ECCLESIASTICAL

L A W.

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Commemoration.

COmmemorations in the ancient church were recitals of the names, and honourable mention made in the ſolemn offices of worſhip, of ſuch perſons as had been eminent for piety and ſanctity, and who had departed this life in the fear of God, and in communion with the church of Chriſt. And this was done with a kind of prayer and thankſgiving; not from any ſuppoſed benefit that it would be to the dead, but for the example and encouragement of the living. And from hence may be deduced the obſervation of ſaints days in the church. *Ayl. par.* 190.

But in proceſs of time, as this was uſually performed upon the day of the perſon's death, the ſame degenerated into annals, anniverſaries, obits, and ſuch like: wherein prayers were put up for the ſoul of the deceaſed, and maſſes celebrated for the redemption thereof out of purgatory. And upon this foundation the chauntries were eſtabliſhed and endowed. *Ayl. Par.* 190.

Alſo, where the ſervice of the leſſer holiday falleth in with a greater, it is called a commemoration; in which the ſervice of the greater holiday is performed, and commemoration only is made of the ſaint for whom the inferior ſervice is appointed. *Gibſ.* 263.

Commendam.

1. COmmendam is a benefice or eccleſiaſtical living, which being void, or to prevent its becoming void, *commendatur*, is committed, to the charge and care of ſome ſufficient clerk, to be ſupplied until it may be conveniently provided of a paſtor. Thus when a parſon of a pariſh is made the biſhop of a dioceſe, there is a ceſſion of his benefice by the promotion; but if the king gives him power to retain his benefice, he ſhall continue parſon thereof, and ſhall be ſaid to hold it in commendam. *God.* 230. Commendam, what.

Reſtraints of commendam.

2. By a conſtitution of Othobon: *Whereas divers perſons, to avoid the laws againſt pluralities, do procure vacant benefices to be commended to them, to the great decay of piety and hoſpitality, and to the ſin of thoſe who grant ſuch commendams; we do decree that no church ſhall be granted in commendam, but for juſt and lawful cauſe: and in ſuch caſe, that no church ſhall be commended to any perſon, who hath more than one benefice with cure of ſouls; and that no perſon ſhall have more commendams than one; on pain that the ſame ſhall be void, and the biſhop who ſhall grant ſuch commendam ſhall be ſuſpended from collating or preſenting unto benefices until he ſhall recal the ſame.* Athon. 120.

And by a conſtitution of archbiſhop Peccham: *We do decree, that if any perſon ſhall take or obtain more than one benefice with cure of ſouls, or otherwiſe incompatible, without diſpenſation of the apoſtolic ſee, either by way of inſtitution or of cuſtody or commendam, or one by inſtitution and another by commendam, except they be held in that manner which* Gregory's *conſtitution made in the council of* Lyons *doth permit; he ſhall be deprived of all benefices ſo obtained, and be excommunicated* ipſo facto, *and not abſolved but by us or our ſucceſſors or the ſee apoſtolic.* Lind. 136.

Gregory's *conſtitution*] Which was, that no commendam ſhould be granted to any perſon, but who was of lawful age, and a prieſt, and but one commendam to one perſon, and that only when evident neceſſity or the advantage of the church required it, and the ſame to continue no longer than for ſix months. *Gibſ.* 913.

Benefice vacated by acceptance of a biſhoprick.

3. The poſſeſſion of a biſhoprick doth of common right void all other promotions: This is the ancient law of the church as expreſſed in a canon of the council of Lateran under Alexander the third. And agreeable hereunto (and, without doubt, derived from this) are the declarations that we meet with every where in the books of common law, that of common right all promotions are vacated by the taking of a biſhoprick, as ſuch: But the law is otherwiſe, if one is a mere titular biſhop, or a ſuffragan biſhop upon the ſtatute of the 21 *H.* 8. *c.* 14. Gibſ. 913.

But the avoidance may be prevented by a commendam.

4. But this voidance may be prevented by diſpenſation of retainer, granted before poſſeſſion of the biſhoprick: which is commonly called a *commendam retinere.* This the pope had power to do, as claiming a right to diſpoſe of all promotions becoming void in that manner. And the ſame thing the king may do; either ſingly and by himſelf (as many of the law books hold), or at leaſt by command to the archbiſhop to exert the right of diſpenſation veſted

veſted in him by the ſtatute of the 25 *H.* 8. *c.* 21. as the ordinary method is. Which ſort of commendam is defined by Hobart to be, a faculty of retention and continuation of the benefice in the ſame perſon and ſtate wherein it was, notwithſtanding ſomething intervening (as a biſhoprick, or the like) that without ſuch a faculty would have avoided it. By which means, the inſtitution and induction, or other method whereby the perſon obtained ſuch benefice, remain and are continued in their full force. And it being the doctrine both of canon and common law, that former promotions are not vacant, but by conſecration in caſe of creation, and by confirmation in caſe of tranſlation; if ſuch diſpenſation comes before theſe, it comes in time enough to continue the poſſeſſion; but otherwiſe, it comes too late. Thus it is ſaid in the books of common law, that cardinal Beaufort's diſpenſation to hold the biſhoprick of Wincheſter, coming after he was made cardinal, was void; but that cardinal Wolſey's for the archbiſhoprick of York, coming before, was good. *Gibſ.* 913.

And not only dignities and benefices have been granted in commendam, but alſo headſhips of colleges, and hoſpitals, and that by diſpenſation; as, for inſtance, of headſhips, St John's in Oxford, to Dr Mews biſhop of Bath and Wells; of Magdalen college in Oxford, to Dr Hough biſhop of Oxford; of Pembroke college, to Dr Hall biſhop of Briſtol: and of Hoſpitals, at St Croſs near Wincheſter, to Dr Compton biſhop of Oxford; and St Oſwald's near Worceſter, to Dr Fell biſhop of Oxford. *Id.*

It hath been queſtioned, whether a lapſe might be made a commendam: but that ſeems to be a groundleſs nicety; ſince it is certain, that whoever hath right to preſent by ſuch lapſe, hath by the ſame reaſon a right to conſent that it be granted in commendam perpetual, which is equivalent to a preſentation. *Id.*

5. It hath been queſtioned heretofore, whether a biſhop could take a commendam in his own dioceſe, becauſe the ſame perſon cannot be viſitor and viſited: but it hath been anſwered, that the biſhop is under the correction of the metropolitan; and accordingly, that he may have ſuch commendam. *Gibſ.* 913. Whether a biſhop may have a commendam in his own dioceſe.

6. No commendam can be granted but with conſent of the patron. This is the doctrine of the canon law. And therefore in granting a commendam *retinere*, the king (who is patron by the promotion) ſignifies his conſent, by his mandate to the archbiſhop to grant diſpenſation: Patron's conſent neceſſary.

and if the commendam be by *recipere*, it is either to take a promotion in the biſhop's own gift, and ſo his acceptance is a conſent; or in the gift of ſome other patron, and then the conſent of ſuch patron muſt be given in an authentick manner, and mentioned in the diſpenſation. And Hobart ſaid, that if the archbiſhop ſhould commend to a certain church void, without the patron's conſent; the inſtrument of commendam would be void, tho' the patron ſhould conſent afterwards. *Gibſ.* 913, 4.

How far a commendam continues the incumbency.

7. By a commendam *retinere* the incumbency is continued. This follows plainly from what hath been ſaid; that the voidance is thereby prevented, which would otherwiſe have enſued; in the ſame manner as it is prevented with regard to a firſt benefice incompatible, by diſpenſation to hold a ſecond or a plurality of benefices. For this reaſon, it was ſaid by Hobart, that a commendam *retinere* is improperly called a commendam; for (ſaith he) my own benefice cannot be commended unto me. And it is clear from the aforegoing conſtitutions, that what the canon law meant by this term, was only with regard to the ſecond benefice taken *de novo*, by way of cuſtody or commendam, and (to prevent the voidance of the firſt) not taken by way of inſtitution; and that it was no more than the committing to the incumbent of one church the cure and revenues of another, either for a time limited (as ſix months, which time the patron had to conſider of a proper clerk) that the church might be taken care of; or (with conſent of the patron) for a longer term, to the end chiefly that ſuch incumbent might be the better ſupported: the firſt of which (to wit, the care of the church during the vacancy) is now anſwered by ſequeſtration of the benefice; and the grant of the ſecond (namely, the profits of the vacancy) is rendered impracticable by biſhop or patron or both, by the ſtatute of the 21 *H.* 8. *c.* 11. which gives the profits of the vacation to ſuch perſon as ſhall be thereunto next preſented promoted inſtituted or admitted. Which profits before this act belonged either to the church, and ſo were in the diſpoſition of the patron and biſhop; or to the ordinary, or other perſon to whom by cuſtom they appertained, and ſo by the previous conſent of ſuch perſon might be yielded to the commendatary: but the next incumbent being a perſon uncertain, cannot give ſuch conſent, and by conſequence the revenues of vacancies ſince the making of the ſaid act cannot be given; which ſeems to be the true reaſon of the utter diſuſe of that ſort of commendams, with regard

gard to preſbyters; however it hath continued, by prerogative royal, in favour of biſhops. *Gibſ.* 914.

But a commendam *capere* (that is, a dignity or benefice taken by a biſhop after conſecration, and without inſtitution) doth not create a proper incumbency. The canoniſts were not clear, whether during a commendam, the church commended was not really vacant; and whether the commendatary was in law any more than a guardian, adminiſtrator, or procurator of the church, during ſuch vacancy; and they who hold that they were ſomething more (becauſe commendam is a title owned by the canon law) pretend not to ſay, that they were incumbents; they held only by a corrupt and precarious title, invented on purpoſe to elude the laws againſt pluralities. In like manner, though the books of common law ſay, that a commendatary by *retinere* remains full incumbent, and may plead as ſuch; yet of a commendatary by *capere* they ſay, that a dean by ſuch commendam cannot confirm a leaſe made by the biſhop, and that a commendatary parſon in that way cannot have a juris utrum, nor take to him and his ſucceſſors, nor can ſue or be ſued in a writ of annuity. *Gibſ.* 914.

But on the other hand, there is one circumſtance, which makes much for the real title of ſuch ancient commendataries as were ſuch by *retinere*; namely, that we find thoſe benefices declared vacant by the *reſignation* of the commendataries, of which there are ſeveral inſtances to be met with in the archbiſhop's regiſter. *Id.*

For what time a commendam may be.

8. Commendam may be temporary or perpetual at the pleaſure of the king. When it is temporary, the preciſe time is expreſſed and limited in the diſpenſation; when perpetual, the ſtyle is, ſo long as he ſhall live, and continue biſhop of that ſee. And in the caſe of a commendam *retinere*, whether it be temporary or perpetual, it is only a temporary or perpetual continuance of the original incumbency, or the preventing of an avoidance for ſuch a term; of both which there have been frequent inſtances. And ſo anciently, in the caſe of a commendam *capere* granted to preſbyters; the term, when it went beyond ſix months (which was little more than a ſequeſtration), was ſometimes for a year, in caſe a perſon who had entred into a religious ſtate did not return after this year of probation; ſometimes, till another perſon was in orders; ſometimes, to continue at the pleaſure of the ordinary; and ſometimes, for life. But at preſent in the caſe of biſhops, the books of common law ſeem generally

to fall into the opinion, that a commendam *capere* ought to be perpetual; becauſe (there being no previous title by inſtitution, as it is in the caſe of a commendam *retinère*) the law knows not what to make of any thing that ſhall be called a title, and not be equal to that, at leaſt in point of perpetuity; and Dr Gibſon ſays, he believeth that in fact there is no inſtance of a commendam *capere* in the eccleſiaſtical records, but what hath been unlimited or perpetual: tho', whatever the right be that it conveys, it ſeemeth (in reaſon) to be capable of being as well temporary as perpetual. *Gibſ.* 914.

How far the king's right to preſent is ſerved thereby.

9. According to the duration of a commendam and the commendatary, the right of the crown to preſent upon promotion is ſerved or not ſerved. If the commendam be limited to a certain term, the king ſhall preſent by prerogative at the expiration of ſuch term, notwithſtanding the previous grant of a commendam; unleſs it ſo fall out, that the commendatary biſhop dies or reſigns before the expiration of the term: for in ſuch caſe, the church becoming void not by ceſſion but by death or reſignation, the turn of the crown is ſerved, and the patron ſhall preſent. And ſo it is likewiſe ſerved, if the commendam was originally unlimited, that is (according to the language of the faculties) during the life of the perſon and his poſſeſſion of ſuch ſee; becauſe this amounts to a preſentation, and therefore in this caſe alſo, the right of the crown is ſerved, and the patron preſents. *Gibſ.* 915.

But if a biſhop who is poſſeſſed of a commendam, is tranſlated to another ſee, and ſo a new title accrues to the crown by a new promotion; the ſame commendam may be continued, if the king pleaſeth: but it muſt be by a new diſpenſation, granting it to be held with the new biſhoprick. *Id.*

Continuation or renewal of a commendam.

10. Commendam temporary in *retinere* may be renewed and prolonged; that is to ſay, before the original incumbency ceaſeth by the expiration of the firſt diſpenſation, a ſecond diſpenſation may be granted, to prevent the avoidance, and continue the incumbency. 'Tis true, commendams being deſigned to ſupport the dignity of the epiſcopal character (which ſince the time of the reformation hath greatly needed ſupport in many ſees) they have uſually been granted in perpetuity; in which caſe, there was no occaſion to renew them. But that ſuch renewals were underſtood to be legal and regular, appears by the applications that have been made for them, with-

out any marks of doubt, as to their legality: in one inſtance, by the biſhop of Carliſle in the year 1567, and in another inſtance the very next year by the biſhop of Cheſter. But the more ancient books of the faculty office being all loſt, we cannot certainly tell what effect theſe applications had; but of late years we find, that a temporary commendam of the biſhop of Cheſter, which was in *retinere*, being expired, a new commendam of the ſame benefice was granted to him in perpetuity by *capere*, in conſideration of the ſmallneſs of the ſaid biſhoprick, and the private patron's having otherwiſe diſpoſed of the uſual commendam, with which it had been formerly ſupported. *Gibſ.* 915.

11. As to what hath been ſaid of reſigning commendams at pleaſure; this may be of very ill conſequence to the reſpective ſees; many of which are poor, and cannot ſubſiſt without additional ſupports. And perhaps there are no other commendams ſo good, or ſo convenient; at leaſt, if they are reſigned, and other clerks be preſented, there will be none vacant together with the biſhoprick. And therefore it was a general inſtruction which king Charles the firſt ſent to the biſhops, not to reſign their commendams; and we find a particular letter written by the king's order to the biſhop of Peterborough, that he ſhould not reſign the living of Caſtor, which he held in commendam. *Gibſ.* 915. Reſigning of a commendam.

Commiſſary.

COMMISSARY is a title of juriſdiction, appertaining to him that exerciſeth eccleſiaſtical juriſdiction in places of the dioceſe ſo far diſtant from the chief city, that the chancellor cannot call the people to the biſhop's principal conſiſtory court without great trouble to them. This commiſſary is called by the canoniſts *commiſſarius*, or *officialis foraneus*, and is ordained to this ſpecial end, that he ſhould ſupply the office and juriſdiction of the biſhop in the out places of the dioceſe, or in ſuch pariſhes as are peculiars to the biſhop, and exempted from the archdeacon's juriſdiction: for where by preſcription or by compoſition there are archdeacons, who have juriſdiction in their archdeaconries, as in moſt places they

have, there the office of commiſſary is ſuperfluous. *Terms of the law.* 4 *Inſt.* 338.

The law concerning which officer, falling in with the law concerning chancellors, vicars general, and officials; the whole is treated of together, under the title Chancellor.

Commiſſion for pious uſes. See Charitable uſes.
Common prayer. See Publick worſhip.
Communion. See Lord's Supper.
Communion of the ſick. See Sick.
Communion table. See Church.
Commutation. See Penance.

Confeſſion.

BY *Can.* 113. impowering miniſters to preſent offences at the court of viſitation, it is provided, that if any man confeſs his ſecret and hidden ſins to the miniſter, for the unburdening of his conſcience, and to receive ſpiritual conſolation and eaſe of mind from him, he ſhall not in any wiſe be bound by this conſtitution, but is ſtraitly charged and admoniſhed, that he do not at any time reveal and make known to any perſon whatſoever, any crime or offence ſo committed to his truſt and ſecrecy (except they be ſuch crimes as by the laws of this realm his own life may be called in queſtion for concealing the ſame); under pain of irregularity.

Confirmation.

1. IN the office of publick baptiſm; the miniſter directeth the godfathers and godmothers to take care, that the child be brought to the biſhop to be confirmed by him, ſo ſoon as he or ſhe can ſay the creed, the Lord's prayer, and the ten commandments in the vulgar tongue, and be further inſtructed in the church catechiſm ſet forth for that purpoſe.

And by the rubrick at the end of baptiſm of thoſe that are of riper years :———It is expedient that every perſon ſo baptized ſhall be confirmed by the biſhop, ſo ſoon after his baptiſm as conveniently may be; that ſo he may be admitted to the holy communion.

And by the rubrick before the office of confirmation : ———So ſoon as children are come to a competent age, and can ſay in their mother tongue the creed, the Lord's prayer, and the ten commandments, and alſo can anſwer to the other queſtions of the catechiſm, they ſhall be brought to the biſhop.

2. By *Can.* 60. Foraſmuch as it hath been a ſolemn ancient and laudable cuſtom in the church of God, continued from the apoſtles times, that all biſhops ſhould lay their hands upon children baptized and inſtructed in the catechiſm of the chriſtian religion, praying over them, and bleſſing them, which we commonly call confirmation, and that this holy action hath been accuſtomed in the church in former ages, to be performed in the biſhop's viſitation every third year; we will and appoint, that every biſhop or his ſuffragan, in his accuſtomed viſitation, do in his own perſon carefully obſerve the ſaid cuſtom. And if in that year, by reaſon of ſome infirmity, he be not able perſonally to viſit; then he ſhall not omit the execution of that duty of confirmation the next year after, as he may conveniently.

3. By *Can.* 61. Every miniſter that hath cure and charge of ſouls, for the better accompliſhing of the orders preſcribed in the book of common prayer concerning confirmation, ſhall take eſpecial care, that none ſhall be preſented to the biſhop for him to lay his hands upon, but ſuch as can render an account of their faith according to the catechiſm in the ſaid book contained. And when the biſhop ſhall aſſign any time for the performance of that part of his duty, every ſuch miniſter ſhall uſe his beſt endeavour to prepare and make able, and likewiſe to procure as many as he can to be then brought, and by the biſhop to be confirmed.

And by the rubrick: Whenſoever the biſhop ſhall give knowledge for children to be brought unto him for their confirmation; the curate of every pariſh ſhall either bring or ſend in writing, with his hand ſubſcribed thereunto, the names of all ſuch perſons within his pariſh, as he ſhall think fit to be preſented to the biſhop to be confirmed. And if the biſhop approve of them, he ſhall confirm them, according to the form in the book of common prayer.

4. And

4. And every one ſhall have a godfather or a godmother, as a witneſs of their confirmation. *Rubr.*

And no perſon ſhall be admitted godfather or godmother to any child at confirmation, before the ſaid perſon ſo undertaking hath received the holy communion. *Can.* 29.

5. Lord Coke ſays, If a man be baptized by the name of Thomas, and after at his confirmation by the biſhop he is named John; his name of confirmation ſhall ſtand good. And this was the caſe of Sir Francis Gawdie, chief juſtice of the court of common pleas; whoſe name of baptiſm was Thomas, and his name of confirmation Francis; and that name of Francis by the advice of all the judges he did bear, and afterwards uſed in all his purchaſes and grants. 1 *Inſt.* 3.

But this ſeemeth to be altered by the form of the preſent liturgy. In the offices of old, the biſhop pronounced the name of the child or perſon confirmed by him, and if he did not approve of the name, or the perſon himſelf or his friends deſired it to be altered, it might be done by the biſhop's pronouncing a new name upon his miniſtring this rite, and the common law allowed the alteration; but upon review of the liturgy at king Charles the ſecond's reſtauration, the office of confirmation is altered as to this point, for now the biſhop doth not pronounce the name of the perſon confirmed, and therefore cannot alter it. *Johnſ.* A. D. 1281. numb. 3.

6. By the rubrick at the end of the office of confirmation: —— There ſhall be none admitted to the holy communion, until ſuch time as they be confirmed, or be ready and deſirous to be confirmed.

Conge d' eſlire.

CONGE *d' eſlire*, in the language of France, which was introduced into our laws by William the Norman and his ſucceſſors, ſignifieth *leave to chuſe*; and is the king's writ or licence to the dean and chapter to chuſe a biſhop, in the time of vacancy of the ſee.

Conſecration of churches. See Church.

Conſiſtory.

CONSISTORY is the court chriſtian, or ſpiritual court, held formerly in the nave of the cathedral church, or in ſome chapel, iſle or portico belonging to it; in which the biſhop preſided, and had ſome of his clergy for aſſeſſors and aſſiſtants. But this court now is held by the biſhop's chancellor or commiſſary, and by archdeacons or their officials, either in the cathedral church or other convenient place of the dioceſe, for the hearing and determining of matters and cauſes of eccleſiaſtical cognizance, happening within that dioceſe. *Ken. Par. Ant.* Gloſſ. *God.* 83.

From the conſiſtory the appeal is to the archbiſhop of the province. *God.* 83.

Conſolidation of churches. See Union.

Conſultation.

CONSULTATION is a writ, whereby a cauſe being formerly removed by prohibition out of the eccleſiaſtical court or court chriſtian, to the king's court, is returned thither again. For if the judges of the king's court, comparing the libel with the ſuggeſtion of the party, find the ſuggeſtion falſe, or not proved, and therefore the cauſe to be wrongfully called from the court chriſtian; then, upon this *conſultation* or deliberation, they decree it to be returned again; whereupon the writ in this caſe obtained, is called a *conſultation.* Terms of the law.

Concerning which it is enacted by the ſtatute intitled, "The ſtatute of the writ of conſultation", made in the 24 *Ed.* 1. as followeth: *Whereas eccleſiaſtical judges have often ſurceaſed to proceed in cauſes moved before them, by force of the king's writ of prohibition, in caſes where remedy could not be given to complainants in the king's court, by any writ out of chancery, becauſe that ſuch plaintiffs were deferred of their right and remedy in both courts, as well temporal as ſpiritual, to their great damage, like as the king hath been advertiſed by the grievous complaint of his ſubjects; our lord the king willeth and commandeth, that where eccleſiaſtical judges do ſurceaſe in the aforeſaid caſes, by the king's prohibition directed unto them,*

that

that the chancellor or the chief juſtice of our lord the king for the time being, upon ſight of the libel of the ſame matter, at the inſtance of the plaintiff (if they can ſee that the caſe cannot be redreſſed by any writ out of the chancery, but that the ſpiritual court ought to determine the matters) ſhall write to the eccleſiaſtical judges before whom the cauſe was firſt moved, that they proceed therein, notwithſtanding the king's prohibition directed to them before.

Upon ſight of the libel] For (as it was heretofore held,) agreeable to the libel ought the conſultation to be. And therefore in *Hoſkins*'s caſe, when the parſon ſued in the ſpiritual court for all the tithes, of ſuch a ground, and the defendant obtained a prohibition, upon ſurmiſe that the queen had been ſeiſed of two parts of the tithes, and had granted them away, and that he had paid the two parts to the grantee, altho' the prohibition was for the two parts only, yet when the parſon prayed conſultation for the third part, it was denied; becauſe his conſultation could not be granted but according to his libel, and ſo he muſt libel for his third part de novo. But Hobart leaves a quæry on this caſe, whether he might not have had a conſultation, as to the third part only. And the very next year, in *Berrie*'s caſe, where the parſon ſued for tithes of hay in ſpecie for a hundred acres; and in a prohibition iſſue was taken, whether the inhabitants had uſed to pay for all tithes of hay of all ancient meadows within the town a certain rate tithe; and the jury found there was ſuch a cuſtom for all the ancient meadows, ſaving for certain called Barton meadows, for which tithes had been paid in kind; and that the party who was ſued for tithes in the ſpiritual court, had hay upon five acres of the Barton meadow; it was reſolved, that if the jury had found againſt the cuſtom generally, as they might well have done, the parſon ſhould have had his conſultation for all; but however, as they found the truth diſtributively, that he had cauſe to ſue in the ſpiritual court for one part, but not for the other, he had conſultation as to the Barton land; inaſmuch as the libel for tithes in kind for the hundred acres, was ſeveral, for all or any part; and therefore for ſo much as was Barton, and out of the cuſtom, it was as well libelled, as if it had been for that alone. *Gibſ.* 1030. *Hob.* 115, 194.

The reſolution upon this head, in *Fuller*'s caſe, was as follows: When any libel in the eccleſiaſtical court contains many articles; if any of them do not belong to the cognizance of the court chriſtian, a prohibition may be

granted generally; and upon motion made, conſultation may be awarded as to things which do belong to the ſpiritual juriſdiction; for the writ of conſultation with a *quoad*, is frequent and uſual. 12 *Co.* 44.

If they can ſee that the caſe cannot be redreſſed] This ſuppoſeth ſtrict examination of the matter; which is always made before conſultation awarded. For conſultations are the judgments of courts had upon deliberation, whereas prohibitions are granted upon ſurmiſes. To this purpoſe it was ſaid by *Vaughan* chief juſtice, (*Vaugh.* 323.) "We find no record of prohibitions denied, for there is no entry made of motions not granted; but of prohibitions granted there is:" which makes the granting of a prohibition of no great authority, unleſs upon action brought a conſultation be denied upon demurrer. *Gibſ.* 1030.

It is on account of the great deliberation to be beſtowed on theſe occaſions, and its being an award of the court and final, that no conſultation can be granted, tho' by all the judges, out of term; nor by any of them within the term, out of court, as was reſolved in *Fuller*'s caſe; and lord Coke ſays, the name of the writ imports this, that the court upon conſultation amongſt them ought to award it. *Gibſ.* 1030. 12 *Co.* 41.

And by the 50 Ed. 3. c. 4. *Where a conſultation is once duly granted upon a prohibition made to the judge of holy church, the ſame judge may proceed in the cauſe by virtue of the ſame conſultation, notwithſtanding any other prohibition thereupon to him delivered: Provided always, that the matter in the libel of the ſaid cauſe be not ingroſſed, inlarged, or otherwiſe changed.*

Where a conſultation is once duly granted] *H.* 42 *Eliz. Sibley* and *Crawley.* On a prohibition for tithes; the defendant ſhewed, that before that time the plaintiff had ſued in chancery, to ſtay it by engliſh bill, and afterwards brought a prohibition there, and a conſultation was there granted, and that this prohibition is for the ſame cauſe, namely, for matter of diſcharge; wherefore he prayed a conſultation upon this ſtatute, which requireth, that conſultation being once duly granted, there ſhall not be another prohibition. But the court held, that this conſultation was not duly granted according to the intent of the ſtatute; becauſe the prohibition was not duly grantable there, and ſo out of the ſtatute: for it was not duly granted upon an engliſh bill. And by the court, The ſtatute is to be intended where the conſultation is granted

granted upon examination of the matter, and not for the inſufficiency of the proceedings. Whereupon it was awarded, that the prohibition ſhould ſtand. *Cro. Eliz.* 736.

And afterwards, *E.* 11 *Ja.* in the caſe of *Tey* and *Cox*, we find it laid down as a rule by the whole court of king's bench, that if it be apparent matter, that the conſultation was not duly granted, then a new prohibition may be granted. 2 *Brownl.* 35. *Mod.* 917. *Gibſ.* 1031.

Upon a prohibition made to the judge of holy church] But ſo, that the firſt conſultation hath been granted upon the matter or ſubſtance of the ſuggeſtion, and not for default of form only. For in the caſe of *Cox* and *Seymour*, tho' the ſame ſuggeſtion had been made before, in four ſeveral prohibitions for the ſame land, and the ſame manner of tithing was alledged, and every of the four times conſultation had been granted; yet, becauſe it was in every inſtance only for default of proof within ſix months, thro' neglect to have the witneſſes ready in due time according to Edward the ſixth's ſtatute of tithes, and not upon the right or trial of the cuſtom; the ſuggeſtion was held to be good, and a fifth prohibition grantable. And in the caſe of *Stroud* and *Hoſkins*, *H.* 6 *Cha.* the ſame doctrine is laid down as follows: The ſtatute of the 50 *Ed.* 3. is intended, where conſultation is granted upon the ſubſtance of the ſuggeſtion, being proved to be inſufficient in verdict, or non-ſuit after evidence; and not where it is granted for the inſufficiency of the form of the ſuggeſtion, or in the proceeding thereupon. Which doctrine had been alſo laid down before, in the 7 *Ja.* in the court of king's bench; namely, when a conſultation is granted upon any default of the prohibition in form, by miſpriſion of the clerk, or by miſpleading of any ſtatute; in that caſe, or ſuch like, a new prohibition may be granted upon the ſame libel: but if conſultation be granted upon the right of the thing in queſtion, there a new prohibition ſhall not be granted upon the ſame libel. *Gibſ.* 1031.

But the next year, in the 8 *Ja.* in the caſe of *Dorwood* and *Brikinden*, the court ſeems to have gone ſomewhat farther then bare form in the rule there laid down; viz. If a man libel for tithes for divers years, and a prohibition is granted for part of the years, and after that a conſultation is awarded; yet the plaintiff may have a new prohibition for the reſidue of the time, notwithſtanding the ſtatute of the 50 *Ed.* 3. and that it be upon one ſelf ſame libel. *Id.*

A caſe not unlike this, was *T.* 1 *W.* where a prohibition had been granted upon ſuggeſtion of a modus to pay 2 d for every lamb falling in the pariſh; after which, conſultation was alſo granted: Then there was a motion for a new prohibition, on ſuggeſtion of a modus of 2 d for every lamb falling in a *particular farm* of the ſame pariſh. And tho' it is there ſaid, that if this modus had been found by the verdict, no conſultation had been granted; yet the court inclined againſt a prohibition by reaſon of this ſtatute. 2 *Ventr.* 47.

The ſame judge may proceed in the cauſe] Meſme le juge: It was obſerved by Noy, in the caſe of *Bowry* and *Wallington*, that tho' in the printed books, and alſo in the extract of the ſtatute in the time of *R.* 2. and in one roll remaining in the tower, it is *the ſame judge*; yet in the parliament roll it ſelf, it is only *the eccleſiaſtical judge* in general: and he added, that if it were, as in the printed books and extracts, yet this ſhould not be intended the ſame perſonal judge, but the ſame judge of cognizance of the ſame juriſdiction or cauſe; ſo as no new prohibition ſhall be grantable, after conſultation, tho' the biſhop or archdeacon conſtitute a new judge, or the party appeal from an inferior to a ſuperior court. Which doctrine is agreeable to the reſolution in *Bigge*'s caſe, in the 14 *Ja.* where prohibition was prayed, upon an appeal, after conſultation, but was denied; and the court ſaid, that this act ought to have a reaſonable conſtruction, to be before the ſame judge, and for the ſame cauſe; that the appeal doth only ſuſpend the ſentence, but yet the ſame ſtands ſtill in force; that if a new prohibition ſhould be granted upon an appeal, then upon ſeveral appeals three or four prohibitions might be granted, which would be very inconvenient; and that the intent of the ſtatute was, that he which hath but one ſuit, ſhould not be infinitely troubled. *Gibſ.* 1031.

It is true, in the caſe of *Davy* and *Cockam*, in the 22 *Ja.* a new prohibition was prayed (and, as is ſaid, obtained) after an appeal made; and that, according to the reaſoning of Jones, becauſe altho' it was the ſame cauſe, and upon the ſame libel, yet it was before a new court. But it is to be obſerved, that the conſultation there had been granted for lack of form (namely, upon default of proo within ſix months); in which caſe, as hath been already obſerved, a new prohibition after conſultation may be granted to the very ſame judge, notwithſtanding this

this ſtatute. And tho' in the caſe of *Bowry* and *Wallington*, as it ſtands reported by Popham, it was reſolved, that a new prohibition may be granted, if there be an appeal; yet this doth not contradict the former judgment, if we take in the two limitations that are there added; 1. That if he who appeals, prayeth a prohibition, he ſhall not have it; for then ſuits ſhall be deferred in infinitum in the eccleſiaſtical courts. Nor, 2. If the prohibition and conſultation were upon the body of the matter, and the ſubſtance of it; for otherwiſe, he ſhall be put many times to try the ſame matter; which is full of vexation. *Gibſ.* 1031.

Be not engroſſed, enlarged, or otherwiſe changed] In the caſe of *Denton* and the counteſs of *Chanriccard*, in the 18 *Ja.* where the firſt libel was, that tithes had been paid time out of mind; and the ſecond libel was, that the tithes had been paid for twenty, thirty, or forty years, and time out of mind: this was adjudged a change of the libel, as laying the foundation of a new title different from the former; and the whole court ſaid, that if they proceeded upon that addition, they would grant a prohibition. *Gibſ.* 1031.

But when the libel was for tithe milk of eight cows; and upon a modus pleaded, prohibition and injunction were obtained; and afterwards the ſame incumbent libelled for the ſame tithe againſt the ſame perſon, only inſerting a leſs number of cows: this change in the libel did not make it a different cauſe; and therefore attachment upon the prohibition was granted. *Gibſ.* 1032.

Conventicle. See Diſſenters.

Convocation.

Convocation, what.

1. THO' the word *convocation* be in itſelf of a general ſignification, and may indifferently be applied to any aſſembly which is ſummoned or called together after an orderly manner; yet cuſtom (which in theſe matters is wont to prevail) hath determined its ſenſe to an eccleſiaſtical uſe, and made it if not only, yet principally to be reſtrained to the aſſemblies of the clergy.

Before the conqueſt.

2. That the *biſhop* of every dioceſe had here as in all other chriſtian countries power to convene the clergy of his

his dioceſe, and in a common ſynod or council with them to tranſact ſuch affairs as ſpecially related to the order and government of the churches under his juriſdiction, is not to be queſtioned. Theſe aſſemblies of the clergy were as old almoſt as the firſt ſettlement of chriſtianity amongſt us, and amidſt all our other revolutions continued to be held till the time of king Henry the eighth.

What the biſhop of every dioceſe did within his own diſtrict, the *archbiſhop* of each province, after the kingdom was divided into provinces, did within his proper province. They called together firſt the biſhops, afterwards the other prelates, of their provinces; and by degrees added to theſe ſuch of their inferior clergy, as they thought needful.

In theſe two aſſemblies of the clergy (the *dioceſan ſynods* and *provincial councils)* only the ſpiritual affairs of the church were wont for a long time to be tranſacted. So that in this reſpect therefore, there was no difference between the biſhops and clergy of our own and of all other chriſtian churches. Our metropolitans and their ſuffragans acted by the ſame rules here, as they did in all other countries. They held theſe aſſemblies by the ſame power, convened the ſame perſons, and did the ſame things in them.

When the papal authority had prevailed here, as in moſt other kingdoms and countries in Europe, by the leave of our kings and at the command of the legates ſent from Rome, another and yet larger ſort of councils were introduced amongſt us, of the biſhops and prelates of the whole realm. Theſe were properly *national* church councils; and were wont to be held for ſome ſpecial deſigns, which either the pope, the king, or both, had to promote by them.

But beſides theſe ſynods common to us with all other chriſtian churches, and which were in their nature and end as well as conſtitution properly and purely eccleſiaſtical; two other aſſemblies there were of the clergy of this realm, peculiar to our own ſtate and country; in which the clergy were convened, not for the ſpiritual affairs of the church, but for the good and benefit of the realm, and to act as members of the one as well as of the other. Now the occaſion of theſe was this: When the faith of Chriſt was thoroughly planted here, and the piety of our anceſtors had liberally endowed the biſhops and clergy of the church with temporal lands and poſſeſſions; not only the opinion which they had of their pru-

dence and piety prompted them to take the moſt eminent of them into their publick councils, but the intereſt which they had by that means in the ſtate made it expedient ſo to do, and to commit the direction and management of offices and affairs to them.

Hence our biſhops firſt, and then ſome of our other prelates (as abbots and priors), were very early brought into the great councils of the realm, or *parliament*; and there conſulted and acted together with the laity.

Thus were the greater clergy firſt brought into our ſtate councils, and made a conſtant or eſtabliſhed part of them. But in proceſs of time, our princes began to have a further occaſion for them. For being increaſed in number, and with that in their wealth too, not only our kings, but the people began to think it reaſonable, that the clergy ſhould bear a part in the public burdens, as well as enjoy their ſhare of the public treaſure.

Hence our Saxon anceſtors, under whom the church was the moſt free, yet ſubjected the lands of the clergy to the threefold neceſſity, of caſtles, bridges, and expeditions. And the granting of aids in theſe caſes, brought on aſſemblies of the clergy, which were afterwards diſtinguiſhed by the name of *convocation*. Wake's State of the Ch. *paſſim*.

After the conqueſt till the reign of Edw. 1.

3. In the Saxon times, the lords ſpiritual (as well as the other clergy) held by frankalmoigne, but yet made great part (as was ſaid) of the grand council of the nation; being the moſt learned perſons that, in thoſe times of ignorance, met to make laws and regulations.

But William the conqueror turned the frankalmoign tenures of the biſhops and ſome of the great abbots into baronies; and from thenceforwards they were obliged to ſend perſons to the wars, or were aſſeſſed to the eſcuage (which was a fine or payment in money inſtead thereof), and were obliged to attend in parliament. And then their attendance was complained of as a burden. And this begat the grand quarrel in Henry the ſecond's time, between the king and Thomas Becket. For the ſtatute of Clarendon required ſuch attendance, which confirmed the eſcuage on them. For this they made many exceptions; and particularly, that the parliament took cognizance of treaſons and felonies: whereas the clergy, by a canon of the council of Toledo, were forbid to give judgment in caſes of blood. And therefore, to obviate this objection, the conſtitutions of Clarendon permitted them to withdraw in ſuch caſes.

Not-

Notwithſtanding this conceſſion, they ſtill objected againſt the 11th article of that ſtatute, which required them to be preſent until judgment was to be given.

This article obliged them to attend; and therefore tho' they had excepted the caſe of blood, yet they knew their attendance confirmed their eſtates as baronies; and they did not care that the munificence and frankalmoigne of the ancient kings ſhould be changed into ſuch tenures. But notwithſtanding the quarrel with Becket, the king prevailed that they ſhould continue baronies. *Gilb. Exch.* 44, 5, 6.

And the following princes in their parliaments taxed them in reſpect of their baronies, after the ſame manner that they did thoſe of the laity.

Yet ſtill, this reached only to the prelates and ſuperior clergy; but the body of the clergy, that had no baronies, and holding by frankalmoigne, were in a great meaſure exempt from the charges which were aſſeſſed upon the laity, and were therefore by ſome other way to be brought under the ſame obligation.

In order hereunto ſeveral meaſures were taken, till at laſt they ſettled into that method which finally obtained, and ſet aſide the neceſſity of any other way. Firſt, the pope laid a tax upon the church for the uſe of the king; and both their powers uniting, the clergy were forced to ſubmit to it. Next, the biſhops were prevailed with, upon ſome extraordinary occaſions, to oblige their clergy to grant a ſubſidy to the king, in the way of a benevolence; and for this, letters of ſecurity were granted back by the king to them, to inſure them that what they had done ſhould not be drawn into example or conſequence.

And theſe conceſſions were ſometimes made by the biſhops in the name of their clergy; but the common way was, that every biſhop held a meeting of the clergy of his dioceſe. Then they agreed what they would do; and impowered firſt the biſhops, afterwards their archdeacons, and finally proctors of their own, choſen for that end, to make the conceſſion for them. *Wake: ut ſupra.*

4. Thus ſtood this matter till the time of Edward the firſt. Who not willing to continue at ſuch a precarious rate with his clergy, took another method; and, after ſeveral other experiments, fixed at laſt upon an eſtabliſhment, which hath in ſome ſort continued ever ſince. The method he reſolved upon was this; viz. That the earls and barons ſhould be called to parliament as formerly, and embodied in one houſe: And that the tenants in burgage From Edw. 1. to Hen 1.

ſhould ſend their repreſentatives: and that the tenants by knight's ſervice, and other ſocage tenants in the counties, ſhould alſo ſend their repreſentatives; and theſe were embodied in the other houſe. He deſigned to have the clergy as a third eſtate; and as the biſhops were to ſit *per baroniam* in the temporal parliament, ſo they were to ſit with the inferior clergy in convocation. And the project and deſign of the king was, that as the two temporal eſtates charged the temporalties, and made laws to bind all temporal things within this realm; ſo this other body ſhould have given taxes to charge the ſpiritual poſſeſſions, and have made canons to bind the eccleſiaſtical body: To this end was the *Præmunientes* clauſe (ſo called from the firſt word thereof) in the ſummons to the archbiſhops and biſhops, by which he required them to ſummon ſuch of their inferior clergy to come with them to parliament, as he then ſpecified and thought ſufficient to act for the whole body of the clergy.

This altered the Engliſh convocation from the foreign ſynods; for theſe were totally compoſed of the biſhops, who were paſtors of the church; (for the clergy were regularly eſteemed only their aſſiſtants); and therefore the biſhops only were collected to compoſe ſuch foreign ſynods, to declare what was the doctrine, or ſhould be the diſciple of the church.

Edward the firſt projected, to have made the clergy one third eſtate, dependant on himſelf; and therefore not only called the biſhops, whom as barons he had a right to ſummon, but the reſt of the clergy, that he might have their conſent to the taxes and aſſeſſments made on that body.

But the clergy foreſeeing they were likely to be taxed, alledged that they could not meet under a temporal authority, to make any laws or canons to govern the church. And this diſpute was maintained by the archbiſhops and biſhops, who were very loth the clergy ſhould be taxed, or that they ſhould have any intereſt in making eccleſiaſtical canons, which formerly were made by their ſole authority; for even if thoſe canons had been made at Rome, yet, if they were not made in a general council, they did not think them binding here, unleſs they were received by ſome provincial conſtitution of the biſhops. And tho' the inferior clergy, by this new ſcheme of Edward the firſt, were let into the power of making canons; yet they foreſaw they were to be taxed, and therefore joined with the biſhops, in oppoſing what they thought an innovation, and in the end paid no obedience to the *præ-*

munientes

munientes clauſe; but the archbiſhops and biſhops threatned to excommunicate the king.

He, and the temporal eſtate, took it ſo ill, that the clergy would not bear any part of the publick charge, that they were beforehand with them, and the clergy were all outlawed, and their poſſeſſions ſeized into the king's hands.

This ſo humbled the clergy, that they at laſt conſented to meet. And to take away all pretence, there was a ſummons, beſides the *præmunientes* clauſe, to the archbiſhop, that he ſhould ſummon the biſhops, deans, archdeacons, colleges, and whole clergy, of his province. From hence therefore the biſhops, deans, archdeacons, colleges, and clergy, met by virtue of the archbiſhop's ſummons; which being an eccleſiaſtical authority, they could not object to. And ſo the biſhops and clergy came to convocation by virtue of the archbiſhop's ſummons; they eſteeming it to be in his power, whether he would obey the king's writ or not: but when he had iſſued his ſummons, they could not pretend it was not their duty to come. But the *præmunientes* writ was not diſuſed; becauſe it directed the manner in which the clergy were to attend, to wit, the deans and archdeacons in perſon, the chapter by one, and the clergy by two proctors.

So that the clergy were doubly ſummoned; firſt by the biſhop, to attend the parliament; and, ſecondly, by the archbiſhop to appear in convocation. And that the archbiſhop might not appear to ſummon them ſolely in purſuance of the king's writ; he for the moſt part varied in his ſummons from the king's writ, both as to the time and place of their meeting.

And leſt it might be thought ſtill (of which they were very jealous) that their power was derived from temporal authority, they ſometimes met on the archbiſhop's ſummons without the king's writ; and in ſuch convocation the king demanded ſupplies, and by ſuch requeſt owned the epiſcopal authority of convening. So that the king's writ was reckoned by the clergy no more than one motive for their convening. And if the archbiſhop in his ſummons recited the king's writ, they proteſted againſt it, becauſe that was laying his authority on the king's writ, which the clergy would by no means endure; for they would not conſent that the prince had any eccleſiaſtical authority to convene ſynods, but they allowed the king's writ to be a motive for the archbiſhop to convene, if he agreed in judgment with the king.

And from henceforward, inſtead of making one ſtate of the kingdom, as the king deſigned, they compoſed two eccleſiaſtical ſynods, under the ſummons of each of the archbiſhops; and being forced into thoſe two ſynods before mentioned, they ſat, and made canons by which each reſpective province was bound, and gave aids and taxes to the king. But the archbiſhop of Canterbury's clergy, and that of York, aſſembled each in their own province; and the king gratified the archbiſhops, by ſuffering this new body of convocation to be formed in the nature of a parliament. The archbiſhop ſat as king; his ſuffragans ſat in the upper houſe, as his peers; the deans, archdeacons, and the proctor for the chapter, repreſented the burghers; and the two proctors for the clergy, the knights of the ſhire. And ſo this body, inſtead of being one of the eſtates as the king deſigned, became an eccleſiaſtical parliament, to make laws, and to tax the poſſeſſions of the church. *Gilb. Exch.* Ch. 4.

But altho' they thus ſat as a parliament, and made laws for the church, yet they did not make a part of the parliament properly ſo called. Sometimes indeed the lords, and ſometimes the commons, were wont to ſend to the convocation for ſome of their body to give them advice in ſpiritual matters; but ſtill this was only by way of advice: for the parliament have always inſiſted, that their laws, by their own natural force, bind the clergy; as the laws of all chriſtian princes did in the firſt ages of the church. *Gilb. Exch.* 60.

And even the convocation tax did always paſs both houſes of parliament; ſince it could not bind as a law, till it had the conſent of the legiſlature. *Gilb. Exch.* 197.

Even ſo in the Saxon times, if the ſubject of any laws was for the outward peace and temporal government of the church; ſuch laws were properly ordained by the king and his great council of clergy and laity intermixed, as our acts of parliament are ſtill made. But if there was any doctrine to be tried, or any exerciſe of pure diſcipline to be reformed, then the clergy of the great council departed into a ſeparate ſynod, and there acted as the proper judges. Only when they had thus provided for the ſtate of religion, they brought their canons from the ſynod to the great council, to be ratified by the king, with the advice of his great men, and ſo made the conſtitutions of the church to be laws of the realm. —— And the Norman

man revolution made no change in this reſpect. *Ken. Eccl. Syn.* 249.

5. Thus the caſe ſtood, when the act of ſubmiſſion, 25 *H.* 8. *c.* 19. was made; by which it is enacted as followeth: *Where the king's humble and obedient ſubjects the clergy of this realm of* England, *have not only acknowledged according to the truth, that the convocation of the ſame clergy is, always hath been, and ought to be aſſembled only by the king's writ; but alſo ſubmitting themſelves to the king's majeſty, have promiſed* in verbo ſacerdotii *that they will never from henceforth preſume to attempt, alledge, claim, or put in ure, enact, promulge, or execute any new canons, conſtitutions, ordinances, provincial, or other, or by whatſoever name they ſhall be called, in the convocation, unleſs the king's moſt royal aſſent and licence may to them be had, to make promulge and execute the ſame, and that his majeſty do give his moſt royal aſſent and authority in that behalf: It is therefore enacted, according to the ſaid ſubmiſſion, that they nor any of them, ſhall preſume to attempt, alledge, claim, or put in ure any conſtitutions or ordinances provincial, by whatſoever name or names they may be called, in their convocations in time coming (which always ſhall be aſſembled by authority of the king's writ); unleſs the ſame clergy may have the king's moſt royal aſſent and licence, to make promulge and execute ſuch canons, conſtitutions, and ordinances provincial or ſynodal: upon pain of every one of the ſaid clergy doing contrary to this act, and being thereof convict, to ſuffer impriſonment, and make fine at the king's will.*

The act of ſubmiſſion of the 25 Hen. 8.

Accordingly, *T.* 8 *Ja.* It was reſolved upon this ſtatute, by the two chief juſtices and divers other juſtices, at a committee before the lords in parliament; 1. That a convocation cannot aſſemble at their convocation, without the aſſent of the king. 2. That after their aſſembly they cannot confer, to conſtitute any canons without licence of the king. 3. When they upon conference conclude any canons, yet they cannot execute any of their canons without the royal aſſent. 4. That they cannot execute any after the royal aſſent, but with theſe four limitations; (1) that they be not againſt the prerogative of the king; nor (2) againſt the common law; nor (3) againſt any ſtatute law; nor (4) againſt any cuſtom of the realm. All which appeareth by the ſaid ſtatute: And this (Coke ſays) was but an affirmance of what was before the ſaid ſtatute; for it was held before, that if a canon be againſt the law of the land, the biſhop ought to obey the commandment of the king, according to the law of the land. 12 *Co.* 72.

And therefore by this act the clergy being reſtrained from making any canons or conſtitutions in their convocations without the king's licence, the power as to this particular, which was before lodged in the hands of the metropolitan, is now put into the hands of the king, who having by authority of his writ commanded the archbiſhops to ſummon them for ſtate purpoſes (as the tenor of his writ ſhews), has it now in his own breaſt whether he will let them act at all as a church ſynod or no. They are a convocation by the writ of ſummons, but a council properly ſpeaking they are not, nor can they legally act as ſuch till they have obtained the king's licence ſo to do. *Wake: ut ſupra.*

Election. 6. Only parſons, vicars, and perpetual curates, are capable of giving their votes in chuſing proctors for the dioceſan clergy. *Johnſ.* 150.

If any member of the convocation, who is a proctor, dies; the archbiſhop iſſues his mandate to the biſhop of that dioceſe to elect another; and this, by virtue of the power inherent in him to ſummon his ſuffragan biſhops; who being to obey him in all things lawful and honeſt, and the clergy their biſhop in the like manner, they by that command make an election to ſupply the place of one of their proctors. *Gilb. Exch.* 58, 59.

Number. 7. In the province of Canterbury there are only two proctors returned for each dioceſe: In thoſe dioceſes where there are ſeveral archdeaconries, two are nominated by the clergy of each archdeacony; and out of theſe, two are choſen to ſerve as proctors for the whole dioceſe. But in the province of York, two proctors are ſent to convocation for every archdeaconry; otherwiſe the number would be ſo ſmall, as ſcarce to deſerve the name of a provincial ſynod. By this means it comes to paſs, that the parochial clergy have as great an intereſt in convocation there, as the cathedral clergy. Whereas, in the province of Canterbury, the lower houſe of convocation conſiſteth of twenty two deans (taking in Weſtminſter and Windſor), twenty four proctors of the chapters, fifty three archdeacons, in the whole ninety nine of the cathedral clergy; and there are but at the ſame time forty four proctors for the parochial clergy. *Johnſ.* 150. *Wake* 34.

Two houſes. 8. Anciently the lower clergy ſat in the ſame houſe with the biſhops; and in the province of York, the biſhops and other clergy do ſit in the ſame houſe ſtill. *Johnſ.* 149.

But

But in the province of Canterbury (as hath been ſaid), they conſiſt of two houſes; the upper houſe, where the archbiſhop and biſhops ſit; and the lower houſe, where the reſt do ſit. 4 *Inſt.* 322.

And as there are two houſes of convocation, ſo there are two prolocutors, one of the biſhops of the higher houſe, choſen by that houſe; another of the lower houſe, and preſented to the biſhops, for their prolocutor. 4 *Inſt.* 323.

9. By the ſtatute of 8 Hen. 6. c. 1. *Becauſe the prelates and clergy of the realm called to the convocation, and their ſervants and familiars that come with them to ſuch convocation, oftentimes be arreſted moleſted and inquieted; our lord the king, willing to provide for the ſecurity and quietneſs of the ſaid prelates and clergy, at the ſupplication of the ſame prelates and clergy, and by the aſſent of the great men and commons of the realm, hath ordained and eſtabliſhed, that all the clergy hereafter to be called to the convocation by the king's writ, and their ſervants and familiars, ſhall for ever hereafter fully uſe and enjoy ſuch liberty or defence in coming, tarrying, and returning, as the great men and commonalty of the realm, called or to be called to the king's parliament, do enjoy, and were wont to enjoy, or in time to come ought to enjoy.* Privilege.

And in the journals of the houſe of lords, we find ſeveral applications to their lordſhips for redreſs in caſes where this liberty of the convocation-clergy hath been invaded; which their lordſhips have accordingly granted. *Gibſ.* 931.

10. In convocation, thoſe who are abſent, by leave or connivance, are allowed to vote by proxy; and the biſhops who hold leſſer dignities in commendam, can conſtitute any perſon that is member of the lower houſe to vote there as their proxy, for ſuch deanries or archdeaconries as they hold by commendam. *Johnſ.* 142. Proxies.

11. *Can.* 139. Whoſoever ſhall affirm, that the ſacred ſynod of this nation in the name of Chriſt, and by the king's authority aſſembled, is not the true church of England by repreſentation; let him be excommunicated, and not reſtored until he repent and publickly revoke that his wicked error. General power.

Can. 140. Whoſoever ſhall affirm, that no manner of perſon, either of the clergy or laity, not being themſelves particularly aſſembled in the ſaid ſacred ſynod, are to be ſubject to the decrees thereof in cauſes eccleſiaſtical (made and ratified by the king's ſupreme authority) as not having given their voices unto them; let him be excommunicated,

and

and not reſtored until he repent and publickly revoke that his wicked error.

Can. 141. Whoſoever ſhall affirm, that the ſacred ſynod aſſembled as aforeſaid, was a company of ſuch perſons as did conſpire together againſt godly and religious profeſſors of the goſpel, and that therefore both they and their proceedings, in making of canons and conſtitutions in cauſes eccleſiaſtical by the king's authority as aforeſaid, ought to be deſpiſed and contemned, the ſame being ratified confirmed and injoined by the ſaid regal power ſupremacy and authority; let them be excommunicated, and not reſtored until they repent and publickly revoke that their wicked error.

No power to bind the temporalty.

12. Lord Coke ſays, a convocation may make conſtitutions, by which thoſe of the ſpiritualty ſhall be bound, for this, that they all, either by repreſentation or in perſon, are preſent; but not the temporalty. 12 *Co.* 73.

And in the caſe of *Matthews* and *Burdett*, *H.* 1 *An.* In the primitive church, the laity were preſent at all ſynods. When the empire became chriſtian, no canon was made without the emperor's conſent. The emperor's conſent included that of the people; he having in himſelf the whole legiſlative power, which our kings have not. Therefore if the king and clergy make a canon, it binds the clergy in re eccleſiaſtica, but it doth not bind laymen; they are not repreſented in convocation, their conſent being neither given nor aſked. 2 *Salk.* 412.

And in *Cox*'s Caſe, *M.* 1700. By Wright lord Keeper: The canons of a convocation do not bind the laity without an act of parliament. 1 *Peere W.* 32.

And finally, in the caſe of *Middleton* and *Croft*, *M.* 10 *Geo.* 2. it was determined by the unanimous reſolution of the court of king's bench, that ſuch canons do not proprio vigore bind the laity. *Str.* 1056.

Nor againſt the law of the land.

13. The convocation can do nothing againſt the law of the land; for no part of the law, be it common law, or ſtatute law, can be abrogated or altered without act of parliament. 12 *Co.* 73.

And by the ſtatute of 25 *H.* 8. *c.* 19. it is provided, that no canons, conſtitutions, or ordinances ſhall be made or put in execution within this realm, by authority of the convocation of the clergy, which ſhall be contrariant or repugnant to the king's prerogative royal, or the cuſtoms, laws, or ſtatutes of this realm.

Appeal to the convocation.

14. By the 24 *H.* 8. *c.* 12. (concerning appeals) it is enacted, that in all cauſes teſtamentary, matrimonial, or

of

of tithes, depending in the eccleſiaſtical courts, which ſhall touch the king; the party grieved may appeal to the upper houſe of convocation being then convocate by the king's writ, or next enſuing, within the province; ſo that ſuch appeal be taken by the party grieved within fifteen days next after judgment given: and that determination ſhall be final, ſo as that the matter ſo determined ſhall never after come in queſtion and debate, to be examined in any other court.

15. The convocation uſually continueth during the time of parliament; but, as Dr. Warner obſerves, the parliament and convocation are ſeparate bodies, independent on one another, and called together by different writs; and therefore the diſſolution of the parliament doth not neceſſarily, or in any reſpect, diſſolve the convocation; ſo that they may continue to ſit longer than the parliament if the king pleaſes. 2 *Warn.* 535. Continuance.

16. Finally, the clergy having continued to tax themſelves in convocation as aforeſaid, theſe aſſemblies were regularly kept up till the act of the 13 *C.* 2. *c.* 4. was paſſed, when the clergy gave their laſt ſubſidy; it being then judged more advantageous to continue the taxing them by way of a land tax and poll tax, as it had been in the time of the long parliament during the civil wars. *Gilb. Exch.* 56. Their decline.

And in the year 1664, by a private agreement between Sheldon archbiſhop and the lord chancellor Clarendon and other the king's miniſters, it was concluded, that the clergy ſhould ſilently wave the privilege of taxing their own body, and permit themſelves to be included in the money bills prepared by the commons. And this hath made convocations unneceſſary to the crown, and inconſiderable in themſelves. 2 *Warn.* 611, 612.

And ſince that time the clergy have been allowed to vote in chuſing knights of the ſhire, as other freeholders, which in former times they did not. *Johnſ.* 150.

And from that time the convocation hath never paſſed any ſynodical act; and from thenceforth until the year 1700, for the moſt part they were only called, and very rarely did ſo much as meet together in a full body, and with the uſual ſolemnity. 'Tis true that during the remainder of king Charles the ſecond's reign, when the office of prolocutor was void by death or promotion, ſo many of the lower houſe came together as were thought ſufficient to chuſe a new one; and thoſe members that were about the town commonly met, during parliament,

once

once a week, had prayers read, and were formally continued till the parliament was diſſolved, and the convocation together with it. And in king James the ſecond's time, the writs iſſued out of courſe, but the members did not meet. In the year 1689, after the acceſſion of king William and queen Mary to the throne, a convocation was not only called, but began to ſit in due form; but their reſolutions came to nothing. And from thence till the year 1700, they were only called, but did not meet: but in that year, and ever ſince, at the meeting of the parliament, the convocation of the clergy hath likewiſe been ſolemnly opened, and the lower clergy have been permitted to form themſelves into a houſe, and to chuſe their prolocutor; nor have they been finally diſmiſſed ſo ſoon as that ſolemnity was over, but continued from time to time, till the parliament hath broke up or been diſſolved. And now it ſeems to be agreed, that they are of right to be aſſembled concurrently with parliaments, and may act and proceed as provincial councils, when his majeſty in his royal wiſdom ſhall judge it expedient. *Johnſ.* 141, 2, 3.

Cope.

COPE ſignifieth in general a canopy, or vaulted covering; and from thence ſeemeth to have been tranſferred to denote that veſtment of the prieſts, which covereth the back and ſhoulders.

Corody.

A *Corody* is an allowance of meat, bread, drink, money, cloathing, lodging, and ſuch like neceſſaries for ſuſtenance. *Terms of the Law.*

It is ſometimes certain, where the certainty of things is ſet down; ſometimes uncertain, where the certainty is not ſet down, *Id.*

Some corodies began by grant made by one man to another; and ſome are of common right, as every founder of abbies or religious houſes had authority to aſſign ſuch

ſuch in the ſaid houſes for ſuch perſons as he ſhould appoint. *Id.*

Corodies are turned into penſions and money at this day. *Wood b.* 2. *c.* 2.

Corſe preſent. See **Mortuary.**

Council. See **Synod.**

Courts.

THIS title treateth only of the juriſdiction of the eccleſiaſtical courts in general; the law concerning the ſeveral particulars, is inſerted under the reſpective titles: as concerning the ſeveral kinds of courts, under the titles *conſiſtory*, *convocation*, *viſitation*, *arches*, *audience*, *prerogative*, *faculty*, *peculiar*; concerning the officers, under the titles *archdeacon*, *chancellor*, *commiſſary*, *vicar general*, *official*, *ſurrogate*, *advocate*, *regiſter*, *proctor*, *apparitor*; concerning the practice and manner of proceeding, under the titles *caveat*, *libel*, *citation*, *evidence*, *ſentence*, *fees*, *appeal*, *prohibition*, *conſultation*; concerning the judgment and execution of the ſentence, under the titles *penance*, *ſuſpenſion*, *excommunication*, *interdict*, *deprivation*, *degradation*, *ſequeſtration*; and ſuch like.

Origin of the eccleſiaſtical juriſdiction in general.

1. For the firſt three hundred years after Chriſt, the diſtinction of eccleſiaſtical or ſpiritual cauſes, in point of juriſdiction, did not begin; for at that time no ſuch diſtinction was heard of in the chriſtian world; for the cauſes of teſtaments, matrimony, baſtardy, adultery, and the reſt, which are called eccleſiaſtical or ſpiritual cauſes, were merely civil, and determined by the rules of the civil law, and ſubject only to the juriſdiction of the civil magiſtrate. But after the emperors were become chriſtian, out of a zeal and deſire they had to grace and honour the learned and godly biſhops of that time, they were pleaſed to ſingle out certain ſpecial cauſes, wherein they granted juriſdiction to biſhops; namely, in caſes of tithes, becauſe paid to men of the church; in cauſes of matrimony, becauſe marriages were for the moſt part ſolemnized in the church; in cauſes teſtamentary, becauſe teſtaments were many times made *in extremis*, when church-

men were preſent giving ſpiritual comfort to the teſtator, and therefore they were thought the fitteſt perſons to take the probates of ſuch teſtaments: And ſo of the reſt. Yet theſe biſhops did not then proceed in theſe cauſes according to the canons and decrees of the church (for the canon law was not then made), but according to the rules of the imperial law, and as the civil magiſtrate proceeded in other cauſes. *Dav.* 95.

Origin thereof within this realm in particular.

9. Accordingly in this kingdom, in the Saxon times, before the Norman conqueſt, there was no diſtinction of juriſdictions; but all matters, as well ſpiritual as temporal, were determined in the county court called the ſheriff's tourn, where the biſhop and earl (or in his abſence the ſheriff) ſat together; or elſe in the hundred court, which was held in like manner before the lord of the hundred and eccleſiaſtical judge. *Examin. of the ſcheme of ch. pow.* 15. *Duck* 307. 1 *Warn.* 274. 2 *Still.* 14. *God.* 96. *Johnſ.* 246.

For the eccleſiaſtical officers took their limits of juriſdiction, from a like extent of the civil powers. Moſt of the old Saxon biſhopricks were of equal bounds with the diſtinct kingdoms. The archdeaconries, when firſt ſettled into local diſtricts, were commonly fitted to the reſpective counties. And rural deanries, before the conqueſt, were correſpondent to the political tithings. Their ſpiritual courts were held, with a like reference to the adminiſtration of civil juſtice. The ſynods of each province and dioceſe were held at the diſcretion of the metropolitan and the biſhop, as great councils at the pleaſure of the prince. The viſitations were firſt united to the civil inquiſitions in each county; and afterwards, when the courts of the earl and biſhop were ſeparated, yet ſtill the viſitations were held like the ſheriff's tourns twice a year, and like them too after eaſter and michaelmaſs, and ſtill with nearer likeneſs the greater of them was at eaſter. The rural chapters were alſo held like the inferior courts of the hundred, every three weeks; then, and like them too, they were changed into monthly, and at laſt into quarterly meetings. Nay, and a prime viſitation was held commonly, like the prime folcmote or ſheriff's tourn on the very calends of May. *Ken. Eccl. Syn.* 233, 4.

And accordingly Sir Henry Spelman obſerves, that the biſhop and the earl ſat together in one court, and heard jointly the cauſes of church and commonwealth; as they yet do in parliament. And as the biſhop had twice in the year two general ſynods, wherein all the clergy of his dioceſe

dioceſe of all ſorts were bound to reſort for matters concerning the church; ſo alſo there was twice in the year a general aſſembly of all the ſhire for matters concerning the commonwealth, wherein without exception all kinds of eſtates were required to be preſent; dukes, earls, barons, and ſo downward of the laity; and eſpecially the biſhop of that dioceſe among the clergy. For in thoſe days the temporal lords did often ſit in ſynods with the biſhops, and the biſhops in like manner in the courts of the temporalty, and were therein not only neceſſary, but the principal judges themſelves. Thus by the laws of king Canutus, "the ſhyre-gemot (for ſo the Saxons called this aſſembly of the whole ſhire) ſhall be kept twice a year, and oftner if need require, wherein the biſhop and the alderman of the ſhire ſhall be preſent, the one to teach the laws of God, the other the law of the land." And among the laws of king Henry the firſt, it is ordained; "firſt, let the laws of true chriſtianity (which we call the eccleſiaſtical) be fully executed with due ſatisfaction; then let the pleas concerning the king be dealt with; and laſtly, thoſe between party and party: and whomſoever the church ſynod ſhall find at variance, let them either make accord between them in love, or ſequeſter them by their ſentence of excommunication." Whereby it appeareth, that eccleſiaſtical cauſes were at that time under the cognizance of this court. But theſe, he ſays, he takes to be ſuch eccleſiaſtical cauſes, as were grounded upon the eccleſiaſtical laws made by the kings themſelves for the government of the church (for many ſuch there were in almoſt every king's reign), and not for matters riſing out of the Roman canons which haply were determinable only before the biſhop and his miniſters. —— And the biſhop firſt gave a ſolemn charge to the people touching eccleſiaſtical matters, opening unto them the rights and reverence of the church, and their duty therein towards God and the king, according to the word of God. Then the alderman in like manner related unto them the laws of the land, and their duty towards God, the king, and commonwealth, according to the rule and tenure thereof. *Reliquiæ Spelm.* 13, 53, 54.

William the conqueror's charter of ſeparation.

3. The ſeparation of the eccleſiaſtical from the temporal courts, was made by William the conqueror. And as from thence we are to date this great alteration in our conſtitution; it is adjudged neceſſary to recite the charter of ſeparation verbatim; which is as followeth:

"WILLEL-

"Willelmus, Dei gratia, rex Anglorum, R. Bainardo et G. de Magnavilla, et P. de Valoines, cæteriſque meis fidelibus de Eſſex et Hertfordſchire et de Middleſex, ſalutem. Sciatis vos omnes, et cæteri mei fideles qui in Anglia manent, quod epiſcopales leges, quæ non bene, nec ſecundum ſanctorum canonum præcepta, uſque ad mea tempora in regno Anglorum fuerunt, communi concilio, et concilio archiepiſcoporum et epiſcoporum, et abbatum, et omnium principum regni mei, emendandas judicavi. Propterea mando, et regia auctoritate præcipio, ut nullus epiſcopus, vel archidiaconus, de legibus epiſcopalibus amplius in Hundret placita teneant; nec cauſam quæ ad regimen animarum pertinet, ad judicium ſæcularium hominum adducant: ſed quicunque ſecundum epiſcopales leges, de quacunque cauſa vel culpa interpellatus fuerit, ad locum quem ad hoc epiſcopus elegerit et nominaverit, veniat; ibique de cauſa vel culpa ſua reſpondeat, et non ſecundum Hundret, ſed ſecundum canones et epiſcopales leges, et rectum Deo et epiſcopo ſuo faciat. Si vero aliquis, per ſuperbiam elatus, ad juſtitiam epiſcopalem venire contempſerit, et noluerit; vocetur ſemel, et ſecundo, et tertio: Quod ſi nec ſic ad emendationem venerit, excommunicetur; et ſi opus fuerit ad hoc vindicandum, fortitudo et juſtitia regis vel vicecomitis adhibeatur: Ille autem qui vocatus ad juſtitiam epiſcopi venire noluerit, pro unaquaque vocatione legem epiſcopalem emendabit. Hoc etiam defendo, et mea auctoritate interdico, ne ullus vicecomes aut præpoſitus, ſeu miniſter regis, nec aliquis laicus homo, de legibus quæ ad epiſcopum pertinent, ſe intromittat; nec aliquis laicus homo alium hominem ſine juſtitia epiſcopi ad judicium adducat: Judicium vero in nullo loco portetur, niſi in epiſcopali ſede, aut in illo loco, quem epiſcopus ad hoc conſtituerit." *Spelm.* V. 2. p. 14.

This charter, Mr Selden ſays, was recited in a cloſe roll of king Richard the ſecond, and then confirmed. *Str.* 669.

Papal incroachments after the conqueſt.

4. For upon the conqueſt made by the Normans, the pope took the opportunity to uſurp upon the liberties of the crown of England. For the conqueror came in with the pope's banner, and under it won the battle. Whereupon the pope ſent two legates into England, with whom the conqueror called a ſynod, depoſed Stigand archbiſhop of Canterbury becauſe he had not purchaſed his pall from Rome, and diſplaced many biſhops and abbots to make room for his Normans. This admiſſion of the popes legates, firſt led the way to his uſurped juriſdiction in England; yet no decrees paſſed or were put in execution, touching

touching matters eccleſiaſtical, without the royal aſſent; nor would the king ſubmit himſelf in point of fealty to the pope, as appears by his epiſtle to Gregory the ſeventh. Yet in his next ſucceſſor's time, namely, in the time of king William Rufus, the pope by Anſelme archbiſhop of Canterbury attempted to draw appeals to Rome, but prevailed not. Upon this occaſion it was, that the king told Anſelme, that none of his biſhops ought to be ſubject to the pope, but the pope himſelf ought to be ſubject to the emperor; and that the king of England had the ſame abſolute liberty in his dominions, as the emperor had in the empire. Yet in the time of the next king, to wit, king Henry the firſt, the pope uſurped the patronage and donation of biſhopricks, and of all other benefices eccleſiaſtical. At which time Anſelme told the king, that the patronage and inveſtiture of biſhops was not his right, becauſe pope Urban had lately made a decree, that no lay perſon ſhould give any eccleſiaſtical benefice. And after this, at a ſynod held at London, in the year 1107, a decree was made, unto which the king aſſented (ſaith Matthew Paris), that from thenceforth no perſon ſhould be inveſted in a biſhoprick by the giving of a ring and paſtoral ſtaff, (as had been before), nor by any lay hand. Hereupon the pope granted, that the archbiſhop of Canterbury for the time being ſhould be for ever *legatus natus*: And Anſelme for the honour of his ſee obtained, that the archbiſhop of Canterbury ſhould in all general councils ſit at the pope's foot, as *alterius orbis papa*, or pope of this part of the world. Yet after Anſelme's death, this ſame king gave the archbiſhoprick of Canterbury to Rodolph biſhop of London, and inveſted him by the ring and paſtoral ſtaff; and this, becauſe the ſucceeding popes had broken pope Urban's promiſe, touching the not ſending of legates into England, unleſs the king ſhould require it. And in the time of the next ſucceeding king, to wit, king Stephen, the pope gained appeals to the court of Rome; for in a ſynod at London, convened by Henry biſhop of Wincheſter the pope's legate, it was decreed, that appeals ſhould be made from provincial councils to the pope: before which time, appeals to Rome were not in uſe. Thus did the pope uſurp three main points of juriſdiction, upon three ſeveral kings after the conqueſt (for of king William Rufus he could gain nothing), viz. upon the conqueror, the ſending of the legates or commiſſioners to hear and determine eccleſiaſtical cauſes; upon Henry the firſt, the donation and inveſtiture of biſhopricks and other benefices; and upon king Stephen, the appeals to the court

of Rome. And in the time of king Henry the ſecond, the pope claimed exemption of clerks from the ſecular power. And, finally, in the time of king John, he took the crown from off the king's head, and compelled him to accept his kingdom from the pope's donation. *God.* 96.

Oppoſed by the ſtatutes of proviſors.

5. Nevertheleſs all this obtained not without violent ſtruggle and oppoſition: And this cauſed the ſtatutes of Proviſors to be made, in the reigns of king Edward the third and king Richard the ſecond. By the former of which, (namely, the ſtatute of the 27 Ed. 3. c. 1.) it is enacted as followeth:

Becauſe it is ſhewed to our lord the king, by the grievous and clamorous complaints of the great men and commons of the realm, how that divers of the people be drawn out of the realm, to anſwer of things whereof the cognizance pertaineth to the king's court; and alſo that the judgments given in the ſame court be impeached in another court, in prejudice and diſheriſon of our lord the king and of his crown and of all the people of his ſaid realm, and to the undoing and deſtruction of the common law of the ſame realm at all times uſed: Whereupon, upon good deliberation had with the great men and other men of his ſaid council, it is aſſented and accorded, that all the people of the king's ligeance, of what condition that they be, which ſhall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or of things whereof judgments be given in the king's court, or which do ſue in any other court *to defeat or impeach the judgments given in the king's court, ſhall have a day, containing the ſpace of two months, by warning to be made to them, to appear before the king and his council, or in his chancery, or before the king's juſtices of the one bench or the other, or before other the king's juſtices which to the ſame ſhall be deputed, to anſwer in their proper perſons to the king, of the contempt done in this behalf. And if they come not at the ſaid day in their proper perſon to be at the law; they, their procurators, attornies, executors, notaries, and maintainors, ſhall from that day forth be put out of the king's protection, their lands and goods forfeit to the king, and their bodies whereſoever they may be found ſhall be taken and impriſoned and ranſomed at the king's will, and upon the ſame a writ ſhall be made to take them by their bodies, and to ſeize their lands goods and poſſeſſions into the king's hands; and if it be returned that they be not found, they ſhall be put in exigent and outlawed. Provided, that at what time they come before they be outlawed, and will yield them to the king's priſon to be juſtified by the law, and to receive that which the court ſhall award in this behalf, they ſhall be thereto received; the forfeiture of lands and goods abiding*

abiding in their force, if they do not yield them within the ſaid two months as is aforeſaid.

And by the other ſtatute, viz. 16 Ric. 2. c. 5. (which the pope called *execrabile ſtatutum*, and the paſſing thereof *fædum et turpe facinus*) it is enacted, that *if any ſhall purchaſe or purſue, or cauſe to be purchaſed or purſued, in the court of Rome* or elſewhere, *any tranſlations of prelates, proceſſes, ſentences of excommunication, bulls, inſtruments, or any other things whatſoever which touch the king, againſt him, his crown, and his regality, or his realm; and they which bring within the realm, or them receive, or make thereof notification, or any other execution whatſoever within the ſaid realm or without: they, their notaries, procurators, maintainors, abettors, fautors, and counſellors, ſhall be put out of the king's protection, and their lands and goods forfeited to the king, and they ſhall be attached by their bodies if they may be found, and brought before the king and his council, there to anſwer to the caſes aforeſaid, or proceſs ſhall be made againſt them by* præmunire facias, *in manner as it is contained in other ſtatutes of proviſors; and other which do ſue in any other court in derogation of the regality of our lord the king.*

They are called *other courts* (lord Coke ſays), either becauſe they proceed by the rules of other laws, as by the canon or civil law; or by other trials than the common law doth warrant. For the trial warranted by the law of England for matters of fact, is by verdict of twelve men before the judges of the common law of matters pertaining to the common law, and not upon examination of witneſſes in any court of equity. So as thoſe *other courts* are either ſuch as are governed by *other laws*, or ſuch as draw the party to *another kind of trial.* 3 Inſt. 120.

And where the ſtatute of the 16 *R.* 2. ſaith, "in the "court of Rome *or elſewhere*"; (altho' it may ſeem to be meant and conceived of the places of remove which the popes uſed in thoſe days, being ſometimes at Rome in Italy, ſometimes at Avignon in France, ſometimes in other places, as by the date of the bulls and other proceedings in that age may be ſeen:) Yet this expreſſion, he ſaith, doth include alſo the eccleſiaſtical and other courts within this realm, for matters which belong to the cognizance of the common law; as where a biſhop deprives an incumbent of a donative; or excommunicates a man for hunting in his parks; or where commiſſioners of ſewers impriſon a man for not releaſing a judgment at law. 3 *Inſt.* 120. *Rid.* 167. 1 *Haw.* 51.

But it ſeemeth, that the ſuit in theſe courts for a matter which appears not by the libel it ſelf, but only by the

defendant's plea or other matter ſubſequent to be of temporal cognizance (as where a plaintiff libels for tithes, and the defendant pleads that they were ſevered from the nine parts, by which they become a lay fee), is not within the ſtatute, becauſe it appears not that either the plaintiff or the judge knew that they were ſevered. 1 *Haw.* 52.

Aboliſhed in the reign of King Henry the eighth; and the king declared to be the ſupreme head and fountain of juriſdiction.

6. Afterwards (upon the dawn of the reformation) by the ſtatute of the 24 Hen. 8. c. 12. it is recited as followeth: *Where by divers ſundry old authentic hiſtories and chronicles, it is manifeſtly declared and expreſſed that this realm of England is an empire, and ſo hath been accepted in the world, governed by one ſupreme head and king, having dignity and royal eſtate of the imperial crown of the ſame; unto whom a body politick compact of all ſorts and degrees of people, divided in terms and by names of ſpirituality and temporalty, been bounden and owen, to bear next to God, a natural and humble obedience; he being alſo inſtitute and furniſhed, by the goodneſs and ſufferance of almighty God, with plenary whole and intire power pre-eminence authority prerogative and juriſdiction, to render and yield juſtice and final determination, to all manner of folk reſiants or ſubjects within this his realm, in all cauſes matters debates and contentions happening to occur inſurge or begin within the limits thereof, without reſtraint or provocation to any foreign princes or potentates of the world; the body ſpiritual whereof having power, when any cauſe of the law divine happened to come in queſtion, or of ſpiritual learning, that it was declared interpreted and ſhewed by that part of the ſaid body politick, called the ſpiritualty, now being uſually called the engliſh church, which always hath been reputed, and alſo found of that ſort, that both for knowledge integrity and ſufficiency of number, it hath always been thought, and is alſo at this hour, ſufficient and meet of it ſelf, without the intermeddling of any exterior perſon or perſons, to declare and determine all ſuch doubts, and to adminiſter all ſuch offices and duties, as to their rooms ſpiritual doth appertain: for the due adminiſtration whereof, and to keep them from corruption and ſiniſter affection, the king's moſt noble progenitors, and the anteceſſors of the nobles of this realm, have ſufficiently endowed the ſaid church, both with honour and poſſeſſions; and the laws temporal for trial of property of lands and goods, and for the conſervation of the people of this realm in unity and peace, without rapine or ſpoil, were and yet are adminiſtred adjudged and executed by ſundry judges and miniſters of the other part of the ſaid body politick, called the temporalty; and both their authorities and juriſdictions do conjoin together in the due adminiſtration of juſtice, the one to help the other.*

And

And accordingly, lord Coke, treating of the king's eccleſiaſtical laws, ſaith as followeth: By the ancient laws of this realm, this kingdom of England is an abſolute empire and monarchy, conſiſting of one head, which is the king, and of a body politick, compact and compounded of many and almoſt infinite ſeveral and yet well agreeing members. All which the law divideth into two general parts, that is to ſay, the clergy and laity, both of them next and immediately under God ſubject and obedient to the head. Alſo the kingly head of this politick body is inſtituted and furniſhed with plenary and intire power prerogative and juriſdiction, to render juſtice and right to every part and member of this body, of what eſtate, degree, or calling ſoever, in all cauſes eccleſiaſtical or temporal; otherwiſe he ſhould not be a head of the whole body. And as in temporal cauſes, the king by the mouth of his judges in his courts of juſtice doth judge and determine the ſame by the temporal laws of England; ſo in cauſes eccleſiaſtical and ſpiritual, as namely, blaſphemy, apoſtacy from chriſtianity, hereſies, ſchiſms, ordering admiſſions, inſtitutions of clerks, celebration of divine ſervice, rights of matrimony, divorces, general baſtardy, ſubtraction and right of tithes, oblations, obventions, dilapidations, reparation of churches, probate of teſtaments, adminiſtrations and accounts upon the ſame, ſimony, inceſts, fornications, adulteries, ſolicitation of chaſtity, penſions, procurations, appeals in eccleſiaſtical cauſes, commutation of penance, and others, (the cognizance whereof belongeth not to the common laws of England), the ſame are to be determined and decided by eccleſiaſtical judges, according to the king's eccleſiaſtical laws of this realm. For as the Romans, fetching divers laws from Athens, yet being approved and allowed by the ſtate there, called them notwithſtanding the civil law of the Romans; and as the Normans, borrowing all or moſt of their laws from England, yet ſtyled them by the name of the laws or cuſtoms of Normandy; ſo albeit the kings of England derived their eccleſiaſtcal laws from others, yet ſo many as were approved and allowed here, by and with a general conſent, are aptly, and rightly called The king's eccleſiaſtical laws of England; which whoſoever ſhall deny, he denieth that the king hath plenary power to deliver juſtice in all cauſes to all his ſubjects, or to puniſh all crimes and offences within his kingdom, for that the deciding of matters ſo many and of ſo great importance, are not within the cognizance of the common laws; which to deny, doth import that the king is no compleat monarch nor

head of the whole and intire body of the realm. 5 *Co. Cawdrie's* caſe.

And certain it is (he ſaith in another place) that this kingdom hath been beſt governed, and peace and quiet preſerved, when both parties, that is, when the juſtices of the temporal courts, and the eccleſiaſtical judges, have kept themſelves within their proper juriſdiction, without incroaching or uſurping one upon another; and where ſuch encroachments or uſurpations have been made, they have been the ſeeds of great trouble and inconvenience. 4 *Inſt.* 321.

And in the preamble of the ſtatute of the 25 *Hen.* 8. *c.* 21. it is recited, that *this realm, recognizing no ſuperior under God but only the king, hath been and is free from ſubjection to any man's laws, but only to ſuch as have been deviſed made and obtained within this realm, for the wealth of the ſame, or to ſuch other, as by ſufferance of the king and his progenitors, the people of this realm have taken at their liberty by their own conſent to be uſed amongſt them, and have bound themſelves by long uſe and cuſtom to the obſervance of the ſame, not as to the obſervance of the laws of any foreign prince potentate or prelate, but as to the cuſtomed and ancient laws of this realm, originally eſtabliſhed as laws of the ſame, by the ſaid ſufferance conſents and cuſtom and none otherwiſe.*

And according hereunto lord Hale ſaith, that neither the canon nor the civil law have any obligation as laws within this realm, upon any account that the popes or emperors made thoſe laws canons reſcripts or determinations, or becauſe Juſtinian compiled their body of the civil law, and by his edicts confirmed and publiſhed the ſame as authentical, or becauſe this or that council or pope made thoſe or theſe canons or decrees, or becauſe Gratian or Gregory or Boniface or Clement did (as much as in them lay) authenticate this or that body of canons or conſtitutions; for the king of England doth not recognize any for authority as ſuperior or equal to him in this kingdom, neither do any laws of the pope or emperor, as they are ſuch, bind here: but all the ſtrength that either the papal or imperial laws have obtained in this kingdom, is only becauſe they have been received and admitted either by the conſent of parliament, and ſo are part of the ſtatute laws of the kingdom, or elſe by immemorial uſage and cuſtom in ſome particular caſes and courts, and no otherwiſe; and therefore ſo far as ſuch laws are received and allowed of here, ſo far they obtain and no farther; and the authority and force they have here is not founded on, or derived

rived from themſelves; for ſo they bind no more with us, than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative eſſence and qualifies their obligation. *Hale's Hiſt. of the Com. L.* 27.

And hence it is, that even in thoſe courts where the uſe of thoſe laws is indulged, according to that reception which hath been allowed; if they exceed the bounds of that reception by extending themſelves to other matters than hath been allowed to them, or if thoſe courts proceed according to that law when it is controlled by the common law of the kingdom, the common law doth and may prohibit and puniſh them. And it will not be a ſufficient anſwer for them, to tell the king's courts, that Juſtinian or pope Gregory have decreed otherwiſe. For we are not bound by their decrees further, or otherwiſe, than as the kingdom here hath as it were tranſpoſed the ſame into the common and municipal laws of the realm, either by admiſſion of, or by enacting the ſame, which is that alone which can make them of any force in England. *ib.* 28.

But notwithſtanding all this, it is well known, that this nation under the Romans was governed wholly by the civil law for the ſpace of upwards of three hundred years; and this, long before the Norman, Daniſh, or Saxon revolutions. So that perhaps it may as juſtly be obſerved, that ſome parts of the civil law which are ſtill in uſe within this realm, are the remains of the ancient Roman law never from hence entirely aboliſhed, as that other parts of it have been admitted (or rather re-admited) from time to time by the princes of this realm, as the ſtudy of the civil law prevailed, or as the equity and juſtice of that law in certain caſes merited the adoption of the legiſlature.

Appointment of officers in the eccleſiaſtical courts.

7. Every *biſhop*, by his election and confirmation, even before conſecration, hath eccleſiaſtical juriſdiction annexed to his office, as *judex ordinarius* within his dioceſe; and divers abbots anciently, and moſt archdeacons at this day, by uſage, have had the like juriſdiction, within certain limits and precincts. *Hale's Hiſt. of the Com. L.* 30.

By a conſtitution of archbiſhop *Chichely* it is injoined as follows: To remove the ſcandals brought upon the authority of the church; we, following the footſteps of the holy canons, do decree, that no *clerk married*, nor *bigamus*, nor *layman*, ſhall upon any pretence, in his own

name or in the name of any other, exerciſe any ſpiritual juriſdiction; nor in cauſes of correction, where the proceedings are for the health of the ſoul or where the judge proceedeth *ex officio*, ſhall in any wiſe be a ſcribe or regiſter or keeper or the regiſtry of ſuch corrections: And if any ordinary inferior to the biſhop or other perſon having eccleſiaſtical juriſdiction, ſhall admit or ſuffer any ſuch perſon to exerciſe any ſuch office as aforeſaid, he ſhall be *ipſo facto* ſuſpended from the exerciſe of his office and juriſdiction and from the entrance of the church; and all citations, proceſſes, ſentences, acts and other proceedings had or made by ſuch clerks married, bigami, or laymen, ſhall *ipſo facto* incur the ſentence of the greater excommunication. *Lind.* 128.

But by the ſtatute of the 37 H. 8. c. 17. it is thus enacted: *In moſt humble wiſe ſhew unto your highneſs, your moſt faithful humble and obedient ſubjects the lords ſpiritual and temporal and the commons of this preſent parliament aſſembled, that where your moſt royal majeſty is and hath always juſtly been by the word of God ſupreme head in earth of the church of* England, *and hath full power and authority to correct puniſh and repreſs all manner of hereſies errors vices ſins abuſes idolatries hypocriſies and ſuperſtitions ſprung and growing within the ſame, and to exerciſe all other manner of juriſdictions commonly called eccleſiaſtical juriſdiction; nevertheleſs the biſhop of* Rome *and his adherents, minding utterly as much as in him lay to aboliſh obſcure and delete ſuch power given by God to the princes of the earth, whereby they might gather and get to themſelves the government and rule of the world, have in their councils and ſynods provincial made divers ordinances and conſtitutions, that no lay or married man ſhould exerciſe any juriſdiction eccleſiaſtical, nor ſhall be any judge or regiſter in any court commonly called eccleſiaſtical court, leſt their falſe and uſurped power which they pretended and went about to have in* Chriſt's *church ſhould decay, wax vile, and of no reputation, as by the ſaid councils and conſtitutions provincial appeareth, which ſtanding and remaining in their effect, not aboliſhed by your grace's laws, did ſound to appear to make greatly for the ſaid uſurped power of the ſaid biſhop of* Rome, *and to be directly repugnant to your majeſty as ſupreme head of the church and prerogative royal, your grace being a layman; and albeit the ſaid ordinances and conſtitutions by a ſtatute made in the five and twentieth year of your moſt noble reign be utterly aboliſhed fruſtrate and of none effect, yet becauſe the contrary is not uſed nor put in practice by the archbiſhops biſhops archdeacons and other eccleſiaſtical perſons, who have no manner of juriſdiction eccleſiaſtical but by and from your royal majeſty, it addeth or at leaſt*

may

may give occaſion to ſome evil diſpoſed perſons to think the proceedings and cenſures eccleſiaſtical made by your highneſs and your vicegerent officials commiſſaries judges and viſitators, being alſo lay and married men, to be of little or no effect; but foraſmuch as your majeſty is the only and undoubted ſupreme head of the church of England, *to whom by holy ſcripture all authority and power is wholly given to hear and determine all manner of cauſes eccleſiaſtical, and to correct vice and ſin whatſoever, and to all ſuch perſons as your majeſty ſhall appoint thereunto: In conſideration thereof, as well for the inſtructions of ignorant perſons as alſo to avoid the occaſion of the opinion aforeſaid, and the ſetting forth of your prerogative royal and ſupremacy, it may therefore pleaſe your highneſs that it may be ordained and enacted by authority of this preſent parliament, that all and ſingular perſons, as well lay as married, being* doctors of the civil law *lawfully create and made in any univerſity, who ſhall be appointed to the office of chancellor, vicar general, commiſſary, official, ſcribe, or regiſter, may lawfully execute and exerciſe all manner of juriſdiction commonly called eccleſiaſtical juriſdiction, and all cenſures and coercions appertaining or in any wiſe belonging to the ſame, albeit ſuch perſon or perſons be lay, married, or unmarried, ſo that they be doctors of the civil law as is aforeſaid; any law, conſtitution, or ordinance to the contrary notwithſtanding.*

In the caſe of *Walker* and *Sir John Lamb*, *T.* 8 *Charl.* One queſtion was, whether the patent of the office of commiſſary to the plaintiff, who was a lay perſon, and not a doctor but a batchelor only of the civil law, was good, or was reſtrained by this ſtatute. And as to that point, all the court conceived, the grant was good; for the ſtatute doth not reſtrain any ſuch grant; and it is but an affirmance of the common law, where it was doubted if a lay or married perſon might have ſuch offices; and to avoid ſuch doubts, this ſtatute was made, which explains, that ſuch grants were good enough; and it is but an affirmative ſtatute, and there is no reſtriction therein; And altho' doctors of the law (tho' lay perſons or married) ſhall have ſuch offices, yet that is not any reſtriction that none others ſhall have them but doctors of the law; and the ſtatute mentions as well regiſters and ſcribes as commiſſaries, and that a doctor of the law ſhall have thoſe offices, yet in common experience ſuch perſons as are merely lay and not doctors have exerciſed ſuch offices. Wherefore they reſolved, that the grant was well enough. *Cro. Car.* 258.

By *Can.* 127. No man ſhall be admitted a chancellor, commiſſary, or official, to exerciſe any eccleſiaſtical juriſdiction,

diction, except he be of the full *age of ſix and twenty years* at the leaſt, and one that is *learned in the civil and eccleſiaſtical laws*, and is at the leaſt *a maſter of arts*, or *batchelor of law*, and is reaſonably well practiſed in the courſe thereof, as likewiſe well affected and zealouſly bent to *religion*, touching whoſe life and *manners* no evil example is had; and except before he enter into or execute any ſuch office, he ſhall take the *oath of the king's ſupremacy* in the preſence of the biſhop, or in the open court, and ſhall *ſubſcribe to the thirty nine articles*, and ſhall alſo *ſwear that he will to the uttermoſt of his underſtanding deal uprightly and juſtly in his office, without reſpect of favour or reward*; the ſaid oaths and ſubſcription to be recorded by a regiſter then preſent.

By the ancient canon law, no perſon was to be a proctor unleſs he were ſeventeen years of age; nor judge unleſs he were of the age of twenty five. *Gibſ.* 987.

And by *Can.* 128. No chancellor, commiſſary, archdeacon, official, or any other perſon uſing eccleſiaſtical juriſdiction, ſhall *ſubſtitute*, in their abſence, any to keep court for them, except he be either a grave miniſter and a graduate, or a licenſed publick preacher, and a beneficed man near the place where the courts are kept, or a batchelor of law, or a maſter of arts at leaſt, who hath ſome ſkill in the civil and eccleſiaſtical law, and is a favourer of true religion, and a man of modeſt and honeſt converſation; under pain of ſuſpenſion, for every time that they offend therein, from the execution of their offices for the ſpace of three months toties quoties: and he likewiſe that is deputed, being not qualified as is before expreſſed, and yet ſhall preſume to be a ſubſtitute to any judge, and ſhall keep any court as aforeſaid, ſhall undergo the ſame cenſure in manner and form as is before expreſſed.

By the 5 & 6 Ed. 6. c. 16. *If any perſon ſhall* bargain or ſell *any office, or deputation of any office or any part thereof; or take any reward, promiſe, covenant, bond, or other aſſurance to receive any profit, directly or indirectly, for the ſame, or to the intent that any perſon ſhould have or enjoy the ſame; which ſaid office ſhall in any wiſe concern the adminiſtration or execution of juſtice; he ſhall forfeit all his intereſt therein, and right of nomination thereunto; and he who ſhall give or pay or make ſuch promiſe or agreement as aforeſaid, ſhall be diſabled in the law to have and enjoy the ſame; and ſuch bargain ſhall be void. But acts done by ſuch officer ſo offending, before he be removed, ſhall be good in law.*

Any

Any office] In Dr. *Trevor*'s caſe, *H.* 8 *Ja.* It was reſolved by the opinion of the juſtices, upon a reference unto them by the lord chancellor, that the office of chancellor, regiſter, and commiſſary in the eccleſiaſtical courts, are within this ſtatute. Which ſtatute being made for avoiding of corruption in officers, and for the advancement of perſons more worthy and ſufficient to execute the ſaid offices by which juſtice and right ſhall be advanced, ſhall be expounded moſt beneficially to ſuppreſs corruption. And inaſmuch as the law allows eccleſiaſtical courts to proceed in the caſe of blaſphemy, hereſy, ſchiſm, incontinence, matrimony, divorce, right of tithe, probate of wills, granting of adminiſtrations, and ſuch like; and that from theſe proceedings dependeth not only the ſalvation of ſouls, but alſo the legitimation of iſſues, and the like; and that no debt or duty can be recovered by executors or adminiſtrators, without the probate of teſtaments, or letters of adminiſtration, and other things of great conſequence: it is more reaſon that ſuch officers, which concern the adminiſtration and execution of juſtice in theſe points, that concern the ſalvation of ſouls, and other matters aforeſaid, ſhall be within this ſtatute, than officers which concern the adminiſtration or execution of juſtice in temporal matters only. 12 *Co.* 78. *Cro. Ja.* 279.

Or deputation of any office] In the caſe of *Culliford* and *Cardonell*, *H.* 8 *W.* the defendant was made deputy to the plaintiff in his office, and gave bond to pay the plaintiff half the profits. On putting the bond in ſuit, the defendant pleaded this ſtatute. But the determination of the court was, that ſuch bond is not within the ſtatute, becauſe the condition is not to pay him ſo much in groſs, but half the profits, which profits muſt be ſued for in the principal's name; for they belong to him, tho' out of them a ſhare is to be allowed to the deputy for his ſervice. But in the caſe of *Godolphin* and *Tudor*, *M.* 3 *An.* where the deputy was to have the fees, and in conſideration thereof was to pay 200l a year, and ſave the principal harmleſs, this was declared to be within the ſtatute. And it was held by the court, that where an office is within the ſtatute, and the ſalary is certain, if the principal make a deputation, reſerving a leſſer ſum out of the ſalary, it is good: ſo if the profits be uncertain, ariſing from fees, if the principal make a deputation, reſerving a ſum certain out of the fees and profits of the office, it is good: For in theſe caſes, the deputy is not to pay, unleſs the profits riſe to ſo much. And tho' a deputy, by his conſtitution, is in

place of his principal, yet he has no right to the fees; they ſtill continue to be the principal's; ſo that, as to him, it is only reſerving a part of his own, and giving away the reſt to another. But where the reſervation or agreement is not to pay out of the profits, but to pay generally a certain ſum, it muſt be paid at all events; and ſuch bond is void by the ſtatute. *Gibſ.* 980. 2 *Salk.* 466. 468.

The doctrine which we find in Lindwood upon this head is, If a perſon having ſpiritual juriſdiction aſſign to another for his ſalary a certain ſum, ſo that he anſwer to his principal for the whole profits, this is lawful; but if the other be to retain the whole profits to himſelf, and anſwer to his principal a certain ſum, this is unlawful. *Lind.* 282.

He ſhall forfeit all his intereſt therein] in the caſe of Sir *Arthur Ingram*, *M.* 13 *Ja.* it was reſolved by the lord chancellor Egerton and Coke chief juſtice, to whom the king had referred it, upon conference with the other juſtices, that the diſability here intended is ſuch, that the perſon is utterly diſabled during life to take the ſame office; altho' that afterwards becomes void by the death of any other, and a new grant be made unto him. 3 *Inſt.* 154.

And right of nomination thereunto] The ſtatute not having ſaid, who ſhall diſpoſe of the office, upon ſuch forfeiture and diſability; that point came under conſideration in the caſe of *Woodward* and *Fox*, *T.* 2 *W.* and two things were reſolved, 1. That the right of diſpoſing of the office ſo forfeited (which in that caſe was the regiſterſhip of the archdeaconry of Huntington) did devolve to the crown. 2. That the king might make a new regiſter, before office found, or the appearing of the title by any matter of record. *Gibſ.* 981. 2 *Ventr.* 188. 267.

By the 1 Eliz. c. 19. *All gifts grants or other eſtates, to be made by any archbiſhop, or biſhop, of any hereditaments belonging to his archbiſhoprick or biſhoprick, other than for the term of twenty one years or three lives, and whereupon the old accuſtomed yearly rent or more ſhall be reſerved and payable yearly during the ſaid term, ſhall be void.*

And by the 13 Eliz. c. 10. *All gifts grants or other eſtates to be made by any dean and chapter of any cathedral or collegiate church, or other having any ſpiritual or eccleſiaſtical living, of any hereditaments belonging to ſuch cathedral church or other ſpiritual promotion (other than for the term of one and*

twenty years or three lives, and whereupon the accuſtomed yearly rent or more ſhall be reſerved and payable during the ſaid term) ſhall be utterly void and of none effect.

And it hath been adjudged, that the offices of chancellor, commiſſary, official, regiſter, and ſuch like, are hereditaments within theſe ſtatutes. The general deſign of which being to preſerve the rights of ſucceſſors, againſt any illegal practices of the preſent poſſeſſors; it hath been, ever ſince, the general rule in the courts of common law, that no offices of any kind are grantable by biſhops or other eccleſiaſtical perſons, as ſuch, in any larger extent, than they ſhall appear to have been granted before theſe ſtatutes. *Gibſ.* 982.

More eſpecially, it hath been declared, as a maxim there, that grants of offices being made for more lives than they had been made for before theſe ſtatutes, or being made in reverſion, where before theſe ſtatutes they had not been made in reverſion, are both void. *Gibſ.* 982.

But where the queſtion is, whether this or that office hath been granted, for two or three lives, or in reverſion, before the ſtatutes; proof hath been allowed of the practice of ſuch grants for many years paſt, tho' not reaching quite to the times of theſe ſtatutes, where no evidence appeareth to the contrary of grants made before the ſaid ſtatutes. *Gibſ.* 982.

In the caſe of *Jones* and *Pugh*, *M.* 3 *W.* the biſhop of Landaff had granted the office of vicar general to two perſons, to hold jointly and ſeverally, to be exerciſed by themſelves or their ſufficient deputy. It appeared, and was made part of the cauſe by the counſel on both ſides, that this office had been anciently and uſually granted to two, jointly and ſeverally, and to the ſurvivor of them. But it was objected, that a judicial office could not be granted to two; for if they differ, nothing can be done. But the anſwer was, that the ſame may be ſaid of four judges, as in the court of king's bench; and in miniſterial offices, as two ſheriffs. And the court held the grant good, and ſaid, if an office be granted to two, and one dies, the office doth not ſurvive, but determines; as if there be two ſheriffs, and one dies, the other cannot act; otherwiſe, if granted to two, and the ſurvivor of them. *Gibſ.* 983. 2 *Salk.* 465. *Carth.* 213.

8. *Can.* 125. All chancellors, commiſſaries, archdeacons, officials, and all others exerciſing eccleſiaſtical juriſdiction, ſhall appoint ſuch meet places for the keeping of their courts by the aſſignment or approbation of the biſhop

Courts where to be kept.

ſhop of the dioceſe, as ſhall be convenient or entertainment of thoſe that are to make their appearance there, and moſt indifferent for their travel: and likewiſe they ſhall keep and end their courts in ſuch convenient time, as every man may return homewards in as due ſeaſon as may be.

Approbation of the biſhop] And this is agreeable to the rule of the ancient canon law. *Gibſ.* 1001.

In the caſe of the biſhop of *St. David*'s, *E.* 11 *W.* it was alledged againſt the proceedings of the archbiſhop, that he was cited to Lambeth before the archbiſhop himſelf, and not to the court of arches: Upon which it was declared by the court of king's bench, that the archbiſhop may hold his court where he pleaſes, and may convene before himſelf, and ſit judge himſelf; and ſo may any other biſhop; for the power of a chancellor or vicar general is only delegated in eaſe of the biſhop. 1 *Salk.* 134.

Manner of proceeding in the eccleſiaſtical courts.

9. The eccleſiaſtical courts do proceed according to the rules of the civil and canon law: the ſuit is commenced by libel; the witneſſes are privately examined; then there are exceptions and replications: the ſentence is publiſhed in writing; and from the ſentence there lies an appeal, from the biſhop to the archbiſhop; from the archdeacon to the biſhop or immediately to the archbiſhop; from the archbiſhop, as heretofore to the pope, ſo now to the king in chancery, where delegates are appointed, who judge according to the civil and canon law, and revoke or confirm the ſentence: and in theſe judgments given by the courſe of the civil law, the judges of the common law do acquieſce, and give credit thereunto, and will not examine them over again unleſs they think that there is cauſe for the king's prohibition. *Duck*, 346.

Seal.

10. *Otho.* We do ordain, that archbiſhops, biſhops and their officials, abbots, priors, deans, archdeacons and their officials, and deans rural, as alſo chancellors of cathedral churches, and all other colleges whatſoever, and convents either jointly with their rector or ſeverally (according to their cuſtom or ſtatutes), ſhall have a ſeal; on which ſeal ſhall be ingraved their ſeveral diſtinctions; as, the name of their dignity, office or college; alſo their proper name (if it be an office perpetual); and ſo it ſhall be eſteemed an authentic ſeal: But if the office is not perpetual, as that of rural deans and officials, then the ſeal ſhall have ingraved upon it only the name of office; and at the expiration of their office, they ſhall immediately

and

and without difficulty reſign it to thoſe from whom they received the office. *Athon.* 67.

Can. 124. No chancellor, commiſſary, archdeacon, official, or any other exerciſing eccleſiaſtical juriſdiction, ſhall without the biſhop's conſent have any more ſeals than one, for the ſealing of all matters incident to his office: which ſeal ſhall always be kept either by himſelf, or by his lawful ſubſtitute exerciſing juriſdiction for him, and remaining within the juriſdiction of the ſaid judge, or in the city or principal town of the county. This ſeal ſhall contain the title of that juriſdiction which every of the ſaid judges or their deputies do execute.

Trial of temporal incidents.

11. Where ſome temporal matter depends on an eccleſiaſtical cauſe, and is neceſſary to be determined with it; there, tho' the eccleſiaſtical judges may try ſuch temporal matter, yet they ought to do it by the rules of the common law, to which it properly belongeth: otherwiſe the common law judges will interpoſe, by ſending prohibitions. 1 *Peere Will.* 12. *Str.* 672.

As, in caſe of the ſtoppage of a way for the carrying of tithes; tho' the ſpiritual court may try whether the way was ſtopped or not, yet ſtoppage of ways being matter properly triable at the common law, and only allowed to the ſpiritual court in this caſe to be tried as a thing depending upon and neceſſary to the parſon's having and carrying away his tithes, they ought to proceed in the trial thereof, according to the rules of the common law, and to allow ſuch proofs as by that law are allowable: otherwiſe they will be prohibited. *Watſ.* c. 54.

Concurrent juriſdiction.

12. In many caſes, the common law and eccleſiaſtical courts have a concurrent juriſdiction. Accordingly, in the ſtatute of *articuli cleri*, 9 Ed. 2. c. 6. where the clergy do alledge, that *if any cauſe or matter, the knowledge whereof belongeth to a court ſpiritual, ſhall be definitively determined before a ſpiritual judge, and doth paſs into a judgment, and ſhall not be ſuſpended by an appeal; and after, if upon the ſame thing a queſtion is moved before a temporal judge between the ſame parties, and it be proved by witneſs or inſtruments; ſuch an exception is not to be admitted in a temporal court:* It is anſwered by the king and parliament, *That when any one caſe is debated before judges ſpiritual and temporal, as in the caſe of laying violent hands upon a clerk, it is thought, that notwithſtanding the ſpiritual judgment, the king's court ſhall diſcuſs the ſame matter as the party ſhall think expedient for himſelf.*

For the ſpiritual judges proceedings are for the correction of the ſpiritual inner man, and for the health of the ſoul,

ſoul, to injoin him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done. As where one layeth violent hands upon a clerk, the ſpiritual judge *pro ſalute animæ* ſhall injoin him penance, and the clerk may have his action of battery, and recover damages for the injury done to him; and ſo in like caſes. And therefore this article of the clergy was rejected. 2 *Inſt.* 622.

Offences capital.

13. A perſon admitted to the benefit of clergy, is not to be deprived in the ſpiritual court, for the crime for which he hath had his clergy. For a pardon frees the party from all ſubſequent puniſhment, and conſequently from deprivation. Yet Dr Watſon holds an opinion, *Watſ.* c. 6. [which hath alſo been adopted by others] on the authority of *Cro. Ja.* 430. in *Searle*'s caſe, that a clergyman may be deprived for manſlaughter after he hath had his clergy; not obſerving, that what is ſaid there, was only on the ſudden on a motion for a prohibition in the king's bench; and that in the ſame caſe a prohibition was afterwards actually brought and declared on in the court of common pleas, and judgment thereupon ſolemnly given for the plaintiff upon open argument by all the judges. 2 *Haw.* 364.

For there is not any maxim in the law better eſtabliſhed, than that the eccleſiaſtical court hath no cognizance or juriſdiction in caſes of treaſon or felony. *Examin. of the ſcheme of ch. pow.* 90.

Temporal courts to give credence to ſentence given in the eccleſiaſtical court.

14. When the ſpiritual court hath given ſentence of deprivation in caſes within their cognizance, (as in the caſe of ſimony, for inſtance); the temporal court ought to give credence thereunto, and ought not to diſpute whether it be error or not. For the temporal court cannot take cognizance of their proceedings herein, whether they be lawful or not; which is the reaſon, that in the temporal court it ſufficeth to plead a ſentence out of the ſpiritual court briefly, without ſhewing the manner thereof, and of their proceedings. *Watſ.* c. 5.

Execution of the ſentence.

15. No damages can be recovered in the eccleſiaſtical court; but coſts only. *Watſ.* c. 30.

And the coercion or execution of the ſentence, is only by excommunication of the perſon contumacious, and upon ſignification thereof into chancery, a writ *de excommunicato capiendo* iſſues, whereby the party is impriſoned till obedience yielded to the ſentence. But beſides this coercion, the ſentences of the eccleſiaſtical courts touching ſome matters

matters do introduce a real effect, without any other execution; as a divorce a *vinculo matrimonii* for conſanguinity or frigidity, doth induce a legal diſſolution of the marriage; ſo a ſentence of deprivation from an eccleſiaſtical beneſice, doth by virtue of the very ſentence, without any other coercion or execution, introduce a full determination of the intereſt of the perſon deprived. *Hale's Hiſt. of the Com. L.* 33.

General ſuperintendency of the common law.

16. Upon the whole, lord chief juſtice Hale, ſpeaking of the eccleſiaſtical juriſdiction, expreſſeth himſelf thus: Albeit in theſe courts and matters, the laws of England (upon the reaſons and account before expreſſed) have admitted the uſe and rule of the canon and civil law, yet ſtill the common law retaineth the ſuperiority and pre-eminence. And the ſubſtance of all that hath been ſaid upon this point is this:

Firſt, that the juriſdiction exerciſed in the eccleſiaſtical court is derived from the crown of England, and that the laſt devolution is to the king by way of appeal.

Secondly, that altho' the canon or civil law be allowed as the direction or rule of their proceedings; yet that is not as if either of thoſe laws had any original obligation in England, either as they are the laws of emperors, popes, or general councils, but only by virtue of their admiſſion here; which is evident, for that thoſe canons or imperial conſtitutions which have not been received here do not bind; and alſo, for that by ſeveral contrary cuſtoms and uſages in this realm, many of thoſe civil and canon laws are reſtrained and controlled.

Thirdly, That albeit thoſe laws are admitted in ſome caſes in the eccleſiaſtical courts, yet they are but *leges ſub graviori lege*; and the common laws of this kingdom have ever obtained and retained the ſuperintendency over them, and thoſe *ſigna ſuperioritatis* before mentioned, for the honour of the king and the common laws of England. For as the laws and ſtatutes of the realm have preſcribed to the eccleſiaſtical courts their bounds and limits, ſo the courts of common law have the ſuperintendency over them to keep them within the limits of their juriſdiction, and to judge and determine whether they have exceeded thoſe limits or not; and in caſe they do exceed their bounds, the courts of common law will iſſue their prohibitions to reſtrain them, directed either to the judge, or party, or both. And alſo in caſe they exceed their juriſdictions, the officer that executes the ſentence, and in ſome caſes the judge that gives it, are puniſhable in the courts of common law; ſometimes at the ſuit of the king, ſome-

times at the ſuit of the party, and ſometimes at the ſuit of both, according to the variety and circumſtances of the caſe.

Laſtly, that the common law, and the judges of the courts of common law, have the expoſition of ſuch ſtatutes or acts of parliament, as concern either the extent of the juriſdiction of thoſe courts, or the matters depending before them. And therefore if thoſe courts either refuſe to allow theſe acts of parliament, or expound them in any other ſenſe than is truly and properly the expoſition of them; the king's great courts of the common law (who next under the king and his parliament have the expoſition of thoſe laws) may prohibit and controll them. *Hale's Hiſt. Com. L.* 41. 1 *Hale's Hiſt. Pl. Cr.* 408.

After all, it is humbly ſubmitted, whether there doth not appear to be ſome kind of prejudice, even in this great and good man, whenever he touches upon the eccleſiaſtical juriſdiction. And the like may be obſerved of two other very great men, who (in like manner as lord Hale) ſuſtained the office of lord chief juſtice of England, in their reſpective ages, with integrity, learning, and ſpirit; namely, the lord chief juſtice Coke, and the lord chief juſtice Holt. The truth is, this ſeeming byaſs in them all was owing in a great meaſure, to the ſpirit of the times in which they were reſpectively educated; wherein the conteſts between the two juriſdictions were violent, and carried on with obſtinacy on both ſides. It is the glory of the preſent age, that theſe ferments have at length ſubſided. Learned men can now differ in opinion, without bitterneſs and mutual reproaches; and the ſeveral diſcordant parties have been inſtructed to live together in a mutual intercourſe and communication of good offices. Perſecution hath departed to its native hell; and fair benevolence hath come down from heaven. The diſtinctions which were introduced during the plenitude of papal power have fallen away by degrees; and we ſhall naturally recur to the ſtate wherein popery took us up, in which there was no thwarting between the two juriſdictions, but they were amicably conjoined, affording mutual help and ornament to each other *.

Courts in the church or church yard. See Church. Curates.

* It may not be amiſs to take notice in this place, amongſt other means of producing the aboveſaid deſirable effect of the inſtitution

Curates.

SO far as any churches or chapels which fall under this title are donative, and to be conſidered as ſuch; is treated of under the title **Donative.**

Curate

ſtitution by the late Mr Viner of a profeſſorſhip of the common law within one of our univerſities; which naturally will conduce to promote a more intimate connexion between the ſtudents of the eccleſiaſtical and temporal laws, and (as Sir William Blackſtone expreſſeth it) "by extending the pomoeria of univerſity learning, and adopting (as it were) a new tribe of citizens within their philoſophical walls, will intereſt a very numerous and very powerful profeſſion in the preſervation of their rights and liberties."†

And here one cannot refrain from congratulating that learned body, on the choice of their profeſſor at the firſt ſetting forward of this eſtabliſhment; in whom are united qualities which ſeldom concur in one perſon, ſuch as, application and genius, ſolidity and vivacity, attention to dates and figures and a conſummate elegance of compoſition; who can enliven the relicks of antiquity, and render the drieſt ſubjects of the law not only uſeful but entertaining.

Mr Viner dedicated his whole life to the ſervice of the public, in compiling a digeſt of the common law; which, after the labour of above half a century, he had the happineſs to live to publiſh, in two and twenty volumes in folio: and hath provided, out of the profits of his benefaction to the univerſity, that the ſame ſhall be continued from time to time, as occaſion ſhall require, at proper intervals. For the effectual performance whereof, it may be requiſite, and will beſt anſwer Mr Viner's benevolent intention, not barely to inſert under their proper titles ſuch caſes as ſhall happen to be adjudged in time to come, but deliberately to re-examine ſuch whole titles reſpectively. It is aſtoniſhing, that one man could perform what Mr Viner hath done; but it would be much more aſtoniſhing, if ſuch work ſhould at once be perfectly finiſhed in all its parts; and it is not to be ſuppoſed, but that a number of men, attending reſpectively to detached branches, would render the performance more compleat. This is a taſk, which Mr Viner ſeemeth to have reſerved for future proficients under his own inſtitution. In order to render the book ſo ſufficient, as to ſuperſede the neceſſity of having recourſe to the originals from whence it is extracted; it ſeemeth even yet to be

† Introductory lecture, page 27.

Curate is a word of ambiguous ſignification; ſometimes, and moſt properly, it denoteth the incumbent in general who hath the cure of ſouls; but more frequently it is underſtood to ſignify a clerk not inſtituted to the cure of ſouls, but exerciſing the ſpiritual office in a pariſh under the rector or vicar: And in this latter ſenſe it is treated of in this place.

Of ſuch curates there are two kinds: firſt temporary, who are employed under the ſpiritual rector or vicar, either as aſſiſtant to him in the ſame church, or executing the office in his abſence in his pariſh church, or elſe in a chapel of eaſe within the ſame pariſh belonging to the mother church; the other, by way of diſtinction called perpetual, which is, where there is in a pariſh neither ſpiritual rector nor vicar, but a clerk is employed to officiate there by the impropriator.

There are many things common to theſe ſeveral kinds of curates, and other things peculiar to each; as will appear in the following ſections.

Origin of curates in chapels of eaſe.

1. When by long uſe and cuſtom parochial bounds became fixed and ſettled, many of the pariſhes were ſtill ſo large, that ſome of the remote hamlets found it very inconvenient to be at ſo great a diſtance from the church; and therefore for the relief and eaſe of ſuch inhabitants, a method obtained of building private chapels or oratories, in which a capellane was ſometimes endowed by the lord of the manor, or ſome other benefactor, but generally maintained by a ſtipend from the pariſh prieſt. *Ken: Par. Ant.* 587.

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too ſhort: If conſidered only as an index, directing to the originals for further ſatisfaction; it needeth not to be ſo long. And perhaps a work of a leſs diſcouraging ſize, extracted from the whole, might be of more general uſe to all but profeſſed lawyers. And this ſeemeth to have been at firſt Mr Viner's deſign; intending only a republication of Roll's abridgment, together with the caſes ſince adjudged, which multiplied upon him more than in theory could have been imagined. And this hath been an accidental hindrance to the perfection of Mr Viner's work: By adhering ſcrupulouſly to Roll's general titles and reſpective ſubdiviſions, the book is rendered leſs intelligible, than if upon a general proſpect of the materials the author had purſued that method, which his own judgment and the natural order of things would have ſuggeſted. And the inconvenience is the greater, in that as yet there is wanting a general index to the whole.

But

But in order to authorize the erecting of a chapel of eaſe, the joint conſent of the dioceſan, the patron, and the incumbent (if the church was full) were all required. *Ken. Par. Ant.* 585.

2. The origin of perpetual curacies was thus: By the ſtatute of the 4 *H.* 4. *c.* 12. it is enacted, that *in every church appropriated there ſhall be a ſecular perſon ordained vicar perpetual, canonically inſtituted and inducted, and covenably endowed by the diſcretion of the ordinary.* Origin of perpetual curacies.

But if the benefice was given *ad menſam monachorum*, and ſo not appropriated in the common form, but granted by way of union *pleno jure*; in that caſe it was ſerved by a temporary curate belonging to their own houſe, and ſent out as occaſion required. The like liberty, of not appointing a perpetual vicar, was ſometimes granted by diſpenſation, in benefices not annexed to their tables, in conſideration of the poverty of the houſe, or the nearneſs of the church. But when ſuch appropriations, together with the charge of providing for the cure, were tranſferred (after the diſſolution of the religious houſes) from ſpiritual ſocieties to ſingle lay perſons, who were not capable of ſerving them by themſelves, and who by conſequence were obliged to nominate ſome particular perſon to the ordinary for his licence to ſerve the cure; the curates by this means became ſo far perpetual, as not to be wholly at the pleaſure of the appropriator, nor removable but by due revocation of the licence of the ordinary. *Gibſ.* 819.

3. The appointment of a curate to officiate under an incumbent in his own church, muſt be by ſuch incumbent's nomination of him to the biſhop, in this or the like form: Appointment of curates.

"To the right reverend father in God Charles lord "biſhop of Carliſle. Theſe are to certify your lord- "ſhip, that I *A. B.* rector, [or, vicar] of ——— in the "county of ——— and in your lordſhip's dioceſe of "———, do hereby nominate and appoint *C. D.* to "perform the office of a curate in my church of ——— "aforeſaid; and do promiſe to allow him the yearly ſum "of ——— for his maintenance in the ſame; humbly "beſeeching your lordſhip to grant him your licence to "ſerve the ſaid cure. In witneſs whereof I have here- "unto ſet my hand and ſeal, the ———day of———, in "the year of our Lord ———."

The appointment alſo of a curate in a chapel of eaſe ſeemeth moſt properly to belong to the incumbent of the

mother church, who is inſtituted to the cure of ſouls throughout the whole pariſh; and who therefore in ſuch caſe may himſelf ſerve in the chapel, as well as his curate or chaplain (unleſs it be in the caſe of augmentation by the governors of queen Anne's bounty, as will appear afterwards).

But by agreement (of the biſhop, patron, and incumbent) the inhabitants may have a right to elect and nominate a curate. Otherwiſe, the ancient cuſtom was, that he was either arbitrarily appointed by the vicar; or by him nominated to the rector and convent, whoſe approbation did admit him; or was nominated by the inhabitants (as founders and patrons) to the vicar, and by him preſented to the ordinary; for cuſtom herein was different: ſometimes a curate was to be preſented by the patron of the church to the vicar, and by him to the archdeacon, who was then obliged to admit him; at other times the lord of the manor did preſent a fit perſon to the appropriators, who without delay were to give admiſſion to the perſon ſo preſented. *Ken. Par. Ant.* 589.

In the caſe of *Herbert* and others againſt the dean and chapter of *Weſtminſter* and Dr *Broderick*, *H.* 1721. Upon the plague which happened in the year 1625, the churchyard of St Margaret's Weſtminſter not being large enough to bury the dead pariſhioners, the inhabitants of that part of the pariſh, which now reſorts to the new chapel built there, petitioned the dean and chapter of Weſtminſter (who were lords of the manor) to grant them a waſte piece of ground to bury their dead, which accordingly the dean and chapter did under their ſeals; and it was ſolemnly conſecrated. Afterwards theſe inhabitants were at the charge of building a chapel there, having firſt obtained a royal licence for that purpoſe. The veſtrymen and chapelwardens had ever ſince the year 1653 elected the miniſters who were to preach there; but now the dean and chapter of Weſtminſter claimed a right to name the miniſter who ſhould preach and do divine ſervice in this chapel. On a bill brought to ſettle the right of nominating the parſon of this chapel: By Macclesfield lord chancellor; When the dean and chapter gave this ground, they did not reſerve any power to nominate the preacher; and the inhabitants of the chapelry were at the expence of building the chapel. Now the building and endowing of the church was what at the common law originally intitled the patron to the patronage.

age. Here the inhabitants built the chapel, and (as appears) by the pew money have endowed it. It is not reaſonable to ſay that the dean and chapter, as parſon appropriate, have a right to ſupply every chapel built within the pariſh with a preacher. It would be an expence and hardſhip upon them to be obliged ſo to do: neither ought it to be at their election to ſupply it. For ſuppoſe I build a chapel in my houſe for my ſelf or my next neighbour, can the parſon name one to preach there? I think not. And it will make no alteration, if the chapel which I build in my own ground be intended for the uſe of twenty neighbours beſides my own family.——— But afterwards, on the hearing, the court decreed, that the right of nomination of the miniſter did belong to the dean and chapter. 1 *P. Will.* 773.

The form of a nomination to a chapel of eaſe (as alſo to a perpetual curacy) may be to this effect: "To the "right reverend father in God ——— lord biſhop of "——— A. B. of —— &c. ſendeth greeting. Where- "as the curacy of ——— in the county of ——— "and dioceſe of ——— is now void by the death of C. "D. laſt incumbent there, and doth of right belong to "my nomination: Theſe are humbly to certify your "lordſhip, that I do nominate E. F. clerk, to the cu- "racy aforeſaid; requeſting your lordſhip to grant him "your licence for ſerving the ſaid cure. In witneſs "whereof I have hereunto ſet my hand and ſeal, the "———day of ——— in the year of our Lord———."

It is not neceſſary to prevent a lapſe, that the appointment be within ſix months: For if the patron of a curacy do not nominate a clerk, there can be no lapſe thereof (except in the caſe of having received the augmentation, as will appear afterwards); but the biſhop may compel him to do it, by ſpiritual cenſures. 1 *Inſt.* 344. *Gibſ.* 819.

This was declared to be law, in the caſe of *Fairchild* and *Gayre*, with regard to donatives; becauſe though the church is exempted from the power of the ordinary, yet the patron is not: and it holds much more ſtrongly in the caſe of curacies, where both church and patron are ſubject to the ordinary's juriſdiction, and where therefore he may likewiſe ſequeſter the profits, and appoint another to take care of the cure, till the patron ſhall nominate a fit and proper clerk. *Gibſ.* 819.

Whether a mandamus will lie, to admit or reſtore a curate.

4. The following caſe was moved as of a donative, but it ſeems clearly to have been only a chapel of eaſe under the mother church, both from the vicar and alſo the inhabitants claiming the right of nomination, and eſpecially from the biſhop's licence being obtained (which is contrary to the nature of a donative). But it was moved as of a donative probably becauſe the caſe of a donative in that particular is ſomewhat ſtronger than that of a mere chapel of eaſe. It was thus: *T.* 33 *G.* 2. *K.* and *Blooer.* A mandamus was moved for to be directed to one Samuel Blooer, a pariſhioner of Matfield in Staffordſhire, and an inhabitant of the chapelry of Calton within that pariſh (who had turned Mr. William Langley the curate of that chapel, out of it, after he had been eleven weeks in poſſeſſion, and locked it up,) commanding him to reſtore the ſaid William Langley, clerk, to the place and office of curate of the ſaid chapel. It appeared that this chapel is endowed with lands: And that the inhabitants of four different pariſhes contribute to the repair of it. The curate of it has a ſtipend. Mr. Evans, the vicar of Matfield, ſwore in his affidavit, that he believes he has the right of nomination to it, and that it has been executed, and that Mr. Langley is appointed and nominated by him. But there were contrary affidavits, wherein the deponents ſwear, that they believe the right of nomination to be in the inhabitants. It appeared that Mr. Langley had a licence. On ſhewing cauſe againſt iſſuing the mandamus, it was urged, that this chapel is a donative; and as the particular nature of it was not ſtated, it muſt be conſidered as only a private chapel, and not as a public office; and conſequently no mandamus will lie. Beſides, the right of nomination is not eſtabliſhed. The vicar only ſwears, that he believes he has the right of nomination; which is contradicted by the adverſe affidavits. And if it were not, yet a vicar has nothing to do with a donative. The caſe was mentioned of Preſcot chaplain of Mancheſter college, reported in 2 *Strange* 797. But there were letters patent: The college was of the foundation of the crown: The ground of the court's interpoſing in that caſe was, becauſe there was no other remedy. This man may have another remedy: He may bring an ejectment for the farm, which he ſays belongs to him as curate of this chapel; or he may have his action of treſpaſs. Every vicar might as well come for a mandamus to be reſtored, as this man. On the other hand, it was argued, that this was an office that concerned the public, and therefore a mandamus would lie

lie to reſtore to it. A mandamus will lie to reſtore even a ſexton, or a pariſh clerk. It doth not appear that this is a donative. But if it be, yet no licence is neceſſary in caſe of a donative, tho' in the caſe of a perpetual curacy it is neceſſary. And it is no objection to ſay, that he hath another remedy, if he be intitled to this. The counſel on the other ſide (againſt the mandamus) obſerved, that pariſh clerks and ſextons are temporal officers; whereas this is eccleſiaſtical: And a vicar or rector may juſt as well apply for a mandamus as the chaplain of a donative. ——— By lord Mansfield chief juſtice: This is a mere temporal queſtion. Three objections have been offered againſt making the rule abſolute: The firſt was, That there is no ſufficient ground for aſking a mandamus. *Anſ.* But this chaplain hath ſhewn an appointment, and a licence; and was in quiet poſſeſſion for eleven weeks. Second objection: That he has not the right; for the nomination is not in the vicar, but in the inhabitants. *Anſ.* We cannot try the merits upon affidavit. He claims a right, tho' it is litigated; and that is ſufficient for the preſent purpoſe. Third objection: That even ſuppoſing him to have a title, and to have been in poſſeſſion, and turned out of it; yet he ought not to be aſſiſted by way of mandamus, but be left to his ordinary legal remedy, by ejectment or an action of treſpaſs. *Anſ.* A mandamus to reſtore is the true ſpecific remedy, where a perſon is wrongfully diſpoſſeſſed of any office or function which draws after it temporal rights; in all caſes where the eſtabliſhed courſe of law hath not provided a ſpecific remedy by another form of proceeding, as it hath provided in the caſe of rectories and vicarages. Here are lands annexed to this chapel, which belong to the chaplain in reſpect of his function. If the biſhop had refuſed without cauſe, to licence him, he might have had a mandamus to compel the ordinary to grant him a licence. He is now turned out of the chapel and every thing belonging thereto, by force. It is ſaid; He may bring an ejectment, or an action of treſpaſs. I am not ſure that he could. It doth not appear that the legal property is in him. On the contrary, it is certain that it is not. It might originally be in feoffees. Thoſe feoffees may not have been regularly continued. It may be impoſſible to find the heir of the ſurvivor. If they have been continued, the preſent feoffees may refuſe to let Mr. Langley make uſe of their names. Neither of theſe actions, if he could bring them, would be a ſpecific remedy. In the one, he might recover damages; in the other, he might recover

recover the land: But by neither would he be reſtored to his pulpit, and quieted in the exerciſe of his function and office. — And the rule was made abſolute for a mandamus. No return was made to it: but the parties agreed to try the merits in a feigned iſſue.

Note. Upon this caſe being afterwards mentioned, The court took occaſion to ſay, that they had re-conſidered the point, and weighed all the principles and authorities applicable to it; and were fully ſatisfied that the propereſt and moſt effectual method of trying the right to officiate in ſuch chapels, whether it depended upon nomination or election, was by mandamus. *Burrow, Mansf.* 1043.

Licence. 5. To every of theſe ſeveral kinds of curates, the ordinary's licence is neceſſary, before he ſhall be admitted to officiate.

For by *Can.* 48. No curate or miniſter ſhall be permitted to ſerve in any place without examination and admiſſion of the biſhop of the dioceſe, or ordinary of the place having epiſcopal juriſdiction, under his hand and ſeal; having reſpect to the greatneſs of the cure, and meetneſs of the party.

In order to which,

(1) He muſt produce his nomination in form aforeſaid.

(2) Then it muſt appear in the next place, that he is in holy orders; of deacon at leaſt, if he is to be licenſed to be an aſſiſtant curate: and of prieſt, if he is to be licenſed to a perpetual curacy, for by the 13 & 14 *C.* 2. *c.* 4. *ſ.* 14. no perſon ſhall be admitted to *any benefice or eccleſiaſtical promotion* before he ſhall be ordained prieſt; and it is the more neceſſary in this caſe, becauſe he is the ſole incumbent in the pariſh, and by the ſame ſtatute until he ſhall be ordained prieſt he may not conſecrate the ſacrament of the Lord's ſupper. Which words *benefice or promotion* do alſo extend to all chapels of eaſe which have received the augmentation of queen's Anne's bounty; for by one of the ſtatutes of augmentation (as will appear afterwards) it is expreſsly declared, that they ſhall from thenceforth, that is, from the time of ſuch augmentation, be *perpetual cures and benefices.*

And this muſt appear to the ordinary, either of his own knowledge, or by lawful teſtimony.

Thus by a conſtitution of archbiſhop Reynold: *No perſon ſhall be admitted to officiate, until proof ſhall firſt be made of his lawful ordination.* Lindw. 47.

And

And by a conſtitution of archbiſhop Arundel: *No curate ſhall be admitted to officiate in any dioceſe, wherein he was not born or ordained, unleſs he bring with him his letters of orders.* Lind. 48.

(3) By the ſame conſtitution of archbiſhop Reynold: *No perſon ſhall be admitted to officiate, until proof ſhall firſt be made of his good life and learning.* Lind 47.

And by the aforeſaid conſtitution of archbibiſhop Arundel: *No curate ſhall be admitted to officiate in any dioceſe, wherein he was not born or ordained, unleſs he bring with him letters commendatory of his dioceſan, and alſo of other biſhops in whoſe dioceſes he hath continued for any conſiderable time; which letters ſhall be cautious and expreſs with regard to his morals and converſation, and whether he be defamed for any new opinions contrary to the catholick faith or good manners.* Lind. 48.

And by the Can. 48. *If the curates remove from one dioceſe to another, they ſhall not be by any means admitted to ſerve, without teſtimony in writing of the biſhop of the dioceſe, or ordinary of the place having epiſcopal juriſdiction, from whence they came, of their honeſty, ability, and conformity to the eccleſiaſtical laws of the church of England.*

All which is agreeable to the rule of the ancient canon law, which requireth, that no clergyman ſhall be received in another dioceſe, without letters commendatory from the biſhop of the dioceſe from whence he removed. *Gibſ.* 896.

(4) He muſt take the oaths of allegiance and ſupremacy: for by the 1 *Eliz. c.* 1. and 1 *W. c.* 8. every perſon who ſhall be promoted to any ſpiritual or eccleſiaſtical benefice, promotion, dignity, office, or miniſtry, ſhall before he take upon him to receive exerciſe ſupply or occupy the ſame, take the ſaid oaths before ſuch perſon as ſhall have authority to admit him.

(5) Such of the ſaid curates as are admitted to a benefice with cure (as all perpetual curacies are), ſhall ſubſcribe the articles of religion agreed upon in convocation in the year 1562, as rectors and vicars upon their inſtitution, by the 13 *Eliz. c.* 12. *ſ.* 3.

(6) By *Can.* 36. No perſon ſhall be ſuffered to preach, to catechiſe, or to be a lecturer, in any pariſh church, chapel, or other place; except he ſhall firſt ſubſcribe to the three articles ſpecified in the ſaid canon, concerning the king's ſupremacy, the book of common prayer, and the thirty nine articles of religion.

And by *Can.* 37. None who hath been licenſed to preach, read lecture, or catechiſe, and ſhall afterwards

come

come to reſide in another dioceſe, ſhall be permitted there to preach, read lecture, catechiſe, or adminiſter the ſacraments, or to execute any other eccleſiaſtical function, by what authority ſoever he be thereunto admitted; unleſs he firſt conſent and ſubſcribe to the three articles before-mentioned, in the preſence of the biſhop of the dioceſe wherein he is to preach, read lecture, catechiſe, or adminiſter the ſacraments as aforeſaid.

(7) Alſo every curate, lecturer, and every other perſon in holy orders, who ſhall be incumbent or have poſſeſſion of any eccleſiaſtical promotion, curate's place, or lecture, ſhall at or before his admiſſion ſubſcribe the declaration of conformity to the liturgy of the church of England as it is now by law eſtabliſhed, before the biſhop or ordinary of the dioceſe, or before his vicar general, chancellor, or commiſſary; and if it is a pariſh church in which he is to officiate, he ſhall receive a certificate from them of ſuch ſubſcription, to be read by him in the ſaid church afterwards. 13 & 14 *C.* 2. *c.* 4. 15 *C.* 2. *c.* 6. 1 *W. ſeſſ.* 1. *c.* 8.

By the eleventh article of archbiſhop Wake's injunctions (which are inſerted at large under the title Donation) it is required, that in licences to be granted to ſerve any cure, the ordinary ſhall cauſe to be inſerted, after the mention of the particular cure provided for by ſuch licence, a clauſe to this effect, *or in any other pariſh within the dioceſe, to which ſuch curate ſhall move with the conſent of the biſhop.*

Requiſites after licence obtained.

6. Alſo after licence obtained, there are ſeveral requiſites to be performed; which are as follow:

(1) It ſeemeth that they ſhall take the oath of canonical obedience, if thereunto required. Thus by a conſtitution of archbiſhop Winchelſea: *To curates received to officiate in any church, it ought to be injoined in virtue of their obedience, that they duly attend on ſundays and holidays, and other days when divine ſervice is to be performed; and thereupon we do injoin, that oath ſhall be adminiſtred and made at their admiſſion. And we do injoin that they ſhall alſo make oath, that they will not injure the rectors, or vicars, and governors of the churches or chapels wherein they ſhall officiate; but that they will humbly obey them, and give them due reverence.* Lindw. 70.

And thereupon we do injoin that oath ſhall be adminiſtred] But this, not of neceſſity (ſaith Lindwood); but only if the

the rector or vicar ſhall ſee cauſe, as if the curate ſhall ſhew tokens of ſtubbornneſs or diſobedience. *Id.*

Shall be adminiſtred] By ſuch rector, vicar, or other governor of the church. *Id.*

And made] By the curate, at his entrance or admiſſion. *Id.*

Governors of the churches] That is, ſuch as are neither rectors nor vicars; as deans, provoſts, maſters, wardens, and ſuch like. *Id.*

And give them due reverence] In the common inſtances of ſubordination and reſpect; and alſo in performing the uſual ſervices in the publick worſhip of God. *Lindw.* 71.

And by another conſtitution of the ſame archbiſhop: *Stipendiary prieſts, who ſhall celebrate the divine offices, ſhall not receive any oblations, portions, obventions, perquiſites, trentals, or any part thereof, eſpecially oblations for the bodies of the dead when brought to the church to be buried, without licence of the rectors or vicars of the churches where they ſhall officiate; nor in any manner carry them away to the prejudice of the rectors or vicars of the churches aforeſaid or of their ſubſtitutes; leſt they incur the ſentence of the greater excommunication in that behalf ordained. And the ſaid prieſts on the ſunday or holiday after their admiſſion, ſhall ſwear before the rectors, vicars, or their deputies, during the ſolemnity of the publick worſhip, (or otherwiſe before the ordinaries of the reſpective places,) looking upon the holy books there lying open, that they will in no wiſe do any damage or prejudice to the churches or chapels parochial wherein they perform divine ſervice, or to the rectors or vicars thereof, or to thoſe who repreſent them, or who have intereſt therein, as to the oblations, portions, obventions, perquiſites, trentals, or other rights whatſoever, or howſoever called; but that as much as in them lieth, they will ſecure and preſerve them from damage in all and ſingular the premiſſes. And the ſaid prieſts ſhall alſo ſpecially ſwear, that they will by no means raiſe, ſuſtain, or foment hatred, ſcandal, quarrels and contentions, between the rector and pariſhioners; but that as much as in them lieth they will promote and preſerve concord between them. And the ſaid prieſts ſhall not preſume to celebrate divine ſervice in ſuch churches or chapels until they ſhall have taken the oath in form aforeſaid; provided that the rectors or vicars or others aforeſaid ſhall require them ſo to be ſworn: and if they ſhall preſume to celebrate divine ſervice in the place of ſo forbidden to them contrary to this prohibition; they ſhall thereby incur irregularity,*

beſides the other penalties which the canons inflict upon the breakers of holy conſtitutions. And if the aforeſaid curates, being ſo ſworn as aforeſaid before a competent judge, ſhall be convicted by lawful proof of having broken their oath; they ſhall be intirely removed, and as perjured perſons ſhall be interdicted from the celebration of divine offices, until they ſhall be canonically diſpenſed withal. And the ſaid rectors or vicars, or their deputies, ought affably to receive the oaths aforeſaid; and keep in their churches a written copy of the premiſſes and other things ordained in that behalf. Lind. 110.

Stipendiary prieſts] This conſtitution ſeemeth to have been intended, not with reſpect to curates in general, but only ſuch of them as had ſalaries appointed by particular founders, for praying for the ſouls of them and their friends or poſterity: for ſuch were the ſtipendiary prieſts; who officiated in chantries founded and endowed for the purpoſes aforeſaid.

Perquiſites] Denarios pro requeſtis; or, as it is afterwards expreſſed in this conſtitution, *denarios perquiſitos*: that is, pence given for prayers for departed ſouls in the offices of the church. *Johnſ.* Winch.

On the ſunday or holiday after their admiſſion] By the rector or vicar or their deputies. *Lind.* 110.

Shall ſwear before the rectors, vicars, or their deputies] By which deputies are meant pariſh prieſts, or others whom in their abſence they have deputed to be their agents or proctors. *Lind.* 111.

Or who have intereſt therein] As their farmers, or perſons who have a right to a certain portion of the obventions. *Lind.* 111.

(2) By the 13 & 14 C. 2. c. 4. Every perſon who ſhall be put into any eccleſiaſtical promotion ſhall within two months (or in caſe of impediment to be allowed by the ordinary, then within one month after ſuch impediment removed,) in the church or chapel belonging to his ſaid promotion, read the morning and evening prayers, and declare his aſſent thereunto; on pain of deprivation ipſo facto.

(3) He muſt alſo within two months, or at the time when he reads the morning and evening prayers as aforeſaid (on the like pain of deprivation ipſo facto) read and aſſent to the thirty nine articles, if it be a place with cure; becauſe, altho' it is ſaid in the ſtatute of the 13 *Eliz.*

Eliz. c. 12. that this is to be done in two months after *induction*, and in the caſe of curates there is no induction, yet when the having cure of ſouls is the foundation of reading and aſſenting, wherever there is cure of ſouls the induction may be well interpreted of any actual poſſeſſion whatſoever. *Watſ. c.* 15. 13 *El. c.* 12. 23 *G.* 2. *c.* 28.

(4) Alſo by the aforeſaid ſtatute of the 13 & 14 *C.* 2. *c.* 4. Every curate, lecturer, and every other perſon in holy orders, who is incumbent or in poſſeſſion of any eccleſiaſtical promotion, curate's place, or lecture, ſhall, within three months after his ſubſcription as aforeſaid of the declaration of conformity, in the *pariſh church* where he ſhall officiate as aforeſaid, read the ordinary's certificate thereof and again make the ſame declaration; on pain of deprivation ipſo facto (except there be ſome lawful impediment, allowed and approved by the ordinary, 23 *G.* 2. *c.* 28.)

And what was ſaid concerning *induction* under the laſt head ſeemeth equally applicable to the words *pariſh church* in this place; namely, that in caſes where ſubſcription of the declaration before the ordinary was neceſſary, the ſame neceſſity ſhall continue for publickly reading the certificate of ſuch ſubſcription, and making again the ſame declaration, whether it be ſtrictly in the *pariſh church*, as is the caſe of perpetual curates, or in a chapel of eaſe augmented (which by the ſtatute hereafter following is made a perpetual cure).

(5) Finally, by the 1 *G. ſt.* 2. *c.* 13. and 9 *G.* 2. *c.* 26. All eccleſiaſtical perſons ſhall, within ſix months after their admiſſion to any eccleſiaſtical preferment benefice, office or place, take the oaths of allegiance, ſupremacy, and abjuration, in one of the courts at Weſtminſter, or at the general or quarter ſeſſions; on pain of being incapacitated to hold the ſame, and of being diſabled to ſue in any action, or to be guardian, or executor, or adminiſtrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at an election for members of parliament, and of forfeiting 500 l.

7. By *Can.* 48. No curate or miniſter ſhall ſerve more than one church or chapel in one day; except that chapel be a member of the pariſh church, or united thereunto; and unleſs the ſaid church or chapel where ſuch a miniſter ſhall ſerve in two places, be not able in the judgment of the biſhop (or ordinary of the place having epiſcopal juriſdiction) to maintain a curate.

None to ſerve more than one church or chapel in one day.

Salary.

8. By a conſtitution of archbiſhop Iſlip, *curates ſerving a cure ſhall be content with ſix marks a year:* But by a conſtitution of archbiſhop Sudbury, this is enlarged to *eight marks, or their board and four marks, by reaſon of the difference of the times.* Lind. 240.

Which conſtitutions, altho' become obſolete by the decreaſe in the value of money, yet do inform us in general of the proportion thereby intended, which is, that the curate ſhould receive double of what would reaſonably pay for his board. From whence alſo we may collect in ſome degree the value of money at the time of the latter conſtitution, which was in the year 1378, being the ſecond year of king Richard the ſecond; foraſmuch as the ordinary price of a man's board by the year at that time was eſtimated at four marks.

In theſe days, with reſpect to aſſiſtant curates, who are to be paid by the incumbents that employ them; in order to prevent diſputes, it is uſual for the ordinary to require that a certain ſum be appointed in the nomination, according to the form above expreſſed.

