis conq.

(1) *Una latitudo pannorum, &c.*] True it is that broade cloathes were made, though in small number, at the time, and long before this statute, but in the beginning of the raigne of Edward 3. the same came to so great perfection, as in the 11. yeare of his raigne, all men were prohibited to bring in privilie, or apertly by himselfe, or any other, any clothes made in any other places, &c. And this is the worthiest and richest commoditie of this kingdome, for divide our native commodities exported into tenne parts, and that which comes from the sheepes back, is nine parts in value of the tenne, and setteth great numbers of people on worke. For the breadth, and length of clothes, see many statutes made after this act.

Mirror, cap. 5. § 2. Vet. Mag. Cart. cap. Itin. f. 151. 11 E. 3. cap. 3.

[42]

C A P. XXVI.

N I H I L *de cætero detur pro brevi inquisitionis (1) ab eo, qui inquisitionem petit de vita, vel de membris, sed gratis concedatur, et non negetur.*

N O T H I N G from henceforth shall be given for a writ of inquisition, nor taken of him that prayeth inquisition of life, or of member, but it shall be granted freely, and not denied.

(3 Ed. 1. c. 11. 13 Ed. 1. stat. 1. c. 29. Mirror, 314. Regist. 133, 134.)

Mirror, cap. 5.
§ 2. Regist. fol.
133. Glanv. lib.
14. c. 3. Braët.
1. 3. f. 121.
Fleta, lib. 1. c.
23. 25 W. 1.
cap. 11. Glouc.
c. 9. W. 2. cap.
29. Hill 32
E. 1. coram
Rege Rott. 71.
& 79. 5 H. 7. 5.

Glanv. lib. 14.
c. 1.

Hill. 32 E. 1.
ubi sup.

(1) *Brevi inquisitionis.*] That is the writ *de odio et atia*, anciently called *breve de bono et malo*, and here, of life, and member, which the common law gave to a man, that was imprisoned, though it were for the most odious cause, for the death of a man, for the which, without the kings writ he could not be bayled, yet the law favouring the liberty, and freedome of a man from imprisonment, and that he should not be detained in prison, untill the justices in eyre should come, at what time he was to be tried, he might sue out this writ of inquisition directed to the sherife, *quod assumptis tecum custodibus placitorum coronæ in pleno comitatu per sacramentum proborum, et legalium hominum de &c. inquiras (inde appellatur breve inquisitionis) utrum A. captus, et detentus in prisona &c. pro morte W. unde rettatus (I. accusatus existit) rettatus sit odio, et atia &c. nisi indietatus vel appellatus fuerit, coram justitiariis nostris ultimo itinerantibus in partibus illis, & pro hoc captus, et imprisonatus, for by the common law, in omnibus autem placitis de feloniam, solet accusatus per plegios dimitti, præterquam de placito de homicidio, ubi ad terrorem aliter statutum est.* In this writ, fower things are to be observed.

First, though the offence, whereof he was accused, were such, as he was not bayleable by law, yet the law did so highly hate the long imprisonment of any man, though accused of an odious, and heynous crime, that it gave him this writ for his reliefe.

Secondly, If he were indited, or appealed thereof, before the justices in eyre, he could not have this writ, because this writ was grounded upon a surmise, which could not be received against a matter of record.

Thirdly, Upon this writ, though it were found, that he was accused *de odio et atia*, and that he was not guilty, or that he did this act *se defendendo, vel per infortunium*, yet the sherife by this writ had no authority to bayle him, but then the party was to sue a writ *de ponendo in ballium*, directed to the sherife, whereby he was commanded, *quod si prædictus A. invenerit tibi 12. probos, et legales homines de comitatu tuo &c. qui cum manucapiant habere coram justitiariis nostris ad primam assisam, &c. Standum, &c. tunc ipsum A. &c. prædictis duodecim tradas in ballium.*

Lastly, that there was a meane by the common law, before inditement, or appeale, to protect the innocent against false accusation, and to deliver him out of prison.

Odium, signifieth hatred, and *atia* or *acia* in this writ signifieth

hath malice, because that malice is *acida*, that is, eager, sharpe and cruell.

And this branch, for further benefit, and in favour of the prisoner, doth enact, that he shall have it gratis, without fee, and without delay, or deniall, of which the Mirror saith thus, *le defence que se fait del breije de odio, et atia, que le roy ne son chancelor ne preignent par le breise granter se doit extend a tous breifs remedials, et le dit breife ne doit solement extender a felonies de homicide, mes a tous felonies, et ne solemt. in appeles, mes en inditement.*

But this writ was taken away by a later statute, viz. in 28 E. 3. because as some pretended, it became unnecessary, for that justices of assise, justices of oyer and terminer, and justices of gaole delivery came at the least into every county twice every yeare; but within 12 years after this statute, it was enacted, as often hath been said, that all statutes made against *Magna Charta* (as the said act of 28 E. 3. was) should be voyd, whereby the writs of *odio et atia, et de ponendo in balium* are revived, and so in like cases upon all the branches of *Magna Charta*. And therefore the justices of assise, justices of oyer and terminer, and of gaole delivery, have not suffered the prisoner to be long detained, but at their next comming have given the prisoner full and speedy justice, by due triall, without detaining him long in prison: nay, they have been so farre from allowance of his detaining in prison without due triall, that it was resolved in the case of the abbot of S. Albion by the whole court, that where the king had graunted to the abbot of S. Albion, to have a gaole, and to have a gaole delivery, and divers persons were committed to that gaole for felony, and because the abbot would not be at cost to make deliverance, he detained them in prison long time without making lawfull deliverance, that the abbot had for that cause forfeited his franchise, and that the same might bee seised into the kings hand.

For his committing to prison is onely to this end, that he may be forth comming, to be duly tried, according to the law and custome of the realme. The abbot of Crowland had a gaole, wherein divers men were imprisoned, and because he detained some that were acquitted of felony after their fees paid, the king seised the gaole for ever.

And it is provided by the statute of 5 H. 4. that none be imprisoned by any justice of peace, but in the common gaole, to the end they might have their triall at the next gaole delivery, or sessions of the peace. *Vide cap. 29.*

And some say, that this statute extendeth to all other judges, and justices for two reasons. 1. They say, that this act is but declaratory of the common law. 2. *Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est.*

Breve regis de bono et malo is so called of the words, *de bono et malo*, contained in the writ. This writ lay when A. B. was committed to prison for the death of a man, the king did write to the justices of gaole delivery; *quod si A. B. captus, et detentus in gaola prædicta pro morte C. D. de bono et malo super patriam inde ponere voluerit, et ea occasione (et non per aliquod speciale mandatum nostrum) detentus sit in eadem, tunc eandem gaolam de prædicto A. B. secundum legem, et consuetudinem Angliæ, deliberetis.* So as without question the writ *de bono et malo*, is not the writ *de odio et atia*, as some have imagined.

Note, in those dayes the justices of gaole delivery would not proceed.

Regist. f. 133,
134.
Mirror, c. 5. § 2.

[43]
28 E. 3. ca. 9.
Stamf. Pl. Cor.
77. F.N.B. 92.
42 E. 3. ca. 1.

See the Statute
of Gloc. ca. 9.

8 H. 4. 18.
20 E. 4. 6.
Bro. tit. Forfeiture.

20 E. 4. 6.

5 H. 4. cap. 10.
lib. 9. fol. 119.
Seignior Zanchars case.

See the Statute
of Gloc. cap. 9.

Hil. 32 E. 1.
Cora. i. Rege
Eborū. Roger le
Wildes Case.
See the forme of
this Writ at
large in this re-
cord.

proceed in case of the death of a man, without the kings writ: for in the same record it appeareth, that *R. W. indictatus de morte W. E. non tulit breve regis de bono, et malo, ideo retornatur gaolæ, et sic de aliis.*

C A P. XXVII.

SI aliqui teneant de nobis per feodi firmam (1), vel per focagium (2), vel burgagium (3), et de alio teneant terram per servitium militare (4), nos non habebimus custodiam hæredis, nec terræ suæ, quæ est de feodo alterius, occasione illius feodi firmæ, vel focagii, vel burgagii. Nec habebimus * custodiam illius feodi firmæ, vel focagii, vel burgagii, nisi ipsa feodi firma nobis debeat servitium militare. Nos non habebimus custodiam hæredis, vel alicujus terræ, quam tenet de aliquo alio per servitium militare, occasione alicujus parvæ serjantiæ, quam tenet de nobis per servitium, reddend' nobis cul-tellos, sagittas, vel hujusmodi.

* [44]

(Bro. Tenures, 69; Fitz. Gard. 145. 12 Car. 2. c. 24.)

IF any do hold of us by fee-ferm, or by focage, or burgage, and he holdeth lands of another by knights service, we will not have the custody of his heir, nor of his land, which is holden of the fee of another, by reason of that fee-ferm, focage, or burgage. Neither will we have the custody of such fee-ferm, or focage, or burgage, except knights service be due unto us out of the same fee-ferm. We will not have the custody of the heir, or of any land, by occasion of any petit serjeanty, that any man holdeth of us by service to pay a knife, an arrow, or the like.

See the Statute of Glouc. cap. 4. F.N.B. 210. 45 E. 3. 15.

Brit. fol. 164. b. Bract. li. 2. fo. 35. Fleta, lib. 1. ca. 10. Mirror, ca. 2. § 17.

See the first part of the Institutes. fect. 117.

* Rot. claus. 12 H. 3. m. 12. Litt. fect. 162.

ib. fect. 103.

Glouc. li. 7. c. 10.

(1) *Per feodi firmam.*] Fee farme properly taken is, when the lord upon the creation of the tenancy reserve to himselfe, and his heires, either the rent, for the which it was before letten to farme, or at least a fourth part of that farme rent.

But Britton saith, *Fee farmes sont terres tenus in fee, a rendre par eux per ann. le veray value, ou plus, ou moins*, and is called a fee farme, because a farme rent is reserved upon a graunt in fee. And regularly, as it appeareth by this act, lands graunted in fee farme are holden in focage, unlesse an expresse tenure by knights service be reserved, as it appeareth hereafter in this chapter.

(2) *Vel per focagium.*] * *Tenere per firmam albam est tenere libere in focagio. Vide in libro nigro scaccarii, capite De officio clericorum de firma blanca.* It is commonly called blanch farme, *Lucubrat. Occubam, firma blanca, et vidæ ibi antiquum verbum [dealbari].*

(3) *Burgagium.*] See the *Custumier de Normandie, cap. 32.* and the commentaries upon the same.

(4) *Per servitium militare.*] See *le Custumier de Norman. cap. 33. De gard de orphelins, fol. 49.* and the comment upon the same.

This act, as well concerning tenures in fee farme, focage, and burgage, as by little serjanty, is declaratory of the common law, and constantly in use to this day, and needeth no further explanation.

C A P. XXVIII.

NULLUS balivus de cætero ponat aliquem ad legem manifestam, nec ad juramentum simplici loquela sua, sine testibus fidelibus ad hoc inductis.

NO bailiff from henceforth shall put any man to his open law, nor to an oath, upon his own bare saying, without faithful witnesses brought in for the same.

(Fitz. Ley, 78. Bro. Ley, 37.)

The Mirror treating of this chapter saith, *Le point que defend, que nul bayliffe met frank home a serement sans sute present, est interpretable en cest manner, que nul justice, nul minister le roy, ne auter seneeschall, ne bailif ne eit power a mitter frank home a serement faire, sans le commaundement le roy, ne puit reseivre ascuns testmoignes, que testmoignent le monstrance estre veray.*

Mirror, cap. 5. § 2. Fleta ii. 2. cap. 56. W. 2. ca. 35. des hauts homes.

By this it appeareth, that under this word *balivus*, in this act is comprehended every justice, minister of the king, steward and bayliffe.

Fleta ubi supra. Vide Vet. Magna Charta, pt 2. in stat. Hibern. 68. b. See the first part of the Institutes, sect. 248.

Simplici loquela sua.] For as Bracton saith, *vox simplex nec probationem facit, nec præsumptionem inducit; item non per sectam, quæ, fieri potest per domesticos, et familiares, secta enim probationem non facit, sed legem inducit præsumptionem, et vincitur per probationem in contrarium, et per defensionem per legem.*

Brac. l. 5. fo. 400. b.

* [45]

It appeareth by Glanvill, that the defendant ought to make his law, *12. manu*. And so it appeareth by a judgement in the same yeare, and term, that this great charter was made, for there, in debt the defendant waged his law, *ideo consideratum est per curiam, quod defendens se duodecima manu venit cum lege.*

Glanv. li. 1. ca. 9.

Mich. 9. H. 3. tit. Ley 78.

Every wager of law doth countervaile a jury, for the defendant shall make his law, *de duodecima manu, viz.* an eleven, and himself. And it should seeme, that this making of law was very auncient, for one writing of the auncient law of England saith, *hujus purgationis non omnis evanuit vetustate memoria, nam per hæc tempora de pecunia postulatus, debitum nonnumquam duodecima, quod aiunt, manu dissolvit.*

33 H. 6. 8.

How much, and for what cause the law respecteth the number of 12. see the first part of the Institutes.

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

The party himselfe, when he maketh his law shall be sworne *de fidelitate*, that is, directly or absolutely, and the others *de credulitate*, that is, that they beleieve that he saith true.

To make his law, is as much as to say, as to take his oath, &c. and it is so called, because the law giveth him that meane by his owne oath, to free himselfe.

And the reason, wherefore in an action of debt upon a simple contract, the defendant may wage his law, is, for that the defendant may satisfie the party in secret, or before witnessse, and all the witnessses may die, so the law doth allow him to wage his law for his discharge: and this, for ought I could ever reade, is peculiar to the law of England, and no mischief insueth hereupon,

for the plaintiffe may take a bill or bond for his money, or if it be a simple contract, he may bring his action upon his case upon his agreement or promise, which every contract executory implieth, and then the defendant cannot wage his law.

C A P. XXIX.

NULLUS liber (1) homo (2) capiatur, vel imprisonetur (3), aut disseisietur de libero tenemento suo, vel libertatibus (4), vel liberis consuetudinibus (5) suis, aut utlagatur, aut exuetur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium (6) parium suorum (7), vel per legem terræ (8). Nulli vendemus (9), nulli negabimus, aut differemus (10) justitiam, vel reatum (11).

NO freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

(5 Rep. 64. 10 Rep. 74. 11 Rep. 99. Regist. 186. Mirror, 314. 1 Anderf. 158. 2 Bulstr. 328. 3 Bulstr. 47. Wood's Inst. 613, 614. 2 Ed. 3. c. 5. 5 Ed. 3. c. 9. 14 Ed. 3. stat. 2. c. 14. 25 Ed. 3. st. 5. c. 4. 28. Ed. 3. c. 3. 42 Ed. 3. c. 5. 11 R. 2. c. 10. 37 Ed. 3. c. 18. 4 H. 7. c. 12. 16 Car. 1. c. 10. 1 Roll. 208, 209, 225. 12 Rep. 50, 63, 93.)

See the Statute anno 34 E. 1. de tallagio, &c. an excellent Law. 20 H. 6 cap 9. Stamford. Pl. Cor. 152. b. 25 E. 3. 43. b. li. 6 fol. 52. The Countesse of Rutlands case. 11 H. 4. 15 3 H. 6. 58 48 E. 3. 30. 35 H. 6. 46.

* [46]

See W. 1. ca. 15.

(1) *Nullus liber, &c.*] This extends to villeins, saving against their lord, for they are free against all men, saving against their lord. See the first part of the Institutes, sect. 189.

