&c. Hereby two things are to be obſerved: firſt, that hee ſhall not be delivered to the ordinary before hee be convicted: ſecondly, that the priviledge of the church extended not to high treaſon touching the king, *crimen læſæ majeſtatis*, but to petit treaſons and felonies touching other perſons.

About ſix yeares after this act, the abbot of Miſſenden in the county of Buckingham, was adjudged to be drawne and hanged for high treaſon, *viz.* for *contrafactione, et reſectione legalis monetæ.* Coram rege Mich. 31 E. 3. rot. 55. Buck.

At the parliament holden in the firſt yeare of H. 4. on the firſt Thurſday after the biſhop of Canterbury had willed the lords, that in no wiſe they ſhould diſcloſe any thing that ſhould be there ſpoken, the earle of Northumberland demanded of the lords what were beſt to be done for the life of king Richard the ſecond; thus farre are the words of the roll of the parliament: at this time ſpake that worthy prelate John Merkes biſhop of Carliſle, and ſaid, that they ought not to proceed to any judgement againſt king Richard for foure cauſes: firſt, that the lords had no power to give judgement upon him that was their ſuperiour, and the lords annointed: ſecondly, that they obeyed him for their ſoveraigne lord and king 22 yeares or more: thirdly, if they had power to give judgement againſt him, they ought in juſtice to call him to his anſwer; for that (ſaid he) is granted to the cruelleſt murderer, or arranteſt thiefe in ordinary courts of juſtice: fourthly, that the duke of Lancaſter had done more treſpaſſe to king Richard and his realme, then king Richard had done to him or them, &c. and deſired, that if they would proceed againſt him, that the names of them that ſo would proceed might be entred into the parliament roll. It is true, that the parliament roll omitteth this ſpeech of the biſhop, but it appeareth by the parliament roll, that the lords proceeded againſt king Richard, and adjudged him to perpetuall priſon, whoſe life they would by all meanes to be ſaved, as the roll reporteth. The names of the biſhops, and lords, and knights that aſſented, are ſet downe, as the roll of the parliament reports; ſo as it ſeemeth, that the ſtout and reſolute ſpeech of the worthy biſhop wrought ſome effect: for this ſpeech he was arreſted by the earle marſhall, and being for a ſmall time committed to the cuſtody of the abbot of Saint Albons was ſoon delivered; againſt him never any judiciall proceeding was had for this ſpeech in parliament: but this biſhop, tranſported with exceſſe of zeale, and affectionate deſire of the enlargement and reſtitution of king Richard, was party and privie to the conſpiracie of Thomas Holland earle of Kent, John Holland earle of Huntingdon, John Montacute earle of Saliſbury, Edward earle of Rutland, Thomas lord Spencer, and others, to kill the king, under colour of jouſting and paſtimes in the Chriſtmaſſe time, at the caſtle of Windeſor, where the king lay in the firſt yeare of his reigne: for this he was indited of high treaſon, arraigned, tryed, and had judgement as in caſe of high treaſon. But *cor regis in manu domini*, the king pardoned him, and ſet him at liberty. Many more preſidents might to this end be produced, but we will conclude this point with a reſolution of all the judges in 24 H. 8. A prieſt was attainted by verdict at the gaole-delivery at Newgate, for clipping of the kings coine, *viz.* George Nobles, and by advice of all the judges judgement was given againſt him to be drawne and hanged, as another lay perſon, becauſe

[636]

Rot. Parl. 1 H. 4. nu. 73.

Vid. Rot. Parl. an. 2 H. 4. nu. 30. See the record of his attainder, Hill. 2 H. 4. coram rege, rot. 6.

Trin. 24 H. 8. Juſtice Spilmans report.

becauſe it was high treaſon, and without degradation he was executed at Tiborne.

Now for murder, burglary, robbery, ſodomy, rape, burning of houſes, and many other felonies, the benefit and priviledge of clergy is taken away by divers acts of parliament, whereunto the biſhops were party, whereof you may reade, lib. 11. Alexander Poulters caſe, and where the benefit and priviledge of clergy remaineth, the party that takes the benefit of it ſhall not be delivered to the ordinary, nor make any purgation (which had been much abuſed) but forthwith be enlarged and delivered out of priſon by the juſtices, by whom ſuch clergy is allowed, as by another act of parliament, whereunto the biſhops were party appeareth.

Lib. 11. fol. 29. Alexander Poulters caſe. 23 H. 8. ca. 1. 25 H. 8. c. 3. 28 H. 8. c. 1. 32 H. 8. cap. 3. 1 E. 6. cap. 12. 5 E. 6. cap. 9. 8 El. cap. 4. 39 El ca. 9. & 15. 18 El. ca. 7.

* Amongſt the ancient cuſtomes and liberties of England recognized and declared in the parliament before mentioned, holden in the eleventh yeare of Henry the ſecond, this was one, *Cleri accuſati de quacunque re, ſummoniti à juſticiario regis, veniant in curiam ipſi reſponſuri ibidem de hoc, unde videbitur curiæ regis quod ibi ſit reſpondendum, et in curia eccleſiaſtica, unde videbitur quod ibi ſit reſpondendum, ita quod regis juſticiarius mittet in curiam ſanctæ eccleſiæ, ad videndum quomodo res ibi tractabitur, et ſi clericus convictus, vel confeſſus fuerit, non debet eum de cætero eccleſia tueri.* So as in effect the ancient law and cuſtome of England in that caſe is reſtored.

* 11 H. 2. apud Clarendon, ubi ſup. cap. 12.

Laſtly, out of what root this priviledge ſprang? It took his root from a conſtitution of the pope, that no man ſhould accuſe the prieſts of holy church before a ſecular judge, which being contrary to the crowne and dignity of the king, and the common law bound not here, till it was confirmed by parliament, and the rather, for that the church had no power to puniſh the offence; but where their claime was generall, the parliament of Edw. 1. and cuſtome of the realme reſtrained it onely to felony, ſo as they were to anſwer to high treaſon, and all offences under felony.

Polichro. lib. 4. cap. 24. Gaius Pope.

(1) *Clericus ad eccleſiam confugiens*, &c.] By this law, if any that was *infra ſacros ordines* committed felony, and for his tuition fled to a church, if he claimed the priviledge of his clergy, he ſhould not be compelled to abjure, but ſubmitting himſelfe to the law of the kingdome, he ſhould enjoy the priviledge of his clergy. See more of this matter in the next § *ſecundum laudab'*.

Vid. Stamf. pl. cor. 122, 123, &c.

[637]

(2) *Secundum laudabilem conſuetudinem regni.*] So as this priviledge of the clergy took not his vigour or ſtrength by force of any forraine councell or canon, but by authority of parliament, and by the laudable law and cuſtome of the kingdome, a point worthy of obſervation, the anſwer being ſo cautelouſly penned in thoſe dayes, leſt any thing in the petition ſhould countenance any forraigne juriſdiction: but ſo farre as *lex et conſuetudo regni* have allowed of the priviledge of the clergy, ſo farre, and no further it is to be allowed; and yet with this limitation, ſo as the clerke would ſubmit himſelfe (as hath been ſaid) to take it by the law of the kingdome expreſſed in theſe words, *ſed legi regni ſe reddens*, &c.

Vid. W. 1. ca. 2. Ilonque le cuſtome avant ces heures uſe.

He that is within orders hath a priviledge, that albeit hee have had the priviledge of his clergy for a felony, he may have his clergy afterwards againe, and ſo cannot a lay-man; and he that is within orders, and hath his clergy allowed, ſhall not be branded in the hand. But theſe priviledges are given by act of parliament.

4 H. 7. cap. 13.

CAP.

CAP. XVI.

ITEM, quanquam confeſſio coram illo qui non eſt judex confitentis, locum non teneat, nec ſufficiat ad faciend' proceſſum, vel ſententiam proferendam: quidam tamen ſeculares judices clericos, qui de foro ſuo in hac parte non exiſtunt, reatus proprios, et enormes, ut puta furta, roberias, homicidia, coram eis confitentes, admittunt accuſationem illorum, quam ipſi communiter vocant appellum, ipſos ſic confitentes, et accuſantes, ſeu appellum facientes, non liberant prælatis eorum poſt præmiſſa, quanquam ſuper his fuerint ſufficienter requiſit', licet coram eis etiam per confeſſionem propriam judicari vel condemnari nequeant, abſque violatione eccleſiaſticæ libertatis. Reſponſio: Appellatori (1) *in forma debita, tanquam clerico, per ordinarium petito libertatis eccleſiaſticæ beneficio, non negabitur. Nos deſiderantes ſtatui eccleſiæ Anglicanæ, et tranquillitati, et quieti prælatorum, et cleri prædictorum (quatenus de jure poterimus) providere, ad honorem Dei, et emendationem ſtatus dictæ eccleſiæ, et prælatorum, et cleri prædictorum, omnes et ſingulas reſponſiones prædictas, ac omnia et ſingula in eiſdem reſponſionibus content' ratificantes et approbantes, ea pro nobis et hæredibus noſtris concedimus, et præcipimus in perpetuum inviolabiliter obſervari: volentes, et concedentes pro nobis et hæredibus noſtris, quod prædicti prælati, et clerus, et eorum ſucceſſores in perpetuum in præmiſſis juriſdictionem eccleſiaſticam exerceant, juxta tenorem reſponſionum prædictarum, abſque occaſione, inquietatione, vel impedimento noſtri, vel noſtrorum hæredum, ſeu miniſtrorum quoruncunque. In cujus, &c. Teſt. &c.*

ALSO notwithſtanding that a confeſſion made before him that is not lawful judge thereof, is not ſufficient whereon proceſs may be awarded, or ſentence given; yet ſome temporal judges (though they have been inſtantly deſired thereto) do not deliver to their ordinaries, according to the premiſſes, ſuch clerks as confeſs before them their heinous offences, as theft, robbery, and murther, but admit their accuſation, which commonly they call an appeal, albeit to this reſpect they be not of their court, nor can be judged or condemned before them upon their own confeſſion, without breaking of the churches privilege. The anſwer. The privilege of the church, being demanded in due form by the ordinary, ſhall not be denied unto the appealour, as to a clerk. We deſiring to provide for the ſtate of holy church of England, and for the tranquillity and quiet of the prelates and clergy aforeſaid, as far forth as we may lawfully do, to the honour of God, and emendation of the church, prelates, and clergy of the ſame; ratifying, confirming, and approving all and every of the articles aforeſaid, with all and every of the anſwers made and contained in the ſame, do grant and command them to be kept firmly, and obſerved for ever; willing and granting for us and our heirs, that the foreſaid prelates and clergy, and their ſucceſſors, ſhall uſe, execute, and practiſe for ever the juriſdiction of the church in the premiſſes, after the tenour of the anſwers aforeſaid, without quarrel, inquieting, or vexation of us or of our heirs, or any of our officers whatſoever they be.

T. R.

T. R. at York, the xxiv. day of November, in the tenth year of the reign of king Edward, the ſon of king Edward.

Wee have been the longer in expoſition of the former chapter, becauſe wee ſhould be the ſhorter in this which ſomewhat concerneth the ſame matter.

(1) *Appellatori, i. Probatori.*] Albeit the clergy here pretended, that the confeſſion of a clerke (when he was indited of felony, and confeſſed the felony, and became an approver) was *coram non judice*; yet the continuall opinion and reſolution of the judges were againſt this: for they reſolved, that ſuch a clerke as confeſſed the felony before a ſecular judge, could not make his purgation, and conſequently, the confeſſion did bind him: and therefore Shard in 25 E. 3. ſpake in the perſon of a prelate. And when the clerke was delivered to the ordinarie, without any purgation to be made, he ought to have degraded him; but commonly, if the offender were a monke, he delivered him to his abbot to remaine in the abbey perpetually: and if he were ſecular, he remained in the biſhops priſon, &c. in a very favourable manner; which abuſes grew ſo odious and inſufferable in encouragement of malefactors in their wickedneſſe, as they were juſtly taken away, as is aforeſaid.

30 E. 3. cor. 247. 27 H. 6. fol. 7. 13 E. 4. 3. 3 H. 7. 2. 25 E. 3. coron. 128. Vid. 12 R. 2. coron. 109. & 247. 8 E. 2. coron. 417.

An appeale of robbery was brought againſt J. de B. monke of L. who pleaded not guilty, and put himſelfe upon the tryall of the country, who found him not guilty, whereupon the abbot of L. and the ſaid Monke, brought a writ of conſpiracie againſt divers, which procured and abetted the ſaid appeale, and recovered a 1000 markes in damages, which could not have been recovered, unleſſe the monke had been *legitimo modo acquietatus*, before a competent judge: and hereby it appeareth, that a clerke might wave the priviledge of his clergy, if he would, and be tryed by the courſe of the common law. And note, when hee knew himſelfe free and innocent, then hee would be tryed by the common law; but when he found himſelfe fowle and guilty, then would he ſhelter himſelfe under the priviledge of his clergy: and though they committed temporall crimes, yet would they not be tryed by the temporall lawes, which was the more againſt reaſon, becauſe no other law within this realme could puniſh them for the ſame, but the temporall lawes onely.

24 E. 3. 73. a. 22 E. 3. cor. 276. lib. 11. fol. 77. Magd. Colledge caſe.

The

The Expoſition of 18 Edw. 3. Cap. 7. of Tithes.

* *ITEM que per la ou brieſes de ſcire fac' eient eſtre grantes* (1) *a garner prelates religious et auters clerkes* (2), *a reſpondre des diſmes a noſtre chancerie, et a monſtrer ſils eient riens pur enſachent riens dire pur quoi tiels diſmes a les demandants ne deinent eſtre reſtitus, et a reſponder auxibien aux nous, come a partie de ticux diſmes.* † *Que ticux brieſes deſere en avant ne ſoient grantes, et que les proceſſes pendants ſur tieux brieſes ſoient anientes et repeales, et que les parties diſmiſes devant ſecular juges de tiels manners de pleas: ſaves a nous noſtre droit* (3), *tiel come nous et nous anceſtres avouns eit, et ſoloions avoir de reaſon. En teſtimoinance de quele choſe, a le requeſt des dites prelates a ceſtes preſentes letres avons fait metre noz ſeale. Done a Londres le* 8 *jour de July lan de noſtre reigne Engleterre diſoitiſme, et de France quints.*

ITEM, whereas writs of ſcire facias have been granted to warn prelates, religious and other clerks, to anſwer diſmes in our chancery, and to ſhew if they have any thing, or can any thing ſay, wherefore ſuch diſmes ought not to be reſtored to the ſaid demandants, and of anſwer as well to us, as to the party of ſuch diſmes; that ſuch writs from henceforth be not granted, and that the proceſs hanging upon ſuch writs be adnulled and repealed, and that the parties be diſmiſſed from the ſecular judges of ſuch manner of pleas; ſaving to us our right, ſuch as we and our anceſtors have had, and were wont to have of reaſon. In witneſs whereof, at the requeſt of the ſaid prelates, to theſe preſent letters we have ſet our ſeal. Dated at London the eighth day of July, the year of our reign of England the eighteenth, and of France the fifth.

* Le preamble.

† Le act.

Before we enter into the expoſition of this act, we will cleare it of an objection againſt the life of it, *viz.* That it ſhould be no act of parliament, but an ordinance made by the king onely at the requeſt of the prelates: and that the king to theſe letters had put his ſeale, and the *teſte* and date as done by the king only; all which, ſay they, appeare in the parliament roll, and that the clauſe of *En teſtimoinance de quel choſe, &c.* is left out of the print.

But hereunto we anſwer, that by the ſaid clauſe *En teſtimoinance de quel &c.* is to be underſtood, that this act was ſo plauſible to the prelates, that they requeſted the king, that it might be exemplified under the great ſeale for the better preſervation thereof, which the king granted. This parliament began the Munday after the *Octab. Trinitatis*, which was 16 *Junii*; and this exemplification was 8 *Julii* after this act was paſſed, there being but ſeven acts paſſed at this parliament. And *en teſtimoinance de quel*, and the whole clauſe following, are words of an exemplification.

Vide Rot. Parl. 18 E. 3. nu. 31.

Now that this ordinance before the clauſe of the exemplification is an act of parliament, firſt, is proved by divers reaſons, *viz.* The title of the parliament is, *Incipit ſtatutum regis Edwardi anno regni*

jui,

fui decimo octavo. Secondly, it is entred in the parliament roll. Thirdly, it was by force of the kings writ (as the uſage then was) proclaimed as an act of parliament, which writ in French we thinke good to tranſcribe in theſe words: *Edward per le grace de Dieu roy Dangleterre et de France, et ſeignieur Dirland a noſtre viſcount de Nottingham, ſalus. Saches que a noſtre parliament tenus a Weſtm' le Lundye procheine apres les octaves de la Trinity procheine paſſes entre autres choſes monſtres, aſſentus, et accordes en dit parliament, ſi furent monſtres, aſſentus et accordes les choſes ſous eſcrites.* And after a rehearſall of all the ſtatutes, whereof this ſeventh chapter is one, the concluſion is, *Et pur ceo vous mandons, que touts les ſtatutes faces crier et publier, et fermement tener per mye voſtre baillie ſolonque la forme et tenur dicelle. Et ceo ne leſſes en aſcun mannere, &c.*

[640] And F.N.B. 30 E. taketh it for a ſtatute, and ſo it hath ever been by the generall conſent from time to time of learned men. And if it ſhould not be a ſtatute, it would worke great trouble and diſquiet in the realme. Now that wee have cleared this objection, let us peruſe the words of the act.

(1) *Ou briefes de ſcire facias eient eſtre grantes,* &c.] This rehearſall in this ſtatute is true; for wee have found, that upon divers matters of record, that is to ſay, enrolled, returned, or removed into the chancery: firſt, upon tithes granted by the kings letters patents, which are inrolled in the chancery, writs of *ſcire fac'* were brought in that court: as taking one example for many: in 17 E. 3. a *ſcire fac'* was brought by the king, and the dean and canons of the kings free chappell of Saint Martins London, upon letters patents of Mawd, *quondam reginæ Angliæ* of tithes, &c. againſt the abbot of Saint Johns of Colcheſter, who took the ſame after ſeverance, whereunto the abbot pleaded, &c. worthy to be ſeen.

In bundello brevium, an. 17 E. 3. part. 1. & 3. in turri London, vic. Eſſex.

(2) *A garner prelates religious et auters clerks,* &c.] Note, this *ſcire fac'* was not brought againſt the poſſeſſors of the land for ſubſtraction of tithes, but againſt the prelates, or other clerkes, which took the tithes after they were ſevered. See 6 E. 1. *in bundello petitionum in turri London,* where the petition was for ſubſtraction of tithes, to be put in poſſeſſion: the anſwer was in parliament *anno* 6 E. 1. *Rex non intromittit ſe de hiis quæ taliter ſpectant ad forum eccleſiaſticum, proſequatur jus ſuum verſus clericum coram ordinario.* Herewith agreeth Bracton, lib. 5. fol. 403. & 407.

Commiſſions out of the chancery were directed to certaine perſons, giving them authority to enquire, whether ſuch a ſpirituall perſon ought to have tithes of ſuch lands, whereupon inquiſitions were taken and returned; and if it were found for the ſpirituall perſon, upon this record he might have a * *ſcire fac'* againſt any prelate religious, or other clerke that took them after ſeverance.

* See 22 Aſſ. p. 75.

[a] *Compertum eſt per inquiſitionem rectorum, et vicariorum vicinorum de Ewel, quod vicarius eccleſiæ ibidem percipere debet minutas decimas omnium animalium ibidem, et molend' aquatic' ibidem.* But no *ſcire fac'* was ſued hereupon, for that the vicar was to ſue for ſubſtraction of theſe tithes againſt the owner of the land in the ſpirituall court.

[a] Rot. clauſ. 7. E. 2.

[b] Alſo upon a fine executory of tithes before this act, the tenour whereof was removed into chancery, a *ſcire fac'* did lye therefore againſt the ſpirituall perſon that perned the ſame after they were ſevered.

[b] In fin. Term. Trin' 10 regis Johannis.

(3) *Savant*

(3) *Savant a nous nostre droit*, &c.] By force of this [c] saving not onely the king himselfe, but the provost of C. being the kings patentee of tithes of the new assarts in the forest of Rockingham in the county of North-hampton, brought a *scire fac'* in the chancery after this statute, against certaine persons of holy [d] church, who had taken the tithes granted to him, to have execution of the said tithes, according to the kings letters patents. The [e] defendants pleaded to the jurisdiction of the court, that the conusance of this cause for tithes appertained to court christian, and not to the chancery, whereunto it was answered by the court, that that was to be understood, where the suit was taken against them that ought to pay the tithes (that is to say) for subtraction of tithes, and not when it was brought against them, that were wrongfull takers of the tithes. And all this is well warranted by the book, whereupon the defendants pleaded to issue, and the record delivered over to be tried in the kings bench. See Hill. 32 E. 1. *coram rege* Wigorn' the Prior of Worcesters case resolved by the chancellor, treasurer, and all the judges and barons, that appropriation of tithes is no mortmaine, [f] *Quia decimæ sunt meræ spirituales, quarum cognitio ad curiam christianitatis pertinet, et non ad curiam istam.*

And yet the inference that Fitzherbert maketh, that before this statute of 18 E. 3. the right of tithes was tryed in the kings court was true: for upon a *scire facias* by a spirituall person against a spirituall person, and for tithes * which were spirituall, the right of tithes was tried in the *scire fac'* before this statute, albeit the tithes were severed, which is now taken away in case of the *scire fac'* by this statute.

And at this day, albeit in case of tithes, the parties by pleading admit the jurisdiction of the court, yet if it be between spirituall persons, and the right of tithes come to be tried, albeit it be after the tithes severed, the court *ex officio* shall ouste the court of jurisdiction, which we hold, where the right of patronage was not drawne in question, was wrought by the construction and consequent of the said statute of 18 E. 3. for before that statute right of tithes, after severance was tried in a *scire fac'* by the common law in certaine cases. But when the right of tithes trench to the dissolution or diminution of the advowson, &c. in certaine cases, the right of tithes at this day (as hath beene said) shall be tried *in brevi de recto advocat' decimarum*, and in the *indicavit*: but neither of these writs give any jurisdiction to the kings court, to hold plea for subtraction of tithes, but that is sent to the ecclesiasticall court to determine.

Nullus pro decimis quæ sunt spirituales de aliqua reparatione pontis seu aliquibus oneribus temporalibus onerari debet. But at this day if tithes be in the hands of temporall men, they are by reason of them contributory to temporall charges.

[c] 22 Ass. pl. 75. 38 Ass. pl. 20. Bro. tit. Disines 10 Pla. Parlam. Hill. & Pasch. 18 E. 1. the Bish. of Carlisles case, to whose predecessors Hen. rex vetus concessit omnes decimas in Foresta de Englewe. 14 H. 4. 17.

[d] Note, this act of 18 E. 3. is not mentioned in this book of 22 Ass. because the case was taken to be within the saving.

[e] Note, albeit this book was after the stat. yet doth it open the true sense & reason of the common law before this statute of 18 E. 3.

[f] Pasch. 20 E. 1. in banco regis, rot. 135. Buck. F.N.B. 30 E.

