

The Twelfth PART of the  
**R E P O R T S**

OF

*Sir Edward Coke Kt.*

OF

Divers Resolutions and Judgments given upon solemn Arguments, and with great Deliberation and Conference of the Reverend Judges and Sages of the Law, in Cases of Law, the most of them very Famous, being of the King's especial Reference from the *Council-Table*, concerning the *Prerogative*; As for the digging of Salt-peter, Forfeitures, Forests, Proclamations, &c. And the Jurisdictions of the Admiralty, Common Pleas, Star-Chamber, High Commission, Court of Wards, Chancery, &c. And Expositions and Resolutions concerning Authorities, both Ecclesiastical and Civil, within this Realm. Also the Forms and Proceedings of Parliaments, both in *England* and *Ireland*: With an Exposition of *Poyning's Law*, &c.

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*Non est Leges condendi autoritas, ubi non est obediendi necessitas, & e converso.*

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The Fourth Edition carefully corrected; with additional References to all the later Reports.

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*With two exact Tables, the one of the Names of the Cases, and the other of the principal Matters therein contained.*

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In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer Esq;*) for R. Gosling, W. Pears, W. Innys and R. Panby, T. Woodward, F. Clay, A. Ward, J. and D. Knapton, T. Motton, T. Longman, D. Bzstone, T. Osborne, H. Lintot, and T. Waller. M.DCC.XXXVIII.



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I Have perused this *Treatise*,  
intituled, The twelfth Part  
of the *Reports* of Sir *Edward*  
*Coke* Kt. and I do, upon my  
Reading thereof, conceive the  
same to be his *Collections*, and  
that the Printing of the same  
(containing very much good  
and useful Learning) will be  
for the Good of this Nation,  
and of the Professors of the  
*Common Law*.

The second of *February*  
1655.

*Edw. Bulstrode.*

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A  
T A B L E  
O F T H E  
S E V E R A L C A S E S

Contained in this

B O O K.

A.

B.

<b>A</b> Bergaveny (Lord)	<b>B</b> Aker and Hall's Cafe
his Cafe fol. 70	100
<i>Accessory</i> , none in Treason, Petit Larceny, and Trespafs	Bank's Cafe 62
81	Bedles and Beard's Cafe 4
<i>Admiralty</i> 77, 79	Bellingham's Cafe 71
<i>Admiralty</i> , no Court of Record 104	<i>Benevolence</i> , the Cafe thereof 119
<i>Affidavits</i> false 128	Bishops, their Cafe 7
Ap-Evan, and Barker 23	Buggery 36
Ashley's Cafe 90	
<i>Aurum Reginae</i> 21	

C.

A TABLE of the Cases. PART XII.

	Empringham's Case	84
C.	Estwick's Case	135
	Evan and Barker.	23
<b>C</b>	<i>Apias Utlagatum</i> awarded by Justices of Peace	103
	Chancey's Case	82
	Chancellor and Register	78
	Chute's Case	116
	Commissions	31
	Conspiracy	23
	Convocation	72
	Corven's Case	105
	Countess of <i>Sbrewsbury's</i> Case	94
	Crimes and Smith's Case	4
	Crown	100
	Custom	17
	Customs, Subsidies, and Impositions	33
	Customs of London	113
D.		
<b>D</b>	Erby (Earl) his Case	114
	Dignity, Prerogative. See Honours	112
	Dungannon's Case	120
	Duresse <i>per</i> Gaoler	127
E.		
<b>E</b>	EARL of <i>Sbrewsbury's</i> Case	106
	Earl of Derby's Case	114
	Earl of Northampton's Case	132
	Edwards (Dr.) <i>v.</i> Wootton	35
	Estrays	101
F.		
<b>F</b>	Elons Goods	121
	First-fruits and Tenths	45
	Fishing	89
	Floyd and Barker	23
	Ford and Sheldon's Case	1
	Forfeitures by Treason	6
	Forests	22
	Fuller's Case	41
G.		
<b>G</b>	Eriling's Case	71
H.		
<b>H</b>	<i>Abeas Corpus</i>	129
	<i>Habeas Corpus</i> , Return and Discharge	47
	Hawkeridge's Case	129
	Haye's Case	102
	Haynes's Case	113
	Herefy	56
	Hersey's Case	103
	High Commission	49, 84, 88
	High Commissioners	69
	High Commissioners, if they have Power to imprison	19
	Honours	70, 81, 96, 108, 112
	Hungate's Case	122
	Hutchinson (Dr.) his Case	101
	Huffey and Leighton	106
I.		

PART XII. A TABLE of the Cases.

I.

P.

**J**urisdiction of the Court  
of Common Pleas 109  
*Jurisdiction Ecclesiastical*  
112  
Justice in *Wales* not but  
by Commission 48

L.

**L** Angdale's Case 58  
Leake (George) his  
Case 15  
*Libels* 35  
Lord St. John, and Dean  
of *Gloucester's* Case 3  
Lord Abergaveny's Case  
70  
Lord Vaux's Case 93

M.

**M** Anney's Case 101  
Mansfield's Case  
123  
*Manslaughter* 87  
Moufe's Case 63

N.

**N**orthampton (Earl)  
his Case. 132

O.

**O**ATH ex officio 27  
*Oath before Justices*  
130  
Ogle (Lord) his Case 107  
Oldfield's Case 71

**P**ardon 29  
*Parliament in Ireland*  
109  
*Parliament Forms and Or-*  
*ders* 115  
*Piracy* 73  
*Præmunire* 37  
*Prerogative of the King*  
*in Salt-peter* 12  
*Privilege of Priests* 100  
*Proclamations* 74  
*Proctor's Case.* 118  
*Prohibition* 59  
*Prohibitions del Roy* 63  
*Prohibition, Court Eccle-*  
*siastical* 65  
*Prohibition, none after the*  
*Writ De excommunicacione*  
*habendo.* 76

R.

**R**eservation 36  
Robert's Case 65  
Roper's Case 45  
Roper (Anthony) his  
Case 47

S.

**S**alt-peter 12  
Scarlet's Case 99  
Seats in Churches 105  
*Shrewsbury (Countess)*  
*her Case* 94  
*Shrewsbury (Earl) his*  
*Case* 106  
Shulter's Case 90  
*Simony* 74, 101  
Stanneries 9  
Stock-

A TABLE of the Cases. PART XII.

Stockdale's Case 86  
 Stray 101

W.

T.

THomlinfon's . Case 104  
 Throgmorton (Lady) 69  
 Treafon 15  
 Trevor (Dr.) his Case 78

V.

V A U X (Lord) his Case 93

W A L E S, the Lord President's Case

50, 51  
 Warcombe and Carrel's Case 124  
 Women ftolen 20, 100  
 Wootton and Edwin's Case 36  
 Writ De hæretico combu-  
 rendo 20, 93

Y.

Y O R K, the Lord President's Case 50, 51

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**FORD and SHELDON's Case.** Page [1]

Pasch. 4 Jacobi Regis.

*In the Exchequer Chamber.*

**I**N an Information in the Exchequer-Chamber for the King, against *Thomas Ford*, Esq; *Ralph Sheldon*, Esq; and divers others; the Case was thus.

*Thomas Ford* was before the Statute of 23 *Eliz.* a Recusant; and for Money lent to *Sheldon*, some before 23 *Eliz.* and some after, took a Recognizance in the Names of the other Defendants, and took also a Grant of a Rent-charge to them in Fee, with Condition of Redemption by Deed indented: And the Recognizance was conditioned for Performance of Covenants in the said Indenture, and afterward the Statute of the 29 *El.* was made, by which it was enacted, that if Default of Payment was made in any Part of Payment (*viz.*) of 20 *l.* for every Month, &c. That then and so often the Queen's Majesty by Process out of the Exchequer may take, seise, and enjoy all the Goods, and two Parts, &c. And after the said Act, and before the 34th Year of the Reign of the late Queen, *Ford* lent divers other great Sums of Money to *Sheldon*, and for Assurance of it, took a Rent-charge by Deed indented, with Condition of Redemption: And took also several Recognizances in the Names of some of the other Defendants, for Performance of Covenants, &c. as is aforesaid; which Recognizances did amount in all to the Sum of 21000 *l.* all which were to the Use of the said *Ford*, and to be at his Disposition, and they were forfeited: And afterward, *viz.* 41 *El.* *Ford* was convict of Recusancy, and did not pay 20 *l.* *per mensem*, according to the Statute. And, If upon all this Case the King should have the Benefit of these Recognizances, was the Question.

And this Case was debated by Counsel learned on both sides in Court. And it was objected by the Counsel of *Ford*, that if the Recognizance had been acknowledged to *Ford* himself, they should not be forfeited to the King, for the Statute speaks only of Goods. And Debts are not in-

Information on  
a Forfeiture  
for Recusancy.  
1 Hawk's c. 15.  
St. 23 El. c. 1.  
10 Co. 54. 576.  
Hob. 127.  
1 Leon. 249.  
Post. 131.

St. 29 El. c. 6:  
Hob. 205.

8 Co. 33.  
Plow. 229.

FORD and SHELDON'S Case. PART XII.

cluded within the Word (*Goods.*) And therefore, if the King grant all the Goods which came to him by the Attainder of *J. S.* the Patentee shall not have Debts due to him, for that the Grant only extends to Goods in Possession, and not to Things in Action. And this Act is a Penal Law, and shall not be extended by Equity.

2. It was objected that these Recognizances were acknowledged, to perform Covenants in an Indenture concerning a Rent-charge: And therefore favours of the Realty, and are not within the Intention of the said Act, which speaks only of Goods.

3. No Fraud or Covin appears in the Case; and then forasmuch as no Act of Parliament extends to this Case, it was said, that the Common Law doth not give any Benefit to the King: For at the Common Law, in a far stronger Case, if *Cestuy que use* had been attaint of Treason; this Use forasmuch\* as it was but a *Trust* and Confidence, of which the Law did not take Notice, it was not forfeited to the King, and could not be granted: And if an *Use* shall not be forfeited, of which there shall be a *Possessio fratris*, &c. and which shall descend to the Heir, *a multo fortiori* a meer *Trust* and Confidence shall not be forfeited.

Page [2]

St. 29 El. c. 6.

11 Co. 32. b.

\* 8 Co. 33.

4. It was objected, That if the Forfeiture in this Case at the Bar accrues to the King, by the Statute of 29 *Eliz.* it ought to be by Force of this Word (*\*Goods*;) But that shall not be without Question in this Case. For *Ford* hath not any Goods, but only a meer *Trust* and Confidence, which is nothing in Consideration of Law.

And the Court cannot adjudge that these Recognizances belong to the King by Equity of the said Statute, because it is Penal: Also one Recognizance was taken in the Names of some of the other Defendants, before the Statute of the 29 *El.* which gave the Forfeiture.

And for that Reason, it cannot be imagined that it was to defeat the King of a Forfeiture, which then was not in *Esse*, but given afterwards.

As to the first Objection, it was answered and resolved by all the Barons, and by *Popham* Chief Justice of *England*, and divers others of the Justices, with whom they conferred, that if the Recognizances had been acknowledged to the Party himself, that they were given to the King without Question; for personal Actions, are as well included within this Word, *Goods*, in an Act of Parliament, as Goods in Possession. But inasmuch as by the Law Things in Action cannot be granted over, for that Cause by his general Grant Things in Action (which only he may grant by his Prerogative) without special Words pass not; for what he can grant only by his Prerogative can never pass by general Words.

## PART XII. FORD and SHELDON'S Case.

Words. And it was affirmed, That so it had been resolved before, that is to say, That Debts were forfeited to the King by the said Act of the 29 *Eliz.* And where the Statute saith, *Shall take, seise, and enjoy all the Goods, and two Parts, &c.* Although a Debt due to a Recusant cannot be taken and seited, yet inasmuch as there is another Word, *viz. Enjoy*, the King may well enjoy the Debt; and by Process out of the Exchequer levy it, and so *take and seise* refers to *two Parts of Lands in Possession*, and *enjoy* relates to *Goods*.

As to the second Objection, *Answer*, That it was originally for the Loan and Forbearance of Money. And as well the Recognizance as the Annuity were made for the Security of the Payment of the said Money: Also when the Recognizances are forfeited, they are but Chattels personal.

As to the third Objection, *Answer*, There was Covin apparent: For when he was a Recusant continually after that Stat. of the 23 *Eliz.* and for that chargeable to the King, for the Forfeiture given by the same Act, it shall be intended that he took these Recognizances in the Name of others, with an Intent to prevent the King of levying of the Forfeiture: And all the Recognizances, which were taken in other Men's Names after the said Act, shall be presumed in Law to be so taken, to the Intent to defeat the King of his Forfeiture: True it is, That an *Use* or *Trust* shall not be forfeited for *Treason* or other Offence by the Common Law, because it is not a Thing of which the Common Law taketh any Notice, for that *Cestuy que use*, hath neither *Jus in re*, nor *Jus ad rem*; but by the Common Law, when any Act is done with an Intent and Purpose to defraud the King of his lawful Duty, or Forfeiture by the Common Law, or Act of Parliament, the King shall not be barred of his lawful Duty and Forfeiture *Per obliquum*, which belongs to him by the Law, if the Act was done *de directo*.

And therefore if a Man outlawed buy Goods in the Names of others, the King shall have the Goods in the same Manner, as if he had taken them directly in his own Name: So if any Accountant to the King purchase Lands in the Names of others, the King shall seise those Lands for Money due unto him. \* And this appears by the Case of *Page* [3] *Walter Chirton, Trin. 24 Ed. 3. Rot. 4. in Scaccario*, where the Case was, that *Walter de Chirton* was indebted to the King 1800 *l.* which he had received of the King's Treasure, and did purchase certain Lands with the King's Money; and by Covin had caused the Vendor to enfeoff his Friends in Fee to defraud the King, and notwithstanding took the Profits himself: And afterwards *Walter Chir-*

## FORD and SHELDON'S Case. PART XII.

7 Co. 12. b.  
 7 Co. 21. b. 29. b.  
 8 Co. 171. a.  
 10 Co. 114. b.  
 11 Co. 90. a.  
 92, 93, a.  
 10. Eliz. 221,  
 508.  
 Hardr. 25, 26.  
 1 Vent. 132.

ton was committed to the Fleet for the said Debt. And all the Matter was found by Inquisition, and by Judgment the Land was seised into the King's Hands *Quousque*; for in the Case of the King, an Act done by Covin, *Per obliquum*, shall be equal to an Act done *De directo*, to the Party himself; for *Rex fallere non vult, falli autem non potest*: See another Precedent, *Trin. 24 Ed. 3. Rot. 11. Extractum Regis*, where one *Thomas Favell* was Collector of Tithes and Fifteens, and was seised of certain Lands in Fee-simple, and having divers Goods and Chattels, *Die intromissionis de collectione & levatione* of Tenths and Fifteens, *Languidus in extremis alienavit tenementa sua & bona & catalla diversis personis*, and died without Heir or Executor. In this Case by the Prerogative of the King, Process was made as well against the Ter-tenants, as against the Possessors of the Goods and Chattels, although they were not Executors, &c. *Ad computandum pro collectione prædicta & ad respondendum & satisfaciendum inde Regi, &c. Et hoc per Cancellarium Angliæ & Capitales Justiciarios Angliæ, & aliorum Justiciariorum utriusque Banci; Quod nota bene.*

As to the fourth Objection, *Non refert*, whether the Duty do accrue to the King by the Common Law, or by Statute; but be it the one way or the other, no Subterfuge that the Party can use, can defeat or defraud the King: And altho' one of the Recognizances was taken before the Statute of 29 *El.* yet that was to his Use, and for that it is in the Nature of a Chattel in him, and was taken in the Names of others to prevent the Queen of her Forfeiture, which she might have by the Act of 23 *El.* and although *Ford* was not convict until 41 *El.* that is not material, for at all Times before that, he was subject to a Forfeiture for his Recufancy.

*Lord*

*Lord St. JOHN vers. Dean, &c. of  
Gloucester. Pasch. 4 Jac. I.*

In the Chancery, 27 Jun. 29 Eliz. *Inter Johannem Dominum S. John de Bletso querentem, & Decanum & Capitalem Glocestria Defendentes.*

**T**HE Case was, That the Plaintiff brought a *Quare Impedit* in the Common Pleas, against the Defend. for the Church of *Penmark* in the County of *Glamorgan*; which Suit was staid by *Aid prayer*, and the Record was removed into the Chancery; upon which the Plaintiff moved for a *Procedendo*, and upon *Oyer* of Cause, before Sir *Thomas Bromley* Lord Chancellor, in the Presence of Sir *Gilbert Gerrard* Master of the Rolls, and *Shute* and *Wyndham* Justices, and *Popham* Attorney, and *Egerton* Solicitor of the Queen, the Plaintiff shewed a Gift in Tail of the said Advowson made to his Antecessor, in the 18 R. 2. and a Verdict for his Antecessor in the 12 H. 8. and a Presentation by his Grandfather to the said Church, of a Clerk who was admitted, instituted, and inducted, with Possession for certain Years, and divers other Matters to prove the Title of the Plaintiff; And yet for this, that the Defend. and those from whom he claims, Time out of Mind, had had the Possession of the Parsonage as Improprate, (saying Interruption for some small Time;) And for this, that it shall be a dangerous Precedent to the Queen and others, Owners of Improprations, being able to maintain\* the Appropriations to be perfect in all Points and Circumstances, which are requisite to the making of an absolute and compleat Impropration, the Appropriations being made of ancient Time;

It was resolved by this Court of Chancery, by the Advice of the Justices and Counsel learned of the Queen, that no *Procedendo in loquela* should be granted.

Vide Ridley, fol. 153, 154. *the beginning of Appropriations and of Annuities to be discharged of Tithes; it was after Benediēt who was the Institutor of Monks, &c. And note there the Reason of Prayer being preferred before Preaching.*

Appropriation. Procedendo denied in Chancery. See Watson's Clergyman's Law 194, 195, 391, &c. Cotton's Records 481, 623. 1 Danv. 510, 511, &c.

Page [4]

Seldeni Specilegium 198, 199. History of Tithes, chap. 12, 13, &c.

Vide 155, *ibid.* *That the Saxon Kings appropriated eight Churches to the Monastery of Croyland, as appears by Ingulphus who was Abbot there.*

See also Mr. Selden on this Head.

THO-

THOMAS CRIMES & al. *Plaintiffs,*  
& HENRY SMYTH *Defendant.*

Trin. 30 Eliz.

*In the Exchequer-Chamber.*

Endowment  
is presumed  
when a Vica-  
ridge hath long  
continued.  
See Watson's  
Clergyman's  
Law 197, 391,  
392, &c.  
2 Co. 47.

THE Case was such; The Abbot of *Sally* held the Parsonage of *Bulbenham* in the County of *Leicester* appropriate, which as a Parsonage impropriate came to King *H. 8.* by Dissolution of Monasteries, *Anno 31 H. 8.* who in the 37th Year of his Reign granted it in Fee-farm; under which Grant the Plaintiff claimeth; the Defendant had obtained a Presentation of the Queen, and to destroy the said Impropriation did shew the original Instrument of it, *Anno 22 Ed. 4.* with Condition, that a Vicaridge should be competently endowed, and alledged that the said Vicaridge was never endowed. And for that very cause the Impropriation was void, and in truth there was no Instrument, nor direct Proof of any Endowment of the Vicaridge.

But for this, that the said Rectory was, during all the Time of the Impropriation, supposed, reputed, and taken to be appropriate, and by all that Time a Vicar presented, admitted, instituted, and inducted as a Vicar rightfully endowed, and paid his First-fruits, and Tenths:

It was resolved by all the Court, That it shall be presumed that the Vicaridge in respect of Continuance was lawfully endowed, for that *Omnia presumuntur solemniter esse acta.* And it shall be a dangerous Precedent to examine the Originals of Impropriations of any Parsonages, and the Endowments of Vicaridges, for that the Originals of them in Time will perish. And so it was decreed for the Plaintiff.

Watson 195.  
2 Cro 252.  
Port. 5.

WILLIEM.

WILLIELM. BEDLE gen' quer' &  
 THOMAS BEARD Clericus, JA-  
 COBUS WINGFEILD milit. &  
 MARIA WINGFEILD Defend'.

Hill. 4 Jac. I.

THE Case was thus: *Anno 31 Ed. 1.* The King being seised of the Manor of *Kimbolton*, to which the Advowson of the Church of *Kimbolton* was appendent, by his Letters Patent granted the said Manor, with the Appurtenances, to *Humphrey de Bohun* Earl of *Hereford*, in Tail general. *Humphrey de Bohun*, the Issue in Tail, by his Deed, in the 40 of *Ed. 3.* granted the \* said Advowson then full of an Incumbent to the Prior of *Stoneley*, and his Successors: And at the next \* Avoidance they held it, *In proprios usus*; and upon this Appropriation made, *Concurrentibus iis quæ in jure requiruntur*; after the Death of the Incumbent, the said Prior and his Successors held the said Church appropriate, until the Dissolution of the Monastery, in the 27 *H. 8.* the said Manor descended to *Edward*, Duke of *Buckingham*, as Issue to the said Estate-tail. And the Reversion descended to King *H. 8.* The Duke in the 13 *H. 8.* was attaint of High Treason, 14 *H. 8.* The King granted the said Manor, &c. with all Advowsons appendent, &c. to *Rich. Wingfield*, and the Heirs Males of his Body, 16 *H. 8.* It was enacted by Parliament, that the said Duke shall forfeit all Manors, &c. Advowsons, &c. which he had, &c. in 4 *H. 8.* The King, *Anno 37 H. 8.* granted and sold for Money the said Rectory of *Kimbolton*, as impropriate in Fee, which by mean Conveyance came to the Plaintiff for 1200 *l.* 37 *El.* *Beard* the Defendant did obtain a Presentation of the Queen by *Lapse*, pretending that the said Church was not lawfully impropriate to the said Prior of *Stoneley*.

Chancery.  
 Impropriation  
 not void be-  
 cause of an E-  
 state-tail in  
 the Patron,  
 Grantor, &c.

Page [5]

\* 8 Co. 144,  
 145.  
 Watson 189,  
 190.

1. For this, that *Humphrey*, who did grant it to the Prior; \*had nothing in it, for that it did not pass to his Ancestor by these Words (*Manerium cum pertinentibus*.) See *Watson* 89, 92.

4 Co. 31, 33, 34,  
 37, 62.  
 1 Co. 122.  
 2 Co. 32.  
 10 Co. 64.

2. Or for this, that he had no more than an Estate in Tail, and then by his Death his Grant was void.

10 Co. 97, 97,  
 107.  
 1 Co. 22.  
 3 Co. 84.

But it was resolved by the Lord *Ellesmore*, Lord Chancellor, with the principal Judges, and upon Consideration of Precedents, that the Plaintiff shall enjoy the said Rectory. For altho' that by any Thing which can now be shewn, the Impropriation is defective (for by nothing which now appears, the Issue in Tail had any Thing in the Advowson at the Time of his Grant to the said Prior, for that the Advowson did not pass by the Grant of the King, by those Words (*Cum pertinentibus*) yet it shall be now intended in respect of the ancient and continual Possession, that there was a lawful Grant of the King to the said *Humphrey*, who granted in Fee, so that he might lawfully grant it to the said Priory, (*Omnia presumitur solemniter esse acta.*) And all shall be presumed to be done, which might make the ancient Impropriation good: For *Tempus est edax rerum*; and Records and Letters Patent, and other Writings, either consume or are lost, or imbeziled: And God forbid, that ancient Grants and Acts should be drawn in Question, although they cannot be shewn, which at first was necessary to the Perfection of the Thing: And if the Impropriation had been drawn in Question in the Life-time of any of the Parties to it, they might have shewn the Truth of the Matter: But after the Death of all the Parties, and after so many Successions of Ages, (in all which the said Church was esteemed and allowed to be rightfully impropriate.) If any Objection or Exception should now prevail, the ancient and long Possession of the Owners of the said Rectory should hurt them. For if these Objections or Exceptions had been made in the Lives of the Parties, without any Question they had been answered, or otherwise in so many Successions of Ages, it would have been impeached or impugned.

1 Co. 50.

3 Co. 31.

6 Co. 66.

7 Co. 19.

Antea 4.

Fitzgib. 91.

*Case of Forfeiture by Treason.*

Page [6]

Mich. 4 Jac. Regis.

**H**ill. 43 Eliz. A Case was moved to all the Justices: Forfeiture: Tenant in Tail before the Statute of 27 H. 8. made a Treason. Feoffment in Fee, to the Use of himself and his Wife in 2 Hawk'sc. 30. Tail: And after the Statute of 27 H. 8. is made, the Husband was attaint of High Treason, 31 H. 8. and died, the Sect. 19. Wife continued in Possession and died, their Issue enter, and See Cotton's die, and this descends to his Issue: And all this especial Records 53, Matter is found by an Office. 59, 323, 325, 333, 338, 345, 369, 377, &c. 400, 662, 670, 699.

The Question was, If the Issue in Tail, or the King, shall have the Land; and it was objected, that the Right of the ancient Estate-tail cannot be forfeited for divers Causes; *Viz.*

1. For this, that the ancient Estate was discontinued, and such Right of Action cannot be forfeited; as it is agreed in the Marquess of *Winchester's* Case. <sup>3</sup> Co. 1, 2, 3, &c.

2. The Feoffor himself, as this Case is, had not any Right to the ancient Estate-tail (for by his Feoffment his Right was utterly gone) when he was attaint, and he cannot forfeit what he hath not.

The Issue in Tail is remitted to that ancient Right which cannot be forfeited: And the new Estate-tail which was derived under the Discontinuance, and which may be forfeited by the Statute of the 26 H. 8. *cap.* 13. is continued; and by Act in Law, *viz.* The Discent and Remitter avoided: And the Estate of the King may be devested out of the King by Remitter, which is an Act in Law. As if Discontinuee of Tenant in Tail grant the Land to the King, his Heirs and Successors: And the King grant the Land to Tenant in Tail for Life, the Remainder to his Son and Heir apparent for Life, Tenant for Life dies, the Issue by Act in Law is remitted: And by this all the Estate of the King which he hath under the Discontinuance, is devested out of him, and with this accords *Plow. Com.* 489. in *Nicol's* Case: So in the Case at the Bar, the new Estate under the Discontinuance which was forfeitable is now purged by the Remitter of that ancient Right; and the Title which the King hath, is by that defeated and avoided.

Resolved

*Case of Forfeiture by Treason.* PART XII.

Nota.

Resolved that in this Case the Issue in Tail was barred : And that which had been said, answered, confessed, and avoided. For Truth it is, that Right of Action cannot be given to the King, by the Statute of the 26 H. 8. But when Tenant in Tail discontinues his Estate to the Use of himself in Tail, and after is attaint of Treason, now by the Statute of 26 H. 8. he doth not forfeit only the new Estate in Tail, but by this the Right of the ancient Estate is barred for ever : For the Words of the Statute are, That every Offender being lawfully convict of High Treason, &c. shall forfeit to the King, his Heirs and Successors, all such Lands, Tenements, and Hereditaments, which any such Offender shall have of Estate of Inheritance : By which Words, if there was not any Saving, the Right of the ancient Estate-tail was bound, then the Saving is, saving to every Person, &c. (*other than the Offenders, their Heirs and Successors, and such Persons as claim to any of their Uses*) all such Rights, so that the Offender and his Heirs are excluded out of the Saving : For *Heirs* includes all manner of Heirs, and for this they are bound by the Body of the Act.

Page [7]

And so note a Diversity between a naked Right of Action which is not forfeitable, and an Estate of Inheritance which is forfeitable, coupled with an ancient Right, for which the Forfeiture of the Possession is barred \* by the said Act. And when all this appears by Office, then is the Issue in Tail notwithstanding the Remitter barred by Force of the said Act of Parliament, to which all are Parties or Privies : And it is not like to the Case in *Plowden's Com.* of Remitter, for this is no Bar of an ancient Right.

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*A Case at a Committee concerning Bishops.*

Pasch. 4 Jac. 1.

AT this Parliament held, *Pasch. 4 Jac. Regis*, it was moved and strongly urged at a Grand Committee of Lords and Commons in the Painted Chamber, 1. That such Bishops as were made and created after the first Day of this Session of Parliament were not lawful Bishops.

2. Admitting that they were Bishops, yet the Manner and Form concerning their Seals, Stiles, Procefs, and Proceedings in their Ecclesiastical Courts were not consonant to Law: And their Reason was for this, that it is provided by the Statute of 1 *Ed. 6. cap. 2.* that from thence-forward Bishops should not be Elective, but Donative by the Letters Patent of the King: And that forasmuch as at this Day all Bishops are made by Election, and not by Donation of the King, according to the Act; for this Reason, if the said Act of 1 *Ed. 6.* be in Force from the Time that it took its Effect, the Bishops so elected are not lawful.

3. By the said Act of 1 *Ed. 6.* it is further enacted, that all Summons, Citations, and Procefs in Ecclesiastical Courts, shall be made in the Name and Stile of the King, and that their Seals shall be engraven with the King's Arms, and that Certificate shall be made in the Name of the King. And whereas the said Act of 1 *Ed. 6.* was repealed by a special Act. 1 *Marie Parliam. 1 cap. 2. Sess. 2.* And the said Act 1 *Mar.* is now repealed by a Branch of an Act, 1 *Jac. cap. 25. versus finem*; for by the same Act it is enacted, That the said Act of 1 *Mar.* shall be expressly repealed: So that the said Act of 1 *Ed. 6.* is now in Force.

For when an Act of Repeal is repealed, the first Act repealed is revived, &c. as appears in *Spencer's Case*, 15 *Ed.*

3. Title *Petition 2.*

And for this it was concluded that the said Stat. 1 *Ed. 6. c. 2.* being in Force, by Consequence all Bishops made after the Act 1 *Jac.* were not lawful Bishops; and for that their Stile and Proceedings after the same Act were in the Name of the Bishops, and not in the Name and under the Seal of the King; for this Cause the Proceedings were unlawful, *Quia non observata forma, infertur annullatio actus.* And these were Matters of great Import and Consequence.

As

As to these Objections, upon Consideration had of them by Commandment of the King, it was answered and resolved by *Popham* Chief Justice of *England*, and *Coke* Attorney of the King, and afterwards affirmed by the Chief Baron and the other Justices then attendant to the Parliament, upon good Advice and Consideration, that although the said Act 1 *Mar.* be repealed, that yet the said Act 1 *Ed. 6. cap. 2.* for other Causes is not now in Force, but remains repealed: Yet true it is, that when an Act of Repeal is repealed, the first Act, as hath been said, stands in force, and is *implicite* revived. But it is to be observed, That the said Act 1 *Ed. 6.* was repealed, adnulled, and annihilated by three several Acts of Parliament: And as a Man which is bound by three several Bonds, although he break one or two of them, yet the third which remains whole will bind him: So when \* the Words of three several Acts repeal or adnul an Act, altho' that one or two of the Acts of Repeal or Adnullation are repealed, yet the other which remains in Force, adnuls the first Act: First of all, the Act of 1 *Ma.* expressly repealed the Act of 1 *Ed. 6. c. 2.* and the Act of 1 *§ 2 Ph. & Ma.* hath likewise sufficient Words to repeal and adnul the said Act of 1 *Ed. 6.* as to the Stile, Seal, and Process, in Courts *Christian*, altho' that the Act of 1 *Mar. Parlia. 1.* had never been made, the Words of which Act are; and the Ecclesiastical Jurisdictions of the Archbishops, Bishops, and Ordinaries to be in the same Estate for Process of Suits, Punishment of Crimes, and Execution of Censures of the Church, with knowledge of Causes belonging to the same; and as large in these Points as the said Jurisdiction was, *Anno 20 H. 8.* And altho' that the said Act of 1 *Mar.* hath by express Words repealed the said Act of 1 *Ed. 6.* and for that it may be said, that the said Act of 1 *§ 2 Ph. & Ma.* could not repeal that which was repealed before; yet it was resolved that now, in as much as the Repeal on which the Act of 1 *Mar. operates*, is now adnulled and repealed, it follows, that if now the Act of 1 *§ 2 Ph. & Ma.* be in Force, or if the said Act of the 1 *Eliz. cap. 1.* operate only as to the said Act of the 1 *§ 2 Ph. & Ma.* it makes that the said Act of 1 *Ed. 6.* cannot also stand, *Quia leges posteriores priores contrarias abrogant.* But it was objected that the said Act of the first and second of *Ph. & Ma.* is repealed by the Statute of 1 *El. 1.* And it was answered and resolved, that it was enacted by the Act of the 1 *Eliz.* that the said Act of 1 *§ 2 Ph. & Ma.* and every Branch and Article of it (other than for such Branches as be hereafter expressed) shall be repealed: And after by the other Branch of 1 *El.* it is enacted, that all other Laws, Statutes, and every Branch thereof repealed and made void by

Negatur.

Page [8]

Vide Cod. 35, 36, 132, 967.

This can't be by Implication.

This Argument seems a Possé ad Esse, and smells of Court Flattery.

PART XII. *concerning Bishops.*

by the said Act of 1 & 2 of *Pb. & Ma.* and not in this Act especially mentioned and revived, shall remain and be repealed and void, as the same were before the Making of the Act: But the Act of 1 *Ed. 6.* was, as hath been said, repealed by the Act of 1 & 2 *Pb. & Ma.* and the Act of 1 *Ed. 6.* is not revived specially by the Act 1 *El.* yet the Act of 1 *Ed. 6.* remains repealed as it was before the second Act, *which hath sufficient Words to repeal and annul* the Act of 1 *Ed. 6.* and to answer both the Objections; the Statute of 1 *Eliz. cap. 1.* revives the Act of 25 *H. 8. c. 20.* and further enacts, that it shall stand in full Force and Effect, to all Intents, Constructions and Purposes. And by the said Act of the said 25 *H. 8. c. 20.* it is provided, that at every Avoidance of any Archbishop or Bishop, the King, his Heirs and Successors, may grant to the Prior and Covent, and the Dean and Chapter, &c. a Licence under the Great Seal, as of old Time hath been accustomed, to proceed to the Election of an Archbishop, or Bishop, with a Letter missive, containing the Name of the Person which they shall elect and chuse, &c. And further by another Branch in the same Act, it is enacted, That every Person chosen elected, and invested, and consecrated Archbishop or Bishop, according to the Form and Effect of this Act, shall do and execute every the Thing and Things, as any Archbishop or Bishop of this Realm, without the Offending of the Prerogative Royal of the Crown, and the Laws and Customs of the Realm, might at any Time heretofore do: And these two Branches answer to both the Objections, *viz.* For the Manner of Election and Consecration of Archbishops and Bishops, and also for the Making and Execution of all Things which belong to their Authority, as any Archbishop or Bishop might have done before the Making of the said Act of 25 *H. 8.* within which Words the Stile and Seal of their Court, and the Manner of their Proceedings are inclosed. And now the Act of 1 *Eliz. cap. 1.* having reviv'd the Act of 25 *H. 8.* and enacted that the same shall stand and be in full Force and \* Strength, to all Intents, Constructions and Purposes; from hence it follows, that the Act of 1 *El.* reviving the 25 *H. 8.* hath repealed \* the Act of 1 *Ed. 6.* for in an Act which was repealed, the Repeal is void and annulled: And this was the principal Cause of the said Resolution, for both the Points upon which the said Doubts were conceived. And it is to be observed, that the Intention of the said Repeal by the Act of 1 *Jac.* was to repeal the said Act of 1 *Mar.*----- As to an Act made 5 *Ed. 6.* by which it is enacted, *That the Matrimony of all and every Priest, and other Ecclesiastical and Spiritual Persons, shall be adjudged, deemed, and taken, for just, true, and lawful*  
*Matrimony.*

Quære de hoc?

Cod. 125, 871.

Conge de  
 Ellier.

Page [9]

\* This is not done but by Implication, which can never make void a positive Law.

Case at a Committee, &c. PART XII.

*Matrimony, to all Intents, Constructions and Purposes: And that all Children born in such Matrimony shall be deemed and adjudged, to all Intents, Constructions and Purposes, to be born in lawful Matrimony, and be legitimate and inheritable, to Lands, Tenements, and Hereditaments; and that they shall be Tenants by the Courtesy and Tenants in Dower, &c.* so that now the said Act of 1 *Ma.* being repealed, the said Act of 5 *Ed. 6. cap. 10.* is now in Force, and the Matrimony of all Ecclesiastical Persons and their Issue, lawful and legitimate, to all Intents, Constructions and Purposes, by which the Doubt amongst the Vulgar is well explained.

But the Repeal of all the Act of 1 *Mar.* by which divers other Statutes were repealed, being repealed generally without any Reference as to the said Act of 5 *Ed. 6.* according to the Intention of the Parliament *sub silentio*, made the said Scruple. And yet as it appears by this Resolution upon manifest and direct Matter, no Inconvenience of the general Repeal of the said Act 1 *Mar.* doth insue.\*

\* But after all that is here said, it is still held a Scruple by many; especially, For that a Bishop here in England is a meer Temporal Officer, and may be constituted by Letters Patent, as in Ireland, &c. Vide 8 Co. 68, 69.

*And note, by our Books it appears, that if a Deacon or Priest take a Wife, the Marriage was voidable by Divorce, and not void, for they had not vowed Chastity: And for that, if they had Issue, and one of them dies, the Issue should be inheritable. But if a Monk or Nun, or other religious Person which had made a Vow of Chastity, had married, this Marriage is void: And this doth appear 5 Ed. 2. Title Non-ability 26. 19 H. 7. Title Bastardy 33. 2 H. 7. 39. b.*

## The Case of the Stannaries.

Mich. 4. Jac. 1. *In the Star-Chamber.*

**I**T was resolved in the Star-chamber in the same Term, that the King had not the Pre-emption of Tin in *Cornwall* by any Prerogative. For *Stanni fodina, nec plumbi fodina, &c.* or other such base Mines, do not belong to the King by his Prerogative, but to the Subject which is Owner of the Land. But the Pre-emption of Tin in *Cornwall* belongs to the King as an ancient Rent and Inheritance due to the King, as well of Tin in the Land of the Subject as in his proper Demesnes: And although that now a Reason cannot easily be rendered of Things done before Time of Memory, yet it may well be, that all the Land of the County was the Demesne of the King; and upon Grant of the Land the King reserved the Mines to himself; for these Mines of Tin are of great Antiquity, as appears after, *Ex Diodoro Siculo. Et certo certius est*, that all the Land in *England* is derived mediately or immediately from the Crown, for all Land is held mediately or immediately of the King; and for this Reason such a Profit appender may have a reasonable Commencement: And where Usage hath allowed it to the King, it doth belong to him. True it is, that all the County of *Cornwall* was within the Forest of the King; and that \* it was disafforested by King *John*, as appears by *Camden*. And what Consideration the County gave for it to the King concerning Tin cannot now appear; but this appears plainly, that before the 33 *Edw. 1.* all the Tin in *Cornwall* and *Devon* also, to whomsoever the Land belonged, appertained to the King: And this is proved by divers express Records, and by an ancient Charter of King *John* amongst the Records of the Bishop of *Exeter* in *hæc Verba. Johannes Dei gratia Rex Angl', &c. Omnibus baliwis salutem: Sciatis quod intuitu Dei & pro salute animæ nostræ, &c. dedimus, concessimus ac præsentî charta nostra confirmavimus Deo & Ecclesiæ beati Petri Exon, & venerabili patri Simoni Exon' Episcopo & successoribus suis Exon' Episcopis, decimam de antiqua firma stanni in Corn'*

Pre-emption of Tin in Cornwall. See Cotton's Records 56, 142, 197, 346, 355. 4 Inlt. 229, 238, &c.

Ancient Demesne.

Page [10]  
Q

In Registr.

Co. 4 Inlt. 232.

Case of the Stannaries. PART XII.

*Com' Devon' & Cornub' : Habendum sibi & successoribus suis cum omnibus libertatibus & liberis consuetudinis ad eam pertinentibus, per manus illius vel illorum qui Stannarium habuerint in custodia, &c.*

Paten. 1 H. 3.  
Memb. 4.      *Rex Roberto de Courtney salutem. Mandamus vobis quod sine dilatione & difficultate aliqua, habere facietis Isabell' Regin' matri nostr', stannaria Com' Devon' cum Cuneo & omnibus pertinent'.*  
*Teste Com' Marescallo, &c.*

4 H. 3. Fines  
5 H. 3.      *Rex concessit Johanni, filio Richardi, stannariam in Cornubia reddendo 1000 Marks.*

10 H. 3. Memb.  
9.      *Rex, &c. Sciatis quod concessimus Ricardo dilecto fratri nostro stannariam nostram Cornub', cum omnibus pertinentibus, with Prohibition that none transport any Tin without Licence of the said Richard.*

10 Ed. 2. Inqui.  
2. Numero 29.      For this that *Decima stannariæ nostr' in Com' Cornub' & Devon'* do belong to the Bishop of *Exeter* ; It was therefore commanded to the said Sheriff to value the said Stannary, so that the Bishop may have that which to him doth belong, *viz. vera decima stannariæ* ; in which note *stannariæ nostræ*.

33 Ed. 1.  
Grant all Tinners. Vide Pl. Com. 327.      Note ; there are two several Charters, both bearing Date 10 Aprilis An. 33 Ed. 1. The one *Ad emendationem Stannariarum nostrarum in Com' Devon'* : And the other *Ade-mendationem Stannariarum nostrarum in Com' Cornub'* : *Concessimus eisdem Stannatoribus quod fodere possunt stannum & turbus ad stannum fundendum ubique in terris nostris, & vastis nostris, & aliorum quorumcunque in Comitatu prædicto ; & aquas & aquarum Cursus divertere, Ubi & Quoties opus fuerit, &c. ad fundaturam stanni sicut antiquitas consuevit, sine impedimento nostro seu aliorum quorumcunque : Ac quod omnes stannatores nostri prædicti totum stannum suum ponderatum, &c. licite vendere possunt cuicunque voluerint, faciendo nobis & heredibus nostris cunageum & alias consuetudines debitas & usitatas nisi nos vel heredes nostri stannum illum emere voluerimus.*

35 Ed. 1. in  
the Treasury.      The Liberty granted to Tinnens by the said Charter, 33 Ed. 1. is by Charter 35 E. 1. granted to all Tinnens, which Charter of 33 Ed. 1. made to the Tinnens of *Devon'*, was confirmed *De verbo in verbo*, An. 4. Ed. 2. and was also confirmed An. 1 & 17 Ed. 3.

PART XII. *Case of the Stannaries.*

*De advisamento Concilii nostri ordinavimus quod Stannum in Com' Cornub' & Devon' ad opus nostrum capiatur pro defensione regni nostri, &c. Et ad partes marinas celeriter mittatur, in auxilium & supportationem\* honorum nostrorum, &c. Ita quod hominibus quibus stannum illud capi contigerit, de pretio ejusdem stanni ad certos terminos solvend' sufficiens securitas per nos fiat, Assignavimus vos conjunctim & divisim ad capiendum, ad opus nostrum, totum stannum in Comitatu predicto cunitum & etiam cuniend' cum cunitum fuerunt. And there is also Authority given to take Carriages tam per naves & battellos in Portibus Com' predict' existent' quam Carrecta & alia Carriagia quaecunque pro stanno illo usque ad Portum Southampton carriandum: And Commandment given to the Sheriffs, Quod ipsi sumptis pro Carriagiis & aliis necessariis in hac parte inveniendis de exitibus ballivarum suarum solvant.*

Rot. Ann. 12 E. 3. Part. 1. Num. 17. Page [11]

*Edward the black Prince being deceased, the King (under the Great Seal) confirmed (the same Year) to Tydman of Limberge, Cunageum stannar' totius Ducatus Cornub' pro tribus annis. Necnon exemptionem totius stanni, tam infra dictum Ducatum Cornub' quam Com' Devon' fossi & fodendi, quod vendi debeat pro sine mille marcarum, & reddendo tria mille & quingentas marcas.*

21 Ed. 3. ex Rot. Patent. Note; The Prince had this during his Life.

The said Charter was confirmed at the Suit of the Tinn-<sup>8 R. 2.</sup>ners, 8 Ric. 2. to the Tinn-ners in Cornwall.

The said Charter of 33 Ed. 1. to the Tinn-<sup>1 Ed. 4.</sup>ners of Devon, was confirmed at the Suit of the Tinn-ners, Anno 1 Ed. 4.

It was also at their Suit confirmed, 3 H. 7. to the Tinn-<sup>3 H. 7.</sup>ners of Devon.

*Vide the Stat. of the 11 of H. 7. by which it is ordained, that a certain Weight and Measure shall be used throughout all England; Provided always, that this Act extend not, nor be in any wise hurtful or prejudicial to the Prince within the Dutchy of Cornwall, or any Weights belonging to the Coinage of Tin within the Counties of Cornwall and Devon, but that such Weights shall be used, &c. as hath been accustomed.*

11 H. 7. cap. 4.

Case of the Stannaries. PART XII.

26 Apr. 7 E. 6.  
le Roy moruli  
in lan. enlozot,  
&c.

The King gave Commission and Power to *Gilbert Broc-  
house*, to have Pre-emption for and in the Name of the said  
King of all white Tin within *Cornwal* and *Devon*, for one  
and twenty Years, yielding three thousand Marks Rent.

Q.

Note; The Stile of the said Courts of Stannaries in *Corn-  
wal* and *Devon*, at all Times, and during all the Reign of  
*Queen Elizabeth*, *Mar. Ed. 6. H. 8. H. 7. Ed. 4. H. 6.  
H. 5. H. 4. &c. Magna Curia Domini Regis Ducatus sui  
Cornub' apud Crokerenton in Com' Devon coram Johanne  
Comite Bedford Custode Stannar' dicti Domini Regis &  
Regin' in dicto Comitatu Devon*: By which it may appear,  
that at the first all the Tin in the County of *Cornwal* and  
*Devon* belonged to the King: And by, and after the said  
Charters of 33 *Ed. 1.* the King (or Prince) may buy all if  
he will.

Camden in  
Cornw. f. 137.  
Diod Siculus  
floruit sub Au-  
gusto.

And note the Antiquiry of Tin-Mines in *Cornwal*. *Vide  
Camden in Cornwal, 121. extremum Promontorium quod  
oream Vergivio incumbit, Diodoro Siculo dicitur Baleri-  
um: Et vide Diodoro Siculo, lib. 5. c. 8. fol. 142. b. Bri-  
tanni qui juxta Balerium promontorium incolunt Mercato-  
rum usu qui eo stanni, &c.*

Page [12]

And as for that which was objected, that the Charter  
of 33 *E. 1.* extends only to Tin within the Land of the  
King himself: It was resolved, that by the said Clause (*fo-  
dere & fundere stannum terris nostris & vastis nostris &  
aliorum \* quorumcunque, &c. Sicut Antiquitas consuevit,  
&c.*) It is manifest that the King (or Prince) hath all the  
Tin, as well in the Land of the Subject as in his own pro-  
per Land.

2. It shall be absurd that the King shall reserve the  
Emption of his own Tin.

4 Inst. 129, &c.

3. The King grants *Stannatoribus nostris* divers Liber-  
ties and Immunities which are all enjoyed as well by the  
Tinnars in the Lands of the Subject, as by those in the  
Land of the King, &c.

*The Case of the King's Prerogative in  
Salt-peter.*

In the Session of Parliament held in *December*  
*An. 4 Jac. Regis.*

**A**LL the Justices, *viz. Popham*, Chief Justice of *Eng-land*, *Coke* Chief Justice of the Common Pleas, *Fleming* Chief Baron, *Fenner*, *Searl*, *Yelverton*, *Williams*, and *Tanfield*, Justices, were assembled at Serjeants Inn, to consult what Prerogative the King had in digging and taking of Salt-peter to make Gunpowder by the Law of the Realm; and upon Conference between them, these Points were resolved by them all, *una voce*.

That although the Invention of Gunpowder was devised within Time of Memory, *viz. in the Time of R. 2.* yet inasmuch as this concerns the necessary Defence of the Realm, he shall not be driven to buy it in foreign Parts; and foreign Princes may restrain it at their Pleasure, in their own Dominions: And so the Realm shall not have sufficient for the Defence of it, to the Peril and Hazard of it: And therefore inasmuch as Salt-peter is within the Realm, the King may take it according to the Limitations following for the necessary Defence of the Kingdom.

Although the King cannot take the Trees of the Subject growing upon his Freehold and Inheritance, as it was now lately resolved by us the Justices of *England*: And although he cannot take Gravel in the Inheritance of the Subject, for Reparation of his Houses, as the Book is in *11 H. 4. 28.* Yet it was resolved, that he may dig for Salt-peter, for this that the Ministers of the King who dig for Salt-peter, are bound to leave the Inheritance of the Subject in so good Plight as they found it, which they cannot do if they might cut the Timber growing, which would tend to the Disinheritance of the Subject, which the King by Prerogative cannot do; for the King (as it is said in our Books) cannot do any Wrong.

1 Point.  
See Cotton's  
Records 24.  
That Powder  
or Gunpowder  
was then in  
Use, viz. 14 E. 3.

2 Point.

See Plowd 246.  
247.

*Case of the Prerogative.* PART XII.

And as to the Case of Gravel, for Reparation of the Houses of the King, it is not to be compared to this Case; for the Case of Salt-peter extends to the Defence of the whole Realm, in which every Subject hath Benefit; but so it is not in the Case of the Reparation of the King's Houses: And therefore it is agreed in 13 *H. 4.* and other Books, that the King may charge the Subject for Murage of a Town, to which the Subjects were charged in the Time of Insurrection or War, for Safety: And so for Pontage, for this that he which is charged hath Benefit by it, but the King cannot charge the Subject for the making of a Wall about his own House, or for to make a Bridge to come to his House; for that doth not extend to publick Benefit: But when Enemies come against the Realm to the Sea-Coast, it is lawful to come upon my Land adjoining to the same Coast, to make Trenches or Bulwarks for the Defence of the Realm, for every Subject hath Benefit by it. And therefore by the Common Law, every Man may come upon\* my Land for the Defence of the Realm, as appears 8 *Ed. 4.* 23. And in such Case on such Extremity they may dig for Gravel, for the making of Bulwarks; for this is for the Publick, and every one hath Benefit by it; but after the Danger is over, the Trenches and Bulwarks ought to be removed, so that the Owner shall not have Prejudice in his Inheritance: And for the Commonwealth, a Man shall suffer Damage; as, for saving of a City or Town, a House shall be plucked down if the next be on Fire: And the Suburbs of a City in Time of War for the common Safety shall be plucked down; and a Thing for the Commonwealth every Man may do without being liable to an Action, as it is said in 3 *H. 8. fol. 15.* And in this Case the Rule is true, *Princeps & Respublica ex justa causa possunt rem meam auferre.*

Page [13]

3 Point

It was resolved, that this Taking of Salt-peter is a Purveyance of it for the making of Gunpowder for the Necessary Defence and Safety of the Realm. And for this Cause, as in other Purveyances, it is an Incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the Ministers of the King (as other Purveyances ought, and cannot be converted to any other Use than for the Defence of the Realm, for which Purpose only the Law gave to the King this Prerogative. And it is not like to the Mines of Gold and Silver, for there the King hath Interest in the Metal; and therefore there  
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PART XII. *of the King in Salt-peter.*

he may dig for it, *Quia quando lex aliquid alicui concedit, concedere videtur id, sine quo res ipsa esse non potest.* Plow. 314, 325, 326. *Vide Plow. in le Case de Mines.* So the King may dig in the Land of the Subject for Treasure-trove, for he hath Property: And if the Powder which is so made by the Ministers of the King, begin to decay (as it will in two Years) then it ought to be changed for other, or the Money coming of it ought to be employed for Powder for the Defence of the Realm; or the Ministers of the King ought to make Provision of Salt-peter which will endure a long Time, and when need is, to make it into Gunpowder, which may be made before the Navy can be put in Readiness.

The Ministers of the King cannot undermine, weaken, <sup>4</sup> Point. or impair any of the Walls or Foundation of any Houses, be they Mansion-houses, or Out-houses, or Barns, Stables, Dove-houses, Mills, or any other Buildings: And they cannot dig in the Floor of my Mansion-house which serves for the Habitation of Man; for this, that my House is the safest Place for my Refuge, Safety, and Comfort, and of all my Family; as well in Sickness as in Health, and it is my Defence in the Night and in the Day, against Felons, Misdoers, and harmful Animals; and it is very necessary for the Weal publick, that the Habitation of Subjects be preserved and maintained.

And there are two notable Precedents, by which it appears, that the King by his Prerogative had Power to prohibit Depopulation, and provide for Habitation.

The one in the 43 *Ed. 3. Rot. claus. in turri, numero 23. pro villa de Southampton.*

The other, *An. 21 R. 2. in dorso clause, par. 1. N. 15.* by which the King prohibits that *Incol' villarum predictarum non prosternant domus suas in villis predictis in alias migraturi regiones, &c.*

Also the Ministers of the King cannot dig the Floor of any Barn employed for the safe Custody of any Corn, Hay, &c. of the Owner, for that the Floor of a Barn cannot be made dry and serviceable again in a long Time: But they may dig in the Floors of Stables and Ox-houses, so that there \* be sufficient Room left for the Horses and other Cattle of the Owner: And so that they repair it in convenient Time, in so good Plight as it was before; also they may dig in the Floors of Cellars and Vaults, so that there be sufficient Room for the Necessaries of the Owner; and so that the Wine, Beer, and other necessary Provision of the Owner be not

Page [14]

Q.

*Case of the Prerogative* PART XII.

not removed, or in any Sort impaired. And they may dig any Mud-walls which are not the Walls of any Mansion-house, so that Order be taken that the Mansion-house be well defended, as it was before; and so they may dig in the Ruins and Decays of any House or Buildings, which are not preserved for the necessary Habitation of Men.

5 Point. They ought to make the Places, in which they dig, so well and commodious to the Owner as they were before.

6 Point. They ought to work in the Possession of the Subject, but betwixt Sun-rising and setting; so that the Owner may make fast the Doors of his House, and put it in Defence against Misdoers.

7 Point. They ought not to place or fix any Furnace, Vessels, or other Necessaries in any House or Building of the Subject without his Consent, or so near any Mansion-house, as by it it may receive Prejudice or Disquiet.

8 Point. They ought not to continue in one Place over a convenient Time, nor to return again into the same Place before convenient Time (which is long Time) be passed.

9 Point. It was resolved, that the Owner of the Land cannot be restrained from digging and making Salt-peter, for the King hath not Interest in it as he hath in Gold and Silver in the Land of the Subject, for the King in the Case of Salt-peter hath but Purveyance; so that the Property of it is in the Owner, and for that he cannot be excluded of the Commodity in his own Land.

And it is to be observed, that before 31 *Eliz.* which was the next Year after the *Spanish* Invasion, there was not any Licence or Commission of any King or Queen of this Realm, for the taking of Salt-peter: But in the said 31st Year there were two Licences granted.

The one particular to *George Constable* Esquire, and the other general to *George Evelin*, *Richard Hills*, and *John Evelin*: The first gives *Constable* Power and Authority for eleven Years to dig, open, and work for Salt-peter within the Counties of *York*, *Nottingham*, *Lancaster*, *Northumberland*, *Cumberland*, and the Bishoprick

PART XII. *of the King in Salt-peter.*

rick of *Duresme*, as well within our Lands, Grounds and Possessions, as also within the Lands, Grounds and Possessions of any of our loving Subjects within the Counties aforesaid: And the Consideration of the Patent was for a great Quantity of Salt-peter yearly, by the said *George Constable*, to be made and provided for the Store of the Queen, at a lower Rate than before was paid.

And further, Our Will and Pleasure is, That the said *George Constable*, &c. shall at his own proper Costs and Charges, erect, make up, and raise all Mud-walls, Stables, and Grounds whatsoever so digged up, &c. In which Licence it was observed, that no Power is given to dig in any Mansion-house, Barns, Dove-houses, &c. but, as appears in the last Clause, in Mud-walls, Stables, and Grounds; for the Clause of Reparation ought without Question to extend to all the Places to which the Power to dig extends, &c.

The other Commission to *Evelin*, &c. extends to all the Realm of *England* \* and *Ireland*, and all other Dominions of the King, as well within our own Lands, Grounds and Possessions, as also within the Lands, Grounds and Possessions of any of our Subjects.

Page [15]

*Note*; The Licence begins with Lands, &c. so that Houses or Builings are not named in it. For the learned Counsel of the Queen, as it should seem, who drew the Licence, thought not that the Licence ought to extend to the Mansion-house, or other necessary Houses; for otherwise it would have been expressed in the Licence. And after, *scilicet* 18 *October 2 Jacobi*, Commission was granted to *Evelin* and others, to take Salt-peter in the Lands, Possessions, and other convenient Places, and in convenient Times, so that there were but three Licences or Commissions ever made. And in none of them any Power by express Words is given to dig in any Mansion-house, &c. And in none of them is any Prohibition to the Subject to dig in his own Land: And it is observed, that in the said last Commission is a Clause, that for Carriage none ought to go above nine Miles from his own House, and that he shall have 4 *d.* for every Mile laden and empty, *viz. Eundo & Redundo*. And the Reason was, That the Owner may return again to his own House in the same Day: And note Reader, here is a good Resolution of the Justices for the true Prerogative of the King in taking Purveyance of Salt-peter.

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 GEORGE LEAK'S Case.

Hill. 4 Jac.

3 Inst. 16.  
Treason in  
procuring the  
Great Seal to a  
Blank, and  
then Writing  
a Patent, &c.  
on it.  
See 1 Hawk's  
ch. 17. Sect.  
47, 48, 49, &c.

**I**N this very Term, one *George Leak*, a Clerk in Chancery, had upon an ordinary Piece of Parchment, by great Deceit, fixed with a kind of Glew, another Parchment so thin, as Art could make it, so that it did appear but one Piece of Parchment; and upon the thin Piece which was as it were the Superficies of the other, he writ by good warrant a Licence, which was brought to the Lord Chancellor, and sealed with the Great Seal: And after, the said *George* took the thin Piece upon which the Writing was, from the other Parchment to which the Great Seal was affixed, and then all was a Blank with the Great Seal annexed: And after the said *George* writ upon the Blank, a Grant of the King of certain Lands: And what Offence this was, was this Term debated amongst the Justices; and it was a great Question amongst them, Whether this was High Treason or no: And it seemed to me, that this cannot be adjudged High Treason, until it was so declared by Parliament: For true it is, that the Statute of 25 *Ed.* 3. declares that if a Man do counterfeit the Great Seal, or Privy Seal, that this is High Treason: And true it is, that the Judges in Times past, *viz.* 2 *H.* 4. 25. have adjudged that the Taking of the Wax which was printed with the Great Seal, from one Patent, and fixing of it to another Writing made in the Name of the King is a Counterfeiting of the Great Seal, for this that he abuseth the ancient Seal, in removing it from the Patent, and fixing of it on another without Warrant: And so *Stamford*, *lib.* 1. *fol.* 3. proves that it was adjudged in his Time: And yet 40 *Aff. pla.* 33. that it was Petit Treason after the Statute: And 37 *H.* 8. *Title Treason*, *Brook*, by the Justices that this was not Treason: And I have seen a Record of 2 *H.* 4. the 25. where the Party was indicted generally for counterfeiting of the Great Seal: And the Jury found him Not guilty of counterfeiting of the Great Seal, as it was supposed by the Indictment: And found over the especial Matter, that he took the Great Seal from one Patent, and fixed it to another, and put this in Execution: And Judgment is given against the Party. But with

without Question against the Law, for as much as they found him Not guilty of counterfeiting, for this is a full Verdict, and all the rest is Surplusage; but this Case in Question much differs from it, for in \* this Case *George Leak* hath not any meddling with the Great Seal, but this remains now annexed as it did before: And for this Reason it seems to me, if the Seal be fixed to a blank Patent, and one writes a Grant in it, contrary to his Direction and Trust; or if one hath Letters Patent with good Warrant made, and them rase in a Place material, and put in other Words, to the great Prejudice of the King: In none of these Cases can it be adjudged a Counterfeiting of the Great Seal. For the Statute 25 *Ed.* 3. doth not speak of counterfeiting of Writings, but only of the Great Seal, and the Delinquent in this Case doth not meddle with the Seal, but only with the Writing. And I shewed a notable Precedent in *Claus.* 42 *Ed.* 3. *memb.* 8. *in dorso*, where the Case was, that King *R.* 1. by his Charter granted divers Lands and Liberties *Abbati de Bruera*, in which the Abbot rased out this Word *Fitterida*, and instead of it writ *Eftleigh*. And upon shewing of it obtained a Confirmation of it from King *Ed.* 3. and an Allowance of it *in Banco R.* And for this Offence the said Abbot was called before the King and his Council, *viz.* in the Star-Chamber; where the Abbot charged one *Robert Rigg* his Com-monk, with the Rasure: And the Abbot was convict (which could not be but in Court.) And it was Part of the Sentence, that the said Charter, Confirmation and Allowance of it should be brought in by the Abbot to be cancelled. Out of which Record, I do observe five Things.

