1727

The Reports of Sir Edward Coke Kt., in English, Compleat in Thirteen Parts: The Thirteenth Part of the Reports of Sir Edward Coke Kt., Her Majesty's Attorney General

Sir Edward Coke

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 Third Edition corrected, with the Addition of References.

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

In the *SAVOY*:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edw. Sayer* Eſq;) to D. Browne, J. Walthoe, B. Lintot, R. Goſling, W. Mears, T. Ward, W. Innys, J. Osborn, T. Woodward, J. Pooke, F. Clay, T. Wotton, R. Williamſon and A. Ward.

M DCC XXVII.

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 *Caſſiodore* could affirm, *Neque enim dignus eſt a quopiam redargui qui noſtro judicio meretur abſolvi*, That no Man

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 hath 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 View ſome Remains of his, under his own Hand-writing, 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 valued: Though, in Reſpect of their Quantity and Number, the Reports 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 & evidentiam:* So theſe ſmall Parcels, being

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 Memories 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.

THE

THE NAMES OF THE CASES.

Mutton's

Mich.

Mich. An. 6 Jac. Regis.

In the Common Pleas.

Willowes's *Caſe.*

IN Treſpaſs brought by *Richard Stallon*, one of the Attornies of the Court againſt *Thomas Brayde* (which began in *Eaſter* Term, *An. 6 Jacobi Rot.* 1845.) for breaking of his Houſe and Cloſe 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 ſaith, that the Place where, was Parcel of the Manor of *Fenditton*, and demiſable, &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 ſaith, That well and true it is, that the Tenements in which, &c. were Parcel of the Manor, and demiſable, &c. And the Surrender and Admittance ſuch, *prout*, &c. But the ſaid *Thomas Brayde* further ſaith, 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 monetæ Angliæ ſuper quamlibet admiſſionem cujuſlibet perſonæ, ſive quarumcunque perſonarum tenent' vel tenent' per Dom' vel Dominos manerii prædict' ſive per Seneſchallum*, &c. *ad aliquas terras ſive tenementa Cuſtomaria Manerii prædict' ſecundum conſuetudinem Manerii illius debetur, & a tempore quo*, &c. *debit' fuit Dom'*, &c. *tempore ejuſdem admiſſionis pro fine pro admiſſione*

Copyhold Fine reaſonable. See Moor 622, 623. Cro. Eliz. 351, 379. Cro. Jac 196, or 256. Co. Lit. 59. b. 60. a. 4 Co. 27. b Cumberb. 44.

miſſione illa, quod idem Dominus, vel iidem Dom' prædict' vel Seneſchallus ſuus Curiæ ejuſdem Manerii pro tempore exiſten' uſus fuit, vel uſi fuerunt per totum tempus ſupradict' in plena curia Manerii illius pro admiſſione ejuſdem perſonæ, ſeu earundem perſonarum ſic facta aſſidere & appunctuare, *Anglice*, to aſſeſs and appoint *eandem rationabilem denariorum ſummam pro fine pro eadem admiſſione ſic ut præfertur facta, nec non ſuperinde eandem denariorum ſummam ſic aſſeſſam & appunctuatam, præfatæ perſonæ ſive perſonis ſic admiſſæ ſive admiſſis, ſolveret & ſolverent, &c. eidem Domino, &c. prædictam rationabilem denariorum ſummam pro fine, pro admiſſione ſua prædict' ſic aſſeſſam & appunctuat'*. And further ſaith, That the Steward of the ſaid Manor at a Court holden 1 *Octob.* in the fourth Year of the Reign of the King that now is, admitted the Plaintiff to the Tenements, in which, &c. and aſſeſſed and ſet a reaſonable Sum of Money, that is to ſay, five Pounds ſix Shillings, eight Pence, that is to ſay, *Valorem eorundem tenementorum per duos annos, & non ultra pro fine pro prædict' * admiſſione prædict' Ricard' 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 ſaith, that the ſaid *Willowes* and *Willowes*, afterwards, that is to ſay, the ſecond Day of *November*, in the fourth Year aforeſaid, at *Fenditton* 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 *Rich. 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 Willowes* all his Right, Eſtate, &c. of and in the Tenements aforeſaid in which, &c. The Plaintiff ſurjoineth, and ſaith, that the ſaid Sum of five Pounds, ſix Shillings, eight Pence, &c. was not *rationabilis finis*, as the ſaid *Thomas Brayde* above hath alledged, &c. upon which the Defendant doth demur in Law. And in this Caſe theſe Points were reſolved by *Coke* Chief Juſtice, *Walmſley*, *Warberton*, *Daniel*, and *Foſter*, Juſtices, 1. And principally, if the Fine aſſeſſed 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 Forfeiture: As if a Man bargains and aſſures Land to one and his Heirs, upon Condition that if he pay to the Bargainee or his Heirs, ten Pounds at ſuch a Place, that he

Page [2]

and

and his Heirs ſhall re-enter: In that Caſe, becauſe no Time is limited, the Bargainor ought to give Notice to the Bargainee, &c. when he will tender the Money, and he cannot tender it when he pleaſeth; 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 Bargainee in ſuch Caſe is not tied to ſtay always in the Place, &c. So in the Caſe 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 it, becauſe that the Fine was uncertain and arbitrable, as it was reſolved in *Hubbard's* Caſe in the fourth Part of my Reports amongſt the Copyhold Caſes. 2. It was reſolved, that although the Fine be 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. Where a Man avowed the Taking of ſixty Sheep for 3 *d.* 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 *Articuli ſuper Chartas* extends only where a grievous Diſtreſs is taken for the King's Debt. See *F. N. B.* 174. *a.* and 27 *Aſſ.* 51. 28 *Aſſ.* 50. 11 *H.* 4. 2. and 8 *H.* 4. 16, &c. *Non Capiatur gravis diſtrictio*, &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.

4 Co. 27. b.

Vid. F. N. B. 82 a. reaſonable Aid incertain until the Statute of Glanvil. lib 9. fol. 70. 14 H. 4. 9. by Hill. 14 H. 4. 1. a.

Page [3] See Glanvil lib. 9. cap. 8. Optime, B. rationabilibus auxiliis, i. a tacultates ut quod rationem

men moderat' ſecundum quantitatem feodorum ſuorum & ſecundum nemini gravidæ viderentur, &c. Vide Bracton 84. b. rationab' relev' 1. & menſuram non excedat; and ſee him there 86, &c. optime.

See *F. N. B.* 75. *Nullus liber homo amercietur niſi ſecundum quantitatem delicti.* And *gravis Redemptio non eſt exigenda.* And the Common Law gives an Aſſiſe of Sovient Diſtreſs, and Multiplication of Diſtreſs found, which is exceſſive, in Reſpect of the Multiplicity of Vexation. And therewith agreeth 27 *Aſſ.* 30, 51. *Non capiatur multiplex diſtrictio, F. N. B.* 178. *b.* And if Tenant in Dower hath Villains, or Tenants at Will who were rich, and ſhe by exceſſive Tallages and Fines makes them poor and Beggers, the ſame is adjudged Waſte. And therewith agreeth *F. N. B.* 61. *b.* 16 *H.* 3. Waſte 135, and 16 *H.* 7. And ſee the Regiſter judicial, *fol.* 25. *b.* Waſte lieth, *in exulando Henricum, & Hermanum, &c. Villeios, Quorum quilibet tenet unum Meſſuagium & unam virgat' terræ, in villinagio in prædict' villa de T.* by grievous and intolerable Diſtreſſes: 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 Lord limits the ſame in a reaſonable 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, although the Fine is incertain, yet it ought to be reaſonable; and ſo it appeareth by the ſaid Cuſtom which the Defendant hath alledged. And therefore 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 30. 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 ſaid 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 aſſeſſeth 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. & 50. 29 *H.* 8. 32, *&c.* So if the Diſtreſs be reaſonable, and the like, *&c.*

Vide 14 H. 4. 4. by Hil.

Bracton l. 2. fol. 51. Quam longum debet eſſe tempus non definitur in jure, ſed pendet ex juſticiariorum diſcretione.

It

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 æſtimari debet*; but when the Lord is compellable to admit him to whoſe Uſe the Surrender is, and when *Ceſtuy 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 a Rack, at fifty three Shillings by the Year.

5. It was reſolved, That the Surrejoinder is no more than what the * Law ſaith, 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. *Page* [4]

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 his Diſcretion, as it appeareth in 19 *H.* 6, 7. That if the Amerciament be outragious 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 Computum de exitibus Manerii.* And the Law requireth a Thing which is reaſonable, and no Exceſs or Extremity in any Thing.

II. *Mich.* 6 Jacobi.

In the Common Pleas.

Porter *and* Rocheſter's *Caſe.*

The Statute of 23 H. 8. c. 9. of citing out of Dioceſes. See 5 Co. 9. 12 Co. 77. Gibſon's Cod. 1046, & 1050. Poſt. 15, &c.

THIS Term *Lewis* and *Rocheſter* who dwelt in *Eſſex* within the Dioceſe of *London*, were ſued for Subſtraction of Tithes growing in *B.* 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 Subſtraction 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 others 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.

See the Proem to the Codex 20, 21. 2 Co. 44, 45, &c. 5 Co. 9, 16, 20. 12 Co. 63. 11 Co. 25. 12 Co. 63. Poſt. 14, 15, &c. * 5 Co. 23.

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 Commoniſts, 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 aliquam nefandam opinionem contrariam fidei Catholicæ ſeu determinationi Eccleſiæ ſacroſanctæ, nec de hujuſmodi ſecta, & nefandis Doctrinis 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 he

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 *Keysar's* Case in the * King's Bench, which you may see in my Book of Precedents: And so the Statutes of *Articuli Cleri*, *de Prohibitione regia*; *de circumspecte 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, *Pasch.* 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 Pluralities, and the having of two Benefices: *Common Laws and Dispensations*, see 7 *Eliz. Dyer* 233. The King's Courts shall adjudge of *Dispensations* and *Commendams*: See also 17 *Eliz. Dyer* 251. 14 *Eliz. Dyer* 312. 15 *Eliz. Dyer* 327. 18 *Eliz. Dyer* 352 & 347. 22 *Eliz. Dyer* 377. *Construction of the Statute cap.* 12. *Smith's* Case, concerning Subscription which is a meer Spiritual Thing. Also it appeareth by 32 *Eliz. Dyer* 377. That for want of Subscription the Church was always void by the said Act of 23 *El.* and yet the Civilians say, that there ought to be a *Sentence Declaratory*, altho' that the Act maketh it void.

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1, 2 Co: 44.45, &c. 5 Co. 9. 11 Co. 10, 14, 16.

Stat. 23 El. c. 1, 2. See Watson's Clergyman. 11, 50 & 52. 4 Inst. 323, 324.

2. It was resolved by *Coke* Chief Justice, *Warberton*, *Daniel* and *Foster* 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*.

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 Ordinance, &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*.

don. To which it was anſwered and reſolved, That the ſame was prohibited by the ſaid Act for divers Cauſes.

See Weſenbeck's OEconomies, fo. 264. Calepine in verbo.

1. As to all the ſaid Objections, one Anſwer makes an End of them all: For *Diœceſis dicitur diſtinctio, vel diviſio, ſive gubernatio, quæ diviſa, & diverſa eſt ab Eccleſia alterius Epiſcopatus, & Commiſſa Gubernatio in unius*; and is derived *a Di quod eſt duo, & electio, id eſt, ſeparatio, quia ſeparat duas Juriſdictiones*: So Dioceſe 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 Dioceſe 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 exempt Peculiar in *London*, cites one dwelling in *Eſſex*, he cites him out of the Dioceſe or Juriſdiction of the Biſhop of *London*, *ergo* he is cited out of the Dioceſe: And in the Clauſe of the Penalty of ten Pounds, it is ſaid, out of the Dioceſe or other Juriſdiction where the Party dwelleth, which agreeth with the Signification of Dioceſe before. And as to the Words, *Far off, &c.* they were put in the Preamble, to ſhew the great Miſchief which was before the Act: As the Stat. of 32 *H.* 8. *c.* 33. in the *Preamble*, it is Diſſeiſins with Strength, and the Body * of the Act ſaith, *ſuch Diſſeiſor*, yet the ſame extendeth to all Diſſeiſors, but Diſſeiſin with Force was the greateſt Miſchief, as it is holden in 4 & 5 *Eliz. Dyer* 219. So the Preamble of the Statute of *Weſt.* 2. *cap.* 5. is, Heirs in Ward, and the Body of the Act is, *Hujuſmodi præſentat.* as it is adjudged in 44 *E.* 3. 18. That an Infant who hath an Advowſon 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, recites in the *Preamble*, That divers Leſſees have paid divers great Incomes, *&c.* Be it enacted, That all ſuch Termors, *&c.* and yet the ſame extends to all Termors: and yet all theſe Caſes are ſtronger than the Caſe Bar, for there that Word (*ſuch*) in the Body of the Act referreth the ſame to the *Preamble*, which is not in our Caſe.

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2. The Body of the Act is, No manner of Perſon ſhall be henceforth cited before any Ordinary, *&c.* out of the Dioceſe or peculiar Juriſdiction where the Perſon ſhall be dwelling: And if he ſhall not be cited out of the Peculiar before any Ordinary, a *Fortiori*, the Court of Arches which ſits in a Peculiar, ſhall not cite others out of another Dioceſe:

ceſe: And theſe Words, *Out of the Dioceſe*, are to be meant out of the Dioceſe or Juriſdiction of the Ordinary, where he dwelleth; but the exempt Peculiar of the Archbiſhop is out of the Juriſdiction of the Biſhop of *London*, as S. *Martins*, and other Places in *London*, are not Part of *London*, although they are within the Circumference of it.

3. It is to be obſerved, That the Preamble reciting of the great Miſchief, recites expreſly, That the Subjects were called by compulſory Proceſs to appear in the Arches, Audience, and other high Courts of the Archbiſhoprick of this Realm; ſo as the Intention of the ſaid Act was to reduce the Archbiſhop to his proper Dioceſe 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 grieved 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 Dioceſe, 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 Dioceſe (theſe ſpecial Caſes excepted) mediate Judge, *ſcil.* by Appeal, &c.