* [641] 28 E. 3. f. 6. S. a. b. 22 E. 4. 23, 24. 20 H. 6. 17. 31 H. 6. 11. 35 H. 6. 39. 47. 38 H. 6. 12. 6 E. 4. 3. Trin. 5 E. 1. in Banco. 29 Norff. Pasch. 12 E. 1. Rot. 28. Norff. Abb. de Selbies case. Pasch. 19 E. 1. in Banco Rot. 45. Pasch. 7 E. 1. in Banco Rot. 78. Gloc'. Eliz. Penbreges case. Mich. 9 E. 1. in Banco Rot. 88. Salop. Bract. l. 5. 402. Placita de advocat. Eccl. spectant ad Coronam. Fleta, l. 6. ca. 36. Glanv. l. 4. ca. 13. acc'. 18 E. 2. bre. 825. 4 E. 3. 27. Rot. pat. 27 E. 3. 1. ps. nu. 18. F.N.B. 44. k. 45. b. c. d. 50. q. r. 51. c. 1. 30. e. g. 37. e. Vid. bre. de Indicav. Vid. Regist. 29. b. de rect. advocat. decim. Regist. 36. b. prohibition. de decimis reparatis. W. 2. ca. 5. 4 E. 3. 27. per Parning. 7 E. 3. 42. 8 E. 3. 49. 38 E. 3. 13. 16 E. 3. Quare Impedit. 147. 31 H. 6. 13. 38 H. 6. 20. 12 E. 4. 15. 2 H. 7. 12. Doct. & Stud. lib. 2. cap. 25. fol. 108.

Hil. 35 E. 3. coram Reg. Rot. 72. Mid. Vid. 32 H. 8. ca. 7. Dier 7 E. 6 83 l. 11. fo. 25. b. in Henry Harpers case.

Where

10 H. 7. f. 18. a. per Brian. 44 E. 3. 5. Doct. & Stud. lib. 2. cap. 55. 7 E. 6. Dier fo. 84. & F.N.B. 54. b. Lib. 2. fo. 44. in Leveſque de Winchesters caſe. But Parning in 7 E. 3. fo. 5. pl. 8. who not long after was lord treaſurer, and after lord chauncellor, vowcheth it truly, for hee ſaith that of auncient time before a new conſtitution made by the pope, the patron of one church might grant his tithes to another pariſh, that is, by the conſtitutions made by pope Innocent 3. anno dom. 1200. in his decretall epiſtle, which you ſhall finde in his 6. Epiſtle. Decret. lib. 1. p. 452. edit. Colon. See the ſtatutes of 18 E. 3. cap. 7. 1 R. 2. cap. 14. 5 H. 4. ca. 1. 27 H. 8. c. 20. 32 H. 8. c. 7. 2 E. 6. c. 13. Regiſt. 179, 180. † Anno 2 Regis Johannis. In bundello petitionum parliam. anno 6 E. 1. in Turri.

Where it is ſaid in ſome of our books, that of auncient time before the councell of Lateran, any man might have given his tithes to what ſpirituall perſon he would, and that at that councell it was provided that tithes in one pariſh ſhould be given to the rector or parſon of the ſame pariſh, that hee that gave the ſpirituall food, ſhould reap temporall, &c. The truth is, that I have peruſed the councels holden at Lateran, and ſpecially that holden under pope Alexander the third, *anno Domini* 1179, *anno* 25 H. 2. and cannot finde any ſuch decree: but pope Innocent the third, in a decretall epiſtle, in or about the yeare of our lord † 1200. and the firſt yeare of king John dated at Lateran, directed to the archbiſhop of Canterbury, *ut eccleſiis parochialibus juſte decimæ perſolvantur*, hath theſe words, *Pervenit ad audientiam noſtram, quod multi in dioceſi tua decimas ſuas integras vel duas partes ipſarum non illis eccleſiis in quarum parochiis habitant, vel ubi prædia habent, et à quibus eccleſiaſtica percipiunt ſacramenta, perſolvunt, ſed eas aliis pro ſua diſtribuunt voluntate. Cum igitur inconveniens eſſe videatur, et à ratione diſſimile, ut eccleſiæ, quæ ſpiritualia ſeminant, metere non debeant à ſuis parochianis temporalia, et habere; fraternitati tuæ authoritate præſentium indulgemus, ut liceat tibi ſuper hoc, non obſtante contradictione vel appellatione cujuſlibet, ſeu conſuetudine hactenus obſervata, quod canonicum fuerit ordinare et facere quod ſtatueris per cenſuram eccleſiaſticam firmiter obſervari, nulli ergo, &c. confirmationis, &c. Dat. Lateran. nonas Julii.* And (that I may ſpeake once for all) this epiſtle decretall bound not the ſubjects of this realme, but the ſame being juſt and reaſonable they allowed the ſame, and ſo became *lex terræ*.

See Linwood *cap. de locato et conducto, fo.* 117. *verbo portiones*, where he ſaith, *Quod ante conſilium Lateranenſe, anno Domini* 1179. *bene potuerunt laici decimas in feudum retinere, et eas alteri eccleſiæ dare, non tamen poſt dicti conſilii, &c.* And thus began portions of tithes, what the parſon of one pariſh hath in another. *Vide concilium Lateran', anno Domini* 1215. 17 *Joh. regis.*

[642]

Albeit the parochiall right of tithes is now eſtabliſhed by divers acts of parliament as before it appeareth (a matter tending to the exceeding benefit and quiet of the clergy) yet he that is deſirous to know what the auncient lawes of England were concerning the paiment of tithes before the conqueſt, let him reade *Fœdus Edvardi et Guthruni regum, cap.* 6. *et inter leges Ethelſtani cap.* 1. *Inter leges Edmundi regis, cap.* 2. *Leges Edgari regis, cap.* 2. & 3. *Leges Canuti regis, cap.* 8, 10, 11, 12. *et leges Edwardi regis,* * *cap.* 8, 10. *Quas Willielmus Conqueſtor recitavit, et confirmavit.* All which lawes M. Lambard hath well tranſlated out of the Saxon into the Latine tongue, which was faithfully, but not ſo accurately, done before him, which wee have.

Having ſpoken of tithes, it is ſaid.
* *Hæc prædicavit beatus Auguſtinus, & conceſſa ſunt à rege baronibus, & populo, &c.* Lamb. 128.
Vide inter leges Edwardi regis, * ca. 8. ubi ſupra. de boſco.

There hath been great controverſie heretofore concerning the tithes of wood, as appeareth by divers petitions in parliament, which petitions together with the anſwers we will recite, and incidently will ſhew, how that controverſie is quieted, and ended.

That

That no man be impleaded for tithes of wood, or underwood, but in places accuſtomed. The anſwer was, as heretofore the ſame ſhall be. *Item prie le commen, que come * conſtitution ſoit fait per les prelats a prender diſmes de cheſcun maner de boyes, quel choſe ne fuit auques uſée, et que niefs, et femes poent faire teſtaments, que eſt contre reaſon, que pleſe per luy, et per ſon bon counſeil ordeiner remedie, et que ſon people demoerge en meſme leſtate quilz ſoloient eſtre en temps de touts ſes progenitors, et que prohibitions ſoient grantes a touts ceux que ſont impledes de diſmes de bois ſans avoir conſultation.* Whereunto the anſwer of the king was, the king willeth that law and reaſon be done.

Rot. Parl. anno 17 E. 3. nu. 51. Rot. Par. 18 E. 3. Artic. 9.

* This conſtitution was made in ann. 17 E. 3. an. dom 1343. Vide Linwood. Note the aſſeveration of the whole body of the realm in this petition, concerning the paiment of tithewood. Rot. Par. 21 E. 3. Artic. 48. Note alſo theſe aſſeverations.

Item monſtre la commune come nadgaires lercheveſque de Canterbury, et les auters prelates ordeinerent une conſtitution a doner diſmes de ſubbois vendus tantſolement la ou avant ſes heures nulles diſmes furent doxes, ore les gents de Seint Eſgliſe per force de la conſtitution pernent et demandent les diſmes auxibien de gros bois, come de ſubbois vendus et neient vendus, contre ce qui is ont uſes puis temps de memorie a la grand damage de la commune de quoi ilz priont remedie, de lun point et del autre.

Whereunto the anſwer is, the archbiſhop of Canterbury, and the other biſhops have anſwered, that ſuch tithe is not demaunded by reaſon of the ſaid conſtitution, but of underwood. But the ſubject being ſtill moleſted for woods not tithable complained again in *anno* 25 E. 3. all which were preparatives to a good law made in *anno* 45 E. 3. cap. 3. *De groſſe boyes dage de vint ans, ou de greinder age nul diſmes ſerra demands in noſme de ceſt parol ſylva cædua, eſt ordeine et eſtablie que prohibition en ceo caſe, ſoit grant, et ſur ceo attachment come ad eſtre uſe avant ceux heures.*

Rot. Parl. 25 E. 3. nu. 37. Rot. Parl. 45 E. 3. nu. and in the print cap. 3.

It appeareth before that all the biſhops claimed onely tithes *de ſubbois*, of underwood, under the name of *ſilva cædua*, ſo as of hautboyes, of great wood no tithes were claimed; but herein reſted two doubts; 1. what ſhould be ſaid high or great wood. 2. Of what age the ſame ſhould be, becauſe it is parcell of the inheritance.

As to the firſt, this act, which is declaratory of the common law, as it appeareth by the book in 50 E. 3. fol. 10. b. 9 H. 6. fol. 56. Pl. Com. fol. 471. and this act it ſelfe proveth it, for it concludeth, *Come ad eſtre uſe devant ceux heures*; and this is confirmed by divers judgements hereafter cited.

Li. Intrat. R. fo. Regiſt. fo. 44. See the old book of Entries, fo. 34. b. & 34. a. premunire, printed anno dom. 1546. 50 E. 3. 10. 9 H. 6. 56. Pl. Com. 47. Lib. 11. fol. 48. b. Lifords caſe.

And it is to be underſtood that this act uſeth theſe words *groſſe boyes*, and not *haut boyes*, or *graund boyes*, which word is alſo uſed in the books of 50 E. 3. and 9 H. 6. And in this act this word [*groſſe*] ſignifieth ſpecially ſuch wood as hath been, or is either by the common law or cuſtome of the country timber, for this act extends not to other woods, that have not beene, or will not ſerve for timber, though they be of the greatneſſe or bigneſſe of timber. And it is to be obſerved, that the prohibition in 50 E. 3. for ſuing for tithes in court chriſtian of groſſe boys, was grounded upon the common law, without mentioning of this act.

Here it is to be demanded, to what kinde of wood groſſe boys do extend? And the anſwer is, that oake, aſh, and elm, are included within theſe words; and ſo is beech, horſbeche, and hornbeam, becauſe they ſerve for building, or reparation of houſes, mills, cottages, &c. againſt the opinion in Plowd. Comment. fol. 470. in Molyns.

See the firſt part of the Inſt. f. 3. waſt in beech. So it was adjudged coram rege Paſch. 2 Jac. Regis rot. 292. betweene

Henry Hall, and Dorothy Fettiplace. Kanc.

Molyns caſe, holden without argument, which opinion the whole court upon deliberate advice held to be no law.

[a] It was reſolved by the whole court, that aſp is alſo comprehended within groſſe boys, becauſe it may ſerve for building, or reparation, *ut ſupra*. But otherwiſe it is of birch (as it was ſaid) it was adjudged in the caſe of Lennard *cuſtos brevium*, becauſe that kinde of wood ſerveth not for building.

[a] Pl. Com. f. 470. Molyns caſe. Tr. 26 El. coram rege.

[b] If a timber tree be *arida, ſicca, et non portans folia nec fructus in æſtate, nec exiſtens macremium*, and the owner cut it down, and convert it to fuell, &c. no tithe ſhall be paid thereof for the inheritance which was once in it.

[b] Hil. 2 Jac. in Com. Kanc. Rot. 229. int. Brooke et Rogers.

[c] So for the bark of oakes, being timber trees, no tithes ſhall be paid, becauſe it is parcell of the tree, and renueth not *de anno in annum*. [d] But for acorns tithe ſhall be paid, becauſe they renue yeerly.

[c] Lib. 11. f. 49. Lifords caſe. Doct. & Stud. fo. 174, 175.

[d] Regiſt. fo. 49. lib. 11. fo. 49.

As to the ſecond doubt, of what age thoſe groſſe or timber trees, whereof no tithes ſhould be had, ſhould be; the ſtatute reſolveth this doubt in theſe words, *Groſſe boys del age de* 20. *ans, ou greinder*. Which point was alſo declaratory of the common law, as by the concluſion of this act, and the authorities aforeſaid appeareth: for this *groſſe boys* thus deſcribed, it appeareth by the act, that parſons and vicars ſued for tithes of them, *en noſme de ceſt parol, ſylva cædua*.

50 E. 3. 10. b. 44 E. 3. 32. a. meriſme.

Del age de 20 *ans*.] This is the age, as to bar all ſuits in court chriſtian for tithes. And theſe words are to be underſtood of groſſe trees, which may ſerve for timber, and grow out of the own ſtubs: for if a man uſually top or lop timber trees, tithes ſhall not be paid, though they be under the age of 20 yeers. For as the law priviledgeth the body of the tree, being parcell of the inheritance, ſo it doth priviledge the branches alſo.

Pl. Com. 470. b. Doct. & Stud. fo. 175. Br. diſmes 14. li. 11. fo. 49. Lifords cafe.

So if a man cut down timber trees, tithe ſhall not be paid for the germyns or branches which grow out of the roots, of what age ſoever; for that the root is parcell of the inheritance.

Pl. Com. 470. So reſolved Paſch. 29 El. coram rege. Lib. 11. fo. 49. Lifords caſe.

The biſhops, and others of the clergie taking upon them to interpret this ſtatute, which belonged not unto them, gave out and publiſhed that this ordinance did not reſtrain their ancient juriſdiction, and that this ordinance was never affirmed for a ſtatute: and thereupon the ſubject was ſtill vexed in court chriſtian, both contrary to the common law, and the ſaid ſtatute: and thereupon a bill was exhibited in the next parliament following, holden in the 47 yeer of E. 3. reciting the ſtatute of 45 E. 3. and then ſhewing that the perſons of holy church intending that this ordinance did not reſtrain their ancient incroachments; and ſurmiſing, that this was not affirmed for a ſtatute, held plea in court chriſtian to the contrary of the ordinance aforeſaid, to the great damage of the people. Wherefore may it pleaſe our ſoveraign lord the king to affirm the ſaid ordinance for a ſtatute to indure for all times to come; and that a ſpeciall prohibition upon the ſame ſtatute thereupon be made in the chancery, prohibiting that they ſhould not hold plea in court chriſtian of tithes of wood of the age aforeſaid. Whereunto the anſwer was, that ſuch prohibition be granted, as hath been uſed of ancient time. Which anſwer being compared with the concluſion of the act of 45 E. 3. hath given ſuch an end to both theſe points, as no queſtion hath been made thereof at any time ſince. And to ſay the truth, that the ſurmiſe that this act of

45 E. 3. was but an ordinance, and no ſtatute, was but a meer cavill, without any colour of probability: for 1. it is entred in the parliament roll amongſt the other ſtatutes made at that parliament. 2. It is under the title in that roll of ſtatut. E. 3. *de anno regni ſui* 45. 3. It was proclaimed by the ſherifes (as the uſage in thoſe dayes was) amongſt the reſt of the ſtatutes of that parliament. 4. It hath the phraſe of an act of parliament [*Ordeine eſt et eſtablie*] agreeing therein in effect with the other acts in that parliament. 5. It hath the conſent of the lords and commons (who joyn in the petition in the preamble) and of the king. 6. Infinite prohibitions upon this ſtatute, as taking ſome few precedents, whereof we have the number roll, of ſuch as be not in print.

Coram rege Tr. 27 E. 1. Rot. 28. *Linc. Magiſter Willielmus perſona eccleſiæ de Epworth attachiatus fuit ad reſpondend' Stephano de Rodnes de Gener' laco, et Willielmo Stel de Cottingham de placito quare ſecutus fuit placitum in curia Chriſtianitatis, de catallis et debitis quæ non ſunt de teſtamento, vel matrimonio contra prohibitionem regis, &c. Et unde queruntur, quod cum prædictus magiſter Willielmus ſecutus fuit placitum verſus eos in curia Chriſtianitatis coram offic' epiſcopi Lincol' de catallis et debitis laicis, viz. de quercubus et aliis arboribus per ipſos empt' de quodam Rogero Mubey. Et idem Stephanus et Willielmus ſuper hoc protuliſſent prohibitionem domini regis coram prædict' officiariis in eccleſia omnium Sanctorum de Northt' die Martis prox' poſt feſtum Sancti Nicholai, anno regni regis nunc 25. et ei inhibuiſſent ne placitum illud contra prohibitionem prædictam ulterius ſequeretur in præſentia Rogeri de Waldebye, Gened' de Cave, Willielmi de Clere, et Thomæ de Redneſſe tunc ibidem præſentium, idem tamen magiſter Willielmus non obſtante prohibitione prædicta placitum præd' ulterius ſecutus fuit quouſque ipſi per ſectam ſuam prædictam excommunicati fuerunt; unde dicunt quod deteriorati ſunt et dampnum habent ad valentiam C. l. et in contempt' domini regis mille libr', &c.*

Regiſt. 34. the ſame prohibition, & 50 E. 3. 10.

Et prædictus magiſter Willielmus venit et defendit, &c. et dicit quod nullum placitum de bonis et catallis laicis ſecutus fuit in curia chriſtianitatis contra prohibitionem domini regis ſicut ei imponunt, et vadiavit eis inde legem ſe 12. *manu, &c.* And had a day to make his law, at which he came; and *incepit* (ſaith the record) *jurare, et poſt quartum juratum defecit de lege, ideo conſideratum eſt, quod prædict' Stephanus et Willielmus recuperarent damna ſua prædicta centum librarum, et fecit finem cum rege ad* 40 *l.*

De quercubus & arboribus. Vide Paſch. 15 E. 1. in banco Rot. 52. Linc. mille quercus, &c.

The law at this day, and long after was holden, that in this caſe he might wage his law. 18 E. 3. 4. 24 E. 3. 39. ſo adjudged, 32 E. 3. tit. Ley. 62. But in 44 E. 3. fo. 32. it is otherwiſe ruled, becauſe it is not in a writ of contempt; and ſo hath the law been taken ever ſince.

It is to be noted, that the parſon ſtood not upon his right to have tithes of oake and other trees; but the colour he had to wage his law, was in reſpect of theſe words, *De bonis et catallis laicis*, and tithes are not lay-chattels: but he durſt not in that caſe ſtand to it to make his law, but upon failing therein, judgement was given againſt him of the damages, as the plaintifes had counted.

See lib. Intrat. Ratl. fol. 448. b. nu. 2. 449. a *prohibition ſur leſtatute de* 45 E. 3. *circa* 14 H. 7. The old book of Entries, fol. 34. b.

Hil. 33 H. 8. Rot. 78. Inter Stelling et Spooner.
Ibidem Rot. 103. Inter Peiers et Dixon.
Mich. 34 H. 8. Rot. 116. Inter Felton et Glover.
Paſch. 36 H. 8. Rot. 116. Inter Smy et Ap. Richard.
Mich. 36 H. 8. Rot. 1. conſimilis prohibitio.
Hil. 36 H. 8. Rot. 1. conſimilis prohibitio.
Paſch. 38 H. 8. Rot. 1. conſimilis prohibitio.

Prohibitions coram rege tempore H. 8.

Mich. 38 H. 8. Rot. 1. consimilis prohibitio.
Coram rege tempore E. 6. Trin. 1 E. 6. Rot. 94. consimilis prohibitio. Inter Herne & Croft.
Mich. 2 E. 6. Rot. 97. Inter Heford & Howe.
Mich. 3 E. 6. Rot. 1. consimilis prohibitio.
Pasch. 4 E. 6. Rot. 1. consimilis prohibitio.
Hil. 5 E. 6. Rot. 2. consimilis prohibitio.
Trin. 6 E. 6. Rot. 1. consimilis prohibitio.
[645] Coram rege tempore Mariæ. Mich. 1 Ph. et Mar. Rot. 159. Inter Gray et Philpot, consimilis prohibitio.
Pasch. 1 Mar. rot. 1. consimilis prohibitio.
Hil. 1 et 2 Ph. et Mar. Rot. 1. consimilis prohibitio.
Pasch. 1 et 2 Ph. et Mar. Rot. 3. consimilis prohibitio.
Trin. 1 et 2 Ph. et Mar. Rot. 10. consimilis prohibitio.
Mich. 2 et 3 Ph. et Mar. Rot. 4. consimilis prohibitio.
2 et 3 Ph. et. Mar. Rot. 1. consimilis prohibitio.
3 et 4 Ph. et Mar. Rot. 2. consimiiis prohibitio.
Hil. 4 et 5 Ph. et Mar. Rot. 1. consimilis prohibitio.
Mich. 4 et 5 Ph. et Mar. Rot. 1. consimilis prohibitio.

We could cite a world of other examples of this kinde, out of the kings bench, chancery, and common place, but in a case whereof never any learned man made any doubt, these shall suffice.

But this is against the provinciall constitution of Simon Mepham, *anno Domini* 1332. *anno* 6 E. 3. and the exposition of Linwood thereupon.

Regist. 44. a. b. See the old book of Entries, fol. 34. a. the like prohibition. The latter book of Entries, R. 449 a. b. Old book of Entr[illegible], 34. a. 31 H. 8. tit. prohib. Brook 17. Regist. 49. a.

There is a consultation *de sylva cædua*, where the prohibition was, *De catallis et decimis quæ non sunt de testamento et matrimonio*; and yet in the consultation there is a restraint (according to the common law, and the said act of 45 E. 3.) *Dummodo tamen de grossis arboribus in hac parte non agatur, &c.*

If any sue in court christian for tithes *de grossis arboribus ultra ætatem* 20 *annorum*, he incurs the danger of a *præmunire*, if so it be contained in the libell.

In the Register it is said by Herlaston, *Concordatum fuit coram concilio regis in parliamento apud Sarum, quod consultationes fuit debent de sylva cædua, eo non obstante, quod non renovatur per annum; et super hoc facta fuit quædam consultatio pro abbate de Notley, de sylva cædua.*

Great question hath been made, when this parliament at Salisbury was holden, but we shall make it evident, that it was holden the Friday next after the feast of Saint Mark the Evangelist, in the seventh yeer of R. 2. which appeareth by William de Herlaston here named, who was a clerk of the chancery, and as here it appeareth, inserted this into the Register.

Regist. f. 80. b. This Herlaston lived at the time of the holding of this parliament at Salisbury; for afterward in the same Register, fol. 80. b. it is said, *Nota que nul home serra prise, ne imprison, pur vert ne pur verison, si il ne soit trove ove le mayneur, ou si il ne soit indite, &c.* *Et vide inde*
7 R. 2. cap. 4. *statute R. 2. de anno 7. cap. 4. Quando quis taliter fuerit indictatus, et virtute indictamenti illius est convictus, ita quod non ponet se super patriam, et sic fiet de illis, qui indictati sunt de receptamento, ac si essent principales transgressores per Herlaston.*

And in the Register, fol. 261. a. you shall finde this note, *Hoc breve concessum fuit pro hominibus de Odiham, et concessum fuit pro omnibus aliis antiquis dominicis per cancellarium Lescrope, et W. de Herlaston.*

Herſton. Now this Leſcrope lord of Bolton was chancellor in *annis* 2 & 5 R. 2. as we finde of record.