(2) *Nullus liber homo.*] Albeit *homo* doth extend to both sexes, men and women, yet by act of parliament it is enacted, and declared, that this chapter should extend to duchesses, countesses, and baronesses, but marchionesses, and viscountesses are omitted, but notwithstanding they are also comprehended within this chapter.

* Upon this chapter, as out of a roote, many fruitfull branches of the law of England have sprung.

And therefore first the genuine sense hereof is to be seene, and after how the same hath been declared, and interpreted. For the first, for more perspicuity, it is necessary to divide this chapter into severall branches, according to the true construction and reference of the words.

This chapter containeth nine severall branches.

1. That no man be taken or imprisoned, but *per legem terræ*, that is, by the common law, statute law, or custome of England; for these words, *per legem terræ*, being towards the end of this chapter, doe referre to all the precedent matters in this chapter, and this hath the first place, because the liberty of a mans person is more precious to him, then all the rest that follow, and therefore it is great reason, that he should by law be relieved therein, if he be wronged, as hereafter shall be shewed.

2. No man shall be disseised, that is, put out of seison, or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties,

liberties, or free-customes, that is, of such franchises, and freedoms, and free-customes, as belong to him by his free birth-right, unlesse it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by the due course, and processe of law.

3. No man shall be out-lawed, made an *exlex*, put out of the law, that is, deprived of the benefit of the law, unlesse he be out-lawed according to the law of the land.

4. No man shall be exiled, or banished out of his country, that is, *nemo perdet patriam*, no man shall lose his country, unlesse he be exiled according to the law of the land.

5. No man shall be in any fort destroyed (*destruere, i. quod prius structum, et factum fuit, penitus evertere et diruere*) unlesse it be by the verdict of his equals, or according to the law of the land.

6. No man shall be condemned at the kings suite, either before the king in his bench, where the pleas are *coram rege* (and so are the words, *nec super eum ibimus*, to be understood) nor before any other commissioner, or judge whatsoever, and so are the words, *nec super eum mittemus*, to be understood, but by the judgement of his peers, that is, equals, or according to the law of the land.

7. We shall sell to no man justice or right.

8. We shall deny to no man justice or right.

9. We shall defer to no man justice or right.

The genuine sense being distinctly understood, we shall proceed in order to unfold how the same have been declared, and interpreted. 1. By authority of parliament. 2. By our books. 3. By precedent.

(3) *Nullus liber homo capiatur, aut imprisonetur.*] Attached and arrested are comprehended herein.

1. No man shall be taken (that is) restrained of liberty, by petition, or suggestion to the king, or to his councell*, unlesse it be by indictment, or presentment of good, and lawfull men, where such deeds be done. This branch, and divers other parts of this act have been notably explained by divers* acts of parliament, &c. quoted in the margin.

2. No man shall be disseised, &c.

^b Hereby is intended, that lands, tenements, goods, and chattells shall not be seised into the kings hands, contrary to this great charter, and the law of the land; nor any man shall be disseised of his lands, or tenements, or dispossessed of his goods, or chattels, contrary to the law of the land.

^c A custome was alledged in the town of C. that if the tenant cease by two yeares, that the lord should enter into the freehold of the tenant, and hold the same untill he were satisfied of the arrearages, and it was adjudged a custome* against the law of the land, to enter into a mans freehold in that case without action or answer.

King H. 6. graunted to the corporation of diers within London, power to searh, &c. and if they found any cloth died with log-wood, that the cloth should be forfeit: and it was adjudged, that this charter concerning the forfeiture, was against the law of the land, and this statute: for no forfeiture can grow by letters patents.

^a 5 E. 3. cap. 9.
25 E. 3. ca. 4.
37 E. 3. ca. 8.
38 E. 3. ca. 9.
42 E. 3. ca. 3.
17 R. 2. cap. 6.
Rot. Parl. 43
E. 3. Sir Jo. a
Lees case. nu.
21, 22, 23, &c.
lib. 10. fol. 74.
in case del Mar-
shallea.

* See W. 1. ca.
15.

^b See 43 Aff. p.
21. where this
branch of Magna
Charta, and
other statutes
are cited, *nota*
bene, the usurpa-
tion to an ad-
vowson is with-
in this act.

5 E. 3. cap. 9.
25 E. 3. cap. 4.
^c 43 E. 3. 32.

Lib. 8. Tr. 41.
El. fol. 125.
Case de Londres.

• [47]

No man ought to be put from his livelihood without answer.

2 & 3 Ph. et
Mar. Dicr. 114,
115.

3. No man outlawed, that is, barred to have the benefit of the law. Vide for the word, the first part of the Institutes.

Note to this word *utlagetur*, these words, *nisi per legem terræ*, do refer.

(4) *De libertatibus.*] This word, *libertates*, liberties, hath three significations:

1. First, as it hath been said, it signifieth the laws of the realme, in which respect this charter is called, *charta libertatum*.

Tr. 41 Eliz.
Coram Rege.
Rot. 92. in trns.
int. Davenant &
Hurdus.

2. It signifieth the freedoms, that the subjects of England have; for example, the company of the merchant tailors of England, having power by their charter to make ordinances, made an ordinance, that every brother of the same society should put the one half of his clothes to be dressed by some clothworker free of the same company, upon pain to forfeit x. s. &c. and it was adjudged that this ordinance was against law, because it was against the liberty of the subject, for every subject hath freedom to put his clothes to be dressed by whom he will, *et sic de similibus*: and so it is, if such or the like graunt had been made by his letters patents.

3. Liberties signifieth the franchises, and priviledges, which the subjects have of the gift of the king, as the goods, and chattels of felons, outlaws, and the like, or which the subject claim by prescription, as wreck, waife, fraie, and the like.

Tr. 44 Eliz.
Coram Rege, lib.
11. fol. 84, 85,
&c. Edw. Dar-
cies case.

So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedom of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter.

Generally all monopolies are against this great charter, because they are against the liberty and freedom of the subject, and against the law of the land.

(5) *Liberis consuetudinibus.*] Of customes of the realme, some be generall, and some particular. Of these reade in the first part of the Institutes. And *liberis* is added, for that the customes of England bring a freedom with them.

4. No man exiled.

Rot. Parliam.
19 E. 1. Rot. 12.
Boilands case.
31 E. 1. Cui in
vita 31. 18 E. 3.
54. Matravers
case. Parliam.
15 E. 2. Exilium
Hugonis.

By the law of the land no man can be exiled, or banished out of his native countrey, but either by authority of parliament, or in case of abjuration for felony by the common law: and so when our books, or any record speak of exile, or banishment, other then in case of abjuration, it is to be intended to be done by authority of parliament: * as Belknap and other judges, &c. banished into Ireland.

* Rot. Parliam.
13 R. 2. nu. 28.
Stam. Pl. Cor.
116, 117. 35 E.
4. cap. 1.

This is a beneficially law, and is construed benignly, and therefore the king cannot send any subject of England against his will to serve him out of this realme, for that should be an exile, and he should *perdere patriam*: no, he cannot be sent against his will into Ireland, to serve the king as his deputy there, because it is out of the realme of England: for if the king might send him out of this realme to any place, then under pretence of service, as ambassador, or the like, he might send him into the furthest part of the world, which being an exile, is prohibited by this act. And albeit it was accorded in the upper-house of parliament, anno 6 E. 3. nu. 6. that such learned men in the law, as should bee sent, as justices, or otherwise, to serve in Ireland, should have no excuse, yet

yet that being no act of parliament, it did not binde the subject. And this notably appeareth by a record, in 44 E. 3. Sir Richard Pembrughs case, who was warden of the cinque ports, and had divers offices, annuities, and lands graunted to him for life, or in fee by the king under the great seale, *pro servitio impenso, et impendendo*, the king commanded Sir Richard to serve him in Ireland, as his deputy there, which he absolutely refused, whereupon the king by advice of his councill, seised all things graunted to him. *pro servitio impendendo* (in respect of that clause) but he was not upon that resolution committed to prison, as by that record it appeareth; and the reason was because his refusall was lawfull, and if the refusall was lawfull to serve in Ireland parcell of the kings dominions, *a fortiori*, a refusall is lawfull to serve in any forein country. And it seemeth to me, that the said seisure was unlawfull, for *pro servitio impenso et impendendo*, must be intended lawfull service within the realme.

Rot. claus. anno 44 E. 3. Sir Richard Pembrughs Case.

5. No man destroyed, &c.

That is, fore-judged of life, or limbe, disherited, or put to torture, or death.

5 E. 3. cap. 9.
28 E. 3. cap. 3.
Fortescue cap. 22.
Mirror, cap. 2.
§ 3.

The Mirror writing of the auncient laws of England, saith, *soloient les roys faire droit a tous, per eux, ou per leur chiefe justices, et ore les faits les royes per leur justices commissaries errants assignes a tous pleas: en aid de tiels eires sont tornes de viscounts necessaries, et views de frankpl. et quant que bones genti a tiels inquests inditerent de peche mortel, soloient les royes destruerre sans respons, &c. Accord est, que nul appelee, ne enditee soit destroy sans respons.*

Thomas earle of Lancaster was destroyed, that is, adjudged to die, as a traitor, and put to death in 14 E. 2. and a record thereof made: and Henry earle of Lancaster his brother, and heire, was restored for two principall errors in the proceeding against the said Thomas Earle, 1. *Quod non fuit araniatus, et ad responsionem positus tempore pacis, eo quod cancellaria, et aliæ curiæ regis fuer' aperte, in quibus lex fiebat unicuique, prout fieri consuevit.* 2. *Quod contra cartam de libertatibus, cum dictus Thomas fuit unus parium, et magnatum regni, in qua continetur (and reciteth this chapter of Magna Charta, and specially, quod dominus rex non super eum ibit, nec mittet, nisi per legale iudicium parium suorum tamen per recordum prædictum, tempore pacis absq; aranamento, seu responsione, seu legali iudicio parium suorum, contra legem, & contra tenorem Magnæ Chartæ)* he was put to death: more examples of this kinde might be shewed.

Plaf. 39 E. 3.
Coram Rege,
John of Gaunts
case. Rot. Parl.
4 E. 3. nu. 13.
Countee de
Arund. case.
Rot. Parl. 42
E. 3. nu. 23.
Sir Jo. of Lees
case.

Every oppression against law, by colour of any usurped authority, is a kinde of destruction, for, *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud*: and it is the worst oppression, that is done by colour of justice.

Lib. 10. fol. 74.
In the case of the
Marshallia.

Regula.

It is to be noted, that to this verb *destruatur*, are added *aliquo modo*, and to no other verb in this chapter, and therefore all things, by any manner of meanes tending to destruction, are prohibited: as if a man be accuted, or indicted of treason, or felony, his lands, or goods cannot be graunted to any, no not so much as by promise, nor any of his lands, or goods seised into the kings hands, before attainder: for when a subject obtaineth a promise of the forfeiture, many times undue meanes and more violent prosecution is used for private lucre, tending to destruction, then the quiet and just proceeding of law would permit, and the party ought to live of his own untill attainder.

Rot. Parl. 15
E. 3. nu. 6. &c.

(6) Per

11 E. 3. breve.
173. 6 R. 2.
proces. Pl. ulti-
mo. 20 E. 4. 6.
20 Eliz. Dier,
360. Lib. 9. fol.
117. Seignior
Zanchars case.

[49]
1 H. 4. 1.
13 H. 8. 1.
10 E. 4. 6.

19 H. 7. Edm.
de la Pole Earle
of Suff. case.
Hil. 13. Jac. b.
the Lord Norrice
case coram rege.

Stamf. pl. cor.
130.

Pasch. 26. H. 8.
in the case of
the L. Dacres of
the north, re-
solved by all the
judges of Eng-
land as justice
Spelman reports.
See the 3rd part of
the Institutes,
cap. Treason.

(6) *Per iudicium parium suorum.*] By judgement of his peers. Onely a lord of parliament of England shall be tried by his peers being lords of parliament: and neither noblemen of any other country, nor others that are called lords, and are no lords of parliament, are accounted *pares*, peers within this statute. Who shall be said *pares*, peeres, or equals, see before cap 14. § *per pares*.

Here note, as is before said, that this is to be understood of the kings sute for the words be, *nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum*. Therefore, for example, if a noble man be indicted for murder, he shall be tried by his peeres, but if an appeale be brought against him, which is the suite of the party, there he shall not be tried by his peeres, but by an ordinary jury of twelve men: and that for two reasons. First, for that the appeale cannot be brought before the lord high steward of England, who is the only judge of noble men, in case of treason, or felony. Secondly, this statute extendeth only to the kings suite.

And it extendeth to the kings suite in case of treason, or felony, or of misprision of treason, or felony, or being accessary to felony before, or after, and not to any other inferior offence. Also it extendeth to the triall it selfe, whereby he is to be convicted: but a noble man is to be indicted of treason, or felony, or of misprision, or being accessary to, in case of felony, by an inquest under the degree of nobility: the number of the noble men that are to be triers are, 12. or more.

And a peer of the realme may be indicted of treason, or felony, before commissioners of oier & terminer, or in the kings bench, if the treason or felony be committed in the county where the kings bench sit: he also may be indicted of murder, or manslaughter, before the coroner, &c. But if he be indicted in the kings bench, or the indictment removed thither, the noble man may plead his pardon there before the judges of the kings bench, and they have power to allow it, but he cannot confesse the indictment, or plead not guilty before the judges of the kings bench, but before the lord steward; and the reason of this diversity, that the triall or judgement must be before or by the lord steward, but the allowance of the pardon may be by the kings bench, is because that is not within this statute.

If a noble man be indicted, and cannot be found, proces of outlawrie shall be awarded against him *per legem terræ*, and he shall be outlawed *per iudicium coronatorum*, but he shall be tried *per iudicium parium suorum*, when he appeares and pleads to issue.

(7) *Per legale iudicium.*] By this word *legale*, amongst others, three things are implied. 1. That this manner of triall was by law, before this statute. 2. That their verdict must be legally given, wherein principally it is to be observed. 1. That the lords ought to heare no evidence, but in the presence, and hearing of the prisoner. 2. After the lords be gone together to consider of the evidence, they cannot send to the high steward to aske the judges any question of law, but in the hearing of the prisoner, that he may heare, whether the case be rightly put, for *de facto jus oritur*; neither can the lords, when they are gone together, send for the judges to know any opinion in law, but the high steward ought to demand it in court in the hearing of the prisoner. 3. When all the evidence is given by the kings learned councill, the high steward cannot collect

collect the evidence against the prisoner, or in any sort conferre with the lords touching their evidence, in the absence of the prisoner, but he ought to be called to it; and all this is implied in this word, *legale*. And therefore it shall be necessary for all such prisoners, after evidence given against him, and before he depart from the barre, to require justice of the lord steward, and of the other lords, that no question be demanded by the lords, or speech or conference had by any with the lords, but in open court in his presence, and hearing, or else he shall not take any advantage thereof after verdict, and judgement given: but the handling thereof at large and of other things concerning this matter, belongs to another treatise, as before I have shewed, only this may suffice for the exposition of this statute. See the 3 part of the Institutes, cap. Treason.

And it is here called *judicium parium*, and not *verdictum*, because the noble men returned, and charged, are not sworne, but give their judgement upon their honour and ligeance to the king, for so are all the entries of record, separately beginning at the *puisne* lord, and so ascending upward.

And though of ancient time the lords, and peeres of the realme used in parliament to give judgement, in case of treason and felony, against those, that were no lords of parliament, yet at the suite of the lords it was enacted, that albeit the lords and peeres of the realme, as judges of the parliament, in the presence of the king, had taken upon them to give judgement, in case of treason and felony, of such as were no peeres of the realme, that hereafter no peeres shall be driven to give judgement on any others, then on their peeres according to the law.