4. Or in Caſe that the Biſhop of the Dioceſe, 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, *ſcil.* That every Suit (others than thoſe which are expreſſed) ought to be begun and proſecuted, before the Biſhop of the Dioceſe, 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 Inſtance to the Archbiſhop, Biſhop, or other inferior Ordinary or Judge, and that to be done in Caſes only where the Law Civil or Common doth affirm, &c. By which it fully appeareth, That the Act intendeth, That every Ordinary and * Eccleſiaſtical Judge ſhould have the Conuſance 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

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be judged where he and the Matter is beſt known; as alſo that he ſhall have many Appeals as his Adverſary in the higheſt Court at the firſt. Alſo there are two *Proviſoes* which explain it alſo, *ſcil.* That it ſhall be lawful to every Archbiſhop to cite any Perſon inhabiting in any Biſhop's Dioceſe within his Province, for Matter of Hereſy, (which were a vain *Proviſo*, if the Act did not extend to the Archbiſhop: But by that ſpecial *Proviſo* for Hereſy, it appeareth, that, for all Cauſes not excepted, is prohibited by the Act) then the Words of the *Proviſo* go further, if the Biſhop or other Ordinary immediately hereunto conſent, or if the ſame Biſhop or other immediate Ordinary or Judge do not his Duty in Puniſhment of the ſame; which Words immediately and immediate expound the Intent of the Makers of the Act.

2. There is a Saving for the Archbiſhop, the Calling any Perſon out of the Dioceſe where he ſhall be dwelling to the Probate of any Teſtaments; which *Proviſo* ſhould be alſo in vain, if the Archbiſhop notwithſtanding that Act ſhould have concurrent Authority with every Ordinary through his whole Province: Wherefore it was concluded that the Archbiſhop out of his Dioceſe, unleſs in the Caſes excepted, is prohibited by the Act of 25 *H.* 8. to cite any Man out of any other Dioceſe. And in Truth the Act of 23 *H.* 8. is but a Law declaratory of the ancient Canons, and of the true Expoſition of them: And that appeareth by the Canon, *Cap. Romana in ſexto de Appellationibus*, and *Cap. de Competenti in ſexto.* And the ſaid Act is ſo 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 Archbiſhop's Dioceſe, or Peculiar, other than in ſuch particular Caſes only as are expreſly excepted and reſerved 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 Archbiſhop of *Canterbury*, the Biſhops and their Succeſſors, 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 Archbiſhop's Courts, Guardians of Spiritualities, Chancellors, *&c.* So the ſame is alſo expreſly confirmed under the Great Seal. And altho' the Archbiſhoprick of *Canterbury* was then void, yet the Guardian of the Spiritualties was there, and the Arch-

The Act of 23 H. 8. is a Declaration of the old Canon Law. Gibſon's Cod. 1046, 1050.

Canon 1 Jac. at the Synod at London. Lyndwood de excuſationibus, 200. Lit. m. 5. & pag. 2. L. a.

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 ſaid in the Preamble of the Act, in the Arches, Audience, and other high Courts of the Archbiſhop of this Realm; 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. Papæ mittuntur, ut Cardinales quos appellant fratres.* 2. *Alii ſunt Dativi, & non de latere, qui ſimpliciter in Legatione mittantur, &c.* 3. *Sunt Nati, ſive Nativi, qui ſuarum Eccleſiarum prætextu legatione fungantur, & Tales ſunt quatuor, ſcil. Archiepiſcopus Cant. Eboracenſis, Remanenſis, & Piſanis.* 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 current Authority with 'em, which altho' they held in the Courts of the Arbhbiſhop, the ſame was remedied by the Act of 25 *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.

Archbiſhops were Legati nati, and had Legatine Power, which is now aboliſhed, vi. Lin-wood.

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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 Archbiſhopricks) 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.

Vi. lib. Arch. Cant. p. 39 that the Archbiſhop of Cant. hath a Peculiar in many Dioceſes. Gibſ. Cod. 417, & 1050.

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 Houſhold. *Quod Seneſchallus & Mariſcallus non teneant Placit. de libero tenem. de Debito, de Conventione, &c.* So in the Statute of *Articuli ſuper chartas, cap.* 3. *Regiſter fol.* 185. *inter Brevia ſuper ſtatuta.* So againſt the Conſtable of the Caſtle of *Dover*:

Quod

Quod non tangit Cuſtodiam Caſtri. So to Juſtices of Aſſiſe upon the Statute *Quod Inquiſitiones quæ ſunt magnæ exactionis non capiantur in Patria.*

Vi. Paſc. 42 El. Rot. 139. Rudd's Caſe, a Prohibition for citing out of the Dioceſe. Tr. 44 El. Rot. 1073. the like in an Information upon the Statute againſt Zachary Babington.

Alſo to the Treaſurer and Barons of the Exchequer, upon the Statute *De Articul. ſuper Cartas, cap.* 4. The Statute 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 Statuta.* See *F. N. B.* 45 *&* 56, *&c.* 17 *H.* 6. 54. *vi.* 13 *E.* 3. *to Prohibition:* A Prohibition to the Chancellor, and Diverſity of Courts in the Title of Chancery. So againſt all Eccleſiaſtical 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, although that the Matter be meer Eccleſiaſtical: and therewith agreeth 4 *E.* 4. 37. and *F. N. B.* 43. *e.* So the Caſe upon the Statute of 2 *H.* 5. *cap.* 15. If the Eccleſiaſtical Judges in Caſe of Hereſy, and other Matters of meer Spiritualty do not proceed according to the Intention of the ſame Statute; as it appeareth by the Precedent in 5 *E.* 4. *Keyſon's* Caſe, 10 *H.* 7. 17. See the Opinion of *Paſton*, 9 *H.* 6. 3. A Man excommunicated by the Biſhop of *London*, for a Crime done in another Dioceſe, ſhall not be grieved thereby; ſo as the Common Law takes Notice of the Canons, in ſuch Caſe, as *Coram non Judice.* 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 not put his Name unto the Return; yet the ſame is Error if he doth not put to his Name. See 35 *H.* 66. 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 Perſon ſhould be put to his Action upon the Statute, the ſame would be Cauſe 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 *Mortuaries*, 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.* 55. *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 expreſly in the Point: And the Caſe at Bar is a more ſtrong Caſe, and that for three Reaſons.

Vi. If any one in the Spiritual Court appeals contrary to the Statute of 24 H. 8. cap. 12. although the Matter be meer Spiritual, a Prohibition lieth. So upon the Statute of 2 H. 5. cap 2.

Page [9] * See 2 H. 4. 10. by Hawkford, and ſo affirmed by the Court, when one who hath not Authority, holdeth Plea in Spiritual Things, whereof the Juriſdiction doth not belong to him, yet no Conſultation ſhall be granted, becauſe a Conſultation ſhall not be granted to one that hath not Power, &c.

1. It

1. It was made an Affirmance of the Canon Law.

2. It was made for the Eaſe of the People and Subjects, and for the Maintenance of the Juriſdiction of the Ordinary, ſo as the Subjects have Benefit by the Act; and therefore although that the King may diſpence with the Penalty, yet the Subject grieved ſhall have a Prohibition. And the Rule of the Court was, *Fiat Prohibitio Curiæ Cantuar. de Arcub. inter partes prædict' per Curiam.* And *Sherley*, and *Harris* junior, Serjeants at Law, were of Counſel in the Caſe.

III. *Mich.* 6 Jac. *Regis.*

Edwards's *Case*.

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

High Commiſſion. Poſt. 47. 12 Co. 19, 47, 76. See Gibſon's Codex 36, 50, 54, 56, 58, &c. 219, 309, 396.

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 practiſed Man in the Art of Phyſick.

3. That you the ſaid *Thomas Edwards* are no graduate, *&c.*

4. That you knowing the Premiſſes, notwithſtanding you the ſaid *Edwards*, *&c.* of Purpoſe 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 Aſs*, as if he had no Manner of Skill in his Profeſſion, and were altogether unworthily admitted to the ſaid Degrees, and therein you purpoſely and adviſedly taxed the whole Univerſity of Raſhneſs and Indiſcretion for admitting him to that Degree without Sufficiency and Deſert.

5. And

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, *Sipſilam licheneu mentegram*, Take that for your Inheritance, and thank God you have 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 Diſlike of the Dignity and Calling of Biſhops.

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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 miſſive 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, *Warberton*, *Daniel*, and *Foſter* Juſtices, That the firſt ſix Articles were meerly 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.

See Book of Entries 444. & 447. Non eſt juri conſentaneum quod quis ſuper iis quorum cognitio ad nos pertinet in Curia Chriſtianitatis trahatur in placita. Vi. Chriſtianitatis dicuntur mere tat. vi. 22 E. 4.

1. Becauſe that the Matter and Perſons are Temporal.

2. Secondly, Becauſe it is for Defamation, which if any ſuch ſhall be for the ſame, 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

Stat. Circumſpecte agatis, An. 13 E. 1 Epiſcopus teneat placita in Curia de his quæ ſunt mere Spiritualia. Et vi. Lindwood, fol. 70. Lit. m. Spiritualia quia non habent mixturam Temporalem. vi. 22 E. 4. l. Conſul. the Abbot of Sion's Caſe.

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 pœnam nemo emeret*. 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 and 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 tutus 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 meer Spiritual, ſuch a Defamation is not examinable before the High Commiſſioners.

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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 Conuſance 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 *Hales*, for ſcandalling of the Eccleſiaſtical Commiſſioners.

Judex non potest injuriam ſibi datam punire.

Vi. the Stat. of 23 H. 8. c. 9.

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 ſo did the Biſhop of *Canterbury* and his Colleagues, by Force of a High Commiſſion to them directed, cite one *Humphrey Frank* Maſter of Arts, and Schoolmaſter of the School of *Sevenock*,

(of

(of the Foundation of Sir *William Sevenock*, 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 ſubſcribed by Sir *John Bennet* Doctor of Law, Doctor *James*, and Doctor *Hickman*, three of the High Commiſſioners: And Sir *Chriſtopher Perkins* procured the ſaid Citation to be made, and when the ſaid *Frank* appeared, the Archbiſhop being aſſociated with Sir *Chriſtopher Perkins*, and Doctor *Abbot* Dean of *Wincheſter*, made an Order concerning the ſaid School, *(ſcil.)* That the ſaid *Frank* ſhall continue in the ſame School until the Annunciation, and that he ſhould have twenty Pounds paid to him by Sir *Ralph Boſoile* Knight, *who it ſeems was never cited; but* Quære, *If he was not Plaintiff.*

IV. *Mich.* 6 Jacobi *Regis.*

Taylor *and* Shoile's *Caſe.*

Brewer, a Trade within 5 Eliz. Indictments, &c. on the ſaid Stat. See 1 Salk. 370, 373, 382. 5 Mod. 180. 2 Rol. Abr. 81. pl. 6. Cumb. 179, 212, 254, &c. 288.

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

Page [12] ſame is eaſily and preſently learned, and he * needs not to have

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 Handycraft Artificer.

2. It was moved, That the ſaid Averment was not ſufficient, for the Averment ought to be as general as the Exception in the Statute is, (*ſcil.*) 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 exerciſe any other Art whatſoever.

As unto the firſt, It was reſolved, That the Trade of a Brewer, (*ſcil.*) 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 ſhe 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 expreſly named alſo in the Act as Arts and Myſteries: And the Act of 22 *H.* 8. *cap.* 13. is explained, That a Brewer, Baker, Surgeon, and Scrivener Alien, are not Handicrafts mentioned 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 Handicrafts, for the ſame is reſtrained to Manufactures.

As to the ſecond Point, It was reſolved, That the Intention 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 uſeth any Art or Myſtery at the Time of the Act, might uſe the ſame Art or Myſtery; for *Quod quiſque norit in hoc ſe exerceat*: 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 Healths: And ſo the firſt Judgment was affirmed.

V. *Mich.* 6 Jacobi *Regis.*

In the Common Pleas.

The Caſe of Modus Decimandi.

De non Decimando Silvæ cæduæ. Vide poſt. 23, 37, 58, &c. 12 Co 63, 64. Watſon's Clergyman 546, 547, &c. Farreſl. 137.

Herley Serjeant moved to have a Prohibition, becauſe that a Perſon ſued to have Tithes of *Silva Cædua* under twenty Years Growth in the *Weild of Kent*; where, by the Cuſtom of it, which is a great Part of the County, 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 although 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 ceſſeth 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 ſame 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 *Doctor 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, ſo 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 ſame,

Ibid. 515 516. *Page* [13] Cuſtom de non Decimando, where good, or not. See Watſon's Clergyman 502, 503, 506, 526, 544, &c. 568, &c. Selden of Tithes, ch. 14. ſect. 2, 3, &c.

ſame, 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 ſaith, *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 therefore 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*. *Samſon Foliet* brought an Attaint upon a Prohibition, againſt *Thomas* Parſon of *Swyndon*, 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 petiit de eodem Decimas fœni de quodam prato ipſius Samſonis in Walcot unde eſt in poſſeſſione per ſententiam Judicum ſuorum, & fuit antequam Prohibitio Dom. Regis ad eum pervenerit, & quod pratum prædict. eſt in Walcot unde ipſe eſt Perſona, & non in Draycot:* To which the ſaid *Samſon* replied and ſaid, *Quod anteceſſores ſui antiquitus dederunt Duas acras prati Eccleſiæ de Draycot pro decimis fœni quam prædict. Thomas modo petit in eodem prato, quas quidem duas acras prati eadem Eccleſia adhuc habet, & ſemper hucuſque habuit, unde videtur ei quoad illud quod prædict. Thomas ultra petit, eſt de laico feodo ſuo, & dicit quod pratum illud in quo idem Thomas petit Decimas eſt in Draycot ſicut Breve dicit, & non in Walcot, & de hoc ponit ſe ſuper Patriam:* And the Jury found, *Quod prædict. Thomas Perſona de Swyndon ſecutus fuit placita in Curia Chriſtianitatis de Laico feodo prædict. Samſonis contra Prohibitionem Dom. Regis, petendo ab ipſo Decimas fœni de quodam prato ipſius Samſonis in Draycot unde Anteceſſores ſui antiquitus dederunt Eccleſiæ de Draycot duas acras prati pro Decima * fœni quam præd. Thomas modo petit, & quas eadem Eccleſia adhuc habet & ſemper hucuſque habuit, &c. Et quod pratum prædict. in quo idem Thomas petiit Decimas eſt in Draycot, & non in Walcot.*

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Walcot, &c. Ideo conſideratum eſt quod prædict. Thomas ſit inde in miſericord. & reddat præd. Samſoni 20 *Marcas quas verſus eum 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, 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 Deſuetude hath antiquated, and Time and Cuſtom hath taken away divers others; ſo as the Rule is good, *Quod Judiciis poſterioribus fides eſt adhibenda*; *Et a communi obſervantia non eſt recedendum.* There are two Points adjudged by the ſaid Record.