And by the tenth article of archbiſhop Wake's directions beforementioned, it is required, that in the inſtrument of licence granted to any curate, the ordinary do appoint him a ſufficient ſalary, according to the power veſted in him by the laws of the church, and the particular direction of the late act of parliament for the better maintenance of curates.

Which act is that of the 12 *An. ſt.* 2. *c.* 12. and is for the curates of non-reſidents only; by which it is enacted as followeth: *Whereas the abſence of beneficed miniſters ought to be ſupplied by curates that are ſufficient and licenſed preachers, and no curates or miniſters ought to ſerve in any place without the examination and admiſſion of the biſhop of the dioceſe, or ordinary of the place, having epiſcopal juriſdiction; but nevertheleſs, for want of ſufficient maintenance and encouragement of ſuch curates, the cures have been in ſeveral places meanly ſupplied: it is enacted, that if any rector or vicar having cure of ſouls, ſhall nominate and preſent any curate to the biſhop or ordinary, to be licenſed or admitted to ſerve the cure of ſuch rector or vicar in his abſence; the ſaid biſhop or ordinary, having regard to the greatneſs of the cure and the value of the eccleſiaſtical benefices of ſuch rector or vicar, ſhall, on or before the granting ſuch licence, appoint by writing under his hand and ſeal, a ſufficient certain ſtipend or allowance, not exceeding* 50 *l a year, nor leſs than* 20 *l. a year, to be paid or anſwered at ſuch times as he ſhall think fit, by ſuch rector or vicar to ſuch curate for his*

his ſupport and maintenance. And in caſe any difference ſhall ariſe between any rector or vicar and his curate touching ſuch ſtipend or allowance, or the payment thereof; the biſhop or ordinary, on complaint to him made, ſhall ſummarily hear and determine the ſame: and in caſe of neglect or refuſal to pay ſuch ſtipend or allowance, may ſequeſter the profits of ſuch benefice, for or until payment thereof.

And in the faculty of diſpenſation of plurality, order is taken, that there ſhall be a reſiding curate, if the revenues of the church will conveniently bear it, and that ſuch curate ſhall have a competent and ſufficient ſalary, to be aſſigned by the proper ordinary at his diſcretion; or if he ſhall not take due care therein, then by the archbiſhop granting the diſpenſation, or his ſucceſſors.

And by the ſtatute of the 13 *Eliz. c.* 20. He who is curate to a pluraliſt, in that benefice on which the incumbent doth not moſt ordinarily reſide, hath the privilege of leaſing that benefice reſerved to him only; but he forfeiteth his leaſe, if he be abſent above forty days in one year.

As to the ſalaries of *perpetual* curates; whilſt the impropriations were in the hands of monks and other eccleſiaſtical perſons and bodies; the biſhop had power to aſcertain, increaſe, or leſſen the ſalaries of theſe as well as other curates, as he had alſo of augmenting vicarages endowed, if he ſaw occaſion: but ſince theſe impropriations are fallen into the hands of laymen, this hath not been allowed. So that now, in effect, (Mr. Johnſon ſays) the impropriators have theſe cures ſerved by whom, and at what rates they pleaſe. *Johnſ.* 89.

If the biſhop aſſign the ſalary, the curate's moſt effectual remedy for his pay, is to apply to the eccleſiaſtical court; for there, in default of payment, a ſequeſtration may be ſerved on the benefice: but if the curate have no licence, he cannot ſue in that court. *Johnſ.* 87.

If he ſue for his ſalary at the common law, he muſt prove an agreement betwixt himſelf, and the incumbent: But in ſuch caſe he may be called upon to prove, that he made the ſubſcriptions and declarations before mentioned, and otherwiſe qualified himſelf as the law directs. *Johnſ.* 87.

H. 1672. *Pierſon* and *Atkinſon*. The plaintiff, having a diſpenſation for two benefices, agreed with the defendant to ſerve one of them for 22 l a year. The defendant made his application to the biſhop to inlarge his ſtipend. The biſhop ordered, that the plaintiff ſhould al-

low him 32 l a year. The plaintiff paid him his 22 l according to agreement. And the curate libelled in the ſpiritual court, for the addition made by the biſhop. Upon which the plaintiff moved for a prohibition. The curate's counſel inſiſted, that this being an allowance by order of the biſhop, was properly ſuable in the eccleſiaſtical court. But the court granted a prohibition. For there being a contract between the parties, the biſhop had no power to make any order: But if the curate had ſerved the cure, and made no agreement, then the biſhop ought to have allowed him what he thought reaſonable, in the nature of a quantum meruit. *Freem.* 70.

Reſidence. 9. By the laſt article of archbiſhop Wake's directions before mentioned it is ordered, that the biſhop do take care as much as is poſſible, that whoſoever is admitted to ſerve any cure, do reſide in the pariſh where he is to ſerve; eſpecially in livings that are able to ſupport a reſident curate: and where that cannot be done, that they do at leaſt reſide ſo near to the place, that they may conveniently perform all their duties both in the church and pariſh.

And if the curate do not comply, the ordinary may withdraw his licence.

Now removed. 10. By a conſtitution of Edmund, archbiſhop of Canterbury: *We admoniſh the rectors of churches, that they do not endeavour to remove their annual curates, without reaſonable cauſe; eſpecially if they be of honeſt converſation, and have laudable teſtimony thereof.* Lind. 310.

Without reaſonable cauſe] Of which it ſeemeth that the ordinary ſhall be judge, who granted the licence; who may, at his diſcretion, diſplace ſuch curate, by withdrawing his licence, without formal proceſs of law. *Johnſ.* 88.

And as to perpetual curates; theſe alſo are licenſed by the biſhop as well as others; and Mr Johnſon ſays, he is aſſured, that their licences do run in the ſame form, at leaſt in many places, with the licences of other curates, and particularly, to continue only during the biſhop's pleaſure: and yet for diſtinction ſake, they are called perpetual curates; and indeed, whatever power the biſhops have in removing ſuch curates at pleaſure, yet it is ſeldom or never made uſe of. *Johnſ.* 89.

In the caſe of the curate of *Orpington*, *H.* 27 & 28 *C.* 2. who was appointed by the impropriator, and licenſed by the archbiſhop as ordinary, the court held, that being but a curate at will, and not inſtituted and inducted,

ducted, he was not an *incumbent* within the ſtatute of the 13 *El. c.* 10. nor liable to dilapidations. 3 *Keb.* 614.

So in the caſe of *Wood* and *Birch*, *H.* 10 *W.* Wood pretending to be curate in a chapel of eaſe in the pariſh of Preſton, ſued the vicar of the pariſh in the ſpiritual court, for the arrears of a penſion claimed by preſcription; and a prohibition was granted, unleſs cauſe ſhewed: for that the curate was removable at the will of the parſon, and ſo cannot preſcribe, but his remedy muſt be by *quantum meruit*. 2 Salk. 506.

And in the caſe of *Price* againſt *Pratt* and others, *M.* 1729. The plaintiff Price preferred his bill as perpetual curate of Bovington, being a chapel annexed to the church of Hemel Hemſted in the county of Hertford, againſt the defendants inhabitants and occupiers of lands within the ſaid chapelry. He made his title under a nomination to his curacy in the year 1716 by the then vicar of Hemel Hemſted, who alſo gave him by the ſame inſtrument the ſmall tithes in Bovington, with power to ſue for them in his (the vicar's) name. He alſo ſet forth a licence to preach from the then biſhop of Lincoln: And alſo that upon the ſaid vicar's death, his ſucceſſor the preſent vicar in the year 1722 granted him a new nomination to this curacy expreſsly for life, with like power to ſue for the ſmall tithes in both their names: But though he took a ſecond nomination, yet that by the firſt, and the biſhop's licence, he was ſufficiently intitled to the tithes; becauſe by ſuch nomination he became perpetual curate. But by the court: The bill muſt be diſmiſſed, for no title appears in the plaintiff; for though a curate is appointed by a vicar, either generally, or expreſsly for life, yet ſuch appointment is in its own nature revocable at the common law, even without any cauſe aſſigned, and by the eccleſiaſtical law upon cauſe ſhewn; ſo that the plaintiff had not ſuch a permanent intereſt, as to claim any tithes. *Bunb.* 273.

But notwithſtanding theſe adjudications, the principal point, whether theſe curates are revocable at pleaſure, ſeemeth not to have been fully conſidered upon ſolemn argument: but that they are ſo, ſeemeth to have been taken for granted; and that, upon a principle which perhaps will not be admitted, namely, that at the common law they are revocable without any cauſe aſſigned; for after they are nominated by the impropriator, and licenced by the ordinary, it ſeemeth that they are not to be removed but for ſuch cauſe as would deprive a rector or vicar.

With regard to ſuch of the perpetual curacies, as have been augmented by the governors of queen Anne's bounty, there is no doubt, but by the act of parliament here next following, the curates thereof are not removable at pleaſure; and therefore the form of the licence in that caſe at leaſt ought to be altered.

And as to the reſt it ſhould ſeem, that ſuch curacies are *beneficia eccleſiaſtica*. Lord Coke ſays, *Beneficium* is a large word, and is taken for any eccleſiaſtical promotion or ſpiritual living whatever. (2. *Inſt.* 29.) And in the caſe of *Moſeley* and *Warburton*, *M.* 9 *W.* it was ſaid by the court, that a *prebend* is an eccleſiaſtical *benefice*. (1 Salk. 321.) And Dr. Gibſon, obſerving upon the aforeſaid caſe of *Wood* and *Birch*, where it was held that the curate was removable at the will of the parſon, and conſequently could not preſcribe; ſays, this is true of an aſſiſtant curate to a reſident rector or vicar, but not of a curate properly ſpeaking, who has the *curam animarum* committed to him *pro tempore* by the biſhop, in the abſence of the incumbent. (*Gibſ.* 896.) And in the caſe of perpetual curacies in particular, the court of king's bench will grant a mandamus to the biſhop to admit and licenſe a curate; which implies a right in the perſon nominated to ſuch office or promotion: as was done by the court in the caſe of the dean and chapter of *Carliſle*, with reſpect to the curacy of *St Cuthbert's*; which caſe is ſet forth at large, under the title *Deans and chapters*.

Chapels of eaſe and perpetual curacies augmented.

11. By the 1 G. ſt. 2. c. 10. *Whereas the late queen* Anne's *bounty to the poor clergy was intended to extend, not only to parſons and vicars who came in by preſentation or collation, inſtitution, and induction; but likewiſe to ſuch miniſters who come in by donation; or are only ſtipendiary preachers or curates; moſt of which are not corporations, nor have a legal ſucceſſion, and therefore are incapable of taking a grant or conveyance of ſuch perpetual augmentation as is intended by the ſaid bounty; and in many places it would be in the power of the donor, impropriator, parſon, or vicar, to withdraw the allowance which was before paid to the curate or miniſter ſerving the cure; or in caſe of a chapelry, the incumbent of the mother church might refuſe to employ a curate and officiate there himſelf, and take the benefit of the augmentation, whereby the maintenance of the curate would be ſunk inſtead of being augmented; it is enacted, that all ſuch churches curacies or chapels which ſhall be augmented by the governors of the ſaid bounty ſhall be from thenceforth perpetual cures and benefices, and the miniſters duly nominated and licenſed thereunto ſhall be in law bodies politick and corporate and have perpetual ſucceſſion, and be*

be capable to take in perpetuity; and the impropriators or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches whereunto ſuch augmented curacy or chapel doth appertain, ſhall be excluded from receiving any profit by ſuch augmentation, and ſhall pay to the miniſters officiating ſuch annual and other penſions and ſalaries, which by ancient cuſtom or otherwiſe, of right, and not of bounty, they were before obliged to pay.

And for continuing the ſucceſſion in ſuch augmented cures, hereby made perpetual cures and benefices, and that the ſame may be duly and conſtantly ſerved; if they ſhall be ſuffered to remain void for ſix months, they ſhall lapſe in like manner as preſentative livings.

And by this ſtatute the augmented chapels being expreſsly made perpetual cures and benefices; if the incumbents of ſuch chapels have not before ſuch augmentation been qualified or qualified themſelves, according to the requiſites above ſpecified for perpetual curates, it may be adviſable, upon ſuch augmentation made, that they be nominated de novo, and then perform the ſeveral particulars within the times required: Which nomination may be in this or the like form;

"To the right reverend father in God C. lord biſhop "of ——— A. B. of ——— gentleman, ſendeth greet- "ing. Whereas the curacy of the chapel of —— in "in the county of ——— and in your lordſhip's dioceſe "of ——— is augmented, or ſhortly intended to be "augmented, by the governors of the bounty of the late "queen Anne, for the augmentation of the maintenance "of the poor clergy; by reaſon whereof it is requiſite, "that a curate ſhould be duly nominated and licenſed "to ſerve the ſaid cure, purſuant to the ſtatute in that "caſe made: I the ſaid A. B. do hereby nominate C. D. "clerk, (the perſon employed by me in ſerving the ſaid "cure,) to be curate of the ſaid chapel of ——; and "and do humbly pray your lordſhip to grant him your "licence to ſerve the ſaid cure, and to perform all di- "vine offices therein accordingly. In witneſs whereof, "I have hereunto ſet my hand and ſeal, the —— day "of —— in the year of our Lord ———". *Elton* 460.

Dalmatica.

DALMATICA, was one of the ſacerdotal veſtments; ſo called from its having been at firſt woven in *Dalmatia*. Lind. 252.

Darrein preſentment.

AN aſſiſe of *darrein preſentment*, or laſt preſentation, lies when a man, or his anceſtors under whom he claims, have preſented a clerk to a benefice, who is inſtituted; and afterwards upon the next avoidance a ſtranger preſents a clerk, and thereby diſturbs him that is the real patron. In which caſe, the patron ſhall have this writ, directed to the ſheriff to ſummon an aſſiſe or jury, to inquire who was the laſt patron that preſented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: And, according as the aſſiſe determines that queſtion, a writ ſhall iſſue to the biſhop, to inſtitute the clerk of that patron, in whoſe favour the determination is made, and alſo to give damages. 3 *Blackſt.* B. 3. Ch. 16.

But this courſe of proceeding is now become obſolete, and ſuperſeded by the writ of *quare impedit*: And the learning concerning them both is comprehended under the title Advowſon.

Deacon. See Ordination.

Deans and chapters.

FOR the *leaſes* of deans and chapters, and of every member of the chapter, in their ſole or aggregate capacity; ſee title Leaſes.

I. *Of deans.*
II. *Of chapters.*
III. *Of the ſeveral members of the chapter in their ſole capacity; as canons and prebendaries.*
IV. *Of dean and chapter, as one body aggregate.*
V. *Of deans of peculiars.*
VI. *Of rural deans.*

I. *Of deans.*

1. There are four ſorts of deans and deanries; of which and of whom the law of this realm taketh knowledge. The *firſt* is a dean *who hath a chapter* conſiſting of prebendaries or canons, ſubordinate to the biſhop, as a council aſſiſtant to him in matters ſpiritual relating to religion, and in matters temporal relating to the temporalties of his biſhoprick: for ſeeing that it was impoſſible but that ſects ſchiſms and hereſies ſhould ariſe in the church, it was in chriſtian policy thought fit and neceſſary, that the burden of the whole church, and the government thereof ſhould not lie upon the perſon of the biſhop only; and therefore it was thought neceſſary that every biſhop within his dioceſe ſhould be aſſiſted with a council, to conſult with him in matters of difficulty concerning religion, and deciding of the controverſies thereof; and alſo for the better ordering and diſpoſing of the things of the church, and to give their aſſent to ſuch eſtates as the biſhop ſhould make of the temporalties of his biſhoprick; for it was not convenient that the whole power and charge thereof ſhould remain in any one ſole perſon only. The *ſecond* is a dean *who hath no chapter*, and yet he is *preſentative*, and *hath cure of ſouls*; he hath a peculiar, and a court wherein he holdeth eccleſiaſtical juriſdiction; but he is not ſubject to the viſitation of the biſhop or ordinary; ſuch is the dean of *Battel* in Suſſex, which deanry was founded by king William the conqueror in memory of his conqueſt; and the dean there hath cure of ſouls, and hath ſpiritual juriſdiction within the liberty of Battel. The *third* dean is eccleſiaſtical alſo, but the deanry is *not preſentative* but *donative*, nor *hath any cure of ſouls*, but he is only by covenant or condition; and he alſo hath a court and a peculiar, in which he holdeth plea and juriſdiction of all ſuch matters and things as are eccleſiaſtical, and

Several kinds of deans.

which do ariſe within his peculiar, which oftentimes extends over many pariſhes: ſuch a dean, conſtituted by commiſſion from the metropolitan of the province, is the dean of the *Arches*, and the dean of *Bocking* in Eſſex; and of ſuch deanries there are many more. The *fourth* ſort of dean, is he who is uſually called the *rural* dean; having no abſolute judicial power in himſelf, but he is to order the eccleſiaſtical affairs within his deanry and precinct, by the direction of the biſhop, or of the archdeacon; and is a ſubſtitute of the biſhop in many caſes. *Hughes*, *c.* 2.

Cathedral dean. 2. The dean which hath a chapter, ſuch as the dean of Canterbury, St Paul's, and the like, is ſet forth to be an eccleſiaſtical governor ſecular over the prebendaries, and canons in the cathedral church. *Hughes*, *c.* 2.

Original inſtitution of deanries. 3. The inſtitution of deanries, as alſo of the other eccleſiaſtical offices of dignity and power, ſeems to bear a reſemblance and relation to the methods and forms of civil government, which obtained in thoſe early ages of the church throughout the weſtern empire. Accordingly, as in this kingdom, for the better preſervation of the peace, and more eaſy adminiſtration of juſtice, every hundred conſiſted of ten diſtricts called tithings, every tithing of ten friborghs or free pledges, and every free (or frank) pledge of ten families; and in every ſuch tithing there was a juſtice or civil dean appointed, for the ſubordinate adminiſtration of juſtice: ſo in conformity to this ſecular method, the ſpiritual governors the biſhops divided each dioceſe into deanries (decennaries, or tithings), each of which was the diſtrict of ten pariſhes or churches; and over every ſuch diſtrict they appointed a dean, which in cities or large towns was called the dean of the city or town, and in the county had the appellation of rural dean. *Ken. Paroc. Ant.* 633, 634.

The like office of deans began very early in the greater *monaſteries*, eſpecially in thoſe of the *Benedictine* order; where the whole convent was divided into decuries, in which the dean or tenth perſon did preſide over the other nine; took an account of all their manual operations; ſuffered none to leave their ſtation, or to omit their particular duty without expreſs leave; viſited their cells or dormitories every night; attended them at table to keep order and decorum at their meals; guided their conſcience; directed their ſtudies; and obſerved their converſation: and for this purpoſe held frequent chapters, wherein they took publick cognizance of all irregular practices; and impoſed ſome leſſer penances; but ſubmitted all their pro-

proceedings to the abbat or prelate, to whom they were accountable for their power, and for the abuſe of it. And in the larger houſes, where the numbers amounted to ſeveral decuries, the ſenior dean had a ſpecial pre-eminence, and had ſometimes the care of all the other devolved upon him alone. *Ken. Par. Antiq.* 634, 635.

And the office of dean in ſeveral *colleges* in the univerſities, ſeemeth to have ariſen from the ſame foundation.

And the inſtitution of *cathedral* deans ſeemeth evidently to be owing to this practice. When in epiſcopal ſees, the biſhops diſperſed the body of their clergy by affixing them to parochial cures; they reſerved a college of prieſts or ſecular canons for their counſel and aſſiſtance, and for the conſtant celebration of divine offices in the mother or cathedral church, where the tenth perſon had an inſpecting and preſiding power, till the ſenior or principal dean ſwallowed up the office of all the inferior, and in ſubordination to the biſhop was head or governor of the whole ſociety. His office was, to have authority over all the canons, preſbyters, and vicars; and to give poſſeſſion to them when inſtituted by the biſhop; to inſpect their diſcharge of the cure of ſouls; to convene chapters, and preſide in them, there to hear and determine proper cauſes; and to viſit all churches once in three years within the limits of their juriſdiction. The men of this dignity were called *archipreſbyters*, becauſe they had a ſuperintendence or primacy over all their college of canonical prieſts; and were likewiſe called *decani chriſtianitatis*, becauſe their chapters were courts of chriſtianity, or eccleſiaſtical judicatures, wherein they cenſured their offending brethren, and maintained the diſcipline of the church within their own precincts. *Ken. Par. Ant.* 634, 635.

Dean how appointed.

4. Deans of the old foundation come in by election of the chapter upon the king's conge d'eſlire, with the royal aſſent, and confirmation of the biſhop, much in the ſame way as the biſhops themſelves do: but (generally) the deans of the new foundation come in by the king's letters patents; upon which, they are inſtituted by their reſpective biſhops; and then inſtalled upon a mandate, purſuant to ſuch inſtitution, and directed to the chapters. *Gibſ.* 173.

Which diſtinction between the old and new foundations came in after the diſſolution of monaſteries, when king Henry the eighth having ejected the monks out of the cathedrals, placed ſecular canons inſtead of them: thoſe whom he thus regulated, are called the deans and chapters

chapters of the new foundation; ſuch are Canterbury, Wincheſter, Worceſter, Ely, Carliſle, Durham, Rocheſter, and Norwich. And beſides theſe, he erected five cathedrals de novo, and endowed them out of the eſtates of diſſolved monaſteries, viz. Cheſter, Peterborough, Oxford, Glouceſter, and Briſtol: which were by him made epiſcopal ſees, as alſo Weſtminſter, but the biſhoprick of this laſt place was altered again, and the monaſtery turned into a collegiate church by queen Elizabeth. *Johnſ.* 54.

Deanry held in commendam with a biſhoprick.

5. Dr Godolphin ſays, where a dean is made a biſhop, with a diſpenſation from the king to hold the deanry notwithſtanding the biſhoprick, ſuch diſpenſation continues him dean as before, by force and virtue of his former title, to all intents and purpoſes; ſo as that he may confirm, or make leaſes, or do any other act as dean, as if he had not been made a biſhop at all. *God.* 112.

Deanry a fine-cure.

6. Deanries are fine-cures, that is, they have not the cure of ſouls. *God.* 200. *Watſ. c.* 2.

Therefore perſons admitted to deanries need not by the 13 *El. c.* 12. to ſubſcribe the thirty-nine articles before the ordinary; nor to read and declare their aſſent to the ſame, as perſons admitted to benefices with cure are required to do by the ſaid ſtatute. *Gib.* 808. 817.

But otherwiſe, the ſame oaths, ſubſcriptions, and declarations are required to be taken and made by them, as by other perſons qualifying for eccleſiaſtical offices.

Whether it is a lay office.

7. Dr *Godolphin* ſaith, the dean may be a layman; as was the dean of Durham, by ſpecial licence and diſpenſation from the king; but that is rare and a ſpecial caſe, and is not common and general, and therefore not to be brought as an example. *God.* 367.

And Dr *Watſon* ſays, altho' in former time a layman might have taken a title to a deanry; yet now by the ſtatute of the 13 & 14 *C.* 2. *c.* 4. a perſon muſt have prieſt's orders to qualify him for the ſame. *Watſ. c.* 14.

But Dr *Gibſon* ſaith, a deanry is a promotion merely ſpiritual; and might never be poſſeſſed, regularly, by any perſon but who was of the order of prieſthood. This is plain from the ancient name, archipreſbyter, or head preſbyter of the college of preſbyters, and from the ſeveral rules of the canon law, expreſsly requiring, that none be conſtituted archipreſbyters or deans, but preſbyters only: —*no biſhop in his church ſhall preſume to ordain an archipreſbyter or dean, unleſs they be preſbyters.* Which tho' the gloſs qualifies, by ſaying, *it is ſufficient if he be ſuch that in a ſhort time he may be promoted to that order*, as being already

of

of inferior orders; yet it was never underſtood, that deanries might be held, as temporal promotions, by mere laymen; which is a notion entertained by ſome, againſt all law reaſon and antiquity, upon an irregular inſtance or two ſince the reformation; and urged, that ſo it would ſtill have been, had not the laſt act of uniformity made the order of prieſthood a neceſſary qualification of being admitted to any eccleſiaſtical promotion or dignity. That it was ever made a queſtion, whether a deanry was a mere temporal or ſpiritual promotion, could be owing to nothing but the inſtances juſt now referred to, and the not knowing or not conſidering the original nature and deſign of the office; in conformity to which, in the caſe of *Goodman* and *Turner* in the tenth year of queen Elizabeth (*Dyer* 273. *b.*) where the point in iſſue was the validity of a leaſe, the juſtices unanimouſly agreed, that it was a *ſpiritual* promotion, and accordingly the legality or illegality of the deprivation of Goodman had been tried (without any exception of either party ſo far as appears) in the ſpiritual courts; viz. before the biſhop, archbiſhop, and delegates ſucceſſively. *Gibſ.* 173.

8. The title of dean is a title of dignity; which belongs to this ſtation as having *eccleſiaſtical adminiſtration with juriſdiction or power annexed*, as the civilians defined a dignity in the caſe of *Broughton* and *Gouſley*, *E.* 43 *El.* and more eſpecially as coming within all the three qualifications of a dignity as laid down by *Lindwood*, — *a dignity*, he ſays, *is known*, 1. *From the adminiſtration of eccleſiaſtical affairs with juriſdiction.* 2. *From the name and preference which he hath in the choir and chapter.* 3. *From the cuſtom of the place.* By which rule, no ſtations in the cathedral church, under the degree of a biſhop, or dignities ſtrictly ſpeaking, beſides thoſe of the dean and archdeacon; unleſs where juriſdiction is annexed to any of the reſt, as in ſome caſes it is to prebends and others. *Gibſ.* 173. Deanry a dignity.

This title of dignity, as annexed to deanries, may perhaps be one reaſon of what the law books affirm, that if lands be given by licence to a dean and chapter of ſuch a place, or a leaſe be made by them, or a writ be brought againſt the dean; ſuch grant leaſe and writ ſhall be good, tho' the dean is mentioned only by his title of dignity, and not by his proper name. *Gibſ.* 173.

9. If a dean take an obligation to him and his ſucceſſors, it goes to his executors; which holds true alſo as to a biſhop, parſon, vicar, and the like. *God.* 55. Bond given to a dean and his ſucceſſors.

10. The

Poſſeſſions of deanries.

10. The biſhop, dean, and chapter (that is prebendaries or canons), and all other perſons belonging unto, or having any thing to do in any cathedral churches, at the firſt, and in ancient times, held their poſſeſſions together in groſs; but afterwards for the avoiding of confuſion and for better order, and for ſome other ſpecial cauſes known to the king and ſtate of this realm, the ſame were afterwards by them ſevered and divided; and part of the lands and poſſeſſions belonging to the ſame church were aſſigned to the biſhop and his ſucceſſors to hold by themſelves, and other parts thereof were aſſigned unto the dean and chapter to hold by themſelves, of which lands they have ever ſince continued ſeverally ſeized in their ſeveral capacities. *Hughes, c.* 2.

Concerning the poſſeſſions of deans and others of the new foundation, it is enacted by the 34 & 35 *H.* 8. *c.* 21. that *the king's grant to the new foundations ſhould be good; notwithſtanding any miſrecital of name, place, or date.*

And by the 35 *El. c.* 3. *Foraſmuch as divers doubts have ariſen touching the ſurrenders of religious houſes, and the validity of the erections of deans and chapters made by king* Hen. 8. *notwithſtanding the aforeſaid ſtatute; it is enacted, that all eſtates of religious houſes ſurrendred to king* Hen. 8. *ſhall be adjudged to have been lawfully in the poſſeſſion of the ſaid king, notwithſtanding any defect in the ſurrender; and all letters patents made by the ſaid king, for the erection foundation incorporation or endowment of any dean and chapter, ſhall be reputed taken and adjudged, to have been good perfect and effectual in the law, for all things therein contained, according to the true intent and meaning of the ſame, any thing matter or cauſe to the contrary thereof in any wiſe notwithſtanding.*

Many years before this, in the eighth year of the queen, we find a bill in the houſe of lords (for the confirmation of late erected deanries and prebends) read a ſecond time and committed; but it proceeded no further. Whereupon, great diſturbance having been given to the deans and chapters of the new foundation, under pretence, that the poſſeſſions thereof were paſſed by letters patents of concealment; they did this year unanimouſly apply themſelves to the lord treaſurer Burleigh, for a confirmation of them by parliament: as appears from a letter ſent by them from the convocation houſe, bearing date Mar. 16. 1592, in which they beſeech him, that by his honourable mediation and countenance, a remedy may at this parliament (by confirmation of the ſaid grants) be obtained.

This application produced the preſent act, in favour of the new foundations; notwithſtanding which, five years after, divers perſons, labouring a diſſolution of the cathedral church of Norwich, under the old pretence of concealments, brought this matter to a ſolemn hearing; and it was declared, that if any imperfection were in the tranſlation made by king *Hen.* 8. from prior and convent to dean and chapter, this act had made it clear and without queſtion. To which lord Coke ſubjoins, that all defects are remedied by this moſt excellent act of parliament, the fatal plea to all concealment as to thoſe poſſeſſions; adding, that though the caſe under conſideration did only concern the church of Norwich, it would ſerve as well for many other cathedral churches. *Gibſ.* 184. 3 *Cro.* 76.

11. The dean ought to viſit his chapter. *God.* 55. Dean to viſit the chapter.

And of ancient time, the canons made their confeſſions to the dean; and *Lindwood* ſays, that the canons are under the dean as to the cure of ſouls. *God.* 55.

12. The dean may make a deputy or ſubdean, to exerciſe the ſpiritual juriſdiction; yet ſuch deputy cannot charge the poſſeſſions of the church, ſo as to confirm leaſes, unleſs it be otherwiſe provided by the local ſtatutes. *God.* 55. *Watſ. c.* 44. Dean may make a deputy.

13. Every dean ſhall be reſident in his cathedral church fourſcore and ten days, conjunctim or diviſim, in every year at the leaſt, and then ſhall continue there in preaching the word of God, and keeping good hoſpitality, except he ſhall be otherwiſe let with weighty and urgent cauſes to be approved by the biſhop, or in any other lawful ſort diſpenſed with. *Can.* 42. Reſidence of the dean.

14. Deans in cathedral and collegiate churches, ſhall not only preach there in their own perſons ſo often as they are bound by law ſtatute ordinance or cuſtom, but ſhall likewiſe preach in other churches of the ſame dioceſe where they are reſident, and eſpecially in thoſe places whence they or their church receive any yearly rents or profits. And in caſe they themſelves be ſick, or lawfully abſent, they ſhall ſubſtitute ſuch licenſed preachers to ſupply their turns, as by the biſhop ſhall be thought meet to preach in cathedral churches. And if any otherwiſe neglect or omit to ſuply his courſe as is aforeſaid, the offender ſhall be puniſhed by the biſhop, or by him or them to whom the juriſdiction of that church appertaineth, according to the quality of the offence. *Can.* 43. Dean's eccleſiaſtical duty.

15. By

Profits of a deanry during the vacation.

15. By the 28 *H.* 8. *c.* 11. The profits of a deanry during the vacation ſhall go to the ſucceſſor, towards the payment of his firſt fruits.

II. Of chapters.

Chapter, what.

1. A chapter of a cathedral church conſiſteth of perſons eccleſiaſtical, canons and prebendaries, whereof the dean is chief, all ſubordinate to the biſhop to whom they are as aſſiſtants in matters relating to the church, for the better ordering and diſpoſing the things thereof, and for confirmation of ſuch leaſes of the temporalties and offices relating to the biſhoprick, as the biſhop from time to time ſhall happen to make. *God.* 58.

And they are termed by the canoniſts *capitulum*, being a kind of *head*, inſtituted not only to aſſiſt the biſhop in manner aforeſaid, but alſo anciently to rule and govern the dioceſe in the time of vacation. *God.* 56.

Of theſe chapters, ſome are ancient, ſome new: the new are thoſe which are founded or tranſlated by king *Hen.* 8. in the places of abbats and covents, or priors and covents, which were chapters whilſt they ſtood, and theſe are new chapters to old biſhopricks; or they are thoſe which are annexed unto the new biſhopricks founded by king *Hen.* 8. and are therefore new chapters to new biſhopricks. 1 *Inſt.* 95.

The chapter in the collegiate church is more properly called a *college*; as at Weſtminſter and Windſor, where there is no epiſcopal ſee. *Wood, b.* 1. *c.* 3.

Chapter without a dean.

2. There may be a chapter without any dean; as the chapter of the collegiate church of Southwel: and grants by or to them are as effectual as other grants by dean and chapter. *Watſ. c.* 38.

In the cathedral churches of St David's and Landaff, there never hath been any dean, but the biſhop in either is head of the chapter; and at the former the chantor, at the latter the archdeacon preſides, in the abſence of the biſhop or vacancy of the ſee. *Johnſ.* 60.

In ſome places two chapters.

3. One biſhop may poſſibly have two chapters, and that by union or conſolidation: and it ſeemeth that if a biſhop hath two chapters, both muſt confirm his leaſes. *God.* 58.

Capacity to take or purchaſe.

4. A chapter of it ſelf, is not capable to take by purchaſe, or gift, without the dean, who is the head of it. This was agreed in *Eyre*'s caſe (*Mo.* 51.); but whereas in the leaſe there mentioned (made by the archbiſhop of York)

York) of a field in Batterſea, one article was, that during the vacancy of the archbiſhoprick, the rent ſhould be paid to the chapter of York, *as in their own proper right*; upon a queſtion raiſed, whether a chapter could receive the rent, it was agreed that they could; becauſe they are perſons of which the law takes notice, and to whom therefore ſuch payment might be made; and tho' it ſhould appear afterwards that they could not receive it *in their own proper right*, that defect would not hinder the payment. *Gibſ.* 174.

III. *Of the ſeveral members of the chapter in their ſole capacity; as canons, and prebendaries.*

Difference between prebend and prebendary.

1. The books do generally confound the two words *prebend* and *prebendary*: whereas the former ſignifieth the office, or the ſtipend annexed to that office; and the latter ſignifieth the officer, or perſon who executeth the office and enjoyeth ſuch ſtipend.

Prebendary, whence ſo called.

2. Lord Coke ſaith, a prebendary was ſo called *a præbendo*, from the aſſiſtance he affordeth to the biſhop; whereas he had his name, on the contrary, from the aſſiſtance which the church affordeth him, in meat drink and other neceſſaries. *Gibſ.* 172.

Prebend, what.

3. A prebend, is an endowment in land, or penſion in money, given to a cathedral or conventual church *in præbendam*; that is, for a maintenance of a ſecular prieſt or regular canon; who was a prebendary, as ſupported by the ſaid prebend. *Ken. Par. Ant. Gloſſ.*

Canonry.

4. A *canonry* alſo is a name of office; and a canon is the officer in like manner as a prebendary; and a prebend is the maintenance or ſtipend both of the one and of the other. *Gibſ.* 172.

Two kinds of prebendaries.

5. Prebendaries are diſtinguiſhed into thoſe which are called ſimple and dignitary. A ſimple prebendary is ſuch who hath no cure, and who hath no more but his revenue for his ſupport; and a dignitary prebendary hath always a juriſdiction annexed, and for this reaſon he is called a dignitary, and his juriſdiction is gained by preſcription. *Country parſ. comp.* 136.

Prebendary, how appointed.

6. Of common right the biſhop is patron of all the prebends, becauſe the poſſeſſions were derived from him. *God.* 52.

And in ſuch caſe he doth prefer to them by collation, which is the ſame thing with inſtitution, ſaving that no preſent is made; but if a prebend be in the gift of a lay-

a layman, the patron doth preſent to the biſhop, who doth inſtitute in like manner as to another benefice; and then the dean and chapter do induct them, that is, after ſome ceremonies, place them in a ſtall in the cathedral church, to which they belong; whereby they are ſaid to have a place in the choir. *Watſ. c.* 15.

In the caſe of *Clarke* againſt the biſhop of *Sarum*, *M.* 11 *G.* 2. A mandamus was granted to admit the plaintiff to a canonry or prebend of Sarum, and to inſtitute, induct and inveſt him therein; tho' it was ſtrongly oppoſed on the rule to ſhew cauſe, as turning the common law remedy by quare impedit into another chanel. But the court ſaid, that tho' formerly mandamus's were not ſo frequent, eſpecially where the party had another remedy; yet they being found to be more expeditious and leſs expenſive, had been given into of late. And as to there being another remedy; it might be ſaid equally in caſes where an aſſiſe or an action upon the caſe would try the right, and yet that was never thought a ground to deny a mandamus: ſo that the writ was ordered, but never iſſued, the parties agreeing to refer the diſpute. *Strange*, 1082.

Prebends are ſome of them donative. At Weſtminſter, the king collates by patent; and by virtue thereof, the prebendary takes poſſeſſion without inſtitution or induction. *Johnſ.* 55. *Watſ. c.* 15.

And the king at this day is patron of moſt of the great prebends. *Johnſ.* 28, 29.

None to have two prebends in one church

7. No perſon may hold more than one prebend in the ſame church: and this is agreeable to the rule of the ancient canon law. *Gibſ.* 174.

So if a prebendary accepteth of a *deanry*, his prebend is void by ceſſion; ſo if he is made a *biſhop*, the king preſents to his prebend. *Nelſ.* Preb.

But the acceptance of a deanry muſt be underſtood to be in the ſame church; therefore 11 *Ed.* 3. the biſhop of Durham having preſented a clerk to a prebend of the church of St. Andrew, and afterwards the ſame perſon being preſented to a deanry in that church, it was held that the king ſhould recover the preſentation to this prebend, becauſe one and the ſame perſon cannot poſſeſs two prebends in one and the ſame church; but then it muſt be underſtood of a prebendary who is a compleat member of the chapter, that is, one who hath a place in the choir and a vote in the chapter; for an archdeacon may be either a dean or prebend of that church where he is

arch-

archdeacon, becauſe as ſuch he hath no vote in the chapter. *Neſſ.* Preb.

8. Formerly, a layman (Dr *Watſon* ſays) might have taken a title to a prebend; but now by the act of uniformity of the 13 & 14 *C.* 2. *c.* 4. no perſon is capable of being admitted to any eccleſiaſtical promotion, who is not in prieſt's orders. *Watſ. c.* 14. Whether a prebend is a lay-fee.

9. The poſſeſſions of the dean and chapter are for the moſt part divided; the dean having one part alone in right of his deanry, and each particular prebendary a certain part in right of their prebends; the reſidue the dean and chapter have alike; and each of them is to this purpoſe incorporate by himſelf. *God.* 52. Separate poſſeſſions.

For a prebendary, who hath a diſtinct eſtate, and hath alſo a vote in the chapter; is a corporation ſole in reſpect of the one, and at the ſame time is a member of a corporation aggregate in reſpect of the other. *Johnſ.* 61.

10. If the cathedral church be in one county, and the *corps* (body, or eſtate) of the prebend be in another county; a writ of quare impedit ſhall be brought in the county of the cathedral, where the office, or the foundation of the right to the corps is, and not in that where the corps lies. *Gibſ.* 174. Quare impedit to be brought in the county where the cathedral is.

11. By the yearly land tax acts——*Whereas the rents and revenues belonging to the reſidentiaries of the cathedral churches are chargeable to the land tax, and in ſome caſes the overplus of the ſaid rents and revenues, above ſuch tax repairs and other charges, is to go in ſhares for the maintenance of the ſaid reſidentiaries which ſhares are diminiſhed by the ſaid land tax; in ſuch caſes the ſaid reſidentiaries ſhall not be further chargeable as enjoying offices of profit out of the ſaid rents and revenues.* How to be charged to the land tax.

12. It doth not appear that canons or prebendaries have cure of ſouls in any reſpect; they are indeed for the moſt part inſtituted, but not to the cure of ſouls. *Johnſ.* 86. Prebend a ſinecure.

So that a prebend and a parochial benefice are not incompatible; but both may be holden together, without any diſpenſation. *Johnſ.* 91.

And for the ſame reaſon, he who takes a title to a prebend, is not thereby obliged by the 13 *El. c.* 12. to ſubſcribe or read the thirty nine articles; but otherwiſe, he muſt take the ſame oaths, and make and ſubſcribe the ſame declarations, as other perſons qualifying for eccleſiaſtical offices.

13. No prebendaries nor canons in cathedral or collegiate churches, having one or more benefices with cure (and not being reſidentiaries in the ſame cathedral or collegiate Reſidence.

legiate churches), ſhall under colour of their ſaid prebends, abſent themſelves from their benefices with cure, above the ſpace of one month in the year; unleſs it be for ſome urgent cauſe, and certain time, to be allowed by the biſhop. And ſuch of the ſaid canons and prebendaries, as by the ordinances of the cathedral or collegiate-churches do ſtand bound to be reſident in the ſame, ſhall ſo among themſelves ſort and proportion the times of the year, as that ſome of them always ſhall be perſonally reſident there; and all ſuch reſidentiaries ſhall, after the days of their reſidency appointed by their local ſtatutes or cuſtoms expired, preſently repair to their benefices, or ſome one of them, or to ſome other charge where the law requireth their preſence, there to diſcharge their duties according to the laws in that caſe provided. And the biſhop of the dioceſe ſhall ſee the ſame to be duly performed and put in execution. *Can.* 44.

Preaching.

14. Prebendaries and canons in every cathedral and collegiate church, ſhall not only preach there in their own perſons, ſo often as they are bound by law ſtatute ordinance or cuſtom, but ſhall likewiſe preach in other churches of the ſame dioceſe where they are reſident, and eſpecially in thoſe places where they or their church receive any yearly rents or profits. And in caſe they themſelves be ſick, or lawfully abſent, they ſhall ſubſtitute ſuch licenſed preachers to ſupply their turns, as by the biſhop ſhall be thought meet to preach in the cathedral churches. And if any otherwiſe neglect or omit to ſupply his courſe, as is aforeſaid, the offender ſhall be puniſhed by the biſhop, or by him or them to whom the juriſdiction of that church appertaineth, according to the quality of the offence. *Can.* 43.

Profits of a prebend, during the vacation.

15. Dr *Godolphin* ſaith, that after the death of a prebendary, the dean and chapter ſhall have the profits. *God.* 52.

But by the ſtatute of the 28 *H.* 8. *c.* 11. the profits of a prebend, during the vacation, ſhall go to the ſucceſſor; towards the payment of his firſt fruits.

In order to reconcile which, perhaps the diſtinction may be this: that the iſſues of thoſe poſſeſſions which he hath in common with the reſt of the chapter, ſhall after his death be divided amongſt the ſurviving members of the chapter; but the profits of thoſe poſſeſſions which he hath in his ſeparate capacity, as a ſole corporation of himſelf, ſhall be and inure to his ſucceſſor.

16. A

16. A prebendary leaving a houſe, by death or ceſſion, out of repair; he or his executors ſhall be liable to a ſuit of dilapidation, tho' it was not annexed to the prebendal ſtall. This was declared in the court of king's bench, *T.* 35 *C.* 2. in the caſe of Dr *Sands* againſt the executors of his predeceſſor, the reſidentiary prebendary in the church of *Wells*, where the biſhop appoints to each prebendary what houſe he thinks fit. For altho' the houſe is not parcel of any particular prebend, it muſt be aſſigned to ſome particular prebend; and when it is ſo aſſigned it is part of the prebend, and ſhall be liable to a ſuit for dilapidations. Wherefore in this caſe the court refuſed to grant a prohibition. *Gibſ.* 174. *Skin.* 121. Dilapidations.

IV. *Of dean and chapter as one body aggregate.*

1. Dean and chapter is a body corporate ſpiritual, conſiſting of many able perſons in law, namely, the dean who is chief, and his prebendaries; and they together make the corporation. *God.* 51. Dean and chapter, what.

2. They were originally ſelected by the biſhop from amongſt his clergy, as counſel and aſſiſtants to him; but they derive their corporate capacity from the crown. *God.* 52. How incorporated.

3. By degrees the dependance of the dean and chapter on the biſhop, and their relation to him, grew leſs and leſs; till at laſt the biſhop hath little more left to him than the power of viſiting them, and that very much limited: and he is now ſcarcely allowed to nominate half of thoſe to their prebends, who all were originally of his family. *Johnſ.* 54. 2 *Roll's Abr.* 229. Their dependence on the biſhop.

Nevertheleſs, the dean and chapter may not alter the ancient and approved uſages of their church, without conſent of the biſhop; and if they do, ſuch innovations are declared void by the canon law. *Gibſ.* 174.

4. In the ſaxon times, there was no delegation of the biſhop's juriſdiction, to the ſeveral officers of the biſhop's courts; for the biſhops did ſit in perſon in the county courts, and there heard eccleſiaſtical cauſes. 1 *Still. Eccl. caſes.* 242. Their juriſdiction.

But now the exerciſe of the biſhop's power is ſometimes reſtrained by ancient compoſitions; as is ſeen in the two ancient eccleſiaſtical bodies of St. Paul's and Litchfield. And where the compoſitions are extant, both parties are equally bound to obſerve the conditions and limitations

mitations thereof. By the remiſſneſs and abſence of the biſhops of Litchfield from their ſee, in going to Cheſter, and then to Coventry, the deans had great power lodged in them, as to eccleſiaſtical juriſdiction there; and after long conteſts, the matter came to a compoſition in the year 1428; by which, the biſhops were to viſit them but once in ſeven years, and the chapter had juriſdiction over their own peculiars. So in the church of Sarum, the dean hath very large juriſdiction; which makes it probable to have been very ancient; but upon conteſt it was ſettled by compoſition between the biſhop, dean, and chapter in the year 1391. And where there are no compoſitions, it depends upon cuſtom, which limits the exerciſe, altho' it cannot deprive the biſhop of his dioceſan right. 1 *Still. Eccl. caſ.* 241, 242.

And beſides that authority which deans and chapters have within their own bodies, they have ſometimes an eccleſiaſtical juriſdiction in ſeveral neighbouring pariſhes, and deanries; and this eccleſiaſtical juriſdiction is executed by their officials. And they have alſo temporal juriſdiction in ſeveral manors belonging to them, as well as biſhops, where their ſtewards keep courts. *Johnſ.* 56. *Wood, b.* 1. *c.* 3.

Making of ſtatutes.

5. A ſtatute made by dean and chapter to bind their ſucceſſors, and not themſelves, is void, and ſo declared by the canon law; foraſmuch as it is not equitable that a man ſhould lay that burden upon another, which he will not bear himſelf.

Grants made to them.

6. It ſeemeth that at the common law, by the gift or grant of lands to the dean and chapter, as a corporation aggregate, the inheritance or fee ſimple may paſs to them without the word *ſucceſſors*; becauſe in conſtruction of law, ſuch body politick is ſaid never to die. *God.* 58.

How far they are guardians of the ſpiritualties.

7. The dean and chapter of common right are guardians of the ſpiritualties of the biſhoprick during the vacation, altho' the archbiſhop now uſually hath that right by preſcription or compoſition: but when the archbiſhoprick is vacant, the dean and chapter of the archiepiſcopal ſee are guardians of the ſpiritualties throughout the province. *God.* 55.

Preſentation of one of their own body to a benefice.

8. Dr Watſon ſays, if a corporation do preſent their head, as if the dean and chapter do preſent the dean to a benefice, it is void; but if they preſent one of their prebendaries, it is good. *Watſ. c.* 20.

Whether the ſurrender of their lands doth diſſolve the corporation.

9. The ſurrender of the lands and poſſeſſions of a dean and chapter, doth not diſſolve the corporation. This was declared

declared in the caſe of the dean and chapter of Norwich, who having conveyed their lands to king Edward the ſixth, and being incorporated anew, and their lands re-granted, made a leaſe by their old name; and it was adjudged to be a good leaſe, becauſe notwithſtanding the ſaid conveyance of the lands, the old corporation of king Henry the eighth remained. The reaſon of which was, that the two principal ends, for which deans and chapters were inſtituted (the firſt to adviſe the biſhop in ſpiritualties, the ſecond to reſtrain him in temporalties) might well be anſwered by them, tho' they had no temporal poſſeſſions. *Gibſ.* 173, 4. 3 *Co.* 73.

In like manner, if the corps of a prebend is a manor, and no more, if the manor is recovered from him by title paramount, notwithſtanding ſuch recovery the perſon remains a prebendary of the church, becauſe he hath a ſtall in the choir, and a voice in the chapter. 3 *Co.* 75.

Deans and chapters of the new foundation.

10. There have been many diſputes concerning the deans and chapters of the new foundation; which altho' agitated ſometimes in the courts at Weſtminſter, do not appear as yet to have received a full and final determination: particularly, with regard to the validity of their local ſtatutes; and then (ſuppoſing their validity), with regard alſo to the conſtruction of thoſe ſtatutes themſelves in divers inſtances.

In order to obtain a diſtinct knowledge whereof, it will be neceſſary to inveſtigate the hiſtory of this matter, throughout the following periods of time; namely, from the firſt erection of the ſaid deanries and chapters, in purſuance of the act of the 31 H. 8. to the firſt year of the reign of queen Mary; from the firſt year of queen Mary, to the firſt year of queen Elizabeth; from the firſt year of queen Elizabeth to the ſixth year of queen Anne; and from the ſixth year of queen Anne, to the preſent time.

(1) By the 31 H. 8. c. 9. power of foundation and erection is given to the king as followeth: *Foraſmuch as it is not unknown, the ſlothful and ungodly life which hath been uſed among all thoſe ſorts which have born the name of religious folk, and to the intent that from henceforth many of them might be turned to better uſe, as hereafter ſhall follow, whereby God's word might be the better ſet forth, children brought up in learning, clerks nouriſhed in the univerſities, old ſervants decayed to have livings, alms houſes of poor folk to be ſuſtained in, readers of greek hebrew and latin to have good ſtipend, daily alms to be miniſtred, mending of highways, exhibition for miniſters*

of the church; it is thought therefore unto the king's highne's moſt expedient and neceſſary, that more biſhopricks, collegial and cathedral churches ſhall be eſtabliſhed inſtead of theſe aforeſaid religious houſes, within the foundation whereof theſe other titles afore rehearſed ſhall be eſtabliſhed: It is therefore enacted, that the king ſhall have power to declare and nominate by his letters patents, or other writings to be made under his great ſeal, ſuch number of biſhops, ſuch number of cities (ſees for biſhops), cathedral churches and dioceſes, by metes and bounds, for the exerciſe and miniſtration of their epiſcopal offices and adminiſtration as ſhall appertain; and to endow them with ſuch poſſeſſions, after ſuch manner form and condition, as to him ſhall be thought neceſſary and convenient; and alſo ſhall have power to make and deviſe tranſlations, ordinances, rules and ſtatutes, concerning them all and every of them, and further to do every other thing which he ſhall think requiſite for the good perfection and accompliſhment of his ſaid moſt godly and gracious purpoſes touching the premiſſes, or any other charitable or godly deeds to be deviſed by him concerning the ſame; and that all ſuch tranſlations, nominations of biſhops, cities, ſees, and limitations of dioceſes for biſhops, erections, eſtabliſhments, foundations, ordinances, ſtatutes, rules, and all other things which ſhall be deviſed and expreſſed by his ſundry and ſeveral letter patents, or other writings under his great ſeal, *touching the premiſſes, or any of them, or any circumſtances or dependencies thereof, neceſſary and requiſite for the perfection of the premiſſes, ſhall be as effectual to all intents and purpoſes, as if done by the authority of parliament.*

In purſuance of this power, the king did erect the ſeveral ſees, deanries, and churches before mentioned; and in the charters of their foundation, with reſpect to the matters before us, did ordain as followeth: *Rex omnibus ad quos, &c. ſalutem. Cum nuper cenobium quoddam ſeu domus regularium canonicorum, quod, dum extitit, prioratus, ſeu domus canonicorum regularium beatæ Mariæ virginis Carliolenſis vulgo vocabatur, atque omnia et ſingula ejus maneria, dominia, meſſuagia, terras, tenementa, hæreditamenta, dotationes et poſſeſſiones certis de cauſis ſpecialibus et urgentibus per Lancelotum ipſius nuper cenobii ſive domus canonicorum regularium priorem et ejuſdem loci conventum, nobis et hæredibus noſtris imperpetuum jam data fuerunt et conceſſa, prout per ipſorum prioris et conventus cartam ſigillo ſuo communi ſive conventus ſigillatam, et in cancellaria noſtra irrotulatam manifeſte liquet: —— Nos —— quandam eccleſiam cathedralem, de uno decano preſbytero, et quatuor preſbyteris præbendariis ibidem, omnipotenti Deo omnino et imperpetuum ſervituris creari, erigi, fundari et ſtabiliri decrevimus; et eandem eccleſiam cathedralem, de uno decano*

decano preſbytero, et quatuor prebendariis preſbyteris, cum aliis miniſtris ad divinum cultum neceſſariis, tenore præſentium, realiter et ad plenum creamus, erigimus, &c.—Volumus etiam et ordinamus, quod prædicti decanus et quatuor prebendarii, ſe gerent, exhibebunt, et occupabunt, juxa et ſecundum ordinationes, regulas, et ſtatuta eis per nos in quadam INDENTURA inpoſterum fienda, ſpecificanda, et declaranda. *—Et quod præfati decanus et prebendarii eccleſiæ cathedralis prædictæ et ſucceſſores ſui ſint, et imperpetuum erunt, capitulum epiſcopatus Carliolenſis, ſitque idem capitulum Roberto nunc Carliolenſi epiſcopo, et ſucceſſoribus ſuis epiſcopis Carliolenſibus perpetuis futuris temporibus annexum, incorporatum, et unitum. ——Volumus etiam, et per præſentes concedimus, præfato decano et capitulo dictæ eccleſiæ cathedralis ſanctæ et individuæ Trinitatis Carliolenſis, et ſucceſſoribus ſuis, quod* decanus eccleſiæ cathedralis illius pro tempore exiſtens, omnes et ſingulos ejuſdem eccleſiæ cathedralis inferiores officiarios et miniſtros, ac alias prædictæ eccleſiæ cathedralis ſanctæ et individuæ Trinitatis Carliolenſis quaſcunque perſonas, prout caſus ſeu cauſa exiget, faciet, conſtituet, admittet, et acceptabit, de tempore in tempus imperpetuum; et eos et eorum quemlibet ſic admiſſos, vel admiſſum, ob cauſam legitimam, corrigere, deponere, et etiam ab eadem eccleſia cathedrali amovere et expellere poſſit et valeat. *Salvis nobis, hæredibus et ſucceſſoribus noſtris, titulo, jure, et auctoritate, decanum, prebendarios, et omnes pauperes, ex liberalitate noſtra ibidem viventes, de tempore in tempus nominandi, aſſignandi et præficiendi, qualitercunque et quotieſcunque eccleſia cathedralis prædicta decano, prebendariis vel pauperibus prædictis, vel eorum aliquo, per mortem, vel aliter vacare contigerit.—— Teſte rege &c.*

Note, all the other foundation charters are of the like form; but that of Carliſle in particular is here recited, becauſe upon this charter did ariſe the conteſts which occaſioned the act of the 6 *Ann. c.* 21. (hereafter following) to be made.

In the mean time, what is to be obſerved at preſent is, that by the above recited act of the 31 *H.* 8. the ordinances, rules, and ſtatutes to be given by the king to the new foundations, were to be under the *great ſeal*; and by the above recited charter of foundation they were alſo to be ſpecified in a certain *indenture* by the king then after to be made.

Now the king did, by his commiſſioners appointed for that purpoſe, inſtitute ordinances, rules, and ſtatutes for the ſaid new foundations; which were delivered to them ſigned by the ſaid commiſſioners, but not under the *great*

ſeal, nor *indented*. And it is recited in the commiſſion afterwards iſſued by king Philip and queen Mary for reviſing the ſaid ſtatutes, that they were only given to the ſeveral churches by way of trial or probation, as being intended afterwards to be perfected and delivered in form under the great ſeal and indented, if the ſame had not been prevented by the king's death.

And there ſeemeth to be ſome foundation for this ſurmiſe; for the ſtatutes do not conclude in the uſual form of letters patents under the great ſeal, but end with the ſubſcription of the commiſſioners; and in fact ſome of the ſtatutes were not given until a little before the king's death; as particularly the ſtatutes of the church of Carliſle, which bear date the ſixth day of June in the thirty ſeventh year of his reign, when the king was very infirm, and he died in the January following.

(2) But, whatever might be the cauſe, upon this foundation only did theſe ſtatutes ſubſiſt, at the end of the reign of king Henry the eighth, and during the reign of king Edward the ſixth.

In the beginning of the next reign, by the act of the 1 *Mar. ſeſſ.* 3. *c.* 9. it is enacted as followeth: *Whereas the late noble prince of famous memory, king* Henry *the eighth, father unto our moſt gracious ſovereign lady the queen, amongſt other his godly acts and doings, did erect make and eſtabliſh divers and ſundry churches as well cathedral as collegiate, and endowed every of the ſame with divers manors lands tenements and poſſeſſions, for the maintenance of the deans prebendaries and miniſters within the ſame, and for other charitable acts to be done by the ſame deans prebendaries and miniſters; and alſo did incorporate the ſame deans prebendaries and miniſters, and made them bodies politick in perpetual ſucceſſion, according to the laws of this realm of* England; *and whereas alſo the ſaid late king, for the better maintenance and preſervation of the ſaid churches in a godly unity and good order and governance, granted unto the ſeveral corporations and bodies corporate of every of the ſaid churches, that they ſhould be ruled and governed for ever according to certain ordinances rules and ſtatutes, to be ſpecified in certain* indentures *then after to be made by his highneſs, and to be delivered and declared to every of the bodies corporate of the ſaid churches, as by the ſeveral erections and foundations of the ſaid churches more plainly it doth and may appear: Since which ſaid erections and foundations, the ſaid late king did cauſe to be delivered to every of the ſaid churches, by certain commiſſioners by his highneſs appointed, divers and ſundry ſtatutes and ordinances, made and declared by the ſame commiſſioners, for the order rule and governance of the ſaid ſeveral churches and*

of the deans prebendaries and miniſters of the ſame; which ſaid ſtatutes and ordinances were made by the ſaid commiſſioners, and delivered to every of the ſaid corporations of the ſaid ſeveral churches in writing, but not indented *according to the form of the ſaid foundations and erections; by reaſon whereof, the ſaid churches, and the ſeveral deans prebendaries and miniſters of the ſame, have no ſtatutes or ordinances of any force or authority, whereby they ſhall be ruled and governed, and therefore remain as yet not fully eſtabliſhed in ſuch ſort, as the godly intent of the ſaid late king was; to the great imperfection of the churches, and the hindrance of God's ſervice, and good order and government to be had and continued amongſt the miniſters of the ſame: and foraſmuch as the authority of making the ſaid ſtatutes ordinances and orders was reſerved only to the ſaid king, and no mention made of any like authority to be reſerved unto his heirs and ſucceſſors, the ſame orders and ſtatutes cannot now be made and provided without authority of parliament — It is therefore enacted, that the queen ſhall, during her natural life, have power to make and preſcribe to every of the ſaid churches and the deans prebendaries and miniſters of the ſame, and to their ſucceſſors, ſuch ſtatutes ordinances and orders, for the good government rule and order of every of the ſame churches deans prebendaries and miniſters of the ſame, and of the lands manors tenements and poſſeſſions of every of the ſame churches, as ſhall ſeem good to her highneſs, the ſame ſtatutes and ordinances to be made by her highneſs in writing, ſealed with the great ſeal of* England, *and to be delivered to the deans prebendaries and miniſters of every of the ſaid churches for the time being; and alſo ſhall have power, by writing ſealed with the great ſeal of* England, *to alter tranſpoſe change augment or diminiſh the ſaid orders ſtatutes and ordinances of every of the ſaid churches, as to her ſhall ſeem good; and alſo ſhall have power to eſtabliſh ſtatutes ordinances and foundations, for the good order and government of ſuch grammar ſchools as have been erected founded or eſtabliſhed by king* Henry *the eighth, or king* Edward *the ſixth, and of the maſters and ſcholars of the ſaid ſchools, and to alter and tranſpoſe ſuch other ſtatutes and ordinances there made heretofore, from time to time as to her ſhall ſeem moſt convenient.*

In purſuance of this act, king Philip and queen Mary iſſued their commiſſion to the effect following: Philippus *et* Maria, *reverendis in* Chriſto *patribus &c. ſalutem. Cum illuſtriſſimus princeps et pater noſter* Henricus *octavus collegium ſive eccleſiam cathedralem* Chriſti *et beatæ* Mariæ *virginis* Dunelmenſis *erexit et inſtituit, ac eandem ad miniſtrorum ejus ſuſtentationem prædiis aliiſque proventibus munifice dotavit; nec potuit, ex hac vita diſcedens, eandem legibus ac ſta-*

tutis

tutis convenientibus magnoque ſigillo ſuo Angliæ *ſignatis, firmiter ſtabilire: Idcirco nos et inſtitutione ac voluntate patris noſtri, et decreto ſenatus noſtri (quem parliamentum vocamus) authoritatem habentes imperfecta abſolvendi, et operi ab eodem inchoato faſtigium imponendi, vobis poteſtatem facimus ſtatuta ad eandem eccleſiam cathedralem* Dunelmenſem *preclare regendam, et miniſtris ejuſdem pro tempore experienda et exercenda ante aliquot annos patris noſtri nomine tradita, pervidendi, examinandi, mutandi, et pro arbitrio corrigendi, approbandi, plura ſi opus fuerit addendi, et (ſi quid ambigui aut obſcuri in eiſdem inveniatur) explanandi atque expediendi, et tandem in eam formam redigendi, quæ ad illius eccleſiæ cathedralis* Dunelmenſis *miniſtrorumque ejus rectam et quietam moderationem, et ad virtutis et pietatis aſſiduum exercitium, veſtræ prudentiæ maxime neceſſaria videbitur.*

By virtue of which commiſſion, the preſent ſtatutes of the church of Durham were drawn up and ſigned; after which Philip and Mary annexed to them this form of confirmation: *Statuta prædicta in hoc volumine contenta, noſtra facimus; eiſque robur et authoritatem noſtram, quam ex decreto parliamenti anno primo regni noſtri edito habemus, impertimur; et magni ſigilli noſtri appenſione confirmamus; ac pro veris et indubitatis eccleſiæ cathedralis* Chriſti *et* Mariæ *virginis* Dunelmenſis *ſtatutis haberi volumus, &c.* Which ſtatutes are the ſame with the former ſtatutes of king Henry the eighth; ſave only that the oath of the king's ſupremacy is left out: So that what the queen intended ſeems only to have been, to undo what hath been done againſt papal ſupremacy.

Note, in the ſaid act of queen Mary it is only recited, that king Henry the eighth's ſtatutes were not *indented*; but in this commiſſion it is alſo ſpecified, that they were not under the *great ſeal.*

And it is obſervable, in order ſtill the more to invalidate the ſaid ſtatutes of king Henry the eighth, that the very act of 31 *H.* 8. *c.* 9. which is the foundation of the whole, was after this ſtatute of the 1 *Mar.* expreſsly and by name repealed, by the act of 1 & 2 *P. & M. c.* 8. *ſ.* 18. only with a proviſo at *ſ.* 26. that the foundations nevertheleſs ſhould continue. But as to the ordinances rules and ſtatutes by which they ſhould be governed, this entirely then reſted upon the power given to the queen by the aforeſaid act of the 1 *Mar. ſeſſ.* 2. *c.* 9. But it doth not appear that ſhe gave ſtatutes to any but the church of Durham aforeſaid. In the laſt year of her reign, we find this direction given by cardinal Pole archbiſhop, at the opening of the convocation, *Deinde voluit reve-*

reverendiſſimus ſtatuta eccleſiarum noviter erectarum aut mutatarum a regularibus ad ſeculares, expendi per epiſcopos Lincolnienſem, Ciceſtrienſem, *&c. et quæ conſideranda ſunt, referri reverendiſſimo quam primum commode poterunt.* But the queen died, and nothing further was done.

(3) Upon queen Elizabeth's acceſſion, the like power was given to her, during her natural life, by the act of 1 *Eliz. c.* 22. (which act was not printed until the year 1707, when the diſputes happened that cauſed the act of 6 An. c. 21. to be made.) By which act of 1 *Eliz. c.* 22. it is enacted as followeth; *Foraſmuch as certain cathedral and collegiate churches, and other eccleſiaſtical corporations, and ſome ſchools have been erected founded or ordained by king* Henry *the eighth, king* Edward *the ſixth, queen* Mary, *and by the late cardinal* Pole, *not having as yet eſtabliſhed ſuch good orders rules and conſtitutions, as ſhould be meet and convenient for the good order ſafety and continuance of the ſame: It is enacted, that the queen, during her life, ſhall have power to make and preſcribe to every of the ſaid churches incorporations and ſchools, and to all and every the officers miniſters and ſcholars therein, and to their ſucceſſors for ever, ſuch ſtatutes ordinances and orders, as well for the good uſe and governance of themſelves being officers miniſters or ſcholars, and for the order of their ſervice miniſtry functions and duties, as alſo for their houſes lands tenements revenues and hereditaments with the appurtenances; and to alter or change, augment or diminiſh the ſame, from time to time, as to her ſhall ſeem expedient: And the ſaid churches incorporations and ſchools, and every perſon therein, for which the queen ſhall make any ſtatutes ordinances or orders, or alter change diminiſh or augment the ſame, and ſet forth the ſame under the great ſeal of* England, *ſhall keep and obſerve all the ſame ſtatutes orders and ordinances, any former rules laws or conſtitutions in any wiſe notwithſtanding; and the ſame ſo made ordained and ſet forth under the great ſeal, ſhall be and remain good and effectual to all intents and purpoſes.*

Purſuant to the power veſted in the queen by this act, there ſeems to have been ſome ſort of confirmation *preſently* made of the ſtatutes of king Henry the eighth, for a rule to the ſeveral churches, until they could be reviewed and reformed; for ſo it plainly was in the church of Peterborough, as appears by biſhop Scambler's letter to the queen concerning thoſe ſtatutes: "After this houſe was erected (ſays he), there came to the ſame certain ſtatutes for the government thereof, under his majeſty's name, and ſo have continued, not without regard; the rather thro' a confirmation made of them by your majeſty's

majeſty's viſitors, appointed for that place and countries adjacent, in the firſt year of your moſt happy reign."

Afterwards, ſpecial power for that end having been inſerted in the body of the eccleſiaſtical commiſſion, new ſtatutes were prepared by the archbiſhop and others, and finiſhed in the month of July, 1572; and the ſeveral bodies were ready for the royal confirmation; but this (for what reaſon, or by what accident, appears not) was never obtained.

Three years after that, the like power was inſerted in the eccleſiaſtical commiſſion granted to archbiſhop Grindal and others; which was thus: "Whereas there were divers cathedral and collegiate churches, grammar ſchools, and other eccleſiaſtical corporations, erected founded or ordained by king Henry the eighth, king Edward the ſixth, queen Mary, and the late lord cardinal Pole, the ordinances rules and ſtatutes whereof be either none at all, or altogether imperfect; or, being made at ſuch a time as the crown of this realm was ſubject to the foreign uſurped authority of the ſee of Rome, they be in ſome points contrary diverſe and repugnant to the dignity and prerogative of our crown, the laws of this our realm, and the preſent ſtate of religion within the ſame; we therefore do give full power and authority to you, to cauſe and ordain in our name, all and ſingular the ordinances rules and ſtatutes of all and every the ſaid cathedral and collegiate churches, grammar ſchools, and other eccleſiaſtical corporations, together with their ſeveral letters patents and other writings touching and in any thing concerning their ſeveral erections and foundations, to be brought and exhibited before you; willing and commanding you, upon the exhibiting, and upon diligent and deliberate view ſearch and examination of the ſaid ſtatute rules and ordinances letters-patents and writings, not only to make ſpeedy and undelayed certificates of the enormities diſorders defects ſurpluſage or wants, of all and ſingular the ſtatutes rules and ordinances, but alſo with the ſame, to advertiſe us of ſuch good orders and ſtatutes as you ſhall think meet and convenient to be by us made and ſet forth, for the better order and rule of the ſaid ſeveral churches erections and foundations, and the poſſeſſions and revenues of the ſame; and as may beſt tend to the honour of almighty God, the increaſe of virtue and unity in the ſaid places, and the publick weal and tranquility of this our realm; to the intent we may thereupon further proceed, to the altering making and eſtabliſhing of the ſame and other ſtatutes rules and ordinances, according

to

to an act of parliament thereof made in the firſt year of our reign."

But nothing appears to have been done in purſuance of thoſe powers: altho' the inconveniencies and miſchiefs of wanting a certain rule appear evidently by the tenor of the aforeſaid letter, which was written to the queen by biſhop Scambler. The biſhop, after a complaint of non-reſidence and want of diſcipline, with his own fruitleſs endeavours to reform what was amiſs, adds, "One chief and ſole cauſe in a manner, of all this matter, beſides the perverſeneſs of men's natures, being the uncertainty of the authority of the ſtatutes of the ſaid church; the froward and diſobedient pretending for their defence, that the ſame were and are of no force, and that they ſtand at liberty to do or not to do the premiſſes at their pleaſure; becauſe they are not extant under the *great ſeal* and *indented*." Whereupon, his prayer to the queen is, "Let not then, I moſt humbly beſeech you, the matter of government of theſe houſes (for they, all that are of your father's foundation, be in like uncertainty of the authority of their ſtatutes, and eſpecially this church where I am) ſtand any longer doubtful; but let it be by your moſt ſacred majeſty decided and determined, under what rules and orders they ſhall live."

But nothing further was done in that queen's reign. Whether it was, that ſhe did not like the power by which ſhe acted (for ſhe was always averſe from the parliament's interfering in eccleſiaſtical affairs, and that might be one reaſon perhaps why the act was not then printed); or whether ſhe had a mind (as appears in divers other inſtances) to retain the church at that time in a ſtate of dependence upon the crown; or whatever elſe might be the cauſe, ſo it was, that during her long and active reign, nothing was effected to render theſe foundations more eſtabliſhed and ſecure.

However, thus much is certain, that notwithſtanding the recital in the act of the 1 Mar. abovementioned, that ſuch ordinances rules and orders *could not be made without authority of parliament*; the princes of this realm in thoſe days did not think themſelves under that reſtraint; and accordingly, king Charles the firſt, and king Charles the ſecond, of their own royal authority, did give ſtatutes to ſeveral of thoſe churches, without any parliamentary ſanction to ſupport them.

But ſtill the doubt remained, for the reaſons abovementioned, how far any of theſe ſtatutes were in force.

(4) And

(4) And particularly, about the year 1706, Dr Atterbury then dean of Carliſle, reſting ſolely upon the foundation charter, which (as before expreſſed) gives unto the dean a power of appointing, ordering, and removing all and every the inferior officers and miniſters of the church, *and other perſons whatſoever* of the ſaid church, extended this clauſe ſo far, as to take upon himſelf the ſole appointment ordering and removing of all perſons whatſoever any way concerned in the government and revenue of the ſaid church; rejecting at the ſame time the authority of the local ſtatutes, which limit that general power, and expreſsly define what officers and miniſters only in the ſaid charter are intended.

About the ſame time, Dr Todd one of the prebendaries of the ſaid church, ſtrenuouſly oppoſed the viſitation of the chapter by Dr Nicolſon then biſhop; inſiſting, that the ſtatutes of king Henry the eighth, by which only the biſhop is appointed local viſitor were of no force; and conſequently, that this being a royal foundation, the power of viſitation was in the crown. Upon which, Dr Todd was excommunicated by the biſhop; and the proceedings were removed into the court of king's bench. In the mean time, this diſpute involving in it moſt of the churches of the new foundation, not only upon the aforeſaid account of the uncertain authority of their reſpective local ſtatutes, but alſo in regard that the originals of the ſaid ſtatutes in ſome places were periſhed by length of time, or loſt, or deſtroyed in the great rebellion; therefore, that this matter might finally be at reſt, the act of the 6 *An. c.* 21. was made; by which it thus enacted: *Whereas ſeveral doubts and queſtions have ariſen, and may hereafter ariſe, in relation to the validity and force of the ſtatutes of divers cathedral and collegiate churches, founded by king* Henry *the eighth; which doubts and queſtions have been occaſioned, partly by a temporary act of parliament made in the firſt year of the reign of queen* Mary *in relation to the ſaid ſtatutes, and in order to defeat the true and pious ends and deſigns of the ſaid foundations, and partly by reaſon of the known loſs of many records and evidences during the late rebellion in this kingdom; and whereas the ſaid doubts and diſputes may in time not only turn to the great diſquiet and prejudice of the ſaid foundations, but may prove a manifeſt obſtruction to the peace, order, good government and diſcipline of the church, unleſs ſome ſpeedy and effectual remedy be provided; it is therefore enacted, that in all cathedral and collegiate churches founded by the ſaid king* Henry *the eighth, ſuch ſtatutes as have been uſually*

uſually received and practiſed in the government of the ſame reſpectively, ſince the late happy reſtoration of king Charles *the ſecond, and to the obſervance whereof the deans and prebendaries, and other members of the ſaid churches, from the ſaid time have uſed to be ſworn at their inſtalments or admiſſions, ſhall be and ſhall be taken and adjudged to be good and valid in law, and ſhall be and be taken and adjudged to be the ſtatutes of the ſaid churches reſpectively; nevertheleſs, ſo far forth only, as the ſame or any of them are in no manner repugnant to, or inconſiſtent with the conſtitution of the church of* England *as the ſame is now by law eſtabliſhed, or the laws of the land.——Provided, that it ſhall be lawful for her majeſty, during her life, from time to time to alter, amend, correct, revoke, diminiſh, or enlarge the ſaid ſtatutes, or any of them; and to make new ſtatutes and ordinances for the ſaid cathedral and collegiate churches, and for reſuming or ſettling the local viſitation of them, or any of them; in ſuch manner, from time to time, as to her majeſty ſhall ſeem meet.*

By this act the former diſputes were at an end; the local ſtatutes being hereby generally eſtabliſhed and confirmed. But hereupon divers queſtions have ariſen: As, firſt of all, Under what reſtrictions this act is to be underſtood; or, what thoſe ſtatutes are which are hereby confirmed, and what ſtatutes are not hereby confirmed? And the reſtrictions are three: 1. Such ſtatutes only are confirmed, as were uſually received and practiſed in the reſpective churches, from the time of the reſtoration to the time of making the act. 2. And ſuch only, to the obſervance whereof the deans and prebendaries and other members of the ſaid churches from the ſaid time had uſed to be ſworn at their inſtallments or admiſſions. And, 3. So far forth only, as the ſame ſtatutes or any of them are in no manner regugnant to or inconſiſtent with the conſtitution of the church of England, or the laws of the land.

Now one great doubt hath been, Whether by the words [*ſuch ſtatutes*] in the firſt reſtriction, are meant *bodies* of ſtatutes generally received and practiſed ſince the reſtoration; or only, *particular* ſtatutes within ſuch bodies, as had been ſo received. In the former caſe, if the whole *bodies* of ſtatutes are intended, then the ſeveral particulars therein are confirmed, altho' perhaps ſome of thoſe particulars had not been practiſed ſince the reſtoration; provided ſuch particulars are not contrary to the conſtitution of the church or laws of the realm. In the latter caſe, if *particular* ſtatutes are only intended, then to know whether

ther any ſuch particular ſtatute is in force, it will be neceſſary to be informed whether it was generally received and practiſed during the aforeſaid time. The former opinion ſeemeth generally to prevail. An inſtance will render this plain. The charters of foundation do require, that the deanries ſhall be donative, and conferred by the king's letters patents: But the local ſtatutes (for it is to be obſerved, that the ſtatutes of the ſeveral churches are in many reſpects the ſame) do require that the dean ſhall be preſented by the crown, and inſtituted by the biſhop; and the particular ſtatute which injoins this, had not in ſeveral of the churches been uſually practiſed ſince the reſtoration. And particularly with regard to the church of Glouceſter, in the year 1720, the caſe was ſtated by the crown to the then attorney and ſolicitor general, who delivered their opinion according to the following weighty and very judicious report:

Whitehall, 23d May, 1720.

Gentlemen,

The deanry of Glouceſter being become vacant, the biſhop of that ſee apprehends, that by an act of parliament in the ſixth year of the late queen Anne, a new ſanction is given to the body of ſtatutes of that cathedral; and that thoſe ſtatutes require, that contrary to the practice of above a hundred years, the dean thereof ought to come in by preſentation, and receive inſtitution from him. I herewith ſend you ſeveral copies of records and other papers; which will more fully apprize you of this matter. And I am to ſignify to you his majeſty's pleaſure, that you conſider of it, and report your opinion, whether the ancient method ſhould take place or a new one be introduced; and that if you think the practice ought to be altered, you do in that caſe prepare a form of ſuch an inſtrument as you ſhall think proper to paſs under the great ſeal for that purpoſe. I am, &c.

Stanhope.

To his majeſty's attorney
and ſolicitor general.

To their excellencies the lords juſtices.

May it pleaſe your excellencies:

In humble obedience to his majeſty's commands, ſignified to us by letter from the right honourable the earl Stanhope &c. whereby we are informed, that the deanry

&c.

&c. (as above)——We have conſidered of the matters thereby to us referred, and do moſt humbly certify your excellencies, That the deanry of Glouceſter was erected by letters patents bearing date 7th Sept. 23 H. 8. whereby the king appoints the firſt dean and prebendaries, and in ordering the precedence of the dean, directs, *quod ipſe decanus, et quilibet ejus ſucceſſorum, per nos nominandi*, ſhall be next in dignity to the biſhop. Then the charter appoints, that the dean and prebendaries ſhall be a body corporate, and have perpetual ſucceſſion; *et ſe gerent, exhibebunt, et occupabunt, ſecundum ordinationes regulas et ſtatuta, eis per nos in quadam* indentura *impoſterum fienda, ſpecificanda, et declaranda.* The king further grants them divers privileges: after which follows a ſaving clauſe in theſe words: *Salvis, nobis hæredibus et ſucceſſoribus noſtris, titulo jure et authoritate decanos prebendarios et omnes pauperes ex liberalitate noſtra ibidem viventes de tempore in tempus nominandi, aſſignandi, et præficiendi, qualitercunque et quotieſcunque eccleſia cathedralis prædicta de decano præbendariis vel pauperibus prædictus vel eorum aliquo per mortem vel aliter vacare contigerit per literas noſtras patentes de tempore in tempus ordinare præficere et præſentare.*

Theſe are all the clauſes in the letters patents of foundation, which concern the manner in which future deans were to come in; and we humbly apprehend, that if the queſtion had reſted ſingly upon the charter, this deanry muſt have been taken to be donative in the crown: for tho' the wood *præſentare* is uſed in the laſt clauſe, yet we apprehend, that is not be underſtood of a proper preſentation to the biſhop, becauſe it is brought in only in a ſaving clauſe, and that ſenſe ſeems inconſiſtent with the other words with which it ſtands coupled which import a compleat appointment by the crown.

The caſe ſtanding thus upon the charter of foundation, we further humbly certify your excellencies, that as there is a clauſe in the charter referring to future ſtatutes to be given by the king, ſo it appears to us, that king Henry the eighth, in the 36th year of his reign, did give a body of ſtatutes, for the better rule and government of the cathedral church of Glouceſter; which, however invalid in the original, have in general been eſteemed and obſerved as the ſtatutes of that church ever ſince. The ſecond chapter of thoſe ſtatutes, intitled, "Of the "qualification of the dean", of which an engliſh tranſlation only hath been laid before us, has theſe words: *Whenſoever the office of dean ſhall hereafter become void, by*

death reſignation deprivation or ceſſion or by any other means; we will that ſuch perſon ſhall be dean, and be ſo accepted, and enjoy the office of dean in all reſpects, whom we or our ſucceſſors ſhall nominate elect and prefer by our letters patents to be ſealed under the great ſeal of us or our ſucceſſors, and ſhall think fit to preſent to the biſhop of Glouceſter; *which ſaid dean ſo nominated elected and preſented, and having been inſtituted by the biſhop, the canons for the time being ſhall accept and admit for dean of the cathedral church of* Glouceſter; *and the dean upon ſuch his admiſſion, before he ſhall take upon him any government in the church, or concern himſelf in any affairs thereunto belonging, ſhall take an oath in this form,* viz. "I *N.* "who am elected and inſtituted dean of this cathedral "church, do call God to witneſs, &c."

The expreſſions in this ſtatute are ſomewhat particular and uncommon; but upon the whole, we apprehend, that in caſe the ſaid ſtatute had been regularly given purſuant to the power reſerved by the charter, it would have made a preſentation to the biſhop neceſſary in this caſe, and the dean ought to have received inſtitution from him. But it appears, that the body of ſtatutes, of which this is one, was not given by indenture, which is the only form the charter preſcribes; and we find that by an act of parliament made in the 1 *Mar.* the ſtatutes given by king Henry the eighth to the cathedral churches founded by him are recited to be void.

For theſe reaſons, we are humbly of opinion, that this ſtatute was not valid in its original, had no operation to alter the charter, and conſequently that the dean ought then to have come in by donation notwithſtanding the ſtatutes.

We further humbly certify your excellencies, that ſeveral copies of inſtruments under the great ſeal for conſtituting deans of Glouceſter from time to time, have been tranſmitted to us; which we have peruſed and hereto annexed, and find none of them to be in the ſtrict form of a preſentation.

The only precedent which looks that way, is that of dean Cooper in the 11 *Eliz.* which is directed to the biſhop of Glouceſter, and has in it the word *præſentamus*, and requires the biſhop to inſtitute him. But it contains alſo an expreſs grant of the deanry to Cooper; and we beg leave to obſerve to your excellencies upon this precedent, that it ſeems framed in conformity to the ſtatute before mentioned about the qualification of the dean, having purſued it in the very words and expreſſions.

All

All the other precedents tranſmitted to us beſides that of Cooper, as well before as ſince the reſtoration, we conceive to be mere grants from the crown.

This was the ſtate of the caſe at the time the ſtatute 6 *An.* intitled, *An act for avoiding doubts and queſtions touching the ſtatutes of divers cathedral and collegiate churches*, was made. And the body of ſtatutes given by king Henry the eighth being (as hath been already obſerved) originally void, and this deanry (as appears by the precedents) having paſſed by grant from time to time; we apprehend the ſingle queſtion to be, Whether this act of parliament has given ſuch a ſanction to the ſtatute about the qualification of the dean, as to alter the practice of granting which has hitherto prevailed, and make a preſentation to the biſhop neceſſary?

We beg leave to obſerve to your excellencies, that as far as we can be informed, this is the firſt queſtion that hath ariſen upon this act; and that, upon conſideration of the act, it appears to be drawn in a looſe and doubtful manner, and may admit of various conſtructions.

The preamble takes notice, that ſeveral doubts had ariſen, concerning the validity of the ſtatutes of divers cathedral and collegiate churches founded by king Henry the eighth; which had been occaſioned partly by an act of the 1 *Mar.* and partly by reaſon of the loſs of records during the rebellion, which might prove an obſtruction to the good government and diſcipline of the church: And then it enacts, that in all cathedral and collegiate churches founded by the ſaid king Henry the eighth, ſuch ſtatutes as have been uſually received and practiſed in the government of the ſame reſpectively ſince the reſtoration, and to the obſervance whereof the deans and prebendaries and other members of the ſaid churches from the ſaid time have uſed to be ſworn at their inſtalments or admiſſions, ſhall be and be taken and adjudged to be the ſtatutes of the ſaid churches reſpectively; nevertheleſs, ſo far forth only as the ſame or any of them are in no manner repugnant to or inconſiſtent with the conſtitution of the church of England as it is now by law eſtabliſhed, or the laws of the land.

The queſtion ariſing upon this act, material to the point referred to us, is whether by the words——*Such ſtatutes as have been uſually received and practiſed ſince the reſtoration*——be intended, bodies of the ſtatutes, particular ſtatutes within which bodies have been generally acted under as occaſion required; or only, ſuch particular indi-

vidual ſtatutes as have been actually put in practice? For if this act only confirmed ſuch particular ſtatutes as have been actually practiſed; then it is clear, that this ſtatute about the qualification of the dean is not confirmed, nor has any greater force than it had originally; there being no pretence of any practice under it ſince the reſtoration. But if the act has confirmed bodies of ſtatutes, particular ſtatutes within which bodies have been generally acted under; then this ſtatute will be in conſequence confirmed, notwithſtanding it has not been in fact ſpecially obſerved.

We apprehend this to be a queſtion of great doubt and difficulty: but upon conſideration of the ſeveral parts of the act, we are humbly of opinion, that bodies of ſtatutes, particular ſtatutes in which have been generally acted under as occaſion has required ſince the reſtoration, are thereby confirmed; for theſe reaſons:

In the firſt place, the doubts and queſtions, which are recited in the preamble to have ariſen, were not concerning any particular individual ſtatutes, but concerning the bodies of ſtatutes given by king Henry the eighth, whether they were given in a proper manner; and the reaſon for which they were declared void by the act of 1 *Mar.* went to the whole body of ſtatutes, and not to particular branches; and it ſeems reaſonable, that the ſame expreſſion ſhould have the ſame ſignification in the enacting clauſe, as in the preamble.

Beſides, the act does not only confirm ſuch ſtatutes as have been uſually received and practiſed ſince the reſtoration, but makes a further deſcription, viz. *And to the obſervance whereof the deans and prebendaries from the ſaid time have uſed to be ſworn at their inſtalments:* And it is well known, that the members of cathedral churches are never ſworn to the obſervance of particular ſtatutes, but of bodies of ſtatutes in general.

The reſtrictive clauſe at the end is likewiſe obſervable to this purpoſe; *Nevertheleſs, ſo far forth only, as the ſame or any of them are in no manner repugnant to or inconſiſtent with the conſtitution of the church of England as it is now by law eſtabliſhed, or the laws of the land.* Hereupon we humbly conceive, that the legiſlators could not apprehend, that any particular ſtatutes, inconſiſtent with the conſtitution of the church or the laws of the land, had been uſually received and practiſed ſince the reſtoration; but that reſtriction ſeems aimed at ſome parts of the bodies of thoſe ſtatutes, which might poſſibly relate to popiſh ſuperſtition,

ſtition, and therefore were not fit to be confirmed with the reſt.

Upon the whole, we are humbly of opinion, that the abovementioned ſtatute about the qualification of the dean has received a confirmation by this act of parliament, as part of the body of ſtatutes of this church; and conſequently, that in the caſe of this particular deanry a preſentation to the biſhop, according to the terms of that ſtatute is now become neceſſary. And we have, in humble obedience to his majeſty's commands, prepared the form of an inſtrument (hereto annexed), which we humbly ſubmit to your excellencies, as proper to paſs the great ſeal for that purpoſe; wherein we have alſo inſerted a clauſe of grant, and exactly followed the precedent of dean Cooper, that ſeeming to us to have been ſettled with great care in purſuance of the ſtatute. All which, &c.

R. RAYMOND.
11 July, 1720. P. YORK.

Again: ſuppoſing the whole bodies of ſtatutes to be confirmed, ſo far as the ſame ſtatutes or any of them are not contrary to the conſtitution of the church or laws of the land; queſtions have ariſen concerning the conſtruction of thoſe ſtatutes themſelves. As particularly, how far the clauſe in thoſe local ſtatutes, which gives power to the dean or in his abſence to the vicedean and chapter to chuſe the minor canons, lay clerks, and other officers therein particularly ſpecified, ſhall be underſtood to qualify the general power given by the charter of foundation to the dean to appoint all and every the inferior officers and miniſters.

Thus in the church of Briſtol, in the year 1751, a diſpute of this kind ariſing, the ſame was referred to the then biſhops of London, St David's and St Aſaph; whoſe determination was as follows:—Whereas differences and diſputes having ariſen, between the Reverend Dr Chamberlayne dean of the cathedral church of Briſtol, and the chapter of the ſaid church, touching the right of naming the precentor, minor canons, grammar ſchoolmaſter, lay clerks, or ſinging men, choriſters, ſubſacriſt, or ſexton of the ſaid church, They the ſaid dean and chapter did, by an act of chapter, dated the 19th of Auguſt, 1751, ſubmit the ſaid diſpute to the arbitration and determination of the lords biſhops of London, St David's and Norwich, in caſe he ſhould be able to attend: if not the lord biſhop

of St. Aſaph: And whereas the lord biſhop of Norwich has, by reaſon of his conſtant attendance on the prince of Wales and prince Edward, declined the ſaid arbitration, We the ſaid biſhops of London, St David's, and St Aſaph, have accepted and do hereby accept of the ſaid reference and arbitration, in virtue of the aforeſaid act of chapter, and alſo of two ſubſequent acts of chapter bearing date the 30th of November, 1751, and the 2d of March, 1752, as by the ſaid acts (relation being thereunto had) may more fully appear. And we the ſaid arbitrators, having conſidered the caſe laid before us, by the dean of Briſtol of the one part, and the prebendaries on the other, and alſo the papers and documents delivered on each ſide, in ſupport of their reſpective claims, particularly and eſpecially the charter of foundation of Hen. 8. bearing date June 4, in the 34th year of his reign, and alſo the body of ſtatutes given by his commiſſioners to the ſaid dean and chapter, bearing date the 5th of July, in the 36th year of his reign, are of opinion, and do determine, that the right of naming the precentor, minor canons, grammar ſchoolmaſter, lay clerks or ſinging men, choiriſters, ſubſacriſt or ſexton of the cathedral church of Briſtol, is in the dean and chapter, and the dean being abſent, in the vicedean and chapter of the ſaid church. In witneſs whereof, we have hereunto ſet our hands and ſeals, this 23d day of March 1752.

Tho. London (Sherlock)
Ri. St David's (Trevor)
R. St Aſaph (Drummond)

Thus alſo in the year 1764, a like diſpute ariſing in the cathedral church of Glouceſter, the ſame was determined upon reference as follows:—Whereas diſputes and differences have ariſen, between the reverend Dan. Newcome, D. D. dean of the cathedral Church of Glouceſter, and Joſeph Atwell, D. D. and Sam. Wolley, M. A. two of the prebendaries of the ſaid church, concerning the right of electing and removing the precentor, minor canons, ſacriſt, ſubſacriſts, ſchoolmaſter, uſher, organiſt, lay clerks, and choiriſters of the ſaid church, They the ſaid deans and prebendaries did enter mutually into bonds dated Oct. 14. 1754, to abide by the arbitration and award of ſuch perſon or perſons as ſhould be in that behalf nominated and appointed arbitrators by the right reverend the lord biſhop of Glouceſter, on or before the 30th of November then next, ſo as the award of ſuch arbitrators be made

made in writing ready to be delivered on or before Nov. 30, 1755. And whereas the ſaid biſhop did, in purſuance thereof, by writing dated the third day of November 1754, nominate and appoint us the underwritten to award and determine the ſaid diſputes and differences, Now we the ſaid arbitrators, having duly conſidered the caſes laid before us by the dean of Glouceſter of the one part, and the ſaid prebendaries on the other, and alſo the papers delivered in ſupport of their ſeveral claims, particularly the charter of foundation of Hen. 8. bearing date Sept. 4. in the 33d year of his reign, and alſo the body of ſtatutes given by his commiſſioners to the ſaid dean and prebendaries, bearing date Jul. 5. in the 36th year of his reign, are of opinion and do determine, that the right of electing and removing of the precentors, minor canons, ſacriſts, ſubſacriſts, ſchoolmaſters, uſhers, organiſts, lay clerks, and choiriſters of the church of Glouceſter, is in the dean and chapter, and the dean being abſent, in the vicedean and chapter of the ſaid church. In witneſs whereof we do hereunto ſet our hands and ſeals, this 16th day of Oct. 1755.

Tho. Cant. (Herring)
Tho. Clerk (Maſter of the rolls)
Geo. Lee (Dean of the Arches)

In like manner, there have been ſeveral diſputes betwixt the deans on the one hand, and the prebendaries on the other, concerning a negative power which the deans have claimed by virtue of the ſaid ſtatutes in divers inſtances. As in the aforeſaid church of Glouceſter, about the year 1752, the dean refuſed to affix the chapter ſeal to a leaſe agreed upon by the majority of the chapter; inſiſting, that by the local ſtatutes his conſent was abſolutely neceſſary to the validity of ſuch leaſe, which conſent he would not give. But the dean ſubmitted before it came to a judicial determination.

In the years 1752 and 1753, a like diſpute happened in the cathedral church of Carliſle, about the dean's negative power in conferring of benefices.—The four prebendaries of which the chapter conſiſteth, one of whom is always vicedean, unanimouſly elected and nominated under the chapter ſeal Mr. Henry Richardſon, to the perpetual curacy of St Cuthbert's Carliſle. The dean entered a caveat againſt his admiſſion; and the biſhop refuſed to admit and licenſe him. Whereupon it was moved in the court of king's bench, for a mandamus to the biſhop to admit and licenſe the curate.

On ſhewing cauſe, it was inſiſted on behalf of the dean, that by the local ſtatutes the dean's conſent is neceſſary, and conſequently, that without this the nomination is not good. The clauſes in the ſtatutes reſpecting this point are theſe four:

In Chap. 5. De officio decani. —— *Statuimus etiam et volumus, in omnibus cauſis gravioribus, veluti in feodi conceſſione, terrarum et firmarum dimiſſione, ac beneficiorum collatione, aliiſque id genus rebus, decani (ſi præſens ſit) conſenſus obtineatur, ſin abſens fuerit (modo intra regni noſtri Angliæ limites degat) conſenſus ejus requiratur.*

In Chap. 6. De viſitatione terrarum. —— *Porro, quoniam crebra capituli mentio in iis ſtatutis habetur; ſub capituli nomine ubique intelligimus mediam ad minus partem totius numeri omnium canonicorum: Ea enim ſola tanquam per capitulum recta haberi volumus, quibus media ad minus pars totius numeri omnium canonicorum ſimul præſens adeſt, et expreſſe eidem conſentiat: Nam abſentium canonicorum ſuffragium (ſi quid ferre voluerint) nullo modo valere ſinimus, nec alicujus roboris eſſe.*

In Chap. 7. De dimiſſione terrarum ad firmam. —— *Præterea volumus, ut nec decanus nec canonicorum ullus terras aut tenementa ulli locet aut ad firmam dimittat, ſine conſilio et conſenſu capituli.* —— *Sacerdotia vero, id eſt, rectoriam, vicariam, aut alia ejus generis eccleſiaſtica beneficia, ad collationem eccleſiæ noſtræ ſpectantia, decanus cum capitulo, aut (abſente decano) vicedecanus cum capitulo conferendi aut epiſcopo præſentandi jus et poteſtatem habeant.*

In Chap. 18. De officio vicedecani —— *Statuimus et volumus, ut vicedecanus qui pro tempore fuerit canonicis et omnibus miniſtris eccleſiæ noſtræ (decano abſente, vel decanatu vacante) præſit et proſpiciat, eoſque in ordine contineat; et quæcunque fieri deberent per decanum præſentem, quod ad eccleſiæ negotia et regimen pertinet, ipſo abſente aut ipſius officio vacante, bene et fideliter faciat et miniſtret.*

For the dean it was urged, that by the 5th ſtatute abovementioned, his conſent, if he is preſent, muſt perſonally be obtained; and if he is abſent, provided he be within the kingdom, his conſent nevertheleſs is required.

To which it was anſwered, that the 7th ſtatute explains this fully; whereby it appeareth, that the dean and chapter if the dean is preſent, and if he is abſent, the vicedean and chapter ſhall nominate and preſent.

It was further inſiſted on behalf of the dean, that the biſhop is viſitor by the local ſtatutes, and thereby is appointed the expounder and interpreter of the ſaid ſtatutes

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when any doubt ſhall ariſe. But this objection was overruled: partly, as it ſeemeth, becauſe Mr Richardſon was no member of the chapter or body corporate ſubject to the biſhop's local viſitation, and having by his nomination obtained a temporal right, was therefore properly before the court, to have that right aſſerted; and partly, perhaps, becauſe this matter of viſitation was not then before the court, but would come in regularly upon the biſhop's return to the mandamus, if he ſhould ſo think fit thereupon to return himſelf viſitor; and perhaps partly becauſe this negative power, if given to the dean by the local ſtatutes, might be deemed by the court to be contrary to the law of the land. And the rule for a mandamus was made abſolute: ſetting forth, that whereas Henry Richardſon, clerk, had been nominated to the ſaid curacy, and had applied to the biſhop to admit and licenſe him, and that the biſhop had refuſed ſo to do, in contempt of the king, and to the damage and grievance of the ſaid Henry Richardſon, *and to the manifeſt prejudice of his eſtate*; therefore the biſhop is commanded (in the uſual form) to admit and licenſe him, or ſhew cauſe to the contrary.

The biſhop upon the mandamus admitted and licenſed the curate; ſo that the whole cauſe upon the merits came not to be determined. If the dean had appealed to the biſhop as viſitor, and the biſhop had determined for the dean's negative power; or if the biſhop had returned himſelf viſitor upon the mandamus, and thereupon had proceeded to viſit and determine as aforeſaid; then upon a prohibition it would have come to be conſidered, how far theſe local ſtatutes in this particular are conſiſtent with the laws of the land, according to the third reſtriction in the ſtatute of the 6 An. before recited.

And this introduces the act of the 33 H. 8. c. 27. which is as follows: *Albeit that by the common laws of this realm of* England, *all aſſents elections grants and leaſes, had made and granted, by the dean warden provoſt maſter preſident or other governor of any cathedral-church hoſpital college or other corporation, with the aſſent and conſent of the more or greater part of their chapiter fellows or brethren of ſuch corporation having voices of aſſent thereunto, be as good and effectual in the law to the grantees and leſſees of the ſame, as if the reſidue or the whole number of ſuch chapiter fellows and brethren of ſuch corporation, having voices of aſſent, had thereunto conſented and agreed; yet the ſaid common laws notwithſtanding, divers founders of ſuch deanries hoſpitals colleges and*

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corporations within the ſaid realm, have upon the foundation and eſtabliſhment of the ſame deanries hoſpitals colleges and other corporations, eſtabliſhed and made (amongſt other their peculiar acts) local ſtatutes and ordinances, that if any one of ſuch corporation, having power or authority to aſſent or diſaſſent, ſhould and would deny any ſuch grant or grants, that then no ſuch leaſe election or grant ſhould be had granted or leaſed; and for the performance of the ſame, every perſon having power of aſſent to the ſame, have been and be daily thereunto ſworn, and ſo the reſidue may not proceed to the perfection of ſuch elections grants and leaſes, according to the courſe of the common laws of this realm, unleſs they ſhould incur the danger of perjury: for the avoiding whereof, and for the due execution of the common law univerſally within this realm, and every place in one conformity of reaſon to be uſed, it is enacted, that all and every peculiar act order rule and eſtatute, heretofore made or hereafter to be made, by any founder of any hoſpital college deanry or other corporation, at or upon the foundation of any ſuch hoſpital college deanry or corporation, whereby the grant leaſe gift or election of the governor or ruler of ſuch hoſpital college deanry or other corporation, with the aſſent of the more part of ſuch of the ſame hoſpital college deanry or corporation as have or ſhall have voice or aſſent to the ſame, at the time of ſuch grant leaſe gift or election hereafter to be made, ſhould be in any wiſe hindred or let by any one or more, being the leſſer number of ſuch corporation, contrary to the form order and courſe of the common law of this realm of England, *ſhall be from henceforth clearly fruſtrate void and of none effect; and that all oaths heretofore taken by any perſon of ſuch hoſpital college deanry and other corporation, ſhall be, for and concerning the obſervance of any ſuch order eſtatute or rule, deemed void and of none effect; and that from henceforth no manner of perſon or perſons of any ſuch hoſpital college deanry or other corporation, ſhall be in any wiſe compelled to take an oath for the obſerving of any ſuch order eſtatute or rule; on pain of every perſon giving ſuch oath, to forfeit for every time ſo offending the ſum of* 5*l. half to the king, and half to him that will ſue for the ſame in any of the king's courts of record.*

The act ſeemeth to be expreſſed in terms ſomewhat inaccurate and confuſed; but the manifeſt intention is, to eſtabliſh the rule of the common law, that a majority of the body corporate ſhould bind the reſt. In ſome parts of the act the dean ſeemeth to be contradiſtinguiſhed from the chapter; ſo as that the negative of the inferior number of the chapter only, excluſive of the dean, was hereby intended to be taken away; but the other parts of the

the act ſeem to explain this; expreſſing, that *all local ſtatutes, whereby the grant leaſe or election of ſuch corporation ſhould be any wiſe hindred by any one or more, being the leſſer number of ſuch corporation, contrary to the courſe of the common law, ſhall be void.* And it is certain, the dean is one and but one member of the body corporate.

Unto all which may be added, that the rule for the neceſſity of a majority of the whole body to be conſenting, is not only agreeable to the common law and (as it ſeemeth) to the declaration of the ſaid ſtatute of the 33 H. 8. but alſo to the ancient canon law, which clearly determineth, that elections ſhall be made by the *major et ſanior pars*, that is, by a majority of legal votes (as is before ſet forth at large under the title Cathedrals.)

V. *Of deans of peculiars.*

Deans without juriſdiction.

1. The word dean is alſo applied to divers that are the chief of certain peculiar churches or chapels; as the dean of his majeſty's chapel royal, and the dean of the chapel of St George at Windſor; not being the heads of any collegiate body, nor endowed with any juriſdiction, but only dignified and honoured with the name and title. *God.* 52. 54.

Without a chapter.

2. And as there are ſome deans without juriſdiction, ſo there are alſo ſome deans with juriſdiction, but without any chapter; as the dean of Croydon in Surrey, the dean of Battle in Suſſex, the dean of Bocking in Eſſex, and many others. *God.* 52.

Dean of Battle.

3. Altho' the biſhop of Chicheſter doth *admit* the dean of the exempt juriſdiction of Battel within that dioceſe, and doth commit to him the cure and juriſdiction of that church; yet the patron thereof is to *inſtitute* and *induct* him, and the patrons accordingly have given the deans inſtitution and induction for ſome hundreds of years, and without queſtion ſuch inſtitution and induction is good: but this deanry was originally given to the incumbents as a donative only by the patron, and the biſhop admits or approves of the patron's preſentee, and commits to him the cure and juriſdiction, by compoſition only. *Watſ. c.* 15.

Dean of the Arches.

4. The dean of the *Arches* is the judge of the court of Arches, ſo called of *Bow-church* in London, by reaſon of the ſteeple thereof raiſed at the top with ſtone pillars in faſhion like a *bow* bent *archwiſe*; in which church this

court was ever wont to be held, being the chief and moſt ancient court and conſiſtory of the juriſdiction of the archbiſhop of Canterbury; which pariſh of Bow, together with twelve others in London, whereof Bow is the chief, are within the peculiar juriſdiction of the ſaid archbiſhop in ſpiritual cauſes, and exempted out of the biſhop of London's juriſdiction. *God.* 100.

And it is ſuppoſed that he was originally ſtyled dean of this court, by reaſon of his ſubſtitution to the archbiſhop's official, when he was employed abroad in foreign embaſſies; whereby both theſe names or ſtyles became at laſt in common underſtanding, as it were ſynonymous. *God.* 102.

Dean of St Martin's.

5. There is alſo a deanry of St Martin le grand in London, concerning which Lindwood puts the queſtion, whether it be ſuch an eccleſiaſtical benefice as that the incumbent thereof may incur ſuch penalties, as other perſons beneficed may incur? And after deep inquiries into the laws precedents and antiquities foreign and domeſtic, with delectable variety of great learning on both ſides argumentatively and impartially, at laſt doth conclude it in the affirmative. *God.* 53.

Profits during vacation.

6. It is ſaid, that after the death of the dean of a free chapel belonging to the king, the king ſhall have the profits of the deanry; for it is at his pleaſure, whether he will collate a new dean to it. *God.* 52.

But, otherwiſe, by the ſtatute of the 28 *H.* 8. *c.* 11. the profits of all ſpiritual promotions benefices dignities or offices, inferior to thoſe archbiſhops and biſhops, ſhall go to the ſucceſſor, towards the payment of his firſt fruits.

VI. *Of rural deans.*

Antiquity of the office of rural deans.

1. The office of rural deans was not unknown to our Saxon anceſtors. For in one of the laws aſcribed to Edward the confeſſor, it is provided, that of eight pounds penalty for breach of the king's peace, the king ſhall have an hundred ſhillings; the earl of the county fifty ſhillings; and *the dean of the biſhop in whoſe deanry the peace was broken*, the other ten: which words can be applied only to the office of rural deans, according to the reſpective diſtricts which they had in the parts of every dioceſe. *Ken. Par. Ant.* 633.

2. The

2. The exerciſe of juriſdiction in the church by patriarchs, primates, and metropolitans, was inſtituted in conformity to the like ſubordinations in the ſtate. *Gibſ.* 971. Apportioning the diſtrict of rural deans.

In like manner the dioceſes within this realm ſeem to have been divided into archdeaconries and rural deanries, in order to make them correſpond to the like diviſion of the kingdom into counties and hundreds. Hence it came to paſs, that the archdeacons, whoſe courts were to anſwer to thoſe of the county, had the county uſually for their diſtrict, and took their titles from the diſtrict in which they acted; and the names of the rural deanries ſeem to be taken from the hundreds, and were at firſt, and generally now are the ſame. 1 *Warner's Eccl. Hiſt.* 275.

And as in the ſtate, every hundred was at firſt divided into ten tythings or friborghs, and every tything was made up of ten families; both which kept their original names, notwithſtanding the increaſe of villages and people: ſo, in the church, the name of deanry ſtill continued, notwithſtanding the increaſe of perſons and churches. And theſe diſtricts from time to time have been contracted or inlarged at the diſcretion of the biſhop. Tho' ſome deanries do ſtill retain the primitive allotment of ten churches, eſpecially in Wales, where the moſt ancient uſages do continue. In the dioceſe of St. Aſaph, the deanries of Bromfield and Yale and of Kidwin; in the dioceſe of Bangor, the deanries of Llin and Llivon; in the dioceſe of Landaff, the deanry of Uſk; in that of St. David's, the deanry of Emlin,——have the preciſe number of ten pariſh churches. And ſeveral other deanries, that upon their new diviſion were made up of two conjoined, or three contracted into two or one, do now contain the number of fifteen, twenty, or thirty churches, according to the diviſion ſo made: As for inſtance, the deanry of Burceſter in the dioceſe of Oxford, is made up of thirty one pariſh churches; out of which the church of Ambroſden being excepted (as before the reformation being in the deanry of Codeſdon), the remaining thirty do expreſsly anſwer the three diſtinct deanries of Curtlington, Iſlip, and Burceſter, of which the two former were annexed to the latter. *Ken.* 634. *Gib.* 971.

3. And as in the aforeſaid law of king Edward the confeſſor, the rural dean is there called the *dean of the biſhop*, ſo without doubt he was appointed by the biſhop, to have the inſpection of clergy and people within the diſtrict in which he was incumbent, under him, and him alone; Appointment of rural deans.

alone; in like manner as the archipreſbyter at the epiſcopal ſee, was one of the college of preſbyters, appointed at the pleaſure of the biſhop, who in his abſence might preſide over them, and under him have the chief care of all matters relating to the church. But as in proceſs of time, by the conceſſion of the biſhops, the cathedral archipreſbyter or dean became elective, and being choſen by the college of preſbyters, or the chapter, was only confirmed by the biſhop; ſo after that the archdeacon, by the like conceſſions, became a ſharer in the adminiſtration of epiſcopal juriſdiction, he became of courſe a ſharter in the appointment of rural deans. *Gibſ.* 971.

Their oath of office.

4. The proper authority and juriſdiction of rural deans, perhaps may be beſt underſtood, from the oath of office which in ſome dioceſes was anciently adminiſtred to them; which was this: "I A. B. do ſwear, diligently and "faithfully to execute the office of dean rural within the "deanry of D. Firſt I will diligently and faithfully "execute, or cauſe to be executed, all ſuch proceſſes as "ſhall be directed unto me from my lord biſhop of B. "or his officers or miniſters by his authority. Item, I "will give diligent attendance, by my ſelf or my deputy, "at every conſiſtory court, to be holden by the ſaid "reverend father in God, or his chancellor, as well to "return ſuch proceſſes as ſhall be by me or my deputy "executed; as alſo to receive others, then unto me to "be directed. Item, I will from time to time, during "my ſaid office, diligently inquire, and true information "give unto the ſaid reverend father in God, or his chan-"cellor, of all the names of all ſuch perſons within the "ſaid deanry of D. as ſhall be openly and publickly "noted and defamed, or vehemently ſuſpected of any "ſuch crime or offence, as is to be puniſhed or reformed "by the authority of the ſaid court. Item, I will dili-"gently inquire, and true information give, of all ſuch "perſons and their names, as do adminiſter any dead "men's goods, before they have proved the will of the "teſtator, or taken letters of adminiſtration of the de-"ceaſed inteſtates. Item, I will be obedient to the right "reverend father in God J. biſhop of B. and his chan-"cellor, in all honeſt and lawful commands; neither "will I attempt, do, or procure to be done or attempted, "any thing that ſhall be prejudicial to his juriſdiction, "but will preſerve and maintain the ſame to the utter-"moſt of my power." *God. Append.* 6, 7.

5. From

5. From whence it appears, that beſides their duty concerning the execution of the biſhop's proceſſes, their office was, to inſpect the lives and manners of the clergy and people within their diſtrict, and to report the ſame to the biſhop: to which end, that they might have knowledge of the ſtate and condition of their reſpective deanries, they had a power to convene rural chapters. *Gibſ.* 973. Their holding rural chapters.

Which chapters were made up of all the inſtituted clergy, or their curates as proxies of them, and the dean as preſident or prolocutor. Theſe were convened either upon more frequent and ordinary occaſions, or at more ſolemn ſeaſons for the greater and more weighty affairs. Thoſe of the former ſort were held at firſt every three weeks, in imitation of the courts baron, which run generally in this form, from three weeks to three weeks: but afterwards they were moſt commonly held once a month, at the beginning of the month, and were for this reaſon called kalendæ or monthly meetings. But their moſt ſolemn and principal chapters were aſſembled once a quarter, in which there was to be a more full houſe, and matters of great import were to be here alone tranſacted. All rectors and vicars or their capellanes, were bound to attend theſe chapters, and to bring information of all irregularities committed in their reſpective pariſhes. If the deans were by ſickneſs or urgent buſineſs detained from their appearing and preſiding in ſuch conventions, they had power to conſtitute their ſubdeans or vicegerents. The place of holding theſe chapters was at firſt in any one church within the diſtrict, where the miniſter of the place was to *procure for*, that is, to entertain the dean and his immediate officers. But becauſe in pariſhes that were ſmall and unfrequented there was no fit accommodation to be had for ſo great a concourſe of people; therefore in a council at London under archbiſhop Stratford, in the year 1342, it was ordained, that ſuch chapters ſhould not to be held in any obſcure village, but in the larger or more eminent pariſhes. *Ken.* 639, 640.

And one ſpecial reaſon why they ſeemed to have been formed in this realm after the manner of the courts baron is, becauſe we find nothing of rural chapters in the ancient canon law. *Gibſ.* 973.

In purſuance of which inſtitution of holding rural chapters, and of the office of rural deans in inſpecting the manners of clergy and people, and executing the biſhop's

ſhop's proceſſes for the reformation thereof, we find a conſtitution of archbiſhop Peccham, by which it is required, that *the prieſts, on every ſunday immediately following the holding of the rural chapter, ſhall expound to the people the ſentence of excommunication.*

And in theſe chapters continually preſided the rural deans, until that Otho the pope's legate required the archdeacons to be frequently preſent at them; who being ſuperior to the rural deans, did in effect take the preſidency out of their hands: inſomuch that in Edward the firſt's reign, John of Athon gives this account of it; "Rural chapters," ſays he, "at this day are holden by "the archdeacon's officials, and *ſometimes* by the rural "deans." From which conſtitution of Otho, we may date the decay of rural chapters; not only as it was a diſcouragement to the rural dean, whoſe peculiar care the holding of them had been; but alſo, as it was natural for the archdeacon and his official to draw the buſineſs that had been uſually tranſacted there, to their own viſitation, or as it is ſtiled in a conſtitution of archbiſhop Langton, to their own chapter. *Gibſ.* 973.

Their attendance at the biſhop's viſitation.

6. And this office of inſpecting and reporting the manners of the clergy and people rendered the rural deans neceſſary attendants on the epiſcopal ſynod or general viſitation, which was held for the ſame end of inſpecting, in order to reformation. In which ſynods (or general viſitation of the whole dioceſe by the biſhop) the rural deans were the ſtanding repreſentatives of the reſt of the clergy, and were there to deliver information of abuſes committed within their knowledge, and to propoſe and conſult the beſt methods of reformation. For the ancient epiſcopal ſynods (which were commonly held once a year) were compoſed of the biſhop as preſident, and the deans-cathedral or archipreſbyters in the name of their collegiate body of preſbyters or prieſts, and the archdeacons or deputies of the inferior order of deacons, and the urban and rural deans in the name of the pariſh miniſters within their diviſion; who were to have their expences allowed to them according to the time of their attendance, by thoſe whom they repreſented, as the practice obtained for the repreſentatives of the people in the civil ſynods or parliament. But this part of their duty, which related to the information of ſcandals and offences, in progreſs of time devolved upon the churchwardens; and their other office of being convened to ſit members of pro-

provincial and epiſcopal ſynods, was transferred to two proctors or repreſentatives of the parochial clergy in every dioceſe to aſſemble in convocation, where the cathedral deans and archdeacons ſtill keep their ancient right, whilſt the rural deans have given place to an election of two only for every dioceſe, inſtead of one by ſtanding place for every deanry. *Ken.* 648, 649.

7. And albeit their office at firſt might be merely inſpection, yet by degrees they became poſſeſſed of a power to judge and determine in ſmaller matters; and the reſt they were to report to their eccleſiaſtical ſuperiors. *Gibſ.* 972. Their judicial and other authority, ordinary and extraordinary.

And by ſpecial delegation they had occaſionally committed to them the probate of wills, and granting adminiſtration of the goods of perſons inteſtate; the cuſtody of vacant benefices, and granting inſtitutions and inductions; and ſometimes the deciſions of teſtamentary cauſes, and of matrimonial cauſes, and matters of divorce. Of which there appear ſome footſteps in one of the legatine conſtitutions of Otho: by which it is injoined, that the dean rural ſhall not thereafter intermeddle with the cognizance of matrimonial cauſes: and by another conſtitution of the ſame legate, he is commanded to have an authentic ſeal: All which ſhews, that anciently there was ſomewhat of juriſdiction intruſted with them. *Ken.* 641. —4. 647. *Gibſ.* 972. *God. Append.* 7.

And before their declining ſtate, they were ſometimes made a ſort of *chorepiſcopi*, or rural biſhops; being commiſſioned by the dioceſan to exerciſe epiſcopal juriſdiction, for the profits whereof they paid an annual rent: but as the primitive *chorepiſcopi* had their authority reſtrained by ſome councils, and their very office by degrees aboliſhed; ſo this delegation of the like privileges to rural deans, as a burden and ſcandal to the church, was inhibited by pope Alexander the third, and the council of Tours. *Ken.* 639.

8. This office hath been always of a temporary nature; and is expreſsly declared ſo to be both by Lindwood and John de Athon. And this was the reaſon why the ſeals which they had for the due return of citations, and for the diſpatch of ſuch buſineſs as they ſhould be employed about, had only the name of the office (and not as other ſeals of juriſdiction, the name of the perſon alſo) engraved in it. *Gibſ.* 972. Their continuance in their office.

But in the dioceſe of Norwich, the admiſſion of rural deans ſeems to have been more ſolemn than elſewhere,

and their continuance perpetual: for whilſt that ſee was vacant, in the time of archbiſhop Witleſey, ſeveral rural deans their were *collated*, whereas in other places they are only ſaid to be *admitted*; and in an ancient metropolitical viſitation of the ſame dioceſe, the firſt in every deanry is ſuch an one *perpetual dean*. Gibſ. 972.

And perhaps ſeveral of the deans of peculiars may have ſprung originally from rural deans.

Their diſuſe. 9. Finally; By the preſcription and power of the archdeacons and their officials, it happened, that in the next age before the reformation of our church, the juriſdiction of rural deans in this iſland declined almoſt to nothing. And at the reformation, in the publick acts of our reformers, no order was taken for the reſtoration of this part of the government of the church. In the *reformatio legum* this was provided for, but fell to the ground for want of confirmation by the legiſlative power. So that theſe rural officers in ſome deanries have become extinct, in others have only a name and ſhadow left. No do we find any expreſs care further taken for the ſupport of this office, but only in the provincial ſynod of convocation held at London, Apr. 3. 1571. by which it was ordained, that "the archdeacon when he hath finiſh-"ed his viſitation, ſhall ſignify to the biſhop what cler-"gymen he hath found in every deanry ſo well endowed "with learning and judgment, as to be worthy to in-"ſtruct the people in ſermons, and to rule and preſide "over others: out of theſe the biſhop may chuſe ſuch "as he will have to be rural deans." But this is rather a permiſſion, than a poſitive command, for the continuance of that office: however, it proves that rural deans were thought fit miniſters to aſſiſt in diſpenſing the laws and diſcipline of our reformed church; and it doth imply, that when they are deputed by the biſhop, they may exert all that power which by canon and cuſtom reſided in the ſaid office before the reformation. The little remains of this dignity and juriſdiction depend now on the cuſtom of places, and the pleaſure of dioceſans. *Ken.* 652, 653. *God. Append.* 7.

Dedication of Churches. See Church.

Defamation.

1. BY the ſtatute of Circumſpecte agatis, 13 Ed. 1. ſt. 4. *In cauſe of defamation, it hath been granted already, that it ſhall be tried in a ſpiritual court, when money is not demanded, but a thing done for puniſhment of ſin: In which caſe, the ſpiritual judge ſhall have power to take knowledge notwithſtanding the king's prohibition.* By ſtatute.

It hath been granted already] By this it appeareth (ſaith lord Coke) that the cognizance of defamation was granted by act of parliament; for otherwiſe it could not be granted. 2 *Inſt.* 492.

When money is not demanded] For in this caſe, he that is defamed cannot ſue there for amends or damages; but only for correction of the ſin, *pro ſalute animæ.* 2 Inſt. 492.

And by the ſtatute of articuli cleri, 9 Ed. 2. c. 4. *In defamations, prelates ſhall correct, the king's prohibition notwithſtanding; firſt injoining a penance corporal, which if the offender will redeem, the prelate may freely receive the money, tho' the king's prohibition be ſhewed.*

2. But to bring offences within theſe ſtatutes, they muſt have theſe following incidents: Not for matters temporal.

As, firſt, the defamation muſt not be for matters temporal.

Thus if a man be called *thief* or *traytor:* if one be ſued for ſuch ſlander in the eccleſiaſtical court, a prohibition lieth. *God.* 516.

So if one call a man a *perjured* perſon; he muſt take his remedy for it at the common law. 2 *Inſt.* 493.

M. 22 *H.* 8. A ſuit was in the ſpiritual court, for calling one a *falſe knave*; and a prohibition was granted: for *knave* originally was no word of reproach, but ſignified a man ſervant, and a knave child a man child. 2 *Inſt.* 493. For albeit theſe words do not imply any offence of which the temporal law taketh cognizance, yet being alſo not of ſpiritual cognizance, the temporal courts will grant a prohibition, that the eccleſiaſtical courts may not exceed their juriſdiction.

In like manner a ſuit being commenced, for calling the plaintiff *quean*; a prohibition was granted, by reaſon of the uncertainty of that word. *God.* 517.

E. 9 *W. Braithwaite* and *Matthews.* Matthews libelled in the ſpiritual court againſt Braithwaite, for having ſaid Matthews is a *rogue*, a cheating rogue, and keeps rogues company. And a prohibition was granted. *L. Raym.* 212.

M. 10 *W.* A libel was preferred againſt a man in the ſpiritual court, for ſaying to another, Thou art an impudent brazenfaced *Beelzebub:* And a prohibition was granted. *L. Raym.* 397. 2 *Salk.* 692.

Nor for matters ſpiritual mixed with temporal.

3. Nor muſt the defamation be, for matters ſpiritual mixed with temporal.

Thus, *E.* 11 *W.* A libel was preferred in the eccleſiaſtical court for ſcandalous words, *viz.* You are a damned bitch, whore, a *pocky whore*, and if you have not the itch, you have the pox. And it was moved for a prohibition, becauſe an action lies at common law. And this difference was taken, where the word *pox* is joined with other words, ſo that it cannot be underſtood but of the french pox, there the action lies. And by Holt chief juſtice: The joining it with the word whore, will make it to be underſtood of the french pox, which is actionable; and he cited a caſe where the words were, He got the pox by a yellow haired wench in Moorfields, and they were held actionable. And a prohibition was granted. *L. Raym.* 446.

H. 10 *G.* 2. *Legate* and *Wright.* It was moved for a prohibition to the ſpiritual court of Norwich, in a ſuit pending there for defamation. The words were, You are an old rogue, and a *thief*, and I will prove you ſo, and an old *whoring* rogue, and a *baſtard-getting* old rogue: It was allowed, that the latter words were of ſpiritual cognizance; but as the firſt was temporal, a prohibition will lie for the whole. And a rule was made to ſhew cauſe. On ſhewing cauſe, it was alledged that theſe words were not of a temporal nature ſufficient to ground a prohibition. But the court held the contrary; and accordingly the rule was made abſolute. 2 *Jur. Eccl.* 215.

But for ſpiritual matters only.

4. But to intitle the ſpiritual court to juriſdiction, the defamation muſt be for matters merely ſpiritual.

Thus in the caſe of *Smith* and *Wood*, *M.* 5 *W.* Libel in the ſpiritual court for theſe words, You are a rogue, raſcal, *whoremaſter*, and a ſon of a perjured affidavit bitch. A prohibition was moved for; and all the words being waived but the word *whoremaſter* (none of them being ſuch as an action may be brought for at the common law),

it

it was urged that is only a word of heat, and that words of paſſion are not defamatory, but regarded by the hearers no more than the words of one non-compos mentis or mad. But by Holt chief juſtice; to ſay whoremaſter of a man, is the ſame with whore of a woman, which is an eccleſiaſtical ſlander. 2 *Salk.* 692.

H. 9 *Car. Gobbet's* caſe. A prohibition was prayed, to ſtay a ſuit in the ſpiritual court for defamation, in ſpeaking theſe words, He is a *cuckoldly knave*; and a precedent was cited, that for ſaying, he is a knave, and a cheating knave, ſuit being in the ſpiritual court, a prohibition was granted upon good adviſement. But the court ſaid, that precedent is not like to this caſe; for there was not any offence wherewith the ſpiritual court ought to meddle; but in this caſe, for theſe words, it is properly to be examined and puniſhed there. And a prohibition was denied. *Cro. Car.* 339.

H. 2 *G.* 2. *Ferguſon* and *Cuthbert.* A prohibition was moved to a ſuit in the ſpiritual court, for calling a woman *jilt* and *ſtrumpet*, and ſaying he would cut his wife's legs off if ſhe was ſuch a ſtrumpet: And denied; for, by the court, they are a charge of incontinence, and the ſignification of them well known. *Str.* 823.

T. 40 *Eliz. Pollard* and *Armſhaw.* Pollard and his wife brought an action againſt Armſhaw for theſe words, Thou art a *whore*, for J. S. goldſmith, hath the uſe of thy body, and a cart is too good for thee. By the court, The words are of ſpiritual cognizance only, and the action will not lie. *Gouldſb.* 172. *God.* 519.

E. 3 *An. Graves* and *Blanchet.* An action was brought for theſe words, She is a *whore*, and had a baſtard by her father's apprentice. And judgment was arreſted. The court ſaid they could not overthrow ſo many authorities. The reaſon of the law is, that fornication is a ſpiritual offence; and no action lay at the common law for what the common law took no notice of, without ſpecial damage. 2 *Salk.* 696.

E. 4 *An. Auberry* and *Barton.* A woman libelled againſt another in the ſpiritual court, for theſe words, You are a *brandy-noſed whore*, you ſtink of brandy. And a prohibition was moved for, becauſe they were words of heat, and did rather charge the defendant with intemperance than incontinence. But by Holt chief juſtice, Prohibition hath been denied in like caſes forty times. And a prohibition was denied. *L. Raym.* 1136.

M. 7 *Car. Hollingſhead*'s caſe. Hollingſhead prayed a prohibition, to ſtay a ſuit in the ſpiritual court for defamation, for ſpeaking theſe words, Thou art a *bawd*, and I will prove thee a bawd. And becauſe theſe are words properly determinable in the ſpiritual court, and for which no action lies at the common law, the prohibition was denied. But for ſaying, Thou keepeſt an houſe of bawdry, this being matter determinable at the common law by indictment, ſuit ſhall not be in the ſpiritual court. *Cro. Car.* 229.

So in the caſe of *Lockey* and *Dangerfield*, *M.* 12 *G.* 2. Libel in the ſpiritual court for theſe words, You are a *bawd*. And upon motion for a prohibition, caſes were cited to prove, that an action would lie. But the court upon conſideration diſcharged the rule; for it is not a charge of *keeping a bawdy houſe*, which is puniſhable as a temporal offence; an action will lie for theſe words, but for the word *bawd* only it will not; that being perhaps no more than a ſolicitation of chaſtity. *Str.* 1100.

In what caſe an action at law will lie for matters merely ſpiritual.

5. *T.* 35 *Eliz. Davies* and *Gardiner*. An action upon the caſe of ſlander, was brought by Anne Davies againſt John Gardiner: That whereas there was a communication of marriage to be had, between the plaintiff and one Anthony Elcock; the defendant, to the intent to hinder the ſaid marriage, ſaid and publiſhed, that there was a grocer in London that did get her with child, and that ſhe had a child by the ſaid grocer; whereby ſhe loſt her marriage. To which the defendant pleaded not guilty; and was found guilty, at the aſſizes at Ayliſbury, to the damages of 200 marks. And now it was alledged in arreſt of judgment, that this matter appeareth to be merely ſpiritual, and therefore not determinable at the common law, but to be proſecuted in the ſpiritual court. But by the court, The action lies here; for a woman not married cannot by intendment have ſo great advancement as by her marriage, whereby ſhe is ſure of maintenance for her life, or during her marriage, and dower and other benefits which the temporal laws give by reaſon of her marriage: and therefore by this ſlander ſhe is greatly prejudiced in that which is to be her temporal advancement; for which it is reaſon to give her remedy by way of action at the common law. *Poph.* 36.

T. 9 *Car. Penſon* and *Gooday*. Action upon the caſe: Whereas he keepeth an alehouſe licenſed by the juſtices, the defendant to ſcandalize the plaintiff's wife ſpake theſe words to her, Hang thee, bawd; thou art worſe than a bawd;

bawd; thou keepeſt a houſe worſe than a bawdy houſe; and thou keepeſt a whore in thy houſe, to pull out my throat. Upon not guilty pleaded, it was found for the plaintiff. It was moved in arreſt of judgment, that theſe words are not actionable. But it was agreed, that for ſaying one is a bawd and keeps a bawdy houſe, an action lieth; becauſe it is a temporal offence, for which the common law inflicts puniſhment: But to call one bawd, without further ſpeaking, an action lieth not, no more than to call one whore; but it is a defamation puniſhable in the ſpiritual court. *Cro. Car.* 329.

So if a man who hath lands by deſcent ſue in the eccleſiaſtical court againſt another for calling him baſtard; a prohibition ſhall be granted, for this tendeth to a temporal diſinheritance. 2 *Roll's Abr.* 292.

But in the caſe of *Bernard* and *Beale*, *E.* 16 *Ja.* On an action upon the caſe, for ſaying that the plaintiff had two baſtards, and ſhould have kept them, by reaſon of which words diſcord aroſe betwixt him and his wife, and they were likely to have been divorced; after verdict, it was moved in arreſt of judgment, that theſe words were not actionable, becauſe he doth not ſhew any temporal loſs, as loſs of marriage, or the like; and this imagination to be divorced is not to any purpoſe, for it is but a cauſeleſs fear. And of that opinion was the whole court. And therefore it was adjudged for the defendant. *Cro. Ja.* 472.

Words ſpoken of a clergyman.

6. Dr. Gibſon ſays, If a miniſter is defamed in any article relating to the diſcharge of his miniſterial function; this is agreed by the books of common law, to be duly triable in the ſpiritual court. *Gibſ.* 1025.

But in the caſe of *Coxeter* and *Parſons*, *H.* 10 *W.* Dr Parſons libelled againſt Coxeter in the ſpiritual court, for ſaying of him, He had no ſenſe, was a dunce, and a blockhead, and he wondered that the biſhop would lay his hands upon ſuch a fellow, and that he deſerved to have his gown pulled over his ears. And a prohibition was granted: For a parſon is not puniſhable in the ſpiritual court for being a knave or a blockhead, more than another man. And whereas it was urged that a parſon might be deprived for want of learning, Holt chief juſtice ſaid, if that be the caſe, he muſt bring his action at law; for that was a temporal damage. 2 *Salk.* 692.

T. 19 *H.* 8. The prior of *Laund* libelled in the ſpiritual court againſt *Robert Lee* and *John Lee*, for calling the prior churl's ſon, rotten churl, and cankered churl;

and a prohibition was granted: for the words concerned no ſpiritual matter, and therefore he could not ſue for them in the eccleſiaſtical court; neither could he have action for them at the common law. 2 *Inſt.* 493.

H. 6 *G.* 2. *Muſgrave* and *Bovey.* A prohibition was granted to a ſuit for theſe words, ſpoken by one clergyman of another: You are an old rogue, and a raſcal, and a contemptible fellow, deſpiſed and hated by every body. *Str.* 946.

Words ſpoken in London.

7. *H.* 13 *W. Johnſon* and *Bewick.* A rule was made for a prohibition to be granted, unleſs cauſe ſhewed, to the conſiſtory court of the biſhop of Wincheſter to ſtay, a ſuit againſt the plaintiff by the defendant, for having ſaid to the defendant, Thou art a whore; and for having ſaid to the defendant's huſband, You have married an old whore, and therefore have no children; upon ſuggeſtion of the cuſtom of London to cart whores, and that theſe words were ſpoke in London. And on ſhewing cauſe againſt the rule, it was urged, that it appeared upon the face of the ſuggeſtion, that as well the plaintiff as the defendant lived out of the juriſdiction of London, viz. Bewick at Bewick in Middleſex, and Johnſon in the pariſh of St Olave's Southwark; and therefore it would be hard to deprive the defendant of puniſhing the plaintiff for having ſpoken theſe malicious and defamatory words, in a court where ſhe may proceed, to drive her to another court where ſhe cannot proceed, the plaintiff living out of the juriſdiction of the court. And of that opinion was the whole court. And Holt chief juſtice ſaid, that if in ſuch caſe a prohibition were granted, it would give licence to all the market women, when they were in London, to defame their neighbours without fear of puniſhment. And the rule was diſcharged. *L. Raym.* 711.

T. 5 *G. Argyle* and *Hunt.* Libel in the ſpiritual court, for the word whore; which upon the face of the libel appeared to have been ſpoken in London: and after ſentence, it was moved for a prohibition, becauſe the defect of juriſdiction appeared in the libel itſelf, and the court will judicially take notice of the cuſtom of London, where an action lies for the word whore. By the court: The rule is, that you ſhall never alledge matter out of the libel, as a ground for a prohibition after ſentence; but the foundation of our granting it muſt ariſe out of the libel itſelf in defect of juriſdiction. And if there be a defect of juriſdiction appearing in the libel, then the party never

never comes too late; for the ſentence and all other proceedings are a mere nullity. But where the ſpiritual court hath an original juriſdiction, which is to be taken from them upon account of ſome matter ariſing in the ſuit, as for defect of trial; there after ſentence the party ſhall never have a prohibition, becauſe he himſelf hath acquieſced in their manner of trial, which is a waiver of the benefit of a common law trial. It is true, theſe words appear to be ſpoken in London; but how doth the cuſtom of London appear to us? There is nothing of that in the libel; and tho' we have ſuch a private knowledge of it, that upon motion we do not put the party to produce an affidavit, becauſe the other ſide never diſputes it, yet we cannot judicially take notice of it; and if any body ſhall inſiſt on an affidavit, we muſt have it in every caſe. It was never known, that the court judicially takes notice of private cuſtoms; but they are always ſpecially returned. In the caſe of *Stone* and *Fowler*, *M.* 9 *An.* there was a preſcription for the pariſhioners to repair the fences of the churchyard; and after ſentence they came and ſuggeſted, that the rector was bound to thoſe repairs; and that the ſpiritual court, inaſmuch as the preſcription was not admitted, had no power to proceed: but the court held, they came too late after ſentence. *Str.* 187.

M. 8 *Geo. Vicars* and *Worth.* The wife libelled in the ſpiritual court, for words which appeared on the libel to be ſpoken in London; the words were (ſpeaking to the huſband), You are a cuckoldly old rogue, and was cuckolded by a porter. And againſt a prohibition it was urged, that the cuſtom of London extends only to the word whore; and that words which only import a woman to be ſo, are not within the cuſtom. But the whole court held the contrary; for prohibitions have been often granted where the words are tantamount. And a prohibition was granted. *Str.* 471.

T. 9 *Geo. Cook* and *Wingfield.* The word ſtrumpet was held to be within the cuſtom of London; but the defendant not coming for a prohibition till after ſentence, the court denied a prohibition, on the authority of *Argyle* and *Hunt*, tho' it appeared on the libel to be ſpoken in London. *Str.* 555.

8. By the 1 Ed. 3. ſt. 2. c. 11. intitled, No ſuit ſhall be made in the ſpiritual court againſt indictors: *The commons do grievouſly complain, that when divers perſons, as well clerks as lay people, have been indicted before ſheriffs in their turns, and after the inqueſt procured be delivered before the juſtices;* Matters given in evidence.

ces; after their deliverance they do ſue in the ſpiritual court againſt ſuch indictors, ſurmiſing againſt them that have defamed them, to the great damage of the indictors, wherefore many people of the ſhire be in fear to indict ſuch offenders; the king will that in ſuch caſe every man that feeleth himſelf grieved thereby, ſhall have a prohibition formed in the chancery upon his caſe.

Before ſheriffs in their turns] Altho' the ſtatute provides expreſsly for indictors in the turns only; yet it extends as well to indictors in all other courts, and to all witneſſes, and to all others who have affairs in the temporal court; and who ſhall not be therefore ſued or moleſted in the court chriſtian. 12 *Co.* 43.

In what time the ſuit muſt be commenced.

9. Regularly, if the party defamed doth not commence an action or cauſe of defamation, and conteſt ſuit in the ſame, within a year from the time of uttering the words; the action is taken away by the lapſe of the year: for in ſuch caſe, the plaintiff ſhall be ſuppoſed to have remitted the injury, at leaſt not to recall it to mind; eſpecially if the party defaming, and the party defamed, after uttering of the words, have been very familiar and converſant together, as in eating, drinking, ſaluting each other, or other ſigns of familiarity. *Clarke*, Tit. 118.

But if the defamatory words were uttered in the abſence of the plaintiff, he being then perhaps in remote parts out of the kingdom; and he doth inſtitute the cauſe ſo ſoon as he returns, or at leaſt within a year after his return to thoſe parts or to that pariſh in which the defamatory words were ſpoken, and cauſeth ſuit to be conteſted in the ſame; his action is not taken away. *Clarke*, Tit. 119.

By the ſtatute of the 21 Ja. c. 16. *Actions upon the caſe for ſlandrous words ſhall be brought within two years after the words ſpoken, and not after: and if the jury find the damages under* 40 *ſhillings, the plaintiff ſhall have no more coſts than damages.*

In what caſe the defendant may juſtify.

10. *M.* 9 *Ja. Webb* and *Cook.* Prohibition to ſtay a ſuit in the eccleſiaſtical court at Norwich for defamation, and calling him whoremaſter, and ſaying that he had a baſtard; and ſhews, that the defendant who ſues in the ſpiritual court was ſentenced for this cauſe of having a baſtard, and ordered to keep the baſtard at the ſeſſions at Norwich. And notwithſtanding, they would examine this again in the ſpiritual court. And upon this ſuggeſtion the defendant demurred. And it was adjudged, that

the

he prohibition ſhould ſtand: For being ſentenced to be he reputed father by the juſtices of the peace, which is by the authority of the ſtatute law; it cannot now be impeached in the ſpiritual court, nor elſewhere; and all are concluded to ſay the contrary, until it be reverſed. *Cro. Ja.* 625.

So in *Cooke's* caſe, *E.* 17 *Ja.* The plaintiff ſued the defendant in court chriſtian, for calling him a baſtard-maker; and the defendant juſtified, becauſe he was proved to be ſuch before two juſtices of the peace, according to the ſtatute of the 18 *Eliz.* which plea the judges in the court chriſtian refuſed: Wherefore a prohibition was awarded. 2 *Roll. Rep.* 82.

11. If any perſon is called to anſwer in a cauſe of defamation, if the plaintiff hath alſo defamed the defendant, the defendant may in the very ſame cauſe re-convene the plaintiff, that is, he may give a libel in the preſence of the plaintiff and his proctor, tho' no citation was firſt taken out againſt him. But in theſe caſes of re-convention, the parties muſt proceed together in the conteſting of ſuit, in deſiring one and the ſame term probatory, in the production of witneſſes, in the concluſion, and in the pronouncing of ſentence; and ſo in all things, unto the end of the ſuit. And if defamatory words, mentioned in the libel, are mutually proved, a mutual compenſation is to be made, both as to the penance and the charges; that is, there ought to be no penance injoined, nor any condemnation in charges on either part. But it is otherwiſe, where two ſeparate cauſes of defamation are commenced. And note, that in cauſes of re-convention, tho' a compenſation may be made between the parties, yet ſeeing defamers are by law to be corrected; the judge may, if he pleaſeth, correct theſe defamers ex mero officio at his pleaſure. *Clarke*, Tit. 134.

Caſe where there are mutual defamations.

12. *M.* 10 *Geo. Tarrant* and *Mawr.* The wife libelled in the ſpiritual court for calling her whore, and there being proceedings likewiſe for defamation againſt her by the other, the two huſbands enter into an agreement to ſtay proceedings on both ſides; and upon one of the wives going on, the huſband moved for a prohibition: But it was denied. For, by the court, The ſuit is by the wife to recover her fame, and it is not in the power of the huſband to reſtrain her. *Str.* 576.

Huſband cannot releaſe the wife's ſuit.

13. But if a feme covert ſue in the ſpiritual court, and recover coſts, if the huſband releaſe them, the wife is barred. For ſince the huſband is liable to the charges of the

But he may releaſe the coſts.

the ſuit expended by the wife, he ſhall have the coſts in recompence; beſides that, the wife cannot have a chattel intereſt excluſive of her huſband. But if the huſband dies, the wife ſhall have them, becauſe they were a thing in action; and they ſhall not go to the executors of her huſband. *Chamberlain* and *Hewitſon. H. 7 W.* L. Raym. 74.

Sentence and execution.

14. The puniſhment of defamation, is penance to be injoined at the diſcretion of the judge. And after paſſing of the ſentence, the judge declareth, in the preſence of the offender or of his proctor, the manner in which the penance ſhall be performed. And if the party is preſent, he is admoniſhed by the judge (otherwiſe a monition iſſueth againſt him under ſeal), to take out of the regiſtry of the court a ſchedule of his penance, and to perform the ſame according to the form of the ſaid ſchedule, and to make certificate of the due performance thereof on or before ſuch court day as ſhall be appointed, and alſo to pay the coſts taxed within a time limited, on pain of excommunication. 1 *Ought.* 391, 2.

If the words were ſpoken in a publick place, then the penance is uſually injoined to be done publickly, as in the church of the pariſh where the perſon defamed dwelleth, in time of divine ſervice, in the preſence of the perſon defamed (if he has a mind to be preſent), but not covered with a linen garment as in cauſes of correction. But if the words were ſpoken in a private place, then the penance is done in the houſe of the perſon defamed, or of the miniſter, or of ſome other honeſt neighbour. 1 *Ought.* 392.

And the form of words uſually is this: The defamer publickly pronounces, that by ſuch and ſuch words (as are ſet forth in the ſentence to have been ſpoken by him) he hath defamed the plaintiff; and therefore that he begs pardon and forgiveneſs, firſt of God, and then of the party defamed, for his uttering ſuch words. 1 *Ought.* 392, 3.

Degradation.

1. DEgradation is an eccleſiaſtical cenſure, whereby a clergyman is deprived of his holy orders which formerly he had, as of prieſt or deacon. *God. Rep.* 309.

2. And

2. And by the canon law, this may be done two ways: either ſummarily, as by word only; or ſolemnly, as by deveſting the party degraded of thoſe ornaments and rites, which were the enſigns of his order or degree. *God. Rep.* 309.

3. Which ſolemn degradation was anciently performed in this manner, as is ſet forth in the ſixth book of the decretals: If the offender was a perſon in inferior orders, then the biſhop of the dioceſe alone, if in higher orders as prieſt or deacon, then the biſhop of the dioceſe together with a certain number of other biſhops, ſent for the party to come before them. He was brought in, having on his ſacred robes, and having in his hands a book, veſſel, or other inſtrument or ornament appertaining to his order, as if he were about to officiate in his function. Then the biſhop publickly took away from him, one by one, the ſaid inſtruments and veſtments belonging to his office, ſaying to this effect, This and this we take from thee, and do deprive thee of the honour of prieſthood; and, finally, in taking away the laſt ſacerdotal veſtment, ſaying thus, By the authority of God almighty, the Father, the Son, and the Holy Ghoſt, and of us, we do take from thee the clerical habit, and do depoſe, degrade, deſpoil, and deprive thee of all order, benefit, and privilege of the clergy. *Gibſ.* 1066.