This triall by peeres was very auncient, for I reade, that William the Couqueror, in the beginning of his raigne, created William Fitzosberne (who was earle of Bretevil in Normandy) earle of Hereford in England, his sonne Roger succeeded him, and was earle of Hereford, who under colour of his sisters marriage at Exninge, neare Newmarket in Cambridge shire, whereat many of the nobility, and others were assembled, conspired with them to receive the Danes into England, and to depose William the Conqueror (who then was in Normandy) from his kingdome of England: and to bring the same to effect, he with others rose. This treason was revealed by one of the conspirators, viz. Walter earle of Huntingdon an English man, sonne of that great Syward earle of Northumberland: for which treason this Roger earle of Hereford was apprehended, by Urse Tiptoft then sheriffe of Worcester shire, and after was tried by his peeres, and found guilty of the treason *per judicium parium suorum*, but he lived in prison all the daies of his life. You have heard in the exposition of the 14 chapter, who are to be said peeres, somewhat is necessary to be added thereunto. It is provided by the statute of 20 H. 6. that dutchesses, countesses, and baronesses, shall be tried by such peeres as a noble man, being a peere of the realme ought to be; which act was made in declaration, and affirmance of the common law: for marquesses, and viscountesses not named in the act shall be also tried by their peeres, and the queene being the kings consort, or dowager, shall also be tried, in case of treason, *per pares*, as queene Anne, the wife of king Henry the eight was *termino Pasch. anno 28 H. 8.* in the towre of London before the duke of Norff. then high steward.

[50]
Rot. Parliam.
4 E. 3. nu. 6.

Anno 8 Will.
conq.

Anno 8. W. 1.

20 H. 6. cap. 9.

Pasch. 28 H. 8.
Spelmans report.

If

22 H. 6. 47.
11 H. 6. 51.

If a woman that is noble by birth, doth marry under the degree of nobility, yet shee shall be tried by her peeres, but if she be noble by marriage, and marry under the degree of nobility shee loseth her dignity, for as by marriage it was gained, so by marriage it is lost, and shee shall not be tried by her peers. If a dutchesse by marriage doe marry a baron, shee loseth not her dignity, for all degrees of nobility, as hath been said, are *pares*. If a queene dowager marry any of the nobility, or under that degree, yet loofeth shee not her dignity, as Katherine queene dowager of England, married Owen ap Meredith ap Theodore esquire, and yet shee by the name of Katherine queene of England, maintained an action of detinew, against the bishop of Carlile,

Rot. Parliam.
26 E. 1. Rot. 1.

And the queene of Navarra marrying with Edmund the brother of E. 1. sued for her dower by the name of queene of Navarra and recovered.

25 E. 3. cap. 4.

(8) *Nisi per legem terræ.*] But by the law of the land. For the true sense and exposition of these words, see the statute of 37 E. 3. cap. 8. where the words, by the law of the land, are rendred without due proces of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his free-hold without proces of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law.

Without being brought in to answer but by due proces of the common law.

23 E. 3. cap. 3.
37 E. 3. cap. 8.
42 E. 3. cap. 3.

No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ originall, according to the old law of the land.

Wherein it is to be observed, that this chapter is but declaratory of the old law of England. Rot. Parliament. 43 E. 3. nu. 22, 23. the case of Sir John a Lee, the steward of the kings house.

[51]

Per legem terræ.] i. *Per legem Angliæ*, and hereupon all commiffions are grounded, wherein is this clause, *facturi quod ad justitiam pertinet secundum legem, et consuetudinem Angliæ, &c.* And it is not said, *legem et consuetudinem regis Angliæ*, lest it might be thought to bind the king only, nor *populi Angliæ*, lest it might be thought to bind them only, but that the law might extend to all, it is said *per legem terra, i. Angliæ*.

19 H. 6. 7.

And aptly it is said in this act, *per legem terræ*, that is, by the law of England: for into those places, where the law of England runneth not, other lawes are allowed in many cases, and not prohibited by this act. For example: if any injury, robbery, felony, or other offence be done upon the high sea, *lex terræ* extendeth not to it, therefore the admirall hath conufance thereof, and may proceed, according to the marine law, by imprisonment of the body, and other proceedings, as have been allowed by the lawes of the realme.

13 H. 4. 5.

And so if two English men doe goe into a foreine kingdome, and fight there, and the one murder the other, *lex terræ* extendeth not hereunto, but this offence shall be heard, and determined before the constable, and marshall, and such proceedings shall be there, by attaching of the body, and otherwise, as the law, and custome of that court have been allowed by the lawes of the realme

11 H. 7. cap. 3.

Against this ancient, and fundamentall law, and in the face thereof, I finde an act of parliament made, that as well justices of assise, as justices

justices of peace (without any finding or presentment by the verdict of twelve men) upon a bare information for the king before them made, should have full power, and authority by their discretions to heare, and determine all offences, and contempts committed, or done by any person, or persons against the forme, ordinance, and effect of any statute made, and not repealed, &c. By colour of which act, shaking this fundamentall law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson knight, and Edm. Dudley being justices of peace, throughout England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they made masters of the kings forfeitures.

But at the parliament, holden in the first yeare of H. 8. this act of 11 H. 7. is recited, and made voide, and repealed, and the reason thereof is yeelded, for that by force of the said act, it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the kings subjects to their great dammage, and wrongfull vexation: and the ill successe hereof, and the fearefull ends of these two oppressors, should deterre others from committing the like, and should admonish parliaments, that in stead of this ordinary, and pretious triall *per legem terræ*, they bring not in absolute, and partiall trialls by discretion.

1 H. 8. cap. 6.

If one be suspected for any crime, be it treason, felony, &c. And the party is to be examined upon certaine interrogatories, he may heare the interrogatories, and take a reasonable time to answer the same with deliberation (as there the time of deliberation was tenne houres) and the examinee, if he will, may put his answer in writing, and keepe a copie thereof: and so it was resolved in parliament by the lords spirituall and temporall, in the case of justice Richill. See the record at large.

Rot. pl. 1 H. 4. memb. 2. nu. 1.

And the Lord Carew being examined, for being privy to the plot, for the escape of Sir Walter Rawleigh attainted of treason, desired to have a copy of his examination, and had it, as *per legem terræ* he ought.

Anno 16. Jacobi regis.

Now here it is to be knowne, in what cases a man by the law of the land, may be taken, arrested, attached, or imprisoned in case of treason or felony, before presentment, indictment, &c. Wherein it is to be understood, that proces of law is two fold, viz. By the kings writ, or by due proceeding, and warrant, either in deed, or in law without writ.

As first, where there is any witness against the offender, he may be taken and arrested by lawfull warrant, and committed to prison.

* [52]

^a When treason and felony is committed, and the common fame and voice is, that A. is guilty, it is lawfull for any man, that suspects him, to apprehend him.

7 E. 4. 20.
8 E. 4. 3.
9 E. 4. 27.
11 E. 4. 2.
2 H. 7. 15. b. 4.
4 H. 7. 13.
5 H. 7. 5. a.
26 H. 8. 9.
27 H. 8. 23.
^a Bracton. fo. 143.

^a This fame Bracton describeth well, *fama quæ suspicionem inducit, oriri debet apud bonos, et graves, non quidem malevolos, et maledicos, sed providas et fide dignas personas, non semel, sed sæpius, quia clamor minuit, et defamatio manifestat.*

^b So it is of hue and cry, and that is by the statute of Winchester, which is but an affirmance of the common law: likewise if A.

^b 29 E. 3. 9.
30 E. 3. 39.
26 E. 3. 71.
W. 1. cap. 9.

bc

be suspected, and he fleeth, or hideth himselfe, it is a good cause to arrest him.

c 11 H. 4. 4. b.
20 E. 4. 6. b.
14 H. 8. 16.
27 H. 8. 23.

c If treason or felony be done, and one hath just cause of suspicion; this is a good cause, and warrant in law, for him to arrest any man; but he must shew in certainty the cause of his suspicion: and whether the suspicion be just, or lawfull, shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a *habeas corpus*, &c.

29 E. 3. 39.

A felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be by a warrant in law, attached and imprisoned by the law of the land.

4 H. 7. 2.

A watchman may arrest a night walker by a warrant in law.

5 H. 7. 5.

If a man woundeth another dangerously, any man may arrest him by a warrant in law, until it may be known, whether the party wounded shall die thereof, or no.

10 H. 7. 20.

If a man keep the company of a notorious thiefe, whereby he is suspected, &c. it is a good cause, and a warrant in law to arrest him.

26 E. 3. 71. a.

38 H. 8. faux imprisonment, Br. 6.

If an affray be made to the breach of the kings peace, any man may by a warrant in law restrain any of the offenders, to the end the kings peace may be kept, but after the affray ended, they cannot be arrested without an expresse warrant.

See now the statutes of 1 & 2 Phil. & Mar. cap. 13. & 2 & 3 Phil. & Mar. cap. 10.

Now seeing that no man can be taken, arrested, attached, or imprisoned but by due processe of law, and according to the law of the land, these conclusions hereupon doe follow.

First, that a commitment by lawfull warrant, either in deed or in law, is accounted in law due processe or proceeding of law, and by the law of the land, as well as by processe by force of the kings writ.

2. That he or they, which doe commit them, have lawfull authority.

3. That his warrant, or *mittimus* be lawfull, and that must be in writing under his hand and seale.

4. The cause must be contained in the warrant, as for treason, felony, &c. or for suspicion of treason or felony, &c. otherwise if the *mittimus* contain no cause at all, if the prisoner escape, it is no offence at all, whereas if the *mittimus* contained the cause, the escape were treason, or felony, though he were not guilty of the offence; and therefore for the kings benefit, and that the prisoner may be the more safely kept, the *mittimus* ought to contain the cause.

13 H. 7. Kildway
34. b.
See more before
hereof in the ex-
position upon
the statute of
1 E. 2. de fran-
gentibus pille-
nata.

Out of the kings
bench, though
there be not any
priviledge, &c.

5. The warrant or *mittimus* containing a lawfull cause, ought to have a lawfull conclusion, viz. and him safely to keep, untill he be delivered by law, &c. and not untill the party committing doth further order. And this doth evidently appeare by the writs of *habeas corpus*, both in the kings bench, and common pleas, eschequer and chancery.

Rex vicecom. London. salutem. Præcipimus vobis, quod corpus A. B. in custodia vestra detent. ut dicitur, una cum causa detentionis suæ, quocunq; nomine præd. A. B. censeatur in eisdem, habeatis coram nobis apud Westm. die Jovis prox' post ætatis S. Martini, ad subjiciend. et recipiend. ea, quæ curia nostra de eo adtunc, et ibidem ordinari contigerit.

contigerit in hac parte, et hoc nullatenus omittatis, periculo incumbente, et habeatis ibi hoc breve, teste Edw. Coke 20 Nov. anno regni nostri 10.

This is the usuall forme of the writ of habeas corpus in the kings bench, *vide Mich. 5 E. 4. Rot. 143. coram Rege, Kefars case,* under the teste of Sir John Markham.

Rex vicecom. London. salutem. Præcipimus vobis, quod habeatis coram justiciariis nostris, apud Westm. die Jovis prox' post quinque septiman. Pasche, corpus A. B. quocunque nomine censeatur, in prisona vestra, sub custodia vestra detent. ut dicitur, una cum die, et causa captionis et detentionis ejusdem, ut iidem justiciar. nostri, visa causa illa, ulterius fieri fac', quod de jure, et secundum legem, et consuetudinem regni nostri Angliæ foret faciend. et habeatis ibi hoc breve, teste, &c.

The like writ is to be graunted out of the chancery, either in the time of the terme (as in the kings bench) or in the vacation; for the court of chancery is *officina justitiæ*, and is ever open, and never adjourned, so as the subject being wrongfully imprisoned, may have justice for the liberty of his person as well in the vacation time, as in the terme.

By these writs it manifestly appeareth, that no man ought to be imprisoned, but for some certain cause: and these words, *ad subjiciend. et recipiend. &c.* prove that cause must be shewed: for otherwise how can the court take order therein according to law?

And this doth agree with that which is said in the holy history, *Sine ratione mihi videtur, mittere vinculum in carcerem, et causas ejus non significare.* But since we wrote these things, and passed over to many other acts of parliament; see now the petition of right, *anno tertio Caroli regis*, resolved in full parliament by the king, the lords spirituall, and temporall, and the commons, which hath made an end of this question, if any were.

Imprisonment doth not onely extend to false imprisonment, and unjust, but for detaining of the prisoner longer then he ought, where he was at the first lawfully imprisoned.

If the kings writ come to the sheriffe, to deliver the prisoner, if he detain him, this detaining is an imprisonment against the law of the land: if a man be in prison, a warrant cannot be made to the gaoler to deliver the prisoner to the custody of any person unknown to the gaoler, for two causes; first, for that thereby the kings writ of habeas corpus, or delivery, might be prevented. 2. The mittimus ought to bee, as hath beene said, till hee bee delivered by law.

If the sheriffe, or gaoler detain a prisoner in the gaole after his acquittall, unless it be for his fees, this is false imprisonment.

In many cases a man may be by the law of the land taken, and imprisoned, by force of the kings writ upon a suggestion made.

Against those that attempt to subvert, and enervate the kings lawes, there lieth a writ to the sheriffe in nature of a commission, *ad capiendum impugnatores juris regis, et ad ducendum eos ad gaolam de Newgate*; which you may reade in the Register at large. *Ubi supra.* And this is *lex terræ*, by proceffe of law, to take a man without answer, or summons in this case: and the reason is, *merito beneficium legis amittit, qui legem ipsam subvertere intendit.*

If a souldier alter wages received, or prest money taken, doth absent

[53]

In the common pleas, for any man priviledged in that court, and the like in the eschequer:

Out of the chancery generally, though there be not any privilege, &c.

4 E. 4.

Act. Apost. ca. 25. ver. ult.

Hil. 32 E. 1. coram rege. Rot. 71. & 79. So it was holden Pasch. 34. Eliz. by all the justices. 8 H. 4. 18. 20 E. 4. 6.

Registr. 64. Rot. Pat. 21 E. 3. pt. 1. impugnatores jurium regis.

Registr. 24. & 191.

absent himself, or depart from the kings service; upon the certificate thereof of the captain into the chancery, there lieth a writ to the kings serjeants at armes, if the party be vagrant, and hideth himselfe, *ad capiendum conductos proficiscend. in obsequium nostrum, &c. qui ad dictum obsequium nostrum venire non curaverint.* And this is *lex terræ*, by processe of law, *pro defensione regis, et regni*, or for the same cause, a writ may be directed to the sheriffe, *de arrestando ipsum, qui pecuniam recepit ad proficiscendum in obsequium regis, et non est profectus.*

Regist. fol. 267.
F. N. B. 233,
234.
20 E. 2. Cor.
233. 6 E. 3. 17.
22 E. 3. 2.

[54]

If a man had entered into religion, and was professed, and after he departed from his house, and became vagrant in the country against the rules of his religion, upon the certificate of the abbot, or prior thereof into the chancery, a writ should be directed to the sheriffe, *de apostata capiendo*, whereby he was commanded in these words; *præcipimus tibi quod præfatum, &c. sine dilatione arrestes, et præfat. abbat. &c. liberes secundum regulam ordinis sui castigand'*; and this was *lex terræ*, by processe of law, *in honorem religionis.*

Regist. 59, 60.
F. N. B. 54.
15 R. 2. ca. 2.

