The Thirteenth Part.

Or Certain

Select Cases in Law,

Reported by

Sir Edward Coke, Kt.

Late Lord Chief Justice of

England,

And one of

His Majesty's Council of State.

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

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

In the Savoy:

TO THE READER.

READER,

It may seem altogether an unnecessary Work to say any Thing in the Praise and Vindication of that Person and his Labours, which have had no less than the general Approbation of a whole Nation convened in Parliament: For if King Theodorick in Casiodore could affirm, Neque enim dignus est a quopiam redargui qui nostro judicio meretur absolvi, That no Man ought
To the READER.

ought to be reproved whom his Prince commends; how much rather then should Men forbear to censure those and their Works, which have had the greatest Allowance and Attestation a Senate could give, and to acquiesce and rest satisfied in that Judgment? Such Respect and Allowance have been given to the learned Works of the late Honourable and Venerable Chief Justice, Sir Edw. Coke, whose Person in his Life-time was reverenc'd as an Oracle, and his Works (since his Decease) cited as authentick Authorities, even by the reverend Judges themselves. The Acceptance his Books (already extant) have found with all knowing Persons, have given me the Confidence to commend to the publick
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publick View some Remains of his, under his own Handwriting, which have not yet appeared to the World, yet (like true and genuine Eaglets) are well able to behold and bear the Light: They are of the same Piece with his former Works, and in Respect of their own native Worth, and the Reference they bear to their Author, cannot be too highly valu'd: Tho', in Respect of their Quantity and Number, the Cases reported are but few; yet, as the skilful Jeweller will not lose so much as the very Filings of rich and precious Metals; and the very Fragments were commanded to be kept where a Miracle had been wrought, Propter miraculi claritatem & evidentiæ: So these small Parcells, being
To the READER.

being Part of those vast and immense Labours of their Author, great almost to a Miracle; (if I may be allowed the Comparison) were there no other Use to be made of them (as there is very much; for they manifest and declare to the Reader many secret and abstruse Points in Law, not ordinarily to be met with in other Books so fully and amply related) deserve a Publication, and to be preserved in the Respects and Memo- ries of Learned Men, and especially the Professors of the Law; and to that End they are now brought to Light and published.

Farewel.

J. G.
PART XIII.

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WILLLOWES'S CASE.

1 Mich. 6 Jac. 1.

In the Common Pleas.

IN Trespass brought by Richard Stallon, one of the Attornies of the Court, against Thomas Brayde (which began in Easter Term, An. 6 Jacobi Roi. 1845,) for breaking of his House and Clofe at Fenditton in the County of Cambridge; and the new Assignment was in an Acre of Pasture: The Defendant pleads, that the Place where, &c. was the Land and Freehold of Thomas Willowes and Richard Willowes; and that he as Servant, &c. And the Plaintiff for Replication faith, that the Place where, was Parcel of the Manor of Fenditton, and demifable, &c. by Copy of Court-Roll in Fee-simple: And that the Lords of the Manor granted the Tenements in which, &c. to John Stallon and his Heirs, who surrendered them unto the said Willowes and Willowes, Lords of the said Manor, to the Use of the Plaintiff and his Heirs, who was admitted accordingly, &c. The Defendant doth rejoin, and faith, That well and true it is, That the Tenements in which, &c. were Parcel of the Manor, and demifable, &c. And the Surrender and Admittance fuch, prout, &c. But the said Thomas Brayde further faith, that the Tenements in which, &c. at the Time of the Admission of the said Richard Stallon, were, and yet are of the clear yearly Value of fifty three Shillings and four Pence; and that within the said Manor there is such a Custom, Quod rationabilis denariorum summa legalis moneta Anglie super quamlibet admissionem cum juxtabibet persona, five quarumcunque personarum tenent' vel tenent' per Domi vel Dominos manerii pradit' five per Seneschallum, &c. ad aijudas terras five tenementa Cu- stomaria Manerii pradit' secundum consuetudinem Manerii illius debeatur, & a tempore quo, &c. debit' fuit Domi, &c. tempore ejusdem admissionis pro fine pro ad-
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missione illa, quod idem Dominus, vel idem Domini praedicti vel Seneschallus suus Curie ejusdem Manerii pro tempore existente usus fuit, vel ut fuerent per totum tempus supra
praedicta in plena curia Manerii illius pro admissione ejusdem per-
sone, seu earundem personarum sic facta affidere & appunctuare,
Anglice, to affes and appoint eadem rationabilem denario-
rum summam pro fine pro cadem admissione sic ut praefetur 
facta, nec non superinde eandem denariorum summam sic af-
ffessam & appunctuatum, praesta persona se vice personis sic ad-
missa, five admissis, solvete & solverent, &c. idem Domino,
&c. praedictam rationabilem denariorum summam pro fine, pro
admissione sua praedicta affessment & appunctuation.

And further faith, That the Steward of the said Manor at
a Court holden 1st October, in the fourth Year of the Reign
of the King that now is, admitted the Plaintiff to the
Tenements, in which, &c. and affessed and set a rea-
sonable Sum of Money, that is to say, five Pounds six
Shillings, eight Pence, that is to say, Valorem corundem
tenementorum per duos annos, & non ultra pro fine pro
praedicta admissione praedicta Richardus Stallon, to the said
Lords of the Manor to be paid: And also the said
Steward at the same Court did give Notice, and signify

to the Plaintiff the said Sum was to be paid to the said
Lords of the Manor, &c. And further faith, that the said
Willows and Willewes, afterwards, that is to say, the
second Day of November, in the fourth Year aforesaid, at
Fendition aforesaid, requested the said Richard Stallon to
pay to them five Pounds, six Shillings, eight Pence there,
for the Fine for his Admittance, &c. which the said Ri-
chard Stallon then and there utterly denied and refused,
and as yet doth refuse. By which the said Richard Stallon
forfeited to the aforesaid Thomas and Richard Willewes all
his Right, Estate, &c. of and in the Tenements aforesaid
in which, &c. The Plaintiff surrejoinder, and faith, that
the said Sum of five Pounds, six Shillings, eight Pence,
&c. was not rationabilis finis, as the said Thomas Brady
above hath alledged, &c. upon which the Defendant doth
demur in Law. And in this Case these Points were re-
solved by Coke Chief Justice, Walmsey, Warburton, Da-
niel, and Foster, Justices, &c. And principally, if the Fine
affessed had been reasonable, yet the Lords ought to have
set a certain Time and Place when the same should be
paid, because the same stands upon a Point of For-
feiture: As if a Man bargains and affires Land to one
and his Heirs, upon Condition that if he pay to the Bar-
gainee or his Heirs, ten Pounds at such a Place, that he

and
PART XIII. Willows's Cafe.

and his Heirs shall re-enter: In that Cafe, because no Time is limited, the Bargainor ought to give Notice to the Bargaine, &c. when he will tender the Money, and he cannot tender it when he pleareth; and with that agrees 19 Eliz. Dyer 354. For a Man shall not lose his Land, unless an express Default be in him; and the Bargaine in such Cafe is not tied to stay always in the Place, &c. So in the Cafe at Bar, the Copyholder is not tied to carry his Fine always with him, when he is at Church, or at Plough, &c. And although that the Rejoinder is, that the Plaintiff refused to pay the Fine; so he might well do, when the Request is not lawful nor reasonable; for in all Cases when the Request is not lawful nor reasonable, the Party may without Prejudice deny the Payment. And he who is to pay a great Fine as 100 L. or more, it is not reasonable that he carry it always with him in his Pocket, and presently the Copyholder was not bound to pay it, because that the Fine was uncertain and arbitrable, as it was resolved in Hubbard's Cafe, in the fourth Part 14 Co. 27.b, of my Reports, amongst the Copyhold Cases. 2. It was resolved, that although the Fine was uncertain and arbitrable, yet it ought to be secundum arbitrium boni viri: And it ought to be reasonable and not excessive, for all Excessiveness is abhorred in Law, Excessus in re qualibet jure reprobatur communi; for the Common Law forbids any excessive Distress, * as it appeareth in 41 E. 3. 26. *Fitzgib. 85, 87. Where a Man avowed the Taking of sixty Sheep for 3s. Rent, and the Plaintiff prayed that he might be amerced for the Distress: And the Court (who is always the Judge whether the Distress be reasonable or excessive) held, that six Sheep had been a sufficient Distress for the said Rent, and therefore he was amerced for so many of them as were above six Sheep: And the Court said, that if the Avowant shall have Return, he shall have a Return but of six Sheep: And this appeareth to be the Common Law; for the Statute of Articulus super Chartas extends only where a grievous Distress is taken for the King's Debr. See F. N. B. 174. a. and 27 Ass. 51. 28 Ass. 50. 11 Hen. 4. 2. and 8 Hen. 4. 16, &c. Non capiatur gravis distrieta, &c. And so if an excessive or an unreasonable Amerciament be imposed in any * Court-Baron or other Court which is not of Record, the Party shall have mo­derata misericordia: And the Statute of Magna Charta is but an Affirmance of the Common Law in such Point. 

...moderat secundum quantitatem feuorum & secundum facultatem unum omninonem auxilii, ut nemini gravide impedatur, &c. Vide Bracton 84. d. rationabilius velit, secundum rationem & mensuram non excedat; sed hic has 80. 85. opinant.
See F.N.B. 75. Nullus liber homo amerciatur nisi secundum quantitatem deliti. And the Common Law gives an Affise of So- vvent Diffretis, on Multiplication of Distresses found, which is excessive in Respect of the Multiplicity of Vexation. And thereby agreeeth 27 Ass. 30. 51. Nol capiatur multiplex distictio, F.N.B. 178. b. And if Tenant in Dower hath Villains, or Tenants at Will who are rich, and the by excessive Tallages and Fines makes them Poor and Beggars, the same is adjudged Wafe. And thereby agreeeth F.N.B. 61. b. 16 H. 3. Waste 135, and 16 H. 7. And see the Register judicial, fol. 25. b. Waife lieth, in exulando Henricum, & Harmanum; &c. Villanos suis; Quorun quislibet tenet unum Messuagium & unam virgat terrae, in villanagio in pradict villa de T. by grievous and intolerable Diffretes: By all which it appeareth, that the Common Law doth forbid intolerable and excessive Oppressing and Ransoming of Villains, whereby of Rich they become Poor: And yet it may be said, that a Man may do with his Villain what he pleaseth, or with his Tenant at Will; but the Law limits the same in a rea- sonable and convenient Manner: For it appeareth, that such intolerable Oppression of the poor Tenants is to the Disinherison of him in the Reversion. So in the Case at Bar, altho' the Fine is incertain, (and arbitrary) yet it ought to be reasonable; and so it appeareth by the said Custom which the Defendant hath alledged. And there-fore in such Case the Lord cannot take as much as he pleaseth, but the Fine ought to be reasonable, according to the Resolve of the Court in the said Case of Hubbard in the fourth Part of my Reports.

3. It was resolved, That if the Lord and Tenant cannot agree of the Fine, but the Lord demandeth more than a reasonable Fine, that the same shall be decided and adjudged by the Court, in which any Suit shall be, for or by Reason of the denying of the Fine, and the Court shall adjudge what shall be paid a reasonable Fine, having regard to the Quality and Value of the Land, and other necessary Circumstances which ought to appear in Pleading upon a Demurrer, or found by Verdict: And if the Fine which the Lord or his Steward affeth be reasonable, let the Copyholder well advise himself before he deny the Payment of it: And always when Reasonableness is in Question, the same shall be determined by the Court in which the Action dependeth: As reasonable Time, 21 H.6. 30. 22 E. 4. 27. &c. 29 H. 8. 32, &c. So if the Di- stress be reasonable, and the like, &c.
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4. It was resolved, That the said Fine in the Case at the Bar was unreasonable, viz. to demand for a Cottage and an Acre of Pasture, five Pounds, six Shillings, eight Pence, for the Admittance of a Copyholder in Fee-simple upon a Surrender made; for this is not like to a voluntary Grant, as when the Copyholder hath but an Estate for Life, and leaseth; or if he hath an Estate in Fee-simple, and committeth Felony, there Arbitrio Domini res estimari debet; but when the Lord is compellable to admit him to whose Use the Surrender is, and when Cestui que use is admitted, he shall be in by him who made the Surrender, and the Lord is but an Instrument to present the same: And therefore in such Case the Value of two Years for such an Admittance is unreasonable, especially when the Value of the Cottage and one Acre of Pasture is on a Rack, at fifty three Shillings by the Year.

5. It was resolved, That the Surrejoinder is no more than what the * Law faith, For in this Case in the Judgment of the Law the Fine is unreasonable; and therefore the same is but ex abundanti; and now the Court ought to judge upon the whole special Matter; and for the Causes aforesaid, Judgment was given for the Plaintiff.

And Coke Chief Justice said in this Case, That where the Usage of the Court of Admiralty is to amerce the Defendant for his Default by its Discretion, as it appeareth in 19 Hen. 6. 7. That if the Amerciament be outrageous and excessive, the same shall not bind the Party, and if it be excessive or not, it shall be determined in the Court in which the Action shall be brought for the Levying of it: And the Writ of Account is against the Bailiff, or Guardian, Quod reddat ei rationabilem Computation de exitibus Manerii. And the Law requireth a Thing which is reasonable, and no Excess or Extremity in any Thing.
PART XIII.

Porter and Rochester's Case.

2 Mich. 6 Jac. 1.

In the Common Pleas.

This Term Lewis and Rochester, who dwelt in Essex within the Diocese of London, were sued for Sub- traction of Tithes growing in R. within the County of Essex, by Porter, in the Court of the Arches of the Bishop of Canterbury in London. And the Case was, That the Archbishop of Canterbury hath a peculiar Jurisdiction of fourteen Parishes, called a Deanery, exempted from the Authority of the Bishop of London, whereof the Parish of S. Mary de Arcubus is the Chief: And the Court is called the Arches, because the Court is holden there; and a great Question was moved, if in the said Court of Arches holden in London within his Peculiar, he might cite any dwelling in Essex for Subtraction of Tithes growing in Essex; or if he be prohibited by the Statute of the twenty third Year of King Henry the Eighth, c.9. And after that the Matter was well debated as well by Counsel at the Bar, as by Dr. Ferrard, Dr. James, and other Civilians in open Court; and lastly, by all the Justices of the Common Pleas, a Prohibition was granted to the Court of Arches. And in this Case divers Points were resolved by the Court.

1. That all Acts of Parliament, made by the King, Lords and Commons of Parliament, are Parcel of the Laws of England, and therefore shall be expounded by the Judges of the Laws of England, and not by the Civilians and Canonists, although the Acts concern Ecclesiastical and Spiritual Jurisdiction; and therefore the Act of *2 H. 4. cap. 15. by which in Effect it is enacted, Quod nullus teneat, doceat, informet, &c. clam, vel publice aliquid nefandam opinionem contrariam sibi Catholicce seu determinationis Ecclesie sacrofanet, nec de hujusmodi secta, & nefandis Duteunist Conventiculas faciat: And that in such Cases the Diocesan might arrest and imprison such Offender, &c. And in 10 H. 7. the Bishop of London commanded one to be imprisoned, because that the Plaintiff said that
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he ought not to pay his Tithes to his Curate; and the Party so imprisoned brought an Action of false Imprisonment against those who arrested him by the Commandment of the Bishop; and there the Matter is well argued, What Words are within the said Statute, and what without the Statute: So upon the same Statute it was resolved in 5 E. 4. in Keynes's Case in the * King's Bench, which you may see in my Book of Precedents: And to the Statutes of Articuli Cleri, de Prohibitione regia; de circumspite agatis, of 2 E. 6. cap. 13. and all other Acts of Parliament concerning Spiritual Causes, have always been expounded by the Judges of the Common Law; as it was adjudged in Wood's Case, Past. 29 Eliz. in my Notes, fol. 22. So the Statute of 21 H. 8. cap. 13. hath been expounded by the Judges of the Realm concerning Spiritual Causes, and the having of two Benefices: Canon Laws and Dispensations, see 7 Eliz. Dyer 233. The King's Courts shall adjudge of Dispensations and Commandments: See also 17 Eliz. Dyer 251. 14 Eliz. Dyer 312. 15 Eliz. Dyer 327. 18 Eliz. Dyer 352. & 347. 22 Eliz. Dyer 377. Confirmation of the Statute, cap. 12. Smith's Case, concerning Subscription which is a mere Spiritual Thing. Also it appeared by 32 Eliz. Dyer 377. That for want of Subscription the Church was always void by the said Act of 23 El. &c. 1. See Watson's Clergyman, 11, 56, & 152. 4 Index 323, 324.

2. It was resolved by Coke Chief Justice, Warberton, Daniel and Essex Justices, That the Archbishop of Canterbury is restrained by the Act of 23 H. 8. cap. 9. to cite any one out of his own Diocese, or his peculiar Jurisdiction, altho' that he holdeth his Court of Arches within London. And first it was objected.

That the Title of the Act is, An Act that no Person shall be cited out of the Diocese where he or she dwelleth, except in certain Cases: And here the Archbishop doth not cite the said Party dwelling in Essex, out of the Diocese of London, for he holdeth his Court of Arches within London, (and Essex is in the Diocese of London.)

2. The Preamble of the Act is, Where a great Number of the King's Subjects dwelling in divers Dioceses, &c. And here he doth not dwell in divers Dioceses.

3. Far out of the Diocese where such Men, &c. dwell, and here he doth not dwell far out, &c.

4. The Body of the Act is, No manner of Person shall be cited before any Ordinary, &c. out of the Diocese or peculiar Jurisdiction where the Person shall be inhabiting, &c. And here he was not cited out of the Diocese of London.
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1. As to all the said Objections, one Answer makes an
End of them all: For Diocefs dicitur distinctio, vel diviśio,
sever gubernatio, quæ divisa, & diversa oft ab Ecclesia alterius
Episcopatus, & Commissa ost Cubernatio in unus; and is
derived a Di quod est duo, & Oeœ, sedes vel separatio,
quæ separat duas Jurisdiciones: So Diocefe signifies the
Jurisdiction of one Ordinary separated and divided from
others; and because the Archbishop of Canterbury hath a
peculiar Jurisdiction in London, exempt out of the Diocefe
or Jurisdiction of the Ordinary or Bishop of London: For
that Cause it is fitly said, in the Title, Preamble, and Body
of the Act, That when the Archbishop sitting in his ex-
empt Peculiar in London, cites one dwelling in Essex, he
cites him out of the Diocefe or Jurisdiction of the Bishop of
London, ergo he is cited out of the Diocefe: And in the
Clauses of the Penalty of ten Pounds, it is said, out of the
Diocefe or other Jurisdiction where the Party dwellth,
which agreeth with the Signification of Diocefe before.
And as to the Words, Far off, etc. they were put in the
Preamble, to shew the great Mischief which was before
the Act: As the Stat. of 32 Hen. 8, c. 33. in the Preamble,
it, is Distinguishing with Strength, and the Body of the Act
faith, such Distinguor, yet the fame extendeth to all Diffe-
fors, but Distinguor with Force was the greatest Mischief, as
it is holden in 4 & 5 Eliz. Dyer 219. So the Preamble
of the Statute of Westm. 2, cap. 5. is, Heirs in Ward, and
the Body of the Act is, Hujusmodi praesenta, as it is ad-
judged in 44 Eliz. 3. 18. That an Infant who hath an Advow-
son by Descent, and is out of Ward, shall be within the
Remedy of the said Act, but the Frauds of the Guardians
was the greater Mischief. So the Preamble of the Act of
21 H. 8. cap. 15. which gives falsifying of Recoveries, re-
cites in the Preamble, That whereas divers Leefe sees have
paid divers great Incomes, &c. Be it enacted, That all such
Terms, &c. and yet the same extends to all Terms; and
yet all these Cases are stronger than the Case at Bar,
for there that Word (such) in the Body of the Act refer-
reth the same to the Preamble, which is not in our Case.

2. The Body of the Act is, No Manner of Person shall
be henceforth cited before any Ordinary, &c. out of the
Diocefe or peculiar Jurisdiction where the Person shall be
dwellling: And if he shall not be cited out of the Peculiar
before any Ordinary, a Fortiori, the Court of Arches which
fits in a Peculiar, shall not cite others out of another Dio-
cefe:
PART XIII. Porter and Rochester's Cafe.

cede: And these Words, Out of the Diocefe, are to be meant out of the Diocefe or Jurisdiction of the Ordinary, where he dwelleth; but the exempt Peculiar of the Archbishops is out of the Jurisdiction of the Bishop of London, as St. Martins, and other Places in London, are not Part of London, although they were within the Circumference of it. Vide 4 E. 4. 17. 20 E. 4. 8, &c.

3. It is to be observed, That the Preamble reciting the great Mischief, recites expressly, That the Subjects were called by compulsory Process to appear in the Arches, Audience, and other high Courts of the Archbishopsricks of this Realm; so as the Intention of the said Act was to reduce the Archbishops to his proper Diocefe or peculiar Jurisdiction, unless it were in five Cases.

1. For any Spiritual Offence or Cause committed or omitted contrary to the Right and Duty by the Bishop, &c. which Word (omitted) proves that there ought to be a Default in the Ordinary.

2. Except it be in Case of Appeal, and other lawful Cause, wherein the Party shall find himself grievèd by the Ordinary after the Matter or Cause there first begun; ergo the same ought to be first begun before the Ordinary.

3. In Case that the Bishop of the Diocefe, or other immediate Judge or Ordinary dare not, or will not convent the Party to be sued before him; where the Ordinary is called the immediate Judge, as in Truth he is; and the Archbishop, unless it be in his own Diocefe (these special Cases excepted) mediate Judge, &c.

4. Or in Case that the Bishop of the Diocefe, or the Judge of the Place within whose Jurisdiction, or before whom the Suit by this Act should be begun and prosecuted, be Party directly or indirectly to the Matter or Cause of the same Suit; which Clause in express Words is a full Exposition of the Body of the Act, &c. That every Suit (other than those which are expressed) ought to be begun and prosecuted, before the Bishop of the Diocefe, or other Judge of the same Place.

5. In Case that any Bishop, or any inferior Judge, having under him Jurisdiction, &c. make Request or Infiance to the Archbishop, Bishop, or other inferior Ordinary or Judge, and that to be done in Cases only where the Law Civil or Canon doth affirm, &c. By which it fully appeareth, That the Act intendeth, That every Ordinary and Ecclesiastical Judge, should have the Conuance of Causes within their Jurisdiction, without any concurrent Authority or Suit by Way of Prevention: And by this, the Subject hath great Benefit as well by saving of Travel and Charges to have Justice in his Place of Habitation, as to be
Porter and Rochester's Case. Part XIII.

be judged where he and the Matter is best known; as also that he shall have as many Appeals as his Adversary in the highest Court at the first. Also there are two Provifos which explain it also, seil. That it shall be lawful to every Archbifhop to cite any Person inhabiting in any Bishop's Diocefe within his Province, for Matter of Herefy; (which were a vain Provifo, if the Act did not extend to the Archbifhop: But by that special Provifo for Herefy, it appeareth, that, for all Caufes nor excepted, it is prohibited by the Act) then the Word of the Provifo go further; if the Bishop or other Ordinary immediately hercunto content, or if the fame Bishop or other immediate Ordinary or Judge do not his Duty in Punishment of the fame; which Words immediately and immediate expound the Intent of the Makers of the Act.

2. There is a Saving for the Archbifhop, the Calling any Person out of the Diocefe where he shall be dwelling, to the Probate of any Testaments; which Provifo should be also in Vain, if the Archbifhop, notwithstanding that Act, should have concurrent Authority with every Ordinary through his whole Province: Wherefore it was concluded that the Archbifhop out of his Diocefe, unless in the Caufes excepted, is prohibited by the Act of 23 H. 8 to cite any Man out of any other Diocefe. And in Truth the Act of 23 H. 8. is but a Law declaratory of the ancient Canons, and of the true Expofition of them: And that appeareth by the Canon, Cap. Romana in fexto de Appellationibus, and Cap. de Competenti in fexto. And the said Act is fo expounded by all the Clergy of England, at a Convocation in London, An. 1 Jac. Regis 1603, Canon 94. Where it is decreed, ordained and declared, That none should be cited to the Arches or Audience, but the Inhabitants within the Archbifhop's Diocefe, or Peculiar, other than in fuch particular Caufes only as are expressly excepted and referred in and by a Statute, Anno 23 H. 8. cap. 9. And the King by Letters Patent under the Great Seal hath given his Royal Assent to this amongst others, from Time to Time to be observed, fulfilled and kept, as well by the Archbifhop of Canterbury, the Bishops and their Succedors, and the rest of the whole Clergy of the Province of Canterbury, in their several Callings, Offices, Functions, Ministeries, Degrees and Administrations; as also by all and every Dean of the Arches, and other Judge of the said Archbifhop's Courts, Guardians of Spiritualities, Chancellors, &c. So the fame is also expressly confirmed under the Great Seal. And altho' the Archbifhopricks of Canterbury was then void, yet the Guardian of the Spiritualities was there, and the Arch-
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Archbishop of Canterbury that now is, and then Bishop of London, was by Letters Patent, President of the said Council in the Place of the Archbishop then deceased: And the King gave his Royal Assent to the same, and the said Canon is of as full Force as if the said late Archbishop of Canterbury had been then alive. And whereas it is faid in the Preamble of the Act; in theArchies, Audience, and other high Courts of the Archbishops of this Realm; it is to be known, That the Archbishops of this Realm before that Act, had Power Legatine from the Pope, by which they pretended to have not only supereminent Authority over all, but concurrent Authority with every Ordinary in his Diocese, not as Archbishop of Canterbury, &c, but by his Power and Authority Legatine: For Sunt tria genera Legatorum. 1. Quidam de latere Dom. Pope mittuntur ut Cardinales quos appellant fratres. 2. Alii sunt Daivivi, & non de latere, qui simpliciter in Legatione mittuntur, &c. 3. Sunt Nati, sive Nativi, qui suarum Ecclesiarum praetexta legatione fungantur, & Tales sunt quatuor, scil. Archiepiscopus Cant. Eboracensis, Remanensis, & Pifanis. So as before that Act, the Archbishop of Canterbury, was Legatus Natus, and by Force of his Authority Legatine usurped against the Canons upon all the Ordinaries in his Precinct, and by Colour thereof claimed concurrent Authority with them, which although they held in the Courts of the Archbishop, the same was remedied by the Act of 23 H.8. cap. 9. and all that which he usurped before, was not as he was Archbishop, for as to that he was restrained by the Canons, but as he was Legatus Natus, which Authority is now taken away and abolished utterly.

Lastly, If the said Act of 23 H.8. cap. 9. should not be so expounded, Then the Act which is principally made (as it appeareth by the Preamble against the Courts of the Archbishoapricks) should be as to them illusory; for if the Bishop of Canterbury, in Respect of his exempt Peculiar in London, may draw to him all the Diocese in London; so might he at Newington, which is a Peculiar in Winchester Diocese, draw to him the whole Diocese of Winchester; and at Totteridge near Barnet, the whole Diocese of Lincoln, and so of the like.

3. It was resolved, That when any Judges are prohibited by any Act of Parliament, that if they do proceed against the Act, there a Prohibition lieth. As against the Steward and Marshal of the Household. Quod Seneschallus & Marifcallus non tenent Placit. de libero tenem. de Definio, de Convenionibus, &c. So in the Statute of Articulus super chartas, cap. 3. Regis. fol. 185, inter Brevia super Natura. So against the Constable of the Castle of Dover.
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Quod non tangit Custodiem Castri. So to Justices of Aisle
upon the Statute Quod Inquisitiones que sunt
magna exactionis non capiantur in Patria.