And this ſeemeth to have been done in the moſt diſgraceful manner poſſible; of which there ſeem to be ſome remains, in the common expreſſion of *pulling a man's gown over his ears.*

4. By *Can.* 122. Sentence againſt a miniſter, of depoſition from the miniſtry, ſhall be pronounced by the biſhop only, with the aſſiſtance of his chancellor and dean (if they may conveniently be had), and ſome of the prebendaries, if the court be kept near the cathedral church; or of the archdeacon, if he may be had conveniently, and two other at leaſt grave miniſters and preachers to be called by the biſhop, when the court is kept in other places.

Delegates.

THE court of delegates is ſo called, becauſe theſe delegates do ſit by force of the king's commiſſion under the great ſeal, upon an appeal to the king in the

court of chancery, in three cauſes: 1. When a ſentence is given in any eccleſiaſtical cauſe by the archbiſhop or his official. 2. When any ſentence is given in any eccleſiaſtical cauſe in places exempt. 3. When a ſentence is given in the admiral's court, in ſuits civil and marine, by the order of the civil law. And theſe commmiſſioners are called delegates, becauſe they are *delegated* by the king's commiſſion for theſe purpoſes. 4 *Inſt.* 339.

The law concerning this court, falleth in under the title **Appeal.**

Deprivation.

Deprivation is an eccleſiaſtical cenſure, whereby a clergyman is deprived of his parſonage, vicarage, or other ſpiritual promotion or dignity. *Deg.* p. 1. c. 9.

And the cauſes of ſuch deprivation are properly and naturally determinable by the eccleſiaſtical laws of this realm: But becauſe generally there are eſtates of freehold dependant upon theſe promotions and dignities, and annexed to them inſeparably, which reſt at the ſole determination of the common law; the courts of common law do ſometimes inſpect and regulate the proceedings of the eccleſiaſtical courts; and where they proceed againſt the rules of law, they frequently prohibit them: (eſpecially where ſuch ſentence for any offence is inflicted by act of parliament.) *Deg.* p. 1. c. 9.

In all cauſes of deprivation of a perſon actually poſſeſſed of a benefice, theſe things muſt concur: 1. A monition or citation of the party to appear. 2. A charge given him, to which he is to anſwer, called a libel. 3. A competent time aſſigned for the proofs and anſwers. 4. A liberty for counſel to defend his cauſe, and to except againſt the proofs and witneſſes. 5. A ſolemn ſentence after hearing all the proofs and anſwers. Theſe are the fundamentals of all judicial proceedings in the eccleſiaſtical courts, in order to a deprivation. And if theſe things be not obſerved, the party hath juſt cauſe of appeal, and may have a remedy by a ſuperior court. And theſe proceedings are agreeable to the common juſtice and reaſon of mankind; becauſe the party accuſed hath the liberty of defence, and the right of appeal. 1 *Still.* 323. *Ayl. Parerg.* 209.

By

By *Can.* 122. Sentence againſt a miniſter, of deprivation from his living, ſhall be pronounced by the biſhop only with the aſſiſtance of his chancellor and dean (if they may conveniently be had), and ſome of the prebendaries, if the court be kept near the cathedral church; or of the archdeacon, if he may be had conveniently, and two other at leaſt grave miniſters and preachers to be called by the biſhop, when the court is kept in other places.

Deviſe. See Wills.

Dilapidations.

Dilapidations of chancels, to be repaired by *lay impropriators*, are treated of under the title Church.

A biſhop as ſoon as he is inſtalled, and a rector or vicar as ſoon as he is inducted, ought to procure workmen, as carpenters, maſons, tilers, and others ſkilled in building, to view the dilapidations or whatſoever ſhall want repairing, and write down for what ſum a workman will or may rebuild or repair the ſame, and ſet their hands to the ſame for a memorial thereof when they ſhall be called to be witneſſes thereunto. For after this inſpection ſhall be made, ſuch biſhop, rector, or vicar may commence his ſuit for dilapidations when he pleaſeth. And ſuch workmen in ſupport of the action ought to prove, that ſuch decay cannot ſufficiently be repaired or amended for leſs than ſuch ſum, and that they themſelves would not do it for leſs. And that ſuch proof may be ſufficient; it is requiſite, that there be two witneſſes in every particular, and not one witneſs to one kind of work only and another to another. *Clarke*, Tit. 124. 1 *Ought.* 253.

If the benefice hath been vacant for ſome time, as for three or four years; or if the incumbent hath not ſued for ſome time after his induction or inſtallation, nor cauſed the dilapidations to be viewed and eſtimated; he ſhall not be intitled to recover the whole ſum eſtimated for dilapidations, but conſideration ſhall be had of the time elapſed from the ceſſation of the laſt incumbency, and a proportionable deduction made for the decays which may reaſonably be ſuppoſed to have happened during ſuch intermediate time. *Clarke*, Tit. 126. 1 *Ought.* 255.

More particularly; concerning dilapidations, the following conſtitutions and ſtatutes have been made:

Edm. *If the rector of a church at his death ſhall leave the houſes of the church ruinous or decayed, ſo much ſhall be deducted out of his eccleſiaſtical goods as ſhall be ſufficient to repair the ſame, and to ſupply the other defect of the church. The ſame we do decree concerning thoſe vicars, who have all the revenues of the church, paying a moderate penſion. For inaſmuch as they are bound to the premiſſes, ſuch portion may well be deducted, and ought to be reckoned amongſt the debts. Always nevertheleſs having a reaſonable regard to the revenues of the church, when ſuch deduction is to be made.* Lind. 250.

Shall leave the houſes of the church ruinous or decayed] As, the manſe of the rectory or vicarage; and other buildings whatſoever, the building or reparation whereof pertaineth to the rector or vicar *immediately*. But otherwiſe it ſeemeth to be, of thoſe houſes the building or reparation whereof pertaineth to others, as of tenants and vaſſals, by virtue of the tenure of their lands. *Id.*

So much ſhall be deducted] Either by himſelf in his laſt will and teſtament; or by the ordinary, whoſe office it is to provide for the church's good. *Id.*

Out of his eccleſiaſtical goods] Which he hath obtained in the right of his church: for ſuch goods by tacit agreement are bound to the ſaid reparation, but ſuppoſe (ſaith Lindwood) he hath not eccleſiaſtical goods ſufficient; whether ſuch reparation ought to be made out of his patrimonial goods, hath been made a queſtion. It ſeemeth (he ſays) that if he hath employed his eccleſiaſtical goods in the improving of his patrimony, or if by too much attention to his worldly affairs he hath neglected his eccleſiaſtical; in ſuch caſe, he is bound to make ſatisfaction out of his patrimonial goods. *Id.*

As ſhall be ſufficient] And if there be not ſufficient, then ſo far forth as the goods will extend. *Id.*

To repair the ſame] Having regard to the exigencies and quality of the thing to be repaired; ſo as the ſame be for neceſſity, but not for pleaſure. *Id.*

And to ſupply other defects of the church] So far forth as they belong to the rector or vicar to be ſuſtained. *Id.*

Ought to be reckoned amongſt the debts] And therefore to be preferred before legacies; for legacies are not to be paid, until the debts ſhall be firſt ſatisfied. *Id.*

But

But albeit the law allows the payment of dilapidations before legacies, yet the ſame are not to be paid before other debts; for the common law (Sir Simon Degge ſays) prefers the payment of debts before damages for dilapidations. *Deg. p.* 1. *c.* 8.

Othob. *To the intent that we may provide a remedy againſt the covetouſneſs of divers perſons, who altho' they receive much ſubſtance from their churches and eccleſiaſtical benefices, do yet neglect their houſes and other edifices, ſo as not to preſerve them in repair, nor build them when ruinous and fallen down; by reaſon whereof deformity occupieth the ſtate of the churches, and many inconveniencies enſue: We do ordain and eſtabliſh, that all clerks ſhall take care, decently to repair the houſes of their benefices, and other buildings, as need ſhall require; whereunto they ſhall be earneſtly admoniſhed by their biſhops or archdeacons; and if any of them, after the monition of the biſhop or archdeacons ſhall neglect to do the ſame for the ſpace of two months, the biſhop ſhall cauſe the ſame effectually to be done, at the coſts and charges of ſuch clerk, out of the profits of his church and benefice, by authority of this preſent ſtatute; cauſing ſo much thereof to be received, as ſhall be ſufficient for ſuch reparation. The chancels alſo of the church they ſhall cauſe to be repaired by thoſe who are bound thereunto, according as is above expreſſed. Alſo we do injoin, by atteſtation of the divine judgment, the archbiſhops and biſhops and other inferior prelates, that they do keep in repair their houſes and other edifices, by cauſing ſuch reparations to be made as they know to be needful.* Athon. 112.

That all clerks ſhall take care] Under which general expreſſion are comprehended curates and prebendaries and all others having any eccleſiaſtical benefice whatſoever. *Id.*

Whereunto they ſhall be earneſtly admoniſhed by their biſhops or archdeacons] And this hath ſometimes been done by a general monition throughout the diocefe, or deanry. *Gibſ.* 751.

Shall neglect to do the ſame for the ſpace of two months] At leaſt, to ſet about the ſame: for it may be that ſuch time ſhall by no means be ſufficient for the finiſhing thereof. *Id.*

Out of the profits of the church and benefice] So that it is lawful for the ordinary to ſequeſter the ſame, for the making of ſuch reparations. *Id.*

Cauſing ſo much thereof to be received] And ſold to the beſt purchaſer. *Id.*

As ſhall be ſufficient for ſuch reparation] According to the diſcretion of the biſhop, as particular occaſions require. The general practice is a fifth part. And if the party is diſſatisfied, he may appeal. *Athon.* 112. 1 *Still.* 61.

Mepham. *We do ordain, that no inquiſition to be made concerning the defects of houſes or other things belonging to an eccleſiaſtical benefice, ſhall avail to the prejudice of another, unleſs it be made by credible perſons ſworn in form of law, the party intereſted being firſt cited thereunto. And the whole ſum eſtimated for the defects of houſes or other things belonging to eccleſiaſtical benefices, whether found by inquiſition, or by way of compoſition made, the dioceſan of the place ſhall cauſe to be applied to the reparation of ſuch defects, within a competent time to be appointed by his diſcretion.* Lind. 254.

Inquiſition to be made] Which may be done, not only at the inſtance of any party intereſted, but alſo by the judge himſelf *ex officio.* For the ordinary, without any application made by any perſon, may cauſe the houſes of the church to be covenably repaired out of the profits of the benefice. And ſuch inquiſition as aforeſaid may be made without any fame of the defects preceding. And the reaſon is becauſe it is done, not for deprivation of the parſon, but for amendment of the defects. *Id.*

Concerning the defects of houſes or other things belonging to an eccleſiaſtical benefice] That is, of which the beneficed perſon hath the burden and charge of reparation; as of the chancel, incloſures, hedges, ditches, and ſuch like. *Id.*

Shall avail to the prejudice of another] That is, of the beneficed perſon himſelf, if he be living; or of his executors or adminiſtrators, if he be dead. *Id.*

Unleſs it be made by credible perſons] As for inſtance, able and experienced workmen; as alſo clergymen, having ſkill and knowledge in ſuch matters, who are uſually joined with laymen in the mandates for ſuch inquiſitions to be made. *Id.*

Sworn in form of law] That is, who ſhall ſwear, that they will truly make inquiſition, without hatred or favour or any intereſt which they have or ſhall have therein. *Id.*

The

The party intereſted being firſt cited thereunto] And if the witneſſes of the party ſuing for dilapidations, either for favour, or becauſe they have taken the work to be done, or have had a promiſe thereof, ſhall depoſe that the decays cannot be repaired for leſs than ſuch a ſum; the defendant, if he ſhall ſee cauſe, may produce witneſſes to the contrary, and ſhall be allowed to carry workmen upon the premiſſes to inſpect the dilapidations, and may make exceptions, and diſprove the eſtimate (if it is exceſſive) by more or more ſkilful workmen. *Clarke*, Tit. 125.

If the party cited doth not appear, thro' contumacy; the inquiſition nevertheleſs may proceed. *Lind.* 254.

Or, by way of compoſition made] For the parties may agree, without any inquiſition, for a certain ſum to be laid out in the reparations. *Lind.* 254.

The dioceſan of the place ſhall cauſe to be applied] So that his inferior, namely, the archdeacon, cannot by this conſtitution do that which followeth. For albeit the archdeacon may admoniſh the perſon beneficed to make due reparation; yet the biſhop only ſhall cauſe ſo much of the profits to be received, as may be ſufficient for making the reparations. *Lind.* 254.

Shall cauſe to be applied] By eccleſiaſtical cenſures and other lawful remedy, and alſo by ſequeſtration of the profits. *Lind.* 254.

Within a competent time to be appointed by his diſcretion] In a juſt and reaſonable manner; otherwiſe the party may appeal. *Lind.* 254.

By the ſtatute of the 13 Eliz. c. 10. *Where divers eccleſiaſtical perſons, being endowed and poſſeſſed of ancient palaces, manſion houſes, and other edifices and buildings belonging to their eccleſiaſtical benefices or livings, have not only ſuffered the ſame, for want of due reparations, partly to run to great ruin and decay, and in ſome part utterly to fall down to the ground, converting the timber, lead and ſtones to their own benefit; but alſo have made deeds of gift, colourable alienations, and other conveyances of like effect, of their goods and chattels in their life time, to the intent and of purpoſe after their deaths to defeat and defraud their ſucceſſors, of ſuch juſt actions and remedies as otherwiſe they might and ſhould have had for the ſame againſt their executors or adminiſtrators by the laws eccleſiaſtical of this realm; to the great defacing of the ſtate eccle-*

ſiaſtical, and intolerable charges of their ſucceſſors, and evil precedent and example for others, if remedy be not provided: It is therefore enacted, that if any archbiſhop, biſhop, dean, archdeacon, provoſt, treaſurer, chaunter, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church; or if any parſon, vicar, or other incumbent of any eccleſiaſtical living whereunto belong any houſe or houſes, or other buildings, which by law or cuſtom he is bound to keep and maintain in reparation, ——— do make any deed or gift or alienation or other like conveyance of his moveable goods or chattels, to the intent and purpoſe aforeſaid; the ſucceſſor of him that ſhall make ſuch deed of gift or alienation, ſhall and may commence ſuit, and have ſuch remedy in any eccleſiaſtical court of this realm, competent for the matter againſt him or them to whom ſuch deed of gift or alienation ſhall be ſo made, for the amendment and reparation of ſo much of the ſaid dilapidations and decays, or juſt recompence of the ſame, as hath happened by his fact or default: in ſuch ſort as he might or ought to have, if he to whom ſuch deed of gift or alienation ſhall be ſo made, were executor or adminiſtrator of him that made ſuch deed or alienation.

Note, here is no appearance of this ſtatute being temporary: nevertheleſs it is continued as temporary by the 1 *Ja. c.* 25. and further by the 21 *Ja. c.* 28. and not further indefinitely (as a great many other ſtatutes were) by the 16 *C. c.* 4. So that upon the whole there may perhaps be ſome doubt, whether this ſtatute is now in force.

And other edifices and buildings] Altho' in this preamble, nothing is referred to as dilapidation, but decayed or ruinous buildings: yet it is certain, that under that name are comprehended hedges, fences, ditches, and ſuch like; and it hath been particularly adjudged concerning wood and timber, that the felling of them by any incumbent (otherwiſe than for repairs or for fuel), is dilapidation; from which he may be reſtrained by prohibition during his incumbency, and for which he or his executors are liable to be proſecuted, after he ceaſeth to be incumbent. *Gibſ.* 752. 2 *Bulſtr.* 279. 3 *Bulſtr.* 158.

Againſt their executors or adminiſtrators] This act only makes proviſion againſt the particular abuſe of fraudulent deeds to defeat the ſucceſſor, after the incumbent is dead; but by the rules of the church (as appears by the foregoing conſtructions) the ordinary, in caſe of dilapidations, hath a right to take cognizance of them, during the life of the incumbent, either by voluntary inquiſition, or upon

on complaint made to him; and to inforce reparation by ſequeſtring of the profits, or by eccleſiaſtical cenſures, even to deprivation. *Gibſ.* 753. 3 *Inſt.* 204.

Their executors or adminiſtrators] In a ſuit for dilapidations in the ſpiritual court, the executor of an adminiſtrator prayed a prohibition, upon oath that he had no goods of the firſt inteſtate; and the court agreed, that the executor of the adminiſtrator is not liable, unleſs he hath goods of the firſt inteſtate, or be adminiſtrator of goods not adminiſtred by ſuch adminiſtrator; upon which, the prohibition was granted, and ſtood. *Gibſ.* 753. 3 *Keb.* 619.

By the laws eccleſiaſtical of this realm] In acknowledgment of the right of the eccleſiaſtical courts to the ſole cognizance in the caſe of dilapidations, a writ of conſultation is provided in the regiſter. *Gibſ.* 753.

And Sir Simon Degge ſays, ſuits for dilapidations are moſt properly and naturally to be brought in the ſpiritual courts; and no prohibition lieth. But nevertheleſs, he ſays, the ſucceſſor may (if he will) upon the cuſtom of England, have a ſpecial action upon the caſe againſt the dilapidator, his executors, or adminiſtrators. *Deg. p.* 1. *c.* 8. *Watſ. c.* 39. 1 *Bac. Abr.* 63.

So in the caſe of *Jones* and *Hill*, *E.* 2. *W.* An Action upon the caſe was brought by a parſon for dilapidations, againſt his predeceſſor who had accepted another benefice, and left the houſes out of repair, ſetting forth, that by the cuſtom of the realm he ought to pay to the ſucceſſor ſo much as ſhall be ſufficient to make the reparations, and that the repairs do amount to ſo much: It was moved in arreſt of judgment, that this action doth not lie. And of that opinion was Pollexfen chief juſtice, who tried the cauſe, and was of the ſame opinion now, becauſe it was merely ſuable in the eccleſiaſtical court. And tho' the caſe of *Day* and *Hollington*, *M.* 3 *Ja.* 2. was cited as adjudged for the plaintiff on a demurrer; yet the court now inclined to Pollexfen's opinion. But the caſe being in the paper to be argued again, and Pollexfen and Ventris dying in the mean time, and the caſe being argued again before Powell and Rookeby juſtices, they gave judgment for the plaintiff. 3 *Lev.* 268. *Viner.* Actions. O. c. *Viner.* Dilapidations.

Or other incumbent of any eccleſiaſtical living] In the caſe of the curate of *Orpington*, *H.* 27 & 28 *C.* 2. who was appointed by the impropriator, and licenſed by the arch-

biſhop as ordinary; the court held, that being but curate at will, and not inſtituted and inducted, he was not an incumbent within this ſtatute, nor liable to dilapidations; and accordingly prohibition was awarded to ſtay ſuit againſt him in the ſpiritual court. 3 *Keb.* 614.

But theſe curates are included within the aforeſaid conſtitution of Othobon. And even with reſpect to this ſtatute, it ſeemeth that this adjudication did proceed upon a principle at leaſt doubtful, namely, that ſuch curates are but curates at will. In the caſe of curacies augmented by the governors of queen Anne's bounty, it is certain, by the ſtatute of 1 *G. ſt.* 2. *c.* 10. that they are perpetual cures and benefices. And as to the reſt, it ſeemeth moſt natural, from the very words of this ſtatute, to underſtand this expreſſion [*or other incumbent*] to denote eſpecially perpetual curates; for archbiſhops, biſhops, deans, archdeacons, chancellors, prebendaries, and ſuch like, had been mentioned before; and then the act goes on, and recites parſons, vicars, *or other incumbent of any eccleſiaſtical living, whereunto any houſes or buildings do belong.* And what other incumbents theſe ſhould be, if they are not perpetual curates, it is not eaſy to determine.

As hath happened by his fact or default] This ſtatute, in the particular caſe of a fraudulent conveyance, ſeems at firſt ſight to limit the ſuit to the dilapidations that have grown in the time of the laſt incumbent; which (in caſe his predeceſſor did alſo leave dilapidations, and die inſolvent) cannot be known, but by a regular ſurvey of the defects at his firſt coming in, that thereby the reſpective dilapidations of the two predeceſſors may be diſtinguiſhed. But in other caſes, the laſt incumbent, or his executors, are chargeable with the whole dilapidations in whoſe time ſoever they have grown; and the reaſon is, becauſe he had the ſame remedy againſt the executors or adminiſtrators of his predeceſſor, and it was his own fault if he did not make uſe of it. *Clarke* Tit. 122. And if ſuch predeceſſor was inſolvent; he accepted the benefice with that charge and incumbrance upon it.

And agreeably to this general rule may this ſtatute alſo be well interpreted, ſo as to make this clauſe [*by his fact or default*] to be excluſive, not of dilapidations which have grown in the time of the predeceſſors to the deceaſed, but of ſuch as may have grown between the time of his deceaſe, and the proſecution for them; that is, either in the time of the vacation of the benefice, or ſince the time of the preſent incumbent. *Gibſ.* 753, 4.

By

By the 14 Eliz. c. 11. *All ſums of money to be recovered for or in the name of dilapidations, by ſentence, compoſition, or otherwiſe, ſhall within two years after ſuch receipt, be truly employed upon the buildings and reparations, in reſpect whereof ſuch money for dilapidations ſhall be paid; on pain that every perſon ſo receiving and not employing as aforeſaid, ſhall forfeit double as much as ſo ſhall be by him received and not employed; which forfeiture ſhall be to the uſe of the queen's majeſty, her heirs and ſucceſſors.* ſ. 18.

In caſe of the incumbent's death within the two years, it ſeemeth that the ſame ought to be paid by his executors to the ſucceſſor, to be laid out by him (and not by the executors) in repairs. *Gibſ.* 754.

Finally, In order to prevent dilapidations, it is enacted by the 17 *G.* 3. c. 53. as followeth:

Where the parſon, vicar, or other incumbent of any eccleſiaſtical living, parochial benefice, chapelry, or perpetual curacy, being under the juriſdiction of the biſhop or other eccleſiaſtical ordinary, is deſirous to build or improve the buildings belonging to his benefice, which one year's neat income will not be ſufficient to put in due repair, he muſt firſt procure a certificate from an experienced workman, containing a ſtate of the buildings, the value of the timber and other materials fit to be employed in building or repairing, or to be ſold, and alſo a plan or eſtimate of the work, which muſt be verified upon oath before a juſtice of the peace or maſter in chancery, ordinary or extraordinary. He muſt alſo make out in writing, to be ſigned and verified by him on oath as aforeſaid, a particular account of the annual profits of the living.

Theſe muſt be laid before the ordinary and patron; in order to obtain their conſent to ſuch purpoſed buildings or repairs.

But the ordinary, before he gives his conſent, ſhall cauſe an inquiry to be made of the ſtate and condition of the buildings at the time when the incumbent entred, how long he hath enjoyed the living, what he hath received for dilapidations, and how the ſame hath been laid out: And if it ſhall appear that the incumbent had by wilful negligence ſuffered the buildings to go out of repair, he ſhall pay down ſo much as the damages thereby occaſioned ſhall amount unto, before the ordinary ſhall give his conſent.

If the patron is a minor, idiot, lunatic, or feme covert, the guardian, committee, or huſband reſpectively may act for them.

If the ſeveral parties ſhall declare their conſent by writing under their hands, the incumbent may borrow at intereſt ſuch ſum as the ſaid eſtimate ſhall amount unto, after deducting the value of the timber or other materials which may be thought proper to be ſold, not exceeding two years value of the living after deducting all outgoings, except only the ſalaries to aſſiſtant curates where neceſſary: and as a ſecurity for the money ſo borrowed, he may mortgage the glebe, tithes, and other profits of the living, for 25 years, or until the principal, intereſt, and coſts ſhall be paid.

And the mortgagee ſhall execute a counterpart of the mortgage, to be kept by the incumbent; and a copy thereof ſhall be depoſited in the biſhop's regiſtry.

And on failure of payment of principal and intereſt for forty days after the ſame ſhall become due, the mortgagee may diſtrain in like manner as rents may be recovered by landlords from their tenants.

And a proper perſon ſhall be appointed by the ordinary, patron, and incumbent, to receive the money borrowed; who ſhall give bond to apply the ſame for the purpoſes intended, and ſhall make contracts, pay the workmen, and when finiſhed render a due account, to be entred in the regiſtry aforeſaid.

Where new buildings are neceſſary, the ordinary, patron, and incumbent may purchaſe any building within one mile of the church, and land not exceeding two acres if the living is under 100l a year; if above, then not exceeding two acres for every 100l a year. And the purchaſe money may be raiſed by ſale or exchange of ſome part of the glebe or tithes.

And every ſuch incumbent ſhall annually, at his own expence, from the time ſuch buildings ſhall be compleated, inſure at one of the offices in London or Weſtminſter the ſaid houſes againſt accidents by fire, at ſuch ſum as the ordinary, patron, and incumbent ſhall agree on: And on neglect of ſuch inſurance, the ordinary may ſequeſter the profits, till ſuch inſurance ſhall be made.

And every incumbent ſucceſſively ſhall pay the intereſt yearly as the ſame ſhall become due, or within one month after, and alſo 5l per centum of the principal; and if ſuch incumbent ſhall not reſide twenty weeks in each year computing from the date of the mortgage deed, he ſhall inſtead of 5l pay 10l per centum yearly; ſuch payments to be made till the whole principal and intereſt ſhall be diſcharged: And in default of ſuch payment, the ordinary may ſequeſter the profits as aforeſaid.

And

And where there ſhall be no houſe, or a very mean one, on a living worth above 100l a year, and the incumbent ſhall not reſide in the pariſh twenty weeks within any year, and he ſhall not think fit to lay out one year's income where the ſame may be ſufficient, nor to apply in manner aforeſaid for two year's income, the ordinary, with conſent of the patron, may procure ſuch plan, eſtimate and certificate as aforeſaid, and proceed in the execution of the purpoſes of this act, as if the incumbent had conſented; and the mortgage executed by the ordinary ſhall be binding on the incumbent and his ſucceſſors.

And the governors of queen Anne's bounty may lend money not exceeding 100l in reſpect of a living not exceeding 50l a year, without intereſt; and where the annual value exceeds 50l, they may lend any ſum not exceeding two years income at the intereſt of 4 *per cent.*

And colleges and other corporate bodies, having the patronage of livings, may lend money for the purpoſes aforeſaid without intereſt.

Note, The forms of inſtruments relative to the aforeſaid proceedings, are drawn out ſpecially in the act itſelf.

Dimiſſory letters. See Ordination.

Dioceſe.

1. Dioceſe (from διοικεω, ſeorſim habito;) ſignifies the circuit of every biſhop's juriſdiction. For this realm hath two ſorts of diviſions: one into ſhires or counties in reſpect of the temporal ſtate; and another into dioceſes, in regard to the eccleſiaſtical ſtate. 1 *Inſt.* 94. Dioceſe, what.

2. The bounds of dioceſes are to be determined by witneſſes and records, but more particularly by the adminiſtration of divine offices. To which purpoſe, there are two rules in the canon law: In one caſe, upon a diſpute between two biſhops upon this head, the direction is, that they proceed in the buſineſs, by ancient books or writings, and alſo by witneſſes, reputation, Boundary.

tion, and other ſufficient proof: In the other caſe, where the queſtion was, by whom a church built upon the confines of two dioceſes ſhould be conſecrated, the rule laid down is, that it ſhould be conſecrated by the biſhop of that city, who before it was founded, baptized the inhabitants, and adminiſtred to them other divine offices. *Gibſ.* 133.

Juriſdiction. 3. The juriſdiction of the *city* is not included in the name of *dioceſe*. So ſaith the canon law: And accordingly, in citations to general viſitations, directed to the clergy, it is ordered to cite the clergy of the *city and dioceſe*. Gibſ. 133.

Biſhop in another's dioceſe. 4. A biſhop may perform divine offices, and uſe his epiſcopal habit, in the dioceſe of another, without leave; but he may not perform therein any act of juriſdiction, without permiſſion of the other biſhop. *Gibſ.* 133, 134.

Clerk in two dioceſes. 5. A clergyman dwelling in one dioceſe, and beneficed in another, and being guilty of a crime, may, in different reſpects, be puniſhed in both: That is, the biſhop in whoſe dioceſe he dwells, may proſecute him; but the ſentence, ſo far as it affects his benefice, muſt be carried into execution by the other biſhop. *Gibſ.* 134.

Diſpenſation.

NOtwithſtanding the ſtatute of proviſors, and divers other ſtatutes againſt the papal incroachments upon the eccleſiaſtical juriſdiction in this realm, the pope's power ſtill prevailed againſt all thoſe ſtatutes; and particularly in the matter of diſpenſations, which was one great branch of the revenue of the apoſtolick ſee.

But by the ſtatute of the 25 H. 8. c. 21. it is enacted, that *no perſon ſhall ſue to the biſhop or ſee of Rome, or to any perſon having or pretending any authority by the ſame, for licences, diſpenſations, compoſitions, faculties, grants, reſcripts, delegacies, or any other inſtruments or writings, for any cauſe or matter for which any licence, diſpenſation, compoſition, faculty, grant, reſcript, delegacy, inſtrument, or other writing, hath been uſed to be obtained at the ſee of Rome, or by authority thereof, or of any prelates of this realm; or that in cauſes of neceſſity may lawfully be granted* without offending the laws of God: *but the ſame, neceſſary for the king and his ſubjects,*

ſubjects, upon due examination of the cauſes and qualities of the perſons procuring the ſame, ſhall be granted within the realm and not elſewhere, in manner following, and none otherwiſe; *that is, The archbiſhop of Canterbury ſhall have power by his diſcretion, to grant by an inſtrument under his ſeal, unto the king, his heirs and ſucceſſors, as well all ſuch licences, diſpenſations, compoſitions, faculties, grants, reſcripts, delegacies, inſtruments, and all other writings, for cauſes not being contrary to the laws of God, as have been uſed to be obtained by the king or any of his ſubjects at the ſee of Rome, or any perſon by authority of the ſame; and all other licences, diſpenſations, faculties, compoſitions, grants, reſcripts, delegacies, inſtruments, and other writings, upon all ſuch mattters as ſhall be convenient and neceſſary to be had, for the honour and ſurety of the king, and the wealth and profit of the realm: ſo that the ſaid archbiſhop in no wiſe ſhall grant any diſpenſation, licence, reſcript, or any other writing afore rehearſed, for any cauſe repugnant to the law of God.* ſ. 3.

And the ſaid archbiſhop, after due examination *of the cauſes and qualities of the perſons procuring the ſame, ſhall have power by himſelf, or by his ſufficient and ſubſtantial commiſſary or deputy, by his diſcretion from time to time to grant and diſpoſe by an inſtrument under the name and ſeal of the ſaid archbiſhop, to any of the king's ſubjects, all manner of licences, diſpenſations, faculties, compoſitions, delegacies, reſcripts, inſtruments, or other writings, for any ſuch cauſe or matter, whereof heretofore the ſame have been accuſtomed to be had at the ſee of Rome, or by the authority thereof, or of any prelate of this realm.* ſ. 4.

Nevertheleſs, the ſaid archbiſhop or his commiſſary ſhall not grant any other licence, diſpenſation, compoſition, faculty, writing, or inſtrument, in caſes unwont and not accuſtomed to be had at the court of Rome, nor by authority thereof, nor by any prelate of this realm, until the king or his council ſhall be advertiſed thereof, and determine whether the ſame ſhall commonly paſs as other diſpenſations faculties or other writings ſhall or no; on pain that the grantor ſhall make fine at the king's will: and if it be determined by the king or his council that the ſame ſhall paſs, then the ſaid archbiſhop or his commiſſary, having licence of the king by his bill aſſigned, ſhall diſpenſe with them accordingly. ſ. 5.

Provided, that no diſpenſation, licence, faculty, or other reſcript or writing to be granted by the ſaid archbiſhop or his commiſſary, being of ſuch importance, that the tax for the expedition thereof at Rome extended to the ſum of 41 *or above, ſhall in any wiſe be put in execution, till it be confirmed by the king*

king under the great ſeal, and inrolled in the chancery, *in a roll by a clerk to be appointed for the ſame; and this act ſhall be a ſufficient warrant to the chancellor or keeper of the great ſeal, to confirm in the king's name the foreſaid writings paſſed under the ſaid archbiſhop's ſeal, by letters patents in due form to be made under the great ſeal: remitting as well the ſaid writing under the archbiſhop's ſeal, as the ſaid confirmation under the great ſeal, to the parties from time to time procuring for the ſame. And all ſuch licences, diſpenſations, and other writings, for the expedition whereof the ſaid taxes to be paid at Rome were under* 41, *which be matters of no great importance, ſhall paſs only by the archbiſhop's ſeal, and ſhall not of any neceſſity be confirmed by the great ſeal, unleſs the procurers thereof deſire to have them ſo confirmed; in which caſe they ſhall pay for the ſaid great ſeal, to the uſe of the king,* 5 s *and not above, over and beſides ſuch taxes as ſhall be hereafter limited for the making, writing, regiſtring, confirming and inrolling of ſuch licences confirmations and writings under the ſaid tax of* 41. ſ. 6.

And every ſuch licence, diſpenſation, compoſition, faculty, reſcript, and writing, for ſuch cauſes as the tax was wont to be 41 *or above, ſo granted by the archbiſhop, and confirmed under the great ſeal; and all other licences, diſpenſations, faculties, reſcripts, and writings to be granted by the archbiſhop, whereunto the great ſeal is not limited of neceſſity to be put, by reaſon that the tax of them is under* 41; *ſhall be as effectual in the law, as if they had been obtained of the ſee of Rome, or of any other perſon by authority thereof, without any revocation or repeal thereof to be had.* ſ. 7.

And all children procreated after ſolemnization of any marriage to be had by virtue of ſuch licences or diſpenſations, *ſhall be taken to be legitimate, in all courts as well ſpiritual as temporal, and in all other places, and ſhall inherit the inheritance of their parents and anceſtors.* ſ. 8.

And the archbiſhop ſhall conſtitute a clerk, who ſhall write and regiſter every ſuch licence, diſpenſation, faculty, writing, or other inſtrument to be granted by the ſaid archbiſhop; and ſhall find parchment, wax, and ſilken laces convenient for the ſame; and ſhall take for his pains ſuch ſums as are in this act hereafter limited: And the king, by letters patents under the great ſeal, ſhall conſtitute one ſufficient clerk, being learned in the courſe of the chancery, who ſhall always be attendant upon the lord chancellor or keeper of the great ſeal; and ſhall make, write, and inroll the confirmation of all ſuch licences, diſpenſations, inſtruments, or other writings, as ſhall be thither brought under the archbiſhop's ſeal, there to be confirmed and inrolled;

inrolled; *and ſhall alſo intitle in his books, and inroll of record, ſuch other writings as ſhall thither be brought under the archbiſhop's ſeal, not to be confirmed*; *taking for his pains the ſums in this act hereafter appointed. And as well the ſaid clerk appointed by the archbiſhop, as the clerk appointed by the king, ſhall ſubſcribe their names to every ſuch licence, diſpenſation, faculty, or other writing, that ſhall come to their hands to be written, made, granted, ſealed, confirmed, regiſtered, and inrolled.* ſ. 9.

And there ſhall be two books made of one tenor, in which ſhall be contained the taxes of all cuſtomable diſpenſations, *faculties, licences, and other writings wont to be ſped at Rome*; *which book, and every leaf of thoſe books, and both ſides of every leaf, ſhall be ſubſcribed by the archbiſhop of Canterbury, the lord chancellor, the lord treaſurer, and the two chief juſtices*; *to which books all ſuitors for diſpenſations, faculties, licences, and other writings afore rehearſed, ſhall have recourſe if they require it*; *and one of the ſaid books ſhall remain in the hands of the ſaid clerk to be appointed by the archbiſhop, and the other to remain with the clerk of the chancery to be appointed by the king*; *which clerk of the chancery ſhall alſo intitle and note particularly and daily in his book ordained for that purpoſe, the number and qualities of the diſpenſations, faculties, licences, and other writings, which ſhall be ſealed only with the ſeal of the archbiſhop, and alſo which ſhall be ſealed with the ſaid ſeal and confirmed with the great ſeal.* ſ. 11.

And no man ſuing for diſpenſations, faculties, licences, or other writings, which were wont to be ſped at Rome, ſhall pay any more for the ſame, than ſhall be limited in the ſaid duplicate books of taxes; *only compoſitions excepted, of which, being arbitrary, no tax can be made, wherefore the tax thereof ſhall be ſet and limited by the diſcretion of the ſaid archbiſhop and the lord chancellor or lord keeper of the great ſeal*; *and ſuch as exact or receive of any ſuitor more than ſhall be contained in the ſaid book of taxes, ſhall forfeit ten times as much, half to the king, and half to him that ſhall ſue.* ſ. 12.

And the ſaid tax ſhall be employed and ordered as hereafter enſueth; *that is, if the tax extend to* 41 *or above, by reaſon whereof the writing which ſhall paſs by the archbiſhop's ſeal muſt be confirmed by the appenſion of the great ſeal, the ſame ſhall be divided into three parts*; *two parts whereof ſhall be divided into four, of which three parts ſhall go to the king, and the remaining fourth part ſhall be divided into three, whereof the chancellor or lord keeper ſhall have two, and the*

ſaid clerk of the chancery one. And the remaining third part of the whole tax ſhall be divided into three; whereof the archbiſhop ſhall have two, and his officers one, which one part ſhall be divided equally between the ſaid clerk or regiſter, and the archbiſhop's commiſſary appointed to ſeal the ſaid inſtruments. f. 13.

If the tax be under 4 l, *and not under* 40 s, *then the ſaid tax ſhall be divided into three parts as is aforeſaid, whereof the king ſhall have two parts, abating* 3 s 4 d *which ſhall be to the ſaid clerk of the chancery for his trouble; and the archbiſhop and his officers ſhall have the third part, of which the archbiſhop ſhall have one moiety, and his ſaid clerk and commiſſary the other moiety, equally betwixt them. And if the tax be under* 40 s, *and not under* 26 s 8 d; *it ſhall be divided into two parts, whereof one ſhall be to the king, deducting* 2 s *for the ſaid clerk of the chancery for his pains; and the other ſhall be to the archbiſhop and his officers, whereof the archbiſhop ſhall have one moiety, and his ſaid clerk and commiſſary the other moiety equally betwixt them. And if the tax be under* 26 s 8 d, *and not under* 20 s; *the ſame ſhall be divided into two parts, whereof the king ſhall have one, abating* 2 s *to the ſaid clerk of the chancery; and the archbiſhop and his ſaid clerk and commiſſary ſhall have the other part equally amongſt them. And if the tax be under* 20 s; *the ſame ſhall be to the ſaid commiſſary, clerk of the archbiſhop, and clerk of the chancery equally amongſt them.* f. 14.

Provided, that this act ſhall not be prejudicial to the archbiſhop of York, or to any biſhop of this realm; *but that they may lawfully diſpenſe in all caſes, in which they were wont to diſpenſe by the common law or cuſtom of the realm before the making of this act.* f. 15.

And if it happen that the ſee of the archbiſhoprick of Canterbury ſhall be void; then ſuch licences, diſpenſations, faculties, inſtruments, and other writings ſhall, during the vacation, be granted under the name and ſeal of the guardian of the ſpiritualties. f. 16.

And if the archbiſhop or guardian of the ſpiritualties ſhall refuſe or deny to grant any licences, diſpenſations, faculties, inſtruments, or other writings, to any perſon that ought, upon a good juſt and reaſonable cauſe to have the ſame; then the chancellor of England, or the lord keeper of the great ſeal, on complaint thereof made, ſhall direct the king's writ to the ſaid archbiſhop or guardian, enjoining him upon a certain pain therein to be limited, that he ſhall in due form grant the ſame, or elſe ſignify to the king in the court of chancery at a certain day, for what cauſe he refuſed to grant the ſame; and if it ſhall appear

pear to the ſaid chancellor or lord keeper, upon ſuch certificate, that the cauſe of refuſal was reaſonable juſt and good, then it ſo being proved by due ſearch and examination ſhall be admitted and allowed. And if it ſhall appear upon the ſaid certificate, that the cauſe of refuſal was not juſt and reaſonable, then the king being thereof informed, after due examination had that the ſame may be granted without offending the law of God, ſhall have power to ſend his writ of injunction under the great ſeal out of the chancery, commanding the archbiſhop or guardian to make grant thereof, by a certain day, and under a certain pain in the ſaid writ to be contained. And if the ſaid archbiſhop or guardian, after receipt of the ſaid writ, refuſe or deny to grant the ſame as enjoined by the ſaid writ, and ſhew no juſt cauſe why he ſhould do ſo; then he ſhall forfeit ſuch pain and penalty as ſhall be limited and expreſſed in the ſaid writ of injunction. And the king may give power by commiſſion under the great ſeal, to two ſuch ſpiritual prelates or perſons as will do and grant the ſame. ſ. 17.

And if any perſon ſhall ſue to the court or ſee of Rome, or to any perſon claiming authority by the ſame, for any licence, faculty, diſpenſation, or other thing contrary to this act, or put the ſame in execution, or attempt to do any thing contrary to this act; he ſhall incur a præmunire. ſ. 22. And by the 13 *Eliz. c.* 2. *ſ.* 3. he ſhall *be guilty of high treaſon.*

Without offending the laws of God] By this clauſe the archbiſhop was reſtrained from granting diſpenſations of ſeveral kinds which the popes uſually granted, and in other countries do ſtill grant; as, for marriages within the degrees prohibited, for an alien who underſtandeth not our mother tongue to have a benefice, and (before the ſtatutes of diſſolution) for an appropriation of a benefice with cure to a nunnery. *Gibſ.* 89. *Hob.* 148.

In manner following, and none otherwiſe] The kings of England from time to time, in every age, before the time of Henry the eighth, have uſed to grant diſpenſations in cauſes eccleſiaſtical. *God.* 108.

And notwithſtanding this negative clauſe, it hath been held and allowed, in the caſe of *Colt* and *Glover*, *M.* 10 *Ja.* that the king is not thereby reſtrained from granting diſpenſations; but that his authority remains full and perfect as before, and he may ſtill grant them as king; for all acts of juſtice and grace flow from him. Before which time, the like had been declared, in the caſe of *Armiger* and *Holland*, *H.* 39 *Eliz.* that the king by the prerogative

tive he hath at common law, might grant ſuch a diſpenſation as was then under debate, namely, to hold a benefice in commendam without the archbiſhop; this ſtatute only transferring the authority of the biſhop of Rome to the archbiſhop, but not intending to take away from the king (who is not named in the ſtatute) the ancient prerogative of the crown. Which reſolution is more diſtinctly delivered by *Moore*; that in caſes where the archbiſhop had not authority given him by this ſtatute, the king might grant diſpenſations as the pope had done, becauſe the papal authority was transferred to the crown; but that all diſpenſations which this ſtatute enables the archbiſhop to grant, are neceſſarily to be paſſed in the form directed by the ſtatute. Since both which caſes, it hath been delivered, in the caſe of *Evans* and *Aſcuithe*, (*Palm.* 457.) that this ſtatute gives the archbiſhop a power concurrent with the power which the king had and ſtill hath at common law; and that a diſpenſation granted by the king, or by the archbiſhop, is good; and altho' this, as the other two, is delivered in the caſe of a commendam, yet this declaration of a power in the king, notwithſtanding the negative clauſe in the ſtatute, ſeems to be general as to all other diſpenſations. [How juſtly or reaſonably delivered, Dr Gibſon ſays, he will not pretend to affirm.] *Gibſ.* 88.

After due examination] After which, if the archbiſhop affirm the cauſe juſt, there ſhall be no exception or averment by the court or by the party againſt it. But in caſe he deny to diſpenſe with any perſon, who upon a good juſt and reaſonable cauſe ought to have a diſpenſation; a remedy is provided in the following part of the act. *Hob.* 158.

Inrolled in the chancery] Which inrollment is not a neceſſary condition, ſo as to render the diſpenſation null without it; but the neglect is a contempt in the clerk; who alſo ought to enter it at length in a roll, and not a paper book or by way of memorandum. *Dyer.* 233. *Mo.* 447.

After ſolemnization of any marriage to be had by virtue of ſuch licences or diſpenſations] And by the marriage act of the 26 *G.* 2. *c.* 33. the archbiſhop of Canterbury's right of granting ſpecial licences of marriage is particularly reſerved to him.

Cuſtomable diſpenſations] Among theſe is the right of conferring degrees of all kinds, for which faculties had been cuſtomarily grantable, and which this act hath veſted in the archbiſhop of Canterbury. Which power, as it hath not been abrogated, or touched, by any ſucceeding law, ſo it hath been exerciſed by the ſucceeding archbiſhops, as a right veſted in their ſee by no leſs than parliamentary authority; to which authority, as conveyed by the act, ſpecial reference is made in the body of every faculty that is granted upon this head. *Gibſ.* 91.

Or to any biſhop of this realm] The canoniſts are much divided about the power of biſhops in the point of diſpenſing; but the Gloſs ſays, the more common opinion is, that *a biſhop may diſpenſe whereſoever it is not found to be prohibited*; and, generally, *whereſoever a diſpenſation is not prohibited, it is underſtood to be permitted:* which diſpenſations ſeem to refer chiefly to canonical *defects*, and irregularities of that kind. *Gibſ.* 92.

By the ſeveral ſtamp acts; every diſpenſation or faculty from the archbiſhop of Canterbury or maſter of the faculties, ſhall be on a treble 40 s ſtamp.

Diſſenters.

I. *Laws againſt diſſenters.*

II. *How far mitigated by the act of toleration, and other acts.*

I. *Laws againſt diſſenters.*

1. *Can.* 9. WHoever ſhall ſeparate themſelves from the communion of ſaints, as it is approved by the apoſtles rules, in the church of England; and combine themſelves together in a new brotherhood; accounting the chriſtians who are conformable to the doctrine government rites and ceremonies of the church of England, to be profane and unmeet for them to join with in chriſtian profeſſion: let them be excommunicated ipſo facto, and not reſtored but by the archbiſhop, after their repentance and publick revocation of ſuch their wicked errors. Canons.

Can. 10. Whoever ſhall affirm, that ſuch miniſters as refuſe to ſubſcribe to the form and manner of God's worſhip in the church of England preſcribed in the communion book, and their adherents, may truly take unto them the name of another church not eſtabliſhed by law; and dare preſume to publiſh it, that this their pretended church hath of long time groaned, under the burden of certain grievances impoſed upon it and upon the members thereof before mentioned, by the church of England and the orders and conſtitutions therein by law eſtabliſhed: let them be excommunicated, and not reſtored until they repent, and publickly revoke ſuch their wicked errors.

Can. 11. Whoever ſhall affirm or maintain, that there are within this realm other meetings aſſemblies or congregations of the king's born ſubjects, than ſuch as by the laws of this land are held and allowed, which may rightly challenge to themſelves the name of true and lawful churches: let them be excommunicated, and not reſtored but by the archbiſhop, after his repentance and publick revocation of ſuch his wicked errors.

Can. 12. Whoever ſhall affirm, that it is lawful for any ſort of miniſters and lay perſons, or either of them, to join together and make rules orders or conſtitutions in cauſes eccleſiaſtical, without the king's authority, and ſhall ſubmit themſelves to be ruled and governed by them: let them be excommunicated ipſo facto, and not be reſtored until they repent, and publickly revoke thoſe their wicked and anabaptiſtical errors.

Can. 71. No miniſter ſhall preach or adminiſter the holy communion in any private houſe; except it be in times of neceſſity, when any being either ſo impotent, as he cannot go to the church, or very dangerouſly ſick, is deſirous to be partaker of the holy ſacrament: upon pain of ſuſpenſion for the firſt offence, and excommunication for the ſecond. Provided, that houſes are here reputed for private houſes, wherein are no chapels dedicated and allowed by the eccleſiaſtical laws of this realm. And provided alſo, under the pains before expreſſed, that no chaplains do preach or adminiſter the communion in any other places, but in the chapels of the ſaid houſes; and alſo that they do the ſame very ſeldom upon ſundays and holidays: ſo that both the lords and maſters of the ſaid houſes, and their families, ſhall at other times reſort to their own pariſh churches, and there receive the holy communion at the leaſt once every year.

Can. 72.

Can. 72. No miniſter or miniſters ſhall, without the licence and direction of the biſhop firſt obtained under his hand and ſeal, appoint or keep any ſolemn faſts, either publickly or in any private houſes, other than ſuch as by law are, or by publick authority ſhall be appointed; nor ſhall be wittingly preſent at any of them: under pain of ſuſpenſion for the firſt fault, of excommunication for the ſecond, and of depoſition from the miniſtry for the third. Neither ſhall any miniſter, not licenſed as is aforeſaid, preſume to appoint or hold any meetings for ſermons, commonly termed by ſome prophecies or exerciſes, in market towns or other places; under the ſaid pains: nor without ſuch licence to attempt, upon any pretence whatſoever, either of poſſeſſion or obſeſſion, by faſting and prayer to caſt out any devil or devils; under pain of the imputation of impoſture or coſenage, and depoſition from the miniſtry.

Can. 73. Foraſmuch as all conventicles and ſecret meetings of prieſts and miniſters, have ever been juſtly accounted very hurtful to the ſtate of the church wherein they live; we do ordain, that no prieſts or miniſters of the word of God, nor any other perſons, ſhall meet together in any private houſe, or elſewhere, to conſult upon any matter or courſe to be taken by them, or upon their motion or direction by any other, which may any way tend to the impeaching or depraving of the doctrine of the church of England, or of the book of common prayer, or of any part of the government and diſcipline now eſtabliſhed in the church of England; under pain of excommunication ipſo facto.

2. By the 1 *El.* 2. All perſons ſhall diligently and faithfully, having no lawful or reaſonable excuſe to be abſent, endeavour themſelves to reſort to their pariſh church or chapel accuſtomed, or upon reaſonable let thereof, to ſome uſual place where common prayer and ſuch ſervice of God ſhall be uſed in ſuch time of let, upon every ſunday and other days ordained and uſed to be kept as holidays, and then and there to abide orderly and ſoberly, during the time of the common prayer preaching or other ſervice of God there to be uſed and miniſtred; on pain of puniſhment by the cenſures of the church, and alſo on pain of forfeiting 12 d for every ſuch offence, to be levied by the churchwardens to the uſe of the poor, of the goods lands and tenements of ſuch offender by way of diſtreſs. *ſ.* 14. Not reſorting to church.

And by the 23 *El. c.* 1. Every perſon, above the age of ſixteen years, which ſhall not repair to ſome church chapel or uſual place of common prayer, but forbear the ſame contrary to the 1 *El. c.* 2. ſhall forfeit 20 l a month; and if he ſhall forbear the ſame for twelve months, he ſhall, after certificate thereof made in writing into the court of king's bench, by the ordinary of the dioceſe, a judge of aſſize, or juſtice of the peace of the county where the offender ſhall dwell, be bound with two ſureties in 200 l at leaſt to the good behaviour, and ſo to continue bound until he do conform. ſ. 5.

And if any perſon or perſons, body politick or corporate, ſhall keep or maintain any ſchoolmaſter which ſhall not repair to church as is aforeſaid or be allowed by the biſhop or ordinary of the dioceſe; they ſhall forfeit 10 l a month. Provided, that no ſuch ordinary, or their miniſters, ſhall take any thing for the ſaid allowance. And ſuch ſchoolmaſter or teacher preſuming to teach contrary to this act, ſhall be diſabled to be a teacher of youth, and be impriſoned for a year. ſ. 6, 7.

And by the 29 *El. c.* 6. Every ſuch offender in not repairing to divine ſervice, but forbearing the ſame contrary to the 23 *El. c.* 1. as ſhall thereof be once convicted, ſhall for every month afterwards until he do conform, pay into the exchequer without any other indictment or conviction, in every eaſter and michaelmas term, as much as ſhall then remain unpaid after ſuch rate of 20 l a month; and if default ſhall be made in any part of the payment thereof, the queen may by proceſs out of the exchequer ſeize all the goods and two parts of the lands of ſuch offender. ſ. 4, 6.

And by the 3 *Ja. c.* 4. The king may refuſe the 20 l a month, and take two parts of the lands at his option. ſ. 11.

And every perſon who ſhall willingly maintain retain relieve keep or harbour in his houſe, any ſervant ſojourner or ſtranger, who ſhall not repair to church, but ſhall forbear the ſame for a month together, not having any reaſonable excuſe; ſhall forfeit 10 l a month. ſ. 32.

And every perſon who ſhall retain or keep in his ſervice fee or livery any perſon who ſhall not repair to church but ſhall forbear the ſame for a month together; ſhall for every month he ſhall ſo retain keep or continue in his ſervice fee or livery any ſuch perſon ſo forbearing, knowing the ſame, forfeit 10 l. ſ. 33.

Provided

Provided that this ſhall not extend to puniſh or impeach any perſon, for keeping his father or mother, wanting (without fraud or covin) other habitation, or ſufficient maintenance. ſ. 34.

And by the 21 *Jac. c.* 4. Actions againſt perſons for not frequenting the church and hearing divine ſervice, ſhall be laid in any county at the pleaſure of the informer. ſ. 5.

3. By the 35 *El. c.* 1, If any perſon above the age of ſixteen years, which ſhall obſtinately refuſe to repair to ſome church chapel or uſual place of common prayer to hear divine ſervice, and ſhall forbear the ſame by the ſpace of a month next after without any lawful cauſe, ſhall by printing writing or expreſs words or ſpeeches, adviſedly or purpoſely practiſe or go about to move or perſuade any perſon to deny withſtand or impugn her majeſty's power and authority in cauſes eccleſiaſtical, united and annexed to the imperial crown of this realm; or to that end or purpoſe ſhall adviſedly and maliciouſly move or perſuade any perſon to forbear or abſtain from coming to church to hear divine ſervice or to receive the communion, or to be preſent at any unlawful aſſemblies conventicles or meetings, under colour or pretence of any ſuch exerciſe of religion; he ſhall be committed to priſon until he ſhall conform to go to church, and make ſubmiſſion as hereafter is expreſſed. ſ. 1. Frequenting conventicles.

Provided, that if he ſhall not within three months after conviction ſo conform himſelf and make ſubmiſſion, being thereunto required by the biſhop of the dioceſe or a juſtice of the peace or the miniſter or curate of the pariſh; then he ſhall, being thereunto warned or required by a juſtice of the peace, upon his corporal oath before the juſtices in ſeſſions or at the aſſizes, abjure this realm of England and all other the queen's dominions for ever, unleſs her majeſty ſhall licenſe the party to return; and thereupon ſhall depart out of this realm at ſuch haven or port and within ſuch time, as ſhall be aſſigned by the juſtices before whom the abjuration ſhall be made, unleſs he be letted or ſtayed by ſuch lawful and reaſonable cauſes as by the common laws of this realm are allowed in caſes of abjuration for felony; and in ſuch caſes of let or ſtay, then within ſuch reaſonable and convenient time after, as the common law requireth in caſe of abjuration for felony: and the juſtices of the peace before whom the abjuration ſhall happen to be made, ſhall cauſe the ſame pre-

ſently to be entred of record before them, and ſhall certify the ſame to the next aſſizes. ſ. 2.

And if he ſhall refuſe to make abjuration, or after abjuration made ſhall not go to ſuch haven and within ſuch time as is before appointed, and from thence depart, or after departure ſhall return without her majeſty's ſpecial licence; he ſhall be guilty of felony without benefit of clergy ſ. 3.

But if he ſhall, before he be required to abjure, repair to ſome pariſh church on ſome ſunday or other feſtival day, and then and there hear divine ſervice, and at ſervice time before the ſermon on reading of the goſpel make publick and open ſubmiſſion and declaration of his conformity, he ſhall be diſcharged: Which ſubmiſſion ſhall be in this form, "I A. B. do humbly confeſs and acknowledge, that I have grievouſly offended God, in contemning her majeſty's godly and lawful government and authority, by abſenting myſelf from church, and from hearing divine ſervice, contrary to the godly laws and ſtatutes of this realm, and in uſing and frequenting diſordered and unlawful conventicles and aſſemblies, under pretence and colour of exerciſe of religion; and I am heartily ſorry for the ſame; and do acknowledge and teſtify in my conſcience, that no other perſon hath or ought to have, any power or authority over her majeſty; and I do promiſe and proteſt, without any diſſimulation, or any colour or means of any diſpenſation, that from henceforth I will from time to time obey and perform her majeſty's laws and ſtatutes, in repairing to the church, and hearing divine ſervice, and do my uttermoſt endeavour to maintain and defend the ſame." Which ſubmiſſion and declaration the miniſter ſhall preſently enter in a book to be kept in every pariſh for that purpoſe; and in ten days ſhall certify the ſame in writing to the biſhop of the dioceſe. ſ. 4, 5, 6.

Provided, that if after ſubmiſſion ſuch offender ſhall fall into relapſe, or eftſoons obſtinately refuſe to repair to ſome church chapel or uſual place of common prayer to hear divine ſervice and ſhall forbear the ſame as aforeſaid, or ſhall be preſent at any ſuch aſſemblies conventicles or meetings, under colour or pretence of any exerciſe of religion; he ſhall loſe all benefit of his ſubmiſſion. ſ. 7.

All pains duties forfeitures and payments on this act, and on the 23 *El. c.* 1. ſhall be recovered to her majeſty's uſe in any of the courts of record at Weſtminſter. ſ. 10.

Provided,

Provided, that one third of the penalties by this act ſhall be employed to ſuch charitable uſes, and in ſuch manner and form as is directed by the ſtatute of the 29 *El. c.* 6. (that is, for the relief of the poor, as ſhall be directed by the lord treaſurer, chancellor and chief barons of the exchequer.) ſ. 11.

Provided that no *popiſh* recuſant, or feme covert, ſhall be compelled or bound to abjure by virtue of this act. ſ. 12.

Provided, that every perſon that ſhall abjure by this act, or refuſe to abjure being thereunto required as aforeſaid, ſhall forfeit to the queen all his goods and chattels for ever, and his lands during life. ſ. 13.

And by the 17 *C.* 2. *c.* 2. All ſuch perſons as ſhall take upon them to preach in any unlawful aſſembly conventicle or meeting, under colour or pretence of any exerciſe of religion, contrary to the laws and ſtatutes of this kingdom; ſhall not, unleſs only in paſſing upon the road, come within five miles of any city or town corporate, or borough that ſends burgeſſes to parliament; on pain of 40 l, one third to the king, one third to the poor, and one third to him that ſhall ſue in any court of record at Weſtminſter, or at the aſſizes or ſeſſions. ſ. 3.

And it ſhall not be lawful for any perſon ſo reſtrained, or for any other perſon that ſhall not frequent divine ſervice eſtabliſhed by the laws of the kingdom and carry himſelf reverently decently and orderly there; to teach any public or private ſchool, or take any boarders or tablers that are taught or inſtructed by himſelf or any other; on the like pain of 40 l. ſ. 4.

Provided, that if any ſuch perſon ſhall without fraud be ſerved with any writ ſubpœna warrant or other proceſs, whereby his perſonal attendance is required; his obedience thereunto ſhall not be conſtrued an offence againſt this act. ſ. 6.

And by the 22 *C.* 2. *c.* 1. If any perſon of the age of ſixteen years or upwards, being a ſubject of this realm, ſhall be preſent at any aſſembly conventicle or meeting, under colour or pretence of any exerciſe of religion, in other manner than according to the liturgy and practice of the church of England, at which there ſhall be five perſons or more aſſembled together, beſides thoſe of the houſhold if it be in a houſe where there is a family; or if it be in a houſe field or place where there is no family inhabiting, then where any five perſons or more are ſo aſſembled as aforeſaid: it ſhall be lawful for any one or

more juſtices of the peace, or chief magiſtrate of the place, and they are hereby required and enjoined on proof to them made of ſuch offence, either by confeſſion of the party, or oath of two witneſſes, or by notorious evidence and circumſtance of the fact, to make a record of every ſuch offence under hand and ſeal; which record ſhall be a full conviction of every ſuch offender; and thereupon they ſhall impoſe on every ſuch offender a fine of 5 s for ſuch firſt offence: which record and conviction ſhall be certified to the next ſeſſions. ſ. 1.

For the ſecond offence, every ſuch offender ſhall incur the penalty of 10s. Which fines for the firſt and every other offence ſhall be levied by diſtreſs and ſale of the offender's goods; or in caſe of the poverty of ſuch offender, upon the goods of any other perſon who ſhall be then convicted of the like offence at the ſame conventicle, at the diſcretion of ſuch juſtice or chief magiſtrate; ſo as the ſum to be levied on any one perſon in caſe of the poverty of other offenders, amount not in the whole to above the ſum of 10 l upon the occaſion of any one meeting: and the conſtables, churchwardens, and overſeers of the poor reſpectively, ſhall levy the ſame accordingly, by warrant of ſuch juſtice or chief magiſtrate; and the ſame ſo levied ſhall be forthwith delivered to ſuch juſtice or chief magiſtrate, and by him diſtributed, one third to the ſheriff at the quarter ſeſſions for the king's uſe, one third to the poor, and one third to the informer and to ſuch perſon and perſons as ſuch juſtice or chief magiſtrate ſhall appoint, having regard to their diligence and induſtry in the diſcovering, diſperſing, and puniſhing of the ſaid conventicles. ſ. 2.

And every perſon who ſhall take upon him to preach or teach in any ſuch meeting aſſembly or conventicle, and ſhall thereof be convicted as aforeſaid; ſhall forfeit for ſuch firſt offence 20 l, to be levied and diſpoſed of in manner aforeſaid: and if the ſaid preacher or teacher ſo convicted be a ſtranger, and his name and habitation not known, or is fled and cannot be found, or in the judgment of ſuch chief magiſtrate ſhall be thought unable to pay the ſame; they ſhall levy the ſame by their warrant upon the goods of any ſuch perſons who ſhall be preſent at the ſame conventicle: and for every other offence 40 l in like manner. ſ. 3.

And every perſon who ſhall wittingly and willingly ſuffer any ſuch conventicle meeting or unlawful aſſembly aforeſaid, to be held in his houſe out-houſe barn yard or backſide,

backſide, and be convicted thereof in manner aforeſaid; ſhall forfeit 20 l, to be levied in manner aforeſaid upon his goods, or in caſe of his poverty or inability as aforeſaid, upon the goods of ſuch perſons who ſhall be convicted in manner aforeſaid of being preſent at the ſame conventicle: and the money ſo levied to be diſpoſed in manner aforeſaid. ſ. 4.

Provided, that no perſon ſhall by any clauſe of this act be liable to pay above 10 l for any one meeting, in regard of the poverty of any other perſons. ſ. 5.

Provided, that in all caſes of this act, where the penalty or ſum charged upon any offender exceeds the ſum of 10 s, and ſuch offender ſhall find himſelf aggrieved, it ſhall be lawful for him within one week after the ſaid penalty or money charged ſhall be paid or levied, to appeal in writing from the perſon or perſons convicting, to the judgment of the juſtices of the peace in their next quarter ſeſſions; to whom the juſtice or juſtices, chief magiſtrate, or alderman, that firſt convicted ſuch offender, ſhall return the money levied upon the appellant, and ſhall certify under his and their hands and ſeals the evidence upon which the conviction paſt, with the whole record thereof, and the ſaid appeal: whereupon ſuch offender may plead and make defence, and have his trial by a jury thereupon. And in caſe ſuch appellant ſhall not proſecute with effect, or if upon ſuch trial he ſhall not be acquitted, or judgment paſs not for him upon his ſaid appeal; the ſaid juſtices at the ſeſſions ſhall give treble coſts againſt ſuch offender for his unjuſt appeal. And no other court whatſoever ſhall intermeddle with any cauſe of appeal upon this act, but they ſhall be finally determined in the quarter ſeſſions only. ſ. 6.

Provided, that upon the delivery of ſuch appeal the appellant ſhall enter before the perſon convicting into a recognizance to proſecute the ſaid appeal with effect; who ſhall alſo certify the ſame to ſuch ſeſſions: and if no ſuch recognizance be entered into, the appeal ſhall be void. ſ. 7.

And every ſuch appeal ſhall be left with the perſon convicting at the time of making thereof. ſ. 8.

And the juſtices of the peace and chief magiſtrates reſpectively, or conſtables by warrant from any ſuch juſtice or chief magiſtrate, ſhall and may with what aid force and aſſiſtance they ſhall think fit, for the better execution of this act, after refuſal or denial to enter, break open and enter into any houſe or other place, where they ſhall

be

be informed any ſuch conventicle is or ſhall be held, as well within liberties as without; and take into their cuſtody the perſons there unlawfully aſſembled, to the intent they may be proceeded againſt according to this act: And the lieutenants or deputy lieutenants or any commiſſionated officer of the militia or other of his majeſty's forces, with ſuch troops or companies of horſe and foot; and alſo the ſheriffs, and other magiſtrates and miniſters of juſtice, or any of them jointly or ſeverally, with ſuch other aſſiſtance as they ſhall think meet or can get in readineſs with the ſooneſt, on certificate made to them reſpectively under the hand and ſeal of any one juſtice or chief magiſtrate, of his particular information or knowledge of ſuch unlawful meeting or conventicle held or to be held in their reſpective counties or places, and that he with ſuch aſſiſtance as he can get together is not able to ſuppreſs and diſſolve the ſame,——ſhall and may, and are hereby required and enjoined to repair unto the place where they are ſo held or to be held, and by the beſt means they can to diſſolve diſſipate or prevent all ſuch unlawful meetings, and take into their cuſtody ſuch and ſo many of the ſaid perſons ſo unlawfully aſſembled as they ſhall think fit, to the intent they may be proceeded againſt according to this act. ſ. 9.

Provided, that no dwelling houſe of any peer of the realm, where he or his wife ſhall be then reſident, ſhall be ſearched by virtue of this act, but by immediate warrant from his majeſty under his ſign manual, or in the preſence of the lieutenant or a deputy lieutenant, or two juſtices of the peace whereof one to be of the quorum. ſ. 10.

And if any conſtable, churchwarden, or overſeer of the poor, who ſhall know or be credible informed of any ſuch meetings or conventicles held within his precincts, pariſhes or limits, and ſhall not give information thereof to ſome juſtice of the peace or the chief magiſtrate, and endeavour the conviction of the parties according to his duty; but ſuch conſtable churchwarden or overſeer of the poor, or any perſon lawfully called in aid of the conſtable, ſhall wilfully and wittingly omit the performance of his duty in the execution of this act, and be thereof convicted in manner aforeſaid; he ſhall forfeit 5l, to be levied and diſpoſed as aforeſaid: and if any juſtice of the peace or chief magiſtrate ſhall wilfully and wittingly omit the performance of his duty in the execution of this act; he

ſhall

ſhall forfeit 100l, half to the informer, to be recovered in any of his majeſty's courts at Weſtminſter. ſ. 11.

And if any perſon be at any time ſued for putting in execution any of the powers contained in this act, otherwiſe than upon appeal allowed by this act; he may plead the general iſſue, and give the ſpecial matter in evidence: and if the plaintiff be nonſuit, or a verdict paſs for the defendant, or if the plaintiff diſcontinue his action, or if upon demurrer judgment be given for the defendant, every ſuch defendant ſhall have his full treble coſts. ſ. 12.

And this act, and all clauſes therein contained, ſhall be conſtrued moſt largely and beneficially for the ſuppreſſing of conventicles, and for the juſtification and encouragement of all perſons to be imployed in the execution hereof: and no record, warrant, or mittimus to be made by virtue of this act, or any proceedings thereupon, ſhall be reverſed avoided or any way impeached by reaſon of any default in form. And in caſe any perſon offending againſt this act, ſhall be an inhabitant in any other county or corporation, or fly into another county or corporation, after the offence committed; the juſtice or chief magiſtrate before whom he ſhall be convicted as aforeſaid, ſhall certify the ſame under his hand and ſeal, to any juſtice of the peace or chief magiſtrate of ſuch other county or corporation wherein the ſaid perſon is an inhabitant or is fled into, who ſhall levy the penalty as fully as the other juſtice might have done in caſe he had been an inhabitant where the offence was committed. ſ. 13.

Provided, that no perſon ſhall be puniſhed for any offence againſt this act, unleſs he be proſecuted within three months after the offence committed. And no perſon who ſhall be puniſhed for any offence by virtue of this act, ſhall be puniſhed for the ſame by virtue of any other act or law whatſoever. ſ. 14.

And the aldermen of London ſhall have the ſame power to execute this act there, as the juſtices of the peace elſewhere. ſ. 15.

If the perſon convicted as aforeſaid be a feme covert, cohabiting with her huſband; the penalties of 5s and 10s as aforeſaid, ſhall be levied upon the goods of her huſband. ſ. 16.

Provided, that no peer of the realm ſhall be attached or impriſoned by this act. ſ. 17.

Provided, that nothing in this act ſhall extend to invalidate or make void the king's ſupremacy in eccleſiaſtical affairs;

affairs; but that he may exerciſe and enjoy all powers and authority in eccleſiaſtical affairs, as he might have done before. ſ. 18.

Sacrament. 4. By the 13 & 14 *C.* 2. *c.* 4. No perſon ſhall preſume to conſecrate and adminiſter the ſacrament of the Lord's ſupper, before he ſhall be ordained prieſt according to the manner of the church of England; on pain of 100 l, half to the king, and half to be equally divided between the poor and him who ſhall ſue in any of his majeſty's courts of record. ſ. 14.

And by the 13 *C.* 2. *ſt.* 2. *c.* 1. No perſon ſhall be placed elected or choſen, into the office of mayor, alderman, recorder, bailiff, town clerk, common council man, or other office of magiſtracy, or place or truſt or other employment relating to or concerning the government of any of the cities corporations boroughs cinque ports and their members and other port towns within this realm, that ſhall not have within one year next before ſuch election or choice taken the ſacrament of the Lord's ſupper, acording to the rites of the church of England; and in default thereof, every ſuch placing election and choice is hereby declared to be void. ſ. 12.

Upon which act, in *Larwood*'s caſe, *H.* 6 *W.* it was ſaid by the court, that ever ſince the making hereof, when a freeman who was a diſſenter was choſen alderman of a corporation, he never inſiſted upon the act as an excuſe, but ſubmitted to a fine. And it was alſo declared in the ſame caſe (which was, whether a diſſenter being choſen ſheriff of Norwich, and not having received the ſacrament as the act directs, the election was void, in favour of the elected who declined the office;) that the corporation act never deſigned to exempt diſſenters from bearing offices in the government, but to eſtabliſh a ſucceſſion of perſons who were well affected to it; for otherwiſe it would be an encouragement to ſome men to perſiſt in their nonconformity, on purpoſe to avoid offices of burden and charge, inſtead of bringing them to conform, which was chiefly intended by that ſtatute. And therefore they declared, that he muſt ſubmit to a fine, as others had done. But becauſe one of the judges (and, as was ſaid at the bar, the lord keeper alſo) was of a contrary opinion (namely, that the defendant was ſufficiently puniſhed by the corporation act, in being diſabled to hold any office or employment of profit, and now to puniſh him by an information, would be a double puniſhment for one offence, which the law will not allow:) therefore there being a

capias againſt the defendant *pro fine*, and he now appearing in court, he was fined five marks and no more. *Gibſ.* 506. 4 *Mod.* 269.

But four years before, *M.* 2 *W.* this was adjudged as a good plea, in the caſe of *Guilford Town* againſt *Clarke*, viz. that he being a diſſenter, and unqualified by this act, the election was void; and that the by-law for forfeiting 20 l upon refuſal after election did not take place, becauſe the perſon being abſolutely incapacitated by the ſtatute, there was really no election; and ſo he could not refuſe after election. *Gibſ.* 506. 2 *Ventr.* 247.

T. 16 *G.* 2. *K.* and *Groſvenor.* He was one of the diſſenters who was choſen ſheriff of London and Middleſex, and refuſed to take upon him the office; for which an information was moved for againſt him, as it is an office in which the publick are intereſted, and therefore not to be compenſated by a pecuniary ſatisfaction to the city. But upon ſhewing cauſe, the court diſcharged the rule; it appearing that there were acts of common council that that had provided penalties upon refuſers, which is the proper remedy; eſpecially where it is doubtful whether the refuſal is a crime or not, which hath never yet been ſettled. In this caſe the facts are agreed, and the only doubt is in point of law, and therefore more proper for a civil ſuit: and ſo was the opinion of the court, in the caſe of *Shackleton* of York in lord Hardwick's time. However, they declared, that if after the point was determined againſt the diſſenters, others ſhould refuſe; it might be a foundation to move for an information. *Str.* 1193.

Finally, in the caſe of *Allen Evans*, eſquire, and the *chamberlain of London*, July 5th, 1762, this matter came thoroughly to be conſidered. In the year 1748, the corporation of London made a by-law, impoſing a fine of 600 l, upon every perſon, who being elected ſhould refuſe to ſerve the office of ſheriff. (Which fines they appropriated to defray the expence of building the manſion houſe.) An action was brought in the ſheriff's court, upon this by-law, for the penalty of 600 l, againſt the defendant *Allen Evans*, for refuſing to ſerve the ſaid office. The defendant pleaded this ſtatute, that no perſon ſhall be choſen into ſuch office who ſhall not, within one year next before, have taken the ſacrament according to the rites of the church of England; and in default thereof, every ſuch choice is declared to be void. The defendant further pleads the ſtatute of 1 *W.* c. 18. for exempting proteſtant diſſenters from penalties contained in former acts. Then the plea

avers,

avers, that the ſheriffs of London are officers who before the 13 *C.* 2. were perſons bearing ſuch office; that the defendant was and ſtill is a proteſtant diſſenter from the church of England, a perſon of a ſcrupulous conſcience in the exerciſe of religion, and during all that time has and ſtill does frequent the congregation of religious worſhip amongſt proteſtant diſſenters. The defendant then ſtates, that he took the oaths, and ſubſcribed the declaration, according to the act of toleration, in the year 1751, at the ſeſſions held for the county of Middleſex; and that his taking the oaths was duly regiſtred in the court of ſeſſions: That he had not within one year before the ſuppoſed election taken the ſacrament of the Lord's ſupper according to the rites of the church of England, nor has he at any time ſince done it, nor can he in conſcience take the ſame, nor was he bound to take the ſame ſince May 1751: That of theſe premiſſes the lord mayor aldermen and citizens had notice; and that by reaſon thereof, and of the act of parliament made for governing corporations, the mayor aldermen and citizens aſſembled in July 1745 and the livery were prohibited from electing, and had no power to elect him ſheriff; that he was diſabled from, and incapable of being elected; and that the ſuppoſed election of him was void. —— To this plea, the plaintiff replied, that by the ſtatute of the 5 *G. c.* 6. *ſ.* 3. it is enacted, that no perſon choſen into ſuch office ſhall be removed or otherwiſe proſecuted, for omiſſion of taking the ſacrament, nor ſhall any incapacity or diſability be incurred by reaſon of the ſame (unleſs he be removed, or proſecution commenced within ſix months). —— To this replication the defendant demurred; and the plaintiff joined in demurrer. And judgment was given for the plaintiff, in the ſheriff's court.

The defendant ſued a writ of error, before the mayor and ſheriffs, in the court of the Huſtings: And the judgment was there affirmed.

A writ of error of this judgment given in the Huſtings was brought before the commiſſioners of St. Martin's le Grand. The judges named in the commiſſion were the chief baron Parker, Foſter, Bathurſt, and Wilmot. The plaintiff in the original action pleaded, In nullo eſt erratum. The cauſe was argued three ſeveral times by the moſt eminent counſel in the profeſſion. The counſel for the defendant objected to the declaration, becauſe the plaintiff had not ſtated therein, that the city of London had any right either by charter or preſcription to elect the defend-

ant

ant ſheriff: And the by-law being made to regulate this franchiſe, it ought to appear on the face of the declaration, that they are intitled to the franchiſe; which can only be by charter or preſcription. But the judges, being unanimous in their opinion upon the real merits of this cauſe, declined giving any opinion upon this point, tho' they all ſeemed to think there was great weight in it.

Mr juſtice Foſter delivered his opinion to the following effect: —— I ſhall found my opinion upon the toleration and corporation acts. I ſhall conſider the corporation act, in the light of a prohibition to the electors. It was conſidered in that light in the caſe of the mayor of *Guildford* and *Clarke*. Notwithſtanding there were in that caſe exceptions to the declaration which were ſaid to be fatal, yet it appears by the report, that the court delivered their opinion in this manner,——That the matter pleaded by the defendant was a good bar; that to make a default in the defendant, there muſt have been an election antecedent; and the election of ſuch a one as the defendant is, is abſolutely prohibited by the ſtatute: Then I add, that ſince the corporation act is prohibitory to the electors, now they have wilfully after notice choſen the defendant, they have contravened that whole prohibition, and acted contrary to it; and I am of opinion, that the election is a mere nullity.—The preamble to acts of parliament is the great window by which light is let in upon the ſenſe of them. If you conſider the preamble to the corporation act, it will appear beyond a doubt, that the intention of the legiſlature in paſſing the corporation act was to exclude proteſtant diſſenters of all denominations from corporation offices. The preamble to the act, after making ſhort mention of the late troubles, ſays, "To "the end that the ſucceſſions in ſuch corporations may "be moſt probably perpetuated in the hands of perſons "well affected to his majeſty and the eſtabliſhed govern-"ment, it being too well known, that notwithſtanding "all his majeſty's endeavours, and indulgence in pardon-"ing what is paſt, nevertheleſs many evil ſpirits are ſtill "working; for prevention of the like miſchief for the time "to come, and for preſervation of the publick peace both "in church and ſtate, be it enacted"——and ſo on. Theſe were the motives upon which the legiſlature proceeded in making this act. The means they made uſe of to effect theſe ends were two: One regards the perſons who were at that time in corporation offices: The other, thoſe

thoſe who ſhould come into ſuch offices of truſt for the future. The act, in order to accompliſh the great ends for which it was made, is very particular: "No perſon "ſhall for ever hereafter be placed or choſen in or to any "the offices or places aforeſaid, who ſhall not have with- "in one year next before ſuch election taken the ſacra- "ment of the Lord's ſupper according to the rites of the "church of England": And then it goes on, and ſays, that "Every perſon ſo placed or choſen ſhall take the oaths "and ſubſcribe the declaration at the ſame time the oath "of office is adminiſtred; and in default thereof, every "ſuch election is declared to be void." This clauſe, as I take it, conſiſts of two branches, compleat, diſtinct, and independent in their own nature. The firſt regards perſons who have a right, and have power in poſſeſſion; the ſecond regards thoſe who ſhould be candidates, and be elected hereafter. The firſt is in my opinion prohibitory upon the electors. It lays reſtraint upon them in the exerciſe of their power of electing. It confines them to perſons who conform to what is preſcribed in the act. The words, as I read them, are that no perſon not previouſly qualified ſhall be for ever hereafter elected. What is that but ſaying, that no perſon having power to elect, ſhall elect any perſon not previouſly qualified as the act directs. I cannot make out any difference between the two terms, that the election ſhall be void, and that they ſhall not elect ſuch perſons.——The ſecond branch of this clauſe, regards only the condition of the candidate. It goes upon a ſuppoſition, that a candidate may be eligible, and actually elected into the office; and upon that ſuppoſition, it requires a form to be gone thro' by him, and in default thereof his election is declared to be void. I do not found my opinion upon this branch of the ſtatute, but upon the other, which (I take it) prohibits the election of a perſon not previouſly qualified.———As to the words in the ſecond branch "that in default thereof the "election ſhall be void", I think that according to true grammar, and the ſtrict meaning of the words, it means plainly this; in default of thoſe things being done, that are required to be done by a candidate after his election, and not in default of that which this act no way requires. The corporation act does not require from any perſon who is a candidate for a corporation office, that he ſhall take the ſacrament: he is under another obligation to conform to the eſtabliſhed church. And tho' I admit that the rubrick did formerly enjoin conformity to the eſtabliſhed

bliſhed church, yet in the conſtruction of theſe words "in default thereof the election to be void" we muſt confine ourſelves to thoſe duties which this act alone requires. We muſt do ſo in common grammar and conſtruction. There is no running into the other branch of the clauſe in order to conſtrue this. If then the act is prohibitory upon the electors, the conſequence will be, that if they having due notice of the incapacity of the candidate, proceed notwithſtanding to the election of a perſon declared by the ſtatute to be not eligible; the whole proceeding will be a mere nullity, in contravention of the prohibition to the electors, wilful, open, and undiſguiſed.—A right of action cannot accrue to the corporation from ſuch an improper proceeding, contrary to the ſtatute, prohibited by the ſtatute, and conſequently null and void from the beginning. Thus it ſtands with regard to the corporation.—As to the defendant: He is now called upon under a penalty, to uſurp an office upon the crown; which uſurpation will ſubject him to a criminal proſecution and all its conſequences. A ſtrange dilemma this: To be obliged to uſurp upon the crown, or forfeit the penalty of the by-law. Can the by-law purge the uſurpation? A by-law cannot purge or excuſe an uſurpation. It would be abſurd then to ſay, it can oblige a man to uſurp.——It hath been ſaid, that all corporations have a right to the ſervice of their members. All corporations, under proper limitations, certainly have this right. But ſtill it is a right ſubject to the controul of the legiſlature. And in matters of election, they muſt ſubmit to ſuch regulations as the ſtate ſhall think fit to make.——It is aſked, Shall perſons who live in open contempt of all government in a ſtate, ſhelter themſelves under this act? That was ſaid in *Larwood*'s caſe; and it has been thrown out in this caſe, not very decently. It is ſufficient at this time to ſay, that the caſe of debauchees and infidels was not in the contemplation of the legiſlature at the time this act was made. Conſequently, this act cannot extend to them. The act was plainly levelled at perſons of quite a different character. It was not levelled at atheiſts or infidels, but proteſtant diſſenters. Beſides, the defendant does not endeavour to ſhelter himſelf under the idle excuſe which the objection puts him to, of being an atheiſt, debauchee, or an infidel: But the defendant, as he pleads the toleration act, avers that he does not live in open diſobedience to the ordinances of the church, altho' he has taken ſome ſcruples in regard to the mode of adminiſtration in the

eſtabliſhed church: He is real and ſincere in his ſcruples, and lives in obedience to the ordinances of the church. —— A diſtinction has been made in the argument, between the acts and proceedings being void of themſelves, and only voidable. The anſwer I give to that is, that the point now in queſtion will not turn, nor do I put it upon that branch of the clauſe which declares the election void, but upon that which abſolutely prohibits the election, and conſequently renders it a mere nullity.——It has been ſaid, that the conſtruction now contended for is partial to diſſenters, in excuſing them from offices of burden. I ſay, yes, it is; and it therefore excludes them from all corporation offices which are attended with profit and honour. It would be abſurd to ſay, that the ſame law that exempts them from the one, as perſons unworthy of a publick truſt, has ſtill left them liable to the other offices, be the truſt that attends the office what it may. The truſt attending the office of ſheriff of the city of London is a high truſt. Therefore if proteſtant diſſenters are excluded from offices attended with profit, merely as perſons not worthy of a publick truſt; it would be odd to ſay, that they ſhall be obliged to ſerve the office of ſheriff, which is not only an office of honour, but likewiſe an office of very high truſt.—It was ſaid in *Larwood*'s caſe, and I believe it had weight, that no man can by his own plea diſable himſelf, nor excuſe one default by another. It is ſufficient now to ſay, that Larwood's caſe was totally and ſubſtantially different from the preſent. He had not properly pleaded to the toleration act, and therefore could take no advantage of it. The preſent defendant has pleaded it properly, and ſhewn himſelf not eligible. The defendant does not plead the toleration act and diſability, to excuſe one offence by another; but to ſhew, that altho' the rubrick did require a conformity in all things, as to receive the ſacrament in the church three times a year, and the like, yet now his not complying with the rubrick is not to be imputed to him as a crime; that the ſame act which hath taken away the offence, hath taken away the guilt; and that he is guilty of no offence, in not complying with that which does not bind him; that by the toleration act the rubrick is taken out of the defendant's way, and doth not extend to his caſe. There are particular branches of the act, from which this intent may be collected; but I am clearly of this opinion, from the whole ſpirit and frame of it. The act of toleration is not to be conſidered merely as an act of connivance and

exemption from former laws. It was made, that the publick worſhip of the diſſenters might be legal, and that they might be intitled to the publick protection. Upon different occaſions in the act, the religious worſhip of the diſſenters is ſpoken of, as a mode of worſhip tolerated by the act. This clearly ſhews, that the mode of worſhip among the diſſenters is legal, and authorized by law. There were former laws obliging perſons to reſort to different churches, to be attendant on divine ſervice; and diſſenters are now obliged to the ſame in their way of worſhip. Perſons contemptuouſly diſturbing the publick worſhip of proteſtant diſſenters, are liable to the ſame penalties with thoſe who diſturb the worſhip in pariſh churches or chapels. As to perſons acting as preachers in diſſenting congregations; they are exempted from ſerving upon juries, and from publick offices, as fully as thoſe of the eſtabliſhed church are by the common law. ——Upon the whole: The corporation act being prohibitory upon the electors, every election contrary to it is a mere nullity; and the toleration act having diſpenſed with the conformity of the defendant in this particular; the judgment ought to be reverſed.

By Mr juſtice Wilmot: The great queſtion in this cauſe is, Whether the plaintiff in the original action, under all the circumſtances diſcloſed by the pleadings, is intitled to recover this ſum of 600 l, impoſed upon the defendant, for refuſing to comply with that part of the by-law ſtated in the declaration, which directs that "every perſon elected into the office of ſheriff ſhall appear before the lord mayor and aldermen, and become "bound in a bond for taking the oath of office on the "vigil of St Michael."—I am of opinion, the plaintiff is not intitled to recover in this action; and that the judgments which have been given in this cauſe ought to be reverſed.—Several poſitions have been laid down, by the counſel who argued in this caſe, that are clear and indiſputable: Firſt, It is clear, that of common right a power is inherent in every corporation, to call upon their members for the performance of all corporate duties. Secondly, That the execution of corporation offices is one of the duties. Thirdly, That a power of making by-laws is incident to every corporation. Fourthly, That a by-law impoſing a fine for the refuſal of a corporation office is good. It is equally clear, that the right which every corporation has of calling upon their members to execute corporation offices may be abridged by themſelves,

or by the general laws of the land. The true queſtion is, whether this right has not been abridged in the preſent caſe, and what will be the legal conſequences of ſuch abridgment.——The unhappy ſituation the royal family and the nation had been in before the reſtoration, made the legiſlature willing to guard againſt a relapſe; and therefore they thought it neceſſary to regulate the corporations in an arbitrary way, by removing ſome officers, and placing others in their room who were better affected, and alſo by providing officers for the future. The method they took was, by veſting a power in commiſſioners (as we find in the former part of the act), to turn out whom they pleaſed, and place others in their offices. Of theſe they did not require any ſacramental qualification; becauſe while the extraordinary power ſubſiſted, there was another check or controul. But when that commiſſion expired, they did not then chuſe to reſt upon oaths and declarations; but meaſured the fitneſs of men by their antecedent religious habit; and made the having received the ſacrament, according to the rites of the church of England, the criterion by which that fitneſs was to be determined. They did not propoſe it as a teſt, to be given at, or after his election; becauſe they thought that the charms of power in poſſeſſion, might make ſudden converſions, which might not always be ſincere.—The intent of the legiſlature is expreſſed in the ſtrongeſt terms, to effectuate ſuch an intention. "Provided, that (after "the expiration of the commiſſions) no perſon ſhall for "ever hereafter be placed elected or choſen in or to any "of the offices or places aforeſaid, that ſhall not have, "within one year next before, taken the ſacrament," and ſo on: "And in default hereof, every ſuch election "is hereby declared to be void." Now this clauſe is not addreſſed to the party elected, but to the electors. The prohibition is laid moſt clearly upon the perſons who had a right to elect. It is the voice of the legiſlature, commanding them not to elect ſuch perſons. An election contrary to that prohibition, is a tranſgreſſion; and in this caſe it was a wilful tranſgreſſion, becauſe they had notice that Evans was one of thoſe perſons; if wilful, then a moral wrong, which can never lay a foundation for an action in a court of juſtice. Courts of juſtice are to inforce the will of the ſociety. Laws manifeſt that will. And it is the duty of courts of juſtice to carry theſe laws into execution; but they are not to ſuſtain actions, for doing what the ſociety has forbid.——The injunction

injunction not to elect, extinguiſhes the right to elect. The act does not make the office, but the election, void. The election in the preſent caſe is an infraction of the law: and right cannot ſpring out of wrong. —— If an act of parliament was to be made, with a clauſe, that all unmarried men ſhould be incapable of being elected; this would work a releaſe of the original contract, as to ſuch perſons. A valid election is a condition, precedent to the right which the corporation has to command, and to the obligation on the members to obey. — It has been ſaid, that this act was not made to eaſe diſſenters, but to puniſh them; and that an exemption from burdenſome offices will be an eaſe; that the office of ſheriff being one of thoſe, it will be giving the act an effect which the legiſlature did not intend; that it is more agreeable to the intention of the legiſlature, to conſtrue the office void as to the perſon elected, and good as to the corporation, who are puniſhing as for a contumacy. This is the ſubſtantial part of the argument. Many caſes have been cited, where acts have been deemed good to a certain degree, and void as to all others. But there never was, and it is impoſſible there ever ſhould be, a caſe, where the word *void* was conſtrued in ſuch a manner, as to make the act void as to a perſon who broke the law, and good as to the perſons who have concurred in breaking it. The only point the legiſlature had in view was, to ſecure the power to perſons who outwardly profeſſed the religion of the ſtate. The puniſhment of non-conformiſts, by excluding them from power, was the conſequence, not the end, of the law. We, as judges, ought to expound the law with the ſame ſpirit it was made; and therefore ought not to conſtrue it as a vindictive law, for any purpoſe but its own end. Whether this caſe occurred to the legiſlature, or how they thought it ſhould be determined, does not appear. Different men may make different conjectures. But arbitrary conjectures never ought to be the baſis of judicial determinations. If it had occurred, and they had intended to have made any difference between burdenſome and lucrative offices, they would have taken notice of it. The conſtruction now muſt be the ſame. Suppoſe it had been the office of chamberlain, and the queſtion put to the legiſlature; the anſwer muſt have been, We intend to keep non-conformiſts out of power, and therefore we command corporations not to elect them. They cannot be expoſed to a penalty for not executing an office to which they cannot be elected: The exemption from both,

makes it equal.——As to what is ſaid, that perſons may be qualified for a lucrative, and not for a burdenſome office; I do not ſee how ſuch a caſe can exiſt. For if they are qualified to accept a lucrative office, they are qualified to bear a burdenſome one. It ſhews that it was only a mockery in them; but it does not prove, that the ſcruples of other diſſenters are imaginary. It would be as unjuſt to judge of the ſcruples of all the diſſenters, by the conduct of ſome; as to judge of the doctrines of the eſtabliſhed church, by the lives of ſome of thoſe who profeſs it.———It has been urged, that a man ſhall not be permitted to excuſe himſelf, on account of a diſability occaſioned by his own default; that it is an aggravation of his offence, to excuſe one crime by another; and that the toleration act did not mean to exempt diſſenters from relative duties: Inſtances have been mentioned, of perſons out of their ſenſes, who are not allowed to diſable themſelves; if ſo, when the incapacity ariſes from a natural diſability, *a fortiori* in the caſe of a diſability ariſing from neglect. Firſt, I deny the rule. In *Skin.* 576. Fitzherbert was of a different opinion. It may ſeem hard, that a man ſhall avoid his own acts for dureſs of man, and not for a viſitation from heaven. But the reaſon is, that the law has directed a mode of inquiry, and the king is to take madmen under his immediate protection, and after office found to avoid ſuch acts as he thinks proper. 5 *Mod.* 421. Madmen cannot be choſen into corporation offices. In *Eq. Caſ. Abr.* 279. Lord King has drawn a rational line, between the acts done by an inſane perſon to the prejudice of others, and the acts done by him to the prejudice of himſelf. *King* and *Larwood* is no authority in the preſent caſe; becauſe it is clear, that the toleration act was not pleaded, and it was only the opinion of two judges againſt Sir Samuel Eyre. In 4 *Mod.* 274. Lord Somers is ſaid to have been of the ſame opinion as Sir Samuel Eyre. The fine was only five marks; which ſhews the judges thought it a tender caſe. I obſerve, it was admitted in that caſe, that if a man be diſabled by judgment to bear an office, there he is excuſed, becauſe *judicium redditur in invitum.* Why then ſhall not an act of parliament excuſe, which is the judgment of the whole legiſlature.———As to Sir *John Read*'s caſe, which was mentioned, it was an information in the exchequer 28 Nov. 26 C. 2. He was appointed ſheriff of Hertfordſhire, was ſworn, and took upon himſelf the execution of the office. A caſe very different from this;

for

for he was capable of the office at the time he was appointed, and had been in poſſeſſion. In the preſent caſe, the defendant was not eligible. Sir John Read had alledged a diſability which it was in his power to remove, and which it was his duty to remove. But here the defendant's receiving the ſacrament muſt be precedent; and ſince the toleration act, it is not his duty to receive it.—*Bex* and *Woollaſton*, another caſe cited, turned upon the informality in the plaintiff's replication. Had it been determined on the point it is now produced to prove, it would certainly have been mentioned by chief juſtice Holt and Eyre, as a caſe in favour of their opinions.—The caſe in 3 *Lev.* 116. differs as much from the preſent caſe, as between legally and illegally elected.—I am therefore clearly of opinion, that the judgment ought to be reverſed.

The other two judges delivered their opinions to the like effect: and the judgment was reverſed.

Upon this, the corporation by writ of error brought the cauſe before the houſe of lords, when all the judges, who had not ſate as delegates (except Mr. juſtice Yates who was ill) gave their opinions ſeriatim; and all, except Mr baron Perrot who was of opinion to reverſe the judgment, delivered their opinion for confirming it. Upon which occaſion lord Mansfield ſaid; In every view in which I have been able to conſider this matter, I think this action cannot be ſupported. If they rely on the corporation act; by the literal and expreſs proviſion of that act, no perſon can be elected, who hath not within a year taken the ſacrament in the church of England: the defendant hath not taken the ſacrament within a year; he is therefore not elected. Here they fail.—If they ground it on the general deſign of the legiſlature in paſſing the corporation act; the deſign was, to exclude diſſenters from office, and diſable them from ſerving. For in thoſe times, when a ſpirit of intolerance prevailed, and ſevere meaſures were purſued, the diſſenters were reputed and treated as perſons ill-affected and dangerous to the government: The defendant therefore, a diſſenter, and in the eye of this law a perſon dangerous and ill-affected, is excluded from office, and diſabled from ſerving. Here they fail.—If they ground the action on their own by-law; ſince that by-law was profeſſedly made to procure fit and able perſons to ſerve the office, and the defendant is not fit and able, being expreſsly diſabled by ſtatute law, here too they fail.—If they

ground it on his diſability, being owing to a neglect of taking the ſacrament at church, when he ought to have done it; the toleration act having freed the diſſenters from all obligation to take the ſacrament at church, the defendant is guilty of no neglect, no criminal neglect; Here therefore alſo they fail.——And after having expatiated on each of theſe ſeveral heads, he adds: The defendant in the preſent cauſe pleads, that he is a diſſenter within the deſcription of the toleration act; that he hath not taken the ſacrament in the church of England within one year preceding the time of his ſuppoſed election, nor ever in his whole life; and that he cannot in conſcience do it. Conſcience is not controulable by human laws, nor amenable to human tribunals. Perſecution, or attempts to force conſcience, will never produce conviction; and are only calculated to make hypocrites, or martyrs. My lords, there never was a ſingle inſtance, from the Saxon times down to our own, in which a man was ever puniſhed for erroneous opinions concerning rites or modes of worſhip, but upon ſome poſitive law. The common law of England, which is only common reaſon or uſage, knows of no proſecution for mere opinions. For atheiſm, blaſphemy, and reviling the chriſtian religion, there have been inſtances of perſons proſecuted and puniſhed upon the common law; but bare nonconformity is no ſin by the common law: and all poſitive laws, inflicting any pains or penalties for nonconformity to the eſtabliſhed rites and modes, are repealed by the act of toleration; and diſſenters are thereby exempted from all eccleſiaſtical cenſures. What bloodſhed and confuſion have been occaſioned from the reign of Hen. 4. when the firſt penal ſtatutes were enacted, down to the revolution in this kingdom, by laws made to force conſcience? There is nothing certainly more unreaſonable, more inconſiſtent with the rights of human nature, more contrary to the ſpirit and precepts of the chriſtian religion, more iniquitous and unjuſt, more impolitic, than perſecution. It is againſt natural religion, revealed religion, and ſound policy. Sad experience, and a large mind, taught that great man, the preſident De Thou, this doctrine: let any man read the many admirable things which, tho' a papiſt, he hath dared to advance upon the ſubject, in the dedication of his hiſtory to Henry the fourth of France (which I never read without rapture); and he will be fully convinced, not only how cruel, but how impolitic it is, to perſecute for religious opinions.

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As a ſubject of Great Britain, I ſhould not have been ſorry, if France had continued to cheriſh the Jeſuits, and to perſecute the Huguenots. There was no occaſion to revoke the edict of Nants; the Jeſuits needed only to have adviſed a plan, ſimilar to what is contended for in the preſent caſe: make a law to render them incapable of office; make another, to puniſh them for not ſerving. If they accept, puniſh them; if they refuſe, puniſh them: If they ſay yes, puniſh them; if they ſo no, puniſh them. My lords, this is a moſt exquiſite dilemma, from which there is no eſcaping; it is a trap a man cannot get out of; it is as bad perſecution as that of Procruſtes: If they are too ſhort, ſtretch them; if they are too long, lop them. Small would have been their conſolation to have been gravely told, The edict of Nantz is kept inviolable; you have the full benefit of that act of toleration; you may take the ſacrament in your own way with impunity; you are not compelled to go to maſs. Were this caſe but told in the city of London, as of a proceeding in France; how would they exclaim againſt the Jeſuitical diſtinction? and yet in truth it comes from themſelves: the Jeſuits never thought of it: when they meant to proſecute, their act of toleration, the edict of Nants was repealed. This by-law, by which the diſſenters are to be reduced to this wretched dilemma, is a by-law of the city, a local corporation, contrary to an act of parliament which is the law of the land: a modern by-law, of very modern date, made long ſince the corporation act, long ſince the toleration act, in the face of them; for they knew theſe laws were in being. It was made in ſome year of the reign of the late king; I forget which: but it was made about the time of building the manſion-houſe. Now if it could be ſuppoſed, that the city have a power of making ſuch a by-law; it would intirely ſubvert the toleration act, the deſign of which was to exempt the diſſenters from all penalties: for by ſuch a by-law they have it in their power to make every diſſenter pay a fine of 600l, or any ſum they pleaſe; for it amounts to that. The profeſſed deſign of making this by-law, was to get fit and able perſons to ſerve the office: and the plaintiff ſets forth in his declaration, that if the diſſenters are excluded, they ſhall want fit and able perſons to ſerve the office. But were I to deliver my own ſuſpicion, it would be, that they did not ſo much wiſh for their ſervices, as for their fines. Diſſenters have been appointed to this of-

fice, one who was blind, another who was bedridden; not, I ſuppoſe, on account of their being fit and able to ſerve the office. No; they were diſabled both by nature, and by law. We had a caſe lately in the courts below, of a man choſen mayor of a corporation, while he was beyond the ſeas, with his majeſty's troops in America; and they knew him to be ſo. Did they want him to ſerve the office? No; it was impoſſible. But they had a mind to continue the former mayor a year longer, and to have a pretence of ſetting aſide him who was now choſen, on all future occaſions, as having been elected before. In the preſent caſe, the defendant was by law incapable at the time of his pretended election: and it is my firm perſuaſion, that he was choſen becauſe he was incapable. If he had been capable, he had not been choſen; for they did not want him to ſerve the office. They choſe him, becauſe without a breach of the law, and an uſurpation upon the crown, he could not ſerve the office. They choſe him, that he might fall under the penalty of their by-law made to ſerve a particular purpoſe: In oppoſition to which, he hath pleaded a legal diſability grounded on two acts of parliament: As I am of opinion that this plea is good, I conclude with moving your lordſhips that the judgment be affirmed. — And the judgment was immediately affirmed, nemine contradicente. *Appendix to Furneaux's letters to Mr Juſtice Blackſtone, 2d Edit.*

Diſability. 5. By the 3 *J. c.* 5. No recuſant convict ſhall practiſe the common or civil law, or phyſick, nor ſhall be judge miniſter clerk or ſteward or other officer in any court, or any officer in the army or navy; on pain of 100 l, half to the king, and half to him that ſhall ſue in any of the king's courts of record. ſ. 8.

Children. 6. By the 3 *J. c.* 5. If the children of any ſubject (the ſaid children not being ſoldiers, mariners, merchants, or their apprentices or factors) ſhall, to prevent their good education in England, or for any other cauſe, be ſent or go beyond ſeas without licence of the king or ſix of the privy council (whereof the principal ſecretary to be one); ſuch child ſhall take no benefit by any gift, conveyance, deſcent, deviſe, or otherwiſe, of any lands or goods, until he conform. ſ. 16.

Quakers in particular. 7. *Arundel.* It ſhall be publickly taught and preached by all, that in judicial matters oaths may be lawfully taken. *Lind.* 298.

Art. 39.

Art. 39. As we confeſs, that vain and raſh ſwearing is forbidden chriſtian men by our Lord Jeſus Chriſt, and James his apoſtle; ſo we judge, that chriſtian religion doth not prohibit, but that a man may ſwear when the magiſtrate requireth, in a cauſe of faith and charity, ſo it be done according to the prophet's teaching, in juſtice judgment and truth.

The unlawfulneſs of taking an oath, though before a judge, was one of the tenets of the old anabaptiſts; againſt whom therefore firſt the foregoing conſtitution, and after that this article was made; long before the quakers had either name or being. But becauſe they who at preſent go under the name of anabaptiſts have quitted the doctrine, and the people called quakers have taken it up, it is judged moſt proper to inſert the ſame here, under the law relating to quakers. *Gibſ.* 510, 511.

Again; by the 5 *El. c.* 1. If any perſon ſhall refuſe to take the oaths of allegiance and ſupremacy lawfully tendred, he ſhall incur a præmunire. ſ. 8.

And by the 13 & 14 *C.* 2. *c.* 1. Whereas certain perſons, under the name of quakers and other names of ſeparation, have taken up and maintained ſundry dangerous opinions and tenets, and (amongſt others) that the taking of an oath in any cauſe whatſoever, altho' before a lawful magiſtrate, is altogether unlawful and contrary to the word of God; and the ſaid perſons do daily refuſe to take an oath, tho' lawfully tendred, whereby it often happens that the truth is wholly ſuppreſſed, and the adminiſtration of juſtice much obſtructed; and whereas the ſaid perſons, under pretence of religious worſhip, do often aſſemble themſelves together in great numbers in ſeveral parts of this realm, to the great endangering of the publick peace and ſafety, and to the terror of the people, by maintaining a ſecret and ſtrict correſpondence amongſt themſelves, and in the mean time ſeparating and dividing themſelves from the reſt of his majeſty's good and loyal ſubjects, and from the publick congregations and uſual places of divine worſhip: for the redreſſing therefore and preventing the many miſchiefs and dangers that may ariſe by ſuch dangerous tenets and ſuch unlawful aſſemblies, it is enacted, that if any perſon who maintaineth that the taking of an oath in any caſe whatſoever (altho' before a lawful magiſtrate) is altogether unlawful and contrary to the word of God, ſhall wilfully and obſtinately refuſe to take an oath, where by the laws of the realm he ſhall be bound to take the ſame, being lawfully and duly tendred;

dred; or ſhall endeavour to perſuade any other perſon to whom any ſuch oath ſhall in like manner be duly and lawfully tendred, to refuſe and forbear the taking of the ſame; or ſhall by printing writing or otherwiſe go about to maintain and defend, that the taking of an oath in any caſe whatſoever is altogether unlawful: And if the ſaid perſons commonly called quakers, ſhall depart from the places of their ſeveral habitations, and aſſemble themſelves to the number of five or more, of the age of ſixteen years or upwards, at any one time in any one place, under pretence of joining in a religious worſhip, not authorized by the laws of this realm: —— In every ſuch caſe the party ſo offending, being convict by verdict of twelve men, or confeſſion, or by the notorious evidence of the fact, ſhall forfeit to the king for the firſt offence a ſum not exceeding 5 l.; for the ſecond offence a ſum not exceeding 10 l; to be levied by diſtreſs and ſale by warrant of the parties before whom the offender ſhall be convicted; and for want of ſuch diſtreſs or non-payment of the penalty within one week after the conviction, the ſaid party ſhall for the firſt offence be committed to the common gaol or houſe of correction for the ſpace of three months, and for the ſecond offence during ſix months, there to be kept to hard labour: which ſaid penalties ſhall be employed for the increaſe of the ſtock of the houſe of correction to which they ſhall be committed and providing materials to ſet them on work: And for the third offence, every ſuch perſon ſhall abjure the realm; or otherwiſe his majeſty may order him to be tranſported to any of his majeſty's plantations beyond the ſeas. ſ. 1, 2.

And the juſtices of aſſize, and juſtices of the peace in their open and general ſeſſions, ſhall have power to inquire of hear and determine the ſame, and make proceſs for the execution thereof, as they may do in caſes of treſpaſs. ſ. 3.

And any juſtice of the peace, or mayor of a corporation, may commit to the common gaol, or bind over with ſufficient ſureties to the quarter ſeſſions, any perſon offending in the premiſſes, in order to his conviction. ſ. 4.

Provided, that if any perſon after conviction ſhall take ſuch oaths for which he ſtands committed, and ſhall alſo give ſecurity that he will forbear to meet in any ſuch unlawful aſſembly; he ſhall be diſcharged. ſ. 5.

Anabaptiſts in particular.

8. The tenets of the old anabaptiſts were; that infants ought not to be baptized; and if they be baptized, that they ought to be rebaptized when they come to lawful

ful age; that it is not lawful for a chriſtian man to bear office or rule in the commonwealth; that no man's laws ought to be obeyed; that it is not lawful for a chriſtian man to take an oath before any judge; that Chriſt took no bodily ſubſtance of the bleſſed virgin; that ſinners after baptiſm cannot be reſtored by repentance; that all things be or ought to be common, and nothing ſeveral: All which were excepted out of the general pardons of the 32 *H.* 8. *c.* 49. and the 3 & 4 *Ed.* 6. *c.* 24.

Art. 16. Not every deadly ſin willingly committed after baptiſm, is ſin againſt the Holy Ghoſt and unpardonable. Wherefore the grant of repentance is not to be denied to ſuch as fall into ſin after baptiſm. After we have received the Holy Ghoſt, we may depart from grace given, and fall into ſin, and by the grace of God we may ariſe again, and amend our lives. And therefore they are to be condemned, which ſay they can no more ſin as long as they live here, or deny the place of forgiveneſs to ſuch as truly repent.

Art. 27. The baptiſm of young children is in any wiſe to be retained in the church, as moſt agreeable to the inſtitution of Chriſt.

Preface to the book of Common Prayer. It was thought convenient, that an office ſhould be added for the baptiſm of ſuch as are of riper years; which altho' not ſo neceſſary when the former book was compiled, yet by the growth of anabaptiſm, thro' the licentiouſneſs of the late times crept amongſt us, it is now become neceſſary.

Art. 37. The laws of the realm may puniſh chriſtian men with death, for heinous and grievous offences.

And by the ſame *article*; It is lawful for chriſtian men, at the commandment of the magiſtrate, to wear weapons, and ſerve in the wars.

Art. 38. The riches and goods of chriſtians are not common, as touching the right title and poſſeſſion of the ſame, as certain anabaptiſts do falſly boaſt. Notwithſtanding, every man ought, of ſuch things as he poſſeſſeth, liberally to give alms to the poor, according to his ability.

II. *How far mitigated by the act of toleration, and other acts.*

By the 1 W. c. 18 it is enacted as followeth:

Foraſmuch as ſome eaſe to ſcrupulous conſciences in the exerciſe of religion, may be an effectual means to unite their majeſties pro-

proteſtant ſubjects in intereſt and affection; it is enacted, that neither the ſtatute of the 23 El. c. 1. *nor the ſtatute of the* 29 El. c. 6. *nor the* 1 El. c. 2. ſ. 14. *nor the* 3 J. c. 4. *nor the* 3 J. c. 5. *nor any other law or ſtatute of this realm made againſt papiſts or popiſh recuſants (except the* 25 Car. 2. c. 2. *and the* 30 Car. 2. ſt. 2. c. 1.) *ſhall be conſtrued to extend to any perſon diſſenting from the church of England, that ſhall take the oaths of allegiance and ſupremacy, and make and ſubſcribe the declaration againſt popery of the* 30 Car. 2. ſt. 2. c. 1. *Which oaths and declaration the juſtices of the peace at the general ſeſſions of the peace to be held for the county or place where ſuch perſon ſhall live, are hereby required to tender and adminiſter to ſuch perſons as ſhall offer themſelves to take make and ſubſcribe the ſame, and thereof to keep a regiſter: and none of the perſons aforeſaid ſhall give or pay, as any fee or reward, to any officer or officers belonging to the court aforeſaid, above the ſum of* 6*d*, *nor that more than once, for the entring of his taking the ſaid oaths and making and ſubſcribing the ſaid declaration; nor above the further ſum of* 6*d*, *for any certificate of the ſame to be made out and ſigned by the officers of the ſaid court.* ſ. 1, 2.

And all and every perſon and perſons that ſhall as aforeſaid take the oaths, and make and ſubſcribe the ſaid declaration, ſhall not be liable to any pains penalties or forfeitures mentioned in the 35 El. c. 1. *nor in the* 22 Car. 2. c. 1. *nor ſhall any of the ſaid perſons be proſecuted in any eccleſiaſtical court, for or by reaſon of their non-conforming to the church of England.* ſ. 4.

Provided, that if any aſſembly of perſons diſſenting from the church of England ſhall be had in any place for religious worſhip, with the doors locked barred or bolted, during any time of ſuch meeting together; all and every perſon and perſons that ſhall come to and be at ſuch meeting ſhall not receive any benefit from this law, but be liable to all the pains and penalties of all the aforegoing laws recited in this act, for ſuch their meeting, notwithſtanding his taking the oaths, and his making and ſubſcribing the declaration aforeſaid. ſ. 5.

Provided, that nothing herein contained ſhall be conſtrued to exempt any of the perſons aforeſaid from paying of tithes or other parochial duties, or any other duties to the church or miniſter; nor from any proſecution in any eccleſiaſtical court, or elſewhere, for the ſame. ſ. 6.

And if any perſon diſſenting from the church of England as aforeſaid, ſhall be choſen or otherwiſe appointed to bear the office of high conſtable, or petit conſtable, churchwarden, overſeer of the poor, or any other parochial or ward office, and ſuch perſon

perſon ſhall ſcruple to take upon him any of the ſaid offices in regard of the oaths, or any other matter or thing required by the law to be taken or done in reſpect of ſuch office; every ſuch perſon ſhall and may execute ſuch office or employment by a ſufficient deputy by him to be provided, that ſhall comply with the laws on this behalf. Provided always, the ſaid deputy be allowed and approved by ſuch perſon or perſons, in ſuch manner as ſuch officer or officers reſpectively ſhould by law have been allowed and approved. ſ. 7.

And no perſon diſſenting from the church of England, in holy orders or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation of diſſenting proteſtants, that ſhall make and ſubſcribe the declaration aforeſaid, and take the ſaid oaths at the general or quarter ſeſſions of the peace to be held for the county town parts or diviſion where ſuch perſon lives, and ſhall alſo declare his approbation of and ſubſcribe the articles of religion mentioned in the ſtatute of the 13 Eliz. c. 12. *except the* 34th, 35th, and 36th, *and theſe words of the* 20th *article*, viz. [the church hath power to decree rites or ceremonies, and authority in controverſies of faith, and yet] *ſhall be liable to any of the pains or penalties of the* 17 C. 2. c. 2. *nor the penalties mentioned in the ſaid act of the* 22 C. 2. c. 1. *by reaſon of preaching at any exerciſe of religion; nor to the penalty of* 100 l *by the* 13 & 14 C. 2. c. 4. *for officiating in any congregation for the exerciſe of religion permitted and allowed by this act.* ſ. 8.

Provided always, that the making and ſubſcribing the ſaid declaration, and the taking the ſaid oaths, and making the declaration of approbation and ſubſcription to the ſaid articles, in manner as aforeſaid, at ſuch general or quarter ſeſſions of the peace, ſhall be then and there entred of record in the ſaid court, for which 6 d *ſhall be paid to the clerk of the peace, and no more: provided, that ſuch perſon ſhall not at any time preach in any place, but with the doors not locked barred or bolted as aforeſaid.* ſ. 9.

And whereas ſome diſſenting proteſtants ſcruple the baptizing of infants; it is enacted, that every perſon in pretended holy orders, or pretending to holy orders, or preacher or teacher, that ſhall ſubſcribe the aforeſaid articles of religion, except before excepted, and alſo except part of the 27th *article touching infant baptiſm, and ſhall take the ſaid oaths, and make and ſubſcribe the ſaid declaration, in manner aforeſaid, ſhall enjoy all the privileges benefits and advantages which any other diſſenting miniſter as aforeſaid might have or enjoy by virtue of this act.* ſ. 10.

And

And every teacher or preacher in holy orders, or pretended holy orders, that is a miniſter preacher or teacher of a congregation, that ſhall take the oaths herein required, and make and ſubſcribe the declaration aforeſaid, and alſo ſubſcribe ſuch of the aforeſaid articles of the church of England as are required by this act in manner aforeſaid, ſhall be thenceforth exempted from ſerving on any jury, or from being choſen or appointed to bear the office of churchwarden, overſeer of the poor, or any other parochial or ward office, or other office in any hundred of any ſhire, city, town, pariſh, diviſion, or wapentake. ſ. 11.

And every juſtice of the peace may at any time require any perſon that goes to any meeting for exerciſe of religion, to make and ſubſcribe the declaration aforeſaid, and alſo to take the ſaid oaths (or declaration of fidelity herein after mentioned, in caſe ſuch perſon ſcruples the taking of an oath), and upon refuſal thereof, he ſhall commit him to priſon without bail, and certify his name to the next ſeſſion, to be held for that place where ſuch perſon then reſides; and if he ſhall there upon a ſecond tender refuſe to make and ſubſcribe the declaration aforeſaid, he ſhall be then and there recorded and from thenceforth taken for a popiſh recuſant convict, and incur all the penalties of all the aforeſaid laws. ſ. 12.

And whereas there are certain other perſons, diſſenters from the church of England, who ſcruple the taking of any oath; it is enacted, that every ſuch perſon ſhall make and ſubſcribe the declaration aforeſaid, and alſo a declaration of fidelity, and ſubſcribe a profeſſion of their chriſtian belief. Which declarations and ſubſcription ſhall be made and entred of record at the general quarter ſeſſions of the peace for the place where ſuch perſon reſides. And every ſuch perſon that ſhall make and ſubſcribe the two declarations and profeſſion aforeſaid, being thereunto required, ſhall be exempted from all the pains and penalties of all the aforementioned ſtatutes made againſt popiſh recuſants or proteſtant non-conformiſts, and alſo from the penalties of the 5 El. c. 1. *and* 13 & 14 C. 2. c. 1. *concerning the taking of oaths; and ſhall enjoy all other the benefits privileges and advantages, under the like limitations proviſoes and conditions, which any other diſſenters ſhould or ought to enjoy by virtue of this act.* ſ. 13.

And if any perſon ſhall refuſe to take the ſaid oaths, when tendred to him, which every juſtice of the peace is hereby impowered to do; ſuch perſon ſhall not be admitted to make and ſubſcribe the two declurations aforeſaid, tho' required thereunto either before a juſtice of the peace, or at the ſeſſions before or after any conviction of popiſh recuſancy as aforeſaid, unleſs ſuch perſon can, within thirty one days after ſuch tender of the declarations

clarations to him, produce two ſufficient proteſtant witneſſes to teſtify upon oath that they believe him to be a proteſtant diſſenter, or a certificate under the hands of four proteſtants who are conformable to the church of England or have taken the oaths and ſubſcribed the declaration above mentioned, and ſhall alſo produce a certificate under the hands and ſeals of ſix or more ſufficient men of the congregation to which he belongs, owning him for one of them. ſ. 14.

Provided, that until ſuch certificate under the hands of ſix of his congregation as aforeſaid be produced, and two proteſtant witneſſes come to atteſt his being a proteſtant diſſenter, or a certificate under the hands of four proteſtants as aforeſaid be produced; the juſtice ſhall take a recognizance with two ſureties in the penal ſum of 50 l for his producing the ſame; and if he cannot give ſuch ſecurity, ſhall commit him to priſon until he hath produced ſuch certificates, or two witneſſes as aforeſaid. ſ. 15.

Provided always, that all the laws made and provided for the frequenting of divine ſervice on the Lord's day, ſhall be ſtill in force, and executed againſt all perſons that offend againſt the ſaid laws, except ſuch perſons come to ſome congregation or aſſembly of religious worſhip, allowed or permitted by this act. ſ. 16.

Provided, that nothing in this act ſhall be conſtrued to extend, to give any eaſe benefit or advantage to any papiſt or popiſh recuſant whatſoever; or to any perſon that ſhall deny in his preaching or writing the doctrine of the bleſſed Trinity, as it is declared in the aforeſaid articles of religion. ſ. 17.

Provided, that if any perſon ſhall willingly and of purpoſe, maliciouſly or contemptuouſly come into any cathedral or pariſh church, chapel, or other congregation permitted by this act, and diſquiet or diſturb the ſame or miſuſe any preacher or teacher; he ſhall, upon proof thereof before any juſtice of the peace by two witneſſes, find two ſureties to be bound by recognizance in the penal ſum of 50 l, and in default of ſuch ſureties ſhall be committed to priſon till the next ſeſſions; and upon conviction of the ſaid offence at the ſaid ſeſſions, ſhall ſuffer the pain and penalty of 20 l to the king. ſ. 18.

Provided always, that no congregation or aſſembly for religious worſhip ſhall be permitted or allowed by this act, until the place of ſuch meeting ſhall be certified to the biſhop of the dioceſe, or to the archdeacon of the archdeaconry, or to the juſtices of the peace at the general or quarter ſeſſions of the peace for the county city or place in which ſuch meeting ſhall be held, and regiſtred in the ſaid biſhop's or archdeacon's court reſpectively, or recorded at the ſaid ſeſſions; the regiſter or clerk

of the peace whereof reſpectively, is hereby required to regiſter the ſame, and to give certificate thereof to ſuch perſon as ſhall demand the ſame: for which there ſhall be no greater fee nor reward taken, than the ſum of 6 d. ſ. 19.

S. 2. *Nor any other law or ſtatute of this realm made againſt papiſts or popiſh recuſants*] Which are ſpecially inſerted under the title Popery.

Except the 25 C. 2. c. 2. *and the* 30 C. 2. ſt. 2. c. 1.] Which ſaid ſtatute of the 25 *C.* 2. *c.* 2. requires that perſons admitted to temporal offices ſhall receive the ſacrament according to the uſage of the church of England, and ſubſcribe the declaration againſt tranſubſtantiation.

And the ſaid ſtatute of the 30 C. 2. ſt. 2. c. 1. diſables perſons from ſitting in either houſe of parliament or coming to court, who ſhall not ſubſcribe the declaration againſt popery therein mentioned.

Shall be conſtrued to extend to any perſon or perſons diſſenting from the church of England, that ſhall take the oaths] In the judgment given againſt *Larwood*, *H.* 6 *W.* it was declared by the court, that the defendant ſhould at firſt have pleaded in bar, that he was a diſſenter from the church, and then brought himſelf within the compaſs of the act of indulgence; of which the court cannot take any notice, becauſe it is a private act; for before it was made, the law did not take any notice of *proteſtant diſſenters*, but only of diſſenters from the church in general: beſides, it is an act which doth not extend to all ſorts of proteſtant diſſenters, but only to ſuch who ſhall qualify themſelves as therein is preſcribed. 4 *Mod.* 274.

Diſſenting from the church of England] In the caſe of Dr *Trebec* and *Keith*, Feb. 12, 1742. Mr Keith, miniſter of May-fair chapel, which was a chapel of eaſe to St George's pariſh, Hanover ſquare, of which the plaintiff was rector, being cited into the biſhop of London's court, for officiating as a clergyman of the church of England, without being licenſed by the biſhop, and having been denounced excommunicate forty days, for contumacy and contempt of the eccleſiaſtical laws; upon the biſhop's certificate into chancery of this fact, the writ de excommunicato capiendo iſſued. It was moved to quaſh the writ, and one of the ſuggeſtions was, that Mr Keith is within the toleration act. But by the lord chancellor Hardwicke: The act of toleration was made to protect perſons of tender conſciences, and to exempt them from penal-

penalties; but to extend it to clergymen of the church of England, who act contrary to the rules and diſcipline of the church, would introduce the utmoſt confuſion.——And the exception was over-ruled. 2 *Atkyns*, 498.

That ſhall take the oaths] And by the 10 An. c. 2. *If any perſon diſſenting from the church of England (not in holy orders, or pretended holy orders, or pretending to holy orders, nor any preacher or teacher of any congregation) who ſhould have been intitled to the benefit of the toleration act if he had duly taken and ſubſcribed the oaths and declaration or otherwiſe qualified himſelf as required by the ſaid act, and ſhall be proſecuted upon any of the penal ſtatutes from which proteſtant diſſenters are exempted by the ſaid act,—ſhall at any time during ſuch proſecution, take and ſubſcribe the ſaid oaths and declaration, or being of the people called quakers ſhall make and ſubſcribe the aforeſaid declaration and alſo the declaration of fidelity and ſubſcribe the profeſſion of their chriſtian belief according to the ſaid act, or before any two juſtices of the peace (who ſhall take and return the ſame to the next quarter ſeſſions to be there recorded); ſuch perſon ſhall be intitled to the benefit of the ſaid act, as fully as if he had duly qualified himſelf within the time preſcribed by the ſaid act, and ſhall be thenceforth exempted and diſcharged from all the penalties and forfeitures incurred by force of any of the aforeſaid penal ſtatutes.* ſ. 8.

That ſhall take the oaths of allegiance and ſupremacy, and make and ſubſcribe the declaration againſt popery] Which oaths and declaration are inſerted under the title **Oaths.**

For the county or place where ſuch perſon ſhall live] And by the 10 An. c. 2. *Any preacher or teacher of any congregation of diſſenting proteſtants, duly qualified according to the ſaid act, ſhall be allowed to officiate in any congregation, altho' the ſame be not in the county wherein he was ſo qualified; provided that the ſaid congregation or place of meeting hath been duly certified, and regiſtred or recorded according to the ſaid act: and ſuch preacher or teacher ſhall, if required, produce a certificate of his having ſo qualified himſelf under the hand of the clerk of the peace; and ſhall alſo before any juſtice of the peace of the county or place where he ſhall officiate, make and ſubſcribe ſuch declaration, and take ſuch oaths as are mentioned in the ſaid act, if thereunto required.* ſ. 9.

S. 4. *All and every perſon and perſons ſhall not be liable*] The ſenſe in this, and in the following ſection where the

ſame words are repeated, is evident enough; but it ſeemeth to be ſomewhat inaccurately expreſſed.

Shall not be liable to any pains, penalties, or forfeitures] And the law ſo far favours diſſenters upon the foundation of this act, that charities are permitted to be eſtabliſhed for the ſupport of diſſenting miniſters. As in the caſe of the *Attorney General* and *Cock*, May 4, 1751. Anne Partridge by her will deviſed an annuity to the miniſter of a baptiſt meeting houſe in the pariſh of Hemel Hempſtead. On an information in the name of the attorney general to eſtabliſh this charity, it was urged, that the act is not merely an act of toleration, but that it reſtores the common right of mankind to worſhip God according to their own conſcience, and is agreeable to the policy of inviting people to come to trade and live here, and to the policy of every man's diſpoſing of his own as he pleaſes. And the caſe of the *Attorney General* and *Andrews* was cited, 9 March, 1748, wherein copyhold lands, not ſurrendered to the uſe of the will, were deviſed for the benefit of quakers; and on a bill, the lord chancellor eſtabliſhed it. On the other hand it was argued, that this court, before it interpoſes for a charity, will conſider the nature of it, and not execute every charity, altho' made on religious principles. In the caſe of *Mendes D'Coſta* againſt *D'Pays*, Dec. 6. 1743, *Elias D'Pays*, a Jew, by his will ordered 1200 l to be appropriated for an eſtabliſhment of an aſſembly for the reading their holy and divine law for ever: And the lord chancellor held it an illegal charity, and ſuch as this court would not inforce.—By Sir John Strange, maſter of the rolls, for the lord chancellor: This caſe is not now to be made a queſtion. Baptiſts are perſons the legiſlature looks upon as well as quakers. In the quakers caſe, the court went a great way, not only countenancing it as a good charitable uſe, but ſupplying the want of ſurrender to the uſe of the will. The Jew caſe was different: The lord chancellor held it an illegal charity, becauſe it was not for the ſupport or encouragement of any denomination of chriſtians, but for the propagation of the Jewiſh law in contradiction to the chriſtian religion, which is part of the law and conſtitution of this kingdom. 2 *Vezey*, 273.

S. 8. *And ſhall alſo declare his approbation of, and ſubſcribe the articles of religion*] So that the act doth not extend to all perſons

perſons whatſoever, who ſhall think fit to ſtyle themſelves proteſtant diſſenters; but in order to be intitled to the benefits thereof, they muſt firſt qualify themſelves as is therein directed; that is to ſay, they muſt take the oaths, and make the ſubſcriptions requiſite within certain bounds. Until this ſhall be done, they are not intitled to any indulgence by this act. Which obſervation is applicable particularly to a ſect that has ſprung up of late years diſtinguiſhed by the name of Methodiſts; which does not as yet ſeem to be ſettled to any certain principles. They did originally proceed as members of the church of England, profeſſing only a ſtricter purity, and an adherence to the genuine doctrines of the church, which they ſuppoſed the church it ſelf deſerted, or did not ſufficiently inculcate. And this was firſt ſet on foot by clergymen of the church of England; no doubt, with a very good intention. But, as Solomon ſaith concerning the beginning of ſtrife, that it is like the letting out of water; ſo here the floodgate being opened, it doth not as yet appear where the inundation will ſtop. If they continue to profeſs themſelves ſtill members of the church, and at their aſſemblies do perform their religious exerciſes according to the form and manner of the church of England; this act doth not extend unto them, nor do they ſeem to need the benefit of it; I mean, as to their hearers: But thoſe miniſters of the church of England, who take upon them to preach in ſuch aſſemblies, will do well to conſider the force of the 71ſt canon aforementioned; which, to prevent the danger and probable factious conſequences of ſuch clandeſtine aſſemblies, doth for their ſecond offence in this kind inflict upon them the penalty of excommunication. If they do not proceed in their aſſemblies according to the form and manner of the church of England; then both miniſter and people are liable to all the penalties of the aforeſaid ſtatutes made againſt conventicles, until they ſhall be qualified by taking the oaths, and making the ſubſcriptions, and performing the other requiſites, according to this act: Which being done, it is probable they will then fall in at laſt amongſt ſome of the other ſects of proteſtant diſſenters.

S. 11. *Preacher or teacher of a congregation*] And the law ſo far takes notice of them that a mandamus will iſſue to admit or reſtore them: As in the caſe of *K.* and *Barker*, *H.* 2 *G.* 3. It was moved for a mandamus to be

directed to the ſurviving truſtees under a deed of releaſe made by one Charles Vinſon to John Enty a diſſenting miniſter at Plymouth, and other truſtees, ſettling a then new built meeting houſe upon the ſaid truſtees, in truſt (among other things) to ſuffer the meeting houſe to be for the publick worſhip of God, by ſuch congregation of proteſtant diſſenters commonly called preſbyterians, as ſhould attend the miniſtry of the ſaid Mr Enty, or ſuch other preſbyterian miniſter as ſhould in his room ſucceſſively, in all times coming, be by the members in fellowſhip of the ſaid or ſuch like congregation regularly and fairly choſen and appointed to be the miniſter, preacher, or paſtor, to preach in the ſaid meeting; requiring them to admit Chriſtopher Mends to the uſe of the pulpit thereof, as paſtor, miniſter, or preacher there; he the ſaid Chriſtopher Mends being duly elected thereto. The counſel, on ſhewing cauſe againſt the mandamus, controverted by affidavits the election of Mends, and endeavoured to ſupport the election of Mr Hanmer, whom the truſtees had put in poſſeſſion. The majority of the congregation ſeemed to be on the ſide of Mends. The truſtees eſpouſed Hanmer, and meant to maintain him with an high hand. There was no colour for the election of Hanmer; and that of Mends was liable to objections. This conteſt had raiſed great animoſity, eſpecially in thoſe who were for Hanmer: And as they thought their ſtrength lay in throwing obſtacles in the way of any (more eſpecially a ſpeedy) redreſs, as Hanmer was upholden and maintained in poſſeſſion by the truſtees; their counſel with great earneſtneſs argued againſt making the rule abſolute for a mandamus, and contended that it could not be to admit, when another was in poſſeſſion. A mandamus to admit goes no further (they ſaid) than to give a legal poſſeſſion, where otherwiſe the party would be without remedy. A mandamus to admit is only to give a legal, not an actual poſſeſſion; tho' in a mandamus to reſtore, the court will go further. But here another perſon (Mr Hanmer) is in poſſeſſion; and Mr Mends never has been ſo. Here is no legal right. And this court cannot take notice of truſts, ſo as to give relief, upon an equitable title only; nor is this gentleman the *Ceſtui que truſt*: But, at moſt, his title is only equitable. —— By lord Mansfield: A mandamus is a prerogative writ, to the aid of which the ſubject is intitled, upon a proper caſe previouſly ſhewn to the ſatisfaction

tion of the court. It was introduced to prevent diſorder from a failure of juſtice; and ought to be uſed upon all occaſions, where the law has eſtabliſhed no ſpecific remedy, and where in juſtice and good government there ought to be one. Writs of mandamus have been granted to admit lecturers, clerks, ſextons, and ſcavengers: to reſtore an alderman to precedency, an attorney to practiſe in an inferior court, and the like. Since the act of toleration, it ought to be extended to protect an endowed paſtor of proteſtant diſſenters, from analogy and the reaſon of the thing. The right it ſelf being recent, there can be no direct ancient precedent: But every caſe of a lecturer, preacher, ſchoolmaſter, curate, chaplain, is in point. The deed is the foundation or endowment of the paſtorſhip. The form of the inſtrument is neceſſarily by way of truſt: For the meeting houſe, and the land upon which it ſtands, could not be limited to Enty and his ſucceſſors. Many lectureſhips and other offices are endowed by truſt deeds. The right to the function is the ſubſtance, and draws after it every thing elſe as appurtenant thereto. The power of the truſtees is intirely in the nature of an authority to admit. The uſe of the meeting houſe and pulpit in this caſe follows, by neceſſary conſequence, the right to the function of miniſter, preacher, or paſtor; as much as the inſignia do the office of a mayor, or the cuſtody of the books that of a town-clerk. —— The court propoſed an iſſue to try, whether Mr Hanmer was or was not duly elected; as the cheapeſt and beſt way to put it in. The defendants refuſed to have it ſo tried, and their counſel argued ſtrenuouſly againſt granting a mandamus. They knew, the election of Hanmer could not be ſupported upon a trial. The election of Mends ſeemed liable to objection as irregular. But if the matter was proper for a mandamus, they were aware that in caſe neither was elected, the court would iſſue a mandamus to proceed to an election; in which caſe, the majority of the congregation were inclined to Mends. The truſtees therefore obſtinately perſiſted in oppoſing a mandamus and refuſing a trial. — Lord Mansfield: Every reaſon concurs here for granting a mandamus. We have conſidered the matter fully; and we are all clearly for granting it. Here is a function, with emoluments; and no ſpecific legal remedy. The right depends upon election; which intereſts all the voters. The queſtion is of a nature to inflame mens paſſions. The refuſal to

try the election in a feigned iſſue, or proceed to a new election, proves a determined purpoſe of violence. Should the court deny this remedy, the congregation may be tempted to reſiſt force with force. A diſpute, "who ſhall preach chriſtian charity," may raiſe implacable feuds and animoſities, in breach of the public peace, to the reproach of government, and the ſcandal of religion. To deny this writ, would be putting proteſtant diſſenters and their religious worſhip out of the protection of the law. This caſe is intitled to that protection; and cannot have it in any other mode, than by granting this writ. The defendants have refuſed either to go to a new election, or to try it in a feigned iſſue. We were all of opinion, when a trial was propoſed to them, that a mandamus ought to iſſue, in caſe of refuſal. —— Afterwards, the parties by agreement came to a new election; and a peremptory mandamus was iſſued by conſent of both parties. *Bur. Manſf.* 1265.

S. 11. *Shall be exempted from ſerving on any jury*] And by the 2 *G.* 3. *c.* 20. from ſerving in the militia.

S. 13. *Scruple the taking of any oath*] And by the 22 *G.* 2. c. 46. *In all caſes wherein by any act of parliament an oath is or ſhall be allowed or required, the ſolemn affirmation of quakers ſhall be allowed inſtead of ſuch oath, although no particular or expreſs proviſion be made for that purpoſe in ſuch act: and if any perſon making ſuch affirmation ſhall be convicted of having wilfully falſly and corruptly affirmed or declared any thing, which if the ſame had been depoſed upon oath would have amounted to wilful and corrupt perjury; he ſhall ſuffer as in caſes of perjury.* ſ. 36.

Provided, that no quaker ſhall by virtue hereof be qualified or permitted to give evidence in any criminal caſes, or to ſerve on juries, or to bear any office of profit in the government. ſ. 37.

T. 7 *G. Robinſon* and *Sayward.* By the court, We cannot ground an attachment for non-performance of an award on the affirmation of a quaker; for tho' it be a ſuit between party and party, yet it is a criminal proſecution within the ſtatutes that in certain caſes do diſpenſe with the oaths of quakers. *Str.* 441.

T. 8 *G.* A motion was made for exhibiting articles of the peace, on the behalf of *Elizabeth Collet*, a quaker; but ſhe refuſing to ſwear, the court could do nothing. *Str.* 527.

H. 3 *G.* 2. *Caſtel*, widow, againſt *Bambridge* and *Corbett*. On an appeal of murder, a quaker's affirmation was offered in evidence, and it was inſiſted that this is a civil ſuit only, betwixt party and party, in which therefore he might be a witneſs: But by Raymond chief juſtice, As to this purpoſe, it is a criminal proceeding; and he cannot be a witneſs, unleſs he be ſworn. *Str.* 856.

T. 4 *G.* 2. *K.* and *Wych.* It was denied to read a quaker's affirmation, on motion for an information for a miſdemeanor. *Str.* 872.

H. 18 *G.* 2. *K.* againſt *Turner* and others. A rule to ſhew cauſe, why an appointment of overſeers of the poor for Cirenceſter ſhould not be quaſhed, was ſerved by a quaker, and on his affirmation made abſolute; this not being looked on as a criminal proſecution, tho' it is on the crown ſide, and the rule intitled in the king's name. *Str.* 1219.

But beſides the quakers, there is another ſect not unlike to the quakers in this reſpect, called *Moravians*, who ſcrupling to take an oath have been indulged by the legiſlature in making a ſolemn affirmation inſtead thereof; it being enacted by the 22 *G.* 2. *c.* 30. (intitled, An act for encouraging the people known by the name of *Unitas fratrum*, or *United brethren*, to ſettle in his majeſty's colonies in *America*) that *every perſon being a member of the proteſtant epiſcopal church, known by the name of* unitas fratrum, or *the* united brethren, *which church was formerly ſettled in* Moravia *and* Bohemia, *and are now in* Pruſſia, Poland, Sileſia, Luſatia, Germany, *the* United provinces, *and alſo in his majeſty's dominions, who ſhall be required on any lawful occaſion to take an oath, ſhall inſtead of the uſual form be permitted to make his ſolemn affirmation, in theſe words*, "I A. B. do declare, in the preſence of almighty "God, the witneſs of the truth of what I ſay". *Which ſhall be of the ſame force and effect in all courts of juſtice and other places where by law an oath ſhall be required within the kingdoms of* Great Britain *and* Ireland, *and within his majeſty's dominions in* America, *and under the like penalties as for perjury, as if ſuch perſon had taken an oath in the uſual form. But this not to qualify ſuch perſon to give evidence in a criminal cauſe, or to ſerve on juries. — And by the ſaid act, every member of the ſaid church or congregation, who ſhall reſide in any of his majeſty's dominions in* America, *and ſhall be ſummoned there to bear arms, ſhall be diſcharged from perſonal ſervice, on paying the like rate or aſſeſſment in lieu thereof, as perſons unable by reaſon of age, ſex or other infirmity. — And*

to

to prevent any doubt, whether a perſon pretending to be of ſuch congregation, is actually a member thereof; every perſon who ſhall claim any benefit of this act, ſhall at the time of ſuch claim produce a certificate ſigned by ſome biſhop of the ſaid church, or by the paſtor of ſuch church or congregation who ſhall be neareſt to the place where ſuch claim is made: and ſuch perſon proving by his affirmation, or by other legal witneſs, that the ſaid certificate was duly executed, and alſo affirming that he is actually a member of the ſaid church, ſhall be adjudged and deemed accordingly.—And that it may be known whether ſuch biſhops and paſtors are of the ſaid church; the advocate of the ſaid church or congregation for the time being, ſhall from time to time lay before The commiſſioners for trade and plantations, *in order that the ſame may remain in their office, liſts of all the biſhops of the ſaid church appointed by them to grant certificates, with their hand writing and uſual ſeal; and alſo the names, hand writing, and ſeals of the biſhops appointed by the ſaid brethren as aforeſaid, and the names of ſuch paſtors as ſhall be authorized by the ſaid advocate or biſhops to give certificates in any of his majeſty's colonies in* America.

Declaration of fidelity, and ſubſcribe a profeſſion of their chriſtian belief] The forms of which are inſerted under the title Oaths.

Shall enjoy all other the benefits, privileges, and advantages, which any other diſſenters ſhould or ought to enjoy] And the rules of their diſcipline ſeem to be allowed, as in the caſe of marriages abovementioned, ſo alſo in other particulars: As in the caſe of *K.* and *Francis Hart*, *M.* 3 *G.* 3. On an indictment for a libel. The proſecutrix, Miſs Mary Jerom, was educated among the quakers, at the town of Nottingham; her parents, who lived there, being of that perſuaſion. There are ſeveral ſeparate congregations of quakers in this town; and once a month a general aſſembly is held of them all. At theſe monthly meetings, they take into conſideration the conduct of ſuch of their members, as have not acted conformably to their rules; and proceed according to the direction of our Saviour in the 18th chapter of St. Matthew, v. 15th, 16th, and 17th*, which they call their diſcipline. If gentle admonitions

* *If thy brother ſhall treſpaſs againſt thee, go and tell him his fault between thee and him alone: if he ſhall hear thee, thou haſt gained thy brother.*

But

monitions in private have no effect, complaint is made to the monthly meeting; from whence a deputation is formally ſent, to viſit, and to endeavour to reclaim the party offending. And if theſe ſteps prove ineffectual, they proceed at laſt to a final ſentence of expulſion; which is uſually by ſome inſtrument or paper in writing drawn up for that purpoſe, and openly read at one of the meetings for publick worſhip. The perſon employed in this ſervice is called the clerk of the meeting; and the writing by which the ſociety exclude and diſown as their member the delinquent, generally ſets forth the cauſe of their proceeding, and the fruitleſs care and endeavours of the ſociety to reclaim. This has been their general practice ſince the toleration act; and at Nottingham, as well as in many other places, they continue on this plan to this time. The proſecutrix having acted in diſobedience to their rules, by frequenting places of public diverſions, going into mourning for the death of a relation, and doing other things which they eſteem unlawful: the method of admonition, and viſitation by deputies, was taken by the ſociety; and ſeveral conferences were had; but they proving ineffectual, and ſhe abſenting herſelf from their meetings, and declaring that ſhe did not look upon herſelf as one of their body, the ſociety at laſt (after ſeveral fruitleſs attempts to reclaim her for a year and a half) proceeded in their uſual way to the ſentence of expulſion, in the following words, which were reduced into writing, approved of by the monthly meeting, and afterwards read by the defendant Francis Hart, as clerk of the meeting, at the cloſe of their meeting for worſhip at Nottingham, on Sunday, Sept. 6, 1761.

"Whereas Mary Jerom, of this town, was born of "parents profeſſing the ſame religious principles with us, "and by them educated in our ſociety; but not duly "regarding the truth we profeſs, ſhe imbibed erroneous "notions contrary to ſcripture doctrine, and in divers "parts of her conduct acted very inconſiſtently with a "life of ſelf denial, and of late years moſtly neglected "meeting

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But if he will not hear thee, then take with thee one or two more; that in the mouth of two or three witneſſes every word may be eſtabliſhed.

And if he ſhall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican.