1. The Antiquity of the Star-Chamber, and this then was a Court in which the Abbot was convict, and Sentence given. See 4 Inst. 10.

2. That the said Rasure was not any Counterfeit of the Great Seal; for if the Offence had been High Treason, it should not have been determined before the Council of the King in the Star-Chamber.

3. That Spiritual Persons were then punishable for Offences before Temporal Judges.

4. That if there be Rasure of a Deed between Subject and Subject, in a Place material, all the Deed becomes naught: And the Party may plead to it *non est factum*. So, if the Patentee rase his Letters Patent in any Place material, all the Patent becomes of no Force by the Law, as appears by the said Sentence; all the Patent and all the Dependence upon it, *viz.* The Confirmation and Allowance of it should be all cancelled and defaced.

5. That

5. That altho' that it is commonly said, that an Abbot can do nothing in Prejudice of his House, yet in this Case he may do it, for the King ought not to be in worse Case than a Subject: And if the Abbot had rased a Charter made to him by a Subject, in such a Manner as he had rased the Charter of the King, the Deed of the Subject had become of no Force: And so in Case of the King. And then I concluded, that if the Rasing of a Word in the Patent of the King be not Treason, the Rasing of two or three, or all the Words of the Patent, and Writing a new Grant, is not Treason: And I recited another Precedent *in an. R. 2.* in Parliament, where the Case was, That the Ambassador of the Duke and State of *Genoa* being here under the safe Conduct of the King, for the Business of the King and the Realm, was murdered by certain Subjects of the King: And this Matter was debated in Parliament, and there resolved, declared and decreed, that this was Treason: *Note it well*, this Case was not referred to the Judges, but was declared in and by Parliament: For it is provided by the said Act of 25 *E. 3.* that for this that many other Cases of like Treason might happen in Time to come, which Men cannot think nor declare at present, that if another Case, supposed Treason, and which is not specified in the Act, shall come before any of the Justices, the said Justices shall stay without going to Judgment of Treason, until the Case be \* shewn before the King in Parliament, who ought to adjudge it Treason or other Felony; in which Branch two Things are to be observed.

See 3 Inst. 8.  
John Imperial's Case.  
To kill an Ambassador, Treason.  
3 Inst. 8.

Page [17]

1. That although a Case happen like to the Cases of Treasons mentioned in the said Act, that the Judges ought not (as they do in other Cases by equal and like Reason) adjudge it to be Treason, for that Branch restrains them: But this ought to be declared in Parliament, for the Words of the Act are, *Forasmuch as many other Cases of Treason, like, &c.* The second Thing is, that when a particular Case (as the said Case of an Ambassador of a King) was adjudged High Treason, *Et legatos violare contra jus gentium est*: And it appears 2 *Reg. cap. 10. Hamon Rex Amontarum Legatos Davidis contumeliis, &c. super quo acerrimum bellum movetur, &c.* By which it appears the Consequence of an Abuse of an Ambassador, *&c. Quod talis injuria est justis belli causa.* Note, that *Legatus ejus vice fungitur, a quo destinatur; & honorandus est, sicut ille cujus vicem gerit.* And afterwards *George Leak*, upon Examination before the Chief Justice of *England*, made a clear Confession of all the Manner and Circumstances of the Fact: And upon Examination, the Case (as it was delivered to the Justices to consider of it, and to give their Opinions)

Vide Grotium  
de Jure Belli.  
lib. 2. c. 18.

was

PART XII. *Case of Treason.*

was such; *George Leak* joined two blank Parchments fit for Letters Patent, so close together with Mouth Glew as they were taken for one, and did put one Label through them both; then upon the Uppermost he writ a true Patent and got the great Seal put to the Label, so the Label and the Seal were annexed to both the Parchments, the one Written, and the other Blank, then he cut off the glewed Skirts round about, and took off the Uppermost thin Parchment (which was written, and was a perfect Patent) from the Label which with the great Seal did still hang to the blank Parchment; then he writ another Patent within the blank Parchment, and did publish it as a good Patent: Hereupon two Questions were moved.

1. Whether this Offence be High Treason or no?

2. If it be High Treason, then whether he may be indicted generally for the Counterfeiting of the great Seal, or else the special Fact must be expessed? And the Justices were divided in Opinion in the first Point of the Case: And my self and divers others held that this Act was neither High Treason nor Petit Treason, because it is not within either of the Branches of the said Statute of 25 *Ed.* 3. But it is a very great Misprision; and the Party delinquent liveth at this Day. But the Chief Justice and divers others were against us; and by Reason of the Diversity of Opinions, *respectuatur. Vide Fleta, lib. 1. cap. 22. Item crimen Falsi dicitur, cum quis illicitus cui non fuerit hæc data auctoritas de sigillo Regis rapto vel invento & brevia cartæ consignaverit.* As to the second Point it was resolved,

25 H. 8. c. 12.

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## A Case of CUSTOM.

Hill. 24 Eliz. *In the Exchequer.*

Customs  
Post 33, 34.  
See the Case  
of Reniger,  
&c.  
Plow. 5, 6, 7,  
&c.

Page [18]

Qr. 20 R. 2.  
c. 4.

**A** Merchant brought eighty Weights of Bay-salt by Sea, to a Haven in *England*, and out of the Ship sold twenty Weights, and discharged them to another Ship in which they were transported: But the said twenty Weights were never actually put on the Shore: And for the Residue, *viz.* 60. he agreed for the Custom, and put them upon Land: And now the Doubt was upon the Words of the Statute of 1 *El. cap. 11.* \* concerning Exportation, *viz.* sent from the Wharf, Key, or other Place on the Land, and concerning Importation, take up, discharge, and lay on Land: If in this Case the said twenty Weights which always were water-born, and never touched the Land, ought to pay Custom as well inwards as outwards.

And it was resolved, that in both the Cases Custom ought to be paid; for the Discharging out of the Ship upon the Sale aforesaid, amounts in Law to a putting them upon the Land, for in the Law this is *infra corpus comitatus*: And if the Law shall not be so taken, the King may be defrauded of all his Custom, and in this Case sofar as much as no Custom was paid, it was resolved that the Goods were forfeited, &c.

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## Case of Non Obstante, or Dispensing Power.

Prerogative of  
dispensing  
Power.

7 Co. 36, 37.

8 Co. 38.

Vaugh. 333,

347.

Cumberb. 22,

23.

\* 11 Co. 82.

Plow. 457, 508.

1 Salk. 168.

See Skin. 157.

† Q. de hoc.

**NOTE**; A good Diversity when the King shall be bound by Act of Parliament, so that he cannot dispense with it by any Clause of *non obstante*. No Act can bind the K. from any Prerogative which is sole and inseparable to his Person, but that he may dispense with it by a *non obstante*; as a Sovereign Power to command any of his Subjects to \* serve him for the Publick Weal: And this solely and inseparably is annexed to his Person: And this Royal Power cannot be restrained by any Act of Parliament, † neither in *Tbest*, nor in *Hypothesi*, but that the King by his Royal Prerogative may dispense with it; for upon Commandment of the King,

## PART XII. *Case of Non Obstante.*

King and Obedience of the Subject, doth his Government consist: As it is provided by the Statute of 23 *H. 6. cap. 8.* <sup>3 Inst. 259.</sup> that all Patents made or to be made of any Office of a Sheriff, &c. for Term of Years, for Life, in Fee-simple, or in Tail, are void and of no Effect, any Clause or Parol *de non obstante*, put, or to be put into such Patents to be made, notwithstanding. And further, whosoever shall take upon him or them to accept or occupy such Office of Sheriff by Virtue of such Grants or Patents, shall stand perpetually disabled to be or bear the Office of Sheriff within any County of *England* by the same Authority: and notwithstanding that by this Act. 1. The Patent is made void. 2. The King is restrained to grant *non obstante*. 3. The Grantee disabled to take the Office, yet the King by his Royal Sovereign Power of commanding, may command by his Patent, (for such Causes as he in his Wisdom doth think meet and profitable for himself and the Common-wealth, of which he himself is solely Judge) to serve him and the Weal publick, as Sheriff of such a County for Year, or for Life, &c. And so was it resolved by all the Justices of *England*, in the Exchequer-Chamber, 2 *H. 7. 66.* And so the Royal Power to pardon Treasons, Murders, Rapes, &c. is a Prerogative incident solely and inseparably to the Person of the King: And for this *non obstante* an Act of Parliament, to make the Pardon of the King void, and restrain the King to dispense with this by *non obstante*, and to disable him to whom the Pardon is made, to take or plead it, shall not bind the King but that he may dispense with it: And this is well proved by the Act of 13 *R. 2. Parliament 2. cap. 1.* For by this it was enacted, that no Charter of Pardon, from henceforth be allowed by whatsoever Justices, for Murders, Treason, Rape of a Woman, not specified in the said Charter; and if it be otherwise, *Be the Charter disallowed.*

Note; this mischievous Resolution was the Ground of K. J. 2. Patents to Popish Officers?

Vid. Post. 30. & Quare.

Pardons.

*Note*; This was the surest Way that the Parliament could take to restrain the King to pardon Murder, unless that he pardon it by *express* Terms, which *they thought the King would not*, for they knew that the King could not be restrained by any Act to make a Pardon; for Mercy and Power to Pardon is a Prerogative incident, solely and inseparably to the Person of the King: And it hath oftentimes been adjudged that the King can Pardon Murder by general Words without any *express* Mention, with *non obstante* the said Statute: See 4 *H. 4. cap. 31.* In which it is ordained that no *Welforman* be Justice, \* Chamberlain, Treasurer, Sheriff, Steward, Constable of a Castle, Escheator, Coroner, or chief Forester, nor other Officer whatsoever, nor Keeper

Case of Non Obstante. PART XII.

Keeper of Records, &c. in any Part of *Wales*, notwithstanding any Patent made to the contrary, with Clause of *non obstante licet sit Wallicus natus*: And yet without Question, the King may grant this with a *Non obstante*. So Purveyance for the King and his Household is incident solely and inseparably to the Person of the King: And for this Cause the Act of Parliament held in Time of *H. 3. de tallagio non concedendo*, Tit. Purveyance, in *Rastall*, which bars the King wholly of Purveyance, is void, as it appears in *Co. lib. fol. 69*. But in all such Cases, although that the King may dispense with Statutes, yet a general Dispensation or Grant without *non obstante* is void: But in Things which are not incident solely and inseparably to the Person of the King, but belong to every Subject, and may be severed, there an Act of Parliament may absolutely bind the King: As if an Act of Parliament do disable any Subjects of the King, to take any Land of his Grant, or any of his Subjects (as Bishops) (as it is done by the Statute 1 *Fac. c. 3.*) to grant to the King, this is good; for to grant or take Lands or Tenements, is common to every Subject: And for this it is not *Proprium quarto modo*, to Kings, *scilicet omni soli & semper*. Vide the Case of Deans and Chapters upon the Statute of 13 *Eliz. vide 8 R. 2. cap. 2. & 33 H. & 33 H. 8. c. 24. 6.* That none shall be Justice of Assize, &c. in the Country where he was born or did inhabit, and yet the King with special *non obstante* may dispense with this, for this belongs to the inseparable Prerogative of the King, *viz.* his Power of Commandment to serve, &c.

Note.

Stat. 8 R. 2. c. 2.  
& 33 H. 8. c. 24.  
Cumb. 23.

[Note; These Opinions may justify any King's acting against Law, and are a proper Ground to erect arbitrary Power, &c.]

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Q. If

## Q. If High Commissioners have Power to Imprison.

Hill. 4 Jac. Regis.

**N**OTE; *Mich. 4 Jac. Post Prandium*, There was moved a Question amongst the Judges and Serjeants at *Serjeants-Inn*, if the High Commissioners in Ecclesiastical Causes, may by Force of their Commission *imprison* any Man or no?

High Commissioners, if they have Power to Imprison.

First of all it was resolved, by all, that before the Statute of 1 *El. cap. 1.* the King might have granted a Commission to hear and determine Ecclesiastical Causes: But then notwithstanding any Clause in their Commission, the Commissioners ought to proceed according to the Ecclesiastical Law allowed within this Realm, for he cannot alter neither his Temporal\* nor his Ecclesiastical Laws within this Realm by his Grant or Commission: *Vide Caudry's Case, 5 Report.* And they could not in any Case have punished any Delinquent by *Fine or Imprisonment* unless they had Authority so to do by Act of Parliament. Then all the Question rests upon the Act of 1 *El.* which as to this Purpose rests upon three Branches.

Post. 47, 76, 88.

13 Co 9, 47.

Nora.

Post. 74, 75.

\* Ergo, Q. the Opinions in the preceding Case?

1. Such Commissioners have Power to exercise, use, occupy, execute all Jurisdiction Spiritual and Ecclesiastical.

2. Such Commissioners by Force of Letters Patent have Power to visit, reform, &c. all Heresies, &c. which by any Manner of Spiritual or Ecclesiastical Power, &c. can, or lawfully may be reformed, &c. so that these Branches limit the Jurisdiction, and what Offences shall be within the Jurisdiction of such Commissioners, by Force of Letters Patent of the King: And this is all, and only such Offences may lawfully be reformed by the Ecclesiastical Law.

3. The third Branch is, That such Commissioners after such Commission delivered to them so authorized, shall have Power and lawful Authority by \* Virtue of this Act, and the said Letters Patent, to exercise, use, and execute all the Premises according to the Tenor and Effect of the said Letters Patent. This Branch gives them Power to execute their Commission. But it was objected, that this

Page [20]

*If High Commissioners have Power, &c.* PART XII.

Branch doth not give to the Queen Power, by her Letters Patent, to alter the Proceedings of the Ecclesiastical Law; or gave to the Queen absolute Power by her Letters Patent, to prescribe what manner of Proceedings, or Punishment concerning the Lands, Goods, or Bodies of the Subject; and this appears by the Title of the Act restoring to the Crown the ancient Jurisdiction, so that the Intent was to make Restitut. and not any Innovation in the Proceeding or Punishment: And it was observed that this last Branch gave to them Power to execute all the Premises; according to the Tenor and Effect of the said Letters Patent, so that these Words *so authorized* in the said Letters Patent, have Relation only to the Authority of the Letters Patent, before specified; *viz.* such as gave to them Power to visit, reform, redress, order, correct and amend all *Errors, Heresies, Schisms, Abuses, Contempts, and Enormities* whatsoever; which by any manner of Spiritual or Ecclesiastical Power, can or may lawfully be reformed, &c. These are the Tenor and Effect of the Letters Patent before remembered: And if any other Construction shall be made;

1. It shall be against the express Letters, *Scilicet, said Letters Patent.*

2. It shall be full of great Peril and Inconvenience, for then not only Imprisonment of Body, but Confiscation of Lands, Goods, &c. And some corporal Punishment may be imposed, for Heresy, Schism, Incontinence, &c. Also Power may be given to them to *burn* any Man for *Heresy*; which would be against the common Law of the Land.

Heresy, &c.  
Post 56.

*See Simpson's Case in Hill. the forty-second of Eliz. now reported by my Lord Coke in 4 Inst. 333. See Dyer 389.*

[*Vide post. 56, 58. and 93. of the Writ De Heretico comburendo.*]

## Of the Stealing of Women.

**N**Ote; the Statute of 3 *H. 7. cap. 12.* stands upon a Pre-Stealing Women, Felony. Preamble and a Purview; the Preamble is, Where Women, Felony. men, as well Maids as Widows and Wives having Substance, Post 100. &c. and some being Heirs apparent, &c. for the Lucre of Vid. Stare such Substance, be oftentimes taken by Misdoers, contrary 2 Inst. 434, 435. to their Wills, and after married, &c. or defiled: So Note 1 Hawk. 109, these three Words in the Preamble: viz. 110.

1. Be taken.
2. Be married.
3. Be defiled.

2 Hawk 313.  
Farrl. 101, 102,  
132.

The Purview is, That what Person or Persons from henceforth that taketh any Woman so against her Will unlawfully, viz. Maid, Wife, or Widow, that such taking, procuring, and abetting to the same, and also receiving the said Woman so taken against her Will, and knowing the same, be Felony. And that such Misdoers, Takers, and Procurers to the same, and Receivers, knowing the said Offence in Form aforesaid, be henceforth reputed and judged as principal Felons, so that it is not said in the Purview so taken, married, or defiled, but only so taken against their Will: And upon this, great Question was moved 4 & 5 *Ph. & Mar.* in the Star-Chamber, if the Eloyment against her Will, without Marriage, or carnal Copulation (which is intended by this Word Defiled) be Felony or no? And the Opinion of *Brook* and some other of the Justices was, that it was \* Felony; but *Sanders* Chief Justice was against it; and afterwards, as *Periam* Chief Baron did report, it was resolved by the Justices in the 26 *Eliz.* that such Eloyment only is not Felony by the Intent of the Statute, without Marriage or carnal Copulation, for the Mischiefe was not only the Taking, but the Marriage, or the Defiling, which was (as it was said in the Preamble) to the Disparagement of the said Woman, and utter Heaviness and Discomfort of her Friends: And the Purview ought to pursue the Mischiefe.

Page [21]

Secondly, This Word *So*, hath Reference to the Preamble, and all the Mischiefe contained in it.

Note; by the express Purview of the Act, the Accessary both before and after is made Principal, &c. but by a Construction of the Common Law they that receive the Misdoers, and not the Women are *Accessaries*; for this Act makes even the Receivers of the Women Principals.

*Aurum Regina, Quid? &c.*

Pasch. 4 Jac. Regis.

Aurum Regi-  
næ.  
2 Rol. Abr. 213.  
Maddox's Fi-  
ma Burgi. pa.  
and his Hist. of  
the Excheq.

**N**Ote; by the Commandment of the King, it was re-ferred to *Popham*, Chief Baron, and my self, what Right the Queen which now is, hath, and in what Cases, to a Right claimed by her, called *Aurum Reginae*, that is to say, *Pro centum marcis argenti una marca auri solvend' per illum qui sponte se obligat*: And upon Consideration had of it by a long Time and View of all the Records and Precedents, viz. *Librum Rubrum in scaccario, fol. 56. de Auro Reginae*, where it is said, that this is to be taken *De iis qui sponte se obligant Regi, &c.* which is the Foundation of this Claim; and of a Record in the *Tower*, 52 *H. 3.* And of a Record in the Exchequer, 4 *E. 1.* and of a Record in the Exchequer, *Hill. 12 Ed. 3.* And of the *Tower* in the same Year, in *Rot. Claus.* And the Acts of Parliament, 15 *Ed. 3. cap. 6.* & 31 *Ed. 3. cap. 13.* and the 13 *R. 2. in Turri*, and divers other Precedents and Process out of the Exchequer in the Time of *R. 2. H. 4.* and other Kings, until the Time of *H. 7.*

Resolution.

It was resolved that the Queen hath Right to it, but with these Limitations.

1. That it ought to be *Sponte* by the Subject *Sine coactione*, so that this ought to be at the Pleasure of the Subject, whether he will offer, or give, or no: And for this all Fines upon Judgment, or by Offer or Fine for Alienation, or in any other Case where the Subject doth not do it *Sponte sine aliqua coactione*, viz. That the King of Right ought to have it, there the Queen shall have nothing.

2. It ought to be *Sponte sine consideratione alicujus reventionis seu interesse*, That the King hath in *Esse, in Jure Coronæ*: And for this upon Sale or Demise of his Lands, or Wards, or Goods of Felons, Outlaws, & *simili casu*; for these are Contracts and Bargains concerning the Revenues and Interests of the King: And it cannot be said in such Case that the Subjects *Sponte se obligant*, as to Purchase

or

or Buying any the Revenues or Interests which the King hath.

3. It ought to be *Sponte super considerationem, & non ex mera gratia & benevolentia Subditi*, for that which is of meer Grace is not properly said of Obligation or Duty, and the Words of the Records are, to have *De iis qui sponte se obligant*; and so was it ordained by the King and his Counsel, as appears by the Record of *Hill. 4 E. 1. in Scaccario, &c.*

4. It ought to be *Sponte super considerationem quæ non attingat reventionem seu interesse Coronæ*, in any Thing which the King hath: As if the \* Subject give to the King *Sponte* a Sum of Money for Licence in Mortmain, or for to create a Tenure of himself, to have a Fair, Market, Park, Chase, or Warren, within his Manor, there the Queen shall have it: For the Subject did this *Sponte*, and was not constrained to it: And this doth not concern any Revenue or Interest of the King: But if the King hath a Fair or Market, or Park, or Warren, and grant it for a Sum of Money, there the Queen shall have nothing; for this was a Thing in *Esse*; and Parcel of the Revenue of the Crown: And by that it appears, that forasmuch as little or nothing is given in such Case, where this of Right is due, this is not now of any such Value as was pretended: And this Resolution was reported to our Sovereign Lord the King by *Popham*, in the Gallery at *Whitehall*.

Page [22]

## *Case of Forests.*

Pasch. 5 Jac. Regis.

Forests.  
Chafes.  
3 Inst. 76, 77.  
4 Inst. 289,  
313 to 319.

IN this same Term it was informed to the King, that great Wrongs were done in his Forest of *Leicester* in the County of *Leicester*: And in his Forest of *Borwland* in the County of *Warwick*, &c. Parcel of his Dutchy of *Lancaster*: And upon this, by Warrant of the King under his Signet, all the Justices were assembled to resolve certain Questions, to be moved concerning the Forests by the Attorney of the Dutchy, and the Counsel of the other Part, which were Forests, and which were Chafes; the which being Matter in Fact, the Judges could not give their Resolutions but by way of Direction: And it was resolved by them, that if these are Forests, it will appear by Matter of Record, as by *Eyres* of Justices of Forests, *Swannymotes*, Officers of Forests, as Regardors, Agisters, Verderors, &c. But the Appellation of it by the Name of a Forest in Grants, Otices and Conveyances, is not any Proof that this is a Forest in Law.

4 Inst. 299,  
300.

2. It was resolved by all the Justices, that if these are not other than free Chafes, and no Forests in Law, then he who hath any Freehold within them, may cut his Timber and Wood growing upon it, without any View or Licence of any: But if he cut so much, that there is not sufficient for Covert, and to maintain the Game of the King, he shall be punished at the Suit of the King. And so if a common Person hath Chase in another's Soil, the Owner of the Soil cannot destroy all the Covert, but ought to leave sufficient Covert, and sufficient Brouse-wood, as hath been accustomed.

3. It was resolved, That within such a Chase the Owner of the Soil by Prescription may have Common for his Sheep, and Warren for his Conies, by Grant or Prescription: But he cannot sur-charge with more than hath

hath been used, Time from which, &c. nor make Burrows in other Places than hath been used from the Time of which, &c. unless he hath Warren by Grant, and then he may use it according to his Grant; but he cannot erect a new Warren without Charter.

4. It was resolved, That he who hath such a Warren may lawfully build upon his Inheritance, within his Warren, a convenient Lodge for Preservation of his Game.

5. It was said by *Popham* Chief Justice, that it was adjudged in the Time of the Chief Baron *Brett*, in the Exchequer, that a Man may prescribe to cut his Wood upon his own Inheritance within a Forest, although it was against the Act in the 43 *Ed. 1.* which is in the Abridgment, Title \* *Forest* 21. And this was the Case of *Sellen-ger*, for cutting Wood in the Forest of *Hay* in the County of *Hereford*: And their Reason was for that this was but a Declaration of the Common Law, and it may be tolled by Custom, as *Littleton* said; *vid. 2 Ed. 2.* Title *Trespas*, fol. 9. in the Time of *Ed. 1.* *Trespas* 239. *Plowd. Com. Dyer* 72. 332. 2 *Ed. 4. cap. 7.* that the Subject may have a Forest: But this is intended if he hath Power to have *Swanimotes* and Justices in *Eyre* and Foresters appendant to his Forests.

Page [23]

4 Inst. 31, 43, 15.  
1b. 289, 290.

*Consuetudo ex rationabili causa usitata privat communem legem*: And it was held by some that this was but an Ordinance, and not any Act of Parliament. Q.

## FLOYD and BARKER.

Pasch. 5 Jacobi Regis.

*In the Star-Chamber.*

Conspiracy doth not lie against a Juror or Indictor, but against a Witness.  
 Vide Post. 32, 91, 92, 99, &c.  
 1 Hawk. ch 72. per totum.

**I**N this very Term, between *Rice ap Evan ap Floyd*, and *Richard Barker*, one of the Justices of the Grand Sessions in the County of *Anglesey*, and other Defendants: It was resolved by *Popham* and *Coke* Chief Justices, the Chief Baron, and *Egerton* Lord Chancellor, and all the Court of Star-Chamber, that when a Grand Inquest indicts one of Murder or Felony, and after the Party is acquitted, yet no Conspiracy lies for him who is acquitted, against the Indictors, for this that they are returned by the Sheriff by Process of Law to make Inquiry of Offences upon their Oath, and it is for the Service of the King and the Commonwealth. And as it is said in the 10 *El.* 265. they are compellable to serve the Law, and the Court; and their Indictment or Verdict is Matter of Record, and called *Vere-dictum*, and shall not be avoided by Surmise or Supposal, and no Attaint lies. And for this Reason they shall not be impeached, for any Conspiracy or Practice, before the Indictment: For the Law will not suppose any unindifferent, when he is sworn to serve the King: And with this agrees the Books in 22 *Aff.* 77. *Affise* p. 12. 21 *Ed.* 3. 17. 16 *H.* 6. 19. 47 *Ed.* 3. 17. 27 *H.* 8. 2. *F. N. B.* 115. a. But it is otherwise of a Witness; for if he conspire out of the Court, and after swear in the Court, his Oath shall not excuse his Conspiracy before; for he is a private Person, produced by the Party, and not returned by the Sheriff, who is an Officer sworn, and the Jurors are sworn in Court as indifferent Persons: And the Law presumes, that every Juror will be indifferent when he is sworn; nor will the Law admit Proof against this Presumption.

2. It was resolved, That when the Party indicted is convicted of Felony by another Jury, upon *Not guilty* pleaded, there he never shall have a Writ of Conspiracy, but when the Party upon his Arraignment is *legitimo modo acquietatus*: But in the Case at the Bar, the Grand Jury who indicted one *William Price* for the Murder of *Hugh ap William*, the Jury, who, upon *Not guilty* pleaded, convicted him,

PART XII. *Case of Conspiracy.*

him, were charged in the Star-Chamber for Conspiracy against him, and indicted and convicted, which Manner of Complaint was never seen before: For if the Party shall not have a Conspiracy against the Indictors, when the Prisoner is acquitted upon his Indictment, *a multo fortiori* when he is lawfully convict, he shall not charge neither the Grand Inquest by whom he was indicted, nor the Jury who found him guilty: For the Law in such Case doth not give any Attaint, for this that he was indicted by the Oath of twelve Men at the least, and found guilty by twelve: And in these Cases, the King is the sole Party to the Proceedings against the Prisoner: But on the other side, when a Jury hath acquitted a Felon or Traitor against manifest Proof, there they \* may be charged in the Star-Chamber, for their Partiality in finding a manifest Offender Not guilty, *Ne maleficia remanerent impunita*. And it will be a Cause of infinite Vexation and Occasion of Perjury and smothering of great Offences, if such Averments and Supposals shall be admitted after ordinary and judicial Proceeding: And it will be a Means *ad deterrendos & detrahendos juratores a servitio Regis*.

3. It was resolved that the said *Barker* who was Judge of Assise, and gave Judgment upon the Verdict of Death, against the said *W. P.* and the Sheriff who did execute him according to the said Judgment, nor the Justices of Peace who did examine the Offender, and the Witnesses for Proof of the Murder before the Judgment, were not to be drawn in Question in the Star-Chamber, for any Conspiracy, nor any Witness, nor any other Person ought to be charged with any Conspiracy in the Star-Chamber, or elsewhere, when the Party indicted is convicted or attaint of Murder or Felony: And altho' the Offender upon the Indictment be acquitted, yet the Judge, be he Judge of Assise, or a Justice of Peace, or any other Judge, being Judge by Commission and of Record, and sworn to do Justice, cannot be charged for Conspiracy, for that which he did openly in Court as Judge or Justice of Peace: And the Law will not admit any Proof against this vehement and violent Presumption of Law, that a Justice sworn to do Justice will do Injustice; but if he hath conspired before out of Court, this is extrajudicial; but due Examination of Causes out of Court, and inquiring by Testimony, & *similia*, is not any Conspiracy, for this he ought to do; but Subornation of Witnesses, and false and malicious Prosecutions, out of Court, to such whom he knows will be Indictors, to find any guilty, &c. amounts to an unlawful Conspiracy.

And Records are of so high a Nature, that for their Sublimity they import Verity in themselves; and none shall be received to aver any Thing against the Record it self; and in this Point the Law is founded upon great Reason, for if the judicial Matters of Record should be drawn in Question, by partial and sinister Supposals and Averments of Offenders, or any on their Behalf, there will never be an End of Causes: But Controversies will be infinite; *Et infinitum in jure reprobatur*: And for this it is adjudged in the 47 *Ed.* 3. 15. That a Judge who hath a Commission, *viz.* that is of Record, shall not be charged in Conspiracy; which is to be understood of what he did in Court, for the Reasons and Causes aforesaid: And with this agree the Books, 21 *Ed.* 4. 67. & 27 *Aff. pl.* 12, and the Reason is for this, that tho' the Party is acquitted, yet the Accusing stands with the Record: And accordingly was the Law taken in this Case. But in an Hundred Court, or other Court which is not of Record, there Averment may be taken against their Proceedings, for that it is no other than Matter *in Pais*, and not of Record; as it appears in the 47 *Ed.* 3. 15. Also one shall never assign for Error, against that which the Court doth as Judges; as to say, that the Jury gave Verdict for the Defendant, and the Court did enter it for the Plaintiff, or to say that the Party who levied the Fine was dead before the Fine was levied, or such like. *Vide* 1 *H.* 6. 4. 39 *H.* 6. 52. 7 *H.* 7. 11 *H.* 7. 4. 28. 1 *Mar. Dyer* 89. But in a Writ of false Judgment, the Plaintiff shall have a direct Averment against that which the Judges in the inferior Court, have done as Judges, *Quia Recordum non habent*, and with this accords 21 *H.* 6. 34. And as a Judge shall not be drawn in Question in the Cases aforesaid, at the Suit of the Parties, no more shall he be charged in the said Cases before any other Judge at the Suit of the King. And for this in the 27 *Aff. pl.* 18. One was indicted and arraigned at the Suit of the King, That as he was a Justice of Oyer and Terminer, where certain Persons were indicted \* of Trespass before him, he made an Entry of Record, that they were indicted of Felony: And it was adjudged that this Indictment was against the Law, for this, that he was a Justice by Commission; and that is of Record; and this present Act shall be to defeat the Record, *hoc est*, to aver against that which he did as Judge of Record, which cannot be by the Law. *Vide* 27 *Aff. pl.* 23. 2 *R.* 3. 9. 28 *Aff. pl.* 21. 9 *H.* 6. 60. And it was said, that it was the Case of one *Nudigate*, who as a Justice of Peace had recorded a Force upon a View, which he did as Judge upon

Averments.

Note.

Page [25]

PART XII. *Case of Conspiracy.*

on Record; and a Bill was exhibited against him in this Court, for this, that he had falsly made a Record, where indeed there was not any Force: And by the Opinion of *Catlyn* and *Dyer*, Chief Justices, it was resolved, that that Thing, that a Judge doth as Judge of Record, ought not to be drawn in Question in this Court.

Note well, that the said Matters done at the Bar were not examinable in the Star-Chamber; and for this it was ordered and decreed by all the Court, that the said Bill without any Answer to it, by the said *Richard Barker*, shall be taken off the File and cancelled, and utterly defaced: And it was agreed, that insomuch as the Judges of the Realm have the Administration of Justice, under the King, to all his Subjects, they ought not to be drawn into Question for any supposed Corruption, which extends to the Annihilating of a Record, or of any judicial Proceedings before them, or tending to the Slander of the Justice of the King, which will trench to the Scandal of the King himself, except it be before the King himself; for they are only to make an Account to God and the King, \* and not to answer to any \* Q. The Parliament. Suggestion in the Star-Chamber; for this would tend to the Scandal and Subversion of all Justice. And those who are the most sincere, would not be free from continual Calumniation, for which Reason the Orator said well, *Invigilandum est semper, multæ insidiæ sunt bonis.*

And the Reason and Cause why a Judge, for any Thing done by him as Judge, by the Authority which the King hath committed to him, and as sitting in the Seat of the King (concerning his Justice) shall not be drawn in Question before any other Judge, for any Surmise of Corruption, except before the King himself, is for this; The King himself is *de jure* to deliver Justice to all his Subjects; and for this, that he himself cannot do it to all Persons, he delegates his Power to his Judges, who have the Custody and Guard of the King's Oath. Judges have Custody of the King's Oath.

And forasmuch as this concerns the Honour and Conscience of the King, there is great Reason that the King himself shall take Account of it, and no other. See 4 Inst. 41, 43, 71.

And *Thorp's* Judgment who was drawn in Question for Corruption before Commissioners, was held against the Law, and upon that he was pardoned; and it is contained in the same Record, *Quod non trahitur in exemplum. Vide* the Conclusion of the Oath of a Judge. *Vide* the Chronicle of *Stow*, 18 *Edw.* 3. 312. See Cotton's Records 74, 316. That Thorp's Judgment was by Parliament adjudged just and legal, but in Truth the whole Set of Judges were then so corrupt that the K. was forced to try him by Commission.

Note; *Thomas Weyland* Chief Justice of the Common Bench, *Sir Ralph Hengham* Justice of the King's Bench; and the other Justices were accused of Bribery and Corruption, K. was forced to try him by Commission.

ruption, and their Causes were determined in Parliament, where some were banished, and some were fined and imprisoned.

*Vide 2 Ed. 3. fol. 27.* That the Justices of *Trayl-baston* (so called for their summary Proceeding) were in a Manner Justices in *Eyre*; and their Authority was founded upon the Statute of *Ragman*, which you may see in the old *Magna Charta*. *Vide* the Form of the Commission of the *Page* [26] \* *Trayl-baston, Hollingshead, Chron. fol. 512.* And note; it appears by the said Precedent and Chronicle, that the King did examine the Corruption of his Judges, before himself in the *Parliament*, and not by Force of any Commission.

*Absurdum est affirmare, (re judicata) credendum esse non Judici.*

### Of Oaths before an Ecclesiastical Judge ex Officio.

The Ordinary cannot enforce a Man to answer general Articles Ex Officio.

**N**OTE; *Pasch. 4 Jacobi*, In the Time of the Parliament, the Lords of the Council of *Whitehall* demanded of *Popham* Chief Justice, and my self, upon Motion made by the Commons in Parliament, in what Cases the Ordinary may examine any Person *ex officio* upon Oath; and upon good Consideration and View of our Books, we answered to the Lords of the Council at another Day in the Council-Chamber.

Note this Ex Officio Oath is since abrogated by Stat. 16 Car. 1. c. 2. Sect. 4. & 13 Car. 2. c. 12. Sect. 4. See Gibson's Codex 56, 58, 407, 999, 1053.

1. *That the Ordinary cannot constrain any Man Ecclesiastical or Temporal, to swear generally to answer to such Interrogatories as shall be administered unto him; but ought to deliver to him the Articles upon which he is to be examined, to the Intent that he may know whether he ought by the Law to answer to them: And so is the Course of the Star-Chamber and Chancery; the Defendant hath the Copy of the Bill delivered unto him, or otherwise he need not to answer to it.*

2. *No Man Ecclesiastical or Temporal shall be examined upon secret Thoughts of his Heart, or of his secret Opinion: But something ought to be objected against him what he hath spoken or done: No Lay-man may be examined ex officio, except in two Causes, and that was grounded upon great Reason; for Laymen for the most part are not lettered, wherefore they may easily be inveigled and intrapped, and principally in Heresy and Errors:*

PART XII. Oath Ex Officio.

rors of Faith: And this appears by an Ordinance made in the Time of Ed. I. Tit. Prohibition in Rastal.

The Words of which Ordinance are, And *2.<sup>a</sup>* non permittant quod aliqui laici in balliva sua in aliquibus locis conveniantur, ad aliquas recognitiones per juramenta sua faciendas, nisi in causis Matrimonialibus & Testamentariis. And the Reason that the Ecclesiastical Judge shall examine them in these two Cases, is for this, that Contracts of Matrimony, and the Estates of the Dead are many Times secret; and they do not concern the Shame and Infamy of the Party, as Adultery, Incontinency, Usury, Simony, Hearing of Mass, Herefy, &c.

And for this Cause in these Cases, and such like, the Ecclesiastical Judge ought not to examine *Partem ream*, upon their Oath; for as a Civilian said, that this was *Inventio Diaboli ad detrudendas miserorum animas ad infernum*: And in the Register, fol. 36. 6. There is a Prohibition in this Form, *Præcipimus tibi quod non permittas quod aliqui laici ad citationem talis Episc<sup>i</sup> aliquo loco conviant de cætero ad aliquas Recognitiones factas vel sacramenta præstanda* (the one is the Exposition of the other) *nisi in casibus matrimonialibus & testamentariis*: And there is an Attachment upon it, *Pone per vad. talem Episc<sup>i</sup>: quod sit coram Justiciariis nostris, &c. ostensurum quare fecit summoniri, & per censuras Eccles. distringi laicas personas vel laicos homines & feminas ad comparendum coram eo ad præstandum juramentum pro voluntate sua ipsis invitis in grave Coronæ præjudicium* \* Page [27] *& dignitatis nostræ Regiæ, necnon contra consuetudinem Regni nostri: Et habeas ibi nomina plegiorum, &c. Te-ste, &c.* by which it doth appear, that this was not only against the said Ordinance, but also against the Custom of the Realm, which had been Time out of Mind, and also in Prejudice of the Crown and Dignity of the King: And with this agrees *F. N. B. fol. 41.* And *Vide* the Case reported by the Lord *Dyer* (but the Case is not printed) *Trin. 10 Eliz.* one *Leigh* an Attorney of the Common Pleas, *Leigh's Case.* was committed to the Fleet by the high Commissioners in a Cause Ecclesiastical, for this, that he had been at Mass, and refused to swear to certain Articles to be proposed to him. And held, That altho' in such Case, Ecclesiastical Jurisdiction is saved by the Statute of *10 Eliz.* yet they ought not in such Case to examine upon his Oath: And hereupon he was delivered by all the Court of Common Pleas upon the Return of the Matter upon a *Habeas Corpus*.

And in *Mich. 18 El. Dyer, fol. 175.* in *Hind's Case*, who *Hind's Case.* would not swear *coram Commissionariis Eccles. super articulos*

Note; the Delivery out of Prison was because the high Commission had no Power to imprison. See 2 Inst. 333. Gibbon's Codex 410.

*los pro usura, & ea de causa commissus est Gaolæ de le Fleet.* He was delivered by *Habeas corpus per totam Curiam.* This was also because they could not imprison.

*Vide le Statute 25 H. 8. cap. 14.* Which is declaratory as to this Point: It standeth not with the right Order of Justice nor good Equity, that any Person should be convicted, and put to the Loss of his Life, good Name, or Goods, unless it were by due Accusation, and Witnesse, or by Presentment, Verdict, Confession, or Process of Outlawry, &c. And it is not reasonable that any Ordinary upon Suspicion conceived of his own Fantasy, without due Accusation or Presentment, should put any Subject of this Realm in Infamy and Slander of Heresy, to the Peril of Life, Loss of good Name, or Goods; (*Et paulo antea*) the most expert and learned Man of this Realm, diligently laying guard upon himself, cannot eschew and avoid Penalty and Danger, &c. if he should be examined upon such captious Interrogatories, as is and hath been accustomed to be ministred by the Ordinaries of this Realm, in Case where they will suspect any Man of Heresy: And this was the Judgment of all the said Parliament. See *F. N. B.* Justice of Peace 72. *Lamb.* in his Justice of Peace, 338. *Crompt.* in his Justice of Peace 36. 6. In all which it appears, that if any be compelled to answer upon his Oath, where he ought not by the Law, that this is Oppression and punishable before a Justice of Peace, a Justice of Assize, &c. For this is an Article of Charge, to enquire of all Oppressions: And as to that which was objected, that for a very long Time, divers had been examined upon Oath in Ecclesiastical Courts; as to this it was answered, that it might very well be, and not against Law, for the Words of the Treatise or Ordinance, and of the Register, are, *Contra voluntatem eorum, &c.* So that if any assent to it, and take it without Exception, that is not *Contra voluntatem eorum*, but to inforce any to take it, who ought not to take it by the Law, is a great Oppression: But if any Person Ecclesiastical be charged with any Thing which is punishable by our Law, as for Usury, &c. there he shall not be examined upon Oath, for this, that his Oath is Evidence against him at the Common Law, and to do it incurs the Penalty of the Statute; but Witnesse may be cited to testify. *Register, Tit Consult. F. N. B. 53 d.* Also by the Statute 2 H. 4. cap. 15. it is provided, that *dictus Diacesanus per se vel per Commissarios suos contra hujusmodi personas, &c. Et ad omne juris effectum, publice & judicialiter procedat & negotium hujusmodi, &c. terminet juxta*

Gibbon's Codex 400.

PART XII. *Oath Ex Officio.*

*juxta Canonicas Sanctiones*, which Words, *juxta Canonicas sanctiones*, give them Power to proceed according to their Canons, and exclude the Common Law, and by Pretext of this in the Cases mentioned in the said Act, they examined as well Lay-people as \* Clerks, upon their Oaths concerning Heresy, erroneous Opinions, &c. mentioned in the said Act in the Reigns of *H. 4. H. 5. H. 6. Ed. 4. R. 3. H. 7.* unto the Time of the said Act of 25 *H. 8.* And for this in the Reign of *H. 8.* nor in the Reign of *Ed. 6.* no Lay-man was examined upon his Oath, except in the said two Cases of Matrimony and Wills: But in the Reign of Queen *Mary*, this Act of 2 *H. 4.* was revised, and then all the Martyrs who were burnt were examined upon their Oaths: And afterwards by the 10 *El.* the said Act of 2 *H. 4.* is repealed, by which the Common Law is in full Force and Effect: And for this Cause all the Pretence of Possession and Practice which the Ecclesiastical Courts have had is strongly answered by this which hath been said, that the Words of the said Treatise and Register are, *Contra voluntatem eorum*, &c. And those who have so taken it, have assented to it, and that stands with Law.

Page [28]

Post. 57, 58, 93.

Note, That King *John* after he had murdered his Nephew *Arthur*, and Niece *Ellenor*, the Issue of his elder Brother *Geffery*, after he had lost *Normandy, Aquitaine, and Anjou*, after that his Commons for unjust Vexation disobeyed him, his Nobles revolted from him, the Clergy oppressed by him, and that he stood excommunicated by the Pope, and his Kingdom interdicted, he for his Protection, granted by his Charter of 13 *Maii anno Regni* 14. submitted himself to the Obedience of the Pope: And after in the fourteenth Year of his Reign, as one destitute of all Succour and Safety, and from Day to Day in Fear to lose his Crown, by another Charter he resigned his Crown and Realm to the Pope *Innocent* and his Successors, by the Hands of *Pandolph* his Legate, and took it of him again to hold of the Pope, which was utterly void, for this, that the Kingly Dignity is an Inherent inseparable to the Royal Blood of the King, and descendable to the next of Blood of the King, and cannot be transferred to another, no more than a Duke, or Earl, or Baron, or other Dignity may transfer over their Dignity, for these are Incidents inseparable; also the Pope was an Alien born, and therefore was not capable of Inheritance within *England*: By Colour of which Submission and Resignation, the Pope and his Successors exacted great Sums of the Clergy and Laity of *England*, *pra commutandis*

Matth. Paris, 225, 226, 227, &c.

Parliament Cases, 1, 2, &c.

*penitentiis*, to maintain the Height and Dignity of the Pope. And for the better enriching of the Coffers of the Pope, Pope Gregory the Ninth sent *Otho Cardinalis de Carcere Tulliano* into this Realm, when there was Indignation betwixt *H. 3.* and his Nobles, to collect Money for the Pope, who did collect infinite Sums of Money, so that it was said of him, *Quod legatus saginatur bonis Angliæ*, which Legate held his Council at *London*, Anno Domini 1237, & 22 *H. 3.* And for the better finding out Offences which should be redeemed with Money, he, with the Assent of the Bishops of *England* there assembled, made divers Canons, amongst which one was, *Fus jurandi Calumniæ in causis ecclesiasticis cujuslibet, & de veritate dicendi in spiritualibus quoque, ut veritas facilius aperiat, & causæ celerius determinentur, Statuimus de cætero præstari in Regno Angliæ secundum Canonicas & legitimas Sanctiones, obtenta in contrarium consuetudine non obstante, &c.*

By which Canon it appears, that the Law and Custom of *England* was against this Examination of the Party Defendant upon his Oath, for it is said *Statuimus de cætero præstari in Regno Angliæ*, so that this was a new Law, and took its Effect *de cætero*.

2. *Obtenta in contrarium consuetudine non obstante.* And this very well agrees with the Register and the said Treatise *De Regia Prohibitione*; and the other Authorities, that the Law and Custom of *England* \* was, that Lay-people in criminal Causes, be they Ecclesiastical or Temporal, shall not be examined upon their Oath (only in Causes matrimonial and testamentary;) otherwise it is of Clerks, as is aforesaid: And for this, that it appears by the said Canon it self, that this was against the Law and Custom of *England*; whence it follows that this Canon shall not bind, for that the Law and Customs of *England* cannot be changed without an Act of Parliament, for this, that the Law and Custom of *Engl.* is the Inheritance of the Subject, which he cannot be deprived of without his Assent in Parliament: And it appears in *Linwood, cap. jure jurandi, fol. 8. 6.* That *Boniface* Bishop of *Canterbury*, An. 1272. & 57 *H. 3.* a little before the Death of that King made this Canon, *Statuimus quod Laici de subditorum peccatis & excessibus corrigendis per prælatos & judices ecclesiasticos inquiratur ad præstandum de veritate dicenda sacramentum per excommunicationis sententias. Si opus fuerit compellantur impedientes, vero ne hujusmodi juramentum præstetur per interdict' est excommunicatio sententia arceantur.* In which Canon it is to be observed, that this extends

Page [29]

See Gibbon's  
Codex 999.  
& ibid. 407,  
1080.

PART XII. Oath Ex Officio.

tends to Lay-people ; for, as appears, the Ecclesiastical Judge may examine those of the Clergy upon their Oaths, And note ; *Linwood, cap. jure jurando, fol. 6. litera E.* saith so. *Hic dicitur causa editionis hujus statuti, viz. Prælati Ecclesiastici procedebant ad inquirendum de criminibus & excessibus subditorum suorum, & laici (nota hic) suffulti potestate dominorum temporalium in hujusmodi inquisitionibus noluerunt jurare de veritate dicenda.*

Note well what the Cause was, why Lay-people refused to be examined for Crimes and Excess.

2. It appears, that the Judges of the Common Law, by their Prohibition did interdict, &c. as it appears by the Register and the other Authorities ; in the Time of *Ed. 1.* and other Kings, Incroachments were made upon the Subjects, which are here called *Impedimentes*, but now the Canon saith, *Impellat.*

3. That where by the Law they may examine Lay-people upon their Oath, *In causis matrimonialibus & testamentariis*, here *Boniface* makes this Canon to extend to *Peccata & Excessus*, which Canon was utterly against the Law and Custom of *England*. In like Manner another was made by him at the same Time, *Linwood, cap. de benef. fol. 231.* which Canon being made directly against the Judges, who did award Process against them, if they did impose any pecuniary Pain : And prohibits them the Judges with Fear of Excommunication, the Canon being against Law, the Judges prohibited them notwithstanding this Thundering of Excommunication in all Ages. And the Scope and Purpose of the said Canon was to perplex the Subjects, and to enrich themselves by Punishment pecuniary : And this is declared by Act of Parliament made 9 *Edw. 2.* called *Articuli Cleri.* *Si prælati imponant Pœnam pecuniarum alicui* Note *pro peccato, &c. Regia Prohibitio locum habet.* Note this.

## Of Pardons.

Trin 5. Jac. 1.

Action popular.  
Bonum publicum.  
Pott. 63.  
1 Salk. 32.  
1 Inst. 56. a.

Page [30]  
Nota.  
Bridges.  
See 13 Co. 33.  
&c. ib.  
Antea 18, 19.

Antea 8. 49.

**N**ota; the Law so regards the Weal publick, that altho' in Actions popular the King shall have the Suit solely in his own Name for the Redress of it, yet by his Pardon he cannot discharge the Offender, for this, that it is not only in Prejudice of the K. but in Damage of the Subjects; tho' for the avoiding of infinite Suits, they cannot have private Actions, and for that Reason the Suit is given to the King, not only for himself, but also for all his Subjects, \*as if a Man ought to repair a Bridge, and for Default of Reparation it falls into Decay: In this Case the Suit ought to be in the Name of the King, and the King is sole Party to the Suit, but for the Benefit of all his Subjects. And for this, if the King pardon it, yet the Offence remains; and in any Suit in the Name of the King, for Redress of it, the Offender ought (notwithstanding the Pardon) to make and repair the Bridge for the Benefit of the Weal publick; but peradventure the Pardon shall discharge the Fine for the Time past; and with this agrees 37 H. 6. 4. 6. *Plow. Com.* in *Nicol's* Case 487. where the Words of the Law are; If a Bridge or a Highway is repairable by the Subject, and is in Decay, the Pardon of the King shall not excuse him which ought to do it, for this, that the other Subjects of the King have Interest in it. But note; the Pardon in such Case shall discharge the Fine, but only for the Time before the Pardon: But for the Time after the Pardon, without Question the Offender for his Default shall be fined and imprisoned; the same Law, and a *multo fortiori* in case of Depopulation; for this is not only an Offence against the King, but against all the Realm; for by this the Realm is infeebled; idle and dissolute People, which are Enemies to the Common-wealth, abound: And for this Cause Depopulation and Diminution of Subjects is a greater Nuisance and Offence to the Weal publick, than the Hindrance of the Subjects in their good and easy Passage by any Bridge or Highway: And for this, notwithstanding the Pardon of the King, he shall be bound to re-edifie the Houses of Husbandry which he hath depopulated;

pulated; but peradventure for the Time before the Pardon he shall not be fined, but for the Time after without doubt he shall be fined and imprisoned, for the Offence it self cannot be pardoned, as in the Case of a Bridge or Highway; *Quia est malum in se*: But this continues as to the Fine and Imprisonment at all Times after the Pardon: But the Penalty inflicted by the Statute that may be discharged, *Quia prohibitum*. Vide 3 Ed. 3. Tit. Ass. 443; Where an Abbot was bound to repair a Bridge by Prescription, and after the King by his Charter discharged him, which Charter was allowed in a *Quo warranto*. And after the Abbot was indicted at the Suit of the King, for Default of Reparation of the said Bridge, and he pleaded the said Charter and Allowance: And notwithstanding it was adjudged that he should repair the said Bridge, for this, that altho' the Suit be in the Name of the King for the Offence, yet the King cannot discharge it, for this, that it shall be to the Prejudice and Damage of his Subjects: But when the King chargeth his Subjects for the Making of a Bridge, or Causey or Wall, &c. there the King may discharge of the *Pontage, Murage, &c.* But when one is bound by Prescription or Tenure, &c. to repair a Bridge, &c. there the King cannot discharge it. And all this appears in the said Book.

And Note; If one be bound to the King in a Recognizance for to keep the Peace against one, and other the Liege People of the King; in this Case the King, before the Peace cannot pardon or release the Recognizance, as it is agreed in 11 H. 4. 43. 37 H. 6. 4. 1 H. 7. 10. And the Reason is, although the Recognizance be made to the King solely, yet inasmuch as this is made for the Benefit and Safety of the Subjects of the King, in such Case it cannot be discharged.

Vide 37 H. 6.  
29. per Fortescue & 16 Ed.  
3. Grant 53.

Note; No Licence can be made to do any Thing that is *Malum in se*, but *Malum prohibitum* may. 11 H. 7. 11. 3 H. 7. 39 H. 6. 39.

See Vaug. 333;  
342.  
Post. 61.

## Commissions of Enquiry.

Trin. 5 Jac. 1.

Commissions  
in English il-  
legal.

**N**Ote; Commissions in *English* under the Great Seal were directed to divers Commissioners within the Counties of *Bedford, Bucks, Huntington, Northampton, Leicester,* and *Warwick*, to enquire of divers Articles annexed to it: And the Articles were also in *English*, to enquire of Depopulation of Houses, converting of Arable Land into Pasture, &c. But the Commissioners should not have any Power to hear and determine the said Offences, but only to enquire of them: And by Colour of the said Commissions, the said Commissioners took many Presentments in *English*, and did return them into the Chancery, and after, *scil. Trin. 5 Jac.* it was resolved by the two Chief Justices, and by *Walmsley, Fenner, Yelwerton, Williams, Snigg, Altham,* and *Foster*, that the said Commissions were against Law for three Causes:

1. For this, that they were in *English*.
  2. For that the Offences enquirable were not certain within the Commission it self, but in a Schedule annexed to it.
  3. For this, that it was only to enquire, which is against Law, for by this a Man may be unjustly accused by Perjury, and he shall not have any Remedy.
  4. For this, that it is not within the Statute of 5 *Eliz.* &c.
- Also the Party may be defamed, and shall not have any Traverse to it.

\* Quere if not  
Treature-trove  
and Felons  
Goods  
Original of Af-  
fizes and Nii-  
prius.

- 1 Inst. 153. b.
- 2 Co 80.
- 4 Co. 43.
- 7 Co. 12.
- 8 Co. 57.
- 10 Co. 53, 71,
- 103
- 11 Co. 69.

Such a Commission may be only to enquire of \* *Treason, Felony committed, &c.* And no such Commission ever was seen, to enquire only, (i. e. of Crimes.)

At the Common Law, Assises were not taken but before Justices in *Eyre* (who sat *virtute Brevis*, every 7th Year. *Vide Britton, fo. 1. and Bracton, lib. 5 & 11.*) or in the Common Pleas: And this being a great Molestation and Trouble to the Recognitors of Assise, which Writ for the most part was in Use, for the Ease of the Country, and Expedition of Justice; it was provided by *Magna Charta, cap. 12. Quod recognitiones de nova disseisina, & de morte ancestor' non capiuntur nisi in suis Comitatus, & hoc modo: Nos, vel (si extra regnum fuerimus) Capitales Justiciarii nostri mittent justiciarios nostros per unumquemque Comitatum semel in anno, qui, &c. capiant in Comitatus illis Assisas prædict.*

And

And after was the Statute of *Westminster 2. c. 30.* made, Judges, their Authority, &c. and by this it is provided, *Quod assignentur duo Justiciarii jurati, coram quibus & non aliis capiantur assise, &c. ad plus per annum.* By which Act Justices of *Nisi prius* were constituted of other Pleas, as well of one Bench as the other, *Coram quibus Justiciariis & societate, (viz.) Coram duobus Justiciariis vel coram uno & uno milite, &c.* And by the same Act the Justices of *Nisi prius* have Power to give Judgment, &c. in Assises of Darrain Presentment, and *Quare Impedit*; then came the Statute of *21 Ed. 3. De Finibus, cap. 4.* and provided *Quod inquisitiones & recognitiones capiantur tempore vacationis generally before aliquo Justiciario de utroque banco, coram quibus placitum deduct. fuerit associat. sibi, &c.* And after by the Statute of *York, cap. 3.* It is provided, that in Pleas of Land the *Nisi prius* shall be taken before one of the Justices; where the Plea, &c. and Chapter. 4. That no other Pleas moved by Attachment or Distress shall be taken before any Justice, either of the one Bench or the other generally, be the Plea before them or not, &c. by the Statute *14 Ed. 3. cap. 15. Nisi prius* may be taken in any Plea, real or personal before two, so that the one be a Justice of the one Bench; or a Ch. Justice, or a Serjeant sworn.

\* By the Statute *De finibus, cap. 3. Justiciarii ad assisas capiendas assignati deliberant Gaolas in Comitatibus illis si- ve infra libertates quam extra de (omnibus) prisonariis quibuscunque, Vide le recital del Stat. of 28 Ed. 1. de appellatis,* which recites the Statute *de feloniam, &c.* but Note that Felony included Trespas in ancient Time. *Vide Stamf. 57.* The Statute of *3 H. 3. cap. 7.* gives Power to Justices of Assise to hear and determine Treason, concerning false Money: The Statute of *14 H. 6. cap. 1.* provides that Justices of *Nisi prius* have Power in all the Cases of Felony and Treason to give their Judgment as well where the Party is acquitted of the Felony or Treason, as where he is attaind, and to award Execution, &c. Page [32]

The Statute of *28 Ed. 1. De appellatis* gives Power to Justices of Assise to try the Appeals of Approvers.

Justices of Assise by the Statute *34 & 35 H. 8. cap. 14.* May write to the Clerk of the Crown *De Banco Regis,* to certify the first Conviction in their own Name; but where Justices of one County or Circuit write to other to certify the Attainder of a Principal, the best Form is in the Name of the King. *2 & 3 Ed. 6. cap. 24.*

By the Stat. *De Articulis super chartas, c. 10. & 4 Ed. 3. 5 Co. 2 Part cap. 11. & 7 R. 2.* Justices of Assise may hear and determine *Conspiracies, false Informations, and Male-procurers* 8 Co. 118. of Antea 23, 24.

of Inquests and Juries to any Plaint, without Writ, and without Delay, and of Confederacies, and Champerties, and Maintainers, Bearers and Alliances by Bond, &c.

Q. Stat. 4 E. 3.  
cap. 2.  
Sec 7 Co. 12.  
9 Co. 118.  
10 Co. 54.  
11 Co. 62.

By the Statute of *Northampton*, 2 *Ed. 3. cap. 3.* Justices of Assise have Power to hear and determine the Statute concerning Armour; also to punish the Justices of Peace, and others, who have not done their Office in such like Cafes, &c.

Justices of Assise ought twice in the Year to proclaim the Statute 32 *H. 8.* and other Statutes against unlawful Maintenance, Champerty, Imbracery, and unlawful Retainers.

By the 3 *H. 7. cap. 1.* Justices of Assise take Bail of him who is acquit of Murder within the Year, to answer the Appeal of the Party.

By 33 *Hen. 8.* Justices of Assise cause the Statute against unlawful Games, to be proclaimed in their Circuit.

Justices of Assise to make Execution of the Statute 13 *H. 4. cap. 7.* of Riots made in their Presence, upon Pain of a Hundred Pounds, and by 2 *H. 5. cap. 8.* Commission shall be awarded to enquire of a Default of Justices of Assise and of the Peace.

Note.  
27 *H. 8. fo. 3.*

By the Statute of *Westm. 2. cap. 37. & 2 Ed. 3. cap. 5.* Justices of Assise ought to enquire of Return, or not Return of Sheriffs.