Also to the Treasurer and Barons of the Exchequer, up-
on the Statute De Articul. super Cortas, cap 4. The Sta-
tute of Rutland, cap. ultimo. Quod communia Placit. non
teneantur in Scaccario. All which and many more, you
may see in the Register inter Brevia super Statua. See
F. N. B. 45 & 56, &c. 17 H. 6. 54. vi. 13 E. 3. Tit. Prohi-
bition: A Prohibition to the Chancellor, and Divinity of
Courts in the Title of Chancery. So against all Ecclesiasti-
cal Judges upon the Statute of 2 H. 5, cap. 3. If the Judges
there will not give or deliver to the Party a Copy of the
Libel, altho' that the Matter be meerly Ecclesiastical: And
therewith agreeeth 4 E. 4, 37, and F. N. B. 43. e. So the
Case upon the Statute of 2 H. 5. cap. 15. If the Ecclesiasti-
cal Judges in Case of Hereby, and other Matters of meer
Spirituality do not proceed according to the Intention of the
fame Statute; as it appeareth by the Precedent in 5 E. 4.

Keyson's Case, 10 H. 7. 17. See the Opinion of Payfon, 9 H.
6. 5. A Man excommunicated by the Bishop of London,
for a Crime done in another Diocese, shall not be grieved
therby; fo as the Common Law takes Notice of the Ca-
nons, in such Case, as Coram non iudice. And although
the Statute of 23 H. 8. inflicts a Penalty, yet a Prohibition
lieth, for the inflicting of the Penalty doth not take away
the Prohibition of the Law: And therefore, Cap. which
inflicts Punishment, if the Sheriff doth put his Name unto
the Return; yet the fame is Error if he doth not put to his
Name. See 35 H. 6. 6. when any thing is prohibited by a
Statute, if the Party be convicted, he shall be fined for
the Contempt to the Law; and 19 H. 6. 4. agrees in
Maintenance: And if every Perfon should be put to his
Action upon the Statute, the fame would be Caufe of Suits
and Vexation, and the shortest and more easy is to have a
Prohibition: See the Statute of 21 H. 8. cap. 6. of Mort-
tuaries, by which it is enacted, That no Parson, Vicar,
Curate, &c. demand any Mortuary but in such Manner as
is mentioned in the Act, upon Pain of Forfeiture of so much
in Value as they take, more than is limited by the Act, and
forty Shillings over to the Party grieved. Yet it appeareth
by Doctor and Student, lib. 2. cap. 15. fol. 105. That if the
Parson, &c. sueth for Mortuaries otherwise than the Act
appointeth, that a Prohibition lieth; yet there is a Penalty
added, which is an Authority expressly in the Point: And
the Cafe at Bar is a more strong Cafe, and that for three
Reasons.

1. It
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1. It was made an Affirmance of the Canon Law.
2. It was made for the Eafe of the People and Subjects; and 3. For the Maintenance of the Jurifdictions of the Ordinary, fo as the Subjects have Benefit by the Act; and therefore altho' that the King may dispence with the Penalty, yet the Subject grieved shall have a Prohibition. And the Rule of the Court was, Fiat Prohibitor Curia Contuæ, de Arcub. inter partes pratid. per Curiam. And Sherry, and Harris, jun. Serjeants at Law, were of Counsel in the Case.

EDWARDS'S Case.

3 Mich. 6 Jac. 1.

THE High Commissioners in Clauses Ecclesiastical objected divers Articles in English, against Thomas Edwards dwelling in the City of Exeter.

1. That Mr. John Walton hath been many Years trained up in Learning in the University of Oxford, and there worthily admitted to several Degrees of Schools, and deservedly took upon him the Degree of Doctor of Physick.
2. That he was a Reverend, and well practis'd Man in the Art of Physick.
3. That you the said Thomas Edwards said to him, You are no Graduate, &c.
4. That you knowing the Premisses, notwithstanding you the said Edwards, &c. of Purposé to disgrace the said Dr. Walton, and to blemish his Reputation, Learning and Skill, with Infamy and Reproach, did against the Rules of Charity write and send to the said Mr. Doctor Walton, a Lewd and Ungodly, and Uncharitable Letter, and therein taxed him of Want of Civility and Honesty, and Want of Skill and Judgment in his Art and Profession, &c. And you so far exceeded in your immoderate and uncivil Letter, that you told him therein in plain Terms, He may be crowned for an Aft, as if he had no Manner of Skill in his Profession, and were altogether unworthily admitted to the said Degrees, and therein you purposedly and advisedly taxed the whole Universitv of Rallnes and Indiscretion for admitting him to that Degree without Sufficiency and Desert.

5. And
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5. And further to disgrace the said Mr. Doctor Walton, in the said University, did publish a Copy of the said Letter to Sir William Courtney and others, and in your Letter was contained, Sipiam lehemen mentagram. Take that for your Inheritance, and thank God you had a good Father: And did not you thereby covertly mean and imply, That the Father of the said Dr. Walton (being late Bishop of Exeter, and a Reverend Prelate of this Land) was subject to the Diseases of the French Pox and Leprosy, to the Diflike of the Dignity and Calling of Bishops.

6. That in another Letter you sent to Mr. Doctor Maders, Doctor of Physick, you named Mr. Doctor Walton, and made a Horn in your Letter: And we require you upon your Oath to set down, whether you meant not that they were both Cuckolds, and what other Meaning you had.

7. You knowing that Dr. Walton was one of the High Commission in the Diocese of Exeter, and having obtained a Sentence against him in the Star-Chamber, for contriving and publishing of a Libel, did triumphingly say, That you had gotten on the Hip a Commissioner for Causes Ecclesiastical in the Diocese of Exeter, which you did to vilify and disgrace him, and in him the whole Commission Ecclesiastical in those Parts.

Lastly, That after the Letter mislively sent unto you, you said arrogantly, That you cared not for any Thing that this Court can do unto you, nor for their Censure, for that you can remove this Matter at your Pleasure.

And this Term it was moved to have a Prohibition in this Case. And the Matter was well argued: And at last it was resolved by Coke Chief Justice, Warburton, Daniel, and Foster Justices, That the first six Articles were merely Temporal, concerning Doctor Walton in his Profession of Physick, and so touched only the temporal Person, and a temporal Matter, and in Truth, it is in the Nature of an Action upon the Case for Scandal in his Profession of Physick: And yet the Commissioners themselves do proceed in the same Ex Officio. And it was resolved, that as for them, a Prohibition doth lie for divers Causes.

1. Because that the Matter and Persons are Temporal.

2. Secondly, Because it is for Defamation, which if any such shall be for the fame, it ought to begin before the Ordinary, because it is not such an enormous Offence, which is to be determined by the High Commissioners: And for the same Reason Suit doth not lie before them, for calling
calling the Doctor Cuckold, as it was objected in the seventh Article: And it was said that the High Commissioners ought to incur the Danger of Premunire.

2. It was resolved, That the Ecclesiastical Judge cannot examine any Man upon his Oath, upon the Intention and Thought of his Heart, for Cogitationis pranam nemo emergit. And in Cases where a Man is to be examined upon his Oath, he ought to be examined upon Acts or Words, and not of the Intention or Thought of his Heart; and if every Man should be examined upon his Oath, what Opinion he holdeth concerning any Point of Religion, he is not bound to answer the same; for in Time of Danger, Quis modo autus erit, if every one should be examined of his Thoughts. And so long as a Man doth not offend neither in Act nor in Word any Law established, there is no Reason that he should be examined upon his Thought or Cogitation: For as it hath been said in the Proverb, Thought is free; and therefore for the sixth and seventh Articles, they were resolved as well for the Matter as for the Form, in offering to examine the Defendant upon his Oath, of his Intention and Meaning, to be such, to which the Defendant was not to be compelled to answer: Ergo, it was resolved, that as to the Article, he might justify the same, because as it appeareth upon his own Shewing, that * the Doctor was sentenced in the Star-Chamber: Also the Libel is Matter meer Temporal, and if it were mere Spiritual, such a Defamation is not examinable before the High Commissioners.

As to the last Article, It appeareth now by the Judgment of this Court, that he might well justify the said Words: Also the High Commissioners shall not have Conscience of any Scandal to themselves for that they are Parties; and such Scandal is punishable by the Common Law, as it was resolved in Hale's Case, which see in the Book of the Lord Dyer's Reports, and see in my Book of Precedents, the Copy of the Indictment of Hale, for scandalizing of the Ecclesiastical Commissioners.

Note, The Bishop of Winchester being Visitor of the School of Winchester of the Foundation of Wickham Bishop of Winchester; and the Bishop of Canterbury, and other his Colleagues, An. 5 Car. cited the Usher of the said School, by Force of the said Commission to appear before them, and proceeded there against him, for which they incurred the Danger of a Premunire. And to did the Bishop of Canterbury and his Colleagues, by Force of a High Commission to them directed, cite one Humphry Frank Master of Arts, and Schoolmaster of the School of Sevenoak,
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(of the Foundation of Sir William Seeveycn, in the Time of King Henry the Sixth) to appear before the High Commissioners at Lambeth the sixth Day of December last past, which Citation was subcribed by Sir John Bemnet Doctor of Law, Doctor James, and Dr. Hickman, three of the High Commissioners: And Sir Christopher Perkins procured the said Citation to be made, and when the said Frank appeared, the Archbishops being associated with Sir Christopher Perkins, and Doctor Abbct Dean of Winchester, made an Order concerning the said School, (seil.) That the said Frank shall continue in the same School until the Annunciation, that he should have twenty Pounds paid to him by Sir Ralph Boswile Knight, who it seems was never cited; (but Quere, If he was not Plaintiff?)

Taylor and Shoile's Case.

4 Mich. 6 Jac. 1.

Taylor informed upon the Statute 5 Eliz. cap. 4. Tam pro Domino Reg. quam pro seipso in the Exchequer, That the Defendant had exercised the Art and Mystery of a Brewer, &c. and averred that Shoile the Defendant did not use or exercise the Art or Mystery of a Brewer, at the Time of the Making the Act, nor had been Apprentice by seven Years at least, according to the said Act, &c. The Defendant did demur in Law upon the Information, and Judgment was given against him by the Barons of the Exchequer. And now in this Term, upon a Writ of Error, the Matter was argued at Serjeants-Inn, before the two Chief Justices, and two Matters were moved; The One, That a Brewer is not within the said Branch of the said Act: For the Words are, That it shall not be lawful to any Person or Persons, other than such as now lawfully use or exercise any Art or Mystery, or manual Occupation, to set up, use or exercise any Art, Mystery, or manual Occupation, except he shall have been brought up therein seven Years at the least, as an Apprentice. And it was said, That the Trade of a Brewer is not any Art, Mystery, or manual Occupation within the said Branch, because the same is easily and presently learned, and he needs not to have
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have seven Years Apprenticeship to be instructed in the
same, for every Housewife in the Country can do the same:
And the Act of Henry the Eighth is, That a Brewer is
not a Handicraft Artificer.

2. It was moved, That the said Averment was not suf-
ficient, for the Averment ought to be as general as the Ex-
ception in the Statute is, {eis.) That the Defendant did
not use any Art, Mystery, or Occupation at the Time of
the Making the same Act; for by this Pretence, if any Art,
&c. then as a Taylor, Carpenter, &c. he may now exer-
cise any other Art whatsoever.

As unto the first, It was resolved, That the Trade of a
Brewer, {eis.) to hold a common Brew-house, to sell
Beer or Ale to another, is an Art or Mystery within the
said Act; for in the Beginning of the Act, it is enacted,
That no Person shall be retained for less Time than a whole
Year in any of the Services, Crafts, Mysteries, or Arts of
Cloathing, &c. Bakers, Brewers, &c. Cooks, &c. So as
by the Judgment of the same Parliament, the Trade of a
Brewer is an Art and Mystery; which Words are in the
said Branch upon which the said Information is grounded.
Also because that every Housewife brews for her private
Use; so also the bakes, and dresseth Meat: And yet none
can hold a common Bake-house, or a Cook's Shop to sell to
others, unless that he hath been an Apprentice, &c. for
they are expressly named also in the Act as Arts and Myste-
ries: And the Act of 22 H.8. cap. 13. is explained, That
a Brewer, Baker, Surgeon, and Scrivener Alien, are not
Handicrafts mention'd within certain Penal Laws: But the
same doth not prove, but that they are Arts or Mysteries,
for Art or Mystery is more general than Handicraft, for
the same is restrained to Manufactures.

As to the second Point, It was resolved, That the In-
tention of the Act was, That none should take upon him
any Art, but he who hath Skill or Knowledge in the same:
And therefore the Statute intendeth, That he who used
any Art or Mystery at the Time of the Act, might use the
same Art or Mystery; for Quod quisque norit in hoc se ex-
creat. And the Words of the Act are, As now do lawfully
use, &c. And it was said, That it was very necessary, that
Brewers should have Knowledge and Skill in brewing good
and wholesome Beer and Ale, for that the same doth greatly
conduce to Mens Health: And so the first Judgment
was affirmed.
(5) The Case of Modus Decimandii.

Mich. 6 Jacobi 1.

In the Common Pleas.

Sirlely Serjeant, moved to have a Prohibition, because that a Person sued to have Tithes of Silva Cadua under twenty Years growth in the Weild of Kent; where, by the Custom of it, which is a great Part of the Country, Tithes of any Wood was never paid. And if such a Custom in non Decimando for all Lay-people within the said Weild, were lawful or not, was the Question; and to have a Prohibition it was said, That altho' one particular Man shall not prescribe in non Decimando, yet such a general Custom within a great Country might well be, as in 43 E.3. 32. and 45 E.3. Custom 15. It was presented in the King's Bench, That an Abbot had purchased Tenements after the Statute, &c. And the Abbot came and said, That he was Lord of the *Town, &c. And the Custom of the Town was, That when the Tenant cetheth for two Years, that the Lord might enter until Agreement be made for the Arrearages; and that he who held these Tenements was his Tenant, and cessed for two Years, and he entred: And the Rule of the Court is, because it was an Usage only in that Town, and not in the Towns, that is, in the Country adjoining, he was put to answer. So as by the fame it appeareth, that a Custom was not good in a particular Town, which perhaps might be good and of Force in a Country, &c. See 40 Ass. 21. and 27. 39 E.3. 2. A Custom within a Town, that an Infant, &c. might alien, is not good; but yet such a Custom within Kent hath oftentimes been adjudged to be good. See 7 H.6. 26 b. 16 E. 2. Prescription 53. Dyer 363. 22 H.6. 14. 21 E. 4. 15. and 45 Ass.8. See Dyer and Student, lib. 2. cap. 55. A particular Country may prescribe to pay no Tithes for Corn, Hay, and other Things, but that is with this Caution, to as the Minister hath sufficient Portion besides to maintain him, to celebrate Divine Service: And fol. 172. it is holden, That where Tithes have not been paid of Under-woods under twenty Years growth, that no Tithes shall be paid for the
PART XIII. The Case of Modus Decimandi.

fame, because that they do not renew nor increase from Year to Year, so as they are not due to the Parson but by Custom.* And he faith, fol. 174. That such a Custom of a whole Country, that no Tithes of a Lordship shall be paid, is good; and it is to be observed, that in all Libels for Tithes of Woods, they alledge a Prescription to have Tithes of them: But the Court would advise, whether such a Custom for a Town or Country should be good: But in antient Times, the Parishioners have given or procured to the Parson a Wood or other Lands, &c. to have and to hold to him and his Successors in Satisfaction of all Tithes of Wood in the same Parish; and the Parson is now seised of the same Wood, and that without Question is a good Discharge of his Tithes; and that in such Case, if he sueth for Tithes of Wood, a Prohibition lieth: And for that it hath been said now of late, That such Opinions were new and without any Antiquity, unto the great Prejudice of the Church: I will cite you an antient Judgment many Years past, Mich. 25 H. 3. Wilts. Rot. 5. before the King at Westminster. Sampson Foliet brought an Attaint upon a Prohibition, against Thomas Parson of Swyndern, because he sued him in the Spiritual Court for a Lay Fee of the said Sampson, in Draycot, contrary to the King's Prohibition, &c. The Defendant pleaded, Quod coram Judicibus Delegatis petitis de eodem Decimas sani de quodam prato ipsius Sampsonis in Walcot unde est in possessione per sententiam Judicum suorum, &c. antequam Prohibition Dom. Regis ad eum pervenerit, & quod pratum predictum est in Walcot unde ipse est Persona, & non in Draycot: To which the said Sampson replied and said, Quod antecessores sui antiquius dederunt duas acras pratis Ecclesiae de Draycot pro decimas sani quam praeditum Thomas modo petit in eodem prato, quas quidem duas acras prati eadem Ecclesiae adhuc habet, & semper hucusque habitat, unde videtur quod illud quod praeditum Thomas ultra petit, est de laico feudis suo, & dicit quod pratum illud in quo idem Thomas petit Decimas est in Draycot fuit Breve dicit, & non in Walcot, & de hoc ponit se super Patriam: And the Jury found, Quod predictum Thomas Persona de Swayndon fuit placiata in Curia Christianitatis de Laico feudis praeditum. Sampsonis contra Prohibitionem Dom. Regis, petition ab ipso Decimas sani de quodam prato ipsius Sampsonis in Draycot unde Antecessores sui antiquius dederunt Ecclesiae de Draycot duas acras prati pro Decima sani quam praeditum Thomas modo petit, & quas eadem Ecclesiae adhuc habet & semper hucusque habuit, &c. Et quod pratum predictum in quo idem Thomas petit Decimas est in Draycot, & non in Walcot.
The Case of Modus Decimandi. PART XIII.

Walco, &c. Ideo consideratum est quod praelit Thomas fit inde in misericord. & reddat prael. Samsoni 20 Marcus quas versus cum pro Damnis, &c. Which antient Judgment I have recited at large, because that the same agrees with the Rule and Reason of the Law continued until this Day:

For Judgments or Precedents in the Time of Ed. 2. E. 1. H. 3. John, R. 1. and more antient are not Authorities or Precedents to be now followed, unlefs that they concur and agree with the Law, and common Experience and Practice at this Day; for many Acts of Parliaments (and some of them not extant) have changed the antient Laws in divers Cases: And Defuetude hath antiquated, and Time and Custom hath taken away divers others; so as the Rule is good, Quod Judiciis posteri.oribus fides est adhibenda; Et a communi observantia non est recedendum. There are two Points adjudged by the said Record.

1. That Satisfaction may be given in Discharge of Payment of Tithes; and if the Successor of the Parson enjoyeth the Thing given in Satisfaction of the Tithes, and sueth for Tithes in Kind, the Defendant shall have a Prohibition, which antient Judgment I have recited at large, because that the same agrees with the Rule and Reason of the Law continued until this Day:

For Judgments or Precedents in the Time of Ed. 2. E. 1. H. 3. John, R. 1. and more antient are not Authorities or Precedents to be now followed, unless that they concur and agree with the Law, and common Experience and Practice at this Day; for many Acts of Parliaments (and some of them not extant) have changed the antient Laws in divers Cases: And Defuetude hath antiquated, and Time and Custom hath taken away divers others; so as the Rule is good, Quod Judiciis posteri.oribus fides est adhibenda; Et a communi observantia non est recedendum. There are two Points adjudged by the said Record.

Vide post. 15.

16. 16.

Discharge of Tithes to be tried at Common Law. See and Note the Introduction to Gibbon's Codex 20. 21. Amca 4, &c. ib. 2 Co. 38. 41. 10.

4 Co. 74. 5 Co. 91. 15, &c.
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also it appeareth, That Tithes may be discharged, and that the Matter of Discharge ought to be determined by the Common Law, and not in the Spiritual Court: And it is to be observed, That neither in the said Judgment, nor in the Register any Averment is taken of the Value of the Thing given in Satisfaction of the Tithes. Also by the Act of Circumspecte agatis, made 13 E. 1. it is said, *Si Reclio pecunie versus parochianos oblationes, &c. decimas debitas, seu consequas, &c.* which proves that there are Tithes due in Kind, and other Tithes due by Custom, as a Modus Decimandi, &c. And yet it is resolved in 19 E. 3. Jurisdiction 28. That the Ordinance of Circumspecte agatis is not a Statute; and that the Prelates made the same *sans assent, &c.* and yet then the Prelates acknowledged, *That there were Tithes due by Custom, which is a Modus Decimandi.* By which it appeareth also, That Tithes by Custom may be altered into another Thing: Where a Man grants a Parcel of his Manor to a Parson in Fee to be quit of Tithes, and makes an Indenture, and the Parson with the Assent of the Ordinary (without the Patron) grants to him that he shall be Quit of Tithes of his Manor for that Parcel of Land: Afterwards if he or his Assignee be sued in the Spiritual Court for Tithes of his Manor, he or his Assignee shall have a Prohibition upon that Deed. And if that Deed was made before Time of Memory, and he hath so continued to be Quit of Tithes, he shall have a Prohibition upon that Deed, if he be sued for the Tithes of that Manor, or of any Parcel of the same upon that Matter shewed, See 8 E. 4. 14. F. N. B. 41. G. Vide 3 E. 3. 17. 16 E. 3. t. Annuity 24. 40 E. 3. 3. b. and F. N. B. 152. And therefore, if the Lord of a Manor hath always holden his Manor Discharged of Tithes, and the Parson had before Time of Memory, or in antient Times, divers Lands in the same Parish, of the Gift of the Lord, of which the Parson is seised at this Day in Fee, in Respect of which, the Parson nor any of his Predecessors ever had received any Tithes of the said Manor; if the Parson now sueth for Tithes of the Manor, the Owner of the Manor may shew that special Matter, and that the Parson and his Successors Time out of Mind have holden those Lands, &c. of the Gift of one who was Lord of the said Manor, in full Satisfaction of the Tithes of the said Manor; and the Proof that the Lord of the Manor gave the Lands, that Tithes should never be paid, at this Day, is good Evidence to prove the Surmise of the Prohibition. And so of the like; and 19 E. 3. t. Jurisdiction 28. it is adjudged, That Title of Preemption, shall be determined in the King's Court: And therefore a Modus...
The Case of Modus Decimandi. Part XIII.

dus Decimandi which accrues by Custom and Prescriptions shall be sued in the King's Court. And it appeareth by the Stat. of 7 H. 4. c. 6. That the Pope by his Bulls discharge'd divers from Payment of Tithes, against which the Act of Parliament was made; and by Stat. 31 H. 5. c. 13. That the Possessions of Religious Persons given to the King, were discharge'd of Payment of Tithes in certain Cases: And by Stat. 32 H. 8. c. 7. it is provided, That all and singular Persons shall divide, set out, yield and pay all and singular Tithes and Offerings aforesaid, according to the lawful Customs and Usages of the Parishes and Places where such Tithes or Duties shall come, or immediately rise or be due: Provided always, and be it enacted, That no Person or Persons shall be sued or otherwise compelled to pay any Manner of Tithes, for any Manors, Lands, Tenements, or Hereditaments, which by the Laws or Statutes of this Realm are discharged, or not chargeable with the Payment of any such Tithes: And the Stat. 2 E. 6. c. 13. enacts, That every of the King's Subjects shall from henceforth justly and truly, without Fraud or Guile, divide, set out, &c. all Manner of their predial Tithes in their proper Kind as they shall rise and happen, in such Manner and Form as hath been of Right yielded and paid, within forty Years next before the Making of this Act, or of Right or Custom ought to be paid. So as it appeareth by this, that Tithe is due of Right, and by Custom: And also in the same Act there is a Provision in these Words; Provided always and be it enacted, That no Person shall be sued, or otherwise compelled to yield, give, or pay any Manner of Tithes for any Manors, Lands, Tenements or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Prescription, are not chargeable with the Payment of any such Tithes, or that he be discharged by any Composition real: So as it appeareth by that Act, that one may be discharged from the Payment of Tithes five Manner of Ways.

1. By the Law of the Realm, that is, the Common Law; as Tithes shall not be paid of Coals, Quarries, Brick, Tiles, &c. P.N. B. 53. and Register 54. Nor of the After-Pasture of a Meadow, &c. nor of Raking, nor of Wood to make Pales, or Mounds, or Hedges, &c.


3. By the Privilege, as those of St. John's of Jerusalem in England; the Cistercians, Templars, &c. as it appeareth by 10 H. 7. 277. Dyer.

4. By Prescription, As by Modus Decimandi, or an annual Recompence in Satisfaction of them, as appeareth before by the Authorities aforesaid.
PART XIII. The Case of Modus Decimandi.

5. By real Composition, as appeareth by the said Writ cited out of the Register: And so you have one or two Examples (for many others which may be added) of these five Manners of Discharges of Tithes. And by them all it appeareth, That a Man may be discharged of the Payment of Tithes, as before it is said: So as now it apparently appeareth by the Laws of England, both antient and modern, That a Layman ought to prescribe in Modo decimandi, but not in non Decimando; and that in Effect agrees with the Opinion of Thomas Aquinas in his Secunda secunda, Quest. 86. art. ultimo. For there he faith, Quod in veteri leges praecipuum de solutione Decimarum, partim erat morali inditum ratione naturali qua dictat quod suis qui divino cultui ministrant ad salutem totius populi necessaria viuendi debent ministri, juxta illud, 1 Cor. 9. Quis militat, &c. Who goeth to War at his own Charges, &c. Partim autem erat judiciale ex divina institutione robur habens, (seil.) Quantum ad determinationem certa partis. And all that agrees with our Law; and he goeth further, In tempore vero nova Legis etiam est determinatio partis solvendi auctoritate Ecclesiæ (that is, by their Canons) Instituta secundum quaedam humanitatem, ut seiliet non minus populus nova legis ministri Novi Testamenti exhibeat, quam populus veteris legis ministri Veteris Testamenti exhibebat, præterim cum ministri nova legis sunt maiores dignitate, ut probat Apostolus, 2 Cor. 3. Sic ergo patet quod ad solutionem Decimarum tenentur homines partim quidem ex jure naturali, quantum ad hoc quod aliquo portio data est ministris Ecclesiæ, partim vero ex institutione Ecclesiæ, quantum ad determinationem decima partis. See Docteur and Student, lib. 2. cap. 56. fol. 164. That the tenth Part is not due by the Law of God, nor by the Law of Nature, which he calleth the Law of Reason: And he citeh JohnGerfion, who was a Doctor of Divinity, in a Treatise which he calleth Regula morales (seiliet) Solutio decimarum facer dotibus est jure divino, quatenus inde sustentetur, sed quoad partem hanc vel illam assignare aut in alios redditus commutare, positiv juris est. And afterwards, Non vocatur portio curatis debita præterea decima, eo quod est decima pars, imo est interdum vicecima aut tricepima. And he holdeth, That a Portion is due by the Law of Nature, which is the Law of God, but it appertaineth to the Law of Man to assign Hanc vel illam portionem, as Necesfity requireth for their Sustenance: And further he faith, That Tithes may be exchanged into Lands, Annuity, or...
The Case of Modus Decimandi. Part XIII.

Rent, which shall be sufficient for the Minister, &c. And there he faith, That in Italy, and in other the East Countries, they pay no Tithes, but a certain Portion according to the Custom, &c. And all this is true, if * not, that Tithes be discharged or changed by one of the said five Ways: And forasmuch as it appeareth from themselves that the tenth Part or Value was Part of the Judicial Law only, certainly the same doth not bind any Christian Commonwealth, but that the same may be altered by Reason of Time, Place, or other Consideration, as it appeareth in all Punishments inflicted by the Judicial Law, they do not now bind any; for Felony is now punished by Death, &c. which was not so by the Judicial Law, &c. Also forasmuch as now it is confessed, that the tenth Part or Value was Part of the Judicial Law only, certainly the same doth not bind any Christian Commonwealth, but that the same may be altered by Reason of Time, Place, or other Consideration, as it appeareth.

All this is true, if * nor, that Pfluge Tithes be discharged or changed by one of the said five Ways: And forasmuch as it appeareth from themselves that the tenth Part or Value was Part of the Judicial Law only, certainly the same doth not bind any Christian Commonwealth, but that the same may be altered by Reason of Time, Place, or other Consideration, as it appeareth. In all Punishments inflicted by the Judicial Law, they do not now bind any; for Felony is now punished by Death, &c. which was not so by the Judicial Law, &c. Also forasmuch as now it is confessed, that the tenth Part or Value was Part of the Judicial Law only, certainly the same doth not bind any Christian Commonwealth, but that the same may be altered by Reason of Time, Place, or other Consideration, as it appeareth.