" meeting for divine worſhip, and when viſited by friends " appointed by our monthly meeting in love to her ſoul, " and in order to reclaim her from error and bring her " to the acknowledgment of truth both in judgment " and practice, but rejecting our labour of love, ſhe de- " clared that ſhe did not look upon herſelf as a member " of our ſociety: We therefore hereby declare her not " in unity with nor a member of our religious ſociety, " until by unfeigned repentance ſhe duly acknowledge " ſcripture doctrine, and behave agreeable to our holy " profeſſion; which that ſhe may, we ſincerely deſire. " Signed in and by order of our monthly meeting, " held at Nottingham, the fifth of the eighth month, " 1761. By Francis Hart, clerk."

The proſecutrix being acquainted with this proceeding, ſent her maid ſervant to the defendant for a copy of this ſentence; who accordingly tranſcribed it, and incloſed it in a cover directed to Mrs. Mary Jerom; who being thus poſſeſſed of it, annexed it to an affidavit, and applied to the court of king's bench for an information for a libel. But the court rejected the motion, and refuſed to grant a rule to ſhew cauſe. She afterwards, on the 12th of March 1762, preferred a bill of indictment againſt the defendant for a libel, before the grand jury at the aſſizes held for the town of Nottingham. Which bill being found by them was afterwards removed by certiorari into the king's bench. And the defendant having pleaded not guilty, it was tried before Mr. Juſtice Clive, at the ſummer aſſizes held for the town of Nottingham, July 30th 1762. The evidence on the part of the proſecution was, the proſecutrix, and her ſervant maid who went for the paper; and the evidence of the publication of it as a libel was, the direction of it to the proſecutrix, and the defendant's acknowledgment to the maid that he read it at the meeting. The defendant's counſel called no witneſſes; being of opinion, that the quakers, who were the only perſons that could give an account of their method of proceeding, were diſabled by the ſtatute of 7 & 8 W. c. 34. from being witneſſes on a criminal proſecution; and being reſtrained from arguing that the paper in queſtion was no libel, by the judge, who ſaid that ſuch a queſtion was more proper to be determined by the court above, could only inſiſt, that the evidence on the part of the proſecution was not ſufficient to maintain the indictment. The judge left the caſe, with its circumſtances, to the jury; but rather recommended it to them to acquit the defendant. The jury, after withdrawing about

three

three hours, found the defendant guilty. In the Michaelmaſs term following, Mr. Cuſt moved the court of king's bench for a new trial; and after ſtating the abovementioned facts, and obſerving upon the circumſtances of hardſhip which would attend the caſe on a motion in arreſt of judgment, where no facts could be relied on but what appeared in the record, and after a verdict it might be preſumed that a malicious intention to defame the proſecutrix (which was charged in the indictment) was proved, inſiſted that the leaving ſuch a caſe as this to a jury, would be enabling a jury to ſet up a judgment in oppoſition to the legiſlature, and overturn the toleration act, and that therefore the verdict ought to be ſet aſide as a verdict againſt law. The court was clearly of opinion, that the jury ſhould have been directed to acquit the defendant; and, as notice of the motion was given, and counſel appeared for the proſecution, who did not contradict the abovementioned facts, the court ſaid they would not do ſo much credit to ſuch a proſecution as to grant a rule to ſhew cauſe; and they ordered the verdict to be ſet aſide, and a new trial to be had, on the firſt motion.

S. 16. *Except ſuch perſons come to ſome congregation*] But, by Holt chief juſtice: If a man be a profeſſed churchman, and his conſcience will permit him ſometimes to go to meetings inſtead of coming to church, the act of toleration ſhall not excuſe him; for it was not made for ſuch ſort of people. *Gibſ.* 521. 6 *Mod.* 190.

And by the 5 G. c. 4. *If any mayor bailiff or other magiſtrate, ſhall knowingly or wilfully reſort to or be preſent at any publick meeting for religious worſhip, other than of the church of England*, in the gown or other peculiar habit, or attended with the enſign or enſigns belonging to his office; *he ſhall, upon conviction by due courſe of law, be diſabled to hold ſuch office, and be incapable to bear any publick office or employment whatſoever.*

S. 18. *Diſquiet or diſturb*] And by the 1 G. ſt. 2. c. 5. *If any perſons unlawfully riotouſly and tumultuouſly aſſembled together, to the diſturbance of the publick peace, ſhall unlawfully and with force demoliſh or pull down, or begin to demoliſh or pull down any church or chapel, or any building for religious worſhip certified and regiſtred according to the* 1 W. c. 18. *the ſame ſhall be adjudged felony without benefit of clergy.* ſ. 4. *And the hundred ſhall anſwer damages, as in caſes of robbery.* ſ. 6.

S. 19.

S. 19. *Place of ſuch meeting ſhall be certified*] *M.* 8 *W. Green* and others againſt *Pope.* Green and fifteen others bring an action upon the caſe, in the court of common pleas, againſt the defendant, for having made a falſe return to a mandamus to him directed. The plaintiffs in their declaration ſhew the act of the 1 W. c. 18. which exempts proteſtant diſſenters from the penalties of divers former acts, if they take the oaths and ſubſcribe the declaration there mentioned; that by the ſame it is enacted, that no meeting by proteſtant diſſenters for religious worſhip ſhall be allowed, until the place for the meeting be certified unto the biſhop of the dioceſe, or the archdeacon, or to the quarter ſeſſions, and regiſtred or recorded there reſpectively; and the plaintiffs ſhew, that they were proteſtant diſſenters, and had taken the oaths and ſubſcribed the declaration according to the act; and that in the pariſh of Hindley at a town called D. within the dioceſe of Cheſter, the plaintiffs had appointed a place called *The chapel* for their religious worſhip, and that they had authority ſo to do: that Green one of the plaintiffs made a certificate of their appointment of this place to the biſhop of Cheſter, and delivered it to Pope the defendant, being regiſter to the biſhop, to regiſter it as he ought; that the defendant Pope refuſed to regiſter it; upon which the plaintiffs were driven to ſue a mandamus out of the king's bench, directed to the defendant, commanding him to regiſter the certificate; but that the defendant notwithſtanding did not regiſter it, but made return to the mandamus, that Hindley was an ancient populous village, diſtant one mile from the pariſh church, and for theſe forty years laſt paſt this place called *The chapel* had been and yet is a chapel of eaſe, and endowed with 50l a year, and had a miniſter appointed to officiate, and that there were ſeveral places within the pariſh already appointed for diſſenters for religious worſhip; all which return the plaintiffs aver to be falſe; and for this falſe return they bring this action. The defendant pleads, that the return to the mandamus was true, and avers every particular of the return. The plaintiffs demur. And it was reſolved by the court, that this plea was bad, becauſe it amounts but to the general iſſue, it being all matter of fact, and having no intermixture of law. Then it was urged for the defendant, that judgment ought to be given for him, 1. Becauſe it is ſaid in the declaration, that the plaintiffs appointed the place, but the act gives no direction, who ſhall have authority to appoint the place, and there-

therefore it ought rather to be done by the preacher, or otherwiſe with the conſent of the whole meeting. 2. They have no authority to appoint a chapel; but this place in the declaration they call a chapel. But to this the court anſwered, that a field or tavern may be called a chapel. 3. They ſhould have ſhewn, by whon this appointment was made, as by the diſſenters inhabitants within ſuch a diſtrict; but it is ſo general here, that it may be by all the diſſenters in England. Then if it is no good appointment, the whole will fail; for then there will be no certificate; if no certificate, no regiſtring; if no cauſe to regiſter, the refuſal was no ground for a mandamus; if no mandamus, then there could be no falſe return. 4. It is ſaid that the certificate was made by Green alone; but the act gives no authority to any one in particular to make it. But by Treby chief juſtice, the act being general, any of them may well certify. 5. The mandamus in this caſe was not grantable, for there was here no diſturbance of a freehold, nor office of truſt, but a thing merely eccleſiaſtical: and if a man hath a ſeat in a church, and is hindred of the enjoyment, no mandamus lies; and as to the plaintiffs, this was in nature of a church. But to all theſe objections the court gave one general anſwer, that this action was brought for the falſe return to the mandamus, and therefore all the reſt is but inducement: And therefore whether a mandamus will lie or not, is not now before the court, but it muſt be taken for granted, that a mandamus was iſſued, and the defendant made a falſe return. The principal point therefore of the caſe was, whether the plaintiffs can join in this action, or not? And this was ſeveral times argued at the bar. And the defendant's counſel argued that they could not; becauſe that where perſons are jointly intitled to the action, they may all join in it, ſince the damages which were the foundation of it were joint, but where perſons are ſeverally damnified, as in treſpaſs or the like, there they cannot join. But it was adjudged by the whole court upon great deliberation, that the plaintiffs might well join, for the damages in this caſe were joint; for they all jointly ſue a mandamus, they all jointly proſecuted, the charges were all joint, and theſe are the damages the plaintiffs ſue to recover; and by Treby chief juſtice, if the attorney ſues the plaintiffs for the charges of the ſuit of the mandamus, he muſt ſue them jointly, and the ſurvivors are liable: And tho' it was objected, that the plaintiffs had no need to join in the ſuit of the mandamus;

damus; yet the court anſwered, ſince they might have done it, the charges will ſurvive. And they relied principally upon a caſe adjudged in this court, *M.* 4 *W.* where the two churchwardens of Chelſea church, being elected by the pariſh by cuſtom, went to Dr Brampſton the official, to be ſworn; Dr Brampſton refuſed to adminiſter the oath to them; upon which they ſued a mandamus directed to Dr Brampſton, to command him to adminiſter the oaths; upon which he returned, that the cuſtom was, that the miniſter ſhould name one churchwarden and that the pariſh ſhould chuſe the other; that becauſe the pariſh had elected two, he did not know which of them he ought to admit; they brought an action upon the caſe jointly againſt Dr. Brampſton for this falſe return; and exception was taken, that the damages were ſeveral, and the profits of the offices ſeveral; but to this it was anſwered, that the action was not brought to recover damages for the profits of the office, for the office had no profits; but it was brought to recover the damages and charges expended in the ſuit of the mandamus; and for this reaſon it was adjudged, that they might well join: which does not differ from the principal caſe. But to make a diſtinction between theſe two caſes, it was objected, that the churchwardens might well join; becauſe they are a corporation in judgment of law, and may ſue for goods of the pariſh which are taken out of their poſſeſſion, or may have treſpaſs or appeal of robbery for the goods of the pariſh; which diſtinguiſhes them from this caſe, which was of common perſons. But to this the court anſwered, that churchwardens are not a corporation, till they are admitted; but this mandamus was ſued, to procure admittance, and conſequently then they were not a corporation. And by the court, this action is not brought, only to recover damages, but alſo to have a peremptory mandamus, in which all ought to join. For one of them cannot have a peremptory mandamus, where ſixteen joined in the principal mandamus; for the peremptory mandamus muſt purſue the principal. And for theſe reaſons all the court were of opinion, that the plaintiffs might well join. And therefore judgment was given for the plaintiffs. Afterwards the plaintiffs moved the court of king's bench for a peremptory mandamus. But the court of king's bench denied to grant it; becauſe the peremptory mandamus ſays, that the return is falſe *as it appeareth unto us by the record*, which cannot be ſaid

here; for the king's bench cannot take judicial notice of the record of the common pleas, unleſs it come before them by courſe of law; and therefore the action for the falſe return ſhould have been brought in the king's bench, where the falſe return is, if the party deſigned to have a peremptory mandamus. *L. Raym.* 125.

By the 10 *An. c.* 7. 19 *G.* 2. *c.* 38. and 21 *G.* 2. *c.* 34. for regulating epiſcopal meeting houſes in *Scotland*; no letters of orders of any paſtor or miniſter of any epiſcopal meeting or congregation in *Scotland*, ſhall be deemed ſufficient, but ſuch as have been given by ſome biſhop of *England* or *Ireland*; and ſuch paſtor, as often as he ſhall officiate in any ſuch epiſcopal meeting houſe or congregation, ſhall at ſome time during the divine ſervice pray for the king by name, and for the royal family, in the ſame form of words as they ſhall be directed by lawful authority to be prayed for, in the prayers for the royal family, contained in the liturgy of the church of *England*.

Finally, By the 19 *G.* 3. *c.* 44. intitled, An act for the further relief of proteſtant diſſenting miniſters; with reſpect to ſubſcribing the 39 articles except as before excepted: it is enacted, that every perſon diſſenting from the church of *England*, in holy orders, or pretended holy orders, or pretending to holy orders, being a preacher or teacher of any congregation of diſſenting proteſtants, who ſhall take the oaths and ſubſcribe the declaration required by the 1 *W. c.* 18. and ſhall alſo make and ſubſcribe the declaration in the words following, viz. "I "A. B. do ſolemnly declare, in the preſence of almighty "God, that I am a chriſtian and a proteſtant, and as "ſuch, that I believe that the ſcriptures of the old and "new teſtament, as commonly received among proteſtant "churches, do contain the revealed will of God; and "that I do receive the ſame as the rule of my doctrine "and practice:" ſhall be intitled to all the benefits granted to proteſtant diſſenting miniſters by the aforeſaid act of 1 *W. c.* 18. and the ſame ſhall be entred and recorded at the ſeſſions in like manner as the oaths and former declaration. And every ſuch perſon ſo qualifying himſelf ſhall, beſides the other privileges, be exempted from ſerving in the militia of this kingdom.

And no diſſenting miniſter, nor any other proteſtant diſſenting from the church of *England*, who ſhall take the aforeſaid oaths, and make and ſubſcribe the ſaid declarations, ſhall be proſecuted in any court whatſoever,

for teaching and inſtructing youth as a tutor or ſchool-maſter. But this ſhall not extend to the enabling any perſon diſſenting from the church of *England*, to hold the maſterſhip of any college or ſchool of royal foundation, or of any other endowed college or ſchool for the education of youth, unleſs the ſame ſhall have been founded ſince the firſt year of the reign of *William* and *Mary*, for the immediate uſe and benefit of proteſtant diſſenters.

Diſtribution.

THE diſtribution of inteſtates effects, is treated of under the title Wills.

Divine Service. See Publick worſhip.

Divorce. See Marriage.

Doctors commons.

DOCTORS Commons is the college of civilians in London, which was purchaſed by Dr Harvey, dean of the arches, for the profeſſors of the civil law. Here commonly reſide the judge of the arches court of Canterbury, the judge of the admiralty, and the judge of the prerogative court of Canterbury, with divers other eminent civilians; who there living (for diet and lodging) in a collegiate manner, and commoning together, it is known by the name of doctors commons. It was burnt down in the fire of London, and rebuilt at the charge of the profeſſion. *Chamberl. preſent State.*

Donatio cauſa mortis.

Donatio cauſa mortis, is a gift in proſpect of death; where a perſon moved with the conſideration of his mortality, doth give and deliver ſomething to another, to be his in caſe the giver die, but if he lives he is to have it again. *Law of Teſt.* 179.

Which is treated of more at large under the title Wills.

Donative.

1. A Donative is a ſpiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any preſentation to the biſhop; and without admiſſion, inſtitution, or induction by any mandate from the biſhop or other; but the donee may by the patron, or by any other authorized by the patron, be put into poſſeſſion. *Deg.* p. 1. c. 13. Donative, what.

2. And this right in the donor (together with the exemption of the church from eccleſiaſtical juriſdiction) ſeemeth to have come from the conſent of the biſhop in ſome particular caſes: as when the lord of a manor in a great pariſh, having his tenants about him at a remote diſtance from the pariſh church, did offer to build and endow a church there, provided that it ſhould belong intirely to him and his family, to put in ſuch perſons as they ſhould think fit, if they were in holy orders. It is very poſſible, that the biſhops at that time, to encourage ſuch a work, might permit them to enjoy this liberty; which being continued time out of mind, is turned into a preſcription. And they are to be diſtinguiſhed from thoſe called fine-cures, and exempt juriſdictions; for fine-cures in truth are benefices preſentable; but by means of vicarages endowed in the ſame places, the perſons who enjoy them have by long cuſtom been excuſed from reſidence: and exempt juriſdictions are not ſo called, becauſe they are under no ordinary; but becauſe they are not under Original of donatives.

the ordinary of the dioceſe, but have one of their own; and are therefore called peculiars. 1 *Still.* 335.

Of what kind of benefices or dignities.

3. There is not any one particular ſort of eccleſiaſtical preferments, that are peculiarly ſaid to be donatives; for ſome of all ſorts may be donative, as well as preſentative, or elective. For biſhopricks were donative in England, after the conqueſt, until the time of king John. So a prebend may be donative, as at Windſor and Weſtminſter, in the chapels of the king, where the prebend being void, it is ſaid that the king ſhall make collation of his clerk by patent, and by force thereof he ſhall take poſſeſſion without any inſtitution or induction. Alſo a benefice with cure of ſouls may be a donative; as the rectory of Briery or Burien in Cornwall: and ſo the church of the tower of London is a cure of ſouls, and the king's donative. *Watſ.* c. 15.

Yet ſome of theſe inſtances, and other ſuch like, may be ſaid to reſemble donations, rather than to be donations, properly ſo called; ſuch as the grant of the king to prebends without inſtitution; ſo alſo, the collation of a biſhop without preſentation; and the nomination to perpetual curacies, which is without either preſentation inſtitution or induction. For theſe differ from donatives properly ſo called, which are given and fully poſſeſſed by the ſole donation of the patron in writing; inaſmuch as collations and royal grants are to be followed by induction and inſtalment; and perſons nominated to curacies are to be authorized by a licence from the biſhop, before they can legally officiate. Whereas poſſeſſion by donation is not ſubject to any of theſe conſequents, but receives its full eſſence and effect from the ſingle act and ſole authority of the donor as aforeſaid. *Watſ.* c. 15.

Stamp.

4. By the ſeveral ſtamp acts; for every ſheet or piece of vellum or parchment, or ſheet of paper, upon which any donation which ſhall paſs the great ſeal of England, or upon which any donation to be made by any patron whatſoever, of or to any benefice, dignity, or eccleſiaſtical promotion, ſhall be ingroſſed or written, ſhall be paid a double forty ſhilling ſtamp duty. Provided, that ſuch benefice, dignity, or promotion be of the yearly value of 10 l or above in the king's books.

If under that, it ſeemeth that the ſame ſhall be upon a treble 5 s ſtamp.

Form of a donation.

5. The form of a donation may be thus: "To all to "whom theſe preſents ſhall come. Know ye, that I "A. B. of ——— in the county of ——— eſquire, "have

" have given and granted, and by theſe preſents do give " and grant, to my beloved in Chriſt C. D. clerk, the " office or place of curate" [or as the caſe ſhall be] " of the chapel of ——— in the county of ——— now " lawfully vacant, and to my donation and free diſpoſi- " tion in full right belonging, and by theſe preſents do " make conſtitute and appoint him the ſaid C. D. curate " of the ſaid chapel; to have, hold, and enjoy the ſaid " office or place of curate in the chapel aforeſaid to him " the ſaid C. D. during his natural life, with all and " every the ſalaries ſtipends rights and appurtenances to " the ſame office or place of curate aforeſaid in any wiſe " belonging or appertaining, as fully freely and perfectly, " and in as ample manner and form, as any other hath or " ought to have held and enjoyed the ſame. In witneſs " whereof I have hereunto ſet my hand and ſeal, the " ——— day of ——— in the year of our Lord ———" *Elton* 459.

Or thus: " To all to whom theſe preſents ſhall come, " A. B. of ——— in the county of ——— eſquire, " lord of the manor of ——— in the county of ——— " ſendeth greeting. Whereas the chapel of ——— in the " county aforeſaid is now vacant, and to my donation " in full right belongeth; know ye, that I the aforeſaid " A. B. have given and granted to my beloved in Chriſt " C. D. clerk, the aforeſaid chapel of ——— with all " its rights and appurtenances, and by the tenor of theſe " preſents do induct him the ſaid C. D. into corporal " poſſeſſion of the ſaid chapel, with all its appurtenances. " In witneſs whereof, *&c.*" *Elton* 461.

Effect of a donation.

6. The grant of a donative being once made, creates a right as full and laſting as inſtitution and induction; that is, a right not to be taken away, but by the reſignation or deprivation of the donee; the reſignation to be made to the donor, and the deprivation to be made by the donor likewiſe; both the church and the clerk being exempt from ordinary juriſdiction. To this purpoſe it is, what we find in the reports of Sir John Davis, that a donative cannot be granted for years or at will only, becauſe this great inconvenience would follow, that the freehold might be in perpetual abeyance; which is an inconvenience that the law will not ſuffer. *Gibſ.* 819.

How far the donee muſt quality, as other clerks promoted.

7. Altho' a clerk upon whom a donative is beſtowed, doth not gain poſſeſſion by preſentation, inſtitution, and induction; yet he is obliged, in order to preſerve and maintain his poſſeſſion, to be qualified and to qualify himſelf

ſelf in many things, as others do who are preſented inſtituted and inducted: as,

(1) He muſt be a prieſt; without which, by the 13 & 14 *C.* 2. *c.* 4. *ſ.* 14. no perſon ſhall be admitted to any eccleſiaſtial promotion.

(2) He muſt take the oaths of allegiance and ſupremacy, before he takes the donation; and this he muſt do before ſuch perſon who hath authority to admit him thereunto, that is, his patron; by the 1 *El.* *c.* 1. and 1 *W.* *c.* 8. *ſ.* 5.

(3) And if the donative be a benefice with cure, he that takes it ought firſt to ſubſcribe the thirty nine articles in the preſence of the *ordinary* (by the 13 *El.* *c.* 12.) which Dr Watſon ſuppoſeth muſt be underſtood of the ordinary of the dioceſe, and not of his patron; altho' the patron hath the power of viſiting and correcting him, and not the ordinary of the dioceſe. *Watſ.* c. 15.

(4) He muſt alſo, before his admiſſion to be incumbent or have poſſeſſion of his donative, ſubſcribe before the archbiſhop, biſhop, or ordinary of the dioceſe (or their vicar general, chancellor, or commiſſary reſpectively) the declaration of conformity to the liturgy of the church of England as by law eſtabliſhed. And if the donative hath a pariſh church belonging to it; he muſt have a certificate under the hand and ſeal of the perſon before whom he ſubſcribed, to be read by him in ſuch church afterwards. 13 & 14 *C.* 2. *c.* 4. 15 *C.* 2. *c.* 6. *ſ.* 5.

(5) And he ought to read the morning and evening prayers in his church or chapel, within two months after he ſhall be in the actual poſſeſſion of his donative, or in caſe of impediment (to be allowed of by the ordinary) then within one month after ſuch impediment removed; together with the form of giving aſſent and conſent thereunto: by the 13 & 14 *C.* 2. *c.* 4.

(6) He muſt alſo within two months (or at the time when he reads the morning and evening prayers as aforeſaid) read and aſſent to the thirty nine articles, if it be a place with cure: for altho' it is ſaid in the ſtatute of the 13 *Eliz.* *c.* 12. *ſ.* 2. that this is to be done in two months after *induction*; yet when the having cure of ſouls is the foundation of reading and aſſenting, wherever there is cure of ſouls, the *induction* may be well interpreted of any actual poſſeſſion whatſoever. 13 *El.* *c.* 12. 23 *G.* 2. *c.* 28. *Watſ.* c. 15.

(7) He muſt within three months after ſubſcription of the declaration aforeſaid, within his pariſh church as

afore-

aforeſaid, read the ordinary's certificate of his ſubſcription, and again make the ſame declaration; by the 13 & 14 *C.* 2. *c.* 4.

(8) And finally, within ſix months he muſt take the oaths of allegiance, ſupremacy, and abjuration; in one of the courts at Weſtminſter, or at the general or quarter ſeſſions. 1 *G. ſt.* 2. *c.* 13. 9 *G.* 2. *c.* 26.

8. Donatives are within the ſtatute againſt ſimony. *Deg.* p. 1. c. 13. Donative within the ſtatutes of ſimony and plurality.

And where they have cure of ſouls, they are likewiſe within the ſtatute againſt pluralities. *Deg.* p. 1. c. 13.

9. If the patron of a donative do not nominate a clerk, there can be no lapſe thereof, unleſs it be ſo ſpecially provided for in the foundation: but the biſhop may compel him to do it by ſpiritual cenſures. 1 *Inſt.* 344. *Gibſ.* 819. Lapſe.

But if it is augmented by queen Anne's bounty (as will appear afterwards) it will lapſe in like manner as preſentative livings.

10. Lord Coke ſays, if the king doth found a church, hoſpital, or free chapel donative, he may exempt the ſame from ordinary juriſdiction, and his chancellor ſhall viſit the ſame. Yea, if he do found the ſame, without any ſpecial exemption; the ordinary is not, but the king's chancellor to viſit it. And as the king may create donatives exempt from the viſitation of the ordinary; ſo he may by his charter licenſe any ſubject to found ſuch a church or chapel, and to ordain that it ſhall be donative and not preſentative, and to be viſited by the founder and not by the ordinary. And thus began donatives in England (he ſays), whereof common perſons were patrons. 1 *Inſt.* 344. How far exempt from the ordinary's juriſdiction.

But the Regiſter ſuppoſeth a royal foundation, and not a mere royal licence; and that it muſt be proved to be ancient too: and therefore a new licence will not come up to the Regiſter. 1 *Still.* 335.

However it is certain, that the ordinary cannot viſit a donative, but the patron muſt viſit the ſame, by commiſſioners to be appointed by him. 1 *Inſt.* 344.

And by conſequence a donative is freed from procurations. *Deg.* p. 1. c. 13. And the incumbent is exempted (Dr *Gibſon* ſays) from attendance at viſitations. *Gibſon* 819.

And it is ſaid, that if the biſhop ſhall take upon him to viſit a donative, and deprive the incumbent, he runs himſelf into the danger of a præmunire. *Deg.* p. 1. c. 13.

And in ſuch caſe was Barlow, biſhop of Bath, in the time of king Edward the ſixth; and was forced to get a pardon, for having deprived the dean of Wells, which was a donative by letters patents from the king. 3 *Inſt.* 122.

But altho' the ordinary hath not power as to the place, ſo as to regulate ſeats in that church, or the like; yet he hath power as to the parſon, if he committeth any miſdemeanor, to proceed againſt him by ſpiritual cenſures. As in the caſe of *Colefatt* and *Newcomb*, *M.* 4 *An.* A miniſter of a donative was ſued in the eccleſiaſtical court, for that, when he read prayers, he did not read the whole ſervice, but left out what part of it he thought fit; and for preaching without licence. And it was moved for a prohibition, upon a ſuggeſtion that the church was a donative; and argued, that donatives were exempt from the juriſdiction of the ordinary, and that it was a lay thing, and the biſhop could not viſit it; and that if the incumbent was guilty of hereſy, the ordinary could not meddle with him, for the parſon was privileged in reſpect to the place; but the patron might by commiſſion examine the matter, and upon cauſe deprive him. But Powell juſtice, in the abſence of Holt chief juſtice, took the difference, where the ſuit in the eccleſiaſtical court is in order to deprivation, and where only for reformation of manners; in the former caſe the court will prohibit, but not in the latter: and therefore if in this caſe the ſpiritual court proceeded to deprivation, the court would prohibit them, but not till then. He ſaid, he had known prohibitions denied frequently, to ſuits againſt parſons of donatives for marrying without licence. And the reporter ſays, Mr Mead and Mr Salkeld both told him, that they had known the chief juſtice Holt take the ſame diſtinction; that the parſon of a donative was liable to the eccleſiaſtical juriſdiction, as he was a member of the eccleſiaſtical body, for perſonal offences, tho' for matters relating to the church he was exempt; and therefore the ſpiritual court could not deprive him: but for drunkenneſs, or preaching hereſy, they might cenſure him. And this (ſaith the reporter) ſeemeth to be the better opinion. *L. Raym.* 1205.

So in the caſe of churchwardens, *M.* 13 *G. Caſtle* and *Richardſon*. On a libel in the eccleſiaſtical court for not taking upon him the office of chapel-warden; the defendant pleaded, that it was a donative, and thereupon moved for a prohibition. And upon debate, the ſame

was

was denied; the whole court being of opinion, that tho' there was a difference as to the incumbent, yet as to the pariſh officers there was none; for they are the officers of the pariſh, and not of the patron of the donative. *Str.* 715.

And as to donatives augmented by the governors of queen Anne's bounty, it is enacted by the 1 G. ſt. 2. c. 10. as followeth: *Whereas the late queen* Anne's *bounty to the poor clergy was intended to extend not only to parſons and vicars who come in by preſentation or collation, inſtitution, and induction; but likewiſe to ſuch miniſters who come in by donation, or are only ſtipendiary preachers or curates, moſt of which are not corporations, nor have a legal ſucceſſion, and therefore are incapable of taking a grant of conveyance of ſuch perpetual augmentation as is intended by the ſaid bounty; and in many places it would be in the power of the donor, impropriator, parſon, or vicar, to withdraw the allowance which was before paid to the curate or miniſter ſerving the cure; or in caſe of a chapelry, the incumbent of the mother church might refuſe to employ a curate, and officiate there himſelf and take the benefit of the augmentation, whereby the maintenance of the curate would be ſunk inſtead of being augmented; it is therefore enacted, that all ſuch churches curacies or chapels, which ſhall be augmented by the governors of the ſaid bounty ſhall be from thenceforth perpetual cures and benefices, and the miniſters duly nominated and licenſed thereunto ſhall be in law bodies politick and corporate and have perpetual ſucceſſion, and be capable to take in perpetuity; and the impropriators or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches whereunto ſuch augmented curacy or chapel doth appertain, ſhall be excluded from receiving any profit by ſuch augmentation, and ſhall pay to the miniſters officiating ſuch annual and other penſions and ſalaries, which by ancient cuſtom or otherwiſe, of right, and not of bounty, they were before obliged to pay.* ſ. 4.

And for continuing the ſucceſſion in ſuch augmented cures, hereby made perpetual cures and benefices, and that the ſame may be duly and conſtantly ſerved; if they ſhall be ſuffered to remain void for ſix months, they ſhall lapſe in like manner as preſentative livings. ſ. 6, 7.

And all ſuch donatives, which at the time of their augmentation are exempt from all eccleſiaſtical juriſdiction, ſhall by ſuch augmentation become ſubject to the viſitation and juriſdiction of the biſhop of the dioceſe wherein ſuch donative is. ſ. 14.

Provided, that no donative ſhall be augmented without the conſent of the patron in writing under his hand and ſeal. ſ. 15.

Goes to the heir and not to the executor.

11. In the caſe of *Repington* againſt the *Governors of Tamworth ſchool*, *E.* 3 *G.* 3. A perſon being ſeiſed of the advowſon of a donative, the church in his life time becomes void; then he dies, the church being ſtill void. By his will he made the plaintiff executor, who brought a quare impedit, ſuppoſing himſelf intitled to this turn, as an executor is in the caſe of a preſentative benefice. After two arguments in the court of common pleas, the whole court was clearly of opinion, that the right of donation deſcended to the heir at law; and that the executor had no title, which he would have had, if it had been a preſentative benefice. 2 *Wilſon*, 150.

How far of temporal cognizance.

12. It was ſaid in the caſe of *Spratt* and *Nicholſon*, that if iſſue be joined, whether donative or preſentative, it ſhall be tried by a jury at the common law; and elſewhere it is ſaid, that if the patron of a donative being diſturbed in collating, recover by quare impedit, the writ ſhall be directed to the ſheriff, to put the clerk in poſſeſſion. *Gibſ.* 820.

For if the patron of a donative is diſturbed in collating his clerk, he may have a quare impedit againſt the biſhop and the diſturber; but the declaration in ſuch a caſe muſt be ſpecial. *Deg.* p. 1. c. 13.

And a mandamus will lie, to admit or reſtore the donee. *Burrow*, *Manſf.* 1043.

How extinguiſhed.

13. Lord Coke ſays, if the patron of a donative doth once preſent to the ordinary, and his clerk is admitted and inſtituted, it is now become preſentable, and never ſhall be a donative after. But a preſentation to ſuch a donative by a ſtranger, and admiſſion and inſtitution thereupon, is merely void. 1 *Inſt.* 344.

But in the caſe of *Ladd* and *Widdows*, *M.* 1 *An.* Upon motion for a new trial in a quare impedit, wherein the point in iſſue was, whether the church was donative or preſentative, evidence was pleaded of ſeveral preſentations: And the court, viz. Holt chief juſtice and Powell juſtice, held, that tho' a preſentation might deſtroy an impropriation, yet it could not deſtroy a donative; becauſe the creation thereof was by letters patent, whereby land is ſettled to the parſon and his ſucceſſors, and he to come in by donation. 2 *Salk.* 541.

Door into the churchyard. See Church.

Double quarrel.

DUplex querela (double *querele* or complaint, called improperly *double quarrel)* is a complaint made by any clerk or other, to the archbiſhop of the province againſt any inferior ordinary, for delaying juſtice in any cauſe eccleſiaſtical, as to give ſentence, or to inſtitute a clerk preſented, or ſuch like. The effect of which is, that the archbiſhop, taking knowledge of ſuch delay, directs his letters under his authentick ſeal to all and ſingular clerks of his province, thereby commanding and giving authority to them and every of them, to admoniſh the ſaid ordinary within a certain time (as for inſtance nine or fifteen days) to do the juſtice required; or otherwiſe to cite him to appear before him or his official at a day in the ſaid letters prefixed, and there to alledge the cauſe of his delay; and laſtly, to intimate to the ſaid ordinary, that if he performs not the thing injoined, nor appears at the day aſſigned, he will proceed to do juſtice in the premiſſes. And it ſeems to be called a *double* querele, becauſe it is moſt commonly made both againſt the judge, and againſt the party at whoſe requeſt juſtice is delayed by the ſaid judge. *Terms of the L. Clarke*, Tit. 84, 85, 86.

The proceſs, form, and manner of trial in which ſuit, is treated of under the title Benefice.

Drunkenneſs.

1. *Can.* 109. IF any offend their brethren by drunkenneſs; the churchwardens or queſtmen and ſidemen in their next preſentment to their ordinaries, ſhall preſent the ſame, that they may be puniſhed by the ſeverity of the laws, according to their deſerts: and ſuch notorious offenders ſhall not be admitted to the holy communion, till they be reformed. Drunkenneſs by the canon law.

2. By the 1 J. c. 9. 4 J. c. 5. 21 J. c. 7. and 1 C. c. 4. If any inn-keeper, victualler, or alehouſe keeper, or tavern keeper Penalty of ſuffering tipling by the ſtatute law.

keeper or ſeller of wine, keeping an inn or victualling houſe, ſhall permit any perſon to continue drinking or tipling therein; (other than ſuch as be invited by any traveller, and ſhall accompany him only during his neceſſary abode there; and other than labouring and handicraftmen in market towns, upon the uſual working days, for one hour at dinner time, to take their diet in an alehouſe; and other than labourers and workmen, which for the following of their work ſhall ſojourn there; and other than for urgent and neceſſary occaſions to be allowed by two juſtices of the peace;) he ſhall forfeit 10s to the poor: the ſame offence being viewed by the mayor or a juſtice of the peace, or proved before them by one witneſs, or confeſſion of the party; and after ſuch confeſſion, the oath of the party ſo confeſſing ſhall be taken againſt any other offending at the ſame time.

And he ſhall alſo be diſabled from keeping any ſuch alehouſe for the ſpace of three years.

The ſaid penalty to be levied by the conſtables or churchwardens by diſtreſs; and for default of ſatisfaction within ſix days, the ſame to be appraiſed and ſold: and for want of ſufficient diſtreſs, the party to be committed to the common gaol, till the ſaid penalty be truly paid.

And if the conſtables or churchwardens do neglect their duty in levying, or do not levy the ſame; or in default of diſtreſs, do neglect to certify ſuch default, for 20 days: they ſhall forfeit reſpectively 40s to the poor, by diſtreſs, by warrant of ſuch juſtice or mayor; and if not paid in ſix days, the diſtreſs to be appraiſed and ſold; and for want of ſufficient diſtreſs, to be committed to the common gaol until the ſaid penalty to be truly paid.

Provided, that the correction and puniſhment of ſuch as ſhall offend herein within the two univerſities, ſhall be miniſtred in this behalf by the governors, magiſtrates, juſtices of the peace, or other principal officers thereof, to whom in other caſes the adminiſtration of juſtice and correction and puniſhment of offenders by the laws of this realm and their ſeveral charters doth belong; and the ſaid forfeitures to be levied by officers to be from time to time appointed by the vicechancellors: and all powers and authorities either of impriſonment or otherwiſe hereby appointed, ſhall by the governors, magiſtrates, and principal officers aboveſaid of either of the ſaid univerſities, be duly executed and done within the ſaid univerſities,

ties, and the liberties and precincts thereof, according to the true intent and meaning hereof.

Alſo the ſaid offences may be inquired of and preſented before the juſtices of aſſize, juſtices of the peace in their ſeſſions, and before the mayors of cities and towns corporate who have power to inquire of treſpaſſes riots routs forces and ſuch like offences, and in every court leet; and ſuch proceeding ſhall be had thereupon as upon indictment or preſentment.

And all conſtables, churchwardens, headboroughs, tythingmen, aleconners, and ſidemen, ſhall in their oaths incident to their offices, be charged to preſent the ſaid offence.

3. By the 4 J. c. 5. 7 J. c. 10. and 21 J. c. 7. If any perſon ſhall continue drinking or tipling in any inn, victualling houſe or alehouſe, or any tavern keeping an inn or victualling houſe, and the ſame be viewed and ſeen by any mayor or juſtice of the peace, or duly proved as is before mentioned in the caſe of perſons ſuffering tipling (unleſs it be in ſuch caſes as in the ſaid inſtance are alſo tolerated); he ſhall forfeit 3 s 4 d to the poor, to be levied in like manner: and if he be not able to pay, then the mayor, juſtice, or juſtices of the peace or court where the conviction ſhall be, ſhall puniſh him by ſetting him in the ſtocks for four hours. Tipling.

And if any alehouſe keeper ſhall be convicted of ſuch offence, he ſhall be diſabled to keep any ſuch alehouſe for the ſpace of three years.

And all conſtables, churchwardens, headboroughs, tythingmen, aleconners, and ſidemen, ſhall in their oaths incident to their offices be charged in like ſort to preſent the ſaid offence.

Provided, that this ſhall not in any wiſe abridge or reſtrain the eccleſiaſtical power or juriſdiction; but that all ordinaries, and other eccleſiaſtical judges and officers may proceed to enquire of, cenſure, and puniſh all ſuch offenders, according to the eccleſiaſtical laws of this realm, as before they might lawfully do.

And provided, that offenders having been once puniſhed by any the ways and means before limited, ſhall not eftſoons be puniſhed for the ſame by any other ways or means.

And provided, that nothing herein ſhall be prejudicial to either of the univerſities; but that the chancellor, maſters, and ſcholars, and their ſucceſſors, may enjoy all their

their juriſdictions, rights, privileges, and charters, as heretofore they have or might have done.

Alſo provided, that no perſon be moleſted for ſuch offence, but within ſix months after the offence committed.

Drunkenneſs. 4. He who is guilty of any crime through his voluntary drunkenneſs, ſhall be puniſhed for it as much as if he had been ſober. 1 *Haw.* 2.

By the 4 J. c. 5. 7 J. c. 10. 21 J. c. 7. and 1 C. c. 4. Every perſon who ſhall be drunk, and of the ſame offence of drunkenneſs ſhall be convicted in like manner as aforeſaid; ſhall forfeit 5 s, to be paid within one week next after his conviction, to the churchwardens, to the uſe of the poor: and if he ſhall refuſe to pay the ſame as aforeſaid, then the ſame ſhall be levied of the goods of the offenders, by warrant from the ſame court, judge, juſtice, or juſtices, before whom the conviction ſhall be: and if he be not able to pay the ſaid ſum of 5 s. he ſhall be committed to the ſtocks for the ſpace of ſix hours.

And for the ſecond offence, he ſhall be bound with two ſureties in a recognizance or obligation of 10 l, to be from thenceforth of good behaviour.

And if any alehouſe keeper ſhall be convicted of ſuch offence, he ſhall be diſabled to keep any ſuch alehouſe for the ſpace of three years.

And any juſtice of the peace, or head officer in a city or town corporate, ſhall have power on his view, or confeſſion, or oath of one witneſs, to convict any perſon of the ſaid offence; and for the ſecond offence ſhall bind him to good behaviour, as if he had been convicted in open ſeſſions.

And if any conſtable or other inferior officer, to whom it ſhall be given in charge by the precept of any mayor or juſtice of the peace, do neglect the due correction of the offender, or the due levying of the penalties; he ſhall forfeit 10 s to the uſe of the poor of the pariſh or place where the offence ſhall be committed, to be levied by diſtreſs by any other perſon having warrant from any mayor, juſtice of the peace, or court where ſuch conviction ſhall be, and to be paid to the churchwardens who are to account for the ſame to the uſe aforeſaid.

And all conſtables, churchwardens, headboroughs, tythingmen, aleconners, and ſidemen, ſhall in their oaths incident to their offices be charged in like ſort to preſent the ſaid offence.

Provided,

Provided, that this ſhall not in any wiſe abridge or reſtrain the eccleſiaſtical power or juriſdiction; but that all ordinaries, and other eccleſiaſtical judges and officers may proceed to enquire of, cenſure, and puniſh all ſuch offenders, according to the eccleſiaſtical laws of this realm, as before they might lawfully do.

And provided, that the offenders having been once puniſhed by any the ways and means before limited, ſhall not eftſoons be puniſhed for the ſame by any other ways or means.

And provided, that nothing herein ſhall be prejudicial to either of the univerſities; but that the chancellor, maſters, and ſcholars, and their ſucceſſors, may enjoy all their juriſdictions, rights, privileges, and charters, as heretofore they have or might have done.

Alſo provided, that no perſon be moleſted for ſuch offence, but within ſix months after the offence committed.

M. 8 *Car. Cucko* and *Starre.* Prohibition was prayed to the ſpiritual court, to ſtay a ſuit there for defamation, for theſe words, "Thou art a drunkard," or "a drunken "fellow." And by the opinion of Croke, Jones, and Berkley, a prohibition was granted: for theſe words do not concern any ſpiritual matter, but merely temporal, and are but a temporal ſlander, and a common phraſe of brawling, for which there ought not to be a ſuit in the ſpiritual court. And ſo it was held in *Martin Calthorp*'s caſe in the common pleas. But *Richardſon* doubted thereof; becauſe the ſpiritual court, as well as temporal, may meddle with the puniſhment of drunkenneſs: ſo it is not merely temporal. But he aſſented to the grant of a prohibition; and the party may after declaration, if he will, demur thereto. Whereupon a prohibition was granted. *Cro. Car.* 285.

5. In the 8th year of king James the firſt, one *Parker* a clergyman was deprived of his benefice by the ſpiritual court for drunkenneſs; and tho' he prayed a prohibition, yet it was denied him. *Brownl.* 37.

And in the next year, another was deprived for the like cauſe; and the judges at common law allowed the ſentence to be good. *Ayl. Parerg.* 232.

6. By the 22 *G.* 2. *c.* 33. *Art.* 2. All flag officers, and all perſons in or belonging to his majeſty's ſhips or veſſels of war, being guilty of drunkenneſs, ſhall incur ſuch puniſhment as a court martial ſhall think fit to impoſe, Perſons in the navy.

impoſe, and as the nature and degree of their offence ſhall deſerve.

Duplex querela. See Double quarrel.

Election of Biſhops. See Biſhops.
Elopement. See Marriage.
Ember days. See Holidays.
Endowment of churches. See Church.
Endowment of vicarages. See Appropriation.
Engliſh ſervice. See Publick Worſhip.

Eſſoin.

ESSOIN, *exonium*, is derived of the french *eſſonier* or *exonier*, which ſignifieth to excuſe; ſo as an eſſoin, in legal underſtanding, is an excuſe of a default by reaſon of ſome impediment or diſturbance, and is as well for the plaintiff as for the defendant; and is all one with what the civilians called *excuſatio*. Of eſſoins there have been five kinds, 1. De ſervitio regis. 2. In terram ſanctam. 3. Ultra mare. 4. De malo lecti; in our old books called, eſſonium de reſiantiſa. 5. De malo veniendi; and this laſt is the common eſſoin. 2 *Inſt.* 125.

Eve. See Holidays.

Evidence.

One witneſs how far evidence.

1. A Single witneſs is not ſufficient in the civil law; and the ſpiritual court will not allow of one witneſs only, but there muſt be two witneſſes at the leaſt;

leaſt; and if the point is merely ſpiritual, the temporal courts will not grant a prohibition. *Gibſ.* 1011.

For where the eccleſiaſtical court doth proceed in a matter that is merely ſpiritual, and pertinent to their court, acording to the civil law, altho' their proceedings are againſt the rules of the common law, yet a prohibition doth not lie: As if they refuſe a ſingle witneſs to prove a will; for the cognizance of that belongs to them. *God. Rep.* 115.

Which ſame thing was affirmed in *Robert's* caſe, *H.* 8 *J.* with regard to points not otherwiſe cognizable in the ſpiritual courts, than as incidental to the principal point. There the ſuit was for ſubſtraction of tithes, and prohibition was obtained, becauſe there was but one witneſs to prove the leaſe of the tithes, and the ſpiritual court would not allow the proof. And upon adviſement in this caſe, by Coke and all the juſtices, it was reſolved, that conſultation ſhould be awarded; becauſe there is a rule in the regiſter, that where the cognizance of the principal is, there the cognizance of the acceſſary neceſſarily follows. And if ſuch ſurmiſe ſhould be allowed in every caſe, it would oftentimes be made for mere delay, and the ſpiritual court ſhould not try the acceſſary as well as principal. And the concluſion is, ——— when the original cauſe belongs unto them, altho' matter triable at the common law ariſeth, depending upon the original cauſe, yet it ſhall be determined by the eccleſiaſtical court: and ſuch ſurmiſe, that he had but one witneſs, is not ſufficient to have a prohibition, where the eccleſiaſtical court hath juriſdiction of the principal: for if ſuch a ſurmiſe ſhould be ſufficient, all ſuits in the eccleſiaſtical court ſhould thereby be ſtayed, or otherwiſe taken away; for the eccleſiaſtical judges cannot write to the temporal judges to try it, and certify; as the temporal judges, where the original matter belongs to and is commenced in their courts, and iſſue is taken upon matter triable by the eccleſiaſtical law, may write to the judges of the eccleſiaſtical court to try the matter, and certify to them. *Cro. Ja.* 269. 12 *Co.* 65.

But in the caſe of *Richardſon* and *Deſborough*, *H.* 27 & 28 *C.* 2. a prohibition was prayed, becauſe the ſpiritual court refuſed the proof of *plene adminiſtravit* by one witneſs; and it was granted: and Hale chief juſtice ſaid, where the matter to be proved (which falls in incidentally in a cauſe before them in the ſpiritual court) is temporal, they ought not to deny ſuch proof as the common law allows. 1 *Ventr.* 291.

And in *Shotter* and *Friend*, *H.* 1 *W.* a prohibition was prayed and obtained, becauſe the ſpiritual court would not allow the proof of the payment of a legacy by one witneſs. Upon which occaſion the court ſaid, —— ſuch proof which is good at the common law ought to be allowed in their court; and at the common law it is not neceſſary to prove the payment of a debt by two witneſſes: they may follow their own rules, in things which are originally in their cognizance; but if any collateral matter doth ariſe, as concerning the payment of a legacy, if the proof be by one witneſs, they ought to allow it. 2 *Salk.* 547. 3 *Mod.* 283.

And in the caſe of *Breedon* and *Gill*, *E.* 9 *W.* By Holt chief juſtice; As to the courſe of granting prohibitions, for not allowing evidence which would be good at the common law, the difference is thus: when the eccleſiaſtical courts are poſſeſſed of a cauſe, which is merely of ſpiritual conuſance, the courts at common law allow them to purſue their own methods in the determination of it; but when in ſuch cauſe collateral matter ariſes, which is not of their conuſance properly, there the courts of common law inforce them to admit ſuch evidence as the common law would allow. Therefore if the ſpiritual court require more than one witneſs, to prove the revocation of a nuncupative will, the king's bench doth not intermeddle. But if in a ſuit for a legacy, payment or a releaſe be pleaded, if they do not admit proof by one witneſs, the king's bench grants a prohibition. *L. Ray.* 221.

Depoſitions and ſentence in the eccleſiaſtical court.

2. Depoſitions taken in the eccleſiaſtical court (altho' the witneſſes be dead) are not evidence in an action brought at common law; but a ſentence given in the eccleſiaſtical court (it being a judicial act) may be given in evidence in an action brought in the temporal courts. *Watſ.* c. 58.

Probate of a will.

3. *H.* 8 *W. Hoe* and *Nelthrope*. It was held by Holt chief juſtice, that a copy of a probate of a will is good evidence, where the will it ſelf is of chattels; for there the probate is an original taken by authority, and of a publick nature; otherwiſe, where the will is of things in the realty, becauſe in ſuch caſe the eccleſiaſtical courts have no authority to take probates, therefore ſuch probate is but a copy, and a copy of it is no more than a copy of a copy. 3 *Salk.* 154.

Qualification of witneſſes.

4. It is required, that witneſſes be perſons of reputation, and free from infamy of law and fact; that they be diſintereſted, and ſo not liable to the juſt ſuſpicion of partiality;

tiality; that they be men of diſcretion, and ſane memory; and all reaſonable exceptions are to be allowed againſt them. They muſt be deliberate, and not given to paſſion; conſiſtent as to time, place, and other circumſtances. They muſt be certain and poſitive, and not upon hearſay or the belief of other perſons. They muſt be free from any juſt ſuſpicion of contrivance, or conſpiracy, or any ſort of corruption or partiality. 2 *Still.* 152.

And the canon law requires, that they ſhall not be father, ſon, brother, ſiſter, or other near of kin, or domeſticks and dependents. And if the matter to be proved be merely ſpiritual, the common law (as was ſaid before) will not interfere; but if a temporal matter falleth incidentally in a cauſe in the ſpiritual court, they muſt admit ſuch evidence as the common law allows of, otherwiſe they will be prohibited.

Croſs examining.

5. Croſs examining a witneſs ſets him upright before the court, ſo that the party afterwards cannot except to his credibility; but he may to his competency, if it ſhould come out that he is intereſted, or the like. 2 *Chan. Ca.* 250.

Confronting in what caſe.

6. It ſometimes happens, that there is a deficiency in proof as to the identity: in ſuch caſe, confronting of witneſſes with the party, may be ordered after publication, and they may be cited in order thereto, and their declaration be taken down in the acts of court; but one witneſs to prove the identity is ſufficient.

Re-examining.

7. If a witneſs is once examined in general to the libel or allegation, and his depoſition cloſed with an *aliter neſcit*, or to any ſuch effect, he cannot afterwards be re-examined, for fear of ſubornation. But where an examination taken has been loſt or deſtroyed, it may be ſupplied by a new examination. So if ticketted to more articles than the examination takes in, he may be examined again to thoſe omitted. So as to interrogatories; but then the re-examination muſt not be extended to the libel or allegation, but to the interrogatories only.

Expenſes of the witneſſes.

8. He that will produce witneſſes that come at a great diſtance, ought to tender and allow them their expences: But the perſon againſt whom they are produced, is not bound to bear any part of thoſe expences, altho' the witneſſes are bound to teſtify the truth on both ſides. And theſe expences are to be tendred and paid to them before they depart from home, without any regard had to what ſuch witneſſes might have ſpent in their own houſes; but it ought to be conſidered, what their journey or tra-

velling expences may ſtand them in. And if ſuch witneſs ſhall receive expences for ten days, and ſhall be diſpatched in five, he ſhall be obliged to render back the overplus. *Ayl. Parerg.* 536.

If the party hath made no agreement with his witneſſes for their journey and expences; they may then, before they are ſworn, deſire of the judge to order them their expences: which he ſhall tax and allow, according to the condition of the parties, the time, and the diſtance; and decree the ſame to be paid before they ſhall be examined; or, if the witneſſes deſire the ſame, he may decree a monition to the party producing the witneſſes, to pay the ſame; which if the ſaid party ſhall refuſe, he may be proceeded againſt to excommunication. 1 *Ought.* 121.

Examination of clerks before inſtitution.
See Benefice.

Examination of perſons to be ordained.
See Ordination.

Exchange.

EXCHANGE is, where two perſons, having procured licence from the ordinary to treat of an exchange (of which ſort there are many to be found in the eccleſiaſtical records) do by one inſtrument in writing, agree to exchange their benefices being both ſpiritual (for a lay preferment, as an hoſpital, cannot be exchanged or go for a prebend or other ſpiritual benefice); and in order thereunto, do reſign them into the hands of the ordinary: ſuch exchange being executed, the reſignations are good. *Watſ.* c. 4. *Gibſ.* 821.

But tho' the one is inſtituted and inducted into the other's benefice, yet if the exchange be not executed on both parts, the clerk on whoſe part the exchange was not executed may have his benefice again; for in this caſe of exchanging, the law doth annex this condition to a reſignation, viz. if it be fully executed. *Watſ.* c. 4.

Thus where one is both inſtituted and inducted, and the other is only inſtituted, and dies or refuſes to finiſh; in this caſe, tho' they have proceeded ſo far, yet the reſignation

ſignation and all that followed upon it ſhall be void, and both (if both are living) may return to their former benefices upon the foot of former poſſeſſion; or if one dies before he is inducted, and after the induction of the other, this induction and all that went before ſhall be void, becauſe the exchange was not fully executed during the lives of the parties. *Gibſ.* 868.

And this is agreeable to the reaſon of the common law: for at the common law if a man exchange lands, and the lands he receives in exchange be evicted, he may repair to his own lands, and re-enter upon them. *Deg.* p. 1. c. 14.

By the 31 El. c. 6. ſ. 8. *If any incumbent of any benefice with cure of ſouls, ſhall corruptly reſign or exchange the ſame; or corruptly take for or in reſpect of the reſigning or exchanging the ſame, directly or indirectly, any penſion, ſum of money, or other benefit whatſoever: as well the giver, as the taker, of any ſuch penſion, ſum of money, or other benefit corruptly, ſhall loſe double the value of the ſum ſo given taken or had; half to the queen, and half to him that ſhall ſue for the ſame in any of her majeſty's courts of record.*

Exchange of glebe lands. See **Glebe Lands.**

Excommunication.

1. EXcommunication is an eccleſiaſtical cenſure, whereby the perſon againſt whom it is pronounced is for the time caſt out of the communion of the church. *God.* 624. What.

2. And it is of two kinds, the leſſer and the greater: The leſſer excommunication is, the depriving the offender of the uſe of the ſacraments and divine worſhip; and this ſentence is paſſed by judges eccleſiaſtical, on ſuch perſons as are guilty of obſtinacy or diſobedience, in not appearing upon a citation, or not ſubmitting to penance, or other injunctions of the court. *Johnſ.* 168. Leſſer.

3. The greater excommunication is that whereby men are deprived, not only of the ſacraments, and the benefit of divine offices, but of the ſociety and converſation of the faithful. *Johnſ.* 168. Greater.

If a perſon be excommunicated, generally; as if the judge ſay, *I excommunicate ſuch a perſon*; this ſhall be underſtood of the greater excommunication. *Lindw.* 78.

Ipſo facto.

4. The law in many caſes inflicteth the cenſure of excommunication ipſo facto upon offenders; which nevertheleſs is not intended ſo as to condemn any perſon without a lawful trial for his offence: but he muſt firſt be found guilty in the proper court; and then the law gives that judgment.

And there are divers provincial conſtitutions, by which it is provided, that this cenſure ſhall not be pronounced (in ordinary caſes) without previous monition or notice to the parties, which alſo is agreeable to the ancient canon law. *Gibſ.* 1046. 1048.

Body corporate cannot be excommunicated.

5. A body corporate, or whole ſociety together, cannot be excommunicated; for this might involve the innocent with the guilty; but ſuch perſons only of the ſociety as are guilty of the crime, are to be excommunicated ſeverally. *Gibſ.* 1048.

Excommunicate perſon deprived of chriſtian communion.

6. By a conſtitution of archbiſhop Stratford: *Excommunicate perſons ſhall be inhibited the commerce and communion of the faithful; and they who communicate with them ſhall be puniſhed by eccleſiaſtical cenſure.* Lind. 266.

Commerce] That is, buying or ſelling, or other interchange of wares or merchandiſe. *Lind.* 266.

By eccleſiaſtical cenſure] That is, by the leſſer excommunication, if they have not been admoniſhed to deſiſt; and by the greater excommunication, if they have been admoniſhed, and have not deſiſted. *Lind.* 266.

And by Art. 33. *That perſon, which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken, of the whole multitude of the faithful, as an heathen and publican; until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto.*

And this is according to the ancient rule of the church: And it was further ordained by many other ancient conſtitutions of the church, that if a perſon excommunicated in one city or dioceſe went to another, whoever received him to communion, ſhould be alſo excommunicate; for which reaſon no ſtrangers were to be received to communion, till they ſhewed their letters of recommendation. And the ſame was made part of our engliſh conſtitution, in the council of London, in the year 1126; that no perſon ſhall preſume to receive to communion any ſtranger excom-

excommunicate; and if any ſhall knowingly do ſo, he himſelf ſhall be deprived of chriſtian communion. *Gibſ.* 1049.

7. By *Can.* 85. The churchwardens or queſtmen eſpecially ſhall ſee, that all perſons excommunicated, and ſo denounced, be kept out of the church. To be kept out of the church.

And if a *clergyman* preſume to officiate, after he is excommunicated; the canon law orders him to be deprived. *Gibſ.* 1049.

8. In the ancient church, the ſentences of the greater excommunication were ſolemnly promulged four times in the year; with candles lighted, bells tolling, the croſs and other ſolemnities. *Lind.* 355. To be publickly denounced every ſix months.

And by *Can.* 65. All ordinaries ſhall, in their ſeveral juriſdictions, carefully ſee and give order, that as well thoſe who for obſtinate refuſing to frequent divine ſervice eſtabliſhed by publick authority within this realm of England, as thoſe alſo (eſpecially thoſe of the better ſort and condition) who for notorious contumacy or other notable crimes ſtand lawfully excommunicate (unleſs, within three months immediately after the ſaid ſentence of excommunication pronounced againſt them, they reform themſelves, and obtain the benefit of abſolution), be every ſix months enſuing, as well in the pariſh church as in the cathedral church of the dioceſe in which they remain, by the miniſter openly in time of divine ſervice upon ſome ſunday, denounced and declared excommunicate, that others may be thereby both admoniſhed to refrain their company and ſociety, and excited the rather to procure out a writ de excommunicato capiendo, thereby to bring and reduce them into due order and obedience. Likewiſe the regiſter of every eccleſiaſtical court, ſhall yearly between Michaelmaſs and Chriſtmaſs, duly certify the archbiſhop of the province of all and ſingular the premiſſes aforeſaid.

9. Where a man is excommunicate by the law of holy church, and he ſueth an action real or perſonal, the defendant may plead, that he who ſueth is excommunicated; and of this it behoves him to ſhew the biſhop's letters under his ſeal, witneſſing the excommunication, and aſk judgment if he ſhall be anſwered. But in this caſe, if the plaintiff cannot deny it, the writ ſhall not abate, but the judgment ſhall be, that the defendant ſhall go quit without day; becauſe when the plaintiff hath purchaſed his letters of abſolution, and ſhewed them to the court, he may have a reſummons or reattachment upon his original, according to the nature of his writ. *Litt.* ſect. 201. Diſabled to bring an action.

And either the greater or leſſer excommunication diſableth the party. 1 *Inſt.* 134.

Yet every excommunication diſableth not the party. Thus, if bailiffs and commons, or any other corporation aggregate of many, bring an action; excommunication in the bailiffs ſhall not diſable them, for that they ſue and anſwer by attorney: but otherwiſe it is of a ſole corporation. 1 *Inſt.* 134.

And where it appeared in the bill, that the plaintiff was a recuſant convict, and ſo as a perſon excommunicate; notwithſtanding which, the defendant had anſwered him, and then prayed a prohibition: the court told him, that by anſwering he admitted him a perſon able, and it was then too late for that plea. And a prohibition was denied. *Gibſ.* 1050. *Noy.* 88.

Nor if a biſhop be defendant, ſhall an excommunication by the ſame biſhop againſt the plaintiff diſable him. 1 *Inſt.* 134.

If executors or adminiſtrators be excommunicated, they may be diſabled; becauſe they which converſe with a perſon excommunicate, are excommunicate alſo. 1 *Inſt.* 134.

It is intimated by Bracton, that a commiſſary or official in this caſe may teſtify the excommunication; but Littleton in the paſſage above recited nameth the biſhop only. And Lord Coke ſaith; none can certify excommunication but only the biſhop, unleſs the biſhop be beyond ſea or in parts remote; or one that hath ordinary juriſdiction, and is immediate officer to the king's courts; as the archdeacon of Richmond, or the dean and chapter in time of vacation. But in ancient time, every official or commiſſary might teſtify excommunication to the king's court; and for the miſchief that enſued thereupon it was ordained by parliament, that none ſhould teſtify excommunication, but the biſhop only. 1 *Inſt.* 134.

Of this power, as reſtrained to the biſhop, Lindwood writeth thus: At the requeſt of inferior prelates, the king uſeth not to write for the taking of excommunicates. Wherefore, if any be excommunicated by a perſon inferior to the biſhop, as by the dean, or archdeacon: the invocation of the king's majeſty ought to be made by the biſhop; for they who are inferior to biſhops cannot call in the ſecular arm, but the biſhops ſhall execute their ſentences; and if the biſhops will not do this, they may be compelled thereunto by the archbiſhop. *Lind.* 350.

10. The

10. The rule of the canon law is, that an excommunicate perſon ſhall not be preſented to a benefice; and he who knowingly ſhall preſent an excommunicate perſon, ſhall be ſuſpended from preſenting to any benefice, until he ſhall have obtained abſolution. *Gibſ.* 1050. May not be preſented to a benefice.

11. Neither, by the canon law, can a perſon excommunicate be an advocate. *Gibſ.* 1050. Nor be an advocate.

12. Whilſt an excommunicate perſon is under that ſentence, he is diſabled to be a witneſs. *Swin.* 109. Nor a witneſs.

13. It was anciently holden, that excommunication was a good cauſe of challenge againſt a juror; yet not principal, but only to the favour, unleſs the record of the judgment be produced. 2 *Haw.* 418. Whether he may be a juror.

14. An excommunicate perſon may have the benefit of clergy. 2 *Haw.* 338. May have the benefit of clergy.

15. An excommunicate perſon may make a teſtament; unleſs he be excommunicated by the greater excommunication. *Swin.* 109. *God. O. L.* 37. Whether he may make a teſtament.

16. An excommunicate perſon may be appointed executor, and is capable of a legacy; yet pending the excommunication, he is not to be admitted by the ordinary, nor ſhall commence or proſecute any ſuit or action for his teſtator's goods: yet this doth not null his executorſhip, or quite deſtroy the action, but only ſuſpends it until his abſolution. *God. O. L.* 37, 38. *Swin.* 367. Whether he may be executor.

17. By *Can.* 68. If the miniſter refuſe to bury any corps, except the party deceaſed were denounced excommunicated by the greater excommunication, for ſome grievous and notorious crime, and no man able to teſtify of his repentance: he ſhall be ſuſpended by the biſhop from his miniſtry for the ſpace of three months. Shall not have chriſtian burial.

But by the *rubrick* in the book of common prayer, *The burial office ſhall not be uſed for any that die excommunicate.*

18. Upon this head, it is proper to take notice of a confuſion which runs thro' almoſt all the books, by reaſon of the ambiguous ſenſe in which the word *Significavit* is uſed ſometimes, to denote the biſhop's certificate of the excommunication into the court of chancery, in order to obtain the writ de excommunicato capiendo; ſometimes to denote that writ itſelf. In this latter ſenſe it ſeemeth more properly to be applied; the writ having received its name, from this ſame word in the beginning of it. Writ of excommunicato capiendo.

By the law and cuſtom of this realm, the perſon who remaineth forty days under the ſentence of excommunication, ſhall at the requeſt of his proper dioceſan, be arreſted and impriſoned by a writ of de excommunicato capiendo

piendo directed to the ſheriff; but firſt there ought to be a certificate from ſuch dioceſan under his epiſcopal ſeal, ſignifying to the court of chancery the contempt of the party to holy church. *Lind.* 350. *Swin.* 109.

Which forty days are to be accounted after the miniſter hath publiſhed the excommunication in the church; which is done by virtue of an inſtrument he hath for that purpoſe under the ſeal of the eccleſiaſtical court: and then if the perſon excommunicated doth not ſubmit within forty days after the ſaid publication, he may (after ſuch certificate ſo made as aforeſaid) be arreſted upon the excommunicato capiendo. *Swin.* 109.

But tho' the biſhop may certify not only an excommunication made by himſelf, but alſo an excommunication made by his commiſſary or official who doth it in his right, and by his archdeacon whoſe juriſdiction is derived from him (in which caſe, the rule in the regiſter is, that when the biſhop ſignifieth any one to be excommunicate by authority of the archdeacon or official, it ought always to be ſaid in the writ to be by the authority of that biſhop or him who ſo certifieth); yet he may not certify that which hath been done in another court: and therefore a certificate, that another biſhop hath certified him, or that he hath ſeen a ſentence of excommunication made by another biſhop, is of no force. *Gibſ.* 1050. 1 *Inſt.* 134.

And if the biſhop make a wrong certificate, he ſhall be liable to be made a party, and to pay coſts. *Str.* 1190.

At the common law, a certificate of the biſhop, whereupon a ſignificavit was to be granted, ought to expreſs the cauſe, and the ſuit againſt him, ſpecially in the certificate; to the end the temporal judges may ſee, whether the ſpiritual court hath cognizance of the original cauſe, and whether the excommunication be according to law; that if it be otherwiſe, they may write to them to abſolve the party. 2 *Inſt.* 623.

For ſince it doth affect the liberty of a man's perſon, therefore it concerneth a temporal intereſt. 1 *Hale's Hiſt.* 409.

And the biſhop having certified the excommunication under ſeal, albeit he dieth, yet the certificate ſhall ſerve. 1 *Inſt.* 134.

Lord Coke ſays; the writ of excommunicato capiendo proceedeth only ex gratia regis. 2 *Inſt.* 621.

On the contrary; Lindwood ſaith, this writ is grantable of right, ex debito. *Lind.* 351.

And

And by a conſtitution of archbiſhop *Boniface*, delivered in the wonted ſtrain of that archbiſhop's conſtitutions; If the king deny the accuſtomed writ de excommunicato capiendo, his cities, caſtles, towns, and villages within that dioceſe, ſhall by the biſhop be put under an interdict, until the ſame ſhall be granted. *Lind.* 351.

Dr *Coſins* (with more moderation) ſaith concerning this writ, that it is a liberty or privilege peculiar to the church of England, above all the realms in chriſtendom that he hath read of; that altho' the aſſiſtance of the ſecular arm hath ever been afforded to the church in moſt other chriſtian countries, as well as this, yet in no inſtance is it perhaps ſo ſurely and ſo effectually reached out, as in the execution of this writ, which is debitum juſtitiæ, and not made to depend upon the pleaſure of the prince. For tho' in one place it is ſaid by the king in the regiſter, that it proceedeth on his grace; yet a note in the ſame book upon the ſame words teaches us, that ſuch clauſe is only uſed in honour of the king, albeit he is bound to grant it de jure: and it is expreſsly ſaid in the aforeſaid writ, and in divers others, to iſſue according to the cuſtom of England; or, in other words, according to the common law of the realm. *Coſ. Apol.* 8.

And this ſeems to be agreeable to the tenure of the ſtatute of Articuli cleri, 9 *Ed.* 2. *ſt.* 1. *c.* 12. where, to the complaint of the clergy in this reſpect, the king maketh anſwer; that the ſaid writ was never yet denied, nor ſhall be hereafter.

And the expreſſion in the ſtatute of 2 & 3 *Ed.* 6. *c.* 13. concerning tithes, is, that the biſhop may *require* proceſs of excommunicato capiendo.

By the ſtatute of the 5 *Eliz. c.* 23. *Foraſmuch as divers perſons offending in many great crimes and offences, appertaining merely to the juriſdiction and determination of the eccleſiaſtical courts and judges of this realm, are many times unpuniſhed for want of due execution of the writ* de excommunicato capiendo; *the great abuſe whereof, as it ſhould ſeem, hath grown, for that the ſaid writ is not returnable into any court that might have the judgment of the well executing and ſerving the ſaid writ; but hitherto hath been left only to the diſcretion of the ſheriffs and their deputies, by whoſe negligences and defaults for the moſt part the ſaid writ is not executed upon the offenders as it ought to be; by reaſon whereof, ſuch offenders be greatly encouraged to continue their ſinful and criminous life, to the diſpleaſure of almighty God, and contempt of the eccleſiaſtical laws of this realm*; ſ. 1.

Therefore

Therefore it is enacted, that every writ of excommunicato capiendo, *that ſhall be granted out of the high court of chancery, ſhall be made in the time of the term; and returnable in the king's bench in the term next after the teſte of the ſame writ; and the ſame writ ſhall be made to contain at leaſt twenty days between the teſte and the return thereof: and after the ſame writ ſhall be ſo made, and ſealed, it ſhall be forthwith brought into the court of king's bench, and there in preſence of the juſtices ſhall be opened and delivered of record to the ſheriff or other officer to whom the ſerving and execution thereof ſhall appertain, or to his or their deputy or deputies: and if afterwards it ſhall appear to the juſtices of the ſame court, that the ſame writ ſo delivered of record be not duly returned before them at the day of the return thereof, or that any other default or negligence hath been uſed or had in the not well ſerving and executing of the ſaid writ, the ſaid juſtices ſhall aſſeſs ſuch amerciament upon the ſaid ſheriff or other officer in whom ſuch default ſhall appear, as to them ſhall ſeem meet, the ſame to be eſtreated into the exchequer, as other amerciaments have been uſed.* ſ. 2.

And the ſheriff or other officer to whom ſuch writ of excommunicato capiendo, *or other proceſs by virtue of this act ſhall be directed, ſhall not in any wiſe be compelled to bring the body of ſuch perſon as ſhall be named in the ſaid writ or proceſs, unto the ſaid court of king's bench at the day of the return thereof; but ſhall only return the ſame writ and proceſs thither, with declaration briefly how and in what manner he hath ſerved and executed the ſame.* ſ. 3.

And if ſuch ſheriff or other officer ſhall return, that the party cannot be found within his bailiwick; the ſaid juſtices of the king's bench ſhall award a writ of capias *againſt the perſon named in the ſaid writ of* excommunicato capiendo; *returnable in the ſame court in the term time, within two months at leaſt after the teſte thereof; with a proclamation to be contained in the ſaid writ of* capias, *that the ſheriff or other officer as aforeſaid, in the full county court, or at the aſſizes or quarter ſeſſions within the ſaid county, ſhall make open proclamation ten days at leaſt before the return, that the party named in the ſaid writ ſhall, within ſix days next after ſuch proclamation, yield his body to the priſon of the ſaid ſheriff or other ſuch officer, there to remain as a priſoner, according to the tenor and effect of the firſt writ of* excommunicato capiendo, *upon pain of forfeiture of* 10l: *And thereupon, after ſuch proclamation had, and the ſaid ſix days paſt and expired, the ſaid ſheriff or other officer ſhall make return of the ſame writ of* capias *into the ſaid court of king's bench, of all*

that he hath done in the execution thereof, and whether the party named in the ſaid writ have yielded his body to priſon or not. ſ. 4.

And if upon the return of the ſaid ſheriff it ſhall appear, that the party named in the ſame writ of capias *hath not yielded his body to the gaol and priſon of the ſaid ſheriff or other officer, according to the effect of the ſame proclamation; every ſuch perſon that ſhall ſo make default, ſhall for every ſuch default forfeit to the king* 10 l; *to be eſtreated into the exchequer, as fines and amerciaments there taxed and aſſeſſed are uſed to be.* ſ. 5.

And thereupon the ſaid juſtices of the king's bench ſhall alſo award forth one other writ of capias *againſt the ſaid perſon that ſo ſhall be returned to have made default, with ſuch like proclamation as was contained in the firſt* capias, *and a pain of* 20 l *to be mentioned in the ſaid ſecond writ and proclamation. And the ſheriff or other officer to whom the ſaid ſecond writ of* capias *ſhall be ſo directed, ſhall ſerve and execute the ſaid writ, in ſuch like manner and form as before is expreſſed for the ſerving and executing of the ſaid firſt writ of* capias. *And if the ſheriff or other officer ſhall return upon the ſaid ſecond* capias, *that he hath made the proclamation according to the tenor and effect of the ſame writ, and that the party hath not yielded his body to priſon according to the tenor of the ſaid proclamation; then the ſaid party that ſhall ſo make default, ſhall for ſuch his contempt and default forfeit to the king the ſum of* 20 l, *to be eſtreated into the exchequer as aforeſaid.* ſ. 6.

And then the ſaid juſtices ſhall likewiſe award forth one other writ of capias *againſt the ſaid party, with ſuch like proclamation and pain of forfeiture as was contained in the ſaid ſecond writ of* capias: *And the ſheriff or other officer to whom the ſaid third writ of* capias *ſhall ſo be directed, ſhall ſerve and execute the ſaid third writ of* capias, *in ſuch like manner and form, as before in this act is expreſſed for the ſerving and executing of the ſaid firſt and ſecond writs of* capias: *And if the ſheriff or other officer to whom the execution of the ſaid third writ ſhall appertain, do make return of the ſaid third writ of* capias, *that the party upon ſuch proclamacion hath not yielded his body to priſon, according to the tenor thereof; every ſuch party, for every ſuch contempt and default, ſhall likewiſe forfeit to the king other* 20 l, *to be eſtreated in manner aforeſaid. And thereupon the ſaid juſtices of the king's bench ſhall likewiſe award forth one writ of* capias *againſt the ſaid party, with like proclamation, and like pain of forfeiture of* 20 l. *And alſo the ſaid juſtices ſhall have authority infinitely to award ſuch proceſs of* capias, *with ſuch like proclamation and pain of for-*

forfeiture of 20 l *as is before limited, againſt the ſaid party that ſo ſhall make default in yielding of his body to the priſon of the ſheriff; until ſuch time as by return of ſome of the ſaid writs before the ſaid juſtices, it ſhall appear, that the ſaid party hath yielded himſelf to the cuſtody of the ſaid ſheriff or other officer, according to the tenor of the ſaid proclamation: and the party upon every default and contempt by him made againſt the proclamation of any of the ſaid writs ſo infinitely to be awarded againſt him, ſhall incur like pain and forfeiture of* 20 l, *to be eſtreated in like manner.* ſ. 7.

And when any perſon ſhall yield his body to the hands of the ſheriff or other officer, upon any of the ſaid writs of capias; *he ſhall remain in the priſon and cuſtody of the ſaid ſheriff or other officer, without bail, in ſuch manner and form as he ſhould have done if he had been apprehended upon the writ of* excommunicato capiendo. *ſ.* 8.

And if any ſheriff or other officer by whom the ſaid writs of capias *or any of them, ſhall be returned as is aforeſaid, do make an untrue return upon any of the ſaid writs, that the party named in the ſaid writ hath not yielded his body upon the ſaid proclamations, or any of them, where indeed the party did yield himſelf according to the effect of the ſame; every ſuch ſheriff or other officer, for every ſuch falſe and untrue return, ſhall forfeit to the party grieved the ſum of* 40 l, *to be recovered in any of the king's courts of record.* ſ. 9.

Provided always, that in Wales, *and the counties palatine of* Lancaſter, Cheſter, Durham, *and* Ely, *and in the cinque ports, being juriſdictions and places exempt, where the king's writ doth not run, and proceſs of* capias *from thence not returnable into the king's bench; after any* ſignificavit *being of record in the ſaid court of chancery, the tenor of ſuch* ſignificavit *by* mittimus *ſhall be ſent to ſuch of the head officers of the ſaid country of* Wales, *counties palatine, and places exempt, within whoſe juriſdiction the offenders ſhall be reſiant; that is to ſay, to the chancellor or chamberlain for the ſaid county palatine of* Lancaſter *and* Cheſter, *and for the cinque ports to the lord warden of the ſame, and for* Wales *and* Ely *and the county palatine of* Durham *to the chief juſtice or juſtices there: And thereupon every of the ſaid juſtices and officers to whom ſuch tenure of* ſignificavit *with* mittimus *ſhall be directed and delivered, ſhall have power to make like proceſs to the inferior officers to whom the execution of proceſs there doth appertain, returnable before the juſtices there, at their next ſeſſions or courts, two months at the leaſt after the teſte of every ſuch proceſs: So always, as in every degree they ſhall proceed in their*

ſeſſions

ſeſſions and courts againſt the offenders as the juſtices of the ſaid court of king's bench are limited by the tenor of this act in term times to do and execute. ſ. 11.

Provided alſo, that any perſon, at the time of any proceſs of capias *aforementioned awarded, being in priſon, or out of this realm in the parts beyond the ſea, or within age, or of non ſane memory, or woman covert, ſhall not incur any of the pains or forfeitures aforementioned, which ſhall grow by any return or default happening, during ſuch time of non-age, impriſonment, being beyond ſea, or non-ſane memory; and the party grieved may plead every ſuch cauſe or matter in bar of and upon the diſtreſs or other proceſs that ſhall be made for levying of any of the ſaid pains or forfeitures.* ſ. 12.

And if the offender againſt whom any ſuch writ of excommunicato capiendo *ſhall be awarded, ſhall not in the ſame writ have a ſufficient and lawful addition; or if in the* ſignificavit *it be not contained, that the excommunication doth proceed upon ſome cauſe or contempt of ſome original matter of hereſy, or refuſing to have his child baptized, or to receive the holy communion as it is now commonly uſed to be received in the church of* England, *or to come to divine ſervice now commonly uſed in the ſaid church of* England, *or error in matters of religion or doctrine now received and allowed in the ſaid church of* England, *incontinency, uſury, ſimony, perjury in the eccleſiaſtical court, or idolatry: that then all and every the pains and forfeitures limited againſt ſuch perſons excommunicate by this ſtatute, by reaſon of ſuch writ of* excommunicato capiendo *wanting ſufficient addition, or of ſuch* ſignificavit *wanting all the cauſes aforementioned, ſhall be utterly void in law; and, by way of plea, to be allowed to the party grieved.* ſ. 13.

If the addition ſhall be with a nuper *of the place, in every ſuch caſe at the awarding of the firſt* capias *with proclamation according to the form mentioned, one writ of proclamation (without any pain expreſſed) ſhall be awarded into the county where the offender ſhall be moſt commonly reſiant at the time of the awarding of the ſaid firſt* capias *with pain, in the ſame writ of proclamation, to be returnable the day of the return of the ſaid firſt* capias *with pain and proclamation thereupon, at ſome one ſuch time and court, as is preſcribed for the proclamation upon the ſaid firſt* capias *with pain: And if ſuch proclamation be not made in the county where the offender ſhall be moſt commonly reſiant in ſuch caſes of addition of* nuper; *every ſuch offender ſhall ſuſtain no pain or forfeiture by virtue of this ſtatute, for not yielding his body according to the*

tenor

tenor aforementioned; *any thing before ſpecified, and to the contrary hereof, in any wiſe notwithſtanding.* ſ. 14.

S. 2. *It ſhall be forthwith brought into the court of king's bench, &c.*] It hath been often adjudged, that this form of taking out the writ, and the ſeveral ſteps therein (as contained in this clauſe of the act) ought to be preciſely purſued; and for default thereof many perſons have been diſcharged. *Gibſ.* 1056.

Into the court of king's bench] In the biſhop of *St David's* caſe, *M.* 1 *Ann.* it was declared, that before this ſtatute, the writ was returnable into chancery; and there the *ſignificavit* was quaſhed, if undue: but now the judgment of that, by this ſtatute, is devolved on the court of king's bench. *Farreſt.* 57.

S. 4. Capias] The penalties of this act being inflicted upon none but thoſe who are excommunicated for ſome of the cauſes ſpecified in *ſ.* 13. the capias accordingly muſt not be with penalty in any other caſe: Or if it iſſue ſo by miſtake, the court will grant a ſuperſedeas upon motion; and if the party be taken, will upon pleading (after the habeas corpus is granted and returned, and ſo the matter is judicially before them) diſcharge him from the penalties, tho' not from the impriſonment. In conſideration of which pleading, and the trouble and charge that attends it; it is ſaid, that he may have an attachment againſt the plaintiff. *Gibſ.* 1056. 1 *Salk.* 294.

S. 8. *He ſhall remain in the cuſtody of the ſaid ſheriff*] *T.* 1 *An. Slipper* and *Maſon.* The plaintiff obtained ſentence againſt the defendant for 210l for non-payment of tithes and coſts. The defendant for non-payment was excommunicated, and arreſted upon an excommunicato capiendo, and the ſheriff let him eſcape. The plaintiff brought a ſpecial action againſt the ſheriff; and had a verdict againſt him for the 210 l. It was moved in arreſt of judgment, that the action would not lie. But by the court it was adjudged, that the action well lay: And they relied much upon the caſe, where it was held, that an action lies againſt the ſheriff for ſuffering a man to eſcape, being arreſted upon a capias utlagatum after outlawry upon meſne proceſs. *L. Raym.* 788.

S. 8. *Without bail*] By the ſtatute of the 3 *Ed.* 1. *c.* 15 perſons excommunicate, taken at the requeſt of the biſhop.

ſhop, ſhall be in no wiſe repleviſable, by the common writ, nor without writ.

That is to ſay, he that is certified into the chancery by the biſhop to be excommunicated, and after is taken by force of the king's writ of excommunicato capiendo, is not bailable: for in ancient time, men were excommunicated only for hereſies propter lepram animæ, or other heinous cauſes of eccleſiaſtical cognizance, and not for ſmall or petty cauſes; and therefore in thoſe caſes the party was not bailable by the ſheriff or gaoler without the king's writ: but if the party offered ſufficient caution de parendo mandatis eccleſiæ in forma juris, then ſhould the party have the king's writ to the biſhop to accept his caution, and to cauſe him to be delivered. And if the biſhop will not ſend to the ſheriff to deliver him, then ſhall he have a writ out of the chancery to the ſheriff for his delivery: Or if he be excommunicated for a temporal cauſe, or for a matter whereof the eccleſiaſtical court hath no cognizance; he ſhall be delivered by the king's writ without any ſatisfaction. 2 *Inſt.* 188.

And where it is ſaid, that the ſheriff ſhall not bail them *by the common writ, nor without writ*; this is to be underſtood, that the ſheriff ſhall not replevy them by the common writ de homine replegiando, nor *without writ*, that is, ex officio: But they may be bailed in the king's bench. 2 *Inſt.* 189.

S. 13. *Shall not in the ſame writ have a ſufficient and lawful addition*] *M.* 1 *An.* Q. and *Sangway*. The defendant was excommunicated for a certain cauſe of jactitation of marriage, and taken upon a capias, and brought up by habeas corpus; and exception was taken to the writ, that therein no addition was given to the defendant: But the court held; that for any of the cauſes mentioned in the ſtatute, the defendant's addition ought to be in the writ; but that in other caſes, no addition is neceſſary. 1 *Salk.* 294.

S. 13. *If in the* ſignificavit *it be not contained, &c.*] By Holt chief juſtice, at the common law, the cauſe had no need to be ſhewn in the writ of excommunicato capiendo; but it was ſufficient to ſay, that the party was excommunicate for manifeſt contumacy: but in the biſhop's certificate it ought to be ſhewn. And now ſince the ſtatute of the 5 *Eliz.* the cauſe ought to be ſhewn in the writ. *Ld. Raym.* 619.

M. 12 *W. K.* and *Fowler.* In the king's bench. On a habeas corpus the return was, that Fowler was taken and in cuſtody by a writ of excommunicato capiendo; and the excommunication was in the writ recited to be, for certain cauſes of ſubtraction of tithes or other eccleſiaſtical rights. And becauſe this return was uncertain, the court was moved that he might be diſcharged. And the queſtion was, whether this return was uncertain; and whether that uncertainty would vitiate the writ. And the court reſolved, 1. That the return was uncertain; for that the *other rights* might be ſuch matters as were out of their juriſdiction, and they ought to ſhew the matter was within their juriſdiction; for of that the king's courts are to be judges, and not they themſelves. 2. The cauſe of excommunication muſt be ſet forth in the writ. At common law, the writ de excommunicato capiendo was always general, for contumacy; not containing a ſpecial cauſe. And the writ was returnable in chancery, and founded on a certificate of the biſhop, which certificate ſet forth the cauſe before, and the party could not be diſcharged but by ſuperſedeas in chancery, if the cauſe were inſufficient. But now the cauſe muſt be ſet forth in the writ de excommunicato capiendo itſelf, becauſe by the ſtatute of the 5 *Eliz.* the writ is made returnable in this court, which would be to no purpoſe, if the cauſe were not to be ſet forth in the writ, and this court judge of that cauſe. The court held, they might diſcharge the party, upon the inſufficiency of the return. Before the 5 *Eliz.* there were no diſcharges in this court on excommunicato capiendo's, but where a man was excommunicated pending a prohibition: Now, the caſe is altered; for this court may quaſh the writ of excommunicato capiendo, or award a ſuperſedeas; becauſe this court are judges of the cauſe, and have it before them, and the party cannot go into chancery for a ſuperdeas now, becauſe the writ is returnable here. Accordingly the writ was quaſhed, and this ſpecial entry made on the habeas corpus, that the party was diſcharged becauſe the writ de excommunicato capiendo was quaſhed. 1 *Salk.* 293.

M. 1 *An.* Q. and the biſhop of *St. David's.* The defendant, having been arreſted upon an excommunicato capiendo, was brought into court by habeas corpus. And upon the return it appeared, that he was excommunicated for non-payment of coſts, in which he was condemned by commiſſioners delegate *in a certain cauſe* of office or

correction, at the promotion of Lucy. And this by the court was held to be ill; becauſe it did not appear, that theſe coſts were adjudged in a cauſe of eccleſiaſtical cognizance; and it is plain, ſince the ſtatute of the 5 *Eliz.* that the cauſe ought to appear in the writ; for otherwiſe how can this court make judgment of the ſeveral cauſes ſpecified in that ſtatute, in order to award ſeveral proceſſes with penalties? And the court quaſhed the writ of excommunicato capiendo, and diſcharged the defendant. *L. Raym.* 817.

So in the court of chancery, *M.* 10 *G.* 2. *K.* and *Eyre.* Two ſignificavits were quaſhed, being only ſaid to be in a cauſe which came by appeal concerning a matter merely ſpiritual. For by lord Talbot; we are not to lend our aſſiſtance, but where it appears clearly they have juriſdiction, and are not to truſt them to determine what is a matter merely ſpiritual: In Fowler's caſe it was, in cauſes of eccleſiaſtical rights, and held not ſufficient. *Str.* 1067.

19. In the ſaid ſtatute of the 5 *Eliz. c.* 23. there is a ſaving *to all archbiſhops and biſhops, and all others having authority to certify any perſon excommunicated, the like authority to accept and receive the ſubmiſſion and ſatisfaction of the ſaid perſon ſo excommunicated, in manner and form heretofore uſed; and him to abſolve and releaſe, and the ſame to ſignify, as heretofore it hath been accuſtomed, to the king's majeſty in the high court of chancery; and thereupon to have ſuch writs for the deliverance of the ſaid perſon ſo abſolved and releaſed from the ſheriff's cuſtody or priſon, as heretofore they or any of them had, or of right ought or might have had; any thing in this ſtatute to the contrary notwithſtanding.* ſ. 10. Abſolution and diſcharge.

In which caſe, if due caution be offered by the party excommunicated, and admitted by the biſhop; then the biſhop may command the ſheriff to deliver him out of priſon. *Gibſ.* 1063.

The language of the writs, when they ſpeak of abſolving and delivering an excommunicate is, facta ſatisfactione, aut præſtita cautione, prout moris eſt, de parendo mandatis eccleſiæ; that is, either making preſent ſatisfaction at or upon his abſolution, or putting in caution that he will hereafter perform that which the biſhop ſhall reaſonably and according to law injoin him. Which caution, in the civil law, is of three ſorts: 1. Fidejuſſoria; as, where a man bindeth himſelf with ſureties to perform ſomewhat. 2. Pignoratitia, or realis cautio;

tio; as when a man engageth goods, or mortgageth lands, for the performance. 3. Juratoria; when the party which is to perform any thing, taketh a corporal oath to do it. *Gibſ.* 1063.

If good and ſufficient caution is offered and not admitted, then a writ to the biſhop is provided in the regiſter, to command him (after having taken ſufficient caution) to order the perſon to be delivered. *Gibſ.* 1063.

And if the biſhop doth not deliver him upon the ſaid writ, then the party may have another writ to the ſheriff, to command him to apply perſonally to the biſhop, and admoniſh him to deliver the party after having taken ſufficient caution; and if the biſhop will not do the ſame in preſence of the ſheriff, then the ſheriff to deliver him. *Gibſ.* 1063.

And the reaſon thereof is, for that by the excommunication the party is diſabled to ſue any action, or to have any remedy for any wrong done unto him ſo long as he ſhall remain excommunicate. And alſo the party grieved may have his action upon his caſe againſt the biſhop; in like manner as he may when the biſhop doth excommmunicate him for a matter which belongeth not to eccleſiaſtical cognizance. Alſo the biſhop in thoſe caſes may be indicted at the ſuit of the king. 2 *Inſt.* 623.

In like manner, if one appear in the ſpiritual court, and is excommunicated for refuſing to anſwer, where he is not bound by the law to anſwer (as, for inſtance, when he cannot obtain a copy of the libel); prohibition is granted, with a clauſe to abſolve and deliver the party. *Gibſ.* 1063.

But although, in caſe the party excommunicated reſts in the ſentence given againſt him, there is no legal means for his deliverance, but ſubmiſſion and caution as is aforeſaid; yet if he *appeal* from ſuch ſentence to a ſuperior eccleſiaſtical judge, this puts the party in the ſame ſtate that he was in before the ſentence given; which the law orders, by reaſon of the preſent doubtfulneſs whether it was valid or invalid. Add to this, that by appeal, the judge *a quo* doth ceaſe to be his judge in that cauſe; and if the party was impriſoned, and were to continue ſo, he would thereby be hindred from the effectual proſecution of his appeal, which may happen to prove juſt. Wherefore, upon allegation in behalf of the party againſt whom the writ is gone out, that he hath appealed, and upon proof

proof made thereof by an authentic inſtrument, a writ of ſuperſedeas (without any appearance of a ſcire facias preceding) is provided for him in the regiſter. *Gibſ.* 1063.

But the uſual way (eſpecially in caſes where it is doubtful whether objections may not lie againſt his being delivered) is, the iſſuing a ſcire facias, to warn the biſhop and the party proſecuting, to ſhew cauſe why the ſheriff ſhould not ſurceaſe from attaching the excommunicate, or why he ſhould not deliver him, if he be in priſon. And if the biſhop in caſes of office, and the proſecutor in caſes of inſtance, do not appear in chancery, the party is delivered; but if they appear, and not the party, then a reattachment goes forth to impriſon him. *Gibſ.* 1014.

M. 1 *An.* Q. and the biſhop of *St. Davids.* The defendant was taken upon a writ of excommunicato capiendo, and being in cuſtody in Newgate prayed a habeas corpus, and was brought into court thereupon; and it appeared by the return, that the writ of excommunicato capiendo was not yet returnable. And the court held, that one taken on a writ of excommunicato capiendo cannot come into this court but by habeas corpus; and if he be brought in before the writ is returnable, he ſhall not be allowed to plead or move to quaſh the writ. 1 *Salk.* 294.

But in the caſe of *K.* and *Theed*, *H.* 3 *G.* After the writ had been opened and entred of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had it ſuperſeded: for the court ſaid, they could judge of it by the entry; and ſince it appeared, that the defendant could not be legally detained upon it if he was taken, it was proper to ſuperſede it, to prevent the man's being reſtrained of his liberty contrary to law; that the intent of the ſtatute, which directs the writ to be delivered in open court, was to apprize the court of the nature of the cauſe; that this was now to be conſidered as a writ that *improvide emanavit*; and they were not to wait till the return, till all the inconveniences which they ſhould have prevented by not iſſuing the writ had happened. *Str.* 43.

If a perſon be excommunicated by divers excommunications, for divers offences, and produceth letters of abſolution from one ſentence; he ſhall not be diſcharged, until he be abſolved from them all. 1 *Inſt.* 134.

If after a perſon is excommunicate, there comes a general act of pardon, which pardons all contempts; it ſeems that the offence is taken away, without any formal abſolution. 2 *Bac. Abr.* 326.

Executor. See Wills.

Exemptions. See Peculiars.

Exorciſt.

Exorciſt, what.

1. *EXORCIST*, is one of the five inferior orders in the church of Rome; whoſe office it is, to compel by abjuration evil ſpirits tormenting men, in the name of almighty God to come out of them. *Gibſ.* 99.

Licence to exorciſe.

2. *Can.* 72. No miniſter ſhall, without the licence of the biſhop of the dioceſe under his hand and ſeal, attempt upon any pretence whatſoever, either of poſſeſſion or obſeſſion, by faſting and prayer to caſt out any devil or devils; under pain of the imputation of impoſture or coſenage, and depoſition from the miniſtry.

Exorciſing in the office of baptiſm.

3. In the form of baptiſm in the liturgy of the 2 *Ed.* 6. it was ordered thus; ——

Then let the prieſt looking upon the children, ſay,

I command thee, unclean ſpirit, in the name of the Father of the Son and of the Holy Ghoſt, that thou come out, and depart from theſe infants, whom our Lord Jeſus Chriſt hath vouchſafed to call to his holy baptiſm, to be made members of his body and of his holy congregation; therefore thou curſed ſpirit, remember thy ſentence, remember thy judgment, remember the day to be at hand, wherein thou ſhalt burn in fire everlaſting, prepared for thee and thy angels; and preſume not hereafter to exerciſe any tyranny towards theſe infants, whom Chriſt hath bought with his precious blood; and by this his holy baptiſm called to be of his flock.

Extortion, See Fees.

Faculty. See Diſpenſation.

Faculty court.

THE faculty court belongeth to the archbiſhop of Canterbury; and his officer is called maſter of the faculties. His power is, to grant diſpenſations, as to marry, to eat fleſh on days prohibited, to hold two or more benefices incompatible, and ſuch like. 4 *Inſt.* 337.

Fairs and markets. See Church.

Faſts. See Holidays.

Feaſt. See Holidays.

Fees.

1. BY the 25 Ed. 3. ſt. 3. c. 9. *Becauſe the king's juſtices do take indictments of ordinaries and of their miniſters, of extortions and oppreſſions, and impeach them without putting in certain, wherein, or whereof, or in what manner they have done extortion; the king will, that his juſtices ſhall not from henceforth impeach the ordinaries, nor their miniſters, becauſe of ſuch indictments of general extortions or oppreſſions, unleſs they ſay, and put in certain, in what thing, and of what, and in what manner, the ſaid ordinaries or their miniſters have done extortions or oppreſſions.*

In the 33 *Eliz.* a commiſſary, regiſter, and apparitor, were indicted of extortion; for that they, by colour of their offices, had received 11 s 6 d for abſolution: And exception was taken to the indictment, that by this ſtatute the particular offence of every offender ought to have been eſpecially ſet down; but the exception was not allowed; becauſe they took the ſum in groſs, and the party grieved could not have notice by what proportion they divided it. 2 *Leon.* 268.

Another exception in the ſame caſe was, becauſe it was not ſhewed what was their due fee: and this was conceived to be a good cauſe of exception; for if no fee be due, the ſame ought to appear in the indictment. And afterwards, the opinion of the court was, that they ſhould be diſcharged. 2 *Leon.* 268.

2. *Can.* 135. No biſhop, ſuffragan, chancellor, commiſſary, archdeacon, official, nor any other exerciſing eccleſiaſtical juriſdiction whatſoever, nor any regiſter of any eccleſiaſtical courts, nor any miniſter belonging to any of the ſaid officers or courts, ſhall hereafter for any cauſe incident to their ſeveral offices, take or receive any other or greater fees, than ſuch as were certified to the moſt reverend father in God John late archbiſhop of Canterbury, in the year of our Lord 1597, and were by him ratified and approved; under pain that every ſuch judge officer or miniſter offending herein, ſhall be ſuſpended from the exerciſe of their ſeveral offices for the ſpace of ſix months for every ſuch offence. Always provided, that if any queſtion ſhall ariſe concerning the certainty of the ſaid fees, or any of them; then thoſe fees ſhall be held for lawful, which the archbiſhop of Canterbury for the time being ſhall under his hand approve: except the ſtatutes of this realm before made do in any particular caſe expreſs ſome other fees to be due.

One of the artieles or canons ratified in the year 1584 was, that no other nor greater fees ſhould be taken for any cauſe, by any biſhop ordinary archdeacon or their miniſters, than thoſe which were uſed to be taken at the beginning of the queen's reign; and that a table of all ſuch fees ſhould be put in every conſiſtory before the feaſt of St John Bapiſt then next enſuing: a copy whereof, ſigned by the ordinary, was to be tranſmitted within the ſaid time to the archbiſhop. *Gibſ.* 1015.

Which ſaid article was repeated in the conſtitutions of archbiſhop Whitgift, in the year 1597 aforeſaid: And it is there enjoined, 1. That the table which is to be hung up in the conſiſtory ſhall contain the ſeveral ſums of every particular fee, which moſt frequently and uſually, from the beginning to the eighteenth year of the queen's reign, had been wont to be taken, as well by the judge, as by all and every of the officers and miniſters of the ſame court. 2. That an authentic copy of the ſaid tables, be delivered by every judge to their reſpective biſhops, to be preſerved in their archives. 3. That every biſhop tranſmit

mit an authentic copy written on parchment, to the archbiſhop. *Gibſ.* 1015.

3. *Can.* 136. The regiſters belonging to every eccleſiaſtical judge, ſhall place two tables, containing the ſeveral rates and ſums of all the ſaid fees; one in the uſual place of conſiſtory where the court is kept, and the other in his regiſtry; and both of them in ſuch ſort as every man whom it concerneth may without difficulty come to the view and peruſal thereof, and take a copy of them; the ſame tables to be ſet up before the feaſt of the nativity next enſuing. And if any regiſter ſhall fail to place the ſaid tables according to the tenor hereof: he ſhall be ſuſpended from the execution of his office, until he cauſe the ſame to be accordingly done. And the ſaid tables being once ſet up, if he ſhall at any time remove, or ſuffer the ſame to be removed hidden or any way hindred from ſight, contrary to the true meaning of this conſtitution; he ſhall for every ſuch offence be ſuſpended from the exerciſe of his office for the ſpace of ſix months.

The judge of every eccleſiaſtical court hath an undoubted right, upon proper application (by petition) from any ſuitor in the ſaid court, to tax the proctor's bill. And the method uſually practiſed is, for the judge to refer it to the regiſter, directing the reſpective parties to attend him if they think fit, one to make his exceptions, and the other to juſtify the ſeveral articles or items of his bill; and the regiſter to make his report to the judge, who thereupon proceeds to tax the bill. If the regiſter has any doubt, the aſſiſtance of the other proctors may be required. The fees alledged to be given to counſel, if denied by the client, as alſo his demand for any unuſual or extraordinary articles which do not appear from the proceedings in the cauſe, muſt be cleared up to the ſatisfaction of the judge, either by the proctor's oath (if he voluntarily offers it, and there be no affidavit to the contrary), or by receipts and vouchers from thoſe to whom the money is alledged to be paid, or by producing letters and orders from his client.

4. Dr. Gibſon ſays, Fees having been demanded by proctors, and (upon refuſal to pay) ſuits commenced by them in the ſpiritual courts againſt their clients; prohibitions have been prayed on many occaſions: ſome on pretence that the thing itſelf is properly cognizable in the temporal courts, for which they might bring an action upon the retainer, for work and labour done; and others,

upon ſurmiſe of cuſtom. and the ſum and ſubſtance of what hath uſually been reſolved upon that head, was delivered by Vaughan and Windham, in the caſe of *Horton* and *Wilſon*, (1 Mod. 167); that no court can better judge of the fees that have been due and uſual in the ſpiritual court than themſelves, and that therefore the ſuit for fees was moſt proper for that court; unleſs where the foundation of the demand ſhould be cuſtom, and it ſhould come in queſtion whether the cuſtom was ſo or not: and in that reſpect they compared this caſe to the caſe of a modus for tithes; which if not denied may be recovered in the ſpiritual court; but if denied, prohibition goeth. It was ſaid by Hale chief juſtice, in the caſe of *Web* and *Hartfell* (3 *Keb.* 516.) that no action upon the caſe was ever brought for proctor's fees, and that therefore they may be ſued for in the ſpiritual court. And tho' a prohibition was granted in the caſe of *Sir Edward Lake* (3 Keb. 203.) that was not becauſe it was a ſuit for fees, but becauſe it was a ſuit before himſelf for his own fees. To which may be added, what was ſaid in the caſe of *Johnſon* and *Lee* (5 Mod. 242), that rules are made in the temporal courts, to oblige the attorneys there in matters of practice: and the like rules are made in the eccleſiaſtical courts, to oblige the proctors and miniſters there; ſo that they muſt be allowed to be the proper judges in this matter. *Gibſ.* 1015.

But in the caſe of *Goſlin* and *Elliſon*, *H.* 5 *W.* A prohibition was prayed and granted, in the king's bench, to ſtay a ſuit in the archdeacon of Litchfield's court, againſt churchwardens, for a fee for ſwearing them, and taking preſentments; and tho' an attempt was made to diſcharge the rule, it was over-ruled: And it was inſiſted, that no fees could be due but by cuſtom, or for work done; in which caſe, a quantum meruit lay. 1 *Salk.* 330.

And in the caſe of *Pollard* and *Gerard*, *M.* 13 *W.* A motion was made in the court of king's bench for a prohibition to be directed to the court of the archdeacon of Middleſex, to ſtay a ſuit there by Gerard againſt the plaintiff for fees, to wit, 4s due to him as regiſter, from Pollard, being ſworn before him churchwarden; upon ſuggeſtion, that the office of regiſter is a temporal office, and all profits and fees due to it ſuable at common law. And a rule was made to ſhew cauſe why a prohibition ſhould not be granted. And on ſhewing cauſe, it was agreed, that prohibitions have been granted in this court, to ſtay

ſuits

ſuits in the ſpiritual court for fees due to the *proctors*; but in this caſe (it was ſaid) the ſpiritual court may make a better judgment, whether the fees in demand are due and reaſonable: Beſides that they are ſo ſmall, that it would not be worth while to bring an action at common law for them; and in ſuch caſe this court will not drive the party to the tedious and expenſive remedy of an action: In this court, the door keepers claim fees by cuſtom; and fees are due to the marſhal, cryer, and others, at the aſſizes; and in ſuch caſes, if the parties who ought to pay the fees refuſe to do it, this court or the judge of aſſize reſpectively exert their authority, and commit perſons refuſing to pay their fees, and do not drive the party grieved to their action: and this (it was ſaid) is the conſtant practice. But by Holt chief juſtice; I know of no ſuch practice: I cannot commit a man for not paying the ſaid fees: If there is right, there is remedy: Indebitatus aſſumpſit will lie, if the fee is certain; if uncertain, quantum meruit: It was held in the 15 Cha. 2. in the exchequer, in a caſe reported by Hardres, that a regiſter cannot ſue for his fees in the ſpiritual court: therefore in this caſe a prohibition ſhall be granted; and if the parties will, the plaintiff ſhall declare upon it, to the end the matter may be determined more judicially. *L. Raym.* 703.

So in *Gifford*'s caſe, *M.* 1 *An.* Gifford was libelled againſt in the eccleſiaſtical court for fees: and upon motion a prohibition was granted. for no court hath a power to eſtabliſh fees. The judge of a court may think them reaſonable; but that is not binding. But if on a quantum meruit, a jury think them reaſonable, then they become eſtabliſhed fees. 1 *Salk.* 333.

And in the caſe of *Davies* and *Williams*, *T.* 1724. In the exchequer: Libel in the ſpiritual court for proctor's fees. And a prohibition was granted: for, by the court where there is remedy at law, the ſpiritual court ought not to proceed; and this caſe depends upon a contract and retainer, which is triable at law. *Bunb.* 170.

Archbiſhop Whitgift's table of fees, ſet forth in the year 1597; taken from *Ayl. Parerg.* 551.

	Judge		Regiſter		Proctor.		Apparitor.	
	ſ	d	ſ	d	ſ	d	ſ	d
Commiſſion — —	10	0	6	8				
Exemplification ——	10	0	6	8				
Significavit — —	10	0	6	8				
Letter of quietus ——	10	0	6	8				
Adminiſtration where the goods exceed 40l ——	10	0	6	4				
Letters to collect the goods of the deceaſed ——	6	8	3	4				
Sequeſtration of the profits	6	8	3	4				
Tuition of guardianſhip —	6	8	3	4				
Licence to ſolemnize matrimony without banns —	6	8	3	4				
Sentence — ——	6	0	6	0				
Tranſmiſſion of proceſs —	6	0	aſtaxedby thejudge.					
Licence to ſue out of the juriſdiction —— —	5	0	5	0				
Letters teſtimonial ——	5	0	6	8				
Examination of proceſs —	3	4						
Interlocutory decree ——	3	4	1	8				
Examination of any account	3	4						
Acceptance of a reſignation	3	4	2	6				
Licence to a preacher, curate or ſchoolmaſter —	2	0	1	4				
Licence to ſolemnize matrimony in the time of prohibition of banns to be publiſhed — —	2	0	1	4				
For exhibiting of any proxy	2	0	1	4				
Letters of interdict ——	2	0	1	4				
Commiſſion of abſolution	2	0	1	4				
Inhibition in a cauſe of matrimony —— —	1	8	1	8				
Reſpite of an inventory —	1	0						
Letters of intimation or proclamation —— —	1	0	1	0				

	Judge.		Regiſter		Proc-tor.		Appa-ritor.	
	ſ	d	ſ	d	ſ	d	ſ	d
Caveat for inſtitution or matrimony — —	1	0	1	8				
Decree — —	0	10	0	10				
Production of the party principal — —	0	9	0	9				
Production of the firſt witneſs — —	0	9	0	9				
— — — of every other witneſs — —	0	4½	0	4½				
Purgation — —	0	9	0	9				
For the firſt compurgator	0	9	0	9				
For every of the reſt —	0	4½	0	4½				
For interrogatories adminiſtred — —	0	9	0	9	3	4		
Suſpenſion — —	0	8	0	8				
Abſolution thereof — —	0	9	0	9				
Excommunication — —	0	8	0	8				
Abſolution thereof —	0	9	0	9				
Certificate of abſolution	0	8	0	8				
Caveat for wills and adminiſtrations — —	0	6	0	6				
Citation — —	0	5	0	5				
Diſmiſſion of any cauſe of incontinence and inſtance after conteſtation of ſuit	0	5	0	5				
Admiſſion of any exhibit	0	4	0	4				
Wills and adminiſtrations according to acts of parliament 21 *H.* 8. *c.* 5.								
Proctor's fee on proving a will — — —	—	—	—	—	1	0		
To the apparitor for every Teſtament or adminiſtration above 5l — —	—	—	—	—	—		0	6
Inſtitution with a mandate	—	—	6	8				
Writing any account —	—	—	6	8				
Letters of deacons or prieſts orders — — —	—	—	3	4				
Licence of non-reſidence	—	—	1	4				
Bond — —	—	—	1	0				
For every ſearch in the regiſtry — —	—	—	1	0				

	Judge	Regiſter	Proc-tor.	Appa-ritor.
	ſ d	ſ d	ſ d	ſ d
Schedule of excommunication — — —	——	0 6	0 6	
For any act — —	——	0 4		
At the viſitation: For exhibiting deacon's orders	——	0 4		
—— prieſt's orders —	——	0 4		
—— inſtitution, with the mandate — —	——	0 4		
—— diſpenſation ——	——	1 0		
—— exhibiting any proxy at the time of viſitation	——	2 0		
——— for exhibiting any bill of detection at the ſame time — —	——	0 4	—	0 4
Copy of any matter, by the regiſter: according to quantity				
To the proctor for counſel	——	——	2 0	
For every court day ——	——	——	1 0	
Schedule of coſts ——	——	——	1 0	
Libel — —	——	——	5 0	
Drawing ſentence —	——	——	3 4	
Drawing any account	——	——	3 4	
Drawing any perſonal anſwer	——	——	2 6	
For any other procuratorial matter — —	——	——	3 4	
Execution of any proceſs per mile ——— —	——	——	—	0 2
Diſmiſſion of a cauſe of incontinency ———	——	——	—	0 3

To the judge's man for wax to ſeal every thing, 4d.

Note, There were no ſtamps in thoſe days.

In the ſeveral dioceſes there are tables of fees, different (as it ſeemeth) in the ſeveral charges, in proportion to the difference of times wherein they have been eſtabliſhed. Thoſe which have in them the *purgation* fees, are probably ancienter than the ſtatute of the 13 *C.* 2. by which ſtatute purgation was aboliſhed. And the older they are, the nearer they approach to this ſtandard of archbiſhop Whitgift. But conſidering the continual and large decreaſe

creaſe in the value of money, it is impoſſible to fix any certain meaſure which will continue reaſonable for any conſiderable time; but new ſtandards ought to be fixed at certain periods. Money in the latter end of queen Elizabeth's reign, was more than double, or treble the value of what is at preſent.

Here follows a table of fees allowed to be taken by the practitioners in doctors commons, as ſettled by a jury, Nov. 19. 1734. Taken from *Floyer*'s proctors practice, p. 172.

	l	ſ	d	
To the regiſter for the copy of anſwers (if one ſheet)	0	4	6	Regiſter's fees.
For every other ſheet (ſtamps included)	0	2	0	
For the copy of a ſentence, or interlocutory decree, and ſtamp	0	7	8	
For the copy of any common record	0	4	4	
Attending with records at another court, the firſt day	1	0	0	
For every other attendance	0	10	0	
Poundage for money brought into court, *per* pound	0	0	2	
For a bond in a cauſe of legacy and ſtamps	0	14	10	
For two receipts regiſtring	0	3	4	
Regiſter's attendances	0	3	6	
For the ſervice of a proceſs within the bills of mortality	0	2	6	Apparitors.
Serving a compulſory, upon the firſt witneſs	0	2	6	
——— Upon every other	0	1	0	
——— A decree for anſwers, upon a proctor	0	1	0	
For every ſentence or interlocutory	0	2	0	
Reporting ſecurities	0	2	6	
For every witneſs ſworn in court	0	0	6	
For citing a peer *more procerum*	0	5	0	
For the copy of a will (fifteen lines and ſix words in a ſheet)	0	0	10	To regiſter.
For the copy of an adminiſtration, bond and ſtamps	0	5	0	
To the clerk looking it up	0	1	0	
The whole fees for a faculty to remove a corpſe	3	10	10	Proctor and regiſter.
——— for building a vault	4	6	8	
For a ſequeſtration under ſeal, and ſtamps	1	1	8	

Relaxing

		l	s	d
	Relaxing the ſame	0	13	4
	To the officer (if in London 2s 6d) in the country	0	5	0
To the regiſter.	Drawing an inſtitution, mandate, certificate and letters teſtimonial	4	8	0
	If caution is given, then extraordinary for it	0	6	8
	Stamp	0	1	6
	For inſtitution to any prebend of Canterbury	4	8	0
	Every collation is	2	18	8
	Every lecturer and curate's licence	1	19	4
	Pariſh clerk's licence	1	15	8
	Sexton's licence	1	12	8
Proctor and regiſter.	Whole fees for an adminiſtration (under 20l) of a ſailor in the king's ſervice	0	7	0
	Probate of a will *ditto*	0	7	6
	For an adminiſtration under 5l. in other caſes	0	7	0
	For an adminiſtration under 20l in other caſes	1	1	0
	Ditto under 40l	1	18	0
	For an adminiſtration above 40l	2	5	0
	A commiſſion for an adminiſtration, inſtructions and return	1	10	0
	For a probate (under 20l) the will ſhort	1	4	10
	Ditto above 20l.	1	14	0
	A commiſſion for a will; duty, &c.	1	8	0
	Exemplification of a will	0	10	4
	Exemplifying	0	1	0
	Ingroſſing (according to length.)			
	Seal	0	7	2
	In a will without witneſs, where the handwriting is to be proved by two witneſſes, the affidavit and ſtamp is	0	7	8
	Oaths	0	5	4
	Whole fees of a guardianſhip if you have a copy atteſted by the regiſter) are	1	1	0
	If not, you deduct 7s 8d. remains	0	13	4
	Expence of having an original will attended with at aſſizes			
	Searching and looking up the original	0	3	4
	Record keeper's fee	0	2	0
	Affidavit and ſtamps	0	7	8
	Oath and record keeper's attendance	0	4	6
	Copy of the will to lie in the room of the original, and ſtamps, (according to the length).			

	l	s	d
Collating by notaries	0	5	0
Receipts	0	1	8
Record keeper's fee attending at aſſizes *per* day	1	1	0
Attending on delivering out the original	0	6	8
Regiſter's fees on delivery	1	0	0
For a proxy to appear for plaintiff or defendant	0	6	4
Drawing a declaration inſtead of an inventory	0	7	8
Oath and attendance	0	4	4
A marriage licence	1	4	6
For a ſequeſtration or renunciation or adminiſtration	0	6	8
For the firſt term fee in cauſes	0	5	0
For every other term fee	0	3	4
Every judicial attendance	0	3	4
Extrajudicial attendance	0	6	8
For every act ſped in court, in term	0	1	8
Out of court	0	2	4

Note, by the ſtatute of the 30 *G.* 2. *c.* 19. all thoſe inſtruments which before were to be on a treble ſixpenny ſtamp, ſhall now be on a ſtamp of 2s 6d.

Fence of the churchyard. See **Church**.

Fighting in the church or churchyard. See **Church**.

First fruits and tenths.

I. *First fruits and tenths given to the pope.*

II. *First fruits and tenths annexed to the crown.*

III. *Concerning the manner of payment of first fruits and tenths.*

IV. *First fruits and tenths appropriated to the augmentation of small livings.*

I. *First fruits and tenths given to the pope.*

First fruits.

1. ANNATES, *primitiæ*, or *first fruits*, was the value of every spiritual living by the year; which the pope, claiming the disposition of all ecclesiastical livings within christendom, reserved out of every living. 12 *Co.* 45.

What pope first imposed first fruits historians do not agree. 4 *Inst.* 120.

In the 34 *Ed.* 1. at a parliament held at Carlisle, great complaint was made of intolerable oppressions of churches and monasteries by William Testa (called Mala Testa) and the legate of the pope, and principally concerning first fruits; at which parliament the king by the assent of his barons denied the payment of first fruits of spiritual promotions within England, which were founded by his progenitors and the nobles and others of the realm, for the service of God, alms, and hospitality. And to this effect he writ to the pope; and thereupon the pope relinquished his demand of first fruits of abbeys: in which parliament the first fruits for two years were granted to the king. 12 *Co.* 45.

In the 50 *Ed.* 3. the commons complain, amongst other grievances from the court of Rome, that the pope's collector that year (a thing never before done) had taken the first fruits of every benefice whereof he had made provision or collation; whereas he was used to take first fruits only of benefices vacant in the court of Rome. *Degge*, p. 2. c. 15.

In truth this tribute or revenue of first fruits was gradually by little and little imposed by the bishop of Rome, on such vacant benefices as himself conferred and bestowed; and this was often complained of as a very great grievance; so that in the council at Vienna, Clement the fifth, why

who was made pope in the year 1305, for bad the receiving thereof, and ordered the ſame to be laid aſide, and that the twentieth part of the ſacerdotal revenues ſhould inſtead thereof be annually paid to the biſhop of Rome: but this not taking effect, the pope ſo retained the ſaid annates to his exchequer, as that it long remained one of the moſt conſiderable parts of his revenue. *God. Rep.* 337.

2. *Tenths, decimæ,* are the tenth part of the yearly value of all eccleſiaſtical livings. 4 *Inſt.* 120, 121. Tenths.

Theſe tenths the pope (after the example of the high prieſt among the Jews, who had of the Levites a tenth part of the tithes) claimed as due to himſelf by divine right. And this portion or tribute was by ordinance yielded to the pope in the 20 *Ed.* 1. and a valuation then made of the eccleſiaſtical livings within this realm, to the end the pope might know and be anſwered of that yearly revenue; ſo as the eccleſiaſtical livings chargeable with the tenth (which was called ſpiritual) to the pope, were not chargeable with the temporal tenths or fifteenths granted to the king in parliament, leſt they ſhould be doubly charged: but their poſſeſſions acquired after that taxation were liable to the temporal tenths or fifteenths, becauſe they were not charged to the other. So as the tenths of eccleſiaſtical livings were not yielded to the pope de jure after the example of the high prieſt among the Jews, for then he ſhould have had the tenths of all eccleſiaſtical livings whenſoever they were acquired, but he contented himſelf with what he had got, and never claimed more: and that he might the better keep and enjoy that which he had got, the popes did often after grant the ſame for certain terms to divers of the kings of England, as by our hiſtories doth appear. 2 *Inſt.* 627, 628.

II. *Firſt fruits and tenths annexed to the crown.*

1. By the 25 H. 8. c. 20. *No perſon ſhall be preſented and nominated or commended to the biſhop of Rome, for the office of an archbiſhop or biſhop, nor ſend nor procure there for any bulls breeves palls or other things requiſite for an archbiſhop or biſhop, nor ſhall pay any ſums of money for annates, firſt fruits, nor otherwiſe for expedition of any ſuch bulls breeves or palls; but the ſame ſhall utterly ceaſe, and no longer be uſed within this realm.* ſ. 3. Taken from the pope.

Given to the king.

2. And by the 26 H. 8. c. 3. *The king his heirs and ſucceſſors, kings of this realm, ſhall have from time to time to endure for ever, of every perſon who ſhall be nominated elected prefected preſented collated or by any other means appointed to have any archbiſhoprick, biſhoprick, abbacy, monaſtery, priory, college, hoſpital, archdeaconry, deanry, provoſtſhip, prebend, parſonage, vicarage, chauntery, free chapel, or other dignity benefice or promotion ſpiritual, of what name nature or quality ſoever they be, or to whoſe foundation patronage or gift ſoever they belong, the firſt fruits revenues and profits thereof for one year.* f. 2.

And *he ſhall alſo yearly have united to his imperial crown for ever, one yearly rent or penſion amounting to the value of the tenth part of all the revenues, rents, farms, tythes, offerings, emoluments, and of all other profits as well called ſpiritual as temporal, belonging to any archbiſhoprick, biſhoprick, abbacy, monaſtery, priory, archdeaconry, deanry, hoſpital, college, houſe collegiate, prebend, cathedral church, conventual church, parſonage, vicarage, chauntery, free chapel, or other benefice or promotion ſpiritual, of what name nature or quality ſoever they be, within any dioceſe of this realm or in Wales.* f. 9.

III. *Concerning the manner of payment of the firſt fruits and tenths.*

Compounding for and payment of firſt fruits.

1. *Every perſon, before any actual or real poſſeſſion or meddling with the profits of his benefice, ſhall pay or compound for the firſt fruits to the king's uſe, at reaſonable days, and upon good ſureties.* 26 H. 8. c. 3. f. 2.

And the chancellor of England and maſter of the rolls, jointly and ſeverally, or ſuch other perſons as the king ſhall depute by commiſſion under the great ſeal, ſhall have power to examine and ſearch for the true value of ſuch firſt fruits, and to compound for the ſame, and to limit reaſonable days of payment thereof upon good ſurety by writing obligatory: and if compoſition be made for the ſame before the lord chancellor or maſter of the rolls, then the writings obligatory or money taken for the ſame ſhall be delivered to the clerk of the hanaper for the king's uſe; and if compoſition be made before any other perſons ſo deputed by the king as aforeſaid, then the ſame ſhall be delivered to the treaſurer of the chamber or elſewhere as the king by commiſſion under the great ſeal ſhall appoint. f. 3.

Whoſe acquittance reſpectively ſhall be a ſufficient diſcharge. f. 4.

And ſuch writings obligatory ſhall be of the ſame effect as writings obligatory made by any lay perſon by authority of the ſtatute of the ſtaple; and upon certificate thereof into the chancery, like proceſs and execution ſhall be thereupon had, as upon certificate of writings obligatory of the ſtatute of the ſtaple. ſ. 4.

And the ſum of 8*d* (over and above the ſtamps) *ſhall be paid for ſuch writing obligatory, and no more; and* 4*d for an acquittance.* ſ. 4.

And one bond only ſhall be given for the ſeveral payments. 2 & 3 An. c. 11. ſ. 6.

And perſons ſo deputed as aforeſaid ſhall every ſix months deliver to the treaſurer of the chamber, or elſewhere to ſuch other commiſſioners as the king ſhall appoint, as well all ſuch money as all ſuch ſpecialties and bonds, by indenture to be made between them: and if any ſuch perſon ſo deputed, his heirs executors or adminiſtrators, ſhall conceal or embezil any of the ſaid ſpecialties or bonds, and do not deliver them according to the tenor of this act; he ſhall forfeit his office, and make fine and ranſom at the king's will. 26 H. 8. c. 3. ſ. 4.

Penalty on not paying or compounding.

2. And *if any perſon ſhall enter into the poſſeſſion or meddle with the profits of his ſpiritual promotion before he hath paid or compounded as aforeſaid, and be convict thereof by preſentment verdict confeſſion or witneſs, before the ſaid lord chancellor or ſuch other as ſhall have authority by commiſſion to compound for the ſame; he ſhall be accepted and taken an intruder upon the king's poſſeſſion, and ſhall forfeit double value.* 26 H. 8. c. 3. ſ. 5.

Value how to be aſcertained.

3. And in order to aſcertain the valuation, it was enacted by the ſaid ſtatute of the 26 H. 8. c. 3. that *the chancellor of England ſhould have power to direct into every dioceſe commiſſions in the king's name under his great ſeal, as well to the archbiſhop or biſhop as to ſuch other perſons as the king ſhould appoint, commanding them to examine and inquire of the true yearly values of all the manors lands tenements hereditaments rents tythes offerings emoluments and all other profits as well ſpiritual as temporal, appertaining to any ſuch benefice or promotion; with a clauſe to be contained in every ſuch commiſſion, that they ſhould deduct and allow theſe deductions following, and none other, that is ſay, the rents reſolute to the chief lords, and all other annual and perpetual rents and charges which any ſpiritual perſon is bound yearly to pay to any perſon, or to give yearly in alms by reaſon of any foundation or ordinance, and all fees for ſtewards receivers bailiffs and auditors, and ſynods and proxies; and with another clauſe to be contained in their commiſſion, that they ſhould certify under their ſeals, at ſuch*

days as ſhould be limited by the ſaid commiſſions, as well the whole and entire value as the deductions aforeſaid. ſ. 10, 11.

And furthermore, *all fees which any archbiſhop biſhop or other prelate of the church is bound yearly to pay to any chancellor, maſter of the rolls, juſtices, ſheriffs, or other officers, or miniſters of record, for temporal juſtice to be done or miniſtred within their dioceſe or juriſdictions, were to be deducted by the commiſſioners in their valuation.* ſ. 30.

In what dioceſe to be rated.

4. And *every archbiſhoprick biſhoprick and other benefice and promotion above ſpecified, ſhall be ſeverally and diſtinctly rated in the proper dioceſe where they be, whereſoever their poſſeſſions or profits ſhall happen to lie.* 26 H. 8. c. 3. ſ. 12.

Year when to commence.

5. *The year in which the firſt fruits ſhall be paid, ſhall begin and be accounted immediately after the avoidance; and the profits belonging to any archdeaconry, deanry, prebend, parſonage, vicarage, or other ſpiritual promotion, benefice, dignity, or office during the vacation (chaunteries only excepted) ſhall go to the ſucceſſor towards the payment thereof.* 28 H. 8. c. 11. ſ. 3.

Incumbent dying.

6. By the 26 H. 8. c. 3. *A perſon preſented or collated to a parſonage or vicarage not exceeding eight marks a year (that is, according to the valuation then to be made), was not to pay firſt fruits except he lived three years after his admiſſion; and in the compoſition there was to be a clauſe, that if the incumbent died within three years, the obligation ſhould be void.* ſ. 27.

And by the 1 El. c. 4. *If an incumbent live to the end of half a year next after the avoidance, ſo as he hath received or without fraud might lawfully have received the rents and profits of that half year, and before the end of the next half year ſhall die or be lawfully evicted removed or put out by judgment at common law without fraud; he his heirs executors adminiſtrators and ſureties ſhall be charged but only with a fourth part of the firſt fruits, any bond or other matter to the contrary notwithſtanding. And if he live for one whole year next after ſuch avoidance, and before the end of half a year then next following ſhall die or be removed as aforeſaid; he ſhall be charged but with half of the firſt fruits. And if he live to the end of one whole year and an half, and before the end of ſix months then next following ſhall ſo die or be removed; he ſhall be charged but only with three parts of the firſt fruits. And if he ſhall live to the end of two whole years, and not be lawfully evicted removed or put out as aforeſaid; he ſhall pay the whole.* ſ. 30, 31, 32, 33.

Within what time archbiſhops and biſhops ſhall pay.

7. *Every archbiſhop and biſhop ſhall have four years allowed him, when he ſhall compound for the ſame, for the payment*

ment of his firſt fruits, which ſhall commence from the time of reſtitution of his temporalties; and in every year he ſhall pay one fourth part; and if he die or be removed before the four years be expired, he ſhall be diſcharged of ſo much as did not become due or payable at or before the time of his death or removal, in like manner as the heirs executors and adminiſtrators of rectors and vicars ſhall be diſcharged. 6 An. c. 17. ſ. 5.

Deans, archdeacons, how to pay.

8. *Deans, archdeacons, prebendaries, and other dignitaries, ſhall compound for their firſt fruits in like manner as rectors and vicars; and in caſe of death or removal within the time uſually allowed to rectors and vicars for payment of their firſt fruits, they ſhall be in the like condition, and have the ſame benefit as is allowed to rectors and vicars.* 6 An. c. 27. ſ. 6.

Tenths to be deducted out of the firſt fruits.

9. And whereas by the 26 H. 8. c. 3. there was no proviſion for deduction of the tenths of that ſame year for which the firſt fruits were due to be paid, whereby there became a double charge; therefore by the 27 H. 8. c. 8. it is enacted as follows: viz. *for reformation thereof, the king's highneſs, for the entire and hearty love that his grace beareth to the prelates and other incumbents chargeable to the payment of the tenth and firſt fruits, of his excellent goodneſs is pleaſed and contented that it be enacted; that at the compoſition, allowance and deduction ſhall be made of the tenth part out of the firſt fruits, which tenth ſhall be paid to the king for that firſt year.* ſ. 1, 2, 3.

Grants of exemption from firſt fruits and tenths to continue.

10. And *all grants made to the univerſities or any college or hall therein, and to the college of Eaton and Wincheſter, by any kings of this realm or by act of parliament, for the diſcharge of firſt fruits and tenths, ſhall remain in force.* 1 El. c. 4. ſ. 34.

What livings are exempted from firſt fruits according to the valuation in the king's books.

11. By the 1 El. c. 4. *Vicarages not exceeding the yearly value of 10 l, after the rate and value upon the records and books of the rates and values for the firſt fruits and tenths remaining in the exchequer* (according to the valuation made in the 26 H. 8); *and parſonages not exceeding the like yearly value of ten marks;—ſhall be diſcharged of firſt fruits.* ſ. 29.

And the reaſon why vicarages not exceeding 10 l ſhould be freed of this charge, and parſonages of ten marks ſhould pay; was becauſe the vicarages in times of popery, and when the valuation was taken, had a great income by voluntary offerings, which falling to little or nothing upon the diſſolution of monaſteries, this favour was afforded them in their firſt fruits. *Degge*, p. 2. c. 15.

What livings are exempted from firſt fruits and tenths, according to their clear yearly value.

12. And by the 5 *An.* c. 24. *All eccleſiaſtical benefices with cure of ſouls, not exceeding the clear yearly value of 50 l by the improved valuation of the ſame, ſhall be diſcharged for ever from the firſt fruits and tenths.* ſ. 1.

But *this ſhall not diſcharge any benefices with cure of ſouls, the tenths whereof were granted away by any of her majeſty's predeceſſors in perpetuity.* ſ. 3. That is to ſay, it ſhall not diſcharge them of ſuch *tenths*, but if ſuch livings do not exceed the ſaid clear yearly value of 50 l by the ſaid improved valuation, they ſhall be diſcharged for ever from *firſt fruits.* 6 An. c. 27. ſ. 1.

Alſo *this ſhall not diminiſh any annual ſum ſtipend penſion or annuity heretofore granted to any perſon, body politick or corporate, and charged upon the ſaid revenues of firſt fruits and tenths or any part thereof; but in caſe it ſhall ſo happen, that by diſcharging ſuch ſmall livings, the firſt fruits and tenths which ſhall hereafter be collected in any dioceſe or dioceſes ſhall not be ſufficient to pay ſuch annual ſums as they now ſtand charged with, then the whole revenues of the firſt fruits and tenths throughout the kingdom ſhall be liable to make good ſuch deficiency, during the continuance of ſuch.* 5 An. c. 24. ſ. 6.

And for aſcertaining the ſaid clear yearly value, *the biſhops of every dioceſe or guardians of the ſpiritualties (ſede vacante), and the ordinaries of peculiars and places of exempt juriſdiction, were required by the ſaid act of* 5 *An. c. 24. as well by the oaths of witneſſes, as by other lawful means, to inform themſelves of the clear improved yearly value of every benefice with cure of ſouls within their reſpective juriſdictions, the clear improved yearly value whereof did not then exceed* 50 *l, and were to certify the ſame under hand and ſeal into the exchequer; which certificate being made and filed in the ſaid court, was to aſcertain the clear yearly value of ſuch benefices to be diſcharged.* ſ. 2.

St George's chapel in Windſor exempted from firſt fruits and tenths.

13. Alſo *the dean and canons of the free chapel of St George within the caſtle of Windſor, and all the poſſeſſions thereof, ſhall be diſcharged of tenths and firſt fruits.* 1 El. c. 4. ſ. 35.

Hoſpitals and ſchools exempted from firſt fruits and tenths.

14. Alſo, *nothing herein ſhall diſcharge any hoſpital or the poſſeſſions thereof employed for the relief of poor people, or any ſchool or the poſſeſſions or revenues thereof, with the payment of tenths or firſt fruits.* 1 El. c. 4. ſ. 40.

Leſſor to pay firſt fruits and tenths, and not the leſſee.

15. By the 26 H. 8. c. 17. *Farmers and leſſees of any manors, lordſhips, lands, parſonages, vicarages, portions of tithes, or other profits or commodities belonging to any archbiſhop biſhop or other prelate or ſpiritual perſon, or ſpiritual body corporate or politick, ſhall be diſcharged of firſt fruits and tenths; but the leſſors and owners ſhall pay the ſame.*

Collector of the tenths.

16. *There ſhall be one collector or receiver of the perpetual yearly tenths, who ſhall be nominated and appointed by the king by letters patents under the great ſeal.* 3 G. c. 10. ſ. 2.

And

And *immediately after ſuch nomination and appointment, and before he takes upon him the execution of his office, he ſhall take his corporal oath for the due and faithful execution of his ſaid office, before ſeven or more of the governors of the bounty of queen Anne for the augmentation of ſmall livings* (as is hereafter mentioned) *in a general court.* Id.

And *he ſhall likewiſe give ſecurity to the ſaid corporation or to ſuch perſon or perſons as they in their general court ſhall appoint, for his true and juſt accounting for and payment of all and every ſum and ſums of money which he ſhall receive by virtue of his ſaid office, and for the due and faithful execution and diſcharge of his ſaid office, as the governors at a general court at any time before his taking upon him the execution of his office ſhall order and direct.* Id.

17. And *he ſhall keep his office in ſome convenient place within London or Weſtminſter; and ſhall give attendance for receipt of the tenths, at ſuch times as the ſaid governors in their court ſhall direct, between Dec. 25. and Ap. 30. yearly: of which times and place, due notice ſhall be given by the governors in the gazette yearly one week at leaſt before Dec. 25. whereof every perſon concerned ſhall be obliged to take notice, without any further notice by way of ſummons demand or otherwiſe.* 3 G. c. 10 ſ. 2. Where he ſhall keep his office, and when to attend there.

18. By the 26 H. 8. c. 3. The ſaid tenths are *to become duly yearly at the feaſt of the nativity of our Lord God.* ſ. 9. Times of payment of the tenths.

And by the 3 G. c. 10. *If any perſon charged with the payment of tenths ſhall not pay or duly tender the ſame yearly before the laſt day of April ſucceeding the feaſt of the nativity whereon the ſame ſhall become due; then upon certificate thereof made by the collector or receiver, on or before the firſt day of June following, he ſhall be allowed upon his account all ſuch ſums as any perſons againſt whom ſuch certificates ſhall be made ſhould or ought to have paid. And in every ſuch caſe, the treaſurer chancellor and barons of the exchequer ſhall iſſue upon every ſuch certificate ſuch proceſs as to them ſhall ſeem proper and reaſonable, againſt every ſuch perſon againſt whom ſuch certificate ſhall be made his executors or adminiſtrators, whereby the ſame may be truly levied and paid to the ſaid collector or receiver. And every ſum ſo levied and paid the collector or receiver ſhall bring to account, and charge himſelf therewith in his next account.* ſ. 3.

19. By the 26 *H.* 8. *c.* 3. and 2 & 3 *Ed.* 6. *c.* 20. perſons making default in payment were to be deprived of their benefice; and the reaſon of this ſevere penalty was, becauſe upon the reformation many clergymen ſcrupled and Forfeiture on non-payment of tenths.

and denied to pay theſe tenths to the king, being (as they ſuppoſed) a duty properly due to the pope. *Degge*, p. 2. c. 15.

But now by the 3 G. c. 10. *perſons making default of payment ſhall forfeit double value of the tenths.* ſ. 2.

Tenths a charge upon executors, adminiſtrators, and ſucceſſors.

20. *By the* 26 H. 8. c. 3. the biſhops were charged to collect the tenths, and upon their certificate into the exchequer of non-payment by any incumbent, *proceſs was to be iſſued out of the ſaid court againſt ſuch incumbent, his executors and adminiſtrators; or for inſufficiency of them, againſt the ſucceſſors of ſuch incumbent: whereby the king might be truly anſwered and paid.* ſ. 18.

And by the 27 H. 8. c. 8. *In caſes whereby the ſucceſſor ſhall be chargeable to the payment of tenths unpaid in the time or life of his predeceſſor, he may diſtrain ſuch goods of his predeceſſor as ſhall be upon the premiſſes, and retain the ſame till the predeceſſor if he be alive, and if he be dead till his executors or adminiſtrators ſhall pay the ſame; and if the ſame ſhall not be paid in twelve days, then he may cauſe the goods to be praiſed by two or three indifferent perſons to be ſworn for the ſame; and according to the ſame appraiſing may ſell ſo much thereof as ſhall pay the ſame and alſo the reaſonable coſts that ſhall be ſpent by the occaſion of diſtraining and appraiſing the ſame; and if no ſuch diſtreſs can be found, then ſuch predeceſſor if he be alive, and if he be dead his executors or adminiſtrators may be compelled to the payment thereof by bill in chancery, or by action or plaint of debt at common law.* ſ. 4.

But by the 3 G. c. 10. the biſhops are diſcharged from the ſaid collection; nevertheleſs *all former ſtatutes for the impoſing charging aſſeſſing and levying and the true anſwering and payment of the firſt fruits and tenths, not altered by the ſaid ſtatute of the* 3 G. *ſhall continue in force.* ſ. 4.

Caſe of tenths where there is no incumbent.

21. And by the 7 *Ed.* 6. c. 4. If any promotion ſpiritual ſhould chance to be or remain in ſuch ſort void, that no incumbent could be conveniently provided, the biſhops were to certify the ſame ſpecially: in which caſe it is enacted, that *the king may levy and take all the glebe lands tithes iſſues or profits of ſuch benefice, until he be paid the whole arrearages of the tenths.* ſ. 4.

Members of cathedrals and colleges to pay ſeparate.

22. *In cathedral churches and colleges, every diſtinct head and member ſhall pay according to his own reſpective ſalary, and not for any others.* 26 H. 8. c. 3. ſ. 25, 26.

Collector to give acquittances.

23. *The collector ſhall give acquittances under his hand to the perſons paying the ſame, which ſhall be a ſufficient diſcharge; for every of which acquittances ſhall be paid the ſum of* 6 *d and no more.* 3 G. c. 10. ſ. 2.

24. *And*

24. *And he ſhall pay the ſame yearly into the exchequer, before or on the laſt day of May.* 7 Ed. 6. c. 4. 3 G. c. 10. ſ. 2. To pay the tenths into the exchequer.

25. *And ſuch collector and receiver, his lands and tenements, ſhall ſtand charged for the true payment of ſuch ſums as he ſhall receive.* 34 & 35 H. 8. c. 2. 13 El. c. 4. 14 El. c. 7. 27 El. c. 3. 3 G. c. 10. ſ. 2. His eſtate chargeable.

26. And *no officer of the exchequer ſhall take of any ſuch collector or receiver any reward for making his account or quietus eſt in the exchequer; on pain of forfeiting his office, and making fine at the king's will.* 26 H. 8. c. 3. ſ. 20. 3 G. c. 10. ſ. 2. Paſſing his accounts.

IV. *Firſt fruits and tenths appropriated to the augmentation of ſmall livings.*

1. By the 2 & 3 An. c. 11. *It ſhall be lawful for the queen, by her letters patents under the great ſeal, to incorporate ſuch perſons as ſhe ſhall therein nominate or appoint, to be one body politick and corporate, to have a common ſeal and perpetual ſucceſſion, and alſo at her majeſty's will and pleaſure, by the ſame or any other letters patents, to grant limit or ſettle to or upon the ſaid corporation and their ſucceſſors for ever, all the revenue of firſt fruits and yearly perpetual tenths of all dignities offices benefices and promotions ſpiritual, to be applied and diſpoſed of for the augmentation of the maintenance of ſuch parſons vicars curates and miniſters officiating in any church or chapel where the liturgy and rites of the church of England as now by law eſtabliſhed ſhall be uſed and obſerved; with ſuch lawful powers authorities directions limitations and appointments, and under ſuch rules and reſtrictions, and in ſuch manner and form as ſhall be therein expreſſed.* ſ. 1. Power to eſtabliſh a corporation, and ſettle thereon the firſt fruits and tenths.

But this ſhall not affect any great exchange alienation or incumbrance heretofore made of or upon the ſaid revenues of firſt fruits and tenths: but the ſame, during the continuance of ſuch grant exchange alienation or incumbrance, ſhall remain in ſuch force as if this act had not been made. ſ. 3.

2. And by the ſaid ſtatute of the 2 & 3 An. c. 11. *Every perſon having in his own right any eſtate or intereſt in poſſeſſion reverſion or contingency in any lands, or property in any goods, ſhall have power by deed inrolled in ſuch manner and within ſuch time as is directed by the 27 H. 8. c. 16. for inrollment of bargains and ſales; or by his laſt will or teſtament in writing, to give and grant to and veſt in the ſaid corporation and their ſucceſſors all ſuch his eſtate intereſt or pro-* Power to ſettle benefactions on the ſaid corporation.

property, or any part thereof, towards the augmentation of the maintenance of ſuch miniſters as aforeſaid officiating in ſuch church or chapel where the liturgy and rights of the ſaid church ſhall be ſo uſed or obſerved as aforeſaid, and having no ſettled competent proviſion belonging to the ſame; and to be for that purpoſe applied, according to the direction of the ſaid benefactor by ſuch deed or will; and in default of ſuch direction, in ſuch manner as by her majeſty's letters patents ſhall be appointed as aforeſaid. And ſuch corporation and their ſucceſſors ſhall have full capacity and ability to purchaſe receive take hold and enjoy for the purpoſes aforeſaid, as well from ſuch perſons as ſhall be ſo charitably diſpoſed to give the ſame, as from all other perſons as ſhall be willing to ſell or aliene to the ſaid corporation any manors lands tenements goods or chattels, without any licence or writ of ad quod damnum; the ſtatute of mortmain, or any other ſtatute or law notwithſtanding. —— But this not to enable any perſon within age, or of non-ſane memory, or woman covert (without her huſband), to make any ſuch alienation. ſ. 4, 5.

But by the 9 G. 2. c. 36. *From and after Jun.* 24, 1736, *no manors lands tenements rents advowſons or other hereditaments corporeal or incorporeal, nor any ſum of money goods chattels ſtocks in the publick funds ſecurities for money or any other perſonal eſtate, to be laid out or diſpoſed of in the purchaſe of any lands tenements or hereditaments, ſhall be given granted aliened limited releaſed transferred aſſigned or appointed or any ways conveyed or ſettled to or upon any perſon body politick or corporate or otherwiſe, for any eſtate or intereſt whatſoever, or any ways charged or incumbred by any perſon, in truſt or for the benefit of any charitable uſes; unleſs ſuch gift conveyance appointment or ſettlement of ſuch lands tenements or hereditaments ſums of money or perſonal eſtate (other than ſtocks in the publick funds) be and be made by deed indented ſealed and delivered in the preſence of two or more credible witneſſes, twelve kalendar months at leaſt before the death of ſuch donor or grantor, and be inrolled in the chancery within ſix kalendar months next after the execution thereof; and unleſs ſuch ſtocks be transferred in the publick books uſually kept for the transfer of ſtocks, ſix kalendar months at leaſt before the death of ſuch donor or grantor; and unleſs the ſame be made to take effect in poſſeſſion for the charitable uſe intended, immediately from the making thereof, and be without any power of revocation reſervation truſt condition limitation clauſe or agreement whatſoever, for the benefit of the donor or grantor or of any perſon claiming under him.* ſ. 1.