Justices of Assise to enquire of all Points of the Statute of 23 *H. 6. cap. 10.* concerning Sheriffs, Under-Sheriffs and their Clerks, Coroners, Stewards of Franchises, Bailiffs and Guardians of Prisons, for their Extortion, and for delivering of them who are notailable, and for detaining those who ought to be bailed, 2 *Mariae Dyer* 99. Justices of Assise may hold Plea in Appeal of Murder, by *W. 2. & 3 H. 7.* and of Robbery by Commission for Gaol-delivery.

23 *Ed. 3. cap.* Justices of Assise may enquire of Default, (of Justices of Peace, &c.) of Punishment of Victualers, &c. who sell at unreasonable Prices.

Justices of Oyer and Terminer, and Gaol-delivery. See 4 *Co. 46. 47. 6 Co. 20. 9 Co. 12. 7 Co. 56. 118.*

Note; Justices of *Oyer and Terminer* cannot by this Authority enquire but of such, who are indicted before themselves, for their Commission is, *Ad inquirendum, audientum & terminandum*: But Justices of Gaol-delivery may arraign a Prisoner indicted before others, the Words of their Commission are, *Ad Gaolas, Gaolam de B. de prisonariibus in ca existentibus hac vice deliberandum, secundum leges, &c. Brook Title Commission, \* 3 Mar. 24. 4 Ed. 3.*

Page [33] c. 2. That Justices of Gaol-delivery deliver Prisoners indicted

## PART XII. *Customs, Subsidies and Impositions.*

dicted before the Guardians of the Peace. And by the Stat. of 1 *Ed. 6. cap. 7.* New Commissioners of Gaol-delivery; but this doth not extend to Indictments or Conviction before the Commissioners of *Oyer* and *Terminer*: And the Reason of this, is for this, that the Indictments and Proceedings before Justices of *Oyer* and *Terminer*, after the *Oyer* determined, ought to remain in the King's Bench: And the Records before Justices of Gaol-delivery remain with the *Custos Rotularum*. *Vide Brook*, Title *Commission* 12, 38 *Ed. 8.* Title *Oyer* and *Terminer*, 44 *Ed. 2. 31.*

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### *Customs, Subsidies and Impositions.*

**N**ote; upon Conference between *Popham*, Ch. Justice, and my self, upon a Judgment given lately in the Exchequer, concerning the Imposition of Currans: And upon Consideration of our Books, and of the Statutes to this Purpose, it appeared to us, That the Rule of the Common Law is in the Register, Title *Ad quod Damnum*, and *F. N. B. 222. a.* *Quod patria magis solito non oneretur seu gravetur.* Also there is another Rule, that the King may charge his People of this Realm without special Assent of the Commons, to (do) a Thing which may be of Profit to the Common People, but not to their Charge; as is held in the 13 of *H. 4. 16.* *Et Statutum de Tallagio non concedendo, Nullum Tallagium, seu Auxilium per nos, seu heredes nostros ponatur seu levetur absque voluntate & assensu Parliamenti.* *Et Magna Charta, cap. 30.* *Omnes Mercatores (Nisi publice antea Prohibiti fuerint) habeant Salvum & securum conductum abire de Anglia & venire in Angliam, & morari & ire per Angliam, tam per terram quam per aquam, ad emendum & vendendum sine omnibus malis Tolnetis per antiquas & rectas consuetudines, præterquam in Tempore Guerræ;* which Statute hath been confirmed more than thirty Times by several Acts of Parliament. *Vide le Statute 25 Ed. 1. 3 Ed. 1. in turri. 9 Ed. 3. cap. 1. & 2. 14 Ed. 3. 2. 25 Ed. 3. cap. 2, &c.* The Effect of which is, that every Merchant of this Realm, or other may freely buy, sell, and pass the Sea with all their Merchandizes, paying the Customs of ancient Time used. *Queen Mary* put an Imposition upon Cloaths, which 1 *El. Dy. 165.* was moved and not resolved. *Vide 51 H. 8. Dyer fol.*

Customs, Subsidies and Impositions.

See Cotton's Records 91, 138, 152. and 16. Tit. Taxes, &c. in Tabula. 4 Inst. 28 10 34.

Q.

*Customs, Subsidies and Impositions.* PART XII.

43. § 1 El. 165. *Magna Custuma & parva Custuma.* Vide 9 H. 6. 12 § 35. And note there the Saying of *Babington*. Note the 1 Eliz. *Dyer* 165. there was *Antiqua sive Magna Custuma* at the Common Law, *scil.* for Wools, Wool-fells, and Leather, and this was equal to Strangers as well as Denizens; and in the Time of *Ed. 1.* on Merchants Strangers, a Grant is over the said Customs, 3 s. 4 d. which is called *Nova seu parva Custuma*.

Upon all which and divers Records which we had seen, it appeared to us, that the King cannot at his Pleasure put any Imposition upon any Merchandize to be imported into this Kingdom, or exported, unless it be for Advancement of Trade and Traffick, which is the Life of every Island, *Pro bono publico*. As it in foreign Parts any Imposition is put upon the Merchandizes of our Merchants, *Non pro bono publico*; and for to make Equality for the Purpose to advance Trade and Traffick, the King may put an Imposition upon their Merchandizes, for this is not against any of the Statutes which were made for Advancement of Merchandize, or of the Statutes of *Magna Charta*, c. 30. which is, *Si aliqui Mercatores de terra contra nos guerrina incrementur in terra nostra in principio guerræ attachentur, &c. Quo modo mercatores terræ nostræ tractantur qui tunc inveniuntur in terra illa contra nos guerrina: Et si nostri salvi sunt ibi, illi salvi sunt in terra nostra*; for the End of all such Restraints is *Salus populi*: And so in the Case of Currans, which was now lately adjudged in \* the Exchequer: Also in the Case of *Customer Smith*, which was adjudged in the Exchequer, in the Reign of *Q. Elizabeth*, both the Impositions were imposed upon the said Reason to make Equality; for this was the Truth of both Cases (*Scil.*) The Advancement of Trade and Traffick, and for this Cause such Impositions were lawful.

Page [34]

And it was clearly resolved by us, that such Impositions so put, cannot be demised or granted to any Subject, for this, that it is to augment and decrease, or be quite taken away upon just Occasion for Advancement of Merchandize. And this was one of the Reasons in *Customer Smith's* Case, that it could not be demised; also it was assessed after the Demise or Grant.

And although that the King may prohibit any Person in some Cases with some Commodities to pass out of the Realm, yet this cannot be where the End is private, but where the End is publick, *viz.* To restrain the Person, for this, that *Quam plurima nobis & Coronæ nostræ præjudicialia in partibus exteris prosequi intendit*, and to restrain any Merchandizes either in Time of Dearth, or in Time of War, for *Necessitas est lex temporis*.

## PART XII. *Customs, Subsidies and Impositions.*

It appeared unto us also, that at the Common Law no Custom was paid, but only for Wools, Wools-fells, and Leather, which is called in *Magna Charta, Recta consuetudo*, and all others are there called *Mala Tolnera*, which in the Statute *De Tallagio non concedendo* is called *Male Tolt*. And at the Beginning of the Reigns of Kings, it hath for a long Time been used, by Authority and Consent of Parliament, to grant to the King certain Subsidies of Tonnage and Poundage, for Term of his Life, which began in such Form, 2 & 3 *H. 5.* in the 31 *H. 6. c. 8.* & 12 *Ed. 4. c. 5.* For the Defence of the Realm, and Maintenance of certain Wars, by Act of Parliament, which proves, that the King by his own Power cannot impose it, but by Consent of Parliament; but such Subsidy of Tonnage and Poundage might be granted by the King so long as he lived; for this, that this is limited and given to the King in certain: But an Imposition put for Equality, as hath been said, hath not any certain Continuance, but is to be augmented, diminished, or taken away, for the Benefit of the Commonwealth: And for that Cause it cannot be demised. *Vide* 51 *H. 1. Dyer* 43. 1 *Mar. D.* 92. 1 *El. D.* 165. 2 & 3 *P. & M. D.* 128. 12 *El. D.* 296. 23 *El. D.* 375. 45 *Ed. 3. c. 4.* 27 *Aff. pl.* 44. *Register* 192, &c.

*Vide M. Ch. cap.* 30. they are called *Consuetudines*, & *per vocabulum artis* they are called *Custumata*. *Vide le Stat.* 51 *H. 3.* Title *Exchequer* in *Rastall*: It appears that there were ancient Customs, and those were for Wools, Wool-fells and Leather. *Vide le Statute* 9 *Ed. 3. c. 2.* That all Charters and Letters Patent against free Trade and Traffick made, or to be made, are void.

*Vide Fortesc.* in his Comment of the Laws of England, *cap.* 3. 6. *fo.* 43. *Neque Rex per se vel per ministros suos Tallagia, subsidia, aut quævis alia onera imponit Legeis suis, aut leges eorum mutat, vel novas condit, sine concessione & assensu totius Regni sui in Parlamento suo expresso, &c.* *Vide fol.* 13. *cap.* 9.

And note; for the Benefit of the Subject, the King may make an Imposition or Toll within the Realm, to repair Highways, Bridges, and to make Walls for Defence: But then the Sum imposed ought to be proportionable to the Benefit: And this appears the 13 *H. 4. 16.* So the Imposition for Equality ought to be for the publick Good; see the Charter 31 *Ed. 1.* which is called *Charta mercatoria, ex Rot. mercator. an.* 31 *Ed. 1. n.* 42. *Patents* 3 *Ed. 1. n.* 1 & 9. *de sacco lanæ dimidium marcæ; testa coriorum,* 1 *Mark, &c. Fines* 3 *Ed. 1. n.* 24. *intus & non in dorso.* *Vide Rot. Parliament. an.* 13 *Ed. 3.* No new Inhansement of Customs to be without common \* Consent: And in

Tonnage and Poundage. See Selden's *Mare Clausum.* 193. 194. 195. 33 *H. 6. 17. b.* + *litt.* 32. 33.

Toll; Quære if such Toll may be general, or only on some particular Townships? as Ancient Demefine Towns, &c.

22 *Ed. 3. n. 8.* against new Customs and Impositions, and that Merchants may freely pass, &c. And in the Parliament *an. 8 H. 6. n. 29.* Against the new Impositions granted by *H. 5.* upon Merchandizes coming to *Burdeaux*: And Parliament 28 *H. 6. n. 35.* the Duke of *Somerſet* accused for causing the King to grant unto Sir *Pierce Bracy* an Imposition of Wines.

*Par. 9 R. 2. n. 30.* against a Patent made to the Lieutenant of the *Tower*, by Colour of which he took Custom of Wine, Oysters, and other Victuals, to be void.

29 *Ed. 3. 11. n. Ex Rot. Parliamenti*, Subsidy of Wools granted for 6 Years, so as during the same Time no other Aid or Imposition be laid upon the Commons.

*Parliament 5 Ed. 3. n. 17, 18, 19.* against new Impositions upon Staple Commodities, *Parl. 22 Ed. 3. n. 31.* against Alnage of Worstedes, *5 Ed. 3. n. 163.* against all new Impositions, and *5 Ed. 3. n. 191. 38 Ed. 3. n. 26. Rot. Parl.* against unreasonable Impositions.

*Parl. 7 R. 2. n. 35, 36. 9 R. 2. n. 30.* No Impositions or Taxes without Consent of Parliament.

Note 2 *R. 2. Parl. apud Glocestriam, Act 25.* Subsidy only for defensive Wars, not for invasive, *1 R. 2. Parl. Accord, 1 R. 3.* against Benevolence. *Vide Claus. 4 Ed. 3. n. 22. bis.*

## Dr. EDWARDS versus Dr. WOOTON.

Libels. v.  
Star-Chamber.  
Poit. 103.  
3 Inst. 174.  
Cumberb. 56,  
358, 359.  
2 Str. 418.  
1 Hawk. c. 73.  
2 Hawk. Vide  
Tabula.  
5 Co. 2. Part.  
124, 5.  
9 Co. 59.  
10 Co. 75.

IN the Case in the Star-Chamber, between *Edwards* a Physician Plaintiff, and *Wooton* a Doctor in Physick Defendant.

The Case was, *That Dr. Wooton writ to Edwards an infamous, malicious, scandalous, obscene Letter, to which he subscribed his Name; And this he sealed and directed, To his loving Friend Mr. Edward Speed this: And after the said Doctor published and dispersed to others a great Number of Copies of the said Letter.*

And it was resolved by the Lord Chancellor *Egerton*, the two Chief Justices, & *per totam Curiam*, that this was a subtle and dangerous Kind of Libel: For inasmuch as the Writing of a private Letter to another, without any other Publication, the Party to whom it is directed cannot have an Action *Sur le Case*, for this, that no Action lies; but when it is published to others

to the Scandal of the Plaintiff, as it hath been often Times adjudged, an Action lieth.

The Doctor thought that this could not be punished in any Manner; but it was resolved, that the said infamous Letter, which in Law is a Libel, shall be punished (altho' it was solely writ to the Plaintiff without any other Publication) in the Star-Chamber, for that it is an Offence to the King, and is a great Motive to Revenge, and tends to the breaking of the Peace and great Mischief: And for that Reason it was necessary, that it should be punished either by Indictment, or in the Star-Chamber, to prevent such Occasions of Mischief. But in the Case at the Bar, the Dispersing of Copies of it, or the Publication of the Effect of it, aggravates the Offence, and makes it a new Offence: For, for that also the Party may have an Action *sur le Case*.

Note, That by the Civil Law, if any Person hath (to disable himself to bear any Office, or for any other Purpose) made a Libel against himself, he shall be punished for it. And so it seems to me, he should be in the Star-Chamber; for this is an Offence to the King and the Commonwealth: And without Question, altho' that the Doctor subscribed his Name to the said Letter, yet the said Letter importing the scandalous Matter of a Libel, is in the Law a Libel.

\* *Nota*; The Law of the *Lydians* was, that he who slanders another shall be let Blood in the Tongue, and he, who hears it and assents to it, in the Ear, &c. Page [36]

## WOOTON *versus* EDWIN.

Mich. 5 Jac.

*Reservation.*

*I*nter Johannem Wooton Quer. & Johannem Edwin Defendantem. In Replevin the Defendant avowed, and the Plaintiff demurred; and the Case was thus.

William Hawes was seized in Fee of a Messuage, and fifty-five Acres of Land, five Acres of Meadow, and six Acres of Pasture in Fromanton in the County of Hereford: And 27 Junii 28 H. 8. by Indenture demised the Tenement aforesaid to Nicholas Traheren, for seventy-nine Years, Reddendo inde annuatim præfato Gulielmo Hawes, & assignatis suis 26 s. 8 d. at the Feasts of the Annunciation and St.

This Case will scarcely be allowed for Law at this Day.

*St. Michael by even and equal Portions: And after the Lessor died, and the Reversion descended to William his Son, under whom the said John Edwin claimed.*

And the sole Point in this Case was, If the Rent reserved in this Case shall go to the Heir, or shall be determined by the Death of the Lessor, for if the Lessor had reserved the Rent to him without more, this shall determine by the Death of the Lessor; and the Addition of these Words (*And his Assignees*) shall not enlarge the Reservation, for if the Lessor had assigned the Reversion over, yet the Rent shall determine by his Death, for the Assignees cannot have the Rent longer than the Lessor himself should have it; and the Lessor himself hath it but for Term of his own Life. *Vide 11 Ed. 3. Tit. Ass. 86. 10 Ed. 4. 18. 27 H. 8. 19. per Audley, & vide Hill. 33 Eliz. Rot. 1341.* In this Court in a Replevin, *inter Richmond & Butcher*, where the Case was, that *Butcher* avowed for a Rent as Heir to his Father, upon a Demise made by his Father of certain Lands for 21 Years, by these Words, *Reddendo & solvendo proinde durante prædicto termino 21. annorum præfato (Patri) Executoribus & assignatis suis 10l. legalis monete Angliæ, &c. ad festa, &c.* And it was adjudged, that by this Reservation the Heir should not have the Rent for that the Reservation was made to the Father, his Executors and Assignees, and not to his Heirs, &c.

Owen 9.

## Corone, \* Buggary.

Mich. 5 Jac.

Corone, Buggary.

\* Nota, Buggrone, Italice, is a Buggarer, and Buggare is to Buggar, so Buggary cometh of the Italian Word.

1 Hawk. ch. 4.  
1 Inst. 58.

THE Letter of the Statute of the 25 H. 8. cap. 6. If any Person shall commit the detestable Sin of Buggary with Mankind or Beast, &c. it is Felony, which Act being repealed by the Statute 1 Mar. is revived and made perpetual by 5 Eliz. cap. 7. And he shall lose his Clergy.

It appears by the ancient Authorities of Law, that this was Felony; but they vary in the Punishment, for *Brit. cap.*

## PART XII.

*Buggary.*

*cap. 9.* faith, that *Sorcerers, Sodomers and Hereticks* shall be burnt, *F. N. B. 269. a.* agrees with it: But *Flet. lib. 1. cap. 35. Pecorantes & Sodomitæ terra vivi ceu fo-diantur.* But in the ancient Book \* called the *Mir-Page* [37] *ror of Justice* vouched in *Plow. Com. in Fogesse's Case*, the Crime is more high, for there it is called, *Crimen læsæ Majestatis*, a Sin horrible, committed against the King of Heaven: And this is either against the King Celestial or Terrestrial in three Manners; by Heresy, by Buggary, by Sodomy. Note, that Sodomy is with Mankind, and it is Felony by the Statute of 25 *H. 8.* and therefore the Judgment for Felony doth now belong to this Offence, *viz.* to be hanged by the Neck till he be dead. To make that Offence, *Oportet rem penetrare, & semen naturæ emittere, & effundere*, for the Indictment is *Contra ordinationem Creatoris & naturæ ordinem rem habuit veneream, dictumque puerum carnaliter cognovit.* Every of which (*rem habuit, & carnaliter cognovit*) imply Penetration and Emission of Seed: And so it was held in the Case of *Stafford*, who was attaint in the King's Bench and executed. *Pæderastes, amator puerorum*, whereof the *Greek Word* is, *Παιδεαστα*, Buggary with Boys. *Vide Rot. Parliament. 50 Ed. 3. num. 58.* complained in Parliament, that a *Lumbard* did commit the Sin that was not to be named: So in *Rape*, there ought to be Penetration and Emission of Seed. *Vide Stamford, fol: 44.* Which Statute makes it Felony; he who procures, &c. or receives the Offender, &c. is Accessary.

The Words of the Statute of *West. 1. cap. 34.* If a Man ravish a Woman, 11 *H. 4. 18.* If one aid another to commit Rape, and if he be present, he is principal in the Buggary, &c. *Vide Leviticus 18. 22. & cap. 10, 13. 1 Cor. 6. v. 9, &c.*

*Premunire.*

**N**OTE; in the Book of Doctor *Cosines*, intituled, *An Answer, &c. to the Abstract*, and published 1584. And a Pamphlet now lately published by Doctor *Ridley*, they would obtrude upon the World, That forasmuch as that now by the Act 10 *Eliz. cap. 1.* all Spiritual and Ecclesiastical Power within this Realm is annexed to the Crown, and the Law, by which they determine Causes which belong to their Cognizance, is the Ecclesiastical Law of the King: 21. 5 Co. 5, 12. 16 to 26. 7 Co. 13, 14, 16. 9 Co. 74. 11 Co. 34, 67. Vid. *Prefa. to 6 Co.* *Premunire. Vid. 15. H. 7. 9. Premunire was at the Common Law: Post. 84, 85. Co. Lit. 129, 130. 4 Inst. 139. 1 Hawk. c. 19. per. rot. & ch. 79. Sect. 12 &c.* That

That for that Cause no Premunire lies against any Spiritual Judge for any Cause whatsoever. And some other of their Professions have some other Reasons to confirm it.

1. That when the Statute of Premunire was made, *viz.* in the Reign of the Kings *Ed. 3. & R. 2.* then the Pope usurped Ecclesiastical Jurisdiction, although that *de jure* it belonged to the King. And therefore forasmuch as the King is as well *de facto*, as *de jure*, supream Head of all, as well Ecclesiastical as Temporal; now the Cause being changed, the Law is changed also.

2. The Conclusion of the Writ of Premunire is *in Domini Regis contemptum & præjudicium, & dictæ Coronæ & dignitatum suarum lesionem & exheredationem manifestam, & contra formam statuti, &c.* Which proves that the Jurisdictions shall be now severed, and united to the Crown; for that which is united to, and derived from the Crown, cannot be said *contra coronam & dignitatem Regis.*

3. The Court of High Commission is the Court of the King, and is by Force of an Act of Parliament and Letters Patent of the King: And for this, although it may be said, that the Consistory Courts are *Curie episcoporum*, yet the Court by Force of High Commission is the Court of the King: And for that Reason their Proceedings shall not be subject to Premunire.

4. This new Court is erected by Act of Parliament, and Letters Patent of the King: And for this, where the Statute of *R. 2.* speaks *De Curia Romana seu alibi, &c.* This (*alibi*) cannot extend to a Court erected by Parliament, *An. 10 Reg. Eliz.*

Page [38] But to these Objections it was answered and resolved by divers Justices \* in this very Term, that without Question the Statutes 37 *Ed. 3.* 16 *R. 2.*, &c. *De premunire*, are yet in Force: And all such Proceedings, by Colour of Ecclesiastical Law before any Ecclesiastical Judges, who were in Danger of Premunire, before the said Act 1 *El.* are now in Case of Premunire after the said Act; be it before the Commissioners by Force of a High Commission, or before Bishops or other Ecclesiastical Judges: For the said Acts of Premunire are not repealed by the said Act 1 *Eliz.*

And as to the first and second Objections, it was answered, that true it is, that the Crown of *England* hath as well Ecclesiastical as Temporal Jurisdiction, *de jure* annexed to it, as appears by the Resolution in *Cawdrey's Case*, from Age to Age: And although this was *de jure*, yet when the Pope became so potent and powerful, he did usurp upon

## PART XII.

*Premunire.*

upon the King's Ecclesiastical Jurisdiction within this Realm; but this was but mere Usurpation, (for the King cannot be put ought of the Possession of any Thing which belongs to his Crown.) And for this Reason, all the Kings of this Realm *Totis viribus providere* for the Establishment of their temporal Law, by which they inherit the Crown, and by which they govern their Subjects in Peace, and punish those who are rebellious, or who commit great Offences against them and their Crown: And they were always jealous lest any Part or Point of their temporal Law should be inroached upon: And for this, if the Ecclesiastical Law usurp any Thing upon the temporal Law, this was severely punished, and the Offender esteemed and adjudged an Enemy to the King by the ancient Statutes; and every one might have killed him before the Statute 5 *Eliz.* and this is the Reason for why; although both Jurisdictions belong to the Crown, yet inasmuch as the Crown itself is directed and descendible by the Common Law, and all Treason against the Crown punished by this Law; for this Cause, when the Ecclesiastical Judge usurps upon the Common Law, it is said *contra coronam & dignitatem, &c.* And all the Prohibitions directed to the high Commissioners from Year to Year, from the Time of the making of the said Statute 1 *Eliz.* do conclude, *contra coronam & dignitatem regiam.*

For, as it was resolved by all the Justices, *Pasch. 4 Jac. Reg. est contra coronam & dignitatem regiam*, when any Ecclesiastical Judge doth usurp upon the temporal Law, because as in all those Writs it appeareth, the Interest or Cause of the Subject is drawn *ad aliud examen*, that is, when the Subject ought to have his Cause ended by the Common Law, whereunto by Birth-right he is inheritable, he is drawn *in aliud examen (viz.)* to be decided and determined by the Ecclesiastical Law: And this is truly said *contra coronam & dignitatem regiam.* And this appears by all the Prohibitions (which are infinite) which have been directed to the high Commissioners and others after the said Act 1 *Eliz. a fortiori*, he who offends in Premunire shall be said to offend *contra coronam & dignitatem regiam*: And this in Effect answers to all the aforesaid Objections; but yet other particular Answers shall be given to every of them.

As to the Third, although the Court by Force of high Commission is the Court of the King, yet their Proceedings are Ecclesiastical: And for this, if they usurp upon the Temporal Law, this is the same Offence

fence which was before the said Act of 10 *Eliz.* for this was the End of all the ancient Acts, that the Temporal Law shall not in any Manner be emblemished by any Ecclesiastical Proceedings.

Page [39]

As to the Fourth, although it be a new Court, yet the ancient Statutes extend to it within this Word *A- libi*, and divers new Bishopricks were erected in the Time of *H. 8.* And yet there was never any Question, but that \* the ancient Acts of Premunire extended to them.

But to answer to all the Objections aforesaid, founded upon the said Statute of 1 *Eliz.* out of the Words and Meaning of the same Act; for whereas the Act 1 *Eliz.* repealed the Statute of 1 & 2 *P. M. c. 8.* there is an exprefs Proviso in the said Act 1 *Eliz.* that that shall not extend to repeal any Clause, Matter, or Sentence contained or specified in the 1 & 2 *P. M.* which in any Sort toucheth or concerneth any Matter or Cause of Premunire: But that all of that, which doth touch or concern any Matter of Premunire, shall stand in Force and Effect: And the Clause of 1 & 2 *P. M.* which concerns Matter of Premunire, is such; every Person who by any Process out of any Ecclesiastical Court of the Realm, or out of it, or by Pretence of any spiritual Jurisdiction, or otherwise, contrary to the Laws of the Land, shall unquiet or molest any Man for any Thing, Parcel of the Possession of any Religious House, shall incur the Danger of the Act of Premunire, *Ann. 16 R. 2.* which proves that as well the Act 1 & 2 *P. M.* as the Act 1 *Eliz.* which creates the high Commission-Court, which refers to the Act of 1 & 2 *P. M.* intends by exprefs Words, that the Act of 16 *R. 2.* of Premunire shall stand in Force. Also the Act of 1 *Eliz.* revives the Act of 25 *H. 8. cap. 10.* which makes a Premunire in a Dean and Chapter, &c. for not electing, nor certifying, or not admitting of any Bishop elected; by which it is directly proved, that the Act 1 *Eliz.* never intended to take away the Offence of Premunire, but expressly provided for it, as appears by that which hath been said.

Premunire  
See 1 Inst. 129, lies, in what not.

130.

And for this that it is so penal, it is necessary that it should be explained and made known.

Regula prima. In all Cases, when the Cause originally belongs to the Cognizance of the Ecclesiastical Court, and Suit is prosecuted there, in the same Nature as the Cognizance belongs

belongs to them, (although in Truth the Cause, all Circumstances being disclosed, belongs to the Court of the King, and to be determined by the Common Law,) yet no Premunire lies in that Case, but a Prohibition. As if Tithes are severed from the nine Parts, and are carried away; if the Parson sue for the Substraction of these Tithes in the spiritual Court, this is not within the Case of Premunire; for it may be that the Plaintiff did not know that they were severed from the nine Parts, nor that they were carried away; nor may the Ecclesiastical Judge know any Thing of it: And although that the Defendant pleads this, yet the Ecclesiastical Court may proceed to try the Truth of it without Danger. *Vide* 10 H. 4. 2. according with this Opinion; so if a Parson sue for Tithes of Wood, surmising that they were *Sylvæ cedue*, under the Age of twenty Years, whereas in Truth they were above the Age of twenty Years (in which Case by the Statute of 45 Ed. 3. Tithe ought not to be paid) yet a Prohibition lieth and no Premunire.

See Watfon's  
Clergyman,  
chap. 54.

But although the Cause originally may appertain to the Cognizance of the Ecclesiastical Judge, yet if he sue for it in the Nature of a Suit, which doth not belong to the Ecclesiastical Court, but to the Common Law, there a Premunire lieth; as in the Case put before: If the Parson, after the Severing of Tithes, will in any Ecclesiastical Court within this Realm sue for carrying away his Tithes severed from the nine Parts, which Action by Matter appertains to the Ecclesiastical Court appertains to the Common Law; in such Case both the Actor and the Judge incur the Danger of a Premunire: And so was it adjudged in 17 H. 8. as *Spilman* reports it: One *Turberville* sued a Premunire against a Parson, who by Citation convened him into the Ecclesiastical Court within this Realm, \* and there libelled against him for taking of Tithes, which were severed from the nine Parts, and the Parson was condemned and had Judgment that he should be out of the Protection of the King, and forfeit all his Lands, Goods and Chattels, and his Body to perpetual Imprisonment, and Damages to the Party. So if a Mortuary be delivered to a Parson, and after the Party retake it, if the Parson sue for this as for a Mortuary to him delivered and carried away, he is in Case of a Premunire; but after the Reprisal, if he sue for it as Mortuary not executed, in Nature of a Suit, which belongs to Court Christian, upon the Truth of the Case there is Cause of Prohi-

Regula secunda.

Page [40]

Prohibition, and no Premunire lies. *Vide* 16 H. 4. 2. So the Case which hath been put of Suit for Tithes of Wood, if the Parson sue for Tithes of Wood above twenty Years Growth, so that it appears by the Libel, that the Cognizance of this Case doth not belong to Court Christian (*viz.*) to the Court of the Archbishop of *Canterbury*, the Premunire lies, as you may see in the Book of Entries, *Tit. Dismes*, fol. 221. But in the *Tit. Prohibition*, fol. 449, *Divisione Dismes*, pl. 2, 3, 4; 5, & 6. if the Suit be *pro sylva cædua*, &c. So that, as the Suit is framed, the Cognizance belongs to Court Christian, although that the Truth be otherwise, there a Prohibition lies, and no Premunire. For when the Cause originally belongs to the Cognizance of the Ecclesiastical Court, although they hold Plea of any incident to it, which belongs to the Common Law, there Prohibition lies, and not Premunire.

Regula tertia.

When the Cause originally belongs to the Cognizance of the Common Law, and not to the Ecclesiastical Court, there although they libel for it according to the Course of the Ecclesiastical Law, yet the Premunire lieth, for this, that this draws the Cause, which is determinable at the Common Law, *ad aliud examen*, *viz.* to be decided by the Civil or Ecclesiastical Law; and so deprives the Subject of the Benefit of the Common Law, which is his Birth-right:

Antea 27, 39.

And with this agrees the Book of *Entries*, Title *Premunire*, fol. 229. b. & 430. a. where it is put for a Rule, *Quod cum Placita, Querel, & possessiones terrarum & tenementorum transgr' debitorum & aliorum consimilium infra Regnum Angl' illat. ad Dominum Regem ad regalem coronam & dignitates suas specialiter, & non ad forum Ecclesiasticum, pertinent. Quidam I. R. &c. machinans Dominum Regem & Coronam & dignitates suas exheredare, & cognitionem quæ ad Curiam Domini Regis pertinent, ad aliud examen infra regnum suum Angl' in Curiam Christianitatis coram A. W. Official', &c. trahere, &c. quendam articulum ad prosequendum ipsum R. in eadem Curia Christianitatis coram præfato Officiali pro debito 20 l. & ipsum R. in eadem Curia præfato I. A. inde responsum citari, &c.* So that if the original Cause be temporal, although that they proceed by Citation, Libel, &c. in Ecclesiastical Manner, yet this is in Danger of Premunire: And the Reason of this Offence is expressed in the Writ, for this, that he endeavours to draw *Cognitionem (cause,) quæ ad curiam Domini Regis pertinet, ad aliud examen*, which is as much as to say, that the Debt, the Cognizance whereof belongs to the

Court of the King, and to be determined by the Common Law, he intends by the original Suit to draw it to be determined by the Ecclesiastical Law.

And note, in the Indictment of Premunire against Cardinal Wolsey, Mich. 21 H. 8. it is said, *Quod prædictus Cardinalis, &c. intend' finaliter antiquissimas Angl' legis penitus subvertere & enervare, univcrsumque hoc regnum Angl' & ejusdem Angl' populum legibus imperialibus vulgo dictis legibus Civilibus & eorum legum Canonibus in perpetuum subjugare\* & subjicere, &c.* and this is included within these Words, *ad aliud examen trahere, viz.* to decide that by the Civil and Ecclesiastical Laws, which is determinable by the Common Law: And upon this was a notable Case in *Hill. an. 25 H. 8.* the Case of Nick Bishop of Norwich, against whom, he then being in the Custody of the Marshalsea, the King's Attorney preferred a Bill of Premunire: And the Matter of the Premunire was such: Within *Tbetford* in the County of *Norfolk* hath been *De tempore cujus, &c.* such Custom, that all Ecclesiastical Causes arising within that Town should be determined before the Dean of the same Town, who hath within it peculiar Jurisdiction; and that none in the same Town shall be drawn in Plea in any other Court Christian for Ecclesiastical Causes, unless before the same Dean: And if any be against the said Custom drawn in Suit before any other Ecclesiastical Judge, and this be presented before the Major of the same Town, that such Party shall forfeit 6 s. 8. d. And that an Inhabitant of *Tbetford* sued in the Consistory Court of the said Bishop, at *Norwich* for an Ecclesiastical Cause arising within the said Town of *Tbetford*, and this was presented before the Major of *Tbetford* according to the Custom, for which he forfeited 6 s. 8. d. the said Bishop cited the said Major to appear before him at his House in *Hoxin* in *Suffolk*, generally *pro salute animæ*, and upon Appearance labelled, *Per parole*, upon all the Matter, and enjoined him upon Pain of Excommunication to adnul the said Presentment before a Day: And upon a Premunire brought for this Matter the said Bishop had Counsel learned assigned him; and they objected, that as well the said Presentment as the said Custom were for divers Causes void, and therefore it cannot be said *contra coronam & dignitatem regiam*; nor hath the Bishop drawn the Party *ad aliud examen*, for it ought not to be examined in any Court.

2. They objected, that the Court of the Bishop was not intended within the Act of 16 R. 2. 32. but in *Cu-*

## NICHOLAS FULLER'S Case. PART XII.

*via Romana aut alibi*; and this *alibi* ought to be intended out of the Realm; but it was resolved by *Fitz-James* Chief Justice, & *per totam Curiam*, that be the Custom and Presentment good or not, this is a temporal Thing and determinable by the Common Law, and not examinable in the spiritual Court; and for this the Bishop in this Case hath incurred a Premunire.

3. That *Alibi* extends as well to the Courts of the Bishops, and other Ecclesiastical Courts within this Realm, as elsewhere: And so the Court said, that it had been oftentimes adjudged, upon which the said Bishop, (the Matter of the Indictment being true) confessed the said Indictment: And upon this Appearing the secondary Justice gave Judgment against him, that the said Bishop shall be out of the Protection of the King, and that his Lands, Goods and Chattels should be forfeited to the King, and his Body to be imprisoned *ad voluntatem Regis, &c.*

## NICHOLAS FULLER'S Case.

Ecclesiastical  
Commission.

**I**N the great Case of *Nicholas Fuller* of *Grays-Inn*, these Points were resolved upon Conference had with all the Justices and Barons of the Exchequer.

See ant. 19, 20,  
21. Post. 45, 49,  
to 56, 85, &c.

1. That no Consultation can be granted out of the Term, for this, that it is an Award of the Court, and is final, and cannot be granted by all the Judges out of the Term, nor by any of them within the Term out of Court: And the Name of the Writ, *viz.* a Writ of Consultation, imports this, that the Court upon Consultation amongst them ought to awarded it.

Page [42]

See the Intro-  
ductory Dis-  
course to Gib-  
son's Codex,  
p. 20, 21. that  
the spiritual  
Judge has a  
Right to inter-  
pret all Statutes  
relating to spi-  
ritual Matters.  
But the Bishop  
is not actually

\* 2. That the Construction of the Statute 1 *Eliz. cap. 1.* and of the Letters Patent of high Commission in Ecclesiastical Causes founded upon the said Act, belongs to the Judges of the Common Law: For although that the Causes, the Cognizance of which belongs to them, are merely spiritual, and the Law by which they proceed is merely spiritual, yet their Authority and Power is given to them by Act of Parliament, and Letters Patent, the Construction of which belong to temporal Judges: And  
for

mistaken, and throughout the Book appears too partial to his own Order.

## PART XII. NICHOLAS FULLER'S Case.

for this, the Consultation which was granted is with this Restraint. *Quatenus non agat de autoritate & validitate literarum patentium pro causis Ecclesiasticis vobis vel aliquibus vestrum directè aut de expositione & interpretatione statuti de anno primo nuper Reginae, &c.* In the same Manner as if the King hath a Benefice donative by Letters Patent, although that the Function and Office of the Incumbent be spiritual; yet inasmuch as he comes to it merely by Letters Patent of the King, he shall not be visitable, nor deprivable by any Ecclesiastical Authority, but by the Chancellor of the King, or by Commissioners under the great Seal.

3. It was resolved when there is any Question concerning what Power or Jurisdiction belongs to Ecclesiastical Judges, in any particular Case, the Determination of this belongs to the Judges of the Common Law, in what Cases they have Cognizance, and in what not; for if the Ecclesiastical Judges shall have the Determination of what Things they shall have Cognizance; and that all that appertains to their Jurisdiction, which they shall allow to themselves, they will make no Difficulty *Ampliare jurisdictionem suam*: And according to this Resolution, *Bract. lib. 5. tract. de except. cap. 15. fol. 412. Cum Judex Ecclesiasticus prohibitionem a Rege suscepit, supersedere debet in omni casu, saltem donec constiterit in Curia regia ad quam pertinet jurisdictionem; quia si Judex Ecclesiasticus estimare debet an sua esset jurisdictio, in omni casu indifferenter procederet, non obstante regia prohibitionem. Vide Entries fol. 445.* There was a Question whether the Court Christian should have Cognizance of a Lamp. And a Prohibition was granted, *Quod non procedant in curia Christianitatis, quousque in curia nostra discussum fuerit, utrum cognitio placiti illius ad curiam nostram vel ad forum Ecclesiasticum pertineat.* And so the Determination of a Thing, whether it belongs to Court Christian, doth appertain to the Judges of the Common Law, and the Judges of the Common Law have Power to grant a Prohibition. And all this appears in our Books, that the Judges of the Common Law shall determine in what Cases the Ecclesiastical Judges have Power to punish any *pro lesione fidei*, 2 H. 4. fol. 10. 11 H. 4. 88. 22 Ed. 4. 20. So of the Bounds of Parishes in 5 H. 5. 10. 39 Ed. 3. 23. So it belongs to the Judges of the Common Law, to decide who ought to certify Excommunication, and to reject the Certificate, when the Ordinary or Commissary is Party, 5 Ed. 3. 8. 8 Ed. 3. 69, 70. 18 Ed. 3. 58. 12 Ed. 4. 9 H. 7. 1. 10 H. 7. 9. For this it was resolved clearly, that if any Person slander the Authority or

## NICHOLAS FULLER'S Case. PART XII.

Power of the high Commissioners, this is to be punished before the Judges of the Common Law, for that the Determination of their Authority and Power which is given to them by the Statute, and the Letters Patent of the King belong to them, and not to Court Christian: And for this, that the many Articles objected against *Fuller* concerning the Slander of their Authority and Power, was solely determinable and punishable before the Judges of the Common Law. One other Restraint was added in the Consultation: *Et quatenus non agat de aliquibus scandalis, contemptibus, seu aliis rebus, quæ ad communem legem dicit per statuta regni nostri Angl' sunt punienda & determinanda.*

Page [43]

4. It was resolved, That if a Counsellor at Law, in his Argument shall \*scandal the King or his Government, Temporal or Ecclesiastical, this is a Misdemeanor and Contempt to the Court; for this he is to be indicted, fined, and imprisoned, and not in Court Christian: But if he publish any Heresy, Schism, or erroneous Opinion in Religion, he may be for this convened before the Ecclesiastical Judges, and there corrected according to the Ecclesiastical Law: For the Rule is, *Quod non est juri consonum quod quis pro aliis quæ in Curia nostris acta sunt, quorum cognitio ad nos pertinet, trabatur in placitum in Curia Christianitatis,* as it appears in the Book of Entries, fol. 448. So that the Intent is, that Heresy, Schism, or such enormous Opinions in Religion, do not appertain to the Cognizance of temporal Courts: For this Cause a Consultation was granted, *Quoad schismata, hæreses, & inormiam impiam, vel pernitiosam opinionem in religione, fide, seu doctrina Christiana pie & salubriter stabilita infra regnum nostrum Angl', quorum cognitio ad forum Ecclesiasticum spectat, &c. Vide Mich. 18 H. 8. Rot. 78. In Banco Regis.* The Case was, that a Leet was held die Jovis post festum Sancti Mich. Arch. 17 H. 8. of the Prior of the House of St. John de Bethlehem de Sheine, of his Manor of *Levisham* in the County of *Surrey*, before *John Beare* the Steward there, a grand Jury was charged to enquire for the King of all Offences inquirable within the said Leet, where one *Philip Aldwin*, who was a Resident within the said Leet, appeared at the said Leet, *Idemque Philippus sciens quandam Margaretam, uxorem Johannis Aldwin apud East Greenwich, infra jurisdictionem Letæ prædictæ, pluries per antea corpus suum in adulterio vitiose exercuisse, ac volens ipsam Margaretam pro republica in exemplum taliter offendere volentium legitime punire, ad dictam magnam juratam se personaliter exhibuit, & eisdem sic juratis de dicta mala &*

PART XII. NICHOLAS FULLER'S Case,

*vitiosa vita præfatæ Margaretæ instructionem & informationem veraciter dedit.* Upon which the said Margaret did draw the said Philip into the Court of the Archbishop of Canterbury, and there did libel against him for Defamation of Adultery; and that the said Philip said *in hijce Anglicanis verbis; Margaret Aldwin is a Whore and a Bawd,* and it is not yet three Weeks ago since a Man might take a Priest betwixt her Legs; which *English Words* were Parcel of the Words by which he informed the grand Inquest at the said Lect: And upon this he had by Award of the Court a Prohibition, by which Writ it appears, *Quod per leges hujus regni Angl' omnes & singuli quicumque Domini Regis subditi coram quibuscunque istius Domini Regis Justiciariis seu quocunque alio viro judiciali officio seculari fungente in aliquam juratam patriæ jurati, vel ad aliquas instructiones seu informationes alicui hujusmodi jurat. in evidencias dandas comparentes & evidencias dantes, ab omni impetitione & calumnia in aliqua Curia Christianitatis propterea fienda, quieti & liberi esse debent, & in perpetuum penitus irreprehen'. And by this Record it appears, and by the Statute of 10 Ed. 3. c. 11. by which it is provided, that Indictors of Lay-people, or Clerks in Turns, and after delivering them before Justices, shall not be sued for Defamation in Court Christian, but that the Plaintiff who finds himself grieved shall have a Prohibition formed in the Chancery upon his Case, which was but an Affirmance of the Common Law, for that the Statute provides only for Indictors in the Turn only: And yet as well all Indictors in other Courts, and all Witnesses, and all others who have Affairs in the temporal Courts, shall not be sued or molested in Court Christian. *Vide Pasch. 6 Eliz.* In the Reports of the Lord Dyer (which Case is not printed) *John Halles* in the Case of Marriage between the Earl of Hereford and the Lady *Catharine Gray*, declared his Opinion against the Sentence given by Commissioners Delegates of the Queen, in a Cause Ecclesiastical, under the Great Seal: \* And that the said Sentence in Disaffirmance of the said*

Page [44]

Marriage was unjust, wicked, and void, and that he thought that the said Judges Delegates had done against their Conscience, and could not render any Reason for the said Sentence: And what Offence this was, was referred to divers Judges to consider; by whom upon great Deliberation it was resolved, that this Offence was a Contempt as well against the Queen, as to the Judges; and every of them were punishable by the Common Law,

NICHOLAS FULLER'S Case. PART XII.

by Fine and Imprisonment: And that the Queen may upon that sue for it in what Court she shall please; for the Slander of a Judge in Point of his Judgment, be it true or false, is not justifiable, &c. And all this appears by the Report of the Lord *Dyer*, so that in the said Consultation it was well provided, that the High Commissioners should not intermeddle with any scandal by the Common Law.

5. It was resolved, that when any Libel in Ecclesiastical Court contains many Articles, if any of them do not belong to the Cognizance of *Court Christian*, a Prohibition may be generally granted; and upon Motion made, Consultation may be made as to Things which do belong to the Spiritual Jurisdiction: For the Writ of Consultation with a *Quoad*, is frequent and usual, but a Prohibition with a *Quoad*, is *Rara avis in terra nigroque simillima Cygno*. And for these Reasons it was resolved by all, that the Prohibition in the Case at the Bar was well granted, which in Truth was granted by *Fenner* and *Croke* Justices, in the Time of the Vacation.

Note these general Rules concerning Prohibitions, *quæ sparsim inveniuntur in libris nostris*.

Articuli Cleri,  
c. 8.

*Non debet dici tendere in præjudicium Ecclesiasticæ libertatis quod pro Rege & Repub. necessarium videtur.*

Entries 444.  
447.

*Non est juri consuetum, quod quis super iis quorum cognitio ad nos pertinet in Curia Christianitatis trabatur in placitum.*

Circumspecte  
agatis, &c.

*Episcopus teneat placitum in Curia Christianitatis de iis quæ mere sunt spiritualia.*

West. 2. cap.  
43.

*Probibeatur de cætero Hospitalariis & Templariis ne de cætero trabant aliquem in placitum coram Conservatoribus privilegiorum suorum de aliqua re cujus cognitio ad forum spectat Regium.*

Ibidem.

*Non concedantur citationes priusquam exprimat super qua re fieri debet citatio.*

The Knowledge of Cases Testamentary, Matrimony, &c. by the Goodness of the Princes, and by the Laws and Customs of the Realm, appertain to Spiritual Jurisdiction.

6. It was resolved, That this especial Consultation, being only for Heresy, Schism, and erroneous Opinions, &c. That if they convict *Fuller* of Heresy, Schism, or erroneous Opinion, &c. that if he recant the said Heresy, Schism, or erroneous Opinion, that he shall never be punished \* by Ecclesiastical Law: And after the said Consultation granted, the said Commissioners proceeded and convicted *Fuller* of Schism and erroneous Opinions, and imprisoned

\* Note.

PART XII. *First-fruits and Tenths.*

prisoned him and fined him two Hundred Pounds: And after in the same Term, Fuller by his Counsel moved the Court of King's Bench to have a *Habeas Corpus*, & *ei conceditur*, upon which Writ the Gaoler did return the Cause of his Detention.

\* *Of First-fruits and Tenths.*

Page [45]

Mich. 5 Jacobi Regis.

NOTE; *Annates, Primitiæ*, and First-fruits, are all one; it 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; and those and Impropriations began about the Time that *Polydore Virgil*, lib. 8. cap. 2. saith *Nullum inventum majores Romano Pontifici cumulavit opes quam id quod Annates vocant, qui usus omnino multo antiquior est quam recentiores scriptores suspicantur, & annates more suo appellant primos fructus unius anni: Vide Concilium Viennense quod Clemens Quintus indixit pro annatibus.*

First-fruits.  
Acts and Monuments 351  
& 352.  
Warton's Clergyman 175,  
177, &c.  
744, &c.  
Gibson's Cod.  
870 to 912.

These First-fruits were given to the Crown by 26 H. 8. cap. 3.

Note; *Hill. 34 Ed. 1. An. 1307.* At a Parliament held at *Carlisle*, great Complaint was made of intolerable Oppressions of Churches and Monasteries by *William Testa* (called *Mala Testa*) 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 Abbies, in which Parliament the First-fruits for two Years were granted to the King.

*Decimæ, id est*, The Tenths of Spiritualties were perpetual, which in ancient Times were paid to the Pope, until Pope *Urbane* gave them to R. 2. to aid him against *Charles* King of *France*, and others who supported *Clement* the 7th against him. Tenths perpetual.

*Sir ANTHONY ROPER'S Case.* PART XII.

Acts and Mo-  
numents 335,  
336. An. Dom.  
1266.

And 5 *H. 3.* by the Bulls of the Pope, the Church of *England* began to pay the Tenths of all their Revenue, as well Spiritual as Temporal to *H. 3.* for Years; these were given to the King by the said Act of 26 *H. 8. cap. 6.*

Peter-pence.

*Vide Lambert de Prist. Leg. Anglorum, &c. f. 128. c. 10. omnes qui habuerint 30 denariat. vive pecunie in domo sua, de suo proprio, Anglorum lege dabit denarium Sancto Petro. Vide ibid. inter leges Inæ, fol. 78. cap. 4.*

*Lambert ib. expositione verbi, Monies and Peter-perce; Ina King of the West Saxons granted it to the Pope when he was in Pilgrimage at Rome. Camb. Brit. pag. 306. saith, that it was Offa the West Saxon King that did grant it: Quære. [But neither King could grant it but for himself only, and his Grant could not bind the Subject without their Consent.]*

*Sir ANTHONY ROPER'S Case.*

High Com-  
mission.

Anrea 19.  
Poitea 47, 49,  
58, 59.  
13 Co. 10, 47.

Hab. Corpus.  
Poitea 47, 69.

Page [46]

**I**N the Case of *Sir Anthony Roper*, who was drawn before the High Commissioners at the Suit of one *Bulbrook* the Vicar of *Bentley*, for a Pension out of a Rectory Improprate, of which *Sir Anthony* was seised in Fee: And the High Commissioners sentenced the said *Sir Anthony* to pay that, which he refused; and upon this they committed him to Prison, who in this Term by *Habeas Corpus* appeared in Court, upon the Return of which Writ the Matter did appear: And it was well debated by the Justices, and was resolved, that the said Commissioners had not Authority or \* Commission in the said Case, for when the Acts of the 27 *H. 8.* & 31 *H. 8.* of Monasteries had made Parsonages Improprate, and other Religious Possessions Lay-fee, altho' that Pensions were saved, yet, as it appears by the Preamble of the Act of 34 *H. 8. cap. 16.* those to whom the Pensions appertain, had not Remedy for the said Pensions, &c. And for this there it is provided, that if the Farmer or Occupier of such Possessions shall wilfully deny the Payment of any such Pensions, Portions, Corrodies, Indempnities, Synod Proxies, or any other Profits, whereof any Archbishop, Bishop, Archdeacon, or any other Ecclesiastical Person were in Possession at, or within ten Years next before the Time of such Dissolution of any such Monastery, &c. that then it shall be lawful for the said Archbishop, Bishop,

## PART XII. *Sir ANTHONY ROPER's Case.*

shop, or other Ecclesiastical Person aforesaid, being so denied to be satisfied and paid thereof, and having Right to the Thing in Demand, to have such Process, as well against every such Person and Persons, as so shall deny Payment, &c. as against the Church and Churches charged with the same, as heretofore they have lawfully done, and as by and according to the Laws of this Realm they may now lawfully do, &c. And if the King hath covenanted to discharge the Patentee, &c. of Pensions, and then Suit shall be made for the same in the Court of Augmentations, and not elsewhere; then if the High Commissioners will determine of Pensions, they ought to do it by the Act 34 H. 8. and the said Act gives this expressly to Ordinaries, and their Officials, and the High Commissioners have their Authority by the Act 1 El. made a long Time after.

But it was objected, that the said Act 1 El. gave to the Queen, her Heirs and Successors, Power to Assign Commissioners to exercise and execute all Manner of Jurisdiction Spiritual, to visit, reform, &c. all Schism and Heresy, &c. and Enormities, which by any Manner of Spiritual Jurisdiction can, or lawfully may be reformed. And it was said, that such Spiritual Jurisdiction, which the Bishop should have, is transferred to the High Commissioners.

But it was unanimously resolved by *Coke, Walmsley, Warberton, Daniel and Foster*, Justices, that the Act 1 El. doth not extend to this Case for divers Causes, *viz.*

1. For that the said Clause of Resignation is not more large than the Clause of Restitution; and that the Act of 1 Eliz. doth not take away nor alter any Act of Parliament, unless those only which are expressly named in the Act: And it was resolved that the High Commissioners cannot hold Plea for the double Value of Tithes carried away before Severance, for two Causes.

Tithes subtracted. Vide ante.

(1.) For this, that the Statute 2 Ed. 6. cap. 13. gave the Cognizance of it to Spiritual Judges, which is to be intended of such Spiritual Judges who then were.

(2.) Subtraction of Tithes is Injury and no Crime, but concerns Interest and Property: And for this the High Commissioners cannot meddle with it.

2. For that the Words of the Act 1 El. are (which by any manner of Spiritual Jurisdiction can or lawfully may be reformed.) And it appears that these Words extend to the Crime only, and not to Cases of Interest betwixt Party and Party; for the Words are: All such Errors, Heresies, &c. which by any Manner, &c. so that (such) and (which) are Relatives.

3. This

Sir ANTHONY ROPER's Case. PART XII.

3. This Jurisdiction was given to the Bishops by Act of Parliament, viz. by 34 H. 8. which is more Temporal than Spiritual: And for this out of the Precedent Words 1 Eliz. viz. Spiritual or Ecclesiastical Jurisdiction, which is to be intended of Jurisdictions meerly or purely Spiritual, \* but Acts of Parliament are more Temporal than Spiritual.

Page [47]

4. It was not the Intent of the Act 1 El. which revived the Statute 23 H. 8. cap. 9. by which Act it is enacted, that none shall be sued out of his Diocese, &c. that the High Commissioners for private Causes shall send for Subjects out of any Part of the Realm, and so in Effect confound the Jurisdiction of the Ordinary, who is an Officer and Minister so necessary, that in divers Cases the Courts of the King cannot administer Justice to Subjects without him, &c.

13 Co. 9. 47.

5. If the Act of 1 Eliz. had extended to give to High Commissioners Power to determine *meum & tuum*, as Pensions, Tithes, Legacies, Matrimonies, Divorces, Administrations, Probates of Testaments, &c. the Act would also give the Party grieved Benefit of Appeal, and not give absolute Authority to the High Commissioners finally to determine *meum & tuum*, and to bastardise Issue, &c. without any Controlment, for this should be to dissolve the Court of the Ordinary, which is so ancient and inevitably necessary in many Cases to the Administration of Justice, in divers Points of it, that without this Justice cannot be executed.

6. The High Commissioners cannot extend themselves but only to Crimes, for the Clause which gives to them Power to imprison, &c. and to punish, &c. and imprison such Offender, &c. And (Offender) is only to be intended of him who commits any Crime, and not of him who detains Pensions, Legacy, Tithes, &c.

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Sir ANTHONY ROPER's Case.

Mich. Jacobi Rot. 2254.

Hab. Corpus  
returned and  
discharged by  
Judgment of  
the Court-  
Ant. 19, 27, 45.  
Post. 69, 82,  
104, 219.

*PR*aeceptum fuit Guardiano prisonae Domini Regis de le  
Fleet, Quod haberet hic, viz. apud Westmonasterium  
immediate post receptionem hujus brevis corpus Antonii  
Roper

PART XII. *Sir ANTHONY ROPER'S Case.*

*Roper militis in prisona prædicta sub custodia sua detenti quocunq; nomine censeretur, una cum die & causa captionis & detentionis ejusdem Antonii : Et iidem Justiciarii hic, visa causa illa, ulterius fieri fecerint quod de jure & secundum legem & consuetudinem regni Domini Regis Angliæ fuerit faciendum : Et modo hic ad hunc diem, scilicet diem Sabbati proximum post octabis Sancti Mich. isto eodem termino venit prædictus Antonius in propria persona sua sub Custodia prædicti Guardiani ad barram, hic prædict' & idem Guardianus, tunc hic mand. Quod ante adventum brevis prædicti, viz. nono die Octob. ultimo præterito prædictus Antonius Roper miles reducit se prisona prædictæ præantea commissus virtute cujusdam warranti, dati 30. die Junii ultimo præterit', quod sequitur in hæc verba, viz.*

**T**Hese are in his Majesty's Name to require and charge you, by Virtue of his High Commission for Causes Ecclesiastical, under the Great Seal of *England*, to us and others directed, that herewith you receive and take into your Custody the Body of *Sir Anthony Roper*, Knt. and him safely detain Prisoner at this our Commandment, until we shall give Order for his Enlargement, signifying unto you, that the Cause of his Commitment is, for that there being a certain Cause referred unto us by his Majesty's special Direction, betwixt him the said *Sir Anthony Roper* and *John Bulbrook*, Vicar of *Bentley*, for that he detained wrongfully from him the said Vicar, a certain yearly Pension due unto him from the said *Sir Anthony*; and being thereupon called before us, and after full Hearing of \* the Cause in the Presence of *Sir Anthony* and his Counsel at 3 or 4 several Times, he was at the last adjudged by us to pay the said Pension, and he having some Time of Deliberation given unto him by us to consider thereof, hath notwithstanding obstinately disobeyed the said Order, and doth so still persist: And this shall be your Warrant in that behalf; Given at *Lambeth* this thirtieth of *June 1607*. Et quod hæc fuit Causa Captionis & detentionis, præd' Antonii in prisona prædicta, corpus tamen prædicti Antonii modo hic paratus habet prout per breve prædictum sibi præceptum fuit, &c. super quo, visis præmissis & per Justiciarios hic plenius examinatis & intellectis, videtur iisdem Justic. hic quod prædicta Causa commissionis prædicti Antonii prisona de *Fleet* prædict' in retorno prædict', superius specificata minus sufficiens in lege existit ad detinendum prædictum Antonium in prisona præd. Ideo prædictus Antonius a prisona præd' per Curiam hic dimittitur, ac idem Guardianus

*de hujusmodia Custodia per eandem Curiam hic plene exonere-  
tur, &c.* And this was resolved *una voce* by Coke Chief  
Justice, *Walmsly, Warberton, Daniel, and Foster* Justices  
for the Causes and Reasons afore expressed.

And in the very same Term in *Lane's Case*, a Parson in  
*Norfolk* who sued one of his Parishioners before the High  
Commissioners, for scandalizing of him, saying in the Church  
on the Sabbath before all his Parishioners, *That he was  
a wicked Man, and an arrant Knave*: Prohibition lies,  
for this, that it was not so enormous as the Statute intend-  
ed: Note, that by express *Proviso*, the High Commissioners  
cannot intermeddle with all Heresies, but with exorbitant  
Heresies, &c. and the other shall be determined before the  
Ordinary.

## Justice in Wales not to be by Commission.

Hill. 5 Jacobi.

Justice of  
Wales cannot  
be by Com-  
mission but by  
Patent.  
4 Inst. 240.  
Postea 52.

**N**OTE; It was moved to the Justices this very Term,  
upon Consideration of the Acts of 34 *H. 8. c. 28.* and  
the 18 *Eliz.* If the Justices in *Wales* may be constituted by  
Commission; and upon Conference it was conceived they  
could not, but that it ought to be by Patent, as it hath been  
used ever since the Act 34 *H. 8.* Then it was moved, if the  
King which now is, may by Force of a Clause of 34 *H. 8.*  
do it, which Clause is, That the King's most Royal Maje-  
sty shall and may at all Times hereafter from Time to  
Time, change, add order, alter, minish, and reform all  
Manner of Things before rehearsed, as to his most excel-  
lent Wisdom and Discretion shall seem meet: And also to  
make Laws and Ordinances for the Common-wealth, and  
good quiet of his said Dominion of *Wales*, and his Subjects  
of the same, from Time to Time, at his Majesty's Pleasure:  
And it seemed to divers of the Justices, that this Power gi-  
ven to the King determined by his Death, for divers  
Causes.

I. It wants these Words, *His Successors*, and for this it  
ought not to be drawn in Succession by Construction, and that  
should be against the Intention of the Makers of the Act,  
for they gave this high Power of Alteration, &c. of the  
Laws to the King's most excellent Majesty, as to his most  
ex-

PART XII. *Just. in Wales not to be by Commission.*

excellent Wisdom and Discretion shall be thought most meet; which Words want *His Successors*: For as his Wisdom and Discretion, which they well knew, did not go in Succession; so the Power and great Confidence which was annexed to them did not go in Succession; and for this, that *Eorum progressus ostendunt multa que ab initio provideri non possunt*: And what ensues upon this Act of the 34 *H. 8.* concerning this Uniting of \* *Wales and England*, Page [49] and the Subjection of them to the Laws of *England*, none could divine: For this Cause it was thought reasonable that King *H. 8.* during his Time, might alter them; that he seeing the Obedience of those of *Wales*, and the good Fruit which proceeded out of the said Act, never altered any Part of it: But it was never the Intention of the said Act to give Power to the King and his Successors for ever, to alter, &c. the Laws, so that none of that Country could be certain of his Life, Lands, Goods or Liberty, or any Thing which he hath, and that would be of great Servitude, *Misera servitus est, ubi jus est vagum*: Also the Words are for the Commonwealth, &c. if his Majesty's Subjects of *Wales*, at his Majesty's Pleasure, &c. by which it appears that the Intention of the Makers of the Act, was to give this Power to King *H. 8.* for his Pleasure did determine by his Death.

