sitium forinsecum, scrutentur rotuli de cancellaria de tempore prædecessorum domini regis, et fiat secundum quod fieri consuevit.

shall be searched for the time of the kings predeceſſors. And it ſhall bee done as it hath uſed to be done.

8. *Eodem modo fiat de clericis infra sacros existentibus laicum feodum tenentibus, qui milites esse deberent, si laici fuissent.*

In like manor ſhall be done of clerkes being within orders, holding lay fee which ſhould be knights if they were laye.

9. *Item nullus distringatur pro burgagiis suis, licet valorem xx. li. attingant, aut plus.*

Alſo none ſhall be diſtrained for his burgage lands, although they doe amount to the value of xx.li. yeerely or more.

10. *Item qui milites esse debent et non sunt, qui per modicum tempus terras suas tenuerunt, et similiter qui niniam senectutem, vel defectum membrorum habent, seu morbum incurabilem, vel onus liberorum, vel placitorum allegant, vel alias causas necessarias prætendunt: adeant ad Robertum Typtoft, et Anto' de Berk, et coram eis fines faciant: quibus est injunctum, quod secundum discretionem eorum, rationabiles fines admittant de viris prædictis.*

Alſo they that ought to be knights and be not, which have holden their lands in their hands but a ſmall time, and likewiſe ſuch as ſhould be knights that do pretend great age, or default of their members, or any other incurable diſeaſe, or charge of their children, or of ſuites, or do alledge ſuch neceſſary excuſes, they ſhall reſort unto Robert Typtoffe and Anthonie de Berke, and ſhall make fine before them, to whom it is enjoyned that according to their diſcretions they ſhall admitte the reaſonable fines of all ſuch perſons. [*Raſtell's Tranſlation.*]

(1) *Dominus rex concessit, quod omnes illi qui milites esse debent, et non sunt.*] That is, the king doth grant, that all they which ought to be knights, and be not, &c. In theſe words conſiſt the locke and the key of this writ, *viz.* who by the common lawes of this realme ought (that is, *de jure*) to be compelled to be a knight. For the underſtanding whereof, and of all the parts of this writ, ſeven things fall into conſideration. (There being foure kinds of knights, *viz.* knights of the garter, knights banaret, knights of the bath, and knights bachelor of the ſpurre, 3 E. 4. cap. 5.)

Firſt, of what degree knighthood is. This writ being underſtood of a knight bachelor.

It is reſolved in our bookes without any contradiction, that the name of this knight is a name of dignity, and of the inferiour degree of nobility; and therefore is parcell of his name. And in writs and inditements he ought to be named knight by the common law; but ſo it is not of the ſtate of an eſquire or gentleman. * Britton ſtileth a knight honourable, and in the record of 9 E. 1. Sir John Acton knight hath the addition of *nobilis*; and certaine it is, that, ſeeing it is a name of dignity, it followeth, that he ought to have ſufficient revenue to maintaine that dignity. See W. 1. cap. 55. 5 E. 4. 19. 15 E. 4. 14. 18 E. 4. 20. 21 E. 4. 71.

11 E. 3. brev. 259. 26 E. 3. brev. 250. 42 E. 3. 9. 22 R. 2. brev. 925. 4 H. 4. 2. 7 H. 4. 7. 11 H. 4. 19. 14 H. 4. 21. 7 H. 6. 15. 14 H. 6. 15. 22 H. 6. 32 H 6. 29. 35 H. 6

* Brit. cap. 25. fo. 49. b. Mich. 9 E. in banco rot. 63. Somerſet.

10. *verbo chivalers*, that in ancient times coroners ought to have been knights, and the reaſon was, for that being knights, the law did intend, that they had ſufficient to anſwer both the king and the ſubject, if cauſe ſhould require. But hereof more ſhall bee ſaid hereafter.

In the meane time this is to be obſerved, that the greater dignity doth never drowne the leſſer dignity, but both ſtand together in one perſon: and therefore if a knight be created a baron, yet he remaineth a knight ſtill; and if the baron be created an earle, yet the dignity of a baron remaineth, *et ſic de cæteris*. But if an eſquire (which is no name of dignity be made a knight, the degree of the eſquire is changed, and gone, and cannot ſo be named in any judiciall proceeding.

7 E. 4. 7. adiudge. 32 H. 6. 29.

2. Secondly, of what quality he that is to be a knight ought to be, *debet*, &c. We have not found that a baron, being a lord of parliament, or higher degree, hath been diſtrained *ad arma militis ſuſcipienda*. But he that is diſtrained, &c. ought to be a gentleman of name and bloud, *claro loco natus*, or elſe *non debet*, he ought not to be compelled by this writ to take the dignitie of knighthood upon him.

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Vid. 7 E. 3. ca. 19. Un gentlehome de eſtat. Pat. 38 E. 3. part. 1. m. 1. Rex licentiam dedit Johanni Beverly armigero ſuo, &c. Rot. clauſ. 19 R. 2. in dorſ. proclam. Ne quis miles, armiger, &c. 11 H. rot. clauſ. m. 2. Omnes qui tenent per ſervitium militare in capit milites ſunt.

Of ancient time thoſe that held by knights ſervice were regularly gentile, and thoſe which held by ſocage, or in burgage, were yeomen or burgeſſes: and this appeareth by the ancient rule of law, * *Lex Angliæ nullum ſcutagium aut ſervitium militare de ſockmannis aut burgenſibus expetit*. It appeareth alſo by many ancient records, and particularly by this writ, that *ſockmannus, &c. et qui terras tenent in ſocagio, &c. et nullum faciunt forinſecum ſervitium*, that is, thoſe which hold in ſocage, of what value ſoever, and doe no knights ſervice, ought not to be knights, *non debent, &c.* And our writ ſaith, *Nullus diſtringatur pro burgagiis ſuis, &c.* no man ought to be diſtrained to be a knight for the land which he holds in burgage, &c. of what value ſoever. But though it were of ancient time a badge of gentry to hold by knights ſervice, yet now *tempora mutantur*, and many a yeoman, burgeſſe, or tradeſman purchaſe lands holden by knights ſervice, and yet *(non debet)* ought not for want of gentry be a knight. At this day the ſureſt rule is, *Nobiles ſunt qui arma gentilicia anteceſſorum ſuorum proferre poſſunt*; therefore they are called *ſcutiferi, armigeri, &c.* When a knight is degraded, one of his puniſhments is, *quod clypeus ſuus gentilicius reverſus erit*, and here his armes be reverſed that beareth none.

* See here cap. 6 & 7 Glanv. lib. 7. cap. 9. Burgenſis.

Lands and tenements anciently holden by knights ſervice, belonging to the nobility and gentry of the realme, are not of the cuſtome of gavelkind, which belonged to the yeomanry, and were holden in ſocage for the ſervice of the plow: and this appeareth by the judgement of the whole parliament in [a] 31 H. 8. cap. 3. and by the booke of 9 H. 3. tit. Preſcription 63. and 26 H. 8. fol. 4. and the reaſon thereof was, becauſe the lands and tenements holden by knights ſervice ſhould not be carried by deſcent into many hands of iſſues males, whereby the ſervice for defence of the realme in a few deſcents ſhould be loſt or diminiſhed, and the owners (the lands being divided into ſo many hands) ſhould not be able to maintaine the countenance of their order and degree. *Inter ſtatuta ſeu inſtitutiones H. 1. cap. 11. Militibus qui per loricas terras ſuas deſerviunt, terras dominicarum carucarum ſuarum quietas ab omnibus gildis, et ab omni opere ipſo domino meo concedo; ut ſicut dignitas mea propenſior eſt in eis, ita*

Mich. 9 E. 2. fol. 61. in libro mes. Dower de ſocage terre, & nemy de terre tenus per ſervice de chivaler, Lit. de la pluis beale. [a] 31 H. 8. cap. 3. 9 H. 3. preſcript. 63. 26 H. 8. fol. 4. b. Bract. fol. 77. Glanvil. fol. 46 In Bundello. Orlac. an 1 E. 3. acc.

ita mihi fideles ſint: et ſicut tam magno gravamine alleviati ſunt, ita equis et armis ſe bene inſtruant, ut apti et parati ſint ad ſervitium meum, et ad defenſionem regni mei. And where it is enacted by the ſtatute of *prerogat' regis, cap.* 16. *quod fœminæ non participabunt cum maſculis,* it is to be underſtood of ſuch as be in equall degree; as the ſiſter ſhall not inherit with the brother, becauſe they be in equall degree; but the daughter of the ſonne ſhall have a part with her uncle, for they be not in equall degree.

Prerogat. regis, cap. 16. Vid. Paſch. 4 E. 1. in com' banco rot. 22. Kanc' for the cuſtome of gavelkind, Hill. 10 E. 1. in banco Kanc' per de Benbrokes caſe, & m. 18 E. 1. in banco rot. 68. Suff. Laurence le Fryes caſe.

A knight is by creation, and not by deſcent, a gentleman is by deſcent, and yet I read of the creation of a [b] gentleman; and thus it was: a knight of France came into England, and challenged John Kingſton (a good and a ſtrong man at armes, but no gentleman) as the record ſaith, *ad certa armorum puncta, &c. perficienda. Rex, ut prædictus Johannes honorabilius in præmiſſis accipiatur, ipſum Johannem ad ordinem generoſorum adoptavit, et armigerum conſtituit, et certa honoris inſignia ei conceſſit, &c.* Note, the king made him no knight, as his adverſary was, becauſe he was no gentleman.

[b] Rot. patent. an. 13 R. 2. part. 1. 7 H. 4. fol. 7. 1 H. 5. cap. 1.

But for any thing that I have reade and doe remember in the raigne of H. 4. or ever before, gentlemen of name and bloud had very rarely the addition of *generoſus* or *armiger*, as of a ſtate or degree, but were diſtinguiſhed from yeomen, who ſerve by the plow, by their ſervice, *viz.* knights ſervice, *forinſecum ſervitium*, but in the raigne of H. 5. and ever ſince, they have had the addition of gentlemen or eſquires, and the reaſon thereof is this: it is enacted by the ſtatute of 1 H. 5. that in every writ originall of actions perſonals, appeales, and inditements, in which proceſſe of outlary doe lye, that to the name of the defendants addition be made of the eſtate or degree, or myſterie: and hereupon in thoſe writs addition was made as the caſe required, of *generoſus* or *armiger*; for if a gentleman were named in ſuch a writ huſbandman, or yeoman, he may abate the writ, by pleading that he is a gentleman. And after this the like additions were made in commiſſions, and after that in grants and conveyances, &c.

1 H. 5. cap. 5.

14 H. 6. 15. 22 H. 6. 3. 28 H. 6. 8. 38 H. 6. 10. 23 H. 6. cap. 15.

And great diſcord and diſcontentment would ariſe within the realme, if yeomen and tradeſmen ſhould be called to the dignity of knighthood, to take the place and precedency of the ancient and noble gentry of the realme. And the eldeſt ſonne of a knight is an eſquire, as his father ought to be, before he was called to the dignity of knighthood.

3.

Thirdly, of what livelihood or revenue a knight ought to be, *debet, &c.* And it is certaine, that he ought to have a knights fee: *i. feodum unius militis.* Herein three things are to obſerved: firſt, whether the law doth determine of what yearly value a knights fee (*viz.* the lands and revenue of a knight) ought to be. Secondly, if the law define not the certainty of the value, what is eſteemed in law a knights fee, Thirdly, what eſtate he ought to have in it.

To the firſt, the law doth reſpect rather the value, then the content, *viz.* to be of ſufficient value to maintain the degree of a knight, but doth not determine of any certaine yearly value: for nothing is more incertaine than the values of lands in ſucceſſion. And therefore in a writ in the raigne of H. 3. no value was expreſſed, but a writ iſſued out of the chancery generally to diſtraine *omnes qui tenent per ſervitium militare.*

Lib. 9. fol. 124. Lowes caſe. 1. part Inſtitutes, ſect. 112. Sir Tho. Smith, lib. 1. cap. 18. 11 H. 3. ubi ſup.

At the making of *Magna Charta* a knights fee was accounted the value of 20 li. and the fourth part thereof was a knights reliefe.

9 H. 3. Magn. Chart. cap. 2.

Glanv. lib. 9. ca. 4. lib. 7. fol. 33. b. Rot. parl. 20 E. 1. r. t. 4. * Trin. 1 E. 2. coram rege, rot. 4. Linc'.

In *anno* 20 E. 1. the value of the knights fee in the writ was 40 li. by our writ in 1 E. 2. 20. li. * Trin. 1 E. 2. 48. *carucat' terræ faciunt unum feodum militis.* This was in the ſame year that this writ was granted. [a] 19 E. 2. *feodum unius militis annui valoris* 40 li. [b] 2 R. 2. 10. li. *per annum.* 7 H. 6. fol. 15. 10 li. *per annum.* [c] 18 Hen. 6. nu. 43. 40 li. *per an. &c.* So as (as hath been ſaid) nothing is more incertaine then the values of lands; but he muſt have *feodum unius militis.* And in ſeverall ages a knights fee, as before it appeareth, was valued at ſeverall values. * The king cauſed a proclamation to be ſet forth, that all ſuch as might diſpend 15 li. in lands, ſhould receive the order of knighthood, and thoſe that would not, or could not, ſhould pay theirfines.

[a] Rot. clauſ. 19 E. 2. m. 16. in dorſ.

[b] Brev. regis, part 1. & 2. 2 R. 2.

[c] Rot. parl. * Hill. 40 H. 3. pa. 254. a. 30. Ibid. a. 60.

There was 5 markes ſet on every ſhriefes head, becauſe they had not diſtrained every perſon that might diſpend 15 li. lands, to receive the order of knighthood, as was to the ſame ſhriefes commanded.

[d] Vid Camden. Brit. pag. 126. Note, a baron & others of higher degrees are preſumed to have greater livings, as appeareth by their reliefe, Mag. Chart. cap. 2. li. 2. fol. 129. ubi ſupr. Glanv. lib. 2. ca. 3. acc'. Pateh' 3 E. 1. coram Rogero de Seton & ſociis ſuis, rot. 10. Ralph Normanvils cate. 19 E. 2. ubi ſupr.

[d] As to the ſecond it appeareth before, that he ought to have a knights fee: then the onely queſtion is, what quantity of land a knights fee is. And without doubt this ſhall not be accounted by the acres; for ſome acre is of far greater value then another: and therefore that ſhould be as uncertaine as the values be; but this is reſolved by prudent ſages of the law of ancient time, who have reduced a knights fee to a certaine number of carues, or plow lands, which though they be incertaine (for if the land be fertile and heavie, there goeth to a plow land the leſſe; and if it be lighter, a greater quantity) yet it is as neere to certainty as can be, and this computation time cannot alter: and therefore a knights fee containeth [e] 12 plow lands. And by this writ it appeareth, that a knights fee is here valued at 20 li. *per an.* And if he be impleaded for it, or any part thereof, &c. that he ſhall not be compelled to be a knight, untill the action be determined. And ſo likewiſe, if he be indebted to the king, and his debt ſtalled, he ſhall not be compelled to be a knight, untill his debt be paid: and the reaſon hereof is, that povertie ſhould not be apparelled with honour and dignity.

[e] See here, cap. 5.

As to the third, he ought to have an eſtate in fee-ſimple or fee-taile, as it appeareth in 20 E. 1. *ubi ſupra, in feodo et hæreditate.* Or as tenant by the curteſie (which in this writ is intended by the name of tenant for life) whoſe heire by poſſibility may inherit.

4. The end.

Fourthly, to what end he ought to be called to this dignity of knighthood. And our writ doth truly anſwer, *ad arma militaria ſuſcipienda,* to take upon him the military armes, or the armes of a knight for the honour, and ſervice, and defence of the realme; this is *pro bono publico.*

The writs of parliament are to returne two knights for every county *gladiis cinctos,* not that they ſhould come to the parliament girt with ſwords, but that they ſhould be able to do knights ſervice, *et arma militaria exercere,* the ſword being named, for that it is the warden of all weapons: and therefore this end ought not to be pretended, and a private intended. *Dicuntur arma, quia armos tegunt, et ab humeris dependent, et continent ſcutum, gladium, tela, et ea quibus præliantur.* No inſufficient men are to be called *ad arma militaria ſuſcipienda, ne dignitas hujus ordinis vileſceret.*

Fifthly,

Fifthly, of what age he ought to be, &c. when he is called, *debet*, &c. By this writ it appeareth, that he ought to be above 21, and this agreeth with Littleton, and other authorities and records; but this is so to be understood, that he cannot be compelled to be a knight before 21, but if he be made a knight before that age, it is good enough. 5.

* And above the age of 60 (which in this writ is called *nimia senectus*) no man ought to bee compelled *ad arma militaria suscipienda*, or to serve as a souldier. If the plaintife in an appeale of death, &c. be of the age of 60, or maimed, or of any great infirmity, so as hee is not able to fight, hee shall not bee compelled to wage battell. And by this writ it appeareth, that if hee hath *defectum membrorum, seu morbum incurabilem, vel alias causas rationabiles*, that hee shall not be compelled *ad arma militaria suscipienda*, because he is not able to performe the service and duty of knighthood.

* See here, ca. 10. Rot. claus. an. 7 E. 3. part. 1. mem. 25. & m. 22, 23. Rot. parl. 5 H. 4. nu. 24, 25. 33 H. 8. cap. 22 E. 4. 19. 15 E. 2. coron. 185. Brit. fol. 40. Fitz. N.B. 163. n. simile.

Sixthly, by what meanes hee ought to bee called, *debet*, &c. hee ought to bee called by writ. It hereby appeareth, that this writ issueth out of the chancery to the shriefe, commanding him, *quod proclamari faciat, quod omnes illi qui habent* * *terra, arma militaria suscipiant citra (tale festum) et quod summoneri fac eos'*, &c. and this writ is returnable into the chancery at a certaine returne. At which day of the returne it is necessary for them that are summoned to appeare; for if they make default, it is finable (which, it may be, is the marke that is aimed at) but if they appeare, and take the dignity upon them, or refuse for the causes aforesaid, or any of them, they ought not be fined. See here, cap. 10. 6.

* The yearly value of the land.

This writ and the returne thereof is by writ of *mittimus* transmitted into the court of exchequer, who cannot make a commission to others concerning this matter, but ought to proceed legally themselves, because they have but *delegatam potestatem, quæ non potest delegari*, and they are learned and sworne judges, and able to allow the parties their just exceptions.

For writs of summons or *distringas* for the dignity of bachelor knighthood, see Rot. claus. 29 H. 3. m. 9. 44 H. 3. *parte prima. ibid.* 6 E. 1. *dors.* 8. *ibid.* 6 E. 2. *dors.* 29. &c.

Seventhly, if he ought to be a knight, and refuse, or make default, how often he may be fined. 7.

He can by the law be fined but once, no more then an apprentice at law, that is called by writ *ad statum et gradum servientis ad legem*, if hee refuse, and be fined, he cannot be fined againe; for so he might be fined infinitely, *et infinitum in jure reprobatur*. Rot. Parl. 18 H. 6. nu. 43. 14 H. 6. 2, 3. Fitz. N.B. 231. b. Le Roy navera que un pension.

The commons petitioned (to have a declaratory law) that no person once making fine for not being knight, be never after called thereunto againe. But this was but to avoid charge and vexation. *Vid.* Dyer, 35 H. 8. 55. Brook briefe 150, *fine pur contempts* 19.

We doe not remember that we have read any thing touching this matter in Bracton, Britton, Fleta, Mirror, the Register, or F.N.B.

No clerke within holy orders, be hee regular or secular, though hee hath a knights fee, can be made a knight, as by this writ it appeareth. See here, cap. 7.

See Matth. Paris, *an.* 29 H. 3. pag. 832. *Rex die natali Johannem de Gatesden clericum, et multis ditatum beneficiis, sed omnibus ante expectatum resignatis, quia sic oportuit, baltheo cinxit militari.* This See here, cap. 10.

last

laſt clauſe, *item qui milites eſſe debent, et non ſunt*, and yet have juſt cauſe of excuſe (as for inſtance, that they are impleaded for their land, which before by this writ is allowed for a good excuſe, &c. or have any other of the juſt cauſes of excuſe here expreſſed, and yet will not ſtand to a legall and chargeable pleading and proceeding) they may, if they will, redeem their vexation and charge, and ſubmit themſelves to a reaſonable fine: and therefore by this writ Robert Tiptoft, and Anthony de Berke are appointed to aſſeſſe reaſonable fines; but this muſt be underſtood by conſent, for this was no legall proceeding. I find in the parliament roll *de anno* 18 E. 1. rot. 6. that Robert Tiptoft was *juſticiarius domini regis*. And ſo, it is like, Anthony Berk was; but certainly what he was, we have not yet found.