Letters patents of incorporation.

3. In purſuance whereof, the queen by letters patents, bearing date Nov. 3. in the third year of her reign, incorporated

corporated the archbiſhops, biſhops, deans, ſpeaker of the houſe of commons, maſter of the rolls, privy counſellors, lieutenants and *cuſtodes rotulorum* of the counties, the judges, the queen's ſerjeants at law, attorney and ſolicitor general, advocate general, chancellors and vicechancellors of the two univerſities, mayor and aldermen of London, and mayors of the reſpective cities, for the time being, according to the purport of the ſaid ſtatute (unto whom, by a ſupplemental charter bearing date Mar. 5. in the 12th year of her majeſty's reign, were added, the officers of the board of green cloth, the queen's counſel learned in the law, and the four clerks of the privy council) to be a body corporate, by the name of *the governors of the bounty of queen Anne, for the augmentation of the maintenance of the poor clergy:* And thereby granted to them the ſaid revenue of the firſt fruits and tenths for the purpoſes aforeſaid, under the rules and directions to be eſtabliſhed purſuant to the ſaid letters patent, together with theſe following directions; that is to ſay, That they ſhall keep four general courts at leaſt in every year, at ſome convenient place within London and Weſtminſter (notice being in that behalf firſt given in the gazette, or otherwiſe, 14 days before); the ſaid courts to be in the months of March, June, September, and December: That the ſaid governors or ſo many of them as ſhall aſſemble, not leſs than ſeven in number at any one meeting (whereof, by the aforeſaid ſupplemental charter, a privy counſellor, biſhop, judge, or one of the queen's council to be one) ſhall be a general court, and diſpatch buſineſs by majority of votes: With power to appoint committees, for the eaſier diſpatch of buſineſs.

And to draw up rules and orders for the better rule and government of the ſaid corporation and members thereof; and receiving, accounting for and managing the ſaid revenues; and for diſpoſing of the ſame, and of ſuch other gifts and benevolences as ſhall be given to them for the purpoſes aforeſaid: which being approved altered or amended by the crown, and ſo ſignified under the great ſeal, to be the rules whereby the governors ſhall manage the ſaid revenue, and ſuch other gifts and benevolences whereof the donors ſhall not particularly direct the application.

And that they ſhall inform themſelves of the true yearly value of the maintenance of every ſuch parſon vicar curate and miniſter officiating in any ſuch church or chapel as aforeſaid, for whom a maintenance of the yearly value

of

of 80l is not ſufficiently provided; and the diſtances of ſuch churches and chapels from London; and which of them are in towns corporate or market towns, and which not; and how they are ſupplied with preaching miniſters; and where the incumbents have more than one living.

And that they ſhall have a ſecretary and treaſurer and ſuch inferior officers ſubſtitutes and ſervants as they ſhall think fit; to be choſen by a majority of votes at a general court, and to continue during the pleaſure of the ſaid governors: The ſecretary and treaſurer to be firſt ſworn, at a general court, for the due and faithful execution of their offices; and the treaſurer to give ſecurity for his faithful accounting for the monies he ſhall receive by virtue of the ſaid office.

And with power to admit into their ſaid corporation all ſuch perſons who ſhall be piouſly diſpoſed to contribute towards ſuch augmentation as the ſaid governors in a general court ſhall think fit.

And that they ſhall cauſe to be entered in a book to be kept for that purpoſe, the names of all the contributors with their ſeveral contributions; to the end a perpetual memorial may be had thereof, and whereby the treaſurer may be charged with the more certainty in his account.

And by the 1 G. ſt. 2. c. 10. *The courts and committees of the ſaid governors ſhall have power to adminiſter an oath to ſuch perſons as ſhall give them information or be examined concerning any thing relating to the execution of their truſt.* ſ. 19.

Rules and orders made in purſuance of the ſaid letters patents.

4. And in purſuance of the ſaid letters patents, the following rules and orders have been eſtabliſhed: viz.

(1) That the augmentations to be made by the ſaid corporation ſhall be by the way of purchaſe, and not by the way of penſion.

(2) That the ſtated ſum to be allowed to each cure which ſhall be augmented be 200l to be inveſted in a purchaſe, at the expence of the corporation.

(3) That as ſoon as all the cures not exceeding 10l *per annum*, which are fitly qualified, ſhall have received our bounty of 200l; the governors ſhall then proceed to augment thoſe cures that do not exceed 20l *per annum*; and ſhall augment no other till thoſe have all received our bounty of 200l: except in the caſes, and according to the limitations hereafter named. And that from and after ſuch time as all the cures not exceeding 10l a year, which are fitly qualified, ſhall have received our bounty,

of 200 l; the like rules, orders, and directions ſhall be from thenceforth by the governors obſerved and kept, in relation to cures not exceeding 20 l a year, as are now in force and ought to be by them obſerved and kept, in relation to cures not exceeding 10 l a year.

(4) That in order to encourage benefactions from others, and thereby the ſooner to compleat the good intended by our bounty; the governors may give the ſum of 200 l to cures not exceeding 45 l a year, where any perſons will give the ſame or a greater ſum, or the value thereof in lands, tithes, or rent charges.

(5) That the governors ſhall every year, between Chriſtmas and Eaſter, cauſe the account of what money they have to diſtribute that year to be audited; and when they know the ſum, publick notice ſhall be given in the gazette or ſuch other way as ſhall be judged proper, that they have ſuch a ſum to diſtribute in ſo many ſhares, and that they will be ready to apply thoſe ſhares to ſuch cures as want the ſame and are by the rules of the corporation qualified to receive them, where any perſons will add the like or greater ſum to it or the value in land or tythes, for any ſuch particular cure.

(6) That if ſeveral benefactors offer themſelves, the governors ſhall firſt comply with thoſe that offer moſt.

(7) Where the ſums offered by other benefactors are equal, the governors ſhall always prefer the poorer living.

(8) Where the cures to be augmented are of equal value, and the benefactions offered by others are equal; there they ſhall be preferred, that firſt offer.

(9) Provided nevertheleſs, that the preference ſhall be ſo far given to cures not exceeding 20 l a year; that the governors ſhall not apply above one third part of the money they have to diſtribute that year, to cures exceeding that value.

(10) Where the governors have expected till Michaelmas what benefactors will offer themſelves, then no more propoſals ſhall be received for that year; but if any money remain after that to be diſpoſed of, in the firſt place two or more of the cures in the gift of the crown, not exceeding 10 l a year, ſhall be choſen by lot, to be augmented preferably to all others; the preciſe number of theſe to be ſettled by a general court, when an exact liſt of them ſhall be brought in to the governors.

(11) As for what ſhall remain of the money to be diſpoſed of after that, a liſt ſhall be taken of all the cures

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in the church of England not exceeding 10 l a year; and ſo of many of them be choſen by lot, as there ſhall remain ſums of 200 l for their augmentation.

(12) Provided, that when all the cures not exceeding 20 l a year, which are fitly qualified, ſhall be ſo augmented; the governors ſhall then proceed to augment thoſe of greater value, according to ſuch rules, as ſhall at any time hereafter be propoſed by them, and approved by us, our heirs or ſucceſſors, under our or their ſign manual.

(13) That all charitable gifts, in real or perſonal eſtates, made to the corporation, ſhall be ſtrictly applied according to the particular direction of the donor or donors thereof, where the donor ſhall give particular direction for the diſpoſition thereof; and where the gift ſhall be generally to the corporation, without any ſuch particular direction, the ſame ſhall be applied as the reſt of the fund or ſtock of the corporation is to be applied.

(14) That a book ſhall be kept, wherein ſhall be entred all the ſubſcriptions, contributions, gifts, deviſes or appointments, made or given, of any monies, or of any real or perſonal eſtate whatſoever, to the charity mentioned in the charter, and the names of the donors thereof, with the particulars of the matters ſo given; the ſame book to be kept by the ſecretary of the corporation.

(15) That a memorial of the benefactions and augmentations made to each cure ſhall, at the charge of the corporation be ſet up in writing on a ſtone to be fixed in the church of the cure ſo to be increaſed; there to remain in perpetual memory thereof.

(16) When the treaſurer ſhall have received any ſum of money for the uſe of the corporation; he ſhall, at the next general court to be holden after ſuch receipt, lay an account thereof before the governors: who may order and direct the ſame to be placed out, for the improvement thereof, upon ſome publick fund or other ſecurity, till they have an opportunity of laying it out in proper purchaſes, for the augmentation of cures.

(17) That the treaſurer do account annually before ſuch a committe of the governors, as ſhall be appointed by a general court of the ſaid corporation; who ſhall audit and ſtate the ſame: and the ſaid account ſhall be entred in a book to be kept for that purpoſe, and ſhall be laid before the next general court after ſuch ſtating; the ſame to be there re-examined and determined.

(18) The

(18) The perſons whoſe cures ſhall be augmented, ſhall pay no manner of fee or gratification to any of the officers or ſervants of this corporation.

And by the 1 G. ſt. 2. c. 10. it is enacted, that *all ſuch rules and orders as ſhall from time to time be by the governors agreed upon prepared and propoſed to the king, according to the true intent of the ſaid letters patent and by him approved under his* ſign manual, *ſhall be as good as if they were eſtabliſhed under the* great ſeal. ſ. 3.

Aſcertaining the valuation of livings to be augmented.

5. By the 5 *An. c.* 24. All benefices, with cure of ſouls, not exceeding the clear improved yearly valûe of 50 l (as hath been ſaid) are diſcharged from firſt fruits and tenths; and the biſhops and guardians of the ſpiritualties ſede vacante were to inform themſelves of the values of all ſuch benefices.

And by the 1 G. ſt. 2. c. 10. *The biſhops of every dioceſe, and the guardians of the ſpiritualties ſede vacante, are impowered and required from time to time as they ſhall ſee occaſion, as well by the oath of two or more witneſſes (which they or others commiſſioned by them under their hands and ſeals are impowered to adminiſter) as by all other lawful ways and means, to inform themſelves of the clear improved yearly value of every benefice with cure of ſouls, living, and curacy within their ſeveral dioceſes, or within any peculiars or places of exempt juriſdiction within the limits of their reſpective dioceſes, or adjoining and contiguous thereunto, altho' the ſame be exempt from the juriſdiction of any biſhop in other caſes, and how ſuch yearly values ariſe, with the other circumſtances thereof; and the ſame, or ſuch of them whereof they ſhall have fully informed themſelves, from time to time, with all convenient ſpeed to certify under their hands and ſeals, or ſeals of their reſpective offices, to the governors of the bounty.* ſ. 1.

Provided, that *where by certificates returned into the exchequer by the* 5 An. c. 24. *the yearly value of any livings not exceeding the clear yearly value of* 50 l *are particularly and duly expreſſed and ſpecified, ſuch certificates ſhall aſcertain the yearly value of ſuch livings in order to their being augmented; and no new or different valuation thereof ſhall be returned to the ſaid governors by this act.* ſ. 2.

Agreement with benefactors for the nomination.

6. *All agreements with benefactors, with the conſent and approbation of the governors, touching the patronage or right of preſentation or nomination to ſuch augmented cure, made for the benefit of ſuch benefactor his heirs or ſucceſſors, by the king under his ſign manual, or by any bodies politick or corporate, or by any perſon of the age of twenty one years having an eſtate of inheritance in fee ſimple or fee tail in his own right or in the*

right of his church or of his wife or jointly with his wife made before coverture or after, or having an eſtate for life or for years determinable upon his own life with remainder in fee ſimple or fee tail to any iſſue of his own body, in ſuch patronage or right of preſentation or nomination in poſſeſſion reverſion or remainder, ſhall be good and effectual in the law; and the advowſon patronage and right of preſentation and nomination to ſuch augmented churches and chapels ſhall be veſted in ſuch benefactors their heirs and ſucceſſors, or the ſaid bodies politick and corporate and their ſucceſſors, or the ſaid reſpective perſons as aforeſaid, as fully as if the ſame had been granted by the king under his great ſeal, and as if ſuch bodies politick or corporate had been free from any reſtraint, and as if ſuch other perſon ſo agreeing had been ſole ſeized in their own right of ſuch advowſon patronage right of preſentation and nomination in fee ſimple, and had granted the ſame to ſuch benefactors their heirs and ſucceſſors reſpectively according to ſuch agreements. 1 G. ſt. 2. c. 10. ſ. 8.

And *the agreements of guardians on the behalf of infants or idiots, ſhall be effectual as if the ſaid infants or idiots had been of full age and of ſound mind, and had themſelves entred into ſuch agreements.* ſ. 9.

But *in caſe of ſuch agreement by any parſon or vicar, the ſame ſhall be with the conſent and approbation of his patron and ordinary.* ſ. 10.

And *in caſe of ſuch agreement made by any perſon ſeized in right of his wife, the wife ſhall be a party to the agreement, and ſeal and execute the ſame.* ſ. 11.

And *ſuch agreements with benefactors ſo made as aforeſaid, ſhall be as effectual for the ſupplying cures vacant at the time of ſuch augmentation made or propoſed, as for the advowſon or nomination to future vacancies.* ſ. 12.

Agreement with patrons and others for a ſtipend, in caſe of augmentation by lot.

7. And *where it ſhall fall to the lot of any donative, curacy, or chapelry to receive an augmentation, according to the rules eſtabliſhed or to be eſtabliſhed; it ſhall be lawful for the governors, before they make the augmentation, to treat and agree with the patron of any donative, impropriator of any rectory impropriated without endowment of any vicarage, or parſon or vicar of any mother church, for a perpetual yearly or other payment or allowance to the miniſter or curate of ſuch augmented donative curacy or chapelry and his ſucceſſors, and for charging with and ſubjecting the impropriate rectory or the mother church or vicarage thereunto, in ſuch manner and with ſuch remedies as ſhall be thought fit: And ſuch agreements made with the king under his ſign manual, or with any bodies politick or corporate, or any other perſon having any eſtate or intereſt in*

poſſeſſion reverſion or remainder in any ſuch impropriate rectory in his own right or in the right of his church or of his wife, or with the guardian of any perſon having ſuch eſtate or intereſt, or with any parſon or vicar of any mother church, ſhall be as effectual with reſpect to ſuch charges, as agreements made with the king or with the ſame perſons or bodies politick or corporate touching the patronage or right of preſentation or nomination. And if ſuch impropriator other than the king, and ſuch parſon or vicar, will not or ſhall not make ſuch agreement with the ſaid governors; the ſaid governors may refuſe ſuch augmentation, and apply the money ariſing from the bounty which ought to have been employed therein, for augmenting ſome other cure according to the rules then in force. ſ. 16.

Capacity of miniſters for receiving the augmentation.

8. And *whereas the augmentation is intended for the maintenance, not only of parſons and vicars, but alſo of curates and other miniſters officiating in churches or chapels; therefore, for the preventing of all doubts touching the capacity of ſuch miniſters who are to receive the benefit of ſuch augmentation, it is enacted, that when any part or portion of the firſt fruits or tenths ſhall be annually or otherwiſe applied or diſpoſed of towards the maintenance of any miniſter officiating in any church or chapel as aforeſaid, ſuch part or portion ſhall from thenceforth for ever be in the like manner continued to the miniſter from time to time ſo officiating in the ſame church or chapel: and every ſuch miniſter whether parſon vicar curate or other miniſter for the time being, ſo officiating in ſuch church or chapel, ſhall enjoy the ſame for ever.* 5 An. c. 24. ſ. 4.

Augmentation of benefices vacant.

9. And to the end that churches and chapels may at all times be capable of receiving augmentations; *if the governors ſhall, by any deed or inſtrument in writing under their common ſeal, allot or apply to any church or chapel any lands tithes or hereditaments ariſing from the ſaid bounty or from private contribution or benefaction, and ſhall declare that the ſame ſhall be for ever annexed to ſuch church or chapel; then ſuch lands tithes and hereditaments ſhall from thenceforth be held and enjoyed, and go in ſucceſſion with ſuch church and chapel for ever: And ſuch augmentation ſo made ſhall be good and effectual to all intents and purpoſes, whether ſuch church or chapel for which ſuch augmentation is intended be then full or vacant of an incumbent or miniſter; provided ſuch deed or inſtrument be inrolled in the chancery, within ſix months after the day of the date thereof.* 1 G. ſt. 2. c. 10. ſ. 21.

Benefices augmented ſhall be perpetual cures.

10. And *all churches curacies or chapels which ſhall be augmented by the governors of the bounty, ſhall be from the time of ſuch augmentation perpetual cures and benefices; and the miniſters duly nominated and licenſed thereunto, and their ſucceſſors*

reſpectively, ſhall be in law bodies politick and corporate, and ſhall have perpetual ſucceſſion by ſuch name and names as in the grant of ſuch augmentation ſhall be mentioned, and ſhall have a legal capacity, and be enabled to take in perpetuity to them and their ſucceſſors all ſuch lands tenements tithes and hereditaments as ſhall be granted unto or purchaſed for them reſpectively by the ſaid governors, or other perſons contributing with the ſaid governors as benefactors. And the impropriators or patrons of any augmented churches or donatives for the time being and their heirs, and the rectors and vicars of the mother churches whereto any ſuch augmented curacy or chapel doth appertain and their ſucceſſors, ſhall be utterly excluded from having or receiving directly or indirectly any profit or benefit by ſuch augmentation, and ſhall pay and allow to the miniſters officiating in any ſuch augmented church and chapel reſpectively ſuch annual and other penſions ſalaries and allowances which by ancient cuſtom or otherwiſe of right and not of bounty ought to be by them reſpectively paid and allowed, and which they might by due courſe of law before the making of this act have been compelled to pay or allow, and ſuch other yearly ſum or allowance as ſhall be agreed upon (if any ſhall be) between the ſaid governors and ſuch patron or impropriator upon making the augmentation; and the ſame ſhall be perfectly veſted in the miniſters officiating in ſuch augmented church or chapel reſpectively, and their ſucceſſors. 1 G. ſt. 2. c. 10. ſ. 4.

Provided, *that no ſuch rector or vicar of ſuch mother church, or any other eccleſiaſtical perſon having cure of ſouls within the pariſh or place where ſuch augmented church or chapel ſhall be ſituate, ſhall hereby be deveſted or diſcharged from the ſame; but the cure of ſouls, with all other parochial rites and duties (ſuch augmentation and allowances to the augmented church or chapel as aforeſaid only excepted) ſhall remain in the ſame ſtate plight and manner as before the making of this act.* ſ. 5.

And lapſe thereof may incur.

11. *And if ſuch augmented cures be ſuffered to remain void for ſix months, without a nomination within that time of a fit perſon to ſerve the ſame (by the perſon having right of nomination) to be licenſed for that purpoſe; the ſame ſhall lapſe to the biſhop or other ordinary, and from him to the metropolitan, and from the metropolitan to the crown, according to the courſe of law uſed in caſes of preſentative livings: and the right of nomination to ſuch augmented cure may be granted or recovered, and the incumbency thereof ſhall ceaſe and be determined, in like manner as in a vicarage preſentative.* 1 G. ſt. 2. c. 10. ſ. 6.

Provided, that *if the perſon intitled to nominate in ſuch augmented cure ſhall ſuffer lapſe to incur, but ſhall nominate before*

before advantage taken thereof; ſuch nomination ſhall be as effectual as if made within ſix months, altho' ſo much time be elapſed as that the title of lapſe be veſted in the crown. ſ. 7.

12. *All donatives exempt from eccleſiaſtical juriſdiction, and augmented by virtue of the powers given by this act, ſhall be ſubject to the viſitation and juriſdiction of the biſhop of the dioceſe.* 1 G. ſt. 2. c. 10. ſ. 14. Donatives how affected by the augmentation.

But *no donative ſhall be augmented without the conſent of the patron in writing under his hand and ſeal.* ſ. 15.

13. *It ſhall be lawful, with the concurrence of the governors, and the incumbent, patron, and ordinary of any augmented living or cure, to exchange all or any part of the eſtate ſettled for the augmentation thereof, for any other eſtate in lands or tithes, of equal or greater value, to be conveyed to the ſame uſes.* 1 G. ſt. 2. c. 10. ſ. 13. Exchanging of lands ſettled by the augmentation.

14. By the 1 G. ſt. 2. c. 10. *All the augmentations certificates agreements and exchanges to be made by virtue of this act, ſhall be carefully examined and entred in a book to be provided and kept by the governors for that purpoſe: which ſaid entries being approved at a court of the ſaid governors, and atteſted by the governors then preſent, ſhall be taken to be as records; and the true copies thereof, or of the ſaid entries, being proved by one witneſs, ſhall be ſufficient evidence in law touching the matters contained therein or relating thereto.* ſ. 20. Regiſtry to be kept of all matters relating to the augmentation.

The number of livings capable of augmentation hath been certified as follows: 1071 livings not exceeding 10l a year, which may be augmented (by the bounty alone) ſix times, purſuant to the preſent rules of the governors, which will make 6426 augmentations; 1467 livings above 10l and not exceeding 20l a year, may be augmented four times each, which will make 5868 augmentations; 1126 livings above 20l and not exceeding 30l a year, may be augmented three times each, which will make 3378 augmentations; 1049 livings above 30l and not exceeding 40l a year may be augmented twice each, which will make 2098 augmentations; 884 livings above 40l and not exceeding 50l a year, may be each once augmented, which will make 884 augmentations. So that in the whole there are 5597 livings certified under 50l a year, which will require (by the bounty alone) 18654 augmentations, before they will be advanced to 50l a year each. And thereupon, computing the clear amount of the bounty to make fifty five augmentations yearly, it will be 339 years from the year 1714 (which was the firſt year in which any augmentations were made)

before all the ſaid livings can exceed 50l a year. And if it be computed, that half of ſuch agmentations may be made in conjunction with other benefactors (which is improbable) it will require 226 years before all the livings already certified will exceed 50 l a year.

The form of a deed of gift of money, to be executed by the donor; as the ſame hath been ſettled, and generally uſed, ſince the mortmain act of the 9 G. 2. c. 36.

THIS INDENTURE *made the —— day of —— in the year of our Lord———Between* A. B. *of* C. *in the county of* D.——— *of the one part; and the governors of the bounty of queen* Anne *for the augmentation of the maintenance of the poor clergy, of the other part; Witneſſeth, that the ſaid* A. B. *hath given and granted, and by theſe preſents doth give and grant, unto the ſaid governors, the ſum of —— to be by them diſpoſed of and laid out, for a perpetual augmentation of the* [vicarage] *of* E. *in the county of* F. *and dioceſe of* G. *purſuant to the rules and orders made and eſtabliſhed under the great ſeal of* Great Britain *for the diſpoſition of the ſaid bounty. Which ſaid ſum of ——— the ſaid* A. B. *doth hereby covenant and promiſe to and with the ſaid governors, to pay forthwith into the revenue of the ſaid governors, to take effect in poſſeſſion for the uſe and purpoſe aforeſaid, immediately from the making hereof. In witneſs* &c.

Note, this deed muſt be ingroſſed upon a five ſhilling ſtamp; and when executed, muſt be acknowledged by the donor, before a maſter, or maſter extraordinary, in chancery; and afterwards inrolled in chancery. And if the donor dies within 12 calendar months after the execution of ſuch deed, the gift will be void.—Nor is any living capable (by the preſent rules) of being augmented, which exceeds 45 l a year.——— The money given muſt be actually paid into the governors hands, as ſoon as may be after the execution of ſuch deed of gift.

Where any augmentation is intended with *lands* or *tithes*; ſuch lands or tithes muſt be immediately conveyed, by deed of bargain and ſale, to be executed in manner aforeſaid, and inrolled in chancery, according to the ſaid act.

Form of an inſtrument, now uſually executed by the governors, when any benefactor deſires it.

WHEREAS A. B. *of* C. *in the county of* D. ——— *hath by his deed indented, bearing date the* ——— *day of* ——— *laſt paſt, and duly atteſted and inrolled in his majeſty's high court of chancery, given and granted unto the governors of the bounty of queen* Anne *for the augmentation of the maintainance of the poor clergy, the ſum of* 200 l, *for the augmentation of the* [vicarage] *of* E. *in the county of* F. *and dioceſe of* G. *Now the ſaid governors do hereby promiſe to give the ſum of* 200 l *out of their revenue, to be added thereto: the whole to be diſpoſed of, and laid out, for the perpetual augmentation of the ſaid* [vicarage] *of* E. *purſuant to the rules and orders made and eſtabliſhed under the great ſeal of* Great Britain, *for the diſtribution of the ſaid bounty. Provided alway that the ſaid gift and grant be made compleat and effectual, according to the ſtatute made in the ninth year of the reign of his late majeſty king* George *the ſecond, intitled,* An act to reſtrain the diſpoſition of lands, whereby the ſame become unalienable. *In witneſs whereof, the ſaid governors have cauſed their common ſeal to be hereunto affixed this* ——— *day of* ——— *in the year of our Lord* ———

Font.

1. AT firſt baptiſm was adminiſtred publickly, as occaſion ſerved, by rivers: afterwards the baptiſtery was built at the entrance of the church, or very near it; which had a large baſon in it, that held the perſons to be baptized, and they went down by ſteps into it. Afterwards, when immerſion came to be diſuſed fonts were ſet up at the entrance of churches. 1 *Still.* 146.

2. Edm. *There ſhall be a font of ſtone or other competent material in every church, which ſhall be decently covered and kept, and not converted to other uſes. And the water, wherein the child ſhall be baptized, ſhall not be kept above ſeven days in the font.* Lind. 241.

Or other competent material] In which the child may be dipped. *Id.*

3. Edm. *The fonts ſhall be kept locked up, for fear of ſorcery.* Lind. 247.

For fear of ſorcery] This was ſome vulgar ſuperſtition, which Lindwood ſays, it is better to ſay nothing of, than to explain. *Id.*

4. By the rubrick of the 2 *Ed.* 6. it was ordered, that the water in the font ſhould be changed once in every month at the leaſt.

And on changing the water, there was a new benediction of it.

5. By Can. 81. *According to a former conſtitution too much neglected in many places, there ſhall be a font of ſtone in every church and chapel where baptiſm is to be miniſtred, the ſame to be ſet in the ancient uſual places: in which only font the miniſter ſhall baptize publickly.*

Former conſtitution] That is, amongſt the canons made in the year 1571.

Fornication. See **Lewdneſs.**

General council. See **Synod.**
Gilbertine monks. See **Monaſteries.**

Glebe lands.

Every church to have a glebe.

1. EVERY church of common right is intitled to houſe and glebe. And the aſſigning of theſe, at the firſt, was of ſuch abſolute neceſſity, that without them no church could be regularly conſecrated. *Gibſ.* 661.

Glebe lands are in abeyance.

2. The fee ſimple of the glebe is in *abeyance*; from the french *bayer*, to expect: that is, it is only in the remembrance, expectation, and intendment of law. 1 *Inſt.* 342.

And this was provided by the wiſdom of the law, for that the parſon and vicar have the cure of ſouls, and are bound

bound to celebrate divine ſervice, and adminiſter the ſacraments: and therefore no act of the predeceſſor ſhall make a diſcontinuance, to take away the entry of the ſucceſſor, and to drive him to a real action, whereby he might be deſtitute in the mean time. 1 *Inſt.* 341.

Freehold thereof in the parſon.

3. After induction, the freehold of the glebe is in the parſon. *Gibſ.* 661.

Yet not alienable.

4. But yet he may not alienate the ſame: Concerning which, it was of ancient time ordained by a conſtitution of archbiſhop *Langton* as followeth; *Being willing to provide for the indemnities of churches, we do eſtabliſh by the authority of this preſent council, that no abbot, prior, archdeacon, dean or other having any parſonage or dignity, nor any inferior clerk ſhall preſume to ſell, mortgage, infeoff* de novo, *or in any other manner alienate (without obſerving the form of the canon) the poſſeſſions or revenues of the dignity or church committed to them, to their kinsfolk or friends, or to any other whatſoever. And if any one ſhall preſume to do contrary hereunto, the ſame ſhall be void; and he who ſo preſumeth ſhall be deprived by his ſuperior of the parſonage or church which he hath injured, unleſs within a time to be appointed by his ſuperior, he ſhall reſtore at his own expence without damage to the church, that which he ſhall have alienated. And moreover, he who ſhall receive any eccleſiaſtical goods, and after admonition ſhall preſume to detain the ſame, ſhall be excommunicated, and not abſolved until he ſhall make reſtitution. And alſo the greater prelates ſhall obſerve the ſame.* Lind. 149.

Infeoff de novo] That is, ſo as that the grantee ſhall take to himſelf and his ſucceſſors the fruits and profits of the thing granted in fee, the eſtate remaining in the grantor. *Lind.* 149. —— This was before the ſtatute of *Quia emptores terrarum*, which prohibits all ſuch grants in general.

Without obſerving the form of the canon] That is, the biſhop might not do the ſame without conſent of the chapter; nor other eccleſiaſticks, without the conſent of the biſhop. 1 *Inſt.* 144. 3 *Co.* 75.

Greater prelates] That is, greater than the abbot; and ſo this conſtitution extendeth alſo to the biſhops. *Lind.* 150.

And by the ſtatute of the 13 Ed. 1. ſt. 1. c. 41. *Our lord the king hath ordained, that if abbots, priors, keepers of hoſpitals and other religious houſes founded by him or by his progenitors, do from henceforth aliene the lands given to their houſes*

houſes by him or by his progenitors; the land ſhall be taken into the king's hands, and holden at his will, and the purchaſer ſhall loſe his recovery as well of the lands as of the money that he paid. And if the houſe were founded by an earl, baron or other perſon; for the lands ſo aliened, he from whom or from whoſe anceſtor the land ſo aliened was given, ſhall have a writ to recover the ſame land in demeſne. In like manner for lands given for the maintenance of a chantry, or of a light in a church or chapel, or other alms to be maintained, if the land given be aliened: But if the land ſo given for a chantry, light, ſuſtenance of poor people, or other alms to be maintained or done, be not aliened, but ſuch alms is withdrawn by the ſpace of two years; an action ſhall lie for the donor or his heirs, to demand the land ſo given in demeſne, as it is ordained in the ſtatute of Glouceſter *for lands leaſed to do, or to render the fourth part of the value of the land, or more.*

If abbots, priors, keepers of hoſpitals and other religious houſes] Seeing this act beginneth with abbots, and concludeth with other religious houſes; biſhops are not comprehended within theſe words, for they are ſuperior to abbots, and theſe words [*other religious houſes*] ſhall extend to houſes inferior to them that were mentioned before. 2 *Inſt.* 457.

Or other alms to be maintained] This latter clauſe extendeth to lands or tenements given to any eccleſiaſtical perſon; that is, either religious, as abbots, or priors; or ſecular, as parſons of churches or others, for the finding of a chantry prieſt, or of a light, or any other charity or alms-deeds, or when a chantry is incorporated, and lands given for maintenance of the ſame. 2 *Inſt.* 459.

And this branch being general, the ſame extendeth as well to biſhops and all other ſecular perſons or eccleſiaſtical, as religious, conſiſting of one ſole perſon or aggregate of many. 2 *Inſt.* 459.

Statute of Glouceſter] Which is that of the 6 *Ed.* 1. *c.* 4. which ordaineth, that if a man let his land to farm, or to find eſtovers, in meat or in cloth, amounting to the fourth part of the very value of the land, and he which holdeth the land ſo charged letteth it lie freſh, ſo that the party can find no diſtreſs there by the ſpace of two or three years to compel the farmer to render or to do as is contained in the writing or leaſe; the two years being paſſed, the leſſor ſhall have an action to demand the land in demeſne, by a writ out of the chancery.

Yet

Yet ſtill, they might have aliened, tho' not of themſelves, yet with proper conſent as aforeſaid: for at the common law, if the biſhop with the aſſent of his chapter, or the abbot with the aſſent of his covent, and the like, had aliened the land, the eſtate of the alienee could not have been avoided; for they having a fee ſimple, were not reſtrained from alienation. But now, by the ſtatutes of the 1 *Eliz. c.* 19. and 13 *Eliz. c.* 10. all gifts, grants, feoffments, conveyances or other eſtates, if they be contrary to the tenor of the ſaid acts reſpectively, ſhall be utterly void and of none effect; notwithſtanding any conſent or confirmation whatſoever. 2 *Inſt.* 457.

For by the 1 *Eliz. c.* 19. with regard to biſhops, it is enacted, that *all gifts, grants, feoffments, fines, or other conveyances or eſtates, to be had made done or ſuffered, by any archbiſhop or biſhop, of any honours, caſtles, manors, lands, tenements, or other hereditaments, being parcel of the poſſeſſions of his archbiſhoprick or biſhoprick, or belonging to the ſame, to any perſon or perſons, bodies politick or corporate, whereby any eſtate ſhould or may paſs from the ſame archbiſhop or biſhop, or any of them; other than for the term of twenty one years, or three lives, from ſuch time as any ſuch leaſe grant or aſſurance ſhall begin, and whereupon the old accuſtomed yearly rent or more ſhall be reſerved and payable yearly during the ſaid term of twenty one years or three lives,—ſhall be utterly void and of none effect.*

And by the 13 *El. c.* 10. with regard to all other ſpiritual perſons and corporations, it is enacted as followeth: *For that long and unreaſonable leaſes made by colleges, deans and chapters, parſons, vicars, and other having ſpiritual promotions, be the chiefeſt cauſes of the dilapidations and the decay of all ſpiritual livings and hoſpitality, and the utter impoveriſhing of all ſucceſſors incumbents in the ſame; it is enacted, that all leaſes, gifts, grants, feoffments, conveyances, or other eſtates, to be made had done or ſuffered, by any maſter and fellows of any college, dean and chapter of any cathedral or collegiate church, maſter or guardian of any hoſpital, parſon, vicar, or any other having any ſpiritual or eccleſiaſtical living or any houſes lands tithes tenements or other hereditaments, being parcel of the poſſeſſions of any ſuch college cathedral church chapel hoſpital parſonage vicarage or other ſpiritual promotion, or any ways appertaining or belonging to the ſame, to any perſon or perſons bodies politick or corporate (other than for the term of one and twenty years, or three lives, from the time that any ſuch leaſe or grant ſhall be made or granted, whereupon the accuſtomed yearly rent or more ſhall be*

reſerved

reſerved and payable during the ſaid term) ſhall be utterly void and of none effect.

So that now they may not alienate, altho' with conſent as aforeſaid, for longer term than twenty one years or three lives.

Exchange. 5. Nor by the ſame rule may they exchange, tho' they do it with like conſent; as it was laid down in *Turther's* caſe, *T.* 40 *Eliz.* where the parſon exchanged his glebe land, and died; and tho' the ſucceſſor, by entring into the exchanged lands and taking the profits did bind himſelf for his own time (being made before the 13 *Eliz.*) it was declared, that no ſuch exchange ſince the 13 *Eliz.* could be good. Yet in the chancery reports 5 *C.* in the caſe of *Morgan* and *Clerk*, we find a decree made to confirm an exchange of glebe, for other lands. *Gibſ.* 661. But this is uſually done by act of parliament.

But as exchanges in either of the ways abovementioned cannot be made without conſiderable expence, it hath been ſometimes practiſed (eſpecially in laying together ſmall quantities of land for the ſake of incloſure and improvement) for the incumbent to make an exchange during his own time, in which his ſucceſſors alſo will find the ſame advantage; until by length of time all remembrances where the lands formerly lay ſhall be worn out: which altho' it doth not operate to effect a legal title, yet no perſon being grieved thereby, will probably never be inquired into and diſannulled.

And by the 1 *G. ſt.* 2. *c.* 10. where a benefice hath been augmented by the governors of queen Anne's bounty, it ſhall be lawful, with the concurrence of the ſaid governors, and the incumbent, patron, and ordinary, to exchange all or any part of the eſtate ſettled for the augmentation thereof, for any other eſtate in lands or tithes of equal or greater value.

Waſte. 6. So alſo they may not commit waſte, by felling wood, or the like; and if they do, a prohibition will be granted, for which there is a writ in the regiſter. *Gibſ.* 661.

But it hath been adjudged, that the digging of mines in glebe lands, is not waſte; and accordingly, when a prohibition was prayed in the 15 *C.* 2. by the earl of Rutland, it was denied; for, ſaid the court, If this were accounted waſte, no mines that are in glebe lands could ever be opened. 1 *Lev.* 107. 1 *Sid.* 152.

Tithes of glebe lands. 7. Glebe lands in the hands of the parſon ſhall not pay tithe to the vicar, tho' endowed generally of the tithes of all lands within the pariſh; nor being in the hands of the vicar,

vicar ſhall they pay tithe to the parſon: and this is according to the known maxim of the canon law, that the church ſhall not pay tithes to the church. But if the vicar be ſpecially endowed of the ſmall tithes of the glebe lands of the parſonage; then he ſhall have them, tho' they are in the hands of the appropriator. *Gibſ.* 661. *Deg. p.* 2. *c.* 2.

If a parſon leaſe his glebe lands, and do not alſo grant the tithes thereof; the tenant ſhall pay the tithes thereof to the parſon. *Deg. p.* 2. *c.* 2. 1 *Roll's Abr.* 655.

And if a parſon lets his rectory, reſerving the glebe lands; he ſhall pay the tithes thereof to his leſſee. *Gibſ.* 661.

8. By the 28 H. 8. c. 11. *If any incumbent ſhall die, and before his death hath cauſed any of his glebe lands to be manured and ſown at his proper coſts and charges with any corn or grain; in ſuch caſe every ſuch incumbent may make his teſtament of all the profits of the corn growing upon the ſaid glebe lands ſo manured and ſown.* ſ. 6. Incumbent dying.

But if his ſucceſſor is inducted before the ſeverance thereof from the ground, the ſucceſſor ſhall have the tithe thereof; for altho' the executor repreſent the perſon of the teſtator, yet he cannot repreſent him as parſon, inaſmuch as another is inducted. 1 *Roll's Abr.* 655.

Otherwiſe, if the parſon dieth after ſeverance from the ground, and before the corn is carried off; in this caſe, the ſucceſſor ſhall have no tithe: becauſe, tho' it was not ſet out, yet a right to it was veſted in the deceaſed parſon by the ſeverance from the ground. The ſame is true in caſe of deprivation, or reſignation, after glebe ſown: the ſucceſſor ſhall have the tithe, if the corn was not ſevered at the time of his coming in; otherwiſe if ſevered. *Gibſ.* 662.

Goods of the Church. See **Church.**

Grace.

GRACE is ſometimes uſed for a faculty, licence, or diſpenſation; but this ſeemeth to be only in caſe where the matter proceedeth as it were *ex gratia*, of grace and favour; and not where the licence or diſpenſation is granted of courſe, or of neceſſity. *Ayl. Par.* 353.

Grail.

GRAIL, *gradale*, is that book which containeth all that was to be ſung by the quire at high maſs; the tracts, ſequences, hallelujahs; the creed, offertory, triſagium, as alſo the office for ſprinkling the holy water. *Lindw.* 251.

Guardian. See **Wills.**
Guardian of the ſpiritualties. See **Biſhops.**
Gunpowder treaſon. See **Holidays.**

Hearth penny.

HEARTH PENNY is a preſcription for the tithe of wood cut down and uſed for fuel.

Hereſy.

Hereſy, what.

1. IT ſeemeth, that among proteſtants hereſy is taken to be a falſe opinion repugnant to ſome point of doctrine clearly revealed in ſcripture, and either abſolutely eſſential to the chriſtian faith, or at leaſt of moſt high importance. 1 *Haw.* 3.

But it is impoſſible to ſet down all the particular errors which may properly be called heretical, concerning which there are and always have been ſo many intricate diſputes: However the following ſtatute of the 1 *El. c.* 1. which erected the high commiſſion court, having reſtrained the ſame from adjudging any points to be heretical, but ſuch as are therein expreſſed; it hath been ſince generally holden, that altho' the high commiſſion court was aboliſhed by the ſtatute of the 16 *C.* 1. *c.* 11. yet thoſe rules will be good directions to eccleſiaſtical courts in relation to hereſy. 1 *Haw.* 4.

By which ſaid ſtatute of the 1 *El. c.* 1. it is enacted as followeth: *All ſuch juriſdictions privileges ſuperiorities and pre-*

preheminences, ſpiritual and eccleſiaſtical, as by any ſpiritual or eccleſiaſtical power or authority have heretofore been or may lawfully be exerciſed or uſed for the viſitation of the eccleſiaſtical ſtate and perſons, and for reformation order and correction of the ſame, and of all manner of hereſies ſchiſms abuſes offences contempts and enormities, ſhall for ever be united and annexed to the imperial crown of this realm. ſ. 17.

And ſuch perſons to whom the queen ſhall by letters patents under the great ſeal give authority to execute any juriſdiction ſpiritual, ſhall not in any wiſe have power to adjudge any matter or cauſe to be hereſy, but only ſuch as heretofore have been adjudged to be hereſy, by the authority of the canonical ſcriptures, or by ſome of the firſt four general councils, or by any other general council wherein the ſame was declared hereſy by the expreſs and plain words of the ſaid canonical ſcriptures, or ſuch as hereafter ſhall be judged or determined to be hereſy, by the high court of parliament, with the aſſent of the clergy in the convocation. ſ. 36.

And this is the firſt boundary that was ſet to the extent of hereſy as to the matter thereof, what only ſhall be adjudged hereſy. 1 *H. H.* 406.

The ground of making which limitation was a retroſpect to the times of popery, in which every thing was adjudged hereſy, that the church of Rome thought fit to call by that name, how far ſoever in its own nature from being fundamental, or from being contrary to the goſpel and the ancient doctrine of the catholick church; ſuch as ſpeaking againſt pilgrimages, againſt the worſhip of images, againſt the neceſſity of auricular confeſſions, and the like. *Gibſ.* 352.

Inſomuch that the canon law reckons up eighty eight different ſorts of hereſy. *Ayl. Par.* 290.

The act indeed is not ſo particular and certain, as might have been wiſhed; for according to the inclination of the judge, poſſibly ſome would determine that to be hereſy by the canonical ſcriptures which is not at all hereſy, nor contrary to the canonical ſcriptures; but howſoever, it brought hereſy to a greater certainty than before. 1 *H. H.* 407.

Power of the convocation to inquire thereof.

2. Lord Hale ſays; Before the time of Richard the ſecond, that is, before any acts of parliament were made about hereticks, it is without queſtion, that in a convocation of the clergy or provincial ſynod, they might and frequently did here in England proceed to the ſentencing of hereticks. 1 *H. H.* 390.

Mr

Mr Hawkins ſays; It is certain that the convocation may declare what opinions are heretical: but it hath been queſtioned of late, whether they have power at this day to convene and convict the heretick. 1 *Haw.* 4.

And Dr Gibſon ſaith; How far the convocation of each province, which had once an undoubted right to convict and puniſh hereticks in a ſynodical manner, doth ſtill retain or not retain that authority, he will not preſume to ſay; until the judges ſhall be clear and final in their opinions, and that point ſhall have received a judicial determination. *Gibſ.* 353.

Power of the ordinary.

3. The dioceſan alone, as to eccleſiaſtical cenſures, may doubtleſs proceed to ſentence hereſy. 1 *H. H.* 392. 1 *Haw.* 4.

And ſo might he have done at common law, before any ſtatute for hereſy was made. 3 *Inſt.* 39.

But it is ſaid, that no ſpiritual judge, who is not a biſhop, hath this power. 1 *Haw.* 4.

And it hath been queſtioned, whether a conviction before the ordinary where a ſufficient foundation, whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the convocation was. 1 *Haw.* 4.

For anciently, the temporal courts would not uſually burn the offender, without a ſentence from a provincial ſynod. 1 *H. H.* 392.

Power of the temporal courts.

4. It is certain, that a man cannot be proceeded againſt at the common law in a temporal court merely for hereſy; yet if in maintenance of his errors he ſet up conventicles and raiſe factions, which may tend to the diſturbance of the publick peace, it ſeemeth that he may in this reſpect be fined and impriſoned upon an indictment at the common law. 1 *Haw.* 4.

Alſo a temporal judge may incidently take knowledge, whether a tenet be heretical or not: as where one was committed by force of the ſtatute of the 2 *H.* 4. *c.* 15. (which is now repealed), for ſaying that he was not bound by the law of God to pay tithes to the curate; and another, for ſaying that tho' he was excommunicate before men, yet he was not ſo before God; the temporal courts, on an habeas corpus in the firſt caſe, and an action of falſe impriſonment in the other, adjudged neither of the points to be hereſy within that ſtatute; for the king's courts will examine all things which are ordained by ſtatute. 1 *Haw.* 4.

Alſo in a *quare impedit*, if the biſhop plead that he refuſed the clerk for hereſy; it ſeems that he muſt ſet forth the

the particular point, that it may appear to be heretical to the court wherein the action was brought, which having cognizance of the original cauſe muſt by conſequence have a power as to all incidental matters neceſſary for the determination thereof. 1 *Haw.* 4.

But if a perſon be proceeded againſt as an heretick in the ſpiritual court *pro ſalute animæ*, and think himſelf aggrieved, his proper remedy ſeems to be to bring his appeal to a higher eccleſiaſtical court, and not to move for a prohibition from a temporal one, which as it ſeems to be agreed, cannot regularly determine or diſcuſs, what ſhall be called hereſy. 1 *Haw.* 4.

5. There is no doubt, but that at the common law one convicted of hereſy, and refuſing to abjure it, or falling into it again after he had abjured it, might be burned by force of the writ *de hæretico comburendo*, which was grantable out of chancery upon a certificate of ſuch conviction; but it is ſaid, that he forfeited neither lands nor goods, becauſe the proceedings againſt him were only *pro ſalute animæ*. But at this day, the ſaid writ *de hæretico comburendo* is aboliſhed by the ſtatute of the 29 *C.* 2. *c.* 9. and all the old ſtatutes which gave a power to arreſt or impriſon perſons for hereſy, or introduced any forfeiture on that account, are repealed: yet by the common law, an obſtinate heretick being excommunicate, is ſtill liable to be impriſoned by force of the writ *de excommunicato capiendo*, till he make ſatisfaction to the church. 1 *Haw.* 4, 5. How puniſhable.

By which ſaid ſtatute of the 29 *C.* 2. *c.* 9. it is enacted that *the writ commonly called* breve de hæretico comburendo, *with all proceſs and proceedings thereupon in order to the executing ſuch writ, or following or depending thereupon, and all puniſhment by death, in purſuance of any eccleſiaſtical cenſures, ſhall be utterly taken away and aboliſhed.* ſ. 1.

Provided, that nothing in this act ſhall extend to take away or abridge the juriſdiction of proteſtant archbiſhops or biſhops, or any other judges of any eccleſiaſtical courts, in caſe of atheiſm, blaſphemy, hereſy, or ſchiſm, and other damnable doctrines and opinions; but that they may proceed to puniſh the ſame according to his majeſty's eccleſiaſtical laws, by excommunication, deprivation, degradation, and other eccleſiaſtical cenſures, not extending to death, in ſuch ſort, and no other, as they might have done before the making of this act. ſ. 2.

As they might have done before the making of this act] Upon the abrogating of all the ancient ſtatutes made againſt hereticks, the cognizance of hereſy and puniſhment of

hereticks returned into its ancient channel and bounds; and now belongs to the archbiſhop, as metropolitan of the province, and to every biſhop within his own proper dioceſe, who are to puniſh only by eccleſiaſtical cenſures. And ſo (ſaith lord Coke) it was put in ure in all queen Elizabeth's reign; and ſo it was reſolved by the chief juſtice, chief baron, and two other of the judges, upon conſultation in the 9 *Ja.* in the caſe of *Legate* the heretick. *Gibſ.* 353.

But as no perſon can be indicted or impeached for hereſy before any temporal judge, or other that hath temporal juriſdiction; ſo if a heretick be convicted of hereſy, and recant, he may not be puniſhed by the eccleſiaſtical law: as was reſolved in the 9 *Ja.* in the caſe of *Nicholas Fuller.* Gibſ. 353.

Heriot.

HERIOT, in the ſaxon *heregeat*, from *here*, an army, and *geat*, a march or expedition; was firſt paid in arms and horſes, to the lord of the fee. It was the practice alſo to have a heriot paid to the pariſh prieſt; which was commonly the beſt or ſecond beſt horſe of the deceaſed, led before the corps, and delivered at the place of ſepulture. *Dalr. Feud.* 54. *Ken. Par. Ant.* Gloſs.

And this was in the name of a mortuary or corſe preſent: and ſo it was injoined by a conſtitution of archbiſhop *Winchelſea*, that if a perſon at the time of his death had two or more quick goods, the firſt beſt ſhould be given to him to whom it was due (that is, to the lord of the fee); and the ſecond beſt ſhould be reſerved to the church where the deceaſed perſon received the ſacraments whilſt he lived. *Lind.* 184.

Holidays.

1. BY the 5 & 6 Ed. c. 3. *Foraſmuch as at all times men be not ſo mindful to laud and praiſe God, ſo ready to reſort and hear God's holy word, and to come to the holy*

holy communion and other laudable rights which are to be observed in every chriſtian congregation, as their bounden duty doth require; therefore to call men to remembrance of their duty and to help their infirmity, it hath been wholeſomely provided, that there ſhould be ſome certain times and days appointed, wherein the chriſtians ſhould ceaſe from all other kind of labours, and ſhould apply themſelves only and wholly unto the aforeſaid holy works, properly pertaining unto true religion; the which times and days ſpecially appointed for the ſame are called holidays, not for the matter and nature either of the time or day, nor for any of the ſaints ſake whoſe memories are had on thoſe days (for ſo all days and times conſidered are God's creatures, and all of like holineſs), but for the nature and condition of thoſe godly and holy works wherewith only God is to be honoured, and the congregation to be edified, whereunto ſuch times and days are ſanctified and hallowed, that is to ſay, ſeparated from all profane uſes, and dedicated and appointed not unto any ſaint or creature, but only unto God and his true worſhip; neither is it to be thought, that there is any certain time or definite number of days preſcribed in holy ſcripture, but that the appointment both of the time, and alſo of the number of days, is left by the authority of God's word to the liberty of Chriſt's church, to be determined and aſſigned orderly in every country, by the diſcretion of the rulers and miniſters thereof, as they ſhall judge moſt expedient to the true ſetting forth of God's glory, and the edification of their people: it is therefore enacted, that all the days hereafter mentioned ſhall be kept and commanded to be kept holidays, and none other; that is to ſay, all ſundays in the year, the days of the feaſt of the circumciſion of our Lord Jeſus Chriſt, of the epiphany, of the purification of the bleſſed virgin, of St. Matthie the apoſtle, of the annunciation of the bleſſed virgin, of St. Mark the evangeliſt, of St. Philip and Jacob the apoſtles, of the aſcenſion of our Lord Jeſus Chriſt, of the nativity of St. John Baptiſt, of St. Peter the apoſtle, of St. James the apoſtle, of St. Bartholomew the apoſtle, of St. Matthew the apoſtle, of St. Michael the archangel, of St. Luke the evangeliſt, of St. Simon and Jude the apoſtles, of all ſaints, of St. Andrew the apoſtle, of St. Thomas the apoſtle, of the nativity of our Lord, of St. Stephen the martyr, of St. John the evangeliſt, of the holy innocents, monday and tueſday in eaſter week, and monday and tueſday in whitſun week; and that none other day ſhall be kept and commanded to be kept holy, or to abſtain from lawful bodily labour. f. 1.

And it ſhall be lawful to all archbiſhops and biſhops in their dioceſes, and to all other having eccleſiaſtical or ſpiritual juriſ-

diction, to inquire of every perſon that ſhall offend in the premiſſes, and to puniſh every ſuch offender by the cenſures of the church, and to injoin them ſuch penance as the ſpiritual judge by his diſcretion ſhall think meet and convenient. ſ. 3.

Provided, that it ſhall be lawful for every huſbandman, labourer, fiſherman, and every other perſon of what eſtate degree or condition he be, upon the holidays aforeſaid, in harveſt, or at any other time in the year when neceſſity ſhall require, to labour, ride, fiſh, or work any kind of work, at their free wills and pleaſure. ſ. 6.

Provided, that it ſhall be lawful to the knights of the right honourable order of the garter, to keep and celebrate ſolemnly the feaſt of their order, commonly called St. George's feaſt, yearly on the 22, 23, and 24th days of April and at ſuch other times as yearly ſhall be thought convenient by the king and the ſaid knights of the ſaid honourable order. ſ. 7.

This act was repealed in the firſt year of queen Mary; and in the firſt of queen Elizabeth a bill to revive the ſame was brought into parliament, but paſſed not; ſo that the repeal of queen Mary remained upon this act till the firſt year of king James the firſt, when this repeal was taken off. In the mean while, the kalendar before the book of common prayer had directed what holidays ſhould be obſerved; and in the articles publiſhed by queen Elizabeth in the ſeventh year of her reign, one was, that there be none other holidays obſerved, beſides the ſundays, but only ſuch as be ſet out for holidays as in the ſaid ſtatute of the 5 & 6 Ed. 6. and in the new kalendar authorized by the queen's majeſty: who appears in other inſtances (as ſhe did probably in this) to have greatly diſliked the parliament's intermeddling in matters of religion, the ordering of which ſhe reckoned one great branch of the royal ſupremacy. *Gibſ.* 245.

Feaſts. 2. Rubrick before the common prayer. *A table of all the feaſts that are to be obſerved in the church of England throughout the year: —— All ſundays in the year, the circumciſion of our Lord Jeſus Chriſt, the epiphany, the converſion of St. Paul, the purification of the bleſſed virgin, St. Matthias the apoſtle, the annunciation of the bleſſed virgin, St. Mark the evangeliſt, St. Philip and St. James the apoſtles, the aſcenſion of our Lord Jeſus Chriſt, St. Barnabas, the nativity of St. John the Baptiſt, St. Peter the apoſtle, St. James the apoſtle, St. Bartholomew the apoſtle, St. Matthew the apoſtle, St. Michael and all angels, St. Luke the evangeliſt, St. Simon and St. Jude the apoſtles, all ſaints, St. Andrew the apoſtle, St. Thomas the apoſtle, the nativity of our Lord,*

Lord, St. Stephen the martyr, St. John the evangeliſt, the holy innocents, monday and tueſday in eaſter week, monday and tueſday in whitſun week.

In this table it is obſervable, that all the ſame days are repeated as *feaſts*, which were enacted to be *holidays* by the aforeſaid ſtatute: and alſo theſe two are added, viz. the *converſion of St. Paul*, and *St. Barnabas*, which perhaps were omitted out of the ſtatute, becauſe St. Paul and St. Barnabas were not accounted of the number of the twelve. But in the rubrick which preſcribeth the leſſons proper for *holidays*, thoſe two feſtivals are ſpecified under the denomination alſo of *holidays*. But their eves are not appointed by the kalendar, as the eves of the others are, to be faſting days.

3. By *Can.* 72. No miniſter ſhall, without the licence and direction of the biſhop under hand and ſeal, appoint or keep any ſolemn faſts, either publickly, or in any private houſes, other than ſuch as by law are, or by publick authority ſhall be appointed, nor ſhall be wittingly preſent at any of them; under pain of ſuſpenſion for the firſt fault, of excommunication for the ſecond, and of depoſition from the miniſtry for the third. Faſting days.

By the 2 & 3 Ed. 6. c. 19. *Albeit the king's ſubjects now having a more perfect and clear light of the goſpel and true word of God, thro' the infinite mercy and clemency of almighty God, by the hands of the king's majeſty, and his moſt noble father of famous memory, and thereby perceiving that one day or one kind of meat of it ſelf is not more holy, more pure, or more clean than another; yet foraſmuch as divers of the king's ſubjects, turning their knowledge herein to ſatisfy their ſenſuality, have of late times more than in times paſt broken and contemned ſuch abſtinence which hath been uſed in this realm, upon the fridays and ſaturdays, the embring days, and other days commonly called vigils, and in lent, and other accuſtomed times: the king's majeſty, conſidering that due and godly abſtinence is a mean to virtue, and conſidering alſo ſpecially that fiſhers and men uſing the trade of living by fiſhing in the ſea may thereby the rather be ſet on work, and that by eating of fiſh much fleſh ſhall be ſaved and increaſed; and alſo for divers other conſiderations and commodities of this realm, doth ordain and enact with the aſſent of the lords ſpiritual and temporal and the commons in this preſent parliament aſſembled, that all manner of ſtatutes laws conſtitutions and uſages, concerning any manner of faſting or abſtinence from any kinds of meats, heretofore in this realm made or uſed ſhall loſe their force and ſtrength and be void and of none effect.* §. 1.

And alſo that no perſon ſhall willingly and wittingly eat any manner of fleſh upon any friday or ſaturday, or the embring days, or in lent, nor at any other day commonly reputed as a fiſh day, wherein it hath been commonly uſed to eat fiſh and not fleſh; on pain of 10 *s for the firſt offence, and impriſonment for ten days, and during the time of his impriſonment to abſtain from eating any manner of fleſh; for the ſecond offence* 20 *s, and impriſonment twenty days, and during the time of his impriſonment to abſtain from eating any manner of fleſh: and ſo like pain and impriſonment, as often as he ſhall afterwards offend.* ſ. 2, 3.

And the juſtices of gaol delivery, and of the peace, ſhall have power to inquire of, hear, and determine the ſame; as in caſes of treſpaſs, or other offence againſt the peace: Half of which forfeitures ſhall be to the king, and be eſtreated into the exchequer, as other fines for any treſpaſs or other offence againſt the peace; and half to him that will ſue in any of the king's courts of record. ſ. 4.

Provided, that this ſtatute ſhall not extend to any perſon that hath obtained any licence of the king; nor to any perſon being in great age, and in debility and weakneſs thereby; nor to any perſon being ſick or notably hurt, without fraud or covin, during the time of his ſickneſs; nor to any woman being with child, or lying in child bed, for eating of ſuch one kind of fleſh as ſhe ſhall have great luſt unto; nor to any perſon being in priſon for any other offence than againſt this act; nor to any that ſhall be the king's lieutenant deputy or captain of any of his majeſty's army hold or fortreſs, but the ſame themſelves may eat fleſh, and licenſe their ſoldiers to do the ſame, in time prohibited, upon the want and lack of other kind of victual; nor to St Laurence even, St Mark's day, or any other day or even being abrogate; neither to any ſuch as heretofore have obtained any licence in due form of the archbiſhop of Canterbury. ſ. 5.

And all archbiſhops, biſhops, archdeacons, and their officers ſhall have power to inquire of offenders in the premiſſes: and preſent the ſame to ſuch, from time to time, as by virtue of this act have authority to hear and determine the ſame. ſ. 6.

Provided, that no perſon be moleſted on this act except he be accuſed, convented, or indicted, within three months after the offence committed. ſ. 7.

By the 5 & 6 Ed. 6. c. 3. *Every even or day next going before any of the aforeſaid days of the feaſts of the nativity of our Lord, of eaſter, of the aſcenſion of our Lord, pentecoſt, and the purification, and the annunciation of the aforeſaid bleſſed virgin, of all ſaints, and of all the ſaid feaſts of the apoſtles (other than of St John the evangeliſt, and Phi-*

lip

lip and Jacob) ſhall be faſted, and commanded to be kept and obſerved; and none other even or day ſhall be commanded to be faſted. ſ. 2.

And it ſhall be lawful to all archbiſhops and biſhops in their dioceſes, and to all other having eccleſiaſtical or ſpiritual juriſdiction, to inquire of every perſon that ſhall offend in the premiſſes, and to puniſh every ſuch offender by the cenſures of the church, and to injoin them ſuch penance as the ſpiritual judge by his diſcretion ſhall think meet and convenient. ſ. 3.

Provided, that this act ſhall not extend to abrogate or take away the abſtinence from fleſh in lent, or on fridays and ſaturdays, or any other day which is already appointed ſo to be kept, by virtue of the aforeſaid act of the 2 & 3 Ed. 6. c. 19. ſaving only of thoſe evens or days whereof the holiday next following is abrogated by this ſtatute. ſ. 4.

And provided, that when any of the ſaid feaſts (the evens whereof be by this ſtatute commanded to be obſerved and kept faſting days) do fall upon the monday; then the ſaturday next before, and not the ſunday, ſhall be commanded to be faſted for the even of any ſuch feaſt or holiday. ſ. 5.

Other than of St John the evangeliſt, and of Philip and Jacob] The one of which falleth within the chriſtmaſs holidays; and the other within the paſchal ſolemnity, betwixt eaſter and whitſuntide. *Gibſ.* 252.

By the rubrick, the table of vigils and faſts and days of abſtinence to be obſerved in the year, is as followeth (which altho' not in words, yet in ſubſtance is the ſame, with what is above expreſſed in the aforeſaid ſtatute;) viz. *the evens or vigils before the nativity of our Lord, the purification of the bleſſed virgin Mary, the annunciation of the bleſſed virgin, eaſter day, aſcenſion day, pentecoſt, St Matthias, St John Baptiſt, St Peter, St James, St Bartholomew, St Matthew, St Simon and St Jude, St Andrew, St Thomas, all ſaints. And if any of theſe feaſts fall upon a monday then the vigil or faſt day ſhall be kept upon the ſaturday, and not upon the ſunday, next before it.*

Vigils] Vigil was ſo called *a vigiliis*, becauſe thereupon people were not only to faſt, but to watch or wake by night, and pray. *Gibſ.* 252.

And by the rubrick aforeſaid, the days of faſting or abſtinence are as followeth: 1. *The forty days of lent.* 2. *The ember days, at the four ſeaſons; being the wedneſday, friday, and ſaturday, after the firſt ſunday in lent, the feaſt of pentecoſt, September the fourteenth, and December the thirteenth.* 3. *The three rogation days; being the monday, tueſ-*

day, and wedneſday, before holy thurſday or the aſcenſion of our Lord. 4. *All the fridays in the year, except chriſtmas day.*

The ember days] Ember days were faſts obſerved in the church very early; and particularly by the church of England in the Saxon times, who called them *ymbryne dagas*, from whence (and not from *embers*, or from the greek ημεραι, as ſome have conjectured) our name of ember days is to be derived. The Saxon *embryne* (ſays Dr. Marſhal) ſignifies a circle, a circuit, or courſe; and therefore they may be not improperly called the circular faſts, or faſts in courſe, being obſerved in the four ſeaſons on which the circle of the year turns, and accordingly called by the canoniſts *jejunia quatuor temporum*, or faſts of the four quarters of the year. *Gibſ.* 252.

Rogation days] Dr. *Grey* ſays, the rogation days were ſo called; from the extraordinary prayers and ſupplications which, with faſting, were at this time offered to God by devout chriſtians. *Grey Abr. Cod.* 101.

But Dr. *Godolphin* ſays, the rogation days had their name, from certain rules or ordinances for abſtinence or days of faſting, which the biſhop of Rome recommended to be obſerved by the weſtern churches, before that he aſſumed the power of compulſion; and which therefore he called by the gentle name of *rogation:* and thence the week of abſtinence, a little before the feaſt of pentecoſt, was called the rogation week, the time of abſtinence being appointed at the beginning by that ordinance which was called *rogatio*, and not *lex*, *decretum*, *ſtatutum*, or the like. *God.* 129.

By the 5 El. c. 5. intitled, An act touching political conſtitutions for the maintenance of the navy; *For the maintenance of the navy, and for the ſparing and increaſe of fleſh victual, it ſhall not be lawful to any perſon to eat any fleſh upon any days now uſually obſerved as fiſh days; on pain of* [20 s *or one month's cloſe impriſonment without bail,* 35 El. c. 7. ſ. 22.] ſ. 15.

And every perſon within whoſe houſe ſuch offence ſhall be done, and being privy or knowing thereof, and not effectually publiſhing or diſcloſing the ſame to ſome publick officer having authority to puniſh the ſame; ſhall forfeit [13 s 4 d. 35 El. c. 7. ſ. 22.] ſ. 16.

All which forfeitures for not abſtaining from meats, ſhall be one third to the queen, one third to the informer, and one third to the common uſe of the pariſh where the offence ſhall be committed;

mitted; and to be levied by the churchwardens after conviction in that behalf. ſ. 16.

Provided, that nothing in this act contained, concerning the eating of fleſh, ſhall extend to any perſon that hereafter ſhall have any ſpecial licence, upon cauſes to be contained in the ſame licence, and to be granted according to the laws of this realm in ſuch caſes provided. ſ. 17.

All and every of which licences ſhall be void, unleſs they contain theſe conditions; viz. every licence made to any perſon being of the degree of a lord of parliament, or of their wives, ſhall be upon condition, that every ſuch perſon ſo to be licenſed, ſhall pay to the poor mens box, within the pariſh where they dwell, on the feaſt of the purification or within ſix days after, 26 *s* 8 *d; the ſame to be paid within one month next after the ſame feaſt, on pain of forfeiting the licence: and every licence to any perſon of the degree of a knight, or a knight's wife, ſhall be upon condition, that every ſuch perſon ſo licenſed ſhall pay yearly* 13 *s* 4 *d as aforeſaid: and every licence to any perſon under the degrees aboveſaid, ſhall be upon condition, that every perſon ſo licenſed ſhall pay yearly* 6 *s* 8 *d as aforeſaid.* ſ. 18.

Provided, that no licence ſhall extend to the eating of any beef, at any time of the year; nor to the eating of any veal in any year, from the feaſt of St Michael, unto the firſt day of May. ſ. 19.

Provided, that all perſons which by reaſon of notorious ſickneſs ſhall be inforced, for recovery of health to eat fleſh for the time of their ſickneſs, ſhall be ſufficiently licenſed by the biſhop of the dioceſe; or by the parſon vicar or curate of the pariſh where ſuch perſon ſhall be ſick, or of one of the next pariſh adjoining, if the ſaid parſon vicar or curate of his own pariſh be wilful, or if there be no curate within the ſame pariſh: which licence ſhall be made in writing, and ſigned by ſuch biſhop parſon vicar or curate, and not endure longer than the time of the ſickneſs; and if the ſickneſs continue above eight days after ſuch licence granted, then the licence ſhall be regiſtred in the church book, with the knowledge of one of the churchwardens; and the party licenſed ſhall give to the curate 4 *d for the entry thereof; and that licence to endure no longer but only for the time of his ſickneſs.* ſ. 20.

And if any licence by any parſon vicar or curate be granted to any perſon, other than ſuch as evidently appear to have need thereof by reaſon of their ſickneſs; not only every ſuch licence ſhall be void, but alſo every ſuch parſon vicar or curate ſhall forfeit for every ſuch licence otherwiſe granted, five marks. ſ. 21

Provided, that all ſuch perſons as heretofore were or ought to be licenſed, by reaſon of age or other impediment or cauſe, by order of the eccleſiaſtical laws, ſhall enjoy the ſame privilege and accuſtomed licences. ſ. 23.

And juſtices of the peace in their ſeſſions, and mayors and other head officers in cities and towns corporate in their ſeſſions or other courts, ſhall have power to inquire of offenders againſt this act, as well by the oaths of twelve men, as otherwiſe by information; and thereupon to hear and determine the ſame. ſ. 30.

And they may make proceſs againſt the offenders, as upon indictment of treſpaſs. ſ. 31.

And for levying the forfeitures, the ſaid juſtices mayors or other head officers ſhall have power to make ſuch proceſs, as they ſhall think good by their diſcretions. ſ. 34.

But no information at the ſuit of any perſon concerning this act, ſhall be of any effect to put any perſon to anſwer, except the ſame be within half a year after the offence done; and no information or preſentment for the queen, ſhall be of any effect to put any perſon to anſwer, except the ſame be within one year after the offence done. ſ. 35.

Provided, that ſuch perſons as ſhall have, upon good and juſt conſideration, any lawful licence to eat fleſh upon any fiſh day (except ſuch perſons as for ſickneſs ſhall for the time be licenſed by the biſhop of the dioceſe, or by their curates, or ſhall be licenſed by reaſon of age or other impediment allowed heretofore by the eccleſiaſtical laws of this realm;) ſhall be bound by force of this ſtatute to have for every one diſh of fleſh ſerved to be eaten at their table, one uſual diſh of ſea fiſh freſh or ſalt, to be likewiſe ſerved at the ſame table, and to be eaten or ſpent without fraud or covin, as the like kind is or ſhall be uſually eaten or ſpent on ſaturdays. ſ. 37.

And this article to be taken and interpreted in the favour of expence of ſea fiſh; and the offender to be puniſhed in like manner as is ordered by this ſtatute for puniſhment of ſuch as ſhall eat fleſh upon fridays, ſaturdays, or other fiſh days. ſ. 38.

And becauſe no manner of perſon ſhall misjudge of the intent of this ſtatute, limiting orders to eat fiſh, and to forbear eating of fleſh, but that the ſame is purpoſely intended and meant politickly for the increaſe of fiſhermen and mariners, and repairing of port towns and navigation, and not for any ſuperſtition to be maintained in the choice of meats: it is enacted, that whoſoever ſhall by preaching, teaching, writing, or open ſpeech notify, that any eating of fiſh, or forbearing of fleſh, mentioned in this ſtatute, is of any neceſſity for the ſaving of the ſoul of man, or that it is the ſervice of God, otherwiſe than

as

as other politick laws are and be; that then ſuch perſons ſhall be puniſhed as ſpreaders of falſe news are and ought to be. ſ. 39, 40.

And by the 27 El. c. 11. ſ. 4. *To the intent that the fridays, ſaturdays, and days appointed by former laws to be fiſh days, may the better be obſerved, for the utterance and expence of fiſh, and for the ſparing of fleſh; no innholder, taverner, alehouſekeeper, common victualler, common cook, or common table keeper, ſhall utter or put to ſale, or cauſe to be uttered or put to ſale, on the ſaid days, not being chriſtmaſs day, or upon any day in the time of lent, any kind of victuals except it be to ſuch perſons reſorting to his houſe as ſhall have lawful licence to eat the ſame, according to the tenor of the* 5 *El. c.* 5.*)*; *on pain of* 5 *l and ten days impriſonment without bail, one third to the queen, one third to the lord of the leet where the offence ſhall be committed, and one third to him that ſhall ſue in any of her majeſty's courts of record: and the ſaid offences, by virtue of this ſtatute, ſhall be inquired of heard and determined, in manner and form as is expreſſed for the offences contained in the ſaid ſtatute of the* 5 El.

Lord *Coke* ſays, before theſe acts the eating of fleſh on fridays was puniſhable in the eccleſiaſtical court; as yet it is, the juriſdiction being ſaved by the ſaid acts. 3 *Inſt.* 200.

4. Rubrick after the nicene creed: *the curate ſhall then declare to the people, what holidays or faſting days are in the week following to be obſerved.* Repairing to church on holidays.

Can. 64. Every parſon vicar or curate ſhall in his ſeveral charge declare to the people every ſunday, at the time appointed in the communion book, whether there be any holidays or faſting days the week following. And if any do hereafter wittingly offend herein, and being once admoniſhed thereof by his ordinary, ſhall again omit that duty; let him be cenſured according to law, until he ſubmit himſelf to the due performance of it.

Can. 13. All manner of perſons within the church of England ſhall from henceforth celebrate and keep the Lord's day commonly called ſunday, and other holidays, according to God's will and pleaſure and the orders of the church of England preſcribed on that behalf; that is, in hearing the word of God read and taught, in private and publick prayers, in acknowledging their offences to God and amendment of the ſame, in reconciling themſelves charitably to their neighbours where diſpleaſure hath been, in oftentimes receiving the communion of the body and blood of Chriſt, in viſiting of the poor and ſick, uſing all godly and ſober converſation.

Can.

Can. 14. The common prayer ſhall be ſaid or ſung, diſtinctly and reverently, upon ſuch days as are appointed to be kept holy by the book of common prayer, and their eves.

By the 1 El. c. 2. *Every perſon ſhall diligently and faithfully, having no lawful or reaſonable excuſe to be abſent, endeavour themſelves to reſort to their pariſh church or chapel accuſtomed, or upon reaſonable let thereof, to ſome uſual place where common prayer and ſuch ſervice of God ſhall be uſed in ſuch time of let, upon every ſunday and other days ordained and uſed to be kept as holidays, and then and there to abide orderly and ſoberly, during the time of the common prayer, preaching, or other ſervice of God there to be uſed and miniſtred: on pain of puniſhment by the cenſures of the church, and alſo upon pain that every perſon ſo offending ſhall forfeit for every ſuch offence* 12 *d, to be levied by the churchwardens of the pariſh where ſuch offence ſhall be done, to the uſe of the poor of the ſame pariſh, of the goods lands and tenements of ſuch offender, by way of diſtreſs.* ſ. 14.

Provided, that whatſoever perſons offending in the premiſſes, ſhall for their offences firſt receive puniſhment of the ordinary, having a teſtimonial thereof under the ordinary's ſeal, ſhall not for the ſame offence eftſoons be convicted before the juſtices; and likewiſe receiving for the ſaid offence puniſhment firſt by the juſtices, ſhall not for the ſame offence eftſoons receive puniſhment of the ordinary. ſ. 24.

And the juſtices of aſſize may hear and determine the ſame, and make proceſs for execution as they may do in caſes of treſpaſs. ſ. 17.

Or the ſame may be determined by one juſtice of the peace; to whom it ſhall be lawful, on proof to him made of ſuch default by confeſſion or oath of witneſs, to call the party before him: and if he ſhall not make a ſufficient excuſe, and due proof thereof to the ſatisfaction of the ſaid juſtice, he ſhall give warrant to the churchwardens of the pariſh where the party ſhall dwell, to levy 12 *d for every ſuch default by diſtreſs and ſale; and in default of ſuch diſtreſs, ſhall commit him to priſon till payment be made: which forfeiture ſhall be applied to the uſe of the poor of that pariſh wherein the offender ſhall dwell at the time of the offence committed.* 3 J. c. 4. ſ. 27. *Provided, that proſecution be within one month.* ſ. 28.

But this ſhall not extend to qualified proteſtant diſſenters, who repair to ſome place of religious worſhip allowed by the toleration act. 1 *W.* c. 18.

Fairs prohibited on certain holidays.

5. By the 27 H. 6. c. 5. *Conſidering the abominable injuries and offences done to almighty God, and to his ſaints, always*

ways aiders and ſingular aſſiſters in our neceſſities, becauſe of fairs and markets upon their high and principal feaſts as in the feaſt of the aſcenſion of our Lord, in the day of corpus chriſti, in the high feaſt of the aſſumption of our bleſſed lady, the day of all ſaints, and on good friday, accuſtomably and miſerably holden and uſed in the realm of England; in which principal and feſtival days, for great earthly covetiſe, the people is more willingly vexed, and in bodily labour foiled, than in other ferial days, as in faſtening and making their booths and ſtalls, bearing and carrying, lifting and placing their wares outward and homeward, as tho' they did nothing remember the horrible defiling of their ſouls in buying and ſelling, with many deceitful lies and falſe perjury, with drunkenneſs and ſtrifes, and ſo ſpecially withdrawing themſelves and their ſervants from divine ſervice; it is ordained, that all manner of fairs and markets in the ſaid principal feaſts and good friday ſhall clearly ceaſe from all ſhewing of any goods or merchandiſes (neceſſary victual only except) upon pain of forfeiture of all the goods aforeſaid ſo ſhewed, to the lord of the franchiſe or liberty where ſuch goods contrary to this ordinance be or ſhall be ſhewed. Nevertheleſs the king of his ſpecial grace by authority of the parliament granteth to them power, which of old time had no day to hold their fair or market, but only upon the feſtival days aforeſaid, to hold by the ſame authority and ſtrength of his old grant, within three days next before the ſaid feaſts, or next after; proclamation firſt made to the ſimple common people, upon which day the aforeſaid fair ſhall be holden, always to be certified without any fine or fee to be taken to the king's uſe. And they which of old time have by ſpecial grant, ſufficient days before the feaſt aforeſaid, or after, ſhall in like manner as is aforeſaid hold their fairs and markets, the full number of their days; the ſaid feſtival days; and good fridays, (and ſundays) except.

Occaſional offices.

6. Beſides the occaſional faſt days, in time of war, or other calamity; and days of thankſgiving for peace, or victory, or other bleſſing: there are four ſolemn days annually, for which ſpecial ſervices are appointed: to wit, the fifth day of November, being the day of the papiſt's conſpiracy, and of the arrival of king William; the thirtieth day of January, being the day of the martyrdom of king Charles the firſt; the nine and twentieth day of May, being the day of the reſtoration of king Charles the ſecond; and the twenty fifth day of October, being the day on which his majeſty began his happy reign.

For the fifth of November.

7. By the 3 J. c. 1. *Foraſmuch as almighty God hath in all ages ſhewed his power and mercy in the miraculous and gracious*

gracious deliverance of his church, and in the protection of religious kings and ſtates; and that no nation of the earth hath been bleſſed with greater benefits than this kingdom now enjoyeth, having the true and free profeſſion of the goſpel under our moſt gracious ſovereign lord king James, the moſt great learned and religious king that ever reigned therein, inriched with the moſt hopeful and plentiful progeny, proceeding out of his royal loins promiſing continuance of this happineſs and profeſſion to all poſterity: the which many malignant and deviliſh papiſts jeſuits and ſeminary prieſts much envying and fearing, conſpired moſt horribly, when the king's moſt excellent majeſty, the queen, the prince, and all the lords ſpiritual and temporal and commons ſhould have been aſſembled in the upper houſe of parliament, upon the fifth day of November in the year of our Lord one thouſand ſix hundred and five, ſuddenly to have blown up the ſaid whole houſe with gunpowder: an invention ſo inhuman barbarous and cruel, as the like was never before heard of, and was (as ſome of the principal conſpirators thereof confeſs) purpoſely deviſed and concluded to be done in the ſaid houſe, that where ſundry neceſſary and religious laws for preſervation of the church and ſtate were made, which they falſly and ſlanderouſly term cruel laws, enacted againſt them and their religion, both place and perſons ſhould all be deſtroyed and blown up at once; which would have turned to the utter ruin of this whole kingdom, had it not pleaſed Almighty God, by inſpiring the king's moſt excellent majeſty with a divine ſpirit, to interpret ſome dark phraſes of a letter ſhewed to his majeſty, above and beyond all ordinary conſtruction, thereby miraculouſly diſcovering this hidden treaſon not many hours before the appointed time for the execution thereof: therefore the king's moſt excellent majeſty, the lords ſpiritual and temporal, and all his majeſty's faithful and loving ſubjects, do moſt juſtly acknowledge this great and infinite bleſſing to have proceeded merely from God his great mercy, and to his moſt holy name do aſcribe all honour glory and praiſe: and to the end this unfeigned thankfulneſs may never be forgotten, but be had in a perpetual remembrance, that all ages to come may yeild praiſes to his divine Majeſty for the ſame, and have in memory this joyful day of deliverance; ſ. 1.

It is enacted, that all and ſingular miniſters in every cathedral and pariſh church, or other uſual place for common prayer, ſhall always upon the fifth day of November ſay morning prayer, and give unto Almighty God thanks for this moſt happy deliverance; and all perſons ſhall always upon that day diligently and faithfully reſort to the pariſh church or chapel accuſtomed, or to ſome uſual church or chapel where the ſaid morning prayer, preaching or other ſervice of God ſhall be uſed,

and

and then and there to abide orderly and ſoberly during the time of the ſaid prayers preaching or other ſervice of God there to be uſed and miniſtred. ſ. 2.

And that every perſon may be put in mind of his duty, and be then better prepared to the ſaid holy ſervice; every miniſter ſhall give warning to his pariſhioners, publickly in the church, at morning prayer, the ſunday before every ſuch fifth day of November, for the due obſervation of the ſaid day. ſ. 3.

And after morning prayer or preaching upon the ſaid fifth day of November; they ſhall read publickly, diſtinctly, and plainly this preſent act. Id.

Give unto Almighty God thanks] It ſhould ſeem by the tenor of this act, that the form or manner of giving thanks was left to the diſcretion of every miniſter: but that there was a ſtanding form for this day, in the 16 *C.* 1. appears from this order of the houſe of lords; "Ordered, that the "title before the prayers for the deliverance from the "gunpowder plot ſhall be altered and printed hereafter "*in hæc verba*, viz. A thankſgiving for the delivery from "the gunpowder treaſon: And the printer is to be ſent "for to appear before the houſe, to be aſked how this "title that is now prefixed, viz. A thankſgiving for "peace and victory, came to be introduced." *Gibſ.* 249.

This office was reviſed by the convocation, in the year 1662; and afterwards ſome few additions and alterations were made, upon a new reviſal in the ſecond year of William and Mary; and ſo continueth. *Gibſ.* 249.

And the title thereof is this: *A form of prayer with thankſgiving, to be uſed yearly upon the fifth day of November; for the happy deliverance of king James the firſt, and the three eſtates of England, from the moſt traiterous and bloody intended maſſacre by gunpowder; and alſo for the happy arrival of his majeſty king William on this day, for the deliverance of our church and nation.*

And altho' the due obſervation of this day, as alſo of the thirtieth of January, and the twenty-ninth of May, are injoined by act of parliament; yet the particular forms to be uſed on thoſe days, are not previouſly directed, nor ſubſequently confirmed by any act of parliament; but they are ſpecially authorized (as is alſo that of the king's inauguration) by this order of his majeſty:

"GEORGE R.

"Our will and pleaſure is, that theſe four forms of "prayer, made for the fifth of November, the thirtieth "of January, the twenty ninth of May, and the twenty "fifth

" fifth of October, be forthwith printed and publiſhed, " and annexed to the book of common prayer and li- " turgy of the church of England, to be uſed yearly on " the ſaid days, in all cathedral and collegiate churches " and chapels, in all chapels of colleges and halls with- " in both our univerſities, and of all our colleges of Eaton " and Wincheſter, and in all pariſh churches and cha- " pels within that part of our kingdom of Great Britain " called England, the dominion of Wales, and town of " Berwick upon Tweed. Given at our court at St " James's, the ſeventh day of October, 1761, in the " firſt year of our reign.

" By his majeſty's command;

" BUTE."

Dr *Watſon* queſtioneth (and juſtly as it ſeemeth) the ordinary's power, to puniſh for the neglect of keeping the ſolemn days, injoined by act of parliament; becauſe the reſpective acts do give to the ordinary no ſuch power. *Watſ. c.* 32.

But there ſeemeth to be no doubt, ſo far as the ſeveral offences ſhall fall within the words of the ſaid acts, but that the offenders may be thereupon indicted, fined, and impriſoned for the contempt.

For the thirtieth of January.

8. By the 12 C. 2. *c.* 30. it is enacted, by the lords and commons aſſembled in parliament; that *every thirtieth day of January, unleſs it falls out to be upon the Lord's day, and then the next day following, ſhall be for ever ſet apart, to be kept and obſerved in all churches and chapels, as an anniverſary day of faſting and humiliation, to implore the mercy of God, that neither the guilt of the ſacred and innocent blood of his late majeſty king Charles the firſt, nor thoſe other ſins by which God was provoked to deliver up both us and our king into the hands of cruel and unreaſonable men, may at any time be viſited upon us or our poſterity.*

The form of prayer for this ſolemnity, and alſo for that of the 29th of May, were of a different complexion in the reign of king Charles the ſecond from what they are now. Of which, the reaſon is ſaid to have been this: The parliament and other leading men who called home king Charles the ſecond (many of whom had been concerned in oppoſing his father's meaſures) would not be called traytors; and required that a diſtinction ſhould be made between the commencement of the war, and the concluſion of it: they would not ſuffer the firſt oppoſition made to the meaſures of that unhappy prince to be ſtyled rebellion;

bellion; notwithſtanding that they diſapproved of the abolition of the regal government which enſued.

And accordingly the offices for theſe two ſolemnities were drawn up, without any reflection on the firſt authors or promoters of the oppoſition; and, in general breathe more a ſpirit of piety than of party, of humiliation than of revenge; and, throughout, are modeſt, grave, decent, ſenſible and devout.

King James the ſecond altered theſe forms. And king William did not venture to reduce them to their primitive ſtate. And ſo they have continued, with very little variation, to this day.

9. By the 12 C. 2. c. 14. *Foraſmuch as almighty God the King of kings, and ſole diſpoſer of all earthly crowns and kingdoms, hath by his all-ſwaying providence and power miraculouſly demonſtrated in the view of all the world, his tranſcendent mercy love and graciouſneſs, towards his moſt excellent majeſty Charles the ſecond, by his eſpecial grace, of England, Scotland, France and Ireland, king, defender of the true faith, and all his majeſty's loyal ſubjects of this his kingdom of England, and the dominions thereunto annexed by his majeſty's late moſt wonderful glorious peaceable and joyful reſtauration, to the actual poſſeſſion and exerciſe of his undoubted hereditary ſovereign and regal authority over them (after ſundry years forced extermination into foreign parts, by the moſt traiterous conſpiracies, and armed power of uſurping tyrants, and execrable perfidious traytors) and that without the leaſt oppoſition or effuſion of blood, thro' the unanimous cordial loyal votes of the lords and commons in this preſent parliament aſſembled, and paſſionate deſires of all other his majeſty's ſubjects; which unexpreſſible bleſſing (by God's own moſt wonderful diſpenſation) was compleated on the twenty ninth day of May laſt paſt, being the moſt memorable birth day, not only of his majeſty, both as a man and prince, but likewiſe as an actual king, of this and other his majeſty's kingdoms, all in a great meaſure new born and raiſed from the dead on this moſt joyful day, wherein many thouſands of the nobility gentry citizens and other his lieges of this realm, conducted his majeſty unto his royal cities of London and Weſtminſter, with all poſſible expreſſions of their publick joy and loyal affections, in far greater triumph than any of his moſt victorious predeceſſors kings of England, returned thither from their foreign conqueſts; and both his majeſty's houſes of parliament, with all dutiful and joyful demonſtrations of their allegiance, publickly received, and cordially congratulated his majeſty's moſt happy arrival, and inveſtiture in his royal throne, at his palace at Whitehall: Upon all which conſiderations, this* For the twenty ninth of May.

being the day which the Lord himſelf hath made and crowned with ſo many publick bleſſings and ſignal deliverances, both of his majeſty and his people, from all their late moſt deplorable confuſions, diviſions, wars, devaſtations and oppreſſions, to the end that it may be kept in perpetual remembrance in all ages to come, and that his ſacred majeſty with all his ſubjects of this real and the dominions thereof, and their poſterities after them, might annually celebrate the perpetual memory thereof, by ſacrificing their unfeigned hearty publick thanks thereon to almighty God, with one heart and voice, in a moſt devout and chriſtian manner, for all theſe publick benefits received and conferred on them, upon this moſt joyful day; it is enacted, by the king's moſt excellent majeſty, and the lords and commons in parliament aſſembled, that all and ſingular miniſters of God's word and ſacraments, in every church chapel and other uſual place of divine ſervice and publick prayer, which now are, or hereafter ſhall be within this realm of England and the dominions thereof, and their ſucceſſors, ſhall in all ſucceeding ages annually celebrate the twenty ninth day of May, by rendring their hearty publick praiſes and thankſgivings unto almighty God, for all the forementioned extraordinary mercies bleſſings and deliverances received, and mighty acts done thereon, and declare the ſame to all the people there aſſembled, and the generations yet to come, that ſo they may for ever praiſe the Lord for the ſame, whoſe name alone is excellent, and his glory above the earth and heavens.

And be it further enacted, that every perſon inhabiting within this kingdom and the dominions thereunto belonging, ſhall upon the ſaid day anually reſort with diligence and devotion, to ſome uſual church chapel or place, where ſuch publick thankſgiving and praiſes to God's moſt divine majeſty ſhall be rendred, and there orderly and devoutly abide during the ſaid publick thankſgivings, prayers, preaching, ſinging of pſalms and other ſervice of God there to be uſed and miniſtred:

And to the end that all perſons may be put in mind of their duty thereon, and be the better prepared to diſcharge the ſame with that piety and devotion as becomes them; be it further enacted, that every miniſter ſhall give notice to his pariſhioners publickly in the church at morning prayer the Lord's day next before every ſuch twenty ninth day of May, for the due obſervation of the ſaid day, and ſhall then likewiſe publickly and diſtinctly read this preſent act to the people.

Of the difference between the form of prayer which was firſt drawn up for this ſervice, and uſed during the reign of king Charles the ſecond, and the form which is now

now uſed, it is thought fit here to ſubjoin ſome ſtriking ſpecimens.

Office of Cha. 2.	Office of Ja. 2. (now in uſe)
Title thereof, and rubrick.	
A form of prayer with thankſgiving, to be uſed yearly upon the 29th day of May; being the day of his majeſty's birth, and happy return to his kingdoms.	A form of prayer with thankſgiving to almighty God, for having put an end to the great rebellion, by the reſtitution of the king and royal family, and the reſtoration of the government, after many years interruption: which unſpeakable mercies were wonderfully completed upon the 29th of May, in the year 1660. And in memory thereof, that day in every year is by act of parliament appointed to be for ever kept holy. The act of parliament for the obſervation of this day, ſhall be read publickly in all churches on the Lord's day next before; and notice to be given for the due obſervation of the ſaid day.
Collect.	
. . . We yield thee praiſe and thankſgiving for our deliverance from thoſe great and apparent dangers wherewith we were compaſſed.	. . . We yield thee praiſe and thankſgiving for the wonderful deliverance of theſe kingdoms from the great rebellion, and all the miſeries and oppreſſions conſequent thereupon, under which they had ſo long groaned. . . . We yield thee thanks . . for our deliverance . . . from the unnatural rebellion, uſurpation, and tyranny, of ungodly and cruel men.

Finally, by way of contraſt, the ſpirit both of the one and the other will appear, from the following anecdotes.

Office of Cha. 2.	Office of Ja. 2.
O God, who by thy divine providence and goodneſs didſt this day firſt bring into the world, and didſt this day alſo bring back and reſtore to us, and	Almighty God, and heavenly Father, who of thine infinite and unſpeakable goodneſs towards us, didſt in a moſt extraordinary and wonderful manner diſappoint and

and to his own juſt and undoubted rights, our moſt gracious ſovereign lord thy ſervant king Charles; preſerve his life, and eſtabliſh his throne, we beſeech thee. Be unto him a helmet of ſalvation againſt the face of his enemies, and a ſtrong tower and defence in the time of trouble. Let his reign be proſperous, and his days many. Let juſtice, truth, and holineſs; let peace, and love, and all chriſtian virtues flouriſh in his time. Let his people ſerve him with honour and obedience; and let him ſo duly ſerve thee on earth, that he may hereafter everlaſtingly reign with thee in heaven, through Jeſus Chriſt our Lord. Amen.

O Lord our God, who upholdeſt and governeſt all things in heaven and earth; receive our humble prayers, with our thankſgivings, for our ſovereign lord Charles, ſet over us by thy grace and providence to be our king: and ſo, together with him, bleſs the whole royal family with the dew of thy heavenly Spirit; that they, ever truſting in thy goodneſs, protected by thy power, and crowned with thy gracious and endleſs favour, may continue before thee in health, peace, joy, and honour, a long and happy life upon earth, and after death obtain everlaſting life and glory in the kingdom of heaven; by the merits and mediation of Chriſt Jeſus our Saviour, who with the Father and the Holy Spirit, liveth and reigneth ever one God, world without end. Amen.

and overthrow the wicked deſigns of thoſe traiterous, heady, and highminded men, who under pretence of religion and thy moſt holy name, had contrived, and well nigh effected the utter deſtruction of this church and kingdom; as we do this day moſt heartily and devoutly adore and magnify thy glorious name for this thine infinite goodneſs already vouchſafed to us; ſo do we moſt humbly beſeech thee to continue thy grace and favour towards us, that no ſuch diſmal calamity may ever again fall upon us. Infatuate and defeat all the ſecret counſels of deceitful and wicked men againſt us. Abate their pride, aſſwage their malice, and confound their devices. Strengthen the hand of our now moſt gracious ſovereign, and all that are put in authority under him, with judgment and juſtice, to cut off all ſuch workers of iniquity, as turn religion into rebellion, and faith into faction; that they may never again prevail againſt us, nor triumph in the ruin of the monarchy, and thy church among us. Protect and defend our ſovereign lord the king, with the whole royal family, from all treaſons and conſpiracies. Be unto him an helmet of ſalvation, and a ſtrong tower of defence againſt the face of all his enemies; clothe them with ſhame and confuſion, but upon himſelf and his poſterity let the crown for ever flouriſh. So we thy people, and the ſheep of thy paſture, will give thee thanks for ever, and will always be ſhewing forth thy praiſe, from generation to generation, thro' Jeſus Chriſt our only Saviour and Redeemer; to whom with thee, O Father, and the Holy Ghoſt, be glory in the church, throughout all ages, world without end. Amen.

Note,

Note, there is no order in either of these offices, for a sermon or homily on this day; and in the office of Cha. 2. there is no direction for a sermon or homily on the 30th of January, but by the office of James 2d it is required that on the said 30th day of Jan. shall be read the first and second parts of the homily against disobedience and wilful rebellion, or else the minister shall preach a sermon of his own composing upon the same argument.

10. The inauguration day, or the day when the king or queen, for the time being, began their respective reigns, is not injoined by act of parliament, as are the other solemn days for which particular services are appointed. The observation of this day, in the time of king Charles the first, was inforced by a particular canon in the year 1640, after the example (as it is said in the preface to that canon) as well of the godly christian emperors in the former times, as of our own most religious princes since the reformation: and the said preface further saith, that a particular form of prayer was appointed by authority for that day and purpose, and injoineth all churchwardens to provide two of those books at least. This festival was disused in the reign of king Charles the second, upon occasion of the death of his royal father, the manner of which changed the day into a day of sorrow and fasting, as is set forth in the order for reviving that usage in the first year of king James the second, before the service composed for that purpose. Which service (after another disuse of that festival during the reign of king William) was revised, and the observation of the day commanded by a special order thereunto annexed, in the second year of queen Anne, and so continueth to this time. *Gibs.* 246. For the [illegible] inaugu[illegible]

Some have questioned by what authority of law this solemnity, as also the other occasional thanksgivings and fasts appointed by the king, are kept. Upon which Mr *Johnson* observeth, that it is sufficient in this case (as he thinketh) that the two houses of parliament have and do own this power to be lodged in the crown, as they do by submitting to these royal commands in observing such days, and sometimes petitioning him to order these religious solemnities. *Johns. Cler. Vad. Mec.* 182.

Nevertheless this same Mr Johnson afterwards, in the year 1715, being cited before the ordinary to give an account why he omitted in his church the service of the king's inauguration, persisted in his omission thereof, and

gave this for the reaſon (which he deſired might be underſtood as well for his omiſſion of the ſervice of that day, as of other occaſional prayers at other times); namely, that the king's proclamation hath not the force of a law in England; that the king is ſupreme in eccleſiaſtical cauſes, only as he is ſo in temporal, that is, in his courts; and that he knoweth (he ſays) of no ſupremacy, which is exerciſed without either parliament, or convocation, or court of delegates, or the courts in Weſtminſter hall; or however, that the king's ſupremacy, whatever it is, in this reſpect is reſtrained and limited by act of parliament; that by the 36th canon, every clergyman is required to promiſe under his hand, that he will uſe the form in the book of common prayer preſcribed, *and no other*; that by the ſtatute of the 5 & 6 Ed. 6. c. 3. all the days there mentioned ſhall be kept as holidays, *and none other*; and that by the ſeveral acts of uniformity, all miniſters are required to uſe the form preſcribed in the book of common prayer, *and none other, or otherwiſe.*——And the proſecution againſt him (he ſays) did not proceed. *Johnſon*'s caſe of occaſional days and prayers.—This was in the year 1721, after the cauſe had reſted for ſix years. But whether it was upon the occaſion of Mr Johnſon's publiſhing this caſe, or for whatever other reaſon, it appears, that the proſecution did afterwards proceed. And in archbiſhop Wake's *Collectanea*, now belonging to the library of *Chriſt-church* in Oxford, (Canterbury. v. 4. art. 276.) there is a letter from Dr Bower, archdeacon of Canterbury (who was then alſo biſhop of Chicheſter) to archbiſhop Wake, propoſing methods of bringing Mr Johnſon's cauſe to ſpeedy iſſue; dated Oct. 26. 1723.

Then, Art. 277. follows a copy of Mr Johnſon's proxy; viz.

"Whereas there has been a cauſe of office &c. And whereas divers articles have been given in and admitted, to which the ſaid Johnſon had given a negative office ——as by the act &c.——Now know all men by theſe preſents, that I the ſaid J. J. do acknowledge and confeſs my ſelf ſorry for having given offence in the matters contained in the ſaid articles, and do hereby retract the negative iſſue given by me to them, and do confeſs the ſaid articles in all and every part thereof, and ſubmit my ſelf in all things to the right reverend the archdeacon aforeſaid, or his official; and do hereby ſincerely promiſe not to offend in the like manner for the future: and being aged and infirm, and very unfit to travel from my ſaid vi-

carage to Canterbury, but desirous that this my retraction of the negative issue given by me to the said articles, and my promise not to offend in the like manner for the future, may have their due effect; I do hereby constitute and appoint Mr. George Upton, one of the proctors of the said archdeacon's court, to be my lawful and undoubted proctor, for me, and in my name, to appear before the right reverend the archdeacon aforesaid, or his official, or surrogate, or any other competent judge in this behalf, to pray and procure this my retraction of the negative issue given by me to the said articles to be admitted, and to confess the same in all their parts, with a promise in my name not to offend in the like manner for the future; and submitting in all things to what the right reverend the archdeacon or his official shall do touching the premisses; ratifying, allowing, and hereby confirming whatsoever my said proctor shall fully do or cause to be done herein. In witness whereof, I have hereunto set my hand and seal, this third day of March, 1723.

John Johnson.

Then follows,

6to. Martii 1723 Coram Dno Wise, &c.

Procures hinc inde consenserunt in diem &c. Tunc Upton ext' procurium suum spiale sub manu et sigillo J. J. Clici partis suæ firmatum et vigore ejusdem retractavit responsa sua negativa aliis artis con' eundem J. J. extis facta et data et animo contestandi litem affirmative et eosdem agnovit omnes et singulos artos præd' in omni parte eorundem esse veros et nomine partis suæ submisit se Rdo Dno Epo Ciceastr' Archiono Cant' ejusq' officiali cum promissione de non repetendo offensiones in articulis præd' objectas et homoi procurium retactionem confession' submission' et promission' admisit Quatus &c. in præsentia Norris eadem confessa oblata et acta per Upton acceptantis. Tunc dtus Upton petiit dtum J. J. partem suam dimitti dto Norris dissen' ad cujus petnem Dnus decrevit Monem contra dtum J. J. ad legend' et recitand' in Eccliа sua paraoli de Cranbrook Formulas precum publicar' 29 Maii 1o Augusti 5to Novembris et 30 vel 31 Jan' legi et recitari authoritate Regia injunctas diebus respve præd' et ad certificand' Dno Archiono præd' e-

juſve officiali aut alii Judici in hac parte competent' de obedientia ſua in hac parte facta primo die Juridico poſt 30m Januarii prox futur' et condemnavit dtum J. J. in expenſis &c. et aſſignavit Procuribus hinc inde ad audiend' Voltem &c. ſuper petnem dti Upton et ſuper taxation' earundem expenſarum in proxm &c. dto Upton diſſen'.

Art. 292. Extract from a letter to archbiſhop Wake, in Mr Johnſon's own hand-writing.

Cranbrook. Lady-day, 12 4.

May it pleaſe Your Grace,

To accept of my moſt humble thanks for Your Lenity, in the point of extraordinary days and occaſional prayers. And I promiſe that I will never give You juſt occaſion to repent of it.———

Homilies. See Publick worſhip.

Hoſpitals.

FOR Papiſts being diſabled to nominate to hoſpitals, ſee title Popery.

Divers kinds of hoſpitals.

1. Of hoſpitals, ſome are corporations aggregate of many, as of maſter or warden, and his confreres; ſome, where the maſter or warden hath only the eſtate of inheritance in him, and the brethren or ſiſters power to conſent, having college and common ſeal; ſome, where the maſter or warden hath only the eſtate in him, but hath no college and common ſeal. And of theſe hoſpitals ſome be eligible, ſome donative, and ſome preſentable. 1 *Inſt.* 342.

Power of foundation.

2. By the 39 *Eliz. c.* 5. (made perpetual by the 21 *Jac. c.* 1.) *Every perſon ſeiſed of an eſtate in fee ſimple, ſhall have full power at his will and pleaſure, by deed inrolled in the high court of chancery, to erect found and eſtabliſh an hoſpital, maiſon de Dieu, abiding place, or houſe of correction, as well for the finding ſuſtentation and relief of the maimed poor needy or impotent people, as to ſet the poor to work; to have continuance for ever; and from time to time to place therein ſuch head and members, and ſuch number of poor, as to*

him his heirs and aſſigns ſhall ſeem convenient: And ſuch hoſpital ſo founded, ſhall be incorporated, and have perpetual ſucceſſion for ever; by ſuch name as the founder, his heirs, executors, or aſſigns ſhall appoint: And ſhall by the name of incorporation have capacity to purchaſe and hold any goods or freehold lands, not exceeding 200 l *a year above repriſes; without licence or writ of* ad quod damnum; *the ſtatute of mortmain, or any other ſtatute or law to the contrary notwithſtanding. And they ſhall have a common ſeal. Provided, that no ſuch hoſpital ſhall be founded or incorporated, unleſs upon the foundation or erection thereof, the ſame be endowed for ever with lands tenements or hereditaments of the clear yearly value of* 10 l. *And, finally, ſuch conſtructions ſhall be made of this act, as ſhall be moſt beneficial for the maintenance of the poor, and for repreſſing and avoiding of all acts and devices to be invented or put in ure contrary to the true meaning of this act.*

Not exceeding 200 l *a year*] If they be at the time of the foundation or endowment of the yearly value of 200 l or under, and afterwards they become of greater value by good huſbandry, riſing of prices, ſudden accidents, as by eſcheat, or otherwiſe; they ſhall continue good, to be enjoyed by the hoſpital, albeit they be above the yearly value of 200 l: for the yearly value muſt be accounted as it was at the time of the endowment made. Alſo goods and chattels (real or perſonal) they may take of what value ſoever. 2 *Inſt.* 722.

But by the 9 G. 2. c. 36. *No manors, lands, tenements, rents, advowſons, or other hereditaments, corporeal or incorporeal; nor any ſum of money, goods, chattels, ſtocks in the publick funds, ſecurities for money, or any other perſonal eſtate whatſoever, to be laid out or diſpoſed of in the purchaſe of any lands, tenements or hereditaments, ſhall be given or any ways conveyed or ſettled (unleſs it be* bona fide *for full and valuable conſideration) to or upon any perſon or perſons, bodies politick or corporate, or otherwiſe, for any eſtate or intereſt whatſoever, or any ways charged or incumbred, in truſt or for the benefit of any charitable uſes whatſoever; unleſs ſuch appointment of lands, or money, or other perſonal eſtate (other than ſtocks in the publick funds), be made by deed indented, ſealed, and delivered in the preſence of two witneſſes, twelve kalendar months at leaſt before the death of the donor, and be inrolled in chancery within ſix kalendar months next after the execution thereof; and unleſs ſuch ſtock in the publick funds be transferred in the publick books uſually kept for the transfer of ſtocks,*

ſix

ſix kalendar months at leaſt before the death of the donor: and unleſs the ſame be made to take effect in poſſeſſion for the charitable uſe intended, immediately from the making thereof, and be without power of revocation. And any aſſurance otherwiſe made ſhall be void.

Viſitation and government.

By the aforeſaid ſtatute of the 39 *Eliz. c.* 5. The hoſpitals, ſo founded, ſhall be ordered and viſited by ſuch perſon or perſons, as ſhall be aſſigned by the founder, his heirs or aſſigns, in writing under his or their hand and ſeal, not being repugnant or contrary to the laws and ſtatutes of this realm.

If the founder maketh no appointment; then it is enacted by the 2 *H.* 5. *c.* 1. as followeth: Foraſmuch as many hoſpitals within this realm, founded as well by the noble kings of this realm, and lords and ladies both ſpiritual and temporal, as by divers other eſtates, to the honour of God and of his glorious mother, in aid and merit of the ſouls of the ſaid founders, to the which hoſpitals the ſame founders have given a great part of their moveable goods for the building of the ſame, and a great part of their lands and tenements, therewith to ſuſtain impotent men and women, lazars, men out of their wits, and poor women with child, and to nouriſh relieve and refreſh other poor people in the ſame,——be now for the moſt part decayed, and the goods and profits of the ſame by divers perſons as well ſpiritual as temporal withdrawn and ſpent in other uſe, whereby many men and women have died in great miſery, for default of aid living and ſuccour, to the diſpleaſure of God, and peril of the ſouls of ſuch manner of diſpoſers; it is ordained and eſtabliſhed, that as to the hoſpitals which be of the patronage and foundation of the king, the ordinaries, by virtue of the king's commiſſion to them directed, ſhall inquire of the manner and foundation of the ſaid hoſpitals, and of the governance and eſtate of the ſame, and of all other matters neceſſary and requiſite in this behalf, and the inquiſitions thereof taken ſhall certify in the king's chancery: And as to other hoſpitals which be of another foundation and patronage than of the king; the ordinaries ſhall inquire of the manner of the foundation, eſtate, and governance of the ſame, and of all other matters and things neceſſary in this behalf, and upon that make thereof correction and reformation, according to the laws of holy church, as to them belongeth.

And by the 43 *El. c.* 4. Where lands and goods given to hoſpitals have been miſapplied, the lord chancellor

lor may iſſue commiſſions to inquire and take order therein: but this not to extend to hoſpitals which have ſpecial viſitors or governors. And provided, that this act ſhall not extend to abridge the power of the ordinary.

Of elections in hoſpitals.

4. By the aforeſaid ſtatute of the 39 *Eliz. c.* 5. In the hoſpitals ſo founded as aforeſaid, they ſhall be placed, or upon juſt cauſe diſplaced, by ſuch perſon or perſons as ſhall be aſſigned by the founder, his heirs or aſſigns, by writing under his or their hand and ſeal, not being repugnant or contrary to the laws and ſtatutes of this realm.

And by another clauſe in the ſame ſtatute; it ſhall be lawful to the founder, his heirs or aſſigns, upon the death or removing of any head or member, to place one other in the room of him that dieth or is removed, ſucceſſively for ever.

And by the 31 *Eliz. c.* 6. If any perſon ſhall take any reward for nominating to an hoſpital, his place (if he ſhall have any) in ſuch hoſpital ſhall be void. And any perſon receiving any reward for reſigning his place in any ſuch hoſpital, ſhall forfeit double the ſum, and the perſon for whom he reſigns ſhall be incapacitated.

Leaſes.

5. By the aforeſaid ſtatute of the 39 *Eliz. c.* 5. it is provided, that all leaſes or eſtates to be made by any ſuch corporation, exceeding the number of twenty one years, and that in poſſeſſion, and whereupon the accuſtomable yearly rent or more, by the greater part of twenty years next before the taking of ſuch leaſe, ſhall not be reſerved and yearly payable, ſhall be void.

Taxes.

6. By the 43 *Eliz. c* 2. All lands within the pariſh are to be aſſeſſed to the *poor* rate.

And by Holt chief juſtice, *E.* 1 *An.* Hoſpital lands are chargeable to the poor as well as others; for no man by appropriating his lands to an hoſpital, can diſcharge or exempt them from taxes to which they were ſubject before, and throw a greater burden upon his neighbours. 2 *Salk.* 127.

In the caſe of *St Luke's* hoſpital for lunaticks, *M.* 1 *G.* 3. it was determined, that the ſaid hoſpital was not chargeable to the pariſh rates; and that in general no hoſpital is ſo, with reſpect to the ſite thereof, except thoſe parts of it which are inhabited by the officers belonging to the hoſpital, as the chaplain, phyſician, and the like, in Chelſea hoſpital. And theſe apartments are to be rated as ſingle tenements, of which the ſaid officers are the

the occupiers. The reaſon why the apartments in this hoſpital, of the ſick or mad perſons, are not to be rated is, that there are no perſons who can be ſaid to be the occupiers of them (and it is upon the occupiers of houſes that the rate is to be levied). For it would be abſurd to call the poor objects ſo with reſpect to this purpoſe; and the leſſees of the hoſpital in truſt for the charitable purpoſes to which it is applied, cannot with any propriety be conſidered as the occupiers of it; nor laſtly, can the ſervants of the hoſpital, who attend there for their livelihood; and no other perſons, ſaid Lord Mansfield chief juſtice, can with any ſhadow of reaſon be conſidered as the occupiers of it. *Burr.* Mansf. 1053.

By the annual acts for the *land tax*, it is provided, that the ſame ſhall not extend to charge any hoſpital, for or in reſpect to the ſite of ſuch hoſpital, or any of the buildings within the walls and limits thereof; or to charge any of the houſes or lands, which on or before Mar. 25. 1693, did belong to Chriſt's Hoſpital, St Bartholomew, Bridewell, St Thomas, and Bethlehem hoſpitals in London and Southwark; or to charge any other hoſpitals or alms-houſes, for or in reſpect only of any rents or revenues, which on or before Mar. 25. 1693, were payable to the ſaid hoſpitals or alms-houſes, being to be received and diſburſed for the immediate uſe and relief of the poor of the ſaid hoſpitals and alms-houſes only.

Provided, that no tenants that hold any lands or houſes, by leaſe or other grant from any of the ſaid hoſpitals or alms-houſes, do claim any exemption; but that all the houſes and lands which they ſo hold, ſhall be rated for ſo much as they are yearly worth, over and above the rents reſerved and payable to the ſaid hoſpitals or alms-houſes, to be received and diſburſed for the immediate ſupport and relief of the poor of the ſaid hoſpitals and alms-houſes.

Provided, that nothing herein ſhall be conſtrued to extend to diſcharge any tenant of any the houſes or lands belonging to the ſaid hoſpitals or alms-houſes, who by their leaſes or other contracts are obliged to pay all rates taxes and impoſitions whatſoever; but that they ſhall be rated and pay all ſuch rates taxes and impoſitions.

And if any queſtion ſhall be made, how far any lands or tenements belonging to any hoſpital or alms-houſe, not exempted by name, ought to be aſſeſſed and charged; the ſame ſhall be determined by the commiſſioners upon the appeal day.

And

And there is, further, a general clauſe, that all ſuch lands, revenues, or rents belonging to any hoſpital or alms-houſe, or ſettled to any charitable or pious uſe, as were aſſeſſed in the fourth year of *Will.* and *Mar.* ſhall be liable to be charged; and that no other lands, tenements, or hereditaments, revenues, or rents whatſoever, then belonging to any hoſpital or alms houſe, or ſettled to any charitable or pious uſes, as aforeſaid, ſhall be charged.

Hoſpitallers. See Monaſteries.

Hotchpot. See Wills.

January the thirtieth. See Holidays.

Jews.

A Jew is to be ſworn on the old teſtament; and perjury may be aſſigned upon that oath. 2 *Keb.* 313.

By the 10 *G. c.* 4. When any of his majeſty's ſubjects, profeſſing the jewiſh religion, ſhall take the oath of abjuration; the words, *upon the true faith of a chriſtian* ſhall be omitted. ſ. 18.

H. 2 *G.* 2. *Gomez Serra* and *Munez.* Upon error in debt upon a bond, the bail being both jews, were ſuffered to put on their hats while they took the oath. *Str.* 821.

By the 1 *An. ſt.* 1. *c.* 30. If any jewiſh parent, in order to the compelling his proteſtant child to change his religion, ſhall refuſe to allow ſuch child a ſufficient maintenance, ſuitable to the degree and ability of ſuch parent, and to the age and education of ſuch child; then, upon complaint thereof to the lord chancellor, it ſhall be lawful for him to make ſuch order therein, for the maintenance of ſuch proteſtant child, as he ſhall think meet.

Marriages, where both parties are jews, are excepted out of the marriage act of the 26 *G.* 2. *c.* 33.

Ile. See Church.

Images.

Winch. IMages in the church, and the principal image in the chancel (viz. of the ſaint to whom the church is dedicated) ſhall be provided at the charge of the pariſh. *Lindw.* 251.

Arund. None ſhall bring into diſpute the determinations of the church, concerning the adoration of the glorious croſs, the worſhip of the images of ſaints, or pilgrimages to the places or relicks of the ſame; but it ſhall be publickly taught and preached by all, that the croſs, and image of the crucifix, and other images of the ſaints, in memory and honour of thoſe whom they repreſent, and their places and relicks, ought to be worſhipped by proceſſions, kneeling, bowing, incenſe, kiſſing, oblations, illuminations, pilgrimages, and all other modes and forms whatſoever uſed in the times of us and our predeceſſors, on pain of incurring the guilt of hereſy. *Lindw.* 297.

Art. 22. *The romiſh doctrine concerning the worſhipping and adoration as well of images as of relicks, and alſo invocation of ſaints, is a fond thing, vainly invented, and grounded upon no warranty of ſcripture, but rather repugnant to the word of God.*

3 & 4 Ed. 6. c. 10. *Images in churches, of ſtone timber alabaſter or earth, graven carved or painted, ſhall be defaced and deſtroyed.* ſ. 2.

But this not to extend to any image or picture, ſet or graven upon any tomb in any church chapel or churchyard, only for a monument of any king prince nobleman or other dead perſon, which hath not been commonly reputed and taken for a ſaint. ſ. 5.

Alſo this ſhall not be done by any perſon of his own authority, but he ought to have the licence of the ordinary. *Cro. Ja.* 366.

And if any ſhall do ſo without the licence of the ordinary; Dr Godolphin ſays, he ſhall bind him to his good behaviour: But the meaning is only, that *he may be bound to his good behaviour*, not by the ordinary, but by the temporal judge; as in *Pricket*'s caſe (which is the caſe referred to), the offender was bound to his good behaviour, not by the ordinary, but by the lord chief juſtice of the court of king's bench.

Impropriation.

APPROPRIATION (as ſome ſay) is properly ſo called, when it is in the hands of a biſhop, college, or religious houſe; *impropriation*, when it is in the hands of a layman. But the words are generally uſed promiſcuouſly. And the law concerning the ſame is treated of under the title Appropriation.

Inauguration day. See Holidays.
Inceſt. See Lewdneſs.
Incumbent. See Benefice.

Indemnity.

AN *indemnity* was, a penſion paid to the biſhop, in conſideration of diſcharging or *indemnifying* churches united, or appropriated, from the payment of procurations; or by way of recompence for the profits which the biſhop would otherwiſe have received during the time of the vacation of ſuch churches. *Gibſ.* 706, 719.

Indicavit.

INDICAVIT (ſo called from thoſe words in the writ, *Indicavit nobis, &c.*) is a writ of prohibition that lieth for the patron of a church, whoſe clerk is defendant in the eccleſiaſtical court in an action for tithes, commenced by another clerk, and extending to the fourth part of the value of the church at leaſt. In which caſe the ſuit belongs to the king's court by the ſtatute of the 13 *Ed.* 1. *c.* 5. Wherefore the defendant's patron (being like to be prejudiced in his church and advowſon, if the plaintiff obtain in the eccleſiaſtical court) hath this means to remove it to the king's court. *Terms of the L. F. N. B.* 104.

But

But if the tithes in queſtion do not amount to the fourth part of the yearly value of the church; the eccleſiaſtical court may determine the right on a writ of *Spoliation*. F. N. B. 70.

Induction. See Benefice.

Inhibition.

1. AN inhibition is a writ, to forbid a judge from farther proceeding in a cauſe depending before him, being in nature of a prohibition. *Terms of the law.* And this writ moſt commonly iſſueth out of an higher court chriſtian to an inferior, upon an appeal. *Id.*

But there are likewiſe inhibitions on the viſitations of archbiſhops and biſhops: Thus when the archbiſhop viſits, he inhibits the biſhop; and when a biſhop viſits, he inhibits the archdeacon: And this is to prevent confuſion. *Id.*

2. By *Can* 96. That the juriſdiction of biſhops may be preſerved (as near as may be) intire and free from prejudice; and that for the behoof of the ſubjects of this land, better proviſion be made, that henceforward they be not grieved with frivolous and wrongful ſuits and moleſtations; it is ordained, that no inhibition ſhall be granted out of any court belonging to the archbiſhop, at the inſtance of any party, unleſs it be ſubſcribed by an advocate practiſing in the ſaid court. And the like courſe ſhall be uſed in granting forth any inhibition at the inſtance of any party, by the biſhop or his chancellor againſt the archdeacon, or any other perſon exerciſing eccleſiaſtical juriſdiction. And if in the court or conſiſtory of any biſhop there be no advocate at all; then ſhall the ſubſcription of a proctor, practiſing in the ſame court, be held ſufficient.

3. And by *Can.* 97. It is further ordered and decreed, that henceforward no inhibition be granted by occaſion of any interlocutory decree, or in any cauſe of correction whatſoever, except under the form aforeſaid. And moreover, that before the going out of any ſuch inhibition, the appeal itſelf, or a copy thereof (avouched by oath to be juſt and true), be exhibited to the judge or his lawful ſurrogate, whereby he may be lawfully informed, both

both of the quality of the crime, and of the cauſe of the grievance, before the granting forth of the ſaid inhibition. And every appellant, or his lawful proctor, ſhall before the obtaining of any ſuch inhibition, ſhew and exhibit to the judge or his ſurrogate in writing, a true copy of thoſe acts wherewith he complaineth himſelf to be aggrieved, and from which he appealeth; or ſhall take a corporal oath, that he hath performed his diligence and true endeavour for the obtaining of the ſame, and could not obtain it at the hands of the regiſter in the country, or his deputy, tendring him his fee. And if any judge or regiſter ſhall either procure or permit any inhibition to be ſealed, ſo as is ſaid, contrary to the form and limitation above ſpecified; let him be ſuſpended from the execution of his office, for the ſpace of three months: and if any proctor, or other perſon whatſoever by his appointment, ſhall offend in any of the premiſſes, either by making or ſending out any inhibition contrary to the tenor of the ſaid premiſſes; let him be removed from the exerciſe of his office for the ſpace of a whole year, without hope of releaſe or reſtoring.

Inſtallment. See Biſhops.
Inſtitution. See Benefice.

Interdict.

INTERDICT is an eccleſiaſtical cenſure, whereby the divine ſervices are prohibited, either to particular perſons, or in particular places, or both. *Lind.* 320.

And both theſe kinds of interdict have been frequently exerciſed heretofore, upon whole villages, towns, provinces, and even kingdoms; till they ſhould make ſatisfaction for injuries done, or abſtain from injuries they were doing, to the church. *Gibſ.* 1047.

During the time of the interdict, baptiſm was allowed, becauſe of the frailty and uncertainty of life; but the holy euchariſt was not allowed, except in the article of death; ſo alſo chriſtian burial was denied in any conſecrated place, except it were done without divine offices. *God.* App. 18.

But this cenſure hath been long diſuſed; and nothing of it appeareth in the laws of church or ſtate ſince the reformation. *Gibſ.* 1047.

Interlocutory decree.

AN interlocutory decree in the ſpiritual court, is that which doth not decide the cauſe, but only ſome incidental matter, which happens between the begihning and end of it.

Inteſtates.

THE law concerning inteſtates, being connected in many inſtances with the law concerning laſt wills and teſtaments the whole is treated of together under the title Wills.

Intruſion.

Otho. *Foraſmuch as we underſtand, that certain prieſts caſting an eye upon the benefice of a perſon who is abſent, feigning reports that they have heard he is dead, or hath reſigned his benefice, and ſo procure themſelves to be intruded into the ſame benefice; and if perhaps he who was pretended to be dead ſhall return into his church, anſwer is made unto him, I know thee not, and the door is ſhut againſt him: And foraſmuch alſo as others, blinded with coveteouſneſs, do preſume privately or in what manner ſoever they can, to intrude themſelves into the benefices not only of the abſent but alſo of thoſe who are preſent; and when they are in, neither the ſentence of the judge nor any other thing by which they may be ejected doth avail, but they defend themſelves with force of arms: We do decree, and ſtrictly injoin, that no benefice in any wiſe be conferred, upon pretence of any fame or report of the death or ceſſion*

of

of any perſon being abſent; but the ordinary ſhall wait until he be fully informed in either caſe: otherwiſe he ſhall be bound to render the whole damages to ſuch abſent perſon; and moreover, he who hath procured himſelf to be intruded, ſhall beſides the reparation of damages, be ſuſpended ipſo facto from his office and benefice. Which alſo ſhall extend to every one, who ſhall of his own authority or preſumption, either privily or by force, obtain the poſſeſſion of an eccleſiaſtical benefice which is full of another incumbent, and after it ſhall be declared to belong to ſuch other, ſhall endeavour to defend himſelf therein by force of arms. Athon. 32.

Nor any other thing by which they may be ejected] That is, not any ſpiritual cenſure. *Id.*

That no benefice in any wiſe be conferred] Either by collation of the biſhop, or preſentation of any other. *Id.*

Boniface. *Foraſmuch as it frequently happeneth, that divers clerks by lay power do poſſeſs themſelves of churches parochial, or prebendal (even altho' they have the cure of ſouls) and are intruded into the ſame without eccleſiaſtical authority; we do decree, that a clerk ſo intruded into the church or prebend by himſelf or by lay power, ſhall be excommunicated in due form of law, and ſhall be denounced excommunicated by the dioceſan of the place, and be diſabled for ever ipſo facto to hold that benefice. And if after ſentence pronounced againſt him, he ſhall obſtinately perſiſt in ſuch intruſion for two months; the profits of his other benefices (until he ſhall make ſatisfaction) ſhall be ſequeſtred by the dioceſans of the places where they ſhall be, upon denunciation of the biſhop in whoſe dioceſe he intruded, and whoſe monition and excommunication he contemned. And if he ſhall perſevere under ſuch ſentence of excommunication for a year, from thenceforth he ſhall not be admitted to any eccleſiaſtical benefice within the province. And if he was intruded by a proctor who was a clergyman, the like proceedings ſhall be againſt ſuch proctor, and he ſhall be ſubject to the penalties aforeſaid. And if ſuch proctor was a layman, he ſhall be excommunicated in form of law, and be publickly ſo denounced. And his principal, if he be abſent ſhall be cited; and if he ſhall appear and ratify what his proctor ſhall have done in this behalf, he ſhall be ſubject to the penalties aforeſaid. But if by contumacy he ſhall abſent himſelf for three months; if he be in the kingdom, he ſhall be excommunicated by the greater excommunication, and nevertheleſs ſhall incur the penalties aforeſaid; eſpecially ſince to his ſacrilege he hath added diſobedience and*

contempt: and if he ſhall be out of the kingdom, the like proceedings ſhall be had againſt him, after a citation, time being allowed for his being beyond ſea. And the church or prebend in which ſuch intruſion ſhall be made, ſhall be put under an eccleſiaſtical interdict. And the fautors and aiders of ſuch intruſion, if they be clerks, ſhall incur the pains aforeſaid ordained againſt clerks; and if they be lay perſons, they ſhall be puniſhed in like manner as is afore ordained for lay perſons. And the places and lands of ſuch intruders, if they do not make ſatisfaction within one month, ſhall be put under an eccleſiaſtical interdict. And if ſuch intruſions be made by authority of the king, our lord the king ſhall be admoniſhed by the dioceſan of the place to cauſe the ſame to be recalled within a time convenient; otherwiſe the lands and places which our lord the king hath in that dioceſe wherein the intruſion was made, ſhall be put under an eccleſiaſtical interdict, according to the form above expreſſed. And if ſuch intruſion ſhall be made by any other of the nobility or perſon in authority, he ſhall be reſtrained by the ſentences of interdict and excommunication as aforeſaid; and if for two months he ſhall continue under ſuch ſentences pronounced againſt him for the ſame, from thenceforth his lands and places which he hath in that dioceſe ſhall be put under an eccleſiaſtical interdict by the dioceſan of the place; nor ſhall the aforeſaid ſentences be relaxed, until he ſhall make competent ſatisfaction for the injury, diſobedience, and contempt. Lind. 319.

Are intruded into the ſame without eccleſiaſtical authority] That is, without canonical inſtitution. *Id.*

So intruded into a church or prebend by himſelf] That is, without lay power, and without violence. *Id.*

Or by lay power] And the ſame it is, if done by clerical power, ſuch as is not ordinary nor authoritative. *Id.*

Shall be excommunicated in due form of law] Namely, preceded by a canonical monition to go away and quit the premiſſes. *Id.*

Time being allowed for his being beyond ſea] Which is arbitrary: reſpect being had of the place, and of the diſtance. *Lind.* 320.

And the church or prebend in which ſuch intruſion ſhall be made, ſhall be put under an eccleſiaſtical interdict] Whereupon, in ſuch church eſpecially interdicted divine ſervice cannot be performed. When a whole place is interdicted, this is called a general interdict. *Lind.* 320.

Our

Our lord the king ſhall be admoniſhed] This canon was made in the time of king Henry the third. And we may obſerve from hence, to what height the eccleſiaſtical authority was exalted at that time. But this part of the canon, denouncing judgments againſt the king, was never in force; being againſt the common law of the realm, and the prerogative royal.

Othobon. *No patron, eccleſiaſtical or ſecular, ſhall preſume to preſent any one to a church, in which he hath the right of patronage, unleſs he have probable notice of its vacancy; in which caſe, altho' he may preſent, to prevent the inconvenience of a lapſe; yet the prelate to whom the inſtitution appertaineth, ſhall by no means preſume to admit or inſtitute the perſon preſented, unleſs it appear to him that the rector is dead, or that the church is otherwiſe become legally void. And it ſhall not be ſufficient that the ſame ſhall appear to him, otherwiſe than by the bodily preſence of the perſon dead or reſigning or otherwiſe demiſing; or if he be abſent, then by ſentence of the biſhop of the dioceſe in whoſe city or dioceſe he is ſaid to have died or otherwiſe demiſed, or at leaſt by letters of ſome other authentic perſon, ſealed with one or more authentic ſeal or ſeals, by a public inſtrument, or by proper witneſſes ſworn and above all exception, by whom a ſufficient and open teſtimony ſhall be given as the law requireth, not only of their belief but of their knowledge: And if any perſon ſhall in fact be inſtituted, or more properly intruded, into any church contrary to the premiſſes, ſuch inſtitution ſhall be invalid and of no force, nor ſhall any right accrue to him thereby, altho' perhaps afterwards it may appear, that the church at the time of ſuch inſtitution was really void. And if it ſhall afterwards appear that the former rector is living, either by his appearing in perſon, or by authentic letters or publick inſtrument, or proper witneſſes; as well the prelate inſtituting, as he who ſhall be ſo inſtituted, ſhall be bound to reſtore to ſuch rector the whole fruits damages and expences incurred thereby, the payment of the one being no diſcharge to the other. And becauſe a pecuniary puniſhment is not ſufficient, where there is a ſpiritual offence; the prelate who ſhall inſtitute contrary hereunto, ſhall nevertheleſs from the time of ſuch offence be ſuſpended from the collation inſtitution or preſentation of any benefices whatſoever, until poſſeſſion of the church be reſtored to the rector aforeſaid: adding moreover, that if after it ſhall appear as aforeſaid that the rector is living, the church ſhall not be reſtored to him, but contrariwiſe the intruder ſhall perſiſt in his rebellion for three months; beſides the puniſhments aforeſaid, he ſhall for ever be deprived ipſo facto of all the*

benefices which he hath in the kingdom, and ſhall be for ever diſabled to accept that benefice which he hath ſo detained whenſoever or howſoever it ſhall be vacant; and if he have no benefice, he ſhall for ever be diſabled to hold any benefice whatſoever in that dioceſe which he hath ſo wickedly diſturbed. And moreover, when probable notice, otherwiſe than by the aforeſaid means, of the avoidance of a church or benefice, ſhall come to any archbiſhop or biſhop unto whom the collation thereof belongeth, and he doth collate to that church or benefice, fearing leſt a lapſe ſhould incur, yet he ſhall not deliver, nor ſuffer to be delivered, the corporal poſſeſſion of that church or benefice, until proof of the avoidance ſhall be made in the manner aforeſaid; nor ſhall he to whom the collation is made, preſume to enter upon the poſſeſſion by his own or any other authority: And if an archbiſhop or biſhop ſhall do contrary hereunto, he ſhall be ſubject to the penalties aforeſaid; and if he to whom the collation is made ſhall take poſſeſſion contrary to the premiſſes, he ſhall for ever be deprived of that church or benefice, and nevertheleſs be ſubject to the other penalties aforeſaid. Athon. 96.

One might wonder at firſt ſight, what ſhould make theſe two cardinals *Otho* and *Othobon*, and alſo the aforeſaid archbiſhop *Boniface*, who were all foreigners, ſuch zealous aſſerters of the properties of the Engliſh clergy. We find no conſtitutions of our own native prelates that expreſs ſuch a concern upon this head. But the truth ſeemeth to be this: Theſe proviſions were made in behalf of abſent clergymen. The chief occaſion of the long abſence of clergymen was their going to Rome to attend appeals, to procure diſpenſations or indulgences, to obtain preferment, or out of devotion to the apoſtolick ſee; or elſe they were foreigners who never came here at all. It was much to the advantage of the pope and city of Rome, that the travels of the clergy thither, and their long ſtay there ſhould be encouraged; and other abſentees be tolerated and diſpenſed withal. And truly, by theſe conſtitutions their rights were better ſecured in their abſence, than they would have been by their being preſent and keeping reſidence. *Johnſ.* Othob.

Stratford. *All clerks, who ſhall procure themſelves to be preſented or collated to dignities, parſonages, offices, or prebends, or other eccleſiaſtical benefices whatſoever, being full and poſſeſſed in fact by others; and ſhall directly or indirectly by virtue of the writs of* quare non admiſit, *or* quare impedit, *or other ſuch like, proſecute the biſhops or others in the ſecular court, without any mention made in the ſaid writs of the poſ-*

ſeſſors of the benefices, and without ſuch poſſeſſors being regularly removed (altho' they have been cited); unleſs they firſt cauſe an inquiſition to be made concerning the cauſe of the pretended vacancy by mandate of the ordinary, and the poſſeſſors to be canonically removed by competent judges eccleſiaſtical; —— *ſhall* ipſo facto *incur the ſentence of the greater excommunication, and as being ſo excommunicate ſhall in no wiſe be admitted to ſuch benefices, but ſhall be deemed for ever diſabled to hold the ſame. And if contrary to the premiſſes, any one be inſtituted or admitted into a benefice poſſeſſed by another* de facto, *ſuch inſtitution or admiſſion ſhall be void in law. And whoſoever ſhall ſo inſtitute or admit, by his own right or by delegation, any perſon ſo preſented or collated, into a benefice poſſeſſed by another, the poſſeſſor not being firſt removed by a ſufficient authoritative ſentence in the eccleſiaſtical court; he ſhall be ſuſpended from his office and benefice, till ſatisfaction be made to the poſſeſſor for the whole damage which he ſhall ſuſtain. And if the clerk ſo inſtituted or admitted ſhall ſuffer himſelf to be inducted contrary to the premiſſes into a benefice poſſeſſed by another; he ſhall be deemed an intruder, and ſhall incur* ipſo facto *the penalties of intruſion contained in the conſtitution of* Othobon, *and the other penalties inflicted by the canons and holy fathers. Nevertheleſs by the premiſſes we do not intend to derogate from the power of the ordinary; but that he may collate to the benefices which he hath a right to collate unto, howſoever poſſeſſed by others* de facto *and not* de jure: *nor to reſtrain the perſons receiving collations of ſuch benefices.* Lind. 144.

Poſſeſſed in fact by others] Altho' not de jure; becauſe perhaps the incumbent hath not a juſt title. *Id.*

An intruder getting poſſeſſion, and holding it by a ſtrong hand and great power of the laity, vi et armis, againſt the ſpiritual authority; ſuch force is removeable by the writ de vi laica amovenda. Which writ is uſually iſſued, upon a certificate of the biſhop into chancery touching ſuch force and reſiſtance: but may alſo be obtained upon a ſurmiſe made by him that is immediately grieved. But by this writ, the ſheriff is not to remove the incumbent who is in poſſeſſion of the church, whether the poſſeſſion be of right or wrong; but only to remove the force; and to leave the incumbent to be removed by other legal means. *Gibſ.* 783.

Inventory. See Wills.

Inveſtiture. See Biſhops.

Invitatory.

INVITATORY, was a text of ſcripture, adapted and choſen for the occaſion of the day, and uſed before the *Venite*; which alſo it ſelf was called the invitatory pſalm. *Gibſ.* 263.

Judgment. See Sentence.

Juriſdiction. See Courts.

Juris utrum.

Juris utrum is a writ that lieth for the ſucceeding incumbent of a benefice, to recover the lands or tenements belonging to the church, which were aliened by his predeceſſor. *Terms of the law.*

And it is ſo called, in like manner as moſt of the other writs in the regiſter, from certain words in the writ reſpecting the ſpecial matter for which the writ is brought.

By the ſtatute of the 14 Ed. 3. ſt. 1. c. 17. *It is aſſented and eſtabliſhed, that parſons, vicars, wardens of chapels, and provoſts, wardens and prieſts of perpetual chantries, ſhall have their writs of* juris utrum *of lands and tenements, rents, and poſſeſſions annexed, or given perpetually in alms, to vicarages and chapels, or chaunteries, and recover by other writs, in their caſe, as far forth as parſons of churches or prebends.*

Jus patronatus. See Advowſon.

Kalen-

Kalendar.

1. WHEREAS the legal ſupputation of the year of our Lord in that part of Great Britain called England, according to which the year beginneth on the twenty fifth day of March, hath been found by experience to be attended with divers inconveniences, not only as it differs from the uſage of neighbouring nations, but alſo from the legal method of computation in that part of Great Britain called Scotland, and from the common uſage throughout the whole kingdom, and thereby frequent miſtakes are occaſioned in the dates of deeds and other writings, and diſputes ariſe therefrom; and whereas the kalendar now in uſe throughout all his majeſty's Britiſh dominions, commonly called the Julian kalendar, hath been diſcovered to be erroneous, by means whereof the vernal or ſpring equinox, which at the time of the general council of Nice in the year of our Lord 325 happened on or about the twenty firſt day of March, now happens on the ninth or tenth of the ſame month; and the ſaid error is ſtill increaſing, and if not remedied would in proceſs of time occaſion the ſeveral equinoxes and ſolſtices to fall at very different times in the civil year from what they formerly did, which might tend to miſlead perſons ignorant of the ſaid alteration; and whereas a method of correcting the kalendar in ſuch manner as that the equinoxes and ſolſtices may for the future fall nearly on the ſame nominal days, on which the ſame happened at the time of the ſaid general council, hath been received and eſtabliſhed, and is now generally practiſed by almoſt all other nations of Europe; and whereas it will be of general convenience to merchants and other perſons correſponding with other nations and countries, and tend to prevent miſtakes and diſputes in or concerning the dates of letters and accounts, if the like correction be received and eſtabliſhed in his majeſty's dominions; it is therefore enacted, that in and throughout all his majeſty's dominions and countries in Europe, Aſia, Africa, and America, belonging or ſubject to the crown of Great Britain, the ſaid ſupputation, according to which the year of our Lord beginneth on the twenty fifth day of March ſhall not be made uſe of from and after the laſt day of December 1751; and that from thenceforth the firſt day of January every

Year to begin on the firſt day of January.

every year ſhall be reckoned and accounted to be the firſt day of the year. 24 *G.* 2. *c.* 23. *ſ.* 1.

Eleven days thrown out.

2. And that from the firſt day of January 1752, the ſeveral days of each month ſhall go on and be reckoned and numbred in the ſame order and the feaſt of Eaſter and other moveable feaſts thereon depending, ſhall be aſcertained according to the ſame method as before, until the ſecond day of September 1752 incluſive; and that the natural day next immediately following the ſaid ſecond day of September, ſhall be called reckoned and accounted to be the fourteenth day of September, omitting (for that time only) the eleven intermediate nominal days of the common calendar; and that the ſeveral natural days, which ſhall follow and ſucceed next after the ſaid fourteenth day of September, ſhall be reſpectively called reckoned and numbered forwards in numerical order from the ſaid fourteenth day of September, according to the order and ſucceſſion of days now uſed in the preſent calendar. 24 *G.* 2. *c.* 23. *ſ.* 1.

Writings to bear date according to the new ſtyle.

3. And that all acts, deeds, writings, notes, and other inſtruments of what nature or kind ſoever, whether eccleſiaſtical or civil, publick or private, which ſhall be made executed or ſigned, upon or after the ſaid firſt day of January 1752, ſhall bear date according to the ſaid new method of ſupputation. 24 *G.* 2. *c.* 23. *ſ.* 1.

Courts and meetings.

4. And that the two fixed terms of St Hilary and St Michael, in that part of Great Britain called England; and the courts of great ſeſſions in the counties palatine, and in Wales; and alſo the courts of general quarter ſeſſions, and general ſeſſions of the peace; and all other courts, of what nature or kind ſoever, whether civil, criminal, or eccleſiaſtical; and all meetings and aſſemblies of any bodies politick or corporate, either for the election of any officers or members thereof, or for any ſuch officers entring upon the execution of their reſpective offices, or for any other purpoſe whatſoever; which by any law ſtatute charter cuſtom or uſage within this kingdom, or within any other the dominions or countries ſubject or belonging to the crown of Great Britain, are to be holden and kept on any fixed or certain day of any month, or on any day depending upon the beginning or any certain day of any month (except ſuch courts as are uſually holden or kept with any fairs or marts) —— ſhall from time to time from and after the ſaid ſecond day of September, be holden and kept upon or according to the ſame reſpective nominal days and times, whereon or according

cording to which the ſame are now to be holden, but which ſhall be computed according to the ſaid new method of numbering and reckoning the days of the calendar as aforeſaid; that is to ſay, eleven days ſooner than the reſpective days whereon the ſame were before holden and kept. 24 G. 2. c. 23. ſ. 1.

Provided, that the elections of officers in towns corporate, and doing of other corporate acts, which ſhall happen to fall upon any of the ſaid eleven days dropt or entirely omitted, ſhall for that year only be made or done upon the natural day, which ſhall be as effectual as if the ſame were done on any of the nominal days ſo dropt or omitted. 25 G. 2. c. 30. ſ. 1.

And the annual admiſſion and ſwearing of the lord mayor of London, and all annual meetings and aſſemblies for that purpoſe, ſhall be on the ſame natural day and not on the ſame nominal day of the month as before. 25 G. 2. c. 30. ſ. 4.

And the annual meeting for the election of the mayor, ſheriffs, treaſurers, coroners, and leave lookers of the city of Cheſter, ſhall be transferred from the next friday after the feaſt of St Dennis yearly unto the next friday after the feaſt of St Simon and Jude; that it may not coincide with Cheſter fair. 26 G. 2. c. 34. ſ. 4.

5. And for the continuing and preſerving the calendar, or method of reckoning and computing the days of the year, in the ſame regular courſe as near as may be in all times coming; it is further enacted, that the ſeveral years of our Lord 1800, 1900, 2100, 2200, 2300, or any other hundred years of our Lord, which ſhall happen in time to come, except only every four hundredth year of our Lord whereof the year of our Lord 2000 ſhall be the firſt, ſhall not be eſteemed or taken to be biſſextile or leap years, but ſhall be taken to be common years conſiſting of 365 days and no more; and that the years of our Lord 2000, 2400, 2800, and every other four hundredth year of our Lord from the ſame year of our Lord 2000 incluſive, and alſo all other years of our Lord which by the preſent ſupputation are eſteemed to be biſſextile or leap years, ſhall for the future and in all times to come be eſteemed and taken to be biſſextile or leap years, conſiſting of 366 days, in the ſame ſort and manner as is now uſed with reſpect to every fourth year of our Lord. 24 G. 2. c. 23. ſ. 2. Regulations perpetuated.