2. Power of Alteration of Laws, &c. is a Point of High Confidence concerning the Administration of Justice; and the Act by omitting [of his Successors] intended to unite this Confidence to the Person of *H. 8.* and not to extend it without Limitation of Time to his Successors: And this stands with the Construction of Law in other Cases; for all Commissions concerning the Administration of Justice determine by the Death of the King, yea he constitutes them *Justiciarios suos*, which Authority being in Case of Administration of Justice determines by the Death of the King, or Resignation, 1 *Ed. 5. 1.* 1 *H. 7. 1.* 14 *Ed. 4. 44.* yet if the King make a Lease *Durante beneplacito*, or present one to a Church, these are not void by his Death, until they are controlled or revoked by his Successor: But the Office of a Sheriff which is granted, *Durante beneplacito*, determines by the Death of the King, for this concerns the Administration of Justice: And upon Certificate of the Opinion of the Justices, that the Justices of *Wales* cannot be constituted by Commission to the Lord Chancellor, Baron *Snigg* had a Patent for the Circuit of *Wales*, as others had before.

*High*

## High Commission.

Trin. 6 Jac. 1.

Pursivant.  
Antea 19, 45,  
47.  
Post. 76, 82, 84.

Simpson's Case  
before the  
Judges of As-  
sise in North-  
amptonshire.  
42 Eliz.  
Page [50]

See Dent's  
Case, Rep. Q. A.

**T**HIS Term it was resolved *Per rotam Curiam in Comuni Banco*, viz. Coke Chief Justice, *Walmsley*, *Warberton*, *Daniel* and *Foster*, in the Case of *Allan Ball*, that the High Commissioners cannot by force of the Act 1 *El. cap. 1.* send a Pursivant to arrest any Person subject to their Jurisdiction, to answer to any Matter before them: But they ought to proceed according to Ecclesiastical Law, by Citation; for the Statute 1 *El.* did not give them any such Authority to arrest the Body of any Subject upon Surmise; and although that it be comprised within their Commission, that they may send for any by Pursivant, &c. yet inasmuch as this hath no Foundation upon the Act of 1 *El.* the King by his Commission cannot alter the Ecclesiastical Law, nor the Proceedings of it; for the Act says, that the Commissioners shall exercise, use and execute all the Premises (according to the Privileges of the Act) according to the said Letters Patent, *Id est*, the Letters Patent which are mentioned and Authority before, for this is implied within this Word (*said*) and for this, without Question, the Commission only without the Act cannot alter the Proceedings of the Ecclesiastical Law? And in the Circuit of *Northampton*, when the Lord *Anderson* and *Glanville* were Justices of Assise, a Pursivant was sent by the Commissioners to arrest the Body of a Man to appear before them, and \* in Resistance of the Arrest, and striving amongst them, the Pursivant was killed: And if this was Murder or not was doubted, and this depended upon the Validity of the Power and Authority of the Pursivant; for if his Authority was lawful, then in killing of an Officer of Justice in Execution of his Office, is Murder: And Advise ment was taken till the next Assises; and upon Conference at the next Assises it was resolved, that the Arrest was *Tortious*, and by Consequence that this was not Murder: But they may send Citation by a Pursivant, and proceed, if the Party make Default, to Excommunication, and then to have a *Capias excommunicatum*, and to imprison him by the Writ of the King, which Writ

## PART XII. MARMADUKE LANGDALE'S Case.

Writ *de excommunicato capiendo* is prescribed and returnable by the Statute of 5 *El.* which shall be in vain, if they may arrest him by a Pursivant before any Answer or Default made: And this will be against the Statute of *Magna Charta*, and all the ancient Statutes, which see *Rastall*, Title *Accusation*, If a Freeman shall be arrested upon a bare Surmise or Accusation: Which Statutes, if good and profitable for the Weal Publick, never were intended to be repealed by the said Statute of 1 *Eliz.*

*Note, That neither the Star-chamber nor Chancery award any Messenger to arrest the Body until a Contempt made; but first a Subpœna, &c. goes.*

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## MARMADUKE LANGDALE'S Case.

*Vide Postea 58.*

IN the Case of *Marmaduke Langdale* of *Leaventhorp* in the County of *York*, being sued by *Joan* his Wife, for Maintenance before the Bishop of *Canterbury*, and other High Commissioners: It was resolved *Per totam Curiam, præter Walmesley* who doubted of it, that a Prohibition, which before was granted, was well maintainable, for this, that it was not any *Enormity*, nor any Offence within the Statute, but a Neglect of his Duty, and a Breach of his Vow of Maintenance; also the Party shall be defeated of his Appeal: And for that Reason it belongs to the Court of the Ordinary: And the Rule of the Court was, that the Plaintiff shall count against the High Commissioners (for against his Wife, being one Person in Law with him, he could not count) and upon Demurrer joined, the Case is to be argued and adjudged, upon which the Party grieved may have a Writ of Error, *Si sibi viderit expedire, &c.* See more, *fol. 58.*

High Com-  
mission.  
Post. 58, &c. B.

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## The Case of the Lords President of Wales and York.

ON Sunday last, my Lord Chief Justice and my self, at *Serjeants Inn* in the Afternoon, received by the Hands of the King's Attorney by Commandment, as he signified to

*The Case of the Lords Presidents* PART XII.

See 4 Inst. 242,  
245, 281.  
13 Co. 30, 31,  
&c.

us, by your Lordships, the said Complaints, exhibited to his Majesty by the Lord President of *Wales*, and the Lord President of *York*, against the Judges of the Realm, with a Signification of your Lordships Pleasure, that we two should impart the same to the rest of our Brethren, which we did on *Monday* in the Afternoon, the Forenoon being spent in the publick Service of the Realm, at *Westminster*: And upon Consideration had of the Parts of the Complaint, we have, as this short Time will give us Leave, (being daily employed, as well in the Courts at *Westminster*, as some of us for Trials of Writs of *Nisi prius*.) resolved upon these Answers, which we knowing to be warranted by the Laws of this Realm, doubt not but will be allowed by your Lordships; and do hope that where the Judges of this Realm have been more often called before your Lordships, than in former Times they have\* been, which is much observed, and gives much emboldning to the Vulgar, that after this Day we shall not be so often upon such Complaints, (your Lordships being truly informed of our Proceedings) hereafter called before you.

Page [51]

And seeing that my Lord President of *York* hath now *Ore tenus* first opened the Cause of his Grief more amply and in some Cases more particularly, I will begin with those Objections that have been made on the behalf of that Council, wherein for Method, and for avoiding of Confusion, I will first speak to the true Cause of the Institution of that Court.

2. That our Proceedings in granting of Prohibitions, is for the Matter justifiable by Law.

13 Co. 30, 31.

3. That the Manner of our Proceedings was respectful and compliant towards the Ld. President of *York*, and the Council there.

4. Give Answers to all Objections both particular and general.

5. Propose Remedies for the Time past, if there be just Cause.

6. And lastly, Remedies for the Future, to take away all the Causes of Opposition between the Judges and both the said Councils:

4 Inst. 245.

And first as the Cause of instituting the said Court, *viz.*

After the Suppression of all religious Houses to the Value of two hundred Pounds, or under, Anno 27 H. 8. in the Beginning of *Octob. An. 28 H. 8.* there was a great Insurrection of the Lord *Hussey*, and twenty thousand Persons in *Lincolnshire*, about the Cause of Religion, against whom *Charles Brandon* Duke of *Suffolk* went, and appeased them.

As soon as they were appeased, a great Commotion began of forty thousand Men of that County, Sir *Robert Ask*

being

PART XII. of Wales and York.

being Chief, against whom the Duke of *Norfolk* went and dispersed them. Soon after in *Lancaſhire* began a great Rebellion of Men of that County, and of *Cumberland*, *Westmorland* and *Northumberland*; against whom the Earl of *Darby* was employed, and quieted them: After that *Musgrave*, *Tilby*, and others, began to raise a great Number, and assaulted *Carlisle* Castle, whom the Duke of *Norfolk* overthrew.

Presently after Sir *Francis Bigot* with a Multitude of <sup>4 Inst. 245.</sup> People, made an Infurrection at *Ketrington*, *Leigh*, *Pickering* and *Scarborough* in *Yorkshire*; whom the Duke of *Norfolk* pacified; And soon after the Lord *Darcy*, *Ask*, *Constable*, *Bulmer*; &c. began a new Commotion about *Hull* in *Yorkshire*, whom the Duke of *Norfolk* appeased. And all these Rebellions were between the Beginnings of 28 and 30 of *H. 8.* within which Time many of the Rebels were executed in *Furore belli*, and in *Flagranti crimine*, by Marshal Law, and some attainted by the Common Law. The King intending the Suppression of the greater Houses of Religion, which *An. 31 H. 8.* he effected, he established a Council there for the Quiet of the Counties of *Yorkshire*, *Northumberland*, *Westmorland*, *Cumberland*, *Duresme*, the Counties of the City of *York*, *Kingston upon Hull*, and *Newcastle upon Tyne*, for Preventions of Riots, Tumults and Infurrections in those Counties and Places: In this Time of Necessity and Danger, the King did arm the President and Council with two Authorities in one Commission; the one a Commission of *Oyer and Terminer, de quibuscunque congregationibus & conventiculis illicitis, coadunationibus, confederationibus, Lolardiiis, imprisonmentibus falsis allegatis, transgressionibus, Riotis, Routis, retentionibus, contemptibus, falsitatibus, manutenentiis, oppressionibus, violentiis, extortionibus & aliis malefactis, offensis, & injuriis quibuscunque, per que pax & tranquillitas subditorum nostrorum Comitatus, Civitatibus, & villis predictis gravat, &c. secundum legem & consuetudinem regni nostri Angliæ vel aliter secundum sanas discretionones vestras audiendum & terminandum.*

The other Authority was, *Nec non quascunque actiones reales, seu de libero tenemento, & personales, causasque debitorum & demandorum quorumcunque; \* in Com' &c. predict' Page [52]* quando ambæ partes vel altera pars sic gravata paupertate gravata fuerit, quod commode Jus suum secundum legem Regni nostri aliter prosequi non possit, similiter secundum leges & consuetudines regni nostri Angliæ vel aliter secundum sanas discretionones vestras. And this is all the Authority that the President and Council had first expressed in

*The Case of the Lords Presidents* PART XII:

their Patents, without any private Instructions: And this appears by the Commission under the Great Seal, 31 H. 8. 6 Pars. *Roberto Landavensi Episcopo Presidenti Concilii, & aliis*; out of which Charter these Things were observed, *viz.*

1. That the final Intention of the Commission was, *quod pax & tranquillitas subditorum præservedur.*

2. That they hear and determine Riots, Routs, &c. according to Law, or their Discretions, which Authority by Discretion was added, *ad faciendum populum*: For it was resolved without Quest. that in such Cases they had not Power, but to proceed according to Law, for that is *summa discretio*, and not according to their private Conceits and Affections, *quia talis discretio discretionem confundit*; so the other Clause concerning real and personal Actions in all the Counties of *York, Northumberland, Cumberland, Westmorland, Duresme*, and the Towns aforesaid was only *ad faciendum populum*, for this was utterly void in Law. For,

1. No such general Authority granted, may be made by the Commission of the King, to hear and determine all real Actions within such a County according to Law, as he may by Charter within a certain County or particular Place, for the King by Commission may give Power to determine criminal Causes between the King and the Party, *secundum legem & consuetudinem Angliæ*; but he cannot give Power by Commission to determine Causes between Party and Party: As it was resolved in *Scrogg's Case, An. 2 Eliz. fol. 175. in Dyer. Vide Dyer 236.* But the King by his Letters Patent may grant to such a Corporation in such a Town, *Tenere placita realia, personalia, & mixta*; and none by this can have any Prejudice, for the Proceeding ought to be according to Law; and if they err, the Party grieved may have his Writ of Error; but the Crown cannot grant to them a Court of Equity for the Cause aforesaid; and for this Cause, that such a Judge should be without Controlment: And it was said, that if such Commissioners cannot determine Felonies, or other criminal Causes by Writ, but by Commission; so cannot any determine private Causes betwixt Party and Party by Commission, but by Writ, by the Statute of *Magna Charta, cap. 12. & West. 2. cap. 30. Recognitiones de nova disseisina, &c. non capiuntur nisi in propriis Comitatus*: Which Act gives Authority to Justices of Assise in their proper Counties, by which it appears, that without an Act of Parliament, the King by his Letters Patent cannot put and authorise Justices *De Assisis Capiendis*, to take 'em within another County: And for this the ancient Precedents and Proceedings of Law ought not to be altered. As a Justice  
of

Antea 48.

2 Inst. 24. 422.

423.

4 Inst. 158.

## PART XII. of Wales and York.

of one Bench, or of the other, ought to be made by Commission, and not by Writ, and yet he may be discharged by Writ, 5 *Ed.* 4. 32. But Justices in Eyre are by Writ, as it appears by *Bracton's lib. 3. cap. 11.* and *Britton, fol. 1.* Also by the Statute of *West. 2. cap. 30.* and of *York, cap. 4.* Justices of *Nisi prius* give Judgment in Assises of *Darrein presentment*, and *Quare Impedit* in such a County, which cannot be done without Patent. *Et sic de cæteris.*

Also it was observed, that at the first the said Commission concerning Actions between Party and Party, extended only when both the Parties, or one of them, were so poor, as they were not able to prosecute at Law: Also by the first Institution they had no Power to grant Injunctions. And lastly, \* their Commission was Patent under the great Seal, and inrolled in Chancery: And thus much was said for the first, concerning the true Cause of the Institution of the Court, *viz.* For Preventing of Tumults and Rebellions, and when it began.

Page [55]

2. As to the second Point, the Granting of Writs of *Habeas Corpus*, and Prohibitions, is justifiable by Law; for whereas at the first their Authority was Patent, it is now private; for the Letters Patent do refer unto certain Instructions which are no where of Record, but kept in private, and as it was feared, for private Respects, *Et de non apparentibus & non existentibus eadem est ratio*; besides the Danger to the Subject is great, for if they lose their Instructions (as it hath happened heretofore) all is *coram non iudice*: And this first Reason is drawn from the Instructions themselves: The second Reason is drawn from the Contumacy of the Party that supposeth himself to be grieved by the Prohibition, and against whom it is granted; if the Authority of the Council be never so good, yet being a late and particular Jurisdiction, the Party must of Necessity plead it, so as it may appear unto us judicially; for as we are Judges of Record, so must we be informed of Record, and never yet hath any Party prohibited moved in Court to have a Consultation, by which might be set forth the Jurisdiction of that Court and Council, so as the Granting of Prohibitions hath been just; and the Fault (if any be) in the Parties themselves, that never hitherto made their Cause known, as it ought to be by Law, to the Court.

The third Reason is drawn from the great Injury offered to the Defendants, for it is a true Rule, *Misera servitus ubi jus est vagum aut incertum*: The Defendants, by Law, may in all Courts plead to the Jurisdiction of the

2 *Silk.* 512.  
Plea to the Jurisdiction. See *Instit. Leg.* 424. to 488.

*The Case of the Lords Presidents* PART XII.

Court; but how can they do so when no Man can possibly know what Jurisdiction they have: Concerning Matters of State, which are *Arcana Imperii*, it is meet they should be kept *sub sigillo consilii*, and in secret; but for Jurisdiction between Party and Party, for Deciding of *Meum & Tuum*, God forbid they should not be known to them, who are to be judged by them; but the Keeping of them in such Secrecy bewrayeth, that the Council are afraid that they would not be justified if they were known: And it was concluded again, *Misera servitus ubi jus aut vagum aut incertum*.

3. But our Proceedings herein have been respectful; for a Jury of Officers and Attornies of our Court, being according to an ancient Custom, Time out of Mind of Man used, sworn to present amongst other Things and Articles, all Defaults of Officers and Ministers in not Executing the Writs and Proceſs out of this Court, and all Impediments and Hinderances whatsoever of the due Proceedings of this Court, whereby Justice cannot be administred: And finding upon their Oaths divers unjust and undue Impediments of the Proceedings of this Court, by the said Council in particular: And thereupon a Motion being made in open Court in *Michaelmas* Term last, by the King's Serjeant *Philips*, of many intolerable Grievances of the Subjects offered by the said Council, to many of his Majesty's Subjects, in Derogation of the King's Laws, in Prejudice of the King's Profits, and in Hinderance of the due Proceedings of this Court, prayed the Court, according to Law and Justice, to grant several Prohibitions in all those several Causes, which we could not deny; but yet thought fit before we granted the same, that there might be a good Correspondence between both Courts; we should confer with Sir *Cutbert Pepper*, Attorn. of the Wards, and one of that Council, to let him understand the particular Grievances and Oppressions, and to hear what he could say in the Justification thereof; who accordingly upon Motion came to us to Serjeants Inn, with \* whom we conferred, and signified to him the Particulars of the said Grievances, who would not take upon him to justify the same in no Sort, but said, he would acquaint the President and Council therewith, and return their Answer; which for that it was neglected, we upon further Motion in Court granted Prohibitions, as in Justice we ought, which Course and Order of Proceedings we hold to be respectful and comely toward the Lord President and Council.

4. It was objected, that more Prohibitions have been granted of late than in many Years before, whereunto a sixfold Answerd was made.

1. That

## PART XII. of Wales and York.

1. That they had exceedingly multiplied the Number of Causes, so as they have above two thousand depending at one Time, and having but five Counties and three Towns; at one Sitting there were about 450 Causes at Hearing; whereas the Chancery that extends into 41 Counties *English*, and 12 in *Wales*, in all 53, had in *Easter Term* but 95 to be heard, and in *Trinity Term* but 72; so as if they multiply their Causes so infinitely above what were at the first, it is no Wonder if the Number of Prohibitions be increased.

2. Besides the Multiplication they have innovated and taken upon them to deal in Causes which we know never any President could, and we think never any President and Council did usurp: As first, Suits upon penal Laws, and many of them limited to the Courts at *Westminster*, but all of them without Question out of their Jurisdiction: As for Example, between *Harrison* and *Thurstone* in *English Bill*, upon the Statute 39 *Eliz.* of Tillage; whereas the very Statute giveth Jurisdiction to certain special Courts: The Defendant pleaded to the Jurisdiction, whereupon an Attachment was awarded against him, and fined.

And in the Case of *Hartley* after Indictment of forcible Entry and Restitution, according to the Statute, he was upon an *English Bill* dispossessed by the President.

3. And after a Recovery in an *Ejectione firmæ*, and Execution by *Habere facias possessionem* out of our Court, they upon an *English Bill* dispossessed the Plaintiff, and this was *Hart's Case*. Between *Jackson* and *Philips*, after Judgment in our Court, Suit there by *English Bill*. Between *Stanton* and *Child*, after Execution in Debt by Process out of our Court they commit the Plaintiff, an old Man and lame. So between *Binns* and *Collet*, after the Defendant was outlawed in an Action of Battery.

4. They admit *English Bills* in the Nature of Writs of Error, and of *Formedons*, and other real Actions.

5. They will admit no Plea of Outlawry in Disability of the Plaintiff.

6. They usually granted Injunctions to stay the Common Law, which is utterly against Law, and sometimes to stay Suits in Chancery, and in the Exchequer Chamber; and many other Proceedings which are against Law and Reason, to the great Oppression and Grievance of the Subject: And so in Respect as well of the Multiplication of Suits, as Innovations of others, it may very well be, that more Prohibitions and *Habeas Corpus* have been granted of late than were in Times past; and yet there have been more granted, and more ancient than is supposed:

*The Case of the Lords Presidents* PART XII.

Page [55]

Notes.

For *Mich. 7 Eliz. Rot. 31.* upon a Motion made by *Carus*, the King's Serjeant, a *Habeas Corpus* was granted out of the King's Bench, for the Body of *John Lamburn*, alias *Lambert*, which Writ being returned, that he went to the Castle of *York*, where *John Lambert* was a Prisoner, and that one *Oswald Wilkinson* the Gaoler refused to deliver him, without the Leave of the Archbishop of *York*, President of the Council there; whereupon he went to the \* Archbishop, and shewed unto him the Queen's Writ of *Habeas Corpus*, whereunto the Archbishop answered, that *John Lambert* was not the Sheriff's Prisoner, but was committed by him and the Council to the Gaoler's Custody, and therefore he should not be delivered; and therefore he sent one *Morgan* his Secretary to the Gaoler, that he should not be delivered; and thereupon, as well for the Contempt in the Archbishop and the Gaoler, as for the insufficient Return in not having the Body, *Carus* the King's Serjeant moved for an Attachment against the Archbishop of *York* and *Wilkinson* the Gaoler, for the Contempt returned by the Sheriff; and it was granted; and the Sheriff was amerced, for that he shewed no lawful Cause, *Mich. 7 & 8 Eliz. in libro de Habeas Corpus.* *John Dawson* in Prison for a Riot, by *English* Bill, before the President and Council of *York*, removed by *Habeas Corpus* and delivered; for no Man ought to be convicted for a Riot, but by Indictment, Trial, or other due Process at Law, and there are many other like Writs of later Time, *Pasch. 12 Eliz. in libro de Habeas Corpus,* *Thomas ap Morgan* committed by the Council and President of *Wales*, &c. and this Court finding the Cause unjust, bailed him, &c. And in *Trin. 20 El. ib.* the like Writ for the Body of *John Rowland*, committed by the President and Council of *Wales*, and finding by the Return that the Commitment of him was against Law, he was discharged by the Court, and many more of that Nature.

3. The Judges never grant either Prohibitions or *Habeas Corpus*, but upon Motion or Complaint by the Party grieved, so as if the Parties have greater Cause of Complaint than they had in Times past, there must of Necessity be more Writs of Prohibition and *Habeas Corpus* granted than was heretofore.

4. The Proceedings before the President and Council are by absolute Power, their Decrees uncontrolable and final, and more final than a Judgment in a Writ of Right; for thereupon a Writ of Error lieth; but these Sentences are irreversible, which makes them adventure, and presume too much upon their Authority, and which tends to the great Oppression and Grievance of the Subject.

5. These

PART XII. *of Wales and York.*

5. These Suits grow to be more prejudicial to the King than ever they have been, for by the Multiplication and Innovation of Suits, as well real as personal, the King loseth his Fines, &c.

6. Remedy for the Time past, if we have erred in Judgment, a Writ of Error lieth in the King's Bench; if the King's Bench doth err, a Writ of Error lieth in the *Upper House of Parliament, where the King and the Lords are only Judges.*

3dly, For the Time to come, first, that the Instructions be enrolled in the Chancery, whereunto the Subject may have Access, and know their Jurisdiction. 2. That the Presidents and Councils have some Counsel learned in the Court, who may inform us judicially of their true Jurisdiction, and we will give a Day to them before we grant any Writ, to shew Cause to the contrary; so as Justice upon hearing of both Sides shall be done; and if we err, the Law hath provided a Remedy by a Writ of Error, and no other Course can be taken: And we are sworn both to maintain the King's Prerogative, and to do Justice to all Men, according to the Laws and Customs of *England*: So as command, my Lords! whatsoever it shall please you, that lieth in our Power, and which by our Oath we may perform, and we will most willingly obey it: And that which a great Divine said to God Almighty, we say unto your Lordships, who sit in God's Seat, *Da Domine quod jubes, & jube quod vis, &c.*

\* The particular Cases set down in the Petition are answered in the second Part of our Proceedings justifiable until they plead their Jurisdiction, and make it appear to the Court to be lawful. Concerning the Jury of Attornies, it hath been answered before; and for the Motion to have a Rule set down, &c. it was moved by the King's Serjeant, and we advised thereupon. When this had been thus delivered, by Way of Answer, *Bacon* the King's Solicitor offered to reply; but after the Judge had spoken in the Name of all his Brethren, the Lords would not suffer him to speak after the Judge: But all others being desired to retire into the next Chamber, the Lords had long and prudent Conference amongst themselves; and after we were called in again, and then the Earl of *Salisbury*, Lord Treasurer, by the Consent of that honourable Table, gave this Resolution:

1. *That the Instructions should be recorded for so much as concern'd either Criminal Causes, or Causes between Party and Party: As for Matter of State, if any be, the same not to be published.*

2. That it was necessary that both Councils should be within the Survey of Westminster-Hall, viz. The Courts of Westminster.

3. The Motion was well allowed, that the Presidents and Councils should have Counsel learned in every Court; and that upon Motion made in open Court, upon any Prohibition, to either of them, Day should be given to shew Cause, &c.

4. The Lord Treasurer repeated the Sentence, and said, that true it is, *Ubi lex aut vaga aut incerta, miserrima est servitus, where Men's Estates and Fortunes should be decided by Discretion.*

And concerning the Remoteness of the Place, what Reason should there be at this Time more for those Parts than for the Counties of Cornwall and Devon, which are more remote than York? And this was the End of this Day's Work.

## The Case of Heresy.

Heresy, upon Conference with Sir John Popham and others, an. 43 Eliz.

Vide post. 93. 1 Hawk. c. 2. Sect. 1, 2, 3, &c. ch. 3. Sect. 2.

THE Archbishop and other Bishops, and other the Clergy, at a general Synod or Convocation might convict an Heretick by the Common Law. But for this, that it was troublesome to call a Convocation of the whole Province, it was ordained by the Statute of 2 H. 4. cap. 15. That every Bishop in his Diocese might convict Hereticks; and note, 2. *Mary Brook*, Title *Heresy*, per *omnes Justic. & Baker* Chancellor of the Exchequer, and *Hare* Master of the Rolls, by that Statute. And if the Sheriff was present, he might deliver the Party convict to be burnt, without any Writ *De heretico comburendo*; but if the Sheriff be absent, or if he be to be burnt in another County, then there ought to be a Writ *De heretico comburendo*; and that the Common Law was such, *vide lib. intra*, Title *Indictment*, p. 11. such who there are taken for Hereticks, some of them are consonant to true Religion. *Vide* 11 H. 7. *Book of Entries*, fol. 3. 19. *See Dr. & Stud. lib. 2. cap. 29. Cofin* 48. 2. See the Statute of 1 & 2 P. M. cap. 6. That Ordinaries wanting Authority to proceed against Hereticks. 3. *F. N. B.* 8. fol. 269. And the Writ in the Register, which in the new Book is omitted, proves

proves this directly. 4. *Bracton, lib. 3. cap. 2. fol. 123, 124. Concilio Oxoniensi quidam Diaconus convictus fuit de Apostasia, sed primo degradatus fuit per Ordinarium*: And true it is, that every Ordinary may \*convent any Heretick or Schismatick before him, *pro salute animæ*, and may degrade him, as *Bracton* saith, and may injoin him Penance according to the Censure of Ecclesiastical Law: But upon such Conviction at Common Law, the Party convict shall not be burnt, nor any Writ *De heretico comburendo* lieth upon it; for the Common Law will not commit the Decision of a Heresy, for the Life of a Christian Man, to any sole Judge. Page [57]

The Makers of the Act of 1 *Eliz.* were in Doubt what shall be adjudged Heresy; and therefore if any Person be charged with Heresy before the high Commissioners, they have no Authority to judge any Matter or Cause to be Heresy, but only such as hath been so adjudged by the Authority of canonical Scripture, and by the four first General Councils, or by any other General Council, wherein the same was declared Heresy by the exprefs and plain Words of canonical Scripture, or such as shall hereafter be determined to be Heresy by Parliament, with the Assent of the Convocation; for so it is expressly provided by the said Act of 1 *Eliz.* And although this Proviso extends only to the high Commissioners, yet seeing in the high Commission there be so many Bishops, and other Divines and learned Men, it may serve for a good Direction to others, especially to the Diocesan, being a sole Judge in so weighty a Cause.

At this Day the Diocesan hath Jurisdiction of Heresy, and so it hath been put in Ure in all Queen *Elizabeth's* Reign, but without the Aid of the Act of 2 *H. 4. cap. 15.* the Diocesan could imprison no Person accused of Heresy, but was to proceed against him by the Censures of the Church; for the Bishop of every Diocese might convict any for Heresy before the Statute 2 *H. 4.* as appears by the Preamble of it. But could not imprison, &c. and now seeing that not only the said Act of 2 *H. 4.* but 25 *H. 8. cap. 14.* are repealed, the Diocesan cannot imprison any Man accused of Heresy, but must proceed against them as he might have done before those Statutes by the Censures of the Church; as it appears by the said Act of 2 *H. 4. cap. 15.* Likewise the supposed Statute of 5 *R. 2. cap. 5.* And the Statutes of 2 *H. 5. cap. 7.* 25 *H. 8. cap. 14.* 1 & 2 *P. & M. cap. 6.* are all repealed, so as no Statute made against Hereticks stands now in Force; and at this Day no Person can be indicted or impeached for Heresy before

before any Temporal Judge, or other that hath Temporal Jurisdiction, as upon Perusal of the said Statute appeareth.

See Cotton's Records 285. That this Stat. was never assented to by the Commons, and therefore the King at their Prayer revokes it by a Statute 6 R. 2. But yet the Power of the Prelates was such (as Mr. Rymer observes in his MS. of Parliamentary Proceedings (penes W. Bohun) p. 149. That the Stat. of Repeal was never formed into an Act, or published, so as the former Ordinance continued to be enforced by the Clergy (whereby many godly Men were cruelly burnt) till it was repealed by a special Act of Parliament 1 Ed. 6. Page [58]

There was a Statute *supposed* to be made in 5 R. 2. that Commissions should be by the Lord Chancellor made and directed to Sheriffs, and others, to arrest such as should be certified into the Chancery by the Bishops and Prelates, Masters of Divinity, to be Preachers of *Heresies* and notorious Errors, their Factors, Maintainers and Abettors, and to hold them in strong Prison, until they will justify themselves to the Law of the Holy Church. By Colour of this *supposed* Act, certain Persons that held, that Images were not to be worshipped, &c. were holden in strong Prison, until they (to redeem their Vexation) miserably yielded before these Masters of Divinity to take an Oath, and did swear to worship Images, which was against the moral and eternal Law of Almighty God. We have said by Colour of the said *supposed* Statute, &c. not only in Respect of the said Opinion, but in Respect also, that the said *supposed* Act, was in Truth never any Act of Parliament, though it was entered in the Rolls of the Parliament, for that the Commons never gave their Consent thereunto. And therefore in the next Parliament, (tho' it was entered in the Rolls of the Parliament) for that the Commons never gave their Consent thereunto, therefore in the next Parliament, the Commons preferred a Bill, reciting the said *supposed* Act, and constantly affirmed, that they never assented thereunto, and therefore desired that the said *supposed* Statute might be annulled and declared to be void; for they *protested*, that it was never their Intent to be justified by, and to bind themselves and Successors \* to the *Prelates*, more than their Ancestors had done in Times past; and hereunto the King gave his Royal Assent in these Words, *Pleist au Roy*. And mark well the Manner of the Penning of the Act, for seeing the Commons did not assent thereunto, the Words of the Act be, *It is ordained and assented in this present Parliament, that, &c.* And so it was, being but by the King and the Lords. [Or rather, by the craft of the Bishops and the then Chancellor.]

It is to be known, that of ancient Time, when any Acts of Parliament were made to the End the same might be published and understood, and especially before the Use of Printing came into *England*, [after the Parliament was ended] the Acts of Parliament were ingrossed into Parchment and *bundled* † up together with a Writ in the King's Name, under the Great Seal, to the Sheriff of every County, sometimes in *Latin*, and sometimes in *French*, to command the Sheriff to proclaim the said Statutes within

† Note; this Method gave Opportunity to the Chancellors and Bishops to insert in the said Bundles several Things as Acts of Parliament, which never passed in Parliament. W. B.

his Bayliwick, as well within Liberties as without. And this was the Course of Parliamentary Proceedings, before Printing came in Use in *England*, and it continued after we had the Print till the Reign of *H. 7.*

Note; at the Parliament holden in 5 *R. 2.* *John \* Brai-*  
*brooke*, Bishop of *London*, being Lord Chancellor of *Eng-*  
*land*, caused the said Ordinance of the King and Lords to  
 be inserted into the Parliamentary Writ of Proclamation to  
 be proclaimed amongst the Acts of Parliament, which Writ  
 I have seen, the Purclose of which Writ, after the Recital  
 of the Acts directed to the Sheriff of *N.* is in these Words.  
*Nos volentes dictas concordias, sive Ordinationes in omnibus*  
*& singulis suis Articulis inviolabiliter observari, tibi præ-*  
*cipimus quod prædictas concordias sive ordinationes in locis*  
*infra baliivam tuam, ubi melius expedire volueris, tam*  
*infra libertates, quam extra, publice proclamari & teneri*  
*facias juxta formam prænotatam. Teste Rege apud Westm.*  
*26 Maii anno regni Regis, R. 2. 5.*

\* He was made  
 Chancellor in  
 September sex-  
 to *R. 2.* But Sir  
 Rich. Scroop,  
 Knt. the preced-  
 ing Chancel-  
 lor being ex-  
 auctorated in  
 July, the King  
 by Delapool  
 and Braibroke's  
 Advice took  
 the Seal into  
 his own Hands.  
 Vide Hall. 440.  
 Carol. Canc. 51.

But in the Parliamentary Proclamation of the Acts passed  
 in *Anno 6 R. 2.* the said Act of 6 *R. 2.* whereby the said  
 supposed Act of 5 *R. 2.* was declared to be void, is omitted,  
 and afterwards the said supposed Act of 5 *R. 2.* was con-  
 tinually printed, and the said Act of 6 *R. 2.* hath by the  
 Craft of the Prelates been ever from Time to Time kept  
 from the Print.

Nota; Sir Mi-  
 chael Delapool  
 succeeded Brai-  
 brook being  
 made Chancel-  
 lor in March  
 sexto *R. 2.* See  
 Cotton 194,  
 198, 290. Hol-  
 lingsh. 457, 422,  
 &c.

Certain Men called *Lollards* were indicted for Heresy  
 upon the Statute 2 *H. 4.* for these Opinions, viz. *Quod non*  
*est Meritorium ad Sanctum Thomam nec ad Sanctam Ma-*  
*riam de Walsingham peregrinari. 2. Nec Imagines Cruci-*  
*fixi & aliorum Sanctorum adorare. 3. Nulli Sacerdoti con-*  
*fiteri nisi soli Deo, &c.* Which Opinions were so far from  
 Heresy, as the Makers of the Statute of 1 *Eliz.* had great  
 Cause to limit what Heresy was.

[Vide Post. 93. of the Writ De Hæretico Comburendo.]

LANGDALE's *Case*, Antea, p. 50.

Mich. 6 Jac. Regis.

*Prohibition.*High Commis-  
sion.Vid. post. 76, 77.  
4 Inst. 99, 100.Page [59]  
4 Inst. 99.

IN the *Case* of *Langdale* in this very term, in a Prohibition to the high Commissioners, two points were moved; the one if a Feme-covert may sue for Alimony before the high Commissioners; the other, if the Court of Common Pleas may grant a Prohibition, when no Plea is pendent in the Common Pleas: As in this *Case* no Plea can there depend betwixt Husband and Wife. And forasmuch as this concerns the Jurisdiction of the Court, this was first of all debated; and divers Objections were made against it.

1. That this Court hath not Jurisdiction to hold Plea without an \* Original, unless it be by Privilege of an Attorney, Officer, or Clerk of the Court, unless that it be in an especial *Case*, viz. when there is an Action there depending for the same Cause; then it was agreed that a Prohibition shall be awarded out of the Common Pleas, in Respect that the Court hath an Action there depending for the same Cause, and so being possessed of the Cause, it gave the Court Jurisdiction to award Prohibition out of the same Court: And for that the Prohibition ought to recite, *Quod cum tale placitum pendet, &c.* and the Defendant, *pendente placito prædicto*, hath pursued in Court Christian: And with this accords, *F. N. B.* 43. g. where it is said, that if a Man be sued in the Common Pleas for a Trespass, if the Plaintiff also sue in Court Christian for the same Cause, the Defendant may sue for this in the Common Pleas, and shall have a Prohibition then directed to the Judges: And so always when the Matter is pendent in the Common Pleas, if Suit be for the same Cause in Court Christian, he shall have a Prohibition: But a Man shall have a Prohibition out of the Chancery or King's Bench upon his Surmise, surmising that he is sued in Court Christian for a temporal Cause: And 2 *Ed.* 4. 11. 6. was cited, where it is held that *Ne admittas*, which is a Prohibition, doth not lie unless that the *Quare Impedit* be pendent.

But

But it was answered and resolved by *Coke* Chief Justice, <sup>4 Inst. 99, 100.</sup> *Warberton, Daniel and Foster*, Justices, that the Common Pleas may award a Prohibition, although that no Suit be there pendent, for this, that the Common Pleas is the principal Court of Common Law for Common Pleas: For it belongs to the Jurisdiction of the Common Pleas to determine all Common Pleas.

*Communia placita non sequantur Curiam nostram*, as it is enacted by *Magna Charta*, which hath thirty-two Times been confirmed by other Acts of Parliament: Then if the Ecclesiastical Judges inroach upon the Jurisdiction of the Common Pleas to hold Plea of any Thing against the Common Law of the Land, or of any Thing triable by the Law, there the principal Court of Common Law shall grant a Prohibition, and that without Original Writ, for divers Causes.

1. For that no Original Writ of Prohibition which issues out of the Chancery is returnable either into the King's Bench or Com. Pleas but is directed to the Judge or Party, or both, and is not returnable at all: But it appears in the Register, that if the Prohibition be contemned, then the Chancellor may award an Attachment to punish this Contempt, returnable either in the Common Pleas, or in the King's Bench: But an Attachment in such Case is but as a Judicial Writ; and this appears by the Register, *fol. 33.* And if the Attachment in such Case be returnable into the Common Pleas, &c. the Plaintiff in the Declaration shall make Mention of an Original Writ in the Chancery, and of the Contempt, &c. Writ of Prohibition not returnable.

2. There was great Reason that no Original Writ of Prohibition shall be returnable, for the *Common Law was a Prohibition* in it self, and he who did inroach upon the Jurisdiction of it incurred a Contempt: And with this agree our Books, as *9 H. 6. 56.* in Attachment upon a Prohibition in the Common Pleas, before *William Babington* then Chief Justice of the Bench, concerning a Suit in *Court Christian* of Tithes of gross Trees: And there *Fulthorp* the Searjeant took Exception to the Count, for this, that the Plaintiff in his Count did not declare upon any Statute, nor that any Prohibition, *scil.* Original Writ, was directed unto him: And there it is held that the Statute of *45 E. 3.* and the Common Law also was a Prohibition in itself: And thus the Rule of the Book, *19 H. 6. 54.* Prohibition for this, that one had sued in a Court-Baron against the Common Law; \* and there *Ascue* said, the Statute is a Prohibition in itself, so it is held in *8 R. 2. Title Attachment sur Prohibition, 15.* Note by *Clopton* in the Common Pleas, The Common Law is a Prohibition. Page [60]

who

who then was a Serjeant, that if a Plea be held in *Court Christian*, which belongs to the Court of the King, without any Prohibition *in facto*, the Plaintiff shall have an Attachment upon a Prohibition, for this, that the *Law is a Prohibition* in it self; for by the Law they ought to hold no Plea, but that which doth belong to their Jurisdiction, *Quod fuit concessum, &c. Register 77. Estrepmment. Præcipimus quod inbibeas, &c. Fitz. N. B. 259. Register 112. Superseas* to a Court-Baron, for holding Plea *vi & armis*, for above forty Shillings: And *F. N. B.* a Writ of Consultation is as much an Original as a Prohibition, yet the Common Pleas hath granted infinite Consultations; *ergo* Prohibitions, *Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi*; and one Writ is as Original as the other.

Several Kinds  
of Prohibitions

Note; there are several Writs of express Prohibitions, *scil.* Prohibitions with this Word, *Prohibemus vobis*, and Letters in Nature of Prohibitions, as *Superseas*, by which it is commanded, *Quod supersed. in placito prædict.* And an Injunction is a Prohibition also in its Nature, for the Words are an Injunction to the Party, not to the Judge; and a *Superseas* is to an Officer or Judge, not to the Party.

Express Prohibitions are in two Manners, the one founded upon a Suggestion, the other upon Record; upon Suggestion where no Plea is pendent, but the Suggestion is the Foundation, for it is not so when a Plea is pendent; upon Record when a Plea is pendent. Prohibitions founded upon Record, as *Ne admittas, &c.* ought to recite the Plea pendent, for all those which are founded upon Record ought to recite a Plea pendent. So a Writ to the Bishop to admit a Clerk, is a judicial *Latitat*, as *Dyer* defines it: And as to the Book of 2 *Ed. 4.* it is well agreed, that this doth not lie in the Common Pleas, unless a *Quare Impedit* be depending; for this ought to recite a Writ to be depending; and it should be against Reason to restrain any to present, or to make Waste by *Estrepmment*, unless that a Writ be pendent: And as to the Opinion of *Fitzherbert*, it was affirmed for good Law, for every one agrees it, that if a Plea be pendent in the Common Pleas, then a Prohibition there lies, and the Pendency or not Pendency of a Plea is not material for divers Causes.

Pendency of  
Plea, &c. not  
necessary.

I. The Pendency of a Plea may give a Privilege to the Party, but no Jurisdiction to the Court in collateral Suit: And there is a Diversity betwixt Privilege to the Party, and Jurisdiction of Court, for a Plea pendent may give Privilege to the Party, *Eundo, redeundo & morando*, but doth not give Jurisdiction to the Court to hold Plea by Bill by

col-

PART XII. *Prohibition.*

collateral Suit against any other, as an Officer, Attorney or Clerk may.

2. The Prohibition in such a Case where Plea is pendent is no Process Judicial upon the Record, for it is a collateral Suit.

3. If the Common Pleas, which is the proper Court for Common Pleas, cannot grant a Prohibition without a Plea pendent; certainly the King's Bench, which holds Plea of Common Pleas, by secondary Means, cannot do it: And so the Archbishop of *Canterbury* in his Articles concerning Prohibitions, holds that neither the one Court nor the other may grant Prohibitions in such a Case: But inasmuch as the Common Law is instead of an Original, as hath been said, both \* Courts may grant it.

\* See Vaugh. 157, 209.

4. Infinite Precedents may be shewn of Prohibitions out of the Common Pleas, without Recital of any Plea pendent, as is agreed on the other Part: And true it is, that it ought not to be so, if the Court hath not Jurisdiction \* to grant any without Plea pendent. Every petty Clerk of the Common Law shall have by his Privilege a Prohibition without Plea pendent; *a fortiori* the Common Law it self may prohibit any one, who against the Common Law shall in-croach upon its Jurisdiction, and enquire of Things done against the Jurisdiction of the Court. Plea pendent is cause of Privilege and not of Jurisdiction, 4 *Ed.* 4. 37. 37 *H.* 8. 4. Action or Information upon the Statute of 2 *H.* 5. c. 5. is but an Information to the Court of Wrong done to the Common Law, for this, that no Original Writ lies, as upon Penal Law, upon *Malum prohibitum*, this is *Malum in se, de quo Curia intelligi & informari voluit.*

Page [61]

Vaugh. 333, 342, &c. Antea 30.

5. A Precedent is in 22 *Ed.* 4. where a Prohibition was granted out of the Common Pleas, for that the Plaintiff might have a Writ of false Judgment at the Common Law: The Record it self agrees with the Report.

6. Officers and Clerks, as well in the Common Pleas as in the Exchequer, and Farmers of the King in the Exchequer, may have by Privilege of Court a Prohibition without Original; *a fortiori* the Law it self shall have greater Privilege than an Officer or Clerk, and certainly to enforce the Party to bring an Action, will be a Means to multiply Suits to no End, for the Law it self in 4 *Ed.* 4. fol. 37. if any Man upon the Statute of 2 *H.* 5. for not delivering of a Libel, be brought into the Common Pleas; and if he cannot have a Prohibition without such Suit this shall be a Cause, as hath been said, to multiply Suits, and is against the publick Weal: For he will bring his Action upon the Statute before that he will be deprived of his

Stat. 2 H. 5. c. 3. See 13 Co. 42. 10 Co. 75. b. 3 Bulf. 5. 120. Cro. Jac. 37. 388. Moor 756. Regr. 58.

Prohibi-

Prohibition, and by that he gives himself cause of Prohibition; every Prohibition is as well at the Suit of the King as of the Party, as is held in 28 *Ed.* 3. 97. false *Latin* shall not abate, nor Excommunication in the Plaintiff is no Plea: For this is the Suit of the King, as well for his Jurisdiction as for the Party, who by Law may chuse his Court, 15 *Ed.* 3. Title *Corrody* 4. The King may sue for this Contempt where he pleaseth.

Note, that although the original Cause was in the King's Bench for Corody, Excommunication is no Plea in Disability of the Plaintiff, because it is the Suit of the K. for Contempt to his Law. *Vide* 21 *H.* 7. 71. *Kelway* 6. in *Quare non admisit*, 4 *Ed.* 4. 37. for not delivery of a Libel, in the Common Pleas, and then he shall have a Prohibition by all the Justices: So upon the Statute of 2 *Ed.* 6. *cap.* 13. for suing for Tithes where there is a Prescription, &c. And this shall be to introduce Multiplication of Suits, when himself gives Cause of Prohibition. 38 *H.* 6. 14. 22 *Ed.* 4. 20. 13 *Ed.* 3. Title *Prohibition* 11. After a Judgment in the Common Pleas, after which the Patron sues the Recoveror in Chancery, surmising Equity, Attachment upon a Prohibition out of the Common Pleas, yet no Plea pendent.

Note; the Reporter reporteth this Attachment to issue out of the Common Pleas, for the Chancellor would not prohibit him.

32 *H.* 6. 34. An Attorney in the Palace assaulted and menaced, the Court shall take a Bill and enquire of it, 4 *Ed.* 4. 36, 37. there a Prohibition without View of Libel, for this, that Action was pendent. *Statbam*, *Prohibition* 3.

*Prohibition super Articulis*, Title *Prohibition*, Plea 5. gives a Prohibition before, *scil.* *Coram Justiciariis nostris apud West.* *Vide* *F. N. B.* fol. 69. b. in a Writ of *Pone*, Register, *Judic. coram Justiciariis nostris apud West.* is the Common Pleas. *F. N. B.* 64. d. 38 *Ed.* 3. 14. Stat. 2 *Ed.* 6. *cap.* 13. such Courts grant Prohibition who have used to grant them: *Hale's Case* in \* *my Reports*. Note, the Reason that many Prohibitions were granted in the K.'s Bench, for that no Writ of Error lies but in Plaints.

## BANKS'S Case.

Mich. 6 Jac. 1.

**M**Ich. 6 Jac. Rot. 639. Robert Banks, Gent. brought an Action upon the Statute of *Winton* 13 Ed. 1. against the Inhabitants of the Hundred of *Burnham* in the County of *Bucks*, and counted, that certain Misdoers to the Plaintiff unknown, at *Hitcham* in the County aforesaid; which Town is in the Hundred of *Burnham*, the 22 Nov. *An. Regni Regis Jacobi* 5. assaulted the Plaintiff, and robbed him of 25 l. 3 s. 2 d. ob. and that the Plaintiff immediately after the Robbery, *scil.* the 22d of Nov. at *Joplow* and *Manlow*, in the County aforesaid; which were Towns next the said Town of *Hitcham*, within the said Hundred; made Hue and Cry of the said Robbery; and gave Notice of the said Robbery to the Inhabitant of the said Towns of *Joplow* and *Manlow*, and after the said Robbery, and within 20 Days before the Purchase of the Writ, *scil.* 19. Day of *Feb. Anno* 5. at *Dorney* in the County aforesaid, the Plaintiff, before Sir *Wm. Gerrard*, Knt. then Justice of Peace within the same County, an Inhabitant next to the said Hundred, being examined upon his Oath, according to the Statute of 27 *El.* the Plaintiff upon his Oath said, That he did not know the Parties who did rob him, nor any of them: And since the said Robbery are forty Days past, and the Inhabitants of the said Hundred of *Burnham* have not made Amends of the said Robbery to the Plaintiff, nor the Bddy of the Felons and Misdoers aforesaid, nor any of them have taken, nor answered their Bodies, nor the Bodies of any of them, but have suffered the Felons to escape. To which the Defendants plead (Not guilty) and a *Venire facias* was awarded to the Sheriff, *De vicineto* of the Hundred of *Stoke*, which is the Hundred next adjacent to the said Hundred of *Burnham*: And the Jury gave a special Verdict; they found that the Plaintiff was robbed, and that he made Hue and Cry in Manner and Form, as he hath counted, and found over, that the Plaintiff was sworn before the said Sir *Wm. Gerrard*, then being a Justice of Peace within the same County, and an Inhabitant next un-

Sur Statute  
Winton.  
Hue and Cry.  
See 1 Show 60.  
1 Show 150.  
7 Co. 6, 7.  
Farr 153, 160.  
Cro. Car. 267;  
1 Hawk. ch. 76.  
Sect. 3. 26.  
2 Hawk. c. 12.  
Sect 5, 6.  
2 Sand 379,  
380, 423.  
2 Salk. 614.  
Farr 157, &c.  
Rep. Q. A. 8;  
9, 10, &c.

M O U S E ' s C a s e .                      P A R T X I I .

to the Hundred of *Burnham*, and said Upon his Oath in these *English Words*, *That he, on Thursday being the Two and Twentieth Day of November 1608. riding under Hitcham Wood, in the Parish of Hitcham, within the Hundred of Burnham, was then and there set upon by two Horsemen, which then, nor at this present he did, nor doth know, and by them robbed and spoiled of the just Sum of 25 l. 3 s. 2 d. ob. not without great Danger of his Life: But whether the said Oath so taken is true, according to the Form and Effect of the said Act of 27 El. and according to the Count, the Jurors pray the Direction of the Court.*

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Page [63]

\* M O U S E ' s C a s e .

Mich. 6 Jac. 1.

Injuria, pro Bo  
no publico.

See 1 Danv. 13  
Molloy 246,  
247.  
2 Bulst.  
Allen 93.  
1 Sal. 35.

**I**N an Action of Trespass brought by *Mouse*, for a Casket, and a Hundred and Thirteen Pounds, taken and carried away, the Case was, *The Ferryman of Gravesend took Forty-seven Passengers into his Barge, to pass to London, and Mouse was one of them, and the Barge being upon the Water, a great Tempest hapned, and a strong Wind, so that the Barge and all the Passengers were in Danger to be Drowned, if a Hogshead of Wine and other ponderous Things were not cast out, for the Safeguard of the Lives of the Men: It was resolved Per totam Curiam, that in case of Necessity, for the Saving of the Lives of the Passengers; it was lawful to the Defendant, being a Passenger, to cast the Casket of the Plaintiff out of the Barge, with the other Things in it; for Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur, to which the Defendant pleads all this special Matter; and the Plaintiff replies, De injuria sua propria absque tali causa: And the first Day of this Term, this Issue was tried, and it was proved directly, that if the Things had not been cast out of the Barge, the Passengers had been drowned; and that Levandi causa they were ejected, some by one Passenger, and some by another; and upon this the Plaintiff was Nonsuit.*

*It was also resolved, that although the Ferryman surcharge the Barge, yet for Safety of the Lives of Passengers in such a Time and Accident of Necessity, it is lawful for any Passen-*

PART XII. *Prohibitions del Roy.*

*Passenger to cast the Things out of the Barge: And the Owners shall have their Remedy upon the Surcharge against the Ferryman, for the Fault was in him upon the Surcharge; but if no Surcharge was, but the Danger accrued only by the Act of God, as by Tempest, no Default being in the Ferryman, every one ought to bear his Loss for Safeguard of the Life of a Man; for Interest Reipublicæ quod homines conserventur, 8 Ed. 4. 23. &c. 12 H. 8. 15. 28 H. 8. Dyer 36 Plucking down of a House, in Time of Fire, &c. And this Pro bono publico; Et conservatio vitæ hominis est bonum publicum. So if a Tempest arise in the Sea, Levandæ navis causâ, and for Salvation of the Lives of Men, it may be lawful for Passengers to cast over the Merchandizes, &c.*

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*Prohibitions del Roy.*

Mich. 5 Jac. 1.

**N**Ote; upon *Sunday* the 10th of *Novemb.* in this same Term, the King, upon Complaint made to him by *Bancroft*, Archbishop of *Canterbury*, concerning Prohibitions, the King was informed, that when the Question was made of what Matters the Ecclesiastical Judges have Cognizance, either upon the Expositions of the Statutes concerning Tithes, or any other Thing Ecclesiastical, or upon the Statute 1 *El.* concerning the High Commission, or in any other Case in which there is not express Authority in Law, the King himself may decide it in his Royal Person; and that the Judges are but the Delegates of the King, and that the King may take what Causes he shall please to Determine, from the Determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in Divinity, that such Authority belongs to the King by the Word of God in the Scripture. To which it was answered by me, in the Presence, and with the clear Consent of all the Justices of *England*, and Barons of the Exchequer, that the King in his own \* Person cannot ad-  
judge any Case, either criminal, as Treason, Felony, &c. or betwixt Party and Party, concerning his Inheritance, Chattels, or Goods, &c. but this ought to be determined and adjudged in some Court of Justice, according to the

Judges to determine Ecclesiastical Matters.  
Vide 13 Co. 4.  
14. 11, &c.  
2 Co. 44, 45.  
5 Co. 9. 16, 20.  
11 Co. 25.  
See and Note the Introduction to Gibson's Codex. p. 20, 21.  
Carthew 215.

En Sycophonem.

Page [64]

## Prohibitions del Roy. PART XII.

Law and Custom of *England*, and always Judgments are given, *Ideo consideratum est per Curiam*, so that the Court gives the Judgment: And the King hath his Court, *viz.* in the upper House of Parliament, in which he with his Lords is the supreme Judge over all other Judges; for if Error be in the Common Pleas, that may be reversed in the Kings Bench: And if the Court of King's Bench err, that may be reversed in the upper House of Parliament, by the King, with the Assent of the Lords Spiritual and Temporal, without the Commons: And in this respect the King is called the Chief Justice, 20 *H. 7. 7. a.* by *Brudnell*: And it appears in our Books, that the King may sit in the Star-chamber; but this was to consult with the Justices, upon certain Questions proposed to them, and not *in Judicio*: So in the King's Bench he may sit, but the Court gives the Judgment: And it is commonly said in our Books, that the King is always present in Court in the Judgment of Law; and upon this he cannot be Nonsuit: But the Judgments are always given *Per Curiam*; and the Judges are sworn to execute Justice according to Law and the Custom of *England*. And it appears by the Act of Parliament of 2 *Ed. 3. cap. 9.* 2 *Ed. 3. cap. 1.* That neither by the Great Seal, nor by the Little Seal, Justice shall be delay'd; *ergo*, the King cannot take any Cause out of any of his Courts, and give Judgment upon it himself, but in his own Cause he may stay it, as it doth appear, 11 *H. 4. 8.* And the Judges informed the King, that no King after the Conquest assumed to himself to give any Judgment in any Cause whatsoever, which concerned the Administration of Justice within this Realm, but these were solely determined in the Courts of Justice: And the King cannot arrest any Man, as the Book is in 1 *H. 7. 4.* for the Party cannot have Remedy against the King; so if the King give any Judgment, what Remedy can the Party have. *Vide* 39 *Ed. 3. 14.* One who had a Judgment reversed before the Council of State; it was held utterly void, for that it was not a Place where Judgment may be reversed. *Vide* 1 *H. 7. 4.* *Huffey* Chief Justice, who was Attorney to *Ed. 4.* reports, that Sir *John Markham*, Chief Justice, said to King *Ed. 4.* That the King cannot arrest a Man for Suspicion of Treason or Felony, as others of his Lieges may; for that if it be a Wrong to the Party grieved, he can have no Remedy: And it was greatly marvelled that the Archbishop durst inform the King, that such absolute Power and Authority, as is aforesaid, belonged to the King by the Word of God. *Vide* 4 *H. 4. cap. 22.* which being translated into *Latin*, the Effect is, *Judicia in Curia Regis reddita non annihilentur,*  
*sed*

2 R. 3. 9. 21.  
H. 7. 8.

17 H. 6. 14 339.  
Ed. 3. 14.

Stat. 4 H. 4.  
cap. 25.

## PART XII. *Prohibitions del Roy.*

*sed stet iudicium in suo robore quousque per iudicium Curie Regis tanquam erroneum, &c. Vide West. 2. cap. 5. Vide le Stat. de Marbridge, cap. 1. Provisum est, concordatum, & concessum, quod tam majores quam minores justitiam habeant & recipiant in Curia Domini Regis, & vide le Stat. de Magna Charta, cap. 29. 25 Ed. 3. cap. 5. None may be taken by Petition or Suggestion made to our Lord the King or his Council, unless by Judgment: And 43 Ed. 3. cap. 3. no Man shall be put to answer without Presentment before the Justices, Matter of Record, or by due Process, or by Writ Original, according to the Ancient Law of the Land: And if any Thing be done against it, it shall be void in Law and held for Error. Vide 28 Ed. 3. cap. 3. 37 Ed. 3. cap. 18. Vide 17 R. 2. ex rotulis Parliamenti in Turri, Art. 10. A controversy of Land between Parties was heard by the King, and Sentence given, which was repealed, for this, that it did belong to the Common Law: Then the King said, that he thought the \* Law was founded upon Reason, and that he and others had Reason, as well as the Judges: To which it was answered by me, that true it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his Realm of *England*, and Causes which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects, are not to be decided by natural Reason, but by the artificial Reason and Judgment of Law, which Law is an Act which requires long Study and Experience, before that a Man can attain to the Cognizance of it; and that the Law was the Golden Met-wand and Measure to try the Causes of the Subjects; and which protected his Majesty in Safety and Peace: With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; to which I said, that *Bracton* saith, *Quod Rex non debet esse sub homine, sed sub Deo & Lege.**

Page [65]

Vide Fleta  
fol. 2  
Bracton 74.

[*Note; Bracton and Fleta both affirm, Rex habet superiores in Regno Deum & Legem. Item curiam suam, &c. Comites & Barones, &c.*]

## ROBERTS'S Case.

Mich. 8 Jac. Regis.

## Courts Ecclesiastical. Prohibition.

Anrea 63, &c.  
Post. 76, 77.  
Tithes sub-  
tracted.

See Gibson's  
Cod. 719, 722.

Watson's Cler-  
gyman 578,  
589, &c. 632,  
&c.

**I**N this Term, in the Case of one *Roberts*, a Prohibition had been granted in a Case of Subtraction of Tithes, upon Surmise that the Plaintiff being Defendant in the Spiritual Court, had but one Witness in that Court to prove his Demise; to which that Court said, that *Singularis testis* is not allowable: And upon Consideration and Sight of a Prohibition granted upon the same Cause in *Hill. 3 El. in Banco Regis*, it was resolved by *Coke* Chief Justice & *totam Curiam in Communi Banco*, that Consultation should be granted, and that for divers Causes.