If any lay men with force and strong hand, doe enter upon, or keep the possession either of the church, or of any of the houses, or glebe, &c. belonging thereunto, the incumbent upon certificate thereof of the bishop, or without certificate upon his own surmise may have a writ to the sheriffe, *de vi laica amovenda*, by which the sheriffe is commanded in these words; *præcipimus tibi quod omnem vim laicam seu armatam, quæ se tenet in dicta ecclesia, seu domibus eidem annexis, ad pacem nostram in com. tuo perturband. sine dilatione amoveas, et si quos in hac parte resistentes inveneris, eos per corpora sua attachias, et in prisona nostra salvo custodias, &c.* and this is *lex terræ*, by processe of law, *pro pace ecclesiæ.*

Vide Regist.
284. 289, 290.
for the arresting
of purveyors,
which make
purveyance of
the men of the
church.

Regist. 80.
F. N. B. 85.
21 H. 8. Dier
37. 1 Mar. 92.
1 Mar. 95.

Also a writ of *ne exeas regnum* may be awarded to the sheriffe, or justices of peace, or to both, that a man of the church shall not depart the realme; the effect whereof is; *quia datum est nobis intelligere, quod A. B. clericus versus partes exteras, ad quamplurima nobis, et quamplurima de populo nostro præjudicialia, et damnosa, ibidem prosequend. transire propevit, &c. tibi præcipimus, quod prædict' A. B. coram te corporaliter venire facias, et ipsum ad sufficientes manucaptos, inveniend. &c. Et si hoc coram te facere recusaverit, tunc ipsum A. B. proximæ gaole committas salvo custodiend. quousque hoc gratis facere voluerit.* And there is another writ in the Register directed to the party either of the clergy or laity. And this is *lex terræ*, by processe of law, *pro bene publico regis et regni*; whereof you may reade more at large in the third part of the Institutes, cap. Fugitives.

Regist. 207.
F. N. B. 234.
Duct. li. 5. fo.
421. Rot. 10.
79. 88. F. 10,
li. 6. ca. 39
Hil. 7 H. 5.
coram rege. Rot.
7. Rot. clauf.
22 L. 3. in doif.
20. pte. m. 14.

Upon a surmise that a man is a leper, one that hath *morbum elephantiacum*, so called, because he hath a skin like to an elephant, there may be a writ directed to the sheriffe, *quia accepimus quod I. de N. leprosus existit, et inter homines comitatus tui communitate conversatur, &c. ad grave damnum homin' præd. et propter contagionem morbi præd. periculum manifestum, &c. tibi præcipimus quod assumptis tecum aliquibus discretis et legalibus hominibus de comitat. præd. non suspectis, &c. ad ipsum I. accedas, &c. et examines, &c. et si ipsum leprosum inveneris, ut prædict' est, tunc ipsum honestiori modo, quo poteris a communitate hominum prædict' amoveri, et se ad locum solitarium ad habitand' ibidem, prout moris est, transferre facias indilate, &c.* And this is *lex terræ*, by processe of law, for saving of the people from contagion and infection.

Lib. 10. fo. 74.
in the case of the
Marshalsea.

But if any man by colour of any authority, where he hath not any

any in that particular case, arrest, or imprison any man, or cause him to be arrested, or imprisoned, this is against this act, and it is most hatefull, when it is done by countenance of justice.

Rot. Parl.
42 E. 3. nu. 23.
Sir John a Lees case.

King Edw. 6. did incorporate the town of S. Albons, and granted to them to make ordinances, &c. they made an ordinance upon paine of imprisonment, and it was adjudged to be against this statute of *Magna Charta*; so it is, if such an ordinance had been contained in the patent it selfe.

Lib. 5. fol. 64.
Clarks case.

All commissions that are consonant to this act, are, as hath been said. *secundum legem, et consuetudinem Angliæ.*

A commission was made under the great seale to take I. N. (a notorious felon) and to seise his lands, and goods: this was resolved to be against the law of the land, unlesse he had been indicted, or appealed by the party, or by other due processe of law.

42 Aff. pl. 5.
Rot. Parliam.
17 R. 2. nu. 37.

It is enacted, if any man be arrested, or imprisoned against the forme of this great charter, that he bee brought to his answer, and have right.

Rot. Parliam.
2 H. 4. nu. 60.

No man to be arrested, or imprisoned contrary to the forme of the great charter.

See more of the severall lawes allowed within this land, in the first part of the Institutes, sect. 3.

The philosophicall poet doth notably describe, the damnable and damned proceedings of the judge of hell,

[55]

*Grossus hic Radamanthus habet durissima regna,
Castigatque, auditque dolos, subigitque fateri.*

Virgil.

And in another place,

----- leges fixit precio atque refixit.

First he punisheth, and then he heareth: and lastly, compelleth to confesse and make and marre lawes at his pleasure; like as the centurion in the holy history, did to S. Paul: For the text saith, *Centurio apprehendi Paulum jussit, et se catenis ligari et tunc interrogabat, quis fuisset, et quid fecisset:* but good judges and justices abhorre these courses.

Act. Apost. c.
22. v. 24. 27.

Now it may be demanded, if a man be taken, or committed to prison *contra legem terræ*, against the law of the land, what remedy hath the party grieved? To this it is answered: first, that every act of parliament made against any injury, mischief, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved: as in many of the chapters of this great charter appeareth; and therefore he may have an action grounded upon this great charter. As taking one example for many, and that in a powerfull, and a late time. Pasch. 2 H. 8. *coram rege* rot. 538. against the prior of S. Oswin in Northumberland. And it is provided, and declared by the statute of 36 E. 3. that if any man feeleth himselfe grieved, contrary to any article in any statute, he shall have present remedy in chancery (that is, by originall writ) by force of the said articles and statutes.

36 E. 3. cap 9:

2. He may cause him to be indicted upon this statute at the kings suite, whereof you may see a precedent Pasch. 3 H. 8. Rott. 71. *coram rege.* Rob. Sheffields case.

3. ^a He may have an *habeas corpus* out of the kings bench or chancery, though there be no priviledge, &c. or in the court of

^a See the resolution of all the judges of Eng-

land in the answer to the articles of the clergy hereafter at large in the exposition of the statute of artic. Cler. to the 21. and 22. artic. Of the writ of *habeas corpus* see more in the exposition upon the stat. of W. 1. cap. 15.

common pleas, or eschequer, for any officer or privileged person there; upon which writ the goaler must retourne, by whom he was committed, and the cause of his imprisonment, and if it appeareth that his imprisonment be just, and lawfull, he shall be remanded to the former goaler, but if it shall appeare to the court, that he was imprisoned against the law of the land, they ought by force of this statute to deliver him: if it be doubtfull and under consideration, he may be bailed.

In 5 E. 4. *coram rege* Rot. 143. John Keafars case; a notable record and too long here to be recited.

10 Eliz. Rot. Leas case.

In 1 & 2 Eliz. Dier. 175. Serogs case.

In 18 Eliz. Dier. 175. Roland Hynds case *in margine*.

4. He may have an action of false imprisonment, 10 H. 7. fol. 17. but it is entred in the court of common pleas Mich. 11 H. 7. Rot. 327. Hilarie Warners case, and it appeareth by the record, that judgement was given for the plaintife: a record worthy of observation.

5. ^b He may have a writ *de homine replegiando*.

Vide Marlebridge, cap. 8.

6. ^c He might by the common-law have had a writ *de odio, et atia*, as you may see before, cap. 26. but that was taken away by statute, but now is revived againe by the statute of 42 E. 3. cap. 1. as there it also appeareth. It is said in ^d W. 2. *Sed ne hujusmodi appellati, vel indictati diu detineantur in prisona, habeat breve de odio et atia, sicut in Magna Charta, et aliis statutis dict' est*: and by the said act of 42 E. 3. all statutes made against Magna Charta are repealed.

(9) *Nulli vendemus, &c.* ^e This is spoken in the person of the king, who in judgement of law, in all his courts of justice is present, and repeating these words, *nulli vendemus, &c.*

And therefore, every subject of this realme, for injury done to him in *bonis, terris, vel personis*, by any other subject, be he ecclesiasticall, or temporall, free, *or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

Hereby it appeareth, that justice must have three qualities, it must be *libera, quia nihil iniquius venali justitia; plena, quia justitia non debet claudicare; et celeris, quia dilatio est quedam negatio*; and then it is both justice and right.

(10) *Nulli negabimus, aut differemus, &c.* These words have beene excellently expounded by latter acts of parliament, that by no meanes common right, or common law should be disturbed, or delayed, no, though it be commanded under the great seale, or privie seale, order, writ, letters, message, or commandement whatsoever, either from the king, or any other, and that the justices shall proceede, as if no such writs, letters, order, message, or other commandement were come to them. *Judicium redditum per defaultum affirmatur, non obstante breve regis de prorogatione judicii.*

That the common lawes of the realme should by no meanes be delayed, for the law is the surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all; *lex est tutissima cassis*, and *sub clypeo legis nemo decipitur*: but the king may stay

^b Regist. 77.

F. N. B. 66.

Bract. 1. 3. f.

185.

^c Regist. 83.

268. F. N. B.

249. 258. Bract.

1. 2. f. 154.

^d W. 2. c. 29.

Gloc. cap. 9.

^e Mirror, c. 1. §.

5. cap. 2. § 13.

cap. 5. § 1, 2.

Fleta, 1. 2. c. 12.

Ocham, cap.

quid sponte of-

ferentibus F. N.

B. 96.

Rot. Parliam. { 8 E. 3. nu.

7. 38 E. 3.

n. 23. 45

E. 3. n. 19.

51 E. 3.

n. 58. 5 H.

4. nu. 32.

20 R. 2. fines

134. 34 H. 6.

38. 2 E. 3. c. 10.

1 E. 4. cap. 1.

26 H. 8. cap. 3.

27 H. 8. cap. 11.

* [56]

2 E. 3. c. 8.

14 E. 3. c. 14.

20 E. 3. 1, 2.

11 R. 2. cap. 11.

Rot. Parl. 2 R. 2.

nu. 51.

Rot. Parl.

2 H. 4. nu. 64.

Regist. 186.

1 E. 3. f. 25.

2 E. 3. 3.

14 E. 3.

tit. Jour. 24.

stay

stay his owne suite, as a *capias pro fine*, for the king may respite his fine and the like.

All protections that are not legall, which appeare not in the Register, nor warrant-ed by our books, are expressly against this branch, *nulli differemus*: as a protection under the great seale granted to any man, directed to the sherifes, &c. and commanding them, that they shall not arrest him, during a certaine time at any other mans suite, which hath words in it, *per prerogativam nostram, quam nolumus esse arguendam*; yet such protections have beene argued by the judges; according to their oath and duty, and adjudged to be void: as Mich. 11 H. 7. Rot. 124. a protection graunted to Holmes a vintner of London, his factors, servants and deputies, &c. resolved to be against law, Pasch. 7 H. 8. Rot. 66. such a protection disallowed, and the sherife amerced for not executing the writ. Mich. 13 & 14 Eliz. in Hitchcocks case, and many other of latter time: and there is a notable record of auncient time in 22 E. 1. John de Mershalls case, *non pertinet ad vicecomitem de protectione regis judicare, imo ad curiam.*

(11) *Justitiam vel rectum.*] Wee shall not sell, deny, or delay justice and right. *Justitiam vel rectum*, neither the end, which is justice, nor the meane, whereby we may attaine to the end, and that is the law.

Rectum, right, is taken here for law, in the same sence that *jus*, often is so called. 1. Because it is the right line; whereby justice distributive is guided, and directed, and therefore all the commissions of oier, and terminer, of goale delivery, of the peace, &c. have this clause, *facturi quod ad justitiam pertinet, secundum legem, and consuetudinem Angliæ*, that is, to doe justice and right, according to the rule of the law and custome of England; and that which is called common right in 2 E. 3. is called common law, in 14 E. 3. &c. and in this sence it is taken, where it is said, *ita qd. stet recto in curia, i. legi in curia.* 2. The law is called *rectum*, because it discovereth, that which is tort, crooked, or wrong, for as right signifieth law, so tort, crooked or wrong, signifieth injurie, and *injuria est contra jus*, against right: *recta linea est index sui, et obliqui*, hereby the crooked cord of that, which is called discretion, appeareth to be unlawfull, unlesse you take it, as it ought to be, *discretio est discernere per legem, quid sit justum.* 3. It is called right, because it is the best birth-right the subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong: *major hæreditas venit unicuiq; nostrum à jure, et legibus, quam à parentibus.*

4. Lastly, *rectum* is sometime taken for the right it selfe, that a man hath by law to land: as when wee say there lieth *breve de recto*, in so much that some old readers have supposed, that *rectum* in this chapter, should be understood of a writ of right, for which at this day no fine in the hamper is paid. As the goldfiner will not out of the dust, threds, or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to let passe any syllable of this law, in respect of the excellency of the matter.

18 E. 3. 47.
 39 E. 3. 7. L.
 5 E. 4. 132.
 Pasch. 3 H. 4.
 coram rege
 Rot. 16. War-
 wik. Rot. Parl.
 5 H. 4. nu. 33.
 22 aff. pl. 9.
 9 H. 6. 50. b.
 Fortesc. cap. 51.
 F. N. B. 237.
 240. 11 H. 4.
 76. 31 E. 3.
 quare imp. 161.
 Mich. 11 H. 7.
 Rot. 124. in
 com. banc.
 Pasch. 7 H. 8.
 Rot. 66. in com.
 banc.
 Mich. 13. & 14.
 Eliz. in com.
 banc. Hitch-
 cocks case.
 11 H. 4. 57.
 39 H. 6. 38.
 * Pas. 22 E. 1.
 Rot. 39. coram
 rege Essex.
 W. 1. cap. 1.
 1 E. 3. cap. 14.
 2 E. 3. cap. 8.
 7 H. 4. cap. 14.
 1 H. 4. cap. 1.
 2 H. 4. cap. 1.
 4 H. 4. cap. 14.
 7 H. 4. cap. 1.
 See the 1. part of
 the Institut. sect.
 234.
*Injuria est in, seu
 contra jus.*

Cicero,

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C A P. XXX.

OMINES mercatores (1), nisi publice antea prohibiti fuerint, habeant saluum et securum conductum, exire de Anglia, et venire in Angliam, et morari, et ire per Angliam, tam per terram, quam per aquam, ad emendum, vel vendendum, sine omnibus malis tolne-
tis (2) per antiquas et rectas consuetudines (3), præterquam in tempore guerræ. Et si sint de terra contra nos guerrina, et tales inueniantur in terra nostra in principio guerræ, attachientur sine dampno corporum suorum, vel rerum, donec sciatur à nobis, vel a capitali iustitiaro nostro, quomodo mercatores terræ nostræ tractantur, qui tunc inueniantur in terra illa contra nos guerrina. Et si nostri salvi sint ibi, ceteri salvi sint in terra nostra.

ALL merchants (if they were not openly prohibited before) shall have their safe and sure conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolts, by the old and rightful customs, except in time of war. And if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, untill it be known unto us, or our chief justice, how our merchants be intreated there in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us.

(12 Rep. 33. 2 Roll. 115. 1 Bullst. 134. 9 Ed. 3. stat. 1. c. 1. 14 Ed. 3. stat. 1. c. 2. 25 Ed. 3. nat. 4. c. 2. 2 R. 2. stat. 1. c. 1. 11 R. 2. c. 7.)

(1) *Omnes mercatores.*] This chapter concerneth merchant strangers.

First it is to be considered, what the auncient lawes, before this statute, were concerning this matter.