6. And whereas according to the rule prefixed to the book of common prayer, Eaſter day is always the firſt ſunday after the firſt full moon which happens next after Eaſter and other holidays.

the

the one and twentieth day of March; and if the full moon happens upon a ſunday, Eaſter day is the ſunday after; which rule was made in conformity to the decree of the ſaid general council of Nice, for the celebration of the ſaid feaſt of Eaſter: And whereas the method of computing the full moons now uſed in the church of England, and according to which the table to find Eaſter for ever (prefixed to the ſaid book of common prayer) is formed, is by proceſs of time become conſiderably erroneous: and whereas a calendar, and alſo certain tables and rules for the fixing the true time of the celebration of the ſaid feaſt of Eaſter, and the finding the times of the full moons on which the ſame dependeth, ſo as the ſame ſhall agree as nearly as may be with the decree of the ſaid general council, and alſo with the practice of foreign countries, have been prepared, and are hereunto annexed: It is therefore further enacted, that the ſaid feaſt of Eaſter, or any of the moveable feaſts thereon depending, ſhall from and after the ſaid ſecond day of September be no longer kept or obſerved according to the ſaid method now uſed, or the ſaid table prefixed to the ſaid book of common prayer; and that the ſaid table, and alſo the column or golden numbers, as they are now prefixed to the reſpective days of the month in the ſaid calendar, ſhall be left out in all future editions of the ſaid book of common prayer; and that the ſaid new calendar, tables, and rules hereunto annexed, ſhall be prefixed to all ſuch future editions of the ſaid book in the room and ſtead thereof; and that from and after the ſaid ſecond day of September, all and every the fixed feaſt-days holidays and faſt-days obſerved by the church of England, and alſo the ſeveral ſolemn days of thangſgiving and of faſting and humiliation which by virtue of any act of parliament now in being are to be kept and obſerved, ſhall be kept and obſerved, on the reſpective days marked for the celebration of the ſame in the ſaid new calendar, that is to ſay, on the ſame reſpective nominal days on which the ſame are now kept and obſerved, but which according to the alteration by this act intended to be made will happen eleven days ſooner than the ſame now do; and that the ſaid feaſt of Eaſter, and all other moveable feaſts thereon depending, ſhall be obſerved according to the ſaid new calendar tables and rules hereunto annexed, in that part of Great Britain called England, and in all the dominions and countries aforeſaid wherein the liturgy of the church of England now is or hereafter

hereafter ſhall be uſed; and that the two moveable terms of Eaſter and Trinity, and all courts of what nature or kind ſoever, and all meetings and aſſemblies of any bodies politick or corporate, and all markets fairs and marts and courts thereunto belonging, which by any law ſtatute charter cuſtom or uſage are appointed or uſed to be holden at any moveable time depending upon the time of Eaſter or any other ſuch moveable feaſts as aforeſaid, ſhall be holden and kept on ſuch days and times whereon the ſame ſhall reſpectively happen or fall, according to the falling or happening of the ſaid feaſt of Eaſter or ſuch other moveable feaſts as aforeſaid, to be computed according to the ſaid new calendar tables and rules. 24 *G.* 2. *c.* 23. *ſ.* 3.

7. The ſeveral meetings of the court of ſeſſion, and terms fixed for the court of exchequer in Scotland; and April meeting of the governor, bailiffs, and commonalty of the company of conſervators of the great level of the fens; and the holding and keeping of all markets fairs and marts, whether for the ſale of goods or cattle, or for the hiring of ſervants, or for any other purpoſe, which are either fixed to certain nominal days of the month, or depending upon the beginning of any certain day of any month; and all courts incident or belonging to, or uſually holden or kept with any ſuch fairs or marts fixed to ſuch certain times as aforeſaid; —— ſhall not be continued upon or according to the nominal days of the month, or the time of the beginning of any month, to be computed according to the ſaid new calendar; but they ſhall be holden and kept upon or according to the ſame natural days, on or according to which the ſame ſhould have been ſo kept or holden, in caſe this act had not been made, that is to ſay, eleven days later than the ſame would have happened according to the nominal days of the ſaid new ſupputation of time, by which the commencement of each month and the nominal days thereof are anticipated or brought forward by the ſpace of eleven days. 24 *G.* 2. *c.* 23. *ſ.* 4. Fairs.

8. And whereas according to divers cuſtoms preſcriptions and uſages in certain places within this kingdom, certain lands and grounds are on particular nominal days and times in the year to be opened for common of paſture and other purpoſes, and at other times the owners and occupiers of ſuch lands and grounds have a right to incloſe or ſhut up the ſame for their own private uſe; and there is in many other inſtances, a temporary and diſtinct Paſtures; rents; coming of age.

diſtinct property and right veſted in different perſons, in and to many ſuch lands and grounds, according to certain nominal days and times in the year; and whereas the anticipating or bringing forward the ſaid nominal days and times, by the ſpace of eleven days, according to the ſaid new method of ſupputation, might be attended with many inconveniences: it is therefore further declared and enacted, that nothing herein ſhall extend to accelerate or anticipate the days or times for the opening incloſing or ſhutting up any ſuch lands or grounds as aforeſaid, or the days or times on which any ſuch temporary or diſtinct property or right in or to any ſuch lands or grounds as aforeſaid is to commence; but that all ſuch lands and grounds ſhall be reſpectively opened incloſed or ſhut up, and ſuch temporary and diſtinct property and right in and to ſuch lands and grounds as aforeſaid ſhall commence and begin upon the ſame natural days and times on which the ſame ſhould have been ſo reſpectively opened incloſed or ſhut up, or would have commenced or begun in caſe this act had not been made, that is to ſay, eleven days later than the ſame would have happened according to the ſaid new account and ſupputation of time, ſo to begin on the ſaid fourteenth day of September as aforeſaid. 24 *G.* 2. *c.* 23. *ſ.* 5.

Provided alſo, that this ſhall not extend to accelerate or anticipate the time of payment of any rent annuity or ſum of money, which ſhall become payable by virtue or in conſequence of any cuſtom uſage leaſe deed writing bond note contract or other agreement whatſoever, now ſubſiſting, or which ſhall be made ſigned ſealed or entred into before the ſaid fourteenth day of September, or the time of doing any matter or thing directed or required by any ſuch act of parliament to be done in relation thereto; or to accelerate the payment of, or increaſe the intereſt of any ſuch ſum of money which ſhall be payable as aforeſaid; or to accelerate the time of the delivery of any goods chattels wares merchandize or other things whatſoever; or the time of the commencement, expiration, or determination of any leaſe or demiſe of any lands tenements or hereditaments, or of any other contract or agreement whatſoever; or of the accepting, ſurrendring, or delivering up the poſſeſſion of any ſuch lands tenements or hereditaments; or the commencement, expiration, or determination of any annuity or rent; or of any grant for any term of years, of what nature or kind ſoever, by virtue or in conſequence of any ſuch deed, writing, contract,

tract, or agreement; or at the time of the attaining the age of one and twenty years, or any other age requiſite by any law cuſtom or uſage deed will or writing whatſoever, for the doing any act, or for any other purpoſe, by any perſon now born or who ſhall be born before the ſaid fourteenth day of September; or the time of the expiration or determination of any apprenticeſhip or other ſervice, by virtue of any indenture, or of any articles under ſeal, or by reaſon of any ſimple contract or hiring whatſoever: but that all ſuch rents annuities ſums of money, and the intereſt thereof, ſhall remain and continue to be due and payable; and the delivery of ſuch goods and chattels, wares and merchandizes ſhall be made; and the ſaid leaſes and demiſes of all ſuch lands tenements and hereditaments, and the ſaid contracts and agreements ſhall be deemed to commence, expire, and determine; and the ſaid lands tenements and hereditaments ſhall be accepted, ſurrendred, and delivered up; and the ſaid rents, and annuities, and grants for any term of years ſhall commence, ceaſe, and determine, —— at and upon the ſame reſpective natural days and times, as the ſame ſhould and ought to have been payable, or made, or would have happened, in caſe this act had not been made; and that no further or other ſum ſhall be paid or payable for the intereſt of any ſum of money whatſoever, than ſuch intereſt ſhall amount unto, for the true number of natural days for which the principal ſum, bearing ſuch intereſt, ſhall continue due and unpaid; and that no perſon ſhall be deemed or taken to have attained the ſaid age of one and twenty years, or any other ſuch age as aforeſaid, until the full number of years and days ſhall be elapſed, on which ſuch perſon would have attained ſuch age, as would have compleated the time of ſuch ſervice as aforeſaid, in caſe this act had not been made. *ſ.* 6.

Provided always, that whereas in divers parts of this kingdom, by cuſtom preſcription or uſage, or by virtue of ſome law or contract, certain lands and grounds are to be opened and uſed for common paſture or other purpoſes, and the ſame lands and grounds are again incloſed and ſhut up; and certain rents or other payments are due and payable; and ſome other matters and things may be to be done, upon ſome of the moveable feaſts, or upon certain days or times depending upon or to be computed from the ſame; it is enacted, that from and after the ſaid ſecond day of September, the reſpective times for opening uſing incloſing and ſhutting up all ſuch lands and grounds as aforeſaid, for the paying of ſuch rents or other

other payments, and for the doing of ſuch other matters or things as aforeſaid, if ſuch times are depending on any moveable feaſt, ſhall be computed and take place according to the ſaid new calendar, and not according to the method of ſupputation heretofore uſed; and the temporary and diſtinct property and right of all perſons, bodies politick and corporate, of to and in all ſuch lands and grounds, ſhall commence and be enjoyed, and all ſuch rents and payments ſhall become and be due and payable, and all ſuch matters and things ſhall be tranſacted and done accordingly. 23 *G.* 2. *c.* 30. *ſ.* 2.

King's inauguration. See Holidays.
King's ſupremacy. See Supremacy.

Lapſe.

Lapſe, what.

1. LAPSE, *lapſus*, is a ſlip or departure of a right of preſenting to a void benefice, from the original patron neglecting to preſent within ſix months next after the avoidance. Whence it is commonly ſaid, that ſuch benefice is in lapſe or lapſed, whereunto he that ought to preſent hath omitted or ſlipped his opportunity. *God.* 242.

And in ſuch caſe the patronage doth devolve from the patron to the biſhop, from the biſhop to the metropolitan, and from the metropolitan to the king; that is, to the biſhop, as ordinary; to the metropolitan, as ſuperior; and to the king, as patron paramount. *Gibſ.* 768.

For it is to be remembred, that churches and dioceſes were of common right under the care of the biſhops; and it was by particular indulgence that the patrons had the right of preſentation; which being neglected, things do return to common right; and therefore the biſhop hath a true intereſt, and acts not in the right of the patron, but his own. And if the biſhop doth not collate within ſix months, then it falls to the archbiſhop; not as ordinary, but as ſuperior; to whom the right of devolution falls upon the inferior's neglect. Upon the metropolitan's neglect, then it falls to the king (as the lawyers expreſs it) as patron paramount of all the benefices within the realm; by which is meant, that the king by right

right of his crown is to ſee that all places be duly ſupplied with perſons fit for them; and if all others whom the law hath intruſted, do neglect their duties, then by the natural order and courſe of government it falls to the ſupreme power, which is to ſupply defects, and to reform abuſes. 1 *Still.* 320.

2. The term or ſpace, in which title by lapſe accrues ſucceſſively to the forementioned ſuperiors, is ſix months. The canon law upon this head did make a diſtinction between lay patrons, and clergymen being patrons; appointing four months in caſe of the former, and ſix months in caſe of the latter. But the common law obſerveth not this diſtinction; but gives eccleſiaſtical and temporal patrons an equal title to preſent at any time within the ſix months. *Gibſ.* 768. Incurred in ſix months.

And becauſe this computation doth concern the church, therefore it ſhall be made according to the computation of the church, that is, by the kalendar, for one half year, and not accounting twenty eight days to the month; and the day on which the church becomes void, is not to be taken into the account. 2 *Inſt.* 360.

3. As to the time from which the ſix months are to commence, the rule of the canon law in all caſes was, that the ſix months ſhall be reckoned not from the time of the voidance, but from the time of notice; and ſo it is held in ſome of the old books. *Gibſ.* 769. From what time the months to be computed.

Thus Rolle ſaith, that the ſix months ſhall begin from the time of the patron's knowledge of the avoidance; and ſo it was adjudged upon a writ in the time of king Edward the ſecond. As if the incumbent die beyond ſea, the ſix months ſhall not be computed from the time of his death, but from the time of the patron's knowledge thereof: And ſo it was adjudged in a caſe between the abbot of *St Mary's York*, and the biſhop of *Norwich*, in a *quare non admiſit.* For the ſix months ſhall not be reckoned from the death of the laſt incumbent, but from the time the patron might (according to a reaſonable computation, having regard to the diſtance of the place where he was at the time of the incumbent's death, if he were within the realm at that time) have come to the knowledge thereof: for he ought afterwards to take notice thereof at his peril, and not before, for that he was in ſome other county than that where the church is, and wherein the incumbent died. 2 *Roll's Abr.* 363.

And Dr Watſon ſaith, the law (he finds) hath been holden to be, that the ſix months for lapſe upon an avoidance, ſhall not be accounted but from the time the patron could

reaſonably be ſuppoſed to have notice of the incumbent's death; eſpecially if the patron or incumbent ſhould happen to be beyond the ſeas, or in ſome remote county within the realm at the time of ſuch avoidance: But by the common law of England (he ſays) the ſix months, as he ſuppoſeth, ſhall be accounted from the time of the death. *Watſ. c.* 1.

And Dr Gibſon ſaith, foraſmuch as the former notion was attended with great uncertainty, therefore the common law hath made this diſtinction; that where the avoidance is occaſioned by an act between the ordinary and the incumbent (as in the caſe of deprivation, and reſignation) lapſe ſhall incur from the notice given by the biſhop, or (if he die) by his ſucceſſor; but where it is occaſioned by the act of God (as in the caſe of death), or by the act of the incumbent (as in the caſe of ceſſion), no notice need to be given, but the patron is bound to take notice of it; and ſo, lapſe ſhall incur from the time of death or ceſſion. *Gibſ.* 769. 1 *Still.* 251.

Caſe where an inſufficient clerk is preſented.

4. But where a clerk is refuſed for want of abilities or morals, tho' the patron ought to have notice, that he may preſent another in due time; yet if he neglect, the lapſe ſhall incur from the death or ceſſion, and not from the time of the notice. And in this caſe, where a *ſpiritual* perſon preſents an illiterate clerk, it hath been adjudged, that lapſe incurs without any notice, becauſe the law ſuppoſeth ſuch to be judges of the abilities of their clerk, and that therefore they ought not to have preſented an inſufficient clerk. 2 *Roll's Abr.* 364. *Gibſ.* 769.

It hath alſo been held, that altho' no lapſe ſhall incur, if no notice be given; yet, if in ſuch caſe a ſtranger preſent, and his clerk is inſtituted and inducted, and the patron gives no diſturbance within ſix months, he has no remedy for that turn: becauſe induction is a notorious act, of which he is bound to take notice. *Gibſ.* 769. *Noy* 65.

But if the clerk whether of an eccleſiaſtical or lay patron be not refuſed, but only the biſhop doth delay the examination of him, whereby the ſix months paſs; lapſe ſhall not incur, becauſe the church remains void by the biſhop's own default, and he is thereby a diſturber. *Watſ. c.* 12.

Where the lapſe happeneth thro' the biſhop's own default.

5. And generally, lapſe ſhall incur or not incur, according as it happeneth or doth not happen thro' the default of the biſhop, and according as he is named or not named in the writ of *quare impedit* brought upon that occaſion. So, if he will not award a *jus patronatus* when required,

quired, or refuſeth the clerk without cauſe, and the church becomes litigious; in ſuch caſes the lapſe ſhall not incur. But if he do what is his duty upon a preſentment made to him, and refuſeth with good cauſe, and is not named in the *quare impedit*; or if no preſentation is made, and yet a *quare impedit* is brought againſt patron and ordinary; the lapſe ſhall incur, and his collation thereupon ſhall be good. *Gibſ.* 769.

Alſo, after the commiſſioners, upon a *jus patronatus* awarded, have certified the right as it is found before them, the biſhop ſhall not take advantage of the lapſe; that is, if the clerk of the patron for whom it is certified doth afterwards make a new requeſt to the ordinary to be admited, which may be done upon the firſt preſentation; but without ſuch after requeſt, the ordinary may have the void turn, as by lapſe, ſuch inquiry and certificate notwithſtanding. *Watſ. c.* 12.

Alſo if when a church is litigious, no *jus patronatus* is awarded, but only an aſſiſe of *darrein preſentment* or *quare impedit* is brought by one party, who doth recover againſt the other; if the biſhop was not named in the writ, and the ſix months paſs pending the ſame, lapſe ſhall incur, for that there was no default in the biſhop. And tho' the patron in ſuch caſe doth recover within the ſix months; yet if the ſix months paſs before the writ to the biſhop be taken forth, lapſe ſhall incur: And if the ordinary doth collate before the receipt of the writ; his clerk ſhall not be removed. And ſo it is, if after the recovery within the ſix months, the defendant doth bring a writ of error, and the ſix months do paſs pending the ſame; unleſs the plaintiff, before the ſix months by ſuch means paſs, doth bring a *quare impedit* againſt the biſhop, for thereby it hath been ſaid that lapſe ſhall be prevented. However it is generally ſaid, that if a *quare impedit* in any caſe be brought, and the biſhop be named therein, lapſe ſhall not paſs to the ordinary pending the writ. *Watſ. c.* 12.

6. Title by lapſe can never accrue to the metropolitan, or to the king, unleſs it hath firſt accrued to the immediate ordinary. This is agreed on all hands, even tho' the lapſe be loſt by default of the ordinary, as for want of giving notice, or the like, and for the ſame reaſon, if a clerk is inſtituted, and remains eighteen months without induction; tho' inſtitution is no plenarty againſt the king, yet being ſo againſt the biſhop, no title by lapſe ſhall accrue to the king. *Gibſ.* 769. *Watſ. c.* 12. Lapſe ſhall not incur per ſaltum.

And by the ſtatute of the 25 Ed. 3. ſt. 3. c. 7. *Becauſe that many preſentments to divers benefices of holy church, as well*

of the patronage of lay people, as of people of holy church, which were void by ſix months, whereof the collation by lapſe of time was devolute and of right pertaining to the ordinaries of the places, were recovered by the king by judgments thereof given of the aſſent of the ſaid patrons, in deceit of the ſaid collations ſo made reaſonably by the ſaid ordinaries; in which pleas, the ordinaries nor their clerks to whom they did give ſuch benefices, were not received to ſhew nor defend their right in this behalf, nor to counterplead the king's right ſo claimed: the king, by the aſſent of the parliament, willeth and granteth for him and his heirs, that when archbiſhops, biſhops, or other ordinaries have given a benefice of right devolute to him by lapſe of time, and after the king preſenteth and taketh the ſuit againſt the patron, which percaſe will ſuffer that the king ſhall recover without action tried, in deceit of the ordinaries, or the poſſeſſors of the ſaid benefices; that in ſuch caſe, and all other caſes like, where the king's right is not tried, the archbiſhop or biſhop, ordinary, or poſſeſſor, ſhall be received to counterplead the title taken for the king, and to have his anſwer, and to ſhew and defend his right upon the matter, altho' that he claim nothing in the patronage in the caſe aforeſaid.

Biſhop being both patron and ordinary, ſhall not have twice ſix months.

7. Altho' the biſhop be both patron and ordinary, he ſhall not have a double time to preſent in, but only ſix months, before title by lapſe accrues to the metropolitan. And there is a parity of reaſon, for its paſſing from the metropolitan to the king in ſix months, where the metropolitan is both patron and ordinary (as it frequently happeneth in churches within his own dioceſe); for the title by lapſe is in the nature of a truſt, and not of an intereſt; and the ſelf ſame perſon who hath neglected that truſt, and kept the church deſtitute of a paſtor for one ſix months, ought not in equity to have it in his power to keep it vacant for ſix months more. *Gibſ.* 769. *Watſ. c.* 12.

Lapſe incurred during the metropolitical viſitation.

8. If an archbiſhop doth viſit an inferior dioceſe, and doth inhibit the biſhop during the viſitation (as the uſe is), and afterwards during the viſitation and inhibition, and before any releaſe made by the archbiſhop, ſome church in the ſame dioceſe doth lapſe; altho' that the juriſdiction of the ordinary be ſuſpended during the viſitation; ſo that he cannot in any ſuch caſe collate his clerk himſelf, yet he ſhall have the benefit of the lapſe, and not the archbiſhop; to whom in this caſe the biſhop muſt as a common perſon preſent his clerk, and the archbiſhop as his ordinary ought to inſtitite upon ſuch preſentment. *Watſ. c.* 12.

And the reaſon is plain; for altho' the biſhop is under inhibition during the time of the viſitation, yet ſuch inhibition reacheth not his right of patronage, but only ſuſpends his right of inſtitution and collation; and therefore the only difference is, that inſtead of collating by his own authority, he is to preſent his clerk to the archbiſhop for inſtitution. *Gibſ.* 770.

9. If title by lapſe is accrued to the biſhop, and he dies, or is tranſlated, or deprived, before he takes the benefit of it; the devolution is to the metropolitan, as he is guardian of the ſpiritualties, and as this is not an intereſt, but a mere ſpiritual truſt. For altho' it is laid down in an ancient writ, as a thing notorious, that churches which belonged to the collation of biſhops while they lived, do belong to the king by reaſon of his cuſtody thereof in the time of the vacation; yet this relates only to ſuch voidances as belong to the biſhops in their own right; but lapſes belong to the guardians of the ſpiritualties, whoever they be. *Watſ. c.* 12. *Gibſ.* 770. Biſhop dying after lapſe incurred.

10. By the ſtatute of Prerogativa regis, 17 Ed. 2. c. 8. *Of churches being vacant, the advowſons whereof belong to the king, and other preſent to the ſame, whereupon debate ariſeth between the king and other: if the king by award of the court do recover his preſentation, tho' it be after the lapſe of ſix months from the time of the avoidance, no time ſhall prejudice him, ſo that he preſent within the ſpace of ſix months.* No lapſe from the king.

The meaning of which ſtatute is, that where a church belonging to the patronage of the king is litigious, and not recovered in ſix months, lapſe ſhall not incur, as in the caſe of a common perſon: but the laſt clauſe ſeemeth to be a limitation of that privilege; viz. on condition that the king preſent within the ſpace of ſix months after it is recovered; and if he preſent not, then lapſe to incur. But it being a maxim in law, that *nullum tempus occurrit regi*, and the reſtraining words being not expreſs, that the prerogative ſhall be reſtrained in that particular, but only words of implication; the law is taken to be that the church can in no wiſe go in lapſe from the king. *Gibſ.* 766. 770.

And therefore there is no remedy againſt a neglect in the king to fill vacant churches, but only the ordinary's ſequeſtring the profits of the church, and appointing a clerk to ſerve the cure. *Gibſ.* 770.

11. After a church is lapſed to the immediate ordinary, if the patron doth preſent before the ordinary hath filled the church, the ordinary ought to receive his clerk. For Patron's right, where advantage of the lapſe is not taken.

lapſe to the ordinary is only an opportunity of executing a truſt, viz. of ſeeing the cure ſupplied in caſe of the patron's neglect; which being performed by the patron himſelf, the ordinary can take no advantage by it. *Watſ. c.* 12.

And the like law is, if lapſe be accrued to the metropolitan; for then, if the patron preſent to the inferior ordinary, whilſt the church remains void, he is bound to receive his clerk, and the metropolitan is barred. *Watſ. c.* 12.

But if the ordinary of the dioceſe, or metropolitan, hath collated his clerk, whilſt the turn was reſpectively theirs, altho' the clerk be not inducted; the patron's clerk, if after that preſented, is not to be admitted. *Watſ. c.* 12.

Or if the inferior ordinary, after the time is gone by lapſe to the metropolitan, hath collated his clerk to the benefice that is in lapſe; altho' this collation be tortious to the metropolitan, yet it ſeems that it takes away the preſentation of the patron, ſo that he ſhall not preſent, and is only an uſurpation upon the metropolitan; and thereby the metropolitan is put out of poſſeſſion, and driven to his *quare impedit.* Watſ. c. 12.

It hath been a queſtion, whether the biſhop ought to admit the patron's clerk, after the title of lapſe is paſſed from the metropolian to the king. And by Hobart, the patron's preſentation takes place, after the church is lapſed to the king, if it be exhibited to the ordinary before the king's; becauſe the patron's right to preſent continueth, until the title by lapſe be executed, and the king's title is not veſted in him in this caſe abſolutely, as other titles are, but conditionally, viz. if he doth preſent before the patron; becauſe the king hath it only as ſupreme ordinary. But by others, the turn is by lapſe ſo veſted in the king, that if the patron's or other perſon's clerk be admitted to a church, after it is come to the king by lapſe; the king by *quare impedit* may recover the preſentment, and remove ſuch clerk. And this latter opinion is taken to be the law. So if the king hath title by lapſe, to preſent to a prebend of his free chapel, for that the dean thereof hath not collated to it within ſix months; tho' the dean doth collate before the king preſents, yet the king ſhall remove his clerk. *Watſ. c.* 12.

And this power in the king is in effect the ſame that the pope claimed and exerciſed; as appears by the direction given to his legates in this very caſe, which became part of the body of the canon law; where ſpeaking of

ſuch

ſuch benefices, or dignities as were lapſed to him, and filled by the patrons notwithſtanding ſuch lapſe, he orders them to permit the perſons ſo preſented, if they be perſons fit and ſufficient, peaceably to enjoy the ſame; otherwiſe that they remove them, and put others ſufficient in their places. *Gibſ.* 770.

But if in ſuch caſe, the patron's clerk is ſuffered to die incumbent, or is deprived, the king's turn is ſerved, and he hath loſt the advantage of the lapſe. Upon which head, all the books are clear, as to death; and moſt of them, as to deprivation; but many of them will not allow the ſame reaſon, in caſe of reſignation, becauſe there is room to ſuſpect fraud and covin. *Gibſ.* 770.

12. A donative remaining void never goes in lapſe, unleſs it be ſpecially provided for by the foundation, or by compoſition afterwards; but the ordinary may compel the patron to fill the ſame, by eccleſiaſtical cenſures. *Weſt.* *c.* 12. No lapſe of a donative.

But if it is augmented by the governors of queen Anne's bounty, it will lapſe in like manner as preſentative livings. 1 *G. ſt.* 2. *c.* 10. *ſ.* 7.

Leaſes.

1. BY the common law, biſhops with the confirmation of the dean and chapter, maſter and fellows of any college, deans and chapters, maſter or guardian of any hoſpital and his brethren, parſon or vicar with the conſent of the patron and ordinary, archdeacon, prebendary, or any other body politick ſpiritual and eccleſiaſtical, might have made leaſes for lives or years without limitation or ſtint; and ſo might they have made gifts in tail, or eſtates in fee, at their will and pleaſure; whereupon not only great decay of divine ſervice, but dilapidations and other inconveniences enſued; and therefore they were diſabled and reſtrained by ſeveral ſtatutes. 1 *Inſt.* 44. 3 *Co.* 75. Leaſes by the common law.

Corporations *aggregate*, conſiſting of divers perſons, as maſter and fellows, dean and chapter, might of themſelves have made ſuch grants, without confirmation; nor is any confirmation yet required to ſuch leaſes as they may make by ſtatute. *Gibſ.* 744.

But the law did not think fit to truſt a ſingle perſon, or *ſole* corporation, as an archbiſhop, biſhop, archdeacon, prebendary, parſon, vicar, with the diſpoſition of eſtates held in right of the church; and therefore, by way of reſtraint, appointed the aſſent and confirmation of ſome others, without which their grants ſhould not be valid againſt the ſucceſſor. *Id.*

Accordingly, all leaſes of archbiſhops and biſhops (to bind their ſucceſſors) were to be confirmed by the dean and chapter, or deans and chapters if there be ſeveral chapters; leaſes of deans, by the biſhop and chapter; leaſes of archdeacons, prebendaries, and the like, by the biſhop, dean and chapter; leaſes of parſons and vicars, by the patron and ordinary; and leaſes of the incumbent of a donative, by the patron alone: but if the king be patron of a prebend, or the like, then the king and dean and chapter, and not the biſhop, ought to confirm the leaſe. *Gibſ.* 744. *Degge* p. 1. c. 10. *Watſ.* c. 44.

But all theſe ſole corporations, as archbiſhops, biſhops, archdeacons, prebendaries, and the like (parſons and vicars only excepted) were enabled by the ſtatute of the 32 *H.* 8. hereafter following, to let leaſes for twenty one years or three lives, without confirmation; provided that in ſuch leaſes the conditions and limitations of the ſaid act, as to the expiration of the old leaſe, the commencement of the new, the reſervation of rent, and the like, were punctually obſerved; but if not, confirmation remained neceſſary, as before, in order to bind the ſucceſſor. And with confirmation, long leaſes of ſole corporations continued (ſo far as that act is concerned) to be good againſt the ſucceſſor, as they had been at the common law. *Gibſ.* 744.

Afterwards, by the ſtatutes of the 1 *El.* 13 *El.* and 18 *El.* all corporations, whether ſole or aggregate, were diſabled from making leaſes for more than twenty one years or three lives; and all (except biſhops) from making any new leaſe, where the old was not expired or ſurrendred or ended within three years. In which caſes, confirmation was excluded, and could avail nothing; and therefore confirmation is of real effect only to two ſorts of ſole corporations, viz. 1. To parſons and vicars; who being ſpecially excepted out of the enabling act of the 32 *H.* 8. cannot nor ever could bind their ſucceſſors without confirmation: And, 2. To biſhops; who being not included in the reſtraint of the 18 *El.* hereafter mentioned againſt *concurrent* leaſes, may ſtill (as at common law they might) let ſuch leaſes at any time, with confirmation;

mation; as will appear more particularly, in the recital and explanation of the ſeveral ſtatutes. *Gibſ.* 744.

2. By the 32 H. 8. c. 28. *All leaſes to be made of any manors lands tenements or other hereditaments, by writing indented, under ſeal, for term of years, or for term of life, by any perſon or perſons being of full age of twenty one years having any eſtate of inheritance either in fee ſimple or in fee tail, in their own right, or in the right of their churches or wives, or jointly with their wives, of an eſtate of inheritance made before the coverture or after, ſhall be good and effectual in the law againſt the leſſors, their wives, heirs, and ſucceſſors, and every of them, according to ſuch eſtate as is compriſed and ſpecified in every ſuch indenture of leaſe, in like manner and form as the ſame ſhould have been, if the leſſors thereof, and every of them, at the time of the making of ſuch leaſes had been lawfully ſeiſed of a good perfect and pure eſtate of fee ſimple thereof, to their own only uſes.* ſ. 1. Leaſes by the enabling ſtatute of the 32 H. 8.

But this ſhall not extend (1) *to any leaſes to be made of any manors lands tenements or hereditaments being in the hands of any farmer or farmers by virtue of an old leaſes, unleſs the ſame old leaſe be expired ſurrendred or ended within one year next after the making of the ſaid new leaſe; nor* (2) *ſhall extend to any grant to be made of any reverſion of any manors lands tenements or hereditaments; nor* (3) *to any leaſe of any manors lands tenements or hereditaments, which have not moſt commonly been letten to farm, or occupied by the farmers thereof by the ſpace of twenty years next before ſuch leaſe thereof made; nor* (4) *to any leaſe to be made without impeachment of waſte; nor* (5) *to any leaſe to be made above the number of twenty one years or three lives at the moſt from the day of the making thereof; and* (6) *that upon every ſuch leaſe there be reſerved yearly during the ſame leaſe, due and payable to the leſſors their heirs and ſucceſſors to whom the ſame lands ſhould have come after the deaths of the leſſors if no ſuch leaſe had been made thereof, and to whom the reverſion thereof ſhall appertain, according to their eſtates and intereſts, ſo much yearly farm or rent, or more, as hath been moſt accuſtomably paid for the ſame within twenty years next before ſuch leaſe thereof made.* ſ. 2.

And every ſuch perſon to whom the reverſion ſhall appertain, after the death of ſuch leſſors, or their heirs, ſhall have like remedy and advantage againſt the leſſees their executors and aſſigns, as the ſame leſſor might have had againſt the ſame leſſee: ſo that if the leſſor were ſeiſed of any ſpecial eſtate tail of the ſame hereditaments at the time of ſuch leaſe, the iſſue or heir of that ſpecial eſtate ſhall have the reverſion rents and ſervices reſerved upon ſuch leaſe after the death of the ſaid leſſor, as the leſſor himſelf might have had if he had lived. ſ. 2.

Provided, that nothing herein ſhall extend to give any liberty or power to any parſon or vicar of any church or vicarage, to make any leaſe or grant of any of their meſſuages lands tenements tithes profits or hereditaments belonging to their churches or vicarages, otherwiſe or in any other manner, than they might have done before the making of this act. ſ. 4.

All leaſes to be made, &c.] Before this ſtatute, altho' corporations aggregate of many (as deans and chapters) might have made long leaſes for lives or years, of themſelves and without any conſent or confirmation; yet if ſuch leaſes had been made by a ſole corporation (as biſhop, archdeacon, prebendary), and not confirmed by ſuch other perſon or perſons whoſe conſent was neceſſary, they expired with the leſſor, and could not bind the ſucceſſor. But by this ſtatute, all ſuch ſole corporations (except parſons and vicars) are *enabled* to make leaſes for twenty one years or three lives, without any confirmation whatſoever (the ſeveral conditions which follow in the ſtatute being punctually obſerved): for which reaſon it is called the *enabling* ſtatute, and ſo it wholly was, and had nothing in it of reſtraint; but left aggregate corporations, and alſo ſole corporations *with proper conſent*, to their full liberty of going on to make all ſuch leaſes as they might have made before; without being limited at all to the conditions of this ſtatute, if they had but the ſame proper confirmation or conſent. *Gibſ.* 732.

Of any manors lands tenements or other hereditaments] It muſt be of lands tenements or hereditaments, manurable or corporeal, which are neceſſary to be letten, and whereout a rent by law may be reſerved; and not of things that lie in grant, as advowſons, fairs, markets, franchiſes and the like, whereout a rent cannot be reſerved. 1 *Inſt.* 44.

For the better underſtanding of which rule, it will be neceſſary to take notice of ſome diſtinctions which plainly ariſe out of the books. As, firſt; All the books agree, that a leaſe *for three lives* of tithes or other incorporeal inheritance will not bind the ſucceſſor, becauſe he would then be without the tithes or other ſuch incorporeal inheritance, and have no remedy for the rent thereon reſerved; for diſtrain he could not, becauſe there would be no place wherein to take any diſtreſs, the things leaſed or granted being perfectly incorporeal, and inviſible; an aſſize he could not have, becauſe either he had not ſeiſin, or if he had yet there would be nothing to put in view of

of

of the recognitors; and an action of debt he could not maintain during the leaſe, becauſe being for three lives, that is an eſtate of freehold, which will endure no action of debt ſo long as it continues: And ſo the ſucceſſor in ſuch caſe would have no manner of remedy for the rent reſerved, which would be againſt the expreſs proviſion and intent of the ſeveral acts. Secondly, it is held in ſome books, that a leaſe *for twenty one years* of ſuch incorporeal inheritances, tho' they have been uſually demiſed, and the ancient rent be thereout reſerved, is yet voidable by the ſucceſſor within theſe ſtatutes: becauſe tho' the rent reſerved be good by way of contract between the leſſor and leſſee, and an action of debt may be maintained for the recovery thereof, yet they ſay it is not ſuch a rent as is incident to the reverſion, nor ſhall paſs with it to the ſucceſſor; and therefore the ſucceſſor, having no remedy for the rent, ſhall not be bound by the leaſe. 5 *Co.* 3. *Litt.* 44.

But this point ſeems to have been ſhaken by contrary reſolutions. For ſome books expreſsly hold ſuch leaſe for years to be good againſt the ſucceſſor, becauſe they ſay he has remedy for the rent by action of debt, and ſay it has been ſo judged, and take the diverſity between ſuch leaſe for years and a leaſe for life. Alſo they ſay, that the rent iſſues out of the tithes in point of render, tho' not in point of remedy; becauſe no diſtreſs can be taken for it; but that is ſupplied by the action of debt, which lies for ſuch rent, and ſhall devolve on the ſucceſſor; and that ſuch rent doth not lie only in privity of contract, as a ſum in groſs, but is incident to the reverſion, otherwiſe the ſucceſſor could not have it, being only privy to the eſtate, not to the perſonal contracts of his predeceſſor. And to this opinion the court inclined, but thought it a point of great conſequence, and therefore to avoid it gave judgment on another point which was clear. Thirdly, all the books agree, that a leaſe for three lives or twenty one years, of a manor with the advowſon appendant or of lands or houſes and of tithes, uſually let therewith reſerving the ancient rent, and the like, is good and ſhall bind the ſucceſſor; for tho' the rent doth not iſſue out of the advowſon, or tithes, in point of remedy, yet the rent is greater in reſpect thereof, and the ſucceſſor hath his remedy for the whole rent upon the lands or other corporeal inheritance let therewith. And Vaughan proves this from the expreſs words of the ſtatute of the 13 *Eliz.* which are, that all leaſes by any ſpiritual or eccleſiaſtical perſons, having any lands tenements *tithes* or

hereditaments, (other than for twenty one years or three lives) ſhall be void. So that the ſtatute plainly ſhews, that ſome way or other tithes may be leaſed for twenty one years or three lives, and if they cannot be leaſed ſingly, it muſt be with lands uſually let therewith. 3 *Bac. Abr.* 352.

But now, by the 5 *G.* 3. *c.* 17. Whereas it may be doubtful, whether by the laws now in being, archbiſhops or biſhops, maſter and fellows, or any other head and members of colleges or halls, deans and chapters, precentors, prebendaries, maſters and guardians of hoſpitals, or any other perſon or perſons having any ſpiritual or eccleſiaſtical promotions, heretofore had, or now have, any power to make or grant any leaſe or leaſes of tithes or other incorporeal hereditaments only, which lie in grant, and not in livery, for one, two, or three lives, or for any term or terms of years not exceeding twenty one, altho' the ancient rent is thereby reſerved, and all other requiſites preſcribed by the acts of parliament now in being to that end, or any of them, were or are juſtly obſerved and performed, by reaſon that there is generally no place wherein a diſtreſs can be taken; and it may be alſo doubtful whether, in caſes of leaſes for life or lives, there is any remedy in law for ſuch perſons, by action of debt or otherwiſe, for recovering the rent in arrear reſerved on ſuch leaſes for life or lives: Therefore, for obviating all doubts, and enabling the ſaid perſons to make valid leaſes of ſuch their incorporeal hereditaments, and to recover the rent reſerved on leaſes for one, two, or three lives; and alſo to make good ſuch leaſes as have been already granted by them; it is enacted, that all leaſes for one, two, or three lives, or any term not exceeding twenty one years, already made and granted, or hereafter to be made or granted, of any tithes, tolls, or other incorporeal hereditaments ſolely and without any lands or corporeal hereditaments, by any ſuch perſons as aforeſaid, ſhall be good and effectual in law, againſt ſuch perſons and their ſucceſſors, as any leaſe made by ſuch perſons of lands or other corporeal hereditaments by virtue of the ſtatute of the 32 *H.* 8. or any other act. And if the rent or yearly ſum reſerved upon ſuch leaſe ſhall be behind or unpaid for twenty eight days; the ſaid leſſors, their executors, adminiſtrators, and ſucceſſors reſpectively may bring action of debt againſt the leſſee, his heirs, executors, adminiſtrators, or aſſigns, for recovering the ſame, as any landlord or leſſor or other perſon may do for recovering of arrears of rent due on any leaſe for life, lives, or years, by the laws now in being.

By

By writing indented] It muſt be by deed indented, and not by deed poll, or by parol. 1 *Inſt.* 44.

And if it be not really indented, tho' the words of the deed be *this indenture*, yet ſtill it is not a deed indented; but if the deed actually be indented, it matters not whether it ſpeaks itſelf to be an indenture or not, it is however a deed indented. *Watſ.* c. 42.

In the right of their churches] Yet a biſhop that is ſeiſed in the right of his biſhoprick, a dean of his ſole poſſeſſions in the right of his deanry; an archdeacon in the right of his archdeaconry, a prebendary, and the like, are within this ſtatute; for every of them generally is ſeiſed in *jure eccleſiæ*. 1 Inſt. 44.

And in general, all ſole corporations whatſoever (parſons and vicars only excepted) are included within this ſtatute, and are hereby enabled to bind their ſucceſſors. Accordingly it hath been adjudged, on ſeveral occaſions, that præcentors, chancellors, and treaſurers of churches, are within the benefit of this ſtatute; only, as to præcentors, it hath been determined, that tho' there are perſons of inferior rank in ſeveral churches, who are commonly ſo called, yet they are not within this ſtatute; but only thoſe dignitaries of that denomination who are properly ſo called, and who are next to the deans in place and order. *Gibſ.* 732.

Unleſs the ſame old leaſe be expired ſurrendred or ended within one year next after the making of the ſaid new leaſe] This ſurrender muſt be abſolute, and not conditional; for the intent of the makers of the act was, to have a continual and abſolute ſurrender, and not ſuch an illuſory ſurrender, which might be avoided the next day. 5 *Co.* 2.

H. 17 *G.* 2. *Wilſon* on the demiſe of *Eyre*, clerk, againſt *Carter* and others. The leſſor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a leaſe made by his predeceſſor, as not being conformable to this proviſo, which requires, that upon renewals, the old leaſe muſt be expired ſurrendred or ended, within one year next after making of the new leaſe. And his objection was, that the *ſurrender* made of the former leaſe was with a condition, that if the then prebendary did not within a week after grant a new leaſe for three lives, the ſurrender ſhould be void; whereby (as was contended for the plaintiff) the old term was

not

not abſolutely gone, but the leſſee reſerved a power of ſetting it up again. But the court, after two arguments, gave judgment for the defendants: this being within the intent of the ſtatute, which was, that there ſhould not be two long leaſes ſtanding out againſt the ſucceſſor. Here the new leaſe was made within the week, and from thence it became an abſolute ſurrender both in deed and in law. And the whole was out of the leſſee, without further act to be done by him. In the proviſo in the act, there is the word *ended* as well as *ſurrendred*; and can any body ſay the firſt leaſe is not at an end? This was no more than a reaſonable caution in the firſt leſſee, to keep ſome hold of his old eſtate, till a new title was made to him. *Strange.* 1201.

Of ſurrenders in general, the ſtatute of the 29 *C.* 2. *c.* 3. enacteth, that no leaſes eſtates or intereſts, either of freehold or terms of years, or any uncertain intereſt not being copyhold or cuſtomary intereſt of in to or out of any meſſuages manors lands tenements or hereditaments, ſhall be aſſigned granted or ſurrendred, unleſs it be by deed or note in writing, ſigned by the party ſo aſſigning granting or ſurrendring the ſame, or their agents thereunto lawfully authorized by writing, or by act and operation of law. ſ. 3.

Note, a ſurrender *by deed*, is a ſurrender in expreſs words, into the hands of him who hath the immediate remainder: a ſurrender *in law*, or *by operation of law*, is by taking a new leaſe of the ſame eſtate; for this is an acknowledgment, that the leſſor hath power to make ſuch new leaſe; which power he could not have, but by ſurrender of the former leaſe in being. *Gilb.* 733.

Further, with reſpect to ſurrenders, it is enacted by the 4 *G.* 2. *c.* 28. that whereas many perſons hold conſiderable eſtates by leaſes for lives or years, and leaſe out the ſame in parcels to ſeveral under tenants; and whereas many of thoſe leaſes cannot by law be renewed without a ſurrender of all the under leaſes derived out of the ſame, ſo that it is in the power of any ſuch under tenants to prevent or delay the renewing of the principal leaſe, by refuſing to ſurrender their under leaſes, notwithſtanding they have covenanted ſo to do, to the great prejudice of their immediate landlords, the firſt leſſees: therefore for preventing ſuch inconveniences, and for making the renewal of leaſes more eaſy for the future, in caſe any leaſe ſhall be duly ſurrendered in order to be renewed, and a new leaſe made and executed by the chief landlord or

landlords, the ſame new leaſe ſhall, without a ſurrender of all or any the under leaſes, be as good and valid, to all intents and purpoſes, as if all the under leaſes derived thereout had been likewiſe ſurrendred at or before the taking of ſuch new leaſe. *ſ.* 6.

And by the 29 *G.* 2. *c.* 31. Whereas divers lands tenements and hereditaments, have been and may be granted by leaſe for the life of one or more perſon or perſons, or otherwiſe; and whereas, in order to obtain a renewal of ſuch leaſes, it is in many caſes neceſſary to ſurrender up the eſtates thereby granted; which ſurrenders cannot be effectually made by perſons under the age of twenty one years, nor lunaticks, nor by femes covert, without levying a fine; it is enacted, that in all caſes, where any perſon ſo under age, lunatick, or feme covert ſhall become intereſted in or intitled to any leaſe or leaſes made or granted by any perſon or perſons, bodies politick, corporate, or collegiate, aggregate or ſole, for the life or lives of one or more perſon or perſons, or for any term of years, either abſolute, or determinable upon the death of one or more perſon or perſons, or otherwiſe, it ſhall be lawful for ſuch perſon ſo under age, or for his guardian or other perſon on his behalf, and for ſuch lunatick or his guardian or committee for his eſtate or other perſon on his behalf, and for ſuch feme covert or any perſon on her behalf, to apply to the court of chancery or exchequer, or to the courts of equity of the counties palatine of Cheſter, Lancaſter, and Durham, or the courts of great ſeſſion in Wales, reſpectively, by petition or motion in a ſummary way: and by the order and direction of ſuch court, upon hearing all parties concerned, ſuch perſon ſo under age, lunatick, or perſons appointed by ſuch court, and alſo ſuch feme covert, by deed or deeds only, without levying any fine, ſhall be enabled to ſurrender ſuch leaſes, and to take new ones, as ſuch court ſhall direct.——And all ſums of money and other conſideration, paid or advanced by any ſuch guardian, truſtee, committee, or other perſon, for a fine on account of the renewal of ſuch leaſe, and all reaſonable charges incident thereunto, ſhall be paid out of the eſtate or effects of ſuch infant or lunatick, or be a charge upon the leaſehold premiſes, together with intereſt for the ſame, as ſuch court ſhall direct; and as for leaſes to be made upon ſurrenders by femes covert, unleſs the fine or conſideration of ſuch leaſe and the reaſonable charges ſhall be otherwiſe paid or ſecured, the ſame, together with intereſt, ſhall be

a charge

a charge upon the leaſehold premiſſes, for the uſe of ſuch perſon who ſhall advance the ſame.

Within one year next after the making of the ſaid new leaſe] This, as to ſole corporations inferior to biſhops, is extended by the 18 *El.* (hereafter following) to three years; and as to biſhops themſelves, it holds only where they make a new leaſe without confirmation; for if it be confirmed by the dean and chapter, the years to come, in the old leaſe, are not material. *Gibſ.* 733.

Nor ſhall extend to any grant to be made of any reverſion] That is, ſuch grants as are made to commence at a day to come. *Gibſ.* 733.

Nor to any leaſe of any manors lands tenements or hereditaments, which have not moſt commonly been letten to farm or occupied by the farmers thereof by the ſpace of twenty years next before ſuch leaſe made] So that if it be letten for eleven years (lord Coke ſaith) at one or ſeveral times within theſe twenty years, it is ſufficient. 1 *Inſt.* 44.

Letten to farm] A grant by copy of court roll in fee for life or years, is a ſufficient letting to farm within this ſtatute, for he is but tenant at will according to the cuſtom, and ſo it is of a leaſe at will by the common law, but thoſe lettings to farm muſt be made by ſome ſeiſed of an eſtate of inheritance, and not by a guardian in chivalry, tenant by the curteſy, tenant in dower, or the like. 1 *Inſt.* 44.

Nor to any leaſe to be made without impeachment of waſte] Therefore if a leaſe be made for life, the remainder to another for life, remainder to a third for life; this is not warranted by the ſtatute, becauſe the remainders make the preſent tenants diſpuniſhable of waſte: but if a leaſe be made to one during three lives, this is good; for the occupant, if any happen, ſhall be puniſhed for waſte. 1 *Inſt.* 44.

And altho' this condition of a good leaſe is not expreſſed in the ſtatutes of the 1 *El.* and 13 *El.* here next following, for reſtraining of unreaſonable leaſes (the firſt of biſhops, and the ſecond of the inferior clergy); yet are both biſhops and clergy reſtrained by the equity of the ſaid ſtatutes from making leaſes diſpuniſhable of waſte: for the ſtatutes were made againſt unreaſonable leaſes; and it is unreaſonable, that a leſſee ſhall at his pleaſure do waſte and ſpoil. 6 *Co.* 37. *Gibſ.* 733.

Nor

Nor to any leaſe to be made above the number of twenty one years or three lives at the moſt from the day of the making thereof] There muſt not be a double leaſe in being at one time; as if a leaſe for years be made according to the ſtatute, he in reverſion cannot expulſe the leſſee, and make a leaſe for life or lives according to the ſtatute; nor e converſo: for the words of the ſtatute be, to make a leaſe for twenty one years *or* three lives, ſo as one or the other may be made, and not both. 1 *Inſt.* 44.

Or three lives] That is, for three lives, to be all wearing together; and not to one for life, the remainder to a ſecond for life, the remainder to a third for life; which would be a void leaſe; as it would be, if a leaſe were let for ninety nine years determinable upon three lives. But a leaſe to one for the lives of three others, or to three for their three lives, is good. *Gibſ.* 733. *Watſ.* c. 42.

At the moſt] It muſt not exceed three lives or one and twenty years from the making of it; but (according to lord Coke) it may be for a leſſer term or fewer lives. 1 *Inſt.* 44.

But in the caſe of *Smartle* and *Penhallow*, *H.* 13 *W.* where the point was, whether a copyhold for one life, where the cuſtom enabled to grant for three was good, and it was held to be good; Holt chief juſtice added, This is not like the caſe of a biſhop's leaſe, which cannot be good for any part, becauſe the ſtatute ties it up to an expreſs form: otherwiſe perhaps, had it been, that biſhops ſhould make leaſes for any number of years, not exceeding ſuch a number. 1 *Salk.* 188. *Gibſ.* 733.

From the day of the making thereof] The ſtatutes of the 1 *El.* and 13 *El.* are *from the making*, and not *from the day of the making*; and the diſtinction ſeems to be this: where the habendum is for twenty one years from the making, the day of delivery (which is the making) ſhall be included; but where it is from the day of the making, or from the day of the date, that day ſhall not be included as part of the term, but the twenty one years ſhall begin on the day following. *Gibſ.* 733.

And that upon every ſuch leaſe there be reſerved yearly] If the accuſtomable rent had been payable at four days or feaſts of the year; yet if it be reſerved yearly payable at one feaſt, it is ſufficient: for the words of the ſtatute be, *reſerved yearly*. 1 Inſt. 44.

So much yearly farm or rent, or more, as hath been moſt accuſtomably paid for the ſame] Where not only a yearly rent was formerly reſerved, but things not annual, as heriots, or any fine or other profit at or upon the death of the farmer; yet if the yearly rent be reſerved upon a leaſe made by force of this ſtatute, it ſufficeth by the expreſs words of the act. 1 *Inſt.* 44.

But if a couple of capons, or the like, have been expreſsly reſerved in kind or in money, over and above the rent; a ſubſequent leaſe not reſerving theſe ſhall be void: And ſo it ſhall be, where all the great trees have been uſually excepted, and then are omitted; becauſe by this means every ſucceſſor cannot have the benefit of boughs and fruits yearly renewing. *Gibſ.* 734.

Or more] Therefore if more than the accuſtomable rent be reſerved, it is good, by the expreſs letter of the act. 1 *Inſt.* 44.

As hath been moſt accuſtombly paid for the ſame] If twenty acres of land have been accuſtomably letten, and a leaſe is made of thoſe twenty, and of one acre which was not accuſtomably letten, reſerving the accuſtomable yearly rent, and ſo much more as exceeds the value of the other acre: this leaſe is not warranted by the act, for that the accuſtomable rent is not reſerved, ſeeing part was not accuſtomably letten, and the rent iſſueth out of the whole. 1 *Inſt.* 44.

But if tenant in tail let part of the land accuſtomably letten, and reſerve a rent pro rata, or more, this is good: for that is in ſubſtance the accuſtomable rent. 1 *Inſt.* 44.

So if two coparceners be tenants in tail of twenty acres, every one of equal value, and accuſtomably letten, and they make partition, ſo as each have ten acres; they may make leaſes of their ſeveral parts each of them, reſerving the half of the accuſtomed rent. 1 *Inſt.* 44.

Provided, that nothing herein ſhall extend to give any liberty or power to any parſon or vicar] Therefore if either of them make a leaſe for twenty one years or three lives, of lands accuſtomably letten, reſerving the accuſtomed rent, it muſt alſo be confirmed by the patron and ordinary: becauſe it is excepted out of this act, and not reſtrained by the ſtatutes of the 1 *El.* or the 13 *El.* 1 Inſt. 44.

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3. By the 1 *El. c.* 19. *All gifts grants feoffments fines or other conveyance, or eſtates, to be had made done or ſuffered by any archbiſhop or biſhop, of any honours caſtles manors lands tenements or other hereditaments, being parcel of the poſſeſſions of his archbiſhoprick or biſhoprick, or united appertaining or belonging to the ſame; to any perſon or perſons, bodies politick or corporate, other than to the crown,* (and by the 1 *J. c.* 3. not to the crown neither;) *whereby any eſtate or eſtates ſhould or may paſs from the ſame archbiſhop or biſhop, other than for the term of twenty one years or three lives, from ſuch time as any ſuch leaſe grant or aſſurance ſhall begin, and whereupon the old accuſtomed yearly rent or more ſhall be reſerved and payable yearly during the ſaid term of twenty one years or three lives,——— ſhall be utterly void and of none effect to all intents conſtructions and purpoſes.* ſ. 7. Leaſes of biſhops by the diſabling ſtatute of the 1 El.

All gifts, grants, &c.] Neither this act, nor that which followeth, of the 13 *El. c.* 10. which are called the *diſabling* acts, nor any other act or ſtatute whatſoever, do in any ſort alter or change the *inabling* ſtatute of the 32 *H.* 8. aforegoing; but leave it for a pattern in many things, for leaſes to be made by others. And no leaſe made according to the limitations of this ſtatute of the 1 *El.* or of the 13 *El.* here next following, and not warranted by the ſtatute of the 32 *H.* 8. if it be made by a biſhop or any ſole corporation, but it muſt be confirmed by the dean and chapter, or others that have intereſt; as hath been ſaid in the caſe of the parſon and vicar. 1 *Inſt.* 44, 45.

Gifts, grants, feoffments, fines, or other conveyance, or eſtates] Neither biſhops by this act, nor other eccleſiaſtical or collegiate corporations by the ſaid act of the 13 *El.* are reſtrained from making grants of *copyholds* in fee, in tail, or for lives, or for any number of years, according to the cuſtom of the manor; nor is confirmation neceſſary to make ſuch grants good, tho' it be made by a ſole corporation, as by biſhop, prebendary, or the like. *Watſ. c.* 42. 4 *Co.* 23, 24.

Of any honours, caſtles, manors, lands, tenements, or other hereditaments] The general deſign of this ſtatute being in favour of the ſucceſſor, to preſerve biſhopricks from impoveriſhment; it hath been extended, in equity and intention, to a prohibition of the grants of new *offices* (tho' not directly included in any of the foregoing terms). For if a biſhop might erect new offices at pleaſure, and

aſſign ſalaries to the officers, and then make grants to bind his ſucceſſors, the end of the ſtatute would be manifeſtly defeated. The ſame thing is to be ſaid of the augmentation of the fee or ſalary belonging to an ancient office; which power of augmentation (for the ſame reaſon) is alſo reſtrained; as, when the keeperſhip of a park was granted with the ancient fee, and alſo with paſture for two horſes in the ſame park, this was void: And it hath been ſaid, that if the ancient fee was leſs than 5 l and a grant is made with a fee of 5 l intire, the whole grant is void, as well for the ancient fee, as the overplus: But if the office, and the ancient and new fee, are as ſeveral grants, in ſeveral ſentences; the grant is good for the office and ancient fee, and void only for the new. *Gibſ.* 735.

But, ſaith my lord Coke, if the office hath been ancient and neceſſary, the grant thereof, with the ancient fee, is not any diminution of the revenue, nor impoveriſhing of the ſucceſſor; and therefore, for neceſſity, ſuch grants are by conſtruction exempted out of the general reſtraint of this act. And as to granting it for the life of the grantee, he adds, If biſhops ſhould not have power to grant ſuch offices of ſervice and neceſſity for the life of the grantees, but that their eſtates ſhould depend upon uncertainties, as upon the death or tranſlation of the biſhop; then able perſons would not ſerve them in ſuch offices, or at leaſt would not diſcharge their office with any alacrity, if they have not ſuch certain eſtates for their lives, as their predeceſſors had in the ſame offices. 1 *Inſt.* 44. 10 *Co.* 61.

However, this equity of granting for life amounts to no more than for one life; and therefore where a biſhop grants an office for two or more lives, it muſt be upon the foot of cuſtom, that is, becauſe ſuch patent hath uſually been for two or more lives, and had been ſo granted before the preſent act was made. For this is the great rule; and in this, there is no difference between biſhopricks of the old and of the new foundation; ſince the new as well as old are capable of coming under this rule. *Gibſ.* 735.

The ſame is the law, and the reaſon of it, concerning grants of offices in reverſion (that is, to have and enjoy ſuch office, after the death of the preſent grantee for life;) for there can be no pretence, that ſuch ſecond grant is neceſſary, or for the advantage of the biſhoprick; and therefore nothing can make it legal but cuſtom, and particularly,

ticularly, inſtances, or an inſtance, of ſuch grant, before the making of the ſtatute. *Gibſ.* 735.

But to the end that unqueſtionable grants of ancient eſtabliſhed offices, may be good againſt the ſucceſſor of a biſhop; they muſt in the firſt place be grants of one office ſingly; for two offices, which have been uſually granted apart, cannot be granted by one patent, tho' to the ſame perſon: and in the next place, they muſt be confirmed by the dean and chapter (tho' they be but for one life), becauſe they are grants at common law and not warranted by this ſtatute; and muſt therefore paſs as they uſually did at common law before this ſtatute. *Gibſ.* 735.

In like manner, the grants of new offices (if of neceſſary uſe to the biſhop), and of new fees annexed to ſuch offices, ſhall be good, and bind the ſucceſſor; as was declared in the caſe of the biſhop of *Ely*, who granted the keeping of his houſe and garden, with 3l a year, to one for life; and it was adjudged to be good againſt the ſucceſſor, becauſe the office was neceſſary, and the fee thought reaſonable by the court. But on the other hand, where the foundation of the grant to a civilian for life, was, for counſel given and to be given, and an annual penſion was annexed to the office; judgment was given againſt the grant, as not binding the ſucceſſor, tho' it was alledged to be the ancient fee; becauſe this was a voluntary thing, to make an election of one man to be of his counſel, and not an office; and peradventure the next biſhop would not make ſuch election. *Gibſ.* 735.

But notwithſtanding all that hath been ſaid concerning the *neceſſity* of the office, it hath been determined upon ſolemn hearing, that the neceſſity of the office is not at all material. Thus in the caſe of Sir *John Trelawney* and the biſhop of *Wincheſter*, *H.* 30 *G.* 2. Lord Mansfield chief juſtice delivered the reſolution of the court: —The plaintiff brings his action of debt, to recover 500l, being for five years arrears of a ſalary of 100l a year, for executing the offices of "great and chief ſteward of the biſhop, and of *conductor tenentium* of the biſhop", and as a fee annexed to thoſe two offices.

This comes before the court upon a ſpecial verdict, the material facts of which are, that theſe offices are ancient offices, and exiſted before the ſtatute of the 1 *Eliz.* and that they have been granted in the uſual manner, and with the ancient fee; that biſhop Trelawney by indenture granted this office to the plaintiff his eldeſt ſon for

life; that the dean and chapter confirmed this grant; that every biſhop ſince hath paid to the plaintiff this fee of 100l a year, and that the defendant paid it for eleven years after he came to the biſhoprick; and that this action is brought for five years accrued ſince: But the jury further find, that theſe ſeveral offices, at the time of making the ſaid ſtatute were, and ever ſince have been, and ſtill are, offices merely nominal; and that no duty, ſervice, work or labour, attendance or buſineſs, ever was or is done in reſpect of theſe offices, as the defendant hath in his plea alledged.

This is the only doubt which the jury have; and upon this fact the whole queſtion depends.

This caſe hath been argued ſeveral times; and we are all of the opinion which I ſhall now give.

At common law the biſhop, with the confirmation of the dean and chapter, might exerciſe every act of ownerſhip over the revenue of the ſee, and might bind his ſucceſſors in the ſame manner as every tenant in fee might bind his heirs. The ſtatute was made in reſtraint of this power. But patents or grants of offices, with the fees or the privileges annexed to them, are not mentioned therein; nor are there any general words adapted to the caſe of offices. And yet there were not any biſhopricks in the kingdom at that time, but what had ſome ancient offices annexed to them, granted by the biſhop. Had the legiſlature meant to reſtrain the granting of theſe offices, there muſt have been a ſpecial proviſion in the ſtatute; and as the general reſtraint is not extended to offices, there was no reaſon to make the exception. Their continuing ancient offices was no injury or dilapidation to the biſhoprick. They brought no new charge upon the ſucceſſor; and he accepted the biſhoprick charged with theſe offices as his predeceſſor had done, and the office and biſhop continued ſubject to the ſame ancient fee.

The act hath no retroſpect. It was made on the 23d of January in the 1 *Eliz.* The biſhop of *Ely*'s caſe, *H.* 10 *Eliz.* (Ley's Rep. 78.) proves that the ſtatute doth not extend to the grant of an office; when an annuity was recovered againſt the ſucceſſor, upon the grant of the keeping of the biſhop's houſe in Holborn, with the fee of 3l: which grant was made after the beginning of the parliament, to which the act hath reference, to wit, on the 20th of April in the firſt of Eliz. This was a grant of a new office with a new fee, made the very year the act took place; and yet was held to be good, as not being

ing reſtrained by the ſtatute. It was extraordinary, if it was thought that the office of taking care of a houſe was neceſſary; it was alſo extraordinary, to hold the fee of 3 l a year a reaſonable fee, which conſidering the value of money at that time would amount to 30 l a year now; and as extraordinary, as it was the grant of an office which never ſubſiſted before: But the true ground was, the court did not think the grant of ſuch offices within the ſtatute.

T. 30. *Eliz.* *Bolton*'s caſe, (cited *Ley* 75. 10 *Co.* 60.) When the biſhop of Cheſter, after the ſaid ſtatute, granted to Bolton an annuity of five marks for counſel given and to be given, which was confirmed by the dean and chapter, the biſhop died, and Bolton brought a writ of annuity againſt the ſucceſſor; the plaintiff had no judgment; but the reaſon of that caſe was not that the office was within the ſtatute, but that it was no office at all, but a voluntary thing to make election of one man to be his counſel, and that the grant of the ſalary was an alienation of the revenue of the biſhoprick.

In the caſe of the archbiſhop of *Canterbury*, 43 *Eliz.* (cited in *Ley* 75.) The true diſtinction is taken: The archbiſhop granted the office of ſurveyor with the ancient fee, to a parker; and further he granted to him paſture for two horſes in a park: and the whole grant was adjudged void. This judgment was grounded upon the new addition made to the ancient fee.

The ſtatute of the 1 *Ja. c.* 3. extends this ſame reſtraint to the king, which by the 1 *Eliz.* was laid upon the ſubject. Yet the legiſlator did not interpoſe then in this caſe of granting ancient offices; and therefore we may preſume they were ſatisfied that the biſhop ſhould continue to have this power.

10. *Co.* 58. The biſhop of *Saliſbury*'s caſe came next in point of time.

From the 10 *Eliz.* to this day, no grant of a new office by a biſhop with a new fee has been held good. Such a grant is within the 1 *Eliz.* by conſtruction; for it is a colourable alienation. But a grant of an ancient office with an ancient fee is not within that ſtatute, but remains at common law. And if ſuch a grant is not within the ſtatute, but ſtands as at common law; the utility or neceſſity of the office cannot be material. And there is no caſe ſince the 10 *Eliz.* that has turned upon theſe: the only queſtions have been, whether the grants were within the ſtatute.

In the ſaid caſe of the biſhop of Saliſbury, it is not alledged in the pleadings, that the office was neceſſary. The fifth reſolution in this caſe (10 *Co.* 62.) is very material: Reſolved, that the grant of an ancient office to one with an ancient fee, by a biſhop, ſhall not bind his ſucceſſor, unleſs confirmed by the dean and chapter; for ſuch grants are not reſtrained by the ſtatute of the 1 *Eliz.* and therefore remain as at the common law, and by conſequence ought to be confirmed by the dean and chapter.

If ſuch grants remain as at the common law, the neceſſity of the office cannot be material.

In the caſe of the biſhop of *Chicheſter* and *Freedland*, 1 *Car.* (Cro. Car. 47.) There were no allegations in the pleadings, whether the offices were neceſſary or not.

In the caſe of *Young* and *Fowler*, 14 *Car.* (Cro. Car. 557.) Upon a ſpecial verdict, the jury do not find that the office (of regiſter) was a neceſſary office: The queſtion turned upon the grant in reverſion.

Thus ſtood the conſtruction, upon the reaſon, the words, and the practice of making theſe grants, until the 14 *Car.*

But beſides the real ground upon which the caſe in 10 *Co.* 60. was determined; the counſel ex abundanti laboured to prove that the office was neceſſary; but the arguments are ſo confuſed and inconſiſtent, that it is difficult to underſtand them.

In real truth, few of theſe offices (except judicial ones) are uſeful or neceſſary in any reſpect. None of them can be granted in reverſion, unleſs they exiſted before the 1 *Eliz.* and then they remain as at common law; and however unneceſſary they were, will bind the ſucceſſor.

The caſe of *Ridley* and *Pownal*, 27 *Car.* 2. (2 *Lev.* 136.) is the firſt caſe wherein it appeared to the court judicially, that the office was neceſſary. But my lord Hale, who underſtood what he read, and clearly diſtinguiſhed, made no diſtinction upon the neceſſity of the office.

In the caſe of *Jones* and *Beau*; 4 *Mod.* 16. The iſſue out of chancery was, whether the office had been granted to two, before the ſtatute of the 1 *Eliz.* but there is not a word whether neceſſary or not.

The preſent office is found never to have been more uſeful than at preſent; and yet the predeceſſors of the biſhop have thought the grants of it valid, and have granted it to ſome of the greateſt men in the kingdom,

* who accepted it as valid; and the ſucceeding biſhops acquieſced, until the preſent biſhop conceived a doubt thereupon.

Upon the whole, we are unanimouſly of opinion; Firſt, this being an ancient office, which exiſted before the ſtatute, that it is not within it. And ſecondly, that the utility or neceſſity of the office are not material: And this opinion we think agreeable to every judicial determination ſince the making of the ſaid ſtatute.

Whereupon the old accuſtomed yearly rent or more ſhall be reſerved] It was held by Hale chief juſtice, that the accuſtomed rent mentioned in this ſtatute and in the following ſtatute of the 13 *El.* ought to be underſtood of the rent reſerved upon the laſt leaſe, and not upon the firſt; for that rent having been altered ſince, cannot be called the accuſtomed rent. *Gibſ.* 736.

Rent] For this reaſon, a grant of the next avoidance of a benefice, is void againſt the ſucceſſor: becauſe it is one of thoſe things which are incorporeal, and lie in grant only, and ſuch an intereſt, out of which a *rent* cannot be reſerved. *Gibſ.* 736.

Shall be utterly void] Foraſmuch as this and the ſaid ſtatute of the 13 *El.* make all ſuch leaſes other than for the term of twenty one years or three lives to be utterly void; therefore, generally ſpeaking, at this day, no eccleſiaſtical or collegiate perſon, or corporation, can *aliene* any of their manors lands or tenements, by any ways or means whatſoever; for tho' before theſe ſtatutes they might have aliened, yet by the ſaid ſtatutes they are now reſtrained. *Watſ. c.* 42.

However by the 14 *El. c.* 11. (hereafter following) all but biſhops, that is, all thoſe who are reſtrained by the 13 *El. c.* 10. have ſome liberty given them as to alienating of *houſes* mentioned in the ſaid ſtatute of the 14 *El.* But this ſeems to be reſtrained to ſuch houſes only, as by the ſaid ſtatute may be let for forty years, namely, to houſes in cities boroughs or market towns. *Watſ. c.* 42.

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*Sir *John*'s grant was, to hold in an ample manner, as Richard earl of Portland, Thomas Cary, George duke of Buckingham, Charles earl of Nottingham, Thomas duke of Norfolk, Philip earl of Pembroke and Montgomery, James duke of Ormond, or Henry earl of Clarendon had holden. *Burrow*, 225.

But

But by the 1 *G. ſt.* 2. *c.* 10. in caſe of lands or other eſtates purchaſed for the augmentation of ſmall livings by the governors of queen Anne's bounty, exchanges may be thereof made by the concurrence of the governors, incumbent, patron and ordinary; for any other eſtate in lands or tithes, of equal or greater value. *ſ.* 13.

And it is ſaid, that if a pariſh be upon the deſign of incloſing, and a parſon hath tithes in kind, and common for beaſts in the fields, a decree may be had in chancery, that he ſhall take a quantity of ground in lieu thereof. *Watſ. c.* 42.

However, an act of parliament will do this; and this is the uſual way; namely, in the ſpecial acts for the dividing and incloſing of heaths, waſtes, commons, common fields, and the like, to inſert a clauſe for a recompence to be given to the incumbent for his right of common, or tithes, or otherwiſe as the caſe ſhall be.

Shall be utterly void and of none effect] Yet they are good againſt the leſſor, if it be a ſole corporation; or ſo long as the dean or other head of the corporation remaineth, if it be a corporation aggregate of many: for the ſtatute was made in benefit of the ſucceſſor. 1 *Inſt.* 45.

To all intents conſtructions and purpoſes] Nevertheleſs, the acceptance of rent by the ſucceſſor, may affirm a leaſe (otherwiſe *voidable*) for his own time. *Gibſ.* 745.

It is indeed regularly true, that where the ſucceſſor accepts a rent after the death of the predeceſſor upon a *void* leaſe made by the predeceſſor, that ſuch acceptance will not affirm the leaſe; but this rule muſt be underſtood of ſuch a leaſe as is void ipſo facto, without entry or any other ceremony; and therefore if a parſon vicar or prebendary make a leaſe not warrantable by the ſtatutes, for twenty one years, rendring rent, and dies, here no acceptance of rent by the ſucceſſor will affirm this leaſe, becauſe the ſame was void without entry or other ceremony: But if a parſon vicar or prebendary make a leaſe not warrantable within the before mentioned ſtatutes, for life or lives, reſerving rent, and dies, and the ſucceſſor before entry accept the rent; this leaſe ſhall bind him for the time, for this being an eſtate of freehold could not be void before entry. *Degge p.* 1. *c.* 10.

But if a biſhop, which hath the inheritance in fee ſimple in him, make a leaſe for lives or years not warranted by the ſaid ſtatutes, not being abſolutely void by his death, but only voidable by the entry of the ſucceſſor; if the

ſucceſſor

ſucceſſor accept the rent before entry, be it for lives or years, he affirms the leaſe for his life. *Id.*

But whereſoever the acceptance of rent binds, whether a ſole or aggregate corporation, it muſt, in order to ſuch binding, appear to be their own act; and therefore in ſuch caſe, if the bailiff of a biſhop accepts the rent, without order, this binds not the biſhop. But if he acquaints the biſhop that ſeveral rents are in arrear, and has an order from him to receive them, and receives (among others) the rent of a voidable leaſe, and pays all the rents to the biſhop, without giving him notice of the ſaid voidable leaſe, this hath been judged ſuch an acceptance as affirms a leaſe; becauſe the biſhop of himſelf ought to take notice, what leaſes were made by his predeceſſor. *Gibſ.* 745.

In like manner, with regard to a corporation aggregate; where the maſter of a college accepted rent, having no expreſs authority from the corporation to accept it; it was adjudged, that this did not affirm a voidable leaſe, during the continuance of ſuch maſter; becauſe the act of the head ſingly, cannot deveſt the members of their right. *Gibſ.* 746.

But no acceptance of rent by the ſucceſſor availeth (as hath been ſaid) where the leaſe is abſolutely and ab initio void. *Gibſ.* 746.

And in what caſes a voidable leaſe may be affirmed by the acceptance of rent; in the ſame it may be affirmed by diſtraining, or bringing an aſſiſe for rent, after the death of the predeceſſor; and alſo by bringing an action of waſte againſt the leſſee. *Gibſ.* 746.

Leaſes of other corporations, ſole and aggregate, by the diſabling ſtatute of the 13 *El.* and other ſtatutes.

4. By the 13 *El. c.* 10. *All leaſes gifts grants feoffments conveyances or eſtates, to be made had done or ſuffered, by any maſter and fellows of any college, dean and chapter of any cathedral or collegate church, maſter or guardian of any hoſpital, parſon, vicar, or any other having any ſpiritual or eccleſiaſtical living, of any houſes lands tithes tenements or other hereditaments, being any parcel of the poſſeſſions of any ſuch college, cathedral church, chapel, hoſpital, parſonage, vicarage, or other ſpiritual promotion, or any ways appertaining or belonging to the ſame: to any perſon or perſons, bodies politick and corporate, (other than for the term of one and twenty years, or three lives, from the time as any ſuch leaſe or grant ſhall be made or granted, whereupon the accuſtomed yearly rent or more ſhall be reſerved and payable yearly during the ſaid term;) ſhall be utterly void and of none effect to all intents conſtructions and purpoſes.* ſ. 3.

Provided,

Provided, that this ſhall not be conſtrued to make good any leaſe or other grant to be made by any ſuch college or collegiate church within either of the univerſities of Oxford or Cambridge, or elſewhere within the realm of England, for more years than are limited by the private ſtatutes of the ſame college. ſ. 4.

And by the 18 *El. c.* 11. it is enacted as follows: *Whereas ſince the making of the ſaid ſtatute of the* 13 El. c. 10. *divers of the ſaid eccleſiaſtical and ſpiritual perſons and others having ſpiritual or eccleſiaſtical livings, have made leaſes for twenty one years or three lives long before the expiration of the former years, contrary to the true meaning and intent of the ſaid ſtatute; it is enacted, that all leaſes to be made by any of the ſaid eccleſiaſtical ſpiritual or collegiate perſons or others, of any their ſaid eccleſiaſtical ſpiritual or collegiate lands tenements or hereditaments, whereof any former leaſe for years is in being, not to be expired ſurrendred or ended within three years next after the making of any ſuch new leaſe, ſhall be void fruſtrate and of none effect.* ſ. 2.

The ſaid act of the 13 El. *not to extend to any leaſe to be made of the manor of* Fifield *in the county of* Berks, *by St* John's *college in* Oxford, *to the heirs male of Sir* Thomas White *founder of the ſaid college.* ſ. 5, 6.

All leaſes, gifts, grants, &c.] Corporations aggregate might always let long leaſes without any confirmation; and ſo might ſole corporations, with confirmation, until this act was made; none but biſhops being reſtrained by the 1 *El. c.* 19. But by this ſtatute, all other corporations, ſole and aggregate, are put under the ſame reſtraints that biſhops were; and the two acts being of the ſame tenor and form, what hath been obſerved upon the former act will help towards the right underſtanding of ſeveral clauſes in this act alſo.

By any maſter and fellows of any college, dean and chapter of any cathedral or collegiate church] That is to ſay, by the major part of ſuch body corporate: In regard whereunto, it is thus enacted by the 33 *H.* 8. *c.* 27. viz. Albeit that by the common law all aſſents elections grants and leaſes, had made and granted, by the dean warden provoſt maſter preſident or other governor of any cathedral-church hoſpital college or other corporation, with the aſſent of the major part of their chapter fellows or brethren of ſuch corporation, be as effectual as if the reſidue of the whole number had aſſented; yet nevertheleſs divers founders of ſuch corporations have amongſt other their local ſtatutes eſta-

eſtabliſhed, that if any one of ſuch corporation ſhould deny any ſuch grant, that then no ſuch leaſe election or grant ſhould be made, and for performance of the ſame every perſon having power of aſſent hath been wont to be ſworn; for remedy thereof, it is enacted, that all and every peculiar act order rule and ſtatute made by any ſuch founder, whereby the grant leaſe gift or election of the governor or ruler, with the aſſent of the more part of ſuch corporation, ſhould be in any wiſe hindred by any one or more being the leſſer number (contrary to the courſe of the common law), ſhall be void; and none ſhall be compelled to take an oath for the obſerving of any ſuch order rule or ſtatute, on pain of every perſon giving ſuch oath to forfeit 5 l, half to the king, and half to him that ſhall ſue in any of the king's courts of record.

But ſuch major part are to attend in perſon, and to be preſent together at the executing of ſuch act: Thus in the caſe of the dean and chapter of *Fernes* in *Ireland*, which was, concerning the confirmation of a leaſe made by the biſhop; it was adjudged, that the confirmation was ill, becauſe the dean was not only not preſent, but acted by a proctor who was a *ſtranger* to the chapter, and not of the body. Agreeable to which are the rules of the civil law, that he ſhall make no deputation in ſuch a caſe but to one of the chapter only.

And in the ſame caſe it was ſaid further, upon the authority of the year books, that neither would this, nor any other act that had charged the revenues of the church, have been good, tho' the dean had done it by one of the chapter *as his commiſſary*; for (as is there alledged) tho' the dean may have his preſident or commiſſary to execute his ſpiritual juriſdiction, yet ſuch commiſſary cannot charge the poſſeſſions of the church. And therefore beſides the authority of the preſident, ſub-dean, or the like, for the exerciſe of the decanal office; a diſtinct proxy to one or more members of the chapter, who may repreſent him in the paſſing of grants, confirmations, and other chapter acts, is neceſſary to make them good and valid in law.

And their aſſent muſt be given by each member ſingly; and not in a confuſed, and uncertain manner; and this muſt be, when they are capitularly aſſembled in one certain place; and not a conſent given by the members, in ſeveral places, and at ſeveral times: Which was the caſe of the laſt cited act of the dean and chapter of Fernes. The chapter conſiſted of ten perſons, and only three were preſent

preſent (together with the dean's proctor), when the chapter ſeal was fixed to the confirmation; afterwards three others of the prebendaries ſubſcribed it: And this was adjudged ill, as being the act of particular perſons only, and not of the corporation, by reaſon they were not aſſembled in one place, and in a capitular manner, that is, the act was not done *ſimul et ſemel*, at the ſame time and place, as the law requires.

But it was there agreed and acknowledged, that in caſe the dean and chapter be capitularly aſſembled in *any place*, their acts ſhall be good, tho' ſuch aſſembly is not held in the *chapter houſe*; and the act of the dean and major part of the chapter, ſo aſſembled, is properly the act of the corporation, altho' the reſt do not agree, or be abſent thro' their own default. *Gibſ.* 744. *Dav.* 42.

Maſter and fellows of any college] This includes all colleges, by what name ſoever incorporated, and of what nature ſoever the foundations be, eccleſiaſtical, temporal, or mixed; the ſtatute being conſtrued moſt largely and beneficially, againſt long and unreaſonable leaſes. 11 *Co.* 76.

Dean and chapter of any cathedral or collegiate church] For the ſame reaſon, tho' it is ſaid dean and chapter, it extendeth to chapters where there are no deans. *Gibſ.* 736.

Maſter or guardian of any hoſpital] In like manner, this ſhall extend to all manner of hoſpitals, be the hoſpital incorporated by any other name; or be it a ſole corporation, or corporation aggregate. 11 *Co.* 76.

Or any other having any ſpiritual or eccleſiaſtical living] That this is a *general* law, as it concerns all the clergy, hath been often declared and adjudged, tho' at firſt much doubted. But it was always agreed, notwithſtanding this general clauſe, that biſhops were not included; becauſe the ſtatute begins with an order inferior to them. *Gibſ.* 772.

Of any houſes] But by the 14 *El. c.* 11. This ſhall not extend to any grant aſſurance or leaſe of any houſes belonging to any perſons or bodies politick or corporate aforeſaid, nor to any grounds to ſuch houſes appertaining, which houſes be ſituate in any city borough town-corporate or market town or the ſuburbs of any of them; but that all ſuch houſes and grounds may be granted demiſed and aſſured, as by the laws of this realm, and the ſeveral ſtatutes of the ſaid colleges cathedral churches and hoſpi-

tals, they lawfully might have been before the making of the ſtatute of the 13 *El.* or lawfully might be if the ſaid ſtatute were not; ſo alway that ſuch houſe be not the capital or dwelling houſe uſed for the habitation of the perſons aboveſaid, nor have ground to the ſame belonging above the quantity of ten acres. Provided, that no leaſe of any ſuch houſes ſhall be permitted to be made by force of this act in reverſion, nor without reſerving the accuſtomed yearly rent at the leaſt, nor without charging the leſſee with the reparation, nor for longer term than forty years at the moſt; nor any houſes ſhall be permitted to be aliened, unleſs that in recompence thereof there ſhall be good lawful and ſufficient aſſurance made in fee ſimple abſolutely to ſuch colleges houſes bodies politick or corporate and their ſucceſſors, of lands of as good value, and of as great yearly value at the leaſt, as ſo ſhall be aliened; any ſtatute to the conſtrary notwithſtanding. *ſ.* 17, 19.

But this ſtatute alſo, referring only to *ſuch perſons or bodies corporate as were ſpecified in the ſtatute of the* 13 *El.* doth not extend unto biſhops, but the 1 *El.* remaineth as it did; and biſhops have no power to let houſes, otherwiſe than according to the ſaid ſtatute of the 1 *El.* nor may they make exchanges, for any recompence or conſideration. But altho' the biſhops are not included, yet this is a general law, as extending to all the other clergy. *Gibſ.* 738.

And by the expreſs words of the act, no leaſe of any ſuch houſes ſhall be made *in reverſion:* For which reaſon, when the dean and chapter of St Paul's made a leaſe of a houſe for forty years, which houſe was then in leaſe for ten years to come, to a ſtranger; it was adjudged, without argument, not to be a good leaſe, becauſe in reverſion: but otherwiſe, if both leaſes had been to the ſame perſon; becauſe the acceptance of the ſecond leaſe by the leſſee would have made the firſt leaſe void. *Gibſ.* 739. *Cro. El.* 564.

Other than for the term of one and twenty years or three lives] Altho' eccleſiaſtical *corporations aggregate* are not within the ſtatute of the 32 *H.* 8. yet is that ſtatute (as hath been ſaid) a pattern for leaſes by them made, in many things which are not here ſpecified. And as to leaſes made by *ſole corporations*, according to this ſtatute; they are not good without confirmation, unleſs they be alſo made according to the limitations of the ſaid ſtatute of the 32 *H.* 8. *Gibſ.* 736.

Shall

Shall be utterly void and of none effect] If a corporation aggregate makes a leaſe not warranted by this ſtatute, ſuch leaſe is void againſt themſelves; but nevertheleſs if a ſole corporation maketh ſuch leaſe, it ſhall bind himſelf, tho' it be void againſt his ſucceſſor. *Gibſ.* 737.

Divers of the ſaid eccleſiaſtical and ſpiritual perſons and others] Which words of the ſtatute of the 18 *El. c.* 11. referring alſo to the ſame perſons or bodies corporate which were particularly enumerated in the ſaid ſtatute of the 13 *El. c.* 10. it is plain, that this ſtatute likewiſe extendeth not to biſhops, but they ſtill remain, as they ſtood at firſt, upon the ſtatute of the 1 *El. c.* 19. Therefore if a biſhop makes a leaſe for twenty one years, and more than three of thoſe years are unexpired (for the number of years to come in ſuch caſe is not material, this ſtatute of the 18 *El.* not extending to biſhops), yet this concurrent leaſe is good; but then it muſt be confirmed by the dean and chapter, becauſe it is not warranted by the ſtatute of the 32 *H.* 8. Alſo deans (in their ſole capacity), prebendaries, heads of colleges, maſters of hoſpitals, and the like, may make concurrent leaſes as biſhops may, with confirmation: but they muſt by this ſtatute be within three years of the determination of the former term by expiration ſurrender or otherwiſe; ſo that in this point the biſhop hath the advantage. *Wood b.* 2. *c.* 3. *Degg. p.* 1. *c.* 10.

But in all caſes where concurrent leaſes are made, the new leaſe, altho' it may be made *a die confectionis*, is not to take effect in intereſt till the old leaſe be expired ſurrendred or ended, that is, the new leſſee cannot enjoy the land till ſuch time; for the new leaſe doth commence preſently by eſtoppel only, not in intereſt; yet it ſeems that the rent is due from the firſt commencement of the leaſe, ſo that the biſhop or other being leſſor is intitled to two rents, and may bring an action of debt to recover the rent reſerved upon the ſecond leaſe, during the continuance of the former; for the rent muſt be reſerved and made payable during the term, and not from the determination of the former leaſe, elſe ſuch concurrent leaſes will be void, as contrary to the ſtatute. *Watſ. c.* 42.

But where the ſecond leaſe is made to the ſame perſon to whom the former leaſe was made, and not to a ſtranger; it ſeemeth that the former leaſe is wholly vacated by the ſame perſon accepting the concurrent leaſe. *Watſ. c.* 44. *Cro. Eliz.* 564. *Gibſ.* 739.

5. By

5. By the 14 *El. c.* 11. *Whereas ſundry perſons have defrauded the true meaning of the aforeſaid ſtatute of the* 13 El. c. 20. *by* bonds *and covenants of ſuffering other perſons to enjoy eccleſiaſtical livings, for that ſuch bonds and covenants are not in law taken to be leaſes, altho' indeed they amount to as much; it is enacted, that all bonds contracts promiſes and covenants, for ſuffering any perſon to enjoy any benefice or eccleſiaſtical promotion with cure or to take any profits or fruits thereof, other than ſuch bonds and covenants as ſhall be made for aſſurance of any leaſe heretofore made, ſhall be to all intents and purpoſes adjudged of ſuch force and validity, and not otherwiſe, as leaſes by the ſame perſons made of ſuch benefices, and eccleſiaſtical promotions with cure.* ſ. 15. Bonds and judgments to defraud the ſaid ſtatutes.

And by the 43 *El. c.* 9. *All* judgments *to be had for the intent to have or enjoy any leaſe contrary to the ſtatute of the* 13 El. c. 20. *or any other ſtatute explaining or altering the ſame, ſhall be deemed void in ſuch ſort as bonds and covenants are appointed to be void, which are made for that purpoſe.* ſ. 8.

Upon which two ſtatutes the rule is this: Where leaſes are made void by the 13 *El. c.* 20. there all bonds covenants and judgments for the enjoying ſuch leaſes, are made void by theſe ſtatutes; But if the leaſes be void at the common law, as by death reſignation or deprivation, and not by the ſtatute of the 13 *El. c.* 20. their bonds and covenants for the enjoying of ſuch leaſes are not made void by either of theſe ſtatutes.

Where the covenant was, that the leſſee ſhould enjoy a rectory for three years, without expulſion, or any thing *done or to be done* by the leſſor; which leſſor omits to read the articles, and ſo is ipſo facto deprived, and the leaſe void; in ſuch caſe, the obligation is not forfeited, becauſe this happeneth not by any *act* of the leſſor, but by *non-feaſance*, and ſo not within the covenant: But otherwiſe it would have been, if the leſſor had covenanted, not to omit the doing of any thing. *Gibſ.* 740,

And by the 18 *El. c.* 11. it is enacted, that *every bond and covenant for renewing or making of any leaſe or leaſes contrary to the true intent of the ſaid act of the* 18 El. c. 11. *or of the act of the* 13 El. c. 10. *ſhall be utterly void.* ſ. 3.

T. 14 *Jac. Rudge* and *Thomas.* A parſon covenanted with another, that he ſhould have his tithes for thirteen years; afterwards he reſigned, and another parſon was inducted; the leſſee brought an action of covenant againſt the leſſor, and the defendant pleaded this ſtatute of the 18

El. c. 11. in bar. But Coke, Doderidge, and Haughton agreed, that the covenant was not made void by this ſtatute; which was only intended to void bonds and covenants contrary to the ſtatute of 13 *El.* but doth not extend to bonds and covenants made for the enjoyment of leaſes which become void by the common law, as leaſes do by reſignation, or the like. 3 *Bulſt.* 202. *Gibſ.* 737.

But when a dean and canons made bonds among themſelves, to aſcertain to each other the benefit of particular leaſes, and the whole body engaged, under ſuch and ſuch forfeitures, to make the leaſes reſpectively as there ſhould be occaſion; ſuch bonds were declared to be void by this ſtatute. And ſo it was, where the dean and chapter obliged themſelves to make to one a leaſe of lands, which were then in leaſe to another for fifteen years to come; the covenant was declared void, upon this ſtatute. *Gibſ.* 738.

Further regulations as to college leaſes.

6. *For the better maintenance of learning, and the relief of ſcholars in the univerſities of* Cambridge *and* Oxford, *and the colleges of* Wincheſter *and* Eaton; *no maſter provoſt preſident warden dean governor rector or chief ruler of any college cathedral-church hall or houſe of learning in any of the univerſities aforeſaid, nor any provoſt warden or other head officer of the ſaid colleges of* Wincheſter *or* Eaton, *nor the corporation of any of the ſame by what title ſtyle or name ſoever they ſhall be called, ſhall make any leaſe for life or lives or years of any farm or any their lands tenements or other hereditaments, to the which any tithes arable land mea low or paſture doth or ſhall appertain; except that one third part at the leaſt of the old rent be reſerved and paid in corn, for the ſaid colleges cathedral-church halls and houſes; that is to ſay, in good wheat after* 6 *s.* 8 *d. a quarter or under, and good malt of* 5 *ſh. the quarter or under, to be delivered yearly upon the days prefixed, at the ſaid colleges cathedral-church halls and houſes: and for default thereof, to pay to the ſaid colleges cathedral-church halls or houſes in ready money at the election of the ſaid leſſees their executors adminiſtrators and aſſigns after the rate of the beſt wheat and malt in the market of* Cambridge, *for the rents that are to be paid to the uſe of the houſe or houſes there; and in the market of* Oxford, *for the rents that are to be paid to the uſe of the houſe or houſes there; and in the market at* Wincheſter, *for the rents that are to be paid to the uſe of the houſe or houſes there; and in the market at* Windſor, *for the rents that are to be paid to the uſe of the houſe or houſes at* Eaton, — *is or ſhall be ſold at the next market day before the ſaid rent ſhall be due,*

due, without fraud: And all leaſes otherwiſe to be made, and all collateral bonds or aſſurance to the contrary, by any of the ſaid corporations, ſhall be void in law: The ſame wheat malt or money coming of the ſame, to be expended to the uſe of the relief of the commons and diet of the ſaid colleges cathedral-church halls and houſes only, and by no fraud or colour let or ſold away from the profit of the ſaid colleges cathedral-church halls and houſes, and the fellows and ſcholars in the ſame, and the uſe aforeſaid; upon pain of deprivation of the governor and chief rulers of the ſaid colleges cathedral-church halls and houſes, and all other thereunto conſenting. 18 El. c. 6. ſ. 1.

But this ſhall not extend to any leaſe to be made by the preſident and ſcholars of St. John Baptiſt's *college in* Oxford, *to any heir male of Sir* Thomas White, *late knight and alderman of* London, *founder of the ſaid college; which leaſe ſhall be made, according to the meaning of the foundation and ſtatutes of the ſaid college, of the manor of* Fifield, *and no other hereditaments.* ſ. 3.

For the better maintenance of learning, &c.] Dr Kennet ſays, the memory of Sir Thomas Smith is highly to be honoured for promoting this act, which provideth that a third part of the rent be reſerved in corn, payable either in kind or money, after the rate of the beſt prices in the market. For if a certain rate thereof had been fixed in money inſtead of corn, it would have been highly prejudicial to the colleges, the value of money abating, as the value of land and of the produce thereof advanceth. This worthy knight is ſaid to have been engaged in this ſervice, by the advice of Mr Henry Robinſon, ſoon after provoſt of queen's college in Oxford, and from that ſtation advanced to the ſee of Carliſle. *Ken. Par. Antiq.* 605.

To the which any tithes arable land meadow or paſture doth or ſhall appertain] *T.* 26 *Eliz. Haynes* and *Hollingbridge.* The queſtion was, whether this ſhould be intended of tithes of corn only, or alſo of tithes of money, or the like, as in London, where money is paid as the tithe of houſes; and it was adjudged by Manwood chief baron, in the abſence of Shute, that it is to be intended of tithe corn. For the parliament never meant, to cauſe thoſe farmers to pay corn, but where they had corn or land that beareth an annual crop, as arable, meadow, or paſture; and not of wood, heath, marſh, or the like. But afterwards a writ of error was brought. *Sav.* 68. *Gibſ.* 742.

How leaſes of benefices with cure become void by non reſidence.

7. *That the livings appointed for eccleſiaſtical miniſters may not by corrupt and indirect dealings be transferred to other uſes; no leaſe to be made of any benefice or eccleſiaſtical promotion with cure, or any part thereof, and not being impropriated, ſhall endure any longer than while the leſſor ſhall be ordinarily reſident, and ſerving the cure of ſuch benefice, without abſence above fourſcore days in any one year; but every ſuch leaſe, immediately upon ſuch abſence, ſhall ceaſe and be void; and the incumbent ſo offending, ſhall for the ſame loſe one year's profit of his ſaid benefice, to be diſtributed by the ordinary among the poor of the pariſh.* 13 El. c. 20. ſ. 1. *And after complaint made to the ordinary, and ſentence given upon ſuch offence; he ſhall, within two months after ſuch ſentence given and requeſt to him made by the churchwardens of the ſaid pariſh or one of them, grant the ſequeſtration of the profits of ſuch benefice, to ſuch inhabitant or inhabitants within the pariſh where ſuch benefice ſhall be as to him ſhall ſeem meet: and upon default therein by the ordinary, it ſhall be lawful to every pariſhioner to retain his tithes, and likewiſe for the churchwardens to enter and take the profits of the glebe lands and other rents and duties of every ſuch benefice, to be employed to the uſe of the poor as aforeſaid, until ſuch time as ſequeſtration ſhall be committed by the ordinary; and then as well the churchwardens as pariſhioners to yield account thereof, and to make payment to him or them to whom ſuch ſequeſtration ſhall be committed; and ſuch ſequeſtrator ſhall juſtly and truly employ and beſtow the ſaid profits or the value thereof, to ſuch uſes as by the ſaid ſtatute of the* 13 El. c. 20. *is limited; on pain of forfeiting double value of ſuch witholden profits, to be recovered in the eccleſiaſtical court by the poor of the ſaid pariſh.* 18 El. c. 11. ſ. 7.

And *all charging of ſuch benefices with cure as aforeſaid, with any penſion, or with any profit out of the ſame to be yielded or taken, other than rents to be reſerved upon leaſes hereafter to be made according to the meaning of the ſaid ſtatute of the* 13 El. c. 20. *ſhall be utterly void.* 13 El. c. 20. ſ. 1 14 El. c. 11. ſ. 14.

Provided, *that every parſon by the laws of this realm allowed to have two benefices, may demiſe the one of them upon which he ſhall not then be moſt ordinarily reſident, to his curate only, that ſhall there ſerve the cure for him; but ſuch leaſe ſhall endure no longer than during ſuch curate's reſidence, without abſence above forty days in any one year.* 13 El. c. 20. ſ. 2.

And *all leaſes bonds promiſes and covenants of and concerning benefices and eccleſiaſtical livings with cure, to be made by any curate, ſhall be of no other nor better force validity or continuance,*

tinuance, than if the ſame had been made by the beneficed perſon himſelf that demiſed or ſhall demiſe the ſame to any ſuch curate. 14 El. c. 11. ſ. 16.

That the livings appointed, &c.] This ſtatute was intended to prevent corrupt bargains between patron and clerk; it being at that time a practice for patrons to get ſome unworthy clergyman to take inſtitution to their vacant benefices, upon condition of having leaſes of thoſe benefices made to themſelves at very low rates; by which means theſe patrons ſecured the main of the benefices to themſelves, and got them ſerved at any rate by ſtipendiary curates, while the incumbents were non-reſident, and making their fortunes elſewhere: So that the ſtatute was not primarily deſigned againſt non-reſidence, but againſt ſuch non-reſidents as by corrupt bargains and leaſes made themſelves tools to diſhonourable patrons; and he only offends againſt this ſtatute, who is non-reſident, and yet at the ſame time leaſeth out his benefice. *Johnſ.* 131.

Shall be ordinarily reſident] If the parſon be abſent eighty days in a year, altho' it be at ſeveral times, to wit, ten days at one time, and twenty days at another time, until eighty days; this is non-reſidence of eighty days within the ſtatute. *Gibſ.* 739.

Shall be ordinarily reſident and ſerving the cure] If an incumbent, having a houſe fit for his habitation, liveth in a neighbouring pariſh, but cometh on all occaſions to his pariſh church, to ſerve the cure in perſon; this, however it be non-reſidence within the ſtatute of the 21 *H.* 8. *c.* 13. yet it is not ſuch an abſence as will avoid a leaſe within this ſtatute. *Gibſ.* 739.

Without abſence above fourſcore days in any one year] If an incumbent is abſent eighty days, and cometh again in the night of the eightieth day, he is no offender within this ſtatute; for the ſtatute ſays, without abſence *above* fourſcore days. *Gibſ.* 739.

Every ſuch leaſe immediately upon ſuch abſence ſhall ceaſe and be void] So that the leaſe is not void ab initio, but only from the time of ſuch abſence; which appears alſo from the preceding negative words, that the leaſe ſhall endure *no longer*; for that implies, that it ſhall endure ſo long. And therefore, tho' the leaſe and covenants become void by the abſence of eighty days, yet for any covenant broken before the end of the eighty days, an action of covenant will lie for the leſſor or leſſee. *Gibſ.* 739

And the incumbent ſo offending] This ſhews, that it is not all abſence whatſoever, that brings an incumbent under the penalties of this act; but ſuch abſence only as is voluntary, and by conſequence an *offence*, in the abſentee: from which it follows, that if a parſon be abſent, and did not ſerve the cure, involuntarily, by reaſon of ſickneſs ſuſpenſion inhibition ejectment or other coercion or reſtraint; he is not abſent within this ſtatute. Much leſs can the abſence of eighty days after death, avoid any leaſe according to this ſtatute; the plain drift of which was, to oblige incumbents to reſidence while they lived, and not to puniſh them for non-reſidence after they were dead.

As to this laſt point, it had been debated in the reign of queen Elizabeth, and ruled by the opinions of three judges againſt one, that leaſes were void by this ſtatute, eighty days after the death of the incumbent; the conſequence of which would be, that parſons could make no manner of leaſes to bind their ſucceſſors, longer than for eighty days after their death.

But in the 25 *C.* 2. this matter coming under debate again, it was ſolemnly adjudged, contrary to the foregoing caſe, that ſuch non-reſidence is not made by death, as can avoid a leaſe; and the conſequence of that judgment is, 1. That parſons and vicars (obſerving the directions of the ſtatute of the 32 *H.* 8. which is the great rule to all the other ſtatutes) may make leaſes for twenty one years or three lives, of lands accuſtomably letten, and the like; which leaſes ſhall bind the ſucceſſors, with confirmation, but not without; inaſmuch as they are ſpecially excepted out of the enabling ſtatute of the 32 *H.* 8. and the ſtatute of the 13 *El. c.* 10. is wholly diſabling. 2. That ſuch leaſes of parſons and vicars are not confirmed, tho' they do become void by their deaths, yet the voidance is according to the common law, and not according to this ſtatute.

Concerning which leaſes of parſons and vicars (viz. thoſe that are not confirmed by patron and ordinary, and by conſequence hold not beyond the life or incumbency of the leſſor) the rule is this: that if they be for a term of years abſolutely, without ſaying *if the parſon ſhall ſo long live*, and the parſon dies, or reſigns, or is deprived before the term expires; the leſſee may recover damages in an action of covenant againſt the executors of the parſon, for not enjoying his term. But if that clauſe be added, ſuch action ſhall lie only upon reſignation, or other volun-

tary avoiding of the leaſe: and againſt this action he is alſo ſafe, tho' he reſign, or be non-reſident, or the like, if he add, *and ſhall ſo long continue parſon.* Gibſ. 739, 740.

Littleton ſaith, if the parſon of a church do charge the glebe land of his church by his deed; and after, the patron and ordinary confirm the ſame grant: then ſuch grant ſhall ſtand in its force according to the purport thereof. But in this caſe it behoveth, that the patron hath a fee ſimple in the advowſon; for if he hath but an eſtate for life or in tail in the advowſon, then the grant ſhall not ſtand, but during his life, and the life of the parſon which granted the ſame. *Litt. ſect.* 528.

Upon which there are divers things to be noted:

(1) The confirmation of the grant: which indeed is but a mere aſſent by deed to the grant. And therefore it is holden, that if there be parſon, patron and ordinary, and the patron and ordinary give licence by deed to the parſon, to grant a rent charge out of the glebe, and the parſon granteth the rent charge accordingly, this is good, and ſhall bind the ſucceſſor; and yet here is no confirmation ſubſequent, but a licence precedent.

(2) The ordinary alone, without the dean and chapter, may agree thereunto, either by licence precedent, or confirmation ſubſequent; for that the dean and chapter hath nothing to do with that which the biſhop doth as ordinary, in the life time of the biſhop.

(3) But if the biſhop be patron, there the biſhop cannot confirm alone, but the dean and chapter muſt confirm alſo; for the advowſon or patronage is parcel of the poſſeſſion of the biſhoprick: and therefore the biſhop, without the dean and chapter, cannot make the grant good, but only during his own life, after the deceaſe of the incumbent, either by licence precedent or confirmation ſubſequent.

(4) He that is patron muſt be patron in fee ſimple; for if he be tenant in tail, or tenant for life, his confirmation or agreement is not good to bind any ſucceſſor, but ſuch as come into the church during his life. But if the patron be tenant in tail, and diſcontinue the eſtate in tail, the leaſe ſhall ſtand good during the diſcontinuance; or if the eſtate tail be barred, it ſhall ſtand good for ever. 1 *Inſt.* 300.

For a confirmation being in the nature of a charge upon the advowſon, can operate no further in order to the binding of the ſucceſſor, than according to the degree of eſtate or intereſt, which the patron hath who doth con-

firm. And therefore where a tenant in tail is patron; to render the confirmation valid, the iſſue in tail muſt alſo confirm: otherwiſe the preſentee of ſuch iſſue ſhall hold the benefice diſcharged of ſuch leaſe. *Gibſ.* 745.

In like manner, if the patron who confirms hath granted the next avoidance; the clerk of ſuch grantee ſhall not be bound, without the grantee's joining in the confirmation. *Gibſ.* 745.

And ſo, where there are coparceners or tenants in common of an advowſon; they muſt all join in the confirmation, to bind the next incumbent; unleſs they have agreed before to preſent by turns. *Gibſ.* 745.

May demiſe one of them to his curate] That is, as it ſeemeth, to his curate legally licenſed and admitted by the ordinary of the place; without which he is no curate in law. *Gibſ.* 740.

Such leaſe ſhall endure no longer than during ſuch curate's reſidence] So that in this caſe, tho' the curate leaſes over, it ſhould ſeem that no abſence of the parſon himſelf will void ſuch leaſe, but the abſence of the curate only. *Gibſ.* 740.

Lecturer.

Lecturer.

1. IN London and other cities there are lecturers appointed, as aſſiſtants to the rectors of churches. They are generally choſen by the veſtry or chief inhabitants; and are uſually the afternoon preachers. There are alſo one or more lecturers in moſt cathedral churches: and many lectureſhips have likewiſe been founded by the donation of private perſons, as lady Moyer's at St. Paul's, and many others.

How appointed.

2. And it ſeemeth, generally, that the biſhop's power is only to judge as to the qualification and fitneſs of the perſon, and not as to the right of the lectureſhip: As in the caſe of the churchwardens of *St Bartholomew's*, *M.* 12 *W.* One Fiſhburne left 25*l* a year for the maintenance of a weekly lecturer, and appointed that the lecturer ſhould be choſen by the pariſhioners, and to preach on any day in every week as they ſhould like beſt. The pariſhioners fixed on Thurſday, and choſe a lecturer every year;

year; and now Mr Turton being lecturer, and the parish having chosen Mr Rainer, the other would not submit to the choice, whereupon the churchwardens shut Turton out of the church. Afterwards the bishop of London determined in his favour, and granted an inhibition and monition for that purpose. But by Holt chief justice; a prohibition must go, to try the right: it is true a man cannot be a lecturer, without a licence from the bishop or archbishop; but their power is only as to the qualification and fitness of the person, and not as to the right of the lectureship; and the ecclesiastical court may punish the churchwardens, if they will not open the church to the person, or to any one acting under him, but not if they refuse to open it to any other. 3 *Salk.* 87.

But in case where there is no fixed lecturer, or ancient salary, but the lectureship is to be supported only by voluntary contributions, and there is not any custom concerning such election; it seemeth that the ordinary is the proper judge, whether or no any lecturer in such place ought to be admitted: As in the case of a lecturer of *St Anne's Westminster*, *T.* 16 *G.* 2. The court of king's bench, upon consideration, refused to grant a mandamus to the bishop of London to grant licence to a lecturer; who appeared to have no fixed salary, but to depend altogether upon voluntary contributions; and where there was no custom; and the rector had refused his leave to preach in the church to the person now applying. *Str.* 1192. 1 *Wilson*, 11.

Licence and his duty thereupon.

3. By *Can.* 36. No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or any other places within this realm; except he be licensed either by the archbishop or by the bishop of the diocese where he is to be placed under their hands and seals, or by one of the two universities under their seal likewise; and except he shall first subscribe to the three articles concerning the king's supremacy, the book of common prayer, and the thirty nine articles: and if any bishop shall license any person without such subscription, he shall be suspended from giving licences to preach for the space of twelve months.

By *Can.* 37. None licensed as is aforesaid to preach, read lecture or catechize, coming to reside in any diocese, shall

ſhall be permitted there to preach, read lecture, catechize, or miniſter the ſacraments, or to execute any other eccleſiaſtical function (by what authority ſoever he be thereunto admitted); unleſs he firſt conſent and ſubſcribe to the three articles before mentioned in the preſence of the biſhop of the dioceſe wherein he is to exerciſe ſuch function.

By the ſtatute of the 13 & 14 *C.* 2. *c.* 4. No perſon ſhall be allowed or received as a lecturer, unleſs he be firſt approved and thereunto licenſed by the archbiſhop of the province, or biſhop of the dioceſe, or (in caſe the ſee be void) by the guardian of the ſpiritualties, under his ſeal; and ſhall, in the preſence of the ſaid archbiſhop or biſhop or guardian, read the nine and thirty articles mentioned in the ſtatute of 13 *Eliz.* *c.* 12. with declaration of his unfeigned aſſent to the ſame: And every perſon who ſhall be appointed or received as a lecturer, to preach upon any day of the week, in any church chapel or place of publick worſhip, the firſt time he preacheth (before his ſermon) ſhall openly publickly and ſolemnly read the common prayers and ſervice appointed to be read for that time of the day, and then and there publickly and openly declare his aſſent unto and approbation of the ſaid book, and to the uſe of all the prayers rites and ceremonies forms and orders therein contained; and ſhall upon the firſt lecture day of every month afterwards, ſo long as he continues lecturer or preacher there, at the place appointed for his ſaid lecture or ſermon, before his ſaid lecture or ſermon, openly publickly and ſolemnly read the common prayers and ſervice for that time of the day, and after ſuch reading thereof ſhall openly and publickly before the congregation there aſſembled declare his unfeigned aſſent unto the ſaid book according to the form aforeſaid: and every ſuch perſon who ſhall neglect or refuſe to do the ſame, ſhall from thenceforth be diſabled to preach the ſaid or any other lecture or ſermon, in the ſaid or any other church chapel or place of publick worſhip, until he ſhall openly publickly and ſolemnly read the common prayers and ſervice appointed by the ſaid book, and conform in all points to the things therein preſcribed according to the purport and true intent of this act. ſ. 19.

Provided, that if the ſaid lecture be to be read in any cathedral or collegiate church or chapel, it ſhall be ſufficient for the ſaid lecturer openly at the time aforeſaid to declare his aſſent and conſent to all things contained in the ſaid book, according to the form aforeſaid. ſ. 20.

And

And if any perſon who is by this act diſabled [or prohibited, 15 *C.* 2. *c.* 6. *ſ.* 7.] to preach any lecture or ſermon, ſhall during the time that he ſhall continue ſo diſabled (or prohibited), preach any ſermon or lecture; he ſhall ſuffer three months impriſonment in the common goal; and any two juſtices of the peace of any county within this realm, and the mayor or other chief magiſtrate of any city or town corporate within the ſame, upon certificate from the ordinary made to him or them of the offence committed, ſhall and are hereby required to commit the perſon ſo offending to the goal of the ſame county city or town corporate. *ſ.* 21.

Provided, that at all times when any ſermon or lecture is to be preached, the common prayers and ſervice in and by the ſaid book appointed to be read for that time of the day, ſhall be openly publickly and ſolemnly read by ſome prieſt or deacon, in the church chapel or place of publick worſhip where the ſaid ſermon or lecture is to be preached, before ſuch ſermon or lecture be preached, and that the lecturer then to preach ſhall be preſent at the reading thereof. ſ. 22.

And provided that this act ſhall not extend to the univerſity churches, when any ſermon or lecture is preached there, as and for the univerſity ſermon or lecture; but the ſame may be preached or read in ſuch ſort and manner, as the ſame have been heretofore preached or read. ſ. 23.

Legacies. See Wills.

Legates.

OF legates there are three kinds:

1. *Legati a latere*; theſe are cardinals, ſent by the pope *a latere*, that is from his own immediate preſence.

2. *Legati nati*, legates born; and of this kind was anciently the archbiſhop of Canterbury, who had a perpetual legantine power annexed to his archbiſhoprick.

3. *Legati dati*, legates given; and theſe are ſuch as have authority from the pope by ſpecial commiſſion. *God.* 18, 19, 20, 21.

Legend.

LEGEND, *legenda*, is that book which contained the leſſons, whether out of the ſcriptures, or out of other books, which were to be read throughout the year. *Lind.* 251.

Letters dimiſſory. See Ordination.

Lewdneſs.

Preſentable in the ſpiritual court.

1. BY *Can.* 109. If any offend their brethren by adultery, whoredom, inceſt, ribaldry, or any other uncleanneſs, and wickedneſs of life; the churchwardens or queſtmen and ſidemen, in their next preſentment to their ordinaries, ſhall preſent the ſame, that they may be puniſhed by the ſeverity of the laws, according to their deſerts; and ſuch notorious offenders ſhall not be admitted to the holy communion, till they be reformed.

Anciently puniſhable in the leet.

2. In ancient times the king's courts, and eſpecially the leets, had power to inquire of and puniſh fornication and adultery; and it appeareth often in the book of domeſday, that the king had the fines aſſeſſed for thoſe offences which were aſſeſſed in the king's courts, and could not be inflicted in the court chriſtian. 2 *Inſt.* 488.

And theſe fines were called *letcherwite*, *legerwite*, or *legergeldum*: *wite*, and *gelt* or *geld*, in the Saxon, do ſignify a tribute, fine, or amerciament; and *leger* importeth a bed, from *liggan* to lie down, which in divers parts of England is ſtill pronounced *ligg*. And theſe again, as alſo the Gothic *ligan*, the German *ligen*, the Daniſh *ligge*, the Belgic *liggen*, and the Latin *lectus*, (to ſhew the cognation of the languages of Europe and of the weſtern Aſia,) from the Greek word λεχω; and this again, from the Hebrew or Chaldee *lachath* or *lecheth*, which ſignifieth to lie down; as *lachan* or *lechen*, in the ſame languages, expreſſeth a harlot or concubine. Unto which fountain we may alſo refer our Anglo-Saxon word *lecher* (wherein the Saxons pronounced the *ch* hard, as the letter χ); as alſo the Latin *leccator*; and the Greek λεχω, which denoteth a woman in child-bed; and other ſuch like.

3. But

3. But now by the 13 Ed. 1. ſt. 4. called the ſtatute of *Circumſpecte agatis*, it is enacted as follows: *The king to his judges ſendeth greeting. Uſe your ſelves circumſpectly in all matters concerning the biſhop of* Norwich *and his clergy; not puniſhing them if they hold plea in court chriſtian of ſuch things as be meer ſpiritual, that is to wit, of penance enjoined by prelates for deadly ſin; as fornication, adultery, and ſuch like; for the which ſometimes corporal penance and ſometimes pecuniary is injoined, ſpecially if a freeman be convict of ſuch things. In all which caſes, the ſpiritual judge ſhall have power to take knowlege, notwithſtanding the king's prohibition.* No prohibition to the ſpiritual court.

The biſhop of Norwich] The biſhop of *Norwich* is put here only for example; for the ſtatute extendeth to all the biſhops within this realm. 2 *Inſt.* 487.

Fornication, adultery, and ſuch like] Here are two examples in particular, of matters merely ſpiritual, which have no mixture of the temporalties, for the correction of theſe offences *pro ſalute animæ.* 2 Inſt. 488.

And ſuch like] Theſe are to be taken for offences of like nature as the two offences here particularly expreſſed be; as ſolicitation of any woman's chaſtity, which is leſſer than theſe, and for inceſt which is greater. 2 *Inſt.* 488.

In the caſe of *Galliſand* and *Rigaud*, *T.* 1 *An.* it was agreed by the court, that *ſolicitation of chaſtity* was of eccleſiaſtical cognizance; but yet that the prohibition ſhould ſtand, becauſe the perſon had been convicted on an indictment for an aſſault upon the woman with intent to raviſh her, and after that, the woman had ſued an action of aſſault and battery againſt him for the ſame offence, which action was depending at the ſame time that the proſecution was in the ſpiritual court; for the force added to it, which is temporal, makes it cognizable by the temporal courts. *L. Raym.* 809. *Gibſ.* 1085.

In the caſe of *Harris* and *Hicks*, *H.* 4 & 5 *W.* A prohibition was moved for to the eccleſiaſtical court, where a ſuit was for *inceſt*, in marrying his firſt wife's ſiſter, ſuggeſting that the ſaid ſecond wife was dead, and by his ſaid wife he had a ſon, to whom an eſtate was deſcended as heir to his mother, and that notwithſtanding that he had pleaded this matter, they went on to annul the marriage and baſtardize the iſſue. And by the court: A prohibition ſhall go as to annulling the marriage or baſtardizing the iſſue, but they may proceed to puniſh the inceſt. 2 *Salk.* 548.

Pecu-

Pecuniary] That is, in commutation of penance. 2 *Inſt* 489.

Yet puniſhable alſo by the temporal laws.

4. But altho' the ſin of adultery is properly and of right belonging to the cognizance of the eccleſiaſtical juriſdiction; yet it will not be denied, but that as it is an offence againſt the peace of the realm (for which reaſon ſome are of opinion that avoutry or bawdry is an offence temporal as well as ſpiritual) the juſtices of the peace may take cognizance thereof. *Godb.* 474.

And Mr. *Hawkins* ſays, all open lewdneſs groſsly ſcandalous, as it tendeth to ſubvert religion and morality, which are the foundation of government, are puniſhable by the temporal judges by fine and impriſonment, and alſo ſuch corporal infamous puniſhment as to the court in diſcretion ſhall ſeem meet according to the heinouſneſs of the crime. 1 *Haw.* 7.

And eſpecially, the keeper of a brothel houſe is puniſhable upon indictment at the common law, by fine and impriſonment; for altho' adultery and fornication be puniſhable by the eccleſiaſtical law, yet the keeping of a houſe of bawdry, or ſtews, or brothel houſe, being as it were a common nuſance, is puniſhable by the common law, and is the cauſe of many miſchiefs, not only to the overthrow of mens bodies, and waſting of their livelihoods, but to the indangering of their ſouls. 3 *Inſt.* 205.

And a wife may be indicted together with her huſband, and condemned to the pillory with him for keeping a bawdy houſe; for this is an offence as to the government of the houſe, in which the wife hath a principal ſhare, and alſo ſuch an offence as may generally be preſumed to be managed by the intrigues of her ſex. 1 *Haw.* 2.

But it is ſaid, that a woman cannot be indicted for being a bawd generally; for that the bare ſolicitation of chaſtity is not indictable. 1 *Haw.* 196. 1 *Salk.* 382.

Temporal puniſhment in caſes of baſtardy in particular.

5. By the 18 *El. c.* 3. Concerning baſtards begotten and born out of lawful matrimony (an offence againſt God's law or man's law); it is enacted, that the juſtices of the peace ſhall take order as well for the puniſhment of the mother and reputed father, as for relief of the pariſh by charging ſuch mother or reputed father with the payment of money weekly, or other ſuſtentation for the relief of ſuch child, as to them ſhall ſeem meet.

And by the 7 *J. c.* 4. Every lewd woman which ſhall have any baſtard which may be chargeable to the pariſh, the juſtices of the peace ſhall commit ſuch lewd woman to the houſe of correction, there to be puniſhed and ſet on

on work, during the term of one whole year; and if ſhe eftſoons offend again, then to be committed to the ſaid houſe of correction as aforeſaid, and there to remain until ſhe can put in good ſureties for her good behaviour, not to offend ſo again.

And by the 13 & 14 *C.* 2. *c.* 12. If the mother or reputed father run away and leave the child upon the charge of the pariſh, the juſtices of the peace may order their effects to be ſeized, in order to indemnify ſuch pariſh.

6. Adultery is allowed by all, to be a ſufficient cauſe of divorce *a menſa et thoro.* Adultery.

But if the defendant proves, that the plaintiff alſo hath committed adultery; he or ſhe ſhall be diſcharged: for this is a compenſation of the crime. *Clarke* 115.

By the 13 Ed. 1. ſt. 1. c. 34. *If a wife willingly leave her huſband, and go away, and continue with her advouterer, ſhe ſhall be barred for ever of action to demand her dower that ſhe ought to have of her huſband's lands, if ſhe be convict thereupon; except that her huſband willingly, and without coercion of the church, reconcile her, and ſuffer her to dwell with him; in which caſe ſhe ſhall be reſtored to her action.*

7. By the 1 *H.* 7. *c.* 4. It ſhall be lawful to all archbiſhops, and biſhops, and other ordinaries having epiſcopal juriſdiction, to puniſh and chaſtiſe prieſts, clerks, and religious men, being within the bounds of their juriſdiction, as ſhall be convicted before them by examination and other lawful proof requiſite by the law of the church, of advoutry, fornication, inceſt, or any other fleſhly incontinency, by committing them to ward and priſon, there to abide for ſuch time as ſhall be thought to their diſcretions convenient for the quality and quantity of their treſpaſs. Clergymen further puniſhable.

And there have been ſome inſtances, ſince the reformation, of clergymen being deprived for adultery, of which our law books take notice; viz. one in the 12th, another in the 16th, and a third in the 27th year of queen Elizabeth. *Ayl. Parerg.* 47.

8. Preſumptions of guilt may go ſometimes for a proof of the aforeſaid crimes; as when a man and woman are ſeen in bed together, this is allowed to be ſufficient evidence; for ſuch crimes will ſcarce admit of other proof. *Wood Civ. L.* 274. Evidence.

9. By the 22 *G.* 2. *c.* 33. All flag officers, and all perſons in or belonging to his majeſty's ſhips or veſſels of war, being guilty of uncleanneſs, or other ſcandalous actions, in derogation of God's honour, and corruption of good Navy.

good manners; ſhall incur ſuch puniſhment as a court martial ſhall think fit to impoſe, and as the nature and degree of their offence ſhall deſerve. *Art.* 2.

Libel.

1. A Libel is a declaration or charge, drawn up in writing on the part of the plaintiff; unto which the defendant is obliged to anſwer. *Gibſ.* 1009.

For when the defendant appeareth upon the citation, then the libel ought to be exhibited by the plaintiff, and a copy of it delivered to the defendant. *Wood Civ. L.* 318.

2. To which purpoſe it is enacted by the ſtatute of the 2 H. 5. c. 3. as follows: *Foraſmuch as divers of the king's liege people be daily cited to appear in the ſpiritual court before ſpiritual judges, there to anſwer to divers perſons, as well of things which touch freehold debt treſpaſſes covenants and other things whereof the cognizance pertaineth to the court of our lord the king, as of matrimony and teſtament; and when ſuch perſons ſo cited appear and demand a libel of that which againſt them is ſurmiſed to be informed, to give their anſwer thereunto, or otherwiſe to purchaſe of our lord the king a writ of prohibition according to their caſe; which libel to them is denied by the ſaid ſpiritual judges, to the intent that ſuch perſons ſhould not be aided by any ſuch writ againſt the law, and to the great damage of ſuch perſons ſo impleaded: our ſaid lord the king, by the advice and aſſent of the lords ſpiritual and temporal, and at the requeſt and inſtance of the commons, hath ordained and eſtabliſhed, that at what time the libel is grantable by the law, it may be granted and delivered to the party without any difficulty.*

A libel of that which againſt them is ſurmiſed] in the ſecond year of king James the firſt, all the juſtices of England were aſſembled, for their opinion (among other points) concerning the extent of this ſtatute; whether it related only to proceedings between party and party, or alſo to proceedings ex officio: and their reſolution hereupon is differently related. Croke's report of it is, that the ſtatute is intended, where the eccleſiaſtical judge proceeds ex officio and ore tenus; whereas More and Noy ſay, it was unanimouſly reſolved, that the ſtatute intended only

only proceedings between party and party, and not proceedings ex officio and ore tenus. *Gibſ.* 1009.

From this variety of reports concerning the reſolution of the juſtices at that time, hath ſprung a like variety in the ſubſequent judgments upon this head. In the 13 *Ja.* where the high commiſſion proceeded not by way of libel but by articles, it was reſolved, that the articles were in the nature of a libel, and ſo within the intent of the ſtatute: In like manner in the 27 *Cha.* 2. where the caſe was, concerning articles of preſentment, it was adjudged that a copy ought to be delivered, as well on articles of preſentment as on other libels, and that the reading the preſentment to the party is not ſufficient. And before that, in the 20 *Cha.* 2. in the caſe of *Taylor* and *Brown*, the court reſolved, that this ſtatute extends, where the proceeding in the eccleſiaſtical court is ex officio, as well as between party and party; and that the report of More is ill reported, for Croke is contrary. *Gibſ.* 1009.

On the other hand, not only More and Noy concur in their reports of the reſolution as aboveſaid; but ſo late as the 16 *Cha.* 2. in the caſe of *Scurr* and *Burrell* (that is, but four years before the abovementioned caſe of *Taylor* and *Brown*), the court agreed, that where the libel is ex officio judicis, the judge is not bound to give a copy within this ſtatute, but only where it is between party and party. *Gibſ.* 1009.

But after all, it ſeemeth ſomewhat ſtrange, that there ſhould be ſo much difficulty about this matter. It is plain enough that More and Noy report the reſolution right, and that in Croke it hath been nothing but a ſlip of the pen, or error in the impreſſion. It is ſufficiently evident, from the words of the ſtatute it ſelf, that proceedings betwixt party and party are by no means intended to be excluded; for it reciteth that perſons are daily cited to appear in the ſpiritual court *to anſwer to divers perſons of things which touch freehold, debt, treſpaſs, and the like*, all of which concern matters between party and party; the only doubt was, whether it ſhould extend alſo to proceedings ex officio; and the caſe there was, that the high commiſſioners had deprived certain puritan miniſters, proceeding againſt them ex officio being ore tenus convocati. And Croke ſays (*Cro. Ja.* 37.), that all the juſtices held, that they were lawfully ſo deprived: And then the juſtices being aſked, whether a prohibition be grantable againſt the commiſſioners upon this ſtatute, if they do not deliver a copy of the libel to the party;

Croke ſays that they all anſwered that the *ſtatute is intended where the eccleſiaſtical judge proceeds ex officio et ore tenus:* but to make it conſiſtent with what went before, he muſt have meant to ſay that the *ſtatute is* " not" *intended where the eccleſiaſtical judge proceeds ex officio et ore tenus.* And the nature of the caſe requires it; for they all held, that the miniſters were lawfully deprived, and it is certain in that caſe they had no copy of the libel given them, for there was no libel.

Nevertheleſs, the law hath ſince been held to be otherwiſe: For, *M.* 2 *An. Anonym.* It was held, that a prohibition lieth for denying a copy of the libel, to any eccleſiaſtical court; for the eccleſiaſtical juriſdiction is limited; and the party ought to know whether the matter be within their juriſdiction, and how to anſwer. And Holt chief juſtice ſaid, that it was formerly held by all the judges of England, that when there was a proceeding ex officio in the eccleſiaſtical court, they were not bound to give the party a copy of the articles: but the law is otherwiſe; for in ſuch caſe, if they refuſe to give a copy of the articles, a prohibition ſhall go until it be given. And accordingly in this caſe a prohibition was granted by the court. 2 *Salk.* 553.

But after a copy is given, the prohibition ipſo facto is diſcharged, without any writ of conſultation iſſued. *Gibſ.* 1010.

At what time the libel is grantable by the law] Therefore this ſtatute was not introductory of a new law, but only an affirmance of the common law. *Gibſ.* 1009.

It may be granted and delivered to the party] In the caſe of *Syms* and *Selwood*, *M.* 27 *C.* 2. When the eccleſiaſtical court declared, that proclamation, or reading with an audible voice in court was a delivery; a prohibition was granted by the temporal court unleſs cauſe ſhewed. 3 *Keb.* 565.

Without any difficulty] And if a copy of the libel is not delivered, there is a writ in the regiſter to compel the delivery of it. *Gibſ.* 1010.

Fitzherbert ſaith, If a man be ſued in the ſpiritual court, and the judges there will not grant unto the defendant a copy of the libel, then he ſhall have a prohibition directed unto them for to ſurceaſe, until they have delivered the copy of the libel. Which prohibition the more modern books have put under theſe two limitations; firſt, that before it is granted, an oath be required, of the de-

niel of the libel; and ſecondly, that it ſhall not be granted at all, if the appeal is made for ſuch denial (as for a gravamen) from an inferior to a ſuperior court, becauſe the party hath his election, and hath choſen another remedy. *Gibſ.* 1010.

To the remedy by way of prohibition, Fitzherbert adds, that the defendant may have an action againſt them upon this ſtatute, if they will not deliver the copy of the libel, whether the cauſe in the libel be a ſpiritual cauſe or not. *Gibſ.* 1010.

3. By the ſeveral ſtamp acts, every libel or copy thereof, ſhall be upon a double ſixpenny ſtamp.

Library.

Eſtabliſhment of parochial libraries confirmed.

1. BY the 7 *An. c.* 14. Whereas in many places in England, the proviſion for the clergy is ſo mean, that the neceſſary expence of books for the better proſecution of their ſtudies cannot be defrayed by them; and whereas ſeveral perſons of late years have by charitable contributions erected libraries within ſeveral pariſhes and diſtricts; but ſome proviſion is wanting to preſerve the ſame, and ſuch others as ſhall be provided in the ſame manner, from embezilment: it is enacted, that in every pariſh or place where ſuch a library is or ſhall be erected, the ſame ſhall be preſerved for ſuch uſes as the ſame is and ſhall be given; and the orders and rules of the founders thereof ſhall be obſerved and kept. §. 1.

Ordinary to viſit the ſame.

2. And it ſhall be lawful for the proper ordinary, or his commiſſary or official, or the archdeacon, or by his direction his official or ſurrogate, if the ſaid archdeacon be not the incumbent of the place where ſuch library is, in their viſitation to inquire into the ſtate and condition of the ſaid libraries, and to amend and redreſs the grievances and defects of and concerning the ſame, as to him or them ſhall ſeem meet: and it ſhall be lawful for the proper ordinary from time to time, as often as ſhall be thought fit, to appoint ſuch perſons as he ſhall think fit, to view the ſtate and condition of ſuch libraries; and the ſaid ordinaries, archdeacons, or officials reſpectively, ſhall have free acceſs to the ſame, at ſuch times as they ſhall reſpectively appoint. §. 3.

To be locked up during the vacancy of the church.

3. And to prevent any embezilment of books upon the death or removal of any incumbent; immediately after ſuch death or removal, the library belonging to ſuch pariſh or place ſhall be forthwith ſhut up, and locked, or otherwiſe ſecured by the churchwardens, or by ſuch perſons as ſhall be authorized by the proper ordinary or archdeacon reſpectively; ſo that the ſame ſhall not be opened again, till a new incumbent, rector, vicar, miniſter, or curate ſhall be inducted or admitted. ſ. 6.

Provided, that if the place where ſuch library ſhall be kept, ſhall be uſed for any publick occaſion for meeting of the veſtry or otherwiſe for the diſpatch of any buſineſs of the ſaid pariſh, or for any other publick occaſion for which the ſaid place hath been ordinarily uſed; the ſaid place ſhall nevertheleſs be made uſe of as formerly for ſuch purpoſes, and after ſuch buſineſs diſpatched, ſhall be again forthwith ſhut and locked up, or otherwiſe ſecured as is before directed. ſ. 7.

New incumbent to give ſecurity.

4. And for the encouragement of ſuch founders and benefactors, and to the intent they may be ſatisfied that their pious and charitable intent may not be fruſtrated; every incumbent, rector, vicar, miniſter, or curate of a pariſh, before he ſhall be permitted to uſe and enjoy ſuch library, ſhall enter into ſuch ſecurity by bond or otherwiſe for preſervation of ſuch library, and due obſervance of the rules and orders belonging to the ſame, as the proper ordinaries within their reſpective juriſdictions in their diſcretion ſhall think fit. ſ. 2.

And to make new catalogues.

5. And where any library is appropriated to the uſe of the miniſter of any pariſh or place, every rector, vicar, miniſter or curate of the ſame, within ſix months after his inſtitution induction or admiſſion, ſhall make a new catalogue of all books remaining in or belonging to ſuch library, and ſhall ſign the ſaid catalogue, thereby acknowledging the cuſtody and poſſeſſion of the ſaid books; which ſaid catalogue ſo ſigned ſhall be delivered to the proper ordinary within the time aforeſaid, to be kept or regiſtred in his court, without any fee or reward for the ſame. ſ. 4.

And where any library ſhall at any time hereafter be given and appropriated to the uſe of any pariſh or place, where there ſhall be an incumbent rector vicar miniſter or curate in poſſeſſion; he ſhall make a catalogue thereof, and deliver the ſame as aforeſaid, within ſix months after he ſhall receive ſuch library. ſ. 5.

6. And

6. And none of the ſaid books ſhall in any caſe be alienable, or be alienated, without the conſent of the proper ordinary; and then only, when there is a duplicate of ſuch book. ſ. 10. Books not to be alienated.

7. And in caſe any book or books be taken or otherwiſe loſt out of the ſaid library, it ſhall be lawful for a juſtice of the peace to grant his warrant to ſearch for the ſame; and in caſe the ſame be found, ſuch book or books ſo found ſhall immediately by order of ſuch juſtice be reſtored to the ſaid library. ſ. 10. Remedy in caſe of books loſt or detained.

And in caſe any book or books belonging to the ſaid library ſhall be taken away and detained; it ſhall be lawful for the incumbent, rector, vicar, miniſter, or curate for the time being, or any other perſon or perſons, to bring an action of trover and converſion, in the name of the proper ordinaries within their reſpective juriſdictions: whereupon treble damages ſhall be given, with full coſts of ſuit, as if the ſame were his or their proper book or books; which damages ſhall be applied to the uſe and benefit of the ſaid library. ſ. 2.

8. And for the better preſervation of ſuch books, and that the benefactions given towards the ſame may appear; a book ſhall be kept within the ſaid library, for the entring and regiſtring of all ſuch benefactions and ſuch books as ſhall be given towards the ſame, and therein the miniſter ſhall enter ſuch benefaction, and an account of all ſuch books as ſhall from time to time be given, and by whom given. ſ. 8. Account to be kept of new benefactions.

9. And for better governing the ſaid libraries, and preſerving of the ſame; it ſhall be lawful for the proper ordinary, together with the donor of ſuch benefaction (if living) and after the death of ſuch donor for the proper ordinary alone, to make ſuch other rules and orders concerning the ſame, over and above, and beſides, but not contrary to ſuch as the donor of ſuch benefaction ſhall in his diſcretion judge fit and neceſſary; which ſaid orders and rules ſo to be made, ſhall from time to time be entred in the ſaid book or ſome other book to be prepared for the purpoſe, and kept in the ſaid library. ſ. 9. New regulations from time to time how to be made.

10. But nothing in this act ſhall extend to a publick library erected in the pariſh of Ryegate in the county of Surrey, for the uſe of the freeholders vicar and inhabitants of the ſaid pariſh, and of the gentlemen and clergymen inhabiting in parts thereto adjacent; the ſaid library being conſtituted in another manner than the libraries provided for by this act. ſ. 11. Exception.

Litany. See **Publick Worſhip.**

London: Cuſtom of diſtribution of inteſtates effects there. See **Wills.**

Lord's day.

THE penalties of 12 d a ſunday, and 20 l a month, for not reſorting to church on the Lord's day, are treated of under the titles **Publick Worſhip** and **Popery.**

Due obſervation of the Lord's day.

1. *Can.* 13. All manner of perſons within the church of England ſhall celebrate and keep the Lord's day commonly called ſunday, according to God's holy will and pleaſure and the orders of the church of England preſcribed in that behalf; that is, in hearing the word of God read and taught, in private and publick prayers, in acknowledging their offences to God and amendment of the ſame, in reconciling themſelves charitably to their neighbours where diſpleaſure hath been, in oftentimes receiving the communion of the body and blood of Chriſt, in viſiting the poor and ſick, uſing all godly and ſober converſation.

Exerciſing worldly calling on the Lord's day.

2. By the 1 J. c. 22. *No ſhoemaker ſhall ſhew, to the intent to put to ſale, any ſhoes, boots, buſkins, ſtartops, ſlippers or pontoſles, upon the ſunday; on pain of forfeiting 3 s 4 d a pair, and the value thereof; to be recovered at the aſſizes, ſeſſions, or leet; one third to the king, one third to him who ſhall ſue, and one third to the town or lord of the leet where the offence ſhall be committed.* ſ. 28, 46, 50.

By the 3 C. c. 1. *Foraſmuch as the Lord's day commonly called ſunday, is much broken and profaned, by carriers waggoners carters wainmen butchers and drovers of cattle, to the great diſhonour of God and reproach of religion; it is enacted, that no carrier with any horſe or horſes, nor waggon-men with any waggon or waggons, nor carmen with any cart or carts, nor wainman with any wain or wains, nor drovers with any cattle, ſhall by themſelves or any other travel upon the ſaid day, on pain of 20 s: or if any butcher, by himſelf, or any other for him by his privity or conſent, ſhall kill or ſell any victual on the ſaid day, he ſhall forfeit 6 s 8 d. The ſame being done in the*

view

view of any juſtice of the peace, mayor or other head officer of any city or town corporate, or proof on oath of two witneſſes, or confeſſion: To be levied by a conſtable or churchwarden, by warrant of ſuch juſtice or head officer, by diſtreſs and ſale; or the ſame may be recovered, by any perſon who ſhall ſue for the ſame, by bill plaint or information, in any of his majeſty's courts of record, in any city or town corporate, before his majeſty's juſtices of the peace in their general quarter ſeſſions of the peace: The ſame to be employed to the uſe of the poor of the pariſh where the offence ſhall be committed; ſaving only that it ſhall be lawful for ſuch juſtice mayor or head officer, out of the ſaid forfeitures to reward ſuch perſon as ſhall inform or otherwiſe proſecute as aforeſaid, ſo as ſuch reward exceed not the third part of the forfeitures. Proſecution to be in ſix months. And provided, that this act ſhall not in any ſort abridge or take away the authority of the court eccleſiaſtical.

If any butcher] *E.* 12 *G. K.* and *Brotherton.* There was an indictment for exerciſing the trade of a butcher on a ſunday: and exception was taken, that it was not laid to be againſt the form of the ſtatute, and it was no offence at common law. And upon demurrer, judgment was given for the defendant. *Str.* 702.

By the 29 C. 2. c. 7. *All perſons ſhall on every Lord's day apply themſelves to the obſervation of the ſame, by exerciſing themſelves thereon in the duties of piety and religion, publickly and privately: and no tradeſman artificer workman labourer or other perſon whatſoever, ſhall do or exerciſe any worldly labour buſineſs or work of their ordinary callings on the Lord's day or or any part thereof (works of neceſſity and charity only excepted): And every perſon being of the age of fourteen years and upwards, offending in the premiſſes ſhall forfeit* 5 *s. And no perſon ſhall publickly cry, ſhew forth, or expoſe to ſale, any wares merchandizes fruit herbs goods or chattels whatſoever, upon the Lord's day, or any part thereof; on pain of forfeiting the ſame. And no drover horſe-courſer waggoner butcher higler or any of their ſervants, ſhall travel or come in to his or their inn or lodging, upon the Lord's day, or any part thereof; on pain of* 20 *s. And no perſon ſhall uſe employ or travel upon the Lord's day, with any boat wherry lighter or barge (except it be upon extraordinary occaſion, to be allowed by a juſtice of the peace of the county, or head officer or ſome juſtice of peace of the city borough or town corporate where the fact ſhall be committed); on pain of* 5 *s. And if any perſon offending in any of the premiſſes, ſhall be thereof convicted before any juſtice of the peace of the county, or chief officer or juſtice of the peace*

of the city borough or town corporate where the offence ſhall be committed, on view or confeſſion or oath of one witneſs; the ſaid juſtice or chief officer ſhall give warrant to the conſtables or churchwardens of the pariſh where the offence ſhall be committed, to ſeize the ſaid goods cried, ſhewed forth, or put to ſale as aforeſaid, and to ſell the ſame; and to levy the ſaid other forfeitures or penalties by diſtreſs and ſale; and in default of ſuch diſtreſs, or in caſe of inſufficiency or inability of the ſaid offender to pay the ſaid forfeitures or penalties, that then the party offending be ſet publickly in the ſtocks, by the ſpace of two hours. And all the forfeitures or penalties aforeſaid ſhall be employed and converted to the uſe of the poor of the pariſh where the offence ſhall be committed; ſave only that ſuch juſtice mayor or other head officer may reward the informer out of the ſame, not exceeding the third part. But this ſhall not extend to the prohibiting of dreſſing of meat in families, or dreſſing or ſelling of meat in inns, cooks ſhops, or victualling houſes, for ſuch as otherwiſe cannot be provided; nor to the crying or ſelling of milk, before nine of the clock in the morning, or after four of the clock in the afternoon. Proſecution for the ſaid offences to be in ten days.

But by the 10 & 11 W. c. 24. *Mackarel* are allowed to be ſold on ſundays, before or after divine ſervice. ſ. 14.

And by the 2 *G.* 3. *c.* 15. *Fiſh carriages* (for the ſupply chiefly of the markets within London and Weſtminſter) ſhall be allowed to paſs on ſundays or holidays, whether laden or returning empty.

And by the 11 & 12 *W. c.* 21. The rulers and overſeers, auditors and aſſiſtants of the ſociety and company of *watermen* of the river Thames, may appoint any number of watermen not exceeding forty, to ply and work on every Lord's day between Vaux Hall and the Lime houſe, for the carrying paſſengers at one penny each perſon; the ſame to be applied (after paying thereout to ſuch perſons for their day's labour ſo much as ſhall be agreed on) to the uſe of the poor aged decayed and maimed watermen and lightermen of the ſaid ſociety and their widows. ſ. 13.

And by the 9 *An. c.* 23. It ſhall be lawful for any licenſed *hackney coachman* or his driver, or any chairman, to ply and ſtand with their coaches and chairs, and to drive and carry the ſame reſpectively on the Lord's day, within the limits of the bills of mortality. ſ. 20.

In the regiſter of archbiſhop Chichley, we find a ſpecial declaration, forbidding the *barbers* of London to exerciſe

ercise their callings on the Lord's day; and in a visitation of archbishop Warham, we find *barbers* and *butchers* presented to the spiritual court for exercising their several trades on that day, and admonished to forbear it, on pain of ecclesiastical censures. *Gibs.* 238.

3. By the 27 H. 6. c. 5. *Considering the abominable injuries and offences done to almighty God, and to his saints, always aiders and singular assisters in our necessities, because of fairs and markets upon their high and principal feasts, as in the feast of the ascension of our Lord, in the day of corpus christi, in the day of whitsunday, in Trinity sunday, with other sundays, and also in the high feast of the assumption of our blessed lady, the day of all saints, and on good friday, accustomably and miserably holden and used in the realm of England; in which principal and festival days, for great earthly covetise, the people is more willingly vexed, and in bodily labour foiled, than in other ferial days, as in fastening and making their booths and stalls, bearing and carrying, lifting and placing their wares outward and homeward, as tho' they did nothing remember the horrible defiling of their souls in buying and selling, with many deceitful lies, and false perjury, with drunkenness and strifes, and so specially withdrawing themselves and their servants from divine service; it is ordained, that all manner of fairs and markets in the said principal feasts and sundays and good friday, shall clearly cease from all shewing of any goods or merchandises (necessary victual only except), upon pain of forfeiture of all the goods aforesaid so shewed, to the lord of the franchise or liberty where such goods contrary to this ordinance shall be shewed (the four sundays in harvest except). Nevertheless the king of his special grace by authority of the parliament granteth to them power, which of old time had no day to hold their fair or market, but only upon the festival days aforesaid, to hold by the same authority and strength of his old grant, within three days next before the said feasts, or next after, proclamation first made to the simple common people upon which day the aforesaid fair shall be holden, always to be certified without any fine or fee to be taken to the king's use. And they which of old time have, by special grant, sufficient days before the feasts aforesaid, or after, shall in like manner as is aforesaid hold their fairs and markets the full number of their days; the said festivals and sundays, and good fridays except.* Fairs and markets on the Lord's day.

Provided, that this present ordinance shall endure until the next parliament, and so forth; except in the said parliament a reasonable cause be alledged shewed and proved, for the which it shall seem not expedient that the aforesaid ordinance shall so endure.

Within

Within three days next before the ſaid feaſt, or next after] In the 8 & 9 of queen Elizabeth, a bill was read the firſt and ſecond time, to avoid fairs and markets on ſunday, to the next working day following; which therefore ſeems to be the bill that had been prepared in the convocation of 1562, whereby it was provided, that upon every ſabbath day and principal feaſt day, be kept neither open fair nor market throughout the year; and that all perſons or corporations, having by patent ſuch days expreſſed, may change the ſame days with the days immediately following or going before the ſaid ſundays or principal feaſt day. *Gibſ.* 242.