1. It appears by the Register, fol. 5. that it is put for a Rule, *Quod non est consonum rationi, quod cognitio accessorii in Curia Christianitatis impediatur, ubi cognitio causæ principalis ad forum Ecclesiasticum noscitur pertinere*: And with this agrees *1 R. 3. 4.*

2. If such a Surmise shall be allowed, then in every Case for meer Delay such a Surmise may be made; for he who was Plaintiff in the Spiritual Court cannot deny, that where it is surmised that he hath one Witness, that he hath two, or more, for then he affirms Matter against himself: And when the Spiritual Court hath Jurisdiction of the principal Cause, they determine the Accessory. But it was objected, that if *A.* claiming a Lease by *B.* of a Rectory, libels for Subtraction of Tithes, and the Defendant pleads a former Lease made by *B.* and *C.* and the Defendant hath but one Witness in the Case to prove the former Lease, if no Prohibition shall be granted, the Defendant shall be charged: And if *C.* sue him upon the Statute of *2 Ed. 6.* at the Common Law, the Testimony of that one only will there be sufficient, and so he shall be twice charged: To which it was answered, that first the Fault was the Defendant's, that he would not set forth his Tithes, and then he shall be charged whosoever takes them: But in such a Case, those of the Ecclesiastical Court will upon one good Witness,

## PART XII. *Courts Ecclesiastical. Prohibition.*

ness, and any concurrent vehement Presumption, as Possession, or the like, allow of such a Proof: And the Testimony of one Witness in our Law is no conclusive Evidence, but ought to be left to the Conscience of the Jury, and so the Validity or Invalidity of Proof of Matters of *Fait* shall be left to them; but if a Question of the Common Law arise from the Party upon the Construction of a Statute, or the like, and those of the Ecclesiastical Court will take upon them to judge of it against the Rule of Law, \* there *Page* [66] upon special Surmise of it, and upon the Shewing of the Answer or other Pleadings of the Parties, by which it appears to the Court, that such Surmise is on a good Ground, a Prohibition lies; for Matter in Law, arising upon Estates or Interests (given) by the Common Law and Construction of Statutes, ought to be determined according to the Rules of Common Law; *Et non debet trahi ad aliud examen.*

And *Coke* Chief Justice cited a notable Judgment, *Pasch. 35 El. in Bank le Roy*; *Fuller* brought a Prohibition against *Clemens* and *Wiskard*; and *Fuller* counted that he himself was Owner of the Rectory of *Longham* in the County of *Norfolk*, and libelled against *Clemens* one of the Defendants, before the Official of the Bishop of *Norwich*, for Substraction of Tithes, *scil.* of Wheat, &c. pendent which Suit, the said *Wiskard*, intervening *Pro interesse suo*, made these Allegations against the said *Fuller*.

1. That the said Rectory was impropriate to the Monastery of *Wendling*, and by the Dissolution of the said Monastery, came to the Hands of *H. 8.* and did convey it by Mesne Discent to Queen *Elizabeth*, who by her Letters Patent of Concealment granted it to *Min* and *Hall*, who enfeoffed *Bozome*, who did let it to *Wiskard* for four Years, and proved his Allegations by Witnesses, upon which in Fine, Sentence was given against *Fuller*, and 8 *l.* 10 *s.* given to *Clemens* for Costs, and 13 *l.* 6 *s.* to *Wiskard*; and after *Fuller* did appeal to the Court of the Arches, and there *Fuller* claimed the said Rectory by Reason that *Hall* was seised of it, and by his Deed gave and granted the said Rectory, and all Lands and Tithes to it appertaining, to Sir *Edward Clere*, before the Feoffment supposed to be made to *Bozome*: And that Sir *Edward Clere* by his Deed did enfeoff *Fuller*; and although that he offered to prove the Delivery of the Deed of the said Feoffment made to Sir *Edward Clere* by one sole Witness, the Ecclesiastical Court would not allow it without producing another Witness: And *Fuller* further said, that altho' he had further alledged there, that these were Matters determinable at the Com-

*Courts Ecclesiastical. Prohibition.* PART XII.

mon Law, notwithstanding they gave Sentence: The Defendants for to have a Consultation pleaded, that *Fuller* in the said Court of the Arches proved the Delivery of the Deed aforesaid, by Sir *Edward Clere* and *Moufe*, but could not prove Livery and Seisin according to the Deed: And for this cause Sentence was given, without (for) that the Judges of the Arches would not admit the said Proof, unless he proved the Deed by other Witnesses; upon which *Fuller* demurred in Law; and it was objected by the Counsel for *Fuller*.

1. That *Wiskard*, who is a meer Stranger to the Suit, and who comes in *Pro interesse suo* in the said Rectory, pleads Matter meerly determinable at the Common Law, *scil.* Letters Patent, Feoffment, and Lease for Years; and on the other Part *Fuller* claims an Estate in the said Rectory, by Conveyance at the Common Law. And now the Question in the Ecclesiastical Court being only who hath the best Estate in the said Rectory by the Common Law, this ought to be tried by the Common Law, and not in the Ecclesiastical Court; for this is the Birth-right of the Subject to have his Inheritance and Freehold tried and determined by Common Law; for the Civil Law differs much in deciding of Inheritances.

2. It was objected, that all Matters in Law ought to be determined by the Judges of the Law; and in this Case, Matters of Law arising, *scil.* If a Man hath a Rectory impropriate, which consists in Glebe and Tithes, and by his Deed gives and grants the said Rectory, and all Lands and Tithes any way belonging or appertaining to it, to another and his Heirs; \* and no Livery is made in this Case, if the Tithes shall pass, or no, for that Tithes may pass without any Livery: This Question is not fit to be determined by the Ecclesiastical Judges, but by the Judges of the Common Law, *Quod quisque novit, in hoc se exercet.*

3. It was objected, That *Wiskard* was a meer Stranger to the Suit, and all his Allegation is Temporal, and for that it is a stronger Case to maintain a Prohibition, forasmuch as betwixt him and *Fuller* nothing is in Question, but to whom the Inheritance of the Rectory belongs; but *Clements*, who is sued for Substraction of Tithes, hath greater Colour in his Defence, being lawfully sued in the Ecclesiastical Court, than for *Wiskard*, who is no Party to the Suit for any Ecclesiastical Cause, but all his Allegation, as hath been said, is Temporal.

## PART XII. *Courts Ecclesiastical. Prohibition.*

4. It was objected, that *Fuller* had but one Witness to prove the Delivery of the Deed ; and in the Ecclesiastical Law, *Unus testis, est nullus testis* ; for all which Causes it was prayed that the Prohibition may stand, and that no Consultation may be granted.

To which it was answered and resolved by Sir *Christop. Wray* Chief Justice, and *per totam Curiam*.

1. That to the first Objection, for that the Original belongs to the Ecclesiastical Court, the Determination of all that which depends upon it belongs to the Judges of the same Court, altho' that the Matter be triable by the Common Law ; but where the Original Matter belongs to the Common Law, and is there commenced, and issue be taken upon Matter triable by the Ecclesiastical Law, there the Judges of our Law shall write to the Judges of the Ecclesiastical Court to try it, and to certify: And the Reason of this Diversity is, for that our Judges have Authority to write and command them by the King's Writ to certify them ; but they cannot write to the Judges of our Law to try any Thing, and to certify them, for they have no such Authority to command by Writ, but to obey the Writs of the King: As in any Action Ancestral, if Bastardy be pleaded in the Demandant, and upon this issue is joined, this shall be tried by the Bishop, and his Certificate shall bind ; so in a *Quare Inpedit*, if issue be taken, whether a Clerk, which was presented, was able, or not able, this shall be tried by Examination of the Clerk, and certified by the Bishop: But altho' that such Issues are in their Nature triable by the Ecclesiastical Law, yet if the Case was such, that the Ecclesiastical Court could not try it, then (to the End that Justice shall not be wanting) such Ecclesiastical Matter shall be tried by the Common Law, as 4 *Ed.* 3. 26. if the Presentee be dead, if he was able, or not able, shall be tried *Per pais* ; for the Bishop cannot try it: But against this was objected the Statute *de Articulis Cleri*, c. 13. by which it is provided, *Quod de idoneitate Personæ personatæ ad beneficium Ecclesiasticum, pertineat examinatio ad Judicem Ecclesiasticum* ; upon which it was concluded, that the Trial *De idoneitate personæ*, in all Cases belongs to Court *Christian*. To which it was answered and resolved, that true it is, that the Trial of Ability belongs to them ; but the Statute explains in what Manner it shall be made, for the Statute saith, *Pertinet examinatio ad Judicem Ecclesiasticum*, so that this Trial ought to be by Examination of the Party, and this cannot be when the Presentee is dead:

And

See Cod. 1073.  
Vaugh. 304.  
2 Inst. 614.

## Courts Ecclesiastical. Prohibition. PART XII.

Page [68]

And although he be not Party to the Writ, yet he may be examined; and with this agrees 39 *Ed.* 3. 2. The Earl of *Arundel's* Case, and 4 *Ed.* 3. 25. 16 *El.* *Dyer* 327. So if Bastardy be alledged in one who is not Party to the Writ, there, for this, that the Certificate binds for ever, it should be against Law and Reason, that he should not be Party to the Certificate; for this Cause in such Case it shall be tried *Per \* pais*; and if any Difficulty ariseth upon it, the Judges of our Law use to consult with the Judges Ecclesiastical; and with this accords 4 *Ed.* 3. 37. The same Law of Profession, 42 *Ed.* 3. 8. So if Bastardy be alledged in one who is dead. *Vide* 17 *Ed.* 3. 5. where Bastardy is alledged in the Tenant, and one who is a Stranger to the Writ, who are Sisters. *Vide* 32 *Ed.* 3. *Trial* 59. where the Tenant alledgeth Bastardy in himself, and the Demandant doth aver him *Mulier.* *Vide* 29 *Aff. pl.* 14. 6 *El.* *Dyer* 226, 228. If the Issue be *quod vacavit per resignationem*, Part of which is Temporal, and Part Spiritual, this shall be tried *Per pais.* *Vide* 9 *H.* 7. Profession and the Time of it, &c. But Admission and Institution, altho' that it be alledged in a Stranger to the Writ, yet this shall be tried by the Ordinary; as it appears 7 *Ed.* 6. 78. 6. in *Dyer*; for Admission, Institution, Resignation, & *semilia*, are judicial Acts, and remain in their Courts and Register, upon which they ground their Certificate; otherwise it is of Bastardy, Idoneity, &c. By which it appears, that in divers Cases the Judges of the Common Law write to the Ecclesiastical Judges, commanding them to certify some Thing put in Issue; and the Judges of our Law prohibit the Judges Ecclesiastical to hold Plea of some Things which are determinable at Common Law: But the Court Ecclesiastical hath not Power to write to our Judges, or to command them, or to prohibit them when they hold Plea of Things determinable by the Ecclesiastical Judges; but this is erroneous, and shall be reversed by Error. And of the other side, if in the Ecclesiastical Court the Suit is for a Legacy, and the Defendant plead a Release, if in the admitting or rejecting of Proofs concerning this Release, which is Matter determinable at Common Law, they do Wrong to the Plaintiff or Defendant, they have no Remedy but by way of Appeal.

2. To the Second it was answered and resolved, that if upon Consultation with Men learned in the Law, they give Sentence according to Law, this is well done; and no Prohibition ought to be granted; but if they take upon them

## PART XII. Courts Ecclesiastical. Prohibition:

them to draw the Interest of any Man *ad aliud examen*; and to Judge against the Rule of Law, concerning the Inheritance or Interest of any, there Prohibition lies: And in the Case at the Bar, they well resolved the Law, for by the said Livery of the Charter the Tithes do not pass as gross, for this, that the Intention of the Parties was to pass the entire Rectory by Feoffment, and not to pass the Tithes by the same, and so to dismember the Rectory by Fractions, and that by Construction of Law, against the Intention of the Parties.

3. As to the Third, it was answered and resolved, that by the Ecclesiastical Law, a Stranger may come in *Pro interesse suo*; and when they have Jurisdiction of the original Cause of the Suit, we ought not to draw in Question their Order and Proceeding; but if they proceed *inverso ordine*, or not observing Form, this ought to be redressed by Appeal: And although that the Matter depending upon the original Cause be determinable by the Common Law, yet it shall be determined, as it hath been said, in the Ecclesiastical Court.

4. As to the fourth Objection, it was answered and resolved, that such a Surmise, that he hath but one Witness, is not sufficient to have a Prohibition, for this, that the Ecclesiastical Court hath Jurisdiction of the Principal, and if such a Surmise shall be sufficient, all Suits in the Ecclesiastical Court shall be either delayed, or quite taken away, for such a Surmise may be made in every Case; and the Plaintiff in the Ecclesiastical Court cannot have any good Answer to it to have a Consultation, which agrees with the Resolution in the Principal Case, &c.

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### \* SMITH'S Case.

Page [69]

IT was resolved, upon Evidence, by *Coke* Chief Justice *De Banco, inter J. S.* who informed upon the Stat. of Usury, and one *Smith*, that the Parties to the supposed usurious Contract shall not be admitted Witnesses, for this, that upon the Matter they were *Testes in propria causa*, and by their Oath shall avoid their Bond, &c. or shall be revenged on him who lent them the Money, before they are enforced to repay it: And for the most part they incite and raise up one of their own Servants to inform and have Part of the Thing recovered.

Ante 20.

Usury Evidence.

See 1 Hawk.

c. 82. Sect. 27.

2 Hawk. c. 46.

Sect. 24.

*Lady*

## *Lady THROGMORTON'S Case.*

Trin. 8 Jacobi I.

*High Commissioners.*

Hab. Corpus.  
Antea 19, 27,  
45, 47,  
Post. 82, 83,  
104, 219.

**U**PON a *Habeas Corpus* by *Elizabeth Lady Throgmorton*, Prisoner in the *Fleet*, the Return was; the *Lady Throgmorton* was committed by *George Bishop of London* and others, Ecclesiastical Commissioners, under their Hands, till further Order should be taken for her Inlargement: And the Cause of the Commitment of her was, for that she had done many evil Offices betwixt Sir *James Scudamore* and her Daughter the *Lady Scudamore*, Wife of the said *James*, and to make Separation betwixt them, and detained her from her Husband: And upon her Departure after Sentence before the Commissioners, for divers contemptuous Words against the Court, saying, that she neither had Law nor Justice there: And it was resolved, that for detaining of the Wife, and endeavouring to make Separation, no Suit can be before the high Commissioners, for that it is not any enormous Offence within the Meaning of the Act.

2. For the Detaining of the Wife, there is Remedy by the Common Law.

3. Without Question, for such an Offence they cannot imprison the Wife.

4. By the Words it doth not appear, that they were spoken in the Court.

Secondly, It is no Court of Record, for that they proceed according to the Civil Law, and it is like the Admiralty Court; and for this they cannot imprison, for none shall be committed for Misdemeanor in Court, unless that the Court be of Record.

5. It doth not appear by the Return what Court this was, which is uncertain; and upon this, upon good Consideration, she was bailed.

I

But

PART XII. *The Lord ABERGAVERY's Case.*

But *Randal* and *Hickins* were this very Term committed by the high Commissioners, for that they were vehemently suspected to be *Brownists*, &c. And they obtained a *Habeas Corpus*, and were remanded for this, that the high Commissioners have Power to commit for Heresy. *Quere nunc Stat. 29 Car. 2.* And the Stat. for abolishing this Court, &c.

\* *The Lord ABERGAVERY's Case.* Page [70]

IN the Parliament a Question was made by the Lord of *Northampton*, Lord Privy Seal, in the Upper House of Parliament: That one *Edward Nevil*, the Father of *Edward Nevil*, Lord of *Abergavenny*, which now is, in the 2d and 3d of *Queen Mary* was called by Writ to Parliament, and died before the Parliament: If he was a Baron or no, and so ought to be named, was the Question. And it was resolved by the Lord Chancellor, the two Chief Justices, Chief Baron, and divers other Justices there present, that the Direction and Delivery of the Writ did not make him a Baron or Noble until he did come to the Parliament, and there sit, according to the Commandment of the Writ; for until that, the Writ did not take its Effect, and the Words of the Writ were well penned, which are, *Rex & Regina, &c. Edwardo Nevil de Abergavenny Chivalier, Quia de advisamento & assensu concilii nostri pro quibusdam arduis & urgentibus negotiis statum & defensionem regni nostri Angliæ concernentibus, quoddam Parliamentum nostrum apud Westmonasterium, 21 die Octobris proximo futuro teneri ordinavimus, & ibidem vobiscum, ac cum Prælati, Magnatibus & Proceribus dicti regni nostri colloquium habere & tractatum: Vobis in fide & ligeantia, quibus nobis tenemini, firmiter injungendo mandamus, quod consideratis dictorum negotiorum arduitate & periculis imminenti- bus, cessante excusatione quacunque, dictis die & loco personaliter interfitis vobiscum, ac cum Prælati, Magnatibus ac Proceribus supradictis, super dictis negotiis tractaturis, vestrumque consilium impensur. & hoc sicut nobis, &c.* And in the 35 *H. 6.* 46. and other Books, he is called a Peer of Parliament, the which he cannot be until he sit in Parliament, and he cannot be of the Parliament until the Parliament begin; and forasmuch as he hath been made a Peer of Parliament by Writ, (by which implicitly he is a Baron) the Writ hath not its Operation and Effect, until he

The Writ doth not make a Peer, &c. Vide post 81, 96, 108, 112. 1 Inst. 16. 2 Salk. 509, 510.

*The Lord ABERGAVENY's Case.* PART XII.

he sit in Parliament, there to consult with the King and the other Nobles of the Realm; which Command of the King by his *Superfedeas* may be countermanded, or the said *Edward Nevil* might have excused himself to the King, or he might have waved it, and summited himself to his Fine; as one who is distrained to be a Knight, or one learned in the Law is called to be a Serjeant, the Writ cannot make him a Knight, or a Serjeant: And when one is called by Writ to Parliament, the Order is, that he be apparelled in his Parliament-Robes, and his Writ is openly read in the Upper-House, and he is brought into his Place by two Lords of Parliament, and then he is adjudged in Law *Inter Pares Regni*, that is to say, *Ut cum olim Senatores e censu eligebantur, sic Barones apud nos habitii fuerint, qui per integram Baroniam terras suas tenebant, sive 13 feoda militum, & tertiam partem unius feodi militis, quolibet feodo computato ad 20 l. quæ faciunt 400 marcas denarii erat valentia unius Baronie integræ, & qui terras & redditus ad hanc valentiam habuerint, ad Parliamentum summoniri solebant*; so that by this it appears, that every one who hath an intire Barony may have of Right and of Course a Writ to be summoned to Parliament, for without Writ none can sit in Parliament: And with this agrees our Books, for *una voce* they agree, that none can sit in Parliament as Peer of the Realm, without Matter of Record; and if Issue be taken, whether a Baron or no Baron, Earl or no Earl, this shall not be tried *per pais*, but by the Record, by which it appears, that he was a Peer of Parliament; for without Matter of Record he cannot be a Peer of Parliament, \* 35 H. 6. 46. 48 Ed. 3. 30. b. 48 Aff. pl. 6. 22 Aff. pl. 24. Register 287. *Henricus tertius post magnas perturbationes & enormes exactiones inter ipsum Regem, Simonem de monte forti, & alios Barones motas & susceptas, statuit & ordinavit, quod omnes illi Comites & Barones Regni Angliæ, quibus ipse Rex dignatus est brevia summonitionis dirigere, venirent ad Parliamentum, & non alii nisi forte Dominus Rex alia illa brevia eis dirigere voluisset*: Which Act or Statute continues in Force to this Day, so that now none, although that he hath an intire Barony, can have a Writ of Summons to Parliament without the King's Warrant, under the Privy Seal at least.

Note.

Post 96.

Page [71]

But if the King creates any Baron by Letters Patent under the Great Seal to him and his Heirs, or to him and to his Heirs of his Body, or for Life, &c. there he is a Nobleman presently; for so he is expressly created by Letters Patent of the King, which cannot be counter-

PART XII. *OLDFIELD and GERLING's Case.*

countermanded; and he ought to have a Writ of Summons to Parliament of Right and of Course, and he shall be try'd by his Peers, if he shall be arraigned before any Parliament; but so shall not he be who is called by Writ, until he sits in Parliament, which is the Diversity.

*Richard* the second created *John Beauchamp of Holt*, Baron of *Kidderminster*, by Letters Patent, dated 10 Oct. 11 Year of his Reign, where all others before him were created by Writ. *Vide Cotton* 319, he was summoned by Writ. *But 'tis said he never sate in Parliament. And note; he was Delapool's Friend, and fell with him.*

OLDFIELD *and* GERLING's Cases.

Trin. 8 Jac. 1.

**I**N this very Term *Thomas Oldfield* came out of the Court of the Dutchy, and before he came into *Westminster-Hall*, with a Knife stabbed one *Ferrar*, a Justice of Peace, of which he died: And if *Oldfield* should have his Right Hand cut off, was the Question before the two Chief Justices, Chief Baron, *Walmesley*, *Warberton*, *Foster*, and divers other Justices. And it was resolved, no; for it ought to be in the Hall of *Westminster*, *sedentibus Curii*, as it appears in 3 *Eliz. Dyer* 188. 41 *Ed.* 3. Title *Coron.* 280. And a Precedent was shewn, *An. 9 Eliz. in Banco Regis*, where one *Robert Gerling* smote one in *Whitehall*, sitting in the Court of Requests, and was but fined and ransomed: The same Law if one smite one in the Court of the Dutchy: But if one smite another before the Justices of Assise, there his Right Hand shall be cut off, as it appears, 22 *Ed.* 3. fol. 13. and 19 *Ed.* 5. Title *Judgment*. And one *Bellingham*, *An. 2 Jac.* in the Hall of *Westminster*, *Sedentibus Curii*, with his Elbow and Shoulder, out of Malice, justled *Anthony Dyer* of the *Inner Temple*, so that he overthrew him, and with his Feet spurned him upon the Legs, but did not smite him neither with his Hand, nor with any Weapon: And yet it was held that his Right Hand should be cut off, &c. upon which *Bellingham* was indicted in *Banco Regis*, but after obtained his Pardon.

Stabbing in Westminster Hall. See 6 Mod. 75, 76. 1 Sid. 211. Cro. Car. 272. Ryley's Plac. Par. 6, 7. Pryn on 4 Inst. 18, 19. 2 Inst. 449. Gerling's Case.

Bellingham's Case.

## *Bishop and Deans Leases.*

Page [72]

A Case was put to all the Justices of *England*, which was such; the Bishoprick of *Waterford* and *Lismore*, being originally two Bishopricks distinct, were by lawful Authority in the Reign of *H. 3.* united and consolidated, but the Chapters yet remain several; after which Union the Bishop aliened Lands of the See of *Waterford*, and aliened Lands of the See of *Lismore*, with the Confirmation of the Chapter of *Lismore*; the Question was, whether such Alienations are not voidable by the Successor, being without the Confirmations of both the Deans and Chapters. The second Question\* was, Whether the Queen might avoid such Alienations, *contra formam collationis* by Seifure, or otherwise: And the Justices demanded a View of the Union; to which it was answered, That it was not extant; then it was resolved by the Justices, that inasmuch as the Usage hath been after the said Union, that the several Deans and Chapters have severally made Confirmations, *ut supra*, it shall be intended that the Union was made especially in such Manner, *scil.* That notwithstanding the Union, yet for Avoiding of Confusion, and in Respect of the Remoteness of the Deaneries and Chapters, that Estates made shall be severally confirmed, as before the Union, and then such Confirmations shall be good, for in such Case, *Modus & conventio vincunt Legem*. But if the Union was made generally, and the Bishop eligible by both Chapters, then Estates made ought to be confirmed by both the Chapters. *Vide 50 Edward 3. Title Assise, Statham, the Time of R. 2. Title Grant, 27 H. 8. Dyer 58. 11 El. Dyer 33 H. 8. cap.*

See 2 Co 41.  
4 Co 76. 108.  
6 Co. 68.  
8 Co. 170.  
11 Co. 11.

It was resolved, that upon a lawful Alienation made, with Confirmation of the Dean and Chapter, no *contra formam collationis* lieth upon the Statute of *Westminst. 2. 35* hath been resolved in *the seventh Part of my Reports.*

Of Convocations.

Trin 8. Jac. 1.

**N**OTE; it was resolved by the two Chief Justices and divers other Justices, at a Committee before the Lords in the same Parliament, on divers Points concerning the Authority of a Convocation.

See Gibson's Codex p. 28, 40, 54, 98, 413, 474, 528, 974, 984. 4 Inst. 322. 1 Hawk. ch. 2. Sect. 2, 3, 4. 2 Salk. 412.

1. That a Convocation cannot assemble at their own or the Achbishop's Convocation, without the Assent of the King, *i. e.* by *Writ*.

2. That after their Assembly they cannot confer together to constitute any Canons without Licence *del Roy*.

3. When they upon Conference conclude any Canons, yet they cannot execute any of their Canons without Royal Assent.

4. They cannot execute any after Royal Assent, but with these four Limitations.

1. That they be not against the Prerogative of the King.

2. Nor against the Common Law.

3. Nor against any Statute Law.

4. Nor against any Custom of the Realm.

See Bp Wake's State of the Church, Chap. 10, &c.

And all this appears by the Statute 25 *Hen. 8. cap. 19.* and this was but an Affirmance of what was before the said Statute, for that it appears by the 19 *Ed. 3. Title Quare non admittit* 7. where it is held, that if a Canon, Law be against the Law of the Land, the Bishop ought to obey the Commandment of the King, according to the Law of the Land, 10 *H. 7. 17.* there is a Canon that no spiritual Person shall be put to answer before a secular Judge; but this does not bind, because it is against the Common Law: And it appears by the Statute of *Merton, cap. 9.* that they in Case of Bastardy were enforced to certify against the Law of the holy Church, that *Nati ante matrimonium fuerint Bastardi, quia Ecclesia habet tales pro legitimis, & rogaverunt omnes Episcopi Magnates quod consentirent, quod qui nati fuerint \* ante matrimonium essent legitimi*; which proves, that the Canon

2 Inst. 97, 98.

Page [13]

1 Inst. 182 397  
470  
4 Inst. 322, 323

Law in this Point being repugnant to the Law of the Land, was not of any Force: And for this, they implored the Aid of the Parliament, *Et omnes Comites & Barones una voce responderunt, quod nolumus leges Angliæ mutari, quæ huc usque usitate sunt & approbate.*

2 H. 6. 13. A Convocation may make Constitutions, by which those of the Spirituality shall be bound, for this, that they all, or by Representation, or in Person, are present, but not the Temporality.

21 Ed. 4. 47. The Convocation is spiritual, and all their Constitutions are spiritual. *Vide* the Records in the Tower of 18 H. 8. 8 Ed. 1. 25 Ed. 1. 11 Ed. 2. & 15 Ed. 2.

*Prohibitio Regis ne Clerus in Congregatione sua, &c. attemptet contra jus seu coronam. Et alia, ne quod statuat in Concilio suo in præjudicium Regis seu legis, &c.* By which it appears, that they can do nothing against the Law of the Land; for every Part of the Law, be it Common Law, or Statute Law, cannot be abrogated nor altered without an Act of Parliament, (to which every one shall be Party) except for spiritual Causes, or which concern spiritual Persons; nor then, if it be against the Prerogative of the King or the Common Law.

## Piracy.

Trin. 8 Jac. 1.

Ld. Admiral.  
See 4 Inst. 136.  
Polh. 79.

Bona Piratorum, &c.  
Moloy, lib. 1.  
chap. 3, 4.

**I**N this very Term the King referred the Consideration of Letters Patent of the Lord Admiral of *England*, to the two Chief Justices, and the Chief Baron, whether by the said Letters Patent, the Goods which Pirates should take from others by Robbery and Piracy did pass to the Lord Admiral or no? And upon the Consideration of the said Letters Patent, it appeared to us, that thereby he had *Bona & Chattalla Piratorum*, and also *Bona & Chattalla deprædata, id est*, the Goods robbed from others; which did not pass for two Causes.

1. If the King grant *Bona & Chattalla Felonum*, the Patentee shall have the Goods and Chattels of the Felon himself, in which he hath Property, but he shall not

not have the Goods and Chattels which the Felon stealeth from others.

2. The Goods taken from others the King cannot grant, for it appears by the Statute 27 *Ed. 3. cap. 8. S. 2.* that the Merchant, &c. so robbed shall be received to prove, that the Goods and Chattels belong to him by his Chart or Cocker, or by other lawful Proof of Merchants, &c. the said Goods shall be delivered without any Suit at the Common Law, which Act is general, be the Robber privy or a Stranger: But it was resolved, that until such Proof be made, the King may seise the said Goods; for Goods of which the Property is unknown, the King may seise: And if they are *Bona peritura*, the King may sell them; and upon Proof, &c. restore the Value. And note; the Statute doth not limit the Owner in Case of Depredation to any certain Time to prove the Property of the same Goods, as ought to be in Case of Wreck. *Vide Stat. 31 H. 6. cap. 4. Vide 2 R. 2. cap. 2. 1; Ed. 4. 9, 10.* a good Resolution of the Justices. And the Register \* 129. *F. N. B. 114.* when a Subject of *Page [74]* the King, who is spoiled beyond the Seas, shall have a Writ, &c. for to take Goods within *England, &c.*

*Simony.*

Trin. 8 Jac. 1.

IT was agreed *ad mensam*, by all the Justices and Barons in *Fleetstreet*, that if the Patron, for any Money, present any Person to any Benefice with Cure, &c. that then every such Presentation, and the Admission, Institution and Induction thereupon, are void, although that the Presentee be not Party nor privy to it; for the Statute intends to punish the wicked Avarice of corrupt Exactions by the Loss of his Presentation *hac vice*, and the Statute gives the Presentation to the Queen; and all this *per verba statuti*, which is penned strongly enough against corrupt Patrons.

See Watson's  
Clergyman's  
Law, chap. 5.  
& pa. 48, 96,  
97, 146, &c.  
Post. 101.

## Proclamations.

Mich. 8 Jac 1.

Proclamation  
cannot make  
that an Offence  
which was not.  
See Gibbon's  
Codex \* 989,  
\* 991.  
antea 19.

*MEMORAND.* That upon *Thursday*, 20 Sept. 8 Regis *Ja-*  
*cobi*, I was sent for to attend the Lord Chancellor,  
Lord Treasurer, Lord Privy Seal, and the Chancellor of  
the Dutchy; there being present the Attorney, the Solicitor,  
and Recorder: And two Questions were moved to me  
by the Lord Treasurer; the one, If the King by his  
Proclamation may prohibit new Buildings in and about  
*London*, &c. the other, If the King may prohibit the  
Making of Starch of Wheat; and the Lord Treasurer said,  
that these were preferred to the King as Grievances, and  
against the Law and Justice: And the King hath answered,  
that he will confer with his privy Council, and his  
Judges, and then he will do Right to them. To which I  
answered, That these Questions were of great Importance.  
2. That they concerned the Answer of the King to the  
Body, *viz.* to the Commons of the House of Parliament.  
3. That I did not hear of these Questions until this  
Morning at Nine of the Clock; for the Grievances were  
preferred, and the Answer made when I was in my Circuit.  
And lastly, both the Proclamations, which now were  
shewed, were promulgated, *An. 5 Jac.* after my Time of  
Attorneyship: And for these Reasons I did humbly desire  
them that I might have Conference with my Brethren the  
Judges about the Answer of the King, and then to make an  
advised Answer according to Law and Reason. To which the  
Lord Chancellor said, that every Precedent had first a  
Commencement, and that he would advise the Judges to  
maintain the Power and Prerogative of the King; and in  
Cases in which there is no Authority and Precedent, to  
leave it to the King to order in it, according to his  
Wisdom, and for the Good of his Subjects, or otherwise  
the King would be no more than the Duke of *Venice*:  
And that the King was so much restrained in his  
Prerogative, that it was to be feared the Bonds would  
be broken: And the Lord privy Seal said, that the  
Physician was not always bound to a Precedent, but  
to apply his Medicine according to the Quality of the  
Disease:

Disease: And all concluded that it should be necessary at that Time to confirm the King's Prerogative with our Opinions, although that there were not any former Precedent or Authority in Law; for every Precedent ought to have a Commencement.

\* To which I answered, That true it is that every Precedent hath a Commencement; but when Authority and Precedent is wanting, there is need of great Consideration, before that any Thing of Novelty shall be established, and to provide that this be not against the Law of the Land: For I said, that the King cannot change any Part of the Common Law, nor create any Offence by his Proclamation, which was not an Offence before, without Parliament. But at this Time I only desired to have a Time of Consideration and Conference with my Brothers, for *Deliberandum est diu, quod statuendum est semel*; to which the Solicitor said, that divers Sentences were given in the Star chamber upon the Proclamation against Building; and that I my self had given Sentence in divers Cases for the said Proclamation: To which I answered, that Precedents were to be seen, and Consideration to be had of this upon Conference with my Brethren, for that *melius est recurrere, quam male currere*; And that Indictments conclude, *Contra leges & statuta*, but I never heard an Indictment to conclude, *Contra regiam Proclamationem*. At last my Motion was allowed, and the Lords appointed the two Chief Justices, Chief Baron, and Baron *Altham* to have Consideration of it.

Note; The King by his Proclamation, or other Ways, cannot change any Part of the Common Law, or Statute Law, or the Customs of the Realm, 11 *H.* 4. 37. *Fortescue de laudibus Angliæ legum, cap. 9.* 18 *Ed.* 4. 35, 36, &c. 31 *H.* 8. *cap. 8. hic infra*: Also the King cannot create any Offence by his Prohibition or Proclamation, which was not an Offence before, for that was to change the Law, and to make an Offence which was not; for, *Ubi non est lex, ibi non est transgressio*; ergo, that which cannot be punished without Proclamation, cannot be punished with it. *Vide le Stat. 31 H. 8. cap. 8.* which Act gives more Power to the King than he had before, and yet there it is declared, that Proclamations shall not alter the Law, Statutes, or Customs of the Realm, or impeach any in his Inheritance, Goods, Body, Life, &c. But if a Man should be indicted for a Contempt against a Proclamat. he shall be fined and imprisoned, and so impeached in his Body and Goods. *Vide Fortescue, cap. 9, 18, 34, 36, 37, &c.*

But a Thing which is punishable by the Law, by Fine, and Imprisonment, if the King prohibit it by his Proclama-

tion, before that he will punish it, and so warn his Subjects of the Peril of it, there if he permit it after, this as a Circumstance aggravates the Offence; but he by Proclamation cannot make a Thing unlawful, which was permitted by the Law before: And this was well proved by the ancient and continual Forms of Indictments, for all Indictments conclude, *Contra legem & consuetudinem Angliæ, or contra leges & statuta, &c.* But never was seen any Indictment to conclude *contra regiam Proclamationem.*

So in all Cases the King out of his Providence, and to prevent Dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the Offence if it be afterwards committed: And as it is a grand Prerogative of the King to make Proclamation (for no Subject can make it without Authority from the King, or lawful Custom) upon Pain of Fine and Imprisonment, as it is held in the 22 *H. 8. Procl. B.* But we do find divers Precedents of Proclamations which are utterly against Law and Reason, and for that void; for *Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam.*

An Act was made, by which Foreigners were licensed to merchandize within *London*; *H. 4.* by Proclamation prohibited the Execution of it; and that it should be in Suspence *usque ad proximum Parliament*, which was against Law. *Vide dorf. claus. 8 H. 4. Proclamat. in London.* But 9 *H. 4.* \* An Act of Parliament was made, That all the *Irish* People should depart the Realm, and go into *Ireland* before the Feast of the Nativity of the blessed Lady, upon Pain of Death, which was absolutely *in terrorem*, and was utterly against the Law.

*Hollinshhead 722. Ann. Dom. 1546. 37 H. 8.* the Whorehouses, called the Stews, were suppressed by Proclamation and Sound of Trumpet, &c.

In the same Term it was resolved by the two Chief Justices, Chief Baron, and Baron *Altham*, upon Conference betwixt the Lords of the Privy Council and them, that the King by his Proclamation cannot create any Offence which was not an Offence before, for then he may alter the Law of the Land by his Proclamation in a high Point; for if he may create an Offence where none is, upon that ensues Fine and Imprisonment: Also the Law of *England* is divided into three Parts, Common Law, Statute Law, and Custom; but the King's Proclamation is none of them: Also *Malum aut est malum in se, aut prohibitum*, that which is against Common Law is *malum in se, malum prohibitum* is such an Offence as is prohibited by Act of Parliament, and not by Proclamation.

Also

Also it was resolved, that the King hath no Prerogative, but that which the Law of the Land allows him.

But the King for Prevention of Offences may by Proclamation admonish his Subjects that they keep the Laws, and do not offend them; upon Punishment to be inflicted by the Law, &c.

Lastly, if the Offence be not punishable in the Star-Chamber, the Prohibition of it by Proclamation cannot make it punishable there: And after this Resolution, no Proclamation imposing Fine and Imprisonment, was afterwards made, &c. *Quære antea* 20.

*Prohibition.*

Mich. 8 Jac. 1.

**N**OTE; it was resolved in the same Term, That if a Man be excommunicated by the Ordinary, where he ought not to be, as after a general Pardon, &c. and the Defendant being negligent doth not sue a Prohibition, but remains excommunicate by forty Days, and upon Certificate in Chancery, he is taken by the King's Writ *De excommunicato capiendo*; that no Prohibition lies in this Case, for that he is taken by the King's Writ, and no Precedent or Authority can be found where a Prohibition was granted after the Party was taken by the King's Writ; for Prohibition lies to prohibit Ecclesiastical Proceedings, not any Thing which is done by the King's Writ by Force of the Common Law; and if a Prohibition be granted, it will not deliver the Party: Then it was moved, what Remedy hath the Party who is so wrongly excommunicated? To which it was answered, that he hath three Remedies, &c.

No Prohibition after the Writ De Excommunicato capiendo. Comb. 166. 2 Rol. 318. Hob. 79. That Prohibitions may go after Sentence. See Farr. 148, 337. 1 Sid. 65. 332. 1 Show. 158, 172. 6 Mod. 252. Comb. 253, 254, 448, 462.

1. He may have a Writ out of Chancery to absolve him; for as it is held in 14 H. 4. fol. 14. In all Cases where a Man is excommunicated by the Bishop against our Law, he shall have a Writ out of the Chancery directed to the Bishop, commanding him to assail him: And with this agrees 7 Ed. 4. 14.

2. When a Man is excommunicated against the Law of this Realm, so that he cannot have a Writ *De Cautione*

Page [77] *admittenda*, for then he ought \* *Parere mandatis Ecclesie in forma Juris, id est, Ecclesiastici*, where in Truth it is, *Excommunicatio contra Jus & formam Juris, id est, communis Juris*: But if he shew his Cause to the Bishop, and request him to assail him, for this, that he was excommunicated after the Offence was pardoned, or this, that the Cause doth not appear to be of Ecclesiastical Cognizance, and he refuse to assail him, so that he is now disabled to sue any Writ of the King, so long as he remains excommunicated, he may have an Action *sur le Case* against the Ordinary, who hath done him this Wrong, to disable him in this Case; and with this agrees the *Dr. & Stud. lib. 2. cap. 32. fol. 119.*

3. If the Party be excommunicated for none of these Causes mentioned in the Act of 5 *Eliz. cap. 23.* then he may have this for Plea in the King's Bench by the same Act, and avoid the Penalties inflicted by the same Act.

See 13 Co. 4.  
5, &c. ib.

Note; it was resolved by the Court, &c. that where one is cited before the Dean of the Archives in Cause of Defamation, for calling the Plaintiff Whore, out of the proper Diocese, *scil.* the Diocese of *London*, against the Statute of 23 *H. 8.* and the Plaintiff hath Sentence, and the Defendant is excommunicated, and so continues 80 Days: And upon Certificate into the Chancery, a Writ of *Excommunicato capiendo* is granted, and after the Defendant is taken and imprisoned by Force of it, that he shall not have a Prohibition upon the Statute 23 *H. 8.* for no Writ in the Register extends to it, *Et sententia, si quam fulminaveritis, sine dilatione revocetis*, and after Sentence is appealed, a Prohibition lies, as appears by the Register; but no Writ nor Precedent can be shewn in this Case; but there is a Writ in the Register called a Writ *De cautione admittenda*, when the Defendant is taken by the King's Writ *De Excommunicato capiendo, de parendo mandatis Ecclesie*, and to assail and deliver the Defendant: But note a Diversity, where it appears to the Court, that the Matter of the Libel is not within their Jurisdictions, as of Lay Fee, or of Lay Contract, &c. there lies a Prohibition with Clause to deliver the Party, for there he cannot find Caution *De parendo mandatis Ecclesie*, for this, that *Mandata Ecclesie* are *contra legem & extra jurisdictionem suam*: But in the Case at the Bar, although it appears by the Libel, that the Defendant was of one such Parish in *London*, yet inasmuch as the Stat. 23 *H. 8.* hath many Exceptions, *scil.* That the Ordinary request the Archbishop, &c. to examine the Case, &c. so that the said Defamation being the Matter of the Libel, is of Ecclesiastical Cognizance, and the Statute hath many Exceptions, so that

See 13 Co. 6, 7.

that it doth not appear to us judicially without Information, that the Citation is against the Form of the Statute; and this Information comes too late in this Case after the Defendant hath persisted so long in his Contumacy, and is taken by the King's Writ and imprisoned.

*Admiralty.*

**I**T was resolved *per totam Curiam*, that if one be sued in the Admiralty Court for a Thing alledged to be done upon the High Sea, within the Jurisdiction of the Admiral, and the Defendant plead to it, and confess the Thing to be done, and after Sentence is given, the Court will be advised to grant a Prohibition, upon Surmise that it was done *infra corpus Comitatus*, against their own Confession, unless it can be made to appear to the Court \* by any Matter in Writing, or other good Matter, that this was done upon the Land, for otherwise every one will stay until after Sentence, and then for Vexation only sue out a Prohibition; for altho' the Admittance of the Party cannot give a Jurisdiction to the Court where it of Right hath none, for that it will be an Incroachment upon the Common Law; yet when the Court shall be advised that it is meerly for Vexation, and shall be intended for Delay, if the Prohibition shall not be sued forth, till after Sentence; unless that he can shew good Matter to the Court to ascertain the Court that this is not for Vexation, it shall not be granted. And Admonition was given to them which sue forth Prohibitions, that they should not keep them by long Time in their Hands, and notwithstanding proceed in the Ecclesiastical Court, &c. And when they perceive that they cannot prevail, then to cast in their Prohibitions; for if they abuse that Liberty to the Damage and Vexation of the Party, we will take such Order as in Case of a Writ of Privilege, if the Defendant keep it until the Jurors are ready, &c. it shall not be allowed.

The Court cannot grant prohibition after Sentence. Vide ant. pag. 53, 52, 76. contra.

Page [78]

Vide antea 76.

## Dr. TREVOR'S Case.

Hill. 8 Jac. I.

*Bishops, Chancellor and Register.*

Corruption in Officers, &c. Vide Baldum de falsitate verf. finem, & Peckium de jure listendi, cap. 24. See 13 Co. 24, &c. ib.

**I**N this very Term in the Case of Dr. Trevor, who was Chancellor of a Bishop in *Wales*, it was resolved, that the Office of a Chancellor and Register, &c. in the Ecclesiastical Courts, are within the Stat. 5 Ed. 6. cap. 16. the Words of which Statute are, *Any Office, &c. which shall in any Ways touch or concern the Administration or Execution of Justice*; and the Words are strongly penned against Corruption of Officers, for they are, *Which shall in any wise touch or concern the Administration, &c.* And the Preamble, *And for Avoiding of Corruption which may hereafter happen to be in the Officers and Ministers of those Courts, Places, and Rooms, wherein there is requisite to be had the true Administration of Justice in Services of Trust: And to the Intent, that Persons worthy and meet to be advanced to the Place where Justice is to be ministered, in any Service of Trust to be executed, should be preferred to the same, and none other.* Which Act being made for Avoiding of Corruption in Officers, &c. And for the Advancement of Persons more worthy and sufficient for to execute the said Offices, by which Justice and Right shall be also advanced, shall be expounded most beneficially to suppress Corruption. And inasmuch as the Law allows Ecclesiastical Courts to proceed in Case of Blasphemy, Heresy, Schism, Incontinence, &c. and the Loyalty of Matrimonies, of Divorce, of the Right of Tithes, Probate of Wills, granting of Administrations, &c. And that from these Proceedings depend not only the Salvation of Souls, but also the Legitimation of Issues, &c. 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 most Reason that such Officers, which concern the Administration and Execution of Justice in these Points, which concern the Salvation of Souls, and the other Matters aforesaid, shall be within this Statute, then Officers which concern the Administration or Execution of Justice

in

in Temporal Matters; for this, that Corruption of Officers in the said Spiritual and Ecclesiastical Causes is more dangerous than the Officers in Temporal Causes; for the Temporal Judge commits the Party convict to the Gaoler, \* but the Spiritual Judge commits the Person excommunicate to the Divil. Also those Officers do not only touch and concern the Administration of Justice, &c. but also are Services of great Trust, for this, that the principal End of their Proceedings is *pro salute animarum*, &c. and there is no Exception or Proviso in the Statute for them.----Ergo

*It was resolved that such Offices were within the Purview of the said Statute.*

Page [79]  
The Divil,  
Warden or  
Gaoler of the  
spiritual  
Courts.

## Admiralty.

Hill. 8 Jacobi Regis.

IT is to be understood, that the Jurisdiction of the Admiralty is more ancient than Mr. *Lambert* in his Jurisdiction of Court doth affirm, for there is held an Opinion in these Words concerning the Admiralty; I think that the Decision of marine Causes was not put out of the King's House, and committed over to the Charge of the Admiral, until the Time of *Ed. 3.* whereunto I am led, partly by the Consideration of the Time of his Reign, which was much occupied in Affairs beyond the Seas, and by Reason of his Wars with *France*, and of the Intercourse and Trade of Merchandize, which then flourished; and partly, for that I find no Mention of the Admiralty before the Reign of *R. 2.* who going about by a Statute made the thirteenth Year of his Reign, to restrain the Authority of that Court which had exceeded her known Limits, doth take Order, that it should meddle no more than it was wont to do in the Time of his Grandfather *Edw. 3.* thereby reducing its Authority, as I think, to the first Original (*hoc ille*): But without Question the Jurisdiction of the Admiralty is more ancient than the Reign of the said King *Edw. 3.* For where it is said, that there is found no Mention of it before the Time of *Ed. 3.* I find a notable Book in the Time of *Edw. 1.* Title *Avowry* 192. which proves the Jurisdiction of the Admiralty more ancient than Mr. *Lambert* supposeth: The Case was; *One brought a Replevin of his Ship taken on the Coast of Scarborough, upon the Sea, and*

Antea 73.

See 4 Inst. 134.

Sec. to 147.

Inst. 84.

See Spelm.

Gloss verbo

Admiral.

4 Inst. 140.

carried into the County of Norfolk, and there detained: The Plaint of taking in the Coast of Scarborough, which is no Town nor Place certain by which the Pais may be taken, for the Coast contains four Leagues. And also of a Thing done at Sea, this Court cannot have Cognizances, for this Judgment is given to Mariners. Beresford who gave the Rule in the Case: The King Wills that the Peace be kept as well upon the Sea as upon the Land: And we find that you come by due Process, and we see nothing why you ought not to answer, upon which Book I observe five Things.

1. That of Things done upon the Sea, certain Judgment is given to Mariners, id est, to Admirals, as shall appear, and that doth not belong to the Court of the King, for this, that no Pais may be taken there: And for this, that of a Thing in any Town or Place where the Pais or Jury may come, there the Admiral hath not Jurisdiction.

2. This proves directly, that then the Admiral hath Jurisdiction to adjudge Things done upon the Sea, from whence no Pais may come; and this did not begin then: But without Question, so long as there hath been Trade and Traffick (which is the Life of every Island) there was Marine Jurisdiction to redress Depredations, Piracies, Murders, and others Offences \* upon the Sea; and to determine all Contracts made there: And this doth appear by the said Beresford Chief Justice (who speaks in the Voice of all the Court) where he says, that the King willeth that the Peace be as well kept upon the Sea as upon the Land; and it is not possible that Peace should be kept without Jurisdiction of Justice.

3. The third Thing to be observed is, That if Part of the Matter be done upon the Sea, and Part in a County, that the Common Law shall have all the Jurisdiction.

4. The Sea within the Jurisdiction of the Admiral is described to be out of every County, for if the Sea be within any County, then Pais may come from thence, and the Admiral hath Jurisdiction where the Common Law cannot give Remedy.

5. If a Thing be done upon the Sea, Hors del County, the Party may plead it to the Jurisdiction of the Court: And all these Points are directly, without any Strain, collected out of the said Book.

And it is to wit, that in ancient Time the Jurisdiction of the Admiral was called *Maritima Angliæ*, and sometimes *Marina Angliæ*, and so the *Vocabulum artis* was made of an Adjective, as the Office of Chamberlainship of England

was

was granted to the E. of Oxford of ancient Time, *Per nomen Camerariæ Angliæ*, so that *Maritima Angliæ*, and since *Marina Angliæ*, signifies the Admiralship, or Marinship of England: for *Marinus*, *id est quod θαλάσσιος*, that is, of the Sea, and *θαλασσιάρχος*, is the Admiral or General of the Fleet; and *Almarah*, by Corruption *Admiral*, signifies the Governor or Captain of the Navy; and so *Archigubernus* signifies the Admiral or chief Governor of the Captains of the Navy, chief Captain of Mariners, Admiral of the Fleet, Admiral of the Ships, &c. *sunt synonyma*: And in antient Time, sometimes one was Admiral of all England, and sometimes the Office was divided: And for this *Ex* Vide Spelman ut ant. *Rotulo Patentium de An. 6 H. 3. de Maritima Custodienda*, the Letters Patent are; *Dominus Rex commisit Galfrido de Lacy Maritimam Angliæ custodiendam quamdiu Dominus Rex placuerit*, with Commandment of that Attendance, *ad fidem, commodum, & honorem Domini Regis. Teste apud Lond. 29 Augusti.*

*Ex Rotulo Patentium Anno 9 H. 3. Rex omnibus de Costera maris Norf. & Suff. salutem. Sciatis quod concessimus Ricardo Agnillum Marinam Guardiam Norf. & Suff. cum omnibus pertinentiis, scil. Erewel, Oreford, Dunmervie, Gerem. & Lenn custodiendam quamdiu nobis placuerit, & ideo vobis mandamus, quod ei in omnibus, quæ ad dictam Marinam pertinent, intendentes sitis & respondentes. Teste, &c. apud West. 3. Octob. And Giffrey Lacy was called Admiral of England.*

*Charta 15 H. 3. 28. Junii, Petrus de Rivall habet ad totam vitam suam Custodiam omnium Portuum & totius Costeræ Marinæ Angliæ cum omnibus libertatibus & liberis consuetudinibus prædict. Portuum & Costeræ Maris pertinentibus, &c. 2 pars Patent. 25 Ed. in 14 Claus. in Dorso in 18 William Leybourne Capitaneus Marinariorum.*

At this Time there were two Admirals; the one had the Government of all the Fleet from the Mouth of *Thames* versus *Boream*, the other from the Mouth of *Thames* versus *occidentem*. 1. *Pars Patent. 25 Ed. 1. 25. Martii in 9. Johannes Botetort Custos Regis portuum Maritimarum versus partes boreales. 1. Pars Patentium, 10 Ed. 2. 8 Dec. Nicolaus Kirril constituitur Admirallus del Fleete, scil. omnium Navium ab ore aquæ Thamisiss versus partes occidentales, 18 Aug. Et ibid. Tho. de Drayton Admirallus ab ore aquæ Thamisiss versus partes Boreales.*

And so in the Time of R. 2. H. 4. H. 5. H. 6. during whose Reigns there was likewise *unus, qui fuit Admirallus Angliæ.*

\* 8 Ed. 2 Coron. 399. Where a Man may see that which *Page [81]* was done of one Part, and the other of the Water, &c. in that

that Place the County may have Cognizance, and it may be tried by a Jury; which proves also, that that which may be tried by the Common Law, doth not belong to the Admiral's Jurisdiction: And *Stamford's Pleas of the Crown*, lib. 1. fol. 51. citing this Book, says thus, viz. So this proves that by the Common Law before the Statute, &c. the Admiral shall not have Jurisdiction, unless upon the high Sea, which proves that the Admiral by the Common Law hath Jurisdiction upon the high Sea, *Ex quo sequitur*, that his Jurisdiction was by the Common Law, and then it is so ancient, that the Commencement cannot be known; so that I do conclude, that his Authority did not begin in the Reign of *Ed. 3.* as Monsieur *Lambert*, upon uncertain Conjectures supposeth: For if the Jurisdiction hath then began and been instituted, it would have appeared upon Record.

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## *Honours and Dignities.*

Pasch. 9 Jac. 1.

Creations of  
Baronets, &c.  
2 Salk. 509,  
510.  
2 Inst. 668.

IT was resolved by the two Chief Justices, the Chief Baron, the Attorney and Solicitor, that the King may erect any Name of Dignity, which was not before, and for that Reason the King may create a *Dignity*, by Name of Baronet, and create one to be a Baronet, to him and his Heirs Males of his Body issuing.

It was resolved, That if he does not create him of some Place, he shall not have an Estate-Tail, but Fee-simple conditional, which shall be forfeited for Felony; but if he create him Baronet of a Place, then he shall have an Estate-Tail, within the Statute of *West. 1. De Donis cond.* and the King may grant to him, and the Heirs Males of his Body, Precedency before Knights Baronets, Knights of the Bath, and Knights Batchelors, and also may grant Precedency to their Wives, Sons and Daughters, &c. And that he cannot create any *Dignity above the Dignity of a Baronet, and under the Dignity of a Baron*: And that the Creation of his Dignity of a Baronet shall not discharge the Heir to be in Guard, as if the Heir be made a Knight,

for

See 10 Co 37. b  
&c. ibid.  
Parliament  
Cases 9.

Note.

PART XII. *No Accessary in Treason, &c.*

for he is not made Knight by this, for the Dignity of a Knight is not descendible.

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*No Accessary in Treason, Petit Larceny, and Trespafs.*

Pasch. 9 Jac. 1.

**N**Ote, That in Trespafs and Treason, the highest and the lowest Offence, there are not any Accessaries, but all are Principals: But in Case of Felony, above the Sum of 12 *d.* there, and in Case of Death, &c. there may be Accessories, as well before as after; in case of Petit Larceny there cannot be any Accessory for the Smallness of the Felony; then the Case is, *That A. counterfeits the Great Seal of England, and B. knowing that he did counterfeit it, receives him, and abets and comforts him*: If *B.* in this Case was guilty of the Treason, is the Question. And it seems he is not, for although that *A.* by the Counterfeiting be a Traitor, the Accepting and Comforting of him cannot make him an Accessory, for that in Case of High Treason there can be no Accessory, and a Principal he cannot be, for this, \* that at the Time of the Counterfeiting he did not know of it; but if one, before the Act done, procure one to counterfeit the Great Seal, there it is High Treason; for in the Law he himself counterfeits the Great Seal: And in the Indictm. he may be charged with the Fact, *viz.* the Counterfeiting; but so is not he who receives after the Fact, for he cannot be charged with the Fact: And in Case of Trespafs, he who gives Consent and Aid to the Trespafs, is a Principal in the Trespafs; and this, as to me it appears, is very apparent in Reason, and agrees with our Books, as 19 *H.* 6. 47. *b.* he who is consenting and aiding to the Making of false Money, commits High Treason, for he is *Particeps Criminis* before the Fact done; but it is held in *Conyer's Case*, *Mich.* 13 & 14 *El.* *Dyer* 296. that in the same Case, if one after the Act done know of the Making of false Money, and receive the Party, this is not Treason, but Misprision of Treason, for not making Discovery, and with this accords 3 *H.* 7. 10. that it is not Treason, which *Diversiry Stamford's Pleas of the Crown*, fol. 3. hath

Accessaries  
1 Init. 57. a.

Page [82]

See Rep. Q. A.  
25, 26.  
2 Salk. 418,  
334, 542.

Sir WILLIAM CHANCEY'S. PART XII.

hath not well observed. *Vide Dyer* 298. *Vide le Stat.* 27 *El.* which made him who received a Jesuit a Felon, for by the Judgment of the Parliament the Receipt of a Jesuit, although he be a Traitor, is not Treason; for the Stat. makes the Returning of a Jesuit Treason, of which he who receives him cannot be indicted; but it is Misprision for any who receives him, and doth not discover, according to the Resolution of *Conger's Case*.

Sir WILLIAM CHANCEY'S Case.

Pasch. 9 Jac. 1.

High Commission.  
Hab. Corpus.  
Ant. 47 69.  
See 4 Inst. 334.  
Wm. Thickne's  
Case.  
Post. 84, 86,  
104, 129.

IN this very Term Sir *Wm. Chancey* having the Privilege of this Court, and being Prisoner in the *Fleet*, was brought to the Bar by *Habeas Corpus* by the Guardian *de Fleete*, who returned, that the said Sir *William* was committed to the *Fleet* by force of a Warrant from the High Commissioners in Ecclesiastical Causes: The Tenor of which Warrant follows in these Words:

Return.

*These are to will and require you in his Majesty's Name, by Virtue of his High Commission for Causes Ecclesiastical, under the great Seal of England, to us and other directed, by force of a Statute in such Case provided, that herewithall you take and receive into your Custody the Body of Sir Wm. Chancey, Knt. whom we will that you keep and detain under Custody, until further Order shall be taken for his Enlargement, letting you know, that the Cause of his Commitment is, for that being at the Suit of his Lady convicted before his Highness Commissioners Ecclesiastical, for Adultery, and for expelling her from his Company, and Cohabitation with another Woman, without allowing her any competent Maintenance, and by his own Confession convicted thereof, he was thereupon by Order of Court enjoyned to allow his Wife a competent Maintenance, according to his Ability, and to perform such Submission and other Order for his Adultery, as by Law should be enjoyned him. Which expressly he refused \* to do, in Contempt of his Majesty's said Authority, to us in that behalf committed. Given at London 19 Martii 1611. subscribed,*

Adultery.

Page [83]

London.

Henry Montague, } Thomas Morton,  
George Overall, } Zachary Pasfield.

PART XII. *Sir WILLIAM CHANCEY'S Case.*

And it was moved by *Nicholas Serjeant* of Counsel with *Sir William*, that this Return was insufficient, for two <sup>Adultery, 3 Inst. 332,</sup> Causes. The one for this, that Adultery ought to be punished by the Ordinary, and is not such enormous Offence <sup>333, 334. See Part. 31, 32.</sup> that it shall be punished by the High Commissioners, upon which the Offender cannot have his Appeal, or other Remedy; and clearly the Wife shall not sue there for Alimony; *Quod fuit concessum per Coke, Warberton and Foster*, but *Walmsley* doubted of Adultery; for it seemed to him, that this was an Offence enormous. 2. That by Force of the Act 1 *El.* the High Commissioners cannot imprison the said *Sir William* for Adultery, nor for denying Alimony to his Wife (if that was within their Jurisdiction.) And altho' that the Words of the Letters Patent give them Power to imprison the Party, yet if the Act doth not warrant it, they cannot imprison him. And *Doderidge*, Serjeant to the King, of Council on the other Side, did not defend the Imprisonment to be lawful; and it was clearly agreed by *Coke, Walmsley, Warberton and Foster*, that the Commissioners had not Power to imprison him in this Case: And *Walmsley* said, that although they have used by 20 Years to imprison in such Case, without Exception taken, yet when it came before them judicially, they ought to judge according to Law: And upon this *Sir Wm. Chancey* was bailed: Also it was resolved *Per totam Curiam*, that when upon the Return it doth appear, that the Imprisonment is not lawful, the Court may discharge him of Imprisonment; but in this Case, the Court thought fit rather to bail him, until the next Term, and in the mean Time to attend upon the Archbishop, and to do that which of Right and Reason they ought to do. Also it was resolved that the Return was insufficient in Form, *viz.*

1. It is not shewed when the Adultery was committed.

2. He was enjoined to allow his Wife a competent Maintenance, without any Certainty; and to perform such Submission and other Order for his Adultery, as by the Law he shall be enjoined, and it is all *in futuro*, and uncertain what Order they will take, and yet for the Refusal they imprison him: Also they make their Warrant by Force of a Commission to them and others directed, and do not say, or to any four of them, so that it may appear to the Court that they who made the Warrant had Power by the Commission; also it is said in the Warrant, that he was summoned by the Order of the Court. *Vide* in my Treatise at large the Reasons and Causes for which the Commissioners (unless <sup>4 Inst. 332;</sup> that it be in special Cases) may not sue and imprison. *Vide* <sup>333, &c.</sup>

## EMPRINGHAM'S Case. PART XII.

4 Inst. 334.

*Pasch. 42 El. Rot. 1209. Ed. Thicknesse* was imprisoned by the High Commissioners, and upon *Habeas Corpus* delivered by the Justices of the Common Pleas.