Mirror, cap. 1.
§ 3.

Int. leges Ethel.
cap. 2.

By the auncient kings (amongst whom king Alfred was one) *defendu fuit que nul merchant aliene bantost Angleterre forsque aux 4 foires, ne que nul demurraest in la terre ouster 40. jours. Mercatorū navigia, vel inimicorum quidem, quæcumq; ex alto (nullis jactata tempestatibus) in portum aliquem inuehantur, tranquilla pace fruuntur; quin etiam si maris aëta fluctibus ad domicilium aliquod illuſire, ac pacis beneficio donatum navis appulerit inimica, atq; istuc nautæ confugerint, ipsi et res illorum omnes augusta pace potiuntur*

2. It is to be seene what this statute hath provided.

1. That before this statute, merchant strangers might be publicly prohibited, *publice prohibeantur*. And this prohibition is intendable of merchant strangers in amitie, for this act provideth afterward for merchant strangers enemies; and therefore the prohibition intended by this act, must be by the common or publique councill of the realme, that is, by act of parliament, for that it concerneth the whole realme, and is implied by this word (*publice.*)

2. That all merchant strangers in amity (except such as be so publicly prohibited) shall have safe and sure conduct in 7 things.
1. To depart out of England. 2. To come into England. 3. To tarry here. 4. To goe in and through England, as well by land

as by water. 5. To buy and to sell. 6. Without any manner of evill tolles, 7. By the old and rightfull customes.

Now touching merchant strangers, whose soveraigne is in warre with the king of England.

There is an exception, and provison for such, as be found in the realme at the beginning of the warre, they shall be attached with a priviledge, and limitation, viz. without harme of body, or goods, with this limitation, untill it be knowne to us, or our chiefe justice (that is our gardien, or keeper of the realme in our absence) how our merchants there in the land in warre with us shall be intreated, and if our merchants be well intreated there, theirs shall be likewise with us, and this is *jus belli*. *Et in republica maxime conservanda sunt jura belli*.

But for such merchant strangers as come into the realme after the warre beginne, they may be dealt withall as open enemies: and yet of auncient time three men had priviledge granted them in time of warre. *Clericus, agricola, et mercator, tempore belli. Ut oretq; colat, commutet, pace fruuntur.*

^a The end of this chapter was for advancement of trade, and traffique; the meanes for the well using, and intreating of merchant strangers in all the particulars aforesaid, is a matter of great moment, as appeareth by many other acts of parliament, for as they be used here, so our merchants shall be dealt withall in other countries.

(2) *Mala tolmeta.*] ^b Evill tolles.

This word *tolnetum*, and *telonium*, and *theolonium* are all one, and doe signify in a generall sence, any manner of custome, subsidie, preitacion, imposition, or summe of mony demanded for exporting, or importing of any wares, or merchandizes, to be taken of the buyer. In both these senses it is here taken of severall kind of tolles: more shall be said hereof, in the exposition of the statutes of W. 1. and W. 2. In the meane time see John Webbes case, lib. 8. fol. 46.

^c They are called *mala tolmeta*, when the thing demanded for wares or merchandizes, doe so burden the commodity, as the merchant cannot have a convenient gaine by trading therewith, and thereby the trade it selfe is lost or hindered. And in divers statutes *maletout* for *maletot*, or *maletout* is a French word, and signifieth an unjust exaction.

Now this act after it hath dealt privatively, *sine omnibus malis tolmetis*, it goeth on for more surety affirmatively.

(3) *Per antiquas et rectas consuetudines.*] That is, by auncient and right duties, due by auncient and lawfull custome, which hath been the auncient policy of the realme to encourage merchants strangers, they have a speedy recovery for their debts and other duties, &c. *per legem mercator.*; which is a part of the common law.

This word *consuetudo*, hath in law divers significations. 1. For the common law, as *consuetudo Angliæ*. 2. For statute law, as *contra consuetudinem communi concilio regni edit*. 3. For particular customes, as gavelkind, borough English, and the like. 4. For rents services, &c. due to the lord, as *consuetudines et servitia*. 5. For customes, tributes, or impositions, as *de novis consuetudinibus levatis in regno, sive in terra, sive in aqua*. 6. Subsidies, or customes granted by common consent, that is, by authority of parliament, *pro bono publico*, and these be *antiquæ, et rectæ consuetudines* intended

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Regist. 129. de arell fact. super bonis mercator. alienig.

Rot. Parliam. Mich. 18 E. 1. coram rege fol. 7. reprisel.

Tr. 33 E. 1. corā rege rot. 127. 27 E. 3.

stat. 2. cap. 17. lawe of marke.

Rot. parl. 11 H. 4. nu. 66.

4 H. 5. c. 7.

14 H. 6. c. 7.

18 H. 6. c. 9.

Mat. Par. 966.

^a 2 E. 3. c. 5.

9 E. 3. c. 1.

14 E. 3. c. 2.

25 E. 3. cap. 2.

11 R. 2. c. 7.

14 R. 2. cap. 9.

16 R. 2. cap. 1.

^b Lib. 8. fol.

46. John Webbes

case. See the

exposition of

W. 1. c. 31.

46 E. 3. barre

215. 39 E. 3. 13.

^b F. N. B. 227.

^d West. 1. c.

30. W. 2. cap.

25.

^c See Rot. par-

lia. 17 E. 3. nu.

27, 28. and

21 E. 3 nu.

29. Maletot ta-
ken in good part.

See the expositio
of W. 1. cap. 31.

Glanvil. lib. 9.

c. 7. lib. 12. cap.

9, 10. Regist. 4.

159. F. N. B. 10.

151. cap. Itine-

ris. cap. Eschea-

tie. See before

c. 4. cap. Itine-

ris.

by this act, this agreeth with that, which hath been said before in the end of the exposition upon the eight chapter.

Hereby it appeareth that the king cannot set any new impost upon the merchant, and therefore this act provideth not only affirmatively, viz. *per antiquas, et rectas consuetudines*, but privately also, *sine omnibus malis tolnetis*, within which words new impositions are included, and are here called *mala tolmeta*, as opposite to ancient and rightfull customes, or subsidies graunted by authority of parliament.

And where some have supposed, that there was a custome due to the king by the common law, as well of the stranger, as of the English, called *antiqua custodia*, viz. for woolls, wooll-fells, and leather, that is to say, for every sack of wooll containing 26 stone, and every stone 14 pound, vj. s. viij. d. and for a last of leather, xiiij. s. iij. d. Certain it is, that those customes had their beginning by common consent by act of parliament, for king E. 1. by his letters patents reciteth, *cum prelati, magnates, et tota communitas quandam novam consuetudinem nobis et hæredibus nostris de lanis, pellibus, et coriis, viz. de sacco lane dimid' marc' de 300. pellibus dimid' marc', et de lasto corii xiii. s. iij. d. &c.* Herein foure things are to be observed. 1. That these customes had their creation by authority of parliament, and were not by the common law, appearing by these words, *quandam novam consuetudinem*, so as it was new, and not old. 2. That this new custome was graunted to king Edw. 1. proved by this word *nobis*. 3. That it was graunted at the parliament holden 3 E. 1. commonly called W. 1. (though the record thereof cannot be found) for the said patent bears date 10. Nov. anno 3 E. 1. which was neare the ending of that yeare, and the parliament was holden in *Clauso Pasch.* before. 4. That here *consuetudo* signifieth a custome, or subsidie graunted by common consent by parliament, and in that sense it is here taken, and likewise in the statute of 51 H. 3. *statutum de scaccario*, for in 48 H. 3. proclamation was made, *contra suggerentes, &c. Regem velle exigere tallagia inconsueta, et introducere extraneos.*

And herewith agreeth the act of parliament commonly called *confirmaciones cartarum* (which is but an explanation of this branch of *Magna Charta*) wherein it is enacted, that for no occasion any aide, tasks, or takings shall be taken by the king, or his heires, but by the common assent of the realme, saving the ancient aides, and takings due and accustomed.

And whereas the most of the whole comminalty of the realme finde themselves hardly grieved of the maletout (or ill tell) of woolls, that is to say, of every sack of wooll 40. s. and prayed the said king to release the same, thereupon the said king did release the same, and graunted further for him and his heires, that no such thing should be taken without their common assent, and their good will: and in that act there is a saving, *sauve a nous, et nous heires la custome de laynes, pealx, et quiures avant grantee per la commnaltie avandit*; So as this act of parliament proveth that the said custome of vj. s. viij. d. for wooll, and xiiij. s. iij. d. for leather was graunted by parliament.

By the statute *de tallagio non concedendo* (which is but an explanation of this branch of the statute of *Magna Charta*) it is provided: *Nullum tallagium vel auxilium per nos vel hæredes nostros in regno nostro ponatur, seu levetur sine voluntate et assensu archiepiscoporum, episcoporum, co-*

See the statute of Carlile.

35 E. 1. for this word imposition, and from whom it came.

Dier, 31 H. 8. 43. 1 Mar. 92. 1 Eliz. Dier, 165.

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Rot. Pat. 3. E. 1. m. 1. rot. finium. 3 E. 1. m. 24. Mich. 26 E. 1. ut return. brevium. ex pte. remem. The-saur' in Scac.

Rot. Pat. anno 48 H. 3. a tergo.

Anno 25 E. 1. See more in the exposition of that statute.

Rot. Parliam. 13 H. 4. nu. 18. A new office graunted with a fee in charge of the subject, is against this act of 25 E. 1. and of 34 E. 1. hereafter following.

Ann. 24 E. 1. See more in the exposition of this statute.

mitum, baronum, militum, burgensium, et aliorum liberorum comit' de regno nostro; so as E. 1. in conclusion added the effect of the clause concerning this matter, which in his exemplification he had omitted out of *Magna Charta*.

See *cap. itineris de novis consuetudinibus levatis in regno, sive in terra, sive in aqua, &c.* where *consuetudines* are taken for *customes*.

Upon grant to merchant strangers of divers priviledges, liberties, and immunities they graunted to the king and his heirs, *de quolibet sacco lanæ 40 d. de incremento ultra custumam antiquam dimid' marc' quæ prius fuerit persoluta et sic pro lasto coriorum dimid' marc', et de trescentis pellibus lanatis 40 d. ultra certum illud, quod et antiqua custuma fuerit prius datum.* Note here the custome which was graunted 3 E. 1. is here called *antiqua custuma*, and this new custome is called *nova custuma*, and sometime the one is called *magna custuma*, and the other *parva custuma*.

2. Here it appeareth that merchants strangers paid the former custome.

Moreover by that charter, poundage of three pence upon the pound was graunted to the king, and his heires by the merchant strangers, *et de quolibet vini nomine custumæ duos solidos, &c.* and this at this day is called butlerage, and is paid onely by merchant strangers; but prisage is paid by the English onely, except the citizens of London, and this is an auncient duty: for I finde it accounted for in the raigne of H. 3. by the kings butler, and is called *certa prisæ*, which at the first was graunted in lieu and satisfaction of purveyance for wines. And lastly, by that charter it is graunted, *quod nulla exactio, prisæ, vel prætatio, aut aliquod aliud onus super personas mercatorum alienorum prædict', seu bona eorundem aliquatenus imponatur contra formam expressam superius concessam:* So as no imposition can be set without assent of parliament upon any stranger.

It was ordered and resolved by divers prelates, earls, and barons, by force of the kings commission, that no new customes could be levied, nor auncient increased, without authority of parliament, for that should be against the great charter, *anno 6 E. 3.* Rot. Parliament, nu. 4. that no tallage shall be assessed but in such manner as it hath been in time of his auncestors, and as it ought to be, and disannull all others.

In *anno 11 E. 3.* it was made felony to carry wooll out of the realme, the end whereof was, that our wooll should bee draped into cloth. But the king wanting made this use of this act; in the 12 and 13 years of his raigne he made dispensations of that statute in consideration of money paid: but that statute lived not long. In 13 E. 3. a great imposition was set upon woolls, and it is called a great wrong, *cum populus regni nostri variis oneribus, tallagiis, et impositionibus hætenus prægravetur, quod dolentes referimus,* and there doth excuse himselfe.

Note here is the word *impositiones* first used, imposed by any king, in any record that I have observed, and doe remember.

Anno 14 E. 3. cap. 21. A subsidie graunted to the king of wooll, woollfells, and leather, &c. by parliament, for a certain time in respect of the warres, for which the king graunteth, that

Cap. itineris.

Rot chartarum.
31 E. 1. nu. 44.
Charta Mercatoria.

Rot. Pat. anno
40 H. 3.

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Fleta, lib. 2.
ca. 21.

Rot. ordinatio-
num, anno 5 E.
2. in Scaccario.

11 E. 3. cap. 1.
Rot. parl. 13 E.
3. nu. 12. li-
cence, &c. & 14
E. 3. nu. 3. li-
cence.

Rot. alianance.
12 E. 3. memb.
22. in dorſ.

14 E. 3. cap. 21.

after that time, he nor his heires would take more then the old custome.

Rot. parliam.
17 E. 3. nu. 28.
25 E. 3. nu. 22.
36 E. 3. nu. 26.

After this time ended, the king entred into a new device to get money, viz. that by agreement and consent of the merchants, the king was to have 40 s. of a sack of wooll, &c. but hereof the commons (that in troth were to beare the burden, for the merchant will not be the loser) complained in parliament, for that the graunt of the merchants did not binde the commons, and that the custome might be taken according to the old order, which in the end was graunted, and that no graunt should be made but by parliament.

Rot. parliam.
21 E. 3. nu. 16.
Rot. parliam.
21 E. 3. Dier,
1 Eliz. 165.
Int' origin. Scacc.
24 E. 3. Rot. 13.
27 E. 3. cap. 4.

No charge shall be levied of the people, if it were not graunted in parliament.

In 21 E. 3. by authority of parliament, a custome was graunted of cloth, for that the wooll was for the most part converted into cloth, which you may see in Orig. Scaccar. 24 E. 3. Rot. 13.

By the statute of 27 E. 3. cap. 4. in print, a subsidie of every cloth to take of the feller (over the customes thereof due, that is, such as then endured for a time, and were graunted by parliament) that is to say, of every cloth of assise, wherein there is no grain, 4. d. &c.

And here it is worthy of observation, that there were two causes of the making of this statute. 1. For that for cloth no custome was due other then by the act of 21 E. 3. 2. For that wooll being converted to a manufecture, and made into cloth, the ancient custome of *dimid.* mark for a sack of wooll was not by law payable, because the wooll was turned into another kinde, albeit the cloth was made of the wooll; and this doth notably appeare by the records of the exchequer, one of them in the same yeare that the act of 27 E. 3. was made.

In origines. de
Scaccar. anno
24 E. 3. Rot. 4.
Vide ibidem,
ibid. 24 E. 3.
Rot. 13.
See the first part
of the Institutes,
fol. 49. b.

Ac jam magna pars lane disti regni nostri eodem regno pannificetur, ac quod custuma aliqua nobis non est soluta; and there it appeareth that that was the cause, of giving to the king a subsidie for cloth by the said act of parliament, of 27 E. 3. And yet if in any case the king by his prerogative might have set any imposition, he might have set in that case, because as it appeareth by the record by making of cloth hee lost the custome of wooll.

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Rot. parliam.
45 E. 3. nu. 42.
Rot. parliam.
50 E. 3. nu. 17.
28.
Nu. 163. et vide
ibidem, 191.

Rot. parliam. 45 E. 3. No imposition or charge, &c. shall be set without assent of parliament.