In the third year of king Charles the firſt, a national faſt having been appointed, the biſhop of Wincheſter was directed to move the king, that whereas on that day divers fairs and markets were granted to divers towns by charter, his majeſty would be pleaſed, that in thoſe places they might have liberty to keep the ſaid faſt the next day after the ſaid fairs ended, notwithſtanding his majeſty's proclamation to that day; with which his majeſty was well pleaſed, and the biſhops of each dioceſe were directed by the houſe to take care accordingly. *Gibſ.* 275.

M. 38 & 39 *El. Comyns* and *Boyer.* A fair holden upon the ſunday is ſufficient in law; for altho' by the ſtatute there is a penalty inflicted upon the party that ſells upon that day, yet it maketh not the ſale to be void. *Cro. Eliz.* 485.

Sports. 4. By the 1 C. c. 1. *Foraſmuch as there is nothing more acceptable to God, than the true and ſincere ſervice and worſhip of him according to his holy will, and that the keeping holy of the Lord's day is a principal part of the true ſervice of God, which in very many places of this realm hath been and now is profaned and neglected by a diſorderly ſort of people, in exerciſing and frequenting bear-baiting, bull-baiting, interludes, common plays, and other unlawful exerciſes and paſtimes upon the Lord's day; and for that many quarrels, bloodſheds and other great inconveniences, have grown by the reſort and concourſe of people going out of their own pariſhes, to ſuch diſordered and unlawful exerciſes and paſtimes, neglecting divine ſervice both in their own pariſhes and elſewhere: it is enacted, that from henceforth there ſhall be no meetings, aſſemblies, or concourſe of people, out of their own pariſhes, on the Lord's day, for any ſports and paſtimes whatſoever; nor any bear-baiting, bull-baiting, interludes, common plays, or other unlawful exerciſes and paſtimes, uſed by any perſons within their own pariſhes. And every perſon offending in any the premiſſes, ſhall forfeit for*

for every offence 3 s 4 d to the uſe of the poor. And any juſtice of the peace of the county, or chief officer of a city borough or town corporate where the offence ſhall be committed, who on his own view, or confeſſion of the party, or proof of one witneſs by oath ſhall find any perſon offending in the premiſſes, ſhall give warrant under his hand and ſeal to the conſtables and churchwardens of the pariſh where the offence ſhall be committed, to levy the ſaid penalty ſo aſſeſſed by diſtreſs and ſale; and in default of ſuch diſtreſs, that the party offending be ſet publickly in the ſtocks by the ſpace of three hours. Provided, that no man be impeached by this act except he be called in queſtion within one month next after the offence committed. Provided alſo that the eccleſiaſtical juriſdiction by virtue of this act, ſhall not be abridged; but that the eccleſiaſtical court may puniſh the ſaid offences, as if this act had not been made.

The keeping holy of the Lord's day] Which duty Lindwood thus deſcribes: To keep it holy and pure with reverence; that is to ſay, generally, by ceaſing on that day, from wickedneſs; particularly, by reſting from bodily labour, which hinders the operations of the ſoul towards God; and moſt eſpecially, by employing it wholly in divine contemplations. And elſewhere, he ſays, we muſt reſt wholly unto God. From which, and from the many laws that were made in the times of our Saxon anceſtors againſt profaning the Lord's day, the learned biſhop Stillingfleet draws this pious concluſion, That the religious obſervation of the Lord's day is no novelty ſtarted by ſome ſects and parties among us; but that it hath been the general ſenſe of the beſt part of the chriſtian world, and is particularly enforced upon us of the church of England, not only by the homilies, but by the moſt ancient eccleſiaſtical laws amongſt us. Accordingly (before the book of ſports had been ſet forth by king James the firſt) not only the injunctions of Edward the ſixth and queen Elizabeth had ſpecially inforced this duty; but a bill had been provided by the biſhops in the twelfth year of queen Elizabeth for enforcing the obſervation of it; and divers bills for that end had alſo been actually brought into parliament: One, in the 27 Eliz. intitled, A bill for the better and more reverend obſerving of the ſabbath day; which having paſſed both houſes after great diſputation, was denied the royal aſſent, probably upon the diſlike the queen had of the parliament's intermeddling in matters of religion. Three attempts of the like nature were alſo made in the reign of king James the firſt;

firſt; as appears by the journals of parliament in the ſeveral years: and (after what had been done in the firſt and in the third year of king Charles the firſt) we find a bill in parliament in the ſixteenth of Charles the ſecond, for puniſhing divers abuſes committed on the Lord's day; and in the ſame year, when a bill for the better obſervation of the Lord's day was prepared for the royal aſſent, and ready to be paſſed, it was ſtolen, and could not be recovered upon a ſtrict examination made by the houſe of lords. *Gibſ.* 236.

There ſhall be no meetings, aſſemblies, or concourſe of people, out of their own pariſhes, on the Lord's day, for any ſports out paſtimes whatſoever] This alſo was provided againſt in king James's book of ſports: "We do likewiſe ſtraightly command, that every perſon ſhall reſort "to his own pariſh church, to hear divine ſervice, and "each pariſh by itſelf to uſe the ſaid recreation after di-"vine ſervice." *Gibſ.* 236.

For any ſports and paſtimes whatſoever] King James the firſt, in the aforeſaid book of ſports, in the year 1618, publickly declared to his ſubjects theſe games following to be *lawful*; viz. dancing, archery, leaping, vaulting, may-games, whitſun ales, and morris dances; and did command that no ſuch honeſt mirth or recreation ſhould be forbidden to his ſubjects on ſundays after evening ſervice: but reſtraining all recuſants from this liberty; and commanding each pariſh (as was ſaid before) to uſe theſe recreations by it ſelf; and prohibiting all *unlawful* games, bear-baiting, bull-baiting, interludes, and bowling by the meaner ſort. *Dalt.* c. 46. *Gibſ.* 236.

Proceſs. 5. By the 29 C. 2. c. 7. *No perſon, upon the Lord's day, ſhall ſerve or execute, or cauſe to be ſerved or executed, any writ, proceſs, warrant, order, judgment, or decree (except in caſes of treaſon, felony, or breach of the peace); but the ſervice of the ſame ſhall be void to all intents and purpoſes: and the perſon ſo ſerving or executing the ſame, ſhall be as liable to the ſuit of the party grieved, and to anſwer damages to him for doing thereof, as if he had done the ſame without any writ, proceſs, warrant, order, judgment, or decree at all.* ſ. 6.

Shall ſerve or execute, or cauſe to be ſerved or executed, any writ, proceſs, &c.] Before this ſtatute, one might have been attached for arreſting another on ſunday (as in *Prinſor's* caſe, *H.* 16 *Car.* who was fined 20 s for ſo doing); but

but with this circumſtance, that he might have arreſted him upon any other day of the week. Agreeably to which, *Keeling* ſaid, upon ſuch a motion, that he had known many attachments for arreſting a man upon a ſunday, but ſtill the affidavit contained, that he might have been taken on another day; to which *Twiſden* added, that ſo alſo it was for arreſting a man as he was going to church, to diſgrace him. *Cro. Car.* 602. 1 *Mod.* 56.

Proceſs] A libel was exhibited in the ſpiritual court of Durham againſt a woman for incontinence, and the citation was fixed upon the church door on a ſunday, according to cuſtom; upon which it was urged as the opinion of civilians, that ſuch citation was ſufficient without a perſonal ſerving, and that this had been the conſtant practice both before and ſince this ſtatute: and *Holt* chief juſtice ſaid, if the eccleſiaſtical law was and had always been to ſerve this proceſs on a ſunday (in which reſpect it was different from temporal proceſs, which may be as well ſerved on any other day,) that then it did not ſeem to be the intent of this ſtatute, to take away the ſerving it in that manner; which is only meant of proceſſes, that may as well be executed at any other time. 5 *Mod.* 449. 2 *Salk.* 625.

Except in caſes of treaſon, felony, or breach of the peace] But by the 5 *An. c.* 9. a judge's warrant for apprehending a perſon eſcaped out of the king's bench or fleet priſon, may be executed on the Lord's day. ſ. 3.

Breach of the peace] A juſtice of the peace made a warrant to a conſtable, to take another perſon to find ſureties for the *good behaviour*. The conſtable executed the warrant on a ſunday: and he was juſtified by the court; who reſolved, that a warrant for the good behaviour is a warrant for the peace and more, and that this ſtatute is to be favourably interpreted for the peace. *Raym.* 250.

6. By the ſame ſtatute, *If any perſon which ſhall travel upon the Lord's day, ſhall be then robbed; no hundred, or the inhabitants thereof, ſhall be charged with or anſwerable for any robbery ſo committed: but the perſon ſo robbed ſhall be barred from bringing any action for the ſaid robbery. Nevertheleſs, the inhabitants of the counties and hundreds (after notice of any ſuch robbery to them or ſome of them given, or after hue and cry for the ſame to be brought) ſhall make freſh ſuit* Robbery.

ſuit after the offenders; on pain of forfeiting to the king as much money, as might have been recovered againſt the hundred by the party robbed, if this law had not been made. ſ. 5.

If any perſon &c.] This clauſe was probably inſerted, with reference to a judgment given in the court of king's bench, *M.* 16 *J.* in the caſe between *Waite* and the hundred of *Stoke*; where the queſtion was, whether one being robbed upon the ſunday morning in time of divine ſervice, and making hue and cry, and the hundred not producing any of the robbers, the ſaid hundred ſhould be chargeable by the ſtatute? And this queſtion was twice argued at the bar on both ſides; and the juſtices delivering their opinions ſeriatim, becauſe it was a leading caſe in this point, and had never before been queſtioned, *Croke*, *Doderidge*, and *Haughton* held that the hundred was chargeable; but *Mountague* chief juſtice held the contrary, for this among other reaſons, becauſe the law appoints that men ſhould be at divine ſervice on ſunday, and as it is at the peril of thoſe who will travel upon ſundays, if they be robbed. However judgment was given otherwiſe; and it appears not by the report, what the particular occaſion was, to travel on the ſunday. *Cro. Ja.* 496. *Gibſ.* 239.

Which ſhall travel upon the Lord's day M. 7 *G. Teſhmaker* againſt the hundred of *Edmington*. The plaintiff lived a mile from the church, and going thither with his lady in his coach upon a ſunday, was robbed; and brought his action againſt the hundred, and recovered; for the ſtatute extends only to the caſe of *travelling:* but *Pratt* chief juſtice ſaid, if they had been going to make viſits, it might have been otherwiſe. *Str.* 406.

Lord's ſupper.

CONcerning the adminiſtring of this ſacrament to ſick perſons: See title Sick.

Who ſhall or ſhall not be admitted to the holy communion.

1. *Rubrick.* There ſhall none be admitted to the holy communion, until ſuch time as he be confirmed, or be ready and deſirous to be confirmed.

Peccham. *None ſhall give the communion to the pariſhioner of another prieſt, without his manifeſt licence: Which ordi-*

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nance nevertheleſs ſhall not extend to travellers, nor to perſons in danger, nor to caſes of neceſſity. Lind. 233.

Travellers] For travellers are pariſhoners of every pariſh. *Id.*

Perſons in danger] That is, in danger of death. *Id.*

And by *Can.* 28. The churchwardens or queſtmen and their aſſiſtants ſhall mark, as well as the miniſter, whether any ſtrangers come often and commonly from other pariſhes to their church, and ſhall ſhew their miniſter of them, leſt perhaps they be admitted to the Lord's table amongſt others; which they ſhall forbid, and remit ſuch home to their own pariſh churches and miniſters, there to receive the communion with the reſt of their own neighbours.

Rubr. And if any be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, ſo that the congregation be thereby offended; the curate, having knowledge thereof, ſhall call him and adverti ſe him, that in any wiſe he preſume not to come to the Lord's table, until he hath openly declared himſelf to have truly repented, and amended his former naughty life; that the congregation may thereby be ſatisfied, which before were offended; and that he hath recompenſed the parties to whom he hath done wrong; or at leaſt declare himſelf to be in full purpoſe ſo to do, as ſoon as he conveniently may.

Rubr. The ſame order ſhall the curate uſe with thoſe, betwixt whom he perceiveth malice and hatred to reign; not ſuffering them to be partakers of the Lord's table, until he know them to be reconciled. And if one of the parties ſo at variance be content to forgive, from the bottom of his heart, all that the other hath treſpaſſed againſt him, and to make amends for that he himſelf hath offended, and the other party will not be perſuaded to a godly unity, but remain ſtill in his forwardneſs and malice; the miniſter in that caſe ought to admit the penitent perſon to the holy communion, and not him that is obſtinate. Provided, that every miniſter ſo repelling any, as is ſpecified in this or the next preceding paragraph of this rubrick, ſhall be obliged to give an account of the ſame to the ordinary, within fourteen days after at the fartheſt. And the ordinary ſhall proceed againſt the offending perſon according to the canon.

By *Can.* 26. No miniſter ſhall in any wiſe admit to the receiving of the holy communion, any of his cure or flock, which

which be openly known to live in ſin notorious without repentance; nor any who have maliciouſly and openly contended with their neighbours; nor any churchwardens or ſidemen who refuſe or neglect to make preſentment of offences according to their oaths.

By *Can.* 27. No miniſter, when he celebrateth the communion, ſhall wittingly adminiſter the ſame to any but to ſuch as kneel, under pain of ſuſpenſion; nor, under the like pain, to any that refuſe to be preſent at publick prayers, according to the orders of the church of England; nor to any that are common and notorious depravers of the book of common prayer and adminiſtration of the ſacraments, and of the orders rites and ceremonies therein preſcribed; or of any thing that is contained in any of the 39 articles; or of any thing contained in the book of ordering prieſts and biſhops; or to any that have ſpoken againſt and depraved his majeſty's ſovereign authority in cauſes eccleſiaſtical: except every ſuch perſon ſhall firſt acknowledge to the miniſter before the churchwardens, his repentance for the ſame, and promiſe by word (if he cannot write) that he will do ſo no more; and except (if he can write) he ſhall firſt do the ſame under his hand writing, to be delivered to the miniſter, and by him ſent to the biſhop of the dioceſe, or ordinary of the place. Provided, that every miniſter ſo repelling any (as is ſpecified either in this, or in the next preceding conſtitution) ſhall upon complaint, or being required by the ordinary, ſignify the cauſe thereof unto him, and therein obey his order and direction.

By *Can.* 109. If any offend their brethren, either by adultery, whoredom, inceſt, or drunkenneſs, or by ſwearing, ribaldry, uſury, or any other uncleanneſs, or wickedneſs of life; ſuch notorious offenders ſhall not be admitted to the holy communion, till they be reformed.

Not to be adminiſtred in private houſes.

2. *Can.* 71. No miniſter ſhall adminiſter the holy communion in any private houſe; except it be in times of neceſſity, when any being either ſo impotent as he cannot go to the church, or very dangerouy ſick, are deſirous to be partakers of the holy ſacrament: upon pain of ſuſpenſion for the firſt offence, and excommunication for the ſecond. Provided, that houſes are here reputed for private houſes, wherein are no chapels dedicated and allowed by the eccleſiaſtical laws of this realm. And provided alſo, under the pains before expreſſed, that no chaplains do adminiſter the communion in any other places, but in the chapels of the ſaid houſes; and that alſo they

they do the ſame very ſeldom upon ſundays and holidays: ſo that both the lords and maſters of the ſaid houſes, and their families, ſhall at other times reſort to their own pariſh churches, and there receive the holy communion at the leaſt once every year.

Notice to be given of the holy communion.

3. *Can.* 22. We do require every miniſter to give warning to his pariſhioners publickly in the church at morning prayer, the ſunday before every time of his adminiſtring that holy ſacrament, for their better preparation of themſelves: which ſaid warning we injoin the ſaid pariſhioners to accept and obey, under the penalty and danger of the law.

And by the *Rubrick*; The miniſter ſhall always give warning for the celebration of the holy communion, upon the ſunday, or ſome holiday immediately preceding.

Names to be given in the day before.

4. *Rubr.* So many as intend to be partakers of the holy communion, ſhall ſignify their names to the curate, at leaſt ſome time the day before.

E. 13 *Car.* 2. An action upon the caſe was brought againſt a miniſter for refuſing the ſacrament to another, and the jury found for the plaintiff, and gave damages. And it was moved in arreſt of judgment, among other things, that the party had not ſet forth in his declaration, that he gave notice according to the ſtatute; nor that he was a pariſhioner of that pariſh; without which the miniſter might not admit him by the laws of the church. But theſe points appear not to have come under conſideration, becauſe another exception was of itſelf adjudged to be fatal, viz. That the plaintiff declared for not adminiſtring two ſundays, and had not ſet forth that in the ſecond inſtance he deſired the miniſter to do it, and yet intire damages had been given for both. 1 *Sid.* 34.

What number is requiſite for communicating.

5. *Rubr.* There ſhall be no celebration of the Lord's ſupper, except there be a convenient number to communicate with the prieſt, according to his diſcretion.

And if there be not above twenty perſons in the pariſh of diſcretion to receive the communion; yet there ſhall be no communion, except four (or three at the leaſt) communicate with the prieſt.

And in cathedral and collegiate churches and colleges, where there are many prieſts and deacons, they ſhall all receive the communion with the prieſt every ſunday at the leaſt, except they have reaſonable cauſe to the contrary.

Communion table.

6. *Can.* 82. Whereas we have no doubt, but that in all churches convenient and decent tables are provided and placed, for the celebration of the holy communion; we

appoint that the ſame tables ſhall from time to time be kept and repaired in ſufficient and ſeemly manner, and covered in time of divine ſervice with a carpet of ſilk or other decent ſtuff, thought meet by the ordinary of the place, if any queſtion be made of it, and with a fair linen cloth at the time of the miniſtration as becometh that table; and ſo ſtand, ſaving when the holy communion is to be adminiſtred, at which time the ſame ſhall be placed in ſo good ſort within the church or chancel, as thereby the miniſter may be more conveniently heard of the communicants in his prayer and miniſtration, and the communicants alſo more conveniently and in more number may communicate with the ſaid miniſter.

Bread and wine to be provided.

7. By *Can.* 20. The churchwardens, againſt the time of every communion, ſhall at the charge of the pariſh, with the advice and direction of the miniſter, provide a ſufficient quantity of fine white bread, and of good and wholeſome wine, for the number of communicants that ſhall receive there; which wine ſhall be brought to the communion table, in a clean and ſweet ſtanding pot or ſtoop of pewter, if not of purer metal.

And by the *Rubrick:* The bread and wine for the communion ſhall be provided by the curate and churchwardens at the charges of the pariſh.

In the caſe of *Franklyn* and the maſter and brethren of *St Croſs*. *T.* 1721. Altho' by the endowment the vicar was to find the ſacrament wine; yet the court were of opinion it ſhould be found by the pariſhioners, according to the canon. *Bunb.* 79.———It had been better to have ſaid, *according to the rubrick*; which is eſtabliſhed by act of parliament.

And to take away all occaſion of diſſention and ſuperſtition, which any perſon hath or might have concerning the bread and wine; it ſhall ſuffice that the bread be ſuch as is uſual to be eaten, but the beſt and pureſt wheat bread that conveniently may be gotten.

Offertory.

8. In the *rubrick* in the communion ſervice of the 2 *Ed.* 6. it was ordained, that "whyles the clearkes do ſyng the "offertory, ſo many as are diſpoſed, ſhall offer to the "poore mennes boxe, every one accordinge to his habi-"litie and charitable mynde."

And by the preſent *rubrick:* Whilſt the ſentences of the offertory are in reading, the deacons, churchwardens, or other fit perſon appointed for that purpoſe, ſhall receive the alms for the poor, and other devotions of the people,

in a decent baſin to be provided by the pariſh for that purpoſe, and reverently bring it to the prieſt, who ſhall humbly preſent and place it upon the holy table.

And after divine ſervice is ended, the money given at the offertory ſhall be diſpoſed of to ſuch pious and charitable uſes, as the miniſter and churchwardens ſhall think fit; wherein if they diſagree, it ſhall be diſpoſed of, as the ordinary ſhall appoint.

9. *Rubr.* Such ornaments of the church, and of the miniſters thereof, at all times of their miniſtration, ſhall be retained and be in uſe, as were in the church of England by the authority of parliament in the ſecond year of the reign of king Edward the ſixth. Habit of the miniſter officiating.

And by the rubrick of the 2 *Ed.* 6. it is ordained, that upon the day and at the time appointed for the miniſtration of the holy communion, the prieſt that ſhall execute the holy miniſtry ſhall put upon him the veſture appointed for that miniſtration, that is to ſay, a white albe plain, with a veſtment or cope: and where there be many prieſts or deacons, there ſo many ſhall be ready to help the prieſt in the miniſtration, as ſhall be requiſite; and ſhall have upon them likewiſe the veſtures appointed for their miniſtry, that is to ſay, albes with tunacles.

And whenſoever the biſhop ſhall celebrate the holy communion in the church, or execute any other publick miniſtration; he ſhall have upon him, beſides his rochet, a ſurplice or albe, and a cope or veſtment, and alſo his paſtoral ſtaff in his hand, or elſe born or holden by his chaplain.

10. *Art.* 28. Tranſubſtantiation (or the change of the ſubſtance of bread and wine) in the ſupper of the Lord, cannot be proved by holy writ; but it is repugnant to the plain words of ſcripture, overthroweth the nature of a ſacrament, and hath given occaſion to many ſuperſtitions. Conſecration.

And by the ſtatute of the 25 *C.* 2. *c.* 2. the declaration required as a qualification for offices is as follows: "I "A. B. do declare, that there is not any tranſubſtantia- "tion in the ſacrament of the Lord's ſupper, or in the "elements of bread and wine, at or after the conſe- "cration thereof by any perſon whatſoever."

11. By *Can.* 27. No miniſter, when he celebrateth the communion, ſhall wittingly adminiſter the ſame to any but to ſuch as kneel; under pain of ſuſpenſion. Poſture of the communicants.

And by the *rubrick* at the end of the communion office: Whereas it is ordained in this office for the adminiſtration

of the Lord's ſupper, that the communicants ſhould receive the ſame kneeling (which order is well meant for a ſignification of our humble and grateful acknowledgement of the benefits of Chriſt therein given to all worthy receivers, and for the avoiding of ſuch profanation and diſorder in the holy communion as might otherwiſe enſue), yet leſt the ſame kneeling ſhould by any perſons, either out of ignorance and infirmity, or out of malice and obſtinacy be miſconſtrued and depraved; it is here declared, that thereby no adoration is intended, or ought to be done, either unto the ſacramental bread and wine there bodily received, or unto any corporal preſence of Chriſt's natural fleſh and blood; for the ſacramental bread and wine remain ſtill in their very natural ſubſtaces, and therefore may not be adored (for that were idolatry, to be abhorred of all faithful chriſtians); and the natural body and blood of our ſaviour Chriſt are in heaven, and not here; it being againſt the truth of Chriſt's natural body, to be at one time in more places than one.

Communion in both kinds.

12. *Art.* 30. The cup of the Lord is not to be denied to the lay people; for both the parts of the Lord's ſacrament, by Chriſt's ordinance and commandment, ought to be miniſtred to all chriſtian men alike.

And by the ſtatute of the 1 *Ed.* 6. *c.* 1. Foraſmuch as it is more agreeable to the firſt inſtitution of the ſaid ſacrament, and more conformable to the common uſe and practice of the apoſtles and of the primitive church for above 500 years after Chriſt's aſcenſion, that the ſame ſhould be adminiſtred under both the kinds of bread and wine, than under the form of bread only; and alſo it is more agreeable to the firſt inſtitution of Chriſt, and to the uſage of the apoſtles and the primitive church, that the people ſhould receive the ſame with the prieſt, than that the prieſt ſhould receive it alone: it is therefore enacted, that the ſaid moſt bleſſed ſacrament be commonly delivered and miniſtred unto the people, under both the kinds, that is to ſay, of bread and wine, except neceſſity otherwiſe require. And alſo that the prieſt which ſhall miniſter the ſame, ſhall at the leaſt one day before, exhort all perſons which ſhall be preſent, likewiſe to reſort and prepare themſelves to receive the ſame. And when the day prefixed cometh, after a godly exhortation by the miniſter made (wherein ſhall be further expreſſed the benefit and comfort promiſed to them which worthily receive the holy ſacrament, and danger and indignation of God threatned to them which ſhall preſume to receive the

ſame

ſame unworthily, to the end that every man may try and examine his own conſcience before he ſhall receive the ſame) the ſaid miniſter ſhall not without a lawful cauſe deny the ſame to any perſon that will devoutly and humbly deſire it.——Not condemning hereby, the uſage of any church out of the king's dominions. ſ. 7.

13. *Rubr.* If any of the bread and wine remain unconſecrated, the curate ſhall have it to his own uſe; but if any remain of that which was conſecrated, it ſhall not be carried out of the church, but the prieſt, and ſuch other of the communicants as he ſhall then call unto him, ſhall immediately after the bleſſing, reverently eat and drink the ſame. Bread and wine remaining.

14. By a conſtitution of archbiſhop *Langton*, it is enjoined, that *no ſacrament of the church ſhall be denied to any one, upon the account of any ſum of money: but if any thing hath been accuſtomed to be given by the pious devotion of the faithful, juſtice ſhall be done thereupon to the churches by the ordinary of the place afterwards.* Lind. 278. Oblations due to the miniſter.

Upon the account of any ſum of money] Uſed to be paid or taken in the adminiſtration of any of the ſacraments. *Id.*

Hath been accuſtomed to be given] That is, of old, and for ſo long time as will create a preſcription, altho' at firſt given voluntarily; for they who have paid ſo long, are preſumed at firſt to have bound themſelves voluntarily thereunto. *Id.*

And by the *rubrick:* Yearly at eaſter, every pariſhioner ſhall reckon with the parſon vicar or curate, or his or their deputy or deputies; and pay to them or him all eccleſiaſtical duties, accuſtomably due then and at that time to be paid.

15. By the ancient *canon law*, every layman (not prohibited by crimes of a heinous nature) was required to communicate at leaſt thrice in the year, namely, at eaſter, whitſuntide, and chriſtmas; and the ſecular clergy not communicating at thoſe times, were not to be reckoned amongſt catholicks. *Gibſ.* 387. How often in the year to be adminiſtred.

And by the *rubrick* in the book of common prayer; Every pariſhioner ſhall communicate at the leaſt three times in the year, of which eaſter to be one.

And by *Can.* 21. In every pariſh church and chapel where ſacraments are to be adminiſtred, the holy commu-

nion ſhall be adminiſtred by the parſon vicar or miniſter, ſo often, and at ſuch times, as every pariſhioner may communicate at the leaſt thrice in the year, whereof the feaſt of eaſter to be one: according as they are appointed by the book of common prayer.

And the churchwardens or queſtmen, and their aſſiſtants, ſhall mark (as well as the miniſter), whether all and every of the pariſhioners come ſo often every year to the holy communion, as the laws and conſtitutions do require. *Can.* 28.

And ſhall yearly within forty days after eaſter exhibit to the biſhop or his chancellor, the names and ſirnames of all the pariſhioners as well men as women, which being of the age of ſixteen years received not the communion at eaſter before. *Can.* 112.

By *Can.* 24. All deans, wardens, maſters or heads of cathedral and collegiate churches, prebendaries, canons, vicars, petty canons, ſinging men, and all others of the foundation, ſhall receive the communion four times yearly at the leaſt.

And by *Can.* 23. In all colleges and halls within both the univerſities, the maſters and fellows, ſuch eſpecially as have any pupils, ſhall be careful that all their ſaid pupils, and the reſt that remain among them, do diligently frequent publick ſervice and ſermons, and receive the holy communion, which we ordain to be adminiſtred in all ſuch colleges and halls, the firſt and ſecond ſunday of every month; requiring all the ſaid maſters fellows and ſcholars, and all the reſt of the ſtudents, officers, and all other the ſervants there, ſo to be ordered, that every one of them ſhall communicate four times in the year at the leaſt, kneeling reverently and decently upon their knees, according to the order of the communion book preſcribed in that behalf.

Penalty of depraving the holy communion.

16. By the 1 *Ed.* 6. *c.* 1. Whoſoever ſhall deprave deſpiſe or contemn the moſt bleſſed ſacrament of the body and blood of our ſaviour Jeſus Chriſt, commonly called the ſacrament of the altar, and in ſcripture the ſupper and table of the Lord, the communion and partaking of the body and blood of Chriſt, in contempt thereof, by any contemptuous words, or by any words of depraving deſpiſing or reviling, or whoſoever ſhall adviſedly in any other wiſe contemn deſpiſe or revile the ſaid moſt bleſſed ſacrament, contrary to the effects and declaration aboveſaid; ſhall ſuffer impriſonment of his body, and make

make fine and ranſom at the king's will. And the juſtices of the peace, or three of them at leaſt, whereof one to be of the quorum, ſhall have power to take information and accuſation by the oaths of two witneſſes; and after ſuch accuſation or information ſo had, to inquire by the oaths of twelve men, in every their four quarter ſeſſions yearly to be holden, of all and ſingular ſuch accuſations or informations to be had or made of any the offences aforeſaid; and upon every ſuch accuſation and information, the offender ſhall be inquired of and indicted before the ſaid juſtices, or three of them as aforeſaid, of the ſaid contempts and offences, by the verdict of twelve men, if the matter of the ſaid accuſation and information ſhall ſeem to the ſaid jury good and true. ſ. 1.

And the ſaid juſtices, or three of them as aforeſaid, before whom any ſuch preſentment information and accuſation ſhall be made, ſhall examine the accuſers what other witneſſes were by and preſent at the time of the committing the offence, and how many others than the accuſers have knowledge thereof; and ſhall have power by their diſcretions to bind by recognizance as well the ſaid accuſers, as all ſuch other perſons whom the ſaid accuſers ſhall declare to have knowledge of the offences by them preſented and informed, every of them in 5 l to the king, to appear before the ſaid juſtices before whom the offender ſhall be tried at the day of trial and deliverance of ſuch offender. ſ. 2. ib

And the ſaid juſtices, or three of them as aforeſaid, ſhall have power to make proceſs againſt every perſon ſo indicted, by two capias's and an exigent and by capias utlagatum into all the places within this realm; and upon the appearance of the offender, to determine the offences aforeſaid: And the ſaid juſtices, or three of them as aforeſaid, ſhall have power to let any ſuch perſon ſo indicted, upon ſufficient ſureties by their diſcretion, to bail for their appearance to be tried. ſ. 3.

Provided, that the ſaid juſtices at their quarter ſeſſions where any offender ſhall be or ſtand indicted of any of the ſaid offences ſhall direct a writ in the king's name to the biſhop of the dioceſe wherein the offence is ſuppoſed to be committed, willing and requiring the ſaid biſhop to be in his own perſon, or by his chancellor, or other his ſufficient deputy learned, at the quarter ſeſſions in the ſaid county to be holden, when and where the ſaid offender ſhall be arraigned and tried, appointing to them in the

ſaid writ the day and place of the ſaid arraignment; which writ ſhall be of this form: "The king, &c. to "the biſhop of ——— greeting. We command you, "that you, your chancellor, or other your deputy ſuf- "ficiently learned, be with our juſtices aſſigned to keep "the peace within our county of ——— ſuch a day, at "our ſeſſion then and there to be holden, to give coun- "ſel and adviſement to the ſame our juſtices aſſigned to "keep the peace as aforeſaid, upon the arraignment "and delivery of the offenders, againſt the form of the "ſtatute concerning the holy ſacrament of the altar." ſ. 4.

Provided, that no perſon ſhall be indicted for any the ſaid offences, but within three months next after the offence committed. ſ. 5.

And in all trials for ſuch offences before the ſaid juſtices, the perſon complained of, and arraigned ſhall be admitted to purge or try his innocency, by as many or more witneſſes in number, and of as good honeſty and credence, as the witneſſes be which depoſed againſt him. ſ. 6.

Service when there is no communion.

17. *Rubr.* Upon the ſundays and other holidays (if there be no communion) ſhall be ſaid all that is appointed at the communion, until the end of the general prayer for the whole ſtate of Chriſt's church militant here in earth, together with one or more of the collects there following; concluding with the bleſſing.

Mahometans.

MR Hawkins ſays, it ſeems to be agreed to be a good exception to a witneſs, that he is an infidel; that is, that he believes neither the old nor new teſtament to be the word of God, on one of which our laws require the oath ſhould be adminiſtred. 2 *Haw.* 434.

Nevertheleſs, infidels in ſome caſes have been admitted to give evidence.

Thus in the caſe of *Omichund* and *Barker*, in the court of chancery, a Mahometan was ſworn upon the Koran. 2 *Eq. Caſ. Abr.* 397.

And *M.* 12 *G.* 2. At the council, Dec. 9. 1738. Preſent the two chief juſtices. On a complaint of *Jacob Fachina*

Fachina againſt general *Sabine*, as governor of *Gibraltar*; *Alderaman Ben Monſo*, a Moor, was produced as a witneſs, and ſworn upon the Koran. *Str.* 1104.

Markets. See Church.

Marriage.

CONCERNING marrying again, the former huſband or wife being living; See Tit. Polygamy.

Concerning a man marrying a ſecond wife, the former wife being dead; or marrying a widow; See Tit. Bigamy.

Having firſt premiſed, that the ſtatute of the 26 *G.* 2. *ch.* 33. which will often occur in the following ſections doth not extend to the marriages of the royal family; nor to Scotland; nor to any marriages amongſt the people called quakers, or amongſt perſons profeſſing the jewiſh religion, where both the parties are quakers or jews reſpectively; nor to any marriages beyond the ſeas. ſ. 17, 18. I will treat of the matters contained under this title in the following order:

I. *Who may marry.*
II. *Of marriage contracts.*
III. *Of banns.*
IV. *Of licence.*
V. *When and where to be ſolemnized; and therein of clandeſtine marriages.*
VI. *Form of ſolemnization.*
VII. *Fee for marriage.*
VIII. *Regiſter of marriage.*
IX. *Certificate of marriage.*
X. *Trial of marriage.*
XI. *Divorce.*
XII. *Alimony.*
XIII. *Elopement.*

I. *Who*

I. *Who may marry.*

1. EDM. *Where there is not the conſent of both parties, it is no marriage, Therefore they who give girls unto boys in their infancy, do nothing; unleſs both parties ſhall conſent after they come to the age of diſcretion. Therefore we do prohibit, that from henceforth no perſons ſhall be joined together, where both or either of the parties ſhall not have arrived to the age appointed by the laws and canons; unleſs ſuch conjunction ſhall be diſpenſed withal, in caſes of neceſſity, for the publick welfare.* Lind. 272.

Where there is not &c.] This conſtitution is taken out of the decretals, and was from thence transferred into the body of the Engliſh laws, in the council at Weſtminſter, in the year 1175. *Gibſ.* 415.

Girls unto boys in their infancy] That is under the age of ſeven years. *Lindw.* 272.

Do nothing] That is, as to the bond of matrimony: nor even as to eſpouſals, unleſs after the ſeventh year it ſhall appear, either by word or deed, that they continue in the ſame mind: for then, from ſuch willingneſs or conſent, eſpouſals do begin between them. For if after the ſeventh year compleat, both parties do continue in the ſame mind, this is ſufficient as to eſpouſals. *Lindw.* 272.

Unleſs both parties ſhall conſent after they come to years of diſcretion] The time of agreement or diſagreement, when they marry within the marriageable years is for the woman at twelve or after, and for the man at fourteen or after; and there needs no new marriage, if they then agree. But diſagree they cannot before the ſaid ages; and then they may diſagree, and marry again to others without any divorce: and if they once after give conſent, they can never diſagree afterwards. If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may as well diſagree as ſhe may, tho' he were at the age of conſent; becauſe in contracts of matrimony, either both muſt be bound, or equal election or diſagreement given to both: and ſo on the contrary, if the woman be of the age of conſent, and the man under. 1 *Inſt.* 79.

Age

Age determined by the laws and canons] Which, as to eſpouſals (as hath been ſaid), is the age of ſeven years, when infancy endeth, both in the one party and in the other; and which, as to finiſhing the contract, is the age of twelve in the woman, and of fourteen in the man. *Lindw.* 272.

By the laws of this realm, if a woman during her minority be married to a man ſeized of lands or tenements in fee ſimple or fee tail, by purchaſe or deſcent, ſhe ſhall be endowed of the third part of ſuch lands and tenements, ſo that ſhe have accompliſhed the age of *nine* years at her huſband's death. *Swinb. Matr. Con.* ſ. 7.

In caſes of neceſſity] Of which neceſſity the dioceſan, without whoſe licence they ought not to contract matrimony, ſhall be the judge. *Lindw.* 272.

For the publick welfare] As where two princes conclude a peace, and for the more aſſured confirmation thereof, match their children in marriage: This marriage the laws do tolerate as lawful, being made upon ſuch urgent cauſe, altho' otherwiſe for divers wants the ſame were unlawful. *Swinb.* ſ. 7.

And by the 26 *G.* 2. *c.* 33. which layeth ſundry reſtraints upon marriages, the marriages (as hath been ſaid) of the royal family are excepted. ſ. 17.

Conſent of parents or guardians.

2. Marriages that are made contrary to the conſent of parents, are pronounced to be invalid both by the canon and civil law; and the church did ſometimes anathematize ſuch as married without the conſent of parents. But yet when ſons and daughters arrive at a competent age, and are endowed with the uſe of ſtrong reaſon, they may of themſelves contract marriage without this conſent: for it is reaſonable that children ſhould be left at liberty in nothing more than in marriage, becauſe their future happineſs in this life depends upon it. By the civil law indeed, an emancipated ſon might have contracted marriage without his father's conſent: But a ſon under the power of his father, could not do it without his father's approbation. And as children owe a reverential obedience to their parents, ſons at this day under twenty five years of age, and daughters under twenty, are, in Holland and other countries governed by the civil law, forbidden to marry without their parents conſent. But if they exceed the ſaid reſpective ages, the bare diſſent of parents, without a ſufficient cauſe, is not a legal impediment to hinder them from contracting marriage. *Ayl. Par.* 362.

But

But by the law of England, full age is when a perſon, either male or female, hath attained to the age of twenty one years compleat. And accordingly, by the 26 G. 2. c. 33. it is enacted as follows; viz. *All marriages ſolemnized by* licence, *where either of the parties, not being a widower or widow, ſhall be under the age of twenty one years, which ſhall be had without the conſent of the father of ſuch of the parties ſo under age (if then living) firſt had and obtained; or if dead, of the guardian or guardians of the perſon of the party ſo under age, lawfully appointed, or one of them; and if there ſhall be no ſuch guardian, then of the mother, if living and unmarried; or if there be no mother living and unmarried, then of a guardian or guardians of the perſon appointed by the court of chancery——ſhall be void.* ſ. 11.

But whereas it may happen that the guardian or mother of any ſuch party to be married, being ſo under age as aforeſaid, may be non compos mentis, or may be in parts beyond the ſeas or may be induced unreaſonably and by undue motives to abuſe the truſt repoſed in them by refuſing their conſent to a proper marriage; it is therefore enacted, that in caſe any ſuch guardian or mother, whoſe conſent is made neceſſary as aforeſaid, ſhall be non compos mentis, or beyond ſea, or withhold his or her conſent to the marriage of any perſon, ſuch perſon deſirous to marry may apply by petition to the lord chancellor, who may proceed upon ſuch petition in a ſummary way; and if the marriage propoſed ſhall on examination appear to be proper, he ſhall judicially declare the ſame to be ſo, by an order of court; and ſuch order ſhall be as effectual, as if ſuch guardian or mother had conſented. ſ. 12.

And by *Can.* 62. No miniſter, upon pain of ſuſpenſion for three years ipſo facto, ſhall celebrate matrimony between any perſons when *banns* are thrice aſked, and no licence in that reſpect neceſſary; before the parents or governors of the parties to be married, being under the age of twenty and one years, ſhall either perſonally, or by ſufficient teſtimony, ſignify to him their conſents given to the ſaid marriage.

Purſuant to which canon, about the year 1725, Mr Bridgen curate of Shoreditch, London, having married a couple by banns publiſhed in that church, and they appearing not to be of age, was articled againſt before the chancellor of London (Dr Henchman), and had ſentence againſt him as being guilty of a breach of the canon. Mr Bridgen, being a man of character, and it appearing that he was impoſed upon; the chancellor and biſhop of London were willing to have mitigated the penalty. But

upon

upon a conſultation at doctors commons, it was agreed, that the canon having fixed a penalty, without leaving any power in the judge to mitigate it; he could only be pronounced guilty of a breach of the canon, and muſt undergo the penalty of it. Mr Bridgen appealed to the arches; where, after deliberation, the ſentence was confirmed. Then he petitioned the archbiſhop of Canterbury for a diſpenſation of the canon: But it was agreed by all the civilians, that as the father of the young man had been at the expence of proſecuting, and Mr Bridgen was convicted of a breach of the canon, he had a right to have lawful puniſhment thereby directed to be inflicted. And Mr Bridgen could have no relief. But if there had only been a neceſſary promoter, or an ex officio proceſs; they were of opinion it might be taken off diſcretionally, as no perſon could be injured by it.

And the late archdeacon Sharpe, in his viſitation charges, is of opinion, that it is the miniſter's duty to be himſelf aſſured of the age, or conſent of the parents of the parties, before he marries any couple even by banns; otherwiſe he will be guilty of a breach of the canon. *p.* 291.

But now by the ſtatute of the 26 *G.* 2. *c.* 33. No miniſter ſolemnizing marriages between perſons both or one of whom ſhall be under the age of twenty one years, after banns publiſhed, ſhall be puniſhable by eccleſiaſtical cenſures, for ſolemnizing ſuch marriages without conſent of parents or guardians, whoſe conſent is required by law, unleſs he ſhall have notice of the diſſent of ſuch parents or guardians. And in caſe the parents or guardians or one of them, of either of the parties who ſhall be under the age of twenty one years, ſhall openly and publickly declare or cauſe to be declared in the church or chapel where the banns ſhall be ſo publiſhed, at the time of ſuch publication, his diſſent to ſuch marriage; ſuch publication of banns ſhall be void. ſ. 3.

3. By the 25 *H.* 8. *c.* 22. (which Dr *Gibſon* ſays is repealed by the 28 *H.* 8. *c.* 7. *ſ.* 3. and by the 1 *Mar. ſeſſ.* 2. *c.* 1. and which Mr *Cay* takes notice of as repealed, but which Mr *Hawkins* inſerts in his edition of the ſtatutes, as being in force and unrepealed) it is enacted as follows: *Since many inconveniencies have fallen by reaſon of marrying within the degrees of marriage prohibited by God's laws, that is to ſay, the ſon to marry the mother or the ſtepmother, the brother the ſiſter, the father the ſon's daughter or his daughter's daughter, or the ſon to marry the daughter of his father procreate* Levitical degrees.

procreate and born by his ſtepmother, or the ſon to marry his aunt being his father's or mother's ſiſter, or to marry his uncle's wife, or the father to marry his ſon's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter or his wife's ſon's daughter or his wife's daughter's daughter or his wife's ſiſter; which marriages, albeit they be prohibited by the laws of God, yet nevertheleſs at ſome times they have proceeded under colour of diſpenſation by man's power: it is enacted, that no perſon ſhall from henceforth marry within the ſaid degrees. ſ. 3, 4.

Provided, that this article concerning prohibitions of marriages within the degrees aforementioned, ſhall always be taken and interpreted of ſuch marriages, where marriages were ſolemnized, and carnal knowledge was had. ſ. 14.

And by the 28 *H.* 8. *c.* 7. (which is not in Mr *Hawkins*'s nor in Mr *Cay*'s collection, and which Dr *Gibſon* thinketh to be repealed; but which *Vaughan* and *Ventris*, in the caſe of *Harriſon* and *Burwell* hereafter following, do ſuppoſe and argue to be unrepealed) it is in like manner enacted thus: *Since many inconveniences have fallen, by reaſon of the marrying within the degrees of marriage prohibited by God's law, that is to ſay, the ſon to marry the mother, or the ſtepmother carnally known by his father; the brother the ſiſter; the father his ſon's daughter, or his daughter's daughter; or the ſon to marry the daughter of his father, procreate and born by his ſtepmother; or the ſon to marry his aunt, being his father's or mother's ſiſter; or to marry his uncle's wife, carnally known by his uncle; or the father to marry his ſon's wife, carnally known by his ſon; or the brother to marry his brother's wife, carnally known by his brother; or any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's ſon's daughter, or his wife's daughter's daughter, or his wife's ſiſter.* ſ. 9.

And further to declare the meaning of theſe prohibitions, it is to be underſtood, that if it chance any man to know carnally any woman, that then all and ſingular perſons, being in any degree of conſanguinity or affinity as is above written, to any of the parties ſo carnally offending, ſhall be deemed to be within the caſes and limits of the ſaid prohibitions of marriage: All which marriages, albeit they be prohibited by the laws of God, yet ſometimes have proceeded under colour of diſpenſations by man's power; it is enacted, that from henceforth no perſon ſhall marry within the degrees afore rehearſed. ſ. 10, 11.

And by the 32 *H.* 8. *c.* 38. (which was repealed in part by the 2 & 3 *Ed.* 6. *c.* 23. and was repealed in the whole

whole by the 1 & 2 *P. & M. c.* 8. *ſ.* 19. but was again revived in part by the 1 *El. c.* 1. *ſ.* 11, 12. and ſo left as it ſtood upon the 2 & 3 *Ed.* 6. *c.* 23. ashereafter followeth) *All ſuch marriages as ſhall be contracted between lawful perſons (as by this act we declare all perſons to be lawful, that be not prohibited by God's law to marry), ſuch marriages being contract and ſolemnized in the face of the church, and conſummate with bodily knowledge, or fruit of children or child being had therein, between the parties ſo married, ſhall be deemed lawful juſt and indiſſoluble; notwithſtanding any precontract not conſummate with bodily knowledge, which either of the parties ſo married or both ſhall have made, with any other perſon, before the time of contracting that marriage which is ſolemnized and conſummate, or whereof ſuch fruit is enſued or may enſue as aforeſaid: and notwithſtanding any diſpenſation, preſcription, law, or other thing granted or confirmed by act, or otherwiſe; and no reſervation, or prohibition, God's law except, ſhall trouble or impeach any marriage without the levitical degrees; and no perſon ſhall be admitted in the ſpiritual court to any proceſs, plea, or allegation to the contrary.*

And by the 2 & 3 *Ed.* 6. *c.* 23. before mentioned, it is thus enacted: *As concerning precontracts, the ſaid ſtatute of the* 32 *H.* 8. *c.* 38. *ſhall be repealed, and be of no force or effect, and be reduced to the eſtate and order of the king's eccleſiaſtical laws of this realm; ſo that when any cauſe or contract of marriage is pretended to have been made, it ſhall be lawful to the king's eccleſiaſtical judge of that place, to hear and examine the ſaid cauſe; and (having the ſaid contract ſufficiently and lawfully proved before him) to give ſentence for matrimony, commanding ſolemnization, cohabitation, conſummation, and tractation as becometh man and wife to have, with inflicting all ſuch pains upon the diſobedients and diſturbers thereof, as before the ſaid ſtatute he might have done.* ſ. 2.

Provided, that this act do not extend to make good any of the other cauſes, to the diſſolution or diſannulling of matrimony, which be in the ſaid act ſpoken of and diſannulled; but that in all other cauſes and other things therein mentioned, the ſaid act do ſtand in force. ſ. 4.

The degrees ſpecified in theſe ſtatutes, are particularly ſet forth in the eighteenth chapter of Leviticus; whereby not only degrees of kindred and conſanguinity, but degrees of affinity and alliance do hinder matrimony. Which lord Coke illuſtrateth in this manner.

Of

Of the man's part.

Degrees of kindred and conſanguinity prohibited.	Degree of affinity or alliance prohibited.
A man may not marry his	A man may not marry his
Mother.	Father's wife.
Father's ſiſter.	Uncle's wife.
Mother's ſiſter.	Father's wife's daughter.
Siſter.	Brother's wife.
Daughter.	Wife's ſiſter.
Daughter of his ſon or daughter.	Son's wife or wife's daughter.
	Daughter of his wife's ſon or daughter.

Of the woman's part.

A woman may not marry her	A woman may not marry her
Father.	Mother's huſband.
Father's brother.	Aunt's huſband.
Mother's brother.	Siſter's huſband.
Brother.	Huſband's brother.
Son.	Son of her huſband's ſon or daughter.
Son of her ſon or daughter.	

And according hereunto a table was ſet forth, in the year 1563, as followeth:

An admonition to all ſuch as ſhall intend hereafter to enter the ſtate of matrimony godly and agreeable to the laws:

Firſt, That they contract not with ſuch perſons as be hereafter expreſſed, nor with any of like degree, againſt the law of God, and the laws of the realm.

Secondly, That they make no ſecret contracts, without conſent and counſel of their parents or elders, under whoſe authority they be, contrary to God's laws, and man's ordinances.

Thirdly, That they contract not anew with any other, upon divorce and ſeparation made by the judge for a time, the laws yet ſtanding to the contrary.

A man

A man may not marry his

Secundus gradus in linea recta aſcendente,

Conſ.	*Avia.*	1 Grandmother.
Affin.	*Avi relicta.*	2 Grandfather's wife.
Affin.	*Proſocrus, vel ſocrus magna.*	3 Wife's grandmother.

Secundus gradus inæqualis in linea tranſverſali aſcendente,

Conſ.	*Amita.*	4 Father's ſiſter.
Conſ.	*Matertera.*	5 Mother's ſiſter.
Affin.	*Patrui relicta.*	6 Father's brother's wife.
Affin.	*Avunculi relicta.*	7 Mother's brother's wife.
Affin.	*Amita uxoris.*	8 Wife's father's ſiſter.
Affin.	*Matertera uxoris.*	9 Wife's mother's ſiſter.

Primus gradus in linea recta aſcendente,

Conſ.	*Mater.*	10 Mother.
Affin.	*Noverca.*	11 Stepmother.
Affin.	*Socrus.*	12 Wife's mother.

Primus gradus in linea recta deſcendente,

Conſ.	*Filia.*	13 Daughter.
Affin.	*Privigna.*	14 Wife's daughter.
Affin.	*Nurus.*	15 Son's wife.

Primus gradus æqualis in linea tranſverſali,

Conſ.	*Soror.*	16 Siſter.
Affin.	*Soror uxoris.*	17 Wife's ſiſter.
Affin.	*Fratris relicta.*	18 Brother's wife.

Secundus gradus in linea recta deſcendente,

Conſ.	*Neptis ex filio.*	19 Son's daughter.
Conſ.	*Neptis ex filia.*	20 Daughter's daughter.
Affin.	*Pronurus, i. relicta nepotis ex filio.*	21 Son's ſon's wife.
Affin.	*Pronurus, i. relicta nepotis ex filia.*	22 Daughter's ſon's wife.
Affin.	*Privigni filia.*	23 Wife's ſon's daughter.
Affin.	*Privignæ filia.*	24 Wife's daughter's daughter.

Secundus gradus inæqualis in linea tranſverſali deſcendente,

Conſ. Neptis ex fratre.
Conſ. Neptis ex ſorore.
Affin. Nepotis ex fratre relicta.
Affin. Nepotis ex ſorore relicta.
Affin. Neptis uxoris ex fratre.
Affin. Neptis uxoris ex ſorore.

25 Brother's daughter.
26 Siſter's daughter.
27 Brother's ſon's wife.
28 Siſter's ſon's wife.
29 Wife's brother's daughter.
30 Wife's ſiſter's daughter.

A woman may not marry with her

Secundus gradus in linea recta aſcendente,

1 Grandfather. *Conſ. Avus.*
2 Grandmother's huſband. *Affin. Aviæ relictus.*
3 Huſband's grandfather. *Affin. Proſocer, vel ſocer magnus.*

Secundus gradus inæqualis in linea tranſverſali aſcendente,

4 Father's brother. *Conſ. Patruus.*
5 Mother's brother. *Conſ. Avunculus.*
6 Father's ſiſter's huſband. *Affin. Amitæ relictus.*
7 Mother's ſiſter's huſband. *Affin. Materteræ relictus.*
8 Huſband's father's brother. *Affin. Patruus mariti.*
9 Huſband's mother's brother. *Affin. Avunculus mariti.*

Primus gradus in linea recta aſcendente,

10 Father. *Conſ. Pater.*
11 Stepfather. *Affin. Vitricus.*
12 Huſband's father. *Affin. Socer.*

Primus gradus in linea recte deſcendente,

13 Son. *Conſ. Filius.*
14 Huſband's ſon. *Affin. Privignus.*
15 Daughter's huſband. *Affin. Gener.*

Primus gradus æqualis in linea tranſverſali,

16 Brother. *Conſ. Frater.*
17 Huſband's brother. *Affin. Levir.*
18 Siſter's huſband. *Affin. Sororis relictus.*

Secundus gradus in linea recte deſcendente,

19 Son's ſon. *Conſ. Nepos ex filio.*
20 Daughter's ſon. *Conſ. Nepos ex filia.*

21. Son's

21	Son's daughter's huſband.	*Affin. Progener, i. relictus neptis ex filio.*
22	Daughter's daughter's huſband.	*Affin. Progener, i. relictus neptis ex filia.*
23	Huſband's ſon's ſon.	*Affin. Privigni filius.*
24	Huſband's daughter's ſon.	*Affin. Privignæ filius.* Secundus gradus inæqualis in linea tranſverſali deſcendente,
25	Brother's ſon.	*Conſ. Nepos ex fratre.*
26	Siſter's ſon.	*Conſ. Nepos ex ſorore.*
27	Brother's daughter's huſband.	*Affin. Neptis ex fratre relictus:*
28	Siſter's daughter's huſband.	*Affin. Neptis ex ſorore relictus.*
29	Huſband's brother's ſon.	*Affin. Leviri filius, i. nepos mariti ex fratre.*
30	Huſband's ſiſter's ſon.	*Affin. Gloris filius, i. nepos mariti ex ſorore.*

1. It is to be noted, that thoſe perſons which be in the direct line aſcendent and deſcendent, cannot marry together altho' they be never ſo far aſunder in degree.

2. It is to be noted, that conſanguinity and affinity (letting and diſſolving matrimony) is contracted as well in them and by them which be of kindred by the one ſide, as in and by them which be of kindred by both ſides.

3. Item, that by the laws, conſanguinity and affinity (letting and diſſolving matrimony) is contracted as well by unlawful company of man or woman, as by lawful marriage.

4. Item, in contracting between perſons doubtful, which be not expreſſed in this table, it is moſt ſure firſt to conſult with men learned in the laws, to underſtand what is lawful, what is honeſt and expedient, before the finiſhing of their contracts.

5. Item, that no parſon vicar or curate ſhall ſolemnize matrimony out of his or their cure or pariſh church or chapel, and ſhall not ſolemnize the ſame in private houſes, nor lawleſs or exempt churches, under the pains of the law forbidding the ſame; and that the curate have their certificates, when the parties dwell in divers pariſhes.

6. Item, the banns of matrimony ought to be openly pronounced in the church by the miniſter, three ſeveral ſundays or feſtival days; to the intent that who will and can alledge any impediment, may be heard, and that ſtay may be made till further trial, if any exception be made there againſt it, upon ſufficient caution.

7. Item, Who ſhall malicioufly object a frivolous impediment againſt a lawful matrimony, to diſturb the ſame, is ſubject to the pains of the law.

8. Item, Who ſhall preſume to contract in the degrees prohibited (tho' he do it ignorantly) beſides that the fruit of ſuch copulation may be judged unlawful, is alſo puniſhable at the ordinary's diſcretion.

9. Item, If any miniſter ſhall conjoin any ſuch, or ſhall be preſent at ſuch contracts making, he ought to be ſuſpended from his miniſtry for three years, and otherwiſe to be puniſhed according to the laws.

10. Item, It is further ordained, that no parſon vicar or curate do preach treat or expound, of his own voluntary invention, any matter of controverſy in the ſcriptures, if he be under the degree of a maſter of arts, except he be licenſed by his ordinary thereunto, but only for the inſtruction of the people, read the homilies already ſet forth, and ſuch other form of doctrine as ſhall be hereafter by authority publiſhed: and ſhall not innovate or alter any thing in the church, or uſe any old rite or ceremony, which be not ſet forth by publick authority.

So much concerning the table of degrees, which by reaſon of the canon here next following it hath been thought requiſite to inſert intire, together with the previous admonitions and the ſubſequent obſervations; altho' ſome of the ſaid obſervations (as particularly that concerning the publication of banns on feſtival days) are now abrogated.

By which canon it is ordained, that *no perſon ſhall marry within the degrees prohibited by the laws of God, and expreſſed in a table ſet forth by authority in the year of our Lord* 1563; *and all marriages ſo made and contracted ſhall be adjudged inceſtuous and unlawful, and conſequently ſhall be diſſolved as void from the beginning, and the parties ſo married ſhall by courſe of law be ſeparated. And the aforeſaid table ſhall be in every church publickly ſet up, at the charge of the pariſh.* Can. 99.

Before the ſaid ſtatute of the 32 *H.* 8. *c.* 38. other prohibitions than God's law admitteth, were invented by the court of Rome; the diſpenſation whereof they always reſerved to themſelves: as for inſtance, in kindred and affinity between couſin germans, and ſo to the fourth degree: as alſo, carnal knowledge of any of the ſame kin or affinity before in ſuch outward degrees. But now by this act, all perſons are declared to be lawful to contract matrimony,

matrimony, that be not prohibited by God's law to marry; and that no reſervation or prohibition (God's law excepted) ſhall trouble or impeach any marriage without the levitical degrees. So as, without queſtion, the ſon of the father by another wife, and the daughter of the mother by another huſband, and ſo on the contrary, may marry. 2 *Inſt.* 684.

For the better underſtanding of which prohibitions, together with the grounds and limitations of them; it may not be improper to mention ſome ſpecial rules, which have been laid down for that end, both by lawyers and divines. As

Firſt, that marriages in the aſcending and deſcending line, that is, of children with their father, grandfather, mother, grandmother, and ſo upwards, are prohibited without limit; becauſe they are the cauſe (immediate or mediate) of their being; and it is directly repugnant to the order of their nature, which hath aſſigned ſeveral duties and offices, eſſential to each, that would thereby be inverted and overthrown. A parent cannot obey a child; and therefore it is unnatural, that a parent ſhould be wife to a child: a parent, as a parent, hath a natural right to command and correct a child; and that a child, as huſband, ſhould command and correct the ſame parent, is unnatural. To which we may add, the inconſiſtency, abſurdity, and monſtrouſneſs of the relations to be begotten, if ſuch prohibition were not abſolute and unlimited. The ſon or daughter, for inſtance, born of the mother, and begotten by the ſon; conſidered as born of the mother, would be a brother or ſiſter to the father; but as begotten by him, would be a ſon or daughter. So the iſſue procreate upon the grandmother; as born of the grandmother, will be uncles or aunts to the father; but as begot by the ſon, they will be ſons or daughters to him, and this in the firſt degrees of kindred. *Gibſ.* 412.

Further, there are ſeveral degrees, which altho' not expreſsly named in the levitical law, are yet prohibited by that, and by the ſtatute of the 32 *H.* 8. *c.* 38. by parity of reaſon. Which is thus illuſtrated in the *reformatio legum:* This in the levitical degrees is to be obſerved, that all the degrees by name are not expreſly ſet down; for the Holy Ghoſt there did only declare plainly and clearly ſuch degrees, from whence the reſt might evidently be deduced. As, for example, where it is prohibited that the ſon ſhall not marry his mother, it followeth alſo, that

the daughter ſhall not marry her father. And by injoining that a woman ſhall not marry her father's brother; the like reaſon requireth that ſhe ſhall not marry her mother's brother. To which the ſame book adds two particular rules, for our direction in this matter: 1. That the degrees which are laid down as to men, will hold equally as to women in the ſame proximity. 2. That the huſband and wife are but one fleſh; ſo that he who is related to the one by conſanguinity, is related to the other by affinity in the ſame degree. *Gibſ.* 412.

Upon the foregoing rule, from parity of reaſon (which is alſo acknowledged and laid down by the books of common law) reſts the prohibition againſt marrying a wife's ſiſter; which is well expreſſed by biſhop *Jewel* in his printed letter upon that point: "Albeit (ſays he) I be "not forbidden by plain words, to marry my wife's "ſiſter; yet I am forbidden ſo to do by other words, "which by expoſition are plain enough. For when God "commands me that I ſhall not marry my brother's "wife, it follows directly by the ſame, that he forbids "me to marry my wife's ſiſter. For between one man "and two ſiſters, and one woman and two brothers, is "like analogy or proportion." And when this point of marrying the wife's ſiſter, came under conſideration in the court of king's bench, *M.* 25 *C.* 2. in the caſe of *Hill* and *Good*, tho' it was alledged, that the precept prima facie ſeemed to be only againſt having two ſiſters at the ſame time, and prohibition to the ſpiritual court was granted; yet in the Trinity term next following, after hearing civilians they granted a conſultation, as in a matter within the ſtatute of the 32 *H.* 8. tho' the former ſtatute of the 28 *H.* 8. had never been revived, which yet it virtually was; and there, as in the ſtatute of the 25 *H.* 8. the wife's ſiſter is expreſly prohibited. *Gibſ.* 412. *Vaugh.* 302. 3 *Keb.* 166.

Upon the like parity of reaſon, in the caſe of *Wortley* and *Watkinſon*, a conſultation was granted, where one had married the daughter of the ſiſter of his former wife, which (as Sir John King laid the argument) is the ſame degree of proximity, as the nephew's marrying his father's brother's wife; and this being expreſsly prohibited, the other by parity of reaſon is ſo likewiſe; as it had been declared *E.* 16 *J.* in *Rennington*'s caſe, before the high commiſſioners. Which point was again argued *T.* 1 *An.* in the caſe of *Snowling* and *Nurſey*, and conſultation granted as before, notwithſtanding the caſe of *Rich-*

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ard Parſons mentioned by lord *Coke*, 1 *Inſt.* 235, in which it was firſt determined not to be within the levitical degrees, and prohibition granted; but a conſultation being awarded on debate two years after, that caſe is ſaid to have been expunged out of the firſt Inſtitute, by order of the king and council. And this was the very point in which (preſently after the making of the act) lord Cromwell deſired a diſpenſation for one Maſſey, who was contracted to his ſiſter's daughter of his late wife: but the archbiſhop denied it as contrary to the law of God, and gave for reaſon, that as ſeveral perſons are prohibited, which are not expreſſed, but underſtood by like prohibition in equal degree; ſo in this caſe, it being expreſſed that the nephew ſhall not marry his uncle's wife, it is implied, that the niece ſhall not be married to the aunt's huſband. *Gibſ.* 412, 413.

Much leſs can it be doubted, whether the like rule concerning parity of reaſon, doth not forbid the uncle to marry his niece, which tho' not expreſsly forbidden, is virtually prohibited in the precept, that forbids the nephew to marry the aunt; nor is it of moment to alledge, that the firſt is a more favourable caſe, as the natural ſuperiority is preſerved; ſince the parity of *degree* which is the proper rule of judging, is the very ſame. *Gibſ.* 413.

But where in the caſe of *Harriſon* and *Burwell*, *T.* 20 *C.* 2. in the ſpiritual court, one had married the wife of his great uncle, this was declared, not to be within the levitical degrees; and accordingly, after the opinion of all the judges taken by the king's ſpecial command, a prohibition was granted. *Gibſ.* 413.

By the civil law, firſt couſins are allowed to marry; but by the canon law, both firſt and ſecond couſins (in order to make diſpenſations more frequent and neceſſary) are prohibited. Therefore when it is vulgarly ſaid that firſt couſins may marry, but ſecond couſins cannot; probably this aroſe by confounding theſe two laws: for firſt couſins may marry by the civil law, and ſecond couſins cannot by the canon law. *Wood Civ. L.* 118, 119. *Ayl. Par.* 364.

But now, by the aforeſaid ſtatute of the 32 *H.* 8. *c.* 38. it is clear, that both firſt and ſecond couſins may marry.

The kindred of the huſband are not of affinity to the kindred of the wife; and therefore the huſband's brother may marry the wife's ſiſter, as well as the huſband's ſon

by a former wife may marry the wife's daughter by a former husband. The affinity is terminated in the husband himself from the wife's kindred, and in the wife herself from the husband's kindred. *Wood Civ. L.* 119.

H. 7 W. Hains and *Jephcott.* A day was appointed to hear counsel, why a prohibition should not be granted to the spiritual court of Worcester, to stay a suit against *Hains* for marrying with the *bastard* daughter of his sister. And it was argued for the prohibition, that this is not prohibited by any law, for there is neither affinity nor consanguinity, for a bastard is *nullius filius.* On the contrary it was urged, that the levitical law is *ad proximum sanguinis non accedat*; that the jews made no difference, as to marriage, between bastards and others; that tho' bastards are deprived of certain privileges by particular laws, yet the same reason prohibits them from marriage as others: And by this rule a man might marry his own bastard; which doubtless could not be allowed. And the court inclined not to grant a prohibition; but the cause was adjourned, and it appears not what became of it. *L. Raym.* 68. 5 *Mod.* 168. *Gibs.* 413.

In the case of *Ellerton* and *Gastrel*; where Ellerton had married the *daughter of the sister of his former wife*, this was declared to be within the prohibition of the levitical degrees. *Gibs.* 412. *Comyns.* 318.

If a man marry one within the degrees prohibited, the issue between them is not by the common law a bastard, until there be a divorce; for by that law, the marriage is not till then void. *God.* 486.

Dumb persons. 4. They which be dumb, and cannot speak, may contract matrimony by signs; which marriage is lawful and available to all intents. *Swinb. Matr. Con.* s. 15.

Idiots and lunatics. 5. Formerly, it was adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. 1 *Roll's Abr.* 357. But by later resolutions it hath been determined otherwise, because consent is absolutely requisite to marriage, and idiots are not capable of consenting to any thing. So also of a lunatic, unless the marriage was in a lucid interval: But as it may be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, therefore the statute 15 *G.* 2. *c.* 30. hath provided, that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void. 1 *Black.* 439.

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6. By the ancient law of England, if any chriſtian man did marry with a woman that was a jew or a chriſtian woman did marry with a jew; it was felony, and the party ſo offending ſhould be burnt alive. 3 *Inſt.* 89. Jews.

The author of *Fleta* ſaith, that ſuch offender ſhould be buried alive. *Fleta.* 54.

But where both parties are jews, they are allowed to marry; and are not under the reſtraints (as was before obſerved) of the ſtatute of the 26 *G.* 2. *c.* 33.

7. By the civil law, the woman is forbidden to marry again, within the year (as it is called) of mourning, unleſs there is a ſpecial diſpenſation from the prince; by reaſon of the uncertainty to which huſband the iſſue may belong, and becauſe a reverential mourning and pious regard to the memory of her deceaſed huſband is in decency expected. *Wood Civ. L.* 124. 2 *Domat.* 126. Widows.

And lord Coke ſays; for the avoiding of ſuch like inconveniencies, this was the law before the conqueſt——— Let every widow continue unmarried for twelve months; and if ſhe ſhall marry, let her loſe her dower. 1 *Inſt.* 8.

But the divine and the canon law leave no ſuch injunctions. *Wood. Civ. L.* 122.

Alſo by the common law of England, a widow is not prohibited from marrying at any time after her huſband's death.

8. *Langton.* Perſons beneficed or in holy orders ſhall not preſume to keep concubines publickly in their houſes, nor elſewhere ſhall have publick acceſs to them with ſcandal. If the concubines, after publick admonition, ſhall not depart; they ſhall be expelled from the churches which they ſhall ſo preſume to defame, and they ſhall not be admitted to the ſacraments. And if they ſtill perſiſt, let them be excommunicated, and the ſecular arm be invoked againſt them. And the clerks, after canonical admonition, ſhall be deprived of their office and benefit. *Lind.* 125. Prieſts.

Langton. If clergymen leave ought by their wills to concubines, it ſhall go to the church. *Lind.* 166.

Wetherſhead. Clergymen under the office of ſubdeacon may keep their wives; but ſubdeacons or above ſhall leave their women whether ſuch women do conſent to it or not. *Lind.* 128.

Otho. Clergymen who publickly keep concubines ſhall put them away, on pain of ſuſpenſion from their office and benefice. *Athon.* 41.

Othobon.

Othobon. None ſhall let houſes to clerks who keep concubines. *Athon.* 92.

By the 1 *H.* 7. *c.* 4. It ſhall be lawful to all archbiſhops biſhops and other ordinaries having epiſcopal juriſdiction, to puniſh and chaſtiſe prieſts clerks and religious men, being within the bounds of their juriſdiction, as ſhall be convicted before them by examination and other lawful proof requiſite by the law of the church, of advoutry, fornication, inceſt, or any other fleſhly incontinency, by committing them to ward and priſon, there to abide for ſuch time as ſhall be thought to their diſcretions convenient for the quality and quantity of their treſpaſs.

By the 31 *H.* 8. *c.* 14. (which was altered by the 32 *H.* 8. *c.* 10. here next following, and which was finally repealed by the 1 *Ed.* 6. *c.* 12.) it was enacted as followeth: A prieſt keeping company with a *wife*, to the evil example of other perſons; ſhall be guilty of felony, as ſhall alſo the woman. And if any prieſt ſhall keep a *concubine*, to the evil example of other perſons; he ſhall forfeit his goods and ſpiritual promotions, and be impriſoned during the king's pleaſure: and if he ſhall again offend, he ſhall be guilty of felony. And the women ſhall have like puniſhment as the prieſts.

By the 32 *H.* 8. *c.* 10. (which is repealed as to *wives* by the 2 & 3 *Ed.* 6. *c.* 21. here next following, but continues in its force as to *concubines:*) The penalties of the aforeſaid ſtatute of the 31 *H.* 8. are mitigated; and for both offences alike, the prieſt ſhall *only* forfeit (as it is there expreſſed) for the firſt offence all his goods and ſpiritual promotions, except one; for the ſecond offence, all his goods, and alſo during his life all the profits of his lands and of his ſpiritual promotions; and for the third offence, all his goods, and alſo during his life all the profits of his lands and of his ſpiritual promotions, and be impriſoned during life. And the woman offending, if ſhe be unmarried, ſhall for the firſt offence forfeit all her goods; for the ſecond offence, all her goods and half the iſſue of her lands during life; for the third offence, all her goods and the iſſues of all her lands during life, and impriſonment during life: if ſhe be married, ſhe ſhall for the firſt offence be impriſoned for all the term of her life, at the king's will and pleaſure.

By the 2 & 3 *Ed.* 6. *c.* 21. (which was repealed by the 1 *Mar. ſeſſ.* 2. *c.* 2. and revived by the 1 *J.* *c.* 25.) All and every law and laws poſitive, canons, conſtitutions, and ordinances, heretofore made by authority of

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man only, which do prohibit or forbid marriage to any eccleſiaſtical or ſpiritual perſon or perſons, of what eſtate condition or degree they be, or by what name or names ſoever they be called, which by God's law may lawfully marry, in all and every article branch and ſentence concerning only the prohibition for the *marriage* of the perſons aforeſaid, ſhall be utterly void and of none effect.

And by the 5 & 6 *Ed.* 6. *c.* 12. (which alſo was repealed by the 1 *Mar. ſeſſ.* 2. *c.* 2. and revived by the 1 *J. c.* 25.) The matrimony of all and every prieſt and other eccleſiaſtical and ſpiritual perſon, which ſhall be duly had celebrated and made; ſhall be adjudged deemed and taken for true and lawful matrimony, to all intents conſtructions and purpoſes.

Note, that by theſe ancient canons, concubinage ſeemeth to have been partly connived at; only the publick avowance thereof was diſcouraged. And by the aforeſaid ſtatute of the 31 *H.* 8. marriage, of the two, is eſteemed the greater offence; and by the 32 *H.* 8. both offences are rendered equal: the penalties of which latter ſtatute (as was obſerved) do ſtill continue in force with reſpect to *concubinage*, altho' by the 2 & 3 *Ed.* 6. they are abrogated as to *marriage*. And by the 5 & 6 *Ed.* 6. the clergy, as to the point of matrimony, are put upon the ſame footing with all other perſons. In queen *Mary*'s time, king *Edward*'s laws being repealed, the clergy were again brought under the ſevere laws of king *Henry* 8. and ſo continued during all that reign, and (which is remarkable) during alſo the whole reign of queen *Elizabeth*. Yet nevertheleſs the thirty nine articles were paſſed in convocation and confirmed by the royal authority in the fifth year of that queen, in the year of our Lord 1562; and ratified anew by her in the year 1571. The thirty ſecond of which articles is as follows:

Biſhops, prieſts, and deacons, are not commanded by God's law, either to vow the eſtate of ſingle life, or to abſtain from marriage; therefore it is lawful for them, as for all other chriſtian men, to marry at their own diſcretion, as they ſhall judge the ſame to ſerve better to godlineſs.

Which perhaps may be accounted for from this; that queen Elizabeth was always averſe from the parliament's interfering in eccleſiaſtical affairs; and therefore might think that her ſole allowance and ratification of this (amongſt the other articles of religion) would be ſufficient in this matter, without expreſsly repealing the ſtatute of queen Mary. Or perhaps, in order to have the clergy more

more dependent, ſhe might be willing that this matter ſhould continue doubtful. However by the ſtatute of the 1 *J.* *c.* 25. all foundation for any further queſtion is taken away, which expreſsly revives the aforeſaid ſtatutes of *Ed.* 6. and ſo the law hath continued ever ſince.

Six clerks in chancery.

9. By the 14 & 15 *H.* 8. *c.* 8. Whereas of old time accuſtomed hath been uſed in the high court of chancery, that all manner of clerks and miniſters of the ſame court, writing to the great ſeal, ſhould be unmarried (except only the clerk of the crown) ſo that as well the curſitors and other clerks, as the ſix clerks of the ſaid chancery were by the ſame cuſtom reſtrained from marriage, whereby all thoſe that contrary to the ſame did marry were no longer ſuffered to write in the ſaid chancery, not only to their great hindrance, loſing thereby the benefit of their long ſtudy and tedious labours and pains of youth taken in the ſaid court, but alſo to the great decay of the true courſe of the ſaid court; and foraſmuch as now the ſaid cuſtom taketh no place nor uſage, but only in the office of the ſaid ſix clerks, but that it is permitted for maintenance of the ſaid courſe, that as well the ſaid curſitors as the other clerks aforeſaid may and do take wives, and marry at their liberty, after the laws of holy church and of long time have ſo done, without interruption or let of any perſon: therefore in conſideration of the premiſſes, and for that the ſaid cuſtom is not grounded upon any law, it is enacted, that all perſons who ſhall be in the office of the ſix clerks of the chancery, may take wives and marry at their liberty, after the laws of holy church; and ſhall hold their offices notwithſtanding in as ample manner as if they had never been married.

Doctors of the civil law.

10. By the 37 *H.* 8. *c.* 17. (which was repealed by the 1 & 2 *P.* & *M.* *c.* 8. *ſ.* 27. and revived by the 1 *El.* *c.* 1. *ſ.* 19. All perſons, as well lay as thoſe that be married, being doctors of the civil law, lawfully create and made in any univerſity, who ſhall be conſtituted chancellor, vicar general, commiſſary, official, ſcribe or regiſter, may lawfully execute and exerciſe all manner of juriſdiction, commonly called eccleſiaſtical juriſdiction, and all cenſures and coertions appertaining or in any wiſe belonging to the ſame, albeit ſuch perſons be lay, married, or unmarried; ſo that they may be doctors of the civil law as aforeſaid.

II. *Of*

II. Of marriage contracts.

1. Spouſals *de futuro*, are a mutual promiſe or covenant of marriage to be had afterwards; as when the man ſaith to the woman, I will take thee to my wife, and ſhe then anſwereth, I will take thee to my huſband: Spouſals *de præſenti*, are a mutual promiſe or contract of preſent matrimony; as when the man doth ſay to the woman, I do take thee to my wife, and ſhe then anſwereth, I do take thee to my huſband. *Swinb. Matr. Con.* ſ. 3. Spouſals, what.

2. *Raynolds.* The miniſters ſhall frequently denounce to thoſe who are deſirous to contract matrimony; that on pain of excommunication, they do not contract matrimony, but in an open place, and before divers witneſſes in publick. *Lind.* 271. Not to be made privately.

3. Both by the civil and canon law, infants under ſeven years of age cannot contract any kind of ſpouſals. *Swinb.* ſ. 6. Age for contracting.

From the age of ſeven, to the age of twelve as to the woman, and fourteen as to the man, they cannot contract matrimony *de præſenti*, but only *de futuro*. Swinb. ſ. 7.

A man ſo ſoon as he hath accompliſhed the age of fourteen years, and a woman ſo ſoon as ſhe hath accompliſhed the age of twelve years, may contract true and lawful matrimony. *Swinb.* ſ. 9.

But by *Can.* 100. no children under the age of one and twenty years compleat, ſhall contract themſelves without the conſent of their parents, or of their guardians and governors if their parents be deceaſed.

4. By the civil law, the woman is not conſtrained to bring her whole ſubſtance as a portion to her huſband, but may retain back part of her goods, which are then called *paraphernalia* (from παρα *beſides*, and φερνη *dower*), in which the huſband hath no intereſt: for ſhe may diſpoſe of it without his conſent, and bring actions in her own name, or in the name of the huſband, for recovering the ſame. *Wood Civ. L.* 123. Part of the portion reſerved.

In England we account the paraphernalia to be only the woman's wearing apparel, jewels, and perſonal ornaments, which ſhe wore during her marriage; ſuitable to the quality of her huſband. *Id.*

And a wife after the death of her huſband may claim her paraphernalia, or neceſſary apparel for her body, cloth given her to make a garment, and the like, beſides her

dower or jointure. But ſhe ſhall not have exceſſive apparel, beyond her rank or degree. Pearl necklaces, chains of diamonds, gold watches, and ſuch like, may be included under paraphernalia, if they were uſually worn by the wife, and were ſuitable to her degree, according to the faſhion of the times. 1 *Roll's Abr.* 911.

What remedy ſhall be upon the contract.

5. Heretofore, if any having contracted matrimony *de præſenti*, and being convented by the eccleſiaſtical judge, did refuſe to execute the ſentence given by him to celebrate the matrimony accordingly, after lawful admonition given in that behalf; he or ſhe ſo refuſing might for their contumacy or diſobedience therein be excommunicated, and be impriſoned on a writ *de excommunicato capiendo*, until he or ſhe did ſubmit to obey the monition of the ordinary in that behalf. *Swinb.* ſ. 17.

But for perſons who had contracted ſpouſals only *de futuro*, if either of them did refuſe to perform their promiſe, the judge was not to proceed to the *ſignificavit* into chancery for an *excommunicato capiendo*, but rather to abſolve that curſed party which contemned the cenſures of the church, albeit there might be no cauſe of favour, but for fear of further miſchief, by compelling them to go together which did hate one another: yet was not this froward party thus to be diſmiſſed, but was to ſuffer penance for the breach of his promiſe: nor was he or ſhe to be diſmiſſed or abſolved, if thoſe ſpouſals *de futuro* by reaſon of carnal knowledge or ſome other act equivalent did become matrimony; for in that caſe as in the former where ſpouſals were contracted *de præſenti*, the diſobedient party was to be excommunicated, apprehended, and impriſoned; and not to be abſolved or releaſed before ſatisfaction, or death, or other juſt cauſe of divorce. *Id.*

But now by the 26 *G.* 2. *c.* 33. No ſuit or proceeding ſhall be had in any eccleſiaſtical court, in order to compel a celebration of any marriage *in facie eccleſiæ*, by reaſon of any contract of matrimony, whether *per verba de præſenti*, or *per verba de futuro*, which ſhall be entred into after the twenty fifth day of March 1754. ſ. 13.

But notwithſtanding, the party is not the leſs liable to damages for the ſame, in an action to be brought upon the caſe.

Infant's contract, how far binding.

6. *T.* 5 & 6 *G.* 2. *Holt* againſt *Ward* clarencieux king at arms. Mrs *Holt* the plaintiff declared, that it was mutually agreed between the defendant Mr *Ward* and herſelf, that they ſhould marry at a future day, which is paſt, and that in conſideration of each other's promiſes, each

each engaged to the other; notwithſtanding which he did not marry her, but had married another; which ſhe lays to her damage of 4000 l. The defendant, with leave of the court, pleaded double: viz. firſt, that he made no ſuch promiſe; and ſecondly, that Mrs *Holt* the plaintiff at the time of the promiſe was an infant of fifteen years of age. The plaintiff joins iſſue upon the former point, and a verdict was found for her, with 2000 l damages; and as to the plea of infancy demurred. This cauſe was argued ſeveral times at the bar. Upon the firſt argument, the court were ſtrongly inclined with the plaintiff, becauſe though the defendant would not have the ſame remedy againſt her by action for damages, yet they thought he might have ſome remedy, to wit, by the eccleſiaſtical court to compel a performance, the plaintiff being of the age of conſent, and that would be a ſufficient conſideration; and therefore appointed an argument by civilians, to ſee what their law would determine in ſuch a caſe. Upon the argument of the civilians, no inſtance could be ſhewn, wherein they had compelled the performance of a minor's contract. And they who argued for the defendant ſtrongly inſiſted, that in the caſe of a contract *per verba de futuro* (as this was), there was no remedy given againſt a perſon of full age in the ſpiritual court, but only an admonition: And the only reaſon why they hold juriſdiction in the caſe of a contract *per verba de præſenti* was becauſe that is looked upon amongſt them to be *ipſum matrimonium*, and they only decree the formality of a ſolemnization in the face of the church. After their arguments, it was ſpoken to again. And now this term *Raymond* chief juſtice delivered the reſolution of the court: The objection in this caſe is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my lord Vaughan, whether any action could be maintained on mutual promiſes to marry; but that is now a point not to be diſputed. And as to the preſent caſe, we ſhould have had no difficulty in giving judgment for the plaintiff, if we could have been ſatisfied by the arguments of the civilians, that as the plaintiff was of the age of conſent, any remedy, tho' not by way of action for damages, could be had againſt her. But ſince they ſeem to have no precedent in the caſe, we muſt conſider it upon the foot of the common law. And upon that the ſingle queſtion is, whether this contract, as againſt the plaintiff, was abſo-

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lutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant; and as to the perſon of full age, it abſolutely binds. The contract of an infant is conſidered in law, as different from the contracts of all other perſons. In ſome caſes his contract ſhall bind him: ſuch is the contract of an infant for neceſſaries, and the law allows him to make this contract, as neceſſary for his preſervation; and therefore in ſuch a caſe a ſingle bill ſhall bind him, tho' a bond with a penalty ſhall not. Where the contract may be for the benefit of the infant, or to his prejudice; the law ſo far protects him, as to give him an opportunity to conſider it when he comes of age: and it is good, or voidable at his election. But tho' the infant hath this privilege; yet the party with whom he contracteth, hath not: he is bound in all events. And as marriage is looked upon as an advantageous contract, and no diſtinction holds whether the party ſuing be man or woman, but the true diſtinction is whether it may be for the benefit of the infant; we think, that tho' no expreſs caſe upon a marriage contract can be cited, yet it falls within the general reaſon of the law with regard to infants contracts. And no dangerous conſequence can follow from this determination, becauſe our opinion protects the infant even more than if we rule the contract to be abſolutely void. And as to perſons of full age, it leaves them where the law leaves them, which grants them no ſuch protection againſt being drawn into inconvenient contracts. For theſe reaſons we are all of opinion, that the plaintiff ought to have her judgment upon the demurrer. *Str.* 937.

What conſent ſhall amount to a contract.

7. *E.* 3 *An. Hatton* and *Manſel.* It was held by *Holt* chief juſtice, that if there be an expreſs promiſe by the man, and it appear the woman countenanced it, and by her actions at that time behaved herſelf as if ſhe agreed to the matter, altho' there be no actual promiſe, yet that ſhall be ſufficient evidence of a promiſe on her part. *Read.* Tit. Marriage.

But if the one only promiſeth, and the other doth not, either expreſsly, or by implication: this is a contract that walks upon one leg, and conſequently not of any force. *Ayl. Parerg.* 246.

III.

III. *Of banns.*

1. *Banns*, is a ſaxon word, and ſignifieth a proclamation. Banns, what.

2. No miniſter ſhall be obliged to publiſh the banns of matrimony between any perſons whatſoever, unleſs they ſhall ſeven days at the leaſt before the time required for the firſt publication, deliver or cauſe to be delivered to him a notice in writing of their true chriſtian and ſirnames, and of the houſes of their reſpective abodes within ſuch pariſh chapelry or extraparochial place where the banns are to be publiſhed, and of the time during which they have inhabited or lodged in ſuch houſes reſpectively. 26 *G.* 2. *c.* 33. ſ. 2. Previous notice.

3. And all banns of matrimony ſhall be publiſhed in the pariſh church, or in ſome publick chapel wherein banns of matrimony have been uſually publiſhed, of the pariſh or chapelry wherein the perſons to be married ſhall dwell. 26 *G.* 2. *c.* 33. ſ. 1. Where.

And where the perſons to be married ſhall dwell in divers pariſhes or chapelries, the banns ſhall be publiſhed in the church or chapel belonging to ſuch pariſh or chapelry wherein each of the ſaid perſons ſhall dwell. *Id.*

And where both or either of the perſons to be married ſhall dwell in any extraparochial place (having no church or chapel wherein banns have been uſually publiſhed), then the banns ſhall be publiſhed in the pariſh church or chapel belonging to ſome pariſh or chapelry adjoining to ſuch extraparochial place. *Id.*

Note, that all pariſhes where there ſhall be no pariſh church or chapel belonging thereto, or none wherein divine ſervice ſhall be uſually celebrated every ſunday, may be deemed extraparochial places for the purpoſes of this act, but for no other purpoſe. ſ. 5.

Provided, that after the ſolemnization of any marriage under a publication of banns, it ſhall not be neceſſary in ſupport of ſuch marriage, to give any proof of the actual dwelling of the parties in the reſpective pariſhes or chapelries wherein the banns of matrimony were publiſhed; nor ſhall any evidence in ſuch caſe be received to prove the contrary, in any ſuit, touching the validity of ſuch marriage. ſ. 10.

4. And the ſaid banns ſhall be publiſhed upon three ſundays preceeding the ſolemnization of marriage, during the time of morning ſervice, or of the evening ſervice if When.

there be no morning ſervice in ſuch church or chapel on any of thoſe ſundays, immediately after the ſecond leſſon. 26 *Geo.* 2. *c.* 33. ſ. 1.

Proclamation.

5. *Raynolds.* Whilſt the marriage is contracting, the miniſters ſhall inquire of the people by three publick banns, concerning the freedom of the parties from all lawful impediments. And if any miniſter ſhall do otherwiſe, he ſhall be ſuſpended for three years. *Lind.* 271.

Rubr. And the curate ſhall ſay after the accuſtomed manner; "I publiſh the banns of marriage between M. "of ——— and N. of ——— If any of you know "cauſe or juſt impediment why theſe two perſons ſhould "not be joined together in holy matrimony, ye are to "declare it. This is the firſt (ſecond, or third) time of "aſking."

Diſſent of parents or guardians.

6. And in caſe the parents or guardians or one of them, or either of the parties who ſhall be under the age of twenty one years, ſhall openly and publickly declare or cauſe to be declared in the church or chapel where the banns ſhall be ſo publiſhed, at the time of ſuch publication, his diſſent to ſuch marriage; ſuch publication of banns ſhall be void. 26 *Geo.* 2. *c.* 3. ſ. 3.

Certificate.

7. *Rubr.* And where the parties dwell in divers pariſhes, the curate of the one pariſh ſhall not ſolemnize matrimony betwixt them, without a certificate of the banns being thrice aſked, from the curate of the other pariſh.

And by the 26 *Geo.* 2. *c.* 33. Where the banns ſhall be publiſhed in any church or chapel belonging to any pariſh adjoining to any extraparochial place as aforeſaid, the miniſter publiſhing ſuch banns ſhall in writing under his hand certify the publication thereof, in ſuch manner as if either of the parties to be married dwelt in ſuch adjoining pariſh. ſ. 1.

The form of which certificate may be to this effect: "I do hereby certify, that the banns of marriage between "A. B. of the pariſh of Orton in the county of Weſt-"morland, and C. D. of the pariſh of Ravenſtondale in "the county aforeſaid, have been duly publiſhed in the "pariſh church of Orton aforeſaid, on three ſeveral "ſundays, to wit, Oct. 27. Nov. 3. and Nov. 10. now "laſt paſt; and that no cauſe or juſt impediment hath "been declared, why they may not be joined together "in holy matrimony. Witneſs my hand, Nov. 13. 1762.

Ri. Burn,
Vicar of Orton aforeſaid."

IV.

IV. *Of licence.*

1. Some have queſtioned the biſhop's power to grant licences for marrying without banns firſt publiſhed; becauſe this is diſpenſing with an act of parliament: for the marriage office, which requires banns, is part of the ſtatute law. But this power of diſpenſing is granted to the biſhop by ſtatute law too, viz. by the 25 *H.* 8. *c.* 21. by which all biſhops are allowed to diſpenſe as they were wont to do; and ſuch diſpenſations have been granted by biſhops, ever ſince archbiſhop *Mepham*'s time at leaſt. *Johnſ.* 194. Who may grant.

By *Can.* 101. No faculty or licence ſhall be granted for ſolemnization of matrimony without publication of banns, by any perſon exerciſing any eccleſiaſtical juriſdiction or claiming any privileges in the right of their churches; but only by ſuch as have epiſcopal authority, or the commiſſary for faculties, vicars general of the archbiſhops and biſhops ſede plena or ſede vacante, the guardian of the ſpiritualties, or ordinaries exerciſing of right epiſcopal juriſdiction in the ſeveral juriſdictions reſpectively.

And by the 26 *G.* 2. *c.* 33. No ſurrogate deputed by any eccleſiaſtical judge, who hath power to grant licences of marriage, ſhall grant any ſuch licence before he hath taken an oath before the ſaid judge, faithfully to execute his office according to law, to the beſt of his knowledge, and hath given ſecurity by his bond in the ſum of 100 l to the biſhop of the dioceſe, for the due and faithful execution of the ſaid office. *ſ.* 7.

2. And no licence ſhall be granted, but unto ſuch perſons only, as be of good ſtate and quality. *Can.* 101. To whom.

3. And no licence ſhall be granted, but upon good caution and ſecurity taken. *Can.* 101.

Which ſecurity ſhall contain theſe conditions: 1. That at the time of granting ſuch licence, there is not any impediment of precontract, conſanguinity, affinity, or other lawful cauſe, to hinder the ſaid marriage. 2. That there is not any controverſy or ſuit depending in any court, before any eccleſiaſtical judge, touching any contract or marriage of either of the ſaid parties with any other. 3. That they have obtained thereunto the expreſs conſent of their parents (if they be living), or otherwiſe of their guardians or governors. Laſtly, that they ſhall celebrate the ſaid matrimony publickly in the pariſh church or Security to be given, and oath to be made.

chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon. *Can.* 102.

And for the avoiding of all fraud and colluſion in the obtaining of ſuch licences and diſpenſations; before ſuch licence ſhall be granted, it ſhall appear to the judge by the oaths of two ſufficient witneſſes, one of them to be known either to the judge himſelf, or to ſome other perſon of good reputation then preſent, and known likewiſe to the ſaid judge, that the expreſs conſent of the parents, or parent (if one of them be dead), or guardians or guardian of the parties, is thereunto had and obtained: And furthermore, that one of the parties ſhall perſonally ſwear, that he believeth that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cauſe whatſoever, nor any ſuit commenced in any eccleſiaſtical court, to bar or hinder the proceeding of the ſaid matrimony, according to the tenor of the foreſaid licence. *Can.* 103.

But if both the parties which are to marry, being in widowhood, do ſeek a faculty for the forbearing of banns; then the clauſes before mentioned, requiring the parents conſents, may be omitted: but the pariſhes where they dwell, both ſhall be expreſſed in the licence, as alſo the pariſh named where the marriage ſhall be celebrated. And if any commiſſary for faculties, vicars general, or other the ſaid ordinaries ſhall offend in the premiſſes or any part thereof; he ſhall for every time ſo offending be ſuſpended from the execution of his office for the ſpace of ſix months; and every ſuch licence or diſpenſation ſhall be held void to all effects and purpoſes, as if there had never been any ſuch granted; and the parties marrying by virtue thereof, ſhall be ſubject to the puniſhments which are appointed for clandeſtine marriages. *Can.* 104.

Which clauſe declaring the licence *void to all effects and purpoſes as if there had never been any ſuch granted*, ſeemeth to render it a matter of great importance that the aforeſaid prerequiſites be ſtrictly obſerved; for altho' before the ſtatute of 26 *G.* 2. only the *licence* in ſuch caſe was void, and the parties marrying by virtue thereof were liable to be puniſhed as for a clandeſtine marriage, yet now by the ſaid ſtatute the *marriage* alſo will be void, and the other conſequences of clandeſtine marriages, will enſue.

Stamp. 4. By the 5 *W. c.* 21. For every ſkin or piece of vellum or parchment, or ſheet or piece of paper, upon which any licence for marriage ſhall be ingroſſed or written, ſhall be paid a ſtamp duty of 5*s.* *f.* 3.

5. No licence of marriage ſhall be granted by any archbiſhop, biſhop, or other ordinary or perſon having authority to grant the ſame, to ſolemnize any marriage in any other church or chapel, than in the pariſh church or publick chapel of the pariſh or chapelry, within which the uſual place of abode of one of the perſons to be married ſhall have been for the ſpace of four weeks immediately before the granting ſuch licence; or where both or either of the parties ſhall dwell in an extraparochial place having no church or chapel wherein banns have been uſually publiſhed, than in the pariſh church or chapel belonging to ſome pariſh or chapelry adjoining to ſuch extraparochial place; and in no other place whatſoever. 26 *G.* 2. *c.* 33. ſ. 4. Licence where to be run.

Provided, that where the marriage is by licence, it ſhall not be neceſſary, in ſupport of ſuch marriage, to give any proof that the uſual place of abode of one of the parties for the ſpace of four weeks as aforeſaid, was in the pariſh or chapelry where the marriage was ſolemnized; nor ſhall any evidence in ſuch caſe be received to prove the contrary, in any ſuit touching the validity of ſuch marriage. ſ. 10.—That is to ſay, this ſhall not avail ſo as to render the marriage null and void: but nevertheleſs, the ſurrogate who granteth ſuch licence contrary to the tenor of this act, ſeemeth to incur the violation of his oath, and forfeiture of his bond given to the ſpiritual judge; and is liable to be otherwiſe puniſhed for his contempt of the law.

Alſo this ſhall not to extend to deprive the archbiſhop of Canterbury, and his proper officers, of the right which hath hitherto been uſed, in virtue of the ſtatute of the 25 *H.* 8. *c.* 21. of granting ſpecial licences to marry at any convenient time or place. ſ. 6.

By which ſtatute of the 25 *H.* 8. power is given to the archbiſhop of Canterbury, to grant faculties, diſpenſations, and licences; as the pope had done before. And by the ſame ſtatutes it is enacted, that all children procreated after ſolemnization of any marriages to be had by virtue of a licence or diſpenſation from the archbiſhop of Canterbury, ſhall be admitted reputed and taken legitimate in all courts and other places, and inherit the inheritance of their parents and anceſtors.

6. If any perſon ſhall falſly make, alter, forge or counterfeit any ſuch licence of marriage; or cauſe or procure the ſame to be done; or aſſiſt therein; or utter or publiſh the ſame as true, knowing the ſame to be falſe, altered, Forging licence.

altered, forged, or counterfeited: he ſhall be guilty of felony without benefit of clergy. 26 *G.* 2. *c.* 33. ſ. 16.

V. *When and where to be ſolemnized; and therein of clandeſtine marriages.*

When and where.

1. In all caſes where *banns* ſhall have been publiſhed, the marriage ſhall be ſolemnized in one of the pariſh churches or chapels where ſuch banns have been publiſhed, and in no other place. 26 *G.* 2. *c.* 33. ſ. 1.

And no *licence* marriage ſhall be ſolemnized in any other church or chapel, than where the uſual place of abode of one of the parties hath been for the ſpace of four weeks next before the granting of ſuch licence. ſ. 4.

And by *Can.* 63. Every miniſter who ſhall celebrate marriage between any perſons contrary to the canons aforeſaid, or any part thereof, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, ſhall be ſuſpended for three years, by the ordinary of the place where the offence ſhall be committed; and if any ſuch miniſter ſhall afterwards remove from the place where he hath committed the fault, before he be ſuſpended; then ſhall the biſhop of the dioceſe, or ordinary of the place where he remaineth, upon certificate under the hand and ſeal of the other ordinary from whoſe juriſdiction he removed, execute that cenſure upon him.

By a conſtitution of archbiſhop *Reynolds:* Matrimony ſhall be ſolemnized reverently, and *in the face of the church.* Lind. 271.

And by the words in the beginning of the office of matrimony, it is ſuppoſed to be done *in the preſence of the congregation.*

And in the caſe of a marriage by licence, it is required by *Can.* 62. that the ſame ſhall be ſolemnized *between the hours of eight and twelve in the forenoon: and in time of divine ſervice.*

Eccleſiaſtical puniſhment of clandeſtine marriages.

2. Stratford. *Perſons contracting matrimony, and cauſing the ſame to be ſolemnized, knowing any canonical impediments in that behalf, or having ſtrong preſumption thereof; ſhall ipſo facto incur the ſentence of the greater excommunication.* Lind. 277.

Mepham. *Every prieſt, who ſhall preſume to celebrate matrimony any where ſave in the pariſh church* [where one of the parties or their friends do inhabit; *Johnſ.*] *without the ſpecial licence of the dioceſan; or who ſhall be preſent thereat; ſhall be ſuſpended from his office for a whole year.* Lind. 274.

Stratford. *The foregoing conſtitution ſhall be extended to chapels, having of old time had parochial rights: and the prieſt ſhall incur the ſaid pain ipſo facto.* Lind. 277.

Of old time] That is, for forty years at leaſt. *Id.*

Stratford. *Prieſts, who ſhall knowingly make ſolemnization of marriages prohibited, or of lawful matrimony between others than their own pariſhioners, without the licence of the dioceſans, or of the proper curates of the perſons contracting; alſo they who ſhall cauſe by force or fear clandeſtine marriages to be ſolemnized in churches oratories or chapels, or ſhall be preſent thereat, knowing the ſame; ſhall incur the ſentence of the greater excommunication, and be otherwiſe puniſhed as the law directs.* Lind. 276.

Between others than their own pariſhioners] That is, where neither of the parties is of their own pariſh. *Id.*

Without the licence of the dioceſans] Who having cure throughout the whole dioceſe, have power to grant licences in all places within their dioceſe. *Id.*

Or of the proper curates] That is, as to their own pariſhioners only. *Id.*

Or ſhall be preſent thereat] And ſuch perſon would not be admitted in the ſpiritual court to prove ſuch marriage, until he ſhould be legally abſolved from the ſentence incurred thereby.

Canon 62. *No miniſter, upon pain of ſuſpenſion for three years ipſo facto, ſhall celebrate matrimony between any perſons, without a faculty or licence, or without banns publiſhed; neither ſhall any miniſter, upon the like pain, under any pretence whatſoever, join any perſons ſo* licenſed *in marriage at any unſeaſonable times, but only between the hours of eight and twelve in the forenoon, nor in any private place, but either in the churches or chapels where one of them dwelleth, and likewiſe in time of divine ſervice; nor when* banns *are thrice aſked (and no licence in that reſpect neceſſary) before the parents or governors of the parties to be married, being under the age of twenty and one years, ſhall either perſonally, or by ſufficient teſtimony, ſignify to him their conſent given to the ſaid marriage.*

Upon pain of ſuſpenſion] In our eccleſiaſtical records, we frequently meet with abſolutions of clergymen who had celebrated marriages clandeſtinely; and ſo late as archbiſhop *Sancroft*'s time, we find the intire proceſs of ſuch an abſolution: but in the more ancient regiſters, towards

the beginning of the reformation, one and the ſame diſpenſation iſſued, for the miniſter and the two parties; which ſort (as well as ſeparate diſpenſations) are very common in our books. *Gibſ.* 425.

Without a faculty or licence] Such faculties have been very various, in point of extent; in many inſtances requiring a publication, ſometimes once, and diſpenſing with two; in other caſes twice, and diſpenſing but with one; and again in other caſes expreſly requiring all the three publications, and diſpenſing only with time or place. Inſtances of all which, eſpecially before the reformation, are very common in our eccleſiaſtical records. *Gibſ.* 425.

At any unſeaſonable times] That is, of the day, not of the year; concerning which latter head, there ſeem to be no prohibitions expreſſed, or plainly ſuppoſed, in our conſtitutions or canons. But there is a place in *Lindwood*, which not only implies a prohibition of times in general, but expreſly mentions the times prohibited. Which is, that the ſolemnization of marriage cannot be from the firſt ſunday in advent, until the octaves of epiphany excluſive; and from ſeptuageſima ſunday to the firſt ſunday after eaſter incluſive; and from the firſt rogation day, until the ſeventh day after pentecoſt incluſive: altho' marriage may be *contracted* within theſe times. *Gibſ.* 430. *Lind.* 274. *Ayl. Par.* 364.

It is alſo certain, that a diſtinction of times hath been obſerved, as the law of our reformed church; not only from the clauſe which we may obſerve in ſeveral licences in our books, *quocunque anni tempore*; but alſo from a remarkable diſpute which happened in archbiſhop *Parker's* time, between the maſter of the faculties and the vicar general, whether the firſt only, or the ſecond in conjunction with him, had a right to grant licences on that particular head. *Gibſ.* 430.

And after that, in archbiſhop Whitgift's table of fees, there is firſt a fee for a licence to ſolemnize matrimony *without banns*, and afterwards a fee for a licence to ſolemnize matrimony *in the time of prohibition of banns to be publiſhed.*

Which point is further confirmed, by the attempts that have been made in parliament and convocation, to take away that diſtinction of times: In parliament, in the 17th of Elizabeth, a bill was depending, intitled, an act declaring marriages lawful at all times: And in convocation, in the year 1575, the laſt of the articles preſented to

to the queen for confirmation (but by her rejected) was, that the biſhops ſhall take order, that it be publiſhed and declared in every pariſh church within their dioceſe, before the firſt day of May next coming, that marriage may be ſolemnized at all times of the year. Which goes further than what had been projected upon that head in the year 1562, when the ſcheme intended to be offered to the parliament or convocation or both, was, that it ſhall be lawful to marry at any time of the year without diſpenſation; except it be upon chriſtmaſs day, eaſter day and ſix days going before, and upon whitſunday. *Gibſ.* 430.

But theſe diſtinctions, being invented only at firſt as a fund (among many others) for diſpenſations, and being built upon no rational foundation, nor upon any law of the church of England, have vaniſhed of themſelves; and it may be juſtly queſtioned, whether if a miniſter ſhall refuſe to marry any perſons within the times pretended to be prohibited, an action upon the caſe would not lie againſt him for ſuch refuſal; for ſuppoſing that heretofore any popiſh canons, importing ſuch prohibition, were received in this kingdom; yet now they can be of no force, as being contrary to the common law, which for the benefit of the ſubject, and in favour of the natural rights of mankind, and for the publick emolument, alloweth matrimony at all times of the year without reſtraint.

Before the parents or governors ſhall ſignify their conſents] But by the 26 *G.* 2. *c.* 33. no miniſter ſolemnizing marriages between perſons, both or one of whom ſhall be under the age of twenty one years, after banns publiſhed, ſhall be puniſhable by eccleſiaſtical cenſures for ſolemnizing ſuch marriages without conſent of parents or guardians whoſe conſent is required by law, unleſs he ſhall have *notice* of the diſſent of ſuch parents or guardians. ſ. 3.

3. By the 6 & 7 *W.* *c.* 6. *No perſon ſhall be married at any place pretending to be exempt from the viſitation of the biſhop of the dioceſe, without a licence, except the banns ſhall be publiſhed and certified according to law; and every parſon, vicar, and curate, who ſhall marry any perſons contrary to the true intent hereof, ſhall forfeit* 100 *l, half to the king, and half to him that will ſue in any of his majeſty's courts of record; and for the ſecond offence, ſhall be ſuſpended from his office and benefice for three years.* ſ. 52. Pecuniary forfeiture.

And by the 7 & 8 *W.* *c.* 35. *Every parſon, vicar, or curate, who ſhall marry any perſons in any church or chapel, except*

exempt or not exempt, or in any other place whatever, without publication of banns, or without licence, ſhall forfeit 100 *l.* ſ. 2.

And every parſon, vicar, or curate, who ſhall ſubſtitute or employ, or knowingly and wittingly ſhall ſuffer and permit, any other miniſter to marry any perſons in any church or chapel to ſuch parſon vicar or curate belonging or appertaining, without publication of banns or licence; ſhall forfeit 100 *l.* ſ. 3.

The ſaid forfeitures to be half to the king, and half to him that ſhall ſue. ſ. 3.

And every man *ſo married without licence or publication of banns as aforeſaid, ſhall forfeit* 10 *l, to be recovered with coſts in manner as aforeſaid, by him who ſhall ſue: and every ſexton or pariſh clerk, or other perſon acting as ſexton or pariſh clerk, who ſhall knowingly and wittingly aid promote and aſſiſt, at ſuch marriages ſo celebrated without banns or licence as aforeſaid, ſhall forfeit* 5 *l, to be recovered with coſts of ſuit in manner as aforeſaid, by him who ſhall ſue.* ſ. 4.

And by the 10 An. c. 19. *Whereas great loſs hath happened of the duties upon ſtamped vellum parchment and paper, and other inconveniencies daily grow from clandeſtine marriages; it is enacted, that every parſon vicar or curate, or other perſon in holy orders, beneficed or not beneficed, who ſhall marry any perſon in any church or chapel, exempt or not exempt, or in any other place whatſoever, without publication of banns, or without licence from the proper ordinary, ſhall forfeit* 100 *l, with full coſts, half to the queen, and half to him that will ſue in any of the courts of record at Weſtminſter; and if ſuch offender ſhall be a priſoner in any priſon or gaol (other than a county gaol) at the time of ſuch offence committed, and ſhall be duly convicted thereof, then upon oath made of ſuch impriſonment before one of the judges, and upon producing a copy of the record of ſuch conviction to be likewiſe proved upon oath before the ſaid judge, he ſhall grant his warrant to the keeper of the gaol or priſon where ſuch offender is a priſoner, to remove him to the gaol of that county where he is a priſoner, there to remain charged in execution with the penalty inflicted by this act, and with all and every the cauſes of his former impriſonment: And if any gaoler or keeper of any priſon, ſhall be privy to, or knowingly permit any marriage to be ſolemnized in the ſaid priſon, before publication of banns or licence as aforeſaid; he ſhall forfeit* 100 *l, to be recovered and diſtributed as aforeſaid.* ſ. 176.

Saving nevertheleſs, to all archbiſhops, biſhops, archdeacons and other ordinaries, their vicars-general commiſſaries and officials, the free exerciſe of all eccleſiaſtical juriſdiction, and full power

power and authority of inflicting all ſuch pains and cenſures for this or any other crime or crimes, as they might have done if this act had not been made. ſ. 177.

And provided, that the ſaid proviſion for marriages do not extend to that part of Great Britain called Scotland. ſ. 178.

Upon the aforeſaid ſtatute of the 7 & 8 *W.* c. 35. *ſ.* 4. in the caſe of *Middleton* and his wife againſt *Croft*, *M.* 10 *G.* 2. In prohibition: The plaintiff declared, that by the ſaid ſtatute a penalty of 10 l is inflicted on every *man* who marries without licence or banns, notwithſtanding which, he and his wife had been cited into the ſpiritual court, for being married *before eight in the morning, without licence or banns*, contrary to the canon, which fixes the time to be between eight and twelve, and requires a licence of banns; that they are lay perſons, not bound by the canon; and therefore pray a prohibition. The defendant, as to the contempt, pleads not guilty; and for a conſultation, demurs. And after ſeveral arguments at the bar, lord *Hardwicke* chief juſtice this term delivered the reſolution of the court:—In this caſe three queſtions have been made; 1. Whether by the canons of 1603, lay perſons are puniſhable for a clandeſtine marriage. 2. If not, whether by the canon law anciently received, the ſpiritual court hath a juriſdiction to proceed for a clandeſtine marriage. And, 3. Suppoſing they have a juriſdiction either way, whether that juriſdiction is taken away by the act of parliament, which hath inflicted a penalty of 10 l. As to the firſt: two things are conſiderable, firſt, whether the laity are within the words of thoſe canons as to this matter; ſecondly, whether there was a proper authority to bind the laity, if the words do extend to them. And as to the queſtion, whether the words take them in; thoſe which any way relate to this matter are the canons 62, 101, 102, 103, and 104. In the four firſt of which, there are no words that affect the parties contracting: Indeed in the 104th there are words relating to the married perſons, but they relate only to marriages under void or irregular licences, which is not this caſe: And therefore upon this point we are all of opinion, that lay perſons are not within the words of the canons of 1603. The next point is, whether the makers of thoſe canons had a power to bind the laity: And we are all of opinion that proprio vigore the canons of 1603 do not bind the laity; I ſay, proprio vigore, becauſe ſome of them are only declaratory of the ancient canon law. The ſecond point to be conſidered is, whether laying aſide the canons of

1603,

1603, the ſpiritual court hath any juriſdiction under the former canon law received and allowed, to proceed againſt the plaintiffs for a clandeſtine marriage: And we are all of opinion, that in this reſpect their juriſdiction is well founded. And as to the third point, whether the ſtatute of the 7 & 8 *W.* hath by inflicting that penalty taken away the juriſdiction of the ſpiritual court; it is to be obſerved, that as to the woman, ſhe indiſputably remains ſubject to the eccleſiaſtical juriſdiction, for the penalty is only upon the man; but as to the man likewiſe, we are all of opinion, that the eccleſiaſtical juriſdiction is not taken away by the ſtatute, but that both the juriſdictions do well ſtand together. And upon the whole we are of opinion, that there ought to go a conſultation as to all the points of the ſuit below but one, which is, the hour at which the marriage is alledged to have been had. Now as the confining marriages to be between eight and twelve in the morning, is only a regulation introduced by the canons of 1603, which we have determined do not bind in this caſe; it is of conſequence, that the ſpiritual court be reſtrained from making that any ground of their proceedings. In this reſpect therefore, the prohibition muſt ſtand, and a conſultation muſt go for the reſt. *Str.* 1056. 2 *Atkyns.* 650.

Felony. 4. By the 26 *G.* 2. *c.* 33. If any perſon ſhall ſolemnize matrimony in any other place than a church or publick chapel where banns have been uſually publiſhed, unleſs by ſpecial licence from the archbiſhop of Canterbury; or ſhall ſolemnize matrimony without publication of banns, unleſs licence be firſt had from ſome perſon having authority to grant the ſame; every perſon knowingly and wilfully ſo offending, and being lawfully convicted thereof, ſhall be adjudged guilty of felony, and tranſported for fourteen years. ſ. 8. (Except in Scotland, and except the marriages of quakers or jews as aforeſaid. ſ. 18.)

The proſecution for ſuch felony to be commenced within three years after the offence committed. ſ. 9.

Marriage to be void. 5. *T.* 9 *An. Haydon* and *Gould.* Before the delegates. It appeared that Haydon and Rebecca his wife were ſabbatarians, and were married by one of their miniſters in a ſabbatarian congregation: the form in the common prayer book was uſed, except the ceremony of the ring. They lived together as man and wife for ſeven years, and then Rebecca died. Whereupon Haydon took out letters of adminiſtration to her. But Gould and Margaret his wife

who

who was ſiſter to Rebecca, ſued a repeal, ſuggeſting that Rebecca and Haydon were never married. And it appearing that the miniſter who married them was a mere layman, and not in orders, the letters of adminiſtration which had been granted to Haydon as her huſband were repealed and a new adminiſtration granted to the ſaid Margaret Gould her ſiſter. And this ſentence, upon an appeal, was affirmed by the court of delegates. For it was held, that as Haydon demanded a right to himſelf as huſband by the eccleſiaſtical law, he ought to prove himſelf a huſband by that law: And ſo the court ruled. And a caſe was cited out of Swinburn, where ſuch a marriage had been ruled to be void, as to the privileges attending legal marriages. And it is obſerved in that caſe, that an act of parliament was thought neceſſary after the grand rebellion, to intitle people who had been married by juſtices of the peace, to ſuch legal advantages of dower, thirds, and the like, as attended marriages duly ſolemnized according to the rites of the church of England; and the act of the 7 & 8 *W. c.* 35. ſeems to put this matter out of all doubt, which lays a penalty on clergymen in orders, if they celebrate marriage in a clandeſtine manner; for if the ſame privileges and advantages attended marriages ſolemnized by the diſſenters as thoſe celebrated according to the church of England, how eaſily would that act be evaded, or rather rendred of no effect. There would then be no occaſion for licence or banns; for making oath; or giving ſecurity that there were no legal impediments: but every one might do what was right in his own eyes, who ſhould get himſelf admitted of a diſſenting congregation. *Read.* Tit. Marriage. 1 *Salk.* 119.

But marriages by romiſh prieſts, whoſe orders are acknowledged by the church of England, have been deemed to have the effects of a legal marriage, at leaſt in ſome inſtances; as in the caſe of Mr. *Fielding*, who was married by a romiſh prieſt to Mrs. *Wadſworth*: This was held to be ſuch a marriage, as to make it felony in him to marry afterwards to the dutcheſs of *Cleveland*. Read, *Tit.* Mar.

And in *Wigmore*'s caſe, *M.* 5 *Ann.* where the wife ſued in the ſpiritual court for alimony, and in fact the huſband was an anabaptiſt, and altho' he had a licence, from the biſhop to marry, yet he married this woman according to the forms of their own religion; Holt chief juſtice, upon the prohibition, ſaid, By the canon law,

a contract *per verba de præſenti* is a marriage, ſo is a contract *per verba de futuro* if the contract be executed and he does take her; this is a marriage, and they cannot puniſh for fornication, but only for not ſolemnizing the marriage according to the forms preſcribed by law, but not ſo as to declare the marriage void. 2 *Salk.* 438.

But now by the 26 *G.* 2. *c.* 33. If any perſon ſhall ſolemnize matrimony (except in Scotland, and except quakers and jews as aforeſaid) in any other place than in a church or publick chapel where banns have been uſually publiſhed, unleſs by ſpecial licence from the archbiſhop of Canterbury; or ſhall ſolemnize the ſame without lawful banns or licence: ſuch marriage ſhall be null and void to all intents and purpoſes whatſoever. ſ. 8.

The paſſage into Scotland being left open by this act, many perſons have found their way thither to be married, in a manner very clandeſtine and irregular. And there hath been diverſity of opinions concerning the validity of ſuch marriages.

Lord *Stair*, in his Inſtitutions of the law of Scotland, page 26, ſays, "The public ſolemnity of marriage, is a matter of order, juſtly introduced by poſitive law, for the certainty of ſo important a contract; but not eſſential to marriage. Thence ariſes the diſtinction, of public or ſolemn, and private or clandeſtine marriages. And altho' perſons who act contrary thereto may be juſtly puniſhed (as in ſome nations by excluſion of the iſſue of ſuch marriages from ſucceſſion), yet the marriage cannot be declared void and annulled; and ſuch excluſions ſeem very unequal againſt the innocent children. But by the cuſtom of Scotland, cohabitation, and being commonly reputed man and wife, validates the marriage, gives the wife right to her thirds, who cannot be excluded therefrom, if ſhe was reputed lawful wife, and not queſtioned during the huſband's life, till the contrary be clearly proved."

Mr. *Erſkine*, in his Principles of the law of Scotland, pages 62, and 64, ſays, "It is not neceſſary that marriage be celebrated by a clergyman. The conſent of parties may be declared before any magiſtrate, or ſimply before witneſſes. When the order of the church is obſerved, the marriage is called regular; when otherwiſe, clandeſtine. Towards a regular marriage, the church requires proclamation of banns in the churches where the bride and bridegroom reſide. Formerly, not only biſhops, but preſbyteries, aſſumed a power of diſpenſing with proclamation

clamation of banns on extraordinary occaſions: but this hath not been exerciſed ſince the revolution."

In *M'Douall's* Inſtitute of the law of Scotland, Vol. 1. p. 112. he ſays, "Marriage is perfected by ſole conſent; for carnal knowledge is only the conſummation of it. Marriage is either ſolemn, or clandeſtine. A ſolemn marriage is that which is celebrated by a miniſter of the eſtabliſhed church, or one having the benefit of the toleration act, after due proclamation of banns. This ought regularly to be done three ſeveral Sundays, in the churches reſpectively where the parties frequent divine ſervice; but if they belong to an epiſcopal meeting, it muſt be done in their congregation, and likewiſe in the pariſh churches where the parties reſide; and in caſe the miniſter of ſuch pariſh ſhall neglect or refuſe to publiſh the banns, it is declared ſufficient, if done in the epiſcopal congregation alone. But the public ſolemnity is only a matter of order, and not eſſential to marriage; and therefore by the law of Scotland, not only a marriage ſolemnized by any miniſter or prieſt is good, but likewiſe cohabitation as man and wife, ſufficiently aſcertains the marriage, not called in queſtion during their joint lives. Thoſe marriages which are not ſolemnized according to the order of the church, are termed clandeſtine. Notwithſtanding that clandeſtine marriages are equally binding with ſolemn ones, certain penalties are impoſed upon the parties, who thereby act contrary to the order of law; theſe are, impriſonment for three months and a penalty upon the parties, with perpetual baniſhment or other arbitrary puniſhment upon the perſon that ſolemnizes the marriage. Of old, the parties loſt their reſpective intereſts of *jus mariti* and *jus relictæ*; but that afterwards was altered. Perſons reſiding in Scotland, who marry in England or Ireland, without proclamation of banns in due courſe, are ſubject to the pains of clandeſtine marriages. And the witneſſes to an irregular marriage are ſubject to a fine."

But whether clandeſtine marriages in Scotland, of Engliſh parties, who reſort thither to evade the Engliſh law, ſhall be ſuſtained in England, hath been doubted. And very learned men have queſtioned, notwithſtanding that ſuch marriages are valid by the law of Scotland, whether they are effective in England. Where parties are bound, by the laws of their own country, to execute any important act or contract with certain ſolemnities; it is doubted whether they can elude their own law, by

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going purpoſely to another country where ſuch ſolemnities are not eſſential, and then returning immediately when the act is done. It is a queſtion of public law; and the moſt celebrated writers on public law have holden, that ſuch an act is fraudulent; it is *fraudem facere legi*, which the laws of all nations diſallow. In the caſe of *Robinſon* and *Bland*, *M.* 1 *G.* 3. which was upon a ſecurity given in France for money there loſt at play, wherein the locality of the tranſaction came in queſtion, there is an *obiter* obſervation of lord Mansfield very remarkable. "As to the money won at play, By the rule of the law of England, no action can be maintained for it. To this it has been objected, that the contract was made in France: Therefore the law of France muſt prevail, and be the rule of determination; by which law, it is alledged, that the money is there recoverable before the marſhals of France, who can inforce obedience to their ſentences by impriſonment. I admit that there are many caſes, where the law of the place of the tranſaction ſhall be the rule: And the law of England is as liberal in this reſpect, as other laws are. It has been laid down at the bar, that a *marriage* in a foreign country muſt be governed by the law of that country where the marriage was had. Which, in general, is true. But the marriages in Scotland, of perſons going from hence for that purpoſe, were inſtanced by way of example. *They* may come under a very different conſideration; according to the opinion of Huberus, p. 33. and other writers. No ſuch caſe hath yet been litigated in England, except one, of a marriage at Oſtend; which came before lord Hardwicke; who ordered it to be tried in the eccleſiaſtical court: But the young man came of age, and the parties were married over again; and ſo the matter was never brought to a trial." *Bur. Manſf.* 1079.

But in *Buller's* law of *Niſi Prius*, p. 113. there is a ſhort note of a caſe wherein this point was afterwards determined, upon an appeal to the Delegates; viz. "*Compton* and *Bearcroft*, 1 Dec. 1768. The appellant and reſpondent, both Engliſh ſubjects, and the appellant being under age, ran away without the conſent of her guardian, and were married in Scotland; and on a ſuit brought in the ſpiritual court to annul the marriage, it was holden that the marriage was good."

VI. *Form*

VI. *Form of ſolemnization.*

1. By the ſtatute of the 26 *G.* 2. *c.* 33. All marriages ſhall be ſolemnized in the preſence of two credible witneſſes at the leaſt, beſides the miniſter; who ſhall ſign their atteſtation thereof. *ſ.* 15. Witneſſes preſent.

2. And at the time of the celebration of the marriage; the miniſter reciting the cauſes for which matrimony was ordained, ſhall ſay, "If any man can ſhew any juſt "cauſe why they may not lawfully be joined together "let him now ſpeak, or elſe hereafter for ever hold his "peace." *Rubr.* Impediments alledged.

And then, ſpeaking unto the perſons that ſhall be married, he ſhall ſay; "I require and charge you both, as "ye will anſwer at the dreadful day of judgment when "the ſecrets of all hearts ſhall be diſcloſed, that if either "of you know any impediment, why you may not be "lawfully joined together in matrimony, ye do now "confeſs it; for be ye well aſſured, that ſo many as are "coupled together otherwiſe than God's word doth al"low, are not joined together by God, neither is their "matrimony lawful." *Rubr.*

At which day of marriage, if any man do alledge and declare any impediment why they may not be coupled together in matrimony by God's law, or the laws of this realm; and will be bound, and ſufficient ſureties with him to the parties, or elſe put in a caution (to the full value of ſuch charges as the perſons to be married do thereby ſuſtain) to prove his allegation; then the ſolemnization muſt be deferred until ſuch time as the truth be tried. *Rubr.*

3. If no impediment be alledged, then the marriage ſhall go on; and after the parties have declared their mutual aſſent, and have taken each other in marriage according to the form preſcribed, then the man ſhall give unto the woman a ring, laying the ſame upon the book, with the accuſtomed duty to the prieſt and clerk. And the prieſt taking the ring, ſhall deliver it unto the man to put it on the fourth finger of the woman's left hand; and the man holding the ring there, and taught by the prieſt, ſhall "ſay, "With this ring I thee wed, with my body I "thee worſhip, and with all my worldly goods I thee "endow." *Rubr.* Ring.

Which laſt words are beſt explained by the rubrick of the 2 *Ed.* 6. which was thus: "The man ſhall give "unto the woman a ring, and other tokens of ſpouſage, "as gold or ſilver, laying the ſame upon the book, and "the man taught by the prieſt ſhall ſay, With this ring "I thee wed, this gold and ſilver I thee give;" and then theſe other words, "with all my worldly goods I thee "endow," were delivered with a more peculiar ſignificancy.

The ring at firſt (according to *Swinburn)* was not of gold but of iron, adorned with an adamant; the metal hard and durable, ſignifying the durance and perpetuity of the contract. Howbeit (he ſays) it ſkilleth not at this day, what metal the ring be of: The form of it being round and without end, doth import, that their love ſhould circulate, and flow continually. The finger on which this ring is to be worn, is the fourth finger of the left hand next unto the little finger, becauſe there was ſuppoſed a vein of blood to paſs from thence unto the heart. *Swinb. Matr. Cont.* ſect. 15.

In the roman ritual, there is a benediction of the ring, and a prayer that ſhe who wears it may continue in perfect love and fidelity to her huſband, and in the fear of God all her days.

Sacrament. 4. By the rubricks of the 2 and of the 5 *Ed.* 6. The new married perſons were required on the ſame day of their marriage to receive the holy communion.

But by the preſent rubrick, it is only declared to be convenient, that the new married perſons ſhould receive the holy communion, at the time of their marriage, or at the firſt opportunity afterwards.

Sermon. 5. By the rubricks of the 2 and of the 5 *Ed.* 6. After the goſpel was to be a ſermon, wherein ordinarily the office of a man and wife ſhould be declared, according to holy ſcripture; or if there were no ſermon, then the miniſter was to read ſeveral ſentences out of ſcripture, ſetting forth the ſaid duties.

And by the prefent rubrick, If there be no ſermon declaring the duties of man and wife, then the miniſter ſhall read the ſame ſentences as aforeſaid.

VII. *Fee for marriage.*

Langton. *We do firmly injoin, that no ſacrament of the church ſhall be denied to any one upon the account of any ſum of money, nor ſhall matrimony be hindred therefore: becauſe if any*

any thing hath been accuſtomed to be given by the pious devotion of the faithful, we will that juſtice be done thereupon to the churches by the ordinary of the place afterwards. Lind. 278.

That no ſacrament of the church] Which were ſeven; of which matrimony was one.

Shall be denied] Or delayed. *Lindw.* 278.

Upon the account of any ſum of money] That is, uſed to be paid or taken in the adminiſtration of any of the ſacraments. *Lind.* 278.

Nor ſhall matrimony be hindred therefore] But by the rubrick in the office of matrimony, at the time of delivering the ring, 'the man ſhall alſo then lay down the accuſtomed duty to the prieſt and clerk. Which if he ſhall refuſe to do; whether the miniſter is bound to proceed nevertheleſs, doth not appear from any rubrick or canon.

Hath been accuſtomed to be given] That is, of old, and for ſo long time as will create a preſcription, altho' at firſt given voluntarily. For they who have paid ſo long, are preſumed at firſt to have bound themſelves voluntarily thereunto. *Lind.* 279.

And this, it is ſaid, is recoverable by law, in ſuch places and caſes only, where there is a cuſtom for the payment thereof, upon performance of the duty. *Boh. L. of Tith.* 144, 5.

Mr *Johnſon* ſays, it was an ancient cuſtom, that marriage ſhould be performed in no other church but that to which the woman belonged as a pariſhioner; and therefore to this day, the eccleſiaſtical law allows a fee due to the curate of that church, whether ſhe be married there or not. And this fee was expreſsly reſerved for him by the words of the licence, according to the old form, which is not yet diſuſed in all dioceſes. But it is ſaid, that judgment hath been otherwiſe given in the temporal courts. *Johnſ.* 188, 189.

So in the caſe of *Thompſon* and *Davenport*, *M.* 13 *W.* The plaintiff libelled againſt the defendant, ſetting forth a cuſtom in the pariſh of Ellington in Derbyſhire, that of every woman who is a pariſhioner, and dwelleth there, and marrieth with a licence, the huſband at the time of the marriage, or ſoon after, ſhall pay to the vicar 5s as an accuſtomed fee; and ſo brought his caſe within that cuſtom; the defendant ſuggeſted for a prohibition, that all cuſtoms are triable at common law, and that the plain-

tiff had libelled againſt him, ſetting forth the cuſtom as aforeſaid. And a prohibition was granted. *Lutw.* 1059.

And in a late caſe, upon an appeal to the arches, Sir George Lee not only declared againſt the cuſtom as an unreaſonable cuſtom, but gave coſts againſt the clergyman with ſome warmth.

VIII. *Regiſter of marriage.*

By the 26 *G.* 2. *c.* 33. The churchwardens and chapelwardens of every pariſh or chapelry ſhall provide proper books of vellum or good and durable paper, in which all marriages and banns of marriage reſpectively there publiſhed or ſolemnized ſhall be regiſtred; and every page thereof ſhall be marked at the top with the figure of the number of every ſuch page, beginning at the ſecond leaf with number one; and every leaf or page ſo numbred ſhall be ruled with lines at proper and equal diſtances from each other, or as near as may be; and all banns and marriages publiſhed or celebrated in any church or chapel, or within any ſuch pariſh or chapelry, ſhall be reſpectively entred, regiſtred, printed, or written, upon or as near as conveniently may be to ſuch ruled lines, and ſhall be ſigned by the parſon vicar miniſter or curate, or by ſome other perſon in his preſence and by his direction; and ſuch entries ſhall be made as aforeſaid on or near ſuch lines in ſucceſſive order, where the paper is not damaged by accident or length of time. And all books provided as aforeſaid, ſhall be deemed to belong to ſuch pariſh or chapelry reſpectively. ſ. 14.

And immediately after the celebration of every marriage, an entry thereof ſhall be made in ſuch regiſter; in which entry or regiſter it ſhall be expreſſed, that the ſaid marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with conſent of the parents or guardians as the caſe ſhall be; and ſhall be ſigned by the miniſter with his proper addition, and alſo by the parties married, and atteſted by two witneſſes preſent at the ſolemnization of ſuch marriage. ſ. 15.

Which entry ſhall be made in the form or to the effect following, *viz.*

A. B. *of* [*the* / *this*] *pariſh* ——— *and* C. D. *of* [*the* / *this*] *pariſh* ——— *were married in this* [*church* / *chapel*] *by* [*banns* / *licence*] *with conſent of* [*parents* / *guardians*] *this* ——— *day of* ——— *in the year* ———

By me J. J. [*Rector* / *Vicar* / *Curate*]

This marriage was ſolemnized between us A. B. / C. D. *in the preſence of* E. F. / G. H. f. 15.

And if any perſon ſhall knowingly and wilfully inſert or cauſe to be inſerted in ſuch regiſter book any falſe entry of any matter or thing relating to any marriage; or falſly make alter forge or counterfeit, or cauſe or procure to be falſly made altered forged or counterfeited, or aſſiſt in falſly making altering forging or counterfeiting, any ſuch entry in ſuch regiſter; or utter or publiſh as true any ſuch falſe altered forged or counterfeited regiſter as aforeſaid, or a copy thereof, knowing the ſame to be falſe altered forged or counterfeited; or if any perſon ſhall wilfully deſtroy, or cauſe or procure to be deſtroyed, any regiſter book of marriages, or any part thereof, with intent to avoid any marriage, or to ſubject any perſon to any of the penalties of this act: he ſhall be guilty of felony without benefit of clergy. f. 16.

A doubt hath been made, in what manner a marriage celebrated by virtue of a ſpecial licence from the archbiſhop of Canterbury, ſhall be regiſtred; eſpecially where the marriage is ſolemnized in a private houſe, and by a clergyman not being the incumbent of the pariſh, and the incumbent refuſes to permit the ſame to be entred in the pariſh regiſter. But the doubt ſeemeth to be ſolved by the words of the act itſelf: The regiſter book of marriages is of the goods of the pariſh, and conſequently the churchwardens (and not the miniſter) ought to have the keeping thereof; and the act ſays, all marriages celebrated in any church or chapel, or *within any ſuch pariſh or chapelry*, ſhall be entred in ſuch regiſter; and therefore if the churchwardens ſhall refuſe to produce the regiſter book for that purpoſe, they may be compelled thereunto by legal proceſs: for where a thing by any act of par-

liament is required to be done; that alſo is required without which the thing itſelf cannot be.

Another doubt hath been made, by what *name* the wife ſhall ſubſcribe the regiſter, whether by the name which ſhe had before marriage, or by the newly acquired name of her huſband. In Scotland, the wife retains the name which ſhe had before marriage; but in England the caſe is otherwiſe: for by the marriage ſhe loſes her former name, and legally receives the name of her huſband. As appears from a pretty ſtrong caſe, *Bon* v. *Smith*, *M.* 38. *El.* a man had iſſue a ſon and a daughter, and deviſed his land to his ſon in tail; and if he died without iſſue, that it ſhould remain to the next of his name; and died. The ſon died without iſſue; the daughter being then married, the queſtion was, whether ſhe ſhould have this land. And it was held by the court, that ſhe ſhould not. For ſhe had loſt her name by her marriage. But it ſhould go to the next heir male of the name. But if ſhe had not been married at the time of her brother's death, ſhe ſhould have had it; for ſhe was the next of the name. *Cro. Eliz.* 532.

IX. *Certificate of marriage.*

By the 5 *W. c.* 21. For every piece of vellum, parchment, or paper, upon which any certificate of marriage (except of the marriage of a ſeaman's widow) ſhall be ingroſſed or written, ſhall be paid a ſtamp duty of 5 s. And if any perſon ſhall write ſuch certificate upon the ſame before it be ſtamped, he ſhall forfeit 5 l.

X. *Trial of marriage.*

By the eccleſiaſtical judge.

1. Dr *Godolphin* ſays, that marriage was at firſt tried in the temporal courts; but afterwards by the conceſſion of princes, ſuch cauſes were determined in the ſpiritual courts. *God.* 489.

And the reaſons why the cognizance thereof hath been permitted to the eccleſiaſtical judge, are divers; eſpecially becauſe matrimony was heretofore a ſacrament of the church; and the office being performed by clergymen, this of conſequence brings the performance under the dioceſan's inſpection; and in the caſe of the levitical degrees in particular, eccleſiaſticks are preſumed to be the beſt judges of what is prohibited by God's law.

2. The

2. The lawfulneſs of marriage is to be tried by the biſhop's certificate, upon an iſſue, *accoupled in lawful matrimony or not*; as in a writ of dower, appeal, baſtardy, or the like. 1 *Inſt.* 134. As to the lawfulneſs of marriage.

But whether a woman is a feme covert, or whether ſhe is the wife of ſuch a perſon, is triable by a jury upon ſuch an iſſue. Therefore a marriage *de facto*, or in reputation (as amongſt the quakers) hath been allowed by the temporal courts to be ſufficient to give title to a perſonal eſtate, becauſe the lawfulneſs of the marriage is not in iſſue, or the point to be tried. For the iſſue is whether a marriage was contracted between the parties or not, or whether the parties lived in a married eſtate, where the legality of it doth not come in queſtion. *Wood.* *b.* 1. *c.* 6.

In the act of 6 & 7 *W.* *c.* 6. laying a duty upon marriages; quakers and jews, cohabiting as man and wife, were required to pay the ſaid duty, altho' not married *according to the law of England:* and there was a proviſo, that nothing therein contained ſhould be conſtrued to make good or effectual in law any ſuch marriage or pretended marriage; but that they ſhould be of the ſame force, and no other, as if the ſaid act had not been made.

But in the act of the 26 *G.* 2. *c.* 33. there is no proviſo of the like purport; but rather the act proceeds upon a ſuppoſition that ſuch marriages are good and valid.

And in the aforeſaid caſe of *Haydon* and *Gould*, it was ſaid, that tho' the huſband, demanding a right due to him as huſband, by the eccleſiaſtical law, muſt prove himſelf a huſband according to that law, before he can be intitled to it; and if he do not, ſhall not reap benefit by his own fault: yet the wife who is the weaker ſex, and children who were in no fault, may intitle themſelves to a temporal right, by ſuch marriage; which (as was urged) cannot be called a mere nullity, becauſe by the law of nature the contract was ſufficient; but only an irregularity, in not complying with a poſitive law. *Gibſ.* 430.

3. In writs of dower or other writs brought in the king's temporal courts, if iſſue be joined upon *not accoupled in lawful matrimony*, this being a cauſe which is merely eccleſiaſtical, the trial thereof muſt be by the biſhop or ordinary, upon an inquiſition taken before him as judge. Which is after this manner: The king firſt ſends his writ to the biſhop to make the inquiry; for the Biſhop's certificate.

eccleſiaſtical judge, before he hath received the king's writ, may not of himſelf inquire of the lawfulneſs of the matrimony; but after ſuch time as he hath received the ſaid writ to make the inquiry, he muſt not ſurceaſe for any appeal or inhibition, but muſt proceed until he hath certified the king's court thereof: and then when the biſhop hath received the king's writ, he doth give notice thereof unto the party who took exception to the matrimony at his dwelling houſe if he hath any within the dioceſe, to ſpeak at a day prefixed by him againſt the matrimony if he will; and after ſuch notice given, whether the party come or not, the witneſſes of the demandant to prove the legality of the matrimony are taken, and admitted by the biſhop, if no ſufficient exception be taken to the witneſſes. After the depoſitions taken, they are publiſhed, and certified into the king's court where the iſſue was joined, by letters under the ſeal of the biſhop, importing that in purſuance of the ſaid writ he hath made due inquiry, according to the eccleſiaſtical laws, into the matters therein contained; and that he hath found by lawful proofs, and other canonical requiſites in that behalf, that ſuch perſon (as the caſe ſhall be) was or was not accoupled in lawful matrimony. For he muſt certify the point in iſſue generally, and not make a ſpecial verdict of it, or expreſs the manner of the marriage at large. And after ſuch certificate made, there ſhall be no appeal, but the ſame certificate ſhall be a bar and conclude all parties for ever. And after ſuch certificate, and re-ſummons of the tenant in the king's temporal court, judgment ſhall be given for the plaintiff. *Hughes* 293, 294.

Prohibition. 4. In the caſe of *Harriſon* and *Burwell* before mentioned, it was obſerved, that no prohibition was to be found in the regiſter or elſewhere, concerning the queſtioning of any marriage in the ſpiritual court, in all the time before the acts of parliament, and long after ſome of them; and it was alſo confeſſed, that neither the act of the 25 *H.* 8. nor 28 *H.* 8. gave any juriſdiction to the temporal courts concerning marriages, more than they had before; being acts only directory to the eccleſiaſtical proceeding in matters of marriage. But it was declared, that by the 28 *H.* 8. the temporal courts are become the proper judges what marriages are within or without the levitical degrees, and are to prohibit the ſpiritual courts if they impeach any perſons for marriages without thoſe degrees. But *Vaughan* declared in this caſe (and repeated

repeated that declaration in the caſe of *Hill* and *Good)* that if granting prohibitions to the ſpiritual courts in caſes of matrimony, were res integra now, he ſaw no reaſon why they ſhould be granted in any caſe; but that there having been ſo many precedents of prohibitions, and no complaint, or at leaſt redreſs, in parliament, they could not take upon them to alter the courſe of the law ſo long practiſed. *Gibſ.* 413.

The latter of theſe two caſes, was in the 25 *C.* 2; and in the 34 *C.* 2. a prohibition was prayed to the ſpiritual court at York, to hinder a proſecution there for marrying the ſiſter's daughter. But it was denied by the whole court upon this general reaſon; becauſe it is a cauſe of eccleſiaſtical cognizance, and divines better know how to expound the law of marriages than the common lawyers; and tho' ſometimes prohibitions have been granted in cauſes matrimonial, yet if it were now res integra, they would not be granted. And it being ſuggeſted in that caſe, that the iſſue of the marriage would be baſtardized in caſe of a divorce, and deprived of certain lands ſettled upon them in marriage; the court ſaid, this was not ſufficient matter of ſuggeſtion, for here the ſpiritual court held not plea of the temporal inheritance directly, but only conſequentially; for which if they ſhould be prohibited, they would have nothing left. *Gibſ.* 413. *Raym.* 464. *Skin.* 37.

And in the caſe of *Denny* and *Aſhwell*, *E.* 3 *G.* a prohibition was denied to a ſuit in the ſpiritual court, for a perſon's marrying his wife's ſiſter's daughter. *Str.* 53.

5. The proof of a marriage may be by witneſſes who were preſent at the ſolemnization; by cohabitation of the parties; by publick fame and reputation; by confeſſion of the married perſons themſelves, altho' their acknowledgment might only be to avoid the puniſhment of fornication; and by divers other circumſtances; which if they amount to half proof, ought to be extended in favour of marriage rather than contrary to it. *Wood Civ. L.* 122. Evidence.

But now, ſince the ſtatute of the 26 *G.* 2. *c.* 33. the regiſter book ſeems to be intended as the proper, altho' not the only evidence in this matter; for if there ſhall be any doubt as to the identity of the perſons, or the like, the regiſter in this reſpect can be no evidence at all.

In the caſe of *St Devereux* and *Muchdewchurch*, *E.* 2 *G.* 3. with regard to the ſettlement of a poor perſon, there was proof

proof of a marriage by two witneſſes, who ſwore they were preſent on February the 7th, 1758, when a marriage was ſolemnized in the pariſh church of *St Devereux*, between *John* and *Suſannah Meredith* by the miniſter of the pariſh by banns. An entry was made in the regiſter, that they were married by banns: but it was not ſigned by the miniſter, parties, or witneſſes. Lord *Mansfield*, chief juſtice, held this to be a ſufficient proof of the marriage, ſo as to fix the ſettlement of the wife in the huſband's pariſh; but ſaid, he would *ex officio* grant a rule upon the miniſter, to ſhew cauſe why an information ſhould not be granted againſt him, for not atteſting the entry agreeable to the ſtatute.