For knights of the bath.

Writs to divers *ad ordinem militiæ de balneo ſuſcipiendum juxta antiquam conſuetudinem in creatione uſitatam, Rot. clauſ. in dorſo*, 10 *H.* 7. 20. *Septembris.*

For knights baneretts.

See Rot. Vaſch' 13 E. 3. m. 13. William de la Pole created. Rot. *eodem* m. 1. Rich. de Cobham created. Rot. Pat. 15 E. 3. part 2. m. 22. John Coupland created. See Matth. Paris, pag. 1354, 1355. &c. Camden Brit. 124.

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ARTICULI CLERI,

Edit' Anno nono Edw. II.

LONG before the making of this ſtatute, that is, *anno* 42 H. 3. *anno Domini* 1258, Boniface younger ſonne of Thomas earle of Savoy, archbiſhop of Canterbury, uncle of Elianor queen of England, who was daughter of Reymond earle of Province by Beatrix daughter of Thomas earle of Savoy, and ſiſter to the ſaid Boniface, made divers and many canons and conſtitutions provinciall directly againſt the lawes of the realme, which canons begun thus: *Univerſis Chriſti fidelibus ad quos præſens pagina pervenerit, Bonifacius miſeratione divina Cantuarienſis archiepiſcopus, totius Angliæ primas, et ſui ſuffraganei in verbo ſalutari ſalutem,* And ending thus: *Actum apud Weſtm', ſexto iduum Junii anno Domini* 1258. *In quorum omnium robur et teſtimonium, &c.* which being exceeding long, we could not here inſert. But the effect of them is, ſo to uſurp and incroach upon many matters, which apparently belonged to the common law, as, amongſt many others, the tryall of limits and bounds of pariſhes, and right of patronage, againſt tryall of right of tithes (by *indicavit*) againſt writs to the biſhop upon a recovery in a *quare impedit*, &c. in the kings courts. That none of their poſſeſſions or liberties, which any of the clergy had in the right of their church, ſhould be tryed before any ſecular judge; (ſo as they would not have conuſance of things ſpirituall, but of temporall alſo) and concerning diſtreſſes and attachments within their fees, and

and in effect, that no *quo warranto* ſhould be brought againſt them, when they had been long in poſſeſſion, with an invective againſt the perverſe interpretation by the judges of the realme (ſo they termed it) of charters, &c. granted to them, and in ſubſtance againſt the ancient and juſt writs of prohibition in caſes, where by the lawes of the realme they are maintainable: and commandement given to admoniſh the king, and interdict his lands and revenues, and thundred out excommunications againſt the judges and others if they violated, or obeyed not the ſaid canons and conſtitutions. And this was the principall ground of the controverſies between the judges of the realme and the biſhops: for this cauſed eccleſiaſticall judges to uſurp and incroach upon the common law. But notwithſtanding the greatneſſe of the archbiſhop Boniface, and that divers of the judges of the realm were of the clergy, and all the great officers of the realm, as chancellor, treaſurer, privie ſeale, &c. were prelates; yet the judges proceeded according to the lawes of the realm, and ſtill kept, though with great difficulty, the eccleſiaſticall courts within their juſt and proper limits. The courts by pretext of theſe canons being at variance, at length at a parliament holden in the 51 yeare of Henry the third, Boniface, and the reſt of the clergy complained (which was *ultimum refugium*, and yet the right way) and exhibited many articles as grievances, called *Articuli Cleri*. The articles exhibited by the clergie either by accident or induſtry are not to be found; ſome of the anſwers are extant, *viz. ad* 16 *articulum de uſuris reſpondetur, quod licet epiſcopus, &c. ad* 17 *articulum de defamatione, &c. reſpondetur, ſi aliquis defamatus, &c. ſi autem certæ perſonæ nominatæ fuerint, per quas rei veritas melius ſcire poterit, nominantur, ad proband' matrimonium vel teſtamentum: et ſimiliter in accuſationibus tales perſonæ impediendæ non ſunt, quia teſtimonium perhibent veritati, ſed propter hoc non eſt congregatio laicorum faciend', quia per congregationem hujuſmodi ſervitia dominus poſſit deperire.*

Ex fragmento Rot. parl. anno 51 H. 3.

Ad 18 *artic' dominus poſuit remedium.*

Ad 19 *artic' reſpondetur, quod archiepiſcopus de epiſcopatu vacante non ſe intromittat quantum ad temporalia, ſed tantum ſe de ſpiritualibus intromittat, &c.*

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Ad 20 *artic' reſpondetur, quod de clericis occiſis, et de hiis qui forſan occidi contigerit, in futurum fiat juſtitia, ſecundum legem et conſuetudinem terræ, &c.*

Ad 21 *artic' reſpondetur, quod excommunicatus per ordinarium, aut alium judicem competentem, et denunciatus taliter, debebit ab aliis evitari, niſi forſan excommunicatus conqueratur ſe eſſe injuſte excommunicatum pro aliqua re temporali, de qua non debeat coram ordinario reſpondere, ad cujus probationem debet admitti, ſed in cæteris quæ proponit, ut actor, eſt interim evitandus.*

Ad 22 *artic' mandabitur juſticiariis, quod non fiant aliquæ priſæ per totam terram de bonis aliquorum, niſi debitæ priſæ et conſuetæ.*

Ad 23 *artic' reſpondetur, quod cum aliqui tenent aliquod de rege in capite unde cuſtodia debeatur, cuſtodiæ omnium terrarum de quibuſcunque tenentes illi tenementa illa teneant cum acciderint (ſi inde cuſtodia habere debeatur) hactenus ex conſuetudine approbata ſpectarunt ad regem, ſed epiſcopi ſi expedire videant, inhibeant tenentibus ſuis, ne aliqua tenementa ibi perquirant de feodis regis.*

Theſe

Theſe anſwers are yet extant of record, and are worthy to be read at large as they yet remaine; whereunto we referre the reader. This is to be obſerved, that none of Boniface's canons againſt the lawes of the realme, and the crowne and dignity of the king, and the birth-right of the ſubject, are here confirmed.

Prohibitio formata de ſtatut' Artic'Cleri. Vet. Magn. Chart.

What the reſidue of the articles and the anſwers were, may be collected by that act of parliament entitled *prohibitio formata de ſtatuto articuli cleri*, which was made in the time of Edward the firſt, about the beginning of his raign, which beginneth thus: *Edwardus, &c. prælatis, &c.* wherein divers points are to be obſerved againſt the canons of Boniface: 1. *Quod cognitiones placitorum ſuper feodalibus et libertatibus feodalium, diſtrictionibus, officiis miniſtrorum, executionibus contra pacem noſtram factis, felonum negotiationibus, conſuetudinibus ſecularibus, attachiamentis, vi laica malefactoribus rectatis, robberiis, arreſtationibus, maneriis, advocationibus eccleſiarum, ſufficientibus aſſiſis juratis, recognitionibus laicum feodum contingentibus, et rebus aliis, et cauſis pecuniarum, et de aliis catallis et debitis quæ non ſunt de teſtament' vel matrimon' ad coronam et dignitatem regiam pertineant, et de regno de conſuetud' ejuſdem regni approbata, et hactenus obſervata.*

2. *Et proceres, et magnates, aut alii de eodem regno temporibus noſtrorum prædeceſſorum regum Angliæ, ſeu noſtra authoritate alicujus non conſueverunt contra conſuetudinem illam ſuper hujuſmodi rebus in cauſa trahi vel compelli ad comparendam coram quocunque judice eccleſiaſtico.*

3. *Et quod vicecomes non permittant, quod aliqui laici in baliva ſua conveniunt ad aliquas recognitiones per ſacramenta ſua faciend', niſi in cauſis matrimonialibus et teſtamentariis.* Of the ſubſtance of this prohibition, Britton ſpeaketh in theſe words, *et queux ount ſuffert pleader en court chriſtian auters pleas, que de teſtament ou matrimonie, et de pure ſpiritueltie ſans deniers prender de lay home. Ou ſuffert lay home iorrer devant lordinary.*

Vid. Brit. fo. 33. b. Regiſtr. 36. b. 2 E. 3. 29. F.N.B. 41. a. Vid. Vet. Magn. Chart. fol. 91. Bettelets impreſſion.

After this the clergy, at a parliament holden in the raigne of the ſame king E. 1. preferred articles intitled *articuli contra prohibitionem regis*, fearing leſt by reaſon of ſome generall words therein they might be prohibited in cauſes, which of right belonged to the eccleſiaſtical juriſdiction, in theſe words, *ſub hac forma impetrant laici prohibitionem in genere ſuper decimis, oblationibus, obventionibus, mortuariis, redemptionibus penitentiarum, violenta manuum injectione in clericum vel cōmiſſarium, et in cauſa defamationis, in quibus caſibus agitur ad pœnam canonicam imponendam.* And a juſt and legall anſwer was made thereunto, as thereby appeareth. But it is to be obſerved, that they claimed nothing which was againſt the true meaning of the ſaid act, called *prohibitio formata de ſtatuto artic' cleri*, nor any of Boniface's canons to bee confirmed: and ſo theſe matters reſted, untill the parliament holden at Lincoln in the ninth yeare of Edw. 2. where Walter Reynolds biſhop of Canterbury (whom the king favoured, ſaith one, ſingularly for the opinion he had of his fidelity and great wiſdome, and *Walterus archiepiſcopus Cantuarienſis regi gratioſiſſimus fuit, hæc regis æquiſſima reſponſa ad prælatorum petita obtinuit*) in the name of himſelfe and of the clergy, preferred theſe 16 articles, and by authority of parliament had the anſwers here following *ſeriatim* to every one of them. And now it may ſeem high time that we ſhould deſcend to the peruſall of the preamble, and the articles and anſwers. But before we come to it, it ſhall conduce

Mat. Parker, fol. 229.

duce much to the right understanding of divers parts of this act of parliament, to report unto you what articles Richard Bancroft archbishop of Canterbury exhibited in the name of the whole clergy in Michaelmas terme *anno* 3 *Jacob. regis* to the lords of the privie councell against the judges of the realm, intitled, Certain articles of abuses, which are desired to be reformed, in granting of prohibitions, and the answers thereunto, upon mature deliberation and consideration, in Easter terme following, by all the judges of England, and the barons of the exchequer, with one unanimous consent under their hands (resolutions of highest authorities in law) which were delivered to the lords of the councell. And we for distinction sake (because we shall have occasion often to cite them) call them *Articuli Cleri* 3 *Jacobi*.

His Majesty hath power to reforme abuses in prohibitions. 1.

Objection. The clergy well hoped, that they had taken a good course in seeking some redresse at his majesties hands concerning sundry abuses offered to his ecclesiasticall jurisdiction, by the over frequent and undue granting of prohibitions; for both they and we supposed (all jurisdiction, both ecclesiasticall and temporall being annexed to the imperiall crowne of this realme) that his highnesse had been held to have had sufficient authority in himselfe, with the assistance of his councell, to judge what is amisse in either of his said jurisdictions, and to have reformed the same accordingly; otherwise a wrong course is taken by us, if nothing may bee reformed that is now complained of, but what the temporall judges shall of themselves willingly yeeld unto. This is therefore the first point, which upon occasion lately offered before your lordships by some of the judges, we desire may be cleared, because we are strongly perswaded as touching the validity of his majesties said authority, and doe hope we shall be able to justifie the same, notwithstanding any thing that the judges, or any other can alledge to the contrary.

Answer of the judges. No man maketh any question, but that both the jurisdictions are lawfully and justly in his majesty, and that if any abuses be, they ought to bee reformed: but what the law doth warrant in cases of prohibitions to keep every jurisdiction in his true limits, is not to be said an abuse, nor can be altered but by parliament.

The formes of prohibitions prejudiciall to his majesties authority in causes ecclesiasticall. 2.

Objection. Concerning the forme of prohibitions, forasmuch as both the ecclesiasticall and temporall jurisdictions be now united in his majestie, which were heretofore *de facto*, though not *de jure* derived from severall heads, we desire to be satisfied by the judges, whether, as the case now standeth, the former manner of prohibitions heretofore used importing an ecclesiasticall court to be *aliud forum à foro regio*, and the ecclesiasticall law not to be *legem terræ*, and the proceedings in those courts to bee *contra coronam et dignitatem regiam*, may now without offence and derogation to the kings ecclesiasticall prerogative be continued, as though either the said jurisdictions remained now so distinguished and severed as they were before, or that the lawes ecclesiasticall, which wee put in execution, were

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not the kings and the realmes eccleſiaſticall lawes, as well as the temporall lawes.

Anſwer. It is true, that both the juriſdictions were ever *de jure* in the crowne, though the one ſometimes uſurped by the ſee of Rome; but neither in the one time, nor in the other hath ever the forme of prohibitions been altered, nor can bee but by parliament. And it is *contra coronam et dignitatem regiam* for any to uſurp to deale in that, which they have not lawfull warrant from the crowne to deale in, or to take from the temporall juriſdiction that which belonged to it. The prohibitions doe not import, that the eccleſiaſticall courts are *aliud* then the kings, or not the kings courts, but doe import, that the cauſe is drawne into *aliud examen* then it ought to be: and therefore it is alwaies ſaid in the prohibitions (be the court temporall or eccleſiaſticall, to which it is awarded) if they deale in any caſe which they have not power to hold plea of, that the cauſe is drawn *ad aliud examen* then it ought to be; and therefore *contra coronam et dignitatem regiam.*

3. A fit time to be aſſigned for the defendant, if he will ſeek a prohibition.

Objection. As touching the time when prohibitions are granted, it ſeemeth ſtrange to us, that they are not onely granted at the ſuit of the defendant in the eccleſiaſticall court after his anſwer (whereby hee affirmeth the juriſdiction of the ſaid court, and ſubmitteth himſelfe unto the ſame;) but alſo after all allegations and proofes made on both ſides, when the cauſe is fully inſtructed and furniſhed for ſentence: yea, after ſentence, yea after two or three ſentences given, and after execution of the ſaid ſentence or ſentences, and when the party for his long continued diſobedience is laid in priſon upon the writ of *excommunicato capiendo*, which courſes, foraſmuch as they are againſt the rules of the common law in like caſes (as we take it) and doe tend ſo greatly to the delay of juſtice, vexation, and charge of the ſubject, and the diſgrace and diſcredit of his majeſties juriſdiction eccleſiaſticall, the judges (as we ſuppoſe) notwithſtanding their great learning in the lawes, will be hardly able in defence of them to ſatisfie your lordſhips.

Anſwer. Prohibitions by law are to be granted at any time to reſtraine a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much miſtaken that maintaine the contrary. And it is the folly of ſuch as will proceed in the eccleſiaſticall court for that, whereof that court hath not juriſdiction; or in that, whereof the kings temporall courts ſhould have the juriſdiction. And ſo themſelves (by their extraordinary dealing) are the cauſe of ſuch extraordinary charges, and not the law: for their proceedings in ſuch caſe are *coram non judice.* And the kings courts that may award prohibitions, being informed either by the parties themſelves, or by any ſtranger, that any court temporall or eccleſiaſticall doth hold plea of that (whereof they have not juriſdiction) may lawfully prohibit the ſame, as well after judgement and execution, as before.

4. Prohibitions unduly awarded heretofore in all cauſes almoſt of eccleſiaſticall cognizance.

Objection. Whereas it will be confeſſed, that cauſes concerning teſtaments, matrimony, benefices, churches, and divine ſervice, with many offences

offences againſt the 1, 2, 3, 4, 5, 7, 9. and 10. commandements, are by the lawes of this realm of eccleſiaſticall cognizance, yet there are few of them, wherein ſundry prohibitions have not been granted, and that more ordinarily of latter times, then ever heretofore, not becauſe we that are eccleſiaſticall judges doe give greater cauſe of ſuch granting of them, then before have been given, but for that the humour of the time is growne to be too eager againſt all eccleſiaſticall juriſdiction. For whereas (for examples ſake) during the raigne of the late queen of worthy memory, there have been 488 prohibitions, and ſince his majeſties time 82 ſent into the court of the arches; we humbly deſire your lordſhips, that the judges may be urged to bring forth one prohibition of ten, nay the twentieth prohibition of all the ſaid 488, and but 2 of the ſaid 82, which upon due conſiderations with the libels in the eccleſiaſticall court, they ſhall be able to juſtifie to have been rightly awarded: we ſuppoſe they cannot; our predeceſſors, and we our ſelves have ever been ſo carefull not to exceed the compaſſe and limits of the eccleſiaſticall juriſdiction: which if they ſhall refuſe to attempt, or ſhall not be able to performe, then we referre our ſelves to your lordſhips wiſdomes, whether we have not juſt cauſe to complaine, and crave reſtraint of this over laviſh granting of prohibitions in every cauſe without reſpect. That which we have ſaid of the prohibitions in the court of the arches, we verily perſwade our ſelves may be truly affirmed of all the eccleſiaſticall courts in England, which doth ſo much the more aggravate this abuſe. [603]

Anſwer. It had been fit they ſhould have ſet downe ſome particular caſes, in which they find the eccleſiaſticall courts injured by the temporall (as their lordſhips did order) unto which we would have given a particular anſwer; but upon theſe generalities nothing but clamour can be concluded. And where they ſpeake of multitudes of prohibitions; for all granted to, or in reſpect of any eccleſiaſticall court, we have heretofore cauſed diligent ſearch to be made in the kings bench and common pleas, from the beginning of his majeſties raigne, unto the end of Hilary term, in the third yeare of his raigne; in which time we find, that there were granted unto all the eccleſiaſticall courts in England out of the kings bench but 251. whereof 149. were *de modo decimandi*, upon unity of poſſeſſion, for trees of 20 yeares growth and upwards, and for barren and heath ground, and all out of the common pleas, but 62. whereof 31. were ſuch as before, and the reſt grounded upon the bounds of pariſhes, or ſuch other cauſes as they ought to be granted for; but for that which was done in the late queenes time, it would be too long a ſearch for us to make, to deliver any certainty thereof. And for his majeſties time, they requiring to have but two to be lawfully warranted upon the libell in the eccleſiaſticall court, we have ſix to ſhew to be lawfully warranted upon the libell there, and ſo are all the reſt of like kind, by which it will appeare, that this ſuggeſtion is not onely untrue, but alſo, that the extraordinary charges growing unto poore men, are of neceſſity by meanes of the undue practices of eccleſiaſticall courts.

The multiplying of prohibitions in one and the ſame cauſe, the libell being not altered. 5.

Objection. Although it hath been anciently ordained by a ſtatute, that when a conſultation is once duly granted upon a prohibition made

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to the judge of holy church, the ſame judge may proceed in the cauſe, by vertue of that conſultation, notwithſtanding any other prohibition to him delivered; provided that the matter in the libell of the ſame cauſe be not engroſſed, enlarged, or otherwiſe changed; yet notwithſtanding prohibitions and conſultations in one and the ſame cauſe, the libell being no waies altered according to the ſaid ſtatute, are lately ſo multiplyed, as that in ſome one cauſe, as aforeſaid, two, in ſome three, in ſome other ſix prohibitions, and ſo many conſultations have been awarded, yea divers are ſo granted out of one court: as for example, when after long ſuit a conſultation is obtained, it is thought a ſufficient cauſe to ſend out another prohibition in revocation of the ſaid conſultation, upon ſuggeſtion therein contained, that the ſaid conſultation *minus commode emanavit*. By which pretty device the judges of thoſe courts which grant prohibitions, may, notwithſtanding the ſaid ſtatute, upon one
[604] libell not altered, grant as many prohibitions as they liſt, commanding the eccleſiaſticall judges in his majeſties name, not to proceed in any cauſe that is ſo divers times by them prohibited, whereby the poore plaintifes doe not know when their conſultations (procured with great charge) will hold, and ſo finding ſuch and ſo many difficulties, are driven to goe home in great griefe, and to leave the cauſes in Weſtminſter hall, the eccleſiaſticall judges not daring to hold any plea of them. Now may it pleaſe your lordſhips, the premiſſes being true, we humbly deſire to heare what the judges are able to produce for the juſtifying of theſe their proceedings.