The second Point which agrees with the Law at this Day, which was adjudged in the said Record of 25 H. 3. is, That the Limits and Bounds of Towns and Parishes shall be tried by the Common Law, and not in the Spiritual Court; and in this the Law hath great Reason, for thereupon depends the Title of Inheritance.
PART XIII. The Case of Modus Decimandi.

ritance of the Lay-fee, whereof the Tithes were demanded for Fines, and Recoveries are the Common Assurances of Lay Inheritances; and if the Spiritual Court should try the Bounds of Towns, if they determine that my Land lieth in another Town than is contained in my Fine, Recovery, or other Assurance, I shall be in Danger to lose my Inheritance, and therewith a- greeth 39 E. 3. 29. 5 H. 5. 10. 32 E. 4. 1. Consultation, 3 E. 4. 12. 19 H. 6. 20. 50 E. 3. 20. and many other Precedents until this Day. And note, there is a Rule in Law, that when the Right of Tithes shall be tried in the Spiritual Court, and the Spiritual Court hath Jurisdiction thereof, that our Courts shall be oufed of the Jurisdiction. 35 H. 6. 47. 38 H. 6. 21. 2 E. 4. 15. 22 E. 4. 23. 38 E. 3. 36. 14 H. 7. 17. 13 H. 2. Jurisd. 19. but that is, when Debate is between Parson and Vicar, or when all is in one Parish; but when they are in several Parishes, then this Court shall not be oufed of the Jurisdiction. See 12 H. 2. Tit. Jurisdiction 17. 13 R. 2. ibid. 19. 7 H. 4. 34. 14 H. 4. 17. 38 E. 3. 56. 42 E. 3. 12. And yet there is a Canon expressly against this, which see in Linwood titulo de pennis 55. And so fol. 217, 228, amount the Canons or Constitutions of Boniface, Anno Dom. 1277. And the Causes whereof the Judges of the Common Law would not permit the Ecclesiastical Judges to try Modum Decimandi, being pleaded in their Court is, because that if the Recompence* which is to be given to the Parson, in Satisfaction of his Tithes doth not amount to the Value of the Tithes in Kind, they would overthrow the same: And that also appeareth by Linwood amongst the Constitutions Simonis Mepham, Tit. De Decimis, cap. Quantiam propter, fo. 139. 6. verbo confuetudines, confuetudo ut non solvantur, aut minus plene solvantur Decima, non valet, and ibidem secundum alios, Quad in Decimis realibus, non valet confuetudo ut solvantur minus decima parte, sed in personalibus, &c.

shall come in Debate, there this Court shall be oufed of the Jurisdiction, and the Spiritual Court shall have Jurisdiction. But when the Right of Tithes cometh in Debate, and the Spiritual Court cannot have Jurisdiction or Conuance of it; as where a Layman is Plaintiff as Farmer, or Defendant as Servant of the Parson, as a Layman Farmer cannot sue there, nor he who justifies a Servant cannot be sued in Trespass; but if the Suit be between Parson and Vicar, or Parson and Parson, and other Spiritual Persons, it the King's Court be oufed of the Jurisdiction after Severance of the Ninth Part; yet the Libel ought to be for Subdivision of Tithes, for of that they have Jurisdiction, and not of Tithes severed from the nine Parts; for that shall be in Case of a Premunire, and it appertaineth to Common Law. See 16 H. 2. in the Case of Mortuary. Vide Decretal. Sext. lib. 3. Tit de Decimus, cap. 1. fo. 159. col. 4.

Et summam Angeli, fo. 72.

Note, All this seems the Opinion of some Citizen: Ergo Quere.
Baron and Boys's Case. PART XIII.

And ibidem Lit. M. verbo, integre, faciunt expresse contra opinionem quorundam Theologorum, qui dicitur sufficere aliquid dari pro Decima. And that is the true Reason in both the said Cases, &c. de Modo Decimandi, & de Limitibus Parochiarum, &c. that they would not adjudge according to their own Canons; and therefore a Prohibition lieth; and therewith agreeeth 8 E. 4. 14. and the other Books above said, and infinite Precedents; and the rather after the Statute of 2 E. 6. cap. 13. And also the Customs of the Realm are Part of the Laws of the Realm, and therefore they shall be tried by the Common Law, as is aforesaid. See 7 Ed. 6. Dyer 79. and 18 Eliz. Dyer 349. the Opinion of all the Justices.

(6) Baron and Boys's CASE.

Mich. 6 Jacobi 1.

In the Exchequer.

In the Case between Baron and Boys, in an Information upon the Statute of 5 E. 6. cap. 14. of Ingrossers, after Verdict it was found for the Informer, That the Defendant had ingrossed Apples against the said Act: The Barons of the Exchequer held clearly, That Apples were not within the said Act, and gave Judgment against the Informer upon the Matter apparent to them, and caused the same to be entered in the Margin of the Record where the Judgment was given; and the Informer brought a Writ of Error in the Exchequer-chamber, and the only Question was, Whether Apples were within the said Act? The Letter of which is, That whatsoever Person or Persons, &c. shall ingross or get into his or their Hands, by Buying, Contracting, or Promise, taking (other than by Demise, Grant, or Lease of Land, or Tithe) any Corn growing in the Fields, or any other Corn or Grain,
PART XIII. Baron and Boys's Case.

Grain, Butter, Cheese, Figs, or other dead Victual within the Realm of England, to the Intent to sell the same again, shall be accepted, &c. an unlawful Ingrosser. And although that the Statute of 2 E. 6. cap. 15. made against Sellers of Victual, which for their great Gain conspire, &c. numbereth Butchers, Brewers, Bakers, Cooks, Costermongers and Fruiterers, as Victuallers: Yet Apples are not dead Victuals within the Statute of 5 E. 6. for the Buyers and Sellers of Corn and other Victuals have divers Proviso's and Qualifications for them, as it appeareth by the said Act, but * Costermongers and Fruiterers have not any Proviso for them: Also, always after the said Act they have bought Apples and other Fruits by Ingroses, and sold them again, and before this Time no Information was exhibited for them, no more than for Plumbs or other Fruit, which serveth more for Delicacy than for necessary Food. But the Statute of 5 E. 6. is to be intended of Things necessary and of common Use for the Sustenance of Man; and therefore the Words are Corn, Grain, Butter, Cheese, or other dead Victual; which is as much as to say, Victual of like Quality, that is, of like necessary and common Use: But the Statute of 2 E. 6. cap. 15. made against Conspiracies to enhance the Prices, was done and made by express Words, to extend it to Things which are more of Pleasure than of Profit: So it was said, That of those Fruits a Man cannot be a Forester to within this Act of 5 E. 6. for in the same Branch the Words are, any Merchandize, Victual, or any other Thing. But this was not resolved by the Justices, because that the Information was conceived upon that Branch of the Statute concerning Ingrossers.

MENVILL'S
(7) MENVILL's Case.

Hill. 27 Eliz.

(Dower) In the Chancery.

Hillary Term, the 27th of Eliz. in the Chancery, the Case was thus: One Ninian Menvill seised of certain Lands in Fee, took a Wife, and levied a Fine of the said Lands with Proclamations, and afterwards was indicted and outlawed of High Treason, and died: The Conueses convey the Lands to the Queen, who is now seised; the five Years past after the Death of the Husband: The Daughters and Heirs of the said Ninian in a Writ of Error in the King's Bench, reverse the said Attainder, Mist. 26 & 27 Eliz. last past; and thereupon the Wife sueth to the Queen, (who was seised of the said Land as aforesaid) by Petition, containing all the special Matter, fail. the Fine with Proclamations, and the five Years past after the Death of her Husband, the Attainder and the Reversal of it: and her own Title, fail. her Marriage, and the Seisin of her Husband before the Fine: And the Petition being endorsed by the Queen, Fiat droit aux parties, &c. the same was sent into the Chancery, as the Manner is.

And in this Case divers Objections were made against the Demandant.

1. That the said Fine with Proclamations should bar the Wife of her Dower, and the Attainer of her Husband should not help her; for as long as the Attainder doth remain in Force, the same was a Bar alfo of her Dower, fo as there was a double Bar to the Wife, viz. the Fine levied with Proclamations, and the five Years past after the Death of her Husband, and the Attainer of her Husband of his Treason. But admit that the Attainer of the Husband shall avail the Wife in some Manner, when the same is now reverfed in a Writ of Error, and now upon the Matter is in Judgment of Law, as if no Attainder had been: And against that a Man might plead, that there is no fuch Record, because that the first Record is reverfed, and utterly disaffirmed and annihilated, and now by Relation made no Record ab initio,
PART XIII.  In the Chancery.

and therewith agreeeth the Book of 4 H. 7. 11, for the Words of the Judgment in a Writ of Error are, Quod Judicium pradict & Errores pradict & alios in Recordo, &c. revocetur & adnulletur, &c. & quod ipfa ad possessionem suam seynam suam (as the Case requireth) tenementorum suorum judicium una cum exitibus & proficiis inde a tempore judicis praedict reddi percepit, & ad omnia que occasione judicis illius amitt revertatur. By which it appeareth, that the first Judgment, which was originally imperfect and erroneous, is for the same Errors now annulled and revoked ab initio; and the Party, against whom the Judgment was given, restored to his Possessions, and to all the same Profits, from the Time of the erroneous Judgment given, until the Judgment in the Writ of Error, so as the Reversal hath a Retroспект to the first Judgment, as if no Judgment had been given: And therefore in 4 H. 7. 10. b. the Case is, A. seised of Land in Fee, was attainted of High Treason, and the King granted the Land to B. and afterwards A. committed Trespass upon the Land, and afterwards by Parliament A. was restored, and the Attainder made void, as if no Act had been done; and shall be as available and ample to A. as if no Attainder had been: And afterwards B. bringeth Trespass for the Trespass Mense; and it was adjudged in 10 H. 7. fol. 22. b. That the Action of Trespass was not maintainable, because that the Attainder was disaffirmed and annulled ab initio. And in 4 H. 7. 10. it is held, that after a Judgment reversed in a Writ of Error, he who recovered the Land by erroneous Judgment shall not have an Action of Trespass for a Trespass’ Mense, which was said, was all one with the principal Case in 4 H. 7. 10. and divers other Cases were put upon the same Ground.

It was secondly objected, That the Wife could not have a Petition, because there was not any Office by which her Title of Dower was found, scil. her Marriage, the Seisin of her Husband, and Death: For it was said, That although she was married, yet if her Husband was not seised after the Age that she is dowerable, she shall not have Dower; as if a Man seised of Land in Fee, taketh to Wife a Woman of eight Years, and afterwards before her Age of nine Years, the Husband alieneth the Lands in Fee, and afterwards the Woman attaineth to the Age of nine Years, and the Husband dieth; it was said, that the Woman shall not be endowed. And that the Title of him who sueth by Petition ought to be found by Office, appeareth by the Books in 11 H. 4. 52. 29 Ass. 31. 30 Ass. 28. 46 E. 3. bre. 618. 9 H. 7. 24, &c.
As to the first Objection, it was resolved, That the Wife should be endowed, and that the Fine with Proclamations was not a Bar unto her, and yet it was resolved that the Act of 4 H. 7. c. 24. shall bar a Woman of her Dower by a Fine levied by her Husband with Proclamations, if the Woman doth not bring her Writ of Dower within five Years after the Death of her Husband, as it was adjudged, *Hill. 4 H.8. Rot. 344.* in the Common Pleas, and 5 El. Dyer 244. For by the Act, the Right and Title of a *Feme covert* is saved, so that she take her Action within five Years after she becomes uncover, &c. but it was resolved, That the Wife was not to be aided by that Saving; for in Respect of the said Attainder of her Husband of Treason, she had not any Right of Dower at the Time of the Death of her Husband, nor can she after the Death of her Husband bring an Action, or prosecute an Action to recover her Dower, according to the Direction and Saving of the said Act: But it was resolved, That the Wife was to be aided by another former Saving in the same Act, *viz.* And saving to all other Persons (feil. who were not Parties to the Fine) such Actions, Right, Title, Claim and Interest in or to the said Lands, &c. as shall first grow, remain, descend, or come to them after the said Fine ingrossed, and Proclamations made, *by* Force of any Gift in Tail, or by any other Cause or Matter had and made before the said Fine levied, so that they take their Actions and pursue their Right and Title according to the Law, within five Years next after such Action, Right, Claim, Title or Interest to them accrued, descended, fallen or come, &c. And in this Case the Action and Right of Dower accrued to the Wife after the Reversal of the Attainder, by Reason of a Title of Record before the Fine, by Reason of the Seisin in Fee (had) and the Marriage (made) before the Fine levied, according to the Intention and Meaning of the said Act.

And as to the said Point of Relation, it was resolved, That sometimes by Constitution of Law a Thing shall relate *ab initio* to some Intent, and to some Intent not; for *Relation est ficta juris,* to do a Thing which was and had Essence, to be annulled *ab initio,* betwixt the same Parties to advance a Right, or *Ut res magis valeat quam pereat:* But the Law will never make such a Constitution to advance a Wrong, which the Law abhorreth, or to defeat collateral Acts which are lawful, and principally if they do concern Strangers: And this appeareth in this Case (feil.) when an erroneous Judgment is reversed by a Writ of Error: For true it is, as it hath been said, That as to the mean Profits, the same shall have Relation by Constitution of Law, until
until the Time of the first Judgment given, and that is to
favour Justice, and to advance the Right of him who hath
Wrong by the erroneous Judgment. But if a Stranger hath
done a Trespass upon the Land in the mean Time, he who
recovereth after the Reversal, shall have an Action of Tres-
passes against the Trespassors; and if the Defendant pleadeth
that there is no such Record, the Plaintiff shall shew the spe-
cial Matter, and shall maintain his Action, so as unto the
Trespassors who are wrong Doers, the Law shall not make
any Construction by Way of Relation ab initio to excuse
them, for then the Law by a Fiction and Construction should
do wrong to him who recovereth by the first Judgment: And
for the better apprehending of the Law on this Point, it is
to know, That when any Man recovers any Possessions or
Seisin of Land, in any Action by erroneous Judgment, and
afterwards the Judgment is reverfed as is said before, and
upon that the Plaintiff in the Writ of Error shall have a
Writ of Restitution, and that Writ reciting the first Re-
covery, and the Reversal of it in the Writ of Error, is, that
the Plaintiff in the Writ of Error shall be restored to his Pos-
session and Seisin, Una cum exitibus thereof from the Time
of the Judgment, &c. Tibi praecipimus quod eundem A:
ad plenarium seifiam tenementorum prædicto cum pertinen-
tiis sine dilatatione restitui factas, & per sacramentum probo-
rum & legalium hominum de Com. tuo diligenter inquiras
ad quantum exitus & præsdicta tenementorum illorum cum
pertinentiis a tempore falsi Judicii prædicti reddas, usque
ad Off. Sancti. Mich. anno, &c. quod die judicium illud per
præfat. Justiciar. nostros revocas. fuit, se attingunt, juxta
verum valorem eorumdem eadem exitus & præsdicta de ter-
rris & catallis prædicto B. in baliva tua fieri factas, &c. dena-
rrios inde præsato A. pro exitibus & præsdictis tenementorum
per eundem B. dilo medio tempore percept. sine dilatione
haberi factas: Et qualiter hoc præceptum nostrum fuisse
exequi. confasse factas, &c. in Offic. &c. By which it ap-
peareth, That the Plaintiff in the Writ of Error shall
have Restitution against him who recovereth of all the mefn
Profits, without any Regard by them taken; for the Plain-
tiff in the Writ of Error cannot have any Remedy against
any Stranger, but only against him who is Party to the
Writ of Error, and therefore the Words of the said Writ
* command the Sheriff to enquire of the Illues and Profits
generally, between the Reversal and the Judgment, with
all which he who recovers shall be charged, and as the
Law chargeth him with all the mefn Profits, so the Law
gives to him Remedy, notwithstanding the Reversal, against
all Trespassors in the Interim, for otherwise the Law should
make
MENVILL'S CAFE. PART XIII.

make a Construction by Relation to discharge them who are wrong Doers, and to charge him who recovers with the Whole, who peradventure hath good Right, and who entereth by the Judgment of the Law, which peradventure is reversed for want of Form, or Negligence or Ignorance of a Clerk. And therefore as to that Purpose the Judgment shall not be reversed ab initio, by a Fiction of Law, but as the Truth was, the same stands in Force until it was reversed: And therefore the Plaintiff in the Writ of Error after the Reversal shall not have an Action of Trespass for a Trespass mein, because he shall recover all the mein Profits against him who recovered, nor he that recovers shall be after barred of his Action of Trespass for a Trespass mein, by Reason that his Recovery is reversed, because he shall answer for all the mein Profits to the Plaintiff in the Writ of Error: And therewith agreeeth Brian Chief Justice, 4 H. 7. 12 a.

Note Reader, If you would understand the true Sense and Judgment of the Law, it is needful for you to know the true Entries of Judgments, and the Entries of all Proceedings in Law, and the Manner and the Matter of Writs of Execution of such Judgments. See Butler and Baker's Case in the third Part of my Reports, good Matter concerning Relations. So as it was resolved in the Cafe at Bar, although that to some Intent the Reversal hath Relation, yet to bar the Wife of her Dower by Fiction of Law, by the Fine with Proclamations, and five Years past after the Death of her Husband, when in Truth she had not Cause of Action, nor any Right or Title so long as the Attainder stood in Force, should be to do wrong by a Fiction of Law, and to bar the Wife, who was a meer Stranger, and who had not any Means, to have any Relief until the Attainder was reversed.

And as unto the other Point or Objection, that the Demandant on the Petition ought to have an Office found for her, it was resolved, that it needed not in this Cafe, because that the Title of Dower stood with the Queen's Title, and affirmed it; otherwise if the Title of the Demandant in the Petition had disaffirmed the Queen's Title; also in this Case, the Queen was not entitled by any Office that the Wife should be driven to traverse it, &c. for then the ought to have had an Office to find her Title: But in Case of Dower, altho' that Office had been found for the Queen which doth not disaffirm the Title in Dower, in such Case the Wife shall have her Petition without Office, because that Dower is favour'd in Law, the claiming but only for Term of Life, and affirming the Title of the Queen. See the Sadler's Cafe in the 4th Part of my Reports.
And the Case which was put to the Court, for it was resolved, That if a Man seised of Lands in Fee, take a Wife of eight Years of Age, and alieneth his Lands, and afterwards the Wife attaineth to the Age of nine Years, and afterwards the Husband dieth, that the Wife shall be endowed: For altho' at the Time of the Alienation the Wife was not dowerable; yet, forasmuch as the Marriage and Seisin in Fee, was before the Alienation, and the Title of Dower is not consummated until the Death of her Husband, so as now there was Marriage, Seisin of Fee, Age of nine Years, during *the Coverture, and the Death of the Husband, for that Cause the Wife shall be endowed: For it is not requisite that the Marriage, Seisin and Age concur altogether at one Time, but it is sufficient if they happen during the Coverture: So if a Man seised of Lands in Fee take a Wife, and afterwards she elopes from her Husband, now she is barred of her Dower, yet if during the Elopement the Husband alieneth, and after the Wife is reconciled, the Wife shall be endowed: So if a Man hath Issue by his Wife, and the Issue dieth, and afterwards Land descends to the Wife, or the Wife purchaseth Land in Fee, and dieth without any other Issue, the Husband (for the Issue which he had before the Descent or Purchase) shall be Tenant by the Curtesy, for it is sufficient if he have Issue, and that the Wife be seised during the Coverture, altho' that it be at several Times. But if a Man taketh an Alien to Wife, and afterwards he alieneth his Lands, and afterwards she is made a Denizen, she shall not be endowed, for she was absolutely disabled by the Law, and by her Birth not capable of Dower, but her Capacity and Ability began only by her Denization; but in the other Case there was not any Incapacity or Disability in the Person, but only a temporary Bar, until such Age or Reconciliation, which being accomplished, the temporary Bar ceaseth: As if a Man seised of Lands in Fee, taketh a Wife, and afterwards the Wife is attainted of Felony, and afterwards the Husband alieneth, and afterwards the Wife is pardoned, and afterwards the Husband dieth, the Wife shall be endowed, for by her Birth she was not incapable, but was lawfully, by her Marriage and Seisin in Fee, entitled to have Dower; and therefore, when the Impediment is removed, she shall be endowed.

D (8) S P R A T
PART XIII.

(8) Sprat and Heal’s Case.

Trin. 44 Eliz.

In the King’s Bench.

John Sprat libelled in the Spiritual Court against Walter Heal, for Subtraction of Tithes; the Defendant, in the Spiritual Court, pleaded, that he had divided the Tithes from the nine Parts: And then the Plaintiff made Addition to the Libel (in the Nature of a Replication) seil. That altho’ he divided the Tithes from the nine Parts, qua predicit. the Plaintiff non fatetur, sed prorsus dissipetur; yet presently after this pretended Division in fraudem legis, he took and carried away the same Tithes, and converted them to his own Use; and the Plaintiff thereupon obtained Sentence in the Spiritual Court; and to recover the treble Value, according to the Statute of 2 Ed. 6. cap. 13. And thereupon Heal made a Surmise, that he had divided his Tithes, and that the Plaintiff ought to sue in the Spiritual Court for the double Value, and at the Common Law for the treble Value: And it was objected, That when the Owner of the Corn divides them, then they are become Lay-chattels, for the Taking of which, an Action lieth at the Common Law; and therefore, after Severance from the nine Parts, the Parson shall not sue for them in the Spiritual Court.

But it was resolved by the whole Court, That the said Division or Severance mentioned in the Libel, was not any Division or Severance within the Statute of 2 Ed. 6. cap. 13. For the same Act provides, That every of the King’s Subjects shall, from henceforth, truly and justly, without Fraud or Guile, divide, set out, yield, and pay all manner of other predial Tithes in their proper Land, so as when he divides them to the Purpose to carry them away, he doth not divide them justly and truly, without Fraud or Guile; but here is Fraud and Guile, and no Way a just Division,
PART XIII. SPRAT and HEAL's CASE.

Division, and therefore the same is out of the Statute, for the Makers of the Statute respect quo animo he divides them (foil,) with a Mind and Intention that the Parson carry them away, as in Right he ought, or with a Mind and Intention that he himself carry them away, which he ought not, Quia fraus & dolus alium produxerat, aut simplicitas alium obesse non debet: And the same is Crimen Stellionatum, which we call fraudis rem & imposturam: And where the Words of the Statute are, divide, set out, &c. their predial Tithes, &c. And if any Person carrieth away his Corn and Hay, and his and their predial Tithes, &c. And to make an Evasion out of these Words, this Invention was devised: the Owner of the Corn by Covin sold his Corn before Severance to another, and then, as Servant to the Vendee, reaped the Corn, and carried away the Corn, without any Severance; pretending, that neither the Vendee, because he did not carry them away, nor the Vendor, because he had no Property in them, for he did not carry away his Corn, or his predial Tithes, should be within that Statute: But it was resolved, that the Vendor should be charged in that Case with the Penalty of the Statute, for he carried them away, in fraudem Legis, and his Fraud and Covin should not help him or avail him. See 8 Ed. 3. 290. A real Action brought by a Man of Religion by Collusion, although he hath Right, yet he shall not have Execution, 9 Hen. 6. 41. A Recovery upon a good Title by Collusion, shall not abate the Writ, 33 Hen. 6. 5. A Sale in open Market by Covin, shall not bind the Property of a Stranger: But it was resolved, that the Plaintiff could not sue in the Spiritual Court for the treble Value, but for the double Value that he might.

[Note, The Suit for the Treble Value on that Statute, must be at the Common Law.]
PART XIII.

(9) NEALE and ROWSE's Case.

Hill. 6 Jacobi.

In the Common Pleas.

AT a Nisi prius in London, before myself this Term, the Case was this: Edward Neale informed upon the Statute of 21 H. 8. cap. 5. which Plea begun Mich. 6 Jac. Rot. 1031. against James Rowse, Commisary and Official within the Archdeaconry of Huntington, within the Diocese of Lincoln, and having Probate of Wills and Testaments, &c. within the same Archdeaconry; and that Nicholas Neale, the third Year of the Reign of the King that now is, made his Testament and left Will in Writing, and made the Plaintiff his Executor, and died possessed of Goods and Chattels to the Value of a Hundred and fifty Pounds: The Defendant, then Commisary and Official, &c. the 23d of February, 1605. at the Parish of St. Mary Bow, Testament, pridie probavit, infinuavit, registravit & sigillavit; ac per manus ejusdem Thome Nicke tunc ministri ejus Jacob Rowse in ea parte deputat. & autorizat. 14 s. 10 d. pro probatione, inscriptione & registratione Testamenti pridie de codem Edwardo, &c. qui tam, &c. calore Officii sui pridie adiunct & ibidem extortae recepit, & habuit contra formam statuti pridie with this, that the said Edward, qui tam, &c. will add, That the Writing of the said Testament, according to the Rate of a Penny for every ten Lines of the said Testament, every Line thereof containing * in Length ten Inches, non attingebat, to the Sum of 12 s. 4 d. according to the Form of the Statute aforesaid, &c. The Defendant pleaded Nihil debet, and at the Nisi prius, the Evidence of two Witnesses was, That the Plaintiff caused the said Testament which was in Paper, to be engrossed in Parchment; and the Plaintiff offered both to the said Rowse, the Official, to be proved; and he answered, That he would prove it if his Fees shall be paid to him; and the Plaintiff asked him what were his Fees, and he wrote them in a Paper, which amounted to 14 s. 10 d. for

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Extortion:
Stat. 25 H. 8. cap. 5.
See 10 Co. 101.
2 Co. 78.
1 Hawk. 28.
3 Inst. 147, 149.
150.
PART XIII. Neale and Rowse's Case.

for the Probate, Insumnation, Registering and Sealing: And thereupon the Plaintiff laid upon the Table 20 s. and desired him to take as much as was due to him, and all that was in the House of the Official; but he would receive nothing there but appointed the Plaintiff to come in Court, where he would receive his Fees, and accordingly the Plaintiff came to him in Court, and prayed to have the said Will proved; and the Defendant required the said Nick his Minister, to take of him for the Probation, Insumnation, Registering and Sealing, 14 s. 10 d. and thereupon he put the Seal of his Office to the said Parchment ingrossed, which the Plaintiff brought with him, and which he delivered to the Defendant. And it was objected, That this Case was out of the said Statute, for thereby as to this Purpose, it is provided, viz. And where the Goods of the Testator, &c. amount above the Value of 40 l. that then the Bishop, or Ordinary by him or themselves, or any of his or their Registrars, Scribes, Praifers, Summoners, Apparators, or any other their Ministers, for the Probation, Insumnation and Approbation of any Testament or Testaments, &c. for the Registering, Sealing, Writing, Praising, making of Inventories, making Acquittances, Fines, or any Thing concerning the same Probate of Testaments, shall take, or cause to be taken, of any Person or Persons, but only 5 s. and not above, whereby to the Bishop, Ordinary, &c. for him and his Ministers 2 s. 6 d. and not above, and 2 s. 6 d. to the Scribe for Registering of the same, &c. And it was objected by the Counsel of the Defendant, that the Defendant did not take the 14 s. 10 d. for the Probation, Insumnation, Registering or Sealing of the Testament, for no Probate was written upon the Testament itself, nor any Seal put to it, but the Testament was ingrossed in Parchment, and the Probate and Seal put to the Transcript ingrossed, and not to the Testament itself, and so out of the Statute; and the Statute extends only when the Probate and Seal is put to the Testament itself, and for the Ingrossing of it after the Probate, no certain Fee is provided by the Statute; but for the Registering of it after it is proved, there is an express Fee in the Statute: But I conceived that the said taking the 14 s. 10 d. in the Case at at Bar, was directly against the Statute: For the Act is in the Negative, and if the Executor requireth the Testament to be ingrossed in Parchment, he ought to agree with him whom he requireth to do it, as he may: But the Ordinary, Official, &c. ought not to exact any Fee for the same of the Party as a Thing due to him, for divers Causes.
Neale and Rowse's Case. Part XIII.