Thus have we diſcovered the clerk that inſerted into the Regiſter the ſaid *concordatum* in the parliament at Saliſbury: but looking diligently into that parliament roll, no ſuch *concordatum* as Herlaſton inſerted into the Regiſter can be found, and therefore you muſt take it upon the truſt and credit of this clerk. But admitting that any ſuch *concordatum* had been, as in the Regiſter it is ſet down, it may well ſtand with law: for in the Regiſter, fol. 44. there is a conſultation (as before hath been ſaid) *de ſylva cædua*, and is conſonant to law, having ſuch a reſtraint in the ſame writ, as is aforeſaid.

A country may preſcribe to be quit of tithes of wood, or any other tithe, ſo there be ſufficient maintenance and ſuſtentation of the incumbent beſides; but a town cannot ſo preſcribe. Doct. & Stud. 147. b. Br. Diſmes 14.

Rex tali judici ſalutem. Monſtravit nobis venerabilis pater H. Lincoln' epiſcopus (1), *quod cum I. præcentor eccleſiæ beatæ Mariæ Lincoln' teneat de dono ſuo omnes decimas dominicarum terrarum ſuarum vel dominici ſui de N. quas idem epiſcopus et prædeceſſores ſui epiſcopi loci prædicti libere conferre conſueverunt: Prior beatæ Catherinæ extra Lincoln. clamans decimas illas pertinere ad eccleſiam ſuam de B. trahit eum inde in placitum, &c.* (2). *Et quia placitum prædictum tangit coronam et dignitatem noſtram, præſertim cum collatio earundem decimarum ad nos poſſit devolvi ratione cuſtodiæ vel eſcaetæ, quia etiam conſimiles decimas conferimus in quibuſdam dominicis, et ſimiliter quamplures magnates regni noſtri in dominicis ſuis: vobis prohibemus ne placitum illud teneatis in curia chriſtianitatis, nec aliquid quod in derogationem regiæ dignitatis noſtræ cedere valeat in hac parte attentetis, ſeu per alios attentari faciatis, quoviſmodo. T. &c.* Regiſt. 36. b.

[646]

Opus eſt interprete, therefore we will peruſe the words of this writ in ſuch order as they doe lye in the ſame.

(1) *Venerabilis pater H. Lincoln. epiſcopus.*] Is intended as I take it of Hugh biſhop of Lincoln, who deceaſed ſoone after: and hereby it appeareth, that this writ was in uſe before the ſaid conſtitution of pope Innocent the third, as alſo is proved by latter words of this writ, which we ſhall obſerve when we come to it. This was S. Hugh, biſhop of Lincolne, as wee conceive it.

(2) *Quod cum præcentor eccleſiæ beatæ Mariæ Lincoln. de dono ſuo teneat omnes decimas dominici de N. &c. Prior beatæ Katherinæ extra Lincoln. clamans decimas illas ad eccleſiam ſuam de B. trahit eum inde in placitum*, &c.] Here it may be demanded that ſeeing the ſuit is between ſpirituall perſons, and for tithes which are ſpirituall things, wherefore they ſhould bee prohibited. Hereof three reaſons are rendred in this writ. Firſt, *quia placitum prædictum tangit coronam et dignitatem noſtram.* For all advowſons are lay fee, and pleas of them doe belong to the kings law, and ſeeing the whole benefit of the patron of this advowſon conſiſteth in conferring of theſe tithes to any of his chaplains, &c. And if the tithes be recovered, the advowſon vaniſheth as a thing without fruit or benefit, and therefore the eccleſiaſticall court cannot hold plea of them.

Bre. de Indicavit. Bre. de recto advoc. decimarum. Regiſt. 29. b. Artic. cleri c. 2. 12 E. 4. 13. b. 4 E. 3. 2. Glan. li. 4 c. 13. Bract. lib. 5. fo. 402, 403. Fleta, li. 6. c. 36. Fitz. N. B. 30. g. Vet. N. B. 24. a. Vide Mich. 2 E. 2. in communi banco. Rot. 52. Lelc. the Prior of S. Mary de pratis caſe. indicavit bre. de indicavit ſuper 4e. partem.

Quia tangit, &c. See the writ of *indicavit, et breve de recto de advocatione decimarum*, before in this ſecond part of the Inſtitutes W. 2. cap. 2. *verſus finem, & Articuli cleri* cap. 2. And if the ſuit in the eccleſiaſticall court were for ſubſtraction of tithes, after the right of the advowſon be tryed for the patron of the perſon that ſueth, he ſhall proceed in the eccleſiaſticall court.

2. The ſecond reaſon yeelded in this writ is, *Præſertim cum collatio earundem decimarum ad nos poſſit devolvi ratione cuſtodiæ, &c.* And if the tithes ſhould be recovered, as hath been ſaid, the advowſon ſhould vaniſh, &c.

3. *Quia etiam conſimiles decimas conferimus in quibuſdam dominicis, et ſimiliter quamplures magnates noſtri in dominicis ſuis, &c.*

By this it is probable, that the king ſpeaking in this writ for himſelfe and the grandees of the realme in the preſent time, that this writ was in uſe before the conſtitution that confined tithes to pariſhes, and hereby it is proved that at this time the king, and the nobles of the realme might give their tithes to what ſpirituall perſon they would. Laſtly albeit the king and the nobles be for honour ſake named in the writ, yet the liberty of granting of tithes extended at this time to all the kings ſubjects.

The marginall note in the Regiſter is *de decimis ſeparatis*, ſo called becauſe they had been granted to ſome ſpirituall perſon, and not annexed to any pariſh church.

Extravagant tit. de Decimis, ca. 13. quoniam.

For the better underſtanding of the opinion of Sir William Herle in the ſaid book of 7 E. 3. which is, *Ore ne poet home ſes diſmes que ſont hors de pariſh; grant a que il voudra, car leveſque del lieu les averd.* Hee grounded his opinion in this caſe upon the canon law, which is, that the biſhop is to have all tithes growing in lands not aſſigned to any pariſh within his dioceſſe. Yet this canon being againſt the law of the land, never had allowance within this realme, for in ſuch part of foreſts as are out of any pariſhes, the king ſhall have them. See a notable record, term' Mich. *an.* 5 E. 3. *coram rege* Rot. 168. *Cumbria*; adjudged for the king againſt the canon, and the opinion of Herle. And this had been formerly reſolved in parliament, *inter placita coram ipſo domino rege et ejus conciho ad parliament' ſua poſt feſtum Sancti Hilarii, et etiam poſt feſtum Paſch', anno* 18 *E.* 1. *fo.* 8. *int' epiſcopum Carliſle, et priorem ejuſdem de decimis aſſartorum vocat' Linthwait et Kirketbwait in foreſta de Englewood.* The words of which record are, *Quod decimæ prædictæ pertinent ad regem, et non ad alium, quia ſunt infra bundas foreſtæ de Englewood, et quod rex in foreſta ſua prædicta poteſt villas ædificare, eccleſias conſtruere, terras aſſertare, et eccleſias illas cum decimis terrarum illarum pro voluntate ſua cuicunque voluerit conferre, &c.* And E. 1. granted tithes comming of land within the foreſt of Deane, as were not within any pariſh, to the biſhop of Landaffe, and his ſucceſſors.

[647]

Mich 5 E. 3. cor. Rege. Rot. 168. Cumb. 22 Aſſ. p. 75. 38 Aſſ. p. 2. 14 H. 4. fo. 17. Br. diſmes 10. Acc' Rot. Parl. 18 E. 1. fo. 8. Lib 5. fo. 15. in Caudries caſe. Li. 2. fo. 44. in Leveſque de Winchellers caſe.

Rot. Parl. anno 8 E. 2. nu. 17. in dorſ.

An:

An Expoſition upon the Statute entituled, An Act for the true Paiment of Tithes.

Anno 2 E. VI. *cap.* 13.

THE noiſe of the diſſolution of monaſteries in the parliament holden in the 27 yeare of H. 8. (lay-men taking ſmall occaſions to withdraw their tithes) was the occaſion of the making of the ſtatute of 27 H. 8. c. 20. The principall cauſe of the making of the ſtatute of 32 H. 8. cap. 7. was to inable lay-men, that had eſtates or intereſts in parſonages, or vicarages impropriate, or otherwiſe in tithes, to ſue for ſubtraction of tithes in the eccleſiaſticall courts, and to provide that no parſon ſhould be ſued, or compelled to pay any manner of tithes for any mannors, lands, tenements, or hereditaments, which by the laws or ſtatutes of this realme were diſcharged, or not chargeable for payment of any ſuch tithes.

27 H. 8. ca. 20. acc'. Vid. 31 H. 8. ca. 20. verſ. finem.

This act of 2 E. 6. is an act of addition, as by the words thereof hereafter following appeare.

Where in the parliament holden at Weſtminſter the fourth day of February, anno 27 H. 8. there was one act made concerning paiment of tithes prediall, and perſonall: and alſo in another parliament holden at Weſtminſter, 24 July, 32 H. 8. another act was made concerning true paiment of tithes, and offerings: in which ſeverall acts, many and divers things be omitted and left out, which were convenient and very neceſſary to be added to the ſame. In conſideration whereof, and to the intent the ſaid tithes may be hereafter truly paid, according to the minde of the makers of the ſaid act: bee it ordained and enacted, &c. that not onely the ſaid acts made in the ſaid 27 and 32 yeare of H. 8. concerning true paiment of tithes, and every article, and branch therein contained, ſhall abide and ſtand in their full ſtrength and vertue: but alſo be it further enacted by the authority of this preſent parliament, that every of the kings ſubjects ſhall from henceforth truly and juſtly, without fraud or guile, divide (2), ſet out, yeeld, and pay all manner of their predial tithes (1), in their proper kinde, as they ariſe and happen, in ſuch manner and forme, as hath been of right yielded and payd within 40 yeares (3) next before the making of this act, or of right or cuſtome ought to have been paid (4). And that no perſon ſhall from henceforth (5) take or carry away any ſuch or like tithes, which have been yeelded or payd within the ſaid 40 yeares or of right ought to have been payd in the place or places tithable of the ſame, before he hath juſtly divided or ſet forth for the tithe thereof, the tenth

27 H. 8. ca. 20.

32 H. 8. cap. 7.

part of the ſame, or otherwiſe agreed for the ſame tithes with the parſon, vicar, or other owner, proprietory or farmer of the ſame tithes, under the paine of forfeiture of treble value of the tithes ſo taken or carried away.

(1) *Prediall tithes.*] This branch extends only to prediall tithes.

Paſch. 1 Ja. Rot. 1119. *in communi banco. Int. Booth et Southraie* in debt upon this ſtatute by the parſon of the church *pro non extrapoſitione decimarum pro caſeo, vitulis, agnis, ceraſis, volemis et pyris* to have the treble value, &c. The defendant pleaded *nihil debet per patriam*, and it was found againſt him. And it was moved in arreſt of judgement that the ſaid tithes of cheeſe, of calfes, and lambes were no prediall tithes, and therefore not within this branch of the ſtatute; and this act is penall, and ſhall not be taken by equity, *quod fuit conceſſum per totam curiam.* And it was reſolved, *quod decimarum tres ſunt ſpecies, quædam perſonales, quæ debentur ex opere perſonali, ut artificio, ſcientia, militia, negotiatione, &c. Quædam prædiales, quæ proveniunt ex prædiis, i. e. ex fructibus prædiorum, ut blada, vinum, fenum, linum, canabium, &c. ſeu ex fructibus arborū, ut poma, pyra, pruna, volema, ceraſa, et fructus hortorum, &c. Quædam mixtæ, ut de caſeo, lacte, &c. aut ex fœtibus animaliū, quæ ſunt in paſcuis, et gregatim paſcuntur, ut in agnis, vitulis, hœdis, capreolis, pullis, &c. Ex prædialibus ſunt quædam majores, quædam minutæ. Majores, ut frumentum, ſigilo, zizania, &c. fenum, &c. minores ſive minutæ, quidam dicunt, ſunt quæ proveniunt ex menta, aneto, oleribus, et ſimilibus juxta illud dictum Domini, Luk. 11. verſ. 42. Væ, qui decimatis mentam et rutum et omne olus, et præteritis judicium et charitatem Dei; hæc autem oportuit facere, illa non omittere. Alii dicunt quod in Anglia conſiſtunt decimæ minutæ in lino quæ ſunt prædiales, et lana, lacte, caſeis, et in decimis animalium, agnis, pullis, et ovibus, decimæ etiam mellis et ceræ numerantur inter minutas, quæ ſunt mixtæ. Vide Linwood cap. de decimis cap. Quoniam, fol. 140. verb. talibus decimis.*

Deut. 4. verſ. 29. Here is ſhewed the true uſe whereto tithes ſhould be imployed.

And the Levite (to whom tithes were aſſigned) ſhall come, and the ſtranger, the fatherleſſe, and the widow which are within thy gates ſhall eat and be filled.

The firſt addition. Simile in the ſame termine in the caſe of Webb parſon of Fiettenden in Kent.

(2) *Henceforth truly and juſtly without fraud or guile divide,* &c.] Trin. 44 Eliz. *coram rege.* In a prohibition between Walter Heale and John Sprat, the caſe was, Walter Heale ſet out his prediall tithes, and divided them juſtly from the 9 parts, and ſoone after carried the ſame away. Sprat ſued for ſubſtraction of the ſame in the eccleſiaſticall court, Heale pleaded that hee had ſet them out *ut ſupra,* whereunto Sprat ſaid, that preſently after his ſetting out, &c. he carryed them away *in fraudem legis.* Adjudged that this was fraud and guile within this act, albeit he did juſtly devide the ſame within the letter of this law. It was further reſolved, that if the owner of the corne before ſeverance grant the ſame to another of intent that the grantee ſhould take away the ſame to the end to defraud the parſon, &c. of his tithe, this is fraud and guile within this ſtatute.

Lib. Int. Coke 384.

(3) *Within forty yeares.*] This time of 40 yeares is here ſet downe becauſe it is the uſuall time for the proofe *de modo decimandi.*

[650]

(4) *Or of right or cuſtome ought to have been yeelded,* &c.] The ſenſe of theſe words [as hath been of right yeelded] is of tithes

tithes to be yeelded *in ſpecie* within 40 yeares, and the ſenſe of the words [or of right or cuſtome] is, or by rightfull cuſtome *de modo decimandi* ought to have been paid.

(5) *And that no perſon from henceforth*, &c.] Albeit this branch doth not give the forfeiture to any perſon in certaine, and therefore it was pretended that the forfeiture ſhould be given to the king. And thereupon, upon this branch, the attourny generall, Hil. 29 Eliz. did exhibit an information in the exchequer againſt Wood of Cambridgeſhire for this treble forfeiture for carrying away his tithes before they were juſtly divided. The defendant pleaded not guilty, and by a jury at the barre he was found guilty, and in arreſt of judgement it was moved that in this caſe the forfeiture was not given to the king, for that the words of the act be, under the paine of the forfeiture of the treble value of the tithes ſo taken away. And whenſoever a forfeiture is given againſt him that doth diſpoſſeſſe, &c. the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or diſpoſſeſſed, and the rather for that this is an additionall law, as hath been ſaid, and made for the benefit of the propriator of the tithes. And ſo it was adjudged by Sir Roger Manhood and the whole court of the exchequer Paſch. 29 Eliz. And this was the firſt leading caſe, that was adjudged upon this point, and ever ſince it hath been received for law, and the party intereſted in the tithes doth in an action of debt recover the treble value. And ſo it was alſo adjudged Hil. 40 Eliz. Rot. 699. where Rob. Bedell and Sarah his wife in the right of his wife joyned in an action of debt for the treble forfeiture. A record well examined and adjudged, and worthy to be a precedent. In which caſe it was reſolved that the generall allegation in the count, that the defendant *anno* 38 Eliz. *grano ſeminavit* 20 *acras terræ*, &c. *et quod decimæ inde attingunt ad valorem* 150*l.* without ſhewing what kind of graine, was good.

The ſecond addition.

And be it alſo enacted by the authority aforeſaid, that at all times whenſoever, and as often (6) as the ſaid prediall tithes ſhall bee due at the tithing time of the ſame, it to be lawfull to every party to whom any of the ſaid tithes ought to be paid, or his deputy or ſervant to view and ſee their ſaid tithes to be juſtly and truly ſet forth and ſevered from the nine parts, and the ſame quietly to take and carry away. And if any perſon carry away his corne, or hay, or his other prediall tithes before the tithe thereof be ſet forth, or willingly withdraw his tithes of the ſame, &c. that then upon due proofe thereof made before the ſpirituall judge, or any other judge, to whom heretofore he might have made complaint, the party ſo carrying away, withdrawing, letting, or ſtopping ſhall pay the double value (7) of the tenth, or tithe ſo taken, loſt, withdrawn, or carryed away, over and beſides the coſts, charges, and expences (8) of the ſuit in the ſame, the ſame to be recovered before the eccleſiaſticall judge, according to the kings eccleſiaſticall lawes.

The third addition.

Mich. 9 E. 2. fol. 61. in libro nigo. Libbe de Offreis case 19 R. 2. action sur le case, 52. 17 H. 6. Jurisdiction, 58. So resolved by all the judges of England, Pasch. 4 Jac. Vide Artic. cleri 4 Jac. Artic. 16.

(6) *That at all times whensoever, and as often,* &c.] The first part of this branch is declaratory of the common law, because for the stopping of his way, &c. an action of the case did lye at the common law.

(7) *Shall pay the double value,* &c.] The reason why the double value, &c. is by this branch to be recovered in the ecclesiasticall court, where by the former branch, the parson, &c. at the common law shall recover the treble, is, * for that in the ecclesiasticall court hee shall recover the tithes themselves, and therefore the value recovered in the ecclesiasticall court is equivalent with the treble forfeiture at the common law.

* [651]

(8) *Besides the costs, charges, and expences,* &c.] So as the suit in the ecclesiasticall court is more advantagious then the suit for the treble forfeiture at the common law: for at the common law he shall recover no costs, but he shall recover in the ecclesiasticall court costs and expences. But then it is demanded, whether in an action of debt for the treble value at the common law, if the plaintiffe be nonsuite, or if the verdict passe for the defendant, the defendant shall recover his costs by the statute of 23 H. 6. c. 15. And the answer is, that in that case he shall recover no costs, and so it was adjudged. Trin. 43 Eliz. *in communi banco, inter* Dounton plaintiffe in debt upon this statute, and S. Moile Finch defendant, that this action of debt is no action of debt within the statute of 23 H. 8. because it is neither upon a specialty or by contract; neither is this action upon this statute any action for wrong personall immediately done to the plaintiffe, for it is a *non-feasance, viz.* a not-setting out of the tithes, Trin. 42 Eliz. *in communi banco* adjudged in an action of debt for the treble value upon this statute, not guilty, or *nihil debet* are good uses, and so upon the statute of 5 Eliz. upon perjury.

The fourth addition.

And be it further enacted, &c. that all and every person which hath or shall have any beasts or other cattel tithable (9), going, feeding, or depasturing in any waste or common ground, whereof the parish is not certainly knowne, shall pay their tithes for the increase of the said cattel so going in the said waste or common to the parson, vicar, proprietory, portionary, owner or other their farmours or deputies, of the said parish, hamlet, towne, or other place, where the owner of the said cattell inhabiteth, or dwelleth.

Rot. parl. 18 E. 1. fol. 8. Int. Episcopum Carliel. & decan. 22 ass. p. 75.

(9) *All and every person which hath or shall have any beasts or other cattel tithable,* &c.] Where the king ought to have the tithes within the wasts or commons in his forests, which are not within any parish, this branch giveth the tithes of the increase of cattle to the parson of the parish where the owner dwelleth.

The fifth addition.

Provided, &c. that no person shall be sued, or otherwise compelled to yield, give, or pay, any manner of tithes for any mannours, lands, tenements, or hereditaments, which by the lawes (10), and statutes (11) of this realme or by any priviledge or prescription (12) are not chargeable with the payment of any such tithes (13), or that be discharged by any composition reall (14).

(10) *By*

(10) *By the lawes of the realme*, &c.] (and ſo ſpeaks the ſtatute of 32 H. 8. cap. 7.) That is, by the common lawes and cuſtomes of the realm, *terræ ſunt indecimabiles*: hereof you may read divers examples lib. 8. fol. 48, 49, 81.

So reſolved; Mich. 21 & 22 Eliz. coram rege per Wray chiefe juſtice & totam curiam. F.N.B. 53. g. Regiſt. 54. b. Rot. parl. 51 E. 3. nu. 57. 7 H. 12 H. 8. 4. b. 4. nu. 105.

[652]

Note, that tithes ſhall not be payd of any thing that is of the ſubſtance of the earth and are not annuall, as of quarries of ſtone, turfe, flagges, tynne, lead, brick, tyle, lyme, marle, coales, chalke, pots of earth, and the like, nor of beaſts that be *feræ natura*, as deere, &c. nor of agiſtment of ſuch beaſts, as the parſon hath tithe of, nor of cattle that manure the ground; but of barren beaſts he ſhall have tithe for agiſtment, or herbage of them, unleſſe they be nouriſhed for the pale or plough, and ſo imployed. Mich 41 & 42 Eliz. *coram rege* in prohibition *int.* Greene & Hull. & Mich. 37 & 38 Eliz. *inter* Griſman & Lewes *in communi banco.* Nor of rakings left without covin, nor of after paſture. No tythes ſhall bee payd for *ſylva cædua* imployed to hedging or for fewell, for maintenance of the plough or pale. Nor for the herbage of meres, bawkes, nor fearne, locks of wooll, or ſtubble, &c. but are freed thereof by the common law and cuſtome of the realme. *Vide* Hil. 8 Jac. *coram rege* Tho. Baxters caſe. And in that caſe it was reſolved and adjudged, that a parſon ſhall not have two tithes of one land in one yeare, as of corne, and of the ſtubble or herbage, of hay, and of the after-paſture, *et ſic in ſimilibus.* But if the ſoyle of an orchard be ſowne with any kinde of graine, the parſon ſhall have tithe of the fruit trees and of the graine, for they be of ſeverall and diſtinct kindes. But if he pay tithe for the fruit of the trees, and after cut downe the trees, and ſell them in billet, or faggot, he ſhall pay no tithe, for they bee not of ſeverall kindes.

If a man pay tithe for his corne, and after grindeth the ſame corne at a mill within the ſame pariſh, no tithe meale ſhall be payd therefore. *Vide Artic' Cleri.* cap. 2.

Decimam partem ſeparabis de cunctis fructibus quæ naſcuntur in terra per annos ſingulos, &c. Decimam frumenti tui, et vini, &c. Thou ſhalt tithe all the increaſe of thy ſeed that the field bringeth forth yeare by yeare, as of corne, wine, &c. Deut. 14. verſ. 22, 23.

Regiſter 54. b. F.N.B. 53. E. Brooke Diſmes. 16.

All canons and conſtitutions made againſt the lawes &c. of the realme are made void. 25 H. 8. cap. 19.

(11) *By the ſtatutes*, &c.] *Viz.* 27 H. 8. cap. 20. 31 H. 8. cap. 13. 32 H. 8. cap. 7.

(12) *By preſcription.*] The orders of *Ciſtercienſes, Templarii, et Hoſpitularii decimas prædiorum ſuorum, quæ propriis manibus aut ſumptibus excolunt, non tenentur ſolvere, &c.* *Vide* Dier, 10 Eliz. fol. 277, 278. & 2 H. 4, 5. cap. 14.