Anſwer. It were fit they ſhould ſet downe particular cauſes, whereupon this grievance is grounded, and then we doubt not but to anſwer it ſufficiently, without uſing any pretty device, ſuch as is ſet downe in this article.

6. The multiplying of prohibitions in divers cauſes, but of the ſame nature, after conſultations formerly awarded.

Objection. We ſuppoſe, that as well his majeſties eccleſiaſticall juriſdiction, as alſo very many of his poore, but dutifull ſubjects, are greatly prejudiced by the granting of divers ſeverall prohibitions, and conſultations in cauſes of one and the ſame nature and condition, and upon the ſelfe ſame ſuggeſtions: for example, in caſe of beating a clerke, the prohibition being granted upon this ſuggeſtion, that all pleas *de vi et armis* belong to the crowne, &c. notwithſtanding a conſultation doth thereupon enſue, yet the very next day after, if the like ſuggeſtion be made upon the beating of another clerke, even in the ſame court another prohibition is awarded. As alſo, where 570 prohibitions have been granted ſince the late queenes time into the court of arches (as before is mentioned) and but 113 conſultations afterwards upon ſo many of them obtained: yet it is evident by the ſaid conſultations, that (in effect) all the reſt of the ſaid prohibitions ought not to have been awarded, as being grounded upon the ſame ſuggeſtions, whereupon conſultations have been formerly granted: and ſo it followeth, that the cauſes why conſultations were awarded upon the reſt of the ſaid prohibitions, were for that either the plaintifes in the court eccleſiaſticall were driven for ſaving of further charge, to compound, to their loſſe, with their adverſaries, or were not able to ſue for them; or being able, yet through

through ſtrength of oppoſition againſt them, were conſtrained to deſiſt; which is an argument to us, that the temporall judges doe wittingly and willingly grant prohibitions, whereupon they know, before hand, that conſultations are due: and if we miſtake any thing in the premiſſes, we deſire your lordſhips, that the judges, for the juſtification of their courſes, may better enforme us.

Anſwer. It ſhall be good, the eccleſiaſtical judges doe better enforme themſelves, and that they put ſome one or two particular caſes to prove their ſuggeſtions, and thereupon they will find their owne errour; for the caſe may be ſo, that two ſeverall miniſters ſuing in the eccleſiaſticall court for beating of them in one and the ſelfe ſame forme, that the one may and ought to have a conſultation, and the other not. And ſo it is in caſes of prohibitions, *de modo decimandi*; and hereof groweth the overſight in making this objection. And we aſſure our ſelves, that they ſhall not find 570 prohibitions granted into the arches ſince her late majeſties death; for we find (if our clerkes affirme truly upon their ſearch) that out of the kings bench have been granted to all the eccleſiaſticall courts in England but 251 prohibitions (as before is mentioned) from the beginning of his majeſties raigne, unto the end of Hilary terme laſt; and out of the common pleas not 63. And therefore it cannot be true, that ſo many have paſſed to the arches in that time, as is ſet downe in the article; and this article in that point doth exceed that which is ſet downe in the fourth article by almoſt 500, and therefore whoſoever ſet this downe, was much forgetfull of that which was before ſet downe in the fourth article, and might well have forborne to lay ſo great a ſcandall upon the judges, as to affirme it to be a witting and willing errour in them, as is ſet downe in this article.

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New formes of conſultations, not expreſſing the cauſe of the granting of them. 7.

Objection. Whereas upon the granting of conſultations, the judges in times paſt did therein expreſſe and acknowledge the cauſes ſo remitted to be of eccleſiaſticall cognizance, which were preſidents and judgements for the better aſſurance of eccleſiaſtical judges, that they might afterward hold plea in ſuch caſes, and the like; and were alſo ſome barre as well to the temporall judges themſelves, as alſo to many troubleſome and contentious perſons from either granting or ſeeking prohibitions in ſuch caſes, when ſo it did appeare unto them upon record, that conſultations had been formerly granted in them; they the ſaid temporall judges have now altered that courſe, and doe onely tell us, that they grant their conſultations *certis de cauſis ipſos apud Weſtm' mouentibus*, not expreſſing the ſame particularly, according to their ancient preſidents. By meanes whereof the temporall judges leave themſelves at liberty without prejudice, though they deny a conſultation; at another time upon the ſame matter contentious perſons are animated, finding no cauſe expreſſed, why they may not at another time ſeeke for a prohibition in the ſame cauſe; and the eccleſiaſticall judges are left at large to thinke what they liſt, being no way inſtructed of the nature of the cauſe which procured the conſultation: the reaſon of which alteration in ſuch conſultations, we humbly intreat your lord-

lordſhips, that the judges, for our better inſtruction, may be required to expreſſe.

Anſwer. If we find the declaration upon the ſurmiſe, upon which the prohibition is granted, not to warrant the ſurmiſe, then we forthwith grant a conſultation in that forme which is mentioned, and that matter being mentioned in the conſultation would be very long and cumberſome, and give the eccleſiaſticall court little information, to direct them in any thing thereafter; and therefore in ſuch caſes, for brevity ſake, it is uſuall: but when the matter is to receive end by demurrer in law, or tryall, the conſultation is in another forme. And it is their ignorance in the arches, that will not underſtand this, and we may not ſupply their defects with changing our formes of proceedings, wherein if they would take the advice of any learned in the lawes, they might ſoon receive ſatisfaction.

3. That conſultations may be obtained with leſſe charge and difficulty.

Objection. The great expences and manifold difficulties in obtaining of conſultations are become very burthenſome to thoſe that ſeeke for them; for now a dayes, through the malice of the plaintifes in the temporall courts, and the covetous humours of the clerkes, prohibitions are ſo extended and enlarged, without any neceſſity of the matter (ſome one prohibition containing more words and lines then forty prohibitions in ancient times) as by meanes thereof the party in the eccleſiaſticall court, againſt whom the prohibition is granted, becomes either unwilling, or unable to ſue for a conſultation, it being now uſuall and ordinary, that in the conſultations muſt be recited *in eadem verba* the whole tenour of the prohibition, be it never ſo long; for the which (to omit divers other fees, which are very great) he muſt pay for a draught of it in paper viii. d. the ſheet, and for the entry of it xii. d. the ſheet. Furthermore, the prohibition is quicke and ſpeedy; for it is ordinarily granted out of court by any one of the judges in his chamber, whereas the conſultation is very ſlowly and hardly obtained, not without (oftentimes) coſtly motions in open court, pleadings, demurrers, and ſundry judiciall hearings of both parties, and long attendance for the ſpace of two or three, nay, ſometimes of eight or nine yeares before it be obtained. The inconvenience of which proceedings is ſo intolerable, as we truſt, ſuch as are to grant conſultations will by your lordſhips meanes not onely doe it expeditely, and moderate the ſaid fees; but alſo reforme the length of the ſaid conſultations, according to the formes of conſultations in the Regiſter.

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Anſwer. It were fit the particular cauſe were ſet downe, whereupon the generall grievance, that is mentioned in this article, is grounded; and that done, it may have a full anſwer: for a prohibition is grounded upon the libell, and the conſultation muſt agree therewith alſo; and therefore we doubt not, but the ground of this grievance, when it is well looked into, will grow from themſelves in interlacing of much nugatory and unneceſſary matter in their libells: and for the fees taken; wee aſſure our ſelves, none are taken, but ſuch as are anciently due and accuſtomed; and it will appeare, that we have abridged the fees, and length of pleadings,

and

and uſe no delayes, but ſuch as are of neceſſity, and we wiſh they would doe the like, and upon examination it will appeare of which ſide it growes, that the fees or delayes are ſo intolerable. And where in ancient time ſuch as ſued for tithes, would not ſue but for things queſtionable, and never ſought at their pariſhioners hands their tithes in other kinds then anciently they had been uſed to have been paid; now many turbulent miniſters do infinitely vexe their pariſhioners for ſuch kinds of tithes as they never had, whereby many pariſhes have been much impoveriſhed: and for example, we ſhall ſhew one record, wherein the miniſter did demand ſeventeen ſeverall kinds of tithes, whereupon the partie ſuing a prohibition had eight or nine of them adjudged againſt the miniſter upon demurrer in law, and other paſſed againſt him by tryall, and this muſt of neceſſity grow to a matter of great charge; but where is the fault, but in the miniſter that gave occaſion? and we will ſhew one other record, wherein the party confeſſed to ſome of us, that hee was to ſue his pariſhioner but for a calfe and a gooſe; and that his proctor nevertheleſſe put in the libell or demand of tithes, of ſeven or eight things more then he had cauſe to ſue for: this enlarged the prohibition, and gave occaſion of more expence then needed; and where is the fault of this, but in the eccleſiaſticall courts? and as in theſe, ſo can wee approve in many others; and therefore wee muſt retort the cauſe and ground of this grievance upon themſelves, as more particularly may appeare by the ſeverall preſidents to be ſhewed in this behalfe.

Prohibitions not to be granted upon frivolous ſuggeſtions. 9.

Objection. It it a prejudice and deriſion to both his majeſties eccleſiaſticall and temporall juriſdictions, that many prohibitions are granted upon trifling and frivolous ſuggeſtions, altogether unworthy to proceed from the one, or to give any hinderance or interruption to the other: as upon a ſuit of tithes brought by a miniſter againſt his pariſhioner, a prohibition flyeth out upon ſuggeſtion, that in regard of a ſpeciall receipt, called a cup of buttered beare made by the great ſkill of the ſaid pariſhioner to cure a grievous diſeaſe called a cold, which ſorely troubled the ſaid miniſter, all his tithes were diſcharged. And likewiſe a woman being convented for adultery committed with one that ſuſpicioully reſorted to her houſe in the night time, the ſuggeſtion of a prohibition in this caſe was, that *omnia placita de nocturnis ambulationibus* belong to the king, &c. Alſo where a legatary ſued for his legacy given in a will, the prohibition was, *Quia omnia placita de donis et conceſſionibus ſpectant ad forum regium, et non ad forum eccleſiaſticum, dummodo non ſint de teſtamento et matrimonio*; as if a legacy were not *donatio de* or *in teſtamento*, with many other of like ſort. The reformation of all which frivolous proceedings, ſo chargable notwithſtanding to many poore men, and the great hinderance of juſtice, we humbly referre to your lordſhips conſideration.

Anſwer. We grant none upon frivolous ſuggeſtions, but for the caſe put, it is ridiculous in the miniſter to make ſuch a contract (if any ſuch were) but that maketh not the contract void, but diſcovereth the unworthineſſe of the party that made the ſame, and yet no fault in granting the prohibition; but when it ſhall appeare unto us, that ſuch a matter is ſuggeſted by fraud of any clerke or counceller

at law, we will not remit ſuch offences, but will exclude ſuch attorney from the court, and ſuch councellers from their practice at the barre. And if they will ſuggeſt adultery to one, againſt whom they prove but night-walking, and doe adjudge him for it, we are in ſuch a caſe to prohibite their proceedings: for that is a matter meerly pertinent to the temporall court; ſo, if it appeare hee hath entred the houſe as a thiefe, or a burglarer, and ſo in many other caſes alſo. And if any furmiſe a legacy from the dead, where it was but a promiſe of payment in his life time, in that caſe ſuch a ſuit is to be prohibited: but if in theſe caſes the parties were named, then we might ſee the record, and thereupon be directed to ſhew upon what conſideration theſe prohibitions were granted, otherwiſe wee ſhall thinke that theſe are caſes newly invented.

10. No prohibition to be granted at his ſuit, who is plaintife in the Spirituall Court.

Objection. We ſuppoſe it to be no warrantable nor reaſonable courſe, that prohibitions are granted at the ſuit of the plaintife in the eccleſiaſticall court, who having made choice thereof, and brought his adverſary there into tryall, doth by all intendment of law and reaſon, and by the uſage of all other judiciall places conclude himſelfe in that behalfe; and although he cannot be preſumed to hope for helpe in any other court by way of prohibition, yet it is very uſuall for every ſuch perſon ſo proceeding onely of meere malice for vexation of the party, and to the great delay and hinderance of juſtice, to find favour for the obtaining of prohibitions, ſometimes after two or three ſentences, thereby taking advantage (as he muſt plead) of his owne wrong, and receiving aide from that court, which, by his owne confeſſion, he before did contemne; touching the equity whereof, we will expect the anſwer of the judges.

Anſwer. None may purſue in the eccleſiaſticall court for that which the kings courts ought to hold plea of, but upon information thereof given to the kings courts, either by the plaintife, or by any meere ſtranger, they are to be prohibited, becauſe they deale in that which appertaineth not to their juriſdiction, where if they would be carefull not to hold plea of that which appertaineth not to them, this needed not: and if they will proceed in the kings courts againſt ſuch as purſue in the eccleſiaſticall courts for matter temporall, that is to be inflicted upon them, which the quality of their offence requireth; and how many ſentences howſoever are given, yet prohibitions thereupon are not of favour, but of juſtice to be granted.

11. No prohibition to be granted, but upon due conſideration of the libell.

Objection. It is (we are perſwaded) a great abuſe, and one of the chiefe grounds of the moſt of the former abuſes, and many other, that prohibitions are granted without ſight of the libell in the eccleſiaſticall court; yea, ſometimes before the libell be there exhibited, whereas by the lawes and ſtatutes of this realme (as we thinke) the libell (being a briefe declaration of the matter in debate betweene the plaintife and defendant) is appointed as the only rule and direction for

for the due granting of a prohibition, the reaſon whereof is evident, *viz.* upon diligent conſideration of the libell it will eaſily appeare, whether the cauſe belong to the temporall or eccleſiaſticall cognizance, as on the other ſide without ſight of the libell, the prohibition muſt needs range and roave with ſtrange and forraigne ſuggeſtions at the will and pleaſure of the deviſor, nothing pertinent to the matter in demand: whereupon it cometh to paſſe, that [608] when the judge eccleſiaſticall is handling a matter of ſimony, a prohibition is grounded upon a ſuggeſtion, that the court tryeth *placita de advocationibus eccleſiarum, et de jure patronatus.* And when the libell containeth nothing but the demand of tithe wooll, and lamb, the prohibition ſurmiſeth a cuſtome of paying of tithe pigeons. So that if it may be made a matter of conſcience to grant prohibitions only, where they doe rightly lye, or to preſerve the juriſdiction eccleſiaſticall united to his majeſties crowne, it cannot (we hope) but ſeem neceſſary to your lordſhips, that due conſideration be firſt had of the libell in the eccleſiaſticall court, before any prohibition be granted.

Who hath an advowſion granted to him for money, being ſued Anſwer. for ſimony, ſhall have a prohibition; and it is manifeſt, that though in the libell there appeare no matter to grant a prohibition, yet upon a collaterall ſurmiſe the prohibition is to be granted: as where one is ſued in a ſpirituall court for tithes of *ſilva cædua*, the party may ſuggeſt, that they were groſſe or great trees, and have a prohibition, yet no ſuch matter appeareth in the libell. So if one bee ſued there for violent hands laid on a miniſter by an officer, as a conſtable, hee being ſued there may ſuggeſt, that the plaintife made an affray upon another, and he to preſerve the peace laid hands on him, and ſo have a prohibition. And ſo in very many other like caſes, and yet upon the libell no matter appeareth why a prohibition ſhould be granted: and they will never ſhew, that a cuſtome to pay pigeons was allowed to diſcharge the payment of wooll, lamb, or ſuch like.

No prohibition to be granted under pretence, that one witneſſe cannot be received in the eccleſiaſticall court, to ground a judgement upon. 12.

There is a new deviſed ſuggeſtion in the temporall courts com- Objection. monly received and allowed, whereby they may at their will and pleaſure draw any cauſe whatſoever from the eccleſiaſticall court: for example, many prohibitions have lately come forth upon this ſuggeſtion, that the lawes eccleſiaſticall doe require two witneſſes, where the common law accepteth of one; and therefore it is *contra legem terræ*, for the eccleſiaſticall judge to inſiſt upon two witneſſes to prove his cauſe: upon which ſuggeſtion, although many conſultations have been granted (the ſame being no way as yet able to warrant and maintaine a prohibition) yet becauſe we are not ſure, but that either by reaſon of the uſe of it, or of ſome future conſtruction, it may have given to it more ſtrength then is convenient, the ſame tending to the utter overthrow of all eccleſiaſticall juriſdiction, we moſt humbly deſire, that by your lordſhips good meanes, the ſame may be ordered to be no more uſed.

If the queſtion be upon payment, or ſetting out of tithes, or Anſwer. upon the proofe of a legacy, or marriage, or ſuch like incidence,

we are to leave it to the tryall of their law, though the party have but one witneſſe; but where the matter is not determinable in the eccleſiaſticall court, there lyeth a prohibition either upon, or without ſuch a ſurmiſe.

13. No good ſuggeſtion for a prohibition, that the cauſe is neither teſtamentary, nor matrimoniall.

Objection. As the former device laſt mentioned endevoureth to ſtrike away at one blow the whole eccleſiaſticall juriſdiction; ſo there is another as uſuall, or rather more frequent then the former, which is content to ſpare us two kind of cauſes to deale in, *viz.* teſtamentary, and matrimoniall: and this device inſulteth mightily in many prohibitions, commanding the eccleſiaſticall judge, that be the cauſe never ſo apparently of eccleſiaſticall cogniſance, yet hee ſhall ſurceaſe; for that is neither a cauſe teſtamentary, nor matrimoniall: which ſuggeſtion, as it grew at the firſt upon miſtaking, and omitting the words, *de bonis et catallis*, &c. as may appeare by divers ancient prohibitions in the Regiſter; ſo it will not be denied, but that, beſides thoſe two, divers and ſundry other cauſes are notoriouſly knowne to be of eccleſiaſticall cognizance, and that conſultations are as uſually awarded (if ſuit in that behalfe be proſecuted) notwithſtanding the ſaid ſuggeſtion, as their prohibitions are eaſily granted; which, as an injury, marching with the reſt to wound poore men, protract ſuits, and prejudice the courts eccleſiaſticall, we deſire that the judges will be pleaſed to redreſſe.

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Anſwer. If they obſerve well the anſwer to the former objections, they may be thereby ſatisfied, that we prohibit not ſo generally as they pretend, nor doe in any wiſe deale further then we ought to doe, to the prejudice of that which appertaineth to that juriſdiction; but when they will deale with matters of temporall contracts, coloured with pretended eccleſiaſticall matter, wee ought to prohibit them with that forme of prohibitions, mentioning, that it concerneth not matter of marriage, nor teſtamentary: and they ſhall not find that we have granted any, but by form warranted, both by the Regiſter, and by law: And when ſuggeſtions, carrying matter ſufficient, appeare to us judicially to be untrue and inſufficient, we are as ready to grant conſultations as prohibitions: and we may not alter the forme of our prohibitions upon the conceits of eccleſiaſticall judges, and prohibitions granted in the forme ſet downe in the article, are of that forme which by law they ought to be, and cannot be altered but by parliament.

14. No prohibition upon ſurmiſe onely to be granted, either out of the kings bench, or common pleas, but out of the chancery onely.

Objection. Amongſt the cauſes whereby the eccleſiaſticall juriſdiction is oppreſſed with multitude of prohibitions upon ſurmiſes onely, this hath a chiefe place, in that through incroachment (as wee ſuppoſe) there are ſo many ſeverall courts, and judges in them, that take upon them to grant the ſame, as in the kings bench five, and in the common pleas as many, the one court oftentimes croſſing the proceedings of the other, whereas wee are perſwaded, that all ſuch kinds of prohibitions, being originall writs, ought onely to iſſue out

out of the chancery, and neither out of the kings bench, nor common pleas. And that this hath been the ancient practice in that behalfe, appeareth by some statutes of the realme, and sundry judgements at the common law; the renewing of which practice carrieth with it an apparant shew of great benefit and conveniency, both to the church, and to the subject: for if prohibitions were to issue onely out of one court, and from one man of such integrity, judgement, sincerity, and wisedom, as we are to imagine the lord chancellour of England to be endued with, it is not likely, that he would ever be induced to prejudice and pester the ecclesiasticall courts with so many needlesse prohibitions; or, after a consultation, to send out in one cause, and upon one and the same libell not altered, prohibition upon prohibition, his owne act remaining upon record before him to the contrary. The further consideration whereof, when, upon the judges answer thereunto, it shall be more thoroughly debated, wee must referre to your lordships honourable direction and wisdome.