50 E. 3. Richard Lions, a merchant of London punished for procuring new impositions, and so was the lord Latimer, the kings chamberlaine. And in the same parliament, nu. 163. upon complaint that new impositions were set, the king in parliament assented that the ancient custome should be holden, and no new imposition set.

Rot. pat. anno
25 E. 3. created
duke of Aquitaine.

In the raigne of E. 3. the black prince of Wales having *Aquitaine* granted to him, did lay an imposition of fuage or focage, *à foco*, upon the subjects of that dukedome, viz. a shilling for every fire called harth silver, which was of so great discontentment, and odious to them, as it made them to revolt.

Rot. Parl. 8 H.
6. nu. 29. &
Rot. Parl. 28 H.
6. nu. 35.

And no king since this time imposed by pretext of any prerogative, any charge upon marchandises imported into, or exported out of this realme, untill queen Maries time. See the statute of 11 R. 2. cap. 9. & Rot. Parliament. 8 H. 6. num. 29.

Rot. parl. 3 H.
5. nu. 50. Stat. 2.

And in 3 H. 5. the subsidie of tannage and poundage was graunted

granted to king H. 5. during his life, in respect of the recovery of his right in France (which was the first graunt for life of that kinde) yet therein was a *proviso*, that the king should not make a graunt thereof to any person, nor that it should be any precedent for the like to be done to other kings afterwards; but yet all the kings after him have had it for life, so forcible is once a precedent fixed in the crown, adde what *proviso* you will.

And this graunt by parliament of the subsidy of tunnage and poundage to the king is an argument, that the king taking it of the gift of the subject had no power to impose it himselfe.

The lords and commons cannot be charged with any thing for the defence of the realme, for the safeguard of the sea, &c. unlesse it be by their will in parliament, that is, in the graunt of a subsidy, whereunto the king assented.

Non potest rex subditum renitentem onerare impositionibus.

King Philip and queen Mary, graunted by letters patents to the major, bayliffes, and burgessees of Southampton, and their successors, that no wines called Malmeseyes to be imported into this realme by any denizen, or alien, should be discharged or landed at any other place within this realme, but onely at the said town and port of Southampton, with a prohibition, that none should doe to the contrary upon pain to pay treble custome to the king and queen, &c. And for that Anthony Donate, Thomas Frederico, and other merchant strangers bought divers butts of Malmesey, &c. and landed them at Goore, and in Kent, Gilbert Gerard the attourney generall, informed in the exchequer, against the said merchant strangers for the said treble custome, &c. Upon which information, as to the said treble custome, the said Anthony Donat demurred in law, &c. And this case was argued in the exchequer chamber by counsell learned on both sides, and upon conference had, two points were resolved by all the judges. 1. That the graunt made in restraint of landing of the said wines was a restraint of the liberty of the subject, against the lawes and statutes of the realme. 2. That the assessment of treble custome was meerly void, and against the law. As it appeareth by the report of the lord Dier under his hand (which I have in my custody.) But after by act of parliament, in *anno* 5 Eliz. the said charter is established as to merchant strangers onely, but not against subjects.

And where imposts, or impositions, be generally named in divers acts of parliament, the same are to be intended of lawfull impositions, as of tunnage, and poundage, or other subsidies imposed by parliament, but none of those acts or any other doe give the king power at his pleasure to impose. See the first part of the Institutes, sect. 97.

It is then demaunded, by what law custome is paid for kerseyes, whites, plaine, straits, and other new draperies, made of wooll; for it appeareth by acts of * parliament, and common experience, that all these pay custome to the king. To this it is answered, that a proportionable subsidy, or custome is paid for them within the equity of the said statute of 27 E. 3. cap. 4. and likewise a proportionable alnage is also due for them by that act.

Hil. & Pasch. *anno* 2 Jacobi regis, great questions were moved, whether frisedoes, bayes, northern cottons, northern dozens, cloth-rash, durances, perpetuanoes, tuft-mocadoes, sackcloth, fustians, worsteds, stuffles made of worsted yarne, &c. were within the said act

See in the fourth part of the Institutes, cap. of the high court of parliament, more of the subsidy of tunnage.

Rot. Parliam. 13 H. 4. nu. 10.

Fortesc. c. 9. & 18.

Int' communia de termino S. Trin. anno 1 Eliz. Rot. 73.

Mag. Charta, ca. 30. 9 E. 3. c. 1. 14 E. 3. 25 E. 3. cap. 2. 27 & 28 E. 3. of the staple. 2 R. 2. cap. 1.

23 H. 6. cap. 18. 14 H. 8. ca. 4. 13 El. c. 4. 1 Jac. ca. 13. 3 Jac. ca. 6.

Int' decreta in camera, Scac. Mich. 3 & 4 El. Mich. 32 & 33 Eliz. Mic. 39 & 40 Eliz.

* [62]

of 27 E. 3. as concerning the subsidy, and alnage: and if they were not, whether the king by his prerogative might not impose a reasonable subsidy, or custome upon them proportionably to the cloth mentioned in the statute of 27 E. 3. And this being questioned before the lords of the councell, they wrote to the judges to be certified what the law was in these cases, who upon mature deliberation, the 24 of June 1605, resolved, and so certified the lords by their letters under all their hands, that all frisedoes, bayes, northern dozens, northern cottons, cloth-rash, and other new drapery made wholly of wooll, of what new name soever made, as new drapery for the use of mans body, are to yeeld subsidy, and alnage according to the statute of 27 E. 3. and within the office of the ancient alnager, as may appeare by severall decrees in that behalfe in the exchequer, in the time of the late queen: but as touching fustians, canvas, and such like made meerly of other stufte then wooll, or being but mixed with wooll, it was resolved by all the judges, that no charge could be imposed for the searck or measuring thereof, but that all such letters patents so made are voyd, as may appeare by a record of 11 H. 4. wherein the reason of the judgement is particularly recited, which the judges thought good in their letters to set downe as followeth.

Note this,

King H. 4. graunted the measuring of woollen cloth, and canvas, that should be brought to London, to be sold by any stranger or denizen (except he were free of London) taking an ob. of every whole peece of cloth so measured of the feller, and one other ob. of the buyer, and so after that rate for a greater or lesser quantity, and one penny for the measuring of an C. ells of canvas of the feller, and so much more of the buyer; and though it were averred that two other had enjoyed the same office before with the like fees, viz. one Shearing by the same kings graunt, and one Clithew before by the graunt of R. 2. (and the truth was, Robert Pooley in 5 E. 3. and John Mareis, in 25 E. 3. had likewise enjoyed the same) yet amongst other reasons of the said judgement, it was set downe, and adjudged that the former possession was by extortion, cohertion, and without right, and that the said letters patents were in *onerationem, oppressionem, et depauperationem subditorum domini regis, &c. et non in emendationem ejusdem populi*; and therefore the said letters patents were voyd. And as touching the narrow new stufte made in Norwich, and other places of worsted yarn, it was resolved that it was not grauntable, nor fit to be graunted, for there was never any alnage of Norwich worsteds, and for these stufes, if after they be made, and tucked up for sale by the makers thereof, they should be again opened to be viewed, and measured, they will not well fall into their old plights, &c. as by the said letters it more at large appeareth. These letters were openly read at the councell table, and well approved by the whole councell, and the lords commanded the same to be kept in the council chest to be a direction for them to answer suitors in these cases.

But three judgements in the exchequer have been cited for prooffe, that the king hath power to set impositions upon merchandizes exported, and imported.

1. A judgement given in the exchequer in an information against Germane Cioll for 40. s. set by queen Mary upon every tun of wine, of the growth of France to be brought into the realme. But the case there was this, the attourney generall informed, that where

23 E. 3. ex pte Remem. The-saurar. Rot. par-liam. 25 E. 3. enacted according to this resolution.

30 E. 3. Com-pot. Forinfeco. in Scaccar. com-pot. Joh. Mareis.

Pasch. 1 Eliz. in Scacc. ex pte. remem. regis.

king

king Philip and queen Mary by their proclamation 30 Martii, in the 4. and 5 yeares of their raigne, did will and straitly command, that no wines of the growth of France, should be brought into this realme, without speciall licence of the said king and queene, under paine of forfeiture of such wine to the king and queene, *cumq; etiā dict' nuper rex et regina de advisamento concilii sui ad tunc ordina-ver' et decreverunt, quod qualibet persona, quæ in hoc regnum Angliæ induceret huiusmodi vina contra formam proclamationis prædict', solveret pro quolibet dolio huiusmodi vini 40. s. vocat impost. &c.* and that German Ciol, against the forme and effect of the said proclamation, had brought into the realme 338. tunnes of wines of the growth of France, and had not paid 40 s. for each and every tunne: the defendant pleaded a licence from the said king and queene, dated the 9. of Decemb. anno 1 & 2, to bring into the realme 1500. tunnes of wine, of the growth of Fraunce, in strangers bottoms, with a *non obstante* of any law, statute, or proclamation made or to be made to the contrary, whereupon the demurrer was joyned.

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In this record these things are to be observed, first that a proclamation prohibiting importation of wines upon paine of forfeiture, was against law: for it appeareth not, that any warre was betweene the realmes. 2. The proclamation was made of purpose to set an imposition, for the 40 s. is imposed upon them only, and upon such as should bring in wines against the said proclamation, so as the proclamation was the ground of this information. 3. The king and queene by advice of their councell, did order, and decree, &c, and sheweth not how, or by what meanes this order and decree was made: the pleading of such a former licence so insufficiently sheweth, that it was by agreement and consent.

2. The executors of customer Smith, were charged in a speciall information for receiving an imposition of iii. s. iiiii. d. set by queene Elizabeth, under her privy signet, upon every hundred weight of allome made within the dominions of the pope, and judgement in the exchequer was given against them: the reason of this judgement was, for that customer Smith received the same as due to the queene, and the issue was joyned, *quod prædicti executores non tenebantur ad computum, &c.* and the validity of the imposition was never questioned.

Mich. 38 & 39
Eliz. in Scaccario
Rot. 319.

3. A judgement was given in the exchequer, for an imposition set upon currants, but the common opinion was, that that judgement was against law, and divers expresse acts of parliament; and so by that which hath been said, it doth manifestly appeare.

In mem. Scaccar. int. com. Pasc. 4 Jacob. Rot. 32. in inform. vers. John Bate de London mercat. Pl. com. 236. in the B. Barkleys case. Fortesc. sepe.

To conclude this point, with two of the *maximes* of the common law. 1. *Le common ley ad tielment admeasure les prerogatives le roy, que ilz ne tolleront, ne prejudiceront le inheritance dascun,* the common law hath to admeasured the prerogatives of the king, that they should not take away, nor prejudice the inheritance of any: and the best inheritance that the subject hath, is the law of the realme.

2. *Nihil tam proprium est imperii, quam legibus vivere.* Upon this chapter, as by the said particulars may appeare, this conclusion is necessarily gathered, that all monopolies concerning trade and traffique, are against the liberty and freedom, declared and graunted by this great charter, and against divers other acts of parliament, which are good commentaries upon this chapter.

2 E. 3. c. 9.
9 E. 3. c. 1.
25 E. 3. c. 2.
2 R. 2. c. 1.
11 R. 2. cap. 7.
6 R. 2. cap. 1.
12 H. 7. cap. 6.

Mirror, c. 5. § 5.
 4 E. 4. c. 15.
 5 H. 4. c. 9.
 27 H. 6. cap. 3.
 17 E. 4. cap. 1.
 3 H. 7. cap. 8.
 * See hereafter
 the exposition
 upon the statutes
 of employments.

Le point del conge del demurrer des merchants aliens est issint interpretable, que ceo ne soit in prejudice des villes, ne des merchants dangleterre, et il soient serements al roy et ple-uyes filz demurront plus que 40 jours.

For the well intreating and ordering of merchant strangers and denizens, and for * due employment of their money upon the native commodities of this realme, many statutes have beene made since this great charter, and have been excellently expounded in the raigne of queene Elizabeth, but that matter belongs not to this place.

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C A P. XXXI.

SI quis tenuerit de aliqua escaeta, sicut de honore Wallingford, Notting. Bolon. et de aliis escaetis (1) quæ sunt in manu nostra, et sint baronia, et obierit hæres ejus, non det aliud relevium, nec faciet nobis aliud servitium, quam faceret baroni, si baronia esset in manu baronis, et nos eodem modo eam tenebimus, quo baro eam tenuit. Nec nos occasione talis baronia, vel escaetæ habebimus aliquam escaetam, vel custodiam aliquorum nostrorum hominum, nisi de nobis alibi tenuerit in capite ille qui tenuit baroniam, vel escaetam illam.

IF any man hold of any eschete, as of the honour of Wallingford, Nottingham, Boloin, or of any other eschetes which be in our hands, and are baronies, and die, his heir shall give none other relief, nor do none other service to us, than he should to the baron, if it were in the baron's hand. And we in the same wise shall hold it as the baron held it; neither shall we have, by occasion of any barony or eschete, any eschete or keeping of any of our men, unless he that held the barony or eschete otherwise held of us in chief.

(Bro. Livery, 58. Bro. Tenures, 57, 61, 94, 99. 26 H. 8. pl. 3. 2 Inst. 14. Regist. 184. 1 Ed. 3. stat. 2. c. 13. 1 Ed. 6. c. 4.)

By this chapter it is declared, and enacted, that if any man hold of any escheate, as of any honour, or of other escheats, which are baronies, and were in the kings hands; first, if he die, his heire being of full age, his heire shall give no other reliefe to the king then he did to the baron. 2. Nor doe none other service to the king, then he should have done to the baron. 3. That the king shall hold the honour or baronie as the baron held it, that is, of such estate, and in such manner and forme, as the baron held it. 4. The king shall not have by occasion of any barony, or escheate, any escheate but of lands holden of such baronie. 5. Nor any wardship of any other lands then are holden by knights service of such baronie, unlesse he, which held of the baronie, held also of the king by knights service in *capite*.

All this is meereley declaratory of the common law, and here it appeareth that he that holdeth of the king, must hold of the person of the king, and not of any honor, barony, mannor or feignory: and it appeareth farther in our books, that he that holdeth of the king in chicfe, must not only hold of the person of the king, but the tenure must be created by the king, or some one of the progenitors,

See the first part
 of the Institutes,
 sect. 103. 47 E.
 3. 21. F. N. B. 5.

or predecessors kings of this realme, to defend his person and crowne, otherwise he shall have no prerogative by reason of it, for no prerogative can be annexed to a tenure created by a subject. Note here is not named the honour of Lanc. which was an auncient honour ever since the conquest, which E. 3. raised to a count palatine, as in the 4. part of the Institutes, cap. Duch. of Lancastre appeareth. See 28 H. 6. 11. *per tous les justices*. 1 E. 6. Bro. trav. 53. Stamford Prerog. 29. b.

(1) *De aliis escheatis.*] Some question hath been made of these words, for some have said that these words are to be understood of common escheats, as where the lord dieth without heire, or where he is attainted of felony: but where the lord is attainted of high treason, there the king hath the land by forfeiture of whomsoever the land is held, and not in respect of any escheate by reason of any feignorie: and therefore where William Riparave a Norman, held lands in fee of the king, as of the honour of Pevenell, and Riparave forfeited his said land for treason, and the king seized it as his escheate of Normandy, in this case the land so forfeited was no part of the honour, as it should have been, if it had come to the king, as a common escheate, for it cometh to the king by reason of his person, and crowne, and therefore if he graunt it over, &c. the patentee shall hold it of the king in chiefe, and not of the honour. And all this is to be agreed, but yet the tenants that held before of the honour by knights service, cannot hold of the king in chiefe. 1. For that they hold not of the person of the king, but of the honour. 2. Because the tenure was not created by the king, or any of his progenitors, as hath been said.