1. Because the Words of the Act are expressed, for the Probation, &c. and for the Registering, Sealing, Writing, Praising, making of Inventories, Fines, giving Acquittances, &c. which Word (Writing) extends expressly to this Case.

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2. The Words are, or any Thing concerning the same Probate, and when the Seal and Probate is put to the Transcript, the same, without Question, concerns the Probate, for the Probate is not put to any Writing but only to that, therefore the same concerns the Probate.

3. Such a Construction should make the Act idle and vain, for if the Ordinary, Official, &c. might take as much as he pleaseth for the Ingrossing done by his Ministers, as a Fee due to him, all the Purview of the Statute which is penned so precisely concerning Persons, &c. Bishops, Ordinaries, and all Persons who have Power to prove Wills and Testaments, Registors, Scribes, Summoners, Apparators, or any other the Ministers, as for the Thing itself, &c. the Probation, Infinuation, Approbation, Registering, Sealing, Writing, Praising, making of Inventories, Fines, giving of Acquittances, or any other Thing concerning the same, should be all in vain, by that Evasion of trancribing of it, as well against the express Letter of the Act as the Intention and Meaning of it: Also the Statute faith 5 s. and not above, so as the Manner of precise penning of it excludes all nice Evasions: And the Act ought to be expounded to suppress Extortion, which is a great Affliction, and impoverishing of the poor Subjects.

4. As this Case is, he annexeth the Probate and Seal to the Transcript ingrossed, which the Plaintiff brought with him and offered to the Defendant; so as the Case at Bar was without Question, and generally the Ordinary, Official, &c. cannot exact or take any Fee for any Thing which concerns the Probate of a Will or Testament, but that which the Statute limits: And afterwards the Jury found for the Plaintiff, and of such Opinion was Walmley, Werberton, Daniel and Foster, Justices, the next Term in all Things, but upon Exception in Arrest of Judgment for not pursuing of the Act, in the Information, Judgment is not yet given, &c.

(10) Aid
PART XIII.

(10) Aid to the KING.

Hill. 6 Jacobi.

In the Common Pleas.

Nota, that in this Term a Question was moved to the Court, which was this: If Tenant in Burgage should pay Aid unto the King to make his eldest Son a Knight, And the Point rests upon this, If the Tenure in Burgage be a Tenure in Soccage; for by the ancient Common Law every Tenant in Knights Service, and every Tenant in Socage, was to give to his Lord a reasable Aid to make his eldest Son a Knight, and to marry his eldest Daughter, and that was uncertain at the Common Law, and also uncertain when the same should be paid. And this appeareth by Glanvil, lib. 9. cap. 8. fol. 70. who wrote in the Time of Henry II. Nihil autem certum statum est de hujusmodi auxiliaribus dandis, vel exigendis, &c. sunt ali praeore Casus in quibus licet Dominis auxilia solvenda sunt certa forma praescripta ab hominibus suis at filius suis & heres flizontally miles. And in the Beginning of the Chapter it is called Rationabile Auxilium, because then it was not certain, but to be moderated by Reason in Respect of Circumstances: And by the Preamble of the Statute of Wesfm. 1. Anno 3 E. 1. cap. 35. where it is said, Forasmuch as before that Time reasonable Aid to make one's Son Knight, or to marry his Daughter, was never put in certain, nor when the same ought to be paid, nor how much be taken; the said Act put the said two Incertainties to a Certainty, 1. That for a whole Knight's Fee there be taken but 20s. and of 20l. Lands holden in Socage 20s. and of more, more, and of less, less, according to the Rate by which the Aid itself was made certain. 2. That none might levy such Aid, to make his Son a Knight, until his Son be of the Age of fifteen Years, nor to marry his Daughter until she be of the Age of seven Years. And Fleta, who wrote after the said Act, calls them Rationabilia auxilia ad filium militem faciendum, vel ad filiam primogenitam maritandum: And by the Statute of 25 Edw. 1. where it is provided, That no Taxes shall be taken but by common Consent of the Realm, there is an Exception of the ancient Aids, &c. which is to be vide the King's eldest Son Knight. Vide poL 28. and Gilbert's Historical View, cap. 2. 3. and Paul. Manus. poL. See the Statute of 27 H. 8. cap. 10 of Utiles in the Preamble, concerning Aids to make the eldest Son Knight, and to marry the Daughter.
be intended of these Aids due unto the King by the ancient Common Law: But notwithstanding the said Act of Westm. 1. it was doubted, whether the King, because he is not expressly named, was bound by it; and therefore in the 20th Year of Ed. 3. the King took an Aid of 40 s. of every Knight's Fee for to make the Black Prince Knight, and nothing then of Lands holden in Socage; and to take away all Question concerning the same, the same was confirmed to him in Parliament: And afterwards Anno 25 E. 3. it was doubted, whether the King, because he is not expressly named, was bound by it; and therefore in the 20th Year of Ed. 3. the King took an Aid of 40 s. of every Knight's Fee for to make the Black Prince Knight, and all thing then of Lands holden in Socage; and to taxe away all Question concerning the same, the same was confirmed to him in Parliament: And afterwards Anno 25 E. 3.

Vide Paulum Manutium De Senatu Romano, par. 9. of Aids instituted by Romanus ad redemptionem Corpus Domini, & ad filias coilecan- das, &c. per Clientes erga Patronos.

Burbage-Tenure, guid.
PART XIII.  Aid to the KING.

the Daughter, or to make the Son a Knight, but Tenure by Knights Service, and Tenure by Socage; but not Tenure by Grand Serjeanty, nor no other: And 13 H. 4. 34. agrees to the Cafe of Grand Serjeanty: And by the said Books it appeareth, that Tenure by Frankalmoign, and Tenure by Divine Service, shall not pay, for they are none of them: But Tenure in Burgage is a Tenure in Socage; and therefore the said Books prove, that such a Tenure shall pay Aid. And I conceive, that Tenure by Petit Serjeanty shall pay also Aid. For Lit. lib. 2. cap. 8. fol. 36. says, that such a Tenure is but Socage in Effect: But Fitz. N. B. 83. A. avoucheth 13 H. 4. 34. that Tenant by Petit Serjeanty shall not pay Aid; for the Book only extends to Grand Serjeanty: If the Houses in a City or Borough are holden of the King in Burgage, and the King grant the Seigniories to one, and the City or Borough to another to hold of him, then those Houses shall not be contributary to Aid, for they are not immediately holden of the King, as is required by the Law.

And I conceive, that he who holdeth a Rent of the King by Knight’s Service, or in Socage, shall pay Aid; for the Words of the Act of Westm. cap. 36. are, From henceforth of a whole Knights Fee only be taken 20 s. of 20 l. Land holden in Socage 20 s. and the Mean is said in Supposition of Law to hold the Land: And it is not Reason that the Tenant by a Feoffment before the Statute should prejudice the Lord of his Benefit. And although it was said, that a Tenure in Socage is servitium Socae, as Littleton faith, and the same cannot be applied to Houses: To that it was answered, that the Land upon which the House is built, or if the House falleth down, may be made arable, and be ploughed. And a Rent may be holden in Socage, and yet it is not subject to be ploughed, but by a Possibility afterwards escheat to the Lord of the Land. See Huntington, Polyedor, Virgil, and Hollingshed’s Chronicle, fol. 35. 15 Hen. 4. Aid was levied by Hen. 2. to marry Mawd his eldest Daughter to the Emperor, viz. 3 l. of every Hide of Land, &c. And fee The Grand Customary of Normandy, cap. 35. there is a Chapter of Aids, whereof the first is, to make the eldest Son of his Lord a Knight; and the Second to marry his eldest Daughter. And see a Statute made in Anno 19 H. 7. which beginneth thus, Item prefai Commanee in Parliamento pradito existentes ex asserjui dominorum Spiritualium & Temporalium in dicto Parliamento sumitler existentes conceferunt prefato Regin quandam pecunia summam in loco duorum rationabilium auxiliorum sua Majestati de jure debitum tam ratione creationis.
Aid to the King. Part XIII.

Aidis nobilissimi filii sui primogeniti bona memoria, Domini Arthurii nuper Principis Walliae, quam ratione Matrimonii & traductionis nobilissimi Principis Margarita filicis sui primogeniti, quam eum multiplicare pro Regni sui perpetua pace & tranquillitate, &c. certis viis & modis levand. cujus quidem concessiosis Tenor, &c. sequitur in bee verba: Forasmuch as the King, our Sovereign Lord, is rightfully intitled to have two reasonable Aids, according to the Laws of this Land, the one for the making Knight the Right Honourable his first begotten Son Arthur, late Prince of Wales, deceas'd, and the other for the Marriage of the Right Noble Princes his first begotten Daughter Margaret, now married to the King of Scots: And also that his Highness hath borne great and inestimable Charges for the Defence of the Realm, &c. considering the Premisses; and if the same Aids should be levied and had, by Reason of their Tenures, according to the ancient Laws of the Land, should be to them doubtful and uncertain, and great Unquietness, for the Search and not Knowledge of their several Tenures, and their Lands chargeable to the same, have made humble Petition unto his Highness, graciously to accept and take of them the Sum of 40,000l. as well in Recompense and Satisfaction of the said two Aids, as for the said great and inestimable Charges, &c. as is aforesaid. The King, to eschew and avoid the great Vexation, Troubles and Unquietness which to them should have ensued, if the said Aids were levied after the ancient Laws: And for the good and acceptable Services of the Nobles of this Realm, and other his faithful Subjects, in their own Persons, and otherwise done to his Grace, and thereby sustained manifold Costs and Charges to his great Honour and Pleasure, doth pardon the said two Aids, and accepteth the Offer aforesaid: And that the poorest of his said Commons should not be contributary to the said Sum of 40,000l. hath pardoned 10,000l. Parcel thereof, and doth accept of 30,000l. in full Satisfaction, &c. And that the Cities and Boroughs, Towns and Places, being in every Shire not by themselves accountable in the Exchequer for Fifteenths and Tenths, be chargeable with the Shires, &c. And that the Cities and Boroughs, Towns and Places, being in every Shire not by themselves accountable in the Exchequer for Fifteenths and Tenths, be chargeable with the Shires, &c. And all Cities and Boroughs not contributary, &c. but accountable by themselves, &c. shall be chargeable by themselves, towards the Payment of the said 30,000l. with such Sums as under the Act particularly appear, &c. And there under the Act appear the several Taxations of every several County, City, Borough, &c. and that the City of London is taxed to 618l. 2s. 5d. the City of Norwich to 81l. 6s. 11d. the City of Canterbury to 53l. 13s. 3d. ob. Norfolk,
PART XIII. Aid to the King.

folk, 286 l. 6 s. 10 d. Suffolk, 1214 l. 5 s. 4 d. ob. &c. The Sum of all the Sums then expressed, is 31,648 l. whereof allowable for Fees and Wages of Commissioners and Collectors 651 l. 16 s. 2 d. and so remaineth 3106 l. 4 s. and 10 d. Note, that the Universities of Cambridge and Oxford, and the College of Eaton be excepted.

See Rot. 30 H. 3. ex parte remem. Dom. Thebaur. in Scaccario, in auxilio nobis concess, ad primogenitam filiam nostram maritand. And note, that King Henry III. had Aid granted to him in Parliament ad Isbellam fororem suam Imperator maritandum but that was of Benevolence.

Rot. 42 H. 3. ibid. 6. Monstrat R. Johannes de Francois Baro de Scaccario, quod cum Dominus Rex non caperet nisi 20 s. de integro feodo militis de auxilio ad primogenitam filiam suam maritand. Radol' fil* Rad' fil. Mich. injusse exigit de codem 30. ad primogenitam filiam suam maritand. pro duabus partibus unus feodi militis, & averia sua cepit, & ea detinet. Et ideo mandatum est Vic. Com. Bedd. & Buck. quod venire faciant, &c. pradicit R. ad respondendum idem Johanni de pradicto transgressione, & pradicit averio, &c. So as it appeareth by this, that some held, that the Statute of Wesm. 1. aforesaid was but a Confirmation of the Common Law, and that the King also ought not to take more; But that was doubted.

Ibid in Regno 2 Ed. 1. Rot. 3. de auxilio ad militiam, (which is meant of Knighthood of the King's Son) in the Time of Henry III. & Isabella Comitissa Abermarle, perdonata 1161. 8 s. 7 d. pro codem auxilero, quia Baldwinus de Insula fratur ejus cujus heres ipsa fuit infra aestem, & in custodia ejus: & quia tenentes dille Isabella onerentur per fervium militare de praedicto pecunias. Note, that that was before the Statute of Wesm. 1. and by that it appeareth, That if one within Age be in Ward of the King, he shal not be contributory to Aid, but his Tenants which hold of him (and then held of the King by Reafon of Ward) shall pay Aid unto the King, as it appeareth by that Record.

Ibid. 30 Ed. 1. Rex dilettis & fidelibus, Vic. Kanc. & Rico de R. * salutem. Scialis, quod in primo die Junii anno Regni nostri 18. Pralati, Comites Barones, & ceteri Magnates, de regno nostro conceditur, pro se & tota comunitate ejusdem Regni in pleno Parliamento nostro, nobis concesserunt 40 s. de fungulis fudis militum in dicto Regno ad auxilium ad primogenitam filiam nostram maritand. levandos, sic his in usus auxilium alius in casu consili levari consuevit, cui quidem levationis faciend' pro dicta communisias easimento hue quoque superedicimus faciend' gratiae assignavimus vos ad praedictum auxilium, &c. Note, that his eldest Daughter was married to the Earl of Bar.

Ibid.
PROHIBITIONS. PART XIII.

Ibid. T. R. 34 Ed. 1. De auxilio concesso ad militiam filii Regis.


See ibid. T. R. 21 Ed. 3. Rot. Cantab. de auxilio de filium Regis primogenitum militis faciend. per Episcopum Eliensi: By which it appeareth, that a Bishop, for his Lands which he holdeth by Knights Service, or Socage, shall pay Aid: But those who hold by Frankalmoign, or by Divine Service, shall not pay Aid, as before is said.

See ibid. 20 Ed. 3. Rot. 13 and 14. de auxiliando ad primogenitum filium Regis militem faciend. and Collectors thereupon appointed. By all which before cited, it appeareth, that Tenure in Burgage is subject to the Payment of Aid. And note, that a great Part of London was Abbey or Chauntry Land, and the Lands of Persons attained: And all those which are immediately holden of the King by Knights Service, or in Socage, shall be contributary to the Payment of Aid, &c.

Q.

(II) PROHIBITIONS.

Hill. 6 Jacobi.

UPON Wednesday, being Ash-Wednesday, the Day of February, 1606. A great Complaint was made by the President of York unto the King, That the Judges of the Common Law had, in Contempt of the Command of the King the last Term, granted sixty, or fifty Prohibitions at the least, out of the Common Pleas, to the President and Council of York after the 6th Day of February, and named three in particular, (seil.) one between Bell and Thorpere, another between Snell and Hurt, and another in
in an Information of a riotous Rescue preferred by English Bill by the Attorney General against Christopher Dicken-
son, one of the Sheriffs of York, and divers others, in re-
fusing of one William Watson out of the Custody of the Deputys of one of the Pursuivants of the same Counsel who had arrested the said Watson by Force of a Commission of Rebellion awarded by the President and Counsel, which Prohibition in the said Information was (as was affirmed) denied upon a Motion made in the King's Bench the last Term, and yet granted by us. And the King sent for me to answer to that Complaint: And I only, all the rest of the Justices being absent, waited upon the King in the Chamber near the Gallery; who, in the Presence of Egerton Lord Chancellor, the Earl of Salisbury Lord Treas-
urer, the Lord of Northampton Lord Privy Seal, the Earl of Suffolk Lord Chamberlain, the Earl of Worcester, the Archbishops of Canterbury, the Lord Wotton, and others of his Counsel, rehearsed to me the Complaint aforesaid: And I perceived well, that upon the * said Information he had conceived great Displeasure against the Judges of the Com-
mon Pleas, and chiefly against me; to which I (having the Copy of the Complaint sent to me by the Lord Treas-
urer the Sabbath Day before) answered in this Manner,
That I had, with as much Brevity as the Time would per-
mit, made Search in the Offices of the Preignorities of the Common Pleas: And as to the said Cases between Bell and Thawples, and Snell and Huet, no such could be found: But my Intent was to take Advantage of the Misprisal:
And the Truth was, that the sixth Day of February the Court of Common Pleas had granted a Prohibition to the President and Council of York, between Lock, Plaintiff, and Bell and others Defendants: And that was, A Replevin in English was granted by the said President and Council, which I affirmed was utterly against Law: For at the Common Law no Replevin ought to be made, but by or-
iginal Writ directed to the Sheriff. And the Statute of Marlbridge, cap. 21. and Westm. 1. cap. 17. hath autho-
rized the Sheriff upon Plaintiff made to him, to make a Replevin; and all that appeareth by the said Statutes, and by the Books of 29 E. 3. 21. 8 Eliz. Dyer 245. And the King, neither by his Instructions had made the President and Council Sheriffs, nor could grant to them Power to make a Replevin against the Law, nor against the said Acts of Parliament; but the same ought to be made by the Sheriff. And all that was affirmed by the Lord Chancellor for very good Law: And I said, that it might well be that we have granted other Prohibitions in other Cases of En-
*Prohibitions.* Part XIII.

*lish Replevis.* Another Prohibition I confess we have granted between Sir Bethel Knight, now Sheriff of the County of York, as Executor of one Stephenson, who had made him and another his Executors, and preferred an English Bill against Chambers, and divers others in the Nature of an Action upon Cafe, upon a Trover and Conversion in the Life of the Testator of Goods and Chattels, to the Value of 1000 l. and because the other Executor would not join with him, although he was named in the Bill, he had not any Remedy at the Common Law, he prayed Remedy there in Equity: And I say, that the President and Council have not any Authority to proceed in that Cafe, for divers Causes.

1. Because there is an express Limitation in their Commission, that they shall not hold Plea between Party and Party, &c. unless both Parties, or one of them, *tanta pau­ pertate sunt gravati,* that they cannot sue at the Common Law: And in that Cafe the Plaintiff was a Knight, and Sheriff, and a Man of great Ability.

2. By that Suit the King was deceived of his Fine, for he ought to have had 200 l. Fine, because the Damages amounted to 4000 l. and that was one of the Causes that the Sheriff began his Suit there, and not at the Common Law: Another Cause was, that their Decrees which they take upon them are final and uncontrollable, either by Error, or any other Remedy. And yet the President is a Nobleman, but not learned in the Law; and those which are of the Counsel there, although that they have the Countenance of Law, yet they are not learned in the Law; and nevertheless they take upon them final and uncontrollable Decrees in Matters of great Importance: For if they may deny Relief to any at their Pleasure without Controulment, so they may do it by their final Decrees without Error, Appeal, or other Remedy: Which is not so in the King’s Courts where there are five Judges; for they can deny Justice to none who hath Right, nor give any Judgment, but the fame is controulable by a Writ of Error, &c. *And if we shall not grant Prohibitions in Cases where they hold Plea without Authority, then the Subjects shall be wrongfully oppreßed without Law, and we restrain’d to do them Justice: And their Ignorance in the Law appeareth by their Allowance of that Suit, *seil.* That the one Executor had no Remedy by the Common Law, because the other would not join in Suit with him at the Common Law: Whereas every one learned in the Law knoweth, that Summons and Severance lieth in any Suit brought as Executors: And this also in that particular Cafe was affirmed by the Lord Chan­cellor;*
PART XIII. PROHIBITIONS.

and he much inveighed against Actions brought there upon Trover and Conversion, and said, that they could not be found in our ancient Books.

Another Prohibition I confess we have granted, between the L. Wharton, who by English Bill sued before the Counsel, Banks, Buttermere, and others, for Filling in his several Fillings in Darwent in the County of C. in the Nature of an Action of Trespass at the Common Law, to his Damage of 200 l. And for the Causes next before recited, and because the same was meerly determinable at the Common Law, we granted a Prohibition; and that also was allowed by the Lord Chancellor. And as to the Case of Information upon the riotous Restoros. I having forgotten to speak to that, the King himself asked what the Case was? To whom I answered, that the Case was, That one exhibited a Bill there in the Nature of an Action of Debt, upon a Mutuatus against Watson, who upon his Oath affirmed, that he had satisfied the Plaintiff, and that he owed him nothing; and yet because the Defendant did not deny the Debt, the Counsel decreed the same against him, and upon that Decree the Pursuivant was sent to arrest the said Watson, who arrested him, upon which the Restoros was made: And because that the Suit was in the Nature of an Action of Debt upon a Mutuatus at the Common Law, and the Defendant at the Common Law might have waged his Law, of which the Defendant ought not to be barred by that English Bill, quia beneficium juris nemini est auferendum: The Prohibition was granted; and that was affirmed also by the Lord Chancellor: Whereupon I concluded, that if the principal Case doth not belong unto them, all their Proceedings was coram non Judge, and then no Restoros could be done: But the Lord Chancellor said, that though the same cannot be a Restoros, yet it was a Riot, which might be punished there: Which I denied, unless it were by Course of Law by Force of a Commission of Oyer and Terminer, and not by an English Bill: But to give the King full Satisfaction in that Point, the Truth is, the said Case was debated in Court, and the Court inclined to grant a Prohibition in the said Case; but the same was stayed to be better advised upon, so as no Prohibition was ever under Seal in the said Case.

Also I confess, that we have granted divers Prohibitions to stay Suits there by English Bill upon penal Statutes: For the Manner of Prosecution, as well for the Action, Process, &c. as for the Count, is to be pursued, and cannot be altered, and therefore without Question the Counsel
Repair of Bridges, &c. Part XIII.

Counsel in such cases cannot hold Plea, which was also affirmed by the Lord Chancellor. And I said, that it was resolved in the Reign of Queen Elizabeth in Parot's Case, and now lately in the Case of the President and Council of Wales, That no Court of Equity can be erected at this Day without Act of Parliament, for the Reasons and Causes in the Report of the said Case of Parot.

And the King was well satisfied with these Reasons and Causes of our Proceedings, who of his Grace gave me his Royal Hand, and I departed from thence in his Favour. And the Surmise of the Number, and that the Prohibition in the said Case in the Information was denied in the King's Bench, was utterly denied; for the same was moved when two Judges only were in Court, who gave not any Opinion therein, but required Serjeant Hutton, who moved it, to move the same again when the Court was full, &c.

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(12) Repair of Bridges, &c.

Pasch. 7 Jac. 1.

NOTE, That this Term a Question was moved at Serjeants-Inn; Who by the Common Law ought to repair the Bridges, common Rivers, and Sewers, and the Highways, and by what Means they shall be compelled to it? And first of the Bridges: And as to them it is to be known, That of Common Right all the Country shall be charged to the Reparation of a Bridge; and therewith agreeeth Ed. 3. 28. b. That a Bridge shall be levied by the whole Country, because it is a common Easement for the whole Country; and as to that Point, the Statute of 22 H. 8. cap. 5. was but an Affirmance of the Common Law: And this is true, when no other is bound by the Law to repair it, but he who hath the Toll of the Men or Cattle which pafs over a Bridge or Causey, he ought to repair the same, for he hath the Toll to that Purpose. Ei qui sentit commodum sentire debet & onus; and
PART XIII. Repair of Bridges, &c.

and therewith agrees 14 E. 3. Bar 276. Also a Man may be bounden to repair a Bridge, ratione Tenure of certain Land, but a particular Person cannot be bound by Prescription, fail. That he and all his Ancestors have repaired the Bridge, if it be not in Respect of the Tenure of his Land, taking of Toll, or other Profit; for the Act of the Ancestor cannot charge the Heir without Profit. But an Abbot or other Corporation who hath a lawful Being may be charged, fail. That he and his Predecessors Time out of Mind, &c. have repaired the Bridge; for the Abbot and Covent may bind their Successors, Vide 21 E. 4. 28. 27 E. 3. 8. 22 Aff. 8. 5 H. 7. 3. And if an Abbot and his Predecessors Time out of Mind have repaired a Bridge of Alms, they shall be compelled to repair it; and therewith agreeth 10 Edw. 3. 28. So it is of a Highway of Common Right, all the Country ought for to repair it, because that the Country have their Ease and Passage by it, which stands with the Reason of the Case of the Bridge; but yet some may be particularly bounden to repair it as is aforesaid. He who hath the Land adjoining, ought of Sewers, common Right without Prescription to scour and cleanse the Ditches, next to the Way to his Land; and therewith agreeth the Book of 8 H. 7. 5. But he who hath Land adjoining without Prescription, is not bound to repair the Way. So of a common River, of common Right all who have Ease and Passage by it, ought to cleanse and scour it; for a common River is as a common Street, as it is said in 22 Aff. and 37 Aff. 10. But he who hath Land adjoining to the River is not bounden to cleanse the River, unless he hath the Benefit of it, fail. a Toll, or a Fishing, or other Profit. See 37 Aff. p. 10.
In the great Case in the Star-Chamber of a Forgery between Sir William Read Plaintiff, and Roger Booth, and
Guibert Booth, and others, Defendants; the Case was this:

The said Roger Booth, 38 Eliz. was convicted in that Court of the Publication of a Writing under Seal, forged in the Name of Sir Thomas Gresham, of a Rent-charge of an hundred Pounds, out of all his Lands and Tenements, to one Markham for Ninety-nine Years, bearing Date the one and twentieth Year of Queen Elizabeth; the said Roger knowing it to be forged. And afterwards the said Sir William Read exhibited the said Bill against the said Booth and others, for Forging of another Writing under Seal, bearing Date the twentieth of Eliz. in the Name of the said Sir Thomas Gresham, purporting a Deed of Feoffment of all his Lands (except certain) to Sir Rowland Heyward and Edward Hounon and their Heirs, to certain Uses; which was in Effect to the Use of Markham the younger and his Heirs: And for the Publication of the said Writing, knowing the same to be forged, was the Bill exhibited. And now upon the Hearing of the Cause in the Star-chamber this Term, these Doubts were moved upon the Statute of 5 Eliz. 1.

If one who is convicted of Publication of a Deed of Feoffment or Rent-charge, knowing the same to be forged, again at another Day forge another Deed of Feoffment, or Rent-charge, if he be within the Case of Felony within the said Act (which Doubt ariseth upon these Words (effoons) committed against any of the said Offences.) And therefore it was objected, that he ought to commit again the same Nature of Offence, seil. if he were convicted of Forgery he ought to forge again, and not only publish, knowing, &c. And if first he were convicted of Publishing, knowing, &c. he ought to offend again in Publication, knowing, &c. and not in Forgery, for (effoons) which is (iterum) implieth that it ought to be of the same Nature of Offence. The second Doubt was,
PART XIII. Sir Will. Read and Booth's Case.

was, if a Man committed two Forgeries, the one in 37 of Eliz. and the other in 38, and he is first convicted of the last, if he may be now impeached for the first. The third Doubt was, when Roger Booth was convicted in 38 Eliz. and afterwards is charged with a new Forgery in 37 Eliz. if the Witnesses proving in Truth that it was forged after the first Conviction, if the Star-chamber hath Jurisdiction of it. The last Doubt was, when Cutbert Booth, who never was convicted of Forgery before, if in Truth the Forgery was done, and so proved in 38 Eliz. if he might be convicted upon this Bill, because that the Forgery is alleged before that it was done. As to the first and second Doubts, it was resolved by the two Chief Justices and the Chief Baron, that if any one be convicted of Forgery or Publication of any Writing concerning Freehold, &c. within the first Branch; or concerning Interesse or Term for Years, &c. within the second Branch, and be convicted, if afterwards he offend either against the first Branch or second, that the same is Felony: As if he forseth a Writing concerning Interest for Years within the second Branch, and be convicted, and afterwards he forgeth a Charter of Feoffment within the first Branch, or e converso, * that that is Felony, and that by express Words of the Act; That if any Person or Persons being hereafter convicted or condemned of any of the said Offences (which Words, any of the said Offences, extend to all the Offences mentioned before, either in the first Branch, or in the second Branch) by any the Ways or Means above limited, shall, after any such Conviction or Condemnation, offend or perpetrate any of the said Offences, in Form aforesaid, which Words, Any of the said Offences, &c. do extend to the Nature of all the Offences mentioned in the first and second Branches: But if one forge a Writing in 37 of Eliz. and afterwards he forge another in 38 of Eliz. yet it is not Felony, altho' that he forgeth many Writings one after the other, for by the express Words of the Act, it is not Felony. The Forgery, &c. which is Felony by the Act, ought to be after Conviction or Condemnation of a former Writing. As to the third Doubt, it was resolved, That the Allegation of the Time by the Plaintiff in the Bill, shall not alter the Offence, but shall give unto the Court Jurisdiction; but if it appeareth to the Court, that the Forgery or Publication was after the Sentence, then the Court shall surcease. As to the last Point, it was resolved, That the Time of the Forgery is not material, be it before or after the Offence in Truth com-
The Case of Sewers. Part XIII.

mitted, if it be committed before the Exhibiting of the Bill; but if the Date of the Writing supposed to be forged had been mistaken, there the Defendant could not be condemned of a Deed of another Date, for that is not the Offence complained of in the Bill, of which the Court can give Sentence.