Vide poſt. 15, 16. 46. Diſcharge of Tithes to be try'd at Common Law. See and Note the Introduction to Gibſon's Codex 20, 21. Anrea 4, &c. ib. 2 Co. 38, 44, to 48. 4 Co. 74. 5 Co. 9, 13, 15, &c.

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, he ſhall have a Prohibition, becauſe that he chargeth his Lay Fee with Tithes, which is diſcharged of them. By which it appeareth that Tithes may be diſcharged, and altogether taken away and extinct: And herewith agreeth the Regiſter which is the moſt antient Book of the Law, *fol.* 38. *Rex, &c. tali Judici, &c. ſalutem. Monſtravit nobis A. tenens quandam partem Manerii de D. quod licet E. nuper Dominus Manerii præd. per quoddam ſcriptum Indentat. dediſſet & conceſſiſſet F. nuper Perſonæ Eccleſiæ de D. quatuor acras terræ cum pertin. in eodem Manerio habend. & tenend. eidem F. & ſucceſſoribus ſuis Perſonæ Eccleſiæ præd. in perpetuum. Et idem F. per præd. ſcriptum de aſſenſu & voluntate Epiſcopi Lincoln. Diœceſani loci præd. & J. tunc Patroni Eccleſiæ præd. conceſſit pro ſe & ſucceſſoribus ſuis quod idem E. hæredes & aſſignati ſui eſſent quieti de Decimis vitulorum, &c. in Manerio præd. pro præd. quatuor acris ſibi datis, &c. Et tamen nunc Perſona Eccleſiæ præd. tenens præd. quatuor acras terræ præd. præd. A. aſſignat. præd. E. ſuper decimam hujuſmodi vitulorum, &c. in eodem Manerio, ſibi præſentand. trahit in placitum coram, &c. in Curia Chriſtianitatis, &c. Et quia diſcuſſio hujuſmodi Donationis de laico feodo in regno noſtro in Curia noſtra, & non alibi tractari & fieri debet, vobis prohibemus, Quod placitum aliquod ſuper laicum feodum in Regno noſtro non teneatis in Curia Chriſtianitatis, nec quicquam in hac parte quod in enervationem dicti ſcripti aut Donationis, & conceſſionis præd. quæ in Curia noſtra & non alibi tractari ſicut præd. eſt cedere poterit attentetis, ſive attentim faciatis quoviſmodo*; By which alſo

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 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, *S. Rector petat verſus parochianos oblationes, & decimas debitas, ſeu conſuetas, &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, 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: So 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 Preſcription, ſhall be determined in the King's Court: And therefore a *Modus*

Averment. Poſt. 38.

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Preſcriptions to be adjudg'd in the King's Courts Vide 15, 16.

dus Decimandi which accrueth by Cuſtom and Preſcription in the King's Court. And it appeareth by the Statute of 7 *H.* 4. *c.* 6. That the Pope by his Bulls diſcharged divers from Payment of Tithes, againſt which the Act of Parliament was made; and by Stat. 31 *H.* 8. *c.* 13. That the Poſſeſſions of religious Perſons given to the King, were diſcharged of Payment of Tithes in certain Caſes: And by Statute 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 juſtify, and truly, without Fraud or Guile, divide, ſet out, *&c.* all Manner of their predial Tithes in their proper Kind as they will 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 *Proviſo* 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.

Watſon's Clergyman 528.

Ibid. 518, 519, 526, &c. 529.

Ibid. 578, 584, 600.

Ibid. 536, 560, 564, 571, 586, &c. 598, &c. 614, 623, 632, &c.

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See Watſon 503, 512, &c. to 558.

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

Ibid. 546, &c.

2. By the Statutes of the Realm: As by the Statute of 31 *H.* 8. *cap.* 13. the Statute of 45 *E.* 3. *&c.*

Ibid. 526, &c.

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

Ibid. 502.

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

5. By

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 ancient 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 ſecundæ*, *Quæſt.* 86. *art. ultimo.* For there he ſaith, *Quod in veteri lege præceptum de ſolutione Decimarum, partim erat morali inditum ratione naturali quæ dictat quod iis qui divino cultui miniſtrant ad ſalutem totius populi neceſſaria victui debent miniſtr. 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*, (*ſcil.*) *Quantum ad determinationem certæ partis.* And all that agrees with our Law; and he goeth further, *In tempore vero novæ Legis etiam eſt determinatio partis ſolvend' authoritate Eccleſiæ* (that is by their Canons) *Inſtituta ſecundum quandam humanitatem, ut ſcilicet non minus populus novæ legis miniſtris Novi Teſtamenti exhibeat, quam populus veteris legis miniſtris Veteris Teſtamenti exhibebat, præſertim cum miniſtri novæ legis ſunt majores 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 aliqua portio data eſt miniſtris Eccleſiæ, partim vero ex inſtitutione Eccleſ. quantum ad determinationem decimæ partis.* See *Doctor 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 citeth *John Gerſon*, who was a Doctor of Divinity, in a Treatiſe which he calleth *Regulæ morales* (*ſcil.*) *Solutio decimarum ſacerdotibus eſt de jure divino, quatenus inde ſuſtententur, ſed quoad tam hanc vel illam aſſignare aut in alios redditus commutare, poſitivi juris eſt.* And afterwards, *Non vocatur portio curatis debita propterea decima, eo quod eſt decima pars, imo eſt interdum viceſima aut triceſima.* 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 Neceſſity requireth for their Suſtenance. And further he ſaith, That Tithes may be exchanged into Lands, Annuity, or

See Selden of Tithes, ch. 14. ſect. 3. ib. 507.

Selden of Tithes, ch. 6, 7, 8, &c. Watſon 431, 506, 511.

Rent, which shall be sufficient for the Minister, &c. And there he saith, 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 by themselves, that the tenth Part or Value was Part of the Judicial Law, and certainly the same doth not bind any Christrian 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 is now due, *ex institutione Eccles.* that is to say, by their Canons, and it appeareth by the Statute of 25 *H.* 8. *cap.* 19. That all Canons, &c. made against the Prerogative of the King in his Laws, Statutes, or Customs of the Realm, are void, and that was but a declaratory Law; for no Statute or Custom of the Realm can be taken away or abrogated by any Canon, &c. made out or within the Realm, but only by Act of Parliament; and that well appeareth by 10 *H.* 7. *f.* 17. *c.* 18. That there is a Canon or Constitution, That no Priest ought to be impleaded at the Common Law. And there *Brian* saith, that a grave Doctor of the Law once said unto him, that Priests and Clerks might be sued at the Common Law well enough; for he said, that *Rex est persona mixta*, and is *Persona unita cum Sacerdotibus Statutis Ecclesiæ*. In which Case the King might maintain his Jurisdiction by Prescription; by which it appeareth, that Prescription doth prevail against expres Canons or Constitutions, and is not taken away by them, which proves that the Statute of 25 *H.* 8. was but a Declaration of the ancient Law before: And there is an expres Prohibition in *Numb.* 18. *Nihil aliud possidebunt, decimarum oblatione contenti quas in usus eorum & necessaria separavi:* Which was not Part of the Moral Law, or Law of Nature, but Part of the judicial: And therefore Men of the holy Church at this Day do posses Houses, Lands and Tenements, and not Tithes only.

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Canons against the Prerogative Statutes, Custom or Prescription are void. Vide post. 47. 2 Inst. 599, &c.

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

2d Point. Limits and Bounds of Parishes, &c. to be try'd by Common Law. Vide Farr. 63. Quære Gibson's Codex 239, &c. 2 Inst. 599.

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 agreeth 39 *E.* 3. 29. 5 *H.* 5. 10. 32 *E.* 4. t. *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 ouſted 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 ouſted 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 expreſly againſt this, which ſee in *Linwood titulo de pœnis* 55. And ſo *fol.* 227, 228. amongſt the Canons or Conſtitutions of *Boniface*, *Anno Dom.* 1277. And the Cauſes wherefore 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 Mephum*, Tit. *de Decimis*, *cap. Quoniam propter*, *fo.* 139. 6. *verbo conſuetudines*, *conſuetudo ut non ſolvantur*, *aut minus plene ſolvantur Decimæ*, *non valet*, and *ibidem ſecundum alios*, *Quod in Decimis realibus*, *non valet conſuetudo ut ſolvatur minus decima parte*, *ſed in perſonalibus*, &c.

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Note this Difference; although that the Parties do admit the Juriſdiction of the Court, yet upon the Pleading, if the Right of the Tithes ſhall come in Debate, there this Court ſhall be ouſted 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 Conuſance of it; as where a Lay-man is Plaintiff as Farmor, or Defendant as Servant of the Parſon, as a Lay-man Farmor 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, if the King's Court be ouſted of the Juriſdiction after Severance of the ninth Part; yet the Libel ought to be for Subſtraction 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 the Common Law. See 16 H. 2. in the Caſe of Mortuary. Vide Decretalia Sexti, lib. 3. Tit. de Decimis, cap. 1. fo. 130. Col. 4. Et ſumma Angelica, fo. 72.

And

And *ibidem Lit. M. verbo, integre, faciunt expreſſe contra opinionem quorundam Theologorum, qui dicunt ſufficere aliquid dari pro Decima.* And that is the true Reaſon in both the ſaid Caſes, *ſcil. de Modo Decimandi, & de Limitibus Parochiarum, &c.* that they would not adjudge according to their Canons; and therefore a Prohibition lieth; and therewith agreeth 8 *E.* 4. 14. and the other Books aboveſaid, 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.

VI. *Mich.* 6 Jac.

In the Exchequer.

Baron *and* Boys's *Caſe.*

Sur Stat. 2 E 6. cap. 14. of Ingroſſers. 1 Hawk. ch. 80. ſect. 1, 2, 3, 5. & ſect. 15, 16. 17, &c.

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 Margent 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,*

Grain, Butter, Cheeſe, Fiſh, 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 Ingroſs, 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 to ſay, as 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 Foreſtaller 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.

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VII. *Hill.*

VII. *Hill.* 27 Eliz.

In the Chancery.

Fine. Dower. See 2 Co. 74, 78. 6 Co. 79. 7 Co. 38, 40. St. 27 H. 8. c. 10. St. 4 H. 7. c. 24. St. 18 E. 1. de Modo levandi. 5 Co. 2. Part 38, 39, 2 Inſt. 511, &c.

Hillary Term, the 27 of *Eliz.* in the Chancery the Caſe was thus: One *Ninian Menvil* 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 Conuſees convey the Lands to the Queen, who is now ſeiſed; the five Years paſs 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, *M.* 26 and 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, *ſcil.* the Fine with Proclamations, and the five Years paſſed after the Death of her Husband, the Attainder and the Reverſal of it; and her own Title, *ſcil.* 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 Attainder of her Huſband ſhould not help her; for as long as the Attainder doth remain in Force, the ſame was a Bar alſo of her Dower, ſo 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 Attainder of her Husband of his Treaſon. But admit that the Attainder of the Husband ſhall avail the Wife in ſome Manner, when the ſame is now reverſed in a Writ of Errror, 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 ſuch Record, becauſe that the firſt Record is reverſed, and utterly diſaffirmed and annihilated, and now by Relation made no Record *ab initio*, and

and therewith agreeth the Book of 4 *H.* 7. 11. for the Words of the Judgment in a Writ of Error are, *Quod Judicium prædict' & Errores prædict' & alios in Recordo, &c. revocetur & adnulletur, &c. & quod ipsa ad poſſeſſionem ſuam ſive ſeiſinam ſuam* (as the Caſe requireth) *tenementorum *ſuorum prædict' una cum exitibus & proficuis inde a tempore judicii prædict' reddit' percept'* Page [20] *& ad omnia quæ occaſione Judicii illius amiſit reſtituatur.* By which it appeareth, that the firſt Judgment, which was originally imperfect and erroneous, is for the ſame Errors now adnulled and revoked *ab initio*; and the Party, againſt whom the Judgment was given, reſtored to his Poſſeſſion, and to all the mean Profits, from the Time of the erroneous Judgment given, until the Judgment in the Writ of Error, ſo as the Reverſal hath a Retroſpect to the firſt Judgment, as if no Judgment had been given: And therefore the Caſe 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; and ſhall be as available and ample to *A.* as if no Attainder had been: And afterwards *B.* bringeth Treſpaſs for the Treſpaſs Meſne; 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 holden, 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 Mean, 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 dowable, 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

Limitations. Vide 2 Co. 93. 3 Co. 87. 8 Co. 72, 100. 9 Co 140, &c. 10 Co. 49, 99. Cumb. 70. Farr. 5, 12, &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. *cap.* 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 5 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 uncovert, *&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 (*scil.* 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 *Page* [21] 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.

Relation. See 3 Co. 29. 4 Co. 42. Plow. 31, 260 Moor 140. Cro. El. 196, 739.

And as to the said Point of Relation, it was resolved, That sometimes by Construction of Law a Thing shall relate *ab initio* to some Intent, and to some Intent not; for *Relatio est fictio Juris*, to do a Thing which was and had Essence, to be adnulled *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 Construction 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 (*scil.*) when an erroneous Judgment is reversed by a Writ of Error: For true it is as it hath been said, That as unto the mean Profits, the same shall have Relation by Construction of Law, until

til 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 Treſpaſs againſt the Treſpaſſors; and if the Defendant pleadeth that there is no ſuch Record, the Plaintiff ſhall ſhew the ſpecial 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 'em, 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 reverſed as is ſaid before, and upon that the Plaintiff in the Writ of Error ſhall have a Writ of Reſtitution, and that Writ recites the firſt Recovery, and the Reverſal of it in the Writ of Error, is, that the Plaintiff in the Writ of Error ſhall be reſtored to his Poſſeſſion and Seiſin, *Una cum exitibus* thereof from the Time of the Judgment, &c. *Tibi præcipimus quod eundem A. ad plenariam ſeiſinam tenementorum prædict' cum pertinentiis ſine dilatione reſtitui facias, & per ſacramentum proborum & legalium hominum de Com. ſuo diligenter inquiras ad quantum exitus & proficua tenementorum illorum cum pertinentiis a tempore falſi Judicii prædict' reddit. uſque ad Oct. Sanct. Mich. anno, &c. quo die judicium illud per præfat. Juſticiar. noſtros revocat. fuit, ſe attingunt, juxta verum valorem eorundem, eadem exitus & proficua de terris & catallis prædict. B. in baliva tua fieri facias, & denarios inde præfato A. pro exitibus & proficuis tenementorum per eundem B. dicto medio tempore percept. ſine dilatione haberi facias: Et qualiter hoc præceptum noſtrum fuerit execut. conſtare facias, &c. in Octab. &c.* By which it appeareth, That the Plaintiff in the Writ of Error ſhall have Reſtitution againſt him who recovereth of all the mean Profits, without any regard by them taken; for the Plaintiff 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 Iſſues 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 mean Profits, ſo the Law gives to him Remedy notwithſtanding the Reverſal againſt all Treſpaſſors in the *Interim*, for otherwiſe the Law ſhould make

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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 have an Action of Treſpaſs for a Treſpaſs mean, becauſe he ſhall recover all the mean Profits againſt him who recovered, nor he that recovereth after ſhall be barred of his Action of Treſpaſs for a Treſpaſs mean, by Reaſon that his Recovery is reverſed, becauſe he ſhall anſwer for all the mean Profits to the Plaintiff in the *Writ of Error:* And therewith agreeth *Brian* Chief Juſtice, 4 *H.* 7. 12 *a.*

Note Reader, If you would underſtand the true Sence 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 Caſe 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.