This priviledge to theſe three orders of religion was granted to them by the councell of Lateran, *anno Domini* 1215. & *anno* 17. *Johannis regis*, and was allowed by the generall conſent of the realme, but this priviledge extendeth only to the lands which they had before that generall councell.

Pope Innocent the third by his bul diſcharged thoſe of the order of Premonſtratenſes of the payment of tithes of ſuch lands as were of their owne manurance, or other improvement. Note, about the yeare of our lord 1150. moſt of all religious orders were exempt from payment of tithes out of their poſſeſſions kept in their owne hands. Which pope Adrian the fourth about that time reſtrained to

Innocent the 3. in epiſt. decretali. lib. 1. pag. 262. Vid. 38 E. 3. 6. a.

to *Ciſtercienſes, Templarii, et Hoſpitularii*, and that all other orders ſhould pay tithes, &c.

2 H. 4. cap. 4. By the ſtatute of 2 H. 4. not only the Ciſtercienſes, but all other religious and feculars which put any bulls in execution for diſcharge of tithes of their lands in the hands of their farmours ſhould be in danger of a premunire.

28 H. 8. cap. 16. Vid. 25 H. 8. cap. 21. Vid. 11 H. 4. 76. 12 H. 8. 5, 6. Premunire. [653] Vid. Dier 10 Eliz. 277, 278. Vid. 25 H. 8. cap. 19. Vid. 18. Eliz. Dier, fol. 347. Weſtons caſe. Extr. tit. de Eccl. aedific. cap. 4. De his Lindwood fol. 39. verb. ſeparat. Extr. tit de offic. judicis ordinar. cap. 4. cum vers. Lindwood fol. 121. verb. legitima. Rot. Clau. 30 H. 3. m. 4. in turri Lond. Pat. 13 E. 1. m. 11. ib. de monitura epiſcopi Hil. 2 E. 2. in mem. Scaccarii. Tr. 36 E. 3. ib. proces verſ. epiſcopum, Ceſtr. Hil. 5 E. 4. int. communia Rot. 47. Larcheveque de Yorkes caſe.

By the ſtatute of 28 H. 8. it is enacted that all bulls, briefes, faculties, diſpenſations, of what names, natures, or qualities whatſoever they be of, heretofore had or obtained of the biſhop of Rome, or of any of his predeceſſours, or by authority of the ſea of Rome, by or to any ſubjects, reſiants, or bodies politique or corporate of or in this realme, or of or in other the kings dominions, ſhould from thenceforth be clearely voyde, and of no value, force, ſtrength, nor vertue, and ſhould never after that act be uſed, admitted, allowed, pleaded, or alledged in any places or courts of this realme or any other the kings dominions, upon paine contained in the ſtatute of premunire, &c. This is a generall law, and plenarily and ſtrictly penned againſt all bulls, &c. True it is, that there are ſome exceptions or qualifications in the act, which you may read there; but there is no exception or qualification therein for any diſpenſation or diſcharge of not payment of tithes by any bull of the pope. And we are of opinion, that the pope by his bull could not diſcharge any ſubject of this realme of payment of tithes, for it ſhould be againſt the liberty of the ſubject, when he had liberty to grant his tithes to what ſpirituall perſon he would, and againſt the right of the perſons, &c. of pariſhes, after parochiall rights were eſtabliſhed.

This act of 28 H. 8. extendeth not to general councells, but leave them as they were before, but all canons (as elſewhere hath been ſaid) which are againſt the prerogative of the king, the common law or cuſtome of the realme, are of no force. Let not therefore only ſerjants, apprentices, and attournyes, but the parties themſelves be well adviſed how they plead or alledge any bull, briefe, faculty, or diſpenſation from Rome, &c. which is not warranted by this act, the punihment being ſo penall as a premunire, if they plead or alledge any bull, &c. againſt that act.

And in ſome caſes, this maketh for the clergy. By the canon law pariſh churches are to be repaired by the parſons of the pariſh, but the cuſtome of this realme being that the pariſh churches are to be repaired by the pariſhioners or inhabitants of the pariſhes, this canon bound not the clergy.

Alſo by another canon, neither arch-biſhop nor any other of the clergy could by their teſtament bequeath any thing wherein he had property in the right of his church; but this being contrary to the cuſtome of the realme originally obtained by the biſhops of this realme for themſelves and their whole clergy, for which at this day a recompence is given to the king, as elſewhere we have ſhewed.

(12) [a] *Preſcription.*] As *modus decimandi*, lands given in ſatisfaction, &c. [b] And a country may preſcribe to be quit of tithes, or in *non decimando.* But for the better underſtanding both of this ſtatute, and of our books, it is good to be knowne what the time of preſcription for tithes is by the canon law, and by what authority. And the time for preſcription in that caſe is forty yeares, by which time of preſcription a ſpirituall perſon may gaine by the canon

[a] Regiſt. 38. F.N.B. 41. g. 8 E. 4. 24. 18 H. 6. 14.
[b] Doct. & Stud. 174.

canon law a right of tithes in another pariſh, &c. [c] And this preſcription hath this ground and warrant by a decretall epiſtle of pope Alexander the third, *anno Domini* 1180. But this canon being againſt the common law which alloweth no preſcription unleſſe it be time out of mind of man, never had allowance in England. [d] Of preſcription according to the common law, you may read in the firſt part of the Inſtitutes ſect. 170. at large. And the epiſtle decretall of pope Alexander we have thought good to recite *in hæc verba, Alexander Mauricio epiſcopo: Ad aures noſtras te ſignificante pervenit, duas eccleſias ſæpius ſub examine tuo litigare ſuper decimis, quas una eccleſiarum in alterius parœchia 40 annis poſſedit, ac per hoc petit ejus actionem extentam, altera vero volens eas jure parochiali vincere præſcriptionem non debere ſibi obeſſe proponit; ideo quid juris ſit in hoc caſu tua nos duxit fraternitas conſulendos. Tuæ itaque fraternitati literis præſentibus innoteſcat, quod jure * divino et humano melior eſt conditio poſſidentis, quoniam * quadragenalis præſcriptio omnem prorſus actionem ſecludit.*

[c] 20 H. 6. fol. 17. ac. preſcription per le ley de St. Egliſe eſt 40. ans, et en noſtre ley neſt vailent. preſcrip. per C. ans. 2 E. 4. 15. 6 E. 4. 3.

[d] 1. part. Inſtitut. ſect. 170.

* Jure Canonico.

[c] Mich. 43 & 44 Eliz. In a prohibition between Nowell and Hicks vicar of Edmonton in Midd. the plaintiffe in the prohibition alledged a cuſtome within the ſaid pariſh of Edmonton time out of mind of man to pay for every lambe a penny, &c. And iſſue was taken upon the cuſtome, and the jury found, &c. before twenty yeares laſt paſt time out of mind, that there was within the ſaid pariſh ſuch a cuſtome, and *modus decimandi*; but for twenty yeares laſt paſt by reaſon of ſuits and troubles, the inhabitants of the ſaid pariſh had payd tithe lambs in kinde. And in this caſe theſe two points were adjudged. Firſt, when a cuſtome doth create an inheritance, this cannot be waved or adnulled by payment or other matter *in pais*. 2. Albeit that the *modus decimandi* had not been yeelded or payd by twenty yeares, yet the preſcription may be generall, for that the cuſtome once eſtabliſhed doth continue. As if a man hath a common of paſture, &c. and taketh a leaſe of the land, &c. for many yeares, yet after the yeares ended he may preſcribe generally; for the inheritance of the common continued: and if the law ſhould be otherwiſe, it were dangerous for the parties that doe preſcribe for one yeare, and tenne or twenty yeares, &c. is all one in judgement of law. And ſo herewith doe agree the books in 15 E. 3. tit. judgement 133. in a writ of meſne. 14 E. 3. *ibidem* 155.

[c] This is le ley de St. Eſgliſe mentioned in 20 H. 6.

[c] Mich. 43 & 44 Eliz. coram rege.

Edmundus de mortuo mari attachiatus fuit ad reſpondendum Johanni de Segrave et Chriſtianæ uxori ejus, quare impedit eos habere liberam chaceam in boſco ſuo de Kinkeſwood pertinen' ad manerium ſuum de Stoteſden quod tenent de rege in capite, et quod habent ex feoffamento Hugonis le Pleſſye quondam domini dicti manerii. Edmundus dicit quod Rogerus pater ſuus obiit ſeiſitus inde tenend' in ſuo ſeperali, et quod prædictus Hugo tempore quo feoffavit prædictos Johannem et Chriſtianam de dicto manerio, non fuit ſeiſitus de dicta chacea. Et de hoc ponit ſe ſuper patriam, et præd' Johannes et Chriſtiana ſimiliter. Jur' dicunt quod Johannes de Pleſſy pater prædicti Hugonis de Pleſſy fuit ſeiſitus de prædicta chacea dum fuit dominus dicti manerii, et dicunt quod dictus Hugo voluit ibidem fugaſſe, poſtquam prædictum manerium pervenit ad manum ſuam, ſet Rogerus de mortuo mari ipſum impedivit et non permiſit. Et dicunt quod Hamo le Strange, et Hugo de Turbervile parentes uxoris ipſius Hugonis ex rogatu ipſius Hugonis venerunt ad manerium de Stoteſden, et prædictam chaceam ſimul

Mich. 13 E. 1. in banco Rot. 119. Salop. Free chaſe appendant al mannor. Iſſue, non fuit ſeiſitus. Verdict.

Multiplex interruptio non tollit præſcriptionem ſemel obtentam. Note an interruption to chace is no diſſeiſin thereof, but at the will of the owner. Judgement. Seiſina bona debet eſſe pacifica. Mich. 2 E. 2. coram rege. Warw. in monſtraverunt.

ſimul cum prædicto Hugone intraverunt nomine ipſius Hugonis cum equis et armis, et in ea cum equis et armis per tres dies fugaverunt abſque impedimento prædicti Rogeri de mortuo mari aut hominum ſuorum. Et queſit' jur' &c. dicunt quod illud fecerunt tempore pacis, et abſque impedimento prædicti Rogeri aut hominum ſuorum eo quod dictus Rogerus neſcivit quod ibi fugaverunt, et quod ab eo tempore dictus Hugo nunquam fugavit ibi; quia quotieſcunq; fugare ibidem voluit, dictus Rogerus ipſum impedivit. Poſtea term' Trin' anno 20 venerunt partes, et petierunt judicium ſuum per attornatos ſuos. Judicium redditum, quod quia Johannes de Pleſſy fuit de chacea ſeiſitus tanquam pertinen', &c. Et poſtea dictus Hugo per tres dies continue tempore pacis ſeiſinam ſuam obtinuit abſque impedimento Rogeri de mortuo mari, aut alicujus paren' ſuorum, per quod videtur cur' quod ſeiſina illa eſt ſufficiens, bona, et pacifica in hoc caſu: conſideratum eſt, quod Edmundus injuſte impedivit dictus Johannem et Chriſtianam de prædicta chacea, et ipſi re' chaceam illam et damn' 100 *s.*

The mannour of Brimſgreen and Norton was ancient demeſne, and in the kings hands, and William of Brimingham and his anceſtours time out of minde and before the conqueſt had taken toll aſwell of the tenants of the ſaid mannour as of others, whereupon judgment was given, as it appeareth in the record in theſe words: *Et quia manifeſte conſtat, &c. quod manerium de Brymmeſgreen et Norton eſt de antiquo dominico coronæ Angliæ, et à tempore quo non extat memoria, extitit in ſeiſina progenitorum reg' quondam regum Angliæ, ut adhuc in ſeiſina domini regis nunc exiſtit. Et homines de eodem manerio ſicut et cæteri homines de antiquis dominicis coronæ domini reg' quieti eſſe deleant à præſtatione theolonii per totum regnum Angliæ, ut prædictum eſt, &c. Et ſuper hoc viſo et lecto recordo placiti prædicti manifeſtè patet quòd predict' Willielmus de Brimingham recognovit quòd ipſe et anteceſſores ſui habuerunt mercatum in prædicta villa de Brimingham, et theolonium de omnibus mercandiſis in eadem villa, de quibus theolonium præſtari deberet, perceperunt et habuerunt, et etiam de hominibus de Bremeſgreen et Norton, quam de aliis ibidem vendentibus et ementibus ante Conqueſtum, et ſine temporis interruptione, et quòd ipſe ſtatum eorundem anteceſſorum continuavit diſtringendo et percipiendo ab eiſdem hominibus theolonium, tam pro minutis, ut pro victualibus et aliis neceſſariis ſuis, quam de aliis quibuſcunque mercandiſis ſicut de aliis mercatoriis. Conſideratum eſt quòd prædicti Richardus, Robertus, Johannes, et omnes alii de manerio prædicto, quieti ſint imperpetuum à præſtatione theolonii in villa prædicta præſtandi ſecundum legem et conſuetudinem in regno uſitat', et quod recuperent damna, quæ taxantur per diſcretionem juſticiarior' ad vigint marc'. Et prædictus Willielmus pro injuſta continuatione, uſurpatione anteceſſorum ſuorum in miſericordia. Et inhibitum eſt eidem Willielmo ne homines de manerio prædicto de cætero diſtring' ad theolonium in dicta villa de Brimingham præſtand' contra legem et conſuetudinem prædictas, &c.*

Nota, ante Conqueſtum. Note a poſſeſſion beyond time of memory ſhall not ſtand, but give place to law. Conſuetudo licet ſit magnæ authoritatis, nunquam tamen præjudicat veritati.

Trin. 18 E. 1. banco rot. 50. Norff. Nota pro leporariis. Ingarennatum pertinet fugare. Verdict ſpeciall. Bellum de Lewes 48 H. 3. anno Domini, 1264.

Abbas de Sancto Edmundo implacitat Rogerum de Bigod com' Norff' mareſc. Angl', et duos alios pro captione duorum leporariorum ſuorum in villa de magna Thorpe. Comes dicit, quod dicta villa eſt infra præcinctum demid' hundredi ſui de Erſham quod tenet ingarennatum prout Rogerus avunculus ſuus, cujus hæres ipſe eſt, illud tenuit, et quia invenit prædictum abbatem ibidem fugantem, ipſe cepit, &c. Abbas dicit quòd ratione terrarum ſuarum ibidem ad ipſum pertinet fugare, prout omnes prædeceſſores ſui ibidem fecerunt, &c. Ideo ven' jur' qui per ſpeciale veredictum dicunt, quòd abbas et prædeceſſores ſui ſolebant ante bellum de

Lewes

Leaves ibidem semper fugare. &c. Et dicunt quod tam Rogerus comes, quam Rogerus nunc ipsum abbatem et homines suos sæpe impedivit ibidem fugare, et leporarios suos surripuerunt.

(13) *Not chargeable by payment of tithes*, &c.] As by unity of possession. lib. 2. fol. 46, 47, 48, 49. lib. 11. fol. 10, 11, 14, 16.

(14) *Discharged by any composition reall*, &c.] Either before time of memory, or within time of memory, that is by parson, patron, and ordinary. *Vide* 8 H. 6. 22, 23. 9 H. 6. 17. 41 E. 3. 27. 17 E. 3. 11, 38 E. 3. 6. 8. 12 H. 4. 13. 19 H. 6. 75. 32 H. 6. 4. 34 H. 6. 36. 31 H. 6. 28. 35 H. 6. 5. a. 37 H. 6. 25. 1 E. 4. 6. 8 E. 4. 14. 18. 14 H. 7. 3. 26 H. 8. 7. 27 H. 8. 20, 21.

*Concordia facta inter Willielmum Mallet et rectorem ecclesiæ de Aure beiton Bathon, et Wellen' dioces' ex una parte, et * nobilem virum Johannem de Acton mil' ex altera parte, de * modo decimandi omnia infra parochiam de Aure per consensum episcopi et capitul' Bathon' unde placitat' fuit prius in curia Cantuar'. Nota.*

Mich. 9 E. 1. in banco rot. 63. Somerset.
* Miles est nobilis.
* Modus decimandi per realem compositionem.

Provided, &c. that all such barren (15), heath (16), or wast (17) ground, other then such, as be discharged for the payment of tithes by act of parliament, which before this time have lyen barren and payd no tithes by reason of the same barrennesse, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and tearme of seven yeares, next after such improvement fully ended and determined, pay tithe (18) for the corne and hay growing upon the same, any thing in this act to the contrary in any wise notwithstanding.

'The fifth addition, with a proviso.

(15) *Barren.*] *Terra sterilis ex vi termini est terra infœcunda, nullum ferens fructum.* Virgil. *Infelix lolium, et steriles dominantur avenæ.*

But it is not only so strictly taken in this act, but hath also a more restrained sense. For albeit it doth yeeld some fruit, yet if it be barren land, *quoad agriculturam*, as to tillage, which this branch meant to advance, it is within this act, for albeit barren ground (as to tillage) doth pay tithe wooll and lambe, yet is it within this act, and this appeares by the next proviso in this act for the payment of such tithe as during the seven yeares before the improvement was payd. But yet if the ground be not apt for tillage, yet if it be not *suapte natura* barren, it is not within this act. As if a wood be stubbed and grubbed, and made fit for the plough, and imployed thereunto, yet shall it pay tithes presently, for wood-ground is *terra fertilis, et fœcunda.*

Dier, 2 Eliz. fol. 170, 171. lib. Int. Coke 462, 463.

6 E. 6. ex libro Bendloes.

Devenere locos lætos, et amæna vireta
Fortunatorum nemorum, sedesq; beatas.

Virgi Æneid.

And so was it resolved Hil. 9 Jac. reg. upon the motion of Serjant Houghton by the whole court of common pleas.

In a prohibition between Sharington and Fleetwood for tithes in Orwell in the county of Lancaster, it was resolved, that if marish meadow, or other land for not cleansing of the trenches or sewers, or by suddaine accident or inundation of waters be surrounded; or by ill husbandry or unprofitable negligence any land become overrunne

Hil. 38 Eliz. coram rege.

Multiplex interruptio non tollit præſcriptionem ſemel obtentam. Note an interruption to chace is no diſſeiſin thereof, but at the will of the owner. Judgement. Seiſina bona debet eſſe pacifica. Mich. 2 E. 2. coram rege. Warw. in monſtraverunt.

ſimul cum prædicto Hugone intraverunt nomine ipſius Hugonis cum equis et armis, et in ea cum equis et armis per tres dies fugaverunt abſque impedimento prædicti Rogeri de mortuo mari aut hominum ſuorum. Et queſit' jur' &c. dicunt quod illud fecerunt tempore pacis, et abſque impedimento prædicti Rogeri aut hominum ſuorum eo quod dictus Rogerus neſcivit quod ibi fugaverunt, et quod ab eo tempore dictus Hugo nunquam fugavit ibi; quia quotieſcunq; fugare ibidem voluit, dictus Rogerus ipſum impedivit. Poſtea term' Trin' anno 20 *venerunt partes, et petierunt judicium ſuum per attornatos ſuos. Judicium redditum, quod quia Johannes de Pleſſy fuit de chacea ſeiſitus tanquam pertinen', &c. Et poſtea dictus Hugo per tres dies continue tempore pacis ſciſinam ſuam obtinuit abſque impedimento Rogeri de mortuo mari, aut alicujus paren' ſuorum, per quod videtur cur' quod ſeiſina illa eſt ſufficiens, bona, et pacifica in hoc caſu: conſideratum eſt, quod Edmundus injuſte impedivit dictos Johannem et Chriſtianam de prædicta chacea, et ipſi re' chaceam illam et dampn'* 100 *s.*

The mannour of Brimſgreen and Norton was ancient demeſne, and in the kings hands, and William of Brimingham and his anceſtours time out of minde and before the conqueſt had taken toll aſwell of the tenants of the ſaid mannour as of others, whereupon judgment was given, as it appeareth in the record in theſe words: *Et quia manifeſte conſtat, &c. quod manerium de Brymmeſgreen et Norton eſt de antiquo dominico coronæ Angliæ, et à tempore quo non extat memoria, extitit in ſeiſina progenitorum reg' quondam regum Angliæ, et adhuc in ſeiſina domini regis nunc exiſtit. Et homines de eodem manerio ſicut et cæteri homines de antiquis dominicis coronæ domini reg' quieti eſſe deb'eant à præſtatione theolonii per totum regnum Angliæ, ut prædictum eſt, &c. Et ſuper hoc viſo et lecto recordo placiti prædicti manifeſtè patet quòd prædict' Willielmus de Brimingham recognovit quòd ipſe et anteceſſores ſui habuerunt mercatum in prædicta villa de Brimingham, et theolonium de omnibus mercandiſis in eadem villa, de quibus theolonium præſtari deberet, perceperunt et habuerunt, et etiam de hominibus de Bremeſgreen et Norton, quam de aliis ibidem vendentibus et ementibus ante Conqueſtum, et ſine temporis interruptione, et quòd ipſe ſtatum eorundem anteceſſorum continuavit diſtringendo et percipiendo ab eiſdem hominibus theolonium, tam pro minutis, ut pro victualibus et aliis neceſſariis ſuis, quam de aliis quibuſcunque mercandiſis ſicut de aliis mercatoriis. Conſideratum eſt quòd prædicti Richardus, Robertus, Johannes, et omnes alii de manerio prædicto, quieti ſint imperpetuum à præſtatione theolonii in villa prædicta præſtandi ſecundum legem et conſuetudinem in regno uſitat', et quod recuperent damna, quæ taxantur per diſcretionem juſticiarior' ad vigint marc'. Et prædictus Willielmus pro injuſta continuatione, uſurpatione anteceſſorum ſuorum in miſericordia. Et inhibitum eſt eidem Willielmo ne homines de manerio prædicto de cætero diſtring' ad theolonium in dicta villa de Brimingham præſtand' contra legem et conſuetudinem prædictas, &c.*

Nota, ante Conqueſtum. Note a poſſeſſion beyond time of memory ſhall not ſtand, but give place to law. Conſuetudo licet ſit magnæ authoritatis, nunquam tamen præjudicat veritati.

[655]

Trin. 18 E. 1. banco rot. 50. Norff. Nota pro leporariis. Ingarennatum pertinet fugare. Verdict ſpeciall. Bellum de Lewes 48 H. 3. anno Domini, 1264.

Abbas de Sancto Edmundo implacitat Rogerum de Bigod com' Norff' mareſc. Angl', et duos alios pro captione duorum leporariorum ſuorum in villa de magna Thorpe. Comes dicit, quod dicta villa eſt infra præcinctum demid' hundredi ſui de Erſham quod tenet ingarennatum prout Rogerus avunculus ſuus, cujus hæres ipſe eſt, illud tenuit, et quia invenit prædictum abbatem ibidem fugantem, ipſe cepit, &c. Abbas dicit quòd ratione terrarum ſuarum ibidem ad ipſum pertinet fugare, prout omnes prædeceſſores ſui ibidem fecerunt, &c. Ideo ven' jur' qui per ſpeciale veredictum dicunt, quòd abbas et prædeceſſores ſui ſolebant ante bellum de

Lewes

Lewes ibidem semper fugare. &c. Et dicunt quod tam Rogerus comes, quam Rogerus nunc ipsum abbatem et homines suos sæpe impedivit ibidem fugare, et leporarios suos surripuerunt.