14. The Case of Sewers.

Pasch. 7 Jac. Regis.

The Case was, That there was a Caufey or Mill-flanks of Stone in the River of Dee and City of Chester, which Caufey before the Reign of King Edward the First, was erected for the necessary Maintenance of certain Mills, some of the Kings, and others of the Subjects at the End of the said Caufey: And now a certain Decree was made by certain Commissioners of Sewers, for a Breach to be made of ten Poles in Length in the said Caufey, which Caufey as it was admitted by both Parties was erected before the Reign of King Edward the First, and so hath continued until this Day without any Exaltation or Enhancing: And if by any Decree of the Commissioners by Force of any Statute, any Breach may be made in that Caufey, was the Question. And it was referred by the Letters of the Lords of the Privy Council, to the two Chief Justices and the Chief Baron; and upon hearing of Counsel learned at divers Days, and good Consideration had in the Time of the last Vacation, of all the Statutes concerning Sewers, and upon Conference had among themselves, it was resolved as followeth.

1. Whereas it is provided by the Statute of Magna Charta, cap. 23. Quod omnes Kidelli deponantur de castra per Thamscam, & Medes cam & per totam Angli. nisi per Castra Maris. It was resolved, That that Statute extended only to Kidellis, &c. open Wears for taking of Fish; but the first Statute which extended to pulling down, or abating of any Mills, Mill-flanks and Caufeys, was the Statute of 25 E. 3. cap. 4. which Act appointed...
PART XIII. The Case of Sewers.

appointed such only to be thrown down or abated, which were levied or erected in the Reign of King Edward the First, or after: * But by the Statute made An. 1 H. 4. cap. 12. upon Complaint in Parliament of the great Damages which have riven by the outrageous Inhancing of Mills, Mill-flanks, and other Impediments made and erected before the Reign of King Edward the First: The said old Mills and Mill-flanks were appointed by Act then made to be surveyed, and such as were found to be much inhanced to be corrected and amended; having always reasonable Substance of such Mills, Mill-flanks, Wears, &c. so in old Time made and levied: None of which Acts extended to the Case in Question; for that Cause was erected before the Reign of Edward the first, and never exalted or inhanced after the Erection of it: And the Statute of 12 Hen. 4. cap. 7. doth confirm all the said Acts, and by them the Generality of the Act of Magna Charta is restrained, as by the said Acts appeareth. And by the Statute of 23 Hen. 8. cap. 5. None of the said Acts, as to the Case in Question, is repealed: for first, the same Act appoints the Manner, Form, Tenor, and Effect of the Commission of Sewers, by which, Power is given to the Commissioners to survey Walls, &c. Fences, Caufeys, &c. Mills, &c. and then to correct, repair, amend, pull down, or overthrow, or reform, as Cause requireth, according to their Wisdoms and Discretions; and therein as well to ordain and do after the Form, Tenor and Effect of all and singular the Statutes and Ordinances made before the first of March, in the twenty third Year of Henry the Eighth, as also to enquire by the Oaths of honest and lawful Men, &c. through whose Default the said Hurts and Damages have happened, &c. By which it appeareth, That the Discretion of the Commissioners was limited, &c. to proceed according to the Statutes and Ordinances before made, &c. and also to reform, repair, and amend the said Walls, &c. which by Force of that Word (said) hath Relation to the precedent Purview of the Act, &c. And further to reform, prostrate and overthrow all such Mills, &c. and other Impediments and Annoyances (aforesaid) as shall be found by Inquisition or by your Survey and Discretion to be excessive, i.e. hurtful; which Word (aforesaid) refers that Clause also to the precedent Purview, &c. such Impediments and Annoyances as are against the Statutes and Ordinances before made. Also it is further provided by the same Act, That all and every Statute, Act, and Ordinance hereafter
The Case De Modo Decimandi, Part XIII.

Heretofore made concerning the Premises or any of them, not being contrary to this present Act, nor heretofore repealed, shall from henceforth stand and be good and effectual for ever. But the said Acts of 25 E. 3. and 1 H. 4. are not contrary to any Clause of that Act, nor were repealed before: And always such Construction ought to be made, that one Part of the Act may agree with another, and all to stand together; and if they had intended a Repeal of the said former Acts, they would not have repealed them by such general and doubtful Words, when they concerned the Inheritances of many Subjects: And according to this Resolution we certified the Lords of the Council, that the said Statutes of 25 E. 3. and of 1 H. 4. remained yet in Force; and that the Authority given by the Commission of Sewers did not extend to Mills, Mill-flanks, Causeys, &c. erected before the Reign of King Edw. 1. unless that they have been enhanced and exalted above their former Height, and thereby made more prejudicial, &c. In which Case they are not to be overthrown or subverted, but to be reformed by abating the Excess and Inhancement only.

15. The Case De Modo Decimandi, and of Prohibitions debated before the King's Majesty.

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Richard Bancroft, Archbishops of Canterbury, accompanied with the Bishop of London, the Bishop of Bath and Wells, the Bishop of Rochester, and divers Doctors of the Civil and Canon Law, as Dr. Dunn, Judge of the Arches; Dr. Bennet, Judge of the Prerogative; Dr. James, Dr. Martin, and divers other Doctors of the Civil and Canon Law, came attending upon them to the King at Whitehall the Thursday, Friday, and Saturday after Easter Term, in the Council-Chamber, where the Chief Justice and myself.

Daniel
PART XIII. and of Prohibitions, debated, &c.

Daniel Judge of the Common Pleas, and Williams Judge of the King's Bench, by the Command of the King, attended also: Where the King being assisted by his Privy-Council, all sitting at the Council-table, spake as a most gracious, good, and excellent Sovereign, to this Effect; As I would not suffer any Novelty or Innovations in my Courts of Justice Ecclesiastical or Temporal; so I will not have any of the Laws, which have had Judicial Allowances in the Times of the Kings of England before me, to be forgotten, but to be put in Execution. And forasmuch as upon the Contentions between the Ecclesiastical and Temporal Courts, great Trouble, Inconvenience, and Loss may arise to the Subjects of both Parts; namely, when the Controversy ariseth upon the Jurisdiction of my Courts of ordinary Justice; and because I am the Head of Justice immediately under God, and knowing what Hurt may grow to my Subjects of both Sides, when no Private Case, but when the Jurisdictions of my Courts are drawn in Question, which in Effect concerneth all my Subjects; I thought that it stood with the Office of a King, which God hath committed to me, to hear the Controversies between the Bishops and other of his Clergy, and the Judges of the Laws of England, and to take Order, that for the Good and Quiet of my Subjects, the one do not incroach upon the other, but that every of them, hold themselves within their natural and Local Jurisdiction, without Incroachment or Usurpation the one upon the other. And he said, that the only Question then to be disputed was, If a Parson, or a Vicar of a Parish sueth one of his Parish in the Spiritual Court for Tithes in Kind, or Lay-fee, and the Defendant alledgegeth a Custom or Prescription, De Modo Decimandi, if that Custom or Prescription, De Modo Decimandi, shall be tried and determined before the Judge Ecclesiastical where the Suit is begun; or a Prohibition lieth, to try the same by the Common Law. And the King directed, that we who were Judges should declare the Reasons and Causes of our Proceedings, and that he would hear the Authorities in the Law which we had to warrant our Proceedings in Granting of a Prohibition in Cases of Modus Decimandi. But the Archbishop of Canterbury kneeled before the King, and desired him, that he would hear him and others who are provided to speak in the Case for the Good of the Church of England; and the Archbishop himself inveighed much against two Things: 1. That a Modus Decimandi should be tried.
The Case De Modo Decimandi, Part XIII.

Page [38.]* tried by a Jury, because that they themselves claim more or less a Modum Decimandi; so as in effect they were Triers in their own Cause, or in the like Cases. 2. He inveighed much against the precipitate and hasty Trials by Juries; and after him Dr. Bennet, Judge of the Prerogative Court, made a large Imposition against Prohibitions in Causes Ecclesiastics: And that both Jurisdictions as well Ecclesiastical as Temporal were derived from the King; but all that which he spake out of the Book which Dr. Ridley hath lately published, I omit as impertinent: And he made five Reasons, why they should try a Modum Decimandi.

And the first and principal Reason was out of the Register, fo. 58. quia non est consonans rationi, quod cognitio accessari in Curia Christianitatis impeditur ubi cognito Causa principali ad forum Ecclesiasticum mutetur perinere. And the principal Cause is Right of Tithes, and the Plea of Modum Decimandi founds in Satisfaction of Tithes; and therefore the Conunance of the original Cause, (feil.) the Right of Tithes appertaining to them, the Conunance of the Bar of Tithes, which he said was but the Accessory, and as it were dependant upon it, appertained also to them. And whereas it is said in the Bishop of Winchester's Case, in the second Part of my Reports, and 8 E. 4. 14. that they would not accept of any Plea in Discharge of Tithes in the Spiritual Court, he said, that they would allow such Pleas in the Spiritual Court, and commonly had allowed them; and therefore he said, that that was the Mystery of Iniquity founded upon a false and feign'd Foundation, and humbly defired the Reformation of that Error, for they would allow Modum Decimandi being duly proved before them.

2. There was great Inconveniency, that Laymen should be Triers of their own Customs, if a Modus Decimandi should be tried by Jurors; for they shall be upon the Matter Jurors (i. e. Judges) in their own Cause.

3. That the Custom De modo Decimandi is of Ecclesiastical Jurisdiction and Conunance, for it is a Manner of Tithing, and all Manner of Tithing belongs to Ecclesiastical Jurisdiction: And therefore he said, that the Judges, in their Answer to certain Objections made by the Archbishop of Canterbury, have confessed, that Suit may be had in Spiritual Courts pro modo Decimandi; and therefore the same is of Ecclesiastical Conunance; and by Consequence it shall be tried before the Ecclesiastical Judges: For if the Right of Tithes be of Ecclesiastical Conunance, and the Satisfaction also for them of the same Jurisdiction, the same shall be tried in the Ecclesiastical Court.

4. In
PART XIII. and of Prohibitions, debated, &c.

4. In the Prohibitions of Modus Dedimandi Averment is taken, That although the Plaintiff in the Prohibition offereth to prove Modum Decimandi, the Ecclesiastical Court doth refuse to allow of it, which was confessed to be a good Cause of Prohibition: But he said, they would allow the Plea De modo Decimandi in the Spiritual Court, and therefore cessante causa cessabit & effectus, and no Prohibition shall lie in the Case.

5. He said, That he can shew many Consultations granted in the Cause De modo Decimandi, and a Consultation is of greater Force than a Prohibition; for Consultation, as the Word imports, is made by the Court with Consultation and Deliberation. And Bacon, Solicitor General, being (as it is said) assigned with the Clergy by the King, before the King, and in Effect said les than Dr. Bennet said before; but he vouched the Opinion of Huyse, when the Original ought to begin in the Spiritual Court, and afterwards a * Thing cometh in Issue which is triable in our Law, yet it shall be tried by their Law: As if a Man sueth for a Horse devised to him, and the Defendant saith, that the Devisor gave to him the said Horse, the same shall be tried there. And the Regisfer 57 and 58. If a Man be condemned in Expences in the Spiritual Court for laying violent Hands upon a Clerk, and afterwards the Defendant pays the Costs, and gets an Acquittance, and yet the Plaintiff sueth him against his Acquittance for the Costs, and he obtains a Prohibition, for that Acquittances and the Deeds are to be determined in our Law, yet he shall have a Consultation, because that the Principal belongeth to them, 38 E. 3. 5. Right of Tithes between two Spiritual Persons shall be determined in the Ecclesiastical Court. And 38 E. 3. 6. where the Right of Tithes comes in Debate between two Spiritual Persons, the one claiming the Tithes as of common Right within his Parish, and the other claiming to be discharged by real Composition, the Ecclesiastical Court shall have Jurisdiction of it.

And thereupon the said Judges made humble Suit to the King, That forasmuch as they perceived that the King in his Princely Wisdom did detest Innovations and Novelties, that he would vouchsafe to suffer them with his gracious Favour, to inform him of one Innovation and Novelty which they conceived would tend to the Hindrance of the good Administration and Execution of Justice within his Realm.
The Case De Modo Decimandi, Part XIII.

Your Majesty, for the great Zeal which you have to
Justice, and for the due Administration thereof hath con-
stituted and made fourteen Judges, to whom you have
committed not only the Administration of ordinary Justice
of the Realm, but criminæ lege Majestatis, touching your
Royal Person for the legal Proceeding: Also in Parlia-
ment we are called by Writ, to give to your Majesty and
to the Lords of the Parliament our Advice and Council,
when we are required: We two Chief Justices sit in the
Star-Chamber, and are oftentimes called into the Chan-
cery, Court of Wards, and other High Courts of Justice:
We in our Circuits do visit twice in the Year your
Realm, and execute Justice according to your Laws; and
if we who are your Publick Judges receive any Diminu-
tion of such Reverence and Respect in our Places, which.
our Predecessors had, we shall not be able to do you such
acceptable Service as they did, without having such Reve-
rence and Respect as Judges ought to have. The State of
this Question is not in status deliberativo, but in status judi-
ciali; it is not disputed de bono, but de vero, non de Lege
senvenda, sed de Lege lata; not to frame or devise new
Laws, but to inform your Majesty what your Law of
England is: And therefore it was never seen before, that
when the Question is of the Law, that your Judges of
the Law have been made Disputants with him who is
inferior to them, who Day by Day plead before them at
their several Courts at Westminster: And although we
are not afraid to dispute with Mr. Bennet and Mr. Bacon,
yet this Example being primae impressionis, and your Majesty
detesting Novelties and Innovations, we leave it to your
Grace and Princely Consideration, whether your Majesty
will permit our answering in hoc status judiciali, to this
Charge upon your Publick Judges of the Realm? But in
Obedience to your Majesty's Command, We, with your
Majesty's gracious Favour, in most humble Manner will
inform your Majesty touching the said Question, which
we, and our Predecessors before us, have oftentimes ad-
judged upon judicial Proceedings in your Courts of Justice
at Westminster: Which Judgments cannot be reverted or
examined for any Error in Law, if * not by a Writ of
Error in a more high and supreme Court of Justice, upon
legal and judicial Proceedings: And that is the ancient Law
of England, as appeareth by the Statute of 4 H. 4, cap. 22.

And we being commanded to proceed; all that which
was said by us, the Judges, was to this Effect: That the
Trial De Modo Decimandi ought to be by the Common
Law.
PART XIII. and of Prohibitions, dated, &c.


But first it is to see, What is a Modus Decimandi? Modus Decimandi is, when Lands, Tenements or Hereditaments have been given to the Parson and his Successors, or an annual certain Sum, or other Profit, always, Time out of Mind, to the Parson and his Successors, in full Satisfaction and Discharge of all the Tithes in Kind in such a Place; and such Manner of Tithing is now confessed by the other Party to be a good Bar of Tithes in Kind.

2. That Modus Decimandi shall be tried by the Common Law, that is, that all Satisfactions given in Discharge of Tithes, shall be tried by the Common Law: And therefore put that which is the most common Case; That the Lord of the Manor of Dale prescribes to give to the Parson 40s. yearly, in full Satisfaction and Discharge of all Tithes growing and renewing within the Manor of Dale, at the Feast of Easter: The Parson sueth the Lord of the Manor of Dale for his Tithes of his Manor in Kind, and he in Bar prescribes in Manner ut supra: The Question is, if the Lord of the Manor of Dale may upon that have a Prohibition, for if the Prohibition lieth, then the Spiritual Court ought not to try it; for the End of the Prohibition is, That they do not try that which belongs to the Trial of the Common Law; the Words of the Prohibition being, that they would draw the same ad alium examen.

First, The Law of England is divided into Common Law, Statute-Law, and Customs of England; and therefore the Customs of England are to be tried by the Trial which the Law of England doth appoint.

Secondly, Prescriptions by the Law of the Holy Church, and by the Common Law, differ in the Times of Limitation; and therefore Prescriptions and Customs of England shall be tried by the Common Law. See 20 H. 6. fol. 17. 19 E. 3. Jurisdiction 28. The Bishop of Winchester brought a Writ of Annuity against the Archdeacon of Surrey, and declared, how that he and his Ancestors were feised by the Hands of the Defendant by Title of Prescription, and the Defendant demanded Judgment, if the Court would hold Jurisdiction being between Spiritual Persons, &c. Stone Justice: Be aslured, that upon Title of Prescription we will here hold Jurisdiction; and upon that, Wilby Chief Justice gave the Rule, Answer over: Upon which it follows, that if a Modus Decimandi, which
The Case De Modo Decimandi, Part XIII.

is an annual sum for Tithes by Prescription, comes in Debate between Spiritual Persons, that the same shall be tried here: For the Rule of the Book is general, (seil.) upon Title of Prescription, We will hold Jurisdiction, and that is fortified with an Affeuration, Know assuredly; as if he should say, that it is so certain, that it is without Question. 32 E. 3. Jurisd. 26. There was a Vicar who had only Tithes and Oblations, and an Abbot claimed an Annuity or Pension of him by Prescription: And it was adjudged, that the same * Prescription, although it was betwixt Spiritual Persons, should be tried by the Common Law. Vide 22 H. 6. 46 and 47. A Prescription, that an Abbot Time out of Mind had found a Chaplain in his Chapel to say Divine Service, and to minister Sacraments, tried at the Common Law.

3. See the Record of 25 H. 3. cited in the Case of Modus Decimandi before; and see Register fol. 38. when Lands are given in Satisfaction and Discharge of Tithes.

4. See the Statute of Circumspelle quatis, Decima debitis, seu confueta, which proves that Tithes in Kind, and a Modus by Custom, &c. differ.

5. 8 E. 4. 14. and F. N. B. 41. G. a Prohibition lieth for Lands given in Discharge of Tithes. 28 H. 3. 97. a. There Suit was for Tithes, and a Prohibition lieth, and so abridged by the Book, which of Necessity ought to be upon Matter De Modo Decimandi, or Discharge.

6. 7 E. 6. 79. If Tithes are sold for Money, by the Sale the Things Spiritual are made Temporal, and so in the Case De Modo Decimandi, 42 E. 3. 12. agrees.

7. 22 E. 3. 2. Because an Appropriation is mixt with the Temporality, (seil.) the King's Letters Patent, the same ought to be shewed how, &c. otherwise of that which is mere Temporal: And so it is of real Composition, in which the Patron ought to join. Vide 11 H. 4. 85. Composition by Writing, that the one shall have the Tithes, and the other shall have Money, the Suit shall be at the Common Law.


1. The said Act of Circumspelle agatis, which giveth Power to the Ecclesiastical Judge to sue for Tithes due first in Kind, or by Custom, i.e. Modus Decimandi: So as by Authority of that Act, although that the yearly Sum foundeth in the Temporality, which was paid by Custom in Discharge of Tithes, yet because the same cometh in the Place of Tithes, and by Constitution, the Tithes are changed into Money, and the Parson hath not any Remedy for
PART XIII. and of Prohibitions, debated, &c.

For the fame, which is the Modus Decimandi at the Common Law; for that Cause the Act is clear, that the fame was a Doubt at the Common Law: And the Statute of Articuli Cleri, cap. 1. If corporal Penance be changed in painam pecuniariam, for that Pain Suit lieth in the Spiritual Court: For see Mich. 8 Hen. 3. Rot. 6. in Thefau. A Prohibition lieth pro eo quod Rector de Chefferton exigit de Hugone de Logis de certa portione pro Decimis Molendinarum; so as it appeareth, it was a Doubt before the said Statute, if Suit lay in the Spiritual Court De Modo Decimandi. And by the Statute of 27 Hen. 8. cap. 20. it is provided and enacted, That every of the Subjects of this Realm, according to the Ecclesiastical Laws of the Church, and after the laudable Usages and Customs of the Parish, &c. shall yield and pay his Tithes, Offerings, and other Duties: And that for Substraction of any of the said Tithes, Offerings, or other Duties, the Parson, &c. may by due Process of the King's Ecclesiastical Laws, convent the Person offending before a competent Judge, having Authority to hear and determine the Right of Tithes, and also to compel him to yield the Duties, i.e. as well Modus Decimandi, by laudable Ulage or Custom of the Parish, as Tithes in Kind: And with that in Effect agrees the Statute of 32 H. 8. cap. 7. By the Statute of 2 E. 6. c. 13. it is enacted, That every of the King's Subjects shall from henceforth, truly and justly, without Fraud or Guile, divide, &c. and pay all Manner of their predial Tithes in their proper Kind, as they rise and happen in such Manner and Form as they have been of Right yielded and paid within 40 Years next before the Making of this Act, or of Right and Custom ought to have been paid. And after, in the same Act, there is this Clause and Provifo, Provided always, and be it enacted, That no Person shall be sued, or otherwise compelled to yield, give, or pay any Manner of Tithes, Profits, Commodities, or other Duties before mentioned (which extends to Customs of Tithing, i.e. Modus Decimandi, mentioned before in the Act, &c.) that then the Party so substracting, &c. may be convented and sued in the King's Ecclesiastical Court, &c. And upon the said Branch, which is the Negative, That no Person shall be sued for any Tithes of any Lands which are
The Case De Mode Décimahdi, Part XII.

are not chargeable with the Payment of such Tithes by any Law, Statute, Privilege, Precept, or real Composition. And always when an Act of Parliament commands or prohibits any Court, be it Temporal or Spiritual, to do any Thing Temporal or Spiritual, if the Statute be not obeyed, a Prohibition lieth: As upon the Statute de articulis super Cartas, cap. 4. Quod communia Placita non tenentur in Scaccario: A Prohibition lieth to the Court of Exchequer, if the Barons hold a Common Plea there; as appeareth in the Register 187. b. So upon the Statute of Westm. 2. Quod inquisitiones qua magna sunt examinationis non capiantur in patria; a Prohibition lieth to the Judges of Nisi prius. So upon the Statute of Articuli super Cartas, cap. 7. Quod Confessariorum Casfr. Dover, non tenet Placitum forinsecom quod non tangit Caesarium Casfr. Register 185. So upon the same Statute, cap. 3. Quod Seneschalius & Marchialis non tenent Placita de libero tenemento, de debito, conventione, &c. a Prohibition lieth 185. And yet by none of these Statutes, is any Prohibition or Supercedure as given by express Words of the Statute. So upon the Statutes 13 R. 2. cap. 3. 15 R. 2. cap. 2. 2 H. 4. cap. 11. by which it is provided, That Admirals do not meddle with anything done within the Realm, but only with Things done upon the Seas, &c. a Prohibition lieth to the Court of Admiralty. So upon the Statute of Westm. 2. cap. 43. against Hospitallers and Templars, if they do against the same Statute, Register 39. a. So upon the Statute de prohibitione regia, Ne laici ad citationem Episcopi convenient ad recognizенm faciend. vel Sacrament. praestanda nisi in casibus matrimonialibus & Testamentaribus, a Prohibition lieth. Register 36. b. And so upon the 1st Statute of 2 H. 5. cap. 3. at what Time the Libel is grantable by the Law, that it be granted and delivered to the Party without Difficulty, if the Ecclesiastical Judge, when the Cause which depends before him is meer Ecclesiastical, denieth the Libel, a Prohibition lieth, because that he doth is against the Statute; and yet no Prohibition by any express Words is given by the Statute. And upon the same Statute the Case was in 4 E. 3. 37. Pierce Peckham took Letters of Administration of the Goods of Rose Brown of the Bishop of London, and afterwards T. T. sued to Thomas Archbishop of Canterbury, That be saufe the said Rose Brown had Goods within his Diocese, he prayed Letters of Administration to be committed to him, upon which, the Bishop granted him Letters of Administration, and afterwards *T. T. libelled in the Spiritual Court of the Archbishops in the Arches against Pierce Peckham, to whom the Bishop of London had committed...
PART XIII. and of Prohibitions, debated, &c.

mitted Letters of Administration to repeal the same: And Pierce Peckham, according to the said Statute, prayed a Copy of the Libel exhibited against him, and could not have it, and thereupon he sued a Prohibition, and upon that an Attachment: And there Catesby Serjeant, moved the Court, that a Prohibition did not lie, for two Causes: 1. That the Statute gives that the Libel shall be delivered, but doth not say that the Plea in the Spiritual Court shall surcease by Prohibition. 2. The Statute is not intended of Matter meer Spiritual, as that Case is, to try the Prerogative and the Liberty of the Archbishop of Canterbury and the Bishop of London, in committing of Administrations.

And there Danby Chief Justice, If you will not deliver the Libel according to the Statute, you do Wrong, which Wrong is a temporal Matter, and punishable at the Common Law; and therefore in this Case the Party shall have a special Prohibition out of this Court, reciting the Matter, and the Statute aforesaid, commanding them to surcease, until he had the Copy of the Libel delivered unto him: Which Case is a stronger Case than the Case at Bar, for that Statute is in the Affirmative, and the said Act of 2 E. 6. cap. 13. is in the Negative, jeil. That no Suit shall be for any Tithes of any Land in Kind where there is Modus Decimandi, for that is the Effect of the said Act, as to that Point. And always after the said Act, in every Term in the whole Reigns of King Ed. 6. Queen Mary, and Queen Elizabeth, until this Day, Prohibitions have been granted in Causa Modi Decimandi, and Judgments given upon many of them, and all the same without Question made to the contrary. And accordingly all the Judges resolv'd in 7 E. 6. Dyer 79. Et contemporanea expostitia est optima & fortisima in lege, & a communi observantis non esset recedendum; & minime mutanda sunt quae certam habuerunt interpretationem.

And as to the first Objection, that the Plea of Modus Decimandi is but accessory to the Right of Tithes; it was resolved, that the fame was of no Force, for three Causes.

1. In this Case, admitting that there is a Modus Decimandi, then by the Custom, and by the Act of 2 E. 6. and the other Acts, the Tithes in Kind are extinct and discharged; for one and the same Land cannot be subject to two Manner of Tithes, but the Modus Decimandi is all the Tithe with which the Land is chargeable: As if a Horse or other Thing valuable be given in Satisfaction of the Duty, the Duty is extinct and gone: And it shall be intended, that the Modus Decimandi began at the first by real Composition, by which the Lands were discharged of the Tithes, and a yearly Sum in Satisfaction of them alligned.
The Case De Modo Decimandi, Part XIII.

Signed to the Parson, &c. So as in this Case there is neither Principal or Accessory, but an Identity of the same Thing.

2. The Statute of 2 E. 6. being a Prohibition in itself, and that in the Negative, if the Ecclesiastical Judge doth against it, a Prohibition lieth, as it appeareth clearly before.

3. Although that the Rule be general, yet it appeareth by the Register itself, that a Modus Decimandi is out of it; for there is a Prohibition in Caufa Modo Decimandi, when Lands are given in Satisfaction of the Tithes.