47 E. 3. 21. Riparaves case.

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And so doth Bracton, who wrote soone after the statute, expound this great charter to extend to forfeiture of baronies for treason, as of the Normans.

Bracton, l. 2. fol. 87. b. 30 H. 8. tenures. Br. 44. 29 H. 8. livery. 28 Br. 36 H. 8. Dier 58. 1 E. 6. cap. 4. 1 E. 3. cap. 13. See the 1. part of the Institutes, sect. 1.

And yet to make an end of all ambiguities and questions, the statute of 1 E. 6. was made, which is, as the words be, a plain declaration and resolution of the common law. Likewise the statute of 1 E. 3. which provideth, that where the land, that is holden of the king, as of an honour, is aliened without licence, no man shall be thereby grieved, is also a declaration of the common law.

By this chapter it appeareth, that a subject may have an honour.

C A P. XXXII.

NULLUS liber homo det de cetero amplius alicui, vel vendat [alicui] de terra sua, quam ut de residuo terræ suæ possit sufficienter fieri domino feodi servitium ei debitum, quod pertinet ad feodum illud.

NO freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him, which belongeth to the fee.

Tr. 1. E. 1. coram rege. Not. & Derb. a declaration made of this act. Bract. l. 1. Britton. fol. 88. Fleta. l. 3. cap. 3. Mirror, c. 5. § 2. Customier de Norm. cap. 116. (1 Inst. 43. a. 18 Ed. 1. stat. 1. c. 2.)

1 First it is to be scene, what the common law was before this statute.

2 What is wrought by this statute, where the lands are holden of the king

20 H. 7. 11.

3 What this statute hath provided in case where lands are holden of a subject.

Before this statute, in case where the tenure was of a common person, the tenant might have made a feofment of a parcell of his tenancy to hold of him, for the feignory remained intire as it was, and the lord might distreine in the tenancy paravaile for his rent, and service; but at the common law, he could not have given a part of his tenancy to be holden of the lord, for the tenant by this act could not divide the feignory of the lord which was intire, for at the beginning the lord reserved his feignory out of the whole tenancy, and might distreine in every part thereof for his feignory; but if the tenant might have made a feofment of part to hold of the lord, then had he secluded the lord of his liberty to distreine for the whole feignory in every part thereof.

At the common law the tenant might have made a feofment of the whole tenancy to be holden of the lord, for that was no prejudice at all to the lord.

^a 29 Ass. p. 19.

20 Ass. p. 17.

26 Ass. p. 37.

20 E. 3. avowry.

Rot. parl.

29 E. 3. nu. 18.

^b Rot. par.

18 E. 1.

^c 34 E. 3. c. 15.

See the Stat. of

W. 3. de quia

emptores terr.

an. 18 E. 1.

F. N. B. 143. b.

& 235. c.

13 Eliz. Dier.

299. b.

^d Rot. pat. an.

21 H. 3. nu.

4 H. 3. confirm-

ed this chart.

made 9 H. 3.

^e 20 Ass. p. 17.

26 Ass. p. 37.

14 H. 4. 2, 3.

15 E. 4. 13.

Stainf. prer.

cap. 6. fo. 27,

28. 9 E. 3. 36.

Hil. 13 E. 3. co-

ram rege Norff.

in Turri.

* [66]

^a But in the kings case it was doubted, whether his tenant might have given part of the tenancy to hold of himselfe, because the land, and the profit that might come to the king thereby, was removed farther off from him, and the mesnalty was ever of lesse value, then the land, and for that cause the tenancy was called paravaile:

^b and in 18 E. 1. the king answered to a petition in parliament, *rex non vult aliquem medium, &c.* and this question remained after this statute about the space of 133. years, viz. till the ^c statute of 34 E. 3. was made, whereby it is provided, that alienations of lands made by tenants, which held of H. 3. or of other kings before him, to hold of themselves, that the alienations should stand in force, saving to the king his prerogative of the time of his great grandfather, his father, and his own, whereby it appeareth that this prerogative to have a fine for alienation, ^d began in the raign of H. 3. which was by this act, and therefore he beginneth with H. 3. his great grandfather.

^e To the second point by this act, where lands are holden of the king, as king, in *capite*, be it by knights service, or in socage in *capite*; and aliened without licence, there * groweth, as hath been said, to the king a fine: for by the common law it was against the nature and purity of a fee-simple, for the tenant to be restrained from alienation.

But some did hold, that upon this act the land so aliened without licence was forfeite to the king, by reason of these words, *nullus liber homo det, &c.* and others did hold the contrary, that upon these words, the land was not forfeited, but that it should be seised in the name of a distresse, and a fine to be paid for the trespass, which I take to be the better opinion; and the reason why our books speake, that no fine was due before 20 H. 3. is, for that about that yeare H. 3. being of full age (as hath been said) did establish and confirme this great charter, but in truth it was in 21 H. 3. as by the charter it selfe appeareth.

But this question depended about the space of 100 years, &c. and was not determined untill the statute made in 1 E. 3. whereby it

1 E. 3. c. 12.

See the statute of

quia emptores

It is enacted, that the king shall not hold them as fofteite in fuch cafe, but that of lands fo aliened there shall be from thenceforth, a reasonable fine taken in the chancery, by due proces. which act was but an exposition of this chapter of *Magna Charta* as to lands holden of the king *in capite* aliened without licence, and extendeth to lands holden of the king by grand serjantie aliened without licence.

terrarium. ubi
sup. Hill. 2 E.
3. coram rege
wiltel. Prerog.
regis, c. 6.
F.N.B. 175-
14 E. 3 quare
Imp. 54.
Br. Alienation
sans licence 34.
Hill. 43 Eliz.
l. 2. fol. 80, 87.
Seign. Cromwels
case.

To the 3. the great doubt upon this act was, that in as much as this act was a prohibition generall, and imposed no paine or penalty, what paine the tenant, or his feoffee should incurre, if he did the contrary; and by the common opinion this act was thus interpreted: that when a tenant of a common person did alien parcell contrary to this act, the feoffor himfelfe during his life should not avoide it, *quia nemo contra factum suum proprium venire potest*, but that his heire after his decease might avoide it by the intendment of this act, to the end that men should not purchase fuch parcell, for feare of losing the same after the death of the feoffor: but if the heire apparant had joyned with his auncester in the feoffment, or after had confirmed it, and thereby had given his assent thereunto, he or his heires should never have avoided it, whether he survived his father or no: and if the heire entred upon this statute, the alienee of part might plead that the service, whereby the land was holden, might be sufficiently done of the residue, and thereupon issue might be taken. And I have seene divers fuch precedents betweene this act of *Magna Charta*, and 18 E. 1.

Then came the statute of 18 E. 1. which enacteth, *quod de cætero liceat unicuique libero homini terras suas, seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita tamen quod feoffatus teneat terram illam, seu tenementum illud de capitali domino per eadem servitia, et consuetudines, per quæ feoffator suus illa prius de eo tenuit, et si partem aliquam earundem terrarum, seu tenementorum alicui vendiderit, feoffatus ille partem illam immediate teneat de domino.*

18 E. 1. de quia
emptores terra-
rum.

Many excellent things are enacted by this statute, and all the doubts upon this chapter of *Magna Charta* were cleered, both statutes having both one end (that is to say) for the upholding and preservation of the tenures, whereby the lands were holden; this act of 18 E. 1. being enacted *ad instantiam magnatum regni*.

1 First this statute of 18 E. 1. doth begin with a *de cætero liceat*, which proveth that before it was not lawful to alien part, unles sufficient were left, and this approveth the aforesaid common opinion, that in that case, the heire might enter, otherwise this chapter of *Magna Charta*, had been in vaine and this *de cætero liceat*, had not needed.

2 That by this statute of 18 E. 1. the prohibition and penalty by this chapter of *Magna Charta*, to avoide the state of the feoffee is taken away; *de cætero liceat, &c.*

3 The point aforesaid of the common law, that the tenant could not alien parcell to hold of the lord, is by this act of 18 E. 1. altered.

4 Another point of the common law is by this act altered, that where by the common law, he hath aliened parcell to hold of himfelfe, this is taken away, and the alienee shall hold of the lord *pro particula*.

5 Where the tenant had liberty, and election by the common law

law to make a feoffement of the whole, to hold either of himselfe, or of the lord, now this liberty and election is taken away, for by this act the land must be immediately holden of the lord.

Registr. 268.
F. N. B. 234.

6. That the king is bound by this act, and this appeareth by the Register, that the king cannot charge the feoffee of part with the entire rent, but there lieth a writ *de ouerando pro rata portione*; but the king may graunt lands to hold of himselfe, for he is not restrained by this act, for hereby no man is restrained, but he which holds over of some lord, and the king holdeth of none.

But then here riseth a question, if by this chapter of *Magna Charta*, a fine for alienation accrued to the king upon an alienation of the kings tenant in *capite*, and now this restraint (as hath been said) being taken away; how can that prerogative stand when the foundation, whereupon it is built faileth?

But hereunto it is answered. 1. The restraint of *Magna Charta*, *secundum quid*, as to the avoydance of the state of the feoffee by the heire, is taken away, as hath been said, but not *simpliciter*, for in respect of the king, the fine for alienation remains due, and here-with agreeth constant and continuall usage. 2. The statute of 1 E. 3. enacteth, *que de formes de tielz terres et tenements alien soit reasonable sine prise in le chauncery*, and though it saith (*deformes*) from henceforth, that was not, that any fine was due before, but, as hath been said, to take away the question of the forfeiture.

17 E. 2. ca. 7.
1 E. 3. ubi su.
pra.

After this act out of the office of the remembrancer of the exchequer, writs of *quo titulo ingressus est*, to help the king to his reasonable fine, issued out of the exchequer, to know how the feoffee came to the whole, or part of the land, and of what estate, whereupon the feoffee was driven to plead to his great charge and trouble, and therefore upon conference had with the kings officers, and the judges, it was ordained, that seeing the kings tenant could not alien without licence, for if he did, he should pay a fine, that for a licence to be obtained, the king should have the third part of the value of the land, which was holden reasonable, and the feoffee should pay the same because his land was otherwise to be charged, and he rid of the trouble and charge by the writ of *quo titulo ingressus est*; and if the alienation was without licence, then a reasonable fine by the statute, was to be paid by the alienee, which they resolved to be one yeares value, which ever since constantly and continually hath bene observed and paid.

45 E. 3. ca. 6.
27 E. 3. 6.

This fine was to be paid by the alienee, as hath been said, or by those that claimed by or under him, and if the fine be not paid, the land shall be seised into the kings hands; and the intent of a parliament is always intended just, and reasonable; and therefore if a disseisor of lands in *capite* make an alienation without licence; and the disseisee enter, the land shall not be seised for the fine, for the disseisee is in by a title before the alienation, and so in other like cases. If he in the reversion levy a fine of lands holden in *capite* without licence, the lessee for life shall not bee charged with the fine, because that estate was before the alienation, but yet in a *quid juris clamat*, the lessee shall not be compelled to attorne, because the court will not suffer a prejudice to the king in like manner, as if the reversion had been aliened in mortmain without the kings licence.

I have been the longer in explaining this chapter, because it seemed so obscure to some readers in former times, that they passed it over without any explanation.

C A P. XXXIII.

OMNES patroni abbatiarum, qui habent chartas regum Angliæ de advocacione, vel antiquam tenuram, vel possessionem, habeant earum custodiam cum [vacaverint] sicut habere debent, sicut superius declaratum est, cap. 5.

ALL patrons of abbies, which have the king's charters of England of advowson, or have old tenure or possession in the same, shall have the custody of them when they fall void, as it hath been accustomed, and as it is afore declared.

(25 Ed. 3. stat. 3. c. 1.)

This statute is intended where the patron, or founder of abbeyes, or priories by special reservation, tenure or custome, ought to have the custody of the temporalities of the same, during the vacation, as many patrons and founders in times past had. But if the king be founder, he ought to have the temporalities during the vacation, of common right by his prerogative.

Mirror, ca. 5. § 2. F. N. B. 34. 44 E. 3. 24. 38 Aff. 22. 50 Aff. p. 6.

If the king and a common person joyn in a foundation, the king is the founder, because it is an entire thing.

44 E. 3. 24.

If a common person found an abbey, or priory, with possessions of small value, and the king after endow it with great possessions, yet the common person is founder. If a common person found a chauntery, and after the king translate it, and make it a monastery, and endow it with possessions, yet the common person is in law the founder, because he gave the first living; so if the translation be from regular to secular, *vel e contra*.

C A P. XXXIV.

NULLUS capiatur, aut imprisonetur propter appellum femine (1), de morte alterius quam viri sui.

NO man shall be taken or imprisoned upon the appeal of a woman for the death of any other, than of her husband.

(Bro. Appeal, 5, 17, 60, 68, 104, 112. Raft. Ent. 43.)

For this word, Appeale, see the first part of the Institutes. At the common law before this statute, a woman, as well as a man might have had an appeale of death of any of her auncestors, and therefore the son of a woman shall at this day have an appeale, if he be heire at the death of the auncestor, for the son is not disabled, but the mother onely, for the statute saith, *propter appellum feminae*. Vide more of this in the first part of the Institutes.

See the first part of the Institutes, sect. 500.

Glanv. lib. 14.

c. 3. 15 E. 2.

Coro. 335.

17 E. 4. 1.

20 H. 6. 43.

Stamf. Pl. Cor.

58, 59. Bract.

li. 4. fol. 148.

Brit. fo. 55.

Flet. l. 1. ca.

* Fleta saith, *Fœmina autem de morte viri sui inter brachia sua interfecit, et non aliter poterit appellare*; and therewith agreeth the Mirror, Britton, and Bracton.

Flet. l. 1. ca. 2. & ca. 2. § 7.

33. See the first part of the Institutes, sect. 24.

* Fleta ubi supra. Mirror, ca. 5. §

50 E. 3. 14. 28 E. 3. 91. 3 E. 3. Coron. 357. 20 H. 6. 46.

By *inter brachia* in these auncient authors, is understood the wife, which the dead had lawfully in possession at his death, for she must be his wife both of right and in possession, for in an appeale, *unques accouple in loialē matrimony*, is a good plea.

A woman at this day may have an appeale of robbery, &c. for she is not restrained thereof.

This writ of appeale of the death of her husband, is annexed to her widowhood, as her quarentine is.

If the wife of the dead marry again, her appeale is gone, albeit the second husband die within the yeare; for shee must before any appeale brought, continue *fœmina viri sui*, upon whose death she brings the appeale.

[59]

11 H. 4. 46.

So if she bring the appeale during her widow-hood, and take husband, the appeale shall abate, and is gone for ever.

So likewise, if in her appeale she hath judgement of death against the defendant, if after she take husband, she can never have execution of death against him.

35 H. 6. 63.

Albeit the husband be attainted of high treason, or felony, yet if he be slain, his wife shall have an appeale, for notwithstanding the attainder he was *vir sœus*, but the heire cannot have an appeale, for the blood is corrupted betweene them.

(1) *Appellum fœminæ.*] A hermophrodite, if the male sex be predominant, shall have an appeale of death as heire, but if the female sexe doth exceed the other, no appeale doth lie for her as heire.

CAP. XXXV.