Answer. A strange presumption in the ecclesiasticall judges, to require that the kings courts should not doe that which by law they ought to doe, and alwayes have done, and which by oath they are bound to doe! and if this shall be holden inconvenient, and they can in discharge of us obtaine some act of parliament to take it from all other courts then the chancery, they shall doe unto us a great ease: but the law of the realme cannot be changed, but by parliament; and what reliefe or ease such an act may worke to the subject, wise men will soone finde out and discerne: but by these articles thus dispersed abroad, there is a generall unbeseeming aspersion of that upon the judges, which ought to have been forborn. [610]

15. No prohibition to be awarded under a false pretence, that the ecclesiasticall judges would hold no plea for customes for tithes.

Objection. Amongst many devices, whereby the cognizance of causes of tithes is drawn from ecclesiasticall judges, this is one of the chiefest, *viz.* concerning the tryall of customes in payment of tithes, that it must be made in a temporall court; for upon a quirke and false suggestion in Edward the fourth his time, made by some sergeants, a conceit hath risen (which hath lately taken greater strength then before) that ecclesiasticall judges will allow no plea of custome or prescription, either in *non decimando*, or *in modo decimandi*; and thereupon, when contentious persons are sued in the ecclesiasticall court for tithes, and doe perceive, that upon good proofe judgement will be given against them, even in their owne pleas, sometimes for customes, doe presently (knowing their own strength with jurors in the country) flie unto Westminster hall, and there suggesting that they pleaded custome for themselves in the ecclesiasticall courts, but could not be heard, doe procure thence very readily a prohibition; and albeit the said suggestion be notoriously false, yet the party prohibited may not bee permitted to traverse the same in the temporall court (directly contrary to a statute made in that behalfe): neither may the judge prohibited proceed without danger of an attachment, though himselfe doe certainly know, either that no such custome was ever alledged before him, or being alledged, that he did receive the same, and all manner of proofes offered

offered thereupon: which courſe ſeemeth the more ſtrange unto us, becauſe the ground thereof laid in Edward the fourth his time, as aforeſaid, was altogether untrue, and cannot with any ſound reaſon be maintained: divers ſtatutes and judgements at the common law doe allow the eccleſiaſticall courts to hold plea of ſuch cuſtomes; all our bookes and generall learning doe therewith concurre, and the eccleſiaſticall courts, both then and ever ſince, even untill this day, have, and ſtill doe admit the ſame, as both by our ancient and recent records it doth and may to any moſt manifeſtly appeare. And beſides, there are ſome conſultations to bee ſhewed in this very point, wherein the ſaid ſurmiſe and ſuggeſtion, that the eccleſiaſticall judges will heare no plea of cuſtomes, is affirmed to be inſufficient in law to maintaine any ſuch prohibition: and therefore we hope, that if we ſhall be able, notwithſtanding any thing the judges ſhall anſwer thereunto, to juſtifie the premiſſes, your Lordſhips will be a meanes, that the abuſes herein complained of, having ſo falſe a ground, may be amended.

Anſwer. The temporall courts have alwayes granted prohibitions as well in caſes *de modo decimandi*, as in caſes upon reall compoſitions, either in diſcharge of tithes, or the manner of tithing: for that *modus decimandi* had his originall ground upon ſome compoſition in that kinde made, and all preſcriptions and compoſitions in theſe caſes are to be tryed at the common law, and the eccleſiaſticall courts ought to be prohibited, if in theſe caſes they had plea of tithes in kind: but if they will ſue in the eccleſiaſticall court *de modo decimandi*, or according to compoſition, then we prohibit them not: and the cauſe why the eccleſiaſticall judges find fault herewith, is, becauſe many miniſters have growne of late more troubleſome to their pariſhioners, then in times paſt; and thereby worke unto theſe courts more commodity, whereas in former ages they were well contented to accept that which was uſed to be paid, and not to contend againſt any preſcription or compoſition; but now they grow ſo troubleſome to their neighbours, as, were it not for the prohibition (as may appeare by the preſidents before remembred) they would ſoone overthrow all preſcriptions and compoſitions that are for tithes, which doth and would breed ſuch a
[511] generall garboile amongſt the people, as were to be pitied, and not to be permitted. And where they ſay, there bee many ſtatutes that take away theſe proceedings from the temporall courts, they are much deceived; and if they looke well unto it, they ſhall find even the ſame ſtatutes (they pretend) to give way unto it. And it is ſtrange they will affirme ſo great an untruth, as to ſay, they are not permitted to traverſe the ſuggeſtion in the temporall court; for both the law and daily practice doth allow it.

16. The cuſtomes for tithes are onely to be tried in the eccleſiaſticall courts, and ought not to be drawne thence by prohibitions.

Anſwer. Although ſome indiſcreet eccleſiaſticall judges, either in the time of king Edward the fourth, or Edward the ſixth, might, againſt law, have refuſed in ſome one cauſe to admit a plea of cuſtome of tithes, to the prejudice of ſome perſon whom he favoured, and might thereby peradventure have given occaſion of ſome one prohibition (but whether they did ſo or no, the ſuggeſtion of a lawyer for his fee is no good proofe) yet foraſmuch as by three ſtatutes made

made ſince that time, wherein it is ordained, *viz.* both that tithes ſhould be truly paid, according to the cuſtome, and the tryall of ſuch payments, according to cuſtome upon any default or oppoſition, ſhould be tryed in the kings eccleſiaſticall courts, and by the kings eccleſiaſticall lawes, and not otherwiſe, or before any other judges then eccleſiaſticall, we moſt humbly deſire your lordſhips, that if according to the ſaid lawes we be moſt ready to heare any plea of cuſtomes your lordſhips would be pleaſed, that the judges may not be permitted hereafter to grant any prohibitions upon ſuch falſe ſurmiſes; or if they ſhall anſwer, that wee miſtake the ſaid ſtatutes, that then the ſaid three ſtatutes may bee throughly debated before your lordſhips, leſt under pretence of a right, which they challenge, to expound theſe kind of ſtatutes, the truth may be over-borne, and poore miniſters ſtill left unto country tryalls, there to juſtifie the right of their tithes before unconſcionable jurors in theſe caſes.

The anſwer to the former article may ſerve for this; and where the objection ſeemeth to impeach the tryall at the common law by jurors, we hold, and ſhall be able to approve it to be a farre better courſe for matter of fact upon the teſtimonie of witneſſes, ſworne *viva voce*, then upon the conſcience of any one particular man, being guided by paper proofes; and we never heard it excepted unto heretofore, that any ſtatute ſhould be expounded by any other then the judges of the land; neither was there ever any ſo much over-ſeen, as to oppoſe himſelfe againſt the practice of all ages to make that queſtion, or to lay any ſuch unjuſt imputation upon the judges of the realme. Anſwer.

No prohibition to be granted, becauſe the treble value of tithes is ſued for in the eccleſiaſticall court. 17.

Whereas it appeareth plainly by the tenour of the ſtatute of Edw. 6. cap. 13. that judges eccleſiaſticall, and none other, are to heare and determine all ſuits of tithes, and other duties for the ſame, which are given by the ſaid act; and that nothing elſe is added to former lawes by that ſtatute, but onely certaine penalties, for example, one of treble value: foraſmuch as the ſaid penalty, being onely deviſed as a meanes to worke the better payment of tithes, and for that there are no words uſed in the ſaid ſtatute to give juriſdiction to any temporall court, we hold it moſt apparant, that the ſaid penalty of treble value, being a duty given in the ſaid ſtatute for non-payment of tithes, cannot bee demanded in the temporall court, but onely before the eccleſiaſticall judges, according to the expreſſe words of the ſaid ſtatute: and the rather, wee are ſo perſwaded, becauſe it is moſt agreeable to all lawes and reaſon, that where the principall cauſe is to bee decided, there all things incident and acceſſary are to bee determined. Beſides, it was the practice of all eccleſiaſticall courts in this realme, immediately after the making of the ſaid ſtatute, and hath continued ever ſince to award treble damages (when there hath been cauſe) without any oppoſition, untill about ten yeares paſt, when, or about which time, notwithſtanding the premiſſes, the temporall judges began to hold plea of treble value, and doe now accompt it ſo proper and peculiar to their juriſdictions, as by colour thereof they admit ſuits originally for the ſaid penalty, and dee make thereby (very Objection. [612]

(very abſurdly) the penalty of treble value to bee principall, which is indeed but the acceſſary; and the cognizance of tithes to bee but the acceſſary, which in all due conſtruction is moſt evident to be the principall, thereby wholly perverting the true meaning and drift of that ſtatute, whereupon if in the ſpirituall court the treble value be now demanded by the libell as a duty, according to that ſtatute, or that ſentence be awarded *directly and ſincerely* upon the ſaid libell, preſently, as contentious perſons are diſpoſed, a prohibition is granted, and ſome ſharp words are further uſed, as if the eccleſiaſticall judges were in ſome further danger for holding of theſe kind of pleas: and therefore we moſt humbly deſire, that if the judges ſhall inſiſt in their anſwers upon ſuch their ſtraining of the ſaid ſtatute, your lordſhips will be pleaſed to heare the ſame further debated by us with them.

Anſwer. If they obſerve well the ſtatute, they ſhall find, that the eccleſiaſticall court is by that ſtatute to hold plea of no more, then that which is ſpecially thereby limited for them to hold plea of; and the temporall court not reſtrained thereby, to hold plea of that which is not limited unto the eccleſiaſticall court by that act, and of that they had juriſdiction of before: and the forfeiture of double value is expreſly limited to be recovered before the eccleſiaſticall judges; but where a forfeiture is given by an act generally not limiting where to be recovered, it is to be recovered in the kings temporall courts, and the cauſe why it is ſo divided, ſeemeth to be for that, where by that act, temporall men were to ſue for their tithes in the eccleſiaſticall court, where it was then preſumed they were to have no great favour: therefore the party grieved might (if he would) purſue for the forfeiture of the treble value in the temporall court, where hee was to recover no tithes; but if he would ſue where he might alſo recover the tithes, then hee would purſue for the double value: for that is ſpecially appointed to be recovered in the eccleſiaſticall court, but not the treble value. And although they alledge, that they ſometimes uſed to maintaine ſuit for the treble value, yet as ſoon as that was complained of to the kings courts, they gave remedy unto it as appertained.

18. No prohibition to be awarded, where the perſon is ſtopped from carrying away of his tithes by him that ſetteth them forth.

Objection. As the ſaid ſtatute of Edward the ſixth laſt mentioned aſſigneth a penalty of treble value, if a man upon pretence of cuſtome, which cannot be juſtified, ſhall take away his corne before he hath ſet out his tithes; ſo alſo in the ſaid ſtatute it is provided, that if any man having ſet out his tithes, ſhall not afterwards ſuffer the parſon to carry them away, &c. he ſhal pay the double value thereof ſo carried away, the ſame to be recovered in the eccleſiaſticall court. Howbeit the clearneſſe of the ſtatute in this point, notwithſtanding meanes are found to draw this cauſe alſo from the eccleſiaſticall court; for ſuch as of hatred towards their miniſters are diſpoſed to vexe them with ſuits at the common law (where they finde more favour to maintaine their wrangling, then they can hope for in the eccleſiaſticall court) will not faile to ſet out their tithes before witneſſes, but not with any meaning or intent that the parſon ſhall ever carry them away; for preſently thereupon they will cauſe their owne ſervants to load them away to their owne

owne barnes, and leave the parſon as he can to ſeek his remedy; which if he do attempt in the eccleſiaſticall court, out cometh a prohibition, ſuggeſting, that upon ſeverance and ſetting forth of the tenth part from the nine, the ſame tenths were preſently by law in the parſons poſſeſſion, and being thereupon become a lay [613] chattell, muſt be recovered by an action of treſpaſſe at the common law, whereas the whole pretence is grounded upon a meere perverting of the ſtatute, which doth both ordain, that all tithes ſhall be ſet forth truly and juſtly without fraud and guile; and that alſo the parſon ſhall not be ſtopped or hindered from carrying them away, neither of which conditions are obſerved when the farmer doth ſet them forth, meaning to carry them away himſelfe (for that is the fraudulent ſetting of them out;) and alſo, when accordingly hee taketh them away to his own uſe; for thereby hee ſtoppeth the parſon to carry them away: and conſequently, the penalty of this offence is to bee recovered in the ſaid eccleſiaſticall courts, according to the words of the ſaid ſtatute, and not in any court temporall: wherefore we moſt humbly deſire your lordſhips, that either the judges may make it apparant to your lordſhips, that we miſlike this ſtatute in this point, or that our eccleſiaſticall courts may ever hereafter be freed from ſuch kinds of prohibitions.

Anſwer. For the matter of this article it is anſwered before, and where the truth of the caſe is, that he that ought to pay prediall tithes, doth not divide out his tithes, or doth in any wiſe interrupt the parſon or his deputy, to ſee the dividing or ſetting of them out: that appearing unto us judicially, we maintain no prohibition upon any ſuit there for the double value, but if after the tithes ſevered, the parſon will ſell the tithes to the party that divided them, upon the ſurmiſe thereof, we doe, and ought to grant a prohibition; but if that ſurmiſe doe prove untrue, we do as readily grant a conſultation, and the party ſeeking the ſame, is, according to the ſtatute, to have his double coſts and damages.

No prohibition to be granted upon any incident plea in an eccleſiaſticall cauſe. 19.

Objection. We conceive it to be great injury to his majeſties eccleſiaſticall juriſdiction, that prohibitions are awarded to his eccleſiaſticall courts upon every by, and every incident plea or matter alledged there in barre, or by way of exception, the principall cauſe being undoubtedly of eccleſiaſticall cognizance: for example, in ſuit for tithes in kind, if the limits of the pariſh, agreements, compoſitions, and arbitraments, as alſo whether the miniſter that ſueth as parſon, be indeed parſon or vicar, doe come in debate by way of barre, although the ſame particulars were of temporall cognizance (as ſome of them wee may boldly ſay are not) yet they were in this caſe examinable in the eccleſiaſticall court, becauſe they are matters incident, which come not in that caſe finally to be ſentenced and determined, but are uſed as a meane and furtherance for the deciſion of the maine matter in queſtion. And ſo the caſe ſtandeth in other ſuch incident pleas by way of barre; for otherwiſe either party in every cauſe might at his pleaſure, by pleading ſome matter temporall by way of exception, make any cauſe eccleſiaſticall whatſoever ſubject to a prohibition, which is contrary to the reaſon of the common law, and ſundry judgements thereupon given,

given, as wee hope the judges themſelves will acknowledge, and thereupon yeeld to have ſuch prohibitions hereafter reſtrained.

Anſwer. Matters incident that fall out to be meere temporall, are to be dealt withall in the temporall, and not in the eccleſiaſtical court, as is before particularly ſet downe in the eleventh article.

20. That no temporall judges, under colour of authority to interpret ſtatutes, ought, in favour of their prohibitions, to make cauſes eccleſiaſticall to be of temporall cognizance.

Objection. Although of late dayes it hath been ſtrongly held by ſome, that the interpretation of all ſtatutes whatſoever doe belong to the judges temporall, yet we ſuppoſe, by certain evil effects, that this
[614] opinion is to bee bounded within certaine limits; for the ſtrong conceit of it hath already brought forth this fruit, that even thoſe very ſtatutes which doe concerne matters meerly eccleſiaſticall, and were made of purpoſe with great caution, to preſerve, enlarge, and ſtrengthen the juriſdiction eccleſiaſticall, have been by colour thereof turned to the reſtraining, weakening, and utter overthrow of the ſame, contrary to the true intent and meaning of the ſaid ſtatutes: as for example (beſides the ſtrange interpretation of the ſtatutes before mentioned, for the payment of tithes) when parties have been ſued in the eccleſiaſtical courts, in caſe of an inceſtuous marriage, a prohibition hath been awarded, ſuggeſting, under pretence of a ſtatute in the time of king Hen. 8. that it appertaineth to the temporall courts, and not to the eccleſiaſticall, to determine what marriages are lawfull, and what are inceſtuous by the word of God. As alſo a miniſter, being upon point of deprivation for his inſufficiency in the eccleſiaſticall court, a prohibition was granted, upon ſuggeſtion that all pleas of the fitneſſe, learning, and ſufficiency of miniſters belong only to the kings temporall courts, relying, as wee ſuppoſe, upon the ſtatute of 13 Eliz. by which kind of interpretation of ſtatutes, if the naming, diſpoſing, or ordering of cauſes eccleſiaſticall in a ſtatute ſhall make the ſame to be of temporal cognizance, and ſo aboliſh the juriſdiction of the eccleſiaſticall court, without any further circumſtances, or expreſſe words to warrant the ſame, it followeth, that foraſmuch as the common book and articles of religion are eſtabliſhed and confirmed by ſeverall acts of parliament, the temporall judges may challenge to themſelves an authority to end and determine of all cauſes of faith and religion, and to ſend out their prohibitions, if any eccleſiaſticall judge ſhall deale or proceed in any of them: which conceit, how abſurd it is, needeth no proofe, and teacheth us, that when matters meerly eccleſiaſticall are comprized in any ſtatute, it doth not therefore follow, that the interpretation of the ſaid matters doth belong to the temporall judges, who by their profeſſion, and as they are judges, are not acquainted with that kind of learning: hereunto, when we ſhall receive the anſwer of the judges, we ſhall be ready to juſtifie every part of this article.

Anſwer. If any ſuch have ſlipt, as is ſet downe in this article, without other circumſtances to maintaine it, we make no doubt, but when that appeared to the kings temporall court, it hath been preſently remitted; and yet there be caſes, that we may deale both with marriages and matters of deprivation, as where they will call the marriage in queſtion after the death of any of the parties, the

marriage

marriage may not then be called in queſtion, becauſe it is to baſtard and diſinherit the iſſues, who cannot ſo well defend the marriage, as the parties both living themſelves might have done; and ſo is it, if they will deprive a miniſter not for matter appertaining to the eccleſiaſticall cognizance, but for that which doth meerly belong to the cognizance of the kings temporall courts. And for the judges *expounding of ſtatutes that concerne the eccleſiaſticall* government or proceedings, it belongeth unto the temporall judges; and wee thinke they have been expounded as much to their advantage, as either the letter or intention of lawes would or could allow of. And when they have been expounded to their liking, then they could approve of it; but if the expoſition be not for their purpoſe, then will they ſay, as now they doe, that it appertaineth not unto us to determine of them.

That perſons impriſoned upon the writ of *de excommunicato capiendo* are unduly delivered, and prohibitions unduly awarded for their greater ſecurity. 21.

Foraſmuch as impriſonment upon the writ of *excommunicato capiendo* is the chiefeſt temporall ſtrength of eccleſiaſticall juriſdiction, and that by the lawes of the realm none ſo committed for their contempt in matters of eccleſiaſticall cognizance, ought to be delivered untill the eccleſiaſticall courts were ſatisfied, or caution given in that behalfe, we would gladly be reſolved by what authority the temporall judges do cauſe the ſherifes to bring the ſaid parties into their courts, and by their owne diſcretions ſet them at liberty, without notice thereof firſt given to the eccleſiaſticall judges, or any ſatisfaction made either to the parties at whoſe ſuit he was impriſoned, or the eccleſiaſticall court, where certaine lawfull fees are due: and after all this, why doe they likewiſe ſend out their prohibitions to the ſaid court, commanding, that all cenſures againſt the ſaid parties ſhall be remitted, and that they be no more proceeded with for the ſame cauſes in thoſe courts. Of this our deſire, we hope your lordſhips do ſee ſufficient cauſe, and will therefore procure us from the judges ſome reaſonable anſwer. Objection. [615]

We affirme, if the party excommunicate be impriſoned, wee ought upon complaint to ſend the kings writ for the body and the cauſe, and if in the returne no cauſe, or no ſufficient cauſe appeare, then we doe (as we ought) ſet him at liberty; otherwiſe, if upon removing the body, the matter appeare to be of eccleſiaſticall cognizance, then we remit him againe; and this we ought to doe in both caſes; for the temporall courts muſt alwaies have an eye, that the eccleſiaſticall juriſdiction uſurp not upon the temporall. Anſwer.