3 Co. 25, 26. &c. Pop. 87. Moor. Ca. 384.

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 Caſe, 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 ſhe 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 favoured in Law, ſhe claiming but only for Term of Life, and affirming the Title of the Queen. See the *Sadler*'s Caſe in the 4th Part of my *Reports*.

And

And the Caſe which was put on the other Side was utterly denied by the Court, for it was reſolved, That if a Man ſeiſed of Lands in Fee, taketh 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 dowable, yet for as much as the Marriage, and Seiſin in Fee, was before the Alienation, and the Title of Dower is not conſummate 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 ſhe ſhall be endowed: For it is not requiſite that the Marriage, Seiſin and Age concur together all 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 barrable of her Dower, 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 deſcendeth to the Wife, or the Wife purchaſeth Lands 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 Reconcilement, 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 uncapable, 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.

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VIII. *Trin.* 44 Eliz.

In the King's Bench.

Sprat *and* Heal's *Caſe.*

Tithes ſubſtracted, Covin. Vid. ant. 12. Poſt. 37, 38, 48, &c. 5 Co. 2. Part. 67, 68. Watſ. 540, 555, 588, &c. 593, &c. 632, &c.

John Sprat libelled in the Spiritual Court againſt *Walter Heal* for Subſtraction 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) *ſcil.* That the Defendant divided the Tithes from the nine Parts, *quod prædict.* the Plaintiff *non fatetur*, *ſed prorſus diffitetur*; 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 *E.* 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 *E.* 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, di-

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vide, 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 Divi-

Diviſion, and therefore the ſame is out of the Statute for the Makers of the Statute reſpect *quo animo* he divides them (*ſcil.*) 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 alicui prodeſſe, aut ſimplicitas alicui obeſſe not debet*: And the ſame is *Crimen Stellionatum*, which we call *fraudem rem & impoſteram*: 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, who 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 carrieth them away, and his Fraud and Covin ſhould not help him or avail him. See 8 *E.* 3. 290. A real Action brought by a Man of Religion by Colluſion, although that he hath Right, yet he ſhall not have Execution, 9 *H.* 6. 41. A Recovery upon a good Title by Colluſion, ſhall not abate the Writ, 33 *H.* 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. 2 Danv. 223. Poſt. 48.

IX. *Hill.* 6 Jacobi.

In the Common Pleas.

Neale *and* Rowſe's *Caſe.*

Extortion. Star. 21 H. 8. cap. 5. See 10 Co. 101. 12 Co. 78. 1 Hawk. ch. 68. 3 Inſt. 147, 149, 150. See Sir John Bennet's Caſe. 4 Inſt. 336.

AT a *Niſi prius* in *London*, before my ſelf 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* Commiſſary and Official within the Archdeaconery of *Huntington*, within the Dioceſe of *Lincoln*, and having Probat of Wills and Teſtaments, *&c.* within the ſame Archdeaconery; and that *Nicholas Neale*, the third Year of the Reign of the King that now is, made his Teſtament and laſt 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 Commiſſary and Official, *&c.* the Twenty third of *Febr.* 1605. at the Pariſh of St. *Mary Bow*, *Teſtament. prædict. probavit, inſinuavit, regiſtravit & ſigillavit; ac per manus cujuſdam Thomæ Nicke tunc miniſtri ipſius Jacobi Rowſe in ea parte deputat. & authorizat.* 14 *s.* 10 *d. pro probatione, inſinuatione & regiſtratione Teſtamenti prædict. de eodem Edwardo, &c. qui tam, &c. colore Officii ſui prædict. adtunc & ibidem extorſive recepit, & habuit contra formam ſtatuti prædict.* 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 twelve Shillings four Pence, 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 ingroſſed 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 fourteen Shillings

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ten

ten Pence for the Probat, Inſinuation, Regiſtring 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 *Nioke* his Miniſter, to take of him for the Probation, Inſinuation, Regiſtring 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, nor Ordinary by him or themſelves, nor any of his or their Regiſters, Scribes, Praiſers, Summoners, Apparators, or any other their Miniſters, for the Probation, Inſinuation and Approbation of any Teſtament or Teſtaments, *&c.* for the Regiſtring, Sealing, Writing, Praiſing, Making of Inventories, making Acquittances, Fines, or any Thing concerning the ſame Probat of Teſtaments, ſhall take or cauſe to be taken of any Perſon or Perſons, but only five Shillings, and not above, whereof 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 Regiſtring 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, Inſinuation, Regiſtring or Sealing of the Teſtament, for no Probat was written upon the Teſtament it ſelf, nor any Seal put to it, but the Teſtament was ingroſſed in Parchment, and the Probat and Seal put to the Tranſcript ingroſſed, and not to the Teſtament it ſelf, and ſo out of the Statute; and the Statute extends only, when the Probat and Seal is put to the Teſtament it ſelf, and for the Ingroſſing of it after the Probat, no certain Fee is provided by the Statute; but for the Regiſtring 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 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.

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

Page [26] *2. The Words are, or any Thing concerning the ſame Probat, and when the Seal and Probat is put to the Tranſcript, the ſame without Queſtion concerns the Probat, for the Probat is not to put any Writing but only to that, therefore the ſame concerns the Probat.

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, *ſcil.* Biſhops, Ordinaries, and all Perſons who have Power to prove Wills and Teſtaments, Regiſters, Scribes, Summoners, Apparators, or any other the Miniſters, as for the Thing it ſelf, *ſcil.* the Probation, Inſinuation, Approbation, Regiſtring, 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 tranſcribing of it, as well againſt the expreſs Letter of the Act as the Intention and Moving of it: Alſo the Statute ſaith 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 Extorſion, which is a great Affliction, and impoveriſhing of the Poor Subjects.

4. As this Caſe is, he annexeth the Probat 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 Probat of a Will or Teſtament, but that which the Statute limits: And afterwards the Jury found for the Plaintiff, and of ſuch Opinion was *Walmſley*, *Warberton*, *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.

X. *Hill.*

X. *Hill. Anno* 6 Jac. *Regis.*

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 Knight. And the Point reſts upon this, If the Tenure in Burgage be a Tenure in Socage; for by the antient Common Law every Tenant in Knights Service, and every Tenant in Socage, was to give to his Lord a reaſonable Aid, to make his eldeſt Son a Knight, and to marry his eldeſt Daughter, and that was incertain at the Common Law, and alſo incertain when the ſame ſhould be paid. And this appeareth by *Glanvil, Lib. 9. cap.* 8. *fol.* 70. who wrote in the Time of *Henry* the Second, *Nihil autem certum ſtatutum eſt de hujuſmodi auxiliis dandis, vel exigendis, &c. ſunt alii præterea Caſus in quibus licet Dominis auxilia ſolvenda ſint certa forma præſcripta ab hominibus ſuis ut filius ſuus & hæres fiat miles, vel ſi primogenitam ſuam filiam maritaverit, &c.* 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 *Weſtm.* 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 20*s.* and of 20 *l.* Lands holden in Socage 20*s.* and of more, more, and of leſs, leſs, according to the Rate, by which the Aid it ſelf 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 *E.* 1. where it is provided, That no Taxes ſhall be taken but by common Conſent of the Realm, there is an Exception of the antient Aids, *&c.* which is to

Aid to make the King's eldeſt Son Knight. Vide poſt. 28.

Vide F. N. B. 82. ac.

See the Statute of 27 H. 8. cap. 10. of Uſes in the Preamble, concerning Aids, to make the eldeſt Son Knight, and to marry the Daughter.

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be intended of theſe Aids due unto the King by the antient Common Law: But notwithſtanding the ſaid Act of *Weſtm.* 1. it was doubted, whether the King, becauſe he is not expreſly named, were bound by it; and therefore in the twentieth Year of *E.* 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. *cap.* 11. it is enacted, That reaſonable Aid to make the King's eldeſt Knight, and to marry his eldeſt Daughter, ſhall be demanded and levied after the Form of the Statute made thereof, and not in other Manner; that is to ſay, Of every Fee holden of the King without Mean 20 *s.* and no more, and of every 20 *l.* Land holden of the King without Mean in Socage 20 *s.* and no more. Now *Littleton*, *lib.* 2. *cap.* 10. *fol.* 36. *b.* Burgage-Tenure is, where an antient Borough is, of which the King is Lord; and thoſe who have Tenements within the Borough, hold of the King their Tenements, that every Tenant for his Tenement ought to pay to the King a certain Rent: And ſuch Tenure is but Tenure in Socage; and all Socage-Land is contributary to Aid, and therefore a Tenant in Burgage ſhall be contributary to it.

Vide Paulum Manutium De ſenatu Romano, pag. 9. of Aids inſtituted by Romulus, ad redimendum Corpus Domini, & ad filias collocandas, &c. per Clientes erga Patronos.

Burgage-Tenure, quid.

And it is to be obſerved, and ſo it appeareth in the Regiſter, *fol.* 1, & 2. That in a *Writ of Right*, if the Lands or Tenements are holden by Knights Service, it is ſaid, *Quas clamat tenere de te per ſervitium unius feodi Militis*: And if the Lands be holden in Socage, the Writ is, *Quas clamat tenere de te per liberum ſervitium unius libræ cumini*, &c. ſo as Socage-Tenure in all Writs is called *Liberum ſervitium*. And by the Writ of Aid, *Fitz. N. B.* 82. it is commanded to the Sheriff, *Quod juſte*, &c. *facias habere A. rationabile Auxilium de Militibus*, & *liberis tenentibus ſuis in Baliva tua*, &c. ſo as the ſame Writ makes a Diſtinction of Knights Service by the Name of *Militibus*, and of Socage by the Name of *Liberis tenentibus*. And in the Regiſter, *fol.* 2. 6. the Writ of Right for a Houſe in *London* (which is holden of the King in Burgage) is in theſe Words, *Rex*, *Majori*, *vel Cuſtodi* & *Vicecom.* London: *Præcipimus vobis quod ſine dilatione teneatis G. de uno Meſſuagio*, &c. *in* London, *quæ clamat tenere de nobis per liberum ſervitium*, &c. which proves, That Tenure in Burgage is a Tenure in Socage: But it appeareth by the Books of *Avowry* 26. and 10 *H.* 6. ſo *Ancient Demeſne* 11. it was reſolved by all the Juſtices in the Exchequer-Chamber, That no Tenure ſhould pay for a reaſonable Aid to marry the

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 Caſe 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 *Litt. 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; but 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.

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And I conceive that he who holdeth a Rent of the King by Knights Service, or in Socage, ſhall pay Aid; for the Words of the Act of *Weſtm.* 1. *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 Feoffment before the Statute ſhould prejudice the Lord of his Benefit. And although it was ſaid, that a Tenure in Socage, is *ſervitium Socæ*, as *Littleton* ſaith, 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*, *Polydor Virgil*, and *Hollinſhed*'s *Chronicle*, *fol.* 35. 15 *H.* 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 ſee *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 præfati Communes in Parliamento prædicto exiſtentes ex aſſenſu dominorum Spiritualium & Temporalium in dicto Parliamento ſimiliter exiſten. conceſſerunt præfato Regi quandam pecuniæ ſummam in loco duorum rationabilium auxiliorum ſuæ Majeſtati de jure debit. tam ratione creationis*

1 Inſt. 162. b, 2 Inſt. 231, 232, &c. 11 Co. 44.

tionis nobiliſſimi filii ſui primogeniti bonæ memoriæ, Domini Arthuri nuper Principis Walliæ, quam ratione Matrimonii & traductionis nobiliſſimi Principis Margaritæ filiæ ſuæ primogenit. quam etiam multiplicare pro Regni ſui perpetua pace & tranquillitate, &c. certis viis & modis levand. cujus quidem conceſſionis Tenor, &c. ſequitur in hæc verba: For as much 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* deceaſed, and the other, for the Marriage of the Right Noble Princeſs his firſt begotten Daughter *Margaret*, now married to the King of *Scots:* And alſo that his Highneſs hath born 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 antient 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 40000 *l.* * as well in Recompence 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 antient 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 40000 *l.* hath pardoned 10000 *l.* Parcel thereof, and doth accept of 30000 *l.* 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 Fifteens 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 30000 *l.* 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 618 *l.* 3 *s.* 5 *d.* the City of *Norwich* to 8 *l.* 6 *s.* 11 *d.* the City of *Canterbury* to 53 *l.* 13 *s.* 3 *d. ob.* Norfolk

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Note. See Mr. Madox's Firma Burgi. cap. 7.

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 31648 *l.* whereof allowable for Fees and Wages of Commiſſioners and Collectors 651 *l.* 16 *s.* 2 *d.* and ſo remaineth 31006 *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 reman. Dom. Theſaur. in Scaccario, in auxilio nobis conceſſ. ad primogenitam filiam noſtram maritand'.* And note, that King *Henry* the Third had Aid granted to him in Parliament *ad Iſabellam ſororem ſuam Imperatori maritand.* but that was of Benevolence. Benevolence. See 12 Co. 119, 120.