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Page [84]

### \* EMPRINGHAM'S Case.

*Pasch. 9 Jac. 1.*

Star-Chamber.  
Admiralty.  
Sec 73, 79, 80.

**I**N this very Term a Case was moved in the Star-Chamber, upon a Bill exhibited by the Attorney General against *Robert Empringham*, Vice-Admiral in the County of *York*, *Marmad. Kettlewell*, one of the Marshals of the Admiralty, and *Thomas Harrison*, one of the Informers of the Court of Admiralty in the said County, and they were charged with Oppression and Extortion, that they had fin'd and imprisoned divers of the King's Subjects in the County of *York*, which no Judge of the Admiralty can justify; for that the Court is not a Court of Record, but the Proceedings there are according to the Civil Law, and upon their Sentence, Appeal and no Writ of Error lieth: Also the said *Empringham* hath caused divers to be cited to appear before him for Things done in the Body of the County; as for not repairing of the Banks of a River, which is within the Body of a County: Also for cutting of Trees upon his own Soil, and such like, which were determinable by the Common Law; and not before the Admiral, for his Authority is limited to the High Sea, and is out of any County: And for these and other Oppressions and Extortions they were by Sentence of the Court of Star-Chamber, fined, and imprisoned, and an Award, that Restitution should be made, &c.

*High*

## High Commission.

Trin. 9 Jac. 1.

*Memorandum*, that upon *Thursday* before the Term of *Prohibitions.*  
*Holy Trinity*, all the Justices of *England* were by the *Antea 58, 59,*  
 Command of the King assembled in the Council-chamber *63, 64, 82, &c.*  
 at *Whitehall*, where was also *Abbot*, Archbishop of *Can-* *13 Co. 8, 9, &c.*  
*terbury*, and with him two Bishops and divers Civilians, *17, 18, 41, 42,*  
 where the Archbishop did complain of *Prohibitions* to the *70.*  
 High Commissioners out of the Common Pleas, and the De-  
 livery of Persons committed by them by *Habeas Corpus*, *Antea 82.*  
 and principally of *Sir Wm. Chancey*; where I defended our  
 Proceedings, according to the Treatise which I made of it,  
 and which I delivered before the High Commissioners:  
 And after great Disputation betwixt the Archbishop and  
 me, at the last the Archbishop said, that he had a Point  
 not yet touched upon in my Treatise, which would give  
 Satisfaction to the Lords, and to us also without Question,  
 upon which he would rely; and that was the Clause of Re-  
 stitution and Annexation, *scil. And that all such Jurisdicti-*  
*ons, Privileges, Superiorities and Prebeminencies Spiritu-*  
*al and Ecclesiastical, as by any Spiritual Power or Autho-*  
*rity hath heretofore, or hereafter lawfully may 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 Errors, Heresies, Schisms, &c. shall for e-*  
*ver by Authority of this present Parliament, be united and*  
*annexed to the imperial Crown of this Realm:* And it was  
 said, that the Kings *H. 8.* and *Ed. 6.* gave Power by their  
 Commissions under the Great Seal to divers to impose  
 Mulcts, &c. in Spiritual and Ecclesiastical Causes, &c. and  
 upon this he concludes, that inasmuch as this had been  
 used before *1 El.* this is given to the Queen *Eliz.* and her  
 Successors: Also inasmuch as by the Statute of *2 H. 4.* and *Antea 37.*  
*2 H. 7.* the Jurisdiction \* Ecclesiastical may fine and im- *Page [85]*  
 prison in certain particular Causes Ecclesiastical, for this  
 Cause Jurisdiction to fine and Imprison in all Ecclesiastical  
 Causes is given to the King: And this he said he uttered  
 to the Intent that this may be answered; to which I for a  
 Time gave this answer, That it was good for the Weal

Publick, that the Judges of the Common Law should interpret the Statutes, and Acts of Parliament within this Realm; and that if such Interpretation ought to be made, what he urged, was absurd and against Law and Reason for divers Causes.

1. For that if such Word (*lawfully*) were omitted, that yet this Act, as appears by the Title and Preamble, being an Act of Restitution, ought to be intended of lawful Jurisdictions, Privileges, &c.

2. These Words, *Heretofore hath, or hereafter lawfully may be exercised, &c.* This Word *lawfully* extends as well to Times past, as to Times future: And all this was affirmed by all the Justices.

3. It was said by me, That before the Statute of 1 *Eliz.* no Ecclesiastical Judge may impose a Fine or Imprison for any Ecclesiastical or Spiritual Offence, unless there be Authority by Act of Parliament: And this was so affirmed by all the Justices, that although in some Cases they may fine and imprison, therefore to say, that by this Clause in all Cases they may fine and imprison, was so manifest, that it was not worthy any Answer: But now I have seen the Commission made to *Cromwell* the King's Vice-gerent, and other Commissions to others by his Appointments, for this, that he was employed in the Affairs of the Kingdom, in which Commission are these Words. *Vide my Book of Precedents, the Commission at large.*

And afterwards in this very Term the Privy Counsel sent for the Justices of the Common Pleas only, and there the Reasons and Causes of the said Resolution were largely debated; and Opposition was made as much as might be by *Egerton* Lord Chancellor; but the Justices of Common Pleas remained constant in their former Opinion; and afterwards the Counsel sent for the Chief Justice of the King's Bench, Justice *Williams*, Justice *Croke*, *Tanfield* Chief Baron, *Sing*, *Altham* and *Bromley*, who were not acquainted with the Reasons and Causes of the said Rule of the Common Pleas; nor did they know for what Cause they came before the Counsel; and hearing the Lord Chancellor affirm, That the High Commissioners have always by Act of 1 *Eliz.* imposed Fine and Imprisonment for exorbitant Crimes (without any Conference with us) were of a suddain Opinion with us, without any Conference amongst themselves, and without hearing of the Matter debated: And after at another Day this very Term, the said Judges of the King's Bench, Barons of the Exchequer, and Justice *Fenner* and *Telverton*, who were omitted before, and We the Justices of the Common Pleas were all commanded to attend the Privy Council; and when we all were assembled,

We

We of the Common Pleas were commanded to retire, for that, as the Lord Treasurer said, we had contested with the King, and in our Absence the King and the Prince sat with the Counsel, and then the Justices of the K.'s Bench, and Barons of the Excheq. were (questioned) *seriatim* with the Counsel: And the King demanded their Opinions in certain Points concerning the High Commission, with which they were not acquainted before, which were not related to us. In all which as appears after, they were not unanimously agreed; and after two Hours and a Half, We the Justices of the Bench, *Coke, Walmfley, Warberton* and *Foster*, were commanded to come before the King, the Prince, and the Counsel, where the King declared, That by the Advice of his Counsel, and by the Advice of the Justices of the King's Bench, and Barons, he will reform the High Commission in divers Points, \*and reduce it to certain Spiritual Causes, Page [86] the which after he will have to be obeyed in all Points: And the Lord Treasurer said, that the Principal Feather was pluckt from the High Commissioners, and nothing but Stumps remaining; and that they should not intermeddle with Matter of Importance, but of Petit Crimes; and this Word (*Errors*) being general, shall be explained, and no Obligations shall be taken of the Parties, as before absurdly and unjustly (as he said) had been taken, and divers other Things were reformed, as he said; but he did not declare them in particular.

To which it was said by me to the King, that it was grievous to us his Justices of the Bench, to be so severed from our Brethren, the Justices and Barons, but more grievous that they differed from us in Opinion, without hearing one another; and especially forasmuch as we have proceeded in the Case of Sir *Will. Chancey*, and other Cases concerning the Power of the High Commissioners in imposing of Fines and Imprisonment judicially in open Court, upon Argument at the Bar and the Bench, where it was resolved by us, that the High Commissioners cannot *fine and imprison*, but in certain Cases; and the judicial Course ought to be judicially reversed: But I said to the King, that when We the Justices of Common Pleas see the Commission newly reformed, we will, as to that which is of Right, seek to satisfy the King's Expectation; and so we departed without any Demand of our Opinions. Antea 82.

## STOCKDALE'S Case.

Trin. 9 Jacobi Regis.

*In the Court of Wards.*

King's Grant  
void for In-  
certainty.  
See 1 Co. 50.  
3 Co. 4. 4 Co.  
66. 7 Co. 14.  
8 Co. 45. 55.  
9 Co. 23, 29, 47.  
10 Co. 26. b.  
64. b. 112. b.  
11 Co. 11.

**T**HE King by his Letters Patent, dated 9 April the ninth Year of his Reign, granted, assigned and fet over to William Stockdale, in these Words:

*Such and so many of the Debts, Duties, Arrearages, and Sums of Money, being of Record in our Court of Exchequer, Court of Wards and Liveries, Court of the Dutchy of Lancaster, or within any other Court or Courts within this our Realm of England, or being of Record in any of our said Courts, &c. in any Year, of several Years from the last Year of the Reign of H. 8. until the Thirteenth Year of our late Dear Sister, as shall amount to the Sum of a Thousand Pound, to have, take, levy, recover and enjoy the said Debts, Duties, Arrearages, and Sums of Money amounting unto the Sum of a Thousand Pound, before, in and by these Presents given and granted to the said William Stockdale, his Executors, Administrators and Assigns.*

And in this Case divers Points were resolved.

1. That the said Grant of the King is void for the Incertainty, for by the Grant no Debt in certain may pass, and if it cannot pass by the Grant at the Beginning, it shall never pass, as this Case is: As if the King hath a Hundred Acres of Land in *D.* and he grant to a Man 20 Acres of the Land in *D.* without any describing of them by the Rent, or Occupation, or Name, &c. this Grant is void; and in the Case of the King the Patentee shall not have his Election, as he shall in the Case of a common Person; but in case of the King, if the 20 Acres are described, or by Abuttals, or \* by Name certain in the Particular, this is good Demonstration which 20 Acres shall pass.

2. Where the Patentee claims by Force of this Word *Arrearagia*, to have Arrearages of Rents, Reliefs, and mean Rates of Lands, &c. in the Court of Wards, &c.

It was resolved clearly, that he shall not have them, if the Patent had not gone further; for inasmuch as this Word

*Ar-*

*Arrearages* is coupled with these Words, Debts, Duties, and with these Words subsequent (Sums of Money) it shall be intended of Arrearages of Things personal, and not of Things real; as of Arrearages of Account of Monies delivered in Prest, &c.

But the Proviso in the End of the Patent, *scil.* Provided always, that the said *William Stockdale* shall take no Benefit by any Means of Arrearages of any Rents, Reliefs, Tenths, or annual Payments whatsoever, until Sir *Patrick Murrey* and others be satisfied and paid the Sum of 10000 *l.* &c. hath well explained what Arrearages the King intended, *viz.* of Rents, &c. and so to construe Part of the Patent by the other; but clearly mean Rates, (Rents) are not within the said Words, for they are the Profits of Demesne Land.

## *Manslaughter.*

Trin. 9 Jacobi Regis.

**D**ivers Men playing at Bowls at *Great Marlow* in the County of *Kent*, two of them fell out, and quarrelled the one with another, and the third Man who had not any Quarrel, in Revenge of his Friend, struck the other with a Bowl, of which Blow he died; this was held Manslaughter, for this, that it happen'd upon a sudden Motion in Revenge of his Friend.

Vide Keeling's Reports.  
Rex ver. Mawgridge.  
1 Hawk. c. 32.  
per totum.

In the very same Term a special Verdict, being divers Years past found in the County of *Heresford*, the Effect of which; *That two Boys combating together, the one of them was scratched in the Face, and his Nose voided a great Quantity of Blood, and so he run three Quarters of a Mile to his Father, who seeing his Son so abused, and the Blood run from him, and his Cloaths and Face all bloody, he took in his Hand a Cudgell, and went three Quarters of a Mile to the Place where the other Boy was, and struck him upon the Head, upon which he died.* And this was held but Manslaughter, for the Ire and Passion of the Father was continued, and there was no Time that the Law can determine that it was so settled, that it shall be adjudged in Law Malice prepense; and this Case was moved *ad mensam*, &c.

## \* High Commission.

Mic. 9 Jacobi Regis.

Vid. Ant. 19,  
47, 76.  
13 Co. 9, 47.

*Memorandum*, That upon *Thursday* in this Term, a High Commission in Causes Ecclesiastical was published in the great Chamber of the Archbishop at *Lambeth*, in which I with the Chief Justice, Chief Baron, Justice *Williams*, Justice *Crook*, Baron *Altham*, and Baron *Bromley*, were named Commissioners, amongst all the Lords of the Council, divers Bishops, Attorney and Solicitor, and divers Deans and Doctors of the Canon and Civil Laws; and I was commanded to sit by Force of the said Commission, which I refused for these Causes:

1. For this, that I, nor any of my Brethren of the Common Pleas were acquainted with the Commission, but the Judges of the King's Bench were.

2. That I did not know what was contained in the new Commission, and no Judge can execute any Commission with a good Conscience without Knowledge; and that always the Gravity of the Judges hath been to know their Commission, for *Tantum sibi est permissum, quantum commissum*: And if the Commission be against Law, they ought not to sit by Virtue of it.

3. That there was not any Necessity that I should sit, who understood nothing of it, so long as the other Judges were there, the Advice of whom had been had in this new Commission.

4. That I have endeavoured to inform my self of it, and have sent to the Rolls to have a Copy of it, but it was not enrolled.

5. None can sit by Force of any Commission, until he hath took the Oath of Supremacy, according to the Statute of 1 *Eliz.* And for this, if they will read the Commission so that we may hear it, and have a Copy to advise upon it, then I will either sit or shew Cause to the contrary. But the Lord Treasurer would for divers Reasons persuade me to sit, which I utterly denied.

See 1 Hawk.  
c. 14 Sect. 1. &c.  
ch. 24. Sect. 11.  
&c. Oaths to  
sit in Parliament.  
and ch. 1.  
Sect. 12. ch. 9.  
Sect. 4. ch. 19.  
Sect. 27. to  
Sect. 29. and  
ch. 24. by Off.  
licens, &c.

And

And to this the Chief Justice, Chief Baron, and some other of the Judges seem'd to incline, upon which the Lord Treasurer confer'd in private with the Archbishop *Bancroft*, who said to him, that he had appointed divers Causes of Heresy, Incest, and *enormous Crimes* to be heard upon this Day, and for that he would proceed; but at last he was content that the Commission should be solemnly read, and so it was, which contained three great Skins of Parchment, and contained divers Points against the Laws and Statutes of *England*: And when this was read, all the Judges rejoic'd that they did not sit by Force of it: And then the Lords of the Council, *viz.* The Archbishop, the Lord Treasurer, the Lord Privy Seal, the Lord Admiral, the Lord Chamberlain, the Earl of *Sbrewsbury*, the Earl of *Worcester*, with the Bishops, took the Oath of Supremacy and Allegiance, and then we as Commissioners were required to take the Oath, which I refus'd until I had consider'd of it: But as the Subject of the King, I and the other Judges also took the Oaths of Supremacy and Allegiance.

Then the Lord Archbishop made an Oration in Commendation of the Care and Providence of the King for the Peace and Quiet of the Church; also he commended the Commissioners, also the Necessity of the Commission to proceed summarily in these Days, wherein Sins of a detestable Nature, and Factions, and Schisms did abound, and protest'd to proceed sincerely by \* Force of it, and then he caus'd to be call'd a most blasphemous Heretick, and after him another, who was brought thither by his Appointment, to shew to the Lords and the Auditory the Necessity of that Commission.

Page [89]  
Heresy.  
Ant. 56, 57.  
Politea 93.

And after, the Archbishop came to the Chief Justice and to me, and promis'd us, that we should have a Copy of the Commission, and then I should observe the Diversity between the old Commission and this; and all the Time that the long Commission was in reading, the Oath in taking, and the Oration made, I stood and would not sit, as I was request'd by the Archbishop and the Lords, and so by my Example did all the Rest of the Justices.

And the Archbishop said, that the King had command'd him to sit by Virtue of this new Commission, in some open Place, and at certain Days: And for that Cause he appointed the Great Chamber at *Lambeth* in Winter, and the Hall in the Summer; and every *Thursday* in the Term-Time, at two of the Clock in the Afternoon, and in the Forenoon, he would have a Sermon for the better informing of the Commissioners of their Duty, in the true and sincere Execution of their Duties.

*Fishing*

## *Fishing in the River Thames.*

Mich. 9 Jacobi Regis.

Rivers. Fish.  
See Shep. Abr.  
270, 211. and  
Nelson's Just.  
Tit. Fish.

**I**N this same Term the Issue in an Information upon the Statute of 2 H. 6. 15. was tried at the Bar, and upon the Evidence upon the Words of the said Act, which are, that every Person which setteth or fastneth in the River of *Thames* any Nets or Engines called Trincks, or any Manner of Nets, to any Posts, Boats, Anchors, or the like Thing, to stand *continually* Day and Night, forfeits to the King a Hundred Shillings for every Time, &c. and the Defendants having set and fastned Nets called Trincks, in the River of *Thames*, &c. to Boats Day and Night, for so long Time as the Tide did serve, *and did not say continually.*

The Question was, If this was within the Statute. And it was clearly resolved, that it was within the Statute; for the Nets called Trincks, cannot stand but for so long as the Tide serves: And for this, the Word *Continually* shall be taken continually so long as they may stand to take Fish, and as the Time of fishing endures, be it in the Day or Night, for *Lex non intendit aliquid impossibile*, for otherwise the Law should not be of any Effect: And although that it was said, that this Statute remains in Force, and if any had complained of any Offence against it, he shall be punished; but the Reason why no Execution hath been made of this Act, was for this, that none shall have Benefit by the Suit but the King only, for the Penalty is only given to the King. And as it doth appear by the Preamble, and in the *Proviso* in the Act, the Manner of the Nets was not the Cause of the Making of the Act, for by the *Proviso* every Man may fish in his seasonable Time with Trincks, if they are of Assise, drawing and conveying them with their Hands, as others Fishers do, and not fastning them to Posts, Boats or Anchors, &c. continually to stand; for the Michief was by fastning them, and the standing

PART XII. SHULTER'S Case.

standing of them continually, the Brood and Fry of Fish were destroyed, and Disturbance made to common Passage of Vessels, as Weers, Lidels, and other Engines.

\* SHULTER'S Case.

Page [90]

Mich. 9 Jac. Regis.

*In the Star-Chamber.*

*I*N Camera Stell. the Case was such; John Shulter of Wisbich of the Age of 115 Years had Issue John his eldest Son, and others, viz. Christopher, Richard, &c. and being seised of Lands in Fee of the Value of a hundred Marks per Annum, his eldest Son being dead, and his Grandchild John being within Age he intended, and so gave Directions to make a Lease of a Farm called Roushall to Christopher, during the Minority of his Grandchild, rendring the ancient Rent, with Power of Revocation: And of Lands in Yatsbury to the said Richard, in the same Manner, and for the same Time: And Christopher and Richard by the Covin and Aid of one Woodroof a Scrivener, 24 Eliz. drew and ingrossed two several Leases of the Premisses severally to Christopher and Richard, for one and fifty Years, rendring but four Pence per Ann. and without any Power of Revocation: And John Shulter the Grandfather could read and write very well, but by Reason of his great Age was blind; and Woodroof declared to him, that the Effect of the said Leases were in all Points according to his Direction: And upon this the said John Shulter, the Grandfather, sealed and delivered as his Deeds.

<sup>A</sup> Blind Man seals a Decd read falsly. See 2 Co. 3. and 9. b. 1 Joh. 314. Moor. 182. 1 Rol. R. 440. 4 Leon. 62.

And it was resolved by the Lord Ellesmere Chancellor, and the two Chief Justices, that the said Indentures could not bind the said John Shulter, for this, that he was blind and like to one who could not read at all; and that the Effect being declared unto him in other Manner than in Truth the Indentures were, it did fully agree with Manser's Case in the second Part of my Reports, fol. 4.

Sir

## *Sir ANTHONY ASHLEY'S Case.*

Mich. 9 Jac. Regis.

### *Conspiracy.*

See Nels. Abr.  
35, 484.  
1 Danv. 207,  
208, &c.  
1 Hawk. c. 72.

**B**etween Sir *Anthony Ashley*, Knight, Plaintiff, and Sir *James Creighton*, Knight, *Hercules Hunnings*, *John Cantrell* Servant of *Hunnings*, *Thomas Hampron*, *Archibald Sterling*, Servant to Sir *James Creighton*, *Hen. Smith*, *Mary Rice*, and divers others Defendants, the Case was thus:

*Sir James Creighton had bought a pretended Right of and in the Manor of Lyddy and Millisent, and divers other Lands of which Sir Anthony had long Possession; upon which divers Motions were made concerning Fines acknowledged to be staid, &c. in the Common Bench, and Sir James Creighton not prevailing in it, and Sir Anthony, for divers Misdemeanors only, heard before the Lords of the Council, at the Council-Table, being discharged to be one of the Clerks of the Council and in great Disgrace, he entered into a wicked and damnable Conspiracy with the other\* Defendants, to accuse the said Sir Anthony of some heinous and capital Crime, by which he should forfeit all his Land to the Value of two thousand Marks per Annum, and his Goods and Chattels to a great Value, which they should share amongst them: And in the End, Henry Smith, who had been Servant to Sir Anthony, was suborned by the said Sir James, and others, to accuse the said Sir Anthony of the Murder of one William Rice who was the Husband of the said Mary Rice, one of the Defendants, which William Rice was dead above eighteen Years before, upon Surmise made by Sir James Creighton, that after the Attainder of Sir Anthony Ashley, Smith should have a Portion of five hundred Pounds in Money; and that Sir James should procure of his Uncle, the Captain of the Guard, a Place of the Guard in Ordinary, and procure the King to grant Protection to the said Smith against his Creditors, and a general Pardon*

*Pardon of all Offences; but he would not make any Accusation of the said Sir Anthony until he had Assurance of it; and upon this, Articles by Writing indented, were drawn and ingrossed by one Thomas Wood, a Scrivener, who dwelt in an obscure Place about the Tower, made between Sir James Creighton of the one Part, and the said John Cantrell, Servant to Hunning, by the Consent of Smith, and to his Use, on the other Part; by which Sir James covenanted, that the said John Cantrell and his Heirs, after the Conviction and Attainder of Sir Anthony Ashley, shall have the sixth Part of his Manors, Lands, Tenements and Hereditaments, Goods and Chattels in six Parts to be divided, in Consideration that Cantrell covenanted, &c. that he should procure Witnesses to convict the Plaintiff of Murder, or other capital Crime, and to deliver to Sir James Creighton a true Particular of all the Lands, Goods and Chattels of Sir Anthony, which Articles were sealed and delivered by Sir James Creighton, 16 February Anno 7 Jac. And at the same Time he was bound to Cantrell in an Obligation of eight thousand Pounds for Performance of the said Articles, and after, within two Days after the said Articles were sealed and delivered, Henry Smith counterfeited himself to be sick, and then he revealed the said Murder in Discharge, as he pretended, of his Conscience, and accused himself of poisoning of the said William Rice, by the Commandment of the said Sir Anth. Ashley, so that he himself was the Principal; and upon this Sir James Creighton procured the said Mary Rice, late the Wife of the said William Rice, to prefer a Petition to the King, importing the Accusation aforesaid: The King referred the Petition to the Chief Just. of the King's Bench, to examine the Cause and the Witnesses on both Sides, the which he did, and certified the King that he had found a false Conspiracy, to indict Sir Anthony without any just Ground; and certified also the Effect of the said Articles; upon which the King, after Conference with his Privy Council, and by their Advice thought the Matter necessary to be heard and sentenced in the Star-Chamber, the which Matter upon ordinary Proceedings was heard by six Days in the very same Term: And it was objected by the Counsel of the Defendants, that the Bill upon the said Conspiracy did not lie, and that it should be dangerous to maintain it; for if it should be lawful for every one who is accused, or was in Fear to be accused of any capital Crime, to exhibit his Bill in this Court against the Accuser and all the Witnesses, and by many captious and intricate Interrogatories severally to examine them, to find Contrariety*

Page [92]

*in them in Circumstances; this will deter Men to prosecute against great Offenders, and thence great Offences will pass unpunished, which will be dangerous to the Weal Publick, and by the Law, Conspiracy lies when a Man is indicted, and Legitimo modo acquietatus; but here he was never indicted, and \* for that it may be, that Sir Anthony is guilty of the said Crime, and then are all Mouths stopped to say the Contrary.*

See 1 Hawk.  
ch. 72.  
Sect. 1, 2, 3, &c.  
Qr. 11 Co. 29.

But to that it was answered and resolved by the Lord Chancellor, the two Chief Justices, and all the Court, that in this Case the Bill was maintainable, although that the Party accused was not indicted and acquitted before, as it was resolved in this Court, *Hill. 8 Jac. in Poulter's Case*, and for the Reasons and Cautions there expressed; also in this Case at the Bar, be Sir *Anthony* Guilty or Not guilty of the said Murder, yet the Defendants are punishable for the great and hainous Misdemeanor and Conspiracy, *scil.* for promising of the said Bribes and Rewards to suborn the said *Henry Smith* to accuse the Plaintiff of the said Murder eighteen Years passed, and the Articles in Writing to share and divide the Estate of Sir *Anthony* after the Attainder; for this corrupt Conspiracy, and great and perilous Practice and Misdemeanor, the Defendants shall be punished, let Sir *Anthony* be Guilty or Not in the said Crime. And it is a great Indignity offered to the King for any Subject, to presume to covenant or assume, that the King shall grant Protection or Pardon, or that the Estate of any Man shall be shared and divided before his Attainder.

The Grand  
Pox.

So that although that the Court will not enter into the Examination of the Crime, yet it appears by the Testimony of a great Number of Witnesses, that the said *William Rice* did not die of any poisoning, but of another horrible Disease, that he had got by his wicked and dissolute Life, which with Reverence cannot be spoken.

Suspicion.  
Co. Lit. 6. b.  
Rep. Q. A. 247.

And in this Case it was resolved, that if Felony be done, and one hath Suspicion upon probable Matter that another is guilty of it, because that he had Part of the Goods robbed, and is indigent, or of evil Fame; or if the Party be indicted, or if Murder be committed, and one is seen near the Place, or coming with a Sword or other Weapon embued with Blood, or that he was in Company of Felons, or hath carried the Goods stolen to obscure Places, or such like Things, these are good Causes of *Suspicion*, and by Reason of this he may arrest the Party so suspected, to the End that he may subject him to Justice.

But in this Case three Things are to be observed.

I. That

PART XII. *Writ de Heretico comburendo.*

1. That a Felony be done.
2. That he who doth arrest, hath Suspicion upon probable Cause, which may be pleaded, and is traversable.
3. That he himself, who hath the Suspicion, arrest the Party.

2 Hawk. c. 123  
Sect. 12. c. 15.  
Sect. 41, 42, &c.  
cap. 45. Sect. 7.  
and 46. Sect.  
42.

For he cannot command another to do it, for *Suspicion* is a Thing individual and personal, and cannot extend to another Person than to him who hath it.

Also it was resolved, that if Felony be done, and the common Fame and Voice is that one hath committed it, this is good Cause for him who knows of it to arrest the Party, to the Intent that he may be brought to Justice; but none can arrest the Party suspected by the Command of him who hath the Suspicion; and with this agrees the Book in 2 *H.* 7. 15, 16. 15 *H.* 7. 5. 20 *H.* 7. 12. 21 *H.* 7. 28. 7 *Ed.* 4. 20. 8 *Ed.* 4. 27. 11 *Ed.* 4. 4. 6. 17 *Ed.* 4. 5, 6. 20 *Ed.* 4. 6. *b.* 7 *H.* 4. 25. 27 *H.* 8. 23. 26 *H.* 8. 9. 7 *El. Dy.* 226.

*Writ de Heretico comburendo.* Page [93]

Hill. 9 Jac. 1.

**I**N this very Term, the Attorney and Solicitor consulted with me, if at this Day upon Conviction of an Heretick before the Ordinary, this Writ *De Heretico comburendo* lieth; and it seems to me clearly that it doth not, for the Reasons and Authorities that I have reported, *Trin.* 9 *Jac.* fol. 73. And after they consulted with *Fleming* Ch. Justice, *Tanfield* Chief Baron, *Williams* and *Crook*; and they upon the Report of *Dr. Cosins*, mentioned in my said Report, and upon certain Precedents which passed in the Time of *Q. Elizabeth*, upon former Precedents, altho' the Statute of 2 *H.* 4. was enforced, and without Consideration (as I have heard) of the Authorities cited by me in my said Report, they certify the King, that a Writ *De Heretico comburendo* lieth upon a Conviction before the Ordinary, but that the most convenient and sure way was to convict the Heretick before the High Commissioners.

Breve de Heretico combu-  
rendo, lieth not  
at this Day,  
&c.  
5 Co. 23, 58.  
St. 2 H. 4. c. 15.  
Vide Ant. 28,  
56, 57.  
1 Hawk. c. 2.  
Sect. 10, 11.

*Note; this Writ De Heretico comburendo with all Process thereon, is now entirely abrogated by Stat. 29 Car. 2. c. 9.*

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*The Lord VAUX's Case.*

Pasch. 10 Jac. 1.

Premunire,  
antea 37, 38.  
See 1 Hawk.  
ch. 19. & ch. 79.

**I**N this Term, the Lord *Vaux* was indicted of a Premunire in the King's Bench upon the new Statute for refusing the Oaths of Allegiance, and upon this he was arraigned, and prayed that he might be tried *per Pares*.

2 Inst. 45.

But it was resolved, that he shall not in this Case be tried by his Peers, for the Stat. of *Magna Charta*, cap. 29. *Nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium Parium suorum*, is only to be understood of Treason, Misprision of Treason, Petit Treason, and Felony, and of Accessories to them, &c. But Premunire is but a Contempt, and Pardon of all Contempts pardons it; and for this Cause it shall not be *per Pares*.

And upon this the Lord *Vaux* did confess the Indictment. *Vide Lamb. Just. del pace* 520. *Dallison's Report* accordingly; that of Riots, Routs, unlawful Assemblies, &c. a Peer of the Realm shall not be tried *per Pares*. *Vide Stamford, &c.*

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Page [94]

*Countess of SHREWSBURY's Case.*

Trin. 10 Jac. 1.

Of Contempts.  
See 1 Hawk.  
ch. 21. per tot.  
ch. 22. Sect. 2, 3,  
4. ch. 23 Sect.  
1, 2, 3, &c. ch  
24. Sect. 2, 3, 4.  
2 Hawk. ch. 10  
Sect. 15, 17, 19.

**I**N this Term, before a select Council at *York House*, *scil.* the Lord Chancellor, the Archbishop, the Duke of *Lenox*, the Earl of *Northampton*, Lord Privy Seal, the Earl of *Suffolk*, Lord Chamberlain, the Earl of *Worcester*, the Earl of *Pembroke*, Viscount *Erskin*, Viscount *Rocheford*, the Lord *Zouch*, the Lord *Knolls*, the Lord *Wootton*,

PART XII. *Countess of Shrewsbury's Case.*

the Chancellor of the Exchequer, the Chancellor of the Dutchy, *Fleming* Chief Justice of the King's Bench, *Phillips* Master of the Rolls, *Coke* Chief Justice of the Common Pleas, and *Tanfield* Chief Baron.

The Countess of *Shrewsbury* (the Wife of *Gilbert*, Earl of *Shrewsbury*) then Prisoner in the Tower, was brought before the said Lords, and by the Attorney and Solicitor of the King, was charged with a high and great Contempt of dangerous Consequence; for they declared that the Lady *Arbella*, being of the Blood Royal, had married *Seymer*, second Son of the Earl of *Hertford*, without Privy or Assent of the King, for which Contempt the said *Seymer* was committed to the Tower, and had escaped and fled beyond the Seas; the Lady *Arbella* being under Restraint escaped also, and embarked her self upon the Sea, and was taken before she got over; of which Flight of the said Lady *Arbella*, the said Countess being her Aunt, very well knew and abetted, as is directly proved by *Crompton*, and not denied by the Lady *Arbella*: And admit it, that the Lady *Arbella* had no evil Intent against the King (who had always a great and special Care of her, and was very bountiful unto her, until her Marriage with the said *Seymer*, which was the *Pomum vetitum*); yet when she fled, and when she should be environed with evil Spirits, *Cum perversis perverti possit*, and when she shall be in another Sphere, she will not move within the same Orb.

Accessorium  
Innocenti.

Q. If illegal?

Quid possit non  
est.

And the Lords of the privy Council knowing the *Arca-  
na Imperii*, did shew divers perilous Consequences, and the rather for this, that the said Countess is an obstinate Popish Recusant, and as was said, perverted also the Lady *Arbella*.

Quid profunt  
Legi?

Now the Charge was in two Points.

I. That the said Countess of *Shrewsbury*, by Commandment of the King, being called to the Council-table, before the Lords of the Council at *Whitehall*, and there being required by the Lords to declare her Knowledge touching the said Points, and to discover what she knew concerning them, for the Safety of the King, and Quiet of the Realm; she answered, That she would not make any particular Answer; and being again asked by the King's Command by the Council at *Lambeth*, and being charged again to answer to the said Point, she refused for two Causes.

Univoca æqui-  
voca.

Particulare ad  
generale.

I. For that she had made a rash Vow that she would not declare any Thing in particular touching the said

L

Points;

Countess of SHREWSBURY'S Case. PART XII.

Points; and for that (as she said) it was better to obey God than Man.

Page [95] \* 2. She stood upon her Privilege of Nobility, *scil.* to answer only when she was called judicially before her Peers, for that such Privilege was allowed (as she said) to *William* Earl of *Pembroke*, and to the Lord *Lumley*.

2. The second Point of her Charge was, that when such Answer which she had made was put in Writing, and read to her, yet she refused to subscribe to it; which Denial to discover and discharge her Conscience in a Case which toucheth the Safety of the King, and Quiet of the Realm, was urged by the King's Council to be a great and high Contempt, and that Nobility hath not any such Privilege as is alledged, nor any such Allowance as was supposed; and that rash and illegal Vows make not an Excuse, and that this Precedent being now upon the Stage, was of very dangerous Consequence: And the said Countess hearing the Charge, yet persisted in her obstinate Refusal, for the same Reasons and Causes upon which she had insisted before: And the Lord Chancellor began, and the Archbishop, and all the other Lords began with the first, and adjudged it a great and high Contempt, and the Lord Chancellor said, that that was against the Law of *England*, with which all the Lords agreed.

And that no such Allowance was given to the said Earl, of *Pembroke*, or to the Lord *Lumley* in Respect of their Privilege of Nobility, but that they were *Voces populi, & ideo non audiendæ*: And the Lord Archbishop principally proved, that as well the Contempt, as the said rash Vow was against the Law of God, which he and the Earl of *Northampton* principally proved by divers Texts and Examples in holy Scripture.

And the Effect of all that which the three Justices said, was, that after the Sentences of all the learned, prudent, and honourable Personages and Counsellors of Estate, they might well be silent; but in Regard that *silentium in Senatu est vitium*, they would speak something briefly, *viz.*

That three Things in this Case are to be well considered.

1. Whether the Refusals aforesaid of the said Countess were Offences in Law against the King, his Crown and Dignity.

2. What Manner of Proceeding this is, and whether it was justifiable by Precedent or Reason.

3. What

## PART XII. *Countess of SHREWSBURY'S Case:*

3. What is the Demerit of the Offences, and how punishable.

As to the first, it was resolved by the Justices and Master of the Rolls, that the Denying to be examined was a high and great Contempt in Law, against the King, his Crown and Dignity; and that if it should be permitted, it would be an Occasion of many high and dangerous Designs against the King and the Realm, which cannot be discovered: And upon Hope of Impunity it will be an Encouragement to Offenders, as *Fleming* Justice said, to enterprize dangerous Attempts.

And the Master of the Rolls said, that it was not any Privilege of Nobility, to refuse to be examined in this Case; no more than of any Subject.

Also, if one that is Noble, and a Peer of the Realm, be sued in the Star-Chamber; or in Chancery, they ought to answer upon their Oaths, and may be examined in the Star-chamber upon Interrogatories upon their Oaths: And if one who is Noble be produced as a Witness between Party and Party, he ought to be sworn, or otherwise his Testimony is of no Value; and so is the common Experience in the said Courts: And the Chief Justice said, that forasmuch as where Order is neglected, Confusion will follow; he would recite some of the honourable Privileges which the Law of *England* (more than any other Law) attribute to the Nobility \* of *England* in legal Proceedings; and they will not be impertinent, but give a great Light to the Case now in Hand.

1. If a Baron, Viscount, Earl, or other Lord of Parliament and Peer of the Realm be Plaintiff in any Action, and the Defendant will plead that the Plaintiff is not a Baron, Viscount, Earl, &c. as he is named in the Writ; this shall not be tried at the Common Law by Jury, who may be corrupted, nor by Witnesses, as in the Star-chamber, or Chancery, who may be suborned; but it shall be tried by the Record in Chancery, which imports by itself solid Truth; so great Regard hath the Law to the Trial of their Honour and Dignity, &c.

2. Their Persons have many honourable Privileges in Law.

1. *At the Suit of a Subject their Bodies shall not be arrested, neither Capias nor Exigent lieth against them.*

2. *For the Honour and Reverence which the Law gives to Nobility, their Bodies are not subject to Torture in *Causa criminis læsæ Majestatis.**

Countess of SHREWSBURY's Case. PART XII.

3. They are not to be sworn in Assises, Juries, or other Inquests.
4. If any Servant of the King, named in the Chequer-Roll, compass or intend to kill any Lord of Parliament, or other Lord of the King's Council, this is Felony.
5. In the Common Pleas, a Lord of Parliament shall have Knights returned on his Jury.
6. He shall have Day of Grace.
7. A Lord of Parliament shall not be tried in Case of Treason, Felony, or Misprision of them, but by those who are Noble and Peers of the Realm.
8. In Trial of a Peer, the Lords of Parliament shall not swear, but they give their Judgment Super fidem & ligeantiam Domino Regi debitam, so that their Faith and Allegiance stands in Equipage with an Oath in the Case of a common Person in Trial of Life: And the Writs of Parliament directed to the Lords of Parliament, are sub fide & ligeantia, &c. And the Reason and Cause that the King gives them many other Privileges, is for this, because all Honour and Nobility is derived from the King as the true Fountain: And the King honours with Nobility, for two Causes.
  1. Ad consulendum, and for that Reason he gives them a Robe.
  2. Ad defendendum Regem & Regnum, and for that Cause he gives them a Sword.

And forasmuch as they derive their Dignities, accompanied with all those honourable Privileges from the King, to deny to answer, being required thereto by the King, to such Points as concern the Safety of the King and Quiet of the Realm, is a high Contempt and Disobedience, accompanied with great Ingratitude.

Page [97]

\* This Denial is *contra ligeantiam suam debitam* against the Faith and Allegiance of a Person Noble, due to the King, and which the Law greatly esteems.

And that this Denying is against her Faith and Allegiance appears by the ancient Oath of Allegiance, which is imprinted in the Heart of every Subject, *scil. Ero verus & fidelis, & veritatem prestabo Domino Regi de vita & membro, & de terreno honore, ad vivendum & moriendum contra omnes gentes, &c. Et si cognoscam aut audiam de aliquo damno aut malo quod Domino Regi evenire poterit, quod non revelato, &c.* And this Oath of Alle-

## PART XII. *Countess of SHREWSBURY's Case.*

Allegiance is common to all Subjects, as well those of the Nobility as Commonalty: But the Law hath greater Account of the Faith and Allegiance of a Nobleman, than of one of the Commons, for this, that the Breach of their Allegiance is more dangerous to the King and Estate, for *Corruptio optimorum est pessima*; and for this Reason, the Countess by her Allegiance was bound, without being demanded, to reveal to the King what she knows concerning the Premises, upon which great Mischief may happen to the King and the Realm. But being commanded by the King to declare her Knowledge, the Denying of it doth greatly aggravate the Offence.

*Qui contemnit præceptum, contemnit præcipientem.*

Command and Obedience are the Ligament of Government, and *Ligeantia est Legis Essentia*; for without Allegiance and Obedience, the Law cannot proceed.

As to the second Point, *viz.* concerning the Manner of this Proceeding.

1. Privative, it is not to fine and imprison, or inflict corporal Punishment upon the Countess; for Fine and Imprisonment ought to be assessed in some Court judicially. Vide the Earl of Essex's Case, 42 & 43 Eliz. 424.

2. Positive, the Fine is *ad monendum*, or at the most *ad minandum*; it is *ad instruendum non ad destruendum*.

This selected Council is to express what Punishment this Offence justly deserved, if it be judicially proceeded within the Star-chamber; for which Reason this Manner of Proceeding is out of the Mercy and Grace of the King against this honourable Lady, that she seeing her Offence may submit her self to the King without any Punishment in any Court judicially.

If Sentence shall be given in the Star-chamber according to Justice, you the Lords shall be Agents in it: But in this Manner according to the Mercy of the King, the King is only Agent; the Law hath put Rules and Limits to the Justice of the King, but not unto his Mercy, that is transcendent and without any Limits of the Law; *Et ideo processus iste est regalis plane & rege dignus.*

Also inasmuch as the Allegiance and Obedience of the Subject, is the best Flower in his Imperial Garland, to the Intent, that it may neither be blasted, nor impaired by this dangerous Example, to the Prejudice of his Royal Prerogative and Posterity, this Proceeding hath been thought

ROBERT SCARLET'S Case. PART XII.

necessary: And this is fortified by the Precedent of the Earl of *Essex*, against whom such Proceedings were in this very Place, *An. 42 & 43 Eliz. Reg.*

And as to the last Point it was resolved by all *quasi una voce*, that if a Sentence should be given in the Star-Chamber judicially, she should be fined twenty Thousand Pounds, and imprisoned during the King's Pleasure. *Vide antea 69, &c.*

*Hoc in terrorem, sed quare quid inde venit?*

Page [98]

\* ROBERT SCARLET'S Case.

Trin. 10 Jacobi Regis.

Grand Jury.  
Sec 2 Hawk.  
ch. 25. sect. 15.  
8cc. to 32.

NOTE, that at Sessions of Peace held lately at *Wood-bridge* in the County of *Suffolk*, the Sheriff returned a Grand Inquest, of which one *Robert Scarlet* in the County of *Suffolk* had requested to be one, but the Sheriff knowing the Malice of the Man refused to return him; but notwithstanding by Confederacy with the Clerk who read the Panel, he was sworn of the Grand Inquest, and was not returned by the Sheriff; and being amongst them of the Grand Inquest, and as one of them, of his Malice, and upon his own Knowledge, as he pretended (to whom the rest gave Credit) indicted seventeen honest Men, upon divers penal Laws; and some of the Justices looking over the Bills found by the Grand Inquest, and perceiving so many honest Men to be indicted, as they did think, maliciously, demanded of them of the Inquest, what Evidence they had to find the said Bills, and they answered, by the Testimony and Cognizance of one of themselves, *scil. of Robert Scarlet*: And upon Examination it did appear, that the said *Robert Scarlet* was not returned, but that he, by Confederacy betwixt him and the Clerk, procured himself to be sworn of the said Grand Inquest, with Intent to indict his Neighbours maliciously, for which Offence he was indicted at Summer Assises, *An. 10 Jac.* held at *Bury*, upon the Statute 11 *H. 4. cap. 9.* by which it is provided, that no Indictment shall be found by any Persons named

Co. Inst. 3, 32,  
33.  
2 Hawk. p. 218.  
Hale's P.C. 202.

## PART XII. ROBERT SCARLET'S Case.

named to the Justices, without due Return of the Sheriff, but by Inquest of lawful Liege-people of the King, in such Manner as was used in the Time of his noble Progenitors, returned by the Sheriff, &c. without any Nomination, &c. And if any Indictment be made hereafter in any Point contrary, that the Indictment shall be void, and for ever held *Nul*.

And upon this Act of 11 H. 4. the said *Robert Scarlet* was indicted, and he pleaded Not guilty. And all the especial Matter aforesaid was proved in Evidence, and upon this he was found Guilty by a substantial Jury: And in this Case Consideration was had of divers Points.

I. Whether the Justices of Assise have Power to punish this Offence, or no; and it was held affirmatively, *scil.* by Force of their Commission of *Oyer* and *Terminer*, for that the said Commission gives them Power *ad inquirendum inter alia de omnibus falsitatibus, negligentibus, &c. & aliis malefactis, offensis & injuriis quibuscunque*, and of them to hear and determine; and this is understood as well of Offences against an Act of Parliament, as against the Common Law; and for that that it is commonly used, that Indictments of Non-residency of Parsons, Vicars, &c. upon the Statute of 21 H. 8. are taken before the Justices of Assise, by Force of this Word in the said Commission of *Oyer* and *Terminer*, *viz.* *Negligentibus, &c.* so that if the Act be indefinite or general, and doth not give Jurisdiction to any certain Courts in special (for then the Act is to be pursued) the general Words of the Commission of *Oyer* and *Terminer* extends to it: And it was well observed, that in the Commission of the Peace, the said general Words, *scil.* *De omnibus & singulis aliis malefactis & offensis* have a Qualification, *scil.* *de quibus Justiciarii de pace legitime inquirere possint aut debent*, which Limitation proves the large Extent of \* the Words, when they stand without any Page [99]  
Qualification.

*Vide* 7 *Eliz.* *Dyer*, Commissioners of *Oyer* and *Terminer* may enquire of Offences against penal Statutes, unless that the Statute appoints them to be determined in any Court of Record? and the Opinion there, that in any Courts of Record of the King, are restrained to the four ordinary Courts of Record at *Westminster*, is not held for Law; and continual Experience hath been always against it, as the Statute 5 *Ed.* 6. 14. of *Forefallers*, *Ingroffers*, *Regrators*, gives the Penalty to be recovered in any Court of Record: And Justices of Assise in Respect of their Commission of *Oyer* and *Terminer* have always  
L 4 enquired

## ROBERT SCARLET'S Case. PART XII.

enquired of them, the Statute 33 H. 8. 9. of unlawful Games, and the Statute of Woods 35 H. 8. cap. 17. and many other Statutes; and so the *Quere* is well resolved in 7 Eliz. for the Opinion of *Fallin, Saunders* and *Whiddon*, there, is held at this Day for good Law.

2. The second Consideration was had upon the Statute of 11 H. 4. cap. 9. and it was held, that the said *Robert Scarlet* was an Offender within the Statute, for it is to be understood, that the said Statute is partly affirmative of the Common Law, and partly a new Law.

In Affirmance of the Common Law, in Part privative, *No Indictment shall be found by any Person named to the Justices*; and in Part positive, *But by Inquest of lawful People of the King, returned by the Sheriff*. And that this was in Affirmance of the Common Law, the Statute proves it, in the Manner as was used in the Time of his noble Progenitors; and in the Preamble it is said, against the Course of Common Law used and accustomed before this Time: And that the said *Robert Scarlet* was an Offender against the said Act, for this, that he knowing that he was not returned of the Grand Inquest, procured himself by *false Conspiracy to be sworn*, as is aforesaid: And altho' that a Person solely was in such undue and unlawful Manner sworn of the Grand Inquest, yet this was within the Act; and by Consequence an Offence against the Common Law, for that Malice and Falseness alone may be of great Mischief, as appears in this Case.

Vide antea 23,  
20, 21, &c.

3. The third Consideration was had of 3 H. 8. 10. which alters the said Act of the 11 H. 4. in Part, as: to Denomination; for by the Act of the 3 H. 8. the Justices of the Gaol-Delivery, or Justices of Peace, of whom one to be of the *Quorum*, in open Court may alter the Panel returned by the Sheriff to enquire for the King only, by Addition or Extraction of any Jurors so returned; and they have Power to command the Sheriff to put others in the Panel, according to their Discretion: And the Sheriff ought to return the Panel so reformed upon the Penalty of the said Act, so that none can be of any Grand Inquest but by the Return of the Sheriff; and for this, the Act of 3 H. 8. cap. 10. hath not altered the Law, as to the Offence of *Robert Scarlet*.

4. The said Act 11 H. 4. hath made a new Law, *scil.* That any Indictment found against the Act shall be void, which Branch doth not make void any Indictment or Presentment, that in the Nature of an Indictment found any Point contrary to the said Act, is made void by the said

PART XII. BAKER and HALL's Case.

said Act, so that this may draw in Question all the Indictments found at the same Sessions: And for this, Judgment was given that he should be fined and imprisoned.

\* BAKER and HALL's Case. Page [100]

Trin. 10 Jac. 1.

**N**OTE, that upon Consideration of the Statute of Star-Chamber. Women taken against their Will. Antea 20. 1 Hawk. ch. 41. per tot. 2 Hawk. ch. 23. 2 Inst. 434, 435. 3 Inst. 61. Farr. 102, 132. State Trials Vol. 4. 3 H. 7. cap. 14. it was resolved by Coke Chief Justice of the Common Pleas, *Telverton, Williams, Snig,* and others; That whereas it is provided, that what Person soever who takes a Woman so against her Will, &c. although that the Body of the Act extend to Taking only, yet in Respect of this Word (so) it hath Relation to the Preamble (to such Person as is described in the Preamble, *scil. Having Substance*) it was agreed by all, that if the Wife hath nothing, nor is Heir apparent, it is out of the Statute, for the Statute would not have been so curious in describing the Person, and all in vain.

2. This Word (*so*) relates to the Quality and Event of the Taking mentioned in the Preamble, *scil. to be married or defiled*; for if she be not married or defiled, it is not such a Taking (*so*), *id est*, so married, or so defiled; and it is not reasonable that (*so*) shall have Relation to the Taking, which is more remote, and not to the Marriage or the Defiling, which is nearer, *Quod fuit concessum, &c.* and Clergy is taken away by the Statute of 38 Eliz. cap. 9. for Principals or Procurers before, *vide Stamford, fol. 37. b.* accordingly: And so was the Law taken in the 3 & 4 Ph. & Mar. as Justice Dallison reported. *Vide Lamb. 252.* Justice of Peace.

Note; the Receivers of the Woman are Principals, but not the Receivers of them who took the Woman, for these are but Accessories. *Vide Lamb. ibid.* Antea 21.

*Privilege*

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*Privilege of Priests.*

**N**OTE, That I saw a Report in the Time of Queen *Mary*, upon the Statute 50 *Ed.* 3. *cap.* 5. & 1 *R.* 2. c. 15. concerning the \* Arresting them of holy Church, that the said Statutes are but an Affirmance of the Common Law, and in Maintenance of the † Liberties of holy Church, as appears by the Preamble of the same Statutes, and there held, that *Eundo, redeundo, & morando*, for to celebrate Divine Service, the Priest ought not to be arrested, nor any who aid him in it; as the Case was of one who administered to the Priest to sing Mass; and that the Party grieved may have an Action upon the Statute 50 *Ed.* 3. for when any Thing is prohibited by an Act, altho' that the Act doth not give an Action, yet Action lieth upon it; as upon the Stat. of *Marlb.* which prohibits to take in the Highway; or *Articuli super Chariis*, c. 3. which prohibits the Court of *Marshalsea* to hold Plea, &c. altho' that these Acts do not give Action, yet an Action lieth. 7 *H.* 6. 30, &c. and the Statute 2 *H.* 5. which commands a Libel to be delivered, 4 *Ed.* 4. 37. *Vide Registrum in Bre. 6. super Stat.*

\* 9 Co. 66.  
1 Salk. 78.

† 4 Inst. 323.  
2 Inst. 3, 4.

6 Mod. 53.

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*Crown.*

**N**OTE; If a Man be convicted, or hath Judgment of Death for a Felony, he shall never answer by the Common Law to any Felony done before the Attainder, so long as the Attainder remains in Force. *Vide* 8 *Eliz.* c. 4. 18 *Eliz.* 7. And at this Day, if a Man be adjudged to be hanged, and hath his Pardon, he shall never answer to any Felony before, for he cannot have two Judgments to be hanged. *Aliter*, If the first Attainder be reversed by Error: So if a Man be outlawed, and by that Attaint of Felony \* he cannot be arraigned of any Felony before, for he cannot be twice attaind. *Vide* 10 *H.* 4. *Coron.* 227. *Case del Appeal, &c.*

Page [101]

*Estray.*

*Estray.*

A Man seized of a Manor to which he hath Stray appendant by Prescription, &c. by his Bailly he seiserh an Ox as a Stray within the Manor, and makes Proclamations according to Law; and within the Year and Day lets the Manor with all Royalties, Liberties, &c. and after the Year and Day passed: And *Dyer*, Serjeant, did move the Court who should have the Estray; and *Brown*, Justice, was of Opinion, that the Lessor should have it, forasmuch as he had the Possession; and when the Year and Day are passed the Propriety shall have Relation to the Time of the first Seisure: But all the Justices were against him, and that the Lessee shall have it, forasmuch as the Propriety of the Stray is not altered nor changed before the Year and Day: And the Lord of the Manor, **Q** until the Year and Day are past, hath but the Custody, so that the Owner may rehave it always within the Year and Day, if he will pay for the Meat of it: Nor can the Ox be laboured, or used by the Lord before the Year and Day, and therefore he shall be paid for the Meat, unless it be such a Beast as of Necessity ought to be used as a Milch-Cow, &c. And it was held, that if one take a Stray, and within a Year and a Day it strays out of the Manor, the Lord may retake it by Seizure, &c.

See Lex Ma-  
nerior. 78, 79,  
&c.  
2 Cro. 513.

*Doctor HUTCHINSON'S Case.**Simony.*

**I**N the Case of Dr. *Hutchinson*, Parson of *Kenn*, in the County of *Devon*, it was resolved *per totam Curiam*, that if any should receive or take Money, Fee, Reward, or other Profit, for any Presentation to a Benefice with Cure, although in Truth he which is presented be not knowing of it, yet the Presentation, Admission, and Induction, are void *per expressa verba statuti* of 31 H. 8. cap. 6. and the King shall have the Presentation *hac vice*, for the Statute intends to inflict Punishment upon the Patron, as up-

Stat. 31 Eliz.  
Vide antea 74.  
Watson's Cler-  
gyman chap. 5.  
per tot. &c.  
p. 48, 96, 97,  
146, &c.

## HUGH MANNEY'S Case. PART XII.

on the Author of this Corruption, by the Loss of his Presentation, and upon the Incumbent, who came in by such a corrupt Patron, by the Loss of his Incumbency, although that he never knew of it; but if the Presentee be not cognizant of the Corruption, then he shall not be within the Clause of Disability in the same Statute: And so it was resolved by all the Justices in *Fleet-street*, Mich. 8 Jac. fol. 7. *vide verba statuti*, which are very well penned against the Avarice of corrupt Patrons.

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## HUGH MANNEY'S Case.

Perjury.  
See 1 Hawk.  
ch. 29. per tot.

IN an Information in the Exchequer against *Hugh Manney*, Esq; the Father, and *Hugh Manney* the Son, for Intrusion and cutting of a great Number of Trees in the County of *Merioneth*, the Defendants plead not guilty: And *Rowland ap Eliza*, Esquire, was produced as a Witness for the King, and deposed upon his Oath to the Jurors, that *Hugh* the Father and the Son joined in Sale of the said Trees, and commanded the Vendees to cut them down, upon which the Jurors found for the King with great Damages; and Judgment upon this was given, and Execution had of a great Part.

And *Hugh Manney* the Father exhibited a Bill in the Star-chamber at the Common Law, against *Rowland ap Eliza*, and did assign the Perjury in this, that the said *Hugh* the Father did never join in Sale, nor \* command the Vendees to cut the Trees; and the said *Rowland ap Eliza* was by all the Lords in the Star-chamber convict of corrupt and wilful Perjury: And it was resolved by all that it was by the Common Law punishable before any Statute: And although that the Witness depose for the King, yet he shall the rather be punished than for another; for the King is the Head and Fountain of Justice and Right; and he, who perjures himself for the King, doth more offend than if it was in the Case of a Subject.

1 Hawk. p. 172,  
173, &c.

2 Hawk. p. 395.

433.

## HAYE'S Case.

*In Curia Wardorum.*

**B**Y Inquisition in the County of *Middlesex*, *An. 6 Jac.* Diem clausit extremum. 13 Co. 48, 49, 50, 72. by Virtue of a *Diem clausit extremum*, after the Death of *Humphrey Wilward*, it was found that the said *Humphrey* died seised of a Messuage and 26 Acres of Land in *Stepney*; and that *John Wilward* was his Heir, and of the Age of 14 Years and 9 Days; and that the Land was held of the King *in Capite*, by Knight's Service. *John Wilward* died within Age, and by Inquisition in *Mid. 8 Junii Ann. Jac.* by Virtue of a Writ of *Devenerunt*, after the Death of the said *John Wilward*, it was found, that the said *John* died seised in Ward to the King, and that the said Messuages and Lands at the Time of the Death of the said *John*, were holden of the Dean of *Pauls*, as of his Manor of *Shadwell*.

All the mean Rates incurred in the Life of *John Wilward*, are paid to the King.

*The Questions are,*

1. *Whether by the Death of the said John, and finding of the mean Tenure in the Devenerunt, the first Office granted to Points be determined?*
2. *Whether the Tenure found by the Office may be traversed?*

And as to these Questions, it was resolved by the two Ch. Justices and Chief Baron, that where the said *John* died, the Office found by Force of the said Writ. of *Diem clausit extremum*, after the Death of *Humphrey Wilward*, whereby the King was entitled to the Guardianship of the said *John*, hath taken its Effect and is executed, and does remain as Evidence for the King after the Death of the said *John*, but nevertheless is not traversable, for it is traversable during the Time it remains in Force only, and the Jurors upon the *Devenerunt* after the Death of the said *John*, are at Liberty to find the Certainty of the Tenure, and they are not concluded by the first Inquisition, for they are sworn *ad veritatem dicendum*; and with this agrees 1 *H. 4.*

*Award of Capias utlagatum, &c.* PART XII.

Page [103]  
Not.

68. And all this appears by the Diversity between the Writ of *Diem clausit extremum*, and the Writ of *Devenerunt*: And it is to be observed, that there is no Difference between the Writ of *Diem clausit extremum*, and the Writ of *Devenerunt*, but in one Point; to Wit, the \* *Diem clausit extremum* is general, viz. *Quantum terrarum & tenementorum idem H. tenuit de nobis in capite, &c. die quo obiit, & quantum de aliis generally*; and the *Devenerunt* recites quod *J. filius & Heres H. qui de nobis tenuit in capite, nuper dum fuit infra etatem, & in custodia nostra fuit, Diem clausit extremum, ut accipimus; tibi precipimus, quod per Sacramentum 12. inquiras, quæ terræ & tenementa per mortem prædicti H. & ratione minoris etatis prædicti J. ad manus nostras Devenerunt, &c.* So that this Writ is not general, but does restrain only the Lands and Tenements, *Quæ Devenerunt, &c.* and all the other Points of the said Writ do relate to the Lands and Tenements, *Quæ Devenerunt, &c.* by which it appears, that the first Inquisition is not so conclusive, but that by the express Rules of the Writ, the Jurors are at large to find the Truth of the Tenure, notwithstanding the first Office. And so it was resolved and decreed accordingly *nono Jacobi*, in the Court of Wards, in the Case of one *Lewes*.

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*Award of Capias utlagatum by Justices of the Peace.*

Capias utlagat'  
See 2 Hawk.  
ch. 27.  
Sect. 115, 116,  
&c.