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(14) *Discharged by any composition reall,* &c.] Either before time of memory, or within time of memory, that is by parson, patron, and ordinary. *Vide* 8 H. 6. 22, 23. 9 H. 6. 17. 41 E. 3. 27. 17 E. 3. 11, 38 E. 3. 6. 8. 12 H. 4. 13. 19 H. 6. 75. 32 H. 6. 4. 34 H. 6. 36. 31 H. 6. 28. 35 H. 6. 5. a. 37 H. 6. 25. 1 E. 4. 6. 8 E. 4. 14. 18. 14 H. 7. 3. 26 H. 8. 7. 27 H. 8. 20, 21.

*Concordia facta inter Willielmum Mallet et rectorem ecclesiæ de Aure beiton Bathon, et Wellen' diocesʃ' ex una parte, et * nobilem virum Johannem de Acton mil' ex altera parte, de * modo decimandi omnia infra parochiam de Aure per consensum episcopi et capitul' Bathon' unde placitat' fuit prius in curia Cantuar'. Nota.*

Mich. 9 E. 1. in banco rot. 63. Somerset.
* Miles est nobilis.
* Modus decimandi per realem compositionem.

Provided, &c. that all such barren (15), heath (16), or waste (17) ground, other then such, as be discharged for the payment of tithes by act of parliament, which before this time have lyen barren and payd no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and tearme of seven yeares, next after such improvement fully ended and determined, pay tithe (18) for the corne and hay growing upon the same, any thing in this act to the contrary in any wise notwithstanding.

The fifth addition, with a proviso.

(15) *Barren.*] *Terra sterilis ex vi termini est terra infœcunda, nullum ferens fructum.* Virgil. *Infelix lolium, et steriles dominantur avenæ.*

But it is not only so strictly taken in this act, but hath also a more restrained sense. For albeit it doth yeeld some fruit, yet if it be barren land, *quoad agriculturam,* as to tillage, which this branch meant to advance, it is within this act, for albeit barren ground (as to tillage) doth pay tithe wooll and lambe, yet is it within this act, and this appeares by the next proviso in this act for the payment of such tithe as during the seven yeares before the improvement was payd. But yet if the ground be not apt for tillage, yet if it be not *suapte natura* barren, it is not within this act. As if a wood be stubbed and grubbed, and made fit for the plough, and imployed thereunto, yet shall it pay tithes presently, for wood-ground is *terra fertilis, et fœcunda.*

Dier, 2 Eliz. fol. 170, 171. lib. Int. Coke 462, 463.

[656]

6 E. 6. ex libro Bendloes.

Devenere locos lætos, et amæna vireta
Fortunatorum nemorum, sedesq; beatas.

Virgi Æneid.

And so was it resolved Hil. 9 Jac. reg. upon the motion of Serjant Houghton by the whole court of common pleas.

In a prohibition between Sharington and Fleetwood for tithes in Orwell in the county of Lancaster, it was resolved, that if marish meadow, or other land for not cleansing of the trenches or sewers, or by suddaine accident or inundation of waters be surrounded; or by ill husbandry or unprofitable negligence any land become over-runne

Hil. 38 Eliz. coram rege.

runne with buſhes, furres, whinnes, and bryers, yet are not they or any of them ſaid to bee barren land within this ſtatute, becauſe of their owne nature they are fruitfull, and the parſon, &c. ſhall not by this act be barred of his tithes by the ill huſbandry or negligence of the owner or poſſeſſour.

(16) *Heath.*] In French it is called *bruyere*; in legall Latin *bruera*, Regiſt. 2. In domeſday it is called *bruaria*; *Latinè erix*, *erica* an unprofitable kinde of ground, but wholly barren, for thereon ſheep and beaſts will bruiſe, and ſome poore people the flags and turfes thereof doe apply to fewell; and this heath cannot without great ſkill, charge and induſtry bee converted to tillage. It ſendeth forth a flower in autumne (when all others ceaſe) which bees doe exceedingly covet, as it is ſaid, this is within this act. Some ſay, *eſt quaddam genus myricæ*, a kinde of wilde tameriſke, and in Lincolnſhire a litle religious houſe was called Temple bruer, becauſe it was ſeated in the heath.

Lib. Intr. Coke ubi ſupra.

Lib. Intr. Coke ubi ſupra.

(17) *Waſt.*] It is called *vaſtus fundus*, waſt ground, becauſe it lyeth as waſt with little or no profit to the lord of the mannour, and is ſo called to diſtinguiſh it from the reſidue of the demeſnes in the lords hands, and cannot without great charge and induſtry be improved or converted to tillage being *ſuapte natura* unprofitable, and being converted to tillage it ſhall pay no tithes by the ſpace of ſeven yeares.

(18) *Shall after the end and terme of ſeven yeares next after ſuch improvement pay tithe.*

Dier, 2 Eliz. 170. b.

Note, here are no expreſſe words of diſcharge of the tithes during the ſeven yeares, but by reaſonable conſtruction it doth implyedly amount to a diſcharge during the ſeven yeares, and the ſeven yeares are to be accounted next after the improvement.

The ſixth addition with the proviſo.

And be it enacted, &c. that every perſon exerciſing merchandizes, bargaining, and felling, clothing, handicraft, or other art or faculty, being ſuch kinde of perſons as heretofore within theſe forty yeares have accuſtomably uſed to pay ſuch perſonall tithes, or of right ought to pay (other then ſuch as bee common day-labourers) ſhall yearly, &c. pay for his perſonall tithes, the tenth part of his cleare gaines (19), his charges, &c. deducted; and where handicrafts men have uſed to pay their tithes within this forty yeares, the ſame cuſtome of payment of tithes (20) to be obſerved. And if any perſon refuſe to pay his perſonall tithes, &c. it ſhall be lawfull to the ordinary of the ſame dioceſſe, &c. to call the ſame party before him, and by his diſcretion to examine him by all lawfull and reaſonable meanes other then by the parties owne corporall oath (21), concerning the true payment of the ſaid perſonall tithes.

(19) *Pay for his perſonall tithes the full tenth part of his cleare gaines*, &c.] Of perſonall tithes we have ſpoken before. Vid. 37 H. 8. cap. 12. Vid. Linwood, tit. de Decimis, fol. 141, 142.

(20) *Cuſtome of payment of tithes.*] Nota, there may be *modus decimandi* for perſonall tithes.

(21) *By all lawfull and reaſonable meanes, other than by the parties owne corporall oath.*] Here is juſt occaſion offered to ſpeake *de juramento*

juramento calumniæ, wherein we will endeavour to find out three things: firſt, the beginning of the bringing in of this oath: ſecondly, how the law hath ſtood therein in former ages: and thirdly, what the right is at this day.

1. By a conſtitution *domini Othonis diaconi cardinalis Sancti Nich. apoſtolicæ ſedis legati*, at a provinciall councell, holden *octab' Sancti Martini in eccleſia Sancti Pauli London, an. Dom.* 1236. *anno* 21 H. 3. it was ordained in theſe words: *Juſ-jurandum calumniæ in cauſis eccleſiaſticis et civilibus de veritate dicenda in ſpiritualibus, quod veritas facilius aperiatur, et cauſæ celerius terminentur, ſtatuimus præſtari de cætero in regno Angliæ, ſecundum canonicas et legitimas ſanctiones obtenta, conſuetudine in contrarium non obſtante.* By this it appeareth, that by the cuſtome of the realme of England, *juramentum calumniæ* was not to be miniſtred: but to confeſſe the truth, the cuſtome was not ſo generall, as in this canon is alledged; for lay-men were free by the cuſtome of the realme for taking of that oath, unleſſe it were *in cauſis matrimonialibus et teſtamentariis*: and in thoſe two caſes the eccleſiaſticall judge might examine the parties upon their oath, becauſe contracts of matrimony were often made in private, and legitimation of children depended thereupon. And in cauſes teſtamentary many things conſiſt in ſecrecie, and the truth therein is to be drawn out by oath, *et intereſt reipublicæ teſtamenta hominum rata haberi.* And this appeareth by a * prohibition by authority of parliament directed to the ſherifes, &c. *Quod non permittant quod aliqui laici in baliva ſua in aliquibus locis conveniant ad aliquas recognitiones p. ſacramenta ſua facere, niſi in cauſis matrimonialibus et teſtamentariis.* But this cuſtome extended not to them of the clergy, but to lay-people only, for that they of the clergy being preſumed to be learned men, were better able to take *juramentum calumniæ*: for concerning the teſtimony of witneſſes in the eccleſiaſticall court, that act, or the cuſtome of the realme extends not unto.

* Prohib. format' ſuper Artic' Cleri, tit. Prohib. Raſtall 4. vet. Magn. Chart. 2. part. fol. 70. a. Vid. aſſ. de Clarendon, 10 H. 2. Brit. fol. 35. b. acc' Hill. 7 E. 3. rot. 285. in communi banc. Hill. 7 H. 6. rot. 135. ibid. Trin. 3 H. 6. rot. 41. ibid. 19 E. 4. 10. per Brian, that it is a ſtatute. 20 E. 4. 3. b. [a] Regiſt. fol. 36. b. F.N.B. 53. d. A prohibition, and thereupon an attachment, contra conſuetudinem regni, but there is a conſultation for witneſſes. Fitzh. juſtice of peace 72. Lamb. juſtice of peace, 338.

But if in a penall law the juriſdiction of the ordinary be ſaved, as by 1 Eliz. [b] for hearing of maſſes, or by 13 Eliz. [c] for uſury, or the like, neither clerke nor lay-man ſhall be compelled to take *juramentum calumniæ*, becauſe it may be an evidence againſt him at the common law upon the penall ſtatute.

[b] Dyer manuſcript. propria manu, Trin. 9 Eliz. in communi banco, Leighs caſe, Habeas corpus.

[c] 18 Eliz. Dyer 175. in margine, Hindes caſe, Habeas corpus.

2. But it is objected, that this oath hath long continued in the eccleſiaſticall court. To this it is anſwered: Firſt, that it had the warrant of an act of parliament (as it was holden) in 2 Hen. 4. cap. 15. whereby it was enacted, *Quod dioceſanus per ſe, vel commiſſarios ſuos contra hujuſmodi perſonas, &c. ad omnem juris effectum publice, et judicialiter procedat et negotium hujuſmodi terminet juxta canonicas ſanctiones.* By this ſtatute, and the ſaid provinciall conſtitution, and other the canons of the church, the dioceſans, &c. miniſtred the ſaid oath, even in the caſe of hereſie, &c. This ſtatute of 2 H. 4. was repealed by the act of 25 H. 8. (which act is partly declaratory of the ancient law of the realme) in theſe words: "It ſtandeth not "with the right order of juſtice, nor good equity, that any perſon "ſhould

25 H. 8. cap. 14. & 1 E. 6. cap. 12.

This ſtatute of 2 H. 4. was revived in an. 1 & 2 Phil. & Mar.

ca. 6. and repealed again an. 1 Eliz. 1. & ſo remaineth.

" ſhould be convict, and put to loſſe of life, good name, or goods,
" unleſſe it were by due accuſation and witneſſe, or by preſent-
" ment, verdict, confeſſion, or proceſſe of outlawry, &c. And
" that it is not reaſonable, that any ordinary, upon any ſuſpicion
" conceived of his owne fantaſie, without due accuſation or pre-
" ſentment ſhould put any ſubject of this realm in any infamy and
" ſlander of hereſie, to the perill of life, or loſſe of name, or
" goods." And in a former clauſe of the ſaid act it is ſaid:
" That the moſt expert and beſt learned man of this your realm,
" diligently lying in wait upon himſelfe, can eſchew and avoid
" the penalties and dangers, &c. if he ſhould be examined upon
" ſuch captious interrogatories, as is, and hath been accuſtomed to
" be miniſtred by the ordinaries of this realme, in caſes where they
" will ſuſpect any man of hereſie, &c.

Secondly, the words of the ſaid act of parliament are *contra voluntatem eorum*, and of the Regiſter, *ipſis invitis*; ſo as ſuch as willingly have taken it, ſerveth for no poſſeſſion againſt the law.

3. But now laſtly it is to be ſeen, how the right ſtandeth touching this oath at this day. It is confeſſed, as before it appeareth, as well by the ſaid provincial conſtitution of Otho, as by the Regiſter, that the ſaid conſtitution was *contra conſuetudinem regni*, whereupon it followeth, that no cuſtome of the realme can be taken away by a canon of the church, but only by act of parliament, and ſpecially in caſe of an oath, which is ſo ſacred a thing, and which generally concerneth all the nobility, gentry, and comminalty of the realme of both ſexes. And by the ſtatute of * 25 Hen. 8. cap. 19. no canon againſt the kings prerogative, the law, ſtatutes, or cuſtome of the realme, is of force, which is but declaratory of the common law.

Vid. the third part of the Inſtitutes, cap. Perjury.
* 25 H. 8. ca. 19. Rot. pat. an. 25 E. 2. part 1. m. 8. 19 E. 3. errore non admittit. 7. 10 H. 7. fo. 6. per Brian.

[d] Wee have read over what Doctor Coſin hath in his book ſpoken for the maintenance of this oath, and certainly, he toucheth not the ſtate of the queſtion, as will appeare to the learned reader.

See the fourth part of the Inſtitutes, cap. The Court of Convocation.
d Doct. Coſin in his book intitled, An Apology, &c. cap. 15.

To conclude: This branch of 2 Ed. 6. giveth no life to any forceleſſe canon, which is againſt any law or cuſtome of the realme, but, according to the law and cuſtome of this kingdome prohibiteth the ordinary in caſe of perſonall tithes to examine the party upon his corporall oath; for the parliament did take that to be no lawfull and reaſonable meanes (whereof it ſpeaketh); for a parliament would never have prohibited any thing that was lawfull and reaſonable; and yet the cleare gains of merchants, clothiers, or handicraft men do lye in great ſecrecie, and hardly to be proved by witneſſes. And before, in the clauſe concerning the ſecond addition, for recovery of predial tithes, it is ſaid; upon due proofe thereof, made before the ſpirituall judge, &c. for that they are open, viſible, and eaſie to be proved by witneſſes: and at this time the ſtatute of 2 H. 4. ſtood repealed.

L. 18. F. de pœna. Cogitationis pœnam nemo meretur.

No perſon eccleſiaſticall or temporall ought in any eccleſiaſticall court to be examined upon the cogitation of his heart, or what hee thinketh, &c. as it was holden by the judges in the parliament holden 4 Jac. and as it was after holden in the court of common pleas, Mich. 6 Jac. in Doctor Wolſtons caſe in a prohibition.

Provided

Provided, &c. that all and every perſon and perſons, which by the lawes or cuſtomes of this realme ought to make or pay their offerings, ſhall yearly from henceforth well and truly content and pay his or their offerings (22) to the parſon, &c. of the pariſh or pariſhes, where it ſhall fortune or happen him or them to dwell or abide, &c. The 7. addition.

(22) *Offerings.*] Offerings or oblations, *oblationes*, theſe are of two ſorts, viz. free or voluntary, and conſuet; or by cuſtome, as here it appeareth. Offerings and obventions are in London the profits of the church, and not in corn, or other manner. [659]

A writ of right of advowſon brought of the fourth part of the tithes and offerings of the church of Saint Dunſtan in the Weſt in Fleetſtreet London, and adjudged to be good. 30 E. 3. 1. in account.

See lib. 11. fol. 16. Doctor Grants caſe. Vid. there for obventions, 38 E. 3. 13. and 16 E. 3. ubi ſup. and ſee here the 10 addition. Vid. the next addition. 38 E. 3. 13. per Finch. acc'. 16 E. 3. quare Imped. 147.

Provided, &c. That this act, or any thing therein contained, ſhall not extend to any pariſh, which ſtands upon and towards the ſea coaſts, the commodities, and occupying whereof conſiſteth chiefly in fiſhing, and have by reaſon thereof uſed to ſatisfie their tithes by fiſh, but that all and every ſuch pariſh and pariſhes ſhall hereafter pay their tithes, according to the laudable cuſtomes, as they have heretofore of ancient time within theſe 40 yeares uſed and accuſtomed, and ſhall pay theſe offerings, as is aforeſaid. The 8. addition.

Provided that this act, &c. ſhall not extend in any wiſe to the inhabitants of the citie of London and Canterbury, and the ſuburbs of the ſame, ne to any other towne or place, that hath uſed to pay their tithes by their houſes, otherwiſe then they ought or ſhould have done before the making of this act, any thing in this act to the contrary in any wiſe notwithſtanding. The 9. addition.

Mich. 5. Jac. *in communi banco*, between John Skidmore and Robert Eire plaintifes in a prohibition againſt John Beil parſon of Saint Michael Queenhithe in London: the caſe upon the ſaid ſtatute of 37 H. 8. and the decree thereupon was this: the ſaid parſon libelled before the chancellor of London for the tithes of an houſe, called the Bores Head in Breadſtreet in the ſaid pariſh, by force of the ſaid act and decree, the ancient farme rent whereof was five pounds, at the time of the ſaid decree, and after, and that of late a new leaſe was made of the ſaid houſe, rendring the rent of five pounds *per annum*, and over that a great in-come or fine, which was covenanted and agreed to be paid yearly at the ſame day; that the rent was paid as a ſumme in groſſe, and that ſo much rent might have been reſerved for the ſaid houſe, as the rent reſerved, and the ſumme in groſſe amounted unto; which reſervation and covenant, &c. were made to defraud the ſaid parſon of the tithes of the true rent of the ſaid houſe, which to him did appertaine by the purport and true intention of the ſaid decree. And in this caſe foure points were reſolved by the whole court.

First,

Firſt, if ſo much rent be reſerved as was accuſtomed to be paid at the making of the ſaid decree in 37 H. 8. (whatſoever fine or in-come be paid) that the parſon can averre no covin; for the words of the decree be; Where any leaſe is or ſhall be made of any dwelling houſe, &c. by fraud or covin in reſerving leſſe rent then hath been accuſtomed, or is paid, &c. So as if the accuſtomed rent be reſerved, no fraud can be alledged; for the fraud by the decree is, when leſſer rent then was then accuſtomed to be paid, is reſerved; or if no rent at all be reſerved, &c. for then tithe ſhall be paid according to the rent, that then was laſt before reſerved to be paid. The words of the decree are: Or that any leaſe ſhall be made without any rent reſerved upon the ſame by reaſon of any fine or income, then the fermor ſhall pay for his tithes after the rate aforeſaid, according to the quantity of ſuch rent, as the houſe was laſtly letten for, without fraud or covin, before the making of ſuch leaſe. So as the decree conſiſteth upon foure points, viz. Firſt, where the accuſtomed rent, &c. was re-
[660] ſerved. Secondly, where the rent was increaſed, there the tithes ſhould be paid according to the whole rent. Thirdly, where leſſer rent was reſerved. Fourthly, where no rent was reſerved, but had been formerly reſerved. And this act and decree were very beneficiall for the clergy of London, in reſpect of that which they had before: and the defendant in his libell confeſſeth, that the accuſtomed rent, &c. was reſerved: and therefore no cauſe of ſuit.

Secondly, it was reſolved, that ſuch houſes as were never letten to farme, but inhahited by the owner, this is *caſus omiſſus*, and ſhall pay no tithes by force of the decree.

Thirdly, it was reſolved, that where the decree ſaith, Where no rent is reſerved by reaſon of any fine or in-come paid before-hand, albeit no fine or in-come be paid in that caſe, yet if no rent be reſerved, the parſon ſhall have his tithes according to the decree, for that is put but for an example or cauſe, why no rent is reſerved, and whether any fine or in-come were paid, or no, is not materiall, as to the parſon.

Fourthly, it was reſolved, that the parſon could not ſue for the ſaid tithes in the eccleſiaſticall court, for that the act and decree that raiſed and gave theſe kind of tithes, did limit and appoint how, and before whom the ſame ſhould bee ſued for, viz. That if a controverſie were moved in the city for not payment of thoſe tithes, or concerning the true rent or tithes, that then upon complaint made by the party grieved to the lord maior of London, hee by advice of his aſſiſtants ſhould make a finall end, with coſts to be awarded by his diſcretion. And if the maior doth not make an end of it within two moneths, or if any of the parties find themſelves grieved, that then the lord chancellor within three moneths ſhall make an end thereof with coſts, according to the true intention of the ſaid decree: therefore as the decree gave a new and ſpeciall kind of tithings; ſo it did appoint new and ſpeciall judges to heare and determine the ſame. And in the end it was awarded, that the prohibition ſhould ſtand. Vid. for tithes in London, 27 H. 8. cap. 20. and 32 H. 8. cap. 7.

See lib. 5. fo. 73. the caſe of Orphanage, in London.

The 10. addition.

And be it further enacted, &c. that if any perſon do ſubſtract or withdraw any manner of tithes, obventions (23), profits, commodities,

commodities, or other duties before mentioned, or any part of them, contrary to the true meaning of this act, or of any other act heretofore made, that then the party ſo ſubſtracting or withdrawing the ſame, may or ſhall be convented and ſued in the kings eccleſiaſticall court by the party from whom the ſame ſhall be ſubſtracted or withdrawne, to the intent the kings judge eccleſiaſticall ſhall and may then and there heare and determine the ſame, according to the kings eccleſiaſtical lawes. And that it ſhall not be lawfull unto the parſon, vicar, proprietorie, owner, or other their fermors or deputies, contrary to this act to convent or ſue ſuch with-holder of tithes, obventions, or other duties aforeſaid, before any other judge then eccleſiaſticall. And if any archbiſhop, biſhop, chancellor, or other judge eccleſiaſticall give any ſentence in the aforeſaid cauſes of tithes, &c. and (no appeale ne prohibition hanging) and the party condemned do not obey the ſaid ſentence; that then it ſhall be lawfull for every ſuch judge eccleſiaſticall to excommunicate the ſaid party ſo, as aforeſaid, condemned and diſobeying: In the which ſentence of excommunication, if the ſaid party excommunicate, wilfully ſtand and endure ſtill excommunicate by the ſpace of 40 daies next after, upon denunciation, and publication thereof in the pariſh church, or the place or pariſh, where the party ſo excommunicate is dwelling, or moſt abiding, the ſaid judge eccleſiaſticall may then at his pleaſure ſignifie unto the king into his court of chancery of the ſtate and condition of the ſaid party ſo excommunicate, and thereupon to require proceſſe *de excommunicato capiendo* (24), to be awarded againſt every ſuch perſon as hath been ſo excommunicate. [661]

(23) *Obventions.*] Obventions aforeſaid are offerings.

That the juriſdiction of tithes belong to the eccleſiaſticall court, it appeareth by the acts of parliament, viz. of *Circumſpecte agatis, an.* 13 E. 1. *Artic' Cleri anno* 9 E. 2. 18 E. 3. cap. 7. 1 R. 2. cap. 13. 27 H. 8. cap. 20. 32 H. 8. cap. 7. and this act.

Of ancient they were determined in the ſherifes turne, as it appeareth in *lib. rubeo inter leges* H. 1. cap. 8. After by *ſcire fac'* at the common law before the ſtatute of 18 E. 3. Vid. Rot. clauſ. 21 H. 3. m. 3. & Rot. Eſchaet' 8 E. 1. nu 67. Regiſt. fol. 165. a writ of covenant to levie a fine *de decimis garbarum*, &c. 38 H. 6. 20. F. N. B. 30. e. f. 4 E. 3. 27. 29. 7 E. 3. fol. 5. per Parning. 8 E. 3. 49. Bracton, lib. 5. fol. 401. Britton, cap. 4. fol. 11. omitted tithes, &c. Fleta, lib. 6. cap. 36. 28 E. 3. 97. Vid. Mich. 7 E. 1. coram Reg. rot. 21.