Rot. 42 *H.* 3. *ibid.* 6. *Monſtrat R. Johannes le 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. injuſte exegit de eodem* 30 *s. ad primogenitam filiam ſuam maritand. pro duabus partibus unius feodi militis, & averia ſua cepit, & ea detinet. Et ideo mandatum eſt Vic. Com. Bedd. & Buck. quod venire faciant, &c. prædict. R. ad reſpondendum eidem Johanni de prædict. tranſgreſſione, & prædict. averio, &c.* So as it appeareth by this, that ſome held, that the Statute of *Weſtm.* 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 *E.* 1. *Rot.* 3. *de auxilio ad militiam,* (which is meant of Knight of the King's Son) in the Time of *Henry* the Third, *& Iſabella Comitiſſa Albermarle, perdonata* 116 *l.* 8 *s.* 7 *d. pro eodem auxilio, quia Boldwinus de Inſula frater ejus cujus hæres ipſa eſt fuit infra ætatem, & in cuſtodia ejus: & quia tenentes dictæ Iſabellæ onerentur per ſervitium militare de prædict. pecuniis.* Note, that that was before the Statute of *Weſtm.* 1. and by that it appeareth, That if one within Age be in Ward of the King, he ſhall not be contributary to Aid, but his Tenants which hold of him (and then held of the King by Reaſon of Ward) ſhall pay Aid unto the King, as it appeareth by that Record.

Ibid. 30 *E.* 1. *Rex dilectis & fidelibus, Vic. Kanc. & Rico. de R.* * *ſalutem. Sciatis, quod in primo die Junii anno Regni noſtri* 18. *Prælati, Comites, Barones, & cæteri Magnates, de regno noſtro conceditur, pro ſe & tota communitate ejuſdem Regni in pleno Parliamento noſtro, nobis conceſſerunt* 40 *s. de ſingulis feodis militum in dicto Regno ad auxilium ad primogenitam filiam noſtram maritand. levandos, ſicut hujuſmodi auxilium alias in caſu conſimil. levari conſucvit, cui quidem levationi faciend. pro dicta com-*

Page [30] Note, that this double Charge was in reſpect that they were diſcharged of any Contribution for Socage, which I conceive was for the Difficulty to find the Socage-Tenure.

communitatis eaſiamento hucuſque ſuperſedimus faciend. gratioſe aſſignavimus vos ad prædictum auxilium, &c. Note that his eldeſt Daughter was married to the *Earl of Bar.*

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

Ibid. Hill. 4 *H.* 4. *Rot.* 19. *De rationabili auxilio de Will. Domino Roos*, for the Marriage of *Blanch* the King's eldeſt Daughter, out of the Manor of *Wragby* in the County of *Lincoln:* The like *M. Rot.* 5 *H.* 4. *Rot.* 33. *Lincoln.* and *Rot.* 34. *Lincoln.* and *Rot.* 35. *Lincoln.* and *Tr. R.* 5 *H.* 4. *Rot.* 2. *Kanc.* and *Rot.* 3. *Kanc.* and *Rot.* 5. *Kanc.*

See *ibid. P. R.* 21 *E.* 3. *Rot. Cantab. de auxilio ad filium Regis primogenitum milit. faciend. per Epiſcopum Elienſem:* 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 *E.* 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 Abby or Chauntry Land, and the Lands of Perſons attainted: 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.*

XI. *Hill.* 6 Jacobi *Regis.*

Prohibitions.

Preſident of York. See 4 Inſt. 242, 245. 12 Co. 48, 50, 52.

UPON Wedneſday, being *Aſhwedneſday*, 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 ſixth Day of *February*, and named three in particular, (*ſcil.*) one between *Bell* and *Thawptes*, another between *Snell* and *Huet*, and another in

in an Information of a riotous Reſcue preferred by Engliſh Bill by the Attorney General againſt *Chriſtopher Dickenſon*, one of the Sheriffs of *York*, and divers others, in reſcuing of one *William Watſon* out of the Cuſtody of the Deputy 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 Treaſurer, the Lord of *Northampton* Lord Privy Seal, the Earl of *Suffolk* Lord Chamberlain, the Earl of *Worceſter*, the Archbiſhop 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 Common Pleas, and chiefly againſt me; to which I (having the Copy of the Complaint ſent to me by the Lord Treaſurer the Sabbath-day before) anſwered in this Manner, That I had, with as much Brevity as the Time would permit, made Search in the Offices of the *Preignothories* of the Common Pleas: And as to the ſaid Caſes between *Bell* and *Thawptes*, and *Snell* and *Huet*, no ſuch could be found: But my Intent was not to take Advantage of a 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 original Writ directed to the Sheriff. And the Statute of *Marlbridge*, *cap.* 21. and *Weſtm.* 1. *cap.* 17. hath authorized the Sheriff upon Plaint 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 Counſel 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 *Engliſh*

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liſh Replevins. Another Prohibition I confeſs we have granted between Sir *Bethel Knight*, now Sheriff of the County of *York*, as Executor to one *Stephenſon*, who had made him and another his Executor, and preferred an Engliſh Bill againſt *Chambers*, and divers others of the Nature of an Action upon Caſe, 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 Caſe, 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 paupertate ſunt gravati*, that they cannot ſue at the Common Law: And in that Caſe 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 that 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 uncontroulable, 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 uncontroulable 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 ſame 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 denied to do them Juſtice: And their Ignorance in the Law appeareth by their Allowance of that Suit, *ſcil.* 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 Caſe was affirmed by the Lord Chan-

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

Another Prohibition I confeſs we have granted, between the L. *Wharton*, who by Engliſh Bill ſued before the Counſel, *Bancks*, *Buttermere*, and others, for Fiſhing in his ſeveral Fiſhings 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 Reſcous, 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 Reſcous 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 Cauſe doth not belong unto them, all their Proceedings was *coram non Judice*, and then no Reſcous could be done: But the Lord Chancellor ſaid, that though the ſame cannot be a Reſcous, 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 Coun-

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 *Eliz.* 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*.

Page [33] 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 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.*

XII. *Paſch.* 7 Jac. *Regis.*

Repair of Bridges, &c.

See 1 Hawk. ch. 7. ſect. 1, 2, 3, 4, 5, 6. 1 Salk. 358, 359. 12 Co. 30. Farr. 54, 98, &c.

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 agreeth 10 *E.* 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 paſs over a Bridge or Cauſey, ought to repair the ſame, for he hath the Toll to that Purpoſe, *Et qui ſentit commodum ſentire debet & onus*; and

and therewith agrees 14 *E.* 3. *Bar* 276. Alſo a Man may be bounden to repair a Bridge, *ratione Tenuræ* of certain Land, but a particular Perſon cannot be bound by Preſcription, *ſcil.* 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, *ſcil.* 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 *Aſſ.* 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 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 *Aſſ.* and 37 *Aſſ.* 10. But he who hath Land adjoining to the River is not bounden to cleanſe the River, unleſs he hath the Benefit of it, *ſcil.* a Toll, or a Fiſhing, or other Profit. See 27 *Aſſ. p.* 10.

Sewers Poſt. 3.

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*XIII. *Paſch.* 7 Jacobi.

Sir William Read *and* Booth's *Caſe.*

Caſe of Forgery, &c. See 1 Sal. 342, 371, 375. 1 Hawk. ch. 70. per totum. 2 Hawk. ch. 8. ſect. 38. ch. 27. ſect. 28. ch. 43. ſect. 25. ch. 46. ſect. 19, &c 24. 4 Co. 18. 5 Co. 2. Part 50. 61. 10 Co. 103.

IN the great Caſe in the Star-chamber of a Forgery between Sir *William Read* Plaintiff, and *Roger Booth*, and *Cuthert 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 *Reger* knowing it to be forged. And afterwards the ſaid Sir *William Read* exhibited the ſaid Bill againſt the ſaid *Booths* 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 Hoogon* 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 *(eſtſoons)* committed again any of the ſaid Offences.) And therefore it was objected, that he ought to commit again the ſame Nature of Offence, *ſcil.* 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 *(eſtſoons)* which is *(iterum)* implieth that it ought to be of the ſame Nature of Offence. The ſecond Doubt

was

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 *Cuthert 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 alledged 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 Intereſt 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 forgeth 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, eftſoons commit 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, although 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 committed,

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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.

XIV. *Pasch.* 7 Jac. *Regis.*

The Case of Sewers.

Sewers. ant. 33. See 5 Co. 2. part 100. 6 Co 20. 10 Co. 138, 139 to 143.

THE Case was, That there was a Causey or Mill-stank of Stone in the River of *Dee* and City of *Chester*, which Causey 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 Causey: 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 Causey, which Causey 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 Inhancing: And if by any Decree of the Commissioners by Force of any Statute, any Breach may be made in that Causey, 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 cætero per Thamesiam, & Medeweiam & per totam Angl. nisi per Costeram Maris.* It was resolved, That that Statute extended only to *Kidells, sc.* open Wears for taking of Fish, but the first Statute which extended to pulling down, or abating of any Mills, Mill-stanks and Causeys, was the Statute of 25 *E.* 3. *cap.* 4. which Act appointed

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 riſen by the outragious Inhancing of Mills, Mill-ſtanks, and other Impediments made and erected before the Reign of King *Edward* the Firſt: The ſaid old Mills and Mill-ſtanks were appointed by Act then made to be ſurveyed, and ſuch as were found to be much inhanced to be corrected and amended; ſaving always reaſonable Subſtance of ſuch Mills, Mill-ſtanks, Wears, *&c.* ſo in old Time made and levied: None of which Acts extended to the Caſe in Queſtion; for that Cauſey was erected before the Reign of *Edward* the Firſt, and never exalted or inhanced after the Erection of it: And the Statute of 12 *H.* 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 *H.* 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, Cauſeys, *&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, *ſcil.* 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, *ſcil.* 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

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heretofore made concerning the Premiſſes 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 1 of *H.* 4. remained yet in Force; and that the Authority given by the Commiſſion of Sewers did not extend to Mills, Mill-ſtanks, Cauſeys, &c. erected before the Reign of King *Ed.* 1. unleſs that they have been inhanced 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.

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* XIV. *Trin.* 7 Jac. *Regis.*

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

De Modo Decimandi ant. 12. poſt. 58. 2 Inſt. 607. Gibſon's Codex 1072. Watſon's Clergyman 503, 509, &c. 538, &c. 543, &c. to 568.

Richard Bancroft Archbiſhop 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 Archives; 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 to *Whitehall* the Thurſday, Friday, and Saturday after *Eaſter* Term in the Council-chamber; where the Chief Juſtice and my ſelf, *Daniel* Judge of

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 and 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 his Subjects, that 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 alledgeth 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 *Modo 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

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 Invection againſt Prohibitions *in Cauſis Eccleſiaſticis:* 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 acceſſarii in Curia Chriſtianitatis impediatur ubi cognitio Cauſæ principalis ad forum Eccleſiaſticum noſcitur pertinere.* And the principal Cauſe is Right of Tithes, and the Plea of *Modo Decimandi* ſounds in Satisfaction of Tithes; and therefore the Conuſance of the original Cauſe, (*ſcil.*) the Right of Tithes appertaining to them, the Conuſance of the Bar of Tithes, which he ſaid was but the Acceſſary, and as it were dependant upon it, appertained alſo to them.

2 Co. 43, 44, &c. 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 feigned Foundation, and humbly deſired the Reformation of that Error, for they would allow *Modum Decimandi* being duly proved before them.

Note. 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.

Poſt. 58. Antea 12, 14. 3. That the Cuſtom *De modo Decimandi* is of Eccleſiaſtical Juriſdiction and Conuſance, 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 Conuſance; and by Conſequence it ſhall be tried before the Eccleſiaſtical Judges: For if the Right of Tithes be of Eccleſiaſtical Conuſance, and the Satisfaction alſo for them of the ſame Juriſdiction, the ſame ſhall be tried in the Eccleſiaſtical Court.

4. In

4. In the Prohibitions of *Modus Decimandi* 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. Averment, Antea 14. Poſt. 44.

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, argued before the King, and in Effect ſaid leſs than Dr. *Bennet* ſaid before; but he vouched 1 *R.* 3. 4. the Opinion of *Huſſey*, when the Original ought to begin in the Spritual 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 *Regiſter* 57 and 58. If a Man be condemned in Expenſes 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 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. *Page* [39]

And the ſaid Judges made humble Suit to the King, That for as much 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.

Your

Your Majeſty, for the great Zeal which you have to Juſtice, and for the due Adminiſtration thereof, hath conſtituted and made fourteen Judges, to whom you have committed not only the Adminiſtration of ordinary Juſtice of the Realm, but *crimina læſæ Majeſtatis*, touching your Royal Perſon; for the legal Proceeding: Alſo in Parliament 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 Chancery, 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 Diminution 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 Reverence and Reſpect as Judges ought to have. The State of this Queſtion is not in *ſtatu deliberativo*, but *in ſtatu judiciali*; it is not diſputed *de bono*, but *de vero, non de Lege fienda, 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 *primæ impreſſionis*, and your Majeſty deteſting Noveltics and Innovations, we leave it to your Grace and Princely Conſideration, whether your Majeſty will permit our anſwering *in hoc ſtatu 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 adjudged upon judicial Proceedings in your Courts of Juſtice at *Weſtminſter*: Which Judgments cannot be reverſed or examined for any Error in Law, if * not by a Writ of Error in a more high and ſupream 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.

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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

Law by a Jury of twelve Men, it appeareth in three Manners: Firſt, by the Common Law: Secondly, by Acts of Parliament: And laſtly, by infinite Judgments and judicial Proceedings long Times paſt without any Impeachment or Interruption.

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. Modus Decimandi. See Watſon's Clergyman, 509, &c.

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 40*s.* 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 aliud 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 *Surry*, and declared, how that he and his Anceſtors were ſeiſed 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 aſſured, 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

is

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, (*scil.*) upon Title of Prescription, We will hold Jurisdiction, and that is fortified with an Asseveration, *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.

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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 *Circumspecte agatis*, *Decimæ debitæ*, *seu consuetæ*, which proves that Tithes in Kind, and at *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 Temporalty, (*scil.*) the King's Letters Patent, the same ought to be shewed how, &c. otherwise of that which is meer 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.

Secondly, By Acts of Parliament.