NULLUS comitatus (1) de cetero teneatur nisi de mense in mensem, et ubi major terminus esse solebat, major sit (2). Nec aliquis vicecomes, vel ballivus suus faciat turnum suum per hundredum, nisi bis in anno, et non nisi in loco debito et consueto, viz. semel post Pasch', et iterum post festum S. Michaelis (3), et visus francipleg' tunc fiat ad illum terminum Sancti Michaelis sine occasione. Ita scilicet quod quilibet habeat libertates suas quas habuit, vel habere consuevit tempore regis Henrici avi nostri, et quas postea perquisivit. Fiat autem visus de frankpleg' sic (4): videlicet, quod pax nostra teneatur, et quod tithinga teneatur integra (5), sicut esse consuevit, et quod vicecomes non quærat occasiones (6), et contentus sit de eo, quod vicecomes habere consuevit (8) de visu suo

NO county court from henceforth shall be holden, but from month to month; and where greater time hath been used, there shall be greater: nor any sheriff, or his bailiff, shall keep his turn in the hundred but twice in the year; and no where but in due place, and accustomed; that is to say, once after Easter, and again after the feast of Saint Michael. And the view of frankpledge shall be likewise at the feast of Saint Michael without occasion; so that every man may have his liberties which he had, or used to have, in the time of king Henry our grandfather, or which he hath purchased since. The view of frankpledge shall be so done, that our peace may be kept; and that the tithing be wholly kept as it hath been accustomed; and that the sheriff seek

sue faciendo, tempore H. reg. avi nostri (6).

no occasions, and that he be content with so much as the sheriff was wont to have for his view-making in the time of king Henry our grandfather.

(Fitz. Leet, 11. 8 H. 7. f. 4. 1 Roll, 201. Cro. El. 125. 2 Leon. 74. Regist. 175, 187. F.N.B. 361. 31 Ed. 3. Stat. 1. c. 15.)

(1) Comitatus.] Quod modo vocatur comitatus, olim apud Britones temporibus Romanorum in regio isto Britanniae vocabatur consulatus; et qui modo vocantur vicecomites, tunc temporis vice-consules vocabantur; ille vero dicebatur vice-consul, qui consule absente ipsius vices supplebat in iuris foro.

Inter leges R. Ed. Lamb. 129. 2. b. Idem verbo Conventus.

Curia comitatus, in Saxon, *ðcýpegemoz, i. comitatus conventus.*

12 H. 7. 18.

Ejus duo sunt genera, quorum alterum hodie le countie court, alterum le tourne del viscount, olim folkmete, vulgo nuncupatur; so as many times turn' vicecomitis is expressed under the name of curia comitatus, because it extended through the whole county: and therefore in the red book of the exchequer, amongst the laws of king H. 1. cap. 8. de generalibus placitis comitatum, it is thus contained, viz.

Lamb. 135. Britton, c. 27. Flet. 1. 2. ca. 36, 37. In libro rubro, in Scaccario, ca. 8.

Sicut antiqua fuerat institutione formatum, salutaris regis imperio vera est recordatione firmatum, generalia * comitatum placita certis locis, et vicibus, et definito tempore per singulas anni provincias convenire debere, nec ullis ultra fatigationibus agitari, nisi propria regis necessitas, vel commune regni commodum sapius adjiciant. Inter sint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermanni, praefecti, praepositi, barones, et vassores, tingre-vii, et ceteri terrarum domini diligenter intendentes, ne maiorum impunitas, aut gravionum pravitas, vel iudicum subversio solita majores laceratione confiniant: agantur itaque primo, debita verae christianitatis iura, secundo, regis placita, postremo, causae singulorum, &c. debet enim Sherysmote, (i. the sheryffes tourne) bis; hundreda, et wapentachia, (i. the county courts) duodecies in anno congregari.

[70]
* i. Turnorum placita.

Regis placita. i. The pleas of the crown holden in the sheryffes tourn also.

And truly did H. 1. say, sicut antiqua fuerat institutione formatum: for these courts of the tourn, and of the county, and of the leete or view of frankpledge mentioned hereafter in this chapter were very ancient; for of the tourn you shall read amongst the lawes of king Edw. Statutum est quod ibi (scilicet apud le folkmete) debent populi omnes, &c. convenire, et se fide et sacramento non fracto ibi in unum et simul confederare, &c. ad defendendum regnum, &c. una cum domino suo rege, et terras suas, et honores illius omni fidelitate cum eo servare, et quod illi, ut domino suo regi intra et extra regnum universum Britanniae fideles esse velint, &c. Hanc legem invenit Arthurus (qui quondam fuit inclytissimus rex Britonum) et ita consolidavit et confederavit regnum Britanniae universum semper in unum, hujus legis auctoritate expulit Arthurus praedictus Saracenos et inimicos a regno, lex enim ista diu sopita fuit, donec Edgarus rex Anglorum qui fuit avus Edwardi regis, illam excitavit, et erexit in lucem et per totum regnum firmiter observari praecipit: et hujus legis auctoritate rex Etheldred. subito uno et eodem die per universum regnum Danos occidit.

Lamb. fol. 135. The oath of allegiance in the tourn or leet.

By the lawes of king Edward, before the conquest the first, which succeeded king Alured, it is thus enacted:

Praepositus quisque, i. vicecomes Saxonice gerefa, Anglice sheryffe, ad quartam circiter septimanam frequentem populi concionem celebrato, cuique jus dicitur aequabile, litesque singulas cum dies conditi adveniant dirimito.

Inter leges Edw. regis. ante conq. 1. cap. 11. fol. 51.

Hereby it appeareth that common pleas between party and party were holden in the county court every month, which agreeth with *Magna Charta*, and other statutes and continuall usage to this day.

Inter leges Ed-
gari regis, ca. 5.
fo. 8c.

And amongst the laws of king Edgar it is thus concerning the sheriffes tourn provided.

Celeberrimus ex omni satrapia bis quotannis conventus agitor, cui quidem illius diocesis episcopus, et senator interfunto, quorum alter jura divina, alter humana populum edoceto; which also agreeth with *Magna Charta*, and other statutes and continuall usage.

Britton. cap. 29.
Fleta, lib. 2. cap.
45. Marlebr.
ca. 10. 31 H. 6.
Leet II. F. N. B.
169. a.

By that which hath been said, it appeareth that the law made by king H. 1. was (after the great heat of the conquest was past) but a restitution of the auncient law of England: and forasmuch as the bishop with the sheriffe did goe in circuit twice every yeare, by every hundred within the county (which also appeareth by this chapter of *Magna Charta* in these words, *turnum suum per hundreda, &c.*) it was called tour, or tourn, which signifieth a circuit, or perambulation.

Now let us peruse the severall branches of this chapter.

(2) *Nullus comitatus de cetero teneatur nisi de mense in mensem, et ubi major terminus esse solebat, major sit.*] This (as hath been said) is an affirmance of the common law, and custome of the realme.

Comitatus.] Here *comitatus* is taken in the common sence for the county court.

[71]

That the realme was divided into counties long before the raigne of king Alured, viz. in the time of the auncient Britons. See the first part of the Institutes, sect. 248.

2 E. 6. cap. 25.

Et ubi major terminus, &c.] This is altered by the statute of 2 E. 6. whereby it is provided that no county court shall be longer deferred, but one month from court to court, and so the said court shall be kept every month, and none otherwise.

By which act every county of England, concerning the time of the keeping of the county court is governed by one and the same law.

And there is to be accounted 28 dayes to the legall month in this case, and not according to the month of the kalender.

31 E. 3. ca. 15.

(3) *Nec aliquis vicecomes, vel ballivus suus faciat turnum suum per hundredum, nisi bis in anno, et nec nisi in loco debito et consueto, viz. semel post Pasch. et iterum post festum S. Michaelis.*] Where this branch saith, *semel post Pasch. &c.* The statute of 31 E. 3. explaineth it, viz. one time within the month after Easter, and another time within the month after S. Michael, and if they hold them in any other manner, then they should lose their tourn for that time, which is as much to say, as the court so holden for that time, shall be utterly void, and the sheriffe shall lose the profits thereof.

38 H. 6. fol. 7.
6 H. 7. 2.
Stamt. pl. Cor.
84.

Nisi in loco consueto.] This remaineth to this day.

42 E. 3. 4, & 5.
Dier, 4, & 5.
Phil. & Mar.
151.

Per hundreda.] How hundreds, and the courts of the hundreds first came, see hereafter in this chapter.

Et vijus franciplegii tunc fiat ad illum terminum Sancti Michaelis, &c.] It hath appeared before, that of auncient time the sheriffe had two great courts, viz. the tourne, and the county court: afterwards for the ease of the people, and specially of the husbandman, that each of them might the better follow their businesse in their severall degrees, this court here spoken of, viz. view of frankpledge,

pledge, or leet was by the king divided, and derived from the tourn, and graunted to the lords to have the view of the tenants, and resiants within their manners, &c. So as the tenants, and resiants should have the same justice, that they had before in the tourn, done unto them at their own doores without any charge or losse of time, and for that cause came the duty in many leets to the lord *de certo lete*, towards the charge of obtaining the graunt of the said leet.

11 H. 4. 89.
13 H. 4. 9. lib.
11. fo. 45. God-freyes case.

So likewise, and for the same reason were hundreds, and hundred courts, divided and derived from the county courts, and this the king might doe, for the tourn and leet both are the kings courts of record: and as the king may graunt a man to have power *tenere placita* within a certain precinct, &c. before certain judges, and in a manner exempt it from the jurisdiction of his higher courts of justice, so might he doe in case of the tourne, and hundred courts: so as the courts and judges may be changed, but the lawes and customs, whereby the courts proceed, cannot be altered. And as the county court, and hundred court are of one jurisdiction, so the tourne, and leet be also of one and the same jurisdiction; for *derivativa potestas est ejusdem jurisdictionis cum primitiva*.

Regula.

The style of the tourn is *curia franc. plegii domini regis tent apud L. coram vicecomite in turno suo tali die, &c.* And therefore in some books it is called the leete of the tourn. And therefore where the sheriffe styled his court, *turn. vicecom. tent. tali die apud L. &c.* it was resolved that it was insufficient for that this word tourn is but the perambulation of the sheriffe, but by the right style of the tourn, it appeareth that the tourn and leet have but one style, and the same jurisdiction.

31 H. 6. Leet
11. 8 H. 7. 11.
6 H. 7. 2.
8 H. 7. 1.
[72]
Mirror, ca. 7. § 16.

But for want of the knowledge of antiquity it was *obiter*, in 18 H. 6. denied that the tourn, and the leet were of one jurisdiction, and two instances are there put, viz. that the leet hath conufance of bread and ale, that is, of the assise of bread and ale, and the tourn hath not conufance thereof; and the other is, that in the leet they have authority *de presenter ceux, queux ne sont lies*, abridged by Fitzh. *a presenter ceux, que ne sont misés in le decennarie*.

18 H. 6. abbr. by F. Leet. 1.

To the first it is cleare, that the breach of the assise of bread and ale is presentable in the tourn, as a common nufance, and therewith agreeth constant and continuall experience, and reason proveth, that the derivative cannot have conufance of that which the primitive had not, unlesse it be given by some act of parliament; and herewith agreeth the style of the tourn, and the authority of later books.

4 E. 4. 31.
22 E. 4. 22.
12 H. 7. 18.
28 H. 8. Dier.
13. b.

As to the second, it is ill reported in the book itselc; but if it be intended as Fitzh. abridgeth it, then it is cleare that in the tourn they that be not put into the decennary may be inquired of, for, as hath been often said, the style of the tourn is, *curia visus frank-pleg'*; and the derivative cannot of common right have more then the primitive.

But both of the tourn and the leete, this may be truly said,

Pasch. 5. Jac. lib. fo. 78. Bulleins case. Cicero.

Tempora mutantur, & nos mutamur in illis;

Quodque vera institutio istius curiæ evanuit, et velut umbra ejusdem ad huc remanet: habemus quidem senatus consultum, sed in tabulis repositum, et tanquam gladium in vagina reconditum.

But now let us return to our *Magna Charta*.

Mirror, ca. 1.
§ 17. & ca. 5.
§ 2.
6 H. 7. 2. & 3.

30 H. 6. Lect
31. 24 H. 8.
Br. Lect 23.
27 H. 6. 14.
8 H. 7. 4.
12 H. 7. 15.
30 H. 6. 7.
14 H. 7. 14.
23. 23.

Et visus de franc' plegio tunc fiat ad illum terminum Sancti Michaelis, &c.] It is to be observed that the precedent branch is, that *vicecomes non faciat turnum per hundredum nisi bis in anno*, as hath been said, viz. *semel post Pasch' et iterum post festum Sancti Michaelis*; this clause extendeth to the enquiry of felonies, common nufances and other misdeeds, the view of frankpledges, and to all things inquireable in the tourn. Now by this clause it is provided that the article of the tourn concerning the view of frankpledge, being here understood in a particular sense, shall be dealt withall by the sheriffe in his tourne but once in the year, viz. at the tourn holden after Easter, and so it hath been formerly expounded: and therefore it was well resolved in 24 H. 8. that this clause of the statute of *Magna Charta*, is to be understood of the leet of the tourn, and not of other leets, and so without question is the law holden at this day, that he that claimes a leet by charter, must hold it at the same dayes which are contained in the charter, and he that claimes it by prescription may claime to hold it once or twice every yeare, at any such dayes as shall upon reasonable warning be appointed, if the usage hath been so, so that it hath been kept at uncertain times, or else it ought to be kept at such certain dayes and times, as by prescription hath been certainly used; and the next words to this clause bee, *ita scilicet quod quilibet habeat libertates suas, quas habuit, &c.* doe explaine the meaning of this chapter, that it extended not to the leets of the subjects, but they should have their liberties, as before they had; and this also appeareth by the conclusion of this chapter, *et quod vicecomes, &c. contentus sit de eo quod vicecomes habere consuevit de visu suo faciendo*; so as it must be *visus suus*, the sheriffs view, which of necessity must be parcell of the tourn; and it is said in the Mirror, that this view of frankpledge (parcell of the tourn) should be made once every yeare.

[73]

(-) *Fiat autem visus de franc' pleg' sic, &c.*] Here it appeareth that the view of frankpledge should have two ends. 1. *Quod pax nostra teneatur.* 2. *Quod tithingia teneatur integra.*

For the first, that the kings peace might be kept; the right institution of the view of franke pledge, and whereon the name came is to be considered, which is as followeth.

Bract. lib. 3.
1. 124. inc. leges
Cantuar. fol. 108.
19. Int. leges
124. regis fol.
122. cap. de tithing
Bract.
u. sup. Lamb.
vel centana &
eccuria.

Bract. fol. 19. b.

Franci plegii. i. Liberi fidejussores, free sureties or pledges; and here it is said *fiat visus de francis plegiis, ita scilicet quod pax nostra teneatur*, that is, let the view of pledges or sureties for free-men be made, so that our peace may be holden: now the institution hereof, for the keeping of the kings peace, was, that every free-man, at his age of 12 years, should in the leet (if he were in any) or in the tourne, (if he were not in any leet) take the oath of alleageance to the king, and that pledges or sureties should be found, in manner hereafter expressed, for his truth to the king, and to all his people, or else to be kept in prison: this franke pledge consisted most commonly of ten households, which the Saxons called *Theothung*, in the north parts they call them *Tenmentale*, in other places of England *Tithing*, here in this chapter *Tritthinga. i. decemvirale collegium*, whereof the masters of the nine families (who were bound) were of the Saxons called *Freoborh*, which in some places is to this day called *free Barrowe. i. Free surety, or frankpledge*, and the master of the tenth household was by the Saxon called by divers names, viz. *Theothungmon*, to this day in the west called *Tythingman*, and *Tihenbeofod* and *Freoborh. i. Capitalis plegius*, chiefe pledge: and these