At this day a writ of right of advowſon lyeth *de advocatione decimarum eccleſiæ*, &c. for the tithe is the profit of the church; and if the tithes be taken away, the advowſon is of none effect, and the eſples in a writ of right of advowſon (which is the fruit of the advowſon) are alledged in the parſon, in taking of the great and ſmall tithes by the preſentment of the patron. See 16 Ed. 3. tit. *Quare Imped.* 147. 30 E. 3. fol. 1. 38 E. 3. 13. 45 E. 3. 12. Brit. cap. 4. and the writ of *indicavit*, whereof you may 4 E. 3. 27. per Shard & per Stoner, &c. 26 H. 8. 3. F.N.B. 30. c. F.N.B. 30. e. Vet. N.B. 31. 4 E. 3. 27. 8 E. 3. 49. 31 H. 6. 16. 12 E. 4. 13.

13 H. 7. 16. 31 H. 8. prohib. 17.

may reade at large before in the expoſition of the ſtatute of W. 2. cap. 5.

This 10. addition for the eſtabliſhment of eccleſiaſticall juriſdiction for tithes was made, but by the generality thereof (which obſerve well) it ſhould have been doubted, whether the writ of right of advowſon of tithes, and of *indicavit* had been taken away; but to cleare the doubt, there is hereafter a ſpecial proviſion therefore, as hereafter ſhall be ſhewed. See the 12. addition.

(24) *Proceſſe de excommunicato capiendo.*] See the ſtatute of 5 Eliz. cap. 23. for divers notable things concerning this matter; but none of the penalties of that ſtatute doe extend to the proceeding upon cauſe of tithes, but onely upon nine cauſes belonging to eccleſiaſticall juriſdiction particularly expreſſed in that act.

The 11. addition.

Be it further enacted, &c. that if any party at any time hereafter, for any matter or cauſe before rehearſed (25), limited, or appointed by this act to be ſued or determined in the kings eccleſiaſticall court, or before the eccleſiaſticall judge, doe ſue for any prohibition in any of the kings courts, where prohibitions before this time have been uſed to be granted: that then in every ſuch caſe the ſame party, before any prohibition ſhall be granted to him or them, ſhall bring and deliver to the hands of ſome of the juſtices or judges of the ſame court where ſuch party demanded prohibition, the very true copy of the libell depending in the eccleſiaſticall court concerning the matter, wherefore the partie demandeth prohibition, ſubſcribed or marked with the hand of the ſame party; and under the copy of the ſaid libell ſhall be written the ſuggeſtion, wherefore the party ſo demandeth the ſaid prohibition. And in caſe the ſaid ſuggeſtion by two honeſt and ſufficient witneſſes at the leaſt, be not proved true in the court (26) where the ſaid prohibition ſhall be ſo granted within 6 moneths next following after the ſaid prohibition ſhall be ſo granted and awarded, that
[662] then the party that is letted or hindered of his or their ſuit in the eccleſiaſticall court by ſuch prohibition, ſhall upon his or their requeſt and ſuit, without delay, have a conſultation granted in the ſame caſe in the court, where the ſaid prohibition was granted, and ſhall alſo recover double coſts and damages againſt the party that ſo purſued the ſaid prohibition, the ſaid coſts and damages to be aſſigned or aſſeſſed by the court, where the ſaid conſultation ſhall be ſo granted; for which coſts and damages the party to whom they ſhall be awarded may have an action of debt by bill, plaint, or information in any of the kings courts of record, wherein the defendant ſhall not wage his or their law, nor have any eſſoine or protection allowed or admitted.

(25) *Rehearſed.*] This word is very materiall, for this additional act of 2 E. 6. extendeth onely to prediall and perſonall tithes; but in as much as this act doth rehearſe the ſtatutes of 27 H. 8. cap. 20. and 32 H. 8. cap. 7. both which ſtatutes extend unto

unto all kind of tithes, viz prediall, perſonall, and mixt, and to offerings alſo; therefore this branch extendeth to them all. And it is to be obſerved, that this branch reſpecteth the cauſe of ſuit, viz. for tithes or offerings, and not the cauſe of the prohibition. Vid. Dyer, 2 Eliz. fol. 170.

(26) *And in caſe the ſaid ſuggeſtion, &c. be not proved true in the court,* &c.] This clauſe was made in favour of the clergy for proofe by witneſſes, which they had not at the common law.

If the ſuggeſtion be in the negative, as if the proprietary of a parſonage impropriate ſue for tithes, and the cauſe of the ſuggeſtion be, that the parſonage is not impropriate; or if the parſon of Dale ſue for tithes of lands in that pariſh, and the party ſue a prohibition, for that the land lieth not in that pariſh, or that the parſon that ſueth for tithes was not inducted, &c. or any the like cauſe in the negative of any matter of fact, hee ſhall not produce any witneſſe by force of this branch, becauſe a negative cannot be proved: and therefore a prohibition upon cauſes in the negative remains at the common law.

If a man plead a deed in barre, wherein witneſſes be, and iſſue is joyned, *non eſt factum*, and proceſſe is awarded againſt the witneſſes, who are joyned to the jury, and it is found *non eſt factum*, notwithſtanding this joynder, the party grieved ſhall have an attaint: for it is a maxime in law, That witneſſes cannot teſtifie in the negative, but in the affirmative: otherwiſe it is, if they found it to be the deed of the party in the affirmative, there no attaint doth lye. Vid. 11. aſſ. p. 19. 22 aſſ. p. 15. 23. aſſ. p. 11. 40 aſſ. p. 23. 12 H. 6. 6. F.N.B. 106. h. So it is, if the ſuggeſtion be grounded upon any matter in law, for that the ſuit for tithes in that kind are not due by law. As if the libell be in the eccleſiaſticall court, for the tithe of tiles, turfes, or the like, there need no witneſſes to be produced; for that matters in law are to be decided by the judges, and not to be proved by witneſſes: and *quod conſtat curiæ, opere teſtium non indiget*, and the cauſe of this prohibition, or the like, appeareth in the libell it ſelfe. See before *Artic' Cleri* 3. *regis Jacobi, Artic'* 18.

A proviſo touching the 11 addition.

Provided alwaies, and be it enacted by the authority aforeſaid, that this act, or any thing therein contained, ſhall not extend to give any miniſter or judge eccleſiaſticall any juriſdiction to hold plea of any matter, cauſe, or thing, being contrary or repugnant to, or againſt the effect, intent, or meaning of the ſtatute of Weſt. 2. (27) the fifth chapter, the ſtatutes of *Articuli Cleri* (28), *Circumſpecte agatis* (29), *Sylva cædua* (30), the treatiſe *de regia prohibitione* (31), ne againſt the ſtatute of *anno primo Edwardi tertii* the tenth chapter (32), or any of them, ne yet hold plea in any matter, whereof the kings court of right ought to have juriſdiction (33): any thing therein contained to the contrary in any wiſe notwithſtanding.

[663]

(27) *Statute of W. 2. cap.* 5.] Hereby, if need were, the writ of indicavit, and the writ of right of the fourth part of tithes, and all dependances thereupon are ſaved. See before in the expoſition of this act of W. 2. cap. 5. anno 13 E. 1.

(28) *Articuli cleri,*] Theſe articles were eſtabliſhed by act of parliament anno 9 E. 2. See before in the expoſition upon theſe articles. By this act alſo cap. 2. the writs of indicavit, and of right of advowſon of tithes are ſaved.

10 H. 4. 1. b. (29) *Circumſpecte agatis.*] This act is (as here it appeareth) a ſtatute, and enacted anno 13 E. 1. See before the expoſition hereof.

(30) *Silva cædua.*] Here is intended the ſtatute of 45 E. 3. cap. 3. concerning tithes *de ſilva cædua,* and not of great wood above 20 ycares growth.

Hill. 7 H. 4. pl. 2. (31) *The treatiſe de regia prohibitione.*] Herein ſome difference is in our bookes; for in Hill. 7 H. 4. it is ſaid, that the ſtatute *de regia prohibitione* doth rehearſe how *per venditiones ſpirituales fiunt temporales* which clauſe is in *Artic' Cleri,* cap. 1. *in fine.* Alſo in 31 H. 6. 13, 14. 31 H. 6. it is ſaid, that the ſtatute *de regia prohibitione,* and recite the effect of the ſecond chapter of *Artic. Cleri.* So as by theſe bookes the ſtatute *de regia prohibitione* is the ſtatute of *Artic' Cleri*: but it cannot be ſo conceived in this act, becauſe herein they are diſtinguiſhed as two ſeverall ſtatutes, and ſo in truth in the intendment of this act they are: and the treatiſe *de regia prohibitione* intended by this act is that treatiſe *de regia prohibitione,* intitled *Prohibitio formata ſuper artic'.* Vide Vet. Mag. Chart. part 2. fol. 7. Raſtall abridg. ſtat. tit. prohib. pl. 6.

21 E. 3. 29. a. Concerning lay fee, &c. this is affirmed to be a ſtatute. (32) *Statute of* 1 *E.* 3. *cap.* 10.] This is miſprinted; for the act is 1 E. 3. ſtat. 2. cap. 11. that if any ſuit be in the ſpirituall court againſt inditers, a prohibition doth lye. This act is in affirmance of the common law. Vide Regiſt. fol. 39. lib. intr. R. 447. b. tit. Defamation.

(33) *Ne yet hold plea in any matter where the kings court of right ought to have juriſdiction.*] So provident the makers of this ſtatute were to keep both juriſdictions within their proper bounds, a great meanes to make both church and common-wealth flouriſh. And this is a large and a generall ſaving of the juriſdiction of the kings courts of the common law.

[illegible] and laſt [illegible] Provided neverthcleſſe, where heretofore ſuch a cuſtome hath been in many parts of Wales, that of ſuch cattell and other goods as have been given with marriage of any perſon, there tithes have been exacted and levied by the parſons and curats in thoſe parts; which cuſtome being diſſonant from any part of this realme, as it ſeemeth, when the country of Wales was through civill diſſention unculted for want of other ſufficient profits, that might otherwiſe grow to the curats and miniſters there, to have been for that time tolerable (34), ſo now the countrie being now well manured and huſbanded, and the tithe is duly paid there of corne, hay, wooll, and cheeſe, and of other increaſe of all manner of cattell, as it is commonly in all other parts of this realme, the ſame cuſtome ſeemes to be grievous and unreaſonable, ſpecially where the benefices are elſe ſufficient for the finding of the ſaid miniſters and curats: that it be therefore enacted by the authority aforeſaid, that from and after the firſt day of May next coming no ſuch tithes of marriage goods be exacted or required of any perſon within the ſaid dominion of Wales, or marches of the ſame:

any

any thing in this act contained, or any other act, cuſtome, preſcription had or made to the contrary hereof notwithſtanding.

(34) *To have been for that time tolerable.*] Here is firſt to be noted, that a cuſtome once reaſonable and tolerable, if after it become grievous, and not anſwerable to the reaſon, whereupon it was grounded, yet is to be (as here it appeareth) taken away by act of parliament; for an inheritance once fixed cannot be taken away, but by parliament. Secondly, here is to be noted, that by cuſtome a parſon, &c. may have tithes of ſuch things, as are not tithable of common right.

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[665]

An Expoſition upon the Statute of 1 H. 5. Cap. 5. of Additions.

ORDEINES eſt et eſtablies, que en cheſcun briefe originall (1) *des actions perſonels, appeales, et indictments, et en queux exigends ſerr' agard'* (2), *que aux noſmes des defendants en tiels briefes originals, appeales, et indictments ſoient faits addition de lour eſtate, ou degree* (3), *ou de meſtier* (4), *et les villes* (5) *ou hamlets* (6), *lieux* (7), *et les counties* (8) *de queux ils fueront ou ſont, ou en queux ils ſont ou fueront converſantes. Et ſi per proces ſur les dits briefes originals, appeales, ou indictments, en queux les dits additions ſoient enterleſſes aſcuns utlagaries ſoient pronouncies, que ils ſoient voides* (9), *irrites, et tenus pur nul. Et que avant les utlagaries pronouncies les dits briefes et endictments ſoient abatus per exception du partie* (10), *per la ou en icell' les dits additions ſoient enterleſſes. Purview touts foits, que meſq; les dits briefes dactions perſonels ne ſoient accordants as recordes, et faits* (11) *per le ſurpluſage de additions ſuiſdits, que pur cel cauſe ils ne ſoient abatus. Et que les clerkes del chancellarie* (12), *ſouth que noſmes tiels briefes iſſeront eſcriptes ne*

ITEM it is ordained and eſtabliſhed, that in every original writ of actions perſonals, appeals, and indictments, and in which the exigent ſhall be awarded, in the names of the defendants in ſuch writs original, appeals and indictments, additions ſhall be made of their eſtate or degree, or myſtery, and of the towns, or hamlets, or places, and counties, of the which they were, or be, or in which they be or were converſant; and if by proceſs upon the ſaid original writs, appeals, or indictments, in the which the ſaid additions be omitted, any utlagaries be pronounced, that they be void, fruſtrate, and holden for none; and that before the utlagaries pronounced, the ſaid writs and indictments ſhall be abated by the exception of the party, where in the ſame the ſaid additions be omitted. Provided always, that though the ſaid writs of additions perſonals be not according to the records and deeds, by the ſurpluſage of the additions aforeſaid, that for that cauſe they be not abated; and that the clerks of the chancery, under whoſe

ne enterlessent, ne facent omission des dits additions, come dessus est dit, sur peine destre punis, et faire fine al roy per discretion de le chancellor (13). *Et commencera cest ordinance a tener lieu al suit de partie, de la feast de Saint Michael prochein ensuant* (14).

names such writs shall go forth written, shall not leave out, or make omission of the said additions as is afore said, upon pain to be punished, and to make a fine to the king, by the discretion of the chancellor. And this ordinance shall begin to hold place at the suit of the party, from the feast of St. Michael next ensuing forward.

(4 Ed. 4. f. 10. 6 Rep. 67. Cro. El. 198. Cro. Jac. 610. Dyer, 46. Ero. Addit. 4, 5. 7, 8, 9, 10. 12 14, 15. 19. Fitz. Brief, 30. 36. 40. 47. 49. 51. 61. 67. 72. 75. 109. 122 124, 125. 129. 151. 163. 169 201. 236. 940. 2 Leon. 183. 200. 3 H. 6. 30. b. pl. 17. 2 Roll, 225. 3 Mod. 139. 1 Shower, 16. Hob. 129. Mod. Cases in Law, 52. 8 H. 6. c. 12. 5 El. c. 23.)

We shall, in expounding the words of this act, shew what was the common law before the making hereof.

3 H. 6. 30.
14 H. 6. 21.
35 H. 6. 30.
10 E. 4. 16. a.
18 E. 4. 9.
* 10 E. 4. 16.
10 H. 7. 21.
15 H. 7. 21.

(1) *En briefe originall.*] Though it be in writ originall, yet if the plea be not holden upon the originall, this act extendeth not to it; as in a *recordare* to remove a plaint of replevin into the common place, because the plea is holden upon the plaint, this act extends not to it. * So in a returne of rescous, though there lyeth processe of outlawry, yet this statute extends not to it, because this act speaketh only of writs originall.

9 ass. pl. 1.
9 E. 3. ass. 449.
7 H. 4. 39.

(2) *Des personels actions, &c. en queux exigends ferr' agard'.*] In an assise of *novel disseisin*, if the disseisin be found with force and armes, a *capias pro fine* and exigent doe lye for the king; yet the defendant shall have no addition within this statute, for that the originall writ is in the realty, and this act extendeth onely to personall actions.

* 17 E. 3. 44. b.
11 H. 6. 11. in maintenance.
27 H. 6. 3.
10 E. 4. 16.
10 E. 4. 12.
35 H. 6. 12.

Aux noſmes des defendants.] * Regularly by the common law every naturall man, having no name of dignity, ought to be named in all originalls, and other suits by his christian name and firname, and that before this act * sufficed; but if he had a name of inferiour dignity (as knight, or banneret) he ought to be named by his christian name and firname, and by the addition of his name of dignity by the common law, which is implyed in these words: *aux noſmes des defendants.*

27 H. 6. 9.
10 H. 6. 1.
7 E. 4. brc. 163.
18 E. 4. 21.
8 E. 3. 247.
24 E. 3. 31.
39 E. 3. 17.
35 H. 6. 12.
32 E. 3. brc. 291.
32 H. 6. 28, 29.
* 12 E. 4. 10.
18 E. 4. 9.
21 E. 4. 153.

If there be a corporation of one sole person that hath a fee-simple, and may have a writ of right, he may be named in originals, &c. by the common law by his christian name, without any firname; for the name of his corporation is in lieu of his firname (some say both christian name and firname) as John abbot of D. &c. John bishop of N. but otherwise it is of a parson: for hee must be named by his christian name and firname.

* If it be a corporation aggregate of many able persons; as maior and comminalty, dean and chapter, master of an hospital and confreres, &c. the maior, deane, or master need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and firname.

2 H. 6. 29.
7 E. 3. 26.
25 E. 3. 39, 40.
7 E. 4. brev. 163.

If a man be created by letters patents duke, marquesse, earle, viscount, or baron, the dignity is so incorporated to him, according to the state given unto him by those letters patents, as the duke, &c. by

by the common law might be named by his chriſtian name, and by the name of his dignity, which ſtandeth in lieu of his firname: as *Præcipe Johanni duci Lancaſtriæ.* And the reaſon thereof is, for that the king by thoſe letters patents creates him to the ſtate, honour, and degree of duke, *et imponit ei ſtilum et titulum ducis Lanc' &c. habend' &c. et ſic in ſimilibus.* And albeit a creation by writ hath not the ſame words, yet it hath the ſame effect.

5 E. 3. 28. 99. 22 aſſ. 24. Nota, nobility in a manner incorporated.

And it is to be obſerved, that *ſurnoſme* is derived of *ſur (id eſt) ſuper*, and *noſme* (that is) *nomen, quaſi ſuper nomen*, becauſe it is ſuperadded to the chriſtian name, which legally is *prænomen*, in Latine *cognomen, quia conjunctum nomen.*

(3) *Soient faits addition de lour eſtate, ou degree, ou de meſtier.*] Eſtate, *ſtatus à ſtando*, the condition wherein any ſubject ſtandeth. Degree, *gradus à gradiendo*, the degree wherein any ſubject ſtandeth. So as in legall underſtanding theſe two words are of * one ſignification, and doe extend to perſons of nobility, of dignity, and under the degree of nobility and dignity; as yeoman, &c. and doe extend as well to the clergy as to the temporalty, and to graduates and degrees in univerſities in any kind of profeſſion.

* 37 E. 3. ca. 8. 22 E. 4. cap. 1. 8 E. 4. cap. 2. 13 R. 2. ſtat. 2. cap. 1.

State of a lord, 3 E. 4. cap. 5. *ſæpe.*

22 E. 4. cap. 1.

Under the eſtate of a knight, & cap. 14. of the eſtate of carriers, plowmen, &c. and the eſtate of a groome attending to huſbandry, cap. 13. degree and eſtate of clerkes.

37 E. 3. ca. 10.

Degrees applied to all, as well women as men.

3 E. 4. cap. 5.

No yeoman, nor lower eſtate then an eſquire.

16 R. 2. cap. 4.

Under the degree of a knight or lords ſon.

20 R. 2. cap. 2.

Under the degree of a barons ſon, or knight.

24 H. 8. cap. 13. 8 Eliz. cap. 11.

So as in legall underſtanding, *ſtatus* and *gradus ſunt ſynonyma.* And ſo in the ancient writ of the call of a ſerjeant, * *ad ſtatum et gradum ſervientis ad legem.*

* Forteſc. ca. 50. 14 H. 6. 15. Br. tit. Addition 44.

The eſtates and degrees againſt whom originall writs may be brought, are the queen, conſort of the king, the prince of Wales, dukes, * marqueſſes, earles, viſcounts, and barons. Theſe are of the greater nobility.

* Marchiones. 26 H. 6. bre. 100.

Knights of Saint George, knights bannerets, knights of the bathe, knights of the chamber, [b] *milites cameræ*, knights batchelors, baronets, eſquires, gentlemen. Theſe are of the leſſer nobility.

[b] Rot. pat. 29 E. 3. part. 1. m. 29.

Cives, burgenſes, and yeomen, which are of the loweſt eſtates or degrees.

Armigeri, ſcutiferi, unde ſcutagium, generoſi.

There is another diviſion made in our * books of leſſer nobility, *viz.* ſome be names of dignities, as all the knights aboveſaid, and baronets; and ſome of worſhip, as eſquires and gentlemen.

* 14 H. 6. 14. Camb. Brit. p. 24.

Baronets were firſt raiſed and created by king James, of an eſtate to them and the heires males of their bodies: and where in ſome * ſtatutes and records baronets are named, it is *vitium impreſſoris, ſeu ſcriptoris*, and ſhould be bannerets, who were not of inheritance, for that they were knights, which dignity was not deſcendable, nor yet is. Bannerets rightly named. Rot. Parl. 46 E. 3. nu. 10. 50 E. 3. nu. 40. 1 H. 4. nu. 53, &c. In letters patents, Rot. Pat. *anno* 13 E. 3. m. 13. Will. de la Pool *ſtatum et honorem banereti*, part 2. 15 E. 3. m. 22, 23. & Rot. Pat. *anno* 7 R. 2. S. octab' Thomas Camois banerettus, &c. 22 E. 3. fol. 18. a banner, *quia nomen habet à vexillo*, of the banner, &c. Corruptly baronet,

[667]

* Rot. Parl. 2 R 2. nu. 13, 14. 13 R. 2. ſtat. 2. cap. 1. 14 R. 2. cap. 11. 16 R. 2. cap. 6.

Vid. Camb. ubi ſup.

ronet, in 35 H. 6. 46. for baron. But let us proceed to ſome more profitable matter.

There have been within this realme ſince the conqueſt divers names of dignities, which are growne to dis-uſe, and in a manner loſt: as, *vicedomini, vidams. Vavaſores, viri* (as Bracton ſaith) *magnæ dignitatis. Vavaſor enim nihil melius dici poterit, quam vas ſortitum ad valetudinem: unde vavaſoria* in divers ancient records. Cambden Brit. 123. *vavaſores ſive valvaſores proxime poſt barones locum olim tenuerunt.* See Chaucer our Engliſh poet in the Franklyns prologue.

Lib. rubr. 8. Bract. lib. 1. cap. 8.

Some doe hold, that it had been more fit to have revived ſome of the ancient dignities, then to have created any of a new invention.

We have ſpoken of all the names of dignity, let us now ſpeake of the names of worſhip.

Eſquier, armiger, ſcutifer, &c.] In legall underſtanding he is derived *ab armis, quæ in clypeis gentiliciis honoris inſignia geſtant.* In Spaniſh *eſcudero, ab eſcudo, id eſt, ſcuto.*

37 E. 3. cap. 10.
1 R. 2. ca. 7.
16 R. 2. ca. 4.
20 R. 2. ca. 2.
7 H. 4. 7.
28 H. 6. 8.
32 H. 6. 28, 29.
* 3 E. 4. cap. 5. Rot. Parl. anno 1 E. 4.