1. The said Act of *Circumspecte 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 soundeth in the Temporalty, 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

for the ſame, which is the *Modus Decimandi* at the Common Law; for that Cauſe the Act is clear, that the ſame was a Doubt at the Common Law: And the Statute of *Articuli Cleri, cap.* 1. If corporal Penance be changed *in panam pecuniariam*, for that Pain Suit lieth in the Spiritual Court: For ſee *Mich.* 8 *H.* 3. *Rot.* 6. *in Theſaur.* A Prohibition lieth *pro eo quod Rector de Cheſterton 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 *H.* 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 Uſage 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.* 3. *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 Proviſo, 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 be diſcharged by any Compoſitions real. And afterwards, there is another Branch in the ſaid Act; and be it further enacted, That if any Perſon do ſubſtract or withdraw any manner of Tithes, Obventions, Profits, Commodities, or other Duties before mentioned (which extends to Cuſtom 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 in the Negaitve, That no Perſon ſhall be ſued for any Tithes of any Lands

Prohibition. Antea 8. &c. 17, &c. Poſt. 70. Poſt 47, &c.

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Lands which are not chargeable with the Payment of such Tithes by any Law, Statute, Privilege, Prescription, 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, ca.* 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 quæ magnæ sunt examinationis non capiantur in patria*; a Prohibition lieth to the Justices of *Nisi prius.* So upon the Statute of *Articuli super Cartas, cap.* 7. *Quod Constabularius Castr.* Dover, *non teneat Placitum forinsecum quod non tangit Custodiam Castri,* Register 185. So upon the same Statute, *cap.* 3. *Quod Senescallus & Marischallus non teneant Placita de libero tenemento, de debito conventione, &c.* a Prohibition lieth 185. And yet by none of these Statutes, is any Prohibition or *Supersedeas* 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 any Thing 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 Hospitalers and Templars, if they do against the same Statute, *Regist.* 39. *a.* So upon the Statute *de prohibitione regia, Ne laici ad citationem Episcopi conveniant ad recognitionem faciend. vel Sacrament. præstanda nisi in casibus matrimonialibus & Testamentariis,* a Prohibition lieth. *Regist.* 36. *b.* And so upon the † 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 Peckam* 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 because 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 Archbishop in the *Arches* against *Pierce Peckham,* to whom the Bishop of *London* had committed

See Lib. Entr. 450. a Prohibition was upon the Statute that one shall not maintain; and so upon every penal Law. See F.N.B. 39. B. Prohibition to the Common Pleas upon the Stat. of Magna Charta that they do not proceed in a Writ of Præcipe in Capite, where the Land is not holden of the King. 1 & 2 Eliz. Dy. 170, 171. Prohibition upon the Statute of Barrenes, and Petit is only prohibited by Implication.

† See 12 Co. 61, &c. ib.

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 the Bar, for that Statute is in the Affirmative, and the ſaid Act of 2 *E. 6. cap.* 13. is in the Negative, *ſcil.* 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 *E. 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 reſolved in 7 *E. 6. Dyer* 79. *Et contemporanea expoſitio eſt optima & fortiſſima in lege, & a communi obſervantia non eſt recedendum, & minime mutanda ſunt quæ certam habuerunt interpretationem.*

See 2 Inſt. 648, to 664.

And as to the firſt Objection, that the Plea of *Modus Decimandi* is but acceſſary to the Right of Tithes; it was reſolved, that the ſame 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 aſ-

A Modus extinguiſhes Tithes in Kind. Antea 13, 14, 16.

ſigned

ſigned to the Parſon, &c. So as in this Caſe there is neither Principal nor Acceſſary, but an Identity of the ſame Thing.

2. The Statute of 2 *E.* 6. being a Prohibition in it ſelf, 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 it ſelf, that a *Modus Decimandi* is out of it; for there is a Prohibition *in Cauſa Modi 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 *ſtatus Quæſtionis non eſt* * *deliberativus ſed judicialis*, 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.

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As to the third Objection, it was anſwered and reſolved: Firſt, That *ſatisfactio pecuniaria* of it ſelf is Temporal: But for as much 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 *F.* 4. *Conſultation*, That Right of Tithes which is meerly 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:

Antea 14, 38.

1. It is only to inforce the Contempt.

2. If the Spiritual Court ought to have the Trial *de Modo Decimandi*, then the Refuſal of Acceptance of ſuch a Plea ſhould give Cauſe of Appeal, and not of Prohibition: As if an Excommunication, Divorce, Hereſy, Simony, *&c.* be pleaded there, and the Plea refuſed, the ſame gives no Cauſe of Prohibition: As, if they deny any Plea, meer Spiritual Appeal, and no Prohibition lieth. See the Proem to Gibſon's Codex, and the Codex, p. 703, 735. Watſon's Clergyman, chap. 54, 55, 56, and p. 586.

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

4. The Refuſal is no Part of the Matter iſſuable or material in the Plea; for the ſame 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 Refuſal, which proveth, that the *Modus Decimandi* is only the Matter of the Suggeſtion, and not the Refuſal.

5. All the ſaid five Matters of Diſcharge of Tithes mentioned in the ſaid Branch of the Act 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 ſaid Act; and therefore the Stat. of 2 *E.* 6. clearly intended, that Prohibitions ſhould be granted in ſuch Cauſes.

6. Although that they would allow *bona fide de Modo Decimandi*, without Refuſal, yet if the Parſon ſueth there for Tithes in Kind, when the *Modus* is proved, the ſame being expreſly prohibited by the * Act of 2 *E.* 6. a Prohibition lieth, although the *Modus* be ſpiritual, as appeareth by the ſaid Book of 4 *E.* 4. 37. and other the Caſes aforeſaid. *Page* [45]

And afterwards, in the third Day of Debate of this Caſe before his gracious Majeſty, Dr. *Bennet* and Dr. *Martin* had reſerved divers Conſultations granted *in Cauſa Modi Decimandi*, thinking that thoſe would make a great Impreſſion in the Opinion of the King: And thereupon they ſaid, That Conſultations were the Judgments of Courts had upon Deliberation, whereas Prohibitions were only granted upon Surmiſes: And they ſhewed four Precedents: Third Days Debate.

One, where three jointly ſued a Prohibition in the Caſe of *Modo Decimandi*, and the Conſultation ſaith, *Pro eo quod ſuggeſtio materiaque in eadem contenta minus ſufficiens in Lege exiſtit, &c.*

2. Another *in Cauſa Modi Decimandi*, to be paid to the Parſon or Vicar.

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 the 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 center 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 Conſciences 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 agreeth 38 *E.* 3. 6. cited before by *Bacon:* And alſo there the Prior was of the Order of the *Ciſtertians*; 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 a *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 fuit ad. materiaq; 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.*

* To

* To which I anſwered, That when the Matter is inſufficiently or uncertainly alledged, the Matter it ſelf faileth; for Matter ought to be alledged in a good Sentence: And altho' the Matter be in Truth ſufficient, yet if it were inſufficiently alledged, the Plea wanteth Matter. And the Lord Treaſurer ſaid openly to them, that he admired that they would alledge 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 caſu de Modo Decimandi*, when an annual Sum ought to be paid, as where Land is given: For all the Records and Precedents of Prohibition in ſuch Caſes are, That ſuch a Sum had been always, &c. paid *in plenam contentationem, ſatisfactionem & exonerationem 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 had anſwered him in, &c.

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Gibſon's Codex 700. Watſon's Clergyman 552 to 588.

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 our ſelves, 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.

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 Case, 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 said in the said Books? To which I answered, that it appeareth 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* the Sixth, a little before the said Case in 8 *E.* 4. in his Title *de Decimis, cap. Quoniam propter, &c. fol.* 139. *b. Quod Decimæ 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 specie, and then the same is against their Canon; *Quod decimæ solvantur absque diminutione, & quod consuetudo de non plene Decimando non valet.* And it seemed to the King, that that Book was a good Cause for them in the Time of King *Edward* the Fourth to say, as they had said; but I said, That I did not rely upon that, but upon the Grounds aforesaid, (*scil.*) 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 Statute of 25 *H.* 8. *cap.* 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.

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Antea 13, 15, 17.

Antea 17.

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 Process 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 Heresy, Schism, Incest, and the like great Offences: For the King said, That it was not Reason that the High Commission should have Conusance of common Offences, but to leave them to Ordinaries, *scil.* because that the Party cannot have an Appeal in Case 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.

High Commission.

Antea 9, 10. 12 Co. 51 to 55. 84 to 89. Gibson's Codex 50, 54, 56, 58, 59, &c.

XV. *Mich.*

XV. *Mich.* 39 & 40 Eliz.

In the King's Bench.

Bedell *and* Sherman's *Caſe.*

Subſtraction of Tithes. Gibſon's Codex 718, &c. 826. ant. 23.

MICH. 39 & 40 *Eliz.* which is entred *Mich.* 40 *Eliz.* in the Common Pleas, *Rot.* 699. *Cantabr.* the Caſe was this; *Robert Bedel*, Gent. and *Sarah* his Wife, Farmers of the Rectory of *Litlington* in the County of *Cambridge*, brought an Action of Debt againſt *John Sherman*, in the Cuſtody of the Marſhal of the Marſhalſea, and demanded 550 *l.* 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 Pheſant* the ſaid Rectory for 21 Years, rendering 17 *l.* 15 *s.* 5 *d.* and reſerving Rent-corn according to the Statute, &c. which Kent 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 Bedel*, 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 *Litlington* aforeſaid, which ought to pay Tithes to the Rector of *Litlington*; and in *anno* 38 *Eliz.* the Defendant *grano ſeminavit* 200 Acres, Parcel, &c. And that the Tithes of the ſame did amount to 150 *l.* and that the Defendant did not divide nor ſet forth the ſame from the 9 Parts, but took and carried them away, againſt the Form and Effect * of the Statute of 2 *E.* 6, &c. And the Defendant pleaded *Nihil debet*, and the Jury found that the Defendant did owe 55 *l.* and to the Reſidue they found *Nihil debet*, &c. and in Arreſt of Judgment, divers Matters were moved.

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1. That *Grano ſeminata* is too general and incertain, but it ought to be expreſſed with what Kind of Corn the ſame was ſowed.

Ant. 24. 2 Danv. 223.

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.

XVI. *Trin.* 7 Jac.

In the Court of Wards.

John Bailie's *Case.*

Diem clauſit extremum. 12 Co. 102. 8 Co. 168.

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 Barons.

1 Sal. 169.

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

Poſt. 59, 72.

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 lieth; and from the Viſne 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 *nuper* 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 incertain and void.

8 Co. 155. Poſt. 72.

XVII. *Trin.*

XVII. *Trin.* 7 Jac. *Regis.*

In the Court of Wards.

Covenant to Uſes.

THE Attorney of the Court of Wards moved the two Chief Juſtices and Chief Baron in this Caſe, That a Man ſeiſed of Lands in Fee-ſimple, covenants for the Advancement of his Son, and of his Name, and Blood, and Poſterity, that he will ſtand ſeiſed 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, *ſcil.* 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, *Page* [49] 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, *ſcil.* 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 *Eliz.* in *Sheffield*'s Caſe, for both Points.

4 Mod. 153. 2 Sal. 675. to 679. 1 Vent. 137, 138. &c. Uſes. Vide poſt. 50, 55 Parliament Caſes 104.

XVIII. *Trin.* 7 Jac. *Regis.*

In the Court of Wards.

SPARY's *Case.*

Office. Mean Profits, vide infra. 3 Inſt. 216. 4 Inſt. 196, 197, 297, 200, 207. 4 Co. 54. 7 Co. 21. 8 Co. 133. 10 Co. 114, 115.

JOHN Spary ſeiſed 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 anſwered 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 Statute of 32 *H.* 8.

XIX. *Trin.* 7 Jac. *Regis.*

In the Court of Wards.

Office, &c. 3 Inſt. 216. 4 Inſt. 196, 197, 200. Vide ſupra, & 2 Co. 93, 94. 3 Co 31, 34, 66. 6 Co. 76. 8 Co. 164, 165, 173. 9 Co. 126, 152. 10 Co. 80, 81, &c.

IT was found by Force of a *Mandamus* at *Kendal* in the County of *Weſtmerland* the 21ſt of *December*, 6 *Jacobi Regis*, That *George* Earl of *Cumberland*, long before his Death, was ſeiſed 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

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, coveyed 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 *Geo.* 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* 3 *Jacobi*, 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.

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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 the Day of his Death was neceſſary: But this Office is to be maintained upon the Statute of 32 and 34 *H.* 8. by Force of which no Dying ſeiſed is requiſite, but rather the contrary, *ſcil.* if the Land be (as this Caſe is) conveyed to the Wife, *&c.* And ſo it was reſolved in *Vincent's* Caſe, *anno* 23 *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.

Vide poſt. 72. ant. 48.

Stat. 32 H. 8. c. 1. & 34 H. 8. c. 5. See 2 Co. 93, 94, &c.

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 aliened 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.

See 1 Co. 52, 53. 158, 173. 4 Co. 54. &c. 7 Co. 16, &c.

XX. *Trin.* 7 Jac.

In the Court of Wards.

Wills's *Caſe.*

Uſes.
1 Co. 121, 127, 140.
2 Co. 57, 58.
6 Co. 64.
7 Co. 13 & 34.
Vide ant. 48.
poſt. 55, 56.

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 Iriſh* 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 2d Son in Tail, and afterwards to the Uſe of *Richard 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 aboveſaid 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 *Ouſter 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 *Ouſter 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

Page [51] *Poſſeſſion, his Heir within the Age of fourteen Years, he ſhall not ſue Livery, but ſhall have an *Ouſter 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 agreeth 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

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 *Ouſter le main* ſhould be ſued in ſuch Caſe, and the Reaſon was, becauſe that the precedent Clauſe giveth 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 *Ouſter 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 Allett* was ſeiſed of certain Lands in *Pitſey* called *Lundſey*, 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 *Ouſter 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.

XXI. *Trin.*

XXI. *Trin. Anno* 7 Jacobi *Regis.*

The Caſe of the Admiralty.

Admiralty. See 12 Co. 129, &c. ibid 2 Co. 93. 10 Co. 115, 117. 5 Co. 2. Part 106, 108.

A Bill was preferred in the Star-chamber againſt Sir *Richard Hawkins*, Vice-admiral of the County of *Devon*; and was 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.