IN the same Term, the Opinion of all the Court of Com. Pleas was, that if one be outlawed before the Justices of Assise or Justices of Peace, upon an Indictment of Felony, that they may award a *Capius utlagatum*; and so was the Opinion of *Periam* Ch. Baron, and all the Court of the Exchequer as to the Justices of Peace, for they that have Power to award Process of Outlawry, have also Power to award a *Capius utlagatum*, as incident to their Authority and Jurisdiction: see the Statute of the 34 *H. 8. cap. 14.* for Certificate of a short Transcript of every Attainder, Conviction or Outlawry of Felony, by the Clerks of the Assises, Clerks of the Peace, &c. into the King's Bench, on Penalty of 40 s. &c. And note well, that such Transcript is by the said Act made to be of as great Force as the Record it self: See *Lambert* in his Justice of Peace, fol. 563. *contra*, but see 1 *Ed.*

PART XII. HERSEY'S Case.

1 Ed. 6. cap. 1. Justices of Peace in Case of Profanation of the Sacrament shall award a *Capias utlagatum* throughout all England.

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HERSEY'S Case.

Star-Chamber.

John Hersey, Gent. exhibited his Bill in the Star-Chamber, against Antho. Barker, Knight, Thomas Barker, Counsellor of Law, Robert Wright, Doctor of Divinity Ravenscroft, Clerk, and John Haynes; and did thereby charge the Defendants with the Forging of the Will of one Margery Pain; and the Cause came to Hearing, *Ad requisitionem Defendentium*, and upon hearing of the Plaintiff's Counsel, there appeared no Purpose or Presumption against the Defendants, or any of them, but that the Testament was duly proved in the Ecclesiastical Court, and upon an Appeal was also affirmed before Commissioners Delegates, and had also been decreed in the Chancery; so that it appeared to the Court, that the said Bill was preferred of meer Malice and Spite, to slander the Defendants without any Colour, and because the Defendants had no Remedy at the Common Law for the said Slander; and if such Slander should pass unpunish'd, \*it may encourage malicious Men to make this Court as a Pasquil, to fix therein a Libel of Record to charge those that are innocent with hainous Crimes, to remain to all Perpetuity.

Damages on a scandalous Bill. Vid. ant. 35.

Page [104]

In this Cause it was resolved by the Court, that by the Course of the Court, and according to former Precedents, the Court may give Damages to the Defendants, and so was it done, viz. two hundred Pounds to the Doctor of Divinity, two hundred Marks to the Knight, forty Pounds to the Clerk, a hundred and twenty Pounds to the Woman, and it was said, that *Creare ex nihilo, quando est bonum, est divinum; sed creare aliquid ex nihilo, quando est malum, est diabolicum; & plus Maledicite nocent, quam Benedicite docent.*

## THOMLINSON'S Case.

Hill. 2 Jac. 1.

*Admiralty no Court of Record.*

Hab. Corpus.  
Ant. 19, 27, 45,  
47, 69, 82.  
Pott. 129.

*Theodore Thomlinson* had brought an Action of Account for Goods against one *Philips* in the Common Pleas, and thereupon *Philips* sued *Thomlinson* in the Court of the Admiralty, supposing the Goods to have been received in foreign Parts beyond the Seas; and the said *Thomlinson* being committed for refusing to answer upon his Oath to some Interrogatories there proposed to him, brought his *Habeas Corpus*, which was returned thus, *Ego William Pope Marefcallus supremæ Curie Admiralitatis Angliæ Dom. Justic. Sereniff. Reginæ nostræ in brevi huic Schedulæ annex. specificat. Certific. quod infra vocat. Theodore Thomlinson ante advent. istius brevis capt. fuit & custodiæ meæ commiss. ex eo quod dictus Theodorus Thomlinson vinculo sacramenti coram Judice Admiralitatis Angliæ astrictus ad respondend. quibusdam Articulis contra eum in dicta Cur. dat. &c. sub pœna quinque librarum, &c. contumaciter examen suum subire recusavit, Idcirco, &c.* And it was resolved by the Court of Common Pleas,

1. That the Court of Admiralty hath no Cognizance of Things done beyond Sea, and this appears plainly by the Statute of 13 *Rich. 2. cap. 5.* the Words of which Statute are, that the Admirals and their Deputies shall not meddle from henceforth of any Thing done within the Realm, but only of a Thing done upon the Sea. *Vide 19 H. 6. f. 7.* For Things transitory done beyond the Seas, either are triable in the King's Courts, or the Party grieved may have his Remedy before the Justices where the Fact was done beyond Seas.

2. That the Proceedings in the Court of the Admiralty are according to the Course of the Civil Law, and therefore the Court is not of Record, and by Consequence cannot assess any Fine in such Case, as Judges of a Court of Record may do.

PART XII. *Right to Seats in the Church.*

3. That the Return abovementioned was insufficient; as being too general, because it is not specified for what Cause or Matter *Thomlinson* was examined, so as it might appear that the Interrogatories were of such Things, as were within their Jurisdiction, and that the Party ought by Law to answer upon his Oath; for otherwise he might very well refuse.

*This Case was intended to have been inserted by my Lord Coke into his seventh Report, but not then published, because the King commanded that it should not be Printed; but the Judges resolved ut supra.*

Nota.

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\* *CORVEN'S Case.*

Page [105]

*Right to Seats in the Church.*

*Corven* did Libel against *Pym*, an Attorney in this Court, for a Seat in a Church in the County of *Devon*: And *Pym* by Serjeant *Hutton*, moved the Court to have a Prohibition upon this Reason, that himself is seised of a House in the said Parish, and that he, and all those whose Estate he hath in the House, have had a Seat in an Isle of the Church: And it was resolved by the Court, that if a Lord of the Manor, or other Person, who hath an House and Land in the Parish, Time out of Mind, and had a Seat in an Isle of the same Church, so that the Isle is sole and proper to his Family, and they have maintained it at their own Charges, that if the Bishop would dispossess him, he shall have a Prohibition, for it shall be intended that the Party's Ancestors, or those whose Estate he hath, have erected and built the Isle with the Assent of the Parson, Patron and Ordinary, to the Intent to have it only to himself. But for a Seat in the Body of the Church, if a Question ariseth concerning it, it is to be decided by the Ordinary, because the Freehold is to the Parson, and the Place is dedicated and consecrated to the Service of God, and is common to all the Inhabitants; and therefore it belongs to the Bishop to order it in such manner as the Service of God may be best celebrated, and that there be no Contention in the Church. And it is to be presumed, that the

Seats in Churches. See *Watson's Clergyman*, 382 to 388, and 643, 644. *Gibson's Cod.* 221, 223.

## Right to Seats in the Church. PART XII.

Ordinary, who hath the Cure of Souls, will take Order in such Cases, according to Right and Conveniency; that is to say, to take Care that the Gentlemen may have Places fit for them, and the poor People fit Places for them also; and the Ordering thereof is a Matter meerly Spiritual; and with this agrees 8 *H.* 7. 12. and the Chief Justice cited the Case of Dame *Wicke* in 9 *H.* 4. 14. and said, the Case there was, that the Lady brought a Bill in the K.'s Bench against a Parson, *Quare unum Tunicam vocatam a Coat-armor & Pennons* with the Arms of the said Sir *Hugh Wicke* her Husband, and a Sword in a Chapel where he was buried.

And the Parson claimed them as Oblations, and therefore that they did belong to him: And there it is holden, that if one Use to sit in the Chancel, and hath there a Place, his Carpet, Livery and Cushion, the Parson cannot claim them as Oblations, neither ought he to have the said Things, for that they were hanged there in Honour of the deceased; and therefore, by the same Reason, although a Gravestone, Coat of Armor, Tomb, &c. are annexed to the Freehold of the Parson, yet in regard the Church is free to all the Inhabitants for burying, the Parson cannot take them.

And the Chief Justice said, that the Lady might have a good Action during her Life in the Case aforesaid, because she her self caused the said Things to be set up there, and after her Death, the Heir to the deceased shall also have his Action, because that (as the Book says) they were hanged there for the Honour of his Ancestor, and therefore they are in the Nature of Heirlomes, which by the Common Law belong to the Heir, as being the Principal of the Family: The like Law of a Gravestone, Tomb, and the like.

And this agrees with the Laws of other Nations, *Bartho. Cassaneus*, fol. 13. *Concl.* 29. *Action. dat. si aliquis arma, in aliquo loco posita, debeat sive abresit, &c.* & in 21 *Ed.* 3. 48. in the Bishop of *Carlisle's* Case, it appeared, *Page [106]* \* that the Ornaments of the Chapel of a preceding Bishop do belong to the succeeding Bishop, and are meerly in Succession, altho' that other Chattels, in Case of a sole Corporation, do belong to the Executors of the deceased Party, and shall not go in Succession; so in the other Case, Things erected in the Church for the Honour of the dead Person, shall go to his Heir, as *Heirlomes*, as in manner of an Inheritance.

Nota.

Huffey and  
Leighton.

Note, That in *Easter-Term* 10 *Jacobi*, It was resolv'd in the Court of Star-chamber, in the Case between *Huffey* and *Katharine Leyton*, and others, that if a Man have a House in any Parish, and Time out of Mind he and all those whose Estate he hath, have used to have a certain Pew in  
the

PART XII. *Earl of SHREWSBURY's Case.*

the Church, that if the Ordinary will displace him, he shall have a Prohibition; for if he hath it by Prescription, he has as good Right in the Seat, as he hath in his House; but observe that he must claim it as belonging to his House, and not in other Manner; for properly it belongs to the Inhabitants in the Manor-House, if any Manor be, and not to the Manor which includes other Tenants, Farmers, and Inhabitants: But true it is, that the Ordinary shall dispose of common and vulgar Seats in the Church, where there is no such Prescription, as is aforesaid.

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*Earl of SHREWSBURY's Case.*

**B**Y Force of certain Letters (bearing Date 28 *Martii* Ireland. 1612.) of the Lords of the Privy Council, directed to Dignities. Anr. 70, 81, 95. Post. 108, 11. 7 Co. 33: 34. Sir *Humphrey Winch*, Sir *James Lay*, Sir *Anthony Saint-leger*, and Sir *James Hulleston*; they did certify to their Lordship the Claim of *Gilbert*, Earl of *Shrewsbury*, to the Dignities of the Earldom of *Waterford*, and *Barony* of *Dungarvan* in *Ireland*, in such manner as followeth;

King *Henry* the Sixth, by his Letters Patent, in the twentieth Year of his Reign, did grant to his thrice beloved Cousin *John* Earl of *Shrewsbury*, in Consideration of his approved and loyal Services, in the City and County of *Waterford*, *pro eo quoque eundem consanguineum nostrum prædicta terra nostra Hiberniæ in partibus illis contra inimicorum & Rebellionum nostrorum insultus potentius defendat, ipsum in Comitum Waterford, una cum stilo & titulo ac nomine & honore eidem debitis ordinamus & creamus, habendum* to the said Earl and his Heirs Males of his Body; and further by the said Letters Patent did grant the Castles, Lordships, Honours, Lands, and Manors of *Dungarvan* to the said Earl and the Heirs Males of his Body, to hold the Premises of the King and his Heirs, by Homage and Fealty, and by the Service of being his Majesty's *Seneschall* in the Realm of *Ireland*: Afterwards in the Parliament called *Des absentees*, holden at *Dublin* in *Ireland*, the tenth of *May* the 28th of *Henry* the Eighth, by Reason of the long Absence of *George* Earl of *Shrewsbury*

*Earl of SHREWSBURY'S Case.* PART XII.

out of his Realm; it was enacted, that the King, his Heirs and Assigns, shall have and enjoy the Right of his Crown of *England*, all Honours, Manors, Castles, Lordships, Franchises, Hundreds, Liberties, Count-Palatines, Jurisdictions, Annuities, Fees of Knights, Lands, Tenements, &c. and all and singular Possessions, Hereditaments, and all other Profits, as well Spiritual as Temporal whatsoever, which the said *George Earl of Shrewsbury and Waterford*, or any other Person or Persons had to his Use, &c. King *Henry the Eighth*, by his Letters Patent, the Twenty-ninth Year of his Reign, reciting the said Statute *De Absentees*,

Page [107]

\* *Nos premissa considerantes, & nolentes statum, honorem, & dignitatem prædicti Comitis diminuerè, sed amplius augere, de certa scientia & mero motu, &c.* did grant to the said Earl and his Heirs, the Abby of *Rufford*, with the Lands thereto belonging in the County of *Nottingham*, and the Lordship of *Rotheram* in the County of *York*, the Abbies of *Chesterfield Shirbrook*, and *Glossadel* in the County of *Derby*, with divers other Lands and Tenements of great Value, to be holden *in Capite*: And the Questions were;

1. Whether by the long Absence of the Earl of *Shrewsbury* out of *Ireland*, by Reason whereof the King and his Subjects wanted their Defence and Assistance there, the Title of the Honour be lost or forfeited, the said Earl being a Peer of both Realms, and residing here in *England*.

2. Whether by the said Act *De Absentees, An. 28 H. 8.* the Title of the Dignity of the Earl of *Waterford*, be taken from the said Earl, as well as the Manors, Lands, Tenements, and other Hereditaments in the said Act specified.

And afterwards by other Letters Patent of the Lords of the Council, dated the Twenty-seventh of *September 1612.* the two Chief Justices and the Chief Baron were required to consider of the Case which was inclosed within their Letters, and were to certify their Opinions of the same.

Which Case was argued by Counsel learned in the Law, in behalf of the said Earl, before the said Chief Justices and Chief Barons, upon which they having taken great Consideration and Advise ment, after they had read the Preamble, and all the said Act of the 28 *H. 8.* it was unanimously resolved by them all, as followeth;

As to the first it was resolved, that forasmuch as it does not appear what Defence was requisite, and that the Con-

PART XII. *Earl of SHREWSBURY's Case.*

Consideration Executory was not found by Office to be broken as to that Point, the said Earl of *Shrewsbury* notwithstanding does remain Earl of *Waterford*.

As to the Second, it was resolved, that the said Act of the Twenty-eight of *H. 8. De Absentees*, doth not only take away the Possessions which were given to him at the Time of his Creation, but also the Dignity itself, for altho' one may have a Dignity without any Possession *ad sustinendum nomen & onus*, yet it is very inconvenient that a Dignity should be cloathed with Poverty: And in Cases of Writs, and such other legal Proceedings, he is accounted in Law a Nobleman, and so ought to be called, in respect of his Dignity; but yet if he want Possessions to maintain his Estate, he cannot press the King in Justice to grant him a Writ to call him to the Parliament; and so was it resolved in the Case of the Lord *Ogle*, in the Reign of Lord *Ogle's Edward* the Sixth, as the Baron of *Burleigh*, Lord Treasurer of *England*, at the Parliament *An. 25 Eliz.* did report: And therefore the Act of the 28 *H. 8.* (as all other Acts ought to be) shall be expounded to take away all Inconvenience, and therefore by the general Words of the Act, *viz. Of Honours and Hereditaments, the Dignity it self, with the Lands given for Maintenance of it, are given to the King, and the Dignity is extinct in the Crown:* Honour taken away for Poverty.

And the Cause of Degradation of *George Nevill*, Duke of *Bedford*, is worthy the Observation, which was done by Force of an Act of Parliament, 16 June 17 *Ed. 4.* which Act reciting the Making of the said *George* Duke, doth express the Cause of his Degradation in these Words: *And forasmuch as it is openly known, that the said George hath not, or by Inheritance may have any livelyhood to support the said Name, Estate, and Dignity, or any Name of Estate;* and often times it is to be seen, that when any Lord is called to high Estate, and hath not convenient Livelihood to support the same Dignity, it induceth great Poverty and Indigence, and causeth\* ofentimes great Extortion, Imbracery and Maintenance to be had, to the great Trouble of all such Countries where such Estate shall happen to be: Wherefore the King by Advice of his Lords Spiritual and Temporal, and by the Commons in this present Parliament assembled, and by the Authority of the same, ordaineth, establisheth and enacteth, that from henceforth the same Creation and making of the said Duke, and all the Names of Dignity given to the said *George*, or to *John Nevill*, his Father, be from henceforth void and of none Effect, &c. In which Act, these Things are to be observed.

Page [108]

*Earl of SHREWSBURY'S Case, PART XII.*

See 1 Parliam-  
ent Cases  
2, 3, 4, &c.  
Ant. 70, 81, 96.  
Post. 112.

1. *That altho' the Duke had not any Possessions to support his Dignity, yet his Dignity cannot be taken from him without an Act of Parliament.*

2. *The Inconveniences do appear where a great State and Dignity is, and no Livelihood to maintain it.*

3. *It is good Reason to take away such Dignity by Act of Parliament; and therefore the said Act of the 28 H. 8. shall be expounded according to the general Words of the Writ, to take away such Inconvenience: And altho' the said Earl of Shrewsbury be not only of great Honour and Virtue, but also of great Possessions in England, yet it was not the Intention of the Act to continue him Earl in Ireland, when as his Possessions in Ireland were taken away from him, but that the King at his Pleasure might confer as well the Dignity as the Possessions to any other, for the Defence of the said Realm. And the said Letters Patent de Anno 29 H. 8. have no Words to restore the Dignity which the Act of Parliament hath taken away; but it was not the Intention of the King Diminuere statum, honorem, & dignitatem ipsius Comitum, but augere his Possessions for Maintenance of his Dignity, for so much appears by this Word Augere; for he doth by the said Letters Patent, with exceeding great Bounty, increase the Revenues of the said Earl in England, which the King did think was an Increase of large Possessions in England, instead of all that which was taken away from him by the Act of the 28 H. 8.*

And whereas it was objected, That the general Words Honours and Hereditaments are explained and qualified by the said Words Relative subsequent, *Which the said George, or any to his Use hath*; and therefore it shall not be intended of any Honour or Hereditament, but of such whereof others are seised to his Use, and no Man can be seised of the Dignity, and therefore that the said Act doth not extend to it; but that it is to be understood *Reddendo singula singulis*, and these Words, *which the said George Earl hath*, are sufficient to pass the Dignity; and with this agrees the Opinion of all the Judges of England in Nevil's Case upon the like Words in the Statute of the 28 H. 8. in the 7th Part of my Reports, fol. 33 & 34.

\* *Jurisdiction*

\* *Jurisdiction of the Court of Common Pleas* Page [109]

Hill. 2 Jac.

IN the last Term, by Commandment of the King, the Justices of the King's Bench, and the Barons of the Exchequer, were assembled before the Lord Chancellor *Elfmere* at *York-house*, to deliver their Opinions, whether there was any Authority in our Books, that the Justices of the Common Bench may upon Information to the Court (which commonly is called Suggestion) grant Prohibitions, or whether of Necessity every Plea ought to be pending in the Court for such Cause, and the King would know their Opinions in this Case: And the Judges took Time to deliver their Opinions until this Term. And then *Fleming* Chief Justice, *Tanfield* Chief Baron, *Snigg*, *Albam*, *Crook*, *Bromley* and *Doderidge*, (*Telverton* and *Williams* Justices being dead since the last Term) did deliver their Opinions to the said Lord Chancellor. That the Precedents of each Court are sufficient Warrants for their Proceedings in the same Court; and therefore as well in the King's Bench in the Exchequer, as in the Common Bench, the judicial Precedents in them are good Warrants of their Proceedings; and therefore for a long Time, and in many Successions of Reverend Judges, Prohibitions upon Information, without any other Plea pending, have been granted, Issues tried, Verdicts and Judgments given upon Demurrer; all which being in Force, they were unanimously agreed to give no Opinion against the Jurisdiction of the Court of the Common Bench in this Case, and none of the Judges of the Common Bench were called, or present at any Conference concerning this Matter; and yet *Laqueus confractus est, & nos liberati sumus. Et magna est veritas & praevalet.* See my particular Treatise of the Jurisdiction of the Common Bench in this Point, by which the Jurisdiction of that Court evidently appears.

Prohibitions.  
13 Co. 8, &c.  
41 & 70  
4 Inst. 100.  
Vid. Far. 8, 31,  
78 &c. 113,  
137, 148.

4 Inst. 99, 100.

## Parliament in Ireland.

Hill. 10 Jacobi 1.

Ireland.  
Parliam. Cases  
78, 79, &c.  
Par. 103.  
4 Inlt. 351.

**T**HE Lords of the Council did write to the two Chief Justices and Chief Barons in these Words, *After our hearty Commendations to your Lordships: Whereas his Majesty, for divers weighty Considerations, hath resolved to hold a Parliament within the Realm of Ireland: And that by an Act made in the tenth Year of H. 7. called Poyning's Act, it is provided, That all such Bills as shall be offered to the Parliament there, shall be first transcribed hither under the Great Seal of that Kingdom, and having received Allowance and Approbation here, shall be put under the Great Seal of this Kingdom, and so returned thither to be preferred to the Parliament, forasmuch as there are accordingly transferred hither from thence \* divers Bills, as well publick as private, some of which Bills were first agreed on here, some others were framed and conceived there, and coming now hither may happily receive Amendment and Alteration; We have thought meet for Avoidance of any Question or Inconvenience that may arise of the Manner and Form of Proceedings in amending or altering of those Bills, hereby to pray and require you, calling to you his Majesty Attorney and Solicitor, to look into Poyning's Act, and to consider of such Course as shall be fit to be held concerning the same, &c.*

Page [110] Dat' ultimo Junii 1612. Upon which in this Term the said Chief Justices, Chief Baron, Attorney, and Solicitor General, were assembled two several Days at Serjeants Inn; and they had not only considered of the 10 H. 7. c. 4. called Poyning's Act; but also of an Act made in the Realm of Ireland; § 4 Phil. & Ma. cap. 4. intituled, *An Act declaring how Poyning's Act shall be expounded and taken: For by the said Act of the 10 H. 7. it is provided, That no Parliament be hereafter holden in the said Land of Ireland, but at such Seasons as the King's Lieutenant and Council there first do certify the King, under the Great Seal of that Land, the Causes and Considerations, and all such Acts as to them seemeth should pass*

## PART XII. *Parliament in Ireland.*

pass in the said Parliament: And such Causes, Considerations, and Acts affirmed by the King and his Council, to be good and expedient for the Land, and his Licence thereupon, as well in Affirmation of the said Causes and Acts, as to summon the said Parliament under the Great Seal of *England* had and obtained: That done, a Parliament to be had and holden after the Form and Effect before rehearsed: And if any Parliament be holden in that Land hereafter, contrary to the Form and Provision aforesaid, it be deemed void and of none Effect in the Law.

Upon which Act divers Doubts and Ambiguities were conceived, some whereof were of greater Difficulty than others: And first, a Doubt was conceived, whether the said Act of the 10 *H. 7.* does extend to the Successors of *H. 7.* for that the Act speaks only of the King generally, and not of his Successors. 2. If the Queen *Mary* were within the Word King; and altho' these were not Matters of great Ambiguity, for that this Word King, which imports his politick Capacity, which never dies, and being spoke indefinitely, does extend in Law to all his Successors, yet is this so expounded by the said Act of 3 & 4 *Phil. & Ma. viz.* That the said Act of the 10 *H. 7.* shall extend to the King's and Queen's Majesty, her Heirs and Successors. Secondly, Where the Act of *Poyning's* says, *The King's Lieutenant and Council there*, a Scruple did arise; that if the King appoint one by the Name of his Deputy, or Lord Justice, or that if he constitute two Lords Justices, Chief Governor or Governors, and the Council, &c. and therefore it is explained in the Act of the 2 & 3 *Phil. & Ma.* that the said Act of *Poyning's* extends to all of them. Thirdly, the greatest and most difficult Doubts was upon these Words of the Act of *Poyning's*: *And such Causes, Considerations, and Acts affirmed by the King and his Council to be good and expedient for that Land, &c.* Whether the King may make any Change or Alteration of the Causes, Considerations or Acts which shall be transmitted hither from the Lieutenant and Council of *Ireland*, for that it is not Affirmative, but for Correction and Alteration of them; and therefore it was necessary to explain, that the Act of the 3 & 4 *Phil. & Ma.* was in these Words: *Either for the passing of the said Acts, and in such Form and Tenor as they should be sent into England, or else for the Change or Alteration of them, or any Part of the same.* Fourthly, Another Question was upon the Words of the first Act, *viz. That done, a Parliament to be had and holden, &c.* If at the same Parliament other Acts, which have been affirm'd or altered here, may be enacted by the Authority of the Parliament

The Word King extends to his Successors.

The Word King extends to the Word Queen.

\* there,

Page [111] \* there, the which is explained by the said last Act in these Words, *viz. For passing and agreeing upon such Acts, and no others, as shall be so returned under the Great Seal of England.* Fifthly, Great Doubt did arise on these Words, *That done a Parliament to be holden*, whether the Lieutenant and Council of Ireland, after the Parliament begun, and *pendente Parlamento*, may, upon Debate and Conference had there, transmit any other Considerations, Causes, Tenors, Provisions, and Ordinances, as shall seem to them to be good, to be enacted at the said Parliament within the Realm of Ireland, the which is explained by the said 3 & 4 Ph. & Ma. by express Words, that they may.

*Note, Reader, the Order of Proceedings and Summons of Parliament in Ireland; First, The Lieutenant and Council do certify under the Great Seal of Ireland the Causes and Considerations of all such Acts as seem good to them to be passed in Parliament, so that originally it is to begin there. 2. They are to be affirmed, altered, or changed, and returned under the Great Seal. 3. Licence under the Great Seal to summon and hold a Parliament. 4. To be done pendente Parlamento, as it appears it ought to be.*

And it was unanimously resolved, that the Causes, Considerations and Acts transmitted hither under the Great Seal of Ireland, ought to be kept and preserved here in the Chancery of England, and shall not be remanded. 2. If they be affirmed, they ought to be transcribed under the Great Seal and returned into Ireland, and all that which passes the Great Seal ought to be inrolled here in the Chancery. 3. If the Acts transmitted hither be in any Part altered or changed here, the Act so altered and changed ought forthwith to be returned under the Great Seal of England; but the Transcript under the Great Seal of Ireland, which remains in the Chancery here, shall not be amended, but the Amendment shall be under the Great Seal of England as aforesaid, returned into Ireland, without any Signification or Certification of their Allowance by those in Ireland; for as the Acts move originally in Ireland, so the Amendments or Alterations move here in England; all the Bills which are transmitted here from Ireland, are with the Petition of the Deputy and Council of the King all together under the Great Seal of Ireland, and so all the Acts which are affirmed or altered, are returned together under the Great Seal of England. See 10 H. 6. 8. which begins Mich. 18 H. 6. Rot. 46. *coram Rege*, how the Parliament in Ireland

PART XII. *Parliament in Ireland.*

was holden there before *Poynings Act*. And see another Act made at the Parliament in *Ireland* in the same Year of 10 *H. 7. c. 22.* it is enacted, that all Statutes late made within this Realm of *England*, concerning or belonging to the common and publick Weal of the same, from henceforth to be deemed good and effective in the Law, and over that be accepted, used and executed within this Land of *Ireland* in all Points, at all Times requisite, according to the Tenor and Effect of the same: And over that by the Authority aforesaid, that they and every of them be authorized, proved, and confirmed within the said Realm of *Ireland*; and if any Statute or Statutes have been made within this said Land theretofore to the contrary, that they and every of them by the Authority aforesaid, be adnulled and revoked, void and of none Effect in the Law. And observe that this Word (*late*) in this Act, hath the same Sense (*as before*) so that this Act extends to all Acts of Parliament made in *England* before the Act of 10 *H. 7.* And that is the Reason, that all Acts of Parliament made in *England* before this Act concerning *Ireland*, but only general Acts made since the said Act of 10 *H. 7.* do not bind them, because that (as it hath been said) they have a Parliament for the Realm of *Ireland*, and those of *Ireland* do not come to our Parliament. *Vide R. 3. 12. Hibernia habet Parliamenta, & faciunt leges, & nostra statuta non ligant eos, quia non mittunt Milites ad Parliamentum, sed personæ eorum sunt Subjecti Regis, sicut Inhabitantes Galinæ, Gasconniæ & Guienæ.*

\* But Question is made of this in some of our Books. *Vid. Page [112]*  
 20 *H. 6. 8. 32 H. 6. 25. 1 H. 7. 3. 8 H. 7. 10. 8 Rich. 2. Note.*  
*Process 204. 10 Ed. 5. 41. 13 Ed. 2. titulo Bastard. 11 H.*  
*4. 7. 7 E. 4. 27. Plowd. Comm. 368. 13 El. Dyer 35. 2 E-*  
*liz. Dyer 366. Calvin's Case in the seventh Part of my Reports 226. 14 Ed. 3. 184. A Prebend in England is Note.*  
 made Bishop of *Dublin* in *Ireland*, his Prebendary is void.

See the Statute of *Ireland*, upon what Books and Acts of Parliament: This Question is now by common Experience and Opinion without any Scruple resolved, that the Acts of Parliament made in *England* since the Act of the 10 *H. 7.* do not bind them in *Ireland*; but all Acts made in *England* before the 10 *H. 7.* by the said Act made in *Ireland An. 10 H. 7. cap. 22.* do bind them in *Ireland*. Where a Statute in England is of Force in Ireland. Inft. 350, 351, 356.

## *The King's Prerogative in Dignities.* Quære.

Dignity, Pre-rogative.  
Vide antea 70,  
81, 96, 108.

**N**OTE, that *Camden King at Arms* told me, that some held, that if a Baron dies, having Issue divers Daughters, the King may confer the Dignity on him who marries any of them, as hath been done in divers Cases, viz. In the Case of the Lord *Cromwell*, who had Issue divers Daughters, and the King did confer the Dignity upon *Burchier* who married the youngest Daughter, and he was called Lord *Cromwell*: And so in other Cases: And he said, that the Earl of *Glocester*, who had married the Daughter of King *Henry* the Third, and the Countess after married *Mount Hermer*, who was her Husband's Secretary, for which the King imprisoned him; and after being restored to the King's Favour, during the Minority of the Son of the said Earl of *Glocester*, and until the Infant came of full Age, and when the Infant was of full Age he was called to the Parliament by the Name of the Earl of *Glocester*, and the other by the Name of *Mount Hermer* Knight; and he said, that it appears in the Edict, or Statute made in *France*, that if any be made Duke, Marquess, Earl or Baron of any privileged Place, as of *Guise*, &c. if he die without Heir Male of his Body, the Dignity is not only extinct, but the King shall have the Manor or Territory whereof he took his Name and Dignity: *Sed nos non habemus talem consuetudinem.*

## *Ecclesiastical Jurisdiction.*

See Gibbon's  
Codex 531, 532

**N**OTE (by *Linwood*) that it appears, that by the Canons Ecclesiastick, none may exercise Ecclesiastical Jurisdiction, unless he be within the Orders of the Church, because none may pronounce Excommunication, but a spiritual Person; and there it appears, that as well the Register as the Judge ought to be spiritual, but now by the Statute of the 57 *H. 8. cap. 17.* A Doctor of Law or Register, although he be a Layman, may execute Ecclesiastical Jurisdiction.

Note

PART XII. *Custom of London.*

Note also, that by the Canons no Ecclesiastical Judge ought to cite any Churchwarden to the Court, but so as he may return home again to his House the same Day.

Also the Canons do limit how many Courts *Ex Officio* they may have within a Year.

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\* *Custom of London.*

Page [113]

Mich. 11 Jac.

**N**OTE, that if a Man gives to one of his Children a certain Sum in his Life, and after dies, although this is not given as a Child's full Portion, yet it shall be sufficient for him; but if the Father by Writing or by Will does declare, that it is but Part of a Child's Portion, then he shall have a full Child's Part, otherwise not. But some made a Difference where this Sum, so given and declared to be but for Part, shall be accounted upon Account Parcel of the entire Estate or not; that is to say, if the Issue so in Part advanced shall have so much as amounts to a Child's Part, and that the Wife and the Executor shall gain thereby, where that this Portion so given, shall be of no Benefit to the Wife or the Executors.

See 2 Salk. 426.  
1 Lev. 227.  
1 Lev. 130.  
2 Show. 249.

As if a Man hath two Children, and gives to one of them an hundred Pounds in Part of his Advancement, and then dies worth 900 *l.* in this Case the Wife, the Issue not advanced, and the Executors shall have but three equal Parts of the 900 *l.* viz. three hundred Pounds apiece; and then this hundred Pounds so given shall be in Hotchpot between the Children; which (as I think) cannot be; for then there shall not be Equality among the Issues, as the Custom doth require, who ought in my Opinion to have the Precedency of Favour, if any be.

*Devise*

*Devise.*

**N**OTE, it was holden by the Judges in the King's Bench, That if a Man, being possessed of a House and Term for Years, doth devise to pious Uses for Years, and then does demise this to his Wife for Life, the Remainder over, and dies, all his Debts being paid; if the Widow enters generally, and converts the Profits to her own Use, and not to pious Works; this is a Determination of her Election: And this is the general Case, and therefore it is good that it be specially found.

## HAYNES'S Case.

Felony to steal  
a winding  
Sheet.  
9 E. 4. 14.  
Moor 878.  
3 Inst. 110. 202.  
Who hath Propriety in them.

**N**OTE; in the Lenten Assize, held at *Leicester* 11 and 12 *Jac.* the Case was, *That one William Haynes had digged up the several Graves of three Men and one Woman in the Night, and had taken their winding Sheets from their Bodies, and buried them again;* and it was resolved by the Justices at *Serjeants Inn* in *Fleetstreet*, that the Propriety of the Sheets remain in the Owners, that is, in him who had Property therein, when the dead Body was wrapped therewith, for the dead Body is not capable of it, as in 11 *H.* 4. If Apparel be put upon a Boy, this is a Gift in the Law, for the Boy hath Capacity to take it; but a dead Body being but a Lump of Earth hath no Capacity; also it is no Gift to the Person, but bestowed on the Body for the Reverence towards it, to express the Hope of Resurrection. Also a Man cannot relinquish the Property he hath to his Goods, unless they be vested in another; and accordingly at the said Assises, he was severally indicted for taking each of these Sheets: And the first Indictment was of petty Larceny, for which he was whipped: And at the same Assises he was also indicted for the felonious Taking the three other Sheets, for which he had his Clergy, and so escaped the Sentence of Death, which he well deserved, for this inhumane and barbarous Felony.

\* *Earl*

\* *Earl of DERBY's Case.* In Canc. Page [114]

Hill. 11 Jac.

**I**N the Chancery, between Sir *John Egerton*, Plaintiff, County Palatine and *William Earl of Derby*, Chamberlain of *Chester* N. Chen. Cas. 451. and others, Defendants, for the Trust and Interest of a Farm called *Budspaw* in the County of *Chester*: It was resolved by the Lord Chancellor, the Chief Justice of *England*, the Master of the Rolls, *Doderidge* and *Winch* Justices.

1. That the Chamberlain of *Chester*, being sole Judge of Equity, cannot decree any Thing wherein himself is Party, for he cannot be a Judge *in propria causa*, but in such Case where he is Party, the Suit shall be heard here in the Chancery, *coram Domino Rege*.

2. If the Defendants dwell out of the County Palatine, Cumberb. 30, 49 he who hath Cause to complain in Equity, may also complain here in the Chancery, for in Respect that Proceedings in Chancery do bind the Person only, if the Person be out of the Jurisdiction, the Chamberlain of *Chester* cannot relieve the Party; and therefore, *Ne curia Domini Regis deficeret in justitia exhibenda*, the Suit shall be here in the Chancery; for else the Subject shall have good Right, and yet have no Remedy, which will be Inconvenient.

And this does pursue the Reason of the Common Law, as appears 13 *Ed.* 3. Tit. *Jurisdiction.* 8 *Ed.* 2. *Aff.* 382. 5 *Ed.* 3. 30. 30 *H.* 6. 6. 7 *H.* 6, 37. The Case of the Lord of the Marches of *Wales*, although an Action will lie in *Wales*, yet because he which hath Cause of Action cannot have Justice there, he shall sue here in the King's Bench; for where the particular Courts cannot do Justice to the Parties, they shall sue in the King's general Court at *Westminster*, 11 *H.* 4. 27. 8 *Ed.* 4. 8. in all Cases where it appears to the Court, that those who have Liberties to take Conuance, do fail of Right as in Matter of foreign Plea, &c. the Matter shall be determined in the general Courts at *Westminster*.

*Forms and Orders of Parliament.* PART XII.

Note.  
Causes in E-  
quity may not  
be determin'd  
by Commission.

3. It was resolv'd, that the King cannot grant a Commission to determine any Matter of Equity, but it ought to be determined in the Court of Chancery, which hath had Jurisdiction in such Case Time out of Mind, and had always such Allowance by the Law: But such Commissions or new Courts of Equity shall never have such Allowance; but have been resolv'd to be against Law, as it was agreed in *Pott's Case*.

4. Upon Consideration had of the Certificate of the Lord *Dyer*, and other Justices in the Time of Queen *Elizabeth*, concerning the Jurisdiction of the County Palatine of *Chester*; it was resolv'd, that for Things transitory, although that in Truth they be within the County Palatine, the Plaintiff may by Law alledge them to be done in any Place within *England*, and the Defendant may not plead to the Jurisdiction of the Court, that they were done within the County Palatine. See *Dyer* 13 *Eliz.* fol. 202. 716. Office found by Mandate out of Chancery of Land in *Cheeshire* is void.

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\* *Forms and Orders of Parliament.*

Page [115]

Proceedings in  
Parliament.  
4 Inst. 6, 7, 8.

**I**N the House of Commons, when the Speaker is chosen, he in his Place, where he first shall sit down, shall disable himself, and shall pray that they would proceed to a new Election; but after he is put into the Chair, then he shall pray them, that with their Favours he may disable himself to the King, so that their Expectations may not be deceived.

4 Inst. 7.

But Note, that the King the first Day of Parliament shall sit in the upper House of Parliament, and there the King or the Lord Chancellor by his Commandment, shall relate and shew the Causes of calling the Parliament, the which are best founded on the Words of the Writ of Summons of Parliament (which is a good Subject to treat on, &c.) and then in the Conclusion of the Oration, the Commons are commanded to chuse a grave and learned Man to be their Speaker. Upon which the Commons shall presently assemble themselves in the lower House, and he is to be a Member of their Parliament, and hereupon he shall disable himself, *ut supra*.

See Bohn's  
Debates in Par-  
liament 353,  
354

And

PART XII. *Forms and Orders of Parliament.*

And two or three Days after, the Commons shall present their Speaker in the Upper House to the King, where he shall disabie himself again to the King, and in most humble Manner shall intreat the King to command them to chuse a more sufficient Man: And after he is allowed by the King, then he shall make an Oration, and in the Conclusion shall pray the four usual Petitions; the which Oration being answered by the Lord Chancellor, and his Petitions allowed, the Speaker and the Commons shall depart to the House of Commons, where the Speaker in the Chair shall request the Commons, that inasmuch as they have chosen him for their Mouth, that they would assist him, and favourably accept his Proceedings, which do proceed out of an unfeigned and sincere Heart to do them Service.

Note; in the Lower House, when a Bill is read, the Speaker does open the Parts of the Bill, so that each Member of the House may understand the Intention of each Part of the Bill; and the like is done by the Lord Chancellor in the Upper House; then when it is read the second Time, sometimes it is ingrossed without any Commitment, but then the Speaker makes Question of it in this Manner: The Question is, *Whether this Bill shall be engrossed, or not.* As many as would have the Bill ingrossed, shall say, *Tea*; and as many as would not; say, *No*.

But in the Upper House of Parliament when such Question is made about engrossing, if there be no Contradiction, the Lords do not deliver their Assent in saying, *Content*, or their Dissent in saying, *Not content*, for husbanding the Time; but if their be any Contradiction, it is tried *Seriatim*, by Content, or not Content; but neither in the Upper or Lower House, the Lord Chancellor or Speaker, shall not repeat a Bill or an Amendment but once.

When a Bill is committed to the second Reading, then if the Committees amend it in any Point, then they shall write down their Amendments in a Paper, and shall direct to a Line, and between what Words the Amendments shall be put in, or what Words shall be interlined, and then all shall be ingrossed in a Bill.

And if a Bill pass in the Commons House, and the Lords amend the Bill when it is sent to the Upper House, they do as before shew the Line, and between what Words, and after the Amendments are ingrossed with particular \* References, and the Bill with the Amendments are sent again to the House of Commons where they affirm them; the Amendments are read three Times, and then they insert them into the Body of the Bill, and so *E converso* of a Bill which passeth first in the Upper House. But note, that in

## WALTER CHUTE'S *Case*. PART XII.

one of these *Cases* the entire Bill shall not be read again in the House wherein they first pass, but the Amendments only, for no Bill shall be read above three Times.

No Lord ought to speak to the Bill two Times in one Day. Also no Knight, Citizen or Burgeſs ought to speak above once to one Bill in one Day, unless sometimes by way of Explication.

No private Bill ought to be read before the publick Bills, unless the one House or the other do require it.

Note ; in the House of Commons, those that are for the new Bill, (if there be a Question of Voices) shall go out of the House, and those who are against the Bill, and for the Common Law or any former Law, shall sit in the House ; for they are in Possession of the old Law : And in the Upper House two Lords are appointed, one of the one Part, the other of the other, to number the Voices.

In both Houses, he which first stands up to speak, he shall first speak, without any Difference of Persons.

When a Bill is ingrossed at the third Reading, it may be amended in the same House in any Matter of Substance, *a fortiori*, the Error of the Clerk in the Ingrossing may be amended, &c.

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## WALTER CHUTE'S *Case*.

Pasch. 12 Jac. 1.

New erected  
Office void.  
2 Inst. 540.  
3 Inst. 185.  
4 Insti 31. 40,  
41, 196, 199,  
200.  
Q. Skinner 607.

*Walter Chute*, Sewer to the King, did exhibit a Petition to the King, that for the Safety of the Realm, and the Security of Strangers within the Realm, that the King would vouchsafe to erect a new Office of Registering of all Strangers within the Realm, except Merchant-Strangers, to be kept at *London* ; and to grant the said Office to the Petitioner, with a reasonable Fee, or without a Fee ; and that all Strangers, except Merchant-Strangers, might depart the Realm within a certain convenient Time, if they do not repair to the said Register, and take a Billet under the Register's Hand : Which Petition the Lords of the Council did refer to me,

PART XII. WALTER CHUTE'S Case.

me, by their honourable Letters of the 13th of *November* 1613. that I calling to me Counsel learned in the Law, should consider what the Law is in that behalf, and how it may stand with Conveniency and Policy of State, to put the same in Execution, and by whom it ought to be performed: And upon Conference had with the Justices of the Common Pleas, and the other Justices and Barons of *Serjeants Inn* in *Fleetstreet*, it was resolved, that the Erection of such new Offices, for the Benefit of a private Man was against all Law, of what Nature soever: And therefore where one Captain *Lee* did make Suit to the King to have a new Office, to make Inventory of Goods of those who died Testate or Intestate; it was resolved by the Lord Chancellor and my self, that such Grant shall be utterly void, although no certain Person hath it, and that this was against Common Law, and the Statute of 21 *H.* 8. In like manner another sued \* to have the Registering of Birth-<sup>Page [117]</sup> Days, and the Time of the Death of each Person within the Realm; and that it might be on Record and authentic: So *Mich.* 19 *Jac.* To make a new Office in the Upper Bench, for the only Making of all *Latitars* at the Suit of the Lord *Daubigny*, and after him of the Lord *John Hungerford*, and others, was resolved to be void. So *Littleton's* Suit, to name an Officer to be a general Register, or rather Tabler or Indexer of all Judgments, for Debts, and Damages, Recognizances, Bills, Obligations to the King, Deeds inrolled, Fines upon Offenders in the Star-Chamber, and other Courts whatsoever: And this was pretended to be for the Benefit of the Purchaser, and the ready finding of Records; and to such Purpose was made the Statute of the 27 *Eliz.* for inrolling of Statutes; but the Suit was rejected by the two Chief Justices and others: For every Court shall chuse Officers either by Law or Prescription: The Law or Custom may not be changed without a Parliament; and so it was resolved *Hill.* 12 *Jac. Regis*; and divers other such Inventions were resolved to be against Law and Record.

As to the second, in the Case of Sir *Walter Chute*, concerning the Conveniency or Inconveniency of it, it was resolved, that it was inconvenient for divers Causes. 1. For a private Man to have private Ends. 2. The numbring of Strangers by a private Man would infer a Terror; and the King and Princes of other Countries will take Offence at it, and will do the like to the King's Subjects. 3. It is to be considered, what Breach it will be to former Treaties.

## WALTER CHUTE'S Case. PART XII.

As to the third, in the Case of Sir *Walter Chute*, that may be performed without any Inconvenience; and so it was devised by the Lord *Burleigh*, and other Lords of the Council, *Anno 37 Eliz. viz.* To write Letters to the Majors, Bailiffs, or other Head Officers of every City, Borough or Town where any Strangers are resident, to certify how many Strangers, and of what Quality are in their Cities, &c. the which they are to know in respect of their Inhabitants and Contributions to the Poor, and other Charges; and this may be done without any Writing.

Which Suit being made to the Lords, was well approved by them, and the Suit utterly disallowed the 3 *December An. 3 H. 8.* Commission granted to divers, to certify the Number of Strangers, Artificers, with the Number of their Servants within *London*, and the Suburbs thereof, &c. according to the Statutes. See *Candish's Case*, 29 *El.* for making of all Writs of *Supersedeas* in the King's Bench.

13 *Eliz.* A grant of an Office of *Thomas Knivet*, to examine all his Majesty's Auditors and Clerks of the Pipe concerning their Offices for Years: It was resolved by the Court to be against Law; for it belongs to the Barons who are Judges; and it is also an Innovation in a Court of Justice. 25 *Eliz.* A Grant of an Office to *Tho. Leichfield* to examine all Deceits, false Allowances of the Queen's Officers for eight Years, resolved to be void.

The Making of *Subpœna's* in Chancery, anciently belonged to the six Clerks: The late Queen's Majesty granted the same by Patent to one particular Man.

The Keeping and Filing of Affidavits in Chancery, anciently belonged to the Register. The King's Majesty, that now is, granted the same to one particular Man.

The Erecting and putting down of Inns hath been anciently in the Power of the Justice of Peace. His Majesty hath given that Power by Patent to a particular Man.

Page [118] \* The Taking of the Depositions, and all other Proceedings before and by the Commission, which hath used to be taken and kept by the Commissioners themselves, or some Clerk of their Appointment; his Majesty hath granted the same by Patent to one particular Man.

The King by his Letters Patent granted to *Simon Darlington* the Office of Alveger, and limited what Fees he should take.

The sole Drawing, Writing and Ingrossing of all Licences and Pardons was granted to *Edward Bacon*, Gent. with the

Fee

## PART XII. *Sir STEPHEN PROCTER'S Case.*

Fee that had formerly been taken, and a Restraint for all others, &c.

The Offices of *Subpœnas* was granted to *Thomas George* and others during Life, with the Fee of 2 s. and a Restraint that no others presume to make those Writs.

The Office of making and registering all manner of Assurances and Policies, &c. was by Letters Patent granted to *Richard Gandler*, Gent. with such Fees as the Lord Mayor and others should rate, with Power to rate Fees, and a Restraint of all others, &c. which was during Pleasure, and afterwards to him and others during Lives.

The Office of Writing Tallies and Counter-Tallies granted to *Sir Vincent Skinner*.

The Office of ingrossing Patents to the Great Seal, and <sup>Quere.</sup> an Increase of Fees granted late to *Sir Richard Young*, and *Mr. Pye*.

[*Q. Skinner 607.*]

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## *Sir STEPHEN PROCTER'S Case.*

**I**N an Information preferred in the Star-Chamber by the Attorney General, against *Stephen Procter*, *Berkenhead*, and others, for Scandal and Conspiracy of the Earl of *Northampton*, and the Lord *Wooton*. At the Hearing of this Case, were present eight Lords, *Scil.* the Chief Baron, the two Chief Justices, two Bishops, one Baron, the Chancellor of the Exchequer, and the Lord Chancellor: And the three Chief Justices, and the Temporal Barons condemned *Sir Stephen Procter*, and fined and imprisoned him: But the Lord Chancellor, the two Bishops, and the Chancellor of the Exchequer acquitted him. And the Question was, if *Sir Stephen Procter* shall be condemned or acquitted; and it seemed to some of the Clerks *Prima facie*, that the better shall be taken for the King, and that he shall be condemned. But others were of the contrary Opinion; and hereupon the Matter was referred to the two Chief Justices, calling to their Assistance the King's learned Counsel: And first they resolved, that this Question must be determined by the Precedents of the Court of Star-chamber; for that Court is against the Rule and Order of all other Courts, for in the King's Bench,

## Sir STEPHEN PROCTER'S Case. PART XII.

the Common Pleas, or the Exchequer, or in the Exchequer-Chamber, where all the Justices are assembled, if the Justices are equally divided, no Judgment can be given; and so it is in the Court of Parliament; and therefore this Course ought to be warranted by the Custom of the Court; And as to that, two Precedents only were produced for the Maintenance of the said Custom, *viz.* One in the *Hillary-Term*, 39 *El.* between *Gibson* Plaintiff, and *Griffith* and others Defendants; where the Complaint was for a Riot, and at the Hearing of the Case there were eight present; four gave their Judgments that the Defendants were Guilty; but the other four, whereof the Lord Chancellor was one, pronounced \* the Defendants Not guilty, and no Sentence of Condemnation was ever entred, because the Lord Chancellor was one of the four who acquitted them. The other was *Hill.* 25 *Eliz.* in an Information by the Attorney General against *Katharine* and others, for Forging of a Will, and a Misdemeanor for procuring a fraudulent Deed to defeat the Queen of her Escheat: And eight were in Presence at the Hearing of the Cause, whereof four found the Defendants Guilty of Forgery, and did inflict the Punishment according to the Statute of the 5 *Eliz.* but the others, whereof the Lord Chancellor was one, gave Sentence, that the Defendants were guilty of the Misdemeanor, and not of the Forgery, and imposed a Fine of 500 *l.* only: Which Decree was entred according to the Lord Chancellor's Voice, altho' the Sentence on the other Side was more beneficial for the King; and no other Precedent could be found in this Case, the which I have reported this Term.

Page [119]

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## Exaction of Benevolence.

See Speed's

Chron. 529,

706, 742.

Rawley's Hist.

524, 525.

Polyd. Virgil

302, 303, 527.

576, 1706, &c.

Petition of

Right, Cotton,

Tit. Loans.

Whitlock's

MS. Tit. Bene-

volence.

13 Co. 29.

**N**OTE; the Exaction under the good Name of Benevolence began in this Manner.

*When King Edward the Fourth had a Subsidy granted to him in the 12 Ed. 4. by Parliament, because he could have no more by Parliament, and without a Parliament he could not have any Subsidy to be levied of the Lands and Goods of the Subject, he invented this Shift or Device, in which three Things are to be observed.*

1. *The*

## PART XII. *Exaction of Benevolence.*

1. *The Cause.*
2. *The Invention.*
3. *The Success.*

1. *The Duke of Burgundy, who had married Margaret, the Sister of Edw. 4. solicited King Edward to join in War with him against the French King, to which the King easily consented, because he sought Revenge against the French King for Aiding the Earl of Warwick, Queen Margaret, and Prince Edward, and their Party; and therefore to make War against the French King was the Cause.*

Hollinshed  
11 Ed. 4. 504.  
Stow 701.

2. *The Invention was, The King called before him at several Times a great Number of the Wealthiest of his Subjects, to declare to them his Necessity, and his Purpose to levy War for the Honour and Safety of the Kingdom, and demanded of each of them a certain Sum of Money; and the King treated with them with such great Grace and Clemency, and with such gentle Prayer to assist him in his Necessity, for the Honour of the Realm, that they very freely yielded to his Request, for the Honour and Safety of the Realm: Amongst the rest, there was a Widow of a very good Estate, of whom the King meerly asked what she would willingly give him for the Maintenance of his Wars; By my faith, quoth she, for your lovely Countenance sake, you shall have 20 Pound, which was more than the King expected; the King thanked her, and vouchsafed to kiss her, upon which she presently swore, he should have twenty Pound more.*

3. *The Success and Event was, That whereas the King called this a Benevolence to please the People, yet many of the People did much grudge at it, and called it a Malevolence.*

*Primo Ed. 5. in the Oration of the Duke of Buckingham in Guild-hall in London, he inveighed, amongst other Things, against this Taxation under the Name of Benevolence. 1 Rich. 3. cap. 2. the Subjects of the Realm shall not be charged with such Charge or Imposition called Benevolence, which tendeth to the Subversion of the Law, and Destruction of Commonalty, as appears in the Preamble (where any such Charge.) And that such Exaction before taken, under the Name of Benevolence, shall not be drawn into Example \* to make such or the like Charge, but shall be damned and adnulled for ever: But it appears by the Preamble, that this Benevolence was against the Will and Liberty of the Subject, but a free-will Offering is not restrained.*

Page [120]

*Anno 6 H. 7. The King declared in Parliament, that he had just Cause of War against the French King, which for the Causes there shewn was approved; and for that he de-*

*Exaction of Benevolence.* PART XII.

fired a Benevolence towards the Maintenance of it; and every one promised his helping Hand, the which the King greatly commended; and to the Intent that the poorer Sort might be spared, he demanded it by Way of a *Benevolence*, according to the Example of *Edw. 4.* and published, that he would by their open Hands measure their benevolent Hearts, and he who gives but a little, according to his Gift.

By this Means he collected great Sums of Money, with some Grudge for the Extremity shewn by the Commissioners. 11 *H. 7. cap. 20.* An Act was made for levying of that Benevolence, according to their Assent, but only of such as assented.

*Anno 20 H. 7.* A Commission to levy what was granted by 11 *H. 7.*

Stow 880.

Note, That 15 *H. 8.* a Commission under the Great Seal, called a Commission of Anticipation, to collect the Subsidy before the Day

*Anno 16 H. 8.* For War with *France*, a Benevolence levied by Commission with great Curses and Imprecations against the Council, and with Success; for it was to levy a sixth Part of the Value in Money or Plate against the good Will of the Subject.

*Anno 26 H. 8.* Another Benevolence levied by Commission for Maintenance of War against *France*, with ill Success, for it was exacted of the Subject against his good Will. But if the Subjects of their free Will, without any Compulsion, will give to the King for publick Uses any Sums of Money, this is not prohibited by any Statute.

And the Statute 11 *H. 7. cap. 18.* proves this, where the Parliament compels them who have freely granted any Thing to the King for publick Use, to pay it.

Parliament's  
Annals, 2 Part  
21.

*Feb. Anno 40 Eliz.* It was resolved by all the Justices and Barons, that a free Grant to the Queen without Coercion is lawful; and accordingly they granted it to the Queen, *Quod nota bene, quia, &c.*

[Note also; A Benevolence was taken 12 *Jac. 1.* and another 19 *Jac. 1.* and both of them after Dissolutions of the Parliament. See for this Whitlock's MS. *Tit. Benevolence.* And Quære, if not contrary to the Stat. 3. 5. c.]

Ireland.

## Ireland, and free Borough.

Pasch. 12 Jacobi 1.

THE Case of *Dungannon* in *Ireland*; The Case of the new Corporation of *Dungannon* in *Ireland*, was in Effect, *scil.* That the King constituted the Town of *Dungannon* to be a free Borough, *Et ulterius volumus, declaramus, & statuimus, quod inhabitantes ville prædictæ sint unum corpus corporatum per nomen Præpositi, 12. Burgensium & Communitatis Dungannon, & per idem nomen placitare possint: Et quod ipsi prædicti Præpositi & Burgenses & Successores sui habeant potestatem eligendi duos Burgenses, &c. ad Parliamentum, &c.* And the Doubt was, whether this Grant of Election of Burgeses of Parliament was good, for because it was granted but to Parcel of the Body, *scil.* To the Provost and Burgeses, and not to the Provost, Burgeses and Commonalty. And the Chief Baron thought, that forasmuch as this was not but a Nomination or Election, it was sufficient to make the Provost and Burgeses only to have it: And he took a Diversity betwixt Nomination and other Inheritance: But this was denied \* by all the Justices and Barons; for this Power to elect Burgeses, is an Inheritance of which the Provost and Burgeses are not capable, for that it ought to be vested in the entire Corporation, *scil.* Provost, Burgeses and Commonalty: And it seemed to *Hubbard*, Chief Justice of the Common Pleas, that the King may grant to the Inhabitants of *Islington* to be a free Borough; and that the Burgeses of the same Town may elect two Burgeses to Parliament: And that it shall be good, although that the Burgeses be not incorporated; for there are many Burgeses who elect Burgeses to the Parliament, which are not incorporate: But it was resolved by all, that such a Grant made by the King should be void; for the Inhabitants have not Capacity to take an Inheritance, as in 15 *Ed.* 4. to have Common: And *Littleton* saith in his Chapter of *Burgage*, that the Boroughs which send Burgeses to Parliament, were the most antient and principal Cities, &c. So that it shall be intended, that at the first they were incorporate. Also *Plus valet sæpenumero vulgaris consuetudo, quam Regalis concessio.*

Page [121]

See 3 Saik. 18.

But

But it was resolved by *Hubbard, Tanfield, Altham, Winch, Nicols* and *Haughton*, *Quod volumus*, was a good Word of Grant, as *Piggot* was of Opinion. 21 *Edw.* 4. And this shall be an implied Grant to all the Corporation, that the Provost and Burgessees shall elect, &c. And regularly, when the Grant is indefinite, *scil.* First, *Concedimus* an uncertain Thing, *Et ulterius quod præpositus, & Burgenses, & Successores sui elegerint*; this shall be within the first *Concedimus* to all the Body, which that Party shall chuse: But the Chief Justice of *England*, and *Doderidge*, thought the contrary; for in this Case there was but an Ordinance to erect the Corporation, and no Grant altogether to any Person, so that this Clause, *Et quod, &c.* is idle and vain.

And Note; all the new Corporations were of the same Form, and in none of them is any Clause to elect new Burgessees, so that when those of the modern Burgessees die, this Power to elect Burgessees is gone.

Felons Goods.

Mich. 12 Jac. 1.

Felons Goods,  
when forfeited.  
See 2 Hawk.  
c. 30. sect. 29.  
c. 49. sect. 10,  
11, 12, 13, &c.

A Question was moved to the Chief Baron, and the Justices of *Serjeants Inn* in *Chancery-Lane*, That if a Felon be convict either by Verdict or Confession, if immediately by his Conviction, his Goods and Chattels be forfeited. And it was said, that if the Felon after his Conviction pray his Clergy, that then clearly he shall forfeit his Goods and Chattels, for *Quodammodo* this is a Flight, because he refuseth to be adjudged by the Common Law, and flies to the Privilege of the Holy Church. But it was resolved by the Chief Baron and the Justices, that immediately by his Conviction his Goods and Chattels are forfeited; and the Praying of his Clergy is not any Forfeiture; for then in Case where he cannot have his Clergy, he forfeits nothing until his Attainder, which none will affirm. And with this agrees *Stamford* 192. a. where he says, that the Goods of a Felon are forfeited, which he hath the Day of the Verdict given; and this is proved also by the Stat. of 1 R. 3. where it is admitted, that the Goods of a Felon convict are forfeited and may be seized. And of the same Opinion was the Chief Justice, and the Justices of *Serjeants Inn* in *Fleet-street*. *Vide Trin.* 41 *Eliz.* 332.

\* ANNE

## \* ANNE HUNGATE's Case in Cam. Stell. Page [122]

Mich. 11 Jac. 1.