As to the second Objection, it was answered and resolved, That that was from, or out of the Question; for fatus Qutestionis non est * deliberativus sed judicialis, not what was fit and convenient, but what the Law is: And yet it was said, It shall be more inconvenient to have an Ecclesiastical Judge, who is not sworn to do Justice, to give Sentence in a Case between a Man of the Clergy and a Layman, than for twelve Men sworn to give their Verdict upon Hearing of Witnesses viva voce, before an indifferent Judge, who is sworn to do Right and Justice to both Parties: But convenient or inconvenient is not the Question: Also they have in the Spiritual Court such infinite Exceptions to Witnesses, that it is at the Will of the Judge with which Party he shall give his Sentence.

As to the third Objection, it was answered and resolved: First, That satisfaclio pecuniaria of itself is Temporal: But forasmuch as the Parson hath not Remedy pro Modo Decimandi at the Common Law, the Parson by Force of the Acts cited before might sue pro Modo Decimandi in the Ecclesiastical Court: But that doth not prove, That if he sueth for Tithes in Kind, which are utterly extinct, and the Land discharged of them, that upon the Plea De Modo Decimandi, a Prohibition should not lie, for that without all Question it appeareth by all that which before hath been said, that a Prohibition doth lie. See also 12 H. 7. 24.b. Where the original Cause is the Spiritual, and they proceed upon a Temporal, a Prohibition lieth. See 39 E. 3. 22 E. 4. Consultation, That Right of Tithes which is merely Ecclesiastical, yet if the Question ariseth of the Limits of a Parish, a Prohibition lieth: And this Case of the Limits of a Parish was granted by the Lord Chancellor, and not denied by the other Side.

As to the fourth Objection, that an Averment is taken of the refusal of the Plea De Modo Decimandi: it was answered and resolved, That the same is of no Force for divers Causes.
PART XIII. and of Prohibitions, debated, &c.

1. It is only to inforce the Contempt.

2. If the Spiritual Court ought to have the Trial de Modo Decimandi, then the Refuual of Acceptance of such a Plea should give Caufe of Appeal, and not of Prohibition: As if an Excommunication, Divorce, Herefy, Simony, &c., be pleaded there, and the Plea refufed, the fame gives no Caufe of Prohibition: As, if they deny any Plea, a meer Spiritual Appeal, and no Prohibition lieth.

3. From the Beginning of the Law, no Issue was ever taken upon the Refuual of the Plea in Caufa Modi Decimandi, nor any Consultation ever granted to them, because they did not refufe, but allowed the Plea.

4. The Refuual is no Part of the Matter issuable or material in the Plea: for the fame is no Part of the Suggestion which only is the Substance of the Plea: And therefore the Modus Decimandi is proved by two WitnessEs, according to the Statute of 2 E. 6. cap. 13, and not the Refuual; which proveth, that the Modus Decimandi is only the Matter of the Suggestion, and not the Refuual.

5. All the f aid five Matters of Discharge of Tithes mentioned in the f aid Branch of the Aat of 2 E. 6. being contained within a Suggestion, ought to be proved by two Witnesses, and so have been always from the Time of the Making of the f aid Act; and therefore the Stat. of 2 E. 6. clearly intended, that Prohibitions should be granted in fuch Caufes.

6. Although that they would allow bona fide de Modo Decimandi, without Refuual, yet if the Parfon sueth there for Tithes in Kind, when the Modus is proved, the fame being expressly prohibited by the Act of 2 E. 6. a Prohibition lieth, although the Modus be Spiritual, as appeareth by the f aid Book of 4 E. 4. 37. and other the Cafes aforefaid.

And afterwards, in the third Day of Debate of this Cafe before his gracious Majesty, Dr. Bonnet and Dr. Martin had referved divers Consultations granted in Caufa Modi Decimandi, thinking that thofe would make a great Impreflion in the Opinion of the King: And thereupon they fayd, That Consultations were the Judgments of Courts had upon Deliberation, whereas Prohibitions were only granted upon Surmifes: And they fayd four Precedents:

One, where three jointly fued a Prohibition in the Cafe of Modo Decimandi, and the Consultation faith, Pro eo quod suggelio materiaca in cadem contenta minus sufficiens in Lege exiftit, &c.

2. Another in Caufa Modi Decimandi, to be paid to the Parfon or Vicar.
The Case De Modo Decimandi. Part XIII.

3. Where the Parson sued for Tithes in Kind, and the Defendant alledged *Modus Decimandi* to be paid to the Vicar.

The Fourth, where the Parson libelled for Tithe-Wool, and the Defendant alledged a Custom, to reap Corn, and to make it into Sheaves, and to set forth the tenth Sheaf at his Charges, and likewise of Hay, to sever it from the nine Cocks at his Charge, in full Satisfaction of Tithes of the Corn, Hay and Wool.

To which I answered, and humbly desired the King's Majesty to observe that these have been reserved for the last and centre Point of their Proof: And by them your Majesty shall observe these Things:

1. That the King's Courts do them Justice, when with their Consciencs and Oaths they can.
2. That all the said Cases are clear in the Judgment of those who are learned in the Laws, that Consultation ought by the Law to be granted.

For as unto the first Precedent, the Case upon their own Shewing appeareth to be, Three Persons joined in one Prohibition for three several Parcels of Land, each of which had a several Manner of Tithing; and for that Cause they could not join, when their Interests were several; and therefore a Consultation was granted.

As to the second Precedent, The Manner of Tithing was alledged to be paid to the Parson or Vicar, which was altogether uncertain.

As to the third Precedent, The *Modus* never came in Debate, but whether the Tithes did belong to the Parson or Vicar? Which being betwixt two Spiritual Persons the Ecclesiastical Court shall have Jurisdiction: And therewith agreeeth 38 E. 3. 6. cited before by Bacon: And also there the Prior was of the Order of the Cistercius; for if the Tithes originally belonged to the Parson, any Recompence for them shall not bar the Parson.

As to the last Precedent, the same was upon the Matter of a Custom of *Modus Decimandi* for Wool: For to pay the Tithe of Corn or Hay in Kind, in Satisfaction of Corn, Hay and Wool, cannot be a Satisfaction for the Wool, for the other two were due of Common Right; and all this appeareth in the Consultations themselves, which they shew, but understand not. To which the Bishop of London said, that the Words of the Consultation were, *quod suggestio grad. materias in eadem contenta minus sufficiens in Lege existit, &c.* So as materia cannot be referred to Form, and therefore it ought to extend to the *Modus Decimandi*. 

...
PART XIII. and of Prohibitions, debated, &c.

To which I answer'd, That when the Matter is insufficiently or uncertainly alleged, the Matter itself falleth; for Matter ought to be alleged in a good Sentence: And altho' the Matter be in Truth sufficient, yet if it were insufficiently alleged, the Plea wanteth Matter. And the Lord Treasurer said openly to them, that he admir'd that they would allege such Things which made more against them than any Thing which had been said. And when the King relied upon the said Prohibition in the Register, when Land is given in Discharge of Tithes, the Lord Chancellor said, that that was not like to this Case; for there, by the Gift of the Land in Discharge of Tithes, the Tithes were actually discharged: But in the Case de Modo Decimandi, an annual Sum is paid for the Tithes, and the Land remains charged with the Tithes, but ought to be discharged by Plea de Modo Decimandi: All which was utterly denied by me; for the Land was as absolutely discharged of the Tithes in the Case de Modo Decimandi, when an annual Sum ought to be paid, as where Land is given: For all the Records and Precedents of Prohibitions in such Cases are, That such a Sum had been always, &c. paid in plenam contentationem, satisfactionem & exoneracionem omnium & singularum Decimarum, &c. And although that the Sum be not paid, yet the Parson cannot sue for Tithes in Kind, but for the Money: For, as it hath been said before, the Custom and the said Acts of Parliament (where there is a lawful Manner of Tithing) hath discharged the Lands from Tithes in Kind, and prohibited, that no Suit shall be for them. And altho' that now (as it hath been said) the Parsons, &c. may sue in the Spiritual Court pro Modo Decimandi, yet without Question, at the first, the annual Payment of Money was as Temporal, as annual Profits of Lands were: All which the King heard with much Patience. And the Lord Chancellor answered not to that which I answered him in, &c.

And after that his most excellent Majesty, with all his Counsel, had for three Days together heard the Allegations on both Sides, He said that he would maintain the Law of England, and that his Judges should have as great Respect from all his Subjects as their Predecessors had had: And for the Matter, he said, that for any Thing that had been said on the Part of the Clergy, that he was not satisfied: And advised us his Judges to confer amongst ourselves, and that nothing be encroached upon the Ecclesiastical Jurisdiction, and that they keep themselves within their lawful Jurisdiction, without unjust Vexation and Molestation done to his Subjects, and without Delay or Hindering of Justice. And this was the End of these three Days Consultations.
The Case de Modo Decimandi, &c. PART XIII.

And note, That Dr. Bennet in his Discourse inveighed much against the Opinion in 8 E. 4. 14, and in my Reports in Wright's Cafe, That the Ecclesiastical Judge would not allow a Modus Decimandi; and said, That that was the Mystery of Iniquity, and that they would allow it. And the King asked, for what Cause it was so said in the said Books? To which I answered, that it appeared in Linwood, who was Dean of the Arches, and of so profound Knowledge in the Canon and Civil Law, and who wrote in the Reign of King Henry VI. a little before the said Case in 8 E. 4: in his Title De Decimis, cap. Quoniam propter, &c. fol. 139. b. Quod Decima solvantur, &c. absq; ulla diminutione: And in the Gloss it is said, Quod Consuetudo de non Decimando, aut de non bene Decimando non valet. And that being written by a great Canonist of England, was the Cause of the said Saying in 8 E. 4. that they would not allow the said Plea de Modo Decimandi; for always the Modus Decimandi is less in Value than the Tithes in Species, and then the same is against their Canon; Quod decimam solvantur absque diminutione, & quod consuetudo de non plene Decimando non valet. And that seemed to the King, that that Book was a good Cause for them in the Time of King Edward IV. to say, as they had said; but I said, That I did not rely upon that, but upon the Grounds aforesaid, (feil,) The Common Law, Statute Laws, and the continual and infinite Judgments and Judicial Proceedings; and that if any Canon or Constitution be against the same, such Canon and Constitution, &c. is void by the Stat. of 25 H.8. c. 19. which see and note: For all Canons, Constitutions, &c. against the Prerogative of the King, the common Laws, Statutes, or Customs of the Realm, are void.

Lastly, The King said, That the High Commission ought not to meddle with any Thing but that which is enormous and exorbitant, and cannot permit the ordinary Proces of the Ecclesiastical Law; and which the same Law cannot punish. And that was the Cause of the Institution of the same Commission, and therefore, although every Offence, ex vi termini, is enormous, yet in the Statute it is to be intended of such an Offence, as is extra omnem normam, as Herefy, Schism, Incest, and the like great Offences: For the King said, That it was not Reason that the High Commission should have Conrufance of common Offences, but to leave them to Ordinaries; feil because that the Party cannot have an Appeal in Cafe the High Commission shall determine of it. And the King thought that two High Commissions, for either Province one, should be sufficient for all England, and no more.

Bedell
(16) Bedell and Sherman's Case.

Mich. 39 & 40 Eliz.

In the King's Bench.

Mich. 39 & 40 Eliz. which is entered Mich. 40 Eliz. Subtraction of in the Common Pleas, Rot. 699. Cantabr. the Case was this; Robert Bedell, Gent. and Sarah his Wife, Farmers of the Rectory of Lillington in the County of Cambridge, brought an Action of Debt against John Sherman, in the Custody of the Marshal of the Marshalsea, and demanded 550l. and declared, that the Master and Fellows of Clare-hall in Cambridge, were seised of the said Rectory in Fee, in Right of the said College, and in June 10, 29 Eliz. by Indenture demised to Christopher Priest the said Rectory for twenty-one Years, rendring 17l. 15s. 5d. and referring Rent-corn according to the Statute, &c. which Rent was the ancient Rent, who entered into the said Rectory, and was possessed, and assigned all his interest thereof to one Matthew Batt, who made his Last Will and Testament, and made Sarah his Wife his Executrix, and died; Sarah proved the Will, and entered, and was thereof possessed as Executrix, and took to Husband the said Robert Bedell, by Force whereof, they in the Right of the said Sarah entered, and were possessed thereof; and that the Defendant was then Tenant, and seised for his Life of 300 Acres of arable Lands in Lillington aforesaid, which ought to pay Tithes to the Rector of Lillington; and in Anno 38 El. the Defendant grano feminavit 200 Acres, Parcel, &c. And that the Tithes of the same did amount to 150l. and that the Defendant did not divide nor set forth the same from the nine Parts, but took and carried them away, against the Form and Effect of the Statute of 2 E. 6. &c. And the Defendant pleaded Nibil debet, and the Jury found that the Defendant did owe 55l. and to the Residue they found Nibil debet, &c. and in Arrest of Judgment divers Matters were moved.
John Bailie's Case. PART XIII.

1. That *Grano seminato* is too general and uncertain, but it ought to be expressed with what kind of corn the same was sowed.

2. It was moved, if the Parson ought to have the treble value, the forfeiture being by express words limited to none by the Act, or that the same did belong to the Queen.

3. If the same did belong to the Parson, if he ought to sue for the same in the Ecclesiastical Court, or in the King's Temporal Court.

4. If the Husband and Wife should join in the action, or the Husband alone should have the action, and upon solemn argument at the Bar and at the Bench, the judgment was affirmed.

(17) John Bailie's Case.

Trin. 7 Jacobi I.

In the Court of Wards.

It was found by Writ of *Diem clausit extremum*, that the said John Bailie was seised of a Messuage or Tenement, and of and in the fourth part of one acre of land, late parcel of the Demesne lands of the Manor of Newton, in the County of Hereford, in his Demesne as of Fee, and found the other points of the writ, and it was holden by the two Chief Justices; and the Chief Baron.

1. That *Messuagium, vel Tenementum*, is uncertain; for *Tenementum* is *nomen collectivum*, and may contain land, or any thing which is holden.

2. It was holden, that it was void for the whole, because that no town is mentioned in the office where the Messuage or Tenement, or the fourth part of the acre lie; and from the Visue of the Manor upon a traverse none can come, because it is not affirmed by the Office, that they are parcel of the Manor, but *super parcel* of the Manor, which implieth, that now they are not, and it was holden by them, that no *Melius inquirendum* shall issue forth, because that the whole office is uncertain and void.

(18) Covenants
(18) Covenants to Uses.

Trin. 7 Jacobi I.

In the Court of Wards.

The Attorney of the Court of Wards moved the two Chief Justices and Chief Baron in this Case, That a Man feised of Lands in Fee-simple, covenants for the Advancement of his Son, and of his Name, and Blood, and Posterity, that he will stand feised of them, to the Use of himself for the Term of his Life, and after to the Use of his eldest Son, and to such a Woman which he shall marry, and to the Heirs Males of the Body of the Son and afterwards the Father dieth, and after the Son taketh a Wife and dieth; if the Wife shall take an Estate for Life, and the Doubt was, because the Wife of the Son was not within the Considerations, and the Use was limited to one who was capable, feil. the Son, and to another who was not capable, and therefore the Son should take an Estate in Tail executed. But it was resolved by the said two Chief Justices and Chief Baron, That the Wife should take well enough; and as to the first Reason, they resolved, That the Wife was within the Consideration, for the Consideration was for the Advancement of his Posterity; and without a Wife, the Son cannot have Posterity: Also when the Wife of the Son is sure of a Jointure, the same is for the Advancement of the Son, for thereby he shall have the better Marriage. And as to the second, it was resolved, that the Estate of the Son shall support the Use to the Defendant; and when the Contingent happeneth, the Estate of the Son shall be changed according to the Limitation, feil. to the Son and the Woman, and the Heirs of the Body of the Son: And so it was resolved in the King's Bench by Popham Chief Justice, and the whole Court of the King's Bench, in the Reign of Queen Elizabeth, in Sheffield's Case, for both Points.
(19) SPARY's Case.

Trin. 7 Jac. I.

In the Court of Wards.

JOHN SPARY feised in Fee in the Right of his Wife of Lands holden of the Crown by Knight's Service, had Issue by her, and 22 Decemb. Anno 9 Eliz. aliened to Edward Lord Stafford; the Wife died, the Issue of full Age, the Lands continue in the Hands of the Alienee, or his Assigns; and ten Years after the Death of the Father, and twelve Years after the Death of the Mother, Office is found, 7 Jacobi, finding all the special Matter after the Death of the Mother; the Question was, Whether the mean Profits are to be answer'd to the King? And it was resolved by the said two Chief Justices and the Chief Baron, that the King should not have the mean Profits, because that the Alienee was in by Title; and until Entry the Heir hath no Remedy for the mean Profits; but that the King might seise and make a Livery, because that the Entry of the Heir is lawful by the Stat. of 32 H.8.

(20) The Earl of Cumberland's Case.

Trin. 7 Jac. I.

In the Court of Wards.

It was found by Force of a Mandamus at Kendal in the County of Westmoreland the 21st of December, 6 Jacobi Regis, That George Earl of Cumberland, long before his Death, was feised in Tail to him and to the Heirs Males of his Body, of the Castles and Manors of Browham, Appleby, &c., the Remainder to Sir Ingram Clifford, with
PART XIII. In the Court of Wards.

with divers Remainders over in Tail; the Remainder to the right Heirs of Henry Earl of Cumberland, Father of the said George; and that the said George, Earl, so seised by Fine and Recovery, convey'd them to the Use of himself and Margaret his Wife for their Lives, for the Jointure of the said Margaret; and afterwards to the Heirs Males of the Body of George Earl of Cumberland, and for Want of such Issue, to the Use of Francis now Earl of Cumberland, and to the Heirs Males of his Body begotten; and for Want of such Issue, to the Use of the right Heirs of the said George; and afterwards, by another Indenture, conveyed the Fee-simple to Francis Earl; by Force of which, and of the Statute of Uses they were seised accordingly: And afterwards, 30 Octob. Anno 2 Jacob, the said George Earl of Cumberland died without Heir Male of his Body lawfully begotten: And further found, that Margaret, Countess of Cumberland, that now is, was alive, and took the Profits of the Premisses from the Death of the said George Earl of Cumberland, until the Taking of that Inquisition; and further found the other Points of the Writ.

And first it was objected, that here was no Dying seised found by Office, and therefore the Office shall be insufficient: But as to that it was answered and resolved, That by this Office the King was not intitled by the Common Law, for then a Dying seised, or at least a Dying (feisin) the Day of his Death was necessary: But this Office is to be maintained upon the Statutes of 32 & 34 H.8. by Force of which no Dying seised is requisite, but rather the contrary, seisin if the Land be (as this Case is) conveyed to the Wife, &c. And so it was resolved in Vincent's Case, Anno 22 Eliz. where all the Lands holden in Capite was conveyed to the younger Son, and yet the eldest Son was in Ward, notwithstanding that nothing descended.

The second Objection was, It doth not appear that the Estate of the Wife continued in her until the Death of the Earl, for the Husband and Wife had alienated the same to another; and then no Primer Seisin shall be, as it is agreed in Bingham's Case.

As to that, it was answered and resolved, That the Office was sufficient prima facie for the King, because it is a Thing collateral, and no Point of the Writ; and if any such Alienation be (which shall not be intended) then the same shall come in of the other Part of the Alienee by a Monstrans de droit; and the Case at Bar is a stronger Case, because it is found, that the said Countess took the Profits of the Premisses from the Death of George the Earl until the Finding of the Office.
(21) WILL'S Case.

Trin. 7 Jacobi i.

In the Court of Wards.

Henry Wills, being seised of the fourth Part of the Manor of Wryland in the County of Devon, holden of Queen Elizabeth in Socage-tenure in Capite, of the said fourth Part enfeoffed Zachary Iriska and others, and their Heirs, to the Use of the said Henry for the Term of his Life, and afterwards to the Use of Tho. Wills his second Son in Tail, and afterwards to the Use of Rich. Wills his youngest Son in Tail; and for Default of such Issue, to the Use of the right Heirs of the said Henry; and afterwards the said Henry so seised as above said died thereof seised, William Wills being his Son and Heir of full Age; Thomas the second Son entered as into his Remainder: All this Matter is found by Office, and the Question was, If the King ought to have Primer Seisin in this Case, and that Livery or Ousler le main shall be sued in this Case by the Statutes of 32 and 34 H. 8. And it was resolved by the two Chief Justices and the Chief Baron, that not; if in this Case by the Common Law no Livery or Ousler le main shall be sued; and that was agreed by them all by the Experience and Course of the Court. See 21 Eliz. Dyer 362. If Tenant in Socage dieth seised in Possession, his Heir within the Age of fourteen Years, he shall not sue Livery, but shall have an Ousler le main, una cum exitibus; but otherwise it is, if the Heir be of the Age of fourteen Years, which is his full Age for Socage; and therewith agreeeth 4 Eliz. Dyer 213.

And two Precedents were shewed, which were decreed in the same Court by the Advice of the Justices Assistants to the Court.

One in Trinity Term, 16 Eliz. Thomas Stavely the Father enfeoffed William Strelly and Thomas Law of the
PART XIII. WILLS'S CAFE.

the Manor of Ryndly in the County of Nottingham, upon Condition that they re-enfeoff the Feoffor and his Wife for their Lives, the Remainder to Thomas Stavely Son and Heir apparent of the Feoffor in Fee, which Manor was holden of Queen Elizabeth in Socage in Capite: And upon Consideration of the Saving in the Statute of 32 H. 8, next after the Clause concerning Tenure in Socage in Chief, it was resolved, That no Livery or Oufter le main should be sued in such Case, and the Reason was, because that the precedent Clause gives Liberty to him who holdeth in Socage in Chief, to make Disposition of it, either by Act executed, or by Will at his free Will and Pleasure: And before the said Act, no Livery or Oufter le main should be sued in such Case: And the Words of the Saving are, saving, &c. to the King, &c. all his Right, &c. of Primer Seisin and Relief, &c. for Tenure in Socage, or of the Nature of Tenure in Socage in Chief, as heretofore hath been used and accustomed: But there was no Use or Custom before the Act, that the King should have any Primer Seisin or Relief in such Case: And the Words subsequent in the said Saving depend upon the former Words, and do not give any Primer Seisin or Relief where none was before.

Another Precedent was in Pasch. 37 Eliz. in the Book of Orders, fol. 444. where the Case was, That William Allott was seised of certain Lands in Pilsey called Lansfey, holden of the Queen in Socage in Chief, and by Deed covenanted to stand seised to the Use of his Wife for Life, and afterwards to the Use of Richard his younger Son in Fee, and died, his Heir of full Age; and all that was found by Office, and it was resolved, ut supra, That no Livery or Oufter le main should be sued in that Case; but the Doubt in the Case at Bar was, Because that Henry the Feoffor had a Reversion in Fee, which descended to the said William his eldest Son.
PART XIII.

(22) The Case of the Admiralty.

Trin. Anno 7 Jac. I.

A BILL was preferred in the Star-chamber against Sir Richard Hawkins, Vice-admiral of the County of Devon; and it charged, that one William Hull and others were notorious Pirates upon the High Seas, and shewed in certain, what Piracy they had committed: The said Sir Richard Hawkins knowing the same, did them receive, abet and comfort within the Body of the County, and for Bribes and Rewards suffered them to be discharged. And what Offence that was, the Court referred to the Consideration of the two Chief Justices and the Chief Baron, who heard Counsel of both Sides divers Days at Serjeants Inn.

And first, it was by them resolved, that by the Common Law the Admirals ought not to meddle with any Thing done within the Realm, but only with Things done upon the Sea; and that appeareth fully by *the Statute of 13 R. 2. cap. 5. by which it appeareth, that such was the Common Law in the Time of King Edward the Third, and therewith agreeeth the Statute of 2 Hen. 4. cap. 11. and the Statute of 15 Hen. 4. cap. 13. That because the Admirals and their Deputies incroach to themselves divers Jurisdictions and Franchises more than they ought to have, Be it enacted, That all Contracts, Pleas and Complaints, and all other Things arising within the Bodies of the Counties as well by Land as by Water, as also of Wreck of the Sea, the Admiral Court shall not have any Conunance, Power, or Jurisdiction, &c. Nevertheles of the Death of a Man, and of Mayhem done in great Ships, being in the main Stream of great Rivers, only below the Bridges nigh to the Sea, and not in oth
PART XIII. The Case of the Admiralty.

ther Places of the fame Rivers; and to arrest Ships in the great Flotes for the great Voyage of the King and of his Realm: And by the Statute of 2 Hen. 5. cap. 6. the Admirals of the King of England have done and used reasonably, according to the antient Law and Custom, upon the main Sea. See the Statute of 5 Eliz. cap. 5. And all this appeareth to be by the Common Law; and with that agreeeth Stamford fol. 51. And if a Man be killed or slain within the Arros of the Sea, where a Man may see from the one Part of the Land to the other, the Coronet shall enquire of it, and not the Admiral, because that the Country may well know it: And he voucheth 8 Ed. 2. Coron. 399. to faith Stamford, the fame proves that by the Common Law before the Statute of 2 H. 4. cap. 11. the Admiral shall not have Jurisdiction unless upon the High Sea. See Plo. Com. 37. 6. If the Marshal holdeth Plea out of the Verge, of the Admiral within the Body of the County, the fame is void. See 2 R. 3. 12. 30 H. 6. 6. by Prisot.

2. It was resolved, That the said Statutes are to be intended of a Power to hold Plea, and not of a Power to award Execution, sìl. De Jurisdictione tenendi placiti; non de Jurisdictione exsequendi: For notwithstanding the said Statutes, the Judge of the Admiralty may do Execution within the Body of the County; and therefore in 19 Hen. 6. 7. the Case was, W. T. at Southwark affirmed a Plaint of Trespass in the Court of Admiralty before the Steward of the Earl of Huntington against J. B. of a Trespass done upon the High Sea, upon which issued a Citation to cite the said J. B. to appear before the Steward aforefaid at the common Day then next ensuing, directed to P. who served the said Citation; at which Day the said J. B. made Default: And the Usage of the Court is, that if the Defendant maketh Default, he shall be amerced by the Discretion of the Steward, to the Use of the Plaintiff: The which J. B. for his Default aforesaid, was amerced to twenty Marks; whereby Command was made to the said P. as Minifter of the Court aforesaid, to take the Goods of the said J. B. to make Agreement with the beforefaid W. T. by Force of which he for the said twenty Marks took five Cows, and an hundred Sheep, in Execution for the Money aforesaid, in the County of Leicesters. And there it is holden by Newton, and the whole Court, that the Statutes restrain the Power of the Court of Admiralty
The Case of the Admiralty.  PART XIII.

ralty to hold Plea of a Thing done within the Body of the County, but they do not refrain the Execution of the fame Court to be served upon the Land: For it may be that the Party hath not any Thing upon the Sea, and then it is Reason to have it upon the Land: And if such a Defendant have nothing wherewithal to make Agreement, they of the Court have Power to take the Body of such a Defendant upon the Land in Execution.

* In which Case these Points were observed:

1. Although that the Court of Admiralty is not a Court of Record, because they proceed there according to the Civil Law, (see Brook Error 77. acc.) yet by Custom of the Court they may amerce the Defendant for his Default by their Discretion.

2. That they may make Execution for the fame of the Goods of the Defendant in corpore Comitatus: And if he hath not Goods, then they may arrest the Body of the Defendant within the Body of the County.

But the great Question between them was, If a Man committed Piracy upon the Sea and one knowing thereof, receiveth and comforteth the Defendant within the Body of the County; if the Admiral and other the Commissioners, by Force of the Act of 28 H. 8. cap. 16. may proceed by Indictment and Conviction against the Receiver and Abettor, inasmuch as the Offence of the Accessary hath his Beginning within the Body of the County?