12 Co. 129.

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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 agreeth the Statute of 2 *Hen.* 4. *cap.* 11. and the Statute of 15 *Hen.* 2. *cap.* 3. 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 Conuſance, Power, or Juriſdiction, *&c.* Nevertheleſs 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 other

ther Places of the ſame 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 ancient 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 agreeth *Stamford fol.* 51. And if a Man be killed or ſlain within the Arms of the Sea, where a Man may ſee from the one Part of the Land to the other, the Coroner ſhall enquire of it, and not the Admiral, becauſe that the Country may well know it: And he voucheth 8 *Ed.* 2. *Coron.* 399. ſo ſaith *Stamford*, the ſame 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 *Pla. Com.* 37. 6. If the Marſhal holdeth Plea out of the Verge, or the Admiral within the Body of the County, the ſame is void. See 2 *R.* 3. 12. 30 *H.* 6. 6. by *Priſoit.*

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, *ſcil. De Juriſdictione tenendi placiti; non de Juriſdictione exequendi*: For notwithſtanding the ſaid Statutes, the Judge of the Admiralty may do Execution within the Body of the County; and therefore in 19 *H.* 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 aforeſaid 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; whereupon Command was made to the ſaid *P.* as Miniſter of the Court aforeſaid, to take the Goods of the ſaid *J. B.* to make Agreement with the beforeſaid *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 *Leiceſter*. And there it is holden by *Newton*, and the whole Court, that the Statutes reſtrain the Power of the Court of Admi-

ralty

ralty to hold Plea of a Thing done within the Body of the County, but they do not restrain the Execution of the same 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 wherewithall to make Agreement, they of the Court have Power to take the Body of such a Defendant upon the Land in Execution.

Page [53] * 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 same 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.

See this Point resolved 8 El. Dyer per curiam, which is omitted out of the printed Book.

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, in as much 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 Conusance 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 *Layston* 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, (*scil.*) the Taking of them

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 ſtealeth 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 Aſſiſes. And at the next Aſſiſes the Opinion of *Wray* Ch. Juſtice, and *Periam* Juſtices of Aſſiſe, was that for as much as the Common Law doth not take Notice of the original Offence, the Bringing of the Goods ſtoln 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 2 *Reports* 93. and in *Conſtable*'s Caſe, *C.* 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 *Engliſhmen*, 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 *Engliſh* Men were hanged and drawn, as appeareth by the ſame Book. See *Stamford* 10. *Page* [54]

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 ſhall not be attainted but by Parliament, until the Statute of 35 *H.* 8. *cap.* 2. although that there are Opini-

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

XXII. *Trin.* 7 Jac. *Regis.*

In the Common Pleas.

Pettus *and* Godſalve's *Caſe.*

Fine, Proclamations amended. 4 Co. 42. See 5 Co. 2. Part 28, 39, 43, 44, and 45. 8 Co. 157, to 161.

IN a Fine levied *Trinity-Term, Anno quinto* of this King, between *John Pettus*, Eſq; Plaintiff, and *Roger Godſalve* and others, Deforceants 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 *Dorſis*, upon Record, *& Notæ finis ejuſdem Termini per Juſticiarios*, 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 duely 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 Dorſis ſuper pedes aliorum finium* of the ſame Term: And this was done upon the Motion of *Haughton*, Serjeant at Law.

XXIII. *Mich.*

XXIII. *Mich.* 7 Jac. *Regis.*

In the Court of Wards.

Sammes's *Caſe.*

John Sammes being ſeiſed of *Grany* Mead by Copy of Court-Roll of the Manor of *Tolleſham* the Great, of which Sir *Thomas Beckingham*, &c. 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 * firſt 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* the ſaid Mead called *Grany* Mead, to have and to hold the ſaid Mead 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 Premiſſes to the Uſes within mentioned.

Uſes. See 1 Co. 101, 121, 122, 127, 140. 2 Co. 58, 78. 6 Co. 64. 7 Co. 13 and 34. *Page* [55] Vide ant. 50, 51. Uſes. Vide ant. 48, 50, 54.

John Sammes the Father dieth, *George Sammes* his Son 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:

Wardſhip.

1. For as much as *George* was not named in the Premiſſes, 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.

Habendum.

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

Uſes.

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 deveſt the Eſtate, which was veſted in him by the Common Law, out of him, and veſt the Eſtate in him in the *Poſt* 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 *Poſt*, 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.

Joint-Tenants, &c.

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 deveſted 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, deveſts the Eſtate veſted in him by the Common Law, and executes the ſame

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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 27 *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 covenant 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 deveſted, 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 *Borrough 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 it ſelf, if no Feoffment had been made: As it is holden 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 it ſelf: 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 preſenti*,

See the D. of Norfolk's Caſe in 3 Chanc. Ca.

ſeuti, 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, ſhe 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, *ſcil.* the Feoffment. See 17 *El. Dyer* 340. So if a Diſſeiſin be had to the Uſe of two, and one of 'em agreeth at one Time, and the other at another Time, they
Page [57] 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 of 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 *E.* 3. *Joinder in Action* 10. 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 *E.* 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.

XXIV. *Paſch.*

XXIV. *Paſch.* 39 El. *Rot.* 233.

In the King's Bench.

Collins *and* Harding's *Caſe.*

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 Leſſee the ſame cannot be apportioned: And therefore if one demiſeth three Acres, rendering 3 *s.* Rent, and afterwards bargaineth and ſelleth, by Deed indented and inrolled, 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 Leſſee by that ſhall be Subject to two Fealties, where he was ſubject but to one before.

Rent apportioned. See 3 Co. 24. 4 Co. 37, 38. 5 Co. 2. Part 5, 6, 55. 6 Co. 2. 7 Co. 23. 8 Co. 79. 9 Co. 135. 10 Co. 128.

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 Leſſee, 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 *acceſſarium ſequitur naturam ſui principalis*, and that cannot be ſevered or divided by the Aſſent of the Leſſee, 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 Inrolments, or of Uſes, *&c.* And as to the two Fealties, to that the Leſſee ſhall be ſubject, although that the Rent ſhall be extinct: For Fealty is by

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.

Page [58] *And it was alſo adjudged, That although *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. *Weſt* and *Laſſel's* Caſe: A Man made a Leaſe for Years of certain Lands, and afterwards deviſeth 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.* 108. in the Common Pleas, *Ewer* and *Moyl'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 Serjeant *Bonloes*, in *Hill.* 6. and 7 *E.* 6. to the contrary, *nihil valet (ſcil.)* That the Rent in ſuch Caſe ſhould 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.

De Modo Decimandi.

Modus Decim. Antea 12, 37, 38, &c.

25. NOte; It was adjudged 19 *Eliz.* in the King's Bench, That where one obtained a Prohibition upon Preſcription *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 Conſultation 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

Suit was in the Spiritual Court: And the Trial of the Cuſtom *De Modo 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.

XXV. *Mich.* 7 Jacobi *Regis.*

Ejectment de duabus partibus, *&c.*

IN an *Ejectione Firmæ*, the Writ and Declaration were of two Parts of certain Lands in *Hetherſet* 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 *Aſſiſ.* 1. 10 *Aſſiſ.* 12. 10 *E.* 3. 511. 11 *Aſſ.* 21. 11 *E.* 3. *Bre.* 478. 9 *H.* 6. 36. 17 *E.* 4. 46. 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 *Fourden's* Caſe in the King's Bench: And accordingly Judgment was given in this Term in the Caſe at Bar.

See 3 Co 16, 45. 4 Co. 26, 96. 9 Co. 77, 78. 10 Co. 46. 11 Co. 25, 55, &c.

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XXVI. *Mich.* 7 Jac. *Regis.*

In the Common Pleas.

Mutton's *Caſe.*

Slander. Poſtea 71. 1 Danv. 95, to 99. See Inſt Leg. 291, 292. 1 Lev. 255, 276, 2 Brownl. 276. Hob. 137, 155, 162. 1 Cro. 100. 2 Cro. 205, 233, 236, 306, 399, 531, 560.

AN Action upon the Caſe 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 ſortes exploratio: Et Sortilegus ſive Sortilegiſta eſt qui per ſortes futura prænunciat.* Inchantry *eſt verbis aut rebus adjunctis aliquid præter naturam moliri*: Whereof the Poet ſaith,

Carminibus Circes ſocios mutavit Ulyſſis.

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 *Knevet* 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 *Tuthil*, at the Charges of the Priſoner. And the ancient Law was, as it appeareth 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 Latine Venefica*: But if one ſaith, She is a Witch, and hath bewitched ſuch a one to Death, an Action upon the Caſe lieth, if in Truth he be dead. Conjuration is derived of theſe Words, *Con* and *juro*: *Et proprie dicitur quando multi in alicujus perniciem jurant*: And in the Statute of 5 *Eliz. cap.* 16. it is taken for Invocation of

of any evil and wicked Spirits, *i. eſt conjurare verbis conceptis aliquos malos & iniquos ſpiritus*; the ſame is made Felony: But Witchcraft, Inchantment, Charm or Sorcery, is not Felony, if by them any Perſon be not killed or dieth. So that Conjuration *eſt verbis conceptis compellere malos & iniquos ſpiritus aliquod facere vel dicere, &c.* But a Witch, who works any Thing by any evil Spirit, doth not make any Conjuration or Invocation by any powerful Names of the Devil, but the wicked Spirit comes to her familiarly, and therefore 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 ſaith, 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 ſaid.

And note, That the firſt Statute which was made againſt Conjuration, Witchcraft, Sorcery and Inchantment, 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.

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* XXVII. *Mich.* 7 Jac. *Regis.* *Page* [60]

In the Court of Wards.

Sir Allen Percy's *Case.*

SIR *John Fitz* and *Bridget* his Wife, being Tenants for Life of a Tenement called *Ramſhams*, 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 Aſhes, and Liberty to carry them away, rendering Rent, and afterwards Sir *John* died, having Iſſue *Mary* his Daughter, now the Wife of Sir *Allen Percy*, Kt. 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

Waſte in cutting Trees, &c. See 2 Co. 92. 4 Co. 63, 67, to 70. 5 Co. 2. Part 12. 11 Co. 45, 48, 82.

Eſtate for the Life of *Bridget*, and alſo having the Poſſeſſion by the ſaid Demiſe, might cut down the Timber-Trees, Oaks, and Aſhes: 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 Leſſee 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 anſwered and reſolved by the two Chief Juſtices, and the Chief Baron, That in the Caſe at Bar, the Exception was good without Queſtion, becauſe that he who hath the Inheritance, joins in the Leaſe with the Leſſee for Life. And it was further reſolved, That if Tenant for Life leaſeth for Years, excepting the Timber-Trees, the ſame is lawfully and wiſely done: For otherwiſe, if the Leſſee or Aſſignee cutteth down the Trees, the Tenant for Life ſhould be puniſhed in Waſte, and ſhould not have any Remedy againſt the Leſſee for Years: And alſo if he demiſeth the Land without Exception, he who hath the immediate Eſtate of Inheritance, by the Aſſent of the Leſſee, 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 Leaſe excepteth the Trees, if they be cut down by the Leſſor, the Leſſee or Aſſignee ſhall have an Action of Treſpaſs, *Quare vi & armis*, and ſhall recover Damages according to his Loſs.

And this Caſe is not like the ſaid Caſe of *Saunders*, which was affirmed to be good Law; for there the Leſſee 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 leaſeth for Years, except the Timber-Trees, the ſame remaineth yet annexed to his Freehold, and he may command the Leſſee to take them for neceſſary Reparations of the Houſes. And in the ſaid Caſe of *Saunders*, a Judgment is cited between *Foſter* and *Miles* * Plaintiffs, and *Spencer* and *Bourd* Defendants, That where Leſſee 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

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lieth againſt the Tenant for Life, and ſo there is a Difference, &c.

XXVIII. *Mich.* 7 Jac. *Regis.*

In the Court of Wards.

Hulme's *Caſe*.

THE King (in the Right of his Dutchy of *Lancaſter*) Lord: *Richard Hulm* (ſeiſed of the Manor of *Male* in the County of *Lancaſter*, holden of the King as of his Dutchy by Knights Service) Meſne: And *Rob. Male* ſeiſed of Lands in *Male*, holden of the Meſne as of his ſaid Manor by Knights Service) Tenant. *Rich. Hulm* died; after whoſe Death, 31 *Hen.* 8. it was, that he died ſeiſed of the ſaid Menalty, 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 ſeiſed of the ſaid Tenancy peravail, 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 Knights Service; whereas in Truth the ſame was holden of *Edward Hulm*, then in Ward of the King, as of his Menalty: For which the King ſeiſed 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 ſeiſed of the ſaid Tenancy, and held the ſame of the King, as of his Dutchy, by Knights Service, his Heir within Age: Whereupon *Richard Hulm*, Couſin and Heir of the ſaid *Richard Hulm*, 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 *Hulm*, to traverſe the ſaid laſt Office? Or if that the ſaid *Hulm* ſhould be driven firſt to traverſe the Office of 35 *H.* 8.

Traverſe of Office.

See 4 Co. 43, 55 to 59. 6 Co. 8. 7 Co. 44, 45. 8 Co. 168.

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 Demeſne, 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 Socage, if the Heir ſueth 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 that is not any Eſtoppel to the Heir himſelf who ſueth the Livery, and ſhall not conclude his Heir: For ſo ſaith *Mowbray* himſelf expreſly in 44 *Aſſiſ. 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 *Diem clauſit 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 ſueth 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 *Laicon*, that if two Siſters be found Heirs, whereof the one is a Baſtard, if they join in a Suit of Livery, ſhe which joineth with the Baſtard in the Livery, ſhall not alledge Baſtardy in the other: But there is no Book that ſaith, 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 Eſchaetori*, &c. *Scias quod cepimus homagium* J. *filii & hæredis* B. *defuncti de omnibus terris & tenementis quæ idem* B. *Pater ſuus tenuit de*

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Co. Lit. 77. a.
Co. Litt. 226. a.

de nobis in capite, die quo obiit, & ei terras & tenements illa reddidimus, ideo tibi præcipimus, &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 ætatem ſuam coram te ſufficienter probavit, &c. Ceperimus homagium ipſius* J. *de omnibus terris & tenementis, quæ idem* B. *Pater ſuus tenuit de nobis in capite die quo obiit, & ei terras & tenement. illa reddidimus, & ideo tibi præcipimus, ut ſupra, &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 falſly 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 *ætate 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 * Eſtoppel 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 20*l.* 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 20*l.* then

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the

the Heir may ſue a general Livery after Office thereof found, as is aforeſaid: But if the Land doth not exceed 5 *l.* 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 Juſtitiæ* is not bound at this Day, after the ſaid Act of 33 *H.* 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 *H.* 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 conſideratum eſt, quod manus Domini Regis a poſſeſſione amoveantur, &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 *H.* 4. *fol.* 33. in the Earl of *Kent*'s Caſe, *&c.*

XXIX. *Mich.* 7 Jac. *Regis.*

Parliament.