IN this very Term a great Case was heard and determined in the *Star-Chamber*, between Sir *Henry Day*, who died, pendent the Bill, and *Anne* his Wife, and *Nicholas Bedingfield* Esq; and *Eliz.* his Wife, Plaintiffs, and *Anne Hungate* Widow, Sir *Robert Wind*, *Henry Brantbwaite* Esq; *Thomas Townsend* Esq; *Thomas Blomfield* Gent. and *George Min* Gent. Defendants; and the Case in Effect was, That *Henry Hoogan Esquire*, being seised of the Manor of *Hammonds*, and of divers Land in *East Bradenham*, &c. in the County of *Norfolk* in Fee, by Deed made a Feoffment of them to the Use of the said *Anne* who took *Hungate* to Husband, and she had Issue by him a Son and a Daughter, and he died: And *Anne* obtained a Grant of the Wardship of the Son, and after when the Son was of the Age of one and twenty Years, saving six Weeks; By *Dedimus potestatem*, directed to Sir *Robert Wind*, *Henry Brantbwait* then Feodary, and *Thomas Townsend*, they took Cognizance of a Fine of the said Son, being then of the Age aforesaid, and sick: And the Bill charged them all with Practise in procuring the said Son to acknowledge the Fine; they all knowing that the said Son was within Age, and in Ward of the King in Custody of the said *Anne*: But there was not any Practise or Circumvention used by any of the Defendants to procure the said Son to acknowledge the same, but the Son of his own good Will levied it. And by Indenture the Use was limited to his Mother, the said *Anne* and her Heirs with Power of Revocation by the Son upon Tender of ten Shillings, &c. and this was in Consideration, that the Mother had paid the Debts of his Father to a very great Value, and had obtained the Wardship of him, and that her Jointure should be confirmed; And that his Mother, if she pleased, might give it to his Brother which she had by *Hungate*, who was of Half-Blood; and it appeared that the Mother knew the Son to be within Age, but the Commissioners, for any Thing that was proved, were ignorant of it, nor did they send for the Book of the Church, in which his Age appeared, being in the same Parish.

Fine, by an Infant, good.

See for this

1 Co. 76.

2 Co. 57, 68, 77.

5 Co. 2 part.

38, 44, 45.

8 Co. 58.

11 Co. 59, 77.

2 Salk. 567.

And

And the Counsel for the Plaintiff prayed, that the Defendants should be punished for their Misdemeanor; and that the said Women being Plaintiffs, who were Cousins, and Heirs to the said Son of the entire Blood, who should be disinherited by the said Fine. To which it was resolved by the two Chief Justices, and the Chief Baron, that there was not any Crime punishable by the Law in this Case: For the Judges of Law, and of this Court, may punish such Offences and Crimes as are determinable in this Court: But the Judges cannot create Offences, nor do as *Hannibal* did, to make his Way over the *Alps*, when he could find none, for *Judicandum est legibus; & ubi non est lex, nec est transgressio*: And for this, when the Infant levied the Fine, if it be not reversed during his Minority, the Fine is unavoidable in Law, and the Heirs of the Infant have not any Remedy by the Law to reverse it; the Cause is for this, that the Age of the Infant is not to be tried but by Inspection of his Person: *Non testium testimonio, non juratorum veredicto, sed judicis inspectione solummodo*: But the Judges as by *adjuncula*, may inform themselves by Witnesses, \* Church-Books, &c. And the Reason of it is, that the Fine should otherwise as well lose its Effects as its Name, for *Dicitur finis ab effectu, quia finem litibus imponit*: And if Infancy should be tried otherwise than by Inspection, no Man should be sure of his Inheritance; for after the Death of the Cognisor, Averment may be made many Years after, That the Cognisor was within Age at the Time of the Fine; and so many Records avoided by naked Averment, which should be against Law, and the Cause of great Vexation and Suit, and *Fitz. N. B. fol. 21.* If an Infant levy Fine, he shall have a Writ of Error during his Nonage, and assign it for Error; and this is Error of the Court in Law, and shall be tried by the Judges of Law.

And for this it was resolved by the said Justices, That forasmuch as no Corruption and Circumvention was proved in the Commissioners, or in any of the Parties, of which they may be indicted at the Suit of the King, or punished in this Court, the Fine shall stand.

And it was not apparent to the Commissioners, that he was within age, forasmuch as he wanted but six Weeks of his full Age; but if the Commissioners had Knowledge that he was within Age, then this had been a Misdemeanor in them: For it was said, that Fines and Recoveries are like to the Pole Artick and Antartick, for upon those Assurances of Lives depend; for which by naked Averment they cannot be shaken or impeached, for which divers notable Precedents have been concerning the Matter in Question in this Court.

And

## PART XII. MANSFIELD'S Case.

And for this in this Court, *Mich.* 24 & 25 *El.* *Cafe.* 14. between *William Cavendish* and *Anne* his Wife, one of the Co-heirs of *Henry Knightly*, against *Robert Worsley*, and *Katharine Lanter* Co-heir, and *Trafford*, and other Defendants. And the Case was, *That Robert Worsley and Katharine his Wife being within Age acknowledged a Note of a Fine before Trafford, and another of the Defendants, by Dedimus Potestatem: And the Decree saith, that the Commissioners did perfectly know that the said Katharine was within Age; and for this Cause every one of them was fined; but the Fine stands.*

*Mich.* 38 & 39 *Eliz.* In this Court one *Alexander Gilderbrand* being seised of certain Lands in *Windkam, in Com. Norf.* in Fee, one *Hubbard* procured one *Roger*, who was in his Custody in his House, to take upon him the Name of *Alexander Gilderbrand* who was then beyond the Seas, to acknowledge a Fine to the said *Hubbard* of the said Lands, and they were fined in this Court; and it was Part of the Sentence, that if he did not re-assure the Land to the said *Alexander*, he should forfeit a greater Fine to the Queen: But there was no Sentence to draw the Fine off from the File, nor Damages awarded to the said *Alexander*, who was the Party grieved.

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## MANSFIELD'S Case.

*Mich.* 12 *Jacobi* 1.

**A** *ANNO* 23 *Eliz.* In the Court of Wards, the Case was this; <sup>Fine, by an Ideor.</sup> That *Henry Busbley* seised in Fee of certain Lands in *North Mins* in the County of *Hertford*, by his Will in Writing demised the said Lands to *Henry Busbley* his Son in Tail, the Remainder to one *William Busbley*.

\* And for this, that his Son was within Age, he demised <sup>Page [124]</sup> the Education of him to *Thomas Harrison*, whom he made his Executor: And afterwards it happened that *Henry* the Son became a monstrous and deformed Cripple, and proved an *Idcot a Nativitate*; The which *Idcot* by the Practice of one *Nicols* and others, was ravished and taken out of the Custody of his Guardian, and was carried upon Men's Shoulders to a Place unknown, and there kept in Secret, until he had acknowledged a Fine of his Lands to one *Bozhome*, before Justice *Southcot*, *Anno* 9 *Reg. Eliz.* and by

See for this  
2 Co. 58.  
4 Co. 2. and  
124, 125.  
10 Co. 42.

## WARCOMBE and CARREL'S Case. PART XII.

Indenture betwixt them, the Use of the said Fine was declared to the Use of the Cognisee and his Heirs, which *Bothome*, Anno 12 *Eliz.* conveyed the said Land to one *Henry Mansfield*: And Anno 22 *Eliz.* the said *Henry Busbley* the Son, by Inquisition was found an *Ideot a nativitate*; and upon this in Anno 33. the Court of Wards took Order for the Possession of the said Lands. *Vide Calvert's Case* in my Reports.

And it was moved as a Doubt in the said Court of Wards, whether the said Fine should be to the Use of the said Ideot and his Heirs; for notwithstanding that the Fine which is of Record binds the Ideot for the Causes aforesaid, yet the Indentures are not sufficient to direct the Uses: But it was resolved, that forasmuch as he was enabled by the Fine as to the Principal, he shall not be disabled to limit the Uses, which are but as accessory.

And the same is the Law of an Infant and Feme Covert. And the said *Mansfield* brought an Action of Trespass in the Common Pleas against one *Trott*, the Farmer of the said Lands; and the Issue was to be tried at the Bar: And the said deformed Ideot was sent out of the Court of Wards, to be shewn to the Judges of the Common Pleas, and to the Jurors there tried and sworn: And being brought upon a Man's Shoulders, the Judges hearing that the Title of *Mansfield* was under the said Fine levied by that Ideot; the Lord *Dyer*, and the Court by Consent of Parties, caused a Juror to be withdrawn; and the Lord *Dyer* said, that the Judge who took the Fine, was never worthy to take another; but notwithstanding this, and although the monstrous Deformity and Ideocy of *Busbley* was apparent and visible, yet the Fine stood good.

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## WARCOMBE and CARREL'S Case.

Mich. 12 Jacobi 1.

Fine by an Infant Feme Covert. *Vide supra* and *antea* 22.

20 Oct. 6 *Eliz.* in the *Star-Chamber*, where were present Sir *Nicholas Bacon*, Knight, Keeper of the Great Seal, the Marquess of *Northampton*, the Earl of *Westmorland*, the Earl of *Suffex*, the Earl of *Leicester*, Lord *Clynton*, High Admiral, Lords *Strange* and *Hunsden*, *Progers* Knight, Controller of the Household, Sir *Francis Knols*, Secretary, Sir *William Peeters*, Sir *John Mason*, Sir *Richard Sackvil*, Under-Treasurer of the Exchequer, Sir *Robert Catlin*,

PART XII. WARCOMBE and CARREL's Case.

Catlin Master of the Rolls, Sir James Dyer, Justice del Banc. The Case was, That Edward Carrell an Apprentice of the Law, for a great Sum of Money bought the Wardship of Johan, Daughter and Heir of Waincombe of the County of Hereford, and married her to Edward Carrell, his youngest Son: And after \* Hill. Anno 5 Eliz. the said Johan fell sick, and being of the Age of nineteen Years, and not having any Issue, the said Edward her Husband perswaded her to acknowledge a Fine of her Inheritance, by which should be conveyed an Estate to the Husband and Wife in Tail, the Remainder to the right Heirs of the Wife: And Cognizance was taken by *Dedimus potestatem* directed to Sir Tho. Sanders and one Chesnell of Grays Inn before Easter, divers Judges being here who might have examined her: And on Friday in Easter-week she died, but the Fine and *l'argent du Roigne* was entered as of the last Term, *scil.* the Term of St. Hilary, four Days before the Death of the Wife. Page [125]

And the original Writ of Covenant bore Teste 15 Jan. returnable *crastino Pur.* and the *Dedimus potestatem* 18 die Jan. And James Warcombe, Cousin and Heir of the said Johan, complained by Bill against Edward Carrell for obtaining of the said Fine by indirect Practice; and thereupon the Sentence of the honourable Court ensued thus: See 3 Co. 77. 78. 5 Co. 2 last 124.

*This Day a Right Honourable Presence being assembled in this Court, the Matter depending in the same, between James Warcombe, Esquire complainant, and Edward Carrell of London, Gent. Defendant, as well for and concerning the Validity of the Fine levied by the said Edward Carrel, and Johan his late Wife, of certain Manors, &c. of the Inheritance of the said Johan, which Johan, as the Plaintiff doth alledge, was not of full Age at the Time of the Fine levied; as also for certain sinister and undue Means committed and done by the said Edward Carrell, in the suing and getting out of the said Fine, as is supposed and alledged by the said Complainant, was by great and long Deliberation heard and examined, with all the Allegations and Sayings that could be alledged and said on both Parts.*

Upon hearing of which Matter the said Fine was by the whole Opinion of the Court adjudged good, available, and effectual in the Law.

And also no Fault adjudged to be in the said Edward Carrell, in the Suing and getting out of the said Fine, but that the same was duly and orderly sued out, according to the due Form and Order of the Laws of this Realm. And all this is within the Rule, *Facta tenent multa, quæ fieri prohibentur*: And the Heir hath *Dammum absque injuria*, for the Law doth not give him any Remedy to reverse it.

And

## Appeal of Robbery. PART XII.

And as *Edward Carrell* was not punished, altho' that he knew that his Wife was within Age; so the said *Hungate* shall not be punished, altho' that she knew that her Son was within Age; and that the rather, by Reason of the ancient Verse,

*Leges communes si nescit femina, miles,  
Clericus, & Cultor, Judex sibi parceret & ultor.*

And by Sentence all were dismissed, &c.

## Appeal of Robbery.

H. P. C. 134.  
1 Inst. 289.  
Bro. Appeal  
100.  
1 Danv. 490.  
2 Hawk. c. 23  
sect. 44, &c.

**A**mongst the Records in the Treasury, *Et inter placita coram Domino Rege de termino Sancti Mich. Anno 42 Ed. 3. Rot. 27.*

*Cornubia. Helena, filia Hugonis Allot, brought an Appeal of Robbery against Laurence Boskosleake, Richard Coborta, Jo. Gilman, and Johan his Wife, and divers others; the Defendants plead Not guilty, &c. and were found Not guilty of the Felony aforesaid, Nec unquam se subtraxerunt, ideo prædictus Laurentius & omnes alii, &c. eunt inde quieti: Et prædicta Elena pro falso appello suo committitur prisonæ in Custodia Marescalli Ric. de Inworth, Marescalli, &c. Et super \* hoc prædictus Laurentius & alii petunt juxta formam statuti quod Furatores hoc inquirent quæ damna prædictus Laurentius & alii sustinuerunt occasione falsi appelli prædicti: Et si præd. Helena sit sufficiens ad damna solvenda: Et super hoc quæsitum est a præfatis Furatoribus quæ damna prædictus Laurentius & alii sustinuerunt singulatim occasione prædicta. Qui dicunt quod prædictus Laurentius sustinuit damna ad valentiam 10 l. Et Ricardus Coborta ad valentiam 10 l. & Johannes Gilman 5 l. & Johanna uxor dicti Johannis Gilman 5 l. & sic singulatim de ceteris: Quæsitum est si prædicta Helena sit sufficiens ad aliqua damna solvenda. Qui dicunt, quod non. Quæsitum, quis vel qui abbetavit vel abbettaverunt præfatam Helenam ad appellationem prædictam prosequendam. Qui dicunt, quod Johannes Riddel senior, Johannes Riddel junior, Tho. Drury & Alicia Allet abbettaverunt præfatam Helenam, ideo ipsi distringantur secundum formam statuti ad respondendum, &c. Out of which Record these Things are to be observed.*

See 2 Hawk.  
ch. 7. sect. 9.  
ch. 23. sect. 44.  
45, 47 and 48.

1. Altho' it is enacted by the Stat. of *Westm. 2. cap. 21.* That in this Case *Justiciarii, &c. puniant appellatorem per prisonam unius Anni, &c.* and according to the Court

com-

## PART XII. *Appeal of Robbery:*

committed to Prison, &c. so that they were not bailable, yet *quia eadem Helena prægnans fuit & in periculo mortis*, she was let out upon Mainprise to have her Body, 15 Mich. *ad satisfaciendum prædicto Laurentio & aliis de damnis singulatim adjudicatis occasione prædicta*: And the Reason of this is, for this, that the Common Law requires in every Case Conveniency; and it is inconvenient that a Woman with Child should remain in Common Gaol *sub salva & arcta custodia*, where Women cannot resort to her upon Times as Necessity shall require forthwith for Conveniency; and principally where it is for avoiding the Danger of Death, the Court hath Power to put her Mainprise until she be delivered, for it ought to be a Truth concerning the Judges of the Common Law, which the moral Poet hath spoken,

*Reddere personæ scit convenientia cuique.*

And with it agrees that Advice which *Bracton* gives to the Judges, *lib. 2. cap. 2.*

*Considerent Judices efficaciter quid oportuerit secundum necessitatem, quid expedierit secundum utilitatem, quid ligatum fuit secundum permissionem, & quid deceat secundum honestatem.*

2. That the Defend. recover their Damages either wholly against the Principal, or wholly against the Abettors, and not Part against the one, and Part against the other; and that the Record is *Quæsitum est, si prædicta Helena est sufficiens ad aliqua damna solvenda*: And with this 'tis agreed in 8 *Ed. 4. 3.*

3. Although that the Statute saith, *Restituant appellatores damna appellatis*, yet the Damages shall be *singulatim* assessed; for that the Words are further, *Secundum discretionem Justiciariorum, habito respectu ad prisonam vel arrestationem, &c.* So that forasmuch as the Causes of Damages are several, as the Defamation, &c. of the one may be greater than of the other, so the Damages of the one may be greater than of the other.

4. That although that the Appellor be not sufficient for to pay, yet his Body shall be taken *ad satisfaciendum*. *Quia qui non habet in ære, luet in corpore.*

5. That although that Jurors in the Appeal have found the Defendants Abettors, yet insomuch as they are Strangers to the Original, they shall not be concluded, for they shall be distrained *ad respondendum*: And to that they may plead Not guilty, or other Plea; *quia res inter alios actæ alteri nocere non debent.*

Rast Ent.

*Vide the Book of Entries, Title, Appeal, divisone damages 1 & 2. And this doth appear also by the said Statute, which says, that si Abetior \*convictus sit de hujusmodi abetita' per malitiam, puniatur per prisonam & tenetur ad restitutionem damnorum faciendam.*

## Durefs per Gaoler.

2 Hawk. c. 24.  
Sect. 20.

**P**Lacita coram Rege apud Ebor. in Crastino Sancti Trin. An. 7 Ed. 3. 44. *Divisione* Indictment (are very worthy of Observation); the Effect of one Indictment was, *Quod ubi quidam Robertus de Bayons de Tunelby captus fuit & in prisona Castri London' detentus pro quodam debito statuti mercatorii in Custodia Thomæ Botelier Constabularii Castri de London ubi ipse Thomas le Botelier posuit ipsum Robertum in profundo Gaolo, inter Lenones & villi prisona contra formam statuti, &c. viz. de 1 Ed. 3. & in eodem profundo detinuit quousque idem Robertus fecit finem cum eo de 40 s. quos ei solvit & hoc per exactionem.*

*Item presentant, That one Wellingtoner was arrested for Trespafs at the Suit of James Cantelupe, and detained in the said Gaol, the said Thomas for forty Shillings ad largum ire permisit: Idem Wallingtoner ire non potuit quousque finem fecit cum Roberto de Barton Clerico de dimidio Marcæ quod ei solvit & ulterius pro ferris, &c.*

*Item presentant, That one John Aylmer of Digby purchased of Thomas Lord of Bardolfe, one Messuage, &c. Ibi venit Magister Clericus Eschetoris colore officii sui, & absque aliqua causa dictam terram seisivit in manus Domini Regis & noluit ipsum Johannem permitttere terram suam prædictam habere quousque idem Johannes finem fecisset cum prædicto Magistro Roberto pro 40 s. quos cepit per extortionem & nunc manum suam amovit.*

*Item presentant, quod ubi Thomas Balivus Wapentachiæ de Flaxwell & Laughton, tenet Wapentachiam suam super proclamationem, & illa proclamatio debet fieri solenniter in villa de Lasford & Kirby, super quam proclamationem homines Wapentachiæ possent pervenire ibi: Prædictus Thomas non fecit proclamationes suas, per quod homines patriæ amerciati sunt graviter, & hujusmodi amerciamentia de iis levata fuerint, & hoc per extortionem: To which*

PART XII. *False Affidavits.*

which he appeared and pleaded Not guilty, and was found guilty, and fined and imprisoned.

*Item presentant, quod Thomas de Maudon Balivus Wapentachiæ de Boby & Grafton, tenere debuisse 2 Wapentachia in diversis locis ad disiammentum patriæ prout de jure deberet. Idem Thomas tenebat ambo Wapentachia in uno loco, ad maximum damnum populi Wapentachiæ prædictæ, & homines eorundem Wapentachiorum nimis excessive fuerint amerciati.*

*Item Thomas Carleton Under-Sheriff of the County of Lincoln, was indicted for this, that one Barthol. de Lotgrave purchased a Writ against Nicolas de Nottingham, and delivered the said Writ to the said Sheriff, who returned a Trade upon the said Writ, although the said Writ was sufficiently in Time delivered: Et sic fecit iterum, &c.*

False Return.  
Qu. 1 Dav.  
179, 18a.

*Item Hugo de Baxter Latro notorius indictatus de feloniam non fuit replegiabilis & quod malæ famæ extitit.*

*False Affidavits.*

Page [128]

**I**N an Action *sur le Case*, it was resolved *per totam Curiam*, that if a Sumner return one certified upon his Oath in Court Christian, where in Truth he was not, and he is pronounced *contumax*, and after he is excommunicated, he shall have an Action *sur le Case*, for here is *injuria & damnum*. And in such Case the Plaintiff shall have Judgment to recover, for although that the Proceeding and Oath touching this Matter are Ecclesiastical, yet the Damage is temporal, for he is disabled to sue in any Court.

Case of a false Return by a Sumner.  
Fitz 2ib. 174.

And it was resolved, that Perjury, by which Damages do accrue, may be punished as a Misdemeanor at the Suit of the King.

And also the Party may have his Action upon the Case to recover Damages, for it should be a very great Defect in the Law, and Incouragement to Parties, if Men may commit Perjury with Impunity: And for that Reason, if Jurors use Perjury themselves, an Attaint lieth at the Common Law, for so it appears by *Glanvil, lib. 2. cap. 29. 15 H. 8. Tit. Attaint 76. 6 H. 3. ib. 73 & 75.* and in the Time of *Ed. 1. Attaint 70.* for the first Act, which gave the Attaint; the Statute of *West. 1. cap. 38. Vide F. N. B.*

109. *Vide* 2. 7 *H. 6.* 25. one who was to be a Pledge affirmed upon his Oath, that he could dispend forty Shillings *per annum*, and upon Re-examination he confessed it false, for which he was committed to the Fleet until he made a Fine, which proves, that the false Oath was the Wrong and Injury, and punishable by the Law, & *ex consequenti*, when Damage follows to the Party, he shall have Remedy by Action upon the Case.

In like Manner it was agreed, that if one make a false Affidavit by which the Party is arrested and molested by Process of Contempt, he may have an Action *sur le Case*, and recover Damages. And although that when the Matter is mere Ecclesiastical, the Court Christian may punish *pro salute animæ*, yet they cannot award any Damages to the Party, for if one within holy Order be beaten, they may proceed against the Delinquent *pro salute animæ*, but the Priest ought to recover his Damages by Action of Battery; so notwithstanding that they may punish the said Sumner in the Case at the Bar, for Perjury and false Certificate, yet the Party grieved shall recover his Damages at the Common Law, and altho' the Matter be merely Ecclesiastical, yet if the Party grieved hath Damages either by any wrongful Proceedings of the Judge, or Misfeasance, or Non-feasance, \* or Falsity of any Minister, or by unjust Prosecution of the Party, the Party grieved may have an Action *sur le Case*, and recover his Damages.

\* See Carthew  
487.

*Doctor and Student* 118, 119. *Action sur le Case*, lieth against the Ordinary, for a wrongful Excommunication touching any thing out of his Jurisdiction, so there are many other good Cases: And the Case in *Fitz.* 47 *H. 6.* 8. If an Archdeacon refuse to induct the Clerk, &c. he shall have an Action upon the Case, which was affirmed for good Law by all the Court, with which agrees 26 *H. 8.* 3. a. and true it is, that it is held in 38 *H. 6.* 14. That in such Case he shall have Remedy against the Archdeacon to punish him; but saving the Opinion there, they cannot award him Damages in such Case, but he shall recover them at Common Law: So *F. N. B.* 92. If a Man proceed against a Prohibition, the Party may have an Action upon the Case against him for prosecuting in Court Christian. *Vide Trin.* 20 *Ed.* 3. *Rot.* 46. in the Treasury, *Rich. Tresil's* Case, there he recovered Damages against the Bishop of Norwich, by him excommunicated after Prohibition; *Episcopus adjudicatur esse illicitum expugnatorem Autoritatis Regie, & querens recuperavit decem mille libras,*  
*simile Pas.* 13 *Ed.* 3. *Rot.* 78. *Philip\* de Hardestat's* Case,  
*Hill*

## PART XII. Habeas Corpus.

Hill. 32 Ed. 3. Rot. 78. Sir Tho. Seaton, Knt. recovered against Lucy who was the Wife of Rob. Cookside, for suing to Rome *pro transgressione facta per ipsum Thomam, pro captione honorum & catallorum suorum & pro debitis, & inde pronuntiari fecit sententiam excommunicationis, &c.* he recovered by Verdict Damages to three thousand Pounds, &c. Trin. 37 Ed. 1. Costs were recovered against the Archbishop of Canterbury, forty Pounds *pro damnis, per quod ipsum excommunicavit pro executione brevis Regis pro manu fortia amovendo. Ideo Episcopus capt. Mich. 29 Ed. 3 Rot. 19. similiter*: And divers other Records you may see in my Book of Precedents.

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### HAWKERIDGE'S Case.

Paſch. 14 Jac. 1.

#### *Habeas Corpus.*

**A**N *Habeas Corpus* to the Marshal of the Admiralty Ant. 69, 104, granted in Hillary Term last past, for Hawkeridge, &c. Admiralty. Prisoner in the Custody of the said Marshal, who did re- See 13 Co. 51, turn, *Quædam causa spoli, &c. contra Hawkeridge pendet inde pro judicio & sententia parata sit, &c. Qui quidem Will. Hawkeridge sic commissus remanet donec ante dicta Causa per præfatum Daniel Dun certificata fuerit, & hoc est causa.* And also upon another *Habeas Corpus*, he made such a Return, and otherwise *parata sit, &c.* which the Court took to be very insufficient, and gave divers Days to amend the Return, and to shew the Cause of Delay, and for why Sentence was not given, forasmuch as *sententia fuit parata*, or otherwise a Man may be in perpetual Prison: And the Marshal would not amend his Return, upon which the Party being in Prison sixteen or eighteen Weeks, always the Return was *est parata, &c.* so the Cause was long *parata ad judicium, sed nunquam judicata*: And after in another Writ returnable *Crastino Ascensionis*, was another Return of *Parata, &c.* without shewing Cause of Delay: Also it seems the Return was insufficient for another Cause, *viz. Quædam causa spoli civilis & maritima quæ coram, &c.* which is too general for two Causes.

1. For that (*spolii*) is uncertain, and ought to be specified in some more Certainty of what Things, or of, or in what Things in particular, and does not shew any Value of the Goods.

33 Co. 51, 52.

2. That *Maritima est super littus, or in portu maris*, for those appertain or are next to the Sea, and yet the Admiral hath not Jurisdiction *Super littus maris, or in portu*, for that they are *Infra corpus Comitatus*, as appears in many Books and Records. And so it was adjudged in *Lacy's Case*, that *infra* the high Water-Mark, and low Water-Mark, when the Sea is at an Ebb, it is within the Body of the County, *Dy. 15 El. the Abbot of Ramsey's Case*, yet this is *Maritima*, *15 El. Dy. fol. 326. Pasch. 17 El. in Scaccario ac contra Diggs*; for which Cause he ought to have said *Super altum mare, infra jurisdictionem Admiralli*; for the Stat. of *13 R. 2. cap. 5. 2 H. 4. cap. 11. 19 H. 6. 7.* confine him only *super altum mare*: And the Return which concerns the Imprisonment of the Body ought to be certain.

But for the first, all the Court resolved, that it was insufficient: Also there was shewn no Time of the Spoil; and for this, in the same Term, for the Insufficiency of the Return which the Court could not obtain to be amended, the said *Hawkeridge* was bailed in open Court until the next \* Term: Also the Words are *Quedam causa spolii ac civilis ac maritima. Vide 28 H. 8. cap. 15.* that upon an insufficient Return the Party ought to be bailed or discharged, as all our Books and infinite Precedents are. *Vide 6 H. 6. 44.* otherwise if the Return shall be insufficient when it is false. And note the Proceeding was *Civiliter*, for to have Restitution, & *non Criminaliter*.

Page [130]

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## *Judgment and Execution in Treason and Felony.*

**N**OTE, That it was said by some, that when Judgment is given, that one shall be hanged until he be dead; the King cannot alter the Judgment, and command that he shall be beheaded, for that the Execution ought to be conform'd to the Judgment: And with this accords *35 H. 6. fol. 58. & Stamford, lib. 1. fol. 13. Vide 27 Ass.*

## PART XII. *Judgment and Execution, &c.*

27 *Aff. pl.* 41. *Vide F. N. B.* 144. where it seems that he may be beheaded, 22 *Aff. pl.* 49. One was beheaded for killing of *Adam Waltam*, the King's Messenger, which is there taken for Petit Treason. But when one is attaint of Treason, his Judgment is to be hanged by the Neck, and cut down alive, and his Entrails and privy Members cut off from his Body, and burnt in his Sight, his Head to be cut off, his Body to be divided into four Parts, and disposed of at the King's Will; so that in such Case the King may pardon all the Execution, but *Decapitation*, for this is Parcel of the Judgment, and the King may pardon all or any Part at his Pleasure; and it was resolved that the Duke of *Somerset*, forasmuch as his Judgment was to be hanged by the Neck could not be beheaded, for that would alter the Judgment. And so it was resolved in the Case of the Lord *Sturton* in the Time of Queen *Mary*, and of the Lord *Dacres* in the Time of *H. 8.* both which were hanged for Felony.

It was resolved also, that King *H. 8.* could not by the Law behead his Wives for Treason, for *Judicandum est legibus, non exemplis.*

And note, That when a Nobleman is attaint of Treason, and hath this Judgment as is aforesaid; the Course is, that the King makes his Letters Patent directed to the Lord Chancellor of *England*, reciting the Attainder; yet we minding to dispence with that Manner of Execution of Judgment, in respect that the said *A. B.* is a Nobleman, do therefore by these Presents remit and release the said *A. B.* of and from such Execution of Judgment, and instead thereof, our Pleasure is, to have the Head of the said *A. B.* cut off, &c. as in such Cases hath been used, touching and concerning Noblemen: And by the same do require the Lord Chancellor to make two Writs under the Great Seal, one to the Lieutenant to deliver the said Prisoner, and the other to the Sheriff of *London*, to receive and execute the said Prisoner, &c. And the Case of the Lord *Sanchar* was stronger, for that he was not Noble within *England*, &c.

## Oath before Justices.

Trin. 9 Jacobi 1.

Justices Power  
on the Statute  
7 Jac. 1. c. 6.  
See 11 Co. 63 b.  
2 Hawk. c. 10.  
sect. 2. 34.  
ch. 11. sect. 2, 3

**I**N this very Term, I moved the Justices in *Serjeants-Inn* in *Fleet-street*, upon the Statute *Anno 7 Jac. cap. 6.* which gave Power to two Justices of Peace, to require any Person or Persons, &c. and in some Cases one Justice of Peace only, If the Justices of Peace may make a special Warrant to Constables, &c. to have the Bodies of Parties, who are to take the Oath according to the Statute before them. And it was resolved by all *una voce* that they may, and that for two Reasons:

1. When the Statute gave Power to Justices of Peace to require any Person or Persons, &c. to take the Oath, the Law *implicite* gave them Power \* to make a Warrant to have the Body before them, for *Quando lex aliquid alicui concedit, conceditur & id sine quo res ipsa esse non potest.*

Page [131]

2. It is against the Offices of the Justices, and of the Authority given them by the Statute, that they shall go and seek the Parties: And principally in a Case of so great Consequence. Then I moved, if in such Case the Constables may break the Houses of the Parties named in their Warrants: And it seemed to us all that they cannot, for that they are not any Offenders until they refuse to take the Oath before them who have Authority to tender it to them, or commit some Contempt to the King; and insomuch as they are not yet Offenders, nor are indicted or charged by any Matter of Record, their Houses \* cannot be broken by Warrant made by Construction upon the Statute, by which Authority is given, &c. to require them to take the Oath, *vide* Statute 7 Jac. and see in it, that Barons and Baronesses, as to the Tender of the Oath, need not to be indicted, &c. for these Words, *Of or above the said Age or Degree*, are to be intended of the same Age, and above the said Degree, or otherwise the first Clause concerning Barons should be idle; *vide* those who have Power to tender the Oath to them of the Nobility, have Power to commit them upon Refusal to the common Gaol, by the general Act; and if any Person or Persons being of the Age of eighteen Years,

\* See 6 Mod.  
105, 210.  
1 Salk.

PART XII. *Oath before Justices.*

or above, shall refuse to take the said Oath duly tendered, &c. which Clause extends to all before.

Note; If the Person be fugitive in another County, he evades the Statute for the present; but he may be indicted for Recusancy, and the Indictment may be removed into the King's Bench, and they may make Process against them in any County of *England*: Also if they are in their Houses, the Door being shut, &c. then they may be indicted either before the Justices of Assize, or before the Justices of Peace at the Quarter-Sessions, and then after a *Venire facias*, &c. by Force of a *Capias*, their Houses may be broken by the Sheriff, *vide* Statute 10 *Eliz. cap. 2.* (to which the Statute of 23 *Eliz.* refers, &c.) such Process is given in Case of not Repairing to Church, as in Indictment of Trespass, which is *Ven. fac. cap. &c.*

*Memorandum, Hill. Term. 9 Jac.* All the Justices of *England* by Commandment of the King, signified by the Lord Chancellor, were assembled to have Consideration of these two Statutes. And in the Beginning of this Term, the said Points were recited and debated; and after good Consideration severally, and Conference had all together, it was resolved by all, That if one be indicted for Recusancy, the Court may proceed by Process upon the Statute of 23 *Eliz.* or by Proclamation according to the Statute of 28 *Eliz.* And that the Process upon the Indictment, for Recusancy, is *Ven. fac. Capias*, &c. which is the Process in Indictment of Trespass; and upon the *Capias*, the Sheriff, upon Request first made to open the Door, may do it, according to the Resolution in *Seyman's Case*; and when the Sheriff has brought him into Court, he may, upon Refusal of Taking his Oath, be generally indicted as before Justices of Assize, or in open Sessions of the Peace upon Refusal before them: But the Justices upon the second Day of Conference, did not speak to the other Point. And after this Resolution was reported to the Lords of the Privy Council at *Whiteball*, in the Presence of all the Justices of *England*, the seventh Day of *Feb. in Termin. sancti Hill. 9 Regis*, and the Lord Chancellor desired that we should put our Resolutions in Writing; to which I answered, that the Judges never used to put their Resolutions in Writing; but that if the Attorney or Solicitor come to us (as the antient Use hath been to our Predecessors) we will deliver our Opinions to them again *Ore tenus*, but not in Writing.

Star. 10 El. c. 2.  
23 El. c. —

Recusancy.  
2 Hawk. c. 27.  
sect. 29.  
Antea 1, 2.

\* At the third Day of the Conference in this very Term, Page [132] it seemed upon the Statute 3 *Jac.* if Justices of Peace upon Refusal

Oath before Justices. PART XII.

Stat. 3 Jac. 1.  
c. 4.

11 Co. 63. b.

Stat. 7 Jac. 1.  
c. 2. and 6.

Refusal before them, commit any Person to Gaol without Bail or Mainprise, and mention in their Warrant the Tender and Refusal, then the Justices of Assises, or Justices of Peace, ought to tender the Oath again, and to have a special Indictment; for the Words of the Act 3 Jac. are, *And if the said Person or Persons, or any other whatsoever, &c.* so that this Word (other) excludes the Persons who were committed for Refusal. But it seems if the *Mittimus* of the Justices of Peace, &c. do not comprehend any Tender and Refusal of the Oath, then they may be generally indicted, as upon Refusal in open Court, for the Court cannot take Notice of the former Tender and Refusal in such Case: And it was resolved, that the major Number of the Justices of Peace who commit the Parties, have Election to commit either to the next Assises, or the next Sessions; for the Words of the Statute being in the Disjunctive, some may be more apt to be committed until the next Assises, and some until the next Sessions: And it is to be observed, that two Justices, of which the one is to be of the *Quorum*, by the Statute 7 Jac. may commit any Person above the Age of eighteen, and under the Degree of Nobility, although that he be not indicted, nor convicted, &c. But a Justice of Peace cannot commit any unless they be prosecuted, indicted, or convicted, &c. according to the Statute 7 Jac. And it was resolved by all, That if the Indictment be commenced upon the Statute 3 Jac. upon Refusal in open Court, the Indictment may be short and general, of what the Parties are indicted, &c. And not so, if the Indictment be upon the Commitment made by two Justices of Peace; this is good of any Person whatsoever, but in such Case, if the *Mittimus* be especial, comprehending the Tender of the Oath and Refusal, there ought to be a special Indictment and Refusal in open Court. Also if the Justice of Peace make a special *Mittimus*, then the Indictment ought to be special, *scil.* To recite that the Party was indicted or presented, &c. in certain, according to the Statute 7 Jac. And that he refused before one Justice of Peace, or otherwise in open Court; but if the *Mittimus* be general, as is aforesaid, then the Indictment before Justices of Assise at the Assises, or Justices of Peace at the Sessions of Peace, may be general upon the Statute 3 Jac.

## The Earl of Northampton's Case.

Mich. 10 Jacobi 1.

**T**He Attorney General informed against *Tho. Goode-Scand' Magnat'*  
*rick*, Gent. *Sir Richard Cox*, Kt. *Hen. Vernon*, Gent. See 1 Cro. 96,  
*Henry Minors*, Serjeant of the Waggon, *Tho. Lake*, Gent. 2 Cro. 196.  
 and *James Ingram*, Merchant, *Ore tenus* in the Star-cham- Plow. 37.  
 ber, the last Day of the Star-chamber, and charged *Goode- Hetley 55.*  
*rick* that he had spoken and published of the Earl of *Nor- 1 Leon 336.*  
*thampton*, one of the Grandees and Peers of the Realm; *Kelw. 26.*  
 one of the King's Privy Council, Lord Privy Seal, and Ld. 2 Inst. 228.  
 Guardian of the Cinque-Ports, divers false and horrible 1 Rol. Abr. 34.  
 Scandals, *scil.* That more Jesuits, Papists, &c. have come *Hob. 35.*  
 into *England*, since the Earl of *Northampton* was Guardian  
 of the Cinque Ports, than before.

2. That the said Earl had writ a Book openly against *Garnet*, &c. but \* secretly he had writ a Letter to *Bellarmino*, Page [133]  
 intimating that he writ the said Book *Ad placandum Regem, sive ad faciendum populum*, and requested that his  
 Book might not be answered; and that the Archbishop of  
*Canterbury* had certified it to the King, and that the said  
*Goode-rick* did relate it to one *Dewsbury*, a Batchellor in  
 Divinity, who had acquainted the said Earl with it. *Goode-rick*  
 being examined, confessed the Words spoken; but to  
 extenuate his Offence said, that he was not the first Foun-  
 der: And he vouched the said *Sir Richard Cox*, who con-  
 fessed that he related to *Goode-rick* the Matter concerning  
 the Book of the Earl, and his Letter to *Bellarmino*, but  
 not the Words concerning the Cinque Ports; and that the  
 Archbishop of *Canterbury* had informed the King of it, to  
 the Intent that the Earl of *Northampton* should not be  
 Lord Treasurer, and to extenuate his Offence, he vouch-  
 ed the said *Vernon*, who upon Examination confessed that  
 which *Richard Cox* had published, but that he was not the  
 first Author, but he cited the said *Lake*, who did likewise  
 confess what *Vernon* had said, but that he heard it from  
 Serjeant *Nicols*, who being examined confessed it; and  
 with all, that one *Speaket* related it to him, and that he  
 had heard it from one *James Ingram*, and *James Ingram*  
 being

*The Earl of Northampton's Case.* PART XII.

being examined, confessed the Words concerning the said Book of the Earl, and of the Letter to *Bellarmino*; and that in the Month of *October* he heard the said Words of two *English* Fugitives at *Ligorne*, and never did publish them until the Death of the Earl of *Salisbury*, Treasurer, who died in May last: And all the said Defendants confessed at the Bar, all that with which they were charged, and at the Hearing of this Case were eleven Judges of Law, *Fleming* Justice being absent *propter aegritudinem*.

And so it was resolved, that the Publishing of false Rumors, either concerning the King, or of the High Grandees of the Realm, was in some Cases punished by the Common Law: But of this were divers Opinions. *Yet it was resolved in general.*

1. Touching the Matter and Quality of the Words.
2. Touching the Persons of whom they are spoke.
3. The Manner of Contrivance, or Publishing of them.
4. Touching the Punishment, for which Cause divers Acts have made Declaration, and have put Things in Certainty.

And first of all, as to the Words or Rumours themselves.

1. *They ought to be false and horrible.*
2. *Of which Discord or Slander may arise betwixt the King and his People, or the Grandees of the Realm, West. 2. cap. 24. or between the Lords and Commons, 2 R. 2. c. 53. by which great Peril and Mischief may come to all the Realm. Ibidem.*

*The Subversion and Destruction of the Realm, ibidem. And for this the said Act of 2 R. 2. against Rumours, false and horrible Messages (Mesoignes i. e. Lyes \*.*

2. As to Persons, they are declared to be Prelates, Dukes, Earls, Barons, and other Nobles and Grandees of the Realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the Household of our Sovereign Lord the King, Justice of the one Bench and of the other, or of any the great Officers of the Realm, *ut 2 R. 2. c. 5.* and the King is contained within the Act of *West. 1. cap. 34.* as appears in *Dyer 5. Mar. 155.*

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[\* Note; These Statutes were occasioned by Reason of some scandalous Reflections, that had been raised by William Wickham, and the Clergy, against John of Gaunt, &c. & contra]

## PART XII. *The Earl of Northampton's Case.*

3. As to the third Point it was resolved, That if one hear such false and \* horrible Rumours, either of the *Page* [134] King, or of any of the said Grandees, it is not lawful for him to relate to others, that he hath heard *J. S.* to say such false and horrible Words; for if it should be lawful, by this Means they may be published generally, &c. And this doth appear by the said Statute, *viz.* That the Party shall be imprisoned until he find out the Party who spoke them, which proves that it was an Offence, or otherwise he should not be punished for it by Fine (for this is implied) and Imprisonment.

4. It was also resolved, That the Offenders at the Bar, if against them the Proceedings had been by Indictment upon these Statutes, no Judgment could be had against them that they should be imprisoned until they found their Author: For, for Example, *Gooderick* did not relate to *Dewsbury* that he heard from Sir *Richard Cox*, but he related the same Words as of himself: And for this no Judgment can be given against him, that he shall be imprisoned until he find his Author; for this, that he ought to be indicted for the Words which he himself did speak, and then, *De non apparentibus & non existentibus eadem est ratio.* When the Indictment is general without any Relation to a certain Author, the Judgment, which always ought to be given of Matter apparent within the Record, cannot be that he shall be imprisoned, until he hath found his Author.

And it was resolved, That if *A.* say that *B.* did you not bear that *C.* is guilty of *Treason*, &c. this is Tantamount to a scandalous Publication: And in a private Action for Slander of a common Person, if *J. S.* publish that he hath heard *J. N.* say, that *J. G.* was a Traitor or Thief; in an Action of the Case, if the Truth be such, he may justify.

But if *J. S.* publish that he hath heard generally without a certain Author, that *J. G.* was a Traitor or Thief, there an Action *sur le Case* lieth against *J. S.* for this, that he hath not given to the Party grieved any Cause of Action against any, but against himself who published the Words, altho' that in Truth he might hear them; for otherwise this might tend to a great Slander of an Innocent; for if one who hath *Lesam Phantasiam*, or who is a Drunkard, or of no Estimation, speak scandalous Words, if it should be lawful for a Man of Credit to report them generally, that he hath heard scandalous Words, without mentioning of his Author, that would give greater Colour and Probability that the Words were true in respect of the Credit of the Reporter,

*The Earl of Northampton's Case.* PART XII.

Reporter, than if the Author himself should be mentioned; for the Reputation and good Name of every Man is dear and precious to him: And a Record was vouched in *Mich.* 33 & 34 *Ed.* and in the 30 *Aff. pl.* 10. and in the Exchequer, *Mich.* 18 *E. 1. Rot.* 4.

Note, That all the Commissions of *Oyer* and *Terminer* give Authority to enquire *De illicitis verborum propalationibus.* Vide *le Stat.* 5 *R. 2. cap.* 6. & 17 *R. 2. cap.* 8. concerning Rumours, and in 3 *Ed.* 2. in the Exchequer, *Henry Bray* spoke of *John Foxley* Baron of the Exchequer: It was resolved, that the Judgment in an Indictment upon the said Statutes, when the Words are spoken generally, without Relation to a certain Author, is, that the Offender shall be fined and imprisoned, for this is implied and included in the said Statutes, as an Incident to the Offence, altho' that it is not expressed. Also the Party grieved may have an Action *de scandalo Magnatum*, and recover his Damages. Also the Party grieved, and the King's Attorney, if the Offenders deny it, may exhibit a Bill in the Star-Chamber against the Offender, in which the King shall have a Fine, and the Party shall be imprisoned, and the Court of Star-Chamber may inflict corporal Punishment, as to stand upon the Pillory, and to have Papers about his Head.

Page [135] \* And if the Offenders confess it, then to proceed *Ore tenus* upon their own Confession; and for the Publication of the said Words, all the Defendants were punished by all the *Presence, una voce nullo contradicente* by Fines and Imprisonments; and *Gooderick* and *Ingram* were fined the most, for that *Gooderick* had no Authority for the Words concerning the Cinque Ports, nor could *Ingram* find any Author for to vouch, that he heard by Persons unknown at *Ligorne* in Foreign Parts; and therefore it was taken as a Fiction of his own.

## ESTWICK'S Case.

Trin. 10 Jac. I.

*In Curia Wardorum.*

**K**ING Philip and Queen Mary by their Letters Patent *De gratia speciali & ex certa scientia & mero motu, &c.* granted to Aringal Wade in Fee, the Farm or Grange called Milton Grange in Com. Bedford, Parcel of the Possessions of the late dissolved Monastery of Woodborn, *Tenendum prædictam firmam sive Grangium de nobis & successoribus nostris, ut de Manerio nostro de East Greenwich in Com. Kantiæ in capite per servitium vicesimæ partis unius Feodi militis pro omnibus redditibus, servitiis, exactionibus, & demandis quibuscunque,* which Grange, by mean Conveyance, came to Christopher Eastwick, after whose Death the Tenure was found *verbatim*, according to the Words of the Patent. And the Question was, if the Tenure was by a Mean, as of the said Honour, or in *Capite*; \* and their principal Reason was, that the Letters Patent of the King shall be construed according to the King's Intention expressed in his Charter. And in this Case of Necessity some Words ought to be rejected, *scil.* these Words (*in capite*) and then the Sense will be, *Tenendum de nobis, &c. ut de Manerio nostro de East Greenwich in Com. Kantiæ per servitium vicesimæ partis unius feodi militis, &c.* or these Words, *De Manerio nostro de East Greenwich in Com. Kantiæ,* and then the Sense will be, *Tenendum de nobis, &c. in capite per vicesimam partem unius Feodi militis, &c.* for both together cannot stand; and then the better shall be taken for the King, as in *5 Mariæ, Dy. 162.* Tenure of the King, *per servitium militare,* is to be intended Tenure *in Capite.* So Tenure *de quo vel quibus & per quæ servitia ignorant,* is Tenure *in Capite,* for the best shall be taken for the King. *Vide 15*

King's Grant, how expounded.

1 Co. 43, &c.

2 Co. 32, 50, 54.

5 Co. 73.

4 Co. 34, 35, 102.

9 Co. 100.

10 Co. 63, 109, &c.

\* 'Twas argued to be a Tenure in Capite.

H. 7. 7. 14 Ed. 4. 5. & 3 H. 7. 12. 9 H. 7. 9. 6. per Hufsey, 13 H. 7. 4. per Fineux. 19 H. 8. Title Office. Brook 58. Action. Another Reason was added, That if these Words, *in Capite*, shall be rejected, then the Words ensuing, *scil. per servitium vicestimæ partis unius Feodi militis*, &c. shall be rejected here; and then the Tenure will be by one entire Fee of a Knight, for Words in the Middle of a Sentence may be extracted, and as well the Consequent as the Precedent stand.

But it was answered and resolved, that the said Grange was held of the King as of the Honour, and not *in Capite*; and the Reason was for this, that Tenure of the King *in Capite* is as much as to say, Tenure in Gross, or of the Person of the King: And for this, that the chief and principal Part of the Body of the Tenure of the Person of the King is said *in Capite*. And it appears by ancient Records, that in ancient Time all Tenures in Gross, or \* of the Person of a Subject, were called Tenures *in Capite*; as in Clause 9 H. 3. Member 28. *Robertus filius Madock tenuit terram de Thoma Corbet in Capite*: And in the same Manner you shall find by many other Records, Lands to be held of Subjects *in Capite*, which we call Tenure of the Person, or in Gross, but of late Time *Dicitur de Rege solummodo, terras teneri in Capite*. Then it is as much as to say, *Tenendum de nobis*, &c. *ut de Manerio nostro de East Greenwich in Gross, ut de persona nostra*, which is against the Nature of a Tenure in Gross, or of the Person, when the Land is expressly limited to be holden of a Manor, &c. And for this, if the said Words should be transposed, *scil. Tenendum de nobis in Capite ut de Manerio nostro de East Greenwich*, &c. this will not alter the Case; so when in the Beginning or End, the Land is expressly limited to be held *ut de Manerio*, the Tenure of the Person is abundant; or it may have this Sense, that the King is *Caput totius Regni*: And for this, inasmuch as it is limited to hold of the King, who is Chief, it may be vulgarly said, that the Tenure is in chief, inasmuch as it is of the King as of a Manor.

And as to the second Objection, it was resolved, That the abundant Words shall be extended in Construction of the Law, and not the Words subsequent, which doth limit the Term in Certainty: And with this Resolution in the principal Point agrees *Mich. 17*

See Cotton's Records 107. a Tenendum in Capite as of the Cattle of Dover.

PART XII. ESTWICK'S Case.

§ 18 *Eliz.* 345. where it was found that *Owen ap David* was seised of certain Land in Fee held of the Queen, as of the Principality of *Wales* in *Cap.* And it was held, *Per consilium Curie*, no Tenure *in Capite*; and so (as it was said) it was resolved in the Time of *H. 8.* in Baron *Luke's* Case, where Lands were granted by the King to hold of him as of the Honour of *Huntington*, *in Capite*, that this was a mean Tenure, and not *in Capite*.

*Nota*, That a Tenure of any ancient Honour, as of *Rawleigh*, *Hagen*, and *Peverel*, are by Usage, and Allowance in all Ages, taken to have the Effect of a Tenure *in Capite*, *scil.* To have all the Lands in Guard, &c. *Et non valet ratio contra experimentum.* *Vide the Stat. of Magna Charta*, cap. 31. and the 11 *H. 7.* in *Rot. Parliamenti* not printed, and 1 *H. 6. c. 4.* *Vide Bracton*, lib. 2. fol. 87. 30 *H. 8.* *Dyer* 8. 58. 29 *H. 8.* *Brook*, Title *Livery* 28, 57. 5 *Ed.* 3. 5.

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A

T A B L E

OF THE

PRINCIPAL MATTERS

Contained in this

B O O K.

A.

<b>A</b> bsentees, 28 <i>H. 8. Ire-</i> <i>land</i> 107	Admiralty, no Court of Re- cord 104
Accessaries, where, and where not 81	Its Original and Jurisdic- tion 73, 79, 80, 84
Action popular 29, 30	It claims Jurisdiction, be- cause of Goods, &c. be- yond the Seas 104
Action on the Case lieth a- gainst a Sumner for a false Return 128	Adultery 83
Account in Common Pleas,	Appeal of Robbery, the Ap- pellant committed 125, 126
	Appropriations of antient Time

*A Table of the principal Matters* PART XII.

<p>Time, now not question- able 4</p> <p>Appropriations not void, be- cause of an Estate-tail in the Patron, Grantor, &amp;c. 4, 5, 6</p> <p><i>Armour</i> and <i>Pennons</i> hang'd in a Church upon Solemn- ities of Burial, who hath the Property 105</p> <p>Affizes, and Justices of Af- fize 31</p> <p><i>Aurum Regine</i>, the King's Right in it, with <i>Cook's</i> Limitations 21, 22</p> <p style="text-align: center;">B.</p> <p><b>B</b>enevolence, when it be- gan, and how lawful 119</p> <p>Upon what Occasions allow- ed of <i>ibid.</i></p> <p>Bishops after the first Sessi- on of Parliament 4 <i>Fac. 1.</i> lawful Bishops 7</p> <p>Bishopricks, two united 71</p> <p>Blind Man scaling a Decd, not good, where 90</p> <p>Bridges repaired, &amp;c. 30</p> <p>Buggary Exposition of the Statute of 25 <i>H. 8. cap. 6.</i> concerning it 36, 37</p> <p>Burrough. <i>See</i> Free Bur- rough.</p> <p style="text-align: center;">C.</p> <p><b>C</b><i>apias utlagatum</i> by Ju- stice of Peace awarded, where it may be 103</p> <p><i>Cestuy que use</i>, what he should have forfeited in Treason 1</p> <p><i>Cestuy que use nec habet jus</i> <i>in re nec jus ad rem</i> 2</p> <p>Chancellor in Court Christi- an his Power 78</p>	<p>Commissions in <i>English</i> a- gainst Law, other Rea- sons why 31, 32, 33</p> <p>Common Pleas Jurisdiction 109</p> <p>Confederacy punished in the Star Chamber 122</p> <p>Conspiracy where it lies, 91, 92</p> <p>Conspiracy lies not against a Juror or Indictor, but a- gainst a Witness 23, 24, 25</p> <p>Consultation, when grantable, when not 41, 42</p> <p>Contempt in refusing to be examined 94</p> <p>Argued 95, 96</p> <p>Punished 97</p> <p>Conviction of a Felon for- feits his Goods 122</p> <p>Convocation, its Power, and how limited 72</p> <p>County Palatine 114</p> <p>Court of Wards 86</p> <p>Customs, Subsidies, and Im- positions, the King's Pow- er in them, where, and where not 33, 34</p> <p>Customs <i>del Roy</i> 17, 18, 19</p> <p style="text-align: center;">D.</p> <p><b>D</b>ignity and Prerogative 112</p> <p>Dispensing Power 18</p> <p><i>Dureffe</i> by a Gaoler present- ed, the Punishment 127, 128</p> <p style="text-align: center;">E.</p> <p><b>E</b>ccllesiastical Law, where, and where not allowable 38, 39, 40</p> <p>Of what it hath Cogni- zance, of what not, and the Reasons 42, 43</p> <p>Ecclesiastical Jurisdiction 112</p>
--	---

Endowment

PART XII. *contained in this Book.*

Endowment is presumed when a Vicarge hath long continued 4

Equity, Causes cannot be determined by Commission 114

Evidence. *See Usury.*

F.

False Return 127

Felony after Attainder not to be answered unto 100

Felony for stealing a Winding-Sheet. 113

Ferry-man, an Action against him for Things lost 63

Fine levied by a Fool, what it operates 123, 124

Fine by Feme Covert under Age 124, 125

First-fruits, what, when granted, and to whom they belong 45

Forfeiture in Treasons 6

Forests and Chases, what, and what not 22

Free-Borough 120

G.

GOODS, whether it includes Debts and Choses in Action 1

Grant *le Roy* void for Incertainty 86

H.

*Habeas Corpus* when allowable, when not 45, 46, 69, 70

*Habeas Corpus* returnable and discharged by Judgment of the Court 47, 82, 83

*Habeas Corpus* returned Discussed 82, 83

*Habeas Corpus* to the Marshal of the Admiralty 129

*Hæretico comburendo*, where it lieth 93, &c.

Heresy, the Power Ecclesiastical and Temporal in it; what is Heresy; how to be punished 56, 57, 89, 93

High Commissioners, what Power they have 19, 20, 21, 41, 49, 50, 56, 85, 86

High Commissioners, their Proceedings examined 84, 85, 86

High Commissioners not warrantable, wherefore 88, 89

Honours and Hereditaments explained 108

Hue and Cry, Exposition of the Statute of *Winton* 62

I.

Indictment *sur le Stat.* 11 *H. 4. cap. 9.* 98, 99

Information, *sur le Stat.* 2 *H. 6. cap. 15.* concerning Fishing 89

Information in the Star-Chamber *ore tenus* by the Attorney General, against Persons who had spoke scandalously against a Peer 132, 133

Inquisition upon *Diem clausit extremum* 102

Interest Common cannot be drawn *ad aliud examen* than the Common Law alloweth 68

*Ireland*, Parliament there 109

Judges divided in the Star-Chamber, how the Matter shall be taken 118

Judges

*A Table of the Principal Matters* PART XII.

Judges of Ecclesiastical Mat- rants 130, 131, 132  
 ters 63  
 Jurisdiction Ecclesiastical. Outlawed Person, what he  
 shall forfeit 2

*See E.*  
 Justices of *Wales* cannot be  
 by Commission but Pa-  
 tent, why 49  
 Justices of Assise, *Oyer* and  
*Terminer*, &c. 31, 32,  
 103

K.

**K**ING cannot discharge an  
 Offender, why, and in  
 what Cases (*See 65*) 29, 30  
 King may ordain a new  
 Name of Dignity not be-  
 fore 81, 112  
 King, the Word extends to  
 Successors 110, 111  
 It extends to Queen *ibid.*

L.

**L**ibels, what they are; and  
 where punishable 35,  
 103  
 Libel for Seats in the Church  
 104  
*London*, Customs there 113

M.

**M**Anslaughter 87  
*Modus decimandi*. *See*  
*Tithes*.

O.

**O**ATH *ex officio* 26, 27  
 Oath for Recusants, by  
 the Stat. of 7 *Jac. cap. 6.*  
 Ordinary cannot enforce a  
 Man to answer generally  
 Articles *ex officio* 26, 27  
 Office newly erected void,  
 where 116, 117  
 The Power of Justice of  
 Peace, Justice of Assise,  
 Constable, in serving War-

P.  
**P**Arliament, Writ of Sum-  
 mons, doth not make a  
 Peer 70  
 Parliament in *Ireland*, *Poy-  
 nings's Law*, 10 *H. 7.* ex-  
 plained 110, 111, 112  
 Patentee, what he shall have  
 by the Grant of Goods 1  
 Penal Statutes not extenda-  
 ble by Equity 3  
 Perjury 101  
 Pirates Goods, &c. granted  
 73  
 Pope, his Pretence to Power  
 in *England* 28, 29  
 Preemption of Tin in *Corn-  
 wall*, its Original and the  
 Reason 9, 10, 11  
*Præmunire* by Statute and  
 Common Law 37, 38  
 Prerogative of the King to  
 make good Debts 3  
 Prerogative to dispense with  
 Statutes 18  
 Prerogative of the King in  
 Salt-peter, and where li-  
 mited, by *Cook* 12, 13, 14  
 Principals, where all the Of-  
 fenders are so 81, 82  
 Privilege of Priests 100  
 Proceedings in Parliam. 115  
 Proclamation cannot make  
 that an Offence which  
 was not 74, 75  
 Prohibition, where it lieth  
 58, 59, 63, 64, 65, 66, 67, 84,  
 &c.  
 Prohibition, none after a Writ  
 of *excommunicato capi-  
 do* 76  
 Nor after a Sentence to the  
 Admiralty 77  
*Quare*

PART XII. *contained in this Book.*

Q.

**Q**uare Impedit stay'd by Aid Prayer 3

R.

**R**ecognizance taken by a Recufant in another's Name, 'twixt Stat. 23 *Eliz.* and 28 *Eliz.* how it appears 1, 2  
 Recufancy, Forfeiture *per Menssem* 1  
 Recufant convict, what he forfeits 2  
 Register in Court Christian, his Authority 73  
 Refervation, whether good to the Heir or not, where and why 36

S.

**S**alt-peter, what the King's Ministers may do in digging for it, and where 13, 14  
 Salt-peter, Licence to take it, when it begun, and upon what Occasion *ibid.*  
 Scandal of a Peer, examined in the Star-Chamber 132, 133, 134  
 Seats in Churches 105  
 Simony, what 74  
 Simony upon the Statute 31 *H. 8. cap. 9.* 101  
 Star-Chamber, its Jurisdiction 84, 90  
 Star-Chamber, Bill for Forgery 103

Statutes in *England*, where of Force in *Ireland* 112  
 Statutes relating to Spiritual Matters 8  
 To be expounded by the Judges 63  
 Stray, who shall have it, and when 101  
 Summons, Citation, and Process in the Ecclesiastical Court shall be made in the Name and Stile of the King 7, 8, 9

T.

**T**Reason for counterfeiting the Great Seal, where and when 15, 16, 17  
 To kill an Ambaffador 16  
 Tithes, what Power the Ecclesiastical Judges have in Exposition of the Statutes 63  
 Trayle Baston Justices, why so called 25

U.

**U**SE and Trust of Goods, &c. 2  
 Usury. *See* Evidence therein 69

W.

**W**estminster-Hall, Stabbing there, *sedente curia*, Offence and Punishment 71  
 Women, the Stat. of 3 *H. 7. cap. 14.* expounded 20, 100

F I N I S.