The kings authority in eccleſiaſticall cauſes is greatly impugned by prohibitions. 22.

We are not a little perplexed touching the authority of his majeſtie in cauſes eccleſiaſticall, in that we find the ſame to be ſo impeached by prohibitions, that it is in effect thereby almoſt extinguiſhed; for it ſeemeth, that the innovating humour is growne ſo rank, and that ſome of the temporall judges are come to be of opinion, that the commiſſioners appointed by his majeſty for his cauſes Objection.

cauſes eccleſiaſticall (having committed unto them the execution of all eccleſiaſticall juriſdiction annexed to his majeſties imperiall crowne, by virtue of an act of parliament made in that behalfe, and according to the tenour and effect of his majeſties letters patents, wherein they are authoriſed to impriſon, and impoſe fines, as they ſhall ſee cauſe) cannot otherwiſe proceed, the ſaid act and letters patents notwithſtanding, then by eccleſiaſticall cenſures onely: and thereupon of latter dayes, whereas certaine lewd perſons (two for example ſake) one for notorious adultery and other intolerable contempts, and another for abuſing of a biſhop of this kingdome with threatning ſpeeches, and ſundry railing termes (no way to be endured) were thereupon fined and impriſoned by the ſaid commiſſioners, till they ſhould enter into bonds to performe further orders of the ſaid court; the one was delivered by an *habeas corpus* out of the kings bench, and the other by a like writ out of the common pleas: and ſundry other prohibitions have been likewiſe awarded to his majeſties ſaid commiſſioners upon theſe ſuggeſtions, *viz.* that they had no authority either to fine or impriſon any man; which innovating conceit being added to this that followeth, That the writ of *de excommunicato capiendo* cannot lawfully be awarded upon any certificate or *ſignificavit* made by the ſaid commiſſioners, wee find his majeſties ſaid ſupreme authority in cauſes eccleſiaſticall (ſo largely amplified in ſundry ſtatutes) to be altogether deſtitute in effect of any meanes to uphold it, if the ſaid proceedings by temporall judges ſhall be by them maintained and juſtified; and therefore wee moſt humbly deſire your lordſhips, that they may declare themſelves herein, and be reſtrained hereafter (if there be cauſe found) from uſing the kings name in their prohibitions, to ſo great prejudice of his majeſties ſaid authority, as in debating the ſame before your lordſhips will hereafter more fully appeare.

Anſwer. We doe not, neither will we in any wiſe impugne the eccleſiaſticall authority in any thing that appertaineth unto it; but if any by the eccleſiaſticall authority commit any man to priſon, upon complaint unto us that he is impriſoned without juſt cauſe, we are to ſend to have the body, and to be certified of the cauſe; and if [616] they will not certifie unto us the particular cauſe, but generally, without expreſſing any particular cauſe, whereby it may appeare unto us to be a matter of the eccleſiaſticall cognizance, and his impriſonment be juſt, then we doe and ought to deliver him: and this is their fault, and not ours. And although ſome of us have dealt with them to make ſome ſuch particular certificate to us, whereby wee may bee able to judge upon it, as by law they ought to doe, yet they will by no meanes doe it; and therefore their errour is the cauſe of this, and no fault in us: for if we ſee not a juſt cauſe of the parties impriſonment by them, then we ought, and are bound by oath to deliver him.

23. No prohibition to be granted, under pretence to reforme the manner of proceedings by the eccleſiaſticall lawes, in cauſes confeſſed to be of eccleſiaſticall cognizance.

Objection. Notwithſtanding that the eccleſiaſticall juriſdiction hath been much impeached heretofore through the multitude of prohibitions, yet the ſuggeſtions in them had ſome colour of juſtice, as pretending,

pretending, that the judges eccleſiaſticall dealt with temporall cauſes: but now, as it ſeemeth, they are ſubject to the ſame controlments, whether the cauſe they deale in be either eccleſiaſticall or temporall, in that prohibitions of late are wreſtled out of their owne proper courſe, in the nature of a writ of errour, or of an appeale: for, whereas the true and onely uſe of a prohibition is to reſtraine the judges eccleſiaſticall from dealing in a matter of temporall cognizance, now prohibitions are awarded upon theſe ſurmiſes, *viz.* that the libell, the articles, the ſentence, and the eccleſiaſticall court, according to the eccleſiaſticall lawes, are grievous and inſufficient, though the matter there dealt withall be meerly eccleſiaſticall: and by colour of ſuch prohibitions, the temporall judges to alter and change the decrees and ſentences of the judges eccleſiaſticall, and to moderate the expences taxed in the eccleſiaſticall courts, and to award conſultations upon conditions: as for example, that the plaintife in the eccleſiaſticall court ſhall except of the one halfe of the coſts awarded, and that the regiſter ſhall loſe his fees; and that the ſaid plaintife ſhall be contented with the payment of his legacy, which was the principall ſued for, and adjudged due unto him at ſuch day, as they the ſaid temporall judges ſhall appoint, or elſe the prohibition muſt ſtand. And alſo where his majeſties commiſſioners, for cauſes eccleſiaſticall, have not been accuſtomed to give a copy of the articles to any party, before he hath anſwered them; and that the ſtatute of Hen. 5. touching the delivering of the libell, was not onely publikely adjudged in the kings bench, not to extend to the deliverance of articles, where the party is proceeded with *ex officio*, but likewiſe imparted to his majeſtie, and afterwards divulged in the ſtarre-chamber, as a full reſolution of the judges, yet within 4 or 5 moneths after, a prohibition was awarded to the ſaid commiſſioners out of the kings bench, upon ſuggeſtion, that the party ought to have a copy of the articles, being called in queſtion *ex officio*, before he ſhould anſwer them; and notwithſtanding that a motion was made in full court ſhortly after for a conſultation, yet an order was entred, that the prohibition ſhould ſtand untill the ſaid partie had a copy of the ſaid articles given him; which novell and extraordinary courſes doe ſeem very ſtrange unto us, and are contrary not onely to the whole courſe of his majeſties lawes eccleſiaſticall, but alſo to the very maximes and judgement of the common law, and ſundry ſtatutes of this realme, as wee ſhall be ready to juſtifie before your lordſhips, if the judges ſhall endeavour to maintaine theſe their proceedings.

To this we ſay, that though where parties are proceeded withall *ex officio*, there needeth no libell, yet ought they to have the cauſe made knowne unto them for which they are called *ex officio*, before they be examined, to the end it may appeare unto them before their examination, whether the cauſe be of eccleſiaſticall cognizance, otherwiſe they ought not to examine them upon oath. And touching the reſt of this article, they doe utterly miſtake it. Anſwer.

That temporall judges are ſworne to defend the eccleſiaſticall juriſdiction. [617] 24.

We may not omit to ſignifie unto your lordſhips, that (as wee take it) the temporall judges are not onely bound by their ancient oath, Objection.

oath, that they ſhall doe nothing to the dis-heriſon of the crown, but alſo by a latter oath unto the kings ſupremacy, wherein they doe ſweare, that, to their power, they will aſſiſt and defend all juriſdictions, priviledges, preheminences, and authorities united and annexed to the imperiall crowne of this realme; in which words the eccleſiaſticall juriſdiction is ſpecially aimed at: ſo that whereas they doe oftentimes inſiſt upon for their oath, for doing of juſtice in temporall cauſes, and do ſeldome make mention of the ſecond oath taken by them for the defence of the eccleſiaſticall juriſdiction, with the rights and immunities belonging to the church; we think, that they ought to weigh their ſaid oaths better together, and not ſo farre to extend the one, as that it ſhould in any ſort prejudice the other: the due conſideration whereof (which we moſt inſtantly deſire) would put them in mind (any ſuggeſtion to the contrary notwithſtanding) to be as carefull not to doe any thing that may prejudice the lawfull proceedings of the eccleſiaſticall judges in eccleſiaſticall cauſes, as they are circumſpect not to ſuffer any impeachment, or blemiſh of their owne juriſdictions and proceedings in cauſes temporall.

Anſwer. We are aſſured, that none can juſtly charge any of us with violating our oaths, and it is a ſtrange part to taxe judges in this manner, and to lay ſo great an imputation upon us; and what ſcandall it will be to the juſtice of the realme to have ſo great levity, and ſo foule an imputation laid upon the judges, as is done in this, is too manifeſt. And we are aſſured it cannot be ſhewed, that the like hath been done in any former age; and for leſſe ſcandals then this of the juſtice of the realme, divers have been ſeverely puniſhed.

25. That excommunication is as lawfull, as prohibition, for the mutuall preſervation of both his majeſties ſupreme juriſdiction.

Objection. To conclude, whereas for the better preſerving of his majeſties two ſupreme juriſdictions before mentioned, *viz.* the eccleſiaſticall and the temporall, that the one might not uſurp upon the other, two meanes heretofore have of ancient time been ordained, that is to ſay, the cenſure of excommunication, and the writ of prohibition; the one to reſtraine the incroachment of the temporall juriſdiction upon the eccleſiaſticall, the other of the eccleſiaſticall upon the temporall, we moſt humbly deſire your lordſhips, that by your meanes the judges may be induced to reſolve us, why excommunications may not as freely be put in ure for the preſervation of the juriſdiction eccleſiaſticall, as prohibitions are, under pretence to defend the temporall, eſpecially againſt ſuch contentious perſons, as doe wittingly and willingly, upon falſe and frivolous ſuggeſtions, to the delay of juſtice, vexation of the ſubjects, and great ſcandall of eccleſiaſticall juriſdictions, daily procure, without feare either of God or men, ſuch undue prohibitions, as we have heretofore mentioned.

Anſwer. The excommunication cannot be gain-ſaid, neither may the prohibition be denied upon the ſurmiſe made, that the matter purſued in the eccleſiaſticall court is of temporall cognizance, but as ſoon as that ſhall appeare unto us judicially to be falſe, we grant the conſultation.

For

For the better ſatisfaction of his majeſty, and your lordſhips, touching the objections delivered againſt prohibitions, we have thought good to ſet downe (as may be perceived by that which hath been ſaid) the ordinary proceeding in his majeſties courts therein; whereby it may appeare both what the judges doe, and ought to doe in thoſe cauſes; and the eccleſiaſticall judges may doe well to conſider, what iſſue the courſe they herein hold can have in the end: and they ſhall find it can be no other, but to caſt a ſcandall upon the juſtice of the realme; for the judges doing but what they ought, and by their oaths are bound to doe, it is not to be called in queſtion: and if it fall out, that they erre in judgement, it cannot otherwiſe be reformed, but judicially in a ſuperiour court, or by parliament. [618]

Subſcribed by all the judges of England, and the barons of the exchequer, Paſch. 4 *Jacobi*, and delivered to the lord chancellour of England.

Which anſwers and reſolutions, although they were not enacted by authority of parliament, as our ſtatute of *Articuli Cleri* in 9 E. 2. was; yet, being reſolved unanimouſly by all the judges of England, and barons of the exchequer, are for matters in law of higheſt authority next unto the court of parliament.

Magna eſt veritas, et prevalet.

But now we will peruſe the preamble, and after every chapter in order, and proceed to the expoſition of the ſame; which office the clergy claimed, *viz.* to interpret all ſtatute lawes concerning the clergy; but it was reſolved by all the judges of England, that the interpretation of all ſtatutes concerning the clergy, being parcell of the lawes of the realme, doe belong to the judges of the common law.

Artic' Cleri. 3 Jac. ad artic. 20.

EDWARDUS Dei gratia rex Angliæ, &c. omnibus ad quos præſentes literæ pervenerint, ſalutem. Sciatis quod cum dudum, temporibus progenitorum noſtrorum quondam regum Angliæ, in diverſis parliamentis ſuis (1); *et ſimiliter poſtquam regni noſtri gubernacula ſuſcepimus, in parliamentis noſtris* (2), *per prælatos, et clerum* (4) *regni noſtri plures articuli continentes gravamina aliqua eccleſiæ Anglicanæ, et ipſis prælatis et clero illata (ut in eiſdem aſſerebatur) porrecti fuiſſent, et cum inſtantia ſupplicatum, ut inde apponeretur remedium opportunum: ac nuper in parliamento noſtro apud Lincoln', anno regni noſtri ix.* (3) *articulos ſubſcriptos, et quaſdam reſponſiones ad aliquos eorum prius factas, coram concilio noſtro recitari, ac quaſdam reſponſiones corrigi, et cæteris*

THE king to all to whom, &c. ſendeth greeting. Underſtand ye, That whereas of late times of our progenitors ſometimes kings of England, in divers their parliaments, and likewiſe after that we had undertaken the governance of the realm, in our parliaments many articles containing divers grievances (committed againſt the church of England, the prelates and clergy) were propounded by the prelates and clerks of our realm; and further, great inſtance was made that convenient remedy might be provided therein: and of late in our parliament holden at Lincoln, the ninth year of our reign, we cauſed the articles underwritten, with certain anſwers made to ſome of them heretofore, to be rehearſed before our council, and made certain anſwers

teris articulis subscriptis per nos, et dictum concilium nostrum fecerimus responderi: quorum quidem articulorum et responsionum tenores subsequuntur in hunc modum.

to be corrected; and to the residue of the articles underwritten, answers were made by us and our council; of which said articles, with the answers of the same, the tenors here ensue.

(1) *Cum dudum temporibus progenitorum nostrorum, &c. in diversis parliamentis.*] That is, in the said parliament holden *anno* 51 H. 3. *Articuli Cleri*, and of the said acts in the raigne of E. 1. called *probibitio formata super Artic' Cleri*, and *Articuli contra prohibitionem regiam*, which have been cited before.

Rot. parl. 5 E. 2. m. 3. & 8 E. 2.

(2) *In parliamentis nostris.*] *Viz.* 5 E. 2. & 8 E. 2.

(3) *Ac nuper in parliamento nostro apud Lincoln' anno regni nostri nono.*] There were two parliaments holden in this ninth yeare, *viz.* the one at Lincolne, 15 Hill. mentioned in this preamble; and the other, 15 Pasch' *anno nono* at Westminster: and as one saith, *Merito in parliamento conquesti sunt, quia lex Angliæ sine parliamento mutari non potest.*

[619]

Vid. artic' Cler' anno 3 Jacobi regis ad artic' 1. & 13.

And note well what is said there, *viz.* what the law doth warrant in cases of prohibition, to keep every jurisdiction in his true limits, cannot be altered but by parliament.

Vid. ubi supra ad artic' 3. Vid. ad artic' 10. 21.

(4) *Per prælatos et clerum*, &c.] In these parliaments complaint was made by the clergy onely; but the kings courts, that may award prohibitions, being informed by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall doe hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgement and execution, as before; and so resolved by all the judges of England, and barons of the exchequer, agreeable to make authorities in law.

CAP. I.

INPRIMIS laici impetrant prohibitiones in genere super decimis, obventionibus, oblationibus, mortuariis, redemptionibus penitentiarum, violenta manuum injectione in clericum vel conversum, et in causa diffamationis: in quibus casibus agitur ad pœnam canonicam imponendum: rex ad istum articulum respondit, quod in decimis, oblationibus, obventionibus, mortuariis, quando sub istis nominibus proponuntur, prohibitioni regiæ non est locus; etiamsi, propter detentionem istorum diuturnam, ad æstimationem eorundem pecuniariam veniatur. Sed si clericus, vel religiosus decimas suas in horreo suo con-

FIRST, whereas lay-men do purchase prohibitions generally upon tythes, obventions, oblations, mortuaries, redemption of penance, violent laying hands on clerks or converts, and in cases of defamation, in which cases spiritual penance ought to be enjoined; the king doth answer to this article, that in tythes, oblations, obventions, mortuaries (when they are propounded under these names) the king's prohibition shall hold no place, although for the long withholding of the same the money may be esteemed at a sum certaine. But if a clerk or a religious man

congregatas, vel alibi existentes vendiderit alicui pro pecunia: si petatur pecunia coram judice ecclesiastico, locum habet regia prohibitio, quia per venditionem res spirituales fiunt temporales, et transeunt decimæ in catalla.

man do sell his tythes being gathered in his barn, or otherwise, to any man for money, if the money be demanded before a spiritual judge, the king's prohibition shall lie; for by the sale the spiritual goods are made temporal, and the tythes turned into chattles.

(8 Ed. 4. 13. Cro. El. 753. 12 Rep. 29. 13 Rep. 41. Rast. 484, &c.)

Of these sufficient hath been said in the exposition upon the statute of *Circumspecte agatis:* whereunto we referre the reader; only this wee may adde (which wee have reserved to this place) the resolution of all the judges of England to the 5. 8. 15, 16. 18. articles in *Artic' Cleri*, 3 *Jacobi regis*, in many cases concerning tithes, &c.

CAP. II.

ITEM si sit contentio de jure decimarum, originem habens de jure patronatus, et earundem decimarum quantitas ascendat ad quartam partem bonorum ecclesiæ, locum habeat regia prohibitio, si hæc causa coram judice ecclesiastico ventilet'. Item, si prælatus imponat pœnam pecuniariam alicui pro peccato (1), *et repetat illam, regia prohibitio locum habet.*

[620] *Veruntamen, si prælati imponant pœnitentias corporales, et sic puniti velint hujusmodi pœnitentias per pecuniam redimere sponte, non habet locum regia prohibitio, si coram prælatis pecunia ab eis exigatur.*

ALSO if debate do arise upon the right of tythes, having his original from the right of the patronage, and the quantity of the same tythes do come unto the fourth part of the goods of the church, the king's prohibition shall hold place, if the cause come before a judge spiritual. Also if a prelate enjoin a penance pecuniary to a man for his offence, and it be demanded, the king's prohibition shall hold place. But if prelates enjoine a penance corporal, and they which be so punished will redeem upon their own accord such penances by money, if money be demanded before a judge spiritual, the king's prohibition shall hold no place.

(Co. 465. Regist. 35.)

This is intended of the kings writ of *indicavit*, whereof, and of the tryall of the right of tithes at the common law, we have spoken sufficiently for the understanding of this branch of this act, in the exposition of the statute of W. 2. cap. 5. *versus finem*, and the statute of *circumspecte agatis*, &c.

Vid. Registr. 48, &c.

(1) *Item, si prælatus imponat pœnam pecuniariam alicui pro peccato*, &c.] For the understanding hereof, wee referre the reader to the exposition upon the statute of *Circumspecte agatis*, where sufficient hath been said of this matter.

CAP. III.

INSUPER, ſi aliquis violentas manus injecerit in clericum, pro violentia facta debet emendari coram rege: pro excommunicatione vero, coram prælato, ubi imponatur pœnitentia corporalis; quod ſi reus velit ſponte per pecuniam redimere, dand' prælato vel læſo, poteſt repeti coram prælato: nec in talibus regia prohibitio locum habet.

MOREOVER, if any lay violent hands on a clerk, the amends for the peace broken ſhall be before the king, and for the excommunication before a prelate, that penance corporal may be enjoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it ſhall be required before the prelate, and the king's prohibition ſhall not lie.

(Regiſt. 51, 52. 57.)

For this matter, we referre the reader to the ſtatute of *Circumſpecte agatis*: to that we adde the reſolution of all the judges of England touching this matter, *ad Artic'* 6. & 11. *in Articulis Cleri*, 3 *Jacob.* which you may reade before, ſince we began with this ſtatute.

And here it is to be noted, that where the article of the clergy, cap. 1. *de violenta manuum injectione in clericum vel converſum*, anſwer is made to the clerke, but no anſwer is made at all to the convert.

CAP. IV.

IN aſſumationibus etiam corrigant prælati ſupradicto modo, regia prohibitione non obſtante, primo injungendo pœnam corporalem: quam ſi reus velit redimere libere, percipiat prælatus pecuniam, licet regia prohibitio porrigatur.

IN defamations alſo prelates ſhall correct in manner aboveſaid, the king's prohibition notwithſtanding; firſt injoyning a penance corporal, which if the offender will redeem, the prelate may freely receive the money, though the king's prohibition be ſhewed.

(4 Rep. 20. Regiſt. 49. Raſt. 487, &c.)

Hereof alſo ſufficient hath been ſaid in the expoſition upon the ſtatute of *Circumſpecte agatis*.

CAP.

CAP. V.