In truth, there is a great miſtake in many perſons, ſuppoſing, where an act of parliament inflicteth no ſpecial penalty for diſobedience, that they may tranſgreſs ſuch act, without any danger of being called to account; whereas nothing is more certain, than that where an act appointeth no particular puniſhment, the offender is liable to be puniſhed by fine and impriſonment, upon indictment or information, at the diſcretion of the court. So that an act inflicting no particular penalty, is in the higheſt degree penal; ſo far as a man's liberty or property may be affected. Which conſideration is applicable, not only to the preſent caſe, where regiſters are not regularly kept according to the ſtatute; but alſo to the caſe, where ſurrogates ſhall grant licences to marry in pariſhes or places where neither of the parties doth inhabit; or where a clergyman ſhall preſume to marry ſuch perſons, neither of them being his own pariſhioners: As alſo, where a miniſter ſhall take upon him to publiſh the banns, not immediately after the ſecond leſſon, as this act requireth; but after the Nicene creed, as was before injoined by the rubrick. For if a father ſhould attend, immediately after the ſecond leſſon, to forbid the banns where his child is under age; and no publication being then made, ſhould go away, and the publication afterwards proceed; the clergyman, making ſuch publication, would not be in a deſirable ſituation. Indeed, it doth not appear, why the time, as it is now limited, immediately after the ſecond leſſon, is more proper than the other time was, after the Nicene creed; or rather, it ſeemeth to be leſs proper, becauſe immediately after the ſecond leſſon the publication makes a manifeſt break and interruption in the ſervice; but after the Nicene creed there is a pauſe, that part of the ſervice being then compleated.

pleated. However, ſo the matter ſtands; and it is not in the diſcretion of any private perſon to judge of the propriety or impropriety; and therefore, this being the law, the rubrick after the Nicene creed in this particular ought to be altered; and the rather, as it may prevent a miſtake of ſome perſons, who may think that the rubrick in this reſpect is ſtill in force, not conſidering, that altho' the rubrick is confirmed by act of parliament, (and is indeed itſelf part of an act of parliament), yet no maxim in the law is more eſtabliſhed, than that a ſubſequent contrary act virtually repeals a preceding act, ſo far forth as it is contrary; and may alſo prevent perhaps another miſtake of thoſe who may ſuppoſe, that the rubrick, together with the book of common prayer, before it received the ſanction of parliament, having been drawn up by the clergy in convocation, received its whole force by eccleſiaſtical authority, and needed no parliamentary confirmation; but, on the contrary, that the parliament have nothing to do with it, either to confirm or alter it. This was once the notion of eccleſiaſticks; but the foundation thereof was aboliſhed, with the papal power, out of this realm, above 200 years ago. What now remains of it, if any thing doth remain, is a ſhadow without any ſubſtance. An empire within an empire, two diſtinct legiſlatures in one kingdom independent of each other, and both of them pretending to be abſolute, have been long ſince found to be abſurd and incompatible.

In the caſe of *Morris* and *Miller*, *E.* 7 *G.* 3. The queſtion was, Whether to ſupport an action for a criminal converſation, there muſt not be proof of an actual marriage? The fact was, they were married at May-Fair chapel. The regiſter or books could not be admitted in evidence. *Keith*, who married them, was tranſported: and the clerk, who was preſent, was dead. So that the plaintiff could not prove the actual marriage, by any evidence. But the plaintiff's witneſſes proved articles between him and his wife, made after marriage, for the ſettling of the wife's eſtate, with the privity of relations on both ſides. They proved cohabitation, name, and reception of her by every body as his wife. And they proved that the defendant Miller confeſſed to the landlord of the lodgings that ſhe was the plaintiff's wife, and that he had committed adultery with her. — By lord Mansfield chief juſtice: I do not at preſent remember any action for criminal converſation, where an actual marriage was not proved. Proof of actual marriage is always

always uſed and underſtood in oppoſition to proof by cohabitation, reputation, and other circumſtances from which a marriage may be inferred. So alſo in proſecutions for bigamy, a marriage in fact muſt be proved. And the whole court were clearly of opinion, that to ſupport this action for criminal converſation, proof of actual marriage is neceſſary; and that acknowledgment, cohabitation, and reputation are not ſufficient. *Bur. Mansf.* 2057.

Sentence in the ſpiritual court concluſive.

6. *H.* 7 *G.* 2. Before lord *Hardwick* chief juſtice, at *niſi prius* in Middleſex. There was an action for maliciouſly procuring the plaintiff's wife to exhibit articles of the peace againſt him, and for living with her in adultery. The plaintiff proved a marriage, by the parſon and a woman, and alſo the conſummation. To encounter which, the defendant produced a ſentence of the conſiſtory court of London, in a cauſe of jactitation of marriage brought by the woman againſt the plaintiff, wherein ſhe was declared free from all contract, and perpetual ſilence impoſed upon the plaintiff: which ſentence was pronounced ſince iſſue joined in this cauſe. And the chief juſtice ruled this to be concluſive evidence, till rèverſed by appeal. *Str.* 960.

And a few days afterwards, at Guildhall, in another cauſe, between *Dacaſta* and *Villa Real*, which was an action upon a contract of marriage *per verba de futuro*, brought by the gentleman againſt the lady, who pleaded *non aſſumpſit*; when the plaintiff had opened his caſe, the defendant offered in evidence a ſentence of the ſpiritual court in a cauſe of contract, where the judge had pronounced againſt the ſuit for a ſolemnization in the face of the church, and declared Mrs. *Villa Real* free from all contract. And the chief juſtice held this to be proper and concluſive evidence on *non aſſumpſit*; that it was a cauſe within their juriſdiction, tho' the contract was *per verba de futuro*, and tho' the ſuit there is *diverſo intuitu*, being for a ſpecific performance, as far as admonition will go; and this, for damages. Yet contract or no contract is the point in iſſue in both. And the plaintiff was nonſuit. And herein was cited the caſe of *Hatfield* againſt *Hatfield*, in the houſe of lords, in the year 1725; where, on an appeal from Ireland, the caſe was, that a woman brought a bill againſt her ſuppoſed huſband's ſon by a former wife; he inſiſted, ſhe never was married to his father, but to one *Porter*, whoſe marriage with her was proved, and a releaſe from him. She upon this ſued

Porter

Porter in the ſpiritual court in a jactitation cauſe, and obtained ſentence againſt him; and then made that her caſe in chancery, where it was held to be concluſive evidence. And the opinion was affirmed here upon appeal. *Str.* 961.

And in the common pleas, *M.* 11 *G.* 2. *Prudam* againſt *Philips*; *Reeve* chief juſtice held ſuch a ſentence concluſive, and would not receive evidence of fraud or colluſion in obtaining it. *Str.* 961.

XI. *Divorce.*

Cauſes of divorce.

1. By the canon law a divorce is not permitted without ſufficient cognizance had of the cauſe. But by the civil law, divorces were often made thro' heat of anger, when the Romans had a mind to put away their wives, by ſending them a bill of divorce by one of their freed-men, who was to acquaint the wife with the purpoſe and intention of her huſband. *Ayl. Par.* 225.

Dr Ayliffe ſays, By the papal canon law there are only five cauſes of divorce; to wit, adultery, impotency, cruelty, infidelity, and entring into religion. *Ayl. Par.* 226. — Unto which ought to have been added, conſanguinity.

Two kinds of divorce.

2. There be two kinds of divorces: the one that diſſolveth the marriage, *a vinculo matrimonii*, as for conſanguinity; and the other *a menſa et thoro*, as for adultery, becauſe that divorce by reaſon of adultery cannot diſſolve the marriage *a vinculo matrimonii*, for that the offence is after the juſt and lawful marriage. 3 *Inſt.* 88.

A vinculo.

3. Cauſes for ſeparation a vinculo, are conſanguinity or affinity within the degrees prohibited, alſo impuberty or frigidity; where the marriage it ſelf was merely void ab initio, and the ſentence of divorce only declaratory of its being ſo. Inſomuch that in debt upon an obligation, tho' the defendant pleaded that at the time of the bond ſhe was wife to a perſon there named; yet the plaintiff ſhewing that a former wife was alive at the time of his marrying the defendant, and that thereupon the marriage with him had been adjudged null and void in the ſpiritual court, judgment was given againſt her, becauſe the marriage being merely void, ſhe was always ſole: And it was further ſaid, that in ſuch caſe the divorce was only declaratory, and there needed not any ſuch ſentence. *Cro. El.* 857. *Gibſ.* 446.

The

The effects of that original voidance and nullity are, that the wife is barred of dower, and the iſſue are illegitimate; and that the perſons ſo divorced may marry any others. *Gibſ.* 446.

Concerning divorce a vinculo in caſe of *impuberty*, or the male or female's marrying under the marriageable years, that is, the firſt under fourteen, or the ſecond under twelve; the books of common law do confirm and ratify this nullity; not only by declaring, that in caſe of ſuch divorce, the woman may have an aſſize for the land given in frank marriage, but alſo in affirming further, that tho' the man hath iſſue by ſuch marriage, and is divorced, and marries again and hath iſſue, and dies, the iſſue of the ſecond wife ſhall be his lawful heir; nor will any averment of conſenting and living together after the marriageable years be received or admitted in the temporal court, after a divorce in the ſpiritual court made upon the original nullity, and unrepealed. *Gibſ.* 446.

In like manner, do the books of common law reſolve, in caſe of divorce *a vinculo* for *frigidity*, after three years trial and examination, and ſentence in the ſpiritual court, for the perpetual impotency of generation. As it was in *Bury*'s caſe, *M.* 40 & 41 *El.* who was ſo divorced, but afterwards married another wife, and had children by her: Upon which it was urged, that the church being evidently deceived as to his perpetual impotency, the divorce thereupon was null; and if ſo, that the ſecond marriage was unlawful, and the iſſue illegitimate. But the court reſolved, that ſince there had been a divorce for frigidity or impotency, it was clear that each of them might lawfully marry again; and tho' it ſhould be allowed, that the church appearing to have been deceived in the foundation of their ſentence, the ſecond marriage was voidable, yet till it ſhould be diſſolved, it remained a marriage, and the iſſue during the coverture lawful. *Gibſ.* 446.

But tho' a ſentence of divorce, given in the ſpiritual court, may be repealed after the death of the parties; yet if any of the parties be dead, before ſuch ſentence given, ſuit cannot be in the ſpiritual court to declare the marriage void, and baſtardize the iſſue; the marriage being already diſſolved by death, and the trial whether legitimate or not, in order to inheritance, originally belongeth to the king's court; and the ſentence in the ſpiritual court being given only *pro ſalute animæ*, it comes too late. *Gibſ.* 446. *Vinor.* Baſt. G. 4.

4. Divorce

4. Divorce *a thoro et menſa* is, when the uſe of matrimony, as the cohabitation of the married perſons, or their mutual converſation, is prohibited for a time, or without limitation of time. And this is, in caſes of adultery, cruelty, or the like; in which the marriage having been originally good, is not diſſolved, nor affected as to the vinculum or bond. And this is ſo by the common as well as by the canon law; inſomuch that the wife ſo divorced, having ſued for a legacy left to her, and the huſband having given a releaſe, ſuch releaſe hath been adjudged good, notwithſtanding the divorce. Nor doth this kind either bar the wife of her dower, or baſtardize the children; but intitles her to alimony, which the eccleſiaſtical court aſſigns, in proportion to the circumſtances and condition of her huſband; and no prohibition will lie. But as to the having again the goods ſhe brought, or ſo much as is not ſpent; that, in the law books, is meant only of divorce *a vinculo*, or when there was a nullity of marriage ab initio, ſo as to be really no marriage. *Gibſ.* 335. A thoro et menſa.

But the children which ſhe hath after the divorce, ſhall be deemed baſtards; for a due obedience to the ſentence will be intended, unleſs the contrary be ſhewed. 1 *Salk.* 123.

By *Can.* 107. In all ſentences pronounced only for divorce and ſeparation *a thoro et menſa*, there ſhall be a caution and reſtraint inſerted in the act of the ſaid ſentence, that the parties ſo ſeparated ſhall live chaſtly and continently; neither ſhall they, during each other's life, contract matrimony with other perſon. And for the better obſervation of this laſt clauſe, the ſaid ſentences of divorce ſhall not be pronounced, until the party or parties requiring the ſame, have given good and ſufficient caution and ſecurity into the court, that they will not any way break or tranſgreſs the ſaid reſtraint or prohibition.

And this doctrine, that neither of the parties ſhall contract matrimony during each other's life, hath been confirmed by the temporal judges in the caſe of *Foliambe*, who having been divorced from his wife for incontinency on her part, married again during her life; and the ſecond marriage was declared to be void, becauſe it was only a divorce *a thoro et menſa*. And the ſame is the doctrine of the canon law; and of the ſame tenor are the ancient conſtitutions of the engliſh church. Nevertheleſs divers acts of parliament, for the divorce of particular perſons in the caſe of adultery, agreeably to what the

Reformatio legum did propoſe in general, have allowed a liberty to the innocent perſon of marrying again. *Gibſ.* 446. *Mo.* 683.

And by *Can.* 108. If any judge, giving ſentence of divorce or ſeparation, ſhall not fully keep and obſerve the premiſſes; he ſhall be, by the archbiſhop of the province, or by the biſhop of the dioceſe, ſuſpended from the exerciſe of his office for the ſpace of a whole year; and the ſentence of ſeparation ſo given, contrary to the form aforeſaid, ſhall be held void to all intents and purpoſes of the law, as if it had not at all been given or pronounced.

A divorce for *adultery*, was anciently *a vinculo matrimonii*; and therefore in the beginning of the reign of queen Elizabeth, the opinion of the church of England was, that after a divorce for adultery, the parties might marry again: but in *Foliambe*'s caſe aforeſaid, *H.* 44 *El.* in the ſtar chamber, that opinion was changed; and archbiſhop Bancroft, by the advice of divines, held that adultery was only a cauſe of divorce *a menſa et thoro*. 3 Salk. 138.

Divorce not to be on confeſſion of the parties.

5. *Can.* 105. Foraſmuch as matrimonial cauſes have been always reckoned and reputed amongſt the weightieſt, and therefore require the greater caution when they come to be handled and debated in judgment, eſpecially in cauſes wherein matrimony, having been in the church duly ſolemnized, is required upon any ſuggeſtion or pretext whatſoever to be diſſolved or annulled; we do ſtraitly charge and injoin, that in all proceedings to divorce and nullities of matrimony, good circumſpection and advice be uſed, and that the truth may (as far as is poſſible) be ſifted out by the depoſition of witneſſes and other lawful proofs and evictions, and that credit be not given to the ſole confeſſion of the parties themſelves, howſoever taken upon oath, either within or without the court.

The rule of the canon law upon this head, is in a decretal epiſtle of pope *Celeſtine* the third; who injoineth, that the parties be not ſeparated by their own confeſſion only, or by the rumour of the neighbourhood: For if they did believe that the eccleſiaſtical judge would concur with them, ſome perſons would collude together, and confeſs inceſt, for the avoiding of their marriage: And the rumour of the neighbourhood ought not ſo far to be judged valid, as to diſannul marriages; unleſs other reaſonable and probable evidences do occur. *Gibſ.* 445.

This prohibition againſt accepting the ſole confeſſion of the parties, was expreſsly renewed in the canons of 1597.

And how great need there was of ſuch a prohibition, will appear to any one who ſhall conſult the ancient acts of courts before thoſe times, and ſhall ſee there how common it was to pronounce ſeparations upon the ſole confeſſion of the parties, and how numerous theſe ſeparations were, ſo long as that continued to be the rule. *Gibſ. ibid.*

In 2 *Mod.* 314. there is a remarkable inſtance of this kind; wherein a prohibition was prayed in behalf of the children, who were in danger to be baſtardized by ſuch a fraud. *Collet* married *Mary*, and had children by her; againſt whom it was libelled in the ſpiritual court, that he had before married *Anne* the ſiſter of *Mary*: He and *Anne* appear, and confeſs the matter; upon which (as the report ſets forth) a ſentence of divorce was to paſs. Whereas in truth, *Collet* was never married to *Anne*, but it was a contrivance between him and his wife to get themſelves divorced, after they had lived together ſixteen years. *Gibſ.* 445.

And ſometimes women were ſuborned to perſonate the wife, who were to come and confeſs the adultery; and ſo the real wife might be divorced, whilſt ſhe knew nothing at all of the matter. And Mr Clerke ſays, he knew two inſtances in his time, where ſuppoſititious women (not the wives of the parties) were ſuborned to come and confeſs the adultery, as if they had been the real and true wives. 1 *Ought.* 316.

6. If the party accuſed ſhall prove, that the accuſer hath alſo committed adultery; this is a compenſation for the crime, and the accuſer ſhall not prevail in his ſuit. 1 *Ought.* 317. What ſhall be deemed a compenſation of the crime.

In like manner, if the party accuſed ſhall prove, that the accuſer before the commencement of the ſuit had probable knowledge of the crime committed, and yet afterwards had carnal intercourſe with the accuſed; in ſuch caſe, the accuſer ſhall not obtain a ſentence of divorce: for the crime ſhall be ſuppoſed to have been remitted. 1 *Ought.* 317.

And probable knowledge in this caſe is, if the huſband, ſuſpecting his wife, ſhall charge her with the offence, and ſhe confeſs it: Or if the witneſſes, whom he ſhall afterwards produce, ſhall ſignify to him before the commencement of the ſuit, that they can teſtify the offence from their own ſight and knowledge: Or if the huſband ſhall take her in the act of adultery: In all which caſes, nevertheleſs, if the huſband ſhall afterwards have carnal knowledge of his wife, he remitteth the injury, and ſhall

not have a divorce. Therefore if he deſires to be divorced, he muſt abſtain from her bed, altho' he doth not preſently turn her out of doors. 1 *Ought.* 317.

Sentence of divorce.

7. *Can.* 106. No ſentence ſhall be given either for ſeparation *a thoro et menſa*, or for annulling of pretended matrimony, but in open court, and in the ſeat of juſtice, and that with the knowledge and conſent either of the archbiſhop within his province, or of the biſhop within his dioceſe, or of the dean of the arches, the judge of the audience of Canterbury, or of the vicars general, or other principal officials, or ſede vacante of the guardians of the ſpiritualties, or other ordinaries to whom of right it appertaineth, in their ſeveral juriſdictions and courts, and concerning them only that are then dwelling under their juriſdictions.

Coſts.

8. *M.* 1 *Car. Green's* caſe. *Green* prayed a prohibition to the eccleſiaſtical court at Saliſbury, becauſe his wife ſued him there to be ſeparated from him, *propter ſævitiam*. And ſentence was there given for the huſband againſt the wife; and he was inforced to pay all the coſts for his wife. And afterwards ſhe appealed; and becauſe the huſband would not anſwer the appeal againſt himſelf, and pay for the tranſmitting of the record, he was therefore excommunicated; and now prayed a prohibition. The court conceived the caſe to be very hard, that he ſhould be inforced to ſpend his money againſt himſelf. But becauſe it was alledged, that the courſe was ſo in the ſpiritual court, they would adviſe until the next term; and ordered to ſtay their proceedings in the mean time. *Cro. Car.* 16.

XII. *Alimony.*

Alimony of eccleſiaſtical cognizance.

1. The ordinary hath the proper cognizance of alimony, and no other court: It is true, there lies an appeal, but ſtill it is to the eccleſiaſtical judge; and if the perſon condemned will not obey the ſentence of that judge, he may be excommunicated. *Ayl. Par.* 59.

In the caſe of *Angier* and *Angier*, *T.* 1718: The wife by her next friend brought a bill againſt her huſband, for a ſpecial execution of articles, whereby he had agreed with a friend of hers to allow her 52*l* a year ſeparate maintenance. Great miſbehaviour to each other was proved in the cauſe. And it was proved by him, that ſhe had libelled in the ſpiritual court for alimony; and when that cauſe was depending there, theſe articles were made;

and

and that he was deſirous to be reconciled to her, and therefore ſtopped the allowance: It was objected, that this would be decreeing a ſeparation; which belongs to the ſpiritual court: Alimony continues only till the parties are reconciled; and if the articles ſhould be decreed, a future reconciliation could not ſet them aſide. But the lord chancellor decreed an execution. He ſaid it was no invaſion upon the ſpiritual court; and if not decreed here, they can be of no force any where; for the ſpiritual court cannot decree a performance of them. If the huſband make a ſeparate proviſion for her, he is not at law chargeable with her debts. And he ordered the maſter to ſettle an indemnity for him againſt her debts; and decreed the arrears; and ſaid, it was not a decree for alimony or ſeparation; for when they come together again, the articles would be no longer binding. *Prec. Cha.* 496.

2. A wife cannot ſue for alimony, during the cohabitation. *Vin.* Baron and Feme. X. a. To be only while the parties live ſeparate.

And although they be ſeparated, yet if the huſband maintains the wife, it bars her claim in reſpect thereof. *Id.*

Alſo if ſhe elopes from her huſband, the law will not compel the huſband to allow her alimony. *Ayl. Par.* 58.

3. A wife having ſeparate allowance, and being ſeparated, may make a gift of what ſhe ſaves, as a feme ſole. *Vin. ibid.* Wife may diſpoſe thereof.

And in the caſe of *Dutton* and *Dutton*, *T.* 1 *G.* Lord chancellor Cowper allowed the wife to keep the plate which ſhe had bought, or had been given to her, during the ſeparation. *Id.*

So if ſhe ſue for defamation or other injury, and has coſts, and the huſband releaſes them, this ſhall not bar the wife; for theſe coſts come in lieu of what ſhe hath ſpent out of her alimony, which is a ſeparate maintenance, and not in the power of her huſband. 1 *Salk.* 115.

XIII. *Elopement.*

1. *E. An. Robinſon* and *Greinold.* By *Holt* chief juſtice: Tho' the wife be ever ſo lewd, yet while ſhe cohabits with her huſband, he is bound to find her neceſſaries, and to pay for them; for he took her for better for worſe: So if he runs away from her, or turns her away. But if Wife living with the huſband.

ſhe goes away from him; when ſuch ſeparation becomes notorious, whoever gives her credit, doth it at his peril: for the huſband is not liable, unleſs he takes her again; for then it is as if a woman had eloped at common law, ſhe thereby loſt her dower; but if ſhe came again, and the huſband received her, the right of dower is revived. 1 *Salk.* 119.

Separating by conſent.

2. *M.* 8 *W. Todd* and *Stokes.* The plaintiff was an apothecary, and ſerved the defendant's wife with phyſick, who lived ſeparate from her huſband, and had a ſeparate allowance of 201 a year. And by *Holt* chief juſtice: If huſband and wife ſeparate by conſent, and ſhe hath a ſeparate allowance; it is unreaſonable ſhe ſhould have it ſtill in her power to charge him; and it is not to be preſumed, but tradeſmen that deal with her truſt her on her own credit, and not on the credit of her huſband; and a perſonal notice is not neceſſary, it is ſufficient that it be publickly and commonly known. 1 *Salk.* 116. *L. Raym.* 444.

Turned away.

3. *H.* 10 *W. Longworthy* and *Hockmore.* It was ruled by *Holt* chief juſtice, that if a huſband turn away his wife, and afterwards ſhe takes up neceſſaries upon credit of a tradeſman; the huſband ſhall be liable to the tradeſman, to pay for them. But if the wife elopes, tho' the tradeſman hath no notice of the elopement, if he gives credit to the wife, the huſband is not liable. If the wife tells her huſband that ſhe will buy ſuch a thing, which is neceſſary, and the huſband tells her that he will not allow it, and forbids the tradeſman to give his wife credit for it, and afterwards the wife takes up that thing of the ſame tradeſman, upon credit given her by him; the huſband is not liable. It is ſufficient for the huſband to give general notice, that people do not give credit to his wife. *L. Raym.* 444.

E. 2 *An. Etherington* and *Parrot.* By *Holt* chief juſtice: If a huſband turns away his wife, he gives her credit wherever ſhe goes, and muſt pay for neceſſaries for her. But if ſhe runs away from her huſband, he ſhall not be bound to any contract ſhe makes. On the other ſide, while they cohabit, the huſband ſhall anſwer all contracts of hers for neceſſaries; for his aſſent ſhall be preſumed to all neceſſary contracts, upon the account of cohabiting, unleſs the contrary appear. But if the contrary appear, as by notice, there is then no room for ſuch a preſumption. 1 *Salk.* 118.

M. 18 *G.* 2. *Bolton* and *Prentice.* In *aſſumpſit* for goods ſold and delivered to the defendant's wife, the caſe appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's houſe, and the plaintiff furniſhed her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and ſuſpecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever to truſt her again. After this, the defendant and his wife cohabited together for a year; when, without any cauſe appearing, he left her, locked up her cloaths, and upon her finding him out, refuſed to admit her, and ſtruck her, and declared he would not maintain her, or pay any body that did. In this diſtreſs, ſhe borrowed cloaths of her friends, and applied to the plaintiff, who furniſhed her with neceſſaries according to the defendant's degree; which the defendant refuſing to pay for, this action was brought: and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right; for whilſt they were at the plaintiff's there was a particular reaſon for the particular prohibition; yet the cauſeleſs turning her away deſtitute afterwards, gave her the general credit again: and if a huſband ſhould be allowed, under the notion of a particular prohibition, to deſtroy her obtaining credit in one place, he may in the ſame manner prevent it with all people ſhe is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. *Str.* 1214.

4. *T.* 4 *G.* 2. *Child* and *Hardyman.* Action for linen ſold to the defendant's wife. Upon *non aſſumpſit*, the delivery was proved. And the defendant proved that ſhe had lived in a very lewd manner; one Mr *Nott* frequently coming to her at her huſband's houſe, and they were locked up together in a bed-chamber; and other indecencies paſſed between them. And it was alſo proved, that ſhe ſeveral times went to the houſe of this *Nott*, a gentleman in *Wiltſhire*, who lived within three miles of the defendant's houſe. It did not appear farther than that he diſliked her going and ſtaying at Mr *Nott*'s. But under theſe circumſtances, the huſband and wife continued to live together. Afterwards, ſhe went away from him, and went to *Marlborough*, where ſhe reſided for ſome time; but after the leaving her huſband's houſe it did not appear that ſhe ever ſaw Mr *Nott*, or lived in a lewd manner. After ſome time, ſhe ſent *Lucas* an attorney to her huſ-

Leaving the huſband without conſent.

band, to desire that he would receive her again; the husband told him, that if she came again, she should never sit at the upper end of his table, nor have the government of the children; but should live in a garret. Then *Lucas* proposed to him, to make her an allowance, and proposed about 80 or 100 l a year, he being worth about 5 or 600 l a year. But that was not complied with; and afterwards she came to *London*, and bought the linen to the amount of 53 l. By *Raymond* chief justice: If a woman elopes from her husband, tho' she does not go away with any adulterer, or in an adulterous manner; the tradesman trusts her at his peril, and the husband is not bound. And this hath been so adjudged in two or three cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he doth not absolutely refuse to receive her again; but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuit. *Str.* 875.

Living with an adulterer.

5. By the 13 Ed. 1. st. 1. c. 33. *If a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon; except that her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him; in which case, she shall be restored to her action.*

Willingly leave her husband, and go away, and continue] Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not willingly but against her will, and afterwards consent, and remain with the adulterer without being reconciled, she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower. 2 *Inst.* 435.

And continue with her advouterer] Albeit she doth not continually remain in avowtry with the adulterer, yet if she be with him and commit adultery, it is a tarrying within this statute. 2 *Inst.* 435.

And if she once remain with the adulterer in avowtry, and afterwards he keepeth her against her will; or if the advouterer turneth her away, yet she shall be said to continue with the advouterer within this statute. 2 *Inst.* 435.

To

To demand her dower] In this caſe of elopement, and remaining with the adulterer, the wife could not be barred of her dower by the common law, altho' a divorce were ſued or had for the ſame adultery: but by a divorce *a vinculo*, in the life time of her huſband, ſhe loſeth her dower by the common law. 1 *Inſt.* 33.

M. 12 *G. Morris* and *Martin.* Action for meat and other things provided for the defendant's wife. The defendant proved ſhe went away from him with an adulterer. *Raymond* chief juſtice held, that the huſband ſhould not be charged for neceſſaries for her, tho' the plaintiff who provided for her had no notice; and he ſaid, chief juſtice *Holt* always ruled it ſo. *Str.* 647.

T. 12 *G. Mainwaring* and *Sands.* In an action againſt the huſband for a laced head ſold to the wife, it was proved, that the wife lived from her huſband in adultery, and that ſhe told the plaintiff ſhe had a huſband, but that ſignified nothing, for ſhe would pay him herſelf. *Raymond* chief juſtice held the defendant not chargeable, and ſaid he ſhould have ruled it ſo, if there had been no actual notice, which only ſtrengthened the caſe. *Str.* 706.

6. *H.* 12 *J. Hyat*'s caſe. *Thomas Hyat* prayed a prohibition to the conſiſtory court of London, for that he was ſued there by his wife to be ſeparated from him *propter ſævitiam*; and ſentence was there given againſt him, that his wife ſhould live from him, and that he ſhould allow her 5 s 6 d weekly, altho' the huſband offered reconciliation, and deſired cohabitation, and proffered caution to uſe her fitly. But it was denied by the court to grant a prohibition; becauſe the court of the ordinary is the proper court for allowance of alimony, and may take order for ſeparation or divorce, if ſhe be cruelly uſed. *Cro. Ja.* 364. Prohibition.

Martyrdom of king Charles the firſt. See Holidays.

Maſt.

MAST is the acorn, nut, or other fruit of the trees of the wood, which is uſually fed upon by the ſwine or other cattle: perhaps from μαστάζω, to champ or chew;

from whence alſo may proceed the ſaxon word *mæſtan*, to fatten. Which is treated of under the title Tithes.

May the twenty ninth. See Holidays.
Methodiſts. See Diſſenters.
Metropolitan. See Biſhops.

Midwives.

HERETOFORE, in caſes of neceſſity, the office of baptizing was frequently performed by the midwife; and it is very probable, that this gave occaſion firſt to midwives being licenſed by the biſhop or his delegated officer. *Watſ. c.* 31. 2 *Burnet's Hiſt. Ref.* 77.

And by ſeveral conſtitutions, the miniſter was required frequently to inſtruct the people, in the form of words to be uſed in ſuch caſes of neceſſity.

In order for a midwife's obtaining a licence, ſhe muſt be recommended under the hands of matrons, who have experienced her ſkill; and alſo of the pariſh miniſter, certifying as to her life and converſation, and that ſhe is a member of the church of England.

The oath to be adminiſtred to a midwife by the biſhop or his chancellor, when ſhe is licenſed to exerciſe that office, is ſaid to have been as followeth:

"You ſhall ſwear, firſt, that you ſhall be diligent "and faithful and ready to help every woman labouring "with child, as well the poor as the rich; and that in "time of neceſſity, you ſhall not forſake the poor wo-"man to go to the rich.

"Item, You ſhall neither cauſe nor ſuffer any woman "to name or put any other father to the child, but only "him which is the very true father thereof indeed.

"Item, You ſhall not ſuffer any woman to pretend, "feign, or ſurmiſe herſelf to be delivered of a child, "who is not indeed; neither to claim any other wo-"man's child for her own.

"Item, You ſhall not ſuffer any woman's child to be "murdered, maimed, or otherwiſe hurt, as much as you "may: and ſo often as you ſhall perceive any peril or "jeopardy either in the woman, or in the child, in any

" ſuch wife as you ſhall be in doubt what ſhall chance
" thereof; you ſhall thenceforth in due time ſend for
" other midwives and expert women in that faculty, and
" uſe their advice and counſel in that behalf.

" Item, You ſhall not in any wiſe uſe or exerciſe any
" manner of witchcraft, charm, or ſorcery, invocation,
" or other prayers, than may ſtand with God's laws and
" the king's.

" Item, You ſhall not give any counſel or miniſter
" any herb, medicine, or potion, or any other thing, to
" any woman being with child, whereby ſhe ſhould de-
" ſtroy or caſt out that ſhe goeth withal before her
" time.

" Item, You ſhall not enforce any woman being with
" child, by any pain or by any ungodly ways or means,
" to give you any more for your pains or labour in
" bringing her to bed, than they would otherwiſe do.

" Item, You ſhall not conſent, agree, give or keep
" counſel, that any woman be delivered ſecretly of that
" which ſhe goeth with, but in the preſence of two or
" three lights ready.

" Item, You ſhall be ſecret, and not open any matter
" appertaining to your office, in the preſence of any
" man; unleſs neceſſity, or great urgent cauſe do con-
" ſtrain you ſo to do.

" Item, If any child be dead born, you yourſelf ſhall
" ſee it buried in ſuch ſecret place, as neither hog or
" dog, nor any other beaſt may come unto it; and in
" ſuch ſort done, as it be not found nor perceived, as
" much as you may: and that you ſhall not ſuffer any
" ſuch child to be caſt into the jaques or any other in-
" convenient place.

" Item, If you ſhall know any midwife uſing or doing
" any thing contrary to any of the premiſſes, or in any
" otherwiſe than ſhall be ſeemly or convenient; you
" ſhall forthwith detect, open or ſhew the ſame to me or
" my chancellor for the time being.

" Item, You ſhall uſe yourſelf in honeſt behaviour
" unto the woman, being lawfully admitted to the room
" and office of a midwife, in all things accordingly.

" Item, That you ſhall truly preſent to my ſelf, or my
" chancellor, all ſuch women as you ſhall know from
" time to time to occupy and exerciſe the room of a
" midwife within my aforeſaid dioceſe and juriſdiction
" of ——— without any licence and admiſſion.

" Item,

" Item, You ſhall not make or aſſign any deputy or " deputies, to exerciſe or occupy under you in your ab- " ſence the office or room of a midwife, but ſuch as you " ſhall perfectly know to be of right honeſt and diſcreet " behaviour; and alſo apt, able, and having ſufficient " knowledge and experience to exerciſe the ſaid room " and office.

" Item, You ſhall not be privy, or conſent, that any " prieſt or other party ſhall in your abſence, or in your " company, or of your knowledge or ſufferance, baptize " any child by any maſs, latin ſervice, or prayers, than " ſuch as are appointed by the laws of the church of " England; neither ſhall you conſent, that any child " born by any woman who ſhall be delivered by you, " ſhall be carried away without being baptized in the " pariſh by the ordinary miniſter where the ſaid child is " born, unleſs it be in caſe of neceſſity baptized pri- " vately according to the book of common prayer: but " you ſhall forthwith, upon underſtanding thereof, either " give knowledge to me the ſaid biſhop, or my chan- " cellor for the time being.

" All which articles and charge you ſhall faithfully " obſerve and keep: So help you God, and by the con- " tents of this book." *Book of oaths.*

If there be a ſuit in the ſpiritual court, againſt a woman for exerciſing the trade of a midwife without licence of the ordinary, againſt the canons; a prohibition lieth: for this is not any ſpiritual function, of which they have cogniſance. 2 *Roll's Abr.* 286.

Mines in the glebe land. See Glebe land.

Monaſteries.

NOTE, the principal parts of this title are extracted from that moſt accurate and valuable work, biſhop *Tanner's Notitia Monaſtica.*

I. Origin

I. *Origin of monaſteries.*
II. *The ſeveral orders of monks.*
III. *Canons.*
IV. *Nuns.*
V. *Friers.*
VI. *Military orders.*
VII. *Of the ſeveral kinds of houſes.*
VIII. *Officers therein.*
IX. *Diſſolution.*
X. *Obſervations.*

I. *Origin of monaſteries.*

The original of *monks* (from the word μονος, ſolus,) ſeemeth to have been this: The perſecutions, which attended the firſt ages of the goſpel, forced ſome chriſtians to retire from the world, and live in deſarts and places moſt private and unfrequented, in hopes to find that peace and comfort among beaſts, which were denied them amongſt men. And this being the caſe of ſome very extraordinary perſons, their example gave ſo much reputation to retirement, that the practice was continued when the reaſon ceaſed which firſt began it. And after the empire became chriſtian, inſtances of this kind were numerous; and thoſe, whoſe ſecurity had obliged them to live ſeparately and apart, became afterwards united into ſocieties.

And in this kingdom in particular, it is not unlikely, but that ſeveral chriſtians, to avoid the heat of perſecution, which raged fiercely here in the time of Dioclesian, about the year 303, might withdraw themſelves into ſolitary places. The troubleſome times which ſoon after followed by the Romans hard uſage of the Britons, and the invaſion of the Scots from Ireland, the Picts and Attacots from the north, and the Saxons and Franks from the eaſt and ſouth, might poſſibly farther incline contemplative perſons to flee into caves, foreſts, and ſuch like ſolitudes, and ſpend their time there in reading the ſcriptures, and other duties of religion, tho' under no tye or vow but what they impoſed upon themſelves.

II. The

II. *The ſeveral of monks.*

Benedictines. 1. The *Benedictine* monks were thoſe who followed the rule of St *Benedict*, or *Bennet*; who was born at Nurſia in the dukedom of Spoletto in Italy, about the year 480. From the colour of their outward habit, they were generally called Black monks. This order is ſaid to have been brought into England, about the year 596. Of this order were all the cathedral priories, except Carliſle; a nd moſt of the richeſt abbies in England. There were alſo nuns, as well as monks, of this order.

Cluniacks. 2. A reformation of ſome things which ſeemed too remiſs in St Benedict's rule, was begun by Bernon, abbot of Gigni in Burgundy, and increaſed and perfected by Odo abbot of *Cluni*, about the year 912; which gave occaſion to the riſe of the *Cluniac* order; which was the firſt and principal branch of the Benedictines. For they lived under the rule of St Benedict, and wore a black habit; but obſerving a different diſcipline, were called by a different name.

William earl Warren, ſon in law to William the conqueror, firſt brought theſe monks into England, and built their firſt houſe at Lewes in Suſſex about the year 1077.

All the monaſteries of this order in England were governed by foreigners; and had more French than Engliſh monks in them. But many of them were afterwards made denizen; and all of them at laſt diſcharged from all ſubjection to the foreign abbies.

There were 27 priories and cells of this order in England.

Grandmontines. 3. The order of *Grandmont* was inſtituted at *Grandmont* in Limoſin in France about the year 1076, by Stephen a gentleman of Auvergne. The monks of it lived under the rule of St Benedict, with ſome little variation. They were brought into England in the reign of king Henry the firſt, and ſeated at Abberbury in Shropſhire; beſides which, it doth not appear that there were more than two other houſes of this order in England, viz. Creſſewell in Herefordſhire, and Groſmont or Eſkedale in Yorkſhire.

Carthuſians. 4. The *Carthuſian* monks were alſo a branch of the Benedictines, whoſe rule they followed, with the addition of a great many auſterities. Their author was one Bruno, born at Cologne in Germany; who firſt inſtituted

this

this order at *Chartreux (Cartuſia)* in the dioceſe of Grenoble in France, about the year 1080.

Their houſes were called *Chartreux* houſes, which by corruption have degenerated into *Charter* houſes.

Their rule was the moſt ſtrict of any of the religious orders; for they were never to eat fleſh, and were obliged to feed on bread, water, and ſalt one day in every week. They wore a hair ſhirt next their ſkins, and were allowed to walk only about their own grounds once a week.

They were brought into England about the year 1180 by king Henry the ſecond; and had their firſt houſe at Witham in Somerſetſhire.

Their habit was all white, except their outward plaited cloak which was black.

There were but nine houſes of monks of this order in England.

5. There was yet another branch of Benedictines called *Ciſtertians*, from *Ciſtertium* or *Ciſteaux* in the biſhoprick of Chalons in Burgundy, where this order was firſt inſtituted by Robert abbot of Moleſme in the year 1098. They were alſo called *Bernardines*, from *St Bernard* abbot of Clairvaux about the year 1116, who was a great promoter of this order. Ciſtertians, or Bernardines.

From the colour of their habit, they were called White monks.

Their monaſteries, which became very numerous in a ſhort time, were generally founded in ſolitary and uncultivated places; and all dedicated to the bleſſed virgin.

Theſe monks came into England in the year 1128; had their firſt houſe at Waverley in Surry; and before the diſſolution had 85 houſes here.

6. The order of *Savigni* or *Fratres Griſei* were founded by Vitalis de Mortain, who began to gather diſciples in the foreſt of *Savigni* in France about the year 1105. He gave his diſciples the rule of St Benedict, with ſome peculiar conſtitutions: And they took a *grey habit*, from whence they were called *fratres griſei*. Vitalis came into England in the year 1120; and preaching here, and converting many, probably introduced his order, which was ſhortly after, (viz. in the year 1148) united to the Ciſtertians. Savignians, or fratres griſei.

7. The order of *Tiron* was inſtituted by St Bernard, who was born in the territory of Abbeville in the year 1046, who ſet up a ſort of monks that took the name of *Tironenſes* Tironenſes.

Tironenſes from their firſt monaſtery, which was founded at *Tiron* about the year 1109. They were reformed Benedictines. There ſeems to have been no houſe in England of this order, and only one abbey in Wales, viz. St Dogmael's (where they were placed about the year 1126), with its dependent priory at Pille, and cell at Caldey.

Culdees. 8. The orders of monks abovementioned, were all that we had in England and Wales, except the *Culdees* or *cultores Dei*; who were Scotch monks, and of the ſame rule with the Iriſh ones. We meet with theſe no where but at St Peter's in York.

And the inſtitution of Scotch monks there, ſeemeth to have ariſen from the connection which was anciently between the metropolitical ſee of York and the kingdom of Scotland; for until about the year 1466, the archbiſhop of York had juriſdiction over all the biſhops of Scotland, who had their conſecration from him, and ſwore canonical obedience to him.

III. *Canons.*

Secular. 1. Beſides the monks, there were alſo *canons* (from κανὼν, regula), which were of two ſorts, regular and ſecular. The ſecular were ſo called becauſe they converſed *in ſæculo*, abroad in the world, performed ſpiritual offices to the laity, took upon them the care of ſouls (which the regulars could not do without diſpenſation), and differed in nothing almoſt from common prieſts, ſave that they were under the government of ſome local ſtatutes. For tho' they were in ſome places confined to live under one roof, as the monks and regular canons did, yet they generally lived apart, and were maintained by diſtinct prebends, almoſt in the ſame manner with the canons and prebendaries of other cathedral and collegiate churches at this day.

Regular. 2. *Regular* canons were ſuch as lived under ſome rule. They were a leſs ſtrict ſort of religious than the monks, but lived together under one roof; had a common dormitory and refectory, and were obliged to obſerve the ſtatutes of their order.

Auguſtines. 3. The chief rule for theſe canons is that of *St Auſtin*, who was made biſhop of Hippo in the year 395. But they were but little known till the tenth or eleventh century, were not brought into England till after the conqueſt,

conqueſt, and ſeem not to have obtained the name of Auſtin canons till ſome years after. The general opinion is, that they came in after the beginning of the reign of king Henry the firſt, about the year 1105.

Their habit was a long black caſſock, with a white rochet over it, and over that a black cloak and hood; from whence they were called black canons regular of St Auſtin.

The monks were always ſhaved; but theſe canons wore beards, and caps on their heads.

There were about 175 houſes of theſe canons, and canoneſſes in England and Wales.

4. But beſides the common and regular ſort of theſe canons, there were alſo the following particular ſorts. Order of St Nicholas.

As firſt, ſuch as obſerved St Auſtin's rule, according to the regulations of *St Nicholas of Arroaſia*; as thoſe of Harewolde in Bedfordſhire, Nutley or Crendon in Buckinghamſhire, Hertland in Devonſhire, Brunne in Lincolnſhire, and Lilleſhul in Shropſhire.

5. Others there were of the rule of St Auſtin, and order of *St Victor*; as at Keynſham and Worſpring in Somerſetſhire, and Wormeſley in Herefordſhire. Order of St Victor.

6. Others of the order of St Auſtin, and the inſtitution of *St Mary of Meretune*, or *Merton*; as at Buckenham in Norfolk. Of St Mary of Merton.

7. The *Præmonſtratenſes* were canons who lived according to the rule of St Auſtin, reformed by St Norbert, who ſet up this regulation about the year 1120, at *Præmonſtratum* in Picardy, a place ſo called becauſe it was ſaid to have been foreſhewn or *Præmonſtrated* by the bleſſed virgin to be the head ſeat and mother church of this order. Theſe canons were, from their habit, called White canons. They were brought into England ſoon after the year 1140, and ſettled firſt at Newhouſe in Lincolnſhire. They had in England a conſervator of their privileges, but were nevertheleſs often viſited by their ſuperiors at Premonſtre, and continued under their juriſdiction till the year 1512, when they were exempted from it by the bull of pope Julius the 2d, confirmed by king Henry the eighth; and the ſuperiority of all the houſes of this order in England and Wales was given to the abbot of Welbeck in Nottinghamſhire—There were about 35 houſes of this order. Præmonſtratenſes,

8. The Sempringham or *Gilbertine* canons were inſtituted by *St. Gilbert* at Sempringham in Lincolnſhire, in the year 1148. He compoſed his rule out of thoſe of St Gilbertines.

Auſtin

Auſtin and St Benedict (the women following the Ciſtertian regulation of St Benedict's rule, and the men the rule of St Auſtin), with ſome ſpecial ſtatutes of their own. The men and women lived in the ſame houſes, but in ſuch different apartments, that they had no communication with each other; and increaſed ſo faſt, that St Gilbert himſelf founded 13 monaſteries of this order, viz. four for men alone, and nine for men and women together, which had in them 700 brethren and 1500 ſiſters. At the diſſolution there were about 25 houſes of this order in England and Wales.

Order of the holy ſepulchre, or holy croſs.

9. Canons regular of the *holy ſepulchre* were inſtituted in the beginning of the 12th century, in imitation of the regulars inſtituted in the church of the holy ſepulchre of our Saviour at Jeruſalem. The firſt houſe they had in England was at Warwick, which was begun for them by Henry de Newburgh earl of Warwick, who died in the year 1123, and perfected by his ſon Roger. They are ſometimes called canons of the *holy croſs*, and wore the ſame habit with the other Auſtin canons, diſtinguiſhed only by a double red croſs, upon the breaſt of their cloak or upper garment. The endeavours of theſe religious for regaining the holy land, coming to nothing after the loſs of Jeruſalem in the year 1188, this order fell into decay, their revenues and privileges were moſtly given to the Maturine friers, and only two houſes of them continued to the diſſolution.

IV. *Nuns.*

Nun, called by the latins *nonna*; as alſo the maſculine *nonnus*, which they uſed to ſignify a monk; are of hebrew extraction, from *nin*, or *nun*, a *ſon*.

Several ſorts of nuns.

1. There were, beſides the Benedictine and Gilbertine nuns before mentioned, Cluniac, Ciſtertian, Carthuſian, Auſtin, and Præmonſtratenſian nuns, who followed the ſame rules with their reſpective monks, omitting only what was not proper for their ſex, and wore habits of the ſame colour, having their heads always covered with a veil.

Order of Fontevrault.

2. And to theſe we muſt add three other orders of religious women, formerly in England; viz.

Firſt, nuns of the order of *Fontevrault*, which was inſtituted about the latter end of the eleventh century, by one Robert ſurnamed de Arbriſſel at *Fontevrault*, in Poictiers

tiers, where he built an abbey for his followers preſently after the year 1100. Tho' this order (which was a reform of the Benedictine) was chiefly for women, yet beyond ſea they had alſo religious men living amongſt them in different apartments, who were under the government of the abbeſs; for the founder grounded his model upon our bleſſed Saviour's recommending the virgin Mary and St John the evangeliſt to each other. And as St John was thereby to look upon the bleſſed virgin as his mother, the founder directed that the men ſhould acknowledge the abbeſs or prioreſs of the convent as their ſuperior, and ſubmit to her authority both in ſpirituals and temporals. And the abbeſs of Fontevrault was made the general ſuperioreſs and head of the order.——Theſe nuns were brought into England by Robert Boſſu earl of Leiceſter, before the year 1161, and placed at Nun Eaton in Warwickſhire; but there were only two houſes more of this order in England, and there is no expreſs account of any monk in any of them, but only of a prior at Nun Eaton.

3. The nuns of *St Clare* were founded by her whoſe name they bear, at Aſſiſe in Italy, about the year 1212. Theſe nuns obſerving St Francis's rule, and wearing the ſame coloured habit with the Franciſcan friers, were often called *minoreſſes*; and their houſe, without Aldgate, the *minories*. They were likewiſe called the *Poor Clares*, probably from their ſcanty endowments. They were brought into England by Blanch queen of Navarre, who was wife to Edmund earl of Lancaſter Leiceſter and Derby, about the year 1293, and ſeated without Aldgate as aforeſaid. Beſides which, there were but three houſes more of this order in England, viz. Waterbeache and Denny in Cambridgeſhire, and Bruſyard in Suffolk. Order of St Clare, or minoreſſes.

4. The *Brigittines*, or nuns of our holy Saviour, were inſtituted by *St Bridget*, princeſs or ducheſs of Nericia in Sweden, about the middle of the 14th century, under the rule of St Auſtin, with ſome additions of her own. This order, tho' chiefly for women, had likewiſe men in every convent (who lived in different apartments, and were not permitted to come near the women but in caſes of great neceſſity), and differed from all other inſtitutions in requiring a particular number of men and women in every houſe, to wit, 60 nuns, 13 prieſts, 4 deacons, and 8 lay brethren. There ſeems to have been only one houſe of this order in England, namely, at Syon in Middleſex, founded by king Henry the fifth, about the year 1414. Order of St Bridget.

V. *Friers.*

The before mentioned were all the ſorts of monks, canons, and nuns, which we had in England and Wales: The *friers* (*fratres*, brethren) were theſe following:

Dominicans. 1. The *Dominicans*; whoſe founder was St *Dominic* a Spaniard, who was born about the year 1070. They were called *preaching friers*, from their office to preach and convert hereticks; *black friers*, from their garments; and in France, *Jacobines*, from having their firſt houſe in St James's ſtreet at Paris. Their rule was chiefly that of St Auſtin. They came into England in the year 1221, had their firſt houſe at Oxford, and at the diſſolution had about 43 houſes in England.——There were nuns alſo of this order, but not in England.

Franciſcans. 2. The *Franciſcans* received their rule from *St Francis* an Italian, in the year 1182. They were alſo called *Grey* or *Minor Friers*, the one from their grey cloathing, the other name they aſſumed out of pretended humility. They girded themſelves with cords, and went barefooted. The general opinion is, that they came into England in the year 1224, and had their firſt houſe at Canterbury, and their ſecond at London.—A relaxation having by degrees crept into this order, it was thought fit to reform and reduce it to its firſt rule and inſtitution. Thoſe that continued under the relaxation were called *Conventuals*; and ſuch as accepted the reformation of their order were called *Obſervants* or *Recollects*. This reformation was begun by *St Barnard* or *Bernardin*, about the year 1400.—King Edward the 4th is commonly ſaid to have brought them into England, but there is no certain account of their being here, till king Henry the 7th built two or three houſes for them. At the diſſolution, the conventual Franciſcans had about 55 houſes, which were under 7 cuſtodies or wardenſhips; viz. thoſe of London, York, Cambridge, Briſtol, Oxford, Newcaſtle, and Worceſter.

Capuchins. 3. As to the *Capuchins*, and other diſtinctions of the Franciſcans beyond the ſeas; they chiefly aroſe ſince the Engliſh reformation, and never had any place here.

Trinitarians, or Maturines. 4. The *Trinitarians*, *Maturines*, or friers of the order of the *Holy Trinity*, for the redemption of captives, were inſtituted by St John de *Matha*, and Felix de Valois in France, about the year 1197. The rule was that of St Auſtin, with ſome peculiar conſtitutions. Their revenues were to be divided into three parts, one for their

own ſupport and maintenance, another to relieve the poor, and a third to redeem ſuch chriſtians as ſhould be taken captives by the infidels. They were called *Trinitarians*, becauſe all their churches were to be dedicated to the *Holy Trinity*; and *Maturines*, from having their firſt houſe in Paris near *St Mathurine*'s chapel. They were brought into England in the year 1224; where the lands, revenues, and privileges of the canons of the holy ſepulchre were given to them upon the decay of that order; and had their firſt houſe at Mottenden in Kent. There were about 10 or 12 houſes of theſe friers in England and Wales.

Carmelites.

5. The *Carmelite* or *white friers* (the former of which names they had from the place of their firſt reſidence, and the latter from the colour of their habit) came next into this kingdom. They were alſo called brethren or friers of the *bleſſed virgin*. They pretended to great antiquity, but the firſt certain account we have of them is at mount *Carmel* in Paleſtine, about the year 1238. Their rule (which was chiefly that of St Baſil) is ſaid to have been given them by Albert patriarch of Jeruſalem about the year 1205. They were brought into England in the year 1240, by the lords John Veſey and Richard Grey, and had their firſt houſes at Alnwick in Northumberland, and Ailesford in Kent. Of this order there were about 40 houſes in England and Wales.

Croſſed or crouched friers.

6. The order of *Croſſed* or *Crouched* friers were inſtituted, or at leaſt reformed, by one Gerard, prior of St Mary of Morello at Bologna; and confirmed in the year 1169 by pope Alexander the third, who brought them under St Auſtin's rule, and made ſome other conſtitutions for their government. At firſt they carried a *croſs* fixed to a ſtaff in their hands, and afterwards had one made of red cloth ſewed upon their backs or breaſts. They came into England in the year 1224, and had their firſt houſe at Colcheſter. There were not here above 6 or 7 houſes of theſe friers.

Auſtins or Eremites.

7. The origin of the *Auſtin* friers, or friers *Eremites* of the order of St Auſtin (from ερημος, a deſert place) is very uncertain. They were brought into England about the year 1250. They had about 32 houſes in England and Wales at the ſuppreſſion.

Order of the Sac.

8. The friers of the *Sac* firſt appeared in England in the year 1257. The right ſtyle of them was *friers of the penance of Jeſus Chriſt*. But they were commonly called friers of the *Sac*, from their habit being either ſhaped like

a *ſack*, or made of that coarſe cloth called *ſackcloth*. They ſeem to have had their firſt houſe near Alderſgate, London. But their order was very ſhort lived here, being put down by the council at Lyons in the year 1307.

Bethlemites. 9. The *Bethlemite* friers, came in alſo in the year 1257. They had their rule and habit much like that of the Dominicans, but were diſtinguiſhed from them by a red ſtar of five rays, with a blue circle in the middle of it, worn on their breaſts in memory of the ſtar which appeared to the wiſe men, and conducted them to *Bethlehem*. They were placed in Trumpington ſtreet at Cambridge the firſt year they came over. And that ſeems to have been the only houſe of theſe friers in England.

Order of St Anthony of Vienna. 10. The order of *St Anthony of Vienna* was inſtituted in the year 1095, for the help and relief of ſuch perſons as were afflicted with that painful inflammation called St Anthony's fire, from that ſaint's being thought to eaſe people under it, and deliver them from it. The friers or brethren of this order followed St Auſtine's rule; came hither early in the reign of king Henry the third, and had one houſe at London, and another at Hereford.

Bonhommes. 11. The laſt order of friers which was brought into this kingdom, was that of *Bonhommes*, or *good men*: who were brought hither by Edmund earl of Cornwall, in the year 1283, and placed at Aſherug in Bucks. Beſides which, there was but one houſe more of this order in England, to wit, Edingdon in Wiltſhire. Theſe friers followed the rule of St Auſtin, and wore a blue habit.

VI. *Military orders.*

Of the *military* orders of the religious, there were theſe following:

Hoſpitalars. 1 *Knights Hoſpitalars*, who took their name from an *hoſpital* built at Jeruſalem for the uſe of pilgrims coming to the holy land, and dedicated to St John Baptiſt. For the firſt buſineſs of theſe knights was, to provide for ſuch pilgrims at that hoſpital, and to protect them from injuries and inſults upon the road. They were inſtituted about the year 1092. They followed chiefly St Auſtin's rule: and wore a black habit, with a white croſs upon it. They ſoon after came into England, and had an houſe built for them in London in the year 1100. And from a poor and mean beginning, they obtained ſo great wealth and honours and exemptions; that their ſuperior here in England

England was the firſt lay baron, and had a ſeat amongſt the lords in parliament; and ſome of their privileges were extended even to their tenants. They were at firſt called knights of St John of Jeruſalem; but ſettling chiefly at Rhodes after they were driven out of the holy land, were afterwards called knights of Rhodes; and after the loſs of Rhodes in the year 1522, and their having the iſland of Malta given them by the emperor Charles the fifth, they were called knights of Malta.

There were alſo ſiſters of this order; but we had only one houſe of them in England, viz. Buckland in Somerſetſhire.

2. The *knights Templars* were inſtituted in the year 1118; and were ſo called from having their firſt reſidence in ſome rooms adjoining to the *temple* at Jeruſalem. Their buſineſs alſo was, to guard the roads for the ſecurity of pilgrims in the holy land; and their rule, that of canons regular of St Auſtin. Their habit was white, with a red croſs on the left ſhoulder. Their coming to England was probably pretty early in the reign of king Stephen: and their firſt ſeat was in Holborne. They increaſed very faſt, and in a little time obtained very large poſſeſſions. But in leſs than 200 years, their wealth and power was thought too great; they were accuſed of horrid crimes, and thereupon every where impriſoned; their eſtates were ſeized; and their order was ſuppreſſed by pope Clement the fifth, in a general council at Vienna, in the year 1312. Templars.

3. The order of *St Lazurus* of Jeruſalem (of which we had a few houſes) ſeems to have been founded for the relief and ſupport of lepers and impotent perſons of the military orders. Order of St Lazarus.

VII. *Of the ſeveral kinds of houſes.*

The above recited are all the religious orders which we had in England and Wales. The houſes belonging to the ſaid orders were as follows:

1. *Cathedral* is a name yet well known: In the conventual cathedrals, the biſhop was in the place of an abbat, and had the principal ſtall on the right hand of the entrance into the quire; as he hath ſtill at Ely, and till lately had at Durham and Carliſle. Cathedrals.

2. *Collegiate* churches and colleges conſiſted of a number of ſecular canons, living together under the govern- Colleges.

ment of a dean, warden, provoſt, or maſter; and having for the more ſolemn performance of divine ſervice, chaplains, ſinging men, and choiriſters belonging to them.

Abbies. 3. An *abby* was a ſociety of religious people, having an abbat or abbeſs to preſide over them. And ſome of theſe were ſo conſiderable, that the abbats of them were called to parliament, and had ſeats and votes in the houſe of lords. Mr Fuller ſaith, that in the 49 Hen. 3. ſixty four abbats, and 36 priors were called to parliament. But this number being too great, king Edward the firſt reduced it to 25 abbats and 2 priors, to whom were afterwards added two abbats. So that there were 29 in all, and no more, that ſtatedly and conſtantly enjoyed this privilege; viz. the abbat of Tewkeſbury, the prior of Coventry, the abbats of Waltham, Cirenceſter, St John's at Colcheſter, Croiland, Shrewſbury, Selby, Bardney, St Bennet's of Hulme, Thorney, Hide, Winchelcomb, Battel, Reading, St Mary's in York, Ramſey, Peterburgh, St Peter's in Glouceſter, Glaſtonbury, St Edmond's Bury, St Auſtin's in Canterbury, St Alban's, Weſtminſter, Abingdon, Eveſham, Malmſbury, and Taviſtock; and the prior of St John's of Jeruſalem, who was ſtyled the firſt baron of England, but it was with reſpect to the lay barons only, for he was the laſt of the ſpiritual ones.

Priories. 4. A *priory* was a ſociety of religious, where the chief perſon was termed a prior or prioreſs; and of theſe were two ſorts:

(1) Where the prior was chief governor, as fully as any abbat in his abby, and was choſen by the convent; ſuch were the cathedral priors, and moſt of the Auſtin order.

(2) Where the priory was a cell, ſubordinate to ſome great abby; and the prior was placed and diſplaced at the will of the abbat. But there was a conſiderable difference between ſome of theſe cells. For ſome were altogether ſubject to their reſpective abbies, who ſent them what officers and monks they pleaſed, and took their revenues into the common ſtock of the abbies. But others conſiſted of a ſtated number of monks, who had a prior ſent them from the abby, and paid a penſion yearly as an acknowledgment of their ſubjection, but acted in other matters as an independant body, and had the reſt of the revenues for their own uſe. Theſe priories or cells were always of the ſame order with the abbies on whom they depended, tho' ſometimes of a different ſex; it being uſual after the conqueſt, for the great abbies to build

nunneries

nunneries in ſome of their manors, which ſhould be priories to them, and ſubject to their viſitation.

There were alſo *priories alien*, which were cells to foreign monaſteries. For when manors or tithes were given to foreign monaſteries, the monks, either to increaſe their own rule, or perhaps rather to have faithful ſtewards of their revenues, built convenient houſes for the reception of a ſmall convent, and then ſent over ſuch a number as they thought proper, conſtituting priors over them. And there was the ſame difference in theſe cells as in the former. For ſome of them were conventual, and had priors of their own chuſing; and theſe were intire ſocieties within themſelves, and received the revenues belonging to their ſeveral houſes for their own uſe and benefit, paying only the ancient apport (*apportum*, perhaps from *porto*, to carry), or what what was at firſt the ſurpluſage, to the foreign houſe. But others depended wholly upon the foreign houſes, their priors were ſet over them by the foreign houſes, their monks alſo were often foreigners; and both of them removable at pleaſure; and they returned all their revenues to the foreign head houſes. For which reaſon their eſtates were generally ſeiſed during the wars between England and France, and reſtored to them again upon a return of peace.

Theſe alien priories were moſt of them made by ſuch as had foreign abbies founded by themſelves or by ſome of their family.

5. *Preceptories* were manors or eſtates of the knights templars, where erecting churches for the ſervice of God, and convenient houſes, they placed ſome of their fraternity under the government of one of thoſe more eminent templars, who had been by the grand maſter created *præceptores templi*, to take care of the lands and rents in that place and neighbourhood, and ſo were only cells to the principal houſe at London. Preceptories.

6. *Commandries* were the ſame amongſt the knights hoſpitalars, as preceptories were amongſt the templars, viz. ſocieties of thoſe knights placed upon ſome of their eſtates in the country, under the government of a *commander*; who were allowed proper maintenance out of the revenues under their care, and accounted for the remainder to the grand prior at London. Commandries

7. *Hoſpitals* were ſuch houſes for relief of the poor and impotent people, as were incorporated by royal patents, and made capable of gifts and grants in ſucceſſion. But Hoſpitals.

beſides the poor and impotent, there generally were in theſe hoſpitals, two or three religious; one to be maſter or prior, and one or two to be chaplains and confeſſors; and theſe obſerved the rule of St Auſtin, and probably ſubjected the poor and impotent to ſome religious reſtraints, as well as to the local ſtatutes. Hoſpitals were originally deſigned for the relief and entertainment of travellers upon the road, and particularly of pilgrims, and therefore were generally built by the way ſide; but of later years they have been always founded for fixed inhabitants.

Frieries. 8. *Frieries* were houſes erected for the habitation of friers; they were very ſeldom endowed, yet many of them were large and ſtately buildings, and had noble churches, in which many great perſons choſe to be buried. Friers were by their profeſſion mendicants, and to have no property; but moſt of their houſes had ſome ſhops and gardens belonging to them.

Hermitages. 9. *Hermitages* (from ερημος, a deſart or ſolitary place) were religious cells erected in private and ſolitary places, for ſingle perſons or communities, many times endowed, and ſometimes annexed to larger religious houſes.

Chauntries. 10. *Chauntries* (*cantariæ*) were endowments of lands or other revenues, for the maintenance of one or more prieſts to celebrate daily maſs for the ſouls of the founder and his relations, and of their other benefactors; ſometimes at a particular altar, and oftentimes in little chapels added to cathedral and parochial churches for that purpoſe.

Free chapels. 11. *Free chapels* were places of religious worſhip, exempt from all juriſdiction of the ordinary, ſave only, that the incumbents were generally inſtituted by the biſhop, and inducted by the archdeacon of the place. Moſt of theſe chapels were built upon the manors and ancient demeſnes of the crown, whilſt in the king's hands, for the uſe of himſelf and retinue when he came to reſide there. And when the crown parted with thoſe eſtates, the chapels went along with them, and retained their firſt freedom; but ſome lords having had free chapels in manors that do not appear to have been ancient demeſne of the crown, ſuch are thought to have been built and privileged by grants from the crown.

VIII. *Officers therein.*

Officers in theſe houſes reſpectively, which we read of, were theſe.

1. In every abby the chief officer was the *abbat* or *abbeſs*, who preſided in great pomp, was generally called lord abbat or lady abbeſs, and had a kitchin, and other offices diſtinct from the common ones of the ſociety. Abbat.

2. In every priory, the chief officer was the *prior* or *prioreſs*, who had the ſame power in priories as abbots and abbeſſes had in abbies, but lived in a leſs ſplendid and expenſive manner, tho' in ſome of the greater houſes they were called lord prior, and lady prioreſs. Prior.

3. Next under the abbat in every *abby* was the prior, who in the abbat's abſence had the chief care of the houſe, and under him was the ſubprior, and in great abbies the third, fourth, and even fifth prior, who had their reſpective ſhares in the government of the houſe, and were removable at the will of the abbat, as all the other obedientiarii or officers were. Subabbat and ſubprior.

Alſo in every *priory*, next under the prior was the ſubprior, who aſſiſted the prior whilſt preſent, and acted in his ſtead when abſent.

4. *Magiſter operis*, maſter of the fabrick; who probably looked after the buildings, and took care to keep them in good repair. Magiſter operis.

5. *Eleemoſynarius*, the almoner, who had the overſight of the alms of the houſe (which were every day diſtributed at the gate to the poor), who divided the alms upon the founder's day, and at other obits and anniverſaries, and in ſome places provided for the maintenance and education of the choiriſters. Eleemoſynarius.

6. *Pitantiarius*, who had the care of the *pietances*; which were allowances (*pittances*) upon particular occaſions over and above the common proviſions. Pitantiarius.

7. *Sacriſta*, the ſexton, who took care of the veſſels, books, and veſtments belonging to the church; looked after and accounted for the oblations at the great altar, and other altars and images in the church, and ſuch legacies as were given either to the fabrick or utenſils. He likewiſe provided bread and wine for the ſacrament: and took care of burying the dead. Sacriſta.

8. *Camerarius*, the chamberlain, who had the chief care of the dormitory, and provided beds and bedding for the monks, razors and towels for ſhaving them, and part of (if not all) their cloathing. Camerarius.

9. *Cellerarius*,

Cellerarius. 9. *Cellerarius*, the cellarer, who was to procure proviſions for the monks and all ſtrangers reſorting to the convent; viz. all ſorts of fleſh, fiſh, fowl, wine, bread, corn, malt, meal, ſalt, and the like: as likewiſe wood for firing, and all utenſils for the kitchin.

Theſaurarius. 10. *Theſaurarius*, the burſar, who received all the common rents and revenues of the monaſtery, and paid all the common expences.

Precentor. 11. *Precentor*, the chaunter, who had the chief care of the choir ſervice, and not only preſided over the ſinging men, organiſt, and choiriſters, but provided books for them, paid them their ſalaries, and repaired the organs. He had alſo the cuſtody of the ſeal, and kept the liber diurnalis or chapter book, and provided parchment and ink for the writers, and colours for the limners of books for the library.

Hoſtilarius. 12. *Hoſtilarius*, or *hoſpitilarius*, whoſe buſineſs it was to ſee ſtrangers well entertained; and to provide firing, napkins, towels, and ſuch like neceſſaries for them.

Infirmarius. 13. *Infirmarius*, who had the care of the infirmary, and of the ſick monks who were carried thither, and was to provide them phyſick and all neceſſaries, and when they died was to waſh and prepare their bodies for burial.

Refectionarius. 14. *Refectionarius*, who looked after the hall, providing table cloths, napkins, towels, diſhes, plates, ſpoons, and other neceſſaries for it, and ſervants alſo to wait and tend there. He had likewiſe the keeping of the cups, ſalts, ewers, and all the ſilver utenſils whatſoever belonging to the houſe, except the church plate.

Coquinarius. 15. *Coquinarius*, the cook, who preſided in the kitchin for the dreſſing of victuals.

Gardinarius. 16. *Gardinarius*, the gardiner.

Portarius. 17. *Portarius*, who ſeemeth to have taken care of the carriages, and ſuch like; for that he was not the janitor or *porter*, ſeemeth probable, for that divers have been promoted to be abbats from that office.

Writers. 18. In every great abby there was a large room called the ſcriptorium, where ſeveral writers made it their buſineſs to tranſcribe the miſſals, liegers, and other books for the uſe of the houſe, and more eſpecially to tranſcribe books for the uſe of the library. And ſo zealous were the monks in general to repleniſh their libraries, that they often procured lands to be given, and churches to be appropriated for that work.

Annaliſts. 19. In all the great abbies, there were alſo perſons appointed to take notice of the principal occurrences of the kingdom,

kingdom, and at the end of every year to digeſt them into *annals*. In theſe records they particularly preſerved the memories of their founders and benefactors; the years and days of their births and deaths, their marriages, children, and ſucceſſors: ſo that recourſe was ſometimes had to them, for proving perſons ages and genealogies; tho' it is to be feared, that ſome of thoſe pedigrees were drawn up from tradition only: and that in moſt of their accounts they were favourable to their friends, and ſevere upon their enemies.

The canons alſo and conſtitutions of the clergy in their national and provincial ſynods, and even acts of parliament, were ſent to the abbies to be recorded.

IX. *Diſſolution.*

1. The Templars (as was before obſerved) for the many and great abuſes charged upon them, were ſuppreſſed ſo early as the year 1312. Templars diſſolved.

And in the year 1323 their lands, churches, advowſons, and liberties here in England were given by the act of parliament of the 17 *Ed.* 2. *ſt.* 3. to the prior and brethren of the hoſpital of St John of Jeruſalem.

2. About the year 1390, William of Wickham, biſhop of Wincheſter, by the leave of the then pope and king, bought the alien priories of Hornchurch and Writtle in Eſſex, and ſettled them on his new college at Oxford. And after the ſuppreſſion of alien priories, Takeley in Eſſex and Hamele in Hampſhire were ſettled upon this college. And Andover was ſettled upon his college at Wincheſter. Other diſſolutions before the 27 H. 8.

About the year 1437, archbiſhop Chicheley founded All Souls college in Oxford, and got the revenues of ſeveral ancient priories to be ſettled thereon.

About the year 1441, king Henry the ſixth founded the college at Eaton, and King's college in Cambridge; and endowed them chiefly with alien priories.

About the year 1459, William Wainfleet biſhop of Wincheſter founded Magdalen college in Oxford, and got the priory of Sele or Atteſele in Suſſex, and the priory of Seleburne in Hampſhire, ſettled on it. The hoſpitals alſo of Aynho and Brakeley in Northamptonſhire were united to this college in the year 1484.

In the year 1497, John Alcock biſhop of Ely, with the king's conſent, ſuppreſſed St Rhadegund's nunnery in

in Cambridgeſhire, and with the revenues thereof founded Jeſus college there.

In the year 1505, Margaret counteſs of Richmond and Derby, founded Chriſt's college in Cambridge, and obtained the pope's licence to ſuppreſs the abby of Creyke in Norfolk, and to ſettle the revenues of it upon that college.

About the year 1508, the ſame counteſs began to convert an ancient hoſpital or priory dedicated to St John the evangeliſt at Cambridge into St John's college, and her executors carried on the deſign. Biſhop Fiſher was one of them, and at his deſire the nunneries of Heyham in Kent and Broomhalle in Berkſhire, and an hoſpital of regulars at Oſprike were ſuppreſſed, and the revenues of them ſettled upon this college.

In the year 1515, Brazen Noſe college in Oxford was founded, and William Smith biſhop of Lincoln bought the priory of Cold Norton in Oxfordſhire of the abbat and convent of Weſtminſter, and gave the lands belonging to it to this new foundation.

Not long after, cardinal Wolſey, by licence of the king and of the pope, obtained a diſſolution of above 30 religious houſes (moſt of them very ſmall), for the founding and endowing his colleges at Oxford and Ipſwich.

About the ſame time, a bull was granted by the ſame pope to cardinal Wolſey to ſuppreſs monaſteries, where there were not above ſix monks, to the value of 8000 ducats a year, for endowing Windſor, and King's college in Cambridge: And two other bulls were granted to the cardinals Wolſey and Campeius, where there were leſs than twelve monks, and to annex them to the greater monaſteries: And another bull to the ſame cardinals to inquire about abbies, to be ſuppreſſed in order to be made cathedrals: Altho' nothing appears to have been done in purſuance of theſe bulls.

And afterwards another bull was granted to the ſame two cardinals, with further powers relating to the new cathedrals; for ſome of the dioceſes were thought too large, and wanted much (as it was ſaid) to be reduced, that the biſhops might the better diſcharge their offices.

But the promoting of learning ſeems to have been the chief intent of cardinal Wolſey, and of moſt others, in ſuppreſſing theſe houſes; tho' probably ſome perſons both then and afterwards, promoted it with other views. Archbiſhop Cranmer particularly is ſaid to have been much

much for it, becauſe he could not carry on the reformation without it. And as the increaſe of learning had rendered the corruptions of the church of Rome more viſible; many others might alſo be againſt theſe houſes, as nurſeries of popiſh ſuperſtition: But other things concurred to bring on their ruin. For, 1. Many of the religious were certainly looſe and vicious; tho' probably not ſo bad as the viſitors repreſented; for thoſe that are to be run down, will always be ſet in the worſt light; and the preamble to the firſt act of diſſolution did ſet forth, that in the larger monaſteries religion was well obſerved. 2. The caſting off the pope's ſupremacy was urged for caſting off the monks, who notwithſtanding their ſubſcriptions, were generally thought to be againſt it in their hearts, and ready to join with any foreign power that ſhould invade the nation; whilſt the king was excommunicated by the pope. 3. Their revenues being not employed according to the intent and deſign of the donors, was alſo alledged againſt them. 4. The diſcovery of many cheats in images, of many feigned miracles, and of counterfeit relicks, brought the monks every where in diſgrace, and contributed towards their overthrow. 5. Perhaps the obſervant friers being ſo much againſt the king's divorce from queen Catharine, might exaſperate him againſt all monks and friers in general. But, 6. Not unlikely the great cauſe might be the king's want of a large ſupply, and the people's willingneſs to ſave their money; altho' it was certainly haſtened by the account which the viſitors gave of them. For after ſome debate in council how to proceed with theſe houſes, the king appointed commiſſioners to viſit them, and they made ſuch a bad report, that when a motion was ſhortly after made in parliament, that in order to ſupport the king's ſtate and ſupply his wants, all the religious houſes might be conferred upon the crown which were not able to ſpend above 200 l a year, it met with but little oppoſition in either houſe, and an act was paſſed for that purpoſe as followeth:

Diſſolution by the 27 H. 8.

3. *Foraſmuch as manifeſt ſin, vicious carnal and abominable living, is daily uſed and committed commonly in ſuch little and ſmall abbies, priories, and other religious houſes of monks canons and nuns, where the congregation of ſuch religious perſons is under the number of* 12 *perſons; whereby the governors of ſuch religious houſes, and their covent, ſpoil conſume and utterly waſte as well their churches, monaſteries, priories, principal houſes, farms, granges, lands, tenements, and hereditaments,*

ditaments, as the ornaments of their churches, and their goods and chattels, to the high diſpleaſure of almighty God, ſlander of good religion, and to the great infamy of the king's highneſs and the realm, if redreſs ſhould not be had thereof: And albeit that many continual viſitations have been heretofore had by the ſpace of 200 *years and more, for an honeſt and charitable reformation of ſuch unthrifty carnal and abominable living, yet nevertheleſs little or no amendment is hitherto had, but their vicious living ſhameleſsly increaſeth, and by a curſed cuſtom is ſo rooted and infected, that a great multitude of the religious perſons in ſuch ſmall houſes do rather chuſe to rove abroad in apoſtacy, than to conform themſelves to the obſervation of good religion; ſo that without ſuch ſmall houſes be utterly ſuppreſſed, and the religious perſons therein committed to great and honourable monaſteries of religion in this realm, where they may be compelled to live religiouſly, for reformation of their lives, the ſame elſe be no redreſs nor reformation in that behalf: In conſideration whereof, the king's moſt royal majeſty, being ſupreme head on earth under God of the church of England, daily ſtudying and deviſing the increaſe advancement and exaltation of true doctrine and virtue in the ſaid church, and the extirpating and deſtruction of vice and ſin, having knowledge that the premiſſes be true, as well by the accounts of his late viſitations, as by ſundry credible informations, conſidering alſo that divers and great ſolemn monaſteries of this realm, wherein (thanks to God) religion is right well kept and obſerved, be deſtitute of ſuch full number of religious perſons, as they ought and may keep, hath thought good that a plain declaration ſhould be made of the premiſſes, as well to the lords ſpiritual and temporal as to other his loving ſubjects the commons in this preſent parliament aſſembled: Whereupon the ſaid lords and commons, by a great deliberation, finally be reſolved, that it is and ſhall be much more to the pleaſure of almighty God, and for the honour of this his realm, that the poſſeſſions of ſuch ſmall religious houſes now being ſpent ſpoiled and waſted for increaſe and maintenance of ſin, ſhould be committed to better uſes, and the unthrifty religious perſons ſo ſpending the ſame be compelled to reform their lives: Thereupon it is enacted, that his majeſty ſhall have and enjoy to him and his heirs for ever, all ſuch monaſteries, priories, and other religious houſes of monks canons and nuns, of what kinds of habits rules or order ſoever they be, which have not in lands, tenements, rents, tithes, portions and other hereditaments, above the clear yearly value of* 200 l; *and alſo all ſuch as within one year next before have been ſurrendred to the king, or otherwiſe diſſolved.* 27 H. 8. c. 28.

By

By this act about 380 houſes were diſſolved, and a revenue of 30 or 32,000 l a year came to the crown; beſides about 100,000 l in plate and jewels. Some ſay, that 10,000 perſons were hereby ſent to ſeek their fortunes in the wide world, without any other allowance than 40 s and a new gown to ſome few of them. Others ſay, that ſuch of the religious as deſired to continue their profeſſion, were (according to the aforeſaid act) allowed to go into the greater monaſteries; and ſuch as choſe to go into the world, being prieſts, had every one the abovementioned allowance, and ſome of them (for their readineſs to ſurrender) got ſmall penſions for life.

The ſuppreſſion of theſe houſes occaſioned great diſcontents, fomented probably by the ſecular as well as regular clergy, which at length broke out in open rebellion. But the rebellion being appeaſed, the king reſolved to ſuppreſs the reſt of the monaſteries, and thereupon appointed a new viſitation, requiring the viſitors to examine every thing that related either to the converſation of the religious, or their affection to the king and the ſupremacy, or to their cheats impoſtures or ſuperſtitions, or how they were affected during the late commotions. This cauſed the greater abbies to be ſurrendred apace. For ſome of the religious having been faulty in the late rebellion, were liable to the king's diſpleaſure, and ſurrendred their houſes to ſave their lives. Some began to like the reformation, and were upon that account eaſily perſuaded to it. Others, ſeeing their diſſolution approaching, had ſo much embezilled their revenues, that they were ſcarce able to keep up their houſes. A great many monks were executed for having been in the rebellion; and no doubt but many were prevailed upon by the viſitors, who endeavoured both by threats and promiſes to get their reſignations. And in the end by the act of the 31 *H.* 8. *c.* 13. it was enacted as followeth.

4. *All monaſteries, abbathies, priories, nunneries, colleges, hoſpitals, houſes of friers, and other religious and eccleſiaſtical houſes and places, which have been ſurrendred or given up ſince the fourth day of February in the twenty ſeventh year of his majeſty's reign, and which hereafter ſhall be ſurrendred or given up, ſhall be veſted in the king.* (With a clauſe reſpecting privileges and exemptions, which was not in the former act; to wit, that ſuch of them as were diſcharged from payment of tithes, ſhould continue ſo; and ſuch as were exempted from the viſitation of the ordinary, ſhould become Diſſolutions by the 31 H. 8.

become visitable by the ordinary or by such persons as the king shall appoint.) 31 *H.* 8. *c.* 13.

By this act no houses were suppressed; but all the surrenders, which either were made or should be made, were confirmed. The mitred or parliamentary abbies were all in being, and most of the abbats present, at the passing of it; and yet none of them either opposed it, or voted against it; but were every one shortly brought to surrender, except the abbats of Colchester, Glastonbury, and Reading, who were therefore accused of high treason, attained and executed; and their abbies were seised as forfeited to the king by their attainder.

Dissolution by the 32 H 8.

5. The next year a bill was brought in and passed, for suppressing the knights of St John of Jerusalem; by which it is enacted as followeth: *The lords spiritual and temporal and commons in this present parliament assembled, having credible knowledge, that divers and sundry the king's subjects, called the knights of* Rhodes, *otherwise called knights of* St John's, *otherwise called friers of the religion of* St John *of* Jerusalem *in* England, *and of a like house being in* Ireland, *abiding in parts beyond the sea, and having yearly great sums of money out of this realm and out of* Ireland, *and other the king's dominions, have unnaturally and contrary to their allegiance sustained and maintained the usurped authority of the bishop of* Rome; *and considering also, that the isle of* Rhodes, *whereby the said religion took their name and foundation, is surprized by the* Turk; *and that it were much better that the possessions of this realm, and in other the king's dominions, appertaining to the said religion, should rather be employed and spent within the same, for the defence and safety thereof, than converted to and amongst such unnatural subjects; it is therefore enacted, that the corporation of the said religion in these realms, by whatsoever name or names they be founded incorporated or known, shall be utterly dissolved and void to all intents and purposes.* 32 H. 8. c. 24. s. 1.

And the king, his heirs and successors, shall have and enjoy all that hospital, mansion house, churches and all other houses, edifices, buildings, and gardens to the same belonging, being near to the city of London, *in the county of* Middlesex, *called the house of* St John *of* Jerusalem *in* England; *and also all that hospital, church, and house of* Kilmainam *in* Ireland; *and all castles, honours, manors, meases, lands, tenements, rents, reversions, services, woods, meadows, pastures, parks, warrens, liberties, franchises, privileges, parsonages, tithes, pensions, portions, knights fees, advowsons, commandries, preceptories, contributions, responsions, rents, titles, entries, conditions,*

ditions, covenants, and all other poſſeſſions and hereditaments, which appertained to the ſaid religion, or to the priors, maſters or governors, knights or other miniſters, poſſeſſed of and in the ſame, by the pretence or in the right of the ſaid religion. ſ. 4.

And all privileges of ſanctuary, heretofore uſed or claimed in manſion houſes and other places, commonly called St John's hold, *and all other ſanctuaries belonging to any of the ſaid hoſpitals, ſhall be utterly void and of none effect.* ſ. 12.

By the ſuppreſſion of theſe greater houſes by the two laſt recited acts, the king obtained a revenue of above 100,000l a year, beſides a large ſum in plate and jewels. But the religious of theſe houſes had almoſt all of them ſomething given for their preſent ſubſiſtence, and penſions aſſigned them for life or until they ſhould be preferred to ſome dignity or cure of greater value than their penſions.

6. The laſt act of diſſolution that was in this king's reign, was the act of 37 *H.* 8. *c.* 4. for diſſolving colleges, free chapels, chantries, and the reſt, as followeth: *All colleges, free chapels, chantries, hoſpitals, fraternities, brotherhoods, guilds, and ſtipendiary prieſts, having continuance in perpetuity, and being charged or chargeable to the payment of firſt fruits and tenths, which have been already ſurrendred, or alienated by covin, or otherwiſe diſſolved, ſhall be adjudged and deemed in the actual poſſeſſion of the king, his heirs and ſucceſſors; and alſo all and ſingular ſuch and ſo many as the king by his commiſſion ſhall appoint, of the chantries, free chapels, hoſpitals, colleges, and other the ſaid promotions, now in being, together with all their poſſeſſions and revenues, charged or chargeable to the payment of firſt fruits and tenths; and all colleges chargeable or not chargeable to the ſaid payment of firſt fruits and tenths; which have lands and other poſſeſſions appointed by the donors, for alms to poor people and other charitable deeds to be done.* Diſſolution by the 37 H. 8.

This act was made ſo general, that even thoſe great nurſeries of learning, the colleges at Oxford and Cambridge, with thoſe of Wincheſter and Eaton, were included. And upon the breaking up of the parliament, notice was ſent to both the univerſities, that their colleges were at the king's diſpoſal. This put them upon petitioning for mercy, which was ſoon obtained, and letters of thanks were ſent for the continuance of them.

But the commiſſioners appointed by this act for giving the king poſſeſſion of the aforeſaid houſes and places, did

not enter upon many of them before his death, which happened in the January following.

Diſſolution by the 1 Ed. 6.

7. And therefore in the beginning of the reign of king Edward the ſixth, another act paſſed, viz. the 1 *Ed.* 6. *c.* 14. as followeth: *All manner of colleges, free chapels, and chantries, which were not in the actual poſſeſſion of the late king nor of the king that now is; and all manors, lands, tenements, rents, tithes, penſions, portions, and other hereditaments and things, given for the finding of any prieſt, anniverſary, obit, lamp, light, or other like thing in any church or chapel;—ſhall be veſted in the king, his heirs and ſucceſſors.*

Provided, *that where any fraternity, or prieſt or incumbent of any chantry, by the firſt inſtitution thereof ought to have kept a grammar ſchool or a preacher; the king's commiſſioners ſhall appoint lands and other hereditaments of ſuch fraternity or chantry, to continue in ſucceſſion to a ſchoolmaſter or preacher for ever: They ſhall alſo have power to make and ordain a vicar, to have perpetuity, in every pariſh church being a college free chapel or chantry, or annexed thereto, that ſhall come to the king's hands by virtue of this act, and to endow every ſuch vicar ſufficiently, having reſpect to his cure and charge; and alſo to aſſign in perpetuity, in every great town and pariſh, where they ſhall think neceſſary to have more prieſts than one for the miniſtring the ſacraments in ſuch town or pariſh, lands and tenements belonging to any chantry chapel or ſtipendiary prieſt, being within the ſame town or pariſh.*

Alſo, *where any profit or benefit hath been payable to any poor perſons, out of any college, free chapel, or chantry, and other the premiſſes by this act given to the king; the commiſſioners ſhall aſſign lands and other hereditaments, parcel of the premiſſes, for the maintenance and continuance of the ſame for ever.*

And they ſhall alſo have power to appoint lands and other hereditaments, parcel of the premiſſes, towards the maintenance of piers, jutties, walls, or banks, againſt the rage of the ſea, havens and creeks.

Provided alſo, *that nothing herein ſhall extend to any college, hoſtel, or hall within either of the univerſities of* Cambridge *and* Oxford, *nor to any chantry founded within the ſame (yet ſo, that the king at any time during his life may alter the names of any the ſaid chantries, and the foundations thereof, within the ſaid univerſities); nor to the free chapel of* St George *in the caſtle of* Windſor; *nor to the college called* St Mary's *college of* Wincheſter, *nigh* Wincheſter, *of the foundation of biſhop* Wickham; *nor to the college of* Eaton; *nor to the pariſh church commonly called the chapel of*

the ſea in Newton, *within the iſle of* Ely, *in the county of* Cambridge; *nor to any chapel made for the eaſe of the people dwelling diſtant from the pariſh church, or ſuch like chapel whereunto no more lands or tenements than the churchyard or a little houſe or cloſe doth pertain; nor to any cathedral church or college where a biſhop's ſee is, nor to the manors lands tenements or other hereditaments thereof (other than to chantries, obits, lights, and lamps within the ſame).*

Provided alſo, *that the king may give authority to his commiſſioners, to alter the nature and condition of all manner of obits, as well within the ſaid univerſities, as in any other place not being ſuppreſſed; and the ſame obits ſo altered, to diſpoſe to a better uſe, as to the relief of ſome poor men being ſtudents or otherwiſe.*

Provided alſo, *that this act ſhall not give any copyhold lands to the king.*

By this act were ſuppreſſed 90 colleges, 110 hoſpitals, and 2374 chantries and free chapels.

X. *Obſervations.*

1. The number of houſes and places ſuppreſſed from firſt to laſt, ſo far as any calculations appear to have been made, ſeemeth to be as follows: Number of houſes ſuppreſſed.

Of leſſer monaſteries whereof we have the valuation	374
Of greater monaſteries	186
Belonging to the hoſpitallers	48
Colleges	90
Hoſpitals	110
Chantries and free chapels	2374
Total	3182

Beſides the friers houſes, and thoſe ſuppreſſed by Wolſey, and many ſmall houſes of which we have no particular account.

2. Sir William Temple, in his introduction to engliſh hiſtory, *p.* 175. ſays, that William the conqueror found above a third part of the lands of the kingdom in the poſſeſſion of the clergy: And Sir Robert Atkins in his Gloceſterſhire, *p.* 11. ſays, that 28,000 knights fees belonged then to the clergy, out of 60,000 in the whole: Value.

But both of them ſeem to ſpeak of the revenues of the clergy in general, viz. ſeculars as well as regulars; and do not ſay, what proportion the one bore to the other, nor mention how much was ſhortly after taken from them by the conqueror.

Archbiſhop Wake, in his ſtate of the church, *p.* 312, 319, takes notice, that in the year 1380, which was the 4th year of king Richard the ſecond, the commons made an offer in parliament, that if the clergy would bear a third part of the charge, they would grant to the king 100,000 l in the way of a poll tax; ſo that the laity ſhould pay 100,000 marks, and the clergy who occupied a third part of the kingdom 50,000. To this the clergy replied, that their grant was not ever made in parliament, nor ought to be; that the laity neither ought, nor could conſtrain the clergy, nor the clergy them; that therefore the commons ſhould be charged to do their part, and they might be ſure the clergy would not be wanting in theirs. But he obſerves withal, that the clergy uſually granted in this proportion.

In the 27th year of king Hen. 8. the revenues of the clergy were laid at a fourth part only of the revenues of the kingdom. And Mr Collier, in his eccleſiaſtical hiſtory, *V.* 2. *p.* 108. ſays, the revenues of the monks did never exceed the proportion of a fifth part; and conſidering the leaſes they granted to laymen upon ſmall rents and eaſy fines, he thinks their revenues did not exceed a tenth part of the kingdom.

Particularly, the ſum total of the clear yearly revenue of the ſeveral houſes at the time of their diſſolution, of which we have any account, ſeemeth to have been as follows:

	l	s	d
Of the greater monaſteries —	104919	13	3$\frac{1}{2}$
Of all thoſe of the leſſer monaſteries of which we have the valuation — —	29702	1	10$\frac{1}{2}$
Knights hoſpitallers head houſe in London — —	2385	12	8
We have the valuation of only 28 of their houſes in the country	3026	9	5
Friers houſes of which we have the valuation — —	751	2	0$\frac{1}{2}$
Total	140,785	6	3$\frac{1}{2}$

And

And if we conſider, that there were many of the leſſer monaſteries and houſes of the hoſpitallers and friers, of which no computation hath been found; and that not one of the colleges, hoſpitals, and great number of chantries and free chapels are reckoned in this eſtimate; and conſider withal, the vaſt quantity of plate and other goods which came into the hands of the king by the diſſolution; and the value of money at that time, which was at leaſt ſix times as much as is at preſent; and alſo that the eſtimate of the lands was generally ſuppoſed to be much under the real worth; we muſt needs conclude their whole revenues to have been immenſe.

3. It doth not appear that any computation hath been made, of the number of perſons contained in the religious houſes. Thoſe of the leſſer monaſteries, diſſolved by the ſtatute of 27 *H.* 8. were reckoned at about— 10000 Number of perſons.

If we ſuppoſe the colleges and hoſpitals to have contained a proportionable number, theſe will make about —— — 5347

If we reckon the number in the greater monaſteries according to the proportion of their revenues, they will be about 35,000; but as probably they had larger allowances in proportion to their number, than thoſe of the leſſer monaſteries, if we abate 5000 upon that account, they will then be — 30000

One for each chantry and free chapel — 2374

Total 47721

But as there were probably more than one perſon to officiate in ſeveral of the free chapels, and there were other houſes which are not included within this calculation; perhaps they may be computed in one general eſtimate at about 50,000.

4. As there were penſions paid to almoſt all thoſe of the greater monaſteries, the king did not immediately come into the full enjoyment of their whole revenues. However out of what did come to him, he founded ſix new biſhopricks, namely, thoſe of Weſtminſter (which was changed by queen Elizabeth into a deanry with 12 prebends, and a ſchool) Peterborough, Cheſter, Glouceſter, Briſtol, and Oxford. And in eight other ſees, he founded deanries and chapters, by turning the priors and monks into deans and prebendaries, to wit, Canterbury, Wincheſter, Durham, Worceſter, Rochcſter, Norwich, Ely, How the revenues were diſpoſed of.

Ely, and Carliſle. He founded alſo the colleges of Chriſt Church in Oxford, and Trinity in Cambridge, and finiſhed King's college chapel there. He likewiſe founded profeſſorſhips of divinity, law, phyſick, and of the hebrew and greek tongues, in both the ſaid univerſities. He gave the houſe of Grey friers, and St Bartholomew's hoſpital, to the city of London; and a perpetual penſion to the poor knights at Windſor; and laid out great ſums in building and fortifying many ports in the channel, and intended to have done more, but whether out of policy, to give content to the nobility and gentry by ſelling theſe lands at low rates, or out of eaſineſs to his courtiers, or an unmeaſured laviſhneſs in his expences, he ſoon diſabled himſelf from it, and nothing further was done by him.

Concluſion. 5. Upon the whole, it is obſervable, that the diſſolution of theſe houſes was an act not of the church, but of the ſtate; prior to the reformation, by a king and parliament of the roman catholick communion, in almoſt all points except the king's ſupremacy: And the pope by his bulls and licences had ſhewed the way before.

One thing greatly to be lamented is, that in the hurry of the diſſolution, better proviſion was not made for the performance of divine offices, in ſuch churches as had been appropriated to the monaſteries, which both the miniſters and pariſhioners of thoſe places ſuffer for to this day, and is juſtly accounted a ſcandal to our reformation.

Another thing to be lamented is, the loſs of a great number of excellent books, to the unſpeakable detriment of the learned world. For there was ſcarce any religious houſe but had a library, and ſeveral of them very good ones. From their chronicles, regiſters, and other books relating to their own houſes and eſtates, the hiſtory and antiquities of the nation in general, and almoſt every particular part of it, might have been more fully diſcovered. The many good accounts of families; of the foundation, eſtabliſhment, and appropriation of ſeveral pariſh churches, and the endowment of their vicarages; of the ancient bounds of foreſts, counties, hundreds, and pariſhes; of the privileges, tenures, and rents, of many manors and eſtates, and the like, which we meet with in ſuch of their books as have been preſerved, is a ſufficient proof that the advantage would have been ſtill greater, if we had been ſo fortunate as to preſerve more of them.

It is not preſumed here to determine, whether they were more hurtful or beneficial to the kingdom. The choiceſts records and treaſures of learning were preſerved

in

in these houses. They were schools of learning and education; for every convent had one person or more appointed for this purpose; and all the neighbours that desired it, might have their children taught grammar and church musick there, without any expence to them. In the nunneries also, young women were taught to work and to read: And not only the lower rank of people, but most of the noblemens and gentlemens daughters were taught in those places.—All the monasteries were in effect great hospitals; and were most of them obliged to relieve many poor people every day. They were likewise houses of entertainment for almost all travellers.—And the nobility and gentry provided not only for their old servants in these houses by corodies, but for their younger children and impoverished friends, by making them first monks and nuns, and in time priors and prioresses, abbats and abbesses.

On the other hand they were very injurious to the secular and parochial clergy; by taking to themselves many prebends and benefices, by getting many churches appropriated to them, and pensions out of many others; and by the exemptions they got from the episcopal jurisdiction, and from the payment of tithes. And they were no less injurious to the nation in general, by depriving the publick of so many hands, which might have been very serviceable to it in trade and other employments; by greatly diminishing the number of people, in consequence of the institution of celibacy; and by their houses or churches being sanctuaries for almost all manner of offenders. And if the superstition had continued, and the zeal of establishing religious institutions had exerted it self with equal vigour to the present age; we should by this time have been a nation of monks and friers, or probably have become a prey to some foreign invader.

Moravians. See Dissenters.

Mortmain.

1. MORTMAIN is, where lands and tenements are given to any corporation, sole or aggregate, ecclesiastical or temporal; and is called *mortmain*, as coming into a *dead hand*; because the lords of the fee could Mortmain, what.

receive nothing of the alienee any more than from a dead hand, but loſt their eſcheats and ſervices before due to them. 1 *Inſt.* 2.

Reſtraints of mortmain.

2. Before the ſtatutes of mortmain, bodies once incorporated might have been endowed, perpetuis futuris temporibus, without licence from the king or any other. *Gibſ.* 641.

But by *ch.* 36. of the great charter, 9 *H.* 3. commonly called the ſtatute of mortmain; *it ſhall not be lawful to any to give his lands to any religious houſe, and to take the ſame land again to hold of the ſame houſe. Nor ſhall it be lawful to any houſe of religion to take the lands of any, and to leaſe the ſame to him of whom he received it. And if any from henceforth give his lands to any religious houſe, and thereupon be convict, the gift ſhall be utterly void, and the land ſhall accrue to the lord of the fee.*

There were two cauſes of making this ſtatute; one, that the ſervices that were due out of ſuch fees, and which in the beginning were created for the defence of the realm, were unduly withdrawn; the other cauſe was, that the chief lords did loſe their eſcheats, wardſhips, reliefs, and the like. 2 *Inſt.* 75.

But the eccleſiaſtical perſons (who in this were to be commended, that they had ever the beſt learned men in the law that they could get, of their counſel) found many ways to creep out of this ſtatute; to wit, religious men, as abbots, priors, and other eccleſiaſtical perſons regular, to purchaſe lands holden of themſelves, or take leaſes for long term of years, and many other devices they had to eſcape out of this ſtatute; and biſhops, parſons, and other eccleſiaſtical perſons ſecular, took themſelves to be out of this ſtatute. 2 *Inſt.* 75.

The ſtatute of the 7 *Ed.* 1. *ſt.* 2. commonly called the ſtatute *De religioſis*, intended to provide againſt theſe devices, which is as followeth: *Where of late it was provided, that religious men ſhould not enter into the fees of any without licence and will of the chief lord; and notwithſtanding, ſuch religious men have entred as well into their own fees, as into the fees of other men, appropriating and buying them, and ſometimes receiving them of the gift of others, whereby the ſervices that are due of ſuch fees, and which at the beginning were provided for the defence of the realm, are wrongfully withdrawn, and the chief lords do loſe their eſcheats of the ſame; it is ordained, that no perſon, religious or other, whatſoever he be, that will buy or ſell any lands or tenements, or under the colour of gift or leaſe, or that will receive by reaſon of any other title whatſoever it be lands or tenements, or by any other*

other craft or engine will preſume to appropriate to himſelf, under pain of forfeiture of the ſame, whereby ſuch lands or tenements may any wiſe come into mortmain: and if any perſon, religious or other, do preſume either by craft or engine to offend againſt this ſtatute, it ſhall be lawful for the lord of the fee to enter, and upon his neglect the king ſhall enter.

That will buy or ſell any lands or tenements, &c.] The tranſlation here, as in many other places in the printed books, ſeemeth to be imperfect. The ſenſe is this: *It is ordained, that no perſon, religious or other, whatſoever he be, ſhall preſume to buy or ſell, or under colour of gift or leaſe or any other title whatſoever to take of any perſon, or by any other means by craft or engine to appropriate unto himſelf any lands or tenements, whereby ſuch lands and tenements may in any wiſe come into mortmain; on pain of forfeiture of the ſame.* The words are, in the original, "Statuimus——quod "nullus religioſus aut alius quicumque terras aut tene- "menta aliqua emere vel vendere aut ſub colore dona- "tionis aut termini vel alterius tituli cujuſcumque ab "aliquo recipere aut alio quovis modo arte vel ingenio "ſibi appropriare preſumat ſub forisfactura eorumdem "per quod ad manum mortuam terre et tenementa hu- "juſmodi deveniant quoquo modo."

Either by craft or engine] A man would have thought that this ſhould have prevented all new devices; but they found alſo an evaſion out of this ſtatute: for this ſtatute extendeth but to gifts alienations and other conveyances made between them and others, by craft or engine: and therefore they gave over them, and they pretending a title to the land that they meant to get, brought a *præcipe quod reddat* againſt the tenant of the land, and he by conſent and colluſion ſhould make default, and thereupon they ſhould recover the land, and enter by judgment of law; and ſo the ſtatute was defrauded. 2 *Inſt.* 75.

When this new invention was alſo provided for, and taken away by the ſtatute of the 13 *Ed.* 1. *c.* 32. yet they found out an evaſion out of all theſe ſtatutes; for now they would neither get any lands by purchaſe, gift, leaſe, or recovery, but they cauſed the lands to be conveyed by feoffment or in other manner to divers perſons and their heirs, to the uſe of them and their ſucceſſors, by reaſon whereof they took the profits. But this was enacted by the ſtatute of the 15 *R.* 2. *c.* 5. to be mortmain, within the forfeiture of the ſaid ſtatute of the 7 *Ed.* 1. 2 Inſt. 75.

But

But after all, the ſaid ſtatute of the 15 *R.* 2. did extend only to bodies *corporate*; therefore by the 23 *H.* 8. *c.* 10. it is enacted as followeth: *Where by reaſon of feoffments and other aſſurances made of truſt, of lands and other hereditaments to the uſe of pariſh churches, chapels, guilds, fraternities, commonalties, companies or brotherhoods, erected and made of devotion or by common aſſent of the people* without any corporation, *or for obits or other like uſes, there groweth and iſſueth to the king and other lords and ſubjects of the realm the like loſſes and other inconveniences, and is as much prejudicial to them, as is in caſe where lands are aliened into mortmain; it is enacted, that all and every ſuch uſes ſhall be void; and all collateral aſſurances in defrauding of this ſtatute ſhall be alſo void; and this ſtatute ſhall be interpreted moſt beneficially to the deſtruction of ſuch uſes.*

M. 34 & 35 *El. Martindale* and *Martin.* In ejectment by the leſſee of Sir Edward Clere againſt the leſſee of Peacock, for certain lands in Thetford, upon a ſpecial verdict the caſe was, An anceſtor of Sir Edward Clere deviſed certain lands to divers and their heirs (under whom Peacock claimed) to the uſe of them and their heirs, upon this truſt and confidence, that they out of the profits of it ſhould erect a free ſchool, and pay ſo much to the maſter yearly, and ſo much to the uſher, and ſhould give 10 l a year to five poor men; and the queſtion was, whether theſe uſes were void by the ſtatute of the 23 *H.* 8. *c.* 10. And after argument, all the juſtices held, that this diſpoſition was not reſtrained by the ſtatute; for that was only to reſtrain ſuperſtitious uſes, and never intended to reſtrain uſes that were in favour of learning and relief of the poor. *Cro. El.* 288.

And lord *Coke* ſays, that any man, notwithſtanding this ſtatute, may give lands or other hereditaments to any perſon or perſons and their heirs, for the finding of a preacher, maintenance of a ſchool, relief and comfort of maimed ſoldiers, ſuſtenance of poor people, reparations of churches, highways, bridges, cauſways, diſcharging of the poor inhabitants of a town of common charges, for the making of a ſtock for poor labourers in huſbandry, and poor apprentices, and for the marriage of poor virgins, or for any other charitable uſes; and it is good policy upon every ſuch feoffment or eſtate, to reſerve to the feoffor and his heirs a ſmall rent, or to expreſs ſome ſuch conſideration of ſome ſmall ſum; ſo that the feoffees may be ſeiſed to their own uſe, and not to the uſe of the feoffor, by which it is out of doubt that this ſtatute cannot make void the uſe. 1 *Co.* 26. *Gibſ.* 645.

3. Though

3. Though the prohibition by the ſtatute of mortmain in the *magna charta* was abſolute; yet with proper licence alienations might ſtill be made, as appears from the preamble of the ſtatute *De religioſis* before mentioned. 2 *Inſt.* 74. Relaxation of thoſe reſtraints.

And by the 18 Ed. 3. ſt. 3. c. 3. *If prelates, clerks beneficed, or religious people, which have purchaſed lands, and the ſame have put in mortmain, be impeached upon the ſame before our juſtices, and they ſhew our charter of licence, and proceſs thereupon made by an inqueſt of* ad quod damnum, *or of our grace, or by fine; they ſhall be freely let in peace without being farther impeached for the ſame purchaſe.*

And by the 17 C. 2. c. 3. *Every owner of any impropriation, tithes, or portion of tithes in any pariſh or chapelry, may give and annex the ſame or any part thereof, unto the parſonage or vicarage of the ſaid pariſh church or chapel where the ſame do lie or ariſe, or ſettle the ſame in truſt for the benefit of the ſaid parſonage or vicarage, or of the curate and curates there ſucceſſively where the parſonage is impropriate and no vicar endowed; without any licence of mortmain.* ſ. 7.

And if the ſettled maintenance of any parſonage, vicarages, churches, and chapels united, or of any other parſonage or vicarage with cure, ſhall not amount to the full ſum of 100 *l a year clear and above all charges and reprizes; it ſhall be lawful for the parſon, vicar, and incumbent of the ſame, and his ſucceſſors, to take and purchaſe to him and his ſucceſſors, lands tenements rents tithes or other hereditaments, without any licence of mortmain.* ſ. 8.

This licence was frequently given by the kings, notwithſtanding the ſtatutes to the contrary; partly by reaſon that the ſtatutes gave to the king a right of entry in caſe of alienation in mortmain, if the lords did not enter within ſuch a time; and this ſeemeth reaſonable, becauſe thereby the king only gives up that right of entry which thoſe ſtatutes do give him for the forfeiture, which every meſne lord might alſo do as well, ſo far as he had a right by thoſe ſtatutes: and partly, becauſe the kings claimed a power inherent in the crown to diſpenſe with ſtatutes or acts of parliament. 2 *Haw.* 391.

But this diſpenſing power was carried ſo very high in the reign of king James the ſecond, and found to be of ſuch dangerous conſequence as to make the execution of the moſt neceſſary laws in effect precarious, and merely dependent on the pleaſure of the prince; and it ſeeming highly incongruous, that the king ſhould have a kind of abſolute unlimited power in diſpenſing with laws, wherein the church and ſtate have the higheſt intereſt, when at the

the ſame time he hath no power at all to diſpenſe with any law which veſts the leaſt right or intereſt in a private ſubject; it was found by experience neceſſary to declare and enact, by the 1 W. ſeſſ. 2. c. 2. *that no diſpenſation by* non obſtante *to any ſtatute ſhall be allowed; but that the ſame ſhall be held void and of none effect, except a diſpenſation be allowed in ſuch ſtatute.* 2 Haw. 391.

But with reſpect to alienations in mortmain, power was afterwards given to the king to grant licences as followeth, by the ſtatute of the 7 & 8 W. c. 37. viz. *Whereas it would be a great hindrance to learning and other good and charitable works, if perſons well inclined may not be permitted to found colleges or ſchools for encouragement of learning, or to augment the revenues of colleges or ſchools already founded, by granting lands tenements rents or other hereditaments to ſuch colleges or ſchools, or to grant lands or other hereditaments to other bodies politick or incorporated, now in being, or hereafter to be incorporated for other good and publick uſes; it is enacted, that it ſhall be lawful for the king, his heirs and ſucceſſors, when and ſo often as they ſhall think fit, to grant to any perſon or perſons, bodies politick or corporate, their heirs and ſucceſſors, licence to aliene in mortmain, and alſo to purchaſe take and hold in mortain, in perpetuity or otherwiſe, any lands tenements rents or hereditaments whatſoever, of whomſoever the ſame ſhall be holden; and the ſame ſhall not be ſubject to any forfeiture, by reaſon of ſuch alienation or acquiſition.*

And by the 2 & 3 An. c. 11. *It ſhall be lawful for any perſon by deed inrolled, to give to the corporation for augmenting the maintenance of the poorer clergy, any lands or goods for that uſe and purpoſe, without any licence or writ of* ad quod damnum; *the ſtatute of mortmain, or any other ſtatute or law notwithſtanding.*

Further reſtraints by the 9 G. 2. c. 36.

4. By the 9 G. 2. c. 36. *Whereas gifts or alienations of lands tenements or hereditaments in mortmain are prohibited or reſtrained by* magna charta *and divers other wholſome laws, as prejudicial to and againſt the common utility, nevertheleſs this publick miſchief hath of late greatly increaſed, by many large and improvident alienations or diſpoſitions made by languiſhing or dying perſons, or by other perſons, to uſes called* charitable uſes, *to take place after their deaths to the diſheriſon of their lawful heirs; it is enacted, that from and after* June 24, 1736, *no manors lands tenements rents advowſons or other hereditaments corporeal or incorporeal whatſoever, nor any ſum or ſums of money goods chattels ſtocks in the publick funds ſecurities for money or any other perſonal eſtate whatſoever to be laid out or diſpoſed of in the purchaſe of any lands tenements or hereditaments, ſhall be given granted aliened limited*

limited releaſed transferred aſſigned or appointed or any ways conveyed or ſettled, to or upon any perſon or perſons bodies politick or corporate or otherwiſe, for any eſtate or intereſt whatſoever, or any ways charged or incumbred by any perſon or perſons whatſoever, in truſt or for the benefit of any charitable uſes whatſoever: unleſs ſuch gift conveyance appointment or ſettlement of any ſuch lands tenements or hereditaments ſum or ſums of money or perſonal eſtate (other than ſtocks in the publick funds) be made by deed indented ſealed and delivered in the preſence of two or more credible witneſſes, twelve kalendar months at leaſt before the death of ſuch doner or grantor (including the days of the execution and death), and be inrolled in his majeſty's high court of chancery withing ſix kalendar months next after the execution thereof; and unleſs ſuch ſtocks be transferred in the publick books uſually kept for the transfer of ſtocks, ſix kalendar months at leaſt before the death of ſuch donor or grantor (including the days of the transfer and death); and unleſs the ſame be made to take effect in poſſeſſion for the charitable uſe intended, immediately from the making thereof; and be without any power of revocation, reſervation, truſt, condition, limitation, clauſe or agreement whatſoever, for the benefit of the donor or grantor, or of any perſon or perſons claiming under him. ſ. 1.

Provided, that nothing herein before mentioned, relating to the ſealing and delivery of any deed or deeds twelve kalendar months at leaſt before the death of the grantor, or to the transfer of any ſtock ſix calendar months before the death of the grantor or perſon making ſuch transfer, ſhall extend to any purchaſe of any eſtate or intereſt in lands tenements or hereditaments, or any transfer of any ſtock to be made really and bona fide for a full and valuable conſideration actually paid at or before the making ſuch conveyance or transfer, without fraud or colluſion. ſ. 2.

And all gifts grants conveyances appointments aſſurances transfers and ſettlements whatſoever, of any lands tenements or other hereditaments, or of any eſtate or intereſt therein, or of any charge or incumbrance affecting or to affect any lands tenements or hereditaments, or of any ſtock money goods chattels or other perſonal eſtate or ſecurities for money, to be laid out in the purchaſe of any lands tenements or hereditaments, or of any eſtate or intereſt therein, or of any charge or incumbrance affecting or to affect the ſame, to or in truſt for any charitable uſes whatſoever, which ſhall after the ſaid 24th *day of* June 1736, *be made in any other manner or form than by this act is directed, ſhall be void.* ſ. 3.

Provided always, that this act ſhall not extend to make void the diſpoſitions of any lands tenements or hereditaments, or of any

any perſonal eſtate to be laid out in the purchaſe of any lands tenements or hereditaments, which ſhall be made in any other manner or form than by this act is directed, to or in truſt for either of the two univerſities; or any of the colleges or houſes of learning within either of the ſaid univerſities; or to or in truſt for the colleges of Eton, Wincheſter, *or* Weſtminſter, *for the better ſupport and maintenance of the ſcholars only upon the foundations of the ſaid colleges of* Eton, Wincheſter, *and* Weſtminſter. ſ. 4.

Provided nevertheleſs, that no ſuch college or houſe of learning, which doth or ſhall hold or enjoy ſo many advowſons of eccleſiaſtical benefices, as are or ſhall be equal in number to one moiety of the fellows or perſons uſually ſtiled or reputed as fellows; or where there are or ſhall be no fellows or perſons uſually ſtiled or reputed as fellows, to one moiety of the ſtudents upon the foundation, whereof any ſuch college or houſe of learning doth or may, by the preſent conſtitution of ſuch college or houſe of learning conſiſt,——be capable of purchaſing acquiring receiving taking holding or enjoying any other advowſons of eccleſiaſtical benefices by any means whatſoever: the advowſons of ſuch eccleſiaſtical benefices as are annexed to, or given for the benefit or better ſupport of the headſhips of any of the ſaid colleges or houſes of learning, not being computed in the number of advowſons hereby limited. ſ. 5.

In the caſe between *Aſhburnham* and *Bradſhaw*—— Whereas by an order made on the hearing of this cauſe in the high court of chancery the 11th day of Dec. 1738, by the right honourable the lord high chancellor of Great Britain, his lordſhip (among other things) declared the will of Robert Bradſhaw in the ſaid order named to be well proved, and that the firſt queſtion in the cauſe appeared to be a point of law ariſing on the conſtruction of a new act of parliament which had never come in judgment before, and to be a matter of great conſequence; for which reaſon his lordſhip thought it fit in order to the ſettling the law thereupon, that the opinion of all the judges ſhould be taken on the following caſe: viz. Robert Bradſhaw, clerk, on the 20th day of November, in the year 1734, duly made and executed his laſt will and teſtament in writing; and by the ſaid will gave and deviſed divers lands and tenements to truſtees and their heirs, in truſt or for the benefit of certain charitable uſes therein mentioned, amongſt ſeveral other truſts. The ſtatute of the ninth year of his preſent majeſty's reign, for reſtraining the diſpoſition of lands in mortmain, commenced from and after the 24th day of June in the year 1736. In July 1736 the teſtator died, without

without revoking or altering the ſaid will. *Quære*, Whether ſuch gift or deviſe, ſo far as the ſame relates to the charitable uſes aforeſaid, be good in law notwithſtanding the ſtatute, or not? *Anſ.* We have heard counſel on all ſides, and are of opinion, that the gift or deviſe, ſo far as the ſame relates to the charitable uſes aforeſaid, is good in law notwithſtanding the ſaid ſtatute.

Sergeant's Inn	Wm Lee.	J. Forteſcue A.
Dec. 4. 1739.	J. Willes.	W. Forteſcue.
	J. Comyns.	W. Chapple.
	F. Page.	T. Parker.
	Law. Carter.	M. Wright.
	E. Probyn.	(Judge Denton being abſent.)

It hath been determined, that if a man deviſeth his land to truſtees *to be turned into money, and that money laid out in a charity*, it is not good within this act; for it is an intereſt ariſing out of land. So a deviſe of a *mortgage*, or of a *term for years*, to a charity, is not good; for the words of the ſtatute are, that the lands ſhall not be *conveyed or ſettled, for any eſtate or intereſt whatſoever, or any ways charged or incumbred, in truſt or for the benefit of any charitable uſe.*

So alſo *money given to be laid out in lands* is expreſsly within the act; but money given generally is not; and if money be given to be laid out *in lands or otherwiſe* to a charitable uſe, it hath been determined that ſuch deviſe is good, by reaſon of the words [*or otherwiſe*]. As in the caſe of *Soreſby* and *Hollins*, Aug. 6. 1740. John Naylor in 1738 made his will in theſe words; "I will and deſire, that my executors, within twelve "months after my deceaſe, do ſettle and ſecure, by "purchaſe of lands of inheritance, or otherwiſe, as "they ſhall be adviſed, out of my perſonal eſtate, "one annuity or yearly payment of 50 l, to be paid "yearly and diſtributed for ever, by my executors their "heirs and aſſigns, among the poor and indigent peo-"ple of Leeke in the county of Stafford, in ſuch "manner as they ſhall think fit. And my will alſo is, "that my executors do ſettle and ſecure one other annuity "of 5 l, to be paid yearly to the vicar of Leeke for the "time being for ever, for preaching an annual ſermon "on the 12th day of October." And the teſtator deviſed the reſidue of his perſonal eſtate, to be equally divided between his ſiſters Mrs. Soreſby and Mrs. Hollins.

—By

—By the lord chancellor Harwicke: The only queſtion in this caſe is, whether the deviſe of the two annuities of 50 l and 5 l to charitable uſes, is void by the late ſtatute of mortmain. It is inſiſted upon by the plaintiffs, the reſiduary legatees, that it is void; becauſe the direction of the deviſe is, to ſettle and ſecure the annuity of 50 l, by a truſt of lands of inheritance: and tho' the words *or otherwiſe* are added, they will not vary the caſe; for Mr. Naylor's intention was, to give the annuity out of lands of inheritance. But I am of opinion upon this act of parliament, that this bequeſt was not void, and that there is no authority to conſtrue it to be void, if by law it can poſſibly be made good. The act of parliament is not at all aimed againſt perpetual charities merely as ſuch, or to prevent the eſtabliſhment or creation of them, but is deſigned againſt the caſes of perpetual charities in lands, and (as the title imports) to reſtrain the diſpoſition of lands whereby the ſame become unalienable. The whole recital, and enacting part of the ſtatute, take notice only of the unalienable diſpoſal of land, whereby heirs are diſinherited; and therefore the alienation or conveyance of lands to ſuch purpoſes are prohibited. And altho' there is a clauſe to prohibit money being laid out in lands to ſuch purpoſes as would make them unalienable; yet there is no reſtriction whatſoever upon any one, from leaving a ſum of money by will, or any other perſonal eſtate, to charitable uſes, provided it be to be continued as a perſonalty, and the executors or truſtees are not obliged or under a neceſſity of laying it out in land by virtue of any direction of the teſtator for that purpoſe. Conſider then, whether this clauſe and deviſe in the will fall within the reſtraint and prohibition of the ſtatute. And in the firſt words they do fall within them. For the teſtator directs, that his executors ſhall *ſettle and aſſure by purchaſe of lands of inheritance*———And if the teſtator had reſted upon ſuch firſt words, the deviſe had been clearly void. But then he goes on in the disjunctive—*or otherwiſe as my executors ſhall be adviſed.* And if a deviſe in a will is in the disjunctive, and leaves to the executors two methods to do a particular thing by, the one lawfully, and the other prohibited by law; can any court ſay, becauſe one method is unlawful, that therefore the other is ſo, and the whole bequeſt void? No; for if one bequeſt is lawful, that ſhall be purſued, and take effect. ———It hath been further argued againſt the deviſe, that the words [*for ever*] ſhew the annuities muſt ariſe out of ſome real eſtate, which only is capable of ſupplying

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ing them for ever: For perſonal funds are too periſhable and tranſitory in their nature, to anſwer ſuch everlaſting annuities: And ſuppoſe a particular ſum were veſted in ſtock, with deſign to purchaſe a particular yearly ſum or annuity; it may ſo happen that the company may be quite diſſolved, or that ſtock may fall, or intereſt be ſo reduced that half the annuity may not be produced. But theſe objections may be over-ruled. For if the company ſhould be diſſolved, the principal ſtock may be taken out, and veſted in ſome other company. And there may be annuities that may probably continue for ever, and yet not payable out of land. I will mention an inſtance of one, which has laſted a century and a half, and may exiſt perpetually; which is, Sir Thomas White's charity, being a diſpoſition of money to be employed by continual rotation, in loans to poor tradeſmen of ſeveral ſums to be let for a ſettled number of years, and then to be repaid. And any man may, at this day, give by will a perpetual charity in this manner. But if a man by will ſecures ſuch loans by lands or purchaſe of lands; ſuch deviſe ſhall be void, and contrary to the late ſtatute of mortmain. If this caſe had been to be conſidered by the court, before the act; it would, as the ſafeſt method to ſecure the charity for ever, have recommended and directed a purchaſe of lands: But when this court is precluded from doing it in this manner; if it can be obtained in any other, there is no reaſon to ſay the deviſe is void.——It is ſaid too, that the words [*heirs and aſſigns*] import a purchaſe in land or ſome real thing; for no perſonal thing can deſcend to heirs: and if the money is to be inveſted in a perſonal ſecurity, it will not go to the heirs, but to the executors; and ſo the intention of the teſtator will not be purſued. I will ſuppoſe, an obligor binds himſelf his heirs executors and adminiſtrators in a ſum of money to a papiſt, who obtains judgment upon the bond and takes out an *Elegit*; in this caſe I think it has been held at the aſſizes, or at leaſt it might very well have been ſo held, that the papiſt cannot maintain an ejectment, and yet the bond is good to bind the perſon of the obligor and his perſonal repreſentatives, but not to charge his land or his heirs who repreſent him in his landed capacity. And this comes up to the preſent caſe; which may ſecure the charity in a double ſenſe, either upon land or perſonalty, if the law would allow both; and if the law prohibits one only, it certainly allows the other. And I am of opinion upon the whole, that there is nothing that makes this bequeſt void in every part; but that

it is good in that way which the law does not forbid. But I would not have it queſtioned, if a man ſhould by his will direct a ſum of money to be laid out in land or upon rent charge to be ſecured upon land for any charity, and in the mean time (till it can be laid out) to be inveſted in government ſecurities for the benefit of the charity, but that that bequeſt will be void; becauſe the final end and intention of ſuch teſtator was to diſpoſe of his money in land, and the inveſtiture of it in government and perſonal ſecurities was but to ſecure it till a proper purchaſe of land or rent charge offered.——As to the annuity of 5 l, there are fewer objections to that than to the other: for there is no direction at all for any money or perſonal eſtate to be laid out in land; for the executors are only willed to *ſecure and ſettle* 5 *l a year* for the purpoſe there mentioned, and it muſt be ſecured upon a perſonal fund conſiſtent with the will and intention of the teſtator, and not contradictory to the words of the act of parliament.——And as it is often ſaid in old books by the judges that "I was by at the making of the act of par-"liament, and the meaning and intention of it was then "ſaid to be this or that;" ſo I was by at the making of this ſtatute, and it was at that very time ſaid by the legiſlature, that it would not hinder any charitable diſtribution of a perſonal eſtate. Therefore it was decreed, that the deviſe was good; and that the money ſhould be inveſted in ſouth ſea ſtock, for the charitable purpoſes mentioned in the will.

Money for *erecting* an hoſpital or ſchool, hath been determined not to be within the act. As in the caſe of *Vaughan* and *Farrer*, Feb. 26, 1751; John Allen by his will gave money to truſtees, to erect, in ſome convenient place in or next the city of York, an hoſpital for the ſupport and maintenance of as many poor old men, as the ſurplus of his effects would admit of, and to put in as many as they ſhould think proper in their diſcretion. In ſupport of the charity it was inſiſted, that for ſuch erection it is not neceſſary that land ſhould be purchaſed, for if any perſon will by deed give a piece of land to build the hoſpital upon, the truſtees might build it there. So if one of the truſtees will give it. Erecting doth not neceſſarily mean building, but founding; putting it on ſuch a foot that the end may be anſwered; which was not for the ſake of the building, but that out of the produce theſe poor might be maintained; and a houſe might be hired for that purpoſe, as is commonly done by the

overſeers of the poor. And for this was cited the caſe of *Gaſtril* and *Baker*, 31 March, 1747: The teſtator's repreſentatives brought a bill for the reſidue of the perſonal eſtate undiſpoſed of by will, againſt the truſtees, who were alſo executors, and who claimed it for a charity in the will, in theſe words: "I give all the reſt and reſidue "of my eſtate, of what nature ſoever, to truſtees; in "order to and towards erecting a ſchool for the education "of poor boys," in ſuch a place, and in ſuch manner, as the truſtees ſhould appoint. It was inſiſted to be a lapſed legacy by the mortmain act, and that erecting a ſchool muſt mean buying and building. But his lordſhip held, that erecting included the founding, and conſequently the maintenance of the maſter; which was a different thing from the mere ſchool place itſelf: but that the end might be obtained by hiring a houſe. And he directed accordingly.——By the lord chancellor Hardwicke: This caſe comes very near that caſe of the ſchool. For a ſchool imports, there ſhould be ſome place in which the children ſhall be taught; for it cannot mean that it ſhould be in the open air. So doth an hoſpital import ſome place, in which theſe people ſhould be entertained. There is no direction in this will, that any part of this money ſhould be laid out in building an hoſpital; for *erect* as well imports foundation as building; and therefore it was ſo conſtrued in the caſe of the ſchool; and ſo is the word *erigimus* conſtrued in charters of the crown and private foundations. There is nothing in the ſtatute prohibiting the giving perſonal eſtate to charity, provided it is not to be laid out in land; and the words of the ſtatute are applied to improvident alienations to diſheriſon of heirs. If a perſonal eſtate is left to truſtees for a charitable uſe, which they direct, and there is no occaſion to come to a court of equity for direction, there is nothing in this ſtatute reſtraining the truſtees from laying out that in land; becauſe by the expreſs proviſo, all purchaſes to take effect in poſſeſſion are good, notwithſtanding this act of parliament; which is a matter may perhaps want a remedy. If indeed theſe truſtees were to come to this court for an eſtabliſhment, the court would never direct it to be ſo laid out in land; but there is nothing illegal diſabling the truſtees from privately doing it, becauſe the ſtatute makes good all purchaſes to take effect immediately in poſſeſſion. In the preſent caſe, if the truſtees had come before the court, and laid a ſcheme, that a certain perſon would give a piece of ground

to build this upon; or if they had ſaid, there were in *York* ſeveral charitable foundations belonging to the city, and they would let them build thereon for this hoſpital; the court would undoubtedly have accepted it. Nay they might have ſaid, they would take a houſe in York for that purpoſe: there is nothing in the ſtatute reſtraining the giving money to build. The act of parliament meant to leave perſons to diſpoſe of perſonal eſtate for a perpetual charity; but meant to prevent the great miſchief of giving land for that, or money to be laid out in land; as that would lock up land from being uſed in a commercial way; which would be a detriment to the public. 2 *Vezey*, 182.

So in the caſe of the *Attorney General* and *Bowles*, July 24, 1754; William Bowles by his will gave 500 *l* out of his perſonal eſtate to lay out part thereof in erecting a ſmall ſchool houſe, and a little houſe adjoining for the maſter to live in, the whole purchaſe and building not to exceed 200 l; the remaining 300 l to be laid out in the purchaſe of lands, or in ſome *real* ſecurity, for the maintenance of the maſter. It was urged, that *real* ſecurity meant ſubſtantial, good, and effectual ſecurity; and therefore was not excluded by the ſtatute. But Hardwicke lord chancellor held otherwiſe; and that he muſt take the word *real* in the known, legal, ſignification of it, and could not annex a new idea to it; therefore the 300 l legacy was void within the ſtatute. But as to the 200 l, if they could get a piece of ground by the gift or generoſity of any perſon, not by purchaſe, they might be at liberty to apply to the court to lay out that 200 l in erecting a ſchool houſe thereon, but not to be laid out in land to build upon. 2 *Vezey*, 547.

Mortuary.

1. MORTUARY ſeems to have been originally an oblation made at the time of a perſon's death. In the Saxon times there was a funeral duty to be paid, which was called *pecunia ſepulchralis*, and *ſymbolum animæ*, or the *ſoul-ſcot*; which was required by the council of Ænham and inforced by the laws of king Canutus; and was due to the church which the party deceaſed belonged to, whether he was buried there or not. 1 *Still.* 171.

Dr Stillingfleet makes a diſtinction between *mortuaries* and *corſe preſents*: The *mortuary*, he ſays, was a right ſettled

tled on the church, upon the deceaſe of a member of it; and a *corſe preſent* was a voluntary oblation uſually made at funerals. 1 *Still.* 172, 3.

And it ſeemeth, that in ancient times a man might not diſpoſe of his goods by his laſt will and teſtament, without firſt aſſigning therein a ſufficient mortuary to the church. And this, in a conſtitution of archbiſhop Winchelſea, is called the *principal legacy*; ſo denominated (ſaith Lindwood) becauſe they who died did bequeath the beſt or the ſecond beſt of their goods to God and the church, in the firſt place, and before other legacies. *Lind.* 196.

And in another conſtitution of the ſame archbiſhop it is injoined, that if a perſon at the time of his death have three or more quick goods, the firſt beſt ſhall be given to him to whom it is due (that is, to the lord of the fee for a heriot); and the ſecond beſt ſhall be reſerved to the church where the deceaſed perſon received the ſacraments whilſt he lived. *Lind.* 184.

And this was uſually carried to the church with the dead corps. And Mr Selden quotes an ancient record, where it is recited, that a *horſe* was preſent at the church the ſame day in the name of a mortuary, and that the parſon received him, according to the cuſtom of the land and of holy church. *Seld. Hiſt. Tith.* 287.

Limitation of mortuaries by ſtatute.

2. By the ſtatute of the 21 H. 8. c. 6. *Foraſmuch as queſtion and doubt hath ariſen upon the order manner and form of demanding receiving and claiming of mortuaries, otherwiſe called corſe preſents, as well for the greatneſs and value of the ſame, which, as hath been lately taken, is thought over-exceſſive to the poor people and other perſons of this realm, as alſo for that ſuch mortuaries or corſe preſents have been demanded and levied for ſuch as at the time of their death have had no property in any goods or chattels, and many times for travelling and wayfaring men, in the places where they have fortuned to die; to the intent therefore that all doubt contention and uncertainty herein may be removed, and as well the generality of the king's people therein remedied, as alſo the parſons vicars pariſh-prieſts curates and others having intereſt in ſuch mortuaries and corſe preſents indifferently provided for, it is enacted, that no parſon, vicar, curate, nor pariſh prieſt, nor any other ſpiritual perſon, nor their farmers, bailiffs, nor leſſees, ſhall take receive or demand of any perſon within this realm, for any perſon dying within the ſame, any manner of mortuary or corſe preſent, nor any ſum of money nor any other thing for the ſame, more than is hereafter mentioned; nor ſhall convent or call any perſon before any judge ſpiritual for the recovery of any ſuch*

mortuaries or corſe preſents, or any other thing for the ſame, more than is hereafter mentioned: on pain to forfeit for every time ſo demanding receiving taking or conventing or calling any ſuch perſon before any ſpiritual judge, ſo much in value as they ſhall take above the ſum limited by this act, and over that 40 s *to the party grieved contrary to this act, to be recovered by action of debt.* ſ. 1, 2.

And *no manner of mortuary ſhall be taken or demanded of any perſon whatſoever, which at the time of his death hath in moveable goods under the value of ten marks.* ſ. 3.

And *no mortuary ſhall be given or demanded of any perſon, but only in ſuch place where heretofore mortuaries have been uſed to be paid and given; and in thoſe places none otherwiſe but after the rate and form hereafter mentioned.* id.

And *no perſon ſhall pay mortuaries in more places than one, that is to ſay, in the places of their moſt dwelling habitation, and there but one mortuary.* id.

And *no parſon, vicar, curate, pariſh prieſt or other, ſhall for any perſon dying or dead, and being at the time of his death of the value in moveable goods of ten marks or more, clearly above his debts paid, and under the ſum of* 30 l, *take for a mortuary above* 3 s 4 d *in the whole. And for a perſon dying or dead, being at the time of his death of the value of* 30 l *or above, clearly above his debts paid, in moveable goods, and under the value of* 40 l, *there ſhall no more be taken or demanded for a mortuary, than* 6 s 8 d *in the whole. And for any perſon dying or dead, having at the time of his death of the value in moveable goods of* 40 l *or above, to any ſum whatſoever it be, clearly above his debts paid, there ſhall be no more taken paid or demanded for a mortuary, than* 10 s *in the whole.* id.

Provided, *that for no woman being covert baron, nor child, nor for any perſon not keeping houſe, any manner of mortuary, nor any thing or money by way of mortuary, ſhall be paid: Nor alſo for any wayfaring man, or other, that dwelleth not nor maketh reſidence in the place where they ſhall happen to die; but that the mortuary of ſuch wayfaring perſons be anſwerable in places where mortuaries be accuſtomed to be paid in manner and form, and after the rate before mentioned, and none otherwiſe, in the place or places where ſuch wayfaring perſons at the time of their death had their moſt habitation, houſe, and dwelling places, and no where elſe.* ſ. 4.

Provided, *that it ſhall be lawful to all parſons, vicars, curates, pariſh prieſts, and other ſpiritual perſons, to take any ſum of money or other thing, which by any perſon dying ſhall be diſpoſed*

diſpoſed given or bequeathed to them, or any of them, or to the high altar of the church. ſ. 5.

And *no mortuaries nor corſe preſents, nor any ſum of money or other thing for any mortuary or corſe preſent, ſhall be demanded or taken in the parts of* Wales *nor in the marches of the ſame, nor in the town of* Berwick, *but only in ſuch places of the ſame where mortuaries have been accuſtomed to be paid: and in thoſe places no mortuaries or corſe preſents, nor any other thing for mortuary or corſe preſent, ſhall be demanded or taken, but only after the form and manner above ſpecified, and none otherwiſe, nor of any other perſon than is limited by this act, upon the pain contained therein.* ſ. 6.

Provided, *that it ſhall be lawful to the biſhops of* Bangor, Landaff, St David's *and* St Aſaph, *and likewiſe to the archdeacon of* Cheſter, *to take ſuch mortuaries of the prieſts within their dioceſes and juriſdictions, as heretofore have been accuſtomed.* ſ. 7.

Provided *alſo, that in ſuch places where mortuaries have been accuſtomed to be taken of leſs value than is aforeſaid; no perſon ſhall be compelled to pay in ſuch place any other mortuary or more for any mortuary, than hath been accuſtomed; nor that any mortuary in ſuch place ſhall be demanded or taken of any perſon exempt by this act, nor in any wiſe contrary to this act, upon the pain afore limited.* id.

By the 12 *Ann. ſt.* 2. *c.* 6. The clauſe in the ſaid ſtatute, ſo far as it relates to the taking of any mortuary or corſe preſent upon the death of any clergyman within the dioceſes of *Bangor*, *Landaff*, *St David's*, and *St Aſaph*, is repealed; and certain ſine-cures and prebends are annexed to the reſpective ſees, in recompence and in lieu of the mortuaries of prieſts dying within the ſaid reſpective dioceſes.

And as to the archdeaconry of *Cheſter*, it is ſaid, that the cuſtom there was, that the archdeacon (and after the erection of the epiſcopal ſee there, the biſhop as archdeacon) had for a mortuary, after the death of every prieſt dying within the archdeaconry of *Cheſter*, the beſt horſe or mare, his ſaddle, bridle, ſpurs, his beſt gown or cloak, his beſt hat, his beſt upper garment under his gown, his tippet, and his beſt ſignet or ring. *Cro. Car.* 237.

But by the 28 *G.* 2. *c.* 6. The aforeſaid clauſe, ſo far as it relates to the taking of any mortuary or corſe preſent upon the death of any clergyman within the archdeaconry of *Cheſter*, ſhall immediately after the living of *Wareton* ſhall become void be repealed; and the ſaid living

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ing ſhall be annexed to the ſee of *Cheſter*, in compenſation of ſuch mortuaries.

And by the 26 H. 8. c. 15. *Foraſmuch as divers ſubjects inhabited within the archdeaconry of* Richmond *in the county of* York, *be and of long time have been ſore and grievouſly exacted and impoveriſhed, by the parſons vicars and others ſuch as have benefices and ſpiritual promotions within the ſame, as by taking of every perſon when he dieth, in the name of a penſion or of a portion, ſometime the ninth part of all his goods and chattels, and ſometime the third part, to the open and manifeſt impoveriſhing of moſt part of the king's poor ſubjects inhabited and deceaſing within the ſame; it is enacted, that no manner of ſpiritual perſon, or other, having any benefice or other ſpiritual promotion within the ſaid archdeaconry, ſhall in any wiſe aſk levy demand or take, after the deceaſe of any perſon, any ſuch portions or penſions, or any other demand or duty in the name or lieu of the ſame, on pain of a* præmunire; *but that all the king's ſubjects of the ſaid archdeaconry, and their executors and adminiſtrators, ſhall be ordered and uſed for their goods and chattels after their deceaſe, in like manner as is contained in the ſtatute of the* 21 H. 8. c. 5. *for probate of teſtaments, and none otherwiſe; any uſe, cuſtom, bull, compoſition, preſcription, or ordinance to the contrary notwithſtanding.*

The riſe of which cuſtom was this: Of very ancient time, the inhabitants of the pariſh of St Rumald's kirk, and after their example the inhabitants of the ſeveral other pariſhes within the archdeaconry of Richmond, being diſſatisfied for that the executors or adminiſtrators of perſons deceaſed gave nothing of the deceaſed's perſonal eſtate to the pariſh church, for the miniſter (according to the ſuperſtition of thoſe times) to pray for the ſoul of the deceaſed; whereas, by the cuſtom eſtabliſhed within the province of York (and at that time throughout the whole kingdom) a certain portion of the deceaſed's perſonal eſtate ought to go and be diſpoſed for the welfare of the ſoul of the deceaſed, which portion ſuch perſon himſelf could not otherwiſe diſpoſe of by will, nor his adminiſtrator after his death in caſe of inteſtacy; and this was, if the deceaſed did leave a wife and alſo a child or children, a third part of the clear perſonal eſtate; if he left a wife and no child, or a child or children and no wife, then a moiety; and if neither wife nor child, then the whole was the dead man's portion, to be diſpoſed for the good of his ſoul: Now the inhabitants aforeſaid obſerving,

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that the executors or adminiſtrators took and applied this whole deadman's portion to their own uſe, came to an agreement and reſolution amongſt themſelves, to ſettle and eſtabliſh for ever inviolably a determinate ſhare and proportion of the ſaid deadman's part, to be given to the incumbent of their pariſh church to pray for the ſoul of the deceaſed. But in proceſs of time their poſterity, thinking this conceſſion too burdenſome, applied to the court of Rome for redreſs; ſetting forth, that the clergy, altho' they received, according to the cuſtom of the kingdom of England, one of the beſt two quick goods of the deceaſed, demanded alſo one other of the beſt quick goods; and likewiſe the ninth part of all the moveable goods of the deceaſed, if he had a wife and children; if he had a wife and no child, or a child or children and no wife, then a ſixth part; and if he had neither wife nor child, then a third part. The pope, having granted a commiſſion to hear and determine the cauſe, did finally in the year 1254 order and decree, that for the future the clergy ſhould receive only one of the two beſt quick goods; and if the deceaſe left a wife and children, his whole clear perſonal eſtate ſhould be divided into three parts, of which the wife ſhould have one, the children another, and the third part (being the deadman's part) ſhould be divided into four, of which four parts the church ſhould receive one; if the deceaſed left a wife and no child, or a child or children and no wife, then the whole ſhould be divided into two parts, of which the wife or children reſpectively ſhould have one, and the other part (being the deadman's ſhare) ſhould be divided into five, of which five parts the church ſhould receive one; if he had neither wife nor child, then the whole (as pertaining intirely to the deceaſed) ſhould be divided into ſix, of which ſix parts the church ſhould have one. So that in the firſt caſe, where there was both wife and children, the church ſhould have a twelfth part; in the ſecond caſe, where there was a wife and no child, or a child or children and no wife, a tenth part; and in the third caſe, where there was neither wife nor child, the church ſhould have a ſixth part. *Regiſtr. Hon. de Richm.* 101.

And after the ſtatute aforeſaid of the 21 *H.* 8. for limiting the ſums to be paid for mortuaries, it ſeemeth that the clergy of the ſaid archdeaconry would not have this to be a mortuary, but called it a penſion or portion; for the aboliſhing of which claim and demand this ſtatute was made.

How recoverable.

3. By the ſtatute of Circumſpecte agatis, 13 Ed. 1. ſt. 4. *If a parſon demand mortuaries, in places where a mortuary hath been uſed to be given; all ſuch demands ſhall be made in the ſpiritual court: and in all ſuch caſes the ſpiritual judge ſhall have power to take knowledge, notwithſtanding the king's prohibition.*

Sir Simon Degge is of opinion, that an action alſo will now lie upon the aforeſaid ſtatute of the 21 *H.* 8. *c.* 6. But that ſtatute plainly ſuppoſeth, that the recovery of the money ſhall be ſolely in the ſpiritual court, as the recovery of the mortuary was before. *Watſ. c.* 53.

In the caſe of *Johnſon* and *Oldam*, *M.* 12 *W* A prohibition was moved for, to be directed to the ſpiritual court, to ſtay a ſuit there for a mortuary, upon a ſuggeſtion of the ſtatute, and that there was no cuſtom in this caſe for the payment of it: And it was urged, that no mortuary was due but by cuſtom; and therefore the cuſtom here being denied, they ought not to proceed in the ſpiritual court. Againſt which, it was argued, that the ſtatute of *Hen.* 8. hath ſaved the juriſdiction to the ſpiritual court, where mortuaries have been uſually paid; beſides, they ought firſt to plead in the ſpiritual court, that there is not any ſuch cuſtom; and then, upon refuſal to admit the plea there, is the time to move the court of king's bench, and not before: but in this caſe they have not pleaded this matter in the ſpiritual court. And by Holt chief juſtice; a prohibition cannot be granted, without a denying of the cuſtom in the ſpiritual court, which is not done here. And the whole court ſeemed to be againſt the prohibition. And a rule was made to hear counſel on both ſides. And afterwards the rule was diſcharged by the court. *L. Raym.* 609.

But if the cuſtom be denied, and the ſpiritual court will not admit that plea, a prohibition will go; and they ſhall not try the cuſtom there. *Cro. El.* 151.

But where the cuſtom of paying a mortuary was owned, and the only queſtion in the ſpiritual court was, whether it belonged to the vicar or impropriator, a prohibition in ſuch caſe hath been denied. 1 *Keb.* 919.

In the caſe of *Torrent* and *Burley*, *M.* 13 *G.* In the exchequer: A bill was brought to diſcover, whether the defendant's huſband died worth 40 l, ſo as to be liable to pay the plaintiff a mortuary; and pray relief. Upon anſwer, admitting aſſets, but denying the cuſtom, the plaintiff went into a proof of his right; and ſeveral witneſſes were examined on both ſides. And at the hearing, the

the bill was diſmiſſed with coſts, as to the relief; becauſe that was properly at law, or in the ſpiritual court: and in a bill againſt one perſon only, the right could not be eſtabliſhed. *Str.* 715.

4. By the 13 *El.* c. 5. All alienations of lands or goods, to defraud creditors and others of their juſt debts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, ſhall (as againſt ſuch claimants) be utterly void and of none effect. Fraudulent alienations to defeat mortuaries.

Here endeth the SECOND VOLUME.