In this ſenſe, as a name of eſtate and degree, it was uſed in divers acts of parliament before the making of this act, and * after this act alſo. Et Rot. Parl. an. 1 E. 4. John lord Audeley, an ancient and a noble baron, was named *Johannes Audeley armiger*, for that all the reſt of the barons that appeared at that parliament were knights: and all dukes, marqueſſes, earles, viſcounts, and barons of other nations, or which are not lords of the parliaments of England, are named *armigeri*, if they be no knights; and if knights, then are they named *milites*.

The ſonnes of all the peeres and lords of parliament in the life of their fathers, are in law eſquires, and ſo to be named. By this ſtatute the eldeſt ſon of a knight is an eſquire.

See before ſtat. de Militibus, anno 1 E. 2.

Gentleman, generoſus, Gentill home.] This is alſo a good addition. And every gentleman muſt be *arma gerens*, and the beſt tryall of a gentleman in bloud (which is the loweſt degree of nobility) is by bearing of armes. For as in ancient time the ſtatues or images of their anceſters were proofes of their nobility, which was a ſolemne and honourable, but yet a cumberſome tryall, whereof, and how in time they decayed, the poet ſpeaketh,

Juvenal. ſat. 8.

Stemmata quid faciunt? quid prodeſt pontice longo
Sanguine conſeri, pictoſque oſtendere vultus
Majorum, et ſtantes in curribus Æmylianos,
Et curios jam dimidios, naſumque minorem
Corvini, et Galbam auriculis naſoque carentem? &c.
Tota licet veteres exornent undique ceræ
Atria: nobilitas ſola eſt atque unica virtus.

Cicero. *Flavia gens obſcura quidem, et ſine imaginibus.*

Cicero. *Nobiles ſunt qui imagines generis ſui proferre poſſunt.*

So of later times coat-armes came in lieu of thoſe ſtatues or images, and are the moſt certaine proofes and evidence of nobility and gentry. So as in theſe daies the rule is, *nobiles ſunt qui inſignia gentilicia generis ſui proferre poſſunt.*

[668] There is ſmall difference between an eſquire and a gentleman; for every eſquire is a gentleman, and every gentleman is *arma gerens*.

And

And *generoſus* and *generoſa* are good additions: and if a gentlewoman be named ſpinſter in any originall writ, &c. appeale, or inditement, ſhe may abate and quaſh the ſame; for ſhe hath as good right to that addition, as baroneſſe, viſcounteſſe, marchioneſſe or dutcheſſe have to theirs.

[a] A man may have an addition of gentleman within this ſtatute, if hee be a gentleman by office (though he be not by birth) as many of the kings houſhold, and of other lords, be; and * clerkes, being officers in the kings courts of record: and if they be out of their office, they are but yeomen; and yet as long as they continue in their office, they ought to be named gentlemen, as their due addition.

A gentleman by [b] reputation, that is, neither gentle by birth, nor by office, nor by creation, but commonly called gentleman, and knowne by that name, is a ſufficient addition within this act. And ſo was it adjudged in [c] Caters caſe, Hill. 25 Eliz. *in communi banco*, but if he be named yeoman, hee cannot abate the writ.

A French knight challenged [d] John Kingſton yeoman, the kings ſubject, at certaine points and deeds of armes, &c. *unde rex* (ſaith the record) *ut dictus Johannes honorabilius in præmiſſis accipiatur, ipſum Johannem in ordinem * generoſorum adoptavit, et armigerum conſtituit, et cætera honoris inſignia conceſſit.* And ſuch a gentleman or eſquire ſo created, is an addition within this ſtatute.

[e] Since the making of this ſtatute, eſquire and gentleman were more frequently by force of this act uſed, as additions in originalls, &c. and afterwards were commonly uſed in deeds and other ſpecialties. * He that hath taken any degree in either univerſity, may be named by that degree without queſtion, being within the direct letter and meaning of this act; and if he hath taken any degree in divinity, he may have the addition of clerke.

[f] *Yeoman or yeman.*] This is a Saxon word ȝeuen gemen, the G being turned in common ſpeech (as is uſuall in like caſes) into a Y. In [g] legall underſtanding a yeoman is a free-holder, that may diſpend 40 ſhillings, anciently 5 nobles *per annum*: and he is called *probus et legalis homo.*

And as of ancient time the [h] gentleman held *per ſervitium ſcuti*, by knights ſervice, ſo the yeoman held *per ſervitium ſocæ*, by ſocage. Of this degree ſee Forteſcue, cap. 25. & 29.

[i] This degree is a good addition within this ſtatute, and is applyed onely to the man, and not to the woman.

We have omitted * citizens and burgeſſes (albeit they are ſuch as are called to parliament) yet becauſe they are no ſufficient additions (being too generall) within this act, we have omitted them.

(4) [k] *Miſtier.*] *i. ars, ſeu artificium, Latinè dicitur, myſterium, Anglicè* myſterie. *Miſtier derivatur à maiſtre, Latinè magiſterium,* becauſe no man ought to exerciſe it, but he that is a maſter of it. *Miſtier* is a large word, and includeth all lawfull arts, trades, and occupations, as taylor, merchant, mercer, huſbandman, labourer, and the like. But [l] ſervant, groome, or fermor are no additions within this act, becauſe they are not of any myſterie. And [m] chamberer, butler, pantler, or the like, are additions of offices, and not of any myſterie or occupation.

Neither doth this act extend to unlawfull practices, as extortioner, maintainer, abetter, hereticke, &c.

Trade

21 E. 4. 15. Lib. int. Raſt. 108. 10 E. 4. 16. 28 H. 6. 3, 4. 7 E. 6. Dyer, fo. 88. lib. int. fol. 107. nu. 9. de gradu hominis generoſi, et non de gradu hominis vocat' a yeoman.

[a] 28 H. 6. fo. 4. a. 5 E. 4. 33. acc' 14 H. 6. 15.

* 20 H. 6. 30. b.

[b] Reputatio eſt vulgaris opinio, ubi non eſt veritas.

[c] Lib. 6. fol. 67. Hill. 25 Eliz. in communi banco, Caters caſe. Lib. int. R. fol. 107. nu. 8. Vid. lib. int. fol. 107. nu. 7. a fellow of Clements Inne, &c.

[d] Rot. pat. 13 R. 2. part 1.

* Nota, the creation of a gentleman.

[e] 21 H. 6. bre. 89. 28 H. 6. 8. 7 H. 4. 7. 16 H. 6. 28. * 35 H. 6. 55. b.

[f] Lib. 6. fol. 67.

[g] See the firſt part of the Inſtitutes, ſect. 464. 2 H. 5. cap. 3.

See the firſt part of the Inſtitutes, ſect. 95.

[h] Forteſc. ca. 25. & cap. 29.

[i] 10 E. 4. 16. 1 H. 4. cap. 7. 2 H. 4. cap. 21.

* 27 H. 6. 4. 4 E. 4. 10. 5 E. 4. 142. 1 H. 5. 3. 35 H. 6 12.

[k] 22 E. 4. 1. 2 R. 3. 2. 9 H. 6. 65. 35 H. 6. 55. 4 H. 6. 26. 5 E. 4. 33. 3 H. 6. 31. 11 H. 6. 11.

[l] 7 E. 4. 10. 9 E. 4. 50. 28 H. 6. 4.

[m] 5 E. 4. 32.

Trade *dicitur à tradendo, quia tradit nobis neceſſaria:* the Saxon word is Cpœꝼt, Cræft, *hodie* craft, *id eſt*, trade.

14 H. 6. 15. 5 E. 4. 33. [669] If a man have divers arts, trades, or occupations, he may be named by any of them: but if a gentleman by birth be a mercer (as many younger ſonnes of gentlemen be bound prentices to arts and trades in London, and elſewhere) if he in an originall, &c. be named *mercer*, or of any other trade, whereof hee is in truth, he may abate the writ, &c. for he ought to be named by the degree of a gentleman, becauſe it is worthier then the addition of any myſterie.

27 H. 6. 4. 4 E. 4. 10. 5 E. 4. 142. 35 H. 6. 12. And ſo it is, if one man be a duke, a marqueſſe, earle, viſcount, and baron, all theſe dignities ſtand diſtinctly in him, and the greater drowneth not the leſſer, yet ſhall hee be named in originall writs, &c. by the worthier dignity, *viz.* by the name of a duke onely within this act.

Having diligently obſerved the order of this act, we find, that in ſome caſes the order thereof is obſerved, and in others not. In appeales and inditements of treaſon or felony, &c. againſt the greater nobility, as dukes, marqueſſes, the order of the ſtatute is purſued, *viz.* For, 1. the eſtate and degree (for example) of a duke, &c. is named, and after the towne and county. *Edwardus dux Buckingham nuper de N. in com' Glouc'.* And ſo it is when one is named of a citie, which is a countie of it ſelfe, the like order is obſerved: as *J. S. pannarius de London in com' civitatis London.*

But in caſe of the leſſer nobility, and all other under them, the towne and county are named before the addition: as, *Th. C. nuper de D. in com' M. miles. Jo. C. nuper de D. in com' M. armiger. N. C. nuper de D. in com' M. merchant, &c.*

7 H. 6. 39. 22 H. 6. 29. 21 E. 4 51. (5) *Et les villes, ou hamlets, ou lieus, et les counties.*] *Villes.* For theſe ſee the firſt part of the Inſtitutes, ſect. 171. And if there be *D. major*, and *D. minor*, and not *D. tantum*, he cannot be named of *D.* for there is no ſuch towne.

(6) *Hamlets.*] See the firſt part of the Inſtitutes, *ubi ſup.* And it is at the election of the party to name him of the hamlet or towne.

(7) *Lieus.*] Theſe be underſtood of places knowne out of any towne or hamlet. 14 H. 6. 24. 35 H. 6. 30. 21 E. 4. 89. 4 E. 3. 129. 19 E. 3. bre. 467. 7 H. 6. 24. 37. 20 H. 6. 30. 7 H. 4. 27. 17 E. 3. 56. 43 E. 3. 5.

Bract. lib. 3. fol. 134. b. 19 H. 6. 1. By the ancient common law of England, *ſecundum antiquam conſuetudinem dici poterit de familia alicujus, qui hoſpitatus fuerit cum alio per tres noctes, et vocatur Hoghenchyne.*

(8) *Counties.*] See the firſt part of the Inſtitutes, ſect. 61. & 248.

See the firſt part of the Inſtitutes, ſect. 171. 7 H. 6. 1. 22 H. 6. 4. 4 E. 4. 10. 5 E. 4. 142. 21 E. 4. 15. * 22 H. 6. 47. 35 H. 6. 30. 4 E. 4. 41. 5 E. 4 20. 22 E. 4. 2. But ſeeing that ancient boroughes were firſt townes, and cities were formerly boroughes, if a citie be a countie of it ſelfe, wherein are divers pariſhes, yet the addition *de London*, or *nuper de London*, is ſufficient within this ſtatute.

* The addition of a pariſh, if there be two or more townes within it, is not good, but if there be one towne, the addition of pariſh is good within this ſtatute: and it ſhall not be intended (if it be not pleaded) that there be more towns then one in the pariſh; for *non præſumitur pluralitas.*

This ſtatute extends not to ſome caſes, though the defendant be

not named of any towne, hamlet, or place. ° As in an action of debt, the writ is, *præcipe R. G. rectori eccleſiæ de T.* without alledging in what town, hamlet, or place he is dwelling. So if the *præcipe* in an action of debt be, *Prec' Tho' Chaſe cancellario univerſitatis Oxon'*, without ſaying *de Oxonia*. So in a writ brought againſt the huſband and his wife, or the abbot and his commoigne, the plaintife need not ſhew in what towne, &c. the wife or commoigne dwell; for the law ſhall intend (which ever intendeth the beſt) that the parſon is reſident upon his rectory, the chancellor upon his office, the wife with her huſband, and the monke with his ſoveraigne.

° 7 H. 6. 1. 10 H. 6. 8. 8 H. 6. 38. 3 H. 6. 31.

P The addition as well of the eſtate, degree, or myſterie, as the towne, hamlet, or place, ought by force of this act to be alledged *in primo nomine*; for the proper uſe of an *alias dict'* is, to agree with the record, or ſpecialty whereupon the writ is grounded, and is not traverſable.

P Alias dict' 30 H. 6. 5. & 6. 32 H. 6. 33. 36 H. 6. 28. 4 E. 4. 10. 21 E. 4. 15. 18. 33 H. 8. Dyer, 50. b. 1 E. 4. 1. 5 E. 4. 141. 26 H. 6. bre. 100. 28 H. 6. 9.

The addition of the eſtate, degree, or myſtery ought to be by force of this act, as the defendant was of at the day of the writ purchaſed, and not with a *nuper*, as *nuper armiger*, *nuper monachus*, *aut nuper comes de D. &c.* but a *nuper* may be of the towne, &c. becauſe men doe often remove their habitation. And this diſtinction appeareth by the act it ſelfe, by reaſon of theſe words in the act, relating to the townes, hamlets, &c. *Ou ils fuer', ou ſont.*

[670]

9 E. 4. 2. 21 H. 6. 3. b. 2 H. 6. 4. 32 H. 6. 20. 29. 5 E. 3. 28.

The end of the purview of this act was, that the perſon of the defendant in originalls, &c. where proceſſe of outlawry did lye, ſhould be ſo deſcribed by certaine additions, as one man might not be troubled for another. See other ſtatutes made to the ſame end. 8 H. 6. cap. 10. * 6 H. 8. cap. 4. 5 E. 6. cap. 26. 31 El. cap. 3. & 9.

* Dyer, 4 Eliz. 213, 214.

(9) *Aſcūs utlagaries ſont pronounce, que ils ſoient voides, &c.*] This being a judgement in law is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *cap. utlegat'*, according to the courſe of the common law: for though the words of the ſtatute be *voides*, yet it is but voidable by a writ of error, or plea; which is worthy of obſervation. 19 H. 6. fol. 1. 8 H. 6. cap. 10. pl. com. 137. b. 7 H. 6. 27. 39. 10 H. 6. 8. 11 H. 6. 19. 67. 19 H. 6. 58, &c. 20 H. 6. 20. 21 H. 6. 23. 55. 37 H. 6. 1. 38 H. 6. 1. 22 H. 6. 18. & 23. 36. 30 H. 6. 1. 21 E. 4. 94. 73. 1 E. 4. 2. 2 E. 4. 10. 4 E. 4. 10. 41, 42. 22 E. 4. 37. 10 E. 4. 13. 5 H. 7. 16. 11 H. 7. 5. 21 H. 7. 13. 3 El. 192. b. 4 El. Dyer, 213, 214.

(10) *Per exception du partie.*] But if the defendant, albeit hee hath not ſuch addition as this act requireth, yet if he appeareth upon proceſſe, and plead, taking no advantage thereof by exception, he hath loſt the benefit of this act.

7 H. 6. 37. 35 H. 6. 12. 5 E. 4. Vid. Br. tit. error 69.

(11) *Ne joyent accordant al records et faits, &c.*] *Abundans cautela non nocet*; but if the addition preſcribed by this act had varied from the record or deed, yet being injoyned by act of parliament to be contained in the writ, &c. ſuch variance ſhould not have abated the writ, albeit this clauſe had been omitted; but yet an act of parliament cannot be made too plaine.

3 H. 6. 24. 35. 28 H. 6. 9. 21 E. 4. 95.

(12) *Et que les clerkes del chancerie.*] *i. e. les courſetours. Clerici de curſu*, that make out originall writs. Of theſe there be in the chancery twenty in number. To every of theſe are appointed certaine counties, and are a corporation of themſelves.

Fleta, lib. 2. ca. 12. 14 & 15 H. 8. cap. 8.

(12) *Deſtre*

(13) *Deſtre punies, et faire fine per le diſcretion del chancellor.*] This extendeth to the lord keeper of the great ſeale, as often elſewhere hath been obſerved.

(14) *Et commencera ceſt ordinance a tener lieu al fait de partie de la feaſt de S. Michael prochein enſuant.*] This parliament began 15 Paſch' 1 H. 5. And this ſtatute was made, when acts of parliament were not printed, but were by the ſherifes proclaimed in every county (as elſewhere hath been ſhewed:) and therefore to the end the ſubject might take notice thereof, day was given by this act untill the feaſt of Saint Michael the archangel following; but at the kings ſuit this act began preſently, for that the kings learned councell were attendants in parliament, and had ſufficient notice of this act.

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[671] # An Expoſition upon the Statute of 27 H. 8. ca. 16. intitled, An Act concerning Inrolments of Bargaines, and Contracts of Lands and Tenements.

BE it enacted by the authority of this preſent parliament, that from the laſt day of July, which ſhall be in the yeare of our Lord God 1536. no mannors, lands, tenements, or other hereditaments ſhall paſſe, alter, or change from one to another, whereby any ſtate of inheritance or freehold ſhall be made (1), or take effect in any perſon or perſons, or any uſe thereof to be made, by reaſon onely of any bargaine (2) and ſale thereof (3); except the ſame bargaine and ſale be made by writing (4) indented (5), ſealed and inrolled (6) in one of the kings courts of record at Weſtminſter (7), or elſe within the ſame countie or counties where the ſame manors, lands, or tenements ſo bargained and ſold, lye or be, before the *cuſtos rotulorum* (9), and two juſtices of the peace (8), and the clerke of the peace of the ſame countie or counties, or two of them at the leaſt, whereof the clerke of the peace to be one: and the ſame inrolment to be had and made within ſix moneths next after the date of the ſame writings indented (10), the ſame *cuſtos rotulorum*, or juſtices of the peace, and clerke, taking for the inrolment of every ſuch writing indented before them, where the land compriſed in the ſame writing exceed not the yearly value of 40 ſhillings, 2s. (11) that is to ſay, 12d. to the juſtices, and 12d. to the clerke, and for the inrolment of every ſuch writing indented before them, wherein the land compriſed exceed the ſumme of 40 ſhillings yearly value, 5s. that is to ſay, 2s. 6d. to the ſaid juſtices, and 2s. 6d. to the ſaid clerke for the inrolling of the ſame. And that the clerke of the peace

for

for the time being, within every ſuch county, ſhall ſufficiently inroll and ingroſſe in parchment (12) the ſame deeds or writings indented, as is aforeſaid, and the rolls thereof, at the end of every yeare ſhall deliver unto the *cuſtos rotulorum* (13) of the ſame county for the time being, there to remaine in the cuſtody of the ſaid *cuſtos rotulorum* for the time being, amongſt other records of every of the ſame counties, where any ſuch inrolments ſhall be ſo made, to the intent that every party that hath to doe therewith may reſort and ſee the effect and tenour of every ſuch writing ſo inrolled.

(1) *Of inheritance, or freehold ſhall be made, &c.*] After the ſtatute of 27 H. 8. cap. 10. of transferring uſes into poſſeſſion. If a man by his deed had bargained, and ſold for valuable conſideration, any lands, &c. of any eſtate of inheritance, free-hold, or for yeares, the ſame had been executed by the ſaid act of 27 H. 8. cap. 10. Now this act of inrolments reſtraines onely eſtates of inheritance and free-hold; and therefore bargaines and ſales for yeares, for what number ſoever, are not reſtrained by this act, though it be not by deed indented nor inrolled. Lib. 2. fol. 36. Sir Rowl. Heywards caſe.

(2) *By reaſon only of any bargaine, &c.*] If a man for valuable conſideration by deed indented doe bargaine and ſell lands to another and his heires, and before the deed be inrolled he levieth a fine, or maketh a feoffment to the bargainee and his heires of the ſame lands, and after, and within the ſix moneths the deed is inrolled, the bargainee ſhall be in by the fine or feoffment, and not by the bargaine and ſale, both by reaſon of this word only, &c. and that the eſtate by the common law veſted ſhall be preferred. Lib. 8. fol. 94. Foxes caſe.

(3) *Of any bargaine and ſale thereof.*] Firſt, what is a bargain and ſale? &c. A bargaine and ſale is a reall contract * upon valuable conſideration for paſſing of mannors, lands, tenements, or hereditaments by deed indented and inrolled within ſix moneths after the date of it, without livery of ſeiſin, or attornement of tenants. Trin. 33 Eliz. in communi banco, int' Ric. Libbear. plaintife en waſte, & Eliz. Hynd defendant, lib. 5. fol. 71. Hynds caſe. * Pl. com. 307. a. 30 H. 8. tit. attornement, Br. 29.

If the bargainor be in poſſeſſion, this is a facile and ready aſſurance, but the feoffment reduceth and reſtoreth the poſſeſſion to the feoffor, and paſſeth the land to the feoffee, though the feoffor had been diſſeiſed, &c. and the inrolment is not pleadable as the feoffment is. 19 H. 6. 6.

Secondly, whether theſe words of [bargain and ſale] only, or equipollent words may be uſed, &c. to take effect by force of this ſtatute? Though it be good to uſe thoſe words mentioned in this act, yet are they not of neceſſity to be uſed; for whatſoever word upon valuable conſideration would have raiſed an uſe of any lands, tenements, or hereditaments at the common law, the ſame doe amount to a bargaine and ſale within this ſtatute: as if a man by deed indented and inrolled according to this act doth covenant for valuable conſideration to ſtand ſeiſed of lands to the uſe of another, &c. this is in nature of a bargaine and ſale within this act. Lib. 8. fol. 93, 94. Foxes caſe. Lib. 7. fol. 40. Beddes caſe. Lib. 8. fol. 93, 94. Foxes caſe. Lib. int. Co. 116. a. b.

A. ſeiſed of certaine lands in fee, demiſed the ſame to C. for life, the remainder for life reſerving a rent at the feaſt of Saint Michael, and of the annuntiation; A. by indenture, in conſideration of 50 pounds, doth demiſe, grant, ſet, and to farme let the ſame lands to B. for 99 yeares, reſerving a rent at the ſame feaſts preſently, and C. the leſſee for life did not attorne; and it was adjudged, that the Lib. 8 fol. 93, 94 Foxes caſe. Vid. li. 2. fo. 35. Sir Rowland Heywards caſe.

ſaid demiſe and grant upon the conſideration of 50 pounds amounted to a bargaine and ſale for the ſaid terme. So if a man for valuable conſideration doth by deed indented and inrolled alien or grant the land to a man and his heires, &c. this is a bargaine within this ſtatute, *et ſic de ſimilibus*. But inaſmuch as the intention of the parties is the principall foundation of the creation of uſes, *if by any clauſe in the deed it appeareth*, that the intention of the parties was to paſſe it in poſſeſſion by the common law, there no uſe ſhall be raiſed: and therefore if any letter of attorney be in the deed, or a covenant to make livery, or the like; there nothing ſhall paſſe by way of uſe, but according to the intention of the parties poſſeſſion by the common law. And albeit no valuable conſideration be expreſſed in the indenture, yet if any were given, the ſame may be averred, and the land doth ſufficiently paſſe.

4 Mar. Dyer, fol. 146. Villiers caſe.

A. by deed indented and inrolled in conſideration of 100 pounds paid by B. bargaineth and ſelleth the land to B. C. and D. parties to the indentures: in this caſe the land paſſeth to them all; for although the valuable conſideration be expreſſed to be paid by one, yet it muſt be intended, that it was paid for them all, to the end, that the land may paſſe to them all, according to the meaning of all the parties, and a conſideration given by one of the parties, is ſufficient to convey the land to them all.