ITEM, si aliquis in fundo suo molendinum erexit de novo, et postea à rectore loci exigatur decima de eodem, exhibetur regia prohibitio sub hac forma:

ALSO if any do erect in his ground a mill of new, and after the parson of the same place demandeth tithe for the same, the king's prohibition doth issue in this form:

Quia de tali molendino hactenus decimæ non fuerunt solutæ, prohibemus, &c. et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omnino.

Responsio: In tali casu nunquam exivit regia prohibitio de principis voluntate (1), *qui et decernit talem perpetuo non exire.*

The answer. In such case the king's prohibition was never granted by the king's assent, nor never shall, which hath decreed that it shall not hereafter lie in such cases.

See hereafter the exposition of the statute of 2 E. 6. cap. 17. verb. by the lawes of the realme. Vid. inter leges Edwardi regis, cap. 8. fo. 128. (1 Roll, 405. 2 Roll, 84.)

The forme of this prohibition is justly condemned, for that the substance of it was a *non decimando*, because the mill was newly erected; but yet hereby, and by our bookes it appeareth, that some tithe or other is due for a mill, be it new, or old.

But this is (as some doe hold) a personall [a] tithe, coming from the gaine of the miller, by his industry and labour: as of a fisherman of the tithe of his gain by fishing, called *decimæ de piscationibus*, or the like.

The words are generall, *molendinum erexit*, and doe extend to all kind of mills, as private mills, and to publike, as to fulling mills, paper mills, &c. whereof there is no tithe to bee paid, but personall, if any bee; which is a good proofe (say they) that so it ought to be of corne mills; and if the parson should have the tenth toll-dish, then should he have not onely tithe corne, but also tithe of the same corne ground at the mill, and so a double tithe, which he shall not have of a fulling mill, paper mill, &c. No tithe shall be demanded of the rawyn, or after-pasture, or of stubble, because the parson shall not have a double tithe of one and the same thing in one yeare. If the parson hath tithe of fruit that groweth on fruit-trees, and in the same yeare the owner fell downe the fruit-trees, and make billets or fagots of them, he shall have no tithe of them, as it was holden Hill. 8 Jacob. Rot. 1109. *in communi banco, inter* Baxter & Hopes.

[b] Every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of persons, and in such places, as heretofore, within 40 yeares, before the statute of 2 E. 6. have accustomably used to pay such personall tithes, or of right ought to pay, other then such as be common day-labourers, shall yearly, before the feast of Easter, pay for his personall

See 2 E. 6. c. 13. every person shall justly, &c. set out, yeeld, and pay all predial tithes in their proper kind, as they rise, and happen, &c. which (say they) cannot be applyed to the taking of the toll-dish. Registr. 48. b. F.N.B 51. h.

[a] Rot. claus. 7 E. 2. Decimæ de molendino Ewell. Mich. 8 & 9 H. 3. coram rege, rot. 6. See Linwood, tit. de Decimis, fol. 141, 142. Mich. 9 & 10 H. 3. coram rege, rot. 15 Jo. Fitzroberts case.

[b] 2 E. 6. cap. 13.

ſonall tithes the tenth part of his cleare gaines, his charges and expences, according to his eſtate, condition, or degree, to be therein abated, allowed, or deducted, &c. And the ordinary hath power to call the parties before him, and to examine them by all lawfull and reaſonable meanes, other then upon oath, concerning the true payment of perſonall tithes.

Nota, in this deſcription of perſonall tithes, the words be, clothing, handicraft, or other art and faculty; within which generall words, the millers of fulling mills, rape mills, corne mills, and other mills be included; for a miller is of an art and faculty.

* Mich. 25 & 26 El. rot. 2617. in communi banco. Mich. 29 & 30 Eliz. rot. 254. Nicholas Muſſels caſe, ibid. Vid. lib. 11. fol. 48, 49. & 81.

Exigatur decima.] Some do hold, that the parſon ſhall have the tenth toll-dith, as a prediall tithe.

* He that deſireth to reade more concerning this matter, let him ſearch for two records of prohibitions in the court of common pleas, in the raigne of the late queen Elizabeth.

[622]

Note, that in many caſes the common law and the canon law differ concerning the payment of tithes; the common law adjudging many things not tithable, which by the canon law ought to pay tithes: and this caſe of tithes of mills was never (that I know) judicially determined.

See the expoſition of the ſtatute of *Circumſpecte agatis*, *verbo Conſuet'*.

(1) *De principis (i. regis) voluntate.*] *i. Curiæ regis, in qua rex ſive princeps repræſentatur.*

CAP. VI.

ITEM, ſi aliqua cauſa, vel negotium, cujus cognitio ſpectat ad forum eccleſiaſticum, et coram eccleſiaſtico judice fuerit ſententialiter terminatum, et tranſierit in rem judicatam (1), *nec per appellationem fuerit ſuſpenſum, et poſtmodum coram judice ſeculari, ſuper eadem re inter eaſdem perſonas quæſtio moveatur, et probetur per teſtes vel inſtrumenta, talis exceptio in foro ſeculari non admittatur. Reſponſio: Quando eadem cauſa diverſis rationibus* (2) *coram judicibus eccleſiaſticis et ſecularibus ventilatur, ut ſupra patet de injectione violentarum manuum in clericum, dicunt quod (non obſtante eccleſiaſtico judicio) curia regis ipſum tractat negotium, ut ſibi expedire videtur.*

ALSO if any cauſe or matter, the knowledge whereof belongeth to a court ſpiritual, and ſhall be definitively determined before a ſpiritual judge, and doth paſs into a judgement, and ſhall not be ſuſpended by an appeal; and after, if upon the ſame thing a queſtion is moved before a temporal judge between the ſame parties, and it be proved by witneſs or inſtruments, ſuch an exception is not to be admitted in a temporal court. The anſwer. When any one caſe is debated before judges ſpiritual or temporal (as above appeareth upon the caſe of laying violent hands on a clerk) it is thought, that notwithſtanding the ſpiritual judgement, the king's court ſhall diſcuſs the ſame matter as the party ſhall think expedient for himſelf.

(4 Rep. 16. 20.)

(1) *Fuerit*

(1) *Fuerit ſententialiter terminatum, et tranſierit in rem judicatam,* &c.] The like article was preferred 3 Jac. and anſwered and reſolved by all the judges of England, which you may reade there, and need not here to be rehearſed. Art. Cleri, 3. Jac. ad artic' 21.

(2) *Diverſis rationibus.*] For the ſpirituall judges proceedings are for the correction of the ſpirituall inner man, and, *pro ſalute animæ*, to injoyne him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done: as if one lay violent hands of a clerke, the ſpirituall judge, *pro ſalute animæ*, ſhall injoyne him penance, and the clerke may have his action of battery, and recover damages for the injury done to him; and ſo in the caſe of uſury, and the like: ſo as this act ſaith well, that *eadem cauſa diverſis rationibus coram judicibus eccleſiaſticis et ſecularibus ventilatur*; and therefore this article of the clergy was deſervedly rejected.

CAP. VII.

*ITEM, litera regia ordinariis dirigitur, qui aliquos ſuos ſubditos excommunicationis vinculo innodarunt, quod eos abſolvant infra certum diem; aliquin quod compareant reſponſur' quare eos excommunicaverunt. Reſponſio: rex * decernit, quod talis litera nunquam in poſterum exire permittatur, niſi in caſu quo poſſit inveniri, lædi per excommunicationem regiam libertatem.*

ALSO the king's letter directed unto ordinaries, that have wrapped thoſe that be in ſubjection unto them in the ſentence of excommunication, that they ſhould aſſoil them by a certain day, or elſe that they do appear, and ſhew wherefore they have excommunicated them. The anſwer. The king decreeth, that hereafter no ſuch letters ſhall be ſuffered to go forth, but in caſe where it is found that the king's liberty is prejudiced by the excommunication.

(5 El. c. 23. Regiſt. 65.)

Here was a miſtaking in the article of the clergy: for never was any writ of the king here called *litera regis*, granted in caſe of excommunication, but in certaine caſes, as, when a man is juſtly excommunicated, and taken by force of the kings writ *de excommunicato cap.* if the biſhop, upon the kings writ *de cautione admittenda*, &c. doe not deliver him, then ſhall a writ out of the chancery goe to the ſherife, upon the refuſall of the biſhop to deliver him; or if the excommunication be unjuſt, that is, if the party be excommunicated for a matter which belongs not to eccleſiaſticall conuſance, and taken by force of the kings writ, then the party grieved ſhall have a writ out of the chancery to the ſherife, to deliver him out of priſon. And this appeareth by our ancient books written before this act, and by ancient records and book-caſes in all ſucceſſion of ages ever ſince; and in both the caſes aboveſaid, *regia libertas læſa fuit*, and thereupon the ſubject had reliefe by the kings writ; and therefore the anſwer to this article was very pertinent, *Niſi in caſu quo poſſit inveniri, lædi per excommunicationem regiam libertatem.* And the

Regiſt. 65, 66, 67, 70. Bract. lib. 5. fol. 408, 409, 427, 443, Flet. lib. 6. c. 43. 5 E. 3. 8. 8 E. 3. 9. 14 H. 4. 14, 15. 3 H. 4. 4.

Doctor & Stud. lib. 2. cap. 32. Vet N.B. 33, 35. F.N.B. 62. &c. Dorſ. clauſ. 21 R. 2. m. 10. Hill. 22 E. 1. apud Sandw. coram rege, rot. 2. William de Valences caſe.

the contempt of the biſhop in thoſe caſes is the greater, for that *breve regis de excommunicato cap. de gratia regis procedit.* And ſo it is if a man be excommunicated, and offer to obey and performe the ſentence, and the biſhop refuſeth to accept it, and to aſſoile him, he ſhall have a writ to the biſhop, requiring him, upon performance of the ſentence, to aſſoile him, &c. and the reaſon thereof is, for that by the excommunication, the party is diſabled to ſue any action, or to have any remedy for any wrong done unto him, ſo long as he ſhall remaine excommunicate. And alſo the party grieved may have his action upon his caſe againſt the biſhop, in like manner as he may when the biſhop doth excommunicate him for a matter which belongeth not to eccleſiaſticall conuſance. Alſo the biſhop in thoſe caſes may be indited at the ſuit of the king, as by many notable records may appeare: Mich. 7 E. 1. *coram rege*, Rot. 33. Robertus Sprot, Hill. 7 E, 1. *coram rege*, Rot. 8. Magiſter R. de Petchford, Paſch' 32 E. 1. *coram rege*, Rot. 33. Walterus de Wilton, Hill. 35 E. 1. *coram rege*, Rot. 52. Gloc' Prior de Gloceſters caſe, Mich. 19 E. 2. *coram rege*, Rot. 53. Linc' Philip Whites caſe, Trin. 20 E. 3. *coram rege*, Rot. 46, 289. Freſiles caſe.

28 E. 3. 97. 14 H. 4. 14. 3 H. 4. 4. 22 E. 4. 20. b 9 H. 7. 22. Fitz. N.B. 6. f. 5 El. cap. 23.

And it is to be obſerved, that at the common law a certificate of the biſhop, whereupon a *ſignificavit*, that is, a writ *de excommunicato capiendo* was to be granted, ought to expreſſe the cauſe, and the ſute againſt him ſpecially in the certificate.

See more the ſtatute of 5 El. cap. 23. concerning the awarding and returning the writ *de excommunicato capiendo.*

See the firſt part of the Inſtitutes, ſect. 201. concerning this matter.

CAP. VIII.

ITEM, barones de ſcaccario domini regis, vendicantes ſibi ex privilegio (1), *quod non debent extra illum locum conquerenti cuicunque reſpondere, extendunt illud privilegium ad clericos commorantes ibidem, vocatos ad ordines, ſeu ad reſidentiam; et diœceſanis inhibeant, ne aliquo modo aliquave ex cauſa, dum ſint in ſcaccario, et in ſervitio domini regis, trahant ad judicium quoviſmodo. Reſponſio: Placet domino regi, ut clerici ſuis obſequiis intendentes, ſi delinquant* (2) *per ordinarios (ut cæteri) corrigantur: ſed tempore quo occupantur circa ſcaccarium, ad reſidentiam* (3) *in ſuis faciendam eccleſiis non teneantur. Hic additur de novo, per concilium domini regis* (4). *Rex et anteceſſores ſui, à tempore*

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ALSO barons of the king's exchequer claiming by their privilege, that they ought to make anſwer to no complainant out of the ſame place, extend the ſame privilege unto clerks abiding there, called to orders or unto reſidence, and inhibit ordinaries that by no means, or for any cauſe, ſo long as they be in the exchequer, or in the king's ſervice, they ſhall not call them to judgement. The anſwer. It pleaſeth our lord the king, that ſuch clerks as attend in his ſervice, if they offend, ſhall be correct by their ordinaries, like as other; but ſo long as they are occupied about the exchequer, they ſhall not be bound to keep reſidence in their churches. This is added of new by the king's council.

The

tempore cujus contrarii memoria non exiſtit, ipſi ſunt, quod clerici ſuis immorantes obſequiis, dum obſequiis illis intenderint. ad reſidentiam in ſuis beneficiis faciendam minime compellantur; nec debet dici tendere in præjudicium eccleſiaſticæ libertatis, quod pro rege et republica neceſſarium invenitur (5).

The king and his anceſtors ſince time out of mind have uſed, that clerks, which are employed in his ſervice, during ſuch time as they are in ſervice, ſhall not be compelled to keep reſidence at their benefices. And ſuch things as be thought neceſſary for the king and the common-wealth, ought not to be ſaid to be prejudicial to the liberty of the church.

(Regiſt. 58.)

(1) *De privilegio*, &c.] The court of the exchequer may grant a prohibition to the ordinary, for any that ought to have the priviledge of the exchequer, where the court may give the party remedy, or where a ſute dependeth in the court of exchequer for the ſame cauſe, or where the kings ſervice, which is the cauſe of the priviledge, is hindered by the ſuit before the ordinary: as for non-reſidence, &c. during that time that he gave his neceſſary attendance in the exchequer for the kings ſervice.

(2) *Si delinquaut.*] This extendeth onely *ad delicta, i. crimina*, whereof the eccleſiaſticall court hath conuſance, as hereſie, adultery, and the like, which the ordinary may correct; and not unto civill actions.

(3) *Ad reſidentiam.*] There is an ancient writ, called *de non reſidentia clerici regis*, the words of which writ be, *Cum clerici noſtri ad faciend' in beneficiis ſuis reſidentiam perſonalem, dum in noſtris immorantur obſequiis compelli, aut alias ſuper hoc moleſtari, ſeu inquietari non debeant: noſque ac progenitores noſtri quondam reges Angliæ, hujuſmodi libertate et privilegio pro clericis noſtris à tempore quo non extat memoria ſemper hactenus uſi ſumus: vobis mandamus, quod dilectum clericum noſtrum A. parſonam eccleſiæ de B. veſtræ diœceſ. qui in cancellaria noſtra, noſtris jugiter intendit obſequiis, ad perſonalem reſidentiam in beneficio ſuo prædict' faciendam, dum in eiſdem obſequiis noſtris immoretur, nullatenus compellatis. Et ſequeſtrum ſi quod in fructibus, aut aliis bonis eccleſiæ ſuæ prædictæ ea occaſione per vos, aut veſtros fuerit appoſitum, ſine dilatione relaxari faciatis. Teſte, &c.* Regiſt. 58. b. F N.B. 44. g.

(4) *Per concilium domini regis.*] Here *concilium domini regis* is taken for *commune concilium regni*, as it is termed in originall writs, and in other legall records, and ſo it is taken in other acts of parliament, and in the preamble of this act alſo, where it is ſaid, *Ac nuper in parliamento noſtro apud Lincoln', &c. coram concilio noſtro, &c.*

This branch is generall (and not limited, as the former is, to the priviledge of the exchequer) but extendeth to any other ſervice of the king for the common-wealth: as if hee be imployed as an embaſſadour into any forraine nation, or the like ſervice of the king, which is *pro republica*, for the common-wealth, as hereafter it is ſaid, which ever muſt be preferred before the private.

(5) *Nec debet dici tendere in præjudicium eccleſiaſticæ libertatis, quod pro rege et republica neceſſarium invenitur.*] The clergy in this parliament inveighing vehemently againſt this anſwer, and that it tended

tended to the breach of the eccleſiaſticall liberty, which was granted to them by *Magna Charta*, and often confirmed by other acts of parliament, *quod eccleſia Anglicana libera ſit, &c.* To which it was anſwered, that the words ſubſequent explained thoſe words, *et habeat omnia jura ſua et libertates ſuas illæſas*; ſo as the clergy cannot claime any right, but *jus ſuum*, nor any liberty, but *libertates ſuas*: and the point here in queſtion, *viz.* to proceed againſt a clerke for non reſidence, whiles hee was in the kings ſervice for the common-wealth, was neither *jus ſuum*, nor *libertas ſua*, but *libertas regis*: and therefore the parliament thought it fit to declare, that the king and his anceſtors had uſed this liberty or prerogative time out of mind. And where it was ſaid, that this tended *in præjudicium eccleſiaſticæ libertatis*, the parliament thereunto anſwered (which is worthy to be written in letters of gold) *nec debet dici in præjudicium eccleſiaſticæ libertatis, quod pro rege et republica neceſſarium invenitur.*

Regiſtr. 58. b.

Regularly perſonall reſidence is required of eccleſiaſticall perſons upon their cures; and to that end, by the common law, if hee that hath a benefice with cure, be choſen to an office as to an office of bailiffe, or bedle, or the like ſecular office, he may have the kings writ, *quod non eligatur in officium, &c. quia non eſt conſonum, quod is, qui pro ſalubri ſtatu animarum eleemoſynis, et aliis piis operibus, infra, &c. manutenendis et ſuſtentandis continue deſervit, extra &c. in ſecularibus negotiis compellatur, vobis præcipimus, quod diſtrictioni et compulſioni, ſi quas &c. eidem &c. ad officium baliui, bedelli, &c. in manerio, &c. aſſumend' feceritis, omnino ſuperſedeatis, et eas ſine dilatione relaxetis, et denarios, ſi quos per amerciamenta, vel alio modo ex cauſa præd' ab eo levaveritis, eidem &c. reſtitui faciatis immediate, ſub periculo quod incumbit. Teſte, &c.*

And this writ of ancient time was granted at the petition of the clergy, and grounded upon holy writ, *Nemo militans Deo implicat ſe negotiis ſecularibus, ut ei placeat cui ſe probavit.* And the opinion of Sir John Priſot, chiefe juſtice of the common pleas, is notable; to thoſe lawes which holy church hath out of the ſcripture, we ought to yield credit; for that (ſaith he) is the common law, upon which all lawes are founded: and the intendment of the common law is, that a parſon, &c. is reſident upon his cure; for in an action of debt brought againſt J. S. *rectorem de* D. the defendant pleaded, that he was demurrant, and converſant at B. in another county: and the rule of the booke is, that ſeeing the defendant denied not that he was rector of the church of D. he ſhall be deemed by law to be demurrant and converſant there for the cure of ſoules; and therefore the plea was over-ruled.

2 Tim. 2. ver. 4.

34 H. 6. 40. a.

20 H. 6. fo. 8. a.

We could not over-paſſe an ancient and an excellent record concerning non-reſidence, in the 48 yeare of king Henry the third, for it is worthy of rehearſall for many purpoſes: at that time one Peter Egneblanke a ſtranger, borne in Savoy, was biſhop of Hereford: this biſhop then was, and long before had been a non reſident, an unfaithfull ſteward, and altogether careleſſe of his paſtorall charge: the king travelling (for the defence and ſafety of the Marches) came to the citie of Hereford, where finding the biſhop abſent, the people neither informed nor reformed *per verbum ſalutis, et virgam correctionis*, divine ſervice neglected, and all things out of order, as by the writ following appeareth, which

which we hold worthy to be rehearſed *de verbo in verbum*, as it is of record.