See Hale of Parliaments 159, 198, &c. Bohun's Collection 268 to 289. See Farſl. 13, &c.

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 holden 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 Preheminences 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 not Leiſure to examine

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 Fourteenth of *February*: And afterwards in *Michaelmas-Term*, *anno* 31 *H.* 6. *Thomas Thorp*, the Speaker of the Commons Houſe, at the Suit of the Duke of *Buckingham*, was condemned in the Exchequer in 1000 *l.* Damages for a Treſpaſs done to him: The Fourteenth 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 *Priſot*, the two Chief Juſtices, in the Name of all the Judges, after ſad 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 Paſton*'s Caſe, it is holden, that every Court ſhall determine and decide the Privileges and Cuſtoms of the ſame Court, *&c.*

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See Bohun's Parliamentary Debates 276, 277.

XXX. *Hill.* 7 Jac. *Regis.*

In the Star-Chamber.

Heyward *and Sir* John Whitbroke's *Case.*

Star-Chamber Juriſdiction, &c. See 12 Co. 84, 90. 4 Inſt. 60.

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 eſtreat 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 the 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 omnia concedi videntur per quæ devenitur ad illud.* And it was reſolved,

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ſolved, That 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. See. 12 Co. 58.

XXXI. *Hill.* 7 Jac. *Regis.*

In the Common Pleas.

Morſe *and* Webb's *Caſe.*

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 Conuſance, becauſe that the Place where is an Acre of Land which is the Freehold of the ſaid *William Sherington*, and for Damage-feaſants, *&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 ſeiſed 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 Horſe-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 traverſed 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 ſeiſed of the ſaid two Yard-Lands, and that the ſaid *Richard Morſe*, *&c.* had

Preſcription for Common, &c. traverſed. See 4 Co. 12. 8 Co. 65. 9 Co. 33 to 36. 10 Co. 107, &c. 2 Saund. 314. 1 Mod. 74. 2 Lev. 2. 1 Salk. 170.

the Common of Paſture for the ſaid Cattle, *per totum contentum* of the ſaid *Downfield*, in Manner and Form as before is alledged; and ſo ſeiſed, the ſaid *Richard Morſe*, in the twentieth Year of Queen *Elizabeth*, demiſed to *William Thomas* and *John Fiſher* divers Parcels of the ſaid two Yard-Lands, to which, &c. *viz.* the four Buts of arable, with the Common and Intercommon to the ſame belonging, for the Term of Four hundred Years; by Force of which the ſaid *William Thomas* and *John Fiſher* entred, 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 *John Morſe* the now Plaintiff: And if upon the whole Matter, the ſaid *John Morſe* 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 Acres of Land, with the Appurtenances belonging, in Law or not, the Jury prayed the Advice of the Court.

Note, That this Plea began *Trin.* 5 *Jacobi*, *Rot.* 1405.

Page [66] 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.

1 Salk. 170. Cro. El. 794. 570.

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 ſurcharged: 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 Leſſor, ſo always as the Land in which be not ſurcharged.

2 Cro. 253. Cro. El. 570.

3. It was reſolved, 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 Tenetenant in which, &c.

4. See

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 (alledging 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.

2 Saund. 324, &c. 2 Cro. 574. Q. 4 Co. 12, 31.

XXXII. *Hill.* 7 Jac. *Regis.*

In the Common Pleas.

Hughes *and* Crowther's *Case.*

IN a Replevin, between *Robert Hughs* Plaintiff, and *Richard Crowther* Defendant, which began *Trin.* 6 *Jacobi*, *Rot.* 2220. The Case was, That *Charles Fox* was seised of six Acres of Meadow in *Bedston*, in the County of *Salop*, in Fee, and 10 *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 afterward *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: Otherwise 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.

Leases. 1 Co. 155. 3 Co. 19. 5 Co. 9, 29. 6 Co. 26, 35. 11 Co. 3. 1 Mod. 187.

Page [67] * XXXIII. *Paſch.* 8 Jac. *Regis.*

In the Common Pleas.

Heydon *and* Smith's *Caſe.*

Manor Cuſtoms. See Lex Manerior. 61 to 67.

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, & *quandam arborem ſuam ad valentiam* 40*s. ibidem nuper creſcen. ſuccciderunt:* The Defendants ſaid, that the Cloſe is, and at the Time of the Treſpaſs was the Freehold of Sir *John Leventhrop* 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 ſaith, That the ſaid Cloſe, and a Houſe and twenty-eight Acres of Land in *Ugley*, are Copyhold, and Parcel of the ſaid Manor of *Ugley*, &c. of which Manor *Edward Leventhrop* Eſquire, Father of the ſaid Sir *John Leventhrop*, was ſeiſed in Fee, and granted the ſaid Houſe, Lands and Cloſe to the ſaid *Richard Heydon* and his Heirs by the Rod, at the Will of the Lord, according to the Cuſtom of the ſaid Manor: And that within the ſaid Manor there is ſuch a Cuſtom, *Quod quilibet tenens Cuſtomar. ejuſdem Manerii ſibi, & hæredibus ſuis, ad voluntatem Domini,* &c. *a toto tempore ſupradicto uſus fuit, & conſuevit ad ejus libitum amputare ramos omnimodarum arborum*, called Pollingers, or Huſbords, *ſuper terris & tenem. ſuis Cuſtomar. creſcen. pro ligno combuſtibili, ad* like *libitum ſuum applicand. & in prædicto Meſſuagio comburend.* and alſo to cut down and take at their Pleaſure all Manner of Trees called Pollengers or Huſbords, and all other Timber-Trees, *ſuper ejuſdem Cuſtumariis ſuis creſcen.* for the Reparation of their Houſes built upon the ſaid Lands and cuſtomary Tenements; and alſo for Ploughbote and Cartbote, and that all Trees called Pollengers or Husbords, and all other Trees at the Time of the Treſpaſs aforeſaid, or hitherto growing upon the aforeſaid

1 Roll. Abr. 499. 4 Co. 24, 29. 8 Co. 63. 1 Roll. Abr. Tit. Cuſtom E. 16. 1 Leon. 238. Cro. Car. 221.

1 Brownl. 132. 4 Co. 30.

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 Leventhrop*, the ſaid Manor deſcended to the ſaid Sir *John Leventhrop*: And that at the Time of the Treſpaſs the aforeſaid Meſſuage of the ſaid *Richard Heydon* was in Decay, *& egebat neceſſariis reparationibus in Maremio ejuſdem.* Upon which the Defendant did demur in Law.

And this Caſe was oftentimes argued at the Bar: And now this Term it was argued at the Bench by the Juſtices: And in this Caſe theſe Points were reſolved.

1. That the firſt Part of the Cuſtom was abſurd and repugnant, *ſcil. Quod quilibet tenens Cuſtomarii ejuſdem Manerii habens & tenens aliquas* * *terras ſeu tenementa Cuſtom. &c. uſus fuit amputare ramos omnimodarum arborum, vocat.* Pollingers, *&c. pro ligno combuſtibili, &c. in prædicto Meſſuagio comburend.* (which ought to be in the Meſſuage of the Plaintiff, for no other Meſſuage is mentioned 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 laſt Part of the Cuſtom, which concerneth the Cutting down of the Trees, concerns the Point in Queſtion; and ſo the firſt Part of the Cuſtom is not material.

Page [68] Moor 47, 94, 392, 436, 811. 4 Co. 30. 8 Co. 63. 2 Salk. 368.

It was objected, That the Pleading, that the Meſſuage of the Plaintiff was in Decay, *& egebat neceſſariis reparationibus in maremio ejuſdem*, 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. 3. He who juſtifieth 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, *ſcil. Quod Meſſuagium præd. egebat neceſſariis reparationibus in maremio*, 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 alledge 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 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.

Eſtovers. 2 Brownl. 229. 2 Bulſt. 281. Godb. 173.

3. It was reſolved, That of Common Right, as a Thing incident to the Grant, the Copyholder may take Houſebote, Hedgbote and Plowbote upon his Copyhold: *Quia conceſſo uno conceduntur omnia ſine quibus id conſiſtere non poteſt: Et quando aliquis aliquid concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt*: And therewith agreeth 9 *H.* 4. *Waſte* 59. But the ſame may be reſtrained by Cuſtom, *ſcil.* 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; *ſcil.* Ruin of the Houſes, and Decay of Tillage and Husbandry.

Bote, its Signification. See Co. Lit. 41. b. and 127. Spelman in verbo. Veritegan. 249. Whiplo. k's M.S. in verbo.

And it is to be underſtood, That *Bote* being an ancient *Saxon* Word, hath two Significations; the one *compenſatio criminis*, as *Frithbote*, 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, (*ſcil.*) for Reparation, as was Bridgbote, Burgbote, Caſtlebote, Parkbote, *&c. ſcil.* Reparation of a Bridge, of a Borough, of a Caſtle, of a Park, *&c.* And it is to be known, that *Bote* and *Eſtovers* are all one: *Eſtovers* are derived of this *French* Word, *Eſtover*, *i. e. fovere*; *i. e.* to keep warm, to cheriſh, to ſuſtain, to defend: And there are four Kinds of *Eſtovers*, (*ſcil.*) *ardendi*, *arandi*, *conſtruendi*, & *claudendi*: (*ſcil.*) Firebote, Houſebote, Ploughbote, and Hedgbote.

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5. It was reſolved, That the Copyholder ſhall have a general Action of Treſpaſs againſt the Lord, *Quare clauſum fregit*, & *arborem* **ſuam*, *&c. ſuccidit*; for Cuſtom hath fixed it to his Eſtate againſt the Lord: And the Copyholder in this Caſe 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 Queſtion the Copyholder ſhall have an Action of Treſpaſs againſt his Lord, *Quare Domum fregit*, and by the ſame Reaſon for the Timber-Trees which are annexed 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.

Bench, between *Stebbing* and *Groſener*, the Cuſtom of the Manor of *Netherhall* in the County of *Suffolk* was, that every Copyholder might lop the Pollengers upon his Copyhold *pro ligno combuſtibili*, &c. And the Lord of the Manor cut down the Pollingers, being upon the Plaintiff's Copyhold, upon which he brought his Action upon the Caſe, becauſe that the Lops of the Trees in ſuch Caſe did belong to the Copyholder, and they were taken by the Lord. See *Taylor*'s Caſe in the fourth Part of my *Reports* 30 and 31. and ſee 5 *H.* 4. 2. Guardian in Knight-Service, who hath *Cuſtodiam terræ*, 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 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 Profits of the Land by Outlawry, ſhall have an Action of Treſpaſs, or take Goods Damage-Feſants: 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 Waſte brought againſt Tenant for Life, and aſſigned the Waſte 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 Waſte.

Cro. El. 6'9. Godb. 173. 2 Bulſt. 281. 2 Brownl. 229.

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 in as much 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, *ſcil.* 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, becauſe he is not chargeable over, but for the ſpecial Loſs which he hath, *ſcil.* 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 Plaintiff.

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XXXIV. *Paſch.* 8 Jacobi.

In the Common Pleas.

Pariſh-Clark.

See Gibſon's Cod. 240. 2 Salk. 536. 2 Roll. 227. Rep. Canon. 367, 365, 567.

THE Pariſhioners of St. *Alphage* in *Canterbury* by Cuſtom 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 Archbiſhop of *Canterbury*, to deprive 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 granted by the whole Court, becauſe the Party choſen is a meer

Prohibition.

meer temporal Man, and the Means of chuſing of him, *ſcil.* the Cuſtom, is alſo 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 may diſplace them, as it is holden in 26 *H.* 8. 5. And although that the Execution of the Office concerneth Divine Service, yet the Office it ſelf is meer Temporal. See 3 *E.* 3. *Annuity* 30. He who is Clark of a Pariſh is removeable by the Pariſhioners. See 18 *E.* 3. 27. A Gift in Tail was made of the Serjeanty or Clarkſhip 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 Deprivation 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 Aſſiſe, as in 4 *Eliz. Dyer* 209. The Preſident of *Magdalen-College* in *Oxford* was deprived of the Biſhop of *Wincheſter* their Viſitor; he ſhall not have an Appeal to the Delegates, for the Deprivation is Temporal, and not Spiritual; but he may have an Aſſiſe: And therewith agreeth the Book of 8 *Aſſ. Siracſe*'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.

Antea 8, 9. &c. 17, 18, 41, &c.

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*XXXV. *Mich.* 5 Jac. *Rot.* 30.

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In the King's Bench.

Prichard *and* Hawkin's *Caſe.*

Slander.

John Prichard brought an Action upon the Caſe againſt *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

See 1 Danv. 104. pl. 6, 12, and 14. 107, 108. pl. 9. 140, 141. pl. 1, to pl. 5.

murder *Joan Adams* Child, (*Quandam Iſabellam Adams modo defunct. filiam cujuſdam Johannis Adams*, of *Williamſtre* 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 defunct.* ought to have been in the Place of *modo defunct.*

XXXVI. *Paſch.* 8 Jacobi.

In the King's Bench.

Diſon *and* Beſtney's *Caſe.*

Slander.
Antea 59.
See 1 Danv. 113. pl. 14, 16, 17. 117. pl. 41, 43. 119. pl. 50.
2 Salk. 691.

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

XXXVII. *Paſch.*

XXXVII. *Paſch.* 8 Jac. *Regis.*

In the King's Bench.

Smith *and* Hill's *Caſe.*

Error. Return alb. Qr. 5 Co. 2. Part 39, to 47. 1 Danv. 180. pl. 13.

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 107 *l.* 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 called *Returnum album*; and for that Cauſe, this *Eaſter-Term* the Judgment was reverſed.

* XXXVIII. *Trin.* 7 Jacobi. *Page* [72]

In the Court of Wards.

Weſtcot's *Caſe.*

Diem clauſit extremum. Vide ant. 48, 49, 50. 12 Co. 102.

IT was found by a Writ of *Diem clauſit 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 *Trewalliard* in his Demeſn 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, as of his Caſtle of *Trematon*, Parcel of his Dutchy 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 *Willielmus*

Willielmus de Torr tenet duo feoda & dimid. militis apud Pick, Strikleſtomb, & 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 therewith agreeth *F. N. B.* 255. that a *Melius inquirendum* ſhall be awarded in ſuch a Caſe.

Vide ant. 48, 50.

Antea 41. 8 Co. 168.

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