And it was resolved by them, that such a Receiver and Abettor by the Common Law could not be indicted or convicted, because that the Common Law cannot take Consequence of the original Offence, because that is done out of the Jurisdiction of the Common Law: And by Consequence, where the Common Law cannot punish the Principal, the same shall not punish any one as Accessary to such a Principal. And therefore Coke Chief Justice reported to them a Case which was in Suffolk in Anno 28 Eliz. where Butler and others upon the Sea, next to the Town of Layloft in Suffolk, robbed divers of the Queen's Subjects, and spoiled them of their Goods, which Goods they brought into Norfolk; and there they were apprehended, and there brought before me, then a Justice of the Peace within the same County, whom I examined; and in the End they confessed a cruel and barbarous Piracy, and that those Goods which then they had with them, were Part of the Goods which they had robbed from the Queen's Subjects upon the High Sea: And I was of Opinion, that in that Case it could not be Felony punishable by the Common Law, because that the original Act, (feil) the Taking of them
PART XIII. The Case of the Admiralty.

them was not any Offence whereof the Common Law taketh Knowledge; and by Consequence, the Bringing of them into a County could not make the same Felony punishable by our Law: And it is not like, where one stealth Goods in one County, and brings them into another, there he may be indicted of Felony in any of the Counties, because that the original Act was Felony, whereof the Common Law taketh Knowledge: And yet notwithstanding I committed them to the Gaol, until the Coming of the Justices of Assizes. And at the next Assizes the Opinion of Wray Chief Justice, and Periam Justice of Assises, was, that forasmuch as the Common Law doth not take Notice of the original Offence, the Bringing of the Goods stolen upon the Sea into a County, did not make the same punishable at the Common Law: And thereupon they were committed to Sir Robert Southwell, then Vice-Admiral of the said Counties: And this in Effect agrees with Lacy's Case, which see in my Reports cited in Bingham's Case in the 2d Reports 93. and in Constable's Case. 3 Reports 107.

See that Piracy was Felony, the Book of 40 Assis. 25. by Schard, where a Norman Master or Capt. of a Ship, together with some Englishman, robbed the King's Subjects upon the Seas; where he saith, that it was Felony in the Norman Captain, and Treason in the Englishmen his Companions: And the Reason of the said Case was, because the Normans were not then under the Obedience and Allegiance of the King of England (for King John lost Normandy) and for that Cause Piracy was but Felony in the Norman; but in the English, who were under the Obedience and Allegiance of the King of England, the same was adjudged Treason, which is to be understood of Petit Treason, which was High Treason before: And therefore in that Case, the Pirate being apprehended, the Norman Captain was hanged, and the Englishmen were hanged and drawn, as appeareth by the same Book. See Stamford 10.

And some objected, and were of Opinion, That Treasons done out of the Realm might have been here determined by the Common Law; but truly the same could not be punishable, but only by the Civil Law before the Admiral, or by Act of Parliament, as all Foreign Treasons and Felonies were by the Common Law: And therefore where it is declared by the Statute of 25 E. 3. That Adherence to the Enemies of the King within England, or elsewhere, is Treason, the same shall be tried by the Common Law: But where it is done out of the Realm, the Offender should not be attainted but by Parliament, until the Statute of 35 H. 8. cap. 2. although that there are Opinions.
Pettus and Godsalve’s Case. Part. XIII.

...ions in some Books to the contrary. See 5 R. 2. Quare Impedit, &c.

[Note, All Crimes are local, and must be tried where committed. See Rep. Q. A. p. 9.]

(23) Pettus and Godsalve’s Case.

Trin. 7 Jacobi 1.

In the Common Pleas.

In a Fine levied Trinity Term, Anno quinto of this King, between John Pettus, Esq; Plaintiff, and Roger Godsalve and others, Deforcients of the Manor of Castre, with the Appurtenances, &c. in the County of Norfolk, where in the third Proclamation upon the Foot of the same Fine the said Proclamation is said to have been made in the sixth Year of the King that now is, which ought to have been Anno quinto of the King: And whereas upon the Foot of the same Fine, the fourth Proclamation is altogether left out; but because upon the View of the Proclamations upon Dorfis, upon the Record, & Nota finis ejusdem Termini per Juliciarios, remaining with the Chirographer, and the Book of the said Chirographer, in which the said Proclamations were first entered, it appeareth, that the said Proclamations were rightly and duly made, therefore it was adjudged, that the Errors or Defects aforesaid should be amended, and made to agree as well with the Proclamation upon Record of the said Fine, and Entry of the said Book, as with the other Proclamations in Dorfis super pedes aliorum finium of the same Term: And this was done upon the Motion of Haughton, Serjeant at Law.

(24) Summes’s
(24) Sammes’s Case.

Mich. 7 Jac. 1.

In the Court of Wards.

John Sammes being seised of Grany Mead by Copy of Uses,

Court-Roll of the Manor of Tollesham the Great, of which Sir Thomas Beckingham was Lord, and held the same of the King by Knights Service in capite; Sir Thomas by his Deed indented, dated the 22d of December, in the 1st Year of King James, made between him of the one Part, and the said John Sammes and George Sammes Son and Heir apparent of the said John of the other Part, did bargain, sell, grant, enfeoff, release, and confirm unto the said John Sammes and George Sammes, and their Heirs and Assigns, to the only Use and Behoof of the said John Sammes and George Sammes, their Heirs and Assigns for ever: And by the same Indenture Sir Thomas did covenant with John and George, to make further Assurance to John and George, and their Heirs, to the Use of them and their Heirs, and Livery and Seisin was made and delivered, according to the true Intent of the said Indentures, of the within mentioned Premises to the Uses within mentioned.

John Sammes the Father dieth, George Sammes his Son Wardship, and Heir being within Age, the Question was, Whether George Sammes should be in Ward to the King or no? And in this Case three Points were resolved:

1. Forasmuch as George was not named in the Premisses, Habendum; he cannot take by the Habendum; and the Livery made according to the Intent of the Indenture, doth not give any Thing to George, because the Indenture as to him is void: But although the Feoffment be good only to John and his Heirs, yet the Use limited to the Use of John and George, and their Heirs, is good.

2. If
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2. If the Estate had been conveyed to John and his Heirs by the Releafe and Confirmation, as it well may be to a Tenant by Copy of Court-Roll, the Use limited to them is good: For upon a Releafe which creates an Estate, a Use may be limited, or a Rent reserved without Question; but upon a Releafe or Confirmation, which enures by Way of Mitter le droit, an Use cannot be limited, or a Rent reserved.

But the Third was of greater Doubt, if in this Case the Father and Son were Joint-Tenants, or Tenants in Common? For it was objected, when the Father is only enfeoffed to the only Use of him and his Son, and their Heirs in the Per, that in this Case, they shall be Tenants in Common. By the Feoffment the Father is in by the Common Law in the Per, and then the Limitation of the Use to him and his Son, and to their Heirs, cannot divest the Estate, which was vested in him by the Common Law, out of him, and vest the Estate in him in the Poss by Force of the Statute, according to the Limitation of the Use; And therefore, as to one Moiety, the Father shall be in by Force of the Feoffment in the Per, and the Son, as to the other Moiety, shall be in by Force of the Statute, according to the Limitation of the Use in the Poss, and by Consequence they shall be Tenants in Common. But it was answered and resolved, That they were Joint-Tenants, and that the Son in the Case at Bar should have the said Grange by the Survivor: For if at the Common Law A. had been enfeoffed to the Use of him and B. and their Heirs, although that he was only seised of the Land, the Use was jointly to A. and B. For a Use shall not be suspended or extinct by a sole Seisin, or Joint Seisin of the Land: And therefore if A. and B. be enfeoffed to the Use of A. and his Heirs, and A. dieth, the entire Use shall descend to his Heir: As it appears in 13 H. 7. 6. in Stoner's Case: And by the Statute of 27 H. 8. cap. 10. of Uses, it appeareth, That when several Persons are seised to the Use of any of them, that the Estate shall be executed according to the Use.

And as to that which was said, That the Estate of the Land which the Father hath in the Land, as to the Moiety of the Use which he himself * hath, shall not be divested out of him: To that it was answered and resolved, That that shall well be: For if a Man maketh a Feoffment in Fee to one, to the Use of him and the Heirs of his Body; in this Case, for the Benefit of the Issue, the Statute according to the Limitation of the Uses, divests the Estate vested in him by the Common Law, and executes the same in
in himself by Force of the Statute; and yet the same is out of the Words of the Statute of 27 H. 8. which are, Where any Person, &c. stand or be seised, &c. to the Use of any other Person; and here he is seised to the Use of himself: And the other Clause is, Where divers and many Persons, &c. be jointly seised, &c. to the Use of any of them, &c. and in this Case A. is sole seised: But the Stat. of 17 H. 8. hath been always beneficially expounded, to satisfy the Intention of the Parties, which is the Direction of the Use according to the Rule of the Law. So if a Man, seised of Lands in Fee-simple, by Deed covenants with another, that he and his Heirs will stand seised of the same Land, to the Use of himself and the Heirs of his Body, or unto the Use of himself for Life, the Remainder over in Fee; in that Case, by the Operation of the Statute, the Estate which he hath at the Common Law is divested, and a new Estate vested in himself, according to the Limitation of the Use. And it is to be known, that an Use of Land (which is but a Pernancy of the Profits) is no new Thing, but Part of that which the Owner of the Land had: And therefore, if Tenant in Borough English, or a Man seised of the Part of his Mother, maketh a Feoffment to another without Consideration, the younger Son in the one Case, and the Heir on the Part of the Mother on the other, shall have the Use, as they should have the Land itself; if no Feoffment had been made: As it is held in 5 E. 4. 7. See 4 & 5 Phil. & Mar. Dyer 163. So if a Man maketh a Feoffment unto the Use of another in Tail, and afterwards to the Use of his right Heirs, the Feoffor hath the Reversion of the Land in him; for if the Donee dieth without Issue, the Law giveth the Use, which was Part of the Land to him: And so it was resolved, Trinity, 31 Eliz. between Fenwick and Milford in the King's Bench. So in 28 H. 8. Dyer 11. the Lord Rosse's Case: A Man seised of one Acre by PRIORITY, and of another Acre by POSTERIORITY, and make a Feoffment in Fee of both to his Use: And it was adjudged, that although both pass at one Instant, yet the Law shall make a Priority of the Uses, as if it were of the Land itself: Which proves, that the Use is not any new Thing, for then there should be no Priority in the Case. See 13 H. 7. b. by Butler.

So in the Case at Bar, The Use limited to the Feoffee and another, is not any new Thing, but the Pernancy of the old Profits of the Land, which well may be limited to the Feoffee and another jointly: But if the Use had been only limited to the Feoffee and his Heirs, there, because there is not any Limitation to another Person, nec in pre-
fenti, nec in futuro, he shall be in by Force of the Feoffment.

And it was resolved, That Joint-Tenants might be seised to an Use, although that they come to it at several Times: As, if a Man maketh a Feoffment in Fee to the Use of himself, and to such a Woman, which he shall after marry, for Term of their Lives, or in Tail, or in Fee; in this Case, if after he marrieth a Wife, the shall take jointly with him, although that they take the Use at several Times, for they derive the Use out of the same Fountain and Freehold, sc. the first Feoffment. See 17 El. Dyer 340. So if a Difference be had to the Use of two, and one of 'em agreeeth at one Time, and the other at another Time, they shall be Joint-Tenants; but otherwise it is of Estates which pass by the Common Law: And therefore, if a Grant be made by Deed to one Man for Term for Life, the Remainder to the Right Heirs of A. and B. in Fee; and A. hath Issue and dieth, and afterwards B. hath Issue and dieth, and then the Tenant for Life dieth; in that Case the Heirs of A. and B. are not Joint-Tenants, nor shall join in a Sci Fac to execute the Fine, 24 El. 3. Join-der in Aliénation because that altho' the Remainder be limited by one Fine, and by Joint Words, yet because that by the Death of A. the Remainder as to the Moiety, vested in his Heir, and by the Death of B. the other Moiety vested in his Heir at several Times, they cannot be Joint-Tenants: But in the Case of a Use, the Husband taketh all the Use in the mean Time; and when he marrieth, the Wife takes it by Force of the Feoffment and the Limitation of the Use jointly with him, for there is not any Fraction and several vesting by Parcels, as in the other Case, and such is the Difference. See 18 El. 3. 28. And upon the whole Matter it was resolved, That because in the principal Case the Father and Son were Joint-Tenants by the original Purchase, that the Son having the Land by Survivor, should not be in Ward: And accordingly it was so decreed.
Collins and Harding's Case.


In the King's Bench.

The case between Collins and Harding was; A Man seised of Lands in Fee, and also of Lands by Copy of Court-Roll in Fee, according to the Custom of the Manor, made one entire Demise of the Lands in Fee, and of the Lands holden by Copy according to the Custom, to Harding for Years, rendering one entire Rent: And afterwards the Lessor surrendered the Copyhold Land to the Use of Collins and his Heirs: And at another Time granted by Deed the Reversion of the Freehold Lands to Collins in Fee, and Harding attorned; and afterwards for the Rent behind, Collins brought an Action of Debt for the whole Rent: And it was objected, That the Reservation of the Rent was an entire Contract, and by the Act of the Leffe such reservation cannot be apportioned: And therefore if one demised three Acres, rendering 3s. Rent, and afterwards bargaineth and selleth, by Deed indented and enrolled, the Reversion of one Acre, the whole Rent is gone, because that the Contract is entire and cannot be severed by the Act of the Lessor: Also the Leffe by that shall be subject to two Fealties, where he was subject but to one before.

As to these Points, it was answered and resolved, That the Contract was not entire, but that the same by the Act of the Lessor, and the Assent of the Leffe, might be divided and severed: For the Rent is incident to the Reversion, and the Reversion is severable, and by Consequence the Rent also: For accessuarium sequitur naturam sui principalis, and that cannot be severed or divided by the Assent of the Leffe, or express Attornment, or implied by Force of an Act of Parliament, to which every one is a Party as by Force of the Statute of Inrolls, or of Uses, &c. And as to the two Fealties, to that the Leffe shall be subject, although that the Rent shall be extinct: For Fealty is by

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De Modo Decimandi. Part XIII.

Necessity of Law incident to the Reversion, and to every Part of it; but the Rent shall be divided pro rata portionis: And so it was adjudged.

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* And it was also adjudged, That altho' Collins cometh to the Reversion by several Conveyances, and at several Times, yet he might bring an Action of Debt for the whole Rent. Hill. 43 Eliz. Rot. 243. Welf and Laffel's Case: A Man made a Lease for Years of certain Lands, and afterwards devieth the Reversion of two Parts to one, he shall have two Parts of the Rent; and he may have an Action of Debt for the same, and have Judgment to recover, Hill. 42 Eliz. Rot. 128. in the Common Pleas, Ewen and Myile's Case: The Devisee of the Reversion of Part shall avow for Part of the Rent, and such Avowry shall be good and maintainable.

Note well these Cases and Judgments, for they are given upon great Reason and Consideration, for otherwise great Inconvenience would ensue, if by Severance of Part of the Reversion, the entire Rent should be lost: And the Opinion reported by Sergeant Bendloe, in Hill. 6. and 7 Eliz. to the contrary, nihil valet (seil.) That the Rent in such Case shall be lost, because that no Contract can be apportioned, which is not Law: For, 1. A Rent reserved upon a Lease for Years is more than a Contract, for it is a Rent-service. 2. It is incident to the Reversion which is severable. 3. Upon Recovery of Part in Waste, or upon Entry in Part for a Forfeiture, or upon Surrender of Part, the Rent is apportionable.

Note; It was adjudged 19 Eliz. in the King's Bench, That where one obtained a Prohibition De Modo Decimandi, by Payment of a certain Sum of Money at a certain Day; upon which Issue was taken, and the Jury found the Modus Decimandi by Payment of the said Sum, but that it had been paid at another Day: And the Case was well debated, and at the last it was resolved, That no Confutlation should be granted; for although that the Day of Payment be mistaken, yet it appeareth to the Court, that no Tithes in Kind were due, for which the Suit
PART. XIII. Ejection de duabus partibus, &c.

Suit was in the Spiritual Court: And the Trial of the Custom De Moto Decimandi belongeth to the Common Law, and a Consultation shall not be granted where the Spiritual Court hath not Jurisdiction of the Cause: Tanfield, Chief Baron, hath the Report of this Case.

(27) Ejection de duabus partibus, &c.

Mich. 7 Jac. 1.

In an Ejection Firma, the Writ and Declaration were of two Parts of certain Lands in Hertford and Windham in Norfolk, and doth not say in two Parts, in three Parts to be divided; and yet it was good as well in the Declaration as in the Writ: For without Question the Writ is good, de duabus partibus, generally, and so is the Register. See 4 E. 3. 162. 2 E. 3. 31. 2 Ass. 1. 10 Ass. 12. 19 E. 3. 511. 11 Ass. 21. 11 E. 3. Bre. 478. 9 H. 6. 39. 17 E. 4. 48. 19 E. 3. Bre. 244. And upon all the said Books it appeareth, that by the Intendment and Construction of the Law, when any Parts are demanded without shewing in how many Parts the whole is divided, that there remains but one Part not divided: As if two Parts are demanded, there remains a third Part; and when three Parts are divided, there remains a fourth Part, &c. But when any Demand is of other Parts in other Form, there he ought to shew the same Specially: As if one demandeth three Parts of five Parts, or four Parts of the six, &c. And according to this Difference it was so resolved in Jorden's Case in the King's Bench: And accordingly Judgment was given in this Term in the Case at Bar.
(28) **Mutton's Case.**

*Mich. 7 Jac. 1.*

*In the Common Pleas.*

An Action upon the Cafe was brought against Mutton; for calling of the Plaintiff, Sorcerer and Inchanter, who pleaded Not Guilty; and it was found against him to the Damages of 6 d. And it was holden by the whole Court in the Common Pleas, that no Action lieth for the said Words: For Sortilegium est rei futuri per fortes exploratio: Et Sortilegus sive Sortilegista est qui per fortès futura prænuntiat. Inchantry est verbis aut rebus adjunctis aliqua præter naturam molii: Whereof the Poeth faith,

*Carminibus Circes socios mutavit Ulyss.*

See 45 E. 3. 17. One was taken in Southwark with the Head and Visage of a dead Man, and with a Book of Sorcery in his Mail: And he was brought into the King's Bench before Justice, but no Indictment was framed against him: For which the Clerks made him swear, that he should never after commit any Sorcery; and he was sent to Prison: And the Head and the Book were burned at Tuthill, at the Charges of the Prisoner. And the ancient Law was, as it appeared by Britton, that those who were attainted of Sorcery were burned: But the Law is not such at this Day; but he who is convicted of such Imposture and Deceit shall be fined and imprisoned. And it was said, that it was adjudged, That if one calleth another Witch, that an Action will not lie, for it is too general: Et dicitur Latina Vesnica: But if one faith, She is a Witch, and hath bewitched such a one to Death, an Action upon the Cafe lieth, if in Truth he be dead. Conjunction is derived of these Words, Con and juro: Et propris dicitur quando multi in alicujus pernicium jurat: And in the Statute of 5 Eliz. cap. 16. it is taken for Invocation of
PART XIII. Sir Allen Percy's Case.

of any evil and wicked Spirits, i.e. est conjurare verbis conceptis alios malos & iniquos spiritus; the same is made Felony: But Witchcraft, Incantation, Charm or Sorcery, is not Felony, if by them any Person be not killed or dieth. So that Conjunction est verbis conceptis compellere malos & iniquos spiritus aliquid facere vel dicere, &c. But a Witch, who works any Thing by any evil Spirit, doth not make any Conjunction or Invocation by any powerful Names of the Devil, but the wicked Spirit comes to her familiarly, and therefore it is called a Familiar: But if a Man be called a Conjurer, or a Witch, he shall not have any Action upon the Case, unless that he faith, That he is a Conjurer of the Devil, or of any Evil or Wicked Spirit: Or, that one is a Witch, and that he hath bewitched any one to Death, as is before saic.

And note, That the first Statute which was made against Conjunction, Witchcraft, Sorcery and Incantation, was the Act of 33 H. 8. c. 8. and by it they were made Felony in certain Cases special, but that Act was repealed by the Statute of 1 E. 6. cap. 12. and it seems all the former Statutes against Witchcraft are now repealed.

(29) Sir Allen Percy's Case.

* Mich. 7 Jac. i. Page [60.]

In the Court of Wards.

SIR John Fitz and Bridget his Wife, being Tenants for Life of a Tenement called Ramsham, the Remainder to Sir John Fitz in Tail, the Remainder to Bridget in Tail, the Reversion to Sir John and his Heirs: Sir John and Bridget his Wife, by Indenture demised the said Tenement to Wm. Sprey for divers Years yet to come, except all Trees of Timber, Oak and Ash, and Liberry to carry them away, rendering Rent; and afterwards Sir John died, having Issue Mary his Daughter, now the Wife of Sir Allen Percy, Kn. and afterwards the said Wm. Sprey demised the same Tenement to Sir Allen for 7 Years: The Question was, Whether Sir Allen, having the immediate Inheritance in the Right of his Wife, expectant upon the Estate
Sir Allen Percy's Cafe.  Part XIII.

Estate for the Life of Bridget, and also having the Possession by the said Demise, might cut down the Timber-Trees, Oaks, and Alhes: And it was objected, that he might well do it: For it was resolved in Saunders's Case, in the fifth Part of my Reports, fol. 12. That if Leesee for Years, or for Life, assigns over his Term or Estate unto another, excepting the Mines, or the Trees, or the Clay, &c. that the Exception is void, because that he cannot except that which he cannot lawfully take, and which doth not belong unto him by the Law. But it was anwiered and resolved by the two Chief Justices, and the Chief Baron, That in the Cafe at Bar, the Exception was good without Question, because that he who hath the Inheritance, joins in the Lease with the Leesee for Life. And it was further resolved, That if Tenant for Life leaves the Trees, the same is lawfully and wisely done: For otherwise, if the Leesee or Assignee cutteth down the Trees, the Tenant for Life should be punished in Waste, and should not have any Remedy against the Leesee for Years: And also if he demiseth the Land without Exception, he who hath the immediate Estate of Inheritance, by the Assent of the Leesee, may cut down all the Timber-Trees, which when the Term ended, all should be wasted, and then the Tenant for Life should not have the Boots which the Law giveth him, nor the Pawnage and other Profits of the said Trees, which he lawfully might take: But when Tenant for Life upon his Leesee excepteth the Trees, if they be cut down by the Leesee, the Leesee or Assignee shall have an Action of Trespass, Quare vi & armis, and shall recover Damages according to his Los.

And this Case not like the said Case of Saunders, which was affirmed to be good Law; for there the Leesee assigned over his whole Interest, and therefore could not except the Mines, Trees, and Clay, &c. which he had not but as Things annexed to the Land: And therefore he could not have them when he had parted with his whole Interest, nor he could not take them either for Reparations or otherwise: But when Tenant for Life leaves for Years, except the Timber-Trees, the same remaineth yet annexed to his Freehold, and he may command the Leesee to take them for necessary Reparations of the Houses. And in the said Case of Saunders, a Judgment is cited between Fister and Miles, Plaintiffs, and Spencer and Board, Defendants, That where Leesee for Years assigns over his Term, except the Trees, that Waste in such Case shall be brought against the Assignee, but in this Case without Question Waste lieth.
PART XIII. HULME's Case.

The action is brought against the tenant for life, and so there is a difference, &c.

(30) HULME's Case.

Mich. 7 Jac. 1.

In the Court of Wards.

The King (in the Right of his Dutchy of Lancaster) and Lord: Richard Hulme (seized of the Manor of Male in the County of Lancaster, holden of the King as of his Dutchy by Knight's Service) Mefne: And Rob. Male (seized of Lands in Male, holden of the Mefne as of his said Manor by Knight's Service) Tenant. Rich. Hulme died; after whose death, 31 H. 8. it was found, that he died seized of the said Mefnalty, and that the same descended to Edward his Son and Heir within Age, and found the Tenure aforesaid, &c. And during the Time that he was within Age, Rob. Male the Tenant died; after which, anno 35 H. 8. it was found by Office, That Robert Male died seized of the said Tenancy perpavail, and that the same descended to Richard his Son and Heir within Age, and that the said Tenancy was holden of the King, as of his said Dutchy, by Knight's Service; whereas in Truth the same was holden of Edward Hulme, then in Ward of the King, as of his Mefnalty: For which the King seized the Ward of the Heir of the Tenant. And afterwards, anno quarto Jacobi Regis that now is, after the Death of Richard Male, who was lineal Heir of the said Robert Male, by another Office it was found, That the said Richard died seized of the said Tenancy, and held the same of the King, as of his Dutchy, by Knight's Service, his Heir within Age: Whereupon Richard Hulme, Cousin and Heir of the said Richard Hulme, had preferred a Bill to be admitted to his Traverse of the said Office found in 4 Jac. Regis: And the Question was, Whether the Office found in 35 H. 8. be any Estoppel to the said Hulme, to traverse the said last Office? Or if that the said Hulme should be driven first to traverse the Office of 35 H. 8.

And
And it was objected, That he ought first to traverse the Office of 35 H.8, as in the first Case of 26 E. 3, 65. That if two Fines be levied of Lands in antient Demeline, the Lord of whom the Land is holden ought to have a Writ of Deceit to reverse the first Fine; and in that the second Fine shall not be a Bar: And that the first Office shall stand as long as the same remains in Force.

To which it was answered and resolved by the two Chief Justices and the Chief Baron, and the Court of Wards, That the finding of an Office is not any Estoppel, for that is but an Enquest of Office, and the Party grieved shall have a Traverse to it, as it hath been confessed, and therefore without Question the same is no Estoppel; but when an Office is found falsly, that Land is holden of the King by Knights Service in capite, or of the King himself in Scoage, if the Heir sue a general Livery, now it is holden in 46 E. 3. 12. by Mowbray and Persey, that he shall not after add, that the Land is not holden of the King; but there is not any Estoppel to the Heir himself who sue the Livery, and shall not conclude his Heir: For so faith Mowbray himself expressly in 44 As. pl. 35. That an Estoppel by suing of Livery shall estop only the Heir himself during his Life: And in 1 H. 4. 6. b. there the Case is put of express Confession and Suing of Livery by the Issue in Tail upon a false Office: And there it is holden, that the Jurors upon a new Dietium extremum, after the Death of such special Heir, are at large, according to their Conscience, to find that the Land is not holden, &c. for they are sworn ad veritatem dicendum: And there Finding is called veredictum, quasi dictum veritatis; which Reason also shall serve, when the Heir in Fee-Simple sue Livery upon a false Office, and the Jurors after his Death ought to find according to the Truth: So it is said 33 H.6.7. by Laizon, that if two Sistors be found Heirs, whereof the one is a Baffard, if they join in a Suit of Livery, the which joineth with the Baffard in the Livery, shall not allledge Baffardy in the other: But there is no Book that faith, that the Estoppel shall endure longer than during his Life: And when Livery is sued by a special Heir, the Force and Effect of the Livery is executed and determined by his Death, and by that the Estoppel is expired with the Death of the Heir; but that is to be intended of a general Livery: But a special Livery shall not conclude one: But as it is expressed, the Words of a general Livery are; when the Heir is found of full Age: Rex Esclactori, &c. Scias quod ceminus homagium J. filii & haredis B. deumibus terris & senementis qua idem B. Eater tenuit
De nobis in capite, die quo obiit, & eis terras & tenementa illa reddidimus, ideo tibi praecipimus, &c. And when the Heir was in Ward, at his full Age, the Writ of Livery shall say, Rex, &c. Quia J. filius & hæres B. defuncti qui de nobis tenuit in capite, eam suam coram te suficienter probavit, &c. Ceperimus homagium ejus de omnibus terris & tenementis, quæ idem B. Pater suus tenuit de nobis in capite, die quo obiit, & eis terras & tenementa illa reddidimus, ideo tibi praecipimus, ut si pra, &c. Which Writ is the Suit of the Heir, and therefore although that all the Words of the Writ are the Words of the King, as all the Writs of the King are; and although that the Livery be general, de omnibus terris & tenementis de quibus B. pater J. tenuit de nobis in capite, die quo obiit, without direct Affirmation that any Manor in particular is holden in capite, and notwithstanding that the same is not at the Prosecution of the King's Writ, and no Judgment upon it; yet because the general Livery is founded upon the Office, and by the Office it was found, That divers Lands or Tenements were holden of the King in capite, for this Cause the Suing of the Writ shall conclude the Heir only which sueth the Livery; and after his Death the Jurors in a new Writ of Diem clausit extremum, are at large, as before is said. And if that Jury find falsely in a Tenure of the King also, the Lord of whom the Land is holden may traverse that Office: Or if Land be holden of the King, &c. in Socage, the Heir may traverse the last Office, for by that he is grieved only; and he shall not be driven to traverse the first Office: And when the Father sueth Livery, and dieth, the Conclusion is executed and past, as before is said. And note, that there is a special Livery, but that proceeds of the Grace of the King, and is not the Suit of the Heir, and the King may grant it either at full Age, before atae probanda, &c. or to the Heir within Age, as it appeareth in 21. E. 3. 40. And that is general, and shall not comprehend any Tenure, as the general Livery doth, and therefore it is not any * Eitoppel without Question. And at the Common Law, a special Livery might have been granted before any Office found; But now by the Statute of 33 H. 8. cap. 22. it is provided, That no Person or Persons, having Lands or Tenements above the yearly Value of 20l. shall have or sue any Livery, before Inquisition or Office found, before the Escheator or other Commission: But by an express Clause in the same Act, Livery may be made of the Lands and Tenements comprised or not comprised in such Office; so that if Office be found of any Parcel, it is sufficient: And if the Land in the Office doth exceed 20l. then the
the Heir may sue a general Livery after Office thereof found, as is aforesaid: But if the Land doth not exceed 5l. by the Year, then a general Livery may be sued without Office by Warrant of the Master of the Wards, &c. See 23 Eliz. Dyer 177. That the Queen ex debito jus titiae is not bound at this Day, after the said Act of 33 Hen. 8. to grant a special Livery; but it is at her Election to grant a special Livery, or to drive the Heir to a general Livery.