Rex epiſcopo Hereford' ſalutem, Paſtores gregibus præponuntur, ut, diei noctiſque vigilias exercendo, oves famelicas in fertilitatis paſcua introducant: errantes vero per verbum ſalutis, & virgam correctionis in unius ovilis conſervare ſtudeant indiſſolubilem unitatem: ſed ſunt nonnulli qui hanc doctrinam damnabiliter contempnentes, & ſua ab aliis [626] *pecora diſtinguere neſcientes, lac & lanam tollunt, qualiter dominicus grex alatur non curantes, temporalia rapiunt, & quis in parochia fame percat, aut periclitetur in moribus, non attendunt; qui non paſtores, ſed mercenarii potius dici promerentur: hoc ſiquidem, dum hiis diebus ad diſponendum de regni noſtri præſidiis in partes Marchiæ nos transferremus, in eccleſia veſtra Hereff. (dolenter referimus) nos inveniſſe quam adeo invenimus paſtoris ſolatio deſtitutam, ut ne dum epiſcopum, ſed nec officialem haberet, vicarium, aut decanum, qui quicquam ſpiritualitatis exercere poſſit in eadem. Sed eccleſia ipſa, quæ olim deliciis affluere conſuevit, & canonicis qui ibidem nocturnis et diurnis officiis vacare, & opera charitatis exercere deberent, eam deſerentibus & longe degentibus in remotis, ſtola jocunditatis exuta cecidit in terram, viduitatis ſuæ detrimenta deplorans, nec eſt qui conſoletur eam ex omnibus caris ejus: ſane, dum hæc vidimus & conſideramus diligenter, pietatis aculeus viſcera noſtra commovit, & compaſſionis gladius intima cordis noſtri acrius vulneravit, ut tantam eccleſiæ matris noſtræ injuriam ulterius diſſimulare non poſſimus, nec pertranſire incorrectam. Quapropter vobis mandamus firmiter injungentes, quatenus ad eccleſiam veſtram prædictam, occaſionibus quibuſcunque poſtpoſitis, cum ea qua poteritis celeritate vos transferre curetis, commiſſum vobis in eadem cura paſtorali officium perſonaliter executur' &c. Alioqui ſcire vos volumus pro conſtanti, quod ſi iſtuc facere non curaveritis, bona temporalia, & omnia quæ ad baroniam ipſius eccleſiæ pertinent, quæ donatione conſtat eidem fuiſſe collata, & quæ hactenus colligi, & ſalvo cuſtodiri præcepimus in commodum & utilitatem ipſius eccleſiæ convertenda, ceſſante jam cauſa in manu noſtra totaliter capiemus, nec ulterius ſuſtinebimus, quod temporalia metat, qui ſpiritualia ad quæ ex officii ſui debito tenetur, irreverenter ſubtrahere non formidat, aut quod emolumenta percipiat, qui incumbentia ejuſdem onera ſubire recuſat. Teſt' R. apud Hereff. primo die Junii anno regni ſui xlviii.*

By this writ the king telleth the biſhop what his paſtorall office and duty was, rehearſeth the damnable and damned events of non-reſidency, commandeth him to be perſonally reſident, and repreſenteth to him the danger, if he doth it not. And this writ, commanding reſidence, ought to have been put into the Regiſter of writs, rather then the writ *de non reſidentia clerici regis: hoc non omittendum, illud faciendum.*

The Engliſhman hath ever been deſirous to be taught and directed in the way of his ſalvation; and therefore hath often complained in * parliament againſt non reſidents, unlearned paſtors, and pluralities, which you may reade in the fountaines themſelves.

After that Thomas Wolſey in the ſeventh year of Henry the eight was made cardinall, and grew into the height of his authority and favour with the king, he hated both parliaments, and the common lawes (the principall meanes to keep greatneſſe in order, and due ſubjection) as it is contained in his inditement, which he confeſſed of record, that hee intended (that I may uſe the very words of &c.

* Rot. parl. 35 E. 1. leſtatute de Carlile. 18 E. 3. nu. 32. Rot. parl. 3 R. 2. nu. 38. 3 R. 2. ſtat. 2. cap. 2. 7 R. 2. nu. 35. 17 R. 2. nu. 43. 1 H. 4. nu. 50. 2 H. 4. nu. 26. 6 H. 4. nu. 48. 7 H. 4. nu. 114. 11 H. 4. nu. 70. 3 H. 6. nu. 38. 4 H. 6. nu. 31.

Mich. 21 H. 8. coram Rege.

of the record) *Antiquiſſimas Angliæ leges penitus ſubvertere, et enervare, univerſumq; hoc regnum Angliæ, et ejuſdem regni populum legibus imperialibus vulgo dictis legibus civilibus, et earundem legum canonibus imperpetuum ſubjugare et ſubducere, &c.* And for execution of his intended plot, he was the meane that but one parliament was holden in fourteen yeares, *viz.* from the ſeventh yeare, till the one and twentieth yeare of Henry the eight, and that one was principally holden for the attainder by parliament of Edward the good duke of Buckingham, whom he hated, and the confiſcation of all that he had. Now the cardinall, being a great protector of non-reſidents, was no ſooner attainted by that law (which he ſought to alter) but at the parliament holden in 21 H. 8. a law was made againſt non-reſidence, which was excellent for that time, but now had need of ſome alterations and additions.

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21 H. 8. cap. 13. Vid. 33 H. 8. cap. 28.

CAP. IX.

ITEM, miniſtri domini regis, ut vicecomites, et alii, ingrediuntur feoda eccleſiæ (1) *ad faciendum diſtrictiones, et aliquando capiunt animalia rectorum* (2) *in via regia, quando non habent niſi terram pertinentem ad eccleſiam. Reſponſio: Placet domino regi quod de cætero diſtrictiones fiant hujuſmodi, nec in via regia, nec in feodis, quibus olim* (4) *eccleſiæ ſunt dotatæ* (3), *vult tamen diſtrictiones fieri in poſſeſſionibus de novo à perſonis eccleſiaſticis acquiſitis.*

ALSO the king's officers, as ſheriffs and other, do enter into the fees of the church to take diſtreſſes, and ſometime they take the parſon's beaſts in the king's highway, where they have nothing but the land belonging to the church. The anſwer. The king's pleaſure is, that from henceforth ſuch diſtreſſes ſhall neither be taken in the king's highway, nor in the fees wherewith churches in times paſt have been indowed; nevertheleſs he willeth diſtreſſes to be taken in poſſeſſions of the church newly purchaſed by eccleſiaſtical perſons.

(52 H. 3. c. 15. Regiſt. 98. 183.)

(1) *Ingrediuntur feoda eccleſiæ.*] See the expoſition upon the ſtatute of Marlebridge: this is to be added, that the ſtatute of Marlebridge was conſtrued to extend onely to lay men, and this ſtatute to men of the church: and this appeareth by the Regiſter; for if a lay man bring an action upon the ſtatute for diſtraining in the kings high-way, he reciteth the ſtatute of Marlebridge: and if a parſon bring an action for diſtraining in the high-way, he groundeth it upon this ſtatute.

Marlbridge, ca. 15.

Reg. 187, 188. F.N.B. 173. e. f.

(2) *Rectorum.*] Here parſons be named but for example; for this law extended to abbots, priors, and the like; for afterwards the words be *perſonæ eccleſiaſticæ*: but this law bindeth not the king, when he is party, for any debt, or duty due unto him, becauſe the diſtreſſe or other proceſſe for the king is not expreſly named in the act, but *diſtrictiones* generally: and this appeareth by a book-caſe: a prior brought a bill of treſpaſſe againſt J. for entering into his

27 Aſſ. p. 66.

his ſanctuary, that is, within the circuit of the ſcite of his priorie, and tooke away his beaſts: J. ſaid that he was ſheriffe, and that the prior loſt iſſues in the court of common pleas, and a writ iſſued to him to levie the iſſues, and that hee entred into the ſanctuary, &c. becauſe he could not find a diſtreſſe without; whereupon the plaintife demurred, and judgement was given againſt the plaintife, which proveth, that the ſheriffe in that caſe could not have returned upon the proceſſe to him directed, *Clericus beneficiatus nullum habens laicum feodum.*

(3) *Nec in feodis quibus olim eccleſiæ ſunt dotatæ.*] Here *dotatæ* is taken in a large ſenſe; for here the fees that they have *ratione fundationis*, or *ratione dotationis* are included; and here is alſo to be noted, that the poſſeſſions of the church are the indowment of the church, and they accounted as tenants in dower, as in another place hath been obſerved.

(4) *Olim.*] This word is well expounded afterwards in this act, to be thoſe that are not *de novo acquiſita.*

Concerning taſkes, tenths, and fifteenes granted by parliament to the king, the poſſeſſions of eccleſiaſticall perſons, which they acquired ſince 20 E. 1. either by purchaſe or act in law, as by others, &c. were chargeable thereunto: but thoſe which they had at that time were not charged therewith; and the reaſon thereof was this, the pope (after the example of the high prieſt amongſt the Jewes, who had of the Levites *decimam partem decimæ*) claimed by pretext thereof a yearly tenth part of the value of all eccleſiaſticall livings: this portion or tribute was by ordinance yeelded to the pope in 20 E. 1. and a valuation then made of the eccleſiaſticall livings within this realme, to the end the pope might know, and be anſwered of that yearly revenue, ſo as the eccleſiaſticall livings chargeable with that tenth (which was called ſpirituall) to the pope, were not chargeable with the temporall tenths or fifteenes granted to the king in parliament, leſt they ſhould be doubly charged, but their poſſeſſions acquired after that taxation were liable to the temporall tenths or fifteenes, becauſe they were not charged to the other; and ſo it was declared by act of parliament in 18 E. 3. which never was printed; ſo as the tenths of eccleſiaſticall livings were not yeelded to the pope *de jure*, after the example of the high prieſt amongſt the Jewes; for then hee ſhould have had the tenths of all eccleſiaſticall livings whenſoever they were acquired; but he contented himſelfe with what he had got, and never claimed more: and that he might the better keep and enjoy that which he had got, the popes did often after grant the ſame for certaine termes to divers of the kings of England, as by our hiſtories appeare. And albeit theſe yearly tenths are perpetually annexed to the crown of England by act of parliament yet hereby the ſtudent ſhall better underſtand the bookes of law that treat hereof.

17 E. 3. 44. b.
27 E. 3. 28. b.
11 H. 4. 35.

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Numeri, ca. 18. ver. 26.

Rot. parl. 18 E. 3. nu. 44. never printed.

26 H. 8. ca. 3.
1 Eliz. ca. 1.

CAP.

CAP. X.

ITEM, quandocunque aliqui confugientes ad ecclesiam abjurant terram (1), *secundum regni consuetudinem, et prosequuntur laici eos, vel inimici eorum, et à publica strata abstrahuntur, et suspenduntur, vel statim decapitantur* (2), *et dum sint in ecclesia custodiuntur per armatos infra cœmeterium, quandoque infra ecclesiam ita arcte, quod non possint exire locum sacrum causa superflui ponderis deponendi, nec permittitur eis necessaria ad victus ministrari. Responsio: Qui terram abjuraverint, dum sint in strata publica, sint in pace domini regis, nec debent ab aliquo molestari: et dum sint in ecclesia, custodes eorum non debent morari infra cœmeterium, nisi necessitas, vel evasionis periculum hoc requirat: nec arctentur confugere, dum sint in ecclesia, quin possint habere vitæ necessaria* (3): *et exire libere pro obsceno pondere deponendo. Placet etiam domino regi, ut latrones vel appellatores* (5), *quandocunque voluerint, possint sacerdotibus sua facinora confiteri: sed caveant confessores, ne erronice hujusmodi appellatores informent* (4).

ALSO where some flying unto the church, abjure the realm, according to the custom of the realm, and lay-men or their enemies do pursue them, and pluck them from the king's highway, and they are hanged or headed; and whilst they be in the church, are kept in the church-yard with armed men, and sometime in the church, so straitly, that they cannot depart from the hallowed ground to empty their belly, and cannot be suffered to have necessaries brought unto them for their living. The answer. They that abjure the realm, so long as they be in the common way, shall be in the king's peace, nor ought to be disturbed of any man; and when they be in the church, their keepers ought not to abide in the church-yard, except necessity or peril of escape do require so. And so long as they be in the church, they shall not be compelled to flee away, but they shall have necessaries for their living, and may go forth to empty their belly. And the king's pleasure is, that thieves or appellors (whensoever they will) may confess their offences unto priests; but let the confessors beware that they do not erroneously inform such appellors.

(1 Jac. 1. c. 25. 21 Jac. 1. c. 28.)

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Bract. lib. 2. fo. 135. &c. Brit. fol. 24. &c. Flet. li. 1. c. 29. Stamf. pl. coro. fo. 116. f. &c. 21 Jacobi Regis, cap.

(1) *Abjurant regnum.*] Concerning abjuration you may plentifully read in our ancient authors, and other bookes of the lawes, and specially in Stamford pl. coron. fol. 116. &c. wherein we are the more briefe, because it is enacted by the statute of 21 Jac. regis, that no sanctuary, or priviledge of sanctuary, after that statute be admitted or allowed in any case; and if the offender be barred of the priviledge of sanctuary to be allowed to him, then can hee not flee to any church, as to a sanctuary, for the tuition of his life, and consequently abjuration is taken away.

(2) *Decapitantur.*] This was mistaken in the petition: for no man can be beheaded but for treason; and no man could abjure for

for treaſon, becauſe the coroner had no power to take any confeſſion for treaſon, albeit the coroner had a ſpeciall commiſſion from the king to doe it.

See 1 Jacobi regis, cap. 25.

(3) *Quin poſſint habere vitæ neceſſaria.*] This is thus to be underſtood, that he ſhall have *neceſſaria vitæ* ſo long as he behaves himſelfe according to the law, and the priviledge of the place; but if hee had continued 40 dayes, and would not abjure, then *vitæ neceſſaria* ſhall be denied unto him, and they ſhould be puniſhed that miniſtred the ſame unto him.

Bract. li. 2. fo. 135. &c. Brit. fol. 24, 25. Flet. li. 1. c. 29. 3 E. 3. coron. 313. Stamf. ubi ſupra.

(4) *Placet etiam domino regi, ut latrones, vel appellatorvs, quandocunque voluerint, poſſint ſacerdotibus ſua facinora confiteri, ſed caveant confeſſores, ne erronice hujuſmodi appellatores informent.*

(5) *Latrones vel appellatores.*] This branch extendeth onely to theeves and approvers indited of felony, but extended not to high treaſons: for if high treaſon be diſcovered to the confeſſor, he ought to diſcover it, for the danger that thereupon dependeth to the king and the whole realme; therefore this branch declareth the common law, that the priviledge of confeſſion extendeth onely to felonies: and albeit, if a man indited of felony becometh an approver, he is ſworne to diſcover all felonies and treaſons, yet is hee not in degree of an approver in law, but onely of the offence whereof he is indited; and for the reſt, it is for the benefit of the king, to move him to mercy: ſo as this branch beginneth with theeves, extendeth onely to approvers of theevery or felony, and not to appeales of treaſon; for by the common law, a man indited of high treaſon could not have the benefit of clergy (as it was holden in the kings time, when this act was made) nor any clergy-man priviledge of confeſſion to conceale high treaſon: and ſo was it reſolved in * 7 Hen. 5. whereupon frier John Randolph the queene dowagers confeſſor, accuſed her of treaſon, for compaſſing of the death of the king: and ſo was it reſolved in the caſe of Henry Garnet, ſuperiour of the jeſuites in England, who would have ſhadowed his treaſon under the priviledge of confeſſion, although in deed he was not onely conſenting, but abetting the principall conſpirators of the powder-treaſon, as by the record of his attainder appeareth; and albeit this act extendeth to felonies onely, as hath been ſaid, yet the caveat given to the confeſſors is obſervable, *ne erronice informent.*

12 E. 4. 10. b. 19 E. 2. cor. 387. 6 H. 6. coro. 231. 19 H. 6. 47. See W. 2. ca. 41. § Si Abbates, &c. li. 2. fo. 45. Leveſque de Cant' caſe, &c. 20 E. 2. coro. pl. 283. 19 H. 6. 47.

* Rot. Parl. anno 7 H. 5. nu. 13. Hill. 3 Jac.

CAP. XI.

ITEM petitur, quod dominus rex, et regni magnates non onerent domos religioſas, vel eccleſiaſticas perſonas pro corodiis, [630] *penſionibus* (1), *vel perhendinationibus* (2) *faciendis in domibus religioſis, et aliis locis eccleſiaſticis, carettis et equis ſibi mittendis, cum per hoc prædictæ domus depauperentur cultuſque*

ALSO it is deſired that our lord the king, and the great men of the realm do not charge religious houſes, or ſpiritual perſons, for corodies, penſions, or ſojourning in religious houſes, and other places of the church, or with taking up horſe or carts, whereby ſuch houſes are impoveriſhed, and God's ſervice diminiſhed,

tuſque divinus in hac parte diminuatur, et propter hujuſmodi onera compelluntur ſæpiſſime preſbyteri, et alii miniſtri eccleſiaſtici divinis officiis deputati à locis recedere ſupradict'. Reſponſio: Placet domino regi, quod ſuper contentis in petitione, de cætero indebite non onerentur. Et ſi per magnates, aut alios contra fiat, habeant inde remedium juxta formam ſtatutorum (3) *tempore dom' E. regis patris domini regis nunc editorum: et fiat conſimile remedium de corodiis, et penſionibus* (4) *per coertionem exactis, de quibus non fit mentio in ſtatutis.*

niſhed, and, by reaſon of ſuch charges, prieſts, and other miniſters of the church deputed unto divine ſervice, are oftentimes compelled to depart from the places aforeſaid. The anſwer. The king's pleaſure is, that upon the contents in their petition, from henceforth they ſhall not be unduly charged. And if the contrary be done by great men or other, they ſhall have remedy after the form of the ſtatutes made in the time of king Edward, father to the king that now is. And like remedy ſhall be done for corodies and penſions exacted by compulſion, whereof no mention is made in the ſtatutes.

(3 Ed. 1. c. 1.)

(1) *Pro corodiis, et penſionibus.*] See hereafter in the end of this chapter, to whom, and in what caſes corodies and penſions be due.

(2) *Perhendinationibus.*] See hereof W. 1. cap. 1.

Raſt. pl. fo. 373. (3) *Juxta formam ſtatutorum.*] That is to ſay, of W. 1. *anno* 3 E. 1. cap. 1.

Regiſt. fol. F.N.B. 230. b. 14 H. 6. 11. 2 E. 2. cui in vita 18. 6 E. 2. ibid. 25. Bract. li. 3. fo. 221. 14 E. 3. corody 5. 15 E. 3. ibid. 4. 11 aſſ. 22. 24 E. 3. f. 33. 38 aſſ. 22. 44 E. 3. 24. 50 aſſ. 6. 10 H. 4. 33. 14 H. 6. 11. 39 H. 6. 28. 1 E. 4. 10. 8 H. 7. 12. F.N.B. 231. Vid. rot. clauſ. in dorſ. 8 H. 4. m. 13. & 9 H. 4. m. 33, 34. penc' coram rege, Mich. 32. E. 1. Northampton.

(4) *Conſimile remedium de corodiis et penſionibus.*] Albeit *corodium* is derived *à con et rodere, i. ſimul comedere*; yet to a corody belong not onely *victus*, but *veſtitus, et alia vitæ neceſſaria*, which is called *ſuſtentatio congrua*, as much as a monke of the ſame houſe hath; and a penſion is a yearly annuity to be granted to one of the kings chapleines. The king ſhall have a corody for his vadelet, and a penſion for his chaplein, out of all the religious and eccleſiaſticall houſes of his foundation (unleſſe the tenure be in frankalmoigne) but by reaſon of dotation, if he be not founder, he ſhall have none, unleſſe it be by ſpeciall grant. A common perſon ſhall have no corody, nor penſion, &c. though he be founder, unleſſe it be by ſpeciall grant. The abbot, &c. ſhall not be charged with a new penſion, though the chaplein dye, during the life of the king; but if the abbot, &c. dye, his ſucceſſor ſhall be charged, *ratione creationis* with a penſion. If the vadelet dye, another ſhall have the corody during the kings life; but if the abbot, &c. dye, no new corody during the life of the former vadelet.

CAP.

CAP. XII.

*ITEM, ſi aliqui de tenura domini regis vocantur coram ordinariis, extra parochiam in qua degunt, ſi propter ſuam contumaciam manifeſtam excommunicentur, ac poſt quadraginta dies pro eorum captione ſcribatur, prætendunt ſe privilegiatos, quod extra villam ſeu parochiam ſuam non debent vocari, et ſic denegatur breve regium pro captione eorundem. * Reſponſio: Nunquam fuit negatum, nec negabitur in futurum.*

*[631]

ALSO if any of the king's tenure be called before their ordinaries out of the pariſh where they continue, if they be excommunicate for their manifeſt contumacy, and after forty days a writ goeth out to take them, they pretend their privilege, that they ought not to be cited out of the town and pariſh where their dwelling is; and ſo the king's writ that went out for to take them is denied. The anſwer. It was never yet denied, nor ſhall be hereafter.