Lib. 11. fol. 25. a. Harpers caſe. Lib. 1. fol. 176. Mildmayes caſe.

(4) *Except the ſame bargaine and ſale be made by writing.*] Firſt, it muſt be by writing, and not by print or ſtamp.

Secondly, it muſt be * written in parchment or paper, and not upon wood, ſtone, lead, or other materiall.

* Lib. 5. fol. 20. b. Stiles caſe.

(5) *Indented.*] If the deed begin, *Hæc indentura*, or, This indenture, yet if the deed be not indented, it is no indenture; but if the deed be indented, though the deed doth begin, This deed made, without mentioning the word of indenture, yet is it a writing indented within this ſtatute.

See Stiles caſe, ubi ſupra.

[673]

In an action of debt between Scudamore and others plaintifes, and Vandenſtene defendant, upon an indenture of charter party the caſe was this: the indenture of charter party was made between Scudamore and others owners of the good ſhip, called B. whereof Robert Pitman was maſter, on the one partie, and Vandenſtene on the other party. In which indenture the plaintife did covenant with the ſaid Vandenſtene and Robert Pitman, and alſo Vandenſtene covenanted with the plaintife and Robert Pitman, and bound themſelves to the plaintife and Robert Pitman for performance of covenants in 600 pounds. And the concluſion of the ſaid indenture was, "In witneſſe whereof the parties aboveſaid to theſe preſent "indentures have put to their ſeals." And the ſaid Robert Pitman to the ſaid indenture put his hand and ſeal, and delivered the ſame. The defendant in barre of the ſaid action pleaded the releaſe of Pitman, &c. whereupon the plaintife demurred. And it was adjudged, that the releaſe of Pitman did not barre the plaintife, becauſe hee was no party to the indenture. And the diverſity was taken and agreed betweene an indenture reciprocall betweene parties on the one ſide, and parties on the other ſide, as this was; for there no bond, covenant, or grant can be made to or with any that is not party to the deed. But where the deed indented is not reciprocall, but is without a between, &c. as, *omnibus Chriſti fidelibus, &c.* there a bond, covenant, or grant may be made to divers ſeverall perſons.

Trin' 29 Eliz. in the kings bench.

See the firſt part of the Inſtitutes, ſect. 65. fol. 52. Vid. 4 E. 2. tit. Obligation 16.

(6) And

(6) *And inrolled.*] Albeit the indenture (as hath been ſaid) may be either of parchment or paper, yet the inrolment muſt be in parchment onely; and ſo it is expreſſed in the clauſe of inrolment by the clerke of the peace, *viz.* That hee ſhall ſufficiently inroll and ingroſſe * in parchment the ſame. And ſo much is implied, when the inrolment is in any of the kings courts of record at Weſtminſter; and ſo was it adjudged, as M. Plowden cited it before the lords in parliament, *anno* 23 Eliz. in the great caſe between Herbert and Vernon, which I heard, and obſerved. 39 E. 3. 39. 40 E. 3. 5. * Nota.

A deed knowledged by the huſband and wife ſhall by the common law be inrolled onely for the huſband, and not for the wife, by reaſon of the coverture, and though it be inrolled for both, it bindeth her not. Otherwiſe it is by cuſtome, and none hath power to examine a feme covert without writ. 29 H. 8. tit. Faits inroll' Br. 14. 7 E. 4. 5. *Vid.* 34 H. 8. ca. 22. 18 E. 3. 29. 45 aſſ. 8. 14 E. 3. execution 73. 19 R. 2. eſtoppel 281. 21 E. 3. 43. 24 E. 3. 64. 21 Eliz. Dyer, fol. 363. Kelwey 12 H. 7. fol. 4. &c. 12 H. 4. 12. 29 H. 8. faits inroll Br. 15. lib. 10. Mary Portingtons caſe, fol. 42.

If an infant acknowledgeth a recognizance, ſtatute merchant, ſtatute ſtaple, or obligation in the nature of a ſtatute ſtaple, or inroll an obligation, in all theſe caſes he muſt avoid it in an *audita querela*, during his minority; for it muſt be tryed by inſpection, and theſe concerne but perſonall duties. But if an infant bargaine and ſell lands which are in the realty by deed indented and inrolled, he may avoid it when he will; for the deed was of no effect to raiſe an uſe: and this ſtatute is to be intended of lawfull and effectuall bargaines and ſales, and ſuch as would have raiſed uſes at the common law, and doth onely reſtraine the execution of them that be of effect, except the deed be inrolled. And this ſtandeth with the reaſon of the common law, that none but effectuall deeds ought to be inrolled; and therefore a deed of feoffment ought not to be inrolled before livery. But in caſe of a fine the infant muſt reverſe it during his minoritie: for the conuſance is taken by force of the kings writ before a judge, and is voidable by the common law. Vid. Regiſt. fol. 150. F.N.B. 104. k. Dyer, 7 El. 132. b. Harriſons caſe. 7 E. 4 5. 13 E. 3. audit. querela 26. 17 E. 3. 76. 10 E. 3. enfant 61. 28 E. 3. audita quer. 27. 8 H. 6. 30. 15 E. 4. 51. 1 H. 7. 15. 11 H. 7. 5. 48 E. 3. 33. 16 H. 7. 5. 44 E. 3. 7. b.

That upon a bargaine and ſale by deed indented and inrolled, a rent may be reſerved, for the uſe and poſſeſſion paſſeth *tanquam uno flatu.* See lib. 2. fol. 54. in Sir Hugh Cholmleys caſe.

(7) *In any of the kings courts of record at Weſtminſter.*] That is, in the kings bench, the chancery, the common pleas, and the exchequer. And though the words be, at Weſtminſter, for that at the time of the making of this act, theſe courts were there; yet if theſe be adjourned into another place, the inrolment may be in any of theſe courts; for the inrolment is confined to the courts, whereſoever they be holden. [674]

(8) Or elſe in the ſame county, &c. before the cuſtos rotulorum, and two juſtices of peace, and the clerke of the peace, &c.

(9) *Cuſtos rot.*] This officer is a juſtice of peace, and is of the gift of the lord chancellor, or lord keeper, and he may exerciſe his office by deputy. He hath the keeping of all bargaines and ſales by deed indented and inrolled, and of all the records and rolls of the ſeſſions of peace, * and of the commiſſion of peace it ſelfe, and thereof he taketh the name of his office to put him in mind of his duty. He hath the gift of the clerkſhip of the peace, to exerciſe 37 H. 8. cap. 1. 3 E. 6. cap. 1. * 9 E. 2. 2. 10 H. 7. 7.

by himſelfe or his deputy, but he continueth no longer in his place, then the cuſtos rotulorum doth.

Dyer, 5 El. 218. Paſch' 4 El. rot. 812. adjudge ſur demurrer, Pophams caſe. Lib. int' Coke fol. 596. Lib. 5. fo. 1. b. Claytons caſe.

(10) *The ſame inrolment to be had within ſix moneths next after the date of the ſame writing indented.*] The ſix moneths ſhall be accounted after the computation of 28 dayes to the moneth. After the date, and after the day of the date upon this act is all one; ſo as the date it ſelfe is taken excluſive. And yet in the report of juſtice Daliſon it is ſaid, that it was holden *anno* 4 Eliz. that if it be inrolled the ſame day it beares date, it is ſufficient; but the ſafer way is to inroll it after the day of the date. And yet where it hath a date, and is delivered after, it ſhall take effect to paſſe from the bargainor from the delivery; for then it became his deed, and not from the date: but the deed muſt be inrolled within ſix moneths after the date.

Lib. 5. fol. 1. b. Claytons cate, ubi ſup. adjudge Trin' 21 Eliz. in communi banco 6 E. 6. faits inrol Br. 9. per les juſtices.

Every deed ſhall be intended to be delivered on the ſame day that it beares date, unleſſe the contrary be proved. And it is the beſt courſe (according to the intendment of law) to deliver it the ſame day that it beares date. But if the deed indented hath no date, then the day of the delivery is the day of the date of that deed, and may be inrolled within ſix moneths after the delivery. And when the deed is inrolled within the ſix moneths, then it paſſeth from the delivery of the deed. And albeit after the delivery and acknowledgement, either the bargainor or the bargainee dye before inrolment, yet the land paſſeth by this act; for the words thereof be: No mannors, lands, tenements, or hereditaments ſhall paſſe of any eſtate of inheritance or freehold, * except the deed be inrolled. So as by the common law and the ſtatute of 27 Hen. 8. of uſes, it ſhould have paſſed. And by the words of this ſtatute, when the deed is inrolled, it paſſeth *ab initio*.

* Note, except is more then unleſſe.

Trin' 42 Eliz. rot. 1037. in communi banco in repl.

Between Andrew Mallery plaintife, and Jennings and others defendants, the caſe was this: one Sewſter was ſeiſed of certaine lands in fee, and knowledged a recognizance to Turner, whoſe executrix brought a *ſcire fac'* upon the recognizance bearing date the 9 day of November, *an.* 41 Eliz. againſt Sewſter, and alledged him to be ſeiſed of the ſaid lands *in dominico ſuo, ut de feodo*, the day of the *ſcire fac'* brought, which was traverſed by the other party. And the truth of the caſe, being by long pleading diſcloſed to the court, was this: Sewſter 7. *die Novemb.* before the recognizance knowledged, by deed indented for money, had bargained and ſold the ſaid land to another, and the deed was inrolled 20 Nov. following. The queſtion was, whether Sewſter was upon the whole matter ſeiſed in fee the 9 day of November, the deed being not inrolled untill the twentieth of the ſame November. And it was adjudged *una voce*, that Sewſter was not ſeiſed in fee of the land the 9 day of November, for that when the deed was inrolled, the bargainee was in judgement of law ſeiſed of that land, from the delivery of the deed. And it was reſolved, that neither the death of the bargainor, nor of the bargainee before inrolment, ſhall hinder the paſſing of the eſtate. And that a releaſe of a ſtranger to the bargainee before inrolment is good. So as it hold not by relation between the parties by fiction of law; but in point of ſtate as well to them as to ſtrangers alſo. And that a recovery ſuffered againſt the bargainee before inrolment (the deed indented being after within the ſix moneths inrolled) is good, for that the bargainee was tenant of the freehold in judgement of law at the time of

of the recovery. And *non refert*, when the deed indented is knowledged, ſo it be inrolled within the ſix moneths. And all this was afterwards affirmed for good law by the court of common pleas Trin' 3 Jac. *regis*, upon a ſpeciall verdict given in an *ejectione firmæ* betweene Lellingham plaintife of the demiſe of Thomas Fitzherbert eſquire, and Alſop defendant: and further, it was there reſolved, that if the bargainee of land after the bargaine and ſale, and before the inrolment doth bargaine and ſell the ſame by deed indented and inrolled to another; and after the firſt deed is inrolled within the ſix moneths, the bargaine and ſale by the bargainee is good: but there in the principall caſe, in reſpect of the ſpeciall manner of the penning of the meane bargaine and ſale, the court being divided, *viz.* three judges againſt two, judgement was given againſt it.

Trin. 3. Jac. in communi banco in eject. firmæ between Lellingham plaintife, and Alſop defendant.

The day of the moneth, and the yeare of our Lord and Saviour Chriſt, and the yeare of the kings raigne are the uſuall dates of deeds. And the day of the moneth by the nones, ides, or kalends is ſufficient.

(11) *The cuſtos rotulorum, or juſtices of the peace, and clerke, taking for the inrolment of every ſuch writing*, &c. *two ſhillings*, &c.] A good preſident, when parliaments appoint new labours, &c. that they would alſo limit and ſet downe in certaine what fees ſhall be taken for the ſame, as here it is done.

(12) *The clerke of the peace ſhall ſufficiently inroll in parchment*, &c.] Of this ſomewhat hath been ſaid before.

(13) *Shall deliver them to the cuſtos rotolorum.*] For (as hath been ſaid) he is the keeper of the records and rolls of the ſeſſions of the peace of that county.

Provided alwaies that this act, nor any thing therein contained, extend not to any mannor, lands, tenements, or hereditaments, lying or being within any citie, borough, or towne corporate within this realme, wherein the maiors, recorders, chamberlaines, bailifes, or other officer or officers have authority, or have lawfully uſed to inroll any evidences (14), deeds, or other writings within their precinct or limits: any thing in this act contained to the contrary notwithſtanding.

(14) *In any citie, borough, or towne corporate, wherein the maiors*, &c. *have authority to inroll evidences*, &c.] Reſolved by the opinion of the juſtices of both benches, that a bargaine and ſale for valuable conſideration of houſes, or lands in London, &c. by word onely is ſufficient to paſſe the ſame; for that houſes and lands in any city, &c. are exempted out of this act: and at the common law ſuch a bargaine and ſale by word only raiſed an uſe. And the ſtatute of 27 H. 8. cap. 10. doth transferre the uſe into poſſeſſion.

6 El. Dyer, 229. in Chilberns caſe.

When the makers of this act had appropriated the inrolment of all indentures of bargaine and ſale to the kings foure courts aforeſaid, it was neceſſary to make a proviſion for cities, &c. which had authority to inroll, and that there ſuch bargaines and ſales ſhould be inrolled. *Sed deſunt verba*: for by the words, the mannors, lands, tenements,

tenements, and hereditaments are exempted out of the ſaid act, without any proviſion for inrolment within thoſe cities, &c.

Hill. 20 E. 1. in banco Rot. 100. Somerſet.

If a deed be ſhewed in court, or in the cuſtody of the court, and by miſchance the ſeale is broken off, the court ſhall inroll the deed in court for the availe of the party.

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[677]

An Expoſition upon the Statute of 32 H. 8. Cap. 5. Of Executions.

WHEREAS before this time divers and ſundry perſons have ſued executions, as well upon judgements for them given of their debts or damages, as upon ſuch ſtatutes merchants, ſtatutes of the ſtaple, or recognizances, as have been to them before made, recognized, and knowledged; and thereupon ſuch lands, tenements, and other hereditaments, as were lyable to the ſame execution, have been by reaſonable extent to them delivered in execution for the ſatisfaction of their ſaid debts and damages, according to the lawes of this realme. Nevertheleſſe, it hath been oftentimes ſeen, that ſuch lands, tenements, and hereditaments ſo delivered, and had in execution, have been recovered, or lawfully deveſted, taken away or evicted from the poſſeſſion of the ſaid recoverers, obligees or recognizees, their executors or aſſignes, before ſuch time as they have been fully ſatisfied and payed of their debts and damages, without any manner fraud, deceit, covin, colluſion, or other default in the ſaid recoverers, obligees, or recogniſees, their executors and aſſignes, by reaſon whereof the ſaid recoverers, obligees and recogniſees have been thereby ſet cleerly without remedy, by any maner ſuit of the law, to recover or come by any ſuch part or parcell of their ſaid debts and damages as was behind, and not by them levied or received, before ſuch time as the ſaid lands, tenements, and other hereditaments ſo by them had in execution, were recovered, lawfully deveſted, taken or evicted out of and from their poſſeſſions, as is aforeſaid, to their great hurt and loſſe, and much ſeeming to be againſt equall juſtice and good conſcience.

For reformation whereof, be it enacted by authority of this preſent parliament, that if hereafter any ſuch lands (2), tenements, or hereditaments, as be, or ſhall be had and delivered (3) to any perſon or perſons in execution (1), as is aforeſaid, upon any juſt and lawfull title, matter, condition, or cauſe (4) wherewithall the ſaid lands, tenements, and hereditaments were lyable, tied, and bound, at ſuch time as they were delivered and taken into execution, ſhall happen to be recovered, lawfully deveſted, taken, or evicted (5) out of, and from the poſſeſſion of any ſuch perſon

perſon and perſons as now have and hold, or hereafter ſhall have and hold the ſame in execution, as is aforeſaid, without any fraud, deceit, covin, colluſion, or other default of the ſaid tenant or tenants by execution, before ſuch time as the ſaid tenants by execution their executors or aſſignes (6) ſhall have fully and wholly levied or received the ſaid whole debt (7) and damages, for the which the ſaid lands, tenements, and other hereditaments were delivered (8) and taken in execution, as is aforeſaid: then every ſuch recoverer, obligee, and recognizee ſhall and may have and purſue a writ of ſcire facias out of the ſame court (9), from whence the ſaid former writ of execution did proceed againſt ſuch perſon or perſons, as the ſaid writ of execution was firſt purſued, their heires, executors, or aſſignes of ſuch lands, tenements, or hereditaments, as were or been then liable or charged to the ſaid execution, retornable into the ſame court at a certaine day, being full forty dayes after the date of the ſame writ. [678]

At which day if the defendant, being lawfully warned, make default, or appeare and doe not ſhew and plead a ſufficient matter or cauſe, other then the acceptance of the ſaid lands, tenements, and hereditaments, by the ſaid former writ of execution, to barre, avoid, or diſcharge the ſaid ſuit for the reſidue of the ſaid debt and damages remaining unlevied, or unreceived by the ſaid former execution: then the lord chancellor, or other ſuch juſtice or juſtices, before whom ſuch writ of ſcire facias ſhall be retornable, ſhall make eſtſoones a new writ or writs out of the ſaid former record of judgement, ſtatute merchant, ſtatute ſtaple, or recognizance of like nature and effect, as the ſaid former writ of execution was, for the levying of the reſidue of all ſuch debt and damage, as then ſhall appeare to be unlevied, unſatisfied, or unpayed of the whole ſumme or ſummes in the ſaid former writ of execution contained: any law, cuſtome, or other thing to the contrary hereof, heretofore uſed, in any wiſe notwithſtanding.

(1) That if hereafter any ſuch lands, tenements, or hereditaments, as be or ſhall be had and delivered to any perſon in execution, &c.

(2) *Such lands.*] This hath relation to the preamble, where there are rehearſed foure kinds of executions of thoſe lands, &c. Firſt, upon judgements: 2. upon ſtatutes merchant: 3. ſtatutes of the ſtaple: 4. recognizances. Theſe recognizances bee of two ſorts; one, uſuall recognizances taken in any of the kings courts of record at Weſtminſter: another, in nature of a ſtatute ſtaple, by the ſtatute of 23 H. 8. cap. 6. This conuſee of the ſtatute ſtaple hereafter in this ſtatute is called obligee, becauſe in them both the ſeale of the party is put, and the [a] tenant by *elegit* upon judgements and recognizances ſhall hold the land, &c. untill he be anſwered his debt without miſes, coſts, &c. But [b] tenant by ſtatute merchant, [c] tenant by ſtatute ſtaple, or by recognizance [d] in nature of a ſtatute ſtaple ſhall hold the land, &c. untill his debt be paid together with miſes; coſts, &c. *Vid.* Regiſt. 151, 152. 289. F.N.B. 131. Flet. lib. 2. cap. 57. lib. intr' Co. 236. Raſt' pl. 542. Dyer

See before the ſtatute of W. 2. cap. 18. and the expoſition upon the ſame.

To what executions this act extendeth unto.

[a] By the ſtat. of W. 2. cap. 8. for Judgements, and cap. 45. for recognizances.

[b] By the ſtat. of Acton Burnel, 11 E. 1. & 13 E. 1. de mercat.

[c] By the ſtat. of 27 E. 3. cap. 9. & 22.

[d] By the ſtat. of 23 H. 8. cap. 6.

2 Eliz. 180. b. 37 Hen. 6. 6. 36 H. 6. 2. 2 R. 3. 8. 17. 15 H. 7. 40 E. 3. 28.

(3) *So had and delivered.*] Had, is by *elegit* upon judgements or recognizances, to have the moity in execution.

Delivered, is by *liberate* upon the other three of the whole land, &c. of the conuſor; but after the extent in thoſe three caſes (of the ſtatutes, or recognizances in nature of a ſtatute) retorned, the conuſee may enter without any delivery by the ſherife by force of the *liberate*: and he that ſo entreth without any delivery is within the aide and benefit of this act, which ſpeaketh of delivery.

Lib. 4. fol. 67. Fulwoods caſe.

(4) *Upon any juſt and lawfull title, matter, condition or cauſe.*] That is, upon ſome former juſt and lawfull title, &c. before the judgements, ſtatutes, or recognizances.

(5) *Shall happen to be recovered, deveſted, taken or evicted.*] By the context of this law, the whole land, &c. had in execution, and the whole intereſt of the land in execution muſt be recovered, deveſted, or evicted for the reaſons and cauſes there expreſſed.

Lib. 4. fol. 66. Fulwoods caſe.

[679]

Execution of a recognizance by *elegit* of lands, &c. of Thomas Camoys was had by two merchants; and afterwards by a former ſtatute the ſame lands were out of the hands of the ſaid merchants delivered to the former conuſee, whereupon the two merchants deſired to have execution of other lands of the ſaid Thomas Camoys, *et conceditur*.

Hill. 11 E. 3. coram rege, rot. 93. Norff.

A man maketh a leaſe for yeares, rendring a rent, the leſſor ouſteth the leſſee, and bindeth himſelfe in a ſtatute, the land is extended, and delivered to the conuſee, the leſſee re-enters, this is no eviction within this ſtatute: for it appeareth by the preamble, that the conuſee muſt be cleerly without remedy, &c. but here the conuſee ſhall have the rent reſerved, and the reverſion.

So was it holden Paſch' 12 El. in communi banco.

(6) *Before ſuch time, as the ſaid tenants by execution their executors or aſſignes*, &c.] Here are adminiſtrators, and ſo through the whole act underſtood, becauſe they are in equall miſchiefe. And likewiſe and for the ſame reaſon, albeit aſſignees be named in this branch, yet are they implyed throughout this act in branches neceſſary, where they are not named.

The aſſignee of parcell is not within this act, as appeareth by that which hath been ſaid; but if there be ſeverall aſſignees, and the land is evicted from them all, they are within the letter and remedy of this act, becauſe the whole is evicted from them, and they may have a re-extent for the whole debt, according to the words and meaning of this act.

Vid. 46. lib. aſſ. tit. ſcire fac' 134.

Which caſe in 46. lib. aſſ. becauſe it hath been often miſtaken, and miſ-applyed by many, we will truly put the ſame. A. ſeiſed of Blacke acre, and White acre in fee, acknowledgeth a ſtatute merchant to J. and infeoffeth B. of White acre, J. ſueth execution of Black acre out of the poſſeſſion of A. the conuſor, and of White acre out of the poſſeſſion of B. A. conveyeth Blacke acre to C. in fee, J. tenant by ſtatute merchant aſſigneth his intereſt to D. C. the aſſignee of A. ſueth a *ſcire fac'* againſt D. aſſignee of J. and tendreth the mony that is behind. D. the defendant pleadeth to the writ, for

See the ſtat. de Mercat. 13 E. 1. Soient liuers al merchant touts les biens del dettor, et touts ſes terres per reaſonable extent a tener jeſque a tant que le dett ſerr' levie pleinment.

Notwithſtanding by good conſtruction the conuſor ſhall have a ſcire fac' upon tender of the debt, with miſes and coſtages; for the land was delivered in nature of a gage, though 17 E. 3. 43. b. and 18 E. 3. 11. ſeeme to the contrary, but in 21 E. 3. tit. ſcire facias 109. & 47 E. 3. 11. a ſcire facias was granted. 32 E. 3. ſcire fac' 101. the aſſignee of the conuſor ſhall have the ſcire fac' 6 E. 3. 53. acc'.

that