It was also resolved in this Case, That the Office of 35 Hen. 8. was not traversable, for his own Traverse shall prove, that the King had Cause to have Wardship by Reason of Ward: And when the King cometh to the Possession by a false Office, or other Means, upon a Pretence of Right, where in Truth he hath no Right, if it appeareth that the King hath any other Right or Interest to have the Land there, none shall traverse the Office or Title of the King, because that the Judgment in the Traverse is, Ideo confera tuum est, quod manus Domini Regis a possessione amoviamur, &c. which ought not to be, when it appeareth to the Court, that the King hath Right or Interest to have the Land, and to hold the same accordingly. See 4 Hen. 4. fol. 33. in the Earl of Kent's Case, &c.

(31) Parliament.

Mich. 7 Jac. 1.

NOTE; the Privilege, Order, or Custom of Parliament, either of the Upper House, or of the House of Commons, belongs to the Determination or Decision only of the Court of Parliament: And this appeareth by two notable Precedents.

The one at the Parliament helden in the 27th Year of King Henry the Sixth, there was a Controversy moved in the Upper House between the Earls of Arundel and of Devonshire, for their Seats, Places, and Preeminences of the same, to be had in the King's Presence, as well in the High Court of Parliament, as in his Councils, and elsewhere: The King, by the Advice of the Lords Spiritual and Temporal, committed the same to certain Lords of Parliament, who for that they had no Leisure to examine the
the same, it pleased the King, by the Advice of the Lords at his Parliament, anno 27 of his Reign, That the Judges of the Land should hear, see, and examine the Title, &c. and to report what they conceive herein: The Judges made Report as followeth; That this Matter, (viz. of Honour and Precedency between the two Earls, Lords of Parliament) was a Matter of Parliament, and belongs to the King’s Highness, and the Lords Spiritual and Temporal in Parliament, by them to be decided and determined; yet being thereto so commanded, they shewed what they found upon Examination, and their Opinions thereupon.

Another Parliament in 31 H.6. which Parliament began the 6th * of March, and after it had continued some Time, it was prorogued until the 14th of February: And afterwards in Michaelmas Term, anno 31 Hen.6. Thomas Thorp, the Speaker of the Commons House, at the Suit of the Duke of Buckingham, was condemned in the Exchequer in 1000l. Damages for a Trespass done to him: The 14th of February, the Commons moved in the Upper House, That their Speaker might be set at Liberty, to exercise his Place: The Lords refer this Case to the Judges; and Fortescue and Priot, the two Chief Justices, in the Name of all the Judges, after said Consideration and mature De­liberation had amongst them, answered and said, That they ought not to answer to this Question, for it hath not been used aforetime, That the Justices should in any wise determine the Privilege of this High Court of Parliament; for it is so high and mighty in its Nature, that it may make Laws; and that, that is Law, it may make no Law: And the Determination and Knowledge of that Privilege belongeth to the Lords of the Parliament, and not to the Justices: But as for Proceedings in the lower Courts in such Cases, they delivered their Opinions. And in 12 E.4. 2. in Sir John Pafton’s Case, it is helden, that every Court shall determine and decide the Privileges and Customs of the same Court, &c.

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PART XIII.

(32) Heyward and Sir John Whitbroke's Case.

Hill. 7 Jac. 1.

In the Star-Chamber.

In the Case between Heyward and Sir John Whitbroke in the Star-Chamber, the Defendant was convicted of divers Misdemeanors, and Fine and Imprisonment imposed upon him, and Damages to the Plaintiff: And it was moved that a special Process might be made out of that Court to levy the said Damages upon the Goods and Lands of the Defendant: And it was referred to the two Chief Justices, whether any such Process might be made? Who this Term moved the Case to the Chief Baron, and to the other Judges and Barons; and it was unanimously resolved by them, That no such Process could or ought to be made, neither for the Damages nor for the Costs given to the Plaintiff: For the Court hath not any Power or Jurisdiction to do it, but only to keep the Defendant in Prison until he pay them. For, for the Fine due to the King, the Court of Star-Chamber cannot make forth any Process for levying of the same, but they esjur the same into the Exchequer, which hath Power by the Law to write forth Process to the Sheriff to levy the same. But if a Man be convicted in the Star-Chamber for Forgery upon the Statute of 5 Eliz, that in that Case, for the double Costs and Damages, an English Writ shall be made, directed to the Sheriff, &c. reciting the Conviction, and the Statute for levying of the said Costs and Damages of the Goods and Chattels, and Profits of the Lands of the Defendant, and to bring in the Money into the Court of Star-Chamber, and the Writ shall be sealed with the Great Seal, and the Test of the King: For the Statute of 5 Eliz. hath given Jurisdiction to the Court of Star-Chamber, and Power to give Judgment (amongst other Things) of the Costs and Damages, which being given by Force of the said Act of Parliament, by Consequence the Court by the Act hath Power to grant Execution; Quia quando aliquid conceditur, ei omnibus concedi videntur per quae deveniur ad illud. And it was resolved,
PART XIII. Morfe and Webb's Case.

...the Giving of the Damages to the Plaintiff was begun of late Times. And although that one or two Precedents were shewed against this Resolution, they being against the Law, the Judges had not any Regard to them. The like Resolution was in the Case of Langdale in that Court.

(33) Morfe and Webb's Case.

Hill. 7 Jacobi r.

In the Common Pleas.

In a Replevin brought by John Morse against Robert Webb of the Taking of two Oxen the last Day of November in the third Year of the Reign of the King that now is, in a Place called the Downfield in Luddington in the County of Worcester: The Defendant, as Bailiff to William Sherington, Gent. made Conufance, because that the Place where, is an Acre of Land which is the Freehold of the said William Sherington, and for Damage-seafants, &c. In Bar of which Avowry the Plaintiff said, That the said Acre of Land is Parcel of Downfield, and that he himself, at the Time, and before the Taking, &c. was and yet is seifed of two Yard-Lands, with the Appurtenances, in Luddington aforesaid: And that he, and all those whose Estate he hath in the said two Yards of Land, Time out of Mind, &c. have used to have Common of Pasture per totum contentum of the said Place called the Downfield, whereof, &c. for four Beasts called Rother-Beasts, and two Beasts called Horfe-Beasts, and for sixty Sheep, at certain Times and Seasons of the Year, as to the said two Yard-Lands, with the Appurtenances appertaining: And that he put in the said two Oxen to use his Common, &c. And the Defendant did maintain his Avowry, and traverfed the Prescription, upon which the Parties were at Issue, and the Jury gave a Special Verdict, That before the Taking, one Richard Morse, Father of the said John Morse, and now Plaintiff, whose Heir he is, was seifed of the said two Yard-Lands, and that the said Richard Morse, &c. had H
the Common of Pasture for the said Cattle, \textit{per totem conten
tum} of the said Downfield, in Manner and Form as before is allledged; and so seised, the said Richard Morse, in the twentith Year of Queen Elizabeth, demised to William Thomas and John Fisher divers Parcels of the said two Yard-Lands, to which, \&c. \textit{viz.} the four Butts of Arable, with the Common and Intercommon to the fame belonging, for the Term of four hundred Years; by Force of which the said William Thomas and John Fisher entered, and were possessed: And the said Richard so seised, died thereof seised; by which the said two Yard-Lands in Possession and Reversion descended to the said Richard the now Plaintiff: And if upon the whole Matter, the said Richard now hath, and at the Time of the Taking, \&c. had Common of Pasture, \&c. for four Beasts called Rother-Beasts, and two Beasts called Horse-Beasts, and for sixty Sheep, \&c. as to the said two Yards of Land, with the Appurte
nces belonging, in Law or not, the Jury prayed the Advice of the Court.

\textbf{Note,} That this Plea began \textit{Trin. 5 Jacobi, Rot. 1405.}

And upon *Argument at the Bar, and at the Bench, it was resolved by the whole Court, that it ought to be found against the Defendant, who had traversed the Prescription: For altho' that all the two Yard-Lands had been demised for Years, yet the Prescription made by the Plaintiff is true; for he is seised in his Demesne as of Fee of the Freehold of the two Yards of Land, to which, \&c. And without Question the Inheritance and Freehold of the Common, after the Years determined, is appendant to the said two Yard-Lands; and therefore clearly the Issue is to be found against the Defendant: But if he would take Advantage of the Matter in Law, he ought (confessing the Common) to have pleaded the said Lease; but when he traverseth the Prescription, he cannot give the same in Evidence.

\textit{2.} It was resolved, That if the said Lease had been pleaded, that the Common, during the Lease for Years, is not suspended or discharged; for each of them shall have Common rateable, and in such Manner, that the Land in which, \&c. shall not be furcharged: And if so small a Parcel be demised, which will not keep one Ox, nor a Sheep, then the whole Common shall remain with the Lesser, so always as the Land in which, be not furcharged.

\textit{3.} It was resolvd, That Common appendant unto Land, is as much as to say, Common for Cattle levant and couchant upon the Land in which, \&c. So that by the Severance of Part of the Land to which, \&c. no Prejudice can come to the Terretenant in which, \&c.

\textit{4.} See
PART XIII. Hughes and Crowther's Case.

4. See the Case of in the fourth Part of my Reports, fo... was affirmed for good Law: And there is no Difference, when the Prescription is for Cattle levant and couchant, and when for a certain Number of Cattle levant and couchant: But when the Prescription is for Common appurtenant to Land without, (alleging that it is for Cattle levant and couchant) there a certain Number of the Cattle ought to be expressed, which are intended by the Law to be levant and couchant.

(34) Hughes and Crowther's Case.

Hill. 7 Jac. 1.

In the Common Pleas.

In a Replevin between Robert Hughes Plaintiff, and Richard Crowther Defendant, which began Trin. 6 Jacobi, Rot. 2220. The Case was, That Charles Fox was feized of six Acres of Meadow in Redstmon, in the County of Salop, in Fee, and to Octob. 9 Eliz. leased the same to Charles Hibbens and Arthur Hibbens for sixty Years, if the aforesaid Charles Hibbens and Arthur Hibbens should so long live, and afterwards Charles died; and if the Lease determine by his Death, was the Question; and it was adjudged, That by his Death the Lease was determined; for the Life of a Man is meer collateral unto the Estate for Years: Otherwife it is, if a Lease be made to one for the Lives of J. S. and J. N. there the Freehold doth not determine by the Death of one of them, for the Reasons and Causes given in the Case of Brudnel, in the fifth Part of my Reports, fol. 9. Which Case was affirmed to be good Law by the whole Court.

H 2 (35) Heydor
Richard Heydon brought an Action of Trespass against Michael Smith and others, of Breaking of his Close called the Moor in Ugley in the County of Essex, the 25th Day of June in the fifth Year of the King, & quondam arborum suam ad valentinam 40. ibidem nuper crescent. succiderunt: The Defendants said, that the Close is, and at the Time of the Trespass was the Freehold of Sir John Leventrop, Knight, &c: and that the said Oak was a Timber-Tree of the Growth of thirty Years and more, and justifies the cutting down of the Tree by his Commandment: The Plaintiff replieth and faith, That the said Close, and a Houfe and twenty-eight Acres of Land in Ugley, are Copyhold, and Parcel of the said Manor of Ugley, &c. of which Manor Edward Leventrop, Esquire, Father of the said Sir John Leventrop, was seised in Fee, and granted the said Houfe, Lands and Close to the said Richard Heydon and his Heirs by the Rod, at the Will of the Lord, according to the Custum of the said Manor: And that within the said Manor there is such a Custum, Quod quilibet tenens Cuslomar. ejusdem Manerii fibi, & heredibus suis, ad voluntatem Domini, &c. a 100 temporis super pradicto usus fuis, & conjuravit ad ejus libitum amputare ramos omnium arborum, called Pollengers, or Hufbords, super terris & tenem. suis Cuslomar. crescent. pro ligno combustibili, ad like libitum suum applicand. & in pradicto Mfoggiio contend. and also cut down and take at their Pleasure all Manner of Trees called Pollengers or Hufbords, and all other Timber-Trees, super ejusdem Cuslomar. crecent. for the Reparation of their Houfes built upon the said Lands and Cuslomary Tenements; and also for Ploughbote and Cartbote, and that all Trees called Pollengers or Hufbords, and all other Trees at the Time of the Trespass aforesaid, or hitherto growing upon the aforesaid
PART XIII. Heydon and Smith's Cafe.

Said lands and tenements customary of the said Richard Heydon, were not sufficient, nor did serve for the necessary uses aforesaid: And that the said Richard Heydon, from the time of the said grant made unto him, had maintained and preserved all trees, &c. growing upon the said lands and tenements to him granted: And that after the death of the said Edward Leventhorp, the said manor descended to the said Sir John Leventhorp: And that at the time of the trespass the aforesaid messuage of the said Richard Heydon, was in decay, &c. pro ligno combustibili, &c. in præ dicto messuagio comburendi (which ought to be in the messuage of the plaintiff, for no other messuage is mention'd before) which is absurd and repugnant, that every customary tenant should burn his fuel in the plaintiff's house: But that branch of the custom doth not extend unto this case: For the first part of the custom, which concerneth the cutting down of the trees, concerneth the point in question; and so the first part of the custom is not material.

It was objected, That the pleading, that the messuage of the plaintiff was in decay, &c. pro ligno combustibili, &c. in prædicto messuagio comburendi, was too general: For the plaintiff ought to have shewed in particular, in what the messuage was in decay: As the book is in 10 E. 4. He who juistifieth for housebote, &c. ought to shew that the house hath cause to be repaired, &c.

To which it was answered by Coke Chief Justice, That the said book proveth, the pleading in the case at bar was certain enough, fei. Quod messuagium præd' egbat necessariis reparacionibus in maremio ejusdem, without shewing the precise certainty: And therewith agrees 7 H. 6. 38 and 34 H. 6. 17.

2. It was also answered and resolved, That in this case without question it needs not to allledge more certainty, for here the copyholder, according to the custom, doth not take it, but the lord of the manor doth cut down the tree, and carrieth it away where the rest was not sufficient, and so preventeth the copyholder of his benefit, and therefore he needeth.
Heydon and Smith's Cafe. Part XII.

needeth not to shew any Decay at all, but only for increasing of the Damages, for the Lord doth the Wrong when he cutteth down the Tree which should serve for Reparations when need should be.

3. It was resolved, That of Common Right, as a Thing incident to the Grant, the Copyholder may take as Houfbote, Hedgbote and Ploughbote upon his Copyhold: Quia concesso uno concedatur omnia sine quibus id confiere non poeta: Et quando aliquis aliquid concedit, concedere vide tur & id haec quo res ipfa esse non potest: And thertewith agreeeth 9 H. 4. Waffe 59. But the same may be restrained by Custom, feil. That the Copyholder shall not take it, unless by Assignment of the Lord or his Bailiff, &c.

4. It was resolved, That the Lord cannot take all the Timber-Trees, but he ought to leave sufficient for the Reparation of the customary Houses, and for Ploughbote, &c. for otherwise great Depopulation will follow; feil. Ruin of the Houses, and Decay of Tillage and Husbandry. And it is to be understood, That Bote being an antient Saxon Word, hath two Significations; the one compensatio criminis, as Erighthote, which is as much as to say, to be discharged from giving amends for the Breach of the Peace; Manbote, to be discharged of Amends for the Death of Man: And secondly, in the later Signification, (feil.) for Reparation, as was Bridgbote, Burghbome, Cattlebote, Parkbote, &c. feil. Reparation of a Bridge, of a Borough, of a Castle, of a Park, &c. And it is to be known, that Boté and Eslovers are all one: Eslovers are derived of this French Word, Esloer, i.e. souere; i.e. to keep warm, to cherish, to sustain, to defend: And there are four Kinds of Eslovers, (feil.) ardendi, arand; confrueandi, & claudendi. (feil.) Firebote, Houfbote, Ploughbote, and Hedgbote.

5. It was resolved, That the Copyholder shall have a general Action of Trefpafs against the Lord, Quare clauum fregit, & arborem* fiam, &c. succidit; for Custom hath fixed it to his Estate against the Lord: And the Copyholder in this Cafe hath as great an Interest in the Timber-Trees, as he hath in his Messuage which he holdeth by Copy; And if the Lord breaketh or destroyeth the House, without Quection the Copyholder shall have an Action of Trefpafs against his Lord, Quare Domnum fregit, and by the fame Reason for the Timber-Trees which are annex'd to the Land, and which he may take for the Reparation of his Copyhold Messuage, and without which the Messuage cannot stand. Trin. 40 Eliz. Rot. 37. in the King's Bench.
ParT XIII. Heydon and Smith's Cafe.

Bench, between Stebbing and Grosvenor, the Custom of the Manor of Netherhall in the County of Suffolk was, that every Copyholder might lop the Pollengers upon his Copyhold pro signo combustibilii, &c. And the Lord of the Manor cut down the Pollengers, being upon the Plaintiff's Copyhold, upon which he brought his Action upon the Cafe, because that the Lops of the Trees in such Cafe did belong to the Copyholder, and they were taken by the Lord. See Taylor's Cafe, in the fourth Part of my Reports 3o and 31. and see 5 H. 4. 2. Guardian in Knight-Service, who hath Custodiam terre, shall have an Action of Trespass for cutting down the Trees against the Heir who hath the Inheritance. Vide 2 H. 4. 12. A Copyholder brought an Action of Trespass, quare clausum fregit, & arbores succidit: And see 2 E. 4. 15. A Servant who is commanded to carry Goods to such a Place, shall have an Action of Trespass or Appeal. 1 H. 6. 4. 7 H. 4. 15. 19 H. 6. 34. 11 H. 4. 28. If after taking the Goods, the Owner hath his Goods again, yet he shall have a general Action of Trespass, and upon the Evidence the Damages shall be mitigated: So is the better Opinion in 11 H. 4. 23. That he who hath a special Property of the Goods at a certain Time, shall have a general Action of Trespass against him who hath the general Property, and upon the Evidence Damages shall be mitigated; but clearly, the Bailee, or he who hath a special Property, shall have a general Action of Trespass against a Stranger, and shall recover all in Damages, because that he is chargeable over. See 21 H. 7. 14. b. acc. And it is holden in 4 H. 7. 3. That Tenant at Sufferance shall have an Action of Trespass in Respect of the Possession, and if the Defendant plead Not guilty, but he cannot make Title, 30 H. 6. Trespass 10. 15 H. 7. 2. the King, who hath the Profits of the Land by Outlawry, shall have an Action of Trespass, or take Goods Damage-feastants. 35 H. 6. 24. 30 H. 6. Tresp. 10, &c. Tenant at Will shall have an Action of Trespass, 21 H. 7. 15. and 11 H. 4. 23. If a Man bail Goods which are taken out of his Possession, if the Bailee recover in Trespass, the same shall be a good Bar to the Bailee, 5 H. 4. 2. In a Writ of Waffle brought against Tenant for Life, and affigned the Waffle in cutting down of Trees; the Defendant pleaded in Bar, that the Plaintiff himself cut them: And Culpeper, the Serjeant of the Plaintiff, objected against it, that it should be no Plea, because the Defendant had not any Thing in the Freehold, no more than a meer Stranger; and if a Stranger had cut down the same Trees, he should be chargeable in the Waffle.
Also in this Case, we should be at a Mischief if we
should not recover against him; for if at another Time he
bringeth an Action of Trespass against us, he shall recover
Damages against us for the Cutting, id est, for the Value
of the Trees: And yet it was holden by the Court, that
the same was a good Bar: And it was said by the Court
that the Plaintiff was not at any Mischief in this Case:
For inasmuch as the Defendant shall have Advantage
now to discharge himself of Waste against the Plaintiff,
upon this Matter he shall be barred for ever of his Action of
Trespass, 

sil. to recover the Value of Trees, which
was the Mischief objected by Culpeper: But without Question
he shall have an Action of Trespass, Quare clausum fregit,
for the Entry of the Lessor, and for the Cutting of the
Trees, but he shall not recover the Value of the Trees, be-
cause he is not chargeable over, but for the special Loss
which he hath, 

sil. for the Loss of the Pawnage, and of
the Shadow of the Trees, &c. See Fitz. Trespass ultimo,
in the Abridgment: And afterwards, the same Term,
Judgment was given on the principal Case for the Plain-
tiff.

(36) Parish-Clark.

Parish-Clark

Part XIII.

Pasch. 8 Jac. 1.

In the Common Pleas.

THE Parlihioners of St. Alphage in Canterbury, by Cu-

stom, ought to chuse the Parish-Clark, whom they
chuse accordingly: The Parson of the Parish, by Colour
of a new Canon made at the Convocation in the Year
of the King that now is (which is not of Force to
take away any Custom) drew the Clark before Doctor
Newman, Official of the Archbishops of Canterbury, to de-
prive him, upon the Point of the Right of Election, and
for other Causes; and upon that it was moved at the Bar
to have a Prohibition: And upon the Hearing of Doctor
Newman himself, and his Counsel, a Prohibition was grant-
ed by the whole Court, because the Party chosen is a
meat temporal Man, and the Means of chusing of him; secil. the Cuslom, is meer Temporal, so as the Official cannot deprive him; but upon Occasion the Parishioners might displace him; and this Office is like to the Office of a Church-warden, who, although they be chosen for two Years, yet for Cause they (the Parishioners) may displace them, as it is holden in 26 H. 8. 5. And altho' that the Execution of the Office concerneth Divine Service, yet the Office itself is meer Temporal. See 3 E. 3. Annuity 30. He who is Clerk of a Parish is removeable by the Parishioners. See 18 E. 2. 27. A Gift in Tail was made of the Serjeanty or Clerkship of the Church of Lincoln, and there adjudged, that the Office is Temporal, and shall not be tried in the Ecclesiastical Court, but in the King's Court: And it is to be known, that the Depredation of a Man of a temporal Office or Place, is a temporal Thing, upon which no Appeal lieth by the Statute of 25 H. 8. but an Affise, as in 4 Eliz. Dyer 209. The President of Magdalen-College in Oxford was deprived by the Bishop of Winchester their Visitor; he shall not have an Appeal to the Delegates, for the Depredation is Temporal, and not Spiritual; but he may have an Affise: And therewith agreeeth the Book of 8 Ass. Sirache's Case: But if a Dean of a Cathedral Church, of the Patronage of the King, be deprived before the Commissioners of the King, he may Appeal to the Delegates within the said Act of 25 H. 8. For a Deanery is a Spiritual Promotion, and not Temporal: And before the said Act, in such Case, the Appeal was to Rome immediately.

*(37) Prichard and Page [71]*

Hawkins's Case.


In the King's Bench.

John Prichard brought an Action upon the Case against Slander.

Robert Hawkins for slanderous Words published the last Day of August in the third Year of the King, viz. That Prichard, which serveth Mistress Shelley, did murder.
Difon and Bestney's Case.  Part XIII.

murder Joan Adams Child, (Quandam Isabellam Adams modo defuncti filiam cujusdam Johannis Adams, of Williamfire in the County of Gloucester, innuendo) upon which a Writ of Error was brought in the Exchequer-Chamber, upon a Judgment given for Prichard in the King's Bench: And the Judgment was reversed in Easter-Term, 7 Jacobi, because it doth not appear, that Isabel was dead at the Time of the Speaking the Words, for tunc defuncti ought to have been in the Place of modo defuncti.

(38) Difon and Bestney's Case.

Pasch. 8 Jacobi i.

In the King's Bench.

Humphrey Difon said of Nicholas Bestney, utter Barrister and Counsellor of Gray's-Inn, Thou a Barrister? Thou art no Barrister, thou art a Barrator; thou went put from the Bar, and thou darest not show thy self there. Thou study Law? Thou hast as much Wit as a Daws. Upon Not guilty pleaded, the Jury found for the Plaintiff, and assized Damages to 23 l. upon which Judgment was given: And in a Writ of Error in the Exchequer-Chamber, the Judgment was affirmed.

(39) Smith
(39) Smith and Hill's Case.

Pasch. 8 Jacobi. 1.

In the King's Bench.

Noah Smith brought an Action of Assault and Battery against Walter Hill in the King's Bench, which began Pasch. 7 Jacobi, Rot. '175, upon Not guilty pleaded, a Verdict and Judgment was for the Plaintiff, and 107l. assessed for Damages and Costs. In a Writ of Error brought in the Exchequer-Chamber, the Error was assigned in the Venire facias, which was certified by Writ of Certiorari: And upon the Writ, no Return was made upon the Back of the Writ, (which is call'd Returnum album;) and for that Cause, this Easter-Term the Judgment was reversed.

*(40) Westcot's Case. Page [72]

Trin. 7 Jacobi 1.

In the Court of Wards.

It was found by a Writ of Diem clausi extremum, after the Death of Roger Westcot, That the said Roger, the Day that he died, was seised of and in the Moiety of the Manor of Trewallard in his Demesne as of Fee, and of such his Estate died thereof seised: And that the Moiety of the said Manor, Anno 19 E. 3, was holden of the then Prince of Wales, as of his Castle of Trematon, Parcel of his Duxty of Cornwall, by Knights-Service, as it appeareth by a certain Exemplification of Trematon for the same Prince, made 9 Martii, 19 E. 3. And the Words of the Extent, were Williamus
Wescot's Case. Part XIII.

Williamus de Torr tenet duo feoda & dimid. militiae opud. Pick, Striklestone, & Trewalliard, per servitium militare, & reddit inde per annum 8 d. And it was resolved by the two Chief Justices, and the Chief Baron, That the Office concerning the Tenure was insufficient and void, because that the Verdict of a Jury ought to be full and direct, and not with a prout patet, for by that the whole Force of the Verdict relieth only upon the Extent, which if it be false, he who is grieved shall have no Remedy by any Traverse; for they have not found the Tenure indefinite which might be traversed, but with a prout patet, which makes the Office in that Point insufficient, and upon that a Melius inquirendum shall issue forth: And therewitht agreeth F. N. B. 255, that a Melius inquirendum shall be awarded in such a Case.
PART XIII.

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