The writ *de excommunicato capiendo*, commonly called a *ſignificavit*, was never denied; for this cauſe, that hee that held of the king had ſuch a priviledge, that they ſhould not be called out of the towne or pariſh where they lived; and therefore the anſwer (which muſt ever be conforme to the petition) ought of neceſſitie to be taken, that for that cauſe the kings writ was never, nor ſhould be denied.

But for the better underſtanding hereof, at the parliament holden at Clarendon, in the eleventh yeare of Henry the ſecond, *Facta eſt recognitio, ſeu recordatio cujuſdam partis conſuetudinum anteceſſorum regis, viz. Henrici (primi) avi ſui, quæ obſervari debebant in regno, et ab omnibus teneri propter diſſenſiones et diſcordias ſæpe emergentes inter clerum et juſticiarios Domini regis, et magnatum regni.* Amongſt the reſt, this was agnized and declared in theſe words: *Nullus qui de rege tenet in capite, nec aliquis dominicorum miniſtrorum ejus excommunicetur, nec alicujus eorum terræ ſub interdicto ponantur, niſi prius dominus rex, ſi in regno fuerit, conveniatur, vel juſticiarius ejus, ſi fuer' extra regnum, ut rectum de eo faciat, ut quod pertinebat ad regis curiam, ibi terminetur, et de eo quod ſpectat ad curiam eccleſiaſticam ad eandem mittatur, et ibidem terminetur.* And the reaſon of this law was, for that the tenures by grand ſerjeantie, and knights ſervice *in capite* were for the honour and defence of the realme; and concerning thoſe that ſerved the king in his houſhold, their continuall ſervice and attendance upon the royall perſon of the king was neceſſary.

8 Kal. Febr. anno 11 H. 2. apud Clarendon, commonly called Aſſiſa de Clarendon, Bract. li. 3. fol. 136. See cap. 15.

Of this law the clergy here complained not, and other then this concerning tenure, &c. in the petition mentioned, we remember not any; ſo as we may conclude this point, that this writ *de excommunicato capiendo* (as hath been ſaid) *procedit de gratia regis.*

Vid. ca. 7. before. Rot. clauſ. in dorſ. 17 R. 2. m. 10.

CAP. XIII.

ITEM petitur quod perſonæ eccleſiaſticæ, quas dominus rex ad beneficia præſentet eccleſiaſtica, ſi epiſcopus eas non admittat, ut puta propter defectum ſcientiæ, vel aliam cauſam rationabilem, non ſubeant examinationem laicarum perſonarum in caſibus antedictis, prout his temporibus attentatur de facto, contra canonicas ſanctiones: ſed adeant judicem eccleſiaſticum, ad quem de jure pertinet pro remedio, prout juſtum fuerit, conſequendo. Reſponſio: De idonietate perſonæ (1) *præſentatæ ad beneficium eccleſiaſticum pertinet examinatio ad judicem eccleſiaſticum: et ita eſt hactenus uſitatum* (2), *et fiat in futurum.*

ALSO it is deſired that ſpiritual perſons, whom our lord the king doth preſent unto benefices of the church (if the biſhop will not admit them either for lack of learning, or for other cauſe reaſonable) may not be under the examination of lay perſons in the caſes aforeſaid, as it is now attempted, contrary to the decrees canonical, but that they may ſue unto a ſpiritual judge for remedy, as right ſhall require. The anſwer. Of the ability of a parſon preſented unto a benefice of the church the examination belongeth to a ſpiritual judge; and ſo it hath been uſed heretofore, and ſhall be hereafter.

(4 Mod. 135. Regiſt. 53.)

(1) *De idonietate perſonæ.*] It is required by law, that the perſon preſented be *idonea perſona*; for ſo be the words of the kings writ, *præſentare idoneam perſonam.* And this *idonietas* conſiſteth in divers exceptions againſt perſons preſented: firſt, concerning the perſon, as baſtardy, villenage, outlawry, excommunication, a layman, under age, and the like: ſecondly, concerning his converſation, as if he be *criminoſus, &c.* Thirdly, concerning his inability to diſcharge his paſtorall duty, as if hee be unlearned, and not able to feed his flocke with ſpirituall food, &c. And the examination of the ability and ſufficiency of the perſon preſented belongs to the biſhop, who is the eccleſiaſticall judge; and in this examination he is a judge, and not a miniſter, and may and ought to refuſe the perſon preſented, if he be not *idonea perſona.* And if the cauſe of refuſall be for default of learning, or that he is an heretick, ſchiſmatick, or the like, belonging to the knowledge of eccleſiaſticall law, there he muſt give notice thereof to the patron; but if the cauſe be temporall, as a felon, or homicide, or other temporall crime; or if the diſability grow by any act of parliament, or other temporall law, there no notice ought to be given, unleſſe notice be preſcribed to be given thereby. But in a *quare impedit* brought againſt the biſhop, for refuſall of the clerke, he muſt ſhew the cauſe of his refuſall ſpecially and directly (for whether the cauſe thereof be ſpirituall or temporall, the examination of the biſhop concludes not the plaintife) to the intent the court, being judges of the principall cauſe, may conſult with learned men in that profeſſion, and reſolve whether the cauſe be juſt or no; or the party may deny the ſame, and then the court ſhall write to the metropolitane to certifie the ſame; or if the cauſe bee

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Regiſt. 53. b.
38 E. 3. 2.
29 E. 3. 44.
5 R. 2. tryall 54.
11 H. 4.
34 H. 6. 40. per Priſot, 5 H. 7. 19.
21 H. 7. 7. 37.
15 H. 7. 7.
9 El. Dyer, 154.
13 El. Dyer, 332.
li. 5. fol. 57. Specots caſe.

bee temporall, and ſufficient in law (which the court muſt decide) the ſame may be traverſed, and an iſſue thereupon joyned, and tried by the country. And yet in ſome caſes, notwithſtanding this ſtatute, *idonietas perſonæ* ſhall be tried by the country, or elſe there ſhould be a failer of juſtice (which the law will never ſuffer) as if the inability or inſufficiency be alledged in a man that is dead, this caſe is out of this ſtatute: for the biſhop cannot examine him, and the words of this act be, *de idonietate perſonæ præſentatæ ad beneficium eccleſ. pertinet examinatio, &c.* And conſequently, though the matter be ſpirituall, yet ſhall it be tried by a jury, and the court, being aſſiſted by learned men in that profeſſion, may inſtruct the jury as well of the eccleſiaſticall law in that caſe, as they uſually doe of the common law. 39 E. 3. 2. 40 E. 3. 25.

(2) *Et ita eſt hactenus uſitatum.*] So as this act is a declaration of the common law and cuſtome of the realme.

CAP. XIV.

ITEM, ſi vacet aliqua dignitas, ubi electio eſt facienda, petitur quod electores libere poſſint eligere, abſque incuſſione timoris à quacunque poteſtate ſeculari: et quod ceſſent preces, et oppreſſiones in hac parte. Reſponſio: Fiant libere, juxta formam ſtatutorum et ordinationum.

ALSO if any dignity be vacant, where election is to be made, it is moved that the electors may freely make their election without fear of any power temporal, and that all prayers and oppreſſions ſhall in this behalf ceaſe. The anſwer. They ſhall be made free according to the form of ſtatutes and ordinances.

(3 E. 1. c. 5.)

The clergy either remembred not the ſtatute of W. 1. or if they did, they doubted whether it extended to eccleſiaſticall elections, although without queſtion it did, and ſo it is declared by this act, and it is an excellent law, and worthy to be put in execution. W. 1. cap. 5.

See more hereof before in the expoſition upon the ſtatute of W. 1.

CAP. XV. [633]

ITEM, licet clericus coram ſeculari judice judicari non debeat, nec aliquid contra ipſum fieri, per quod ad periculum mortis, vel ad mutilationem membrorum valeat perveniri: ſeculares tamen judices clericos ad eccleſiam confugientes, et reatus ſuos forte confitentes

MOREOVER, though a clerk ought not to be judged before a temporal judge, nor any thing may be done againſt him that concerneth life or member; nevertheleſs temporal judges cauſe that clerks fleeing unto the church, and paradventure confeſſing

conſitentes faciunt abjurare regnum, et eorum abjurationes admittunt ex illa cauſa, quanquam eorum judices ſuper hiis non exiſtant: ſicque datur laicis indirecte poteſtas hujuſmodi clericos cruciandi, ſi ipſos poſt hujuſmodi abjurationem in regno contigerit inveniri: ſuper quo petunt prælati, et cler' tale remedium adhiberi, ut immunitas eccleſiæ, et perſonarum eccleſiaſticarum conſervetur illæſa. Reſponſio: Clericus ad eccleſiam confugiens (1) *pro felonia, pro immunitate eccleſiaſtica obtinenda, ſi aſſerit ſe eſſe clericum, regnum non compellatur abjurare, ſed legi regni ſe reddens gaudebit eccleſiaſtica libertate, juxta laudabilem conſuetudinem regni* (2) *hactenus uſitatam.*

confeſſing their offences, do abjure the realm, and for the ſame cauſe admit their abjurations, although hereupon they cannot be their judges, and ſo power is wrongfully given to lay perſons to put to death ſuch clerks, if ſuch perſons chance to be found within the realm after their abjuration; the prelates and clergy deſire ſuch remedy to be provided herein, that the immunity or privilege of the church and ſpiritual perſons may be ſaved and unbroken. The anſwer. A clerk fleeing to the church for felony, to obtain the privilege of the church, if he affirm himſelf to be a clerk, he ſhall not be compelled to abjure the realm; but yielding himſelf to the law of the realm, ſhall enjoy the privilege of the church, according to the laudable cuſtom of the realm heretofore uſed.

(1) Cuſtumier de Norm. c. 83. (28 H. 8. c. 1. 1 Jac. 1. c. 25. 21 Jac. 1. c. 28.)

Here the claim of the clergy is generall, that *clericus coram ſeculari judice judicari non debeat, nec aliquid contra ipſum fieri, per quod ad periculum mortis, vel mutilationem membrorum valeat perveniri:* let us ſee what priviledge the clergy had allowed unto them in criminall caſes: firſt, let us obſerve what our ancient authors have holden in that caſe: ſecondly, what records of parliament, and other records have delivered to us: thirdly, what acts of parliament have eſtabliſhed in theſe caſes: fourthly, what have the judgements and reſolutions been of judges in our bookes and reports. And laſtly, from what root this priviledge of clergy ſprang, to exempt them from the common juſtice of the realme.

Cuſtumier ubi ſupra.

Bracton ſaith, *Cum clericus cujuſcunque ordinis vel dignitatis captus fuerit pro morte hominis, vel alio crimine, et impriſonatus, et de eo fetatur curia chriſtianitatis ab ordinario loci, &c. impriſonatus ſtatim ei deliberetur, &c. donec à crimine ſibi impoſito ſe purgaverit competenter, vel in purgatione defecerit, propter quod debet degradari, &c. cum autem clericus ſic de crimine convictus degradetur, non ſequitur alia pœna pro uno delicto, vel pluribus, ante degradationem perpetratis.* Here three things are to be noted: firſt, that he beginneth with the greateſt felony, that is, the death of man: ſecondly, that albeit he were found guilty, and could not purge himſelfe before the ordinary, yet all that the ordinary could doe was to degrade him. Thirdly, that he could have no other puniſhment for that felony, or any other formerly done, but degradation.

See the ſtatute of 23 H. 8. cap. 11. & ca. 1. 1 E. 6. cap. 12, &c. Bract. lib. 3. fol. 123. b.

Britton alſo ſpeaketh only of felony: *Et ſi le clerk encoupe de felonie alledge clergie, et ſoit tiel trove, et per ordinarie demand, ſi ſoit enquiſe coment il eſt meſcru, et ſil ſoit nient meſcru, &c. ſoit arge tout quitt*

Brit. fol. 11. Stamf. pl. cor. 123. c. 8 E. 2. coron. 417. 17 E. 2. ib. 386 3 H. 7. 12.

quits, et ſil ſoit meſcrue, ſi ſoient ſes chateux taxes, et ſes terres priſes in ure. maine, et ſon cors deliz' al ordinarie.

According to Britton, when one of the clergy was indited of felony, &c. and the ordinary demanded him, yet to the end (ſaith the * record) *ut ſciatur qualis deliberaretur ordinario*, an enqueſt was charged by the court to enquire, whether he were guilty, or no. And though hee was found guilty by this enqueſt of office, yet was he delivered to the ordinary, and his chattels ſeiſed, and his lands taken into the kings hands, as Britton ſaith.

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* Mirr. cap. 3. del exception de clergie accord.

Fleta ſaith, *Si criminaliter agatur verſus clericum, quamvis clericus reſpondere voluerit in foro ſeculari, judex tamen eccleſiaſticus cognitionem habere non poterit, nec regiam auferre juriſdictionem: In cauſa enim ſanguinis non poterit eccleſiaſticus judex cognoſcere, neque judicare, niſi irregularitatem committat. Et quamvis neminem valeat morti condemnare, degradare tamen poterit criminum convictos, vel perpetua carceris incluſione cuſtodire.*

Flet. lib. 6. ca. 36.

The Mirror hath generall words, *Leſgliſe et cy enfranchiſe que nul lay judge ne poet aver conuſans de clarke, tout le voiloit le clarke conuſtre pur ſon judge, &c.*

Mirr. ubi ſupra.

Two of theſe ancient authors have ſpoken of felony, and ſo are the other two to be intended; for the priviledge of the church did not extend to high treaſon, *crimen læſæ majeſtatis*, as by divers judiciall records and authorities in law ſhall appeare.

Walter de Berton clerke counterfeited the great ſeale, which was high treaſon, *crimen læſæ majeſtatis*, whereof he was indited and convicted: for ſo the record ſaith, *Qui convictus fuit pro falſificatione ſigilli domini regis, quod tradatur epiſcopo Sarum, qui eum petiit ut clericum ſuum, ſub pœna et forma qua decet, quia videtur concilio, quod in tali caſu non eſt admittenda purgatio.*

Rot. Parl. anno 21 E. 1. rot. 9.

This delivery to the ordinary was by ordinance of parliament *de gratia, et non de jure:* for it was reſolved, that hee could not make his purgation; and therefore hee was delivered to him *ſub pœna, &c.* In the reigne of Ed. 3. it was taken for a generall rule, *quod privilegium clericale non competit ſeditioſo equitant' cum armis, platis et cotearmuris, ſecundum leges Angliæ.*

Trin. 21 E. 3. coram rege, rot. 173. Hertford.

In 17 E. 2. in the time of the parliament, Adam de Orleton, biſhop of Hereford, was indited of high treaſon, for being party and privie, aiding and abetting of Roger Mortimer earle of March with horſe and armes in his open rebellion; and becauſe he could not have any priviledge of clergy by the common law, the archbiſhop of Canterbury, Yorke, and Dublin, and their ſuffragan biſhops, came to the barre (in that diſordered time) and with force tooke him from the barre: all which was done by pretext and colour of the canons of the church, which you may reade in Linwood.

17 E. 2. rot. Rom. m. 6.

Henricus Blanford.

Linwood tit. de foro compet' cap. Contingit.

But, omitting many other things that might be here rehearſed, let us ſee what acts of parliament have ordained in this caſe; for the clergy never thought themſelves ſure of this priviledge, till it was confirmed to them by authority of parliament. By the ſtatute of W. 1. it is provided, *Que quant clerke eſt priſe pur ret de felonie, et ſoit demand per lordinarie, a luy ſoit liver ſolonque le priviledge de ſaint eſgliſe, in tiel perill come ils appent, ſolonque le cuſtome avant ces heures uſe, &c.* where note, this act extendeth but to felony.

W. 1. cap. 2. See Marlbridge, cap. 27. See hereafter, cap. 5.

See the expoſition of the ſtatute of W. 1. in this point, and the charge as is given to ordinaries, that none be delivered without due

4 H. 4. cap. 3. 23 H. 8. cap. 1.

due purgation; but it is worthy our paines to reade the ſtatutes of 4 H. 4. and 23 H. 8.

Pl. coram domino rege apud Sandwicum in cio' Hilarii, an. 22 E. 1. rot. 15. Kanc'.

After this ſtatute, and in this kings time, Guinandus de Briland, parſon of Snodiland in the county of Kent (in which towne Solomon de Rolfe, one of the kings juſtices in eire, and one that puniſhed the extortions and other crimes of the clergy, dwelt) came to dine with Solomon de Rolfe, and brought poyſon with him of his malice prepenſed, to murder by poyſon the ſaid Solomon; and the record of his inditement ſaith, *Cum eo comedit, et poſuit venenum in cibo et in potu ipſius Solomonis, et ipſum impoiſonavit, per quod, poſt quindecim dies ſequentes inde obiit:* and albeit of all felonies, murder is the worſt, and of all murders, murder by poyſon is the moſt unavoidable and deteſtable, and Guinand being indited and arraigned upon the ſaid inditement, *et quæſitus qualiter ſe vellet acquietare, dicit, quod clericus eſt, et non poteſt hic inde reſpondere, et ſuper hoc venit frater Thomas epiſcopus Roffenſis, et petit ipſum tanquam clericum, &c. Et ut ſciatur qualis deliberare debet, inquiratur rei veritas per patriam; et jurat' &c. dicunt ſuper ſacramentum ſuum, quod prædict' Guinandus dedit prædict' Solomoni venenum unde impoiſonatus fuit, et inde obiit, ut prædictum eſt.* But in the end he was delivered to the ordinary, as by the record it appeareth, and thereby, for any thing that wee find in that or any other record, he eſcaped the ſentence of death, which was due for his offence by the law of God, and by the common law of the realme grounded upon the ſame, *Quicunque effuderit humanum ſanguinem, fundetur ſanguis illius, ad imaginem quippe Dei factus eſt homo.* And againe, in the book of Numbers, *Hæc ſempiterna erunt et legitima in cunctis, homicida ſub teſtibus punietur, &c. non accipies pretium ab eo, qui reus eſt ſanguinis, ſtatim et ipſe moriatur, ne polluatis terram habitationis veſtræ quæ inſontium cruore maculatur, nec aliter expiari poteſt, niſi per ejus ſanguinem, qui alterius ſanguinem fuderit.*

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Geneſ. cap. 9. ver. 6.

Numer. cap. 35. ver. 29, 30, 31. 33.

8 E. 2. coron. 419.

22 E. 3. ib. 248.

In 8 E. 2. a clerke convict for felony, and delivered to the ordinary, murdered his keeper, and fled, *et non obſtante clerimonia ſua*, hee was hanged. And the like was done in 22 E. 3.

The abuſe of delivery of clerkes to the ordinary grew ſo intolerable, as in the end it was taken away; as hereafter ſhall be ſhewed.

See the ſtatute of 18 E. 3. cap. 2. concerning this matter.

Rot. Parl. 25 E. 3. nu. 68, &c.

At the parliament holden *in anno* 25 E. 3. the clergy did complaine, that one Hanketun Honby a knight, and one of the clergy, had judgement given againſt him for high treaſon to be hanged, drawne, and quartered: alſo for a judgement given againſt a prieſt at Nottingham, for killing of his maſter, ſir Thomas Cibethorp, a clerke of the chancery, one of the kings juſtices.

25 E. 3. ca. 4. & 5. 4 H. 4. cap. 3.

And laſtly, for hanging of divers monkes of Combe for felony. Thereupon at this parliament an act of parliament was made, wherein it is recited, that the prelates had grievouſly complained, praying thereof remedy, for that ſecular clerkes, as well chapleines, as other monkes, and other people of religion had been drawne, and hanged by award of the ſecular juſtices, in prejudice of the franchiſes of holy church, &c. It is accorded and granted by the king, that all manner of clerkes, as well ſecular as religious, which ſhould be convict before ſecular juſtices for any treaſons or felonies touching o her perſons, then the king himſelfe or his royall majeſtie, ſhould freely have and enjoy the priviledge of holy church, &c.